



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."*

September 1, 2006

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CASES & RESOLUTIONS:

Taxation of Compensation for Emotional Distress and Loss of Reputation Held Unconstitutional: [Murphy v. United States](#), No. 05-5139 (D.C. Cir. 2006)

Many employment disputes will be easier to settle following the August 22 decision in [Murphy v. United States](#). The U.S. Court of Appeals for the District of Columbia Circuit concluded that compensation for non-physical personal injuries is not income (and thus not taxable) under the Sixteenth Amendment of the U.S. Constitution and ruled that ten-year-old federal legislation was unconstitutional. After complaining about environmental hazards, plaintiff Marrita Murphy was blacklisted and given unfavorable references in violation of whistleblower statutes, and eventually received an award for emotional distress and loss of reputation from her former employer. Plaintiff's award was taxed by the Internal Revenue Service based on 26 U.S.C. § 104(a)(2), which since 1996 has excluded from income compensation based on personal physical injuries, but not non-physical injuries such as emotional distress and harm to reputation. After analyzing the meaning of "income" at the time the Sixteenth Amendment was adopted in 1913, the Court found § 104(a)(2) unconstitutional, reversing summary judgment in favor of the government. The court explained that compensatory awards for emotional distress and harm to reputation are simply intended to make plaintiff whole, akin to a return of capital, rather than to substitute for something that is normally taxed as income, such as lost wages.

Party Offers to Waive Confidentiality to Prove Good Faith in Mediation

Public accusations are being traded by Oklahoma Attorney General Drew Edmondson and the poultry industry concerning who is responsible for failing to settle a dispute over polluted waterways from claimed overuse of chicken litter as fertilizer. The Attorney General stated that his office had negotiated for years and done everything possible to avoid filing federal litigation, describing some proposed settlement terms to demonstrate that the industry was at fault for lack of resolution. In response, the industry

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stated its willingness to release confidential mediation information to show its good faith negotiations. Denying accusations that his public comments violated mediation confidentiality provisions, the Attorney General said he is considering the industry's offer to waive confidentiality.

[Tulsa World \(July 16, 2006\)](#) (Subscription Required)

Sitting Judge Acting as Mediator Results in Controversy

Minnesota Attorney General Mike Hatch is seeking to have state District Judge William Leary removed from two consumer-protection cases based on comments the judge made to the Attorney General's staff about "political needs" during a mediation conducted by the judge in one of the cases. A two hour long hearing before the Chief Judge openly detailed the mediation discussions, with no mention of mediation confidentiality reported. The judge previously put on the record that the Attorney General improperly called him after the mediation ended, threatening publicity over the judge's handling of the cases to try to influence his judicial decisions; the Attorney General asserted that he believed the mediation was still under way when he called, so that ex parte contact was allowed.

[AP Alert \(August 17, 2006\)](#) (Subscription Required); [Star Tribune \(August 23, 2006\)](#) (Subscription Required); [Star Tribune \(August 25, 2006\)](#) (Subscription Required)

Port of Galveston Successfully Mediates Multimillion Dollar Dispute

The Port of Galveston will receive \$9 million to resolve a dispute against a lessee which agreed to build a port terminal, but had not gotten the project under way. Litigation that generated 8,000 court documents was settled in a single 12-hour mediation session. While modest settlement offers had been made previously (with less than \$2 million offered to settle a claim exceeding \$100 million), the presence of the lessee's CEO was noted as significant in the successful mediation.

[The Daily News \(Galveston County\) \(August 16, 2006\)](#)

Court Delays Enforcement of Arbitration/Mediation Clause Until Facts Clarified: *Marathon Ashland Petroleum v. Selker Bros.*, 2006 WL 1878894 (N.D. Ohio)

In a dispute over contaminated petroleum products, a contractual provision between the third-party and fourth-party defendants contained an alternative dispute resolution clause stating that disputes of no more than a million dollars are to go to mediation, while disputes over a million dollars are to be resolved through arbitration. The federal district court denied a motion to compel arbitration and/or mediation, concluding it was premature to order either process. However, the court invited the affected parties to seek to suspend further proceedings against them until liability is clarified in the primary action.

Mediation Quote:

“When you approach your conflict as a journey, process, or voyage that takes you to a new location, you transcend the idea that you are trapped in your conflict. This allows you to move beyond the idea that you can [merely] learn from your conflict, to recognize that the journey itself is worthwhile. In doing so, you increase your capacity to move with rather than against your opponent, to see what is new and unknown as interesting rather than frightening.”

- Kenneth Cloke and Joan Goldsmith, *Resolving Conflicts at Work: Eight Strategies for Everyone on the Job* (Revised Edition, Jossey-Bass 2005) at 16

Mediators Address Community Divisions After London Bombing

Fearing conflict between Muslims and non-Muslims in south Leeds following disclosure that two terrorists in the July 2005 London bombing lived in the neighborhood, the Leeds council called in mediators to help. Two large meetings were held, with thirteen mediators facilitating smaller group discussions of community members' fears and concerns. The facilitated conversations brought out shared commitment to the community, and high levels of concern about being “invaded” by the police and media after the bombing.

[Yorkshire Evening Post \(July 4, 2006\)](#) (Subscription Required)

Mediation Eases World-Class Cyclist's Reunion with Team

Two years after being shunned by the cycling world for being convicted of drug use (later overturned) and providing information about widespread doping, a series of mediations has helped Australian cyclist Mark French return to competition. One-on-one mediations between French and his teammates, organized by the Australian team management, greatly improved their relationships and allowed French to rejoin the Australian team.

[The Age \(August 20, 2006\)](#)

Mediation Avoids Australian Court Battle Over Corporate Assets

An intense three-day mediation resulted in the return to Huon Corporation of business assets by the company's managing director, Charles Shultz. Mr. Shultz had transferred the assets to private trusts while putting Huon Corporation in receivership in July. The return of the assets will enable the company to satisfy obligations to employees of its three businesses and potentially to sell the businesses as going concerns. The successful court-ordered mediation avoided a costly pending action in the Australian Supreme Court.

[The Advertiser \(August 3, 2006\)](#); [The Advertiser \(Bendigo\) \(August 2, 2006\)](#)

Columbian Farmers and Oil Giant Mediate Successfully

A group of Colombian farmers challenged British Petroleum over an oil pipeline that the farmers claimed was devastating their farms due to soil erosion. Avoiding threatened litigation in London and potential negative publicity, the oil company successfully mediated the dispute with the farmers, agreeing to establish an environmental trust fund without admission of liability. Both sides issued statements stating they were pleased with the outcome.

[Reuters \(July 17, 2006\)](#)

Check This Out:

Lawyers Surveyed on Mediation Preferences

In collaboration with the National Arbitration Forum, the American Bar Association's General Practice, Solo and Small Practice Division conducted an [ADR Preference and Usage Survey](#) to determine the alternative dispute resolution experiences and preferences of its members. Key mediation findings include:

- 28% of respondents resolved six or more cases through mediation last year
- 34% reported that none of their mediations is court ordered, with another 25% estimating that only one in four of their mediations is court ordered
- 64% reported that mediation resolved about half or more of the matters in which it was used, with 18% stating that mediation is "almost always" successful
- Over 80% of respondents prefer lawyers or retired judges as mediators; that number is 100% among securities, insurance defense and employer-

NEWS & INITIATIVES:

DOE Requires Mediation in Nuclear Power Industry Disputes

In a final rule published August 12, the Department of Energy (DOE) established a two-step resolution process for disputes with nuclear power companies. The new rule provides government insurance to nuclear power companies to cover costs of delay due to litigation, in order to encourage investment. The first step for disputes is a fifteen-day mediation process, in which the mediator is to be chosen and paid for jointly by the parties. If no resolution is reached, the dispute is to be resolved through binding arbitration by the recently established Civilian Board of Contract Appeals, which is comprised of members of contract appeals boards of various federal agencies, including DOE.

[Final Rule \(August 12, 2006\)](#) (Subscription Required)

USDA Funding Agriculture Mediation Program in North Carolina

North Carolina will join thirty-two other states by establishing an Agriculture Mediation Program through a \$95,000 grant from the U.S. Department of Agriculture (USDA). The program is being created at Western Carolina University's College of Business, and will provide 40-hour basic mediation training along with 20 additional hours of specialized training in issues specific to the business of agriculture. Building on Western's community mediation program, mediators will be trained to handle disputes among farmers, ranchers and the USDA and its agencies (Farm Services Agency, Natural Resources Conservation Services, Rural Development and the Risk Management Agency), as well as private lenders. Disputes may include agricultural credit, risk management and crop insurance, rural water loan programs, rural housing and other rural development issues. The National Association of State Departments of Agriculture has encouraged the development of agricultural mediation programs throughout the country.

[US State News \(August 31, 2006\)](#) (Subscription Required)

Appellate Mediation Increasingly Accepted and Effective

Overcoming initial skepticism, mediation of complex civil disputes at the appellate level is now quite common and effective, as illustrated by the success of the U.S. Court of Appeals for the Sixth Circuit. Processing over 1,000 cases a year with four full-time mediators, the Sixth Circuit's mediation program has markedly reduced costs for both the court and litigants, as well as reducing resolution times. All of the federal circuit courts and 23 states now have appellate mediation programs. Appellate programs report a 45-55% success rate, despite working with cases that previously failed to settle and in which a lower court judgment has been rendered. In contrast with pre-trial mediation, more of the appellate level work is with attorneys rather than parties, looking at the merits of appellate issues and settlement options. In judicial circuits spread across several states, much of the mediation practice is through telephone conferences, although as the value of mediation has been demonstrated, the trend is increasingly toward face-to-face mediations.

employee practitioners

- 1/3 insist on using a mediator they know personally

Other Cases & Resolutions:

Three State Governors Report Progress in Federal Court-Ordered Mediation of 16-Year Dispute over Chattahoochee River, [WTVM NEWS \(August 28, 2006\)](#)

Federal Court Requires Mediation of Patent Infringement Case Prior to "Markman" Hearing, [Dow Jones Newswires \(July 19, 2006\)](#)

Federal Court Orders Tampa Newspapers to Mediate Trademark Dispute over "Tampa Bay Times," [Tampa Bay Business Journal \(July 18, 2006\)](#)

City Council of Stratford, Canada Conditionally Agrees to Mediate Longstanding Dispute with CNR Centre Owner/ Developer, [Stratford Gazette \(July 20, 2006\)](#)

[Daily Record \(August 3, 2006\)](#) (Subscription Required)

Rhode Island Appellate Mediation Program Inspired by Lincoln

The Rhode Island Supreme Court's appellate mediation program has been successful since it began in 2003. Inspired by Abraham Lincoln's motto, "discourage litigation," the mediation program screens civil cases headed for appeal. Mediations are conducted without charge by retired Rhode Island Supreme Court justices who have been able to resolve 74% of the 350 cases eligible for mediation. Early kinks have been worked out and parties report a high level of satisfaction with the mediation program.

[Providence Business News \(August 12, 2006\)](#) (Subscription Required)

West Virginia Expanding Court-Annexed Mediation

The success of the circuit court mediation program in Kanawha County, West Virginia has resulted in a mediation pilot project in the magistrate court. Four other counties in West Virginia currently have magistrate court mediation programs, and the state bar's goal is to have court-annexed mediation in every magistrate court in the state.

[Charleston Daily Mail \(July 26, 2006\)](#) (Subscription Required)

Maryland County Approves Mediation for Zoning Disputes

The Council of Howard County, Maryland authorized its Zoning Board to suggest voluntary mediation in zoning disputes over what the new zone or development plan should be. However, mediation is not to be used to resolve the initial legal issue of whether any zoning change is justified due to a change in the neighborhood or a prior zoning mistake.

[Baltimore Sun \(August 2, 2006\)](#) (Subscription Required); [Baltimore Sun \(July 19, 2006\)](#) (Subscription Required)

New Mediation Program for Florida Mobile Home Owners

A new mediation program has been established in Florida to resolve disputes between owners of mobile homes and mobile home communities relating to maintenance, landscaping and infrastructure. The program was launched by the Florida Manufactured Housing Association and the Federation of Manufactured Homeowners of Florida. Volunteer co-mediators will conduct the mediations, in which attorneys are not permitted to participate. Final agreements are to be circulated to all mobile home owners in the community.

[Miami Herald \(July 2, 2006\)](#) (Subscription Required)

Mediation Growing in Asia Pacific Region

Participants from India, Australia, Malaysia, Japan, Hong Kong, Cambodia, Vietnam and the Philippines attended the Asia Pacific Conference on Contemporary Trends in Mediation and Arbitration in Kuala Lumpur in mid-July. The keynote address by Malaysian Chief Justice Ahmad Fairuz stated that his country is considering mediation legislation which would cover both

(Subscription Required); [Stratford Gazette \(July 20, 2006\)](#) (Subscription Required)

Other News & Initiatives:

Pending Pennsylvania Workers' Compensation Legislation Would Mandate Mediation, [Legal Intelligencer \(July 13, 2006\)](#) (Subscription Required); [Legislation](#)

Macedonia Passes New Mediation Law, Holds Roundtable in Skopje for Senior Members of Ministry of Justice and International Finance Corporation, [Makfax News Agency \(July 20, 2006\)](#)

New South Wales (Australia) Supreme Court Decision May Require Mediation of All Retail Tenancy Disputes Prior to Litigation, [Mondaq \(July 18, 2006\)](#) (Subscription Required)

Bangladesh Calls for Improvement of Community Mediation System to Benefit Powerless, [The New Nation \(August 29, 2006\)](#)

voluntary and court-directed mediation in order to reduce court backlogs. The Chief Justice emphasized that courts around the world struggle to keep up with expanding caseloads and noted the successful use of mediation in Singapore, the United Kingdom, Canada and Australia. The conference was organized by the International Islamic University Malaysia and an arbitration center.

[Bernama General News \(July 18, 2006\)](#) (Subscription Required)

China and India Expanding Use of Mediation

Both India and China are rapidly expanding local mediation programs in order to achieve efficiencies and greater satisfaction among parties to disputes, including multi-party disputes. In the Indian state of Andhra Pradesh, High Court Chief Justice G. S. Singvhi announced that the High Court has decided to open alternative dispute resolution centers in all 23 districts in the state. A proponent of mediation, the Chief Justice urged newly-trained mediators not to be deterred by initial resistance to mediation from local practitioners. Similarly, Shanghai – China's largest city, with over 17 million residents – plans to open alternative dispute resolution centers in every district court by the end of September, following the success of the mediation program established in 2003 in the Changning district court in Shanghai.

[The Hindu \(July 23, 2006\)](#); [ShanghaiDaily.com \(July 28, 2006\)](#) (Subscription Required)

Tamil Nadu Mediation Center to Host President of India

Indian President Abdul Kalam will visit the Tamil Nadu Mediation and Conciliation Centre in September. Established last year as the first court-annexed mediation program in India (as reported in the July 2005 and July 2006 *Mediation News and Updates*), the Centre continues to expand and expects to have 300 mediators by the end of 2006. The Centre also has helped train mediators at the High Courts in Delhi and Calcutta, and notes that an Association of Indian Mediators is forming.

[The Hindu \(August 30, 2006\)](#)

Appellate Commercial Mediation Training Held in Nepal

Over ninety mediators and Nepalese Supreme Court judges attended an appellate commercial mediation training program in Kathmandu in late August. The program was organized by local groups with American instructors and supported by the U.S. Agency for International Development. Speakers emphasized the growing popularity of mediation worldwide and its importance in reducing court caseloads and ensuring equal access to justice.

[The Rising Nepal \(August 30, 2006\)](#)

Malaysia Cites Mediation In Litigation Decline

Civil litigation has been declining notably in Malaysia in recent years, and observers credit mediation along with cyclical factors such as the fact that the Asian economic crisis a few years ago is no longer generating new

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cases. Private mediation and arbitration are both growing in the region, while the recently established Financial Mediation Bureau handled 3,700 cases in its first fifteen months.

[New Straits Times \(July 11, 2006\)](#) (Subscription Required)

Mediation Consistent with Tenets of Koran, According to U.S. Judge

U.S. Ninth Circuit Judge J. Clifford Wallace recently stated in Pakistan that he believes use of mediation is consistent with the requirements of the Koran. Discussing difficulties facing judiciaries around the world, Judge Wallace emphasized mediation and its success in most of the 50-60 countries in which he has worked. Judge Wallace noted the potential for mediation in Pakistan and praised Pakistan's Supreme Court Justice Jillani for his encouragement of alternative dispute resolution.

[Pakistan Link \(August 14, 2006\)](#)

Mediation Variations Explored for U.K. Construction Disputes

A review of issues relating to construction disputes by the Society of Construction Law in the United Kingdom noted that the U.K.'s Technology and Construction Court ("TCC") is conducting a survey to determine in what circumstances mediation is a useful alternative to litigation and at what point in the litigation process mediation is most effective. Also, as reported in the July 2006 *Mediation News and Updates*, the TCC has a pilot mediation program under way, with trained TCC judges acting as mediators. The judges have no continuing role in the matter if negotiations fail, but may set out their views and likely outcome if requested by the parties. In addition, the Society reported on the use of Project Mediation, in which mediators are retained during the initial stages of a construction contract to review the project in order to immediately address any disputes that arise during construction before they escalate or cause serious delays. Project Mediation has similarities to Dispute Boards (although Boards often issue decisions), but may be better suited to mid-sized construction projects. Project Mediation was recently used during construction of a Jersey airport taxiway and contributed significantly to the success of that project.

[Mondaq \(August 11, 2006\)](#) (Subscription Required)


Poland Proposes Large Payments to Mediation Counsel

Draft executive regulations from the Polish Minister of Justice would provide state reimbursement for lawyers taking part in mediations that may be up to 150% of what is paid in ordinary court cases. Generous fees would encourage mediation, which only began in civil cases in Poland in December 2005, but ultimately will be set by the court.

[Polish News Bulletin \(July 4, 2006\)](#) (Subscription Required)

ABA and USAID Help Bring Mediation to Liberia

A week-long mediation training for 50 participants in Liberia was organized



by the American Bar Association and the U.S. Agency for International Development as a step to help sustain the peace in Liberia. In addition, a one-day workshop on the need for mediation legislation in Liberia was organized by the United Nations and the ABA. Noting similarities between modern mediation and traditional African dispute resolution by elders and chiefs, mediation legislation is sought to institutionalize mediation in Liberia and establish uniform standards that meet international norms.

[The Analyst \(Monrovia\) \(July 4, 2006\)](#); [UN Mission in Liberia Press Release \(June 20, 2006\)](#)