



# Associates in Dispute Resolution, LLC

Mediation | Arbitration | System Design

[www.adrmediate.com](http://www.adrmediate.com)

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## Dispute Resolution Update

October, 2008

### IN THIS ISSUE:

- New KC Office Location
- Upcoming Training Events
- Recent Case Decisions
- Dispute Resolution News & initiatives

Dear Friends and Colleagues:

In this edition of our newsletter, we are featuring an article written by ADR Partner, Larry Rute. Larry's article, *In Praise of the Strategic Opening Statement in Commercial Mediation* 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.

This issue also features recent mediation decisions and dispute resolution news and initiatives gathered from around the country and around the world. This information has been summarized by Keith L. Seat, respected mediator and Editor of the International Academy of Mediator's monthly newsletter.

Finally, we have featured in this issue the agenda for our forthcoming CLE, *Emerging Strategies for Managing Business & Workplace Conflict* which will be held in Kansas City on October 24, 2008. We have also provided information regarding the upcoming Kansas Bar Association CLE, *In the Trenches: Best Practices in Commercial & Domestic Mediation* which will be held in Topeka, Kansas, on November 21, 2008.

Larry R. Rute

Patrick R. Nichols



*Larry and Patrick are Fellows of the*

We have recently changed our Kansas City office location to the Livestock Exchange Building located in the historic Kansas City Stockyards area. This new office offers easy access and a neutral location for mediation, arbitration and other dispute resolution services. Our new Kansas City office address is:

Associates in Dispute Resolution LLC  
1600 Genessee St., Suite 838, Kansas City, MO 64102  
(816)531-1001 — (816)531-1221 (fax)

Please visit the ADR web site at [www.adrmediate.com](http://www.adrmediate.com) which provides additional information regarding services, office locations and panel members.



### Larry R. Rute



Larry is ADR's founding partner. He has successfully mediated more than 3,000 complex disputes. His arbitration and 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.

### In Praise of the Strategic Opening Statement in Commercial Mediation

By Larry R. Rute, copyrighted 2008

Over the past fifteen years, mediation has become an increasingly important tool to resolve complex commercial disputes. It is no longer unusual for mediations to be conducted that will involve multiple parties and thousands, if not millions, of dollars in potential damages. In high-stakes mediation, the consideration of whether to utilize the opportunity for an opening statement at an early stage is a very important strategic decision. The determination whether to utilize the opening statement will set into play a psychological process that may ultimately determine whether the negotiation is successful or result in impasse.

[For the complete article, click here.](#)

ASSOCIATES IN DISPUTE RESOLUTION, LLC  
KANSAS CITY SEMINAR

Friday

October 24, 2008

Location: Kansas City Marriott Country Club Plaza  
4435 Main Street, Kansas City, MO 64111

***Emerging Strategies for Managing  
Business and Workplace Conflict***

Associates in Dispute Resolution, LLC, is hosting a seminar on Friday, October 24, 2008 which will offer an advanced training designed to enhance the skills of attorneys, business professionals and experienced mediators.

The program will be held at the Kansas City Marriott, Country Club Plaza, at 4435 Main Street, Kansas City, Missouri.

**\*\*\*GET A DISCOUNT\*\*\***

**Indicate you were reminded in our October newsletter about the seminar and we'll offer you the early-bird rate!**

5.0 CLE Hours  
Includes  
Ethics Hours for  
Kansas and Missouri  
5.0 CME Hours  
For Kansas

8:15 a.m. to 8:50 a.m.	Registration
8:50 a.m. to 9:00 a.m.	Introductions
9:00 a.m. to 9:50 a.m.	Ethical Considerations in Negotiations: Rights, Responsibilities, and Limitations under the Kansas and Missouri Ethical Standards (Patrick Nichols)
9:50 a.m. to 10:40 a.m.	Preparation and Planning for EEOC Mediation (Michelle Minor and Larry Rute)
10:40 a.m. to 11:00 a.m.	BREAK
11:00 a.m. to 11:50 a.m.	Intellectual Property Mediation (Arthur Chaykin)
11:50 a.m. to 1:00 p.m.	LUNCH (provided) Luncheon Speaker (John Phillips) Arbitration Update: The Supreme Court's Decision in <i>Hall Street Associates v. Mattel</i>
1:00 p.m. to 1:50 p.m.	Scope and Design of Corporate Dispute Resolution Systems (Michelle Minor and Larry Rute)
1:50 p.m. to 2:40 p.m.	Hot Topics in Employment Law (Professor Elinor Schroeder)
2:45 p.m.	Questions, closing thoughts and adjournment

Questions? Call 785-357-1800, visit our web site at [www.adrmediate.com](http://www.adrmediate.com) or e-mail at [info@adrmediate.com](mailto:info@adrmediate.com)

**Click Here for Registration Forms and Information**



# KBA

# C L E

## *In the Trenches: Best Practices in Commercial and Domestic Mediation*



KANSAS BAR  
ASSOCIATION

**KBA  
Continuing  
Legal  
Education:  
Your  
partner in  
practice**



**November 21, 2008**

Kansas Law Center  
(Kansas Bar Association)  
1200 SW Harrison  
Topeka, Kan.

### **DISTINGUISHED FACULTY INCLUDE:**

**Christine A. Coates**

Dispute Resolution  
Professional, Boulder,  
Colorado

**Mike Ketchmark**

Davis Ketchmark & McCreight,  
Kansas City, Missouri

**Patrick R. Nichols,**

Associates in Dispute  
Resolution, Lawrence, Kansas

**Kathy Perkins**

Kathy Perkins LLC, Lawrence,  
Kansas

**Donald S. Prophete**

Ogletree Deakins, Nash  
Smoak & Stewart PC, Kansas  
City, Missouri,

**Larry R. Rute**

Associates in Dispute  
Resolution LLC, Topeka,  
Kansas

**Arthur J. Thompson,**

Office of Judicial  
Administration, Topeka,  
Kansas



**KANSAS BAR  
ASSOCIATION**  
[www.ksbar.org](http://www.ksbar.org)

**The KBA has applied for 6.5 hours of continuing legal education (CLE) credit, including 1.0 hours professional responsibility credit for this seminar. Mediation (CME) credit from the OJA is pending approval.**



### **California Supreme Court Reverses *Ghaderi*: No Estoppel or Implied Waiver of Mediation Confidentiality**

The California Supreme Court unanimously reversed the appellate court in *Simmons v. Ghaderi*, and concluded that a party is not estopped from asserting mediation confidentiality despite having litigated the details of the mediation for fifteen months. The case arose when Dr. Ghaderi gave her insurer permission to settle a medical malpractice case in mediation and then changed her mind after an oral agreement was reached, but before a written settlement agreement was signed. In a comprehensive decision analyzing mediation confidentiality, the Court held that no judicial exceptions to the statutory scheme are allowable, other than express waiver by the parties or when due process is implicated. The Court closely reviewed California's statutory provisions and legislative history and noted that despite the legislature's awareness that some bad faith conduct would go unpunished, it chose mediation confidentiality as paramount in order to promote mediation.

[Simmons v. Ghaderi](#), S147848 (Cal., July 21, 2008)

### **Florida Appellate Court Reverses Severe Sanctions for Breach of Mediation Confidentiality**

A workers compensation claimant checked with his doctor after his employer stated in mediation that the doctor had made inconsistent recommendations about whether surgery was needed. When the doctor responded in writing that he had always urged surgery, the employer successfully moved to have the workers comp claims dismissed with prejudice due to breach of mediation confidentiality requirements. The Florida appellate court reversed dismissal of the claims as being too severe a sanction, discussed a range of appropriate sanctions, and remanded the case to the judge of compensation claims for further action.

[Hill v. Greyhound Lines, Inc.](#), No. 1D07-1188 (Fla. App. 1st Dist., August 29, 2008)

**Federal Court Dismisses Lawsuit for Lack of Mediation** A private agreement requiring mediation prior to any litigation was a sufficient basis for a federal court to dismiss without prejudice the pending litigation, since the parties had not yet mediated. Plaintiffs sought to have the litigation stayed pending mediation, but the court dismissed the matter without even holding a hearing.

[Brosnan v. Dry Cleaning Station Inc.](#), 2008 WL 2388392 (N.D. Cal. June 6, 2008) (Subscription Required)

**Settlements in Katrina Mediations Withstand Attack** A federal court upheld the "plain meaning" of settlements reached in the Mississippi hurricane mediation program which released any and all Katrina claims except for subsequent discovery of "additional insured damage." The Scruggs Katrina Group filed some 200 nearly identical complaints alleging a conspiracy of fraud and bad faith that it asserted as grounds for additional insured damages. The court, however, found that the phrase could only mean additional property damage, but left open the record in case plaintiff's new substitute counsel wished to submit affidavits showing newly discovered property damage.

[Boyd v. State Farm](#), No. 1:07CV820 (S.D. Miss., Aug. 6, 2008)

**Personal Injury Settlement Sets County Record** A \$6 million global settlement in a one-day mediation resolved the legal claims of a 9-year-old boy who was blinded from serious craniofacial injuries in an all terrain vehicle accident. The agreed payment is believed to be the largest settlement or verdict in Fayette County, Pennsylvania. Details reported about the accident and claims came from the plaintiffs' mediation memorandum.

[Pennsylvania Law Weekly](#) (August 11, 2008) (Subscription Required)



### **Use of Focus Groups and Tribute Video Help Mediation Succeed**

Plaintiffs' counsel convened two focus groups and shared the comprehensive results with the other side at a second mediation session, after an initial mediation session failed to resolve claims from a serious accident in which a car hit a tractor-trailer stopped on the side of the road, resulting in the death of one passenger and serious injuries to another. In addition, plaintiffs' counsel provided defense counsel with a video containing testimony from the deceased woman's family, friends, and others speaking about the impact she had made on their lives. The second mediation session reached resolution, with settlements totaling \$3.2 million for the two victims.

[North Carolina Lawyers Weekly](#) (September 1, 2008) (Subscription Required)

**Detailed Mediation Agreement Flips City Council on Commercial Development** After a 74-acre commercial project was blocked by the Columbia (MO) City Council, the developer entered into mediation with two neighborhood associations and, after nearly a month of negotiations, agreed to add a layer of restrictions to the development, which was sufficient to obtain City Council approval. The developer concluded that the mediation process improved plans for the development, but one of the neighborhood association leaders expressed frustration by the confidentiality of the mediation process when dealing with community issues.

[Columbia Daily Tribune](#) (August 19, 2008); [Columbia Daily Tribune](#) (August 17, 2008); [Columbia Daily Tribune](#) (July 11, 2008) (Subscription Required)

**Citizens Group and City Defuse Racial Tensions** After seven months of mediation facilitated by the U.S. Department of Justice Community Relations Service, a settlement agreement was signed by Fountain Inn (SC) city leaders and a citizens group concerned about police misconduct against African-Americans. Tensions had escalated with the hanging death of a jail inmate in July 2007. The resolution reached to improve police relations requires the police department to seek state accreditation and the city to establish a Citizens Review Committee to hear complaints, review appeals and oversee police handling of complaints.

[Greenville News](#) (August 12, 2008); [Greenville News](#) (August 13, 2008)

**Decades-Old Australian Naval Disaster Claim Resolved** Forty-four years after Australia's worst peacetime naval disaster, a formal naval seaman resolved his ten-year-old litigation by accepting a six-figure settlement in mediation. Other pending mediations may finally resolve the remaining claims from the accident between aircraft carrier HMAS Melbourne and destroyer HMAS Voyager, in which the Voyager was cut in two and sunk.

[The Age](#) (August 18, 2008)



**Analysis Finds Parties Generally Err in Rejecting Settlement to go to Trial** A study of civil lawsuits over the last 40 years indicates that parties often make poor decisions when passing up settlements prior to trial, and that such mistakes are becoming more common. In only 15% of cases did both sides make the right decision to go to trial, with the verdict falling between what the plaintiff demanded and the defendant offered. Plaintiffs were wrong to proceed to trial 61% of the time, with an average loss of \$43,000 in recent years. Defendants were only wrong 24% of the time, but their average loss was \$1.1 million. The advocate's years of experience, rank of law school and size of firm were less related to bad decisions than the type of case. Errors tended to be made by plaintiffs in cases where contingency fees are common, and by defendants where insurance coverage is generally unavailable. The study, said to be the largest ever of its type, is forthcoming in the *Journal of Empirical Legal Studies*.

[New York Times](#) (August 7, 2008); [Journal of Empirical Legal Studies](#)

**Widespread Adoption of Mediation Programs Reducing Costs** Large companies, insurers, government agencies and courts are all moving towards greater reliance on mediation. For example, Toro Co. has resolved 1,400 products liability claims since launching its mediation program in the early 1990s, and has not taken a case to trial since 1994, resulting in a drop in total costs per claim from \$115,000 to \$43,000. About two-thirds of the Toro claims are resolved directly by claims coordinators, with the remaining third being resolved in mediation. Similarly, after Hurricane Katrina, Zurich Insurance created a new Alternative Dispute Resolution program with a multi-step process that moved from direct negotiation between the insurance representative and policyholder, to mediation, and finally binding arbitration. Out of 20,000 claims against Zurich, 98% have been resolved, with only about 100 reaching and being settled through mediation, and none going to arbitration. While courts are increasingly requiring mediation, some court programs are seeing a decrease in settlements, which is attributed to litigants going directly to private mediators or seeking mediation prior to filing suit.

[Chicago Lawyer](#) (July 9, 2008) (Subscription Required)

**Updated Construction Form Agreements Rely on Mediation** The American Institute of Architects (AIA) has released updated form construction documents which provide more complex dispute resolution language than the prior AIA version. The new A201 form provides that the first determination about a dispute be made by an Initial Decision Maker who no longer needs to be the architect. If that decision is not satisfactory, a party may seek mediation by making a formal demand that the other side file for mediation or waive certain rights. If mediation is not successful, the parties may resort to either arbitration or litigation based on their agreement in the form contract. A competing set of form documents called ConsensusDOCS has been developed by 19 construction associations. ConsensusDOCS is more collaborative and first requires direct discussions at the field and then senior executive levels, followed by mediation (as the default) or "mitigation" with nonbinding findings by an independent neutral or dispute review board. Mediation is to be concluded within 45 days, and if not successful is followed by litigation or arbitration.

[New York Law Journal](#) (August 4, 2008) (Subscription Required)

**Connecticut Provides Mediation for Eminent Domain Disputes** New regulations adopted by the Connecticut Office of Ombudsman for Property Rights provide that mediation can be requested by property owners dissatisfied with the compensation offered in eminent domain proceedings or by occupants concerned about the assistance offered when forced to move due to eminent domain. The Ombudsman determines whether or not to grant a mediation request, and if granted, public agencies may be required to cooperate and participate in the mediation.

[RegAlert](#) (July 8, 2008) (Subscription Required); [Regulation](#) (Subscription Required)



**Maryland Encourages Agricultural Mediation** The Maryland Department of Agriculture is encouraging farmers to mediate disputes with neighbors, family, government agencies and lenders using the Maryland Agricultural Conflict Resolution Service (ACReS). Mediation services are available at modest or no cost, depending on income levels, with a free initial consultation and shared costs if additional sessions are needed. Under state legislation passed in 2006, mediation is required prior to filing suit against an agricultural operation.

[US State News](#) (July 29, 2008) (Subscription Required); [Baltimore Sun](#) (August 10, 2008)

### **New York Court Establishes Modest Statewide Mediator Training Requirements**

The New York state judiciary issued its first statewide mediator training requirements to be on court rosters, requiring 24 hours of basic mediation skills training and another 16 hours relating to the types of cases to be referred. The rules also set standards for neutral evaluators, requiring five years of substantial experience as a judge or practicing lawyer in the kinds of cases being referred. Continuing legal education was set at six hours every two years for both mediators and neutral evaluators. The rules clarify that a person qualifying as both a mediator and neutral evaluator may act in both capacities in the same case.

[Law.com](#) (July 24, 2008)

**Mississippi's Katrina Mediation Program Shows 80% Settlement Rate** Updated figures reveal that nearly 5,000 mediations were requested in the Mississippi Insurance Department's hurricane mediation program, and 82% of those settled. About a fourth of the settlements occurred prior to mediation, with the remainder settling at mediation. In addition, another 235 federal cases were resolved through court-ordered mediation, out of about 1,100 closed federal cases, while another 867 policyholders in two mass lawsuits settled without filing individual claims.

[Sun Herald](#) (August 27, 2008) (Subscription Required)

**Mediation Helps Heirs Minimize Conflict over Estates** Mediation can be helpful to preserve relationships among heirs who get into squabbles when dividing estates left by family members. While conflicts can be minimized through proactive steps to make decisions before death and provide clear instructions on disposition, there are also numerous techniques ranging from blind drawings to drawing cards that can provide processes for allocating assets that seem fair to all involved.

[Toledo Blade](#) (July 6, 2008)

**Mediation Model Urged for Long-Term Care Facilities** A research report on an appropriate mediation model for long-term care facilities concluded that care could be improved by involving residents and families through mediation, but that intensive outreach is required within facilities. Many cases referred to mediation were not mediated due to barriers from lack of knowledge of potential benefits and availability. The report was published in the Journal of the American Medical Directors Association.

[Health & Medicine Week](#) (August 4, 2008) (Subscription Required)



### Council Provides Successful Mediation Alternative in High Stakes Environment

Hanford Concerns Council provides mediation of worker grievances over health, safety, or the environment to avoid litigation against Hanford contractors. Council members include Washington Closure Hanford, Washington River Protection Solutions and CH2M Hill. With annual costs of about \$500,000, the Council has a perfect record of resolving litigation over the last three years since it was resurrected. One cautionary case is the decade-old litigation by pipefitters against Fluor Federal Services that resulted in a \$4.8 million jury award which is still pending on appeal.

[Mid Columbia Tri City Herald](#) (August 12, 2008)

### Mediation Resolving Psychological Harassment Complaints in Quebec

Mediation successfully reaches agreement in 95% of the workplace psychological harassment cases mediated by the Commission des normes du travail in Quebec. In the four years since legislation was enacted protecting employees from psychological harassment, about 8,600 complaints have been filed and a little over a third have been resolved through mediation. Of complainants using mediation, 85% reported they were very satisfied with the mediator's work.

[Canada Newswire](#) (July 3, 2008) (Subscription Required)

### Cricket Council Urged to Use Mediation Between Players

Australia is pressing the International Cricket Council to include a mediation process in cases of racial conflict among players, following the Australian Football League which introduced a mediation code and won a U.N. award. Under Cricket Australia's proposal, mediation would be given a chance to bring reconciliation between bickering players, and the matter would only proceed to a formal tribunal if mediation was not successful.

[Yahoo India News](#) (July 10, 2008); [Daily Times](#) (Pakistan) (July 11, 2008)

### Other International Mediation Developments

- **U.K.** lawyers see financial pressures on businesses resulting in more litigation over disputes and more mediation to reduce risks from litigation, [Crain's Manchester Business](#) (September 1, 2008); [Birmingham Post](#) (August 29, 2008) (Subscription Required)
- Mediation being encouraged in **Scotland** as better solution for conflicts and important to maintaining competitive economy, [Scotsman](#) (July 6, 2008) (Subscription Required)
- Law Reform Commission in **Ireland** urges key role for mediation, [The Irish Times](#) (July 30, 2008)
- Alternative Dispute Resolution workshop reflects increasing popularity of informal resolution processes in **Dubai**, [AME Info](#) (United Arab Emirates) (July 14, 2008)
- Mediation Board for Elders established to address issue of neglected parents in **Sri Lanka**, [Ceylon Daily News](#) (July 29, 2008)
- A three-day mediation update training in **Bangladesh** was given to judges and lawyers who will be training 300 new judges and lawyers in mediation, [The New Nation](#) (Bangladesh) (July 4, 2008) **China** reports 100,000 mediations with 96% success rate since mediation was introduced in Guangdong Province in 2001, [World News Connection](#) (July 31, 2008) (Subscription Required)
- Mediation needed in **Hong Kong** to keep up with other jurisdictions, [South China Morning Post](#) (July 8, 2008) (Subscription Required)
- Court-annexed mediation experiment in the **Philippines** gives better access to justice to poor and marginalized; 40,000 mediations in last six years have 70% resolution rate, [Thai Press Reports](#) (July 9, 2008) (Subscription Required)
- Mediation system, in which courts can mandate mediation, is most important of proposed reforms in **Malaysia**, where lower courts have a 900,000 case backlog, [New Straits Times](#) (July 4, 2008)
- Farm Debt Mediation Act in New South Wales, **Australia** requires equipment finance companies to give farmers option of mediation, [ABC Online](#) (September 4, 2008)
- Number of mediations doubles in New South Wales, **Australia**, with 59% resolution rate, [Sydney Morning Herald](#) (August 14, 2008)
- **Fiji** Employment Relations Bill establishes mediation service, [Fiji Times](#) (August 20, 2008)





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