

MEDIATION NEWS

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CASES & RESOLUTIONS:

California Supreme Court Allows Use of Mediation Confidentiality as Shield to Avoid Legal Malpractice Claims

Continuing its strict interpretation of California's broad mediation confidentiality statute, the California Supreme Court rejected the appellate court's creation of a judicial exception, and prevented a party from using his private communications with his attorneys before and during a mediation in a later action for legal malpractice. The alleged malpractice involved claims that the party's counsel had conflicts of interest and coerced him to settle for too little. Although private conversations during the mediation between the party and his attorneys did not involve the mediator or other party (or reveal anything said or done in mediation discussions with the mediator or other party), the Court relied on the plain language of the statute to conclude they were confidential nonetheless and that any exception must come from the legislature. The confidentiality statute only applies to civil actions, however, so would not protect an attorney from use of mediation-related oral communications in a criminal prosecution for fraud.

[Cassel v. Superior Court](#), No. S178914 (Cal., January 13, 2011).

Court Refuses to Vacate Patent Invalidation Decision to Support Mediated Settlement After Balancing Factors

A settlement reached in the mediation program of the U.S. Court of Appeals for the Federal Circuit was contingent on being able to vacate the district court's ruling that most of the claims in the patent at issue were invalid. On remand, the district court balanced the importance of court-ordered mediation programs and encouraging mediated settlements against other factors, including the parties' desire to conserve resources, the public interest in the orderly operation of the federal judicial system, and the potential to conserve judicial resources. The court concluded that vacating its invalidity ruling was not in the public interest and ultimately would not save judicial resources because the outcome of other pending proceedings also turn on the validity of the patent.

[Ohio Willow Wood Co. v. Thermo-Ply, Inc.](#), No. 9:07-CV-274 (E.D. Tex., February 3, 2011).

Mediation Quote:

"[In mediation,] what lawyers think is strategic information often turns out to be information that, if they did convey it to the other team, would help settle the case.... The private session might be the vehicle they need to assess the risks of exchanging information...and decide to divulge it to the other side."

J. Anderson Little,
*Making Money Talk:
 How to Mediate Insured
 Claims and Other
 Monetary Disputes*
 (American Bar
 Association 2007) at 21

Check These Out:

One to Watch on "Federal Mediation Privilege"

A federal appellate court has accepted an immediate appeal on a discovery ruling by the trial court that there is a "federal mediation privilege" under which documents from mediation proceedings are privileged, but documents from arbitration proceedings are discoverable.

Use of Mediation PowerPoint to Prep Witnesses Opens It to Discovery

A federal district court ruled that materials used in mediation must be turned over to defendants because they were used in preparing plaintiffs for depositions in the case. The court found that there was “testimonial” use of the 90-slide PowerPoint presentation in issue because it was used to refresh the memory of a witness, and that production to defendants was in the interest of justice because plaintiffs had failed to respond to numerous interrogatories and document requests on the specifics of their allegations. The court also concluded that a claim of attorney work product would not prevent disclosure, in part because the materials had already been disclosed to defendants in the mediation. The court stated that it need not consider the applicability of a mediation privilege, since a privilege would not prevent discovery in this situation.

[Greenwood Realty Inc. v. Action Realty Inc.](#), No. 8:09-CV-02683 (D. S.C., February 15, 2011).

Expert Used in Mediation Properly Appointed as Trial Expert, But Must Generate New Report

A New Mexico appellate court concluded that a valuation expert hired by the parties in mediation may be appointed as an expert witness in the trial of the case, as long as her testimony omits anything covered by mediation confidentiality provisions. While the valuation report that the expert generated for the mediation is confidential and not admissible at trial, the court or parties can have her prepare a new report from the same underlying data for use at trial. The court applied New Mexico’s new Mediation Procedures Act, some provisions of which are based on the Uniform Mediation Act.

[Warner v. Calvert](#), No. 29,674 (N.M. App., February 9, 2011).

Consent Judgment Following Mediated Settlement Cannot Be Appealed

A mediated settlement of an eminent domain action and an inverse condemnation action resulted in entry of a stipulated or consent judgment. When the court later awarded funds to the city from a court-controlled deposit to cover costs of remediation, the other party sought to appeal the trial court’s orders. A California appellate court concluded that the orders were not appealable because the matter ended with the consent judgment, which cannot be appealed unless specifically entered to facilitate an appeal.

[City of Gardena v. Rikuo Corp.](#), No. B217302 (Cal. App. 2d Dist., February 7, 2011)

“Opt-out” Settlement Agreement Not Binding Where No Acceptance of Proposal Terms

The parties were not bound by a mediation agreement signed by their counsel, which provided a ten-day period for objections after which the agreement was to be

[Kimberly-Clark Worldwide, Inc. v. First Quality Baby Products](#), No. 957 (Fed. Cir., January 10, 2011)

WIPO Dispute Resolution Survey Under Way

The World Intellectual Property Organization’s (WIPO) Arbitration and Mediation Center is conducting a detailed international survey on dispute resolution clauses in technology agreements and use of alternative dispute resolution in technology disputes. The results will be made available in a report that is intended to provide support in negotiating contract provisions and finding good solutions for future disputes.

[WIPO.int](#) (February 17, 2011); [Survey](#)

“Annapolis Idol” Raises Funds for Mediation

The non-profit Anne Arundel Conflict Resolution Center raises funds by sponsoring an Annapolis Idol event to choose a winner from among finalists who audition to show they have a winning personality and singing ability. This is the fourth year for the Center’s fund-raiser and finalists are expected to sing before a live audience of about 300 guests and a panel of judges.

[Anne Arundel Conflict Resolution Center](#) (January 7, 2011)

Other Cases &

binding, because the agreement also included a settlement “proposal” that was to be accepted or rejected within a specified period. That proposal was not accepted, so under standard contract principles there was no meeting of the minds. The failure of either party to opt out within the ten-day objection period did not result in an enforceable agreement, since there had never been acceptance of the settlement terms.

[Powerhouse Custom Homes, Inc. v. 84 Lumber Co.](#), No. A10A2351 (Ga. App., January 24, 2011).

Cost Order Cannot Include Prevailing Party’s Half of Mediator’s Fees

A Colorado appellate court reversed the trial court’s cost order relating to mediation, holding that when parties agree to split the costs of mediation, the prevailing party’s half cannot subsequently be awarded as costs unless it reserved the right to seek later recovery.

[Valentine v. Mountain States Mutual Casualty Co.](#), No. 09CA1767 (Colo. App., January 6, 2011)

Countrywide to Pay over \$600 Million in Mediated Securities Fraud Class Action Settlement

One of the largest settlements of a securities fraud case in U.S. history was reach in mediation and approved by the federal court. Under the class action settlement, Countrywide Financial Corp. will pay just over \$600 million to New York pension funds for its involvement in sub-prime mortgage lending, to which its accounting firm will contribute \$24 million. However, 33 large institutional investors opted out of the settlement, which triggered the need for further mediation, using the same team of mediators, and resulted in a separate \$22.5 million fund being set aside for those who opted out.

[TMCnet.com](#) (February 28, 2011); [Reuters](#) (February 25, 2011)

Other Notable or High Profile Proceedings

- While analyzing a contract requiring a mini-trial as an alternative dispute resolution process, a federal court listed cases in which dismissal of an action due to failure to mediate was appropriate because a contract required mediation prior to litigation. [Union Electric Co. v. Energy Ins. Mutual Ltd.](#), No. 4:10-CV-1153 (E.D. Mo., January 10, 2011)
- As widely reported, ongoing mediation is being conducted between owners of National Football League teams and the NFL Players Association to try to determine how to split over \$9 billion in annual revenues from the most profitable professional sport in America. The mediation is being conducted by the Federal Mediation and Conciliation Service and has involved numerous sessions which have extended past deadlines. Failure to reach agreement may threaten the upcoming NFL season. [The](#)

Resolutions:

- **Atlanta and the terminated design team for a new international airport terminal have mediated a resolution to the firing and resulting \$60 million in claims against the city.** [Atlanta Business Chronicle](#) (February 28, 2011)
- **Forsyth County Commission reached an agreement with a landfill operator in which the county will be paid \$2.9 million in back fees.** [Waste Management World](#) (January 2, 2011)
- **A \$1.9 million mediated settlement has resolved claims by Wichita Public Schools against four businesses for shoddy construction.** [Wichita Business Journal](#) (March 1, 2011)
- **Bitter litigation by wine growers against pesticide drift resolved in mediation during appeal of mistrial decision.** [The Register-Guard](#) (January 2, 2011)
- **After dismissing antitrust claims, judge orders mediation by**

[Washington Post](#) (March 9, 2011); [NY Daily News.com](#) (March 2, 2011); [The Washington Post](#) (March 1, 2011)

- Former New York Governor Mario Cuomo, said to be experienced as a mediator, was appointed by a federal judge to mediate a billion dollar lawsuit by Madoff trustee Irving Picard against the Mets ownership. [New York Times](#) (February 18, 2011); [Hedge Fund.net](#) (February 17, 2011)
- Investors who lost money in Madoff's ponzi scheme reached a \$100 million settlement in mediation with funds affiliated with Tremont Group Holdings Inc., which invested with Madoff. [Reuters](#) (February 25, 2011)
- James Roosevelt, Jr., grandson of Franklin Delano Roosevelt, has mediated disputes between well-known political figures, and may need his skills in the proposed merger of Harvard Pilgrim Health and Tufts Health Plan, where he is president and CEO. [Becker's Hospital Review](#) (January 28, 2011)
- U.S. Transportation Secretary Ray LaHood held a mediation session involving the expansion of O'Hare International Airport with Chicago Mayor Daley and the CEOs of United and American. [Chicago Tribune.com](#) (February 10, 2011)
- Rapper 50 Cent states that mediation is scheduled to try to resolve his lawsuit against website WorldStarHipHop.com for using his image on the website. [Billboard.com](#) (January 24, 2011)
- After failing to resolve sexual-abuse lawsuits in mediation, the Archdiocese of Milwaukee is filing for bankruptcy protection, becoming the eighth to do so since the clergy abuse scandal arose in 2002. [The Washington Post](#) (January 4, 2011)
- A ten year old lawsuit by homeowners for faulty construction was finally resolved in the third attempt at mediation. The homeowners were first awarded \$800,000 in arbitration, which was appealed and resulted in a \$58 million jury verdict. The court had not finalized the judgment and sent the parties to mediation to try to avoid further appeals. [Star-Telegram](#) (January 27, 2011)
- Court-ordered mediation has resulted in an agreement by AstraZeneca Plc to pay \$150 million to settle 6,000 more lawsuits over its antipsychotic drug Seroquel. [Bloomberg BusinessWeek](#) (February 17, 2011)

defendant University of Minnesota and 24 orchards and apple growers over remaining procedural due process claim. [Star Tribune.com](#) (February 4, 2011)

- **A councilor has proposed a "public mediation board" of local officials and politicians to try to mediate a private contract dispute between Exeter Hospital and Anthem Blue Cross and Blue Shield.** [Sea Coast Online.com](#) (February 5, 2011)
- **Deloitte & Touche involved in mediation over its audits of Washington Mutual that allegedly hid mortgage lending problems.** [Insurance Journal](#) (January 24, 2011)

- **Attorney asserts reputed mob boss's \$250,000 workers' compensation settlement is reasonable because it occurred in mediation.** [Chicago Sun-Times](#) (January 25, 2011)
- **Mediation ordered in dispute over management of \$5.6 million trust.** [KIVTV.com](#) (January 7, 2011)

NEWS & INITIATIVES:

International Mediation Development

- Greater use of mediation is urged to help offset budget cuts to legal aid in boroughs in London, **England.** [Hackney Citizen](#) (February 18, 2011)
- **Germany's** leading arbitration institution, the *Deutsche Institution für Schiedsgerichtsbarkeit eV* (DIS), has issued mediation and other alternative dispute resolution rules. [International Law Office](#) (February 17, 2011)
- **Italy's** lawyers' union is calling for a week-long national strike to protest the March 21 implementation of the groundbreaking new mandatory

mediation statute in Italy. [Karl Bayer.com](#) (February 25, 2011)

- **Russia's** new mediation law took effect on January 1 and regulates mediation procedures for business and commercial disputes, along with employment and family law matters. [Herbert Smith.com](#) (January 31, 2011)
- The National Institute of Defense of Consumers in **Angola** mediated consumer complaints and obtained reimbursement of AKZ 3.9 million (\$42,000) in 2010. [Angola Press](#) (February 2, 2011)
- **Qatar** continues its push to become an international center for dispute resolution, holding a mediation training for local professionals. [The Peninsula](#) (January 26, 2011)
- **India's** Law and Justice Minister asserts that alternative dispute resolution will be the preferred way of settling disputes in the future and that India is working to become a preferred destination for ADR. [Press Information Bureau](#) (January 9, 2011)
- A new mediation center opened at the Hazaribagh Civil Court in the state of Jharkhand, **India**. [OneIndia News](#) (January 24, 2011)
- Four thousand lawyers wore black stripes in Surat, **India** to protest opening a mediation center to mediate cases under the Negotiable Instruments Act. [The Times of India](#) (February 11, 2011)
- The Supreme Court of **Nepal** is expanding mediation with new centers in twenty-five remote district courts, making a total of 58 mediation centers. [Himalayan Times](#) (December 28, 2010)
- The first Asia-Pacific Mediation Leadership Summit will be hosted in Bangkok, **Thailand** in July by the Asia-Pacific Mediation Forum. [APMF Website](#)
- The Second Asian Mediation Association Conference is being hosted by the **Malaysian** Bar Council to encourage use of mediation. [Malaysian National News Agency](#) (January 26, 2011)
- Mediation is growing in **Hong Kong**, with the Hong Kong International Arbitration Centre claiming a 90% mediation settlement rate at the end of 2010. [The Asset](#) (January 28, 2011)
- The Lands Tribunal in **Hong Kong** issued a Direction to encourage parties in Land Compulsory Sale cases to use mediation. [7thSpace Interactive](#) (February 11, 2011)
- The Intellectual Property Office of the **Philippines** is urging mediation of cases relating to copyright and other IP disputes, and devoted February to cases requiring mandatory mediation. [Business Insight Malaya](#) (February 15, 2011)
- **Apotheke partner and its celebrity mixologist ordered to mediate falling out.** [NY Times.com](#) (January 7, 2011)
- **Lawsuit by former CEO of Red Hat and family against investment management firm for loss of \$60 million sent to mediation.** [News Observer.com](#) (January 4, 2011)
- **City paying for mediation between two sky-diving companies to ensure safety at municipal airport.** [The Daytona Beach News-Journal](#) (January 5, 2011)
- **Cities of Texarkana, Arkansas and Texarkana, Texas continue to mediate dispute over shared water utility.** [Chron.com](#) (January 4, 2011)
- **Papau New Guinea's chief judge has ordered mediation between Exxon Mobil, landowners and the government over a multi-billion dollar LNG project.** [Radio New Zealand International](#) (January 24, 2011)
- **Indonesian cabinet secretary has agreed to mediate**

States Continue Use of Mediation for Consumer Restitution

- The Michigan attorney general is forming a multi-state task force of attorneys general to coordinate the mediation of consumer complaints against Allcare Dental and Dentures across the fifteen states in which the company operated before abruptly ceasing business. The mediations will

not only address financial issues, but protection of and access to patient dental records. [The Washington Post](#) (January 7, 2011); [Examiner.com](#) (January 6, 2011)

- Mediation by the Missouri Department of Insurance resulted in recovery of \$9.5 million for consumers who brought insurance complaints. The largest number of complaints involved health insurance, followed by auto and homeowners. The average consumer recovery in the mediations was \$7,000. [Worker's Compensation.com](#) (January 27, 2011)
- The attorney general's office in Massachusetts helped consumers recover over \$4.7 million through mediation last year. The attorney general received over 13,000 complaints in 2010 relating to consumer, health care and elderly issues. The Elder and Health Care mediation program obtained nearly \$700,000 for consumers in the state. [The Newburyport Current](#) (February 14, 2011)

with media groups after causing upset by calling for the government to boycott media organizations that criticize Indonesia. [The Jakarta Globe](#) (February 25, 2011)

Mediation Encouraged for Medical Malpractice

NPR and a major health care provider each urge mediation as a beneficial alternative to malpractice litigation.

[National Public Radio](#) (February 1, 2011); [Kaiser Health News](#) (February 1, 2011)

Update on Home Foreclosure Mediation

- A hearing by the **U.S.** Senate Judiciary Committee emphasized the foreclosure mediation programs of the Bankruptcy Courts in New York and Rhode Island, which began in 2009. However, a loan servicer has challenged the authority of the Rhode Island Bankruptcy Court's mediation program. Senator Sheldon Whitehouse (D-RI), who chaired the hearing, has introduced S.222, the Limiting Investor and Homeowner Loss in Foreclosure Act to clarify the authority of Bankruptcy Courts to run loss mitigation programs and to expand them nationwide. [The State Column](#) (February 3, 2011); [Market Watch](#) (February 1, 2011); [The Providence Journal](#) (January 29, 2011); [Loan Rate Update](#) (January 31, 2011); [S.222](#)
- Legislation requiring mediation with homeowners prior to repossession has made progress in **Washington** state, with extensive negotiations on language resulting in support from both bankers and anti-poverty advocates. [The News Tribune](#) (February 18, 2011)
- Legislation requiring mandatory mediation of home foreclosures is being contemplated in **Hawaii**. The Hawaii House of Representatives passed and sent to the Senate a measure that would provide a five-month moratorium on non-judicial home foreclosures, which would give homeowners time to mediate or otherwise negotiate with lenders. [KITV.com](#) (February 3, 2011); [Forbes.com](#) (February 11, 2011)
- The proposal of the mayor of Boston, **Massachusetts** to require face-to-face mediation prior to mortgage foreclosures in the city has passed the City Council; it needs permission from the state before going into effect. [The Boston Globe](#) (January 6, 2011)

- **Florida's** court-mandated foreclosure mediation program is not achieving the results expected, as only 5.7% of cases referred to mediation statewide have resulted in agreements, with some counties showing settlement rates as low as 1%. Some Florida counties are working to remedy a glitch in the program that gives bank attorneys better access to financial records than defense lawyers. [TBO.com](#) (January 28, 2011); [St. Petersburg Times](#) (January 28, 2011)
- Pre-foreclosure cases are being added to mediation programs in six of **Florida's** twenty court circuits. The change results in beginning the mediation process at an earlier point, when the mortgage may be delinquent as little as 65 days, without waiting for the foreclosure process to begin, when the situation is much more serious. This can result in more successful mediations and may be a "game changer." Fannie Mae and Freddie Mac are considering whether to force loan servicers in South Florida to participate. [Miami Herald.com](#) (January 8, 2011); [PR Newswire](#) (January 7, 2011); [Sun Sentinel.com](#) (January 10, 2011); [The Ledger.com](#) (January 12, 2011)
- After its first year, **Nevada's** Foreclosure Mediation Program has kept nearly half its participants in their homes, and only 13% of 6,000 mediations resulted in foreclosure. The Nevada Supreme Court has updated the rules for its Foreclosure Mediation Program, with the changes taking effect on March 1. [Las Vegas Sun](#) (February 17, 2011); [E-wisdom.com](#) (January 22, 2011); [ABC News](#) (January 12, 2011)
- The mortgage foreclosure mediation program in **Maryland** requires homeowners to opt in, so has resulted in only 317 completed mediations since it began, despite 33,000 active foreclosures. About one-third of the mediations resulted in agreements, with loan modifications and other resolutions. [Baltimore Business Journal](#) (January 18, 2011); [Center for American Progress](#) (January 19, 2011)
- With only a tiny number of homeowners benefiting from **New Jersey's** Residential Mortgage Foreclosure Mediation Program, a court-ordered change gives homeowners 30 days to enter the program rather than just 15. [Delaware State Courts](#) (February 1, 2011); [Cape Gazette.com](#) (February 13, 2011) (Registration Required)
- A **Wisconsin** mandatory mediation program for home foreclosures has been working well after beginning last year in Walworth County. Rock and Milwaukee Counties also have mediation programs. [Gazette Xtra.com](#) (January 16, 2011)