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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.

**Pilot Appellate Mediation Project Begins**

The Kansas Court of Appeals has begun a pilot project to evaluate the potential use of mediation in selected civil cases. The project is committed to keeping the costs low and minimizing disruption to the judges and the parties. This program is intended to provide the parties and their attorneys with a forum and process by which they can:

- consider the possibility of settling the entire case or specific issues in the case;
- discuss limiting and simplifying the issues on appeal;
- take actions that may reduce costs; and
- aid the speedy and just resolution of any case.

A high priority for the pilot project is to collect as much evaluative information as

possible. The pilot will mediate twenty cases and use written evaluations of those cases to assess whether to implement a permanent program. Sixty lawyer mediators have volunteered to participate.

The timing of the mediation is a key program consideration. Early scheduling is intended to give the parties the opportunity to settle a case before they incur major appellate expenses such as having the clerk's record delivered, the reporter's transcript prepared and filing briefs. To obtain additional information, contact Art Thompson, Office of Judicial Administration, 301 S.W. 10th Avenue, Topeka, Kansas 66612. Art can be reached by telephone at (785)291-3748 or via e-mail: [thomspon@kscourts.org](mailto:thomspon@kscourts.org).



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## **MEDIATION QUOTE:**

"After the death of a family member, the loss of a job or business, or any life-changing injury or event, it is impossible for a neutral third party to offer a better past. Our best and only option is to refocus the dialogue on the possibility for the disputants to enjoy a better future based upon the outcome of the negotiated settlement.... Sometimes diplomacy calls for added caution, delicate use of broad language, and an agreement that not all historical issues can be resolved.... Oftentimes, mediators are called upon to refocus the parties before them from the past-looking anger that produced the dispute to a better future based upon the resolution of that dispute."

- Jan Frankel Schau, *View from the Middle of the Road: A Mediator's Perspective on Life, Conflict and Human Interaction* (AuthorHouse, 2013) at 69

## **CASES & RESOLUTIONS**

**Court Rejects Confidentiality Rules of Appellate Court Where**

## Mediation Occurred, Permitting Claim of Malpractice During Mediation

The Colorado federal district court permitted statements during mediation to be included in a malpractice complaint by a client against his attorneys describing advice given privately during a mediation held under the auspices of the U.S. Court of Appeals for the Federal Circuit. The district court rejected arguments that the mediation confidentiality rules of the appellate court should control, and pursuant to the local rules of the district court merely required the dollar amounts of the mediation settlement offers and specific statements made during the mediation process to be removed from the complaint.

[Wyers v. Greenberg](#), No. 12-cv-00750-WYD-CBS (U.S.D.C. D. Colo., December 12, 2012)

## Massive Mediation Is Third Attempt to Resolve Multi- National Nortel Bankruptcies

About 100 lawyers and financial advisors of creditors of Nortel Networks Corp. participated in a lengthy mediation in Toronto to try for the third time to divide \$9 billion among the creditors of Nortel's Canadian, U.S. and European entities and units, which involve numerous pension funds and disabled workers, along with bondholders, trade creditors and governments. Canadian creditors alone have filed more than \$36 billion in claims. Nortel filed for bankruptcy in 2009 in Toronto, Delaware, the U.K. and France, and if mediation is not successful, conflicting rulings by different judges in the four jurisdictions could well occur. Nortel incurred legal fees of \$1.25 million in a month from a U.S. law firm, and one report asserts that total fees incurred by Nortel exceed \$750 million since negotiations first began. The mediator twice extended what began as a weeklong mediation, but abruptly ended the mediation on the eleventh day, concluding that no further efforts were worthwhile.

[News 1130](#) (January 25, 2013); [Bloomberg News](#) (January 22, 2013); [Bloomberg News](#) (January 14, 2013)

## Reliance on Attorney Work Product Avoids Mediation Privilege Issue

The court did not reach whether a mediation privilege exists because it determined that affidavits and related documents prepared prior to mediation were not discoverable under the attorney work product doctrine. However, the court also stated that just because documents prepared for mediation are not admissible in court does not mean that the documents are not discoverable, since they might lead to admissible evidence. [Burtch v. Luminescent Sys., Inc., Astronics Advanced Electronic Sys. Corp.](#), Adv. Nos. 10-55460, 10-55384 (U.S. Bankr. D. Del., December 11, 2012)

## "Evaluator" Treated as Mediator for Purposes of Confidentiality in Ontario

An Ontario court considered whether an "evaluator" hired by the parties to assist in resolving a construction dispute should be treated as a mediator. One party argued that the process was not a true mediation, but the court looked at the essence to conclude that the process should be privileged and confidential as long as it involved a dispute in which litigation is contemplated and communications seeking to reach settlement were not intended to be disclosed to the court. [Ledcor Constr. Ltd. v. Attorney General of Canada](#), 2012 ONSC 7501 (Ont. Super., December 19, 2012)

## Attorney's Fee Provision for Failure to Mediate Not Triggered Without Mediation Request

The dispute resolution clause in a Maine real estate contract required use of mediation and provided for attorney's fees if either party litigated and lost after refusing to go to mediation. However, when a dispute resulted in litigation and neither party sought mediation, the court

concluded that the prevailing party was not entitled to attorney's fees because there had been no refusal to mediate. [Thompson v. Miles](#), No. 1:10-CV-00234 (U.S.D.C. D. Maine, January 8, 2013)

## Other Notable & High Profile Proceedings

- The Ohio Supreme Court concluded that parties are permitted to refer to the outcome of mediation, including what was not settled, in affidavits and other court filings, as long as they do not disclose details about the mediation itself. [State ex rel. Lanham v. DeWine](#), 2013 Ohio 199 (Ohio, January 29, 2013)
- The federal judge overseeing litigation by 872 plaintiffs against TVA for the December 2008 Kingston coal ash spill ordered the parties to agree on mediators. TVA initially resisted mediation, preferring to take a few cases to trial and complete appeals before mediating other cases, but the judge required mediation to begin promptly and be completed in 120 days. [Knox News](#) (January 2, 2013)

## NEWS & INITIATIVES

### CPR Launches New Corporate ADR Pledge

The International Institute for Conflict Prevention & Resolution (CPR) is encouraging companies to take its 21st Century Corporate ADR Pledge, which it recently launched. The new Pledge focuses on "establishing and practicing global, sustainable dispute management and resolution processes" and supplements, rather than replaces, the original CPR Pledge. The original pledge to consider using ADR in individual disputes has been signed by more than 4,000 large companies and 1,500 law firms. As with the original, the 21st Century Pledge does not preclude litigation, but promotes and encourages alternative forms of resolution.

[CPR Press Release](#) (January 22, 2013); [21<sup>st</sup> Century Pledge](#); [National LawJournal](#) (January 21, 2013)

### CPR Report Provides Best Practices for Mediation of Patent Cases

Noting the particular expense of patent litigation, CPR has released the report of a task force that has worked since 2010 on best practices in patent mediation. The task force examined best practices from various perspectives and produced a report that reflects the experience of in-house counsel, business people, outside counsel, mediators and judges. The report contains numerous recommendations for initiating and conducting patent mediations.

[CPR Press Release](#) (February 4, 2013); [Patent Report](#)

### Mediation Program Established for Storm Sandy Claims

The New York Department of Financial Services has issued emergency regulations requiring insurers to offer and pay for mediations of open or denied homeowner insurance claims from Storm Sandy. While 94% of residential property claims have already been resolved, with 287,000 claims there are many thousands that have not been resolved satisfactorily. This program follows the model of those set up after Hurricanes Andrew, Katrina and Rita, in which Florida, Mississippi and Louisiana established mediation programs which achieved settlement rates of 74% to 92%. Mediation is voluntary for homeowners and can be conducted by telephone or video conference, as well as face-to-face.

[Governor of New York](#) (February 25, 2013)

## FMCS Providing Mediation Support to State Department

The Federal Mediation and Conciliation Service (FMCS) is making its mediators available to the U.S. Department of State to support efforts of the U.S. National Contact Point (NCP) to resolve issues connected with the Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises. While the OECD Guidelines are voluntary recommendations to encourage responsible business conduct, the adhering governments' NCPs help implement and promote the Guidelines. [U.S State Department](#) (January 10, 2013)

## FINRA Offering Low Cost Mediation for Smaller Claims

The Financial Industry Regulatory Authority (FINRA) has begun a pilot mediation program offering pro bono or low cost mediation in small claims arbitration cases. There is no charge for mediation of claims up to \$25,000, and FINRA is charging only \$50 per hour in claims from \$25,000 to 50,000, with no administrative fee. Mediation in these cases occurs only with the consent of all parties and is conducted by telephone.

[FINRA](#) (January 16, 2013); [Advisor One](#) (January 17, 2013)

## Other Notable News Items

- The Consumer Protection Division Mediation Center of the Nebraska attorney general's office handled 3,500 complaints and saved consumers \$1.1 million in 2012. The top complaints were in banking and mortgage issues and scams from phishing and fake letters. [Nebraska.TV](#) (February 11, 2013)
- Minnesota legislators - both Republicans and Democrats - participated in a seminar to learn the art of mediation from the Conflict Resolution Center in Minneapolis, and came out of the training hoping to use their additional tools to avoid legislative gridlock. Several of the lawmakers are working with the Conflict Resolution Center on legislation to create an Office of Collaboration and Dispute Resolution. [CBS Minnesota](#) (January 6, 2013)
- Minnesota legislation to extend the Farmer-Lender Mediation Act until 2017 was overwhelmingly passed by the House and sent to the Senate. The Act requires creditors with secured debts against agricultural property in Minnesota to offer mediation prior to judgment collection, repossession or foreclosure. While the law was enacted during the farm crisis 27 years ago, it remains relevant; nearly 3,000 mediation notices were received in 2012. [Daily Planet](#) (February 15, 2013)

## International Mediation Developments

- Mediation focused on private copying and reprography levies, in the ongoing review of the **European Union** copyright framework, concluded with the mediator's recommendations being given to the Internal Market Commissioner. [Europa](#) (January 31, 2013)
- **Scotland** has called for international mediation to find a suitable solution after three years of unsuccessful negotiations over mackerel quotas among the European Union, Iceland, Norway and Faroe Islands. [UPI](#) (January 30, 2013); [Kluwer Mediation Blog](#) (February 9, 2013)
- Mediation is being provided by legal protection insurers in Germany, a service which has become more important following a new German mediation law that went into effect in July 2012. A consumer protection magazine evaluated mediation from six legal protection insurers based on consumer friendliness. [4-Traders News](#) (January 9, 2013)

- Mediators in the **Czech Republic** must pass an examination that covers basic psychology and sociology, along with a broad range of law and civil procedure, pursuant to regulations that took effect with a new Mediation Act in September 2012. Mediators from other EU Member States may register and occasionally mediate in the Czech Republic, and are governed by Czech law. [Terralex](#) (January 2, 2013)
- Legislation in **Romania** permits criminal cases from robbery to rape to be settled in mediation in order to reduce judicial backlogs and promote social peace. The law, which took effect on February 1, 2013, is controversial due to ambiguity over whether mediation is optional for the victim. [Press Europ](#) (February 1, 2013)
- The ambassador to France from **Belarus** met with students of the Belarusian State University who participated with 65 other universities in the ICC International Commercial Mediation Competition in Paris. [Belarusian Telegraph Agency](#) (February 13, 2013)
- A seminar on the benefits of incorporating mediation processes into major construction projects in **Qatar** is being conducted in Doha by mediation providers. [Seminar on Mediation](#) (January 1, 2013)
- The National Debt Mediation Association in South Africa reports that requests for debt mediation have greatly increased, from about 500 in the third quarter to over 1300 in the fourth, with 80% of the complaints coming from the banking sector. [BusinessReport](#) (February 20, 2013)
- The newly-opened Lahore (Pakistan) Chamber of Commerce and Industry and International Finance Corporation Mediation Centre is encouraging members to bring commercial disputes for resolution. [International News](#) (February 9, 2013)
- The Ministry of Industry and Information Technology (MIIT) in **China** hopes that technology companies will use third-party mediation as an alternative to intellectual property litigation. MIIT announced at a conference of the Mediation Center of Internet Legal Professionals and the Internet Society of China that it would establish a center to deal with IP and online copyright disputes. [Tech Crunch](#) (January 22, 2013)
- The Mediation Act (2012) that took effect in **Malaysia** on August 1, 2012 to promote and encourage mediation is helpful to guarantee confidentiality and enhance enforcement of settlement agreements. However, mediation proponents would like to have seen mandatory mediation in appropriate situations and minimum competency requirements for mediators. [The Sun Daily](#) (January 7, 2013)
- **Australia** is considering a new Commercial Arbitration Bill which includes a controversial provision that permits an arbitrator to act as a mediator and then return to the prior role of arbitrator. While acting as a mediator, any information received must be treated as confidential, but if arbitration proceedings resume, then any material confidential information received during the mediation must be disclosed, an obligation that cannot be waived by the parties. [Mondaq](#) (February 2, 2013)

## UPDATE ON HOME FORECLOSURE MEDIATION

### Update on Home Foreclosure Mediation

- Following the path of St. Louis County, the Board of Aldermen of St. Louis City, Missouri,



passed an ordinance that requires lenders to notify homeowners of their right to request mediation if facing foreclosure. Notice must be given to homeowners at the same time as the foreclosure notice. However, the legality of the St. Louis County ordinance has been appealed and the Missouri Court of Appeals has suspended enforcement and set oral arguments for April. [KMOV St. Louis](#) (February 8, 2013); [St. Louis Beacon](#) (January 18, 2013)

- Oregon is seeking to amend the mortgage foreclosure legislation it enacted last summer. While consumer advocates accept some proposed changes in document and notification requirements, strong disagreement exists over whether the mediation program should be extended to judicial foreclosures. Over 400 homeowners have sought mediation under the new law, but only eight mediations have occurred because most lenders have shifted to judicial foreclosures or declined to mediate with homeowners who feel "at-risk," which is not defined in the new law. However, the outcome in those few cases has been encouraging. In the absence of mediations, the Florida-based mediation administrator could not continue to function and the Oregon Department of Justice had to quickly assemble a team to run the program until August when a new administrator will be chosen. [Oregon Live](#) (February 20, 2013);
- The Foreclosure Mediation and Outreach Project at the Seattle University School of Law received a \$100,000 grant to increase awareness about foreclosure mediation among vulnerable homeowners and to train law students in how to represent homeowners in mediation, among other things. The Gonzaga University School of Law and other legal services agencies also received funds for foreclosure mediation, which came through the Washington attorney general's office from the national mortgage settlements. [Seattle University School of Law](#) (January 2, 2013)
- The attorney general of Wisconsin and the Metro Milwaukee Foreclosure Mediation Program announced a new initiative to provide homeowners with a mandatory mediation notice when a foreclosure complaint is filed, following a judicial statewide directive requiring notice of mediation. [Housingwire](#) (February 26, 2013)

## CASES WORTH NOTING

### U.N. Peacemaker Website Re- Launched

The United Nations has updated its content-rich website to support peacemaking professionals in addressing conflict around the world. The revised site contains a mediation library, information on U.N. mediation support activities and services, and comprehensive databases of peace agreements and other resources. Video interviews with mediation experts are being added to the site to discuss how to manage mediation processes and other strategies and tactics. The site includes *U.N. Guidance for Effective Mediation*, much of which may be helpful in any large multi-party conflict. The *Guidance for Effective Mediation* is also available as a smartphone app. [United Nations Peacemaker](#) (January 28, 2013)

### Mediation as Process Shaper

The value of mediation sometimes goes beyond whether a case is settled or not. Significant value can often result from tailoring a process the parties perceive as fair to obtain a decision, even if they are not able to agree on what the final outcome should be. Custom-designed process may be highly sophisticated to increase the chances of a mediated resolution or to narrow the range within which a third-party decision may be made. This is illustrated by the terms in a case that began with an immediate seven-figure payment and ended with baseball-style arbitration and in-between included additional mediation at various points - following submissions of forensic expert studies, expert reports, and best offers. [Kluwer Mediation Blog](#) (February 16, 2013)

### "Speed Dating" Comes to Commercial Mediation

A group focusing on users of commercial mediation in the U.K. held an evening of "speed dating" between top-tier mediators and commercial litigators from 16 firms, to help expand the pool of mediators that the litigators would use. The speed dating process involved one-on-one sessions between litigators and mediators that were 8-minutes long and then a shift to the next pairing. Discussions indicate that most law firms rely regularly on only three to six mediators for commercial disputes, but would like to have a larger number available. The group is considering creation of a secure electronic database for its members that would include information on mediators and feedback on mediator performance. [Kluwer Mediation Blog](#) (February 8, 2013)

#### **Other Cases & Resolutions:**

Mediation involving multiple parties and unsecured creditors achieved a bankruptcy reorganization plan. [In re Gulf States Long Term Acute Care of Covington](#), No. 09-11116 (U.S. Bankr. E.D. La., February 26, 2013)

Counsel for an ex-billionaire has asked a federal judge to order mediation in an effort to resolve a dozen lawsuits seeking \$500 million, many of which have been in litigation for years. [Independent Record](#) (February 15, 2013)

The City of Burlington and CitiBank mediated for two days over the Burlington Telecom dispute and plan to reconvene; the parties are waiting on a report from Early Neutral Evaluation. [Vermont Digger](#) (January 25, 2013)

Mediation is being considered to resolve a dispute between the BBC and Welsh language musicians. [BBC News](#) (January 11, 2013)

One of the owners of Dublin's Savoy and Screen cinemas is preparing to open a competing multiplex which resulted in litigation for which the judge urged mediation; the parties agreed to move immediately into mediation and may return to litigation as soon as the next day. [Independent Ireland](#) (January 22, 2013)

Two mediation sessions between Progress Energy Florida and its insurer have not yet resulted in agreement over how much insurance will cover of the \$1.5 to 3.4 billion it may cost to repair the crippled Crystal River nuclear unit. [Biz Journal](#) (January 8, 2013)

Mediation has been ordered by the judge in a construction dispute involving a county board of commissioners; the county attorney asked at least one commissioner to attend the mediation. [Reporter.net](#) (January 25, 2013)

Two mediators are meeting with all parties involved in construction of a reservoir in Ohio to try to resolve all reservoir-related lawsuits as ordered by the county judge. [The News-Messenger](#) (January 8, 2013)

The defendant in litigation over construction defects in a 40-unit condominium is seeking indemnification from subcontractors and asked the court to send the entire dispute to mediation. [Business Courier](#) (January 2, 2013)

## **BOOK REVIEW**



## BOOK EXCERPT:

Jan Frankel Schau, *View from the Middle of the Road: A Mediator's Perspective on Life, Conflict and Human Interaction* (AuthorHouse 2013)

According to Jan Frankel Schau, IAM Distinguished Fellow and author of the *View from the Middle of the Road*, "Where parties have a seat at the negotiating table and can be fully heard with compassion, an open mind and open heart, the implications for peacemaking extend far, far beyond the litigated case."

Jan's new book provides a rare and honest glimpse into the unique stories of conflict that mediators see. "In a single, prescient day, [the parties and their counsel] expect to end their pending litigation. Sometimes the resolution requires money. Other times it requires an apology, an explanation or an agreement to put the conflict behind the disputants and move forward in peace. Sometimes, it just requires an impartial set of ears, an open heart and a willing third party to lead the way with dignity, decency and humanity. Such is the life of a mediator."

The flavor of the book may be experienced through excerpts from Chapter 4, "Family Secrets and the Rights to Papa's House": When Papa died, he left behind two families with unfinished business and unhealed wounds. While Papa's estate documents left his home and several other properties in trust to his second wife, Maria, and her daughter, Hilaria, the children of his first wife, with whom Papa had spent his final days, alleged that this was not representative of his final will, since Maria had filed for divorce from Papa just two months before his untimely death. These five adult children, ranging in age from thirty-eight to sixty, sought to legally set aside the trust and negotiate with Maria for their fair share of Papa's estate.

\* \* \* \* \*

### **Nature of the Conflict**

After his father passed away, Roberto, who had always had the best relationship with his stepmother, Maria, wrote a letter to her asking to see the trust. Maria refused. Roberto retained a lawyer, who also demanded to see the trust. Maria initially refused again.

\* \* \* \* \*

### **The Facts and Legal Claims**

The law sometimes acts in ways that can feel unjust. In this case, unless the decedent had actively changed his trust during his marriage, or unless the dissolution had been finalized, the trust would control the outcome, and Papa's specific disinheritance of all of his children could not be legally challenged. In fact, if any potential beneficiary challenged the trust, that would trigger her disinheritance by the terms of the document too. The plaintiffs' lawyer and his clients all knew they were treading on thin ice should the matter proceed to court.

\* \* \* \* \*

### **Mediator's Tool: Effective Interviewing**

*One of the basic building blocks of mediation is empathic listening....*

\* \* \* \* \*

### **The Mediation Hearing**

A couple of hours into the dialogue, which Maria requested to be held in two separate rooms, the

adult children revealed something to their attorney that colored the rest of the negotiation. The eldest son Roberto knew that Papa had sexually molested his sisters....

\* \* \* \* \*

### **Mediator's Tool: The Private Meeting Between Clients**

*In its purest form, mediation is designed to be a facilitated communication between the parties in dispute, with a view toward a heightened understanding of one another's perspectives, which in most instances leads to valuable insight into ways in which the conflict may be resolved.*

\* \* \* \* \*

This was a raw moment that portended an early impasse in negotiations. The mediator took the lawyers aside and inquired whether they and their clients wanted to continue the dialogue toward truth-telling and potential restoration of relationships, or whether they wished to shift the discussion to the legal issue at hand: whether Maria would willingly give up any of the property left to her under the trust....

### **Mediator's Tool: Refocusing on the Task at Hand**

\* \* \* \* \*

### **The Outcome**

\* \* \* \* \*

Ultimately, the adult children, understanding that the law was not on their side, made an offer to accept the lots in exchange for a dismissal of their claim to the house that Papa built. Despite Maria's apparently deep disavowal of any rights by the adult children, it was equally clear that she never wanted to be confronted by Papa's children again....

### **Mediator's Reflection**

\* \* \* \* \*

The lawyers were both doing a service for their clients in attempting to resolve this dispute without the aid of the court, which would have led to a harsher and less favorable result for the plaintiffs while potentially exposing all kinds of details that Maria would not have wanted to air publicly. None of the disputants could readily afford the legal fees to fight this matter to an ultimate conclusion.

While many mediators are tempted to play the roles of priest, psychologist, judge, and jury, we are really hired to facilitate dialogue with a view toward settling legal claims. Though that may seem a narrow mission to some, it is nonetheless clear that when the parties hire a mediator to assist in resolving a legal claim, they expect and deserve the lion's share of the mediator's attention to be focused upon that goal.

In this case, after the ugly truth (or lies) came out, all parties agreed to set aside the questions of whether the sexual molestations happened or not, whether the trust was signed under duress or not, whether the divorce was filed because of some molestation or misconduct by Papa or not, to concentrate on some sensible and feasible way to divide the property left in the estate.

It took a lot of courage and trust for all concerned to come together in that meeting and let Roberto reveal what Maria had attempted to hide (or had in fact not seen) over the course of several years. And it took some professional integrity and civility for the lawyers to circle back to the purpose for which they had each been engaged in order to get to a simple division of property without distracting themselves, their clients, or the mediator with the personal drama of this challenged family.

### **Mediator's Tool: Remain Future-Focused**

\* \* \* \* \*

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