



- [Home](#)
- [Find Mediators](#)
- [News](#)
- [Video](#)
- [Blogs](#)
- [Search](#)
- [Marketplace](#)
- [Calendar](#)
- [Organizations](#)

- [Our Services](#)
- [Membership](#)
- [Case Manager](#)
- [Web Site Package](#)
- [Featured Mediator](#)
- [Send Newsletter](#)
- [Newsletter Announcement](#)
- [Marketing on Mediate.com](#)
- [DVD Library](#)
- [Certification](#)

- [For Members](#)
- [Login](#)
- [Mediation News](#)
- [Jobs](#)
- [Join](#)
- [About Us](#)
- [People](#)
- [Policies](#)
- [Contact](#)

Mediate.com Newsletter

Subscribe to Newsletter

Email Address

- Find Mediator by Practice Area:
- [Adult Family Business](#)
 - [Civil](#)
 - [Commercial](#)
 - [Construction](#)
 - [Divorce](#)
 - [Elder Issues](#)
 - [Employment](#)
 - [Family](#)
 - [Personal Injury](#)
 - [Probate](#)
 - [Public Policy](#)
 - [Real Estate](#)
 - [Workplace](#)
 - [...more](#)

Find International Mediators:

- [Australia](#)

[Become a site sponsor](#)

International Academy of Mediators
A Fellowship of Pre-eminent Commercial Mediators

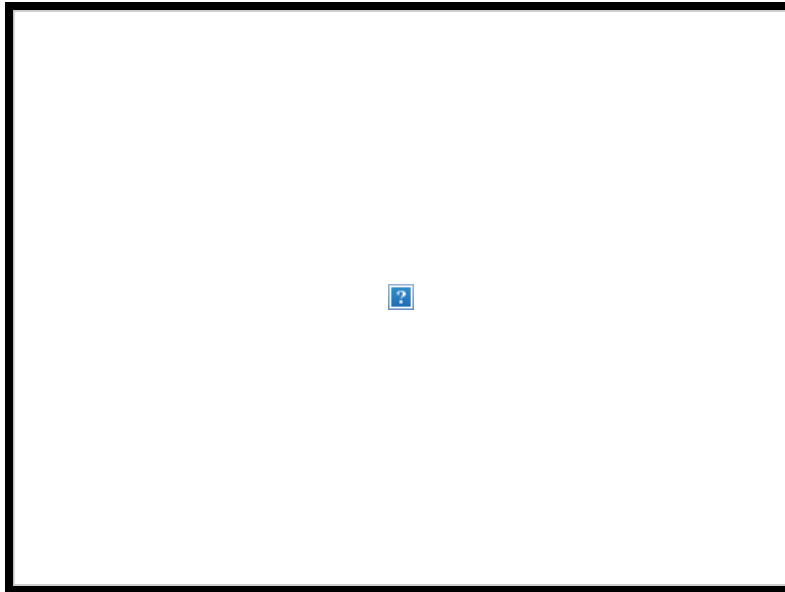
Academic & Training (CA)
Steven Rosenberg
[List Here](#)

Enter Area Code:

Seagate A Floodgate To Patent ADR?

by [Michael Young](#)

From the [IPADR](#) blog of Victoria Pynchon, Les J. Weinstein, Eric Van Ginkel, Michael D. Young and John L. Wagner



(above, [floodgates along the Bitan Dam](#) by [Poagao](#))

The U.S. Supreme Court just denied review of [Convolve Inc. v. Seagate Technology](#).

Why do we care?

Because in *Seagate*, the Federal Circuit reversed a long established precedent and announced a new and higher standard for obtaining treble damages in patent cases, which could have the impact of making some patent cases more receptive to mediation or other ADR processes.

Prior to *Seagate*, a patent holder seeking to prove that a defendant willfully infringed (which opens the door for treble damages) had a pretty low burden to satisfy; the court even suggested that it was as low as a negligence standard. Infringers who had actual knowledge of the patent at issue had an affirmative duty to "exercise due care," which most sought to satisfy by way of an opinion of patent counsel. See *Underwater Devices, Inc. v. Morrison-Knudsen Co.*, 717 F.2d 1380 (Fed. Cir. 1983). In fact, because of *Underwater Devices*, a

Local Mediators (310) S California

Real Estate
Richard F. Hamlin
Dena A. Schechter
Barry Ross
Max Factor III
Joan Kessler

Workplace / Employment
Max Factor III

Construction
Dena A. Schechter

Civil / Legal
Ivan Stevenson

IP / Entertainment
Anthony Keats

Business / Commercial
Max Factor III
Robert K. Wrede
Dena A. Schechter
Kendall Reed

[List Here](#)

Basic Mediation Training
Feb 29-Mar 2 and Mar 7-9 2012

Advanced Mediation Training
Mar 29-30 2012

Steven Rosenberg
Rosenberg Mediation Services

ANTIOCH UNIVERSITY
MIDWEST

Online and Low Residency Graduate Programs in Conflict Analysis and Engagement

STATE LINK (CA)
SAINT-AUBIN MEDIATION

[Canada](#)
[France](#)
[India](#)
[Italy](#)
[New Zealand](#)
[Singapore](#)
[Spain](#)
[United Kingdom](#)

Find Mediator by State:

[Alabama](#)
[Alaska](#)
[Arizona](#)
[Arkansas](#)
[California](#)
[Colorado](#)
[Connecticut](#)
[Delaware](#)
[Florida](#)
[Georgia](#)
[Hawaii](#)
[Idaho](#)
[Illinois](#)
[Indiana](#)
[Iowa](#)
[Kansas](#)
[Kentucky](#)
[Louisiana](#)
[Maine](#)
[Maryland](#)
[Massachusetts](#)
[Michigan](#)
[Minnesota](#)
[Mississippi](#)
[Missouri](#)
[Montana](#)
[Nebraska](#)
[Nevada](#)
[New Hampshire](#)
[New Jersey](#)
[New Mexico](#)
[New York](#)
[North Carolina](#)
[North Dakota](#)
[Ohio](#)
[Oklahoma](#)
[Oregon](#)
[Pennsylvania](#)
[Rhode Island](#)
[South Carolina](#)
[South Dakota](#)
[Tennessee](#)
[Texas](#)
[Utah](#)
[Vermont](#)
[Virginia](#)
[Washington](#)
[West Virginia](#)
[Wisconsin](#)
[Wyoming](#)

Find Mediator by City:

[Albuquerque](#)
[Arlington](#)
[Atlanta](#)
[Austin](#)
[Baltimore](#)
[Boston](#)
[Charlotte](#)
[Chicago](#)
[Cleveland](#)
[Colorado Springs](#)
[Columbus](#)
[Dallas](#)
[Denver](#)
[Detroit](#)
[El Paso](#)
[Fort Worth](#)
[Fresno](#)
[Houston](#)
[Indianapolis](#)
[Jacksonville](#)
[Kansas City](#)
[Las Vegas](#)
[Long Beach](#)
[Louisville](#)
[Los Angeles](#)
[Memphis](#)
[Mesa](#)
[Miami](#)
[Milwaukee](#)
[Minneapolis](#)
[Nashville](#)
[New York City](#)
[Oakland](#)
[Oklahoma City](#)
[Omaha](#)
[Philadelphia](#)
[Phoenix](#)
[Portland](#)

whole new market opened for patent lawyers, the drafting of patent opinions. (This also raised numerous knotty privilege issues during discovery of these opinions, as one might imagine.)

The landscape changed last year with *Seagate*. There, the Federal Circuit overturned *Underwater Devices*, and abandoned the defendant's affirmative duty to demonstrate it had exercised "due care." Instead, the Court imposed a more stringent burden on patent holders to demonstrate that the defendant had willfully infringed. Under *Seagate*, a plaintiff now must show "by clear and convincing evidence" that the infringer acted "despite an objectively high likelihood that its actions constituted infringement of a valid patent," and that this objectively-defined risk was known (or should have been known) to the infringer.

So with the sweep of the pen (a click of the keys?) twenty-four years of precedent was wiped out, along with the need for patent counsel opinion letters (and some of the thorny privilege issues).

Needless to say, patent holders were less than thrilled, and the matter was taken to the U.S. Supreme Court.

To no avail. On Monday, the Supremes allowed the Federal Circuit opinion to stand as-is, without further review by the Court.

So what does this have to do with ADR?

Plenty. Assuming courts apply the new standard properly, the ability to trigger treble damages has just been significantly curtailed in patent cases. There is less of an upside to taking a flyer at trial. Which should mean that there is more of an upside in trying to work out a resolution that is based on the actual value of the dispute in question.

The dispute can be settled by the application of objective standards of value or other measures without having the settlement process derailed by the wish to achieve (or avoid) the home run treble damage award.

This cries out for a more cost effective resolution process, be that mediation or arbitration. Or some hybrid of the two.

Biography

[Recommend](#)

[Tweet](#)

[+ reddit](#)

Michael D. Young is a mediator with Judicate West in Southern California, focusing on the resolution of intellectual property, employment, and other complex business and commercial disputes. He is also an intellectual property and employment litigator with the national law firm of Alston & Bird, a Distinguished Fellow with the International Academy of Mediators, and has been an adjunct professor of negotiation and mediation at the University of Southern California Law School. Mr. Young has co-authored a blog on intellectual property ADR issues at www.ipadrblog.com, and employment issues at <http://www.alston.com/laborandemploymentblog/>.

[Email Author](#)

Website: www.judicatwest.com/neutral/105

Additional articles by [Michael Young](#)

The views expressed by authors are their own and do not necessarily reflect the views of Resourceful Internet Solutions, Inc., Mediate.com or of reviewing editors.



Become a site sponsor

DISPUTE RESOLUTION & CONFLICT MANAGEMENT	 SMU	ANNETTE CALDWELL SIMMONS SCHOOL OF EDUCATION & HUMAN DEVELOPMENT
--	---	--

949-466-2400
AGENCY FOR
DISPUTE
RESOLUTION 800-
616-1202 X720
WWW.AGENCYDR.COM
[Email](#) [Website](#)

GET BUSY,
GET PAID!
WITH RANDOLPH LOWRY

DVD Course



Mediate.com/Library

THE MEDIATORS
DVD Collection



Mediate.com/Library

SETTLE
for
MORE

YOU CAN HAVE THE
RELATIONSHIP
YOU ALWAYS WANTED...
GUARANTEED!

Tom McGeil, Ph.D.
Bobbie Sandose-Merrill, MSW

[Raleigh](#)
[Sacramento](#)
[San Antonio](#)
[San Diego](#)
[San Francisco](#)
[San Jose](#)
[Seattle](#)
[Tucson](#)
[Tulsa](#)
[Virginia Beach](#)
[Washington D.C.](#)
[Wichita](#)
[...more](#)

[Mediator Directory](#) [Mediate.com Services](#)

Copyright 1996-2012 © Resourceful Internet Solutions, Inc. All rights reserved.