



# Associates in Dispute Resolution, LLC

Mediation | Arbitration | System Design

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## Dispute Resolution Update

April, 2008

### IN THIS ISSUE:

- ADR Featured Panel Member
- *Mediation Advocacy in Employment Litigation*
- Recent Arbitration Decisions
- ADR Associate Member Profiles
- Upcoming Regional Training Events

### Dear Friends and Colleagues:

In this edition of our newsletter, we are featuring an article written by ADR Partner, Patrick Nichols, Esq. Patrick's article *Mediation Advocacy in Employment Litigation* is set out in a synopsis below. At the conclusion of the synopsis, readers may access the complete article through a link to our web site.

In the near future, we will announce upcoming ADR sponsored continuing legal education events in Kansas City. We have previously announced that Arthur Chaykin, Esq., will provide additional insight regarding intellectual property mediation. Larry Rute and Michelle Minor plan to discuss "Preparing for an EEOC mediation," and "Designing a Dispute Resolution System for your Organization." Patrick Nichols will discuss professional responsibility issues in negotiation and mediation. If you or any member of your firm would like to receive advance information regarding these continuing legal education programs, simply notify us at [info@adrmediate.com](mailto:info@adrmediate.com). Please also provide e-mail addresses for other attorneys in your office who might wish to attend or receive information.

In our February and March newsletters, we set out four recent mediation confidentiality decisions from California, Utah, New York, and the District of Columbia. In this edition, Larry Rute has summarized two important recent arbitration decisions from the United States Supreme Court and the Missouri Court of Appeals for the Western District.

Larry R. Rute

Patrick R. Nichols



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





### **Patrick R. Nichols, Esq.**

Patrick is a full-time mediator and arbitrator. His mediation practice focuses on personal injury, employment and commercial transactions. He also mediates complex family matters, including high-conflict/high-asset divorce and child custody matters. He is listed in "The Best Lawyers in America" and is a certified civil trial advocate by the National Board of Trial Advocacy. He is a frequent presenter on topics in dispute resolution and has authored a series of articles on advocacy in mediation. Patrick has taught Division of Assets at Washburn School of Law and Workers' Compensation Law at the University of Kansas Law School.

### ***Mediation Advocacy in Employment Litigation*** **Patrick Nichols, Esq. (April 2008)**

Employment cases present unique challenges and opportunities. They often involve multiple issues including direct or indirect evidence, different burdens of proof depending upon the nature of the claim, complex damage issues including back pay, front pay, attorney's fees, and exemplary damages and difficult evidentiary issues. Both parties are emotionally invested. Cost of defense considerations can effect settlement negotiations. Cases involve a wide variety of non economic and tax issues. They can range from fact-driven racial or sexual harassment claims, to document-driven Fair Labor Standard actions. Causes of action include not only retaliation and wrongful termination but discrimination, harassment, wage claims, ADA violation, as well as collective and multi-party actions or class litigation.

Settlement considerations are different in employment cases; they are not only about the money. Litigation and transaction costs can be extremely high. Joint sessions can be very productive in employment cases. Settlements often involve tax questions and other non monetary terms.

Mediation is a powerful settlement tool in employment cases. It focuses the parties' time and energy on a single day, spending less time than in traditional "back and forth" negotiation. It minimizes the "rebound" effect where over time the client forgets their earlier agreement with the attorney's wise advice about settlement. Counsel can be a strong advocate for the client (to the mediator) without increasing conflict. Conversely, counsel can candidly acknowledge weaknesses and problems with the case (to the mediator) without exposing perceived weaknesses. Finally, the neutral mediator has an opportunity to listen empathetically to the parties and allow some venting, can provide objective reality testing, define and analyze possible ranges of outcome, and help to communicate information (demands, facts, arguments) so as to minimize the competitive impact on lawyers or the emotional impact on the client.

There are special considerations in choosing a mediator. Because of the emotional content and the inevitability of its expression, choose someone who understands and is willing to accept the obligation for properly allowing and responding to it. The mediator should be confident and comfortable with the joint session process. They must understand the need for empathic listening and true understanding for both sides of the conflict. They must be able to accept and promote the release of emotion and dysfunctional feelings, even those that may seem initially "over the top" and negative or harmful.

The article [link] explores some of these considerations in greater detail and offers suggestions to maximize value to your client by using mediation to help settle employment claims. [Click here for complete article](#)

Visit our web site at [www.adrmediate.com](http://www.adrmediate.com) and view [Patrick Nichol's bio page](#).



### **U.S. Supreme Court Maintains Judicial Limits on Arbitration Review.**

On March 25, 2008, the High Court sided with the 9<sup>th</sup> U.S. Circuit Court of Appeals in holding that the Federal Arbitration Act limits the role of the courts in reviewing arbitration awards. The case before the Supreme Court involved a cleanup dispute between toymaker Mattel, Inc., and Hall Street Associates, the owner of a factory site in Oregon, contaminated with high levels of trichloroethylene (TCE). Following a bench trial before the United States District Court for the District of Oregon, Mattel was successful in terminating its lease; however, after an unsuccessful try at mediating the remaining claim, the parties proposed to submit a remaining claim to arbitration. The court-approved Arbitration Agreement provided in part that "[T]he Court shall vacate, modify or correct any award: (i) where the arbitrator's findings of fact are not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous." Following an arbitrator's determination that Mattel did not have to pay for environmental cleanup on Hall Street's property, the Federal Court rejected the arbitrator's legal reasoning. The 9<sup>th</sup> U.S. Circuit Court of Appeals reversed. The question before the Supreme Court was whether statutory grounds for prompt vacatur and modification provided by §§10 and 11 of the FAA may be supplemented by contract. In a 6-3 decision, written by Justice David Souter, the Court found that the Federal Arbitration Act "confines its expedited judicial review" to narrow circumstances. The majority noted, however, that "the FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law, for example, where judicial review of a different scope is arguable."

*Hall Street Associates, LLC, v. Mattel, Inc.*, 552 U.S. \_\_\_\_ (2008).

For the entire opinion, click here: <http://www.law.cornell.edu/supct/pdf/06-989P.ZO>

### **Some International Arbitration Agreements Required to be in Writing.**

A regional case with international implications was handed down by the Missouri Court of Appeals, Western District, on January 15, 2008. The Court of Appeals held in *Seaboard Corporation, et al, v. Grindrod, Limited*, that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) requires an agreement, in writing, and signed by the parties in order to be enforceable. Seaboard had filed a petition against Grindrod in Jackson County Missouri Circuit Court. The defendants filed a Motion to Stay the Litigation so that the arbitration could be compelled in the state of New York. The Court of Appeals affirmed the trial court's denial of defendant's motion. The underlying facts revealed that one of the defendants, Kevin Neilson, worked for various subsidiaries of Seaboard Corporation. When Mr. Neilson was relocated from Bermuda to North Carolina, he was sent a new "Employment Offer" letter. The letter contained a paragraph calling for arbitration for any "claim by any party against another party arising out of or in relation to this agreement." Neilson never executed nor returned the letter. Following Mr. Neilson's resignation, Seaboard sued Neilson and Grindrod Limited, alleging that while Neilson still worked at Seaboard Subsidiary, he engaged in improper conduct with Grindrod. Seaboard argued that because Neilson did not sign the employment letter containing the arbitration agreement, the arbitration agreement was not enforceable. The trial court found no "valid or pertinent arbitration agreement" between the parties. On appeal, the Missouri Court of Appeals affirmed the trial court ruling. The Court of Appeals relied upon Article II of the New York Convention, which requires an arbitration agreement to be "in writing" and signed by the parties or contained in an exchange of letters or telegrams.

*Seaboard Corporation v. Grindrod Limited*, No. WD67628, 2008 WL 123887 (Mo. Ct. App. January 15, 2008). For the entire opinion, click here: [http://www1.law.umkc.edu/Library/mo\\_opinions\\_wd/01152008/WD67628%2001152008.pdf](http://www1.law.umkc.edu/Library/mo_opinions_wd/01152008/WD67628%2001152008.pdf)



## ADR ASSOCIATE PANEL PROFILES

### ASSOCIATES IN DISPUTE RESOLUTION, LLC PARTNERS



#### LARRY RUTE

Larry is ADR's founding partner. He has successfully mediated more than 3,000 complex disputes. His mediation practice focuses on civil rights, commercial contract, constitutional law, employment discrimination, malpractice and complex multi-party class-collective actions. He serves as an arbitrator in behalf of the American Arbitration Association (AAA), National Arbitration Forum (NAF), FINRA Dispute Resolution. He is a Due Process Hearing Officer for the Kansas Department of Education. Larry teaches Alternative Dispute Resolution at Washburn School of Law.



#### PATRICK NICHOLS

Patrick is a full-time mediator and arbitrator. His mediation practice focuses on personal injury, employment and commercial transactions. He also mediates complex family matters, including high-conflict/high-asset divorce and child custody matters. He is listed in "The Best Lawyers in America" and is a certified civil trial advocate by the National Board of Trial Advocacy. He is a frequent presenter on topics in dispute resolution and has authored a series of articles on advocacy in mediation. Patrick has taught Division of Assets at Washburn School of Law and Workers' Compensation Law at the University of Kansas Law School.

### TOPEKA AREA - DISTINGUISHED PANEL MEMBERS

ADR's Panel of Distinguished Neutrals have the experience and expertise to resolve disputes in virtually every subject area. Our panel includes experienced litigators, retired judges, law professors, corporate counsel and business executives.



#### HON. J. PATRICK BRAZIL

Judge Brazil retired as Chief Judge of the Kansas Court of Appeals after serving 29 years on the Court of appeals or as a District Court Judge in the 13<sup>th</sup> Judicial District. He continues to serve the Supreme Court and Court of Appeals as a Senior Judge. He is experienced in mediations and arbitrations involving commercial transactions, employment law, insurance law, medical/legal malpractice, product liability law as well as tort and general personal injury law.



#### HON. BILL D. ROBINSON, JR.

Judge Robinson served for 21 years as a District Court Judge in Wyandotte County, Kansas. With over 350 jury trials, he is in an excellent position to provide guidance and evaluations of all types of actions. He has served on the Kansas Court of Appeals by designation and handled jury trials ranging from medical malpractice to employment discrimination, torts and commercial cases. He received extensive mediation training at the National Judicial College in Reno, Nevada in 1996.



#### HON. CATHERINE A. WALTER

Catherine Walter served as a part-time U.S. Magistrate Judge for the District of Kansas and later became the Federal Court's ADR Administrator. She attended the mediation skills workshop sponsored by the Federal Judicial Center in 2001 and has mediated numerous federal cases during her tenure with the court. She serves on the panel for early assessment for the Western District of Missouri and a *pro tem* Administrative Law Judge for the Kansas Human Rights Commission. She is a frequent presenter of mediation seminars and workshops.



#### HON. PHILLIP L. WOODWORTH

Judge Woodworth served as a Kansas District Court Judge in Johnson County from 1969 to 1993. As a district judge he conducted numerous settlement conferences in negligence, products liability, commercial and real estate disputes as well as insurance, malpractice, construction and domestic relations. Since retirement, he has conducted private arbitrations and mediations as well as court-annexed mediations in various jurisdictions.





## ADR ASSOCIATE PANEL PROFILES

### WICHITA AREA - DISTINGUISHED PANEL MEMBERS



#### **HON. PAUL M. BUCHANAN**

Judge Buchanan retired from the Sedgwick County bench after 20 years of service. He has served in all judicial departments including Presiding Judge, Civil Criminal and Domestic Departments and Discovery Judge. Judge Buchanan is available to mediate, arbitrate and serve as Special Master or other dispute resolution matters.



#### **H. ALLAN CALDWELL**

Mr. Caldwell has 29 years experience as a practicing attorney. Mr. Caldwell worked for Koch Industries, Inc., from 1979 to 2002 holding various positions as General Counsel and Secretary to the Corporation. He was the principal attorney and negotiator in numerous multimillion dollar domestic and international acquisitions and business transactions. Allan directly supervised 22 lawyers and a department of 95 members. He has direct legal experience in numerous major acquisitions and divestitures, direct representation of various businesses and administrative responsibilities for large legal departments.



#### **PROFESSOR LINDA HENRY ELROD**

Distinguished Professor of Law, Linda Elrod has been teaching at Washburn University School of Law since 1974. She received the William O. Douglas Outstanding Professor Award in 1979. She wrote the original Kansas Family Law Handbook, a two-volume treatise on Kansas family law for the Kansas Bar Association in 1983, second Edition in 1990. She is the author of a national treatise Child Custody Practice and Procedure (1969), and co-authors with Jim Buchele, for West Group Kansas Family Law. She has been the editor of the Family Law Quarterly for the Family Law Section of the American Bar Association since 1992 and is the immediate past Chair of the American Bar Association Family Law Section. She is a frequent presenter at Kansas Bar Association, Kansas Trial Lawyers Association and American Bar Association training events.



#### **HON. RONALD H. ROGG**

Judge Rogg is a retired Sedgwick County District Court Judge having served as presiding Civil Department Judge and Administrative Judge in that jurisdiction. He serves by special appointment as Senior Judge to the Court of Appeals. He has served as mediator and arbitrator in medical and engineering malpractice cases, employment disputes, general and personal injury damage actions and business disputes. He is trained as a Christian Conciliator and has worked with churches and individuals to resolve disputes about property rights among the congregation.



#### **PROFESSOR ELINOR SCHROEDER**

Professor Schroeder is the Paul E. Wilson Professor of Law at the University of Kansas. Prior to joining the University of Kansas School of Law faculty, Prof. Schroeder practiced law in Kansas City with the firm Spencer, Fane, Britt & Browne. She has also been of counsel to Shook, Hardy & Bacon. She received her JD *summa cum laude* from the University of Michigan Law School in 1974. Prof. Schroeder is the author of a one-volume hornbook and a two-volume practitioner treatise in employment law published by West Publishing Company and editor of the Kansas Employment Law Handbook 2d ed. (Kansas Bar Association 2001).

### KANSAS CITY AREA - DISTINGUISHED PANEL MEMBERS

Kansas City area ADR Neutrals have the ability to provide all forms of alternative dispute resolution including mediation, arbitration, fact-finding, early neutral evaluation, and consultation, prevention and dispute resolution system design.



#### **ARTHUR CHAYKIN**

Arthur is General Counsel for SFA, Inc., the leading distributor of automotive lifting equipment and related accessories in the United States. In addition, Arthur is liaison counsel for Shinn Fu Corporation and its related affiliates. In his current role, Arthur is responsible for all legal affairs on a multi-national basis. Arthur's dispute resolution practice focuses on intellectual property disputes, business and commercial disputes, tort claims and products liability claims, partnership disputes and international business disputes.



#### **AMY GLASER**

Amy joins Associates in Dispute Resolution after completing her LL.M. in Dispute Resolution. Her legal background is broad, ranging from representing plaintiffs in multi-district and local class action litigation to representing insurance companies, defending work-related injury claims and public sector experience with the Missouri Attorney General's Office. Amy focuses on civil mediation and arbitration in a wide variety of subject matters with an emphasis on personal injury and consumer issues. Amy is the immediate past-Chair of the KC MBA ADR Committee. Amy teaches Negotiation at Washburn School of Law.



#### **MICHELLE MINOR**

Michelle has developed a well-deserved reputation as a skilled mediator. She brings 25 years of corporate experience linked with a Masters of Arts in Conflict Management and Dispute Resolution. In addition to Michelle's many accomplishments as a successful mediator and arbitrator, Michelle demonstrates an unusual breadth of business-related experience. Her career in the corporate world has given her a unique perspective to provide assistance in planning, developing and instituting in-house dispute resolution systems.

# UPCOMING TRAINING EVENTS

## AMERICAN BAR ASSOCIATION—FAMILY LAW SECTION



### RECONCEPTUALIZING CHILD CUSTODY: PAST, PRESENT AND FUTURE *Lawyers and Psychologists Working Together*

APRIL 30-MAY 3, 2008

Chicago Marriott

Downtown Magnificent Mile Hotel , Chicago, IL

**Advance Registration  
Deadline: March 15,  
2008**

**Register online at:**

[https://  
cyberstore1.apa.org/  
cyb/cli/  
casinterface1/apaaba/](https://cyberstore1.apa.org/cyb/cli/casinterface1/apaaba/)

**Cosponsored by:**

**American Psychological Association**

**American Bar Association -Family Law Section**

Come to the Windy City this spring for the Joint Conference of the American Psychological Association (APA) and the American Bar Association Section of Family Law (ABA-FLS). This APA/ABA-FLS National Conference is organized around three primary areas of focus:

- The status of marriage, separation, divorce, parenting, and custody in the United States today
- Legal and psychological issues relevant to contested custody cases

Effective legal and psychological interventions for families

The APA and the ABA-FLS have designed this Conference to maximize your opportunity to explore the relationship of psychology to the legal system in the child custody context, and to do so in an educational setting guided by experts from both professions. The 34 sessions planned span three full days and focus on specific interests presented by judges, psychologists, and lawyers. Planned activities include a mock hearing involving expert psychological testimony, followed by responses from judges and the audience; and a number of occasions for networking, such as the April 30th Welcome reception and a ticketed social event at the Chicago Art Institute. Read an overview of the [conference program](#) (PDF-83KB), register for the conference ([Online Registration](#) | [PDF form for print out](#) PDF-52KB), and [book your hotel room](#) now.

Based on the 1997 Los Angeles APA-ABA National Conference on the same topics, the cosponsors expect a sell-out attendance of more than 700 attorneys and psychologists from around the country. Therefore, mark your calendars, and register now.

**NOTE:**

**Larry Rute and Dr. Robert E. Emery will provide a discussion of family law mediation process and its efficacy, including identification of effective components and the satisfaction of children and parents who are most likely to benefit from mediation.**

**Presentation Time: May 1, 2008, at 10:15-11:45 a.m.**



## UPCOMING TRAINING EVENTS

### HEARTLAND MEDIATORS ASSOCIATION UPCOMING TRAINING



Heartland Mediators Association

### Spring Conference

**April 24-25, 2008**

KU Edwards Campus  
Overland Park, Kansas

FMI: [www.heartlandmediators.org](http://www.heartlandmediators.org)

For more information  
contact Janet Lhuillier at  
913.888.3050 or 913.226.0719  
JanetL312@everestkc.net  
[www.HeartlandMediators.org](http://www.HeartlandMediators.org)

*Sifting Through the Chaos:  
Pitfalls and Possibilities  
in Mediation*

### Keynote Presentation Robert D. Benjamin MSW, JD



**Robert Benjamin** has been a practicing attorney since 1975. He was a general practitioner handling domestic, juvenile, personal injury, criminal, business, real estate, and estate planning among other matters. Early on in his law career, he became aware that many of the issues he was seeking to resolve for clients legally, reflected underlying conflicts that could be more effectively managed out of court by negotiation and mediation. After some years of trial practice, he refocused his professional direction toward mediation and now limits his work solely to negotiation, mediation and arbitration. He has been a practicing mediator since 1979.

Benjamin has both law (JD) and social work (MSW) degrees from Saint Louis University. He received his undergraduate degree from Washington University in 1969.

He presents negotiation, mediation, and conflict management workshops, seminars and training courses nationally and internationally. He is an Adjunct Assistant Professor at Washington University's George Warren Brown School of Social Work, and Adjunct Professor of Mediation in the Conflict Resolution Program at Indiana State University. He is a practitioner member and former president of the Academy of Family Mediators (AFM), a former member of the Board of the Association of Family and Conciliation Courts (AFCC), and a member of the Society of Professionals in Dispute Resolution (SPIDR), the American Bar Association Section for Dispute Resolution, and the Missouri Bar Association's Committee on Dispute Resolution.



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785-357-1800.

