



Dispute Resolution Update

March, 2008

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Dear Friends and Colleagues:

In this edition of our newsletter, we are featuring an article written by Kansas City Panelist, Arthur A. Chaykin, Esq. Arthur's article *Mediating Intellectual Property Disputes: The "Nerd Factor"* is set out in a synopsis below. At the conclusion of the synopsis, readers may access the complete article.

In the near future, we will announce a noon-hour CLE in Kansas City in which Arthur will provide additional insights regarding intellectual property mediation. If you or any member of your firm would like to receive advance information regarding this continuing legal education program, simply notify us through the following link: e-mail: info@adrmediate.com. Please provide e-mail addresses for other attorneys in your office who might wish to attend or receive information.

In the February newsletter, we set out two recent mediation confidentiality decisions from the States of Utah and California. In this edition, we have added two additional decisions from the US District Court for the District of Columbia and a state court decision from New York. These decisions have been summarized by Keith L. Seat, a respected mediator and Editor of the International Academy of Mediators monthly newsletter.

Finally, we are also continuing our practice of providing information regarding regional dispute resolution related training events.

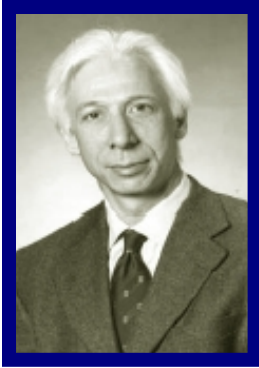
Larry R. Rute

Patrick R. Nichols



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

ADR PANEL MEMBER PROFILE



Arthur A. Chaykin, Esq.

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

MEDIATING INTELLECTUAL PROEPRTY DISPUTES THE "NERD FACTOR"

Arthur A. Chaykin, Esq. (March 2008)

Synopsis

Trademark, trade dress, copyright and patent cases share a "nerd factor" which is characterized by the presence of lawyers and other experts who are particularly attached to a language, a mode of reasoning, and a platform of substantive and procedural complexity that makes it difficult for normal business decision makers to play their typical role in resolving disputes. At the same time, the cost of intellectual property litigation is devastating and the potential gains from successful alternative dispute resolution are great.

The first part of the article describes techniques that are useful for mediating and resolving all intellectual property disputes. The mediator should focus at the early stages of the mediation on using the experts present to help clarify the issues while the mediator reframes the technical and procedural elements so that all parties present can gain a clear understanding of the issues that are on the table. Once the agenda is set, the parties can fruitfully discuss the various risks and complexities that impact their assessment of the dispute and develop creative options for resolving disagreements.

The second part of the article focuses on some of the special qualities of trademark, trade dress, copyright and patent disputes and describes some of the special problems that arise in each area and methods for effectively mediating through them. Effective mediators will understand the typical sources of disagreement in the various categories of intellectual property disputes and develop effective techniques for resolving them. For example, in the trademark area, the question of whether the alleged infringing use is "likely to cause confusion" is a multi-layered issue often requiring expensive consumer surveys and expert testimony. An experienced mediator can help the parties assess their risks with regard to this issue before incurring the heavy cost of surveys and experts by helping the parties envision a "range" of probable outcomes. In the copyright area, a mediator can help the parties work through the dual track structure of copyright damages. And in the patent area, a mediator can help the parties demystify the technical and procedural aspects of patent interpretation so that issue can be easily grasped and resolved.

[Click here for complete article](#)

Visit our web site at www.adrmediate.com and view Arthur Chaykin's bio page.



Counsel in Contempt for Breaching Mediation Confidentiality

Despite acknowledging error and offering a formal apology, counsel for plaintiff in [Williams v. Johanns](#) was found in civil contempt by the U.S. District Court for the District of Columbia for filing a pleading containing statements made in mediation. The court held a show cause hearing and ultimately imposed a nominal fine, noting the importance of confidentiality in the mediation process.

[Williams v. Johanns](#), 2008 WL 36633 (D.D.C., January 2, 2008)
(Subscription Required)

New York Court Permits Post-Mediation Evidence of Settlement Agreement from Mediator

In litigation over an alleged written settlement agreement, a New York court in [Arben Corp. v. N.Y.S. Thruway Authority](#) upheld the confidentiality of mediation and settlement discussions relating to the underlying dispute, but permitted post-mediation evidence from the mediator (who had become a paid consultant to the claimant, apparently to help enforce the purported settlement agreement) about whether or not a settlement agreement had been finalized and then breached. The court based its decision on a written agreement to mediate between the parties and on New York law (CPLR § 4547) which codifies the common law "settlement privilege." The court concluded that negotiations concerning the underlying dispute between the parties were protected, but that CPLR § 4547 does not block efforts to prove the existence of a settlement agreement. The court explained that the policy goals of encouraging settlements requires the ability to prove when a settlement agreement has been reached.

[Arben Corp. v. N.Y.S. Thruway Authority](#), No. 2008-036-308 (NY Ct. Cl., February 26, 2008)



EEOC Continues to Focus on Mediation of Discrimination Charges

The Equal Employment Opportunity Commission reported a 9 percent increase in job bias charges last year, for a total of nearly 83,000 private sector filings in 2007. In addition to non-monetary relief, the EEOC recovered over \$290 million for charging parties through administrative enforcement and mediation, compared with \$55 million through EEOC litigation. Employers continue to enter into Universal Agreements to Mediate with the EEOC, with the total rising by 15 percent during 2007, to over 1,200. The EEOC's National Mediation Program has a user satisfaction rate of 96 percent, meaning that nearly everyone using the program would do so again.

[Federal Information & News Dispatch, Inc.](#), (March 5, 2008) (Subscription Required)

Mediation Requirement Streamlined for Florida Homeowners Associations

Statutory changes in Florida have streamlined the mediation process required prior to litigation of certain disputes between homeowners and members. The aggrieved party now can contact the other party directly with a written offer to mediate as set forth in the statute and propose a choice of five certified mediators. Seeking mediation in this way tolls the statute of limitations. If the dispute goes on to litigation or arbitration, attorneys' fees incurred in the mediation may be recovered by the prevailing party. But those who do not participate in the entire mediation process may not recover any attorneys' fees or costs.

[The News-Press](#) (February 28, 2008); [Fla. Stat. § 720.311](#)

Idaho Introduces Mediation Confidentiality Legislation

Idaho recently introduced legislation to enact the Uniform Mediation Act (UMA) in order to establish confidentiality for mediation communications, with specified exceptions. Such legislation is intended to encourage greater use of non-judicial mediation by providing confidentiality protections that are uniform with the recent rules adopted by the Idaho Supreme Court for court-annexed mediation. The Idaho legislation also incorporates the United Nations Model Law on International Commercial Conciliation, which is a supplement to the UMA for international commercial mediations, unless the parties agree otherwise.

[Idaho S.B. 1261](#)

Kentucky Legislation Would Require Med Mal Mediation and Shield Apologies

Mandatory mediation of all lawsuits involving professional negligence claims against health care providers (defined broadly) would be required by H.B. 8, which was introduced in Kentucky on January 23, 2008. The Kentucky legislation sets forth procedures for the mandatory mediation, including timing, selection of mediators, attendance, location and submission of materials. The mediator is required to submit a report to the applicable court on the outcome of the mediation. In addition, H.B. 8 would prevent apologies for any unanticipated outcomes due to medical treatment from being admitted in any litigation or arbitration as an admission of liability or other admission against interest; however statements of fault which go beyond apology would remain admissible.

[Kentucky H.B. 8](#)



Alabama Again Introduces Mediation Confidentiality Legislation

Legislation has been introduced again this year in Alabama to add additional confidentiality protections to mediation, by providing that mediators in all mediations generally would not be required to testify or produce documents concerning mediation in any adversarial proceeding. Adding this testimonial immunity is intended to increase public confidence in mediation.

[Alabama S.B. 36](#); [Alabama H.B. 30](#)

South Carolina Probate Courts Try Mandatory Mediation

A pilot program to evaluate mandatory mediation in South Carolina probate courts has been joined by 35 of South Carolina's 46 counties. A report on the success and cost effectiveness of the mediation program will be submitted to the South Carolina Supreme Court next January. A probate judge in a county which hasn't yet joined the program is leaning toward participation, due to the benefit of families being able privately to work out solutions to their concerns with the help of a neutral mediator, but is concerned about delays and costs that might result from adding a mediation step to the process (even though those are often the very attributes of mediation that generate enthusiasm).

[South Carolina Now](#) (February 23, 2008)

Two-Thirds of U.S. Bankruptcy Courts Now Use Mediation

A full two-thirds of federal bankruptcy courts now have mediation programs in place and encourage use by the parties. The details of the court mediation programs differ, but most depend on voluntary participation by parties, even though the courts generally have authority to mandate mediation if necessary. Some bankruptcy courts have been offering mediation since the 1980s and the number of courts with programs continues to increase. The level of success has generally been high, with mediation of over 3,700 matters from one court since the program began in 1995, for example, and a settlement rate of 64 percent.

[CommunityDispatch.com](#) (February 28, 2008)

Federal Circuit Mediation Program Impresses

The U.S. Court of Appeals for the Federal Circuit was the last federal appellate court to begin a mediation program, but in just two years is showing results in line with other circuit programs, despite the complexity of its specialized docket, which includes patent appeals. Last year the Federal Circuit's mediation program resolved 42% of the cases mediated.

[The National Law Journal](#) (February 11, 2008) (Subscription Required)

the arbitrator and location of the arbitration.

[Hotelinteractive.com](#) (January 14, 2008)



Co-Mediation by Doctors and Lawyers Begun for Med Mal Mediations

A pilot project to pair up doctors and lawyers as co-mediators in an effort to resolve medical malpractice claims has begun at a Philadelphia suburban hospital. The productivity and healing potential of mediation is being emphasized over the possible monetary savings, as the program tries to reach better outcomes for the parties. Mediation training has begun for 30 doctors and lawyers to become mediators, which was eye-opening for many doctors who realized for the first time how hard it can be to deal productively with strong emotion and find common ground. Many of the lawyers had previous experience with mediation and are expected to take the lead initially in mediations.

[Philadelphia Inquirer](#) (March 4, 2008)

Businesses Encouraged to Use Dispute Resolution Clauses

Companies are encouraged to include mediation or arbitration clauses in agreements covering their business dealings, including employment contracts, in order to avoid litigation. The widespread use of alternative dispute resolution clauses in most consumer contracts for health plans, car leases and insurance demonstrates that all businesses need to make sure their forms are updated with appropriate protections.

[Business Times](#) (January 11, 2008)

Hotel Association Urges Mediation Rather than Arbitration in Franchise Agreements

In its updated standards for fair franchising, the Asian American Hotel Owners Association includes dispute resolution provisions which focus on mediation if informal direct negotiations are unsuccessful. The standards avoid binding arbitration unless mediation has not been successful and there is express agreement on the details of the arbitration process, including the identity of the arbitrator and location of the arbitration.

[Hotelinteractive.com](#) (January 14, 2008)



UPCOMING TRAINING EVENTS

AMERICAN BAR ASSOCIATION—FAMILY LAW SECTION



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

APRIL 30-MAY 3, 2008

Chicago Marriott

Downtown Magnificent Mile Hotel , Chicago, IL

Cosponsored by:

American Psychological Association

American Bar Association -Family Law Section

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

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

Effective legal and psychological interventions for families

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

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

NOTE:

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

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



HEARTLAND MEDIATORS ASSOCIATION UPCOMING TRAINING



For more information
contact Janet Lhuillier at
913.888.3050 or 913.226.0719
JanetL312@everestkc.net
www.HeartlandMediators.org

Spring Conference

April 24-25, 2008

KU Edwards Campus

Overland Park, Kansas

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

FMI: www.heartlandmediators.org

WICHITA BAR ASSOCIATION TRAINING



THE WICHITA BAR ASSOCIATION

Civil Mediation Training , April 22 – 26, 2008

Tues-Fri 6-10 p.m.; Sat 8-4

**Prerequisite: 16-Hour Core Mediation Training
24-hours of civil mediation training available**

For more information, contact The Wichita Bar Association

Wichita Bar Association, 225 N. Market, Suite 200, Wichita, KS 67202

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