



Associates in Dispute Resolution, LLC

Mediation | Arbitration | System Design

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- Recent Mediation Cases & Resolutions
- Dispute Resolution News & Initiatives
- Upcoming Training Events.

Dispute Resolution Update June, 2009

Dear Friends and Colleagues:

This issue features recent Mediation News & Initiatives gathered from around the country and around the world. The news article discusses mediation privilege, mediation sanctions, enforcement of settlement agreements, and other important dispute resolution issues.

This edition also features upcoming ADR related training events in which our panelists are prominent speakers and presenters.

Larry R. Rute

Patrick R. Nichols



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Federal Mediation Privilege Supported by Court Dicta

The federal district court in *McNeil Sampson v. Lancaster School Board*, (E.D. Pa.), found persuasive the reasoning of federal courts which have adopted a federal mediation privilege, which is discussed in detail, but based its decision on other grounds. In the underlying dispute, a mediation over discrimination allegations against a school system was attended by the school's attorney who then prepared a memorandum to the school board about the mediation and the claimant's perception of conspiracy and aggressive stance in the mediation, after which the claimant was fired. In the ensuing litigation, the claimant asserted that her termination was retaliation for participating in mediation and sought discovery related to the mediation. However, the court concluded that the claimant could not depose the school's attorney and that the memorandum drafted about the mediation was protected under the attorney-client privilege. The court also noted that a state mediation privilege is not applicable in a federal case involving both state and federal claims. [McNeil Sampson v. Lancaster School Board](#), No. 05-6414 (E. D. Pa. Nov. 5, 2008); [The Legal Intelligencer](#) (March 11, 2009) (Subscription Required)

Joint Resolution Encourages Governor and Union to Mediate

With the governor of Vermont beginning layoffs that could eliminate 400 state employees in an effort to reduce costs, the legislature passed a joint resolution calling on the administration and the Vermont State Employees' Association to enter into mediation over how to come up with state payroll savings. The resolution gives the mediation two weeks to find solutions before the end of the legislative session.

[Vermont Business Magazine](#) (April 24, 2009)

Remaining 9/11 Cases Mostly Settled in Mediation

Ninety-two of 95 lawsuits by victims of the September 11, 2001 attacks have been settled in mediation by the airlines and other defendants for about \$500 million. Plaintiffs in these 95 lawsuits had opted out of the special fund established by Congress which distributed over \$7 billion to more than 5,000 survivors. The mediator noted that a significant number of the disputes were more about the families having a chance to express their losses or anger than about money. Face-to-face encounters between the families and airline representatives were critical in about a third of the settlements and there were "lots of tears," according to the mediator. Trial dates have not been set in the remaining three cases.

[Breitbart](#) (March 5, 2009); [Bay Ledger News Zone](#) (March 5, 2009)

Mediator Facilitates Six-Month Discussion on Health Care Policy

Eighteen health-interest groups, including insurers, consumer advocates and hospitals, issued a report urging the government to meet the goal of all Americans having health insurance. With the help of a mediator over a six month period progress was made by the groups, which called their effort the Health Reform Dialogue, but consensus was not reached on divisive issues such as whether to mandate that all consumers must obtain health insurance. The American Federation of State, County and Municipal Employees pulled out of the talks in February and the Service Employees International Union didn't join on the report, but the 18 groups that issued the report included large entities such as the Pharmaceutical Research and Manufacturers of America and the American Medical Association.

[Bloomberg](#) (March 27, 2009)

Courts Must Enforce Settlement Agreements as Written

Settling parties provided that the remedy for not carrying out their mediated settlement agreement would be a judgment for the unpaid amount, so a New Jersey appellate court reversed the trial court's decision to reinstitute the original claims. The appellate court explained that if the parties wanted the option to bring back their original litigation as remedy for a breach, they needed to include that in the settlement and seek the acquiescence of the court.

[Kaur v. Assured Lending Corp.](#), 2009 WL 536902 (N.J. Super. App. Div. March 5, 2009)

Courts Seriously Consider Sanctions for Failing to Appear in Person at Mediation

The North Carolina Court of Appeals sent back to the trial court a decision imposing sanctions on parties who failed to appear in person at a court-ordered mediation. Under North Carolina law, all individual parties must appear in person unless they obtain a court order or the agreement of the other parties and mediator. The trial court imposed over six thousand dollars in sanctions, but failed to determine whether the absent parties' excuses of a delayed flight, inability to get off work, and lack of funds constituted good cause for not appearing and relying on a co-party and input by telephone. The appellate court also stated that the trial court should determine whether the parties seeking sanctions had waived their right to sanctions by mediating for over eight hours, and noted the importance of determining the reasonableness of the attorneys' fees and costs requested. [Perry v. GRP Financial Services](#), 2009 WL 782897 (N.C. App. April 7, 2009)

Parties Seek to Disqualify Federal Judge Due to Role as Mediator

Lenders for Sunwest Management are seeking to disqualify a U.S. district judge in litigation brought by the SEC, based on the judge's mediation of a related case between the company and its former CEO. The judge, known for being combative during mediations, refused to step aside in the litigation despite being in a position to gain confidential information in the mediation.

[Hartford Courant](#) (March 8, 2009)

Mediation of Complex Sex Abuse Case Against Hospital Begins Second Year

Over 135 plaintiffs claiming sexual abuse as children by a doctor entered into mediation in March 2008 with the hospital they claim failed to stop the abuse. The court hoped the mediation would be concluded by the end of 2008, but it may continue for months more. The doctor worked for the hospital from 1963 to 1993 and died in 1998. Large amounts of child pornography were found in 2007 in the doctor's former home. State legislation is being considered which would extend the statute of limitations when new evidence is uncovered that could not reasonable have been discovered previously, which could impact about 40 to 50 plaintiffs.

[Hartford Courant](#) (CT) (March 8, 2009)

Governor Uses Mediation Confidentiality to Shield Deal with Power Plant

The confidentiality of mediation is preventing dissemination of details about an agreement that was negotiated between the state of Washington and the only coal-fired power plant in the state. The owner of the plant agreed to significant emission reductions, but critics question whether the state could have done better. Open government advocates are concerned about the public-records exemption for mediation confidentiality.

[The News Tribune](#) (April 8, 2009)

Local Catholics Ask Vatican for Mediation over Parish Closings

Facing the recent or planned closing of 1,000 U.S. parishes, Catholic parishioners from 31 groups in eight U.S. dioceses sent a lengthy letter to Vatican offices seeking mediation between U.S. bishops and local parishioner groups. The Vatican is close to a decision on the appeals of several parishes in the Boston Archdiocese where parishioners have maintained vigils for over four years. But mediation is being pursued because advocates are discouraged by the historical lack of success of appeals.

[The Catholic Review](#) (April 8, 2009)

Maine Considering Uniform Mediation Act

The legislature in Maine is considering the Uniform Mediation Act (UMA) in order to establish confidentiality for mediation communications, with specified exceptions. The legislation is intended to encourage greater use of mediation and generally follows the UMA language of the National Conference of Commissioners on Uniform State Laws. The UMA has been adopted thus far in the District of Columbia and ten states: Idaho, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont and Washington state. Legislation to adopt the UMA is also currently being considered in Hawaii and Rhode Island.

Maine H.B. 968; LegAlert (April 2, 2009) (Subscription Required)

Agricultural Commission May Become Mediation Board

Following a model suggested by the state, a proposed town "right to farm" bylaw would provide information to people moving near farms and begin a mediation program for disputes that arise between farmers and their neighbors. The bylaw of the Massachusetts' town would establish the mediation service in the Agricultural Commission as a first resource for disputes. *The Republican (April 7, 2009)*

Climate Change Disputes May Benefit from Mediation

Increasing numbers of lawsuits and disputes are arising from climate change allegations, which are being taken more seriously by the courts. The cases are complex and often involve multiple parties, so are often well suited to mediation where a skilled mediator can help the parties work through the issues to reach better outcomes, including sophisticated solutions that could not be achieved in other ways. However, a few cases do need judicial or political decisions on the scope of rights and remedies.

Fulton County Daily Report (April 10, 2009) (Subscription Required)

Foundation Frequently Uses Mediation to Assist Seriously Ill Patients

A national non-profit, the Patient Advocate 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's annual Patient Data Analysis Report states that over 48,000 matters were successfully managed for patients last year using mediation or arbitration. The report noted that 93% of patients helped by the Foundation had some health insurance, but were often "underinsured" and lacked the ability to obtain the coverage needed.

PR Newswire (April 29, 2009)

Recession Shifting Disputes to Mediation

Commercial mediators and mediation groups note that corporations may be waiting to initiate litigation in some disputes in order to save costs, but many other conflicts are being brought into mediation more quickly than in the past in order to minimize litigation costs. Moreover, some mediators note that parties may be more amenable to settlement now than in the past, given the pressure on litigation budgets. The weak economy is reawakening clients and advocates to the benefits of mediation, which could well lead to permanent increases in the use of mediation, especially in mid-Atlantic states and other regions of the country that have been slower to shift to mediation.

Pennsylvania Law Weekly (March 23, 2009) (Subscription Required)

Value of Mediation Seen in Tough Economic Times

Challenging economic times may increase the number of disputes, leading more people to turn to mediation for resolution. In New Zealand, a free pilot mediation service began in March for smaller disputes between individuals, while the maximum dollar size of disputes handled by the Disputes Tribunal was increased. Mediation experts note that in addition to generally being less expensive, mediation often reaches better solutions for the businesses and other parties involved.

[The Dominion Post \(New Zealand\)](#) (March 12, 2009)

Update on Home Foreclosure Mediation Efforts

- Oregon** is considering legislation that would require mandatory mediation before foreclosure on residential property and may involve the mediator running calculations to determine if the borrower qualifies for loan modification; the legislation would sunset in 2014. [Oregon SB 628](#); [The Oregonian](#) (April 27, 2009)
- Maine** is considering legislation to establish a mandatory foreclosure mediation program which would stay the foreclosure action during the mediation. [Maine LD 1418](#); [MPBN News](#) (April 28, 2009)
- Minnesota** is considering the Homeowner-Lender Mediation Act, which would require lenders to notify homeowners of their right to mediation prior to beginning foreclosure proceedings. The Executive Director of the Iowa Mediation Service warned that the legislation could open the proverbial floodgates. [Finance and Commerce](#) (April 1, 2009)
- Pending **Wisconsin** legislation would require financial institutions provide mediation request forms to borrowers as the first step towards foreclosure, and would permit borrowers to stay in their homes until mediation is concluded. [New Richmond News](#) (April 16, 2009) (Registration Required); [WISN.com](#) (April 15, 2009)
- Legislation in **Connecticut** would make mediation mandatory, rather than optional, in real estate foreclosures. Under existing law over a quarter of foreclosure proceedings have been mediated, with about 70 percent being resolved. [Hartford Business](#) (April 10, 2009); [Connecticut S.B. 619 Analysis](#); [Greenwich Time](#) (March 10, 2009)
- The **Florida** Supreme Court formed a task force in April to explore foreclosure mediation options that may be suitable statewide. Meanwhile, the Miami-Dade Circuit Court was to launch a pilot mediation program on May 1 which is intended to get lenders and borrowers talking to each other in an effort to avoid foreclosure. The 19th Circuit also has begun requiring mediation in owner-occupied foreclosure cases. Jacksonville is considering local legislation to require foreclosure mediation. [Miami Herald](#) (April 23, 2009); [Jacksonville Daily Record](#) (March 9, 2009); [Jacksonville Daily Record](#) (March 9, 2009)
- New Jersey** plans to use part of a multi-million dollar settlement with Countrywide Financial Corp. to fund foreclosure mediation efforts in the state. [The Star-Ledger](#) (April 2, 2009)
- The Superior Court in **Marion, Indiana** passed a new local rule allowing homeowners facing foreclosure the option of a settlement conference or mediation with their lender. The conferences are mandatory for the lender if the borrower responds. [Indianapolis Star](#) (March 11, 2009)
- New Hampshire** is exploring the idea of a mortgage mediation program to help struggling borrowers keep their homes. [Fox News](#) (March 8, 2009)
- U.S.** Congressman Alan Grayson (D-Florida) is urging mandatory mediation to minimize home foreclosures and seeking \$50 billion from the Trouble Asset Relief Funds for foreclosure relief efforts. [The Ledger](#) (April 23, 2009)

Mediation Helps Prepare Inmates for Release

The Maryland Division of Correction is expanding to a medium security prison its pre-release mediation program for inmates. The program is voluntary for inmates, allowing them to attend up to three mediation sessions with the person who will provide a home for them once they are released. The mediation program helps resolve conflicts that may lead to future trouble, giving the inmates a better chance at success once they are released.

[The Examiner](#) (April 14, 2009)

Texas Legislation Proposes Pretrial Victim-Offender Mediation Programs

The Texas House of Representatives passed, without any opposition, legislation that would authorize cities and counties to establish pretrial victim-offender mediation programs for misdemeanors and certain felonies. Under H.B. 2139, mediation would only occur with the consent of both victim and defendant, and would result in charges being dismissed against the defendant if an agreement is reached which includes an apology along with restitution or community service by the defendant. Mediators need not be trained and the programs may charge defendants up to \$500 in fees. The legislation was amended before passage to also include a juvenile victim-offender pilot program.

[Texas H.B. 2139; Amendment for Juvenile Pilot](#) (April 24, 2009)

Michigan Businesses Slowly Shifting Towards Mediation

Despite inertia, business disputes in Michigan are increasingly being resolved through mediation, rather than litigation or arbitration. However, businesses may often wait too long and participate in mediation only when directed by the court, when they could benefit by seeking out mediation sooner. It is particularly important in the current economic climate to keep down litigation costs and get a settlement in mediation rather than waiting for a later judgment that may not be collectible.

[Michigan Lawyers Weekly](#) (April 6, 2009) (Subscription Required)

Australian Courts Turning to Mediation

A report on mediation in the Supreme and County courts in Australia shows that use of mediation is steadily increasing. All civil cases before the Supreme Court are now being sent to mediation, where judge-led mediations are being used. A pilot mediation program in Magistrates Court has been extended and expanded from all cases under A\$10,000 to all those under A\$40,000. The author of the report noted that 80% of mediation participants are satisfied with the process, but that some cases need to be referred to mediation earlier.

[The Age](#) (April 2, 2009)

Other International Mediation Developments

- New **Australian** Supreme Court judge appointed to promote mediation in civil cases, fulfilling government's commitment, [The Age](#) (April 1, 2009)
- Failure to accept mediation offer may impact award of court costs in work injury cases in **New South Wales, Australia**, [Workers Compensation Report](#) (March 31, 2009) (Subscription Required)
- Mediators from **China** IPR Desk address intellectual property issues at large trade show in Europe, avoiding police raids to seize infringing technology as in past, [PC World](#) (March 9, 2009)
- Hong Kong's** Civil Justice Reform largely became effective in April, with a new mediation directive taking effect on January 1, after which unreasonable refusals to mediate may impact legal cost awards, [Mondaq](#) (April 7, 2009) (Subscription Required)
- The **Philippines** province of Bukidnon will be opening its own mediation center, [Minda News](#) (March 31, 2009)
- The Supreme Court of **India** is preparing a national mediation plan to be submitted to the government in the next two months, [The Hindu](#) (March 12, 2009)
- India** is increasingly using mediation in intellectual property disputes, with generally favorable results, [Mondaq](#) (April 16, 2009) (Subscription Required)
- Bahrain** is hosting conference on mediation and trade disputes; will unveil its own mediation program later in year, [Gulf Daily News](#) (March 7, 2009)
- Dubai** mediation center to open in April to resolve property-related issues, [Emirates Business 24/7](#) (March 9, 2009)
- Romanian** Banking Association received approval for a Banking Mediator to resolve disputes between banks and customers, [Curierul National](#) (April 13, 2009)
- U.K.'s** Federation of Small Businesses is urging the Treasury to fund specialist mediators to resolve lending disputes during credit crisis, as in France and Belgium, [Telegraph.co.uk](#) (April 16, 2009)
- Irish** Commercial Mediation Association survey shows increasing use of mediation; Law Reform Commission is receiving input before publishing final report on alternative dispute resolution, [Irish Times](#) (March 6, 2009) (Subscription Required)

UPCOMING TRAINING EVENTS

Developing Effective Internal Dispute Resolution Systems

with

Larry Rute and Michelle Minor

June 9, 2009

11:15 a.m.

Lawrence Country Club

<http://www.jayhawkshrm.org>

SHRM
JAYHAWK
CHAPTER



Pricing Member - PrePaid: \$0.00
Member - In Advance: \$12.00
Guest - In Advance : \$15.00
Member - Late Registration (6/4 or later): \$15.00
Guest - Late Registration (6/4 or later): \$20.00

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Kansas City

Metropolitan Bar Association

Serving Greater Kansas City's Legal Community - Kansas and Missouri

UPCOMING CLE EVENTS

23rd Annual Corporate Counsel Institute

Wednesday, June 17, 2009

Doubletree Hotel, Overland Park, Kansas

Sponsored by the KCMBA and the Association of Corporate Counsel (Mid-America Chapter)

During the conference join

James A. Heeter, Charlie J. Harris, Jr., Bert S. Braud, Kara Dorssom and Larry R. Rute for:

Preparing for and Surviving a Reduction in Force with Tips from the Experts

Faced with a declining national and local economy, employers, unions, and employees confront multiple workplace dilemmas including workforce reductions or even plant and branch closings. This expert panel will explore the legal challenges involved when employers must reduce their workforce such as: complying with the anti-discrimination provisions of the Age Discrimination in Employment Act and the Older Workers Benefit Protections Act; mass layoff/plant closing obligations under the Worker Adjustment and Retraining Notification Act.

Moderator: James A. Heeter, Sonnenschein Nath & Rosenthal LLP

Panelists:

Charlie J. Harris, Jr., *Seyferth Blumenthal & Harris LLC*

Bert S. Braud, *The Popham Law Firm, PC*

Kara Dorssom, *Kansas City Power and Light Co.*

Larry R. Rute, *Associates in Dispute Resolution, LLC*

Registration Information

8.0 CLE Hours including 1.0 Ethics Hour in Missouri and Kansas

for the latest information – www.kcmba.org.





UPCOMING CLE EVENTS

Annual Labor & Employment Law Seminar

Thursday, June 18, 2009

Lantz Welch Education Center, KCMBA Headquarters

**During the conference join
Larry R. Rute with:**

Effective Trial Strategies and Tips from the Bench...and an Impartial View

This full-day seminar will touch on the most significant developments in labor and employment this year. Beginning with an update of the many legislative changes and ending with practical tips from trial lawyers, mediators and judges, this seminar will provide guidance and insights on such timely topics as reduction in force planning, collective actions, developments under the Missouri Human Rights Act and effective trial strategies and tactics. Our distinguished speakers will ensure a lively day of labor and employment education with something for everyone who practices in this exciting area.

Registration Information

7.0 CLE Hours in Missouri and Kansas

for the latest information – www.kcmba.org.

Associates in Dispute Resolution, LLC

FRIDAY, SEPTEMBER 25, 2009

JOIN US FOR

Creativity in Mediation: Skills, Strategies & Techniques for Success

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

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

8:15 am to 8:50 am	Registration
8:50 am to 9:00 am	INTRODUCTIONS
9:00 am to 9:50 am	<i>Gender in Mediation: Negotiation & the Gender Divide</i> (Kathy Perkins)
9:50 am to 10:40 am	<i>Co-Mediation as a Valuable Settlement Technique</i> (Larry Rute, Michelle Minor and Art Thompson)
10:40 am to 11:00 am	BREAK
11:00 am to 11:50 am	<i>Psychological Barriers to Settlement</i> (Patrick Nichols and Kathie Nichols)
11:50 am to 1:00 pm	LUNCH (provided) (Guest Luncheon Speaker)
1:00 pm to 1:50 pm	<i>Best Practices in Commercial Mediation</i> (Larry Rute)
1:50 pm to 2:40 pm	<i>Best Practices in Family Mediation</i> (Patrick Nichols, Gary Kretchmer & Bill Ebert)
2:40 pm to 2:50 pm	BREAK
2:50 pm to 3:40 pm	<i>Negotiating for Dollars: Distributive Bargaining Techniques in Monetary Settlements</i> (John Phillips)
3:40 pm	ADJOURNMENT

**For more information to come, visit our web site at
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