



# Associates in Dispute Resolution LLC

Mediation Arbitration System Design

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## AUGUST 2010 Dispute Resolution Update

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Dear Friends and Colleagues:

This edition of Dispute Resolution Update features recent mediation cases and updates as well as dispute resolution news and initiatives throughout the United States. This information has been summarized by Keith L. Seat, a respected mediator and Editor of the International Academy of Mediators Newsletter.

It has been our custom for nearly a decade to host a one-day continuing legal education event in the Fall. This year's event will focus on dispute resolution communication skills of interest to litigators and mediators alike. The event is entitled *The Art (and Science) of Dispute Resolution: Getting to the Heart of Conflict*. The program will provide a in-depth look at dispute resolution communication, negotiation tactics, professional responsibility and criminal mediation. It will be held on Friday, October 1, 2010, at the Topeka Associates in Dispute Resolution's Lower Level Conference Room. This program has been approved for 6.0 Kansas CME hours and our application for 6.0 Kansas and Missouri CLE hours is pending. For further information regarding this event, please click here.

Patrick Nichols

Larry Rute



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

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## RECENT MEDIATION CASES & UPDATES

### Alabama Supreme Court Reduces Attorney's Fees for Obtaining Settlement in Mediation

The Supreme Court of Alabama concluded that the trial court had exceeded its discretion in approving attorney's fees of one-third of the settlement reached in mediation for the severe burns suffered by a disabled minor in the custody of the state. The lower court emphasized the rapid work by the attorney to marshal evidence and experts in order to provide three bound volumes of documents to defendants, along with preparation of a "day in the life" film shown at mediation, which led to a settlement of \$737,000, which was nine times the special damages. However, the Supreme Court noted the lack of time records from the attorney, the fact that he worked on the case for only fourteen weeks, and the willingness of defendants to engage in early mediation to minimize litigation costs. After a detailed analysis of many factors, the Supreme Court concluded that 20% would be reasonable as attorney's fees, which a dissenting justice argued was just as arbitrary as the higher percentage in the absence of time records.

[Madison Co. Dept. of Human Resources v. T.S.](#), No. 1081405 (Ala., May 28, 2010)

### Court Approves Mediation Procedures in Lehman Brothers Chapter 11 Cases

The bankruptcy judge has approved mediation procedures for addressing contested claims involving Lehman Brothers Holdings Inc. and its affiliated debtors. The debtors have the option to select either mediation or merits hearings. If mediation is selected, sessions are to take place in New York at a location determined by the debtors, but parties may be able to participate by telephone. The parties are to agree on a mediator from a court-approved list. Mediation of

claims must begin within 60 days after notice by the debtors and be completed within 120 days. The parties may seek to negotiate prior to the mediation; if the mediation is not fully successful, the parties may agree to resolve the remaining issues by binding arbitration, or else the court will hear the merits of the claim. [Mondaq](#) (June 18, 2010) (Subscription Required)

### Feinberg Selected as Independent Claims Administrator for BP Compensation Fund

As widely reported, Kenneth Feinberg has been appointed the independent claims administrator for the \$20 billion BP compensation fund for the extensive damages caused by its ongoing oil spill. BP has established more than 400 claim centers across the Gulf Coast and is also accepting claims through its website and by telephone. Feinberg will be paid by BP, although the amount is still being negotiated.

[Business week.com](#) (May 26, 2010); [Daily Finance.com](#) (June 20, 2010); [USA Today](#) (June 28, 2010)

### Arizona County Hires Feinberg for Half-Million Dollars; Principals Object to Mediation

Maricopa County, Arizona has hired mediator Kenneth Feinberg – apparently at a cost of \$550,000 – in an attempt to resolve \$46 million in claims brought by four judges, two supervisors, a deputy county manager and others against the county for emotional distress and tarnished reputations caused by the unsuccessful probes and prosecutions of the Maricopa County Sheriff and former County Attorney. The Sheriff and ex-County Attorney, however, are objecting to the mediation, alleging that they are being "extorted" by the county with threats of personal liability if they do not cooperate in the mediation.

[AZ Central.com](#) (June 29, 2010);

[AZ Central.com](#) (June 30, 2010)

### Other Notable Cases & Proceedings

- A mediation session was held as ordered by the federal bankruptcy judge between the Texas Rangers and angry creditors. The mediation may effectively reopen bidding; the team is seeking to hold an auction. [USA Today.com](#) (June 25, 2010); [Blogs.Forbes.com](#) (June 28, 2010); [Google.com](#) (July 1, 2010); [Dallas Bizjournals.com](#) (July 7, 2010)
- After a year of mediation, the parties reached settlement with the buyer agreeing to pay Gilat \$20 million following the collapse of a \$475 million deal to purchase the company in 2008. [Globes.co.il](#) (June 28, 2010)
- Mediation has begun on who should pay the additional costs for construction of the \$318 million Northwest Florida Beaches International Airport. [News Herald](#) (June 20, 2010) (Subscription Required)
- Proponents and opponents of San Diego's long-stalled \$228 million waterfront improvement plan have agreed to meet with a new mediator to seek consensus. [Sign on San Diego.com](#) (June 1, 2010)
- Mediation began in November 2008 over appropriate attorneys' fees for prevailing plaintiffs' counsel in the landmark Supreme Court case over DC's handgun ban, which plaintiffs estimate at over \$3.5 million. The federal district judge encouraged the parties to consider additional mediation at a recent hearing. [Legal Times.com](#) (May 26, 2010)

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## RECENT MEDIATION CASES & UPDATES (cont.)

- A wrongful death lawsuit against Phil Spector, a Rock and Roll Hall of Fame inductee, is headed to mediation. Spector is in prison for second degree murder of model/actress Lana Clarkson, whose mother brought the civil suit. [NBC Los Angeles.com](http://NBCLosAngeles.com) (June 18, 2010)
- After multiple mediation sessions, the Erie County Attorney and the U.S. Department of Justice are proceeding with litigation over suicide prevention issues at jails in the New York county. The County Executive estimates that \$386,000 was spent on the litigation prior to mediation, not \$1 million as stated by the County Comptroller. [Buffalo News.com](http://BuffaloNews.com) (June 2, 2010); [WGRZ.com](http://WGRZ.com) (April 28, 2010)
- Mediation conducted by the U.S. Department of Justice that led to re-establishment of a police-community relations commission was broadly praised by participants. [PJ Star.com](http://PJStar.com) (June 25, 2010)
- Mediation is on track between the City of Los Angeles and more than 40 tenants over the higher rents demanded by the city. On the advice of the mediator, the city backed away from its demand that the higher rents be placed into escrow as a condition of mediation. [LA Downtown News.com](http://LADowntownNews.com) (July 2, 2010)
- An effort by Montreal, Maine & Atlantic Railway to abandon 240 miles of tracks in northern Maine is leading to mediation between the state of Maine, the Federal Surface Transportation Board and the Railway. The mediation is expected to be more productive than a scheduled federal hearing, and could help Maine's congressional delegation obtain federal funding to save the tracks. [Maine Biz.biz](http://MaineBiz.biz) (April 27, 2010)
- After years of litigation, the federal judge in the copyright case against Jammie Thomas has appointed a mediator to see if settlement can be reached. Jury damages against Thomas for copyright infringement of 24 songs were reduced by the court from \$1.92 million to \$54,000; Thomas rejected plaintiff RIAA's offer to settle if Thomas paid \$25,000 to a charity benefiting musicians. [Zeropa.com](http://Zeropa.com) (June 22, 2010)
- Mediation continues between San Diego Gas & Electric Co. and critics of its revised plan to cut off power to avoid wildfires during extreme conditions. [Sign on San Diego.com](http://SignonSanDiego.com) (June 28, 2010)
- A local government official released the sixteen point settlement agreement reached in mediation by supporters and opponents of a Christmas light show by 14 homes which attracted thousands of cars. While the show will continue in 2010, there will be a neighborhood vote after the holidays to determine whether it continues in future years. [MLive.com](http://MLive.com) (June 30, 2010)
- The attention on the World Cup is being leveraged by unions in South Africa demanding higher wages, which mediation is attempting to address to avoid massive strikes in the country. [Business Week.com](http://BusinessWeek.com) (May 31, 2010)

## DISPUTE RESOLUTION NEWS & INITIATIVES

### Italy's Mandatory Mediation Statute Seeks to Resolve a Million Disputes a Year

Legislation in Italy requiring mediation prior to litigation of a broad range of civil and commercial disputes was enacted on March 20, but does not take effect until March 2011 so that mediators can prepare for the increased caseload. The procedures in the legislation meet the requirements of the European Directive on Mediation. If mediation is not successful, either party may file suit, but litigation costs may be withheld depending on whether the outcome of litigation differs from the terms of a me-

diator's proposal. The legislation is intended to reduce the backlog of 5.4 million civil cases in Italy and resolve at least a million disputes a year. [Lexology.com](http://Lexology.com) (June 21, 2010) (Registration Required); [Alternatives.com](http://Alternatives.com) (April 2010)

### Other International Mediation Developments

- A farm consultancy firm in **Ireland** has launched a new mediation division to address all types of farm disputes, including succession, landowner/tenant, commercial leasing

and debt recovery. [Independent.ie](http://Independent.ie) (June 29, 2010)

- Five law firms in **Wales** are jointly offering mediation services to keep more dispute resolution work in Wales, as courts increasingly shift towards mediation. [Wales Online.co.uk](http://WalesOnline.co.uk) (June 23, 2010)

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## DISPUTE RESOLUTION NEWS & INITIATIVES (cont.)

- The Master of Rolls announced the publication of a Mediation Handbook as an authoritative **U.K.** source of information. [Lexology.com](#) (June 21, 2010) (Registration Required)
- Detailed information about mediation in twelve European countries (**Austria, Bulgaria, Czech Republic, England & Wales, Estonia, Greece, Hungary, Latvia, Poland, Portugal, Slovakia, and Sweden**) is available from the JAMS International ADR Center. [Herbert Smith.com](#) (June 21, 2010); [Country Reports](#)
- The **Italy-China** Business Mediation Centre opened in 2005 as the first bilateral commercial mediation center between a major European country and China. [International Law Office.com](#) (June 24, 2010)
- The United Nations-African Union Mission in Darfur presented a three-day workshop on conflict resolution, reconciliation, negotiation and mediation for 100 participants to build capacity to settle tribal disputes in the **Sudan**. [Allafrica.com](#) (June 28, 2010)
- The acting Chief Justice of the High Court of the State of Jharkhand, **India** inaugurated the Mediation and Conciliation center in Daltonganj, which will provide assistance to litigants without charge. [Times of India](#) (May 6, 2010)
- Justices in **Nepal** encouraged mediation during the inauguration of a mediation center in Kathmandu; the Nepal Bar Association president seeks involvement of lawyers to expedite mediation. [Himalayan Times](#) (June 18, 2010) (Subscription Required)
- New South Wales, **Australia** is going to use mediation more often in child custody and domestic violence cases to spare children from the trauma of the court system. [ABC.net.au](#) (June 18, 2010)

- New Brunswick, **Canada** published a new franchising regulation containing unique dispute resolution procedures. The regulation permits a party in a dispute to notify the other party and conduct direct negotiations within fifteen days, which may be followed by a request for mediation that the other party may decline. [Lexology.com](#) (July 7, 2010) (Registration Required)

### EEOC Adds 200th Large Employer to Mediation Program

CVS Caremark is the 200th large employer to join the U.S. Equal Employment Opportunity Commission's (EEOC's) Universal Agreement to Mediate (UAM) program to mediate workplace discrimination disputes. The CVS Caremark agreement is nationwide, while some UAMs are regional. In addition, EEOC district offices have entered into more than 1,500 local agreements to mediate with large employers. Under the EEOC's UAMs, discrimination complaints filed with the EEOC will be sent to the agency's mediation unit and to a designated company contact for mediation prior to EEOC investigation or litigation. The EEOC encourages mediation in order to improve the agency's overall effectiveness, while helping companies and employees reach better outcomes. The EEOC mediation program is one of the largest of its kind, with about 12,000 mediations a year.

[OHS online.com](#) (July 5, 2010)

### Other Notable News & Initiatives

- The Wisconsin Supreme Court has clarified that hearings must be held *in camera* when determining whether mediation confidentiality is outweighed by manifest injustice under Wis. Stat. section 904.085(4) (e). [Wisbar.org](#) (April 30, 2010)
- A mediation program in Twin Falls, Idaho increasingly needs interpret-

ers for languages other than Spanish, with a tripling of non-Spanish interpretation since 2007. [Magic Valley.com](#) (July 6, 2010)

- Mediators in Orange County participated in an aging sensitivity training that allowed them to experience the physical challenges of poor hearing, weak eyesight and other limitations. [PR-Canada.net](#) (June 19, 2010)
- After months of effort, Tulsa's Small Claims Court now has a mediation program in place which resolves about half its cases. The impetus for the mediation program was a lack of funds for expanding the court by building a new courthouse. But in addition to reducing the docket, mediation has increased the satisfaction of litigants. [Tulsa Business.com](#) (April 26, 2010)
- The Commander Navy Region Southwest presented awards to 25 mediators and 12 high level managers of the Southwest Region's Alternative Dispute Resolution Mediators Cadre for their success in resolving workplace conflicts. While the Navy ADR program has a 70 percent resolution rate as a nationwide target, the Southwest Region is averaging 78 percent. [Navy Compass.com](#) (June 29, 2010)

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## DISPUTE RESOLUTION NEWS & INITIATIVES (cont.)

### Update on Home Foreclosure Mediation

- A detailed report on foreclosure mediation programs **nationwide** from the Center for American Progress (CAP) states that the number of jurisdictions with foreclosure mediation programs has increased from 11 to 21 in a year. Pending legislation in additional states will boost the number further. The report recommends that states with opt-in programs should move to use of mandatory mediation and that states with coverage in only certain cities or locations should expand statewide. Further, the report urges that states without programs in place move swiftly with legislation or judicial rules to implement mediation programs and that mediation services also be added at the federal level. [American Progress.org](#) (June 29, 2010); [Full Report](#)
- The Obama Administration released its first monthly housing scorecard to track housing market indicators and **federal** efforts to prevent home foreclosures. [Housing Wire.com](#) (June 21, 2010); [Housing Scorecard](#) (June 21, 2010)
- The Circuit Court of Cook County launched a court-based foreclosure mediation program to address the rising foreclosure rate. Moreover, the county – **Illinois'** largest – approved a \$3.5 million budget last Fall to provide free foreclosure mediation services to homeowners. A coalition of community organizations is now launching a major outreach effort, going door-to-door to homes facing foreclosure to explain the details and encourage participation in the county's optional mediation program. In addition, pro bono attorneys are currently being trained to guide homeowners through the mediation process. [Pioneer Local.com](#) (April 29, 2010);

[Progress Illinois.com](#) (June 29, 2010) Palm Beach County, **Florida** homeowners can mediate foreclosures that are filed on or after July 12, although they can choose to opt out of mediation. The mediation program is being run by the Palm Beach County Bar Association. Mediation is free for homeowners, but lenders must pay \$750, which also covers a financial counselor and administrative costs. One mortgage company is enthusiastic and reports success in about 75% of their foreclosure mediations. Others are more skeptical about whether mediation will just further delay the foreclosure process and, on the other side, whether lenders have any motivation to settle. [Palm beach post.com](#) (July 7, 2010)

- **California** legislation to establish a mediation program to help homeowners and lenders agree on sustainable loan modifications passed the Assembly Appropriations Committee. The legislation intends to establish a mediation program similar to those in Nevada and Connecticut. [California Newswire](#) (June 1, 2010)
- Legislation has been introduced in **Connecticut** to extend the state's successful foreclosure mediation program by an extra year, to 2012. However, the source of funding for the additional year will be determined later. The bill would also bar banks and servicers from charging late fees or other charges if they do not come to mediation sessions or are unprepared. [Hartford Courant](#) (May 1, 2010)

### Foundation Relies on Mediation to Improve Patient Access to Care

A national non-profit, the Patient Advocate Foundation, is holding its 11th Annual Patient Congress in Washington, DC, urging members of Congress to support legislation that would improve patient access to care, which is needed even by those fully covered by insurance. The Foundation relies on mediation to ensure that patients with life threatening or debilitating diseases have adequate access to care or receive other needed assistance. The Foundation successfully resolved over 55,000 cases for patients last year using mediation or arbitration. Over 80% of the patients aided by the Foundation were fully insured, but still needed help to access medical care. [PR Newswire.com](#) (June 29, 2010)



## UPCOMING CLE TRAINING INFORMATION

# Associates in Dispute Resolution, LLC

**FRIDAY, OCTOBER 1, 2010**  
**JOIN US FOR**

6.0 CLE Hours includes 1.0  
 Ethics for Kansas & Missouri  
 6.0 CME Hours for Kansas  
 (pending)

## The Art (and Science) of Dispute Resolution: Getting to the Heart of Conflict

An advanced training designed to enhance the skills of attorneys, business professionals and experienced mediators.

At our offices in Topeka, Kansas located at:  
 212 SW 8th Avenue, Lower Level Conference Room, Topeka, Kansas

8:15 am to 8:50 am	Registration
8:50 am to 9:00 am	INTRODUCTIONS
9:00 am to 9:50 am	<i>Transparency in Mediation: Establishing &amp; Maintaining the Confidence of the Parties and the Integrity of the Process</i> (John Phillips, Husch Blackwell Sanders)
9:50 am to 10:40 am	<i>Criminal Mediation: Why? What? Who? When?</i> (Hon. Kevin P. Moriarty, Div. 14, Johnson County, Kansas)
10:40 am to 11:00 am	BREAK
11:00 am to 11:50 am	<i>ADR in the Business Environment: What do Plaintiff Attorneys, Defense Attorneys and Insurance Representatives Look for in a Commercial Mediator?</i> (Anne Schiavone, Holman & Schiavone; Kevin Case, Case & Roberts; and Ted Kudlinski, Zurich Insurance)
11:50 am to 1:00 pm	LUNCH (provided)
1:00 pm to 1:50 pm	<i>Mediating Money: A Practical Guide to Using Core Mediation Skills With Seasoned Negotiators Engaged in Distributive Bargaining When Money is the Issue.</i> (Patrick Nichols, Associates in Dispute Resolution, Lawrence, KS)
1:50 pm to 2:40 pm	<i>A view from the Top: ADR &amp; the Courts in 2010 as Observed By the Office of Judicial Administration</i> (Art Thompson, Dispute Resolution Coordinator, Office of Judicial Administration)
2:40 pm to 2:50 pm	BREAK
2:50 pm to 3:40 pm	<i>Dispute Resolution Ethics: Negotiation &amp; Settlement in Mediation &amp; Arbitration</i> (Larry Rute, Associates in Dispute Resolution, Topeka and Kansas City)
	3:40 pm Questions, Closing Thoughts & ADJOURNMENT

Early-bird Registration prior to September 15, 2010 is \$150.00.

After September 15, 2010, Registration is \$175.00.

For registration information, visit our web site at [www.adrmediate.com](http://www.adrmediate.com) or

E-mail us at [info@adrmediate.com](mailto:info@adrmediate.com)



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