



# Associates in Dispute Resolution LLC

Mediation Arbitration System Design

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## APRIL 2010 Dispute Resolution Update

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Dear Friends and Colleagues

In this edition of our newsletter, we are very proud to announce our association with Louis R. Hiatt. Lou has joined our group and specializes in labor/management relations law with emphasis in mediation, arbitration, collective bargaining and training. More information regarding Louis's background experienced may be viewed by [click here](#).

This edition also includes a broad range of news and mediation cases. Be sure to check out Jan Schau's review of Ken Cloke's "Conflict Revolution: Mediating Evil, War, Injustice and Terrorism." Readers may wish to note the summary of the recent California decision in Phillips v. JAMS (Cal. App. 2d Dist.), in which the court held that "[a]ll functions integral to the dispute resolution process are shielded by absolute immunity."

Please note that Kenneth Cloke will be speaking at the KU Edwards Campus in Overland Park, Kansas, at the Heartland Mediator's Association Spring Conference, April 15-16, 2010. Patrick Nichols is the President-Elect of the Heartland Mediator's Association. Please see additional information in this newsletter about this event.

Finally, we encourage you to contribute articles or other dispute resolution related information for future publications. If you know of someone who would like to receive the newsletter directly, simply notify us at [info@adrmediate.com](mailto:info@adrmediate.com).

Patrick Nichols

Larry Rute



*Distinguished Fellows of the International Academy of Mediators*  
2008-2009-2010 **Super Lawyers**

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## FEATURED ASSOCIATE



## FEATURED ASSOCIATE

## LOUIS HIATT

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Louis Hiatt is a graduate of Rockhurst College and Loyola University, School of Law. For twenty-five years, Mr. Hiatt has specialized in labor/management relations law with an emphasis in mediation, arbitration, collective bargaining and training.

During the past six years, Mr. Hiatt has served as a neutral facilitator in more than six hundred dispute resolution cases between The Kansas City Federation of Teachers Union, Service Employees International Union (AFL-CIO) and The School District of Kansas City, Missouri.

Mr. Hiatt has negotiated more than two hundred labor agreements and served as liaison during strikes, boycotts, pickets and lockouts. He was a Human Resources Director for several corporations.

Louis has participated in professional development seminars at Harvard University, The American Institute for Certified Public Accountants, The Southwestern Legal Foundation, Kansas City Bar Association, Farmland Foods, Inc., Armco Steel Co., and the School District of Kansas City, Missouri; as well as, The Kansas City Federation of Teachers Union, American Federation of Grain Millers Union, Service Employees International Union, and the Oil, Chemical and Atomic Workers Union (AFL-CIO). Louis has also been an Adjunct Instructor at several universities teaching courses in labor law, arbitration, mediation and collective bargaining.

With this background, Louis Hiatt, has the hands on experience and skills required in the facilitation of conflict resolution in both the private and public sectors-union or non union.

Louis is an associate with Associates in Dispute Resolution and may be contacted for scheduling information through the ADR office contact information set out below.



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## RECENT MEDIATION CASES & UPDATES

### California Court Shields Mediation from Scrutiny with Absolute Quasi-Judicial Immunity

A California appellate court concluded that a mediator was shielded by absolute quasi-judicial immunity regardless of whether he was mediating or arbitrating in [Phillips v. JAMS](#) (Cal. App. 2d Dist.). The mediator had agreed in a previous mediation settlement to make a binding decision for the parties if future disputes arose. The mediator tried to mediate a subsequent dispute, in the midst of which he felt he was being abused by aggressive counsel and announced he could no longer be impartial and was not going to make a binding decision, even if the parties could not reach a mediated resolution. Litigation followed, but the appellate court affirmed summary judgment dismissing claims against the mediator and his sponsoring organization, concluding that litigation is not allowable against those providing dispute resolution services which are connected to the judicial process. The court held that “[a]ll functions integral to the dispute resolution process are shielded by absolute immunity.”

[Phillips v. JAMS](#) (Cal. App. 2d Dist. January 28, 2010)

### New York Court Sanctions Party for Rigidity in Mediation

A bankruptcy court in New York imposed penalties for mediating in bad faith on a party the court found to be rigid and obstructionist during court-ordered mediation. The court recognized that of course parties cannot be forced to settle and may take a “no pay” position. But mere attendance without active participation is not sufficient for good faith. Sending representatives who would not consider the risks involved and who could only repeat a mantra that they would pay nothing renders mediation futile and forms the basis for penalties for obstruction of the mediation. Party representatives must have full authority to

settle; having to telephone for additional authority is not sufficient. The offending party did ultimately make a settlement offer, but only after the threat of sanctions, and the offer was considered to be insincere by the mediator and other party. Under the mediation rules of the court, mediators are required to report incidents of bad faith mediation, and are permitted to provide information under the court’s confidentiality provisions.

[In re A. T. Reynolds & Sons, Inc.](#), No. 08-37739 (U.S. Bankr. S.D.N.Y. February 5, 2010)

### Federal Judge Orders Early Mediation in Airliner Crash

The federal judge managing the roughly three dozen lawsuits filed after the February 2009 crash of Continental Connection Flight 3407 has ordered mediation to begin by mid-June and assigned the cases to four local mediators. Both sides say they welcome mediation but wonder whether it is being ordered too soon, as depositions are not expected to begin until summer. Plaintiffs’ lawyers strongly assert that this is a punitive damages case, which impacts resolution. However, the lead plaintiffs’ attorney notes that he tried the last major aviation liability case, which was the 1992 trial of the Lockerbie crash, and that every case since then has settled.

[Buffalo News.com](#) (January 7, 2010)

### Mediation Agreement Aims to Calm Racial Tensions in City

Two years after a gunman killed the mayor, other city officials and police officers during a council meeting in suburban St. Louis, the U.S. Justice Department mediated an agreement that is intended to improve relations between the black and white communities and begin to heal racial divisions. The agreement, which contains tangible programs and

steps by the city, is seen as hopeful progress by many, while others are concerned by the city’s failure to fully admit that a racial problem exists. A follow up meeting has been scheduled to try to further reduce tensions.

[STL Today.com](#) (January 22, 2010); [Fox 2 Now.com](#) (February 9, 2010)

### Other Notable Cases and Proceedings

- Court-ordered mediation between the telephone company FairPoint Communications and the Maine Public Utilities Commission was delayed by the inability of the Maine PUC staffer to bind the agency despite the court’s requirement that representatives must have complete authority. The agency is seeking to modify the court order to permit a public hearing before any tentative settlement is voted on by the PUC commissioners.

[WSJ.com](#) (January 22, 2010)

- Although Ohio’s federal court-conducted mediation program is voluntary, the court requires each participating party to have a representative attend in person who has authority to agree to the last offer or demand made. [Jack v. Allied Systems](#), Case No. 3:05-cv-125 (U.S. S.D. Ohio January 7, 2010)

- A federal magistrate imposed \$6,000 in costs and expenses on companies which failed to send representatives with adequate settlement authority to mediation in a dispute over 55 trees that a pipeline company cut down to keep roots from impacting the underground pipe. The companies have backed out of mediation and intend to litigate the \$300,000 claims against them by the city and local school district. [PDDnet.com](#) (January 12, 2010); [Helenair.com](#) (January 13, 2010)

## RECENT MEDIATION CASES & UPDATES

### Other Notable Cases and Proceedings (CONTINUED)

- Even though counsel moved to withdraw prior to mediation, counsel was jointly liable with the client who failed to appear at mediation for the time of both the mediator and opposing counsel. [George W. Park Seed Co. v. DHL Express](#), Civil Action No. 8:08-1993-WMC (U.S. D.S.C. January 5, 2010)
- Mediation was improperly ordered by court where the statutory requirement mandates a hearing within a short time period on the merits of a personal protection order. Moreover, court-imposed mediation may not be appropriate when domestic violence or stalking is alleged. [Baker v Holloway](#), No. 08-007173-PH (Mich. App. January 26, 2010)
- Appeal dismissed due to parties' failure to engage in appellate mediation. [Alba v. Passage Realty, Inc.](#), No. 14-09-00304-CV (Tex. App. January 7, 2010)
- Mediator sued party for cancellation fee for not proceeding with mediation, but appellate court affirmed summary judgment dismissing case because party had not agreed to cancellation term which was unilaterally sent out by mediator after parties agreed to mediate. [Levin Law Group v. Sigmon](#), No. 14-08-01165-CV (Tx. App. January 21, 2010)
- Mediation settlements are especially unsuited for rescission based on unilateral mistake. [Rachid v. Perez](#), No. 08-1210 (Fla. App. January 20, 2010)
- After 17 years of litigation, six months of mediation resulted in a tentative agreement by the state of Utah to pay \$33 million to a class of 8,000 Navajos for mismanagement of an oil royalty trust fund created in 1933. [Deseret News.com](#) (January 6, 2010)
- Failure to specify the width of road paving in mediation settlement leads to breakdown and litigation over "normal city standards." [James v. City of Russellville](#), No. 2080881 (Ala. App. January 8, 2010)
- New York town objects to mediators selected to resolve environmental claims against General Motors bankruptcy estate due to their lack of subject matter expertise in light of the complexities of environmental science. [WSJ.com](#) (February 8, 2010)
- Los Angeles City councilwoman planned to mediate dispute between the Port of Los Angeles and company seeking to open \$50 million shipyard, but recused herself after revelations of campaign contributions from company. [Daily Breeze.com](#) (February 10, 2010)
- Mediation process to address parents' complaints about high school cheerleading program gets no takers when publicized by criticized athletic director. [Lancaster Online](#) (January 18, 2010)
- Four years after talks to settle lawsuit for \$2 million broke down, Tuomey Healthcare System and the federal government have agreed to mediate. Tuomey alone has spent over \$4 million on legal fees in the case. [The Item.com](#) (January 6, 2010)

### Update on Home Foreclosure Mediation

- Members of Congress from Ohio, California and Florida in February introduced the Foreclosure Mandatory Mediation Act, [H.R. 4635](#), as companion legislation to [S. 2912](#). The **federal** legislation would require mandatory mediation by lenders of loans with federal guarantees or federal insurance. The required one-time mediation would involve both the mortgagor and a housing counseling agency and would be paid for by the lender. [Federal Information & News Dispatch](#) (March 3, 2010) (Subscription Required)
- While the **Florida** Supreme Court ordered each of the 20 circuit courts in the state to establish its own foreclosure mediation process, only three circuits have complied with the order to date. Florida was hit with an additional 296,000 foreclosure filings in the last quarter of 2009, pushing the number of pending foreclosures to 456,000. [Jacksonville.com](#) (February 13, 2010)
- **Nevada** judges have stated publicly that they will not impose loan modifications even if lenders do not negotiate in good faith in mediations. [RGJ.com](#) (January 24, 2010)
- **New Hampshire** has begun a Foreclosure Mediation Program which is voluntary for homeowners and free to both borrowers and lenders. The program is being funded by grants from several sources. [Nashua Telegraph](#) (January 18, 2010); [Foreclosure Mediation Program](#)
- Lenders attempting to foreclose on primary residences on the Big Island of **Hawaii** must now notify borrowers of their right to mediation by serving a mediation notice along with other documents. [Star Bulletin](#) (January 21, 2010); [Judiciary Press Release](#) (January 20, 2010)
- Providence, **Rhode Island** has mandated a foreclosure mediation process, and the City Council is seeking to add a \$2,000 fine for banks or lenders who fail to attempt to renegotiate mortgages with homeowners before filing a deed of foreclosure. [Projo.com](#) (January 25, 2010)
- **Maryland's** governor is pushing for the emergency legislation he introduced to institute a mandatory foreclosure mediation program in the state, and would like lenders to support the plan. Lenders remain concerned about anything that would slow down the foreclosure process. Maryland looked to South Carolina's foreclosure prevention efforts, which require a showing that borrowers are not eligible for modification under the federal Home Affordable Modification Program prior to foreclosure. [Governor O'Malley Press Release](#) (February 16, 2010); [Daily Record](#) (January 18, 2010)
- Although the governor of **Minnesota** vetoed the Homeowner-Lender Mediation Act in 2009, it has been reintroduced this year and the Minnesota attorney general will again seek enactment. [Legal Newsline.com](#) (January 6, 2010)

## DISPUTE RESOLUTION NEWS & INITIATIVES

### Payment of Settlement Funds to Charities Gaining in Both Popularity and Scrutiny

Settlements in class action lawsuits are requiring payments to charities at triple the rate in the past, according to a recent study, which is raising concerns when the charities are unrelated to the litigation or have some connection to the defendants or the judge approving the settlement. Judicial review is pending of a proposed \$9.5 million settlement by Facebook of litigation over sharing personal information. Objections have been raised in the Facebook hearing to the entire settlement amount funding a foundation to promote privacy rights apart from the 30% going to plaintiffs' counsel. In part, concerns are related to Facebook having a role in creating the foundation's bylaws and input on a board member. However, the trend of settlements going to charity may continue as legislation was introduced in Ohio earlier this year encouraging judges to use these types of arrangements.

[WSJ.com](#) (March 2, 2010)

### Federal Office Mediates Disputes Between FOIA Requesters and Federal Agencies

Freedom of Information Act disputes are now being mediated by the Office of Government Information Services (OGIS), which was created within the National Archives and Records Administration and officially began work in September 2009. In its first months, OGIS has begun work on about 40 disputes. OGIS, which will have a staff of six, is working with a contractor to add online dispute resolution and is seeking to provide more transparency into matters it is mediating. In addition to directly resolving disputes, OGIS is tasked with providing suggestions for FOIA improvements. OGIS also plans to provide mediation training to FOIA officers in federal agencies to reduce the number of disputes that arise from the roughly 600,000 FOIA requests made each year.

[Federal Computer Week](#) (January 14, 2010); [OGIS Website](#)

### Concerns Raised over Determining "Bad Faith" in Texas Balance Billing Mediations

Mediators are concerned over provisions in new Texas legislation which would require them to report parties who act in "bad faith" in mediations involving balance billing. The new legislation allows insured patients to mediate whenever they would have to pay over \$1,000 for services of out-of-network doctors received at in-network hospitals. In an effort to compel serious mediation efforts, the law includes a requirement for reporting bad faith conduct, without providing standards. The Texas Department of Insurance is drafting rules to implement the statute, which is to take effect in September 2010. Mediators hope to get the bad faith reporting requirement adjusted in the regulations in order to maintain neutrality.

[Dallas Morning News](#) (January 26, 2010)

### Special Education Mediation an Important Alternative to Litigation

Mediation is particularly important in resolving special education issues, since the parents and schools must work together after the dispute throughout the years of the child's schooling. Federal law added due process rights for parents on behalf of their children in 1975, which sparked rampant litigation. Congress tried to remedy this in 1990 with alternative dispute resolution provisions, but attorneys continue to have incentives to litigate rather than mediate, such as attorneys' fee awards for successful litigation but not for time spent in mediation. More recent amendments seek to balance the process by permitting school districts to recover costs from parents' attorneys for filing frivolous litigation or causing unnecessary delay or increases in litigation costs.

[NJ.com](#) (January 12, 2010)

### Mediation Available for Online Gaming Disputes

An inspection and certification agency for online gaming operators, eCOGRA, certifies that online casinos are safe and fair sites, in part by mediating disputes and ensuring that players' issues are adequately addressed by the online casinos. The agency received over 800 mediation requests in 2009, and reported that valid mediation requests were up 14% over 2008.

[Casino Advisor](#) (January 15, 2010)

### Hong Kong's Practice Directive on Mediation Takes Effect

Hong Kong's Practice Directive 31 (PD31) on mediation went into effect on January 1, as scheduled in the Civil Justice Reform adopted in early 2009. PD31 requires counsel to explain mediation to parties and file with the court in each litigation a statement that the party is willing to mediate or why it is not. Further, PD31 sets up a process by which either party can propose mediation and receive a response from the other party within fourteen days. If mediation is unreasonably refused, the court potentially can impose litigation costs on the unreasonable party.

[Clifford Chance](#) (January 7, 2010)

## DISPUTE RESOLUTION NEWS & INITIATIVES

### Other International Mediation Developments

- Association of Arrears Mediators founded in the U.K. by five leading mortgage and loan arrears mediation companies. [My Introducer.com](#) (January 21, 2010)
- **Armenia**'s Financial System Mediator reports success in its first year of mediating between financial organizations and customers. [Armenia Now](#) (January 25, 2010)
- **Sierra Leone** begins Community Mediation Programme with 18-month pilot projects in an urban and a rural chiefdom in both a northern and a southern province. [AllAfrica](#) (January 28, 2010) (Subscription Required)
- **South Africa**'s Commission for Conciliation Mediation and Arbitration (CCMA) caseload is increasing steadily to over 140,000 cases in fiscal year 2008-09. [Busrep.co.za](#) (February 8, 2010)
- **India**'s Bangalore Mediation Centre has a settlement rate in excess of 60% and plans to expand its mediation model of using experienced lawyers rather than judges as mediators. [Express Buzz.com](#) (January 25, 2010); [Hindu](#) (January 28, 2010) (Subscription Required)
- **China** has resolved hundreds of cross-Straits lawsuits involving Taiwan businesses and residents since opening the first court for such cases in March 2009, with 80% of cases settled through mediation. [CRI English.com](#) (February 13, 2010)
- Significant movement toward mediation in **New Zealand** seen in both civil and criminal justice systems, such as dispute resolution provisions in the Financial Service Providers Act which take effect later this year. [Scoop](#) (January 14, 2010)
- World Bank's IFC helps establish mediation in the **Solomon Islands** through workshop for court and consulting with other groups. [Finchannel.com](#) (January 23, 2010)

### BOOK REVIEW:

**Kenneth Cloke, *Conflict Revolution: Mediating Evil, War, Injustice and Terrorism* (Janis Publications 2008)** by Jan Frankel Schau (ADR Services, [jfschau@schaummediation.com](mailto:jfschau@schaummediation.com))

In the first chapter of *Conflict Revolution*, Ken Cloke urges us to be "audacious enough to become global citizens and „conflict revolutionists“ even at the risk of meddling into what we don't fully understand." So it was that I had to confess to myself that I wasn't ready to join the team when a friend and colleague told me she was going to the COP15 conference in Copenhagen last December with Mediators Beyond Borders, a group Cloke helped found. I know that I don't understand the science or politics of climate change...and yet perhaps Cloke has it right: if I would participate in changing the world, I will need to change myself first.

The message in *Conflict Revolution* is at once intimidating, humbling and compelling. Could our conflict resolution principles possibly work to resolve centuries-old and also new and future political disputes on the global canvas? And if so, don't each of us have a duty as global citizens to share these skills and principles? Indeed, the enormity of the challenges Cloke professes to tackle seem overwhelming, and yet I am sure he is absolutely, undeniably correct that none of us can afford to turn our back and look away.

The book is peppered with quotes ranging from Albert Einstein to Al Gore, Mary Parker Follett (one of the founders of modern mediation in America) to Antoine de Saint-Exupery (author of the ever popular *Le Petit Prince*). Some of his teachings are tautologies. For example, "It has been said that the three most difficult things for any of us to do are to return love for hate, include the excluded and admit we are wrong." Yet they have a certain compelling, common sense ring which speaks to the ultimate wisdom of the book and its author.

Unfortunately, I found this book somewhat inaccessible for non-academics, as

high social science which doesn't have a great deal of applicability to the commercial practitioner. I consider myself fairly well educated, and yet found myself re-reading almost every sentence before I felt I had attained any level of comprehension. I am not alone. In a comprehensive review of Cloke's book for the publisher prior to distribution, colleague Victoria Pynchon suggested to readers that we "[r]ead the introduction and then put the book down for a week or two.... After you read about your own most personal and pressing issue (in a week or two) put the book down again. Based upon what you learn there, try one new thing...."

As a practical guide, I am left overwhelmed and under-prepared to carry Cloke's torch. But every social movement in every age needs an intellectual who is brave enough and articulate enough to point out the deep seated need for change and to advocate the direction which conforms to his vision for accomplishing that goal. We should, therefore, be grateful to Cloke for his superior leadership in defining the problems and urging social, systemic and personal change to fix them. And, in my view, we should all consider our individual roles in achieving the change he advocates. As a matter of fact, we should also consider the impact which the decision not to take any action will make.

I found the book enormously challenging, but ultimately gratifying. Indulging myself in the possibility that the skills and processes we, as mediators, adopt, embrace, teach and advocate could have this far-ranging impact on global affairs is nothing less than thrilling. I am left unable to disagree with Cloke's treatise that it is the personal responsibility of each of us to play that role. We owe it to our grandchildren to lead the march towards making the alternative the norm. He asks nothing more nor less from each of us.

[Purchasing Information](#)

## UPCOMING CLE TRAINING INFORMATION



SPRING CONFERENCE  
April 15 and 16, 2010

Heartland Mediators Association Presents:

**Kenneth Cloke:**

**ART AND EXCELLENCE IN  
DISPUTE RESOLUTION**



KU Edwards Campus  
Regnier Auditorium  
Overland Park, Kansas

Kenneth Cloke, Director of the Center for Dispute Resolution, Santa Monica, California, and a mediator, arbitrator, consultant, and trainer, is president of Mediators Beyond Borders. A prolific and widely respected author, Ken is one of the great creative thinkers in the field.

(KS CME hours, MO CLE hours and SHRM hours applied for)

*You can register on-line and pay on-line / fax or mail the registration form (s) and payment to:  
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