

# MEDIATION NEWS

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## 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

## 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

commercial to cross-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

a settlement allowing a church to build a \$50 million complex on a rural, 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

• 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 name in

disputes. [PIA.gov.ph](http://PIA.gov.ph) (May 1, 2011)

- A requirement that banks must offer mediation to farmers prior to 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)

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)

## 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)

- 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)

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)

## 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

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 agreement to review land

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 “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)

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)