

# 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)



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## 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](#) (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](#) (June 26, 2012); [Oregon Business Report](#) (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](#) (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](#) (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](#) (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](#) (June 28, 2012); [Connecticut Foreclosure Mediation Program](#)
- **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](#) (June 8, 2012); [Delmarva Now.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](#) (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](#) (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](#) (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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