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Dispute Resolution Update

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Mediation Quote

‘Negotiating a deal is like painting a room. It’s all about the preparation. The part where you put the paint on the wall is easy. It’s the scraping and sanding and taping that take time and effort.’

Barry Goldman,
The Science of Settlement: Ideas for Negotiators (ALI ABA 2008) at 9

Dear Friends and Colleagues:

This edition of *Dispute Resolution Update* covers recent mediation cases, as well as updating and featuring dispute resolution news and initiatives across the United States and around the world. The information has been summarized by Keith L. Seat, a respected mediator and Editor of the International Academy of Mediator’s Newsletter.

Long-time readers of *Dispute Resolution Update* are aware that we have previously reported decisions from the California Court of Appeals that have, in some instances, crafted exceptions or limitations to California’s strict mediation confidentiality statute. California Evidence Code §119, subds(a), (b), broadly provides for confidentiality of matters spoken or written in connection with a mediation proceeding. In a decision recently entered by the Supreme Court of California in *Cassel v. The Superior Court of Los Angeles County*, the California high court strictly construed the mediation confidentiality statute in a matter involving allegations of attorney malpractice. See <http://www.courtinfo.ca.gov/opinions/documents/S178914.PDF>. The principal issue in *Cassel* was the effect of the mediation confidentiality statutes on private discussions between a mediating client and attorneys representing him in the mediation. At the close of mediation, Michael Cassel agreed to the settlement of business litigation to which he was a party. He then sued his attorneys for malpractice, breach of fiduciary duty, fraud, and breach of contract. His Complaint alleged that, by bad advice, deception, and coercion, the attorneys induced him to settle at a lower amount than he had told his legal counsel that he would accept, and for less than the case was worth.

The California appellate court majority had reasoned that the mediation confidentiality statutes are intended to protect a mediation disputant from tactics employed, positions taken, or confidences exchanged in the mediation, not to protect attorneys from the malpractice claims from their own clients. Therefore, the majority of the appellate court concluded that, when a mediation disputant sues his own counsel for malpractice in connection with the mediation, the attorneys cannot use mediation confidentiality as a shield to exclude damaging evidence of their private conversations with the client.

The California Supreme Court determined that the result reached by the appellate court majority, contravened the Legislature’s explicit command that, unless the confidentiality of a particular communication is expressly waived by all mediation participants, things said or written “for the purpose of” and “pursuant to” the mediation shall be inadmissible in any civil action. The Court found that it must apply the plain terms of the mediation confidentiality statutes to the facts of the case unless such a result would violate due process or would lead to absurd results that clearly undermine its statutory purpose. The Court found that no situation that extreme arises under the facts of this case and, therefore, reversed the judgment of the Court of Appeals.

As always, readers should feel free to submit news or summaries regarding local, regional or national substantive developments in the field of mediation, arbitration or dispute resolution. Our next newsletter will be published in late March.

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RECENT MEDIATION CASES & UPDATES

Contract Requiring Mediation of Any Claim Prior to Litigation Does Not Apply to Counterclaim

Emphasizing the importance of mediation prior to litigation, the Kansas Court of Appeals reversed the trial court and concluded that a construction contract requiring the parties to mediate any claim before instituting legal proceedings did not apply to a counterclaim, since the litigation had already begun. The fact that defendant had refused plaintiff's offer to mediate the initial claims prior to litigation was not an issue.

[Vanum Constr. Co. v. Magnum Block, LLC](#), No. 103,385 (Kan. App., December 10, 2010).

California Appellate Court Reverses Little-Bit-Settled Ruling

The California Court of Appeals for the First District reversed the trial court and held that a settlement cannot be a little bit enforced. In an extremely contentious battle over real estate transactions that did not go as expected, the parties eventually reached a mediated settlement, but continued to litigate over enforcement. While everyone on one side of the case eventually signed the settlement agreement, in the absence of the signature of one spouse on the other side, the trial court sought to enforce half of the settlement and require the signing spouse to transfer half of community property in exchange for half the payment that was to be made. The appellate court held that the settlement could only be enforced as written, but was incapable of being lawfully enforced as written. The court of appeals did, however, strongly encourage the parties to reach a global resolution.

[Rosen v. Cook](#), Nos. A123548, A123558 (Cal. App. 1st Dist., December 13, 2010).

Other Notable Cases & Proceedings

- Even though counsel for litigants negotiated a full settlement, either party was free to withdraw from the agreement until it was signed by the parties themselves or an attorney with express authorization from the principal. [Sims v. U.S. Agencies Casualty Ins. Co.](#), No. 2010 CA 1120 (La. Ct., December 22, 2010).
- Following an agreement in mediation which determined the amount of alimony and the division of property, the wife was unsuccessful in persuading either the trial or appellate courts that she was of unsound mind or that her husband used coercion, undue influence, overreaching or duress to reach the mediation agreement. The court accepted testimony from all the witnesses at the mediation, including counsel, without mentioning mediation confidentiality. [Toombs v. Toombs](#), No. CA10-272 (Ark. App., December 15, 2010).
- The confidentiality of mediation in a subsequent arbitration was unsuccessfully raised for the first time during judicial review of the arbitration, with a focus on the arbitrator reading the mediator's letter providing a non-binding opinion on the ultimate legal question. [Leagle.com](#) (December 13, 2010)
- The art mediation team of the Art Loss Register was able to reach an amicable settlement and avoid protracted litigation between two wealthy European families over a painting that was stolen from a London home in 1979, ended up in the estate of Gianni Versace and surfaced as the star lot in a Sotheby's auction. [Reuters](#) (November 22, 2010)
- A settlement agreement prepared after an apparently successful media-

tion in October over unpaid admission taxes and other issues between the Wenatchee Wild hockey team and local officials has not been signed by the team. Officials plan to file suit unless the agreement is signed by mid-January. [Wenatchee World](#) (December 31, 2010)

- Lehman Brothers Holdings is seeking judicial intervention to force those with the economic interest to mediate disputes over derivative transactions after trustees announced that they do not have authority to mediate and the investors with monetary interests have not come forward to participate. [Bloomberg](#) (December 9, 2010)
- Gainesville and Hall County have agreed to mediate a high stakes dispute over their rights to reservoir water. While initially planning to have each party send two representatives to mediation, the parties are now moving to make the process open to all commissioners and council members as well as the public, on the basis that the issues are too important to leave out any elected officials. [Gainesville Times.com](#) (December 12, 2010)
- Due to ongoing mediation efforts, IHOP, the pancake chain, has for now dropped its trademark infringement case against the International House of Prayer for use of the IHOP acronym. [Kansas City Star](#) (December 30, 2010)

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RECENT MEDIATION CASES & UPDATES (cont.)

OP-ED: Mastering the Art of Mediation: The Value of a Mentor

by Jan Frankel Schau (ADR Services,
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In most parts of the world, there is no set path for pursuing a career as a mediator. Indeed, many of the most prestigious mediators did not take courses as undergraduates in conflict resolution, nor do they hold advanced degrees in mediation. Since the field has only been systematically taught for the past twenty years or so, anyone who completed formal education before the 1990s missed out on this course of study. Yet we IAM members are now the professors, the authors, and the trainers who send legions of eager lawyers, former judges and other professionals into the field with the benefit of our wisdom and experience, but little formal foundation.

By contrast, physicians have years of medical school and then more years of internships, residencies, and fellowships in their fields before presuming to practice medicine on their own. Lawyers often have internships during law school, three years of formal study after undergraduate degrees and then typically join a firm as a junior associate, under the watchful eye of a partner for several years before they handle cases on their own. One of the most successful personal injury attorneys in Los Angeles, Michael Alder, was recently quoted in the L.A. Daily Journal as attributing a great deal of his own success to being mentored by such greats as David Harney, before branching out on his own.

All of us have come to accept the fact that mastering mediation takes years of experience and hundreds of cases. Because the practice itself is so nuanced and presents unique challenges in every dispute, we know that mediation is as much art as science and mastery requires much more than classroom instruction.

Our profession, however, has no formalized system for oversight or mentoring. Indeed, because of the confidentiality of our work, observing any mediation is complicated. I know that some of our members are in 'study groups' which help to navigate through particular challenges after the fact, while others offer advanced skill building courses and even formal 'coaching' for mediators (bravo Lee Jay Berman). But I think there are few who have taken on mentees in a formal way (with Jeff Krivis and Mariam Zadeh as a notable exception).

In the past three years, I have been privileged to observe mediations conducted by several of my colleagues and friends and to have the benefit of their experience and advice at ADR Services. Many of my closest friends are IAM members and colleagues there including: Linda Bulmash, Eleanor Barr, Denise Madigan, Stefan Mason, Daniel Ben Zvi and Ralph Williams. But I want to focus for a moment on the special relationship with Eugene Moscovitch, who particularly took the time to encourage me to accept the invitation from IAM for membership and has offered me solid advice about practice development and resolution of specific cases.

I think I speak for both of us when I say that our informal mentor/mentee rela-

tionship has enhanced both of us professionally and personally. Gene takes pride in my accomplishments and I in his. He was so pleased to inform me that one of his recent clients had high praise for a mediation I had conducted. Like a proud father, Gene puffed up his chest and told the client that he had been my informal mentor these past few years. I think Gene has benefited not only because my accomplishments reflect well on him, but because my insights and observations about how he approaches his work offer a candor that he can't readily attain from clients or other colleagues. He is that small voice that reminds me, in times of insecurity, that my fellow IAM members are 'just like me: intelligent, hard working, successful and 'with a big heart.'" He is that friendly voice in a sea of mediators attempting to meet and greet lawyer clients who feeds me dialogue in the fine art of 'schmoozing' or making connections that may result in getting more clients to think of me. He's the guy who helps me to create a decision-tree model for a mediator's proposal that is the most likely to be accepted. And I am that ever-smiling optimist who knows the 'power of Gene', even when he has a moment of self-doubt, and that friend in the hallway who reminds him to relax from his normal intensity and breathe!

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RECENT MEDIATION CASES & UPDATES (cont.)

And so it is with particular sadness that I learned that Gene has decided to move on to another agency and that I will no longer have the opportunity to greet him in the hallways and query him in the lobby about the specific day to day obstacles of my work. I will miss his daily presence in our halls terribly. Of course, we will have many chances for future professional and social interactions, but it causes me to consider what a valuable resource we IAM members are and can be for one another and for newer mediators.

Is it time for us to become a more institutionalized 'academy' for newer mediators where we formally make ourselves available for these kinds of relationships in our communities? Is there any wisdom in more experienced IAM Fellows mentoring newer members in a more systemized way? Should our membership committee work on developing lists of prospective members who would be mentored before being admitted as Fellows? Is there a benefit to our own practices from having mentees work with us? Do we have an obligation to the communities in which we live and work to give back through this type of training?

Perhaps it is our duty as members of the International Academy of Mediators to help mentor other mediators, not only to facilitate their own growth, but for the good of the practice so that those walking down this path have some guidance from those who have mastered the art. If teaching mediation elevates the perception (and reality) that we are the experts in our field in academic or intellectual processes, then surely mentoring will help solidify our positions as masters of the art. At the same time, we may gain valuable insight into our

own practice: perceptions that we can't access on our own about our demeanor, how we are perceived, the particular moves we make and why they are or are not effective. We have an opportunity not only to change people for the better, but also to change the practice (ours and others) for good – a long lasting impact that will benefit the field of mediation in invaluable ways for all.



DISPUTE RESOLUTION NEWS & INITIATIVES

Second Canadian Province Enacts Commercial Mediation Statute

Ontario has followed Nova Scotia in enacting a statute specifically addressing commercial mediation. Ontario's *Commercial Mediation Act of 2010* permits agreements reached in mediation to be registered and enforced as court judgments. Commercial mediation does not include disputes over insurance benefits, collective bargaining disputes, computerized mediation or informal attempts by judges or arbitrators to encourage settlement while presiding over litigation or arbitration proceedings. The statute requires certain disclosures by mediators relating to possible conflicts and bias and sets forth mediation confidentiality requirements. The statute is based on the UNCITRAL Model Law on International Commercial Conciliation, which has also been incorporated by several states in the U.S. when enacting the Uniform Mediation Act. The Ontario statute focuses on pre-litigation mediation and does not apply to the mandatory mediation provisions of the Rules of Civil Procedure. The statute took effect with commercial mediations that commenced on or after October 25, 2010 in Ontario or even outside the province if the parties rely on Ontario law. [Stikeman Elliott LLP](#) (November 5, 2010); [Law Times](#) (December 6, 2010)

Ireland Emphasizes Mediation and Conciliation for Cross-Border and Other Disputes

In response to the 2008 EU Directive requiring mediation of EU cross-border disputes beginning in 2011, Ireland's Law Reform Commission issued a 230-page report in November on new procedures for mediation in a broad range of areas, along with proposed legislation to carry out its recommendations. While instigated by the EU Directive, the report also thoroughly addressed alternative dispute resolution within Ireland, focusing on both mediation and conciliation and establish-

ing new court rules which took effect in November. Noting that the terms mediation and conciliation have often been used interchangeably, the five-member Commission urges differentiation so that mediation is always a facilitative process, while conciliation is advisory (e.g., evaluative). The report also gives close attention to confidentiality, among other issues, and proposes a privilege to exempt communications from disclosure, while setting out numerous exceptions.

[International Law Office](#) (December 16, 2010); [CPR](#) (December 3, 2010); [MII.ie](#) (November 16, 2010); Report; [2008 EU Directive](#)

Hong Kong Increasingly Emphasizes Mediation

Hong Kong is seeking to become a regional dispute resolution center and is focused on promoting mediation. At a mediation workshop of the International Chamber of Commerce, Hong Kong's Secretary for Justice stated that a mediation task force is being established to assist in implementing recommendations in a recent Report by a Working Group on Mediation. In addition to public education and promotion of mediation, the Report covered training and accreditation of mediators and the need for a mediation ordinance. The judiciary also has been promoting mediation in implementing Civil Justice Reform. In addition, the Secretary for Development in remarks at the International Construction Law Conference emphasized the importance of prevention of disputes through partnering and use of Dispute Resolution Advisors, as well as the high success rate of mediation in public works and other construction projects.

[7th Space Interactive](#) (November 12, 2010); [7th Space Interactive](#) (December 6, 2010)

Other International Mediation Developments

- HM Revenue & Customs sponsored several informal consultations in 2010 about mediation and appears to be eager to introduce mediation at a much earlier stage of the process in U.K. tax disputes. [Tax Journal](#) (December 16, 2010)
- U.K.'s Justice Minister seeks to reform legal aid and suggests that mediation may provide much of the answer. [IBB Solicitors](#) (November 9, 2010)
- Under Russia's new mediation law, which takes effect in January, employment disputes can be resolved through mediation, although further amendments to the law may be needed. [Moscow Times](#) (November 9, 2010)
- The Supreme People's Court of China promulgated Professional Ethics and a Code of Conduct for judges. Among the 96 articles in the new Code of Conduct are provisions intended to standardize judicial mediation. [Law Library of Congress](#) (December 28, 2010)
- The Papua New Guinea courts have introduced mediation in an effort to address a huge backlog of cases on their dockets. While the Chief Justice set a five year target, the Justice who chaired the rules committee says the impact has been immediate. [ABC Radio Australia](#) (December 30, 2010)
- New South Wales, Australia has replaced a plan for using private arbitrators to resolve planning appeals with legislation before parliament to streamline the court mediation system and have matters resolved in three months rather than six. [SMH.com.au](#) (November 23, 2010)
- New Zealand's leading independent rural advocacy organization is urging the Minister of Agriculture and Forestry to consider legislation for farm debt mediation services, as exists in both Canada and New South Wales, Australia. [Scoop.co.nz](#) (December 9, 2010)

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DISPUTE RESOLUTION NEWS & INITIATIVES (cont.)

Other International Mediation Developments (cont.)

- Mediation is becoming increasingly important in Jamaica, both through court-connected mediation with high settlement rates and by being woven into all other aspects of life, overcoming notable resistance in just a dozen years. [Jamaica Information Service](#) (December 11, 2010)

Medical Malpractice Mediation Useful, But Missing Doctors

A recent study of mediation in medical malpractice cases found there is significant value from the process, but less than is possible. Of the 31 cases studied from New York City nonprofit hospitals, nearly 70% settled during or after the mediation. However, no doctors participated in any of the mediations, which undermines the potential for additional benefits from enhancing future patient care or addressing the upset of patients and their families. Lawyers reported that the physicians' schedules were too full to participate in mediation. [WSJ Blogs](#) (December 15, 2010); [Health Leaders Media](#) (December 22, 2010); [Article in Journal of Health Politics, Policy and Law](#) (Subscription Required)

Minnesota Farmer-Lender Mediation Program Having Bigger Impact

The annual report on the Farmer-Lender Mediation Program in Minnesota shows further increase in the use of mediation in the program. In 2010, farm enterprises and lenders completed over 400 mediations involving \$624 million in debt, which was nearly double the amount in 2009. Creditors with secured debts over \$5,000 against agricultural property in Minnesota are required to offer mediation prior to judgment collection, repossession or foreclosure. Farmers choosing mediation have 90

days to work with lenders to renegotiate their debts.

[Cattle Network](#) (November 22, 2010); [2010 Report](#)

EEOC Reports Record Number of Mediation Resolutions

The U.S. Equal Employment Opportunity Commission reports that in fiscal 2010 it set records both for the number of charges received, at just under 100,000, and the number of resolutions in its mediation program, which were up ten percent. The agency also set a record for the amount of monetary relief obtained for individuals, at \$319 million, of which over \$140 million was obtained in mediations.

[New York Injury News.com](#) (December 11, 2010); [Press Release](#) (November 23, 2010)

Update on Home Foreclosure Mediation

- U.S. Vice President Biden announced steps to strengthen foreclosure mediation programs, along with other means of improving justice, at a Middle Class Task Force event. Biden's announcement was the result of work by the Department of Justice's Access to Justice Initiative, the Department of Housing and Urban Development and other agencies. DOJ and HUD issued a joint report encouraging expanded use of mediation as a way to prevent foreclosures. The report identifies over 25 programs and commends common features in the most successful programs as models. [U.S. Department of Housing and Urban Development](#) (November 19, 2010); [Mortgage Loan.com](#) (November 23, 2010); [Report](#) ■ The Mortgage Bankers Association, which represents the largest mortgage lenders in the U.S., opposes both manda-

tory and voluntary mediation programs, asserting that they are expensive and often merely delay foreclosure. Others view the mediation programs as 'incredibly successful' in light of a million foreclosures in 2010 and federal prevention programs falling short. [Think Progress](#) (December 31, 2010)

- Washington, DC enacted a foreclosure mediation statute that took effect on November 17 under which lenders must provide notice and an opportunity for mediation to homeowners prior to foreclosure. The DC Department of Insurance, Securities and Banking is to implement and enforce the law, and will appoint a mediation administrator and set the fee for mediation. Homeowners opting into mediation pay \$50 at most and will have 90 extra days to try to reach agreement to avoid foreclosure. [Washington Post](#) (December 3, 2010); [Washington Post](#) (November 12, 2010)
- A new foreclosure mediation program has begun in Luzerne County, Pennsylvania in which property owners meet first with a credit counseling agency prior to attending a mediation session facilitated by a county judge. Pro bono attorneys assist homeowners during the mediation. Courts in a number of other Pennsylvania counties are considering adding additional mediation programs to address the ongoing high level of home foreclosures. Some of the counties are emphasizing mediation for all types of debts, as a means of allowing both debtors and creditors to sidestep more formal processes that are often not satisfactory for either side. In addition to pressure from overflowing

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DISPUTE RESOLUTION NEWS & INITIATIVES (cont.)

- (cont.) dockets, courts are also responding to encouragement to add mediation programs from the Pennsylvania Supreme Court which recently convened a summit to review mediation programs in various counties. [The Times Leader](#) (December 20, 2010); [The Times Leader](#) (December 3, 2010); [Pittsburgh Tribune-Review](#) (November 14, 2010)
- The legislature of Hawaii has established a task force to make recommendations about how to improve the foreclosure process in the state. The chairman of the task force says it will be taking a close look at mediation, which is being strongly advocated by a local nonprofit organization. The challenges in Hawaii are increased by nearly all foreclosures involving mainland mortgage lenders. [Star Advertiser](#) (December 13, 2010); [KITV.com](#) (December 11, 2010)
- The mayor of Boston, Massachusetts has proposed requiring face-to-face mediation prior to mortgage foreclosures in the city. The proposal would require lenders to pay for mediation and would provide homeowners with assistance from a housing counselor prior to mediation. The Massachusetts Bankers Association strongly opposes the proposal due to concerns about cost and delay and an expectation that the outcome will not change. [Boston Herald.com](#) (December 13, 2010); [Boston Herald.com](#) (December 10, 2010); [WBUR.org](#) (December 10, 2010)
- The Nevada Supreme Court is considering a fifth set of amendments to Nevada's foreclosure mediation program to make further adjustments, and is holding a hearing and taking written comments on the proposed changes. [KVVU Las Vegas](#) (December 3, 2010); [KTNV](#) (November 10, 2010); [Proposed Changes](#)
- The Federal Reserve Bank of Cleveland found the Cuyahoga County, Ohio foreclosure mediation program to be a model for other areas seeking to address the high level of foreclosures. The Cuyahoga County program, which covers Cleveland, has about a 90% resolution rate, ranging from modification to deeds-in-lieu of foreclosure. While only about one-third of eligible borrowers sought mediation in 2010, that is up from one-fifth in 2009. [Housing Wire](#) (December 28, 2010)
- A year after the Florida Supreme Court required a foreclosure mediation program in every county, a statewide report shows that the process is struggling. While a third of homeowners who go to foreclosure mediation are able to obtain a resolution with their lender, few homeowners actually participate, resulting in agreements in only six percent of the cases referred to mediation. Many homeowners are difficult to reach or mistake the mediation program for a commercial service or scam. Moreover, problems with sloppy or fraudulent documentation has caused many lenders to change outside counsel, which has resulted in additional delays in foreclosure mediation. [Palm Beach Post](#) (December 29, 2010); [Palm Beach Post](#) (November 8, 2010)
- Connecticut's mandatory foreclosure mediation program has permitted 78% of homeowners who participated to avoid foreclosure and 63% to remain in their homes, although critics suggest that these numbers are out of line with the rest of the country and sound too good to be true. [Hartford Advocate](#) (December 14, 2010)

Cognitive Barriers Can Cause Needless Failures in Mediation

The way that parties and counsel think about and value their disputes are often influenced by a variety of cognitive barriers that cause poor decision making when trying to resolve the dispute. Fifteen of these barriers are briefly set forth, ranging from those that are more commonly known, such as Cognitive Dissonance, to those that may be less well known, such as Change Blindness.

[Metropolitan Corporate Counsel \(December 6, 2010\)](#)