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Dispute Resolution Update

December, 2008

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HAPPY HOLIDAYS

From
Associates in Dispute Resolution, LLC

Please visit our web site for detailed information on our associates who are available to handle mediations, arbitrations and dispute resolution design for your clients.

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Larry R. Rute

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Larry and Patrick are Fellows of the International Academy of Mediators.



This issue also features recent mediation decisions and dispute resolution news and initiatives gathered from around the country and around the world. This information has been summarized by Keith L. Seat, a respected mediator and Editor of the International Academy of Mediators monthly newsletter.





RECENT MEDIATION CASES & RESOLUTIONS

Alabama Courts Must Order Mediation When Sought by Litigant

The Supreme Court of Alabama granted a petition for mandamus in [Eckles v. Fort Dearborn Life Ins. Co.](#), requiring a trial court to order mandatory mediation when sought by a litigant, pursuant to state statute and court rule. The lower court didn't think the circumstances were right for mediation, but the Supreme Court made clear that a court cannot exercise discretion if any party seeks mediation. Both the Alabama statute and court rule provide for mandatory mediation even if only one party asks for it, but require that party to pay for the costs of mediation.

[Eckles v. Fort Dearborn Life Ins. Co.](#), No. 1071545 (Ala., Oct. 10, 2008)

Lack of One Signature Prevents Admissibility of Multi-Party Settlement Agreement to Determine if Portions Are Severable

A California appellate court concluded in [Rael v. Davis](#) that the lack of a single signature on a mediated settlement agreement meant that there was no final agreement, so the document could not be admitted in court to consider whether any of the settlement provisions between other parties could be severed and stand alone. In Rael, a mediation arising out of conservatorship litigation involved distribution of property between a man's children and his new wife. The settlement reached in mediation omitted the signature of one child who missed the last mediation session, even though his individual counsel was present and signed the agreement. After the husband died, his wife sought to enforce the agreement concerning what she would receive, since she and her husband had both signed the agreement. However, the trial court examined the parties' intentions and expectations at the mediation session and afterwards and concluded that they intended no agreement unless everyone signed. The appellate court focused on the fact that the agreement expressly named the parties who must sign and one of them did not. If there was no agreement, under California's strict mediation confidentiality provisions the document was inadmissible for any purpose, including imposing attorneys' fees under the agreement against the wife even though she had sought to admit the agreement. The appellate court concluded that neither judicial estoppel nor anything short of due process concerns could permit a judicial exception to mediation confidentiality.

[Rael v. Davis](#), 2008 WL 4335179 (Cal. App. 2d Dist., Sept. 24, 2008)

Public's Need to Know Wrongful Death Outcomes Trumps Mediation Confidentiality in Virginia

The Virginia Supreme Court concluded in [Perreault v. The Free Lance-Star](#) that the state statute requiring wrongful death settlements to receive court approval necessitates filing the settlement terms on the record, even when the settlements result from mediations for which confidentiality is also provided by state statute. The case involved a series of settlements relating to deaths after medication was administered during open heart surgery. The settling parties sought to keep the terms confidential and appealed the trial court's refusal to seal the record. The Court explained that the mediation confidentiality statute contains an exception when disclosure is required by law, and rejected various arguments that would have shielded the settlement amounts from disclosure. The Court also held that whether to seal the record is left to the discretion of the trial court, with a strong presumption of public access to judicial records.

[Perreault v. The Free Lance-Star](#), No 071978 (Va., Sept. 12, 2008)

Year-Long Mediation Effort Develops Better Bridge

Plans for a safer, stronger, quieter, environmentally-friendlier bridge are being developed by a 34-member mediation team. The group has spent the last year working through the myriad issues surrounding a \$3.9 billion replacement of the Evergreen Point Bridge at the direction of the Washington state legislature. Substantial disagreements have been overcome and options narrowed to three plans. The mediation team is due to provide a project impact analysis in October for the legislature.

[Seattle Post-Intelligencer](#) (September 18, 2008)



Mediation Program Established for Montana Grain Shippers

Montana farmers have approved a proposal to use mediation to resolve disputes over grain freight rates with BNSF Railway. Grain producers are not considered shippers by the Surface Transportation Board despite paying the freight, which forced them to rely on grain elevator companies to file cases. The new program with BNSF will first rely on mediation and then resolve any remaining issues with binding arbitration by an independent arbitration board.

[Great Falls Tribune](#) (October 16, 2008); [Montana's News Station.com](#) (October 20, 2008)

Mandatory Med Mal Mediation Working in Illinois County

Mandatory mediation of medical malpractice cases in Madison County, which the Illinois Supreme Court approved in 2007 establishing the first rule of its kind in Illinois, worked as intended to settle a wrongful death case alleging inadequate care by a nursing home. The mediation rule is also considered unique by allowing parties to choose between lawyers and judges to mediate their case. In the wrongful death case, a judge was assigned in February to mediate the matter. The terms of the settlement were filed under seal and not disclosed.

[The Madison - St. Clair Record](#) (October 10, 2008)

New Mexico First State to Join EEOC's Universal Agreement to Mediate

While over 1,200 employers have entered into Universal Agreements to Mediate with the U.S. Equal Employment Opportunity Commission, New Mexico is the first state to do so. With New Mexico's formal agreement to resolve disputes through mediation, all eligible discrimination charges filed with the EEOC naming the state as respondent will be sent to the EEOC's mediation unit.

[Bizjournal.com](#) (October 31, 2008)

Wisconsin Amends Unauthorized Practice of Law Rule to Expressly Permit Mediation Advocacy in Wisconsin of Cases Pending Elsewhere, Without Bar Membership

Effective January 1, attorneys need not be members of the Wisconsin bar in order to appear as advocates in mediations or arbitrations in the state, if the attorneys are handling the matter in another jurisdiction where they are members of the bar. No mention is made of any requirement for the mediators themselves. The Wisconsin amendments are based on the ABA Model Rules of Professional Conduct.

[In re Petition of the State Bar to Amend Ch. 20 of the Wisconsin Supreme Court Rules](#), No. 06-06 (July 30, 2008)

New York Continues to Seek Land Use Mediation Statute

New York is attempting to join about two dozen other states with land use mediation statutes. Bills have passed the New York Senate four times, but ultimately failed to be enacted. Most recently, S.B. 3232 passed the Senate on May 9 and would add mediation as an option for resolving land use disputes, but would not replace existing land use review procedures. The senators introducing S.B. 3232 noted the success of a pilot land use mediation project for the Hudson River Valley and a mediation program in the Office of Court Administration. Other state statutes vary in their breadth and timing, with some encouraging mediation early in the development approval process and others waiting until litigation has begun.

[New York Law Journal](#) (October 15, 2008) (Subscription Required); [New York S.B. 3232](#)

California Bill for HOA Mediation Vetoed

Governor Schwarzenegger vetoed California legislation that would have created a bureau to provide a forum for mediating homeowner association disputes, along with training. The bill was based on fact-finding by the California Law Revision Commission, which studied common ownership developments.

[San Diego Union Tribune](#) (September 30, 2008)

L.A. Bar Association Opposes Pay for Pro Bono Mediators

The Los Angeles Bar Association has decided to oppose a resolution before the California Bar Association that would ask the legislature to require litigants entering mediation to pay for it. Mediators now serve pro bono for the first three hours of Superior Court-annexed mediation. Proponents seek pay for mediation from parties that can afford it so pro bono services can be focused on those without means, while opponents stress that requiring parties to pay may result in less mediation and the courts becoming clogged with litigation.

[Metropolitan News-Enterprise](#) (September 22, 2008)





DISPUTE RESOLUTION NEWS & INITIATIVES

Hong Kong Encourages Mediation of Lehman-Related Disputes

The Hong Kong Monetary Authority appointed the Hong Kong International Arbitration Centre to provide mediation and arbitration services to address disputes between banks and investors in Lehman-related products. In certain circumstances, the Monetary Authority will pay a portion of the fee for the Centre's services. Hong Kong's Secretary for Justice is also encouraging mediation to help resolve disputes relating to Lehman mini-bonds.

[The Standard](#) (October 31, 2008); [The Standard](#) (October 22, 2008)

Singapore Monetary Authority Prefers Mediation for Investors

The Finance Minister of Singapore stated that the Monetary Authority is encouraging mediation as a recourse for protesting investors. Banks in Singapore have established independent mediation panels to address concerns raised by customers.

[Channel News Asia](#) (October 15, 2008)

States Increase Use of Mediation for Home Foreclosures

Connecticut has begun a foreclosure mediation program through legislation enacted on June 12 which is said to be the first of its kind in the U.S. The mediation program allows homeowners facing mortgage foreclosure on primary residences to request mediation at no charge to them. With a state appropriation of \$2.5 million, twelve staff mediators have been appointed for the state, along with seven case flow coordinators. The goal is to keep homeowners in their homes, often through refinancing or restructuring debt. While the program manager estimates that 4,000 homeowners are eligible for the new program, only about 40% have applied thus far. [Connecticut Post](#) (October 4, 2008)

New Jersey Governor Corzine set forth a sweeping financial rescue plan before a rare joint session of the New Jersey legislature. The rescue plan requires mediation in contested foreclosures, which is to be implemented statewide within 60 days. [WCBS-TV New York](#) (October 16, 2008)

The Ohio Supreme Court recommends that Ohio counties implement mediation programs, so Sandusky County has begun a foreclosure mediation program using the Court's model. To participate, homeowners in foreclosure must request mediation, agree to participate in a credit counseling session and allow an appraiser to determine their home's current value. Entering into mediation with a sense of what the homeowners can do financially and their property value, along with requiring banks to send a representative with decision-making authority, makes the mediation process more effective. [Fremont News Messenger](#) (October 1, 2008)

Ohio's Stark County Common Pleas Court is encouraging homeowners in foreclosure to use its mediation program, which has been successful in keeping homeowners in their homes in about half of the mediations. The \$50,000 cost of the mediation program is funded by foreclosure case filing fees. The program is run by the Community Mediation Center. [Canton Repository](#) (September 7, 2008)

Individual judges are ordering mediations in home foreclosure cases in Florida, as many homeowners have difficulty finding anyone with whom they can try to work things out at their lenders' offices. Judges in Florida's Eighteenth and Seventh Judicial Circuits are currently requiring mediations; the Fifth Circuit is considering implementing mediation requirements, while the Ninth Circuit is not. The various circuits are expected to share experiences about how best to handle increasing foreclosure filings. [Orlando Sentinel](#) (October 6, 2008)

A nonprofit organization, Earth Angels United, is administering a foreclosure mediation program in Florida's Eighteenth Judicial Circuit, to help reduce the strain caused by a 200% increase in foreclosure cases. [Orlando Business Journal](#) (October 29, 2008)

JAMS Gearing Up for Credit Crisis Disputes

JAMS announced that it has formed a Financial Markets Group to provide dispute resolution services to those in litigation due to the credit and financial crisis. JAMS is developing special ADR procedures for the types of disputes expected and will provide specialized training to its neutrals who are selected for the group.

[Marketwatch.com](#) (October 14, 2008)





DISPUTE RESOLUTION NEWS & INITIATIVES (continued)

Arizona Rejects Initiative Which Would Have Eliminated Mediation in Homeowner Disputes with Builders By a margin of nearly 4-1, Arizona voters defeated an initiative on the ballot in Arizona which, among other things, would have eliminated the use of mediation in disputes between homeowners and builders, requiring litigation instead. Proponents of the initiative, Proposition 201, asserted that it would not eliminate mediation, but the existing mediation language in the Arizona statute apparently would have been stricken.

Ballotpedia.org; [Tucson Citizen](#) (September 22, 2008); [Proposition 201](#)

“Technical Mediation” Urged for Expert Disputes

Disagreements between parties' experts in complex matters, such as construction defect litigation, may be addressed by “technical mediation” using neutrals who have sufficient subject matter expertise to communicate easily with the feuding experts and mediate technical positions. The goal is to resolve only the technical issues and not consider liability or damages, which are subsequently addressed in a standard mediation or other form of alternative dispute resolution.

[Miami Daily Business Review](#) (September 9, 2008) (Subscription Required)

OTHER INTERNATIONAL MEDIATION DEVELOPMENTS

- After extensive analysis, the **U.K.** has introduced an Employment Bill to abolish statutory grievance and disciplinary procedures and encourage mediation, [Aberdeen Press and Journal](#) (September 26, 2008); New **U.K.** workplace guide by Chartered Institute of Personnel and Development and Acas encourages mediation based on survey of effectiveness, [Financial Adviser](#) (October 2, 2008) (Subscription Required)
- Cardiff, **Wales** begins pilot program offering free mediation for consumers and businesses using two staff mediators, [Wales Online](#) (October 4, 2008)
- European Commission gives award to **U.K.** Small Claims Mediation Service with very high satisfaction rate, [PR-CANADA.net](#) (November 1, 2008)
- **Turkey** proposes mediation to increase efficiency of court system; similarities with Ottoman Empire process noted, [Turkish Daily News](#) (November 1, 2008)
- **India** high court judge praises mediation at inauguration of Mediation and Conciliation Centre in Thalassery, Kerala, [Hindu](#) (September 28, 2008) (Subscription Required)
- **India's** Law Ministry is focusing on training trainers in order to address shortages of trained mediators, which are holding back pre-trial mediation, [Hindu](#) (October 5, 2008)
- High court advises the State Bank of **Pakistan** to instruct all commercial banks to attempt to resolve disputes through mediation prior to going to court, [Business Recorder](#) (September 25, 2008) (Subscription Required)
- **Malaysia** establishing Franchise Mediation Center by early 2009 and training mediators to mediate franchise disputes, [Bernama Economic News](#) (September 11, 2008) (Subscription Required)
- The **Philippines** Intellectual Property Offices proposed draft rules that would permit government mediators to render final decisions on IP disputes when parties cannot reach agreement, [Business World Online](#) (September 29, 2008)
- **Hong Kong** civil justice reforms emphasizing mediation are due to take effect in April, causing concern among counsel, [South China Morning Post](#) (September 29, 2008) (Subscription Required)
- **Jamaican** Justice Minister promises more court appointed mediation and expansion to some criminal matters, [RadioJamaica.com](#) (September 9, 2008)
- **Bermuda** Human Rights Commission urges mediation of complaints, adding five mediators at \$300 per hour, [Royal Gazette \(Bermuda\)](#) (November 1, 2008) dispute resolution. [Miami Daily Business Review](#) (September 9, 2008) (Subscription Required)





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