



MEDIATION NEWS

BROUGHT TO YOU BY

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MARCH 2008

CASES & RESOLUTIONS:

Counsel in Contempt for Breaching Mediation Confidentiality

Despite acknowledging error and offering a formal apology, counsel for plaintiff in [Williams v. Johanns](#) was found in civil contempt by the U.S. District Court for the District of Columbia for filing a pleading containing statements made in mediation. The court held a show cause hearing and ultimately imposed a nominal fine, noting the importance of confidentiality in the mediation process.

[Williams v. Johanns](#), 2008 WL 36633 (D.D.C., January 2, 2008) (Subscription Required)

Utah Supreme Court Upholds Mediation Confidentiality, Seals Record, Recuses Trial Judges

The Utah Supreme Court in [Reese v. Tingey Construction](#) reversed the trial court's order requiring counsel for a party to be deposed to determine whether the parties had orally agreed to settle during mediation, based on state law prior to the Utah Uniform Mediation Act taking effect on May 1, 2007. The Court emphasized the importance of confidentiality to the mediation process, noted that the limited statutory exceptions to mediation confidentiality were not met, and rejected the lower court's notion that mediations contain both confidential and non-confidential portions and that counsel could be required to testify about the non-confidential aspects. The Court stated that parties are free to enter into oral agreements during mediation, but that a written agreement – even if just an email exchange – is needed for a party to obtain judicial assistance enforcing the settlement agreement, since the mediation is confidential. The Court criticized both the trial court and parties for freely discussing mediation communications in the litigation, sealed portions of the record containing confidential mediation information, and ordered any trial judges who had reviewed confidential information to recuse themselves from further proceedings.

[Reese v. Tingey Construction](#), No. 200060594 (Utah, February 1, 2008)

New York Court Permits Post-Mediation Evidence of Settlement Agreement from Mediator

In litigation over an alleged written settlement agreement, a New York court in [Arben Corp. v. N.Y.S. Thruway Authority](#) upheld the confidentiality of mediation and settlement discussions relating to the underlying dispute, but permitted post-mediation evidence from the mediator (who had become a paid consultant to the claimant, apparently to help enforce the purported settlement agreement) about whether or not a settlement agreement had been finalized and then breached. The court based its decision on a written agreement to mediate between the parties and on New York law (CPLR § 4547) which codifies the common law "settlement privilege." The court concluded that negotiations concerning the underlying dispute between the parties were protected, but that CPLR §

Mediation Quote:

"To begin with, everyone in conflict has a different perception of what happened, who caused it, and why. Each side tells stories that are accurate and honest – for themselves, as requests for communication, empathy, and authenticity. Both sides also tell stories that are inaccurate and dishonest – for each other, as literal facts, and as requests for surrender or acceptance of blame.

"In other words, everyone in conflict views the world from the inside out, and finds empathy and honesty difficult with those they detest or by whom they feel detested. Their willingness to accept responsibility is distorted by their need for sympathy and support, or their desire to make themselves appear right by making others appear wrong."

- Kenneth Cloke, *Mediating Dangerously: The Frontiers of Conflict Resolution* (Jossey-Bass 2001) at 28

Other Cases & Resolutions:

Months of Mediation Break Deadlock over Replacing Evergreen Point Bridge, [Seattle Post-Intelligencer](#) (February 21, 2008) (Subscription Required)

Mediation Between Plaintiffs Resolves Split of \$5 Million Insurance Policy, [Virginia Lawyers Weekly](#) (January 28, 2008) (Subscription Required)

Mediation Resolved 20% of Court Cases Under \$25,000 in Edmonton, [The Edmonton Journal](#) (Alberta, Canada) (February 11, 2008)

Mayor Appeals, Seeking Cover of Mediation Confidentiality Provisions, [Detroit Free Press](#) (February 16, 2008), [Detroit Free Press](#) (February 19, 2008)

4547 does not block efforts to prove the existence of a settlement agreement. The court explained that the policy goals of encouraging settlements requires the ability to prove when a settlement agreement has been reached.

[Arben Corp. v. N.Y.S. Thruway Authority](#), No. 2008-036-308 (NY Ct. Cl., February 26, 2008)

IRS and State Agency Successfully Mediate Tax-Exempt Status of Bonds

Using an Internal Revenue Service mediation program, the Rockdale County, Georgia Development Authority reached a settlement with the IRS in order to maintain the tax-exempt status of \$77 million of solid-waste disposal revenue bonds. Under the rarely-used IRS tax-exempt bond mediation program, an IRS employee with no previous involvement in the case acts as mediator, and a private co-mediator may be included at the option of the parties, as was done in this matter. The IRS mediation program was begun in 2003 and renewed last year.

[The Bond Buyer and SourceMedia, Inc.](#), (Georgia) (February 15, 2008) (Subscription Required)

Sears Class-Action Settlement Approved after Two Years of Mediation

A state judge approved the settlement of class-action litigation against Sears after two years of mediation and negotiation, based on Sears' agreement to anchor over 3.9 million stoves, which have become so light that they sometimes tip and injure or kill users. Plaintiffs' counsel will receive \$17 million in fees, but the parties did not agree on the overall cost of the settlement, which plaintiffs' expert estimates as exceeding \$500 million, but Sears believes will be a small fraction of that figure.

[St. Louis Today](#) (February 20, 2008)

Extensive Negotiations Shape Mediation Agenda

Many hours of mediation among some 35 parties succeeded in eliminating certain issues and establishing the scope of future substantive discussions over the Big Tupper Ski Project in the Adirondacks. The parties memorialized their agreement to participate in a voluntary and open-ended process with a written memorandum, and agreed on a date in March to begin the substantive mediation.

[Pressrepublican.com](#) (January 26, 2008); [The Adirondack Daily](#) (January 28, 2008)

NEWS & INITIATIVES:

EEOC Continues to Focus on Mediation of Discrimination Charges

The Equal Employment Opportunity Commission reported a 9 percent increase in job bias charges last year, for a total of nearly 83,000 private sector filings in 2007. In addition to non-monetary relief, the EEOC recovered over \$290 million for charging parties through administrative enforcement and mediation, compared with \$55 million through EEOC litigation. Employers continue to enter into Universal Agreements to Mediate with the EEOC, with the total rising by 15 percent during 2007, to over 1,200. The EEOC's National Mediation Program has a user satisfaction rate of 96 percent, meaning that nearly everyone using the program would do so again.

[Federal Information & News Dispatch, Inc.](#), (March 5, 2008) (Subscription Required)

Mediation Requirement Streamlined for

Nevada Public Utilities Commission Staff Seek Mediation of Sprint's Complaint Against AT&T, TR's State NewsWire (January 22, 2008) (Subscription Required)

Mediation Begun after a Decade of Opposition over Plans to Widen Road, ABC Macon.tv (Georgia) (February 29, 2008)

Seattle SuperSonics Seek Court-Ordered Mediation with Precondition on Outcome, MSNBC (January 17, 2008)

Federal Judge Sends Oracle Claims of Software Theft by SAP to Mediation, Barrons.com (February 14, 2008); [Washingtonpost.com](#) (February 14, 2008)

Litigation on Hold for Mediation of Tainted Pet Food Case, Press of Atlantic City (February 16, 2008)

Seven-Figure Unpaid Wage Case against Target Ordered to Mediation, MySanAntonio.com, Texas (February 15, 2008)

Court Requires Mediation over Ad Valorem Tax Assessments, Clarke County Democrat (Alabama) (Subscription Required)

Mediation Likely in Lawsuit against Jurisdictions for Tax Incentives Not Received, Independent Tribune (North Carolina) (February 26, 2008)

Derivative Litigation over Stock Option Grants Headed to Mediation, St. Louis Business Journal (February 22, 2008) (Subscription Required)

"Listening Session" to Determine Issues for Mediation, The Times Record (January 23, 2008)

Nine Month Mediation in Class Action against Oil Companies over Petroleum Vapors Ends without Settlement; Discovery Resumes, Madison County Record (Illinois) (February 27, 2008)

Litigation Continues after Mediation Unsuccessful over Sign Exception Permits in San Clemente, San Clemente Times (February 21, 2008)

Party Delaying Mediation Until Success Unlikely Might Be Punished by Adverse Cost Order per U.K.'s Technology and Construction Court in Nigel Witham Ltd v. Smith, Mondaq (January 18, 2008) (Subscription Required)

Other News &

Florida Homeowners Associations

Statutory changes in Florida have streamlined the mediation process required prior to litigation of certain disputes between homeowners and members. The aggrieved party now can contact the other party directly with a written offer to mediate as set forth in the statute and propose a choice of five certified mediators. Seeking mediation in this way tolls the statute of limitations. If the dispute goes on to litigation or arbitration, attorneys' fees incurred in the mediation may be recovered by the prevailing party. But those who do not participate in the entire mediation process may not recover any attorneys' fees or costs.

[The News-Press](#) (February 28, 2008); [Fla. Stat. § 720.311](#)

Idaho Introduces Mediation Confidentiality Legislation

Idaho recently introduced legislation to enact the Uniform Mediation Act (UMA) in order to establish confidentiality for mediation communications, with specified exceptions. Such legislation is intended to encourage greater use of non-judicial mediation by providing confidentiality protections that are uniform with the recent rules adopted by the Idaho Supreme Court for court-annexed mediation. The Idaho legislation also incorporates the United Nations Model Law on International Commercial Conciliation, which is a supplement to the UMA for international commercial mediations, unless the parties agree otherwise.

[Idaho S.B. 1261](#)

Kentucky Legislation Would Require Med Mal Mediation and Shield Apologies

Mandatory mediation of all lawsuits involving professional negligence claims against health care providers (defined broadly) would be required by H.B. 8, which was introduced in Kentucky on January 23, 2008. The Kentucky legislation sets forth procedures for the mandatory mediation, including timing, selection of mediators, attendance, location and submission of materials. The mediator is required to submit a report to the applicable court on the outcome of the mediation. In addition, H.B. 8 would prevent apologies for any unanticipated outcomes due to medical treatment from being admitted in any litigation or arbitration as an admission of liability or other admission against interest; however statements of fault which go beyond apology would remain admissible.

[Kentucky H.B. 8](#)

Alabama Again Introduces Mediation Confidentiality Legislation

Legislation has been introduced again this year in Alabama to add additional confidentiality protections to mediation, by providing that mediators in all mediations generally would not be required to testify or produce documents concerning mediation in any adversarial proceeding. Adding this testimonial immunity is intended to increase public confidence in mediation.

[Alabama S.B. 36](#); [Alabama H.B. 30](#)

South Carolina Probate Courts Try Mandatory Mediation

A pilot program to evaluate mandatory mediation in South Carolina probate courts has been joined by 35 of South Carolina's 46 counties. A report on the success and cost effectiveness of the mediation program will be submitted to the South Carolina Supreme Court next January. A probate judge in a county which hasn't yet joined the program is leaning toward participation, due to the benefit of families being able privately to work out solutions to their concerns with the help of a neutral mediator, but is concerned about delays and costs that might result from adding a mediation step to the process (even though those are often the very attributes of mediation that generate enthusiasm).

[South Carolina Now](#) (February 23, 2008)

Initiatives:

U.N. Establishes Standby Team of Mediation Experts to Assist in Hot Spots, [ReliefWeb](#) (March 5, 2008)

Analysis of U.K. Mediation Data Suggests Cases in Mediation Becoming More Difficult as Negotiators Learn from Mediation, [Lawyer](#) (January 21, 2008) (Subscription Required)

Med Mal Rule Approved Requiring Mediation in Third Circuit of Illinois; Claims against Nursing Homes Covered, [Edwardsville Intelligencer](#) (March 7, 2008)

Many Health Care Providers Requiring Patients to Agree to Arbitration, Some Turn to Mediation, [Philadelphia Inquirer](#) (February 10, 2008) (Subscription Required)

County Prosecutor Candidates Clash over Appropriateness of Criminal Mediation, [Athens Messenger](#) (Ohio) (February 29, 2008)

Mediation Helps Parties in Major Insurance Disputes, [Legal Times](#) (March 3, 2008) (Subscription Required)

Mediation Offers Many Benefits in Resolving Elder-Care Disputes, [Wall Street Journal](#) (March 2, 2008)

Tiny Montana Mediation Agency Not Self-Sustaining, Being Shut Down, [KPAX-TV](#) (February 17, 2008)

Two-Thirds of U.S. Bankruptcy Courts Now Use Mediation

A full two-thirds of federal bankruptcy courts now have mediation programs in place and encourage use by the parties. The details of the court mediation programs differ, but most depend on voluntary participation by parties, even though the courts generally have authority to mandate mediation if necessary. Some bankruptcy courts have been offering mediation since the 1980s and the number of courts with programs continues to increase. The level of success has generally been high, with mediation of over 3,700 matters from one court since the program began in 1995, for example, and a settlement rate of 64 percent.

[CommunityDispatch.com](#) (February 28, 2008)

Federal Circuit Mediation Program Impresses

The U.S. Court of Appeals for the Federal Circuit was the last federal appellate court to begin a mediation program, but in just two years is showing results in line with other circuit programs, despite the complexity of its specialized docket, which includes patent appeals. Last year the Federal Circuit's mediation program resolved 42% of the cases mediated.

[The National Law Journal](#) (February 11, 2008) (Subscription Required)

Co-Mediation by Doctors and Lawyers Begun for Med Mal Mediations

A pilot project to pair up doctors and lawyers as co-mediators in an effort to resolve medical malpractice claims has begun at a Philadelphia suburban hospital. The productivity and healing potential of mediation is being emphasized over the possible monetary savings, as the program tries to reach better outcomes for the parties. Mediation training has begun for 30 doctors and lawyers to become mediators, which was eye-opening for many doctors who realized for the first time how hard it can be to deal productively with strong emotion and find common ground. Many of the lawyers had previous experience with mediation and are expected to take the lead initially in mediations.

[Philadelphia Inquirer](#) (March 4, 2008)

Businesses Encouraged to Use Dispute Resolution Clauses

Companies are encouraged to include mediation or arbitration clauses in agreements covering their business dealings, including employment contracts, in order to avoid litigation. The widespread use of alternative dispute resolution clauses in most consumer contracts for health plans, car leases and insurance demonstrates that all businesses need to make sure their forms are updated with appropriate protections.

[Business Times](#) (January 11, 2008)

Hotel Association Urges Mediation Rather than Arbitration in Franchise Agreements

In its updated standards for fair franchising, the Asian American Hotel Owners Association includes dispute resolution provisions which focus on mediation if informal direct negotiations are unsuccessful. The standards avoid binding arbitration unless mediation has not been successful and there is express agreement on the details of the arbitration process, including the identity of the arbitrator and location of the arbitration.

[Hotelinteractive.com](#) (January 14, 2008)

U.K. Funding Increases for Workplace Dispute Resolution

U.K.'s publicly-funded Acas (Advisory, Conciliation and Arbitration Service) is to received an additional £37 million over the next three years to help it offer more mediation for early intervention in workplace disputes. Demand is expected to rise when statutory dispute resolutions procedures end.

[PersonnelToday.com](#) (February 11, 2008); [PersonnelToday.com](#) (February 6, 2008); [Acas](#)

More Mediation Proposed to Enhance Scotland as World-Class Venue

In response to a call for comments on the consultation paper from the Scottish Civil Courts Review group, additional mediation has been suggested as a way to make Scotland into a world-class venue for resolving disputes. Public comments on the wide-reaching analysis are being accepted through March 31.

[The Scotsman](#) (February 11, 2008); [Scottish Civil Courts Review](#)

Mediation Central to Civil Justice Reforms in Victoria, Australia

Australia's longest-serving attorney general is urging that mediation "take center stage" in the reforms of Victoria's legal system which are under way. The Victorian Law Reform Commission proposed introducing pre-action protocols, which may include mandatory mediation, in recommendations presented to the attorney general.

[The Australian](#) (March 7, 2008)

Hong Kong Chief Justice Supports Mediation

Chief Justice Andrew Li promotes mediation as a complement to litigation, noting that Hong Kong has made steady progress in mediation, but has a long way to go to reach the maturity of mediation in common law jurisdictions. The Chief Justice also believes that legal aid should be extended to parties in mediation, since it is an effective alternative to litigation.

[World News Connection](#) (January 14, 2008) (Subscription Required)

Other International Mediation Developments

- Mediation training workshops for judges and lawyers conducted at six sites around **Bangladesh**, [Independent-Bangladesh](#) (February 15, 2008)
- Online dispute resolution emerging in **India**, [Hindu](#) (February 23, 2008)
- Mediation center in Bangalore, **India** in first year resolves over half its 2,000 mediations; mediation demonstration held for judges, lawyers and public, [Daijiworld.com](#) (February 9, 2008); [Hindu](#) (February 9, 2008) (Subscription Required)
- High Court of the state of Karnataka, **India** will require all courts in the state to begin mediation centers, [Mangalorean.com](#) (February 9, 2008); [Hindu](#) (February 9, 2008) (Subscription Required)

- **India** plans to authorize over 6,000 rural mobile courts to engage in mediation, [Hindu](#) (February 1, 2008)
- **India** and **China** each send two teams to the 3rd ICC International Commercial Mediation Competition, [Indlaw.com](#) (February 15, 2008)
- Judicial personnel mediate first in **China's** People's Court, resolving 56% of civil cases by mediation, [China Daily](#) (February 29, 2008) (Subscription Required)
- **Nepal** upbeat about mediation after first year, with 16% of Kathmandu District Court's total docket settled, [Kantipur.com](#) (February 7, 2008)
- Response and recommendations for mediation process in **Kenya**, [AllAfrica.com](#) (February 8, 2008)
- Africa Centre for Dispute Settlement launched in **South Africa** for business and other disputes, with a focus on African heritage and values, [Business Day](#) (February 28, 2008)
- Mediation ending in public apology saves public official in **Australia** from criminal assault trial, [News.com.au](#) (February 15, 2008)
- Mediation increases by 10 percent over previous year in Queensland, **Australia**, and includes criminal cases, [Cairns Post](#) (February 8, 2008) (Subscription Required)
- **Fiji** Labour Ministry officials take exam seeking accreditation as government mediators, [Fiji Times](#) (February 8, 2008) (Subscription Required)
- Sixth mediation center opened in **Trinidad and Tobago**, [Trinidad & Tobago Express](#) (February 16, 2008)
- Eastern Caribbean Supreme Court Mediation Center established in **Nevis**, [Sun St. Kitts/Nevis](#) (January 23, 2008)

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