

MEDIATION NEWS

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CASES & RESOLUTIONS:

California Commercial Liability Insurers Must Defend Mandatory Pre-Complaint Processes

A California appellate court concluded that a Commercial General Liability insurer must defend its insured against proceedings required by California's Calderon Act. Calderon proceedings require common interest development associations to engage in extensive dispute resolution efforts prior to filing a complaint for construction or design defects. The appellate court concluded that the Calderon Process is an integral part of construction defect litigation even though it cannot result in a judgment, so the insurer must provide a defense. The court noted that the standard insurance form definition of "suit" was expanded to include alternative dispute resolution in 1988, but the insurer's definition of "suit" at issue was limited to ADR proceedings to which it consented. Since the court found coverage was required by the more general definition of "suit," it did not reach whether the mandatory ADR requirements of the Calderon Act would satisfy the "consent" term in the policy.

[Clarendon America Ins. Co. v. StarNet Ins. Co.](#), No. G042353 (Cal. App. 4th Dist., July 27, 2010); [Morgan Lewis.com](#) (August 23, 2010)

Ninth Circuit Affirms that Confidentiality Provisions Shield Alleged Legal Malpractice During Mediation

The U.S. Court of Appeals for the Ninth Circuit affirmed the Oregon district court's grant of 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 Oregon's mediation confidentiality statute. The appellate court concluded that there is no confidentiality exception for clients to challenge their attorney, and without the confidential mediation communications there was no evidence of legal malpractice.

[Fehr v. Kennedy](#), No. 09-35768 (9th Cir., July 16, 2010)

Eleventh Circuit Construes Mediation Confidentiality Narrowly

The U.S. Court of Appeals for the Eleventh Circuit upheld an award of attorneys'

Mediation Quote:

"Someone defined a novel as 'a lie in search of the truth.' Similarly, the stories people tell about their conflicts usually reveal the metaphoric truths they have hidden within their lies. Dangerous mediation consists not of confronting the lie, but instead of treating it as a metaphor and an excuse to ask deeply honest questions. We can, for example, treat someone's lie about a successful career as an honest statement of shame and fear of failure."

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

Check These Out:

CPR's Model Civil Litigation Prenup Requires Mediation
The Economical Litigation Agreement (or "litigation pre-nup") is a hybrid of arbitration and litigation which has been introduced by the International Institute for Conflict Prevention &

fees based in part on the fact that defendants did not offer to settle, despite plaintiff's objection that such information should not have been disclosed from the mediation between the parties. However, the Circuit Court held that the applicable mediation confidentiality rules (M.D. Fla. L. R. 9.07(b)) only prevent statements made by a mediation participant from being used against the interest of that participant. In this case, the court did not rely on any statement of plaintiff during the mediation.

[Angiolillo v. Collier County](#), No. 10-10895 (11th Cir., August 25, 2010)

Federal Court Awards Costs for Failure of Corporate and Insurance Reps to Attend Mediation

A federal trial court in South Carolina sanctioned defendants for not having a corporate representative present at mediation, as required by local rule, and for having an insurance representative only participate by telephone without permission of the court. The court awarded full travel expenses, attorneys' fees and mediation fees, as well as \$2,000 of the \$7,500 asserted as lost income by plaintiff for attending the unsuccessful mediation.

[Barnhouse v. Wild Dunes Resort, LLC](#), No. 2:08-CV-2546 (D.S.C., August 5, 2010) (Subscription Required)

Course of Multi-District Litigation Modified for Ongoing Mediation

While the pretrial stage of the Multi-District Litigation (MDL) over whether AstraZeneca's antipsychotic drug Seroquel causes diabetes has been completed, the MDL Panel vacated orders to send thousands of cases back to their originating courts after the mediator appointed by the court raised concerns that ending the MDL process would disrupt ongoing settlement discussions. AstraZeneca announced on August 9 that it had settled with 17,500 claimants for a "modest" \$198 million or only a little over \$11,000 per plaintiff, which won't affect its 2010 profit forecast. It previously settled with others, but has about 6,000 suits still pending out of the 26,000 initially filed. Counsel for most of the 6,000 remaining plaintiffs stated that his clients won't settle for so little.

[ABC News.go.com](#) (August 9, 2010); [Business Week.com](#) (September 1, 2010)

Federal and State Judges Collaborate to Reach Settlements in Multi-District Vitamin Dispute

A Georgia state judge with many dozens of cases involving Total Body Formula liquid supplements worked with the Alabama federal judge responsible for the corresponding federal Multi-District Litigation to streamline the litigation process and move towards settlement. The two judges held a mediation conference in which 222 cases settled, and appointed a special master to assess individual claims and assign a monetary value. Not all of the cases settled; the state judge is now scheduling trials for about 40 remaining cases.

[Law.com](#) (August 25, 2010)

Resolution and a Boston litigator to rationalize discovery and reduce litigation costs and hassles. It is intended to be inserted in contracts in place of arbitration clauses. The prenup contains a tiered dispute resolution approach, first requiring direct negotiation, followed by mandatory mediation, after which more formal processes can be pursued if necessary.

[CPR](#) (August 2010)

Survey Finds Lawyers – Especially Men – Overconfident in Predicting Case Outcomes

A survey by a University of California-Irvine psychologist and law professor, along with other academics, found that lawyers – especially men – tend to be overconfident in predicting case outcomes. Overall, 44 percent of lawyers were less successful than they predicted, negatively influencing case strategies. Notably, accuracy of predictions was not enhanced by practice experience. The researchers suggest that lawyers should seek third party feedback on their cases.

[ABA Journal](#) (May 11, 2010); [Research Paper \(American Psychological Association, Psychology, Public Policy & Law\)](#) (2010)

Evidence Held Back During Oksana-Mel Mediation

Sources state that Oksana Grigorieva did not make an issue of her black eye or reveal photos of it during a two-

Mass Litigation Judges in Massey Pollution Case Dual Track Litigation and Mediation

A five-judge panel handling the long-delayed mass litigation against Massey Energy Co. for pumping coal slurry underground which allegedly poisoned drinking wells has set a trial date of August 1, 2011 and warned attorneys to clear their schedules for two months. While litigation moves forward, two of the judges will hold a mediation day on November 15 to try to reach settlements, requiring every plaintiff to be present and every attorney to appear with the authority necessary to settle. The judge chairing the panel has committed to moving at full speed on both tracks, pursuing both mediation and litigation.

[Businessweek.com](#) (August 20, 2010)

Colorado Court Approves Mediated Settlement of Trust Dispute over Objection of Beneficiary

At the conclusion of a mediation among family members which resolved a dispute over a trust, each party signed a settlement stipulation, with the siblings' attorney signing for a sibling who participated only by telephone. The absent sibling later stated that he did not agree to the settlement, and his attorney scratched out his name. The trial court concluded that the signature of the absent sibling's attorney was consistent with and indicative of the sibling's agreement, and his attorney would not have signed the stipulation without authority. On appeal, the Colorado appellate court affirmed the lower court, concluding that the litigation was a derivative action on behalf of the trust, so there did not need to be unanimity among the settling beneficiaries as long as the settlement was just and reasonable.

[Saunders v. Muratori](#), No. 09CA1645 (Colo. App., August 19, 2010)

Court-Ordered Mediation Precludes Oral Settlement Agreement

A Missouri court of appeals reversed the trial court's enforcement of an agreement not signed by the plaintiff, noting that, while oral settlement agreements are enforceable under Missouri common law, the rules for court-ordered mediations require settlement agreements to be written and signed to be enforceable, and that mediation confidentiality rules also would prevent enforcement of an oral agreement. The appellate court further stated that voluntary mediation proceedings not covered by court rules might permit oral settlement agreements.

[Williams v. Kansas City Title Loan Co.](#), Nos. WD 70941, WD 70969 (Mo. App., July 13, 2010)

Mediator's Declaration About Length of Settlement Agreement Inadmissible

A California appellate court concluded that a mediator's declaration about the number of pages in a settlement agreement and recounting his actions to copy and distribute the final agreement should not have been allowed at trial under California's mediation confidentiality statute. However, admitting the mediator's declaration was harmless error because other evidence provided a sufficient basis

day mediation with Mel Gibson, supposedly because she had more than enough other damning details, such as the secretly recorded telephone rant. Gibson ended up offering \$15 million, which initially was accepted, but ultimately was not sufficient to reach resolution.

[TMZ.com](#) (July 29, 2010); [American Superstar](#) (September 2, 2010)

Other Cases & Resolutions:

The University of South Florida and an academic advisor resolved claims of racial discrimination in mediation, with her return to a new position. [The Ledger.com](#) (August 23, 2010)

Following several bellwether trials, the federal judge ordered mediation for the Knauf Chinese drywall cases, urging the parties to consider global settlements rather than individual resolution of claims. [Nola.com](#) (August 23, 2010)

China Shenghuo Pharmaceutical settled a class action in New York through mediation. [Reuters.com](#) (August 16, 2010)

Terra Firma and Citigroup will mediate in New York in September over the £4.2 billion EMI deal. [Alt Assets.com](#) (August 19, 2010)

Whatcom County,

for the court's conclusion.

[Radford v. Shehorn](#), No. B216323 (Cal. App. 2d Dist., August 19, 2010)

Tulsa Mayor and City Council Jockey over Mediation of Disputes Between Them

The mayor of Tulsa, Oklahoma and the City Council are embroiled in numerous disputes between them and are discussing mediation as a possible avenue for resolution. The current list of nine potential agenda items for mediation includes a criminal probe, actual and threatened litigation and an ethics complaint. A former Oklahoma Supreme Court justice and another retired judge are being considered to act as co-mediators. The City Council is taking a formal vote on whether to mediate the disputes. How the Oklahoma Open Meeting Act would impact the mediation is also being analyzed. The former justice emphasized the importance of mediation confidentiality, but stated that confidentiality is consistent with the Open Meeting Act as long as the mediation only discusses proposals, with the Council publicly voting on whether to mediate and on the issues to be mediated, and then publicly explaining, justifying and voting on any resolution at the end of the process.

[Tulsa World.com](#) (July 31, 2010); [Tulsa World.com](#) (August 18, 2010); [Tulsa World.com](#) (August 24, 2010)

Other Notable Cases & Proceedings

- Skilled Healthcare and plaintiffs reached a settlement in mediation, following a \$671 million jury verdict for improperly staffing 22 nursing homes. The \$671 million verdict is the largest jury award in the U.S. this year and exceeded the policy limits of the company's insurance. Skilled Healthcare agreed not to file for bankruptcy during the mediation period. The settlement must be approved by the court. [Business week.com](#) (July 15, 2010)
- Hemispherx Biopharma announced that it had reached agreements through mediation to settle all securities class action cases against it, which had been consolidated in federal court in the Eastern District of Pennsylvania. [Reuters.com](#) (August 24, 2010)
- Mediation resulted in an offer of \$2.8 million for a brain damaged motorcyclist who was hit by a tractor-trailer with faulty brakes, but was refused, as were offers during trial of \$3.5 and then \$4.5 million. The case finally settled during the second week of trial for \$6.5 million, five years after the accident. [Reuters.com](#) (August 23, 2010)
- Successful mediation resolved litigation against the oversight board of the disbanded Metro Gang Strike Force brought by those claiming that the anti-gang unit had illegally seized their property or violated their rights. The settlement of \$3 million will be administered by a special master who will evaluate individual claims, with any leftover funds going to train law enforcement officers in community policing and racial and ethnic sensitivity. [Star Tribune.com](#) (August 25, 2010)
- A Michigan county is seeking mediation as mandated by their design/build contract for a \$7.8 million septage treatment plant that partially collapsed and handles only half the expected volume. The engineering firm is seeking a negotiated solution without the costs of mediation and legal fees, but says a cash settlement is premature. [Record-Eagle](#) (August 29, 2010)
- Mediation between hip-hop star Kanye West and rap mogul Suge Knight, in which a judge permitted West to participate by telephone because of a business commitment outside the continental U.S., was not successful in

Washington officials are seeking help from the Bureau of Indian Affairs for mediation with the Lummi Nation over charges for a ferry dock. [KGMI.com](#) (August 26, 2010)

The city of Menasha, Wisconsin is mediating federal securities litigation claims of bondholders relating to the Menasha Utilities steam plant. [Trading Markets.com](#) (August 28, 2010)

Court-ordered mediation failed to resolve a major antitrust dispute between Nielson and Sunbeam Television. [Research-Live.com](#) (August 31, 2010)

Opponents hope mediation can resolve disputes swirling around the board of a charter school. [The Pilot.com](#) (August 11, 2010)

The state of Ohio and an Ohio county are entering mediation over the funding formula for mental health support in an attempt to avoid further litigation. [Dispatch Politics.com](#) (August 26, 2010)

An Indiana court will order a billionaire's widow to mediate with his daughter over disposition of his estate. [IBJ.com](#) (August 10, 2010)

An Australian court ordered a billionaire's widow to mediate with his mistress over disposition of his estate. [HeraldSun.com.au](#) (September 2, 2010)

resolving million dollar claims against West for not having better security at a party he hosted at which Knight was shot and robbed. [Google.com](#) (August 18, 2010); [Ace Showbiz.com](#) (August 27, 2010)

- In a legal malpractice case, plaintiffs argued that their lawyer did not make them aware of the difference between mediation and arbitration, and that the lawyer negligently advised them to sign an arbitration agreement without making them aware it was binding. The Supreme Court of Vermont upheld the lower court's summary judgment for defendant, finding that plaintiffs did not meet their burden of proof because their claim was not supported by expert testimony or even their own sworn statement. [Clayton v. Unsworth](#), No. 2009-334 (Vt., August 26, 2010)
- Federal judges have dismissed three lawsuits against car dealerships because the contracts contained mediation and arbitration clauses covering so-called yo-yo sales in which financing fell through and consumers were required to return cars. [Hampton Roads.com](#) (August 27, 2010)
- Archbishop Dolan, head of the Roman Catholic Church in New York, said he would be pleased to mediate between proponents and opponents of the proposed Islamic center and mosque planned near Ground Zero. [New York Times.com](#) (August 18, 2010)
- The Cuban government agreed to release 52 political prisoners through the mediation efforts of the Church, negotiations by the Spanish Foreign Minister and a hunger strike that began in February. Half of the promised number have been released thus far. [France 24.com](#) (August 8, 2010); [Zenit.org](#) (August 23, 2010)

NEWS & INITIATIVES:

Five NYC Hospitals Participating in Federally-Funded Mediation Program

Five New York City hospitals have agreed to participate in a three-year mediation pilot program, which is receiving \$3 million in federal funding. Under the program, hospitals will admit medical mistakes early, offer settlements more quickly and use special "health courts" in which judges will be available to mediate disputes. The goal is to cut medical-malpractice costs and reduce the \$1.4 billion spent on medical premiums in New York state each year.

[The Wall Street Journal](#) (July 23, 2010)

Medical Liability Cases Often Settle Through Negotiations

An American Medical Association survey of 5,800 physicians indicates that about one-fourth of all medical liability litigation filed against doctors is settled, with 4.5% using alternative dispute resolution. Only 5% of lawsuits against physicians make it to trial, where doctors win 90% of the time. A full two-thirds of all cases against doctors are dismissed or withdrawn. However, the cost of defending even cases dismissed or withdrawn was over \$20,000, while the cost of trials averaged over \$100,000.

Other News & Initiatives:

Mediation by the Federal Reserve Bank of Atlanta and the Federal Reserve Bank of Boston has led to surprising progress and consensus on mobile-payment technologies by a group of about 20 representatives from leading players in telecommunications and electronic payment. The first meeting was in January, followed by sessions in May and July, with another set for October. The group has overcome hobbling disagreements and is now collaborating on a paper to be circulated to the financial and telecom industries. [Digital Transactions.net](#) (July 27, 2010)

The Small Business Association recently modified its regulations covering appeals before its Office of Hearings and Appeals, including two provisions to encourage greater use of alternative dispute resolution. The first adds Sec. 134.216(b) to permit a judge to offer ADR to the parties at any time. The second provision adds Sec. 134.216(c) to permit designation of either a judge or an OHA attorney to serve as an ADR neutral. Other clarified provisions which address mediation are in section 134.804-807. [Federal Register.gov](#) (August 6, 2010)

The federal Agricultural

[Amednews.com](#) (August 16, 2010)

MSHA Returning to Mediation in Effort to Streamline Citation Process

The Mine Safety and Health Administration is beginning a 90-day test period in which it is returning to greater use of mediation to resolve factual disputes relating to citations, rather than requiring a formal appeal to be filed. Reinstating the “safety and health conferences,” which were eliminated in 2007 partly due to criticism that they were too friendly to industry, should help stem the backlog of 89,000 cases pending before the Federal Mine Safety and Health Review Commission, which has attracted Congressional scrutiny. The pilot program would allow both mine operators and miner representatives to participate in the conferences, and may make the agency’s enforcement more efficient.

[Platts.com](#) (August 24, 2010)

Update on Home Foreclosure Mediation

- **Nevada** has reported on the first year of its Foreclosure Mediation Program, with state officials asserting that the program is working. The report indicates that 43% of homeowners who completed the mediation process stayed in their homes under agreements with their lenders. However, critics are concerned that many of the resolutions are temporary, 90-day agreements that merely delay foreclosure. In the first year, there were 90,000 notices of default in Nevada, with about 11,700 borrowers requesting mediation, and 3,860 completed mediations. [RGI.com](#) (July 29, 2010)
- **Florida’s** Residential Mortgage Foreclosure Mediation Program is finally under way, with each judicial district independently selecting program managers to operate the mediation program in compliance with rules set by the Florida Supreme Court. The Eighth Judicial Circuit selected the American Arbitration Association, while the Ninth Circuit selected the Orange County Bar Association. Mediators must be Florida Supreme Court-certified and specifically trained in residential mortgage foreclosure matters, so foreclosure training courses are being conducted to create a pool of qualified mediators. [Circuit8.org](#) (July 26, 2010); [Sun Sentinel](#) (August 18, 2010) (Subscription Required)
- **Maryland’s** foreclosure mediation law took effect on June 30, leading lenders to shift a significant number of foreclosure filings prior to that date. Lenders must now pay a \$300 fee with each foreclosure request, which goes into a state fund for mediation and related programs. Lenders must also provide information to homeowners about their new options under the law, including mediation. If homeowners wish to mediate, they must respond within 15 days and pay \$50. Thus far only a handful of homeowners has requested mediation, but that number is expected to increase. Mediations will be conducted by Maryland’s Office of Administrative Hearings, which has hired and is training six additional administrative law judges. [Herald-Mail.com](#) (August 7, 2010)
- Advocates in **Utah** are seeking legislation that would require mandatory mediation between homeowners and lenders to try to negotiate loan modifications. A petition is calling for a law similar to Nevada or Florida. Utah is one of the ten states with the highest foreclosure rates in the country. [Fox 13 Now.com](#) (July 12, 2010)
- A \$600 million settlement reached through a long mediation resolves several class action lawsuits against Countrywide Financial Corp. The settlement is the largest to date in the **United States** of shareholder

Credit Act of 2010 was enacted on August 16, 2010, authorizing appropriations through FY2015 for state agricultural mediation programs. [GovTrack.us](#) (August 16, 2010); [USDA Agricultural Mediation Program](#)

Poor economic conditions encourage development of mediation, as parties cannot afford to pay for less efficient methods of resolving disputes. Increasingly, mediation is attracting law firms and not just solo practitioners. [Memphis Daily News.com](#) (August 12, 2010)

litigation relating to the mortgage meltdown. An additional \$24 million will be paid by KPMG, Countrywide's outside accounting firm during the height of the boom. Countrywide remains the target of other litigation and investigations, including a civil case by the Securities and Exchange Commission, a criminal investigation by the Justice Department, and other actions by attorneys general for California and other states. [Sun Sentinel](#) (August 2, 2010); [Sun Sentinel](#) (August 18, 2010) (Subscription Required); [Orlando Business Journal](#) (July 9, 2010)

California County Mediation Services Consolidated After Funding Cuts

Marin County, California lost its independent Mediation Services program in July due to budget cutbacks. However, its caseload of landlord-tenant, neighborhood and community disputes is being consolidated in the District Attorney's office, which has mediated various disputes for 25 years. Mediation proponents doubt there is any way the DA can add 600 or more additional mediations each year, but the DA says that the transition will be as seamless as possible.

[Marinij.com](#) (August 5, 2010)

Pending Mediations Triple at Minnesota Farmer-Lender Mediation Program

A University of Minnesota study shows increased use of debt mediation among Minnesota farmers. As of the end of July, 488 farmer-lender mediations were pending in Minnesota, up from 133 a year earlier. Experts expect troubled farm loans to increase due to low livestock prices and the ongoing weakness of the economy. Creditors with secured debts over \$5,000 against agricultural property in Minnesota are required to offer mediation prior to judgment collection, repossession or foreclosure. Farmers choosing mediation have 90 days to work with lenders to renegotiate their debts.

[Atlanta.Bizjournals.com](#) (August 21, 2010)

Mediation Expanding in China with New National Mediation Statute

China's highest legislative body, the National People's Congress, enacted the People's Mediation Law in late August, which will take effect on January 1, 2011. China has an extremely long tradition of mediating disputes and currently has nearly five million mediators working in over 800,000 mediation committees. Last year the mediation groups handled over 7.6 million disputes and resolved 97 percent of them. Even so, the legislation is seen as a milestone and is being reported as China's first national mediation law. The legislation is intended to clarify the rights of mediators and parties so that mediation may be used in increasingly complex and difficult disputes. The statute also makes clear that mediation agreements are legally binding and enforceable by a single party, and mandates that courts and police inform those in conflict about the potential for resolution through mediation.

CRIEnglish.com (August 29, 2010); English.Xinhuanet.com (August 30, 2010)

Other International Mediation Developments

- **Columbia** announced a mediation to be held in public between the government and Ingrid Betancourt, who seeks \$6.5 million for six years in FARC captivity before being rescued by Columbia's armed forces. [Colombia Reports.com](http://ColombiaReports.com) (July 12, 2010)
- Use of mediation is increasing in Belfast, **Northern Ireland** to address anti-social behavior, with reliance on two restorative justice groups. Human-Law.co.uk (August 3, 2010)
- The Supreme Court of **India** has referred a border dispute between the states of Assam and Nagaland to mediation, naming two mediators and specifying three mediation sessions. The case has been pending for 22 years; the mediators are to report back to the court in December. [Hindustan Times](http://HindustanTimes.com) (August 21, 2010)
- Following the success of the first three mediation centers established by the Delhi Dispute Resolution Society, the group plans an ongoing mediation awareness campaign; 16 additional mediation centers are planned for the nine districts of Dehli, **India**. [The Hindu.com](http://TheHindu.com) (July 12, 2010)
- A judge in **Indonesia** sent to mediation a lawsuit filed by citizens representing labor unions against President Yudhoyono and other government officials for failing to implement the 2004 National Social Security Law. [The Jakarta Globe](http://TheJakartaGlobe.com) (August 2, 2010)
- The Federal Court of **Australia** announced its procedures for identifying, selecting and appointing mediators to assist with native title land claims. PSNews.com.au (August 16, 2010)
- The Chief Justice of the Supreme Court of the **Philippines** stated during oral arguments that a special committee was being formed to try mediation to resolve complex land disputes between farmers and the company of the President's family. [Business World Online](http://BusinessWorldOnline.com) (August 24, 2010)
- The **Philippine** government saved over 2.3 billion pesos (over \$50 million) through use of village dispute mediator councils which successfully resolved about 80% of 300,000 disputes before them. [All Voices.com](http://AllVoices.com) (July 8, 2010)
- A **Hong Kong** court considered the relevant circumstances and imposed higher costs on a party for unreasonably refusing to mediate in Golden Eagle International (Group), Ltd. v. GR Investment Holdings, Ltd., as required by Practice Direction 31. [International Law Office.com](http://InternationalLawOffice.com) (August 10, 2010)

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