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COURT ADR CONNECTION

The eNewsletter of Resolution Systems Institute

February 2011

The Court ADR News section this month covers two stories out of California. The state Supreme Court recently held that California's mediation confidentiality law applies to private communications between a client and an attorney regarding mediation, even in malpractice actions. The California Bureau of State Audits also released a report this month revealing problems with the ways two county courts track the qualifications of their mediators and process complaints against mediators. The news section also highlights the upcoming ABA Section of Dispute Resolution's annual conference, which will be held in Denver, Colorado, in April.

The New Research section features a new study by Roselle Wissler investigating lawyers' preferences for court-connected settlement procedures. The study found that lawyers preferred mediation conducted by staff mediators over judicial settlements or mediation conducted by volunteers.

Finally, the *Just Court ADR* section highlights blog posts on RSI's evaluation of the Cook County Child Protection Mediation and Facilitation Program, the new mediation TV series, *Fairly Legal*, and the court ADR symposium at the ABA Section of Dispute Resolution's annual conference.

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Court ADR News

[**California Supreme Court: Mediation Confidentiality Applies to Attorney-Client Communication**](#)

The California Supreme Court has held that communications between a client and his attorneys during mediation are inadmissible in a malpractice claim the client brought against the attorneys. In the case, *Cassel v. Superior Court of Los Angeles County*, the plaintiff claimed that his attorneys pressured him into accepting a settlement agreement at mediation. In his case, the plaintiff wanted to use information about conversations between him and his attorneys in preparation for mediation, as well as their private conversations during the mediation. The attorneys objected based on the state's mediation [confidentiality statute](#), which states that evidence of anything said or written "for the purpose of, in the course of, or pursuant to, a mediation" is not discoverable or admissible in any civil action. Reversing the Court of Appeals' decision, the Supreme Court determined that the statute is applicable to private communications between a client and attorney regarding mediation. Noting that there are no exceptions in the statute for malpractice actions, the court concluded that "the Legislature decided that the encouragement of mediation to resolve disputes requires broad protection for the confidentiality of communications exchanged in relation to that process, even where this protection may sometimes result in the unavailability of valuable civil evidence."

In a concurring opinion, Associate Justice Ming W. Chin suggested that the state legislature should consider the issues raised by the case. Justice Chin noted that the court's ruling, while consistent with the law, "will effectively shield an attorney's actions during mediation, including advising the client, from a malpractice action even if those actions are incompetent or even deceptive. ... This is a high price to pay to preserve total confidentiality in the mediation process."

For the full opinion, click [here](#).



State Audit Finds Problems with California Counties' Family Mediation Programs

The California Bureau of State Audits recently released its findings from an audit of the family court systems in the Marin County and Sacramento County superior courts. The courts provide child custody and visitation mediation services. The audit looked at the courts' records for these programs from April 1, 2006 through March 31, 2010. The audit found that neither court could prove that all of its staff mediators met the courts' training and education requirements. In addition, the Sacramento court could not provide evidence that the private mediators receiving case referrals met the requirements, either. The audit also found that neither court kept records of complaints about private mediators during the audit period. The Bureau recommended that the courts take steps to collect missing records for its mediators, develop a policy for retaining records for mediators, and follow the established processes for processing and recording complaints.

To read the full audit, click [here](#).



ABA Section of Dispute Resolution Annual Conference Set for April 13-16

The ABA Section of Dispute Resolution is holding its annual conference this year in Denver, Colorado, from April 13-16. The conference includes dozens of presentations on a variety of ADR topics, as well as a symposium dedicated to court ADR. The symposium will take place on April 13 and will include

presentations on court ADR program design and management, among other topics.

Click [here](#) for more information about the conference.

New Research

Court-Connected Settlement Procedures: Mediation and Judicial Settlement Conferences

Lawyers surveyed in Ohio demonstrated a preference for mediation conducted by staff mediators over judicial settlement conferences and mediation conducted by volunteer mediators. That is the broad finding of an empirical study by Roselle Wissler of the procedural preferences of attorneys. The study is based on a survey of attorneys who served as counsel for cases mediated by the Staff Mediation Program of the US District Court for the Southern District of Ohio. Attorneys were asked a series of questions about their perceptions of five ADR program models: judicial settlement conferences by the judge assigned to hear the case; judicial settlement conferences by a judge not associated with the case; mediation by staff mediators; mediation by volunteer mediators; and private mediation. Wissler discusses the study in "[Court-Connected Settlement Procedures: Mediation and Judicial Settlement Conferences](#)" (Ohio State University Journal of Dispute Resolution 2011).

The 136 lawyers who responded to the survey were more likely to feel free to speak candidly in front of staff mediators than judges and volunteer mediators, but slightly less likely than in front of private mediators. They were more likely as well to see the staff mediators as unbiased. Staff mediators also were considered more likely than any other court-connected neutral – judge or mediator – to have "sufficient time to fully explore settlement," although again less likely than private mediators. On the other hand, the attorneys were more likely to think that the judge assigned to the case had "credibility regarding settlement considerations" than a judge not associated with the case or any type of mediator. Lawyers were also more likely to see judges as able to help them control difficult clients.

An overall measure of attorney preference for staff mediators was their response when asked to rank the five settlement procedures. More than half ranked mediation by staff attorney first, with another 28% ranking it second. Mediation by volunteer mediators was most often selected last, with 48% doing so.

Wissler noted that different circumstances may make one process more appropriate than another. One case may benefit from mediation by a staff mediator, while another would be better served by a judicial settlement conference. For this reason, she recommended that courts offer a number of different ADR options.

From *Just Court ADR* Blog

Child Protection Mediation Study Shows Benefits for Families

"Child protection mediation has been shown in a number of studies to have a positive impact on families, the court and, most importantly, the children. Now one more study adds to the evidence for this. At the request of Judge Patricia Martin, the Presiding Judge of the Child Protection Division, RSI undertook an [evaluation](#) of the Cook County Circuit Court Child Protection Mediation

Program. The study, which we just published, looked at three areas: program performance, program process and stakeholder understanding and assessment of mediation and its role and function within the child protection system.” Click [here](#) to read the rest of this post by Jennifer Shack.



"Fairly Legal" Is Fairly Mundane

“I have a pretty high tolerance for mundane television. But, with months of buzz in the ADR community around *Fairly Legal*, a new show about a California mediator, I was not expecting mundane TV. Prior to last night’s pilot episode, the talk in ADR circles was about how television would treat mediation. Now we have seen it and I must say my main reaction was that this was standard uninspired and uninspiring TV. Even I had to make myself keep watching this show just to see how they dealt with mediation. The mediation setting may be new, but the characters are the same old TV characters.” Click [here](#) to read the rest of this post by Susan Yates.



The Conference to Attend

“If you, like most of us involved in court ADR, have a very limited amount of time and money to attend conferences, I suggest you consider making your way to the [Symposium on ADR in the Courts](#), April 13, 2011 in Denver. It is sponsored by the ABA Section of Dispute Resolution and happens on the day before the Section’s big annual conference. Every year, I find it to be an engaging, edifying event.” Click [here](#) to read the rest of this post by Susan Yates.

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