



## CJI Board Chair Message

**Richard L. Gabriel**

CJI Board Chair

Attorney – Holme Roberts & Owen LLP

Separation of powers, checks and balances, and the concept of separate but equal and independent branches of government are concepts that most, if not all, of us learned as school children and accept as fundamental truths. Perhaps ironically, the application of these principles to the judicial branch seems to come under attack most often from politicians, where partisans on the left and right are quick to label as “activist judges” those jurists who issue rulings with which the speaker happens to disagree.

The tragic circumstances of the Terry Schiavo case are illustrative both for the type of attack to which I have alluded and, more importantly, for the remarkable manner in which numerous judges, from both the right and the left, recognized and upheld the critical role of a separate and independent judiciary.

Let me say at the outset that my point here is not to praise or criticize the result of the case. There is no question that the case posed questions that are as complex as any that any of us can face, and there was certainly merit to the legal and ethical arguments that both sides presented. My point here is to praise the judicial process and the judges who were called upon to address these most difficult issues.

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## Access to Justice Also Applies to ADR

**Lance K. Tanaka**

CJI Board Member - Chair Alternative Dispute Resolution Committee  
Vice President, American Arbitration Association

You may not be aware, but it is likely that you are personally bound by a minimum of 4 binding arbitration agreements: 1) your employer dispute resolution program, 2) your homebuilder agreement, 3) your banking agreement, and 4) your credit card agreement. Using the Internet may have increased that number to 7 agreements--- on-line purchases, brokerage accounts, and your Internet service provider agreement. Many companies rely on arbitration to provide parties with a less costly and expeditious means for resolving disputes. However, courts have found that some arbitration agreements may actually deny an individual’s rights to accessing justice through arbitration.

To ensure that arbitration continues to provide a fair, expeditious, and economical means to resolve disputes, many Alternative Dispute Resolution (“ADR”) providers have developed “Due Process Protocols” and Rules that apply to arbitrations involving: 1) Business to Consumer, 2) Employment, and 3) Healthcare Agreements.

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### Annual Meeting Luncheon

May 12, 2005  
Denver Athletic Club  
1325 Glenarm Place  
11:30 am – 1:30 pm

Board Chair Richard Gabriel will deliver the Annual Report Address, New Board Members will be elected and Board Officers will be elected.

\$25.00 per person

Contact Dana Nelson at 303-766-7501 for reservation information or visit [www.blacktie-colorado.com/rsvp](http://www.blacktie-colorado.com/rsvp) and enter code “CJI” to make reservations online.

The Schiavo case was, from the perspective of judicial independence, notable for the perhaps unprecedented manner in which politicians attempted to use the legislative process to dictate a result in a specific, ongoing judicial proceeding, and then chastised the judges who were asked to decide the case, sometimes in the harshest terms, for somehow failing in their Constitutional duties, because they did not simply reach the result that these legislators sought. The fact is, however, that every judge who was called upon to rule in this case – and they came from both sides of the aisle – acknowledged both the authority of the legislature and their own Constitutional obligations to apply the law dispassionately. Thus, every court that heard the case in its last days assumed the validity of the legislature's actions, notwithstanding what may well have been valid challenges to Congress' actions, and, in the face of enormous political pressure, addressed the case on its merits, reaching the result that these jurists believed was warranted by the law and the facts presented.

Again, to be sure, reasonable and good people can disagree with these decisions. The manner in which these courts confronted these most difficult issues, however, cannot be seriously questioned. The judges who were asked to decide this case acted in the very best tradition of a separate and independent judiciary. They reviewed the facts and the law presented to them, and they reached their decisions based upon the dispassionate application of law to fact, regardless of the enormous political pressure and media scrutiny swirling around them. That is precisely what judges are supposed to do, and, regardless of how we feel about the decisions that these courts reached, we should all acknowledge the remarkable way in which these jurists carried out their Constitutional roles, under the most extraordinary and difficult of circumstances. ▼

### **CJI Members Can Serve on any CJI Committee.**

Current members of CJI are welcome to become more involved in organization activities and committees. Active CJI committees include:

Alternative Dispute Resolution  
Events  
Family Law  
Judicial Excellence  
Public Information  
Public Policy  
Resource Development

For more information on the activities of CJI committees and how to get involved please contact Dana Nelson at 303-766-7501 or [danacji@comcast.net](mailto:danacji@comcast.net).

## **Board of Directors News**

**Dr. Elinor Greenberg** is serving on the Symposium Planning Committee of the Region VIII Office of the Department of Health and Human Services women's health group. The Group is presenting the "Colorado Research Symposium on the Health of Women and Girls" on April 22, 2005. The symposium will be held at the Fitzsimons Campus in Aurora from 8:30 am – 4:45 pm. A reception will follow until 5:30 pm. Anyone interested in attending the symposium or requesting more information should send an email to [jbohl@jsi.com](mailto:jbohl@jsi.com).

**Sheila Gutterman** of Gutterman, Griffiths & Powell, P.C. has been named a 2005 Jewish Business Women of Colorado Award Winner by the National Council of Jewish Women, Colorado Section.

**Hon. Robert J. Kapelke**, recently retired from the Colorado Court of Appeals, has agreed to join Judicial Arbitrator Group in Denver.

**Laurie McKager** has been selected as the new district administrator in the 18<sup>th</sup> Judicial District (Arapahoe, Douglas, Elbert and Lincoln counties). Ms. McKager has worked for the judicial department for 16 years, serving most recently as the district administrator in the 17<sup>th</sup> Judicial District (Adams and Broomfield counties).

**Michael L. O'Donnell**, Chairman of Wheeler Trigg Kennedy LLP has been named one of *The Best Lawyers in America*. Mr. O'Donnell's name has been listed in the Business Litigation section of Woodward/White's *The Best Lawyers in America* 11<sup>th</sup> biennial edition (2005-2006). Mr. O'Donnell, a Fellow of the American College of Trial Lawyers, has also been elected Chair-Elect of The Network of Trial Law Firms – an association of 26 trial law firms with over 4,400 active attorneys.

### **Upcoming CJI Meetings**

May 12<sup>th</sup> – Annual Meeting Luncheon  
Denver Athletic Club 11:30-1:30  
June 9<sup>th</sup> – Executive Committee Meeting  
Mountain States Employers Council 4:00  
July 14<sup>th</sup> – Board Meeting  
Mountain States Employers Council 4:00

**Protocols** serve as a measuring tool for ADR providers to gauge the weight of an arbitration clause (prior to participating in arbitration) to ensure that it is evenly balanced and allows for a fair and objective proceeding. When the scale reflects an imbalance and the arbitration clause contains language that restricts the rights and/or remedies of parties, ADR providers (referring to the Protocols) may refuse to provide their administrative services. If an ADR provider denies the use of its services, parties have various options that may include the following: 1) agree to adopt fair and objective arbitration rules, 2) find another ADR provider to administer the case, or 3) seek recourse through the courts.

The following are examples of arbitration provisions that may be deemed inconsistent with most "Due Process Protocols: 1) no attorneys shall participate in the arbitration, 2) damages shall be capped at a specific monetary amount (in some instances no punitive or treble damages are awardable), 3) locale and choice of law provisions that are not convenient to the individual, and 4) equally sharing of costs of administrative and arbitrator fees. Unlike most Business-to-Business transactions where parties are in a position to negotiate the terms and features of an arbitration agreement, consumers, employees, and healthcare patients may be bound by a company's standard arbitration agreement.

**Rules** serve as the administrative and procedural authority for arbitrators and parties to abide by. Arbitrators are provided with the power to determine issues in a fair and just manner protecting the fundamental rights to "Due Process". The rules ensure that parties are provided with fairness and objectivity while participating in arbitration.

While ADR providers have taken steps to protect the integrity of the arbitration process, unfair and restrictive arbitration clauses are still invoked in many standard slip and mail-out agreements. Similar to the public's need for equal and open access to our judicial system, ADR should provide the public with unrestricted access to a fair and expeditious means for resolving disputes.

*The views expressed here are the author's and do not reflect the views of the AAA, its users, or any other person or entity. Examples of Protocols and Rules may be found on the websites of various ADR providers. ▼*

## **Budget Constraints Can Limit Access to Justice**

**Dana Nelson**

Executive Assistant to the Board

The budget shortfalls have affected all branches of State government. Across Colorado, state employees have absorbed mandatory furlough days, increased workload due to positions going unfilled, and the loss of colleagues due to layoffs. The effect of the budget cuts upon the courts is especially worrisome in that access to justice can be diminished for all citizens of Colorado. Despite the dedication of court staff and the creative methods the courts have created to handle the loss of employees, the amount of time necessary and the cost to resolve an issue before a Colorado court is increasing.

The judicial department is unique in that approximately 85% of the budget is dedicated to salaries for court personnel. Cuts in the judicial department must come in the area of personnel. As reported by the Chief Justice to the legislature in January 2005, since July 1, 2003, the department has cut over 290 full time positions – 13% of the workforce. Twelve district judge positions that were approved in 2001 have not been funded. However, the need for court staff and new judges has not diminished at all.

The courts, like most public service organizations, have absolutely no control over their workload. In fiscal year 2004, there were almost 700,000 new cases filed. The Chief Justice has estimated that that figure may grow to 750,000 by the end of the fiscal year on June 30, 2005. To cope with personnel shortages, courts are being forced to close early, in some instances for an entire day each week, in order to allow the court staff to "catch up" with filing and other organizational tasks. Telephone calls are going directly to voicemail to be returned later in the day or week. Citizens appearing in person are greeted with long lines. Judges are being forced to sacrifice time used for analyzing and deciding cases due to the lack of clerical support. These measures have become necessary, as there just aren't enough hours in the day for the diminished number of court employees to handle the workload.

The ever-increasing workload coupled with declining manpower hours has created the unfortunate need for prioritizing cases. Filings dealing with the safety, abuse or neglect of children and other vulnerable citizens must come first. Other cases before the courts are being forced to endure long waits before any resolution can be found, leading to timelines that can be costly and that can discourage claimants from utilizing the judicial process.

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In private business, when financial times are tight and services are in high demand, the typical action is to raise the "price" of goods offered to consumers. The courts are not, and should never be, forced into a position to dramatically raise fees to cover shortfalls. Any attempt to more fully fund the court system through unacceptably high fees unfairly limits access to the courts. Access to justice should not be dependent upon wealth or a more healthy economy.

The judicial department deserves to be commended for efforts to provide the best possible service to the citizens of Colorado. Innovations such as statewide electronic filing, improved case management and tracking systems, improved jury processes, and case information sharing are helping to mitigate some of the issues created by the current budget situation. We in Colorado are lucky to have a court system that constantly seeks to improve the ease with which services can be accessed. While the judicial department must bear a fair share of the budget cuts, it is important that the unique position of the judicial department be recognized. We, as citizens of Colorado, can do our part by sharing with our elected representatives the need to restore funding to the judicial branch as soon as possible so as to insure that equal access to justice exists for all of us.

*The entire report delivered by Chief Justice Mary Mullarkey on the State of the Judiciary is available at <http://www.courts.state.co.us/supct/justices/2005soj.pdf>*

*For further discussion on the impact of budget cuts on access to justice, please see "Judicature: Journal of The American Judicature Society", January/February 2005, Vol. 88, No. 4. ▼*

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