

ASSOCIATES IN DISPUTE RESOLUTION LLC

Mediation Arbitration Dispute Resolution

Dispute Resolution Update

February 2015

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Dispute Resolution Update

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Dear Friends and Colleagues:

This edition of Dispute Resolution Update features Early Dispute Resolution for Small Businesses and the Planned Early Dispute Resolution Task Force of the American Bar Association, as well as 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.

Early Dispute Resolution for Small Business

Last year ADR, LLC, began to expand its business model by offering low-cost dispute resolution planning services for businesses with as few as 25 to 150 employees. For many years, large Fortune 500 corporate entities have addressed increasingly protracted legal expenses by incorporating into their internal procedures early dispute resolution programs that provide for the availability of mediation and arbitration solutions. We have found that many business disputants prefer mediation because it permits a degree of party control, which is gradually lost once a litigation process is engaged. Even if the internal mediation is unsuccessful, each party can learn a great deal about their own dispute and the other party's position.

Two years ago, the Planned Early Dispute Resolution Task Force of the American Bar Association's Section on Dispute Resolution issued a *Planned Early Dispute Resolution User Guide*. (click here) ADR, LLC, staff have utilized many of the suggestions found in the ABA User Guide to develop a comprehensive dispute resolution system for small businesses.

If you or your law firm have a client in mind that would likely benefit from a small business dispute resolution program assessment, please contact Larry Rute, Patrick Nichols or Jordan

Ryan. We would be happy to work with you and your firm to develop an appropriate program analysis for your client.

 Larry Rute   Patrick Nichols

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Mediation Quote

"When we are in conflict, we all say things we do not mean and mean things we do not say. Only rarely do we communicate at a deep level what we really, honestly think and feel..., "When you approach your conflict as a journey, process, or voyage that takes you to a new location, you transcend the idea that you are trapped in your conflict."

- Kenneth Cloke & Joan Goldsmith,

Resolving Conflicts at Work: Eight Strategies for Everyone on the Job (Jossey-Bass 2007) at xxi, 16

Recent Mediation Cases & Resolutions

Florida's Sunshine Law Trumps Mediation Confidentiality

A Florida appellate court upheld the lower court's determination that mediation of a federal case which resulted in a mediated settlement agreement changing pension benefits of unionized city employees violated Florida's Sunshine Law, which is intended to protect the public from closed-door politics. The court voided the settlement agreement and enjoined the parties from further mediation that involves collective bargaining issues. The fact that the settlement agreement reached in the federal mediation was tentative and needed further approval did not cure the Sunshine Act violations.

[Brown v. Denton](#), Nos. 1D14-0443, 1D14-0444 (C.A. Fla., October 21, 2014)

California Mediation Privilege Doesn't Apply to Communications on Side Issues After Mediation

A California appellate court ruled that the state's mediation privilege doesn't cover communications occurring after the mediation which discuss side issues not covered in the mediation. That determination, however, relied on testimony from mediation participants about what was not discussed in the mediation, in order for the court to know whether the communications in issue materially related to the mediation.

[Pacific Building Development Inc., v. Kensington-Fair Oaks Associates Joint Venture](#)
No. H038482 (C.A. Cal., November 20, 2014)

Mediation in City Bankruptcy Proceedings Has Mixed Results

- A final intense mediation over the fees and expenses of Detroit's bankruptcy professionals resulted in millions of dollars being written off from a total estimated to approach \$200 million by the city of Detroit, the federally-appointed Official Committee of Retirees, and the city's two pension funds. Although awaiting judicial approval, this was the final administrative hurdle in the historic case. [Detroit Free Press](#) (December 11, 2014)
- While the Detroit bankruptcy was completed in seven months with extensive use of mediation, the San Bernardino, California, bankruptcy proceeding is 28 months old and its bankruptcy plan is not due until May 30, 2015. Mediation has been used in San Bernardino, but an agreement between the city and the police union fell through, and an agreement between the city and CalPERS took nine months to reach a commitment that the city would make up all missed payments, along with fees and interest, leaving other creditors worrying that there may not be enough room left for a workable plan. [The Sun](#) (November 18, 2014)

International Mediation Developments

- **Barbados** is initiating a court-annexed mediation program in February 2015. [NationNews](#) (December 30, 2014)
- **Cyprus** is beginning a mediation program between financial institutions and homeowners, with mediation to occur prior to lenders initiating foreclosure proceedings, and is receiving applications from mediators for the program. [Cyprus Property News](#) (November 26, 2014)
- A pilot court-based mediation program has been launched in magistrate courts in the provinces of Gauteng and North West in **South Africa**, in which parties may seek mediation prior to beginning a formal legal action. [Business Report](#) (December 9 2014)
- Extensive mediation training has been provided to 30 community mediators in Tripoli, **Lebanon**, who are now working in six neighborhoods in Tripoli, which has been deeply impacted by the ongoing crisis in Syria. [The Daily Star Lebanon](#) (November 7, 2014)
- The Dubai Chamber of Commerce in the **United Arab Emirates** continues to encourage mediation with the advent of online mediation application processes. The Dubai Chamber received 330 mediation cases and settled 180 in the first 10 months of 2014. [Khaleej Times](#) (November 16, (2014)
- The **Singapore** International Mediation Institute has been officially launched with the expectation of setting world-class mediation standards. The Institute was founded by the National University of Singapore with support from the Singapore Ministry of Law. [NewsWise](#) (November 5, 2014)
- A medical mediation program in Changning District in Shanghai, **China**, received over 250 medical disputes in 2014 and resolved 85%, using retired lawyers and doctors as mediators. The mediation program began in 2012 and may be expanded to other districts. [English.eastday.com](#) (December 25, 2014)

Dispute Resolution News & Initiatives

States Continue Mediation of Agricultural and Related Disputes

The South Dakota Department of Agriculture Mediation Program has just implemented new rules adding federal lands and oil and gas disputes to its mediation program, based on legislation that the state enacted in 2013. [WNAX](#) (December 2, 2014); [Aberdeen News](#) (November 11, 2014)

The Farmer-Lender Mediation Program in Minnesota is experiencing a high success rate in mediation, coupled with the fewest notices in a decade, with volatility in volume resulting from changes in crop yields and prices. [WNAX](#) (December 9, 2014)

Other Cases & Resolutions:

- Mediation resulted in settlements exceeding \$1 billion for thousands of patients with faulty hip replacements after four months of negotiation. [NBC10.com](#) (November 10, 2014)
- Years of mediation resulted in a \$1.1 million settlement for a teenager who became a quadriplegic after a bicycle accident in a San Jose park. [SanJose Mercury News](#) (December 13, 2014)
- Major progress has been reported in mediation between the government and Indian tribes seeking to implement a 2012 U.S. Supreme Court decision over inadequate federal payments on public programs the tribes now administer. [Rapid City Journal](#) (December 19, 2014)
- Mediation has resolved the claims of a woman who was severely injured from drinking sweet tea mistakenly made with white powder for cleaning deep fryers rather than sugar. In the mediation, the restaurant chain agreed to extensive changes to prevent future accidents. [Fox13](#) (December 11, 2014)
- Shell and a law firm plan to mediate claims of 15,000 residents impacted by two major oil pipeline leaks in Nigeria in 2008. [Leigh Day](#) (November 13, 2014)
- IBM and the State of Indiana have agreed to mediate a dispute over IBM's failed attempt to privatize Indiana's welfare system. The Indiana Supreme Court suggested the parties consider mediation after hearing oral arguments in the case. [WTHR.com](#) (December 10, 2014)
- A court sent to mediation an officer's whistleblower claims that he had been pressured to profile young drivers for tickets. [Daily Record](#) (December 11, 2014)
- Mars Hill Church has apologized to those hurt and shunned by its pastor, and is preparing to dissolve and distribute its assets, but a threatened RICO (Racketeer Influenced and Corrupt Organizations Act) case seeking more transparency from the church is being addressed in mediation. [SeattlePi](#) (December 22, 2014)
- Mediation has been ordered in litigation filed as a class action involving a sewage system, drains and a mill pond. [Clarkston News](#) (December 12, 2014)
- Litigation between local media and a university over lack of disclosure of the names of those disciplined in a scandal has been sent to mediation. [WCHL News](#) (December 12, 2014)

Update on Home Foreclosure Mediation

Update on Home Foreclosure Mediation

- Home mortgage foreclosures are generally dropping nationwide, with a 30% reduction reported from 2013 to 2014. However, some states are seeing increases, including **Hawaii** and **Maryland**, which may be due to state mediation programs which delayed the foreclosure

process. Maryland now has the third-highest home foreclosure rate in the country, up over 90% from a year ago. [App.com](#) (December 16, 2014); [WTOP](#) (December 11, 2014); [Pacific Business News](#) (December 15, 2014).

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- Legislation has been introduced in **New Jersey** to ensure the continuation of the state's Foreclosure Mediation Program, which began in 2009. New Jersey now has the highest rate of home foreclosures in the nation. [LegiScan](#) (December 8, 2014); [App.com](#) (December 16, 2014)
- Based on the success of other **Illinois** counties, Macon County has applied to the Illinois Supreme Court to begin a mortgage foreclosure mediation program. A similar foreclosure mediation program went into effect in Champaign County on November 1. [Herald-review.com](#) (November 12, 2014)
- **Massachusetts'** Supreme Judicial Court ruled that the mortgage foreclosure laws in Springfield which require mediation were preempted by state law. The state's highest court had been asked by a federal court for its view on the state law issue. The ruling is likely to impact similar ordinances in Worcester and Lynn as well. State-wide legislation to implement mandatory foreclosure mediation had previously been proposed and will likely be considered again soon, as a result of the ruling. [Mass Live](#) (December 19, 2014)
- **Missouri's** Supreme Court held that a St. Louis County ordinance requiring foreclosure mediation was void because the county lacked authority to implement it. [Daily Journal](#) (November 12, 2014); [Missouri Bankers Assoc.v. St. Louis County](#), No. SC 93848 (S.C. Mo., November 12, 2014)
- The mortgage foreclosure mediation program in **Washington** state provides that the mediator can issue a certificate of bad faith when a party fails to follow the rules or to participate appropriately. While about 6,750 homeowners have sought mediation since the program went into effect three years ago, mediators have found banks in bad faith in about 220 cases out of the 1,500 mediations that failed to reach agreement. Some are concerned that there is insufficient follow up to penalize lenders for bad faith mediation. [KING 5 News](#) (November 17, 2014)

Other Mediation News

Other Notable & High Profile Proceedings

- In a huge product-liability multidistrict litigation, a federal court ruled on motions *in limine* and refused to make a blanket exclusion of evidence of mediation or settlement negotiations, which could not be admitted on the issue of liability or damages, but might conceivably be relevant in some other way. [Eghnayem v. Boston Scientific Corp.](#), No.2:13-cv-07965 (U.S.D.C. W.V., October 28, 2014)
- A Kentucky appellate court overturned the lower court's decision that mediation confidentiality prevented a party from offering evidence about alleged coercion during mediation. The appellate court held that evidence which did not go to liability or validity of the claim, but related to unconscionability of the agreement, was appropriate and should be permitted. [Barnett v. Barnett](#), No. 2013-CA-001310-ME (C.A. Ky., December 19, 2014)
- After lengthy analysis, a federal court permitted an amended complaint to be filed in an Americans with Disabilities Act case against a state court for refusing to appoint an American Sign Language interpreter for a deaf party who was ordered to participate in mandatory mediation, which was later waived. [King v. Indiana Supreme Court](#), No. 1:14-cv-01092 (U.S.D.C. S.D. Ind., November 7, 2014)
- Claims under the Americans with Disabilities Act arising out of a mediation session held in a

defense counsel's offices were dismissed as plaintiff had not adequately alleged that defendants were likely to repeat the ADA offenses in the future. [Novak v. Litchfield Cavo, LLP](#), No. 14-cv-3649 (U.S.D.C. N.D. Ill., December 22, 2014)

- A California appellate court upheld a short settlement agreement that resulted from a mediator's ongoing efforts after a mediation session, rejecting assertions that an elderly party was improperly pressured in the mediation since the agreement was signed four days later, and finding the agreement to be sufficiently definite even though it contemplated the preparation of additional documents. [Dan v. Rambla Vista Enterprises](#), No. B252050 (C.A. Cal., November 25, 2014)
- A federal court stayed, rather than dismissed a case due to failure to comply with a contractual requirement for mediation prior to litigation. The court noted, however, that if the case went forward, the parties' private mediation would not fulfill the court's mediation requirement and the parties would have to participate in a second mediation. [Hawkins v. Citimortgage, Inc.](#), No. 8:14-cv-02810-T-33AEP (U.S.D.C. M.D. Fla., December 29, 2014)
- The U.S. Court of Appeals for the Seventh Circuit rejected a sexual abuse victim's assertion that the dispute he settled in mediation was distinct from his claim in the Archdiocese's bankruptcy case, which would have permitted him to assert a "manifest injustice" exception to mediation confidentiality under Wisconsin law. [Doe v. Archdiocese of Milwaukee](#), No. 13-3783 (U.S.C.A. 7th Cir., November 5, 2014)
- A settlement reached in mediation (involving the widow of William Randolph Hearst's grandson) was upheld against claims of fraud, overreaching and excusable neglect, in part because the mediation was conducted by an experienced mediator. [In re Estate of Hearst](#), Nos. B251912, B251964 (C.A. Cal., December 16, 2014)
- A federal court refused to impose sanctions when a party failed to attend a mediation session in person, as there was disagreement over whether counsel had promised appearance in person. The party did participate by videoconference and then was present in person for the second day of the mediation. The court also noted that a private mediation was at issue, so the court might not have had authority to impose sanctions in any case. [Siebert v. Gene Security Network, Inc.](#), No 11-cv-01987-JST (U.S.D.C. N.D. Cal., November 6, 2014)

Worth Noting:

Preliminary Report for UNCITRAL on International Commercial Mediation

Preliminary findings have been released from what purports to be the first large-scale survey of use and perception of international commercial mediation and conciliation by international legal and business communities. The survey was undertaken to assist the United Nations Commission on International Trade Law (UNCITRAL) and the UNCITRAL Working Group II on Arbitration and Conciliation as they analyze a U.S. proposal for a possible convention in this area, which will be considered in a Working Group II meeting in February 2015. An article presenting an expanded final analysis and proposals on future international action is expected. [Social Science Research Network](#) (November 17, 2014)

Veterans Assisted by Mediation

Veterans mediation services are becoming increasingly important in community mediation centers. Six programs have been chosen to develop best practices for veterans mediation, with support from the National Association for Community Mediation and JAMS. [The Recorder](#) (November 10, 2014)

Medical Dispute Program Review

Oregon Leads the Way on Resolution of Medical Disputes

Review by Susan Hammer (susan@susan-hammer.com)

Last spring I had the great pleasure of being one of several mediators to train participants in Oregon's Early Discussion and Resolution ("EDR") program for addressing medical disputes. About the same time, a friend had a serious and adverse outcome while undergoing a medical procedure at a hospital. She did not receive an explanation, apology or any statement of caring. Before these two recent experiences, I had not thought much about the importance of EDR in resolving medical disputes and how it will likely affect every one of us during our lifetimes. I imagine that in 20 years we will look back and wonder how we could ever have tolerated the current approach.

Oregon, like many states, has struggled over the years with various proposals for "tort reform," such as caps on damages and changes to the evidence code. In 2013, Governor John Kitzhaber and the Oregon legislature, with support from both the plaintiff and defense bars, enacted legislation establishing a statewide EDR program - the first in the nation. The legislation seeks to (1) improve patient safety; (2) efficiently compensate those injured; and (3) reduce the collateral costs of insurance administration, litigation, and defensive medicine.

The premise of EDR is that problems can only be addressed if they are known. By identifying and understanding the root causes of adverse healthcare incidents, healthcare facilities and providers can improve patient safety and prevent injury in the future. With statewide participation, it is anticipated that aggregate data can be used to create effective strategies for resolving adverse healthcare incidents.

The Oregon program became effective on July 1, 2014. It is a thoughtful and user-friendly approach that is available as a model for other states.

EDR Is Good for Patients

"I am still waiting for, and still need that conversation. Not receiving an apology and explanation from someone caring for your child when something goes wrong is incomparable to any form of inhumanity in medicine or in society. It is simply not right...." (Dale Ann Micallizzi, quoted in "The Power of Apology" by Dr. Marie Bismark)

Adverse medical outcomes - results that may or may not be medical malpractice - occur every day. The consequences range from catastrophic to inconvenient. Historically, physicians and health care facilities have been told by their lawyers and insurers not to talk about adverse outcomes, not to admit error and to distance themselves from any patient who complains. As a result, patients may feel abandoned, angry and even vengeful. Their choices are to disparage the provider, file a complaint with a regulatory body or hire a lawyer who may take the case or decline to do so. None are helpful in the short run, when the patient needs answers, communication and caring. EDR is a marked departure from the traditional "deny and defend" paradigm.

Indeed, very few patients who are injured by their health care provider or facility will ever benefit from a legal remedy. The cost of attorney and expert fees makes it impractical to bring lawsuits if liability is questionable or there is little in economic damages (some plaintiffs' counsel estimate \$400,000 minimum). If a patient does go to trial, their chances of success are statistically low (estimates are 1 in 6). Years of discovery and delay may add to the emotional injury the patient has already suffered.

However, following an adverse medical outcome in Oregon, a patient and/or family members, a health care provider or a health care facility may now file a simple notice to initiate the EDR process. Within 72 hours of the notice, a voluntary discussion may occur between the patient/family, provider and facility. Generally, the discussions will conclude within 180 days of notice. The early discussion is coordinated by an EDR manager who is employed by the health care facility. Mediation involving a third party neutral may occur at any time.

Topics for discussion may include:

- What happened and the implications for the patient's health and well-being.
- Why it happened.
- What can be done to fix it.
- An apology, expression of regret or caring about the adverse outcome. Steps the health care facility or provider will take to prevent future occurrences.
- Compensation and/or waiver of medical expenses.

If compensation is offered in exchange for a release, it must be in writing and include advice to the patient of the right to seek legal counsel before accepting the offer.

All oral and written EDR discussions are confidential, with one exception: if litigation is pursued and if material and contradictory evidence is offered, the prior contradictory statement is admissible. However, if the parties engage in mediation, the statutory protections of confidentiality applying to all mediated disputes remain in place.

EDR Is Good for Providers

"We have to understand that, despite our best efforts, things will not always go well. The public needs to understand that, and health care providers need to really integrate that into their way of thinking.... I'm just one of many people to say, 'We're going to tear down the wall of silence, and let's just talk about it.'" (Jo Shapiro, MD, "Revealing Their Medical Errors: Why Three Doctors Went Public").

The concept of a "second victim" after a patient is harmed by healthcare has been strongly established. One study found that after an error occurred, physicians reported increased anxiety about future errors, loss of confidence, sleeping difficulties, reduced job satisfaction, and harm to their reputation (Waterman, et al., 2007). Silence toward the patient may compound their stress and it may stand against the clinicians' own perceptions of a moral duty to disclose. EDR creates a safe and confidential environment for a discussion - a discussion that may preserve the doctor-patient relationship and begin the healing process for everyone involved.

What's Next?

"The current system just doesn't work. It doesn't work for providers and it doesn't work for patients. It's time for a new approach that has the potential to lead to safety improvements that will benefit providers and patients alike." (Bud Pierce, co-Chair, Task force on Resolution of Adverse Healthcare Incidents)

The Oregon Patient Safety Commission is developing a patient and family toolkit that includes guidance and resources. The Commission is also hosting a peer support program, to ensure providers are supported after incidents and given help with their own recovery. Finally, it is planning "disclosure trainings" to give providers guidance for engaging in these difficult conversations.

The Early Dispute Resolution program is both common sense and brilliant. The patient, the health care provider and the facility receive the benefits of early discussion and resolution, and the patient does not forego any potential legal remedy. Both patient and health care provider suffer less than from silence.

For additional information, see: www.OregonPatientSafety.org/discussion-resolution

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