



# MEDIATION NEWS

BROUGHT TO YOU BY

Keith L. Seat

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## CASES & RESOLUTIONS

### Neither Surgery Nor Incarceration Excuse Failure to Appear at Mediation

Sanctions were imposed against two plaintiffs for failing to appear in person at a mediation as required by local court rule, even though one was incarcerated and the other was recovering from surgery and participated by telephone. Although plaintiffs' counsel attended with "full settlement authority," the court imposed the costs of the unsuccessful mediation on plaintiffs, including defendant's attorneys' fees, noting that plaintiffs neglected to seek any accommodation prior to the mediation or move to be excused from personal appearance by the court.

[Scott v. K.W. Max Inv., Inc.](#), No. 6:05-cv-683, 2007 WL 80851 (M.D. Fla., Jan. 8, 2007) (Subscription Required)

### CEO's Presence Required for Full Settlement Authority

Upset by a company representative appearing at a settlement conference with only limited authority, a federal magistrate ordered the CEO of a billion dollar company in St. Louis to personally attend the rescheduled settlement conference in Connecticut. Participants were to have full settlement authority, but the company's initial representative needed to call her boss to exceed \$10,000 in a civil rights case that the plaintiff was willing to settle for \$45,000. The order notes the disadvantages of decision-makers not being present to hear the discussion and emphasizes the value of settlement efforts in light of the "staggering" costs of litigation. The magistrate refused requests for the senior attorney handling the case or even the company's general counsel to appear in place of the CEO, even though the CEO had scheduling conflicts and had not been involved in the litigation. The magistrate also awarded attorneys' fees and costs to plaintiff.

[Kearson v. Schick-Wilkenson Sword](#), No. 3:05-CV-1422, 2007 WL 25499 (D. Conn. Jan. 3, 2007) (Subscription Required)

### Court Requires Privilege Log of Mediation Documents

Following a successful mediation and \$25 million settlement over the construction of a printing plant for the New York Post, the defendant is seeking indemnity of that amount from the subcontractors it hired to do the

### Mediation Quote:

"Wasted time, lowered morale, increased turnover, higher absenteeism, grievances, and lawsuits are just some of the outcomes that can stem from mismanaged conflict.... The first step is for leaders to become personally competent in dealing with conflict... [then] the stage is set for encouraging organizational improvement. Leaders become champions, models, and coaches. Champions take the initiative to set organizational wheels of action into motion. They encourage the review of current practices and develop plans for systematic improvements in conflict resolution."

Craig E. Runde and Tim A. Flanagan, *Becoming a Conflict Competent Leader: How You and Your Organization Can Manage Conflict Effectively* (Jossey-Bass 2007) at 187-88.

### Worth Noting:

#### No Satisfaction in Taking Case to Supreme Court

All the parties who vow to take their case all the way to the U.S. Supreme Court may benefit from the reflections of a plaintiff who was lucky enough to have her case chosen, but then discovered that the legal arguments "leave the person out" – the only time her name was mentioned was when her case was called. In fact, given the Supreme Court's focus on

work. The subcontractors are trying to obtain detailed information about apportionment of liability and whether the mediated settlement was reasonable, which the defendant is withholding as privileged. While stressing the importance of maintaining mediation confidentiality, a New York court has ordered the creation of a privilege log listing the documents and drafts prepared for mediation, but has not yet required the log to be turned over, even for review by the court. The court did question why the defendant mediated and settled the underlying claims without involving the companies it asserts are responsible, and noted that the defendant would somehow have to prove the reasonableness of the settlement to obtain indemnification. [NYP Holdings, Inc. v. McClier Corp.](#), No. 601404/04, 2007 WL 519272 (NY Sup. January 10, 2007) (Subscription Required)

## **Georgia County and Cities Mediate Over Legislation**

Unable to agree on proposed legislation for non-duplication of public services among five cities and a county in Georgia, the government bodies are mediating with a court-appointed mediator. Quorums of elected officials for each government entity are required to attend the initial presentation and remain available on short notice to ratify any agreement reached. Two days of mediation have been scheduled, but if no agreement is reached the mediator is to report back to the court. [The Valdosta Daily Times](#) (February 4, 2007)

## **North Dakota Law Requires Cities to Mediate Zoning Dispute**

The neighboring cities of Fargo and Horace are considering extensions of their zoning jurisdictions which could overlap, and are trading accusations about how the conflict arose. If they cannot resolve the issue, North Dakota law requires the cities to first take their dispute to mediation before going on, if necessary, to an administrative law judge. [The Forum](#) (February 28, 2007)

## **Canadian Lender Secures Claims in Mediation with Bankrupt U.S. Energy Company**

A complex two-day mediation resulted in agreement on all issues between a Canadian lender and U.S. Energy Biogas Corp., which is in Chapter 11 reorganization proceedings, subject to formal approval by the companies' boards and the U.S. bankruptcy court. The mediated agreement includes an allowed secured claim of \$99 million for lender with a payback schedule and mutual releases covering individuals affiliated with lender who used to work for debtor. [CCN Matthews](#) (January 15, 2007)

## **University Turned to Mediation to Heal Racial Divisions**

The University of Virginia relied on a month of intensive weekly mediation sessions following a racially-motivated assault on a female candidate for

legal precedential issues, one Justice has plainly stated that "I don't care much about your particular case." Worse, the Court's decision can be inconclusive and lead to additional years of litigation. [Washington Post](#) (February 20, 2007) (Registration Required)

## **Other Cases & Resolutions:**

**Developer and County Pledge Best Efforts to Meet Mediation Deadline in Real Estate "Taking" Case,** [Pierce County Herald](#) (February 15, 2007)

**Federal Due Process and Rezoning Claims by Car Dealership Against Town to be Mediated,** [ThePilot.com](#) (January 26, 2007)

**Sexual Harassment Case Against Florida Department of Corrections Goes to Mediation,** [First Coast News](#) (February 16, 2007)

**NY Transmission Company Mediating with Environmental Groups Opposed to New Power Lines,** [News 10 Now](#) (January 24, 2007)

**Madonna's Film Production Company to Mediate Fraud Dispute with Competitor,** [International Herald Tribune](#) (February 26, 2007)

**Defamation Claim by Former Athletic Director Against University President Still in Mediation at Urging of Court,** [The Murray State News](#) (January 19, 2007)

**Sixty-Hour Mediation Leads to Agreement Between Nurses' Union and Two Nevada Hospitals; New Committee Will Meet Monthly on Sticking Point,** [The](#)

Student Council president that provoked widespread unrest at the school. The assault, which occurred four years ago, remains under investigation by the FBI. The mediation sessions were designed to address and heal racial divisions and were attended by both students and administrators. A psychiatrist and a professor of psychiatry led the process as co-mediators and worked to improve the Student Council electoral system and address other underlying issues of concern to the students, such as housing preferences which impact desegregation and inclusion on campus. While significant tensions were brought to the table, students who participated found the mediations memorable and helpful in resolving divisions.  
[Cavalier Daily University Wire](#) (February 27, 2007) (Subscription Required)

[Associated Press](#) (February 8, 2007)

**Religious Leaders Use Mediation to Address Crisis in Liberian Legislature,**  
[AllAfrica Global Media](#)  
(February 7, 2007)  
(Subscription Required)

## **Justice O'Connor to Mediate Land-Rights Dispute**

Continuing the trend of former judges serving as mediators, retired U.S. Supreme Court Justice Sandra Day O'Connor will mediate a decade-old dispute between the U.S. government and over 1,000 heirs of former landowners of 36,000 acres in western Kentucky. Although \$3 million was paid when the land was taken for Camp Breckinridge in 1942, many owners expected to be able eventually to return to the land. The U.S. Court of Federal Claims preliminarily awarded \$30 million in 2004, which approximated the profits the government received for oil, gas and coal discovered in the 1960s. The parties have consented to Justice O'Connor mediating the case, but the government has asked for ground rules and plans to appeal if a settlement is not reached.

[Lexington Herald - Leader](#) (February 16, 2007)

## **Mediation Allows Ball Clubs to Share Stadium**

The needs of a new semi-pro baseball team overwhelmed the capacity of the city stadium, leading to mediation among the four teams and groups using the stadium. While no one was thrilled about the outcome, all felt the resolution was the best possible under the circumstances, resulting in the city calling the mediation a success.

[SanLuisObispo.com](#) (February 28, 2007)

## **UK Reversal: Expert Statement Used in Mediation Not Privileged**

A joint statement used in mediation by the parties' experts in a construction dispute was held not to be privileged by the UK's Court of Appeal, reversing the Technology and Construction Court (TCC) in [Aird v. Prime Meridian Ltd.](#) Rather than considering the intent of the trial court, the appellate court focused on the fact that the court mandated the joint expert statement using a litigation form and that the experts had agreed to remove the "without prejudice" designation. The Court of Appeal explained that a joint expert statement could only be ordered for litigation under the court's rules and so would not be privileged even though it was used in mediation.

[Aird v. Prime Meridian Ltd.](#), [2006] EWCA Civ 1866 (Ct. of App. Dec. 21, 2006)

## **Museum to Mediate Return of Aboriginal**

## **Other News & Initiatives:**

**California's Proposed Water Quality Control Act Includes Mediation Provisions,**  
[California H.B. 1018](#) (February 22, 2007) (Subscription Required)

## **Remains**

With a court battle looming in London, the British Natural History Museum has agreed to mediate whether it may take samples before returning nineteenth century remains of Tasmanian aborigines to Australia. Aboriginal leaders view such testing as a desecration of the remains.

[ABC News Online](#) (March 1, 2007)

## **NEWS & INITIATIVES:**

### **ABA Mediation Quality Task Force Focusing on Users**

The Task Force on Improving Mediation Quality of the American Bar Association (ABA) Dispute Resolution Section, which was established in August 2005, has met with focus groups of high-end commercial mediation users in ten major cities in the U.S. and Canada. The participating users of mediation – ninety percent of whom were attorneys – discussed what they look for in mediators and mediation. Users want improved information for making more informed choices among mediators. Many users want mediators to do more than shuttle between parties to get to a dollar figure; they want their clients' emotional needs addressed by creative and intuitive mediators, along with reaching settlement. While users split on whether it is helpful for mediators to express opinions or render evaluations, many want vigorous reality testing and suggestions of ideas for resolution. Many also want mediators to thoroughly prepare by talking with counsel in advance of the mediation about substantive issues relating to key interests, the parties' backgrounds, the "real issues," and what may stand in the way of settlement, as well as the procedural matters of who will attend, memos, timing and process. The Task Force plans to use the guidance from the focus groups, along with information from mediators and mediation organizations, to provide practice guides in order to improve mediation quality, build users' confidence, and increase use of mediation in commercial disputes.

*Just Resolutions* E-newsletter (ABA Section of Dispute Resolution, February 2007)

### **Advocacy Ethics Bar Same for Mediation and Negotiation**

An American Bar Association (ABA) ethics opinion last spring concluded that a lawyer's obligation to be truthful when representing a client is the same in a private mediation caucus as in direct negotiations. In short, whether in mediation or other negotiations, an advocate may engage in negotiation "puffing," but may not make false statements of material fact to their opponent or to the mediator. While some urged that advocates' statements to a mediator privately should be held to a higher standard, the ABA concluded that statements in caucus need not be more truthful than negotiations generally, unless necessary to achieve the client's goals.

[Chicago Lawyer](#) (January 2007) (Subscription Required); [ABA Formal Ethics Opinion 06-439](#) (Membership or Fee Required)

### **Katrina Insurance Mediations Largely**

## **Successful**

On the first anniversary of the Mississippi mediation program for homeowner insurance claims resulting from Hurricane Katrina, the Department of Insurance shows an 83% success rate with more than 3,000 mediations conducted. Even when the parties chose to litigate, but were directed to a federal mediation program, 53% of more than a hundred lawsuits were resolved. The Mississippi Insurance Commissioner states the mediation program is one example of success in the disaster recovery process, with informal feedback indicating that mediating parties are satisfied. While the program has been limited to homeowners insurance, Mississippi is exploring whether the mediation program can be expanded to other types of insurance. [U.S. State News](#) (February 13, 2007) (Subscription Required)

## **Texas Proposes Mandatory Mediation in Health Plan Disputes with Doctors**

Recently introduced legislation in Texas would permit HMOs and Preferred Provider plans to seek mandatory mediation with physician groups in contract disputes, and avoid administrative penalties for not having contacts in place by mediating in good faith. The draft mediation provisions are quite regulatory, preventing mediation until sixty days after giving notice and requiring a "consensus panel" of three mediators (one appointed by each party and a third mediator to chair the panel selected by the party mediators, or the state's health commissioner if necessary), along with other requirements. The costs would be paid by the health plan initiating the mediation. The mediators would be required to report "bad faith" mediation to state authorities leading to significant administrative penalties. Bad faith is specified as failure to send a person with "full authority" who could reach agreement at the mediation, failure to provide information needed by the mediation panel, or insisting on a contract of adhesion. [Texas H.B. 664](#) (2007 Session)

## **Maryland Encourages Agricultural Mediation**

With a roster of twenty-four mediators, the Maryland Department of Agriculture is encouraging farmers to mediate disputes with neighbors, family, government agencies and lenders using the re-named Maryland Agricultural Conflict Resolution Service (Maryland ACRS). Mediation services are available at modest or no cost, depending on income levels, with a free initial consultation and shared costs thereafter. The USDA-certified program encourages agricultural workers to mediate disputes before they land in court. [Southern Maryland Online](#) (January 11, 2007)

## **Probate Mediation Increasing**

Disputes over estates and trusts are increasingly being mediated, based on state, county and court requirements, and the preferences of parties and individuals involved, as awareness grows of the value of mediation in resolving the emotionally difficult situations which often arise between related parties. Washington state, for example, statutorily requires all estate and trust cases to be mediated prior to litigation, while New Jersey and Hawaii allow the court to send any probate case to mandatory mediation. Los

Angeles County requires mandatory mediation of all contested estates and trusts, while San Francisco County relies on voluntary mediation. One open issue in many places is whether a will or trust may itself require that any dispute be mediated or arbitrated, since the beneficiaries did not negotiate or agree to those terms.

[New Jersey Law Journal](#) (February 2, 2007) (Subscription Required)

## **Hungary Expands Mediation to Criminal Cases**

Mediation was introduced in Hungary in 2002 for civil cases and has been expanded to criminal cases beginning in 2007. Hungary's criminal mediation program applies to crimes punishable by less than three years imprisonment, such as many property crimes and personal offenses, even including manslaughter. The mediation program is intended to reduce the impact of crime on both victims and offenders, and permit the victim an opportunity to confront the perpetrator and possibly reach closure. If the offender agrees to reparations or compensation for injuries and/or expresses regret which satisfies the victim, criminal charges will not be pursued.

Hungarian News Agency (January 3, 2007) [The Hungarian Portal](#) (January 17, 2007)

## **UK Maritime Law Conference Discusses Benefits of Mediation**

A maritime law conference in England reviewed various means of resolving disputes, with a Court of Appeal judge noting that the objective of every process is to identify the real issues and settle the case. The Civil Procedure Rules now provide great impetus for mediation, and commercial courts encourage – but do not require – mediation by delaying the litigation to give time for the process, which could reduce problems from settlements on the courthouse steps. But despite mediation's benefits and successes it has not yet become as popular as expected. Explanations ranged from reluctance of lawyers to lose substantial legal fees when cases settle to lack of regulation of the mediation profession, which is now being addressed by the Civil Mediation Council. While mediation can proceed quickly to resolve disputes, it was noted that arbitrations – which remain common in the maritime industry – usually take three or four months for small claims, with an extreme arbitration case lasting eleven years.

[Lloyd's List International](#) (February 14, 2007) (Subscription Required)

## **Hong Kong Court May Sanction Unreasonable Refusal to Mediate**

A pilot mediation program began in September 2006 in Hong Kong's Construction and Arbitration List High Court and is to continue through August 2008. Although participating in the mediation program is voluntary, if one party requests mediation the other party may face costs imposed by the court for unreasonably refusing to participate or not participating sufficiently. The court has complete discretion over whether to impose costs, but there is little basis on which to determine when the court may do so. Other courts, such as those in the United Kingdom, determine sanctions for failure to mediate based on whether a case is suitable for mediation, the merits of the case, whether other settlement attempts have been made, and whether the costs of or delay caused by mediation would be detrimental to the party.

[Mondaq Ltd.](#) (January 4, 2007) (Subscription Required)

## **China's Justice Minister Promotes Mediation**

China continues to expand use of mediation while seeking to standardize mediation processes. At the eighth anniversary of the Hong Kong Mediation Centre, Minister of Justice Wong Yan-lung said the Justice Department would promote mediation throughout the government and set up a task force to help develop consistent policies and regulations. Immediate plans include using mediation for land and personal injury matters to help reduce large caseloads. Discussing the benefits of mediation, Mr. Wong expressed confidence that mediation's value will become readily apparent for higher-end commercial disputes and generate a market in due course.

[South China Morning Post](#) (February 6, 2007) (Subscription Required);

[South China Morning Post](#) (January 9, 2007) (Subscription Required)

## **Nigerian Institute Trains Mediators**

The Mediation Training Institute of Nigeria completed a mediation training program in Johannesburg, South Africa, and plans to conduct additional programs this year in Nigeria, Ghana and South Africa. Other MTI trainings are conducted around the world. MTI noted the serious need for mediation and press attention in Nigeria due to ongoing crises.

[AllAfrica.com](#) (February 14, 2007) (Subscription Required)

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