



Associates in Dispute Resolution LLC

Mediation Arbitration System Design

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JUNE 2010 Dispute Resolution Update

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Dear Friends and Colleagues

This edition of Dispute Resolution Update features recent mediation cases and dispute resolution related updated gathered from around the country and around the world. The state court mediation case decisions found in the update include discussion of confidentiality, sanctions, and the validity of summary/oral mediation agreements. This information has been summarized by Keith L. Seat, a respected mediator and Editor of the International Academy of Mediator’s newsletter.

Over the last several years, it has been our custom to host a one-day continuing legal education event in Topeka. This year’s event will focus on dispute resolution techniques for both mediators and litigators. The event will be held on Friday, October 1, 2010, at the Associates in Dispute Resolution Lower Level Conference Room in Topeka, Kansas. We will seek approval for 6.0 Kansas CLE hours including 1.0 hour of Ethics. Additional information regarding this event will be provided in our August newsletter.

Finally, we continue to encourage readers to contribute cases, articles or other dispute resolution information for future publication. In addition, if you know of someone who would like to receive a copy of this newsletter directly, simply notify us at info@adrmediate.com.

Patrick Nichols

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2008-2009-2010 **Super Lawyers**

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RECENT MEDIATION CASES & UPDATES

California Appellate Court Holds Mediation Confidentiality Should Not Block Clients' Ability to Prove Claims Against Attorneys

A California appellate court split over whether clients are prevented by California's strict mediation confidentiality provisions from using evidence from mediation against their attorneys. In [Porter v. Wyner](#), the majority concluded that mediation confidentiality is only intended to shield communications between disputants and does not apply to communications between a party and that party's attorney. After a successful mediation yielded \$6.7 million relating to the education of the Porters' autistic son, the Porters and their counsel Wyner & Tiffany disagreed over payment terms between them that were worked out during the mediation. The majority of the court concluded that such attorney-client communications are not covered by mediation confidentiality, so no exception is needed to rely on them. The majority reversed the trial court and concluded that a new trial is not required due to the California Supreme Court's strict view of mediation confidentiality in its *Simmons v. Ghaderi* decision. The majority concluded that the attorney-client privilege covers communications between attorneys and clients, which should not be trumped by mediation confidentiality to prevent clients from waiving their privilege. It would not matter even if the mediator or opposing party were present during the attorney-client communications. However, the dissent notes that the key

conversation in issue only took place due to the mediation, and that while unchallengeable attorney malpractice during mediation raises policy concerns, it is up to the legislature and not the courts to provide a remedy. [Porter v. Wyner](#), No. B211398 (Cal. App. 2d Dist. April 8, 2010)

Information from Mediation May Be Used to Convict Party in Maine

Maine's modest mediation confidentiality provisions permit statements and conduct in mediation to be used in a separate proceeding to convict a party to the mediation. In [Maine v. Tracy](#), the Supreme Court of Maine concluded that a car purchaser was properly convicted of forgery for presenting a bill of sale marked "paid in full" during trial, when the purchaser had not made that claim during mediation but asserted only that a small payment had been made. Maine generally has not provided for mediation confidentiality, but a limited privilege that can be asserted by mediators took effect on January 1, 2010. However, statements in mediation are not inadmissible in proceedings with third parties or in other proceedings between the mediating parties that do not involve the subject matter of the mediation. Tracy also argued that his Fifth Amendment right against self-incrimination was violated because the mediator did not warn him that information from the mediation might be admissible in other proceedings. However, the Court expressly declined to require mediators in court-ordered mediations to warn against self-incrimination.

[Maine v. Tracy](#), No. Ken-09-357 (Maine March 25, 2010) (Subscription Required)

California Court Denies Sanctions Against Counsel Who Refused to Interpret Mediator's Communications to Their Clients

A federal district court in California declined to sanction plaintiffs' counsel for refusing to interpret so a mediator could present settlement offers and explanations directly to Spanish-speaking plaintiffs during a mediation which did not settle. The court rejected defendant's argument that plaintiffs' counsel did not mediate in good faith, noting that the mediation was not court ordered and there was no indication that direct communication would have resulted in settlement. The court suggested that if the mediator or the defendant felt that direct communication with plaintiffs was critical they should have ensured that an interpreter would be present during the mediation. [EEOC v. ABM Industries, Inc.](#), No. 1:07-cv-01428 (E.D. Cal., March 3, 2010) (Subscription Required)

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RECENT MEDIATION CASES & UPDATES (cont.)

Massachusetts Appellate Court Enforces “Agreement in Principle” Signed at Mediation

Summary judgment was upheld by the Massachusetts appellate court enforcing an “agreement in principle” which was signed at the end of a lengthy mediation process, even though the parties were later unable to agree on the more detailed settlement agreement intended. The court explained that an intention to draft a more complete agreement did not mean that the agreement in principle was unenforceable, since it was complete, sufficiently definite and the parties intended to be bound when it was signed. The court bolstered its conclusions by noting the course of the mediation effort over thirteen months, the intensity and duration of the final mediation session involving senior party representatives, and the involvement of a recognized expert mediator.

[Targus Group International v. Sherman](#), No. 08-P-113 (Mass. App. March 5, 2010)

Massachusetts Court Enforces Oral Mediation Agreement

The federal district court in Massachusetts enforced an oral agreement reached in mediation against an age discrimination claimant who changed her mind the morning after the mediation. The claimant refused to sign a written settlement agreement prepared by defendant which contained a seven day period for revoking consent (since it was an age discrimination case). The court noted that even though complainant could have backed

out if she had signed the agreement, she could not back out of the oral agreement since no mention had been made about rescission. The court didn't believe any more time was needed to consider the settlement terms beyond the duration of the mediation. The opinion did not discuss mediation confidentiality. The court did note that it was appropriate for the mediator to evaluate the case.

[Eswarappa v. Shed Inc./Kid's Club](#), No. 06-11169 (D. Mass. February 18, 2010)

Lack of Mediation Settlement in Michigan Does Not Provide Basis for Imposing Attorneys' Fees

After an unsuccessful mediation conducted as required by a living trust agreement, the probate court held an evidentiary hearing and awarded post-mediation attorneys' fees to one side as sanctions for the other side failing to settle in mediation. The Michigan appellate court reversed because there was no court rule, contractual or statutory basis for attorneys' fees following mediation.

[In re Hills Revocable Living Trust](#), No. 287285 (Mich. App. March 9, 2010) (Subscription Required)

Mediation Set to Address Access to SeaWorld Death Video

A Florida judge has ordered all interested parties to participate in mediation after granting a temporary injunction blocking release of video of a SeaWorld trainer's death by an orca. The mediation is expected to address privacy concerns along with the

public's right to information. Mediation in similar cases has sometimes resulted in press inspection of imagery without public disclosure. SeaWorld video from an underwater camera and a camera in the park's Sky Tower are at issue.

[CNN.com](#) (April 6, 2010);
[CNN.com](#) (March 26, 2010)

DOJ Mediation Eases Racial Tension in Florida Community

A routine traffic stop led to violence between police officers and a crowd in Lake Wales, Florida in November. After the local NAACP chapter began talks with the city, the U.S. Department of Justice began a mediation in December and reached agreement in March. DOJ used its new mediation program called City Site Problem Identifying and Resolving Issues Together (City SPIRIT). The Lake Wales agreement includes representation of African-American and other minorities in city government and budget decisions, as well as improving communications and cultural sensitivity through training programs.

[News Chief.com](#) (March 30, 2010)

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RECENT MEDIATION CASES & UPDATES (cont.)

Other Notable Cases and Proceedings

- Georgia appellate court affirms dismissal of litigation where plaintiff had not complied with mediation requirement in dealer contract. [Houseboat Store, LLC v. Chris-Craft Corp.](#), No. A09A1815 (Ga. App. March 11, 2010) (Subscription Required)
- Plaintiff's failure to appear at trial because mediation not completed leads to dismissal of litigation, which is upheld on appeal. [Maverick H. v. Givler](#), No. E2009-00253-COA-R3-CV (Tenn. App. February 24, 2010)
- The Federal Mediation and Conciliation Service assisted Major League Soccer and the

Major League Soccer Players Union with their collective bargaining agreement, reaching a new five-year agreement five days before the season opener. The sides met all day and night for two straight days to close the deal and avert a threatened strike. [Washington Post.com](#) (March 20, 2010); [ESPN.go.com](#) (March 6, 2010)

- A New Zealand court dismissed a mediating party's claim against their counsel for failing to advise them properly during mediation, resulting in a settlement they regretted. The court concluded that legal advice from counsel concerning settlement offers is required during mediation, but the legal

given had been correct. [Jung & Anor v. Templeton](#), CIV 2007-404-5383 (Auckland, New Zealand High Court, Justice Venning, November 5, 2009)

- Mediation held at City Hall in Jakarta resulting in an agreement over legendary cleric Mbah Priok's grave, which will not be relocated, but the entrance gate and pavilion will be shifted to avoid disrupting the activities of ports and terminals. A commission will study a master plan and a further mediation session will be held to finalize a memorandum of understanding. [Berita Jakarta.com](#) (April 15, 2010); [Berita Jakarta](#) (April 16, 2010)

DISPUTE RESOLUTION NEWS & INITIATIVES

Adoption of Mediation Being Considered by Russian Parliament

Detailed proposed regulations to establish mediation as a dispute resolution procedure were introduced in the Russian Parliament in March. Mediation has not previously been a part of Russian law. The proposed regulations would rely on voluntary mediation between parties to a dispute and would provide for confidentiality. The regulations would also establish quality standards for mediation services and some integration of mediation with arbitration and litigation. [Mondaq.com](#) (March 22, 2010) (Registration Required)

Italian Legislation Would Mandate Mediation Prior to Litigation

Legislation introduced in Italy would require mediation prior to litigation in civil and commercial disputes, including insurance and medical malpractice. Compulsory mediation is limited to four months and must be conducted by independent professional groups registered with the Italian Ministry of Justice. If mediation is not successful, either party may then file suit, but litigation costs may be awarded or withheld depending on whether the outcome of litigation differs from proposed settlement terms. The legislation, which would take effect in March 2011, is intended

to provide cost savings and help streamline Italy's overburdened judicial system. [Mondaq.com](#) (March 22, 2010) (Registration Required)

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DISPUTE RESOLUTION NEWS & INITIATIVES

Other International Mediation Developments

Jamaica willing to mediate dispute with U.S. over extradition of strongman to U.S. on drug and firearms charges. [Jamaica Observer](#) (March 14, 2010)

Ireland could save up to € 200 million per year by using mediation rather than litigation in state legal matters, according to a study based on over 400 Freedom of Information requests. [Irish Times](#) (March 6, 2010)

Elder mediation training expanding scope of services in **Ireland**. [Irish Times](#) (March 23, 2010)

Pakistan's Karachi Centre for Dispute Resolution, with assistance of the World Bank's International Finance Corporation, sponsors Women Mediation Week for female litigants. [Trading Markets](#) (March 13, 2010)

Non-governmental organization in **Nigeria** trains women in mediation and conflict transformation. [AllAfrica.com](#) (March 17, 2010)

Minister of Justice of **Rwanda** urges Senate to establish local Committees of Mediators to expand mediation capacity and rebuild trust and harmony. [All Africa.com](#) (April 21, 2010)

South Africa's new King III code for the first time requires corporations to consider alternative dispute resolution rather than just litigation. [TimesLive.co.za](#) (March 21, 2010)

Lawyers in **South Africa** should recommend mediation to clients or they may have their

fees limited. [IAfrica.com](#) (March 1, 2010)

Hong Kong's Secretary for Justice emphasizes greater use of mediation as key feature of Civil Justice Reform. [Stock Markets Review](#) (April 17, 2010)

Hong Kong Practice Direction 3.3 provides for voluntary mediation in shareholder and related disputes, in addition to PD 31. [HerbertSmith.com](#) (January 7, 2010)

Singapore seeks to resolve ethnic and religious differences through mediation. [Channel-NewsAsia.com](#) (March 5, 2010)

Florida Restricts Retired Judges from Using Title in Mediation Practices

The Florida Supreme Court has amended its rules relating to marketing for certified and court-appointed mediators. The Court concluded that retired judges may not use the title "judge" in marketing their mediation services, including letterhead and business cards, and may not appear in judicial robes in advertisements for mediation. Further, mediators may not suggest that prior judicial experience makes a better or more qualified mediator. In addition, new provisions in the rules limit how mediators may assert they are certified.

[In re: Amendments to Florida Rules for Certified and Court-Appointed Mediators](#), No. SC09-1384 (Fla. April 1, 2010)

Greensboro Launches Landlord-Tenant Mediation Program

The city of Greensboro, North Carolina is working with the Conflict Studies and Dispute Resolution Program of the University of North Carolina at Greensboro to launch a program to resolve disputes between landlords and tenants. The Landlord-Tenant Dispute Program has been developed

with input from stakeholders. The program is intended to reduce litigation, but depends on both sides voluntarily agreeing to participate. [Digtriad.com](#) (March 30, 2010); [Greensboro Press Release](#)

Washington State Moving to Extend Agricultural Mediation Program

Legislation is moving forward in Washington state to extend to 2015 the agricultural mediation program which began in 1987. The bill authorizes \$7.5 million per year, but less than \$4.5 million has been appropriated for the current fiscal year. Washington is one of 32 states which participates in the Certified State Agricultural Mediation Program, administered by the Farm Service Agency of the U.S. Department of Agriculture, which helps farmers resolve disputes with lenders and others in order to avoid litigation, appeals, bankruptcy and foreclosure, and may occasionally deal with rural housing, development and even civil rights.

[AgWeek.com](#) (March 8, 2010); [USDA Agricultural Mediation Program](#)

California County Mediation Agency Struggles to Maintain Funding

Marin County, California may lose its only agency providing general civil mediation services due to budget cutbacks. The agency currently handles 3,000 calls and 800 mediations a year with a small staff and volunteer mediators, receiving about half its expenses from the county and the other half from fees. The agency would like to raise fees and cut staff in order to keep its doors open, noting that it saves significant court

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DISPUTE RESOLUTION NEWS & INITIATIVES

resources as well as making the county a more peaceful and mentally healthy place to live. The County Administrator is skeptical whether agency action could replace the \$180,000 the county provides, but is willing to listen to cost cutting options.

[Marin IJ.com](#) (March 20, 2010)

Update on Home Foreclosure Mediation

Maryland has passed legislation requiring mediation between homeowners facing foreclosure and mortgage lenders, at the option of borrowers. The legislation builds on existing reforms by requiring lenders to work directly with homeowners on loan modifications. The program takes effect on July 1, 2010 and details are still being worked out. [Washington Post](#) (April 15, 2010); [Loan Safe.org](#) (March 17, 2010)

Outagamie County, Wisconsin judges have begun a program to encourage mediation prior to foreclosure. Foreclosure summonses must include information on the program. Lenders who do not cooperate risk not having

their foreclosures approved. Outagamie is the third county in the state to use the program, which was developed by Marquette University Law School, and three other counties may begin programs. [PostCrescent.com](#) (February 25, 2010)

The **Vermont** House passed legislation requiring mediation between lenders and homeowners prior to home foreclosure. One challenge is a shortage of trained mediators, but the Vermont Bar Association is setting up a training program for lawyers interested in providing mediation. [Business Week](#) (March 19, 2010)

Three banks have filed suit to block the foreclosure-mediation ordinance of **Providence, Rhode Island**, arguing that the city is preempted by state law on foreclosure. The ordinance was the first of its kind in the state when adopted in September; a similar foreclosure-mediation ordinance has since been enacted in Cranston. [Projo.com](#) (April 10, 2010)

Florida's new statewide mediation program to resolve foreclosure cases more quickly has moved slowly in the months since the Florida Supreme Court's order. The program is running in only four of the state's 20 judicial circuits – and three of the four already had foreclosure mediation programs. Logistical issues are a challenge, including the requirement that each program be run by a non-profit organization which is politically and professionally neutral and has resources sufficient for a high case volume. [Bradenton.com](#) (March 31, 2010)

The **Nevada** Supreme Court is considering a third set of rule changes since its Foreclosure Mediation Program went into effect last July. Among other things, the proposed changes would extend mediation timelines from 90 to 135 days, allow price opinion letters in place of appraisals, permit postponement of mediations upon agreement, and generally limit mediators to no more than three mediations a day. [LasVegas-Sun.com](#) (March 4, 2010)

UPCOMING CLE TRAINING INFORMATION

SAVE THIS DATE

FRIDAY, OCTOBER 1, 2010

FOR 6 HOURS OF CME CREDIT

Join us for our annual informative and interesting seminar:

Location:

Associates in Dispute Resolution, LLC

212 S.W. 8th Avenue (Lower Level Conference Room), Topeka, Kansas

MORE INFORMATION TO FOLLOW—STAY POSTED AND MARK IT ON YOUR CALENDAR!

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