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Dispute Resolution Update

February, 2010

Dear Friends & Colleagues,

In this edition of our newsletter, we are featuring an article written by ADR partner Larry R. Rute published in the January edition of the *Journal* of the Kansas Bar Association. With permission of the Kansas Bar Association, Larry's most recent article, *The Evolution of Commercial Mediation in the Midwest: Best Practices, Confidentiality and Good Faith* may be viewed by [clicking here](#).

This edition also features dispute resolution news and initiatives from around the country and around the world. In particular, see the update on [home foreclosure information](#) in the states of California, Florida, Maine and New York. This information has been summarized by Keith L. Seat, respected Mediator and Editor of the International Academy of Mediators monthly newsletter.

Finally, we encourage you to pass along the newsletter to any interested colleague. If you know of someone who would like to receive the newsletter directly, simply notify us at info@adrmediate.com

Larry R. Rute

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Distinguished Fellows
of the
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Sanctions for Bad Faith Mediation Overturned Due to Confidentiality

Sanctions against a doctor for refusing to waive a "consent to settle" provision in court-ordered mediation of a medical malpractice case were overturned by an Ohio appellate court based on mediation confidentiality. The court concluded that a statement by the doctor's counsel that the doctor had never given consent to settle the case was a privileged mediation communication which could not be used to determine bad faith. None of the exceptions to the privilege applied. A concurring opinion added that a doctor refusing to waive a consent to settle provision is no different than any party refusing to make a monetary offer of settlement, which is permissible. Nor is there any obligation on a party to inform the other side at the beginning of mediation that they have no intention to make an offer, as positions may well shift during the course of the mediation.

[Anthony v. Andrews](#), No. 2008-P-0091 (Ohio App. 11 Dist., December 7, 2009)

Indiana Applies Narrow Concept of Mediation Confidentiality

Despite assertions of mediation confidentiality, an Indiana appellate court affirmed the trial court's order requiring disclosure of the amount of a mediated settlement agreement in a related case. The court simply focused on the evidentiary rule that compromising a claim is not admissible to prove liability, but is admissible for other purposes, such as determining the amount to garnish in the case before the court.

[Buchanan v. Consolidated Brokers Corp.](#), 2009 WL 3518003 (Ind. App., October 30, 2009)

Expansion of Florida Statute Requiring Mediation Notice Applied Retroactively to Insurers

A Florida appellate court determined that amendment of a Florida statute expanding mediation requirements to commercial residential insurance, such as condominium associations, applies retroactively to contracts formed prior to the amendment. The court analyzed a balancing test to determine whether the impairment of the contract is constitutionally tolerable, and concluded that impairment is minimal since mediation is non-binding, mediation costs are less than conducting an appraisal, insurance is already regulated, and there is no immediate harm or ongoing change in the contractual arrangements. The court found that minimal impact outweighed by the state's express purpose in expanding mediation requirements to address a substantial economic issue.

[Florida Ins. Guaranty Assoc. v. Devon Neighborhood Assoc.](#), 2009 WL 4283084 (Fla. App. 4 Dist., December 2, 2009)

Court Clarifies North Carolina Mediation Process for Disputes Between School Board and County over Funding

A North Carolina appellate court interpreted the detailed provisions requiring mediation of funding disputes between the board of education and the board of county commissioners and determined that appropriation of more school funds by the county does not again trigger the notification and statutory mediation process if the amount is still considered insufficient by the school board. If the mediation has not been successful by the statutory deadline, the mediator must declare impasse, which triggers the right to file suit and gives the court subject matter jurisdiction.

[Duplin County Bd. of Educ. v. Duplin County Bd. of County Com'rs](#), 2009 WL 3837004 (N.C. App., November 17, 2009) (Subscription Required)

Tribe Seeks Mediation of Ongoing Dispute with Canada Border Services Agency

A dispute over the arming of Canada Border Services Agency officers at a station on the reservation of the Mohawk Council of Akwesasne has festered for many months despite attempts at dialogue and visits by several Members of Parliament. The tribe has been suggesting mediation since the beginning of the conflict. Both sides may finally be leaning toward mediation as the only way to resolve the issues.

[Watertown Daily Times](#) (November 5, 2009)

Appellate Mediation Experience Differs Across States

Mediation programs for litigated cases on appeal are developing around the country, such as the pilot mediation program beginning in Maryland's Court of Special Appeals. Maryland hopes to reduce the 1,300 civil appellate cases heard each year by the court, and will conduct its pilot program for at least a year. However, a pilot appellate program in the Arkansas appellate courts has been slow to develop. After a year, only a couple of appellate cases have been mediated in Arkansas's voluntary program. The state Supreme Court justice who oversees the program suggests a key difference is that Arkansas does not have the congested court dockets of other states.

[Daily Record](#) (November 22, 2009); [Arkansas Times](#) (November 19, 2009)

Texas Gives Patients Right to Mediate "Balance Billing" Claims

Texas has enacted legislation allowing patients in preferred-provider or state benefit plans to mediate whenever they would have to pay over \$1,000 for services of out-of-network doctors received at in-network hospitals. The Texas Department of Insurance is drafting rules to implement the statute, which takes effect in September 2010. An informal telephone call between the parties must occur within 30 days of the patient's request for mediation, and the full mediation session must be conducted within 180 days. Mediators will be appointed by the Texas Office of Administrative Hearings.

[Star-Telegram.com](#) (November 25, 2009)

Texas Mediation Program for Hurricane Ike Claims Has Few Takers in First Months

After lengthy consideration, the Texas Department of Insurance launched a mediation program on September 1 for Hurricane Ike claims, but has received only a handful of requests for mediation. The Department allows insurers not to participate in the program, so only three companies covering one-fourth of the state's property insurance have chosen to do so. Further, the program relies on insurers to do outreach to claimants, resulting in a modest number of letters being sent to policyholders and raising concerns that the companies may cherry-pick who they contact. The mediation company chosen to manage the program has been prevented by the state from advertising the availability of the program, so has mediated only six Hurricane Ike cases – all of which settled.

[Chron.com](#) (November 5, 2009); [KHOU.com](#) (November 25, 2009)

Minnesota Farmer-Lender Mediation Program Seeing Much Greater Use

The annual report on the Farmer-Lender Mediation Program in Minnesota shows a significant increase in the use of mediation over the last year. Farmers made about 1,200 requests for mediation in the program in 2009, an increase of 86 percent over 2008. The total amount of debt involved was \$322 million, more than double 2008. Over a third of the debts have been restructured or resolved, while about 45 percent are still pending in mediation. 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.

[UM News](#) (November 4, 2009); [2009 Annual Report](#)

Congress May Require Auto Makers to Mediate with Rejected Dealers

Several bills have been introduced relating to the economic rights of automobile dealers rejected by auto makers in which the federal government has an ownership interest. Negotiations over the federal legislation have included the issue of whether arbitration or mediation might be a useful process for dealers who lost franchises. Chrysler and GM reportedly agreed to offer an arbitration process to affected dealers, but dealers have sought mediation instead.

[WSJ Online](#) (December 10, 2009)

Other Notable Cases and Proceedings

- After a year of mediation, insurance broker Marsh & McLennan agrees to pay \$400 million to settle class action claims of bid-rigging. [AmLawDaily](#) (November 13, 2009)
- Comverse agrees in mediation to pay \$225 million to resolve a securities class action case over backdated stock options. The long mediation first determined the amount of settlement and then determined how payment would be made, with a contingency plan in case the initial approach doesn't work. Out of 39 options backdating class actions, 22 have now settled, nine have been dismissed and nine are still pending. [AmLaw Litigation Daily](#) (December 18, 2009)
- The Kansas Attorney General announced that successful mediation has prevented the closing of the only hospital in Pawnee County. While several due diligence and approval steps remain, transfer of ownership is to be completed by March 1. [Hutch News.com](#) (December 23, 2009)
- A dispute over the terms for ongoing rebroadcast of Sinclair signals over Mediacom stations – including New Year's bowl games – resulted in mediation that was not immediately successful but was followed by postponement of the December 31 deadline and ultimate agreement. [PNJ.com](#) (December 22, 2009); [TH Online](#) (December 31, 2009); [National Journal.com](#) (January 7, 2010)
- San Diego Gas & Electric Co. has begun a four month mediation with county officials, school leaders, consumer advocates and firefighters to determine how to balance cutting power to prevent wildfires against the burden on users of electricity. The California Public Utilities Commission encouraged a better balancing, finding the initial proposal to cut power during certain weather conditions ill-conceived. [Sign on San Diego.com](#) (December 19, 2009)
- County government and public school officials mediated for ten hours, but could not resolve a dispute over collecting taxes for the school district, which one party lamented was a \$7,000 issue that was likely to cost \$300,000 to \$400,000 to litigate. [Beeville Bee](#) (December 21, 2009)
- A town meeting is scheduled to discuss an agreement reached in mediation between the town and a former secretary who was awarded \$1.3 million after suing under the state's whistleblower act. The town's insurance will pay at least 50% of the settlement, leaving the town to pay no more than \$450,000. The Board of Selectmen must approve any settlement before it is final, but doesn't plan to act until after the informational town meeting. [Norwich Bulletin](#) (December 14, 2009); [Norwich Bulletin](#) (December 16, 2009)
- Mediation over attorneys' fees yields \$190,000 for ACLU's efforts in bringing a class action against the county for conditions in the county jail. The Canyon County, Idaho board unanimously approved the compromise to keep from further increasing costs. [Idaho Statesman](#) (November 19, 2009)
- Litigation has been filed seeking a new evaluation of the Federal Highway Administration's plans for the Ohio River Bridges Project, which is likely to cost over \$4.1 billion. Both sides have agreed to seek the help of a mediator to try to resolve the matter. [Courier-Journal](#) (December 23, 2009) (Subscription Required)
- Racially motivated attacks on three Asian college students resulted in a confidential agreement between the victims and four attackers after months of mediation. Despite the voluntary nature of the settlement, a national civil rights organization complained about the secrecy of the process and the need for publicizing the consequences to deter similar behavior. [Lancaster Online.com](#) (December 20, 2009)
- After more than 140 incidents over the course of a year between two feuding Traveler families in Ireland, an American gang-violence mediator was able to broker peace between them. However, a recent murder may lead to renewed violence. [Irish Times](#) (December 21, 2009)
- The mediation program instituted in 2008 for Montana grain shippers to resolve disputes over grain freight rates with BNSF Railway has been triggered by a signed complaint from a wheat producer. Under the program, the issues will be mediated within thirty days and, if not resolved, will then go to binding arbitration. [Great Falls Tribune](#) (November 24, 2009)
- Louisiana is seeking mediation over the refusal of the U.S. Army Corps of Engineers to use the 60 million tons of sediment dredged from the lower Mississippi River each year to rebuild wetlands due to higher expense. The Coastal Zone Management Act permits a state to seek mediation if federal action is inconsistent with the state's coastal management plan. [Huffington Post](#) (November 24, 2009); [Nola.com](#) (November 29, 2009)
- Mediation is scheduled between the homeowners of two islands and a local government in Florida about where sand to be dredged from Destin harbor by the U.S. Army Corps of Engineers should be placed; both islands seek beach replenishment. [Destin Log](#) (December 18, 2009)

JAMS Proposes Mediator-in-Reserve Process for International Arbitrations

JAMS has proposed a new process that would encourage parties beginning an international arbitration to select a mediator who would be used only if the parties decide to turn to mediation during the arbitration. Such circumstances could arise when the arbitration is delayed, issues threaten to derail it, or if the arbitrator encourages the parties to consider mediation at some point during the proceedings. Under the JAMS proposal, the arbitrator would not know whether the parties had selected or used a mediator during the arbitration. There would be no cost for selecting a mediator-in-reserve unless the parties decide to actually mediate.

[JAMS](#) (November 23, 2009)

Archdiocese Resolves Nearly All Clergy Abuse Cases Through Mediation

The latest figures from the St. Louis Archdiocese show that it spent \$350,000 last year on victims abused by priests and more than twice that on its lawyers, although over the past ten years victims received \$7.6 million while its lawyers were paid \$5.9 million. The archdiocese set up a mediation program in 2003. An attorney for the archdiocese states that it attempts to address credible cases through mediation and has resolved up to 90 percent of the cases that way.

[Kansas City.com](#) (November 16, 2009)

[Update on Home Foreclosure Mediation](#)

The Foreclosure Mandatory Mediation Act, [S. 2912](#), was introduced in the Senate in December by Senator Nelson (D-Fla.). The **federal** legislation would require mandatory mediation by lenders of loans with federal guarantees or federal insurance. The required one-time mediation would involve both the mortgagor and a housing counseling agency and would be paid for by the lender. [US Federal News](#) (December 30, 2009) (Subscription Required)

- The **Florida** Supreme Court is creating a state-wide managed mediation program in an effort to help more homeowners avoid foreclosure. All new foreclosure cases involving primary residences will be referred to mediation once Florida's 20 judicial circuits issue administrative orders, which may take months. Homeowners must see a foreclosure counselor to be eligible for mediation. Lenders are responsible for mediation costs, which are capped at \$750. Tenants can opt into mediation, but must share costs with the lender. Mediators must be from non-profit organizations which can sustain operations without any payment from the courts. The program also requires statewide data collection on mediation outcomes. [Bradenton Herald](#) (December 29, 2009) (Subscription Required)
- The governor of **New York** signed legislation extending to all mortgage borrowers the mandatory settlement conference and other requirements that previously applied only to subprime loans. But success has been elusive, in part because it is difficult to get homeowners to participate in the conferences. In one district 25 percent of borrowers were no-shows at the settlement conference, which are conducted by a single judge or his law clerk. In that district only 28 percent of the conferences held have been successful, but that contrasts favorably with the much larger dockets of Brooklyn and Queens, where less than 10 percent of the meetings have been successful. [Buffalo News](#) (November 28, 2009)
- Concerns are being raised about the mediation program in **Nevada**, with some homeowners feeling that lenders are not willing to negotiate in good faith. Senate Majority Leader Harry Reid (D-Nev.) specifically challenged the Bank of America to do more in Nevada, stating that mediators had reported bad faith by the Bank of America in seven of its eight mediations since Nevada's program was launched in August. Over 3,400 homeowners have sought mediation in Nevada, with a little over ten percent having mediated thus far; 75 additional mediators are being sworn in to bring the total in the state to 170. [Las Vegas Sun](#) (December 1, 2009); [KRNv.com](#) (December 1, 2009); [Mercury News](#) (November 25, 2009); [Mercury News](#) (December 11, 2009)

Update on Home Foreclosure Mediation (continued)

- Lenders are increasingly relying on counsel as the foreclosure process in **Nevada** moves from what they viewed as a streamlined process to one with more uncertainty on how things will unfold in mediation. While mediation does not require legal representation on either side, lenders see more homeowners appearing with counsel; some law firms are advertising their services to homeowners headed for mediation. Lawyering up is the natural response, some say, to avoid “bringing a knife to a gun fight.” LVBusinesspress.com (November 30, 2009)
- The **Connecticut** governor and legislators are proud of making foreclosure mediation programs mandatory, resulting in additional benefits to homeowners, with nearly 4,500 cases handled in the program through October and a settlement rate of 75%. Greenwich-Post.com (November 27, 2009)

International Mediation Developments

- The cost of mediation may be recovered as part of litigation costs if a party does not follow the spirit or letter of the pre-action protocol in the **U.K.** Boyesturner.com (November 30, 2009)
- The Chancellor of **Germany** proposed individuals to be the country’s first “credit mediator” and work with banks and companies to spur loans and avoid the risk of a credit crunch; a mediator has been selected and mediation may begin March 1. Bloomberg.com (November 27, 2009); [WSJ Online](http://WSJOnline.com) (December 2, 2009) (Subscription Required)
- New mediation and arbitration procedures in **Italy** provide additional options to small investors and consumers. [Mondaq](http://Mondaq.com) (December 23, 2009)
- The National Union of mediators in **Romania** holds its first annual congress at the Romanian Parliament, with a focus on mediation as a foundation for Romanian society. PR.com (December 6, 2009)
- The promotion and use of mediation is considered important to **Macedonia**’s bid for EU membership. [BBC International Reports](http://BBCInternationalReports.com) (November 24, 2009) (Subscription Required); [Balkan Insight](http://BalkanInsight.com) (November 23, 2009)
- Commercial mediation begins in **Morocco** with resolution of a dispute between the bar association and a health insurance company; USAID sponsored commercial mediation training. USAID.gov (November 2009)
- A pool of mediators is being trained in **Dubai, U.A.E.** for three recently established mediation programs. [National](http://National.com) (December 19, 2009), Gulfnews.com (November 29, 2009)
- **India** begins a pilot project in five states for mediation centers to handle consumer cases, with assistance from a German group. [Express buzz](http://Expressbuzz.com) (December 26, 2009)
- Legislation authorizing mediation in **Nepal** is sent to the cabinet, after which the final step is action by the parliament. [Republica](http://Republica.com) (December 10, 2009)
- The Securities Commission of **Malaysia** is preparing a mediation framework for the capital markets after consultation with industry and public interest groups. [Star Online](http://StarOnline.com) (November 5, 2009)
- **New Zealand** mediators urge funding of legislated mediation program for child custody to reduce the number of related suicides and murders. [New Zealand Herald](http://NewZealandHerald.com) (November 20, 2009)
- The World Bank’s International Finance Corporation sponsors mediation training and public awareness in **Vanuatu**. Finchannel.com (November 24, 2009)



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