



**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."*

**November 1, 2005**

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## CASES & RESOLUTIONS:

### Mediation Resolves Coach Price's \$20 Million Defamation Suit Against Sports Illustrated

*El Paso Times*, October 11, 2005

Head football coach Mike Price is the latest fan of mediation after settling his \$20 million defamation case against Time, Inc. and a reporter over a lurid story of strippers and alcohol published in Sports Illustrated in 2003. With the terms of the settlement shielded by a confidentiality clause, both Price and defendants were able to claim victory and move on, leaving the field open for speculation about the terms of resolution. While Sports Illustrated states that it continues to stand behind its story, continues to employ the reporter and apparently will not publish a retraction, Price was able to declare that he "got a great victory," is "very happy and satisfied with the results of the mediation" and is looking forward to getting on with his life after 30 months of controversy. Price's attorney asserted that the process has "vindicated" Price's name.

[View Article](#) (Subscription Required)

### Yogi Berra Mediates \$10 Million "Yogasm" Dispute with Turner

*ABCnews.com*, September 16, 2005

Yogi Berra resolved his \$10 million claim against Turner Broadcasting for including him in a multiple-choice quiz on the definition of "yogasm" in an advertisement for Sex and the City reruns. Although the precise settlement terms were confidential, Berra's counsel stated that the payment was "substantial."

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1187, N.C. App. 2005)

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### **Court Dismisses Case with Prejudice When Plaintiff Fails to Mediate: *Office Environments, Inc. v. Lake States Ins. Co.*, 833 N.E.2d 489 (Ind. App. 2005)**

Plaintiff delayed court-ordered mediation several times over two and a half years, and then caused a final cancellation of mediation by refusing to pay the mediator's retainer, which resulted in the trial court dismissing the case with prejudice. The Indiana Court of Appeals (in a 2-1 decision) upheld the dismissal on appeal, noting "the strong emphasis for resolving issues through mediation" and plaintiff's failure to raise any objections to mediation through proper channels.

[View Opinion](#)

### **Court Sanctions Counsel and Party for Failure to Participate in Mediation: *In the Interest of K.A.R.* (No. 14-03-00970-CV, Tx. App. 2005)**

*Texas Lawyer*, September 12, 2005

A split Texas Court of Appeals panel upheld sanctions imposed by the trial court on both a party and counsel for canceling a court-ordered mediation session without adequate notice. The appellate court found that ordering mediation was a core function of the trial court, and thus the court had inherent power to impose sanctions. Sanctions against counsel were appropriate because counsel should have attended and worked towards settlement even though her client refused to attend the mediation.

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### **California Confidentiality Statute Protects Parties Not at Mediation: *Does 1-26 v. Superior Court of Los Angeles County*, 34 Cal. Rptr. 3d 348 (Cal. App. 2d Dist. 2005)**

*ADRWorld.com*, October 3, 2005

Documents summarizing personnel files of priests, prepared during the mediation of nearly 500 cases of alleged sexual molestation, were about to be published over the objections of the priests when the California Supreme Court blocked disclosure based on California's mediation confidentiality statute and remanded the case to the Court of Appeals. The appellate court determined that even though the priests were not present for mediation and were not all parties, they were still mediation participants who could object, because many would have to be brought in before any settlement could be reached, and their attorney had been present when the court addressed settlement discussions. The Court of Appeals also determined that the process was mediation, which is covered by the confidentiality statute, and not merely settlement talks.

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## Mediation Quotes

"[T]he assumption that most people make that their view of the world is the way the world 'really' is...has three aspects. First, when confronting a problem or question, we typically think that we are reasonable and objective. Second, we assume that anyone looking at the same evidence would draw the same conclusions we do. Third, when others reach different conclusions, we suspect that they are unreasonable or driven by suspect motives."

"[I]n disputes we are not observers of the system, we are participants. We cannot see ourselves as others see us, and so our descriptions of the causes of the conflict often lack our own contribution to the problem."

– Michael L. Moffitt and Robert C. Bordone, Editors, *The Handbook of Dispute Resolution* (Jossey-Bass 2005) at 84, 157.

### Fraud No Basis for Breaching Mediation Confidentiality: *Princeton Insurance Co. v. Vergano*, 883 A.2d 44 (Del. Ch. 2005)

Plaintiff obtained a settlement agreement of nearly \$1 million in mediation for medical malpractice based on nerve damage that allegedly left her unable to hold a baby bottle. The day after settlement, an attorney for defendants saw – and videotaped – plaintiff dancing while holding a beer bottle. Defendants sought to rescind the settlement agreement and sought to have the mediator testify, but the court concluded that the confidentiality provisions and public policy would not permit it, nor did defendants need the mediator's testimony. The court did, however, raise concerns over defendants' ex parte contact with the mediator to show him the videotape, stating that any such post-settlement contact should have involved notice to plaintiff.

[View Opinion](#)

### Cost of Mediation (But Not Lunch) Covered by North Carolina Cost-Shifting Rule: *Morgan v. Steiner* (No. COA04-1187, N.C. App. 2005)

Plaintiff was required to pay the cost of an unsuccessful mediation and other specified costs under a North Carolina cost-shifting rule when plaintiff rejected an offer of judgment and then recovered less than the offered amount at trial. However, the North Carolina Court of Appeals determined that costs associated with mediation – in this case the \$100 cost of lunch – were not covered by the rule.

[View Opinion](#)

### Counselor Cannot Avoid Licensing Problems by Claiming to Be Mediator: *Penny v. Wyoming*, 120 P. 3d 152 (Wyo. 2005)

The Wyoming Supreme Court readily concluded that a mental health counselor could not avoid his licensing problems by claiming to be a mediator when his clients believed they were being counseled, he billed his time as counseling, and he made assessments and diagnoses under the Diagnostic and Statistical Manual, DSM-IV.

[View Opinion](#)

### SEC's Suit Against Scrusby Sent to Mediation

*Diagnostics & Imaging Week*, September 22, 2005; *Forbes*, September 16, 2005

One to watch: A U.S. district judge has ordered mediation of the U.S. Securities and Exchange Commission's lawsuit against Richard Scrusby, former head of HealthSouth. The court based its decision on the fact that separate federal litigation filed by investors was previously sent to mediation.

[View \*Diagnostics & Imaging Week\* Article](#) (Subscription Required); [View \*Forbes\* Article](#)

## **Keith L. Seat, J.D.**

is a full-time mediator with substantial experience mediating commercial (including workplace) disputes and a strong telecommunications/technology background; he is also a mediation trainer and speaks on mediation at federal agencies, law firms and bar conferences. Keith was previously in-house counsel at a major telecommunications firm, following four years as General Counsel of the United States Senate Judiciary Committee's Antitrust Subcommittee. Prior to that, Keith practiced law for many years as a commercial litigator at Howrey LLP and was a law clerk for U.S. District Judge William H. Becker.

# NEWS & INITIATIVES:

## **NRC Reviews Pilot Mediation Program**

*Inside NRC*, October 17, 2005

After a year's experience with mediation as an alternative to traditional enforcement by the U.S. Nuclear Regulatory Commission (NRC), industry participants, advocacy groups, and the Commission met on October 12 to discuss draft evaluation criteria for the pilot program. An evaluation report is due in February from Cornell University's Institute of Conflict Resolution, which is under contract with the NRC and provides mediators. While there was vigorous discussion and disagreement about the merits of the program overall, the data are clear. About one-third of the cases in which mediation is suggested get agreement of all parties to proceed to mediation. Of those, mediation has been successful in reaching resolution in just over half of the mediations conducted prior to any investigation by the NRC, while 100% of post-investigation mediations have been successful.

[View Article](#) (Subscription Required); [View NRC ADR Program Website](#)

## **FAA Launches New Mediation Center**

*ADRWorld.com*, September 30, 2005; *FedNews OnLine*, September 27, 2005

The U.S. Federal Aviation Administration (FAA) opened the Center for Early Dispute Resolution on September 26, to assist employees with conflict management and resolution, in response to internal surveys revealing concern about workplace conflict. The new approach provides training and coaching, as well as mediation services. The FAA's new program is expanding to include union as well as non-union employees, and initially will run for 12 to 18 months at FAA headquarters.

[View ADRWorld Article](#) (Subscription Required); [View FedNews OnLine Article](#)

## **HUD Proposes Dispute Resolution Program for Manufactured Housing Defects**

*Federal Register*, October 20, 2005

The U.S. Department of Housing and Urban Development (HUD) is accepting comments through December 19 on its proposed dispute resolution program for disputes over defects in manufactured (mobile) homes. Comments are requested in particular on the use of user-fees and the appropriate level of fees. The HUD program is required by federal statute and will apply only in states that do not adopt their own state-run dispute resolution programs that satisfy HUD guidelines. The proposal primarily relies on mediation, with any unresolved cases proceeding to nonbinding arbitration in which a recommendation would go to the HUD Secretary for final decision. HUD anticipates using contractors as screening neutrals, mediators, and arbitrators, and anticipates nearly 2,000 complaints a year. The proposal notes that the program reflects both the Executive Branch's and Congress' active promotion

## Contact Information

Please contact Keith with dispute resolution questions and to discuss any matters or issues that might be suitable for mediation or facilitation:



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of cost-effective alternative dispute resolution processes by giving “the opportunity to resolve conflicts amicably and creatively.” Further, the proposal estimates that the program will save 80% of the \$10,000 per case that would be spent on litigation by manufacturers, retailers, and installers if ADR was not available, which amounts to savings of \$400 for every mobile home sold.

[View Proposed Rule](#); [View HUD Website](#)

### Rhode Island Joins Medical Malpractice Mediation Trend

*ADRWorld.com*, October 21, 2005

Both the plaintiffs’ and defense bar in Rhode Island have been involved in developing a new program for mandatory mediation of medical malpractice claims, which was established by a September 23 order of the Rhode Island Superior Court. The pilot program will continue for six months and then be analyzed to see if it needs to be tweaked or modified. Initially, three cases will be referred to mediation each week, relying on a retired judge serving on a pro bono basis. The court hopes that cases can be resolved prior to discovery.

[View Article](#) (Subscription Required)

### Missouri Endorses Mediation of Eminent Domain Disputes

*ADRWorld.com*, October 14, 2005; *News-Leader.com*, October 5, 2005

Missouri’s Department of Transportation offers mediation to landowners to resolve eminent domain disputes that remain after direct negotiation, and is able to successfully resolve nearly half of those remaining disputes in which mediation is used. An Eminent Domain Task Force established in Missouri following the U.S. Supreme Court’s June 2005 decision in Kelso v. New London noted in its September 30 preliminary report that lawmakers in 28 states have introduced more than 70 bills to restrict the use of eminent domain. The Missouri Task Force examined the success of mediation and concluded that mediation could be expanded and used in a broader range of cases involving government agencies and property rights.

[View ADRWorld Article](#) (Subscription Required); [View News-Leader.com Article](#); [View September 30 Report](#)

### California Statute Encourages Mediation and Limits Binding Arbitration by Homeowner Associations

*ADRWorld.com*, October 11, 2005

California legislation (SB 137) enacted on October 3 requires homeowner associations to notify members of new alternative dispute resolution provisions under which homeowners may initiate mediation or arbitration by simply submitting a request to the association. Among other things, associations are prohibited from recording a lien without first pursuing ADR, and may not use binding arbitration if intending to resort to judicial foreclosure.

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Thanks.

## California Clarifies Disqualification of Judges Considering ADR Work

*ADRWorld.com*, September 29, 2005

California enacted a new statute on September 22 to clarify situations in which judges will be disqualified for contacts with alternative dispute resolution providers relating to employment or paid service as a neutral. The legislation, AB 1322, went into immediate effective and expressly rejects the broad holding in Hartford Casualty Ins. v. Superior Court (No. B176439), which could have resulting in "wholesale disqualifications" of judges due to superficial contact with ADR providers. The new law clarifies that substantive discussions about employment or service as a neutral are required for disqualification, while expanding the grounds to include disqualification for directing parties to participate in ADR through a provider with whom the judge has served or is discussing future service. Disqualification would be required even if such a provider were merely on a list of possible providers from which the judge would choose an ADR provider.

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## Mediation Week in Florida; Conflict Resolution Day Declared by Other States, ACR

*Pensacola News Journal*, October 20, 2005; *Daily Record (Baltimore, MD)*, October 20, 2005

The week of October 16-22 was designated Mediation Week in Florida, while October 20 was declared Conflict Resolution Day by the Association for Conflict Resolution (ACR), the states of Maryland, Kentucky and New Jersey, and various local jurisdictions.

[View Pensacola News Journal Article](#); [View Daily Record Article](#); [View ACR Website](#)

## Securities Groups Tout Mediation Settlement Month; Discounts for NASD Mediation

*Securities Week*, October 3, 2005

Securities self-regulatory organizations celebrated the seventh anniversary of Mediation Settlement Month in October, sponsoring a program in New York City on October 6. The National Association of Securities Dealers (NASD) Dispute Resolution forum offered half-price discounts on mediation fees during the month of October (passing on fee reductions from the group's mediators). With the October discount, mediation generally increases about 40% above other months. NASD staff has processed more than 12,500 mediations of securities disputes over the past 10 years, and shows an 81% settlement rate.

[View Article](#) (Subscription Required)

## **UK National Mediation Week**

*Times (UK)*, October 25, 2005; *Daily Post (Liverpool)*, October 25, 2005

The UK Department for Constitutional Affairs (DCA) and Her Majesty's Courts Service sponsored "Mediation Week," showing videos, demonstrating mediation, and holding discussions from October 24 to November 4. The publicity is part of DCA's effort to meet its target of reducing the proportion of claims filed with courts by 5 per cent.

[View Times Article](#) (Subscription Required); [View Daily Post Article](#) (Subscription Required); [View Information on Mediation Week](#)

## **Government Use of Mediation Growing in UK**

*Building*, September 9, 2005

A UK Department for Constitutional Affairs (DCA) report on the effectiveness of the government's commitment to alternative dispute resolution during the 2003-2004 fiscal year reveals that government agencies' use of ADR – normally mediation – increased 40% from the previous year, to 229 cases, with a success rate of 79%. Estimated savings from use of mediation during the year are put at 14.6 million pounds. Examples of benefits of mediations are described, along with efforts to develop greater awareness of ADR.

[View Article](#) (Subscription Required); [View Report](#); [View DCA Website](#)

## **UK Insurer Encouraging Mediation to Improve Claims Experience**

*Post Magazine*, October 27, 2005

One of the largest insurers in the UK, Allianz Cornhill, is seeking to change the culture of disputes among both lawyers and claims handlers to get more cases into mediation, where it has found that both the claimant and insurer achieve better results than in litigation. While Allianz is able to get claimants to agree to mediate only one-third of the cases that it would like to, the settlement rate in those cases is 92%.

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## **Pakistan Mediation Center Established for Commercial Cases**

*Business Recorder (Pakistan)*, October 25, 2005

A new mediation center is being established in Karachi to deal with commercial disputes, under an agreement between the Ministry of Law, Justice and Human Rights and the International Finance Corporation of the World Bank Group. The goal of the pilot mediation project is to institutionalize mediation in order to increase efficiency by freeing assets tied up in disputes and minimizing business-stifling litigation.

[View Article](#)

## **Mediation of Labor Disputes Increasing in Philippines**

*BusinessWorld (Manila)*, September 19, 2005

Additional Labor Department personnel are being trained as mediators in Manila and throughout the Philippines in order to provide mediation and address labor disputes in a less hostile way. More firms are considering alternative settlement approaches, and both labor and management are realizing that amicable approaches are preferable to hardline stances.

[View Article](#) (Subscription Required)

## **South African Mediators Strike for Better Pay**

*The Namibian*, September 15, 2005; Commission Website

On September 14, government-funded labor mediators in South Africa shifted from resolving others' employment conflicts to picketing their own employer, the Commission for Conciliation, Mediation and Arbitration, in a wage dispute. The Commission continued operations with part-time employees and contractors until the dispute was settled four days later – through mediation.

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