KEITH L. SEAT, J.D.
MEDIATOR & ARBITRATOR

Mediation News and Updates

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."*

July 1, 2005

In This Issue

CASES & RESOLUTIONS:

Mediation Yields $2.2 Billion Enron Settlement

San Diego Daily Transcript, June 22, 2005

In what may be the largest U.S. securities settlement ever, JP Morgan Chase agreed to pay $2.2 billion after two days of mediation to settle a class-action lawsuit claiming that the bank helped Enron engineer its accounting fraud. The case was mediated by former U.S. District Judge J. Lawrence Irving, who was initially a consultant for the lead plaintiff, the University of California. Irving suggested mediation after discussions with JP Morgan Chase bogged down, and the parties decided to use Irving as the mediator, despite his previous role. The class-action settlement, which must be approved by the boards of the parties, occurred four days after a $2 billion *Enron* settlement by Citibank; litigation continues against another ten financial defendants.

View Daily Transcript Article (Subscription Required); View Reuters Article

Mediation Provides $100 Million Settlement for Southern California Clergy Sexual Abuse Victims

Postscript to Jan.-Feb. 2005 Newsletter: Mediator Cannot Be Decision-maker: *Travelers Casualty and Surety Co. v. Superior Court*, B176030 (Cal. App. 2d Dist. 2005)

Los Angeles Times, January 4, 2005; *Los Angeles Daily Journal*, March 3, 2005

PREVIOUSLY REPORTED: The California Court of Appeals held that a settlement judge, acting as a mediator, cannot be the decision-maker, and that a mediation is not an "actual trial" as the settlement judge stated in a written order. Judge Peter D. Lichtman was appointed as settlement judge to help seek resolution between the Roman Catholic Diocese of Orange's liability insurers and the victims of alleged childhood sexual abuse by various priests. After contention with the parties, Judge Lichtman released a lengthy written "order," stating his determination of the reasonable settlement value of plaintiffs' claims based upon his view that the insurers had stymied attempts to settle the case. The appellate court did expressly

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Mediation Quote

"In general…everyone has a good inner core, and their negative ways, from the distasteful to the downright evil, rise from pain or deprivation they have suffered sometime in their life…. If we can understand the pain that underlies the negativity, we can invoke our compassion" – Suzanne Ghais, Extreme Facilitation

International Mediation Information

The Centre for Effective Dispute Resolution recently published tips for lawyers involved in international mediation. View Tips

state that a mediator may be evaluative and provide views to the parties, but may not issue "findings" or attempt to coerce the participants and thus vacated and sealed the mediation "order." Subsequent news accounts reported that Judge Lichtman has been replaced as the mediator in the case.

POSTSCRIPT: After a mediation conducted by Superior Court Judge Owen Lee Kwong, the Diocese of Orange agreed to pay $100 million to settle the clergy sexual abuse cases. The Diocese will pay just over half of the settlement, with the remainder to be paid by the Diocese's eight insurers. The 90 plaintiffs are each to receive payment between $500,000 and $1.6 million; Orange Diocese Bishop Tod D. Brown further agreed to personally apologize to each of the victims.

View LA Times Article (Subscription or Purchase Required)

U.K. Courts Imposing Costs for Refusals to Mediate

Legal Week Global Edition, June 23, 2005

The trend toward mediation of commercial cases in the United Kingdom is being propelled by the parties' growing experience and understanding of the benefits of mediation on the one hand and the attitude of the courts in encouraging mediation on the other. Appellate decisions in the U.K. have been increasing the stakes by imposing costs on parties who refuse to mediate after the court recommends mediation, with a court of appeals recently stating that the legal profession "can no longer with impunity shrug aside reasonable requests to mediate."

View Article

NEWS & INITIATIVES:

Guidance on Accessible Mediation for Parties with Disabilities

ADRWorld.com, May 12, 2005

The U.S. Equal Employment Opportunity Commission (EEOC), the National Council on Disability and the U.S. Department of Justice jointly released two publications (one for mediators and one for parties) on making the mediation process more accessible for disabled individuals in EEO disputes. Among other things, the mediator publication discusses the types of accommodations that may be required to make a mediation accessible and provides practice tips for ensuring accessibility in specific situations. It also provides guidance on maintaining the confidentiality of medical information disclosed during mediation and recommends types of ADA (Americans with Disabilities Act) training for mediators. The guidance for parties provides information on their right to accommodations and their responsibility to make needs known in a timely manner. One of the examples states that a "private practice solo mediator" would not likely be able to avoid paying for a sign language interpreter (or other expensive accommodation) as a "significant difficulty or expense" because the overall resources of the mediator would be considered, not just the fees from the single mediation.

View Article (Subscription Required); View Publication for Mediators; View Publication for Parties

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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EEOC Finalizing New Field Structure

EEOC Press Release, June 2005

In an effort to flatten its field organization, the U.S. Equal Employment Opportunity Commission (EEOC) plans to vote on July 8 on a plan to change its field structure. The plan would reduce managers and administrators by converting eight district offices into field offices, and add front-line staff who conduct investigations, mediations and litigation, and provide educational services. If the plan is approved, there will be only 15 district offices overseeing 9 field offices, 15 area offices, and 14 local offices (two of which are being newly added in Mobile, Alabama, and Las Vegas, Nevada). The internal realignment is intended to improve efficiencies and customer service, but will not change the way the public interacts with the agency. The Commission will next work on streamlining its Washington headquarters, clarifying roles and responsibilities.

View Press Release; View Proposed Field Office Alignment; Compare Current and Proposed Jurisdictional Boundaries.

Federal Legislation to Encourage Medical Malpractice Mediation

ADRWorld.com, June 7, 2005

In an effort to encourage mediation and reduce litigation costs, legislation was introduced in the U.S. House of Representatives on May 26 to fund mediation programs addressing medical malpractice claims. The "Comprehensive Medical Malpractice Reform Act of 2005" (H.R. 2657) would fund mediation programs (through grants administered by the U.S. Department of Justice) which conform to the model used at Rush University Medical Center in Chicago. The Rush model, which claims a success rate exceeding 90 percent, uses a co-mediation system in which the plaintiff chooses one mediator from a roster of plaintiff's attorneys and a second from defense attorneys. The bill also provides that participation in mediation is to be completely voluntary and that all communications, including any apology or expression of remorse by a health care provider, are to be kept confidential. The legislation also seeks to reduce medical malpractice premiums by, among other things, capping the award of non-economic damages and establishing a mechanism for reporting medical errors. The bill has been referred to the House Judiciary Committee.

View Article (Subscription Required); View H.R. 2657

FMCS Systems Design Project Under Way

Akron Beacon Journal, May 31, 2005

A new employee dispute resolution system has been successfully launched at the Akron General Medical Center, the first created by the Federal Mediation and Conciliation Service (FMCS) under its Dynamic Adaptive Dispute Systems (DyADS) pilot project. This FMCS project designs dispute resolution systems for conflicts *not* covered by collective bargaining agreements. The Akron General system began in February and relies on an ombudsman to assist in resolving concerns of employees and/or management, including bringing the parties together when necessary. The FMCS recently launched additional DyADS projects at the U.S. Department

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of Health and Human Services and at Bechtel Nevada.

View Article; View FMCS Press Release

Florida Eases Multi-Jurisdictional ADR Advocacy

Sunethics.com, May 12, 2005

New Florida rules will make it easier for lawyers from outside Florida to represent clients in mediation and other alternative dispute resolution (ADR) proceedings in Florida. Amended Rule 4-5.5 permits lawyers from other jurisdictions to provide legal services "in or reasonably related" to a mediation or other ADR proceeding if the client "resides in or has an office in" the lawyer's home jurisdiction or "where the services arise out of or are reasonably related to" the lawyer's practice in his or her home jurisdiction. Rule 4-5.5 (c)(3), (d)(3). The lawyer must obtain admission *pro hac vice* for court-annexed arbitration or mediation, or if court rules or law require. The new rules were adopted by the Florida Supreme Court on May 12 and take effect on January 1, 2006; they focus on advocates and the "practice of law" without discussing the activities of mediators or other neutrals.

View Article; View Florida Supreme Court Opinion; View Amended Rule 4-5.5

Massachusetts Adopts ABA Model Rule 2.4 for Lawyers Serving as Third-Party Neutrals

Massachusetts Lawyers Weekly, June 20, 2005

Stating that "alternative dispute resolution has become a substantial part" of the justice system, the Massachusetts Supreme Judicial Court adopted ABA Model Rule of Professional Conduct 2.4 governing lawyers acting as mediators or other third-party neutrals, effective July 1. Rule 2.4 requires a neutral who is a lawyer to explain to *pro se* parties that the neutral is not representing them as an attorney, including enough explanation for the *pro se* parties to understand differences such as the inapplicability of the attorney-client privilege.

View Article; View ABA Model Rule 2.4

Profusion of Codes for Mediators May Cause Confusion

The Legal Intelligencer, May 16, 2005

Mediators face ethical challenges from the profusion of overlapping and in some instances contradictory guidelines and codes of conduct. Mediators coming from professional backgrounds are subject to ethical guidelines based on those professions in addition to the codes and guidelines specifically for mediators. Thus, mediators from different professional backgrounds facing the same problem might be compelled to follow different courses of action, while mediators who are not members of another profession would be subject only to the guidelines and codes for mediators. Although in many cases the codes and guidelines are not in conflict, the proliferation of mediation codes and guidelines by government agencies, courts, businesses, professional associations and private alternative dispute resolution providers leads to complexity and likely confusion.

View Article (Subscription Required)

First Court-Annexed Mediation Center Opens in India

The Hindu, June 10, 2005; June 27, 2005

The first court-annexed mediation center in India opened in the State of Tamil Nadu on April 9. Housed at the Madras High Court, the Tamil Nadu Mediation and Conciliation Centre will mediate a broad range of cases, including commercial, property, partnership and family disputes. Judges may refer cases to mediation, which are typically to be conducted within 60 days, by mediators who will be paid a "nominal sum" set by the court. The Centre organized a training program in which two U.S.-based mediation trainers trained 40 former judges and lawyers as mediators. The Chief Justice expects the program to be extended to other types of courts soon and indicated that eventually every court in the state will have a mediation center.

View June 10 Article; View June 27 Article

Indian Chamber of Commerce Developing ADR Ties in U.S.

Telegraphindia.com, June 14, 2005

The Indian Chamber of Commerce (ICC) is establishing connections with the (U.S.) Council of State Governments and the University of Kentucky in order to expand beyond arbitration and begin offering mediation services for international commercial disputes involving India. A 12-person team from the ICC will visit the United States in July for training and meetings with experts on mediation, reconciliation and arbitration at Harvard Law School, the American Arbitration Association and Northern Virginia Mediation Service.

View Article; View ICC Website

Australian Executive Dispute Highlights Antitrust Issues

News.com.au, June 25, 2005

An Australian court-ordered mediation is scheduled for early July between Amcor and the former head of its Australian corrugated cardboard division who was fired for taking confidential information and recruiting other executives to establish a rival consulting business. But what might otherwise be a routine mediation over the executive's A$1.9 million damage claims is gaining more attention due to the executive's assertions that he was forced to engage in illegal price-fixing which he claims was pervasive at Amcor; the company acknowledged that it might have breached antitrust laws only in its cardboard division. The parties and the court are now trying to determine the extent to which confidential documents seized from the executives may be retained by the company and used in the pending mediation and any litigation that remains after the mediation.

View Article

JAMS and CEDR Form Transatlantic Alliance

Lloyd's List International, June 8, 2005

The Centre for Effective Dispute Resolution (CEDR), Europe's biggest

provider of mediation services (with 700 cases last year), and JAMS in the U.S. (with 7,000 mediations) have formed an international alliance. In addition to referring work to each other, both firms have expressed interest in further developing co-mediation and in pursing insurance disputes together.

View Article (Subscription Required)

Universities Create Transformative Conflict Resolution Consortium

Grand Forks Herald, May 10, 2005

Hofstra University School of Law, Temple University, James Madison University and the University of North Dakota (UND) announced the creation of a consortium to support the Institute for the Study of Conflict Transformation. The new consortium will serve as a clearinghouse for transformative conflict resolution research, studies and practice. The consortium also plans to build an academic structure and training curriculum in transformative mediation. UND will serve as the administrative hub for the consortium.

View Article; View UND Press Release