



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."*

September 1, 2005

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CASES & RESOLUTIONS:

Mediation Confidentiality Outweighs Defendant's Right to Testimony: *New Jersey v. Williams*, 877 A.2d 1258 (N.J. 2005)

ADRWorld, August 3, 2005

In an important decision upholding confidentiality provisions in the Uniform Mediation Act (UMA), the New Jersey Supreme Court concluded that a criminal defendant's right to potentially exculpatory testimony must be balanced against the importance of mediation confidentiality. In this first state supreme court decision on the UMA, the court expressly adopted the UMA's balancing test as the proper approach, even though the UMA had not been adopted in New Jersey at the time the case was initially decided. Under the UMA, mediation communications cannot be introduced in a criminal proceeding unless the defendant shows that the need for the evidence "substantially outweighs the interest in protecting confidentiality" and that the evidence is not otherwise available. In this case, the defendant was convicted after failing in his effort to rely on testimony by the mediator, both because the court found the testimony was not "competent evidence" of what another party said in the mediation and because other evidence about the events that resulted in the criminal charges was available.

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

Confidentiality of Congressional Employee Mediation Broadly Applied: *Banks v. Senate Sergeant-at-Arms*, Nos. Civ.A.03-56, 03-686, 03-2080 (U.S.D.C. D.C. 2005)

Roll Call, July 18, 2005

A U.S. District Court upheld a magistrate's order denying access to any documents involved in mediation under the Congressional Accountability Act, including forms completed to commence the mediation process. The magistrate noted that Congress mandated that mediation "shall be strictly confidential" in the Act, which requires mandatory mediation of workplace disputes involving Congressional employees prior to initiating an

Free IP Mediation

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administrative hearing or filing in district court. In defending against claims of race discrimination, the Senate Sergeant-at-Arms unsuccessfully argued that it needed the mediation documents to determine if the mediation prerequisite had been met. The magistrate refused to compel production of the documents by one legislative branch office to another in order to avoid meddling in the "internal affairs" of Congress.

[View Article](#) (Subscription Required); [View Magistrate's Order](#) (Subscription Required)

U.K. Court Bemoans Lack of Successful Mediation: *Vahidi v. Fairstead House School*, EWCA Civ. 06 (2005)

Lawyer, August 8, 2005

A recent U.K. Court of Appeal decision expressed strong support for early mediation when controlling legal principles are not in serious dispute. In affirming the lower court's decision denying a teacher's work-related stress claim, the court stated:

One shudders to think of the costs of this appeal and of the trial, which apparently took as long as nine days. As the courts have settled many of the principles in stress at work cases, litigants really should mediate cases such as the present. Of course, mediation before trial is infinitely preferable to mediation before appeal. But it is a great pity that neither form of mediation has taken place in this case, or if it has, that it has not produced a result.

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

NEWS & INITIATIVES:

ABA, ACR Adopt Revised Mediator Standards

ADRWorld, August 11, 2005, August 29, 2005

The American Bar Association (ABA) House of Delegates formally approved revised *Model Standards of Conduct for Mediators* on August 9 at its annual meeting. On August 22, the Association for Conflict Resolution (ACR) Board of Directors unanimously approved the newly revised *Model Standards*, which will apply to ACR's 6,000 members and be used whenever ethics complaints are brought. Other groups, including government agencies and court programs are also expected to adopt the revised ethical standards. First adopted in 1994, the *Model Standards* were revised by a committee of representatives from the ABA, ACR and the American Arbitration Association. The revised standards provide more detailed guidance on mediator impartiality, confidentiality and conflict-of-interest disclosures. They also expand on permissible fee arrangements and advertising, including a last minute addition forbidding mediators from charging contingency fees.

[View ABA Article](#) (Subscription Required); [View ACR Article](#) (Subscription Required); [View Model Standards](#)

Mediation Quotes

"We are all lifelong students of conflict resolution (like it or not)...."

"One of the main barriers to resolution comes when people can't let the conflict go and move on with their lives."

"Anger is not a problem to be solved, nor something to be ignored or suppressed.... Anger is an emotion that needs to be worked through and processed as respectfully as possible."

– Gary T. Furlong, *The Conflict Resolution Toolbox*

IBA Mediation Newsletter

The second issue of the International Bar Association's Mediation Newsletter (Vol. 1, No. 2), with 72 pages covering 21 jurisdictions, is now available. [View IBA Newsletter](#)

ABA Task Force Seeks Ways to Improve Mediation Services

ADRWorld, August 9, 2005

In an effort to enhance mediation quality, the American Bar Association's (ABA's) Section of Dispute Resolution on August 6 established a Task Force to Improve the Quality of Mediation. The new task force is expected to seek input from many sources in order to develop practical proposals for improving the quality of mediation and the satisfaction of consumers. The task force is to begin in October and complete its work by July 2007.

[View Article](#) (Subscription Required)

Halliburton, McDonald's Join EEOC Mediation Program

EEOC Press Releases, August 17, 2005, August 31, 2005

Halliburton and McDonald's are the latest large employers to join the U.S. Equal Employment Opportunity Commission's (EEOC's) program to mediate workplace discrimination disputes. Halliburton's agreement is nationwide; McDonald's agreement is regional and covers Alabama, Georgia and South Carolina. Under the EEOC's Universal Agreement to Mediate, discrimination complaints filed with the EEOC will be sent to the agency's mediation unit and to the appropriate company contact for mediation prior to EEOC investigation or litigation. Mediation remains voluntary, however, and either the employer or the EEOC can opt out if it believes mediation is inappropriate for the particular claim. The EEOC is encouraging mediation in order to improve the agency's overall effectiveness, while helping companies and employees reach better outcomes. The EEOC has now entered into over 90 national or regional mediation agreements and 770 local mediation agreements with large employers. The agency has mediated over 72,000 cases since the National Mediation Program was launched in 1999, with about 70% successfully resolved, while over 90% of both claimants and employers would be willing to use the mediation program again in the future. Notably, EEOC data indicates that up to 20% of all successful mediations do not involve any payment of money.

[View EEOC Halliburton Press Release](#); [View EEOC McDonald's Press Release](#)

USDA Draft Regulations Emphasize Mediation, Constraints

ADRWorld, July 29, 2005

The U.S. Department of Agriculture's (USDA's) Farm Service Agency is accepting public comments on proposed mediation regulations until September 26. The regulations describe the current practice of engaging in mediation with parties to adverse agency decisions, such as rejection of applications for loan guarantees or payments. However, the regulations note that alternatives developed in mediation will not be accepted by the agency unless they are fully consistent with statutory and regulatory requirements and agency policy.

[View Article](#) (Subscription Required); [View Proposed Regulation](#)

Federal Medical Malpractice Bill Mandates Mediation

ADRWorld, July 27, 2005

On July 20, Congressmen John Conyers (D-MI) and John Dingell (D-MI) introduced legislation to reform the medical malpractice system, entitled

Check These Out:

Mediators often emphasize the importance of proper framing of facts and issues to help resolve differences. Here's a remarkable visual illustration of that principle:

http://web.mit.edu/per/sci/people/adelson/checkershadow_illusion.html.

If you liked that one, here are more:

<http://www.michaelbach.de/ot/index.html>.

These visual illusion sources are among a range of mediation articles and other interesting items in the blog entitled *Online Guide to Mediation* at: <http://www.mediationblog.blogspot.com/>.

the "Medical Malpractice and Insurance Reform Act of 2005" (H.R. 3359). The bill mandates mediation prior to trial for every medical malpractice action, permits non-binding arbitration depending on state law, and requires states to inform residents of the procedures available to resolve consumer grievances. The bill includes broad confidentiality provisions for any form of alternative dispute resolution used and directs the Justice Department to develop regulations to ensure that mediations are affordable, accessible, timely, "consistent," fair, and reasonable convenient for consumers. As reported in the last newsletter, the "Comprehensive Medical Malpractice Reform Act of 2005" (H.R. 2657) was introduced on May 26. Both bills are currently pending in the House Judiciary Committee and the House Energy and Commerce Committee's Subcommittee on Health.

[View Article](#) (Subscription Required); [View H.R. 3359](#)

Federal Circuit Beginning Free IP Mediation

Chicago Daily Law Bulletin, August 22, 2005

At the same time that other courts are dealing with issues resulting from reliance on pro bono mediators (see summaries below), a federal appellate court that routinely deals with high value cases is starting down that path. The U.S. Court of Appeals for the Federal Circuit announced that it is launching a pilot mediation program on October 3 for intellectual property (IP) appeals. Participation by litigants in the program will be encouraged by the court, but is voluntary. The court is compiling a roster of mediators from a list of candidates recommended by the Federal Circuit Bar Association, and is seeking attorneys and academicians with IP expertise, as well as attorneys with experience mediating. Mediators will not be paid for their services, but will be reimbursed for minor out-of-pocket expenses.

[View Article](#) (Subscription Required); [View Pilot Program Guidelines](#)

New Jersey Court Considering Pay for Its Mediators

New Jersey Law Journal, August 22, 2005

With many mediators abandoning the New Jersey Superior Court mediation program, the New Jersey Supreme Court is considering a proposal to pay mediators \$100 per hour for the first three hours of court-referred mediations. Since the program began in 2000, the first three hours have been provided pro bono by mediators, with market rates for time in excess of three hours, which averages about \$250 to \$300 per hour. Mediators unhappy with the program cite concerns that free mediation is undervalued by the parties, that many parties quit after three hours regardless of the status of the mediation, and that neither counsel nor judges routinely work for free. While the number of active mediators has declined by one-fourth over the past two years, the mediation program is currently expanding to all 21 counties in the state and an influx of Lemon Law cases is expected under new procedures taking effect in January (see summary below).

[View Article](#) (Subscription Required)

Lack of Mediator Pay Generates Controversy in L.A.

Los Angeles Business Journal, July 11, 2005

Controversy is developing around the Los Angeles Superior Court mediation

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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program, in which growing numbers of major law firms and large corporate clients are using the program to mediate six- and seven-figure cases, despite the fact that the program was established to provide free mediation in much smaller cases. Mediation services under the program are primarily provided by volunteer mediators. The Presiding Judge denied a request by the California Dispute Resolution Council to limit free services to litigants who could not afford a mediator, stating that the legislature did not establish a means test for eligibility. One mediator who resigned in protest from the court's panel of volunteers, stated that "Those who can't afford [mediation] should get it for free.... But if you can afford to hire a lawyer, then you ought to be expected to hire your mediator as well."

[View Article](#) (Subscription Required); [View CDRC-Judicial Correspondence](#)

New Jersey Requiring Mediation or Arbitration of Lemon Law Cases

New Jersey Law Journal, July 25, 2005, August 22, 2005

New Jersey is beginning a pilot program that requires parties in so-called Lemon Law cases alleging vehicle defects to elect between mediation, non-binding arbitration or binding arbitration. If the parties do not agree, or fail to make a choice within 90 days of the answer in the case, they will be automatically assigned to mediation. The new procedures go into effect January 1 and are intended to provide uniformity in the way New Jersey Superior Courts address the 1,500 Lemon Law cases filed each year in the state.

[View July Article](#) (Subscription Required); [View August Article](#) (Subscription Required)

California Funds Special Education Mediation Programs

California Budget Act of 2005-06

In its recently-approved 2005-06 budget, California allocated funds for special education mediation and mediation training programs. Among allocations for special education, \$10 million is specifically earmarked for dispute resolution services, including mediations provided through contract for the Special Education Program. Additionally, \$6 million was allocated to local plan areas and the Preschool Grant program for training programs, which may be used to provide training in alternative dispute resolution and the local mediation of disputes.

[View Special Education Budget](#); [View Special Education Dispute Resolution Program](#)

Mediation Winding Down Florida's 2004 Hurricane Disputes

Sarasota Herald Tribune, July 6, 2005

Florida's innovative hurricane mediation program is being scaled back as most insurance disputes are now resolved. As previously reported, Florida began its mediation program last November after hurricanes in 2004 caused an estimated \$21.5 billion in property losses in the state. Of the 1.7 million insurance claims that were filed by hurricane victims, only 50,000 now remain unresolved. Four mediation offices around the state have been conducting mediations, but due to lessening demand one of those is slated to close this month. The closing office has a 96%

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Thanks.

settlement rate of claims mediated.

[View Article](#) (Subscription Required)

Memphis' Largest Law Firm Opens ADR Center

Memphis Commercial Appeal, July 27, 2005; *Mississippi Business Journal Online*, July 12, 2005

Recognizing that clients are increasingly demanding alternative dispute resolution (ADR), Memphis' largest law firm recently opened the Center for Dispute Resolution with twenty of its lawyers who are experienced mediators. The Center is designed to provide ADR services – especially mediation – for a wide range of legal disputes, including commercial, personal injury, employment, product liability, securities matters and other areas. While other Memphis area firms offer mediation, the Center is the first to formalize these services along the lines of a separate practice group, bringing heightened attention from the legal community and the public.

[View Memphis Article](#) (Subscription Required); [View Mississippi Article](#)

Barriers to U.K. Mediation Explored

Post Magazine, July 7, 2005, August 11, 2005

Prominent U.K. mediators, legal experts and insurers gathered to discuss the status and merits of mediation for resolving motor vehicle personal injury claims in the U.K.; a second discussion involved catastrophic personal injury claims. There was general consensus that mediation is a useful tool, as long as the value of the cases is not too low to be able to afford a mediator. Claimants' lawyers expressed concern that injured individuals not be pressured into settlements they later regret. Appropriate timing of mediations in serious personal injury cases is challenging due to the difficulty in determining the full scope of injuries. There was also agreement that the market for mediation has not yet matured and that there needs to be greater awareness and training about the nature and availability of mediation. However, possible amendments to Civil Procedure Rules later this year may encourage much greater use of mediation in catastrophic personal injury cases.

[View July 7 Article](#) (Subscription Required); [View August 11 Article](#) (Subscription Required)

Canada's Largest Auto Insurer Backs Mediation

Post Magazine, August 4, 2005

Despite initial resistance from claims staff and counsel, Canada's largest auto insurer is now aggressively pursuing and promoting mediation. Last year the Insurance Corporation of British Columbia (ICBC) participated in over 3,400 mediations, with 95% settling. ICBC's director Peter Morgan attributes significant savings in legal costs to the use of mediation and credits mediation as a factor that has kept ICBC's bodily injury costs flat for the past five years. Morgan encourages other insurers to promote alternative dispute resolution, explaining that mediation in particular is a "significantly better process for all concerned and much more effective and desirable than the alternative."

[View Article](#) (Subscription Required)

Fiji Promotes Employment Mediation as Response to Globalization

Fiji Times, July 25, 2005

With the assistance of the United Nation's Industrial Labour Organization, Fiji is considering a new Employment Relations Bill to establish mediation as the primary means of resolving employment grievances and disputes. The bill is intended to build productive employment relationships, which Fiji's Labour Minister views as the best response to globalization and important for all Pacific countries.

[View Article](#) (Subscription Required); [View ILO Progress Report on Work in Fiji](#)

Commercial Mediation Conference Held in Beijing

China Daily, July 16, 2005

A conference promoting mediation of commercial disputes between Chinese and U.S. enterprises was held in Beijing on July 15. The conference was sponsored by the China Council for Promotion of International Trade (CCPIT) and CPR's International Institute for Conflict Prevention and Resolution. CCPIT, CPR and the China Chamber of International Commerce launched the U.S.-China Business Mediation Center in 2004 to provide mediation for complex commercial disputes between American and Chinese businesses.

[View Article](#); [View CPR's webpage on U.S.-China Mediation Center](#)