



**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."*

**May 1, 2006**

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## CASES & RESOLUTIONS:

### Court Must Respect Even Ambiguous Mediation Agreement

Feuding parties ended multiple lawsuits with mediation and a written settlement, but were soon back in court squabbling over the terms of the mediation agreement. The trial court concluded that there had been no "meeting of the minds" and invalidated the entire agreement. The Florida appellate court reversed, noting that the parties agreed on the essential terms and intended to enter into an agreement, and that the ambiguities simply needed to be sorted out by the trial court.

[RAHO of Pass-A-Grille, Inc. v. Pass-A-Grille Beach Motel, Inc., 2006 WL 708513 \(Fla. App. 2 Dist. 2006\)](#)

### No Sanctions for Breaching Mediation Confidentiality with Mere Hyperbole

The mayor of Hollywood, Florida was criticized, but not sanctioned, for breaching mediation confidentiality requirements in a court-ordered mediation with a religious group. Mayor Mara Giuliani stated in an e-mail that the opposing party was furious when not offered "the sun, the moon, the stars and mars" in the mediation session. U.S. Magistrate Judge Theodore Klein withheld sanctions due to the lack of substance in the statement, but criticized the mayor as "irresponsible and unprofessional." The court emphasized that it would have imposed sanctions if there had been more than "sheer hyperbole." The mayor asserted that she would never reveal anything about what happened in mediation and claimed that her statement was merely a joke in an informal communication.

[South Florida Sun-Sentinel \(April 30, 2006\)](#) (Subscription Required)

### California Mediation Confidentiality Trumps Presumption of Undue Influence in Unequal Divorce Settlement

In a lengthy analysis, a California appellate court concluded that when an unequal divorce settlement results from mediation, the usual presumption of undue influence should not apply. The court noted that mediation may

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help to minimize any unfairness in reaching settlement, while it is important to preserve the confidentiality of mediation, the basis for which the court reviewed extensively. Although the trial court did apply the presumption of undue influence and required extensive evidence from the mediator about the details of the mediation, the appellate court concluded that the error was harmless.

[In re Kieturakis, 2006 WL 78602 \(Cal. App. 1 Dist. 2006\)](#)

### **New Zealand Court Narrows Mediation Confidentiality**

The confidentiality provisions in the New Zealand Employment Relations Act have been significantly narrowed by the Employment Court's decision in *Jesudhass v. Just Hotel*, in which the court held that there is no confidentiality for statements in mediation that are not genuinely for the purpose of settling litigation or potential litigation. Moreover, evidence of "bad faith" may be admissible because bad faith behavior would not be for purposes of resolving a dispute.

[Independent \(April 19, 2006\)](#) (Subscription Required)

## **NEWS & INITIATIVES:**

### **Legislation Would Require FEMA to Mediate in State Hurricane Programs**

Federal legislation (HR 4973) would require the Federal Emergency Management Agency (FEMA) to participate in the hurricane mediation programs that are under way in Louisiana, Mississippi and Florida. FEMA has refused to participate in the state programs and states lack authority to compel FEMA's involvement. FEMA's National Flood Insurance Program has been resolving insurance coverage disputes through its own internal processes. But determining whether damage was caused by wind or water is a key issues in many state disputes, which has motivated lawmakers to try to get FEMA into the state mediations in order to more efficiently resolve the disputes.

[Federal Legislation \(HR 4973\)](#)

### **Army Relies on Mediation for Returning Troops**

As part of its support for returning troops, the Army National Guard offers mediation when needed to help service members return to their civilian jobs. The Guard also focuses on maintaining active support from employers to ease the transition.

[Defense Department Documents \(March 21, 2006\)](#) (Subscription Required)

### **Utah Enacts Uniform Mediation Act with International Provisions**

Utah enacted the Uniform Mediation Act (UMA) in March, bringing the total

## Check This Out:

### Making Mediation

**Pay....** The practice of mediation and arbitration is now sufficiently mainstream that it has become a front for organized crime in Australia, according to the [Herald Sun \(April 21, 2006\)](#) (subscription required). Pending litigation involves claims that AUS \$250,000 was paid to underworld figure Mick Gatto's company, Arbitrations and Mediations Pty Ltd., even though no mediations or arbitrations were actually conducted. [Wikipedia](#) states in its "series on Australian criminals" that Domenic ("Mick") Gatto is "a former heavyweight boxer and a professional mediator" in the Melbourne building industry.

number of UMA jurisdictions to eight. Following Washington, DC's action in January, Utah is the second to include the international supplement which incorporates the United Nations Model Law on International Commercial Conciliation. The UMA is intended to encourage greater use of mediation by ensuring clear confidentiality protections. The Utah legislation is similar to the uniform act drafted by the National Conference of Commissioners on Uniform State Laws, except for a provision expressly requiring mediators to serve in a neutral fashion. The UMA has been adopted in Washington, DC, Iowa, Illinois, Nebraska, Ohio, New Jersey, and Washington state. Legislation to adopt the Act is pending in Massachusetts, New York, Vermont, Connecticut and Minnesota.

[Utah Legislation \(SB 61\)](#); [United Nation's Model Law on International Commercial Conciliation](#)

### Indiana Provides Mediation for Eminent Domain Disputes

Landowners may request mediation when faced with eminent domain under new Indiana legislation that took effect on March 24. Indiana HB 1010 requires the court to appoint a mediator within ten days of a request; the mediator is paid by the party seeking eminent domain. The mediation is to be concluded within 90 days and must consider any reasonable alternatives to eminent domain.

[Indiana Legislation \(HB 1010\)](#); [Summary](#)

### New Florida Rules for Lawyer-Mediators

The Florida Supreme Court adopted amended rules on March 23 for members of the Florida Bar. Among other changes, the amendments broaden provisions that previously only applied to arbitrators so they now cover mediators and other third-party neutrals. Specifically, Rule 4-1.12 requires all parties in a proceeding to give written consent before any third-party neutral can act as a lawyer for anyone in that matter, and bars negotiating for employment. Rule 4-2.4 requires third-party neutrals to make sure that unrepresented parties understand that the neutral is not legally representing them. The new rules take effect on May 22.

[Florida Bar Rules](#)

### Minnesota Considering Mediation of Budget Disputes

Legislation introduced in Minnesota would require the state Supreme Court to appoint a mediator to work with the governor and the legislature in reaching agreement on major budget bills if the usual processes have not resulted in enactment. The governor and legislative leaders could make recommendations of mediators to the Court, which is encouraged to choose a mediator that is viewed as unbiased, politically neutral and experienced in state budget issues. The governor, speaker of the house and majority leader of the senate must attend the mediation, but may send a designee in their place.

[Minnesota Legislation \(HB 3239\)](#)

## Mediation Quote:

"We all have emotions all the time. Yet during a negotiation [or mediation] we have so many things to think about that we give little or no thought to emotions. We become so busy thinking that we let our emotions take care of themselves.

"Most negotiators [and mediation participants] treat emotions as an obstacle to clear, rational thought. As a result, we do not realize the opportunity afforded by positive emotions."

– Roger Fisher and Daniel Shapiro, *Beyond Reason: Using Emotions as You Negotiate* (Viking 2005) at 203.

## Appellate Mediation Expanding in California

Mediation of cases on appeal is expanding to California's Court of Appeals for the Third Appellate District, where the court will offer mediation in civil cases it finds suitable for settlement. The court expects to conduct mediation training in June and begin the appellate mediations in the Fall. Mediators are expected to prepare and mediate for four hours on a pro bono basis, and then may charge for additional time with the agreement of the parties.

[U.S. State News \(March 29, 2006\)](#) (Subscription Required); [News Release](#)

## New Jersey Court Reconsidering Pay for Its Mediators

A New Jersey Supreme Court panel has moved away from last summer's proposal to pay mediators \$100 an hour for the first three hours of court-referred mediations, and is now proposing simply to shorten the hours mediators must donate. Since the program began in 2000, the first three hours have been provided pro bono by mediators, with market rates allowed for additional time. The latest proposal would reduce the pro bono period to two hours, with the condition that ninety minutes of the pro bono period must be spent in actual mediation, as in the past. Thus, only thirty minutes can be counted towards preparation and convening the mediation, which some do not consider a realistic period and believe will result in additional pro bono time being required. Last year nearly 7,000 cases were referred to mediation across nineteen counties in New Jersey.

[Legal Intelligencer \(March 30, 2006\)](#) (Subscription Required)

## Experience Improves West Virginia Mediation Program

Mediation settlement weeks have been conducted twice a year in the West Virginia Circuit Court in Kanawha County for the last ten years, and the results have improved significantly over time. The first year only 37% of mediated cases settled, while the settlement rate this April was 75%. The cases are mediated without charge by trained volunteer mediators who are licensed attorneys. The subject matters range from property disputes and automobile accidents to workplace discrimination. The Circuit Court Manager, who has seen the program from the beginning, explains that the legal community has become educated about mediation and how helpful it can be, which leads to improved results.

[Charleston Daily Mail \(April 14, 2006\)](#) (Subscription Required)

## Mississippi Hurricane Mediation Program Criticized

Some homeowners are voicing dissatisfaction with the Mississippi hurricane mediation program, perceiving insurance companies as playing hardball and refusing to budge from offers far below what the homeowners believe is fair. Attorney Richard Scruggs' skepticism of the program blossomed into critical television ads funded by his Katrina Group. The ads show Katrina victims stating that the process was humiliating and a hoax. Scruggs is litigating on behalf of Katrina victims against their insurers. Yet the Mississippi Insurance Commissioner states that the mediation program is working fine, with over 1,500 disputes brought into mediation and a 85% settlement rate (which has slipped slightly in recent weeks). More significantly, this rate apparently includes settlements prior to mediation as

## Contact Information

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



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well as those achieved during the mediation process. The state mediation program is offered without cost to consumers, who are free to proceed with litigation if they are not satisfied with their options in mediation.

[Sun Herald \(April 23, 2006\)](#) (Subscription Required); [WLBT.com Article \(March 22, 2006\)](#)

## UK Patent Office Offers Mediation Service

The UK Patent Office began a new mediation service in April for resolving intellectual property (IP) disputes. The Patent Office provides accredited mediators for IP disputes at a set rate of 1,000 pounds/day (in London), as well as a lengthy list of independent mediators that parties can choose to engage directly. Detailed information about the new service and various aspects of mediation is available on the Patent Office's website. The Patent Office also provides useful model mediation procedures and an agreement to mediate.

[UK Patent Office Mediation Service](#); [Model Procedures and Agreement](#)

## English Courts Urging Mediation for Personal Injury and Other Claims

Updated Civil Procedure Rules encouraging mediation and other alternatives to litigation went into effect on April 6 in England and Wales. Notably, "pre-action protocols" were amended for personal injury (PI) claims to encourage negotiation and mediation, which are common for other types of claims. While there has been resistance to mediating PI cases in the UK, use of mediation is increasing and the success rate in PI cases is said to exceed 90%.

[Civil Procedure Rules](#); [PI Pre-Action Protocol](#); [Post Magazine \(March 9, 2006\)](#) (Subscription Required); [Estates Gazette \(March 11, 2006\)](#) (Subscription Required)

## Mediation Needed in Ireland

Mediation of business disputes is relatively undeveloped in Ireland, but more mediation is desirable according to an expert report which has been accepted by the Minister for Justice. Further, an order by a High Court Master required a solicitor to reimburse his client for unnecessary legal action. The Master noted that legislation may be needed to mandate alternative forms of dispute resolution to avoid the spiraling costs of litigation.

[Irish Times \(March 10, 2006\)](#) (Subscription Required); [Article Reprint](#)

## UK-China Mediation Center Launched

A new international alliance launched the UK-China Mediation Centre in April, with locations in Beijing and London. The alliance is between the Centre for Effective Dispute Resolution (CEDR) and the China Council for the Promotion of International Trade. The focus is on mediating disputes between Chinese and European businesses to avoid the need for arbitration or litigation.

[Lloyd's List International \(April 12, 2006\)](#) (Subscription Required)

### **Mediation Being Nurtured in Morocco**

Mediation is being promoted in Morocco by an international non-governmental organization, Search for Common Ground (SFCG), which is based in Washington, DC and Brussels. An agreement was signed in December by the Ministry of Justice and SFCG to create court-annexed mediation centers. SFCG is working to promote mediation and train judges and lawyers. In March, SFCG announced the creation of a women's advice center to provide mediation and conflict resolution services. The center is to open in June with fifteen female mediators who are undergoing a four-month training course.

[Morocco Times \(March 13, 2006\)](#)

### **India Increasing Mediation/ADR Training**

The rapid growth of mediation and other forms of alternative dispute resolution (ADR) in India has spurred the Indian Institute of Arbitration & Mediation (IIAM) to develop new academic programs. IIAM has announced a "Tri-Continental LL.M" program on ADR in a joint venture with Hamline University Law School. In addition to an LL.M, completion of the program will yield a Diploma in Dispute Resolution and a Certificate in Arbitration, with course work spread between Cochin, India; St. Paul, Minnesota; and the School of International Arbitration at Queen Mary University in London.

[Hindu \(April 10, 2006\)](#) (Subscription Required); [IIAM Information](#)

### **Mediation More than Enhanced Negotiation**

Mediation involves many factors that make it far superior to simple negotiation and result in commercial settlement rates in the UK of 75%. The "convergence of readiness" achieved through the focus and preparation of the parties is vital to the success of the mediation process, as well as the "reality testing" and myriad other techniques that mediators use to assist the parties.

[Lloyd's List International \(March 10, 2006\)](#) (Subscription Required)

### **Father of Mediation Saluted at Conference**

On April 28, an afternoon at Harvard Law School was devoted to a "Frank Sander Conference" in honor of the man who sat happily on the front row of the classroom while 200 former students and colleagues applauded his accomplishments in effectively launching mediation and other forms of alternative dispute resolution in the American court system. In addition to recounting Sander's contributions in dispute resolution, the conference included presentations on the future of mediation teaching, scholarship and practice.