

# Associates in Dispute Resolution LLC

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## Dispute Resolution Update

April 2014

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### Dispute Resolution Update

#### Editor Information:

**Larry Rute**  
(Editor) [larry@adrmediate.com](mailto:larry@adrmediate.com)  
**Dawn Dawson**  
(Asst.) [info@adrmediate.com](mailto:info@adrmediate.com)

[For a printable version, Click Here.](#)

[adrmediate.com](http://adrmediate.com)

**Topeka**  
(Main Office)  
212 SW 8th Ave., Suite  
102, Topeka, KS 66603  
[info@adrmediate.com](mailto:info@adrmediate.com)

785-357-1800 (fax) 785-

#### 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.

#### **New York Federal Court Finds that Corporate Representative Failed to Attend Settlement Conference in Good Faith**

On March 14, 2014, the United States Magistrate Judge for the Eastern District of New York entered an Order finding that the Farmers Insurance Exchange representative was not acting in good faith in a court-ordered settlement conference. Prior to the settlement conference, the defendant, Farmers Insurance Exchange, determined through what it described as a process involving lawyers and others in the company, that it would not make a settlement offer. The defendant's in-house counsel representative who came to the settlement conference was sent solely to deliver that message. The Corporate Representative failed to comment on who within the corporate structure was the person with settlement authority. The representative further stated that he lacked the authority to change Farmers' position.

The Court found that unambiguous Court Rules and Orders had directed defendant to produce a representative of the insurer authorized to negotiate, and who had full settlement authority to settle the matter. The Court found that the Company representative would not make a settlement offer. The representative who came to the conference was sent solely to deliver that message. As the Court characterized it:

No matter what facts, evidence, or issues arose during the settlement conference, defendants' representative lacked the authority to change Farmers' position or to settle the case for so much as ten cents. And, when asked by the Court to identify who at the Company had such authority, Mr. O'Brien refused to provide an answer.

The Court held, pursuant to Federal Rule of Civil Procedure 16(f)(2), that the defendant failed to participate in a settlement conference in good faith and ordered Farmers to pay the sum of \$4,185.00 to plaintiff's counsel, representing the expenses incurred as a result of the defendant's dilatory conduct, and an equal amount of \$4,185.00 to the Clerk of the Court as an additional monetary sanction provided by the Rule.

[Grenion v. Farmers Ins. Exchange, CV 12-3219 \(EDNY\)](#)

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**Kansas City**  
1600 Genessee  
Suite 838,  
Kansas City, MO 64102

[info@adrmediate.com](mailto:info@adrmediate.com)

816-531-1001  
(fax) 816-531-1221

  
Larry Rute



  
Patrick Nichols

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



**2008-2014 Super Lawyers**

## Mediation Quote

**"In [other] societies the transfer of money from a wrongdoer to a victim is not a bedrock principle of 'compensation.' But in our America, dating back to the founding of the Republic, monetary compensation has always been integral to our legal system. . . . Therefore, [it is] an accepted given in American society: that compensation consists largely of the transfer of money from one party to another, and that when one is deemed deserving, it is the checkbook rather than other consideration that determines value."**

**- Kenneth R. Feinberg, Who Gets What: Fair Compensation after Tragedy and Financial Upheaval (PublicAffairs 2012) at xix-xx**

## Recent Mediation Cases & Resolutions

### After Agreeing to Mediators' Proposal, Party Bound by Silence on Settlement Agreement

A fee-splitting dispute among some fifty law firms was resolved at the end of a difficult mediation when all parties finally accepted the mediators' proposal for dividing fees. When the settlement agreement was drafted, however, one lawyer tweaked the terms and then was silent as the agreement moved forward and was signed by all other parties. Applying Illinois law, the U.S. Court of Appeals for the Seventh Circuit affirmed the district court's conclusion that based on the parties' long course of dealing the lawyer was bound by his silence even though he never signed the agreement.

[Bauer v. Qwest Communications Co.](#), No. 12-3036 (U.S.C.A. 7th Cir., February 14, 2014)

### Court Narrowly Defines Mediation in Attorney Fee Splitting Dispute

A New York trial court took a narrow view of mediation in resolving a dispute among co-counsel in which the trial lawyer was to receive 12% of the attorneys' fees if the case settled at mediation, but 40% if the case settled after mediation. The mediation session began mid- afternoon and stopped later in the day for defendants to seek more authority from their insurer; a final number was agreed on 11 days later with the mediator's ongoing efforts, three months prior to the

scheduled trial. However, the court ruled the trial lawyer was entitled to 40% because the case was not resolved during the scheduled mediation session.

[Marin v. Constitutional Realty, LLC](#), No. 111531/2007 (N.Y. S.C., February 20, 2014)

## **Mental Illness Rejected as Basis for Undoing Mediated Settlement Agreement**

A party who settled in mediation later claimed that he was mentally ill and should not be bound by the settlement agreement, but a Wisconsin appellate court upheld the agreement based on the trial court's determination that the mental illness was a personality disorder and did not impact the party's cognitive abilities, the fact that he was represented by counsel in the mediation, and the legal presumption that everyone is fully competent until proven otherwise.

[In re Estate of Jackowski](#), No. 2013AP335 (Wis. App., February 18, 2014)

## **Communication Within Family Breaches Confidentiality of Mediated Settlement**

A Florida appellate court reversed the trial court and concluded that a school headmaster's need to tell his daughter how his employment dispute was resolved in mediation violated the confidentiality provision in the settlement agreement. The breach came to light when his daughter immediately sent out a gloating message on Facebook to 1,200 friends, including many students of the school. The appellate court precluded the headmaster from enforcing the settlement agreement, stating that his need to say something about the case's outcome to his daughter should have been raised and worked out during mediation.

[Gulliver Schools, Inc. v. Snay](#), No. 3D13-1952 (Fla. App. 3rd Dist., February 26, 2014)

## **Progress in Detroit Bankruptcy Mediation**

- The federal judge overseeing mediation in Detroit met with Michigan's top two legislators to determine their willingness to help resolve the country's largest municipal bankruptcy. The Michigan Senate and House are both Republican-controlled and lawmakers have proposed using a nearly billion-dollar state surplus to cut taxes. [Bloomberg Businessweek](#) (January 16, 2014)
- The federal judge acting as lead mediator was criticized by several major financial creditors and Detroit's two pension funds for publicly supporting a deal he mediated between Detroit and two global banks; the criticism focused on his support impinging on the confidentiality of the mediation process. [Detroit Free Press](#) (January 2, 2014)
- The federal appellate court that is considering the challenge to Detroit's eligibility for bankruptcy protection stated that it will confer with the lead mediator on the case about the status and timeframe for mediation before determining whether to take the case right away. [Crain's Detroit Business](#) (February 10, 2014)
- Detroit submitted its financial restructuring plan to the federal bankruptcy court a week ahead of the court's deadline. Although much progress has been made in mediation, many issues remain, with objections from a committee of city retirees concerned about cuts to pensions on one hand and bondholders and other creditors complaining about pensioners being favored on the other. Municipal bankruptcies are rare, so there is less clarity about the relative priority of creditors. The governor of Michigan is calling for the plan to be the basis for voluntary settlement as part of the mediation process to resolve the bankruptcy quickly and soften necessary changes. [The Wall Street Journal](#) (February 21, 2014); [The Wall Street Journal](#) (February 14, 2014)

## Other Notable & High Profile Proceedings

- Use of mediation in arriving at a class action settlement is a factor in favor of the court finding no collusion, but is not dispositive even if the mediator is a retired judge. Prior to approval, the court required detailed evidence concerning the mediation and negotiations of the settlement agreements, including the mediation statements and other documents concerning mediation offered by the parties. [Four in One Co. v. S.K. Foods](#), No. 2:08-cv-3017 KJM EFB (U.S.D.C. E.D. Cal., January 2, 2014)
- A federal trial court approved attorneys' fees of \$7.5 million for class counsel, which was the maximum agreed to in a settlement that was reached after five all-day mediation sessions; the court rejected defendant's objection to four senior partners attending each mediation session, as mediation ultimately led to settlement. [Moore v. Verizon Communications, Inc.](#), No. C 09-1823 SBA (U.S.D.C. N.D. Cal., February 14, 2014)
- Failure of a party to pursue mediation as required by contract does not deprive Connecticut courts of subject matter jurisdiction; courts have discretionary authority to stay litigation and compel mediation. [Mark v. Neundorf](#), No. AC 33762 (Conn. App., January 14, 2014)
- Although not raised by the parties, the court held that the unambiguous mediation and arbitration requirement of a partnership agreement between the parties divested the court of jurisdiction, so the plaintiff's complaint was dismissed without prejudice. [Salem Vegas, LP v. Guanci](#), No. 12-cv-01892-GMN- CWH (U.S.D.C. D. Nev., January 2, 2014)
- The court agreed with plaintiff to dismiss its complaint while retaining jurisdiction over the mediated settlement agreement, rejecting various arguments from defendant relating to its own representative negotiating outside his settlement parameters in mediation, plaintiff's representative not having a written statement of authority, the parties signing the settlement in the wrong signature blocks, and more. [Aveos Fleet Performance, Inc. v. Vision Airlines, Inc.](#), No. 8:11-CV-0950 (U.S.D.C. N.D. N.Y., January 13, 2014)
- Appellants could not have the settlement agreement from mediation rescinded due to not being informed about another fraud action involving defendant, because what is not said in mediation is no more admissible than what is said. [Cruz v. Bank of America](#), No. B247763 (Cal. App., 2d Dist., January 6, 2014)
- The court refused to sanction one party for leaving the mediation without notifying the other side or sending a representative without adequate authority because the mediator's report did not indicate a problem. The court refused to sanction the other side for improperly disclosing confidential mediation information in its motion for sanctions, stating that since the mediator was not required to report lack of good faith the party's only recourse was to move for sanctions. [Freedom Scientific BLV Group, LLC v. Orient Semiconductor, Ltd.](#), No. 8:13-cv-569-T-30TBM (U.S.D.C. M.D. Fl., January 17, 2014)
- The court refused to strike defendant's two experts because they accidentally were given confidential ADR materials, accepting the experts' affidavits that they did not rely on the material and noting that neither cited the confidential material in their reports. [McLean v. Air Methods Corp.](#), No. 1:12-cv-241- jgm (U.S.D.C. Vt., January 24, 2014)
- Assertions that a bank failed to make an offer in good faith during mediation with a homeowner were rejected due to mediation confidentiality as well as the bank's evidence that it did make an initial settlement offer. [Klahn v. Clackamas County Bank](#), No. 13-CV-621-ST (U.S.D.C. D. Ore., January 2, 2014)
- The authority of counsel to settle the case two days after mediation was challenged by his clients; the court reversed a decision to enforce the settlement agreement, concluding that there was no evidence that counsel had explained the terms of the settlement to his clients. [Lemoine v. Thornton](#), No. CA 13-889 (La. App., February 12, 2014)
- Even when court-ordered, mediation is not a recoverable cost in federal litigation under 28 U.S.C. § 1920. [Fantroy v. Publix Super Markets, Inc.](#), No. 8:12-cv-1940-T-33EAJ (U.S.D.C. M.D. Fla., February 3, 2014)
- Mediation fees may not be imposed as costs on the losing party under local rule or practice in Montana. [Lazy JC Ranch, LLC v. Donnes](#), No. DA 13-0249 (Mont., January 28, 2014)

### Oregon Medical Malpractice Program May Need More Mediators

Under Oregon legislation enacted a year ago, the Oregon Patient Safety Commission will launch a program in July seeking to resolve medical errors by encouraging a first round of direct discussions between providers and patients before bringing in mediators when needed. However, a shortage of mediators may impede the program, with some estimating that only a dozen mediators in the state may currently qualify for the state's list of recommended mediators. Others believe there are plenty of experienced mediators who can deal with medical malpractice, and that hospitals may be directly developing relationships with mediators and may not need to rely on the official list.

[The Lund Report](#) (January 16, 2014); [SB 483](#)

### Hurricane Sandy Claimants in New Jersey Receive Small Payments in Mediation

New Jersey's mediation program for insurance claims from Hurricane Sandy has resulted in settlements with over 200 consumers who received an average of less than \$16,000 each, which is only about 16 percent of their claims. Nonetheless, the commissioner of the New Jersey Department of Banking and Insurance declared the ongoing mediation program a success, as it helps consumers close claims more quickly so they can apply for government grants and rebuild. The mediation program only covers damage not caused by flood, which was modest compared to flood damage; flood claims are under the Federal Emergency Management Agency's flood insurance program.

[Asbury Park Press](#) (January 11, 2014)

### Wisconsin Farm Center Celebrating 25 Years

The Wisconsin Farm Center is a federally-funded mediation program that serves about 80-100 Wisconsin farmers each year, relying on 20 mediators and 20 financial advisors who volunteer their time. The mediation program began in 1989 and helps farmers, their creditors and the U.S. Department of Agriculture address loan problems, adverse decisions and other disputes.

[Milwaukee Wisconsin Journal Sentinel](#) (January 6, 2014)

### Other Notable News & Programs

- The Ohio Supreme Court has revived its Commission on Dispute Resolution to mediate disputes over budgets, public records and other governmental issues. The Commission had been eliminated in budget cutbacks in 2011. The revived Commission successfully mediated its first matter, involving a budget dispute in Hocking County between a county judge and county commissioners. [The Columbus Dispatch](#) (January 21, 2014)
- Legislation recently introduced in New Jersey would mandate greater use of alternative dispute resolution approaches by state agencies in order to obtain the benefit of techniques developed in the private sector and through court-sponsored programs. [LegiScan](#) (January 14, 2014)
- Legislation introduced in Hawaii would authorize the board of land and natural resources to mediate disputes over the market value of public lands since arbitration is cumbersome and does not provide the opportunity to work collaboratively. Arbitration could be used when



mediation fails to resolve disputes. [LegiScan](#) (January 21, 2014)

- The Colorado HOA information officer submitted a report to the Colorado General Assembly proposing that lawmakers provide both arbitration and mediation for residents to settle disputes with dysfunctional homeowners associations, based on systems in place in Florida, Nevada and Virginia. [The Gazette](#) (February 21, 2014)
- The Mediation Program of the U.S. District Court for the Southern District of New York increased its settlement rate in general civil litigation to 60% in 2013, up from 53% the year before. Other changes were also made in 2013, such as permitting mediations to be conducted in the mediator's office for the first time. [Annual Report of the Mediation Program](#) (January 15, 2014); [Lexology](#) (January 20, 2014)
- A Massachusetts senator was honored for his leadership in securing funding and establishing the Community Mediation Center Grant Program, which supports the work of 14 community mediation centers statewide which have over 600 trained staffers. [iBerkshires.com](#) (January 16, 2014)
- The city of Henderson, Nevada, has begun offering free mediation services through a Neighborhood Justice Center to resolve disputes among neighbors, landlords and tenants, homeowner associations and residents, and employers and employees. [8NewsNow.com](#) (January 21, 2014)

## International Mediation Developments

- The **Organization for Economic Cooperation and Development** (OECD) is willing to mediate between a British oil company and a conservation group about whether exploration within a UNESCO World Heritage site in the Congo violates OECD business guidelines. [Reuters](#) (February 18, 2014)
- The pilot project of Irish Mortgage Holders Organization to provide free mediation services to homeowners having difficulty making mortgage payments in **Ireland** to AIB Group is now being expanded to include other banks, including a subprime lender. In the first two months of the pilot, over 120 long-term sustainable solutions were reached with AIB out of 260 proposals submitted on behalf of customers. [The Irish Times](#) (February 3, 2014)
- Mediation is coming slowly to **Scotland** with guidance from the Law Society of Scotland in November 2013 that solicitors must sufficiently understand alternative dispute resolution options to be able to discuss them with clients. In 2014, three Scottish universities are offering electives in mediation as part of their Diploma in Legal Practice. [Kluwer Mediation Blog](#) (February 13, 2014)
- Three pieces of legislation to encourage mediation in the **Netherlands** are pending without clarity as to whether or how they will be enacted. One of the bills would regulate the mediation profession, while the others would promote mediation in administrative disputes and in civil and commercial matters. [International Law Office](#) (February 20, 2014) (Registration Required)
- The **Malta** Mediation Centre was established over eight years ago and has taken extensive efforts to train mediators and market mediation and have everything in place, but it has never received a single request for mediation directly from parties in dispute and only 24 court-referred disputes. [The Malta Independent](#) (February 8, 2014)
- The High Court of Peshawar in **Pakistan** has for the first time referred a case to mediation at the recently established Mediation Centre in the Khyber Pakhtunkhwa Judicial Academy. [The](#)

[News International](#) (January 21, 2014)

- In order to reduce medical disputes, including fatal attacks on doctors and medical staff, the city of **Shanghai, China**, is increasingly relying on mediation in disputes exceeding \$4,900. Public medical institutes are required to participate whenever mediation is sought by a patient. To enhance patients' trust, an advisory team of over 900 experts has been established. Some 3,000 medical dispute cases have gone to mediation in each of the last two years and about 80 percent were resolved. [China Daily \(February 21, 2014\)](#)
- Panelists discussing the future of mediation in **Australia** divided on the issue of mandatory mediation. The percentage of cases referred to mediation by courts ranges from 45 percent in Western Australia to only 16% in New South Wales. [Lawyers Weekly](#) (February 18, 2014)

## Update on Home Foreclosure Mediation

### Update on Home Foreclosure Mediation

- A mortgage foreclosure mediation program is being launched March 1 in **La Salle and Grundy Counties, Illinois**, similar to that in other Illinois counties which have seen 60 percent participation rates and 20 percent of borrowers keeping their homes. Lenders filing foreclosures must pay an extra \$150 to finance the mediation program; homeowners pay nothing. [News Tribune](#) (February 20, 2014)
- A new mortgage foreclosure mediation program has been established in **St. Clair County, Illinois**, to provide mediation services to homeowners throughout the 20<sup>th</sup> Judicial Circuit who choose to participate. The mediation program is receiving funding from the state attorney general's office. [St. Louis Post-Dispatch](#) (January 14, 2014)
- Legislation (HF 1941) to require mortgage foreclosure mediation in **Minnesota** has recently been introduced. The bill provides that foreclosure cannot proceed unless the homeowner opts out of mediation or the mediator provides an affidavit of good faith mediation by the foreclosing entity. The legislation also lists documents the foreclosing entity would be required to bring to mediation and sets a \$300 fee that would go to the mediation fund when the case is filed. [Minnesota State Legislature](#) (February 25, 2014)
- **New Jersey** legislation (Senate No. 296) would codify the state's Foreclosure Mediation Program in order to make permanent the approach developed by the state judiciary in 2009. Eligible homeowners would submit a mediation request to initiate the process, and may have to submit additional information, but would not have to pay any fees. Foreclosure filing fees and fines would fund the program on an ongoing basis. [LegiScan](#) (January 14, 2014)
- Legislation (HB 2683) has been introduced in **Arizona** to establish a mortgage foreclosure mediation program in the courts to be overseen by the supreme court in order to avoid foreclosure whenever possible. The legislation would require the superior court to provide mediation services and establish requirements for mediators. It also specifies the documents to be provided by each side ten days prior to mediation, and requires the fee for mediations be equally shared by lenders and homeowners. [LegiScan](#) (February 10, 2014)
- A consumer organization, Mass Alliance Against Predatory Lending, is encouraging legislation

in **Massachusetts** to provide pre-foreclosure mediation similar to what exists in Connecticut to help homeowners seeking loan modifications. [WWLP](#) (February 26, 2014)

- The Saving **D.C.** Homes from Foreclosure Act, which provides borrowers the option of mediation, dramatically changed the foreclosure process in Washington, D.C., which used to be one of the fastest in the country. Prior to the law's implementation, lenders were sending over 150 notices of default a month, but are down to only 11 in the first three months of fiscal 2014. However, some fear that a massive logjam of borrowers is developing who ultimately will be facing foreclosure and will be so far behind that it will be even harder to reinstate their mortgages. [Washington Business Journal](#) (February 20, 2014)
- The mortgage foreclosure rate is improving in **Oregon**, dropping from 2.9 percent a year ago to 2.4 percent, while in Portland the foreclosure rate dropped from 2.6 percent a year ago to 2.0 percent. Nationwide the number of homes in foreclosure is 33 percent lower than in January 2013. [Oregon Live](#) (February 27, 2014)

## Other Mediation News

### Other Cases & Resolutions:

The CEOs of both Apple Inc. and Samsung Electronics agreed to attend mediation with only in-house lawyers to discuss settlement options, but later reports suggest that the session did not result in settlement. In the last two years, two juries in federal court in California have awarded Apple a total of about \$930 million. [Reuters](#) (January 9, 2014); [The Verge](#) (February 14, 2014)

The court denied Samsung discovery into Apple's offers to license its utility patents to Samsung, as the settlement negotiations were confidential. [Apple, Inc. v. Samsung Electronics Co.](#), No. 11-CV-01846-LHK (U.S.D.C. N.D. Cal., January 7, 2014)

The European Commission offered to mediate a multi-billion dollar dispute that may delay work to widen the Panama Canal, but the Panama Canal Authority rejected the offer because mediation is not a dispute resolution mechanism specified in the construction contract. [Reuters](#) (January 20, 2014)

The court denied plaintiff's motion to delay its early mediation order because good cause was not shown and plaintiff waited too long to seek modification of the schedule. [National Steel City, LLC v. Outokumpu Stainless USA, LLC](#), No. CA 13-0272-KD-C (U.S.D.C. S.D. Ala., January 8, 2014)

The parties settled a Fair Debt Collection Practices Act claim for a nominal amount in mediation, leaving reasonable attorneys' fees and costs to be set by the court, which reduced the lodestar, the travel time to mediation and other tasks. [Cohen v. RSH & Assoc., LLC](#), No. 1:12CV00204 AGF (U.S.D.C. E.D. Miss., February 13, 2014)

A Nevada statutory provision requiring mediation prior to litigation in homeowner association assessment disputes applies to the amount of assessment but not to debt collection practices. [Gray v. Account Recovery Solutions](#), No. 2:13-CV-887 JCM (U.S.D.C. D. Nev., January 30, 2014)

Mediation is underway in a dispute in which the federal government reportedly is threatening to condemn state property in order to sell it to a private developer and prevent it going into a park district. [Alameda Sun](#) (February 28, 2014)

The University of Louisville is seeking mediation in its ongoing battle with Norton Healthcare over access to Kosair Children's Hospital and its revenues, suggesting that the state governor and attorney general should act as mediators. [Courier-Journal.com](#) (January 31, 2014)



A pro se prisoner had two months to prepare a confidential mediation statement in his civil rights case, so was not permitted additional time. [McDonald v. Olivas](#), No. 3:13-cv-00240-MMD- WGC (U.S.D.C. D. Nev., February 6, 2014)

The court helped wrap up a mediated settlement by a contentious party whose dispute ultimately was with her own counsel over attorneys' fees rather than the opposing party. [Gold v. State Farm Fire & Casualty Co.](#), No. 10-cv-00825-RBJ-MJW (U.S.D.C. D. Colo., February 11, 2014)

The Ohio Supreme Court referred to mediation a student journalist's efforts to obtain police records from a private university. [The Columbus Dispatch](#) (February 25, 2014)

Mediation has resolved a dispute between a woman who sought to open a boarding house for agricultural workers and the city of Avon Park, Florida, which involved a federal complaint of discrimination against Hispanics. [News Sun](#) (February 23, 2014)

The city council agreed to continue mediation with the owners of two strip clubs closed by the city in 2011 who are in a "blood feud" with the city. [Clayton News Daily](#) (February 20, 2014)

## Worth Noting:

### Study Shows Litigants Prefer Mediation over Arbitration

Empirical research indicates that civil litigants clearly favor mediation over arbitration, although they like direct negotiation by their counsel as much as mediation as long as they are present in the negotiations. Civil litigants also favor judge trials over jury trials. The study covered a wide range of legal disputes among 400 litigants in 19 states, gathering information about their views at the beginning of their cases; later papers will analyze their views at the end of litigation.

*Donna Shestowsky, "The Psychology of Procedural Preference: How Litigants Evaluate Legal Procedures Ex Ante," 99 Iowa L. Rev. 637 (2014); Central Valley Business Times (January 13, 2014)*

### Federal Judicial Center Studying ADR in Federal Courts

The Federal Judicial Center is conducting a detailed analysis of the way a range of federal trial courts have designed and use their Alternative Dispute Resolution (ADR) procedures. In 2011, the Federal Judicial Center compiled a summary report on the forms of ADR authorized by local rules in federal courts and discovered that about one-third of the federal trial courts use mediation, about one-third authorize multiple forms of ADR, and the other third provide general authorization for ADR or settlement conferences. The new study focuses on eight districts of varying sizes and locations around the country and is to be completed by late 2014.

[United States Courts](#) (January 23, 2014)

### eDiscovery Mediation

Mediation can be helpful in developing a mediated discovery plan to deal with the cost and complexity of e-discovery, which otherwise can be overwhelming in many cases, with emails, text messaging, social media posting, along with word documents, spreadsheets, and other forms of electronic documents.

[Crain's Cleveland Business](#) (February 6, 2014)

### Picture It Settled® Receives Plaudits

Picture It Settled, a smartphone application developed by IAM Distinguished Fellow Don Philbin to help negotiators and mediators calculate monetary offers and graph trajectories toward settlement, has received strong endorsement from the vice president and associate general counsel of Rackspace Hosting who successfully used it in a high-value longshot mediation after an earlier mediation had left the parties \$10 million apart. Picture It Settled predicted the final outcome with 6.6% accuracy after two moves per side, and 3% accuracy after three moves.

[Karl Bayer's Disputing Blog](#) (February 3, 2014); [Picture It Settled](#)

# Book Review

**Harrie Samaras, Ed.**  
***ADR Advocacy, Strategies, and Practice for Intellectual Property Cases***  
**(ABA Section of Intellectual Property Law 2013)**  
**Book Review by Jack Wadley ([icw@iplawgroup.com](mailto:icw@iplawgroup.com))**

The ABA's *ADR Advocacy, Strategies, and Practice for Intellectual Property Cases* is a valuable collection of articles edited (and some authored) by Harrie Samaras. Ms. Samaras assembled a prominent group of ADR professionals to write articles helpful to both mediators and litigants in IP cases.

The book could very easily serve as a textbook for teaching an advanced mediation course on resolving IP cases. Its contents run the gamut from a relatively simple overview of various ADR formats to in-depth guides for preparing for and conducting ADR proceedings. For experienced mediators or litigators representing clients in ADR, the book is worth every penny if one only reads Chapter 4, written by Chief Magistrate Judge Mary Pat Thyng and entitled "Mediation: One Judge's Perspective (Or Infusing Sanity into Intellectual Property Litigation)." WOW!

Judge Thyng is experienced in IP mediation and full of advice, comments and suggestions for effective mediation of complicated cases, particularly patent cases. Judge Thyng starts with the very cogent observation that mediation is "a non-binding *negotiation process* in which a neutral helps the litigants resolve a dispute." Simple, elegant and accurate. She goes on to say that "the mediator establishes an atmosphere in which *the parties* work to settle the dispute themselves." Again, a fundamental concept on which mediation is based, and a basic tenet for settling patent disputes because, in most cases, the patents are at the heart of the litigants' businesses. Her emphasis on these points is a good reminder to all mediators that our role is to help parties use the negotiation process to settle their disputes. This does not mean, as Judge Thyng makes very clear, that the mediator has to be passive. To the contrary, the mediator has to remain in control of the process and be proactive in helping direct the parties toward settlement.

- A sampling of Judge Thyng's comments illustrates why this article is so valuable: The process should be directed to those business factors that help fashion a resolution.
- The process requires the mediator, counsel, and the business representatives to focus on the three P's: preparation, patience, and persistence.
- An incalculable but invaluable asset of mediation is often ignored by outside counsel. IP cases usually require substantial time from the CEO, CFO, and other business people, technical and IT personnel, and in-house counsel at various levels within the organization. (This is something I refer to in my mediations as "emotional capital." Emotional capital is valuable and needs to be preserved by resolving the case so that business people can get on with their primary role, making money for their company.)

Judge Thyng makes a compelling argument for early mediation. She also addresses the initial conference, including what lawyers should expect to share prior to convening the mediation. Every litigant in a serious IP matter should consider adopting her advice for the early phases of mediation. Likewise, she addresses who to include (or exclude), offering valuable insights:

- Select client representatives based on an individual's ability to make a *meaningful* contribution to the process, and not just his or her title.
- When possible, client representatives should not consist solely of a company's in-house legal department.
- The inventor and patent prosecution counsel are usually counter-productive to mediation.
- Bringing experts - particularly damages experts - to mediation is generally not helpful.

In commenting on preparation for the actual mediation session, and making the most of it, Judge Thyng observes:

- Preparing a list of the opponent's principal contentions/defenses in order of importance, along with your rebuttal, is helpful to educate the mediator on the main issues separating the parties.
- Having a checklist of the important terms for settlement is essential. (As an experienced full time mediator, I insist that prior to mediation, counsel for opposing sides create a settlement agreement that covers expected terms, such as release language, forum for determining disputes under the settlement agreement, controlling law, etc., so that at the end of the day, when a settlement is reached, we only have to insert the pertinent deal points.)

Other well-written articles in the book contain useful information on a multitude of forums and processes in the IP/ADR world. While this review is mostly focused on the mediation process, many practitioners will find the sophisticated article by Kevin Casey, "Tools Useful to Persuade, Evaluate, and Communicate in ADR Proceedings" to be a wonderful resource. Kevin gives detailed formula and advantages and limitations of decision-tree analysis, provides an entire section on algorithms for fair division of property, and provides some eye opening comments on the use of technological tools. Appendices to his article will be particularly valuable to many practitioners by providing tools that help when mediating complicated IP cases.

For counsel representing a party in mediation, Chapters 3 and 5 are a good resource. In Chapter 3, Harrie Samaras and Cynthia Raposo provide an outstanding framework for performing an early case assessment. Likewise, Hildy Bowbeer contributes a rigorous outline on preparing to successfully mediate an IP dispute.

Another section of the book is written by two obviously skilled and experienced lawyers, David Hill and Ronald Bleeker, addressing ADR clauses in transactional documents and why those clauses deserve more attention than they usually get. For practitioners on the transactional side of IP matters, this chapter will be a worthwhile read.

Finally, Chapter 6, written by Don Martens, addresses a subject not often analyzed, "Mastering the Use of a Special Master in Intellectual Property Litigation." Don has significant experience both as a special master in IP cases and using special masters, and the chapter provides, in succinct form, a comprehensive and pragmatic overview.

I expect to go back to the articles in this book often. There is great value in having one resource that gathers many of the practices and tools that experienced neutrals use regularly. It is reinforcing to see them on paper, summarized in a clear and easy-to-follow format, which makes this book one that you should have on your desk if you mediate IP disputes.

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