

# MEDIATION NEWS

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Keith L. Seat

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## CASES & RESOLUTIONS:

### California Court Creates Exception to Mediation Confidentiality for Certain Attorney-Client Communications

A split California appellate court established a judicial exception to the state's mediation confidentiality statute by permitting a party to use evidence from his private communications with his attorneys during a mediation in a later action for legal malpractice. The court concluded that private conversations during the mediation between the attorneys and client that did not involve the mediator or other party and did not reveal anything said or done in mediation discussions with the mediator or other party should not be shielded by mediation confidentiality. The alleged malpractice involved claims that the client's counsel forced him to settle for too little; the terms of the signed settlement agreement were thus available. The dissent objected to any judicial exception to the confidentiality statute, regardless of its desirability.

[Cassel v. Superior Court](#), 2009 WL 3766430 (Cal. App. 2 Dist. November 12, 2009)

### Mediation Confidentiality Shields Alleged Legal Malpractice During Mediation in Oregon

The federal district court in Oregon granted 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 the state's mediation confidentiality statute. The court did not determine whether private conversations between the attorney and his clients were covered by the confidentiality requirements, but concluded that the clients had no case where they could not reveal the proposed settlement terms.

[Fehr v. Kennedy](#), 2009 WL 2244193 (D. Ore. July 24, 2009) (Subscription Required)

### Wisconsin Court Sanctions Insurer for Failing to Send Representative to Mediation

A Wisconsin appellate court upheld sanctions against an insurance company for failing to have a company representative appear in person at a mediation as required by court order. Although a lawyer for the company was present and a

## Mediation Quote:

"[H]ear as fairy tales all the stories of conflict that you will ever be told, not because they are untrue but because their truths are hidden deep within.... [I]f you silently repeat the words 'Once upon a time' immediately before hearing someone tell you a story about conflict, you will be listening in exactly the right frame of mind."

Kenneth Cloke and Joan Goldsmith, *Resolving Personal and Organizational Conflict: Stories of Transformation and Forgiveness* (Jossey-Bass 2000) at xv

## Check These Out:

### Mediation Is Subject of New TV Show

USA Network is developing a TV series called "Facing Kate" in which Sarah Shahi plays a lawyer who leaves her job to become a mediator. Reports note that the main character is divorced, suggesting an emphasis on family mediation.

decision-maker was available by telephone, as is common in many mediations, the court ruled that was not sufficient where the company failed to obtain prior court approval or agreement from the other side and the mediator. Even though the other party did not object to the absence of the insurance representative at the time of the mediation, the majority of the court held that did not bar the claim for sanctions.

[Lee v. Geico](#), 2009 WL 3085095 (Wis. App. September 29, 2009) (Subscription Required)

## **Minnesota Court Enforces Settlement Agreement Which Stated It Was Binding, Despite Lack of Key Terms**

A settlement agreement reached after thirteen hours of mediation was found enforceable by a Minnesota appellate court because the document expressly stated it was binding, despite the omission of precise descriptions of the land involved. The agreement recognized that additional details needed to be finalized and provided that if disputes arose over the final documentation the parties would have the mediator act as an arbitrator and decide the disputes. When issues arose, one party challenged the authority of the mediator turned arbitrator, but the court upheld both the settlement agreement and its arbitration provision.

[Ed Cave & Sons, Inc. vs. City of Two Harbors](#), 2009 WL 2998001 (Minn. App. September 17, 2009) (Subscription Required)

## **California Court Discusses “Binding Mediation” in Enforcing Mediation Clause in Settlement Agreement**

In a lengthy opinion, a California appellate court enforced the mediation clause included in a settlement agreement that was itself reached in mediation, and dismissed the efforts of one party to remedy an alleged breach of the settlement agreement by going directly to court. The mediation clause stated that a named mediator would have discretion to issue a “final and binding” ruling, which one party argued would be unenforceable, but the court explained that its previous case had merely noted conceptual difficulties with binding mediation and not that it was necessarily unenforceable.

[Adams v. Newport Crest Homeowners Assoc.](#), 2009 WL 2875361, (Cal. App. 4 Dist., September 9, 2009)

## **California Senate Uses Mediation to Avoid Legislative Action**

The president pro tempore of the California Senate pulled legislation and sent it to outside mediation in order to prevent the Senate from overriding environmental laws to make it easier for Los Angeles to attract a professional football team with a new stadium. The president pro tempore has used mediation in this way before on transportation projects. He views negotiation as the preferred way of working out roadblocks, rather than precedent setting legislation that would ease environmental and land-use regulations for the stadium.

[Mediation's Place Blog](#) (October 29, 2009); [THR.com](#) (October 21, 2009)

### **Pirates Seek Mediation**

Pirates contacted a mediator for assistance after hijacking a Spanish fishing ship off Somalia. The mediator had worked for the release of a German ship's crew in July. [Bloomberg](#) (October 4, 2009)

### **Mediation Held in Case of Christian Teen Who Ran Away from Muslim Family**

Significant attention has focused on the case of an Ohio teenager who claims her Muslim father threatened to kill her for converting to Christianity. The girl ran away to a church in Florida in July. A Florida judge ordered that the girl and her parents should participate in mediation, and ruled that the girl would remain in foster care until the matter is resolved. News reports indicate that unspecified progress has been made in mediation.

[CNN.com](#) (September 4, 2009); [CFNews13.com](#) (October 10, 2009); [Orlando Sentinel](#) (October 9, 2009)

## **Other Cases & Resolutions:**

### **Successful Mediation Results in Billion Dollar Bankruptcy Reorganization Plan for Semgroup.**

[Reuters.com](#) (September 16, 2009); [Tulsa World](#)

[San Diego Union-Tribune](#) (September 12, 2009)

## **Long-Running Dispute over California Courthouse Construction Resolved in Mediation**

A five-year, \$50 million construction project for a courthouse in Santa Clara County resulted in assertions of faulty construction by the county and counter-assertions of faulty design and \$17 million in change orders by the contractor. After a two day mediation, the parties agreed to resolve all claims against each other and by subcontractors for payments by the county of \$8.1 million. Although the county Supervisor had predicted that the county would come away with money for the faulty work, he stated after the mediation that the settlement was worthwhile to avoid the burden and expense of litigation and that it was time to let the dispute go.

[Gilroy Dispatch](#) (September 14, 2009)

## **Mediations Yield Benefits in Sunwest Management Investment Scandal**

Mediation is assisting investors who sunk upwards of \$400 million in Sunwest Management's senior housing operations before things unraveled. The law firm of Davis Wright Tremaine agreed to pay \$30 million to resolve securities fraud and malpractice claims against it after five days of mediation. Mediation is also expected in litigation against two other law firms who did work for Sunwest affiliates. In addition, a federal judge has been overseeing complex mediation since last winter which seeks to restructure Sunwest into a viable entity to provide value for investors, which resulted in a \$270 million offer in September.

[Oregonlive.com](#) (October 22, 2009)

## **NEWS & INITIATIVES:**

### **IRS Expands Its Appeals Mediation Program**

The Internal Revenue Service has expanded and refined its mediation program in the Appeals administrative process, which was first introduced over a decade ago. Participation in mediation is voluntary for both the taxpayer and the agency. Among other procedures set forth, the mediator will be an IRS employee trained in mediation and compensated by the agency, while the taxpayer can pay for a non-IRS mediator to join as a co-mediator and can participate in the co-mediator's selection with the agency. If mediation does not resolve all issues, parties may request arbitration in appropriate circumstances.

[Journal of Accountancy](#) (September 11, 2009); [Revenue Procedure 2009-44](#)

### **Appellate Mediation Program Begins in New Hampshire**

New Hampshire is adding a mediation program for civil appellate cases pending before the state Supreme Court. The appellate program will be administered by the

(September 23, 2009)

### **Poolside Mediation Makes Unexpected Progress in Bankruptcy Reorganization of Philadelphia Newspapers LLC, Including Short-Term Financing Agreement,**

[Philadelphia Business Today](#) (September 16, 2009); [Philadelphia Inquirer](#) (September 16, 2009)

### **Phoenix Coyotes Owner Seeks Emergency Bankruptcy Court Order Requiring NHL to Mediate Key Sales Issues,**

[SFGate](#) (September 17, 2009)

### **Miami Heat Star Dwyane Wade Hopes Mediation Will Help Him Resolve Multiple Lawsuits over Outside Business Activities,**

[USA Today](#) (September 15, 2009)

### **Mediation Sought in Controversy over Limit on Jockeys' Use of Whips in Australia,**

[Virtual Form Guide](#) (September 30, 2009)

### **Tribe Mediating Dispute over Control of Tribal Council at Suggestion of Bureau of Indian Affairs,**

[SnoValleyStar.com](#) (WA) (September 16, 2009)

### **USDA Offers Mediation Between United Soybean Board and American Soybean Association,**

state's Office of Mediation and Arbitration and rely on retired judges as mediators. The program expands mediation to all levels of court, from small claims and family, to civil cases in superior and probate courts.

[WCax.com](#) (September 10, 2009); [Appellate Mediation Program](#)

## **Philadelphia Court Institutes Mandatory Mediation Program for Landlord-Tenant Appeals**

A committee of lawyers convened by the Court of Common Pleas in Philadelphia to find ways to improve the court's landlord-tenant program recommended a mandatory mediation program, which the court is now implementing. Mediation is particularly intended to assist the 40% of pro se landlords and nearly 100% of pro se tenants who are involved in appeals, which require compliance with procedural rules that are difficult for non-lawyers. The program is now recruiting and training volunteer "settlement masters" to act as mediators, who will have access to court papers through the court's e-filing system and can call a helpline of experienced landlord-tenant attorneys with questions.

[Legal Intelligencer](#) (September 30, 2009)

## **Milwaukee Using Mediation to Resolve Police Complaints**

A new system for complaints against police in Milwaukee, Wisconsin, resulted in litigation by the police union, which ended with agreement over use of mediation in the complaint process. Larger issues are being sent to an outside mediator, and both officers and complainants have been very satisfied. The police chief is encouraging officers to participate in mediation whenever possible.

[Fresno Bee](#) (September 21, 2009) (Subscription Required)

## **Maryland Community Mediation Expanding to Prisoners and Students**

Statewide initiatives by Community Mediation Maryland are providing assistance to both prisoners and students in various counties in Maryland using volunteer mediators. Inmates within six months of release are eligible for three mediation sessions with whomever they will be reconnecting on the outside, which is helping many. Monthly training in conflict resolution skills is also being offered by mediators to inmates. In the school system, mediators are assisting with Independent Individualized Education Programs by meeting with the IEP participants and then sitting in on IEP meetings to facilitate.

[Carroll County Times](#) (September 5, 2009)

## **Fortieth Texas County Begins Mediation Program**

The Commissioners of Hays County, Texas, voted to begin a mediation program that would provide trained mediators to assist parties seeking out of court

[Feedstuffs](#) (September 8, 2009)

**City and County Continue to Mediate Multiple Lawsuits over Tax Abatements from Community Reinvestment Act,** [Morning Journal](#) (OH) (September 15, 2009)

**City Council Seeking Mediation with County and Minnesota Department of Transportation over Jurisdiction of Highway and \$3.5 Million,** [Daily Journal](#) (October 20, 2009)

**Parties in Six Lawsuits Hopeful in Combined Mediation of St. Pete Beach Development Dispute,** [Tampabay.com](#) (September 13, 2009)

**Forty-Six County Employees Fired After Mediation Agreement with County Commission Fell Apart,** [Naples News](#) (FL) (September 16, 2009)

**Successful Mediation with Utility Keeps Water Flowing at Condo,** [Click Orlando](#) (September 21, 2009)

**Dispute Between Cities over Sewage Treatment Continues in Mediation,** [Mountain Mail](#) (CO) (September 16, 2009)

**Court Orders Mediation of Residents' Claims Against New Jersey**

settlements. The program will be funded from fees paid by every litigant, whether or not they use mediation. To obtain mediation services, the county plans to enter into a contract with a non-profit mediation center. Mediations will be offered at no or low cost to parties, and are limited to cases with amounts in dispute of no more than \$50,000 and family cases where the spouses earn no more than \$60,000.

[Newstreamz.com](#) (September 8, 2009)

## Update on Home Foreclosure Mediation

- **Federal** legislation has been introduced that would encourage state and local governments to create strong foreclosure mediation programs, among other things. The Preserving Homes and Communities Act of 2009, introduced by Senator Reed (D-R.I.), would authorize \$80 million in federal matching funds for mandatory mediation programs.

[Press Release](#) (October 1, 2009) (Subscription Required); [S. 1731](#)

- The Mortgage Bankers Association asserts that mediation programs are actually delaying efforts to resolve problem loans, and that **nationwide** the industry has provided over 5.2 million workout plans to help delinquent borrowers since July 2007, with over 2 million loans in which lenders reduced interest rates, lengthened loan terms, reduced the amount owed or took other steps.

[Las Vegas Review Journal](#) (October 14, 2009)

- The **National** Consumer Law Center analyzed foreclosure mediation programs in fourteen states and concluded that the level of accountability is not sufficient for financial institutions to modify loans enough to make the programs effective.

[SFGate](#) (September 24, 2009); [National Consumer Law Center Report](#)

- The **Nevada** Supreme Court on September 28 passed new rules giving mediators the power to determine that lenders acted in "bad faith" in foreclosure mediations, which could block foreclosure and lead to additional court sanctions, causing concern among some over ambiguity. Legal workshops are being held to teach homeowners how to get the most out of foreclosure mediation, so they can effectively represent themselves.

[Las Vegas Business Press](#) (October 12, 2009); [Las Vegas Now](#) (October 22, 2009); [Fox 5 news](#) (September 17, 2009)

- The **Delaware** Superior Court adopted a Residential Mortgage Foreclosure Mediation Program which takes effect September 15 and gives homeowners the ability to mediate prior to foreclosure.

[Sussex Countian](#) (September 10, 2009); [Delaware Online](#) (September 14, 2009); [Administrative Directive](#)

- New legislation in **Indiana** requires creditors to notify homeowners of their right to a settlement conference prior to foreclosure. The Indiana Supreme Court and numerous government and non-profit agencies have just completed a training program for over 1,000 judges, attorneys and mediators in how to handle foreclosure cases.

[RealEstateRama](#) (October 19, 2009)

- The **Florida** Supreme Court heard arguments on a task force report

**Utility, [NJ.com](#)**  
(September 11, 2009)

**City and Restaurants  
Delay Litigation for  
Further Mediation  
over Liquor Licenses,**  
[Wvec.com](#) (September  
18, 2009)

**Mediator to Assist  
City and Restaurant  
in Eminent Domain  
Dispute, [Wicked Local](#)**  
(September 26, 2009)

**Mediation Results in  
\$100,000 Payment by  
West Virginia Police  
to Man Burned when  
Taser Ignited Pepper  
Spray During Arrest,**  
[Herald-Mail](#) (October 14,  
2009)

**"Chicken Whisperer"  
Offers Assistance in  
Court Ordered  
Mediation Between  
Chicken Farmer and  
City, [Times Argus.com](#)**  
(October 23, 2009)

**City of Augusta and  
Adult Video Store  
Enter Mediation after  
Store Awarded  
\$130,000 in Damages  
and Is Appealing to  
Seek More, [WJBF.com](#)**  
(October 13, 2009)

**Over 100 Child Sex-  
Abuse Cases Against  
Hospital for Failure  
to Stop Doctor Are  
Headed to Litigation  
after Mediation  
Impasse, [Hartford  
Courant](#)** (October 9,  
2009)

**After Months of  
Delay, Province  
Refuses to Observe  
Mediation of  
Canadian Breast  
Cancer Class Action**



recommending mandatory mediation for residential foreclosures to help courthouses deal with the flood of cases. Over 290,000 foreclosures were filed in Florida in the first nine months of the year. A dissenter on the task force raised concerns about the financial burden on lenders, suggesting that borrowers should contribute to the cost of mediation when possible.

[Miami Daily Business Review](#) (November 5, 2009) (Subscription Required)

- **Connecticut** is mediating less than 40% of eligible foreclosure cases, even after making mediation mandatory in July, because the program only applies to homeowners who file an appearance in court, and a majority do not. When mediation does occur, 75% are settled, with homeowners staying in their homes in 62% of the cases and 13% moving without foreclosure. About 2,000 cases have been mediated in the last three months with a team of 24 full-time mediators.

[Connecticut Law Tribune](#) (October 26, 2009) (Subscription Required); [Foreclosure Mediation Program Frequently Asked Questions](#)

- Legislation pending in **Ohio** would mandate mediation for nearly every foreclosure case in the state. The legislation would require the court to establish filing fees to cover the cost of mediation, set qualifications for mediators and establish procedures.

[Daily Court Reporter](#); [H.B. 306](#)

## **Federation of European Bars Issues Mediation Resolution Calling for More Legal Involvement**

The Federation of European Bars (FBE), made up of bar associations of 21 European countries, issued a Resolution on Mediation on October 3, 2009, recognizing the importance of mediation and its trend towards greater prominence. Accordingly, the FBE resolution urges that the participation of lawyers should be required in mediations in areas which may have legal consequences, that effective mediation training for lawyers should be a priority, and that necessary government funding should be provided to promote mediation and the involvement of lawyers.

[FBE Website](#)

## **Australia Legislates More Mediation Muscle in Native Title Disputes**

In an effort to reduce the backlog of 500 native title claims, the Australian parliament has amended the Native Title Act to strengthen mediation and give the Federal Court power over the mediation process and the ability to deal with recalcitrant parties. One senator raised concerns about mediators being given coercive powers by the amendment, especially since the legislation does not define who can be a mediator or require any particular qualifications or accountability, while other senators felt the amendments did not go far enough.

[SMH.com.au](#) (September 14, 2009)

## **Other International Mediation Developments**

- First **International Conference for Judicial Mediation** organized by

**over Faulty Hormone Receptor Tests**, [CBC News](#) (September 22, 2009)

**Transmarket Trading Leaving Australia after Mediation Fails to Resolve A\$40 Million Class Action Against Australian Securities Exchange**, [Australian Business WSJ](#) (September 25, 2009)

**Japan Considers Mediation in Effort to Restructure Japan Airlines, Working with 20 Financial Institution Creditors**, [Bloomberg](#) (October 12, 2009)

## **Other News & Initiatives**

**US Government to Mediate Disputes Between Persons Making FOIA Request and Agencies**, [Congressional Documents](#) (September 30, 2009) (Subscription Required)

**Courts Encouraging Mediation Prior to Filing Lawsuits, Not Just Prior to Trial**, [Bradenton Herald](#) (October 20, 2009)

**Survey Respondents Report Decline in Arbitration, But Rise in Companies Expecting Increased Numbers of Disputes over Next Year**, [Fulbright's 6th Annual Litigation Trends Survey Report](#) (October 10, 2009) (Registration

GEMME and held on October 16-17 in Luxembourg, [Conference Brochure](#)

- **The Netherlands** celebrates ten years of court-connected mediation with international mediation conference on November 19, [Gemme.eu](#)
- Organization helps teachers in **Lebanon** promote conflict resolution in classrooms in hopes of more peaceful national culture, [Christian Science Monitor](#) (September 23, 2009)
- Respected members of communities in **China** forming associations of mediators to resolve disputes, [South China Morning Post](#) (September 26, 2009) (Subscription Required)
- **Indonesia** requires mediation prior to judicial determination of cases; Supreme Court regulation requires judges before rendering verdicts to publicly state that cases were mediated and name the mediators, [Jakarta Post](#) (October 9, 2009); [The Malaysian Insider](#) (October 7, 2009)
- Despite admission, **Australian** court concludes that oral agreement at mediation had not finalized all terms and could not be enforced in [Worldwide Timber Traders Pty. Ltd. v. Brouwer](#) (No. 2) [2009] FCA 447, [Mondaq](#) (September 29, 2009)
- **Australian** appellate court upholds contract provision requiring good faith negotiation of disputes, [United Group Rail Services Ltd. v. Rail Corp. New South Wales](#) [2009] NSWCA 177 (July 3, 2009)
- **West Indies** cricket dispute finally resolved by parties, months after mediation effort, [Jamaica Observer](#) (October 16, 2009)

Required)

**Better Business Bureau Offers Mediation Services for Probate Issues,** [Bakersfield.com](#) (CA) (September 11, 2009)

**Law Firm Hires Two Mediation Specialists for Firm's Growing Home Retention Services Division,** [DSnews.com](#) (MI) (September 11, 2009)

**Considerations for Encouraging Later Settlement When Cases Aren't Initially Resolved at Mediation Table,** [New Jersey Law Journal](#) (November 2, 2009) (Subscription Required)

**Massachusetts Attorney General Honored at Mediation Gala,** [US Federal News](#) (October 29, 2009)

**International Conflict Resolution Day (October 15) Time for Celebration of Mediation Programs, Practitioners and Scholars,** [Fresno Bee](#) (September 21, 2009) (Subscription Required)

**ICC's Fifth International Commercial Mediation Competition Opens to Law Schools from Around World,** [Financial](#) (September 16, 2009)

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SEPTEMBER 2009

## CASES & RESOLUTIONS:

### **Mediated Settlements of Sex Abuse Cases Involve Large Payments and Disclosure of Files**

While many mediations focus on maintaining confidentiality, recent mediation settlements of six sex abuse cases involving the Archdiocese of Chicago require the disclosure of information and files as a term of the settlements. In the six cases, the Archdiocese also agreed to pay \$3.9 million for sexual abuse by four priests in the 1970s and 1980s. Counsel for the victims noted that they took comfort in exposing past crimes, while the Archdiocese stated that negotiation and mediation was the most compassionate way to proceed in order to spare victims and their families the stress of extended legal proceedings.

[Chicago Tribune](#) (July 22, 2009)

### **“Baseline” Mediation Agreement Reached over Development of Big Tupper Ski Area**

The Franklin County (NY) legislature ratified a legislator's signing of a “baseline” agreement that resulted from lengthy mediation over a proposed Big Tupper Ski Area development. The mediation came out of New York's Adirondack Park Agency permitting process, and the agreement lists changes to be made to project plans. Permits are still required from the New York Department of Health and the Tupper Lake Planning Board. While the one legislator participated in the mediation and did disclose the agreement (which other participants held confidential), another legislator refused to engage in the process due to the confidentiality required. The latter legislator even suggested that the county might want to bar its legislators from agreeing to confidentiality provisions in the future, while recognizing the downside of not participating in important negotiations.

[Adirondack Daily Enterprise](#) (July 17, 2009)

### **California Attorney General Offers to Mediate Environmental Dispute**

Litigation brought by three environmental groups against Chevron over an

## Mediation Quote:

“Silence at the right time can be one of the most powerful and influential negotiating tools. It can be used in almost any situation.... Most people feel uncomfortable with silence and want to fill the void by saying something – a fact you can use to your advantage.

Silence is deadly because the other person doesn't know what you are thinking and begins to wonder: Are you thinking this is good or bad? Are you going to leave or stay? This lack of knowledge can create a lack of control, and people hate not being in control....”

Steven G. Mehta, *112 Ways to Succeed in Any Negotiation or Mediation* (AuthorHouse 2009) at 104

## Check These Out:

### **Mediators Beyond Borders to Assist Copenhagen Climate Change Negotiations**

MBB will be in Copenhagen in December as an observer organization with the message that mediation is a viable option for climate change disputes. MBB president Ken Cloke says conflict prevention and resolution mechanisms should be a core part of Copenhagen climate change



upgrade of its refinery in Richmond, California resulted in an order to stop work, which led to layoffs of 1,000 construction workers. State Attorney General Jerry Brown offered to mediate and suggested the issues could be resolved quickly. The Richmond City Council unanimously passed a supporting resolution and the environmental groups stated they are willing to participate. Chevron is not interested, as private mediation is still under way making other mediation proposals premature, according to a spokesperson.

[CBS5](#) (July 22, 2009)

## **Parties in Dispute Have Difficulty Agreeing to Voluntary Mediation**

The Maricopa County (AZ) Attorney, the Sheriff, the County Treasurer and the Board of Supervisors have been embroiled in six lawsuits against each other in the past year, costing more than \$1.1 million in attorneys' fees. In the apparent absence of court ordered mediation, the parties have proposed voluntary mediation and agreed to mediation at various times, and even proposed specific mediators. However, no mediation has occurred, for which the parties blame each other.

[Arizona Republic](#) (July 21, 2009)

## **Mediation of Staff Concerns with College President to Be Webcast**

The president of Florida Keys Community College has brought in a professional mediator to address staff concerns in several days of mediation sessions, culminating in a public session which will be webcast. Concerns range from complaints of staff intimidation and retaliation by the president to over-reporting the number of students for purposes of state funding.

[KeysNet](#) (August 29, 2009)

## **U.K. Court Requires Mediator to Testify with Consent of Parties**

Six years after mediation resulted in a settlement, the parties sought testimony from the mediator about whether the settlement had been achieved through economic duress. The mediator objected, but the U.K.'s Technology and Construction Court ruled that the mediator must testify in [Farm Assist Limited v. Secretary of State for Environment, Food and Rural Affairs \(No. 2\)](#), [2009] EWHC 1102 (TCC). The court concluded that mediation confidentiality can be waived by the court in the interests of justice. The court analyzed various possible privileges and concluded that even if there is a mediation privilege, it may be waived by the parties without the consent of the mediator. The court sidestepped the mediation agreement, which provided that the mediator could not be called as a witness in any litigation relating to the dispute, reasoning that the issue of economic duress was distinct from the underlying dispute.

[Farm Assist Limited v. Secretary of State for Environment, Food and Rural Affairs \(No. 2\)](#), [2009] EWHC 1102 (TCC); [Mondaq](#) (July 8, 2009)

negotiations and international implementation efforts,

[The Copenhagen Climate Change Conference; UN Climate Change Conference, December 7-18, 2009](#)

### **Mediators Support President's "Beer Summit"**

Various mediation organizations and mediators spoke out in favor of mediation of the conflict between Professor Henry Gates and Sergeant James Crowley; some supported President Obama's specific efforts to bring the men together in an effort to improve their communication and understanding of each other. However, while food or beverages can benefit a mediation, beer was questioned as a general purpose mediation tool.

[Newsplex.com](#) (July 30, 2009); [Forbes.com](#) (July 30, 2009); [Wall Street Journal Law Blog](#) (July 24, 2009); [Boston.com](#) (July 24, 2009); [Settle It Now Blog](#) (July 24, 2009)

### **Marriage License Fees Increasing to Fund More Family Court Mediation**

The Solano County (CA) Board of Supervisors is holding a public hearing on whether to increase the cost of marriage licenses to provide more funding for family court mediation services. The court plans to establish a permanent mediation center with the funds. Six other California counties already charge the additional fees, while another six counties are seeking to add the fees.

[The Reporter](#) (July 19, 2009)

## **Other Cases &**

(Subscription Required)

## **U.K. Court Imposes Mediation Costs when Party Refuses to Participate**

In the absence of prior agreement by the parties on how mediation costs were to be handled, U.K.'s Technology and Construction Court concluded that a party who refused to appear at a mandatory mediation should bear the costs from late cancellation. The court found insufficient the party's explanation about the futility of mediation in the absence of another entity.

[Commercial Litigation Wire](#) (July 2009)

## **NEWS & INITIATIVES:**

### **West Virginia Grievance Board Adds Mediation to Streamline Process**

The West Virginia Public Employees Grievance Board was created two years ago by the state legislature to improve a slow and expensive system. The new Board reduced the existing four-step system to only three steps, but added mediation as the second step prior to an administrative law judge hearing. A mediator from the Board or a private mediator chosen by the worker is used for the sessions. Although some 2,500 grievances are filed each year, the Board has eliminated the backlog through the mediation process, which resolves about thirty percent of the cases that get to that step.

[Daily Mail](#) (July 29, 2009)

### **Farm Mediation Spikes in Minnesota**

A University of Minnesota study shows that mediation over farm debt has dramatically increased in the last year, with a jump from 133 open cases in July 2008 to 488 cases in July 2009. In total, 2,000 mediation matters were opened in 2008, with negotiation of over \$150 million in debt, and 2009 has seen significant increases. 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.

[Business Journal](#) (August 21, 2009); [Hutchinson Leader](#) (August 15, 2009)

### **Update on Home Foreclosure Mediation Efforts**

- Implementing legislation that went into effect July 1, the **Nevada** Supreme Court has appointed 97 mediators in the state's new home foreclosure mediation program, and expects to increase the number to about 400 mediators over the next year. The current group included 37 Supreme Court settlement judges, along with other retired judges, attorneys and existing mediators. Mediation sessions

## **Resolutions:**

**Federal Bankruptcy Judge Requires Mediation in Lehman Derivatives Dispute,** [Law360](#) (August 26, 2009)

**SemGroup's Secured Lenders Holding Billions in Liens Seek Mediation with Bankrupt Energy Company,** [Tulsa World](#) (August 27, 2009)

**Woman Struck by Tractor-Trailer Settles in Mediation for \$5.4 Million,** [Daily Report](#) (August 3, 2009)

**Public Dispute Between Insurance Company and Hospital Headed to Mediation at Request of New Jersey Governor,** [NJ.com](#) (August 21, 2009)

**Indiana State Medical Association Seeks Mediation with WellPoint over Alleged Systematic Underpayments,** [IndyStar](#) (July 17, 2009)

**Philadelphia Newspapers and Creditors Return to Mediation over Interim Financing,** [Philadelphia Inquirer](#) (August 25, 2009)

**United Airlines, Pilots and Machinists Seek Mediation Assistance from U.S. National Mediation Board,** [ATW Online](#) (August 4, 2009)

**Vermont Judge Pushes Mediation to Resolve Difficult, Old Cases on Docket,** [Burlington Free Press](#) (August 6, 2009)

**Mediation Ordered in ACLU Litigation Against School System for Denying Peace Group Same Access to Students as Military Recruiters,** [Journal Patriot](#)

are expected to last between one and six hours, with mediators paid a flat rate of \$400 split between the parties. The first mediations are scheduled for mid-September.

[Las Vegas Sun](#) (August 28, 2009); [News 3](#) (July 24, 2009)

- **Nevada's** new foreclosure mediation program began modestly, with only ten requests for mediation in the first weeks, although by mid-August 450 requests had been filed. Nevada officials still expect 1,000 or more requests per month once the program is under way. Nevada has the highest rate of home foreclosures in the country, followed by California and Arizona. Nevada set a record for foreclosures in July, with a 94% increase over July 2008. A former casino executive has been hired as Nevada's program administrator.

[Review-Journal](#) (Aug 10, 2009); [Las Vegas Sun](#) (August 14, 2009); [13 Action News](#) (July 26, 2009); [Las Vegas Sun](#) (August 21, 2009)

- The governor of **Connecticut** signed legislation making mandatory the state's home foreclosure mediation program for all foreclosures after July 1. The state's mediation program has helped over 2,000 borrowers stay in their homes – a 60% success rate – since it began in July 2008 as a voluntary program. In Connecticut, 10.8 percent of all residential loans are late or in foreclosure, compared to 13.1 percent nationally. The Connecticut Bankers Association had initial concerns about the mediation program, but now considers it a success.

[Hartford Courant](#) (August 21, 2009); [Los Angeles Times](#) (August 21, 2009)

- A **Florida** task force on residential foreclosures issued a report proposing mandatory mediation unless the borrower and lender agree to opt out. Mediation would be free to borrowers. Vacant and abandoned properties would be exempt from the mediation program, while properties occupied by tenants or other non-borrowers which could involve several parties in mediation would be considered on a case by case basis.

[The Move Channel](#) (August 25, 2009)

- **New York** state is considering expanding its foreclosure mediation program for subprime borrowers to include all homeowners, but faces challenges due to its legislature's leadership crisis.

[New York Times](#) (July 10, 2009)

- A backlog of 46,000 foreclosure cases in **Cook County, Illinois** has caused the presiding judge to order a two-month suspension on initial court appearances by lenders in default cases. While Cook County judges grant individual mediation requests from the parties, an advisory committee is being formed to determine how to increase court-backed mediation.

[Progress Illinois](#) (July 1, 2009)

(August 11, 2009)

**Department of Justice  
Convening Mediation over  
Confederate Battle Flag in  
Parade, [Miami Herald](#)** (July 19,  
2009)

**Zoning Appeal to New  
Jersey Council on  
Affordable Housing Triggers  
Mandatory Mediation  
Between Council and  
Developer, [Independent Press](#)**  
(September 1, 2009)

**Georgia House  
Subcommittee Recommends  
Mediation over Transfer of  
Parks to City, [Crier](#)** (August 4,  
2009)

**Dispute over Future of Miami  
River Heading to Mediation,  
[Miami Today](#)** (July 23, 2009)

**Groups Arguing over How to  
Promote Kingsport Enter  
Mediation, [Times News](#)**  
(August 1, 2009)

**As Ordered by High Court,  
Ohio Judges Begin  
Mediation with Youngstown  
Officials over Adequacy of  
Court Facilities, [Vindy.com](#)**  
(July 29, 2009)

## Other News & Initiatives

**New York Nonprofit Expands  
with Mediation Program to  
Help Indebted Consumers  
and Creditors, [Newsweek](#)**  
(August 20, 2009)

**Virginia Tech Begins  
Mediation Partnership to  
Provide Workplace  
Mediation Services,  
[Newsleader.com](#)** (August 21,

- On the first anniversary of **Philadelphia's** foreclosure mediation program, court officials say that the program has helped 1,400 people keep their homes and another 700 to postpone sheriff's sales.

[Mercury](#) (July 1, 2009)

- The mayor of **Providence, Rhode Island** signed a city ordinance requiring lenders to mediate with borrowers prior to foreclosure.

[Boston Herald](#) (August 6, 2009)

## Rutgers Law School Adds Mediation Center

Due to growth in the field of dispute resolution, Rutgers School of Law-Camden is adding a Mediation Center to provide classes for both the law school and Rutgers School of Business-Camden, as well as provide training to practitioners, with an emphasis on family mediation. The Center will also provide mediation services to the public and businesses.

[Rutgers](#) (July 13, 2009)

## Kentucky Mediating Criminal Cases

Mediation of criminal cases is expanding in western Kentucky, with a retired judge mediating one day a month to resolve cases in which prosecutors and defense attorneys have not been able to reach a plea bargain, such as an assault charge that resulted in a deadlocked jury at trial and then settled in mediation. The program was first begun in 2005 by a judge who prefers to include the crime victims in the mediations so they feel they are being heard, which can promote their healing. The American Bar Association is issuing grants elsewhere for new criminal mediation programs based on the Kentucky model.

[Cincinnati.com](#) (August 8, 2009)

## Parliamentary Inquiry Proposes Mediation to Resolve Disputes Between Police and Protesters

Following one death and hundreds of complaints about police conduct in controlling demonstrators at the April G20 summit in London, a parliamentary inquiry by the Joint Committee on Human Rights proposed that independent mediators be used. The Committee report blamed both police and demonstrators for failing to communicate prior to the protests, leading to excessive violence, and noted that improved communication and resolution of disputes may be achieved through mediation between the police and protesters in the future.

[Reuters](#) (July 28, 2009); [Guardian](#) (July 28, 2009)

## WIPO Opening Arbitration and Mediation

2009)

**Workplace Mediation Program in Maui Receives Grant,** [Maui News](#) (August 19, 2009)

**Utah Mediation Program Focuses on Cultural Differences and Additional Information Needed by Refugees in Disputes,** [Salt Lake Tribune](#) (July 7, 2009)

**Justice Court in Arizona County Establishes Volunteer Mediation Program after Mediation Coordinator Position Eliminated,** [Arizona Republic](#) (August 25, 2009)

**Mediation of Complaints Against Denver Police Considered Successful by Lawmakers and Others, But Criticized as Mere Show by Some,** [Denver Daily News](#) (Aug 12, 2009)

**New York City Police Commissioner Urges Police to Mediate Civilian Complaints,** [Newsday](#) (September 3, 2009)

**Texas College Launches Mediation Training Program,** [Woodlands Online](#) (August 25, 2009)

**Maryland Community Mediation Center Temporarily Closing to Re-establish Leadership and Support,** [SoMDNews.com](#) (July 24, 2009)

**Community Mediation Program Gives T-shirts, Recruits for Trainings at Annual Neighborhood Party in Portland, Oregon,** [Oregon Live](#), August 5, 2009;  
**Maryland Community Mediation Program Uses Billboard with Free Movies**

## Center in Singapore

The World Intellectual Property Organization is opening its first arbitration and mediation center outside its Geneva headquarters, with a new Singapore office opening in January to serve the Asia-Pacific region. WIPO administers mediations relating to patent, trademark and copyright issues, as well as telecommunications, engineering and domain name disputes. The Singapore WIPO office will also collaborate with Singapore's Media Development Authority to address film related disputes, along with providing training and advice on mediation and arbitration.

[Bernama.com](#) (July 28, 2009)

## New Zealand Court Mediation Turning to Private Mediators

The High Court in Auckland, New Zealand is introducing a pilot program using private mediators for court-ordered mediations in certain civil disputes. Judges had previously conducted all mediations and settlement conferences, which were quite successful but took a great deal of judicial time. The Chief High Court Judge is creating a roster of 12 to 15 mediators, who will be paid NZ\$1,500 (US\$1,000) for half-day and NZ\$3,000 for full-day mediations. The pilot begins on November 1 and will be reviewed in June 2010.

[Law Fuel](#) (August 10, 2009)

## Other International Mediation Developments

- Mediator appointed to Parades Commission in **Northern Ireland** after upsurge in parade violence, [Ireland On-Line](#) (July 23, 2009)
- **Nigeria** celebrates tenth anniversary of Citizens' Mediation Center with evaluation of past and strategic planning for future, [AllAfrica.com](#) (July 27, 2009)
- **Mauritius** seeking to become mediation hub to serve African and Indian companies, [Le Defi Media Group](#) (July 16, 2009)
- Two doctors' groups in **Pakistan** have formed a committee to mediate between the government and the Provincial Doctors Association to address ongoing doctors' strike, [News](#) (August 2, 2009)
- **Indian** Police in Dehli turn to mediation in family matters, with mediations conducted six days a week, [Express India](#) (August 24, 2009)
- Chief Justice of Allahabad High Court encourages judiciary in **India** to see benefits of mediation beyond reducing court dockets, [Times India](#) (July 20, 2009)
- **China's** Supreme People's Court issues regulation giving mediation settlements the weight of legal judgments; mediation encouraged to deal with 13% increase in lawsuits, [China View](#) (August 4, 2009)

and Food, [Cumberland Times](#) (July 18, 2009)

**Successful Pilot Project for Appellate Mediation of Family Law Cases in Minnesota Being Extended**, [Minnesota Lawyer](#) (September 3, 2009)

**West Virginia Juvenile Mediation Program Helps Kids Avoid Court**, [Review](#) (August 1, 2009)



- **Mexican** resort opening English-language mediation center to amicably resolve expat and tourist disagreements with local businesses, [Wichita Eagle](#) (August 31, 2009)
- High Court judge in **St. Kitts and Nevis** emphasizes success of court-connected mediation, which is still unknown by many, [ZIZ](#) (August 29, 2009)

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JULY 2009

## CASES & RESOLUTIONS:

### Court Refuses to Allow Plaintiff to Cure Failure to Mediate

A Kansas appellate court affirmed dismissal of a homebuyer's lawsuit against the seller and realtor for failure to first proceed with mediation as required by the purchase contract. When confronted with the defense of failure to mediate, the homebuyer sought to mediate and moved to compel mediation. But the court concluded it was too late and dismissed the litigation, even though the contract provision did not expressly state that the mediation must occur prior to filing suit. The court ruled that when parties contractually agree to mediate they should not be able to continue with their litigation by late compliance with their obligation, as delayed mediation cannot fully achieve its goals.

[Santana v. Olguin](#), 2009 WL 1491383 (Kan. App., May 29, 2009)

### Court Holds that Litigation Damages Cannot be Based on Amount Set in Mediation

A Georgia appellate court reversed a trial court's judgment which relied on the amount agreed upon in mediation with a third party as the measure of consequential damages. The mediation agreement was not performed after discovering the product was defective, but the appellate court concluded that the failure to carry out the mediation agreement was not directly attributable to the breach of warranty, and that the amount agreed to in mediation was not causally connected to the defective product.

[Sunstate Indus., Inc. v. VP Group, Inc.](#), No. A09A0635 (Ga. App., June 26, 2009) (Subscription Required)

### Early Resolution of Multi-Party Mining Disaster Achieved in Mediation

The 2007 Crandall Canyon mine disaster wrongful death and personal injury lawsuits were resolved in mediation for more than \$22 million. The complex cases involved more than 100 participants, including sixteen groups of family plaintiffs, seven defendants, six primary insurance companies, additional secondary insurers, plus four employers. Participants considered the

## Mediation Quote:

"When controversy breaks out, there is no single truth, only different stories about reality. The most dangerous combatants are those who cannot acknowledge multiple realities. Conflicts are kaleidoscopic with many different truths. So the first order of business is to cease antagonizing each other long enough to explore the view planes people are operating on. The second is to understand the different and varied meanings the conflict is imbued with. Only then can you start the journey towards solutions."

Peter S. Adler, *Eye of the Storm Leadership*  
(Mediate.com Publications  
2008) at 43

## Check These Out:

### Directed Body Movements Can Assist Problem Solving

Recent study of "embodied cognition," the link between mind and body, indicates that how people move their bodies may influence how they solve problems. This occurs even when a third party directs the movements of the problem solver, which in the research involved arm swinging.

mediation to be challenging, with a weeklong mediation session, followed by negotiations among counsel, and a final marathon day of mediation. However, settlement was reached prior to any depositions in the case and saved an estimated five years of litigation and a huge emotional and financial toll.

[Salt Lake Tribune](#) (May 30, 2009)

## **Pennsylvania County Mediation Program Criticized for Resolving Property Reassessment Challenges**

All 400 cases mediated with property owners who challenged their property assessments have settled since Luzerne County's mandatory mediation program began in December 2008. To settle the challenges, reductions in assessed value amounting to \$31.6 million have been made. The Pennsylvania county's reassessment company is arguing in court that the county is contractually required to pay the company to defend assessment appeals and to participate in the mediations, which it opposed. The company, which has been paid \$8 million for its reassessment work, alleges that the modifications have been made without adequate basis, reducing tax and school revenues by hundreds of thousands of dollars, but the county stands behind the mediation process. The county has about another 1,600 mediations to go.

[Standard Speaker](#) (May 26, 2009); [The Times Leader](#) (May 28, 2009) (Subscription Required); [The Times Leader](#) (June 30, 2009) (Subscription Required)

## **Ohio Supreme Court Sends Judges' Lawsuit to Mediation**

The three municipal judges of Youngstown filed suit against the city in Ohio's highest court to try to compel suitable accommodations for the court, but the Ohio Supreme Court responded by requiring the parties to mediate. The municipal judges claim that they need larger and better space, but the city states it cannot afford the \$8 million needed for a new facility and that money should be saved by reducing the number of municipal judges. Both sides say they are pleased with the opportunity to mediate.

[Youngstown Vindicator](#) (June 27, 2009)

## **Federal Prosecutors to Mediate with Divorcing Couple**

With a restitution order of over \$3 billion pending against Walter Forbes, the former chairman of Cendant Corp., the U.S. attorney is seeking to intervene in the Forbes' divorce case, asserting an improper effort to transfer assets to his wife, Caren. Caren Forbes filed for divorce in March, after her husband was sentenced to 151 months in federal prison, asserting that the marriage is irretrievably broken and seeking an equitable division of property. Two days of mediation are scheduled to try to resolve the issues, with all divorce proceedings postponed until the mediation is concluded.

[Connecticut Post](#) (June 20, 2009)

[Science Daily](#) (May 13, 2009)

### **Hazardous Mediation Duty**

A court-appointed mediator was bitten and shoved by a woman who was yelling and screaming at the other party in a family dispute, as the mediator tried to separate the parties. The woman was arrested and charged with assaulting the mediator, as well as threatening to kill the other party.

[Foster's Daily Democrat](#) (NH) (May 23, 2009)

## **Other Cases & Resolutions:**

**DuPont and CSX Settle Complex Rate Complaint Using Surface Transportation Board's Mediation Process,** [Progressive Rail Road](#) (May 12, 2009)

**L'Oreal Appealing French Court's Ruling that Ebay Was Not Responsible for Counterfeit Products, But Agreed to Mediate with Ebay at Court's Direction,** [Financial Times](#) (June 25, 2009)

**Mediation Resolves Dispute Between Break-Away Vestry and the Episcopal Diocese of Colorado over Ownership of Grace Church Property,** [Colorado Springs Gazette](#) (June 3, 2009)

**Vodafone Refuses Offers of Mediation to Address Interference from New Telecom 3G Network, So Parties Head to Court,** [New Zealand Herald](#) (May 5, 2009)

**Minnesota Judge Who Benefited by Referring Mediator to Be Removed**

## **Court Requires Mediation in Auto-Parts Maker's Bankruptcy**

Delphi Corp., General Motors Corp., the Treasury Department's auto task force and other lenders were ordered into mediation by the federal bankruptcy court handling Delphi's bankruptcy. The role of General Motors in funding its auto-parts supplier is a central issue. While acknowledging that good faith negotiations were occurring, the court concluded that mediation may be helpful to find a consensual resolution of the bankruptcy cases.

[Bloomberg](#) (May 22, 2009)

## **Australian Court Awards Mediation Expenses as Costs of Proceedings**

The New South Wales Court of Appeals in [Newcastle City Council v. Wieland](#), NSWCA 113 (NSW, Australia 2009), concluded that court-ordered mediation expenses generally should be treated as legitimate costs of the proceedings, since the mediation is a required step. If the parties wish to ensure that each pays its own mediation costs, they must make that clear by agreement.

[Mondaq](#) (May 27, 2009) (Subscription Required)

## **NEWS & INITIATIVES:**

## **Wisconsin Smart Growth Requirements May Spur Mediation**

Wisconsin counties, cities and towns are required to complete comprehensive smart growth plans covering utilities, economic development, housing, transportation, intergovernmental relations and more under the Wisconsin Comprehensive Planning Law, enacted in 1999, which contains a deadline of January 1, 2010. The state has been offering \$2 million a year in grants to help local governments develop their complex plans, which can be aided by mediation, especially in furthering cooperation among communities. Completed smart growth plans range from 100 to 500 pages in length. Once the January 1 deadline arrives, local governments may only take action consistent with their comprehensive plans. The Department of Administration maintains a roster of dispute resolution providers who can assist in intergovernmental and related issues.

[Wisconsin Law Journal](#) (May 25, 2009)

## **Georgia Regulations Require Mediation or Facilitation of Conflicts over Smart Growth Plans**

Final regulations of the Georgia Department of Community Affairs require that mediation or facilitation by a third party neutral be used when conflicts arise from efforts to plan for smart growth in the state. Details of the alternative dispute resolution processes are set forth, including a 90-day deadline which may be extended. The goal is to improve regional and state

from Bench If State Supreme Court Agrees with Board on Judicial Standards, [ABA Journal](#) (May 12, 2009)

**Woman Injured by Running into Curb Receives \$740,000 in Mediation,** [Pennsylvania Law Weekly](#) (June 22, 2009) (Subscription Required)

**Man Struck by Runaway Electric Cart Reaches Mediation Settlement of \$2 Million,** [Pennsylvania Law Weekly](#) (June 1, 2009) (Subscription Required)

**\$3 Billion Lawsuit Against Montana Power Company Sent to Mediation,** [Montana's News Station](#) (May 20, 2009)

**Mediation Set for October in Canadian Breast Cancer Class Action over Faulty Hormone Receptor Tests,** [The Telegram](#) (May 26, 2009)

**Bankruptcy Judge Orders Fontainebleau Las Vegas Resort and Banks into Mediation after Potential Unnamed Lender Appears,** [Las Vegas Sun](#) (June 19, 2009)

**Federal Judge Appoints Mediator in Lawsuit Claiming that Utah Mismanaged Navajo Trust Fund Containing Royalties on Reservation Oil Wells,** [Salt Lake Tribune](#) (June 25, 2009)

**Dozens of Elected Officials from 16 Governments Continue to Mediate over Service Delivery Issues, Including Police and Transportation,** [Gwinnett \(GA\) Daily Post](#) (May 14, 2009)

**Court Order Requiring Mediation Sought to Address Ohio City's Budget**

communication about planning and growth management issues.

[RegAlert](#) (June 10, 2009) (Subscription Required)

## Washington County Requires Mediation of Land Use Disputes

The commissioners of Kitsap County, Washington now require mediation of land use disputes prior to seeking a hearing examiner decision, which may result in an appeal to the county commissioners. The effort to require mediation began after a controversial case involving three appeals was settled late in the process; the commissioners decided to encourage parties to get straight to the compromise and avoid the appeals.

[Kitsap Sun](#) (June 24, 2009)

## Legislation Introduced to Extend Federal Agricultural Mediation Program

The Certified State Agricultural Mediation Program, administered by the Farm Service Agency of the U.S. Department of Agriculture, helps farmers resolve disputes with lenders and others in order to avoid litigation, appeals, bankruptcy and foreclosure. Legislation has been introduced to extend by five years the Mediation Program, which provides matching federal grants to 35 states.

[WIBW](#) (June 26, 2009); [USDA Agricultural Mediation Program](#)

## Early Mediation Becoming More Common in Midwest

Mediators and counsel in the Chicago area report seeing many more commercial disputes being mediated prior to litigation being filed. Some attribute it to the economic climate, while others believe it may be the natural result of court programs encouraging parties to mediate. The Cook County Circuit Court's Law Division began a mediation program five years ago, while the Court's Chancery Division began its mediation program in early 2007, both of which result in hundreds of mediated cases each year. While counsel are more willing to work out disputes earlier, some also observe that lawyers are increasingly reluctant to pay a mediator until after they first try to settle the matter through direct negotiations.

[Chicago Daily Law Bulletin](#) (June 25, 2009) (Subscription Required)

## Update on Home Foreclosure Mediation Efforts

- A detailed 66-page report analyzes the home foreclosure crisis in the U.S., surveys the status of state mediation programs addressing home foreclosures, suggests best practices, and urges a significant federal government role in mandatory mediation.

[Center for American Progress](#) (June 22, 2009); [Report](#)

**Problems,** [Mansfield News Journal](#) (June 18, 2009)

**Illinois Township Turning to Mediator to Address Heated Dispute over Supervisor Hiring Friend,** [Homer Horizon](#) (June 17, 2009)

**National Hockey League and Owner of Bankrupt Phoenix Coyotes Sent to Mediation by Bankruptcy Judge to Determine Control of Team,** [Reuters](#) (May 19, 2009)

**Judge Orders Mediation over Hiring of Goshen, Alabama High School Football Coach,** [Dothan Eagle](#) (June 18, 2009)

**Judge Calls for Second Round of Mediation over Placement of 77-Foot Cross near Highway,** [Kerrville](#) (June 3, 2009) (Subscription Required)

**Two Years of Mediation over Tupper Lake Resort Development Pleases Some, But Leaves Unresolved Issues,** [Plattsburgh Press Republican](#) (June 24, 2009)

**Auckland War Memorial Museum to Mediate with Family of Sir Ed Hillary over Plans for Memorabilia,** [New Zealand Herald](#) (May 25, 2009)

**City Officials and Insurance Carrier Heading to Mediation over Tornado Damage to Civic Center,** [The Enterprised Ledger](#) (AL) (June 3, 2009)

**Lionsgate Films and Weinstein Co. Agree to Mediate Distribution Dispute over Movie "Push,"** [Contra Costa Times](#) (June 8, 2009)

**Court Orders Five Women Accused of Paddling Sorority Pledges to Go to Mediation,** [Cincinnati.com](#)



- **Nevada** has enacted legislation requiring lenders to meet with homeowners who may request mediation if they receive a foreclosure notice. The program takes effect on July 1 and may generate up to 1,500 mediation requests a month, as Nevada has the worst foreclosure rate in the country. The first mediations will be conducted by senior judges and settlement judges; more than 350 lawyers who have expressed interest in acting as mediators, but must both be experienced and receive training. The costs of mediation are to be shared, with homeowners and lenders paying \$200 each. The Nevada Supreme Court issued rules for the mediation program after holding public hearings.

[Mercury News](#) (June 17, 2009); [Mediation Rules](#) (June 30, 2009); [Foreclosure Mediation Website](#)

- **Connecticut** has passed legislation that as of July 1 makes mandatory the foreclosure mediation program that was previously voluntary. About 60% of homeowners in the voluntary program have been able to stay in their homes, but only about one-third of those eligible for the mediation program have used it. The program has been funded through a \$5 million grant, but additional funds may be needed. The mediation program's 30-person staff (including 12 mediators) is expected to more than double along with its caseload.

[Connecticut Law Tribune](#) (June 8, 2009)

- Emergency legislation was enacted in **Maine** to create an optional home foreclosure mediation program and provide additional counseling for homeowners. Maine's bill, modeled on similar legislation in Connecticut, takes effect on July 1.

[LD 1418 Status](#); [Bangor Daily News](#) (June 12, 2009)

- A **Florida** Supreme Court task force is exploring the possibility of a statewide mandatory foreclosure mediation program in light of worsening conditions in Florida, which has the second highest rate of foreclosures in the nation (after Nevada).

[Miami Herald](#) (May 14, 2009)

- The governor of **Minnesota** vetoed a home foreclosure mediation bill that would have required lenders to participate in mediation at the request of homeowners facing foreclosure. The legislation was opposed by the Minnesota Bankers Association. By contrast, a foreclosure mediation program continues to move forward in **Wisconsin** with money from a settlement with Countrywide Financial Corp.

[Bizjournals.com](#) (May 20, 2009); [Arbitration Forum Blogspot.com](#) (May 28, 2009)

(May 14, 2009)

**City's Restrictions on Nude Dancing Sent to Mediation,** [Destin \(FL\) Log](#) (May 29, 2009)

## Other News & Initiatives:

**National Archives Appoints FOIA Ombuds to Mediate Disputes over Access to Information,** [New York Times](#) (June 11, 2009)

**Orange County, Florida Requires All Small Claims Cases to Be Mediated; 75% of Those Mediated Are Resolved,** [TMCnet](#) (June 22, 2009)

**New Hampshire Legislation Sent to Governor to Raise Small Claim Limit to \$7,500 and to Require Mediation of Any Small Claim Exceeding \$5,000,** [Fox 44 News](#) (May 13, 2009)

**Texas Moving Forward with Legislation for Mediation System for Patients Surprised by Out-of-Network Medical Charges,** [Fort Worth Star Telegram](#) (May 30, 2009)

## Elder Mediation Service Launched to Address Dementia Issues

The Alzheimer Society of Ireland launched a pilot elder mediation program to assist families coping with dementia. Family members are often involved and deeply affected by a relative with dementia; the new model of elder mediation services may help address the resulting stress and family conflict.

[Irish Medical Times](#) (June 22, 2009)

## New Chinese Law Provides for Mediation of Rural Land Disputes

China's top legislature enacted legislation on mediation and arbitration of rural land contract disputes. The law is to ensure rural stability by addressing the growing number of disputes resulting from allocating publicly-owned farmland to individual households using long term contracts. Over 50,000 land dispute cases arose from 2003 to 2008. Arbitration has been used in land disputes since the late 1990s, with patchwork arbitration regulations in 23 provinces. Under the new national law, when a land dispute arises the parties can negotiate directly or obtain mediation assistance from a village committee or local government. The law recommends that local officials encourage use of mediation. If mediation is not successful, the parties can apply for arbitration or go to court. The law takes effect January 1, 2010.

[Xinhua Economic News](#) (June 29, 2009) (Subscription Required)

## Other International Mediation Developments

- Latest survey of **U.K.** construction litigation by the Technology and Construction Court and King's College, London finds evidence of increasing use of mediation with significant costs savings. [Building](#) (June 5, 2009) (Subscription Required); [Mondaq News Alerts](#) (May 19, 2009)
- Benefits of mediation are particularly significant when dealing with intellectual property in an international context. [Lawyer \(U.K.\)](#) (May 25, 2009) (Subscription Required)
- **Nigerian** High Court Justice encourages Nigerian Bar Association to focus attention on mediation and other forms of ADR in commercial cases. [AllAfrica.com](#) (May 25, 2009) (Subscription Required)
- **Pakistan's** Ministry of Law is considering amendments to mandate mediation in all cases prior to arbitration or litigation. [Business Recorder](#) (June 24, 2009) (Subscription Required)
- World Bank's International Finance Corporation encourages development of banking mediation in **Pakistan**. [Daily Times](#) (May 5, 2009)
- **Nepal's** six mediation centers are making progress, and may expand by another 20, but face challenges. [eKantipur.com](#) (May 24, 2009)
- Four-day judicial mediation exchange program between **China** and U.S. held in Jilin Province with 60 judges and experts. [Xinhua](#) (June 17, 2009)
- Victoria, **Australia** turns to international expert on judge-led mediation to educate judiciary prior to pilot mediation program. [The New Lawyer](#) (May 12, 2009)
- **Fiji's** employment mediation service exceeding goals with 84% success rate since inception. [Fiji Daily Post](#) (May 14, 2009)

- First **Asian Mediation Association** conference to be held in Singapore. [Business Times \(Singapore\)](#) (May 22, 2009)  
(Subscription Required)

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MAY 2009

## CASES & RESOLUTIONS:

### Courts Seriously Consider Sanctions for Failing to Appear in Person at Mediation

The North Carolina Court of Appeals sent back to the trial court a decision imposing sanctions on parties who failed to appear in person at a court-ordered mediation. Under North Carolina law, all individual parties must appear in person unless they obtain a court order or the agreement of the other parties and mediator. The trial court imposed over six thousand dollars in sanctions, but failed to determine whether the absent parties' excuses of a delayed flight, inability to get off work, and lack of funds constituted good cause for not appearing and relying on a co-party and input by telephone. The appellate court also stated that the trial court should determine whether the parties seeking sanctions had waived their right to sanctions by mediating for over eight hours, and noted the importance of determining the reasonableness of the attorneys' fees and costs requested.

[Perry v. GRP Financial Services](#), 2009 WL 782897 (N.C. App. April 7, 2009)

### Courts Must Enforce Settlement Agreements as Written

Settling parties provided that the remedy for not carrying out their mediated settlement agreement would be a judgment for the unpaid amount, so a New Jersey appellate court reversed the trial court's decision to reinstitute the original claims. The appellate court explained that if the parties wanted the option to bring back their original litigation as remedy for a breach, they needed to include that in the settlement and seek the acquiescence of the court.

[Kaur v. Assured Lending Corp.](#), 2009 WL 536902 (N.J. Super. App. Div. March 5, 2009)

### Federal Mediation Privilege Supported by Court Dicta

The federal district court in [McNeil Sampson v. Lancaster School Board](#), (E.D. Pa.), found persuasive the reasoning of federal courts which have adopted a federal mediation privilege, which is discussed in detail, but based its decision

## Mediation Quote:

"Conflict specialists...can be a vital part of helping people and organizations address what appear to be the ever more complex dilemmas everyone faces. In doing so, we do not have to claim to have the magic bullet to address the big issues, to oversell our potential contribution, or to insist that we are the sine qua non for dealing with major disputes. There is no magic bullet.... But we...have the capacity, and perhaps the obligation, to enhance people's effectiveness in facing the most significant struggles of their lives."

Bernard Mayer, *Staying with Conflict: A Strategic Approach to Ongoing Disputes* (Jossey-Bass 2009) at 272

## Other Cases & Resolutions:

**Fifteen-Year-Old Lawsuit Against Nuclear Company with Exposure of \$1 Billion Settled in Mediation for \$52 million**, [Pittsburgh Post Gazette](#) (April 21, 2009)

**North Carolina County Settles with Two of Four Contractors in Mediation over Cracks in Convention**

on other grounds. In the underlying dispute, a mediation over discrimination allegations against a school system was attended by the school's attorney who then prepared a memorandum to the school board about the mediation and the claimant's perception of conspiracy and aggressive stance in the mediation, after which the claimant was fired. In the ensuing litigation, the claimant asserted that her termination was retaliation for participating in mediation and sought discovery related to the mediation. However, the court concluded that the claimant could not depose the school's attorney and that the memorandum drafted about the mediation was protected under the attorney-client privilege. The court also noted that a state mediation privilege is not applicable in a federal case involving both state and federal claims.

[McNeil Sampson v. Lancaster School Board](#), No. 05-6414 (E. D. Pa. Nov. 5, 2008); [The Legal Intelligencer](#) (March 11, 2009) (Subscription Required)

## **Parties Seek to Disqualify Federal Judge Due to Role as Mediator**

Lenders for Sunwest Management are seeking to disqualify a U.S. district judge in litigation brought by the SEC, based on the judge's mediation of a related case between the company and its former CEO. The judge, known for being combative during mediations, refused to step aside in the litigation despite being in a position to gain confidential information in the mediation.

[Hartford Courant](#) (March 8, 2009)

## **Joint Resolution Encourages Governor and Union to Mediate**

With the governor of Vermont beginning layoffs that could eliminate 400 state employees in an effort to reduce costs, the legislature passed a joint resolution calling on the administration and the Vermont State Employees' Association to enter into mediation over how to come up with state payroll savings. The resolution gives the mediation two weeks to find solutions before the end of the legislative session.

[Vermont Business Magazine](#) (April 24, 2009)

## **Remaining 9/11 Cases Mostly Settled in Mediation**

Ninety-two of 95 lawsuits by victims of the September 11, 2001 attacks have been settled in mediation by the airlines and other defendants for about \$500 million. Plaintiffs in these 95 lawsuits had opted out of the special fund established by Congress which distributed over \$7 billion to more than 5,000 survivors. The mediator noted that a significant number of the disputes were more about the families having a chance to express their losses or anger than about money. Face-to-face encounters between the families and airline representatives were critical in about a third of the settlements and there were "lots of tears," according to the mediator. Trial dates have not been set in the remaining three cases.

[Breitbart](#) (March 5, 2009); [Bay Ledger News Zone](#) (March 5, 2009)

## **Mediator Facilitates Six-Month Discussion**

Center, [New Bern Sun Journal](#) (April 3, 2009)

**Mediation over Large New Zealand Merger that Failed Due to Financial Crisis Successfully Settled for Cash and Shares, Plus Business Initiatives**, [Scoop](#) (April 25, 2009); [National Business Review](#) (April 20, 2009)

**Defective Hydraulic Lift Led to Leg Injuries and \$700,000 Settlement at Mediation that Involved Multi-Media Presentation and Live Explanations by Doctor**, [Virginia Lawyers Weekly](#) (April 20, 2009) (Subscription Required)

**Four Days of Mediation Yield \$10 Million Settlement for Paraplegic after Warehouse Accident**, [Pennsylvania Law Weekly](#) (March 23, 2009) (Subscription Required)

**Carpenter's Claims from Fall off Ladder Resolved in Mediation for \$650,000**, [PR.com](#) (NY) (May 3, 2009)

**Kalamazoo Commissioners Vote to Accept Terms of Mediation Settlement of Sex Discrimination Claim by City's Human Resources Director**, [Kalamazoo Gazette](#) (March 31, 2009)

**Successful Mediation Restores Building Manager's Job and Avoids City Manager Being Fired**, [Florida Today](#) (April 8, 2009)

**New York Knicks' Eddy Curry Files Suit for Breach of Mediation Confidentiality Against Lawyer for Plaintiff Alleging Sexual Harassment by Curry**, [Chicago Tribune](#) (March 5, 2009)



## **on Health Care Policy**

Eighteen health-interest groups, including insurers, consumer advocates and hospitals, issued a report urging the government to meet the goal of all Americans having health insurance. With the help of a mediator over a six month period progress was made by the groups, which called their effort the Health Reform Dialogue, but consensus was not reached on divisive issues such as whether to mandate that all consumers must obtain health insurance. The American Federation of State, County and Municipal Employees pulled out of the talks in February and the Service Employees International Union didn't join on the report, but the 18 groups that issued the report included large entities such as the Pharmaceutical Research and Manufacturers of America and the American Medical Association.

[Bloomberg](#) (March 27, 2009)

## **Mediation of Complex Sex Abuse Case Against Hospital Begins Second Year**

Over 135 plaintiffs claiming sexual abuse as children by a doctor entered into mediation in March 2008 with the hospital they claim failed to stop the abuse. The court hoped the mediation would be concluded by the end of 2008, but it may continue for months more. The doctor worked for the hospital from 1963 to 1993 and died in 1998. Large amounts of child pornography were found in 2007 in the doctor's former home. State legislation is being considered which would extend the statute of limitations when new evidence is uncovered that could not reasonable have been discovered previously, which could impact about 40 to 50 plaintiffs.

[Hartford Courant](#) (CT) (March 8, 2009)

## **Governor Uses Mediation Confidentiality to Shield Deal with Power Plant**

The confidentiality of mediation is preventing dissemination of details about an agreement that was negotiated between the state of Washington and the only coal-fired power plant in the state. The owner of the plant agreed to significant emission reductions, but critics question whether the state could have done better. Open government advocates are concerned about the public-records exemption for mediation confidentiality.

[The News Tribune](#) (April 8, 2009)

## **Local Catholics Ask Vatican for Mediation over Parish Closings**

Facing the recent or planned closing of 1,000 U.S. parishes, Catholic parishioners from 31 groups in eight U.S. dioceses sent a lengthy letter to Vatican offices seeking mediation between U.S. bishops and local parishioner groups. The Vatican is close to a decision on the appeals of several parishes in the Boston Archdiocese where parishioners have maintained vigils for over four years. But mediation is being pursued because advocates are discouraged by the historical lack of success of appeals.

**Mediation Scheduled After Expert Reports in A\$60 Million Class Action Against Wheat Exporter,** [WA Today](#) (Australia) (March 9, 2009)

**Judge Shocked by Psychiatric Hospitals' Overcrowding Orders Parties to Mediate,** [Charleston Gazette](#) (WV) (April 27, 2009)

**Mediation by "Special Master" Proposed for Washington State Democrats in Dispute with Former Lawyer over Legal Files,** [KYW1060.com](#) (March 12, 2009); [Seattle Times](#) (March 18, 2009)

**Warner Bros. and Producer Mediating over Responsibility for Fox's Part Ownership of "Watchmen,"** [Hollywood Reporter](#) (April 20, 2009)

**Barbie-Bratz Battle in Mediation, with Offer Pending to Sell Whole Bratz Line to Mattel,** [Reuters](#) (USA) (April 17, 2009)

**Colorado County Energy Advisory Board Considering Mediator to Improve Board Operations,** [The Grand Junction Daily Sentinel](#) (April 6, 2009)

**United Way and Public Assistance Call Center Agree to Mediation over Funding Dispute,** [Milwaukee Journal Sentinel](#) (March 11, 2009) (Subscription Required)

**Santa Barbara Mayor, City Council Press Hotel and Upset Neighbors to Hire Mediator to Address Project Plan,** [The Santa Barbara Independent](#) (April 30, 2009)

**Georgia County and 15**

[The Catholic Review](#) (April 8, 2009)

## **NEWS & INITIATIVES:**

### **Maine Considering Uniform Mediation Act**

The legislature in Maine is considering the Uniform Mediation Act (UMA) in order to establish confidentiality for mediation communications, with specified exceptions. The legislation is intended to encourage greater use of mediation and generally follows the UMA language of the National Conference of Commissioners on Uniform State Laws. The UMA has been adopted thus far in the District of Columbia and ten states: Idaho, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont and Washington state. Legislation to adopt the UMA is also currently being considered in Hawaii and Rhode Island.

[Maine H.B. 968; LegAlert](#) (April 2, 2009) (Subscription Required)

### **Agricultural Commission May Become Mediation Board**

Following a model suggested by the state, a proposed town "right to farm" bylaw would provide information to people moving near farms and begin a mediation program for disputes that arise between farmers and their neighbors. The bylaw of the Massachusetts' town would establish the mediation service in the Agricultural Commission as a first resource for disputes.

[The Republican](#) (April 7, 2009)

### **Climate Change Disputes May Benefit from Mediation**

Increasing numbers of lawsuits and disputes are arising from climate change allegations, which are being taken more seriously by the courts. The cases are complex and often involve multiple parties, so are often well suited to mediation where a skilled mediator can help the parties work through the issues to reach better outcomes, including sophisticated solutions that could not be achieved in other ways. However, a few cases do need judicial or political decisions on the scope of rights and remedies.

[Fulton County Daily Report](#) (April 10, 2009) (Subscription Required)

### **Foundation Frequently Uses Mediation to Assist Seriously Ill Patients**

A national non-profit, the Patient Advocate Foundation, relies on mediation to ensure that patients with life threatening or debilitating diseases have adequate access to care or receive other needed assistance. The Foundation's annual Patient Data Analysis Report states that over 48,000 matters were successfully managed for patients last year using mediation or arbitration. The report noted that 93% of patients helped by the Foundation had some

**Cities Continue Negotiations over County Tax Levels after Three Days of Mediation,** [Atlanta Journal Constitution](#) (April 27, 2009)

**Mediation Ongoing over Control of Property in Polygamous Community,** [The Salt Lake Tribune](#) (April 23, 2009)

**Mediation Scheduled in Wrongful Death Suit of City Worker Caught in Snow Plow,** [Poughkeepsie Journal](#) (March 24, 2009)

**City Council Orders Mediation Between Award-Winning Rabbit Breeder and Neighbors Complaining of Odor,** [Vallejo Times-Herald](#) (CA) (April 9, 2009)

**After EPA's Third Rejection of Highway Project to Virginia Beach in 22 Year Effort, Highway Administration Offers to Pay for Mediation Among Cities and Agencies,** [The Virginian-Pilot](#) (April 19, 2009)

## **Other News & Initiatives:**

**Vermont Workers' Compensation and Safety Division Proposes Rule Requiring Mediation Prior to Administrative Hearings, as Mandated by Statute,** [Workers Comp Forum](#) (April 27, 2009); [Rule 27.000](#)

**North Dakota Legislators Considers Mediation Provisions in Pending Zoning Legislation,** [Minot Daily News](#) (April 28, 2009)

**New Jersey Proposes to Increase Small Claims Limits**

health insurance, but were often “underinsured” and lacked the ability to obtain the coverage needed.

[PR Newswire](#) (April 29, 2009)

## **Recession Shifting Disputes to Mediation**

Commercial mediators and mediation groups note that corporations may be waiting to initiate litigation in some disputes in order to save costs, but many other conflicts are being brought into mediation more quickly than in the past in order to minimize litigation costs. Moreover, some mediators note that parties may be more amenable to settlement now than in the past, given the pressure on litigation budgets. The weak economy is reawakening clients and advocates to the benefits of mediation, which could well lead to permanent increases in the use of mediation, especially in mid-Atlantic states and other regions of the country that have been slower to shift to mediation.

[Pennsylvania Law Weekly](#) (March 23, 2009) (Subscription Required)

## **Value of Mediation Seen in Tough Economic Times**

Challenging economic times may increase the number of disputes, leading more people to turn to mediation for resolution. In New Zealand, a free pilot mediation service began in March for smaller disputes between individuals, while the maximum dollar size of disputes handled by the Disputes Tribunal was increased. Mediation experts note that in addition to generally being less expensive, mediation often reaches better solutions for the businesses and other parties involved.

[The Dominion Post \(New Zealand\)](#) (March 12, 2009)

## **Update on Home Foreclosure Mediation Efforts**

- **Oregon** is considering legislation that would require mandatory mediation before foreclosure on residential property and may involve the mediator running calculations to determine if the borrower qualifies for loan modification; the legislation would sunset in 2014.

[Oregon SB 628](#); [The Oregonian](#) (April 27, 2009)

- **Maine** is considering legislation to establish a mandatory foreclosure mediation program which would stay the foreclosure action during the mediation.

[Maine LD 1418](#); [MPBN News](#) (April 28, 2009)

- **Minnesota** is considering the Homeowner-Lender Mediation Act, which would require lenders to notify homeowners of their right to mediation prior to beginning foreclosure proceedings. The Executive Director of the Iowa Mediation Service warned that the legislation could open the proverbial floodgates.

[Finance and Commerce](#) (April 1, 2009)

from \$5000 to \$7500 and Require Mediation of Claims over \$5000 with \$60 Fee for Mediation, [New Hampshire H.B. 281-FN](#); [New Hampshire Business Review](#) (April 9, 2009)

**Mediation Procedures Clarified for New Jersey Office of Administrative Law, RegAlert** (April 6, 2009) (Subscription Required)

**North Carolina and Washington State Legislation Encouraging Voluntary Arbitration (Rather than Mediation) in Medical Malpractice Cases Finds Few Takers, North Carolina Lawyers Weekly** (April 13, 2009) (Subscription Required)

- Pending **Wisconsin** legislation would require financial institutions provide mediation request forms to borrowers as the first step towards foreclosure, and would permit borrowers to stay in their homes until mediation is concluded.

[New Richmond News](#) (April 16, 2009) (Registration Required);  
[WISN.com](#) (April 15, 2009)

- Legislation in **Connecticut** would make mediation mandatory, rather than optional, in real estate foreclosures. Under existing law over a quarter of foreclosure proceedings have been mediated, with about 70 percent being resolved.

[Hartford Business](#) (April 10, 2009); [Connecticut S.B. 619 Analysis](#);  
[Greenwich Time](#) (March 10, 2009)

- The **Florida** Supreme Court formed a task force in April to explore foreclosure mediation options that may be suitable statewide. Meanwhile, the Miami-Dade Circuit Court was to launch a pilot mediation program on May 1 which is intended to get lenders and borrowers talking to each other in an effort to avoid foreclosure. The 19th Circuit also has begun requiring mediation in owner-occupied foreclosure cases. Jacksonville is considering local legislation to require foreclosure mediation.

[Miami Herald](#) (April 23, 2009); [Jacksonville Daily Record](#) (March 9, 2009); [Jacksonville Daily Record](#) (March 9, 2009)

- **New Jersey** plans to use part of a multi-million dollar settlement with Countrywide Financial Corp. to fund foreclosure mediation efforts in the state.

[The Star-Ledger](#) (April 2, 2009)

- The Superior Court in **Marion, Indiana** passed a new local rule allowing homeowners facing foreclosure the option of a settlement conference or mediation with their lender. The conferences are mandatory for the lender if the borrower responds.

[Indianapolis Star](#) (March 11, 2009)

- **New Hampshire** is exploring the idea of a mortgage mediation program to help struggling borrowers keep their homes.

[Fox News](#) (March 8, 2009)

- **U.S.** Congressman Alan Grayson (D-Florida) is urging mandatory mediation to minimize home foreclosures and seeking \$50 billion from the Trouble Asset Relief Funds for foreclosure relief efforts.

[The Ledger](#) (April 23, 2009)

## **Texas Legislation Proposes Pretrial Victim-Offender Mediation Programs**

The Texas House of Representatives passed, without any opposition, legislation that would authorize cities and counties to establish pretrial victim-offender mediation programs for misdemeanors and certain felonies. Under H.B. 2139, mediation would only occur with the consent of both victim and

defendant, and would result in charges being dismissed against the defendant if an agreement is reached which includes an apology along with restitution or community service by the defendant. Mediators need not be trained and the programs may charge defendants up to \$500 in fees. The legislation was amended before passage to also include a juvenile victim-offender pilot program.

[Texas H.B. 2139; Amendment for Juvenile Pilot](#) (April 24, 2009)

## **Mediation Helps Prepare Inmates for Release**

The Maryland Division of Correction is expanding to a medium security prison its pre-release mediation program for inmates. The program is voluntary for inmates, allowing them to attend up to three mediation sessions with the person who will provide a home for them once they are released. The mediation program helps resolve conflicts that may lead to future trouble, giving the inmates a better chance at success once they are released.

[The Examiner](#) (April 14, 2009)

## **Michigan Businesses Slowly Shifting Towards Mediation**

Despite inertia, business disputes in Michigan are increasingly being resolved through mediation, rather than litigation or arbitration. However, businesses may often wait too long and participate in mediation only when directed by the court, when they could benefit by seeking out mediation sooner. It is particularly important in the current economic climate to keep down litigation costs and get a settlement in mediation rather than waiting for a later judgment that may not be collectible.

[Michigan Lawyers Weekly](#) (April 6, 2009) (Subscription Required)

## **Australian Courts Turning to Mediation**

A report on mediation in the Supreme and County courts in Australia shows that use of mediation is steadily increasing. All civil cases before the Supreme Court are now being sent to mediation, where judge-led mediations are being used. A pilot mediation program in Magistrates Court has been extended and expanded from all cases under A\$10,000 to all those under A\$40,000. The author of the report noted that 80% of mediation participants are satisfied with the process, but that some cases need to be referred to mediation earlier.

[The Age](#) (April 2, 2009)

## **Other International Mediation Developments**

- New **Australian** Supreme Court judge appointed to promote mediation in civil cases, fulfilling government's commitment, [The Age](#) (April 1, 2009)
- Failure to accept mediation offer may impact award of court costs in



work injury cases in **New South Wales, Australia**, [Workers Compensation Report](#) (March 31, 2009) (Subscription Required)

- Mediators from **China** IPR Desk address intellectual property issues at large trade show in Europe, avoiding police raids to seize infringing technology as in past, [PC World](#) (March 9, 2009)
- **Hong Kong's** Civil Justice Reform largely became effective in April, with a new mediation directive taking effect on January 1, after which unreasonable refusals to mediate may impact legal cost awards, [Mondaq](#) (April 7, 2009) (Subscription Required)
- The **Philippines** province of Bukidnon will be opening its own mediation center, [Minda News](#) (March 31, 2009)
- The Supreme Court of **India** is preparing a national mediation plan to be submitted to the government in the next two months, [The Hindu](#) (March 12, 2009)
- **India** is increasingly using mediation in intellectual property disputes, with generally favorable results, [Mondaq](#) (April 16, 2009) (Subscription Required)
- **Bahrain** is hosting conference on mediation and trade disputes; will unveil its own mediation program later in year, [Gulf Daily News](#) (March 7, 2009)
- **Dubai** mediation center to open in April to resolve property-related issues, [Emirates Business 24/7](#) (March 9, 2009)
- **Romanian** Banking Association received approval for a Banking Mediator to resolve disputes between banks and customers, [Curierul National](#) (April 13, 2009)
- **U.K.'s** Federation of Small Businesses is urging the Treasury to fund specialist mediators to resolve lending disputes during credit crisis, as in France and Belgium, [Telegraph.co.uk](#) (April 16, 2009)
- **Irish** Commercial Mediation Association survey shows increasing use of mediation; Law Reform Commission is receiving input before publishing final report on alternative dispute resolution, [Irish Times](#) (March 6, 2009) (Subscription Required)

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MARCH 2009

## CASES & RESOLUTIONS:

### Minnesota Judge Orders Sunshine Act Exception for Mediation by City Council and County Commissioners

All five Houston County commissioners and the entire city council of Caledonia, Minnesota were to participate in mediation in an effort to resolve litigation over zoning issues for a new county jail. The judge in the case took the unusual step of issuing an order allowing the elected bodies to meet in a joint closed session without violating the state's open meetings law. A day-long mediation was then held that resulted in agreement on the size and location of the jail, and a plan for submission of applications that may result in a release of all claims.

[Winona Daily News](#) (January 25, 2009); [Houston County News](#) (February 3, 2009)

### Cities Resolve Litigation Plus More in Mediation

Intense mediation efforts between the city government leaders of Timnath and Fort Collins resulted in a comprehensive agreement resolving pending litigation over annexation and land-grab issues, as well as a number of other tensions and past disputes between the cities. The agreement, which still must be ratified by both city councils, adjusts each city's growth management area and includes provisions to roll back prior annexations if desired.

[ReporterHerald.com](#) (CO) (January 16, 2009)

### Anglican Bishops Agree on Mediation in Attempt to Avoid Church Schism

Thirty-eight senior Anglican bishops sent a communiqué to the Archbishop of Canterbury requesting a professionally mediated conversation in an effort to avoid a split in the Anglican Church over the ordination of homosexuals and blessing of gay marriages. The 80-million member group has been in conflict since the first openly gay bishop was elected in New Hampshire in 2003.

## Mediation Quote:

"One of the main barriers to resolution comes when people can't let the conflict go and move on with their lives. A dispute can become such an important part of an individual's life that he or she will not allow it to end. It feels as if something important is being lost. This is very similar to the process of grieving...."

- Gary T. Furlong, *The Conflict Resolution Toolbox* (Wiley 2005) at 24

## Other Cases & Resolutions:

**Opes Prime Case Settling in Australia for Over US\$100 Million; Mediation Continues to Finalize Legal Documents,** [Bloomberg](#) (February 9, 2009)

**Mediated Settlement of Lawsuit over Circuit Board Materials in Wireless Products Results in \$9 Million Payment, with \$4 Million Going to Bank Loan,** [Los Angeles Business Journal](#) (January 9, 2009)

**Court Orders Mediation in Multi-Million Dollar Pillsbury Winthrop Shaw Pittman Conflict of Interest Litigation,** [Law.com](#) (CA) (January 21,

[The Times](#) (South Africa) (February 8, 2009)

## **Resort Development Disputes Expand to Squabbles over Mediation**

Developers of a large ski resort in New York sought mediation in March 2008 in order to address objections by various groups, but after several joint sessions among the parties no further joint sessions have occurred since July, according to one of the parties in the mediation. The developer objected to that disclosure as a violation of mediation confidentiality and responded publicly, as well as telling the mediator that it is continuing to meet with various parties, including government agencies, to revise the draft mediation agreement. The developer described project modifications it is making as a result of the mediation, which other parties downplayed as insignificant or already under way prior to mediation.

[Plattsburgh Press Republican](#) (February 3, 2009); [Plattsburgh Press Republican](#) (February 5, 2009)

## **NEWS & INITIATIVES:**

### **Missouri Introduces Legislation to Set Standards for Mediation**

Legislation has recently been introduced in Missouri to create general standards for mediation that occurs as a result of statutes, regulations or contracts entered into in the state. The act allows parties to seek the court's help in obtaining a qualified mediator if they are unable to agree on one. Further, the act specifies the duties of mediators and provides that a mediator may not provide later representation, counseling or treatment on issues raised in mediation. Finally, the act provides for mediation confidentiality, but allows mediators to be called to testify about events following the mediation in order to enforce written settlement agreements.

[Missouri S.B. 444](#)

### **Hawaii Considering Uniform Mediation Act**

The legislature in Hawaii is considering the Uniform Mediation Act (UMA) in order to establish confidentiality for mediation communications, with specified exceptions. The legislation is intended to encourage greater use of mediation and closely follows the UMA language of the National Conference of Commissioners on Uniform State Laws. The Hawaiian proposal also incorporates the United Nations Model Law on International Commercial Conciliation, which is a supplement to the UMA for international commercial mediations, unless the parties agree otherwise. The UMA has been adopted thus far in the District of Columbia and ten states: Idaho, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont and Washington state.

[Hawaii S.B. 120](#)

2009)

**Company Proposes Mediation, Offering \$10 Million to Resolve Failed Merger,** [National Business Review](#) (New Zealand) (February 17, 2009)

**Federal Litigation Between Arenas over Deal with Major Concert Promoter Set for Mediation,** [Michigan Business Review](#) (February 26, 2009)

**Claims of Brothers Mauled by Tiger at San Francisco Zoo Are Being Mediated,** [The San Francisco Examiner](#) (February 8, 2009)

**Mediation Continues in Dispute over Suspension of Trauma Surgeons at Florida Hospital,** [Florida Today](#) (February 18, 2009)

**Mediation Doesn't Resolve Complaint by Pre-Operation Transsexual Seeking to Use Women's Gym,** [The Toronto Star](#) (February 25, 2009)

**Judge Considering Whether Mediation Statements Can Be Used in Forgery Trial,** [Central Maine Morning Sentinel](#) (January 17, 2009)

**Appeals of Redevelopment Approval for Hospital and Retirement Village Headed to Mediation,** [Auckland stuff.co.nz](#) (New Zealand) (January 22, 2009)

**\$10 Million Settlement for Man Injured in Warehouse Accident after Four Days of Mediation,** [The Legal Intelligencer](#) (PA) (February 26, 2009) (Subscription Required)

**Claims of 32 Students Injured by School Bus Plunge off Overpass Settled in Mediation,** [Chicago Tribune](#)

## Texas Regulation Offers Mediation Option in Taxable Value Protests

Mediation of protests over the Texas Comptroller of Public Accounts' preliminary findings of taxable value may be requested by the petitioner pursuant to regulations adopted on January 23, 2009. The mediator is to be selected by the Comptroller and any agreements reached must be documented in writing and signed by all parties. If all issues are not resolved in mediation, either party may request a hearing.

[Regalert](#) (January 23, 2009) (Subscription Required)

## Insurer Reinstates Mediation Program for Resolving Hurricane Claims

To address the destructive 2008 hurricane season, Zurich is bringing back its mediation program which resulted in Zurich having the highest percentage of resolved claims (98.8%) of any insurer after Hurricane Katrina. As in 2005, Zurich has retained Kenneth Feinberg to administer the program. While the bulk of cases were directly resolved prior to mediation, a very small percentage went to mediation with a mediator selected or approved by Feinberg. The Zurich program includes a binding arbitration component as well, with an arbitrator selected or approved by Feinberg, but none of the 2005 cases went to arbitration.

[Business Wire](#) (January 26, 2009) (Subscription Required)

## Economy May Impact Mediation

Some counsel are noting that potential litigants are more interested in mediation rather than expensive commercial litigation as a result of the economic downturn. Others note that parties may be taking that trend a step further by using direct negotiations without involving a mediator. However, in some regions mediation is becoming so much the norm that many counsel are losing their skills at direct negotiation and tend always to rely on the assistance of a third party.

[Lawyers USA](#) (January 6, 2009)

## Update on Home Foreclosure Mediation Efforts

- **New Jersey** launched its mortgage foreclosure mediation program with the enactment of legislation in January. The Mortgage Stabilization Program and Housing Assistance and Recovery Program will be administered by the New Jersey Housing and Mortgage Finance Agency to give homeowners, who are trying to save their primary residence and who are not in bankruptcy, access to counselors, attorneys and mediators.

[Philadelphia Business Journal](#) (January 9, 2009); [NBC40.net](#)

(March 3, 2009)

**Pre-Suit Mediation Yields \$200,000 Settlement for Woman Hit by City Bus**, [Park Record](#) (UT) (March 3, 2009)

**Washington County Agrees to \$300,000 Settlement for Injured Bicyclist in Mediation**, [Seattle Post Intelligencer](#) (February 9, 2009)

**Court Sends Church Dispute over Authority to Fire Minister to Mediation**, [Fairbanks Daily News-Miner](#) (AK) (January 3, 2009)

**Court-Ordered Mediation over Construction of 77-Foot Cross by Highway Unsuccessful**, [Kernville Daily Times](#) (TX) (January 6, 2009) (Subscription Required); [Kernville Daily Times](#) (January 30, 2009) (Subscription Required)

**Mediation Between Cork Hurling Squad and Cork County Board May Continue If Coach Excluded**, [RTE Sport](#) (Ireland) (January 8, 2009)

**Florida County Commission and Public Access Television Network Mediate Tentative Settlement over Budget Cuts in Alleged Effort to Silence Critics**, [MSNBC](#) (January 6, 2009)

**Agreement on New Police Force for Maryland County Reached in Mediation**, [WHAG](#) (February 17, 2009)

**Louisiana Mayor Indicates Final Issues that Must Be Resolved Before Signing Agreement Worked Out in Mediation for Cutting Energy Costs by \$60 Million**, [Alexandria Town Talk](#) (January 11, 2009)

(January 9, 2009)

- A new home foreclosure mediation program takes effect March 13 in the **Florida counties of Indian River, Martin, Okeechobee, St. Lucie** under an administrative order which provides free mediation and counseling services to homeowners who live in their homes. Banks will pay a flat fee of \$750 in the program administered by the Collins Center, which handled the mediations of insurance disputes resulting from hurricanes in 2004. The program responds to a doubling of foreclosure cases between 2007 and 2008, and an increase of ten to twenty-fold since 2005. In contrast with mediation, proceeding with foreclosure through the courts is estimated to cost \$75,000 per home.

[WPEC](#) (February 19, 2009); [Administrative Order 2009-01](#); [Vero Beach Press Journal](#) (February 13, 2009) (Subscription Required)

- Mediation is mandatory for all homeowners who go into foreclosure in **Orange and Osceola Counties in Florida** pursuant to an order by the Chief Judge. The mortgage lender must negotiate in good faith within 45 days and must pay for the cost of mediation.

[My Fox Orlando](#) (February 26, 2009)

- **Philadelphia, Pennsylvania's** mortgage foreclosure mediation program has been visited recently by a group from Kentucky and previously by delegations from Maryland, New York and New Jersey. Philadelphia's program is believed to be successful due to direct outreach to homeowners, rather than simply relying on mailings about the court program. ACORN and 14 other organizations are conducting repeated door-to-door outreach to owners whose homes are in foreclosure.

[The Legal Intelligencer](#) (January 16, 2009) (Subscription Required)

- **Indiana** is training lawyers and judges about loan modification programs and mediation opportunities, with 100 signed up for a March training. A later training will cover mediators. The Chief Justice of the Indiana Supreme Court has promised to have 700 judges, pro bono mortgage lawyers and mediators in place by summer.

[Chicago Tribune](#) (February 27, 2009)

- **Nevada** is considering legislation to require lenders to enter mediation at the request of homeowners seeking terms to avoid foreclosure. Mediations would be overseen by a judge or magistrate and would halt foreclosure proceedings. Nevada is a nonjudicial foreclosure state, which does not require court involvement before a lender can sell a house, and has the worst foreclosure rate in the country. Some in the industry fear that requiring mediation would be a move towards judicial foreclosures.

[Reno Gazette Journal](#) (February 10, 2009); [Las Vegas Sun](#) (February 16, 2009)

**Rather than Ruling on Motions to Dismiss, Judge Orders City of Tulsa and Tulsa County to Return to Mediation over a New Jail Agreement,** [Tulsa World](#) (February 24, 2009) (Subscription Required)

**Local School Officials Hire Mediator to Address Concerns that District Was Short-Changed on Special Ed Money,** [St. Helena Star](#) (CA) (February 19, 2009)

**New Mexico County Commission Agrees to Suspend Appeal and Mediate Hospital Funding and Contracting Issues,** [Valencia County News Bulletin](#) (January 10, 2009)

**\$53 Million Lawsuit Between County Commission and Casino Company Not Settled in Mediation,** [Joplin Globe](#) (MO) (February 17, 2009)

**Mediators to Address Conflict Between Members of Town Council,** [Wilts and Gloucestershire Standard](#) (UK) (January 22, 2009)

**City Council to Hire Mediator to Address Strained Relations with City Manager,** [KFSK](#) (AK) (February 18, 2009)

## Other News & Initiatives:

**Obama Appoints First Native American as Deputy Assistant Director to Act as Mediator of Indian Affairs Between Administration and State, Tribal and Local Governments,** [The Missoulian](#) (February 8, 2009)

**Colorado Regulation Allows**



- The mayor of **Milwaukee, Wisconsin** is working with courts and lenders to create a foreclosure mediation program that would allow owners facing foreclosure to meet with lenders in a mediation to seek to renegotiate their loans. The mayor has pledged \$100,000 towards establishing the program, and stated the program is likely to be spearheaded by the Legal Aid Society and others.

[Milwaukee Journal Sentinel](#) (January 16, 2009); [Milwaukee Journal Sentinel](#) (February 25, 2009)

- The mayor of **Providence, Rhode Island** has proposed ordinances to protect both owners and tenants in home foreclosures. The first would require lenders to mediate with homeowners prior to foreclosure, with the assistance of a state agency. The other ordinance would protect renters from having to vacate foreclosed properties before their leases end. The proposals are said to be similar to what the Philadelphia County Court has mandated, but concerns have been raised about the enforceability of the mediation ordinance.

[Providence Journal Bulletin](#) (February 3, 2009) (Subscription Required)

## States Using Mediation for Consumer Restitution

- The attorney general's office in **Washington** state helped consumers recover nearly \$6.9 million through mediation. The attorney general received 25,000 written complaints in 2008, with the greatest number concerning telecommunications.

[Seattle Post Intelligencer](#) (March 4, 2009)

- The Consumer Protection Division of the **Iowa** attorney general's office obtained benefits of over \$1.3 million for consumers in 2008.

[Omaha World-Herald](#) (January 23, 2009) (Subscription Required)

- In **Florida**, the Miami-Dade Consumer Services Department obtained \$1.2 million in consumer redress in 2008 through investigation and mediation of nearly 4,000 complaints.

[US State News](#) (January 9, 2009) (Subscription Required)

- The Consumer Affairs Mediation Center of the **Nebraska** attorney general's office handled over 4,100 complaints and recovered almost \$1 million for consumers in 2008. With fifteen full-time staff members, the Nebraska Mediation Center also helps consumers avoid scams and sends consumers on to counsel in the attorney general's office if the circumstances warrant litigation.

[Lincoln Journal Star](#) (January 4, 2009) (Subscription Required);

**Parties in Administrative Proceedings to Request Mediation**, [Regalert](#) (January 10, 2009) (Subscription Required)

**New Hampshire Legislation Would Allow Court's Mediation Office to Provide Pre-suit Services**, [New Hampshire S.B. 70-FN](#)

**New York Proposes to Enact Land Use Mediation Program**, [Assembly.state.ny.us](#) (January 23, 2009); [New York A 3147](#)

**New York Legislation Would Resolve Public Disputes Using Alternative Dispute Resolution**, [Assembly.state.ny.us](#) (January 21, 2009); [New York A 2909](#)

**Parties Praise IRS Expansion of Mediation Options with Post-Appeals Pilot Program**, [Accounting Today](#) (January 26, 2009)

**Mediation Is Alternative in Financial Industry Regulatory Authority (FINRA) Cases Against Brokerage or Security Firms**, [Associated Press](#) (NY) (February 25, 2009)

**Illinois County Court Pleased with 62% Settlement Rate in Mandatory Mediation Program for All Medical Malpractice Cases**, [Renal and Urology News](#) (January 23, 2009)

**Pennsylvania County's Newly-Established Mediation Program for Property Reassessment Challenges Resolve 16 of First 18 Cases**, [The Times Leader](#) (January 6, 2009) (Subscription Required)

**Court's Annual "Settlement Week" Relies on Quick Pro Bono Mediations to Help**



[Omaha World-Herald](#) (January 23, 2009) (Subscription Required)

- **Kansas** has begun a Consumer Mediation Program to obtain refunds and restitution for consumers without litigation. The Kansas attorney general is focusing on mediation to limit costs for all parties and to save state resources.

[KAKE](#) (February 19, 2009); [Lawrence Journal World](#) (February 24, 2009)

## Baltimore Safe Streets Program Using Mediation to Reduce Murders

The Baltimore Health Department began its Operation Safe Streets program in August 2007, relying on ex-offenders and counselors to mediate disputes between armed gangs in four communities. Fifty-three "high-stakes" disputes have been mediated. A newly-released interim report notes that one of the communities has gone 17 months in a row without a homicide and attitudes have shifted against using guns to settle disputes. However, nonfatal shootings did not drop as much as in other communities where police have relied on a violent crime task force. Baltimore's health commissioner would like to expand Operation Safe Streets, which has received over \$3 million in federal, city and private funding, but is facing budget cuts.

[The Baltimore Sun](#) (January 14, 2009)

## New Zealand Considering Ongoing Mediation Role for Online Piracy Disputes

A possible last minute compromise between copyright holders and internet service providers would rely on independent mediators to help resolve internet piracy complaints. Mediation would replace an obligation on ISPs and server operators to investigate piracy complaints and bar clients from the web, which would be imposed by the revised Copyright Act. Advocates of internet freedom marched on Parliament to protest the legislation, which was set to take effect at the end of February.

[New Zealand Herald](#) (February 20, 2009)

## Other International Mediation Developments

- **Indian** Supreme Court Justice urges greater use of mediation to benefit both parties and overburdened court system, [Calcutta Telegraph](#) (January 3, 2009)
- Mediation and Conciliation Centre opened in Kottayam, **India**; Chief Judge urges alternatives to litigation, [Hindu](#) (January 12, 2009) (Subscription Required)
- **China** establishes mediation desk to address intellectual property rights at large IT and telecom trade fair in Europe, [People's Daily Online](#) (March 4, 2009)
- **Chinese** city of Tainjin begins mandatory mediation for medical

**Clear Docket**, [Providence Journal](#) (January 19, 2008)

**In Current Economic Climate, Mediation Particularly Helpful, Even in Bankruptcy Litigation**, [Broward Daily Business Review](#) (January 22, 2009) (Subscription Required)

**Companies Increasingly Using Mediation to Avoid Litigation and Control Own Destiny**, [Augusta Chronicle](#) (February 21, 2009)

**UK Court Considers Reasonableness of Party's Mediation Position When Awarding Costs**, [Mondaq](#) (February 23, 2009) (Subscription Required)

**UK Case Determines When Litigation Will Be Suspended If Parties Have Agreed to Mediate**, [Contract Journal](#) (UK) (February 17, 2009)

disputes, [China Business Newswire](#) (January 20, 2009)  
(Subscription Required)

- **Singapore** police gain power to refer squabbling parties to a community mediation center, [Today Online](#) (February 14, 2009)
- **Singapore** Ministry of Health and Singapore Mediation Centre have a year's experience with mediation program addressing health care disputes, [Straits Times](#) (January 28, 2009) (Subscription Required)
- National University of **Singapore** wins 4th ICC International Commercial Mediation Competition, [Finchannel](#) (February 24, 2009)
- **Malaysian** court recommends mediation for jilted businessman's claims against fiancée, [Malaysia Star](#) (February 17, 2009)
- **Australian** government urged to allow use of independent mediators and arbitrators in employer-union disputes, [The Australian](#) (January 9, 2009)
- Popularity of mediation in **Australia** results in fewer opportunities for lawyers to gain courtroom advocacy skills, [Courier Mail](#) (January 17, 2009) (Subscription Required)
- **Taiwan's** Environmental Protection Administration urging mediation rather than protests after injuries from gas leaks, [Taipei Times](#) (January 20, 2009) (Subscription Required)
- **Angola** approves statute of the Association of Ombudsmen and Mediators of Africa to support mediation institutions and human rights, [Angola Press](#) (January 15, 2008)
- Mediation has gained popularity and acceptance in recent years within Ghana, [All Africa](#) (February 20, 2009) (Subscription Required)
- Mediation service for gang members being opened in London, **England**, based on success in West Midlands, [PA News](#) (January 21, 2009) (Subscription Required)
- Proposal would eliminate fee charged solicitors for mediation in effort to encourage quicker resolution of matters brought to the **Scottish** Legal Complaints Commission, [Scotsman](#) (January 19, 2009) (Subscription Required)

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# MEDIATION NEWS

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JANUARY 2009

## CASES & RESOLUTIONS:

### Mediation Confidentiality No Excuse for Court Not to Analyze Reasonableness of Class Action Settlement

A California appellate court concluded in [Kullar v. Foot Locker Retail, Inc.](#) that – without breaching mediation confidentiality – the trial court must look at underlying information about the claims and defenses to determine the reasonableness of a class action settlement reached in mediation. A \$2 million settlement of claims brought by employees against Foot Locker was challenged based on the lack of discovery about the magnitude of the issues being settled. The trial court believed that circumstantial evidence of reasonableness was adequate, in part due to the involvement of an experienced mediator. But the appellate court concluded that the lower court abused its discretion, explaining that the court needed to analyze the amounts in controversy and range of litigation outcomes, and could not rely on general statements that information on these issues was exchanged between competent counsel during mediation with the involvement of a neutral mediator. The appellate court noted that the underlying data should not be immune from discovery even if it was used in mediation, review of which may help the court determine if the class settlement was in the ballpark of reasonableness.

[Kullar v. Foot Locker Retail, Inc.](#), A119697 (Cal. App. 1st Dist., Nov. 7, 2008)

### Colorado Supreme Court Clarifies State Mediation Statute

The Colorado Supreme Court considered a pair of appeals in [Yaekle v. Andrews](#) to clarify that the Colorado mediation statute sets forth the way settlement agreements reached in mediation may be enforced as court orders, but does not affect the common law of contract which determines whether a settlement agreement exists at all. Since the Colorado statute makes “mediation communications” confidential, any agreement must be demonstrated without impinging on the confidentiality of the mediation process. In one case the unsigned term sheet prepared by the mediator was not admissible to show an agreement, and partial performance of the purported agreement by one party did not help. In the other case, the parties conducted direct negotiations over the terms of the settlement agreement and were still exchanging drafts months after the mediation session. The court

## Mediation Quote:

“The use of stories and metaphors in the mediation process often serves to shape and shift the context of a dispute just enough to allow admission of a variant construction of reality. Although disputing parties cannot even envision themselves on the same stage together, the mediator, as master storyteller, must be able to edit the script of each disputant’s story of the conflict and concoct another scenario in which all participants can play a part in the drama. Thus, . . . the understanding and manipulation of the story is the primary technique by which a mediator dislodges disputing parties from their entrenched positions.”

- Robert D. Benjamin, “Managing the Natural Energy of Conflict,” in David Bowling and David A. Hoffman, Eds., *Bringing Peace Into the Room: How the Personal Qualities of the Mediator Impact the Process of Conflict Resolution* (Jossey-Bass 2003) at 120.

## Other Cases &

concluded that these exchanges were no longer mediation communications and could be used, along with statements made by counsel in open court, to determine that an agreement had been reached even though it had never been signed.

[Yaekle v. Andrews](#), Nos. 07SC420, 07SC874 (Colo., Oct. 20, 2008)

## **Court-Style Transcript Setting Forth Agreement Not Sufficient for Mediated Settlement**

A split Colorado appellate court concluded in [GLN Compliance Group, Inc. v. Aviation Manual Solutions](#) that it could not enforce a mediated settlement agreement in the absence of a signed writing, even though the retired judge who acted as mediator called in a stenographer and set forth the settlement terms and obtained each party's agreement "on the record," even though defendants sent a settlement check to plaintiff who cashed it, and even though plaintiff's counsel withdrew and testified that an agreement existed. The court further concluded that Colorado's mediation confidentiality provisions may not be waived by implication. A vigorous dissent agreed with the trial court that the settlement agreement was clearly enforceable since it was "read in the presence of the senior judge [acting as mediator] and transcribed by a court reporter...in open court."

[GLN Compliance Group, Inc. v. Aviation Manual Solutions](#), No. 07CA1563 (October 16, 2008)

## **Court Considers Parties' Mediation Positions in Determining No Harm from Missing Insurer**

A federal magistrate determined there was no harm to plaintiff and imposed no sanctions when defendant's insurer failed to send a representative to mediation in violation of explicit court rules. In denying sanctions, the magistrate noted that other representatives attended the mediation for defendant and it made no difference that the insurer failed to attend because the parties were "light years" apart due to "plaintiff's settlement position." Summary judgment for defendant had been granted days before the mediation, but the magistrate required that the scheduled mediation proceed despite the parties' desire to cancel.

[Hinkle Oil & Gas, Inc. v. Bowles Rice McDavid Graff & Love](#), No. 7:07cv487 (W.D. Va., Oct. 17, 2008)

## **Enforcement of Mediation Clause Doesn't Bar Future Litigation**

The Utah Court of Appeals interpreted the mediation clause in the real estate purchase contract in [Miller Family Real Estate v. Hajizadeh](#) and concluded that it precludes litigation until mediation has been attempted, but that an initial failure to mediate would not prevent eventual litigation if mediation is tried unsuccessfully. Thus, the court affirmed the trial court's dismissal of litigation without prejudice. The appellate court did note that parties could agree to contractual terms that would create a condition precedent and

## **Resolutions:**

**City of Detroit Rejects \$1 Million Mediation Offer for Brain-Damaged Teen, Hit with \$15 Million Jury Verdict**, [DetNews.com](#) (December 17, 2008)

**Mediation Results in Ernst & Young Paying for Continuing Education Courses in Pennsylvania**, [PR Newswire](#) (December 23, 2008)

**Bus Companies Agree in Mediation to Pay Jaywalker \$2.6 Million**, [Pennsylvania Law Weekly](#) (December 22, 2008) (Subscription Required)

**Three Cities Mediate and Settle Condemnation Litigation with Former Brewery for \$5.3 Million, Obtaining Water Rights**, [The Olympian](#) (November 15, 2008)

**NASCAR Settles \$225 Million Sexual Harassment and Discrimination Case in Mediation**, [Autoweek](#) (December 19, 2008)

**Professional Hockey Player Bertuzzi Maintains Confidentiality after Mediation Involving Steve Moore over 2004 "Sucker Punch" that Broke Moore's Neck, Ending Career and Leading to \$38 Million Lawsuit**, [Canoe.ca](#) (December 17, 2008)

**Multi-Party Litigation over Country Club Policy Changes Resolved in 12-Hour Mediation**, [The Free Lance-Star](#) (November 14, 2008)

**Mediator's Proposal Tentatively Resolves Dispute over Demutualization of Prudential Insurance**

prevent any litigation if dispute resolution processes were not carried out, but found that the real estate purchase contract in this case did not contain such terms.

[Miller Family Real Estate v. Hajizadeh](#), 2008 UT App 475 (Utah App., Dec. 26, 2008)

## **Unambiguous Confidentiality Agreement Merits Summary Judgment on Oral Settlement Claim**

The Utah appellate court concluded in [Moss v. Parr Waddoups Brown Gee & Loveless](#) that the terms of a mediation confidentiality agreement were unambiguous and so required summary judgment in litigation seeking to enforce an alleged oral settlement agreement. While the confidentiality agreement was signed for mediation in one case, the parties also negotiated a second case during the mediation session, which plaintiffs argued was not covered by the confidentiality agreement. The appellate court found the broad language of the confidentiality clause to be unambiguous and reversed the district court's denial of summary judgment, without reaching the provisions for mediation confidentiality offered by state statutes. Negotiations in the second case involved an additional plaintiff contacted by telephone who did not sign the confidentiality agreement, but the appellate court concluded that her testimony about the defendants' alleged agreement to settle could not avoid the hearsay rule because the mediator was not an agent conveying a party-opponent's admission.

[Moss v. Parr Waddoups Brown Gee & Loveless](#), 2008 UT App 405 (Utah App., Nov. 6, 2008)

## **Watershed Mediation Still Succeeding After Ten Years**

The successful resolution of an eight-month long mediation in 1998 has permitted ongoing constructive engagement between Minnesota land owners, watershed managers, and county, state and federal conservation agencies in dealing with continuing issues of flood protection, water quality and conservation. Ten years later, the Red River Watershed Management Board continues to use mediation processes. The initial mediation also created a working group which relies on an advisory committee that develops technical consensus to undergird the decision-making of the working group and the Board.

[Crookston Daily Times](#) (December 31, 2008)

## **Class Action Discrimination Claims Against Dating Service Sent to Mediation**

A California case alleging discrimination by the dating service eHarmony for refusing to extend its services to gay and lesbian customers was certified as a class action and sent to mediation. A similar case in New Jersey was just settled, with eHarmony agreeing to open a new website for gay customers, which the company asserts should resolve the California case as well.

**Company with Final Distribution Contingent on Outcome of Summary Judgment Appeal**, [Marketwatch.com](#) (December 15, 2008)

**U.S. Third Circuit Requires Mediation of Antitrust Appeal Involving ATP World Tour**, [Sports Business Journal](#) (December 15, 2008)

**Judge Orders Mediation of Alabama's Lawsuit Against Drug Companies Alleging Medicaid Overcharges**, [Wlox.com](#) (December 11, 2008)

**Court Orders Township and Quarry to Mediate, with Quarry to Pay Mediation Costs as Long as Township Cooperates**, [Scarlet Scuttlebutt](#) (December 1, 2008)

**Trial of Home Fraud Claims Against JP Morgan Chase Bank Delayed for Mediation after Denial of Motion to Dismiss**, [Pocono Record](#) (December 26, 2008); [Fort Mills Times](#) (December 26, 2008)

**Courthouse Mold Dispute Goes to Mediation**, [Monitor](#) (December 25, 2008)

**\$14,500/Day Mediator to Assist Santa Clara County and Contractors in Dispute over Unfinished Courthouse**, [San Jose Mercury News](#) (November 29, 2008)

**Wal-Mart Entering Mediation over Plans to Build Store after Suing the Zionsville (Ind.) Plan Commission**, [Indianapolis Star](#) (December 26, 2008)

**Horse-Rescue Operation Enters Mediation with City**



[PC Magazine](#) (November 21, 2008)

## NEWS & INITIATIVES:

### International Trade Commission Begins Pilot Mediation Program

The U.S. International Trade Commission has launched a pilot mediation program for section 337 investigations, as an initial step towards a permanent mediation program. Participation by parties in the pilot program is voluntary. The program relies on pro bono mediators, most of whom also mediate in the U.S. Court of Appeals for the Federal Circuit. While mediation is confidential and the Commission investigative attorney will not participate or have knowledge of the mediation, the investigative attorney may review any settlement agreement that results from mediation in order to make a recommendation on whether the settlement is in the public interest.

[U.S. International Trade Commission Notice](#) 73 Fed. Reg. 65,615 (November 4, 2008); [Pilot Mediation Program Information](#)

### IRS Expands Mediation Options with Post-Appeals Pilot Program

The Internal Revenue Service has begun a two-year test of a post-Appeals mediation program, along with an arbitration program. The programs are available in specified Appeals offices for Offer in Compromise and Trust Fund Recovery Penalty cases. Either the taxpayer or Appeals may request mediation. While the taxpayer may decline Appeals' request for mediation, Appeals must evaluate taxpayer requests according to established regulations.

[IRS.gov](#) (December 1, 2008)

### EEOC Reports Jump in Filings, Slight Increase in Mediation

The U.S. Equal Employment Opportunity Commission reported a 15 percent increase in job bias charges last year, for a total of over 95,000 private sector filings in fiscal year 2008. Its National Mediation Program obtained nearly 9,000 resolutions in FY 2008, a 2% increase for the year. In addition to non-monetary relief, the EEOC recovered \$124 million for complainants through mediation. The mediation program maintains its very high user satisfaction rate of 96.5 percent. Employers continue to enter into Universal Agreements to Mediate with the EEOC, with the total rising by 14 percent during 2008, to 1,450. In its Federal Sector Mediation Program, the EEOC noted that parties in over 18,000 EEO cases participated in alternative dispute resolution, which was nearly half of all EEO cases in federal agencies.

[National Underwriter Property & Casualty](#) (December 8, 2008) (Subscription Required); [EEOC FY2008 Performance Report](#)

**over Impact on Neighbors, Bonner Springs Chieftain**  
[Bonner Springs Chieftain](#) (December 18, 2008)

**Tulsa County Commissioner Upset with Mayor for Talking to Press after Unsuccessful Mediation over Jail Payments, Ktul.com**  
[Ktul.com](#) (December 3, 2008)

**Vote to Cut Off Water Supply May Lead to Mediation of Dispute Between Towns over Repairs to Aging Water Pipes, Gazette.net** (December 4, 2008)

**Bay County and Panama City in Mediation over Multi-Million Dollar Trash Fees, The News Herald (FL)**  
[The News Herald](#) (FL) (December 8, 2008)

**Parents of Murdered Informant File Lawsuit Against Tallahassee Police Department Despite Ongoing Mediation, Tallahassee Democrat** (December 31, 2008)

**UCSC and Campus Tree-Sitter Supporters End Mediation Without Resolution, San Jose Mercury News** (December 12, 2008)

**Litigation over Pollution of Water Supplies Between San Diego and Water Districts Postponed for Mediation, Union Tribune** (December 5, 2008) (Subscription Required)

**Australian Federal Court Orders Class Actions Against Centro Properties Group to Go Directly to Mediation, The Age** (December 17, 2008)

**Multi-Million-Dollar Defamation Suit Against Australian Police for Naming "Prime" Suspect Going to Mediation, WA today**



## Delaware Joins EEOC's Universal Agreement to Mediate

Delaware is the second state to enter into a Universal Agreement to Mediate with the U.S. Equal Employment Opportunity Commission, following New Mexico in October. Based on Delaware's formal agreement to resolve disputes through mediation, all eligible discrimination charges filed with the EEOC naming Delaware as respondent will be sent to the EEOC's mediation unit.

[US State News](#) (November 19, 2008) (Subscription Required)

## Update on State Programs for Mediation of Home Foreclosure Disputes

- **Connecticut's** foreclosure mediations have saved the homes of about 360 homeowners in the past five months, but the mediation program is reaching less than 30 percent of those eligible. The governor has proposed making the mediation program mandatory for all homeowners facing foreclosure. Mediators in the program report that lenders were initially skeptical, but are now willing to participate and actively negotiate solutions. [Hartford Business](#) (December 8, 2008)
- **New Jersey** has enacted foreclosure prevention legislation which allocates \$12 million for additional mediation and counseling through the Housing and Mortgage Finance Agency, and \$500,000 for state courts to provide mediation services to homeowners facing foreclosure. [Bizjournals.com](#) (December 1, 2008)
- In order to implement the **New Jersey** Residential Foreclosure Mediation Program, the state Supreme Court has relaxed several court rules, including minimum requirements for mediators in the program. [New Jersey Law Journal](#) (November 24, 2008) (Subscription Required); [New Jersey Foreclosure Mediation Information and Forms](#)
- **Wisconsin** is considering legislation that would require lenders to offer mediation to homeowners before proceeding with foreclosure. [Milwaukee Journal Sentinel](#) (December 12, 2008)
- Legislation modeled on the 1986 Farmer-Lender Mediation Act is proposed in **Minnesota** to curb home foreclosures by giving homeowners the right to request mediation in an effort to renegotiate their mortgage terms with lenders. [Bizjournals.com](#) (November 21, 2008)

## Texas Considering New Mediation Program for Hurricane Claims

The Texas Department of Insurance is considering a mediation program to help resolve claims resulting from Hurricane Ike last September, which resulted in about \$10 billion in damages and more than 750,000 insurance claims. While about 60-80 percent of the claims have been settled, the Department of Insurance has received some 2,000 complaints and expects more. The Department is looking to hurricane mediation programs in other states as models and hopes to have a proposal ready for the state legislature in January.

(November 19, 2008)

**Grupo Mexico, Its Bankrupt U.S. Unit Asarco, and India's Sterlite Industries in Mediation over Revised Deal Due to Falling Copper Prices**, [Reuters](#) (November 25, 2008)

**Hong Kong International Arbitration Centre Announces First Mediation of Dispute Relating to Lehman Brothers, with Settlement in Five Hours**, [CNNmoney.com](#) (December 22, 2008)

## Other News & Initiatives:

**Maryland Circuit Court Begins Requiring Mediation in All Motor Tort Cases where Claimed Damages Exceed \$20,000**, [Maryland Daily Record](#) (December 13, 2008)

**Cracker Barrel Signs Universal Agreement to Mediate with EEOC for Workplace Disputes in Florida**, [HR.BLR.com](#) (December 30, 2008)

**ACLU Distinguishes Mediation in Criticism of Rhode Island's Rent-a-Judge Proposal**, [Woonsocket Call](#) (December 29, 2008)

**District Attorney's Office for Yolo County, California Will Hold Mediations Involving Truant High School Students to Provide Final Chance Before Cases Go to Court**, [Daily Democrat](#) (CA) (November 22, 2008)

**Ninth Intercollegiate Mediation Tournament Held by American Mock Trial Association**, [US Federal](#)

[AM Best Newswire](#) (December 30, 2008) (Subscription Required)

[News](#) (November 14, 2008)  
(Subscription Required)

## **Pennsylvania County Using Newly-Established Mediation Program for Property Reassessment Challenges**

Luzerne County, Pennsylvania has implemented a mandatory mediation program for property owners who wish to challenge their property assessments following a formal appeal. The county is reassessing all property in the county for first time since 1965, so expects a large number of challenges, but is relying on the specialty courts director as the sole mediator. Over 850 mediations have already been filed, which may take the single mediator until June, and nearly 8,000 additional appeal board rulings have not yet been received by property owners. The first four settlements in the mediation program have been reached, with assessment reductions ranging from ten to twenty percent. If mediation is not successful, the challenge proceeds to a three-person arbitration panel, then to a special master, and finally to the county court.

[Times Leader](#) (November 7, 2008); [The Citizens' Voice](#) (November 14, 2008) (Subscription Required); [The Times Leader](#) (November 20, 2008) (Subscription Required); [The Times Leader](#) (December 11, 2008) (Subscription Required)

## **Mediation Successful in Providing Consumer Restitution**

Missouri's attorney general recovered \$9.5 million for consumers through mediation in 2008, exceeding the previous mediation record, plus an additional \$6 million through civil and criminal litigation. The attorney general's office handled about 120,000 contacts from consumers during 2008, including over 40,000 formal complaints.

[US State News](#) (December 30, 2008) (Subscription Required)

## **"Street" Mediation Works to Curb Homicides**

CeaseFire, an anti-violence program in Chicago, has been successfully using mediation to reduce homicides since 2000. When shootings occur, trained mediators reach out to try to break the cycle of violence and prevent retaliation. Many of the paid mediators were former gang members who have access to and credibility with current gang members. The CeaseFire program has expanded to 15 Chicago neighborhoods and five other Illinois cities, and has been replicated in Baltimore, Cincinnati and Newark, New Jersey. Kansas City, Missouri has been working to develop a similar anti-violence program with a mediation component to address increasing homicide rates, but daunting organizational and funding challenges have thus far hampered the pilot project.

[Pitch Weekly](#) (November 20, 2008); [CeaseFire Website](#)

## **China Continues to Ramp Up Mediation**

Mediation of litigated cases continues to increase in China; last year, one-third of five million civil cases were resolved using non-mandatory mediation, often with assistant judges acting as mediators. The Supreme People's Court is pleased with the effectiveness of mediation and hopes to further increase the use of mediation in civil and family cases to deal with ever larger caseloads. Pilot projects using mandatory mediation began in June 2008 in seven Chinese provinces and large cities.

[China Daily](#) (November 21, 2008)

## Other International Mediation Developments

- Use of "planning mediators" is urged in **Malta** under the Development Planning Act, [Times of Malta](#) (December 7, 2008)
- **India** launches 17 mediation centers for the courts of Punjab and Haryana, [Express India](#) (November 9, 2008); [The Hindu](#) (November 8, 2008)
- Chief Justice of **India** announces that mediation training camps will be conducted in all high courts in India, [Express Buzz](#) (December 21, 2008)
- **Indian** government turns to UK mediators, who are training Indian lawyers to Western standards, [The Lawyer](#) (November 3, 2008)
- **Indian** television launches mediation/arbitration show in which actual civil disputes are resolved without actors or scripts, [OneIndia](#) (November 30, 2008)
- The third of four mediation centers planned for **Nepal** was launched with support from the U.S. Agency for International Development, [US Federal News](#) (December 19, 2008) (Subscription Required)
- Mediation of large medical disputes will be provided without charge by a mediation committee supported by the Tainjin city government in **China**, [China Business Newswire](#) (December 22, 2008) (Subscription Required)
- Implementation of civil justice reforms by **Hong Kong** is likely to greatly increase demand for mediation, [South China Morning Post](#) (November 15, 2008) (Subscription Required)
- **Malaysia** has trained 200 mediators and expects to train more in concerted effort to defuse racial conflict and tension, [The New Straits Time](#) (December 21, 2008)

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# MEDIATION NEWS

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NOVEMBER 2008

## CASES & RESOLUTIONS:

### Alabama Courts Must Order Mediation When Sought by Litigant

The Supreme Court of Alabama granted a petition for mandamus in [Eckles v. Fort Dearborn Life Ins. Co.](#), requiring a trial court to order mandatory mediation when sought by a litigant, pursuant to state statute and court rule. The lower court didn't think the circumstances were right for mediation, but the Supreme Court made clear that a court cannot exercise discretion if any party seeks mediation. Both the Alabama statute and court rule provide for mandatory mediation even if only one party asks for it, but require that party to pay for the costs of mediation.

[Eckles v. Fort Dearborn Life Ins. Co.](#), No. 1071545 (Ala., Oct. 10, 2008)

### Lack of One Signature Prevents Admissibility of Multi-Party Settlement Agreement to Determine if Portions Are Severable

A California appellate court concluded in [Rael v. Davis](#) that the lack of a single signature on a mediated settlement agreement meant that there was no final agreement, so the document could not be admitted in court to consider whether any of the settlement provisions between other parties could be severed and stand alone. In *Rael*, a mediation arising out of conservatorship litigation involved distribution of property between a man's children and his new wife. The settlement reached in mediation omitted the signature of one child who missed the last mediation session, even though his individual counsel was present and signed the agreement. After the husband died, his wife sought to enforce the agreement concerning what she would receive, since she and her husband had both signed the agreement. However, the trial court examined the parties' intentions and expectations at the mediation session and afterwards and concluded that they intended no agreement unless everyone signed. The appellate court focused on the fact that the agreement expressly named the parties who must sign and one of them did not. If there was no agreement, under California's strict mediation confidentiality provisions the document was inadmissible for any purpose, including imposing attorneys' fees under the agreement against the wife even though she had sought to admit the agreement. The appellate court concluded that neither judicial estoppel nor anything short of due process concerns could permit a judicial

## Mediation Quote:

"Everyone in conflict wears a mask that can only be observed from the outside. They respond to attack egocentrically and suffer from silent self-doubt, poor self-esteem, and denial. Their intentions are always honorable, yet at odds with the effects their actions have on others. Their feelings are too important to risk discussing openly, so they repress or externalize their emotions. "Everyone in conflict takes deliberate steps to protect themselves from the truth, because they know the consequences could compel them to leave the comfortable, albeit dysfunctional patterns they have created. They easily forget what it is like *not* to be in conflict, and adjust to living in environments that are rife with dissension."

- Kenneth Cloke, *Mediating Dangerously: The Frontiers of Conflict Resolution* (Jossey-Bass 2001) at 28-29.

## Check This Out:

### Analysis Finds Parties Generally Err in Rejecting Settlement to go to Trial

The complete article analyzing how parties often make poor decisions when passing up settlements prior to trial, which the press first reported in August, is now available online.

exception to mediation confidentiality.

[Rael v. Davis](#), 2008 WL 4335179 (Cal. App. 2d Dist., Sept. 24, 2008)

## **Public's Need to Know Wrongful Death Outcomes Trumps Mediation Confidentiality in Virginia**

The Virginia Supreme Court concluded in [Perreault v. The Free Lance-Star](#) that the state statute requiring wrongful death settlements to receive court approval necessitates filing the settlement terms on the record, even when the settlements result from mediations for which confidentiality is also provided by state statute. The case involved a series of settlements relating to deaths after medication was administered during open heart surgery. The settling parties sought to keep the terms confidential and appealed the trial court's refusal to seal the record. The Court explained that the mediation confidentiality statute contains an exception when disclosure is required by law, and rejected various arguments that would have shielded the settlement amounts from disclosure. The Court also held that whether to seal the record is left to the discretion of the trial court, with a strong presumption of public access to judicial records.

[Perreault v. The Free Lance-Star](#), No 071978 (Va., Sept. 12, 2008)

## **Year-Long Mediation Effort Develops Better Bridge**

Plans for a safer, stronger, quieter, environmentally-friendlier bridge are being developed by a 34-member mediation team. The group has spent the last year working through the myriad issues surrounding a \$3.9 billion replacement of the Evergreen Point Bridge at the direction of the Washington state legislature. Substantial disagreements have been overcome and options narrowed to three plans. The mediation team is due to provide a project impact analysis in October for the legislature.

[Seattle Post-Intelligencer](#) (September 18, 2008)

## **NEWS & INITIATIVES:**

### **Hong Kong Encourages Mediation of Lehman-Related Disputes**

The Hong Kong Monetary Authority appointed the Hong Kong International Arbitration Centre to provide mediation and arbitration services to address disputes between banks and investors in Lehman-related products. In certain circumstances, the Monetary Authority will pay a portion of the fee for the Centre's services. Hong Kong's Secretary for Justice is also encouraging mediation to help resolve disputes relating to Lehman minibonds.

[The Standard](#) (October 31, 2008); [The Standard](#) (October 22, 2008)

[Randall L. Kiser, Martin A. Asher & Blakely B. McShane, \*Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations\*](#), 5 Journal of Empirical Research 551 (September 2008)

## **Worth Noting:**

### **Con Artist Acting as Mediator Jailed**

A disbarred lawyer acting as a divorce mediator improperly presented himself as an attorney and conned dozens of victims into paying him large amounts of money. He was able to sidestep enforcement efforts for some time by hiding behind the confidentiality provisions of mediation, but eventually was convicted on 24 counts of theft and fraud, having billed 25 victims for \$300,000. He would sometimes become romantically involved with the wives of divorcing parties, with one paying him \$87,000 for "mediation" services. In addition to imprisonment, the ex-lawyer will be required to provide restitution from his assets which have been seized.

[Arizona Republic](#) (October 10, 2008); [ADR Prof Blog](#) (October 13, 2008)

## **Other Cases & Resolutions:**

**AT&T, NuVox Willing to Mediate Missouri Public Service Complaint by Business Customer over Inadequate Facilities**, [TR's State Newswire](#) (October 24, 2008) (Subscription Required)

**Antitrust Suit Against Apple by Unauthorized Seller Sent to Mediation**, [Internetnews.com](#) (October 17, 2008)

**Candidates for Alabama**



## Singapore Monetary Authority Prefers Mediation for Investors

The Finance Minister of Singapore stated that the Monetary Authority is encouraging mediation as a recourse for protesting investors. Banks in Singapore have established independent mediation panels to address concerns raised by customers.

[Channel News Asia](#) (October 15, 2008)

## States Increase Use of Mediation for Home Foreclosures

- Connecticut has begun a foreclosure mediation program through legislation enacted on June 12 which is said to be the first of its kind in the U.S. The mediation program allows homeowners facing mortgage foreclosure on primary residences to request mediation at no charge to them. With a state appropriation of \$2.5 million, twelve staff mediators have been appointed for the state, along with seven case flow coordinators. The goal is to keep homeowners in their homes, often through refinancing or restructuring debt. While the program manager estimates that 4,000 homeowners are eligible for the new program, only about 40% have applied thus far. [Connecticut Post](#) (October 4, 2008)
- New Jersey Governor Corzine set forth a sweeping financial rescue plan before a rare joint session of the New Jersey legislature. The rescue plan requires mediation in contested foreclosures, which is to be implemented statewide within 60 days. [WCBS-TV New York](#) (October 16, 2008)
- The Ohio Supreme Court recommends that Ohio counties implement mediation programs, so Sandusky County has begun a foreclosure mediation program using the Court's model. To participate, homeowners in foreclosure must request mediation, agree to participate in a credit counseling session and allow an appraiser to determine their home's current value. Entering into mediation with a sense of what the homeowners can do financially and their property value, along with requiring banks to send a representative with decision-making authority, makes the mediation process more effective. [Fremont News Messenger](#) (October 1, 2008)
- Ohio's Stark County Common Pleas Court is encouraging homeowners in foreclosure to use its mediation program, which has been successful in keeping homeowners in their homes in about half of the mediations. The \$50,000 cost of the mediation program is funded by foreclosure case filing fees. The program is run by the Community Mediation Center. [Canton Repository](#) (September 7, 2008)
- Individual judges are ordering mediations in home foreclosure cases in Florida, as many homeowners have difficulty finding anyone with whom they can try to work things out at their lenders' offices. Judges in Florida's Eighteenth and Seventh Judicial Circuits are currently requiring mediations; the Fifth Circuit is considering implementing mediation requirements, while the Ninth Circuit is not. The various circuits are expected to share experiences about how best to handle increasing foreclosure filings. [Orlando Sentinel](#) (October 6, 2008)
- A nonprofit organization, Earth Angels United, is administering a

Supreme Court Meet with Mediator in Effort to Avoid Escalation of Negativity, [Tuscaloosa News](#) (October 16, 2008)

Lawsuit Alleging Republicans Incited Violence Against Democratic Nominee Sent to Mediation, [Kansas City Star](#) (October 17, 2008)

Mediation Fails to Resolve Claims Against Democratic National Committee by Its Gay and Lesbian Leadership Council, [PageOneQ.com](#) (September 12, 2008)

Better Business Bureau Expels Construction Company Member for Refusing to Mediate Complaints, [Tri-City Herald](#) (October 14, 2008)

No Settlement in Mediation Between Opes Prime, the Australian Securities and Investments Commission and Creditors over Stockbroker's Collapse, [Business Spectator](#) (October 24, 2008)

Poland's Government and Soccer (Football) Association, PZPN, Close to Resolving Bitter Dispute in Mediation, [Reuters](#) (October 6, 2008)

Professional Hockey Players Bertuzzi and Moore Meeting in Mediation for First Time after 2004 "Sucker Punch" that Broke Moore's Neck, Ending Career and Leading to \$38 Million Lawsuit, [CBC.ca](#) (September 16, 2008)

National Rugby League Legal Issues with Melbourne Coach and CEO Result in Mediation, [Fox Sports](#) (October 31, 2008)

Mediator Requested in Michael Vick Bankruptcy to Work out Settlement of Debts with Creditors, [Associated Press](#)



foreclosure mediation program in Florida's Eighteenth Judicial Circuit, to help reduce the strain caused by a 200% increase in foreclosure cases. [Orlando Business Journal](#) (October 29, 2008)

## **Mediation Program Established for Montana Grain Shippers**

Montana farmers have approved a proposal to use mediation to resolve disputes over grain freight rates with BNSF Railway. Grain producers are not considered shippers by the Surface Transportation Board despite paying the freight, which forced them to rely on grain elevator companies to file cases. The new program with BNSF will first rely on mediation and then resolve any remaining issues with binding arbitration by an independent arbitration board.

[Great Falls Tribune](#) (October 16, 2008); [Montana's News Station.com](#) (October 20, 2008)

## **Mandatory Med Mal Mediation Working in Illinois County**

Mandatory mediation of medical malpractice cases in Madison County, which the Illinois Supreme Court approved in 2007 establishing the first rule of its kind in Illinois, worked as intended to settle a wrongful death case alleging inadequate care by a nursing home. The mediation rule is also considered unique by allowing parties to choose between lawyers and judges to mediate their case. In the wrongful death case, a judge was assigned in February to mediate the matter. The terms of the settlement were filed under seal and not disclosed.

[The Madison - St. Clair Record](#) (October 10, 2008)

## **New Mexico First State to Join EEOC's Universal Agreement to Mediate**

While over 1,200 employers have entered into Universal Agreements to Mediate with the U.S. Equal Employment Opportunity Commission, New Mexico is the first state to do so. With New Mexico's formal agreement to resolve disputes through mediation, all eligible discrimination charges filed with the EEOC naming the state as respondent will be sent to the EEOC's mediation unit.

[Bizjournal.com](#) (October 31, 2008)

## **New York Continues to Seek Land Use Mediation Statute**

New York is attempting to join about two dozen other states with land use mediation statutes. Bills have passed the New York Senate four times, but ultimately failed to be enacted. Most recently, S.B. 3232 passed the Senate on May 9 and would add mediation as an option for resolving land use disputes, but would not replace existing land use review procedures. The senators introducing S.B. 3232 noted the success of a pilot land use mediation project for the Hudson River Valley and a mediation program in

(October 3, 2008)

**Mediation Leads to Developer Giving Dublin City €1.5 Million and Drawings to End Housing Regeneration Projects,** [Irish Times](#) (September 5, 2008)

**Mediation Yields Back Pay for Former Paramedics from Town,** [West Yellowstone News](#) (October 31, 2008)

**Town Manager of Front Royal, Virginia Settles Wrongful Termination Case in Mediation,** [FloridaToday.com](#) (September 9, 2008)

**City of Billings Agrees to Mediation with Its Insurer over Coverage after \$1.6 Million Judgment; Mediation Expected to Be Open to Public,** [Billings Gazette](#) (September 8, 2008)

**Mediation Between Tree-Sitters and Campus Officials over Athletic Center Unsuccessful; Litigation Delays May Add \$20 Million in Construction Costs,** [San Francisco Chronicle](#) (September 9, 2008)

**Mediation Under Way to Avoid Retrial after Hung Jury in Ten-Week Long Criminal Public Corruption Trial,** [Pittsburgh Tribune-Review](#) (September 13, 2008)

**Judge Sends Native American Casino Dispute with Harrah's to Mediation,** [Indianz.com](#), (September 8, 2008)

**Court Sends Tax Suit Back to Mediation,** [Birmingham News](#) (October 30, 2008) (Subscription Required)

**Federal Mediator to Assist Stalled Contract Talks with Screen Actors Guild,** [Los Angeles Times](#) (October 24, 2008)

**Mediation Begins on Clean Up**

the Office of Court Administration. Other state statutes vary in their breadth and timing, with some encouraging mediation early in the development approval process and others waiting until litigation has begun.

[New York Law Journal](#) (October 15, 2008) (Subscription Required); [New York S.B. 3232](#)

## California Bill for HOA Mediation Vetoed

Governor Schwarzenegger vetoed California legislation that would have created a bureau to provide a forum for mediating homeowner association disputes, along with training. The bill was based on fact-finding by the California Law Revision Commission, which studied common ownership developments.

[San Diego Union Tribune](#) (September 30, 2008)

## Arizona Rejects Initiative Which Would Have Eliminated Mediation in Homeowner Disputes with Builders

By a margin of nearly 4-1, Arizona voters defeated an initiative on the ballot in Arizona which, among other things, would have eliminated the use of mediation in disputes between homeowners and builders, requiring litigation instead. Proponents of the initiative, Proposition 201, asserted that it would not eliminate mediation, but the existing mediation language in the Arizona statute apparently would have been stricken.

[Ballotpedia.org](#); [Tucson Citizen](#) (September 22, 2008); [Proposition 201](#)

## “Technical Mediation” Urged for Expert Disputes

Disagreements between parties' experts in complex matters, such as construction defect litigation, may be addressed by “technical mediation” using neutrals who have sufficient subject matter expertise to communicate easily with the feuding experts and mediate technical positions. The goal is to resolve only the technical issues and not consider liability or damages, which are subsequently addressed in a standard mediation or other form of alternative dispute resolution.

[Miami Daily Business Review](#) (September 9, 2008) (Subscription Required)

## Other International Mediation Developments

- After extensive analysis, the **U.K.** has introduced an Employment Bill to abolish statutory grievance and disciplinary procedures and encourage mediation, [Aberdeen Press and Journal](#) (September 26, 2008); New **U.K.** workplace guide by Chartered Institute of Personnel and Development and Acas encourages mediation based on survey of effectiveness, [Financial Adviser](#) (October 2, 2008) (Subscription Required)

**of Lake Polluted by Plugged Drain**, [Lansing State Journal](#) (October 26, 2008)

**Six-Month Mediation Failed to Resolve \$26 Million Plan to Widen Road; County Commissioner Still Hopes for Resolution**, [Macon Telegraph](#) (September 15, 2008)

**Archbishop Sues Newspaper then Seeks Mediation, Which Australian Court Cannot Compel**, [West Australian](#) (October 30, 2008) (Subscription Required)

## Other News & Initiatives:

**Judge Draws Challenger in Election Due to Lack of Use of Mediation**, [Reno Gazette Journal](#) (October 29, 2008)

**Mediators Offer Advice on How Government Can Avoid Budget Impasses**, [The Sacramento Bee](#) (September 22, 2008) (Subscription Required)

**Probate Judge Promotes Use of Mediation Program**, [Mansfieldnewsjournal.com](#) (October 20, 2008)

**Nobel Peace Prize Awarded to Global Mediator Ahtisaari for Decades of Peacemaking**, [Reuters](#) (October 10, 2008)

- Cardiff, **Wales** begins pilot program offering free mediation for consumers and businesses using two staff mediators, [Wales Online](#) (October 4, 2008)
- European Commission gives award to **U.K.** Small Claims Mediation Service with very high satisfaction rate, [PR-CANADA.net](#) (November 1, 2008)
- **Turkey** proposes mediation to increase efficiency of court system; similarities with Ottoman Empire process noted, [Turkish Daily News](#) (November 1, 2008)
- **India** high court judge praises mediation at inauguration of Mediation and Conciliation Centre in Thalassery, Kerala, [Hindu](#) (September 28, 2008) (Subscription Required)
- **India's** Law Ministry is focusing on training trainers in order to address shortages of trained mediators, which are holding back pre-trial mediation, [Hindu](#) (October 5, 2008)
- High court advises the State Bank of **Pakistan** to instruct all commercial banks to attempt to resolve disputes through mediation prior to going to court, [Business Recorder](#) (September 25, 2008) (Subscription Required)
- **Malaysia** establishing Franchise Mediation Center by early 2009 and training mediators to mediate franchise disputes, [Bernama Economic News](#) (September 11, 2008) (Subscription Required)
- The **Philippines** Intellectual Property Offices proposed draft rules that would permit government mediators to render final decisions on IP disputes when parties cannot reach agreement, [Business World Online](#) (September 29, 2008)
- **Hong Kong** civil justice reforms emphasizing mediation are due to take effect in April, causing concern among counsel, [South China Morning Post](#) (September 29, 2008) (Subscription Required)
- **Jamaican** Justice Minister promises more court appointed mediation and expansion to some criminal matters, [RadioJamaica.com](#) (September 9, 2008)
- **Bermuda** Human Rights Commission urges mediation of complaints, adding five mediators at \$300 per hour, [Royal Gazette](#) (Bermuda) (November 1, 2008)

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# MEDIATION NEWS

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## CASES & RESOLUTIONS:

### California Supreme Court Concludes No Estoppel or Implied Waiver of Mediation Confidentiality

The California Supreme Court unanimously reversed the appellate court in [Simmons v. Ghaderi](#), and concluded that a party is not estopped from asserting mediation confidentiality despite having litigated the details of the mediation for fifteen months. The case arose when Dr. Ghaderi gave her insurer permission to settle a medical malpractice case in mediation and then changed her mind after an oral agreement was reached, but before a written settlement agreement was signed. In a comprehensive decision analyzing mediation confidentiality, the Court held that no judicial exceptions to the statutory scheme are allowable, other than express waiver by the parties or when due process is implicated. The Court closely reviewed California's statutory provisions and legislative history and noted that despite the legislature's awareness that some bad faith conduct would go unpunished, it chose mediation confidentiality as paramount in order to promote mediation.

[Simmons v. Ghaderi](#), S147848 (Cal., July 21, 2008)

### Florida Appellate Court Reverses Severe Sanctions for Breach of Mediation Confidentiality

A workers compensation claimant checked with his doctor after his employer stated in mediation that the doctor had made inconsistent recommendations about whether surgery was needed. When the doctor responded in writing that he had always urged surgery, the employer successfully moved to have the workers comp claims dismissed with prejudice due to breach of mediation confidentiality requirements. The Florida appellate court reversed dismissal of the claims as being too severe a sanction, discussed a range of appropriate sanctions, and remanded the case to the judge of compensation claims for further action.

[Hill v. Greyhound Lines, Inc.](#), No. 1D07-1188 (Fla. App. 1st Dist., August 29, 2008)

### Federal Court Dismisses Lawsuit for Lack of

## Mediation Quote:

"[W]e are evoking and supporting a natural impulse of people in conflict to want to be able to *work together*, even in the face of having significant differences in their perspectives.... [E]ven if not in the foreground, that impulse is waiting to be tapped and given room for expression, even if only in the form of a wish of what might be if things were different. The same is true for the parties' capacity to *work through their conflict together*. If given the opportunity and necessary support, many are both willing and able."

- Gary Friedman and Jack Himmelstein, *Challenging Conflict: Mediation Through Understanding* (American Bar Association 2008) at xxxvii

## Other Cases & Resolutions:

**Mediation Results in Settlement of Costly, Complex Litigation and Restoration of Partnership Between Biota and GlaxoSmithKline**, [ITNews](#) (Italy) (July 20, 2008)

**New Zealand Regional Council Settles Appeal of**

## Mediation

A private agreement requiring mediation prior to any litigation was a sufficient basis for a federal court to dismiss without prejudice the pending litigation, since the parties had not yet mediated. Plaintiffs sought to have the litigation stayed pending mediation, but the court dismissed the matter without even holding a hearing.

[Brosnan v. Dry Cleaning Station Inc.](#), 2008 WL 2388392 (N.D. Cal. June 6, 2008) (Subscription Required)

## Settlements in Katrina Mediations Withstand Attack

A federal court upheld the “plain meaning” of settlements reached in the Mississippi hurricane mediation program which released any and all Katrina claims except for subsequent discovery of “additional insured damage.” The Scruggs Katrina Group filed some 200 nearly identical complaints alleging a conspiracy of fraud and bad faith that it asserted as grounds for additional insured damages. The court, however, found that the phrase could only mean additional property damage, but left open the record in case plaintiff’s new substitute counsel wished to submit affidavits showing newly discovered property damage.

[Boyd v. State Farm](#), No. 1:07CV820 (S.D. Miss., Aug. 6, 2008)

## Personal Injury Settlement Sets Record

A \$6 million global settlement in a one-day mediation resolved the legal claims of a 9-year-old boy who was blinded from serious craniofacial injuries in an all terrain vehicle accident. The agreed payment is believed to be the largest settlement or verdict in Fayette County, Pennsylvania. Details reported about the accident and claims came from the plaintiffs’ mediation memorandum.

[Pennsylvania Law Weekly](#) (August 11, 2008) (Subscription Required)

## Use of Focus Groups and Tribute Video Helps Mediation Succeed

Plaintiffs’ counsel convened two focus groups and shared the comprehensive results with the other side at a second mediation session, after an initial mediation session failed to resolve claims from a serious accident in which a car hit a tractor-trailer stopped on the side of the road, resulting in the death of one passenger and serious injuries to another. In addition, plaintiffs’ counsel provided defense counsel with a video containing testimony from the deceased woman’s family, friends, and others speaking about the impact she had made on their lives. The second mediation session reached resolution, with settlements totaling \$3.2 million for the two victims.

[North Carolina Lawyers Weekly](#) (September 1, 2008) (Subscription Required)

## Detailed Mediation Agreement Flips City Council on Commercial Development

**Pest Management Strategy in Mediation**, [Otago Daily Times](#) (July 24, 2008)

**Contempt-of-Court Hearing for Failure to Attend Mediation Session Avoided with Agreement to Mediate by Accused Video-Gambling Racketeer**, [Muncie Star Press](#) (August 16, 2008); [Anderson Herald Bulletin](#) (July 24, 2008)

**Comcast and National Football League Agree to Mediate Carriage Terms for NFL Network**, [Multichannel News](#) (July 7, 2008)

**California Public Utilities Commission Schedules Mediation over Amount of Intercarrier Compensation Due for VoIP Traffic**, [TR's State NewsWire](#) (July 17, 2008) (Subscription Required)

**Rapper Ordered to Mediate Civil Assault Case for Threatening to Shoot Coach**, [Urban411.com](#) (August 22, 2008)

**Mediation Has Not Yet Settled Ray Keller’s Litigation Against NCAA that Resulted in \$5 Million Verdict Which Judge Threw Out Pending Appeal**, [The Daily Sentinel](#) (September 2, 2008)

**Premature Disclosure of Draft Mediation Proposal Derailed Mediation after Four Years, Resulting in Escalating Conflict over Beach Access**, [The Barrie Examiner](#) (Canada) (July 26, 2008)

**Judge Orders Mediation of Litigation Between Surgeons and Medical Center over Emergency Room Call Schedule**, [Muskogee Daily](#)



After a 74-acre commercial project was blocked by the Columbia (MO) City Council, the developer entered into mediation with two neighborhood associations and, after nearly a month of negotiations, agreed to add a layer of restrictions to the development, which was sufficient to obtain City Council approval. The developer concluded that the mediation process improved plans for the development, but one of the neighborhood association leaders expressed frustration by the confidentiality of the mediation process when dealing with community issues.

[Columbia Daily Tribune](#) (August 19, 2008); [Columbia Daily Tribune](#) (August 17, 2008); [Columbia Daily Tribune](#) (July 11, 2008) (Subscription Required)

## **Decades-Old Australian Naval Disaster Claim Resolved**

Forty-four years after Australia's worst peacetime naval disaster, a formal naval seaman resolved his ten-year-old litigation by accepting a six-figure settlement in mediation. Other pending mediations may finally resolve the remaining claims from the accident between aircraft carrier HMAS Melbourne and destroyer HMAS Voyager, in which the Voyager was cut in two and sunk.

[The Age](#) (August 18, 2008)

## **NEWS & INITIATIVES:**

### **Analysis Finds Parties Generally Err in Rejecting Settlement to go to Trial**

A study of civil lawsuits over the last 40 years indicates that parties often make poor decisions when passing up settlements prior to trial, and that such mistakes are becoming more common. In only 15% of cases did both sides make the right decision to go to trial, with the verdict falling between what the plaintiff demanded and the defendant offered. Plaintiffs were wrong to proceed to trial 61% of the time, with an average loss of \$43,000 in recent years. Defendants were only wrong 24% of the time, but their average loss was \$1.1 million. The advocate's years of experience, rank of law school and size of firm were less related to bad decisions than the type of case. Errors tended to be made by plaintiffs in cases where contingency fees are common, and by defendants where insurance coverage is generally unavailable. The study, said to be the largest ever of its type, is forthcoming in the Journal of Empirical Legal Studies.

[New York Times](#) (August 7, 2008); [Journal of Empirical Legal Studies](#)

### **Widespread Adoption of Mediation Programs Reducing Costs**

Large companies, insurers, government agencies and courts are all moving towards greater reliance on mediation. For example, Toro Co. has resolved 1,400 products liability claims since launching its mediation program in the early 1990s, and has not taken a case to trial since 1994, resulting in a drop in total costs per claim from \$115,000 to \$43,000. About two-thirds of the Toro claims are resolved directly by claims coordinators, with the remaining third being resolved in mediation. Similarly, after Hurricane Katrina, Zurich

[Phoenix](#) (August 27, 2008)

**Mediation Possible for Discrimination Complaint Against Bar Banning Drag Queens and Transgender Women,** [Dallas Voice](#) (August 14, 2008)

**Mediation Under Way in Sexual Harassment Cases that Resulted in Resignation of Ohio Attorney General and Half Dozen Others,** [Youngstown Vindicator](#) (September 3, 2008)

**Mediation Scheduled for \$15 Million Sex Abuse Case Against Oregon Archdiocese,** [Seattle Post Intelligencer](#) (August 8, 2008)

**Parties Negotiate Whether to Mediate Free Speech Dispute Relating to Boston Subway Card Vulnerabilities,** [CNET News](#) (August 13, 2008)

**City of Spokane Will Mediate with Developer over Downtown Land Use; Land Trades Suggested,** [Spokane Journal of Business](#) (August 28, 2008)

**County Officials Suggest Mediation if Direct Negotiations Fail to Get Funding from Towns for Dispatcher Salaries,** [Idaho Mountain Express and Guide](#) (August 6, 2008)

**County Commissioners and Developer Agree to Mediate to Overcome Rejection of Plans for Massive Bellevue Subdivision,** [Idaho Mountain Express and Guide](#) (August 27, 2008)

**Court-Ordered Mediation of Lawsuit by Homeowners Fighting Annexation by Town Depends on Obtaining Sufficient Consent Forms**



Insurance created a new Alternative Dispute Resolution program with a multi-step process that moved from direct negotiation between the insurance representative and policyholder, to mediation, and finally binding arbitration. Out of 20,000 claims against Zurich, 98% have been resolved, with only about 100 reaching and being settled through mediation, and none going to arbitration. While courts are increasingly requiring mediation, some court programs are seeing a decrease in settlements, which is attributed to litigants going directly to private mediators or seeking mediation prior to filing suit.

[Chicago Lawyer](#) (July 9, 2008) (Subscription Required)

## Updated Construction Form Agreements Rely on Mediation

The American Institute of Architects (AIA) has released updated form construction documents which provide more complex dispute resolution language than the prior AIA version. The new A201 form provides that the first determination about a dispute be made by an Initial Decision Maker who no longer needs to be the architect. If that decision is not satisfactory, a party may seek mediation by making a formal demand that the other side file for mediation or waive certain rights. If mediation is not successful, the parties may resort to either arbitration or litigation based on their agreement in the form contract. A competing set of form documents called ConsensusDOCS has been developed by 19 construction associations. ConsensusDOCS is more collaborative and first requires direct discussions at the field and then senior executive levels, followed by mediation (as the default) or "mitigation" with nonbinding findings by an independent neutral or dispute review board. Mediation is to be concluded within 45 days, and if not successful is followed by litigation or arbitration.

[New York Law Journal](#) (August 4, 2008) (Subscription Required)

## Connecticut Provides Mediation for Eminent Domain Disputes

New regulations adopted by the Connecticut Office of Ombudsman for Property Rights provide that mediation can be requested by property owners dissatisfied with the compensation offered in eminent domain proceedings or by occupants concerned about the assistance offered when forced to move due to eminent domain. The Ombudsman determines whether or not to grant a mediation request, and if granted, public agencies may be required to cooperate and participate in the mediation.

[RegAlert](#) (July 8, 2008) (Subscription Required); [Regulation](#) (Subscription Required)

## Maryland Encourages Agricultural Mediation

The Maryland Department of Agriculture is encouraging farmers to mediate disputes with neighbors, family, government agencies and lenders using the Maryland Agricultural Conflict Resolution Service (ACReS). Mediation services are available at modest or no cost, depending on income levels, with a free initial consultation and shared costs if additional sessions are needed. Under state legislation passed in 2006, mediation is required prior to filing suit against an agricultural operation.

from Homeowners, [Indianapolis Star](#) (August 27, 2008)

**Cities Ordered to Mediate Lengthy Dispute Over Which Can Annex Farmland for Development,** [Monitor](#) (Texas) (August 27, 2008)

**Mediation Between City, Manufacturer and Consultants Held to Sort Out Costly Water Plant Flaws,** [Times West Virginian](#) August 30, 2008; [Times West Virginian](#) (August 20, 2008)

**County and Paving Company to Mediate over Loss of Contract Due to Late Signing of Anti-Alien Pledge,** [The Huntsville Times](#) (August 16, 2008)

**California Public Utilities Commission Orders Metropolitan Transportation Authority and Critics to Mediate Method for Crossing New Rail Line by High School,** [Los Angeles Wave Newspapers](#) (August 14, 2008)

**Judge Orders Mediation of the University of Akron's Unresolved Eminent Domain Lawsuits Relating to Dormitory Construction,** [Ohio.com](#) (August 15, 2008)

**Landfill Dispute Between Cities Sent to Mediation by Court,** [KBTX](#) (August 14, 2008)

**Scotland Yard Turns to Mediation in Dispute Between Senior Officers,** [Telegraph.co.uk](#) (July 21, 2008)

## Other News & Initiatives:

Better Business Bureau

[US State News](#) (July 29, 2008) (Subscription Required); [Baltimore Sun](#) (August 10, 2008)

## **Mississippi's Katrina Mediation Program Shows 80% Settlement Rate**

Updated figures reveal that nearly 5,000 mediations were requested in the Mississippi Insurance Department's hurricane mediation program, and 82% of those settled. About a fourth of the settlements occurred prior to mediation, with the remainder settling at mediation. In addition, another 235 federal cases were resolved through court-ordered mediation, out of about 1,100 closed federal cases, while another 867 policyholders in two mass lawsuits settled without filing individual claims.

[Sun Herald](#) (August 27, 2008) (Subscription Required)

## **Mediation Helps Heirs Minimize Conflict over Estates**

Mediation can be helpful to preserve relationships among heirs who get into squabbles when dividing estates left by family members. While conflicts can be minimized through proactive steps to make decisions before death and provide clear instructions on disposition, there are also numerous techniques ranging from blind drawings to drawing cards that can provide processes for allocating assets that seem fair to all involved.

[Toledo Blade](#) (July 6, 2008)

## **Mediation Model Urged for Long-Term Care Facilities**

A research report on an appropriate mediation model for long-term care facilities concluded that care could be improved by involving residents and families through mediation, but that intensive outreach is required within facilities. Many cases referred to mediation were not mediated due to barriers from lack of knowledge of potential benefits and availability. The report was published in the Journal of the American Medical Directors Association.

[Health & Medicine Week](#) (August 4, 2008) (Subscription Required)

## **Council Provides Successful Mediation Alternative in High Stakes Environment**

Hanford Concerns Council provides mediation of worker grievances over health, safety, or the environment to avoid litigation against Hanford contractors. Council members include Washington Closure Hanford, Washington River Protection Solutions and CH2M Hill. With annual costs of about \$500,000, the Council has a perfect record of resolving litigation over the last three years since it was resurrected. One cautionary case is the decade-old litigation by pipefitters against Fluor Federal Services that resulted in a \$4.8 million jury award which is still pending on appeal.

**Mediating Many More Cases; Business Members Required to Participate When Consumers Seek Mediation,** [The Columbus \(Ohio\) Dispatch](#) (August 20, 2008)

**Half of Foreclosure Mediations in Stark County Result in Homeowners Keeping Homes,** [Canton \(Ohio\) Repository](#) (July 27, 2008)

**San Diego City Attorney Regularly Uses Mediation to Resolve Cost Overruns, False Claims, Other Concerns,** [San Diego Union Tribune](#) (August 13, 2008)

**Cases in U.K. Address Mediation Confidentiality and Recovery of Costs,** [Shoosmiths Legal Updates](#) (August 8, 2008)

[Mid Columbia Tri City Herald](#) (August 12, 2008)

## Mediation Resolving Psychological Harassment Complaints in Quebec

Mediation successfully reaches agreement in 95% of the workplace psychological harassment cases mediated by the Commission des normes du travail in Quebec. In the four years since legislation was enacted protecting employees from psychological harassment, about 8,600 complaints have been filed and a little over a third have been resolved through mediation. Of complainants using mediation, 85% reported they were very satisfied with the mediator's work.

[Canada Newswire](#) (July 3, 2008) (Subscription Required)

## Other International Mediation Developments

- **U.K.** lawyers see financial pressures on businesses resulting in more litigation over disputes and more mediation to reduce risks from litigation, [Crain's Manchester Business](#) (September 1, 2008); [Birmingham Post](#) (August 29, 2008) (Subscription Required)
- Mediation being encouraged in **Scotland** as better solution for conflicts and important to maintaining competitive economy, [Scotsman](#) (July 6, 2008) (Subscription Required)
- Law Reform Commission in **Ireland** urges key role for mediation, [The Irish Times](#) (July 30, 2008)
- Alternative Dispute Resolution workshop reflects increasing popularity of informal resolution processes in **Dubai**, [AME Info](#) (United Arab Emirates) (July 14, 2008)
- Three-day mediation update training in **Bangladesh** given to judges and lawyers who will be training 300 new judges and lawyers in mediation, [The New Nation](#) (Bangladesh) (July 4, 2008)
- **China** reports 100,000 mediations with 96% success rate since mediation was introduced in Guangdong Province in 2001, [World News Connection](#) (July 31, 2008) (Subscription Required)
- Mediation needed in **Hong Kong** to keep up with other jurisdictions, [South China Morning Post](#) (July 8, 2008) (Subscription Required)
- Court-annexed mediation experiment in the **Philippines** gives better access to justice to poor and marginalized; 40,000 mediations in last six years have 70% resolution rate, [Thai Press Reports](#) (July 9, 2008) (Subscription Required)
- Mediation system, in which courts can mandate mediation, is most important of proposed reforms in **Malaysia**, where lower courts have a 900,000 case backlog, [New Straits Times](#) (July 4, 2008)
- Farm Debt Mediation Act in New South Wales, **Australia** requires equipment finance companies to give farmers option of mediation, [ABC Online](#) (September 4, 2008)
- Number of mediations doubles in New South Wales, **Australia**, with 59% resolution rate, [Sydney Morning Herald](#) (August 14, 2008)
- **Fiji** Employment Relations Bill establishes mediation service, [Fiji Times](#) (August 20, 2008)

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# MEDIATION NEWS

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JULY 2008

## CASES & RESOLUTIONS:

### California Court Tells Insurers with Potential Coverage to Attend Mediation in Person

Noting the benefits of appellate mediation and the desirability of participants attending in person, a California appellate court warned insurers in [Campagnone v. Enjoyable Pools & Spas](#) that even the potential of coverage requires a representative with full settlement authority to attend court-ordered appellate mediations in person, unless excused in writing by the mediator. Further, the court warned parties and counsel that they may also face sanctions if they fail to notify insurers with potential coverage about appellate mediations. The court noted that California's strict mediation confidentiality provisions prevent mediators from disclosing whether anyone fails to attend, but that an aggrieved party may do so in seeking sanctions from the court. The court withheld sanctions in this case only because no previous opinion had spelled out these requirements, even though the insurer was only liable for amounts in excess of \$3 million and the judgment in the trial court was \$2.4 million.

[Campagnone v. Enjoyable Pools & Spas](#), No. C055050 (Cal. App.3d Dist., May 30, 2008)

### California Court Penalizes Lack of Mediation Attempt with Absent Party

A California appellate court overturned a lower court and denied attorneys' fees because the prevailing party did not attempt mediation prior to filing suit, as required by the standard California residential purchase agreement. Even though defendant had moved away, and plaintiff did offer mediation when defendant was found by an investigator to serve the complaint, the court ruled that plaintiff should have hired its investigator prior to filing suit, in order to seek pre-suit mediation as required by the form agreement. The court emphasized the importance of mediation in order to avoid results like the outcome of this case, in which plaintiff spent more than \$113,000 in attorneys' fees to recover a \$13,000 judgment.

[Lange v. Schilling](#), No. C 055471 (Cal. App. 3d Dist., May 28, 2008)

### Mediation Clause Enforced, Despite

## Mediation Quote:

"[W]e must understand that one person's positive insights may be another's distressing notions. Common sense may be only that which a particular individual fashions to fit the individual's emotional or intellectual needs. Nevertheless...the need to stand in the other person's shoes, to understand everyone's real interests and needs, to explore options in a genuinely non-judgmental manner, and to speak and listen empathetically, will not be lost on business people in the farthest corners of the world. We must prepare for the emotional component of mediation by understanding each other at the deepest levels. We must acknowledge emotion. We must use it constructively. So that we can talk."

- David W. Plant, *We Must Talk Because We Can: Mediating International Intellectual Property Disputes* (International Chamber of Commerce 2008)

## Check This Out:

"Collaboration Not Litigation Ale" may be perfect for toasting successful mediations; the ale is the product of collaboration

## Maneuvering over Judicial Forum Selection

The contract between a U.S. licensee and an Australian licensor provided for disputes to be resolved through mediation in Sydney and, if necessary, litigation in New South Wales. But when a dispute arose, the U.S. company quickly filed suit in the U.S. and the Australian court later stayed its case pending the U.S. proceedings. However, the Australian court required the parties to comply with the mediation provision in their contract and proceed with mediation in Sydney, noting that if they had difficulties choosing a mediator the court would do so.

[Armcel Pty Ltd. v. Smurfit Stone Container Corp.](#), [2008] FCA 592 (Australian Fed. Ct., May 2, 2008); [Mondaq Bus. Briefing](#) (May 27, 2008) (Subscription Required)

## Subpoena of Mediator Upheld on Appeal in New York

A New York appellate court affirmed the appellate division's upholding of a subpoena of a mediator in [Hauzinger v. Hauzinger](#), stating that one party signed a waiver releasing the mediator from maintaining confidentiality and the other party waived confidentiality by seeking disclosure from the mediator. The mediator was not allowed to assert a qualified privilege, since the privilege was waived by the parties, but the court expressly did not rule on the applicable state statute.

[Hauzinger v. Hauzinger](#), [43 A.D.3d 1289, 842 N.Y.S.2d 646](#) (NY App. 4th, Sept. 28, 2007), [aff'd](#), [2008 NY Slip Op. 05781](#) (NY Ct. App., June 26, 2008)

## Extensive Water Rights Mediation Resolving Decades-Old Dispute

Over 60 representatives of conservation groups, power producers, federal agencies, ranchers, boaters and downstream communities reached a tentative settlement of water issues in Colorado's Upper Gunnison Basin, which have been in contention for decades and in litigation for the last seven years. The mediation lasted nine months and the representatives still must obtain final approval from principals and final decision-makers. The proposed settlement will resume annual peak flows in the springtime from upstream dams to return the Gunnison River to a more natural condition, even though that leaves less water for hydropower during high demand periods in July and August. Final settlement is sought by September in order to avoid a lengthy and contentious trial.

[Gunnisontimes.com](#) (Colorado) (June 12, 2008)

## Alaska State Senator Proposes Mediation over Pipeline

In an effort to avoid a difficult decision over an exclusive license and \$500 million incentive for a natural gas pipeline from the North Slope to Alberta, an Alaska state senator has proposed mediation among interested parties in order to provide a pause and an opportunity for creative alternatives to emerge. The senator stated she would ask senate and house leaders to hire a professional mediator. The state revenue commissioner and others oppose

between two microbreweries which resolved a potentially nasty dispute between them over Belgian-style ales each had developed and given the same name.

[Mediationchannel.com](#) (May 23, 2008), [Avery Brewing Company](#)

## Other Cases & Resolutions:

**Ten Million Dollar Claim over Cheese on McDonald's Hamburger Sent to Mediation,** [The Record](#) (West Virginia) (May 23, 2008)

**Mediation Begins over Deaths of Six of Nine Firefighters Killed in Sofa Super Store Blaze,** [Charleston Post Courier](#) (June 17, 2008)

**Mediation over Large Development Opposed by City Hopes to Avoid Scheduled 40-Day Hearing of Ontario Municipal Board,** [Guelph Mercury](#) (June 13, 2008)

**Mediation Team Making Progress on Alternatives to Evergreen Point Bridge,** [Seattle Post Intelligencer](#) (June 19, 2008)

**Federal Appellate Court Sends Oklahoma State Officials and Businesses to Mediation over New Immigration Law,** [Tulsa World](#) (June 30, 2008); [KTEN](#) (Oklahoma) (June 28, 2008)

**State Legislator Presses All Parties and Agencies for Mediation of Tellevast Contamination Dispute,** [Bradenton Herald](#) (Florida) (June 28, 2008) (Subscription Required)

**Federal Appeal Delayed Pending Mediation by Adult**



mediation and seek an up or down vote on the license.

[Anchorage Daily News](#) (June 19, 2008)

## **Telecom Companies Seek Further Extension for Mediation**

AT&T Nevada and Sprint were ordered by the Nevada Public Utilities Commission to mediate and try to resolve a dispute over interconnection agreement terms based on FCC merger terms. The parties were required to report to the PUC by July 1 on their mediation progress, but are seeking an extension until September 1 to permit further time for mediation.

[TR's State NewsWire](#) (June 24, 2008) (Subscription Required)

## **NEWS & INITIATIVES:**

### **Final Rules of Civilian Board of Contract Appeals Cover ADR**

The Civilian Board of Contract Appeals (which resulted from the 2007 consolidation of numerous contract appeals boards) published final rules to clarify procedures for alternative dispute resolution, among other things. The Board encourages ADR even on matters not before it, noting that mediation is most often used, but many other processes are available. The rules permit a panel judge to act as an ADR neutral and then (if ADR has not been fully successful) to resume work as a judge, if desired by the parties. The parties are to enter an ADR agreement specifying the neutral, the type of ADR desired, scope of related discovery and timing and location of ADR. However, use of ADR does not toll any statutes of limitation.

[Wileyrein.com](#) (May 14, 2008); [Explanation of Final Rule](#) (May 12, 2008); [48 C.F.R. 6101.54](#) (Subscription Required)

### **Michigan Law Establishes Mediation of Property Tax Disputes**

New Michigan legislation authorizes the Michigan Tax Tribunal to mediate appeals of agency decisions, if the parties agree to mediation and select a certified mediator. The Tribunal will establish a process for creating a roster of certified mediators, who must have five years of tax experience in the previous seven years. The Tribunal may charge mediators an annual certification fee, as well as charging parties a fee for mediation. Mediators must disclose their rates and experience to parties, and report the results of mediations to the Tribunal.

[Michigan H. 4433](#) (Enacted May 8, 2008)

### **Connecticut Enacts Foreclosure Mediation Program in Mortgage Relief Bill**

On June 18, Connecticut enacted wide-ranging mortgage relief and industry reform legislation, which included a foreclosure mediation program. The law

**Superstore and County over Provisions in County and State Laws,** [Rome News-Tribune](#) (Georgia) (June 25, 2008)

**Ohio Attorney General's Office Agrees to Mediate Sexual-Harassment Cases that Resulted in Attorney General's Departure,** [RedOrbit](#) (June 17, 2008)

**University of Hawaii and Former Head Football Coach Agree to Mediation Prior to Contractually Required Arbitration,** [Honolulu Advertiser](#) (May 28, 2008)

**West Virginia University's \$4 Million Lawsuit Against Ex-Football Coach Heading to Mediation,** [Associated Press](#) (West Virginia) (May 30, 2008)

**City Pushing Mediation in Order to Merge Firefighting Services,** [Muskego Now](#) (Wisconsin) (May 21, 2008)

**Judge Orders Mediation in Proposed Merger of Three Firefighting Services,** [FirefightingNews.com](#) (Georgia) (May 22, 2008)

**Progress in Mediation of Plan to Consolidate Fire Coverage,** [The Stamford Advocate](#) (Connecticut) (May 21, 2008)

**Developers of Senior Living Facility to Mediate with Neighbors, Despite City Approval,** [Pleasanton Weekly](#) (California) (June 12, 2008)

**City, Township and Landowners Mediate over Large Septic System,** [Austin Post Bulletin](#) (Minnesota) (May 21, 2008)

**Eleven-Year-Old Dispute over Neighborhood Access to Lake Sent to Mediation,** [The](#)

requires lenders to tell delinquent borrowers about the mediation program when seeking foreclosure. If the borrower chooses mediation, lenders are required to participate, which could delay foreclosure by 60 days or longer.

[Hartford Courant](#) (June 20, 2008)

## **Iowa Reactivates Flood Claim Mediation Program**

Iowa's Insurance Commissioner met with insurers to reactivate a flood claim mediation service in response to extensive flooding since May that resulted in 42 counties being declared disaster areas. While full details on implementation will be available soon, the Iowa Insurance Division plans to provide mediators under contract for consumers and insurers with settlement disputes. The Iowa flood mediation service was first begun after mammoth floods in 1993. State officials believe the damage from the current flood is even greater, calling it a 500-year event.

[NU Online News Service](#) (June 20, 2008) (Subscription Required)

## **Kentucky Mediating Serious Criminal Cases**

Felony criminal cases are being mediated regularly in a pilot program of Kentucky courts, despite opposition from prosecutors. Prosecutors are used to negotiating plea arrangements without outside assistance and chafe at confidentiality restrictions which prevent use in court of any admissions in mediation. However, state judges are pleased with the mediation program, which is reducing both court and prison congestion, while achieving outcomes that satisfy victims and their families without the burden of lengthy trials.

[The Legal Intelligencer](#) (May 26, 2008)

## **Caseload of Oklahoma Supreme Court Reduced by Mediation**

The total number of cases handled by the Oklahoma Supreme Court is down 28% from 1999 to 2006, with the number of written opinions dropping from 250 a year in 2000 to only 99 in 2006. The Chief Justice attributes the decline to mediation, as well as legislative reforms and the rising cost of litigation.

[Insurance Journal](#) (June 10, 2008)

## **Mediation Gaining in Employment Disputes as Arbitration Declines**

Employers are increasingly turning from arbitration in employment disputes, due to the increased costs of discovery, potential for rogue outcomes that cannot be appealed, and uncertainty over whether mandatory arbitration provisions will be upheld. With overtime litigation continuing to increase around the country, many defense lawyers are encouraging clients to turn to mediation instead of arbitration. Wage-and-hour litigation increased over 200% between 2001 and 2007 and overtime lawsuits have displaced employment discrimination as the most common form of employment

[Jackson Citizen Patriot - MLive.com](#) (Michigan) (May 7, 2008)

**Builders Remedy Suit Ordered to Mediation,** [Red Bank Hub](#) (New Jersey) (May 8, 2008)

**Houston Rodeo Rejects Justice Department Offer to Mediate Concerns of Minority Groups,** [Houston Chronicle](#) (May 21, 2008)

**Lack of Settlement in Mediation Leads to Competing Litigation in U.S. and Korea,** [Daily Report Online](#) (May 8, 2008)

**U.K. Human Rights and Equalities Commission Helps Churches Mediate Between Gypsies and Local Communities,** [Essex Echo](#) (May 9, 2008)

**ANZ and Opes Prime Agree to Mediate over Stockbroker's Collapse,** [Business Spectator](#) (Melbourne) (May 22, 2008)

**New Zealand University Agrees to Mediate with Union over Layoffs in Restructuring,** [Stuff.co.nz](#) (May 24, 2008)

**Judge Delays Litigation for Mediation over Nonpayment of Royalties of €400,000 for Music Festivals over Several Years,** [Irish Times](#) (June 16, 2008)

## **Other News & Initiatives:**

**Ohio County Court Beginning New Mediation Foreclosure Program,** [The Plain Dealer - cleveland.com](#) (June 24, 2008)

**Kansas Agricultural Mediation Service Helps Hog Farmers Under Pressure from**

litigation.

[The National Law Journal](#) (June 9, 2008) (Subscription Required)

## **Disclosure and Apology for Medical Errors Reduce Claims**

Medical providers are increasingly offering earnest apologies and full disclosure of mistakes to their patients, along with fair compensation, in an effort to resolve matters promptly and avoid contentious medical malpractice litigation. Medical centers report that claims and lawsuits drop substantially when such practices are followed, and that overall costs are significantly reduced even while more patients are compensated. The American Medical Association, the American Hospital Association and other medical groups now encourage disclosure. Further, 34 states now prevent use in litigation of apologies for medical errors.

[New York Times.com](#) (May 18, 2008)

## **Litigation Funding of Smaller Parties Provides Mediation Counterweight**

A litigation funding company in Australia provides resources in carefully selected cases to individuals and small businesses involved in disputes with larger entities who may try to use their advantage in resources to obtain procedural wins or force unfair settlements. The funding company sees itself as helping to level power imbalances, but selects only cases it feels are likely to generate a good return. The managing director believes mediation is the best option for resolving business disputes, but that mediation works better when the smaller party has options.

[Sydney Morning Herald](#) (June 7, 2008)

## **Debt Collector Grows Using Mediation**

A debt recovery service in the U.K. attributes its rapid growth to focusing on mediation rather than litigation. In addition to obtaining payment, the service seeks to rebuild business relationships between its clients and their debtors, and brings a friendly approach to its work. However, the service emphasizes that it has a 100% win rate in the small number of cases it is forced to take to court.

[Wales Online](#) (May 30, 2008)

## **Other International Mediation Developments**

- Mediation's hidden benefits useful to minimize both financial and non-financial burdens of **U.K.** employment disputes, [HRZone.co.uk](#) (May 22, 2008); [TrainingZone.co.uk](#) (June 12, 2008); [Abeceder](#) (July 2, 2008)
- **U.K.** Law Commission proposes mediation for housing disputes, based on "triage plus" system, [Liverpool Daily Post](#) (May 20, 2008)
- **Australia** simplifies bidding for government legal work and

**High Input Costs,**  
[CattleNetwork.com](#) (Kansas)  
(June 4, 2008)

**Elder Mediation Growing as  
Parents Live Longer and  
Families Fight,** [Long Island  
Business News](#) (May 23, 2008)

**Mediation Should Help  
Businesses Like Microsoft  
and Yahoo Put Together  
Deals,** [The Christian Science  
Monitor](#)

requires agencies to use more alternative dispute resolution, [The Australian](#) (May 23, 2008)

- **Malaysia** encouraging use of mediation, among other judicial reforms, and plans to soon draft a Mediation Act, [Malaysia Star](#) (June 18, 2008)
- Olympic Council of **Malaysia** now includes alternative dispute resolution in its constitution and encourages national sports associations to seek mediation of disputes, [OCM News](#) (June 30, 2008)
- After long reliance solely on arbitration in **Vietnam**, newest arbitration organization also offers mediation, [Thanh Nien Daily](#) (Ho Chi Minh City) (May 23, 2008)
- U.S. college seeks to provide culturally appropriate mediation training in **China**, [Boston.com](#) (May 29, 2008)
- **Uzbekistan** and United Nations Development Programme are organizing seminars around country on business arbitration and mediation, [Journal of Turkish Weekly](#) (June 19, 2008)
- Groundbreaking decision by the High Court for the **Indian** states of Punjab and Haryana allows mandatory mediation order despite objection of parties, [The Statesman](#) Kolkata, India (May 26, 2008)
- World Bank providing funds to International Centre of Alternative Dispute Resolution in **India** to train mediators to settle commercial disputes, [Press Trust of India](#) (June 30, 2008)
- Karachi Centre for Dispute Resolution holds six-day mediation workshop for judges, [Pakistan Press International](#) (June 30, 2008) (Subscription Required)
- **Abu Dhabi** seeking to establish world-class commercial court with specialized mediation capabilities, [AME Info](#) (United Arab Emirates) (June 30, 2008)
- Thirty-one Ethiopian judges and registrars receive three-day mediation training; Federal Supreme Court of **Ethiopia** agrees to send 80 cases to mediation, [Allafrica.com](#) (May 23, 2008)
- Debt mediation company launched to help heavily indebted **South African** consumers recover from debt load, [Business Day](#) (June 14, 2008) (Subscription Required)

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MAY 2008

## CASES & RESOLUTIONS:

### Eleventh Circuit Holds Federal Arbitration Act Cannot Compel Mediation

A contract requiring either mediation or nonbinding arbitration prior to litigation cannot be enforced using the Federal Arbitration Act, because the FAA only applies when the parties have agreed to arbitrate, the U.S. Court of Appeals for the Eleventh Circuit concluded in [Advanced Bodycare Solutions, LLC v. Thione Int'l, Inc.](#) The court carefully examined the attributes of arbitration, since processes are sometimes mislabeled. In dicta, the court emphasized the desirability of mediation, including courts requiring mediation and staying litigation pending mediation, noting that its holding was merely that the FAA cannot be used to compel mediation.

[Advanced Bodycare Solutions, LLC v. Thione Int'l, Inc.](#), No. 07-12309 (11th Cir. April 21, 2008)

### North Carolina Court Requires Disclosure of Insurance Coverage Remaining Prior to Mediation

The North Carolina Business Court in [Harco National Ins. Co. v. Grant Thornton LLP](#) required the defendant to disclose the amount of insurance remaining under its liability policy immediately prior to mediation, even though the court did not require disclosure of all insurance information sought. The court relied on the requirement to mediate in "good faith" and held that refusing information about available insurance coverage was not good faith. The court noted that the North Carolina Supreme Court's governing interpretation of the discovery rule, which requires disclosure of the "true facts" of insurance coverage, is broader than the analogous federal rule.

[Harco National Ins. Co. v. Grant Thornton LLP](#), 2008 NCBC 5 (N.C. Bus. Ct. March 4, 2008)

### Mediation Resolves Pet Food Multi-District Litigation in Principle

A comprehensive, cross-border settlement in principle addressing all major

## Mediation Quote:

"What we believe about ourselves can hold us hostage....[A] belief is more than just an idea – it seems to shift the way in which we actually experience ourselves and our lives. According to Talmudic teaching, 'We do not see things the way they are. We see them as we are.' A belief is like a pair of sunglasses. When we wear a belief and look at life through it, it is difficult to convince ourselves that what we see is not what is real.... Knowing what is real requires that we remember that we are wearing glasses, and take them off. One of the great moments in life is the moment we recognize we have them on in the first place. Freedom is very close to us then. It is a moment of great power."

- Rachel Naomi Remen,  
*Kitchen Table Wisdom*  
(Berkeley Publishing 1996) at 77.

## Other Cases & Resolutions:

Restoration Project Back on Track After Mediation Resolves Litigation Against City over Permitting, [Marshall News Messenger](#) (Texas) (April 19, 2008)



terms has been reached through mediation in the Pet Food Multi-District Litigation. While approval of a definitive settlement agreement is required, along with approval of both the U.S. federal court and Canadian courts, the parties reported to the New Jersey court that they are confident of final resolution. Once finalized, the administrator of a settlement fund will provide details to pet owners on how to submit individual claims.

[Marketwire](#) (April 1, 2008)

## **Mediation During Trial Yields \$7.5 Million Settlement for Injuries from Stepping into Hole**

Five defendants ultimately agreed to pay \$7.5 million after mediation to resolve claims by a man with severe injuries from stepping into a hole left by the removal of an electrical pole on a construction site. Defendants blamed each other, and asserted that plaintiff was trespassing when he was injured. Trial was initially delayed to permit mediation, but settlement efforts continued during the trial proceedings. When the trial began, plaintiff's counsel stated that his demand would increase by a quarter million each day, and the case ultimately settled at the end of the week a million dollars higher, just before plaintiff's mother was to testify. Plaintiff's counsel agreed to use a mediator from a law firm that had represented another defendant in the case who had settled prior to the last minute mediation.

[The Legal Intelligencer](#) (April 30, 2008) (Subscription Required)

## **Lawsuit Filed to Spur More Insurance Mediation**

Litigation has begun asserting that property insurers deliberately failed to inform Florida policyholders that they can seek mediation for hurricane claims, allegedly saving the insurance industry \$400 million in mediation and extra claims settlement costs. The case was brought on behalf of a homeowner against the Florida Office of Insurance Regulation and the Department of Financial Services, alleging that the agencies allowed insurers to ignore their obligations to offer mediation. While class action certification is not being sought, plaintiff's counsel hopes the state agencies will become more diligent in enforcing the mediation notification requirement. The state disputes the claims, stating that it does focus on getting homeowners with insurance disputes into mediation. Over 13,000 requests for mediation of hurricane claims have been submitted in the last 27 months, and about 140 are still arriving monthly. The mediation program, which has been extended to July 31, 2008, has resolved 80-90 percent of the claims.

[Orlando Sentinel](#) (April 3, 2008); [Business Wire](#) (April 2, 2008)

## **Movie and TV Stars Pursue Mediation**

"Desperate Housewife" star Nicollette Sheridan has avoided a June 30 trial date by reaching a confidential settlement through mediation with her ex-manager over his claim for ten percent of her earnings, after a Los Angeles judge ordered the parties into mediation last October. In separate litigation against Keanu Reeves by a paparazzo photographer who claims severe injuries from the actor backing into him with a Porsche, Reeves' lawyer has sought mediation of the claims and requested that legal proceedings be suspended in

**Mediation Continues in Defective Design and Construction Claims by County Against Eleven Contractors in Four Cases,** [Beaufort Gazette](#) (South Carolina) (April 4, 2008)

**County Authorizes Mediation over Land Deal with School Where Intentions Not Included in Contract Language,** [The News-Press](#) (Florida) (April 6, 2008)

**Efforts to Obtain State Approval to Build Hospitals Four Miles Apart Headed to Mediation,** [The Business Journal](#) (North Carolina) (March 13, 2008); [Winston-Salem Journal](#) (March 15, 2008)

**Mediation Set over Sonoma County Wheelchair-Accessible Trail Plan Pitting Hikers Against Cows,** [Santa Rosa Press Democrat](#) (California) (March 16, 2008)

**Dispute over Scope of Archdiocese Documents to Be Disclosed in \$72 Million Sex Abuse Settlement Goes to Mediation,** [Catholic Sentinel](#) (Portland, Oregon) (March 21, 2008)

**Dispute Among Owner, Neighbors and City over Three-Story "Garage Mahal" Being Mediated,** [New Bern Sun Journal](#) (North Carolina) (March 14, 2008)

**Bankruptcy Judge Orders Mediation Between Owner Seeking to Develop Property and Holdout Tenant,** [Business Review](#) (Albany, NY) (March 14, 2008)

**Appearance of Mediator Conflict of Interest in Eye of Mediation Party,** [South](#)



the meantime.

[E! Online](#) (March 25, 2008); [E! Online](#) (March 25, 2008)

## NEWS & INITIATIVES:

### European Parliament Approves Mediation Directive for Cross-Border Civil Disputes

After many years of effort, a Mediation Directive for cross-border civil and commercial disputes was approved by the European Parliament on April 23, 2008. The new Directive (i) requires member states to encourage training of mediators and development of codes of conduct and other quality control measures for mediation services, (ii) gives all judges the right to invite parties to mediate, (iii) requires member states to provide judgment-like status for mediated agreements, (iv) requires mediation confidentiality and protects mediators from compulsion to give evidence, and (v) ensures that statutes of limitations and prescription periods will be suspended during mediation. Member states have three years to implement the Directive for most issues, and may choose to apply the Directive to internal as well as cross-border disputes.

[European Parliament](#) (Brussels) (April 23, 2008)

### Idaho Enacts Uniform Mediation Act

Idaho has enacted the Uniform Mediation Act (UMA), effective July 1, 2008, in order to establish confidentiality for mediation communications, with specified exceptions. The legislation is intended to encourage greater use of non-judicial mediation by providing confidentiality protections that are uniform with the recent rules adopted by the Idaho Supreme Court for court-annexed mediation. The Idaho legislation also incorporates the United Nations Model Law on International Commercial Conciliation, which is a supplement to the UMA for international commercial mediations, unless the parties agree otherwise. The UMA has now been adopted in the District of Columbia and ten states: Idaho, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont and Washington state.

[Idaho S.B. 1261](#)

### Minnesota Adds Mediation to Fight Against Home Foreclosures

The governor of Minnesota is emphasizing voluntary mediation in response to high levels of home foreclosures and as a further step after foreclosure counseling programs. Under his program, Minnesota agencies are to offer grants to pay for mediation if counseling has not resolved the issues, but a home-saving deal may still be possible.

[Post-Bulletin](#) (April 16, 2008)

### California Legislation Would Require

[Florida Sun-Sentinel](#) (April 10, 2008)

**Court Sends Complex Dispute over Grand Bahama Port Authority to Mediation,** [The Bahama Journal](#) (March 8, 2008)

**Mediation Set over Development of Motorsport Park that Neighbors Oppose as Excessively Noisy,** [Drivesouth](#) (New Zealand) (March 27, 2008)

### Other News & Initiatives:

**Mediation Voluntary in Large Civil Cases in Madison County, Illinois, But Nonbinding Arbitration Required,** [Edwardsville Intelligencer](#) (March 10, 2008)

**Marin County Courts Embrace Mediation for All Civil, Probate and Family Law Disputes,** [Marin Independent-Journal](#) (California) (March 21, 2008)

**Legal Culture Shifting Towards Mediation in Michigan,** [MLive.com](#) (April 4, 2008)

**Ohio's Foreclosure Mediation Programs Continue,** [Mansfield News Journal](#) (March 26, 2008); [Kentucky Post](#) (April 1, 2008); [U.S. News & World Report](#) (April 21, 2008)

**Publicity Grows for Hospital Mediation Plan,** [Pennsylvania Law Weekly](#) (March 17, 2008) (Subscription Required); [The Intelligencer](#) (Philadelphia) (March 28, 2008); [6abc.com](#) (Philadelphia) (March 28, 2008)

**Mediation Policy of Large**

## Mediation of Public Works Disputes

Pending California legislation would require mediation at the option of the claimant for disputes of \$50,000 or more arising from public works contracts involving local agencies, cities and counties, followed by binding arbitration if mediation is not fully successful, unless another dispute resolution process was provided in the contract. If the parties are unable to agree on the mediator or arbitrator, the legislation mandates selection through the American Arbitration Association. If litigation is required to enforce the provisions, the legislation provides attorneys' fees and costs to the prevailing party.

[California S.B. 1642](#) (April 3, 2008)

## Resignations Undercut Florida's Open Government Mediation Program

Florida's Open Government Mediation Program began in the early 1990s with the Attorney General's office acting as an intermediary to assist requesters in getting access to documents or meetings of government agencies, rather than agencies spending substantial resources fighting public access. The process was so successful that it was enacted by the state in 1996 and grew to over 120 cases per year. Recently, Florida's Attorney General McCollum has not made the program a priority and top-level turnover has resulted in a one-third reduction in the cases being handled, raising concern among media groups. However, Attorney General McCollum stated that the mediation process has been very successful and promised it will continue.

[Orlando Sentinel](#) (March 16, 2008)

## Missouri Bar Begins Mediation Program for Attorneys in Office Conflicts

Attorneys in disputes due to economic changes at their firm or communication problems will be offered free mediation by the Missouri Bar in a program beginning June 1, 2008. The process requires the consent of both parties and will be confidential unless serious ethical violations are uncovered. The Bar will only pay out of pocket costs for mediators, but more than 100 attorneys have volunteered.

[Missouri Lawyers Weekly](#) (April 28, 2008) (Subscription Required)

## Maryland County Mediating Misdemeanors

Maryland's Worcester County has been sending misdemeanor criminal complaints to mediation and discovered that the results are excellent. Since the mediation program began three years ago, over 360 cases have been referred to the one-person mediation office after review by prosecutors. About two-thirds of the cases were mediated and all but one were successfully resolved. The mediation program, which is free to the parties, has been supported by a modest grant from the Maryland Judiciary's Mediation and Conflict Resolution Office, and hopes to become a permanent county program.

[The Daily Times](#) (March 21, 2008)

**Bulk Chemical Transporter's Risk Management Team Minimizes Costs with 75% Settlement Rate,** [Business Insurance](#) (March 24, 2008)

**Need for Clarity in Mediation on Existence and Scope of Insurance,** [New Jersey Law Journal](#) (March 31, 2008) (Subscription Required)

**CPR Initiative Promotes Mediation for Policyholder-Insurer Disputes,** [Business Insurance](#) (March 24, 2008)

**Technology Contracts Should Include Mediation and Arbitration Provisions,** [ITBusiness.ca](#) (Ontario, Canada) (March 24, 2008)

**Ten Years After Controversial Beginning, Judicial Mediation Celebrated in Quebec,** [The Gazette](#) (Canada) (April 11, 2008)

**Mediation Needs to Become Mainstream in U.K. Planning Disputes,** [Planning \(U.K.\)](#) (March 20, 2008) (Subscription Required)

**U.K. Family Farm Disputes Are Focus in Mediation,** [Farmers Guardian](#) (U.K.) (April 21, 2008)

**American Named as U.N. Ombuds, Will Mediate Issues Involving U.N. Staff Around World,** [China View](#) (March 14, 2008)

## **Tennessee Judges Training in Mediation**

Reflecting the growing importance of mediation and the pressure on court dockets, 29 Tennessee judges, including four Supreme Court justices, are attending a five-day mediation training. State court figures indicate that 1,500 cases were mediated in the first quarter of the year.

[The Tennessean](#) (April 15, 2008)

## **Online Mediation Moves to “Second Life”**

Law students in a dispute resolution class at the University of Dayton Law School are honing their skills in mediations held in the online world of Second Life, where each participant is shown as an avatar or animated character who communicates through its user's voice or by text messages. In addition to the general communication among the group, separate private Instant Messages can occur simultaneously. Compared to communicating through conference calls, personality can come through in how the avatars are dressed and move. Biases based on appearance or voice can be eliminated, but gestures and facial expressions that are important to communication are also lost.

[Dayton Daily News](#) (March 16, 2008)

## **Timing Flexibility for Mandatory Mediation Increases Settlements in Toronto**

Evaluation of Toronto Superior Court's mandatory mediation requirements shows greater success by allowing more flexible timing, rather than requiring mediation to occur too quickly, although some practitioners think the delay sometimes results in parties incurring excessive legal fees which can impede settlement. Counsel have shifted perspective and appear to now be mediating to get cases settled rather than merely as a necessary step to get to trial. The Chief Justice behind the program has concluded that “mediation is the cornerstone of the justice system” in the province.

[Law Times](#) (Canada) (April 21, 2008)

## **Victoria, Australia Expanding Court-Connected Mediation**

Australian Supreme and County Courts will be able to send cases to mediation for the first time in a pilot project being started in Victoria, which will include large commercial disputes. Based on a Canadian model, senior judges will be involved to give the mediation process their imprimatur. The project is allocated A\$3.7 million in the current budget package for the judicial system. In addition, the budget includes a A\$5.8 million expansion of the mediation program in Magistrate Court and A\$6.2 million to expand alternative dispute resolution regionally in Victoria.

[The Age](#) (May 4, 2008)

## **U.K. Group Urges Mediation to Remedy Design Theft**

The leading U.K. trade organization opposing design theft has launched a national campaign to encourage mediation of intellectual property disputes. The organization, known as ACID (Anti Copying in Design), launched its pro-mediation campaign with the slogan "Mediate to Resolve" on the group's tenth anniversary in April. However, ACID has long been involved in resolving disputes, with a mediation panel chaired by a former High Court Judge and a countrywide network of mediators. ACID has handled 2,000 mediations and states that only a handful have gone on to court, as most result in royalty or licensing agreements. ACID's mediation campaign is supported by the Minister for Intellectual Property.

[ITNews](#) (Rome) (April 7, 2008)

## Other International Mediation Developments

- **U.K.** market becoming saturated with retired judges seeking to become mediators and arbitrators, [The Lawyer](#) (March 24, 2008) (Subscription Required)
- **Czech** dispute resolution program begins for consumer complaints, [Prague Post](#) (March 19, 2008)
- Mediation spreading to state of Andhra Pradesh, **India**, with mediation centers being set up in 11 of 23 districts, [Hindu](#) (March 23, 2008) (Subscription Required)
- Bar association opposes judicial involvement in mediation in Delhi, **India**, [Hindustan Times](#) (March 16, 2008) (Subscription Required)
- Chief Justice of **India** encourages mediation at conference on Alternative Dispute Resolution to bolster public confidence in judicial system, [Howrah News Service](#) (March 29, 2008)
- Commercial mediators being trained in **South Africa** to respond to new Companies Bill and provide better alternative to arbitration, [AllAfrica.com](#) (March 25, 2008)
- Victoria's Office of the Small Business Commissioner is unique in **Australia**, using mediation to resolve over 4,000 disputes in five years, including many franchisee-franchisor conflicts, [Herald Sun](#) (May 1, 2008) (Subscription Required)
- Australia funding pilot community mediation programs in **Fiji, Kiribati, Samoa, Solomon Islands, Tonga, Tuvalu** and **Vanuatu**, [Radio New Zealand International](#) (March 19, 2008)
- Trial lawyers are becoming scarcer in the **Philippines** due to high demand for tax and corporate lawyers, resulting in the judiciary putting greater emphasis on court mediation programs, [Inquirer.net](#) (May 6, 2008)

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# MEDIATION NEWS

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MARCH 2008

## CASES & RESOLUTIONS:

### Counsel in Contempt for Breaching Mediation Confidentiality

Despite acknowledging error and offering a formal apology, counsel for plaintiff in [Williams v. Johanns](#) was found in civil contempt by the U.S. District Court for the District of Columbia for filing a pleading containing statements made in mediation. The court held a show cause hearing and ultimately imposed a nominal fine, noting the importance of confidentiality in the mediation process.

[Williams v. Johanns](#), 2008 WL 36633 (D.D.C., January 2, 2008) (Subscription Required)

### Utah Supreme Court Upholds Mediation Confidentiality, Seals Record, Recuses Trial Judges

The Utah Supreme Court in [Reese v. Tingey Construction](#) reversed the trial court's order requiring counsel for a party to be deposed to determine whether the parties had orally agreed to settle during mediation, based on state law prior to the Utah Uniform Mediation Act taking effect on May 1, 2007. The Court emphasized the importance of confidentiality to the mediation process, noted that the limited statutory exceptions to mediation confidentiality were not met, and rejected the lower court's notion that mediations contain both confidential and non-confidential portions and that counsel could be required to testify about the non-confidential aspects. The Court stated that parties are free to enter into oral agreements during mediation, but that a written agreement – even if just an email exchange – is needed for a party to obtain judicial assistance enforcing the settlement agreement, since the mediation is confidential. The Court criticized both the trial court and parties for freely discussing mediation communications in the litigation, sealed portions of the record containing confidential mediation information, and ordered any trial judges who had reviewed confidential information to recuse themselves from further proceedings.

[Reese v. Tingey Construction](#), No. 200060594 (Utah, February 1, 2008)

### New York Court Permits Post-Mediation Evidence of Settlement Agreement from Mediator

In litigation over an alleged written settlement agreement, a New York court in [Arben Corp. v. N.Y.S. Thruway Authority](#) upheld the confidentiality of mediation and settlement discussions relating to the underlying dispute, but permitted post-mediation evidence from the mediator (who had become a paid consultant to the claimant, apparently to help enforce the purported settlement agreement) about whether or not a settlement agreement had been finalized and then breached. The court based its decision on a written agreement to mediate between the parties and on New York law (CPLR § 4547) which codifies the common law "settlement privilege." The court concluded that negotiations concerning the underlying dispute between the parties were protected, but that CPLR §

### Mediation Quote:

"To begin with, everyone in conflict has a different perception of what happened, who caused it, and why. Each side tells stories that are accurate and honest – for themselves, as requests for communication, empathy, and authenticity. Both sides also tell stories that are inaccurate and dishonest – for each other, as literal facts, and as requests for surrender or acceptance of blame.

"In other words, everyone in conflict views the world from the inside out, and finds empathy and honesty difficult with those they detest or by whom they feel detested. Their willingness to accept responsibility is distorted by their need for sympathy and support, or their desire to make themselves appear right by making others appear wrong."

- Kenneth Cloke, *Mediating Dangerously: The Frontiers of Conflict Resolution* (Jossey-Bass 2001) at 28

## Other Cases & Resolutions:

**Months of Mediation Break Deadlock over Replacing Evergreen Point Bridge,** [Seattle Post-Intelligencer](#) (February 21, 2008) (Subscription Required)

**Mediation Between Plaintiffs Resolves Split of \$5 Million Insurance Policy,** [Virginia Lawyers Weekly](#) (January 28, 2008) (Subscription Required)

**Mediation Resolved 20% of Court Cases Under \$25,000 in Edmonton,** [The Edmonton Journal](#) (Alberta, Canada) (February 11, 2008)

**Mayor Appeals, Seeking Cover of Mediation Confidentiality Provisions,** [Detroit Free Press](#) (February 16, 2008), [Detroit Free Press](#) (February 19, 2008)

**Nevada Public Utilities Commission**

4547 does not block efforts to prove the existence of a settlement agreement. The court explained that the policy goals of encouraging settlements requires the ability to prove when a settlement agreement has been reached.

[Arben Corp. v. N.Y.S. Thruway Authority](#), No. 2008-036-308 (NY Ct. Cl., February 26, 2008)

## IRS and State Agency Successfully Mediate Tax-Exempt Status of Bonds

Using an Internal Revenue Service mediation program, the Rockdale County, Georgia Development Authority reached a settlement with the IRS in order to maintain the tax-exempt status of \$77 million of solid-waste disposal revenue bonds. Under the rarely-used IRS tax-exempt bond mediation program, an IRS employee with no previous involvement in the case acts as mediator, and a private co-mediator may be included at the option of the parties, as was done in this matter. The IRS mediation program was begun in 2003 and renewed last year.

[The Bond Buyer and SourceMedia, Inc.](#), (Georgia) (February 15, 2008) (Subscription Required)

## Sears Class-Action Settlement Approved after Two Years of Mediation

A state judge approved the settlement of class-action litigation against Sears after two years of mediation and negotiation, based on Sears' agreement to anchor over 3.9 million stoves, which have become so light that they sometimes tip and injure or kill users. Plaintiffs' counsel will receive \$17 million in fees, but the parties did not agree on the overall cost of the settlement, which plaintiffs' expert estimates as exceeding \$500 million, but Sears believes will be a small fraction of that figure.

[St. Louis Today](#) (February 20, 2008)

## Extensive Negotiations Shape Mediation Agenda

Many hours of mediation among some 35 parties succeeded in eliminating certain issues and establishing the scope of future substantive discussions over the Big Tupper Ski Project in the Adirondacks. The parties memorialized their agreement to participate in a voluntary and open-ended process with a written memorandum, and agreed on a date in March to begin the substantive mediation.

[Pressrepublican.com](#) (January 26, 2008); [The Adirondack Daily](#) (January 28, 2008)

## NEWS & INITIATIVES:

### EEOC Continues to Focus on Mediation of Discrimination Charges

The Equal Employment Opportunity Commission reported a 9 percent increase in job bias charges last year, for a total of nearly 83,000 private sector filings in 2007. In addition to non-monetary relief, the EEOC recovered over \$290 million for charging parties through administrative enforcement and mediation, compared with \$55 million through EEOC litigation. Employers continue to enter into Universal Agreements to Mediate with the EEOC, with the total rising by 15 percent during 2007, to over 1,200. The EEOC's National Mediation Program has a user satisfaction rate of 96 percent, meaning that nearly everyone using the program would do so again.

[Federal Information & News Dispatch, Inc.](#), (March 5, 2008) (Subscription Required)

## Mediation Requirement Streamlined for

**Staff Seek Mediation of Sprint's Complaint Against AT&T, TR's State NewsWire** (January 22, 2008) (Subscription Required)

**Mediation Begun after a Decade of Opposition over Plans to Widen Road,** [ABC Macon.tv](#) (Georgia) (February 29, 2008)

**Seattle SuperSonics Seek Court-Ordered Mediation with Precondition on Outcome,** [MSNBC](#) (January 17, 2008)

**Federal Judge Sends Oracle Claims of Software Theft by SAP to Mediation,** [Barrons.com](#) (February 14, 2008); [Washingtonpost.com](#) (February 14, 2008)

**Litigation on Hold for Mediation of Tainted Pet Food Case,** [Press of Atlantic City](#) (February 16, 2008)

**Seven-Figure Unpaid Wage Case against Target Ordered to Mediation,** [MySanAntonio.com](#), Texas (February 15, 2008)

**Court Requires Mediation over Ad Valorem Tax Assessments,** [Clarke County Democrat](#) (Alabama) (Subscription Required)

**Mediation Likely in Lawsuit against Jurisdictions for Tax Incentives Not Received,** [Independent Tribune](#) (North Carolina) (February 26, 2008)

**Derivative Litigation over Stock Option Grants Headed to Mediation,** [St. Louis Business Journal](#) (February 22, 2008) (Subscription Required)

**"Listening Session" to Determine Issues for Mediation,** [The Times Record](#) (January 23, 2008)

**Nine Month Mediation in Class Action against Oil Companies over Petroleum Vapors Ends without Settlement; Discovery Resumes,** [Madison County Record](#) (Illinois) (February 27, 2008)

**Litigation Continues after Mediation Unsuccessful over Sign Exception Permits in San Clemente,** [San Clemente Times](#) (February 21, 2008)

**Party Delaying Mediation Until Success Unlikely Might Be Punished by Adverse Cost Order per U.K.'s Technology and Construction Court in *Nigel Witham Ltd v. Smith*,** [Mondaq](#) (January 18, 2008) (Subscription Required)

## Other News &



## Florida Homeowners Associations

Statutory changes in Florida have streamlined the mediation process required prior to litigation of certain disputes between homeowners and members. The aggrieved party now can contact the other party directly with a written offer to mediate as set forth in the statute and propose a choice of five certified mediators. Seeking mediation in this way tolls the statute of limitations. If the dispute goes on to litigation or arbitration, attorneys' fees incurred in the mediation may be recovered by the prevailing party. But those who do not participate in the entire mediation process may not recover any attorneys' fees or costs.

[The News-Press](#) (February 28, 2008); [Fla. Stat. § 720.311](#)

## Idaho Introduces Mediation Confidentiality Legislation

Idaho recently introduced legislation to enact the Uniform Mediation Act (UMA) in order to establish confidentiality for mediation communications, with specified exceptions. Such legislation is intended to encourage greater use of non-judicial mediation by providing confidentiality protections that are uniform with the recent rules adopted by the Idaho Supreme Court for court-annexed mediation. The Idaho legislation also incorporates the United Nations Model Law on International Commercial Conciliation, which is a supplement to the UMA for international commercial mediations, unless the parties agree otherwise.

[Idaho S.B. 1261](#)

## Kentucky Legislation Would Require Med Mal Mediation and Shield Apologies

Mandatory mediation of all lawsuits involving professional negligence claims against health care providers (defined broadly) would be required by H.B. 8, which was introduced in Kentucky on January 23, 2008. The Kentucky legislation sets forth procedures for the mandatory mediation, including timing, selection of mediators, attendance, location and submission of materials. The mediator is required to submit a report to the applicable court on the outcome of the mediation. In addition, H.B. 8 would prevent apologies for any unanticipated outcomes due to medical treatment from being admitted in any litigation or arbitration as an admission of liability or other admission against interest; however statements of fault which go beyond apology would remain admissible.

[Kentucky H.B. 8](#)

## Alabama Again Introduces Mediation Confidentiality Legislation

Legislation has been introduced again this year in Alabama to add additional confidentiality protections to mediation, by providing that mediators in all mediations generally would not be required to testify or produce documents concerning mediation in any adversarial proceeding. Adding this testimonial immunity is intended to increase public confidence in mediation.

[Alabama S.B. 36](#); [Alabama H.B. 30](#)

## South Carolina Probate Courts Try Mandatory Mediation

A pilot program to evaluate mandatory mediation in South Carolina probate courts has been joined by 35 of South Carolina's 46 counties. A report on the success and cost effectiveness of the mediation program will be submitted to the South Carolina Supreme Court next January. A probate judge in a county which hasn't yet joined the program is leaning toward participation, due to the benefit of families being able privately to work out solutions to their concerns with the help of a neutral mediator, but is concerned about delays and costs that might result from adding a mediation step to the process (even though those are often the very attributes of mediation that generate enthusiasm).

[South Carolina Now](#) (February 23, 2008)

## Initiatives:

**U.N. Establishes Standby Team of Mediation Experts to Assist in Hot Spots**, [ReliefWeb](#) (March 5, 2008)

**Analysis of U.K. Mediation Data Suggests Cases in Mediation Becoming More Difficult as Negotiators Learn from Mediation**, [Lawyer](#) (January 21, 2008) (Subscription Required)

**Med Mal Rule Approved Requiring Mediation in Third Circuit of Illinois; Claims against Nursing Homes Covered**, [Edwardsville Intelligencer](#) (March 7, 2008)

**Many Health Care Providers Requiring Patients to Agree to Arbitration, Some Turn to Mediation**, [Philadelphia Inquirer](#) (February 10, 2008) (Subscription Required)

**County Prosecutor Candidates Clash over Appropriateness of Criminal Mediation**, [Athens Messenger](#) (Ohio) (February 29, 2008)

**Mediation Helps Parties in Major Insurance Disputes**, [Legal Times](#) (March 3, 2008) (Subscription Required)

**Mediation Offers Many Benefits in Resolving Elder-Care Disputes**, [Wall Street Journal](#) (March 2, 2008)

**Tiny Montana Mediation Agency Not Self-Sustaining, Being Shut Down**, [KPAX-TV](#) (February 17, 2008)

## **Two-Thirds of U.S. Bankruptcy Courts Now Use Mediation**

A full two-thirds of federal bankruptcy courts now have mediation programs in place and encourage use by the parties. The details of the court mediation programs differ, but most depend on voluntary participation by parties, even though the courts generally have authority to mandate mediation if necessary. Some bankruptcy courts have been offering mediation since the 1980s and the number of courts with programs continues to increase. The level of success has generally been high, with mediation of over 3,700 matters from one court since the program began in 1995, for example, and a settlement rate of 64 percent.

[CommunityDispatch.com](#) (February 28, 2008)

## **Federal Circuit Mediation Program Impresses**

The U.S. Court of Appeals for the Federal Circuit was the last federal appellate court to begin a mediation program, but in just two years is showing results in line with other circuit programs, despite the complexity of its specialized docket, which includes patent appeals. Last year the Federal Circuit's mediation program resolved 42% of the cases mediated.

[The National Law Journal](#) (February 11, 2008) (Subscription Required)

## **Co-Mediation by Doctors and Lawyers Begun for Med Mal Mediations**

A pilot project to pair up doctors and lawyers as co-mediators in an effort to resolve medical malpractice claims has begun at a Philadelphia suburban hospital. The productivity and healing potential of mediation is being emphasized over the possible monetary savings, as the program tries to reach better outcomes for the parties. Mediation training has begun for 30 doctors and lawyers to become mediators, which was eye-opening for many doctors who realized for the first time how hard it can be to deal productively with strong emotion and find common ground. Many of the lawyers had previous experience with mediation and are expected to take the lead initially in mediations.

[Philadelphia Inquirer](#) (March 4, 2008)

## **Businesses Encouraged to Use Dispute Resolution Clauses**

Companies are encouraged to include mediation or arbitration clauses in agreements covering their business dealings, including employment contracts, in order to avoid litigation. The widespread use of alternative dispute resolution clauses in most consumer contracts for health plans, car leases and insurance demonstrates that all businesses need to make sure their forms are updated with appropriate protections.

[Business Times](#) (January 11, 2008)

## **Hotel Association Urges Mediation Rather than Arbitration in Franchise Agreements**

In its updated standards for fair franchising, the Asian American Hotel Owners Association includes dispute resolution provisions which focus on mediation if informal direct negotiations are unsuccessful. The standards avoid binding arbitration unless mediation has not been successful and there is express agreement on the details of the arbitration process, including the identity of the arbitrator and location of the arbitration.

[Hotelinteractive.com](#) (January 14, 2008)

## U.K. Funding Increases for Workplace Dispute Resolution

U.K.'s publicly-funded Acas (Advisory, Conciliation and Arbitration Service) is to received an additional £37 million over the next three years to help it offer more mediation for early intervention in workplace disputes. Demand is expected to rise when statutory dispute resolutions procedures end.

[PersonnelToday.com](#) (February 11, 2008); [PersonnelToday.com](#) (February 6, 2008); [Acas](#)

## More Mediation Proposed to Enhance Scotland as World-Class Venue

In response to a call for comments on the consultation paper from the Scottish Civil Courts Review group, additional mediation has been suggested as a way to make Scotland into a world-class venue for resolving disputes. Public comments on the wide-reaching analysis are being accepted through March 31.

[The Scotsman](#) (February 11, 2008); [Scottish Civil Courts Review](#)

## Mediation Central to Civil Justice Reforms in Victoria, Australia

Australia's longest-serving attorney general is urging that mediation "take center stage" in the reforms of Victoria's legal system which are under way. The Victorian Law Reform Commission proposed introducing pre-action protocols, which may include mandatory mediation, in recommendations presented to the attorney general.

[The Australian](#) (March 7, 2008)

## Hong Kong Chief Justice Supports Mediation

Chief Justice Andrew Li promotes mediation as a complement to litigation, noting that Hong Kong has made steady progress in mediation, but has a long way to go to reach the maturity of mediation in common law jurisdictions. The Chief Justice also believes that legal aid should be extended to parties in mediation, since it is an effective alternative to litigation.

[World News Connection](#) (January 14, 2008) (Subscription Required)

## Other International Mediation Developments

- Mediation training workshops for judges and lawyers conducted at six sites around **Bangladesh**, [Independent-Bangladesh](#) (February 15, 2008)
- Online dispute resolution emerging in **India**, [Hindu](#) (February 23, 2008)
- Mediation center in Bangalore, **India** in first year resolves over half its 2,000 mediations; mediation demonstration held for judges, lawyers and public, [Daijiworld.com](#) (February 9, 2008); [Hindu](#) (February 9, 2008) (Subscription Required)
- High Court of the state of Karnataka, **India** will require all courts in the state to begin mediation centers, [Mangalorean.com](#) (February 9, 2008); [Hindu](#) (February 9, 2008) (Subscription Required)

- **India** plans to authorize over 6,000 rural mobile courts to engage in mediation, [Hindu](#) (February 1, 2008)
- **India** and **China** each send two teams to the 3rd ICC International Commercial Mediation Competition, [Indlaw.com](#) (February 15, 2008)
- Judicial personnel mediate first in **China's** People's Court, resolving 56% of civil cases by mediation, [China Daily](#) (February 29, 2008) (Subscription Required)
- **Nepal** upbeat about mediation after first year, with 16% of Kathmandu District Court's total docket settled, [Kantipur.com](#) (February 7, 2008)
- Response and recommendations for mediation process in **Kenya**, [AllAfrica.com](#) (February 8, 2008)
- Africa Centre for Dispute Settlement launched in **South Africa** for business and other disputes, with a focus on African heritage and values, [Business Day](#) (February 28, 2008)
- Mediation ending in public apology saves public official in **Australia** from criminal assault trial, [News.com.au](#) (February 15, 2008)
- Mediation increases by 10 percent over previous year in Queensland, **Australia**, and includes criminal cases, [Cairns Post](#) (February 8, 2008) (Subscription Required)
- **Fiji** Labour Ministry officials take exam seeking accreditation as government mediators, [Fiji Times](#) (February 8, 2008) (Subscription Required)
- Sixth mediation center opened in **Trinidad and Tobago**, [Trinidad & Tobago Express](#) (February 16, 2008)
- Eastern Caribbean Supreme Court Mediation Center established in **Nevis**, [Sun St. Kitts/Nevis](#) (January 23, 2008)

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JANUARY 2008

## CASES & RESOLUTIONS:

### Settlement Increases Company's Market Value by 70%

A \$130 million jury verdict in December motivated American Dental Partners Inc. to settle the breach of contract litigation through mediation, resulting in a 72% surge in the price of the company's stock after the settlement was announced. American Dental provides business services to dental practices, including PDG, P.A. which alleged that among other things American Dental refused to give dentists access to their own funds, paid itself unreasonable service fees, and withheld money for new equipment. The settlement agreement includes American Dental transferring leases and assets for 25 of 31 facilities, payment by PDG of \$19 million in future management fees, forgiveness by American Dental of a few million in accounts receivable due from PDG, among other details. The settlement is subject to the approval of secured lenders and requires the parties to enter into definitive agreements by a specified date.

[CNNMoney.com](#) (December 27, 2007); [Boston Globe](#) (December 27, 2007)

### "007" Sent to Mediation

The "slash-and-burn" litigation of 007's one-time alter ego Sir Sean Connery and his downstairs neighbor in a Manhattan town house has become "exceedingly burdensome" to the court; the judge has urged the parties to seek mediation to obtain goals not achievable through litigation. In addition, with litigation and arbitration between the parties dating back to 2001 over renovations to the building, including six lawsuits filed by Connery alone, the judge ordered that the parties must obtain the court's permission before filing any further litigation.

[People News](#) (December 29, 2007)

### Georgia Supreme Court Creates Mental Capacity Exception to Mediation Confidentiality

### Mediation Quote:

"Effective [mediation] practice reflects the skilled integration of a number of components – theoretical knowledge, attention to process, skills and practice experience, commitment, and above all, the realisation in action of certain essential if elusive personal attributes. . . . [T]hese attributes [are] the virtues of extraordinary patience; word sensitivity and power; personal maturity and authority; the ability to engage readily with people; dedication; and a curious and enquiring mind. In addition, . . . effective practice requires not only the capacity to make delicate judgments relating to the timing of interventions, but emotional awareness, and imaginative thinking that include[s] risk-taking."

- Marian Roberts, *Developing the Craft of Mediation: Reflections on Theory and Practice* (Jessica Kingsley Publishers 2007) at 215

### Other Cases & Resolutions:

U.S. Court of Appeals for Ninth Circuit Urges Mediation of Fifteen Year Battle over School Programs to Teach English in Arizona,

While emphasizing the importance of mediation confidentiality and urging caution, the Georgia Supreme Court in [Wilson v. Wilson](#) created an express exception to mediation confidentiality when a party tries to void a signed settlement agreement by asserting lack of mental competence. Although the divorcing couple who mediated without counsel present signed an agreement stating that all aspects of the mediation would be privileged and "absolutely confidential," the Court affirmed that it was permissible for the mediator to testify about the mental competence of the party who challenged the settlement agreement by asserting that he was depressed, bipolar, on several medications and did not remember signing the settlement or know it was legally binding. The Court stressed that there was no testimony given on the substance of the mediation or specific communications and that testimony was needed in order to protect the integrity of the mediation process and avoid an unjust result. The Court found it helpful that some courts treat an assertion that a mediated agreement is unenforceable as a waiver of confidentiality, which is in line with an exception in the Uniform Mediation Act (which has not been adopted in Georgia). The Court also noted that it was permissible for the mediator to draft the settlement agreement for the parties.

[Wilson v. Wilson](#), No. S07F1201 (Ga. Sup. Ct., Nov. 21, 2007)

## **Rhode Island Supreme Court Requires State Attorney General to Continue Mediation of Criminal Matter**

The Chief Justice of Rhode Island strongly encouraged the parties to continue mediating a contentious criminal matter over the objections of the state's Attorney General and despite the Court's own rules on mediation. Criminal charges arose from violence during a police raid on a Narragansett Indian smoke shop that was selling cigarettes on Indian land without charging state taxes. When the Governor appealed a ruling that he must testify about orders he gave to state police prior to the raid, the Rhode Island Supreme Court ordered the parties to mediate the entire criminal matter. After participating in a mediation session, the state Attorney General strongly objected to mediation as futile and inappropriate, pointing to the Court's rules that limit mediation to civil matters. But at a hearing in late October the Chief Justice stated that "[w]e weren't kidding" in the order and instructed the parties to continue with the mediation.

[The Providence Journal](#) (November 25, 2007)

## **Telecom Giant Mediates with U.S. Agencies to Avoid Prosecution**

Alcatel-Lucent agreed to pay \$2.5 million in fines to the U.S. Department of Justice and the U.S. Securities and Exchange Commission after mediations with the agencies, resolving bribery allegations involving sightseeing trips to the U.S. that Lucent allegedly provided to Chinese officials to secure purchase contracts.

[China.org.cn](#) (December 25, 2007)

## **Fiji Deregulates Telecom Industry Through**

[AP Alert - Arizona](#) (December 5, 2007) (Subscription Required); [KOLD News 13](#) (December 5, 2007)

**Judge Sets Stage for Mediation by Urging Developers to Review Issues Raised by Environmentalists and Neighbors and Agree on Scope of Mediation,** [Press Republican](#) (November 10, 2007)

**Federal Litigation Against Veterans Affairs Department for Data Breach Survives Motion to Dismiss and Is Sent to Mediation,** [National Journal's Technology Daily](#) (November 29, 2007)

**Parties Ordered to Mediate over Unfinished Florida Hockey Arena in Attempt to Avoid Foreclosure and Lien Trial,** [Bradenton Herald](#) (December 15, 2007)

**Judge Orders Mediation of Wrongful Death Claim by Murdered Rapper's Family Against Los Angeles,** [LA Times](#) (December 27, 2007)

**Parties Voluntarily Considering Mediation of Federal Litigation Alleging Massachusetts Town Pushed Out Disabled People,** [MetroWest Daily News](#) (November 15, 2007)

**Florida City and County Mediate Land Use Issues with Participation by Elected Officials in Open Meeting,** [Venicegondolier.com](#) (November 23, 2007)

**District Attorney and City Attorney Attempting to Mediate Law Enforcement Issue, But Stuck on Which Parties Should Attend,** [Victoria Advocate \(TX\)](#) (December 13, 2007)



## Mediation

In four days of negotiations, World Bank-appointed mediators helped Fiji government representatives and the management of several telecommunications companies reach agreement on conditions to deregulate the Fiji telecommunications industry, which had been run as a monopoly for decades. The agreement is subject to approval of the Fiji Cabinet and company boards.

[Fiji Times](#) (November 22, 2007)

## NEWS & INITIATIVES:

### Survey Concludes that Mediation Saves U.K. Businesses a Billion Pounds a Year

A survey by the Centre for Effective Dispute Resolution (CEDR) calculates that mediation in the U.K. saves businesses over £1 billion in legal fees, damaged relationships and lost productivity, at a cost of only £8 million in mediation fees. The survey concluded that there were about 3,700 mediations in the last year, which is up a full one-third since CEDR's 2005 survey. Over half of these mediations were conducted by only 35 individual mediators, with top mediators charging over £3,000 per case and earning over £280,000 a year. The survey also covered the experience and backgrounds of mediators, performance in mediation, ethical issues and perspectives on standards and regulation.

[Sourcewire](#) (November 12, 2007); [CEDR Survey](#) (November 8, 2007)

### World Bank Urges Mediation of Corporate Governance Conflicts

The Global Corporate Governance Forum of the World Bank Group's International Finance Corporation recently released a 60-page analysis strongly encouraging the use of mediation by corporations in resolving both internal and external corporate disputes. The paper discusses mediation approaches and obstacles, giving examples throughout. Among other things, the publication recommends that senior management and directors be trained in mediation techniques, that professional mediators increase their knowledge of corporate governance issues, that corporate professional organizations offer mediation services and training, and that codes of best practices recommend use of mediation.

[Webwire](#) (November 9, 2007); [Mediating Corporate Governance Conflicts and Disputes](#)

### Arkansas Adopts Pilot Appellate Mediation Program

Arkansas will begin an appellate mediation program on a pilot basis in September 2008, pursuant to a December 13 decision of the Arkansas Supreme Court. According to rules on the Arkansas Judiciary's website, while

(Subscription Required)

**University of Colorado Resolves Sexual Assault Case after Mediation Involving President and Policy Changes, Plus Hefty Payment, [Rocky Mountain News](#)** (December 6, 2007)

**University of California in Mediation with City over Expansion Plans, [Santa Cruz Sentinel](#)** (December 28, 2008)

**Public Meeting Determines Issues and Format of Mediation Process Concerning Public Library in Maine, [The Times Record](#)** (December 6, 2007)

**Mediation over Alleged Violations of Ohio Public Records Law Began by Teleconference and Is Going Well, [Advertiser-Tribune.com](#)** (December 14, 2007)

**Three Canadian Soccer Associations Agree in Mediation to Form Unified Youth Soccer Organization for Edmonton, [Market Wire](#)** (November 30, 2007)

**Counsel in Successful Multi-Million Dollar Mediation Against Insurer Credits Extensive PowerPoint on Insurer's Bad Faith Negotiation Presented in Earlier Unsuccessful Mediation, [Daily Business Review](#)** (December 10, 2007)

**Litigation over Sale of Oscar Statuettes Goes to Mediation, [The Desert Sun](#)** (January 4, 2008)

**Kaufman Shoe Company Closing in 2000 Left Millions in Unpaid Severance, But Mediation May Clear Path of Other Litigation, [TheRecord.com](#)** (November

most civil cases will be eligible for the mediation program, participation is voluntary. A roster of appellate mediators is provided, and if funds are available the program will pay mediators \$225 an hour for up to eight hours per case. Most appellate deadlines can be stayed for 60 days pending mediation, and mediation is to be completed within 60 days after an order granting the stay.

[Arkansas Supreme Court Opinion](#) (December 13, 2007); [Appellate Mediation Rules; Program Background](#)

## **Iowa and Ohio Turn to Mediation in Home Loan Crisis**

Seeking pragmatic solutions to address subprime mortgage foreclosures, Iowa Attorney General Tom Miller hired the Iowa Mediation Service in September to establish a toll-free phone line and work with Iowa homeowners. The mediation service has received 4,100 calls and is working to settle over 500 mortgage cases. This is a familiar path for Attorney General Miller, who helped enact a state law in the 1980s requiring lenders to mediate troubled farm loans prior to foreclosure. The Iowa Mediation Service began in 1985 and resolved 21,000 cases during the farm crisis. In Ohio, the state Supreme Court is planning to implement pilot projects in three counties using mediation to resolve foreclosure disputes, while trial judges in two other counties in Ohio are working to develop mediation programs to reduce foreclosures.

[New York Times](#) (December 9, 2007) (Subscription Required); [Mansfield News Journal \(Ohio\)](#) (December 4, 2007); [The Enquirer](#) (January 3, 2008)

## **Florida Tweaks Insurance Mediation Program**

Florida's mediation program has assisted over 13,000 homeowners with disputed hurricane claims in recent years with an 80% settlement rate and it has been emulated in other states, but officials are tweaking the program to make it even more efficient. Issues being addressed include requiring notice be given by homeowners to insurers when reopening claims, such as when repairs cost more than estimated, and the state agency using safeguards in eligibility rules for mediation and sending consumer-friendly letters.

[Palm Beach Post \(Florida\)](#) (November 25, 2007) (Subscription Required)

## **Mediation Successful in Providing Consumer Restitution**

Missouri's attorney general recovered \$9.2 million for consumers through mediation in 2007, greatly exceeding the previous record of \$5.2 million in 2006. The attorney general's office handled about 100,000 contacts from consumers during 2007, including 36,000 formal complaints.

[US State News](#) (December 31, 2007) (Subscription Required)

## **Maine's Court Mediation Program**

22, 2007)

**Eleven-Year Legal Battle Between Minister and Presbyterian Church over Sex Discrimination Going to Mediation,** [CBC News Canada](#) (December 28, 2007)

**Dublin Soccer Club and Neighbor Willing to Mediate €35 Million Property Dispute at Urging of Judge,** [Irish Times](#) (December 11, 2007) (Subscription Required)

**U.K. Town Council Considers Mediation in £40 Million Dispute by Construction Services Firm for Lost Profit in Cancelled Management Project,** [Builder & Engineer](#) (November 16, 2007)

**Australian Supreme Court Refers GlaxoSmithKline Pharmaceutical Litigation to Mediation,** [PharmaLive](#) (December 18, 2007)

## **Other News & Initiatives:**

**Alabama's Requirement of Mediation Prior to Arbitration of Attorneys' Fee Disputes Is Both Criticized, Defended,** [Birmingham News](#) (November 12, 2007) (Subscription Required)

**Business ADR Conference Considers Diversity of Mediation Styles and Ethical Considerations, Along with Growth of Mediation,** [Maryland Daily Record](#) (November 12, 2007)

**Corporate Counsel Discuss Increasing Use of ADR, Inclusion in Contracts and Impact on Discovery,** [The Metropolitan Corporate](#)

## **Celebrates Thirty Years**

Court-annexed mediation in Maine began as an experiment in small claims court thirty years ago, but has become an "inextricable part" of the framework of the court system, according to a Maine Supreme Judicial Court Justice. Last year 150 court mediators conducted over 5,000 family and small claims mediations.

[Fosters.com](#) (November 10, 2007)

## **Senator Inhofe Suggests Mediation for Poultry Waste Dispute, Includes Related Provision in Farm Bill**

With litigation continuing by the Oklahoma Attorney General against numerous poultry companies in the state, U.S. Senator Inhofe (R-OK) is seeking common ground through mediation. Specifically, Senator Inhofe successfully included an amendment which would encourage long term solutions for poultry waste in the major Farm Bill (H.R. 2419) which passed the Senate on December 14.

[Tulsa World](#) (December 15, 2007); [Associated Press](#) (December 15, 2007)

## **Hopi Reservation Begins Mediation Program with Federal Support**

A mediation group funded by a three-year \$300,000 federal grant has been formed on a Hopi Reservation, with the goal of being a role model for other Native American reservations. The concept was developed by the late chief justice of the Hopi Appellate Court. A group of nine has received training in mediation tailored to fit Hopi needs and traditions.

[The Independent](#) (January 3, 2008)

## **Mediation Gaining Momentum in Israel**

Mediation in Israel has developed momentum over the last year, since the Justice Minister approved implementation of a mandatory court-annexed mediation program to begin in March 2008. The pilot program in the magistrate courts of three cities will require parties in civil cases above a certain size to participate in a mediation session prior to going to trial. The court is proceeding carefully with the mandatory program, and is seeking to learn from mediation programs in courts around the world, noting that there are substantial differences in approach between common law jurisdictions (such as the U.S. and U.K.) and civil law jurisdictions (such as Continental Europe).

[The Jerusalem Post](#) (December 5, 2007)

## **Australian Agency Uses Mediation to Assist Small Businesses**

[Counsel](#) (January 2008)

**Increase in Condo and Homeowner Associations Results in More Complaints and More Mediation by Maryland Attorney General's Office,** [Southern Maryland On-Line](#) (December 3, 2007)

**Run-off Insurance Event Suggests that Mediation May Avoid Problems Experienced Using Arbitration,** [Business Insurance](#) (December 24, 2007) (Subscription Required)

**Mediation in U.K. Insurance Industry Analyzed, Especially Personal Injury Claims,** [Post Magazine](#) (November 15, 2007) (Subscription Required)

**World Halal Council (Which Pursues Uniform Certification of Products Meeting Muslim Dietary Laws) Elects New Chairman of Mediation and Arbitration Committee,** [The Times](#) (December 9, 2007)

The Victorian Small Business Commission uses its broad investigative powers and mediation to end unfair market practices and bullying of small businesses by larger companies. The Australian agency has increasingly focused on franchising relationships, along with retail tenancy disputes and other contract issues. The Commission encourages mediation as a way to resolve conflicts without necessarily ruining relationships. The Commission has dealt with 4,000 complaints since the office opened in 2003 and resolved about 80% before or at mediation. The Commission also encourages companies to avoid conflict by utilizing specified practices to sustain good working relationships.

[My Small Business](#) (December 17, 2007)

## Tonga Encourages Mediation During Law Week

The highlight of Law Week in Tonga this year was the prominence of mediation, according to the Chief Justice of Tonga. A mediation film shown every night on Tongan television was very popular and greatly increased knowledge about mediation among both lawyers and the public. With financial assistance from the World Bank, copies of the mediation video are being sent to every village and church committee in the country.

[Tonga-Now](#) (November 23, 2007)

## Other International Mediation Developments

- **China's** New Administrative Reconsideration Law Permits Government to Conduct Mediations in Administrative Appeals, [World News Connection](#) (December 19, 2007) (Subscription Required)
- **Chinese** Authorities Urge Mediation Service Providers to Develop Common Accreditation Benchmark, and Seek Increased Education about Mediation for Lawyers and Students, [South China Morning Post](#) (December 1, 2007) (Subscription Required)
- Chinese Government Establishes Cross-Sector Group to Study How to Promote Mediation in **Hong Kong**, [South China Morning Post](#) (November 25, 2007) (Subscription Required)
- The Asia Foundation and McConnell Foundation Are Expanding Program for Community Mediation across Twelve Districts in **Nepal**, [Earth Times](#) (November 26, 2007)
- **Indian** State of Tamil Nadu Assists Other States in Establishing Mediation Centers; Tamil Nadu Mediation and Conciliation Centre Moves Toward Collecting Fees from Clients, [Hindu \(India\)](#) (November 14, 2007)
- **Tamil Nadu** Chamber of Commerce and Industry Establishes In-House Arbitration Tribunal and Mediation Center, [Hindu \(India\)](#) (November 25, 2007)
- Year-Old Mediation Center in Bangalore, **India** Resolved 600 Cases in First Year with 75 Lawyers Trained as Mediators; "Mediation Week" to Be Held in February, [Hindu \(India\)](#) (November 27, 2007)

- In **Pakistan**, the Karachi Centre for Dispute Resolution Urges Business Community to Mediate Commercial Disputes, [Business Recorder](#) (December 6, 2007) (Subscription Required)
- Citizens Mediation Center in Lagos, **Nigeria** Mediates Thousands of Landlord-Tenant, Workplace, Family and Other Cases, [AllAfrica.com](#) (November 21, 2007) (Subscription Required)
- **Singapore** Resolves Confusion over Enforceability of Settlement Agreement when Judge Is Mediator, [Straits Times](#) (January 4, 2008) (Subscription Required)
- **Philippines** Spreads Mediation to Sarangani Province with New Mediation Center; Nationwide, 82,000 Cases Referred to Mediation in Six Years, [PIA Daily News Reporter](#) (December 4, 2007)
- **Fiji** Ponders Next Step after Court Rules Against Argument that Mediation Should Satisfy Arbitration Requirement in Labor Agreement, [Fiji Government Press Release](#) (December 20, 2007); [Radiofiji.com](#) (December 20, 2007)

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NOVEMBER/DECEMBER 2007

## CASES & RESOLUTIONS:

### **Largest Antitrust Settlement Reached in Mediation**

After five months of mediation, a settlement has been reached in which Visa will pay \$2.1 billion to credit card competitor American Express to resolve antitrust litigation. The U.S. Supreme Court held in 2004 that Visa and MasterCard rules preventing banks from issuing competing credit cards violate antitrust laws. The payments to American Express are to be made over time by Visa's member banks, with almost a billion dollars paid now and then \$70 million per quarter. This is understood to be the most ever paid in an antitrust matter, and resolves American Express's litigation against Visa's member banks. However, Discover Financial still has claims against Visa, and both American Express and Discover have ongoing claims against MasterCard.

[The New York Times](#) (November 8, 2007)

### **Mediation Resolves Land Dispute for Minnesota Twins Ballpark**

Two weeks of intense mediation between Hennepin County, Minnesota and land owners finally resolved the price for ten acres of land needed for a new Minnesota Twins stadium. The settlement avoids a November jury trial on the landowner's appeal of the \$23.8 million set in condemnation proceedings.

[AP Alert Minnesota](#) (October 13, 2007) (Subscription Required)

### **Senator Feinstein Offers to Mediate Mining Dispute**

U.S. Senator Dianne Feinstein (D-CA) offered to mediate between the City of Santa Clarita and Cemex over expansion of aggregate mining near the city, to see if a land trade or other solution could be found. The Senator, revealing options not available to regular mediators, suggested that if discussions are not successful she may introduce legislation in Congress.

## Mediation Quote:

"Each of us is trapped in a place, a time, and a circumstance, and our attempts to use our minds to transcend those boundaries are, more often than not, ineffective....[W]e think we are thinking outside the box only because we can't see how big the box really is. Imagination cannot easily transcend the boundaries of the present, and one reason for this is that it must borrow machinery that is owned by perception. The fact that these two processes must run on the same platform means that we are sometimes confused about which one is running. We assume that what we feel as we imagine the future is what we'll feel when we get there, but in fact, what we feel as we imagine the future is often a response to what's happening in the present."

- Daniel Gilbert, *Stumbling on Happiness* (Alfred A. Knopf 2006) at 125.

## Other Cases & Resolutions:

**Assault Charge Against Local Politician Resolved in Mediation by Apology, [The Daily Tar Heel \(North Carolina\)](#)**



[The Signal](#) (October 10, 2007); [LA Daily News](#) (October 10, 2007)

## **Punishment for Violating Mediation Order by Sending Counsel Alone Limited by U.S. Constitution**

Despite sending a lawyer with “full settlement authority” to a mediation, a Texas trial court found both the individual party and his law firm in contempt because the individual failed to attend the mediation. When a \$500 fine was not paid, the court barred the entire law firm from practicing before the court, even in the absence of notice of the fine or any hearing on the more serious sanctions. Applying an abuse of discretion standard, the appellate court in [In re Magallon](#) upheld the contempt finding and fine against both the party and counsel, but concluded that barring the entire law firm from practicing before the court without prior notice and an opportunity to respond violated the due process clause of the U.S. Constitution.

[In re Magallon](#), No. 09-07-438 CV, 2007 WL 2962934 (Tex.App., October 11, 2007)

## **Judge Orders Mayor’s Arrest for Failure to Appear at Mediation**

A county judge ordered the arrest of the mayor of a small town in Kentucky for failure to appear at a court-ordered mediation; the mayor also had failed to appear at an earlier hearing. The mayor is accused of assaulting a neighbor’s 15-year-old son in a dispute over fireworks, which could result in up to a year in jail. The boy and others waited over an hour for the mayor to appear at the mediation.

[The Cincinnati Post](#) (September 28, 2007)

## **Settlement Undone by Fraud Involving Prior Contradictory Statements**

A settlement reached in mediation based on plaintiff’s certainty about the identity of the truck that caused his injuries was set aside by a divided Alabama Supreme Court in [Billy Barnes Enterprises, Inc. v. Williams](#) when it turned out that plaintiff had made earlier exculpatory statements, the existence of which plaintiff and his counsel repeatedly denied until the day after the settlement was reached. Applying basic principles of contract law, the court found the existence of fraud even if the denials were innocent mistakes, so reversed the trial court and set aside the settlement agreement.

[Billy Barnes Enterprises, Inc. v. Williams](#), No. 1050183, 2007 WL 2812768 (Ala., September 28, 2007)

## **Alleged Fraud Insufficient to Void Settlement Agreement**

A federal court refused to set aside a settlement agreement reached in mediation based on alleged fraud in [Hughes v. Matchless Metal Polish Co.](#)

(October 26, 2007)

Bankruptcy Judge Orders Mediation over Ancient Redwood Groves of Pacific Lumber Co., [The Eureka Reporter](#) (October 24, 2007)

Class Action Against Ambulance Service for Excessive Charges Going to Mediation, [Spokesman-Review \(Spokane, Washington\)](#) (October 11, 2007) (Subscription Required)

Class Action Lawsuit Over Wages Ordered to Mediation, [Kansas City Business Journal](#) (October 12, 2007)

Federal Judge Gives City and Utility More Time for Mediation to Resolve Dispute and Rebuild Relationship, [Kalb.com \(Louisiana\)](#) (September 30, 2007)

After 14-Years of Litigation, Utility Agrees to Mediate with Residents It Flooded, [MyrtleBeachOnline \(South Carolina\)](#) (September 19, 2007)

Judge Returns to Mediation Three-Year Old Dispute with County over Reopening Tiki Bar after Fire, [Venicegondolier.com \(Florida\)](#) (September 14, 2007)

Two Towns Join Mediation with Hospital and State on Proposal to Relocate Hospital, [The News & Observer \(North Carolina\)](#) (September 27, 2007) (Subscription Required)

Oshkosh, Wisconsin and Developer Mediate Tax Dispute, [The Northwestern](#) (October 3, 2007)

Oracle Claims of Software Theft by SAP Headed to

Plaintiff, a self-employed jeweler, sued a manufacturer of metal polish containing silica and other defendants for his lung cancer, but did not accurately disclose his history as a smoker. Defendants settled prior to receiving requested medical records which contradicted plaintiff's statements about when he quit smoking. In refusing to void the settlement or impose other sanctions, the court concluded that plaintiff's actions did not amount to fraud, finding that defendants were on notice of potential evidence of plaintiff's continued smoking and of gaps in his medical records. The court noted that its deadline for mediation had not expired and might have been extended, but that the decision to settle in the absence of complete information was reasonable.

[Hughes v. Matchless Metal Polish Co.](#), No. 2:04-cv-485-FtM-29DNF, 2007 WL 2774214 (M.D.Fla., September 24, 2007) (Subscription Required)

## Subpoena of Mediator Upheld in New York

A New York appellate court upheld the subpoena of a mediator in a one-paragraph opinion in [Hauzinger v. Hauzinger](#), despite the confidentiality agreement signed by the parties. Noting that that parties had not been represented by counsel in the mediation of a separation agreement, the opinion explained that the issue before the court was whether the separation agreement terms were "fair and reasonable," so it was not an abuse of discretion for the trial judge to refuse to quash the subpoena. Moreover, the appellate court was not swayed by the confidentiality provisions of the Uniform Mediation Act, since New York has not adopted the Act and the court did not find it a matter of public policy.

[Hauzinger v. Hauzinger](#), 43 A.D.3d 1289, 842 N.Y.S.2d 646 (NY App. 4th, Sept. 28, 2007)

## NEWS & INITIATIVES:

### Litigation Survey Reveals Extensive Use of Mediation

An annual survey of hundreds of senior corporate counsel on litigation trends states that half of the companies settled all or the majority of their cases prior to trial or arbitration hearing. Mediation was used in settled matters about half the time or more by 50% of U.S. companies and by 75% of U.K. companies. In the U.S., use of mediation is notably higher in the Midwest and New England than in other parts of the country. Among industries, mediation appears to be used much more frequently in Retail/Wholesale, Financial Services and Education, and less frequently in Real Estate, Tech/Communications and Manufacturing. Overall, the number of lawsuits filed was down from the previous year, although the number of cases involving \$20 million or more is increasing.

[Fourth Annual Litigation Trends Survey Findings](#) (Registration Required); [Survey Data](#)

### Mediation Increasingly Used in Brokerage

**Mediation**, [Eweek.com](#) (September 26, 2007); [Bloomberg](#) (September 25, 2007)

**Grain Shippers to Mediate with Canadian National Railway Over Use of Railcars**, [Resource News International](#) (September 17, 2007) (Subscription Required)

**Italian Banks Seek Mediation over Soured Partnership Due to Derivatives Exposure**, [Forbes.com](#) (October 19, 2007)

**Indonesian Toll Road Users and Government Ordered to Mediate Increase in Tolls**, [Jakarta Post](#) (October 24, 2007) (Subscription Required)

**Son of Former Indonesian President Suharto Denies Fraud Scheme and Seeks Mediation**, [People's Daily Online](#) (September 17, 2007)

**New Zealand Claims from Police Anti-Terrorism Raids Sent to Mediation by Human Rights Commission**, [Stuff.co.nz](#) (October 30, 2007)

### Other News & Initiatives:

**Technology Disputes Benefit from Mediation Due to Choice of Mediators with Expertise and Speed of Resolution**, [Australian IT](#) (October 9, 2007)

**Mediation Provides Empowering Alternative to Litigation**, [New Jersey Law Journal](#) (November 2, 2007) (Subscription Required)

**Louisiana Insurance Commissioner Asks Insurers to Continue Paying for Hurricane Mediations even though Legal Requirement**

## Disputes

In the brokerage industry, where the norm of mandatory arbitration is being challenged by pending federal legislation and hearings, one alternative being used by more parties is mediation. The Financial Industry Regulatory Authority (FINRA) notes substantial growth in private mediation of brokerage disputes. Mediation is seen as a safer alternative to arbitration, since the parties retain control both in choosing the mediator and whether to settle at all. In addition, parties and attorneys agree that mediation can be used to test their cases and, in some instances, bring investor expectations back to earth. According to FINRA, about 80% of brokerage mediations do result in settlements, with mediations taking about four months compared to 13 months for arbitration. To promote mediation, FINRA offered discounted fees during October, in honor of Mediation Settlement Month.

[Wall Street Journal](#) (November 4, 2007); [AP DateStream](#) (September 28, 2007) (Subscription Required)

## Mandatory Med Mal Mediation Approved for Illinois County

Mandatory mediation of all medical malpractice cases was approved for Madison County by the Illinois Supreme Court, establishing the first rule of its kind in Illinois. The new rule is also considered unique by allowing parties to choose between lawyers and judges to mediate the case, although a judge trained in mediation will be assigned at no cost to the parties unless all parties agree on an alternate mediator who they will compensate. All mediators are required by the rule to file a report with the court stating whether the parties mediated in "good faith." Mediations must be completed within 90 days after the depositions of all plaintiffs and defendants.

[The Madison-St. Clair Record](#) (September 26, 2007)

## Federal Court in Pennsylvania Proposes Expanded ADR Program

After fourteen months experience with a pilot Alternative Dispute Resolution program, the U.S. District Court for the Western District of Pennsylvania is proposing to expand the program from cases assigned to four judges to nearly all cases before the court, beginning on January 1, 2008. Parties will continue to have a choice between mediation, arbitration, and early neutral evaluation. During the pilot program, the court found that 70% of the cases went to mediation, 20% to early neutral evaluation and only 3% to arbitration, even though the court pays the arbitrators' fees but the parties have to pay mediators and evaluators.

[Court Website](#); [The Legal Intelligencer](#) (October 30, 2007) (Subscription Required)

## Minnesota's Farmer-Lender Mediation Program Building on Success

For twenty years, Minnesota farmers have had a statutory right to mediate claims brought by creditors, who are required to send notice of mediation

Has Ended, [New Orleans Times Picayune](#) (September 29, 2007)

**Tax Court in Canada Willing to Mediate Income and Commodity Tax Disputes**, [Financial Post](#) (October 13, 2007)

**U.K. MPs Accuse Lawyers of Discouraging Mediation for Financial Gain**, [Inthenews.co.uk](#) (October 16, 2007)

**Successful Small Business Mediation Program in Victoria, Australia Has Handled 3,500 Disputes Since Founding in 2003**, [Smh.com.au](#) (September 12, 2007)

rights to debtors. The Farmer-Lender Mediation program administrator then sends a packet of mediation information, and this last year added a follow-up telephone call to debtors to answer any questions. While notices were up 16%, mediation requests by debtors were up by a full one-third with the added phone call, to nearly 1,000.

[Agri News](#) (November 6, 2007)

## **AAA Updates Mediation Procedures**

The American Arbitration Association has updated its mediation procedures, effective September 1. Among other changes are revisions of the duties and responsibilities of mediators, which emphasize party self-determination while permitting mediators to be evaluative. The revised procedures eliminate all filing fees by including AAA fees in the mediators' hourly rates, with a four-hour minimum. Mediator profiles and rates are provided online.

[LawFuel.com](#) (September 4, 2007); [AAA Rules Update](#)

## **Outside Mediators Best in Workplace Disputes**

A mediator who is independent, rather than on staff, and not identified with either side is a key qualification in resolving difficult workplace disputes. An outside mediator may more effectively address problems on both rational and emotional levels, by assisting the parties in viewing issues more clearly and helping them address strong feelings in a safe environment, as well as providing other benefits of mediation.

[Gulfnews.com \(UAE\)](#) (October 2, 2007)

## **Korea Promotes Mediation of Private Antitrust Disputes**

A Korean Fair Trade Mediation Board and a Fair Trade Dispute Mediation Council were established when amendments were made to the Korean Fair Trade Act in July and November. The Korean Fair Trade Commission's new procedures permit persons suffering damage from antitrust violations or unfair trade practices to file an application for mediation by the Council. If a settlement is reached in the mediation, the Fair Trade Commission will not impose additional penalties.

[Mondaq](#) (November 7, 2007)

## **Telephone Mediation Efficiently Resolves U.K. Personal Injury Claims**

Seeking to mediate high volumes of personal injury claims by telephone, London's InterResolve Group has completed a six-month pilot project with AXA Insurance. With mediations typically lasting less than an hour for both liability and damages issues, InterResolve reports an 88% settlement rate. Matters were resolved in an average of seven weeks with mediation, at an average cost of £175 per party, compared to 18 months and much greater cost

using existing claims processes.

[Legal & Medical](#) (October 8, 2007); [InterResolve](#)

## IFC Provides Mediation Assistance to Macedonian Chamber of Commerce

In order to provide better resolution of member disputes and improve the business environment through the use of mediation, the Macedonian Chamber of Commerce signed a memorandum of cooperation with the Alternative Dispute Resolution Program of the World Bank's International Finance Corporation. The agreement is part of an effort by Macedonia and neighboring countries to use mediation in the business sphere, with the greatest success thus far in Serbia, Bosnia and Herzegovina, where about 2,200 disputes involving 45 million euros have been resolved.

[World News Connection](#) (September 21, 2007) (Subscription Required); [IFC's ADR Program](#)

## Mediation Continues to Expand Throughout World

From Africa to Asia to the Americas, mediation continues to develop around the globe:

- The **Moroccan** branch of the NGO (non-governmental organization) Search for Common Ground has been in partnership with the Moroccan Ministry of Justice to foster mediation, including commercial mediation, and has just launched a new project to mediate family disputes through a call center.
- A United Nations official encourages mediation in **Angola's** justice system, relying on both tribal chieftains and NGOs.
- Mediation of business disputes is being encouraged in **Kenya** to avoid harming the economy due to court delays which sometimes exceed ten years.
- **Hong Kong's** government is promoting mediation and considers it a global trend; a mediation conference being held in Hong Kong in November.
- In **Singapore**, the Ministry of State for Health has begun a Medical Mediation pilot program to help aggrieved patients obtain clear explanations and fair settlements.
- Mediation has been formally instituted in **Tonga** this year, and the country has two mediators who have resolved three-fourths of their eight cases.
- In **Barbados**, a former high court judge urges Barbadians to turn to mediation rather than courts.
- The **Chickasaw Nation** is following other **American Indian** tribes in adopting mediation programs as more in line with traditional tribal wisdom than formal court systems.

[Magharebia \(Morocco\)](#) (October 18, 2007); [Angola Press Agency](#) (October 23, 2007); [AllAfrica.com \(Kenya\)](#) (October 2, 2007); [World News Connection \(Hong Kong\)](#) (October 13, 2007) (Subscription Required); [Channel NewsAsia \(Singapore\)](#) (October 20, 2007); [Matangi Tonga](#) (September 24, 2007); [Cbc.cc \(Barbados\)](#) (October 18, 2007); [Tulsa World](#) (October 23, 2007) (Subscription

Required)

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SEPTEMBER 2007

## CASES & RESOLUTIONS:

### **Ninth Circuit Concludes Party Put on Notice by Information Despite Mediation Confidentiality**

Defendant was put on notice of the amount in controversy for purposes of the deadline for removing the case to federal court, even if plaintiffs' letter providing the information was covered by California's strict mediation confidentiality statute, according to the U.S. Court of Appeals for the Ninth Circuit in [Babasa v. LensCrafters, Inc.](#) The court held that the California mediation privilege did not apply because removal is an issue of federal law and that defendant neglected to assert a federal evidentiary privilege.

[Babasa v. LensCrafters, Inc.](#), 2007 WL 2331949 (9<sup>th</sup> Cir. August 16, 2007) (Subscription Required)

### **Federal Court Rejects Assertion of "Interest of Justice" Exception to Mediation Confidentiality**

Denying a motion seeking materials prepared for mediation, a federal magistrate in Connecticut ruled that defendant failed to show that the requested materials fell within the "interest of justice" exception in Connecticut's short mediation statute. Plaintiffs provided defendant with all releases and settlement agreements reached in an earlier mediation with third party defendants and their insurer, and disclosed that there were no other written or oral agreements or understandings. Defendant argued that production of communications before and after settlement was necessary to evaluate third party claims and uncover any potential prejudice of witnesses. The court reviewed the requested materials *in camera*, listed them in the opinion, and held that mediation confidentiality outweighed any interests served by disclosure.

[Bradley v. Fontaine Trailer Co.](#), Civ. 3:06CV62, 2007 WL 2028115 (D.Conn., July 10, 2007) (Subscription Required)

## Mediation Quote:

"During the proposal-swapping stage of traditional bargaining, reactive parties hurl epithets, engage in name-calling, and blame the other side for not getting the case settled. Out of a reactive state, they engage in behavior (make outrageous counterproposals) that drives the other side away and makes the result they give lip service to (settlement) harder to achieve. It is important for us to remember that, when negotiators react reflexively by slowing their movement or stopping movement altogether, they have lost control of their own creative processes.... [T]he mediator can help parties regain control over their own destiny."

- J. Anderson Little, *Making Money Talk: How to Mediate Insured Claims and Other Monetary Disputes* (ABA Section of Dispute Resolution 2007) at 92, 93.

## Other Cases & Resolutions:

**Johnson & Johnson Seeks Mediation in Trademark Suit Against American Red Cross Over Use of Red Cross Emblem,** [Reuters.com](#) (August 16, 2007)

**Parties in Cattle Fraud Lawsuits Begin Mediation; Criminal Charges Also Pending,**

## Texas Court Enforces Strict Terms of Agreement

A Texas appellate court reversed the lower court and held that a mediated settlement agreement was breached and liquidated damages appropriate when a tenant's check bounced, even though the landlord had held the check for weeks, the tenant offered a cashier's check in replacement and had had no other problems with the payment schedule. The appellate court also reversed on the issue of the completeness of the agreement, concluding that the mediated agreement did not lack essential terms by failing to address the refund of a security deposit and timing for vacating the premises.

[E.P. Towne Center Partners, v. Chopsticks, Inc.](#), 2007 WL 2405212 (Tex.App. August 23, 2007) (Subscription Required)

## Short Settlement Agreement Unambiguous and Enforceable

Despite one party's assertions that the short document signed at the end of the mediation was not intended to be a final settlement agreement, a North Carolina Court of Appeals upheld the agreement in [Capps v. Mecklenburg County](#), noting that signed agreements need not be thorough to be enforceable. The objecting party also asserted that the mediator, who filed an affidavit in the litigation, had said that strong confidentiality provisions would be negotiated and included in a subsequent settlement agreement.

[Capps v. Mecklenburg County](#), No. 03 CVS 10822 (N.C. App. August 21, 2007) (Subscription Required)

## Copyright Royalty Terms Go to Mediation

Sirius Satellite Radio and XM Satellite Radio Service are attempting to negotiate royalty deals with the Copyright Royalty Board, as their current arrangements have expired, but the parties are so far apart that they have turned to mediation. The radio service providers are proposing a new approach, with royalties tied to performance rather than overall revenues, and the rate per performance increasing as subscriber targets are met. The process is generating great interest within the broader industry and is being closely followed.

[SeekingAlpha](#) (August 13, 2007)

## Abuse Case Against Mormon Church Enters Mediation

The Church of Latter-day Saints has agreed to mediate a \$45,000,000 sex abuse case in which the church has already been ordered by the Oregon Supreme Court to produce detailed financial information for the first time since 1959. Larger battles over the rights of the church may be litigated in the absence of settlement. In addition to monetary damages, the alleged victim is seeking changes to the church's sex abuse policies in the

[Booneville Daily News](#) (July 11, 2007)

**Mediation Brings Some Success in Second Phase of Canadian Windmill Farm Dispute; Expected Length of Hearings Reduced Significantly,** [Orangeville Citizen](#) (July 26, 2007)

**Dispute Over Allocation of Water for Kayak Park Opposed by Colorado Water Conservation Board Continues in Mediation, Set for Trial,** [The Durango Herald](#) (July 26, 2007)

**Rapper Kanye West and Daredevil Stuntman Evel Knievel to Mediate Multimillion Dollar Trademark Infringement Suit,** [Rap Basement](#) (July 11, 2007)

**Court Hearings in Dispute Between New Orleans School Districts Delayed Indefinitely for Mediation,** [The Advocate](#) (August 7, 2007)

**Court Order for Mediation Seen as Victory for Local Florida Housing Agency Resisting Federal Takeover by HUD,** [Miami Herald](#) (August 24, 2007) (Subscription Required)

**Missouri Judge Orders Mediation of Open-Meeting Dispute Among County Legislators,** [The Examiner](#) (July 19, 2007)

**Panel Investigating Toronto School District Recommends Mediation Between School Board Superintendent and Trustee to Heal Relationship; Parties Concur,** [The Star Toronto](#) (August 30, 2007)

**\$50 Million Real Estate Project in Australia, Delayed 18 Months by Opponents, Goes to Mediation a Second Time,** [The Southland Times](#) (July 16, 2007)

**Civil Fraud Suit Against Former**

mediation.

OregonLive.com (July 26, 2007)

## **City Council Turns to Mediation for Quick Resolution of Tax Dispute**

After ten months of litigation that cost the city of Ashtabula, Ohio over \$120,000, the City Council has decided to seek to mediate its tax dispute with the Ashtabula Area Board of Education, rejecting the alternative of binding arbitration as too time consuming and costly. The dispute involves \$1.3 million in property tax revenues lost by the School Board due to tax abatements granted to residents by the city.

[Star Beacon](#) (August 3, 2007)

## **Court Requires Fire Department, City to Mediate Merger Dispute**

In a dispute over the proposed consolidation of four local fire departments by the City of Stamford, Connecticut, a state court has ordered the dissenting fire department and the city to mediate, as set forth in a management contract between the parties. The court also required the fire department to post a \$5,000 bond to cover the city's legal costs depending on the outcome of the mediation.

[The Advocate](#) (July 10, 2007) (Subscription Required); [The Advocate](#) (August 23, 2007) (Subscription Required)

## **New Zealand Authority Finds Dismissal Unjustified for Post-Mediation Disclosures**

After a successful workplace mediation, the employee mentioned to a co-worker that the manager had attended with her son and had been in tears during the mediation. The employer learned of the conversation, alleged a breach of the mediation confidentiality agreement and terminated the employee. The New Zealand Employment Relations Authority concluded in [Plimmer v. Hawksbury Community Living Trust](#), CA 31/07 (Christchurch, March 28, 2007), that the employee's disclosure was inadvisable but did not breach confidentiality since there was no disclosure of the settlement discussions or the details of what had been agreed.

[Independent \(NZ\)](#) (July 18, 2007) (Subscription Required)

## **NEWS & INITIATIVES:**

### **Evaluating Mediation and Arbitration Clauses in Real Estate Contracts**

**Indonesian President Suharto Ordered to Mediation by Indonesian Court**, [Radio Australia](#) (August 9, 2007)

Other News & Initiatives:

**OECD Adopts Policy Recommendations to Ensure Better Consumer Access to Cost-Effective Dispute Resolution for E-Commerce, Including Cross-Border Transactions**, [OECD Recommendation](#) (July 12, 2007)

**United Nations Security Council Reaffirms Commitment to 2005 Resolution Regarding Peaceful Resolution and Prevention of Disputes, Including Use of Mediation**, [U.S. Federal News](#) (August 28, 2007) (Subscription Required)

**Croatia's Ministry of Finance Requests Proposals to Enhance Mediation Processes, Including Case Management, Recommendations on Mediation Law, and Development of Code of Ethics**, [Tenders Electronic Daily](#) (July 25, 2007) (Subscription Required)

Many residential real estate contracts include mediation or arbitration clauses in order to avoid drawn out, expensive litigation between buyers and sellers if a dispute arises, which may raise concerns about giving up future legal rights. Mediation clauses do not impact legal rights, and if the parties do not settle they continue to have rights to a jury trial, courtroom rules of evidence, and appeal. With binding arbitration these rights are waived and even a mistaken decision by the arbitrator is generally final and non-appealable. While mediators don't have the power to compel settlement, even when the parties don't reach agreement they at least may know better the position of their opponent. Real estate agents are not a party to the sales contract and so are generally not bound by mediation or arbitration clauses.

[Boston.com](http://Boston.com) (August 31, 2007)

## **North Carolina Encouraging Mediation of Criminal Cases**

North Carolina is fostering mediation of all types of criminal cases through new legislation to establish a mediator certification process and permit district attorneys to delay prosecution pending mediation. Enacted on August 19, the legislation applies to mediations conducted after the North Carolina Supreme Court adopts rules and regulations for training and certifying mediators, which the act requires by January 1, 2008. Community mediation centers are to assist in administering the criminal mediation program using volunteer or staff mediators. The act expressly provides confidentiality for work product and case files, as well as protecting conduct and statements made in mediation with listed exceptions that include threats, juvenile abuse, and evidence needed in felony cases that is not otherwise available. The act also provides that mediators in criminal cases are granted judicial immunity.

[North Carolina Session Law 2007-387](#)

## **New York City Expands Online Dispute Resolution**

New York City has agreed to use the online dispute resolution systems of Cybersettle, Inc. for the next three to five years, and expand the types of claims covered, following a three-year pilot project with Cybersettle which resolved two-thirds of the claims submitted, dramatically reduced claim cycle times, and reportedly saved the city many millions in administrative costs and legal expenses. Initially limited to sidewalk, roadway, traffic device, public school and some personal injury claims, the extended agreement will also cover property damage claims by individuals and businesses, subrogation claims and medical malpractice. Cybersettle's double-blind system permits each party to submit offers and demands confidentially; cases settle when the offer exceeds the demand or by automatically splitting the difference when the offer and demand are within a specified range of each other. If the mechanized process does not succeed, optional telephone facilitation is also available.

[Cybersettle.com](http://Cybersettle.com) (July 30, 2007); [GCN](#) (August 7, 2007)

## **Baltimore Increasing Mediation of**

## **Condemnation Disputes**

The Baltimore Development Corp. is increasingly turning to mediation to settle disputes in condemnation proceedings in order to avoid the costs and burdens of trials. Caseloads are up, especially due to Baltimore's "quick take" policy, which has sparked public controversy and judicial criticism. The City Solicitor has stated that Baltimore will cautiously continue the "quick take" program in appropriate circumstances, and is focusing more on negotiations if disputes arise.

[Baltimore Business Journal](#) (July 11, 2007)

## **Mediation Effective in Katrina Insurance Claims in Mississippi**

Two years after Hurricane Katrina, Mississippi mediation programs with different approaches are successfully resolving thousands of insurance claims. The U.S. District Court in Mississippi has reduced its Katrina caseload from over 1,000 to about 500 cases this year by encouraging prompt and fair resolutions, leading many parties to successfully pursue mediation without court order. In the 174 cases in which mediation was actually ordered by the court, the settlement rate was 49 percent. In a second program, the Mississippi Department of Insurance sponsored mediations in nearly 3,700 cases that were voluntarily mediated by the parties, resulting in an 83 percent resolution rate.

[Sun Herald \(Biloxi, MS\)](#) (July 31, 2007) (Subscription Required)

## **Mediation Better Option for Religious Groups**

A Huntsville, Alabama church and its presbytery opted for mediation in a dispute over church property that had gone from state to federal court and back. Potentially facing years of legal wrangling and damage to its public image, the presbytery suggested mediation and the parties successfully resolved the dispute, which involved underlying theological issues that caused the church to leave the presbytery with the disputed property. Religious groups are increasingly turning to mediation out of concern for public perception and to maintain consistency with their principles, as well as to avoid the costs and hassles of litigation.

[The Decatur Daily](#) (July 21, 2007)

## **Mediation Critical When Litigation Unaffordable**

Mediation is crucial for those unable to afford the risks and costs of litigation, according to a strongly worded editorial by British High Court Justice Gavin Lightman. However, mediation was set back by the appellate decision in [Halsey v. Milton Keynes General NHS Trust](#), EWCA (Civ) 576 (2004), which refused to order parties to mediate over their objections and required a litigant seeking costs for an opponent's refusal to mediate to carry the burden of proving the refusal was unreasonable. The importance of these issues is heightened by the government's limitation on

civil legal aid.

[TimesOnline](#) (July 31, 2007)

## **UK Using Mediation to Curb Gang Wars**

In its efforts to reduce gang violence and murders, the police force in Manchester, England is looking to Northern Ireland's use of mediation in the late 1980s which helped Catholics and Protestants break the cycle of retaliatory violence and ultimately settle their issues. The process under consideration involves using community members as mediators between rival gangs in a police-sponsored program, which is already under way in Birmingham.

[Manchester Evening News](#) (August 7, 2007)

## **Asian Mediation Association Forming to Address Commercial Disputes**

Mediation centers in Singapore, Hong Kong, Indonesia, Malaysia and the Philippines are joining together to form the Asian Mediation Association (AMA) in response to increasing trade and cross border activity among countries and businesses in the region. The AMA will pool resources and provide a regional infrastructure for conflict management and resolution. An AMA secretariat will be located at the Singapore Mediation Centre, where a memorandum of understanding forming the AMA was signed on August 17 at the 10<sup>th</sup> anniversary celebration of the Singapore Centre. The AMA hopes to expand to include China and India, as well as other Asian members.

[Channel NewsAsia](#) (August 17, 2007); [Business Times \(Singapore\)](#) (August 18, 2007) (Subscription Required)

## **Japan Upgrading Consumer Mediation Services**

Japan's Cabinet Office plans to improve mediation services for consumers harmed by illegal business practices and defective products by creating a new Alternative Dispute Resolution system at the National Consumer Affairs Center. After submission of a final report in September, legislation will likely be introduced to give the Center greater authority to conduct mediations and resolve matters, including authority to request companies to participate, present materials and execute agreements with consumers. Sufficient resources are also needed to ensure success, as the Center's workload is already heavy. This proposal reflects the gradual change in Japan's approach to consumer protection, which is moving from reliance on extensive regulation to greater enforcement by consumers through the legal system.

[Daily Yomiuri](#) (August 8, 2007) (Subscription Required)

## **China's General Secretary Affirms Civil**



## **Mediation System**

The importance of China's "people's mediation work," a civil reconciliation system in which publicly-elected local mediation committees mediate social contradictions and disputes out of court, was emphasized by General Secretary Hu Jintao in a recent speech at the Central Party School. Referring to that speech at a national conference on the people's mediation work, politburo member Luo Gan affirmed the great success achieved through mediation while stressing the need for institutionalization and standardization of mediation in China, including additional legislation. Luo Gan called on party officials at all levels to overcome any impediments and commit to the success of the people's mediation work.

[BBC International Reports \(Asia\)](#) (July 11, 2007) (Subscription Required)

## **Botswana Begins Court-Annexed Mediation**

Botswana's chief justice announced a new judicial case management system, which includes court-annexed mediation, in order to reduce attorney control over cases and shift the focus to the interests of parties and the delivery of justice. To reduce the huge backlog, judges will intervene earlier to control civil cases, and direct cases to mediation when appropriate. The initiative, co-sponsored by the United Nations Development Programme, the U.S. Embassy in Botswana and the Botswana government, is bringing experienced American judges to work with local judges.

[AllAfrica](#) (July 24, 2007)

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# MEDIATION NEWS

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JULY 2007

## CASES & RESOLUTIONS:

### California Court Reverses Judicial Exception to Mediation Confidentiality

A California appeals court overturned a judicially-created exception to California's mediation confidentiality statute in Wimsatt v. Superior Court. While noting that the result may be unfair, the court felt bound by precedent prohibiting judicial exceptions to California's broad statutory scheme protecting confidentiality. Wimsatt involved a legal malpractice claim by a personal injury plaintiff against his attorneys in the underlying personal injury case, asserting that his counsel made an unauthorized settlement demand, reducing the amount he ultimately was able to recover. The appellate court concluded that confidentiality shielded mediation briefs and related emails from disclosure. Interestingly, however, the court held that the actual conversation between counsel, in which the settlement demand was allegedly lowered, was not confidential as it was routine negotiation and not related to mediation, even though the conversation followed an earlier mediation and occurred in the context of whether to proceed with a second mediation before a different mediator. The appeals court recognized that its ruling against judicial exceptions might mean that by agreeing to mediate a party gives up any new claims that arise during mediation, so suggested that the California legislature may wish to revisit the underlying statute. Wimsatt v. Superior Court, No. B196903 (Cal. App. 2d Dist., June 18, 2007)

### Court Bars Deposition of Counsel about Disclosures at Mediation, But Hints Mediator May Be Considered

A U.S. District Court in Kansas prevented the deposition of opposing counsel about statements made during a mediation based on the fact that other individuals present in the mediation could provide evidence, so testimony from counsel was not the only means of obtaining needed information. The court noted in passing that mediation confidentiality might be an issue at some point, but was not yet ripe for decision. Possibly due to the compelling facts of the case, in which plaintiff was fired soon after being mentioned by a co-worker in the mediation as being able to corroborate the co-worker's claims of race discrimination, the court raised the possibility that even the mediator might be deposed if both parties had waived confidentiality by their

## Mediation Quote:

"The great problem today is that we have divorced our Yeses from our Nos. Yes without No is appeasement, whereas No without Yes is war. Yes without No destroys one's own satisfaction, whereas No without Yes destroys one's relationship with others. We need both Yes and No together. Yes is the key word of community, No the key word of individuality. Yes is the key word of connection, No the key word of protection. Yes is the key word of peace, No the key word of justice.

"The great art is to learn to integrate the two – to marry Yes and No. That is the secret to standing up for yourself and what you need without destroying valuable agreements and precious relationships.

"That is what a Positive No seeks to achieve."

- William Ury, *The Power of a Positive No: How to Say No and Still Get to Yes* (Bantam Books 2007) at 236

## Other Cases & Resolutions:

statements about what occurred in mediation, or other exceptions to mediation confidentiality were met.  
[Harris v. Euronet Worldwide, Inc.](#), 2007 WL 1557415 (D. Kan., May 29, 2007) (Subscription Required)

## **State Agency Representatives Lack Authority to Convert Mediation into Med-Arb**

A New York appellate court rejected a contractor's assertions that during a mediation the representatives of the New York City School Construction Authority had agreed to "binding mediation" but then refused to honor the "mediator's" determination. The court noted that the Authority's procedures allow only "nonbinding mediation" with written advisory opinions in cases that do not settle, and that the Authority has not provided for binding arbitration, so its representatives could not agree to a binding process.  
[Kafka Constr. v. New York City School Constr. Auth.](#), No. 6580/01 (NY App. 2d, May 29, 2007)

## **Court Vacates Conditional Settlement**

Applying basic contract law, a New Jersey appellate court held that no agreement existed when plaintiff added a condition (allowing a three-day period for attorney review) before signing a settlement agreement that had already been signed by defendant and the mediator. The new term resulted in a counteroffer, rather than acceptance of the agreement, so there was no settlement.  
[Kasperowicz v. Kasperowicz](#), 2007 WL 1201722 (N.J.Super.A.D., April 25, 2007) (Subscription Required)

## **Lawsuit Delayed to Allow Mediation**

A Texas court delayed litigation in a suit filed by the San Antonio Housing Authority against the developer of a \$48 million project and ordered the parties to mediation based on a mediation clause in their contract. The Housing Authority asserted that the developer waived any right to mediation by failing to respond to a settlement demand and informal document requests, but the court simply ordered the developer to provide all requested documents within 14 days, prior to a 30-day period for mediation.  
[San Antonio Express-News](#) (May 8, 2007) (Subscription Required)

## **Mediation Expected to Build Consensus over Seattle Bridge**

Washington state has hired two Colorado mediators to overcome roadblocks to replacing the Evergreen Point Bridge, which is vulnerable to severe storms and earthquakes. The project, which lacks full funding and a design, raises complex environmental, transportation, health and community issues and involves federal, state and local jurisdictions. A state law enacted in May requires mediation for the project, resulting in a mediation contract worth nearly \$500,000. A mediation progress report is required by August 1, and the mediators must submit a final plan to the governor and legislature in December.  
[Seattlepi.com](#) (June 26, 2007)

## **Singapore Settlements No Longer Automatically**

**Mediation Set in \$200 Million Litigation Involving Breach of Fiduciary Duty Against Attorneys for Misuse of Fen-Phen Settlement Funds,**  
[Lexington Herald Leader](#) (May 15, 2007) (Subscription Required)

**NASCAR and Kentucky Speedway Take Antitrust Dispute to Mediation,**  
[Msn.com](#) (June 17, 2007)

**After Taking Property By Eminent Domain, City Seeks to Mediate Compensation,**  
[Upstate.com](#) (May 31, 2007)

**Zoning Dispute Goes to Mediation in Michigan Court of Appeals' Settlement Program,**  
[The Ann Arbor News](#) (June 8, 2007)

**School Board and County Commissioners Again Turn to Outside Mediator, This Time Over \$15 Million Funding Issue,**  
[The Charlotte Observer](#) (June 17, 2007) (Archive Search Required)

**Multi-Faith Delegation of Mediators to Address Religious Dispute in India Between Sikh Sects and Dera Sacha Sauda,**  
[newKarala.com](#) (May 20, 2007)

**Dispute Over Future Location of World War II Aircraft Goes to Mediation in Malta,**  
[Times of Malta](#) (May 21, 2007)

**New York Times to Mediate Defamation Claim of Goldmining Company in Jakarta,**  
[ANT- LKBN Antara](#) (July 2, 2007)

## **Other News & Initiatives:**

**ADR Preferable to Litigation**

## **Enforceable as Judgments**

Singapore's High Court held that settlement agreements reached through mediation do not have the authority of court judgments, invalidating the court order a claimant's attorney obtained from a court registrar to enforce a settlement. Singapore's Subordinate Court promptly ruled that mediated settlements reached through the country's Primary Dispute Resolution Centre may be endorsed by courts in order to be enforced as judgments. Questions remain about the status of existing judgments resulting from settlements, as nearly 10,000 cases are mediated a year. [Straits Times](#) (May 3, 2007) (Subscription Required)

in Health Care Disputes, [American Medical News](#) (July 2, 2007) (Subscription Required for Full Article)

**U.K. Construction Mediation Groups Merge to Gear Up for Disputes from Projects for 2012 Olympics,** [Lawyer](#) (May 7, 2007) (Subscription Required)

**Judge in Thailand Urges Use of Court's Mediation Program, Which Has Shown Marked Success,** [Thai Press Reports](#) (May 9, 2007) (Subscription Required)

## **NEWS & INITIATIVES:**

### **Final Wave of 800 MHz Spectrum Licensees Begins Mediation; Post-Mediation Costs to be Borne by Licensees**

As part of the Federal Communication Commission's 800MHz spectrum reconfiguration process begun in early 2006, the third wave of public safety licensees is set to relocate and negotiate final rebanding agreements with wireless carrier Sprint Nextel Corp. It is estimated that, similar to waves one and two, approximately 85% of third-wave licensees have no rebanding agreement in place and will mediate with Sprint. The vast majority of rebanding agreements reached thus far have been achieved through the mandatory mediation program. In related action, the FCC released an order on May 30 which, among other things, denied licensees' petition to require Sprint to pay any post-mediation costs incurred by the parties. Licensees had asserted an unfair advantage to Sprint in the mediations and an incentive to appeal if Sprint did not have to pay the costs of post-mediation litigation. However, the FCC stated that it has no authority to require one party to pay another's litigation costs, and was satisfied with the cost allocation balance it set forth in earlier rulings in the process. [Mobile Radio Technology](#) (May 2, 2007); [TR Daily](#) (May 30, 2007) (Subscription Required); [FCC Order](#) (May 30, 2007)

### **Mandatory Med Mal Mediation Expanding in Rhode Island**

A successful pilot mediation program for medical malpractice cases in Rhode Island Superior Court is being expanded statewide and will be permanent. The program, which requires all med mal cases to go to mediation prior to trial, achieved settlement in about half its cases. Counsel for both plaintiffs and defendants support the program, especially in larger cases. In addition to saving time and money, successful mediations spare families from reliving their anguish at trial. The program also has made a difference in delays that have plagued Rhode Island, where med mal cases on average take over six years, and has reduced the need for legislative reform that many believe would harm those with legitimate claims. [Providence Business News](#) (June 25, 2007)

### **Illinois Court Requires Med Mal Mediation**

A new rule adopted by Illinois's Third Judicial Circuit Court requires early mediation by parties in medical malpractice disputes. The court committee obtained input in its drafting, and the rule has found modest approval from both lawyers and the medical community. Doctors are hopeful the rule will minimize cases filed in anger by parties without real understanding of the facts, while a leading attorney notes the benefit of conducting early mediation, before major investments of time and effort by the parties.  
[Telegraph \(Alton, Ill.\)](#) (June 19, 2007) (Subscription Required)

## **New Jersey Legislation Would Require Agencies to Promote Mediation**

New Jersey's Assembly Judiciary Committee has approved legislation requiring state agencies to adopt policies for alternative dispute resolution and to actively promote mediation and other forms of ADR in resolving disputes and avoiding litigation, based on 1996 federal legislation. The measure is supported by the state's Public Advocate Department, whose Office of Dispute Settlement would train agency staff in mediation skills. The Public Advocate noted significant benefits to New Jersey taxpayers from cost savings and improved government services, and issued a white paper citing a 2007 federal study showing substantial savings as a result of ADR programs, which also provide faster and often more mutually satisfying resolutions to disputes.  
[Public Advocate Press Release](#) (June 14, 2007); [Public Advocate White Paper](#) (June 14, 2007); [New Jersey Legislation](#) (June 11, 2007)

## **Toronto Judge Avoids Court Meltdown by Enhancing Mediation Programs**

Facing a potential "meltdown" of the Toronto court system, which is the third largest in Canada, the Senior Regional Justice introduced a three-phase mediation system to encourage parties to settle, and created specialized pools of judges to mediate in specific areas. Even with 30,000 civil lawsuits being filed annually, wait times for long trials are now down to one year, compared to three years in 2004.  
[Globe and Mail](#) (Toronto) (May 16, 2007) (Subscription Required)

## **Factors in Cases Suitable for Court-Ordered Mediation**

The decision by many states to permit trial courts to require litigants to mediate prior to trial, even if a party objects, may be based on the pragmatic calculation that most cases settle sooner or later – only 2% of civil cases actually reach verdict – so mandatory mediation save resources by helping parties settle more quickly and efficiently. However, not all cases are suitable for mediation, so getting input from counsel is useful. Factors favoring court-ordered mediation include cases where the parties have indicated they tried to settle but could not, the parties will have to deal with each other in the future, the costs of litigation are a significant portion of the amount in dispute, trial is likely to be long or complex, or all parties are represented by experienced counsel.  
[Michigan Law Weekly](#) (June 11, 2007) (Subscription Required)

## **AAA Updates Mediation Procedures for**

## **Residential Construction Disputes**

The American Arbitration Association issued a new set of mediation procedures and arbitration rules for residential construction disputes on June 1. The new procedures address construction specific issues of builders and homeowners, and update the AAA's previous procedures. In its new materials, the AAA recommends using mediation whenever possible, with arbitration as a fallback. No filing fee is required for mediation, as AAA fees are included in the mediators' hourly rates; conference rooms are rented separately.

[LawFuel.com](#) (June 4, 2007); [AAA Rules Update](#)

## **International Reinsurance Protocol Promotes Mediation**

An international reinsurance protocol for resolution of disputes between reinsurers and reinsureds has been launched by the CPR Institute (the International Institute for Conflict Prevention and Resolution), based on work with insurance companies in both the London and American markets. As in the U.S., mediation is emerging as a preferred method of resolution in the London insurance market, with insurers increasingly dissatisfied with the uncertainties, costs and delays of both arbitration and litigation. The International Reinsurance Industry Dispute Resolution Protocol sets out a comprehensive method for identifying reinsurance disputes early in the process and a short timeline for information exchange, quickly followed by negotiation and mediation as needed. Although parties do not waive rights to arbitrate or litigate, the protocol is expected to give them more control and minimize financial uncertainties, allowing companies to manage their exposure and reserves more effectively. The benefits of this general approach were highlighted by the insurance industry's response to Hurricane Katrina, where opting to mediate reinsurance disputes avoided the extensive litigation anticipated by many. However, the ultimate success of the protocol and this trend will depend on the extent to which underwriters incorporate the protocol's provisions into their contracts.

[Financial Times Limited](#) (May 31, 2007) (Subscription Required); [CPR Reinsurance Protocol](#)

## **U.K. Construction Mediation Robust, But Judges Disfavored as Mediators**

Interim results from an ongoing survey of U.K. construction litigation conducted by the Technology and Construction Court (TCC) and King's College, London, reveal that much mediation of construction disputes is occurring, but litigants are not interested in the TCC's pilot project to provide judges as mediators. Of the many cases settled, about one-third were resolved through mediation, with most of the rest settling by direct negotiations. Of the mediations conducted, four-fifths occurred at the parties' own initiative, generally with use of a limited number of well-regarded barristers and construction professionals as mediators. During the first year of the TCC pilot program, litigants have been willing to use judges as mediators only twice.

[Mondaq](#) (June 26, 2007) (Subscription Required or [Direct with Registration](#)); [The Lawyer.com](#) (July 4, 2007)

## **Need for Mediation in U.K. Land Use Planning**

Responding to an analysis of the U.K. land use planning process by a



government appointed reviewer in late 2006, commenters note that mediation has nominally been adopted for land use planning in papers, reports, and a limited 2005 pilot program, but the U.K. has not encouraged mediation in a meaningful way. The current system fails to provide incentives for narrowing issues or encouraging dialogue as parties prepare to argue before the authorities. Among other suggestions, emphasizing the final stages prior to appeal is advocated, where mediation may effectively resolve issues raised by authorities and avoid any appeal, along with a formal pre-appeal protocol.

[Planning \(UK\)](#) (June 27, 2007) (Subscription Required); [Smith Institute Report](#) (Ch. 2, pp. 24-33)

## **Mediation Takes Root in Poland**

Mediation has proven effective in Poland since being introduced only eighteen months ago, with more than 200 cases a month now being referred to mediation by civil courts. Looking to the experiences of other European countries and the U.S., a recent legal conference in Warsaw focused on the continuing need for education on the benefits of mediation, and noted that fees paid to professional mediators often fall short of the efforts spent resolving the dispute.

[Polish News Bulletin](#) (June 6, 2007) (Subscription Required)

## **Bangalore Celebrates First Mediation Center**

The Indian state of Bangalore is inaugurating its first mediation center in a ceremony to be attended by the Chief Justice of India, Supreme Court judges, and other dignitaries, in what is being called one of the most significant developments in the judicial history of the state. The mediation center is one of a handful in India. The center currently handles civil cases with 57 trained mediators and a success rate of nearly 50%. The High Court plans to train additional mediators from surrounding districts and expand to include minor criminal matters.

[Hindu \(India\)](#) (June 21, 2007) (Subscription Required)

## **China Emphasizes Voluntary Mediation**

China's Supreme Court President recently emphasized the importance of continuing to pursue mediation as an alternative to civil trials, calling for a step-up in mediation work. However, courts should not attempt to meet mediation quotas, but should ensure that mediation remains voluntary and fully respect the will of the litigants.

[World News Connection](#) (June 25, 2007) (Subscription Required)

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MAY 2007

## CASES & RESOLUTIONS:

### Court Denies Mediation Demand for Failure to Provide Documents

A Florida trial court denied a party's motion to compel mediation where that party had refused to provide documents about the dispute which led to the litigation. The contract between the parties required them to share equally the profits of a construction project and contained a provision requiring mediation, but the court reasoned that refusing to provide any financial documents would make the mediation useless. Although the order denying mediation was not final, the moving party appealed and the appellate court dismissed it on that basis. Interestingly, the parties noted at oral argument that they had entered into mediation, notwithstanding the lengthy litigation over whether mediation should be compelled. [Coastal Systems Development, Inc. v. Bunnell Foundation, Inc.](#), Nos. 3D06-982, 1188 (Fla. App. 3rd Dist., April 4, 2007)

### Inappropriate Mediation Conduct Lands Party in Jail

An obscenity-filled tirade at the beginning of a court-ordered mediation, along with other inappropriate actions, resulted in a Florida court jailing the creator of "Girls Gone Wild" for contempt. Threats to "bury" opposing counsel and clients were apparently sufficient to meet the exception to mediation confidentiality for threats of physical violence. [Settle It Now Negotiation Blog](#) (April 17, 2007)

### Settlement Agreement Invalid When Attorney Not Authorized

A New York state trial court vacated a \$150,000 settlement agreement that plaintiff's attorney signed after participating in mediation without the plaintiff. Plaintiff asserted that the attorney did not have authority because (unbeknownst to defendant) plaintiff had filed for bankruptcy, so only the trustee had actual authority to settle the personal injury action. The court found representations of authority made by plaintiff's attorney to defendant's counsel and the judge-mediator insufficient, and concluded that settling with an attorney in the client's absence is at one's "own peril." [O'Connell v. Paris Maintenance Co.](#), 34556/2002 (NY Sup. Ct., April 13,

## Mediation Quote:

"Ideally, we would resolve impasse by expending more effort in addressing the issues head-on, satisfying the parties' underlying interests, and finding the optimal solutions.... Often, however, the parties resort to less satisfactory, but sometimes successful, procedural methods, such as reality-testing tactics and negotiation gimmicks....[which] are an admission that the exploration of interests and the generation of settlement options have gone as far as they can go, and the only thing left is to compare the options on the table with the litigation BATNA [Best Alternative To a Negotiated Agreement] and make a choice."

- O. Russel Murray, *The Mediation Handbook: Effective Strategies for Litigators* (Bradford Publishing Co. 2006) at 117

## Other Cases & Resolutions:

**Allegations that Mediated Settlement Induced by Fraud and Duress Sufficient to Keep Litigation Alive**, [Irvine v. University of California](#), G036259 (Cal. App. 4th Dist., April 16, 2007)

**World Trade Center Developer and Insurers Mediating**

2007)

## **Informal Email Sometimes Binds Parties to Settlement**

Parties reached agreement in mediation and signed a handwritten term sheet that expressly stated the document was not enforceable and a formal written agreement was never signed after further negotiations broke down in Delyanis v. Dyna-Empire, Inc. Nonetheless, a U.S. district court in New York enforced the term sheet based on the fact that the parties had responded affirmatively by email that the mediator could report to the court that the case had settled. By contrast, in DeVita v. Macy's East, Inc., a New York state court refused to enforce the purported settlement in a comparable situation, relying on state law requiring agreements to be in writing and signed, and concluding that "confirmatory" emails were not a sufficient writing for settlement.

Delyanis v. Dyna-Empire, Inc., 465 F.Supp.2d 170 (E.D.N.Y. 2006) (Subscription Required); DeVita v. Macy's East, Inc., 828 N.Y.S.2d 531 (2d Dep't 2007) (Subscription Required); New York Law Journal (March 27, 2007) (Subscription Required)

## **Deposition of Mediator Improper Even When Mediated Agreement Unconscionable**

A property settlement agreement reached by a divorcing couple in mediation was overturned by a New Jersey court due to unconscionability based on the corrected value of business assets. However, an order to depose the mediator and examine his file was held inappropriate on appeal due to the importance of mediation confidentiality, which was a specific provision of the mediation agreement and subsequently embodied in the state's Uniform Mediation Act.

Addesa v. Addesa, A-4414-04T3 (N.J. App., April 13, 2007) (Subscription Required)

## **Canadian Music Society to Mediate with Artistic Director**

The Ottawa Chamber Music Society is preparing to mediate with its popular artistic director, Julian Armour, who recently resigned. The plan for mediation came out of a meeting of more than 300 concerned music lovers, and may include a longer-term role for the mediator to assist with other organizational issues.

The Ottawa Citizen (March 13, 2007)

## **NEWS & INITIATIVES:**

### **U.S. Legislation Would Provide Mediation for Immigrant, U.S. Workers**

Two pending pieces of federal legislation would offer U.S. and resident alien workers the option of mediation through the Federal Mediation and Conciliation Service (FMCS) in connection with certain job related disputes. The "Agricultural Job Opportunities, Benefits, and Security Act of

**Amounts Due from Collapse of Towers**, Reuters (March 12, 2007)

**Judge Named to Mediate Jailed Journalist's Refusal to Surrender Unedited Video**, FogCityJournal.com (March 8, 2007)

**Mediator Helps Toledo, Ohio Board of Education Resolve Issues and Set Long-Term Goals in Open Meetings**, Toledoblade.com (April 1, 2007)

**Mediation of Tri-State Water Dispute Continues in Alabama**, The Atlanta Journal-Constitution (March 30, 2007)

**Oregon Ski Area and City Council to Mediate Expansion Plans**, OregonLive.com (March 11, 2007)

**City and County Water Providers to Use Mediation Services of Kansas Water Office**, KC Community News (April 18, 2007)

## **Other News & Initiatives:**

**Washington State Legislation Would Require Mandatory Mediation of Medical Malpractice Claims**, Washington S.B.5910

**New Jersey Continues Pilot Program to Evaluate Presumptive Mediation in Municipal Courts; Supplemental Report on Status of Complementary Dispute Resolution**, 188 N.J.L.J. 66 (April 9, 2007) (Subscription Required); N.J. Supreme Court's 2004-2007 Report

**European Union Directive Proposing Mediation for Cross-Border Civil and Commercial**

2007," H.R.371/S.340, would establish "blue card" status, and also provide so-called H-2A workers with a private right of action, including the option to mediate, over issues relating to conditions of employment, provision of housing and transportation, and other specified rights. Appropriations of \$500,000 per year are contemplated for FMCS to conduct mediations without charge to the parties. The companion bills have been referred to the House and Senate Judiciary Committees. Second, the "Employee Free Choice Act of 2007," H.Res. 800, would amend the National Labor Relations Act to provide voluntary mediation by FMCS to labor organizations and employers attempting to establish an initial collective bargaining agreement. On March 1, the House of Representatives passed H.Res. 800 and sent it to the Senate.  
[H.R.371/S.340](#); [H.Res.800](#)

## **Hawaii Pursuing Eased Visa Restrictions for Foreign Mediators, Parties**

Seeking to become a Pacific hub for dispute resolution, Hawaii is considering a declaration to urge the federal government to relax its visa restrictions on both foreign mediators and parties seeking to mediate. The declaration notes the great diversity among Hawaii's residents and the shortage of skilled mediators who speak a foreign language, as well as the benefits of mediation in resolving disputes.  
[Hawaii H.R. 246-07](#) (Subscription Required)

## **Mediation Useful in Intellectual Property Disputes**

High litigation costs and huge damage exposures, as well as steady increases in case filings, make mediation an attractive alternative for resolving patent, trademark and other intellectual property disputes. Litigation costs can easily exceed a million dollars per case and may be much higher, with potential damages of hundreds of millions. Mediation allows creativity and flexibility in crafting solutions that meet parties' business concerns, rather than ending up with judge or jury decisions that can be unfavorable to all participants, along with public exposure that can result in loss of goodwill and reduced value to trademarks. Selection of experienced mediators can increase parties' confidence in the process, and early mediation can minimize the need for expensive experts and industry-specific consultants.  
[The National Law Journal](#) (April 23, 2007) (Subscription Required); [Inside Indiana Business](#) (April 6, 2007)

## **Virginia Program to Mediate Fee Disputes Underutilized**

The Virginia State Bar added a mediation option in 2004 to its program for resolving attorneys' fee disputes out of court, but lawyers still tend to go to court. The Virginia Supreme Court encourages use of the mediation program and has written to remind judges and ask them to make lawyers aware of it. Those who have used the mediation program note the toll on relationships is often eased, and in some cases the client relationship even continues.  
[Virginia Lawyers Weekly](#) (March 26, 2007) (Subscription Required)

**Disputes Gains Backing**, [US Federal News](#) (March 20, 2007) (Subscription Required)

**Upgrade Allows Mediation by Video Teleconferencing for Malaysian Court Cases**, [The Star \(Malaysia\)](#) (April 19, 2007)

**Nepal Sees Mediation as Best and Only Remedy for Large Court Backlog**, [The Rising Nepal](#) (April 9, 2007)

## **Worth Noting:**

### **New Conflict Resolution Education Website**

A content rich website offering best practices in conflict resolution education is now available at [www.creducation.org](http://www.creducation.org) for educators, policymakers, practitioners and students. The website includes worldwide developments in dispute resolution education and training, curriculum modules, administrative policy examples, and access to current and pending legislation.  
[Conflict Resolution Education Website](#)

### **Mediation Remains True Alternative to Litigation**

While mediation and arbitration were accepted decades ago as alternatives to litigation, over the years arbitration has moved much closer to litigation in terms of formality and costs, in the eyes of many corporate counsel. Mediation continues to be a real alternative, not only in terms of reasonable costs, but with other advantages that have grown in importance over time, including party control, confidentiality, focus on real interests, and preservation of business

## **Trend Away from Litigation Worries Some**

With fewer cases going to trial in Maine (only 1.9% last year), and even state judges championing mediation, some attorneys and judges worry that parties may effectively lose their constitutional right to a jury trial and that the justice system will not generate sufficient precedents to guide future disputes. Mirroring the national trend toward “private justice,” Maine has been on a fast-track since 2002 when the state instituted mandatory alternative dispute resolution for almost all cases. While civil litigants must pay for private mediation or arbitration before being permitted to proceed to trial, Maine’s trial judges continue to face one of the heaviest caseloads in the country. Another concern of critics is that fewer lawyers are obtaining trial experience, which has resulted in proposals in Maine to streamline the trial process for claims under \$75,000 and to begin a mentoring program for new attorneys. However, Superior Court Judge Robert Crowley, who pushes for settlements, responds that lobbyists are also probably losing their skills, but that if more lobbyists are needed in the future the skills will return.

[Portland Press Herald](#) (March 11, 2007)

relationships.

[The Connecticut Law Tribune](#)

(March 12, 2007)

## **Businesses Increasingly Seek Mediation in Canada**

Business disputes in Canada are increasingly turning to mediation, and more mediators are available to resolve them, according to the ADR Institute of Canada and others. Both attorneys and business people are recognizing that mediation can provide better and more subtle solutions to complex business disputes than going to court, as well as saving time and money. Full blown litigation is seen more and more as costly brinkmanship. Ten years ago, Canadian Supreme Court Justice George Adams shocked colleagues by stepping down from the bench to begin a mediation practice, but he has seen lawyers become much more sophisticated in planning for and using mediation over the last decade.

[Financial Post](#) (March 18, 2007)

## **First Set of Barristers’ Chambers to Launch Mediation Practice**

While many sets of chambers in England now have dedicated arbitration practices, Exchange Chambers, a top thirty set in London, is the first to develop a dedicated mediation group, with a third of its barristers becoming accredited mediators. The head of chambers stated the move is based on the dramatic increase in the number of cases being resolved in mediation.

[The Lawyer](#) (March 29, 2007)

## **Mediation Successes in Africa Lead to Search for Insights**

Mediation has led to resolution of many intractable armed conflicts in Africa during the past two decades, despite regular news of ongoing violence. Most civil wars in Africa have ended with negotiated settlements achieved through mediation. Efforts to learn what has worked and improve future mediations are under way at a conference of over thirty senior individuals experienced in mediation in Africa. The “Mediators’ Retreat” is being held the week of April 23 in Zanzibar by the Mwalimu Nyerere

Foundation and the Geneva-based Centre for Humanitarian Dialogue, with support from the government of Norway. Seeking to strengthen Africa's mediation capacity, the conference plans to examine and provide insight into current mediations, ongoing conflicts and post-conflict situations in Africa.

[AllAfrica.com](#) (April 26, 2007) (Subscription Required); [Mwalimu Nyerere Foundation](#); [Centre for Humanitarian Dialogue](#)

## **South African Business Institute Emphasizes Mediation**

South Africa's Institute of Directors, which represents business leaders and professionals, is urging the business community to use mediation to resolve commercial disputes, suggesting that opting to mediate and avoid the delays and costs of litigation may fall under a director's duty to act in the best interests of the company. The importance of mediation to potentially preserve relationships was also emphasized. The Institute, which established a mediation center last year, believes South Africa will embrace mediation, in part to avoid the substantial backlog of cases in the courts.

[AllAfrica.com](#) (March 30, 2007)

## **Karachi Mediation Center Serves as Model**

The Karachi Centre for Dispute Resolution (KCDR) is successfully resolving commercial disputes, which are increasing along with trade and business activity, according to Pakistan's former Chief Justice who is on the KCDR board. Established two years ago with help from the World Bank's International Finance Corporation (IFC), KCDR is now a non-governmental organization guided by both active and retired judges and business leaders. By reducing litigation expenses and delays, and freeing assets tied up in court, the Chief Justice notes that KCDR encourages market-based activity as intended by the IFC and serves as an example for the rest of Pakistan.

[Business Recorder](#) (April 14, 2007) (Subscription Required)

## **Bangkok Sets Up First Mediation Center**

Bangkok's first mediation center has been established in Din Daeng District by the Ministry of Social Development and the Northern Pranakorn District Court. With over 100 officials on site, the center will mediate civil, criminal and family disputes. The Ministry intends to set up mediation centers in every city district.

[Thai Press Reports](#) (March 23, 2007) (Subscription Required)

Feedback and news for potential inclusion in future newsletters may be sent to Mediation News Editor Keith L. Seat at [kseat@keithseat.com](mailto:kseat@keithseat.com). Copyright 2007 Resourceful Internet Solutions, Inc. and Keith L. Seat





MARCH 2007

## CASES & RESOLUTIONS

### **Neither Surgery Nor Incarceration Excuse Failure to Appear at Mediation**

Sanctions were imposed against two plaintiffs for failing to appear in person at a mediation as required by local court rule, even though one was incarcerated and the other was recovering from surgery and participated by telephone. Although plaintiffs' counsel attended with "full settlement authority," the court imposed the costs of the unsuccessful mediation on plaintiffs, including defendant's attorneys' fees, noting that plaintiffs neglected to seek any accommodation prior to the mediation or move to be excused from personal appearance by the court.

[Scott v. K.W. Max Inv., Inc.](#), No. 6:05-cv-683, 2007 WL 80851 (M.D. Fla., Jan. 8, 2007) (Subscription Required)

### **CEO's Presence Required for Full Settlement Authority**

Upset by a company representative appearing at a settlement conference with only limited authority, a federal magistrate ordered the CEO of a billion dollar company in St. Louis to personally attend the rescheduled settlement conference in Connecticut. Participants were to have full settlement authority, but the company's initial representative needed to call her boss to exceed \$10,000 in a civil rights case that the plaintiff was willing to settle for \$45,000. The order notes the disadvantages of decision-makers not being present to hear the discussion and emphasizes the value of settlement efforts in light of the "staggering" costs of litigation. The magistrate refused requests for the senior attorney handling the case or even the company's general counsel to appear in place of the CEO, even though the CEO had scheduling conflicts and had not been involved in the litigation. The magistrate also awarded attorneys' fees and costs to plaintiff.

[Kearson v. Schick-Wilkenson Sword](#), No. 3:05-CV-1422, 2007 WL 25499 (D. Conn. Jan. 3, 2007) (Subscription Required)

### **Court Requires Privilege Log of Mediation Documents**

Following a successful mediation and \$25 million settlement over the construction of a printing plant for the New York Post, the defendant is seeking indemnity of that amount from the subcontractors it hired to do the

### **Mediation Quote:**

"Wasted time, lowered morale, increased turnover, higher absenteeism, grievances, and lawsuits are just some of the outcomes that can stem from mismanaged conflict.... The first step is for leaders to become personally competent in dealing with conflict... [then] the stage is set for encouraging organizational improvement. Leaders become champions, models, and coaches. Champions take the initiative to set organizational wheels of action into motion. They encourage the review of current practices and develop plans for systematic improvements in conflict resolution."

Craig E. Runde and Tim A. Flanagan, *Becoming a Conflict Competent Leader: How You and Your Organization Can Manage Conflict Effectively* (Jossey-Bass 2007) at 187-88.

### **Worth Noting:**

#### **No Satisfaction in Taking Case to Supreme Court**

All the parties who vow to take their case all the way to the U.S. Supreme Court may benefit from the reflections of a plaintiff who was lucky enough to have her case chosen, but then discovered that the legal arguments "leave the person out" – the only time her name was mentioned was when her case was called. In fact, given the Supreme Court's focus on

work. The subcontractors are trying to obtain detailed information about apportionment of liability and whether the mediated settlement was reasonable, which the defendant is withholding as privileged. While stressing the importance of maintaining mediation confidentiality, a New York court has ordered the creation of a privilege log listing the documents and drafts prepared for mediation, but has not yet required the log to be turned over, even for review by the court. The court did question why the defendant mediated and settled the underlying claims without involving the companies it asserts are responsible, and noted that the defendant would somehow have to prove the reasonableness of the settlement to obtain indemnification. [NYP Holdings, Inc. v. McClier Corp.](#), No. 601404/04, 2007 WL 519272 (NY Sup. January 10, 2007) (Subscription Required)

## **Georgia County and Cities Mediate Over Legislation**

Unable to agree on proposed legislation for non-duplication of public services among five cities and a county in Georgia, the government bodies are mediating with a court-appointed mediator. Quorums of elected officials for each government entity are required to attend the initial presentation and remain available on short notice to ratify any agreement reached. Two days of mediation have been scheduled, but if no agreement is reached the mediator is to report back to the court.

[The Valdosta Daily Times](#) (February 4, 2007)

## **North Dakota Law Requires Cities to Mediate Zoning Dispute**

The neighboring cities of Fargo and Horace are considering extensions of their zoning jurisdictions which could overlap, and are trading accusations about how the conflict arose. If they cannot resolve the issue, North Dakota law requires the cities to first take their dispute to mediation before going on, if necessary, to an administrative law judge.

[The Forum](#) (February 28, 2007)

## **Canadian Lender Secures Claims in Mediation with Bankrupt U.S. Energy Company**

A complex two-day mediation resulted in agreement on all issues between a Canadian lender and U.S. Energy Biogas Corp., which is in Chapter 11 reorganization proceedings, subject to formal approval by the companies' boards and the U.S. bankruptcy court. The mediated agreement includes an allowed secured claim of \$99 million for lender with a payback schedule and mutual releases covering individuals affiliated with lender who used to work for debtor.

[CCN Matthews](#) (January 15, 2007)

## **University Turned to Mediation to Heal Racial Divisions**

The University of Virginia relied on a month of intensive weekly mediation sessions following a racially-motivated assault on a female candidate for

legal precedential issues, one Justice has plainly stated that "I don't care much about your particular case." Worse, the Court's decision can be inconclusive and lead to additional years of litigation. [Washington Post](#) (February 20, 2007) (Registration Required)

## **Other Cases & Resolutions:**

**Developer and County Pledge Best Efforts to Meet Mediation Deadline in Real Estate "Taking" Case,** [Pierce County Herald](#) (February 15, 2007)

**Federal Due Process and Rezoning Claims by Car Dealership Against Town to be Mediated,** [ThePilot.com](#) (January 26, 2007)

**Sexual Harassment Case Against Florida Department of Corrections Goes to Mediation,** [First Coast News](#) (February 16, 2007)

**NY Transmission Company Mediating with Environmental Groups Opposed to New Power Lines,** [News 10 Now](#) (January 24, 2007)

**Madonna's Film Production Company to Mediate Fraud Dispute with Competitor,** [International Herald Tribune](#) (February 26, 2007)

**Defamation Claim by Former Athletic Director Against University President Still in Mediation at Urging of Court,** [The Murray State News](#) (January 19, 2007)

**Sixty-Hour Mediation Leads to Agreement Between Nurses' Union and Two Nevada Hospitals; New Committee Will Meet Monthly on Sticking Point,** [The](#)

Student Council president that provoked widespread unrest at the school. The assault, which occurred four years ago, remains under investigation by the FBI. The mediation sessions were designed to address and heal racial divisions and were attended by both students and administrators. A psychiatrist and a professor of psychiatry led the process as co-mediators and worked to improve the Student Council electoral system and address other underlying issues of concern to the students, such as housing preferences which impact desegregation and inclusion on campus. While significant tensions were brought to the table, students who participated found the mediations memorable and helpful in resolving divisions.  
[Cavalier Daily University Wire](#) (February 27, 2007) (Subscription Required)

## **Justice O'Connor to Mediate Land-Rights Dispute**

Continuing the trend of former judges serving as mediators, retired U.S. Supreme Court Justice Sandra Day O'Connor will mediate a decade-old dispute between the U.S. government and over 1,000 heirs of former landowners of 36,000 acres in western Kentucky. Although \$3 million was paid when the land was taken for Camp Breckinridge in 1942, many owners expected to be able eventually to return to the land. The U.S. Court of Federal Claims preliminarily awarded \$30 million in 2004, which approximated the profits the government received for oil, gas and coal discovered in the 1960s. The parties have consented to Justice O'Connor mediating the case, but the government has asked for ground rules and plans to appeal if a settlement is not reached.

[Lexington Herald - Leader](#) (February 16, 2007)

## **Mediation Allows Ball Clubs to Share Stadium**

The needs of a new semi-pro baseball team overwhelmed the capacity of the city stadium, leading to mediation among the four teams and groups using the stadium. While no one was thrilled about the outcome, all felt the resolution was the best possible under the circumstances, resulting in the city calling the mediation a success.

[SanLuisObispo.com](#) (February 28, 2007)

## **UK Reversal: Expert Statement Used in Mediation Not Privileged**

A joint statement used in mediation by the parties' experts in a construction dispute was held not to be privileged by the UK's Court of Appeal, reversing the Technology and Construction Court (TCC) in [Aird v. Prime Meridian Ltd.](#) Rather than considering the intent of the trial court, the appellate court focused on the fact that the court mandated the joint expert statement using a litigation form and that the experts had agreed to remove the "without prejudice" designation. The Court of Appeal explained that a joint expert statement could only be ordered for litigation under the court's rules and so would not be privileged even though it was used in mediation.

[Aird v. Prime Meridian Ltd.](#), [2006] EWCA Civ 1866 (Ct. of App. Dec. 21, 2006)

[Associated Press](#) (February 8, 2007)

**Religious Leaders Use Mediation to Address Crisis in Liberian Legislature,**  
[AllAfrica Global Media](#)  
(February 7, 2007)  
(Subscription Required)

## **Other News & Initiatives:**

**California's Proposed Water Quality Control Act Includes Mediation Provisions,**  
[California H.B. 1018](#) (February 22, 2007) (Subscription Required)

## **Museum to Mediate Return of Aboriginal**

## **Remains**

With a court battle looming in London, the British Natural History Museum has agreed to mediate whether it may take samples before returning nineteenth century remains of Tasmanian aborigines to Australia. Aboriginal leaders view such testing as a desecration of the remains.

[ABC News Online](#) (March 1, 2007)

## **NEWS & INITIATIVES:**

### **ABA Mediation Quality Task Force Focusing on Users**

The Task Force on Improving Mediation Quality of the American Bar Association (ABA) Dispute Resolution Section, which was established in August 2005, has met with focus groups of high-end commercial mediation users in ten major cities in the U.S. and Canada. The participating users of mediation – ninety percent of whom were attorneys – discussed what they look for in mediators and mediation. Users want improved information for making more informed choices among mediators. Many users want mediators to do more than shuttle between parties to get to a dollar figure; they want their clients' emotional needs addressed by creative and intuitive mediators, along with reaching settlement. While users split on whether it is helpful for mediators to express opinions or render evaluations, many want vigorous reality testing and suggestions of ideas for resolution. Many also want mediators to thoroughly prepare by talking with counsel in advance of the mediation about substantive issues relating to key interests, the parties' backgrounds, the "real issues," and what may stand in the way of settlement, as well as the procedural matters of who will attend, memos, timing and process. The Task Force plans to use the guidance from the focus groups, along with information from mediators and mediation organizations, to provide practice guides in order to improve mediation quality, build users' confidence, and increase use of mediation in commercial disputes.

*Just Resolutions* E-newsletter (ABA Section of Dispute Resolution, February 2007)

### **Advocacy Ethics Bar Same for Mediation and Negotiation**

An American Bar Association (ABA) ethics opinion last spring concluded that a lawyer's obligation to be truthful when representing a client is the same in a private mediation caucus as in direct negotiations. In short, whether in mediation or other negotiations, an advocate may engage in negotiation "puffing," but may not make false statements of material fact to their opponent or to the mediator. While some urged that advocates' statements to a mediator privately should be held to a higher standard, the ABA concluded that statements in caucus need not be more truthful than negotiations generally, unless necessary to achieve the client's goals.

[Chicago Lawyer](#) (January 2007) (Subscription Required); [ABA Formal Ethics Opinion 06-439](#) (Membership or Fee Required)

### **Katrina Insurance Mediations Largely**

## **Successful**

On the first anniversary of the Mississippi mediation program for homeowner insurance claims resulting from Hurricane Katrina, the Department of Insurance shows an 83% success rate with more than 3,000 mediations conducted. Even when the parties chose to litigate, but were directed to a federal mediation program, 53% of more than a hundred lawsuits were resolved. The Mississippi Insurance Commissioner states the mediation program is one example of success in the disaster recovery process, with informal feedback indicating that mediating parties are satisfied. While the program has been limited to homeowners insurance, Mississippi is exploring whether the mediation program can be expanded to other types of insurance. [U.S. State News](#) (February 13, 2007) (Subscription Required)

## **Texas Proposes Mandatory Mediation in Health Plan Disputes with Doctors**

Recently introduced legislation in Texas would permit HMOs and Preferred Provider plans to seek mandatory mediation with physician groups in contract disputes, and avoid administrative penalties for not having contacts in place by mediating in good faith. The draft mediation provisions are quite regulatory, preventing mediation until sixty days after giving notice and requiring a "consensus panel" of three mediators (one appointed by each party and a third mediator to chair the panel selected by the party mediators, or the state's health commissioner if necessary), along with other requirements. The costs would be paid by the health plan initiating the mediation. The mediators would be required to report "bad faith" mediation to state authorities leading to significant administrative penalties. Bad faith is specified as failure to send a person with "full authority" who could reach agreement at the mediation, failure to provide information needed by the mediation panel, or insisting on a contract of adhesion. [Texas H.B. 664](#) (2007 Session)

## **Maryland Encourages Agricultural Mediation**

With a roster of twenty-four mediators, the Maryland Department of Agriculture is encouraging farmers to mediate disputes with neighbors, family, government agencies and lenders using the re-named Maryland Agricultural Conflict Resolution Service (Maryland ACRS). Mediation services are available at modest or no cost, depending on income levels, with a free initial consultation and shared costs thereafter. The USDA-certified program encourages agricultural workers to mediate disputes before they land in court. [Southern Maryland Online](#) (January 11, 2007)

## **Probate Mediation Increasing**

Disputes over estates and trusts are increasingly being mediated, based on state, county and court requirements, and the preferences of parties and individuals involved, as awareness grows of the value of mediation in resolving the emotionally difficult situations which often arise between related parties. Washington state, for example, statutorily requires all estate and trust cases to be mediated prior to litigation, while New Jersey and Hawaii allow the court to send any probate case to mandatory mediation. Los Angeles County requires mandatory mediation of all contested estates and

trusts, while San Francisco County relies on voluntary mediation. One open issue in many places is whether a will or trust may itself require that any dispute be mediated or arbitrated, since the beneficiaries did not negotiate or agree to those terms.

[New Jersey Law Journal](#) (February 2, 2007) (Subscription Required)

## **Hungary Expands Mediation to Criminal Cases**

Mediation was introduced in Hungary in 2002 for civil cases and has been expanded to criminal cases beginning in 2007. Hungary's criminal mediation program applies to crimes punishable by less than three years imprisonment, such as many property crimes and personal offenses, even including manslaughter. The mediation program is intended to reduce the impact of crime on both victims and offenders, and permit the victim an opportunity to confront the perpetrator and possibly reach closure. If the offender agrees to reparations or compensation for injuries and/or expresses regret which satisfies the victim, criminal charges will not be pursued.

Hungarian News Agency (January 3, 2007) [The Hungarian Portal](#) (January 17, 2007)

## **UK Maritime Law Conference Discusses Benefits of Mediation**

A maritime law conference in England reviewed various means of resolving disputes, with a Court of Appeal judge noting that the objective of every process is to identify the real issues and settle the case. The Civil Procedure Rules now provide great impetus for mediation, and commercial courts encourage – but do not require – mediation by delaying the litigation to give time for the process, which could reduce problems from settlements on the courthouse steps. But despite mediation's benefits and successes it has not yet become as popular as expected. Explanations ranged from reluctance of lawyers to lose substantial legal fees when cases settle to lack of regulation of the mediation profession, which is now being addressed by the Civil Mediation Council. While mediation can proceed quickly to resolve disputes, it was noted that arbitrations – which remain common in the maritime industry – usually take three or four months for small claims, with an extreme arbitration case lasting eleven years.

[Lloyd's List International](#) (February 14, 2007) (Subscription Required)

## **Hong Kong Court May Sanction Unreasonable Refusal to Mediate**

A pilot mediation program began in September 2006 in Hong Kong's Construction and Arbitration List High Court and is to continue through August 2008. Although participating in the mediation program is voluntary, if one party requests mediation the other party may face costs imposed by the court for unreasonably refusing to participate or not participating sufficiently. The court has complete discretion over whether to impose costs, but there is little basis on which to determine when the court may do so. Other courts, such as those in the United Kingdom, determine sanctions for failure to mediate based on whether a case is suitable for mediation, the merits of the case, whether other settlement attempts have been made, and whether the costs of or delay caused by mediation would be detrimental to the party.

[Mondaq Ltd.](#) (January 4, 2007) (Subscription Required)



## **China's Justice Minister Promotes Mediation**

China continues to expand use of mediation while seeking to standardize mediation processes. At the eighth anniversary of the Hong Kong Mediation Centre, Minister of Justice Wong Yan-lung said the Justice Department would promote mediation throughout the government and set up a task force to help develop consistent policies and regulations. Immediate plans include using mediation for land and personal injury matters to help reduce large caseloads. Discussing the benefits of mediation, Mr. Wong expressed confidence that mediation's value will become readily apparent for higher-end commercial disputes and generate a market in due course.

[South China Morning Post](#) (February 6, 2007) (Subscription Required);

[South China Morning Post](#) (January 9, 2007) (Subscription Required)

## **Nigerian Institute Trains Mediators**

The Mediation Training Institute of Nigeria completed a mediation training program in Johannesburg, South Africa, and plans to conduct additional programs this year in Nigeria, Ghana and South Africa. Other MTI trainings are conducted around the world. MTI noted the serious need for mediation and press attention in Nigeria due to ongoing crises.

[AllAfrica.com](#) (February 14, 2007) (Subscription Required)

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# MEDIATION NEWS

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## CASES & RESOLUTIONS:

### **Mediated Settlement Agreements in California Must Clearly State If Binding**

Emphasizing the importance of mediation confidentiality, the California Supreme Court in [Fair v. Bahktiari](#) reversed the [appellate court](#) and provided "clear drafting guidelines" requiring parties who wish their mediation settlement agreements to be binding to simply say so. Including a statement that the settlement agreement is "enforceable" or "binding" (or words to that effect) shows the intent of the parties and satisfies the California confidentiality statute that otherwise bars disclosure of mediation statements. The Supreme Court concluded that including an arbitration provision was not sufficient to show that a short handwritten document signed by the parties after two days of mediation was intended to be a binding settlement agreement rather than a mere list of terms to be included in a detailed formal agreement. When dispute arose over the language of the longer agreement, the parties did not return to mediation and began litigation over the enforceability of the arbitration provision. Litigation continues with the Supreme Court's remand of the case for further proceedings. [Fair v. Bahktiari](#), S129220 (Cal., Dec. 14, 2006)

### **Judge Dismisses Case to Encourage Mediated Solution**

Dissatisfied with the limitations of picking a winner and loser in litigation, an Oregon circuit judge dismissed a condemnation case without prejudice, after hearing testimony for two days, in order to encourage the parties to mediate. The judge emphasized the broad range of possible solutions available in mediation, although the city and the owners of 140 acres of farmland sought for recreational purposes had previously attempted mediation without success. The circuit judge offered his own services to mediate the dispute; the parties indicated interest.

[The Portland Oregonian](#) (December 22, 2006) (Subscription Required)

### **California Courts May Not Force Parties to Pay for Mediation**

Courts may not compel parties to attend and pay for private mediation, according to California's Fourth District Court of Appeals in [Jeld-Wen v. Superior Court](#), due to the importance of mediation being a voluntary process. The appellate court did note that parties may be ordered into

## Mediation Quote:

"[I]n recent years conceptions of mediation have expanded beyond the notion of the self-centered, rational pursuit of self-interest through distributive bargaining....

[N]egotiations are *always* about more than the pursuit of interests; they are also about identity and about relationships. The key to understanding these dimensions of what a negotiation is 'really' about resides in the stories that people tell about the conflicts or issues that bring them into the negotiation as well as how they describe the negotiation process itself." (H. Gadlin, A. Schneider & C. Honeyman)

*Andrea Kupfer Schneider & Christopher Honeyman, Editors, The Negotiator's Fieldbook: The Desk Reference for the Experienced Negotiator (ABA Section of Dispute Resolution 2006) at 30.*

## Worth Noting:

### **California Supreme Court to Hear Mediation Confidentiality Appeal**

The California Supreme Court will provide the final word on whether the defendant in [Simmons v. Ghaderi](#), B180735 (Cal. App. 2d Dist., Sept. 27, 2006), cert. granted (Cal. Nov. 6, 2006), is estopped from

mediation in smaller cases where they are not charged fees, and may be required to pay fees for mandatory settlement conferences. But in this six-figure multi-party construction dispute, the appellate court was troubled that the marginally-involved uninsured party which objected to mediation faced a settlement demand of less than \$3,000, but was sanctioned for violating a court order to attend mediation and pay its pro rata share of total mediation costs capped at \$50,000. The appellate court concluded that the lower court erred in requiring mediation and overturned the sanctions. [Jeld-Wen v. Superior Court](#), No. D048782 (Cal. App. 4th Dist., Jan. 4, 2007)

## **Breach of Mediation Confidentiality Prevents Testimony by Tainted Experts**

A Michigan federal court prevented plaintiff's experts from testifying at trial in [Irwin Seating Co. v. IBM](#), because plaintiff's counsel gave their experts the defendants' confidential mediation statements to read in preparing their reports. The experts claimed the confidential material did not influence them, but the court emphasized the importance of mediation confidentiality and the settlement privilege in deciding to block testimony by the experts. The court also sanctioned plaintiff by imposing attorneys' fees and costs. [Irwin Seating Co. v. International Business Machines Corp.](#), 1:04-CV-568 (W.D. Mich., Nov. 29, 2006)

## **California Statute Voids Agreements to Mediate Construction Disputes Out of State**

An agreement to mediate was held unenforceable by a California appellate court in [Templeton Development Corp. v. Dick Emard Electric, Inc.](#), due to a California statute preventing disputes involving California subcontractors on construction projects in the state from being "litigated, arbitrated or otherwise determined" outside the state. The contract between a California subcontractor and a Las Vegas general contractor for construction in California required the parties to mediate any dispute in Las Vegas, prior to arbitration or litigation. But when the subcontractor refused to mediate in Las Vegas and the contractor refused to mediate in California, the court permitted the subcontractor to proceed with litigation, since the arbitration clause was expressly conditioned on an initial effort to mediate. While the court recognized that mediation doesn't necessarily "determine" anything! , it was not clear to what process other than mediation the statutory phrase "otherwise determined" might apply. [Templeton Development Corp. v. Dick Emard Electric, Inc.](#), C052528 (Cal. App. 3d Dist., Oct. 25, 2006)

## **Intertwined Bankruptcy and Tax Cases Resolved in Mediation**

After a decade of disputes involving litigation in both state and federal courts, complicated by bankruptcy filings, the New York subsidiaries of Mirant Corporation appear to have finally resolved tax issues that will allow the company to emerge from bankruptcy in New York as it has elsewhere in the country. The underlying tax disputes were with the towns of Haverstraw and Stony Point and the local school district relating to two power generating plants. Ongoing negotiations ended with two long days of mediation that went into the weekend, with the parties signing a term sheet that is to result in a detailed final agreement.

relying on the confidentiality of mediation proceedings to avoid proof of an oral settlement agreement. The defendant litigated over facts from the mediation for fifteen months before claiming they were confidential.

### **Student Mediators Compete in National Competitions**

As mediation becomes mainstream, both college and law school students are engaging in national mock mediation competitions. Drake Law School in Des Moines, Iowa hosted both the National Law School Mediation Tournament in late November and the National Intercollegiate Mediation Competition earlier in the month. Unlike programs in which competition is focused on advocacy in mediation, these tournaments include competition among mediators; the college program even provides "national rankings" of students as mediators. The conferences are sponsored by the American Mock Trial Association and the International Academy of Dispute Resolution. [Aberdeen American News \(December 11, 2006\)](#) [\(Subscription Required\); Drake Law School News \(November 24, 2006\)](#)

## **Other Cases & Resolutions:**

**Contract Dispute Threatens Michigan's Health Care; Detroit Medical Center and Wayne State University to Mediate at Urging of Governor,** [Detroit Free Press \(November 10, 2006\)](#)

**Long Island County Proposes Mediation of Real Estate Dispute in Effort to Land CanonUSA Headquarters,** [Long Island Business News](#)

[The Journal News](#) (November 21, 2006); Harvard Law School Press Release (November 28, 2006)

## **Neutral Evaluation First Step in Wal-Mart Mediation**

A non-binding neutral evaluation was issued by a mediator after two days of proceedings in a dispute between Wal-Mart and Jacksonville, Florida officials over the desirability of a Supercenter due to traffic concerns and land development requirements. The mediator scheduled a third day of mediation and urged the parties to compromise on design and building concepts that could satisfy everyone. The mediation was initially sought by Wal-Mart after the local city council blocked development of its large retail center.

[The Florida Times-Union \(Jacksonville\)](#) (December 29, 2006)

## **Muslim Cleric, Airline Successfully Mediate in New Zealand**

The New Zealand Human Rights Commission illustrated the success of its dispute resolution program – which since 2002 has focused on mediation – by detailing a number of cases, one of which resolved claims against an airline by a Muslim religious leader who was removed from a plane as a security risk for spending ten minutes in the toilet in ritual ablutions before take off. The airline ultimately gave the cleric a written apology and financial compensation for missing his presentation at an overseas conference, and instituted cultural awareness training and other changes to prevent recurrences. Overall, the Commission reported that discrimination complaints are up 11% over the previous year.

[New Zealand Herald](#) (December 9, 2006)

## **Comedian Seeks Mediation to Offer Apology**

Former *Seinfeld* star Michael Richards has agreed to a face-to-face mediation with the African-American men he called racial epithets from the stage of a Los Angeles comedy club. Richards seeks to apologize and possibly offer compensation, and the parties hope the mediation will offer an opportunity for productive dialogue, resolution and healing.

[E! News](#) (December 1, 2006)

## **NEWS & INITIATIVES:**

### **Litigation Against Corporations Increasing Despite ADR**

A detailed survey of hundreds of senior corporate counsel on litigation trends around the world concluded that litigation continues to increase and occupy ever greater attention and resources, even with the growth of alternative dispute resolution. In ranking litigation exposure, respondents' top concerns were labor and employment, contract issues, regulatory issues, intellectual property and class actions. While class actions are primarily an issue in the United States, substantial increases in the United Kingdom were reported. The survey covered international arbitration, which respondents considered to be similar to litigation in both the cost and amount of time involved.

[\(December 6, 2006\)](#)

Dallas School District and Local Education Coalition to Mediate Civil Rights Issues with Help of Department of Justice's Community Relations Division, [Dallas Morning News \(December 21, 2006\)](#) (Subscription Required)

Denver Archdiocese Reaches Mediated Settlements of \$100,000 to \$150,000 in Four Sex-Abuse Cases, [Houston Chronicle \(November 14, 2006\)](#)

QMed and Alere Medical Settle Arbitration of Contract Dispute in Mediation, [MSN.Money \(December 8, 2006\)](#)

Fiji's Great Council of Chiefs Appoints Mediation Committee to Address Impasse Between Government and Military, [Fiji Times \(November 13, 2006\)](#)

Other News & Initiatives:  
New Justice in Malta Promotes Mediation in First Comments from Bench, [The Malta Independent \(November 10, 2006\)](#)

At Country's First Mediation Training, Fiji Labor Minister Urges Mediation and Encourages Expansion Beyond Labor Issues to Commercial and Political Disputes, [Fiji Times \(November 7, 2006\)](#)

Dubai Chamber of Commerce & Industry Organizes Mediation Conference with Assistance of Highly-Regarded Singapore Mediation Center, [AME Information \(December 8, 2006\)](#)

[Fulbright & Jaworski's Third Annual Litigation Trends Survey Findings](#)  
(Registration Required)

## **Mediation Gaining in Reinsurance Industry**

Arbitration has long been the reinsurance industry's primary avenue for resolving serious disputes, but increasing frustration with arbitration becoming more like litigation is causing many in the industry to move towards mediation. Mediation is now being used in many smaller reinsurance disputes, where its speed and efficiency impress parties.

[Business Insurance](#) (November 6, 2006) (Subscription Required)

## **E-Discovery Burdens Encourage Mediation**

The ongoing expansion of "e-discovery" – discovery of electronic materials in legal proceedings – has led to updated Federal Rules of Civil Procedure definitions that took effect December 1, 2006, with state rules of procedure generally following suit. The increased time, expense and aggravation involved, as e-discovery and procedures for production expand in litigation and even arbitration, provide an additional incentive for parties to use mediation. In mediation, parties often reach resolution with little, if any, formal discovery, or can come to consensus on limited information to be exchanged, often with creative help from the mediator. For example, parties might agree on techniques, such as informal sampling, that would be limited to use in the mediation and could not be used in any later litigation.

[The National Law Journal](#) (November 27, 2006) (Subscription Required)

## **Mississippi Considers Mediation for All Tort Claims**

All tort claims would be required to be mediated prior to being litigated under newly-introduced legislation in Mississippi. The legislation would toll the statute of limitations while the dispute is in mediation, and a civil action could not be filed until 90 days after mediation or written denial of claim. Only mediators who have practiced law at least five years could be certified and appointed by the state bar.

[Mississippi H.B. 158](#) (December 28, 2006)

## **State Consumer Hotline Refers Disputes to Mediation**

New Hampshire's consumer protection hotline, sponsored by the state attorney general's Consumer Protection and Antitrust Bureau, handles over 19,000 complaints and inquiries a year. While a pattern of complaints may result in criminal prosecution, other matters may be referred to mediation. Mediators helped consumers recoup over \$500,000 between 2003 and 2005, in areas such as contractor disputes, used car sales, purchases over the internet and lottery scams.

[Concord Monitor](#) (December 26, 2006)

## **Mediation Trumps Litigation in Obtaining Restitution**

Missouri's attorney general recovered \$5.3 million for consumers through mediation in 2006, which exceeded sixteen-fold the amount recovered through litigation. Recoveries by mediation were up 50% over the previous year.

[Springfield News](#) (December 28, 2006)

## **European Commission Commits to Use of Mediation in Contracts**

The European Commission recently committed to use mediation and other forms of alternative dispute resolution in disputes with contractors, many of whom have complained to the Commission Ombudsman. The Commission previously endorsed mediation as a better way to resolve disputes, and proposes to include an optional mediation clause in its standard procurement contracts. While the Commission states it cannot require contractors to mediate disputes with their subcontractors, the Ombudsman is encouraging the Commission to recommend mediation in such situations, as well as using mediation in disputes over grants made by the Commission.

[US Federal News](#) (December 18, 2006) (Subscription Required)

## **Voluntary Mediation Proves Itself in Scotland**

Mediation in Scotland has not had judicial and legislative encouragement as in England, yet has developed steadily due to the positive experiences of those who have used it on a voluntary basis across a broad range of commercial disputes. Scotland has now been reached the point where courts are promoting mediation and new court rules are being contemplated that would impose sanctions on parties for unreasonably failing to participate in mediation.

[Legal Week](#) (November 2, 2006) (Subscription Required)

## **China Considering Nationwide Mediation Regulation**

The Chinese Ministry of Justice is developing comprehensive legislation to regulate the practice of mediation throughout China. The legislation was proposed by the 10th National People's Congress, which recognizes the "pivotal role" mediation already plays in resolving civil disputes and promoting economic development, but sees a need for improved quality, standardization and greater financial support.

[World News Connection](#) (November 24, 2006) (Subscription Required)

## **Mediation Training for African Telecom Sector**

Along with helping African telecommunications markets move towards the world's best practices, the Commonwealth Telecommunications Organization (CTO) is emphasizing effective ways to manage the unavoidable disputes between telecom providers, customers, supplier and regulators in order to minimize damage to relationships. CTO and CEDR (the Centre for Effective Dispute Resolution) provided a multi-day mediation training in Cameroon for over 30 lawyers in the telecom sector from eight African countries.

[SourceWire](#) (November 20, 2006)



Newsletter service provided by [Mediate.com](http://Mediate.com) Feedback and news for potential inclusion in future newsletters may be sent to Mediation News Editor Keith L. Seat at [kseat@keithseat.com](mailto:kseat@keithseat.com).  
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**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)

### 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

#### Construction Disputes

- Trial Advocacy Group Begins Mediation Advocacy Training
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- Landlord-Tenant Mediation Enhanced in New Zealand
- Australia Selects Mediation Firm for Grocery Industry

#### 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, we can also assist people, through a dangerous mediation process, to engage in constructive forms of combat. In the process, they may

expected 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 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:

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 the public to endorse.

[Press Release](#)

[Research Supports Direct Mediation](#)

### 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 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)

## **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)**

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

## **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 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**



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

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 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.



**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:



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[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 survey 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](#)

## **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

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However, if you received this newsletter directly and would prefer not to, you may unsubscribe by clicking [here](#) or by sending an e-mail stating "unsubscribe" to [Admin@KeithSeat.com](mailto:Admin@KeithSeat.com).

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 \(August 31, 2006\)](#)

**September 1, 2006**

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- DOE Requires Mediation in Nuclear Power

## 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 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)

#### Industry Disputes

- USDA Funding Agriculture Mediation Program in North Carolina
- Appellate Mediation Increasingly Accepted and Effective
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- Mediation Variations Explored for U.K. Construction Disputes
- Poland Proposes Large Payments to Mediation Counsel
- ABA and USAID Help Bring Mediation to Liberia

#### Mediation Quote:

"When you approach your conflict as a journey, process, or voyage that takes you

### 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.

### 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

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

### Check This Out:

**Lawyers Surveyed on Mediation Preferences**

In collaboration with

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

## 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



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

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 meditation 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.

[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



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

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 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)

## **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)

## **Contact Information**

Please contact Keith with dispute resolution

## **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 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.**

questions and to discuss any matters or issues that might be suitable for mediation or facilitation:



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## 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)

**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)

### 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



## Complaints

- Maryland Bill Proposes Mediation of Land-Use Disputes
- Trial Consultants May Benefit Parties in Mediation
- Kentucky University Opening Mediation and Arbitration Center
- Australian Justice Lauds Mediation and Suggests State Subsidy
- India Expands Court-Annexed Mediation
- India Encouraging Mediation with Monthly Proceedings in Courts
- World Bank Organizes Mediation Training in Pakistan
- Croatia Turning to Mediation to Reduce Court Backlogs
- Mediation Sought to Harmonize Enforcement of European Securities Regulations
- Controversy over UK Judges Acting as Construction Mediators
- UK Claims-Resolution Firm Adds Mediation and Arbitration
- Dubai Mediation Seminar Emphasizes Business Relationships and Ethics

## Check This Out:

**Court Expands ADR to Include "Rock,**

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 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



## **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 \(Order of June 6, 2006\)](#)

## **Other Cases & Resolutions**

**City Seeks Mediation in \$75 Million**

## **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](#)

## **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](#)

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

**Chinese Justice Minister Notes Role**

## **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. 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

**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)**

### **Mediation Quote:**

"Every conflict we  
experience, no matter  
how trivial, points us

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)

### **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

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.

## Contact Information

Please contact Keith with dispute resolution questions and to discuss any matters or issues that might be

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 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)

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However, if you received this newsletter directly and would prefer not to, you may unsubscribe by clicking [here](#) or by sending an e-mail stating "unsubscribe" to [Admin@KeithSeat.com](mailto:Admin@KeithSeat.com).

## 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 \(May 1, 2006\)](#)



**May 1, 2006**

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- Appellate Mediation Expanding in California
- New Jersey Court Reconsidering Pay for Its Mediators
- Experience Improves West Virginia Mediation Program

## 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 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.



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- Mediation Being Nurtured in Morocco
- India Increasing Mediation/ADR Training
- Mediation More than Enhanced Negotiation
- Father of Mediation Saluted at Conference

## Check This Out:

**Making Mediation Pay....** The practice of mediation and arbitration is now sufficiently mainstream

[In re Kieturakis, 138 Cal.App.4th 56 \(Cal.App. 1st Dist. 2006\)](#)

## 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 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

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.

### **Mediation Quote:**

"We all have emotions all the time. Yet during a negotiation [or

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 \(HB 3239\)](#)

## **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

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.

## Contact Information

Please contact Keith with dispute resolution questions and to discuss any matters or

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 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 \(March 22, 2006\)](#)

issues that might be suitable for mediation or facilitation:



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However, if you received this newsletter directly and would prefer not to, you may unsubscribe by clicking [here](#) or by sending an e-mail stating "unsubscribe" to [Admin@KeithSeat.com](mailto:Admin@KeithSeat.com).

## 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.



**March 1, 2006**

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- Tennessee Proposing More Mediation by State

## CASES & RESOLUTIONS:

### Court-Ordered Mediation Leads to Nearly Half-Billion Dollar HealthSouth Settlement

*Chicago Tribune*, February 24, 2006

After lengthy court-ordered mediation, HealthSouth Corp. and its insurers agreed to pay \$445 million to settle investor lawsuits filed following a \$2.7 billion accounting fraud at the company. If the court approves the resolution, the company will pay \$215 million in stock, with no admission of wrongdoing, and its insurers will pay the rest in cash. In June, HealthSouth agreed to pay \$100 million to settle Securities and Exchange Commission litigation. Fifteen executives have pleaded guilty, while another was convicted at trial. Other litigation continues against HealthSouth's former auditor, its former banker and Richard Scrushy, the company's former chief executive officer, who was acquitted in June of orchestrating the fraud.

[View Article](#) (Registration Required)

### Mediation Saves Teraforce Bankruptcy Plan

*Daily Deal*, February 27, 2006

A February 24 mediation between Teraforce Technology Corp., its lender and a group of dissenting creditors surmounted a great deal of drama in the case and may permit a bankruptcy plan to proceed so that Teraforce can emerge from bankruptcy rather than be liquidated. Facing the prospect of very contentious litigation, participants were pleased with mediation, with counsel for the unsecured creditors' committee concluding "it's the closest we're going to get to happiness."

[View Article](#) (Subscription Required)

### Dispute Can't Be "A Little-Bit-Settled": *Lehr v. Afflitto*, 2006 N.J. Super. LEXIS 8 (N.J. App. 2006)

A New Jersey appellate court reversed the trial court's determination that a dispute was settled where all issues were admittedly not resolved and there was no signed settlement agreement. The appellate court expressed dismay that the trial court had taken testimony from the mediator and noted that "confidentiality of the mediation process is a matter of great public and systemic importance." The court enumerated multiple bases for confidentiality in mediation: terms in the order sending the case to mediation; the mediator's oral statements to the parties; the applicable court rules; and the principles of the Uniform Mediation Act which the court stated was an "appropriate analytical framework" even though the UMA



#### Government

- Florida May Prohibit Mediation If Party Has History of Violence
- Florida Opens New Mediation Center for Hurricane Claims
- Auto Dealers Turning to Mediation as Dissatisfaction with Arbitration Grows
- Mediation Developing in Nigeria
- Mediation Follows Outsourcing to India
- Mediation of Sports Disputes in Malaysia

#### Check This Out:

New Zealand mediator Geoff Sharp writes a blog which can be read [here](#). Geoff describes it as an "offbeat online confessional in pursuit of reflective mediation" – which pretty much sums it up.

#### Mediation Quote:

"In myth and legend, the trickster plays the role of reconciler of immovable objects and the manager of conflict.

was not in force during the time in question.

[View Opinion](#)

#### **Insured Can't Unilaterally Settle and Expect Insurer to Pick up Tab: *Motiva Enterprises v. St. Paul Fire and Marine Ins.*, 2006 WL 270191 (5th Cir. 2006)**

An insured party may not mediate and settle a case without the consent of its insurance company and then expect the insurer to reimburse it for the settlement, according to the U.S. Court of Appeals for the Fifth Circuit in *Motiva Enterprises v. St. Paul Fire and Marine Ins.* However, applying Texas law to standard insurance policy provisions that the insurer's consent must be obtained for settlements and that the insured must cooperate in any defense, the Fifth Circuit reversed summary judgment against the insured, Motiva, because there were questions of fact about its cooperation. The court also concluded that to avoid covering the loss the insurer must have suffered actual prejudice by the failure of Motiva to cooperate or obtain the insurer's consent. The appellate court sent the case back to the trial court to determine whether it was lack of cooperation for Motiva to abruptly exclude the insurer's representative from the mediation and whether the settlement was unreasonable.

[View Opinion](#)

#### **Court Cannot Require Mediation Prior to Enforcing Arbitration Provision: *In re Heritage Building Systems, Inc.*, 2006 WL 300813 (Tex. App. 2006)**

When a party to a dispute seeks to enforce a valid arbitration agreement under the Federal Arbitration Act, the court may not first order the parties to try mediation, but must send the case directly to arbitration, according to a Texas appellate court in *In re Heritage Building Systems, Inc.* Despite the policy of encouraging settlements, the intent of the parties in contracting for arbitration must be respected, the court emphasized, for the parties can always agree to mediate prior to arbitration if they wish. Interestingly, the court noted that once the matter is referred to arbitration, the "arbitrator may, or may not, choose to require mediation."

[View Opinion](#)

## NEWS & INITIATIVES:

#### **Federal Court Launches Broad Mediation Program**

*U.S. District Court (W.D.N.Y.) ADR Program*, January 31, 2006

Finding mediation to be the best alternative dispute resolution process, the U.S. District Court for the Western District of New York launched a pilot

To play this role requires [the mediator] to be able to work in a world of confusion and ambiguity and to be willing to help the parties transform their perspectives so that they can reach a turning point in their decision-making process. . . . Tricksters are shape-shifters, playing whatever role is necessary at the moment to create a dissonance that ultimately leads to a fruitful discussion on common ground. As trickster [the mediator] may simply appear as humorist, judge, and listener, or you may even assume the guise of heckler, fool, or deceiver. Use the techniques of the trickster sparingly."

— Jeffrey Kravis,  
*Improvisational Negotiation: A Mediator's Stories of Conflict About Love, Money, Anger – and the Strategies that Resolved Them*  
(Jossey-Bass 2006)  
at 223-24.

## Contact Information

Please contact Keith with dispute resolution questions and to discuss any matters or

mediation program on January 1. While currently limited to the docket of the judge overseeing the program, the program broadly refers all new and pending civil cases to mediation (with certain exceptions, such as habeas corpus writs and Social Security and bankruptcy appeals). Other judges may choose to refer cases to mediation. Parties may agree to use a form of alternative dispute resolution other than mediation, but may seek to opt out of the program only for good cause. The court has established a roster of mediators (who need not be lawyers) and will make a selection if the parties are unable to agree on a mediator. The court set a rate of \$150/hour for the first two hours of mediation, and allows mediators to charge a higher rate after two hours and to charge for preparation.

[View Court ADR Program](#)

## FCC Relies on Mediation for Modifying Use of Spectrum

*U.S. Federal News*, January 31, 2006

The Federal Communications Commission's plan to rely on mandatory mediation to help relocate users of spectrum was implemented with mediations conducted between December 27 and February 8 in the first wave of the 800 MHz band reconfiguration process. Parties that were unable to resolve all issues during mediation will receive an FCC decision following a de novo review. Unlike the usual case, the mediator prepares and submits a report on the mediation to the FCC, so the proceedings are not expected to be confidential. Along with its report, the mediator or the Transition Administrator is expected to propose a recommended decision or provide advice to the decision-maker about unresolved matters.

[View Article](#) (Subscription Required)

## Mandatory ADR Clauses Endorsed for Banks Contracting with Auditors

*ADRWorld.com*, Feb. 22, 2006

After initially stirring controversy with a May 2005 draft advisory warning banks against agreeing to mandatory alternative dispute resolution provisions in auditing contracts, the Federal Financial Institutions Examination Council issued its final advisory on February 8. The Council's final advisory endorses the use of ADR, and simply warns banks to ensure that they do not limit the liability of auditors.

[View Article](#) (Subscription Required)

## DC Enacts Uniform Mediation Act with International Provisions

*ADR World*, January 23, 2006

Washington, DC became the seventh jurisdiction to enact the Uniform Mediation Act (UMA) on January 26, and the first to include the international supplement which incorporates the United Nations Model Law on International Commercial Conciliation. The UMA is intended to

issues that might be suitable for mediation or facilitation:



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encourage greater use of mediation by ensuring clear confidentiality protections. The DC legislation is very similar to the uniform act drafted by the National Conference of Commissioners on Uniform State Laws, except for the exclusion of consumer mediations conducted by the DC attorney general. The international supplement provides that, unless the parties agree otherwise, mediations of international disputes are to be governed by the UN model law. The UMA has been adopted in Iowa, Illinois, Nebraska, Ohio, New Jersey, and Washington state. Legislation to adopt the Act is near enactment in Utah, and is pending in Massachusetts, New York, and Vermont. The DC legislation should take effect around April 3, following the required waiting period of 30 legislative days for Congressional review.

[View ADRWorld Article](#) (Subscription Required); [View United Nation's Model Law on International Commercial Conciliation](#)

## Growing Legislative Interest in Med Mal Mediation

The legislative trend toward mediation of medical malpractice disputes continues with the introduction of legislation in Hawaii on January 25. The bill (S.B. 2658) states that it is intended to "encourage open, frank communications between patients and physicians, apologies, and quick resolution of claims through mediation to avoid bitter and protracted lawsuits." By requiring medical facilities to implement mediation processes, the legislation seeks to encourage early "exchange of information" in addition to early settlement. By contrast, two bills introduced in New Jersey in the 2006 session (A.B. 945 and A.B. 1088) purport to require mediation, but in fact call for panels of five "mediators" to provide early neutral evaluation. The evaluation may be the basis for cost shifting if the case does not settle and may trigger a requirement to post bonds prior to trial in cases the "mediators" find frivolous.

[Hawaii Legislation](#); [New Jersey Legislation \(A.B. 945\)](#); [New Jersey Legislation \(A.B. 1088\)](#)

## Tennessee Proposing More Mediation by State Government

*Legalert*, February 22, 2006

Legislation introduced in Tennessee would require all departments of the state to submit disputes to mediation if the claimant agrees, and provides for lists of qualified mediators to be developed. Significantly, however, the legislation (HB 3496) would only apply to "valid and meritorious claims" against the state, which may significantly limit its application. Mediation is needed, the bill notes, because there are over 14,000 pending administrative claims or lawsuits in the state at any given time.

[View Legislation](#)

## Florida May Prohibit Mediation If Party Has History of Violence

*ADRWorld*, February 2, 2006

Expanding beyond domestic violence cases, proposed legislation in Florida would prevent a court from ordering mediation in any case in which the judge finds that a history of violence would compromise the mediation process or endanger anyone. A party's motion or request would trigger the

court's inquiry. The legislation (HB 7019) is considered uncontroversial.

[View Article](#) (Subscription Required); [View Legislation](#)

## **Florida Opens New Mediation Center for Hurricane Claims**

*Miami Herald*, January 31, 2006

Florida insurance regulators opened a fifth mediation center in February to help resolve disputes among the 500,000 insurance claims resulting from the four hurricanes that hit Florida last year. Insurance companies must provide notice that homeowners have the option to mediate disputed claims. Last year, 93 percent of the 12,000 claims brought to mediation in the Florida hurricane program were resolved.

[View Article](#) (Subscription Required)

## **Auto Dealers Turning to Mediation as Dissatisfaction with Arbitration Grows**

*Automotive News*, February 6, 2006

Many automobile dealers are finding the benefits of arbitration to be outweighed by its costs, uncertainties and lack of procedural protections. Some dealers are pleased with mediation and are beginning to rely on mandatory mediation clauses, requiring an attempt at mediation prior to initiating litigation.

[View Article](#)

## **Mediation Developing in Nigeria**

*This Day (Nigeria)*, February 13, 2006

A Nigerian chapter of the Centre for Effective Dispute Resolution (CEDR) has been established by local mediators accredited by CEDR (UK). The Nigerian group is emphasizing the value of mediation in Lagos, in part to encourage foreign investors, and asserts that the association members' international training gives them an edge over other local mediators.

[View Article](#) (Subscription Required)

## **Mediation Follows Outsourcing to India**

*Hindu (India)*, February 3, 2006


Mediation is being used in place of arbitration to resolve disputes involving outsourcing contracts, due to its promptness and capacity for preserving relationships between the parties. Incorporating mandatory mediation clauses in outsourcing contracts was advocated at an international Computer Law Association in Bangalore, India in February.

[View Article](#) (Subscription Required)

## **Mediation of Sports Disputes in Malaysia**

*Malay Mail*, February 15, 2006

The Olympic Council of Malaysia is turning to mediation and arbitration to



resolve disputes involving sports in the country, with a mediation workshop on March 4. National sporting associations are sending representatives in an effort to channel more disputes into mediation for amicable resolution, rather than going to court.

[View Article](#) (Subscription Required)

**January 1, 2006**

## In This Issue

### Cases & Resolutions:

- Mediation Demonstrates Procedural Fairness in Class Action Settlement: *Hicks v. Morgan Stanley & Co.*, 2005 WL 2757792 (S.D.N.Y. 2005)
- Court's Judgment May Not Deviate from Mediated Settlement Agreement: *In the Interest of N.R.C. and L.A.C.*, 2005 WL 2875367 (Tex.App. 2005)
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### News & Initiatives:

- FMCS Mediation Saves \$1.5 Billion/Year
- White House Directs Agencies to Mediate Environmental Disputes
- Federal Legislation Would Mandate Mediation of Farm Worker Disputes
- National Mediation Board Launching Online Dispute Resolution System in February
- Louisiana, Mississippi Turn to Mediation for Hurricane Claims
- Alabama Requires Insurers to Mediate Natural Disaster Claims
- Feinberg Overseeing Insurer's Hurricane Dispute Resolution Efforts
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## CASES & RESOLUTIONS:

### Mediation Demonstrates Procedural Fairness in Class Action Settlement: *Hicks v. Morgan Stanley & Co.*, 2005 WL 2757792 (S.D.N.Y. 2005)

A \$10 million mediated settlement agreement in a securities class action litigation was approved by the U.S. District Court in *Hicks v. Morgan Stanley & Co.*, 2005 WL 2757792 (S.D.N.Y. 2005), following a fairness hearing to examine both procedural and substantive aspects of the settlement. The court noted that the record "amply supports" procedural fairness, relying on the mediation and citing cases holding that the "participation of a respected and neutral mediator 'gives [the court] confidence that [the negotiations] were conducted in an arms-length, non-collusive manner.'" Although the court called the mediation unsuccessful because there was no settlement during the two-day mediation session, the mediator continued to work with the parties until settlement was ultimately reached a few months later.

[View Opinion](#) (Subscription Required)

### Court's Judgment May Not Deviate from Mediated Settlement Agreement: *In the Interest of N.R.C. and L.A.C.*, 2005 WL 2875367 (Tex.App. 2005)

A court has no authority – at least under Texas family law – to enter a judgment that differs from the terms of a mediated settlement agreement, unless those terms are illegal or against public policy, according to the Texas Court of Appeals in *In the Interest of N.R.C. and L.A.C.*, 2005 WL 2875367 (Tex.App. 2005). Following a successful mediation, the trial court signed an order proposed by the husband's attorney that differed in several ways from the mediated settlement agreement and later refused to correct the order because the wife had not appeared at the hearing. The appellate court held that the trial court had abused its discretion and that the order must be corrected to accurately reflect the settlement agreement.

[View Opinion](#) (Subscription Required)

### Mediation Sanctions Denied in U.K.

*Post Magazine*, November 24, 2005

While U.K. courts have imposed sanctions for failure to mediate (as reported in previous issues of this newsletter), the court denied sanctions



"Core Function" of  
California Courts

- New Mexico Plans State  
ADR Office
- D.C. Considering  
Mandatory Mediation for  
Medical Malpractice
- High Cost of U.K.  
Litigation Highlights  
Need for Mediation
- Centre For Mediation  
Opening in South Africa

### Mediation Quotes

"It is not the goal of mediation to judge the merits of the dispute; the goal of mediation is to have the parties work together to come to a solution, to allow them to move on with their lives.... While mediating, I attempt to be aware of any dynamic occurring between the parties. I assess the agendas, ethics, and values of the participants, arguments, and positions advanced by counsel and process the information as accurately as possible.... To be successful as a mediator, it is necessary to sift the extreme positions, the falsehoods, and the extreme or impure positions from the discourse. To be successful, the discourse must be substantively meaningful to all

when a party declined to mediate until certain conditions were met and until the facts were clarified in litigation.

View Article ([Subscription](#) or [Registration Required](#))

## NEWS & INITIATIVES:

### FMCS Mediation Saves \$1.5 Billion/Year

*Findlaw.com*, November 17, 2005

An empirical study of Federal Mediation and Conciliation Service (FMCS) mediation of labor disputes and work stoppages concluded that businesses and workers saved \$9 billion from 1999 to 2004. Released in November, the Employment Policy Foundation conducted the study in order to move beyond anecdotal evidence of mediation's benefits. The study also found a strong correlation between early mediation and success in ending or preventing work stoppages.

[View Article](#); [View FMCS Press Release](#); [View Study](#)

### White House Directs Agencies to Mediate Environmental Disputes

*ADRWorld*, December 14, 2005

The White House Office of Management and Budget (OMB) and Council on Environmental Quality (CEQ) released a policy in late October directing federal agencies to use mediation, facilitation and other collaborative methods to resolve disputes "over the use, conservation and restoration of the environment, natural resources and public lands." The memorandum emphasizes that the Administration "strongly supports constructive and timely approaches to resolving conflicts" involving the environment. Neutrals will be drawn from internal agency resources, Department of Justice programs and the private sector. Recognizing the significant efficiencies to be gained through mediation, the policy also directs agencies to ensure that their leadership is committed to conflict resolution with an "open mindset to new perspectives" and encourages "interagency learning" about mechanisms for institutionalizing environmental conflict resolution.

[View Article](#) (Subscription Required); [View Memorandum](#)

### Federal Legislation Would Mandate Mediation of Farm Worker Disputes

*ADRWorld*, December 23, 2005

Legislation introduced in the U.S. House of Representatives (H.R. 4503) would require mediation of claims arising under the Migrant and Seasonal Agricultural Worker Protection Act (29 U.S.C. § 1801). The bill provides that before any action can be filed in court, a mediator must certify that the party "attempted, in good faith, mediation or other non-binding dispute resolution of all issues involving all parties to the dispute." If requested, the Federal Mediation and Conciliation Service would assign a mediator acceptable to the parties. Congressional staff explained that the bill is not

involved.”

- Robert A. Creo in Ch. 18 of *Butterworths Mediators on Mediation: Leading Mediator Perspectives on the Practice of Commercial Mediation* (Tottel Publishing 2005) at 322-23.

### Check These Out:

The CPR Institute for Dispute Resolution unequivocally supports the Proposal for a Directive of the European Parliament and the Council on certain aspects of mediation in civil and commercial matters. CPR states that the Directive is “urgently needed” to maintain the competitive status of European markets, given the growing importance of mediation in North America, Australia, Asia and the United Kingdom. *See CPR Submission. The Directive (COM (2004) 718) was included in material linked in the April 2005 newsletter.*

Those focused on the federal sector may be interested in Judy Cohen’s recent article, *Going Beyond ADR: A Federal Sector Mission- and Work Life-Centered Approach to*

intended to lower workplace standards, but to find the “best solution” to reduce litigation costs, which the sponsors believe are so high as to encourage the hiring of illegal workers who are unlikely to litigate. Even though parties are required to mediate, all claims that are not voluntarily settled may be filed in court. Comparable mediation provisions were introduced in a Senate bill (S. 2087) which would apply to fewer cases than the House bill.

[View Article](#) (Subscription Required); [View H.R. 4503](#); [View S. 2087](#)

## National Mediation Board Launching Online Dispute Resolution System in February

*ADRWorld*, November 29, 2005

*Postscript to Dec. 2004 Newsletter: NMB, UMass Developing New ODR Processes* (*ADRWorld*, December 17, 2004)

PREVIOUSLY REPORTED: The National Mediation Board (NMB) and the University of Massachusetts are developing new online dispute resolution (ODR) processes and techniques for use by federal agencies and the private sector. The University of Massachusetts received a \$700,000 grant from the National Science Foundation at the end of October. The project is scheduled to last three years, with the first year devoted to developing ODR software and then two years using the new tools in a test-bed of the NMB’s voluntary grievance mediation program for labor unions and the railroad and airline industries. Software development will focus on visual communication tools and mapping software, with an emphasis on keeping the ODR processes simple and easy for neutrals to use.

POSTSCRIPT: The new online dispute resolution system is scheduled to be launched in February. The system contains a “brainstorming” function which catalogues ideas for discussion; future functions might include a mapping process for identifying settlement positions and conditions. The online system may permit some mediation processes to be conducted remotely to save costs and time, but is not intended to replace face-to-face mediations.

[View Article](#) (Subscription Required); [View NMB ODR Homepage](#)

## Louisiana, Mississippi Turn to Mediation for Hurricane Claims

*Times-Picayune*, December 23, 2005; *Sun Herald*, December 23, 2005

Louisiana and Mississippi are launching mediation programs in early January to resolve hurricane-related residential insurance disputes. The initiatives are modeled after the successful Florida mediation program following the 2004 hurricane season, which settled 93% of all cases brought to mediation. Under the new programs, when consumers choose to mediate, insurance carriers are required to participate and pay the costs of the program. The American Arbitration Association will administer both programs and provide local mediators, which include former U.S. Court of Appeals Judge Charles Pickering and a former Mississippi Supreme Court Justice. The Louisiana program also provides for insurers to pay \$175 per case to the court systems in areas struggling since hurricane Katrina. While insurance companies are supportive of the mediation program, others are concerned that there will not be sufficient capacity. Richard “Dickie” Scruggs expressed general skepticism about the program in

*Building Collaboration  
and Democratic Values  
on the Job.*

Did you know that in addition to the ABA's Representation in Mediation Competition for law students, there is a *National Intercollegiate Mediation Tournament* for college students? First held in December 2000, the Tournament provides opportunities for college students to compete both as mediation advocates and mediators.

## 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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Mississippi, but has 3,000 clients ready and would like to mediate 100 cases a week.

[View Sun Herald Article](#); [View Times-Picayune Article](#) (Subscription Required)

## Alabama Requires Insurers to Mediate Natural Disaster Claims

Alabama now requires insurers to mediate residential claims resulting from hurricanes and other natural disasters under regulations that took effect on December 31. Alabama's program was developed by a state task force created after Hurricane Ivan in September 2004. Homeowners can request mediation of disputes of \$500 or more if the claimant has not retained counsel or initiated litigation; insurers must cover the \$350 cost of mediation. Under the program, the Alabama Department of Insurance will make appointments from a list of mediators and the Department may assist claimants in preparing for mediation, if requested. Although attorneys for parties may not attend the mediation, the Department can send an attorney or representative to provide legal and technical information. Insurers may avoid the state program by developing and obtaining state approval for their own alternative dispute resolution program.

[View Regulations](#); [View Task Force Report](#)

## Feinberg Overseeing Insurer's Hurricane Dispute Resolution Efforts

*Boston Globe*, December 16, 2005

Insurer Liberty Mutual has implemented a private dispute resolution program in an effort to minimize litigation in the 20% of the claims from Hurricane Katrina and 10% of claims from Hurricane Rita that it has not resolved directly. The insurer has hired Kenneth R. Feinberg, who administered the September 11<sup>th</sup> Victim Compensation Fund, to oversee its mediation and arbitration program. Homeowners who have not settled their hurricane-related claims with Liberty Mutual have the option of participating without cost in a mediation, followed (if the claim remains unresolved) by a binding, unappealable decision made by an arbitrator assigned by Feinberg. The program intends to complete mediations within 14 days and arbitrations within 30. Work is to begin in mid-January using three dozen mediators selected by Feinberg. Claimants may litigate if they choose not to participate in the program. Liberty Mutual has about one percent of the 2,750,000 damage claims resulting from hurricanes Katrina, Rita and Wilma.

[View Article](#) (Subscription Required)

## Mediation Programs Are "Core Function" of California Courts

*ADRWorld*, November 11, 2005

California Superior Courts must implement civil mediation programs as a "core function" of the courts following revision of Section 32 of the California Standards of Judicial Administration by the California Judicial Council, which took effect January 1. The change is the result of reviewing mediation pilot programs, in which the Council found that "mediation of

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civil cases [is] of high benefit to courts." Effective January 1, the Council also modified procedures for bringing complaints against court-connected mediators in Court Rule 1622, in order to maintain confidentiality of mediation communications.

[View Article](#) (Subscription Required); [View Judicial Council Amendments](#)

## New Mexico Plans State ADR Office

*ADRWorld*, December 16, 2005

The state of New Mexico is heading toward greater reliance on mediation and other forms of alternative dispute resolution, with final recommendations expected this Spring from the ADR Advisory Steering Committee established by Governor Bill Richardson last Fall. Seeking to improve government efficiency, the Committee has decided to recommend a permanent ADR office (with a staff of six and a budget for contractors) in order to encourage greater state use of ADR. The recommendations may also contain unique provisions, such as financial incentives for state agencies to use ADR to reduce claims and costs. Issues still under consideration include whether the ADR office will provide mediation training itself and how it will provide names of mediators to state agencies. In the future, the office might even seek to regulate the ADR sector.

[View Article](#) (Subscription Required)

## D.C. Considering Mandatory Mediation for Medical Malpractice

*ADRWorld*, December 2, 2005

Pending legislation that would mandate mediation of medical malpractice claims against health providers was the subject of a District of Columbia Council hearing on December 1. The bill, B16-0418, was developed by a legislative task force that is seeking to reform the medical malpractice system in D.C. and is counting on mandatory mediation to reduce costs and increase party satisfaction, while reducing the burden on the courts. As initially drafted, courts are to require mediation "with little or no discovery," using mediators with ten years experience in medical malpractice litigation. The legislation requires parties to share the costs of mediation (unless otherwise agreed) and includes other details relating to attendance at the mediation, mediation statements, and confidentiality.

[View Article](#) (Subscription Required); [View Bill](#)

## High Cost of U.K. Litigation Highlights Need for Mediation

*Financial Times U.K.*, December 13, 2005

Heavy criticism of top London litigators for legal fees exceeding £100 million (\$175 million) in large cases have renewed calls for greater use of mediation. Lord Woolf, who recently retired as Lord Chief Justice of England and Wales, has long been a strong proponent of mediation not only as a way of reducing costs and avoiding the distraction of large litigations, but because mediation "can often provide a solution that the courts could not." Lord Woolf noted that large companies which use mediation successfully often rely on it again and again. Lord Woolf is now an advisor to the largest mediation group in the U.K. and plans to be

trained as a mediator. The current Lord Chief Justice, Lord Phillips, recently warned that companies should react with “horror” to the possibility of becoming entangled in expensive litigation.

[View Article](#) (Subscription Required)

### **Centre for Mediation Opening in South Africa**

*Business Day (South Africa)*, November 29, 2005

The Institute of Directors plans to open a mediation center in South Africa during the first quarter of 2006, with a focus on resolving commercial disputes in creative and cost-effective ways. The Centre for Mediation is to provide needed alternatives to litigation in South Africa and help the country keep up with the emphasis on mediation as the “preferred route of dispute resolution” in modern societies. The Centre will also offer mediation training for both mediators and advocates.

[View Article](#)



**November 1, 2005**

## In This Issue

### Cases & Resolutions:

- Mediation Resolves Coach Price's \$20 Million Defamation Suit Against Sports Illustrated
- Yogi Berra Mediates \$10 Million "Yogasm" Dispute with Turner
- Court Dismisses Case with Prejudice When Plaintiff Fails to Mediate: *Office Environments, Inc. v. Lake States Ins. Co.*, 833 N.E.2d 489 (Ind. App. 2005)
- Court Sanctions Counsel and Party for Failure to Participate in Mediation: *In the Interest of K.A.R.* (No. 14-03-00970-CV, Tx. App. 2005)
- California Confidentiality Statute Protects Parties Not at Mediation: *Does 1-26 v. Superior Court of Los Angeles County*, 34 Cal. Rptr. 3d 348 (Cal. App. 2d Dist. 2005)
- Fraud No Basis for Breaching Mediation Confidentiality: *Princeton Insurance Co. v. Vergano*, 883 A.2d 44 (Del. Ch. 2005)
- Cost of Mediation (But Not Lunch) Covered by North Carolina Cost-Shifting Rule: *Morgan v. Steiner* (No. COA04-1187, N.C. App. 2005)
- Counselor Cannot Avoid Licensing Problems by Claiming to Be Mediator: *Penny v. Wyoming*, 120 P. 3d 152 (Wyo. 2005)
- SEC's Suit Against Scrushy Sent to

## CASES & RESOLUTIONS:

### Mediation Resolves Coach Price's \$20 Million Defamation Suit Against Sports Illustrated

*El Paso Times*, October 11, 2005

Head football coach Mike Price is the latest fan of mediation after settling his \$20 million defamation case against Time, Inc. and a reporter over a lurid story of strippers and alcohol published in Sports Illustrated in 2003. With the terms of the settlement shielded by a confidentiality clause, both Price and defendants were able to claim victory and move on, leaving the field open for speculation about the terms of resolution. While Sports Illustrated states that it continues to stand behind its story, continues to employ the reporter and apparently will not publish a retraction, Price was able to declare that he "got a great victory," is "very happy and satisfied with the results of the mediation" and is looking forward to getting on with his life after 30 months of controversy. Price's attorney asserted that the process has "vindicated" Price's name.

[View Article](#) (Subscription Required)

### Yogi Berra Mediates \$10 Million "Yogasm" Dispute with Turner

*ABCnews.com*, September 16, 2005

Yogi Berra resolved his \$10 million claim against Turner Broadcasting for including him in a multiple-choice quiz on the definition of "yogasm" in an advertisement for Sex and the City reruns. Although the precise settlement terms were confidential, Berra's counsel stated that the payment was "substantial."

[View Article](#)

### Court Dismisses Case with Prejudice When Plaintiff Fails to Mediate: *Office Environments, Inc. v. Lake States Ins. Co.*, 833 N.E.2d 489 (Ind. App. 2005)

Plaintiff delayed court-ordered mediation several times over two and a half years, and then caused a final cancellation of mediation by refusing to pay the mediator's retainer, which resulted in the trial court dismissing the case with



## News &amp; Initiatives:

- NRC Reviews Pilot Mediation Program
- FAA Launches New Mediation Center
- HUD Proposes Dispute Resolution Program for Manufactured Housing Defects
- Rhode Island Joins Medical Malpractice Mediation Trend
- Missouri Endorses Mediation of Eminent Domain Disputes
- California Statute Encourages Mediation and Limits Binding Arbitration by Homeowner Associations
- California Clarifies Disqualification of Judges Considering ADR Work
- Mediation Week in Florida; Conflict Resolution Day Declared by Other States, ACR
- Securities Groups Tout Mediation Settlement Month; Discounts for NASD Mediation
- UK National Mediation Week
- Government Mediation Growing in UK
- UK Insurer Encouraging Mediation to Improve Claims Experience
- Pakistan Mediation Center Established for Commercial Cases
- Mediation of Labor Disputes Increasing in Philippines
- South African Mediators Strike for Better Pay

## Mediation Quotes

"[T]he assumption that

prejudice. The Indiana Court of Appeals (in a 2-1 decision) upheld the dismissal on appeal, noting "the strong emphasis for resolving issues through mediation" and plaintiff's failure to raise any objections to mediation through proper channels.

[View Opinion](#)

### **Court Sanctions Counsel and Party for Failure to Participate in Mediation: *In the Interest of K.A.R.* (No. 14-03-00970-CV, Tx. App. 2005)**

*Texas Lawyer*, September 12, 2005

A split Texas Court of Appeals panel upheld sanctions imposed by the trial court on both a party and counsel for canceling a court-ordered mediation session without adequate notice. The appellate court found that ordering mediation was a core function of the trial court, and thus the court had inherent power to impose sanctions. Sanctions against counsel were appropriate because counsel should have attended and worked towards settlement even though her client refused to attend the mediation.

[View Article](#) (Subscription Required); [View Opinion](#)

### **California Confidentiality Statute Protects Parties Not at Mediation: *Does 1-26 v. Superior Court of Los Angeles County*, 34 Cal. Rptr. 3d 348 (Cal. App. 2d Dist. 2005)**

*ADRWorld.com*, October 3, 2005

Documents summarizing personnel files of priests, prepared during the mediation of nearly 500 cases of alleged sexual molestation, were about to be published over the objections of the priests when the California Supreme Court blocked disclosure based on California's mediation confidentiality statute and remanded the case to the Court of Appeals. The appellate court determined that even though the priests were not present for mediation and were not all parties, they were still mediation participants who could object, because many would have to be brought in before any settlement could be reached, and their attorney had been present when the court addressed settlement discussions. The Court of Appeals also determined that the process was mediation, which is covered by the confidentiality statute, and not merely settlement talks.

[View Article](#) (Subscription Required); [View Opinion](#)

### **Fraud No Basis for Breaching Mediation Confidentiality: *Princeton Insurance Co. v. Vergano*, 883 A.2d 44 (Del. Ch. 2005)**

Plaintiff obtained a settlement agreement of nearly \$1 million in mediation for medical malpractice based on nerve damage that allegedly left her unable to hold a baby bottle. The day after settlement, an attorney for defendants saw –

most people make that their view of the world is the way the world 'really' is...has three aspects. First, when confronting a problem or question, we typically think that we are reasonable and objective. Second, we assume that anyone looking at the same evidence would draw the same conclusions we do. Third, when others reach different conclusions, we suspect that they are unreasonable or driven by suspect motives."

"[I]n disputes we are not observers of the system, we are participants. We cannot see ourselves as others see us, and so our descriptions of the causes of the conflict often lack our own contribution to the problem."

– Michael L. Moffitt and Robert C. Bordone, Editors, *The Handbook of Dispute Resolution* (Jossey-Bass 2005) at 84, 157.

**Keith L. Seat, J.D.** is a full-time mediator with substantial experience mediating commercial (including workplace) disputes

and videotaped – plaintiff dancing while holding a beer bottle. Defendants sought to rescind the settlement agreement and sought to have the mediator testify, but the court concluded that the confidentiality provisions and public policy would not permit it, nor did defendants need the mediator's testimony. The court did, however, raise concerns over defendants' ex parte contact with the mediator to show him the videotape, stating that any such post-settlement contact should have involved notice to plaintiff.

[View Opinion](#)

### **Cost of Mediation (But Not Lunch) Covered by North Carolina Cost-Shifting Rule: *Morgan v. Steiner* (No. COA04-1187, N.C. App. 2005)**

Plaintiff was required to pay the cost of an unsuccessful mediation and other specified costs under a North Carolina cost-shifting rule when plaintiff rejected an offer of judgment and then recovered less than the offered amount at trial. However, the North Carolina Court of Appeals determined that costs associated with mediation – in this case the \$100 cost of lunch – were not covered by the rule.

[View Opinion](#)

### **Counselor Cannot Avoid Licensing Problems by Claiming to Be Mediator: *Penny v. Wyoming*, 120 P. 3d 152 (Wyo. 2005)**

The Wyoming Supreme Court readily concluded that a mental health counselor could not avoid his licensing problems by claiming to be a mediator when his clients believed they were being counseled, he billed his time as counseling, and he made assessments and diagnoses under the Diagnostic and Statistical Manual, DSM-IV.

[View Opinion](#)

### **SEC's Suit Against Scrusby Sent to Mediation**

*Diagnostics & Imaging Week*, September 22, 2005; *Forbes*, September 16, 2005

One to watch: A U.S. district judge has ordered mediation of the U.S. Securities and Exchange Commission's lawsuit against Richard Scrusby, former head of HealthSouth. The court based its decision on the fact that separate federal litigation filed by investors was previously sent to mediation.

[View \*Diagnostics & Imaging Week\* Article](#) (Subscription Required); [View \*Forbes\* Article](#)

## **NEWS & INITIATIVES:**

### **NRC Reviews Pilot Mediation Program**

*Inside NRC*, October 17, 2005

and a strong telecommunications/technology background; he is also a mediation trainer and speaks on mediation at federal agencies, law firms and bar conferences. Keith was previously in-house counsel at a major telecommunications firm, following four years as General Counsel of the United States Senate Judiciary Committee's Antitrust Subcommittee. Prior to that, Keith practiced law for many years as a commercial litigator at Howrey LLP and was a law clerk for U.S. District Judge William H. Becker.

## Contact Information

Please contact Keith with dispute resolution questions and to

After a year's experience with mediation as an alternative to traditional enforcement by the U.S. Nuclear Regulatory Commission (NRC), industry participants, advocacy groups, and the Commission met on October 12 to discuss draft evaluation criteria for the pilot program. An evaluation report is due in February from Cornell University's Institute of Conflict Resolution, which is under contract with the NRC and provides mediators. While there was vigorous discussion and disagreement about the merits of the program overall, the data are clear. About one-third of the cases in which mediation is suggested get agreement of all parties to proceed to mediation. Of those, mediation has been successful in reaching resolution in just over half of the mediations conducted prior to any investigation by the NRC, while 100% of post-investigation mediations have been successful.

[View Article](#) (Subscription Required); [View NRC ADR Program Website](#)

## FAA Launches New Mediation Center

*ADRWorld.com*, September 30, 2005; *FedNews OnLine*, September 27, 2005

The U.S. Federal Aviation Administration (FAA) opened the Center for Early Dispute Resolution on September 26, to assist employees with conflict management and resolution, in response to internal surveys revealing concern about workplace conflict. The new approach provides training and coaching, as well as mediation services. The FAA's new program is expanding to include union as well as non-union employees, and initially will run for 12 to 18 months at FAA headquarters.

[View ADRWorld Article](#) (Subscription Required); [View FedNews OnLine Article](#)

## HUD Proposes Dispute Resolution Program for Manufactured Housing Defects

*Federal Register*, October 20, 2005

The U.S. Department of Housing and Urban Development (HUD) is accepting comments through December 19 on its proposed dispute resolution program for disputes over defects in manufactured (mobile) homes. Comments are requested in particular on the use of user-fees and the appropriate level of fees. The HUD program is required by federal statute and will apply only in states that do not adopt their own state-run dispute resolution programs that satisfy HUD guidelines. The proposal primarily relies on mediation, with any unresolved cases proceeding to nonbinding arbitration in which a recommendation would go to the HUD Secretary for final decision. HUD anticipates using contractors as screening neutrals, mediators, and arbitrators, and anticipates nearly 2,000 complaints a year. The proposal notes that the program reflects both the Executive Branch's and Congress' active promotion of cost-effective alternative dispute resolution processes by giving "the opportunity to resolve conflicts amicably and creatively." Further, the proposal estimates that the program will save 80% of the \$10,000 per case that would be spent on litigation by manufacturers, retailers, and installers if ADR was not available, which amounts to savings of \$400 for every mobile home sold.

[View Proposed Rule](#); [View HUD Website](#)

discuss any matters or issues that might be suitable for mediation or facilitation:



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## Rhode Island Joins Medical Malpractice Mediation Trend

*ADRWorld.com*, October 21, 2005

Both the plaintiffs' and defense bar in Rhode Island have been involved in developing a new program for mandatory mediation of medical malpractice claims, which was established by a September 23 order of the Rhode Island Superior Court. The pilot program will continue for six months and then be analyzed to see if it needs to be tweaked or modified. Initially, three cases will be referred to mediation each week, relying on a retired judge serving on a pro bono basis. The court hopes that cases can be resolved prior to discovery.

[View Article](#) (Subscription Required)

## Missouri Endorses Mediation of Eminent Domain Disputes

*ADRWorld.com*, October 14, 2005; *News-Leader.com*, October 5, 2005

Missouri's Department of Transportation offers mediation to landowners to resolve eminent domain disputes that remain after direct negotiation, and is able to successfully resolve nearly half of those remaining disputes in which mediation is used. An Eminent Domain Task Force established in Missouri following the U.S. Supreme Court's June 2005 decision in Kelso v. New London noted in its September 30 preliminary report that lawmakers in 28 states have introduced more than 70 bills to restrict the use of eminent domain. The Missouri Task Force examined the success of mediation and concluded that mediation could be expanded and used in a broader range of cases involving government agencies and property rights.

[View ADRWorld Article](#) (Subscription Required); [View News-Leader.com Article](#); [View September 30 Report](#)

## California Statute Encourages Mediation and Limits Binding Arbitration by Homeowner Associations

*ADRWorld.com*, October 11, 2005

California legislation (SB 137) enacted on October 3 requires homeowner associations to notify members of new alternative dispute resolution provisions under which homeowners may initiate mediation or arbitration by simply submitting a request to the association. Among other things, associations are prohibited from recording a lien without first pursuing ADR, and may not use binding arbitration if intending to resort to judicial foreclosure.

[View Article](#) (Subscription Required); [View Statute](#)

## California Clarifies Disqualification of Judges Considering ADR Work

*ADRWorld.com*, September 29, 2005

California enacted a new statute on September 22 to clarify situations in which judges will be disqualified for contacts with alternative dispute resolution providers relating to employment or paid service as a neutral. The legislation,

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Thanks.

AB 1322, went into immediate effective and expressly rejects the broad holding in Hartford Casualty Ins. v. Superior Court (No. B176439), which could have resulting in "wholesale disqualifications" of judges due to superficial contact with ADR providers. The new law clarifies that substantive discussions about employment or service as a neutral are required for disqualification, while expanding the grounds to include disqualification for directing parties to participate in ADR through a provider with whom the judge has served or is discussing future service. Disqualification would be required even if such a provider were merely on a list of possible providers from which the judge would choose an ADR provider.

[View Article](#) (Subscription Required); [View Statute](#); [View Assembly Bill Analysis](#)

## **Mediation Week in Florida; Conflict Resolution Day Declared by Other States, ACR**

*Pensacola News Journal*, October 20, 2005; *Daily Record (Baltimore, MD)*, October 20, 2005

The week of October 16-22 was designated Mediation Week in Florida, while October 20 was declared Conflict Resolution Day by the Association for Conflict Resolution (ACR), the states of Maryland, Kentucky and New Jersey, and various local jurisdictions.

[View Pensacola News Journal Article](#); [View Daily Record Article](#); [View ACR Website](#)

## **Securities Groups Tout Mediation Settlement Month; Discounts for NASD Mediation**

*Securities Week*, October 3, 2005

Securities self-regulatory organizations celebrated the seventh anniversary of Mediation Settlement Month in October, sponsoring a program in New York City on October 6. The National Association of Securities Dealers (NASD) Dispute Resolution forum offered half-price discounts on mediation fees during the month of October (passing on fee reductions from the group's mediators). With the October discount, mediation generally increases about 40% above other months. NASD staff has processed more than 12,500 mediations of securities disputes over the past 10 years, and shows an 81% settlement rate.

[View Article](#) (Subscription Required)

## **UK National Mediation Week**

*Times (UK)*, October 25, 2005; *Daily Post (Liverpool)*, October 25, 2005

The UK Department for Constitutional Affairs (DCA) and Her Majesty's Courts Service sponsored "Mediation Week," showing videos, demonstrating mediation, and holding discussions from October 24 to November 4. The publicity is part of DCA's effort to meet its target of reducing the proportion of claims filed with courts by 5 per cent.

[View Times Article](#) (Subscription Required); [View Daily Post Article](#)



(Subscription Required); [View Information on Mediation Week](#)

## **Government Use of Mediation Growing in UK**

*Building*, September 9, 2005

A UK Department for Constitutional Affairs (DCA) report on the effectiveness of the government's commitment to alternative dispute resolution during the 2003-2004 fiscal year reveals that government agencies' use of ADR – normally mediation – increased 40% from the previous year, to 229 cases, with a success rate of 79%. Estimated savings from use of mediation during the year are put at 14.6 million pounds. Examples of benefits of mediations are described, along with efforts to develop greater awareness of ADR.

[View Article](#) (Subscription Required); [View Report](#); [View DCA Website](#)

## **UK Insurer Encouraging Mediation to Improve Claims Experience**

*Post Magazine*, October 27, 2005

One of the largest insurers in the UK, Allianz Cornhill, is seeking to change the culture of disputes among both lawyers and claims handlers to get more cases into mediation, where it has found that both the claimant and insurer achieve better results than in litigation. While Allianz is able to get claimants to agree to mediate only one-third of the cases that it would like to, the settlement rate in those cases is 92%.

[View Article](#) (Subscription Required)

## **Pakistan Mediation Center Established for Commercial Cases**

*Business Recorder (Pakistan)*, October 25, 2005

A new mediation center is being established in Karachi to deal with commercial disputes, under an agreement between the Ministry of Law, Justice and Human Rights and the International Finance Corporation of the World Bank Group. The goal of the pilot mediation project is to institutionalize mediation in order to increase efficiency by freeing assets tied up in disputes and minimizing business-stifling litigation.

[View Article](#)

## **Mediation of Labor Disputes Increasing in Philippines**

*BusinessWorld (Manila)*, September 19, 2005

Additional Labor Department personnel are being trained as mediators in Manila and throughout the Philippines in order to provide mediation and address labor disputes in a less hostile way. More firms are considering alternative settlement approaches, and both labor and management are realizing that amicable approaches are preferable to hardline stances.

[View Article](#) (Subscription Required)



## **South African Mediators Strike for Better Pay**

*The Namibian*, September 15, 2005; Commission Website

On September 14, government-funded labor mediators in South Africa shifted from resolving others' employment conflicts to picketing their own employer, the Commission for Conciliation, Mediation and Arbitration, in a wage dispute. The Commission continued operations with part-time employees and contractors until the dispute was settled four days later – through mediation.

[View Article](#); [View Website](#)

**September 1, 2005**

## In This Issue

### Cases & Resolutions:

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- Confidentiality of Congressional Employee Mediation Broadly Applied: *Banks v. Senate Sergeant-at-Arms*, Nos. Civ.A.03-56, 03-686, 03-2080 (U.S.D.C. D.C. 2005)
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## CASES & RESOLUTIONS:

### Mediation Confidentiality Outweighs Defendant's Right to Testimony: *New Jersey v. Williams*, 877 A.2d 1258 (N.J. 2005)

*ADRWorld*, August 3, 2005

In an important decision upholding confidentiality provisions in the Uniform Mediation Act (UMA), the New Jersey Supreme Court concluded that a criminal defendant's right to potentially exculpatory testimony must be balanced against the importance of mediation confidentiality. In this first state supreme court decision on the UMA, the court expressly adopted the UMA's balancing test as the proper approach, even though the UMA had not been adopted in New Jersey at the time the case was initially decided. Under the UMA, mediation communications cannot be introduced in a criminal proceeding unless the defendant shows that the need for the evidence "substantially outweighs the interest in protecting confidentiality" and that the evidence is not otherwise available. In this case, the defendant was convicted after failing in his effort to rely on testimony by the mediator, both because the court found the testimony was not "competent evidence" of what another party said in the mediation and because other evidence about the events that resulted in the criminal charges was available.

[View Article](#) (Subscription Required); [View Opinion](#)

### Confidentiality of Congressional Employee Mediation Broadly Applied: *Banks v. Senate Sergeant-at-Arms*, Nos. Civ.A.03-56, 03-686, 03-2080 (U.S.D.C. D.C. 2005)

*Roll Call*, July 18, 2005

A U.S. District Court upheld a magistrate's order denying access to any documents involved in mediation under the Congressional Accountability Act, including forms completed to commence the mediation process. The magistrate noted that Congress mandated that mediation "shall be strictly confidential" in the Act, which requires mandatory mediation of workplace disputes involving Congressional employees prior to initiating an administrative hearing or filing in district court. In defending against claims of race discrimination, the Senate Sergeant-at-Arms unsuccessfully argued that it needed the mediation documents to determine if the mediation prerequisite had been met. The magistrate refused to compel production of the documents by one legislative branch office to another in order to avoid meddling in the "internal affairs" of Congress.

- New Jersey Requiring Mediation or Arbitration of Lemon Law Cases
- California Funds Special Education Mediation Programs
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- Memphis' Largest Law Firm Opens ADR Center
- Barriers to U.K. Mediation Explored
- Canada's Largest Auto Insurer Backs Mediation
- Fiji Promotes Employment Mediation as Response to Globalization
- Commercial Mediation Conference Held in Beijing

## Mediation Quotes

"We are all lifelong students of conflict resolution (like it or not)...."

"One of the main

[View Article](#) (Subscription Required); [View Magistrate's Order](#) (Subscription Required)

## U.K. Court Bemoans Lack of Successful Mediation: *Vahidi v. Fairstead House School*, EWCA Civ. 06 (2005)

*Lawyer*, August 8, 2005

A recent U.K. Court of Appeal decision expressed strong support for early mediation when controlling legal principles are not in serious dispute. In affirming the lower court's decision denying a teacher's work-related stress claim, the court stated:

One shudders to think of the costs of this appeal and of the trial, which apparently took as long as nine days. As the courts have settled many of the principles in stress at work cases, litigants really should mediate cases such as the present. Of course, mediation before trial is infinitely preferable to mediation before appeal. But it is a great pity that neither form of mediation has taken place in this case, or if it has, that it has not produced a result.

[View Article](#) (Subscription Required); [View Opinion](#)

## NEWS & INITIATIVES:

### ABA, ACR Adopt Revised Mediator Standards

*ADRWorld*, August 11, 2005, August 29, 2005

The American Bar Association (ABA) House of Delegates formally approved revised *Model Standards of Conduct for Mediators* on August 9 at its annual meeting. On August 22, the Association for Conflict Resolution (ACR) Board of Directors unanimously approved the newly revised *Model Standards*, which will apply to ACR's 6,000 members and be used whenever ethics complaints are brought. Other groups, including government agencies and court programs are also expected to adopt the revised ethical standards. First adopted in 1994, the *Model Standards* were revised by a committee of representatives from the ABA, ACR and the American Arbitration Association. The revised standards provide more detailed guidance on mediator impartiality, confidentiality and conflict-of-interest disclosures. They also expand on permissible fee arrangements and advertising, including a last minute addition forbidding mediators from charging contingency fees.

[View ABA Article](#) (Subscription Required); [View ACR Article](#) (Subscription Required); [View Model Standards](#)

### ABA Task Force Seeks Ways to Improve Mediation Services

*ADRWorld*, August 9, 2005

In an effort to enhance mediation quality, the American Bar Association's (ABA's) Section of Dispute Resolution on August 6 established a Task Force to Improve the Quality of Mediation. The new task force is expected to seek input from many sources in order to develop practical proposals for improving the quality of mediation and the satisfaction of consumers. The

barriers to resolution comes when people can't let the conflict go and move on with their lives."

"Anger is not a problem to be solved, nor something to be ignored or suppressed.... Anger is an emotion that needs to be worked through and processed as respectfully as possible."

– Gary T. Furlong, *The Conflict Resolution Toolbox*

### **IBA Mediation Newsletter**

The second issue of the International Bar Association's Mediation Newsletter (Vol. 1, No. 2), with 72 pages covering 21 jurisdictions, is now available. [View IBA Newsletter](#)

### **Check These Out:**

Mediators often emphasize the importance of proper framing of facts and

task force is to begin in October and complete its work by July 2007.

[View Article](#) (Subscription Required)

## **Halliburton, McDonald's Join EEOC Mediation Program**

*EEOC Press Releases*, August 17, 2005, August 31, 2005

Halliburton and McDonald's are the latest large employers to join the U.S. Equal Employment Opportunity Commission's (EEOC's) program to mediate workplace discrimination disputes. Halliburton's agreement is nationwide; McDonald's agreement is regional and covers Alabama, Georgia and South Carolina. Under the EEOC's Universal Agreement to Mediate, discrimination complaints filed with the EEOC will be sent to the agency's mediation unit and to the appropriate company contact for mediation prior to EEOC investigation or litigation. Mediation remains voluntary, however, and either the employer or the EEOC can opt out if it believes mediation is inappropriate for the particular claim. The EEOC is encouraging mediation in order to improve the agency's overall effectiveness, while helping companies and employees reach better outcomes. The EEOC has now entered into over 90 national or regional mediation agreements and 770 local mediation agreements with large employers. The agency has mediated over 72,000 cases since the National Mediation Program was launched in 1999, with about 70% successfully resolved, while over 90% of both claimants and employers would be willing to use the mediation program again in the future. Notably, EEOC data indicates that up to 20% of all successful mediations do not involve any payment of money.

[View EEOC Halliburton Press Release](#); [View EEOC McDonald's Press Release](#)

## **USDA Draft Regulations Emphasize Mediation, Constraints**

*ADRWorld*, July 29, 2005

The U.S. Department of Agriculture's (USDA's) Farm Service Agency is accepting public comments on proposed mediation regulations until September 26. The regulations describe the current practice of engaging in mediation with parties to adverse agency decisions, such as rejection of applications for loan guarantees or payments. However, the regulations note that alternatives developed in mediation will not be accepted by the agency unless they are fully consistent with statutory and regulatory requirements and agency policy.

[View Article](#) (Subscription Required); [View Proposed Regulation](#)

## **Federal Medical Malpractice Bill Mandates Mediation**

*ADRWorld*, July 27, 2005

On July 20, Congressmen John Conyers (D-MI) and John Dingell (D-MI) introduced legislation to reform the medical malpractice system, entitled the "Medical Malpractice and Insurance Reform Act of 2005" (H.R. 3359). The bill mandates mediation prior to trial for every medical malpractice action, permits non-binding arbitration depending on state law, and requires states to inform residents of the procedures available to resolve consumer grievances. The bill includes broad confidentiality provisions for any form of alternative dispute resolution used and directs the Justice Department to develop regulations to ensure that mediations are affordable, accessible, timely, "consistent," fair, and reasonable convenient

issues to help resolve differences. A remarkable visual illustration of that principle is linked [here](#).

If you liked that one, more are available at [this link](#).

These visual illusion sources are among a range of mediation articles and other interesting items in the blog entitled [Online Guide to Mediation](#).

## 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.

for consumers. As reported in the last newsletter, the "Comprehensive Medical Malpractice Reform Act of 2005" (H.R. 2657) was introduced on May 26. Both bills are currently pending in the House Judiciary Committee and the House Energy and Commerce Committee's Subcommittee on Health.

[View Article](#) (Subscription Required); [View H.R. 3359](#)

## Federal Circuit Beginning Free IP Mediation

*Chicago Daily Law Bulletin*, August 22, 2005

At the same time that other courts are dealing with issues resulting from reliance on pro bono mediators (see summaries below), a federal appellate court that routinely deals with high value cases is starting down that path. The U.S. Court of Appeals for the Federal Circuit announced that it is launching a pilot mediation program on October 3 for intellectual property (IP) appeals. Participation by litigants in the program will be encouraged by the court, but is voluntary. The court is compiling a roster of mediators from a list of candidates recommended by the Federal Circuit Bar Association, and is seeking attorneys and academicians with IP expertise, as well as attorneys with experience mediating. Mediators will not be paid for their services, but will be reimbursed for minor out-of-pocket expenses.

[View Article](#) (Subscription Required); [View Pilot Program Guidelines](#)

## New Jersey Court Considering Pay for Its Mediators

*New Jersey Law Journal*, August 22, 2005

With many mediators abandoning the New Jersey Superior Court mediation program, the New Jersey Supreme Court is considering a proposal to pay mediators \$100 per hour for the first three hours of court-referred mediations. Since the program began in 2000, the first three hours have been provided pro bono by mediators, with market rates for time in excess of three hours, which averages about \$250 to \$300 per hour. Mediators unhappy with the program cite concerns that free mediation is undervalued by the parties, that many parties quit after three hours regardless of the status of the mediation, and that neither counsel nor judges routinely work for free. While the number of active mediators has declined by one-fourth over the past two years, the mediation program is currently expanding to all 21 counties in the state and an influx of Lemon Law cases is expected under new procedures taking effect in January (see summary below).

[View Article](#) (Subscription Required)

## Lack of Mediator Pay Generates Controversy in L.A.

*Los Angeles Business Journal*, July 11, 2005

Controversy is developing around the Los Angeles Superior Court mediation program, in which growing numbers of major law firms and large corporate clients are using the program to mediate six- and seven-figure cases, despite the fact that the program was established to provide free mediation in much smaller cases. Mediation services under the program are primarily provided by volunteer mediators. The Presiding Judge denied a request by the California Dispute Resolution Council to limit free services to litigants who could not afford a mediator, stating that the legislature did not establish a means test for eligibility. One mediator who resigned in protest

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from the court's panel of volunteers, stated that "Those who can't afford [mediation] should get it for free.... But if you can afford to hire a lawyer, then you ought to be expected to hire your mediator as well."

[View Article](#) (Subscription Required); [View CDRC-Judicial Correspondence](#)

## New Jersey Requiring Mediation or Arbitration of Lemon Law Cases

*New Jersey Law Journal*, July 25, 2005, August 22, 2005

New Jersey is beginning a pilot program that requires parties in so-called Lemon Law cases alleging vehicle defects to elect between mediation, non-binding arbitration or binding arbitration. If the parties do not agree, or fail to make a choice within 90 days of the answer in the case, they will be automatically assigned to mediation. The new procedures go into effect January 1 and are intended to provide uniformity in the way New Jersey Superior Courts address the 1,500 Lemon Law cases filed each year in the state.

[View July Article](#) (Subscription Required); [View August Article](#) (Subscription Required)

## California Funds Special Education Mediation Programs

*California Budget Act of 2005-06*

In its recently-approved 2005-06 budget, California allocated funds for special education mediation and mediation training programs. Among allocations for special education, \$10 million is specifically earmarked for dispute resolution services, including mediations provided through contract for the Special Education Program. Additionally, \$6 million was allocated to local plan areas and the Preschool Grant program for training programs, which may be used to provide training in alternative dispute resolution and the local mediation of disputes.

[View Special Education Budget](#); [View Special Education Dispute Resolution Program](#)

## Mediation Winding Down Florida's 2004 Hurricane Disputes

*Sarasota Herald Tribune*, July 6, 2005

Florida's innovative hurricane mediation program is being scaled back as most insurance disputes are now resolved. As previously reported, Florida began its mediation program last November after hurricanes in 2004 caused an estimated \$21.5 billion in property losses in the state. Of the 1.7 million insurance claims that were filed by hurricane victims, only 50,000 now remain unresolved. Four mediation offices around the state have been conducting mediations, but due to lessening demand one of those is slated to close this month. The closing office has a 96% settlement rate of claims mediated.

[View Article](#) (Subscription Required)

## Memphis' Largest Law Firm Opens ADR Center

*Memphis Commercial Appeal*, July 27, 2005; *Mississippi Business Journal Online*, July 12, 2005



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Thanks.

Recognizing that clients are increasingly demanding alternative dispute resolution (ADR), Memphis' largest law firm recently opened the Center for Dispute Resolution with twenty of its lawyers who are experienced mediators. The Center is designed to provide ADR services – especially mediation – for a wide range of legal disputes, including commercial, personal injury, employment, product liability, securities matters and other areas. While other Memphis area firms offer mediation, the Center is the first to formalize these services along the lines of a separate practice group, bringing heightened attention from the legal community and the public.

[View Memphis Article](#) (Subscription Required); [View Mississippi Article](#)

## **Barriers to U.K. Mediation Explored**

*Post Magazine*, July 7, 2005, August 11, 2005

Prominent U.K. mediators, legal experts and insurers gathered to discuss the status and merits of mediation for resolving motor vehicle personal injury claims in the U.K.; a second discussion involved catastrophic personal injury claims. There was general consensus that mediation is a useful tool, as long as the value of the cases is not too low to be able to afford a mediator. Claimants' lawyers expressed concern that injured individuals not be pressured into settlements they later regret. Appropriate timing of mediations in serious personal injury cases is challenging due to the difficulty in determining the full scope of injuries. There was also agreement that the market for mediation has not yet matured and that there needs to be greater awareness and training about the nature and availability of mediation. However, possible amendments to Civil Procedure Rules later this year may encourage much greater use of mediation in catastrophic personal injury cases.

[View July 7 Article](#) (Subscription Required); [View August 11 Article](#) (Subscription Required)

## **Canada's Largest Auto Insurer Backs Mediation**

*Post Magazine*, August 4, 2005

Despite initial resistance from claims staff and counsel, Canada's largest auto insurer is now aggressively pursuing and promoting mediation. Last year the Insurance Corporation of British Columbia (ICBC) participated in over 3,400 mediations, with 95% settling. ICBC's director Peter Morgan attributes significant savings in legal costs to the use of mediation and credits mediation as a factor that has kept ICBC's bodily injury costs flat for the past five years. Morgan encourages other insurers to promote alternative dispute resolution, explaining that mediation in particular is a "significantly better process for all concerned and much more effective and desirable than the alternative."

[View Article](#) (Subscription Required)

## **Fiji Promotes Employment Mediation as Response to Globalization**

*Fiji Times*, July 25, 2005

With the assistance of the United Nation's Industrial Labour Organization, Fiji is considering a new Employment Relations Bill to establish mediation

as the primary means of resolving employment grievances and disputes. The bill is intended to build productive employment relationships, which Fiji's Labour Minister views as the best response to globalization and important for all Pacific countries.

[View Article](#) (Subscription Required); [View ILO Progress Report on Work in Fiji](#)

### **Commercial Mediation Conference Held in Beijing**

*China Daily*, July 16, 2005

A conference promoting mediation of commercial disputes between Chinese and U.S. enterprises was held in Beijing on July 15. The conference was sponsored by the China Council for Promotion of International Trade (CCPIT) and CPR's International Institute for Conflict Prevention and Resolution. CCPIT, CPR and the China Chamber of International Commerce launched the U.S.-China Business Mediation Center in 2004 to provide mediation for complex commercial disputes between American and Chinese businesses.

[View Article](#); [View CPR's webpage on U.S.-China Mediation Center](#)

**July 1, 2005**

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## CASES & RESOLUTIONS:

### Mediation Yields \$2.2 Billion Enron Settlement

*San Diego Daily Transcript*, June 22, 2005

In what may be the largest U.S. securities settlement ever, JP Morgan Chase agreed to pay \$2.2 billion after two days of mediation to settle a class-action lawsuit claiming that the bank helped Enron engineer its accounting fraud. The case was mediated by former U.S. District Judge J. Lawrence Irving, who was initially a consultant for the lead plaintiff, the University of California. Irving suggested mediation after discussions with JP Morgan Chase bogged down, and the parties decided to use Irving as the mediator, despite his previous role. The class-action settlement, which must be approved by the boards of the parties, occurred four days after a \$2 billion *Enron* settlement by Citibank; litigation continues against another ten financial defendants.

[View Daily Transcript Article](#) (Subscription Required); [View Reuters Article](#)

### Mediation Provides \$100 Million Settlement for Southern California Clergy Sexual Abuse Victims

Postscript to Jan.-Feb. 2005 Newsletter: Mediator Cannot Be Decision-maker: *Travelers Casualty and Surety Co. v. Superior Court*, B176030 (Cal. App. 2d Dist. 2005)

*Los Angeles Times*, January 4, 2005; *Los Angeles Daily Journal*, March 3, 2005

PREVIOUSLY REPORTED: The California Court of Appeals held that a settlement judge, acting as a mediator, cannot be the decision-maker, and that a mediation is not an "actual trial" as the settlement judge stated in a written order. Judge Peter D. Lichtman was appointed as settlement judge to help seek resolution between the Roman Catholic Diocese of Orange's liability insurers and the victims of alleged childhood sexual abuse by various priests. After contention with the parties, Judge Lichtman released a lengthy written "order," stating his determination of the reasonable settlement value of plaintiffs' claims based upon his view that the insurers had stymied attempts to settle the case. The appellate court did expressly state that a mediator may be evaluative and provide views to the parties, but may not issue "findings" or attempt to coerce the participants and thus vacated and sealed the mediation "order." Subsequent news accounts reported that Judge Lichtman has been replaced as the mediator in the case.

POSTSCRIPT: After a mediation conducted by Superior Court Judge Owen Lee Kwong, the Diocese of Orange agreed to pay \$100 million to settle the clergy sexual abuse cases. The Diocese will pay just over half of the

## Mediation Quote

"In general...everyone has a good inner core, and their negative ways, from the distasteful to the downright evil, rise from pain or deprivation they have suffered sometime in their life.... If we can understand the pain that underlies the negativity, we can invoke our compassion"  
– Suzanne Ghais,  
[Extreme Facilitation](#)

## International Mediation Information

The Centre for Effective Dispute Resolution recently published tips for lawyers involved in international mediation.  
[View Tips](#)

## Contact Information

Please contact Keith  
with dispute resolution

settlement, with the remainder to be paid by the Diocese's eight insurers. The 90 plaintiffs are each to receive payment between \$500,000 and \$1.6 million; Orange Diocese Bishop Tod D. Brown further agreed to personally apologize to each of the victims.

[View LA Times Article](#) (Subscription or Purchase Required)

## U.K. Courts Imposing Costs for Refusals to Mediate

*Legal Week Global Edition*, June 23, 2005

The trend toward mediation of commercial cases in the United Kingdom is being propelled by the parties' growing experience and understanding of the benefits of mediation on the one hand and the attitude of the courts in encouraging mediation on the other. Appellate decisions in the U.K. have been increasing the stakes by imposing costs on parties who refuse to mediate after the court recommends mediation, with a court of appeals recently stating that the legal profession "can no longer with impunity shrug aside reasonable requests to mediate."

[View Article](#)

## NEWS & INITIATIVES:

### Guidance on Accessible Mediation for Parties with Disabilities

*ADRWorld.com*, May 12, 2005

The U.S. Equal Employment Opportunity Commission (EEOC), the National Council on Disability and the U.S. Department of Justice jointly released two publications (one for mediators and one for parties) on making the mediation process more accessible for disabled individuals in EEO disputes. Among other things, the mediator publication discusses the types of accommodations that may be required to make a mediation accessible and provides practice tips for ensuring accessibility in specific situations. It also provides guidance on maintaining the confidentiality of medical information disclosed during mediation and recommends types of ADA (Americans with Disabilities Act) training for mediators. The guidance for parties provides information on their right to accommodations and their responsibility to make needs known in a timely manner. One of the examples states that a "private practice solo mediator" would not likely be able to avoid paying for a sign language interpreter (or other expensive accommodation) as a "significant difficulty or expense" because the overall resources of the mediator would be considered, not just the fees from the single mediation.

[View Article](#) (Subscription Required); [View Publication for Mediators](#); [View Publication for Parties](#)

### EEOC Finalizing New Field Structure

*EEOC Press Release*, June 2005

In an effort to flatten its field organization, the U.S. Equal Employment Opportunity Commission (EEOC) plans to vote on July 8 on a plan to change its field structure. The plan would reduce managers and administrators by converting eight district offices into field offices, and add

questions and to discuss any matters or issues that might be suitable for mediation or facilitation:



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front-line staff who conduct investigations, mediations and litigation, and provide educational services. If the plan is approved, there will be only 15 district offices overseeing 9 field offices, 15 area offices, and 14 local offices (two of which are being newly added in Mobile, Alabama, and Las Vegas, Nevada). The internal realignment is intended to improve efficiencies and customer service, but will not change the way the public interacts with the agency. The Commission will next work on streamlining its Washington headquarters, clarifying roles and responsibilities.

[View Press Release](#); [View Proposed Field Office Alignment](#); Compare [Current](#) and [Proposed](#) Jurisdictional Boundaries.

## Federal Legislation to Encourage Medical Malpractice Mediation

*ADRWorld.com*, June 7, 2005

In an effort to encourage mediation and reduce litigation costs, legislation was introduced in the U.S. House of Representatives on May 26 to fund mediation programs addressing medical malpractice claims. The "Comprehensive Medical Malpractice Reform Act of 2005" (H.R. 2657) would fund mediation programs (through grants administered by the U.S. Department of Justice) which conform to the model used at Rush University Medical Center in Chicago. The Rush model, which claims a success rate exceeding 90 percent, uses a co-mediation system in which the plaintiff chooses one mediator from a roster of plaintiff's attorneys and a second from defense attorneys. The bill also provides that participation in mediation is to be completely voluntary and that all communications, including any apology or expression of remorse by a health care provider, are to be kept confidential. The legislation also seeks to reduce medical malpractice premiums by, among other things, capping the award of non-economic damages and establishing a mechanism for reporting medical errors. The bill has been referred to the House Judiciary Committee.

[View Article](#) (Subscription Required); [View H.R. 2657](#)

## FMCS Systems Design Project Under Way

*Akron Beacon Journal*, May 31, 2005

A new employee dispute resolution system has been successfully launched at the Akron General Medical Center, the first created by the Federal Mediation and Conciliation Service (FMCS) under its Dynamic Adaptive Dispute Systems (DyADS) pilot project. This FMCS project designs dispute resolution systems for conflicts *not* covered by collective bargaining agreements. The Akron General system began in February and relies on an ombudsman to assist in resolving concerns of employees and/or management, including bringing the parties together when necessary. The FMCS recently launched additional DyADS projects at the U.S. Department of Health and Human Services and at Bechtel Nevada.

[View Article](#); [View FMCS Press Release](#)

## Florida Eases Multi-Jurisdictional ADR Advocacy

*Sunethics.com*, May 12, 2005

New Florida rules will make it easier for lawyers from outside Florida to represent clients in mediation and other alternative dispute resolution

newsletter may be accessed at [www.keithseat.com/publications.htm](http://www.keithseat.com/publications.htm).

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Thanks.

(ADR) proceedings in Florida. Amended Rule 4-5.5 permits lawyers from other jurisdictions to provide legal services "in or reasonably related" to a mediation or other ADR proceeding if the client "resides in or has an office in" the lawyer's home jurisdiction or "where the services arise out of or are reasonably related to" the lawyer's practice in his or her home jurisdiction. Rule 4-5.5 (c)(3), (d)(3). The lawyer must obtain admission *pro hac vice* for court-annexed arbitration or mediation, or if court rules or law require. The new rules were adopted by the Florida Supreme Court on May 12 and take effect on January 1, 2006; they focus on advocates and the "practice of law" without discussing the activities of mediators or other neutrals.

[View Article](#); [View Florida Supreme Court Opinion](#); [View Amended Rule 4-5.5](#)

### **Massachusetts Adopts ABA Model Rule 2.4 for Lawyers Serving as Third-Party Neutrals**

*Massachusetts Lawyers Weekly*, June 20, 2005

Stating that "alternative dispute resolution has become a substantial part" of the justice system, the Massachusetts Supreme Judicial Court adopted ABA Model Rule of Professional Conduct 2.4 governing lawyers acting as mediators or other third-party neutrals, effective July 1. Rule 2.4 requires a neutral who is a lawyer to explain to *pro se* parties that the neutral is not representing them as an attorney, including enough explanation for the *pro se* parties to understand differences such as the inapplicability of the attorney-client privilege.

[View Article](#); [View ABA Model Rule 2.4](#)

### **Profusion of Codes for Mediators May Cause Confusion**

*The Legal Intelligencer*, May 16, 2005

Mediators face ethical challenges from the profusion of overlapping and in some instances contradictory guidelines and codes of conduct. Mediators coming from professional backgrounds are subject to ethical guidelines based on those professions in addition to the codes and guidelines specifically for mediators. Thus, mediators from different professional backgrounds facing the same problem might be compelled to follow different courses of action, while mediators who are not members of another profession would be subject only to the guidelines and codes for mediators. Although in many cases the codes and guidelines are not in conflict, the proliferation of mediation codes and guidelines by government agencies, courts, businesses, professional associations and private alternative dispute resolution providers leads to complexity and likely confusion.

[View Article](#) (Subscription Required)

### **First Court-Annexed Mediation Center Opens in India**

*The Hindu*, June 10, 2005; June 27, 2005

The first court-annexed mediation center in India opened in the State of Tamil Nadu on April 9. Housed at the Madras High Court, the Tamil Nadu Mediation and Conciliation Centre will mediate a broad range of cases, including commercial, property, partnership and family disputes. Judges may refer cases to mediation, which are typically to be conducted within 60



days, by mediators who will be paid a “nominal sum” set by the court. The Centre organized a training program in which two U.S.-based mediation trainers trained 40 former judges and lawyers as mediators. The Chief Justice expects the program to be extended to other types of courts soon and indicated that eventually every court in the state will have a mediation center.

[View June 10 Article](#); [View June 27 Article](#)

### **Indian Chamber of Commerce Developing ADR Ties in U.S.**

*Telegraphindia.com*, June 14, 2005

The Indian Chamber of Commerce (ICC) is establishing connections with the (U.S.) Council of State Governments and the University of Kentucky in order to expand beyond arbitration and begin offering mediation services for international commercial disputes involving India. A 12-person team from the ICC will visit the United States in July for training and meetings with experts on mediation, reconciliation and arbitration at Harvard Law School, the American Arbitration Association and Northern Virginia Mediation Service.

[View Article](#); [View ICC Website](#)

### **Australian Executive Dispute Highlights Antitrust Issues**

*News.com.au*, June 25, 2005

An Australian court-ordered mediation is scheduled for early July between Amcor and the former head of its Australian corrugated cardboard division who was fired for taking confidential information and recruiting other executives to establish a rival consulting business. But what might otherwise be a routine mediation over the executive's A\$1.9 million damage claims is gaining more attention due to the executive's assertions that he was forced to engage in illegal price-fixing which he claims was pervasive at Amcor; the company acknowledged that it might have breached antitrust laws only in its cardboard division. The parties and the court are now trying to determine the extent to which confidential documents seized from the executives may be retained by the company and used in the pending mediation and any litigation that remains after the mediation.

[View Article](#)

### **JAMS and CEDR Form Transatlantic Alliance**

*Lloyd's List International*, June 8, 2005

The Centre for Effective Dispute Resolution (CEDR), Europe's biggest provider of mediation services (with 700 cases last year), and JAMS in the U.S. (with 7,000 mediations) have formed an international alliance. In addition to referring work to each other, both firms have expressed interest in further developing co-mediation and in pursuing insurance disputes together.

[View Article](#) (Subscription Required)

### **Universities Create Transformative Conflict Resolution**

## Consortium

*Grand Forks Herald*, May 10, 2005

Hofstra University School of Law, Temple University, James Madison University and the University of North Dakota (UND) announced the creation of a consortium to support the Institute for the Study of Conflict Transformation. The new consortium will serve as a clearinghouse for transformative conflict resolution research, studies and practice. The consortium also plans to build an academic structure and training curriculum in transformative mediation. UND will serve as the administrative hub for the consortium.

[View Article](#); [View UND Press Release](#)

**May 1, 2005**

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- Mediation to Ease Court Load in Maryland County
- OECD Consumer Dispute Resolution Workshop Held at FTC

## CASES & RESOLUTIONS:

### Microsoft and Gateway Mediate and Settle Antitrust Dispute

*Out-law.com*, April 12, 2005; *Wall Street Journal*, April 12, 2005

Microsoft and Gateway have mediated and settled a long-running antitrust dispute with Microsoft agreeing to pay \$150 million over four years, while admitting no liability. The settlement resolves previously undisclosed claims that Gateway pursued as a result of findings in the Department of Justice's high-profile antitrust suit against Microsoft in the late-1990s, which was itself resolved through mediation in 2002.

View *Out-law.com* Article; [View WSJ Article](#) (Subscription Required)

### Mediation Term Sheet Enforceable: *Tender Loving Things, Inc. v. Robbins*, 2005 Cal. App. Unpub. LEXIS 3470, (April 20, 2005)

In a patent dispute concerning a scalp massager called "The Tinger," a stipulation for settlement and "term sheet" signed by the parties after mediation was held enforceable by the California court of appeals despite the parties' intention of completing a more polished settlement agreement. The court held that the fact that parties detailed stipulation contemplated a subsequent "final agreement" does not override the fact that the parties agreed that the stipulation itself could be enforced and all key term were in the stipulation, noting that an uncompleted dispute resolution clause was not key. The court also rejected arguments that the mediation agreement was reached by fraud or mistake, stating that a party cannot rely on statements by an opponent in mediation any more than in court proceedings, since each side may present its views in the most favorable light.

[View Opinion](#)

### Unsigned Mediation Settlement Agreement Cannot Be Used as Shield: *Cohen Schatz Associates v. Perry*, 2005 WL 891239, 2005 N.C. App. LEXIS 807 (April 19, 2005)

Although the parties reached an agreement in mediation, one side failed to sign the written settlement agreement, so the North Carolina Court of Appeals held that the settlement could not be used to block ongoing proceedings in the litigation. The appellate court agreed that a properly documented settlement would render litigation over the settled claims moot. However, the court refused to overturn summary judgment, noting that the objecting party had neither signed the settlement agreement nor

### Mediation Quote

"People don't want more information.... They want faith – faith in you, your goals, your success, in the story you tell. It is faith that moves mountains, not facts."

– Annette Simmons,  
[The Story Factor](#)

### IBA Mediation Newsletter

The first issue of the International Bar Association's Mediation Newsletter (Vol. 1, No. 1) with 22 articles from 16 countries is now available and linked [here](#).

### Contact Information

sought to enforce it.

[View Opinion](#)

## NEWS & INITIATIVES:

### ABA Group Finalizes Confidentiality Guide for Federal ADR

*ADRWorld.com*, March 31, 2005

After four years of effort, an ABA ad hoc committee on federal alternative dispute resolution (ADR) confidentiality has adopted a detailed policy statement providing guidance on confidentiality issues and suggesting best practices. Notably, the guide states that participants in federal ADR proceedings can agree to greater confidentiality protections than those set forth in the federal Administrative Dispute Resolution Act (ADRA). This addresses an issue raised by section 574(b)(7) of the Act, which provides that communications made in a joint session are not protected from disclosure. At least one agency has interpreted the Act as prohibiting separate agreements going beyond its terms. The ABA guide encourages parties to extend confidentiality protections beyond what is provided in the Act by simply signing a document agreeing to the confidentiality of the proceeding (which binds signatories but not third parties). The ABA committee included many representatives of federal agencies and public and private ADR groups, who agreed on processes and standards for addressing access requests, which may avoid disclosures in future investigations. The next step is to encourage agency implementation of the policy statement.

The final ABA guide is expected be publicly available in several weeks; in the meantime, the 96-page draft containing the final substantive guidelines is available electronically from Keith Seat.

[View Article](#) (Subscription Required)

### New Mediator Model Standards of Conduct Tweaked

*ADRWorld.com*, April 21, 2005

The ABA Dispute Resolution Section on April 13 approved the Litigation Section's modest changes to the updated Model Standards of Conduct for Mediators. The changes clarify the definitions of "shall" and "should" and state that the document may provide a "standard of care" to which mediators may be held even if it hasn't been adopted by a court or

regulatory authority and doesn't have the force of law.

[View Article](#) (Subscription Required); [View Redlined Model Standards](#) (Subscription Required)

### South Carolina Enacts Mediation Requirement for Medical Negligence Claims

*ADRWorld.com*, April 20, 2005

South Carolina enacted S. 83 on April 4, requiring mediation of medical malpractice claims in an effort to reduce health care costs and provide

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parties the opportunity to go beyond monetary issues when seeking to resolve claims. A sponsor of the legislation stated that studies show that malpractice settlements which include an apology from the doctor can have a positive effect on patients and may reduce future mistakes. The legislation provides that engaging in prelitigation mediation does not eliminate the obligation to participate in alternative dispute resolution after the litigation has begun.

[View Article](#) (Subscription Required); [View Legislation](#) (Subscription Required)

## **Washington and Iowa Enact Uniform Mediation Act**

*ADRWorld.com*, April 29, 2005

The states of Washington and Iowa became the fifth and sixth jurisdictions to enact the Uniform Mediation Act (UMA) on April 22 and 28, respectively. The UMA is intended to encourage greater use of mediation by ensuring clear confidentiality protections. The Iowa legislation is very similar to the uniform act drafted by the National Conference of Commissioners on Uniform State Laws, except for a provision giving mediators and mediation programs immunity from civil actions unless they act in bad faith or with wanton disregard. The Washington legislation contains minor differences to conform to state law, including exemption of mediation materials from disclosure under the state open records laws, and coverage of mediations relating to collective bargaining agreements. The other states that have enacted the UMA are New Jersey, Illinois, Nebraska and Ohio.

[View Washington Article](#) (Subscription required); [View Washington Statute](#) (Subscription required); [View Iowa Article](#) (Subscription required); [View Iowa Statute](#) (Subscription required)

## **Connecticut, Minnesota, District of Columbia Considering Uniform Mediation Act with U.N. Supplement for International Disputes**

*ADRWorld.com*, April 5, 2005

Connecticut, Minnesota and the District of Columbia are the first jurisdictions to consider adopting the Uniform Mediation Act (UMA) enhanced with a supplement that incorporates the United Nation's Model Law on International Commercial Conciliation. Doing so would encourage parties to mediate international disputes in the U.S. by providing more options and greater certainty over the confidentiality of mediation communications in future proceedings. If enacted, the supplement would provide that, unless the parties agree otherwise, mediations of international disputes would be governed by the UN model law with the UMA privilege attached. Six states (New Jersey, Illinois, Nebraska, Ohio, Washington and Iowa) have already enacted the UMA without the UN Model Act supplement, while other states (including Indiana and Vermont) are currently considering adopting the UMA without the supplement.

[View Article](#) (Subscription Required); [View Connecticut Senate Bill 1363](#) (Subscription Required); [View Minnesota House Bill 1159](#) (Subscription Required); [View District of Columbia Bill 16-0145](#) (Subscription Required); [View United Nation's Model Law on International Commercial Conciliation](#)

## **Mediation to Ease Court Load in Maryland County**

Delmarva Daily Times, April 21, 2005

The State's Attorney's office in Worcester County, Maryland is beginning a mediation program this summer to resolve criminal complaints with a renewable \$35,000 grant it received in April from the Maryland Mediation and Conflict Resolution Office (MACRO). The mediation program is intended to both reduce crowded court dockets and offer defendants and accusers an opportunity to find solutions that are tailored to their individual needs and may end the conflict. Cases in which two or more people file charges against each other are more likely to be addressed by mediation than those initiated by a police arrest, so a single mediation often resolves multiple cases.

[View Article](#)

## **OECD Consumer Dispute Resolution Workshop Held at FTC**

The Federal Trade Commission hosted a workshop organized by the Organization for Economic Cooperation and Development's Committee on Consumer Policy on April 19-20. The workshop examined approaches to consumer dispute resolution and redress in OECD member countries. Experts from governments, business, consumer groups, and academia explored the advantages and disadvantages of different mechanisms for resolving consumer disputes in the cross border context.

[View Workshop Information](#); [View Background Report](#)



April 1, 2005

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- Australia Considers More Workplace Mediation

## CASES & RESOLUTIONS:

### Mediation Settlement Agreement Scrutinized Closely: *Goodrich Corp. v. Autoliv ASP, Inc.*, A106077 (Cal. App. 1st Dist. 2005)

Even though the parties signed a memorandum of settlement after mediation stating that their agreement was binding and intended to settle all issues, the California Court of Appeals concluded that the parties had failed to agree to the "same thing" on one material point and thus there was no enforceable settlement agreement. Noting that the parties disagreed from the outset on the terms of a more formal settlement agreement and refused to return to mediation, the court concluded that the issue of whether yearly costs were capped or could be rolled over from year to year was sufficiently material to prevent formation of a binding contract. The appellate court reversed the trial court, stating that whether the agreement was sufficiently definite was a question of law that could be reviewed de novo.

[View Opinion](#)

### Decision-maker as Mediator Can Sour Mediation: *Schauf v. Schauf*, 2005 WL 497133 (Kan. App. 2005)

The Kansas Court of Appeals held that the better practice is not to assign one person to be both mediator and master (with authority to try issues in the case) because "this taints the spirit of open disclosure in mediation and it taints the impartiality of the master." However, a party must promptly object to the dual assignment of roles or the right to object is waived. Here, after nine years of litigation, the trial court appointed a senior judge as both mediator and master to help feuding family members resolve accounting issues and damages relating to the family dairy farm, without objection from either side. When mediation failed, the remaining issues were tried to the master, and the subsequent appeal was unsuccessful.

[View Opinion](#)

## NEWS & INITIATIVES:

### "This Time We Mean It": Utah Re-Emphasizes Agency Use of ADR

*ADRWorld.com*, March 11, 2005

## Mediation Quote

"The art of the mediator is to paint almost invisibly, play a beat that will work but no one will notice, or to direct in such a way that heroes are born. Unlike an artist, you never get to show your work and because you were in the background your work may also be forgotten. But, the disappearing nature of your craft is part of the art as well."

- Eric R. Galton,  
[Ripples from Peace Lake](#)

## Check Out This EU Site:

Click [here](#) for a Green Paper and information about the European Union's approach to mediation in civil and commercial matters

## Contact Information

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The Utah legislature passed a resolution calling on state and local government agencies to rely on alternative dispute resolution (ADR) as a "preferred option" for preventing and resolving public and private conflicts. While existing Utah law already encourages use of ADR to resolve disputes, the resolution urges agencies to take full advantage of that authority in order to reduce litigation costs. The resolution was quickly approved in both the Senate and House before being sent to the governor in March for filing.

[View Article](#) (subscription required); [View Text of Resolution](#)

## New Jersey Considers Ending Free Mediation

*New Jersey Law Journal*, March 14, 2005

To obtain greater professionalism in its civil mediation program, the New Jersey Supreme Court is contemplating whether to end its "first three hours free" rule, which is causing many of the best mediators to quit. Instead, the court may permit a charge of \$100 per hour for the first three hours. Mediators assert that the current rule causes parties to take mediation less seriously, and that some parties give up when the free time runs out, even though a little additional effort could resolve the dispute. The court-ordered civil mediation program has expanded from four to seventeen counties in New Jersey over its five year existence, and mediated about 4,000 cases last year.

## North Carolina Courts May Send More Cases to Mediation

*ADRWorld.com*, March 24, 2005

Pending North Carolina legislation would increase mediation in the state by giving all superior court clerks the authority to send cases within their jurisdiction to mediation. Unlike other states, North Carolina's superior court clerks are judges of probate and other issues such as public land condemnation, foreclosures, adoptions and guardianship, in addition to their administrative responsibilities. Notably, the legislation would allow the clerks to compel attendance of named and interested parties as well as non-party participants who may have useful information which could help the mediation.

[View Article](#) (subscription required); [View NC Senate Bill 805](#)

## Mediation of Complaints Against Police Expanding

*The Oregonian*, March 14, 2005

Mediation is increasingly being used in Portland, Oregon and elsewhere in the country to resolve complaints by the public against police officers, allowing both complainants and officers an opportunity to better understand the concerns and actions of all involved. Cases range from mistaking victims for perpetrators, to cultural misunderstandings and problems caused by short-staffing. Portland seeks to have ten percent of its 1,000 annual complaints for alleged police misconduct addressed through mediation. Portland joins larger cities, including Washington, D.C. and New York City, in relying on mediation for police complaints.

## Mediation Service Helps Maine Consumers

discuss any matters or issues that might be suitable for mediation or facilitation:



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*Bangor Daily News*, March 17, 2005

Disgruntled Maine consumers can take their complaints to mediation, rather than going directly to court. The Maine Attorney General's Volunteer Consumer Mediation Service offers free complaint resolution to anyone who uses products and services in Maine. The Attorney General's office also keeps an eye out for repeated, similar complaints against a business and determines whether enforcement action is needed. Neutral volunteer mediators trained in consumer law are handling about twenty percent of the 8,000 contacts from consumers each year; the resolutions involve payment of hundreds of thousands of dollars each year, along with other types of solutions reached by the parties.

### **U.K. Launches National Mediation Helpline**

*The Liverpool Daily Post & Echo Ltd.*, March 8, 2005

People throughout England and Wales can now make a local call to a National Mediation Helpline to obtain information about resolving personal injury, small claims, and business and consumer disputes through mediation. Launched in March as a pilot project that will run until November, the National Mediation Helpline is a collaborative effort of public and private groups to encourage use of mediation outside the courts. Operators at the Helpline provide detailed information and put callers in touch with mediation providers. Mediators are paid on a sliding scale depending on the size of the case. The Helpline is being publicized by county courts sending out information to litigants and through posters, leaflets and a Helpline website.

Go to *Helpline Website*

### **Australia Considers More Workplace Mediation**

*Lawyers Weekly Magazine*, March 24, 2005

The Australian federal Coalition committed AU \$2 million (US \$1.5 million) to provide free mediation services for workplace disputes involving small businesses, as an alternative to the conciliation services offered by the Australian Industrial Relations Commission. Legislation mandating mediation in workplace cases is also being considered. This has stirred controversy and debate about whether more mediation is needed and how it would differ from the conciliation offered by the Commission, which is described by users as rights-based and evaluative.

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## CASES & RESOLUTIONS:

### Court Upholds Mandatory Mediation Clause Denying Attorneys Fees

Frei v. Davey, No. G033682 (Cal. App. 4th Dist. 12/17/04)

Mandatory mediation clauses gained strong support from a California appellate court ruling that a contract provision barring recovery of attorneys' fees by a prevailing party that refuses to mediate prior to litigation is enforceable. The seller of a house refused to mediate a \$20,000 dispute, which ultimately resulted in attorneys' fees exceeding \$500,000 for the parties. The trial court awarded the seller attorneys' fees of \$130,000, but the appellate court reversed based on a new mandatory mediation provision in the California standard form residential purchase agreement, which prohibits recovery of attorneys' fees by a party refusing a mediation request. This is the first published decision in which the provision has been applied; the court discusses the benefits of mediation and systematically rejected numerous arguments ranging from timing (seller agreed to a later mediation) to futility.

[View Decision](#)

### Short Mediation Settlement Agreement Enforceable

Fair v. Bakhitairi, 18 Cal.Rptr.3d, 208 (Cal App. 1st Dist. 2004)

A California appellate court reversed the lower court and enforced a nine-word arbitration clause in an abbreviated settlement agreement that had been signed by the parties at the end of two days of mediation pending preparation of a detailed formal agreement. When disputes arose over the language of the longer agreement, the parties did not return to mediation, and litigation over the enforceability of the arbitration provision ensued. The appellate court concluded that the inclusion of the arbitration clause demonstrated that the parties intended the document to be binding, so it fell within the state's exception to mediation confidentiality. The court further found that the short settlement agreement set forth all the material terms of a contract and the parties reported to the court that the case had been settled in mediation, even though they intended to flesh out a more comprehensive agreement.

[View Decision](#)

### Mediation Resolves Freedom Tower Dispute

*Wall Street Journal*, October 6, 2004

Assisted by a court-appointed mediator, World Trade Center leaseholder

- U.S. Encouraging Japan to Use ADR
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Larry Silverstein agreed to pay architect Daniel Libeskind's firm \$370,000 for work on the Freedom Tower. Under the settlement, Libeskind, designer of the master plan for redevelopment of the trade center site, will withdraw his lawsuit claiming Silverstein owed him more than \$843,000 for creative services.

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## NEWS & INITIATIVES:

### General Counsels Favor Mediation

*Fulbright & Jaworski, 2004*

An independent survey of hundreds of general counsels of large corporations on litigation trends reported that mediation is viewed favorably by 60% of corporate counsels, while 15% disfavor it. Seventy percent consider that mediation provides savings, with 6% reporting increase in costs from use of mediation. By contrast, domestic arbitration was viewed favorably by only 43% of respondents, and disfavored by 36%. Forty-seven percent noted savings from use of arbitration, and 9% reported increases in costs from arbitration. In ranking litigation exposure, respondents' top concerns were labor and employment, contract issues, intellectual property, product liability and class actions. The survey purports to be one of the largest of its kind ever conducted.

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### Aggressive Settlement Strategy Reaps Benefits

*Corporate Counsel, September 24, 2004*

The \$1.5 billion outdoor equipment business Toro Co. uses mediation whenever informal settlement efforts fail, in order to avoid litigation. Toro states it has saved nearly \$100 million in litigation costs since implementing its aggressive settlement strategy in 1991. Toro's systematic approach begins with sympathetic paralegals (who resolve about 70% of claims), and when needed moves to in-house settlement counsel and mediators experienced with Toro's approach. Toro has cut the total cost of each claim from \$115,000 to \$35,000, and hasn't defended a product liability claim in court since 1994.

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### Tyson to Mediate Future EEOC Claims

*Wall Street Journal, September 15, 2004*

Tyson Foods, Inc. became the 62nd U.S. company to sign the U.S. Equal Employment Opportunity Commission's National Universal Agreement to Mediate, agreeing to rely on mediation to resolve future workplace disputes prior to EEOC investigation or litigation. Either the company or the EEOC may opt out of mediation if it believes a matter is inappropriate.

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### Use of Dispute Boards Increasing; ICC Issues New Rules



## Contact Information

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*Jones Day*, December 2, 2004

Use of "dispute boards" has been increasing well beyond the major civil engineering projects where they originated. Dispute boards comprised of one or three neutrals are typically used by parties to an ongoing project who want a dispute resolution process in place to quickly address conflicts that may arise during the project. The process often involves periodic meetings to keep neutrals up to speed on the project so that any disputes can be more quickly resolved. The mere existence of a dispute board encourages cooperation between the parties and often keeps the relationship from becoming adversarial. The World Bank has relied on dispute boards for a decade and includes revised provisions for them in its model contracts. More recently, the International Chamber of Commerce ("ICC") in Paris issued new Dispute Board Rules, which took effect September 1. The essence of dispute boards is often articulated as making decisions, whether binding or advisory, but dispute boards are intended to be quicker and less formal than arbitration. The process may in fact be closer to mediation in many circumstances. The ICC Rules state that a dispute board may informally assist the parties in resolving disagreements by meeting separately with a party and by giving its informal views to the parties.

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## Interior Department Testing ADR Option for Administrative Appeals

*ADRWorld*, December 22, 2004

As part of its effort to expand use of alternative dispute resolution, the Interior Department's Board of Land Appeals is beginning an 18-month pilot project to use ADR in suitable cases appealed from Bureau of Land Management decisions. Use of mediation and other forms of ADR would be voluntary. Any neutral could be used, although government-provided neutrals would be free, while the parties would be responsible for payment of private-sector neutrals. The agency suggests that this project could be a model for other federal entities and notes that the U.S. Forest Service has already made inquiries.

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## HHS Touts New ADR Program

*ADRWorld.com*, September 29, 2004

In late September, the U.S. Department of Health and Human Services began an alternative dispute resolution pilot program for medical negligence claims against the federal government, which it hopes might become a model for other agencies. However, the so-called Early Offers ADR program merely provides a mechanical administrative process for parties to confidentially submit settlement offers and see whether the claimant's offer is less than or equal to an HHS offer.

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## ICANN Ombudsman to Use ADR System for Complaints

*ADRWorld.com*, December 14, 2004

A newly established ombuds office within the Internet Corporation for Assigned Names and Numbers will use alternative dispute resolution to



handle claims brought as a result of ICANN's actions. The ombudsman will use mediation, neutral fact-finding and conciliation, as appropriate, to help the parties better understand ICANN and resolve concerns before they become formal complaints.

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### **NMB, UMass Developing New ODR Processes**

*ADRWorld.com*, December 17, 2004

The National Mediation Board ("NMB") and the University of Massachusetts are developing new online dispute resolution ("ODR") processes and techniques for use by federal agencies and the private sector. The University of Massachusetts received a \$700,000 grant from the National Science Foundation at the end of October. The project is scheduled to last three years, with the first year devoted to developing ODR software and then two years using the new tools in a test-bed of the NMB's voluntary grievance mediation program for labor unions and the railroad and airline industries. Software development will focus on visual communication tools and mapping software, with an emphasis on keeping the ODR processes simple and easy to use.

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### **U.S. Delegation Meeting with UK, French Officials on ADR**

*ADRWorld.com*, December 7, 2004

A U.S. delegation including Supreme Court Justice Stephen G. Breyer and top jurists and legal experts will meet January 23-28 with high-level officials from the United Kingdom and France to discuss emerging issues in international commercial dispute resolution. The meetings will cover mediation as well as arbitration. The U.S. has more experience mediating large commercial cases than does Europe, where companies and courts are just beginning to move in that direction. The delegation plans to release papers after the sessions and there may be future exchange of ideas.

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### **U.S. Encouraging Japan to Use ADR**

*ADRWorld.com*, October 22, 2004

The U.S. Office of the Trade Representative is encouraging Japan to establish an overall framework for using ADR in cross-border commerce as part of an ongoing U.S.-Japan competition initiative to promote economic growth and competition in the private sector. In particular, the USTR suggests that foreign lawyers and legal advisors should be able to represent clients in ADR processes in Japan; that ADR provider organizations should be able to administer cases in Japan without government license; that parties can choose what ADR processes and standards to use; and that neutrals are not practicing law and need not be supervised by Japanese lawyers. In addition, the U.S. recommends that e-commerce include processes for online dispute resolution. These recommendations will be discussed over the next year pending issuance of an annual report to heads of state.

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## **Survey Shows Strong Support for Mediation Growth in Europe**

*ADRWorld.com*, December 1, 2004

A survey by the CPR Institute of top European business and legal leaders indicates strong support for more use of mediation in both international and domestic commercial disputes and more training of lawyers and managers in mediation skills and uses. According to the head of CPR, there has been much greater use of mediation in the United Kingdom in the last five years, and use is increasing on the continent as well; courts have instituted pilot mediation programs in Italy, Belgium and the Netherlands. The European Commission issued a policy directive in November to promote greater use of mediation in civil and commercial disputes.

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## **Eleventh Circuit Project Allows Private-Sector Mediators**

*ADRWorld.com*, November 4, 2004

The U.S. Court of Appeals for the Eleventh Circuit has launched a two-year pilot project to permit parties to hire outside neutrals in cases the court refers to mediation, which the court states is a first for any federal circuit court. This will allow the parties to have more live mediations and avoid the telephone mediations caused by the court having only three offices across the circuit (which covers Florida, Alabama, Georgia).

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## **New Jersey Is Third State to Adopt Uniform Mediation Act**

*ADRWorld.com*, November 29, 2004

New Jersey became the third state (with Illinois and Nebraska) to enact the Uniform Mediation Act on November 22, providing mediation participants with the privilege to prevent disclosure of mediation communications. The New Jersey legislation is very similar to the model act.

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## **Michigan Encouraging Mediation in Larger Cases**

*ADRWorld.com*, September 23, 2004

Michigan dispute resolution officials are urging state courts to expand their use of mediation in complex and high-dollar civil cases in light of a new study of small claims that shows better collection rates when mediation is used.

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## **Florida to Mediate Hurricane Claims**

*ADRWorld.com*, October 15, 2004

With two million insurance claims expected as a result of the four recent large hurricanes, Florida's Department of Financial Services has adopted a new mediation program. It is modeled after the one used to resolve claims from Hurricane Andrew, which successfully resolved 80% of all claims disputes and partially resolved another 10%. Four mediation centers are being established in the state for the new claims by the Collins Center for

Public Policy, in order to resolve as many as 30,000 claims within a year.  
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### **California Expands Insurance Mediation Program**

*ADRWorld.com*, September 8, 2004

California legislation has created a new program that allows homeowners to pursue mediation for insurance claims stemming from the state's widespread wildfires in 2003 and extends existing programs for car insurance disputes and earthquake claims for another four years. The legislation gives mediators some discovery powers and requires the costs of mediation to be "reasonable," which may be limited by the state agency to \$1500 for fire claims and \$700 for earthquake and car claims.

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### **Philadelphia Court Task Force Exploring ADR Expansion**

*ADRWorld.com*, November 24, 2004

The Philadelphia Court of Common Pleas has convened a task force to explore opportunities for broadening alternative dispute resolution options available to litigants in its civil case docket. The court currently uses arbitration, but based on consumer demand is looking to add mediation and early neutral evaluation, with special attention being given to medical malpractice cases.

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### **Wyoming Voters OK ADR for Medical Malpractice Claims**

*ADRWorld.com*, November 8, 2004

Wyoming voters on November 2 narrowly approved a constitutional amendment authorizing state lawmakers to adopt legislation mandating the use of alternative dispute resolution to settle medical malpractice claims before they are filed in court. The amendment was passed in response to a decision overturning as unconstitutional a previous Wyoming law authorizing ADR in medical malpractice cases.

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### **Doctors Advised that an Apology a Day Keeps the Lawyer Away**

*Associated Press*, November 12, 2004

According to some malpractice-reform advocates, an apology can soothe patients and help doctors avoid malpractice lawsuits, especially when combined with upfront settlement offers. The hospitals in the University of Michigan Health System have been encouraging doctors since 2002 to apologize for mistakes, and have seen annual attorneys' fees drop from \$3 million to \$1 million, and malpractice lawsuits and notices of intent to sue fall from 262 before beginning the program to about 130 per year. The Veterans Affairs hospital in Lexington, Ky., adopted a program called "Sorry Works" in 1987 after two expensive malpractice cases.

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