



# International Academy of Mediators Mediation Newsletter

July 2010

Number 36

## Mediation Quote:

“Like leopards and lice, baboons and bacteria, lawyers in competition for resources adapt to circumstances and respond to incentives. At the same time, the societal institutions for the resolution of disputes – the environment in which lawyers practice – are also evolving. The process and the practitioners co-evolve.”

- Barry Goldman, *The Science of Settlement: Ideas for Negotiators* (ALI ABA 2008) at 166

## NEWS & INITIATIVES:

### Italy's Mandatory Mediation Statute Seeks to Resolve a Million Disputes a Year

Legislation in Italy requiring mediation prior to litigation of a broad range of civil and commercial disputes was enacted on March 20, but does not take effect until March 2011 so that mediators can prepare for the increased caseload. The procedures in the legislation meet the requirements of the European Directive on Mediation. If mediation is not successful, either party may file suit, but litigation costs may be withheld depending on whether the outcome of litigation differs from the terms of a mediator's proposal. The legislation is intended to reduce the backlog of 5.4 million civil cases in Italy and resolve at least a million disputes a year.

[Lexology.com](#) (June 21, 2010) (Registration Required); [Alternatives](#) (April 2010)

### Other International Mediation Developments

- A farm consultancy firm in **Ireland** has launched a new mediation division to address all types of farm disputes, including succession, landowner/tenant, commercial leasing and debt recovery. [Independent.ie](#) (June 29, 2010)
- Five law firms in **Wales** are jointly offering mediation services to keep more dispute resolution work in Wales, as courts increasingly shift towards mediation. [Wales Online.co.uk](#) (June 23, 2010)
- The Master of Rolls announced the publication of a Mediation Handbook as an authoritative **U.K.** source of information. [Lexology.com](#) (June 21, 2010) (Registration Required)
- Detailed information about mediation in twelve European countries (**Austria, Bulgaria, Czech Republic, England & Wales, Estonia, Greece, Hungary, Latvia, Poland, Portugal, Slovakia, and Sweden**) is available from the JAMS International ADR Center. [Herbert Smith.com](#) (June 21, 2010); [Country Reports](#)
- The **Italy-China** Business Mediation Centre opened in 2005 as the first bilateral commercial mediation center between a major European country and China. [International Law Office.com](#) (June 24, 2010)

## Check These Out:

### Legislative Mediation Proposed for Congress

An editorial in the Washington Post entitled "Congress needs a mediation tool to dissolve gridlock" emphasizes the need to build consensus in Congress to avoid stalemates and the dysfunction that has resulted in approval ratings for Congress falling below 25 percent. The editorial emphasizes the importance of good process, and suggests establishing a politically neutral service to provide legislative mediation organized along the lines of the Congressional Budget Office. A legislative mediation service could enrich the policy debate by highlighting information in a nonpartisan manner. And when requested by legislators, mediation techniques could be used to help the parties understand their interests, generate possible solutions and help find common ground.

Washington Post (June 18, 2010)

- The United Nations-African Union Mission in Darfur presented a three-day workshop on conflict resolution, reconciliation, negotiation and mediation for 100 participants to build capacity to settle tribal disputes in the **Sudan**. [Allafrica.com](#) (June 28, 2010)
- The acting Chief Justice of the High Court of the State of Jharkhand, **India** inaugurated the Mediation and Conciliation center in Daltonganj, which will provide assistance to litigants without charge. [Times of India](#) (May 6, 2010)
- Justices in **Nepal** encouraged mediation during the inauguration of a mediation center in Kathmandu; the Nepal Bar Association president seeks involvement of lawyers to expedite mediation. [Himalayan Times](#) (June 18, 2010) (Subscription Required)
- New South Wales, **Australia** is going to use mediation more often in child custody and domestic violence cases to spare children from the trauma of the court system. [ABC.net.au](#) (June 18, 2010)
- New Brunswick, **Canada** published a new franchising regulation containing unique dispute resolution procedures. The regulation permits a party in a dispute to notify the other party and conduct direct negotiations within fifteen days, which may be followed by a request for mediation that the other party may decline. [Lexology.com](#) (July 7, 2010) (Registration Required)

### EEOC Adds 200th Large Employer to Mediation Program

CVS Caremark is the 200th large employer to join the U.S. Equal Employment Opportunity Commission's (EEOC's) Universal Agreement to Mediate (UAM) program to mediate workplace discrimination disputes. The CVS Caremark agreement is nationwide, while some UAMs are regional. In addition, EEOC district offices have entered into more than 1,500 local agreements to mediate with large employers. Under the EEOC's UAMs, discrimination complaints filed with the EEOC will be sent to the agency's mediation unit and to a designated company contact for mediation prior to EEOC investigation or litigation. The EEOC encourages mediation in order to improve the agency's overall effectiveness, while helping companies and employees reach better outcomes. The EEOC mediation program is one of the largest of its kind, with about 12,000 mediations a year.

[OHS online.com](#) (July 5, 2010)

### Update on Home Foreclosure Mediation

- A detailed report on foreclosure mediation programs **nationwide** from the Center for American Progress (CAP) states that the number of jurisdictions with foreclosure mediation programs has increased from 11 to 21 in a year. Pending legislation in additional states will boost the number further. The report recommends that states with opt-in programs should move to use of mandatory mediation and that states with coverage in only certain cities or locations should expand statewide. Further, the report urges that states

## Commercial Mediation Competition

The International Chamber of Commerce (ICC) is holding the 6th ICC International Commercial Mediation Competition from February 4-9, 2011 at its headquarters in Paris. The competition is expected to attract at least 50 universities, along with scores of professional mediators who conduct the mock mediations and judge the students' performance. Applications are being accepted through November 30, 2010.

### ICC Competition

## Mediation on TV

In the fictional, but undoubtedly influential world of NBC's *The Office*, a mediator is brought in to resolve a contract dispute between characters Dwight and Angela to produce a child. The mediator apparently determines the legitimacy of the contractual arrangement between the parties who then reach a sexual solution to their conflict that may be rare in real life contract disputes.

[Frothy Girlz.com](#) (May 15, 2010)

without programs in place move swiftly with legislation or judicial rules to implement mediation programs and that mediation services also be added at the federal level.

[American Progress.org](#) (June 29, 2010); [Full Report](#)

- The Obama Administration released its first monthly housing scorecard to track housing market indicators and **federal** efforts to prevent home foreclosures. [Housing Wire.com](#) (June 21, 2010); [Housing Scorecard](#) (June 21, 2010)
- The Circuit Court of Cook County launched a court-based foreclosure mediation program to address the rising foreclosure rate. Moreover, the county – **Illinois'** largest – approved a \$3.5 million budget last Fall to provide free foreclosure mediation services to homeowners. A coalition of community organizations is now launching a major outreach effort, going door-to-door to homes facing foreclosure to explain the details and encourage participation in the county's optional mediation program. In addition, pro bono attorneys are currently being trained to guide homeowners through the mediation process. [Pioneer Local.com](#) (April 29, 2010); [Progress Illinois.com](#) (June 29, 2010)
- Palm Beach County, **Florida** homeowners can mediate foreclosures that are filed on or after July 12, although they can choose to opt out of mediation. The mediation program is being run by the Palm Beach County Bar Association. Mediation is free for homeowners, but lenders must pay \$750, which also covers a financial counselor and administrative costs. One mortgage company is enthusiastic and reports success in about 75% of their foreclosure mediations. Others are more skeptical about whether mediation will just further delay the foreclosure process and, on the other side, whether lenders have any motivation to settle. [Palm beach post.com](#) (July 7, 2010)
- **California** legislation to establish a mediation program to help homeowners and lenders agree on sustainable loan modifications passed the Assembly Appropriations Committee. The legislation intends to establish a mediation program similar to those in Nevada and Connecticut. [California Newswire](#) (June 1, 2010)
- Legislation has been introduced in **Connecticut** to extend the state's successful foreclosure mediation program by an extra year, to 2012. However, the source of funding for the additional year will be determined later. The bill would also bar banks and servicers from charging late fees or other charges if they do not come to mediation sessions or are unprepared. [Hartford Courant](#) (May 1, 2010)

## Foundation Relies on Mediation to Improve Patient Access to Care

A national non-profit, the Patient Advocate Foundation, is holding its 11<sup>th</sup> Annual Patient Congress in Washington, DC, urging members of Congress to support legislation that would improve patient access to care, which is needed even by those fully covered by insurance. The Foundation relies on mediation to ensure that patients with life

## Other Cases & Resolutions:

Parties agree to mediate a flawed paternity-test dispute which allegedly kept father from child for a decade. [St. Claire Record.com](#) (July 2, 2010)

Dispute over frozen embryos between the donor couple and the recipient couple settled prior to a scheduled mediation. [Courthouse News.com](#) (May 14, 2010)

Circuit City and its largest creditors ordered into mediation by federal bankruptcy judge over final liquidation of assets. [Times Dispatch.com](#) June 24, 2010

Mediation is last opportunity for owners of the Newburyport's Crow Lane Landfill to resolve landfill closure procedures and costs with the state of Massachusetts in six year old litigation. [Boston Globe](#) (June 17, 2010) (Subscription Required)

threatening or debilitating diseases have adequate access to care or receive other needed assistance. The Foundation successfully resolved over 55,000 cases for patients last year using mediation or arbitration. Over 80% of the patients aided by the Foundation were fully insured, but still needed help to access medical care.

[PR Newswire.com](#) (June 29, 2010)

## Other Notable News & Initiatives

- The Wisconsin Supreme Court has clarified that hearings must be held *in camera* when determining whether mediation confidentiality is outweighed by manifest injustice under Wis. Stat. section 904.085(4)(e). [Wisbar.org](#) (April 30, 2010)
- A mediation program in Twin Falls, Idaho increasingly needs interpreters for languages other than Spanish, with a tripling of non-Spanish interpretation since 2007. [Magic Valley.com](#) (July 6, 2010)
- Mediators in Orange County participated in an aging sensitivity training that allowed them to experience the physical challenges of poor hearing, weak eyesight and other limitations. [PR-Canada.net](#) (June 19, 2010)
- After months of effort, Tulsa's Small Claims Court now has a mediation program in place which resolves about half its cases. The impetus for the mediation program was a lack of funds for expanding the court by building a new courthouse. But in addition to reducing the docket, mediation has increased the satisfaction of litigants. [Tulsa Business.com](#) (April 26, 2010)
- The Commander Navy Region Southwest presented awards to 25 mediators and 12 high level managers of the Southwest Region's Alternative Dispute Resolution Mediators Cadre for their success in resolving workplace conflicts. While the Navy ADR program has a 70 percent resolution rate as a nationwide target, the Southwest Region is averaging 78 percent. [Navy Compass.com](#) (June 29, 2010)

## CASES & RESOLUTIONS:

### Alabama Supreme Court Reduces Attorney's Fees for Obtaining Settlement in Mediation

The Supreme Court of Alabama concluded that the trial court had exceeded its discretion in approving attorney's fees of one-third of the settlement reached in mediation for the severe burns suffered by a disabled minor in the custody of the state. The lower court emphasized the rapid work by the attorney to marshal evidence and experts in order to provide three bound volumes of documents to defendants, along with preparation of a "day in the life" film shown at mediation, which led to a settlement of \$737,000, which was nine times the special damages. However, the Supreme Court noted the lack of time records from the attorney, the fact that he worked on the case for only fourteen weeks, and the willingness of defendants to

State officials in Alaska are mediating dispute over flawed fast ferry engines which have been overhauled for \$5.2 million and may need to be replaced. [KCAW.org](#) (July 7, 2010)

The City of Tulsa and Tulsa County, Oklahoma have rejected binding arbitration in favor of mediation to resolve utility bills at the Tulsa County Fairgrounds. [News on 6.com](#) (May 18, 2010)

The Greater Hall Chamber of Commerce is offering to pay for a mediator to resolve the "water war" between Hall County and the City of Gainesville, Georgia over the future of the Cedar Creek Reservoir. [Access North Ga.com](#) (April 29, 2010)

Mediation and litigation are both proceeding in disputes between agricultural water districts and the City of Bakersfield, California over the Kern River. [Bakersfield.com](#) (May 4, 2010)

The City of Macon and Bibb County, Georgia have selected a mediator to assist with

engage in early mediation to minimize litigation costs. After a detailed analysis of many factors, the Supreme Court concluded that 20% would be reasonable as attorney's fees, which a dissenting justice argued was just as arbitrary as the higher percentage in the absence of time records.

[Madison Co. Dept. of Human Resources v. T.S.](#), No. 1081405 (Ala., May 28, 2010)

### Court Approves Mediation Procedures in Lehman Brothers Chapter 11 Cases

The bankruptcy judge has approved mediation procedures for addressing contested claims involving Lehman Brothers Holdings Inc. and its affiliated debtors. The debtors have the option to select either mediation or merits hearings. If mediation is selected, sessions are to take place in New York at a location determined by the debtors, but parties may be able to participate by telephone. The parties are to agree on a mediator from a court-approved list. Mediation of claims must begin within 60 days after notice by the debtors and be completed within 120 days. The parties may seek to negotiate prior to the mediation; if the mediation is not fully successful, the parties may agree to resolve the remaining issues by binding arbitration, or else the court will hear the merits of the claim.

[Mondaq](#) (June 18, 2010) (Subscription Required)

### Feinberg Selected as Independent Claims Administrator for BP Compensation Fund

As widely reported, Kenneth Feinberg has been appointed the independent claims administrator for the \$20 billion BP compensation fund for the extensive damages caused by its ongoing oil spill. BP has established more than 400 claim centers across the Gulf Coast and is also accepting claims through its website and by telephone. Feinberg will be paid by BP, although the amount is still being negotiated.

[Business week.com](#) (May 26, 2010); [Daily Finance.com](#) (June 20, 2010); [USA Today](#) (June 28, 2010)

### Arizona County Hires Feinberg for Half-Million Dollars; Principals Object to Mediation

Maricopa County, Arizona has hired mediator Kenneth Feinberg – apparently at a cost of \$550,000 – in an attempt to resolve \$46 million in claims brought by four judges, two supervisors, a deputy county manager and others against the county for emotional distress and tarnished reputations caused by the unsuccessful probes and prosecutions of the Maricopa County Sheriff and former County Attorney. The Sheriff and ex-County Attorney, however, are objecting to the mediation, alleging that they are being "extorted" by the county with threats of personal liability if they do not cooperate in the mediation.

[AZ Central.com](#) (June 29, 2010); [AZ Central.com](#) (June 30, 2010)

**service delivery negotiations, to ensure that the governments will not be barred from state grants.**

[Macon.com](#) (May 19, 2010)

**San Diego's independent police auditor proposes face to face mediations to resolve complaints about rude police officers.** [KLIV.com](#) (June 30, 2010)

**A court is considering sending a murder case to felony mediation, since similar cases have recently settled through mediation.**

[Richmond Register.com](#) (June 26, 2010)

**The Liberian community in Minnesota created a Special Liberian Mediation Committee to guide a mediation process to resolve political conflict within the community.** [Liberian Journal.com](#) (June 30, 2010)

**Mediation will be held in a politically sensitive case against the State of Victoria, Australia by a former criminal defense barrister who turned prosecution's witness, but failed to receive protection.** [The Age.com.au](#) (June 19,

## Other Notable Cases & Proceedings

- A mediation session was held as ordered by the federal bankruptcy judge between the Texas Rangers and angry creditors. The mediation may effectively reopen bidding; the team is seeking to hold an auction. [USA Today.com](#) (June 25, 2010); [Blogs.Forbes.com](#) (June 28, 2010); [Google.com](#) (July 1, 2010); [Dallas Bizjournals.com](#) (July 7, 2010)
- After a year of mediation, the parties reached settlement with the buyer agreeing to pay Gilat \$20 million following the collapse of a \$475 million deal to purchase the company in 2008. [Globes.co.il](#) (June 28, 2010)
- Mediation has begun on who should pay the additional costs for construction of the \$318 million Northwest Florida Beaches International Airport. [News Herald](#) (June 20, 2010) (Subscription Required)
- Proponents and opponents of San Diego's long-stalled \$228 million waterfront improvement plan have agreed to meet with a new mediator to seek consensus. [Sign on San Diego.com](#) (June 1, 2010)
- Mediation began in November 2008 over appropriate attorneys' fees for prevailing plaintiffs' counsel in the landmark Supreme Court case over DC's handgun ban, which plaintiffs estimate at over \$3.5 million. The federal district judge encouraged the parties to consider additional mediation at a recent hearing. [Legal Times.com](#) (May 26, 2010)
- A wrongful death lawsuit against Phil Spector, a Rock and Roll Hall of Fame inductee, is headed to mediation. Spector is in prison for second degree murder of model/actress Lana Clarkson, whose mother brought the civil suit. [NBC Los Angeles.com](#) (June 18, 2010)
- After multiple mediation sessions, the Erie County Attorney and the U.S. Department of Justice are proceeding with litigation over suicide prevention issues at jails in the New York county. The County Executive estimates that \$386,000 was spent on the litigation prior to mediation, not \$1 million as stated by the County Comptroller. [Buffalo News.com](#) (June 2, 2010); [WGRZ.com](#) (April 28, 2010)
- Mediation conducted by the U.S. Department of Justice that led to re-establishment of a police-community relations commission was broadly praised by participants. [PJ Star.com](#) (June 25, 2010)
- Mediation is on track between the City of Los Angeles and more than 40 tenants over the higher rents demanded by the city. On the advice of the mediator, the city backed away from its demand that the higher rents be placed into escrow as a condition of mediation. [LA Downtown News.com](#) (July 2, 2010)
- An effort by Montreal, Maine & Atlantic Railway to abandon 240 miles of tracks in northern Maine is leading to mediation between the state of Maine, the Federal Surface Transportation Board and the Railway. The mediation is expected to be more productive than a scheduled federal hearing, and could help Maine's congressional delegation obtain federal funding to save

2010)

Families of Cuban political prisoners are making progress with the Cuban government through the mediation efforts of the Church.

[Catholic.net](#) (May 27, 2010)

the tracks. [Maine Biz.biz](#) (April 27, 2010)

- After years of litigation, the federal judge in the copyright case against Jammie Thomas has appointed a mediator to see if settlement can be reached. Jury damages against Thomas for copyright infringement of 24 songs were reduced by the court from \$1.92 million to \$54,000; Thomas rejected plaintiff RIAA's offer to settle if Thomas paid \$25,000 to a charity benefiting musicians. [Zeropa.com](#) (June 22, 2010)
- Mediation continues between San Diego Gas & Electric Co. and critics of its revised plan to cut off power to avoid wildfires during extreme conditions. [Sign on San Diego.com](#) (June 28, 2010)
- A local government official released the sixteen point settlement agreement reached in mediation by supporters and opponents of a Christmas light show by 14 homes which attracted thousands of cars. While the show will continue in 2010, there will be a neighborhood vote after the holidays to determine whether it continues in future years. [MLive.com](#) (June 30, 2010)
- The attention on the World Cup is being leveraged by unions in South Africa demanding higher wages, which mediation is attempting to address to avoid massive strikes in the country. [Business Week.com](#) (May 31, 2010)

## BOOK REVIEW:

### Barry Goldman, *The Science of Settlement: Ideas for Negotiators* (ALI ABA 2008)

by Jan Frankel Schau (ADR Services, [jfschau@schaummediation.com](mailto:jfschau@schaummediation.com))

Barry Goldman is a mediator, arbitrator and an adjunct professor at Wayne State University Law School in Detroit, Michigan. But more than that, he is a keen observer of human nature and an engaging, funny, sometimes caustic and certainly irreverent personality. This is readily apparent by the cartoon-like illustrations (cleverly done by Katie Maratta) throughout *The Science of Settlement*.

In the book, the author both relies on and then demystifies most of the basic concepts of sophisticated mediation (the Zone of Possible Agreement, the Ultimatum Game, etc.) with warmth and humor in ways that make this a great handbook for those engaged in teaching the concepts to either undergraduates or beginning mediators. What's more, it turns out that the book is an excellent resource for almost any of the negotiation concepts which most of us rely on and teach about.

Although Goldman states that he is *not* a scientist, and does not presume to provide the definitive guide to negotiation, he does remind his readers that "People is critters." Thus, he describes his goal as teaching negotiation through using psychology to "get more stuff." (After which he admonishes the reader not to come back to him and whine that although they got more stuff, they still aren't happy. That is another book).

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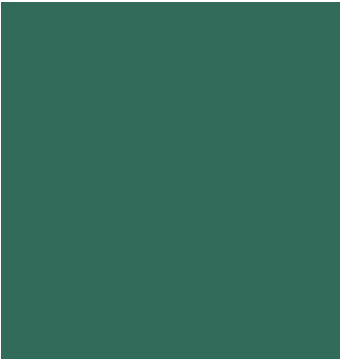
Once you get beyond the initial chuckles from both the humorous illustrations and the liberal use of Yiddish phrasing (See, for example: Chapter 2: Preparation, "The Schmooze"), the reader can't help but notice that this book is, in fact, a very comprehensive nuts and bolts review and explanation of solid quasi-scientific negotiation theory. It extends well beyond basics to include concepts such as regret aversion, the availability heuristic, the similarity-attraction effect, and reactive devaluation in bargaining.

Goldman doesn't presume to invent any new negotiation theories so much as to explain and review them with simple examples. For example, Goldman relies on Dr. Cialdini's work, "*Influence: The Psychology of Persuasion*" (1993) to explain why mediation works. He analyzes each of Cialdini's six "weapons of influence" to demonstrate why the mediator has the persuasive authority to get folks to move to a place they did not or would not go on their own.

The author notes that first, the mediator exerts *authority* simply by having the litigant be greeted by a receptionist, shown to an attractive conference room, and have him wait for the long-awaited, busy and perhaps even expensive mediator to arrive. Next, the mediator expresses *liking* by actively listening and offering coffee and parking. He or she paraphrases, validates and mirrors. Then the clever mediator goes in for the *commitment-consistency* principle by reframing and then suggesting to the litigant that like the mediator and the other party, they are most obviously and clearly committed to putting the dispute behind them. Goldman describes the explicit bargaining phase of the negotiation as the *reciprocity norm*. That is when a move of \$X down from the original offer begets a reciprocal move up in the same value or percentage. Unlike more purist or transformative mediators, when asked, Goldman is quite willing to use the *social proof* weapon described by Cialdini by offering his evaluative opinion, based on social norms. Thus, for example, he may offer: "In cases like yours in this jurisdiction, my experience says they settle in the range of \$X to \$Y. You may get a different result, but that's been the case in my experience." Finally, as we all know, the settlement offer itself is made to appear *scarce* (Cialdini's sixth weapon of influence) because it is only available with a time limitation.

The book is grounded on solid principles known and taught not only in conflict resolution, but also in business schools and psychology programs. For example, there is a solid explanation of risk of loss aversion and status quo bias. At the same time, the author takes pains to explain the confirmation bias vs. disconfirmation bias. He even relies on Jerome Groopman's interesting book, "*How Doctors Think*" in the context of differential diagnoses of illness.

The unique quality of this book is that it describes these concepts through use of simple, readable and often memorable examples. It concludes in an Epilogue: "The time has come to purge ADR scholarship of its cult-like character. There are important texts but no sacred tests. There is no end to the process of co-evolution. Gaming the system *is* the system." The author implores both mediators and lawyers to remain flexible and open to a new co-evolution model of ADR that would move in the direction of future thinking where the old system is no longer effective. He admits that much of what passes for scholarship in the field now needs to be re-thought. He then, in his irreverent style, proceeds to de-bunk and poke fun at the older models of mediation to predict that they, too, will be "gamed."



Though he suggests that change is inevitable, he leaves readers to imagine the next best strategies on their own.

For me, the beauty of this book is in its simplicity. In fewer than 200 pages, complete with an excellent glossary of terms and comprehensive bibliography, Goldman has achieved what most trainers pack into a year's worth of study. I would recommend anyone who lectures or trains in negotiation theory to study it and adopt Goldman's stories as the best illustrations of why what we do works.

[Purchasing Information](#)