



MEDIATION NEWS

BROUGHT TO YOU BY

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MAY 2007

CASES & RESOLUTIONS:

Court Denies Mediation Demand for Failure to Provide Documents

A Florida trial court denied a party's motion to compel mediation where that party had refused to provide documents about the dispute which led to the litigation. The contract between the parties required them to share equally the profits of a construction project and contained a provision requiring mediation, but the court reasoned that refusing to provide any financial documents would make the mediation useless. Although the order denying mediation was not final, the moving party appealed and the appellate court dismissed it on that basis. Interestingly, the parties noted at oral argument that they had entered into mediation, notwithstanding the lengthy litigation over whether mediation should be compelled. [Coastal Systems Development, Inc. v. Bunnell Foundation, Inc.](#), Nos. 3D06-982, 1188 (Fla. App. 3rd Dist., April 4, 2007)

Inappropriate Mediation Conduct Lands Party in Jail

An obscenity-filled tirade at the beginning of a court-ordered mediation, along with other inappropriate actions, resulted in a Florida court jailing the creator of "Girls Gone Wild" for contempt. Threats to "bury" opposing counsel and clients were apparently sufficient to meet the exception to mediation confidentiality for threats of physical violence. [Settle It Now Negotiation Blog](#) (April 17, 2007)

Settlement Agreement Invalid When Attorney Not Authorized

A New York state trial court vacated a \$150,000 settlement agreement that plaintiff's attorney signed after participating in mediation without the plaintiff. Plaintiff asserted that the attorney did not have authority because (unbeknownst to defendant) plaintiff had filed for bankruptcy, so only the trustee had actual authority to settle the personal injury action. The court found representations of authority made by plaintiff's attorney to defendant's counsel and the judge-mediator insufficient, and concluded that settling with an attorney in the client's absence is at one's "own peril." [O'Connell v. Paris Maintenance Co.](#), 34556/2002 (NY Sup. Ct., April 13,

Mediation Quote:

"Ideally, we would resolve impasse by expending more effort in addressing the issues head-on, satisfying the parties' underlying interests, and finding the optimal solutions.... Often, however, the parties resort to less satisfactory, but sometimes successful, procedural methods, such as reality-testing tactics and negotiation gimmicks....[which] are an admission that the exploration of interests and the generation of settlement options have gone as far as they can go, and the only thing left is to compare the options on the table with the litigation BATNA [Best Alternative To a Negotiated Agreement] and make a choice."

- O. Russel Murray, *The Mediation Handbook: Effective Strategies for Litigators* (Bradford Publishing Co. 2006) at 117

Other Cases & Resolutions:

Allegations that Mediated Settlement Induced by Fraud and Duress Sufficient to Keep Litigation Alive, [Irvine v. University of California, G036259](#) (Cal. App. 4th Dist., April 16, 2007)

World Trade Center Developer and Insurers Mediating

2007)

Informal Email Sometimes Binds Parties to Settlement

Parties reached agreement in mediation and signed a handwritten term sheet that expressly stated the document was not enforceable and a formal written agreement was never signed after further negotiations broke down in [Delyanis v. Dyna-Empire, Inc.](#) Nonetheless, a U.S. district court in New York enforced the term sheet based on the fact that the parties had responded affirmatively by email that the mediator could report to the court that the case had settled. By contrast, in [DeVita v. Macy's East, Inc.](#), a New York state court refused to enforce the purported settlement in a comparable situation, relying on state law requiring agreements to be in writing and signed, and concluding that "confirmatory" emails were not a sufficient writing for settlement.

[Delyanis v. Dyna-Empire, Inc., 465 F.Supp.2d 170 \(E.D.N.Y. 2006\)](#) (Subscription Required); [DeVita v. Macy's East, Inc., 828 N.Y.S.2d 531 \(2d Dep't 2007\)](#) (Subscription Required); [New York Law Journal](#) (March 27, 2007) (Subscription Required)

Deposition of Mediator Improper Even When Mediated Agreement Unconscionable

A property settlement agreement reached by a divorcing couple in mediation was overturned by a New Jersey court due to unconscionability based on the corrected value of business assets. However, an order to depose the mediator and examine his file was held inappropriate on appeal due to the importance of mediation confidentiality, which was a specific provision of the mediation agreement and subsequently embodied in the state's Uniform Mediation Act.

[Addesa v. Addesa, A-4414-04T3 \(N.J. App., April 13, 2007\)](#) (Subscription Required)

Canadian Music Society to Mediate with Artistic Director

The Ottawa Chamber Music Society is preparing to mediate with its popular artistic director, Julian Armour, who recently resigned. The plan for mediation came out of a meeting of more than 300 concerned music lovers, and may include a longer-term role for the mediator to assist with other organizational issues.

[The Ottawa Citizen](#) (March 13, 2007)

NEWS & INITIATIVES:

U.S. Legislation Would Provide Mediation for Immigrant, U.S. Workers

Two pending pieces of federal legislation would offer U.S. and resident alien workers the option of mediation through the Federal Mediation and Conciliation Service (FMCS) in connection with certain job related disputes. The "Agricultural Job Opportunities, Benefits, and Security Act of

Amounts Due from Collapse of Towers, [Reuters](#) (March 12, 2007)

Judge Named to Mediate Jailed Journalist's Refusal to Surrender Unedited Video, [FogCityJournal.com](#) (March 8, 2007)

Mediator Helps Toledo, Ohio Board of Education Resolve Issues and Set Long-Term Goals in Open Meetings, [Toledoblade.com](#) (April 1, 2007)

Mediation of Tri-State Water Dispute Continues in Alabama, [The Atlanta Journal-Constitution](#) (March 30, 2007)

Oregon Ski Area and City Council to Mediate Expansion Plans, [OregonLive.com](#) (March 11, 2007)

City and County Water Providers to Use Mediation Services of Kansas Water Office, [KC Community News](#) (April 18, 2007)

Other News & Initiatives:

Washington State Legislation Would Require Mandatory Mediation of Medical Malpractice Claims, [Washington S.B.5910](#)

New Jersey Continues Pilot Program to Evaluate Presumptive Mediation in Municipal Courts; Supplemental Report on Status of Complementary Dispute Resolution, [188 N.J.L.J. 66](#) (April 9, 2007) (Subscription Required); [N.J. Supreme Court's 2004-2007 Report](#)

European Union Directive Proposing Mediation for Cross-Border Civil and Commercial

2007,” H.R.371/S.340, would establish “blue card” status, and also provide so-called H-2A workers with a private right of action, including the option to mediate, over issues relating to conditions of employment, provision of housing and transportation, and other specified rights. Appropriations of \$500,000 per year are contemplated for FMCS to conduct mediations without charge to the parties. The companion bills have been referred to the House and Senate Judiciary Committees. Second, the “Employee Free Choice Act of 2007,” H.Res. 800, would amend the National Labor Relations Act to provide voluntary mediation by FMCS to labor organizations and employers attempting to establish an initial collective bargaining agreement. On March 1, the House of Representatives passed H.Res. 800 and sent it to the Senate.

[H.R.371/S.340](#); [H.Res.800](#)

Hawaii Pursuing Eased Visa Restrictions for Foreign Mediators, Parties

Seeking to become a Pacific hub for dispute resolution, Hawaii is considering a declaration to urge the federal government to relax its visa restrictions on both foreign mediators and parties seeking to mediate. The declaration notes the great diversity among Hawaii’s residents and the shortage of skilled mediators who speak a foreign language, as well as the benefits of mediation in resolving disputes.

[Hawaii H.R. 246-07](#) (Subscription Required)

Mediation Useful in Intellectual Property Disputes

High litigation costs and huge damage exposures, as well as steady increases in case filings, make mediation an attractive alternative for resolving patent, trademark and other intellectual property disputes. Litigation costs can easily exceed a million dollars per case and may be much higher, with potential damages of hundreds of millions. Mediation allows creativity and flexibility in crafting solutions that meet parties’ business concerns, rather than ending up with judge or jury decisions that can be unfavorable to all participants, along with public exposure that can result in loss of goodwill and reduced value to trademarks. Selection of experienced mediators can increase parties’ confidence in the process, and early mediation can minimize the need for expensive experts and industry-specific consultants.

[The National Law Journal](#) (April 23, 2007) (Subscription Required); [Inside Indiana Business](#) (April 6, 2007)

Virginia Program to Mediate Fee Disputes Underutilized

The Virginia State Bar added a mediation option in 2004 to its program for resolving attorneys’ fee disputes out of court, but lawyers still tend to go to court. The Virginia Supreme Court encourages use of the mediation program and has written to remind judges and ask them to make lawyers aware of it. Those who have used the mediation program note the toll on relationships is often eased, and in some cases the client relationship even continues.

[Virginia Lawyers Weekly](#) (March 26, 2007) (Subscription Required)

Disputes Gains Backing, [US Federal News](#) (March 20, 2007)
(Subscription Required)

Upgrade Allows Mediation by Video Teleconferencing for Malaysian Court Cases, [The Star \(Malaysia\)](#) (April 19, 2007)

Nepal Sees Mediation as Best and Only Remedy for Large Court Backlog, [The Rising Nepal](#) (April 9, 2007)

Worth Noting:

New Conflict Resolution Education Website

A content rich website offering best practices in conflict resolution education is now available at www.creducation.org for educators, policymakers, practitioners and students. The website includes worldwide developments in dispute resolution education and training, curriculum modules, administrative policy examples, and access to current and pending legislation.

[Conflict Resolution Education Website](#)

Mediation Remains True Alternative to Litigation

While mediation and arbitration were accepted decades ago as alternatives to litigation, over the years arbitration has moved much closer to litigation in terms of formality and costs, in the eyes of many corporate counsel. Mediation continues to be a real alternative, not only in terms of reasonable costs, but with other advantages that have grown in importance over time, including party control, confidentiality, focus on real interests, and

Trend Away from Litigation Worries Some

With fewer cases going to trial in Maine (only 1.9% last year), and even state judges championing mediation, some attorneys and judges worry that parties may effectively lose their constitutional right to a jury trial and that the justice system will not generate sufficient precedents to guide future disputes. Mirroring the national trend toward “private justice,” Maine has been on a fast-track since 2002 when the state instituted mandatory alternative dispute resolution for almost all cases. While civil litigants must pay for private mediation or arbitration before being permitted to proceed to trial, Maine’s trial judges continue to face one of the heaviest caseloads in the country. Another concern of critics is that fewer lawyers are obtaining trial experience, which has resulted in proposals in Maine to streamline the trial process for claims under \$75,000 and to begin a mentoring program for new attorneys. However, Superior Court Judge Robert Crowley, who pushes for settlements, responds that lobotomists are also probably losing their skills, but that if more lobotomies are needed in the future the skills will return.

[Portland Press Herald](#) (March 11, 2007)

preservation of business relationships.

[The Connecticut Law Tribune](#)
(March 12, 2007)

Businesses Increasingly Seek Mediation in Canada

Business disputes in Canada are increasingly turning to mediation, and more mediators are available to resolve them, according to the ADR Institute of Canada and others. Both attorneys and business people are recognizing that mediation can provide better and more subtle solutions to complex business disputes than going to court, as well as saving time and money. Full blown litigation is seen more and more as costly brinkmanship. Ten years ago, Canadian Supreme Court Justice George Adams shocked colleagues by stepping down from the bench to begin a mediation practice, but he has seen lawyers become much more sophisticated in planning for and using mediation over the last decade.

[Financial Post](#) (March 18, 2007)

First Set of Barristers’ Chambers to Launch Mediation Practice

While many sets of chambers in England now have dedicated arbitration practices, Exchange Chambers, a top thirty set in London, is the first to develop a dedicated mediation group, with a third of its barristers becoming accredited mediators. The head of chambers stated the move is based on the dramatic increase in the number of cases being resolved in mediation.

[The Lawyer](#) (March 29, 2007)

Mediation Successes in Africa Lead to Search for Insights

Mediation has led to resolution of many intractable armed conflicts in Africa during the past two decades, despite regular news of ongoing violence. Most civil wars in Africa have ended with negotiated settlements achieved through mediation. Efforts to learn what has worked and improve future mediations are under way at a conference of over thirty senior individuals experienced in mediation in Africa. The “Mediators’ Retreat” is being held the week of April 23 in Zanzibar by the Mwalimu Nyerere

Foundation and the Geneva-based Centre for Humanitarian Dialogue, with support from the government of Norway. Seeking to strengthen Africa's mediation capacity, the conference plans to examine and provide insight into current mediations, ongoing conflicts and post-conflict situations in Africa.

[AllAfrica.com](#) (April 26, 2007) (Subscription Required); [Mwalimu Nyerere Foundation; Centre for Humanitarian Dialogue](#)

South African Business Institute Emphasizes Mediation

South Africa's Institute of Directors, which represents business leaders and professionals, is urging the business community to use mediation to resolve commercial disputes, suggesting that opting to mediate and avoid the delays and costs of litigation may fall under a director's duty to act in the best interests of the company. The importance of mediation to potentially preserve relationships was also emphasized. The Institute, which established a mediation center last year, believes South Africa will embrace mediation, in part to avoid the substantial backlog of cases in the courts.

[AllAfrica.com](#) (March 30, 2007)

Karachi Mediation Center Serves as Model

The Karachi Centre for Dispute Resolution (KCDR) is successfully resolving commercial disputes, which are increasing along with trade and business activity, according to Pakistan's former Chief Justice who is on the KCDR board. Established two years ago with help from the World Bank's International Finance Corporation (IFC), KCDR is now a non-governmental organization guided by both active and retired judges and business leaders. By reducing litigation expenses and delays, and freeing assets tied up in court, the Chief Justice notes that KCDR encourages market-based activity as intended by the IFC and serves as an example for the rest of Pakistan.

[Business Recorder](#) (April 14, 2007) (Subscription Required)

Bangkok Sets Up First Mediation Center

Bangkok's first mediation center has been established in Din Daeng District by the Ministry of Social Development and the Northern Pranakorn District Court. With over 100 officials on site, the center will mediate civil, criminal and family disputes. The Ministry intends to set up mediation centers in every city district.

[Thai Press Reports](#) (March 23, 2007) (Subscription Required)

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