



Keith's Perspective: *"Mediation is a powerful, yet underutilized tool for resolving serious conflicts, and often saves important business and personal relationships as well. Although mediation is not magic, and requires hard work by the parties, as an experienced mediator I have time and again directed its power to turn difficult situations around and end bitter drawn-out litigation. I invite you to consult with me, as I am committed to the mediation process and fostering understanding of how mediation can help you and your business or clients."*

January 1, 2006

In This Issue

Cases & Resolutions:

- Mediation Demonstrates Procedural Fairness in Class Action Settlement: *Hicks v. Morgan Stanley & Co.*, 2005 WL 2757792 (S.D.N.Y. 2005)
- Court's Judgment May Not Deviate from Mediated Settlement Agreement: *In the Interest of N.R.C. and L.A.C.*, 2005 WL 2875367 (Tex.App. 2005)
- Mediation Sanctions Denied in U.K.

News & Initiatives:

- FMCS Mediation Saves \$1.5 Billion/Year
- White House Directs Agencies to Mediate Environmental Disputes
- Federal Legislation Would Mandate Mediation of Farm Worker Disputes
- National Mediation Board Launching Online Dispute Resolution System in February
- Louisiana, Mississippi Turn to Mediation for Hurricane Claims

CASES & RESOLUTIONS:

Mediation Demonstrates Procedural Fairness in Class Action Settlement: *Hicks v. Morgan Stanley & Co.*, 2005 WL 2757792 (S.D.N.Y. 2005)

A \$10 million mediated settlement agreement in a securities class action litigation was approved by the U.S. District Court in *Hicks v. Morgan Stanley & Co.*, 2005 WL 2757792 (S.D.N.Y. 2005), following a fairness hearing to examine both procedural and substantive aspects of the settlement. The court noted that the record "amply supports" procedural fairness, relying on the mediation and citing cases holding that the "participation of a respected and neutral mediator 'gives [the court] confidence that [the negotiations] were conducted in an arms-length, non-collusive manner.'" Although the court called the mediation unsuccessful because there was no settlement during the two-day mediation session, the mediator continued to work with the parties until settlement was ultimately reached a few months later.

[View Opinion](#) (Subscription Required)

Court's Judgment May Not Deviate from Mediated Settlement Agreement: *In the Interest of N.R.C. and L.A.C.*, 2005 WL 2875367 (Tex.App. 2005)

A court has no authority – at least under Texas family law – to enter a judgment that differs from the terms of a mediated settlement agreement, unless those terms are illegal or against public policy, according to the Texas Court of Appeals in *In the Interest of N.R.C. and L.A.C.*, 2005 WL 2875367 (Tex.App. 2005). Following a successful mediation, the trial court signed an order proposed by the husband's attorney that differed in several ways from the mediated settlement agreement and later refused to correct the order because the wife had not appeared at the hearing. The appellate court held that the trial court had abused its discretion and that the order must be corrected to accurately reflect the settlement agreement.

[View Opinion](#) (Subscription Required)

- Alabama Requires Insurers to Mediate Natural Disaster Claims
- Feinberg Overseeing Insurer's Hurricane Dispute Resolution Efforts
- Mediation Programs Are "Core Function" of California Courts
- New Mexico Plans State ADR Office
- D.C. Considering Mandatory Mediation for Medical Malpractice
- High Cost of U.K. Litigation Highlights Need for Mediation
- Centre For Mediation Opening in South Africa

Mediation Sanctions Denied in U.K.

Post Magazine, November 24, 2005

While U.K. courts have imposed sanctions for failure to mediate (as reported in previous issues of this newsletter), the court denied sanctions when a party declined to mediate until certain conditions were met and until the facts were clarified in litigation.

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NEWS & INITIATIVES:

FMCS Mediation Saves \$1.5 Billion/Year

Findlaw.com, November 17, 2005

An empirical study of Federal Mediation and Conciliation Service (FMCS) mediation of labor disputes and work stoppages concluded that businesses and workers saved \$9 billion from 1999 to 2004. Released in November, the Employment Policy Foundation conducted the study in order to move beyond anecdotal evidence of mediation's benefits. The study also found a strong correlation between early mediation and success in ending or preventing work stoppages.

[View Article](#); [View FMCS Press Release](#); [View Study](#)

White House Directs Agencies to Mediate Environmental Disputes

ADRWorld, December 14, 2005

The White House Office of Management and Budget (OMB) and Council on Environmental Quality (CEQ) released a policy in late October directing federal agencies to use mediation, facilitation and other collaborative methods to resolve disputes "over the use, conservation and restoration of the environment, natural resources and public lands." The memorandum emphasizes that the Administration "strongly supports constructive and timely approaches to resolving conflicts" involving the environment. Neutrals will be drawn from internal agency resources, Department of Justice programs and the private sector. Recognizing the significant efficiencies to be gained through mediation, the policy also directs agencies to ensure that their leadership is committed to conflict resolution with an "open mindset to new perspectives" and encourages "interagency learning" about mechanisms for institutionalizing environmental conflict resolution.

[View Article](#) (Subscription Required); [View Memorandum](#)

Federal Legislation Would Mandate Mediation of Farm Worker Disputes

ADRWorld, December 23, 2005

Legislation introduced in the U.S. House of Representatives (H.R. 4503)

Mediation Quotes

"It is not the goal of mediation to judge the merits of the dispute; the goal of mediation is to have the parties work together to come to a solution, to allow them to move on with their lives.... While mediating, I attempt to be aware of any dynamic occurring between the parties. I assess the agendas, ethics, and values of the participants, arguments, and positions advanced by counsel and process the information as accurately as possible.... To be successful as a mediator, it is necessary to sift the extreme positions, the falsehoods, and the extreme or impure positions from the discourse. To be successful, the discourse must be substantively meaningful to all involved."

- Robert A. Creo in Ch. 18 of *Butterworths Mediators on Mediation: Leading Mediator Perspectives on the Practice of Commercial Mediation* (Tottel Publishing 2005) at 322-23.

would require mediation of claims arising under the Migrant and Seasonal Agricultural Worker Protection Act (29 U.S.C. § 1801). The bill provides that before any action can be filed in court, a mediator must certify that the party "attempted, in good faith, mediation or other non-binding dispute resolution of all issues involving all parties to the dispute." If requested, the Federal Mediation and Conciliation Service would assign a mediator acceptable to the parties. Congressional staff explained that the bill is not intended to lower workplace standards, but to find the "best solution" to reduce litigation costs, which the sponsors believe are so high as to encourage the hiring of illegal workers who are unlikely to litigate. Even though parties are required to mediate, all claims that are not voluntarily settled may be filed in court. Comparable mediation provisions were introduced in a Senate bill (S. 2087) which would apply to fewer cases than the House bill.

[View Article](#) (Subscription Required); [View H.R. 4503](#); [View S. 2087](#)

National Mediation Board Launching Online Dispute Resolution System in February

ADRWorld, November 29, 2005

Postscript to Dec. 2004 Newsletter: NMB, UMass Developing New ODR Processes (*ADRWorld*, December 17, 2004)

PREVIOUSLY REPORTED: The National Mediation Board (NMB) and the University of Massachusetts are developing new online dispute resolution (ODR) processes and techniques for use by federal agencies and the private sector. The University of Massachusetts received a \$700,000 grant from the National Science Foundation at the end of October. The project is scheduled to last three years, with the first year devoted to developing ODR software and then two years using the new tools in a test-bed of the NMB's voluntary grievance mediation program for labor unions and the railroad and airline industries. Software development will focus on visual communication tools and mapping software, with an emphasis on keeping the ODR processes simple and easy for neutrals to use.

POSTSCRIPT: The new online dispute resolution system is scheduled to be launched in February. The system contains a "brainstorming" function which catalogues ideas for discussion; future functions might include a mapping process for identifying settlement positions and conditions. The online system may permit some mediation processes to be conducted remotely to save costs and time, but is not intended to replace face-to-face mediations.

[View Article](#) (Subscription Required); [View NMB ODR Homepage](#)

Louisiana, Mississippi Turn to Mediation for Hurricane Claims

Times-Picayune, December 23, 2005; *Sun Herald*, December 23, 2005

Louisiana and Mississippi are launching mediation programs in early January to resolve hurricane-related residential insurance disputes. The initiatives are modeled after the successful Florida mediation program following the 2004 hurricane season, which settled 93% of all cases brought to mediation. Under the new programs, when consumers choose to mediate, insurance carriers are required to participate and pay the costs of the program. The American Arbitration Association will administer both

Check These Out:

The CPR Institute for Dispute Resolution unequivocally supports the Proposal for a Directive of the European Parliament and the Council on certain aspects of mediation in civil and commercial matters. CPR states that the Directive is "urgently needed" to maintain the competitive status of European markets, given the growing importance of mediation in North America, Australia, Asia and the United Kingdom. *See CPR Submission. The Directive (COM (2004) 718)* was included in material linked in the April 2005 newsletter.

Those focused on the federal sector may be interested in Judy Cohen's recent article, *Going Beyond ADR: A Federal Sector Mission- and Work Life-Centered Approach to Building Collaboration and Democratic Values on the Job.*

Did you know that in addition to the ABA's Representation in Mediation Competition for law students, there is a *National*

programs and provide local mediators, which include former U.S. Court of Appeals Judge Charles Pickering and a former Mississippi Supreme Court Justice. The Louisiana program also provides for insurers to pay \$175 per case to the court systems in areas struggling since hurricane Katrina. While insurance companies are supportive of the mediation program, others are concerned that there will not be sufficient capacity. Richard "Dickie" Scruggs expressed general skepticism about the program in Mississippi, but has 3,000 clients ready and would like to mediate 100 cases a week.

[View Sun Herald Article](#); [View Times-Picayune Article](#) (Subscription Required)

Alabama Requires Insurers to Mediate Natural Disaster Claims

Alabama now requires insurers to mediate residential claims resulting from hurricanes and other natural disasters under regulations that took effect on December 31. Alabama's program was developed by a state task force created after Hurricane Ivan in September 2004. Homeowners can request mediation of disputes of \$500 or more if the claimant has not retained counsel or initiated litigation; insurers must cover the \$350 cost of mediation. Under the program, the Alabama Department of Insurance will make appointments from a list of mediators and the Department may assist claimants in preparing for mediation, if requested. Although attorneys for parties may not attend the mediation, the Department can send an attorney or representative to provide legal and technical information. Insurers may avoid the state program by developing and obtaining state approval for their own alternative dispute resolution program.

[View Regulations](#); [View Task Force Report](#)

Feinberg Overseeing Insurer's Hurricane Dispute Resolution Efforts

Boston Globe, December 16, 2005

Insurer Liberty Mutual has implemented a private dispute resolution program in an effort to minimize litigation in the 20% of the claims from Hurricane Katrina and 10% of claims from Hurricane Rita that it has not resolved directly. The insurer has hired Kenneth R. Feinberg, who administered the September 11th Victim Compensation Fund, to oversee its mediation and arbitration program. Homeowners who have not settled their hurricane-related claims with Liberty Mutual have the option of participating without cost in a mediation, followed (if the claim remains unresolved) by a binding, unappealable decision made by an arbitrator assigned by Feinberg. The program intends to complete mediations within 14 days and arbitrations within 30. Work is to begin in mid-January using three dozen mediators selected by Feinberg. Claimants may litigate if they choose not to participate in the program. Liberty Mutual has about one percent of the 2,750,000 damage claims resulting from hurricanes Katrina, Rita and Wilma.

[View Article](#) (Subscription Required)

Intercollegiate Mediation Tournament for college students? First held in December 2000, the Tournament provides opportunities for college students to compete both as mediation advocates and mediators.

Contact Information

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Mediation Programs Are “Core Function” of California Courts

ADRWorld, November 11, 2005

California Superior Courts must implement civil mediation programs as a “core function” of the courts following revision of Section 32 of the California Standards of Judicial Administration by the California Judicial Council, which took effect January 1. The change is the result of reviewing mediation pilot programs, in which the Council found that “mediation of civil cases [is] of high benefit to courts.” Effective January 1, the Council also modified procedures for bringing complaints against court-connected mediators in Court Rule 1622, in order to maintain confidentiality of mediation communications.

[View Article](#) (Subscription Required); [View Judicial Council Amendments](#)

New Mexico Plans State ADR Office

ADRWorld, December 16, 2005

The state of New Mexico is heading toward greater reliance on mediation and other forms of alternative dispute resolution, with final recommendations expected this Spring from the ADR Advisory Steering Committee established by Governor Bill Richardson last Fall. Seeking to improve government efficiency, the Committee has decided to recommend a permanent ADR office (with a staff of six and a budget for contractors) in order to encourage greater state use of ADR. The recommendations may also contain unique provisions, such as financial incentives for state agencies to use ADR to reduce claims and costs. Issues still under consideration include whether the ADR office will provide mediation training itself and how it will provide names of mediators to state agencies. In the future, the office might even seek to regulate the ADR sector.

[View Article](#) (Subscription Required)

D.C. Considering Mandatory Mediation for Medical Malpractice

ADRWorld, December 2, 2005

Pending legislation that would mandate mediation of medical malpractice claims against health providers was the subject of a District of Columbia Council hearing on December 1. The bill, B16-0418, was developed by a legislative task force that is seeking to reform the medical malpractice system in D.C. and is counting on mandatory mediation to reduce costs and increase party satisfaction, while reducing the burden on the courts. As initially drafted, courts are to require mediation “with little or no discovery,” using mediators with ten years experience in medical malpractice litigation. The legislation requires parties to share the costs of mediation (unless otherwise agreed) and includes other details relating to attendance at the mediation, mediation statements, and confidentiality.

[View Article](#) (Subscription Required); [View Bill](#)

High Cost of U.K. Litigation Highlights Need for Mediation

Financial Times U.K., December 13, 2005

Heavy criticism of top London litigators for legal fees exceeding £100

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million (\$175 million) in large cases have renewed calls for greater use of mediation. Lord Woolf, who recently retired as Lord Chief Justice of England and Wales, has long been a strong proponent of mediation not only as a way of reducing costs and avoiding the distraction of large litigations, but because mediation "can often provide a solution that the courts could not." Lord Woolf noted that large companies which use mediation successfully often rely on it again and again. Lord Woolf is now an advisor to the largest mediation group in the U.K. and plans to be trained as a mediator. The current Lord Chief Justice, Lord Phillips, recently warned that companies should react with "horror" to the possibility of becoming entangled in expensive litigation.

[View Article](#) (Subscription Required)

Centre for Mediation Opening in South Africa

Business Day (South Africa), November 29, 2005

The Institute of Directors plans to open a mediation center in South Africa during the first quarter of 2006, with a focus on resolving commercial disputes in creative and cost-effective ways. The Centre for Mediation is to provide needed alternatives to litigation in South Africa and help the country keep up with the emphasis on mediation as the "preferred route of dispute resolution" in modern societies. The Centre will also offer mediation training for both mediators and advocates.

[View Article](#)