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## Dispute Resolution Update

February 15, 2008

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Dear Friends and Colleagues:

The mediation of complex civil cases has now become the norm. As a result, state and federal courts are beginning to examine more closely the parameters of mediation confidentiality agreements, particularly relating to contract-based defenses. Waiting in the wings are future mediation confidentiality decisions relating to fraud, malpractice and insurance bad faith.

We have set out below two recent mediation confidentiality decisions from the states of Utah and California. These decisions have been summarized by Keith L. Seat, a respected mediator and Editor of the International Academy of Mediators monthly newsletter.

We are also featuring in this issue, some of our ADR services we offer with regard to consultation, training and dispute resolution system design services summarized by our Kansas City Panel Member, Michelle Minor.



Larry R. Rute



Patrick R. Nichols



*Larry and Patrick are Fellows of the  
International Academy of Mediators.*

## RECENT MEDIATION CONFIDENTIALITY CASE DECISIONS

### Utah Supreme Court Upholds Mediation Confidentiality, Seals Record, Recuses Trial Judges

The Utah Supreme Court in [Reese v. Tingley Construction](#) reversed the trial court's order requiring counsel for a party to be deposed to determine whether the parties had orally agreed to settle during mediation, based on state law prior to the Utah Uniform Mediation Act taking effect on May 1, 2007. The Court emphasized the importance of confidentiality to the mediation process, noted that the limited statutory exceptions to mediation confidentiality were not met, and rejected the lower court's notion that mediations contain both confidential and non-confidential portions and that counsel could be required to testify about the non-confidential aspects. The Court stated that parties are free to enter into oral agreements during mediation, but that a written agreement - even if just an email exchange - is needed for a party to obtain judicial assistance enforcing the settlement agreement, since the mediation is confidential. The Court criticized both the trial court and parties for freely discussing mediation communications in the litigation, sealed portions of the record containing confidential mediation information, and ordered any trial judges who had reviewed confidential information to recuse themselves from further proceedings.

[Reese v. Tingley Construction](#), No. 200060594 (Utah, February 1, 2008)

For the entire opinion see

<http://www.utcourts.gov/opinions/supopin/Reese2020108.pdf>

## RECENT MEDIATION CONFIDENTIALITY CASE DECISIONS

### **California Court Reverses Judicial Exception to Mediation Confidentiality**

A California appeals court overturned a judicially-created exception to California's mediation confidentiality statute in Wimsatt v. Superior Court. While noting that the result may be unfair, the court felt bound by precedent prohibiting judicial exceptions to California's broad statutory scheme protecting confidentiality. Wimsatt involved a legal malpractice claim by a personal injury plaintiff against his attorneys in the underlying personal injury case, asserting that his counsel made an unauthorized settlement demand, reducing the amount he ultimately was able to recover. The appellate court concluded that confidentiality shielded mediation briefs and related emails from disclosure. Interestingly, however, the court held that the actual conversation between counsel, in which the settlement demand was allegedly lowered, was not confidential as it was routine negotiation and not related to mediation, even though the conversation followed an earlier mediation and occurred in the context of whether to proceed with a second mediation before a different mediator. The appeals court recognized that its ruling against judicial exceptions might mean that by agreeing to mediate a party gives up any new claims that arise during mediation. The court suggested that the California legislature may wish to revisit its mediation confidentiality statute.

Wimsatt v. Superior Court, No. B196903 (Cal. App. 2d Dist., June 18, 2007)

See full case citation here:

Wimsatt v. Superior Court, 152 Cal. App. 4th 137

## ADR FEATURED SERVICES BY MICHELLE MINOR

### **Dispute Resolution Consultation**

Associates in Dispute Resolution provides assistance and support to individuals and organizations in developing a systematic approach to resolving conflict. Skilled at facilitating problem-solving and information-sharing processes, our professionals provide a variety of services that can be customized to an organization's unique requirements.

Consulting services are available to human resources, organizational development, legal, and others within organizations to determine the best strategy for a particular situation or for the organization as it faces day-to-day operational challenges. Services include:

*Assessment* - Prior to delivery of services, Associates in Dispute Resolution is available to complete a comprehensive diagnostic assessment of your situation and recommend steps for the most appropriate, effective, and efficient course of action.

*Dispute Resolution Systems* - ADR's professionals are experts at developing systems to prevent, manage and resolve conflict in just about any organization. Our approach is individually-tailored to the needs and resources of each client, taking into consideration the existing culture as well as the legal requirements and workplace particularities.

*Intervention* - ADR provides a full range of intervention services from neutral fact-finding, mediation and arbitration to facilitated problem solving.

*Facilitation* - ADR provides facilitators with a wide range of professional experience. Services range from assistance with difficult conversations to creation of structured processes to managing the flow of communication within an organization.



## **Dispute Resolution Training**

ADR provides a variety of training sessions throughout the year at our three office locations. Customized trainings are also available for client locations if desired. Our programs are designed to provide understanding of conflict and conflict strategies, improve communication, improve negotiation skills, learn mediation skills, and support the design of internal dispute resolution systems. A small selection of our course titles includes:

Communication/Negotiation in the Workplace  
Advanced Negotiations: Multi-party Issues  
Self Mediation Skills Training  
Mediation Skills Training  
Peer Panel Training  
Preparing for EEOC Mediation

## **Dispute Resolution System (DRS)**

Executives are facing an ever increasing number of organizational disputes in the form of employee grievances, EEOC charges, contractual disagreements, lawsuits, customer complaints, and unhealthy competition within and between work groups.

Unresolved disputes create frustration and distraction in the workplace. These dynamics prevent an organization from meeting its business goals as well as negatively impacting upon employee morale. An effective dispute resolution system can offer a constructive approach to managing a wide range of organizational conflicts. These systems provide an integrative and comprehensive way to minimize conflict and resolve disputes as soon as they arise.

Dispute Resolution Systems are tailored based on the unique requirements of an organization. The complexity, cost and shape of a DRS depends, in part, on several factors:

- the number of employees;
- the level of internal conflict;
- the conflict resolution skills of management on all levels;
- current litigation costs;

The impact of unresolved conflict on the bottom line as measured by: retention, absenteeism, extended medical leaves, worker compensation claims, and compliance complaints.

A dispute resolution system is vitally important in addressing internal and external conflict. An effective system should provide fair and functional structures and procedures; provide for quick resolution of disputes; provide preventative measures; create a healthy and creative organization; and, create collaborative approaches to dealing with conflict that are inevitable in the workplace.

Associates in Dispute Resolution has designed a number of DRS programs, both small-and large-scale. ADR's professionals are experts at creating systems to prevent, manage, and resolve difficult issues in just about any organization. Our approach is individually tailored to the needs and resources of each client, taking into consideration the culture and unique particularities of the organization.



## ADR PANEL MEMBER PROFILE

### MICHELLE MINOR, KANSAS CITY OFFICE



Michelle has developed a well-deserved reputation as a skilled mediator with an outstanding work ethic. She brings 25 years of corporate experience linked with a Masters of Arts in Conflict Management and Dispute Resolution. Michelle is an approved mediator through the Kansas Supreme Court's Office of Judicial Administration. She is a mediator for the EEOC and the National Association of Securities Dealers (NASD). She serves as an Arbitrator with the NASD and the Better Business Bureau. She has also accepted an internship with the Federal Mediation and Conciliation Service.

In addition to her accomplishments as a successful mediator/arbitrator, Michelle has demonstrated an unusual breadth of business-related experience. Her career in the corporate world has given her unique perspective and insight as to the complex issues facing large corporations today. She brings to the table professional experience related to international business, corporate acquisition/mergers, vendor/supplier relations, marketing management, employee relations and EEOC issues. This background places Michelle in an inimitable position to assist the corporate environment in planning, developing and instituting in-house dispute resolution systems.

## HEARTLAND MEDIATORS ASSOCIATION TRAINING

### HEARTLAND MEDIATORS ASSOCIATION

*FEBRUARY TRAINING—TOPEKA, KANSAS*

**Friday, February 28, 2008**

Topeka & Shawnee County Public Library, 1515 SW 10th Street, Topeka, Kansas

#### Training Event Schedule

**12:00 Noon to 1:00 p.m.**

Lunch offered to participants

**1:00 p.m. to 2:30 p.m.**

#### ***Mediation in the Workplace***

(Presenters Michelle Minor and Larry Rute)

This presentation offers information on an effective Alternative Dispute Resolution (ADR) system for a constructive approach to managing a wide range of organizational conflicts. These systems provide an integrative and comprehensive way to minimize conflict and resolve disputes as soon as they arise. You will gain a better understanding of

- The nature of workplace conflict
- The costs associate with hidden conflict
- The need for an ADR program
- The role of mediation in the ADR program
- How to sell an ADR program to business executives

**2:45 p.m. to 4:15 p.m.**

#### ***Victim Offender Research Findings***

(Presenter J.J. Choi)

This presentation will provide information on conducting successful victim offender mediations including research findings for the best structured interview process and different participant's perspectives regarding the same incident.

**For more information contact Janet Lhuillier at 913-888-3050**

**e-mail: [JANETL312@everestkc.net](mailto:JANETL312@everestkc.net)**

**Online Submission Form: [Click Here](#)**



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