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## Dispute Resolution Update

December 2011

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### Mediation Quote

*People want help with conflict, but they also want realism. When we [mediators] offer to help them revert, resolve, or in some way fix conflicts that they are experiencing as inevitable, intractable, or deeply rooted, we are not seen as credible. This is not to say that the worst aspects of long-term conflict cannot be*

### 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 Mediators' newsletter.

#### RECENT COURT DECISIONS INVOLVING MEDIATION

In *Firth v. Juanita Country Club Condominium Owners Ass'n*, the Washington Court of Appeals overturned and remanded a trial court's order because the lower court had omitted a substantive provision agreed to by the parties during mediation.

In *the Estate of James H. Rice*, a Texas appellate court dismissed an appeal when it was revealed that the appellant had unexpectedly left an appellate mediation session, resulting in impasse. The appellate court found that a named party had violated the rule to be present for the "entire mediation process."

#### KANSAS SETTLEMENT CONFERENCE TRAINING

ADR, LLC, partners, Larry R. Rute and Patrick Nichols were invited to serve as trainers in two separate regional Kansas Judicial Training Sessions in Manhattan and Iola on November 9, 2011. Larry and Patrick participated in judicial training sessions designed to outline best practices when district court judges conduct judicially-mandated settlement conferences.

#### KANSAS SUPREME COURT DISPUTE RESOLUTION COUNCIL ELECTION

On September 27, 2011, Larry Rute was elected Chair of the Kansas Supreme Court's Dispute Resolution Council. Larry will serve as Chair of the Council for three years. The Council's responsibilities are defined by K.S.A. 5-504. Over the next twelve months the Council will review whether to recommend additional automatic court referrals to mediation, a new appellate mediation program, and an expansion of judicial settlement conference training.

#### ABA TORT, TRIAL & INSURANCE PRACTICE SECTION NEWSLETTER ARTICLE

*ameliorated, that complex and destructive interactions cannot be made more constructive, or that progress toward a more positive approach is impossible. But when we focus on preventing or settling conflicts that are not likely to be resolved, we lose credibility and forego the opportunity to help people in realistic and meaningful ways.*

Bernard Mayer, Staying with Conflict: A Strategic Approach to Ongoing Disputes (Jossey-Bass2009) at 6

Larry Rute's article *Successful Settlements that Last: How Mediation Best Practices Techniques Can Improve Your Settlement Strategy*, has been chosen as the lead article in the American Bar Association's Tort, Trial and Insurance Practice Section Fall 2011 newsletter. [To review the article, click here.](#)

**KANSAS AND MISSOURI SUPER LAWYERS**

We are pleased to announce again this year that ADR, LLC, partners, Larry R. Rute and Patrick Nichols, have been named to the 2011-2012 Super Lawyers list in Kansas and Missouri. We understand that no more than 5% of the lawyers in one state are named to the Super Lawyers list. The list is created using a selection process, including a statewide survey of lawyers, independent evaluation of candidates by attorney-led private research staff, peer review of candidates by practice area, good standing, and disciplinary review.

Finally, we encourage readers to contribute articles or other dispute-resolution related information for future publication in Dispute Resolution Update. In addition, should the reader know of someone who would like to receive the newsletter, simply notify us at [info@adrmediate.com](mailto:info@adrmediate.com).

We wish our readers a wonderful holiday season!

**Dispute Resolution Update**

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### **Recent Mediation Cases & Resolutions**

#### **Court Exceeded Authority in Enforcing Mediation Agreement**

A Washington state court of appeals overturned and remanded a trial court's order enforcing a settlement agreement reached in mediation because the lower court omitted a substantive provision agreed to by the parties (setting aside funds to cover future Medicare expenses). The appellate court also rejected the imposition of interest from the date of settlement rather than when performance was due, even though it concurred that a reasonable time for performance could be implied and that defendant took too long by not providing the first draft of a two-page release agreement for 58 days, and by not providing the second draft for 24 days after receiving proposed changes.

[Firth v. Juanita Country Club Condominium Owners Ass'n](#), No. 66211-2-I (Wash. App., October 24, 2011)

#### **Court Dismisses Appeal After Appellant Unexpectedly Leaves Mediation**

After ordering appellate mediation and requiring the named parties to be present for the "entire mediation process," a Texas appellate court later dismissed the appeal based on a letter from the dispute resolution center stating that appellant had unexpectedly left the mediation, resulting in impasse. The court was not satisfied by appellant's explanation that he preferred a decision by the court.

[In the Estate of James H. Rice](#), No. 10-10-00021-CV (Tex. App., August 10, 2011)

#### **Bankruptcy Court Upholds Limited Mediation Privilege in Connecticut**

Based on a limited mediation privilege in Connecticut, a federal bankruptcy court concluded that the mediation statement in another case could not be disclosed, even after that case had ended. The court applied state rather than federal law on mediation privilege because all claims were based on state law. The court also noted that a settlement agreement approved by the court could not provide the basis for contempt because the agreement was not incorporated into the court's order.

[In re New England National, LLC](#), Adv. Pro. No. 10-3033, ECF No. 120, 124 (U.S. Bankr. D. Conn., October 24, 2011)

#### **Court Permits Mediation with Only a Few Participating Plaintiffs**

A federal trial court in Florida agreed to a proposal that court-ordered mediation would occur with as few as three plaintiffs present, due to the large number of plaintiffs in the litigation, as long as plaintiffs had an opportunity to object to the proposed procedure prior to the mediation session and, as in a class action, the nonattending plaintiffs were able to object afterwards to any settlement reached at the mediation. The court noted that the nonattending plaintiffs must agree to maintain the confidentiality of mediation information they receive. [Figueiras v. Devereux Foundation, Inc.](#), No. 1:09-cv-00227-MP-GRJ (U.S.D.C. N.D. Fla., October 7, 2011)

#### **Other Notable or High Profile Proceedings**

- Insurer's agreement to a \$50,000 increase in the settlement amount over the \$1.6 million reached in mediation was enforced by the court over the objection of the insured who was responsible for a sizeable deductible, because an insurer generally has the right to control settlement of claims in good faith. [Davis v. Valero Refining Co.](#), No. A-1337-10T3 (N.J. Super. Ct. App., October 14, 2011).
- In a serious personal injury case with multiple insurance policies, an insurer that declined to participate in mediation cannot attack the reasonableness of settlement or avoid summary judgment by asserting merely that a jury might have found facts resulting in lower damages. [Utica Mut. Ins. Co. v. Government Empls. Ins. Co.](#), 2011 NY Slip Op. 32428(U) (N.Y. Sup. Ct., September 13, 2011).

- A Texas appellate court held that compliance with the statute of frauds, requiring a sufficient written description for conveyance of land, is required to enforce a mediated settlement agreement, but that reference to the litigation being resolved, which included property descriptions, is sufficient. [Fontenot v. Hanus](#), No. 11-10-00016-CV (Tex. App., August 31, 2011).
- The amount in an agreement reached by Orange County, Florida with Expedia in mediation over hotel taxes to be paid by Internet-based businesses is being revealed to the county commissioners who must vote on it only if they agree to sign a confidentiality agreement. The county mayor and at least one commissioner may vote for the agreement without knowing the amount, based on their confidence in the county comptroller who negotiated it. [Orlando Sentinel](#) (October 17, 2011)
- A Texas appellate court affirmed enforcement of a handwritten mediation agreement stating that the parties "agree to enter into a formal settlement agreement," because key terms were set forth and there was no language clarifying that the parties did not intend to be bound by the handwritten agreement. [Border Gateway, LLC v. Gomez](#), No. 14-10-01266-CV (Tex. App., September 20, 2011).
- A court refused to enjoin the effort by a party to obtain from another court the confidential mediation information that the first court had previously found subject to a mediation privilege. [In re Teligent, Inc.](#), No. 01-12974 (SMB), Adv. Proc. No. 03-2523 (U.S. Bankr. S.D.N.Y., October 3, 2011).
- The length of mediation was one factor that the court looked at in reducing attorneys' fees from 20% to 15% in an ERISA class action settlement. [In re Wachovia Corp. ERISA Litig.](#), (U.S.D.C. W.D. N.C., October 24, 2011).
- A court concluded that a settlement was made in good faith, in part due to court-sponsored mediation and third-party mediation. [Smith v. Wacker Neuson Corp.](#), No. 09-CV-1064-DRH-DGW (U.S.D.C. S.D. Ill., October 13, 2011).
- Discovery of mediated settlement amounts agreed to by co-defendants was denied to defendant which did not settle, because abolition of joint and several liability in Florida meant that defendant could not seek a set-off based on other defendants' payments. [Wal-Mart Stores, Inc. v. Strachan](#), No. 4D11-2539 (Fla. App. 4th Dist., October 12, 2011).

## Dispute Resolution News & Initiatives

### European Parliament Issues Resolution to Analyze Implementation of Mediation Directive

European Union member states were directed in 2008 to implement mediation in civil and commercial matters by May 2011; all have reported compliance except for the Czech Republic, Austria, Finland and Sweden. The European Parliament has now issued a resolution to examine the implementation of mediation in the member states, what practitioners and users think about mediation, and whether further action is needed. Among many other things, the resolution notes that mediation confidentiality differs widely among member states and that more coherence may be needed; financial incentives to encourage mediation and settlement differ, with some member states refunding court fees; some national legislation goes beyond the Mediation Directive to achieve important results; knowledge of the benefits of mediation should be promoted; and common standards for mediators are important for high quality professional training and accreditation and better mediation. The resolution goes to the parliaments of the member states, the Council and the Commission, which plans a formal communication on implementation of the Mediation Directive in 2013. [European Parliament Resolution \(T7-0361/2011\)](#) (September 13, 2011)

### Canada's Banking Ombuds Calls on Regulators to Require Banks to Mediate Client Disputes

Canada's Ombudsman for Banking Services and Investments (OBSI) is asking regulators to mandate that banks continue to use the independent national agency to settle any disputes with clients that the banks cannot resolve internally. The issue arose after Toronto Dominion Bank announced plans to withdraw from OBSI and begin using another ADR service; Royal Bank of Canada has been using that service since it left OBSI three years ago. OBSI was created to handle complaints against banks and since 2002 has also been responsible for resolving investment complaints. [The Star.com](#) (October 31, 2011)

## ICC Creates International Centre for ADR

The International Chamber of Commerce has established the International Centre for ADR to offer a range of services, including "Amicable" Dispute Resolution, Dispute Boards with standing neutrals, expert evaluation and more. The Centre addresses commercial disputes from over 65 countries with processes that fit the parties' interests and about 90% use mediation. [The Financial](#) (September 22, 2011)

## International Mediation Developments

- The proposed [Legal Services Regulation Bill](#) in **Ireland** would, among many other things, establish an independent disciplinary tribunal and a new procedure for complaints against the legal profession, and refer disputes to mediation only when the authority believes mediation would be successful. [Irish Times.com](#) (October 12, 2011)
- A university in **Scotland** has begun offering masters courses for a postgraduate certificate in mediation and conflict management. [Kingpin-SEO](#) (September 13, 2011)
- The Chief Justice of **Malta** suggests mediation of cases on appeal, as well as an evaluation comparing Malta's mandatory and voluntary mediation systems. [Times of Malta.com](#) (October 3, 2011)
- The **Qatar** Financial Centre (QFC) Civil and Commercial Court appointed as its first director of alternative dispute resolution a former director of the Centre for Effective Dispute Resolution (CEDR) who had worked with the court for four years. [Zawya](#) (October 17, 2011)
- The Tamil Nadu Mediation and Conciliation Centre is training judges from around the **Indian** state so that judges can help litigants settle disputes. [Indian Express](#) (October 30, 2011)
- A High Court Judge of Madras, in the **Indian** state of Tamil Nadu, stated that judges need to see if cases can be resolved through mediation and conciliation, and specifically encouraged insurance and transport companies to settle matters, as some accident compensation cases have been pending for 20 years. [IBN Live News](#) (September 17, 2011)
- The **Singapore** Mediation Centre reports that construction payment disputes are at a three-year low, based on its caseload. The Centre has assisted over 4,000 parties in mediation and encourages businesses to sign a Singapore Mediation Charter, promising to consider mediation first when disputes arise. [The Straits Times](#) (October 20, 2011); [Today Online](#) (September 10, 2011)
- The **Falkland Islands** obtained its first mediation program. [SARTMA.com](#) (October 22, 2011)

## Law Students Assist Federal Court's Mediation Program

Mediations are likely to quadruple this year in the U.S. District Court for the Southern District of New York due to automatic court referrals to mediation, beginning with employment discrimination matters; encouragement to mediate police brutality claims; and a rule shortening mediation timeframes. Three local law schools are responding with clinical programs in which law students counsel clients, prepare mediation statements, and represent parties in mediation of employment discrimination cases. [New York Law Journal](#) (September 16, 2011)

## North Carolina Uses Disaster Mediation Program for Hurricane Claims

North Carolina's Department of Insurance announced that the state's Disaster Mediation Program may be used by homeowners whose insurance claims from Hurricane Irene have been denied. Nine counties have been declared disaster areas thus far and others may be added. The Disaster Mediation Program was begun in 2006 to assist with homeowner insurance disputes in the aftermath of disasters. [North Carolina News Network](#) (September 2, 2011)

## Conflict Resolution Day/Week Receiving Greater Attention

Conflict Resolution Day (October 19 or 20) and Conflict Resolution Week (October 16-22) are receiving increasing focus, with various events across the country, including:

- The American Bar Association Mediation Week theme is "Civility and Civil Public Discourse" and the group is providing a wide array of mediation-related materials online to assist in the development and dissemination of mediation principles. [American Bar Association](#) (October 2011)
- Wyoming is observing Conflict Resolution Day for the first time state-wide, with presentations and workshops throughout the week of October 17-21 and a statewide symposium on October

19. The Wyoming Agriculture and Natural Resource Mediation Program is sponsoring the observances. [Casper Journal](#) (October 15, 2011); [Trib.com](#) (October 15, 2011)

- New York state is commemorating Mediation Settlement Day on October 20 by lighting buildings in blue to increase awareness of mediation. For the second year, Albany Law School, Niagara Falls and Mid-Hudson Bridge are being lit in blue, and Peace Bridge in Buffalo and 7 World Trade Center in New York City are being added for the first time. [Steuben Courier.com](#) (October 20, 2011)
- The Association for Conflict Resolution states that it first conceived Conflict Resolution Day in 2005 and provides numerous suggestions for how to celebrate the day. [ACR Website](#)

### Other Notable News & Initiatives

- Proposed California legislation, AB 506, would require cities to participate in mediation before declaring bankruptcy. A mediator would be chosen by a state commission and would determine if the city negotiated in good faith, which would be required prior to filing bankruptcy. [Vallejo Times Herald](#) (September 4, 2011)
- The Kansas Agricultural Mediation Service, funded by a U.S. Department of Agriculture grant, continues to help farmers and lenders work out solutions to challenging financial problems. The service includes financial counseling through the Farm Analyst Program to put a financial plan in place making it possible to work things out with the lender. [TMC Net.com](#) (October 15, 2011)
- The UK's Music Publishers Association has created a new mediation service for its members, with a panel of mediators available at a "beneficial rate." The service is being administered by the MPA, which offers its London offices for mediation sessions. [Music Week](#) (October 25, 2011)

## Update on Home Foreclosure Mediation

### UPDATE ON HOME FORECLOSURE MEDIATION

- The residential foreclosure crisis continues in **Florida**, with a backlog of 350,000 cases, but a judicial committee appointed in late September by the Florida Supreme Court recommended that the court end its foreclosure mediation program so that the state's 20 circuit courts could join a newly-created uniform mediation program or merely require mediation on a case-by-case basis. Problems contacting homeowners resulted in the current program reaching only 42% of eligible borrowers and only 14% participating in mediation, which is mandatory only for lenders. About one-fourth of the cases actually mediated reached agreement during mediation, however in additional cases proponents note that paperwork exchanged at mediation often resulted in loan modifications within three months. But overall only 3.6% of cases referred to mediation in Florida reached agreement, resulting in the court's current examination of the program. In addition to lack of participation by borrowers, there has been little enforcement to motivate lenders who have been resistant to mediation; many banks are unwilling to work hard in mediation, saying that they tried to find solutions prior to initiating foreclosure. Options for improving Florida's mediation program include requiring borrowers to participate, considering sanctions for noncompliance, exploring reduced fees (currently \$750 paid by lender) with borrower contributions, and tracking post-mediation settlements. [The Palm Beach Post](#) (September 26, 2011); [The Palm Beach Post](#) (October 21, 2011); [The Palm Beach Post](#) (October 25, 2011)
- Analysis of home foreclosure mediation programs in **New England** by the Federal Reserve Bank of Boston emphasizes the importance of requiring participation by both lenders and borrowers and initiating the mediation process as early as possible. Automatic enrollment of qualifying households, such as the mediation programs in **Philadelphia** and **Connecticut**, have participation rates around 70%, while programs with only an opt-in provision for borrowers top out at about 20% participation, as in **Nevada**. **Maryland** has had only a 10% participation rate in its voluntary mediation program, while **New Hampshire's** voluntary program has only achieved 14 agreements in over 100 mediations in its first 18 months. The report also notes that mediation programs do less well in the early stages when dealing with a backlog of foreclosures. Importantly, in **Connecticut**, nearly 80% of homeowners who completed the mediation program over a three year period kept their homes (64%) or made a

"graceful" exit (15%) by way of short sales or the like. The report cites Connecticut's program, which also incorporates two sources of financial assistance for homeowners, as a model for the rest of the country. Other programs also are noteworthy, including Nevada with an 89% success rate (but only 20% participation), and Philadelphia with 84% success. [Housing Wire](#) (September 29, 2011); [The Day.com](#) (September 30, 2011); [Research Report](#) (September 2011)

- The constitutionality of the Foreclosure Mediation Program in **Nevada** is being challenged under both the U.S. and state constitutions in an appeal asserting the Takings Clause of both constitutions and other grounds. However, the appeal is to the Nevada Supreme Court, which runs the state Foreclosure Mediation Program, so the case may end up in federal court. [Nevada Journal](#) (October 27, 2011)
- Foreclosure activity in **Nevada**, including foreclosure mediation, is being delayed while lenders adjust to legislation (AB 284) that went into effect on October 1 to deter robo-signing and require additional information and safeguards. [Reno Gazette-Journal](#) (October 29, 2011)
- In **Missouri**, a group called Communities Creating Opportunities is seeking to enact state legislation to require mediation prior to home foreclosure. Currently, Missouri homeowners can be evicted in as few as 38 days after receiving a foreclosure notice. [Fox4KC.com](#) (October 18, 2011)

### Other Cases & Resolutions:

A California appellate court affirmed approval of a \$9.7 million settlement fund established in mediation for former gym members. [Williams v.L.A.Fitness Int'l, LLC, No. B225622 \(Cal. App. 2d Dist., September 15,2011\)](#).

Nissan North America agreed in mediation to pay the Rutherford County (Tennessee)Industrial Development Board \$6.25 million to resolve a dispute over bonds issued by the county to land a Nissan plant. [The Daily News Journal \(October 26, 2011\)](#)

Owners of luxury condos in a San Francisco building have recovered over \$5 million in mediation from the builder and 13 subcontractors for shoddy construction, which at \$169,000 each is the highest per-unit recovery ever in California. [Market Watch\(October 24, 2011\)](#)

A bankruptcy judge again refuses to confirm the reorganization efforts of bank holding company Washington Mutual until it participates in mediation with creditor groups. [JD Supra \(October 17,2011\)](#)

Marathon City, Florida agreed in mediation to pay \$3 million to an island property owner after removing a failing 364-ton draw bridge. [KeysNet.com \(October 1,2011\)](#)

Mediation resulted in settlement of a \$250 million ESOP class action litigation against the Tribune Co. for \$32 million, which has been approved by the bankruptcy court. [Business Week \(October 24, 2011\)](#)

Daytona State College is seeking mediation to obtain repayment of \$1.5 million from the insurer of Community Cultural Foundation,which has been dissolved. [The Daytona Beach News-Journal \(September 27, 2011\)](#)

The Clark County Council approved a \$2.2 million mediation agreement to fund the Clark County Sheriff's office for the rest of the year, resolving litigation filed by the Sheriff when the county received \$7 million less than requested. [News and Tribune.com\(September 13, 2011\)](#)

The Port Authority of Guam resolved a million dollar claim with a contractor in mediation. [KUAM.com \(October 24,2011\)](#)

Selmer,Tennessee agreed in mediation to pay \$500,000 toward the six deaths and 22 injuries when a race car hit spectators in 2007. [Jackson Sun.com \(September 6,2011\)](#)

Pensacola, Florida agreed to a \$500,000 settlement in mediation with the mother of a teenage bicyclist killed by the police car he was fleeing; the mother plans a memorial fund to assis to ther families in similar situations. [WEAR ABC3 \(October 20,2011\)](#)

A settlement of \$800,000 for a pedestrian hit by a car was reached in mediation. [Market Watch \(September 21,2011\)](#)

Sutter Gold Mining wants to reopen its mine and reached a resolution in mediation to end underground tours of the historic mine. [News10.net \(September 9,2011\)](#)

Mediation finally resolved medical malpractice litigation from a 2005 incident; a jury defense verdict in 2009 was overturned due to improper juror conduct. [Naples News.com \(October 15,2011\)](#)

A bankruptcy judge sent the Los Angeles Dodgers and Major League Baseball to mediation to resolve a reorganization plan for the team. [ESPNLA \(October 4, 2011\)](#)

Faced with cancelling an increasing portion of the basketball season, the NBA and the players' union are relying on the same mediator who helped the NFL and its union resolve the football lockout. [SportingNews \(October 17,2011\)](#)

## Check These Out:

### Program Developments

The International Chamber of Commerce (ICC) has joined the International Mediation Institute (IMI) as a patron and has added a member to the IMI Board of Directors. [International Mediation Institute \(October 7, 2011\)](#)

JAMS International is adding a new European panel of international cross-border mediators and arbitrators, which it launched with 40 neutrals from nine European countries. [PRNewswire \(September20,2011\)](#)

### Educational Developments

Mediators Beyond Borders has established an International Training Center and an academic alliance with Southern Methodist University's Dispute Resolution & Conflict Management Center in Plano, Texas. The first training of the MBB International Training Center is November 11-12, "Leaving Your Ethnocentric Baggage on the Plane: An Exploration of Culture and Perspective for Conflict Resolution Practitioners Preparing for International Field Work." [Mediators Beyond Borders \(October 2011\)](#)

Online Dispute Resolution (ODR) tools and applications are the focus of Cyberweek 2011, which is hosted by the Werner Institute at Creighton University. [Eventbrite \(October 2011\)](#)

The Werner Institute is also hosting the Association of American Law Schools Works-in-Progress conference on alternative dispute resolution scholarship which is taking place November 4-5. [PRWeb \(September 29, 2011\)](#)

Brenau University hosts its ninth annual intercollegiate Mock Mediation Tournament in Gainesville, Georgia with 16 teams, which is the largest regional invitational tournament. A national tournament follows in November in Des Moines, Iowa. [AccessNorthGA.com \(October 6, 2011\)](#)

### Mediation on Television

Oprah Winfrey's cable network began showing victim-offender mediations on September 17 in the show *Confronting*, with each one-hour segment documenting a single emotional story of a violent crime that culminates with a meeting of victim and offender in a prison mediation. The premiere episode features parents confronting the man who killed their daughter in a drunk driving accident. [Discovery Press Web \(September 17, 2011\)](#)

Production on the second season of the lightweight mediation drama *Fairly Legal* is underway. USA Network acknowledged the show fell short in its first season and is retooling it with a new executive producer in place of its creator. [The Hollywood Reporter \(October 28, 2011\)](#)

An episode of *The Good Wife* involves dramatic action around a court-ordered mediation. [Ology \(October 10, 2011\)](#)





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