

Associates in Dispute Resolution LLC

Mediation

Arbitration

Dispute Resolution



Dispute Resolution Update

December 2014

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Dear Friends and Colleagues:

This edition of Dispute Resolution Update features recent mediation-related court decisions, as well as news describing dispute resolution initiatives in this country and throughout the world. The information has been summarized by Keith L. Seat, a respected mediator and Editor of the International Academy of Mediator's newsletter.

Jorden Ryan Assumes Responsibility as ADR, LLC's Dispute Resolution Program Administrator



Associates in Dispute Resolution LLC, has launched a Dispute Resolution Program for small businesses to reduce litigation risks and save time and money through the use of mediation and arbitration. This concept has been endorsed by the American Bar Association Section of Dispute

Resolution. [To view, click here.](#) We believe that companies that take advantage of a systematic internal dispute resolution program (DRP) will have a competitive advantage over those organizations that do not. The establishment of a quality internal dispute resolution system is an approach designed to enable parties and their lawyers to resolve disputes and conflicts as early as reasonably possible. DRP planning will often result in significant cost savings and reduction of potential litigation costs and expenses.

Jorden gained experience in business negotiation working on international projects for IKEA, Wal-Mart, Sam's Club and various suppliers. He has practical business knowledge in logistics, inventory software, product development, sourcing, sales, and marketing. As a mediator, Jorden's philosophy is to allow parties to obtain a solution that can keep up with the speed of business. Jorden studied law in Barbados, Ireland, and the United States. These experiences have

Dispute Resolution Update

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influenced his ability to understand people with diverse views and objectives. Jordan's areas of expertise include commercial contract disputes, employment disputes, and interoffice dispute resolution design.

He received his Bachelors from Pittsburg State (2003) and his Jurist Doctorate (2013) from Washburn School of Law. He is a member of the Missouri Bar Association, Kansas Bar Association, Kansas City Metropolitan Bar Association, San Diego County Bar Association and Consumer Attorneys of San Diego.

Those interested in learning more about ADR's innovative Dispute Resolution Program are welcome to receive additional information by contacting Jordan at jorden@adrmediate.com.

We wish all of our readers a very happy holiday season.


Larry Rute




Patrick Nichols

Distinguished Fellows **of the International Academy of Mediators**



International
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Established 1990



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Mediation Quote

"Standard negotiation theory stresses the need to brainstorm value-creating tradeoffs. The study of improvisation adds another step: to create value, don't just think outside the box; remain attentive to the mood, posture, and unspoken signals your counterpart offers. Improvise questions aimed at maximizing value and opportunities for both of you, then listen carefully to how the other side responds. Winning in this situation means listening for entirely new opportunities. Practice being more fully attentive. At every moment in a negotiation, your counterpart is sending unspoken messages. If your substantive preparation is sufficient and your general confidence level high enough, you can devote more of your attention to picking up these important signals."

- Lawrence Susskind, *Good for You, Great for Me: Finding the Trading Zone and Winning at Win-Win Negotiation* (PublicAffairs 2014) at 89-90

Recent Mediation Cases & Resolutions

Extensive Mediation Efforts Allow Detroit to Successfully Exit Bankruptcy

Detroit reduced its debt by \$7 billion out of \$18 billion and successfully exited from the largest-ever municipal bankruptcy in record time as a result of many months of mediation efforts that developed a "grand bargain" and minimized litigation. The court-ordered mediation achieved settlements with all of the city's major creditors, including city retirees and pension funds. The final mediated settlements were reached during the lengthy federal court hearing on the plan. Among other things, the grand bargain avoided the assets of the Detroit Institute of Art being sold off.

[New York Times](#) (November 7, 2014); [Reuters](#) (October 22, 2014); [Reuters](#) (October 9, 2014); [Detroit Free Press](#) (September 2, 2014)

Party Who Could Have Participated in Mediation Not Entitled to Confidential Mediation Information

A subcontractor which declined to participate in mediation, but whose claims were impacted by the outcome, was not entitled to obtain any confidential mediation information in related litigation, as it did not meet any of the exceptions to the mediation privilege in Ohio's Uniform Mediation Act. The appellate court criticized the trial court's plan to release privileged mediation documents along with non-privileged documents and invite litigants to seek a protective order and "claw back" the privileged documents to avoid harm.

[American Environmental Grp., Ltd. v. H.M. Miller Constr. Co.](#), No 1000854 (C.A. Ohio, October 23, 2014)

Insufficient Term Sheet and Lack of Clear Intent to Settle Undermines Mediation Outcome

A federal court applying Illinois law concluded that a term sheet developed in mediation was not an enforceable settlement agreement because key terms were missing and there was no clear indication that the parties intended the term sheet to be enforceable, rather than just an agreement to agree. The court noted that the term sheet had been hastily developed through a mediator's proposal at the end of a long day, with the mediator shuttling between the parties and no direct communication over the terms. The court also considered the behavior of the parties after the mediation, as neither side promptly reported to the court that the case had been resolved as is typical when settlement has been achieved.

[Craftwood Lumber Co. v. Interline Brands, Inc.](#), No. 11 C 4462 (U.S.D.C. N.D. Ill., September 23, 2014)

Other Notable & High Profile Proceedings

- Mediation confidentiality was violated by a pleading including the specific positions taken in mediation, but broad characterizations about the mediation - such as a "monumental gap" leading to impasse - were acceptable. [Procaps, S.A. v. Pantheon, Inc.](#), No. 12-24356-CIV (U.S.D.C. S.D. Fla., October 22, 2014)
- When parties agree in advance to mediate any dispute before resorting to litigation and fail to do so, courts may either stay or dismiss the litigation without prejudice. The magistrate did not err in dismissing the case even though plaintiff argued that it had proposed mediation without response from defendant and that a stay was necessary to be able to compel mediation. [Hometown Services, Inc. v. EquitylockSolutions, Inc.](#), No. 1:13-cv-00304 (U.S.D.C. W.D. N.C., September 5, 2014)

- While mediation is generally favored strongly, the supreme court of Vermont held that requiring a counterclaim to be mediated that had only come to light during the litigation and the trial court had already granted a motion to permit it at trial, would have caused greater delay and expense to the parties, undermining the purpose of the mediation clause. [City of Newport v. Village of Derby Center](#), No. 2013-310 (S.C. Vt., September 12, 2014)
- A dispute resolution clause in a contract calling for mediation and arbitration was unenforceable because it failed to inform signatories that they were giving up their right to go to court due to the arbitration provision, without discussion of severing and enforcing the mediation requirement. [Rosenthal v. Rosenblatt](#), No. A-3753-12T2 (Super. N.J., October 24, 2014)
- Nonparty insurance companies who denied coverage to defendants could not be compelled to attend mediation, especially where the defendants themselves were attending mediation and the local rule requires either a party or its representative to attend mediation. [Booth v. Davis](#), Nos. 10-4010-RDR (U.S.D.C. Kan., August 29, 2014)
- Counsel for policyholders in Superstorm Sandy insurance litigation challenged efforts by insurers' counsel to cease mediations in order to pursue more site inspections. [Law360](#) (September 17, 2014)
- The court required mediation despite an objection from the U.S. Department of Justice that it would be a waste of time; the court quoted research finding that settlement rates and party satisfaction are similar in both mandatory and voluntary mediation. [United States v. Tenacious Holdings, Inc.](#), No. 12-00173 (U.S. Ct. Int'l Trade, September 2, 2014)
- The supreme court in Washington held that the lender's failure to mediate a home foreclosure case in good faith could be a compensable injury under the state Consumer Protection Act. [Frias v. Assent Foreclosure Services, Inc.](#), No. 89343-8 (S.C. Wash., September 18, 2014)
- A federal court in Ohio imposed sanctions of one billable hour on opposing counsel who forgot to show up for a scheduled mediation and claimed that he simply failed to put the mediation on his calendar. In imposing sanctions, the court noted that counsel also ignored the other side's settlement demand, and made his excuses in a filing that itself was untimely. [Castro v. Los Camperos, Inc.](#), No. 2:13-cv-1186 (U.S.D.C. S.D. Ohio, October 27, 2014)

Other Cases & Resolutions:

Two lawsuits filed by Democrats seeking public information from the Ohio governor and treasurer were sent to mediation without objection, and will use a mediator from the Ohio supreme court. In a separate matter, the Ohio supreme court rejected a request for mediation by the Democratic gubernatorial candidate in a lawsuit brought by Republicans trying to obtain public information showing when the candidate enters and leaves county buildings in his job as a county executive. [Cleveland.com](#) (September 23, 2014); [wfmj.com](#) (October 17, 2014)

Dispute Resolution News & Initiatives

Cotton Association Launches New Mediation Service to Address Problem of Defaulters

The International Cotton Association is beginning to offer mediation services, claiming to be the first commodities association to do so. The need for mediation arose as cotton prices surged in 2011 and then quickly fell, resulting in many contract breaches and a list of over 700 defaulters with whom association members are not allowed to deal without expulsion from the association themselves. Both defaulting companies and the association are interested in resolving the underlying disputes and restoring relationships, and so are turning to mediation.

[Reuters](#) (October 1, 2014)

Children's Hospital Is Training Health Professionals to Spot Communication Breakdowns and Turn to Mediation

Six hundred health professionals in a children's hospital have received training to spot signs of communication breakdown with parents and encourage mediation in the Evalina Resolution Project in the U.K., as part of a two-year pilot. The goal is to make good medical decisions for the young patients by preventing conflicts from escalating into lawyers seeking decisions from judges.

[Sky News](#) (September 15, 2014)

North Dakota Mediation Program Recertified

The North Dakota Mediation Service was recently recertified by the U.S. Department of Agriculture to receive ongoing federal funding. The 30-year-old mediation program expanded beyond agricultural issues in 2011 to address property disputes related to energy development, as well as landowner disputes with the North Carolina Game and Fish Department.

[Farm & Ranch Guide](#) (October 28, 2014)

International Mediation Developments

- The **World** Trade Organization has approved a new mediation system to resolve food safety policy disagreements among members to minimize the problems facing importers and exporters. [WTO](#) (September 10, 2014)
- At a training program on Alternative Dispute Resolution in Lagos, the **Nigeria** Shippers' Council strongly encouraged use of mediation for settling commercial disputes. [NigerianTribune](#) (October 2, 2014)
- A three-day regional mediation conference brought together r 140 mediators from Rwanda, Burund; and the Democratic Republic of Congo. [AllAfrica.com](#) (September18, 2014)
- The Kigali International Arbitration Centre in **Rwanda** has launched a mediation service for business disputes with 30 trained mediators. [East African Business Week](#) (September 27, 2014)
- A survey in **Rwanda** found that over 70 percent of the public are satisfied with the performance of mediation committees, a concept developed ten years ago to help resolve mostly land-related disputes; mediation committees have resolved over 8,000 land-related cases. Women play a large role o the mediation committees in many disputes. [AllAfrica](#) (October 4, 2014), [AllAfrica](#) (October 16, 2014)
- Mediation is slowly developing in **Belarus** as about 100 mediator licenses have been issued in 2014, following enactment of mediation legislation in 2013 and an earlier pilot project. [Belarusian News](#) (October 15, 2014)

- **Russia's** supreme court has proposed legislation incorporating mediation into a required process to seek settlement prior to filing litigation in commercial courts. [RAPSI](#) (October 21, 2014)
- A new building has been completed for the Alternative Dispute Resolution Centre in Kochi, on the west coast of **India**, to house various ADR agencies, including 50 mediators, that had been located in separate locations. [The New Indian Express](#) (October 29, 2014)
- **Singapore** has begun a six-month pilot project using mediation to resolve disputes between taxi drivers and taxi companies, insurance firms and the drivers themselves. [Channel NewsAsia](#) (October 22, 2014)

Update on Home Foreclosure Mediation

Oregon's foreclosure mediation program continues to ramp up, with 400 sessions in August, the busiest month yet. Since Oregon's new legislation went into place last summer, over 2,200 homeowners have engaged in mediation, a participation rate of 22%. The number of cases ending with agreements and without agreements are just about even. However, 80% of the homeowner participants report in surveys that they were satisfied with the process, even without a favorable outcome. Significantly, 98% of lenders were at least neutral about the process, with 60% reporting they were either satisfied or very satisfied. [The Oregonian](#) (September 30, 2014)

Despite litigation by seven large banks trying to invalidate the mortgage foreclosure ordinance of Lynn, **Massachusetts**, small local banks are complying with the law and resolving foreclosure cases, which Lynn's attorneys are using in their legal defense. Similar litigation continues against mediation ordinances in Worcester and Springfield. [ItemLive.com](#) (September 13, 2014); [22News](#) (September 4, 2014)

Lake County, Illinois, has had some form of success in two-thirds of the cases in its Mortgage Foreclosure Mediation Program that began late in 2013. [Lake County News-Sun](#) (August 10, 2014)

Macon County, Illinois, officials have filed an application with the Illinois supreme court seeking to begin a mortgage foreclosure mediation program similar to those in other counties across the state. Funding would come from a grant from the state attorney general's office and possibly from additional filing fees. [Herald-Review.com](#) (October 28, 2014)

Other Mediation News

Worth Noting

The 10th International Chamber of Commerce (ICC) International Commercial Mediation Competition will occur February 6-11, 2015, in Paris with 66 business and law schools and over 500 students comprising the most diverse competition to date. The competition includes about 200 mock mediation sessions, along with training programs and social events. [International Chamber of Commerce](#) (October 24, 2014)

Other Cases & Resolutions:

Two lawsuits filed by Democrats seeking public information from the Ohio governor and treasurer were sent to mediation without objection, and will use a mediator from the Ohio supreme court. In a separate matter, the Ohio supreme court rejected a request for mediation by the Democratic gubernatorial candidate in a lawsuit brought by Republicans trying to obtain public information showing when the candidate enters and leaves county buildings in his job as a county executive. [Cleveland.com](#) (September 23, 2014); [wfmj.com](#) (October 17, 2014)

The only supplier of a smallpox drug for the U.S. strategic stockpile is entering mediation over the damages award in a licensing dispute that drove it into bankruptcy. [Bloomberg](#) (October 31, 2014)

Apple, Google and Adobe have returned to mediation to try to resolve claims that they conspired not to hire each other's employees, after a federal judge rejected a proposed settlement exceeding \$300 million. [Bloomberg](#) (September 3, 2014)

Google will mediate with consumers who allege that their names and contact information were given to third parties after downloading or purchasing apps. [Courthouse News Service](#) (October 3, 2014)

A court is delaying an injunction ruling on a dispute between Getty Images and Microsoft pending mediation. [PCWorld](#) (September 22, 2014)

LightSquared is back in mediation trying to reach a mediated restructuring deal to avoid the possibility of its bankruptcy being converted to a Chapter 7 liquidation. [Reuters](#) (October 7, 2014)

A court has ordered mediation in litigation by community leaders to stop demolition of a historic school. [Houston Chronicle](#) (September 8, 2014)

A tribal court judge has stayed a trial to permit mediation over an escalating water dispute between a tribe and a town who shut off the water supply for nonpayment. [Great Falls Tribune](#) (October 29, 2014)

Two towns in Oklahoma are going to mediation over a payment dispute for water that has been growing since 2009 and escalated into threats to shut off the water supply. [Tulsa's Channel 8](#) (September 7, 2014)

Mediation between a guardrail maker and whistleblower was ordered following a \$175 million verdict for defrauding the U.S. government. [New York Times](#) (October 28, 2014)

Prior to discovery, a federal judge sent to mediation a civil rights lawsuit against a police officer who was going 88 mph when he struck and killed a motorist. [The Patriot News](#) (August 29, 2014)

Mediation after 18 months of litigation resulted in a financial settlement along with an apology for five mothers whose infants died from bacteria in a Belize hospital. [News5](#) (September 2, 2014)

After years of litigation, multidistrict litigation against Merck over femur fractures allegedly related to its osteoporosis drug has been sent to mediation. [Law360](#) (September 5, 2014)

No criminal charges are being filed, but a consumer who nearly died from drinking iced tea laced with chemicals at a restaurant is beginning mediation over her damages. [ABC News](#) (September 26, 2014)

A lawyer's license to practice law was revoked for, among other things, participating in mediation,

settling the case, and signing a settlement agreement, all without ever informing his client that mediation was occurring or getting authority to take any action. [In the Matter of Disciplinary Proceedings Against Stubbins](#), No. 2014AP1622-D (S.C. Wis., October 14, 2014)

Due to sensitive issues that could cause embarrassment, a judge is encouraging top golfer Rory McIlroy and his former management company to mediate. [Golfweek](#) (September 17, 2014)

A mediator is working to resolve litigation by All Star Boxing against Golden Boy Promotions for punitive damages due to signing Saul "Canelo" Alvarez while under promotional contract with All Star. [FightNews.com](#) (September 23, 2014)

Mediation is ongoing over a rezoning appeal relating to property the Atlanta Braves plan to use for a new \$672 million stadium. [Marietta Daily Journal](#) (October 9, 2014)

Book Review

Lawrence Susskind
Good for You, Great for Me:
Finding the Trading Zone and Winning at
Win-Win Negotiations
(PublicAffairs2014)

Review by Jan Frankel Schau (ADR Services, jfschau@schaummediation.com)

Sitting beside my 87-year-old parents in the mediation of a business dispute in which they were defendants in an alleged constructive fraudulent conveyance forever changed my perspective on the meaning of "winning" at negotiation. I saw what goes on in the room when the mediator leaves and what a challenge it is to create a solution that satisfies both those present and those at the "back table" in a way that permits parties to find peace and satisfaction. So it was with great eagerness that I dove into Lawrence Susskind's new book, *Good for You, Great for Me: Finding the Trading Zone and Winning at Win-Win Negotiation*.

Professor Susskind, co-founder of the Program on Negotiation at Harvard Law School and founder of the Consensus Building Institute, is a thought leader in negotiation and mediation. Susskind goes beyond *Getting to Yes* and even beyond Professor Robert Mnookin's *Beyond Winning*, to a kind of "win-win 2.0" for the next generation of negotiators, moving negotiation several steps beyond the basics.

The book is structured around six moves that can be made to assure that negotiations meet one's objectives. First, Susskind lays out ways to lead even the most stubborn and irrational partners into an acceptable trading zone. To do this, he provides great strategies for appealing to each side's "back table" (corporate boards, public constituents, family members) by creating sometimes unlikely coalitions and mapping that crucial territory at the outset.

Next, Susskind demonstrates creative ways to add value by proposing packages he calls "good for them and great for you." What-if proposals assist the negotiator in figuring out what options might be available that would be best for his or her side and still within a broadly contoured trading zone. In a chapter entitled, "Expect the Unexpected: Use Contingent Offers to Claim More than the Other Side," Susskind describes the art of improvising, contingent agreements and other insightful ways to respond to both surprise and lack of rationality, and even lies in negotiations.

I found it fascinating that Susskind advocates that negotiators "write the victory speech" for the other side. What that means is to win by ensuring that the back table of your opponent approves the deal best for you. He suggests that most apparent two-party negotiations are actually multiparty negotiations when you consider those seated at the back table who need to be included in a winning coalition that facilitates their ultimate acceptance of the final deal.

Susskind's focus is on both offense (how to create a coalition that will approve your best deal) and defense (how to block a coalition that may thwart your efforts). It frankly had not occurred to me that negotiators should always identify and consider not only their own BATNA (best alternative to a negotiated agreement), but the other side's BATNA as well. This simple, elegant bit of advice could be valuable in every mediation.

Once you arrive within the trading zone, each side needs to communicate to the other's back table that their negotiator may be turning down a "very reasonable offer" which at a bare minimum satisfies their needs in the negotiation, because their negotiator believes the alternative may be better. Once that reasonable offer has been made, the back table may weigh in on their appetite for risk and their confidence in their negotiator's ability.

Susskind suggests that a shrewd negotiator will eventually offer a counterpart two options (both acceptable to his own side), with a request to check with their back table about which of the two proposals they prefer. Susskind recognizes that negotiation seldom goes as planned, even with the best strategies. In fact, he discusses "predictable surprises" and identifies ways to bring talks back on track.

As a thought leader, he also offers ideas about facilitation by professional neutrals in business, construction, and public governance, and even suggests a need for "dispute prevention," rather than merely turning to professional neutrals once a dispute has arisen.

Finally, the author suggests that as organizations flatten by eliminating multiple layers of management, encouraging cooperation becomes paramount if the organizations are to move forward productively and harmoniously. Susskind does not advocate compromise, but rather "facilitative leadership," by which he means helping teams and networks of employees and partners set workable agendas, solve problems in creative ways, and support one another when confronted by expected and unexpected obstacles.

Good for You, Great for Me ends with a coda called, "Finding the Sweet Spot in Your Next Negotiation," in which Susskind notes that most negotiators fail to probe carefully into what the other side wants and needs, which makes it harder to enter the trading zone. Traditional "hard bargaining" may backfire because the other side may walk away from the negotiation if they think it is headed hopelessly out of bounds. He advocates investing heavily in value creation: new product lines or not-yet-considered business alliances.

It is refreshing and insightful to avoid compromise and concessions by focusing on win-win negotiations. Susskind is adamant that no negotiator should ever accept an agreement that is worse than no agreement. Sub-optimal deals for either side are not what we are after. What we seek is being confident in negotiating a solution that satisfies all parties by meeting or exceeding their "walk away" point and then finding the sweet spot of victory in getting even beyond that in the outcome. If you are facing a skilled negotiator, she will already have written your victory speech to your back table so that you and your clients can hold your heads up and claim a win that you achieved. This requires both empathy and self-interested cooperation. After all, "[t]he point of win-win negotiation is not to make friends, it is to get a good deal, maintain or improve relationships, and enhance your reputation."

Good for You, Great for Me is worth your time as a guide to creating more value and success in every negotiation. I highly recommend it.

[Purchasing Information](#)

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