



Keith's Perspective: *"Mediation is a powerful, yet underutilized tool for resolving serious conflicts, and often saves important business and personal relationships as well. Although mediation is not magic, and requires hard work by the parties, as an experienced mediator I have time and again directed its power to turn difficult situations around and end bitter drawn-out litigation. I invite you to consult with me, as I am committed to the mediation process and fostering understanding of how mediation can help you and your business or clients."*

November 1, 2006

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CASES & RESOLUTIONS:

Ninth Circuit Requires Mediation over 2000-2001 Energy Crisis

After six years of litigation over the 2000-2001 energy crisis in California and other western states, more than 200 appeals from Federal Energy and Regulatory Commission (FERC) actions remain before the U.S. Court of Appeals for the Ninth Circuit and close to two dozen related appeals are pending in the U.S. Court of Appeals for the D.C. Circuit. In August, the Ninth Circuit sent the parties to mediation, which commenced in September before a federal judge in San Francisco. FERC Chairman Joseph T. Kelliher hailed the move to mediation as a way to bring closure, stating that settlements of FERC-related cases dealing with the crisis have already yielded over \$6 billion for consumers, while litigation has yielded nothing thus far and might continue for another five or ten years.

[US Federal News \(September 6, 2006\)](#) (Subscription Required)

Unsigned Settlement Agreement Enforced by California Court

Where a doctor gave her insurer permission to settle a medical malpractice case and then changed her mind before the written settlement agreement was signed, the California appellate court in Simmons v. Ghaderi applied basic contract law principles to find an enforceable oral agreement to settle the case. The doctor failed to rely on the confidentiality of mediation to object to evidence showing an oral agreement during the first fifteen months of litigation over the events at the mediation, after which the court concluded it was too late and she was estopped from relying on confidentiality. A dissenting opinion vigorously argues that the mediation proceedings must be considered confidential, and thus no oral agreement can be proved, because no exception to California's tough mediation confidentiality statute was shown and there was no harm from the doctor's fifteen month delay in raising confidentiality concerns.

[Simmons v. Ghaderi](#), B180735 (Cal. App. 2d Dist., Sept. 27, 2006)

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Mediation Quote:

“This may sound heretical, as mediators are supposed to be against fighting. While it is clearly important to direct our skills and techniques against unproductive, ineffective, cruel, and costly ways of fighting,

Florida Delays Telecom Complaint Pending Out-of-State Mediation

In a matter brought by a local telephone company against AT&T alleging underpayment of access fees, the Florida Public Service Commission has postponed action for 60 days to await the outcome of a court-ordered mediation in a similar action in federal court in Missouri. The parties are to report back to the Commission on the mediation, which AT&T did not expect to exceed 60 days.

[State Telecom Regulation Report \(September 8, 2006\)](#) (Subscription Required)

Local Government Mediation Rejected for “Prompt” Trial

A Florida appellate court upheld a lower court’s rejection of Pinellas County’s effort to mediate disputes with several municipalities over whether proposed changes to the county charter would be on the November ballot. The county claimed a right to mediation under state law because the dispute was between local government entities. The cities accused the county of attempting to drag out the mediation process beyond the November 7 elections. The court ordered a prompt trial to take place in October.

[St. Petersburg Times \(October 20, 2006\)](#) (Subscription Required); [St. Petersburg Times \(October 5, 2006\)](#) (Subscription Required)

Clergy Sex Abuse Mediation Yields \$16 Million Settlement

A sixteen-hour-long mediation resulted in settlement of sexual abuse claims involving the Archdiocese of Milwaukee, with \$8.25 million to be paid directly by the Archdiocese and \$8.4 million by fourteen insurance providers. In addition to working out the financial settlement in the court-ordered mediation, the archbishop had a “very emotional” meeting with the ten victims. The Archdiocese must sell property to raise funds for the settlement, but avoided potential bankruptcy and negative publicity from the scheduled broadcast of the first trial on Court TV. These claims were among more than 500 clergy sexual abuse cases that remain pending before Judge Haley J. Fromholz in Los Angeles County Superior Court.

[Catholic Herald \(September 7, 2006\)](#)

Expert Statement Prepared for Mediation Is Privileged Despite Circumstances

A joint statement prepared for mediation by the parties’ experts in a construction dispute was held to be privileged and inadmissible in litigation by the UK’s Technology and Construction Court (TCC) in [Aird v. Prime Meridian Ltd.](#), even though the court mandated the statement using a litigation form and the experts had agreed to remove the “without prejudice” designation. While the court frequently requires joint submissions from parties’ experts in litigation, in this case the court intended the submission to be prepared for mediation. When one party sought to amend its pleadings in the litigation in ways inconsistent with the joint statement, the court considered the statement privileged, explaining that the statement may have been prepared under time and resource

we can also assist people, through a dangerous mediation process, to engage in constructive forms of combat. In the process, they may discover that transformation depends on the very friction, strife, and contradiction that is sometimes needed for truth to emerge in conflict."

- Kenneth Cloke, *Mediating Dangerously: The Frontiers of Conflict Resolution* (Jossey-Bass 2001) at 186

Check These Out:

International Coalition of Concerned Mediators Launched

Asserting that mediators should be proactive in the media and political dialogue, the International Coalition of Concerned Mediators has been launched as a project of the Conflict Resolution Research Resource Institute. The Coalition's first step is promoting the **Mediators' Call to Action**, which was developed to advocate that effective negotiation principles be used in public dialogue to address pending crises. Over 750 mediators from 33 countries have signed on to the statement, which is also open for

constraints that would have been handled differently if for litigation.

[Aird v. Prime Meridian Ltd.](#), [2006] EWHC 2338 (TCC) (19 Sept. 2006); [Mondaq](#) (September 28, 2006) (Subscription Required)

NEWS & INITIATIVES:

Vast Majority of ADA Cases Resolved Through Mediation

The U.S. Department of Justice has used mediation to resolve 90% of 2,000 cases involving the Americans with Disabilities Act (ADA) over the past five years, along with another 150 ADA cases against state and local governments. While most settlements involve better access for persons with disabilities to public places and services, a few have also included monetary damages, such as a \$100,000 payment by a theater chain for access problems.

[Washington Post](#) (October 9, 2006)

Merit Systems Protection Board Promoting Mediation

The Merit Systems Protection Board (MSPB), an independent federal agency which handles appeals of personnel cases by federal employees against management, is moving its mediation program to MSPB Headquarters to emphasize and enhance the visibility of its program. The MSPB mediation program began in two regional offices in 2002, and expanded nationwide in 2005. Of more than one hundred MSPB appeals that have been mediated, about 60% have settled at mediation or thereafter, and over 95% of participants say they would use mediation again.

[US Federal News](#) (September 29, 2006) (Subscription Required)

Nevada Insurance Commission Authorizes Mediation for Audit Disputes

Nevada's Division of Insurance adopted regulations permitting qualified certified public accountants (CPAs) to mediate or arbitrate disputes with state insurance companies concerning the companies' audited financial statements. The regulations are to satisfy national insurance accreditation standards.

[RegAlert](#) (September 20, 2006) (Subscription Required)

New Jersey AG Denies Policy of Refusing to Pay for Mediation

Although parties in many types of civil cases in New Jersey state court are required to mediate, they only have to pay for mediation if they agree to continue beyond the first two hours which are provided without charge. In a case in Essex County Superior Court, an attorney has accused the New Jersey Attorney General's Office of making a sham of the court's mediation requirement with a policy of refusing to mediate beyond the free hours. The attorney claims that counsel for the New Jersey Transit Authority told him of the policy, which a supervising attorney in the AG's Office denies, asserting that the decision to pay for mediation is made on a case-by-case

the public to endorse.

[Press Release](#)

Research Supports Direct Mediation Between Parties, Not Just Counsel

Empirical research by Dr. Tamara Relis described in her article in the *Harvard Negotiation Law Review* (Vol. 12, 2007) shows the importance of principals being able to communicate directly with each other, especially in medical malpractice cases. Patients and doctors often have a great interest in interacting with each other that is blocked by their counsel which prevents them from obtaining the "extra-legal" benefits of mediation, including understanding, forgiveness and empowerment, that parties seek in mediation along with financial compensation.

[Abstract and Link](#)

Other Cases & Resolutions:

Tennessee Court Orders City of Kingsport into Mediation over Sunshine Law Allegations, [Times News \(September 27, 2006\)](#)

basis. Two state officials stated they understand that the AG's state agency clients refuse to pay for mediation for financial reasons. Last year, mandatory civil mediations resulted in over 1,100 settlements in total, which was about one-third of completed mediations; separate figures for cases handled by the AG's Office are not available.

[186 N.J.L.J. 373 \(October 23, 2006\)](#) (Subscription Required)

Minnesota City to Mediate Secession Dispute

Following Minnesota's state policy of mediating secession and annexation disputes, the Vadnais Heights City Council has agreed to mediate with neighboring Gem Lake. Groups of residents representing over one-fifth of Gem Lake are seeking to break away from their city and join Vadnais Heights. The parties are working to select a mediator.

[Twin Cities Pioneer Press \(September 22, 2006\)](#)

Number of Jury Trials Constant as Mediation and Settlements Handle Growing Caseloads

Despite court caseloads tripling since 1990, the number of jury trials has remained steady in Butler County, Ohio, which reflects statewide trends. An additional, seventh judge is being added to the court, but the increase in cases is primarily handled through more mediation of civil cases and more plea bargains and careful case selection on the criminal side. As more cases are mediated and settled, the jury trials that remain tend to be more complex and for higher stakes.

[Middletown Journal \(October 23, 2006\)](#)

Mediation Preferred in Construction Disputes

A nationwide survey found that a majority of governmental and other public owners involved in construction projects in the United States have experienced construction disputes in the past three years, and most would prefer resolution through mediation rather than either litigation or other forms of alternate dispute resolution. However, the Southeast is less inclined to use mediation over other forms of ADR, compared to the rest of the country. An overwhelming majority of public owners prefer speedy resolution to keep the project on schedule, rather than detailed resolution on the merits. Nearly all public owners describe themselves as competent to manage and resolve complex construction disputes, while over half consider themselves "very" competent.

[Business Wire \(October 10, 2006\)](#) (Subscription Required)

Trial Advocacy Group Begins Mediation Advocacy Training

Acknowledging the growing importance of mediation, the National Institute of Trial Advocacy (NITA) is launching a training program for lawyers who represent clients in mediation. Using NITA's experiential, learn-by-doing approach, the program plans to cover how to choose a mediator and gain the mediator's support, identifying interests and developing options, when to disclose information, and how to deal with combative opponents and "aberrant" mediators. After focusing on trial advocacy for 35 years, NITA's

Town Council Agrees to Mediate Zoning Dispute with Developer; Mediation to be Open to Residents, Miami Herald (October 1, 2006)

United Airlines and San Mateo County Agree to Mediate Jet Fuel Sales Tax Suit, Inside Bay Area (September 19, 2006)

Irish Farmers Successfully Mediate Location of Developer's Power Lines, Irish Examiner (September 27, 2006)

High-Stakes South African Saga Over Stolen Shares in Mediation, Moneyweb (September 12, 2006); Media 24 (September 13, 2006)

Other News & Initiatives:

Oregon Proclaims November as Mediation Month, Governor's Proclamation (October 17, 2006)

Philippines' Industrial Sector Experiencing Substantial Drop in Strikes with Mediation, Business World (September 15, 2006) (Subscription Required)

president states that training advocates for the "distinctive rigors" of mediation is crucial for adequate client representation.

[Press Release Newswire \(October 5, 2006\)](#)

AAA and Cybersettle Enter Strategic Alliance

The American Arbitration Association (AAA) and Cybersettle, Inc. have announced a "strategic alliance" in North America and Europe to offer clients one-stop shopping and cross promote each other's services. Cybersettle is a leader in online dispute resolution using a double-blind bid system, while AAA provided conventional dispute resolution services in 142,000 cases last year.

[Newstex \(September 25, 2006\)](#)

Promoting Mediation with Reduced Rates for Securities Disputes

The National Association of Securities Dealers (NASD) announced its annual Mediation Settlement Month for October, during which its mediation rates will be reduced substantially (up to 50% or more) and it will provide educational programs to promote mediation. Hundreds of participating mediators have agreed to reduce their rates at NASD's 68 hearing locations. Settlement Month has been a success in past years, increasing the number of cases mediated by 40% or more. In the 11 years since it was established, NASD's mediation program has handled over 14,000 securities cases, with a settlement rate exceeding 80%.

[AP Alert – Financial \(September 18, 2006\) \(Subscription Required\)](#)

New UN Website Offers Tools for Resolving World Conflicts

The United Nations seeks to encourage peacemaking with a new website offering advice and tools to diplomats, mediators and others attempting to resolve global conflicts. The content-rich site includes a "peacemaker's toolbox," a database of peace agreements, and many other resources. The site is part of an initiative by the UN's Department of Political Affairs (DPA) to synthesize existing knowledge about how peace agreements are reached, so that those involved in peacemaking worldwide may learn from past efforts and avoid recurring mistakes. The DPA is also creating a mediation support unit to provide advice and assistance to envoys in the field and to deploy mediation experts quickly for peace negotiations.

[US News Centre \(October 4, 2006\); UN Peacemaker Website \(Registration Required\)](#)

Australian Reinsurance Contracts Increasingly Include Mediation Clauses

With arbitration becoming more like litigation, more reinsurers in Australia are turning to clauses in their contracts with insurers that require disputes to be resolved through mediation or expert determination. The trend is toward including both mediation and arbitration clauses in reinsurance contracts, with arbitration occurring only if mediation fails fully to resolve a dispute. Australian courts are encouraging parties to use mediation, which

President of China's Highest Court Promotes Mediation, World News Connection (October 9, 2006) (Subscription Required)

Malaysian Proposal Would Empower Courts to Require Mediation, The Star (September 23, 2006)

South Africa Joins International Trend Favoring Mediation for Improved Dispute Resolution, Business Day (South Africa) (September 11, 2006) (Subscription Required)

Mediation Training in Angola Aimed at Avoiding Violent Conflict, Relief Web (September 20, 2006)

Contact Information

Please contact Keith with dispute resolution questions and to discuss any matters or issues that might be suitable for mediation or facilitation:



Keith L. Seat, J.D.
Mediator & Arbitrator
Six Whitehall Court
Silver Spring, MD
20901

influences the way contracts are drafted. However, parties need to understand the benefits and limitations of mediation and other forms of alternative dispute resolution before incorporating the provisions in contracts. Reinsurers may be more comfortable incorporating mediation clauses in contracts with sophisticated insurers and relying on arbitration provisions with those less sophisticated.

[Mondaq \(October 31, 2006\)](#)

UK Mediation Providers Evolving

Two prominent UK dispute resolution providers, AIC and In Place of Strife (IPOS, founded by IAM member Mark Jackson-Stops), are merging and will have a panel of over 80 mediators. The combined entity, called In Place of Strife incorporating ACI, will blend AIC's international mediation and arbitration practice with IPOS's specialized commercial business capabilities. In another move, the Centre for Effective Dispute Resolution (CEDR), the UK's largest dispute resolution firm, now offers an option to its traditional management of the whole mediation process by permitting clients to deal directly with CEDR mediators. In addition, CEDR formed an "A" panel of select mediators last year who have a preferred relationship with CEDR in exchange for exclusivity (or paying CEDR a percentage of outside fees earned). A 2005 surveys indicates that the percentage of work mediators obtain directly from clients – rather than through agencies – has increased from 45% to 55% in two years.

[Legal Week \(October 23, 2006\)](#) (Subscription Required); [Legal Week \(October 12, 2006\)](#) (Subscription Required)

New Maritime Mediation Panel Convenes in London

Forty shipping experts from 26 countries met in London on October 13 to initiate a new international mediation panel for shipping disputes and to agree on rules and rates for the panel. Spanish lawyer Jose Maria Alcantara initiated the panel, which has not yet been named, due to the increasing number of disputes and the time and expense required by both litigation and arbitration. The panel emphasizes its diverse international membership and range of mediation styles, along with its use of respected industry experts as mediators. Co-mediation may be used where broader expertise is needed.

[Lloyd's List International \(October 11, 2006\)](#) (Subscription Required); [Lloyd's List International \(October 18, 2006\)](#) (Subscription Required)

UK Mediation Week

The UK Department for Constitutional Affairs (DCA) and Her Majesty's Courts Service sponsored Mediation Week from October 9-13, with presentations, seminars and mediation demonstrations in participating courts across England and Wales. The week is part of DCA's Proportionate Dispute Resolution strategy to ensure justice by increasing awareness of rights, responsibilities and resolution alternatives.

[HMCS Mediation Week](#); [Mediation Week Events](#)

Tel: 301-681-7450
Fax: 301-681-9243
Cell: 301-523-5535
Keith@KeithSeat.com
www.KeithSeat.com

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Mediators to Roam Rural Ireland to Provide On the Spot Resolution

The Irish government will pay "walking managers" to resolve disputes in the Irish countryside between farmers and hikers over rights of way and acceptable routes. The mediators will be empowered only with dispute resolution skills and will not have any enforcement authority. The government will select local mediators who know the region and intends for them to be on the scene or available by cell phone in order to resolve disputes before they escalate.

[The Sunday Times – Ireland \(September 3, 2006\)](#)

Landlord-Tenant Mediation Enhanced in New Zealand

New Zealand has improved its landlord-tenant dispute resolution processes by adding 17 additional centers for face-to-face mediations throughout the country (for a total of 85), by providing new options to mediate simple disputes by telephone, and by making other changes in the country's Residential Tenancy Act.

[US Federal News \(September 22, 2006\)](#) (Subscription Required)

Australia Selects Mediation Firm for Grocery Industry

The Australian government has selected a firm to provide mediation services throughout the country to assist the Produce and Grocery Industry Ombudsman. The Produce and Grocery Industry receives subsidized dispute resolution services under its Code. The mediation firm's contract is overseen by the Department of Industry, Tourism and Industry, which is instituting a nationwide public awareness campaign of the Ombudsman and the Code.

[Industry, Tourism and Resources, Australia \(August 31, 2006\)](#)