



MEDIATION NEWS

BROUGHT TO YOU BY

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CASES & RESOLUTIONS:

Mediated Settlement Agreements in California Must Clearly State If Binding

Emphasizing the importance of mediation confidentiality, the California Supreme Court in [Fair v. Bahktiari](#) reversed the [appellate court](#) and provided “clear drafting guidelines” requiring parties who wish their mediation settlement agreements to be binding to simply say so. Including a statement that the settlement agreement is “enforceable” or “binding” (or words to that effect) shows the intent of the parties and satisfies the California confidentiality statute that otherwise bars disclosure of mediation statements. The Supreme Court concluded that including an arbitration provision was not sufficient to show that a short handwritten document signed by the parties after two days of mediation was intended to be a binding settlement agreement rather than a mere list of terms to be included in a detailed formal agreement. When dispute arose over the language of the longer agreement, the parties did not return to mediation and began litigation over the enforceability of the arbitration provision. Litigation continues with the Supreme Court’s remand of the case for further proceedings. [Fair v. Bahktiari](#), S129220 (Cal., Dec. 14, 2006)

Judge Dismisses Case to Encourage Mediated Solution

Dissatisfied with the limitations of picking a winner and loser in litigation, an Oregon circuit judge dismissed a condemnation case without prejudice, after hearing testimony for two days, in order to encourage the parties to mediate. The judge emphasized the broad range of possible solutions available in mediation, although the city and the owners of 140 acres of farmland sought for recreational purposes had previously attempted mediation without success. The circuit judge offered his own services to mediate the dispute; the parties indicated interest. [The Portland Oregonian](#) (December 22, 2006) (Subscription Required)

California Courts May Not Force Parties to Pay for Mediation

Courts may not compel parties to attend and pay for private mediation, according to California’s Fourth District Court of Appeals in [Jeld-Wen v. Superior Court](#), due to the importance of mediation being a voluntary process. The appellate court did note that parties may be ordered into

Mediation Quote:

“[I]n recent years conceptions of mediation have expanded beyond the notion of the self-centered, rational pursuit of self-interest through distributive bargaining....

[N]egotiations are *always* about more than the pursuit of interests; they are also about identity and about relationships. The key to understanding these dimensions of what a negotiation is ‘really’ about resides in the stories that people tell about the conflicts or issues that bring them into the negotiation as well as how they describe the negotiation process itself.” (H. Gadlin, A. Schneider & C. Honeyman)

Andrea Kupfer Schneider & Christopher Honeyman, Editors, The Negotiator’s Fieldbook: The Desk Reference for the Experienced Negotiator (ABA Section of Dispute Resolution 2006) at 30.

Worth Noting:

California Supreme Court to Hear Mediation Confidentiality Appeal

The California Supreme Court will provide the final word on whether the defendant in [Simmons v. Ghaderi](#), B180735 (Cal. App. 2d Dist., Sept. 27, 2006), cert. granted (Cal. Nov. 6, 2006), is estopped from

mediation in smaller cases where they are not charged fees, and may be required to pay fees for mandatory settlement conferences. But in this six-figure multi-party construction dispute, the appellate court was troubled that the marginally-involved uninsured party which objected to mediation faced a settlement demand of less than \$3,000, but was sanctioned for violating a court order to attend mediation and pay its pro rata share of total mediation costs capped at \$50,000. The appellate court concluded that the lower court erred in requiring mediation and overturned the sanctions. [Jeld-Wen v. Superior Court](#), No. DO48782 (Cal. App. 4th Dist., Jan. 4, 2007)

Breach of Mediation Confidentiality Prevents Testimony by Tainted Experts

A Michigan federal court prevented plaintiff's experts from testifying at trial in [Irwin Seating Co. v. IBM](#), because plaintiff's counsel gave their experts the defendants' confidential mediation statements to read in preparing their reports. The experts claimed the confidential material did not influence them, but the court emphasized the importance of mediation confidentiality and the settlement privilege in deciding to block testimony by the experts. The court also sanctioned plaintiff by imposing attorneys' fees and costs. [Irwin Seating Co. v. International Business Machines Corp.](#), 1:04-CV-568 (W.D. Mich., Nov. 29, 2006)

California Statute Voids Agreements to Mediate Construction Disputes Out of State

An agreement to mediate was held unenforceable by a California appellate court in [Templeton Development Corp. v. Dick Emard Electric, Inc.](#), due to a California statute preventing disputes involving California subcontractors on construction projects in the state from being "litigated, arbitrated or otherwise determined" outside the state. The contract between a California subcontractor and a Las Vegas general contractor for construction in California required the parties to mediate any dispute in Las Vegas, prior to arbitration or litigation. But when the subcontractor refused to mediate in Las Vegas and the contractor refused to mediate in California, the court permitted the subcontractor to proceed with litigation, since the arbitration clause was expressly conditioned on an initial effort to mediate. While the court recognized that mediation doesn't necessarily "determine" anything, it was not clear to what process other than mediation the statutory phrase "otherwise determined" might apply. [Templeton Development Corp. v. Dick Emard Electric, Inc.](#), C052528 (Cal. App. 3d Dist., Oct. 25, 2006)

Intertwined Bankruptcy and Tax Cases Resolved in Mediation

After a decade of disputes involving litigation in both state and federal courts, complicated by bankruptcy filings, the New York subsidiaries of Mirant Corporation appear to have finally resolved tax issues that will allow the company to emerge from bankruptcy in New York as it has elsewhere in the country. The underlying tax disputes were with the towns of Haverstraw and Stony Point and the local school district relating to two power generating plants. Ongoing negotiations ended with two long days of mediation that went into the weekend, with the parties signing a term sheet that is to result in a detailed final agreement.

relying on the confidentiality of mediation proceedings to avoid proof of an oral settlement agreement. The defendant litigated over facts from the mediation for fifteen months before claiming they were confidential.

Student Mediators Compete in National Competitions

As mediation becomes mainstream, both college and law school students are engaging in national mock mediation competitions. Drake Law School in Des Moines, Iowa hosted both the National Law School Mediation Tournament in late November and the National Intercollegiate Mediation Competition earlier in the month. Unlike programs in which competition is focused on advocacy in mediation, these tournaments include competition among mediators; the college program even provides "national rankings" of students as mediators. The conferences are sponsored by the American Mock Trial Association and the International Academy of Dispute Resolution. [Aberdeen American News \(December 11, 2006\)](#) [\(Subscription Required\); Drake Law School News \(November 24, 2006\)](#)

Other Cases & Resolutions:

Contract Dispute Threatens Michigan's Health Care; Detroit Medical Center and Wayne State University to Mediate at Urging of Governor, [Detroit Free Press \(November 10, 2006\)](#)

Long Island County Proposes Mediation of Real Estate Dispute in Effort to Land CanonUSA Headquarters, [Long Island Business News](#)

[The Journal News](#) (November 21, 2006); Harvard Law School Press Release (November 28, 2006)

Neutral Evaluation First Step in Wal-Mart Mediation

A non-binding neutral evaluation was issued by a mediator after two days of proceedings in a dispute between Wal-Mart and Jacksonville, Florida officials over the desirability of a Supercenter due to traffic concerns and land development requirements. The mediator scheduled a third day of mediation and urged the parties to compromise on design and building concepts that could satisfy everyone. The mediation was initially sought by Wal-Mart after the local city council blocked development of its large retail center.

[The Florida Times-Union \(Jacksonville\)](#) (December 29, 2006)

Muslim Cleric, Airline Successfully Mediate in New Zealand

The New Zealand Human Rights Commission illustrated the success of its dispute resolution program – which since 2002 has focused on mediation – by detailing a number of cases, one of which resolved claims against an airline by a Muslim religious leader who was removed from a plane as a security risk for spending ten minutes in the toilet in ritual ablutions before take off. The airline ultimately gave the cleric a written apology and financial compensation for missing his presentation at an overseas conference, and instituted cultural awareness training and other changes to prevent recurrences. Overall, the Commission reported that discrimination complaints are up 11% over the previous year.

[New Zealand Herald](#) (December 9, 2006)

Comedian Seeks Mediation to Offer Apology

Former *Seinfeld* star Michael Richards has agreed to a face-to-face mediation with the African-American men he called racial epithets from the stage of a Los Angeles comedy club. Richards seeks to apologize and possibly offer compensation, and the parties hope the mediation will offer an opportunity for productive dialogue, resolution and healing.

[E! News](#) (December 1, 2006)

NEWS & INITIATIVES:

Litigation Against Corporations Increasing Despite ADR

A detailed survey of hundreds of senior corporate counsel on litigation trends around the world concluded that litigation continues to increase and occupy ever greater attention and resources, even with the growth of alternative dispute resolution. In ranking litigation exposure, respondents' top concerns were labor and employment, contract issues, regulatory issues, intellectual property and class actions. While class actions are primarily an issue in the United States, substantial increases in the United Kingdom were reported. The survey covered international arbitration, which respondents considered to be similar to litigation in both the cost and amount of time involved.

[\(December 6, 2006\)](#)

Dallas School District and Local Education Coalition to Mediate Civil Rights Issues with Help of Department of Justice's Community Relations Division, [Dallas Morning News \(December 21, 2006\)](#) (Subscription Required)

Denver Archdiocese Reaches Mediated Settlements of \$100,000 to \$150,000 in Four Sex-Abuse Cases, [Houston Chronicle \(November 14, 2006\)](#)

QMed and Alere Medical Settle Arbitration of Contract Dispute in Mediation, [MSN.Money \(December 8, 2006\)](#)

Fiji's Great Council of Chiefs Appoints Mediation Committee to Address Impasse Between Government and Military, [Fiji Times \(November 13, 2006\)](#)

Other News & Initiatives:
New Justice in Malta Promotes Mediation in First Comments from Bench, [The Malta Independent \(November 10, 2006\)](#)

At Country's First Mediation Training, Fiji Labor Minister Urges Mediation and Encourages Expansion Beyond Labor Issues to Commercial and Political Disputes, [Fiji Times \(November 7, 2006\)](#)

Dubai Chamber of Commerce & Industry Organizes Mediation Conference with Assistance of Highly-Regarded Singapore Mediation Center, [AME Information \(December 8, 2006\)](#)

[Fulbright & Jaworski's Third Annual Litigation Trends Survey Findings](#)
(Registration Required)

Mediation Gaining in Reinsurance Industry

Arbitration has long been the reinsurance industry's primary avenue for resolving serious disputes, but increasing frustration with arbitration becoming more like litigation is causing many in the industry to move towards mediation. Mediation is now being used in many smaller reinsurance disputes, where its speed and efficiency impress parties.
[Business Insurance](#) (November 6, 2006) (Subscription Required)

E-Discovery Burdens Encourage Mediation

The ongoing expansion of "e-discovery" – discovery of electronic materials in legal proceedings – has led to updated Federal Rules of Civil Procedure definitions that took effect December 1, 2006, with state rules of procedure generally following suit. The increased time, expense and aggravation involved, as e-discovery and procedures for production expand in litigation and even arbitration, provide an additional incentive for parties to use mediation. In mediation, parties often reach resolution with little, if any, formal discovery, or can come to consensus on limited information to be exchanged, often with creative help from the mediator. For example, parties might agree on techniques, such as informal sampling, that would be limited to use in the mediation and could not be used in any later litigation.
[The National Law Journal](#) (November 27, 2006) (Subscription Required)

Mississippi Considers Mediation for All Tort Claims

All tort claims would be required to be mediated prior to being litigated under newly-introduced legislation in Mississippi. The legislation would toll the statute of limitations while the dispute is in mediation, and a civil action could not be filed until 90 days after mediation or written denial of claim. Only mediators who have practiced law at least five years could be certified and appointed by the state bar.
[Mississippi H.B. 158](#) (December 28, 2006)

State Consumer Hotline Refers Disputes to Mediation

New Hampshire's consumer protection hotline, sponsored by the state attorney general's Consumer Protection and Antitrust Bureau, handles over 19,000 complaints and inquiries a year. While a pattern of complaints may result in criminal prosecution, other matters may be referred to mediation. Mediators helped consumers recoup over \$500,000 between 2003 and 2005, in areas such as contractor disputes, used car sales, purchases over the internet and lottery scams.
[Concord Monitor](#) (December 26, 2006)

Mediation Trumps Litigation in Obtaining Restitution

Missouri's attorney general recovered \$5.3 million for consumers through mediation in 2006, which exceeded sixteen-fold the amount recovered through litigation. Recoveries by mediation were up 50% over the previous year.

[Springfield News](#) (December 28, 2006)

European Commission Commits to Use of Mediation in Contracts

The European Commission recently committed to use mediation and other forms of alternative dispute resolution in disputes with contractors, many of whom have complained to the Commission Ombudsman. The Commission previously endorsed mediation as a better way to resolve disputes, and proposes to include an optional mediation clause in its standard procurement contracts. While the Commission states it cannot require contractors to mediate disputes with their subcontractors, the Ombudsman is encouraging the Commission to recommend mediation in such situations, as well as using mediation in disputes over grants made by the Commission.

[US Federal News](#) (December 18, 2006) (Subscription Required)

Voluntary Mediation Proves Itself in Scotland

Mediation in Scotland has not had judicial and legislative encouragement as in England, yet has developed steadily due to the positive experiences of those who have used it on a voluntary basis across a broad range of commercial disputes. Scotland has now been reached the point where courts are promoting mediation and new court rules are being contemplated that would impose sanctions on parties for unreasonably failing to participate in mediation.

[Legal Week](#) (November 2, 2006) (Subscription Required)

China Considering Nationwide Mediation Regulation

The Chinese Ministry of Justice is developing comprehensive legislation to regulate the practice of mediation throughout China. The legislation was proposed by the 10th National People's Congress, which recognizes the "pivotal role" mediation already plays in resolving civil disputes and promoting economic development, but sees a need for improved quality, standardization and greater financial support.

[World News Connection](#) (November 24, 2006) (Subscription Required)

Mediation Training for African Telecom Sector

Along with helping African telecommunications markets move towards the world's best practices, the Commonwealth Telecommunications Organization (CTO) is emphasizing effective ways to manage the unavoidable disputes between telecom providers, customers, supplier and regulators in order to minimize damage to relationships. CTO and CEDR (the Centre for Effective Dispute Resolution) provided a multi-day mediation training in Cameroon for over 30 lawyers in the telecom sector from eight African countries.

[SourceWire](#) (November 20, 2006)

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