



## Tennessee Association of Professional Mediators

### **TAPM Quarterly Meeting to Feature Nationally Recognized Scholar on Negotiation**

We are pleased to have Chris Guthrie, Law Professor at Vanderbilt University Law School, as our guest speaker at the Sept. 25 TAPM Quarterly Meeting. The program is another in our series of lunch meetings at Harper's Restaurant. Lunch will be served at 11:30, and the program will begin at noon.

A leading behavioral law and economics and dispute resolution scholar, Professor Guthrie has frequently been recognized for his research and teaching. Among other awards, he has received two CPR Institute for Dispute Resolution Professional Article Prizes; the 2003-2004 Outstanding First-Year Course Professor Award at Northwestern; and multiple teaching and research prizes at the University of Missouri, where he began his academic career.

Professor Guthrie, who has served as a Visiting Professor at Washington University and Northwestern, has spent half his academic career as Associate Dean. At Vanderbilt, he served as Associate Dean for Academic Affairs from 2004 to 2008. He is currently on sabbatical for the 2008-2009 academic year. Before beginning his teaching career, Professor Guthrie practiced law with Fenwick & West in Palo Alto, California. He has written two books as well as numerous book chapters and articles.



**Chris Guthrie**

### **TAPM QUARTERLY MEETING**

**Thursday, Sept 25, 2008  
Harper's Restaurant  
2610 Jefferson Street  
11:30 Lunch Served.  
12:00 Noon Program Begins.**

**Approved for:**

**1 hour general CLE;**

**1 hour family CME.**

\$15.00 TAPM MEMBERS - includes lunch!

\$20.00 Non TAPM Members – includes lunch!

### **6TH ANNUAL WORKSHOP**

**October 10, 2008**

**Tennessee Supreme Court  
and the ADR Commission Present  
the 6th Annual Advanced**

**Mediation Techniques Workshop:**

**"Assessing Our Internal GPS when  
Navigating the Transitions Through  
Cultural Diversity, Conflict, and  
Change in Our Personal Lives and**

\*\*\*\*\*

**Mediation Day Banquet -- Oct. 9;  
Chief Justice Holder to be Honored;**

## TAPM to Sponsor Reception

On October 9, 2008, at 7:00 p.m. the Coalition for Mediation Awareness in Tennessee (CMAT) will celebrate Mediation Day at a dinner banquet at the Lipscomb University Institute for Conflict Management in Nashville. **The Tennessee Association for Professional Mediators, a member of CMAT, will host a pre-banquet reception at the home of former TAPM President Marietta Shipley in Green Hills, at 5:00 p.m.** All members of TAPM are invited to attend the reception, regardless of whether you are able to attend the banquet.

The Coalition will honor Tennessee Supreme Court Chief Justice Janice Holder with the second annual Grayfred Gray Public Service Mediation Award at the banquet. Space for the banquet is limited. For further details and registration information, click [here](#).

If you plan to attend the reception at Marietta Shipley's home, located at 2809 Wimbledon Road, please RSVP by Oct. 1 to TAPM@tennmediators.org.

The Coalition for Mediation Awareness in Tennessee was formed in 2006 to maximize the resources and expertise of various groups who provide alternative dispute resolution services. The Coalition assists the courts and community organizations in providing programs and activities that educate the public and the legal profession about the benefits of mediation and other forms of alternative dispute resolution.

The Coalition holds an annual event in October to commemorate Tennessee Mediation Day and to award the Grayfred Gray Public Service Mediation Award to a person who has made an innovative and lasting contribution to public service through alternative dispute resolution in Tennessee. The award is named after Professor Grayfred Gray, who is an emeritus University of Tennessee School of Law professor and founder of the University's outstanding Mediation Clinic.

If you have questions or are interested in becoming a sponsor for the dinner, contact Rachel Waterhouse, Chair of the Mediation Day Planning Committee for CMAT. (Phone 615-293-5469 or e-mail at [rachel.waterhouse@comcast.net](mailto:rachel.waterhouse@comcast.net).)

\*\*\*\*\*

## TAPM Practice Topic Series Begins With Oct. 14 Civil Peer Group Session

**When We Serve as Mediators"**  
Call 615-741-2687 for info.

**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:  
Oct. 16, 2008  
Nov. 20 2008  
12:00 Noon  
OASIS CENTER

## Mediation Quote:

"[W]e are evoking and supporting a natural impulse of people in conflict to want to be able to *work together*, even in the face of having significant differences in their perspectives... [E]ven if not in the foreground, that impulse is waiting to be tapped and given room for expression, even if only in the form of a wish of what might be if things were different. The same is true for the parties' capacity to *work through their conflict together*. If given the opportunity and necessary support, many are both willing and able."

- Gary Friedman and Jack Himmelstein, *Challenging Conflict: Mediation Through Understanding (American Bar Association 2008)* at xxxvii

## Other Cases &

**By Leigh Ann Roberts,  
TAPM Vice-President**

TAPM's Civil Section Peer Group hopes you will join us in October as we begin our first in a series of Practice Topic Presentations. As professional mediators and peers, we have shared many of our tips and strategies for developing and maintaining successful mediation practice. In the coming months, we will be featuring area experts on various topics important to mediating civil cases and key for expanding our professional toolkits.

On October 14<sup>th</sup>, we will host our first Practice Topic Presentation on "Business Valuations, the Perils of Portraiture." As with recent civil peer group sessions, the meeting will be at 7:30 a.m. (coffee provided) at the Institute for Conflict Management, 3<sup>rd</sup> Floor, Brewer Conference Room, Ezell Center at Lipscomb University. (Directions to Lipscomb University's Ezell Center can be found on the TAPM web site at [www.tennmediators.org](http://www.tennmediators.org).)

For those of you that have been faced with the tricky task of valuating a business in a business partnership dissolution or other commercial conflict, you know that valuation is field ripe for dispute even among seasoned professionals. In October's Peer Group, Vic Alexander from Kraft CPA's will be offering his expertise to TAPM mediators on 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.

When interviewed about his background on this topic, Mr. Alexander had this to say, "I have been doing this since 1987 and the key thing for people to understand is the framework of valuations and the theories behind valuation standards such as how Fair Market Value differs from Fair Value. People need to better understand how marketability and other variables affect the value of a business and how to best select and utilize an expert in this area."

We look forward to making the most of our time with Mr. Alexander and we hope you will join us for what will be a very informative presentation. (For more information on the topic of valuations, visit [www.KraftCPAs.com](http://www.KraftCPAs.com) and look for the "Valuation" Page.) Like always, we hope you will come to the TAPM Civil Section Peer Group with your questions and your war stories, we will provide the coffee and the lively banter.

The Civil Peer Group and these Practice Topic Presentations are just another benefit of your TAPM membership and there is no fee for TAPM members to

## Resolutions:

**Mediation Results in Settlement of Costly, Complex Litigation and Restoration of Partnership Between Biota and GlaxoSmithKline, [ITNews](#)** (Italy) (July 20, 2008)

**New Zealand Regional Council Settles Appeal of Pest Management Strategy in Mediation, [Otago Daily Times](#)** (July 24, 2008)

**Contempt-of-Court Hearing for Failure to Attend Mediation Session Avoided with Agreement to Mediate by Accused Video-Gambling Racketeer, [Muncie Star Press](#)** (August 16, 2008); **[Anderson Herald Bulletin](#)** (July 24, 2008)

**Comcast and National Football League Agree to Mediate Carriage Terms for NFL Network, [Multichannel News](#)** (July 7, 2008)

**California Public Utilities Commission Schedules Mediation over Amount of Intercarrier Compensation Due for VoIP Traffic, [TR's State NewsWire](#)** (July 17, 2008) (Subscription Required)

**Rapper Ordered to Mediate Civil Assault Case for Threatening to Shoot Coach, [Urban411.com](#)** (August 22, 2008)

**Mediation Has Not Yet Settled Ray Keller's Litigation Against NCAA that Resulted in \$5 Million Verdict Which Judge Threw Out Pending Appeal, [The Daily Sentinel](#)** (September 2, 2008)

**Premature Disclosure of Draft Mediation Proposal Derailed Mediation after Four Years, Resulting in Escalating Conflict over Beach Access, [The Barrie Examiner](#)** (Canada) (July 26, 2008)

**Judge Orders Mediation of Litigation Between Surgeons and Medical Center over Emergency Room Call Schedule, [Muskogee Daily Phoenix](#)** (August 27, 2008)

**Mediation Possible for Discrimination Complaint Against Bar Banning Drag**

attend. Also, be sure to mark your calendar for the second Tuesday of every month for future TAPM Civil Peer Group Meetings. Our second Practice Topic Presentation will feature an expert in the use of structured settlements. Mark your calendars now for that presentation on November 11<sup>th</sup> at 7:30 a.m.

\*\*\*\*\*

## Focus on the Mediator: Jane Wheatcraft

*(The TAPM Newsletter continues its series of profiles of its members. A different member is being featured in each issue.)*



Jane Wheatcraft of Gallatin, Tennessee, crafted her mediation skills while she was a Judge in Sumner County presiding over all the settlement conferences in civil cases for her two colleague judges. She successfully mediated cases ranging from slip and fall to automobile accidents and medical malpractice cases. She was one of the first judges in Tennessee to receive mediation training from David Strawn of Florida. Her next training was with Nina Meierding, from Pepperdine University Strauss Institute, who specifically taught a civil mediation course for judges in Tennessee. She is also trained as a family mediator.

Judge Wheatcraft served as General Sessions Judge, Division I in Gallatin from 1985 to 1994 where she handled all types of civil and criminal disputes. She was then appointed and elected as Criminal Court Judge from 1994 to her retirement in September 2006. As a judge, she served on the Futures Commission of the Supreme Court, which recognized the need for Alternative Dispute Resolution as a way for citizens to access the courts. She also served on the Court of the Judiciary for three years.

**Queens and Transgender Women,** [Dallas Voice](#) (August 14, 2008)

**Mediation Under Way in Sexual Harassment Cases that Resulted in Resignation of Ohio Attorney General and Half Dozen Others,** [Youngstown Vindicator](#) (September 3, 2008)

**Mediation Scheduled for \$15 Million Sex Abuse Case Against Oregon Archdiocese,** [Seattle Post Intelligencer](#) (August 8, 2008)

**Parties Negotiate Whether to Mediate Free Speech Dispute Relating to Boston Subway Card Vulnerabilities,** [CNET News](#) (August 13, 2008)

**City of Spokane Will Mediate with Developer over Downtown Land Use; Land Trades Suggested,** [Spokane Journal of Business](#) (August 28, 2008)

**County Officials Suggest Mediation if Direct Negotiations Fail to Get Funding from Towns for Dispatcher Salaries,** [Idaho Mountain Express and Guide](#) (August 6, 2008)

**County Commissioners and Developer Agree to Mediate to Overcome Rejection of Plans for Massive Bellevue Subdivision,** [Idaho Mountain Express and Guide](#) (August 27, 2008)

**Court-Ordered Mediation of Lawsuit by Homeowners Fighting Annexation by Town Depends on Obtaining Sufficient Consent Forms from Homeowners,** [Indianapolis Star](#) (August 27, 2008)

**Cities Ordered to Mediate Lengthy Dispute Over Which Can Annex Farmland for Development,** [Monitor](#) (Texas) (August 27, 2008)

**Mediation Between City, Manufacturer and Consultants Held to Sort Out Costly Water Plant Flaws,** [Times West Virginian](#) (August 30, 2008); [Times West Virginian](#) (August 20, 2008)

**County and Paving Company to Mediate over Loss of Contract Due to Late Signing of Anti-Alien Pledge,** [The](#)

She was awarded the Leadership Sumner Award in 1995 and 2006 and the "Woman of the Year" by the Gallatin Business and Professional Women.

Prior to her judgeship she was in private practice in Hendersonville as a sole practitioner in both civil and criminal matters. She was active in community organizations including the Board of Trustees for Volunteer State Community College, United Way Board, Hendersonville Community Child Care Center Board and Hendersonville Samaritan Center Board. She had a particular interest in domestic violence, serving on the Tennessee Task Force Against Domestic/Sexual Violence, from whom she received a 2006 Lifetime Achievement Award. She continues to serve on the Task Force.

She graduated from the Nashville School of Law in 1977 first in her class and a member of the Cooper's Inn Society.

She is married to Donald Wheatcraft. She has two children (one is a lawyer) and three grandchildren in New Hampshire and Pennsylvania. She enjoys gardening, going to the Y, reading for pleasure and traveling to see her grandchildren.

\*\*\*\*\*

## Mediation Pointers: "Shrink the Invitation List"

By Jack Waddey  
TAPM Member

*(Jack Waddey is a past President of TAPM and is a shareholder of Waddey and Patterson, PC in Nashville.)*

Anyone who has been involved in mediation knows that to have a successful mediation, the decision makers must be present. Let's consider the "wrinkles" that are involved in having a successful mediation in a complex commercial case.

In these cases, the stakes are high. For that reason, often times the mediation is "well attended". Of course, you want the persons there who have the decision-making authority to settle the case. However, does that list include the President, Chairman of the Board, Director of Engineering, Vice President of Marketing, CFO, General Counsel, risk management leader, outside lead trial counsel, second chair outside counsel, two junior associates and a paralegal? I think not!

With a bevy of representatives from each side, the first

[Huntsville Times](#) (August 16, 2008)

**California Public Utilities Commission Orders Metropolitan Transportation Authority and Critics to Mediate Method for Crossing New Rail Line by High School,** [Los Angeles Wave Newspapers](#) (August 14, 2008)

**Judge Orders Mediation of the University of Akron's Unresolved Eminent Domain Lawsuits Relating to Dormitory Construction,** [Ohio.com](#) (August 15, 2008)

**Landfill Dispute Between Cities Sent to Mediation by Court,** [KBTX](#) (August 14, 2008)

**Scotland Yard Turns to Mediation in Dispute Between Senior Officers,** [Telegraph.co.uk](#) (July 21, 2008)

## Other News & Initiatives:

**Better Business Bureau Mediating Many More Cases; Business Members Required to Participate When Consumers Seek Mediation,** [The Columbus \(Ohio\) Dispatch](#) (August 20, 2008)

**Half of Foreclosure Mediations in Stark County Result in Homeowners Keeping Homes,** [Canton \(Ohio\) Repository](#) (July 27, 2008)

**San Diego City Attorney Regularly Uses Mediation to Resolve Cost Overruns, False Claims, Other Concerns,** [San Diego Union Tribune](#) (August 13, 2008)

**Cases in U.K. Address Mediation Confidentiality and Recovery of Costs,** [Shoosmiths Legal Updates](#) (August 8, 2008)

problem that the mediator has is identifying the “real” decision maker. That process should be filtered before the mediation begins. The mediator should work in conjunction with lead outside counsel to identify the decision makers for the parties and make sure they are present during the mediation – personally present; not just by phone.

Don't leave the problem of identifying the decision-makers to counsel. The mediator should work with counsel from the very beginning of the engagement to identify the person or persons who are the decision makers so that the proper persons will be in attendance. My advice to lawyers is: work with the mediator to identify the decision makers and eliminate those people who will interfere with a successful mediation. My advice to the mediator is: take charge early and work with lead counsel to insure that the proper mediation team is present for both sides and that you eliminate some people from the invitation list.

Who would I recommend eliminating from the initiation list? First, I would “uninvite” house counsel. In many situations, house counsel has been the filter between manager and outside counsel on the progress of the case. To appreciate the significance of this “filter”, remember that when your case first started, it was initiated because house counsel advised management that the action should be initiated or a vigorous defense should be pursued. Frequently that advice was based on outside counsel's opinion, but often the advice came to management from house counsel, usually general counsel.

Now set the table for mediation. The President, CEO, Chairman of the Board, or other identified decision-maker is present at the mediation. For the first time, he hears the strengths of the other side's case or at least he hears those strengths with an enthusiasm that has not been conveyed during any previous discussions of the case. His/her immediate reaction is defensive. He/she will look at house counsel and say, “why didn't you tell me that?” He may not say it during the mediation but you will see it in his eyes or he will say it privately during the breakout sessions. House counsel is likely to immediately become defensive of the prior advice given to management and will attempt to downplay the position of the opposing party.

Outside counsel, on the other hand, generally will allow some impact of the opposing party's statement to filter through, because outside counsel knows that every case can be won and every case can be lost. If it is now time to settle this case, management should understand that they could lose even though counsel thinks they have the stronger position. House counsel, on the other hand, may have taken a very strong position and have some “job

security” issues if he/she concedes that the position of the other party has certain strengths. And besides, if you have the decision-making management team there, how is the “filtering” of house counsel going to help settle the case?

Another person or group of persons to strike from the invitation list is junior associate attorneys with the firm of outside lead counsel. They may know lots of details about the case, facts and evidence that would be offered in proof, legal theories and issues that strengthen your side and weaken the other side, but mediated settlements are most frequently painted with a broad brush. Need for the kind of details that junior associates focus on is not there, and they simply become a distraction. They delay the process of reaching a mediated settlement.

Successful mediation can be predicted if the proper parties are there for the mediation. If the businessmen are there who have to pay the bills and suffer the consequences of a bad business decision, and if they can be guided to a business discussion over the issues rather than a legal one, settlement through mediation is highly likely. If the mediation is conducted between lawyers, and particularly between house counsels for the parties, either directly or with their filtering effect, the mediation is more likely to fail.

My advice: reduce the size of the invitation list to the mediation, focus with great attention and detail on who will be at the mediation and try to eliminate from the mediation those persons who are likely to be barriers to a successful settlement of the case. For the mediator, once again I urge you to take an active part in determining who will participate in the mediation and don't simply leave that decision to outside counsel.

\*\*\*\*\*

## **PRESIDENT'S MESSAGE**



**By Randal Mashburn, TAPM President**

As you can tell from reading the various articles in this issue of the TAPM newsletter, these are exciting times for mediators in Tennessee. There are more opportunities than ever before for Tennessee mediators to receive training, hone their skills and participate in events with other mediators

In the next six weeks there are numerous events ranging from the annual Mediation Day dinner to several CME/CLE programs sponsored by TAPM. I would urge you to take advantage of as many of these opportunities as possible. You should especially consider attending the TAPM reception at Marietta Shipley's home prior to the Mediation Day dinner at Lipscomb University.

As most TAPM members realize, Tennessee has historically been somewhat slow to recognize the full benefits of mediation. However, there seems to be more movement than ever before toward a clearer recognition of the role that mediation can play in dispute resolution. Certainly, the number of Rule 31 mediators has grown -- now topping the 1000 mark. Bit aside from sheer numbers of mediators, my impression is that there is a greater openness to the process.

With Mediation Day coming next month, it is a good time to reflect on what you can do to promote mediation in Tennessee. TAPM members have the opportunity to be ambassadors and cheerleaders for the use of mediation -- not just on Mediation Day but throughout the year.

Of course, not all TAPM members are full-time mediators. Indeed, many are individuals that are simply committed to the idea of out-of-court dispute resolution even though they do not personally conduct mediations on a frequent basis. Many members are attorneys who are active participants in mediations on behalf of their clients. Others are professionals and business people who take advantage of the process in their work environment or in community services. Whatever role you play in that regard, I would ask that you stay involved and look for ways to support your fellow mediators and encourage the process. A good place to start is to check out the many events mentioned in this issue of the TAPM newsletter.

\*\*\*\*\*

SEPTEMBER 2008

## **CASES & RESOLUTIONS:**

### **California Supreme Court Concludes No Estoppel or Implied Waiver of Mediation Confidentiality**

The California Supreme Court unanimously reversed the appellate

court in [Simmons v. Ghaderi](#), and concluded that a party is not estopped from asserting mediation confidentiality despite having litigated the details of the mediation for fifteen months. The case arose when Dr. Ghaderi gave her insurer permission to settle a medical malpractice case in mediation and then changed her mind after an oral agreement was reached, but before a written settlement agreement was signed. In a comprehensive decision analyzing mediation confidentiality, the Court held that no judicial exceptions to the statutory scheme are allowable, other than express waiver by the parties or when due process is implicated. The Court closely reviewed California's statutory provisions and legislative history and noted that despite the legislature's awareness that some bad faith conduct would go unpunished, it chose mediation confidentiality as paramount in order to promote mediation.

[Simmons v. Ghaderi](#), S147848 (Cal., July 21, 2008)

## **Florida Appellate Court Reverses Severe Sanctions for Breach of Mediation Confidentiality**

A workers compensation claimant checked with his doctor after his employer stated in mediation that the doctor had made inconsistent recommendations about whether surgery was needed. When the doctor responded in writing that he had always urged surgery, the employer successfully moved to have the workers comp claims dismissed with prejudice due to breach of mediation confidentiality requirements. The Florida appellate court reversed dismissal of the claims as being too severe a sanction, discussed a range of appropriate sanctions, and remanded the case to the judge of compensation claims for further action.

[Hill v. Greyhound Lines, Inc.](#), No. 1D07-1188 (Fla. App. 1st Dist., August 29, 2008)

## **Federal Court Dismisses Lawsuit for Lack of Mediation**

A private agreement requiring mediation prior to any litigation was a sufficient basis for a federal court to dismiss without prejudice the pending litigation, since the parties had not yet mediated. Plaintiffs sought to have the litigation stayed pending mediation, but the court dismissed the matter without even holding a hearing.

[Brosnan v. Dry Cleaning Station Inc.](#), 2008 WL 2388392 (N.D. Cal. June 6, 2008) (Subscription Required)

## **Settlements in Katrina Mediations Withstand Attack**

A federal court upheld the "plain meaning" of settlements reached in the Mississippi hurricane mediation program which released any and all Katrina claims except for subsequent discovery of "additional insured damage." The Scruggs Katrina Group filed

some 200 nearly identical complaints alleging a conspiracy of fraud and bad faith that it asserted as grounds for additional insured damages. The court, however, found that the phrase could only mean additional property damage, but left open the record in case plaintiff's new substitute counsel wished to submit affidavits showing newly discovered property damage.

[Boyd v. State Farm](#), No. 1:07CV820 (S.D. Miss., Aug. 6, 2008)

## **Personal Injury Settlement Sets Record**

A \$6 million global settlement in a one-day mediation resolved the legal claims of a 9-year-old boy who was blinded from serious craniofacial injuries in an all terrain vehicle accident. The agreed payment is believed to be the largest settlement or verdict in Fayette County, Pennsylvania. Details reported about the accident and claims came from the plaintiffs' mediation memorandum.

[Pennsylvania Law Weekly](#) (August 11, 2008) (Subscription Required)

## **Use of Focus Groups and Tribute Video Helps Mediation Succeed**

Plaintiffs' counsel convened two focus groups and shared the comprehensive results with the other side at a second mediation session, after an initial mediation session failed to resolve claims from a serious accident in which a car hit a tractor-trailer stopped on the side of the road, resulting in the death of one passenger and serious injuries to another. In addition, plaintiffs' counsel provided defense counsel with a video containing testimony from the deceased woman's family, friends, and others speaking about the impact she had made on their lives. The second mediation session reached resolution, with settlements totaling \$3.2 million for the two victims.

[North Carolina Lawyers Weekly](#) (September 1, 2008) (Subscription Required)

## **Detailed Mediation Agreement Flips City Council on Commercial Development**

After a 74-acre commercial project was blocked by the Columbia (MO) City Council, the developer entered into mediation with two neighborhood associations and, after nearly a month of negotiations, agreed to add a layer of restrictions to the development, which was sufficient to obtain City Council approval. The developer concluded that the mediation process improved plans for the development, but one of the neighborhood association leaders expressed frustration by the confidentiality of the mediation process when dealing with community issues.

[Columbia Daily Tribune](#) (August 19, 2008); [Columbia Daily](#)

[Tribune](#) (August 17, 2008); [Columbia Daily Tribune](#) (July 11, 2008) (Subscription Required)

## **Decades-Old Australian Naval Disaster Claim Resolved**

Forty-four years after Australia's worst peacetime naval disaster, a formal naval seaman resolved his ten-year-old litigation by accepting a six-figure settlement in mediation. Other pending mediations may finally resolve the remaining claims from the accident between aircraft carrier HMAS Melbourne and destroyer HMAS Voyager, in which the Voyager was cut in two and sunk.

[The Age](#) (August 18, 2008)

## **NEWS & INITIATIVES:**

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

A study of civil lawsuits over the last 40 years indicates that parties often make poor decisions when passing up settlements prior to trial, and that such mistakes are becoming more common. In only 15% of cases did both sides make the right decision to go to trial, with the verdict falling between what the plaintiff demanded and the defendant offered. Plaintiffs were wrong to proceed to trial 61% of the time, with an average loss of \$43,000 in recent years. Defendants were only wrong 24% of the time, but their average loss was \$1.1 million. The advocate's years of experience, rank of law school and size of firm were less related to bad decisions than the type of case. Errors tended to be made by plaintiffs in cases where contingency fees are common, and by defendants where insurance coverage is generally unavailable. The study, said to be the largest ever of its type, is forthcoming in the *Journal of Empirical Legal Studies*.

[New York Times](#) (August 7, 2008); [Journal of Empirical Legal Studies](#)

### **Widespread Adoption of Mediation Programs Reducing Costs**

Large companies, insurers, government agencies and courts are all moving towards greater reliance on mediation. For example, Toro Co. has resolved 1,400 products liability claims since launching its mediation program in the early 1990s, and has not taken a case to trial since 1994, resulting in a drop in total costs per claim from \$115,000 to \$43,000. About two-thirds of the Toro claims are resolved directly by claims coordinators, with the remaining third being resolved in mediation. Similarly, after Hurricane Katrina, Zurich Insurance created a new Alternative Dispute Resolution program with a multi-step process that moved from direct negotiation between the insurance representative and policyholder, to mediation, and finally binding arbitration. Out of

20,000 claims against Zurich, 98% have been resolved, with only about 100 reaching and being settled through mediation, and none going to arbitration. While courts are increasingly requiring mediation, some court programs are seeing a decrease in settlements, which is attributed to litigants going directly to private mediators or seeking mediation prior to filing suit.

[Chicago Lawyer](#) (July 9, 2008) (Subscription Required)

## **Updated Construction Form Agreements Rely on Mediation**

The American Institute of Architects (AIA) has released updated form construction documents which provide more complex dispute resolution language than the prior AIA version. The new A201 form provides that the first determination about a dispute be made by an Initial Decision Maker who no longer needs to be the architect. If that decision is not satisfactory, a party may seek mediation by making a formal demand that the other side file for mediation or waive certain rights. If mediation is not successful, the parties may resort to either arbitration or litigation based on their agreement in the form contract. A competing set of form documents called ConsensusDOCS has been developed by 19 construction associations. ConsensusDOCS is more collaborative and first requires direct discussions at the field and then senior executive levels, followed by mediation (as the default) or “mitigation” with nonbinding findings by an independent neutral or dispute review board. Mediation is to be concluded within 45 days, and if not successful is followed by litigation or arbitration.

[New York Law Journal](#) (August 4, 2008) (Subscription Required)

## **Connecticut Provides Mediation for Eminent Domain Disputes**

New regulations adopted by the Connecticut Office of Ombudsman for Property Rights provide that mediation can be requested by property owners dissatisfied with the compensation offered in eminent domain proceedings or by occupants concerned about the assistance offered when forced to move due to eminent domain. The Ombudsman determines whether or not to grant a mediation request, and if granted, public agencies may be required to cooperate and participate in the mediation.

[RegAlert](#) (July 8, 2008) (Subscription Required); [Regulation](#) (Subscription Required)

## **Maryland Encourages Agricultural Mediation**

The Maryland Department of Agriculture is encouraging farmers to mediate disputes with neighbors, family, government agencies and lenders using the Maryland Agricultural Conflict Resolution Service (ACReS). Mediation services are available at modest or no cost, depending on income levels, with a free initial consultation and shared costs if additional sessions are needed. Under state

legislation passed in 2006, mediation is required prior to filing suit against an agricultural operation.

[US State News](#) (July 29, 2008) (Subscription Required); [Baltimore Sun](#) (August 10, 2008)

## **Mississippi's Katrina Mediation Program Shows 80% Settlement Rate**

Updated figures reveal that nearly 5,000 mediations were requested in the Mississippi Insurance Department's hurricane mediation program, and 82% of those settled. About a fourth of the settlements occurred prior to mediation, with the remainder settling at mediation. In addition, another 235 federal cases were resolved through court-ordered mediation, out of about 1,100 closed federal cases, while another 867 policyholders in two mass lawsuits settled without filing individual claims.

[Sun Herald](#) (August 27, 2008) (Subscription Required)

## **Mediation Helps Heirs Minimize Conflict over Estates**

Mediation can be helpful to preserve relationships among heirs who get into squabbles when dividing estates left by family members. While conflicts can be minimized through proactive steps to make decisions before death and provide clear instructions on disposition, there are also numerous techniques ranging from blind drawings to drawing cards that can provide processes for allocating assets that seem fair to all involved.

[Toledo Blade](#) (July 6, 2008)

## **Mediation Model Urged for Long-Term Care Facilities**

A research report on an appropriate mediation model for long-term care facilities concluded that care could be improved by involving residents and families through mediation, but that intensive outreach is required within facilities. Many cases referred to mediation were not mediated due to barriers from lack of knowledge of potential benefits and availability. The report was published in the Journal of the American Medical Directors Association.

[Health & Medicine Week](#) (August 4, 2008) (Subscription Required)

## **Council Provides Successful Mediation Alternative in High Stakes Environment**

Hanford Concerns Council provides mediation of worker grievances over health, safety, or the environment to avoid

litigation against Hanford contractors. Council members include Washington Closure Hanford, Washington River Protection Solutions and CH2M Hill. With annual costs of about \$500,000, the Council has a perfect record of resolving litigation over the last three years since it was resurrected. One cautionary case is the decade-old litigation by pipefitters against Fluor Federal Services that resulted in a \$4.8 million jury award which is still pending on appeal.

[Mid Columbia Tri City Herald](#) (August 12, 2008)

## Mediation Resolving Psychological Harassment Complaints in Quebec

Mediation successfully reaches agreement in 95% of the workplace psychological harassment cases mediated by the Commission des normes du travail in Quebec. In the four years since legislation was enacted protecting employees from psychological harassment, about 8,600 complaints have been filed and a little over a third have been resolved through mediation. Of complainants using mediation, 85% reported they were very satisfied with the mediator's work.

[Canada Newswire](#) (July 3, 2008) (Subscription Required)

## Other International Mediation Developments

- **U.K.** lawyers see financial pressures on businesses resulting in more litigation over disputes and more mediation to reduce risks from litigation, [Crain's Manchester Business](#) (September 1, 2008); [Birmingham Post](#) (August 29, 2008) (Subscription Required)
- Mediation being encouraged in **Scotland** as better solution for conflicts and important to maintaining competitive economy, [Scotsman](#) (July 6, 2008) (Subscription Required)
- Law Reform Commission in **Ireland** urges key role for mediation, [The Irish Times](#) (July 30, 2008)
- Alternative Dispute Resolution workshop reflects increasing popularity of informal resolution processes in **Dubai**, [AME Info](#) (United Arab Emirates) (July 14, 2008)
- Three-day mediation update training in **Bangladesh** given to judges and lawyers who will be training 300 new judges and lawyers in mediation, [The New Nation](#) (Bangladesh) (July 4, 2008)
- **China** reports 100,000 mediations with 96% success rate since mediation was introduced in Guangdong Province in 2001, [World News Connection](#) (July 31, 2008) (Subscription Required)
- Mediation needed in **Hong Kong** to keep up with other jurisdictions, [South China Morning Post](#) (July 8, 2008) (Subscription Required)
- Court-annexed mediation experiment in the **Philippines** gives better access to justice to poor and marginalized; 40,000 mediations in last six years have 70% resolution

- rate, [Thai Press Reports](#) (July 9, 2008) (Subscription Required)
- Mediation system, in which courts can mandate mediation, is most important of proposed reforms in **Malaysia**, where lower courts have a 900,000 case backlog, [New Straits Times](#) (July 4, 2008)
  - Farm Debt Mediation Act in New South Wales, **Australia** requires equipment finance companies to give farmers option of mediation, [ABC Online](#) (September 4, 2008)
  - Number of mediations doubles in New South Wales, **Australia**, with 59% resolution rate, [Sydney Morning Herald](#) (August 14, 2008)
  - **Fiji** Employment Relations Bill establishes mediation service, [Fiji Times](#) (August 20, 2008)

Newsletter service provided by [Mediate.com](#). Copyright 2008 Resourceful Internet Solutions, Inc. and Keith L. Seat.

This service takes care to ensure that recipients will not receive more than one copy of each newsletter. If you receive more than one copy, please forward them to [newsadmin@mediate.com](mailto:newsadmin@mediate.com).

Feedback and news for potential inclusion in future newsletters may be sent to Mediation News Editor Keith L. Seat at [kseat@keithseat.com](mailto:kseat@keithseat.com). If you wish to stop receiving this newsletter, you can remove yourself from this email list by [clicking here](#).