



**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."*

**July 1, 2006**

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## CASES & RESOLUTIONS:

### Mediation Enhances Confidentiality of Settlement Discussions

Concerns about the confidentiality of settlement discussions and materials in subsequent lawsuits have arisen following a recent decision in the U.S. Court of Appeals for the D.C. Circuit in *In re Subpoena to the Commodity Futures Trading Com'n*, which concluded that the existence of a federal settlement privilege is an "open question" in federal courts outside the Sixth Circuit. The lack of a settlement privilege greatly increases the risks for parties attempting to resolve their disputes through direct negotiation. However, parties that rely on mediation once federal litigation has commenced are covered by federal statute, while states all have some form of legislation to protect the confidentiality of settlement communications in mediation.

[National Law Journal \(May 15, 2006\)](#); [In re Subpoena to the Commodity Futures Trading Com'n, 2006 WL 508066 \(D.C. Cir. 2006\)](#)

### First Amendment Showdown Avoided by Mediation with Wen Ho Lee

Following a successful court-ordered mediation, Wen Ho Lee, the Los Alamos scientist who asserted his privacy was improperly violated by government leaks, will receive \$895,000 from the federal government and \$750,000 from five news organizations whose journalists reported on the leaks. The journalists had been subpoenaed but refused to reveal their confidential sources even after being held in contempt of court and facing significant fines and imprisonment. The government insisted on not paying damages to Lee and obtained agreement that its payment would be applied only to Lee's attorneys' fees and taxes.

[Washington Post \(June 3, 2006\)](#) (Subscription Required); [New York Times \(May 23, 2006\)](#) (Subscription Required)

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## **Party Mediating Without Insurers Present Must Pay Costs of Unsuccessful Mediation**

An engineering firm has been ordered by a Florida Circuit Judge to pay the costs of an unsuccessful mediation after failing to bring representatives of all its insurance carriers to a mediation session as the court ordered. The engineering firm unsuccessfully argued that the mediator had given permission for the insurance representatives not to appear. The opposing party claimed the four days of mediation were a waste of time without participation of the major insurance carriers, and claimed costs of \$100,000 for mediator fees, expert fees and catering. The judge has ordered the parties back into mediation and is waiting to determine costs until the conclusion of the mediation.

[St. Petersburg Times \(May 5, 2006\)](#) (Subscription Required)

## **Court Finds “Binding Mediation” Term Unclear and Unenforceable**

Parties to a mediated settlement agreed to submit to “binding mediation” any remaining terms that could not be worked out through further negotiation. A California court of appeals recognized that parties can agree to arbitrate any issues they cannot resolve in mediation and that the mediator was clear that the term “binding mediation” meant that he was to decide all unresolved issues. However, the court concluded that the parties had not intended arbitration when specifying “binding mediation” in this case, because some parties had substituted “arbitration” in place of “binding mediation” in one part of the agreement, suggesting that they considered the concepts to be distinct. The court also noted that separate rules for mediation and arbitration do not readily fit a hybrid approach. A concurring opinion vigorously criticized “binding mediation” as an oxymoron and discussed the disadvantages of using the mediator as an arbitrator to decide any remaining issues. Without agreement on the final procedures to resolve the dispute, the court found the entire settlement agreement unenforceable.

[Lindsay v. Lewandowski, No. G033173 \(Cal. App. 4 Dist. 2006\)](#)

## **Wisconsin City and County to Mediate Wireless 911 Dispute**

The city of Middleton, Wisconsin will mediate a dispute with Dane County over the right to answer wireless 911 calls. The city has spent over \$200,000 to implement the dispatch service and has asked the county to stop its “unlawful interference” or pay the city the value of its wireless 911 equipment. The county opposes the city’s handling of the service for public safety reasons.

[Capital Times \(May 3, 2006\)](#) (Subscription Required)

## **Ancient Tree Wins in Mediation; Lengthy Hearing Avoided**

A successful mediation concluded with everyone smiling and a community association and the City of Guelph both able to claim victory in a mediation over issues relating to a proposed 671-acre business park. The association’s concerns over clean water preservation and protection of fisheries and trees, including a 500-year-old ironwood tree, were

## Check This Out:

### Court Expands ADR to Include "Rock, Paper, Scissors"

A U.S. District Court in Florida denied a motion to designate the location for a deposition and instead ordered the parties to engage in "a new form of alternative dispute resolution." Counsel and one paralegal for each side are to meet at a specified time on the courthouse steps (or other location, if one can be agreed upon) and engage in one game of "rock, paper, scissors," with the winner selecting the deposition location. But, given the litigiousness of the parties, the court went ahead and set a date for hearing any appeals resulting from the outcome of the game. [Avista Management, Inc. v. Wausau Underwriters Ins. Co., Case No. 6:05-cv-1430-Orl-31JGG \(Order of June 6, 2006\)](#)

addressed, and construction can commence once the settlement is approved by the municipal board. The mediation avoided a full board hearing that was expected to last ten weeks.

[Guelph Mercury \(June 7, 2006\)](#) (Subscription Required)

### UK Courts Impose Sanctions for Unreasonable Failure to Mediate

While UK courts strongly encourage mediation, they have been reluctant to simply order parties to mediate, and have instead imposed sanctions on litigants who unreasonably refuse to mediate, even if the party is ultimately successful in litigation. In a significant line of cases, UK courts are making increasingly nuanced decisions about whether the refusal to mediate was unreasonable, looking at factors such as the nature of the dispute, the merits of the case, whether delay for mediation would cause harm, whether mediation had a reasonable chance of success and the extent to which mediation was encouraged by the court. Some decisions have recognized that looking into whether a refusal to mediate was unreasonable may involve sensitive issues of mediation confidentiality and privilege, and note the need to avoid questions of why mediation may not have resulted in settlement.

[The Journal \(May 2, 2006\)](#) (Subscription Required); [Lawson Lundell LLP Article \(March 6, 2006\)](#)

### Mediation Successfully Resolving Malpractice Claims

Hundreds of claims against Dr. Jayant Patel in Queensland, Australia are being mediated and 40 claims have been settled so far. The Health Rights Commission predicts resolution of as many as half the original claims in the next few months. The parties have access to independent advice through the Commission, which helps the process move forward quickly.

[ABC News Online \(May 29, 2006\)](#)

## NEWS & INITIATIVES:

### Vermont Enacts UMA with Labor Exemption

On May 3, Vermont became the ninth jurisdiction to adopt the Uniform Mediation Act, which applies to referrals or agreements to mediate after July 1. The UMA is intended to encourage greater use of mediation by ensuring clear confidentiality protections. However, Vermont exempts mediations relating to collective bargaining relationships and disputes before the Vermont Labor Relations Board and the Federal Mediation and Conciliation Service, as well as disputes among students at schools, and other limited categories. The UMA also has been adopted in Utah, Washington, DC, Iowa, Illinois, Nebraska, Ohio, New Jersey, and Washington state. Legislation to adopt the Act is pending in Massachusetts, New York, Connecticut and Minnesota.

[Statute](#)

## **Other Cases & Resolutions**

**City Seeks Mediation in \$75 Million Litigation Against Canadian Government,**  
[Hamilton Spectator, June 30, 2006](#)  
(Subscription Required)

**Court Finds Prior Mediation Agreement Binding on Workers' Comp Factual Issues,**  
[Hoglund v. Aaskov Plumbing & Heating, 2006 ME 42, April 26, 2006](#)

**Federal Judge Rejects Settlement and Orders Mediation of All Claims in Church Sex Abuse Scandal,**  
[Spokesman-Review, May 19, 2006](#)  
(Subscription Required)

## **Other News & Initiatives**

**UN Should Mediate Whenever Possible to Protect Civilians from Armed Conflict,**  
[US Federal News, June 28, 2006](#) (Subscription Required)

**Mediation Used to Resolve Gang Wars,**  
[Sunday Mercury, Birmingham, June 25, 2006](#) (Subscription Required)

**Success in Philippine High Court's**

## **South Carolina Mandates Mediation by Cable Franchises**

In legislation that took effect on May 23, South Carolina has mandated mediation in disputes involving cable franchises. The Competitive Cable Services Act requires municipalities, counties and cable franchise operators to mediate their disputes following the alternative dispute resolution rules of the South Carolina Circuit Court.

[Statute](#)

## **Florida Broadens System for Certifying Mediators**

The Florida Supreme Court approved a new point system for certifying mediators that is designed to replace formal education/professional-based requirements with a flexible approach more directly related to the actual mediation skills and experience needed. The Court noted that the new system is intended to increase cultural and ethnic diversity among mediators and provide parties increased choice. However, pending further input by the Florida Bar, the amended rules retain the requirement that a certified circuit court mediator (as opposed to a certified county court, family or dependency mediator) must be a member of the Florida Bar or a retired trial judge. The new rules take effect August 1.

[In Re: Petition of the Alternative Dispute Resolution Rules and Policy Committee on Amendments to Florida Rules for Certified and Court-Appointed Mediators \(May 11, 2006\)](#)

## **Interagency ADR Working Group Posts Final Guides**

The Interagency ADR Working Group (see [www.adr.gov](http://www.adr.gov)), which assists federal agencies in the use of ADR, has incorporated public comments and finalized three guides relating to mediation and other forms of alternative dispute resolution: (i) Protecting the Confidentiality of Dispute Resolution Proceedings (providing practical guidance on the application of the confidentiality provisions of the Administrative Dispute Resolution Act of 1996 to federal workplace dispute resolution programs); (ii) A Guide for Federal Employee Mediators (providing practical ethical guidance and building on the September 2005 Model Standards of Conduct for Mediators); and (iii) A Guide for Federal Employee Ombuds (building on the Standards for the Establishment and Operation of Ombuds Offices issued by the ABA in February 2004). The mediation guides are designed for use by federal employee mediators within the government, but non-federal mediators may agree to follow the guides in federal mediations.

[Confidentiality Guide](#); [Mediators' Guide](#); [Ombuds' Guide](#)

## **DOD Pilot Programs Use Early Mediation and Facilitation in EEO Complaints**

As mandated by Congress, the Department of Defense (DOD) has undertaken a three-year pilot program seeking to enhance processes for resolving Equal Employment Opportunity (EEO) complaints by civilian employees. Delays in addressing EEO complaints at federal agencies have been a long-standing concern. DOD has begun three pilot programs which emphasize early use of mediation and facilitation techniques to resolve allegations before they become formal complaints. In early May, the U.S.

**Mediation Program, Philippine Daily Inquirer, May 14, 2006** (Subscription Required)

**Chinese Justice Minister Notes Role of Mediation for "Harmonious Society," BBC International Reports, June 21, 2006** (Subscription Required)

**Finland's President Emphasizes Importance of Mediation at Fourth Annual Nordic Mediation Conference, US Federal News, May 26, 2006** (Subscription Required)

**Fiji Mediation Conference Includes Presenters from Sixteen Countries, Pacific Islands Broad. Ass'n News Service, June 26, 2006** (Subscription Required)

**Mediation Volunteerism Spreads to Africa, Post Zambia, June 21, 2006** (Subscription Required)

Government Accounting Office (GAO) issued a report on the first year of the pilot programs, describing their features and status and suggesting enhancements to DOD's evaluation plan.

[GAO Report 06-538 \(May 5, 2006\)](#)

### **Maryland Bill Proposes Mediation of Land-Use Disputes**

Developers and residents in Howard County, Maryland have resolved disputes through ad hoc mediation sessions at the urging of the County. The County Council is now proposing a bill that would permit the Council to formally recommend mediation in zoning and other land-use disputes. Action on the bill is expected this summer. Surrounding jurisdictions experiencing bitter zoning disputes are watching to see if the proposal is successful and may implement similar programs.

[The Examiner \(June 19, 2006\)](#)

### **Trial Consultants May Benefit Parties in Mediation**

Parties heading into mediation often face many of the same issues as litigants at trial – including how to most persuasively present their facts and arguments – so may be assisted by jury consultants and knowledge gained from focus groups. Parties in mediation benefit from a sense of what might happen at trial in determining whether to settle and may also use a jury consultant's information to rebut the other side. In addition, relying on a consultant prior to mediation indicates the party is prepared for either a reasonable settlement or trial.

[Daily Record \(June 5, 2006\)](#) (Subscription Required)

### **Kentucky University Opening Mediation and Arbitration Center**

In order to meet a shortage of mediators and arbitrators to resolve smaller cases at reasonable cost, Northern Kentucky University will open an Alternative Dispute Resolution Center this Fall. Staffed by business and law professors, the Center will resolve employment, family, consumer, business and other disputes. The Center plans to charge below-market fees, which will be divided between the professors, the Center and the University. Law and business graduate students will also have opportunities to assist the Center.

[Kentucky Post \(May 4, 2006\)](#) (Subscription Required)

### **Australian Justice Lauds Mediation and Suggests State Subsidy**

Australia High Court Justice Ian Callinan noted the success of mediation, and the significant savings from out-of-court settlements, at the annual conference of the Institute of Arbitrators and Mediators Australia. Justice Callinan warned against compelling mediation if the parties are unwilling to participate, but stated that the savings from avoiding litigation may merit government subsidy of mediation.

[Cairns Post \(May 29, 2006\)](#) (Subscription Required)

## Mediation Quote:

"Every conflict we experience, no matter how trivial, points us toward a crossroads in our lives. One path leads us into anger, fear, confrontation, and bitterness and draws us into quarrels over the past.... A second path leads us into empathy, acceptance, honesty, and mutual respect and draws us into negotiations over the future.... [A] third path branching off from the second...leads us into increased awareness, compassion, integrity, and heartfelt communications and draws us into awareness of the present."

Kenneth Cloke, *The Crossroads of Conflict: A Journey into the Heart of Dispute Resolution* (Janis Publications 2006) at 1.

## India Expands Court-Annexed Mediation

Continuing efforts to spread mediation practice throughout India, the New Delhi High Court recently opened a mediation and conciliation center at the court. Court-annexed mediation is intended to ease the burden on the court and reduce the time for resolving disputes, as the number of cases increases with industrialization and economic policies promoting new businesses. (The first court-annexed mediation center in India opened in April 2005 in the State of Tamil Nadu.)

[Indlaw Communications Pvt. Limited \(May 29, 2006\)](#)

## India Encouraging Mediation with Monthly Proceedings in Courts

To promote the use of mediation, four districts in the State of Tamil Nadu will hold special mediation proceedings (along with a local process called lok adalats) on a monthly basis, using trained mediators. A recent mediation training was held for judicial officers and bar members, during which Justices stressed the need for speedier resolution of commercial disputes and noted the judicial workload resulting from having only six judges per million people in India, compared with 70 per million in the U.S.

[Hindu \(June 19, 2006\)](#) (Subscription Required)

## World Bank Organizes Mediation Training in Pakistan

The World Bank's International Finance Corporation organized a mediation skills training program in Karachi in June. The training is part of the its ongoing efforts to establish a pilot mediation program in Pakistan in cooperation with the Federal Ministry of Law, Justice and Human Rights and the High Court of Sindh. Thirty-six professionals from various backgrounds were trained by UK mediators. The Chief Justice of the High Court of Sindh praised the efforts, strongly encouraging the use of mediation in Pakistan to ease the burdens on its courts, free tied-up assets, and minimize business-stifling litigation.

[Business Recorder \(June 17, 2006\)](#) (Subscription Required)

## Croatia Turning to Mediation to Reduce Court Backlogs

The Croatian Ministry of Finance is seeking to develop a country-wide mediation program as an alternative to court and to reduce court backlogs. The Ministry is publishing a procurement notice in June for assistance establishing a viable structure for mediation in Croatia, including mediation training, public awareness, and case management services.

[Tenders Electronic Daily \(May 4, 2006\)](#) (Subscription Required)

## Mediation Sought to Harmonize Enforcement of European Securities Regulations

European Union finance ministers want European securities regulators to develop and use mediation processes to make enforcement of securities

## Contact Information

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regulations more uniform within the EU. With large increases in trade and international mergers, the new mediation mechanisms are needed to resolve day-to-day supervisory disputes that result from regulators' conflicting interpretations and overlapping regulations. The EU finance ministers would like implementation of the new mediation processes by the end of the year.

[Irish Times \(May 8, 2006\)](#) (Subscription Required)

## Controversy over UK Judges Acting as Construction Mediators

A pilot program in which judges will mediate construction disputes has begun in the UK's Technology and Construction Court (TCC), despite lack of support from solicitors or the alternative dispute resolution community. Mediations may be handled either by the judge in charge of a case or another judge, with all mediating judges receiving special dispute resolution training. While critics raise concerns about the role of judges as mediators and potential damage to the court's reputation, the TCC Bar Association supports the mediation program because participation is voluntary. The pilot program began June 1 and will continue until July 2007.

[Lawyer \(June 5, 2006\)](#) (Subscription Required)

## UK Claims-Resolution Firm Adds Mediation and Arbitration

Recognizing that insurers are increasingly aware of the financial benefits of mediation and other alternative dispute resolution processes, Inter Resolve, a UK firm that provides one-stop shopping for personal injury claimants has joined with two ADR companies to add mediation and arbitration to its options. The new services provide alternatives to the existing network of claimant lawyers and enable Inter Resolve to offer mediation and arbitration services to claimants early in the process to avoid the delays and costs of litigation.

[Post Magazine \(May 11, 2006\)](#) (Subscription Required)

## Dubai Mediation Seminar Emphasizes Business Relationships and Ethics

Mediation has resolved 35% of commercial complaints according to the Dubai Chamber of Commerce and Industry in a recent seminar focused on ethics in mediation. The seminar was designed to increase awareness in the business community of mediation as an effective means to resolve disputes and one that can lead to better and lasting business relationships. The seminar emphasized the fact that in mediation, in contrast with arbitration and litigation, the parties are more directly responsible for and in control of resolving their own disputes. Topics included ethical obligations of mediators and of disputants, and mediation as the ideal way to preserve business relations, among others. Dubai is seeking to promote its business community and expand its role as a world commercial center.

[Khaleej Times \(May 14, 2006\)](#); [Emirates News Agency \(May 1, 2006\)](#)