

MEDIATION NEWS

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CASES & RESOLUTIONS:

California Court Creates Exception to Mediation Confidentiality for Certain Attorney-Client Communications

A split California appellate court established a judicial exception to the state's mediation confidentiality statute by permitting a party to use evidence from his private communications with his attorneys during a mediation in a later action for legal malpractice. The court concluded that private conversations during the mediation between the attorneys and client that did not involve the mediator or other party and did not reveal anything said or done in mediation discussions with the mediator or other party should not be shielded by mediation confidentiality. The alleged malpractice involved claims that the client's counsel forced him to settle for too little; the terms of the signed settlement agreement were thus available. The dissent objected to any judicial exception to the confidentiality statute, regardless of its desirability.

[Cassel v. Superior Court](#), 2009 WL 3766430 (Cal. App. 2 Dist. November 12, 2009)

Mediation Confidentiality Shields Alleged Legal Malpractice During Mediation in Oregon

The federal district court in Oregon granted summary judgment to a lawyer against claims by his clients that he had committed malpractice by advising them against settling a case in mediation that they subsequently lost in court, because the evidence against the lawyer was inadmissible due to the state's mediation confidentiality statute. The court did not determine whether private conversations between the attorney and his clients were covered by the confidentiality requirements, but concluded that the clients had no case where they could not reveal the proposed settlement terms.

[Fehr v. Kennedy](#), 2009 WL 2244193 (D. Ore. July 24, 2009) (Subscription Required)

Wisconsin Court Sanctions Insurer for Failing to Send Representative to Mediation

A Wisconsin appellate court upheld sanctions against an insurance company for failing to have a company representative appear in person at a mediation as required by court order. Although a lawyer for the company was present and a

Mediation Quote:

"[H]ear as fairy tales all the stories of conflict that you will ever be told, not because they are untrue but because their truths are hidden deep within.... [I]f you silently repeat the words 'Once upon a time' immediately before hearing someone tell you a story about conflict, you will be listening in exactly the right frame of mind."

Kenneth Cloke and Joan Goldsmith, *Resolving Personal and Organizational Conflict: Stories of Transformation and Forgiveness* (Jossey-Bass 2000) at xv

Check These Out:

Mediation Is Subject of New TV Show

USA Network is developing a TV series called "Facing Kate" in which Sarah Shahi plays a lawyer who leaves her job to become a mediator. Reports note that the main character is divorced, suggesting an emphasis on family mediation.

decision-maker was available by telephone, as is common in many mediations, the court ruled that was not sufficient where the company failed to obtain prior court approval or agreement from the other side and the mediator. Even though the other party did not object to the absence of the insurance representative at the time of the mediation, the majority of the court held that did not bar the claim for sanctions.

[Lee v. Geico](#), 2009 WL 3085095 (Wis. App. September 29, 2009) (Subscription Required)

Minnesota Court Enforces Settlement Agreement Which Stated It Was Binding, Despite Lack of Key Terms

A settlement agreement reached after thirteen hours of mediation was found enforceable by a Minnesota appellate court because the document expressly stated it was binding, despite the omission of precise descriptions of the land involved. The agreement recognized that additional details needed to be finalized and provided that if disputes arose over the final documentation the parties would have the mediator act as an arbitrator and decide the disputes. When issues arose, one party challenged the authority of the mediator turned arbitrator, but the court upheld both the settlement agreement and its arbitration provision.

[Ed Cave & Sons, Inc. vs. City of Two Harbors](#), 2009 WL 2998001 (Minn. App. September 17, 2009) (Subscription Required)

California Court Discusses “Binding Mediation” in Enforcing Mediation Clause in Settlement Agreement

In a lengthy opinion, a California appellate court enforced the mediation clause included in a settlement agreement that was itself reached in mediation, and dismissed the efforts of one party to remedy an alleged breach of the settlement agreement by going directly to court. The mediation clause stated that a named mediator would have discretion to issue a “final and binding” ruling, which one party argued would be unenforceable, but the court explained that its previous case had merely noted conceptual difficulties with binding mediation and not that it was necessarily unenforceable.

[Adams v. Newport Crest Homeowners Assoc.](#), 2009 WL 2875361, (Cal. App. 4 Dist., September 9, 2009)

California Senate Uses Mediation to Avoid Legislative Action

The president pro tempore of the California Senate pulled legislation and sent it to outside mediation in order to prevent the Senate from overriding environmental laws to make it easier for Los Angeles to attract a professional football team with a new stadium. The president pro tempore has used mediation in this way before on transportation projects. He views negotiation as the preferred way of working out roadblocks, rather than precedent setting legislation that would ease environmental and land-use regulations for the stadium.

[Mediation's Place Blog](#) (October 29, 2009); [THR.com](#) (October 21, 2009)

Pirates Seek Mediation

Pirates contacted a mediator for assistance after hijacking a Spanish fishing ship off Somalia. The mediator had worked for the release of a German ship's crew in July. [Bloomberg](#) (October 4, 2009)

Mediation Held in Case of Christian Teen Who Ran Away from Muslim Family

Significant attention has focused on the case of an Ohio teenager who claims her Muslim father threatened to kill her for converting to Christianity. The girl ran away to a church in Florida in July. A Florida judge ordered that the girl and her parents should participate in mediation, and ruled that the girl would remain in foster care until the matter is resolved. News reports indicate that unspecified progress has been made in mediation. [CNN.com](#) (September 4, 2009); [CFNews13.com](#) (October 10, 2009); [Orlando Sentinel](#) (October 9, 2009)

Other Cases & Resolutions:

Successful Mediation Results in Billion Dollar Bankruptcy Reorganization Plan for Semgroup, [Reuters.com](#) (September 16, 2009); [Tulsa World](#)

[San Diego Union-Tribune](#) (September 12, 2009)

Long-Running Dispute over California Courthouse Construction Resolved in Mediation

A five-year, \$50 million construction project for a courthouse in Santa Clara County resulted in assertions of faulty construction by the county and counter-assertions of faulty design and \$17 million in change orders by the contractor. After a two day mediation, the parties agreed to resolve all claims against each other and by subcontractors for payments by the county of \$8.1 million. Although the county Supervisor had predicted that the county would come away with money for the faulty work, he stated after the mediation that the settlement was worthwhile to avoid the burden and expense of litigation and that it was time to let the dispute go.

[Gilroy Dispatch](#) (September 14, 2009)

Mediations Yield Benefits in Sunwest Management Investment Scandal

Mediation is assisting investors who sunk upwards of \$400 million in Sunwest Management's senior housing operations before things unraveled. The law firm of Davis Wright Tremaine agreed to pay \$30 million to resolve securities fraud and malpractice claims against it after five days of mediation. Mediation is also expected in litigation against two other law firms who did work for Sunwest affiliates. In addition, a federal judge has been overseeing complex mediation since last winter which seeks to restructure Sunwest into a viable entity to provide value for investors, which resulted in a \$270 million offer in September.

[Oregonlive.com](#) (October 22, 2009)

NEWS & INITIATIVES:

IRS Expands Its Appeals Mediation Program

The Internal Revenue Service has expanded and refined its mediation program in the Appeals administrative process, which was first introduced over a decade ago. Participation in mediation is voluntary for both the taxpayer and the agency. Among other procedures set forth, the mediator will be an IRS employee trained in mediation and compensated by the agency, while the taxpayer can pay for a non-IRS mediator to join as a co-mediator and can participate in the co-mediator's selection with the agency. If mediation does not resolve all issues, parties may request arbitration in appropriate circumstances.

[Journal of Accountancy](#) (September 11, 2009); [Revenue Procedure 2009-44](#)

Appellate Mediation Program Begins in New Hampshire

New Hampshire is adding a mediation program for civil appellate cases pending

(September 23, 2009)

Poolside Mediation Makes Unexpected Progress in Bankruptcy Reorganization of Philadelphia Newspapers LLC, Including Short-Term Financing Agreement, [Philadelphia Business Today](#) (September 16, 2009); [Philadelphia Inquirer](#) (September 16, 2009)

Phoenix Coyotes Owner Seeks Emergency Bankruptcy Court Order Requiring NHL to Mediate Key Sales Issues, [SFGate](#) (September 17, 2009)

Miami Heat Star Dwyane Wade Hopes Mediation Will Help Him Resolve Multiple Lawsuits over Outside Business Activities, [USA Today](#) (September 15, 2009)

Mediation Sought in Controversy over Limit on Jockeys' Use of Whips in Australia, [Virtual Form Guide](#) (September 30, 2009)

Tribe Mediating Dispute over Control of Tribal Council at Suggestion of Bureau of Indian Affairs, [SnoValleyStar.com](#) (WA) (September 16, 2009)

USDA Offers Mediation Between United Soybean Board and American Soybean Association,

before the state Supreme Court. The appellate program will be administered by the state's Office of Mediation and Arbitration and rely on retired judges as mediators. The program expands mediation to all levels of court, from small claims and family, to civil cases in superior and probate courts.

[WCax.com](#) (September 10, 2009); [Appellate Mediation Program](#)

Philadelphia Court Institutes Mandatory Mediation Program for Landlord-Tenant Appeals

A committee of lawyers convened by the Court of Common Pleas in Philadelphia to find ways to improve the court's landlord-tenant program recommended a mandatory mediation program, which the court is now implementing. Mediation is particularly intended to assist the 40% of pro se landlords and nearly 100% of pro se tenants who are involved in appeals, which require compliance with procedural rules that are difficult for non-lawyers. The program is now recruiting and training volunteer "settlement masters" to act as mediators, who will have access to court papers through the court's e-filing system and can call a helpline of experienced landlord-tenant attorneys with questions.

[Legal Intelligencer](#) (September 30, 2009)

Milwaukee Using Mediation to Resolve Police Complaints

A new system for complaints against police in Milwaukee, Wisconsin, resulted in litigation by the police union, which ended with agreement over use of mediation in the complaint process. Larger issues are being sent to an outside mediator, and both officers and complainants have been very satisfied. The police chief is encouraging officers to participate in mediation whenever possible.

[Fresno Bee](#) (September 21, 2009) (Subscription Required)

Maryland Community Mediation Expanding to Prisoners and Students

Statewide initiatives by Community Mediation Maryland are providing assistance to both prisoners and students in various counties in Maryland using volunteer mediators. Inmates within six months of release are eligible for three mediation sessions with whomever they will be reconnecting on the outside, which is helping many. Monthly training in conflict resolution skills is also being offered by mediators to inmates. In the school system, mediators are assisting with Independent Individualized Education Programs by meeting with the IEP participants and then sitting in on IEP meetings to facilitate.

[Carroll County Times](#) (September 5, 2009)

Fortieth Texas County Begins Mediation Program

The Commissioners of Hays County, Texas, voted to begin a mediation program

[Feedstuffs](#) (September 8, 2009)

City and County Continue to Mediate Multiple Lawsuits over Tax Abatements from Community Reinvestment Act, [Morning Journal](#) (OH) (September 15, 2009)

City Council Seeking Mediation with County and Minnesota Department of Transportation over Jurisdiction of Highway and \$3.5 Million, [Daily Journal](#) (October 20, 2009)

Parties in Six Lawsuits Hopeful in Combined Mediation of St. Pete Beach Development Dispute, [Tampabay.com](#) (September 13, 2009)

Forty-Six County Employees Fired After Mediation Agreement with County Commission Fell Apart, [Naples News](#) (FL) (September 16, 2009)

Successful Mediation with Utility Keeps Water Flowing at Condo, [Click Orlando](#) (September 21, 2009)

Dispute Between Cities over Sewage Treatment Continues in Mediation, [Mountain Mail](#) (CO) (September 16, 2009)

Court Orders Mediation of Residents' Claims Against New Jersey

that would provide trained mediators to assist parties seeking out of court settlements. The program will be funded from fees paid by every litigant, whether or not they use mediation. To obtain mediation services, the county plans to enter into a contract with a non-profit mediation center. Mediations will be offered at no or low cost to parties, and are limited to cases with amounts in dispute of no more than \$50,000 and family cases where the spouses earn no more than \$60,000.

[Newstreamz.com](#) (September 8, 2009)

Update on Home Foreclosure Mediation

- **Federal** legislation has been introduced that would encourage state and local governments to create strong foreclosure mediation programs, among other things. The Preserving Homes and Communities Act of 2009, introduced by Senator Reed (D-R.I.), would authorize \$80 million in federal matching funds for mandatory mediation programs.

[Press Release](#) (October 1, 2009) (Subscription Required); [S. 1731](#)

- The Mortgage Bankers Association asserts that mediation programs are actually delaying efforts to resolve problem loans, and that **nationwide** the industry has provided over 5.2 million workout plans to help delinquent borrowers since July 2007, with over 2 million loans in which lenders reduced interest rates, lengthened loan terms, reduced the amount owed or took other steps.

[Las Vegas Review Journal](#) (October 14, 2009)

- The **National** Consumer Law Center analyzed foreclosure mediation programs in fourteen states and concluded that the level of accountability is not sufficient for financial institutions to modify loans enough to make the programs effective.

[SFGate](#) (September 24, 2009); [National Consumer Law Center Report](#)

- The **Nevada** Supreme Court on September 28 passed new rules giving mediators the power to determine that lenders acted in “bad faith” in foreclosure mediations, which could block foreclosure and lead to additional court sanctions, causing concern among some over ambiguity. Legal workshops are being held to teach homeowners how to get the most out of foreclosure mediation, so they can effectively represent themselves.

[Las Vegas Business Press](#) (October 12, 2009); [Las Vegas Now](#) (October 22, 2009); [Fox 5 news](#) (September 17, 2009)

- The **Delaware** Superior Court adopted a Residential Mortgage Foreclosure Mediation Program which takes effect September 15 and gives homeowners the ability to mediate prior to foreclosure.

[Sussex Countian](#) (September 10, 2009); [Delaware Online](#) (September 14, 2009); [Administrative Directive](#)

- New legislation in **Indiana** requires creditors to notify homeowners of their right to a settlement conference prior to foreclosure. The Indiana Supreme Court and numerous government and non-profit agencies have just completed a training program for over 1,000 judges, attorneys and mediators in how to handle foreclosure cases.

[RealEstateRama](#) (October 19, 2009)

Utility, [NJ.com](#)
(September 11, 2009)

City and Restaurants Delay Litigation for Further Mediation over Liquor Licenses, [Wvec.com](#) (September 18, 2009)

Mediator to Assist City and Restaurant in Eminent Domain Dispute, [Wicked Local](#) (September 26, 2009)

Mediation Results in \$100,000 Payment by West Virginia Police to Man Burned when Taser Ignited Pepper Spray During Arrest, [Herald-Mail](#) (October 14, 2009)

“Chicken Whisperer” Offers Assistance in Court Ordered Mediation Between Chicken Farmer and City, [Times Argus.com](#) (October 23, 2009)

City of Augusta and Adult Video Store Enter Mediation after Store Awarded \$130,000 in Damages and Is Appealing to Seek More, [WJBF.com](#) (October 13, 2009)

Over 100 Child Sex-Abuse Cases Against Hospital for Failure to Stop Doctor Are Headed to Litigation after Mediation Impasse, [Hartford Courant](#) (October 9, 2009)

After Months of Delay, Province Refuses to Observe Mediation of Canadian Breast Cancer Class Action

- The **Florida** Supreme Court heard arguments on a task force report recommending mandatory mediation for residential foreclosures to help courthouses deal with the flood of cases. Over 290,000 foreclosures were filed in Florida in the first nine months of the year. A dissenter on the task force raised concerns about the financial burden on lenders, suggesting that borrowers should contribute to the cost of mediation when possible.

[Miami Daily Business Review](#) (November 5, 2009) (Subscription Required)

- **Connecticut** is mediating less than 40% of eligible foreclosure cases, even after making mediation mandatory in July, because the program only applies to homeowners who file an appearance in court, and a majority do not. When mediation does occur, 75% are settled, with homeowners staying in their homes in 62% of the cases and 13% moving without foreclosure. About 2,000 cases have been mediated in the last three months with a team of 24 full-time mediators.

[Connecticut Law Tribune](#) (October 26, 2009) (Subscription Required); [Foreclosure Mediation Program Frequently Asked Questions](#)

- Legislation pending in **Ohio** would mandate mediation for nearly every foreclosure case in the state. The legislation would require the court to establish filing fees to cover the cost of mediation, set qualifications for mediators and establish procedures.

[Daily Court Reporter](#); [H.B. 306](#)

Federation of European Bars Issues Mediation Resolution Calling for More Legal Involvement

The Federation of European Bars (FBE), made up of bar associations of 21 European countries, issued a Resolution on Mediation on October 3, 2009, recognizing the importance of mediation and its trend towards greater prominence. Accordingly, the FBE resolution urges that the participation of lawyers should be required in mediations in areas which may have legal consequences, that effective mediation training for lawyers should be a priority, and that necessary government funding should be provided to promote mediation and the involvement of lawyers.

[FBE Website](#)

Australia Legislates More Mediation Muscle in Native Title Disputes

In an effort to reduce the backlog of 500 native title claims, the Australian parliament has amended the Native Title Act to strengthen mediation and give the Federal Court power over the mediation process and the ability to deal with recalcitrant parties. One senator raised concerns about mediators being given coercive powers by the amendment, especially since the legislation does not define who can be a mediator or require any particular qualifications or accountability, while other senators felt the amendments did not go far enough.

[SMH.com.au](#) (September 14, 2009)

over Faulty Hormone Receptor Tests, [CBC News](#) (September 22, 2009)

Transmarket Trading Leaving Australia after Mediation Fails to Resolve A\$40 Million Class Action Against Australian Securities Exchange, [Australian Business WSJ](#) (September 25, 2009)

Japan Considers Mediation in Effort to Restructure Japan Airlines, Working with 20 Financial Institution Creditors, [Bloomberg](#) (October 12, 2009)

Other News & Initiatives

US Government to Mediate Disputes Between Persons Making FOIA Request and Agencies, [Congressional Documents](#) (September 30, 2009) (Subscription Required)

Courts Encouraging Mediation Prior to Filing Lawsuits, Not Just Prior to Trial, [Bradenton Herald](#) (October 20, 2009)

Survey Respondents Report Decline in Arbitration, But Rise in Companies Expecting Increased Numbers of Disputes over Next Year, [Fulbright's 6th Annual Litigation Trends Survey Report](#) (October 10, 2009) (Registration

Other International Mediation Developments

- First **International Conference for Judicial Mediation** organized by GEMME and held on October 16-17 in Luxembourg, [Conference Brochure](#)
- **The Netherlands** celebrates ten years of court-connected mediation with international mediation conference on November 19, [Gemme.eu](#)
- Organization helps teachers in **Lebanon** promote conflict resolution in classrooms in hopes of more peaceful national culture, [Christian Science Monitor](#) (September 23, 2009)
- Respected members of communities in **China** forming associations of mediators to resolve disputes, [South China Morning Post](#) (September 26, 2009) (Subscription Required)
- **Indonesia** requires mediation prior to judicial determination of cases; Supreme Court regulation requires judges before rendering verdicts to publicly state that cases were mediated and name the mediators, [Jakarta Post](#) (October 9, 2009); [The Malaysian Insider](#) (October 7, 2009)
- Despite admission, **Australian** court concludes that oral agreement at mediation had not finalized all terms and could not be enforced in [Worldwide Timber Traders Pty. Ltd. v. Brouwer](#) (No. 2) [2009] FCA 447, [Mondaq](#) (September 29, 2009)
- **Australian** appellate court upholds contract provision requiring good faith negotiation of disputes, [United Group Rail Services Ltd. v. Rail Corp. New South Wales](#) [2009] NSWCA 177 (July 3, 2009)
- **West Indies** cricket dispute finally resolved by parties, months after mediation effort, [Jamaica Observer](#) (October 16, 2009)

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Better Business Bureau Offers Mediation Services for Probate Issues, [Bakersfield.com](#) (CA) (September 11, 2009)

Law Firm Hires Two Mediation Specialists for Firm's Growing Home Retention Services Division, [DSnews.com](#) (MI) (September 11, 2009)

Considerations for Encouraging Later Settlement When Cases Aren't Initially Resolved at Mediation Table, [New Jersey Law Journal](#) (November 2, 2009) (Subscription Required)

Massachusetts Attorney General Honored at Mediation Gala, [US Federal News](#) (October 29, 2009)

International Conflict Resolution Day (October 15) Time for Celebration of Mediation Programs, Practitioners and Scholars, [Fresno Bee](#) (September 21, 2009) (Subscription Required)

ICC's Fifth International Commercial Mediation Competition Opens to Law Schools from Around World, [Financial](#) (September 16, 2009)

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