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Dispute Resolution Update

December 2010

IN THIS ISSUE:

- Recent Mediation Cases & Resolutions
- Dispute Resolution News & Initiatives

Dear Friends and Colleagues:

This edition of *Dispute Resolution Update* features recent mediation decisions and resolutions from several jurisdictions, including the successful 14-hour mediation which resulted in an \$8.5 million settlement against Google over the privacy provisions of its Buzz Social-Networking application. Of particular interest, are recent mediation decisions from Connecticut and California relating to the authority of legal counsel to enforce an oral settlement agreement, and allegations that legal counsel exercised duress or undue influence in obtaining a settlement.

In [Ackerman v. Sobol Family Partnership, LLP](#), SC 18288, SC 18289 (Conn., September 28, 2010), the Connecticut Supreme Court upheld the apparent authority of legal counsel to orally settle a complex, multi-party case. The Court analyzed at length, counsel's apparent authority to both negotiate the settlement and agree to the final terms. To review the *Ackerman* decision, [click here](#).

In [Chan v. Lund](#), No. H034196 (Cal. App. 6th, September 29, 2010), a California Appellate Court reviewed allegations that plaintiff's counsel utilized economic duress, undue influence and fraud to extort a settlement. To review the *Chan* decision, [click here](#).

The information in Dispute Resolution Update has been summarized by Keith L. Seat, a respected mediator and Editor of the International Academy of Mediator's Newsletter. As always, readers should feel free to submit news or summaries regarding substantive developments in the field of mediation or arbitration, or other noteworthy items for inclusion in future issues. Our next newsletter will be published in early February.

We encourage everyone to have a wonderful holiday season!



Larry R. Rute

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Claims Against Own Counsel Don't Undo Mediation Agreement

A California appellate court upheld an agreement reached after five mediation sessions, despite appellant's claim that he was forced into settlement by his own attorney. Appellant asserted extortion, economic duress, undue influence, fraud, prohibited financial dealings with a client and undisclosed dual agency based on his attorney threatening to withdraw on the eve of trial and because his attorney offered to reduce his fees by \$10,000 to induce settlement. The court noted that counsel was not a party to the dispute and would not benefit from settlement; nor was there any suggestion of counsel conniving with the other party. Appellant also raised constitutional challenges to the confidentiality of mediation, asserting that the mediator would back up his claims, but the court found that no testimony was excluded due to mediation confidentiality.

[Chan v. Lund](#) , No. H034196 (Cal. App. 6th, September 29, 2010)

Counsel's Apparent Authority Sufficient to Enter Binding Oral Settlement Agreement Following Mediation in Connecticut

The Supreme Court of Connecticut upheld the enforceability of an oral settlement agreement reached between counsel for the parties in a complex, multi-party case, based on apparent authority that was established in part by counsel's role in mediation. The Court analyzed at length counsel's apparent authority to both negotiate the settlement and agree to the final terms, but did not raise or discuss the confidentiality of the mediation process.

[Ackerman v. Sobol Family Partnership, LLP](#) , SC 18288, SC 18289 (Conn., September 28, 2010)

Ontario Appellate Court Penalizes Refusal to Mediate

The Ontario Court of Appeals imposed a \$40,000 penalty on an insurance company for refusing to mediate a personal injury case it considered to be outside the statutory requirement for mediation. The lower court found that the case was within the statutory threshold, but accepted the insurer's position as legitimate. However, the appellate court took a harder line in imposing the penalty and emphasized the requirements of participating in mediation and attempting to settle expeditiously.

[Law Times](#) (October 18, 2010)

Publicizing Mediation Briefs Not Protected as Official Proceeding or Free Speech Under Anti-SLAPP Laws

A California appellate court concluded that posting confidential mediation briefs on the internet is not protected under the state's anti-SLAPP laws, so claims of defamation were not stricken. The anti-SLAPP statute is designed to prevent chilling of the constitutional rights of freedom of speech and petition in connection with a public issue, and protects any statement made before judicial or other official proceedings. The court determined that mediation briefs are not covered because mediation, like arbitration, is a private contractual process rather than an official proceeding, and in any case the posting of the mediation briefs was long after the mediation so the posting had nothing to do with the mediation process. Further, the court concluded that the posting was not protected speech and does not concern an issue of public interest by merely providing information to the public about whether to purchase a particular property. [Driver v. Hussein](#) , No. A126534 (Cal. App. 1st, October 1, 2010)

Google Settles Buzz Class Action for \$8.5 Million in 14-Hour Mediation

Class action litigation against Google over the privacy provisions of its Buzz social-networking application was resolved in a 14-hour long mediation, with a plan for Google to donate \$8.5 million (less plaintiffs' legal fees) to Internet privacy and education organizations. Google also modified its privacy provisions to the satisfaction of plaintiffs. Members of the plaintiff class will provide recommendations of possible recipient organizations for Google to review and formulate into a formal proposal for the court's final approval.

[The Harvard Crimson](#) (September 7, 2010); [PCMag.com](#) (September 3, 2010)



Tulsa Mayor and City Council Continue to Sort out Process to Address Disputes Between Them

While the mayor of Tulsa, Oklahoma continues to favor formal mediation to resolve pending legal issues and other disputes with the City Council, the council has concluded that it should only participate in facilitated open meetings in order to comply with the Oklahoma Open Meeting Act. An earlier plan for council members to meet in smaller closed groups to determine the ground rules for an open meeting has been rejected as improper circumvention of the Open Meetings Act. Potential issues include a criminal probe, actual and threatened litigation and an ethics complaint, but the mayor is awaiting communication about the exact purpose of the open meeting. The mayor says he is likely to attend, but is concerned about the posturing, cheap shots and criticism that are likely at open meetings.

[Tulsa World.com](http://TulsaWorld.com) (September 4, 2010)

Other Notable Cases & Proceedings

- The parties to a California real estate transaction agreed that an unsuccessful “informal” mediation was not sufficient to satisfy the mandatory mediation clause in the standard form residential real estate contract and that a professional mediation was needed. The California trial court then set a mediation deadline for the second, professional mediation. [Reilly v. Cowitt](#) , No. B220439 (Cal. App. 2d, October 5, 2010)
- Duke University is in mediation with its insurer, American International Group, seeking to settle litigation over reimbursement for Duke’s costs from confidential settlements the school entered into with three members of the lacrosse team who were falsely accused of raping a stripper. A lawyer in the case stated in 2008 that AIG had offered \$5 million to Duke. [Bloomberg](#) (October 11, 2010)
- The Boy Scouts of America have reached settlements in mediation with six men who claimed to have been sexually abused as members of an Oregon troop in the 1980s. A jury awarded one of the men \$19.9 million in April, which the Scouts intended to appeal but have now settled. [The New York Times](#) (September 1, 2010)
- The Archdiocese of Milwaukee has agreed to mediation of 12 fraud lawsuits by sexual abuse victims who claim that the archdiocese withheld information about priests who sexually abused minors, enabling the priests to abuse again. The archdiocese has paid \$30 million so far in other sex abuse settlements. [The Badger Herald](#) (October 13, 2010)
- Despite calls by the Federal Communications Commission, a U.S. Senator and others for the parties to enter into mediation, a dispute over carriage rates between Fox and Cablevision left three million New York-area consumers without favorite shows and baseball playoff games for two weeks. [CNBC](#) (October 31, 2010); [Fierce IPTV.com](#) (October 27, 2010); [Trading Markets.com](#) (October 19, 2010); [TV Latest](#) (October 16, 2010); [New Tee Vee](#) (October 15, 2010); [The Wrap](#) (October 14, 2010)
- The Tribune Co., owner of The Chicago Tribune, Los Angeles Times and other dailies and TV stations, has reached agreement in mediation and is filing a reorganization plan in its bankruptcy proceedings with the backing of senior lenders and unsecured creditors. [Courthouse News Service](#) (October 19, 2010)
- Bankrupt Nortel Networks is turning to a Los Angeles mediator who charges \$1,000 an hour and a retainer of \$100,000 for prep and five days of mediation in order to divide up \$6 billion of assets in its bankruptcy proceeding. [Ottawa Citizen](#) (October 13, 2010)
- Mediation is under way in an effort to resolve the dispute between the Western Athletic Conference and Nevada and Fresno State, both of which seek to leave the WAC for the Mountain West Conference. In another matter, mediation resulted in a settlement between Nebraska and the Big 12 Conference on October 12, 2010. [Star Advertiser.com](#) (October 12, 2010); [RGJ.com](#) (October 13, 2010)



Mediation Encouraged in California Environmental Quality Act Disputes

New legislation in California amends the California Environmental Quality Act (CEQA) to encourage mediation prior to filing litigation and to discourage frivolous lawsuits. The legislation, SB 1456, was enacted on September 29, 2010, became effective immediately, and sunsets on January 1, 2016. While mediation is optional, if pursued by the parties it tolls all limitation periods until the mediation is completed.

[JD Supra.com](#) (October 18, 2010)

Connecticut Requires Mediation in Medical Malpractice Cases

Mediation or another form of alternative dispute resolution is now required in medical malpractice cases in Connecticut. The presiding judge in the case or another judge will conduct the first mediation session. If the case does not settle at that session it is up to the parties whether to continue with mediation.

[U.S. Politics Today](#) (September 29, 2010)

North Dakota Expands Agricultural Mediation to Oil Exploration

The Agricultural Mediation Service of North Dakota has been authorized to expand beyond helping farmers, ranchers and their creditors to addressing disputes between landowners, producers and energy companies. While the mediation program is voluntary and requires agreement to participate by both sides, the leading oil and gas industry organization in the state, the North Dakota Petroleum Council, is encouraging its members to use mediation to maintain strong relationships with surface owners.

[Grand Forks Herald](#) (October 11, 2010)

Missouri Proposes Mandatory Mediation for All Large Civil Cases

A commission of the Missouri Supreme Court has issued a report proposing revisions to the state's mediation rule, including court-ordered mediation in all civil cases with a demand over \$25,000. The commission also considered the Uniform Mediation Act, but proposes merely to clarify the state's current rules on admissibility and confidentiality. While recognizing that mandatory mediation may be a challenge in rural areas where mediation is less common, the commission was influenced by the national trend towards mediation. The commission began with surveys that showed a high level of use and satisfaction with mediation in Missouri and a majority favoring court-ordered mediation in all cases. The commission is seeking input on its proposals by early December and expects the Court to act by next summer.

[All Business](#) (September 26, 2010)

British Culture Minister Seeks Mediation Service to Address Online Privacy

The British Secretary of State for Culture, Communications and Creative Industries is proposing a new mediation service to give an additional means of redress to consumers concerned about breaches of online privacy or seeking to get inaccurate personal information removed from the internet. The Minister is also pushing an updated code of internet conduct and seeking to meet with internet service providers and other key players to encourage their participation.

[Guardian.co.uk](#) (November 3, 2010); [Telegraph.co.uk](#) (November 2, 2010)

Significant Increases in UK Alternative Dispute Resolution Reported

A detailed report by TheCityUK concludes that mediation and arbitration have risen sharply in the UK over the last two years following the financial crisis. The report states that the total number of disputes resolved by mediation and arbitration in the UK increased by 78% to nearly 35,000, while the number of disputes involving international parties rose by 59% to 5,300. TheCityUK is an independent body which was established in May with support from the government's City of London Corporation.

[LegalWeek.com](#) (September 21, 2010); [Report: Dispute Resolution in London and the UK 2010](#)



Update on Home Foreclosure Mediation

- Mediation programs addressing home foreclosures are well under way in Florida, but the groups administering the programs often have trouble getting through to distrustful homeowners who may not recognize the court-sponsored program and receive many letters and calls from other groups seeking to sell services. While 5,700 mediations have been completed in the Miami-Dade program since it began in May 2009, fewer than half of eligible homeowners participate in mediation. Mediation is free to homeowners in Florida, with lenders paying the entire \$750 mediation fee. The mediation program in Florida's 5th Judicial Circuit began on July 1 and has received about 200 referrals. [Miami Today News](#) (September 9, 2010); [Ocala.com](#) (September 24, 2010)
- Connecticut reported statistics for its Foreclosure Mediation Program showing that in the last fiscal year about 21,000 cases were eligible for mediation, but homeowners chose to proceed with mediation in just under 10,000 or 47% of them. [Program Statistics](#) ; [KarlBayer.com](#) (September 22, 2010)
- Cuyahoga County, Ohio launched a free home foreclosure mediation program two years ago and reports a 72% success rate. The program has assisted about 3,800 homeowners with settlements. A new mediation program in Holmes County, Ohio is also showing good results after half a year, not only with home foreclosures, but civil and domestic cases as well. The Homes County program relies on private mediators, with the parties covering the mediators' fees. [WKYC.com](#) (October 22, 2010); [The-Daily-Record.com](#) (September 30, 2010)
- Foreclosure mediation is off to a slow start in Maryland under the state statute which took effect July 1. In the first three months only 130 borrowers took advantage of the program, while the state expects more than 4,000 mediations in the first year. Requests began to pick up in September, just as national banks began temporarily halting foreclosures due to documentation problems. [Washington Examiner](#) (October 12, 2010)
- The Pennsylvania Supreme Court is requesting county courts in the state to consider adopting mediation programs to help deal with the large number of home foreclosure cases in the courts. Philadelphia and eight other counties in the state already have foreclosure mediation programs in place. The Administrative Office of Pennsylvania Courts expects the foreclosure problem in the state to get worse before it improves. [The Philadelphia Inquirer](#) (September 13, 2010)
- Utah will consider legislation this year that would give homeowners facing foreclosure the right to request mediation with their financial institutions in order to seek a loan modification or other relief. Utah is among the top ten states with the highest foreclosure rates in the country. [ABC4.com](#) (September 28, 2010); [KSL.com](#) (October 11, 2010)

Other International Mediation Developments

- The Law Society of Northern Ireland, which represents 2,000 solicitors, is promoting commercial mediation to the business community as well as its own members; it also provides training to solicitors interested in becoming commercial mediators. [Belfast Telegraph](#) (October 22, 2010)
- Ireland's main state mediation body, the Labour Relations Commission, cannot cope with the explosion of worker-employer disputes caused by record job losses, with filings nearly doubling since 2007. [Irish Independent](#) (September 23, 2010)
- The Irish Medical Council, which found 13 doctors guilty of professional misconduct last year, for the first time referred two cases to mediation with the consent of both complainant and doctor. [Irish Examiner](#) (October 4, 2010)
- Mediation led by a politician and shown live on television and the internet left both sides claiming that their positions had been strengthened at the end of the first day. The dispute involves a highly controversial rail project that would demolish most of the old train station in Stuttgart, Germany. [DW -World.de](#) (October 22, 2010)
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Other International Mediation Developments (continued)

- **Russia** has instituted financial mediation through appointment of a financial ombudsman to increase confidence in Russian banks. [Russia & India Report](#) (October 27, 2010)
- **Rwanda** is increasingly using mediation to resolve land disputes, with 75% reductions in land disputes in districts with trained local leaders. [All Africa.com](#) (October 11, 2010)
- Facing a litigation backlog that would take 30-40 years to resolve in the courts, **Sri Lanka** has amended its Mediation Boards Act to increase tenfold the maximum size of cases in which mediation is mandatory. [Daily Mirror.lk](#) (September 28, 2010)
- **Singapore** is launching a mediation program early in 2011 covering workplace disputes of up to S\$20,000 (US\$15,500) by managers, executives and professionals, while larger disputes will still require litigation. [The Timaru Herald](#) (October 23, 2010)
- The Chief Justice of **Malaysia** issued a Practice Direction to the judiciary to encourage mediation, giving parties the option of free court-assisted mediation or private mediation at a set cost to the parties. [The Star Online](#) (October 29, 2010)
- The annual report of the Victorian Small Business Commissioner in southern **Australia** states that mediation for small retailers had an 80% success rate last year. [Herald Sun.com.au](#) (September 29, 2010)
- The Supreme Court of the **Philippines** uses a mobile mediation center for simple cases that do not need counsel, including criminal cases with penalties of less than six years. [Philippine Information Agency](#) (September 7, 2010)
- The Supreme Court of the **Philippines** is awaiting a report from a mediation panel which has not yet resolved the complex land disputes between farmers and the company of the President's family; the Court may extend the time for mediation. [Business World](#) (October 20, 2010)
- A Swiss mediator may face criminal charges in **Colombia** for financing terrorism by paying \$2.5 million to the FARC to obtain the release of Ingrid Betancourt, while a Colombian senator who mediated the release of dozens of FARC hostages was ousted from the senate and banned from public office. [Colombia Reports.com](#) (October 6, 2010); [New Statesman](#) (October 8, 2010)



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