

# MEDIATION NEWS

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## CASES & RESOLUTIONS:

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

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

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

### California Mediation Confidentiality Statute Shields Legal Malpractice

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

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

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

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

## Mediation Quote:

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

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

## Worth Noting:

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

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

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

## Netflix Mediated Settlement Approved by Court

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

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

## Other Notable & High Profile Proceedings

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

## NEWS & INITIATIVES:

### California Fails to Add Legal Malpractice Exception to Mediation Confidentiality Statute

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

2012); [Toolkit](#)

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

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

## Other Cases & Resolutions:

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

With the assistance of a

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

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

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

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

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

## Mediation Proposed for Medical Malpractice Disputes in Oregon

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

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

## Another Notable News Item

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

## International Mediation Developments

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

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

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

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

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

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

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

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

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

## Update on Home Foreclosure Mediation

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

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

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

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