

MEDIATION NEWS

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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)