

MEDIATION NEWS FOR THE 21ST CENTURY™



MEDIATION NEWS

BROUGHT TO YOU BY

Tennessee Association of Professional
Mediators

TAPM Dec. 11 Quarterly Meeting Focuses on Ethics Scenarios

TAPM's quarterly meeting Dec. 11 will feature a discussion on ethics through the use of a series of hypothetical factual scenarios. TAPM President Randal Mashburn and Immediate Past President Marietta Shipley will present real life civil and family fact scenarios and examine the ethical problems presented in each scenario.

The lunch meeting will again be held at Harper's Restaurant, with lunch being served at 11:30 and the program starting at noon. CLE/CME credit approval is pending, and the program should provide an opportunity to consider how to respond to practical ethical dilemmas that mediators frequently face in dealing with dispute resolution.



MARK YOUR CALENDARS:

**Institute for Conflict
Management,
Lipscomb University
Rule 31 Civil to Family
Crossover Training.**

Lipscomb To Host Southeastern Mediators' Summit

The Institute for Conflict Management at Lipscomb University will be conducting a Southeastern Mediators' Summit Dec. 1-3 to explore the many applications of mediation and how mediators can maximize their personal and business potential.

The title of the program is "In the Shadow and Out of the Box: Realizing Mediation's Future." Participants will have the opportunity to attend a two day skills-based session and interact with professionals from across the nation. On Monday

The course is a 30 hour training. The dates are December 4-6, 2008. The lead instructor will be Jim Melamed, Co-Founder and CEO of Mediate.com, along with other select individuals. If you are interested or would like more information, please contact Brent Culberson, ICM's Director of Marketing and Recruitment, at 615.966.7174 or

evening, December 1, Dr. Tammy Lenski, author of "Marketing Your Mediation Practice," is the keynote speaker at the opening dinner. To register for the Summit or keynote dinner, call (615) 966-7174 or visit: the following website: <http://summit.lipscomb.edu>.

TAPM Selects Speaker for Annual Meeting in March

The date is now set and the speaker has been selected for TAPM's annual meeting -- with the featured topic being dealing with high conflict personalities in mediation.

Each year TAPM conducts its annual business meeting combined with a full day of CLE/CME. This year's program will be March 27, 2009, and the TAPM Board recently approved inviting William A. ("Bill") Eddy to be the primary speaker. Mr. Eddy is the president and co-founder of the High Conflict Institute and is an attorney and mediator in California. He is a nationally recognized author and speaker on managing high conflict disputes. More details will be forthcoming in the next newsletter, but please mark your calendar and plan on attending the annual meeting.

Materials from September Quarterly Meeting Available on Website

The Powerpoint presentation by Vanderbilt Professor Chris Guthrie from TAPM's September quarterly meeting is now available for members' review on TAPM's Website. Professor Guthrie gave a fascinating presentation on what goes on behind the scenes in negotiations and how certain negotiation tactics work and how others can backfire.

He discussed three stages of negotiation: opening,

[**brent.culberson@lipscomb.edu**](mailto:brent.culberson@lipscomb.edu)

CIVIL PEER GROUP

Meets Second Tuesday of Every Month; 7:30 a.m.

Join us for Coffee
Lipscomb University
Institute for
Conflict Management
3rd Floor
Ezell Center

FAMILY PEER GROUP

Meets Third Thursday
(Except for March, June,
September & December)

Upcoming Meetings:

Nov. 20 2008

12:00 Noon

OASIS CENTER

**Dec. 11: TAPM
Quarterly Meeting at
Harper's Restaurant
Ethical Dilemmas in
Mediation**

**March 27: TAPM Annual
Meeting -- Mark Your
Calendar
Handling High Conflict
Personalities in Mediation**

Mediation Quote:

"Everyone in conflict wears a mask that can only be observed from the outside. They respond to attack egocentrically and suffer from silent self-doubt, poor self-esteem, and denial. Their intentions are always honorable, yet at odds with the effects their actions have on others. Their feelings are too important to risk

exchange and evaluation. Based on numerous studies, it is clear that the initial stage can have significant ramifications to the end result by creating an "anchoring" effect. While most mediators encourage parties to be reasonable in their opening demands, a number of studies indicate that the ultimate settlement in a damages case is usually higher when a higher demand was made at the beginning.

The presentation included many surprising points about the impact of demands in settlement and the effect they have on judges and mediators. Similarly, the other stages of negotiation -- "exchange" and "evaluation" -- have a psychology to it that can either enhance or hamper the resolution process. One component is the concept of "reciprocity" -- the feeling that we are obligated to repay in kind what we have received from another. Another aspect is the natural tendency of all disputants toward loss aversion -- including looking at what they will gain by settling versus what they will lose if they settle. Studies confirm that everyone places a higher value on items they already possess than on items they are trying to acquire, and this basic tendency has huge implications for negotiation.

The discussion was chock full of interesting information and practical tools for mediator based on solid statistical information and studies of how people react in the negotiation process. Viewing the a copy of the handout from the presentation will not be the same as having actually attended the program, but there is a lot of useful material. Go to [www.mediate.com/tapm/docs/Chris Guthrie Presentation.pdf](http://www.mediate.com/tapm/docs/Chris_Guthrie_Presentation.pdf)

Business Valuation: A High Value Tool for both Civil and Family Mediators

discussing openly, so they repress or externalize their emotions. "Everyone in conflict takes deliberate steps to protect themselves from the truth, because they know the consequences could compel them to leave the comfortable, albeit dysfunctional patterns they have created. They easily forget what it is like *not* to be in conflict, and adjust to living in environments that are rife with dissension."

- Kenneth Cloke, *Mediating Dangerously: The Frontiers of Conflict Resolution* (Jossey-Bass 2001) at 28-29.

Check This Out:

Analysis Finds Parties Generally Err in Rejecting Settlement to go to Trial

The complete article analyzing how parties often make poor decisions when passing up settlements prior to trial, which the press first reported in August, is now available online.

[Randall L. Kiser, Martin A. Asher & Blakely B. McShane, *Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations*, 5 Journal of Empirical Research 551 \(September 2008\)](#)

Worth Noting:

Con Artist Acting as Mediator Jailed

A disbarred lawyer acting as a divorce mediator improperly presented himself as an attorney and conned dozens of victims into paying him large amounts of money. He was able to sidestep enforcement efforts for some time by hiding behind the confidentiality provisions of mediation, but eventually was convicted on 24 counts of theft and fraud, having billed 25 victims for \$300,000. He would sometimes become romantically involved with the wives of divorcing parties, with one paying him \$87,000 for "mediation" services. In addition to imprisonment,

**Reviewed by Leigh Ann Roberts,
TAPM Vice-President**

On October 14th, the TAPM Civil Peer Group enjoyed a packed room and an excellent presentation on the topic of Business Valuations in Mediation. Mediators of both civil and family cases were in attendance as well as several visiting attorneys and professionals who are considering joining TAPM. The topic of business valuations is an issue that surfaces in many different types of disputes, the most obvious of which are divorces and business partnership dissolutions.

Vic Alexander and Jennifer Bronco from Kraft CPAs, PLLC, provided an overview of the basic principles of valuations, how to select an expert and the key areas where experts and business people are likely to disagree on the topic of business valuations. In the mediation setting, it is not uncommon for parties to present two differing opinions from valuation experts on the value of the underlying business. In divorce cases, spouses will often argue that a business value is high in order to justify a higher support demand. In a business partnership dissolution, an exiting party may want to set their buy-out price much higher than the interest would be valued on the open market. These types of disputes can be both expensive and heated and are also excellent opportunities for mediators to make a difference.

As Mr. Alexander explained, even if experts disagree, there is typically not more than 20% difference between two balanced, well-formed business valuation opinions. If a mediator finds a larger gap between the opinions, the experts from Kraft suggest that the mediator use the mediation as an opportunity to ask some specific questions that might disclose these differences for the parties. Even when the underlying dispute is not resolved, mediation can be an opportunity for the parties to narrow the valuation issues in the dispute, thereby saving the parties time and money

the ex-lawyer will be required to provide restitution from his assets which have been seized.

[Arizona Republic](#) (October 10, 2008);
[ADR Prof Blog](#) (October 13, 2008)

Other Cases & Resolutions:

AT&T, NuVox Willing to Mediate Missouri Public Service Complaint by Business Customer over Inadequate Facilities, [TR's State Newswire](#)
(October 24, 2008) (Subscription Required)

Antitrust Suit Against Apple by Unauthorized Seller Sent to Mediation, [Internetnews.com](#) (October 17, 2008)

Candidates for Alabama Supreme Court Meet with Mediator in Effort to Avoid Escalation of Negativity, [Tuscaloosa News](#) (October 16, 2008)

Lawsuit Alleging Republicans Incited Violence Against Democratic Nominee Sent to Mediation, [Kansas City Star](#) (October 17, 2008)

Mediation Fails to Resolve Claims Against Democratic National Committee by Its Gay and Lesbian Leadership Council, [PageOneQ.com](#)
(September 12, 2008)

Better Business Bureau Expels Construction Company Member for Refusing to Mediate Complaints, [Tri-City Herald](#) (October 14, 2008)

No Settlement in Mediation Between Opes Prime, the Australian Securities and Investments Commission and Creditors over Stockbroker's Collapse, [Business Spectator](#) (October 24, 2008)

Poland's Government and Soccer (Football) Association, PZPN, Close to Resolving Bitter Dispute in Mediation, [Reuters](#) (October 6, 2008)

in the long run.

Mediators can also help parties in a dispute better understand and use valuations to resolve or narrow the issues in their dispute. If a mediator encounters parties grappling with valuation issues and the mediator suggests the use of a valuation expert as an option for the parties, the mediator should be prepared for various questions from parties on this topic. For example, “How much does a valuation cost?”. Mr. Alexander, who has over 20 years of experience in this area and has served as both an arbitrator and Special Master on valuation cases, said parties could be looking to spend anywhere from \$4,000 to \$40,000 depending on the expert selected and the depth of the valuation request.

Mediators suggesting valuation as an option are also often asked how long a valuation would take. The experts at Kraft stated that, in routine cases, it takes anywhere from thirty to forty-five days from the date they receive all the requested documents and information from the parties for their office to turn around a valuation opinion. The key point to emphasize to parties is that the document and information requests parties will receive from valuation experts can be extensive and the experts can only begin the work of valuing the business once they have all the information they need.

Mr. Alexander and Ms. Bronco had several final points for our mediators. When selecting a valuation expert, parties should do their research and find reputable, credentialed professionals. Credentials parties should be on the look-out for are membership to ASA (American Society of Appraisers), accreditation in business valuation or “ABV” status with AICPA (the American Institute of Certified Public Accountants). There are also special certifications and designations for professionals who work with restructuring and bankruptcy issues and forensic accounting.

While valuation principles vary from state to state

Professional Hockey Players Bertuzzi and Moore Meeting in Mediation for First Time after 2004 “Sucker Punch” that Broke Moore’s Neck, Ending Career and Leading to \$38 Million Lawsuit, [CBC.ca](#) (September 16, 2008)

National Rugby League Legal Issues with Melbourne Coach and CEO Result in Mediation, [Fox Sports](#) (October 31, 2008)

Mediator Requested in Michael Vick Bankruptcy to Work out Settlement of Debts with Creditors, [Associated Press](#) (October 3, 2008)

Mediation Leads to Developer Giving Dublin City €1.5 Million and Drawings to End Housing Regeneration Projects, [Irish Times](#) (September 5, 2008)

Mediation Yields Back Pay for Former Paramedics from Town, [West Yellowstone News](#) (October 31, 2008)

Town Manager of Front Royal, Virginia Settles Wrongful Termination Case in Mediation, [FloridaToday.com](#) (September 9, 2008)

City of Billings Agrees to Mediation with Its Insurer over Coverage after \$1.6 Million Judgment; Mediation Expected to Be Open to Public, [Billings Gazette](#) (September 8, 2008)

Mediation Between Tree-Sitters and Campus Officials over Athletic Center Unsuccessful; Litigation Delays May Add \$20 Million in Construction Costs, [San Francisco Chronicle](#) (September 9, 2008)

Mediation Under Way to Avoid Retrial after Hung Jury in Ten-Week Long Criminal Public Corruption Trial, [Pittsburgh Tribune-Review](#) (September 13, 2008)

Judge Sends Native American Casino Dispute with Harrah’s to Mediation, [Indianz.com](#), (September 8, 2008)

Court Sends Tax Suit Back to Mediation, [Birmingham News](#) (October

based in large part to the case law of that state, much of what is available in Tennessee on this topic comes out of divorce and dissenters' rights cases. Mediators looking to review some of the legal discussions around business valuation in Tennessee can check out some of the following cases: *Anderson v. Anderson*, 2006 WL 2535393; *Koch v. Koch*, 874 S.W.2nd 571 (Tn.Ct.App. 1993); *Powell v. Powell*, 124 S.W.3d 100 (Tn.Ct.App. 2003); *Blasingame v. American Materials, Inc.*, 654 S.W.2d 659 (Tenn. 1983); *Hazard v. Hazard*, 833 S.W.2d 911 (Tn.Ct.App. 1991); *Smith v. Smith*, 709 S.W.2d (Tn.Ct.App. 1985); *Witt v. Witt*, 17 TAM 15-6(Tn.Ct.App. 1992); and, *Harmon v. Harmon*, 25 TAM 15-22 (Tn.Ct.App.2000).

Interested in learning more about a particular area or tool for your mediation practice? Let us know. The TAPM Civil Section meets the second Tuesday of every month. This section is dedicated to providing practical feedback, discussion and skills for the civil practice mediator. Whether you are an experienced mediator or newly trained, these discussions offer help at every level. December's meeting will include a presentation on structured settlements: how they work and how mediators can help parties use them to reach resolutions. We hope you will join us. Whether it is a formal presentation or a group discussion tackling issues such as convening, impasse, ethics, marketing, and more, these meetings are not to be missed.

Meet the Mediator: Robert L. Sullivan

(The TAPM Newsletter continues its series of profiles of its members.)

30, 2008) (Subscription Required)

Federal Mediator to Assist Stalled Contract Talks with Screen Actors Guild, [Los Angeles Times](#) (October 24, 2008)

Mediation Begins on Clean Up of Lake Polluted by Plugged Drain, [Lansing State Journal](#) (October 26, 2008)

Six-Month Mediation Failed to Resolve \$26 Million Plan to Widen Road; County Commissioner Still Hopes for Resolution, [Macon Telegraph](#) (September 15, 2008)

Archbishop Sues Newspaper then Seeks Mediation, Which Australian Court Cannot Compel, [West Australian](#) (October 30, 2008) (Subscription Required)

Other News & Initiatives:

Judge Draws Challenger in Election Due to Lack of Use of Mediation, [Reno Gazette Journal](#) (October 29, 2008)

Mediators Offer Advice on How Government Can Avoid Budget Impasses, [The Sacramento Bee](#) (September 22, 2008) (Subscription Required)

Probate Judge Promotes Use of Mediation Program, [Mansfieldnewsjournal.com](#) (October 20, 2008)

Nobel Peace Prize Awarded to Global Mediator Ahtisaari for Decades of Peacemaking, [Reuters](#) (October 10, 2008)



In the world of Media and Entertainment law, Robert L. Sullivan believes “Mediation gives the parties opportunities to create business solutions to matters in dispute and fashion remedies that are not available if the matter goes to trial. The parties in entertainment law disputes often interact with each other on a regular basis. Mediation enables the parties to preserve business relationships that would be damaged by pursuing litigation.”

Robert L. Sullivan is a Partner at Loeb & Loeb LLP, a national law firm that has a reputable history in the entertainment and media industry with more than 300 lawyers in four offices located in Los Angeles, New York, Chicago and Nashville, and an affiliation in Asia and Europe. Mr. Sullivan has been a Rule 31 Listed General Civil Mediator since 2001.

When asked if a mediator in a copyright dispute involving music needs to know how to read music, Mr. Sullivan recommends that “Being able to read music is not essential, but some formal musical training is helpful in analyzing the expert witness reports that are generally at the heart of most copyright infringement disputes.”

Preparing for a mediation concerning a copyright dispute requires listening to the music. Mr. Sullivan explains that “One of the issues in a copyright infringement action is whether the allegedly infringing song is “substantially similar” to the Plaintiff’s work. The test generally applied by the finder of fact to determine whether substantial similarity exists is the “Audience Test.” Part of preparation for the mediation involves both

reviewing any expert reports and listening to the songs at issue.”

Mr. Sullivan earned his Bachelor of Arts degree, *magna cum laude*, from Vanderbilt University in 1974. He earned his Juris Doctor from Vanderbilt University Law School and was admitted to the Tennessee Bar in 1977. Robert Sullivan’s practice focuses on entertainment transactions primarily in the music field, as well as litigation and mediation in entertainment and intellectual property areas.

He represents major recording artists, songwriters, publishing companies and record companies. Mr. Sullivan is also knowledgeable in employment law and general business litigation. In recent years, he has represented employers in disputes involving contracts, covenants not to compete, executive compensation and sexual harassment.

He has written and spoken frequently on topics dealing with entertainment, sports, music and intellectual property. He serves on the Board of Directors for the Copyright Society of the South, the Tennessee Volunteer Lawyers For the Arts, and the Music City Community Chorus. He has lectured at Emory Law School, Cumberland Law School, Stetson University Law School, Practicing Law Institute, and the Nashville Bar Association. Mr. Sullivan has been an instructor at Nashville School of Law and Belmont College.

PRESIDENT'S MESSAGE



By Randal Mashburn, TAPM President

As we approach the end of the year, it is a good time to assess what we have done in our mediation practices in 2008, and I would like to encourage you to focus especially on whether you have done all you should in connection with pro bono work.

Section 18(d) of Rule 31 provides as follows regarding pro bono service for mediators:
"As a condition of continued listing, each Rule 31 Mediator must be available to conduct three pro bono mediations per year, not to exceed 20 total hours. At the initiation of a mediation, the court may, upon a showing by one or more parties of an inability to pay, direct that the Rule 31 Mediator serve without pay. No Rule 31 Mediator will be required to conduct more than three pro bono proceedings or serve pro bono for more than 20 hours in any continuous 12-month period."

Although most mediators would likely say that they are "available" to conduct pro bono mediations, only a limited number of us actually seek out opportunities to fulfill our obligations. In reality, the technical legal requirement of being "available" is much less stringent than what I would contend is a moral obligation to be active and aggressive in looking for chances to utilize our mediation training for the benefit of the community.

If you have not been taking your pro bono

obligations as seriously as you should, I would urge you to undertake a new commitment in the coming year. In that regard, TAPM will help by beginning a new series in the January newsletter that will focus on a different non-profit organization in each newsletter that has the need for volunteer pro bono mediators. While this will provide more information about specific non-profit organizations that need help, we all should look for opportunities in our communities to carry out our obligations. Aside from any rule that may apply, it is simply the right thing to do and can be immensely rewarding.

**Sixth Annual Advanced Mediation
Techniques Workshop Presented by the
Tennessee Supreme Court's Alternative
Dispute Resolution Commission**

**Reviewed by Regina B. Newson,
TAPM Secretary**

Marvin E. Johnson, Esquire, was the featured speaker at this year's Alternative Dispute Resolution Commission program on October 10. The title of the program was "Assessing Our Internal GPS when Navigating the Transitions through Cultural Diversity, Conflict, and Change in our Personal Lives and When We Serve as Mediators."

Mr. Johnson has over 30 years of experience in the field of mediation. He has mediated cases in the field of employment, labor management, consumer, business, and community affairs. He has trained over 10,000 people in various forms of dispute resolution including mediation, joint problem solving, arbitration, facilitation and interest based bargaining. Mr. Johnson has provided conflict resolution training to leaders in Russia, Africa and Central and Eastern Europe and has written numerous articles on cultural diversity in alternative dispute resolution.

Mr. Johnson started his seminar by having each of us put our names in the center of a coin. Around that center, we had to list where we are currently in our lives. On the second circle, we had to list the influences that had brought us to where we are today. Then, we broke into groups of fours. We had discussions about who we are and what made us the way we are. Interestingly, we discovered that many of us had shared experiences; i.e. public education, military backgrounds, or parents who had been public servants. This commonality was also true of the larger group when we came together. The importance was that each of us begin to understand who we are in relationship to our clients. We needed to become aware of our own GPS.

The second exercise involved simple road signs. Stop, Dead End, No Passing Zone, No Outlet, No Left Turns, Uneven Pavement were just a few of the signs that were shown in the exercise. The important question was, "Which road sign represented you?" This exercise generated a lot of lively discussion. Some participants had two or three road signs depending on where they saw themselves. The road signs change as we change in our lives. Some were running at 70 miles an hour speed limits, while others were at 30 or on uneven pavement.

These exercises were important because they got us ready for the hard work of thinking about where we as individual mediators stand on issues of race, gender, cultural diversity, ethnicity, and disabilities. However we feel about these issues, we bring them to the table as mediators with our tone of voice, demeanor, and attitude. The larger question becomes, "Can we set aside how we personally feel about a particular issue in order to effectively mediate the situation?" We cannot mediate these situations effectively unless we are aware of our own internal GPS. Mr. Johnson spoke of acknowledging our own biases. If we refuse to acknowledge our personal biases, we do a

disservice to ourselves and others.

Mr. Johnson spoke of transitions as 'the way through' our personal issues. Transitions are not the same as change. Transitions are the inner process through which people come to terms with a change. They let go of the way things used to be and reorient themselves to the way that things are now.

Meghan Clarke, the second featured speaker continued Mr. Johnson's themes on transitions. Ms. Clarke is an Associate of The ARIA Group where she works on community reconciliation projects – environmental, religious based conflicts, educational inequities and police community relations.

Conflict is situational and external to us. Transitions are what happens inside of us as we adapt to the conflict triggered by the change. There are three phases of transition: endings, neutral zone and new beginnings. Each of these phases has certain characters that are peculiar to them. In endings, there is a sense of loss, letting go, getting closure and saying good bye. In the neutral zone, there is fear, resentment, uncertainty and opportunity. Finally, there is a new beginning, which allows for feeling connected, commitment, and renewed. There is no time limit on any of these phases. The discussion by Ms. Clarke provided a lot of very useful information about resistance to transitions and what can be done to understand their roles in our lives and in the mediation process.

Other portions of the program included a panel representing various community dispute resolution programs to discuss the types of disputes dealt with, training for mediators and pro bono mediation. The final item on the seminar was "Communicating with and about people with disabilities," which provided important tips on dealing with parties having to cope with

disabilities.

Overall, this seminar was about the mediator's struggles with personal values and belief systems. What we believe affects the mediation, and what is said in the mediation in turn affects us and our ability to be neutral. It was a very insightful exercise for mediators.

NOVEMBER 2008

CASES & RESOLUTIONS:

Alabama Courts Must Order Mediation When Sought by Litigant

The Supreme Court of Alabama granted a petition for mandamus in [Eckles v. Fort Dearborn Life Ins. Co.](#), requiring a trial court to order mandatory mediation when sought by a litigant, pursuant to state statute and court rule. The lower court didn't think the circumstances were right for mediation, but the Supreme Court made clear that a court cannot exercise discretion if any party seeks mediation. Both the Alabama statute and court rule provide for mandatory mediation even if only one party asks for it, but require that party to pay for the costs of mediation.

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[Eckles v. Fort Dearborn Life Ins. Co.](#), No. 1071545 (Ala., Oct. 10, 2008)

Lack of One Signature Prevents Admissibility of Multi-Party Settlement Agreement to Determine if Portions Are Severable

A California appellate court concluded in [Rael v. Davis](#) that the lack of a single signature on a mediated settlement agreement meant that there was no final agreement, so the document could not be admitted in court to consider whether any of the settlement provisions between other parties could be severed and stand alone. In Rael, a mediation arising out of conservatorship litigation involved distribution of property between a man's children and his new wife. The settlement reached in mediation omitted the signature of one child who missed the last mediation session, even though his individual counsel was present and signed the agreement. After the husband died, his wife sought to enforce the agreement concerning what she would receive, since she and her husband had both signed the agreement. However, the trial court examined the parties' intentions and expectations at the mediation session and afterwards and concluded that they intended no agreement unless everyone signed. The appellate court focused on the fact that the agreement expressly named the parties who must sign and one of them did not. If there was no agreement, under

California's strict mediation confidentiality provisions the document was inadmissible for any purpose, including imposing attorneys' fees under the agreement against the wife even though she had sought to admit the agreement. The appellate court concluded that neither judicial estoppel nor anything short of due process concerns could permit a judicial exception to mediation confidentiality.

[Rael v. Davis](#), 2008 WL 4335179 (Cal. App. 2d Dist., Sept. 24, 2008)

Public's Need to Know Wrongful Death Outcomes Trumps Mediation Confidentiality in Virginia

The Virginia Supreme Court concluded in [Perreault v. The Free Lance-Star](#) that the state statute requiring wrongful death settlements to receive court approval necessitates filing the settlement terms on the record, even when the settlements result from mediations for which confidentiality is also provided by state statute. The case involved a series of settlements relating to deaths after medication was administered during open heart surgery. The settling parties sought to keep the terms confidential and appealed the trial court's refusal to seal the record. The Court explained that the mediation confidentiality statute contains an exception when disclosure is required by law, and rejected various arguments that would have shielded the settlement amounts from disclosure. The Court also held that whether to seal the record is left to the discretion of the trial court, with a strong presumption of public access to judicial records.

[Perreault v. The Free Lance-Star](#), No 071978 (Va., Sept. 12, 2008)

Year-Long Mediation Effort Develops Better Bridge

Plans for a safer, stronger, quieter, environmentally-friendlier bridge are being developed by a 34-member mediation team. The group has spent the last year working through the myriad issues surrounding a \$3.9 billion replacement of the Evergreen Point Bridge at the direction of the Washington state legislature. Substantial disagreements have been overcome and options narrowed to three plans. The mediation team is due to provide a project impact analysis in October for the legislature.

[Seattle Post-Intelligencer](#) (September 18, 2008)

NEWS & INITIATIVES:

Hong Kong Encourages Mediation of Lehman-Related Disputes

The Hong Kong Monetary Authority appointed the Hong Kong

International Arbitration Centre to provide mediation and arbitration services to address disputes between banks and investors in Lehman-related products. In certain circumstances, the Monetary Authority will pay a portion of the fee for the Centre's services. Hong Kong's Secretary for Justice is also encouraging mediation to help resolve disputes relating to Lehman minibonds.

[The Standard](#) (October 31, 2008); [The Standard](#) (October 22, 2008)

Singapore Monetary Authority Prefers Mediation for Investors

The Finance Minister of Singapore stated that the Monetary Authority is encouraging mediation as a recourse for protesting investors. Banks in Singapore have established independent mediation panels to address concerns raised by customers.

[Channel News Asia](#) (October 15, 2008)

States Increase Use of Mediation for Home Foreclosures

- Connecticut has begun a foreclosure mediation program through legislation enacted on June 12 which is said to be the first of its kind in the U.S. The mediation program allows homeowners facing mortgage foreclosure on primary residences to request mediation at no charge to them. With a state appropriation of \$2.5 million, twelve staff mediators have been appointed for the state, along with seven case flow coordinators. The goal is to keep homeowners in their homes, often through refinancing or restructuring debt. While the program manager estimates that 4,000 homeowners are eligible for the new program, only about 40% have applied thus far. [Connecticut Post](#) (October 4, 2008)
- New Jersey Governor Corzine set forth a sweeping financial rescue plan before a rare joint session of the New Jersey legislature. The rescue plan requires mediation in contested foreclosures, which is to be implemented statewide within 60 days. [WCBS-TV New York](#) (October 16, 2008)
- The Ohio Supreme Court recommends that Ohio counties implement mediation programs, so Sandusky County has begun a foreclosure mediation program using the Court's model. To participate, homeowners in foreclosure must request mediation, agree to participate in a credit counseling session and allow an appraiser to determine their home's current value. Entering into mediation with a sense of what the homeowners can do financially and their property value, along with requiring banks to send a representative with decision-making authority, makes the mediation process more effective. [Fremont News Messenger](#) (October 1, 2008)
- Ohio's Stark County Common Pleas Court is encouraging homeowners in foreclosure to use its mediation program, which has been successful in keeping homeowners in their homes in about half of the mediations. The \$50,000 cost

- of the mediation program is funded by foreclosure case filing fees. The program is run by the Community Mediation Center. [Canton Repository](#) (September 7, 2008)
- Individual judges are ordering mediations in home foreclosure cases in Florida, as many homeowners have difficulty finding anyone with whom they can try to work things out at their lenders' offices. Judges in Florida's Eighteenth and Seventh Judicial Circuits are currently requiring mediations; the Fifth Circuit is considering implementing mediation requirements, while the Ninth Circuit is not. The various circuits are expected to share experiences about how best to handle increasing foreclosure filings. [Orlando Sentinel](#) (October 6, 2008)
 - A nonprofit organization, Earth Angels United, is administering a foreclosure mediation program in Florida's Eighteenth Judicial Circuit, to help reduce the strain caused by a 200% increase in foreclosure cases. [Orlando Business Journal](#) (October 29, 2008)

Mediation Program Established for Montana Grain Shippers

Montana farmers have approved a proposal to use mediation to resolve disputes over grain freight rates with BNSF Railway. Grain producers are not considered shippers by the Surface Transportation Board despite paying the freight, which forced them to rely on grain elevator companies to file cases. The new program with BNSF will first rely on mediation and then resolve any remaining issues with binding arbitration by an independent arbitration board.

[Great Falls Tribune](#) (October 16, 2008); [Montana's News Station.com](#) (October 20, 2008)

Mandatory Med Mal Mediation Working in Illinois County

Mandatory mediation of medical malpractice cases in Madison County, which the Illinois Supreme Court approved in 2007 establishing the first rule of its kind in Illinois, worked as intended to settle a wrongful death case alleging inadequate care by a nursing home. The mediation rule is also considered unique by allowing parties to choose between lawyers and judges to mediate their case. In the wrongful death case, a judge was assigned in February to mediate the matter. The terms of the settlement were filed under seal and not disclosed.

[The Madison - St. Clair Record](#) (October 10, 2008)

New Mexico First State to Join EEOC's Universal Agreement to Mediate

While over 1,200 employers have entered into Universal Agreements to Mediate with the U.S. Equal Employment Opportunity Commission, New Mexico is the first state to do so.

With New Mexico's formal agreement to resolve disputes through mediation, all eligible discrimination charges filed with the EEOC naming the state as respondent will be sent to the EEOC's mediation unit.

[Bizjournal.com](#) (October 31, 2008)

New York Continues to Seek Land Use Mediation Statute

New York is attempting to join about two dozen other states with land use mediation statutes. Bills have passed the New York Senate four times, but ultimately failed to be enacted. Most recently, S.B. 3232 passed the Senate on May 9 and would add mediation as an option for resolving land use disputes, but would not replace existing land use review procedures. The senators introducing S.B. 3232 noted the success of a pilot land use mediation project for the Hudson River Valley and a mediation program in the Office of Court Administration. Other state statutes vary in their breadth and timing, with some encouraging mediation early in the development approval process and others waiting until litigation has begun.

[New York Law Journal](#) (October 15, 2008) (Subscription Required); [New York S.B. 3232](#)

California Bill for HOA Mediation Vetoed

Governor Schwarzenegger vetoed California legislation that would have created a bureau to provide a forum for mediating homeowner association disputes, along with training. The bill was based on fact-finding by the California Law Revision Commission, which studied common ownership developments.

[San Diego Union Tribune](#) (September 30, 2008)

Arizona Rejects Initiative Which Would Have Eliminated Mediation in Homeowner Disputes with Builders

By a margin of nearly 4-1, Arizona voters defeated an initiative on the ballot in Arizona which, among other things, would have eliminated the use of mediation in disputes between homeowners and builders, requiring litigation instead. Proponents of the initiative, Proposition 201, asserted that it would not eliminate mediation, but the existing mediation language in the Arizona statute apparently would have been stricken.

[Ballotpedia.org](#); [Tucson Citizen](#) (September 22, 2008); [Proposition 201](#)

“Technical Mediation” Urged for Expert Disputes

Disagreements between parties' experts in complex matters, such as

construction defect litigation, may be addressed by “technical mediation” using neutrals who have sufficient subject matter expertise to communicate easily with the feuding experts and mediate technical positions. The goal is to resolve only the technical issues and not consider liability or damages, which are subsequently addressed in a standard mediation or other form of alternative dispute resolution.

[Miami Daily Business Review](#) (September 9, 2008) (Subscription Required)

Other International Mediation Developments

- After extensive analysis, the **U.K.** has introduced an Employment Bill to abolish statutory grievance and disciplinary procedures and encourage mediation, [Aberdeen Press and Journal](#) (September 26, 2008); New **U.K.** workplace guide by Chartered Institute of Personnel and Development and Acas encourages mediation based on survey of effectiveness, [Financial Adviser](#) (October 2, 2008) (Subscription Required)
- Cardiff, **Wales** begins pilot program offering free mediation for consumers and businesses using two staff mediators, [Wales Online](#) (October 4, 2008)
- European Commission gives award to **U.K.** Small Claims Mediation Service with very high satisfaction rate, [PR-CANADA.net](#) (November 1, 2008)
- **Turkey** proposes mediation to increase efficiency of court system; similarities with Ottoman Empire process noted, [Turkish Daily News](#) (November 1, 2008)
- **India** high court judge praises mediation at inauguration of Mediation and Conciliation Centre in Thalassery, Kerala, [Hindu](#) (September 28, 2008) (Subscription Required)
- **India's** Law Ministry is focusing on training trainers in order to address shortages of trained mediators, which are holding back pre-trial mediation, [Hindu](#) (October 5, 2008)
- High court advises the State Bank of **Pakistan** to instruct all commercial banks to attempt to resolve disputes through mediation prior to going to court, [Business Recorder](#) (September 25, 2008) (Subscription Required)
- **Malaysia** establishing Franchise Mediation Center by early 2009 and training mediators to mediate franchise disputes, [Bernama Economic News](#) (September 11, 2008) (Subscription Required)
- The **Philippines** Intellectual Property Offices proposed draft rules that would permit government mediators to render final decisions on IP disputes when parties cannot reach agreement, [Business World Online](#) (September 29, 2008)
- **Hong Kong** civil justice reforms emphasizing mediation are due to take effect in April, causing concern among counsel, [South China Morning Post](#) (September 29, 2008) (Subscription Required)
- **Jamaican** Justice Minister promises more court appointed mediation and expansion to some criminal matters, [RadioJamaica.com](#) (September 9, 2008)

- **Bermuda** Human Rights Commission urges mediation of complaints, adding five mediators at \$300 per hour, [Royal Gazette](#) (Bermuda) (November 1, 2008)