

MEDIATION NEWS

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Keith L. Seat

NOVEMBER 2012

CASES & RESOLUTIONS:

Ninth Circuit Courts Must Be Reasonable when Requiring Government Representatives to Appear with “Full Settlement Authority”

The U.S. Court of Appeals for the Ninth Circuit concluded that it was an abuse of discretion to require the Assistant Attorney General (AAG) in charge of the Tax Division of the U.S. Department of Justice personally to attend a settlement conference relating to a \$5 million tax refund, even though no one below her has full settlement authority exceeding \$2 million. The court issued a writ of mandamus to reverse lower court orders requiring attendance in person, noting that participation by telephone or even in person in future settlement negotiations might be reasonable. The court recognized that the Tax Division has over 500 civil cases pending in which the controversy exceeds \$2 million, which might result in more settlement conferences than would be physically possible for the AAG to attend in person. In addition, the court acknowledged the need for centralized decision-making in significant cases, especially when even the AAG's decisions over \$2 million must be reviewed by the Congressional Joint Committee on Taxation. The judges on the appellate panel contrasted their experience in settling cases with the settlement judge's statement that he had never achieved a settlement in 29 years without having a person with full authority present for each side.

[U.S. v. U.S. Dist. Ct. for N. Mariana Islands](#), No. 11–72940 (U.S.C.A. 9th Cir., September 12, 2012)

New York Court Maintains High Bar for Accessing Confidential Mediation Materials

A federal district court in New York considered when a party may access confidential mediation materials and reversed the magistrate's decision that “special need” for the material had been demonstrated. Importantly, the court concluded that a confidentiality agreement among participants in a private mediation was to be treated no differently than mediations in which confidentiality was ordered by a court. Here, the confidential materials were from a prior private mediation in Singapore between plaintiffs and some of the defendants. Defendants sought to use prior

Mediation Quote:

"Public memorials may be erected to signify and symbolize loss; a formal government or private apology may follow an admission of wrongdoing; and emotional, legal, and educational assistance may be a worthy substitute for cash in certain situations. . . . But when we discuss how to compensate innocent victims of wrongdoing or determine the value of corporate employment, Americans rely upon money. It's a natural outgrowth of our free market, capitalist history. . . . [I]n an important sense, the exchange of money constitutes public acknowledgement of injustice and loss. It can serve as an expression of citizen support, the community standing as one with the victim."

Kenneth R. Feinberg, *Who Gets What: Fair Compensation after Tragedy and Financial Upheaval* (PublicAffairs 2012) at 186-87

Events & Gatherings:

The American Bar Association celebrated Mediation Week (October 14-20) with over 50 events around the country and the world, including a luncheon at the National Press Club in Washington, D.C. U.S. Department of Justice representatives spoke at the Washington event and noted that mediation is increasingly important during times of

mediation statements of plaintiffs to impeach them, but plaintiffs sought a protective order to shield the materials. The court concluded that impeachment was not a “special need” or “compelling need” as required to modify a protective order and thus did not meet the test established in [In re Teligent, Inc.](#), 640 F.3d 53 (U.S.C.A. 2d Cir., May 5, 2011), without even analyzing the other two elements of unfairness from lack of discovery and the need for the evidence outweighing the interest in maintaining confidentiality.

[Dandong v. Pinnacle Perf. Ltd.](#), No. 10 Civ. 8086 (U.S.D.C. S.D.N.Y., October 9, 2012).

Advising Court of Settlement in New Jersey Waives Mediation Confidentiality over Terms

After litigants reached agreement in mediation, they permitted the mediator to tell the court that settlement had been achieved, but neglected to prepare or sign a written settlement agreement. When the parties disagreed on the settlement terms a week later, mediation confidentiality under the Uniform Mediation Act was raised in an effort to block enforcement of the oral settlement agreement. The trial court upheld the oral settlement after permitting testimony to establish the terms, on the theory that the “actual mediation” ended with the negotiations, and a final joint mediation session to discuss and finalize the terms was therefore not confidential. Without criticizing that rationale, the appellate court affirmed enforcement of the settlement on the basis of express waiver of confidentiality since the parties permitted the mediator to advise the court that the matter was settled. Having disclosed that there was a settlement, the court held that either party was permitted to disclose the terms and seek enforcement of the settlement.

[Rutigliano v. Rutigliano](#), No. A-2797-11T1 (NJ Sup. Ct. App. Div., October 15, 2012)

Delay by Insurer in Payment of Mediation Settlement Triggers Penalty

An insurer that agreed to settle a disputed claim in mediation, but delayed payment beyond 30 days was penalized \$5,000 for failure to make timely payment, but avoided a \$125,000 penalty that would have been due if the delay followed the insurer receiving satisfactory proof of loss. Since the insurer had denied liability for the claim, the mediation settlement was not considered proof of loss, so the lower statutory penalty applied.

[Katie Realty Ltd. v. Louisiana Citizens Prop. Ins.](#), No. 2012-C-0588 (La., October 16, 2012)

Other Notable & High Profile Proceedings

- The U.S. Office of Special Counsel successfully mediated the Whistleblower Protection Act claim of a U.S. Border Patrol agent who was harassed for refusing overtime pay when there was no work to be performed and then briefing Congress. The Office of

tightening government budgets, giving the example of DOJ spending \$1 million in mediation expenses which saved \$13 million in discovery costs and 1,500 months of litigation in cases resolved in mediation. [ABAnow](#)(October 19, 2012)

The 17th gathering of the World Forum of Mediation Centers was held in Zagreb, Croatia in October and included passionate discussion of mediation styles. Participants attended from the U.S., Canada, the U.K., Spain, France, Belgium, Netherlands, Germany, Austria, Czech Republic, Croatia, Slovenia, Italy, Russia, Lebanon, India, Cameroon and Hong Kong. The next meeting will be in June 2013 in Prague. [Business Conflict Blog](#) (October 15, 2012)

The International Chamber of Commerce considers its International Commercial Mediation Competition to be its biggest educational event of the year with teams of university students competing in mock sessions guided by leading professional mediators. [International Chamber of Commerce](#) (October 2012)

FINRA held its Fourth Annual Securities Dispute Resolution Triathlon in October in which students from various law schools demonstrated their advocacy skills in mediation, negotiation and arbitration of a securities dispute. [FINRA](#)(October 2012)

Worth Noting:

Former British Prime Minister Tony Blair earned \$1 million in less than three hours as a mediator in late-night talks over a £50 billion mining deal that was about to crash. Blair was brought in for his mediation skills after the head of Swiss commodities giant Glencore and the Qatar Prime Minister had reached impasse over Glencore’s plans to merge with Swiss mining

Special Counsel has also mediated three cases for Operation Fast and Furious whistleblowers at the Bureau of Alcohol, Tobacco, Firearms and Explosives. [Government Accountability Project](#) (October 24, 2012)

- The University of California has agreed in mediation to pay \$30,000 and give a personal written apology to each of 21 UC Davis students and alumni who were pepper sprayed at close range by campus police during a peaceful protest. A report about campus responses to civil disobedience urged UC administrators to use mediation in place of confrontation in the future, but indicated that pepper spray might still be needed as a last resort. [Business Insider](#) (September 26, 2012); [Los Angeles Times](#) (September 13, 2012)
- The New York Times has reached a tentative deal with the Newspaper Guild through mediation, in an effort to avoid a proposed byline strike. After 18 months of talks, Times negotiators walked out of negotiations earlier in October and threatened to present their "final offer" at the next meeting, but then agreed to try mediation. Mediation with a trusted mediator made progress, eventually resulting in the tentative deal. [Poynter News](#) (October 28, 2012); [Talking Points Memo](#) (October 22, 2012); [NY Guild](#) (October 10, 2012)

NEWS & INITIATIVES:

OSHA Begins Mediation Pilot Program for Whistleblower Complaints

The U.S. Department of Labor's Occupational Safety and Health Administration is launching an alternative dispute resolution pilot program for whistleblower complaints, offering a choice of mediation or early resolution to assist complainants and employers in finding quicker relief and finality. In early resolution, the parties seek to resolve the whistleblower complaint with the assistance of an OSHA regional ADR coordinator prior to OSHA launching an investigation. The pilot program is beginning in two regional offices covering ten states. OSHA is responsible for the whistleblower provisions of 22 statutes and receives about 2,500 whistleblower complaints a year.

[Mediation World](#) (October 4, 2012); [OSHA Pilot Program Information](#) (October 1, 2012)

Spain Expands Commercial Mediation Through Chambers of Commerce

Spanish judges and Chambers of Commerce entered into a formal agreement in October to implement a system of mediation in which commercial and trial courts can send cases for mediation to the 88 Chambers of Commerce in Spain. Model regulations and a standard training program for mediators have been developed to implement mediation legislation in Spain that took effect in July, which is the first national civil and commercial mediation act in Spain. Importantly, the Spanish mediation legislation goes beyond the EU Directive requiring cross-border mediation, which Spain adopted in March, to provide a general approach to mediation in all civil and commercial matters in the

group Xstrata in which Qatar has a stake large enough to block the merger. [Pune Mirror.in](#) (September 11, 2012)

Other Cases & Resolutions:

Sigma Pharmaceuticals Ltd. agreed in mediation to pay nearly A\$60 million (US\$62 million) to settle a shareholder class action case against it, pending approval of the federal court. [4 Traders](#) (October 23, 2012)

NewPage Corporation has reached an agreement in principle with its major creditor groups through court-ordered mediation and hopes to soon emerge from Chapter 11 bankruptcy. [NewPage News Releases](#) (October 1, 2012)

Mediation resulted in a \$9.9 million settlement for a brain-injured woman thrown from an amusement park ride, along with a tearful apology from an owner of the defendant company. [Law Firm Newswire](#) (October 9, 2012)

Springfield, Massachusetts agreed to pay \$575,000 after a two-day mediation of a vicious police beating caught on video; the police officer had been fired and jailed for 18 months. [Boston.com](#) (September 6, 2012)

Mediation just before trial has resolved all issues in litigation against a regional medical center by a deliveryman for neck and back injuries after a level collapsed. [Madison/St. Cloud Record](#) (September 4, 2012)

Mediation over water rate increases by Aqua Texas has resulted in progress and hope for resolution at the next mediation session; water rates for some consumers doubled as regional rates were implemented. [My San Antonio](#) (October 24, 2012)

Arcelor Mittal South Africa and

country.

[Lexology](#) (October 30, 2012); [ADR Quadro Treviso](#) (July 7, 2012)

Italy's Mandatory Mediation Legislation Held Unconstitutional

The Italian Constitutional Court declared Italy's mandatory civil and commercial mediation legislation unconstitutional on October 24, a year and a half after it took effect. The legislation had been highly contentious, but at this point over 800 mediation centers have been established and over 30,000 matters submitted to mediation. The court has not yet announced the basis for its decision.

[JAMS International](#) (October 30, 2012); [Business Conflict Blog](#) (October 24, 2012); [West: Welfare, Society, Territory](#) (October 25, 2012); [Business Conflict Blog](#) (October 15, 2012)

Comprehensive Mediation Act in Czech Republic Takes Effect

The new Mediation Act of the Czech Republic took effect on September 1, implementing the EU Directive on civil and commercial mediation. The Act is among the most comprehensive and detailed mediation statutes in Europe, with stringent requirements for registration of mediators, fines for breach of mediation duties, and court authority to order mandatory mediation sessions.

[Kluwer Mediation Blog](#) (October 9, 2012)

Romania Mandates Mediation Prior to Litigation

Effective October 1, Romanians are required to participate in mediation before going to court in disputes of RON 50,000 (US\$14,000) or more. Matters already in litigation must also be mediated and, if resolved, generally will have their filing fees returned. Parties who go to court without mediating first may be fined by the court.

[Romania-Insider.com](#) (September 14, 2012)

Taiwan Considering Mandatory Mediation for Medical Malpractice Disputes

Taiwan's Department of Health proposed regulations mandating mediation of medical disputes before filing malpractice litigation. Under the proposal, city and county governments will form mediation committees of medical experts and public health officials to help parties reach settlements prior to litigation. Mediation is viewed as an important solution to rising malpractice litigation that is causing serious shortages of medical staff in internal medicine, surgery, gynecology and other

Sishen Iron Ore Company are mediating to ensure a continuing supply of iron ore until a long-awaited arbitration hearing can occur in the second half of 2013. [Engineering News](#) (October 31, 2012); [Engineering News](#) (October 17, 2012)

Storm Financial clients are set to begin mediation with Macquarie Bank over investor losses estimated at A\$830 million (US\$ 860 million). [The Australian](#) (October 23, 2012)

A Swedish international development agency and a Tanzanian non-governmental organization have agreed to mediation in an effort to resolve litigation over termination of funding for a three-year project. [All Africa](#) (October 25, 2012)

Commissioners of Holiday Island, Arkansas voted to pursue mediation in lawsuits against the district. [Carroll County News](#) (October 26, 2012)

Hundreds of claimants seeking millions of dollars from the Eastern Livestock cattle brokerage bankruptcy will be able to participate in a global mediation, according to the Kentucky Department of Agriculture. [Kentucky.com](#) (October 7, 2012)

departments.

[China Post](#) (October 6, 2012)

Other International Mediation Developments

- The Dubai Chamber of Commerce and Industry in the **United Arab Emirates** is handling increasing numbers of commercial disputes through mediation: 200 mediation cases in 1996 increased to nearly 400 in 2005 and over 850 last year; the Chamber has begun an online mediation application process and recently presented a mediation seminar in association with the Singapore Mediation Centre. [AMEinfo.com](#) (September 24, 2012); [Khaleej Times](#) (September 16, 2012)
- The importance of mediation and other forms of alternative dispute resolution for accelerating economic development was emphasized at the Sekondi-Takoradi Chamber of Commerce and Industry in **Ghana**. [Daily Guide Newspaper](#) (August 23, 2012)
- Delhi, **India** is commissioning two new mediation centers this year for a total of ten, but needs to move towards its goal of twenty centers, according to the Chief Minister, to help address a growing judicial backlog. [Business Standard](#) (September 28, 2012)
- **Greek** and **Chinese** companies are finding success in mediating disputes between them under a collaborative process that began 18 months ago. [Greek Reporter](#) (October 16, 2012)
- Courts in Shanghai, **China** will continue the principle of “Mediation First” in dealing with foreign-related cases, including those involving parties from Hong Kong, Taiwan and Macau; the number of foreign-related cases continues to grow due to the ongoing global financial crisis. [English Eastday.com](#) (September 14, 2012)
- Mediation is expanding in **Hong Kong** following Civil Justice Reforms and a new Mediation Ordinance that will take effect on January 1; a Hong Kong panel of 18 mediators has been launched by CEDR Asia Pacific, a division of the Centre for Effective Dispute Resolution. [Source Wire](#) (October 22, 2012); [China.org.cn](#) (October 19, 2012)
- The first alternative dispute resolution conference in **Singapore** was recently held at the Supreme Court and attended by 600 people, including policymakers from 15 countries; the Chief Justice encouraged mediation and a “culture of holistic resolution of disputes.” [Asia One](#) (October 7, 2012)
- The mediation unit of the Ministry of Labour in **Fiji** is increasingly successful, due to training provided by the Singapore Mediation Centre, which is providing additional training, including a one-day training for judges and magistrates. [The Fiji Times Online](#) (September 11, 2012)

Other Notable News Items

- An expert panel at the Community Association Institute's annual Legal Forum emphasized mediation as a "best practice" and superior to litigation for resolving disputes between homeowner associations, management companies and residents. The experts noted that, in mediation, preparation by the association board, clarity about the delegation of authority, and trust in the representative are critical to success. [Tipp News Daily](#) (October 22, 2012)
- Use of mediation continues to gain popularity in Hawaii, resulting in a declining number of civil lawsuits, saving both time and money. [Biz Journals](#) (October 30, 2012)

Update on Home Foreclosure Mediation

- Statistics about foreclosure mediation programs across the **U.S.** have been compiled by the Resolution Systems Institute in a 19-page report, [Foreclosure Dispute Resolution by the Numbers](#). The data show a wide variation in programs across the country. For example, the percentage of foreclosures mediated ranges from over 60% in Philadelphia to single digits, while the percentage of foreclosure mediations reaching agreement ranges from over 80% in Connecticut to barely 20% in Maine. [Foreclosure Dispute Resolution by the Numbers](#) (September 2012); www.AboutRSI.org
- The foreclosure mediation program in **Springfield, Massachusetts** was upheld by a federal court against a constitutional challenge by banks claiming that the state was the exclusive regulator of the foreclosure process, so a city could not create a foreclosure mediation program without state approval. The court determined that the program did not significantly alter the foreclosure process or the relationship between lender and borrower, but merely sought to soften the crisis. If successful, the challenge would have threatened many other mediation programs around the country. [Just Court ADR](#) (August 23, 2012)
- In **Missouri**, a commercial bank filed a class-action lawsuit against a new ordinance in St. Louis County that requires banks to mediate prior to foreclosing on homes. While the sponsor of the ordinance is confident it will be upheld, she also has introduced legislation to tweak the new law. A public protest in favor of foreclosure mediation and against the bank that brought suit was held by members of Missourians Organizing for Reform and Empowerment. [LoanSafe](#) (September 19, 2012); [St. Louis Local](#) (October 22, 2012)
- Oral arguments over the constitutionality of the foreclosure mediation program in **Nevada** were heard by the Nevada Supreme Court, which is also responsible for the mediation program – a potential conflict of interest that was raised by one justice. [Reno Gazette-Journal](#) (October 7, 2012) (Subscription Required)
- **Maryland** has tweaked its home foreclosure law, with new

regulations taking effect on October 1, which among other things will allow borrowers to request mediation even before lenders file to foreclose on a loan, resulting in earlier mediation. In addition, a mediation checklist has been developed to ensure that short sales and other options are always considered by lenders during mediation. [Herald-Mail.com](#) (September 2, 2012)

- A federal judge in **Rhode Island** is seeking recommendations on improving the foreclosure mediation process that many say is not working well and needs time limits. The judge had appointed a former CEO of Rhode Island Bank to be special master and mediate hundreds of foreclosure disputes; the special master has held 130 settlement conferences and expects more. Settlements have not been reached in most cases, but many requests for loan modifications are still pending. [Boston.com](#) (October 9, 2012)
- The foreclosure mediation program in **Oregon** that took effect in July is severely underutilized, as most large banks have refused to participate for various reasons and nonjudicial foreclosure filings have dried up. Advocates for lenders as well as homeowners are seeking a legislative solution to allow judges to send judicial foreclosures to mediation. [Oregon Live.com](#) (September 14, 2012)
- **Florida** bankruptcy court's foreclosure mediation program that began in Jacksonville in January is off to a slow start, but is working to allow some homeowners to stay in their homes. To participate, homeowners must file for Chapter 13 personal bankruptcy and then seek to participate in the mediation program through their bankruptcy attorney. [Jacksonville Business Journal](#) (October 25, 2012); [Jacksonville Business Journal](#) (October 26, 2012)

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SEPTEMBER 2012

CASES & RESOLUTIONS:

Complex Mediated Settlement Founders on Court's Concerns for Absent Class Members

Five months of mediation resulted in a sophisticated settlement to resolve a large class action against Sprint for charging flat-rate early termination fees to consumers for canceling cell phone service, which provided \$17.5 million to the class, prohibited the objectionable charges for two years, and expressly resolved ten other lawsuits. The class was certified and the settlement approved by the District Court in New Jersey, but the U.S. Court of Appeals for the Third Circuit vacated its order and remanded the case due to concerns over certification of the class and adequate notification of the settlement. The appellate court noted the considerable efforts put into settling the class action, but emphasized the judicial duty to protect absent class members.

[Larson v. AT&T Mobility, LLC](#), No. 10-1285/1477/1486/1587 (U.S.C.A. 3d Cir., June 29, 2012)

California Mediation Confidentiality Statute Shields Legal Malpractice

A California appellate court held that whether plaintiffs intended to settle their claims at mediation is "mediation related" and thus barred by California's strict mediation confidentiality provisions, preventing plaintiffs' claim that their attorneys improperly took their signatures from a confidentiality form at mediation and appended them to a settlement agreement that plaintiffs did not authorize. The trial court dismissed the complaint based on the 2011 decision of the California Supreme Court in [Cassel v. Superior Court](#), and the appellate court affirmed.

[Hadley, et al. v. The Cochran Firm, et al.](#), No. B233093 (Cal. App., 2d Dist., August 3, 2012)

Negotiating Financial Terms in Mediation Not Sufficient for Attorney to Get Paid

Counsel who withdrew from a case he was handling on a contingency fee basis prior to finalizing the settlement terms reached in mediation is not entitled to any fees according to a federal court. Counsel's assertion that the parties were merely fighting over financial terms that he worked out in the mediation did not persuade

Mediation Quote:

"People who are stuck in adversarial stories benefit from delivering full and satisfying descriptions of what they have experienced, as well as from watching the mediator encourage and model a deeper level of listening than it is possible for them to give one another in the midst of their conflict. Only after a story has been fully told, heard, and acknowledged by the mediator (and, whenever possible, by the other side) does it become feasible for the parties to move beyond it."

Kenneth Cloke and Joan Goldsmith, *Resolving Personal and Organizational Conflict: Stories of Transformation and Forgiveness* (Jossey-Bass 2000) at 41-42

Worth Noting:

The American Bar Association has declared October 14-20, 2012 to be ABA Mediation Week, and is providing extensive resources to promote mediation and civil public discourse. [American Bar Association](#) (August

the court since the agreement was incomplete and did not result in his client receiving any payment.

[Neely v. Zimmer](#), No. 2:11-cv-00444 (U.S.D.C. S.D. W. Va., August 2, 2012)

Netflix Mediated Settlement Approved by Court

A federal court in California gave preliminary approval to a settlement reached by Netflix in mediation, resolving a class action which alleged violations of the federal Video Privacy Protection Act due to Netflix maintaining customer viewing histories longer than necessary and disclosing information to third parties without consent. Netflix agreed to pay \$9 million, which after paying fees and costs will go to nonprofits that provide education on protection of privacy and personal information, and also committed to change its practices going forward. The court mentioned mediation in concluding that the settlement was the result of arm's length negotiation.

[In re Netflix Privacy Litigation](#), No. 5:11-CV-00379 (U.S.D.C. N.D. Cal., July 5, 2012)

Other Notable & High Profile Proceedings

- Visa's general counsel expressed great confidence that the court would approve the \$6.6 billion settlement between Visa, MasterCard and banks over credit-card fees because of use of a court-ordered mediation process with two mediators, along with involvement of the court. [Bloomberg](#) (August 7, 2012)
- Defendant sought to compel arbitration/mediation based on an Alternative Dispute Resolution agreement signed by the mother of a comatose patient, but the court ruled that the mother had no authority to bind her daughter. [Walton v. Kindred Hospital Philadelphia](#), No. 1677 EDA 2012 (Penn. Ct. Comm. Pleas, August 1, 2012); [The Legal Intelligencer](#) (August 17, 2012)
- An appellate court concluded that according to the terms of a mediation settlement agreement the parties had agreed to a general release of all claims in the litigation, but not the release of future claims. [CSX Transp., Inc. v. Hamilton](#), Nos. 2011-CA-001401-MR, 2011-CA-001422-MR (Ky. Ct. App., August 3, 2012)
- In the fourth appeal of a case purportedly settled in mediation, in which further disputes were to return to mediation, a California appellate court remanded the case stating that if the plaintiff had submitted the matter to mediation then she was entitled to seek a judicial remedy. [Adams v. Newport Crest Homeowners Assoc.](#), No. G045590 (Cal. Ct. App., 4th Dist., August 16, 2012)

NEWS & INITIATIVES:

California Fails to Add Legal Malpractice Exception to Mediation Confidentiality Statute

The California legislature has been unsuccessful in adding a narrow exception to the state's strict mediation confidentiality statute so that clients may use

2012); [Toolkit](#)

The International Chamber of Commerce is holding its Mediation Week from February 7-13, 2013, with a one-day 4th International Mediation Conference on February 7, followed by its 8th International Commercial Mediation Competition, involving about 70 university teams from more than 40 countries. [International Chamber of Commerce](#) (August 2012)

Roger D. Fisher, a professor at Harvard Law School for 40 years and co-author of *Getting to Yes*, the most popular book in the dispute resolution field, died on August 25 at age 90. Fisher was a pioneer in international law and negotiation and co-founded the Harvard Negotiation Project. [Harvard Gazette](#) (August 28, 2012)

Other Cases & Resolutions:

Apple and a Chinese company reached a \$60 million settlement in mediation to resolve litigation in China over Apple's use of the name "iPad." Apple claimed it had purchased the name for global use in 2009, but the Chinese company asserted the purchase was only for use outside China. With the dispute resolved and payment made, Apple may resume sales of its iPad in China. [ZDNet](#) (July 2, 2012)

With the assistance of a

communications with their own attorneys during mediation if needed to assert claims of professional negligence or misconduct against their counsel in later proceedings. Proposed legislation followed the January 2011 decision by the California Supreme Court in [Cassel v. Superior Court](#), which rejected the Court of Appeal's creation of a judicial exception to the confidentiality statute, and prevented a party from using his private communications with his attorneys before and during a mediation in a later action for legal malpractice. The Court stated that any exception must come from the legislature. Legislation was introduced in February 2012, but in May it was significantly amended to merely require a study and report on the relationship between mediation confidentiality and attorney malpractice and misconduct. The amended proposal passed the Assembly in late May, but died in the Senate Rules Committee at the end of the session on August 31.

[California Assembly Bill No. 2025](#) (as amended) (February 23, 2012, amended May 10, 2012); [Status](#)

California Rejects Amendments to Empower Mediators in Statute Requiring Mediation Prior to Cities Filing Bankruptcy

The California legislature has rejected amendments to recently enacted legislation requiring cities considering bankruptcy to first mediate to resolve disputes with creditors and unions. The changes would have given mediators greater power and relaxed deadlines for negotiations with creditors and labor groups, making it more difficult to file municipal bankruptcies. Three California cities filed for bankruptcy early this summer.

[Total Bankruptcy](#) (August 28, 2012)

Mediation Proposed for Medical Malpractice Disputes in Oregon

The governor of Oregon has proposed medical malpractice reforms in which mediation would be required prior to filing a lawsuit, if direct discussions between an injured patient and the doctor or health care provider were unsuccessful. The recommendations came from an informal advisory panel established by the governor that included representatives from both doctor and trial lawyer groups. A malpractice reform committee set up by the governor is meeting to obtain public comment and other input and will submit recommendations to the 2013 Oregon legislature.

[Statesman Journal.com](#) (July 27, 2012); [OregonLive.com](#) (August 15, 2012)

Another Notable News Item

- A detailed study of the long-term care industry concluded that claims covered by an arbitration agreement were 21 percent cheaper than those without, but that the arbitration claims were often mediated and rarely resolved through arbitration proceedings. [Long-Term Living](#) (July 13, 2012); [Full Analysis](#)

International Mediation Developments

federal bankruptcy judge as mediator, the Town of Mammoth Lakes, California, may be able to avoid municipal bankruptcy as it has reached a tentative settlement with a developer who obtained a \$43 million judgment against the town in litigation that began in 1997. [The Inyo Register](#) (August 27, 2012)

Mediation has resulted in a settlement in principle of two class actions in which an agricultural supplies company would pay \$43.5 million to resolve allegations by shareholders that the company failed to disclose company weaknesses three years ago. [SMH.com.au](#) (August 1, 2012)

The U.S. government reached a settlement in mediation with The Nature Conservancy and farmers and has paid nearly \$1 million for land it condemned in southern Texas to construct the border fence, ending four years of litigation. [The Monitor](#) (August 7, 2012)

After a lengthy mediation, the state of Idaho is paying \$750,000 to its former Transportation Director to settle her wrongful firing lawsuit. [State Impact Idaho](#) (August 22, 2012)

A class action lawsuit by workers at a Kansas slaughterhouse over payment for hours and overtime was settled in mediation. [The Sacramento Bee](#) (August 24, 2012)

- A **U.K.** appellate court criticized the lower court for limiting an award of costs to the prevailing party which had consistently refused mediation because of its reasonable belief in the strength of its case. [Swain Mason v. Mills & Reeve](#), [2012] EWCA Civ 498 (Ct. of App. April 23, 2012); [Wedlake Bell](#) (July 13, 2012)
- The number of people seeking mediation from the Family Mediation Service in **Ireland** has jumped 40 percent as more mediators have been brought in to reduce the delay for the service, which is provided without charge by the government. [Independent.ie](#) (July 9, 2012)
- **England** and **Wales** are considering an automatic referral to mediation of all cases below the small claims limit; a pilot project is being introduced in the Salford Business Centre. [Trethowans](#) (July 26, 2012)
- The **South African** government wants to use mediation to resolve disputes over pay and working conditions for miners in the face of violence that has killed dozens and ongoing strikes, according to the country's Minister of Mines. [CNBC.com](#) (August 28, 2012)
- **South Africa's** Mandatory Court Mediation program will soon require all cases to go to mediation prior to trial; an internationally accredited mediation training program for both legal and non-legal professionals is being held in Cape Town, with another later in the year planned for Johannesburg. [SA Commercial Prop News](#) (July 30, 2012)
- **South Africa** is conducting a Voluntary Debt Mediation Solution pilot program which provides mediation services to debt counselors and consumers in disputes with credit providers. [ITI News](#) (August 30, 2012)
- A mediation center has been established at the Lahore Chamber of Commerce and Industry to resolve business and commercial disputes in and around Lahore, **Pakistan**. [The News.com.pk](#) (July 18, 2012)
- In contrast with other states in **India**, Maharashtra has been able to reduce the number of pending court cases, disposing of over 12 million matters over the last six years while only 10 million were begun, with mediation and an Indian process called Maha Lok Adalat viewed as key. A Bombay High Court justice urged lawyers to make use of mediation to resolve cases. [The Times of India](#) (August 22, 2012); [The Times of India](#) (July 29, 2012)
- The Chief Justice of **India** urged use of mediation to resolve high-stakes commercial disputes between corporations and the government in a speech to the Third National Conference on Mediation. [Hindustan Times](#) (July 8, 2012)
- In an effort to avoid serious upset from failed negotiations, public hospitals in Shanghai, **China** must use third-party mediation in all disputes in which patients demand more than 30,000 yuan (\$4,700); medical mediation committees were introduced a year ago and have settled over 70% of the 2,200 disputes they have handled. [English.Eastday.com](#) (August 29, 2012)
- A third-party mediation mechanism will be designed to deal with investment disputes after **Taiwan** and **China** sign an investment protection pact, with in depth discussions between Taiwan's Ministry of Economic Affairs and China's Ministry of Commerce. [Focus Taiwan](#) (August 8, 2012)
- While a variety of laws and policies have previously encouraged use of Alternative Dispute Resolution in the **Philippines**, an executive order

The Australia Nuclear Science and Technology Organization reached a confidential mediation settlement over mishandling radioactive materials. [The Australian](#) (August 3, 2012) (Limited Access)

signed by the president now requires all local and national government agencies to include ADR provisions in contracts under the Public-Private Partnership program, joint ventures and other projects. [Inquirer Business](#) (July 12, 2012)

- **Australia's** attorney general stated at an Alternative Dispute Resolution workshop that the government's proposed increase of court fees is intended to discourage litigation and encourage ADR. [Lawyers Weekly](#) (August 7, 2012)
- After six months' experience with the Farm Debt Mediation Act in Victoria, **Australia**, which requires creditors to offer mediation before taking farmers to court, the Small Business Commissioner's Office says that there is steady take-up of the service and that most disputes are being resolved. [Australian Broadcasting Network](#) (August 23, 2012)
- **Jamaica** is emphasizing mediation and arbitration for better governance as well as to reduce the court backlog of both civil and criminal matters. [Jamaica Information Service](#) (June 30, 2012)

Update on Home Foreclosure Mediation

- New legislation enacted in **Massachusetts** requires lenders to offer loan modifications when that would provide them more net value than foreclosure. The legislation will also create a task force to study mediation programs and their effectiveness, rather than making mediation mandatory for all loans as proposed by the Senate. [Businessweek](#) (August 27, 2012); [Sentinel and Enterprise.com](#) (July 27, 2012); [Boston Herald.com](#) (July 25, 2012); [Boston Herald.com](#) (July 24, 2012)
- A federal judge upheld an ordinance in Springfield, **Massachusetts** that had been challenged by six banks, concluding that requiring lenders to engage in mediation with homeowners facing foreclosure or pay a \$300/day fine did not violate state law or constitutional protections. [Boston.com](#) (July 3, 2012)
- A new ordinance in St. Louis County, **Missouri** requires lenders to participate in mediation prior to foreclosure if the borrower requests it or pay a \$1,000 fine. Mediation would be financed by fees on lenders. Lenders vigorously opposed the ordinance and may challenge its constitutionality. [University City Patch](#) (August 30, 2012); [St. Louis Post-Dispatch](#) (August 26, 2012)
- About 300 foreclosure mediators have been trained to handle the thousands of mediations that were expected to occur once **Oregon's** new foreclosure mediation statute went into effect on July 11. But the onslaught has not yet occurred, as out-of-court foreclosures essentially stopped when the statute took effect. Even requests for mediation allowed under the new law by homeowners who feel at risk of foreclosure but have not yet missed payments have not received any response from private lenders. A lobbyist for an Oregon lenders' association explained that lenders are simply trying to figure out how best to proceed, as there are numerous changes in addition to the new legislation, including an appellate court decision, new servicing standards from the nationwide mortgage settlement and new rules from federal agencies. [Statesman Journal.com](#) (July 11, 2012); [Oregon Live](#) (July 11, 2012); [Oregon Live](#) (August 29, 2012)
- The **District of Columbia** city council is considering further changes to D.C.'s foreclosure laws, including doubling the foreclosure mediation period to 180 days and strengthening the obligation of parties to mediate

in good faith. [Washington Examiner](#) (July 1, 2012)

- **Illinois** now has foreclosure mediation programs in the counties of Cook, Will, Peoria, Madison/Bond and McLean. Although there are differences between them, all are provided without cost to borrowers and provide a sense of fair treatment for borrowers, who may better understand what is happening and what their options are. This is an aspect of mediation success that is often ignored by a focus limited to whether the borrower is able to stay in the house or is able to give up the house and avoid further liability. Cook County, which has the largest mediation program, is shifting to more in-court pre-mediation screening of which cases will actually benefit from the mediation program to reduce the wait for mediation which sometimes exceeds six months. [Illinois State Bar Association](#) (June 2012)
- Financial eligibility is no longer a requirement to participate in the Foreclosure Mediation Program in Madison County, **Illinois**, according to a state court, and any homeowner may enter mediation if their primary residence is in foreclosure. [STLToday.com](#) (August 29, 2012)
- The Legal Assistance Foundation is receiving \$4.7 million to help homeowners in Chicago and Cook County, **Illinois**, and will collaborate with courts to improve the Cook County Foreclosure Mediation Program. The funds are from the \$25 billion national foreclosure settlement in February. [Chicago Sun-Times](#) (August 28, 2012)
- Over \$2 million is going to Resolution Washington to support the Washington Foreclosure Mediation Program and to train volunteer foreclosure mediators as part of the \$44 million the **state of Washington** is receiving for foreclosure relief as part of the \$25 billion national mortgage settlement with the nation's five largest mortgage servicers. [Seattle PI.com](#) (August 27, 2012); [The Seattle Medium](#) (August 29, 2012)
- **Pennsylvania** is said to be using the bulk of its recovery from the nationwide mortgage settlement to restore funding to its foreclosure mediation program, the Homeowner's Emergency Mortgage Assistance Program. [Keystone Politics](#) (August 9, 2012)
- **Maryland** had the highest rate by far of new foreclosure filings of all states in the second quarter of the year, caused in part by a backlog due to lenders delaying foreclosure filings last year while state officials worked on final regulatory language implementing the state's new foreclosure mediation statute. A new law is to take effect in October, with a pre-foreclosure mediation program to permit homeowners who receive delinquency notices to begin the modification process. [Loan Safe.org](#) (August 10, 2012)

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MEDIATION NEWS

brought to you by:

Keith L. Seat

Keith is focused on conflict resolution and policy consensus building through his work as a mediator and facilitator. Keith is committed to bringing the full potential of mediation to assist parties in conflict. Mediation is a powerful process for resolving serious conflicts, and often saves important business and personal relationships as well. Mediation requires deep engagement by the parties, and as a skilled and experienced mediator Keith often turns difficult situations around dramatically and ends bitter drawn-out litigation. Emphasizing the values of mediation, Keith also assists industry groups in reaching consensus on divisive public policy issues.

JULY 2012

CASES & RESOLUTIONS:

“Binding Mediation” Upheld by California Appellate Court

While noting that it seems “paradoxical,” a California appellate court upheld “binding mediation” as a process in which a mediator can determine the outcome if the parties cannot reach agreement and have the outcome enforced as a mediated settlement agreement, rather than an arbitration award. In [Bowers v. Raymond J. Lucia Cos.](#), the parties agreed that they would attempt to reach settlement in a one-day mediation, but if they could not agree on an outcome, the mediator would be empowered to choose either the plaintiffs’ final demand or the defendant’s final offer, which the parties referred to as baseball arbitration. At the end of the day of mediation there had been no movement by either side and the mediator ultimately chose the plaintiffs’ number. In resulting litigation, the trial court enforced the mediator’s determination as a mediated settlement agreement, rather than an arbitration award. The court noted that the sophisticated parties and counsel involved could have provided for mediation to be followed by a separate binding arbitration, but instead had agreed to binding mediation, with the mediator’s decision based only on what occurred during the mediation. The appellate court affirmed, rejecting arguments of uncertainty and unconstitutionality, ruling that the parties neither agreed to nor sought an arbitration hearing following the failed mediation, but empowered the mediator to determine the outcome without a separate arbitration proceeding.

[Bowers v. Raymond J. Lucia Cos.](#), No. D059333 (Cal. Ct. App., Div. 4, May 30, 2012)

**Direct: 301-681-7450
Cell: 301-523-5535**

KSeat@KeithSeat.com
www.KeithSeat.com

**Six Whitehall Court
Silver Spring, MD
20901**

Keith L. Seat, J.D., is a full-time mediator, facilitator and arbitrator, adjunct law school professor of Negotiation, and a fellow of the International Academy of Mediators who can effectively assist parties in resolving a wide range of telecommunications, workplace and other commercial disputes. With over twenty-five years of legal experience as a mediator, arbitrator, litigator, advocate before executive branch agencies,

Other Notable & High Profile Proceedings

- A complex derivative action was settled through mediation for \$13 million; the court found the settlement reasonable, in part because of the involvement of an experienced and respected mediator. Faced with objections, however, the judge gave the objectors sixty days to elect to post security for the entire amount of the settlement to protect the parties who wanted to settle, take over litigation of the case and proceed to trial if the objectors were confident they could achieve a better outcome than the settlement. [Forsythe v. ESC Fund Management Co.](#), No. 1091-VCL (Del. Ch., May 9, 2012)
- A settlement reached in mediation for insurance policy limits of \$2 million by a manufacturer for injuries to a consumer was found by the court to be in good faith under California precedent, even though the settlement did not release claims against the seller of the product which was only vicariously liable. The court emphasized the absence of any evidence of bad faith since the settlement was reached using an independent mediator. [Rios v. Ames True Temper, Inc.](#), No. EDCV 11-320 CAS (U.S.D.C. C.D. Cal., May 21, 2012)
- While months of mediation resulted in a settlement being reached in November 2011 for the sale of the Los Angeles Dodgers baseball team, parallel litigation continues over marketing procedures for licensing telecast rights. The court plans to hold a hearing and consider whether to approve the mediated settlement agreement in the near future. [In re Los Angeles Dodgers, LLC](#), No. 11-12010(KG) (U.S. Bankr. D. Del., May 23, 2012)

NEWS & INITIATIVES:

All Federal District Courts Authorize Mediation or Other Form of ADR

A survey by the Federal Judicial Center has determined that some 30 years after federal district courts began experimenting with alternative dispute resolution, every court now authorizes some form of ADR, with mediation being the most common by wide margins. Mediation is authorized in over two-thirds of the 94 district courts, and is by far the most commonly used process. By contrast, arbitration programs once promoted by the courts have declined significantly. While only about 20 percent of the courts using mediation mandate it as a general rule, three-fourths can order mediation in particular cases without the consent of the parties. Most courts rely on panels of mediators and most require the parties to pay the fee for mediation.

[The Third Branch News](#) (June 25, 2012); [FJC Study](#)

Ohio Begins Program to Mediate Disputes over Disclosure of Public Records

Ohio's attorney general announced that his office will mediate disputes over public records between local governments and requesters in order to avoid protracted and costly litigation. Ohio had been one of only eight states without a way to address a denial of public documents without going to court. Participation in the Public Records Mediation Program is voluntary, requiring agreement by

and key staffer in the legislative and judicial branches, Keith brings a wealth of experience to his work as a mediator and arbitrator to help parties reach successful resolutions of complex disputes.

Mediation Quote:

"It's in our nature to be egocentric – that is, to make self-serving judgments regarding allocations of credit and blame, a phenomenon that in turn leads us to different conclusions regarding what a fair solution to a problem would be. Specifically, we tend to first determine our preference for a certain outcome on the basis of self-interest, and then justify this preference on the basis of fairness by altering the importance of the attributes that affect what is fair."

Max H. Bazerman & Ann E. Tenbrunsel, *Blind Spots: Why We Fail to Do What's Right and What to Do About It* (Princeton University Press, 2011) at 50

Check These Out:

Online Mediation

- The Auburn University Conflict Resolution Program is affiliating with VirtualCourthouse.com to increase understanding and use of online dispute resolution

both sides. Mediation sessions are expected to be conducted mostly by telephone, without charge. Because the attorney general's office represents state entities, however, the mediation program does not cover disputes involving state agencies or public universities and colleges.

[Marion Star.com](#) (June 25, 2012); [The Columbus Dispatch](#) (June 20, 2012); [The News-Messenger.com](#) (June 21, 2012)

Multi-Year Study Analyzing Impact of Mediation on Maryland Courts

The Maryland state judiciary system is spending \$750,000 for a multi-year study to be conducted on the impact of alternative dispute resolution programs on the courts and access to justice. The study by the Salisbury University Center for Conflict Resolution is reviewing everything from misdemeanor and small claims cases to family custody and larger civil cases. The study is intended to determine the effectiveness of various programs and best practices so that programs found not to be beneficial or cost-effective can be ended and those working well can be expanded.

[Delmarva Now.com](#) (May 15, 2012)

Amendments Empowering Mediators Proposed to California Statute Requiring Mediation Prior to Cities Filing Bankruptcy

The legislator who initially drafted California legislation requiring cities considering bankruptcy to first mediate to resolve disputes with creditors and unions, proposed amendments to the statute just six weeks after it went into effect. The changes would give mediators power to request and control an independent investigation and would loosen deadlines for negotiations with creditors and labor groups. Unions have come out in support of the amendments, while the League of California Cities opposes the proposal. Two California cities are using the existing mediation process.

[Bloomberg](#) (May 8, 2011)

British Columbia Proposes Online Dispute Resolution Tribunal

The Ministry of Justice for British Columbia has introduced the Civil Resolution Tribunal Act to establish a tribunal to provide online dispute resolution services. The legislation would establish an escalating four-phase process in which participation would generally be voluntary. Parties would first rely on self-help using interactive online tools, the second phase would move to assisted negotiations online, while the third phase would include intervention by a case manager. The final phase would be a tribunal hearing, which could also be online, with final tribunal decisions filed in court and enforceable as court orders, with only limited judicial review. Parties would not be allowed to use legal counsel, except in limited circumstances; Canadian lawyers' associations oppose the legislation.

resources. Building on a pilot online mock case in the spring semester, Ashburn is planning to integrate the online system in a Conflict Resolution Program next year that is intended to bring an alternative dispute resolution program to students outside law schools. [Expert Click](#) (June 6, 2012)

- The 2012 Online Dispute Resolution Conference was scheduled for June 27-29 to bring together leading minds in law, technology and conflict resolution in person in Prague. [ADR Hub.com](#) (June 23, 2012)

Mediation Now Saves U.K. Businesses Two Billion Pounds a Year

The fifth survey by the Centre for Effective Dispute Resolution (CEDR) calculates that mediation in the U.K. now saves businesses about £2 billion in legal fees, damaged relationships and lost productivity, at a cost of only £20 million in mediation fees. The survey concluded that there were about 8,000 mediations in the last year, which is up one-third since CEDR's 2010 survey. A large proportion of these mediations were conducted by only 100 mediators, with top mediators charging over £8,500 per case and

[JD Supra](#) (May 15, 2012); [Civil Resolution Tribunal Act](#)

Mediation Added to Investment Canada Act

A formal mediation process is among other recent changes added to the Investment Canada Act, which reviews foreign takeovers of Canadian companies. The mediation process is intended to resolve disputes relating to failures of foreign buyers to live up to commitments they make. The focus on mediation follows protracted litigation against U.S. Steel over promises made to obtain approval of its purchase of a Canadian company in 2007, which was resolved with a negotiated settlement late last year.

[CTV.ca](#) (May 25, 2012); [JD Supra](#) (June 15, 2012)

Investor-State Mediation Rules Developed

The Mediation Committee of the International Bar Association has published draft mediation rules for disputes between investors and states or state entities. In addition to covering basic mediation issues such as confidentiality and impartiality, the rules provide a mechanism for the designation of a mediator if the parties cannot agree on one, the mediator qualifications to be considered, and a form to be completed by mediators stating their availability and independence.

[Disputing](#) (May 11, 2012); [IBA Draft Mediation Rules](#)

Other International Mediation Developments

- The Irish Dental Association has launched the Dental Complaints Resolution Service in **Ireland** to provide free mediation when patients have complaints about their dental treatment. [Irish Times.com](#) (May 9, 2012)
- Following a successful pilot in selected areas of the **U.K.**, HM Revenue & Customs is expanding an alternative dispute resolution program to individuals and small and medium enterprises throughout the country to resolve disputes over VAT and direct taxes during compliance checks. [4rfv.co.uk](#) (May 29, 2012)
- The **U.K.**'s Intellectual Property Office offers mediation to parties in intellectual property disputes and is seeking comments and input from stakeholders about why use of the service is low and what changes would be helpful. [The Information Daily](#) (June 13, 2012)
- **Spain** has adopted a Royal Decree in Law 5/2012 on mediation in civil and commercial matters which may include cross-border conflicts, but excludes criminal matters as well as labor and consumer disputes. [Legal Knowledge Portal](#) (May 2012)
- **Ghana's** president of the Brong Ahafo Regional House of Chiefs is seeking amendments to the Alternative Dispute Resolution Mechanism legislation to make ADR settlements enforceable, to address a problem that resulted in 30 percent of the cases resolved last year ending up back in court. [Spy Ghana](#) (June 6, 2012)
- The Judicial Service of **Ghana** announced that Alternative Dispute Resolution week is July 16-20, during which ADR will be a focus in 52 courts, and programs and activities will create greater public awareness

earning over £400,000 a year. The survey also covered the experience and backgrounds of mediators, performance in mediation and perspectives on standards and regulation. CEDR began its mediation surveys in 2003. [CEDR's Fifth Mediation Audit](#) (May 15, 2012)

Other Cases & Resolutions:

Nortel Networks entities announced a mediated settlement for allocation of \$45 million to the 4th Estate Entities from proceeds held in escrow; mediation continues over allocation of the remainder of multi-billion dollar sale proceeds. [MarketWatch](#) (June 19, 2012)

Following mediation, Buchanan Ingersoll & Rooney, primary legal counsel to Adelphia Communications Corp., agreed to pay \$60 million to settle claims arising from Adelphia's 2002 bankruptcy. [Thomson Reuters](#) (June 28, 2012)

Progress was made in complex bankruptcy litigation involving two Chapter 11 filings and claims of over \$50 million with a sealed mediation settlement filed in a North Carolina court. [Trade Only Today](#) (May 25, 2012)

Parishes in the Catholic Diocese of Spokane are contributing \$1.5 million to avoid foreclosure of churches and schools in a broad mediated settlement of clergy sex abuse claims, along with contributions from six insurance companies and the Morning Star Boy's Ranch where the

of ADR. [Ghana Web](#) (June 19, 2012)

- **Angola's** president has promulgated the Law on Property Mediation. [All Africa.com](#) (April 27, 2012)
- The **United Arab Emirate's** Ajman Chamber of Commerce and Industry announced that it will offer mediation services to assist members in resolving commercial disputes and maintaining business relationships. [The Gulf Today](#) (June 11, 2012)
- The **Bahrain** Chamber for Dispute Resolution participated in the Third World Islamic Banking Conference Asia Summit in **Singapore**, urging greater use of mediation and arbitration in the \$1 trillion Islamic finance industry. [Gulf Daily News](#) (June 11, 2012)
- The **Bahrain** Chamber for Dispute Resolution was named the tenth member of the Asian Mediation Association during the Association's annual meeting in **Indonesia**. [Bahrain News Agency](#) (April 30, 2012)
- A mediation and arbitration center has been launched in Tripoli, **Lebanon** by the Tripoli Bar Association in cooperation with the World Bank's International Finance Corporation to assist in resolving commercial disputes. [The Daily Star](#) (May 11, 2012)
- **Pakistan** hosted the International Judicial Conference in April which proposed boosting mediation in the country by making it mandatory in civil proceedings, through cost sanctions in litigation, and by establishing centers for mediation training, among other steps. [Mediation World](#) (May 1, 2012); [2012 Declarations of the International Judicial Conference](#)
- A study of the four mediation centers of Delhi, **India**, from 2005 to 2012 reports that over 60 percent of the disputes were resolved; the first mediation center opened in the city in 2005. [Two Circles.net](#) (June 15, 2012)
- Alternative dispute resolution legislation has been introduced in **Bhutan** based on ADR's increasing importance in Bhutanese society and to help attract foreign investment. [BBS.bt](#) (June 13, 2012)
- **Hong Kong** has opened the Financial Dispute Resolution Centre to provide mediation for customers with claims against banks or brokers; the Centre expects to handle 2,000 cases a year with claims up to \$64,000. [Channel News Asia.com](#) (June 19, 2012)
- A dispute resolution mechanism between **China**-based Taiwanese and Chinese businesses is being discussed for inclusion in a cross-**Taiwan** Strait investment protection agreement. [Taipei Times](#) (May 28, 2012)

Other Notable News & Programs

- Massachusetts' attorney general has awarded \$1.5 million in grants to mediation programs and local consumer programs for FY13. In FY12, the programs mediated over 10,000 cases, yielding more than \$6 million for consumers. [The Republic](#) (June 23, 2012)
- Montana's 6th Judicial District amended its rules to permit mediation to substitute for a master-supervised settlement conference. [Rules of Practice, Sixth Judicial District, State of Montana](#)
- The attorney general of British Columbia announced that the province

claims arose. The diocese initially settled its bankruptcy case in 2007 for \$48 million, but the addition of late claims drained the settlement fund and reopened bankruptcy issues which have been resolved by this settlement. [The Spokesman-Review](#) (May 30, 2012)

Mediation has resulted in settlements between three bankrupt tobacco companies and two states over escrow payments and penalties, with agreement to pay Missouri almost \$2 million and South Carolina \$1.3 million. [JournalNow.com](#) (June 25, 2012)

Mediation resulted in a \$2.5 million class action settlement for unsolicited text messages from a marketing agency. [The Seattle Times](#) (May 12, 2012)

In post-trial mediation, a county commission in Alabama agreed to pay \$900,000 to a former payroll clerk for retaliation after she filed an EEO complaint. [Moulton Advertiser.com](#) (May 10, 2012)

Efforts are underway to try to settle claims from the collapse of a concert stage at the Indiana State Fair that killed seven and injured nearly 60, with the judge encouraging mediation and the Indiana attorney general, himself a mediator, announcing a new pool of \$7.2 million from the companies involved, in addition to state legislation providing \$6 million, if enough victims settle. [IndyStar.com](#) (June 22, 2012)

will devote \$66 million to an anti-gang strategy over the next three years, which also provides mediation as an alternative to the court system. Canada.com (June 20, 2012)

Update on Home Foreclosure Mediation

- The first statewide mediation portal in the country has been launched in **Maryland** to increase the number of homeowners who opt in to foreclosure mediation by easing the exchange of state-required documents and communication about options among all mediation participants. The Maryland Mediation Portal is a collaboration between the state, GMAC Mortgage and Hope LoanPort and may be a model for other states and servicers to follow. [National Mortgage Professional](http://NationalMortgageProfessional.com) (June 21, 2012)
- **Oregon** is preparing to train hundreds of mediators to handle the flow of mortgage foreclosure mediations that may arise under the new mediation program established by the state. Mediators will be paid if selected for cases, with experienced mediators more likely to be selected. About 1,500 homeowners per month are expected to qualify for foreclosure mediation, but it is uncertain how many will request mediation. The nonprofit Collins Center for Public Policy signed a five-year contract with Oregon to recruit, train and manage mediators for the new program. In May the state approved \$7.6 million to launch the foreclosure mediation program, which included funds from the multi-state settlement of foreclosure abuses. Once under way, the mediation program is to be supported by fees paid by lenders and homeowners using the program. [Statesman Journal.com](http://StatesmanJournal.com) (June 26, 2012); [Oregon Business Report](http://OregonBusinessReport.com) (May 24, 2012)
- A district judge ruled that records from **Nevada's** foreclosure mediation program are not open to public inspection because the state's public records law does not apply to the Nevada Supreme Court, which runs the mediation program. In addition, the court noted that the records could not be disclosed due to mediation confidentiality. [Loan Safe.org](http://LoanSafe.org) (May 11, 2012)
- The **Massachusetts** Senate passed legislation providing greater protections for homeowners, including an amendment that gives borrowers the right to mediation with lenders prior to foreclosure to attempt to renegotiate loan terms. The mediation program would be run by the Massachusetts Office of Public Collaboration at the University of Massachusetts Boston. [Norwood Patch](http://NorwoodPatch.com) (June 9, 2012)
- The foreclosure mediation rules in **Stark County, Ohio** have been tweaked to cut costs by bringing the mediation program into the court and by using one mediator in place of two. Other changes are intended to avoid delays by initially screening cases and then requiring homeowners to attend a class to explain the process, alternatives and documents required during mediation. [Canton Rep.com](http://CantonRep.com) (May 26, 2012)
- The number of foreclosures in **Connecticut** increased 38 percent from the first quarter of 2011 to the first quarter of 2012, with the south central region of the state increasing 75 percent. Only 47 percent of those eligible for foreclosure mediation in Connecticut participated, but of those who did, 63 percent were able to stay in their homes. [East Haven Patch](http://EastHavenPatch.com) (June 28, 2012); [Connecticut Foreclosure Mediation Program](http://ConnecticutForeclosureMediationProgram.com)
- **Florida's** attorney general invited ideas about how the state should

Salisbury, Maryland has settled litigation for \$10 million following mediation with the engineer that designed the city's wastewater treatment plant, along with settlement with a second defendant after mediation; litigation continues against other parties. [Delmarva Now.com](http://DelmarvaNow.com) (June 8, 2012); [Delmarva Now.com](http://DelmarvaNow.com) (June 9, 2012)

Settlement was reached after two days of mediation between the City of Spokane and the family of a man beaten to death by police; the agreement included payment of \$1.67 million to the family, \$2 million for police training and resources, a formal apology from the mayor and naming a pavilion after the man. NWCN.com (May 15, 2012)

The mother of a homeless man beaten to death by Fullerton, California police officers settled in mediation for \$1 million; claims by the man's father have not yet been resolved. Criminal charges are also pending against the two police officers. [My Fox LA.com](http://MyFoxLA.com) (May 16, 2012)

The family of a mentally ill man who committed suicide while being held in a California county jail resolved wrongful death claims in mediation for \$1.6 million. [Siskiyou Daily.com](http://SiskiyouDaily.com) (June 8, 2012)

Funk pioneer George Clinton and the Black Eyed Peas settled claims after mediation that the group had used Clinton's music without permission. [The Washington Post](http://TheWashingtonPost.com) (May 18, 2012)

Bret Michaels settled claims in mediation against the

spend \$300 million from the nationwide \$25 billion settlement which is to be devoted to keeping struggling homeowners out of foreclosure. The money is being held in escrow pending a plan. [TC Palm](#) (May 7, 2012)

- **Hawaii** is providing funding for organizations involved in foreclosure mediation and other frontline efforts to combat foreclosures from a \$7.9 million settlement between the state and various financial institutions. [CBS News](#) (June 11, 2012)
- **Delaware's** attorney general announced that his office would allocate \$900,000 to support the Delaware Mortgage Mediation Program and hire a full-time mediator from a \$10 million settlement for mortgage servicing fraud. The state's mandatory mediation program took effect on January 19, 2012, but is off to a slow start as banks filed over 300 foreclosure actions the week before the program took effect and only 14 foreclosures eligible for mediation since then. [WGMD.com](#) (May 10, 2012)

Tony Awards for injuries he received during the 2009 broadcast when he was knocked down by descending scenery. [The Los Angeles Times](#) (May 15, 2012)

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MEDIATION NEWS

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MAY 2012

CASES & RESOLUTIONS:

Tenth Circuit Affirms Dismissal of Case as Sanction for Violating Mediation Confidentiality

The U.S. Court of Appeals for the Tenth Circuit readily affirmed dismissal of a case with prejudice to sanction plaintiff's violation of mediation confidentiality provisions. The appellate court concluded that the sanction was not disproportionate, noting the egregious nature of the violation of confidentiality in which plaintiff left the unsuccessful mediation and sent emails to over 40 people with extensive and prejudicial details about the mediation. The appellate court also criticized and rejected plaintiff's new argument on appeal that he did not know about the confidentiality requirement.

[Hand v. Walnut Valley Sailing Club](#), No. 11-3228 (U.S.C.A. 10th Cir., April 4, 2012).

Federal Court Refuses to Sanction Party for Trying to Reach Global Settlement in Mediation

An unsuccessful mediation between two brothers resulted in plaintiff filing a motion for sanctions against defendant for not mediating in good faith because defendant sought to resolve broader issues that would have required participation of a sister who was not a party in the litigation. A U.S. district court in Florida stated that it is up to the mediator to report bad faith mediation, not the parties. The court found that all participants required to be in mediation had been present, ignoring plaintiff's argument that defendant sought to resolve issues that went beyond the litigation.

[Kaplan v. Kaplan](#), No. 2:10-cv-00237 (U.S.D.C. M.D. Fla., March 30, 2012)

New Jersey Court Enforces Settlement in Principle Signed in Mediation, But Not Unexamined Longer Agreement

At the end of a nine-hour mediation of a workplace discrimination case, the parties and mediator signed a one-page "settlement in princip[le]" listing

Mediation Quote:

"[Mediators] never know the epilogues of the cases that we work on. The 'failed' mediations may well transform into success stories where the parties become stronger and happier and ultimately resolve their dispute or choose to live with their unresolved dispute because of some spark of understanding that was lighted in the mediation."

Eric R. Galton & Lela P. Love,
Editors, *Stories Mediators Tell*
(ABA Section of Dispute
Resolution 2012) at 355

Other Cases & Resolutions:

In a mediated settlement reached just before trial, the owners of the Mets agreed to pay \$162 million to the trustee for victims of Bernard Madoff, although the amount may be reduced or eliminated by future events. [The New York Times](#) (March 19, 2012)

Bayer agreed to pay \$110 million after mediation to settle claims arising from Yaz and Yasmin birth control pills. [Bloomberg.com](#) (April 13, 2012)

Mediation resulted in a \$21 million settlement stream for a child who suffered permanent brain injuries in a car rear-ended by a tractor-trailer. [PR Web](#) (March 8, 2012)

Condo owners recovered

key terms and stating that a full settlement agreement would be signed within a week. Plaintiff later refused to sign a detailed 11-page agreement, claiming that no settlement had been reached and that she only signed the one-page agreement because she was told it was a confidentiality agreement. The trial court upheld the one-page agreement and required plaintiff to sign the longer agreement. A New Jersey appellate court agreed that the one-page agreement was enforceable, as it was clear that it covered more than confidentiality, so there was no fraudulent inducement. However, the appellate court rejected the trial court's conclusion that plaintiff must then sign the 11-page agreement, as there was no review to ensure that it did not go beyond fleshing out the terms of the one-page settlement agreement.

[Williamson v. Boehringer-Ingelheim Pharmaceuticals, Inc.](#), No. A-6291-10T1 (N.J. App., March 12, 2012)

Court's Disposition Final, Despite Tentative Settlement

Mediation resulted in a tentative settlement agreement that needed approval of the city's board of selectmen, but before the board acted the court ruled for the city on summary judgment, dismissing all claims. Plaintiffs sought to vacate the court's order and enforce the settlement agreement, but the court concluded that the settlement was never finalized because the requirement of board approval had not been met and bad faith delay was not established. The court also rejected plaintiffs' other arguments, including an assertion of excusable neglect by plaintiffs' counsel in failing to inform the court of the settlement discussions, which the court agreed would have likely delayed its summary judgment ruling.

[Bliss v. Fisher](#), No. 10-10252 (U.S.D.C. D. Mass., April 5, 2012)

Other Notable or High Profile Proceedings

- A federal judge in the BP gulf oil spill case has named a mediator to focus on resolving seafood claims for which \$2.3 billion has been set aside in the proposed class action settlement. The seafood claims cover commercial fishing and oyster leaseholders and harvesters, but not the processing or sale of seafood. This is the only portion of the settlement that is capped, with the overall settlement estimated to be about \$7.8 billion. [Nola.com](#) (March 9, 2012)
- Settlement of a consolidated class action securities case was approved by the federal court in part because it had been successfully mediated with no evidence of anything but genuine arms-length negotiation. [In re Apollo Group, Inc.](#), Master File No. CV 04-2147 (U.S.D.C. D. Ariz., April 20, 2012)

NEWS & INITIATIVES:

Maryland Expands Mediation

\$650,000 through mediation for faulty construction only seven months after initiating litigation from insurance which could have been exhausted by another pending case. [MarketWatch](#) (April 18, 2012)

A company trying to build a nuclear power plant in Idaho agreed in mediation to pay \$450,000 to a group of upset investors. [The Republic](#) (April 9, 2012)

Mediation resulted in resolution of defamation claims against ABC for portrayal of the husband of Ita Buttrose deserting his family in the mini-series *Paper Giants: The Birth of Cleo*. [SMH.com.au](#) (April 25, 2012)

A slander lawsuit by Titan America against two local residents relating to permits to build a cement plant has been resolved in mediation. [Star News Online](#) (April 4, 2012)

Former partners of a failed law firm are participating in mediation of a £21 million dispute over the firm's former offices. [MenMedia.co.uk](#) (April 19, 2012)

Three rice farmers have asked for mediation of their claims of ¥3.4 billion for field decontamination and other losses from the Fukushima nuclear disaster. [The Mainichi](#) (April 21, 2012)

A federal judge has ordered Space Coast Credit Union, five banks and two rating agencies to mediate their mortgage securities dispute. [Credit Union Times](#) (March 30, 2012)

Reality TV personality Khloe Kardashian has been ordered into mediation by a judge to try to resolve claims from a bar fight in 2009. [KSN.com](#) (March 5, 2012)

In a third attempt to mediate the distribution of nearly \$9 billion in assets of bankrupt Nortel Networks, Ontario's chief justice

Confidentiality Coverage

Maryland has enacted the Maryland Mediation Confidentiality Act, S.B. 856, to provide for the confidentiality of mediation in matters beyond those already covered by law. The mediation confidentiality provided in the new act generally parallels existing statutory provisions applicable to cases referred to mediation by the Maryland circuit courts. However, the new legislation applies only if the mediator confirms in writing that he or she will abide by the Maryland Standard of Conduct for Mediators and only if the parties either agree to confidentiality or are required to mediate. The legislation does not apply to collective bargaining disputes or other listed exceptions. In addition, confidentiality does not apply to signed agreements reached in mediation by the parties and disclosures needed to prevent bodily harm, assert or defend against professional misconduct, or prevent an injustice a court determines would outweigh the integrity of mediation proceedings. The legislation takes effect on October 1.

[Maryland Mediation Confidentiality Act](#) (May 2, 2012)

California Legislation Would Add Legal Malpractice Exception to Strict Mediation Confidentiality Statute

Legislation has been introduced in California to provide a narrow exception to the state's strict mediation confidentiality statute so that clients may use communications with their own attorneys during mediation if needed to assert claims of professional negligence or misconduct against their counsel in later proceedings. This legislation follows the January 2011 decision by the California Supreme Court in [Cassel v. Superior Court](#), which rejected the Court of Appeal's creation of a judicial exception to the confidentiality statute, and prevented a party from using his private communications with his attorneys before and during a mediation in a later action for legal malpractice. The Court relied on the plain language of the statute and stated that any exception must come from the legislature.

[California Assembly Bill No. 2025](#) (February 23, 2012)

Ninth Circuit Boosts Use of Mediation in Lower Courts through "Resolution Roundup"

The Alternative Dispute Resolution Committee of the U.S. Court of Appeals for the Ninth Circuit is seeking to increase mediation in federal district and bankruptcy courts with heavy caseloads through a week-long "Resolution Roundup" to clear backlogs. The U.S. District and Bankruptcy Court in Idaho is the first to participate in the program, with 35 judges, law professors and other mediation experts volunteering their time to convene and mediate dozens of cases during the first week of April.

[Idaho Statesman](#) (April 1, 2012); [Press Release of U.S. District Court of Idaho](#) (March 21, 2012)

began the mediation with a warning on the high cost of failure in the highly complex cases involving companies in 20 countries. [CanadianBusiness.com](#) (April 24, 2012)

Check These Out:

Corporate Mediation Representation Service Launched

A major multinational corporation has launched an on-site Mediation Representation service in Florida, offering to assist companies in obtaining the best outcomes in mediation by handling the "entire mediation process" and thus save in-house resources. The company, G4S Compliance & Investigations, states that it has mediation representatives located throughout Florida to handle matters such as workers' compensation, disability, property losses and liability, working with company attorneys and claim representatives. G4S plc is the largest employer listed on the London Stock Exchange, with 635,000 employees in 125 countries. [PR Web](#) (April 3, 2012); [G4S Compliance & Investigations](#)

Contests and Awards Raise Profile of Mediation

- The Professional Mediators' Association in the U.K. is seeking to enhance the profile of mediation with National Mediation Awards. Focusing on workplace mediation, the six award categories include in-house mediation program of the year, in-house mediator of the year, independent mediator of the year, and others. Nominations are due by July 31. [SourceWire](#) (April 17, 2012)
- Winners have been

Texas Rule Changes May Impact Mediation

Texas legislation enacted last fall requires the Texas Supreme Court to provide ways to expedite litigation in civil cases up to \$100,000. A task force working with the issue has proposed that the expedited processes be voluntary, and that parties who choose the expedited processes must not be required by the courts to engage in alternative dispute resolution, unless the parties have agreed to ADR or are required to participate in ADR by contract.

[Karl Bayer](#) (March 5, 2012); [Expedited Actions Final Task Force Report](#) (January 25, 2012)

Canada Allows Banks to Use Private Mediators in Client Disputes

Canada has decided against forcing banks to use the Ombudsman for Banking Services and Investments (OBSI) and will provide new regulations permitting them to hire private mediators to resolve client disputes. OBSI was created in 1996 to handle complaints against banks and since 2002 has also been responsible for resolving investment complaints; investment dealers are still required to use OBSI. The issue arose after Canada's two largest banks, the Royal Bank of Canada and Toronto-Dominion Bank, withdrew from OBSI in favor of private mediation and other banks were expected to follow. However, some consumer advocate groups and regulators are concerned that if banks hire private mediators the independence of the mediators could be compromised.

[Financial Post](#) (April 30, 2012)

World Intellectual Property Organization Expands Mediation Programs

The World Intellectual Property Organization (WIPO) continues to expand specialized mediation programs, while dealing with increasing numbers of domain name disputes. WIPO's Arbitration and Mediation Center had over 2,700 cybersquatting cases in 2011 – a record high – and is preparing measures to preemptively address disputes when ICANN expands the number of new generic Top Level Domains this year. The domain name disputes involved parties from 110 countries, WIPO panelists from 49 countries, and resolutions in 13 languages. In addition, WIPO is helping parties resolve disputes from R&D collaboration and technology transfers, working with the Association of University Technology Managers; established procedures to mediate disputes filed with the Intellectual Property Office of Singapore; developed a special mediation process with the International Council of Museums for art and cultural heritage disputes; and is the administrator for mediations relating to material transfers under the International Treaty on Plant Genetic Resources for Food and Agriculture.

[AG-IP-News](#) (March 6, 2012)

Internet IP Mediation Handbook

announced in an essay competition for law and management students in India on the theme of how mediation can benefit the business community. The top winners will receive cash prizes and publication of their essays in the Alternative Dispute Resolution Law Review. [Bar & Bench News Network](#) (April 3, 2012); [Bar & Bench News Network](#) (February 2, 2012)

- The Center for Civic Mediation's 2012 Louis M. Brown Conflict Prevention Award was presented to California Western School of Law's advanced mediation program for its contribution to a more just and peaceful society. [San Diego Source](#) (April 24, 2012) (Limited Access)
- The International Academy for Dispute Resolution Mediation Tournament was held at Loyola University in March with 46 teams from around the world, including the U.S., Canada, U.K., Germany and India. [Liverpool John Moores University](#) (April 17, 2012)

Developed in China

The Mediation Center of the Internet Society of China has prepared the Internet Intellectual Property Disputes Mediation Handbook with the assistance of Beijing Higher People's Court and other People's Courts. The Handbook took effect on February 1 and focuses on online mediation of IP disputes, mediation of court-referred cases, and other areas.

[China Daily](#) (March 14, 2012); [Research Paper Download Center](#)

China's Med-Arb Approach Spreading in Pacific Region

China has been using a blended dispute resolution process in which disputes in arbitration may be sent to mediation and, if not resolved, are returned for a final arbitration decision. The success rate in mediation has been rising in China in recent decades, which has attracted interest in Australia and other Pacific nations that are moving toward the Chinese model. A primary concern is having a single neutral handle both the mediation and the arbitration in a case, so some countries require separate mediators and arbitrators.

[Arbitration.com](#) (March 23, 2012)

U.K. Criticizes E.C. Proposals for Dispute Resolution for Consumers

The U.K. Office of Fair Trading (OFT) has criticized the European Commission's proposal for online dispute resolution of consumer disputes and proposed Directive on alternative dispute resolution for consumer disputes. The OFT supports the goal of increasing ADR for consumers, but urges mandatory use of ADR in many consumer cases, so that companies don't simply refuse to participate.

[Shoo Smiths.co.uk](#) (April 2, 2012)

Isle of Man Promoting Workplace Mediation

The Department of Health and the Department of Social Care of the Isle of Man have launched an internal mediation service called Mediators for Health to help resolve workplace disputes. Fifteen staff members from the two departments have received mediation training; an awareness campaign is accompanying the launch of the mediation program.

[Isle of Man.com](#) (March 16, 2012)

Other International Mediation Developments

- Mediation services are being expanded in **Guyana** with a new mediation center being constructed in New Amsterdam for \$25

million. [Demerara Waves](#) (April 13, 2012)

- **Antigua and Barbuda** suggested to the U.S. that mediation may help resolve their ongoing dispute over Internet gaming. [Antigua Observer Newspaper](#) (April 21, 2012)
- A draft mediation bill in **Ireland** has been published by the Minister of Justice providing, among other things, for both lawyers and courts to suggest mediation to parties in civil disputes. [Irish Times.com](#) (March 2, 2012); [Draft Mediation Bill](#) (March 2012)
- Health experts suggest that a mediation system is needed in **Ireland** to reduce legal costs which consumed 40 percent of the €81 million spent on medical negligence and hospital errors in 2011. [Independent.ie](#) (April 14, 2012)
- The **European Union** is investing millions in mediation and dispute resolution in the North Eastern area of **Ireland**. [Ballymena Times](#) (March 29, 2012)
- **Luxembourg** adopted legislation regarding mediation in civil and commercial matters in its New Code of Civil Procedure to comply with E.U. Directive 2008/52/EC. [Legal Knowledge Portal](#) (April 13, 2012)
- **Germany** is seeking to resolve differences between the two branches of its legislature on the desirability of court-based mediation and related issues. [JAMS ADR Blog](#) (March 7, 2012)
- **Spain** adopted a new law on civil and commercial mediation. [Mediation World](#) (March 13, 2012)
- Plans are advancing in **Ghana** to establish a private ADR University to serve the African continent. [GhanaWeb](#) (April 23, 2012)
- The Central Bank of **Nigeria** is encouraging approval of legislation to create an Alternative Dispute Resolution Commission to regulate the practice and use of ADR in Nigeria. Nigeria's largest city is encouraging ADR through the Lagos Multi-Door Courthouse. [Micro Capital.org](#) (April 1, 2012); [The Nation](#) (March 13, 2012)
- The head of **Angola** promulgated the Law on Property Mediation in April. [Angola Press](#) (April 27, 2012)
- New Court Rules on Mediation in **South Africa** make mediation compulsory in all civil and commercial litigation. [Cape Business News](#) (March 5, 2012)
- The Cape Chamber of Commerce in **South Africa** is opening the African Commercial Dispute Settlement Centre for the benefit of organizations across the continent. [Cape Business News](#) (March 5, 2012)
- A leading law firm in **Lebanon** has launched a mediation department focusing on complex regional and international commercial disputes, one of the first in the country to offer such services. [Alem Website](#)
- The Justice Commission of the Parliament of **Turkey** approved mediation legislation that would suspend litigation for three

months if parties go to mediation and would permit lawyers with at least five years of experience to apply to the Justice Ministry, train as mediators and become licensed, with the risk of imprisonment for mediators who violate privacy rules. [Hurriyet Daily News](#) (April 27, 2012)

- **Russia** plans to pattern its mediation procedures for business disputes on **Belarus**, where court mediation has reached a high point. [Russian Legal Information Agency](#) (April 13, 2012)
- **Nepal** is beginning a highway dispute mediation service to resolve highway closures caused by disputes. [The Himalayan Times](#) (April 23, 2012)
- The National Board of Revenue of **Bangladesh** has launched an alternative dispute resolution process for customs-related disputes, aided by the International Finance Corporation. [BDNews24.com](#) (March 1, 2012)
- More than 80 percent of the medical disputes in Hainan Province, **China**, are settled by the Hainan People's Medical Dispute Mediation Committee, which receives 10 percent of the province-wide medical malpractice insurance policy premiums to which 270 hospitals have contributed. [China Daily.com.cn](#) (April 10, 2012)
- Bank **Indonesia** plans to increase the maximum value of disputes that qualify for its mediation program in order to protect a wider range of clients. [The Jakarta Post](#) (April 4, 2012)

Update on Home Foreclosure Mediation

- **Oregon** has enacted legislation to reform its foreclosure process and provide mandatory mediation for homeowners. The legislation ends the dual track in which foreclosure continued even while homeowners sought to negotiate alternatives. While Oregon joins 21 other states with foreclosure mediation programs, it is the first state in the country to require lenders to participate in mediation even before a borrower is in default, if the borrower seeks mediation before they fall behind. Experts are working out the details of the mediation program required by the legislation, which goes into effect on July 12, and are raising concerns about having enough housing counselors and mediators for the program. [Salem-News.com](#) (April 11, 2012); [Statesman Journal.com](#) (March 18, 2012)
- **Maryland** has enacted legislation to expand the state's foreclosure mediation program to include pre-foreclosure mediation, so that parties need not wait until the situation worsens in order to mediate. However, both borrower and lender must agree to pre-foreclosure mediation. Early mediation satisfies the program's mediation requirement, unless the parties agree otherwise. [Baltimore Sun.com](#) (April 16, 2012); [HB 1374](#)
- The **Nevada** Supreme Court affirmed the trial court's decision that a foreclosure mediation agreement signed by the parties was an enforceable settlement that could not be undermined by later assertions that the bank did not provide the documents required by statute and rule. Once the settlement agreement was signed, any issues of improper documentation were waived. [Jones v. Sun](#)

[Trust Mortgage, Inc.](#), No. 57748 (Nev., April 26, 2012)

- The Foreclosure Mediation Program in **Nevada** has begun sending a letter to homeowners following unsuccessful foreclosure mediations to alert them that the lender may move forward with foreclosure and that homeowners have the right to seek judicial review. [JD Supra](#) (March 23, 2012)
- The Madison County Foreclosure Mediation Program in **Illinois** has had a successful first ten months, with about half of all homeowners in the program avoiding foreclosure. The Program is now partnering with the St. Louis University Legal Clinic. [Alton Daily News.com](#) (April 15, 2012)

MEDIATION NEWS

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MARCH 2012

CASES & RESOLUTIONS:

City Uses Mediation to Avoid Bankruptcy

Stockton, California avoided bankruptcy by bringing in a mediator to resolve disputes with creditors and unions, as required by a California law enacted last year. Stockton is the first city affected by the law, and might be the beginning of a trend, as other cities in California are under financial stress. Twenty-four states permit municipalities to file Chapter 9 bankruptcies, with some restrictions.

[Bloomberg](#) (February 29, 2012)

U.S. Government Unsuccessful in Enforcing Partial Settlement Terms

Two assistant U.S. Attorneys participated in mediation of a civil forfeiture action on behalf of the United States, and sought court enforcement of terms agreed to in the initial mediation session, even though they had agreed with the mediator that the terms were “not a binding settlement” and even though they had not been able to obtain the required approval of their own superiors. Following the first mediation session, a federal magistrate acting as mediator held an “ADR conference” – which was on the record and transcribed – setting forth agreed terms, issues still to be resolved and scheduling a second mediation session. When the property owner decided to litigate and ended the settlement efforts, the U.S. Attorneys tried to enforce the partial agreement, asserting that the unresolved issues were minor. The district court refused to enforce the terms, readily concluding that there was no meeting of the minds on settlement, since there was no agreement to be bound.

[U.S. v. 434 Main Street, Tewksbury](#), No. 09-11635-JGD (U.S.D.C. D. Mass., December 16, 2011)

Other Notable or High Profile Proceedings

- Reaching a settlement through mediation was a factor that contributed to a court’s determination of “good faith” settlement as required by California statute. [Perez v. Ford Motor Co.](#), No. 1:10-cv-02213-LJO-SKO (U.S.D.C. E.D. Cal., January 23, 2012).
- While mediation resulted in settlement of all issues except attorneys’ fees, a federal court determined that discussing attorneys’ fees at mediation helped satisfy a court rule that parties must confer prior to moving for fees. [Dunn & Fenley, LLC v. Diederich](#), No. 10-4038-KHV

Mediation Quote:

“In an all-too-common pattern in ‘litigation as usual,’ settlement comes only after the lawyers engage in adversarial posturing, the litigation process escalates the original conflict, the parties’ relationship deteriorates, the process takes a long time and a lot of money, and none of the parties is particularly happy with the settlement. Although some lawyers enjoy this process and make a good living from it, many would prefer to use a more productive and efficient process....”

John Lande, *Lawyering with Planned Early Negotiation: How You Can Get Good Results for Clients and Make Money* (ABA Section of Dispute Resolution, 2011) at 2

Check These Out:

Online Dispute Resolution (ODR) Developments (see also EU development in the text)

- With ODR rapidly expanding around the world, a three-day conference on ODR is being held

(U.S.D.C. D. Kan., February 2, 2012).

- In a bad faith insurance action following a jury verdict of \$65 million, a federal court found that Florida's Mediation and Privilege Act did not shield disclosure of mediation-related documents between parties who both had been in the previous mediation, up to the point that one party withdrew from the mediation. [Allied World Assurance Co., Inc. v. Lincoln General Ins. Co.](#), No. 1:11-mc-00342 (U.S.D.C. M.D. Pa., February 2, 2012).
- Netflix mediated and settled a federal class action case against it which alleged violations of the federal Video Privacy Protection Act due to Netflix maintaining customer viewing histories even after their subscriptions were cancelled. Netflix agreed to pay \$9 million in the settlement; other terms were not disclosed. [Multichannel News](#) (February 10, 2012)
- A bankruptcy court confirmed Washington Mutual's plan of reorganization as modified by a recent mediation, finally permitting distribution of over \$7 billion. [Market Watch](#) (February 17, 2012)

in Prague, Czech Republic from June 27-29. [ADR Hub.com](#) (February 2012)

- The United Nations Commission on International Trade Law (UNCITRAL) is developing ODR rules discussed in an interview with Vikki Rogers of Pace University. [Intervjew](#); [JDSupra](#) (January 9, 2012)

Law School Mediation Updates

NEWS & INITIATIVES:

European Union Moving Toward Online Dispute Resolution for Consumers

The European Commission has set forth a detailed proposal for online dispute resolution (ODR) of consumer disputes to provide better remedies in support of cross-border e-commerce. The ODR proposal is paired with a proposed Directive on alternative dispute resolution (ADR) for consumer disputes. Many ADR entities permit consumers to submit complaints online, but very few currently allow the entire resolution process to be handled online. Establishing ODR systems will encourage consumers to shop online across borders and permit sellers to reach broader markets. The proposal is to establish an EU-wide ODR platform accessible in all EU official languages that provides a single website for those seeking to resolve cross-border e-commerce disputes. A network of ODR facilitators will be established to provide support for the ODR platform. When a complaint is submitted, the consent of the other party will be sought and the dispute transmitted to an existing national ADR entity that will attempt to resolve the dispute within 30 days, possibly using ODR. The ADR entities will apply their own procedures and rules on cost. Confidentiality applies to the ODR process, and the ODR procedures will not deprive either consumers or sellers of their right to pursue matters in court. The timeline proposed shows adoption of the ODR Regulation and ADR Directive late in 2012, with development of the ODR platform to be completed by 2015.

[Mediation World](#) (February 11, 2012); [European Commission Proposal for Regulation on Consumer ODR](#), COM(2011) 794 final (November 29, 2011); [Commission Staff Executive Summary](#), SEC(2011) 1409 final (November 29, 2011); [Commission Staff Impact Statement](#), SEC(2011) 1408 final (November 29, 2011)

World Bank Analyzes ADR Benefits

- Indiana Tech is creating a new law school to open in the Fall of 2013, with more of a collaborative and experiential focus than existing law schools. The new law school will include a Mediation Clinic that will mediate disputes between undergraduates, among others. [Inside Indiana Business](#) (January 24, 2012)
- The 7th ICC International Commercial Mediation Competition in Paris ended after five days and 140 mock mediation sessions with student mediation advocates from South Texas

A World Bank paper discusses the effectiveness of alternative dispute resolution, looking at the empirical benefits of mediation and other forms of ADR and noting the need for additional studies outside the U.S. The short paper, by the Investment Climate Impact Project, focuses on measurable issues of cost savings and timing. It also discusses less measurable impacts, such as improving business relationships and problem-solving skills, reducing pressure on courts, and improving investors' perceptions about the safety of business investments in emerging markets.

[Settling Out of Court](#), Note No. 329 (2011); [The World Bank Group's Viewpoint Policy Journal](#)

U.K. Trying Regional Workplace Mediation Networks

The U.K. Government announced that it is establishing two regional mediation networks for small and medium size enterprises (SMEs) in a pilot program to reduce workplace disputes and the number of employment tribunal cases. The mediation networks will be in Cambridge and Manchester, with mediation training of employees at 24 SMEs, as smaller companies are often not aware of the benefits of mediation and rarely use it. Trained mediators will then be able to assist other organizations in their regional network. The government is seeking a provider for the first round of mediation training. The pilot program is part of the government's reform of the employment tribunal system; in the last two years tribunal claims have risen to 218,000, an increase of 44 percent. The program will run 12 months and expand to other areas if successful. A related national mediation conference had record breaking attendance.

[People Management Magazine Online](#) (January 23, 2012); [eGov Monitor](#) (January 24, 2012); [SourceWire](#) (January 31, 2012)

Japanese Mediation Center Beginning to Resolve Fukushima Nuclear Accident Claims

The mediation center established by the Japanese government is now beginning to resolve claims resulting from the Fukushima nuclear power plant catastrophe, with three resolutions from among the 600 claims that have been submitted thus far. Many more claims are likely from the 150,000 people displaced by the nuclear accident, but to begin the process each claimant must complete a 56-page form using a 150-page instruction manual and provide receipts and other documentation. The Japanese government has set up a \$26 billion fund to pay damages on behalf of Tokyo Electric Power Co. (Tepco), with another \$11.7 billion approved in November and more likely to follow. Few lawsuits have been filed, although one lawyer is threatening to file a shareholder derivative action against Tepco's corporate directors seeking \$72 billion for failing to raise the height of tsunami barriers.

[Law.com](#) (January 26, 2012)

Canadian Report Encourages Specific Training and Standards for Elder Mediation

In the growing area of elder mediation, which now includes mandatory mediation of adult guardianship issues in British Columbia, a new report calls for mediation practice guidelines, training and ethical standards. The report from the Canadian

College of Law (U.S.) topping Bar Ilan University (Israel) in a final session that drew an audience of 250. [International Chamber of Commerce](#) (February 9, 2012); [International Chamber of Commerce](#) (February 2012)

- The Dr. Ram Manohar Lohia National Law University in Uttar Pradesh, India, held its first National Mediation Competition on January 14-15 among 22 law schools from around the country. [Bar & Bench](#) (January 16, 2012)
- The International Law School Mediation Tournament will be held March 23-24 in Chicago at Loyola University Chicago School of Law. [International Academy of Dispute Resolution](#) (February 2012)

Other Cases & Resolutions:

Lehman Brothers Holdings agreed to pay \$40 million to resolve a securities-fraud class action involving mortgage-backed securities after ten months of mediation with a group

Centre for Elder Law emphasizes the heightened sensitivity and skill needed by mediators. Ethical issues include determining whether parties have the capacity to participate meaningfully in mediation, the need for legal representation and questions of abuse and neglect.

[Canadian Lawyer Legal Feeds](#) (January 16, 2012)

Other International Mediation Developments

- New **U.K.** statistics show that court processes are too slow, which the Courts Minister stated should be remedied by offering more opportunities for mediation, including telephone-based mediation. [Bude People](#) (January 12, 2012)
- A study by a **U.K.** group revealed that only five percent of employers have used mediation to resolve workplace disputes, even though nearly 75 percent agreed that mediation is a good workplace tool for resolving disputes. [Fresh Business Thinking.com](#) (February 2, 2012)
- A High Court judge in **Ireland** speaking at a mediation seminar criticized the delays and great expense of litigation, calling it the “nuclear option,” and urged use of mediation and other forms of alternative dispute resolution, along with revision of court rules to help reduce some of the burden of litigation. [Irish Times.com](#) (February 27, 2012)
- The leading arbitration institution in **Germany** created procedural rules for mediation and other forms of alternative dispute resolution which are now available in English. [German Institution of Arbitration's ADR Rules; Dispute Resolution in Germany](#) (January 25, 2012)
- Mediation legislation that **Russia** enacted in July 2010 has not changed the legal culture, so the Supreme Commercial Court has drafted new legislation that would have assistant judges, retired judges and other court personnel conduct mediations. Participation by parties generally would be voluntary, and the legislation would not exclude private mediation. Judicial mediation might help build skills and a culture of mediation, which would encourage non-judicial mediation as well. [Russian Law Online](#) (February 28, 2012)
- The World Bank's International Finance Corporation is funding a two year project by the Centre for Effective Dispute Resolution (CEDR) to deliver mediation training, develop a network of master trainers and build institutional capacity in mediation centers in **Egypt, Lebanon, Morocco, Pakistan and Afghanistan**. [SourceWire](#) (February 9, 2012)
- The **Bahrain** Chamber for Dispute Resolution has been involved in 47 cases with a value of \$1.6 billion since it began in January 2010; it has over 150 trained mediators and a pool of 600 arbitrators in partnership with AAA. [Gulf Weekly](#) (January 18, 2012)
- **Angola's** National Consumer Protection Institute used mediation to recover more than \$265,000 for consumers in 2011. [Angola Press](#) (January 18, 2012)
- Mediation experts judging a mediation competition in **India** among 32 law school teams stated that they expect mediation will soon become a preferred choice for dispute resolution in India, making mediation a

of union pension funds. [Bloomberg](#) (January 13, 2012)

Following court-assisted mediation, bankrupt newspaper publisher Tribune Co. agreed to contribute \$4.45 million to a \$32 million settlement of an employee retirement fund lawsuit in which the publisher was not a party. [Bloomberg](#) (January 30, 2012)

A bankruptcy judge permitted the owner of LaGrave Field baseball stadium and Amegy Bank to enter into mediation, even though the parties had already spent two years in protracted mediation. [Star-Telegram](#) (January 18, 2012)

Settlements from successful mediations between the bankrupt Los Angeles Dodgers and Fox Sports over media rights and between the Dodgers and Major League Baseball over sale of the franchise, stadium and telecasts were both approved by the bankruptcy court. [The Deal Pipeline](#) (January 11, 2012)

A Rhode Island judge has ordered mediation between the Big East conference and West Virginia University over the school's plan to become a member of the Big 12 beginning in July, rather than waiting the required 27 months. [College Football Talk](#) (January 12, 2012)

Marathon mediation sessions involving three mediators have resulted in settlements with families of 29 men who died in the Upper Big Branch coal

good practice choice for lawyers. The potential of mediation to reduce the burden of litigation in India will be realized by encouraging mediation to begin when a complaint is filed. The average length of a civil case in India is 15 years. [Times of India](#) (February 18, 2012); [Times of India](#) (February 19, 2012); [The Indian Express](#) (February 26, 2012)

- The High Court Mediation Committee and the District Mediation Monitoring Committee organized a mediation conference in Nagpur, Maharashtra, **India** in which judges and lawyers discussed mediation opportunities and challenges. A target was set for judges to refer four cases a month to mediation. [Times of India](#) (January 30, 2012)
- Haryana, **India** is getting its first district alternative dispute resolution center, with the first foundation stone set by a Supreme Court Justice for the building that will house the center. [IBN Live News](#) (January 25, 2012)
- The Mediation Service Center in one region of the **Philippines** Department of Environment and Natural Resources is fully operational with 18 accredited mediators and expects to be involved in over 100 public land disputes this year. [Mb.com.ph](#) (February 29, 2012)
- The Supreme Court of **South Korea** cleared the former head of the state-run Korean Broadcasting System of charges resulting from agreeing to court mediation of a tax dispute that yielded \$160 million less than might have been achieved in litigation. [The Korea Herald](#) (January 12, 2012)
- **Cuba** is hosting the Sixth International Conference on Arbitration and Mediation from January 23-25. [Prensa Latina News](#) (January 12, 2012)

New York Mediation Centers Seek Restoration of Funding

Mediation centers in Westchester and Rockland, NY, are leading a statewide advocacy campaign to restore funding for community mediation, following deep cuts during last year's state budget crisis. The campaign is collecting online signatures, focusing on the cost effectiveness of community mediation centers where 100,000 people resolved conflicts last year, decreasing the pressure on overburdened courts. The average cost per dispute at community mediation centers is \$300, far less than even minor court proceedings.

[Nyack News & Views](#) (January 23, 2012)

BBB Celebrates 100 Years

The Better Business Bureau, the non-governmental agency that focuses on business integrity and transparency, and now emphasizes mediation and resolution, is celebrating its founding 100 years ago in Minneapolis. The non-profit originally covered truth in advertising and has expanded to include internet scams, fraud and vehicle lemon laws. BBB now has 122 branches across the U.S. and Canada.

[Twin Cities Daily Planet](#) (January 20, 2012)

mine explosion in April 2010, which was the worst U.S. mining disaster since 1972. [CNN](#) (January 11, 2012); [West Virginia Metro News](#) (January 6, 2012)

The civil case against an on-duty federal border agent who ran a stop sign at about 100 miles an hour causing an accident that killed three people has been resolved for \$11 million in two lengthy days of mediation. The agent offered condolences and an apology at the beginning of the mediation. The agent, who was tracking a drug runner, has pled not guilty to manslaughter charges. [UTSanDiego.com](#) (February 16, 2012)

After months of mediation over structural problems at the Larimer County, Colorado fairgrounds complex, those involved in its design and construction agreed to pay \$14.8 million to settle the matter. [Coloradoan.com](#) (January 7, 2012)

Condo owners received \$5.2 million through mediation for serious construction defects in their building from the insurers of the builder, general contractor and subcontractors. [Market Watch](#) (February 7, 2012)

After a year of mediation, Western Washington University finally resolved a multi-million dollar construction case with the contractor concerning a new dormitory. [The Western Front](#) (February 17, 2012)

Goldman Sachs agreed in mediation to pay nearly \$1

Update on Home Foreclosure Mediation

- The National Consumer Law Center has released its new report on mortgage foreclosure mediation focusing on programs in 19 states throughout the **U.S.** The report suggests that mediation is an inexpensive solution that could save billions, as well as allowing many troubled homeowners to keep their homes. The report recommends best practices based on foreclosure mediation data from the last three years. The report indicates that some programs, including those in **Connecticut, Nevada and New York**, are more successful than other programs. The report emphasizes the need for enforceable standards and robust outreach, both of which were lacking in the recently suspended **Florida** mediation program. Mediation fees are typically less than \$1,000, a tiny portion of the \$145,000 per foreclosed home lost by investors. In **California** alone, foreclosures have cost more than \$500 billion. [National Consumer Law Center Report](#) (February 2012); [MarketWatch](#) (February 6, 2012); [UTSanDiego.com](#) (February 16, 2012)
- A **U.S.** Department of Justice report on foreclosure mediation emphasizes best practices for research and evaluation and how creative collaborations among the various programs, agencies, institutions and others involved can enhance efficient use of resources. The report, by DOJ's Access to Justice Initiative, summarizes the results of a March 2011 workshop which included recommendations such as requiring federally-backed loans to go through mediation prior to foreclosure, creating federal guidelines for foreclosure mediation programs, and providing matching funds for state programs that meet the federal guidelines. [DOJ Report – Foreclosure Mediation: Emerging Research and Evaluation Practices](#) (December 2011); [National Mortgage Professional Magazine](#) (January 12, 2012); [Huffington Post](#) (January 10, 2012)
- The **U.S.** government and 49 state attorneys general reached agreement on a \$25 billion settlement with the country's five largest loan servicers for improper handling of foreclosures. The settlement resulted from 15 months of intense negotiation and is said to be the largest federal-state joint settlement in history. **Connecticut** will receive \$190 million from the settlement, of which \$27 million will help pay for local foreclosure prevention programs, including the judiciary branch's foreclosure mediation program. **Pennsylvania** is to receive \$266 million, which housing advocates are hoping will be spent in part to restore the Homeowners Emergency Mortgage Assistance Program, which was viewed nationally as an excellent foreclosure mediation program before it lost funding last year. **Utah** will receive \$171 million in the settlement, while **Delaware** will receive \$45 million. [National Mortgage Settlement](#) (February 2012); [Ctwatchdog.com](#) (February 9, 2012); [Keystone Politics](#) (February 10, 2012); [CBS News](#) (February 10, 2012); [WGMD.com](#) (February 10, 2012)
- The **Nevada** advisory panel has recommended additional changes to the Nevada Foreclosure Mediation Program by requiring banks to disclose how much they paid for homeowners' mortgages. Some banks reportedly bought distressed loans for as little as five cents on the dollar. However, lenders state that loans frequently are sold in bulk, making it too difficult to determine the amount paid for individual mortgages. Other lenders question the relevance of the information and are concerned that it will result in homeowners having unrealistic hopes of obtaining principal reductions. [Las Vegas Sun](#) (February 24, 2012)
- Following the **Nevada** Supreme Court's [holding](#) last July that a district

million to resolve claims from computer technicians who were not paid overtime for their work as contractors. [Bloomberg](#) (January 11, 2012)

A \$400 million Regional Desalination Project in Monterey County, California is in mediation with conflict of interest allegations involving county officials and employees. [Monterey Herald.com](#) (January 12, 2012)

A decision to enter into mediation by a committee of the Queenstown (New Zealand) Lakes District Council is to benefit taxpayers by avoiding the costs of Environment Court appeals relating to a \$300 million subdivision outside Queenstown. While the mediation will not be public, the committee chairman promised that interested parties will be kept informed and no covert deals will be made. [The Southland Times](#) (February 4, 2012)

Three Australian property owners impacted by a water grid pipeline are taking their disputes to mediation, which may result in another 140 compensation cases considering mediation as well. [Sunshine Coast Daily](#) (February 28, 2012)

court should have imposed sanctions against a lender that did not negotiate in good faith, District Judge Flanagan has imposed minimal sanctions by requiring the lender to cover the costs of another mediation and to give \$2,500 to a legal services non-profit. [RGJ.com](#) (January 3, 2012)

- The **Nevada** Supreme Court remanded two separate foreclosure cases back to District Judges Mosley and Flanagan, ruling there was insufficient documentation for foreclosure. A Court spokesman noted that there are a significant number of similar foreclosure mediation appeals pending before the Court. In another case, the Nevada Supreme Court is considering whether a bank can foreclose on a home despite a mediator's finding that not all required documents were presented at the mediation. The bank sought judicial review of the mediator's findings and District Judge Flanagan ruled that the bank's failure to produce documents did not amount to bad faith, which the homeowner has appealed. [CBS News](#) (January 24, 2012); [CBS News](#) (January 5, 2012)
- **Delaware** legislators and the attorney general gathered to mark the launch of the state's new mandatory foreclosure mediation program, which applies to home foreclosures from January 19 and continues for two years. [Loan Safe.org](#) (January 20, 2012)
- **New York** will soon provide foreclosure mediation and counseling through a Foreclosure Relief Unit to be set up in the Department of Financial Services. [The Wall Street Journal](#) (January 5, 2012)
- With a continuing high level of foreclosures, the City Council of **Los Angeles, California** is considering whether to adopt a mortgage foreclosure mediation process. The Council is considering the type of program adopted in **Springfield, Massachusetts**. [Loan Safe.org](#) (February 16, 2012)
- Protestors favoring legislation requiring foreclosure mediation and other homeowner protections in **Massachusetts** gathered near the State House to encourage legislative support. The Massachusetts Commission Against Discrimination supports mandatory mediation to prevent discrimination that can occur when banks decide with whom they will mediate. Advocates stress that Massachusetts is the only New England state that does not have a foreclosure mediation law. [The Herald News](#) (January 11, 2012)
- Legislation requiring mediation prior to home foreclosure passed the **Oregon** Senate, but faces opposition from bankers in the House. Although this legislation died in the House last year, it has bipartisan support and the governor has indicated he will sign it if it passes. [Mail Tribune](#) (February 18, 2012)
- HOPE NOW, an alliance of mortgage market participants that provides assistance to homeowners in distress, convened a meeting in Washington, DC among judges, attorneys, and state housing agencies, including **Maryland, Ohio** and **Rhode Island**, to discuss best practices and standards for foreclosure mediation. Foreclosure rates were down in 2011 due to problems such as "robo-signing" that temporarily halted all foreclosure processes at some big banks, but the foreclosure rates in 2012 are expected to rise. [National Mortgage Professional Magazine](#) (February 2, 2012); [HOPE NOW Website](#); [Afro](#) (January 13, 2012)

Other Notable News & Proceedings

- Participation by the Federal Emergency Management Agency in state disaster claims mediation programs would be mandated under the Flood Insurance Reform and Modernization Act of 2011, introduced by Senator Tim Johnson on December 5 in the U.S. Senate to restore financial solvency to the flood insurance fund. [S. 1940](#)
- The South Dakota House of Representatives unanimously passed legislation that would expand the state's agriculture mediation program to also permit mediation of disputes over decisions by federal land-management agencies. The current program is limited to agricultural loan disputes between borrowers and creditors. [Aberdeen News.com](#) (January 31, 2012)
- UCLA is launching a new initiative focusing on peaceful resolution of conflicts and civil discourse, with public lectures, academic courses and programs. Former U.S. Senator George Mitchell is kicking off the initiative with a public lecture on Middle East turmoil, UCLA's Chancellor is teaching a course, and a new honors course on international conflict resolution is to provide both theory and skills for practical conflict resolution. [UCLA Newsroom](#) (February 22, 2012)

MEDIATION NEWS

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Keith L. Seat

JANUARY 2012

CASES & RESOLUTIONS:

Federal Circuit Concludes that Non-Binding Arbitration Is Not Mediation, So No Decision Reached on Mediation Privilege

The U.S. Court of Appeals for the Federal Circuit readily concluded that arbitration is not mediation simply because it is non-binding and intended to facilitate settlement. A key confirming element was that ex parte contact with the arbitrators was prohibited, so the parties could not speak openly and freely about their case with a neutral. Because mediation was not involved, the appellate court declined to determine whether there is a federal mediation privilege as found by the district court.

[Kimberly-Clark Worldwide, Inc. v. First Quality Baby Products, LLC](#), No. 2011-1157 (U.S.C.A. Fed. Cir., November 15, 2011).

West Virginia Supreme Court Reverses Sanctions, But Confirms that Failure to Appear at Mediation with Full Settlement Authority Is Sanctionable

While affirming the principle that sanctions can be imposed for violation of local rules requiring attendance at mediation by an insurance representative with full settlement authority, the West Virginia Supreme Court reversed sanctions exceeding \$270,000. The Court concluded that the sanctioned insurer (which acquired the first insurer) did not receive adequate notice of the first court-ordered mediation; did not act in bad faith by reducing an offer from \$700,000 to \$350,000 because a second representative did not know of the first mediation; and did not deserve sanctions after receiving only three days' notice of a mediation session, when the insurance representative failed to appear in person because of missing a flight, did participate by telephone, and showed up in person for the final mediation session the next day. On the other hand, the Court expressed surprise that no sanctions were imposed for the "egregiously deceptive" conduct of the insurance representative at the first mediation who did not have authority to agree to the \$900,000 she thought was appropriate and went back to the insurer to seek authorization.

[Casaccio v. Curtiss](#), No. 101527 (W. Va., November 9, 2011)

Mediation Quote:

"[E]veryone 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.... [E]veryone 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

Check These Out:

New Technology for Mediation

After three years of work, a

Attorney's Signature Not Sufficient for Binding Settlement Agreement When Party Is Present

A Georgia appellate court reversed summary judgment which enforced a mediated settlement agreement based only on the signature of a party's attorney when the party himself had refused to sign the agreement and stormed out of the mediation. The appellate court concluded that with the party present and signature lines for both the party and attorney, there was no issue of apparent authority on which the lower court relied in enforcing the agreement.

[Omni Builders Risk, Inc. v. Bennett](#), A11A1025 (Ga. Ct. App., November 29, 2011)

Massive Federal Drug Litigations Turn to Mediation

GlaxoSmithKline has reached a \$3 billion settlement of federal civil and criminal charges over the diabetes drug Avandia, and a federal judge has ordered mediation of the thousands of remaining patient claims. The judge appointed a mediator and set a 75-day deadline to resolve 85% of the remaining cases. Earlier this year, GlaxoSmithKline agreed to resolve over 10,000 patient cases for more than \$700 million. In a separate matter involving multidistrict litigation against Merck over its Vioxx painkiller, a federal judge delayed litigation by state attorneys general a year ago to give time for global mediation. Merck has now agreed on payments to the states of Florida, New York and South Carolina, although the size of the settlements is confidential. Merck has paid \$4.85 billion to settle patient lawsuits involving Vioxx.

[MedCity News](#) (November 9, 2011); [Businessweek](#) (November 15, 2011)

NEWS & INITIATIVES:

EEOC Increases Monetary Recoveries in Mediation to \$170 Million

The U.S. Equal Employment Opportunity Commission reports that in fiscal 2011 it again set a record for the amount of monetary relief obtained for victims of discrimination, at \$365 million, of which over \$170 million was obtained in mediations. About 100,000 discrimination charges were filed with the EEOC in 2011, but the agency reduced its backlog so that fewer than 80,000 matters were pending late in the year.

[JDSupra](#) (December 16, 2011)

free smartphone application has been launched for iPhones/iPads and Android devices to help negotiators and mediators calculate monetary offers and graph trajectories, tracking both dollars and the timing of offers and counter-offers. In addition, enterprise software under development can provide input from data accumulated from past cases; it is expected to be available for beta testing early in 2012. [San Antonio Business Journal](#) (December 1, 2011); [Picture It Settled](#)

Decision tree software from [Resolution Tree](#) can help guide the process of building decision trees and quickly calculate the dollar implications of various assumptions. The software is currently in beta testing and free, but will be offered for a monthly charge when launched. [Mediate.com](#) (December 2011); [Resolution Tree](#)

Another Mediation Show

MTV Networks is casting a new reality show in which professional mediators will help high school students resolve their disputes and personal dramas. The casting call seeks disputants with great personalities and genuine, real life issues who are in high school and appear to be between 16 and 19 years old. [RealityWanted.com](#) (December 12, 2011)

Mediation Competitions

The Twelfth Annual National Intercollegiate Mediation Tournament was held November 11-12 at Drake University Law School. Results from the INADR Tenth Annual International Law School

Florida Supreme Court Strengthens Rules on Who Must Attend Mediation

The Florida Supreme Court adopted amendments to the state's mediation procedures relating to who must appear at mediations, which take effect on January 1. The amendments require that final decision-makers on all issues in the case appear in person at the mediation and have the legal capacity to enter a binding settlement agreement. The rule continues to require insurance representatives to appear in person with full authority to settle the case for plaintiff's last demand (or policy limits, if lower) "without further consultation." The identities of those who will be attending a mediation and confirmation of their authority must be submitted to the court and all parties ten days before the mediation session, unless the parties stipulate otherwise. Failure to comply with the rules can result in imposition of sanctions, including mediation fees, attorneys' fees and costs. Some are concerned about the impact on insurers located out of state and the difficulty of providing a person with sole authority to settle for policy limits.

[In re Amendments to Florida Rule of Civil Procedure 1.720](#), No. SC10-2329 (Fla., November 3, 2011); [Claims Journal](#) (November 21, 2011)

Update on Home Foreclosure Mediation

- **Federal** legislation was introduced by Congresswoman Frederica Wilson (D-FL) on December 8 which would provide for mediation between borrowers and lenders prior to foreclosure. H.R. 3595, the Mandatory Foreclosure Mediation Act, was referred to the Committee on Financial Services. [South Florida Caribbean News](#) (December 8, 2011); [H.R. 3595](#)
- The **Florida** Supreme Court terminated its statewide mandatory foreclosure mediation program due to lack of success. Only 4% of cases eligible for mediation concluded with a settlement. Borrowers often were not contacted; when they were, mediation settlements increased to 27%. In ending the statewide program, the Court noted that the state's Circuit Courts have the responsibility to manage residential foreclosure cases and may refer cases to mediation. [In re Managed Mediation Program for Residential Mortgage Foreclosure Cases](#), No. AOSC11-44 (Fla., December 19, 2011); [Miami Herald.com](#) (December 21, 2011); [JDSupra](#) (December 22, 2011)
- A new **Florida** mediation program may help homeowners going through Chapter 13 bankruptcy obtain mortgage modifications to prevent foreclosure of their homes. Thus far, 90% of homeowners who have entered the Bankruptcy Mortgage Modification Mediation Program have obtained mortgage modifications. The program was launched in Orlando, is expanding into Manatee and Sarasota counties and could be statewide by the end of 2012. [Digital Journal](#) (December 16, 2011)
- The **Nevada** Supreme Court concluded that even though a lender had failed twice to mediate as required, it did not lose its security interest and could bring another foreclosure action. The Court rejected the homeowners' assertions of issue and claim preclusion and affirmed the lower court's order that the matter be sent to mediation as part of the subsequent foreclosure process. [Holt v. Regional Trustee Services](#)

Mediation Tournament have also been posted. [International Academy of Dispute Resolution](#) (November 12, 2011)

The Fourth U.K. National Mediation Competition for Law Schools was held November 24-26, with 16 teams participating, including two from the U.S. and one from Germany. [University of Strathclyde](#) (November 29, 2011)

Other Cases & Resolutions:

The U.S. Court of Appeals for the Ninth Circuit reversed the district court's dismissal of law students' antitrust claims against West Publishing Company relating to bar review courses, but ordered the parties to mediate rather than remanding the case to the district court. [Market Watch](#) (November 17, 2011)

Parties praised the mediator for assisting in the settlement between Washington Mutual shareholders and four hedge funds, permitting the \$7 billion bankruptcy-exit plan to move forward. [Businessweek](#) (December 14, 2011)

Consolidated litigation against Netflix was sent to private mediation based on an agreement between the parties. The dispute concerns allegations that Netflix maintained customer movie rental history even after their subscriptions were cancelled. [Lexology](#) (December 15, 2011)

Mediation is to resume

[Corp.](#), 127 Nev. Adv. Op. No. 80 (Nev., December 15, 2011)

- The **Nevada** foreclosure mediation program, run by the Nevada Supreme Court, has conducted over 12,000 homeowner mediations, of which some 11,000 did not result in foreclosures, and in about 3,700 the homeowners were allowed to remain in their homes, according to the program. A California nonprofit group is seeking to verify those claims of success, but has been told it would cost them \$940,000 to review the records. The state asserts that it would cost that much to redact the 600,000 requested documents in order to preserve mediation confidentiality. [Las Vegas Sun](#) (November 19, 2011)
- **Las Vegas, Nevada** has launched an advertising campaign to increase awareness of free assistance by approved counselors relating to foreclosure mediation and related topics. The three-month campaign is funded by a grant from Fannie Mae and HUD. [FOX5 Las Vegas](#) (November 9, 2011)
- **Hawaii's** May 2011 legislation requiring mediation of non-judicial foreclosures continues to significantly constrain the number of foreclosures in the state, with only one-third the number of foreclosure filings compared to a year earlier. The necessary mediation process for non-judicial foreclosures was not available until October 3, but lenders have not used the non-judicial process during the first month and say it will not be used because of punitive penalties for even minor infractions. A legislative push to make the law more palatable to lenders – while still protecting homeowners – is likely in 2012. [Honolulu Star-Advertiser](#) (November 10, 2011)
- Recent legislation in **Delaware** created a Foreclosure Prevention Office that assists homeowners facing foreclosure with mediation and other issues. Delaware's mandatory foreclosure mediation program begins in January. [WGMD.com](#) (November 17, 2011)
- Although two bills addressing foreclosure died in the **Oregon** legislature when the 2011 session ended on June 30, Oregon legislators intend to renew the effort, which may include pre-foreclosure mediation, in the new session beginning in February. [Statesman Journal.com](#) (November 26, 2011)

UK Press Commission Proposed for Mediation of Libel and Privacy Cases

With the phonehacking scandal continuing to unfold, a top UK newspaper editor-in-chief is proposing a new Press, Standards and Mediation Commission that would act as an independent regulator of the press and provide mediation services for libel and privacy cases to reduce the high cost of litigation.

[BBC News](#) (November 13, 2011)

Ontario Insurance Regulator's Mediation Backlog Continues to Grow

A significant mediation backlog has arisen for claimants in disputes with insurers before Ontario's insurance regulator, the Financial Services

between Fox and the Dodgers, even as Fox appeals a ruling by the U.S. Bankruptcy Judge that TV rights may be sold along with the team. [Lasorda's Lair](#) (December 10, 2011)

Analysis of financial records resulted in mediated settlements totaling \$1.39 million in a bankruptcy case. [Tulsa World](#) (December 29, 2011)

Five of six lawsuits have settled through mediation with families of workers killed in the Kleen Energy power plant explosion in February 2010. Mediation continues on other lawsuits by injured workers. [Courant.com](#) (November 13, 2011)

The first settlements have been reached in mediation with an Iowa egg producer for injuries from an outbreak of salmonella in July 2010 that sickened 1,900 people. [Businessweek](#) (November 16, 2011)

A \$1.9 million settlement was reached in a private mediation on the eve of trial with a young father who fell on an untreated patch of ice in a restaurant parking lot resulting in permanent disabilities. [The Township Journal](#) (November 4, 2011)

Three pedestrians hit by a tow truck which was struck by a train settled in mediation for \$1 million. [Press of Atlantic City](#) (December 29, 2011)

Mediation resulted in a \$500,000 settlement for a widower from a truck accident that injured his wife, who died from infection contracted in the hospital. [Delmarvanow.com](#) (December 28, 2011)

Commission of Ontario (FSCO). Mediations are taking 10-12 months to complete, rather than the 60 days required by law. Applications for mediation have arisen by 135% over the last five years, with half of all injury claims ending up in mediation (when the insured is not satisfied with the amounts offered by the insurer). Although FSCO is completing 50% more cases with no increase in staff in the last five years, FSCO expects the mediation backlog to continue to increase; 36,000 new mediation applications are expected in the current fiscal year, up 18% from last year. FSCO is seeking approval to hire external mediation providers to address the backlog because government hiring restrictions prevent bringing on more internal staff.

[2011 Annual Report \(Ch. 3\), Office of the Auditor General of Ontario; Canadian Underwriter.ca](#) (December 5, 2011)

A New Zealand land use decision reached through mediation will permit retail development to begin, likely in 2012. [Stuff.co.nz](#) (December 30, 2011)

A city's reconstruction of a main street to prevent flooding is beginning after a settlement with Amtrak in a court-ordered mediation. [Indystar.com](#) (December 24, 2011)

Mediation has been ordered in a nearly ten-year-old dispute over a home entertainment system in which there have already been two jury trials, trips to the Kentucky Court of Appeals and the Kentucky Supreme Court, as well as battles in a U.S. Bankruptcy Court. [Kentucky.com](#) (December 16, 2011)

Other International Mediation Developments

- **Swiss** mediators succeeded in working out a deal between **Russia** and **Georgia** on monitoring mutual trade, permitting Russia to join the World Trade Organization after 18 years. [Reuters](#) (November 3, 2011)
- Mediation is expanding in the **Ukraine** with the opening of a mediation center in Kyiv by the International Chamber of Commerce; Ukrainian courts are widely viewed as corrupt and Ukrainian arbitration cannot be used in disputes involving a foreign party or real estate located outside the country. [Kyiv Post](#) (November 17, 2011)
- The World Bank Group's International Finance Corporation established the first-of-its-kind Business Mediation Centre at the Lahore Chamber of Commerce and Industry in **Pakistan** to improve the investment climate. [The Nation](#) (December 21, 2011)
- **South Korean** opposition to ratification of the Korea-U.S. Free Trade Agreement has focused on the investor-state disputes (ISD) clause, which permits third party mediation, while proponents note that the ISD settlement system is a global standard which is included in over 2,500 international agreements. [The Korea Herald](#) (November 1, 2011)
- Mediation efforts by the government of **South Korea** were successful in getting cable television operators to resume high definition TV retransmission pending further negotiations in a dispute over retransmission fees. [The Korea Herald](#) (December 5, 2011)
- **Taiwan** is considering amendments to regulations on consumer debt to permit mediation of debt relief between banks and consumers with the assistance of community mediation committees. [The China Post](#) (November 29, 2011)
- Legislation to enhance the confidentiality of mediation was introduced in **Hong Kong** on November 30, based on a 2010 recommendation of the Working Group on Mediation and consultation with stakeholders. [Lexology](#) (December 13, 2011); [7th Space Interactive](#) (November 18, 2011)
- **Victoria, Australia's** Farm Debt Mediation Act 2011 went into effect on December 1, and permits either a farmer or a creditor to initiate mediation relating to enforcement actions involving farm mortgages. [Office of the Victorian Small Business Commissioner](#)

(December 2011).

- In **Queensland, Australia**, the Queensland Farm Finance Strategy, a public agreement between rural groups and nine banks, requires mediation relating to farm loan defaults. The Rural Financial Counseling Service of Queensland predicts an ongoing increase in debt mediation talks by Queensland graziers in 2012. [Queensland Country Life](#) (December 5, 2011); [ABC.net.au](#) (December 6, 2011)
- The Consumer Council of **Fiji** resolved \$2 million worth of complaints through mediation in 2011, with the largest number of complaints involving landlord/tenant issues and faulty electronic products. [Fiji Broadcasting Corporation](#) (November 24, 2011)
- The Mediation Board of **Trinidad and Tobago** presented Mediation Week in November to help further a culture of mediating all types of conflicts. [Breaking News Trinidad and Tobago](#) (November 3, 2011)
- **Lagos, Nigeria** intended to clear a backlog of 300 cases across a range of subject matters during settlement week in December, using mediation and other forms of alternative dispute resolution. [234Next.com](#) (November 16, 2011)
- The National Debt Mediation Association in **South Africa**, a nonprofit organization established by the credit industry, has addressed 1900 valid complaints against credit providers since it was established 19 months ago. [Fin 24](#) (November 8, 2011); [NDMA Website](#)

MEDIATION NEWS

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NOVEMBER 2011

CASES & RESOLUTIONS:

Court Exceeded Authority in Enforcing Mediation Agreement

A Washington state court of appeals overturned and remanded a trial court's order enforcing a settlement agreement reached in mediation because the lower court omitted a substantive provision agreed to by the parties (setting aside funds to cover future Medicare expenses). The appellate court also rejected the imposition of interest from the date of settlement rather than when performance was due, even though it concurred that a reasonable time for performance could be implied and that defendant took too long by not providing the first draft of a two-page release agreement for 58 days, and by not providing the second draft for 24 days after receiving proposed changes.

[Firth v. Juanita Country Club Condominium Owners Ass'n](#), No. 66211-2-I (Wash. App., October 24, 2011)

Court Dismisses Appeal After Appellant Unexpectedly Leaves Mediation

After ordering appellate mediation and requiring the named parties to be present for the "entire mediation process," a Texas appellate court later dismissed the appeal based on a letter from the dispute resolution center stating that appellant had unexpectedly left the mediation, resulting in impasse. The court was not satisfied by appellant's explanation that he preferred a decision by the court.

[In the Estate of James H. Rice](#), No. 10-10-00021-CV (Tex. App., August 10, 2011)

Bankruptcy Court Upholds Limited Mediation Privilege in Connecticut

Based on a limited mediation privilege in Connecticut, a federal bankruptcy court concluded that the mediation statement in another case could not be disclosed, even after that case had ended. The court applied state rather than federal law on mediation privilege because all claims were based on state law. The court also noted that a settlement agreement approved by the court could not provide the basis for contempt because the agreement was not incorporated into the court's order.

[In re New England National, LLC](#), Adv. Pro. No. 10-3033, ECF No. 120, 124 (U.S.

Mediation Quote:

"People want help with conflict, but they also want realism. When we [mediators] offer to help them prevent, resolve, or in some way fix conflicts that they are experiencing as inevitable, intractable, or deeply rooted, we are not seen as credible. This is not to say that the worst aspects of long-term conflict cannot be ameliorated, that complex and destructive interactions cannot be made more constructive, or that progress toward a more positive approach is impossible. But when we focus on preventing or settling conflicts that are not likely to be resolved, we lose credibility and forego the opportunity to help people in realistic and meaningful ways."

Bernard Mayer, *Staying with Conflict: A Strategic Approach to Ongoing Disputes* (Jossey-Bass 2009) at 6

Check These Out:

**Conflict Resolution
Day/Week Receiving**

Court Permits Mediation with Only a Few Participating Plaintiffs

A federal trial court in Florida agreed to a proposal that court-ordered mediation would occur with as few as three plaintiffs present, due to the large number of plaintiffs in the litigation, as long as plaintiffs had an opportunity to object to the proposed procedure prior to the mediation session and, as in a class action, the nonattending plaintiffs were able to object afterwards to any settlement reached at the mediation. The court noted that the nonattending plaintiffs must agree to maintain the confidentiality of mediation information they receive.

[Figueiras v. Devereux Foundation, Inc.](#), No. 1:09-cv-00227-MP-GRJ (U.S.D.C. N.D. Fla., October 7, 2011)

Other Notable or High Profile Proceedings

- Insurer's agreement to a \$50,000 increase in the settlement amount over the \$1.6 million reached in mediation was enforced by the court over the objection of the insured who was responsible for a sizeable deductible, because an insurer generally has the right to control settlement of claims in good faith. [Davis v. Valero Refining Co.](#), No. A-1337-10T3 (N.J. Super. Ct. App., October 14, 2011).
 - In a serious personal injury case with multiple insurance policies, an insurer that declined to participate in mediation cannot attack the reasonableness of settlement or avoid summary judgment by asserting merely that a jury might have found facts resulting in lower damages. [Utica Mut. Ins. Co. v. Government Empls. Ins. Co.](#), 2011 NY Slip Op. 32428(U) (N.Y. Sup. Ct., September 13, 2011).
 - A Texas appellate court held that compliance with the statute of frauds, requiring a sufficient written description for conveyance of land, is required to enforce a mediated settlement agreement, but that reference to the litigation being resolved, which included property descriptions, is sufficient. [Fontenot v. Hanus](#), No. 11-10-00016-CV (Tex. App., August 31, 2011).
 - The amount in an agreement reached by Orange County, Florida with Expedia in mediation over hotel taxes to be paid by Internet-based businesses is being revealed to the county commissioners who must vote on it only if they agree to sign a confidentiality agreement. The county mayor and at least one commissioner may vote for the agreement without knowing the amount, based on their confidence in the county comptroller who negotiated it. [Orlando Sentinel](#) (October 17, 2011)
 - A Texas appellate court affirmed enforcement of a handwritten mediation agreement stating that the parties "agree to enter into a formal settlement agreement," because key terms were set forth and there was no language clarifying that the parties did not intend to be bound by the handwritten agreement. [Border Gateway, LLC v. Gomez](#), No. 14-10-01266-CV (Tex. App., September 20, 2011).
 - A court refused to enjoin the effort by a party to obtain from another court the confidential mediation information that the first court had previously found subject to a mediation privilege. [In re Teligent, Inc.](#), No. 01-12974
- Greater Attention**
Conflict Resolution Day (October 19/20) and Conflict Resolution Week (October 16-22) are receiving increasing focus, with various events across the country, including:
- The American Bar Association Mediation Week theme is "Civility and Civil Public Discourse" and the group is providing a wide array of mediation-related materials online to assist in the development and dissemination of mediation principles. [American Bar Association](#) (October 2011)
 - Wyoming is observing Conflict Resolution Day for the first time state-wide, with presentations and workshops throughout the week of October 17-21 and a statewide symposium on October 19. The Wyoming Agriculture and Natural Resource Mediation Program is sponsoring the observances. [Casper Journal](#) (October 15, 2011); [Trib.com](#) (October 15, 2011)
 - New York state is commemorating Mediation Settlement Day on October 20 by lighting buildings in blue to increase awareness of mediation. For the second year, Albany Law School, Niagara Falls and Mid-Hudson Bridge are being lit in blue, and Peace Bridge in Buffalo and 7 World

(SMB), Adv. Proc. No. 03-2523 (U.S. Bankr. S.D.N.Y., October 3, 2011).

- The length of mediation was one factor that the court looked at in reducing attorneys' fees from 20% to 15% in an ERISA class action settlement. [In re Wachovia Corp. ERISA Litig.](#), (U.S.D.C. W.D. N.C., October 24, 2011).
- A court concluded that a settlement was made in good faith, in part due to court-sponsored mediation and third-party mediation. [Smith v. Wacker Neuson Corp.](#), No. 09-CV-1064-DRH-DGW (U.S.D.C. S.D. Ill., October 13, 2011).
- Discovery of mediated settlement amounts agreed to by co-defendants was denied to defendant which did not settle, because abolition of joint and several liability in Florida meant that defendant could not seek a set-off based on other defendants' payments. [Wal-Mart Stores, Inc. v. Strachan](#), No. 4D11-2539 (Fla. App. 4th Dist., October 12, 2011).
- The Association for Conflict Resolution states that it first conceived Conflict Resolution Day in 2005 and provides numerous suggestions for how to celebrate the day. [ACR Website](#)

Trade Center in New York City are being added for the first time. [Steuben Courier.com](#) (October 20, 2011)

NEWS & INITIATIVES:

European Parliament Issues Resolution to Analyze Implementation of Mediation Directive

European Union member states were directed in 2008 to implement mediation in civil and commercial matters by May 2011; all have reported compliance except for the Czech Republic, Austria, Finland and Sweden. The European Parliament has now issued a resolution to examine the implementation of mediation in the member states, what practitioners and users think about mediation, and whether further action is needed. Among many other things, the resolution notes that mediation confidentiality differs widely among member states and that more coherence may be needed; financial incentives to encourage mediation and settlement differ, with some member states refunding court fees; some national legislation goes beyond the Mediation Directive to achieve important results; knowledge of the benefits of mediation should be promoted; and common standards for mediators are important for high quality professional training and accreditation and better mediation. The resolution goes to the parliaments of the member states, the Council and the Commission, which plans a formal communication on implementation of the Mediation Directive in 2013.

[European Parliament Resolution \(T7-0361/2011\)](#) (September 13, 2011)

Canada's Banking Ombuds Calls on Regulators to Require Banks to Mediate Client Disputes

Canada's Ombudsman for Banking Services and Investments (OBSI) is asking regulators to mandate that banks continue to use the independent national agency to settle any disputes with clients that the banks cannot resolve internally. The issue arose after Toronto Dominion Bank announced plans to withdraw from OBSI and begin using another ADR service; Royal Bank of Canada has been using that service since it left OBSI three years ago. OBSI was created to handle complaints against banks and since 2002 has also been responsible for resolving investment complaints.

Educational Developments

Mediators Beyond Borders has established an International Training Center and an academic alliance with Southern Methodist University's Dispute Resolution & Conflict Management Center in Plano, Texas. The first training of the MBB International Training Center is November 11-12, "Leaving Your Ethnocentric Baggage on the Plane: An Exploration of Culture and Perspective for Conflict Resolution Practitioners Preparing for International Field Work." [Mediators Beyond Borders](#) (October 2011)

The Werner Institute at Creighton University is hosting the Association of American Law Schools Works-in-Progress conference on alternative dispute resolution scholarship which is taking place November 4-5. [PR Web](#) (September 29, 2011)

Brenau University hosts

[The Star.com](#) (October 31, 2011)

Other International Mediation Developments

- The proposed [Legal Services Regulation Bill](#) in **Ireland** would, among many other things, establish an independent disciplinary tribunal and a new procedure for complaints against the legal profession, and refer disputes to mediation only when the authority believes mediation would be successful. [Irish Times.com](#) (October 12, 2011)
- A university in **Scotland** has begun offering masters courses for a postgraduate certificate in mediation and conflict management. [Kingpin-SEO](#) (September 13, 2011)
- The Chief Justice of **Malta** suggests mediation of cases on appeal, as well as an evaluation comparing Malta's mandatory and voluntary mediation systems. [Times of Malta.com](#) (October 3, 2011)
- The **Qatar** Financial Centre (QFC) Civil and Commercial Court appointed as its first director of alternative dispute resolution a former director of the Centre for Effective Dispute Resolution (CEDR) who had worked with the court for four years. [Zawya](#) (October 17, 2011)
- The Tamil Nadu Mediation and Conciliation Centre is training judges from around the **Indian** state so that judges can help litigants settle disputes. [Indian Express](#) (October 30, 2011)
- A High Court Judge of Madras, in the **Indian** state of Tamil Nadu, stated that judges need to see if cases can be resolved through mediation and conciliation, and specifically encouraged insurance and transport companies to settle matters, as some accident compensation cases have been pending for 20 years. [IBN Live News](#) (September 17, 2011)
- The **Singapore** Mediation Centre reports that construction payment disputes are at a three-year low, based on its caseload. The Centre has assisted over 4,000 parties in mediation and encourages businesses to sign a Singapore Mediation Charter, promising to consider mediation first when disputes arise. [The Straits Times](#) (October 20, 2011); [Today Online](#) (September 10, 2011)
- The **Falkland Islands** obtained its first mediation program. [SARTMA.com](#) (October 22, 2011)

Law Students Assist Federal Court's Mediation Program

Mediations are likely to quadruple this year in the U.S. District Court for the Southern District of New York due to automatic court referrals to mediation, beginning with employment discrimination matters; encouragement to mediate police brutality claims; and a rule shortening mediation timeframes. Three local law schools are responding with clinical programs in which law students counsel clients, prepare mediation statements, and represent parties in mediation of employment discrimination cases.

[New York Law Journal](#) (September 16, 2011)

its ninth annual intercollegiate Mock Mediation Tournament in Gainesville, Georgia with 16 teams, which is the largest regional invitational tournament. A national tournament follows in November in Des Moines, Iowa. [Access North GA.com](#) (October 6, 2011)

Mediation on Television

Oprah Winfrey's cable network began showing victim-offender mediations on September 17 in the show *Confronting*, with each one-hour segment documenting a single emotional story of a violent crime that culminates with a meeting of victim and offender in a prison mediation. The premiere episode features parents confronting the man who killed their daughter in a drunk driving accident. [Discovery Press Web](#) (September 17, 2011)

Production on the second season of the lightweight mediation drama *Fairly Legal* is under way. USA Network acknowledged the show fell short in its first season and is retooling it with a new executive producer in place of its creator. [The Hollywood Reporter](#) (October 28, 2011)

An episode of *The Good Wife* involves dramatic action around a court-ordered mediation. [Ology](#) (October 10, 2011)

North Carolina Uses Disaster Mediation Program for Hurricane Claims

North Carolina's Department of Insurance announced that the state's Disaster Mediation Program may be used by homeowners whose insurance claims from Hurricane Irene have been denied. Nine counties have been declared disaster areas, thus far and others may be added. The Disaster Mediation Program was begun in 2006 to assist with homeowner insurance disputes in the aftermath of disasters.

[North Carolina News Network](#) (September 2, 2011)

Update on Home Foreclosure Mediation

- The residential foreclosure crisis continues in **Florida**, with a backlog of 350,000 cases, but a judicial committee appointed in late September by the Florida Supreme Court recommended that the court end its foreclosure mediation program so that the state's 20 circuit courts could join a newly-created uniform mediation program or merely require mediation on a case-by-case basis. Problems contacting homeowners resulted in the current program reaching only 42% of eligible borrowers and only 14% participating in mediation, which is mandatory only for lenders. About one-fourth of the cases actually mediated reached agreement during mediation, however in additional cases proponents note that paperwork exchanged at mediation often resulted in loan modifications within three months. But overall only 3.6% of cases referred to mediation in Florida reached agreement, resulting in the court's current examination of the program. In addition to lack of participation by borrowers, there has been little enforcement to motivate lenders who have been resistant to mediation; many banks are unwilling to work hard in mediation, saying that they tried to find solutions prior to initiating foreclosure. Options for improving Florida's mediation program include requiring borrowers to participate, considering sanctions for noncompliance, exploring reduced fees (currently \$750 paid by lender) with borrower contributions, and tracking post-mediation settlements. [The Palm Beach Post](#) (September 26, 2011); [The Palm Beach Post](#) (October 21, 2011); [The Palm Beach Post](#) (October 25, 2011)
- Analysis of home foreclosure mediation programs in **New England** by the Federal Reserve Bank of Boston emphasizes the importance of requiring participation by both lenders and borrowers and initiating the mediation process as early as possible. Automatic enrollment of qualifying households, such as the mediation programs in **Philadelphia** and **Connecticut**, have participation rates around 70%, while programs with only an opt-in provision for borrowers top out at about 20% participation, as in **Nevada**. **Maryland** has had only a 10% participation rate in its voluntary mediation program, while **New Hampshire's** voluntary program has only achieved 14 agreements in over 100 mediations in its first 18 months. The report also notes that mediation programs do less well in the early stages when dealing with a backlog of foreclosures. Importantly, in **Connecticut**, nearly 80% of homeowners who completed the mediation program over a three year period kept their homes (64%) or made a "graceful" exit (15%) by way of short sales or the like. The report cites Connecticut's program, which also incorporates two sources of financial assistance for homeowners, as a model for the rest of the country. Other programs also are noteworthy, including Nevada with an 89% success rate (but only 20% participation), and Philadelphia with 84% success. [Housing Wire](#) (September 29, 2011); [The Day.com](#)

Other Cases & Resolutions:

A California appellate court affirmed approval of a \$9.7 million settlement fund established in mediation for former gym members. [Williams v. L.A. Fitness Int'l, LLC](#), No. B225622 (Cal. App. 2d Dist., September 15, 2011).

Nissan North America agreed in mediation to pay the Rutherford County (Tennessee) Industrial Development Board \$6.25 million to resolve a dispute over bonds issued by the county to land a Nissan plant. [The Daily News Journal](#) (October 26, 2011)

Owners of luxury condos in a San Francisco building have recovered over \$5 million in mediation from the builder and 13 subcontractors for shoddy construction, which at \$169,000 each is the highest per-unit recovery ever in California. [Market Watch](#) (October 24, 2011)

A bankruptcy judge again refuses to confirm the reorganization efforts of bank holding company Washington Mutual until it participates in mediation with creditor groups. [JD Supra](#) (October 17, 2011)

Marathon City, Florida agreed in mediation to pay \$3 million to an island property owner after removing a failing

(September 30, 2011); [Research Report](#) (September 2011)

- The **Massachusetts** Bankers Association has raised objections to a new mandatory mediation foreclosure ordinance for homeowners in **Springfield** that went into effect on September 13. Among other challenges, bankers are concerned about vagueness, such as daily fines being imposed on banks that do not engage in “good faith” negotiations, and requiring banks to consider the issue of debt forgiveness. [Mass Live.com](#) (September 26, 2011)
- The constitutionality of the Foreclosure Mediation Program in **Nevada** is being challenged under both the U.S. and state constitutions in an appeal asserting the Takings Clause of both constitutions and other grounds. However, the appeal is to the Nevada Supreme Court, which runs the state Foreclosure Mediation Program, so the case may end up in federal court. [Nevada Journal](#) (October 27, 2011)
- Foreclosure activity in **Nevada**, including foreclosure mediation, is being delayed while lenders adjust to legislation (AB 284) that went into effect on October 1 to deter robo-signing and require additional information and safeguards. [Reno Gazette-Journal](#) (October 29, 2011)
- In **Missouri**, a group called Communities Creating Opportunities is seeking to enact state legislation to require mediation prior to home foreclosure. Currently, Missouri homeowners can be evicted in as few as 38 days after receiving a foreclosure notice. [Fox4KC.com](#) (October 18, 2011)
- 364-ton drawbridge. [Keys Net.com](#) (October 1, 2011)
- Mediation resulted in settlement of a \$250 million ESOP class action litigation against the Tribune Co. for \$32 million, which has been approved by the bankruptcy court. [BusinessWeek](#) (October 24, 2011)
- Daytona State College is seeking mediation to obtain repayment of \$1.5 million from the insurer of Community Cultural Foundation, which has been dissolved. [The Daytona Beach News-Journal](#) (September 27, 2011)
- The Clark County Council approved a \$2.2 million mediation agreement to fund the Clark County Sheriff's office for the rest of the year, resolving litigation filed by the Sheriff when the county received \$7 million less than requested. [News and Tribune.com](#) (September 13, 2011)
- The Port Authority of Guam resolved a million dollar claim with a contractor in mediation. [KUAM.com](#) (October 24, 2011)
- Selmer, Tennessee agreed in mediation to pay \$500,000 toward the six deaths and 22 injuries when a race car hit spectators in 2007. [Jackson Sun.com](#) (September 6, 2011)
- Pensacola, Florida agreed to a \$500,000 settlement in mediation with the mother of a teenage bicyclist killed by the police car he was fleeing;

Other Notable News & Initiatives

- Proposed California legislation, AB 506, would require cities to participate in mediation before declaring bankruptcy. A mediator would be chosen by a state commission and would determine if the city negotiated in good faith, which would be required prior to filing bankruptcy. [Vallejo Times Herald](#) (September 4, 2011)
- The Kansas Agricultural Mediation Service, funded by a U.S. Department of Agriculture grant, continues to help farmers and lenders work out solutions to challenging financial problems. The service includes financial counseling through the Farm Analyst Program to put a financial plan in place making it possible to work things out with the lender. [TMC Net.com](#) (October 15, 2011)
- The UK's Music Publishers Association has created a new mediation service for its members, with a panel of mediators available at a “beneficial rate.” The service is being administered by the MPA, which offers its London offices for mediation sessions. [Music Week](#) (October 25, 2011)

the mother plans a memorial fund to assist other families in similar situations. [WEAR ABC 3](#) (October 20, 2011)

- › A settlement of \$800,000 for a pedestrian hit by a car was reached in mediation. [Market Watch](#) (September 21, 2011)
Sutter Gold Mining wants to reopen its mine and reached a resolution in mediation to end underground tours of the historic mine. [News 10.net](#) (September 9, 2011)
- › Mediation finally resolved medical malpractice litigation from a 2005 incident; a jury defense verdict in 2009 was overturned due to improper juror conduct. [Naples News.com](#) (October 15, 2011)
- › A bankruptcy judge sent the Los Angeles Dodgers and Major League Baseball to mediation to resolve a reorganization plan for the team. [ESPN LA](#) (October 4, 2011)
- › Faced with cancelling an increasing portion of the basketball season, the NBA and the players' union are relying on the same mediator who helped the NFL and its union resolve the football lockout. [Sporting News](#) (October 17, 2011)

MEDIATION NEWS

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SEPTEMBER 2011

CASES & RESOLUTIONS:

Federal Court Dismisses Case to Sanction Plaintiff for Violating Mediation Confidentiality

The U.S. District Court for Kansas dismissed a case with prejudice as a result of plaintiff's violation of mediation confidentiality provisions. In a dispute over denial of membership in a social club, plaintiff left the unsuccessful mediation and sent dozens of emails detailing what happened throughout the mediation session, including what the mediator did and said, specific monetary offer and response, and more. The court discussed the importance of mediation confidentiality and the need for severe sanctions due to the intentionality of the breach, the prejudice to defendant, the need to restore respect for the court's authority and the importance of deterring such conduct in the future.

[Hand v. Walnut Valley Sailing Club](#), No. 10-1296-SAC (U.S. D. Kan., July 20, 2011)

Counsel and Client Penalized for Failure to State Demand Prior to Settlement Conference

A federal magistrate imposed attorneys' fees and costs on plaintiff and her counsel for failing to provide a written demand and other information in the format required prior to a settlement conference with the magistrate. During a 3-1/2 hour settlement conference, plaintiff refused to budge from the \$150,000 demand she had made months earlier. The magistrate refused to find that the negotiations were in bad faith, but did conclude that if defendant had known in advance that plaintiff's position was firm, the voluntary settlement conference might have been cancelled. Relying on Rule 16(f)(1)(C) rather than three other bases, the magistrate awarded the attorneys' fees and travel costs of defendant's counsel, but not the lost time of the corporate representative, and then reduced that amount because defendant could have been proactive in contacting plaintiff to determine her position. The magistrate refused to include the \$5,400 defendant spent preparing the sanctions motion, resulting in total sanctions of \$3,300.

[Snydman v. Amper, Politziner & Mattia, LLP](#), No. 10-1344 (U.S. E.D. Pa., July 15, 2011)

Mediation Quote:

"While in situations of trust, where the parties perceive the need to develop a long-term relationship, and empathetic understanding will greatly redound to the benefit of the parties, problem-solving techniques will operate effectively and efficiently. However, where parties are in short term relationships, or perceive it to their advantage to block and conceal to gain transactional advantage, then position-bargaining techniques are safer, even if there is a greater risk of deadlock. At the heart of the matter is a view of human nature."

Thomas F. Guernsey, Paul J. Zwier, *Advanced Negotiation and Mediation Theory and Practice: A Realistic Integrated Approach* (National Institute for Trial Advocacy 2005) at 9

Worth Noting:

University Increases Conflict Resolution Offerings

Kansas State University added a new minor a year ago in Conflict Analysis and Trauma Studies, and many of the courses are so popular they have waiting lists. The University also has conflict resolution certificate programs

Federal Appellate Court in Ohio Upholds Oral Agreement Reached by Trial Judge Acting as Mediator

A federal trial judge successfully mediated a case pending before him and put the basic settlement terms on the record with the agreement of all parties. However, before the written agreement was drafted, plaintiffs sought to back out of the settlement. The trial judge enforced the oral agreement, and the Sixth Circuit Court of Appeals affirmed, applying Ohio law. Plaintiffs unsuccessfully argued that the settlement should fail because of undue pressure from the judge/mediator or economic duress on the plaintiffs. Plaintiffs also argued that the trial judge should have recused himself and not ruled on the enforceability of the oral agreement since he had been the mediator, but the appellate court concluded any failure to recuse was at most harmless error since the case clearly had been settled.

[Smith v. ABN AMRO Mortgage Group, Inc.](#), Nos. 08-3948, 08-4011 (U.S. 6th Cir., July 29, 2011).

Other Notable or High Profile Proceedings

- Massey Energy agreed to pay \$35 million to resolve litigation brought by about 600 West Virginia residents asserting that their drinking water supplies had been polluted by coal slurry that the company had pumped into unused underground mines. The settlement came in the third mediation session after two judges acting as mediators worked all night with counsel to finalize the agreement. Details of the settlement, including the amount, were subsequently leaked to the press in violation of mediation confidentiality provisions. Massey is seeking sanctions for the leak and the panel of judges litigating the case is reviewing documents provided by plaintiffs' counsel pursuant to a review agreement between the parties. [Bloomberg Businessweek](#) (August 23, 2011); [Sacramento Bee](#) (July 27, 2011)
- An appellate court remanded a proposed class action settlement reached in mediation to the district court for a closer analysis of attorneys' fees in a case in which charities were to receive \$100,000, while plaintiffs' counsel were to receive \$800,000. The court noted that while the involvement of a neutral mediator weighed in favor of finding no collusion among counsel, it was not enough to prove the result was fair, adequate, and reasonable. [In re Bluetooth Headset Products Liability](#), No. 09-56683 (U.S. 9th Cir., August 19, 2011)
- Allocation of \$170 million in attorneys' fees among 59 plaintiffs' firms was at issue in the settlement of a huge securities litigation which occurred after seven full mediation sessions and nine months of negotiations, resulting in nearly \$600 million to be paid in over 300 class actions. [In re Initial Public Offering Securities Litigation](#), No. 21 MC 92 (U.S. S.D.N.Y., July 8, 2011).
- A federal appellate court vacated a settlement between freelance authors and large publishers in a copyright case over publishers making the authors' contributions available electronically. The settlement, reached in mediation in 2005, had capped liability at \$18 million. The Second Circuit Court of Appeals held that it unfairly gave some freelancers greater compensation than others. [New York](#)

at both the undergraduate and graduate levels, which began in 2006. The certificate programs are adding a focus on conflict coaching or "mediation for one." [Media Newswire](#) (July 6, 2011)

Ninth Circuit ADR Education Award

The U.S. Court of Appeals for the Ninth Circuit established an ADR Education Award in 2005, which it gives to law schools that significantly advance scholarship and research in alternative dispute resolution. The court gave the award this year to the USC Gould School of Law for its mediation clinics and curriculum. [Metropolitan News-Enterprise](#) (July 19, 2011)

Mediation Advocacy Competitions

The International Chamber of Commerce (ICC) is holding the 7th ICC International Mediation Competition from February 3-8, 2012 in Paris. The competition is expected to attract around 60 law school and business school teams, and over 120 professional mediators will conduct the mock mediations and judge the students' performance. The competition rules and format have been revised this year to ensure that best practices in mediation will be demonstrated. [The Financial](#) (July 19, 2011)

The International Competition for Mediation Advocacy (ICMA)

is holding its annual educational event for law students from March 5-9, 2012 in Toronto. ICMA helps develop the mediation advocacy skills needed in the practice of law. The ICMA competition is cross-cultural, hosting law students, mediators, lawyers, and dispute resolution law faculty from around the world. [ICMA Website](#)

[Times](#) (August 17, 2011)

- Four years of mediation have resulted in a consent decree in which the Metropolitan St. Louis Sewer District would make about \$4.7 billion in improvements over 23 years in *Clean Water Act* litigation brought by the U.S. Environmental Protection Agency and the state of Missouri. The agreement would include \$2.8 million in penalties. However, Missouri's attorney general has decided against signing the agreement because of issues that remain unresolved. [Chesterfield Patch](#) (July 1, 2011)
- A federal appellate court rejected various arguments that the district court lacked subject matter jurisdiction over a case to be able to enforce the settlement agreement reached in mediation. [Quincy V. LLC v. Herman](#), No. 10-1397 (U.S. 1st Cir., July 22, 2011).
- A law firm defending itself against a legal malpractice claim for advice to a client during mediation sought the testimony of the Chief Mediator for the Third Circuit Court of Appeals. The Court Clerk denied the law firm's request due to mediation confidentiality and other reasons. The law firm brought suit in federal court against the Clerk, but the case was dismissed because the Clerk is part of the federal judiciary and thus her decision is exempt from review under the *Administrative Procedure Act*. [McKissock & Hoffman v. Waldron](#), No. 10-7108 (U.S. E.D. Pa., August 4, 2011)
- An Australian court declined to enforce the mediation clause in an agreement because not all parties in the litigation were parties to the mediation agreement, discovery disputes were likely to hinder mediation until resolved by the court, and the court had power to order mediation later in the process, among other reasons. [DibbsBarker.com](#) (August 18, 2011)

NEWS & INITIATIVES:

Alabama to Launch Mediation Program for Tornado Insurance Disputes

Alabama's Department of Insurance is planning to begin a mediation program for insurance disputes following an April 27 tornado that may result in 100,000 insurance claims. Thus far about 600 residents have filed insurance-related complaints that could be assisted by mediation. Similar mediation programs were used after Hurricane Ivan in 2004 and Hurricane Katrina in 2005.

[The Republic](#) (August 4, 2011)

Canadian Ethical Guidelines to Address Judicial Mediation

The Canadian Judicial Council is beginning to consider the appropriate role for sitting judges in court-based mediation and will eventually update its advisory ethical guidelines for Canada's 1,100 federally appointed judges. Judges' participation as mediators in court-based mediation is considered a central question among pending issues of judicial

Mediation...and Twitter

Film director Bret Carr, whose mother left \$40 million to her Chihuahua, is litigating against her estate and intended to send out live tweets during his mediation. [PR Newswire](#) (July 15, 2011); [Twitter.com/#!/bretcarr](#)

Other Cases & Resolutions:

Comcast reached settlement of a class action in mediation, agreeing to pay up to \$3.8 million for "robocalls" placed to Washington state businesses; the settlement was found to be fair, reasonable and adequate by the federal court. [Courthouse News Service](#) (August 3, 2011)

Mediation with Washington Mutual Inc. underwriters resulted in an \$85 million contribution to a \$205 million securities class action settlement. [Thomson Reuters](#) (July 1, 2011)

A bankruptcy judge authorized Ambac Financial Group to pay \$2.5 million to add to \$24 million from insurers to resolve several securities class-action lawsuits in a settlement reached in mediation. [Bloomberg Businessweek](#) (July 21, 2011)

A national labor union and a hospital resolved a defamation case in mediation with the union paying \$6 million and apologizing for sending postcards to consumers disparaging the cleanliness of the hospital's birthing centers. [Sacramento Business Journal](#) (July 5, 2011)

NFL retirees, concerned that they were shut out of the settlement that ended the NFL lockout, have been ordered to meet with the mediator along

ethics. Although the CJC has not received mediation related complaints about judges, some are concerned that judicial mediation will undermine the public's view of judges as impartial decision-makers. Others believe the issue may turn on the type of case, with judicial mediation more acceptable in large commercial matters involving sophisticated counsel. In a related development, the Ontario Bar Association recently created a Judicial Mediation Taskforce.

[Lawyers Weekly](#) (September 2, 2011)

Japan Establishing Mediation Center to Resolve Disputes from Fukushima Nuclear Accident

A Conflict Resolution Center for Disputes over Nuclear Damage Compensation is being established by the Japanese government to mediate the claims that Tokyo Electric Power Co. is not able to settle directly with victims of Japan's ongoing nuclear crisis, which has resulted in evacuation orders to over 100,000 people and extensive property damage. The Center will have a supervisory committee headed by a Tokyo High Court judge overseeing about 50 mediators, along with another section of about 50 staffers to provide administrative support. Mediations will be held both in Tokyo and Fukushima Prefecture, with operations due to begin in September.

[Daily Yomiuri Online](#) (August 18, 2011)

International Mediation Developments

- **Ireland's** first dedicated dispute resolution center has opened in Cork, with the head of the Commercial Court emphasizing the benefits of mediation and the importance of litigation being the last resort. [RTE News](#) (July 8, 2011); [Irish Times.com](#) (July 9, 2011)
- Mediation is an important alternative for intellectual property disputes in the **United Kingdom** and elsewhere, as highlighted by EU Mediation Directive 2008/52/EC which was implemented by the U.K. earlier this year for cross-border disputes. In time, the U.K. may extend the new mediation provisions to cover disputes arising solely within the U.K. [Who's Who Legal](#) (July 2011)
- The European Commission began proceedings against nine EU members – **Cyprus, Czech Republic, Finland, France, Luxembourg, the Netherlands, Slovakia, Spain** and the **United Kingdom** – that have not met the deadline for incorporating Directive 2008/52/EC relating to civil and commercial mediation into their national laws. The Directive took effect on May 21, 2011. [Europolitics](#) (July 22, 2011)
- **Switzerland** has committed \$3.2 million to assist **Egypt** with growth and job creation through a three-year program focused on dispute resolution and a new culture of commercial mediation, along with two other key business issues. [Ahram Online](#) (August 21, 2011)
- The Justice Ministry of **Sri Lanka** announced that a new position of Master will be created in the judicial system to mediate all civil with counsel for the NFL and the players' union to see if mediation would be helpful. [CBS Sports.com](#) (August 10, 2011)
- The filing of a "copycat" lawsuit against Coca-Cola's VitaminWater delayed mediation of an advocacy group's class action claims which had been scheduled for July, with the advocacy group hoping to eventually negotiate on behalf of all plaintiffs. [Vending Times](#) (July 15, 2011)
- Mediation by a Turkish lender resulted in payment of \$1.4 billion by India to Iran and two oil tankers leaving Iran for India. [Hurriyet Daily News](#) (August 8, 2011)
- Trademark disputes between two companies in the Philippines over past infringement and registration of new trademarks were sent to mediation and resolved. [Inquirer Business](#) (July 4, 2011)
- Litigation between Groupon Inc. and a Bangalore company that trademarked the brand name Groupon in India has been sent to mediation by the High Court of Delhi, India. [MediaNama](#) (August 23, 2011)
- Virginia Tech and the owner of Hokie Real Estate resolved acrimonious trademark infringement and fraud litigation in mediation with a confidential settlement. [Roanoke.com](#) (July 1, 2011)
- The Catholic Diocese of Trenton agreed in mediation to pay \$1 million, along with additional amounts for counseling, to five men who were sexually abused by a parish priest 30 years ago, but did not admit liability or apologize. [Philly.com](#) (August 16, 2011)

disputes valued at ten million rupees (approximately \$90,000) or less, to help address a backlog of cases. In larger cases mediation is not mandatory, but parties can agree to mediation by the Master. [Daily Mirror.lk](#) (July 7, 2011)

- Fifty additional mediators are being added to the 90 in place at the Nonthaburi Provincial Court in **Thailand** due to an increase in medical malpractice complaints. The Office of the Courts of Justice is encouraging courts throughout Thailand to use mediation to resolve as many cases as possible. [Bangkok Post](#) (July 17, 2011)
- **Australia's** *Civil Dispute Resolution Act*, requiring alternative dispute resolution or another genuine step to try to resolve the dispute before commencing litigation (with various exceptions), takes effect on August 1, 2011. [Mondaq.com](#) (July 15, 2011); [Australian Government ComLaw](#) (April 14, 2011)
- Legislation is moving forward in Victoria, **Australia**, to require banks to offer mediation to farmers in financial difficulty; farmers in Tasmania would like to see the legislation adopted there as well, although a banker claims mediation is already occurring there. Similar legislation has been in place in New South Wales for 17 years, where there has been a recent spike in mediation notices. [ABC.net.au](#) (July 29, 2011); [ABC Rural](#) (July 21, 2011); [The Land](#) (July 20, 2011)
- The **Fiji** Mediation Unit of the Ministry of Labor boasts a settlement rate of over 80% and has resolved over 1,800 cases since the unit began in 2008, exceeding even the settlement rate in Singapore. Fiji has become the first country in the south Pacific to become a member of the Asian Mediation Association. [FBCL](#) (July 24, 2011); [Fiji Times Online](#) (August 5, 2011)
- Legislation introduced in **Mexico** on fair business practices includes mediation provisions and penalties for noncompliance that have raised some concerns. [International Law Office](#) (July 28, 2011)

A lumber mill agreed in mediation to pay \$900,000 to two women who alleged repeated sexual harassment and retaliation; the EEOC was also involved in the mediation. [World News Report](#) (July 19, 2011)

Mediation resolved a dispute between a city and a deli, with the city paying \$688,000 to resolve allegations that it improperly pressured the deli to move from a high-maintenance city building, while the deli agreed to move by next Spring. [Clearwater Patch](#) (July 22, 2011)

Mediation yielded a \$1.25 million settlement for a wheelchair-bound woman who broke her hip due to unmarked steps. [TMC Net.com](#) (August 8, 2011)

A \$950,000 settlement was reached in mediation for a 78-year-old woman injured in a collision with a truck. [Insurance News Net.com](#) (August 15, 2011)

Litigation over restrictions on siting a topless bar was dismissed after mediation resulted in offers of alternative locations by the county. [WJHG.com](#) (July 9, 2011)

Other Notable News & Initiatives

- A California state legislator introduced legislation requiring local governments to participate in mediation before declaring bankruptcy in an effort to try to work out solutions with creditors and others. Opponents have blocked the legislation thus far, fearing it would give unions too much input into the process. [Capital Public Radio](#) (July 6, 2011)
- Missouri consumers have recovered over \$5 million through mediation by the Missouri Department of Insurance so far this year. Out of 9,000 consumer inquiries with the Insurance Department this year, over 1,000 were related to tornadoes that hit Joplin in May and St. Louis in April. [The Sacramento Bee](#) (July 18, 2011)
- A pilot project to offer independent mediation for disputes with Manitoba Public Insurance, a non-profit Crown Corporation, begins in July. The mediation program is intended to address a backlog of 450 cases pending at the appeals commission. [CTV.ca](#) (July 7, 2011)

Update on Home Foreclosure Mediation

- **Washington** state's new *Foreclosure Fairness Act* took effect on July 22, mandating mediation when homeowners request it and requiring a decision-maker for the lender to be present at the mediation or available by phone. KUOW.org (July 22, 2011); KPLU.org (July 21, 2011)
- The city council of **Washington, D.C.** enacted emergency legislation to amend its foreclosure mediation law to remove a controversial clause that stated any violation of the law would void a foreclosure sale. Concerns over the clause had caused title insurers to stop insuring sales of foreclosed homes. [Washington Post](http://WashingtonPost.com) (July 13, 2011)
- The **Springfield, Massachusetts** city council has passed a tough anti-foreclosure ordinance requiring mortgage lenders to mediate with homeowners or pay a \$300/day fine. It awaits signature by the mayor. [Boston Herald.com](http://BostonHerald.com) (August 23, 2011)
- The **Pennsylvania** Supreme Court encourages counties in the state to establish foreclosure mediation programs and a number have done so. Over the two years that Lackawanna County court has conducted foreclosure mediations, 53% of the mediations have been successful, 17% have failed and 30% are pending. Cumberland County now seeks to begin a foreclosure mediation program, which is likely to be similar to other counties and require homeowners facing foreclosure to request mediation within a certain time after receiving notice about the program. [Penn Live.com](http://PennLive.com) (July 28, 2011)
- A new online portal going live in October will allow **Maryland** homeowners in foreclosure mediation to exchange documents electronically with their mortgage lenders faster and easier, and help the state track the progress of foreclosure mediations. But the foreclosure mediation process is not accomplishing much in Maryland, as fewer than 1,000 homeowners have applied for mediation over the last year and only about 210 have received a loan modification or contingent resolution, while tens of thousands are receiving foreclosure notices. [Washington Business Journal](http://WashingtonBusinessJournal.com) (August 17, 2011); [The Final Call](http://TheFinalCall.com) (August 3, 2011)
- Interpreting the **Nevada** Foreclosure Mediation statute and rules, the Nevada Supreme Court held that the lower court should have imposed sanctions against a lender that the mediator reported did not bring required documents to the mediation and did not have access to someone with authority to modify the loan during the mediation. [Pasillas v. HSBC Bank USA](http://Pasillas.v.HSBC.Bank.USA), No. 56393 (Nev., July 7, 2011). In a companion case, the Nevada Supreme Court concluded that a homeowner who recorded a quitclaim deed and took over mortgage payments was entitled to mediate even though he did not expressly assume the mortgage note. The court further held that the lender failed to comply with the Nevada Foreclosure Mediation statute and rules by not providing all required documentation and that "substantial compliance" is not sufficient to avoid sanctions. [Leyva v. National Default Servicing Corp.](http://Leyva.v.National.Default.Servicing.Corp), No. 55216 (Nev., July 7, 2011).
- **New Hampshire's** foreclosure mediation program is voluntary for both homeowners and lenders, causing difficulty in getting parties into mediation. After 18 months, only 100 cases have entered the

program, of which 60% are still in the pipeline. But better results may be coming as judges are beginning to order parties into mediation. [Union Leader.com](#) (July 16, 2011)

- **Arizona** State University's law school seeks to address the home foreclosure crisis through a program in which students will mediate mortgage related disputes. The program is funded by a grant from the Arizona attorney general's office and will begin in Spring 2012. [AZ Central.com](#) (July 22, 2011)

MEDIATION NEWS

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Keith L. Seat

JULY 2011

CASES & RESOLUTIONS:

Second Circuit Upholds Mediation Confidentiality Despite Modest Bar for Exceptions

While touting the importance of confidentiality in mediation, the U.S. Court of Appeals for the Second Circuit concluded that mediation confidentiality may be overcome if there is (i) a “special need” for the confidential material, (ii) “resulting unfairness,” and (iii) the need “outweighs” the interest in confidentiality. The court stated that its standard comes from the Uniform Mediation Act and the Administrative Dispute Resolution Acts of 1996 and 1998, which the court noted require a showing of “exceptional circumstances” such as manifest injustice, and that the need must “substantially outweigh” the interest in confidentiality. The court did not explain its weaker standard, but did conclude that the party seeking confidential information “failed to show that ‘extraordinary circumstances’ warrant disclosure.” The court also stated that there was no showing of unfairness because the mediation information sought would be available through other means, including interrogatories and depositions. Interestingly, the court noted that the issue of confidentiality exceptions arose because the protective order containing the confidentiality provision did not state “when, or if” a party could release confidential mediation information.

[Savage & Assoc. v. K&L Gates](#), Nos. 10-2257-bk & 10-2411-bk (U.S. 2d Cir., May 5, 2011)

Federal Court in Texas Requires Party to Execute Comprehensive Agreement to Comply with Mediation Settlement Agreement

Parties signed a mediated settlement agreement which contemplated that a comprehensive formal agreement would be prepared and signed. When a dispute arose over details of the longer agreement, a federal court in Texas conducted a “tedious” examination of plaintiff’s objections and concluded that the formal agreement did not “materially differ” from the shorter signed agreement, and ordered plaintiff to sign the comprehensive agreement.

[Alpert v. BAC Home Loans Servicing, LP](#), No. 3:09-CV-2095-B (U.S. N.D. Tex., May 9, 2011).

Oral Mediation Settlement Agreement Upheld

Mediation Quote:

“In mediation...[t]he parties are the arbiters of the relevant facts. A fair outcome is one that parties believe is acceptable and fair – not an outcome, necessarily, that would mirror what a court would do. It is certainly not the outcome that is in keeping with what the particular mediator would find legally or morally acceptable. Rather, the mediated outcome must rest easy with parties’ values, principles, and interests, addressing their needs – psychological, moral and practical – as they judge those needs to be.”

Ellen Waldman,
Ed., *Mediation Ethics: Cases and Commentaries* (Jossey-Bass 2011), quoting Lela P. Love at 137

Check These Out:

The future of online dispute resolution (ODR) is the focus of an interview with the former director of ODR for eBay and PayPal, along with plans for a broad range of new ODR services, covering everything from commercial to cross-

in Kansas, Despite Need for Board Approval

In mediation the parties reached a settlement agreement which required formal approval by defendant's board of directors. Prior to action by the board and before a written agreement was signed, plaintiff decided to "back out" of the settlement. The court, applying Kansas law, concluded that the parties intended an enforceable oral settlement agreement to be formed despite the condition precedent, and that defendant simply needed to act in good faith to obtain board approval. Although the court's opinion made no mention of mediation confidentiality, both parties and the mediator waived confidentiality to permit disclosure of mediation information and the mediator's testimony in court.

[Stephenson v. Young](#), No. 10-2197-KHV (U.S. D. Kan., May 26, 2011); Editor's Research

Efforts by Arbitrator to Mediate Dispute in China Taint Arbitration Award

The High Court in Hong Kong refused to enforce an arbitral award from China because one of the party-appointed arbitrators acted as a mediator and met with a person connected with one of the parties to propose a settlement. Although the court found that lack of transparency and other concerns tainted the arbitral award, the court made clear that it was not rejecting the concept of med-arb, which is expressly permitted in Hong Kong and common in Asia.

[International Law Office](#) (June 7, 2011); [Gao Haiyan v. Keeneye Holdings Ltd.](#), HKEC 514 (April 12, 2011)

Other Notable or High Profile Proceedings

- A federal court in California approved a class action settlement in part because the fact of mediation helped demonstrate that the settlement was not the product of collusion. [In re Apple Inc. Securities Litigation](#), No. 5:06-CV-05208-JF (U.S. N.D. Cal., May 17, 2011).
- A California appellate court held that plaintiff had no chance in a case against his attorney for improperly advising him during mediation, because California's strict mediation confidentiality provisions apply even between those on the same side, as recently clarified by the California Supreme Court in [Cassel v. Superior Court](#). [Gossett v. St. John Wallace, Brennan & Folan](#), No. B222502 (Cal. App., 2d Dist., May 12, 2011).
- The West Virginia Supreme Court found a short, handwritten settlement agreement reached in mediation of a wrongful death action to be clear and unambiguous. [Haynes v. DaimlerChrysler Corp.](#), No. 101151 (W. Va., May 25, 2011).
- While the Winklevosses' litigation to get out of their mediated settlement with Facebook's founder Mark Zuckerberg has finally ended with the agreement upheld, Zuckerberg now faces claims from another individual, Paul Ceglia, who asserts that he and Zuckerberg signed a contract in 2003 which entitles him to half of Zuckerberg's share of Facebook. Ceglia has asked the court to require mediation. [International Business Times](#) (June 19, 2011); [TIME Techland](#) (May 17, 2011)
- After two years of mediation, the St. Johns County Commission approved a settlement allowing a church to build a \$50 million complex on a rural,

border issues.

[Auction Bytes](#) (June 26, 2011)

Lawyer-author writes novels that empower readers about how best to deal with civil disputes, focusing on better alternatives to litigation such as mediation.

[The Register Citizen](#) (June 25, 2011)

USA Network has ordered a second season of its drama series, *Fairly Legal*, starring Sarah Shahi as a young mediator working at a San Francisco law firm.

[UPI.com](#) (May 6, 2011)

A dispute over the notable tattoo in the movie *Hangover 2* was resolved in an all-day mediation between Warner Bros. Pictures and a tattoo artist.

[Ace Showbiz](#) (June 21, 2011)

Mediation in Sports:

NFL owners and players continue mediation efforts as ordered by the court, with involvement of multiple representatives from each side.

[BusinessWeek](#) (June 9, 2011); [WKRN](#) (May 6, 2011)

Lack of mediation blamed for rejection by Major League Baseball of proposed television deal for the Los Angeles Dodgers, which may require MLB to take over the team for sale.

[Karl Bayer.com](#) (June

two-lane road, which resolves three lawsuits brought by the church against the Florida county. While the county sought to protect the neighborhood, residents near the site are concerned that no one in the community knew of the deal, which the County Attorney said had to be secret because mediation is confidential. [St. Augustine Record](#) (June 8, 2011)

- A tentative agreement reached in mediation by a Nevada irrigation district to pay \$10 million to victims of a flood from an irrigation canal has been complicated by concerns raised by the Justice Department that some of the property offered as collateral is actually federal property. The federal magistrate initially ordered the Justice Department to participate in a settlement conference, but reversed his order. The remaining parties will continue mediation in an effort to finalize an agreement. [San Jose Mercury News](#) (May 3, 2011)
- Teletouch reports that it has made significant progress in mediation with AT&T over contractual rights as an AT&T cellular distributor to sell the iPhone and other AT&T exclusive products. With settlement anticipated, the parties agreed to move back the scheduled arbitration of the dispute. [Traders Huddle.com](#) (May 24, 2011)
- Four days of mediation have been scheduled in an effort to obtain a mass settlement of 60 state cases being litigated in Connecticut in the wake of the Kleen Energy natural gas plant explosion in February 2010 which killed six workers and injured dozens. [iStockAnalyst.com](#) (June 27, 2011)
- Nortel Networks units in North America and Europe have been ordered by judges in the U.S. and Canada to attempt mediation to allocate \$4 billion that has been raised by the bankrupt company for creditors. The judicial requirement to mediate is an effort to avoid inconsistent decisions and appellate litigation. [Bloomberg](#) (June 20, 2011)
- Mediation is being conducted over a dam and reservoir project being constructed in the Mexican state of Jalisco which will flood two towns. The mediation will involve Mexico's water authority, Conagua, local authorities and opponents of the project. [Water World](#) (May 23, 2011)

30, 2011); [Huffpost Los Angeles](#) (June 20, 2011)

• Maryland is required by state law to provide mediation to help obtain a new simulcasting agreement between Rosecraft Raceway and thoroughbred racing's representatives, if the parties are not able to negotiate an agreement privately. If state-led mediation does not result in a deal by October 1, the law requires arbitration. [Baltimore Sun](#) (June 30, 2011)

• A written apology and other terms reached in mediation have resolved defamation litigation by boxer Manny Pacquiao against executives of Golden Boy Promotions, although the case continues against the Mayweathers. [GMA News](#) (June 1, 2011)

• Australia's Arena Football League players are headed toward mediation to resolve a dispute over division of revenues after an historic meeting of players in five venues around the country. [Sports News First.com.au](#) (June 29, 2011)

• Resolutions reached earlier this year after five months of mediation over leadership of the Nigeria Rugby Football Federation have not yet been implemented, so issues continue. [Next.com](#) (June 25, 2011)

NEWS & INITIATIVES:

Mediation Helps Reduce Med Mal Litigation

The number of medical malpractice lawsuits filed in Pennsylvania declined for the sixth year in a row, with attorneys attributing the decrease to private mediation, among other changes. The current number of med mal lawsuits is now only about half the peak in 2002.

[Beaumont Enterprise.com](#) (May 22, 2011)

New York Mediation Centers Face Cuts in State Funding

With significant budget cuts to New York's Unified Court System, the court is cutting in half last year's \$9.6 million in funding for a network of conflict resolution centers in the state. Although centers are seeking other funding and considering new fees, the cuts are resulting in layoffs of staff, limiting the number of matters that can be handled even with volunteer mediators. The cutback in mediation is

expected to increase pressure on the crowded court system which is itself facing personnel cuts.

[Legislative Gazette.com](#) (May 23, 2011)

New International Tribunal Created for Disputes over Complex Financial Instruments

The world's first international conflict resolution group for disputes over derivatives and other complex financial instruments has been established as a non-profit under Dutch law and is based in the Hague. The group is the Panel of Recognized International Market Experts in Finance (P.R.I.M.E. Finance). While a panel of experts is already on its newly-launched website, the group will begin offering mediation and arbitration services in January 2012. The organization states that it benefits from various subsidies, so may be less expensive than other alternatives.

[Commodity Focus.com](#) (June 28, 2011); [P.R.I.M.E. Finance](#)

International Mediation Developments

- **Mexico** and the U.S. agreed on a three member mediation panel to address the issue of expanding export of U.S. potatoes to all of Mexico. [Alamosa News.com](#) (June 28, 2011)
- **Britain** is considering requiring claimants to participate in mediation before filing libel claims in court to save money and time and to deter foreigners from "libel tourism." [Mail Online](#) (June 16, 2011)
- A Mediation Helpline has been established in **Scotland** to provide information and encourage greater use of mediation. [Scottish Mediation Helpline](#); [News.Scotsman.com](#) (May 9, 2011)
- As a result of increasing litigation and backlog in its courts, **Cyprus** will soon open a mediation and arbitration center designed to boost its profile, and will include training in alternative dispute resolution for lawyers from the Middle East and North Africa. [The Lawyer](#) (June 6, 2011)
- **Bahrain** is seeking to develop its mediation capacity to attract additional business; a mediation training in Bahrain was attended by over 50 professionals. [AME Info.com](#) (June 13, 2011)
- A National Commission for Civic Education official in **Ghana** urges expedited action to extend an alternative dispute resolution program to all lower courts throughout Ghana. [Ghana Broadcasting Corporation](#) (May 12, 2011)
- A pilot mediation program has begun in Thane district court, which may be expanded to the entire state of Maharashtra, **India**. [The Times of India](#) (June 29, 2011)
- The Gujarat State Lawyers Conference in **India** concluded with Gujarat Justice stressing the need for mediation instead of litigation. [The Times of India](#) (May 2, 2011)
- A new electric cooperative in the **Philippines** has established a mediation and conciliation committee to resolve intra-cooperative disputes. [PIA.gov.ph](#) (May 1, 2011)
- A requirement that banks must offer mediation to farmers prior to

• A horseracing dispute in Jamaica between the United Book Makers' Association and Caymanas Track Limited over quadrupling of rights fees is heading to mediation facilitated by the government. [Go-Jamaica](#) (May 9, 2011)

Other Cases & Resolutions:

• Three years of negotiation and mediation have resulted in a multi-party settlement agreement that may allow gravel mining to increase while restoring an historic watershed and other ecological benefits. [The News Tribune](#) (June 24, 2011)

• Allstate reached a mediated settlement of legal malpractice claims against its counsel following a \$16 million verdict against Allstate in a bad-faith lawsuit. [Kansas City Business Journal](#) (June 23, 2011)

• Dish Network, which recently acquired Blockbuster's assets, has agreed to mediate with Blockbuster Canada over use of the Blockbuster trademark. [Denver Business Journal](#) (June 24, 2011)

• Target Corp. is planning to expand into Canada in 2013, but is in litigation with a Canadian retailer for trademark infringement, with each claiming the Target

foreclosure may expand from New South Wales to Victoria, **Australia**, under legislation introduced in Parliament; A\$3.5 million has been allocated for the Farm Debt Mediation Scheme. [Australian Broadcasting Corporation](#) (June 30, 2011); [Stock & Land](#) (May 9, 2011)

Other Notable News & Initiatives

- Trustees of charities must use mediation prior to litigation for internal disputes according to newly revised governance documents provided by the Charity Commission for use in setting up new charities. [Third Sector](#) (June 16, 2011)
- Texas is working on legislation to revamp the state's windstorm fund which insures coastal properties against hurricanes. The Texas Senate passed a bill which mandates mediation of disputes over claims prior to litigation. [Chron.com](#) (May 24, 2011); [Daily Reporter](#) (May 24, 2011)
- The Santa Barbara Council discussed whether to cut the city's Rental Housing Mediation Task Force as a result of deeper than expected cuts in block grants from the Department of Housing and Urban Development. Alternate sources of funds were also explored, such as payments from large landlords and trade associations. [Noozhawk](#) (May 2, 2011)
- The Harvard Mediation Program at Harvard Law School celebrated its 30th anniversary of training mediators. [Harvard Law School](#) (May 11, 2011)
- Tulsa's Early Settlement program celebrated the success of the nearly 30 year old program which expanded last year to include court cases. The mediation program handled over 1,600 cases in FY2010. [Tulsa World](#) (June 16, 2011)
- name in Canada. Mediation in Canada's federal court has not been successful to date, but trial is not scheduled until November 2012. [Star Tribune.com](#) (June 24, 2011); [Bloomberg](#) (June 2, 2011)
- Eight years of litigation between creditors and the widow of former Enron CEO Kenneth Lay have been resolved in mediation. [Reuters](#) (June 20, 2011)
- An advocacy group's class action against Coca-Cola's VitaminWater will be mediated in July. [Food Navigator-USA.com](#) (June 7, 2011)
- Mediation resulted in agreement by LimeWire to pay \$105 million to 13 record companies, ending five years of litigation. [Reuters](#) (May 12, 2011)

Update on Home Foreclosure Mediation

- **Hawaii** enacted landmark legislation in May to address concerns with home foreclosure processes, requiring mediation of non-judicial foreclosures. But in June legislators held hearings to try to clarify issues surrounding the 100-page bill. Among other concerns, Fannie Mae is shifting all new matters to judicial foreclosure, to which mediation does not apply. Hawaii's Mortgage Foreclosure Dispute Resolution Program is to begin by October 1 and be self-funding from fees collected from the parties. [Hawaii Reporter](#) (June 30, 2011); [MortgageOrb](#) (June 13, 2011); [KHNL/KGMB](#) (May 6, 2011); [KITV.com](#) (May 6, 2011); [BusinessWeek](#) (May 2, 2011)
- **Connecticut** is tweaking its successful foreclosure mediation program to prevent any foreclosure proceedings for eight months on cases that are in mediation. Under the current dual track system, litigation can proceed even while mediation is being conducted, which causes confusion. The new proposal awaits signature by the governor. [Connecticut Post](#) (June 18, 2011); [LoanSafe.org](#) (June 10, 2011)
- Final rules for **Washington, D.C.**'s foreclosure prevention program have been put in place after six months, and require mediation prior to moving forward with foreclosure. Among other provisions that some fear may trap lenders, mediators can impose fines of \$500 per day for failure to act in
- Litigation over land valuation ended with a mediated settlement in which the school district must find \$14 million for repayment of taxes. [Beaumont Enterprise.com](#) (May 14, 2011)
- Mediation and \$1.5 million settlement resolve lawsuit by the family of an unarmed man killed by a California detective. [Fresnobee.com](#) (May 19, 2011)
- Successful mediation concluded with

“good faith.” [The Washington Post](#) (May 20, 2011)

- **Wisconsin** is providing a \$230,000 grant to Marquette University Law School for a third year of operation of the Milwaukee Foreclosure Mediation Program, using funds from the successful Countrywide Financial Corporation litigation. In addition, a new mediation program is beginning for homeowners facing foreclosure in Racine and Kenosha counties, which will be funded by a \$100 fee from each party. [WisBusiness.com](#) (June 27, 2011); [Journal Times.com](#) (June 9, 2011)
- Legislation passed by the House in **Delaware** would require mediation between lenders and homeowners before foreclosure can proceed. The mandatory mediation program, with an opt-out for homeowners, would take the place of the current voluntary program run by the Superior Court. [Forbes.com](#) (May 11, 2011); [Delaware Online.com](#) (May 5, 2011)
- Legislative efforts are under way to create a mortgage foreclosure mediation program for Boston, **Massachusetts**. [WWLP.com](#) (June 30, 2011)
- A **Florida** program permitting mediation prior to foreclosure of Fannie Mae-backed mortgages is spreading within the state and may be expanded by Fannie Mae to other states. The voluntary program is intended to bring parties to the table when the borrower is only 65 days late with mortgage payments. Florida's mandatory mediation program, by contrast, is for homeowners already in foreclosure. [News-press.com](#) (May 24, 2011)
- A requirement in **Iowa** that creditors foreclosing on property must notify borrowers that they can receive free mediation ends on June 30, unless extended. The mediation program, Iowa Mortgage Help, is run by the attorney general's office, which has been seeking legislation to continue the requirement. [Radio Iowa](#) (June 10, 2011)
- To comply with state default mediation regulations across the **U.S.**, providers are turning to online videos to help borrowers learn about the mediation process. The online services make in-person counseling more efficient. [National Mortgage Professional Magazine](#) (June 27, 2011)

agreement to review land use issues at the Barangaroo development in Sydney, Australia. [SMH.com.au](#) (May 12, 2011)

Constance Lake First Nation, Zenyetta Ventures and Ontario are mediating over mineral exploration drilling and how to protect Aboriginal treaty rights; drilling is continuing during the mediation. [Wawatay News](#) (May 20, 2011)

MEDIATION NEWS

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MAY 2011

CASES & RESOLUTIONS:

Facebook Mediated Settlement Agreement Upheld

A short, handwritten settlement agreement prepared and signed in mediation between Facebook and the Winklevosses (who claimed that the idea for Facebook was stolen from them) has been upheld by the U.S. Court of Appeals for the Ninth Circuit against claims that it was missing material terms, was procured by fraud and violated federal securities laws. Although extensive additional documentation of the settlement was anticipated, the handwritten agreement stated that it was "binding" and provided a mechanism for supplying additional terms. The court also concluded that the mediation confidentiality agreement signed by the parties prevented reliance on any evidence from the mediation itself, which eliminated the securities claims. Refusing to give up, the Winklevosses quickly filed a petition for rehearing en banc.

[Facebook, Inc. v. Pacific NW Software, Inc.](#), Nos. 08-16745, 08-16873, 09-15021 (U.S.C.A. 9th Cir., April 11, 2011); [Forbes](#) (April 18, 2011); [Petition for Rehearing En Banc](#)

Mediated Settlement Agreement Enforced Despite Lack of Required Approvals by Bank Committee and FDIC

A U.S. bankruptcy court found a bank's bad faith in holding out a bank official as having authority a sufficient basis on which to enforce the terms of a global settlement agreement reached in mediation, even in the absence of required approval from the FDIC. While the bank repeatedly noted that it would have to obtain the consent of the FDIC to the settlement terms, it only revealed after four months that it had never sent the settlement terms to the FDIC because an internal loan committee of the bank had rejected the terms. No mention of the internal committee had been made previously, which the court concluded was bad faith and relied on the doctrine of prevention to enforce the settlement terms despite the lack of approval by the bank committee or FDIC.

[Bulk Petroleum Corp. v. United Central Bank](#), No. 09-21782-svk, No. 10-2194 (Bankr. E.D. Wis., March 18, 2011)

Court Considers Preliminary Injunction

Mediation Quote:

"When, as mediators, we accept stories that lie at the periphery of the conflict, we can only work at the periphery. Superficial stories yield superficial results. When we discover the stories at the core, however, we can work at the core to discover what created the conflict in the first place and what the parties need to do to resolve it."

Kenneth Cloke and Joan Goldsmith, *Resolving Personal and Organizational Conflict: Stories of Transformation and Forgiveness* (Jossey-Bass 2000) at 114

Check These Out:

"Jury Mediation" May Be Helpful in Some Disputes

In a twist on mini-trials, "jury mediation" brings together typical jurors to receive a short presentation from the parties, including key documents and even witness testimony, after which the "jury" deliberates and provides its conclusions and reactions in conversation with a mediator and trial consultant. The goal is to decrease uncertainty and increase the information on which parties can make informed settlement decisions in mediation.

[New Orleans City Business](#) (March 25, 2011)

Mediation May Resolve Electronic Discovery Disputes

Electronically stored information (ESI) is making litigation more challenging, especially with ever increasing use of social media. Some parties are turning to mediation to work out ESI

Despite Contract's Mandatory Mediation Provision

While recognizing that the parties' franchise agreement provided that disputes must go through mediation prior to litigation, the federal court entertained plaintiff's effort to maintain the status quo during mediation by seeking a preliminary injunction. However, the court denied plaintiff's request after analyzing the factors required for a preliminary injunction. [Edelman v. Certified Restoration Dry Cleaning Network](#), No. 11-10781 (U.S.D.C. E.D. Mich., March 11, 2011)

Other Notable or High Profile Proceedings

- Federal court refuses to allow additional discovery to pursue contentions made by opposing counsel during mediation, as it would undermine the settlement process. [Chenevert v. GC Constructors](#), No. 4:10CV00113-WAP-DAS (U.S.D.C. N.D. Miss., April 8, 2011)
- Federal litigant has no right to mediation in Utah where alternative dispute resolution is not mandatory in federal court. [Lopez v. Administrative Office of Courts](#), No. 10-4137 (U.S.C.A. 10th Cir., March 22, 2011).
- Trial court dismisses foreclosure complaint with prejudice and orders fine plus \$15,000 payment to defendant for attorneys' fees and costs after bank failed to appear for mediation a second time because counsel "inadvertently overlooked" notice. [Bank of New York v. Richardson](#), No. Yor-10-498 (Maine, March 22, 2011)
- Court rejects an injured party's motion to appear for mediation by telephone-video conference because he would not have been able to actively participate, but extends time for mediation. [Hernandez v. Wilsonart Int'l, Inc.](#), No. 2:09-cv-747-FtM-36SPC (U.S.D.C. M.D. Fla., March 15, 2011)
- Court sanctions party for seeking to file mediation brief as "an egregious violation of mediation confidentiality." [Cosolo v. Verizon California, Inc.](#), No. E049017 (Cal. App., 4th Dist., March 15, 2011)
- Rejecting assertions that mediation confidentiality provides a shield from prosecution, Toronto lawyer is found guilty of professional misconduct for uncivil behavior during mediation, among other incidents. [Law Times](#) (March 21, 2011)
- Court considers details of mediation between parties, including counsel and party affidavits, without discussion or reference to confidentiality in mediation. [Vanderford Company, Inc. v. Knudson](#), No. 37061 (Idaho, March 21, 2011)
- Bar is high for any party represented by counsel who seeks to overturn settlement agreement based on duress or incapacity, even if duress is by the party's own counsel. [Shepard v. Florida Power Corp.](#), No. 8:09-CV-2398-T-27TGW (U.S.D.C. M.D. Fla., April 18, 2011).

discovery disputes and streamline the process.

[E-Commerce Times](#) (March 9, 2011)

Oprah Network Featuring Victim-Offender Mediation

Oprah Winfrey's cable network has announced six new shows, including *Confronting*, which documents victim-offender mediations, showing the effort to achieve closure.

[EW.com](#) (April 14, 2011); [Preview](#)

Other Cases & Resolutions:

Unprecedented agreement reached by 34 participants under which Denver Water would pay \$25 million and divert no further water across the Continental Divide. All parties must approve the agreement, which is expected to take months. [Denver Business Journal](#) (April 28, 2011)

Litigation over secret meetings by board of commissioners has been resolved with a detailed settlement co-mediated by a federal judge and a local judge; along with payment of attorneys' fees and other provisions, the commissioners involved are prohibited from violating the law for a year. [The Register-Guard](#) (April 2, 2011)

Lawsuit over competing hospitals in Berkeley County, South Carolina delayed to give hospitals time to mediate. [Charleston Regional Business Journal](#) (April 28, 2011)

Mediation results in full settlement between hospital district and Health Access Washoe County. [RGJ.com](#) (March 16, 2011)

Having already spent \$15 million in legal fees in dispute against construction giant with no end in sight, state senator urges DeKalb County Schools to turn to mediation. [AJC.com](#) (March 7, 2011)

Court delays trial to permit time for mediation in litigation over a major contract dispute which

- Mediation of the NFL dispute with its players is scheduled to resume on May 16. [Businessweek](#) (April 28, 2011)

NEWS & INITIATIVES:

International Mediation Developments

- The Council of Ministers in **Spain** has approved and will send to Parliament legislation to introduce mediation in civil and mercantile matters. [La Moncloa](#) (April 8, 2011)
- Adopting workplace mediation in the **U.K.** significantly reduces costs, as well as improves employee relations. [People Management Magazine Online](#) (March 11, 2011)
- Lawyers in **Italy** went on a week-long national strike to protest the implementation of mandatory mediation in the country, seeking to make mediation optional and to require technical (lawyer) assistance in mediation. [Law Forward](#) (March 17, 2011)
- The northernmost state in **India**, Jammu and Kashmir, broke ground on its second mediation center, with the Chief Justice promoting mediation as an important means to avoid judicial backlogs. [IBN Live News](#) (March 25, 2011)
- **India** has created seven Indirect Tax Ombudsmen to mediate and use other mechanisms to resolve grievances over customs, excise and service taxes with government departments. [The Hindu](#) (April 1, 2011)
- The **Bangladesh** International Arbitration Centre has been established to resolve disputes through both arbitration and mediation, which may help attract foreign investment. [The Financial Express](#) (April 10, 2011)
- The People's Mediation Law, enacted last year in **China**, is intended to enhance democracy at the grassroots level, according to a Chinese lawmaker; China has over 4.9 million mediators and handled over 7 million disputes in 2010, with a resolution rate of 97%. [CriEnglish.com](#) (March 10, 2011)
- More than 20 years after it was first proposed, **Korea** enacts legislation to resolve medical malpractice disputes through alternative dispute resolution; law takes effect in April 2012. [The Korea Times](#) (April 6, 2011); [Donga.com](#) (March 12, 2011)

Mandatory Mediation of Disputes Urged as Best Practice for Commercial Real Estate Financing

The CRE Finance Council has released new “best practices” initiatives to enhance safeguards for the commercial real estate finance market, which include mandatory third-party mediation prior to bringing any legal action.

court expanded to include fraud allegations. [Chelsea Standard](#) (April 25, 2011)

Sir Edmund Hillary's family is mediating an internal squabble over his watches. [Stuff.co.nz](#) (March 23, 2011)

Mediation is scheduled the day before trial between Guns N' Roses' Axl Rose and his former manager over allegations of broken promises and mismanagement. [Beverly Hills Courier](#) (April 11, 2011)

Roseanne Barr seeks mediation of legal dispute with neighbors in Hawaii over construction and privacy issues, with claims of dead goats, restraining orders and much upset. [KHON2.com](#) (March 10, 2011)

Transgender golfer Lana Lawless to mediate with Long Drivers Association over regulation excluding transgender women. [Pro Golf Talk](#) (March 15, 2011)

Mediation results in \$6 million settlement for woman hit by school bus in crosswalk. [PR Web](#) (April 3, 2011)

Mediation in southwest China provides compensation of \$3,800 for discrimination against a carrier of hepatitis. [English.Eastday.com](#) (March 19, 2011)

Public meeting of residents held prior to “public mediation” between board of supervisors and gas driller over town ordinance that prohibits temporary housing at work sites. [Post-Gazette.com](#) (April 13, 2011)

Iowa legislative resolution encourages use of professional mediation in dispute between homeowners and drainage district board of trustees over disposal of material dredged from drainage canal. [Muscatine Journal](#) (March 17, 2011)

Cyclists and shooting club mediate and resolve claims to city land in Mission, Texas for recreational uses. [The Monitor](#) (March 18, 2011)

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

[National Mortgage Professional Magazine](#) (March 24, 2011)

WIPO Developments Include Creative Barcodes

The World Intellectual Property Organization's (WIPO) Arbitration and Mediation Center will provide mediation services for Creative Barcode members; Creative Barcode is a new mechanism for facilitating safe disclosure of creative concepts and ideas in business deals and proposals by using barcoded files. In more traditional endeavors, some 2,700 cybersquatting cases were filed with the WIPO Center in 2010, setting a new record. The cases were handled by over 300 panelists in 49 countries in 13 languages. The WIPO Center also continues to handle significant numbers of intellectual property disputes.

[Dexigner](#) (March 22, 2011); [Ag-IP-News.com](#) (March 31, 2011)

North Dakota Expands Agricultural Mediation Program to Energy Disputes

North Dakota enacted legislation in late April to broaden the mission of the state's Agricultural Mediation Service beyond helping farmers, ranchers and their creditors to addressing disputes between landowners, producers and energy companies. While the mediation program is voluntary, the leading oil and gas industry organization in the state, the North Dakota Petroleum Council, is encouraging its members to use the state mediation services to resolve disputes. The legislation also dropped "Agricultural" from the name of the North Dakota Mediation Service.

[H.B. 1462](#); [Status](#); [The Republic](#) (April 8, 2011)

Other Notable News & Proceedings

- Florida's court system is facing a large deficit due to a shortfall in expected filing fees from mortgage foreclosure cases, so it has transferred \$12 million from the Mediation Arbitration Trust Fund. [Crestview News Bulletin](#) (March 26, 2011)
- Huge increases in credit card collection cases have resulted from the recession, with most cases going to mediation prior to litigation. [Credit Cards.com](#) (April 18, 2011)

Update on Home Foreclosure Mediation

- The U.S. Senate Judiciary Committee passed S. 222, which would give bankruptcy courts nationwide the authority to set up foreclosure mediation programs. Mediation programs have already been set up in several bankruptcy courts in New York, Florida, Iowa, and Connecticut. Banks contested the program in Rhode Island, however, leading to the legislation. On the House side, H.R. 1131 has been introduced to provide grants to states to provide mediation for homeowners facing foreclosure. [Housing](#)

other needed assistance. The Foundation served 83,000 patients in 2010, an increase of 50% over the previous year. [PR Newswire](#) (April 13, 2011)

Mediation between bankrupt Ambac Financial Group and the U.S. will focus on \$700 million in seized tax refunds meant for Ambac. [Reuters](#) (March 21, 2011) Mediation continues between Ameriprise Financial and its brokerage unit, Securities America, after a federal judge rejected a \$21 million class action settlement. [Reuters](#) (March 25, 2011)

Bankruptcy judge orders Fulton Homes and primary creditors into mediation over repayment terms for \$160 million. [AZ Central.com](#) (April 28, 2011)

Mediation to be tried again in Tribune Co.'s huge bankruptcy case, despite lack of success in previous attempts. [Chicago Tribune.com](#) (April 5, 2011)

Millions of dollars of casino money remains in escrow pending mediation seeking to settle six years of litigation. [Chicago Tribune](#) (March 18, 2011)

PricewaterhouseCoopers has sought mediation over who should get NZ\$8 million in its trust account as receiver for a Nelson finance company that failed in 2007. [Stuff.co.nz](#) (March 13, 2011)

Two days of mediation held in New Zealand to narrow issues needing to be decided by the Environment Court relating to the prohibition of dams on the Nevis River. [Otago Daily Times](#) (April 4, 2011)

The City of Ottawa is willing to enter mediation over extending the Urban Boundary. [580 CFRA News Talk Radio](#) (March 18, 2011)

Last ditch mediation efforts make progress in attempt to rescue Edinburgh's tram project.

[Scotsman.com](#) (March 16, 2011)

[Wire](#) (March 31, 2011); [Housing Wire](#) (March 18, 2011)

- **Washington** state enacted H.B. 1362 to provide more time and counseling for indebted homeowners, and mediation with lenders prior to foreclosure. A housing counselor or lawyer can refer a homeowner to mediation, in which a mediator is to make sure both parties are acting in good faith. Washington is the third non-judicial foreclosure state to enact a mediation process, following Nevada and Maryland. H.B. 1362 takes effect in July. [The News Tribune](#) (April 15, 2011)
- New home foreclosure mediation programs are beginning in the **Illinois** counties of Peoria and Madison. While homeowners in Madison County must submit a mediation request and meet certain financial pre-conditions, in Peoria County the mediation period is mandatory for residential foreclosures. The mediation program in Peoria begins June 1 and is financed with increased filing fees. [The Madison/St. Claire Record](#) (April 19, 2011); [PJ Star.com](#) (April 19, 2011)
- **Washington, D.C.** adopted foreclosure mediation legislation in November and then barred residential foreclosures until promulgation of mediation-related rules, which were published in April. Lenders must give borrowers notice of default which includes a mediation election form. If borrowers decide to mediate they must pay a \$50 fee and mediation must be completed within 90 days. [Washington Business Journal](#) (April 8, 2011)
- Three alternative foreclosure reform bills are near enactment in **Hawaii**, although settling on one bill could be challenging. Two of the three bills include mediation. Mortgage industry representatives have raised strong objections to the bills, and especially to the dispute resolution provision. [Star Advertiser.com](#) (April 15, 2011)
- Legislation was introduced in **Delaware** that would provide for automatic mediation for homeowners facing foreclosure, instead of the voluntary mediation program that is currently in place. [Delaware Online.com](#) (March 16, 2011)
- Legislation in **Connecticut** would extend the state's foreclosure mediation program through 2014 and require mediation to be completed before foreclosure litigation can proceed. [Courant.com](#) (March 21, 2011)
- The **Indiana** Supreme Court is launching a secure online network for exchanging necessary financial documents and information in order to make foreclosure mediation more effective. A pilot project using the system is beginning in two counties. [Inside Indiana Business](#) (April 11, 2011)

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MARCH 2011

CASES & RESOLUTIONS:

California Supreme Court Allows Use of Mediation Confidentiality as Shield to Avoid Legal Malpractice Claims

Continuing its strict interpretation of California's broad mediation confidentiality statute, the California Supreme Court rejected the appellate court's creation of a judicial exception, and prevented a party from using his private communications with his attorneys before and during a mediation in a later action for legal malpractice. The alleged malpractice involved claims that the party's counsel had conflicts of interest and coerced him to settle for too little. Although private conversations during the mediation between the party and his attorneys did not involve the mediator or other party (or reveal anything said or done in mediation discussions with the mediator or other party), the Court relied on the plain language of the statute to conclude they were confidential nonetheless and that any exception must come from the legislature. The confidentiality statute only applies to civil actions, however, so would not protect an attorney from use of mediation-related oral communications in a criminal prosecution for fraud.

[Cassel v. Superior Court](#), No. S178914 (Cal., January 13, 2011).

Court Refuses to Vacate Patent Invalidity Decision to Support Mediated Settlement After Balancing Factors

A settlement reached in the mediation program of the U.S. Court of Appeals for the Federal Circuit was contingent on being able to vacate the district court's ruling that most of the claims in the patent at issue were invalid. On remand, the district court balanced the importance of court-ordered mediation programs and encouraging mediated settlements against other factors, including the parties' desire to conserve resources, the public interest in the orderly operation of the federal judicial system, and the potential to conserve judicial resources. The court concluded that vacating its invalidity ruling was not in the public interest and ultimately would not save judicial resources because the outcome of other pending proceedings also turn on the validity of the patent.

[Ohio Willow Wood Co. v. Thermo-Ply, Inc.](#), No. 9:07-CV-274 (E.D. Tex., February 3, 2011).

Mediation Quote:

"[In mediation,] what lawyers think is strategic information often turns out to be information that, if they did convey it to the other team, would help settle the case.... The private session might be the vehicle they need to assess the risks of exchanging information...and decide to divulge it to the other side."

J. Anderson Little,
*Making Money Talk:
How to Mediate Insured
Claims and Other
Monetary Disputes*
(American Bar
Association 2007) at 21

Check These Out:

One to Watch on "Federal Mediation Privilege"

A federal appellate court has accepted an immediate appeal on a discovery ruling by the trial court that there is a "federal mediation privilege" under which documents from mediation proceedings are privileged, but documents from arbitration proceedings are discoverable.

Use of Mediation PowerPoint to Prep Witnesses Opens It to Discovery

A federal district court ruled that materials used in mediation must be turned over to defendants because they were used in preparing plaintiffs for depositions in the case. The court found that there was “testimonial” use of the 90-slide PowerPoint presentation in issue because it was used to refresh the memory of a witness, and that production to defendants was in the interest of justice because plaintiffs had failed to respond to numerous interrogatories and document requests on the specifics of their allegations. The court also concluded that a claim of attorney work product would not prevent disclosure, in part because the materials had already been disclosed to defendants in the mediation. The court stated that it need not consider the applicability of a mediation privilege, since a privilege would not prevent discovery in this situation.

[Greenwood Realty Inc. v. Action Realty Inc.](#), No. 8:09-CV-02683 (D. S.C., February 15, 2011).

Expert Used in Mediation Properly Appointed as Trial Expert, But Must Generate New Report

A New Mexico appellate court concluded that a valuation expert hired by the parties in mediation may be appointed as an expert witness in the trial of the case, as long as her testimony omits anything covered by mediation confidentiality provisions. While the valuation report that the expert generated for the mediation is confidential and not admissible at trial, the court or parties can have her prepare a new report from the same underlying data for use at trial. The court applied New Mexico’s new Mediation Procedures Act, some provisions of which are based on the Uniform Mediation Act.

[Warner v. Calvert](#), No. 29,674 (N.M. App., February 9, 2011).

Consent Judgment Following Mediated Settlement Cannot Be Appealed

A mediated settlement of an eminent domain action and an inverse condemnation action resulted in entry of a stipulated or consent judgment. When the court later awarded funds to the city from a court-controlled deposit to cover costs of remediation, the other party sought to appeal the trial court’s orders. A California appellate court concluded that the orders were not appealable because the matter ended with the consent judgment, which cannot be appealed unless specifically entered to facilitate an appeal.

[City of Gardena v. Rikuo Corp.](#), No. B217302 (Cal. App. 2d Dist., February 7, 2011)

“Opt-out” Settlement Agreement Not Binding Where No Acceptance of Proposal Terms

The parties were not bound by a mediation agreement signed by their counsel, which provided a ten-day period for objections after which the agreement was to be

[Kimberly-Clark Worldwide, Inc. v. First Quality Baby Products](#), No. 957 (Fed. Cir., January 10, 2011)

WIPO Dispute Resolution Survey Under Way

The World Intellectual Property Organization’s (WIPO) Arbitration and Mediation Center is conducting a detailed international survey on dispute resolution clauses in technology agreements and use of alternative dispute resolution in technology disputes. The results will be made available in a report that is intended to provide support in negotiating contract provisions and finding good solutions for future disputes.

[WIPO.int](#) (February 17, 2011); [Survey](#)

“Annapolis Idol” Raises Funds for Mediation

The non-profit Anne Arundel Conflict Resolution Center raises funds by sponsoring an Annapolis Idol event to choose a winner from among finalists who audition to show they have a winning personality and singing ability. This is the fourth year for the Center’s fund-raiser and finalists are expected to sing before a live audience of about 300 guests and a panel of judges.

[Anne Arundel Conflict Resolution Center](#) (January 7, 2011)

Other Cases & Resolutions:

binding, because the agreement also included a settlement “proposal” that was to be accepted or rejected within a specified period. That proposal was not accepted, so under standard contract principles there was no meeting of the minds. The failure of either party to opt out within the ten-day objection period did not result in an enforceable agreement, since there had never been acceptance of the settlement terms.

[Powerhouse Custom Homes, Inc. v. 84 Lumber Co.](#), No. A10A2351 (Ga. App., January 24, 2011).

Cost Order Cannot Include Prevailing Party’s Half of Mediator’s Fees

A Colorado appellate court reversed the trial court’s cost order relating to mediation, holding that when parties agree to split the costs of mediation, the prevailing party’s half cannot subsequently be awarded as costs unless it reserved the right to seek later recovery.

[Valentine v. Mountain States Mutual Casualty Co.](#), No. 09CA1767 (Colo. App., January 6, 2011)

Countrywide to Pay over \$600 Million in Mediated Securities Fraud Class Action Settlement

One of the largest settlements of a securities fraud case in U.S. history was reached in mediation and approved by the federal court. Under the class action settlement, Countrywide Financial Corp. will pay just over \$600 million to New York pension funds for its involvement in sub-prime mortgage lending, to which its accounting firm will contribute \$24 million. However, 33 large institutional investors opted out of the settlement, which triggered the need for further mediation, using the same team of mediators, and resulted in a separate \$22.5 million fund being set aside for those who opted out.

[TMCnet.com](#) (February 28, 2011); [Reuters](#) (February 25, 2011)

Other Notable or High Profile Proceedings

- While analyzing a contract requiring a mini-trial as an alternative dispute resolution process, a federal court listed cases in which dismissal of an action due to failure to mediate was appropriate because a contract required mediation prior to litigation. [Union Electric Co. v. Energy Ins. Mutual Ltd.](#), No. 4:10-CV-1153 (E.D. Mo., January 10, 2011)
- As widely reported, ongoing mediation is being conducted between owners of National Football League teams and the NFL Players Association to try to determine how to split over \$9 billion in annual revenues from the most profitable professional sport in America. The mediation is being conducted by the Federal Mediation and Conciliation Service and has involved numerous sessions which have extended past deadlines. Failure to reach agreement may threaten the upcoming NFL season. [The Washington Post](#) (March 9, 2011); [NY Daily News.com](#) (March 2, 2011);

- **Atlanta and the terminated design team for a new international airport terminal have mediated a resolution to the firing and resulting \$60 million in claims against the city.** [Atlanta Business Chronicle](#) (February 28, 2011)
- **Forsyth County Commission reached an agreement with a landfill operator in which the county will be paid \$2.9 million in back fees.** [Waste Management World](#) (January 2, 2011)
- **A \$1.9 million mediated settlement has resolved claims by Wichita Public Schools against four businesses for shoddy construction.** [Wichita Business Journal](#) (March 1, 2011)
- **Bitter litigation by wine growers against pesticide drift resolved in mediation during appeal of mistrial decision.** [The Register-Guard](#) (January 2, 2011)
- **After dismissing antitrust claims, judge orders mediation by defendant University of Minnesota and 24**

[The Washington Post](#) (March 1, 2011)

- Former New York Governor Mario Cuomo, said to be experienced as a mediator, was appointed by a federal judge to mediate a billion dollar lawsuit by Madoff trustee Irving Picard against the Mets ownership. [New York Times](#) (February 18, 2011); [Hedge Fund.net](#) (February 17, 2011)
- Investors who lost money in Madoff's ponzi scheme reached a \$100 million settlement in mediation with funds affiliated with Tremont Group Holdings Inc., which invested with Madoff. [Reuters](#) (February 25, 2011)
- James Roosevelt, Jr., grandson of Franklin Delano Roosevelt, has mediated disputes between well-known political figures, and may need his skills in the proposed merger of Harvard Pilgrim Health and Tufts Health Plan, where he is president and CEO. [Becker's Hospital Review](#) (January 28, 2011)
- U.S. Transportation Secretary Ray LaHood held a mediation session involving the expansion of O'Hare International Airport with Chicago Mayor Daley and the CEOs of United and American. [Chicago Tribune.com](#) (February 10, 2011)
- Rapper 50 Cent states that mediation is scheduled to try to resolve his lawsuit against website WorldStarHipHop.com for using his image on the website. [Billboard.com](#) (January 24, 2011)
- After failing to resolve sexual-abuse lawsuits in mediation, the Archdiocese of Milwaukee is filing for bankruptcy protection, becoming the eighth to do so since the clergy abuse scandal arose in 2002. [The Washington Post](#) (January 4, 2011)
- A ten year old lawsuit by homeowners for faulty construction was finally resolved in the third attempt at mediation. The homeowners were first awarded \$800,000 in arbitration, which was appealed and resulted in a \$58 million jury verdict. The court had not finalized the judgment and sent the parties to mediation to try to avoid further appeals. [Star-Telegram](#) (January 27, 2011)
- Court-ordered mediation has resulted in an agreement by AstraZeneca Plc to pay \$150 million to settle 6,000 more lawsuits over its antipsychotic drug Seroquel. [Bloomberg BusinessWeek](#) (February 17, 2011)
- **orchards and apple growers over remaining procedural due process claim.** [Star Tribune.com](#) (February 4, 2011)
- **A councilor has proposed a "public mediation board" of local officials and politicians to try to mediate a private contract dispute between Exeter Hospital and Anthem Blue Cross and Blue Shield.** [Sea Coast Online.com](#) (February 5, 2011)
- **Deloitte & Touche involved in mediation over its audits of Washington Mutual that allegedly hid mortgage lending problems.** [Insurance Journal](#) (January 24, 2011)
- **Attorney asserts reputed mob boss's \$250,000 workers' compensation settlement is reasonable because it occurred in mediation.** [Chicago Sun-Times](#) (January 25, 2011)
- **Mediation ordered in dispute over management of \$5.6 million trust.** [KIVITV.com](#) (January 7, 2011)
- **Apotheke partner**

NEWS & INITIATIVES:

International Mediation Development

- Greater use of mediation is urged to help offset budget cuts to legal aid in boroughs in London, **England.** [Hackney Citizen](#) (February 18, 2011)
- **Germany's** leading arbitration institution, the *Deutsche Institution für Schiedsgerichtsbarkeit eV* (DIS), has issued mediation and other alternative dispute resolution rules. [International Law Office](#) (February 17, 2011)
- **Italy's** lawyers' union is calling for a week-long national strike to protest the March 21 implementation of the groundbreaking new mandatory mediation statute in Italy. [Karl Bayer.com](#) (February 25, 2011)

- **Russia's** new mediation law took effect on January 1 and regulates mediation procedures for business and commercial disputes, along with employment and family law matters. [Herbert Smith.com](#) (January 31, 2011)
- The National Institute of Defense of Consumers in **Angola** mediated consumer complaints and obtained reimbursement of AKZ 3.9 million (\$42,000) in 2010. [Angola Press](#) (February 2, 2011)
- **Qatar** continues its push to become an international center for dispute resolution, holding a mediation training for local professionals. [The Peninsula](#) (January 26, 2011)
- **India's** Law and Justice Minister asserts that alternative dispute resolution will be the preferred way of settling disputes in the future and that India is working to become a preferred destination for ADR. [Press Information Bureau](#) (January 9, 2011)
- A new mediation center opened at the Hazaribagh Civil Court in the state of Jharkhand, **India**. [OneIndia News](#) (January 24, 2011)
- Four thousand lawyers wore black stripes in Surat, **India** to protest opening a mediation center to mediate cases under the Negotiable Instruments Act. [The Times of India](#) (February 11, 2011)
- The Supreme Court of **Nepal** is expanding mediation with new centers in twenty-five remote district courts, making a total of 58 mediation centers. [Himalayan Times](#) (December 28, 2010)
- The first Asia-Pacific Mediation Leadership Summit will be hosted in Bangkok, **Thailand** in July by the Asia-Pacific Mediation Forum. [APMF Website](#)
- The Second Asian Mediation Association Conference is being hosted by the **Malaysian** Bar Council to encourage use of mediation. [Malaysian National News Agency](#) (January 26, 2011)
- Mediation is growing in **Hong Kong**, with the Hong Kong International Arbitration Centre claiming a 90% mediation settlement rate at the end of 2010. [The Asset](#) (January 28, 2011)
- The Lands Tribunal in **Hong Kong** issued a Direction to encourage parties in Land Compulsory Sale cases to use mediation. [7thSpace Interactive](#) (February 11, 2011)
- The Intellectual Property Office of the **Philippines** is urging mediation of cases relating to copyright and other IP disputes, and devoted February to cases requiring mandatory mediation. [Business Insight Malaya](#) (February 15, 2011)
- **and its celebrity mixologist ordered to mediate falling out.** [NY Times.com](#) (January 7, 2011)
- **Lawsuit by former CEO of Red Hat and family against investment management firm for loss of \$60 million sent to mediation.** [News Observer.com](#) (January 4, 2011)
- **City paying for mediation between two sky-diving companies to ensure safety at municipal airport.** [The Daytona Beach News-Journal](#) (January 5, 2011)
- **Cities of Texarkana, Arkansas and Texarkana, Texas continue to mediate dispute over shared water utility.** [Chron.com](#) (January 4, 2011)
- **Papau New Guinea's chief judge has ordered mediation between Exxon Mobil, landowners and the government over a multi-billion dollar LNG project.** [Radio New Zealand International](#) (January 24, 2011)

States Continue Use of Mediation for Consumer Restitution

- The Michigan attorney general is forming a multi-state task force of attorneys general to coordinate the mediation of consumer complaints against Allcare Dental and Dentures across the fifteen states in which the company operated before abruptly ceasing business. The mediations will not only address financial issues, but protection of and access to patient dental records. [The Washington Post](#) (January 7, 2011); [Examiner.com](#)
- **Indonesian cabinet secretary has agreed to mediate with media groups after causing upset by calling for the**

(January 6, 2011)

- Mediation by the Missouri Department of Insurance resulted in recovery of \$9.5 million for consumers who brought insurance complaints. The largest number of complaints involved health insurance, followed by auto and homeowners. The average consumer recovery in the mediations was \$7,000. [Worker's Compensation.com](#) (January 27, 2011)
- The attorney general's office in Massachusetts helped consumers recover over \$4.7 million through mediation last year. The attorney general received over 13,000 complaints in 2010 relating to consumer, health care and elderly issues. The Elder and Health Care mediation program obtained nearly \$700,000 for consumers in the state. [The Newburyport Current](#) (February 14, 2011)

**government to
boycott media
organizations that
criticize
Indonesia.** [The
Jakarta Globe](#)
(February 25, 2011)

Mediation Encouraged for Medical Malpractice

NPR and a major health care provider each urge mediation as a beneficial alternative to malpractice litigation.

[National Public Radio](#) (February 1, 2011); [Kaiser Health News](#) (February 1, 2011)

Update on Home Foreclosure Mediation

- A hearing by the **U.S.** Senate Judiciary Committee emphasized the foreclosure mediation programs of the Bankruptcy Courts in New York and Rhode Island, which began in 2009. However, a loan servicer has challenged the authority of the Rhode Island Bankruptcy Court's mediation program. Senator Sheldon Whitehouse (D-RI), who chaired the hearing, has introduced S.222, the Limiting Investor and Homeowner Loss in Foreclosure Act to clarify the authority of Bankruptcy Courts to run loss mitigation programs and to expand them nationwide. [The State Column](#) (February 3, 2011); [Market Watch](#) (February 1, 2011); [The Providence Journal](#) (January 29, 2011); [Loan Rate Update](#) (January 31, 2011); [S.222](#)
- Legislation requiring mediation with homeowners prior to repossession has made progress in **Washington** state, with extensive negotiations on language resulting in support from both bankers and anti-poverty advocates. [The News Tribune](#) (February 18, 2011)
- Legislation requiring mandatory mediation of home foreclosures is being contemplated in **Hawaii**. The Hawaii House of Representatives passed and sent to the Senate a measure that would provide a five-month moratorium on non-judicial home foreclosures, which would give homeowners time to mediate or otherwise negotiate with lenders. [KITV.com](#) (February 3, 2011); [Forbes.com](#) (February 11, 2011)
- The proposal of the mayor of Boston, **Massachusetts** to require face-to-face mediation prior to mortgage foreclosures in the city has passed the City Council; it needs permission from the state before going into effect. [The Boston Globe](#) (January 6, 2011)
- **Florida's** court-mandated foreclosure mediation program is not achieving the results expected, as only 5.7% of cases referred to mediation statewide have resulted in agreements, with some counties showing settlement rates

as low as 1%. Some Florida counties are working to remedy a glitch in the program that gives bank attorneys better access to financial records than defense lawyers. [TBO.com](#) (January 28, 2011); [St. Petersburg Times](#) (January 28, 2011)

- Pre-foreclosure cases are being added to mediation programs in six of **Florida's** twenty court circuits. The change results in beginning the mediation process at an earlier point, when the mortgage may be delinquent as little as 65 days, without waiting for the foreclosure process to begin, when the situation is much more serious. This can result in more successful mediations and may be a "game changer." Fannie Mae and Freddie Mac are considering whether to force loan servicers in South Florida to participate. [Miami Herald.com](#) (January 8, 2011); [PR Newswire](#) (January 7, 2011); [Sun Sentinel.com](#) (January 10, 2011); [The Ledger.com](#) (January 12, 2011)
- After its first year, **Nevada's** Foreclosure Mediation Program has kept nearly half its participants in their homes, and only 13% of 6,000 mediations resulted in foreclosure. The Nevada Supreme Court has updated the rules for its Foreclosure Mediation Program, with the changes taking effect on March 1. [Las Vegas Sun](#) (February 17, 2011); [E-wisdom.com](#) (January 22, 2011); [ABC News](#) (January 12, 2011)
- The mortgage foreclosure mediation program in **Maryland** requires homeowners to opt in, so has resulted in only 317 completed mediations since it began, despite 33,000 active foreclosures. About one-third of the mediations resulted in agreements, with loan modifications and other resolutions. [Baltimore Business Journal](#) (January 18, 2011); [Center for American Progress](#) (January 19, 2011)
- With only a tiny number of homeowners benefiting from **New Jersey's** Residential Mortgage Foreclosure Mediation Program, a court-ordered change gives homeowners 30 days to enter the program rather than just 15. [Delaware State Courts](#) (February 1, 2011); [Cape Gazette.com](#) (February 13, 2011) (Registration Required)
- A **Wisconsin** mandatory mediation program for home foreclosures has been working well after beginning last year in Walworth County. Rock and Milwaukee Counties also have mediation programs. [Gazette Xtra.com](#) (January 16, 2011)

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JANUARY 2011

CASES & RESOLUTIONS:

Contract Requiring Mediation of Any Claim Prior to Litigation Does Not Apply to Counterclaim

Emphasizing the importance of mediation prior to litigation, the Kansas Court of Appeals reversed the trial court and concluded that a construction contract requiring the parties to mediate any claim before instituting legal proceedings did not apply to a counterclaim, since the litigation had already begun. The fact that defendant had refused plaintiff's offer to mediate the initial claims prior to litigation was not an issue.

[Vanum Constr. Co. v. Magnum Block, LLC](#), No. 103,385 (Kan. App., December 10, 2010).

California Appellate Court Reverses Little-Bit-Settled Ruling

The California Court of Appeals for the First District reversed the trial court and held that a settlement cannot be a little bit enforced. In an extremely contentious battle over real estate transactions that did not go as expected, the parties eventually reached a mediated settlement, but continued to litigate over enforcement. While everyone on one side of the case eventually signed the settlement agreement, in the absence of the signature of one spouse on the other side, the trial court sought to enforce half of the settlement and require the signing spouse to transfer half of community property in exchange for half the payment that was to be made. The appellate court held that the settlement could only be enforced as written, but was incapable of being lawfully enforced as written. The court of appeals did, however, strongly encourage the parties to reach a global resolution.

[Rosen v. Cook](#), Nos. A123548, A123558 (Cal. App. 1st Dist., December 13, 2010).

Other Notable Cases & Proceedings

- Even though counsel for litigants negotiated a full settlement, either party was free to withdraw from the agreement until it was signed by the parties themselves or an attorney with express authorization from the principal. [Sims v. U.S. Agencies Casualty Ins. Co.](#), No. 2010 CA 1120 (La. Ct., December 22, 2010).
- Following an agreement in mediation which determined the amount of alimony and the division of property, the wife was unsuccessful in persuading either the trial or appellate courts that she was of unsound mind or that her husband used coercion, undue influence, overreaching or duress to reach the mediation agreement. The court accepted testimony from all the witnesses at the mediation, including counsel, without mentioning mediation confidentiality. [Toombs v. Toombs](#), No. CA10-272 (Ark. App., December 15, 2010).
- The confidentiality of mediation in a subsequent arbitration was unsuccessfully raised for the first time during judicial review of the

Mediation Quote:

"Negotiating a deal is like painting a room. It's all about the preparation. The part where you put the paint on the wall is easy. It's the scraping and sanding and taping that take time and effort."

Barry Goldman, *The Science of Settlement: Ideas for Negotiators* (ALI ABA 2008) at 9

Check These Out:

Video Mediation Spreading

While no one disputes the value of face-to-face mediation, when the parties are not able or cannot afford to come together in person, mediators are increasingly using technology to bridge the divide. Some rely on Skype and other low-cost services, while others use a more sophisticated service that allows the mediator additional control over the process, as well as tools for illustrations and collaboration on documents, including settlement agreements. Even with the parties at a distance, it is possible to edit and transmit documents back and forth to end with a signed agreement. [The Lawyers Weekly](#) (December 10, 2010)

Cognitive Barriers

arbitration, with a focus on the arbitrator reading the mediator's letter providing a non-binding opinion on the ultimate legal question. [Leagle.com](http://leagle.com) (December 13, 2010)

- The art mediation team of the Art Loss Register was able to reach an amicable settlement and avoid protracted litigation between two wealthy European families over a painting that was stolen from a London home in 1979, ended up in the estate of Gianni Versace and surfaced as the star lot in a Sotheby's auction. [Reuters](http://reuters.com) (November 22, 2010)
- A settlement agreement prepared after an apparently successful mediation in October over unpaid admission taxes and other issues between the Wenatchee Wild hockey team and local officials has not been signed by the team. Officials plan to file suit unless the agreement is signed by mid-January. [Wenatchee World](http://wenatchee-world.com) (December 31, 2010)
- Lehman Brothers Holdings is seeking judicial intervention to force those with the economic interest to mediate disputes over derivative transactions after trustees announced that they do not have authority to mediate and the investors with monetary interests have not come forward to participate. [Bloomberg](http://bloomberg.com) (December 9, 2010)
- Gainesville and Hall County have agreed to mediate a high stakes dispute over their rights to reservoir water. While initially planning to have each party send two representatives to mediation, the parties are now moving to make the process open to all commissioners and council members as well as the public, on the basis that the issues are too important to leave out any elected officials. [Gainesville Times.com](http://gainesville-times.com) (December 12, 2010)
- Due to ongoing mediation efforts, IHOP, the pancake chain, has for now dropped its trademark infringement case against the International House of Prayer for use of the IHOP acronym. [Kansas City Star](http://kansascitystar.com) (December 30, 2010)

NEWS & INITIATIVES:

Second Canadian Province Enacts Commercial Mediation Statute

Ontario has followed Nova Scotia in enacting a statute specifically addressing commercial mediation. Ontario's *Commercial Mediation Act of 2010* permits agreements reached in mediation to be registered and enforced as court judgments. Commercial mediation does not include disputes over insurance benefits, collective bargaining disputes, computerized mediation or informal attempts by judges or arbitrators to encourage settlement while presiding over litigation or arbitration proceedings. The statute requires certain disclosures by mediators relating to possible conflicts and bias and sets forth mediation confidentiality requirements. The statute is based on the UNCITRAL Model Law on International Commercial Conciliation, which has also been incorporated by several states in the U.S. when enacting the Uniform Mediation Act. The Ontario statute focuses on pre-litigation mediation and does not apply to the mandatory mediation provisions of the Rules of Civil Procedure. The statute took effect with commercial mediations that commenced on or after October 25, 2010 in Ontario or even outside the province if the parties rely on Ontario law.

[Stikeman Elliott LLP](http://stikemanelliottllp.com) (November 5, 2010); [Law Times](http://lawtimes.com) (December 6, 2010)

Ireland Emphasizes Mediation and Conciliation for Cross-Border and Other Disputes

In response to the 2008 EU Directive requiring mediation of EU cross-border disputes beginning in 2011, Ireland's Law Reform Commission issued a 230-page report in November on new procedures for mediation in a broad range of areas, along with proposed legislation to carry out its recommendations. While instigated by the EU Directive, the report also thoroughly addressed alternative dispute resolution within Ireland, focusing on both mediation and conciliation and

Can Cause Needless Failures in Mediation

The way that parties and counsel think about and value their disputes are often influenced by a variety of cognitive barriers that cause poor decision making when trying to resolve the dispute. Fifteen of these barriers are briefly set forth, ranging from those that are more commonly known, such as Cognitive Dissonance, to those that may be less well known, such as Change Blindness. [Metropolitan Corporate Counsel](http://metropolitan-corporate-counsel.com) (December 6, 2010)

Mediation on TV Coming Soon

USA Network's new show focusing on mediation was initially announced as "Facing Kate," but premieres on January 20 with the new name of "Fairly Legal." Trailers are available at [USA Network.com](http://usa-network.com). The show's website also prominently features an interactive quiz entitled "Could You Be a Mediator?"

Other Cases & Resolutions:

- The Nuclear Regulatory Commission reached a resolution in mediation over violations at a nuclear fuel plant. [Penn Energy](http://pennenergy.com) (December 3, 2010)
- The benefits of mediation are emphasized in the summary of the resolution of a medical malpractice case for \$500,000. [Renal and Urology News](http://renal-and-urology-news.com) (December 14, 2010)
- The city of Atlanta and Eagles patrons resolved litigation over a police raid with a million

establishing new court rules which took effect in November. Noting that the terms mediation and conciliation have often been used interchangeably, the five-member Commission urges differentiation so that mediation is always a facilitative process, while conciliation is advisory (e.g., evaluative). The report also gives close attention to confidentiality, among other issues, and proposes a privilege to exempt communications from disclosure, while setting out numerous exceptions.

[International Law Office](#) (December 16, 2010); [CPR](#) (December 3, 2010); [MIL.ie](#) (November 16, 2010); [Report](#); [2008 EU Directive](#)

Hong Kong Increasingly Emphasizes Mediation

Hong Kong is seeking to become a regional dispute resolution center and is focused on promoting mediation. At a mediation workshop of the International Chamber of Commerce, Hong Kong's Secretary for Justice stated that a mediation task force is being established to assist in implementing recommendations in a recent Report by a Working Group on Mediation. In addition to public education and promotion of mediation, the Report covered training and accreditation of mediators and the need for a mediation ordinance. The judiciary also has been promoting mediation in implementing Civil Justice Reform. In addition, the Secretary for Development in remarks at the International Construction Law Conference emphasized the importance of prevention of disputes through partnering and use of Dispute Resolution Advisors, as well as the high success rate of mediation in public works and other construction projects.

[7th Space Interactive](#) (November 12, 2010); [7th Space Interactive](#) (December 6, 2010)

Other International Mediation Developments

- HM Revenue & Customs sponsored several informal consultations in 2010 about mediation and appears to be eager to introduce mediation at a much earlier stage of the process in **U.K.** tax disputes. [Tax Journal](#) (December 16, 2010)
- **U.K.**'s Justice Minister seeks to reform legal aid and suggests that mediation may provide much of the answer. [IBB Solicitors](#) (November 9, 2010)
- Under **Russia's** new mediation law, which takes effect in January, employment disputes can be resolved through mediation, although further amendments to the law may be needed. [Moscow Times](#) (November 9, 2010)
- The Supreme People's Court of **China** promulgated Professional Ethics and a Code of Conduct for judges. Among the 96 articles in the new Code of Conduct are provisions intended to standardize judicial mediation. [Law Library of Congress](#) (December 28, 2010)
- The **Papua New Guinea** courts have introduced mediation in an effort to address a huge backlog of cases on their dockets. While the Chief Justice set a five year target, the Justice who chaired the rules committee says the impact has been immediate. [ABC Radio Australia](#) (December 30, 2010)
- New South Wales, **Australia** has replaced a plan for using private arbitrators to resolve planning appeals with legislation before parliament to streamline the court mediation system and have matters resolved in three months rather than six. [SMH.com.au](#) (November 23, 2010)
- **New Zealand's** leading independent rural advocacy organization is urging the Minister of Agriculture and Forestry to consider legislation for farm debt mediation services, as exists in both Canada and New South Wales, Australia. [Scoop.co.nz](#) (December 9, 2010)
- Mediation is becoming increasingly important in **Jamaica**, both through court-connected mediation with high settlement rates and by being woven into all other aspects of life, overcoming notable resistance in just a dozen years. [Jamaica Information Service](#) (December 11, 2010)
- dollar payment and change in practices in a court-ordered mediation. [GA Voice](#) (December 9, 2010); [Public Broadcasting.net](#) (November 22, 2010)
- A dispute between the city of Muncie, Indiana and Delaware County over funding for 911 calls is back in court after an attempt at mediation. [Star Press](#) (December 16, 2010); [Star Press](#) (December 8, 2010)
- The city of Princeton agrees to mediate with a landowner over his request to detach land from the city. [Princeton Union-Eagle](#) (December 16, 2010)
- A conflict between Montrose County and Montrose Memorial Hospital over converting the hospital to a private nonprofit without notifying the county is headed to mediation. [KJCT8.com](#) (December 7, 2010)
- The city of Covington has agreed in mediation to pay \$600,000 to the airport operator and assume operation of the airport itself. [Cov News](#) (December 10, 2010)
- Mediation between Jamie and Frank McCourt may determine who owns the Los Angeles Dodgers. [Los Angeles Times](#) (November 17, 2010)
- Three leaders of the Bristol City Council are urging the parties involved in a dispute over building a 30,000-seat soccer stadium to mediate the issues. [Insider Media Limited](#) (December 20, 2010)
- Faced with

Medical Malpractice Mediation Useful, But Missing Doctors

A recent study of mediation in medical malpractice cases found there is significant value from the process, but less than is possible. Of the 31 cases studied from New York City nonprofit hospitals, nearly 70% settled during or after the mediation. However, no doctors participated in any of the mediations, which undermines the potential for additional benefits from enhancing future patient care or addressing the upset of patients and their families. Lawyers reported that the physicians' schedules were too full to participate in mediation.

[WSJ Blogs](#) (December 15, 2010); [Health Leaders Media](#) (December 22, 2010); [Article in Journal of Health Politics, Policy and Law](#) (Subscription Required)

Minnesota Farmer-Lender Mediation Program Having Bigger Impact

The annual report on the Farmer-Lender Mediation Program in Minnesota shows further increase in the use of mediation in the program. In 2010, farm enterprises and lenders completed over 400 mediations involving \$624 million in debt, which was nearly double the amount in 2009. 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.

[Cattle Network](#) (November 22, 2010); [2010 Report](#)

EEOC Reports Record Number of Mediation Resolutions

The U.S. Equal Employment Opportunity Commission reports that in fiscal 2010 it set records both for the number of charges received, at just under 100,000, and the number of resolutions in its mediation program, which were up ten percent. The agency also set a record for the amount of monetary relief obtained for individuals, at \$319 million, of which over \$140 million was obtained in mediations.

[New York Injury News.com](#) (December 11, 2010); [Press Release](#) (November 23, 2010)

Update on Home Foreclosure Mediation

- **U.S.** Vice President Biden announced steps to strengthen foreclosure mediation programs, along with other means of improving justice, at a Middle Class Task Force event. Biden's announcement was the result of work by the Department of Justice's Access to Justice Initiative, the Department of Housing and Urban Development and other agencies. DOJ and HUD issued a joint report encouraging expanded use of mediation as a way to prevent foreclosures. The report identifies over 25 programs and commends common features in the most successful programs as models. [U.S. Department of Housing and Urban Development](#) (November 19, 2010); [Mortgage Loan.com](#) (November 23, 2010); [Report](#)
- The Mortgage Bankers Association, which represents the largest mortgage lenders in the **U.S.**, opposes both mandatory and voluntary mediation programs, asserting that they are expensive and often merely delay foreclosure. Others view the mediation programs as "incredibly successful" in light of a million foreclosures in 2010 and federal prevention programs falling short. [Think Progress](#) (December 31, 2010)
- **Washington, DC** enacted a foreclosure mediation statute that took effect on November 17 under which lenders must provide notice and an opportunity for mediation to homeowners prior to foreclosure. The DC Department of Insurance, Securities and Banking is to implement and enforce the law, and will appoint a mediation administrator and set the fee for mediation. Homeowners opting into mediation pay \$50 at most and will have 90 extra days to try to reach agreement to avoid foreclosure.

opposition to construction of a gas pipeline for a power plant in New South Wales, the company is seeking the appointment of an independent mediator to help work through the issues. The company is willing to cover the cost of a mediator chosen by both sides. [Wellington Times](#) (December 23, 2010)

- Edinburgh is turning to mediation in a dispute involving a tram line construction firm and contractors that has shut down work on the tram project which is to be completed in 2013. [BBC News](#) (November 18, 2010)

Other News & Initiatives:

Madison County, Illinois established a mandatory mediation program for malpractice cases and as a result has seen a marked decrease in such cases, according to the court. [Madison/St. Claire Record](#) (December 14, 2010)

- [Washington Post](#) (December 3, 2010); [Washington Post](#) (November 12, 2010)
- A new foreclosure mediation program has begun in Luzerne County, **Pennsylvania** in which property owners meet first with a credit counseling agency prior to attending a mediation session facilitated by a county judge. Pro bono attorneys assist homeowners during the mediation. Courts in a number of other Pennsylvania counties are considering adding additional mediation programs to address the ongoing high level of home foreclosures. Some of the counties are emphasizing mediation for all types of debts, as a means of allowing both debtors and creditors to sidestep more formal processes that are often not satisfactory for either side. In addition to pressure from overflowing dockets, courts are also responding to encouragement to add mediation programs from the Pennsylvania Supreme Court which recently convened a summit to review mediation programs in various counties. [The Times Leader](#) (December 20, 2010); [The Times Leader](#) (December 3, 2010); [Pittsburgh Tribune-Review](#) (November 14, 2010)
 - The legislature of **Hawaii** has established a task force to make recommendations about how to improve the foreclosure process in the state. The chairman of the task force says it will be taking a close look at mediation, which is being strongly advocated by a local nonprofit organization. The challenges in Hawaii are increased by nearly all foreclosures involving mainland mortgage lenders. [Star Advertiser](#) (December 13, 2010); [KITV.com](#) (December 11, 2010)
 - The mayor of Boston, **Massachusetts** has proposed requiring face-to-face mediation prior to mortgage foreclosures in the city. The proposal would require lenders to pay for mediation and would provide homeowners with assistance from a housing counselor prior to mediation. The Massachusetts Bankers Association strongly opposes the proposal due to concerns about cost and delay and an expectation that the outcome will not change. [Boston Herald.com](#) (December 13, 2010); [Boston Herald.com](#) (December 10, 2010); [WBUR.org](#) (December 10, 2010)
 - The **Nevada** Supreme Court is considering a fifth set of amendments to Nevada's foreclosure mediation program to make further adjustments, and is holding a hearing and taking written comments on the proposed changes. [KVVU Las Vegas](#) (December 3, 2010); [KTNV](#) (November 10, 2010); [Proposed Changes](#)
 - The Federal Reserve Bank of Cleveland found the Cuyahoga County, **Ohio** foreclosure mediation program to be a model for other areas seeking to address the high level of foreclosures. The Cuyahoga County program, which covers Cleveland, has about a 90% resolution rate, ranging from modification to deeds-in-lieu of foreclosure. While only about one-third of eligible borrowers sought mediation in 2010, that is up from one-fifth in 2009. [Housing Wire](#) (December 28, 2010)
 - A year after the **Florida** Supreme Court required a foreclosure mediation program in every county, a statewide report shows that the process is struggling. While a third of homeowners who go to foreclosure mediation are able to obtain a resolution with their lender, few homeowners actually participate, resulting in agreements in only six percent of the cases referred to mediation. Many homeowners are difficult to reach or mistake the mediation program for a commercial service or scam. Moreover, problems with sloppy or fraudulent documentation has caused many lenders to change outside counsel, which has resulted in additional delays in foreclosure mediation. [Palm Beach Post](#) (December 29, 2010); [Palm Beach Post](#) (November 8, 2010)
 - **Connecticut's** mandatory foreclosure mediation program has permitted 78% of homeowners who participated to avoid foreclosure and 63% to remain in their homes, although critics suggest that these numbers are out of line with the rest of the country and sound too good to be true. [Hartford Advocate](#) (December 14, 2010)

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NOVEMBER 2010

CASES & RESOLUTIONS:

Claims Against Own Counsel Don't Undo Mediation Agreement

A California appellate court upheld an agreement reached after five mediation sessions, despite appellant's claim that he was forced into settlement by his own attorney. Appellant asserted extortion, economic duress, undue influence, fraud, prohibited financial dealings with a client and undisclosed dual agency based on his attorney threatening to withdraw on the eve of trial and because his attorney offered to reduce his fees by \$10,000 to induce settlement. The court noted that counsel was not a party to the dispute and would not benefit from settlement; nor was there any suggestion of counsel conniving with the other party. Appellant also raised constitutional challenges to the confidentiality of mediation, asserting that the mediator would back up his claims, but the court found that no testimony was excluded due to mediation confidentiality.

[Chan v. Lund](#), No. H034196 (Cal. App. 6th, September 29, 2010)

Counsel's Apparent Authority Sufficient to Enter Binding Oral Settlement Agreement Following Mediation in Connecticut

The Supreme Court of Connecticut upheld the enforceability of an oral settlement agreement reached between counsel for the parties in a complex, multi-party case, based on apparent authority that was established in part by counsel's role in mediation. The Court analyzed at length counsel's apparent authority to both negotiate the settlement and agree to the final terms, but did not raise or discuss the confidentiality of the mediation process.

[Ackerman v. Sobol Family Partnership, LLP](#), SC 18288, SC 18289 (Conn., September 28, 2010)

Ontario Appellate Court Penalizes Refusal to Mediate

The Ontario Court of Appeals imposed a \$40,000 penalty on an insurance company for refusing to mediate a personal injury case it considered to be outside the statutory requirement for mediation. The lower court found that the case was within the statutory threshold, but accepted the insurer's position as legitimate. However, the appellate court took a harder line in imposing the penalty and emphasized the requirements of participating in mediation and attempting to settle expeditiously.

[Law Times](#) (October 18, 2010)

Publicizing Mediation Briefs Not Protected as Official Proceeding or Free Speech Under Anti-SLAPP Laws

Mediation Quote:

"[T]he best way for parties to better understand each other's perspectives is to meet face-to-face.... It can be very difficult for parties to hear what the others have to say.... But a skilled mediator can help them learn how to listen to each other – even if they strongly disagree – and to express themselves in a way that makes it more likely that they will be heard. A mediator may also be able to accomplish some of this even when meeting with parties in separate sessions, but it's far less likely. There is simply no substitute for *seeing* that your adversary understands your point of view, rather than having the mediator *tell* you it's so."

Robert Mnookin,
Bargaining with the Devil: When to Negotiate, When to Fight
(Simon & Schuster 2010)
at 238

Check These Out:

Students Flock to Mock Mediation Competitions

- The International Chamber of Commerce (ICC) is holding its 6th

A California appellate court concluded that posting confidential mediation briefs on the internet is not protected under the state's anti-SLAPP laws, so claims of defamation were not stricken. The anti-SLAPP statute is designed to prevent chilling of the constitutional rights of freedom of speech and petition in connection with a public issue, and protects any statement made before judicial or other official proceedings. The court determined that mediation briefs are not covered because mediation, like arbitration, is a private contractual process rather than an official proceeding, and in any case the posting of the mediation briefs was long after the mediation so the posting had nothing to do with the mediation process. Further, the court concluded that the posting was not protected speech and does not concern an issue of public interest by merely providing information to the public about whether to purchase a particular property.

[Driver v. Hussein](#), No. A126534 (Cal. App. 1st, October 1, 2010)

Google Settles Buzz Class Action for \$8.5 Million in 14-Hour Mediation

Class action litigation against Google over the privacy provisions of its Buzz social-networking application was resolved in a 14-hour long mediation, with a plan for Google to donate \$8.5 million (less plaintiffs' legal fees) to Internet privacy and education organizations. Google also modified its privacy provisions to the satisfaction of plaintiffs. Members of the plaintiff class will provide recommendations of possible recipient organizations for Google to review and formulate into a formal proposal for the court's final approval.

[The Harvard Crimson](#) (September 7, 2010); [PCMag.com](#) (September 3, 2010)

Tulsa Mayor and City Council Continue to Sort out Process to Address Disputes Between Them

While the mayor of Tulsa, Oklahoma continues to favor formal mediation to resolve pending legal issues and other disputes with the City Council, the council has concluded that it should only participate in facilitated open meetings in order to comply with the Oklahoma Open Meeting Act. An earlier plan for council members to meet in smaller closed groups to determine the ground rules for an open meeting has been rejected as improper circumvention of the Open Meetings Act. Potential issues include a criminal probe, actual and threatened litigation and an ethics complaint, but the mayor is awaiting communication about the exact purpose of the open meeting. The mayor says he is likely to attend, but is concerned about the posturing, cheap shots and criticism that are likely at open meetings.

[Tulsa World.com](#) (September 4, 2010)

Other Notable Cases & Proceedings

- The parties to a California real estate transaction agreed that an unsuccessful "informal" mediation was not sufficient to satisfy the mandatory mediation clause in the standard form residential real estate contract and that a professional mediation was needed. The California trial court then set a mediation deadline for the second, professional mediation. [Reilly v. Cowitt](#), No. B220439 (Cal. App. 2d, October 5, 2010)
- Duke University is in mediation with its insurer, American International Group, seeking to settle litigation over reimbursement for Duke's costs from confidential settlements the school entered into with three members of the lacrosse team who were falsely accused of raping a stripper. A lawyer in the case stated in 2008 that AIG had offered \$5 million to Duke. [Bloomberg](#) (October 11, 2010)
- The Boy Scouts of America have reached settlements in mediation with six men who claimed to have been sexually abused as members of an Oregon troop in the 1980s. A jury awarded one of the men \$19.9 million in April, which the Scouts intended to appeal but have now settled. [The New York Times](#) (September 1, 2010)
- The Archdiocese of Milwaukee has agreed to mediation of 12 fraud

International Mediation Competition from February 4-9, 2011.

[FinChannel.com](#) (October 8, 2010)

- The International Competition for Mediation Advocacy (ICMA) is an annual educational event for law students from around the world. The ICMA competition will be held in Toronto in March 2011. [Advocates in Mediation](#) (October 27, 2010)
- The first International Alternative Dispute Resolution Mooting Competition has been held in Hong Kong with eight teams from various parts of the world. The competition involved an arbitration followed by mediation, in order to expose students to both processes. Murdoch University in Australia placed first, but the Hong Kong team from City University came in second, ahead of Harvard and Tsinghua. [The](#)

- lawsuits by sexual abuse victims who claim that the archdiocese withheld information about priests who sexually abused minors, enabling the priests to abuse again. The archdiocese has paid \$30 million so far in other sex abuse settlements. [The Badger Herald](#) (October 13, 2010)
- Despite calls by the Federal Communications Commission, a U.S. Senator and others for the parties to enter into mediation, a dispute over carriage rates between Fox and Cablevision left three million New York-area consumers without favorite shows and baseball playoff games for two weeks. [CNBC](#) (October 31, 2010); [Fierce IPTV.com](#) (October 27, 2010); [Trading Markets.com](#) (October 19, 2010); [TV Latest](#) (October 16, 2010); [New Tee Vee](#) (October 15, 2010); [The Wrap](#) (October 14, 2010)
 - The Tribune Co., owner of The Chicago Tribune, Los Angeles Times and other dailies and TV stations, has reached agreement in mediation and is filing a reorganization plan in its bankruptcy proceedings with the backing of senior lenders and unsecured creditors. [Courthouse News Service](#) (October 19, 2010)
 - Bankrupt Nortel Networks is turning to a Los Angeles mediator who charges \$1,000 an hour and a retainer of \$100,000 for prep and five days of mediation in order to divide up \$6 billion of assets in its bankruptcy proceeding. [Ottawa Citizen](#) (October 13, 2010)
 - Mediation was used in an effort to resolve the dispute between the Western Athletic Conference and Nevada and Fresno State, both of which sought to leave the WAC for the Mountain West Conference, and agreement was reached. In another matter, mediation resulted in a settlement between Nebraska and the Big 12 Conference on October 12, 2010. [Star Advertiser.com](#) (October 12, 2010); [The Collegian](#) (October 28, 2010); [RGJ.com](#) (October 13, 2010)

[Standard](#)
(September 7, 2010);
[International
ADR Mooting
Competition
Website](#)

- Brenau University hosts its 8th annual intercollegiate mock mediation competition in Gainesville, Georgia, with six teams from Georgia, Tennessee and North Carolina. A national tournament will follow at Drake Law School in Des Moines, Iowa. [PR Web.com](#) (September 28, 2010)

Settlement Videos as Mediation Tool

Plaintiffs' counsel urges preparation of a settlement video – including day-in-the-life footage – in every personal injury and similar case that is significant enough to merit the cost, which ranges from thousands to tens of thousands of dollars. Preparation of the video should be considered from the beginning of the case, with taping of the accident scene and witness interviews all the way to expert testimony and depositions, using a videographer with real movie-making experience. Adjusters and opposing counsel can use the videos to get senior decision-makers to resolve cases.

[Law.com](#) (September 23, 2010)

Collection Agency in Mediation Clothing

NEWS & INITIATIVES:

Mediation Encouraged in California Environmental Quality Act Disputes

New legislation in California amends the California Environmental Quality Act (CEQA) to encourage mediation prior to filing litigation and to discourage frivolous lawsuits. The legislation, SB 1456, was enacted on September 29, 2010, became effective immediately, and sunsets on January 1, 2016. While mediation is optional, if pursued by the parties it tolls all limitation periods until the mediation is completed.

[JD Supra.com](#) (October 18, 2010)

Connecticut Requires Mediation in Medical Malpractice Cases

Mediation or another form of alternative dispute resolution is now required in medical malpractice cases in Connecticut. The presiding judge in the case or another judge will conduct the first mediation session. If the case does not settle at that session it is up to the parties whether to continue with mediation.

[U.S. Politics Today](#) (September 29, 2010)

North Dakota Expands Agricultural Mediation to Oil Exploration

The Agricultural Mediation Service of North Dakota has been authorized to expand beyond helping farmers, ranchers and their creditors to addressing disputes between landowners, producers and energy companies. While the mediation program is voluntary and requires agreement to participate by both sides, the

leading oil and gas industry organization in the state, the North Dakota Petroleum Council, is encouraging its members to use mediation to maintain strong relationships with surface owners.

[Grand Forks Herald](#) (October 11, 2010)

Missouri Proposes Mandatory Mediation for All Large Civil Cases

A commission of the Missouri Supreme Court has issued a report proposing revisions to the state's mediation rule, including court-ordered mediation in all civil cases with a demand over \$25,000. The commission also considered the Uniform Mediation Act, but proposes merely to clarify the state's current rules on admissibility and confidentiality. While recognizing that mandatory mediation may be a challenge in rural areas where mediation is less common, the commission was influenced by the national trend towards mediation. The commission began with surveys that showed a high level of use and satisfaction with mediation in Missouri and a majority favoring court-ordered mediation in all cases. The commission is seeking input on its proposals by early December and expects the Court to act by next summer.

[All Business](#) (September 26, 2010)

Update on Home Foreclosure Mediation

- Mediation programs addressing home foreclosures are well under way in Florida, but the groups administering the programs often have trouble getting through to distrustful homeowners who may not recognize the court-sponsored program and receive many letters and calls from other groups seeking to sell services. While 5,700 mediations have been completed in the Miami-Dade program since it began in May 2009, fewer than half of eligible homeowners participate in mediation. Mediation is free to homeowners in Florida, with lenders paying the entire \$750 mediation fee. The mediation program in Florida's 5th Judicial Circuit began on July 1 and has received about 200 referrals. [Miami Today News](#) (September 9, 2010); [Ocala.com](#) (September 24, 2010)
- Connecticut reported statistics for its Foreclosure Mediation Program showing that in the last fiscal year about 21,000 cases were eligible for mediation, but homeowners chose to proceed with mediation in just under 10,000 or 47% of them. [Program Statistics](#); [KarlBayer.com](#) (September 22, 2010)
- Cuyahoga County, Ohio launched a free home foreclosure mediation program two years ago and reports a 72% success rate. The program has assisted about 3,800 homeowners with settlements. A new mediation program in Holmes County, Ohio is also showing good results after half a year, not only with home foreclosures, but civil and domestic cases as well. The Holmes County program relies on private mediators, with the parties covering the mediators' fees. [WKYC.com](#) (October 22, 2010); [The-Daily-Record.com](#) (September 30, 2010)
- Foreclosure mediation is off to a slow start in Maryland under the state statute which took effect July 1. In the first three months only 130 borrowers took advantage of the program, while the state expects more than 4,000 mediations in the first year. Requests began to pick up in September, just as national banks began temporarily halting foreclosures due to documentation problems. [Washington Examiner](#) (October 12, 2010)
- The Pennsylvania Supreme Court is requesting county courts in the state to consider adopting mediation programs to help deal with the large number of home foreclosure cases in the courts. Philadelphia and eight other counties in the state already have foreclosure mediation programs in place. The Administrative Office of Pennsylvania Courts expects the foreclosure problem in the state to get worse before it improves. [The Philadelphia Inquirer](#) (September 13, 2010)

Calling itself a "mediation firm that specializes in commercial collections," United Mediation Services states in its materials that it is a collection agency. But the firm asserts that it is different because it only uses certified debt mediators and requires its collectors to complete a mediation certification program. [PR.com](#) (October 2, 2010)

Other Cases & Resolutions:

- New Zealand's prime minister offers mediation by the government to resolve a labor dispute that could hold up filming of Peter Jackson's *The Hobbit* movies. [CBC News](#) (October 4, 2010)
- The parties in foreclosure proceedings against the tallest skyscraper in Newark, NJ are heading to mediation. [NJ.com](#) (September 27, 2010)
- After two years of little progress, the Ukiah City Council and Ukiah Valley Sanitation District are paying a facilitator \$31,000 to assist with administrative issues and help identify issues that need mediation. [Ukiah Daily Journal](#) (October 2, 2010)
- A mother received a \$1 million mediation settlement for injuries in deck collapse. [Northwest Herald](#) (October 1, 2010)
- A Pennsylvania school district agreed

- Utah will consider legislation this year that would give homeowners facing foreclosure the right to request mediation with their financial institutions in order to seek a loan modification or other relief. Utah is among the top ten states with the highest foreclosure rates in the country. [ABC4.com](#) (September 28, 2010); [KSL.com](#) (October 11, 2010)

British Culture Minister Seeks Mediation Service to Address Online Privacy

The British Secretary of State for Culture, Communications and Creative Industries is proposing a new mediation service to give an additional means of redress to consumers concerned about breaches of online privacy or seeking to get inaccurate personal information removed from the internet. The Minister is also pushing an updated code of internet conduct and seeking to meet with internet service providers and other key players to encourage their participation.

[Guardian.co.uk](#) (November 3, 2010); [Telegraph.co.uk](#) (November 2, 2010)

Significant Increases in UK Alternative Dispute Resolution Reported

A detailed report by TheCityUK concludes that mediation and arbitration have risen sharply in the UK over the last two years following the financial crisis. The report states that the total number of disputes resolved by mediation and arbitration in the UK increased by 78% to nearly 35,000, while the number of disputes involving international parties rose by 59% to 5,300. TheCityUK is an independent body which was established in May with support from the government's City of London Corporation.

[LegalWeek.com](#) (September 21, 2010); [Report: Dispute Resolution in London and the UK 2010](#)

Other International Mediation Developments

- The Law Society of **Northern Ireland**, which represents 2,000 solicitors, is promoting commercial mediation to the business community as well as its own members; it also provides training to solicitors interested in becoming commercial mediators. [Belfast Telegraph](#) (October 22, 2010)
- **Ireland's** main state mediation body, the Labour Relations Commission, cannot cope with the explosion of worker-employer disputes caused by record job losses, with filings nearly doubling since 2007. [Irish Independent](#) (September 23, 2010)
- The **Irish** Medical Council, which found 13 doctors guilty of professional misconduct last year, for the first time referred two cases to mediation with the consent of both complainant and doctor. [Irish Examiner](#) (October 4, 2010)
- Mediation led by a politician and shown live on television and the internet left both sides claiming that their positions had been strengthened at the end of the first day. The dispute involves a highly controversial rail project that would demolish most of the old train station in Stuttgart, **Germany**. [DW-World.de](#) (October 22, 2010)
- **Russia** has instituted financial mediation through appointment of a financial ombudsman to increase confidence in Russian banks. [Russia & India Report](#) (October 27, 2010)
- **Rwanda** is increasingly using mediation to resolve land disputes, with 75% reductions in land disputes in districts with trained local leaders. [All Africa.com](#) (October 11, 2010)
- Facing a litigation backlog that would take 30-40 years to resolve in the courts, **Sri Lanka** has amended its Mediation Boards Act to increase tenfold the maximum size of cases in which mediation is mandatory. [Daily Mirror.lk](#) (September 28, 2010)
- **Singapore** is launching a mediation program early in 2011 covering workplace disputes of up to S\$20,000 (US\$15,500) by managers, executives and professionals, while larger disputes will still require

in mediation to pay \$610,000 to settle claims by two students that the school spied on them by secretly activating the web cams on their laptops. [UPI.com](#) (October 12, 2010)

- Australia's biggest sexual harassment case against a department store group, nine directors and the former chief executive ended with a mediated settlement of \$850,000.

[SMH.com.au](#) (October 16, 2010)

- Actor-singer Jamie Foxx will mediate a personal injury claim by a waiter who cut his hand at Foxx's party and so cannot become a brain surgeon. [Beverly Hills Courier](#) (October 1, 2010)

Other News & Initiatives:

- Parties are increasingly representing themselves in court, raising numerous challenges for the justice system, some of which are addressed by increased mediation at all judicial levels. [Nashua Telegraph.com](#) (September 26, 2010)
- The Phoenix police department plans to implement a program for mediation of resident complaints against police officers which involve rude behavior, cultural insensitivity and other types of non-violent misconduct. [AZ](#)

- litigation. [The Timaru Herald](#) (October 23, 2010)
- The Chief Justice of **Malaysia** issued a Practice Direction to the judiciary to encourage mediation, giving parties the option of free court-assisted mediation or private mediation at a set cost to the parties. [The Star Online](#) (October 29, 2010)
 - The annual report of the Victorian Small Business Commissioner in southern **Australia** states that mediation for small retailers had an 80% success rate last year. [Herald Sun.com.au](#) (September 29, 2010)
 - The Supreme Court of the **Philippines** is awaiting a report from a mediation panel which has not yet resolved the complex land disputes between farmers and the company of the President's family; the Court may extend the time for mediation. [Business World](#) (October 20, 2010)
- [Central.com](#) (October 5, 2010)
- Pending state legislation in Tennessee would require "binding mediation" – apparently a med-arb process – if the county commission refuses to approve school budgets, in which a neutral would help the parties negotiate, but if necessary would impose a settlement. [The Daily News](#) (October 9, 2010)
 - Oregon is considering legislation that would include a mediation program covering mobile home parks to address landlord-tenant disputes. Mediation costs would be covered by a \$5 a year fee paid by each tenant and an equal amount paid for each unit by landlords, which would generate \$600,000 annually. [Upper Rogue Independent](#) (September 20, 2010)
 - Craft retailer Hobby Lobby is collaborating with Peacemaker Ministries to develop a biblically-based mediation program to address workplace conflict. Hobby Lobby is offering the program to its managers on a voluntary basis, while the Oklahoma Business Ethics Consortium is offering the training to other business leaders. [NewsOK.com](#) (October 10, 2010)
 - Increasing use of

contractors leads the
EEOC to conclude
that federal agencies
and private
contractors are
sometimes "joint
employers,"
permitting a range of
mediation services
and other benefits
which are normally
limited to employees.
[The Washington Post](#)
(October 25, 2010)

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September 2010

CASES & RESOLUTIONS:

California Commercial Liability Insurers Must Defend Mandatory Pre-Complaint Processes

A California appellate court concluded that a Commercial General Liability insurer must defend its insured against proceedings required by California's Calderon Act. Calderon proceedings require common interest development associations to engage in extensive dispute resolution efforts prior to filing a complaint for construction or design defects. The appellate court concluded that the Calderon Process is an integral part of construction defect litigation even though it cannot result in a judgment, so the insurer must provide a defense. The court noted that the standard insurance form definition of "suit" was expanded to include alternative dispute resolution in 1988, but the insurer's definition of "suit" at issue was limited to ADR proceedings to which it consented. Since the court found coverage was required by the more general definition of "suit," it did not reach whether the mandatory ADR requirements of the Calderon Act would satisfy the "consent" term in the policy.

[Clarendon America Ins. Co. v. StarNet Ins. Co.](#), No. G042353 (Cal. App. 4th Dist., July 27, 2010); [Morgan Lewis.com](#) (August 23, 2010)

Ninth Circuit Affirms that Confidentiality Provisions Shield Alleged Legal Malpractice During Mediation

The U.S. Court of Appeals for the Ninth Circuit affirmed the Oregon district court's grant of 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 Oregon's mediation confidentiality statute. The appellate court concluded that there is no confidentiality exception for clients to challenge their attorney, and without the confidential mediation communications there was no evidence of legal malpractice.

[Fehr v. Kennedy](#), No. 09-35768 (9th Cir., July 16, 2010)

Eleventh Circuit Construes Mediation Confidentiality Narrowly

The U.S. Court of Appeals for the Eleventh Circuit upheld an award of attorneys'

Mediation Quote:

"Someone defined a novel as 'a lie in search of the truth.' Similarly, the stories people tell about their conflicts usually reveal the metaphoric truths they have hidden within their lies. Dangerous mediation consists not of confronting the lie, but instead of treating it as a metaphor and an excuse to ask deeply honest questions. We can, for example, treat someone's lie about a successful career as an honest statement of shame and fear of failure."

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

Check These Out:

CPR's Model Civil Litigation Prenup Requires Mediation
The Economical Litigation Agreement (or "litigation pre-nup") is a hybrid of arbitration and litigation which has been introduced by the International Institute for Conflict Prevention &

fees based in part on the fact that defendants did not offer to settle, despite plaintiff's objection that such information should not have been disclosed from the mediation between the parties. However, the Circuit Court held that the applicable mediation confidentiality rules (M.D. Fla. L. R. 9.07(b)) only prevent statements made by a mediation participant from being used against the interest of that participant. In this case, the court did not rely on any statement of plaintiff during the mediation.

[Angiolillo v. Collier County](#), No. 10-10895 (11th Cir., August 25, 2010)

Federal Court Awards Costs for Failure of Corporate and Insurance Reps to Attend Mediation

A federal trial court in South Carolina sanctioned defendants for not having a corporate representative present at mediation, as required by local rule, and for having an insurance representative only participate by telephone without permission of the court. The court awarded full travel expenses, attorneys' fees and mediation fees, as well as \$2,000 of the \$7,500 asserted as lost income by plaintiff for attending the unsuccessful mediation.

[Barnhouse v. Wild Dunes Resort, LLC](#), No. 2:08-CV-2546 (D.S.C., August 5, 2010) (Subscription Required)

Course of Multi-District Litigation Modified for Ongoing Mediation

While the pretrial stage of the Multi-District Litigation (MDL) over whether AstraZeneca's antipsychotic drug Seroquel causes diabetes has been completed, the MDL Panel vacated orders to send thousands of cases back to their originating courts after the mediator appointed by the court raised concerns that ending the MDL process would disrupt ongoing settlement discussions. AstraZeneca announced on August 9 that it had settled with 17,500 claimants for a "modest" \$198 million or only a little over \$11,000 per plaintiff, which won't affect its 2010 profit forecast. It previously settled with others, but has about 6,000 suits still pending out of the 26,000 initially filed. Counsel for most of the 6,000 remaining plaintiffs stated that his clients won't settle for so little.

[ABC News.go.com](#) (August 9, 2010); [Business Week.com](#) (September 1, 2010)

Federal and State Judges Collaborate to Reach Settlements in Multi-District Vitamin Dispute

A Georgia state judge with many dozens of cases involving Total Body Formula liquid supplements worked with the Alabama federal judge responsible for the corresponding federal Multi-District Litigation to streamline the litigation process and move towards settlement. The two judges held a mediation conference in which 222 cases settled, and appointed a special master to assess individual claims and assign a monetary value. Not all of the cases settled; the state judge is now scheduling trials for about 40 remaining cases.

[Law.com](#) (August 25, 2010)

Resolution and a Boston litigator to rationalize discovery and reduce litigation costs and hassles. It is intended to be inserted in contracts in place of arbitration clauses. The prenup contains a tiered dispute resolution approach, first requiring direct negotiation, followed by mandatory mediation, after which more formal processes can be pursued if necessary.

[CPR](#) (August 2010)

Survey Finds Lawyers – Especially Men – Overconfident in Predicting Case Outcomes

A survey by a University of California-Irvine psychologist and law professor, along with other academics, found that lawyers – especially men – tend to be overconfident in predicting case outcomes. Overall, 44 percent of lawyers were less successful than they predicted, negatively influencing case strategies. Notably, accuracy of predictions was not enhanced by practice experience. The researchers suggest that lawyers should seek third party feedback on their cases.

[ABA Journal](#) (May 11, 2010); [Research Paper \(American Psychological Association, Psychology, Public Policy & Law\)](#) (2010)

Evidence Held Back During Oksana-Mel Mediation

Sources state that Oksana Grigorieva did not make an issue of her black eye or reveal photos of it during a two-

Mass Litigation Judges in Massey Pollution Case Dual Track Litigation and Mediation

A five-judge panel handling the long-delayed mass litigation against Massey Energy Co. for pumping coal slurry underground which allegedly poisoned drinking wells has set a trial date of August 1, 2011 and warned attorneys to clear their schedules for two months. While litigation moves forward, two of the judges will hold a mediation day on November 15 to try to reach settlements, requiring every plaintiff to be present and every attorney to appear with the authority necessary to settle. The judge chairing the panel has committed to moving at full speed on both tracks, pursuing both mediation and litigation.

[Businessweek.com](#) (August 20, 2010)

Colorado Court Approves Mediated Settlement of Trust Dispute over Objection of Beneficiary

At the conclusion of a mediation among family members which resolved a dispute over a trust, each party signed a settlement stipulation, with the siblings' attorney signing for a sibling who participated only by telephone. The absent sibling later stated that he did not agree to the settlement, and his attorney scratched out his name. The trial court concluded that the signature of the absent sibling's attorney was consistent with and indicative of the sibling's agreement, and his attorney would not have signed the stipulation without authority. On appeal, the Colorado appellate court affirmed the lower court, concluding that the litigation was a derivative action on behalf of the trust, so there did not need to be unanimity among the settling beneficiaries as long as the settlement was just and reasonable.

[Saunders v. Muratori](#), No. 09CA1645 (Colo. App., August 19, 2010)

Court-Ordered Mediation Precludes Oral Settlement Agreement

A Missouri court of appeals reversed the trial court's enforcement of an agreement not signed by the plaintiff, noting that, while oral settlement agreements are enforceable under Missouri common law, the rules for court-ordered mediations require settlement agreements to be written and signed to be enforceable, and that mediation confidentiality rules also would prevent enforcement of an oral agreement. The appellate court further stated that voluntary mediation proceedings not covered by court rules might permit oral settlement agreements.

[Williams v. Kansas City Title Loan Co.](#), Nos. WD 70941, WD 70969 (Mo. App., July 13, 2010)

Mediator's Declaration About Length of Settlement Agreement Inadmissible

A California appellate court concluded that a mediator's declaration about the number of pages in a settlement agreement and recounting his actions to copy and distribute the final agreement should not have been allowed at trial under California's mediation confidentiality statute. However, admitting the mediator's declaration was harmless error because other evidence provided a sufficient basis

day mediation with Mel Gibson, supposedly because she had more than enough other damning details, such as the secretly recorded telephone rant. Gibson ended up offering \$15 million, which initially was accepted, but ultimately was not sufficient to reach resolution.

[TMZ.com](#) (July 29, 2010); [American Superstar](#) (September 2, 2010)

Other Cases & Resolutions:

The University of South Florida and an academic advisor resolved claims of racial discrimination in mediation, with her return to a new position. [The Ledger.com](#) (August 23, 2010)

Following several bellwether trials, the federal judge ordered mediation for the Knauf Chinese drywall cases, urging the parties to consider global settlements rather than individual resolution of claims. [Nola.com](#) (August 23, 2010)

China Shenghuo Pharmaceutical settled a class action in New York through mediation. [Reuters.com](#) (August 16, 2010)

Terra Firma and Citigroup will mediate in New York in September over the £4.2 billion EMI deal. [Alt Assets.com](#) (August 19, 2010)

Whatcom County,

for the court's conclusion.

[Radford v. Shehorn](#), No. B216323 (Cal. App. 2d Dist., August 19, 2010)

Tulsa Mayor and City Counsel Jockey over Mediation of Disputes Between Them

The mayor of Tulsa, Oklahoma and the City Council are embroiled in numerous disputes between them and are discussing mediation as a possible avenue for resolution. The current list of nine potential agenda items for mediation includes a criminal probe, actual and threatened litigation and an ethics complaint. A former Oklahoma Supreme Court justice and another retired judge are being considered to act as co-mediators. The City Council is taking a formal vote on whether to mediate the disputes. How the Oklahoma Open Meeting Act would impact the mediation is also being analyzed. The former justice emphasized the importance of mediation confidentiality, but stated that confidentiality is consistent with the Open Meeting Act as long as the mediation only discusses proposals, with the Council publicly voting on whether to mediate and on the issues to be mediated, and then publicly explaining, justifying and voting on any resolution at the end of the process.

[Tulsa World.com](#) (July 31, 2010); [Tulsa World.com](#) (August 18, 2010); [Tulsa World.com](#) (August 24, 2010)

Other Notable Cases & Proceedings

- Skilled Healthcare and plaintiffs reached a settlement in mediation, following a \$671 million jury verdict for improperly staffing 22 nursing homes. The \$671 million verdict is the largest jury award in the U.S. this year and exceeded the policy limits of the company's insurance. Skilled Healthcare agreed not to file for bankruptcy during the mediation period. The settlement must be approved by the court. [Business week.com](#) (July 15, 2010)
- Hemispherx Biopharma announced that it had reached agreements through mediation to settle all securities class action cases against it, which had been consolidated in federal court in the Eastern District of Pennsylvania. [Reuters.com](#) (August 24, 2010)
- Mediation resulted in an offer of \$2.8 million for a brain damaged motorcyclist who was hit by a tractor-trailer with faulty brakes, but was refused, as were offers during trial of \$3.5 and then \$4.5 million. The case finally settled during the second week of trial for \$6.5 million, five years after the accident. [Reuters.com](#) (August 23, 2010)
- Successful mediation resolved litigation against the oversight board of the disbanded Metro Gang Strike Force brought by those claiming that the anti-gang unit had illegally seized their property or violated their rights. The settlement of \$3 million will be administered by a special master who will evaluate individual claims, with any leftover funds going to train law enforcement officers in community policing and racial and ethnic sensitivity. [Star Tribune.com](#) (August 25, 2010)
- A Michigan county is seeking mediation as mandated by their design/build contract for a \$7.8 million septage treatment plant that partially collapsed and handles only half the expected volume. The engineering firm is seeking a negotiated solution without the costs of mediation and legal fees, but says a cash settlement is premature. [Record-Eagle](#) (August 29, 2010)
- Mediation between hip-hop star Kanye West and rap mogul Suge Knight, in which a judge permitted West to participate by telephone because of a business commitment outside the continental U.S., was not successful in

Washington officials are seeking help from the Bureau of Indian Affairs for mediation with the Lummi Nation over charges for a ferry dock. [KGMI.com](#) (August 26, 2010)

The city of Menasha, Wisconsin is mediating federal securities litigation claims of bondholders relating to the Menasha Utilities steam plant. [Trading Markets.com](#) (August 28, 2010)

Court-ordered mediation failed to resolve a major antitrust dispute between Nielson and Sunbeam Television. [Research-Live.com](#) (August 31, 2010)

Opponents hope mediation can resolve disputes swirling around the board of a charter school. [The Pilot.com](#) (August 11, 2010)

The state of Ohio and an Ohio county are entering mediation over the funding formula for mental health support in an attempt to avoid further litigation. [Dispatch Politics.com](#) (August 26, 2010)

An Indiana court will order a billionaire's widow to mediate with his daughter over disposition of his estate. [IBJ.com](#) (August 10, 2010)

An Australian court ordered a billionaire's widow to mediate with his mistress over disposition of his estate. [HeraldSun.com.au](#) (September 2, 2010)

resolving million dollar claims against West for not having better security at a party he hosted at which Knight was shot and robbed. [Google.com](#) (August 18, 2010); [Ace Showbiz.com](#) (August 27, 2010)

- In a legal malpractice case, plaintiffs argued that their lawyer did not make them aware of the difference between mediation and arbitration, and that the lawyer negligently advised them to sign an arbitration agreement without making them aware it was binding. The Supreme Court of Vermont upheld the lower court's summary judgment for defendant, finding that plaintiffs did not meet their burden of proof because their claim was not supported by expert testimony or even their own sworn statement. [Clayton v. Unsworth](#), No. 2009-334 (Vt., August 26, 2010)
- Federal judges have dismissed three lawsuits against car dealerships because the contracts contained mediation and arbitration clauses covering so-called yo-yo sales in which financing fell through and consumers were required to return cars. [Hampton Roads.com](#) (August 27, 2010)
- Archbishop Dolan, head of the Roman Catholic Church in New York, said he would be pleased to mediate between proponents and opponents of the proposed Islamic center and mosque planned near Ground Zero. [New York Times.com](#) (August 18, 2010)
- The Cuban government agreed to release 52 political prisoners through the mediation efforts of the Church, negotiations by the Spanish Foreign Minister and a hunger strike that began in February. Half of the promised number have been released thus far. [France 24.com](#) (August 8, 2010); [Zenit.org](#) (August 23, 2010)

NEWS & INITIATIVES:

Five NYC Hospitals Participating in Federally-Funded Mediation Program

Five New York City hospitals have agreed to participate in a three-year mediation pilot program, which is receiving \$3 million in federal funding. Under the program, hospitals will admit medical mistakes early, offer settlements more quickly and use special "health courts" in which judges will be available to mediate disputes. The goal is to cut medical-malpractice costs and reduce the \$1.4 billion spent on medical premiums in New York state each year.

[The Wall Street Journal](#) (July 23, 2010)

Medical Liability Cases Often Settle Through Negotiations

An American Medical Association survey of 5,800 physicians indicates that about one-fourth of all medical liability litigation filed against doctors is settled, with 4.5% using alternative dispute resolution. Only 5% of lawsuits against physicians make it to trial, where doctors win 90% of the time. A full two-thirds of all cases against doctors are dismissed or withdrawn. However, the cost of defending even cases dismissed or withdrawn was over \$20,000, while the cost of trials averaged over \$100,000.

Other News & Initiatives:

Mediation by the Federal Reserve Bank of Atlanta and the Federal Reserve Bank of Boston has led to surprising progress and consensus on mobile-payment technologies by a group of about 20 representatives from leading players in telecommunications and electronic payment. The first meeting was in January, followed by sessions in May and July, with another set for October. The group has overcome hobbling disagreements and is now collaborating on a paper to be circulated to the financial and telecom industries. [Digital Transactions.net](#) (July 27, 2010)

The Small Business Association recently modified its regulations covering appeals before its Office of Hearings and Appeals, including two provisions to encourage greater use of alternative dispute resolution. The first adds Sec. 134.216(b) to permit a judge to offer ADR to the parties at any time. The second provision adds Sec. 134.216(c) to permit designation of either a judge or an OHA attorney to serve as an ADR neutral. Other clarified provisions which address mediation are in section 134.804-807. [Federal Register.gov](#) (August 6, 2010)

The federal Agricultural Credit Act of 2010 was

[Amednews.com](#) (August 16, 2010)

MSHA Returning to Mediation in Effort to Streamline Citation Process

The Mine Safety and Health Administration is beginning a 90-day test period in which it is returning to greater use of mediation to resolve factual disputes relating to citations, rather than requiring a formal appeal to be filed. Reinstating the "safety and health conferences," which were eliminated in 2007 partly due to criticism that they were too friendly to industry, should help stem the backlog of 89,000 cases pending before the Federal Mine Safety and Health Review Commission, which has attracted Congressional scrutiny. The pilot program would allow both mine operators and miner representatives to participate in the conferences, and may make the agency's enforcement more efficient.

[Platts.com](#) (August 24, 2010)

Update on Home Foreclosure Mediation

- **Nevada** has reported on the first year of its Foreclosure Mediation Program, with state officials asserting that the program is working. The report indicates that 43% of homeowners who completed the mediation process stayed in their homes under agreements with their lenders. However, critics are concerned that many of the resolutions are temporary, 90-day agreements that merely delay foreclosure. In the first year, there were 90,000 notices of default in Nevada, with about 11,700 borrowers requesting mediation, and 3,860 completed mediations. [RGI.com](#) (July 29, 2010)
- **Florida's** Residential Mortgage Foreclosure Mediation Program is finally under way, with each judicial district independently selecting program managers to operate the mediation program in compliance with rules set by the Florida Supreme Court. The Eighth Judicial Circuit selected the American Arbitration Association, while the Ninth Circuit selected the Orange County Bar Association. Mediators must be Florida Supreme Court-certified and specifically trained in residential mortgage foreclosure matters, so foreclosure training courses are being conducted to create a pool of qualified mediators. [Circuit8.org](#) (July 26, 2010); [Sun Sentinel](#) (August 18, 2010) (Subscription Required)
- **Maryland's** foreclosure mediation law took effect on June 30, leading lenders to shift a significant number of foreclosure filings prior to that date. Lenders must now pay a \$300 fee with each foreclosure request, which goes into a state fund for mediation and related programs. Lenders must also provide information to homeowners about their new options under the law, including mediation. If homeowners wish to mediate, they must respond within 15 days and pay \$50. Thus far only a handful of homeowners has requested mediation, but that number is expected to increase. Mediations will be conducted by Maryland's Office of Administrative Hearings, which has hired and is training six additional administrative law judges. [Herald-Mail.com](#) (August 7, 2010)
- Advocates in **Utah** are seeking legislation that would require mandatory mediation between homeowners and lenders to try to negotiate loan modifications. A petition is calling for a law similar to Nevada or Florida. Utah is one of the ten states with the highest foreclosure rates in the country. [Fox 13 Now.com](#) (July 12, 2010)
- A \$600 million settlement reached through a long mediation resolves several class action lawsuits against Countrywide Financial Corp. The settlement is the largest to date in the **United States** of shareholder

enacted on August 16, 2010, authorizing appropriations through FY2015 for state agricultural mediation programs. [GovTrack.us](#) (August 16, 2010); [USDA Agricultural Mediation Program](#)

Poor economic conditions encourage development of mediation, as parties cannot afford to pay for less efficient methods of resolving disputes. Increasingly, mediation is attracting law firms and not just solo practitioners. [Memphis Daily News.com](#) (August 12, 2010)

litigation relating to the mortgage meltdown. An additional \$24 million will be paid by KPMG, Countrywide's outside accounting firm during the height of the boom. Countrywide remains the target of other litigation and investigations, including a civil case by the Securities and Exchange Commission, a criminal investigation by the Justice Department, and other actions by attorneys general for California and other states. [Sun Sentinel](#) (August 2, 2010); [Sun Sentinel](#) (August 18, 2010) (Subscription Required); [Orlando Business Journal](#) (July 9, 2010)

California County Mediation Services Consolidated After Funding Cuts

Marin County, California lost its independent Mediation Services program in July due to budget cutbacks. However, its caseload of landlord-tenant, neighborhood and community disputes is being consolidated in the District Attorney's office, which has mediated various disputes for 25 years. Mediation proponents doubt there is any way the DA can add 600 or more additional mediations each year, but the DA says that the transition will be as seamless as possible.

[Marinij.com](#) (August 5, 2010)

Pending Mediations Triple at Minnesota Farmer-Lender Mediation Program

A University of Minnesota study shows increased use of debt mediation among Minnesota farmers. As of the end of July, 488 farmer-lender mediations were pending in Minnesota, up from 133 a year earlier. Experts expect troubled farm loans to increase due to low livestock prices and the ongoing weakness of the economy. 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.

[Atlanta.Bizjournals.com](#) (August 21, 2010)

Mediation Expanding in China with New National Mediation Statute

China's highest legislative body, the National People's Congress, enacted the People's Mediation Law in late August, which will take effect on January 1, 2011. China has an extremely long tradition of mediating disputes and currently has nearly five million mediators working in over 800,000 mediation committees. Last year the mediation groups handled over 7.6 million disputes and resolved 97 percent of them. Even so, the legislation is seen as a milestone and is being reported as China's first national mediation law. The legislation is intended to clarify the rights of mediators and parties so that mediation may be used in increasingly complex and difficult disputes. The statute also makes clear that mediation agreements are legally binding and enforceable by a single party, and mandates that courts and police inform those in conflict about the potential for resolution through mediation.

CRIEnglish.com (August 29, 2010); English.Xinhuanet.com (August 30, 2010)

Other International Mediation Developments

- **Columbia** announced a mediation to be held in public between the government and Ingrid Betancourt, who seeks \$6.5 million for six years in FARC captivity before being rescued by Columbia's armed forces. [Colombia Reports.com](http://ColombiaReports.com) (July 12, 2010)
- Use of mediation is increasing in Belfast, **Northern Ireland** to address anti-social behavior, with reliance on two restorative justice groups. Human-Law.co.uk (August 3, 2010)
- The Supreme Court of **India** has referred a border dispute between the states of Assam and Nagaland to mediation, naming two mediators and specifying three mediation sessions. The case has been pending for 22 years; the mediators are to report back to the court in December. [Hindustan Times](http://HindustanTimes) (August 21, 2010)
- Following the success of the first three mediation centers established by the Delhi Dispute Resolution Society, the group plans an ongoing mediation awareness campaign; 16 additional mediation centers are planned for the nine districts of Dehli, **India**. [The Hindu.com](http://TheHindu.com) (July 12, 2010)
- A judge in **Indonesia** sent to mediation a lawsuit filed by citizens representing labor unions against President Yudhoyono and other government officials for failing to implement the 2004 National Social Security Law. [The Jakarta Globe](http://TheJakartaGlobe) (August 2, 2010)
- The Federal Court of **Australia** announced its procedures for identifying, selecting and appointing mediators to assist with native title land claims. PSNews.com.au (August 16, 2010)
- The Chief Justice of the Supreme Court of the **Philippines** stated during oral arguments that a special committee was being formed to try mediation to resolve complex land disputes between farmers and the company of the President's family. [Business World Online](http://BusinessWorldOnline) (August 24, 2010)
- The **Philippine** government saved over 2.3 billion pesos (over \$50 million) through use of village dispute mediator councils which successfully resolved about 80% of 300,000 disputes before them. [All Voices.com](http://AllVoices.com) (July 8, 2010)
- A **Hong Kong** court considered the relevant circumstances and imposed higher costs on a party for unreasonably refusing to mediate in Golden Eagle International (Group), Ltd. v. GR Investment Holdings, Ltd., as required by Practice Direction 31. [International Law Office.com](http://InternationalLawOffice.com) (August 10, 2010)

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MEDIATION NEWS

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July 2010

CASES & RESOLUTIONS:

Alabama Supreme Court Reduces Attorney's Fees for Obtaining Settlement in Mediation

The Supreme Court of Alabama concluded that the trial court had exceeded its discretion in approving attorney's fees of one-third of the settlement reached in mediation for the severe burns suffered by a disabled minor in the custody of the state. The lower court emphasized the rapid work by the attorney to marshal evidence and experts in order to provide three bound volumes of documents to defendants, along with preparation of a "day in the life" film shown at mediation, which led to a settlement of \$737,000, which was nine times the special damages. However, the Supreme Court noted the lack of time records from the attorney, the fact that he worked on the case for only fourteen weeks, and the willingness of defendants to engage in early mediation to minimize litigation costs. After a detailed analysis of many factors, the Supreme Court concluded that 20% would be reasonable as attorney's fees, which a dissenting justice argued was just as arbitrary as the higher percentage in the absence of time records.

[Madison Co. Dept. of Human Resources v. T.S.](#), No. 1081405 (Ala., May 28, 2010)

Court Approves Mediation Procedures in Lehman Brothers Chapter 11 Cases

The bankruptcy judge has approved mediation procedures for addressing contested claims involving Lehman Brothers Holdings Inc. and its affiliated debtors. The debtors have the option to select either mediation or merits hearings. If mediation is selected, sessions are to take place in New York at a location determined by the debtors, but parties may be able to participate by telephone. The parties are to agree on a mediator from a court-approved list. Mediation of claims must begin within 60 days after notice by the debtors and be completed within 120 days. The parties may seek to negotiate prior to the mediation; if the mediation is not fully successful, the parties may agree to resolve the remaining issues by binding arbitration, or else the court will hear the merits of the claim.

[Mondaq](#) (June 18, 2010) (Subscription Required)

Feinberg Selected as Independent Claims Administrator for BP Compensation Fund

As widely reported, Kenneth Feinberg has been appointed the independent claims administrator for the \$20 billion BP compensation fund for the extensive damages

Mediation Quote:

"Like leopards and lice, baboons and bacteria, lawyers in competition for resources adapt to circumstances and respond to incentives. At the same time, the societal institutions for the resolution of disputes – the environment in which lawyers practice – are also evolving. The process and the practitioners co-evolve."

Barry Goldman, *The Science of Settlement: Ideas for Negotiators* (ALI ABA 2008)

Check These Out:

Legislative Mediation Proposed for Congress

An editorial in the Washington Post entitled "Congress needs a mediation tool to dissolve gridlock" emphasizes the need to build consensus in Congress to avoid stalemates and the dysfunction that has resulted in approval ratings for Congress falling below 25 percent. The editorial emphasizes the importance of good process, and suggests

caused by its ongoing oil spill. BP has established more than 400 claim centers across the Gulf Coast and is also accepting claims through its website and by telephone. Feinberg will be paid by BP, although the amount is still being negotiated.

[Business week.com](#) (May 26, 2010); [Daily Finance.com](#) (June 20, 2010); [USA Today](#) (June 28, 2010)

Arizona County Hires Feinberg for Half-Million Dollars; Principals Object to Mediation

Maricopa County, Arizona has hired mediator Kenneth Feinberg – apparently at a cost of \$550,000 – in an attempt to resolve \$46 million in claims brought by four judges, two supervisors, a deputy county manager and others against the county for emotional distress and tarnished reputations caused by the unsuccessful probes and prosecutions of the Maricopa County Sheriff and former County Attorney. The Sheriff and ex-County Attorney, however, are objecting to the mediation, alleging that they are being “extorted” by the county with threats of personal liability if they do not cooperate in the mediation.

[AZ Central.com](#) (June 29, 2010); [AZ Central.com](#) (June 30, 2010)

Other Notable Cases & Proceedings

- A mediation session was held as ordered by the federal bankruptcy judge between the Texas Rangers and angry creditors. The mediation may effectively reopen bidding; the team is seeking to hold an auction. [USA Today.com](#) (June 25, 2010); [Blogs.Forbes.com](#) (June 28, 2010); [Google.com](#) (July 1, 2010); [Dallas Bizjournals.com](#) (July 7, 2010)
- After a year of mediation, the parties reached settlement with the buyer agreeing to pay Gilat \$20 million following the collapse of a \$475 million deal to purchase the company in 2008. [Globes.co.il](#) (June 28, 2010)
- Mediation has begun on who should pay the additional costs for construction of the \$318 million Northwest Florida Beaches International Airport. [News Herald](#) (June 20, 2010) (Subscription Required)
- Proponents and opponents of San Diego’s long-stalled \$228 million waterfront improvement plan have agreed to meet with a new mediator to seek consensus. [Sign on San Diego.com](#) (June 1, 2010)
- Mediation began in November 2008 over appropriate attorneys’ fees for prevailing plaintiffs’ counsel in the landmark Supreme Court case over DC’s handgun ban, which plaintiffs estimate at over \$3.5 million. The federal district judge encouraged the parties to consider additional mediation at a recent hearing. [Legal Times.com](#) (May 26, 2010)
- A wrongful death lawsuit against Phil Spector, a Rock and Roll Hall of Fame inductee, is headed to mediation. Spector is in prison for second degree murder of model/actress Lana Clarkson, whose mother brought the civil suit. [NBC Los Angeles.com](#) (June 18, 2010)
- After multiple mediation sessions, the Erie County Attorney and the U.S. Department of Justice are proceeding with litigation over suicide prevention issues at jails in the New York county. The County Executive estimates that \$386,000 was spent on the litigation prior to mediation, not \$1 million as stated by the County Comptroller. [Buffalo News.com](#) (June

establishing a politically neutral service to provide legislative mediation organized along the lines of the Congressional Budget Office. A legislative mediation service could enrich the policy debate by highlighting information in a nonpartisan manner. And when requested by legislators, mediation techniques could be used to help the parties understand their interests, generate possible solutions and help find common ground. [Washington Post](#) (June 18, 2010)

Commercial Mediation Competition

The International Chamber of Commerce (ICC) is holding the 6th ICC International Commercial Mediation Competition from February 4-9, 2011 at its headquarters in Paris. The competition is expected to attract at least 50 universities, along with scores of professional mediators who conduct the mock mediations and judge the students’ performance. Applications are being accepted through November 30, 2010. [ICC Competition](#)

Mediation on TV

In the fictional, but undoubtedly influential world of NBC’s *The Office*, a mediator is brought in to resolve a contract dispute between characters Dwight and Angela to produce a child. The mediator apparently determines the legitimacy of the contractual arrangement

2, 2010); [WGRZ.com](#) (April 28, 2010)

- Mediation is on track between the City of Los Angeles and more than 40 tenants over the higher rents demanded by the city. On the advice of the mediator, the city backed away from its demand that the higher rents be placed into escrow as a condition of mediation. [LA Downtown News.com](#) (July 2, 2010)
- An effort by Montreal, Maine & Atlantic Railway to abandon 240 miles of tracks in northern Maine is leading to mediation between the state of Maine, the Federal Surface Transportation Board and the Railway. The mediation is expected to be more productive than a scheduled federal hearing, and could help Maine's congressional delegation obtain federal funding to save the tracks. [Maine Biz.biz](#) (April 27, 2010)
- After years of litigation, the federal judge in the copyright case against Jammie Thomas has appointed a mediator to see if settlement can be reached. Jury damages against Thomas for copyright infringement of 24 songs were reduced by the court from \$1.92 million to \$54,000; Thomas rejected plaintiff RIAA's offer to settle if Thomas paid \$25,000 to a charity benefiting musicians. [Zeropaid.com](#) (June 22, 2010)
- Mediation continues between San Diego Gas & Electric Co. and critics of its revised plan to cut off power to avoid wildfires during extreme conditions. [Sign on San Diego.com](#) (June 28, 2010)
- The attention on the World Cup is being leveraged by unions in South Africa demanding higher wages, which mediation is attempting to address to avoid massive strikes in the country. [Business Week.com](#) (May 31, 2010)

NEWS & INITIATIVES:

Italy's Mandatory Mediation Statute Seeks to Resolve a Million Disputes a Year

Legislation in Italy requiring mediation prior to litigation of a broad range of civil and commercial disputes was enacted on March 20, but does not take effect until March 2011 so that mediators can prepare for the increased caseload. The procedures in the legislation meet the requirements of the European Directive on Mediation. If mediation is not successful, either party may file suit, but litigation costs may be withheld depending on whether the outcome of litigation differs from the terms of a mediator's proposal. The legislation is intended to reduce the backlog of 5.4 million civil cases in Italy and resolve at least a million disputes a year.

[Lexology.com](#) (June 21, 2010) (Registration Required); [Alternatives](#) (April 2010)

Other International Mediation Developments

- A farm consultancy firm in **Ireland** has launched a new mediation division to address all types of farm disputes, including succession, landowner/tenant, commercial leasing and debt recovery. [Independent.ie](#) (June 29, 2010)
- Five law firms in **Wales** are jointly offering mediation services to keep more dispute resolution work in Wales, as courts increasingly shift

between the parties who then reach a sexual solution to their conflict that may be rare in real life contract disputes. [Frothy Girlz.com](#) (May 15, 2010)

Other Cases & Resolutions:

Parties agree to mediate a flawed paternity-test dispute which allegedly kept father from child for a decade. [St. Claire Record.com](#) (July 2, 2010)

Dispute over frozen embryos between the donor couple and the recipient couple settled prior to a scheduled mediation. [Courthouse News.com](#) (May 14, 2010)

Circuit City and its largest creditors ordered into mediation by federal bankruptcy judge over final liquidation of assets. [Times Dispatch.com](#) June 24, 2010

Mediation is last opportunity for owners of the Newburyport's Crow Lane Landfill to resolve landfill closure procedures and costs with the state of Massachusetts in six year old litigation. [Boston Globe](#) (June 17, 2010) (Subscription Required)

State officials in Alaska are mediating dispute over flawed fast ferry engines which have been overhauled for \$5.2 million and may need to be replaced. [KCAW.org](#) (July 7, 2010)

The City of Tulsa and

towards mediation. [Wales Online.co.uk](http://WalesOnline.co.uk) (June 23, 2010)

- The Master of Rolls announced the publication of a Mediation Handbook as an authoritative U.K. source of information. Lexology.com (June 21, 2010) (Registration Required)
- Detailed information about mediation in twelve European countries (**Austria, Bulgaria, Czech Republic, England & Wales, Estonia, Greece, Hungary, Latvia, Poland, Portugal, Slovakia, and Sweden**) is available from the JAMS International ADR Center. [Herbert Smith.com](http://HerbertSmith.com) (June 21, 2010); [Country Reports](http://CountryReports)
- The United Nations-African Union Mission in Darfur presented a three-day workshop on conflict resolution, reconciliation, negotiation and mediation for 100 participants to build capacity to settle tribal disputes in the **Sudan**. Allafrica.com (June 28, 2010)
- The acting Chief Justice of the High Court of the State of Jharkhand, **India** inaugurated the Mediation and Conciliation center in Daltonganj, which will provide assistance to litigants without charge. [Times of India](http://TimesofIndia) (May 6, 2010)
- Justices in **Nepal** encouraged mediation during the inauguration of a mediation center in Kathmandu; the Nepal Bar Association president seeks involvement of lawyers to expedite mediation. [Himalayan Times](http://HimalayanTimes) (June 18, 2010) (Subscription Required)
- New Brunswick, **Canada** published a new franchising regulation containing unique dispute resolution procedures. The regulation permits a party in a dispute to notify the other party and conduct direct negotiations within fifteen days, which may be followed by a request for mediation that the other party may decline. Lexology.com (July 7, 2010) (Registration Required)

EEOC Adds 200th Large Employer to Mediation Program

CVS Caremark is the 200th large employer to join the U.S. Equal Employment Opportunity Commission's (EEOC's) Universal Agreement to Mediate (UAM) program to mediate workplace discrimination disputes. The CVS Caremark agreement is nationwide, while some UAMs are regional. In addition, EEOC district offices have entered into more than 1,500 local agreements to mediate with large employers. Under the EEOC's UAMs, discrimination complaints filed with the EEOC will be sent to the agency's mediation unit and to a designated company contact for mediation prior to EEOC investigation or litigation. The EEOC encourages mediation in order to improve the agency's overall effectiveness, while helping companies and employees reach better outcomes. The EEOC mediation program is one of the largest of its kind, with about 12,000 mediations a year.

[OHS online.com](http://OHSonline.com) (July 5, 2010)

Update on Home Foreclosure Mediation

- A detailed report on foreclosure mediation programs **nationwide** from the Center for American Progress (CAP) states that the number of jurisdictions with foreclosure mediation programs has increased from 11 to 21 in a year. Pending legislation in additional states will boost the number further. The report recommends that states with opt-in programs should

Tulsa County, Oklahoma have rejected binding arbitration in favor of mediation to resolve utility bills at the Tulsa County Fairgrounds. [News on 6.com](http://NewsOn6.com) (May 18, 2010)

The Greater Hall Chamber of Commerce is offering to pay for a mediator to resolve the "water war" between Hall County and the City of Gainesville, Georgia over the future of the Cedar Creek Reservoir. [Access North Ga.com](http://AccessNorthGa.com) (April 29, 2010)

Mediation and litigation are both proceeding in disputes between agricultural water districts and the City of Bakersfield, California over the Kern River. Bakersfield.com (May 4, 2010)

The City of Macon and Bibb County, Georgia have selected a mediator to assist with service delivery negotiations, to ensure that the governments will not be barred from state grants. Macon.com (May 19, 2010)

San Diego's independent police auditor proposes face to face mediations to resolve complaints about rude police officers. KLIV.com (June 30, 2010)

A court is considering sending a murder case to felony mediation, since similar cases have recently settled through mediation. [Richmond Register.com](http://RichmondRegister.com) (June 26, 2010)

The Liberian community in Minnesota created a

move to use of mandatory mediation and that states with coverage in only certain cities or locations should expand statewide. Further, the report urges that states without programs in place move swiftly with legislation or judicial rules to implement mediation programs and that mediation services also be added at the federal level. [American Progress.org](#) (June 29, 2010); [Full Report](#)

- The Obama Administration released its first monthly housing scorecard to track housing market indicators and **federal** efforts to prevent home foreclosures. [Housing Wire.com](#) (June 21, 2010); [Housing Scorecard](#) (June 21, 2010)
- The Circuit Court of Cook County launched a court-based foreclosure mediation program to address the rising foreclosure rate. Moreover, the county – **Illinois'** largest – approved a \$3.5 million budget last Fall to provide free foreclosure mediation services to homeowners. A coalition of community organizations is now launching a major outreach effort, going door-to-door to homes facing foreclosure to explain the details and encourage participation in the county's optional mediation program. In addition, pro bono attorneys are currently being trained to guide homeowners through the mediation process. [Pioneer Local.com](#) (April 29, 2010); [Progress Illinois.com](#) (June 29, 2010)
- Palm Beach County, **Florida** homeowners can mediate foreclosures that are filed on or after July 12, although they can choose to opt out of mediation. The mediation program is being run by the Palm Beach County Bar Association. Mediation is free for homeowners, but lenders must pay \$750, which also covers a financial counselor and administrative costs. One mortgage company is enthusiastic and reports success in about 75% of their foreclosure mediations. Others are more skeptical about whether mediation will just further delay the foreclosure process and, on the other side, whether lenders have any motivation to settle. [Palm beach post.com](#) (July 7, 2010)
- **California** legislation to establish a mediation program to help homeowners and lenders agree on sustainable loan modifications passed the Assembly Appropriations Committee. The legislation intends to establish a mediation program similar to those in Nevada and Connecticut. [California Newswire](#) (June 1, 2010)
- Legislation has been introduced in **Connecticut** to extend the state's successful foreclosure mediation program by an extra year, to 2012. However, the source of funding for the additional year will be determined later. The bill would also bar banks and servicers from charging late fees or other charges if they do not come to mediation sessions or are unprepared. [Hartford Courant](#) (May 1, 2010)

Special Liberian Mediation Committee to guide a mediation process to resolve political conflict within the community. [Liberian Journal.com](#) (June 30, 2010)

Mediation will be held in a politically sensitive case against the State of Victoria, Australia by a former criminal defense barrister who turned prosecution's witness, but failed to receive protection. [The Age.com.au](#) (June 19, 2010)

Foundation Relies on Mediation to Improve Patient Access to Care

A national non-profit, the Patient Advocate Foundation, is holding its 11th Annual Patient Congress in Washington, DC, urging members of Congress to support legislation that would improve patient access to care, which is needed even by those fully covered by insurance. The 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 successfully resolved over 55,000 cases for patients last year using mediation or arbitration. Over 80% of the patients aided by the Foundation were fully insured, but still needed help to access

medical care.

[PR Newswire.com](#) (June 29, 2010)

Other Notable News & Initiatives

- The Wisconsin Supreme Court has clarified that hearings must be held *in camera* when determining whether mediation confidentiality is outweighed by manifest injustice under Wis. Stat. section 904.085(4)(e). [Wisbar.org](#) (April 30, 2010)
- A mediation program in Twin Falls, Idaho increasingly needs interpreters for languages other than Spanish, with a tripling of non-Spanish interpretation since 2007. [Magic Valley.com](#) (July 6, 2010)
- After months of effort, Tulsa's Small Claims Court now has a mediation program in place which resolves about half its cases. The impetus for the mediation program was a lack of funds for expanding the court by building a new courthouse. But in addition to reducing the docket, mediation has increased the satisfaction of litigants. [Tulsa Business.com](#) (April 26, 2010)
- The Commander Navy Region Southwest presented awards to 25 mediators and 12 high level managers of the Southwest Region's Alternative Dispute Resolution Mediators Cadre for their success in resolving workplace conflicts. While the Navy ADR program has a 70 percent resolution rate as a nationwide target, the Southwest Region is averaging 78 percent. [Navy Compass.com](#) (June 29, 2010)

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MAY 2010

CASES & RESOLUTIONS:

California Appellate Court Holds Mediation Confidentiality Should Not Block Clients' Ability to Prove Claims Against Attorneys

A California appellate court split over whether clients are prevented by California's strict mediation confidentiality provisions from using evidence from mediation against their attorneys. In [Porter v. Wyner](#), the majority concluded that mediation confidentiality is only intended to shield communications between disputants and does not apply to communications between a party and that party's attorney. After a successful mediation yielded \$6.7 million relating to the education of the Porters' autistic son, the Porters and their counsel Wyner & Tiffany disagreed over payment terms between them that were worked out during the mediation. The majority of the court concluded that such attorney-client communications are not covered by mediation confidentiality, so no exception is needed to rely on them. The majority reversed the trial court and concluded that a new trial is not required due to the California Supreme Court's strict view of mediation confidentiality in its [Simmons v. Ghaderi](#) decision. The majority concluded that the attorney-client privilege covers communications between attorneys and clients, which should not be trumped by mediation confidentiality to prevent clients from waiving their privilege. It would not matter even if the mediator or opposing party were present during the attorney-client communications. However, the dissent notes that the key conversation in issue only took place due to the mediation, and that while unchallengeable attorney malpractice during mediation raises policy concerns, it is up to the legislature and not the courts to provide a remedy.

[Porter v. Wyner](#), No. B211398 (Cal. App. 2d Dist. April 8, 2010)

Information from Mediation May Be Used to Convict Party in Maine

Maine's modest mediation confidentiality provisions permit statements and conduct in mediation to be used in a separate proceeding to convict a party to the mediation. In [Maine v. Tracy](#), the Supreme Court of Maine concluded that a car purchaser was properly convicted of forgery for presenting a bill of sale marked "paid in full" during trial, when the purchaser had not made that claim during mediation but asserted only that a small payment had been made. Maine generally has not provided for mediation confidentiality, but a limited privilege that can be asserted by mediators took effect on January 1, 2010. However, statements in mediation are not inadmissible in proceedings with third parties or in other

Mediation Quote:

"Mediation, informal problem-solving, group facilitation, collaborative negotiation, public dialogue, prejudice reduction, and other conflict resolution techniques have amply demonstrated, in countless conflicts over the last three decades, that there is a better outcome than winning and losing, a more successful process than accusation and blaming, and a deeper relationship than exercising power over and against others."

Kenneth Cloke, *Conflict Revolution: Mediating Evil, War, Injustice And Terrorism* (Janis Publications 2008) at 3

Check These Out:

Litigation-Focused Counsel May Undermine Mediation

Both the success rate and the satisfaction level of parties in mediation may be declining due to the efforts of counsel to exert more control over the

proceedings between the mediating parties that do not involve the subject matter of the mediation. Tracy also argued that his Fifth Amendment right against self-incrimination was violated because the mediator did not warn him that information from the mediation might be admissible in other proceedings. However, the Court expressly declined to require mediators in court-ordered mediations to warn against self-incrimination.

[Maine v. Tracy](#), No. Ken-09-357 (Maine March 25, 2010) (Subscription Required)

California Court Denies Sanctions Against Counsel Who Refused to Interpret Mediator's Communications to Their Clients

A federal district court in California declined to sanction plaintiffs' counsel for refusing to interpret so a mediator could present settlement offers and explanations directly to Spanish-speaking plaintiffs during a mediation which did not settle. The court rejected defendant's argument that plaintiffs' counsel did not mediate in good faith, noting that the mediation was not court ordered and there was no indication that direct communication would have resulted in settlement. The court suggested that if the mediator or the defendant felt that direct communication with plaintiffs was critical they should have ensured that an interpreter would be present during the mediation.

[EEOC v. ABM Industries, Inc.](#), No. 1:07-cv-01428 (E.D. Cal. , March 3, 2010) (Subscription Required)

Massachusetts Appellate Court Enforces "Agreement in Principle" Signed at Mediation

Summary judgment was upheld by the Massachusetts appellate court enforcing an "agreement in principle" which was signed at the end of a lengthy mediation process, even though the parties were later unable to agree on the more detailed settlement agreement intended. The court explained that an intention to draft a more complete agreement did not mean that the agreement in principle was unenforceable, since it was complete, sufficiently definite and the parties intended to be bound when it was signed. The court bolstered its conclusions by noting the course of the mediation effort over thirteen months, the intensity and duration of the final mediation session involving senior party representatives, and the involvement of a recognized expert mediator.

[Targus Group International v. Sherman](#), No. 08-P-113 (Mass. App. March 5, 2010)

Massachusetts Court Enforces Oral Mediation Agreement

The federal district court in Massachusetts enforced an oral agreement reached in mediation against an age discrimination claimant who changed her mind the morning after the mediation. The claimant refused to sign a written settlement agreement prepared by defendant which contained a seven day period for revoking consent (since it was an age discrimination case). The court noted that even though complainant could have backed out if she had signed the agreement, she could not back out of the oral agreement since no mention had been made about rescission. The court didn't believe any more time was needed to consider the settlement terms beyond the duration of the mediation. The opinion did not discuss mediation

mediation process. Counsel are tending to move away from joint sessions, preventing principals from engaging with each other, and are focusing only on legal issues and the bottom line, to the exclusion of other interests the parties may have. Counsel may also try to game the mediation, which can harm the process for all participants. [Daily Journal.com](#) (January 15, 2010)

Juvenile Offender Mediation Program Expanding as Success Shown

A mediation program which brings juvenile offenders face to face with their victims has been highly successful in Bridgeport, Connecticut and has expanded to the courts in Stamford, Danbury, Waterbury and Norwalk. The program reduces recidivism by more than half by having juveniles dialogue with and try to explain themselves to the people affected by their crimes, generally resulting in offenders accepting responsibility. Agreement is reached in about 95% of the mediations, with victims empowered by being able to speak to the young people, as well as having significant input into reparations and remedies, which may include apologies and community service. [Newtimes.com](#) (January 24, 2010)

Peace Mediator Being Featured in Major Hollywood Movie
Canadian mediator and

confidentiality. The court did note that it was appropriate for the mediator to evaluate the case.

[Eswarappa v. Shed Inc. /Kid's Club](#), No. 06-11169 (D. Mass. February 18, 2010)

Lack of Mediation Settlement in Michigan Does Not Provide Basis for Imposing Attorneys' Fees

After an unsuccessful mediation conducted as required by a living trust agreement, the probate court held an evidentiary hearing and awarded post-mediation attorneys' fees to one side as sanctions for the other side failing to settle in mediation. The Michigan appellate court reversed because there was no court rule, contractual or statutory basis for attorneys' fees following mediation.

[In re Hills Revocable Living Trust](#), No. 287285 (Mich. App. March 9, 2010)
(Subscription Required)

Mediation Set to Address Access to SeaWorld Death Video

A Florida judge has ordered all interested parties to participate in mediation after granting a temporary injunction blocking release of video of a SeaWorld trainer's death by an orca. The mediation is expected to address privacy concerns along with the public's right to information. Mediation in similar cases has sometimes resulted in press inspection of imagery without public disclosure. SeaWorld video from an underwater camera and a camera in the park's Sky Tower are at issue.

[CNN.com](#) (April 6, 2010); [CNN.com](#) (March 26, 2010)

DOJ Mediation Eases Racial Tension in Florida Community

A routine traffic stop led to violence between police officers and a crowd in Lake Wales, Florida in November. After the local NAACP chapter began talks with the city, the U.S. Department of Justice began a mediation in December and reached agreement in March. DOJ used its new mediation program called City Site Problem Identifying and Resolving Issues Together (City SPIRIT). The Lake Wales agreement includes representation of African-American and other minorities in city government and budget decisions, as well as improving communications and cultural sensitivity through training programs.

[News Chief.com](#) (March 30, 2010)

Other Notable Cases and Proceedings

- Georgia appellate court affirms dismissal of litigation where plaintiff had not complied with mediation requirement in dealer contract. [Houseboat Store, LLC v. Chris-Craft Corp.](#), No. A09A1815 (Ga. App. March 11, 2010) (Subscription Required)
- Plaintiff's failure to appear at trial because mediation not completed leads to dismissal of litigation, which is upheld on appeal. [Maverick H. v. Givler](#), No. E2009-00253-COA-R3-CV (Tenn. App. February 24, 2010)
- The Federal Mediation and Conciliation Service assisted Major League

former peace director of the Carter Center, Ben Hoffman, has inspired a character in the upcoming movie *Girl Soldier*, starring Uma Thurman. Hoffman is also publishing a book, *Peace Guerilla*, about his mediation efforts with African guerilla leaders and his work with President Carter. [Marketwire.com](#) (January 13, 2010)

Other Cases & Resolutions:

- City council in Florida considering settlement reached in mediation with strip club owner who filed federal lawsuit against restrictions on nude dancers claiming First amendment right of erotic expression, [NWF Daily News](#) (February 13, 2010)
- Transgender social club and Italian restaurant in Massachusetts to mediate discrimination claims over denial of service, [Salem News.com](#) (February 23, 2010)
- Mediation yields million dollar settlement and apology to man falsely accused and imprisoned for twin's murder, [NBC4i.com](#) (March 5, 2010)
- Litigation against host over brain injuries from teenage wrestling on kitchen floor settled in mediation for \$300,000,

Soccer and the Major League Soccer Players Union with their collective bargaining agreement, reaching a new five-year agreement five days before the season opener. The sides met all day and night for two straight days to close the deal and avert a threatened strike. [Washington Post.com](#) (March 20, 2010); [ESPN.go.com](#) (March 6, 2010)

- Mediation held at City Hall in Jakarta resulting in an agreement over Mbah Priok's grave, which will not be relocated, but the entrance gate and pavilion will be shifted to avoid disrupting the activities of ports and terminals. A commission will study a master plan and a further mediation session will be held to finalize a memorandum of understanding. [Berita Jakarta.com](#) (April 15, 2010); [Berita Jakarta](#) (April 16, 2010)

NEWS & INITIATIVES:

Adoption of Mediation Being Considered by Russian Parliament

Detailed proposed regulations to establish mediation as a dispute resolution procedure were introduced in the Russian Parliament in March. Mediation has not previously been a part of Russian law. The proposed regulations would rely on voluntary mediation between parties to a dispute and would provide for confidentiality. The regulations would also establish quality standards for mediation services and some integration of mediation with arbitration and litigation.

[Mondaq.com](#) (March 22, 2010) (Registration Required)

Italian Legislation Would Mandate Mediation Prior to Litigation

Legislation introduced in Italy would require mediation prior to litigation in civil and commercial disputes, including insurance and medical malpractice. Compulsory mediation is limited to four months and must be conducted by independent professional groups registered with the Italian Ministry of Justice. If mediation is not successful, either party may then file suit, but litigation costs may be awarded or withheld depending on whether the outcome of litigation differs from proposed settlement terms. The legislation, which would take effect in March 2011, is intended to provide cost savings and help streamline Italy's overburdened judicial system.

[Mondaq.com](#) (March 22, 2010) (Registration Required)

Other International Mediation Developments

- **Jamaica** willing to mediate dispute with U.S. over extradition of strongman to U.S. on drug and firearms charges. [Jamaica Observer](#) (March 14, 2010)
- **Ireland** could save up to € 200 million per year by using mediation rather than litigation in state legal matters, according to a study based on over 400 Freedom of Information requests. [Irish Times](#) (March 6, 2010)
- Elder mediation training expanding scope of services in **Ireland**. [Irish Times](#) (March 23, 2010)

[Pennsylvania Law Weekly](#) (January 18, 2010)

- Mayweather-Pacquiao fight canceled after mediation did not resolve dispute over drug testing requirements; federal litigation filed by Pacquiao; mediator seeks to clarify record, [Mlive.com](#) (January 7, 2010); [LA Times.com](#) (January 7, 2010)
- Football coach Mike Leach and Texas Tech are mediating dispute resulting from the university firing coach, [Dallas new.com](#) (February 2, 2010)
- Bickering owners of teams in the new North American Soccer League and the USL compromised to save the 2010 season, with the U.S. Soccer Federation acting as mediator, [Democrat and Chronicle.com](#) (January 8, 2010)
- Parties encouraged by mediation between San Diego Gas & Electric Co. and critics of its plan to cut off power to avoid wildfires during extreme conditions, [SignOn San Diego](#) (February 13, 2010)
- Six Flags unsecured creditors ask federal bankruptcy judge to order mediation over reorganization plan to avoid two-week trial, [Reuters](#) (February 17, 2010)
- Dallas judge orders school district and conservation league to mediate over

- **Pakistan's** Karachi Centre for Dispute Resolution, with assistance of the World Bank's International Finance Corporation, sponsors Women Mediation Week for female litigants. [Trading Markets](#) (March 13, 2010)
- Non-governmental organization in **Nigeria** trains women in mediation and conflict transformation. [AllAfrica.com](#) (March 17, 2010)
- Minister of Justice of **Rwanda** urges Senate to establish local Committees of Mediators to expand mediation capacity and rebuild trust and harmony. [All Africa.com](#) (April 21, 2010)
- **South Africa's** new King III code for the first time requires corporations to consider alternative dispute resolution rather than just litigation. [TimesLive.co.za](#) (March 21, 2010)
- Lawyers in **South Africa** should recommend mediation to clients or they may have their fees limited. [IAfrica.com](#) (March 1, 2010)
- **Hong Kong's** Secretary for Justice emphasizes greater use of mediation as key feature of Civil Justice Reform. [Stock Markets Review](#) (April 17, 2010)
- **Hong Kong** Practice Direction 3.3 provides for voluntary mediation in shareholder and related disputes, in addition to PD 31. [HerbertSmith.com](#) (January 7, 2010)
- **Singapore** seeks to resolve ethnic and religious differences through mediation. [ChannelNewsAsia.com](#) (March 5, 2010)

proposed demolition of historic church building, despite school district's assertion that there is nothing to mediate, [Dallas News.com](#) (February 5, 2010)

- University of Hawaii resolves labor dispute with University of Hawaii Professional Assembly in mediation, [Hawaii.edu](#) (January 16, 2010)
- New York State Agricultural Mediation Program offers support to farmers facing wide variety of disputes, [TCextra.com](#) (February 11, 2010)
- EPA hires local mediator to conduct situation assessment and find common ground for resolving Yakima Valley's ground water contamination problem, [Tri-City Herald.com](#) (February 7, 2010)
- Two Oregon counties have agreed to mediate ongoing dispute over sewer rates and payments, and will resort to binding arbitration if mediation is not fully successful, [Oregon Live](#) (February 19, 2010)
- Georgia cities and county turn to mediation to determine service areas for water and sewer service, [Savannah Now.com](#) (January 16, 2010); [Savannah Now.com](#) (January 23, 2010)

Greensboro Launches Landlord-Tenant Mediation Program

The city of Greensboro, North Carolina is working with the Conflict Studies and Dispute Resolution Program of the University of North Carolina at Greensboro to launch a program to resolve disputes between landlords and tenants. The Landlord-Tenant Dispute Program has been developed with input from stakeholders. The program is intended to reduce litigation, but depends on both sides voluntarily agreeing to participate.

[Digtriad.com](#) (March 30, 2010); [Greensboro Press Release](#)

Washington State Moving to Extend Agricultural Mediation Program

Legislation is moving forward in Washington state to extend to 2015 the agricultural mediation program which began in 1987. The bill authorizes \$7.5 million per year, but less than \$4.5 million has been appropriated for the current fiscal year. Washington is one of 32 states which participates in the Certified State Agricultural Mediation Program, administered by the Farm Service Agency of the U.S. Department of Agriculture, which helps farmers resolve disputes with lenders and others in order to avoid litigation, appeals, bankruptcy and foreclosure, and may occasionally deal with rural housing, development and even civil rights.

[AgWeek.com](#) (March 8, 2010); [USDA Agricultural Mediation Program](#)

Update on Home Foreclosure Mediation

- **Maryland** has passed legislation requiring mediation between homeowners facing foreclosure and mortgage lenders, at the option of borrowers. The legislation builds on existing reforms by requiring lenders to work directly with homeowners on loan modifications. The program

takes effect on July 1, 2010 and details are still being worked out. [Washington Post](#) (April 15, 2010); [Loan Safe.org](#) (March 17, 2010)

- **Outagamie County, Wisconsin** judges have begun a program to encourage mediation prior to foreclosure. Foreclosure summonses must include information on the program. Lenders who do not cooperate risk not having their foreclosures approved. Outagamie is the third county in the state to use the program, which was developed by Marquette University Law School, and three other counties may begin programs. [PostCrescent.com](#) (February 25, 2010)
- The **Vermont** House passed legislation requiring mediation between lenders and homeowners prior to home foreclosure. One challenge is a shortage of trained mediators, but the Vermont Bar Association is setting up a training program for lawyers interested in providing mediation. [Business Week](#) (March 19, 2010)
- Three banks have filed suit to block the foreclosure-mediation ordinance of **Providence, Rhode Island**, arguing that the city is preempted by state law on foreclosure. The ordinance was the first of its kind in the state when adopted in September; a similar foreclosure-mediation ordinance has since been enacted in Cranston. [Projo.com](#) (April 10, 2010)
- **Florida's** new statewide mediation program to resolve foreclosure cases more quickly has moved slowly in the months since the Florida Supreme Court's order. The program is running in only four of the state's 20 judicial circuits – and three of the four already had foreclosure mediation programs. Logistical issues are a challenge, including the requirement that each program be run by a non-profit organization which is politically and professionally neutral and has resources sufficient for a high case volume. [Bradenton.com](#) (March 31, 2010)
- The **Nevada** Supreme Court is considering a third set of rule changes since its Foreclosure Mediation Program went into effect last July. Among other things, the proposed changes would extend mediation timelines from 90 to 135 days, allow price opinion letters in place of appraisals, permit postponement of mediations upon agreement, and generally limit mediators to no more than three mediations a day. [LasVegasSun.com](#) (March 4, 2010)
- Watershed dispute involving Minnesota county, cities, township and local and state agencies moving into mediation, [Woodbury Bulletin.com](#) (February 22, 2010)
- Florida developer pursues statutory right of mediation of land use dispute after plan for townhomes on 2 acres covered by tidal waters is widely rejected, [Palm Beach Daily News](#) (February 20, 2010)
- Mediation expected to resolve dispute with hurling players in Limerick, [RTE Sport](#) (January 21, 2010)
- Iceland contacts several governments about mediating issues related to \$5 billion owed Britain and the Netherlands due to banking crisis; Dutch foreign minister not sure whether mediation needed, [Moneycontrol.com](#) (January 25, 2010); [UK Reuters](#) (January 28, 2010)
- Canadian Liberal leader backs efforts by Six Nations Confederacy to bring in mediator to help resolve land claim with Ottawa from the 1820s in which \$1 billion is demanded and \$26 million offered, [Spec.com](#) (January 14, 2010)
- Third round of mediation talks scheduled in labor dispute that totally halted beer

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- New Zealand Human Rights Commission mediation begins over Sikh barred from club due to policy treating turbans as hats, [NZ Herald](#) (January 19, 2010)

Other News & Initiatives:

- Mediation by the Connecticut insurance department recovered over \$3 million in 2009 from insurance companies on behalf of consumers who complained to the state agency, [Courant.com](#) (January 28, 2010)
- U.S. Department of Justice mediation program urged for resolving disputes over compliance by businesses with the Americans with Disabilities Act, [Post-Gazette](#) (January 13, 2010)
- International mediation expert teaching native title mediation course in Australia to provide a model for land dispute resolution that may help bring to

conclusion the 550
pending native title
cases, which
otherwise may take
30 years, UQ.edu
(February 1, 2010)

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MARCH 2010

CASES & RESOLUTIONS:

California Court Shields Mediation from Scrutiny with Absolute Quasi-Judicial Immunity

A California appellate court concluded that a mediator was shielded by absolute quasi-judicial immunity regardless of whether he was mediating or arbitrating in [Phillips v. JAMS](#) (Cal. App. 2d Dist.). The mediator had agreed in a previous mediation settlement to make a binding decision for the parties if future disputes arose. The mediator tried to mediate a subsequent dispute, in the midst of which he felt he was being abused by aggressive counsel and announced he could no longer be impartial and was not going to make a binding decision, even if the parties could not reach a mediated resolution. Litigation followed, but the appellate court affirmed summary judgment dismissing claims against the mediator and his sponsoring organization, concluding that litigation is not allowable against those providing dispute resolution services which are connected to the judicial process. The court held that “[a]ll functions integral to the dispute resolution process are shielded by absolute immunity.”

[Phillips v. JAMS](#) (Cal. App. 2d Dist. January 28, 2010)

New York Court Sanctions Party for Rigidity in Mediation

A bankruptcy court in New York imposed penalties for mediating in bad faith on a party the court found to be rigid and obstructionist during court-ordered mediation. The court recognized that of course parties cannot be forced to settle and may take a “no pay” position. But mere attendance without active participation is not sufficient for good faith. Sending representatives who would not consider the risks involved and who could only repeat a mantra that they would pay nothing renders mediation futile and forms the basis for penalties for obstruction of the mediation. Party representatives must have full authority to settle; having to telephone for additional authority is not sufficient. The offending party did ultimately make a settlement offer, but only after the threat of sanctions, and the offer was considered to be insincere by the mediator and other party. Under the mediation rules of the court, mediators are required to report incidents of bad faith mediation, and are permitted to provide information under the court’s confidentiality provisions.

[In re A. T. Reynolds & Sons, Inc.](#), No. 08-37739 (U.S. Bankr. S.D.N.Y. February 5, 2010)

Mediation Quote:

“Mediation, informal problem-solving, group facilitation, collaborative negotiation, public dialogue, prejudice reduction, and other conflict resolution techniques have amply demonstrated, in countless conflicts over the last three decades, that there is a better outcome than winning and losing, a more successful process than accusation and blaming, and a deeper relationship than exercising power over and against others.”

Kenneth Cloke, *Conflict Revolution: Mediating Evil, War, Injustice And Terrorism* (Janis Publications 2008) at 3

Check These Out:

Litigation-Focused Counsel May Undermine Mediation

Both the success rate and the satisfaction level of parties in mediation may be declining due to the efforts of counsel to exert more control over the mediation process. Counsel are tending to move away from joint

Federal Judge Orders Early Mediation in Airliner Crash

The federal judge managing the roughly three dozen lawsuits filed after the February 2009 crash of Continental Connection Flight 3407 has ordered mediation to begin by mid-June and assigned the cases to four local mediators. Both sides say they welcome mediation but wonder whether it is being ordered too soon, as depositions are not expected to begin until summer. Plaintiffs' lawyers strongly assert that this is a punitive damages case, which impacts resolution. However, the lead plaintiffs' attorney notes that he tried the last major aviation liability case, which was the 1992 trial of the Lockerbie crash, and that every case since then has settled.

[Buffalo News.com](#) (January 7, 2010)

Mediation Agreement Aims to Calm Racial Tensions in City

Two years after a gunman killed the mayor, other city officials and police officers during a council meeting in suburban St. Louis, the U.S. Justice Department mediated an agreement that is intended to improve relations between the black and white communities and begin to heal racial divisions. The agreement, which contains tangible programs and steps by the city, is seen as hopeful progress by many, while others are concerned by the city's failure to fully admit that a racial problem exists. A follow up meeting has been scheduled to try to further reduce tensions.

[STL Today.com](#) (January 22, 2010); [Fox 2 Now.com](#) (February 9, 2010)

Other Notable Cases and Proceedings

- Court-ordered mediation between the telephone company FairPoint Communications and the Maine Public Utilities Commission was delayed by the inability of the Maine PUC staffer to bind the agency despite the court's requirement that representatives must have complete authority. The agency is seeking to modify the court order to permit a public hearing before any tentative settlement is voted on by the PUC commissioners. [WSJ.com](#) (January 22, 2010)
- Although Ohio's federal court-conducted mediation program is voluntary, the court requires each participating party to have a representative attend in person who has authority to agree to the last offer or demand made. [Jack v. Allied Systems](#), Case No. 3:05-cv-125 (U.S. S.D. Ohio January 7, 2010)
- A federal magistrate imposed \$6,000 in costs and expenses on companies which failed to send representatives with adequate settlement authority to mediation in a dispute over 55 trees that a pipeline company cut down to keep roots from impacting the underground pipe. The companies have backed out of mediation and intend to litigate the \$300,000 claims against them by the city and local school district. [PDDnet.com](#) (January 12, 2010); [Helenair.com](#) (January 13, 2010)
- Even though counsel moved to withdraw prior to mediation, counsel was jointly liable with the client who failed to appear at mediation for the time of both the mediator and opposing counsel. [George W. Park Seed Co. v.](#)

sessions, preventing principals from engaging with each other, and are focusing only on legal issues and the bottom line, to the exclusion of other interests the parties may have. Counsel may also try to game the mediation, which can harm the process for all participants.

[Daily Journal.com](#)
(January 15, 2010)

Juvenile Offender Mediation Program Expanding as Success Shown

A mediation program which brings juvenile offenders face to face with their victims has been highly successful in Bridgeport, Connecticut and has expanded to the courts in Stamford, Danbury, Waterbury and Norwalk. The program reduces recidivism by more than half by having juveniles dialogue with and try to explain themselves to the people affected by their crimes, generally resulting in offenders accepting responsibility. Agreement is reached in about 95% of the mediations, with victims empowered by being able to speak to the young people, as well as having significant input into reparations and remedies, which may include apologies and community service.

[Newstimes.com](#) (January 24, 2010)

Peace Mediator Being Featured in Major Hollywood Movie

Canadian mediator and former peace director of the Carter Center, Ben Hoffman, has inspired a

[DHL Express](#), Civil Action No. 8:08-1993-WMC (U.S. D.S.C. January 5, 2010)

- Mediation was improperly ordered by court where the statutory requirement mandates a hearing within a short time period on the merits of a personal protection order. Moreover, court-imposed mediation may not be appropriate when domestic violence or stalking is alleged. [Baker v Holloway](#), No. 08-007173-PH (Mich. App. January 26, 2010)
- Appeal dismissed due to parties' failure to engage in appellate mediation. [Alba v. Passage Realty, Inc.](#), No. 14-09-00304-CV (Tex. App. January 7, 2010)
- Mediator sued party for cancellation fee for not proceeding with mediation, but appellate court affirmed summary judgment dismissing case because party had not agreed to cancellation term which was unilaterally sent out by mediator after parties agreed to mediate. [Levin Law Group v. Sigmon](#), No. 14-08-01165-CV (Tx. App. January 21, 2010)
- Mediation settlements are especially unsuited for rescission based on unilateral mistake. [Rachid v. Perez](#), No. 08-1210 (Fla. App. January 20, 2010)
- After 17 years of litigation, six months of mediation resulted in a tentative agreement by the state of Utah to pay \$33 million to a class of 8,000 Navajos for mismanagement of an oil royalty trust fund created in 1933. [Deseret News.com](#) (January 6, 2010)
- Failure to specify the width of road paving in mediation settlement leads to breakdown and litigation over "normal city standards." [James v. City of Russellville](#), No. 2080881 (Ala. App. January 8, 2010)
- New York town objects to mediators selected to resolve environmental claims against General Motors bankruptcy estate due to their lack of subject matter expertise in light of the complexities of environmental science. [WSJ.com](#) (February 8, 2010)
- Los Angeles City councilwoman planned to mediate dispute between the Port of Los Angeles and company seeking to open \$50 million shipyard, but recused herself after revelations of campaign contributions from company. [Daily Breeze.com](#) (February 10, 2010)
- Four years after talks to settle lawsuit for \$2 million broke down, Tuomey Healthcare System and the federal government have agreed to mediate. Tuomey alone has spent over \$4 million on legal fees in the case. [The Item.com](#) (January 6, 2010)

NEWS & INITIATIVES:

Payment of Settlement Funds to Charities Gaining in Both Popularity and Scrutiny

Settlements in class action lawsuits are requiring payments to charities at triple the rate in the past, according to a recent study, which is raising concerns when the charities are unrelated to the litigation or have some connection to the defendants or the judge approving the settlement. Judicial review is pending of a proposed \$9.5 million settlement by Facebook of litigation over sharing personal

character in the upcoming movie *Girl Soldier*, starring Uma Thurman. Hoffman is also publishing a book, *Peace Guerilla*, about his mediation efforts with African guerilla leaders and his work with President Carter. [Marketwire.com](#) (January 13, 2010)

Other Cases & Resolutions:

City council in Florida considering settlement reached in mediation with strip club owner who filed federal lawsuit against restrictions on nude dancers claiming First amendment right of erotic expression, [NWF Daily News](#) (February 13, 2010)

Transgender social club and Italian restaurant in Massachusetts to mediate discrimination claims over denial of service, [Salem News.com](#) (February 23, 2010)

Mediation yields million dollar settlement and apology to man falsely accused and imprisoned for twin's murder, [NBC4i.com](#) (March 5, 2010)
Litigation against host over brain injuries from teenage wrestling on kitchen floor settled in mediation for \$300,000, [Pennsylvania Law Weekly](#) (January 18,

information. Objections have been raised in the Facebook hearing to the entire settlement amount funding a foundation to promote privacy rights apart from the 30% going to plaintiffs' counsel. In part, concerns are related to Facebook having a role in creating the foundation's bylaws and input on a board member. However, the trend of settlements going to charity may continue as legislation was introduced in Ohio earlier this year encouraging judges to use these types of arrangements.

[WSJ.com](#) (March 2, 2010)

Federal Office Mediates Disputes Between FOIA Requesters and Federal Agencies

Freedom of Information Act disputes are now being mediated by the Office of Government Information Services (OGIS), which was created within the National Archives and Records Administration and officially began work in September 2009. In its first months, OGIS has begun work on about 40 disputes. OGIS, which will have a staff of six, is working with a contractor to add online dispute resolution and is seeking to provide more transparency into matters it is mediating. In addition to directly resolving disputes, OGIS is tasked with providing suggestions for FOIA improvements. OGIS also plans to provide mediation training to FOIA officers in federal agencies to reduce the number of disputes that arise from the roughly 600,000 FOIA requests made each year.

[Federal Computer Week](#) (January 14, 2010); [OGIS Website](#)

Concerns Raised over Determining "Bad Faith" in Texas Balance Billing Mediations

Mediators are concerned over provisions in new Texas legislation which would require them to report parties who act in "bad faith" in mediations involving balance billing. The new legislation allows insured patients to mediate whenever they would have to pay over \$1,000 for services of out-of-network doctors received at in-network hospitals. In an effort to compel serious mediation efforts, the law includes a requirement for reporting bad faith conduct, without providing standards. The Texas Department of Insurance is drafting rules to implement the statute, which is to take effect in September 2010. Mediators hope to get the bad faith reporting requirement adjusted in the regulations in order to maintain neutrality.

[Dallas Morning News](#) (January 26, 2010)

Mediation Available for Online Gaming Disputes

An inspection and certification agency for online gaming operators, eCOGRA, certifies that online casinos are safe and fair sites, in part by mediating disputes and ensuring that players' issues are adequately addressed by the online casinos. The agency received over 800 mediation requests in 2009, and reported that valid mediation requests were up 14% over 2008.

[Casino Advisor](#) (January 15, 2010)

Hong Kong's Practice Directive on Mediation

2010)

Mayweather-Pacquiao fight canceled after mediation did not resolve dispute over drug testing requirements; federal litigation filed by Pacquiao; mediator seeks to clarify record, [Mlive.com](#) (January 7, 2010); [LA Times.com](#) (January 7, 2010)

Football coach Mike Leach and Texas Tech are mediating dispute resulting from the university firing coach, [Dallas new.com](#) (February 2, 2010)

Bickering owners of teams in the new North American Soccer League and the USL compromised to save the 2010 season, with the U.S. Soccer Federation acting as mediator, [Democrat and Chronicle.com](#) (January 8, 2010)

Parties encouraged by mediation between San Diego Gas & Electric Co. and critics of its plan to cut off power to avoid wildfires during extreme conditions, [SignOn San Diego](#) (February 13, 2010)

Six Flags unsecured creditors ask federal bankruptcy judge to order mediation over reorganization plan to avoid two-week trial, [Reuters](#) (February 17, 2010)

Dallas judge orders school district and

Takes Effect

Hong Kong's Practice Directive 31 (PD31) on mediation went into effect on January 1, as scheduled in the Civil Justice Reform adopted in early 2009. PD31 requires counsel to explain mediation to parties and file with the court in each litigation a statement that the party is willing to mediate or why it is not. Further, PD31 sets up a process by which either party can propose mediation and receive a response from the other party within fourteen days. If mediation is unreasonably refused, the court potentially can impose litigation costs on the unreasonable party.

[Clifford Chance](#) (January 7, 2010)

Other International Mediation Developments

- Association of Arrears Mediators founded in the **U.K.** by five leading mortgage and loan arrears mediation companies. [My Introducer.com](#) (January 21, 2010)
- **Armenia's** Financial System Mediator reports success in its first year of mediating between financial organizations and customers. [Armenia Now](#) (January 25, 2010)
- **South Africa's** Commission for Conciliation Mediation and Arbitration (CCMA) caseload is increasing steadily to over 140,000 cases in fiscal year 2008-09. [Busrep.co.za](#) (February 8, 2010)
- **India's** Bangalore Mediation Centre has a settlement rate in excess of 60% and plans to expand its mediation model of using experienced lawyers rather than judges as mediators. [Express Buzz.com](#) (January 25, 2010); [Hindu](#) (January 28, 2010) (Subscription Required)
- **China** has resolved hundreds of cross-Straits lawsuits involving Taiwan businesses and residents since opening the first court for such cases in March 2009, with 80% of cases settled through mediation. [CRI English.com](#) (February 13, 2010)
- Significant movement toward mediation in **New Zealand** seen in both civil and criminal justice systems, such as dispute resolution provisions in the Financial Service Providers Act which take effect later this year. [Scoop](#) (January 14, 2010)
- World Bank's IFC helps establish mediation in the **Solomon Islands** through workshop for court and consulting with other groups. [Finchannel.com](#) (January 23, 2010)

Update on Home Foreclosure Mediation

- Members of Congress from Ohio, California and Florida in February introduced the Foreclosure Mandatory Mediation Act, [H.R. 4635](#), as companion legislation to [S. 2912](#). The **federal** legislation would require mandatory mediation by lenders of loans with federal guarantees or federal insurance. The required one-time mediation would involve both the mortgagor and a housing counseling agency and would be paid for by the lender. [Federal Information & News Dispatch](#) (March 3, 2010) (Subscription Required)
- While the **Florida** Supreme Court ordered each of the 20 circuit courts in the state to establish its own foreclosure mediation process, only three

conservation league to mediate over proposed demolition of historic church building, despite school district's assertion that there is nothing to mediate, [Dallas News.com](#) (February 5, 2010)

University of Hawaii resolves labor dispute with University of Hawaii Professional Assembly in mediation, [Hawaii.edu](#) (January 16, 2010)

New York State Agricultural Mediation Program offers support to farmers facing wide variety of disputes, [TCextra.com](#) (February 11, 2010)

EPA hires local mediator to conduct situation assessment and find common ground for resolving Yakima Valley's ground water contamination problem, [Tri-City Herald.com](#) (February 7, 2010)

Two Oregon counties have agreed to mediate ongoing dispute over sewer rates and payments, and will resort to binding arbitration if mediation is not fully successful, [Oregon Live](#) (February 19, 2010)

Georgia cities and county turn to mediation to determine service areas for water and sewer service, [Savannah Now.com](#) (January 16, 2010); [Savannah Now.com](#)

circuits have complied with the order to date. Florida was hit with an additional 296,000 foreclosure filings in the last quarter of 2009, pushing the number of pending foreclosures to 456,000. Jacksonville.com (February 13, 2010)

- **Nevada** judges have stated publicly that they will not impose loan modifications even if lenders do not negotiate in good faith in mediations. RGJ.com (January 24, 2010)
- **New Hampshire** has begun a Foreclosure Mediation Program which is voluntary for homeowners and free to both borrowers and lenders. The program is being funded by grants from several sources. [Nashua Telegraph](http://NashuaTelegraph) (January 18, 2010); [Foreclosure Mediation Program](http://ForeclosureMediationProgram)
- Lenders attempting to foreclose on primary residences on the Big Island of **Hawaii** must now notify borrowers of their right to mediation by serving a mediation notice along with other documents. [Star Bulletin](http://StarBulletin) (January 21, 2010); [Judiciary Press Release](http://JudiciaryPressRelease) (January 20, 2010)
- Providence, **Rhode Island** has mandated a foreclosure mediation process, and the City Council is seeking to add a \$2,000 fine for banks or lenders who fail to attempt to renegotiate mortgages with homeowners before filing a deed of foreclosure. Projo.com (January 25, 2010)
- **Maryland's** governor is pushing for the emergency legislation he introduced to institute a mandatory foreclosure mediation program in the state, and would like lenders to support the plan. Lenders remain concerned about anything that would slow down the foreclosure process. Maryland looked to South Carolina's foreclosure prevention efforts, which require a showing that borrowers are not eligible for modification under the federal Home Affordable Modification Program prior to foreclosure. [Governor O'Malley Press Release](http://GovernorO'MalleyPressRelease) (February 16, 2010); [Daily Record](http://DailyRecord) (January 18, 2010)
- Although the governor of **Minnesota** vetoed the Homeowner-Lender Mediation Act in 2009, it has been reintroduced this year and the Minnesota attorney general will again seek enactment. [Legal Newsline.com](http://LegalNewsline.com) (January 6, 2010)

(January 23, 2010)

Watershed dispute involving Minnesota county, cities, township and local and state agencies moving into mediation, [Woodbury Bulletin.com](http://WoodburyBulletin.com) (February 22, 2010)

Florida developer pursues statutory right of mediation of land use dispute after plan for townhomes on 2 acres covered by tidal waters is widely rejected, [Palm Beach Daily News](http://PalmBeachDailyNews) (February 20, 2010)

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30 years, UQ.edu
(February 1, 2010)**

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JANUARY 2010

CASES & RESOLUTIONS:

Sanctions for Bad Faith Mediation Overturned Due to Confidentiality

Sanctions against a doctor for refusing to waive a "consent to settle" provision in court-ordered mediation of a medical malpractice case were overturned by an Ohio appellate court based on mediation confidentiality. The court concluded that a statement by the doctor's counsel that the doctor had never given consent to settle the case was a privileged mediation communication which could not be used to determine bad faith. None of the exceptions to the privilege applied. A concurring opinion added that a doctor refusing to waive a consent to settle provision is no different than any party refusing to make a monetary offer of settlement, which is permissible. Nor is there any obligation on a party to inform the other side at the beginning of mediation that they have no intention to make an offer, as positions may well shift during the course of the mediation.

[Anthony v. Andrews](#), No. 2008-P-0091 (Ohio App. 11 Dist., December 7, 2009)

Expansion of Florida Statute Requiring Mediation Notice Applied Retroactively to Insurers

A Florida appellate court determined that amendment of a Florida statute expanding mediation requirements to commercial residential insurance, such as condominium associations, applies retroactively to contracts formed prior to the amendment. The court analyzed a balancing test to determine whether the impairment of the contract is constitutionally tolerable, and concluded that impairment is minimal since mediation is non-binding, mediation costs are less than conducting an appraisal, insurance is already regulated, and there is no immediate harm or ongoing change in the contractual arrangements. The court found that minimal impact outweighed by the state's express purpose in expanding mediation requirements to address a substantial economic issue.

[Florida Ins. Guaranty Assoc. v. Devon Neighborhood Assoc.](#), 2009 WL 4283084 (Fla. App. 4 Dist., December 2, 2009)

Court Clarifies North Carolina Mediation Process for Disputes Between School Board and County over Funding

Mediation Quote:

"The supreme excellence is not to win a hundred victories in a hundred [litigations]. The supreme excellence is to subdue the [lawyers] of your enemies without even having to fight them."

Lao Tzu (Philosopher,
Founder of Taoism,
Author of the *Tao Te Ching*)

Check These Out:

Larry King Argues over Mediation Confidentiality with Beauty Queen

Former Miss California USA, Carrie Prejean, reached a confidential settlement in mediation with pageant organizers over her claims of being fired due to religious discrimination and the pageant's claims for the cost of her breast implants. Appearing on Larry King Live, Prejean emphasized that everything discussed in the mediation was completely confidential. Against a background of rumors that Prejean felt pressure to settle due to a sex tape, King

A North Carolina appellate court interpreted the detailed provisions requiring mediation of funding disputes between the board of education and the board of county commissioners and determined that appropriation of more school funds by the county does not again trigger the notification and statutory mediation process if the amount is still considered insufficient by the school board. If the mediation has not been successful by the statutory deadline, the mediator must declare impasse, which triggers the right to file suit and gives the court subject matter jurisdiction.

[Duplin County Bd. of Educ. v. Duplin County Bd. of County Com'rs](#), 2009 WL 3837004 (N.C. App., November 17, 2009) (Subscription Required)

Tribe Seeks Mediation of Ongoing Dispute with Canada Border Services Agency

A dispute over the arming of Canada Border Services Agency officers at a station on the reservation of the Mohawk Council of Akwesasne has festered for many months despite attempts at dialogue and visits by several Members of Parliament. The tribe has been suggesting mediation since the beginning of the conflict. Both sides may finally be leaning toward mediation as the only way to resolve the issues.

[Watertown Daily Times](#) (November 5, 2009)

Other Notable Cases and Proceedings

- After a year of mediation, insurance broker Marsh & McLennan agrees to pay \$400 million to settle class action claims of bid-rigging. [AmLawDaily](#) (November 13, 2009)
- Converse agrees in mediation to pay \$225 million to resolve a securities class action case over backdated stock options. The long mediation first determined the amount of settlement and then determined how payment would be made, with a contingency plan in case the initial approach doesn't work. Out of 39 options backdating class actions, 22 have now settled, nine have been dismissed and nine are still pending. [AmLaw Litigation Daily](#) (December 18, 2009)
- The Kansas Attorney General announced that successful mediation has prevented the closing of the only hospital in Pawnee County. While several due diligence and approval steps remain, transfer of ownership is to be completed by March 1. [Hutch News.com](#) (December 23, 2009)
- A dispute over the terms for ongoing rebroadcast of Sinclair signals over Mediacom stations – including New Year's bowl games – resulted in mediation that was not immediately successful but was followed by postponement of the December 31 deadline and ultimate agreement. [PNJ.com](#) (December 22, 2009); [TH Online](#) (December 31, 2009); [National Journal.com](#) (January 7, 2010)
- San Diego Gas & Electric Co. has begun a four month mediation with county officials, school leaders, consumer advocates and firefighters to determine how to balance cutting power to prevent wildfires against the burden on users of electricity. The California Public Utilities Commission encouraged a better balancing, finding the initial proposal to cut power during certain weather conditions ill-conceived. [Sign on San Diego.com](#) (December 19, 2009)
- County government and public school officials mediated for ten hours, but could not resolve a dispute over collecting taxes for the school district, which one party lamented was a \$7,000 issue that was likely to cost \$300,000 to \$400,000 to litigate. [Beeville Bee](#) (December 21, 2009)
- A town meeting is scheduled to discuss an agreement reached in mediation

continued to press for details about why she decided to settle, apart from the settlement terms. Prejean repeated that the mediation was confidential, told King he was inappropriate and threatened to walk off his show. [CBSNews.com](#) (November 12, 2009); [Big Hollywood](#) (November 6, 2009)

Update on Christian Teen Who Ran Away from Muslim Family

The teenager who ran away to Florida from her Muslim family who she said threatened to harm her for converting to Christianity has returned to Ohio. At a court hearing, an Ohio judge rejected the family's request for mediation without attorneys present, and agreed with the girl's attorney to continue with counseling and delay mediation. [SNP Online.com](#) (December 23, 2009)

Update from the Front Lines

The woman who bit a mediator in a courthouse (as previously reported) has been required to undergo anger management therapy and pay restitution for the mediator's medical bills. This resolution was ordered by the court. [Boston Herald](#) (November 17, 2009)

Other Cases & News:

Appellate Court Stays Recall of Bratz Dolls Due to Copyright Infringement and Orders Parties to Participate in Expedited Mediation, [LA](#)

between the town and a former secretary who was awarded \$1.3 million after suing under the state's whistleblower act. The town's insurance will pay at least 50% of the settlement, leaving the town to pay no more than \$450,000. The Board of Selectmen must approve any settlement before it is final, but doesn't plan to act until after the informational town meeting. [Norwich Bulletin](#) (December 14, 2009); [Norwich Bulletin](#) (December 16, 2009)

- Mediation over attorneys' fees yields \$190,000 for ACLU's efforts in bringing a class action against the county for conditions in the county jail. The Canyon County, Idaho board unanimously approved the compromise to keep from further increasing costs. [Idaho Statesman](#) (November 19, 2009)
- Litigation has been filed seeking a new evaluation of the Federal Highway Administration's plans for the Ohio River Bridges Project, which is likely to cost over \$4.1 billion. Both sides have agreed to seek the help of a mediator to try to resolve the matter. [Courier-Journal](#) (December 23, 2009) (Subscription Required)
- The mediation program instituted in 2008 for Montana grain shippers to resolve disputes over grain freight rates with BNSF Railway has been triggered by a signed complaint from a wheat producer. Under the program, the issues will be mediated within thirty days and, if not resolved, will then go to binding arbitration. [Great Falls Tribune](#) (November 24, 2009)
- Louisiana is seeking mediation over the refusal of the U.S. Army Corps of Engineers to use the 60 million tons of sediment dredged from the lower Mississippi River each year to rebuild wetlands due to higher expense. The Coastal Zone Management Act permits a state to seek mediation if federal action is inconsistent with the state's coastal management plan. [Huffington Post](#) (November 24, 2009); [Nola.com](#) (November 29, 2009)
- Mediation is scheduled between the homeowners of two islands and a local government in Florida about where sand to be dredged from Destin harbor by the U.S. Army Corps of Engineers should be placed; both islands seek beach replenishment. [Destin Log](#) (December 18, 2009)

NEWS & INITIATIVES:

Appellate Mediation Experience Differs Across States

Mediation programs for litigated cases on appeal are developing around the country, such as the pilot mediation program beginning in Maryland's Court of Special Appeals. Maryland hopes to reduce the 1,300 civil appellate cases heard each year by the court, and will conduct its pilot program for at least a year. However, a pilot appellate program in the Arkansas appellate courts has been slow to develop. After a year, only a couple of appellate cases have been mediated in Arkansas's voluntary program. The state supreme court justice who oversees the program suggests a key difference is that Arkansas does not have the congested court dockets of other states.

[Daily Record](#) (November 22, 2009); [Arkansas Times](#) (November 19, 2009)

Texas Gives Patients Right to Mediate "Balance Billing" Claims

[Times.com](#) (December 10, 2009)

Comprehensive Settlement by John Hancock Life Insurance Company and Hoosier Energy Rural Electric Cooperative of Litigation over Leaseback Transaction Approved by Federal District Court, [Auto-mobi.info](#) (December 26, 2009)

Mediator Appointed to Help Utah and Navajo Nation Resolve Dispute over Decades of Oil and Gas Royalties, [SLTribune](#) (December 12, 2009)

Martha's Vineyard Center for Dispute Resolution Celebrates 25th Anniversary with Resolution by Massachusetts House of Representatives, [Martha's Vineyard Gazette](#) (November 27, 2009)

Ohio Attorney General Requests Delay of Hospital Merger and Mediation to Consider How to Minimize Harmful Effects to Public, [Cincinnati.com](#) (December 7, 2009); [Cincinnati.com](#) (December 22, 2009)

Court Sets Mediation Deadline in Multimillion Dollar Damages Case Involving 2006 Helicopter Crash During Filming of "The Final Season" Movie, [WCF Courier.com](#) (November 24, 2009)

Massive Repairs of New Denver Art Museum to Be Resolved in Mediation, [CBS 4 Denver.com](#) (Denver 22,

Texas has enacted legislation allowing patients in preferred-provider or state benefit plans to mediate whenever they would have to pay over \$1,000 for services of out-of-network doctors received at in-network hospitals. The Texas Department of Insurance is drafting rules to implement the statute, which takes effect in September 2010. An informal telephone call between the parties must occur within 30 days of the patient's request for mediation, and the full mediation session must be conducted within 180 days. Mediators will be appointed by the Texas Office of Administrative Hearings.

[Star-Telegram.com](#) (November 25, 2009)

Texas Mediation Program for Hurricane Ike Claims Has Few Takers in First Months

After lengthy consideration, the Texas Department of Insurance launched a mediation program on September 1 for Hurricane Ike claims, but has received only a handful of requests for mediation. The Department allows insurers not to participate in the program, so only three companies covering one-fourth of the state's property insurance have chosen to do so. Further, the program relies on insurers to do outreach to claimants, resulting in a modest number of letters being sent to policyholders and raising concerns that the companies may cherry-pick who they contact. The mediation company chosen to manage the program has been prevented by the state from advertising the availability of the program, so has mediated only six Hurricane Ike cases – all of which settled.

[Chron.com](#) (November 5, 2009); [KHOU.com](#) (November 25, 2009)

Minnesota Farmer-Lender Mediation Program Seeing Much Greater Use

The annual report on the Farmer-Lender Mediation Program in Minnesota shows a significant increase in the use of mediation over the last year. Farmers made about 1,200 requests for mediation in the program in 2009, an increase of 86 percent over 2008. The total amount of debt involved was \$322 million, more than double 2008. Over a third of the debts have been restructured or resolved, while about 45 percent are still pending in mediation. 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.

[UM News](#) (November 4, 2009); [2009 Annual Report](#)

Congress May Require Auto Makers to Mediate with Rejected Dealers

Several bills have been introduced relating to the economic rights of automobile dealers rejected by auto makers in which the federal government has an ownership interest. Negotiations over the federal legislation has included the issue of whether arbitration or mediation might be a useful process for dealers who lost franchises. Chrysler and GM reportedly agreed to offer an arbitration process to affected dealers, but dealers have sought mediation instead.

[WSJ Online](#) (December 10, 2009)

2009)

Port Commissioners Suspend Litigation in Order to Pursue Mediation in Attempt to Terminate 100-Year Lease with Seafood Market, [Bandon Western World](#) (December 24, 2009)

After Year of Mediation, Environmental Groups File Suit Against Environmental Regulations that County in Washington State Has Not Yet Finished, [Daily World.com](#) (December 26, 2009)

Eight Year Old Lawsuit by Victims in 2001 West Virginia Flood Moves to Mediation, [West Virginia Media](#) (December 11, 2009)

Judge Schedules Mediation Between Mayor and Four City Council Members Charged with Misconduct, [GazetteXtra.com](#) (November 13, 2009)

Mistrust and Confrontation on Park District Commission Leads Commissioners to Seek Mediation, [Daily Herald](#) (December 17, 2009)

Year-Long Mediation Between City and Township over Economic Development Ongoing, [SNP Online](#) (December 9, 2009)

Court Sends Lawsuit Against School for Sexual and Mental Abuse to Mediation, [WREG.com](#)

Archdiocese Resolves Nearly All Clergy Abuse Cases Through Mediation

The latest figures from the St. Louis Archdiocese show that it spent \$350,000 last year on victims abused by priests and more than twice that on its lawyers, although over the past ten years victims received \$7.6 million while its lawyers were paid \$5.9 million. The archdiocese set up a mediation program in 2003. An attorney for the archdiocese states that it attempts to address credible cases through mediation and has resolved up to 90 percent of the cases that way.

[Kansas City.com](#) (November 16, 2009)

Update on Home Foreclosure Mediation

- The Foreclosure Mandatory Mediation Act, [S. 2912](#), was introduced in the Senate in December by Senator Nelson (D-Fla.). The **federal** legislation would require mandatory mediation by lenders of loans with federal guarantees or federal insurance. The required one-time mediation would involve both the mortgagor and a housing counseling agency and would be paid for by the lender. [US Federal News](#) (December 30, 2009) (Subscription Required)
- The **Florida** Supreme Court is creating a state-wide managed mediation program in an effort to help more homeowners avoid foreclosure. All new foreclosure cases involving primary residences will be referred to mediation once Florida's 20 judicial circuits issue administrative orders, which may take months. Homeowners must see a foreclosure counselor to be eligible for mediation. Lenders are responsible for mediation costs, which are capped at \$750. Tenants can opt into mediation, but must share costs with the lender. Mediators must be from non-profit organizations which can sustain operations without any payment from the courts. The program also requires statewide data collection on mediation outcomes. [Bradenton Herald](#) (December 29, 2009) (Subscription Required)
- The governor of **New York** signed legislation extending to all mortgage borrowers the mandatory settlement conference and other requirements that previously applied only to subprime loans. But success has been elusive, in part because it is difficult to get homeowners to participate in the conferences. In one district 25 percent of borrowers were no-shows at the settlement conference, which are conducted by a single judge or his law clerk. In that district only 28 percent of the conferences held have been successful, but that contrasts favorably with the much larger dockets of Brooklyn and Queens, where less than 10 percent of the meetings have been successful. [Buffalo News](#) (November 28, 2009)
- The Supreme Court of **Maine** adopted new rules for residential foreclosure mediation, requiring certain financial information to be exchanged and limiting dispositive motions and requests for admissions while mediation is being pursued. The new rules are effective on January 1. [DSNews.com](#) (December 23, 2009)
- **California** is considering the creation of a mediation program for home foreclosures similar to Nevada or other states. Currently, California simply mandates a call between the parties prior to foreclosure. [SFGate.com](#) (November 26, 2009); [California Progress Report](#) (November 20, 2009); [California Newswire](#) (November 12, 2009); [Examiner.com](#) (November 4, 2009)
- The governor of **Maryland** introduced legislation requiring mediation in home foreclosure cases and requiring lenders to cover the costs. The state has collaborated with experts and industry representatives to examine how mediation has worked elsewhere. [Hometown Annapolis.com](#) (November

(December 8, 2009)

Mediation Urged by Court in Criminal Case Involving School Principal Who Alleges He Was Choked by Female Boss, [MyCentralJersey.com](#) (December 7, 2009)

Parties Request Judge to Delay Determination of Class Status on Hotel Tax Issue to Give Time for Mediation, [Rome News](#) (December 2009)

Man Who Spent Seven Years in Prison for Murder Before Acquittal on Retrial Obtained Apology and Substantial Damages and Attorneys' Fees from Newspaper, [BBC News](#) (December 16, 2009)

Claims Against Canada by Three Men for Their Torture in Syria Have Not Reached Resolution in Mediation and Appear Headed to Trial, [Winnipeg Free Press](#) (December 4, 2009)

Australian Court Requires Parties to Mediate Litigation Costs Losing Party Must Pay for 232 Hearing Days over Four Years, [SMH.com](#) (November 28, 2009)

- 1, 2009); [Baltimore Sun](#) (November 20, 2009)
- Concerns are being raised about the mediation program in **Nevada**, with some homeowners feeling that lenders are not willing to negotiate in good faith. Senate Majority Leader Harry Reid (D-Nev.) specifically challenged the Bank of America to do more in Nevada, stating that mediators had reported bad faith by the Bank of America in seven of its eight mediations since Nevada's program was launched in August. Over 3,400 homeowners have sought mediation in Nevada, with a little over ten percent having mediated thus far; 75 additional mediators are being sworn in to bring the total in the state to 170. [Las Vegas Sun](#) (December 1, 2009); [KARNV.com](#) (December 1, 2009); [Mercury News](#) (November 25, 2009); [Mercury News](#) (December 11, 2009)
- The **Connecticut** governor and legislators are proud of making foreclosure mediation programs mandatory, resulting in additional benefits to homeowners, with nearly 4,500 cases handled in the program through October and a settlement rate of 75%. [Greenwich-Post.com](#) (November 27, 2009)

International Mediation Developments

- The cost of mediation may be recovered as part of litigation costs if a party does not follow the spirit or letter of the pre-action protocol in the **U.K.** [Boyesturner.com](#) (November 30, 2009)
- The Chancellor of **Germany** proposed individuals to be the country's first "credit mediator" and work with banks and companies to spur loans and avoid the risk of a credit crunch; a mediator has been selected and mediation may begin March 1. [Bloomberg.com](#) (November 27, 2009); [WSJ Online](#) (December 2, 2009) (Subscription Required)
- New mediation and arbitration procedures in **Italy** provide additional options to small investors and consumers. [Mondaq](#) (December 23, 2009)
- The National Union of mediators in **Romania** holds its first annual congress at the Romanian Parliament, with a focus on mediation as a foundation for Romanian society. [PR.com](#) (December 6, 2009)
- The promotion and use of mediation is considered important to **Macedonia's** bid for EU membership. [BBC International Reports](#) (November 24, 2009) (Subscription Required); [Balkan Insight](#) (November 23, 2009)
- Commercial mediation begins in **Morocco** with resolution of a dispute between the bar association and a health insurance company; USAID sponsored commercial mediation training. [USAID.gov](#) (November 2009)
- A pool of mediators is being trained in **Dubai, U.A.E.** for three recently established mediation programs. [National](#) (December 19, 2009), [Gulfnews.com](#) (November 29, 2009)
- India** begins a pilot project in five states for mediation centers to handle consumer cases, with assistance from a German group. [Express buzz](#) (December 26, 2009)
- Legislation authorizing mediation in **Nepal** is sent to the cabinet, after which the final step is action by the parliament. [Republika](#) (December 10, 2009)
- The Securities Commission of **Malaysia** is preparing a mediation framework for the capital markets after consultation with industry and public interest groups. [Star Online](#) (November 5, 2009)
- The World Bank's International Finance Corporation sponsors mediation training and public awareness in **Vanuatu**. [Finchannel.com](#) (November 24, 2009)

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