

# MEDIATION NEWS

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## **CASES & RESOLUTIONS: Contract Requiring Mediation of Any Claim Prior to Litigation Does Not Apply to Counterclaim**

Emphasizing the importance of mediation prior to litigation, the Kansas Court of Appeals reversed the trial court and concluded that a construction contract requiring the parties to mediate any claim before instituting legal proceedings did not apply to a counterclaim, since the litigation had already begun. The fact that defendant had refused plaintiff's offer to mediate the initial claims prior to litigation was not an issue.

[Vanum Constr. Co. v. Magnum Block, LLC](#), No. 103,385 (Kan. App., December 10, 2010).

## **California Appellate Court Reverses Little-Bit-Settled Ruling**

The California Court of Appeals for the First District reversed the trial court and held that a settlement cannot be a little bit enforced. In an extremely contentious battle over real estate transactions that did not go as expected, the parties eventually reached a mediated settlement, but continued to litigate over enforcement. While everyone on one side of the case eventually signed the settlement agreement, in the absence of the signature of one spouse on the other side, the trial court sought to enforce half of the settlement and require the signing spouse to transfer half of community property in exchange for half the payment that was to be made. The appellate court held that the settlement could only be enforced as written, but was incapable of being lawfully enforced as written. The court of appeals did, however, strongly encourage the parties to reach a global resolution.

[Rosen v. Cook](#), Nos. A123548, A123558 (Cal. App. 1st Dist., December 13, 2010).

## **Other Notable Cases & Proceedings**

- Even though counsel for litigants negotiated a full settlement, either party was free to withdraw from the agreement until it was signed by the parties themselves or an attorney with express authorization from the principal. [Sims v. U.S. Agencies Casualty Ins. Co.](#), No. 2010 CA 1120 (La. Ct., December 22, 2010).
- Following an agreement in mediation which determined the amount of alimony and the division of property, the wife was unsuccessful in persuading either the trial or appellate courts that she was of unsound mind or that her husband used coercion, undue influence, overreaching or duress to reach the mediation agreement. The court accepted testimony

## **Mediation Quote:**

“Negotiating a deal is like painting a room. It's all about the preparation. The part where you put the paint on the wall is easy. It's the scraping and sanding and taping that take time and effort.”

Barry Goldman, *The Science of Settlement: Ideas for Negotiators* (ALI ABA 2008) at 9

## **Check These Out:**

### **Video Mediation Spreading**

While no one disputes the value of face-to-face mediation, when the parties are not able or cannot afford to come together in person, mediators are increasingly using technology to bridge the divide. Some rely on Skype and other low-cost services, while others use a more sophisticated service that allows the mediator additional control over the process, as well as tools for illustrations and collaboration on documents, including settlement agreements. Even with the parties at a distance, it is possible to edit and transmit documents back and

- from all the witnesses at the mediation, including counsel, without mentioning mediation confidentiality. [Toombs v. Toombs](#), No. CA10-272 (Ark. App., December 15, 2010).
- The confidentiality of mediation in a subsequent arbitration was unsuccessfully raised for the first time during judicial review of the arbitration, with a focus on the arbitrator reading the mediator's letter providing a non-binding opinion on the ultimate legal question. [Leagle.com](#) (December 13, 2010)
  - The art mediation team of the Art Loss Register was able to reach an amicable settlement and avoid protracted litigation between two wealthy European families over a painting that was stolen from a London home in 1979, ended up in the estate of Gianni Versace and surfaced as the star lot in a Sotheby's auction. [Reuters](#) (November 22, 2010)
  - A settlement agreement prepared after an apparently successful mediation in October over unpaid admission taxes and other issues between the Wenatchee Wild hockey team and local officials has not been signed by the team. Officials plan to file suit unless the agreement is signed by mid-January. [Wenatchee World](#) (December 31, 2010)
  - Lehman Brothers Holdings is seeking judicial intervention to force those with the economic interest to mediate disputes over derivative transactions after trustees announced that they do not have authority to mediate and the investors with monetary interests have not come forward to participate. [Bloomberg](#) (December 9, 2010)
  - Gainesville and Hall County have agreed to mediate a high stakes dispute over their rights to reservoir water. While initially planning to have each party send two representatives to mediation, the parties are now moving to make the process open to all commissioners and council members as well as the public, on the basis that the issues are too important to leave out any elected officials. [Gainesville Times.com](#) (December 12, 2010)
  - Due to ongoing mediation efforts, IHOP, the pancake chain, has for now dropped its trademark infringement case against the International House of Prayer for use of the IHOP acronym. [Kansas City Star](#) (December 30, 2010)

## NEWS & INITIATIVES:

### Second Canadian Province Enacts Commercial Mediation Statute

Ontario has followed Nova Scotia in enacting a statute specifically addressing commercial mediation. Ontario's *Commercial Mediation Act of 2010* permits agreements reached in mediation to be registered and enforced as court judgments. Commercial mediation does not include disputes over insurance benefits, collective bargaining disputes, computerized mediation or informal attempts by judges or arbitrators to encourage settlement while presiding over litigation or arbitration proceedings. The statute requires certain disclosures by mediators relating to possible conflicts and bias and sets forth mediation confidentiality requirements. The statute is based on the UNCITRAL Model Law on International Commercial Conciliation, which has also been incorporated by several states in the U.S. when enacting the Uniform Mediation Act. The Ontario statute focuses on pre-litigation mediation and does not apply to the mandatory mediation provisions of the Rules of Civil Procedure. The statute took effect with commercial mediations that commenced on or after October 25, 2010 in Ontario or even outside the province if the parties rely on Ontario law. [Stikeman Elliott LLP](#) (November 5, 2010); [Law Times](#) (December 6, 2010)

### Ireland Emphasizes Mediation and Conciliation for Cross-Border and Other Disputes

In response to the 2008 EU Directive requiring mediation of EU cross-border disputes beginning in 2011, Ireland's Law Reform Commission issued a 230-page

forth to end with a signed agreement. [The Lawyers Weekly](#) (December 10, 2010)

### Cognitive Barriers Can Cause Needless Failures in Mediation

The way that parties and counsel think about and value their disputes are often influenced by a variety of cognitive barriers that cause poor decision making when trying to resolve the dispute. Fifteen of these barriers are briefly set forth, ranging from those that are more commonly known, such as Cognitive Dissonance, to those that may be less well known, such as Change Blindness. [Metropolitan Corporate Counsel](#) (December 6, 2010)

### Mediation on TV Coming Soon

USA Network's new show focusing on mediation was initially announced as "Facing Kate," but premieres on January 20 with the new name of "Fairly Legal." Trailers are available at [USA Network.com](#). The show's website also prominently features an interactive quiz entitled "Could You Be a Mediator?"

### Other Cases & Resolutions:

- The Nuclear Regulatory Commission reached a resolution in mediation over violations at a nuclear fuel plant. [Penn Energy](#) (December 3, 2010)
- The benefits of mediation are emphasized in the summary of the resolution of a medical malpractice case for \$500,000. [Renal and](#)

report in November on new procedures for mediation in a broad range of areas, along with proposed legislation to carry out its recommendations. While instigated by the EU Directive, the report also thoroughly addressed alternative dispute resolution within Ireland, focusing on both mediation and conciliation and establishing new court rules which took effect in November. Noting that the terms mediation and conciliation have often been used interchangeably, the five-member Commission urges differentiation so that mediation is always a facilitative process, while conciliation is advisory (e.g., evaluative). The report also gives close attention to confidentiality, among other issues, and proposes a privilege to exempt communications from disclosure, while setting out numerous exceptions.

[International Law Office](#) (December 16, 2010); [CPR](#) (December 3, 2010); [MILie](#) (November 16, 2010); [Report](#); [2008 EU Directive](#)

## Hong Kong Increasingly Emphasizes Mediation

Hong Kong is seeking to become a regional dispute resolution center and is focused on promoting mediation. At a mediation workshop of the International Chamber of Commerce, Hong Kong's Secretary for Justice stated that a mediation task force is being established to assist in implementing recommendations in a recent Report by a Working Group on Mediation. In addition to public education and promotion of mediation, the Report covered training and accreditation of mediators and the need for a mediation ordinance. The judiciary also has been promoting mediation in implementing Civil Justice Reform. In addition, the Secretary for Development in remarks at the International Construction Law Conference emphasized the importance of prevention of disputes through partnering and use of Dispute Resolution Advisors, as well as the high success rate of mediation in public works and other construction projects.

[7th Space Interactive](#) (November 12, 2010); [7th Space Interactive](#) (December 6, 2010)

## Other International Mediation Developments

- HM Revenue & Customs sponsored several informal consultations in 2010 about mediation and appears to be eager to introduce mediation at a much earlier stage of the process in **U.K.** tax disputes. [Tax Journal](#) (December 16, 2010)
- **U.K.**'s Justice Minister seeks to reform legal aid and suggests that mediation may provide much of the answer. [IBB Solicitors](#) (November 9, 2010)
- Under **Russia**'s new mediation law, which takes effect in January, employment disputes can be resolved through mediation, although further amendments to the law may be needed. [Moscow Times](#) (November 9, 2010)
- The Supreme People's Court of **China** promulgated Professional Ethics and a Code of Conduct for judges. Among the 96 articles in the new Code of Conduct are provisions intended to standardize judicial mediation. [Law Library of Congress](#) (December 28, 2010)
- The **Papua New Guinea** courts have introduced mediation in an effort to address a huge backlog of cases on their dockets. While the Chief Justice set a five year target, the Justice who chaired the rules committee says the impact has been immediate. [ABC Radio Australia](#) (December 30, 2010)
- New South Wales, **Australia** has replaced a plan for using private arbitrators to resolve planning appeals with legislation before parliament to streamline the court mediation system and have matters resolved in three months rather than six. [SMH.com.au](#) (November 23, 2010)
- **New Zealand**'s leading independent rural advocacy organization is urging the Minister of Agriculture and Forestry to consider legislation for farm debt mediation services, as exists in both Canada and New South Wales, Australia. [Scoop.co.nz](#) (December 9, 2010)
- Mediation is becoming increasingly important in **Jamaica**, both through court-connected mediation with high settlement rates and by being woven

## [Urology News](#)

(December 14, 2010)

- The city of Atlanta and Eagles patrons resolved litigation over a police raid with a million dollar payment and change in practices in a court-ordered mediation. [GA Voice](#) (December 9, 2010); [Public Broadcasting.net](#) (November 22, 2010)

- A dispute between the city of Muncie, Indiana and Delaware County over funding for 911 calls is back in court after an attempt at mediation. [Star Press](#) (December 16, 2010); [Star Press](#) (December 8, 2010)

- The city of Princeton agrees to mediate with a landowner over his request to detach land from the city. [Princeton Union-Eagle](#) (December 16, 2010)

- A conflict between Montrose County and Montrose Memorial Hospital over converting the hospital to a private nonprofit without notifying the county is headed to mediation. [KJCT8.com](#) (December 7, 2010)

- The city of Covington has agreed in mediation to pay \$600,000 to the airport operator and assume operation of the airport itself. [Cov News](#) (December 10, 2010)

- Mediation between Jamie and Frank McCourt may determine who owns the Los Angeles Dodgers. [Los Angeles Times](#) (November 17, 2010)

- Three leaders of the Bristol City Council are urging the parties involved in a dispute

into all other aspects of life, overcoming notable resistance in just a dozen years. [Jamaica Information Service](#) (December 11, 2010)

## Medical Malpractice Mediation Useful, But Missing Doctors

A recent study of mediation in medical malpractice cases found there is significant value from the process, but less than is possible. Of the 31 cases studied from New York City nonprofit hospitals, nearly 70% settled during or after the mediation. However, no doctors participated in any of the mediations, which undermines the potential for additional benefits from enhancing future patient care or addressing the upset of patients and their families. Lawyers reported that the physicians' schedules were too full to participate in mediation.

[WSJ Blogs](#) (December 15, 2010); [Health Leaders Media](#) (December 22, 2010); [Article in Journal of Health Politics, Policy and Law](#) (Subscription Required)

## Minnesota Farmer-Lender Mediation Program Having Bigger Impact

The annual report on the Farmer-Lender Mediation Program in Minnesota shows further increase in the use of mediation in the program. In 2010, farm enterprises and lenders completed over 400 mediations involving \$624 million in debt, which was nearly double the amount in 2009. Creditors with secured debts over \$5,000 against agricultural property in Minnesota are required to offer mediation prior to judgment collection, repossession or foreclosure. Farmers choosing mediation have 90 days to work with lenders to renegotiate their debts.

[Cattle Network](#) (November 22, 2010); [2010 Report](#)

## EEOC Reports Record Number of Mediation Resolutions

The U.S. Equal Employment Opportunity Commission reports that in fiscal 2010 it set records both for the number of charges received, at just under 100,000, and the number of resolutions in its mediation program, which were up ten percent. The agency also set a record for the amount of monetary relief obtained for individuals, at \$319 million, of which over \$140 million was obtained in mediations.

[New York Injury News.com](#) (December 11, 2010); [Press Release](#) (November 23, 2010)

## Update on Home Foreclosure Mediation

- **U.S.** Vice President Biden announced steps to strengthen foreclosure mediation programs, along with other means of improving justice, at a Middle Class Task Force event. Biden's announcement was the result of work by the Department of Justice's Access to Justice Initiative, the Department of Housing and Urban Development and other agencies. DOJ and HUD issued a joint report encouraging expanded use of mediation as a way to prevent foreclosures. The report identifies over 25 programs and commends common features in the most successful programs as models. [U.S. Department of Housing and Urban Development](#) (November 19, 2010); [Mortgage Loan.com](#) (November 23, 2010); [Report](#)
- The Mortgage Bankers Association, which represents the largest mortgage lenders in the **U.S.**, opposes both mandatory and voluntary mediation programs, asserting that they are expensive and often merely delay foreclosure. Others view the mediation programs as "incredibly successful" in light of a million foreclosures in 2010 and federal prevention programs falling short. [Think Progress](#) (December 31, 2010)
- **Washington, DC** enacted a foreclosure mediation statute that took effect on November 17 under which lenders must provide notice and an opportunity for mediation to homeowners prior to foreclosure. The DC Department of Insurance, Securities and Banking is to implement and

over building a 30,000-seat soccer stadium to mediate the issues.

[Insider Media Limited](#) (December 20, 2010)

- Faced with opposition to construction of a gas pipeline for a power plant in New South Wales, the company is seeking the appointment of an independent mediator to help work through the issues. The company is willing to cover the cost of a mediator chosen by both sides. [Wellington Times](#) (December 23, 2010)

- Edinburgh is turning to mediation in a dispute involving a tram line construction firm and contractors that has shut down work on the tram project which is to be completed in 2013. [BBC News](#) (November 18, 2010)

## Other News & Initiatives:

Madison County, Illinois established a mandatory mediation program for malpractice cases and as a result has seen a marked decrease in such cases, according to the court. [Madison/St. Claire Record](#) (December 14, 2010)

- enforce the law, and will appoint a mediation administrator and set the fee for mediation. Homeowners opting into mediation pay \$50 at most and will have 90 extra days to try to reach agreement to avoid foreclosure. [Washington Post](#) (December 3, 2010); [Washington Post](#) (November 12, 2010)
- A new foreclosure mediation program has begun in Luzerne County, **Pennsylvania** in which property owners meet first with a credit counseling agency prior to attending a mediation session facilitated by a county judge. Pro bono attorneys assist homeowners during the mediation. Courts in a number of other Pennsylvania counties are considering adding additional mediation programs to address the ongoing high level of home foreclosures. Some of the counties are emphasizing mediation for all types of debts, as a means of allowing both debtors and creditors to sidestep more formal processes that are often not satisfactory for either side. In addition to pressure from overflowing dockets, courts are also responding to encouragement to add mediation programs from the Pennsylvania Supreme Court which recently convened a summit to review mediation programs in various counties. [The Times Leader](#) (December 20, 2010); [The Times Leader](#) (December 3, 2010); [Pittsburgh Tribune-Review](#) (November 14, 2010)
  - The legislature of **Hawaii** has established a task force to make recommendations about how to improve the foreclosure process in the state. The chairman of the task force says it will be taking a close look at mediation, which is being strongly advocated by a local nonprofit organization. The challenges in Hawaii are increased by nearly all foreclosures involving mainland mortgage lenders. [Star Advertiser](#) (December 13, 2010); [KITV.com](#) (December 11, 2010)
  - The mayor of Boston, **Massachusetts** has proposed requiring face-to-face mediation prior to mortgage foreclosures in the city. The proposal would require lenders to pay for mediation and would provide homeowners with assistance from a housing counselor prior to mediation. The Massachusetts Bankers Association strongly opposes the proposal due to concerns about cost and delay and an expectation that the outcome will not change. [Boston Herald.com](#) (December 13, 2010); [Boston Herald.com](#) (December 10, 2010); [WBUR.org](#) (December 10, 2010)
  - The **Nevada** Supreme Court is considering a fifth set of amendments to Nevada's foreclosure mediation program to make further adjustments, and is holding a hearing and taking written comments on the proposed changes. [KVVU Las Vegas \(December 3, 2010\)](#); [KTNV \(November 10, 2010\)](#); [Proposed Changes](#)
  - The Federal Reserve Bank of Cleveland found the Cuyahoga County, **Ohio** foreclosure mediation program to be a model for other areas seeking to address the high level of foreclosures. The Cuyahoga County program, which covers Cleveland, has about a 90% resolution rate, ranging from modification to deeds-in-lieu of foreclosure. While only about one-third of eligible borrowers sought mediation in 2010, that is up from one-fifth in 2009. [Housing Wire](#) (December 28, 2010)
  - A year after the **Florida** Supreme Court required a foreclosure mediation program in every county, a statewide report shows that the process is struggling. While a third of homeowners who go to foreclosure mediation are able to obtain a resolution with their lender, few homeowners actually participate, resulting in agreements in only six percent of the cases referred to mediation. Many homeowners are difficult to reach or mistake the mediation program for a commercial service or scam. Moreover, problems with sloppy or fraudulent documentation has caused many lenders to change outside counsel, which has resulted in additional delays in foreclosure mediation. [Palm Beach Post](#) (December 29, 2010); [Palm Beach Post](#) (November 8, 2010)
  - **Connecticut's** mandatory foreclosure mediation program has permitted 78% of homeowners who participated to avoid foreclosure and 63% to remain in their homes, although critics suggest that these numbers are out

of line with the rest of the country and sound too good to be true.  
[Hartford Advocate](#) (December 14, 2010)

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