



Associates in Dispute Resolution, LLC

Mediation | Arbitration | System Design

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Dispute Resolution Update

August, 2009

Dear Friends and Colleagues:

This edition of *Dispute Resolution Update* features recent mediation news and initiatives gathered from around the country and around the world. This information has been summarized by Keith L. Seat, a respected mediator and editor of the International Academy of Mediators newsletter. The article notes a recent decision by the Kansas Court of Appeals in *Santana v. Olguin*, in which a home-buyers lawsuit against the seller and realtor was dismissed because the parties failed to first proceed with mediation as required by the purchase contract. To review the *Santana* decision, [click here](#).

Readers may wish to note that on July 16, 2009, President Obama announced his pick to head the Equal Employment Opportunity Commission. His choice, Jacquelyn A. Berrien is currently the Association Director-Counsel of the NAACP Legal Defense & Educational Fund. Prior to that she served as a Program Officer in the Ford Foundation's Peace and Social Justice Program. She also previously served as a staff attorney with the Lawyers Committee for Civil Rights and the American Civil Liberties Union. She has taught in trial advocacy programs at Fordham and Harvard Law Schools and served on the Adjunct Faculty of the New York Law School. To review the White House Press Release, [click here](#). Ms. Berrien would assume the Chair position from Stuart Ishimaru, who has served as Acting Chair during the Obama Administration. Currently, there are two vacancies on the five-person Commission, and the Acting Vice Chair, Christine Griffin, has been nominated for deputy director of the Office of Personnel Management. The past Chair, Naomi Earp, served as a member of the EEOC after Mr. Ishimaru was appointed Acting Chair, and she resigned from the EEOC entirely in June 2009.

It has been our custom for the last several years to host a one-day continuing legal education event. This year's event will focus on mediation skills and is available to both mediators and litigators. The event is entitled *Creativity in Mediation: Skills, Strategies & Techniques for Success*. We will provide an in-depth look at gender in mediation, co-mediation, psychological barriers, commercial mediation techniques, family mediation techniques and distributive bargaining techniques. It will be held on Friday, September 25, 2009, at the Topeka Associates in Dispute Resolution Lower Level Conference Room. It has been approved for 6.0 Kansas CME hours and our application for 6.0 Kansas CLE hours is pending. For further information regarding this event, please [click here](#).

Larry R. Rute

Patrick R. Nichols

Distinguished Fellows
of the
International Academy of Mediators



2008-2009
Super Lawyers



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Court Refuses to Allow Plaintiff to Cure Failure to Mediate

A Kansas appellate court affirmed dismissal of a homebuyer's lawsuit against the seller and realtor for failure to first proceed with mediation as required by the purchase contract. When confronted with the defense of failure to mediate, the homebuyer sought to mediate and moved to compel mediation. But the court concluded it was too late and dismissed the litigation, even though the contract provision did not expressly state that the mediation must occur prior to filing suit. The court ruled that when parties contractually agree to mediate they should not be able to continue with their litigation by late compliance with their obligation, as delayed mediation cannot fully achieve its goals.

[Santana v. Olguin](#), 2009 WL 1491383 (Kan. App., May 29, 2009)

Court Holds that Litigation Damages Cannot be Based on Amount Set in Mediation

A Georgia appellate court reversed a trial court's judgment which relied on the amount agreed upon in mediation with a third party as the measure of consequential damages. The mediation agreement was not performed after discovering the product was defective, but the appellate court concluded that the failure to carry out the mediation agreement was not directly attributable to the breach of warranty, and that the amount agreed to in mediation was not causally connected to the defective product.

[Sunstate Indus., Inc. v. VP Group, Inc.](#), No. A09A0635 (Ga. App., June 26, 2009) (Subscription Required)

Early Resolution of Multi-Party Mining Disaster Achieved in Mediation

The 2007 Crandall Canyon mine disaster wrongful death and personal injury lawsuits were resolved in mediation for more than \$22 million. The complex cases involved more than 100 participants, including sixteen groups of family plaintiffs, seven defendants, six primary insurance companies, additional secondary insurers, plus four employers. Participants considered the mediation to be challenging, with a weeklong mediation session, followed by negotiations among counsel, and a final marathon day of mediation. However, settlement was reached prior to any depositions in the case and saved an estimated five years of litigation and a huge emotional and financial toll.

[Salt Lake Tribune](#) (May 30, 2009)

Pennsylvania County Mediation Program Criticized for Resolving Property Reassessment Challenges

All 400 cases mediated with property owners who challenged their property assessments have settled since Luzerne County's mandatory mediation program began in December 2008. To settle the challenges, reductions in assessed value amounting to \$31.6 million have been made. The Pennsylvania county's reassessment company is arguing in court that the county is contractually required to pay the company to defend assessment appeals and to participate in the mediations, which it opposed. The company, which has been paid \$8 million for its reassessment work, alleges that the modifications have been made without adequate basis, reducing tax and school revenues by hundreds of thousands of dollars, but the county stands behind the mediation process. The county has about another 1,600 mediations to go.

[Standard Speaker](#) (May 26, 2009); [The Times Leader](#) (May 28, 2009) (Subscription Required); [The Times Leader](#) (June 30, 2009) (Subscription Required)

Maine Considering Uniform Mediation Act

The legislature in Maine is considering the Uniform Mediation Act (UMA) in order to establish confidentiality for mediation communications, with specified exceptions. The legislation is intended to encourage greater use of mediation and generally follows the UMA language of the National Conference of Commissioners on Uniform State Laws. The UMA has been adopted thus far in the District of Columbia and ten states: Idaho, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont and Washington state. Legislation to adopt the UMA is also currently being considered in Hawaii and Rhode Island.

Maine H.B. 968; LegAlert (April 2, 2009) (Subscription Required)

Agricultural Commission May Become Mediation Board

Following a model suggested by the state, a proposed town "right to farm" bylaw would provide information to people moving near farms and begin a mediation program for disputes that arise between farmers and their neighbors. The bylaw of the Massachusetts' town would establish the mediation service in the Agricultural Commission as a first resource for disputes. *The Republican (April 7, 2009)*

Climate Change Disputes May Benefit from Mediation

Increasing numbers of lawsuits and disputes are arising from climate change allegations, which are being taken more seriously by the courts. The cases are complex and often involve multiple parties, so are often well suited to mediation where a skilled mediator can help the parties work through the issues to reach better outcomes, including sophisticated solutions that could not be achieved in other ways. However, a few cases do need judicial or political decisions on the scope of rights and remedies.

Fulton County Daily Report (April 10, 2009) (Subscription Required)

Foundation Frequently Uses Mediation to Assist Seriously Ill Patients

A national non-profit, the Patient Advocate Foundation, relies on mediation to ensure that patients with life threatening or debilitating diseases have adequate access to care or receive other needed assistance. The Foundation's annual Patient Data Analysis Report states that over 48,000 matters were successfully managed for patients last year using mediation or arbitration. The report noted that 93% of patients helped by the Foundation had some health insurance, but were often "underinsured" and lacked the ability to obtain the coverage needed.

PR Newswire (April 29, 2009)

Recession Shifting Disputes to Mediation

Commercial mediators and mediation groups note that corporations may be waiting to initiate litigation in some disputes in order to save costs, but many other conflicts are being brought into mediation more quickly than in the past in order to minimize litigation costs. Moreover, some mediators note that parties may be more amenable to settlement now than in the past, given the pressure on litigation budgets. The weak economy is reawakening clients and advocates to the benefits of mediation, which could well lead to permanent increases in the use of mediation, especially in mid-Atlantic states and other regions of the country that have been slower to shift to mediation.

Pennsylvania Law Weekly (March 23, 2009) (Subscription Required)

Wisconsin Smart Growth Requirements Provide Mediation Opportunities

Wisconsin counties, cities and towns are required to complete comprehensive smart growth plans covering utilities, economic development, housing, transportation, intergovernmental relations and more under the Wisconsin Comprehensive Planning Law, enacted in 1999, which contains a deadline of January 1, 2010. The state has been offering \$2 million a year in grants to help local governments develop their complex plans, which can be aided by mediation, especially in furthering cooperation among communities. Completed smart growth plans range from 100 to 500 pages in length. Once the January 1 deadline arrives, local governments may only take action consistent with their comprehensive plans. The Department of Administration maintains a roster of dispute resolution providers who can assist in intergovernmental and related issues.

[Wisconsin Law Journal](#) (May 25, 2009)

Georgia Regulations Require Mediation or Facilitation of Conflicts over Smart Growth Plans

Final regulations of the Georgia Department of Community Affairs require that mediation or facilitation by a third party neutral be used when conflicts arise from efforts to plan for smart growth in the state. Details of the alternative dispute resolution processes are set forth, including a 90-day deadline which may be extended. The goal is to improve regional and state communication about planning and growth management issues.

[RegAlert](#) (June 10, 2009) (Subscription Required)

Washington County Requires Mediation of Land Use Disputes

The commissioners of Kitsap County, Washington now require mediation of land use disputes prior to seeking a hearing examiner decision, which may result in an appeal to the county commissioners. The effort to require mediation began after a controversial case involving three appeals was settled late in the process; the commissioners decided to encourage parties to get straight to the compromise and avoid the appeals.

[Kitsap Sun](#) (June 24, 2009)

Legislation Introduced to Extend Federal Agricultural Mediation Program

The Certified State Agricultural Mediation Program, administered by the Farm Service Agency of the U.S. Department of Agriculture, helps farmers resolve disputes with lenders and others in order to avoid litigation, appeals, bankruptcy and foreclosure. Legislation has been introduced to extend by five years the Mediation Program, which provides matching federal grants to 35 states.

[WIBW](#) (June 26, 2009); [USDA Agricultural Mediation Program](#)

Early Mediation Becoming More Common in Midwest

Mediators and counsel in the Chicago area report seeing many more commercial disputes being mediated prior to litigation being filed. Some attribute it to the economic climate, while others believe it may be the natural result of court programs encouraging parties to mediate. The Cook County Circuit Court's Law Division began a mediation program five years ago, while the Court's Chancery Division began its mediation program in early 2007, both of which result in hundreds of mediated cases each year. While counsel are more willing to work out disputes earlier, some also observe that lawyers are increasingly reluctant to pay a mediator until after they first try to settle the matter through direct negotiations.

[Chicago Daily Law Bulletin](#) (June 25, 2009) (Subscription Required)

Update on Home Foreclosure Mediation Efforts

A detailed 66-page report analyzes the home foreclosure crisis in the **U.S.**, surveys the status of state mediation programs addressing home foreclosures, suggests best practices, and urges a significant federal government role in mandatory mediation. [Center for American Progress](#) (June 22, 2009); [Report](#)

- **Nevada** has enacted legislation requiring lenders to meet with homeowners who may request mediation if they receive a foreclosure notice. The program takes effect on July 1 and may generate up to 1,500 mediation requests a month, as Nevada has the worst foreclosure rate in the country. The first mediations will be conducted by senior judges and settlement judges; more than 350 lawyers who have expressed interest in acting as mediators, but must both be experienced and receive training. The costs of mediation are to be shared, with homeowners and lenders paying \$200 each. The Nevada Supreme Court issued rules for the mediation program after holding public hearings. [Mercury News](#) (June 17, 2009); [Mediation Rules](#) (June 30, 2009); [Foreclosure Mediation Website](#)
- **Connecticut** has passed legislation that as of July 1 makes mandatory the foreclosure mediation program that was previously voluntary. About 60% of homeowners in the voluntary program have been able to stay in their homes, but only about one-third of those eligible for the mediation program have used it. The program has been funded through a \$5 million grant, but additional funds may be needed. The mediation program's 30-person staff (including 12 mediators) is expected to more than double along with its caseload. [Connecticut Law Tribune](#) (June 8, 2009)
- Emergency legislation was enacted in **Maine** to create an optional home foreclosure mediation program and provide additional counseling for homeowners. Maine's bill, modeled on similar legislation in Connecticut, takes effect on July 1. [LD 1418 Status](#); [Bangor Daily News](#) (June 12, 2009)
- A **Florida** Supreme Court task force is exploring the possibility of a statewide mandatory foreclosure mediation program in light of worsening conditions in Florida, which has the second highest rate of foreclosures in the nation (after Nevada). [Miami Herald](#) (May 14, 2009)
- The governor of **Minnesota** vetoed a home foreclosure mediation bill that would have required lenders to participate in mediation at the request of homeowners facing foreclosure. The legislation was opposed by the Minnesota Bankers Association. By contrast, a foreclosure mediation program continues to move forward in **Wisconsin** with money from a settlement with Countrywide Financial Corp. [Bizjournals.com](#) (May 20, 2009); [Arbitration Forum Blogspot.com](#) (May 28, 2009)

New Venture Features Lawyer-Accountant Co-Mediation

The Institute of Chartered Accountants in England and Wales and the ADR Group launched a new mediation service in June with a roster of senior and well-known mediators, including some fellows of the International Academy of Mediators. The new service distinguishes itself by relying on both a lawyer and an accountant to mediate the dispute. The combination is intended to increase emphasis on practical business solutions along with legal analysis.

[Times Online](#) (June 9, 2009); [Website](#)

Elder Mediation Service Launched to Address Dementia Issues

The Alzheimer Society of Ireland launched a pilot elder mediation program to assist families coping with dementia. Family members are often involved and deeply affected by a relative with dementia; the new model of elder mediation services may help address the resulting stress and family conflict.

[Irish Medical Times](#) (June 22, 2009)

New Chinese Law Provides for Mediation of Rural Land Disputes

China's top legislature enacted legislation on mediation and arbitration of rural land contract disputes. The law is to ensure rural stability by addressing the growing number of disputes resulting from allocating publicly-owned farmland to individual households using long term contracts. Over 50,000 land dispute cases arose from 2003 to 2008. Arbitration has been used in land disputes since the late 1990s, with patchwork arbitration regulations in 23 provinces. Under the new national law, when a land dispute arises the parties can negotiate directly or obtain mediation assistance from a village committee or local government. The law recommends that local officials encourage use of mediation. If mediation is not successful, the parties can apply for arbitration or go to court. The law takes effect January 1, 2010.

[Xinhua Economic News](#) (June 29, 2009) (Subscription Required)

Other International Mediation Developments

JAMS established its first international alternative dispute resolution (ADR) center in **Italy** and may open additional locations in Europe. [The American Lawyer](#) (May 22, 2009)

Latest survey of **U.K.** construction litigation by the Technology and Construction Court and King's College, London finds evidence of increasing use of mediation with significant costs savings. [Building](#) (June 5, 2009) (Subscription Required); [Mondaq News Alerts](#) (May 19, 2009)

Benefits of mediation are particularly significant when dealing with intellectual property in an international context. [Lawyer](#) (U.K.) (May 25, 2009) (Subscription Required)

Nigerian High Court Justice encourages Nigerian Bar Association to focus attention on mediation and other forms of ADR in commercial cases. [AllAfrica.com](#) (May 25, 2009) (Subscription Required)

Pakistan's Ministry of Law is considering amendments to mandate mediation in all cases prior to arbitration or litigation. [Business Recorder](#) (June 24, 2009) (Subscription Required)

World Bank's International Finance Corporation encourages development of banking mediation in **Pakistan**. [Daily Times](#) (May 5, 2009)

Nepal's six mediation centers are making progress, and may expand by another 20, but face challenges. [eKantipur.com](#) (May 24, 2009)

Four-day judicial mediation exchange program between **China** and U.S. held in Jilin Province with 60 judges and experts. [Xinhua](#) (June 17, 2009)

Victoria, **Australia** turns to international expert on judge-led mediation to educate judiciary prior to pilot mediation program. [The New Lawyer](#) (May 12, 2009)

Fiji's employment mediation service exceeding goals with 84% success rate since inception. [Fiji Daily Post](#) (May 14, 2009)

First **Asian Mediation Association** conference to be held in Singapore. [Business Times \(Singapore\)](#) (May 22, 2009) (Subscription Required)

Associates in Dispute Resolution, LLC

FRIDAY, SEPTEMBER 25, 2009

JOIN US FOR

Creativity in Mediation: Skills, Strategies & Techniques for Success

**At our offices in Topeka, Kansas located at:
212 SW 8th Avenue, Lower Level Conference Room,
Topeka, Kansas**

We offer an advanced training designed to enhance the skills of attorneys, business professionals and experienced mediators.

	8:15 am to 8:50 am	Registration
	8:50 am to 9:00 am	INTRODUCTIONS
	9:00 am to 9:50 am	<i>Gender in Mediation: Negotiation & the Gender Divide</i> (Kathy Perkins)
	9:50 am to 10:40 am	<i>Co-Mediation as a Valuable Settlement Technique</i> (Larry Rute, Michelle Minor and Art Thompson)
Kansas	10:40 am to 11:00 am	BREAK
6.0 CME Hours	11:00 am to 11:50 am	<i>Psychological Barriers to Settlement</i> (Patrick Nichols and Kathie Nichols)
6.0 CLE Hours	11:50 am to 1:00 pm	LUNCH (provided) (Guest Luncheon Speaker)
	1:00 pm to 1:50 pm	<i>Best Practices in Commercial Mediation</i> (Larry Rute)
	1:50 pm to 2:40 pm	<i>Best Practices in Family Mediation</i> (Patrick Nichols, Gary Kretchmer & Bill Ebert)
	2:40 pm to 2:50 pm	BREAK
	2:50 pm to 3:40 pm	<i>Negotiating for Dollars: Distributive Bargaining</i> <i>Techniques in Monetary Settlements</i> (Henry R. Cox)
	3:40 pm	ADJOURNMENT

**For more information to come, visit our web site at
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