

# MEDIATION NEWS

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## CASES & RESOLUTIONS:

### California Court Shields Mediation from Scrutiny with Absolute Quasi-Judicial Immunity

A California appellate court concluded that a mediator was shielded by absolute quasi-judicial immunity regardless of whether he was mediating or arbitrating in [Phillips v. JAMS](#) (Cal. App. 2d Dist.). The mediator had agreed in a previous mediation settlement to make a binding decision for the parties if future disputes arose. The mediator tried to mediate a subsequent dispute, in the midst of which he felt he was being abused by aggressive counsel and announced he could no longer be impartial and was not going to make a binding decision, even if the parties could not reach a mediated resolution. Litigation followed, but the appellate court affirmed summary judgment dismissing claims against the mediator and his sponsoring organization, concluding that litigation is not allowable against those providing dispute resolution services which are connected to the judicial process. The court held that “[a]ll functions integral to the dispute resolution process are shielded by absolute immunity.”

[Phillips v. JAMS](#) (Cal. App. 2d Dist. January 28, 2010)

### New York Court Sanctions Party for Rigidity in Mediation

A bankruptcy court in New York imposed penalties for mediating in bad faith on a party the court found to be rigid and obstructionist during court-ordered mediation. The court recognized that of course parties cannot be forced to settle and may take a “no pay” position. But mere attendance without active participation is not sufficient for good faith. Sending representatives who would not consider the risks involved and who could only repeat a mantra that they would pay nothing renders mediation futile and forms the basis for penalties for obstruction of the mediation. Party representatives must have full authority to settle; having to telephone for additional authority is not sufficient. The offending party did ultimately make a settlement offer, but only after the threat of sanctions, and the offer was considered to be insincere by the mediator and other party. Under the mediation rules of the court, mediators are required to report incidents of bad faith mediation, and are permitted to provide information under the court’s confidentiality provisions.

[In re A. T. Reynolds & Sons, Inc.](#), No. 08-37739 (U.S. Bankr. S.D.N.Y. February 5,

## Mediation Quote:

“Mediation, informal problem-solving, group facilitation, collaborative negotiation, public dialogue, prejudice reduction, and other conflict resolution techniques have amply demonstrated, in countless conflicts over the last three decades, that there is a better outcome than winning and losing, a more successful process than accusation and blaming, and a deeper relationship than exercising power over and against others.”

Kenneth Cloke, *Conflict Revolution: Mediating Evil, War, Injustice And Terrorism* (Janis Publications 2008) at 3

## Check These Out:

### **Litigation-Focused Counsel May Undermine Mediation**

Both the success rate and the satisfaction level of parties in mediation may be declining due to the efforts of counsel to exert more control over the mediation process. Counsel are tending to move away from joint

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## **Federal Judge Orders Early Mediation in Airliner Crash**

The federal judge managing the roughly three dozen lawsuits filed after the February 2009 crash of Continental Connection Flight 3407 has ordered mediation to begin by mid-June and assigned the cases to four local mediators. Both sides say they welcome mediation but wonder whether it is being ordered too soon, as depositions are not expected to begin until summer. Plaintiffs' lawyers strongly assert that this is a punitive damages case, which impacts resolution. However, the lead plaintiffs' attorney notes that he tried the last major aviation liability case, which was the 1992 trial of the Lockerbie crash, and that every case since then has settled.

[Buffalo News.com](#) (January 7, 2010)

## **Mediation Agreement Aims to Calm Racial Tensions in City**

Two years after a gunman killed the mayor, other city officials and police officers during a council meeting in suburban St. Louis, the U.S. Justice Department mediated an agreement that is intended to improve relations between the black and white communities and begin to heal racial divisions. The agreement, which contains tangible programs and steps by the city, is seen as hopeful progress by many, while others are concerned by the city's failure to fully admit that a racial problem exists. A follow up meeting has been scheduled to try to further reduce tensions.

[STL Today.com](#) (January 22, 2010); [Fox 2 Now.com](#) (February 9, 2010)

## **Other Notable Cases and Proceedings**

- Court-ordered mediation between the telephone company FairPoint Communications and the Maine Public Utilities Commission was delayed by the inability of the Maine PUC staffer to bind the agency despite the court's requirement that representatives must have complete authority. The agency is seeking to modify the court order to permit a public hearing before any tentative settlement is voted on by the PUC commissioners. [WSJ.com](#) (January 22, 2010)
- Although Ohio's federal court-conducted mediation program is voluntary, the court requires each participating party to have a representative attend in person who has authority to agree to the last offer or demand made. [Jack v. Allied Systems](#), Case No. 3:05-cv-125 (U.S. S.D. Ohio January 7, 2010)
- A federal magistrate imposed \$6,000 in costs and expenses on companies which failed to send representatives with adequate settlement authority to mediation in a dispute over 55 trees that a pipeline company cut down to keep roots from impacting the underground pipe. The companies have backed out of mediation and intend to litigate the \$300,000 claims against them by the city and local school district. [PDDnet.com](#) (January 12, 2010); [Helenair.com](#) (January 13, 2010)
- Even though counsel moved to withdraw prior to mediation, counsel was

sessions, preventing principals from engaging with each other, and are focusing only on legal issues and the bottom line, to the exclusion of other interests the parties may have. Counsel may also try to game the mediation, which can harm the process for all participants.

[Daily Journal.com](#)

(January 15, 2010)

## **Juvenile Offender Mediation Program Expanding as Success Shown**

A mediation program which brings juvenile offenders face to face with their victims has been highly successful in Bridgeport, Connecticut and has expanded to the courts in Stamford, Danbury, Waterbury and Norwalk. The program reduces recidivism by more than half by having juveniles dialogue with and try to explain themselves to the people affected by their crimes, generally resulting in offenders accepting responsibility.

Agreement is reached in about 95% of the mediations, with victims empowered by being able to speak to the young people, as well as having significant input into reparations and remedies, which may include apologies and community service. [Newstimes.com](#) (January 24, 2010)

**Peace Mediator Being Featured in Major Hollywood Movie**  
Canadian mediator and former peace director of the Carter Center, Ben Hoffman, has inspired a

jointly liable with the client who failed to appear at mediation for the time of both the mediator and opposing counsel. [George W. Park Seed Co. v. DHL Express](#), Civil Action No. 8:08-1993-WMC (U.S. D.S.C. January 5, 2010)

- Mediation was improperly ordered by court where the statutory requirement mandates a hearing within a short time period on the merits of a personal protection order. Moreover, court-imposed mediation may not be appropriate when domestic violence or stalking is alleged. [Baker v Holloway](#), No. 08-007173-PH (Mich. App. January 26, 2010)
- Appeal dismissed due to parties' failure to engage in appellate mediation. [Alba v. Passage Realty, Inc.](#), No. 14-09-00304-CV (Tex. App. January 7, 2010)
- Mediator sued party for cancellation fee for not proceeding with mediation, but appellate court affirmed summary judgment dismissing case because party had not agreed to cancellation term which was unilaterally sent out by mediator after parties agreed to mediate. [Levin Law Group v. Sigmon](#), No. 14-08-01165-CV (Tx. App. January 21, 2010)
- Mediation settlements are especially unsuited for rescission based on unilateral mistake. [Rachid v. Perez](#), No. 08-1210 (Fla. App. January 20, 2010)
- After 17 years of litigation, six months of mediation resulted in a tentative agreement by the state of Utah to pay \$33 million to a class of 8,000 Navajos for mismanagement of an oil royalty trust fund created in 1933. [Deseret News.com](#) (January 6, 2010)
- Failure to specify the width of road paving in mediation settlement leads to breakdown and litigation over "normal city standards." [James v. City of Russellville](#), No. 2080881 (Ala. App. January 8, 2010)
- New York town objects to mediators selected to resolve environmental claims against General Motors bankruptcy estate due to their lack of subject matter expertise in light of the complexities of environmental science. [WSJ.com](#) (February 8, 2010)
- Los Angeles City councilwoman planned to mediate dispute between the Port of Los Angeles and company seeking to open \$50 million shipyard, but recused herself after revelations of campaign contributions from company. [Daily Breeze.com](#) (February 10, 2010)
- Four years after talks to settle lawsuit for \$2 million broke down, Tuomey Healthcare System and the federal government have agreed to mediate. Tuomey alone has spent over \$4 million on legal fees in the case. [The Item.com](#) (January 6, 2010)

## NEWS & INITIATIVES:

### **Payment of Settlement Funds to Charities Gaining in Both Popularity and Scrutiny**

Settlements in class action lawsuits are requiring payments to charities at triple the rate in the past, according to a recent study, which is raising concerns when the charities are unrelated to the litigation or have some connection to the defendants

character in the upcoming movie *Girl Soldier*, starring Uma Thurman. Hoffman is also publishing a book, *Peace Guerilla*, about his mediation efforts with African guerilla leaders and his work with President Carter. [Marketwire.com](#) (January 13, 2010)

## Other Cases & Resolutions:

**City council in Florida considering settlement reached in mediation with strip club owner who filed federal lawsuit against restrictions on nude dancers claiming First amendment right of erotic expression,** [NWF Daily News](#) (February 13, 2010)

**Transgender social club and Italian restaurant in Massachusetts to mediate discrimination claims over denial of service,** [Salem News.com](#) (February 23, 2010)

**Mediation yields million dollar settlement and apology to man falsely accused and imprisoned for twin's murder,** [NBC4i.com](#) (March 5, 2010)  
**Litigation against host over brain injuries from teenage wrestling on kitchen floor settled in mediation for \$300,000,** [Pennsylvania Law Weekly](#) (January 18,

or the judge approving the settlement. Judicial review is pending of a proposed \$9.5 million settlement by Facebook of litigation over sharing personal information. Objections have been raised in the Facebook hearing to the entire settlement amount funding a foundation to promote privacy rights apart from the 30% going to plaintiffs' counsel. In part, concerns are related to Facebook having a role in creating the foundation's bylaws and input on a board member. However, the trend of settlements going to charity may continue as legislation was introduced in Ohio earlier this year encouraging judges to use these types of arrangements.

[WSJ.com](#) (March 2, 2010)

## **Federal Office Mediates Disputes Between FOIA Requesters and Federal Agencies**

Freedom of Information Act disputes are now being mediated by the Office of Government Information Services (OGIS), which was created within the National Archives and Records Administration and officially began work in September 2009. In its first months, OGIS has begun work on about 40 disputes. OGIS, which will have a staff of six, is working with a contractor to add online dispute resolution and is seeking to provide more transparency into matters it is mediating. In addition to directly resolving disputes, OGIS is tasked with providing suggestions for FOIA improvements. OGIS also plans to provide mediation training to FOIA officers in federal agencies to reduce the number of disputes that arise from the roughly 600,000 FOIA requests made each year.

[Federal Computer Week](#) (January 14, 2010); [OGIS Website](#)

## **Concerns Raised over Determining "Bad Faith" in Texas Balance Billing Mediations**

Mediators are concerned over provisions in new Texas legislation which would require them to report parties who act in "bad faith" in mediations involving balance billing. The new legislation allows insured patients to mediate whenever they would have to pay over \$1,000 for services of out-of-network doctors received at in-network hospitals. In an effort to compel serious mediation efforts, the law includes a requirement for reporting bad faith conduct, without providing standards. The Texas Department of Insurance is drafting rules to implement the statute, which is to take effect in September 2010. Mediators hope to get the bad faith reporting requirement adjusted in the regulations in order to maintain neutrality.

[Dallas Morning News](#) (January 26, 2010)

## **Mediation Available for Online Gaming Disputes**

An inspection and certification agency for online gaming operators, eCOGRA, certifies that online casinos are safe and fair sites, in part by mediating disputes and ensuring that players' issues are adequately addressed by the online casinos. The agency received over 800 mediation requests in 2009, and reported that valid mediation requests were up 14% over 2008.

[Casino Advisor](#) (January 15, 2010)

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**Mayweather-Pacquiao fight canceled after mediation did not resolve dispute over drug testing requirements; federal litigation filed by Pacquiao; mediator seeks to clarify record,** [Mlive.com](#) (January 7, 2010); [LA Times.com](#) (January 7, 2010)

**Football coach Mike Leach and Texas Tech are mediating dispute resulting from the university firing coach,** [Dallas new.com](#) (February 2, 2010)

**Bickering owners of teams in the new North American Soccer League and the USL compromised to save the 2010 season, with the U.S. Soccer Federation acting as mediator,** [Democrat and Chronicle.com](#) (January 8, 2010)

**Parties encouraged by mediation between San Diego Gas & Electric Co. and critics of its plan to cut off power to avoid wildfires during extreme conditions,** [SignOn San Diego](#) (February 13, 2010)

**Six Flags unsecured creditors ask federal bankruptcy judge to order mediation over reorganization plan to avoid two-week trial,** [Reuters](#) (February 17, 2010)

**Dallas judge orders school district and**

## **Hong Kong's Practice Directive on Mediation Takes Effect**

Hong Kong's Practice Directive 31 (PD31) on mediation went into effect on January 1, as scheduled in the Civil Justice Reform adopted in early 2009. PD31 requires counsel to explain mediation to parties and file with the court in each litigation a statement that the party is willing to mediate or why it is not. Further, PD31 sets up a process by which either party can propose mediation and receive a response from the other party within fourteen days. If mediation is unreasonably refused, the court potentially can impose litigation costs on the unreasonable party.

[Clifford Chance](#) (January 7, 2010)

## **Other International Mediation Developments**

- Association of Arrears Mediators founded in the **U.K.** by five leading mortgage and loan arrears mediation companies. [My Introducer.com](#) (January 21, 2010)
- **Armenia's** Financial System Mediator reports success in its first year of mediating between financial organizations and customers. [Armenia Now](#) (January 25, 2010)
- **South Africa's** Commission for Conciliation Mediation and Arbitration (CCMA) caseload is increasing steadily to over 140,000 cases in fiscal year 2008-09. [Busrep.co.za](#) (February 8, 2010)
- **India's** Bangalore Mediation Centre has a settlement rate in excess of 60% and plans to expand its mediation model of using experienced lawyers rather than judges as mediators. [Express Buzz.com](#) (January 25, 2010); [Hindu](#) (January 28, 2010) (Subscription Required)
- **China** has resolved hundreds of cross-Straits lawsuits involving Taiwan businesses and residents since opening the first court for such cases in March 2009, with 80% of cases settled through mediation. [CRI English.com](#) (February 13, 2010)
- Significant movement toward mediation in **New Zealand** seen in both civil and criminal justice systems, such as dispute resolution provisions in the Financial Service Providers Act which take effect later this year. [Scoop](#) (January 14, 2010)
- World Bank's IFC helps establish mediation in the **Solomon Islands** through workshop for court and consulting with other groups. [Finchannel.com](#) (January 23, 2010)

## **Update on Home Foreclosure Mediation**

- Members of Congress from Ohio, California and Florida in February introduced the Foreclosure Mandatory Mediation Act, [H.R. 4635](#), as companion legislation to [S. 2912](#). The **federal** legislation would require mandatory mediation by lenders of loans with federal guarantees or federal insurance. The required one-time mediation would involve both the mortgagor and a housing counseling agency and would be paid for by the lender. [Federal Information & News Dispatch](#) (March 3, 2010) (Subscription Required)

**conservation league to mediate over proposed demolition of historic church building, despite school district's assertion that there is nothing to mediate,** [Dallas News.com](#) (February 5, 2010)

**University of Hawaii resolves labor dispute with University of Hawaii Professional Assembly in mediation,** [Hawaii.edu](#) (January 16, 2010)

**New York State Agricultural Mediation Program offers support to farmers facing wide variety of disputes,** [TCextra.com](#) (February 11, 2010)

**EPA hires local mediator to conduct situation assessment and find common ground for resolving Yakima Valley's ground water contamination problem,** [Tri-City Herald.com](#) (February 7, 2010)

**Two Oregon counties have agreed to mediate ongoing dispute over sewer rates and payments, and will resort to binding arbitration if mediation is not fully successful,** [Oregon Live](#) (February 19, 2010)

**Georgia cities and county turn to mediation to determine service areas for water and sewer service,** [Savannah Now.com](#) (January 16, 2010); [Savannah Now.com](#)

- While the **Florida** Supreme Court ordered each of the 20 circuit courts in the state to establish its own foreclosure mediation process, only three circuits have complied with the order to date. Florida was hit with an additional 296,000 foreclosure filings in the last quarter of 2009, pushing the number of pending foreclosures to 456,000. [Jacksonville.com](#) (February 13, 2010)
- **Nevada** judges have stated publicly that they will not impose loan modifications even if lenders do not negotiate in good faith in mediations. [RGJ.com](#) (January 24, 2010)
- **New Hampshire** has begun a Foreclosure Mediation Program which is voluntary for homeowners and free to both borrowers and lenders. The program is being funded by grants from several sources. [Nashua Telegraph](#) (January 18, 2010); [Foreclosure Mediation Program](#)
- Lenders attempting to foreclose on primary residences on the Big Island of **Hawaii** must now notify borrowers of their right to mediation by serving a mediation notice along with other documents. [Star Bulletin](#) (January 21, 2010); [Judiciary Press Release](#) (January 20, 2010)
- Providence, **Rhode Island** has mandated a foreclosure mediation process, and the City Council is seeking to add a \$2,000 fine for banks or lenders who fail to attempt to renegotiate mortgages with homeowners before filing a deed of foreclosure. [Projo.com](#) (January 25, 2010)
- **Maryland's** governor is pushing for the emergency legislation he introduced to institute a mandatory foreclosure mediation program in the state, and would like lenders to support the plan. Lenders remain concerned about anything that would slow down the foreclosure process. Maryland looked to South Carolina's foreclosure prevention efforts, which require a showing that borrowers are not eligible for modification under the federal Home Affordable Modification Program prior to foreclosure. [Governor O'Malley Press Release](#) (February 16, 2010); [Daily Record](#) (January 18, 2010)
- Although the governor of **Minnesota** vetoed the Homeowner-Lender Mediation Act in 2009, it has been reintroduced this year and the Minnesota attorney general will again seek enactment. [Legal Newsline.com](#) (January 6, 2010)

(January 23, 2010)

**Watershed dispute involving Minnesota county, cities, township and local and state agencies moving into mediation, [Woodbury Bulletin.com](#)** (February 22, 2010)

**Florida developer pursues statutory right of mediation of land use dispute after plan for townhomes on 2 acres covered by tidal waters is widely rejected, [Palm Beach Daily News](#)** (February 20, 2010)

**Mediation expected to resolve dispute with hurling players in Limerick, [RTE Sport](#)** (January 21, 2010)

**Iceland contacts several governments about mediating issues related to \$5 billion owed Britain and the Netherlands due to banking crisis; Dutch foreign minister not sure whether mediation needed, [Moneycontrol.com](#)** (January 25, 2010); [UK Reuters](#) (January 28, 2010)

**Canadian Liberal leader backs efforts by Six Nations Confederacy to bring in mediator to help resolve land claim with Ottawa from the 1820s in which \$1 billion is demanded and \$26 million offered, [Spec.com](#)** (January 14, 2010)

**Third round of mediation talks scheduled in labor**

**dispute that totally halted beer production by Anheuser-Busch InBev in Belgium, [Reuters](#) (January 20, 2010)**

**Warring Australian factions of The Wilderness Society are meeting for two-day mediation in Melbourne to try to resolve escalating litigation, [SMH.com](#) (February 21, 2010)**

**New Zealand Human Rights Commission mediation begins over Sikh barred from club due to policy treating turbans as hats, [NZ Herald](#) (January 19, 2010)**

## **Other News & Initiatives:**

**Mediation by the Connecticut insurance department recovered over \$3 million in 2009 from insurance companies on behalf of consumers who complained to the state agency, [Courant.com](#) (January 28, 2010)**

**U.S. Department of Justice mediation program urged for resolving disputes over compliance by businesses with the Americans with Disabilities Act, [Post-Gazette](#) (January 13, 2010)**

**International mediation expert teaching native title**

**mediation course in  
Australia to provide a  
model for land  
dispute resolution  
that may help bring  
to conclusion the 550  
pending native title  
cases, which  
otherwise may take  
30 years, [UQ.edu](http://UQ.edu)  
(February 1, 2010)**

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