



MEDIATION NEWS

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SEPTEMBER 2008

CASES & RESOLUTIONS:

California Supreme Court Concludes No Estoppel or Implied Waiver of Mediation Confidentiality

The California Supreme Court unanimously reversed the appellate court in [Simmons v. Ghaderi](#), and concluded that a party is not estopped from asserting mediation confidentiality despite having litigated the details of the mediation for fifteen months. The case arose when Dr. Ghaderi gave her insurer permission to settle a medical malpractice case in mediation and then changed her mind after an oral agreement was reached, but before a written settlement agreement was signed. In a comprehensive decision analyzing mediation confidentiality, the Court held that no judicial exceptions to the statutory scheme are allowable, other than express waiver by the parties or when due process is implicated. The Court closely reviewed California's statutory provisions and legislative history and noted that despite the legislature's awareness that some bad faith conduct would go unpunished, it chose mediation confidentiality as paramount in order to promote mediation.

[Simmons v. Ghaderi](#), S147848 (Cal., July 21, 2008)

Florida Appellate Court Reverses Severe Sanctions for Breach of Mediation Confidentiality

A workers compensation claimant checked with his doctor after his employer stated in mediation that the doctor had made inconsistent recommendations about whether surgery was needed. When the doctor responded in writing that he had always urged surgery, the employer successfully moved to have the workers comp claims dismissed with prejudice due to breach of mediation confidentiality requirements. The Florida appellate court reversed dismissal of the claims as being too severe a sanction, discussed a range of appropriate sanctions, and remanded the case to the judge of compensation claims for further action.

[Hill v. Greyhound Lines, Inc.](#), No. 1D07-1188 (Fla. App. 1st Dist., August 29, 2008)

Federal Court Dismisses Lawsuit for Lack of

Mediation Quote:

"[W]e are evoking and supporting a natural impulse of people in conflict to want to be able to *work together*, even in the face of having significant differences in their perspectives.... [E]ven if not in the foreground, that impulse is waiting to be tapped and given room for expression, even if only in the form of a wish of what might be if things were different. The same is true for the parties' capacity to *work through their conflict together*. If given the opportunity and necessary support, many are both willing and able."

- Gary Friedman and Jack Himmelstein, *Challenging Conflict: Mediation Through Understanding* (American Bar Association 2008) at xxxvii

Other Cases & Resolutions:

Mediation Results in Settlement of Costly, Complex Litigation and Restoration of Partnership Between Biota and GlaxoSmithKline, [ITNews](#) (Italy) (July 20, 2008)

New Zealand Regional Council Settles Appeal of

Mediation

A private agreement requiring mediation prior to any litigation was a sufficient basis for a federal court to dismiss without prejudice the pending litigation, since the parties had not yet mediated. Plaintiffs sought to have the litigation stayed pending mediation, but the court dismissed the matter without even holding a hearing.

[Brosnan v. Dry Cleaning Station Inc.](#), 2008 WL 2388392 (N.D. Cal. June 6, 2008) (Subscription Required)

Settlements in Katrina Mediations Withstand Attack

A federal court upheld the “plain meaning” of settlements reached in the Mississippi hurricane mediation program which released any and all Katrina claims except for subsequent discovery of “additional insured damage.” The Scruggs Katrina Group filed some 200 nearly identical complaints alleging a conspiracy of fraud and bad faith that it asserted as grounds for additional insured damages. The court, however, found that the phrase could only mean additional property damage, but left open the record in case plaintiff’s new substitute counsel wished to submit affidavits showing newly discovered property damage.

[Boyd v. State Farm](#), No. 1:07CV820 (S.D. Miss., Aug. 6, 2008)

Personal Injury Settlement Sets Record

A \$6 million global settlement in a one-day mediation resolved the legal claims of a 9-year-old boy who was blinded from serious craniofacial injuries in an all terrain vehicle accident. The agreed payment is believed to be the largest settlement or verdict in Fayette County, Pennsylvania. Details reported about the accident and claims came from the plaintiffs’ mediation memorandum.

[Pennsylvania Law Weekly](#) (August 11, 2008) (Subscription Required)

Use of Focus Groups and Tribute Video Helps Mediation Succeed

Plaintiffs’ counsel convened two focus groups and shared the comprehensive results with the other side at a second mediation session, after an initial mediation session failed to resolve claims from a serious accident in which a car hit a tractor-trailer stopped on the side of the road, resulting in the death of one passenger and serious injuries to another. In addition, plaintiffs’ counsel provided defense counsel with a video containing testimony from the deceased woman’s family, friends, and others speaking about the impact she had made on their lives. The second mediation session reached resolution, with settlements totaling \$3.2 million for the two victims.

[North Carolina Lawyers Weekly](#) (September 1, 2008) (Subscription Required)

Detailed Mediation Agreement Flips City

Pest Management Strategy in Mediation, [Otago Daily Times](#) (July 24, 2008)

Contempt-of-Court Hearing for Failure to Attend Mediation Session Avoided with Agreement to Mediate by Accused Video-Gambling Racketeer, [Muncie Star Press](#) (August 16, 2008); [Anderson Herald Bulletin](#) (July 24, 2008)

Comcast and National Football League Agree to Mediate Carriage Terms for NFL Network, [Multichannel News](#) (July 7, 2008)

California Public Utilities Commission Schedules Mediation over Amount of Inter-carrier Compensation Due for VoIP Traffic, [TR’s State NewsWire](#) (July 17, 2008) (Subscription Required)

Rapper Ordered to Mediate Civil Assault Case for Threatening to Shoot Coach, [Urban411.com](#) (August 22, 2008)

Mediation Has Not Yet Settled Ray Keller’s Litigation Against NCAA that Resulted in \$5 Million Verdict Which Judge Threw Out Pending Appeal, [The Daily Sentinel](#) (September 2, 2008)

Premature Disclosure of Draft Mediation Proposal Derailed Mediation after Four Years, Resulting in Escalating Conflict over Beach Access, [The Barrie Examiner](#) (Canada) (July 26, 2008)

Judge Orders Mediation of Litigation Between Surgeons and Medical Center over Emergency Room Call Schedule, [Muskegon Daily](#)

Council on Commercial Development

After a 74-acre commercial project was blocked by the Columbia (MO) City Council, the developer entered into mediation with two neighborhood associations and, after nearly a month of negotiations, agreed to add a layer of restrictions to the development, which was sufficient to obtain City Council approval. The developer concluded that the mediation process improved plans for the development, but one of the neighborhood association leaders expressed frustration by the confidentiality of the mediation process when dealing with community issues.

[Columbia Daily Tribune](#) (August 19, 2008); [Columbia Daily Tribune](#) (August 17, 2008); [Columbia Daily Tribune](#) (July 11, 2008) (Subscription Required)

Decades-Old Australian Naval Disaster Claim Resolved

Forty-four years after Australia's worst peacetime naval disaster, a formal naval seaman resolved his ten-year-old litigation by accepting a six-figure settlement in mediation. Other pending mediations may finally resolve the remaining claims from the accident between aircraft carrier HMAS Melbourne and destroyer HMAS Voyager, in which the Voyager was cut in two and sunk.

[The Age](#) (August 18, 2008)

NEWS & INITIATIVES:

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

A study of civil lawsuits over the last 40 years indicates that parties often make poor decisions when passing up settlements prior to trial, and that such mistakes are becoming more common. In only 15% of cases did both sides make the right decision to go to trial, with the verdict falling between what the plaintiff demanded and the defendant offered. Plaintiffs were wrong to proceed to trial 61% of the time, with an average loss of \$43,000 in recent years. Defendants were only wrong 24% of the time, but their average loss was \$1.1 million. The advocate's years of experience, rank of law school and size of firm were less related to bad decisions than the type of case. Errors tended to be made by plaintiffs in cases where contingency fees are common, and by defendants where insurance coverage is generally unavailable. The study, said to be the largest ever of its type, is forthcoming in the Journal of Empirical Legal Studies.

[New York Times](#) (August 7, 2008); [Journal of Empirical Legal Studies](#)

Widespread Adoption of Mediation Programs Reducing Costs

Large companies, insurers, government agencies and courts are all moving towards greater reliance on mediation. For example, Toro Co. has resolved 1,400 products liability claims since launching its mediation program in the early 1990s, and has not taken a case to trial since 1994, resulting in a drop in

[Phoenix](#) (August 27, 2008)

Mediation Possible for Discrimination Complaint Against Bar Banning Drag Queens and Transgender Women, [Dallas Voice](#) (August 14, 2008)

Mediation Under Way in Sexual Harassment Cases that Resulted in Resignation of Ohio Attorney General and Half Dozen Others, [Youngstown Vindicator](#) (September 3, 2008)

Mediation Scheduled for \$15 Million Sex Abuse Case Against Oregon Archdiocese, [Seattle Post Intelligencer](#) (August 8, 2008)

Parties Negotiate Whether to Mediate Free Speech Dispute Relating to Boston Subway Card Vulnerabilities, [CNET News](#) (August 13, 2008)

City of Spokane Will Mediate with Developer over Downtown Land Use; Land Trades Suggested, [Spokane Journal of Business](#) (August 28, 2008)

County Officials Suggest Mediation if Direct Negotiations Fail to Get Funding from Towns for Dispatcher Salaries, [Idaho Mountain Express and Guide](#) (August 6, 2008)

County Commissioners and Developer Agree to Mediate to Overcome Rejection of Plans for Massive Bellevue Subdivision, [Idaho Mountain Express and Guide](#) (August 27, 2008)

Court-Ordered Mediation of Lawsuit by Homeowners Fighting Annexation by Town Depends on Obtaining Sufficient Consent Forms

total costs per claim from \$115,000 to \$43,000. About two-thirds of the Toro claims are resolved directly by claims coordinators, with the remaining third being resolved in mediation. Similarly, after Hurricane Katrina, Zurich Insurance created a new Alternative Dispute Resolution program with a multi-step process that moved from direct negotiation between the insurance representative and policyholder, to mediation, and finally binding arbitration. Out of 20,000 claims against Zurich, 98% have been resolved, with only about 100 reaching and being settled through mediation, and none going to arbitration. While courts are increasingly requiring mediation, some court programs are seeing a decrease in settlements, which is attributed to litigants going directly to private mediators or seeking mediation prior to filing suit.

[Chicago Lawyer](#) (July 9, 2008) (Subscription Required)

Updated Construction Form Agreements Rely on Mediation

The American Institute of Architects (AIA) has released updated form construction documents which provide more complex dispute resolution language than the prior AIA version. The new A201 form provides that the first determination about a dispute be made by an Initial Decision Maker who no longer needs to be the architect. If that decision is not satisfactory, a party may seek mediation by making a formal demand that the other side file for mediation or waive certain rights. If mediation is not successful, the parties may resort to either arbitration or litigation based on their agreement in the form contract. A competing set of form documents called ConsensusDOCS has been developed by 19 construction associations. ConsensusDOCS is more collaborative and first requires direct discussions at the field and then senior executive levels, followed by mediation (as the default) or "mitigation" with nonbinding findings by an independent neutral or dispute review board. Mediation is to be concluded within 45 days, and if not successful is followed by litigation or arbitration.

[New York Law Journal](#) (August 4, 2008) (Subscription Required)

Connecticut Provides Mediation for Eminent Domain Disputes

New regulations adopted by the Connecticut Office of Ombudsman for Property Rights provide that mediation can be requested by property owners dissatisfied with the compensation offered in eminent domain proceedings or by occupants concerned about the assistance offered when forced to move due to eminent domain. The Ombudsman determines whether or not to grant a mediation request, and if granted, public agencies may be required to cooperate and participate in the mediation.

[RegAlert](#) (July 8, 2008) (Subscription Required); [Regulation](#) (Subscription Required)

Maryland Encourages Agricultural Mediation

The Maryland Department of Agriculture is encouraging farmers to mediate disputes with neighbors, family, government agencies and lenders using the Maryland Agricultural Conflict Resolution Service (ACReS). Mediation services are available at modest or no cost, depending on income levels, with a

from Homeowners, [Indianapolis Star](#) (August 27, 2008)

Cities Ordered to Mediate Lengthy Dispute Over Which Can Annex Farmland for Development, [Monitor](#) (Texas) (August 27, 2008)

Mediation Between City, Manufacturer and Consultants Held to Sort Out Costly Water Plant Flaws, [Times West Virginian](#) August 30, 2008); [Times West Virginian](#) (August 20, 2008)

County and Paving Company to Mediate over Loss of Contract Due to Late Signing of Anti-Alien Pledge, [The Huntsville Times](#) (August 16, 2008)

California Public Utilities Commission Orders Metropolitan Transportation Authority and Critics to Mediate Method for Crossing New Rail Line by High School, [Los Angeles Wave Newspapers](#) (August 14, 2008)

Judge Orders Mediation of the University of Akron's Unresolved Eminent Domain Lawsuits Relating to Dormitory Construction, [Ohio.com](#) (August 15, 2008)

Landfill Dispute Between Cities Sent to Mediation by Court, [KBTX](#) (August 14, 2008)

Scotland Yard Turns to Mediation in Dispute Between Senior Officers, [Telegraph.co.uk](#) (July 21, 2008)

Other News & Initiatives:

Better Business Bureau

free initial consultation and shared costs if additional sessions are needed. Under state legislation passed in 2006, mediation is required prior to filing suit against an agricultural operation.

[US State News](#) (July 29, 2008) (Subscription Required); [Baltimore Sun](#) (August 10, 2008)

Mississippi's Katrina Mediation Program Shows 80% Settlement Rate

Updated figures reveal that nearly 5,000 mediations were requested in the Mississippi Insurance Department's hurricane mediation program, and 82% of those settled. About a fourth of the settlements occurred prior to mediation, with the remainder settling at mediation. In addition, another 235 federal cases were resolved through court-ordered mediation, out of about 1,100 closed federal cases, while another 867 policyholders in two mass lawsuits settled without filing individual claims.

[Sun Herald](#) (August 27, 2008) (Subscription Required)

Mediation Helps Heirs Minimize Conflict over Estates

Mediation can be helpful to preserve relationships among heirs who get into squabbles when dividing estates left by family members. While conflicts can be minimized through proactive steps to make decisions before death and provide clear instructions on disposition, there are also numerous techniques ranging from blind drawings to drawing cards that can provide processes for allocating assets that seem fair to all involved.

[Toledo Blade](#) (July 6, 2008)

Mediation Model Urged for Long-Term Care Facilities

A research report on an appropriate mediation model for long-term care facilities concluded that care could be improved by involving residents and families through mediation, but that intensive outreach is required within facilities. Many cases referred to mediation were not mediated due to barriers from lack of knowledge of potential benefits and availability. The report was published in the Journal of the American Medical Directors Association.

[Health & Medicine Week](#) (August 4, 2008) (Subscription Required)

Council Provides Successful Mediation Alternative in High Stakes Environment

Hanford Concerns Council provides mediation of worker grievances over health, safety, or the environment to avoid litigation against Hanford contractors. Council members include Washington Closure Hanford, Washington River Protection Solutions and CH2M Hill. With annual costs of about \$500,000, the Council has a perfect record of resolving litigation over the last three years since it was resurrected. One cautionary case is the decade-old litigation by pipefitters against Fluor Federal Services that resulted in a

Mediating Many More Cases; Business Members Required to Participate When Consumers Seek Mediation, The Columbus (Ohio) Dispatch (August 20, 2008)

Half of Foreclosure Mediations in Stark County Result in Homeowners Keeping Homes, Canton (Ohio) Repository (July 27, 2008)

San Diego City Attorney Regularly Uses Mediation to Resolve Cost Overruns, False Claims, Other Concerns, San Diego Union Tribune (August 13, 2008)

Cases in U.K. Address Mediation Confidentiality and Recovery of Costs, Shoosmiths Legal Updates (August 8, 2008)

\$4.8 million jury award which is still pending on appeal.

[Mid Columbia Tri City Herald](#) (August 12, 2008)

Mediation Resolving Psychological Harassment Complaints in Quebec

Mediation successfully reaches agreement in 95% of the workplace psychological harassment cases mediated by the Commission des normes du travail in Quebec. In the four years since legislation was enacted protecting employees from psychological harassment, about 8,600 complaints have been filed and a little over a third have been resolved through mediation. Of complainants using mediation, 85% reported they were very satisfied with the mediator's work.

[Canada Newswire](#) (July 3, 2008) (Subscription Required)

Other International Mediation Developments

- **U.K.** lawyers see financial pressures on businesses resulting in more litigation over disputes and more mediation to reduce risks from litigation, [Crain's Manchester Business](#) (September 1, 2008); [Birmingham Post](#) (August 29, 2008) (Subscription Required)
- Mediation being encouraged in **Scotland** as better solution for conflicts and important to maintaining competitive economy, [Scotsman](#) (July 6, 2008) (Subscription Required)
- Law Reform Commission in **Ireland** urges key role for mediation, [The Irish Times](#) (July 30, 2008)
- Alternative Dispute Resolution workshop reflects increasing popularity of informal resolution processes in **Dubai**, [AME Info](#) (United Arab Emirates) (July 14, 2008)
- Three-day mediation update training in **Bangladesh** given to judges and lawyers who will be training 300 new judges and lawyers in mediation, [The New Nation](#) (Bangladesh) (July 4, 2008)
- **China** reports 100,000 mediations with 96% success rate since mediation was introduced in Guangdong Province in 2001, [World News Connection](#) (July 31, 2008) (Subscription Required)
- Mediation needed in **Hong Kong** to keep up with other jurisdictions, [South China Morning Post](#) (July 8, 2008) (Subscription Required)
- Court-annexed mediation experiment in the **Philippines** gives better access to justice to poor and marginalized; 40,000 mediations in last six years have 70% resolution rate, [Thai Press Reports](#) (July 9, 2008) (Subscription Required)
- Mediation system, in which courts can mandate mediation, is most important of proposed reforms in **Malaysia**, where lower courts have a 900,000 case backlog, [New Straits Times](#) (July 4, 2008)
- Farm Debt Mediation Act in New South Wales, **Australia** requires equipment finance companies to give farmers option of mediation, [ABC Online](#) (September 4, 2008)
- Number of mediations doubles in New South Wales, **Australia**, with 59% resolution rate, [Sydney Morning Herald](#) (August 14, 2008)
- **Fiji** Employment Relations Bill establishes mediation service, [Fiji](#)

[Times](#) (August 20, 2008)

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