



MEDIATION NEWS

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Keith L. Seat

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CASES & RESOLUTIONS:

California Court Tells Insurers with Potential Coverage to Attend Mediation in Person

Noting the benefits of appellate mediation and the desirability of participants attending in person, a California appellate court warned insurers in [Campagnone v. Enjoyable Pools & Spas](#) that even the potential of coverage requires a representative with full settlement authority to attend court-ordered appellate mediations in person, unless excused in writing by the mediator. Further, the court warned parties and counsel that they may also face sanctions if they fail to notify insurers with potential coverage about appellate mediations. The court noted that California's strict mediation confidentiality provisions prevent mediators from disclosing whether anyone fails to attend, but that an aggrieved party may do so in seeking sanctions from the court. The court withheld sanctions in this case only because no previous opinion had spelled out these requirements, even though the insurer was only liable for amounts in excess of \$3 million and the judgment in the trial court was \$2.4 million.

[Campagnone v. Enjoyable Pools & Spas](#), No. C055050 (Cal. App.3d Dist., May 30, 2008)

California Court Penalizes Lack of Mediation Attempt with Absent Party

A California appellate court overturned a lower court and denied attorneys' fees because the prevailing party did not attempt mediation prior to filing suit, as required by the standard California residential purchase agreement. Even though defendant had moved away, and plaintiff did offer mediation when defendant was found by an investigator to serve the complaint, the court ruled that plaintiff should have hired its investigator prior to filing suit, in order to seek pre-suit mediation as required by the form agreement. The court emphasized the importance of mediation in order to avoid results like the outcome of this case, in which plaintiff spent more than \$113,000 in attorneys' fees to recover a \$13,000 judgment.

[Lange v. Schilling](#), No. C 055471 (Cal. App. 3d Dist., May 28, 2008)

Mediation Clause Enforced, Despite

Mediation Quote:

"[W]e must understand that one person's positive insights may be another's distressing notions. Common sense may be only that which a particular individual fashions to fit the individual's emotional or intellectual needs.

Nevertheless...the need to stand in the other person's shoes, to understand everyone's real interests and needs, to explore options in a genuinely non-judgmental manner, and to speak and listen empathetically, will not be lost on business people in the farthest corners of the world. We must prepare for the emotional component of mediation by understanding each other at the deepest levels. We must acknowledge emotion. We must use it constructively. So that we can talk."

- David W. Plant, *We Must Talk Because We Can: Mediating International Intellectual Property Disputes* (International Chamber of Commerce 2008)

Check This Out:

"Collaboration Not Litigation Ale" may be perfect for toasting successful mediations; the ale is the product of collaboration

Maneuvering over Judicial Forum Selection

The contract between a U.S. licensee and an Australian licensor provided for disputes to be resolved through mediation in Sydney and, if necessary, litigation in New South Wales. But when a dispute arose, the U.S. company quickly filed suit in the U.S. and the Australian court later stayed its case pending the U.S. proceedings. However, the Australian court required the parties to comply with the mediation provision in their contract and proceed with mediation in Sydney, noting that if they had difficulties choosing a mediator the court would do so.

[Armcel Pty Ltd. v. Smurfit Stone Container Corp.](#), [2008] FCA 592 (Australian Fed. Ct., May 2, 2008); [Mondaq Bus. Briefing](#) (May 27, 2008) (Subscription Required)

Subpoena of Mediator Upheld on Appeal in New York

A New York appellate court affirmed the appellate division's upholding of a subpoena of a mediator in [Hauzinger v. Hauzinger](#), stating that one party signed a waiver releasing the mediator from maintaining confidentiality and the other party waived confidentiality by seeking disclosure from the mediator. The mediator was not allowed to assert a qualified privilege, since the privilege was waived by the parties, but the court expressly did not rule on the applicable state statute.

[Hauzinger v. Hauzinger](#), [43 A.D.3d 1289](#), [842 N.Y.S.2d 646](#) (NY App. 4th, Sept. 28, 2007), [aff'd](#), [2008 NY Slip Op. 05781](#) (NY Ct. App., June 26, 2008)

Extensive Water Rights Mediation Resolving Decades-Old Dispute

Over 60 representatives of conservation groups, power producers, federal agencies, ranchers, boaters and downstream communities reached a tentative settlement of water issues in Colorado's Upper Gunnison Basin, which have been in contention for decades and in litigation for the last seven years. The mediation lasted nine months and the representatives still must obtain final approval from principals and final decision-makers. The proposed settlement will resume annual peak flows in the springtime from upstream dams to return the Gunnison River to a more natural condition, even though that leaves less water for hydropower during high demand periods in July and August. Final settlement is sought by September in order to avoid a lengthy and contentious trial.

[Gunnisontimes.com](#) (Colorado) (June 12, 2008)

Alaska State Senator Proposes Mediation over Pipeline

In an effort to avoid a difficult decision over an exclusive license and \$500 million incentive for a natural gas pipeline from the North Slope to Alberta, an Alaska state senator has proposed mediation among interested parties in order to provide a pause and an opportunity for creative alternatives to emerge. The senator stated she would ask senate and house leaders to hire a professional mediator. The state revenue commissioner and others oppose

between two microbreweries which resolved a potentially nasty dispute between them over Belgian-style ales each had developed and given the same name.

[Mediationchannel.com](#) (May 23, 2008), [Avery Brewing Company](#)

Other Cases & Resolutions:

Ten Million Dollar Claim over Cheese on McDonald's Hamburger Sent to Mediation, [The Record](#) (West Virginia) (May 23, 2008)

Mediation Begins over Deaths of Six of Nine Firefighters Killed in Sofa Super Store Blaze, [Charleston Post Courier](#) (June 17, 2008)

Mediation over Large Development Opposed by City Hopes to Avoid Scheduled 40-Day Hearing of Ontario Municipal Board, [Guelph Mercury](#) (June 13, 2008)

Mediation Team Making Progress on Alternatives to Evergreen Point Bridge, [Seattle Post Intelligencer](#) (June 19, 2008)

Federal Appellate Court Sends Oklahoma State Officials and Businesses to Mediation over New Immigration Law, [Tulsa World](#) (June 30, 2008); [KTEN](#) (Oklahoma) (June 28, 2008)

State Legislator Presses All Parties and Agencies for Mediation of Tellevast Contamination Dispute, [Bradenton Herald](#) (Florida) (June 28, 2008) (Subscription Required)

Federal Appeal Delayed Pending Mediation by Adult

mediation and seek an up or down vote on the license.

[Anchorage Daily News](#) (June 19, 2008)

Telecom Companies Seek Further Extension for Mediation

AT&T Nevada and Sprint were ordered by the Nevada Public Utilities Commission to mediate and try to resolve a dispute over interconnection agreement terms based on FCC merger terms. The parties were required to report to the PUC by July 1 on their mediation progress, but are seeking an extension until September 1 to permit further time for mediation.

[TR's State NewsWire](#) (June 24, 2008) (Subscription Required)

NEWS & INITIATIVES:

Final Rules of Civilian Board of Contract Appeals Cover ADR

The Civilian Board of Contract Appeals (which resulted from the 2007 consolidation of numerous contract appeals boards) published final rules to clarify procedures for alternative dispute resolution, among other things. The Board encourages ADR even on matters not before it, noting that mediation is most often used, but many other processes are available. The rules permit a panel judge to act as an ADR neutral and then (if ADR has not been fully successful) to resume work as a judge, if desired by the parties. The parties are to enter an ADR agreement specifying the neutral, the type of ADR desired, scope of related discovery and timing and location of ADR. However, use of ADR does not toll any statutes of limitation.

[Wileyrein.com](#) (May 14, 2008); [Explanation of Final Rule](#) (May 12, 2008); [48 C.F.R. 6101.54](#) (Subscription Required)

Michigan Law Establishes Mediation of Property Tax Disputes

New Michigan legislation authorizes the Michigan Tax Tribunal to mediate appeals of agency decisions, if the parties agree to mediation and select a certified mediator. The Tribunal will establish a process for creating a roster of certified mediators, who must have five years of tax experience in the previous seven years. The Tribunal may charge mediators an annual certification fee, as well as charging parties a fee for mediation. Mediators must disclose their rates and experience to parties, and report the results of mediations to the Tribunal.

[Michigan H. 4433](#) (Enacted May 8, 2008)

Connecticut Enacts Foreclosure Mediation Program in Mortgage Relief Bill

On June 18, Connecticut enacted wide-ranging mortgage relief and industry reform legislation, which included a foreclosure mediation program. The law

Superstore and County over Provisions in County and State Laws, [Rome News-Tribune](#) (Georgia) (June 25, 2008)

Ohio Attorney General's Office Agrees to Mediate Sexual-Harassment Cases that Resulted in Attorney General's Departure, [RedOrbit](#) (June 17, 2008)

University of Hawaii and Former Head Football Coach Agree to Mediation Prior to Contractually Required Arbitration, [Honolulu Advertiser](#) (May 28, 2008)

West Virginia University's \$4 Million Lawsuit Against Ex-Football Coach Heading to Mediation, [Associated Press](#) (West Virginia) (May 30, 2008)

City Pushing Mediation in Order to Merge Firefighting Services, [Muskego Now](#) (Wisconsin) (May 21, 2008)

Judge Orders Mediation in Proposed Merger of Three Firefighting Services, [FirefightingNews.com](#) (Georgia) (May 22, 2008)

Progress in Mediation of Plan to Consolidate Fire Coverage, [The Stamford Advocate](#) (Connecticut) (May 21, 2008)

Developers of Senior Living Facility to Mediate with Neighbors, Despite City Approval, [Pleasanton Weekly](#) (California) (June 12, 2008)

City, Township and Landowners Mediate over Large Septic System, [Austin Post Bulletin](#) (Minnesota) (May 21, 2008)

Eleven-Year-Old Dispute over Neighborhood Access to Lake Sent to Mediation, [The](#)

requires lenders to tell delinquent borrowers about the mediation program when seeking foreclosure. If the borrower chooses mediation, lenders are required to participate, which could delay foreclosure by 60 days or longer.

[Hartford Courant](#) (June 20, 2008)

Iowa Reactivates Flood Claim Mediation Program

Iowa's Insurance Commissioner met with insurers to reactivate a flood claim mediation service in response to extensive flooding since May that resulted in 42 counties being declared disaster areas. While full details on implementation will be available soon, the Iowa Insurance Division plans to provide mediators under contract for consumers and insurers with settlement disputes. The Iowa flood mediation service was first begun after mammoth floods in 1993. State officials believe the damage from the current flood is even greater, calling it a 500-year event.

[NU Online News Service](#) (June 20, 2008) (Subscription Required)

Kentucky Mediating Serious Criminal Cases

Felony criminal cases are being mediated regularly in a pilot program of Kentucky courts, despite opposition from prosecutors. Prosecutors are used to negotiating plea arrangements without outside assistance and chafe at confidentiality restrictions which prevent use in court of any admissions in mediation. However, state judges are pleased with the mediation program, which is reducing both court and prison congestion, while achieving outcomes that satisfy victims and their families without the burden of lengthy trials.

[The Legal Intelligencer](#) (May 26, 2008)

Caseload of Oklahoma Supreme Court Reduced by Mediation

The total number of cases handled by the Oklahoma Supreme Court is down 28% from 1999 to 2006, with the number of written opinions dropping from 250 a year in 2000 to only 99 in 2006. The Chief Justice attributes the decline to mediation, as well as legislative reforms and the rising cost of litigation.

[Insurance Journal](#) (June 10, 2008)

Mediation Gaining in Employment Disputes as Arbitration Declines

Employers are increasingly turning from arbitration in employment disputes, due to the increased costs of discovery, potential for rogue outcomes that cannot be appealed, and uncertainty over whether mandatory arbitration provisions will be upheld. With overtime litigation continuing to increase around the country, many defense lawyers are encouraging clients to turn to mediation instead of arbitration. Wage-and-hour litigation increased over 200% between 2001 and 2007 and overtime lawsuits have displaced

[Jackson Citizen Patriot - MLive.com](#) (Michigan) (May 7, 2008)

Builders Remedy Suit Ordered to Mediation, [Red Bank Hub](#) (New Jersey) (May 8, 2008)

Houston Rodeo Rejects Justice Department Offer to Mediate Concerns of Minority Groups, [Houston Chronicle](#) (May 21, 2008)

Lack of Settlement in Mediation Leads to Competing Litigation in U.S. and Korea, [Daily Report Online](#) (May 8, 2008)

U.K. Human Rights and Equalities Commission Helps Churches Mediate Between Gypsies and Local Communities, [Essex Echo](#) (May 9, 2008)

ANZ and Opes Prime Agree to Mediate over Stockbroker's Collapse, [Business Spectator](#) (Melbourne) (May 22, 2008)

New Zealand University Agrees to Mediate with Union over Layoffs in Restructuring, [Stuff.co.nz](#) (May 24, 2008)

Judge Delays Litigation for Mediation over Nonpayment of Royalties of €400,000 for Music Festivals over Several Years, [Irish Times](#) (June 16, 2008)

Other News & Initiatives:

Ohio County Court Beginning New Mediation Foreclosure Program, [The Plain Dealer - cleveland.com](#) (June 24, 2008)

Kansas Agricultural Mediation Service Helps Hog Farmers Under Pressure from

employment discrimination as the most common form of employment litigation.

[The National Law Journal](#) (June 9, 2008) (Subscription Required)

Disclosure and Apology for Medical Errors Reduce Claims

Medical providers are increasingly offering earnest apologies and full disclosure of mistakes to their patients, along with fair compensation, in an effort to resolve matters promptly and avoid contentious medical malpractice litigation. Medical centers report that claims and lawsuits drop substantially when such practices are followed, and that overall costs are significantly reduced even while more patients are compensated. The American Medical Association, the American Hospital Association and other medical groups now encourage disclosure. Further, 34 states now prevent use in litigation of apologies for medical errors.

[New York Times.com](#) (May 18, 2008)

Litigation Funding of Smaller Parties Provides Mediation Counterweight

A litigation funding company in Australia provides resources in carefully selected cases to individuals and small businesses involved in disputes with larger entities who may try to use their advantage in resources to obtain procedural wins or force unfair settlements. The funding company sees itself as helping to level power imbalances, but selects only cases it feels are likely to generate a good return. The managing director believes mediation is the best option for resolving business disputes, but that mediation works better when the smaller party has options.

[Sydney Morning Herald](#) (June 7, 2008)

Debt Collector Grows Using Mediation

A debt recovery service in the U.K. attributes its rapid growth to focusing on mediation rather than litigation. In addition to obtaining payment, the service seeks to rebuild business relationships between its clients and their debtors, and brings a friendly approach to its work. However, the service emphasizes that it has a 100% win rate in the small number of cases it is forced to take to court.

[Wales Online](#) (May 30, 2008)

Other International Mediation Developments

- Mediation's hidden benefits useful to minimize both financial and non-financial burdens of U.K. employment disputes, [HRZone.co.uk](#) (May 22, 2008); [TrainingZone.co.uk](#) (June 12, 2008); [Abeceder](#) (July 2, 2008)
- U.K. Law Commission proposes mediation for housing disputes, based on "triage plus" system, [Liverpool Daily Post](#) (May 20, 2008)

High Input Costs,
[CattleNetwork.com](#) (Kansas)
(June 4, 2008)

Elder Mediation Growing as Parents Live Longer and Families Fight, [Long Island Business News](#) (May 23, 2008)

Mediation Should Help Businesses Like Microsoft and Yahoo Put Together Deals, [The Christian Science Monitor](#)

- **Australia** simplifies bidding for government legal work and requires agencies to use more alternative dispute resolution, [The Australian](#) (May 23, 2008)
- **Malaysia** encouraging use of mediation, among other judicial reforms, and plans to soon draft a Mediation Act, [Malaysia Star](#) (June 18, 2008)
- Olympic Council of **Malaysia** now includes alternative dispute resolution in its constitution and encourages national sports associations to seek mediation of disputes, [OCM News](#) (June 30, 2008)
- After long reliance solely on arbitration in **Vietnam**, newest arbitration organization also offers mediation, [Thanh Nien Daily](#) (Ho Chi Minh City) (May 23, 2008)
- U.S. college seeks to provide culturally appropriate mediation training in **China**, [Boston.com](#) (May 29, 2008)
- **Uzbekistan** and United Nations Development Programme are organizing seminars around country on business arbitration and mediation, [Journal of Turkish Weekly](#) (June 19, 2008)
- Groundbreaking decision by the High Court for the **Indian** states of Punjab and Haryana allows mandatory mediation order despite objection of parties, [The Statesman](#) Kolkata, India (May 26, 2008)
- World Bank providing funds to International Centre of Alternative Dispute Resolution in **India** to train mediators to settle commercial disputes, [Press Trust of India](#) (June 30, 2008)
- Karachi Centre for Dispute Resolution holds six-day mediation workshop for judges, [Pakistan Press International](#) (June 30, 2008) (Subscription Required)
- **Abu Dhabi** seeking to establish world-class commercial court with specialized mediation capabilities, [AME Info](#) (United Arab Emirates) (June 30, 2008)
- Thirty-one Ethiopian judges and registrars receive three-day mediation training; Federal Supreme Court of **Ethiopia** agrees to send 80 cases to mediation, [Allafrica.com](#) (May 23, 2008)
- Debt mediation company launched to help heavily indebted **South African** consumers recover from debt load, [Business Day](#) (June 14, 2008) (Subscription Required)

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