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## Dispute Resolution Update

April 2012

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### Mediation Quote

"In an all-too-common pattern in 'litigation as usual,' settlement comes only after the lawyers engage in adversarial posturing, the litigation process escalates the original conflict, the parties' relationship deteriorates, the process takes a long time and a lot of money, and none of the parties is particularly happy with the settlement.

Although some lawyers enjoy this process and make a good living from it,

### Dear Friends and Colleagues:

This edition of Dispute Resolution Update features 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 Mediators newsletter.

### UPCOMING AMERICAN BAR TRAINING EVENT

ADR, LLC, partner, Patrick Nichols, has been invited to serve on a distinguished panel of attorneys and health care professionals to share their expertise on today's fast-growing use of alternative dispute resolution techniques in the health care sector. This event will be held at 8:00 a.m. on Friday, April 20, 2012, in conjunction with the American Bar Association's Section of Dispute Resolution 14<sup>th</sup> Annual Spring Conference held this year in Washington, D.C. The panel, ***Emerging Opportunities to Resolve Disputes in Health Care***, will include topics such as facilitating resolution of end-of-life decision-making; dealing with advanced directives before and in the ICU; staffing issues; physician credentialing; and, family intervention issues regarding addictions and other anti-social behaviors, among other important topics. The panelists for this program include: Patrick Nichols (Lawrence, Kansas), John Phillips (Kansas City, Missouri), Larry Bridgesmith (Nashville, Tennessee); Kathy Perkins (Lawrence, Kansas); Charity Scott (Atlanta, Georgia) and Alan Waldman (San Diego, California). For more information about the presentation, you may contact [pnichols@adrmidwest.org](mailto:pnichols@adrmidwest.org).

### RECENT ANTI-BULLYING TRAINING EVENT

Anti-bullying efforts are increasingly receiving national and international attention. Most recently, New Jersey prosecutors successfully convicted Dharun Ravi on hate crime and invasion of privacy charges relating to the suicide by Tyler Clementi, who jumped off the George Washington Bridge on September 22, 2010. In recent days, President Obama has also introduced a bullying documentary on the Cartoon Network. <http://abcnews.go.com/blogs/politics/2012/03/obama-introduces-bullying-documentary-on-cartoon-network/>

On February 23 and 24, 2012, ADR, LLC, partner, Larry R. Rute, presented ***Does Bullying Stop at High School? What Every College Student Should Know About Addressing Disruptive***

many would prefer to use a more productive and efficient process...."

John Lande, *Lawyering with Planned Early Negotiation: How You Can Get Good Results for Clients and Make Money* (ABA Section of Dispute Resolution, 2011) at 2

## ***Dispute Resolution Update***

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**and Uncivil Behavior in a Positive and Proactive Manner** for students, faculty, administrators and staff at Pittsburg State University in Pittsburg, Kansas. Any readers seeking additional information regarding the information presented should contact Larry at [larry@adrmediate.com](mailto:larry@adrmediate.com).

## **REGIONAL ADR ACTIVITIES**

The Kansas Supreme Court's Advisory Committee on Dispute Resolution is currently in the process of developing a survey for Kansas District Court Judges, seeking additional information on the types of alternative dispute resolution that Kansas Judicial Districts are currently providing. In addition, the Council will assist judges in developing pilot projects that may include mandatory civil and domestic mediation programs, domestic arbitration, domestic *pro tems*, felony mediation, dependency mediation, parent/adolescent mediation, victim/offender reconciliation programs, and other dispute resolution programs. The Advisory Council is chaired by ADR, LLC, partner, Larry R. Rute. For additional information regarding the Advisory Council's dispute resolution initiatives, contact [larry@adrmediate.com](mailto:larry@adrmediate.com).

  
 Larry Rute



  
 Patrick Nichols

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## **RECENT MEDIATION CASES & RESOLUTIONS**

### **City Uses Mediation to Avoid Bankruptcy**

Stockton, California avoided bankruptcy by bringing in a mediator to resolve disputes with creditors and unions, as required by a California law enacted last year. Stockton is the first city affected by the law, and might be the beginning of a trend, as other cities in California are under financial stress. Twenty-four states permit municipalities to file Chapter 9 bankruptcies, with some restrictions. [Bloomberg](#) (February 29, 2012)

## U.S. Government Unsuccessful in Enforcing Partial Settlement Terms

Two assistant U.S. Attorneys participated in mediation of a civil forfeiture action on behalf of the United States, and sought court enforcement of terms agreed to in the initial mediation session, even though they had agreed with the mediator that the terms were "not a binding settlement" and even though they had not been able to obtain the required approval of their own superiors. Following the first mediation session, a federal magistrate acting as mediator held an "ADR conference" - which was on the record and transcribed - setting forth agreed terms, issues still to be resolved and scheduling a second mediation session. When the property owner decided to litigate and ended the settlement efforts, the U.S. Attorneys tried to enforce the partial agreement, asserting that the unresolved issues were minor. The district court refused to enforce the terms, readily concluding that there was no meeting of the minds on settlement, since there was no agreement to be bound. [U.S.v.434 Main Street,Tewksbury](#), No.09-11635-JGD (U.S.D.C.D. Mass., December 16, 2011)

- Reaching a settlement through mediation was a factor that contributed to a court's determination of "good faith" settlement as required by California statute. [Perezv. Ford Motor Co.](#), No.1:10-cv-02213-LJO-SKO (U.S.D.C.E.D. Cal., January 23, 2012).
- While mediation resulted in settlement of all issues except attorneys' fees, a federal court determined that discussing attorneys' fees at mediation helped satisfy a court rule that parties must confer prior to moving for fees. [Dunn&Fenley,LLCv.Diederich](#), No. 10-4038-KHV (U.S.D.C. D. Kan., February 2, 2012).
- In a bad faith insurance action following a jury verdict of \$65 million, a federal court found that Florida's Mediation and Privilege Act did not shield disclosure of mediation-related documents between parties who both had been in the previous mediation, up to the point that one party withdrew from the mediation. [Allied World Assurance Co., Inc. v. Lincoln General Ins. Co.](#), No. 1:11-mc-00342 (U.S.D.C. M.D. Pa., February 2, 2012).
- Netflix mediated and settled a federal class action case against it which alleged violations of the federal Video Privacy Protection Act due to Netflix maintaining customer viewing histories even after their subscriptions were cancelled. Netflix agreed to pay \$9 million in the settlement; other terms were not disclosed. [Multichannel News \(February 10, 2012\)](#)
- A bankruptcy court confirmed Washington Mutual's plan of reorganization as modified by a recent mediation, finally permitting distribution of over \$7 billion. [Market Watch](#) (February 17, 2012)

## DISPUTE RESOLUTION NEWS & INITIATIVES

### European Union Moving Toward Online Dispute Resolution for Consumers

The European Commission has set forth a detailed proposal for online dispute resolution (ODR) of consumer disputes to provide better remedies in support of cross-border e-commerce. The ODR proposal is paired with a proposed Directive on alternative dispute resolution (ADR) for consumer disputes. Many ADR entities permit consumers to submit complaints online, but very few currently allow the entire resolution process to be handled online. Establishing ODR systems will encourage consumers to shop online across borders and permit sellers to reach broader markets. The proposal is to establish an EU- wide ODR platform accessible in all EU official languages that provides a single website for those seeking to resolve cross-border e-commerce disputes. A network of ODR facilitators will be established to provide support for the ODR platform. When a complaint is submitted, the consent of the other party will be sought and the dispute transmitted to an existing national ADR entity that will attempt to resolve the dispute within 30 days, possibly using ODR. The ADR entities will apply their own procedures and rules on cost. Confidentiality applies to the ODR process, and the ODR procedures will not deprive either consumers or sellers of their right to pursue matters in court. The timeline proposed shows adoption of the ODR Regulation and ADR Directive late in 2012, with development of the ODR platform to be completed by 2015.

[Mediation World](#) (February 11, 2012); [European Commission Proposal for Regulation on Consumer ODR,COM \(2011\) 794 final](#) (November 29, 2011); [Commission Staff Executive](#)

[Summary](#), SEC (2011) 1409 final (November 29, 2011); [Commission Staff Impact Statement](#), SEC (2011) 1408 final (November 29, 2011)

## World Bank Analyzes ADR Benefits

A World Bank paper discusses the effectiveness of alternative dispute resolution, looking at the empirical benefits of mediation and other forms of ADR and noting the need for additional studies outside the U.S. The short paper, by the Investment Climate Impact Project, focuses on measurable issues of cost savings and timing. It also discusses less measurable impacts, such as improving business relationships and problem-solving skills, reducing pressure on courts, and improving investors' perceptions about the safety of business investments in emerging markets.

[Settling Out of Court](#), Note No.329 (2011); [The World Bank Group's Viewpoint Policy Journal](#)

## U.K. Trying Regional Workplace Mediation Networks

The U.K. Government announced that it is establishing two regional mediation networks for small and medium size enterprises (SMEs) in a pilot program to reduce workplace disputes and the number of employment tribunal cases. The mediation networks will be in Cambridge and Manchester, with mediation training of employees at 24 SMEs, as smaller companies are often not aware of the benefits of mediation and rarely use it. Trained mediators will then be able to assist other organizations in their regional network. The government is seeking a provider for the first round of mediation training. The pilot program is part of the government's reform of the employment tribunal system; in the last two years tribunal claims have risen to 218,000, an increase of 44 percent. The program will run 12 months and expand to other areas if successful. A related national mediation conference had record breaking attendance.

[People Management Magazine Online](#) (January 23, 2012); [eGov Monitor](#)(January 24, 2012);

[Source Wire](#) (January 31 ,2012)

## Japanese Mediation Center Beginning to Resolve Fukushima Nuclear Accident Claims

The mediation center established by the Japanese government is now beginning to resolve claims resulting from the Fukushima nuclear power plant catastrophe, with three resolutions from among the 600 claims that have been submitted thus far. Many more claims are likely from the 150,000 people displaced by the nuclear accident, but to begin the process each claimant must complete a 56-page form using a 150-page instruction manual and provide receipts and other documentation. The Japanese government has set up a \$26 billion fund to pay damages on behalf of Tokyo Electric Power Co. (Tepco), with another \$11.7 billion approved in November and more likely to follow. Few lawsuits have been filed, although one lawyer is threatening to file a shareholder derivative action against Tepco's corporate directors seeking \$72 billion for failing to raise the height of tsunami barriers. [Law.com](#) (January 26, 2012)

## Canadian Report Encourages Specific Training and Standards for Elder Mediation

In the growing area of elder mediation, which now includes mandatory mediation of adult guardianship issues in British Columbia, a new report calls for mediation practice guidelines, training and ethical standards. The report from the Canadian Centre for Elder Law emphasizes the heightened sensitivity and skill needed by mediators. Ethical issues include determining whether parties have the capacity to participate meaningfully in mediation, the need for legal representation and questions of abuse and neglect. [Canadian Lawyer Legal Feeds](#) (January 16, 2012)

## New York Mediation Centers Seek Restoration of Funding

Mediation centers in Westchester and Rockland, NY, are leading a statewide advocacy campaign to restore funding for community mediation, following deep cuts during last year's state budget crisis. The campaign is collecting online signatures, focusing on the cost effectiveness of community mediation centers where 100,000 people resolved conflicts last year, decreasing the pressure on overburdened courts. The average cost per dispute at community mediation centers is \$300, far less than even minor court proceedings. [Nyack News & Views \(January 23, 2012\)](#)



## BBB Celebrates 100 Years

The Better Business Bureau, the non-governmental agency that focuses on business integrity and transparency, and now emphasizes mediation and resolution, is celebrating its founding 100 years ago in Minneapolis. The non-profit originally covered truth in advertising and has expanded to include internet scams, fraud and vehicle lemon laws. BBB now has 122 branches across the U.S. and Canada.

[Twin Cities Daily Planet](#) (January 20, 2012)

## Other International Mediation Developments

- New **U.K.** statistics show that court processes are too slow, which the Courts Minister stated should be remedied by offering more opportunities for mediation, including telephone-based mediation. [Bude People](#) (January 12, 2012)
- A study by a **U.K.** group revealed that only five percent of employers have used mediation to resolve workplace disputes, even though nearly 75 percent agreed that mediation is a good workplace tool for resolving disputes. [FreshBusiness Thinking.com](#) (February 2, 2012)
- A High Court judge in **Ireland** speaking at a mediation seminar criticized the delays and great expense of litigation, calling it the "nuclear option," and urged use of mediation and other forms of alternative dispute resolution, along with revision of court rules to help reduce some of the burden of litigation. [IrishTimes.com](#) (February 27, 2012)
- The leading arbitration institution in **Germany** created procedural rules for mediation and other forms of alternative dispute resolution which are now available in English. [German Institution of Arbitration's ADR Rules; Dispute Resolution in Germany](#) (January 25, 2012)
- Mediation legislation that **Russia** enacted in July 2010 has not changed the legal culture, so the Supreme Commercial Court has drafted new legislation that would have assistant judges, retired judges and other court personnel conduct mediations. Participation by parties generally would be voluntary, and the legislation would not exclude private mediation. Judicial mediation might help build skills and a culture of mediation, which would encourage non-judicial mediation as well. [Russian Law Online](#) (February 28, 2012)
- The World Bank's International Finance Corporation is funding a two year project by the Centre for Effective Dispute Resolution (CEDR) to deliver mediation training, develop a network of master trainers and build institutional capacity in mediation centers in **Egypt, Lebanon, Morocco, Pakistan** and **Afghanistan**. [SourceWire](#) (February 9, 2012)
- A seven-day mediation skills training course for 30 judges in **Pakistan** was inaugurated by the Chief Justice of the Lahore High Court; the training was launched by the Centre for Effective Dispute Resolution and the International Finance Corporation. [Business Recorder](#) (January 31, 2012)
- The **Bahrain** Chamber for Dispute Resolution has been involved in 47 cases with a value of \$1.6 billion since it began in January 2010; it has over 150 trained mediators and a pool of 600 arbitrators in partnership with AAA. [Gulf Weekly](#) (January 18, 2012)
- **Angola's** National Consumer Protection Institute used mediation to recover more than \$265,000 for consumers in 2011. [Angola Press](#) (January 18, 2012)
- Mediation experts judging a mediation competition in **India** among 32 law school teams stated that they expect mediation will soon become a preferred choice for dispute resolution in India, making mediation a good practice choice for lawyers. The potential of mediation to reduce the burden of litigation in India will be realized by encouraging mediation to begin when a complaint is filed. The average length of a civil case in India is 15 years. [Times of India](#) (February 18, 2012); [Times of India](#) (February 19, 2012); [The Indian Express](#) (February 26, 2012)
- The High Court Mediation Committee and the District Mediation Monitoring Committee organized a mediation conference in Nagpur, Maharashtra, **India** in which judges and

lawyers discussed mediation opportunities and challenges. A target was set for judges to refer four cases a month to mediation. [Times of India](#) (January 30, 2012)

- Haryana, **India** is getting its first diresolution center, with the first foundation stone set by a Supreme Court Justice for the building that will house the center. [IBN Live News](#) (January 25, 2012)
- The Mediation Service Center in one region of the **Philippines** Department of Environment and Natural Resources is fully operational with 18 accredited mediators and expects to be involved in over 100 public land disputes this year. [Mb.com.ph](#) (February 29, 2012)
- The Supreme Court of **South Korea** cleared the former head of the state-run Korean Broadcasting System of charges resulting from agreeing to court mediation of a tax dispute that yielded \$160 million less than might have been achieved in litigation. [The Korea Herald](#) (January 12, 2012)
- **Cuba** is hosting the Sixth International Conference on Arbitration and Mediation from January 23-25. [Prensa Latina News](#) (January 12, 2012)

## UPDATE ON HOME FORECLOSURE MEDIATION

- The National Consumer Law Center has released its new report on mortgage foreclosure mediation focusing on programs in 19 states throughout the **U.S.** The report suggests that mediation is an inexpensive solution that could save billions, as well as allowing many troubled homeowners to keep their homes. The report recommends best practices based on foreclosure mediation data from the last three years. The report indicates that some programs, including those in **Connecticut**, **Nevada** and **New York**, are more successful than other programs. The report emphasizes the need for enforceable standards and robust outreach, both of which were lacking in the recently suspended **Florida** mediation program. Mediation fees are typically less than \$1,000, a tiny portion of the \$145,000 per foreclosed home lost by investors. In **California** alone, foreclosures have cost more than \$500 billion. [NationalHYPERLINK http://www.nclc.org/foreclosures-and-mortgages/rebuilding-america.html](http://www.nclc.org/foreclosures-and-mortgages/rebuilding-america.html) [Consumer Law Center Report](#) (February 2012); [MarketWatch](#) (February 6, 2012); [UTSanDiego.com](#) (February 16, 2012)
- A **U.S.** Department of Justice report on foreclosure mediation emphasizes best practices for research and evaluation and how creative collaborations among the various programs, agencies, institutions and others involved can enhance efficient use of resources. The report, by DOJ's Access to Justice Initiative, summarizes the results of a March 2011 workshop which included recommendations such as requiring federally-backed loans to go through mediation prior to foreclosure, creating federal guidelines for foreclosure mediation programs, and providing matching funds for state programs that meet the federal guidelines. [DOJ Report - Foreclosure Mediation:HYPERLINK http://tinyurl.com/7egfyn6](http://tinyurl.com/7egfyn6) [Emerging Research and Evaluation Practices](#) (December 2011); [National Mortgage Professional Magazine](#) (January 12, 2012); [Huffington Post](#) (January 10, 2012)
- The **U.S.** government and 49 state attorneys general reached agreement on a \$25 billion settlement with the country's five largest loan servicers for improper handling of foreclosures. The settlement resulted from 15 months of intense negotiation and is said to be the largest federal-state joint settlement in history. **Connecticut** will receive \$190 million from the settlement, of which \$27 million will help pay for local foreclosure prevention programs, including the judiciary branch's foreclosure mediation program. **Pennsylvania** is to receive \$266 million, which housing advocates are hoping will be spent in part to restore the Homeowners Emergency Mortgage Assistance Program, which was viewed nationally as an excellent foreclosure mediation program before it lost funding last year. **Utah** will receive \$171 million in the settlement, while **Delaware** will receive \$45 million. [NationalHYPERLINK http://nationalmortgagesettlement.com/](http://nationalmortgagesettlement.com/) [Mortgage Settlement](#) (February 2012); [Ctwatchdog.com](#) (February 9, 2012); [Keystone Politics](#) (February 10, 2012); [CBS News](#) (February 10, 2012); [WGMD.com](#) (February 10, 2012).

- The **Nevada** advisory panel has recommended additional changes to the Nevada Foreclosure Mediation Program by requiring banks to disclose how much they paid for homeowners' mortgages. Some banks reportedly bought distressed loans for as little as five cents on the dollar. However, lenders state that loans frequently are sold in bulk, making it too difficult to determine the amount paid for individual mortgages. Other lenders question the relevance of the information and are concerned that it will result in homeowners having unrealistic hopes of obtaining principal reductions. [Las Vegas Sun](#) (February 24, 2012)
- Following the **Nevada** Supreme Court's holding last July that a district court should have imposed sanctions against a lender that did not negotiate in good faith, District Judge Flanagan has imposed minimal sanctions by requiring the lender to cover the costs of another mediation and to give \$2,500 to a legal services non-profit. [RGJ.com](#) (January 3, 2012)
- The **Nevada** Supreme Court remanded two separate foreclosure cases back to District Judges Mosley and Flanagan, ruling there was insufficient documentation for foreclosure. A Court spokesman noted that there are a significant number of similar foreclosure mediation appeals pending before the Court. In another case, the Nevada Supreme Court is considering whether a bank can foreclose on a home despite a mediator's finding that not all required documents were presented at the mediation. The bank sought judicial review of the mediator's findings and District Judge Flanagan ruled that the bank's failure to produce documents did not amount to bad faith, which the homeowner has appealed. [CBS News](#) (January 24, 2012); [CBS News](#) (January 5, 2012)
- Delaware legislators and the attorney general gathered to mark the launch of the state's new mandatory foreclosure mediation program, which applies to home foreclosures from January 19 and continues for two years. [Loan Safe.org](#) (January 20, 2012)
- New York will soon provide foreclosure mediation and counseling through a Foreclosure Relief Unit to be set up in the Department of Financial Services. [The Wall Street Journal](#) (January 5, 2012)
- With a continuing high level of foreclosures, the City Council of **Los Angeles, California** is considering whether to adopt a mortgage foreclosure mediation process. The Council is considering the type of program adopted in **Springfield, Massachusetts**. [Loan Safe.org](#) (February 16, 2012)
- Protestors favoring legislation requiring foreclosure mediation and other homeowner protections in **Massachusetts** gathered near the State House to encourage legislative support. The Massachusetts Commission Against Discrimination supports mandatory mediation to prevent discrimination that can occur when banks decide with whom they will mediate. Advocates stress that Massachusetts is the only New England state that does not have a foreclosure mediation law. [The Herald News](#) (January 11, 2012)
- Legislation requiring mediation prior to home foreclosure passed the **Oregon** Senate, but faces opposition from bankers in the House. Although this legislation died in the House last year, it has bipartisan support and the governor has indicated he will sign it if it passes. [Mail Tribune](#) (February 18, 2012)
- HOPE NOW, an alliance of mortgage market participants that provides assistance to homeowners in distress, convened a meeting in Washington, DC among judges, attorneys, and state housing agencies, including **Maryland, Ohio** and **Rhode Island**, to discuss best practices and standards for foreclosure mediation. Foreclosure rates were down in 2011 due to problems such as "robo-signing" that temporarily halted all foreclosure processes at some big banks, but the foreclosure rates in 2012 are expected to rise. [National Mortgage Professional Magazine](#) (February 2, 2012); [HOPE NOW Website](#); [Afro](#) (January 13, 2012)

## OTHER MEDIATION NEWS INFORMATION

Lehman Brothers Holdings agreed to pay \$40 million to resolve a securities-fraud class action involving mortgage-backed securities after ten months of mediation with a group of union pension funds. [Bloomberg \(January 13, 2012\)](#)

Following court-assisted mediation, bankrupt newspaper publisher Tribune Co. agreed to contribute \$4.45 million to a \$32 million settlement of an employee retirement fund lawsuit in which the publisher was not a party. [Bloomberg \(January 30, 2012\)](#)

A bankruptcy judge permitted the owner of LaGrave Field baseball stadium and Amegy Bank to enter into mediation, even though the parties had already spent two years in protracted mediation. [Star-Telegram \(January 18, 2012\)](#)

Settlements from successful mediations between the bankrupt Los Angeles Dodgers and Fox Sports over media rights and between the Dodgers and Major League Baseball over sale of the franchise, stadium and telecasts were both approved by the bankruptcy court. [The Deal Pipeline \(January 11, 2012\)](#)

A Rhode Island judge has ordered mediation between the Big East conference and West Virginia University over the school's plan to become a member of the Big 12 beginning in July, rather than waiting the required 27 months. [College Football Talk \(January 12, 2012\)](#)

Marathon mediation sessions involving three mediators have resulted in settlements with families of 29 men who died in the Upper Big Branch coal mine explosion in April 2010, which was the worst U.S. mining disaster since 1972. [CNN \(January 11, 2012\)](#); [West Virginia Metro News \(January 6, 2012\)](#)

The civil case against an on-duty federal border agent who ran a stop sign at about 100 miles an hour causing an accident that killed three people has been resolved for \$11 million in two lengthy days of mediation. The agent offered condolences and an apology at the beginning of the mediation. The agent, who was tracking a drug runner, has pled not guilty to manslaughter charges. [UTSanDiego.com \(February 16, 2012\)](#)

Condo owners received \$5.2 million through mediation for serious construction defects in their building from the insurers of the builder, general contractor and subcontractors. [Market Watch \(February 7, 2012\)](#)

After a year of mediation, Western Washington University finally resolved a multi-million dollar construction case with the contractor concerning a new dormitory. [The Western Front \(February 17, 2012\)](#)

Goldman Sachs agreed in mediation to pay nearly \$1 million to resolve claims from computer technicians who were not paid overtime for their work as contractors. [Bloomberg \(January 11, 2012\)](#)

A \$400 million Regional Desalination Project in Monterey County, California is in mediation with conflict of interest allegations involving county officials and employees.. [Monterey Herald.com \(January 12, 2012\)](#)

A decision to enter into mediation by a committee of the Queenstown (New Zealand) Lakes District Council is to benefit taxpayers by avoiding the costs of Environment Court appeals relating to a \$300 million subdivision outside Queenstown. While the mediation will not be public, the committee chairman promised that interested parties will be kept informed and no covert deals will be made. [The Southland Times \(February 4, 2012\)](#)

### Other Notable News & Proceedings



Participation by the Federal Emergency Management Agency in state disaster claims mediation programs would be mandated under the Flood Insurance Reform and Modernization Act of 2011, introduced by Senator Tim Johnson on December 5 in the U.S. Senate to restore financial solvency to the flood insurance fund. [S. 1940](#)

The South Dakota House of Representatives unanimously passed legislation that would expand the state's agriculture mediation program to also permit mediation of disputes over decisions by federal land-management agencies. The current program is limited to agricultural loan disputes between borrowers and creditors. [Aberdeen News.com](#)

UCLA is launching a new initiative focusing on peaceful resolution of conflicts and civil discourse, with public lectures, academic courses and programs. Former U.S. Senator George Mitchell is kicking off the initiative with a public lecture on Middle East turmoil, UCLA's Chancellor is teaching a course, and a new honors course on international conflict resolution is to provide both theory and skills for practical conflict resolution. [UCLANewsroom](#)

Harvard Law School's Program on Negotiation blog reports that lawyers attending workplace mediations do not lower the settlement rate, extend the mediations, or reduce parties' sense of fairness and satisfaction with mediation, according to a Canadian study. However with lawyers present, the parties found the mediators slightly less useful and were less likely to reconcile with the other party even when the case settled. [Program on Negotiation Blog](#)

## Check These Out:

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## Book Review

John Lande, *Lawyering with Planned Early Negotiation: How You Can Get Good Results for Clients and Make Money* (ABA Section of Dispute Resolution, 2011)

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

John Lande takes a refreshing approach to litigation, which perhaps only a mediator would have the audacity to offer. His premise is that by encouraging lawyers to take the initiative to plan for negotiation instead of trial, they will not only likely achieve better results for their clients, but will at the same time positively affect their own lives and the lives of opposing counsel.

Lande begins by explaining his inspiration for writing the book. It grew out of two threads of his research and practice: alternative dispute resolution and teaching lawyering courses at the University of Missouri Law School. Lande examines planned early negotiation ("PEN") from both the client's and lawyer's perspectives. He acknowledges that the "litigation as usual" strategy typically escalates the original conflict, is time consuming and expensive. What's even more unfortunate, the ultimate settlement in this model is rarely satisfying to either, let alone both, parties. It is, as Lande describes it, an adversarial game that satisfies only those lawyers who enjoy the sport for its own sake. By teaching young law students "lawyering," he aims to change that thinking and offer real alternatives.

Alternative dispute resolution offers the prospect of more satisfying outcomes for both lawyer and client: the parties may accept responsibility for their part in the underlying conduct that led to the legal dispute, they may arrive at a prescription for new and better future interactions and in many instances at least have the chance for face-saving and keeping the disputed matter confidential, which is virtually unattainable in a public trial. He offers examples of clients who win their trials but remain highly dissatisfied because the other side never accepted responsibility for their actions.

Lande describes several models for PEN processes, including hiring settlement counsel and explicit written agreements for either a cooperative or collaborative negotiation. It was impressive to see that IAM President-elect, Eric Galton, was interviewed about his work as settlement counsel and that IAM Distinguished Fellow David Hoffman is the author of the collaborative negotiation movement which is striving to permeate not only family disputes but civil disputes of all types.

In considering PEN, Lande asks lawyers to look at why they are hired by their clients. Typically, lawyers are engaged to protect and advocate for clients' legal rights in ways in which the clients were already unsuccessful in advocating on their own behalf. Unfortunately, he notes, in many instances lawyers fail to assess the client's interests beyond "their stated or superficial goals." The default for most lawyers is to proceed with litigation when consulted by a client who has a legal claim that has not been adequately redressed.

Instead of assuming that business as usual is appropriate and preferable, Lande suggests that advocates take the time at the outset of their engagement to educate clients about both their substantive legal rights and procedural options in an effort to help them develop realistic expectations for the next few months and years, as well as a broad range of possible outcomes. And Lande strongly urges advocates to return to this conversation throughout the life of the dispute to ensure that choosing one path does not eliminate all other options in the future.

Lande's chapter on billing systems is a brave effort to highlight the tension between clients' and lawyers' best interests in terms of financial incentives. It is a challenging and precarious issue which arises in many of my mediations, where I observe that by recommending acceptance or rejection of an offer of settlement, the lawyer has to evaluate his client's best interest, which is often at variance from his own. For a plaintiff's lawyer on a contingency fee, the risk of losing plus the time required to prepare and litigate a case may color his advice to his client. On the other hand, a client with dreams of a big jackpot who is not paying his attorney's fees may want to keep litigating regardless of the reasonableness of the offer. On the defense side, early settlement often means losing months if not years of billable work.

Lande offers creative solutions to address these natural but still uncomfortable tensions, such as "triggers" or "strike points" for settlement, combining hourly and contingent fees, value billing and even premiums offered for early settlement. The options present realistic and creative ways to defuse this tension and advance a new paradigm for handling legal disputes in reasonable and ethical ways.

The chapter on negotiation techniques is particularly worth reading for lawyers who intend to negotiate without the assistance of outside mediators. Lande discusses theories that include range analysis and ZOPA (the Zone of Potential Agreement), interest-based v. positional negotiation and other means of getting an agreement that will satisfy both clients and their advocates.

Lande notes that "[a]lthough collegial lawyers often can successfully manage a dispute resolution process without professional assistance, sometimes parties can benefit from using mediators." The conclusion that Lande seems to draw is that in a perfect process, lawyers agreeing to use PEN would not need outside mediators, and it is only where that old adversarial dynamic creeps in that a mediator is critical. Otherwise, he seems to suggest that mediators may be useful to the parties, but not necessary for newly indoctrinated lawyers. On the other hand, he highlights instances in which a professional mediator has hindered the process, frustrating both the framework and the outcome for the parties.

I particularly appreciated the time, care and depth of Lande's analysis of the ethical issues that may arise when advocates adopt PEN into their practice. Questions of confidentiality, diligence, loyalty and client control are addressed within the context of the American Bar Association's Model Code of Professional Responsibility. The book ends with an extensive appendix and includes a CD of forms and checklists for the procedures presented.

By modeling and committing to decent behavior, respectful conduct and a genuine effort to develop good working relationships with both clients and opposing counsel, perhaps a new generation of lawyers can positively affect the practice of law and in so doing the life and well-being of both lawyers and clients. It won't be easy, but it would certainly appear to be a worthwhile goal - especially if the end result would be, as Lande suggests, both good results for clients and making money.

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Dr. Tricia S. Jones is Professor of Adult and Organizational Development in the Department of Psychological Studies in Education, Temple University, Philadelphia, PA. She has been a conflict communication scholar, practitioner, and consultant for 25 years.

Dr. Jones brings her extensive knowledge of conflict theory and research to the new discipline of conflict coaching. She has trained Fortune 100 companies, governmental and non-profit organizations and has served as a consultant to the Organization of American States, the Global Partnership for the Prevention of Armed Conflict, American Baptist Churches-USA, Department of Veterans Affairs and others. Her blend of theory, research and practice earned her the 2005 Jeffrey Z. Rubin Theory-to-Practice Award from the International Association for Conflict Management.

Dr. Jones has written, edited or co-edited several books, published over 50 articles and book chapters, presented over 100 presentations at national and international conferences, and received over \$2.1 million in grant funding for her research in conflict processes. She is immediate past editor of *Conflict Resolution Quarterly* and serves as a guest reviewer for other conflict management journals.

Jones also authored *Intercultural Communication: A Peace-Building Approach*, © 2012, with Martin S. Remland, et al.; *Interpersonal Communication Through the Life Span*, © 2006, with Martin Remland & Rebecca Sanford; *Kids Working It Out: Stories and Strategies for Making Peace in Our Schools*, © 2002; and many articles in *Conflict Resolution Quarterly*.



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