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Dispute Resolution Update

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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.

Kansas Court of Appeals Upholds Mediation Confidentiality

A panel of the Kansas Court of Appeals in the matter of Baraban v. Hammonds, et al, has held that, subject only to exceptions set out by statute or court rule, a mediator may not testify about communications made during the mediation when one of the parties to the mediation objects. The Court of Appeals found that no written or signed settlement agreement was adopted at the mediation. Later, at a hearing on a motion to enforce the settlement agreement, the mediator, a retired district judge, had been permitted by the trial court to testify that the parties had reached an agreement at the mediation, with the terms subsequently set out in his e-mail to the parties.

[Manual and Lois Baraban v. Glenn and Vanilda Hammonds, et al, Case No. 105,993 \(KS Ct. App., Oct. 18, 2013\)](#)

Art Thompson

Kansas Supreme Court Dispute Resolution Coordinator Announces Retirement



After a career in public service with the Kansas Bar Association and the Supreme Court's Office of Judicial Administration, Art Thompson will retire on December 6, 2013. In his role as Dispute Resolution Coordinator, he has been instrumental in promoting mediator professionalism and assisting in the development of dispute resolution programs throughout the state. The Dispute Resolution Coordinator works with courts, state government, and non-profit organizations to establish mediation and other dispute resolution policies and procedures. The Dispute Resolution Coordinator provides

technical assistance to any program, individual or other entity requesting the study and development of dispute resolution programs. He approves core, civil, dependency and domestic mediators. He is also a mediation trainer. Finally, he has served an important policy function as staff to the Supreme Court's Dispute Resolution Advisory Council and Access to Justice Committee.

Art's retirement is a great loss to everyone involved in the enhancement and development of dispute resolution programs. Nonetheless, Art has indicated that he will continue to serve in a voluntary capacity to assist dispute resolution programs that are currently in the early stages of development. He will also, on a voluntary basis, continue to serve as a resource to our mediation community. His role in this regard is greatly appreciated by all. Art is an outstanding public servant.

We wish our readers a wonderful holiday season!


Larry Rute




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Mediation Quote

"If parties do not settle it is often because one or more of them wants more than simply an agreement. A litigant may be seeking . . . the chance to confront an opponent in the presence of a neutral person, present arguments, and express his feelings about what happened. . . .

"[S]trong emotions, left unaddressed, can badly distort one or both parties' bargaining decisions. Not dealing with feelings is itself a barrier to settlement. . . .

"[In mediation,] parties can vent feelings to the mediator and to each other. The experience of telling one's story and feeling heard out can have a surprising impact, helping people bring closure to a traumatic event and accept a settlement."

- Dwight Golann, *Sharing a Mediator's Powers: Effective Advocacy in Settlement* (ABA 2013) at 12-13

Recent Mediation Cases & Resolutions

Oregon's Medical Malpractice Mediation Program Raises Concerns

Oregon has enacted reforms permitting medical malpractice claims to be settled in mediation prior to litigation without reporting the settlements to national databases. Consumer advocacy group Public Citizen is raising concerns that the new law will hurt public safety by helping bad doctors cover up their mistakes. Public Citizen is particularly concerned about other states following Oregon and is seeking federal action to require mediation settlements to be included in the National Practitioner Data Bank. Supporters of the legislation, which include the Oregon Medical Association and the Oregon Trial Lawyers Association, assert that medical care is enhanced by requiring malpractice claims to be confidentially shared with the Oregon Public Safety Commission. However, Oregon's governor and other states interested in the mediation program will work with the federal government on whether and how to report payments reached in mediation. [OregonLive](#) (September 10, 2013); [SB 483](#)

Connecticut Authorizes Insurance Mediation Program for Catastrophes

Legislation took effect on October 1 giving Connecticut's insurance department authority to establish a program for consumers to mediate with their insurance carriers over real and personal property claims (other than motor vehicle and condo association policies) following any catastrophe in which the governor declares a state of emergency. Mediation is mandatory for insurers if the amount in controversy is at least \$5,000, and optional below that level. The insurance commissioner may adopt regulations and must designate an entity to implement the mediation program. [Claims Journal](#) (October 8, 2013)

Ohio May Expand Mediation Program to Resolve Property Value Disputes

The Franklin County, Ohio, mediation program, begun in June 2013 to streamline the complaint process over changes in property values, is having very positive results. Sixteen hundred people have gone to mediation since June 4, and only 25 have not reached agreement and gone on to the Board of Revision for a formal hearing. These numbers are better than expected, so the program may be expanded state-wide and other states may want to adopt the program as well. The mediation program may also be expanded beyond disputes involving residential properties to include commercial properties as well. [Columbus Dispatch](#) (October 22, 2013)

Massachusetts Finalizes Mediation Program for Tax Disputes

Following a year-long mediation pilot program for resolving tax disputes, the Massachusetts Department of Revenue has made mediation permanent and reduced the required minimum amount in dispute from \$1 million to \$250,000. Three of four test cases during the pilot settled their tax assessment disputes, which ranged from \$2.6 million to \$9.7 million, during the first mediation session. The longest test case took five months, compared with a year or more through the regular appeals process. [MassLive](#) (October 20, 2013)

International Mediation Developments

- After a successful two-year pilot, HM Revenue & Customs is now using a form of mediation in which HMRC facilitators work to resolve tax disputes with individuals and small and medium enterprises throughout the U.K.; the HMRC facilitators are specially trained and must not have been involved previously in the dispute. [Out-Law.com](#) (September 6, 2013)
- A U.K. Court of Appeal affirmed the denial of costs to a party which simply failed to respond to requests for mediation, even if refusing mediation might have been justified. [Lexology](#) (October 24, 2013); [PGF II SA v. OMFS Co. 1 Ltd.](#), [2013] EWCA Civ 1288 (October 23, 2013)
- The Guernsey Bar has launched a website explaining and encouraging mediation for the islanders. [Guernsey Isle News](#) (September 5, 2013); [Website](#)
- Legislative proposals have been introduced in the Netherlands to require mediators to be qualified and registered and to incorporate mediation into Dutch civil and administrative law. [Mondaq](#) (October 14, 2013)

- A thousand traditional rulers in the state of Jigawa in central northern Nigeria have been trained in alternative dispute resolution. [Premium Times](#) (October 21, 2013)
- Long-awaited mediation legislation took effect in Turkey in June, along with implementing regulations; among many other things, mediators are required to be Turkish citizens and can be imprisoned for violating confidentiality requirements. [Mondaq](#) (October 8, 2013)
- The Ministry of Labor in Saudi Arabia is relying on mediation as the first step of a new mechanism for resolving workplace disputes. [Saudi Gazette](#) (September 15, 2013)
- A mediation conference in Dubai, United Arab Emirates, is being hosted by the International Chamber of Commerce and the International Bar Association; the ICC will unveil new mediation rules in December, which will be published in Arabic among other languages. [4-traders](#) (September 26, 2013)
- Twenty-four judges in India attended a six-day workshop to learn how to encourage mediation to resolve long-pending cases. [Hindustan Times](#) (October 6, 2013)
- While Bangladesh enacted legislation requiring mandatory mediation in 2012, implementation of the law awaits a trained pool of mediators; 22 received mediation training in September. [Financial Express](#) (October 3, 2013); [Financial Express Bangladesh](#) (September 6, 2013)
- The Law Minister of Singapore said it will build up mediation capabilities, focusing on international commercial disputes. [Channel News Asia](#) (October 30, 2013)
- Hong Kong has been ramping up mediation programs and has trained thousands of mediators, but the expected demand for mediation has been slow to develop. [South China Morning Post](#) (October 8, 2013)

Dispute Resolution News & Initiatives

Eighth Circuit Rejects NFL Retirees' Objections to Mediated Settlement Due to Exclusion from Mediation

Litigation by retired players against the National Football League was consolidated with the active players' case and sent to mediation, but the retirees were not involved in the mediation to the extent they would have liked, despite the efforts of the mediator to have them included. When the active players reached a settlement with the NFL, the retired players were dissatisfied with only receiving \$900 million in additional benefits (over ten years), asserting they could have done better negotiating directly, and sued the National Football League Players Association and active players. A federal district court dismissing the retirees' litigation and the U.S. Court of Appeals for the Eighth Circuit affirmed. The appellate court explained that the active players could negotiate on behalf of retirees even without their consent, because it is established industrial practice for unions to bargain over pensioners' rights. Further, notwithstanding suggestions by two NFL owners that an NFL offer would have provided \$1.5 billion for retirees, the court noted that retirees do not have the negotiating leverage of active players with the NFL and could not be part of a collective bargaining agreement, so they likely would not have done better.

[Eller v. National Football League Players Assoc., No. 12-2487 \(U.S.C.A. 8th Cir., September 23, 2013\)](#)

Settlement Agreements Rarely Against Public Policy

A party who signed a detailed settlement agreement after a lengthy mediation between competing factions of a homeowners association sought to have the court strike certain provisions relating to the board and bylaws, asserting they violated specific statutes and public policy generally. A California appellate court affirmed the trial court's conclusion that no specific violation of statutes covering common interest developments was shown. Moreover, the challenged settlement provisions did not violate public policy, as public policy favors settlement agreements and seeks to uphold settling parties' justified expectations.

[Lee v. Castelluccio, No. C068987 \(Cal. App. 3d Dist., October 2, 2013\)](#)

Court Order Requiring Further Mediation Not Appealable

The Nevada Supreme Court concluded that a trial court's determination that a mediation agreement had been violated and requirement that the parties return to mediation under Nevada's foreclosure mediation program was not a final order that could be appealed. The Court explained that the lower court's decision was not final because the mediation would again address the merits of the dispute. Further, the mediation might resolve all outstanding issues between the parties so that no appeal would be necessary, and if not, the parties could appeal after further mediation.

[Wells Fargo Bank, NA v. O'Brien, 129 Nev. Adv. Op. 71 \(Nev., October 3, 2013\)](#)

Mediated Settlement Term Sheet Upheld Against Claims of Uncertainty and Mistake

Mediation between two accountants resulted in a signed term sheet dividing the work and compensation from clients of a third accountant in their office who unexpectedly died. The term sheet expressly stated it was "binding and enforceable," but also required a "complete" settlement agreement to be prepared and signed two weeks later. The day before the deadline, counsel for one party stated that his client had made an error and wished to return to mediation. Litigation followed in which the mediation term sheet was upheld; the appellate court rejected assertions that the term sheet was uncertain or based on a mistake. The court concluded that the mere fact that a more formal agreement was to be prepared did not invalidate the term sheet, if it was otherwise enforceable. Nor did the absence of a list that was to be attached cause problems, as there was no dispute over the subject matter of the list. The appellate court also rejected unilateral mistake as grounds for overturning the term sheet where a party merely had second thoughts after signing the agreement.

[Newman v. Jerome Leventhal Accountancy Corp., No. B237166 \(Cal. App. 2d Dist., September 12, 2013\)](#)

Other Notable & High Profile Proceedings

- The court refused to consider extrinsic evidence and concluded that a typed, single-page settlement agreement reached in mediation was final and binding even though the release was to contain unspecified "other terms." The court rejected defendant's demand for a global release since the agreement only called for release of claims "arising from this action." [Jones Plastic & Engineering Co. v. Varro, No. 2011-CA-000241-MR \(Ky. Ct. App., September 13, 2013\)](#)
- The first joint mediation session in the Detroit bankruptcy case took place with about 90 lawyers; the head mediator was flanked by his team of mediators who have each received a specific assignment focusing on the claims of bondholders, pension funds, retirees and unions. [The Detroit News](#) (September 17, 2013); [Michigan Radio](#) (September 16, 2013)
- The city of San Bernardino promised to more quickly provide a bankruptcy plan "outline" to its creditors and the mediator to allow mediation to begin sooner, responding to the impatience of the bankruptcy judge. [San Bernardino Sun](#) (September 4, 2013)
- After many months of global mediation negotiations involving 140 parties and \$5.5 billion, the bankruptcy court approved a broad settlement reached in a Chapter 11 bankruptcy, rejecting the objections of a group of junior secured note-holders who declined to participate in the global mediation. [In re Residential Capital, LLC, No. 12-12020 \(U.S. Bankr. S.D.N.Y., September 13, 2013\)](#)
- While ninety days' notice is required before filing a medical malpractice case, the District of Columbia Court of Appeals held that merely losing the opportunity to mediate was not a sufficient basis to refuse to waive the notice requirement when the malpractice claim would have then been barred by the statute of limitations. [Lewis v. Washington Hospital Center](#), No. 12-CV-1178 (D.C.Ct.App., October 3, 2013).
- Mediation over concussion-related injuries continues between helmet maker Riddell and injured players, even after the players reached a mediated settlement with the National Football League for \$765 million. [The Pennsylvania Record](#) (September 10, 2013)
- Mediation is scheduled for November between the NCAA and plaintiffs over concussion litigation that seeks long-term medical monitoring and stricter concussion guidelines, in addition to monetary damages. Plaintiffs are seeking class action certification which could include thousands of former NCAA athletes across multiple sports. [CBSSports](#) (September 24, 2013)

- U.S. Airways and American - which are seeking to merge to create the world's largest airline - and the U.S. Department of Justice have entered into mediation with a mediator suggested by the court in an attempt to resolve litigation DOJ filed seeking to block the merger. [Skift](#) (October 29, 2013); [The Street](#) (Oct. 29, 2013)

Update on Home Foreclosure Mediation

- **Rhode Island** has enacted legislation establishing a mortgage foreclosure mediation program in which homeowners must be given the opportunity to mediate prior to foreclosure. If there is no resolution during mediation, the mediator must certify that the lender participated in good faith before foreclosure can proceed. The state-wide mediation law, which expires in five years, preempts local foreclosure mediation ordinances, which is expected to eliminate the confusion of differing requirements in cities and towns. [NuWire Investor](#) (September 12, 2013); [Foreclosure Mediation Law](#)
- A federal district court in **Rhode Island** dissolved its injunction preventing foreclosures and evictions in 825 foreclosure cases as required by the appellate court, but immediately imposed a stay preventing filings in the cases while determining an appropriate process for dealing with them. The court emphasized that its mediation program remains in full force and all parties are expected to participate fully. [Providence Journal](#) (September 4, 2013)
- New legislation in **Nevada** modifies the state's Foreclosure Mediation Program by automatically enrolling homeowners in the program when they receive an initial notice of default. While homeowners can still opt out of the mediation program, officials are hopeful that automatic enrollment will greatly increase its use. The mediation program has been used by only about 15 percent of those eligible, although that still amounts to 18,000 borrowers since it began in 2009. [Houston Chronicle](#) (September 28, 2013); [MyNews3](#) (September 26, 2013)
- The **Nevada** Supreme Court rejected efforts by a nonprofit to obtain personal identifying data in mediations from the Nevada Foreclosure Mediation Program due to confidentiality. [Las Vegas Review-Journal](#) (October 31, 2013)
- **Oregon's** newly expanded mortgage foreclosure mediation program is moving forward and now has 100 mediations scheduled in November and December. Lenders have referred over 1,700 pending foreclosures to the program as they ramp up under the new law. About 25-30 percent of borrowers are agreeing to participate and paying their share of the fee for the program. [OregonLive](#) (October 29, 2013); [OregonLive](#) (September 18, 2013)

Other Mediation News

Updating the Multi-Door Courthouse

The classic notion of a "multi- door" courthouse needs in order to be significantly reformed based on experience and current needs in order to develop efficient court screening processes for determining which cases will benefit from mediation and which will not, according to Barry Edwards in "Renovating the Multi-Door Courthouse: Designing Trial Court Dispute Resolution Systems to Improve Results and Control Costs" (Harvard Negotiation Law Review, Spring 2013). The lengthy article examines the elements that result in settlement and encourages system design to build on them. Using empirical data from real world observations rather than relying on pilot projects as common in the past, the article contains many points of interest, including:

- Settlement rates are no higher even if the mediator charges more per hour or is more frequently selected by the parties.
- Female mediators have a significantly higher settlement rate than male mediators, even after controlling for other variables.
- Subsequent mediation sessions have settlement rates similar to initial sessions, despite the pessimism of counsel that further mediation would be helpful.

- Mediations ending in settlement take significantly longer than those ending in impasse.
- Cases sent to mediation very often are negotiated and resolved prior to mediation; many more settlements occur outside mediation than in mediation.
- New dispute resolution products are not needed, just better arrangement of offerings and greater self-service, like the first Wal-Mart.
- Courts are ill-equipped to make decisions for parties and should empower litigants to make their own strategic choices.

A key conclusion of the article is that resolving routine cases through mediation will reduce the great personal hardships of those involved, as well as reducing court congestion and permitting courts to focus on the novel cases requiring judicial attention. [Court ADR Connection](#) (September 2013); [Full Article](#) (Subscription Required)

Other Cases & Resolutions:

- Securities fraud litigation brought by the Securities and Exchange Commission against the city of Miami was sent by the court to mediation, which is scheduled for May 2014. [The Bond Buyer](#) (October 7, 2013)
- King William County, Virginia, and the Town of West Point have not been able to resolve a tax dispute between them, so will work with three mediators through November, but if agreement is not reached by then the mediators will shift roles and make a final decision to present to the General Assembly. [Tidewater Review](#) (October 3, 2013)
- Mediation is addressing a legislative stalemate in Kansas over whether to create a new mid-level class of dental providers in an effort to remedy a growing shortage of dentists in the state. [KHI News Service](#) (October 3, 2013)
- Land use issues on the Eastern Shore of Maryland are going to mediation, with two sessions planned involving about twenty individuals representing local government, farmers, environmental advocates, bankers, appraisers and nonprofit organizations. [Delmarva Now](#) (October 13, 2013)
- The Minnesota Orchestra's locked-out musicians rejected a management offer, instead urging management to work within the mediation process with former Senate Majority Leader George Mitchell as mediator. The mediator's earlier proposal for the musicians to return to work while negotiations continued was supported by the musicians, but not the board. [Minnesota Public Radio](#) (Sept. 6, 2013)
- A homeowners group opposed to a \$450 million shopping center development in West San Fernando Valley has been referred to the court's mediation program while considering whether to appeal dismissal of their lawsuit. [Los Angeles Daily News](#) (October 10, 2013)
- A financial morass involving a retirement center, which is facing a dozen lawsuits including foreclosure, is headed to mediation in Kansas City. [Kansas City Star](#) (September 26, 2013)
- The owner of a tanker that struck a bridge between New Hampshire and Maine has agreed to mediation with the two states over the \$2.4 million bond he had to post to get the tanker released. [WLBZ2](#) (October 21, 2013)
- A settlement of \$1.7 million was reached in mediation for a mother injured in a severe car wreck. [Yahoo! Finance](#) (October 17, 2013)
- Mediation is scheduled in a wrongful death case involving a 13-year-old who was killed in an avalanche on a Vail ski run. [Summit Daily News](#) (October 24, 2013)
- Town officials in Sheffield, Massachusetts, have agreed to mediation over the proposed construction of a Dollar General store. [Berkshire Eagle](#) (September 26, 2013)

- McDonald's and a group of protesters were sent to mediation by a Victorian Supreme Court justice in an ongoing dispute over construction of a McDonald's restaurant in the Australian town of Tecoma. [Herald Sun](#) (September 20, 2013)
- After beginning mediation in Dublin with two mediators following a breakdown in direct negotiations, the mediators released an agreed statement for a European rugby framework; the mediation process is ongoing. [The Score](#) (October 24, 2013); [The Guardian](#) (September 18, 2013)

Book Review

Dwight Golann
Sharing a Mediator's Powers:
Effective Advocacy in Settlement
(ABA 2013)

Book review by Jan Frankel Schau (ADR Services, jfschau@schaumediation.com)

Mediators must not only balance two sides of a conflict, but also maintain their own balance to provide a fair process while settling contentious lawsuits with impartiality and finesse. When I sat down to read Dwight Golann's *Sharing a Mediator's Powers: Effective Advocacy in Settlement*, I was struggling to regain my own balance after just having mediated a challenging wrongful termination case in which one lawyer was a notorious bully. The case eventually settled on terms suggested in my mediator's proposal, but I wondered if perhaps the aggressive advocate had pushed me off balance and succeeded in getting a better result than a more genteel lawyer would have.

Professor Golann offers comfort by presenting concrete approaches for reality testing, evaluative feedback and simply assuming the role of "weather forecaster" instead of mediator as manipulator. In essence, he suggests the mediator offer an honest broker's approach by forecasting the climate in the courtroom and at times in the other caucus room as well.

One interesting example of why this is important is an experiment with Harvard students who were given identical fact patterns and assigned a side to represent in a hypothetical dispute. Those assigned to represent the plaintiff assessed their chances of success 20% higher than those representing the defense. What's more, both business and law students representing the plaintiff assessed the likely damages as 50% higher than those representing the defendant. It is no wonder so many cases require a neutral third party to do reality testing and mediate these disputes.

The book itself reads a little like a typical mediation (and also demonstrates a mediation in the included Advocacy DVD that is referenced throughout the book). There are many layers: Golann looks at the perspectives of the advocate, the client and the mediator, deftly shifting between them as each chapter unfolds. Like a mediation, the numerous issues - from emotional concerns to bargaining strategies - arise unexpectedly and not in a linear fashion. Indeed, sometimes the sidebar text boxes with real case examples overshadow or confuse, rather than illustrate, the pedagogic purpose intended.

Golann offers advocates solid and insightful advice about ways to "use" the mediator to achieve optimal outcomes. For example, he recommends that advocates contact the mediator in advance to make sure that the opposing side has all the right people at the negotiating table. He advises lawyers to openly discuss process and consider whether a joint session or private caucuses will work best. He even suggests that the advocate deliberately influence the agenda for the mediation by stressing the most important points and avoid addressing weaker points until required or requested to do so. Finally, he recommends that advocates use the mediator to convey data to the other side in order to avoid reactive devaluation.

Golann acknowledges that how the lines are delivered in mediation is as important as the content. For this reason, he advises advocates to carefully and deliberately control the flow of information. Interestingly, he recognizes how confidentiality statutes can be used to the advantage of the advocates and mediator in the deliberate slow leak of information, with purposeful holding back when useful. He

also offers advice to advocates to co-opt their mediator so that the mediator is conveying messages as though she has adopted them as her own. Instead of saying, for example, "They are telling me that \$100,000 is their final offer", the advocate should get the mediator to affirmatively state, "They are offering \$100,000 and I think that is as far as they will go." Language matters.

One of the most insightful parts of the book for me was recognizing that because mediations offer the possibility of settling in a single day a dispute which may have been going on for years, there is sometimes a genuine "loss reaction" in settlement. Where the parties to a lawsuit may have dreamed for years of being victorious (and perhaps economically transformed), they are asked not only to give up that chance, but to maintain strict confidentiality about it. Mediators and advocates who are sensitive to these dramatic emotions are well served, in the words of Professor Hal Abramson, to consider the end point like a fine wine and simply "let it breathe."

The concept of "sharing the power" is best illustrated by the image of a three-sided negotiation with the opposing sides and the neutral forming a dynamic triangle. Golann suggests that while "bargaining with a mediator is civil and principled, [the advocate] and the neutral have different goals: the mediator will ordinarily be content with any terms acceptable to both sides, while [the advocate] is seeking the best possible outcome for [the] client." One of the most effective ways to achieve this, he says, is by combining "hard terms" with a "soft delivery."

We have all observed the smooth negotiator who is always in control and somehow consistently achieves the best outcome for his clients in mediation. Like a good chess player, that advocate will make strategic moves - some small and some sweeping - to get to his goal. This book dissects the smooth negotiator's behavior to describe in detail every step of the process. In the hands of a skilled chess player, there are many options, potential setbacks and ultimately carefully calculated moves, using every chess piece to his advantage. Checkmate.

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