



MEDIATION NEWS

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CASES & RESOLUTIONS:

Alabama Courts Must Order Mediation When Sought by Litigant

The Supreme Court of Alabama granted a petition for mandamus in [Eckles v. Fort Dearborn Life Ins. Co.](#), requiring a trial court to order mandatory mediation when sought by a litigant, pursuant to state statute and court rule. The lower court didn't think the circumstances were right for mediation, but the Supreme Court made clear that a court cannot exercise discretion if any party seeks mediation. Both the Alabama statute and court rule provide for mandatory mediation even if only one party asks for it, but require that party to pay for the costs of mediation.

[Eckles v. Fort Dearborn Life Ins. Co.](#), No. 1071545 (Ala., Oct. 10, 2008)

Lack of One Signature Prevents Admissibility of Multi-Party Settlement Agreement to Determine if Portions Are Severable

A California appellate court concluded in [Rael v. Davis](#) that the lack of a single signature on a mediated settlement agreement meant that there was no final agreement, so the document could not be admitted in court to consider whether any of the settlement provisions between other parties could be severed and stand alone. In Rael, a mediation arising out of conservatorship litigation involved distribution of property between a man's children and his new wife. The settlement reached in mediation omitted the signature of one child who missed the last mediation session, even though his individual counsel was present and signed the agreement. After the husband died, his wife sought to enforce the agreement concerning what she would receive, since she and her husband had both signed the agreement. However, the trial court examined the parties' intentions and expectations at the mediation session and afterwards and concluded that they intended no agreement unless everyone signed. The appellate court focused on the fact that the agreement expressly named the parties who must sign and one of them did not. If there was no agreement, under California's strict mediation confidentiality provisions the document was inadmissible for any purpose, including imposing attorneys' fees under the agreement against the wife even though she had sought to admit the agreement. The appellate court concluded that neither judicial

Mediation Quote:

"Everyone in conflict wears a mask that can only be observed from the outside. They respond to attack egocentrically and suffer from silent self-doubt, poor self-esteem, and denial. Their intentions are always honorable, yet at odds with the effects their actions have on others. Their feelings are too important to risk discussing openly, so they repress or externalize their emotions. "Everyone in conflict takes deliberate steps to protect themselves from the truth, because they know the consequences could compel them to leave the comfortable, albeit dysfunctional patterns they have created. They easily forget what it is like *not* to be in conflict, and adjust to living in environments that are rife with dissension."

- Kenneth Cloke, *Mediating Dangerously: The Frontiers of Conflict Resolution* (Jossey-Bass 2001) at 28-29.

Check This Out:

Analysis Finds Parties Generally Err in Rejecting Settlement to go to Trial

The complete article analyzing how parties often make poor decisions when passing up settlements prior to trial, which the press first reported in August, is now available online.

estoppel nor anything short of due process concerns could permit a judicial exception to mediation confidentiality.

[Rael v. Davis](#), 2008 WL 4335179 (Cal. App. 2d Dist., Sept. 24, 2008)

Public's Need to Know Wrongful Death Outcomes Trumps Mediation Confidentiality in Virginia

The Virginia Supreme Court concluded in [Perreault v. The Free Lance-Star](#) that the state statute requiring wrongful death settlements to receive court approval necessitates filing the settlement terms on the record, even when the settlements result from mediations for which confidentiality is also provided by state statute. The case involved a series of settlements relating to deaths after medication was administered during open heart surgery. The settling parties sought to keep the terms confidential and appealed the trial court's refusal to seal the record. The Court explained that the mediation confidentiality statute contains an exception when disclosure is required by law, and rejected various arguments that would have shielded the settlement amounts from disclosure. The Court also held that whether to seal the record is left to the discretion of the trial court, with a strong presumption of public access to judicial records.

[Perreault v. The Free Lance-Star](#), No 071978 (Va., Sept. 12, 2008)

Year-Long Mediation Effort Develops Better Bridge

Plans for a safer, stronger, quieter, environmentally-friendlier bridge are being developed by a 34-member mediation team. The group has spent the last year working through the myriad issues surrounding a \$3.9 billion replacement of the Evergreen Point Bridge at the direction of the Washington state legislature. Substantial disagreements have been overcome and options narrowed to three plans. The mediation team is due to provide a project impact analysis in October for the legislature.

[Seattle Post-Intelligencer](#) (September 18, 2008)

NEWS & INITIATIVES:

Hong Kong Encourages Mediation of Lehman-Related Disputes

The Hong Kong Monetary Authority appointed the Hong Kong International Arbitration Centre to provide mediation and arbitration services to address disputes between banks and investors in Lehman-related products. In certain circumstances, the Monetary Authority will pay a portion of the fee for the Centre's services. Hong Kong's Secretary for Justice is also encouraging mediation to help resolve disputes relating to Lehman minibonds.

[Randall L. Kiser, Martin A. Asher & Blakely B. McShane, *Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations*](#), 5 Journal of Empirical Research 551 (September 2008)

Worth Noting:

Con Artist Acting as Mediator Jailed

A disbarred lawyer acting as a divorce mediator improperly presented himself as an attorney and conned dozens of victims into paying him large amounts of money. He was able to sidestep enforcement efforts for some time by hiding behind the confidentiality provisions of mediation, but eventually was convicted on 24 counts of theft and fraud, having billed 25 victims for \$300,000. He would sometimes become romantically involved with the wives of divorcing parties, with one paying him \$87,000 for "mediation" services. In addition to imprisonment, the ex-lawyer will be required to provide restitution from his assets which have been seized.

[Arizona Republic](#) (October 10, 2008); [ADR Prof Blog](#) (October 13, 2008)

Other Cases & Resolutions:

AT&T, NuVox Willing to Mediate Missouri Public Service Complaint by Business Customer over Inadequate Facilities, [TR's State Newswire](#) (October 24, 2008) (Subscription Required)

Antitrust Suit Against Apple by Unauthorized Seller Sent to Mediation, [Internetnews.com](#) (October 17, 2008)

[The Standard](#) (October 31, 2008); [The Standard](#) (October 22, 2008)

Singapore Monetary Authority Prefers Mediation for Investors

The Finance Minister of Singapore stated that the Monetary Authority is encouraging mediation as a recourse for protesting investors. Banks in Singapore have established independent mediation panels to address concerns raised by customers.

[Channel News Asia](#) (October 15, 2008)

States Increase Use of Mediation for Home Foreclosures

- Connecticut has begun a foreclosure mediation program through legislation enacted on June 12 which is said to be the first of its kind in the U.S. The mediation program allows homeowners facing mortgage foreclosure on primary residences to request mediation at no charge to them. With a state appropriation of \$2.5 million, twelve staff mediators have been appointed for the state, along with seven case flow coordinators. The goal is to keep homeowners in their homes, often through refinancing or restructuring debt. While the program manager estimates that 4,000 homeowners are eligible for the new program, only about 40% have applied thus far. [Connecticut Post](#) (October 4, 2008)
- New Jersey Governor Corzine set forth a sweeping financial rescue plan before a rare joint session of the New Jersey legislature. The rescue plan requires mediation in contested foreclosures, which is to be implemented statewide within 60 days. [WCBS-TV New York](#) (October 16, 2008)
- The Ohio Supreme Court recommends that Ohio counties implement mediation programs, so Sandusky County has begun a foreclosure mediation program using the Court's model. To participate, homeowners in foreclosure must request mediation, agree to participate in a credit counseling session and allow an appraiser to determine their home's current value. Entering into mediation with a sense of what the homeowners can do financially and their property value, along with requiring banks to send a representative with decision-making authority, makes the mediation process more effective. [Fremont News Messenger](#) (October 1, 2008)
- Ohio's Stark County Common Pleas Court is encouraging homeowners in foreclosure to use its mediation program, which has been successful in keeping homeowners in their homes in about half of the mediations. The \$50,000 cost of the mediation program is funded by foreclosure case filing fees. The program is run by the Community Mediation Center. [Canton Repository](#) (September 7, 2008)
- Individual judges are ordering mediations in home foreclosure cases in Florida, as many homeowners have difficulty finding anyone with whom they can try to work things out at their lenders' offices. Judges in Florida's Eighteenth and Seventh Judicial Circuits are currently requiring mediations; the Fifth Circuit is considering implementing mediation requirements, while the Ninth Circuit is not. The various circuits are expected to share experiences about how best to handle increasing foreclosure

Candidates for Alabama Supreme Court Meet with Mediator in Effort to Avoid Escalation of Negativity, [Tuscaloosa News](#) (October 16, 2008)

Lawsuit Alleging Republicans Incited Violence Against Democratic Nominee Sent to Mediation, [Kansas City Star](#) (October 17, 2008)

Mediation Fails to Resolve Claims Against Democratic National Committee by Its Gay and Lesbian Leadership Council, [PageOneQ.com](#) (September 12, 2008)

Better Business Bureau Expels Construction Company Member for Refusing to Mediate Complaints, [Tri-City Herald](#) (October 14, 2008)

No Settlement in Mediation Between Opes Prime, the Australian Securities and Investments Commission and Creditors over Stockbroker's Collapse, [Business Spectator](#) (October 24, 2008)

Poland's Government and Soccer (Football) Association, PZPN, Close to Resolving Bitter Dispute in Mediation, [Reuters](#) (October 6, 2008)

Professional Hockey Players Bertuzzi and Moore Meeting in Mediation for First Time after 2004 "Sucker Punch" that Broke Moore's Neck, Ending Career and Leading to \$38 Million Lawsuit, [CBC.ca](#) (September 16, 2008)

National Rugby League Legal Issues with Melbourne Coach and CEO Result in Mediation, [Fox Sports](#) (October 31, 2008)

Mediator Requested in Michael Vick Bankruptcy to Work out Settlement of Debts with

filings. [Orlando Sentinel](#) (October 6, 2008)

- A nonprofit organization, Earth Angels United, is administering a foreclosure mediation program in Florida's Eighteenth Judicial Circuit, to help reduce the strain caused by a 200% increase in foreclosure cases. [Orlando Business Journal](#) (October 29, 2008)

Mediation Program Established for Montana Grain Shippers

Montana farmers have approved a proposal to use mediation to resolve disputes over grain freight rates with BNSF Railway. Grain producers are not considered shippers by the Surface Transportation Board despite paying the freight, which forced them to rely on grain elevator companies to file cases. The new program with BNSF will first rely on mediation and then resolve any remaining issues with binding arbitration by an independent arbitration board.

[Great Falls Tribune](#) (October 16, 2008); [Montana's News Station.com](#) (October 20, 2008)

Mandatory Med Mal Mediation Working in Illinois County

Mandatory mediation of medical malpractice cases in Madison County, which the Illinois Supreme Court approved in 2007 establishing the first rule of its kind in Illinois, worked as intended to settle a wrongful death case alleging inadequate care by a nursing home. The mediation rule is also considered unique by allowing parties to choose between lawyers and judges to mediate their case. In the wrongful death case, a judge was assigned in February to mediate the matter. The terms of the settlement were filed under seal and not disclosed.

[The Madison - St. Clair Record](#) (October 10, 2008)

New Mexico First State to Join EEOC's Universal Agreement to Mediate

While over 1,200 employers have entered into Universal Agreements to Mediate with the U.S. Equal Employment Opportunity Commission, New Mexico is the first state to do so. With New Mexico's formal agreement to resolve disputes through mediation, all eligible discrimination charges filed with the EEOC naming the state as respondent will be sent to the EEOC's mediation unit.

[Bizjournal.com](#) (October 31, 2008)

New York Continues to Seek Land Use Mediation Statute

New York is attempting to join about two dozen other states with land use mediation statutes. Bills have passed the New York Senate four times, but ultimately failed to be enacted. Most recently, S.B. 3232 passed the Senate on May 9 and would add mediation as an option for resolving land use disputes, but would not replace existing land use review procedures. The

Creditors, [Associated Press](#)
(October 3, 2008)

Mediation Leads to Developer Giving Dublin City €1.5 Million and Drawings to End Housing Regeneration Projects, [Irish Times](#) (September 5, 2008)

Mediation Yields Back Pay for Former Paramedics from Town, [West Yellowstone News](#) (October 31, 2008)

Town Manager of Front Royal, Virginia Settles Wrongful Termination Case in Mediation, [FloridaToday.com](#) (September 9, 2008)

City of Billings Agrees to Mediation with Its Insurer over Coverage after \$1.6 Million Judgment; Mediation Expected to Be Open to Public, [Billings Gazette](#) (September 8, 2008)

Mediation Between Tree-Sitters and Campus Officials over Athletic Center Unsuccessful; Litigation Delays May Add \$20 Million in Construction Costs, [San Francisco Chronicle](#) (September 9, 2008)

Mediation Under Way to Avoid Retrial after Hung Jury in Ten-Week Long Criminal Public Corruption Trial, [Pittsburgh Tribune-Review](#) (September 13, 2008)

Judge Sends Native American Casino Dispute with Harrah's to Mediation, [Indianz.com](#),
(September 8, 2008)

Court Sends Tax Suit Back to Mediation, [Birmingham News](#)
(October 30, 2008) (Subscription Required)

Federal Mediator to Assist Stalled Contract Talks with Screen Actors Guild, [Los Angeles Times](#) (October 24, 2008)

senators introducing S.B. 3232 noted the success of a pilot land use mediation project for the Hudson River Valley and a mediation program in the Office of Court Administration. Other state statutes vary in their breadth and timing, with some encouraging mediation early in the development approval process and others waiting until litigation has begun.

[New York Law Journal](#) (October 15, 2008) (Subscription Required); [New York S.B. 3232](#)

California Bill for HOA Mediation Vetoed

Governor Schwarzenegger vetoed California legislation that would have created a bureau to provide a forum for mediating homeowner association disputes, along with training. The bill was based on fact-finding by the California Law Revision Commission, which studied common ownership developments.

[San Diego Union Tribune](#) (September 30, 2008)

Arizona Rejects Initiative Which Would Have Eliminated Mediation in Homeowner Disputes with Builders

By a margin of nearly 4-1, Arizona voters defeated an initiative on the ballot in Arizona which, among other things, would have eliminated the use of mediation in disputes between homeowners and builders, requiring litigation instead. Proponents of the initiative, Proposition 201, asserted that it would not eliminate mediation, but the existing mediation language in the Arizona statute apparently would have been stricken.

[Ballotpedia.org](#); [Tucson Citizen](#) (September 22, 2008); [Proposition 201](#)

“Technical Mediation” Urged for Expert Disputes

Disagreements between parties’ experts in complex matters, such as construction defect litigation, may be addressed by “technical mediation” using neutrals who have sufficient subject matter expertise to communicate easily with the feuding experts and mediate technical positions. The goal is to resolve only the technical issues and not consider liability or damages, which are subsequently addressed in a standard mediation or other form of alternative dispute resolution.

[Miami Daily Business Review](#) (September 9, 2008) (Subscription Required)

Other International Mediation Developments

- After extensive analysis, the U.K. has introduced an Employment Bill to abolish statutory grievance and disciplinary procedures and encourage mediation, [Aberdeen Press and Journal](#) (September 26, 2008); New U.K. workplace guide by Chartered Institute of Personnel and Development and Acas encourages

Mediation Begins on Clean Up of Lake Polluted by Plugged Drain, [Lansing State Journal](#) (October 26, 2008)

Six-Month Mediation Failed to Resolve \$26 Million Plan to Widen Road; County Commissioner Still Hopes for Resolution, [Macon Telegraph](#) (September 15, 2008)

Archbishop Sues Newspaper then Seeks Mediation, Which Australian Court Cannot Compel, [West Australian](#) (October 30, 2008) (Subscription Required)

Other News & Initiatives:

Judge Draws Challenger in Election Due to Lack of Use of Mediation, [Reno Gazette Journal](#) (October 29, 2008)

Mediators Offer Advice on How Government Can Avoid Budget Impasses, [The Sacramento Bee](#) (September 22, 2008) (Subscription Required)

Probate Judge Promotes Use of Mediation Program, [Mansfieldnewsjournal.com](#) (October 20, 2008)

Nobel Peace Prize Awarded to Global Mediator Ahtisaari for Decades of Peacemaking, [Reuters](#) (October 10, 2008)

mediation based on survey of effectiveness, [Financial Adviser](#) (October 2, 2008) (Subscription Required)

- Cardiff, **Wales** begins pilot program offering free mediation for consumers and businesses using two staff mediators, [Wales Online](#) (October 4, 2008)
- European Commission gives award to **U.K.** Small Claims Mediation Service with very high satisfaction rate, [PR-CANADA.net](#) (November 1, 2008)
- **Turkey** proposes mediation to increase efficiency of court system; similarities with Ottoman Empire process noted, [Turkish Daily News](#) (November 1, 2008)
- **India** high court judge praises mediation at inauguration of Mediation and Conciliation Centre in Thalassery, Kerala, [Hindu](#) (September 28, 2008) (Subscription Required)
- **India's** Law Ministry is focusing on training trainers in order to address shortages of trained mediators, which are holding back pre-trial mediation, [Hindu](#) (October 5, 2008)
- High court advises the State Bank of **Pakistan** to instruct all commercial banks to attempt to resolve disputes through mediation prior to going to court, [Business Recorder](#) (September 25, 2008) (Subscription Required)
- **Malaysia** establishing Franchise Mediation Center by early 2009 and training mediators to mediate franchise disputes, [Bernama Economic News](#) (September 11, 2008) (Subscription Required)
- The **Philippines** Intellectual Property Offices proposed draft rules that would permit government mediators to render final decisions on IP disputes when parties cannot reach agreement, [Business World Online](#) (September 29, 2008)
- **Hong Kong** civil justice reforms emphasizing mediation are due to take effect in April, causing concern among counsel, [South China Morning Post](#) (September 29, 2008) (Subscription Required)
- **Jamaican** Justice Minister promises more court appointed mediation and expansion to some criminal matters, [RadioJamaica.com](#) (September 9, 2008)
- **Bermuda** Human Rights Commission urges mediation of complaints, adding five mediators at \$300 per hour, [Royal Gazette](#) (Bermuda) (November 1, 2008)

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