

MEDIATION NEWS

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Keith L. Seat

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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)

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

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

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 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

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 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

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 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)

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](#)

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

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 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 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 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

commencing litigation (with various exceptions), takes effect on August 1, 2011. [Mondag.com](http://mondag.com) (July 15, 2011); [Australian Government ComLaw](http://australian.gov.au) (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](http://abc.net.au) (July 29, 2011); [ABC Rural](http://abc.com.au) (July 21, 2011); [The Land](http://theland.com.au) (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](http://fbcl.com) (July 24, 2011); [Fiji Times Online](http://fijitimes.com) (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](http://international-law.com) (July 28, 2011)

trademarks were sent to mediation and resolved. [Inquirer Business](http://inquirer.com) (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](http://medianama.com) (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](http://roanoke.com) (July 1, 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](http://capitalpublicradio.com) (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](http://thesacramento.com) (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](http://ctv.ca) (July 7, 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](http://philly.com) (August 16, 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](http://worldnewsreport.com) (July 19, 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](http://kuow.org) (July 22, 2011); [KPLU.org](http://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-

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](http://clearwaterpatch.com) (July 22, 2011)

foreclosure ordinance requiring mortgage lenders to mediate with homeowners or pay a \$300/day fine. It awaits signature by the mayor. [Boston Herald.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](#) (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](#) (August 17, 2011); [The Final Call](#) (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](#), 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.](#), 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 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)