

# Associates in Dispute Resolution LLC

Mediation

Arbitration

Dispute Resolution

## Dispute Resolution Update

June 2014

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### ***Dispute Resolution Update***

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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.

SAVE THE DATE!

### ***Successfully Managing Dispute Resolution*** **Annual CLE/CME Training Event**

**Friday, October 10, 2014**

**7.0 Hours of CLE/CME with 1.0 Hour of Ethics**  
(pending approval)

Each fall, Associates in Dispute Resolution welcomes litigators, mediators and professionals from around the region to attend our seminar and enhance their dispute resolution techniques. The focus is placed on mastering mediation issues, learning new skills and assessing our self-awareness and methods in dealing with conflict.

This year, our annual one-day continuing legal education event will be held in our traditional conferencing facility located at 212 SW 8<sup>th</sup> Avenue, Lower Level, Topeka, Kansas. In response to past concerns we have arranged for free parking for registrants at the City of Topeka parking facility, Crosby Place, located just one block east of our facility on 8<sup>th</sup> Avenue.

We are seeking approval for seven (7.0) hours of CLE/CME credit in Kansas and Missouri, including 1.0 hours of ethics.

This year, our seminar training focus will be:

- Family Law Arbitration
- Dispute Resolution Ethics
- Employment Law Update
- Behavioral and Psychological Barriers to Settlement
- Successful Co-Mediation
- Overcoming Obstacles to Settlement
- Mediation Confidentiality

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**ADR PANELIST  
J. PATRICK BRAZIL  
RECIPIENT OF HONORARY DOCTOR OF LAW**



On May 17, 2014, the Honorable J. Patrick Brazil was invited to serve as Commencement Speaker and recipient of Washburn University School of Law's Honorary Doctor of Law. We are very proud of Judge Brazil's many accomplishments.

Judge Brazil grew up in Chanute, Kansas, and received a Bachelor of Business Administration from Rockhurst College in 1957. He received his Juris Doctor from Washburn University School of Law in 1962. He practiced law in Pratt and then Eureka, Kansas, until 1972, when he was appointed as Judge of the Kansas District Court for the 13<sup>th</sup> Judicial District. He served as District Judge until 1985, when he was appointed to the Kansas Court of Appeals by Governor John Carlin. In 1995, Judge Brazil was appointed Chief Judge of the Court and served until his retirement in January 2001, but continued to sit with the appellate court until July 2012. Judge Brazil has served as a Panelist for Associates in Dispute Resolution since 2001, providing mediation and arbitration services.

  
Larry Rute



  
Patrick Nichols

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



***2008-2014 Super Lawyers***

## Mediation Quote

"Rather than proclaim abstract universal principles, or assert the priority of liberty over equality, or impose one approach or set of ideas on both parties equally, as the law does, mediation seeks to resolve the practical issues that encourage each side to believe that what is happening is unjust, and allows the parties to decide for themselves what is fair or just, using procedures that invite everyone who is touched by the problem to come to the table and collaboratively negotiate how it should be solved, and in this way, preserves both liberty and equality as interconnected aspects of justice."

- Kenneth Cloke, *The Dance of Opposites: Explorations in Mediation, Dialogue and Conflict Resolution Systems Design* (Goodmedia Press 2013) at 379

## Recent Mediation Cases & Resolutions

### New Jersey Promoting Agricultural Mediation

To promote mediation of agriculture-related disputes, the State Agriculture Development Committee published the New Jersey Agricultural Mediation Program Handbook. The Handbook explains how mediation works as an alternative to the Right to Farm Act's formal dispute resolution process or to resolve USDA program disputes, and gives examples of successful mediations.

[NJ.com](#) (March 28, 2014); [NJ SACD Website](#); [Handbook](#)

### Connecticut Proposes Mediation Program for Condominium Disputes

Legislation has been introduced in Connecticut to create a pilot mediation program for disputes among condominium owners or between owners and their condominium associations. The mediation program is to be run by the courts, with the presiding judge selecting a special master to conduct the mediation without compensation. [LegiScan](#) (March 19, 2014)

### Other Notable News & Programs

- A mediation program to resolve complaints against the Denver police and sheriff's departments is becoming a national model. The Office of the Independent Monitor refers certain complaints to mediation, which is voluntary for both parties. Over 350 successful mediations have been completed since the program began in 2006. [Denver Post](#) (March 25, 2014)
- A pilot mediation program is being developed for Raleigh, North Carolina, which would address conflicts between downtown residents and nightclub owners over noise issues. The mediation program would replace the current system of quasi-judicial hearings and involve an independent mediator from the police department when direct contact doesn't resolve an issue. [Raleigh Public Record](#) (March 27, 2014)
- Funding cuts ended a juvenile offender mediation program in Spokane County, Washington, about five years ago, but a former juvenile court mediator provided mediation between the owner of a taxidermy business and nearly a dozen teenagers who were facing felony charges for burglary and removing mounted animals, imitating a YouTube video. The successful process resulted in restitution of nearly \$10,000 and community service for each teen involved, demonstrating the need for an ongoing program. [The Spokesman Review](#) (March 12, 2014)

### International Mediation Developments

- The National Supplementary Health Agency in **Brazil** has expanded the scope of disputes that it mediates between consumers and healthcare carriers to address legal and technical matters in addition to disputes relating to medical care itself. [Mondaq](#) (April 16, 2014)
- An international mediation service has been launched in **Ireland** by JAMS, the largest U.S. mediation service. [The Global Legal Post](#) (April 10, 2014)
- A new mediation service has been established to address workplace disputes that arise within the church in **Wales**, with specially trained mediators in all six dioceses. [NewsWales](#) (April 26, 2014)
- The tourism industry in **France** has established what it calls a mediation program for disputes between travelers and service providers, which handled over 1,000 cases in 2013, a large increase from its first year in 2012. The chief mediator proposes solutions that the parties accept or reject and also issues rulings to resolve disputes. [The Local](#) (March 21, 2014)

- **Pakistan's** Karachi Centre for Dispute Resolution continues to work to get traction for mediation, proposing legislation to permit courts to order mandatory mediation. [The Express Tribune](#) (March 12, 2014)
- Mediation has resolved a property dispute that began in 1966 and has been pending in court for 32 years in Nagpur, Maharashtra, **India**, where a day-long emphasis on mediation resolved 28 of the 39 cases mediated. [The Times of India](#) (March 30, 2014)
- **Nepal** has adopted a Mediation Act to cover disputes not referred to mediation by courts, including land, property, family and even criminal cases apart from serious felonies. The Act establishes a Mediation Council of high ranking officials to formulate policy, which will be headed by a supreme court justice. [eKantipur.com](#) (April 16, 2014)
- The chief justice in the state of Selangor, **Malaysia**, is encouraging mediation at the court's mediation center which settled 168 cases in the last year, while 234 went back to the court for trial; mediation is optional for litigants and conducted without charge by a judge in the role of mediator. [New Strait Times](#) (February 28, 2014)
- About one in five of the 70,000 franchises in **Australia** has been in a substantial franchise dispute, with two-thirds of the disputes resolved through direct negotiations and another ten percent through mediation. [Franchising](#) (April 14, 2014)
- The Taxation Office of **Australia** is increasingly using mediation to avoid litigation in the early stages of high risk tax disputes that involve large businesses or rich individuals. [The Australian](#) (March 4, 2014) (Subscription Required)
- In **Australia**, the Catholic Church's Truth, Justice and Healing Council is encouraging families with sex abuse cases against the church to mediate rather than pursuing protracted litigation. [ABC.Net.Au](#) (March 17, 2014)
- The Financial Dispute Resolution Centre in **Hong Kong** has received over 3,200 inquiries and mediated about 50 cases since being established in June 2012, with a settlement rate of about 80 percent. About half of the inquiries relate to investment-related products. Industry participants say the existence of the Centre, which costs about HK\$55 million (US\$7 million) a year to operate, makes banks and brokers take client complaints more seriously. [South China Morning Post](#) (March 26, 2014)

## Dispute Resolution News & Initiatives

### Federal Court Concludes that Insurer's Due Process Rights Trump California's Mediation Confidentiality Statute

A federal trial court concluded that California's strict mediation confidentiality provisions were not applicable in a bad faith claim by homeowners against their insurer, as the insurer needed to be able to show that its failure to settle the case was the result of the homeowners' excessive demands in mediation. The court relied on the seminal California Supreme Court case, [Cassel v. Superior Court](#), in which due process is recognized as a limit on the mediation confidentiality statute, even though the Supreme Court was not concerned about shielding legal malpractice when only civil damages were at issue. Here, however, the federal court concluded that the insurer's due process right to defend itself outweighed confidentiality, where the homeowners initially demanded \$7 million in mediation for a house the court found to be worth about \$1 million. While the parties also had signed a confidentiality agreement covering the mediation, it was never presented to the court and thus could not exclude testimony about the mediation. The decision is being appealed to the Ninth Circuit.

[Milhouse v. Travelers Commercial Ins. Co.](#), No. SACV 10-01730-CJC (U.S.D.C. C.D. Cal., November 5, 2013)

## **Term Sheet from Mediation Admissible If Settlement Reached, Regardless of Confidentiality Agreement**

After the parties signed a term sheet in mediation to resolve a class action, one side tried to prevent the document from being introduced in court based on a mediation confidentiality agreement, but a federal trial court concluded that if a full settlement had been reached the term sheet would be admissible regardless of the confidentiality agreement, and the court could review the document to make that determination. The court noted that neither the U.S. Court of Appeals for the Seventh Circuit nor the U.S. District Court for the Northern District of Illinois has recognized a federal mediation privilege. [Craftwood Lumber Co. v Interline Brands, Inc.](#), No. 11 C 4462 (U.S.D.C. N.D. Ill., April 9, 2014)

## **Settlements and Negotiations Protected from Discovery in Mediation, But Not Otherwise**

A federal trial court readily concluded that settlement agreements and settlement negotiations were protected from discovery by a mediation privilege if they took place in mediation, but were not protected if they occurred outside mediation. The court noted that most courts recognize a federal common law mediation privilege, and that the U.S. Court of Appeals for the Federal Circuit had observed that all states have apparently enacted a mediation privilege, while there is no state consensus regarding a settlement negotiation privilege. In addition to the mediation privilege, the trial court noted that the local rules of the court and the parties' agreement to mediate also provided additional confidentiality protection among litigants.

[U.S. Ethernet Innovations, LLC v. Acer, Inc.](#), No. C 10-03724 CW (U.S.D.C. N.D. Cal., March 31, 2014)

## **Appellate Court Reverses Decision that Standard Construction Form Requiring Mediation Is Contract of Adhesion**

A California court of appeals overturned the trial court's decision that a standardized home purchase contract which required homeowners to give notice and an opportunity to correct any construction defects, and then to mediate prior to filing litigation against the builder, was an unconscionable contract of adhesion and violated California's 2002 Right to Repair Act. The appellate court found that there was nothing unfairly one-sided about the mediation terms, as required for a contract to be unconscionable.

[McCaffrey Group, Inc. v. Cital](#), No. F066080 (Cal. C.A. 5th Dist., March 24, 2014)

## **Liquidated Damages in Settlement Agreement Are Unenforceable Penalty in California, If Not Related to Actual Loss Suffered**

A liquidated damages clause requiring payment of the entire \$85,000 in dispute, which was settled in an agreement requiring payment of only \$38,000, was held by a California appellate court to be an unenforceable penalty as there was no reasonable relationship to the damages actually suffered by the failure to make a timely payment of the settlement amount, notwithstanding an express waiver of any challenges to the liquidated damages in the settlement.

[Purcell v. Schweitzer](#), No. D063435 (Cal. C.A. 4th Dist., February 24, 2014)

## **Public Bankruptcy Mediation Update**

- The Detroit bankruptcy judge has ordered three mediators - all federal judges - to work with Detroit and Wayne, Oakland and Macomb Counties to address the possibility of a regional water authority. The bankruptcy judge also ordered Detroit's bond insurers to mediate with the city. [Detroit Free Press](#) (April 17, 2014); [The Bond Buyer](#) (March 21, 2014)
- Mediation has resulted in a tentative settlement between bankrupt San Bernardino and its biggest creditor, Calpers, which should help in reaching mediated settlements with other creditors. However, the firefighters union is frustrated after seven mediation sessions, but were

rebuffed by the bankruptcy judge from taking steps in litigation that might interfere with mediation. [Bloomberg News](#) (March 14, 2014)

## Other Notable & High Profile Proceedings

- A court of appeals reversed the trial court and concluded that a settlement agreement did not affect claims against a third party who was not involved in the mediation and not mentioned in the settlement. The appellate court explained that a third-party beneficiary to a settlement agreement or other contract need not be mentioned, but it must be clear that the contract intended to benefit the third party. [Jarman v. Jones](#), No. A13A1961 (Ga. C.A., March 18, 2014)
- Relying on basic contract law, a federal court refused to enforce a settlement agreement reached in mediation due to a mutual mistake of material fact when one party incorrectly asserted in mediation that it had proof that the other party did not hold title to the asset in issue, resulting in a *de minimis* settlement and further efforts which later proved ownership. [GE Capital Small Business Finance Corp. v. Operators Investment Group](#), No. 3:13CV101-NBB (U.S.D.C. N.D. Miss., March 27, 2014)
- A federal court upheld a mediated settlement agreement between the parent of students with disabilities and their school district after finding no merit in any of the parent's ten arguments against enforceability, which ranged from lack of consideration and duress to mutual mistake, rescission and illegality. The court noted that the federal special education statute authorizes and encourages mediation. [Bd. of Educ. of Plainfield Comm. Consol. School Dist. 202 v. Illinois State Bd. of Educ.](#), No. 13 C 2043 (U.S.D.C. N.D. Ill., March 26, 2014)
- Without any mention of mediation confidentiality, a federal court upheld an oral agreement reached in mediation that was to be immediately binding, even though a written agreement was to be prepared later. The court readily dismissed plaintiff's arguments that the mediator had unethically befriended him - noting that it is beneficial for mediators not to be antagonistic - and that the written agreement should not state that defendants hadn't admitted to any wrongdoing. [Peck v. Nevada Dept. of Corrections](#), No. 2:12-CV-00898-JCM-NJK (U.S.D.C. D. Nev., March 14, 2014)
- The court required the parties to sign a general release of all claims based on a handwritten settlement agreement reached in mediation. Even though certain non-material terms were left for future negotiation, the plain language of the memorandum expressed the parties' intention to be bound rather than merely agreeing to agree in the future. [Trolman v. Trolman, Glaser & Lichtman](#), No. 11838, 11839, 11840, 651212/12 (N.Y. S.C. App. Div., February 27, 2014)
- When the terms of a settlement reached in mediation were formally put on the record in court, the settlement agreement was binding even though there were no signatures or further documentation of the settlement. [Bank of Nova Scotia v. Roy](#), No. 2010-29 (U.S.D.C. D. V.I., February 26, 2014)
- Mediation privilege would prevent disclosure of a document received in mediation under either Illinois or California law. [U.S. Surety Co. v. Stevens Family Ltd. Partnership](#), No. 11 C 7480 (U.S.D.C. N.D. Ill., March 7, 2014)
- Mediation privilege prevents a party from being able to show the probability of prevailing on the claim. [Livingston v. Ballantine](#), No. B250110 (Cal. App. 2d Dist., March 18, 2014)
- The court dismissed the litigation due to failure of the parties to mediate as required by standard construction contract provisions. [Key Restoration Corp. v. Union Theological Seminary](#), No. 155981/13 (N.Y. S.C., February 20, 2014)
- When a party living in Asia participated in a mediation but did not appear in person as ordered, the court declined to impose monetary penalties since his absence was not the cause of impasse and there was no cost for the mediator. The court also refused to strike pleadings and enter default judgment, as such drastic sanctions would require a clear record of delay or willful contempt. [Kahama, LLC v. HJH, LLC](#), No. 8:11-cv-2029-T-30TBM (U.S.D.C. M.D. Fl., March 20, 2014)

- Under a Hawaiian statute, a court may take a party's refusal to mediate into account when awarding attorneys' fees and costs, but is not required to do so. [Assoc. of Apartment Owners of Discovery Bay v. Mitchell](#), No. CAAP-11-0000151 (Haw. App., February 24, 2014)
- Without any discussion of mediation confidentiality, the U.S. Court of Appeals for the Seventh Circuit rejected a sexual abuse victim's assertion that he was fraudulently induced to settle in mediation years earlier based on misleading information, because he failed to show that the misleading information was a substantial factor in his decision to settle. [Archdiocese of Milwaukee v. Doe](#), No. 12-3689 (U.S.C.A. 7th Cir., February 25, 2014)
- When the parties sought enforcement of an oral settlement agreement reached in mediation, a federal district court enforced the parties' agreement to arbitrate if mediation did not resolve all claims. [Rebich v. State Farm Fire and Casualty Co.](#), No. 13-1007 (U.S.D.C. W.D. Pa., January 29, 2014)
- Approval of a class action settlement was denied by the court for various reasons, even though involvement of a mediator in settlement weighs against a finding of collusion. [Zepeda v. Paypal, Inc.](#), No. C 10-2500 SBA, No. C 10-1668 SBA (U.S.D.C. N.D. Cal., February 24, 2014)

## Update on Home Foreclosure Mediation

- A National Foreclosure Mediation Program was launched in February to support the 26 states throughout the **U.S.** that have foreclosure mediation requirements. Hope LoanPort, a 501(c)(3) organization, launched the processing solution, which was supported financially by Wells Fargo. Twenty mortgage servicing partners have implemented the program and over 1,400 counseling agencies have been registered. [GeeksWorld.com](#) (April 8, 2014)
- In April, the governor of **Maine** signed legislation to strengthen the role of foreclosure mediation by incorporating National Mortgage Settlement standards and strengthening standards and training for foreclosure mediators. A report by the attorney general of Maine also recommended expanding the foreclosure mediation program by the judiciary. [RealEstateRama](#) (April 14, 2014)
- The Supreme Court of **Maine** upheld dismissal with prejudice of a complaint seeking foreclosure after the lender failed to appear at three mediation sessions, noting that lesser sanctions and warnings had not been effective to alter the lender's behavior. [Bayview Loan Servicing, LLC, v. Bartlett](#), No. Yor-13-298 (Me., March 4, 2014)
- A court of appeals in **Ohio** found that the trial court lacked authority to dismiss an action after unsuccessfully attempting to assist the parties in reaching a loan modification agreement over the course of a year, because the trial court had previously entered a judgment and decree in foreclosure and could not sua sponte vacate its own final order. [Bank of America v. Bruggeman](#). No. 25763 (Ohio C.A. 2d Dist., March 28, 2014)
- Foreclosure mediation is among the items expected to be funded in **New York** with \$440 million from the state's settlement with JPMorgan relating to mortgage-backed securities. [The Republic](#) (March 31, 2014)
- The **Alabama** Center for Dispute Resolution received a \$500,000 grant from the state attorney general in 2013 as part of the national mortgage settlement with the nation's five largest mortgage servicers in 2012. The Center conducted a mortgage foreclosure training for 40 mediators in April to assist in resolving foreclosures throughout Alabama; mediators are located in 23 of the 67 counties in the state. The cost of foreclosure mediation in Alabama will be covered by the grant through April 2015. [Selma Times-Journal](#) (April 28, 2014)

- The City of **Lynn, Massachusetts** signed a contract in April with a dispute resolution firm to handle mortgage foreclosure mediations required by a city ordinance promulgated last May. Banks, who are responsible for a \$650 mediation fee, believe the resolution process should be handled by state regulators and are evaluating their legal options. [ItemLive.com](#) (April 25, 2014); [The Daily Item](#) (March 7, 2014)
- The City of **Worcester, Massachusetts** approved \$75,000 in funding for the new city foreclosure mediation ordinance, with opponents urging delay until legal challenges to similar ordinances in Springfield are resolved. Lenders will be charged a mediation registration fee to be determined once more accurate information is available about the costs of the program. [The Commons](#) (March 26, 2014); [Telegram.com](#) (March 24, 2014)
- Some 360 cases remain on the foreclosure mediation docket of a federal judge in **Rhode Island** which are expected to be completed by the end of the summer, even though the appellate court found fault with the judge's stay order last June. The judge issued a new stay order in December to streamline the mediation process by limiting it to owner-occupied residential properties and setting a 180-day resolution deadline. [Providence Journal](#) (April 18, 2014)
- Last summer's change in the foreclosure mediation law in **Oregon** created a backlog of foreclosures, which is likely to cause an increase in the number of foreclosures in Oregon this year over last year. Nationwide, foreclosures are at a seven- year low, dropping 27 percent compared to a year ago. [The Register-Guard](#) (March 18, 2014)

## Other Mediation News

### Other Cases & Resolutions:

Two intense days of mediation resulted in a far- reaching settlement between preservationists concerned about a prehistoric Tequesta Indian village and a long- planned hotel and entertainment complex, in which a redesigned complex will use glass enclosures to preserve and display the archeological features. The plan received overwhelming support from all parties; the agreement provides that any future disagreements will also be mediated. [Miami-Herald](#) (March 20, 2014)

Technology giants Google, Apple, Intel, Adobe and others are in mediation with workers seeking \$9 billion for claims that the companies conspired not to recruit employees from each other, driving down salaries. [Silicon Valley Business Journal](#) (April 9, 2014)

Google has agreed to mediation in a four-year-old lawsuit by consumers concerned about Gmail scanning messages to target advertising, even though Google just defeated an effort to certify a class in the case. [MediaPost](#) (March 25, 2014)

Mediation has been agreed to by various defendants involved in the federal multidistrict litigation over fungus infected steroids that allegedly resulted in 64 deaths and nearly 700 other cases of fungal meningitis. [Law.com](#) (March 18, 2014) (Subscription Required)

Following settlements in early mediation of Stryker hip recall cases in New Jersey proceedings, a panel of five mediators has been established to oversee ongoing mediation efforts in a second phase. Following the Stryker recall of hip stems in 2012, over 800 claims have been consolidated in New Jersey state court, with over 600 additional cases in federal multidistrict litigation in Minnesota. [Virtual-Strategy Magazine](#) (March 20, 2014)

The federal judge overseeing more than 700 Skechers toning shoe lawsuits has stayed the multidistrict litigation for seven months and appointed a special settlement master to act as Mediator. [Digital Journal](#) (April 09, 2014)



The Surface Transportation Board is requiring mediation in a dispute over trackage rights between BNSF Railway, Kansas City Southern Railway and Union Pacific. [RailwayAge](#) (April 15, 2014)

TransCanada and two Vermont towns are mediating the value of two hydroelectric dams in a dispute over property tax increases. [Washington Times](#) (March 20, 2014)

Class action litigation against 15 former executives and board members of LandAmerica is being delayed to permit mediation at the request of the parties. [Richmond BizSense](#) (March 14, 2014)

Litigation by farmers against Monsanto for unauthorized release of biotech wheat, which resulted in temporary suspension of wheat exports to Japan and South Korea, is making some progress in mediation. [Capital Press](#) (April 21, 2014); [Capital Press](#) (March 14, 2014)

Three days of mediation have not resolved 300 lawsuits filed against Mountain State University after loss of its nursing program accreditation, but another mediation session will be held this summer. [Register-Herald Reporter](#) (April 3, 2014)

Trial has been postponed for a final attempt at mediation in a dispute over a township's efforts to obtain an airport through eminent domain. [MyCentralJersey.com](#) (March 18, 2014)

A developer and local residents have agreed to mediation over whether a tower must be limited to five stories or 18 stories depending on the applicable Miami zoning requirements. [Miami Herald](#) (April 4, 2014)

A county and city have agreed to mediation over how to address road repairs and legal liability from a dam collapse. [Forsyth County News](#) (March 9, 2014)

Director Quentin Tarantino's copyright infringement suit against Gawker over a leaked screenplay has been sent to mediation by the judge. [Deadline](#) (April 2, 2014)

In litigation against Best Buy for allegedly posting nude photos when recovering computer data, a federal judge sent the case to mediation and required the parties to select mediators. [Tuscaloosane.com](#) (March 13, 2014)

Mediation over details relating to construction of a new park-and-ride was sufficiently successful for the project to move forward once the agreement is reviewed by the town selectboard. [The Commons](#) (March 26, 2014)

Mediation in Putnam County, NY, increased 20 percent last year and has increased 45 percent since 2011. [The Courier](#) (March 27, 2014) (Subscription Required)

An ice cream franchisor in Australia is in mediation with franchisees over an A\$1 million (US\$950,000) claim for seizing stores and changing locks. [SmartCompany](#) (March 31, 2014)

Although NZ\$500,000 (US\$430,000) has been spent on mediation, challenges remain to a large-scale irrigated dairy project in Mackenzie Country, New Zealand; further mediation is possible. [NZFarmer.Co.NZ](#) (April 4, 2014)

A judge has required mediation in a lawsuit by an 18-year-old who moved out and sued her parents for child support and tuition for her private school. ABC 7 Chicago (March 5, 2014)

## Worth Noting:

### Guidance on Settling Employment Disputes with Clean Records

Resolution of federal employment disputes in mediation (and direct negotiation) often includes an agreement to give the employee a clean record. The U.S. Merit Systems Protection Board has issued a lengthy report, *Clean Record Settlement Agreements and the Law*, discussing the range of issues that can arise and focusing on how to make clear commitments in settlement agreements and successfully carry out those commitments.

[U.S. Merit Systems Protection Board](#) (December 5, 2013); [Report](#)

### Mediation in Sports

- Comcast, Astros and Rockets have agreed to allow a federal judge to mediate between them over the Comcast SportsNet Houston bankruptcy case, while continuing to preside over the bankruptcy appeal. [Ultimate Astros](#) (March 29, 2014)
- The University of Maryland and the Atlantic Coast Conference have agreed on a mediator in order to comply with the court's requirement of mediation of the dispute over Maryland's move from the ACC to the Big Ten. [Washington Post](#) (April 28, 2014)
- Mediation sessions between the NCAA and former UCLA player Ed O'Bannon have made no progress, making it more likely the four-year-old class action will go to trial in June, although further mediation is possible. [Yahoo! News](#) (March 29, 2014)
- Two lawsuits challenging the constitutionality of Cleveland's unique approach to taxing visiting professional athletes have been sent to mediation by the Ohio Supreme Court. [Cleveland.com](#) (March 11, 2014)

## Book Review

**Michelle LeBaron, Carrie MacLeod & Andrew Floyer Acland, Eds.**  
***The Choreography of Resolution: Conflict, Movement and Neuroscience***  
**(ABA Section of Dispute Resolution 2014)**

***The Dance of Opposites: Explorations in Mediation, Dialogue and Conflict Resolution Systems Design***  
**(Goodmedia Press 2013)**

Book reviews by Jan Frankel Schau  
(ADR Services, [jfschau@schaummediation.com](mailto:jfschau@schaummediation.com))

True confession: I have never had a formal dance lesson. So it was with some reluctance that I opened the new book published by the ABA's Section of Dispute Resolution, *The Choreography of Resolution*, which I had ordered weeks ago and then placed on my back credenza. It was only after I was invited to a book signing for *The Dance of Opposites*, at the home of author Ken Cloke, that I could successfully coax both volumes out onto the dance floor for a whirl.

A dancer himself, Cloke uses Dance as a metaphor for conflict resolution, while *The Choreography of Resolution* quite literally begs the reader/dancer to process the lessons within it kinesthetically, allowing movement itself to shape the ideas and realizations that flow from the experience.

As a reader, I was flummoxed by the clumsiness of words to communicate flow and silence. Indeed,

editor Andrew Floyer Acland, one of the pioneers of ADR and stakeholder dialogue in the U.K. who has written and taught extensively on negotiation, mediation and conflict transformation, acknowledges that the purpose of the book is to underscore the stark contrast between our "first generation" word-heavy roles as mediators and the "second generation" call for more attention to be paid to the negative spaces that are ever present in conflict: those that lie between the rational brain and the creative imagination. Still, I couldn't quite process how I was meant to experience these messages while sitting on a sofa reading words describing a four-year project of dance and conflict resolution which took place at the European Graduate School in Saas-Fee, Switzerland, where editors Floyer Acland and Professors Michelle LeBaron and Carrie MacLeod from the University of British Columbia met up with internationally acclaimed modern dancer and choreographer, Margie Gillis, to explore and document the benefits of dance to conflict resolution as a field.

Cloke's book reminds the reader that most conflict arises out of distrust, whereas dance depends upon a great deal of trust. The choreography he describes includes offer and acceptance, creating new and different cycles of communication. This felt much more genuine and accessible to my own experience. And so I forged on with both *The Choreography* and *The Dance* to discover if I could find synthesis between the two.

Cloke's *Dance* speaks more directly to mediators to suggest that we are a part of a comprehensive global movement that is in fact transforming and reshaping the world in which we live. He offers tangible guides toward bringing forth this new vision, taking into account the larger social and environmental conflicts that impact all of us. He quotes Martha Graham, "We look at the dance to impart the sensation of living in an affirmation of life, to energize the spectator into keener awareness of the vigor, the mystery, the humor, the variety, and the wonder of life," as well as Jelaluddin Rumi, "Live at the empty heart of paradox. I'll dance there with you, cheek to cheek."

Eventually, *The Choreography* began to make sense to me. For example, when Floyer Acland uses the metaphor of the Japanese garden to describe how dance relates to mediation I understood better that sometimes the empty spaces, the shapes, the relation between disparate elements can inform how people interact in a different dimension than the hard decision-making of Western Corporate thinking. In some sense, he describes the benefits of mediating within the shadows of what is not said and acknowledging the high cost of doing nothing.

Another analogy that I understood was mediation as poetry: teaching people to listen to one another and then to understand what they are hearing. Choreography opens up the possibility that mediators consciously look for the less than rational elements of the conflict before them, to see into the participants' hearts and souls, not just their minds.

Of course, there are many orchestrations which are commonly found in the language of dance within commercial mediation. Consider, for example, the typical "sidestepping of the issues," "stepping on the other's toes," and other corporeal terms like "making room," "taking a breather," "grasping at straws" and "stepping aside." The various authors and editors of *The Choreography* advocate embracing dance as a means to understand relational connection, synchronicity and ways to stay "in step."

As a student of International Relations in the 1970s, I appreciate the concept of how cultural and creative arts have the power to "recover muted histories from the past, restructure the present and re-imagine the future." Intellectually, I appreciated *The Choreography's* premises, yet I struggled to make applications that are useful for my own work in mediating litigated cases. Could I imagine a bunch of adversarial lawyers and their clients dancing through the hallways at ADR Services?

Although I still cannot imagine that, *The Choreography* did help illuminate my own practical observations as to the flow of energy between participants, the rhythm of when to intervene and when to let the participants dance, whether to prod them to energize one another (as Martha Graham described) or even dare them to dance cheek to cheek (as Rumi suggested). Acknowledging a choreographed dance challenged me to consider pacing and when words were inadequate and gestures - such as touch or hug - would work better.

One interesting observation in *The Dance of Opposites* was the simple differentiation between "reacting" and "responding." Whereas reacting is finite and typically places both blame and judgment on the other, responding means taking responsibility for your own role. Responding is an invitation to explore further, and a mark of emotional maturity.

In the end, the two books, read together, have persuaded me that mediators need to be artists as much as they need to be lawyers, psychologists and management consultants. It is the job of artists to discern hidden possibilities, cultivate new tones and tempos, explore nuances of shade or meaning and bring to life what may be inherent in an object or in conflict, but hidden away for only an artist to discover and gently bring to light.

The metaphor of dance helped me to make the connection that is critical to bridge the gap between reason and the point in conflict when reason is not enough. As Cloke writes, "Our youthful field is bursting with creative insights and immense promise." He offers the prospect of a "conflict revolution," by which he means a comprehensive, fundamental transformation in the way we argue, disagree and resolve differences.

Who knows, there might be a place for me on "Dancing with the Stars" yet!

[Purchasing Information for LeBaron's \*The Choreography of Resolution\*](#)

[Purchasing Information for Cloke's \*The Dance of Opposites\*](#)



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