



Associates in Dispute Resolution LLC

Mediation Arbitration System Design

www.adrmediate.com

APRIL 2011

Dispute Resolution Update

IN THIS ISSUE

- Resolving Intellectual Property Disputes
- Recent Mediation Cases & Resolutions
- Dispute Resolution News & Initiatives
- Foreclosure Mediation Update

Mediation Quote

"[In mediation,] what lawyers think is strategic information often turns out to be information that, if they did convey it to the other team, would help settle the case.... The private session might be the vehicle they need to assess the risks of exchanging information...and decide to divulge it to the other side."

- J. Anderson Little, Making Money Talk: How to Mediate Insured Claims and Other Monetary Disputes (American Bar Association 2007) at 21

Dear Friends and Colleagues:

This edition of *Dispute Resolution Update* reviews recent mediation case decisions, as well as updating and featuring dispute resolution news and initiatives across the United States and around the world. Mediation cases of interest include the mediated settlement of a \$600 Million securities fraud matter; a court rejection of a mediation settlement which contained a 10-day period for objections following the mediation; the use of mediation materials to later prepare plaintiffs for depositions; and, the recent California Supreme Court decision (featured in the February issue) supporting the use of mediation confidentiality as a shield to avoid legal malpractice claims. The information has been summarized by Keith L. Seat, a respected mediator and Editor of the International Academy of Mediator's Newsletter.

From the food products we consume, the literature we read, the music we select, and the technology we purchase, the law of intellectual property plays a pivotal and central role in innovation and research in providing our society a mechanism to protect the fruit of one's intellect. Featured in this issue of *Dispute Resolution Update* is a commentary *Resolving Intellectual Property Disputes* authored by ADR, LLC Associate, Arthur Chaykin. In his article, Mr. Chaykin suggests that in attempting to resolve intellectual property disputes, a mediator should be chosen who has experience in clarifying issues for mediation; is capable of developing a range of possible outcomes; is able to assist the parties in understanding their respective risk analysis, and also be prepared to assist the parties in cutting through terminology and data overload typical of intellectual property cases. [Click for a printable version of the article.](#)

We encourage readers to attend the upcoming [ABA Dispute Resolution Conference in Denver, Colorado. Fulfill a year of CLE requirements at the ABA Section of Dispute Resolution's 13th Annual Spring Conference on April 13-16, 2011.](#) The Section's Spring Conference is an opportunity for experienced litigators, dispute resolution practitioners and others interested in dispute resolution to gather and learn from each other. The conference will include more than 90 concurrent programs covering many aspects of mediation, arbitration, and negotiation. Programs are designed for advocates, mediators, arbitrators, in-house counsel, teacher/scholars, court and private administrators, and many others. Patrick Nichols has agreed to serve as Honorary Host for ABA-Denver and Larry Rute will assist in presenting, *It's All His Fault!!!!—Mediating Employment Disputes* with Kathy Perkins (principal presenter, Lawrence, Kansas, and Susan Hammer, presenter, Portland, Oregon).

As always, readers should feel free to submit news or summaries regarding local, regional or national substantive developments in the field of mediation, arbitration or dispute resolution. Our next newsletter will be published in late March.

Larry Rute*

Patrick Nichols

*Licensed in Kansas and Missouri



Distinguished Fellows of the
International Academy of Mediators
2008-2011 **Super Lawyers**

Topeka Office:

212 SW 8th Avenue, Suite 102

Topeka, KS 66603

785-357-1800

785-357-0002 (fax)

Lawrence Office:

5200 Bob Billings Parkway, Suite 302

Lawrence, KS 66549

785-865-3700

785-865-1331 (fax)

Kansas City Office:

1600 Genessee, Suite 838

KC, MO 64102

816-531-1001

816-531-1221 (fax)

RESOLVING INTELLECTUAL PROPERTY DISPUTES

By: Arthur A. Chaykin, Esq., Mediator

Introduction

Intellectual property issues impact businesses of all sizes and in all industries. As more companies and individuals become aware of the importance of intellectual property as a strategic business asset, the amount of intellectual property created has increased and, generally speaking, so has the number of intellectual property disputes. For the sake of efficiency, cost-effectiveness, and control, intellectual property cases are particularly good candidates for alternative dispute resolution – most commonly, mediation or arbitration. This is because transaction costs involved in resolving an intellectual property dispute through traditional litigation are extremely high relative to resolution of “normal” litigation. And although there is a wide range of intellectual property including patents, trade secrets, copyrights and trademarks, parties considering alternative dispute resolution in an intellectual property case should consider certain factors pertaining to the characteristics of the third party-neutral selected to help resolve the dispute.

The Neutral: Expert in IP or in Dispute Resolution?

Although a high level of general dispute resolution skill is an important factor when selecting any neutral, a mediator needs to develop certain special skills and qualities while also gaining a firm handle on the principles, practices, terminology, and damage issues that make intellectual disputes unique.

In the typical business case, the neutral expects that lay business leaders thoroughly grasp the business issues and key principles that impact the dispute. However, intel-

lectual property disputes present an unusual challenge: Although some business decision makers are quite sophisticated with regard to intellectual property issues, there are aspects of intellectual property law that are counter-intuitive and sometimes run contrary to the business and legal principles that apply in other types of property disputes. This sometimes results in confusion, incorrect evaluation, and misunderstanding. This confusion is compounded by the fact that intellectual property disputes often arise in technical or very industry-specific contexts, which can also undermine the clear understanding the parties need to resolve their differences. If not properly managed, these challenges can frustrate the parties, undermine their confidence that the process is effective, and cause the mediation or dispute resolution process to bog down.

Using real estate – the ultimate tangible property – as an example, when one purchases a house, one registers the deed and it is understood that, absent unusual circumstance, rights to the land are protected and have fully vested. Such is not the case for trademarks (for example). A trademark registrant's rights can be greatly impacted by the trademark registrant's use (or non-use) of the mark, as well as the strength of the mark. And the trademark owner's ability to stop a later user of the mark can also be impacted by the extent to which the new use will cause confusion in the marketplace.

A third-party neutral attempting to resolve a trademark dispute must be able to understand such principles and also explain them in a compelling and comprehensible way to the disputants. Of course, when attorneys are involved (which is almost always the case with in-

tellectual property disputes), a neutral can enlist the attorneys to help clarify the issues for their respective clients, which they are usually more than happy to do. A mediator, however, must assure that the jargon and confusion are slowly stripped away so that the parties can perceive their interests with clarity and resolve them through the normal mediation process. Because of the complexity of intellectual property cases, this is a critical function even when the disputants have a high degree of intellectual property knowledge. The law of intellectual property has evolved so rapidly of late, and there have been so many new developments in the field, it is absolutely critical for the neutral to make sure that the parties are “speaking the same language.” This becomes critical toward the resolution phase of the mediation, when the parties may need to carefully identify which party has which rights.

Patent cases sometimes involve detailed issues relating to particular scientific or technical fields. Although the technical field itself may be familiar to the parties, the patent principles that impact their rights may not be totally understandable and they are rarely intuitive. The patent claims will define the scope of the patent holder's rights but interpretation of claims is a complex and difficult process. In some case, the prosecution history, the patent disclosure, the claims allowed by the patent office, and the exact structure, operation and function of the article accused of infringement are all relevant to a determination of liability, pinpointing the source of disagreement between the parties often requires sustained focus and patience.

RESOLVING INTELLECTUAL PROPERTY DISPUTES

By: Arthur A. Chaykin, Esq., Mediator

(continued)

Patent cases, therefore, require a mediator who is a fast learner but once again, overall technical skill is secondary to the ability to clarify, articulate, and help remove confusion and create “buy-in” as to the true nature of the dispute and the range of possibilities available for resolution. The mediator must create an agenda of issues that assure that the parties come to agreement as to the nature and scope of their disagreement.

In fact, in some cases, simply getting agreement as to the agenda of issues for resolution can often clarify issues sufficiently to build substantial momentum toward resolution.

Patent lawyers are specialists who always have some technical or scientific background. As a result, my experience is that intellectual property lawyers in general and patent lawyers in particular usually possess a high degree of technical skill and a fairly deep attachment to the processes, procedures, terminology, and nuances of patent law. However, not all patent lawyers find it easy to move between the very technical field in which they operate and the world of laypeople and dispute resolution where emotions, varied interests and diverse backgrounds can seriously undermine the dispute resolution process. As a result, a third-party neutral who is a “patent nerd” may not be successful in helping the parties clarify the issues and interests that are keeping them from reaching settlement, unless the third party can help the parties break down the communication barriers that may be keeping them from understanding the dispute and the settlement options. A

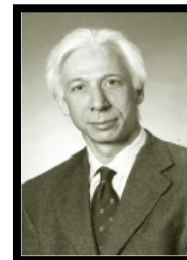
good intellectual property mediator can use apt analogies, comparisons, and descriptions that are understandable to lay parties and intellectual property experts involved in the decision making to move the process forward.

Finally, the types of proof, processes, and remedies that are typically involved in intellectual property cases play a large role in successful dispute resolution. Because IP disputes are so expensive to litigate, the incentive to reach a consensual settlement is high. But although some principles of litigation remain constant, remedies and damages in IP cases can differ markedly from the types of damages available in normal commercial litigation, depending upon the type of property involved and the exact nature of the injury. A skillful third-party neutral will have sufficient understanding of the real world expenses and problems of proof that face the various parties in an intellectual property dispute so that the parties can find ways to increase their overall understanding of the case, narrow their zone of disagreement, and avoid the expensive processes and procedures that will greatly drive up their costs.

In conclusion, mediation of IP disputes can help parties avoid the very high expense of IP litigation while maintaining much greater control over the outcome of the dispute. Parties to mediation may find resolutions that are simply not available to a judge adjudicating a case in a bi-modal “win or lose” fashion. Where parties have invested significant amounts of money in developing their intellectual property, both plaintiff and defendant face grave risks. The plaintiff faces the risk that the IP will be invalidated through the court proceeding. The defendant faces the

risk of being found liable for intellectual property infringement with the attendant exposure to heavy liability. Both parties face the risk of long and protracted litigation involving very expensive and specialized attorneys and experts.

For all these reasons, parties should strongly consider at least attempting to resolve their IP disputes through a mediator who has experience clarifying issues for resolution, clarifying the key elements of dispute and the range of possible outcomes, and assisting the parties in understanding their risks and helping them generate and focus on appropriate avenues for settlement. To accomplish this, a mediator who can successfully help the parties cut through the confusion, terminology, and data overload typical of intellectual property cases will be in a position to help the parties reach resolution.



Arthur Chaykin

is a third-party neutral associated with ADR. He focuses his mediation and arbitration practice on complex commercial and intellectu-

al property disputes. Most recently, Arthur has successfully mediated cases involving trademark rights in the context of computerized search, patent rights in the field of computer system development, and disputes between franchisors and franchisees.

Some practitioners might not include trademarks as Intellectual Property for technical reasons, but for purposes of this article, trademarks are included.

[Click Here for a printable version.](#)

RECENT MEDIATION CASES & UPDATES

California Supreme Court Allows Use of Mediation Confidentiality as Shield to Avoid Legal Malpractice Claims

Continuing its strict interpretation of California's broad mediation confidentiality statute, the California Supreme Court rejected the appellate court's creation of a judicial exception, and prevented a party from using his private communications with his attorneys before and during a mediation in a later action for legal malpractice. The alleged malpractice involved claims that the party's counsel had conflicts of interest and coerced him to settle for too little. Although private conversations during the mediation between the party and his attorneys did not involve the mediator or other party (or reveal anything said or done in mediation discussions with the mediator or other party), the Court relied on the plain language of the statute to conclude they were confidential nonetheless and that any exception must come from the legislature. The confidentiality statute only applies to civil actions, however, so would not protect an attorney from use of mediation-related oral communications in a criminal prosecution for fraud.

[Cassel v. Superior Court](#), No. S178914 (Cal., January 13, 2011).

Court Refuses to Vacate Patent Invalidation Decision to Support Mediated Settlement After Balancing Factors

A settlement reached in the mediation program of the U.S. Court of Appeals for the Federal Circuit was contingent on being able to vacate the district court's ruling that most of the claims in the patent at issue were invalid. On remand, the district court balanced the importance of court-ordered mediation programs and encouraging mediated settlements

against other factors, including the parties' desire to conserve resources, the public interest in the orderly operation of the federal judicial system, and the potential to conserve judicial resources. The court concluded that vacating its invalidity ruling was not in the public interest and ultimately would not save judicial resources because the outcome of other pending proceedings also turn on the validity of the patent.

[Ohio Willow Wood Co. v. Thermoply, Inc.](#), No. 9:07-CV-274 (E.D. Tex., February 3, 2011).

Use of Mediation Power-Point to Prep Witnesses Opens It to Discovery

A federal district court ruled that materials used in mediation must be turned over to defendants because they were used in preparing plaintiffs for depositions in the case. The court found that there was "testimonial" use of the 90-slide Power-Point presentation in issue because it was used to refresh the memory of a witness, and that production to defendants was in the interest of justice because plaintiffs had failed to respond to numerous interrogatories and document requests on the specifics of their allegations. The court also concluded that a claim of attorney work product would not prevent disclosure, in part because the materials had already been disclosed to defendants in the mediation. The court stated that it need not consider the applicability of a mediation privilege, since a privilege would not prevent discovery in this situation.

[Greenwood Realty Inc. v. Action Realty Inc.](#), No. 8:09-CV-02683 (D. S.C., February 15, 2011).

Expert Used in Mediation Properly Appointed as Trial Expert, But Must Generate New Report

A New Mexico appellate court concluded that a valuation expert hired by the parties in mediation may be appointed as an expert witness in the trial of the case, as long as her testi-

mony omits anything covered by mediation confidentiality provisions. While the valuation report that the expert generated for the mediation is confidential and not admissible at trial, the court or parties can have her prepare a new report from the same underlying data for use at trial. The court applied New Mexico's new Mediation Procedures Act, some provisions of which are based on the Uniform Mediation Act.

[Warner v. Calvert](#), No. 29,674 (N.M. App., February 9, 2011).

Consent Judgment Following Mediated Settlement Cannot Be Appealed

A mediated settlement of an eminent domain action and an inverse condemnation action resulted in entry of a stipulated or consent judgment.

When the court later awarded funds to the city from a court-controlled deposit to cover costs of remediation, the other party sought to appeal the trial court's orders. A California appellate court concluded that the orders were not appealable because the matter ended with the consent judgment, which cannot be appealed unless specifically entered to facilitate an appeal.

[City of Gardena v. Rikuo Corp.](#), No. B217302 (Cal. App. 2d Dist., February 7, 2011)

(CONTINUED ON NEXT PAGE)



RECENT MEDIATION CASES & UPDATES (cont.)

“Opt-out” Settlement Agreement Not Binding Where No Acceptance of Proposal Terms

The parties were not bound by a mediation agreement signed by their counsel, which provided a ten-day period for objections after which the agreement was to be binding, because the agreement also included a settlement “proposal” that was to be accepted or rejected within a specified period. That proposal was not accepted, so under standard contract principles there was no meeting of the minds. The failure of either party to opt out within the ten-day objection period did not result in an enforceable agreement, since there had never been acceptance of the settlement terms. [Powerhouse Custom Homes, Inc. v. 84 Lumber Co.](#), No. A10A2351 (Ga. App., January 24, 2011).

Cost Order Cannot Include Prevailing Party’s Half of Mediator’s Fees

A Colorado appellate court reversed the trial court’s cost order relating to mediation, holding that when parties agree to split the costs of mediation, the prevailing party’s half cannot subsequently be awarded as costs unless it reserved the right to seek later recovery.

[Valentine v. Mountain States Mutual Casualty Co.](#), No. 09CA1767 (Colo. App., January 6, 2011)

Countrywide to Pay over \$600 Million in Mediated Securities Fraud Class Action Settlement

One of the largest settlements of a securities fraud case in U.S. history was reached in mediation and approved by the federal court. Under the class action settlement, Countrywide Financial Corp. will pay just over \$600 million to New York pension funds for its involvement in sub-prime mortgage lending, to which its accounting firm will contribute \$24 million. However, 33 large institutional

investors opted out of the settlement, which triggered the need for further mediation, using the same team of mediators, and resulted in a separate \$22.5 million fund being set aside for those who opted out.

[TMCnet.com](#) (February 28, 2011); [Reuters](#) (February 25, 2011)

Other Notable or High Profile Proceedings

- While analyzing a contract requiring a mini-trial as an alternative dispute resolution process, a federal court listed cases in which dismissal of an action due to failure to mediate was appropriate because a contract required mediation prior to litigation. [Union Electric Co. v. Energy Ins. Mutual Ltd.](#), No. 4:10-CV-1153 (E.D. Mo., January 10, 2011)
- As widely reported, ongoing mediation is being conducted between owners of National Football League teams and the NFL Players Association to try to determine how to split over \$9 billion in annual revenues from the most profitable professional sport in America. The mediation is being conducted by the Federal Mediation and Conciliation Service and has involved numerous sessions which have extended past deadlines. Failure to reach agreement may threaten the upcoming NFL season. [The Washington Post](#) (March 9, 2011); [NY Daily News.com](#) (March 2, 2011); [The Washington Post](#) (March 1, 2011)
- Former New York Governor Mario Cuomo, said to be experienced as a mediator, was appointed by a federal judge to mediate a billion dollar lawsuit by Madoff trustee Irving Picard against the Mets ownership. [New York Times](#) (February 18, 2011); [Hedge Fund.net](#) (February 17, 2011)
- Investors who lost money in Madoff’s ponzi scheme reached a \$100 million settlement in mediation with funds affiliated with Tremont Group Holdings Inc., which invested with Madoff. [Reuters](#) (February 25, 2011)
- James Roosevelt, Jr., grandson of Franklin Delano Roosevelt, has mediated disputes between well-known political figures, and may need his skills in the proposed merger of Harvard Pilgrim Health and Tufts Health Plan, where he is president and CEO. [Becker’s Hospital Review](#) (January 28, 2011)
- U.S. Transportation Secretary Ray LaHood held a mediation session involving the expansion of O’Hare International Airport with Chicago Mayor Daley and the CEOs of United and American. [Chicago Tribune.com](#) (February 10, 2011)
- Rapper 50 Cent states that mediation is scheduled to try to resolve his lawsuit against website WorldStarHipHop.com for using his image on the website. [Billboard.com](#) (January 24, 2011)
- After failing to resolve sexual-abuse lawsuits in mediation, the Archdiocese of Milwaukee is filing for bankruptcy protection, becoming the eighth to do so since the clergy abuse scandal arose in 2002. [The Washington Post](#) (January 4, 2011)
- A ten year old lawsuit by homeowners for faulty construction was finally resolved in the third attempt at mediation. The homeowners were first awarded \$800,000 in arbitration, which was appealed and resulted in a \$58 million jury verdict. The court had not finalized the judgment and sent the parties to mediation to try to avoid further appeals. [Star-Telegram](#) (January 27, 2011)
- Court-ordered mediation has resulted in an agreement by Astra-Zeneca Plc to pay \$150 million to settle 6,000 more lawsuits over its antipsychotic drug Seroquel. [Bloomberg BusinessWeek](#) (February 17, 2011)

DISPUTE RESOLUTION NEWS & INITIATIVES

International Mediation Developments

- Greater use of mediation is urged to help offset budget cuts to legal aid in boroughs in London, **England**. [Hackney Citizen](#) (February 18, 2011)
- **Germany's** leading arbitration institution, the *Deutsche Institution für Schiedsgerichtsbarkeit eV* (DIS), has issued mediation and other alternative dispute resolution rules. [International Law Office](#) (February 17, 2011)
- **Italy's** lawyers' union is calling for a week-long national strike to protest the March 21 implementation of the groundbreaking new mandatory mediation statute in Italy. [Karl Bayer.com](#) (February 25, 2011)
- **Russia's** new mediation law took effect on January 1 and regulates mediation procedures for business and commercial disputes, along with employment and family law matters. [Herbert Smith.com](#) (January 31, 2011)
- The National Institute of Defense of Consumers in **Angola** mediated consumer complaints and obtained reimbursement of AKZ 3.9 million (\$42,000) in 2010. [Angola Press](#) (February 2, 2011)
- **Qatar** continues its push to become an international center for dispute resolution, holding a mediation training for local professionals. [The Peninsula](#) (January 26, 2011)
- **India's** Law and Justice Minister asserts that alternative dispute resolution will be the preferred way of settling disputes in the future and that India is working to become a preferred destination for ADR. [Press Information Bureau](#) (January 9, 2011)
- A new mediation center opened at the Hazaribagh Civil Court in the state of Jharkhand, **India**
- [OneIndia News](#) (January 24, 2011)
- Four thousand lawyers wore black stripes in Surat, **India** to protest opening a mediation center to mediate cases under the Negotiable Instruments Act. [The Times of India](#) (February 11, 2011)
- The Supreme Court of **Nepal** is expanding mediation with new centers in twenty-five remote district courts, making a total of 58 mediation centers. [Himalayan Times](#) (December 28, 2010)
- The first Asia-Pacific Mediation Leadership Summit will be hosted in Bangkok, **Thailand** in July by the Asia-Pacific Mediation Forum. [APMF Website](#)
- The Second Asian Mediation Association Conference is being hosted by the **Malaysian** Bar Council to encourage use of mediation. [Malaysian National News Agency](#) (January 26, 2011)
- Mediation is growing in **Hong Kong**, with the Hong Kong International Arbitration Centre claiming a 90% mediation settlement rate at the end of 2010. [The Asset](#) (January 28, 2011)
- The Lands Tribunal in **Hong Kong** issued a Direction to encourage parties in Land Compulsory Sale cases to use mediation. [7th-Space Interactive](#) (February 11, 2011)
- The Intellectual Property Office of the **Philippines** is urging mediation of cases relating to copyright and other IP disputes, and devoted February to cases requiring mandatory mediation. [Business Insight Malaya](#) (February 15, 2011)
- mediation of consumer complaints against Allcare Dental and Dentures across the fifteen states in which the company operated before abruptly ceasing business. The mediations will not only address financial issues, but protection of and access to patient dental records. [The Washington Post](#) (January 7, 2011); [Examiner.com](#) (January 6, 2011)
- Mediation by the Missouri Department of Insurance resulted in recovery of \$9.5 million for consumers who brought insurance complaints. The largest number of complaints involved health insurance, followed by auto and homeowners. The average consumer recovery in the mediations was \$7,000. [Worker's Compensation.com](#) (January 27, 2011)
- The attorney general's office in Massachusetts helped consumers recover over \$4.7 million through mediation last year. The attorney general received over 13,000 complaints in 2010 relating to consumer, health care and elderly issues. The Elder and Health Care mediation program obtained nearly \$700,000 for consumers in the state. [The Newburyport Current](#) (February 14, 2011)

Mediation Encouraged for Medical Malpractice

NPR and a major health care provider each urge mediation as a beneficial alternative to malpractice litigation. [National Public Radio](#) (February 1, 2011); [Kaiser Health News](#) (February 1, 2011)

(CONTINUED ON NEXT PAGE)

States Continue Use of Mediation for Consumer Restitution

- The Michigan attorney general is forming a multi-state task force of attorneys general to coordinate the

DISPUTE RESOLUTION NEWS & INITIATIVES (cont.)

Update on Home Foreclosure Mediation

- A hearing by the **U.S.** Senate Judiciary Committee emphasized the foreclosure mediation programs of the Bankruptcy Courts in New York and Rhode Island, which began in 2009. However, a loan servicer has challenged the authority of the Rhode Island Bankruptcy Court's mediation program. Senator Sheldon Whitehouse (D-RI), who chaired the hearing, has introduced S.222, the Limiting Investor and Homeowner Loss in Foreclosure Act to clarify the authority of Bankruptcy Courts to run loss mitigation programs and to expand them nationwide. [The State Column](#) (February 3, 2011); [Market Watch](#) (February 1, 2011); [The Providence Journal](#) (January 29, 2011); [Loan Rate Update](#) (January 31, 2011); [S.222](#)
- Legislation requiring mediation with homeowners prior to repossession has made progress in **Washington** state, with extensive negotiations on language resulting in support from both bankers and anti-poverty advocates. [The News Tribune](#) (February 18, 2011).
- Legislation requiring mandatory mediation of home foreclosures is being contemplated in **Hawaii**. The Hawaii House of Representatives passed and sent to the Senate a measure that would provide a five-month moratorium on non-judicial home foreclosures, which would give homeowners time to mediate or otherwise negotiate with lenders. [KITV.com](#) (February 3, 2011); [Forbes.com](#) (February 11, 2011)
- The proposal of the mayor of Boston, **Massachusetts** to require face-to-face mediation prior to mortgage foreclosures in the city has passed the City Council; it needs permission from the state before going into effect. [The Boston Globe](#) (January 6, 2011).
- **Florida's** court-mandated foreclosure mediation program is not achieving the results expected, as only 5.7% of cases referred to mediation statewide have resulted in agreements, with some counties showing settlement rates as low as 1%. Some Florida counties are working to remedy a glitch in the program that gives bank attorneys better access to financial records than defense lawyers. [TBO.com](#) (January 28, 2011); [St. Petersburg Times](#) (January 28, 2011)
- Pre-foreclosure cases are being added to mediation programs in six of **Florida's** twenty court circuits. The change results in beginning the mediation process at an earlier point, when the mortgage may be delinquent as little as 65 days, without waiting for the foreclosure process to begin, when the situation is much more serious. This can result in more successful mediations and may be a "game changer." Fannie Mae and Freddie Mac are considering whether to force loan servicers in South Florida to participate. [Miami Herald.com](#) (January 8, 2011); [PR Newswire](#) (January 7, 2011); [Sun Sentinel.com](#) (January 10, 2011); [The Ledger.com](#) (January 12, 2011)
- After its first year, **Nevada's** Foreclosure Mediation Program has kept nearly half its participants in their homes, and only 13% of 6,000 mediations resulted in foreclosure. The Nevada Supreme Court has updated the rules for its Foreclosure Mediation Program, with the changes taking effect on March 1. Las Vegas Sun (February 17, 2011); [E-wisdom.com](#) (January 22, 2011); [ABC News](#) (January 12, 2011)
- The mortgage foreclosure mediation program in **Maryland** requires homeowners to opt in, so has resulted in only 317 completed mediations since it began, despite 33,000 active foreclosures. About one-third of the mediations resulted in agreements, with loan modifications and other resolutions. [Baltimore Business Journal](#) (January 18, 2011); [Center for American Progress](#) (January 19, 2011)
- With only a tiny number of homeowners benefiting from **New Jersey's** Residential Mortgage Foreclosure Mediation Program, a court-ordered change gives homeowners 30 days to enter the program rather than just 15. [Cape Gazette.com](#) (February 13, 2011)
- A **Wisconsin** mandatory mediation program for home foreclosures has been working well after beginning last year in Walworth County. Rock and Milwaukee Counties also have mediation programs. [Gazette Xtra.com](#) (January 16, 2011)

OTHER NEWS & INFORMATION

One to Watch on “Federal Mediation Privilege” A federal appellate court has accepted an immediate appeal on a discovery ruling by the trial court that there is a “federal mediation privilege” under which documents from mediation proceedings are privileged, but documents from arbitration proceedings are discoverable. *Kimberly-Clark Worldwide, Inc. v. First Quality Baby Products, No. 957* (Fed. Cir., January 10, 2011)

WIPO Dispute Resolution Survey Under Way

The World Intellectual Property Organization’s (WIPO) Arbitration and Mediation Center is conducting a detailed international survey on dispute resolution clauses in technology agreements and use of alternative dispute resolution in technology disputes. The results will be made available in a report that is intended to provide support in negotiating contract provisions and finding good solutions for future disputes. *WIPO.int* (February 17, 2011); Survey

“Annapolis Idol” Raises Funds for Mediation The non-profit Anne Arundel Conflict Resolution Center raises funds by sponsoring an Annapolis Idol event to

choose a winner from among finalists who audition to show they have a winning personality and singing ability. This is the fourth year for the Center’s fund-raiser and finalists are expected to sing before a live audience of about 300 guests and a panel of judges. *Anne Arundel Conflict Resolution Center* (January 7, 2011)

MORE NEWS

Atlanta and the terminated design team for a new international airport terminal have mediated a resolution to the firing and resulting \$60 million in claims against the city. *Atlanta Business Chronicle* (February 28, 2011)

Forsyth County Commission reached an agreement with a landfill operator in which the county will be paid \$2.9 million in back fees. *Waste Management World* (January 2, 2011)

A \$1.9 million mediated settlement has resolved claims by Wichita Public Schools against four businesses for shoddy construction. *Wichita Business Journal* (March 1, 2011)

Bitter litigation by wine growers against pesticide drift resolved in mediation during appeal of mistrial deci-

sion. *The Register-Guard* (January 2, 2011)

After dismissing antitrust claims, judge orders mediation by defendant University of Minnesota and 24 orchards and apple growers over remaining procedural due process claim. *Star Tribune.com* (February 4, 2011)

A councilor has proposed a “public mediation board” of local officials and politicians to try to mediate a private contract dispute between Exeter Hospital and Anthem Blue Cross and Blue Shield. *Sea Coast Online.com* (February 5, 2011)

Deloitte & Touche involved in mediation over its audits of Washington Mutual that allegedly hid mortgage lending problems. *Insurance Journal* (January 24, 2011)

Attorney asserts reputed mob boss’s \$250,000 workers’ compensation settlement is reasonable because it occurred in mediation. *Chicago Sun-Times* (January 25, 2011)

Mediation ordered in dispute over management of \$5.6 million trust. *KIVITV.com* (January 7, 2011)

Cognitive Barriers Can Cause Needless Failures in Mediation

The way that parties and counsel think about and value their disputes are often influenced by a variety of cognitive barriers that cause poor decision making when trying to resolve the dispute. Fifteen of these barriers are briefly set forth, ranging from those that are more commonly known, such as Cognitive Dissonance, to those that may be less well known, such as Change Blindness.

[Metropolitan Corporate Counsel \(December 6, 2010\)](#)