

**MEDIATION CASE LAW “REVUE”: LESSONS LEARNED  
FROM STATE AND FEDERAL LITIGATION ABOUT MEDIATION**

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**ALTERNATIVE DISPUTE RESOLUTION SEMINAR**  
October 16, 2006  
Dallas

**CHAPTER 5**



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**RECENT PUBLICATIONS**

West Trial Practice Series Treatise -- MEDIATION: LAW, POLICY AND PRACTICE (3rd edition, forthcoming), co-authored with Peter Thompson, Sara Cole, and Craig McEwen

"Disputing Irony: A Systematic Look at Litigation about Mediation," 11 *Harvard Negotiation Law Review* 43 (Spring 2006), co-authored with Peter Thompson

"Intentional Conversations about the Globalization of ADR," 27 *Hamline Journal of Public Law and Policy* 217 (Spring 2006)

"Mediation Case Law: 2005 in Review," 17 *World Arbitration & Mediation Report* 51 (February 2006)

"Mediation Case Law: 2004 in Review," 16 *World Arbitration & Mediation Report* 62 (February 2005)

"Gollum, Meet Sméagol: A Schizophrenic Ruminaton on Mediator Values Beyond Self Determination and Neutrality," 5 *Cardozo Journal Of Conflict Resolution* 65 (Spring 2004)

"Intentional Conversations about Restorative Justice, Mediation and the Practice of Law," 25 *Hamline Journal Of Public Law And Policy* 235 (Spring 2004), co-authored with Penelope Harley



## **Mediation Case Law “Revue”: Lessons Learned from State and Federal Litigation About Mediation**

The case squibs below are offered as a sampler of the diverse range of disputes about mediation that were litigated in U.S. federal and state courts during the last four years (2003-2006).

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Video Reenactments courtesy of

The Minnesota State Bar Association ADR Institute "Players"

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Special Thanks to Jodie Dulac for video production assistance

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## MEDIATION CASE LAW “REVUE”: LESSONS LEARNED FROM STATE AND FEDERAL LITIGATION ABOUT MEDIATION

### **ENFORCEMENT OF MEDIATED SETTLEMENTS**

#### **STATE SUPREME COURTS**

*Buckley v. Shealy*, \_\_\_ S.E.2d \_\_\_, 2006 WL 2051010 (S.C. July 24, 2006) (affirming decision not to enforce mediated divorce settlement last seen at a mediator’s office in 1997, where it is unclear what happened to the signed agreement, and the family court never entered a signed copy of the agreement in the record).

*Caballero v. Wikse*, 92 P.3d 1076 (Idaho 2004) (affirming enforcement of mediated settlement of wrongful discharge claim negotiated by plaintiff’s attorney, having concluded that attorney had express authority to wholly and finally compromise all claims, where evidence showed that: 1) plaintiff’s attorney and mediator made representations regarding plaintiff’s attorney’s authority; 2) plaintiff left the mediation before it ended knowing that ground rules required someone with settlement authority to be present; and 3) plaintiff specifically authorized attorney to make a counterproposal in response to defendant’s most recent offer). **NOTE:** This opinion supersedes and vacates a prior Supreme Court ruling reaching exactly the opposite conclusion the previous year -- *Caballero v. Wikse*, No. 27995, 2003 WL 21697914 (Idaho, July 23, 2003).

*Catamount Slate Prods., Inc. v. Sheldon*, 845 A.2d 324 (Vt. 2003) (reversing trial court and refusing to enforce alleged oral mediated settlement where intent of the parties to be bound was not established in light of: 1) an unsigned agreement to mediate discussed orally with the parties which expressly stated that mediation would not be “binding upon either party unless reduced to a final agreement of settlement;” 2) post-mediation letters implying that settlement was not final; and 3) evidence suggesting that material elements of a global settlement remained to be negotiated after conclusion of mediation).

**Quote from the Court:** “[I]n their brief, appellants encourage us to hold that a signed writing be required to bind parties to a mediated settlement even when there is no precondition of an intent not to be bound until execution of a final written document. We expressly decline to do so. As we reiterated here, parties to a mediated

settlement are free to enter into a binding oral contract without memorializing their agreement in a fully executed document, even if they intend to subsequently reduce their agreement to writing. But, when parties communicate an intent not to be bound until they have achieved a final executed settlement agreement, oral agreements and draft provisions created during and after mediation will not alone constitute the formation of a binding contract.”

*Chantey Music Pub., Inc. v. Malaco, Inc.*, 915 So.2d 1052 (Miss. 2005) (affirming enforcement of mediated copyright settlement despite plaintiff’s allegations of duress and coercion, where plaintiff was present and represented by counsel during the entire mediation and testimony of both sides’ lawyers, as well as the mediator and opposing party, revealed arms-length bargaining, a lack of any oppression, and clear communication of all settlement terms to the plaintiff).

*Ford v. Ford*, 68 P.3d 1258 (Alaska 2003) (affirming trial court enforcement of mediated divorce settlement orally recited on the record by the mediator despite husband’s claim that his ill health precluded his understanding of the consequences of his actions, where transcript of the settlement indicated husband was an active participant in the mediation, he was represented by counsel, and there was no evidence he was in pain or otherwise incapacitated during the mediation).

*Guthrie v. Guthrie*, 594 S.E.2d 356 (Ga. 2004) (enforcing agreement using ordinary contract principles and not the special rules relating to enforcing mediated divorce settlements, where husband died during the divorce proceedings and the parties agreement contained provisions that were to take effect immediately, indicating the agreement was not contingent upon the divorce judgment).

**NOTE:** Not considered by the Supreme Court given the narrow *writ of certiorari* filed by the husband’s executors, was the Georgia Court of Appeals’ conclusion that summary judgment *in favor* of enforcement (requested by wife) also was inappropriate where allegations of capacity to contract -- specifically that a party “had suffered anxiety attacks, had consumed at least four doses of Valium, and was bereft of energy and mental concentration” -- raised jury questions about whether there was a meeting of the minds sufficient to create a contract). See *Guthrie v. Guthrie*, 577 S.E.2d 832 (Ga. App. 2003).

*Ledbetter v. Ledbetter*, 163 W.W.3d 681 (Tenn. 2005) (refusing to enforce divorce settlement orally dictated by mediator and affirmed by parties and their counsel at mediation, where settlement was later repudiated by one of the parties and never reduced to writing and presented to the court for approval).

*Sierra Club v. Wayne Weber LLC*, 689 N.W.2d 696 (Iowa, 2004) (affirming trial court injunction enforcing an oral agreement dictated into the record following mediation of a nuisance claim, where the parties could not agree on the text of a proposed consent decree to implement their mediated settlement).

*White v. Fleet Bank of Maine*, 875 A.2d 680 (Me. 2005) (enforcing oral mediated settlement of probate dispute against challenge that it was an unenforceable agreement to agree, where three witnesses to the mediation, including the mediator, the trustee's attorney, and a guardian ad litem, testified that an enforceable agreement had been reached, and all of the parties' post-mediation correspondence made references to the "agreement" reached in mediation).

### **FEDERAL CIRCUIT COURTS**

*Beazer East, Inc. v. Mead Corp.*, 412 F.3d 429 (3rd Cir. 2005) (refusing to enforce alleged oral mediated settlement in light of "sound judicial policy" compelling conclusion that parties in appellate mediation can only be bound by a written settlement, especially where the existence or terms of the disputed agreement cannot be proved without violating the confidentiality provisions of the local appellate rules), *cert. denied*, 126 S.Ct. 1040 (Jan. 9. 2006).

*In re Rains*, 428 F.3d 893 (9th Cir. 2005) (concluding that bankruptcy court did not clearly err in finding a debtor mentally competent to enter into a mediated settlement where witnesses to the day-long mediation testified that the debtor "participated actively and appeared to have full understanding of what was transpiring and of the terms of the settlement", notwithstanding that immediately following the conclusion of mediation the debtor drove himself to the hospital where he was admitted and diagnosed with a cerebral aneurysm and stroke and his treating physician and psychologist opined that a person with his diagnosis would not have had mental capacity to conduct business affairs).

*L.J. Pettyjohn v. Estes Express Lines*, 124 Fed.Appx. 174 (4th Cir. March 2, 2005) (affirming enforcement of resignation provision in mediated settlement of workers' compensation claim, finding no violation of public policy because: 1) mediation was arms-length

negotiation, with all parties represented by counsel; 2) plaintiff offered no evidence that at the time of mediation defendant "required" him to resign as a condition of settlement; 3) plaintiff was compensated for his resignation; and 4) statutory limitation on releasing of rights in workers' compensation settlements does not apply to voluntary resignation).

*McDermott v. City of North Olmsted, Ohio*, 178 Fed.Appx. 515 (6th Cir. April 27, 2006) (affirming enforcement of mediated settlement of ADEA claims, concluding that plaintiff employee had reasonable period of time to consider the settlement even though he was forced to sign at the mediation session itself, by virtue of the parties' prior six-weeks of negotiations, involving three revised versions of the written agreement (the last of which had been first presented to plaintiff for consideration 12 days before mediation).

*Stewart v. Carter Machine Co, Inc.*, 82 Fed. Appx. 433 (6th Cir. Nov. 6, 2003) (enforcing oral mediated settlement of ERISA and state law tort claims, where all that remained to be done was to reduce the agreement to written terms, and evidence established that there was no unfulfilled condition precedent regarding the employer's promised production of stock plan documents, given that the mediator reported to the court that a settlement had been reached and employee did not timely complain that an unfulfilled condition precedent precluded the formation of an agreement).

*Zhu v. Countrywide Realty Co., Inc.*, 66 Fed. Appx. 840, No. 02-3087, 2003 WL 21399026 (10<sup>th</sup> Cir. June 18, 2003) (enforcing mediated settlement of Fair Housing Act dispute, claimed to be unconscionable because the settlement was inadequate to cover medical expenses and other damages, where the party was represented by counsel at the mediation and the record demonstrated she understood and agreed to the settlement; finding no impropriety in the same magistrate judge serving as both mediator and later as judge recommending enforcement of settlement; concluding there was no violation of mediation confidentiality rules where the magistrate revealed settlement negotiations in deciding the plaintiff's motion to reopen as the disclosure was necessary to evaluate plaintiff's challenge to the settlement agreement), *cert. denied*, 540 U.S. 1123 (Jan. 12, 2004).

### **STATE COURTS OF APPEAL**

*Ammons v. Cordova Floors, Inc.*, 904 So.2d 185 (Miss. App. 2005) (affirming enforcement of mediated settlement agreement where homeowners waived procedural objection to the trial court's consideration of conflicting affidavits on issue of whether a meeting

of the minds occurred between the parties, and where the preponderance of evidence supported the trial court's finding that a mediated settlement had been reached between the homeowners and their contractor when immediately after the mediation the contractor delivered building materials and homeowners in turn delivered a check in payment).

**Breceda v. Whi**, No. 08-04-00376-CV, 2006 WL 197184 (Tex. App. Jan. 26, 2006) (finding that a mediated settlement signed by one landlord and the attorney for the second landlord was summarily enforceable against both landlords, despite the missing signature and despite a claim that there was not a certified interpreter present).

**Burkley v. Burkley**, 911 So.2d 262 (Fla. Dist. Ct. App. 2005) (reversing trial court modification of child support based on husband's breach of the contractual obligation in his mediated divorce settlement to obtain and maintain employment, where court failed to make findings supporting conclusion that there had been a substantial change of circumstances warranting support modification).

**Quote from the Court:** "Courts may not impose the statute piecemeal—ignoring procedural safeguards and statutory guidelines—simply because the parties signed a mediation agreement."

**Calderon v. J.B. Nurseries, Inc.**, 933 So.2d 553 (Fla. Dist. Ct. App. 2006) (enforcing mediated settlement of a workers' compensation claim despite claimant's failure to execute releases required by the agreement), *rehearing denied* Mar. 15, 2006.

**Quote from the Majority:** "That the claimant later refused to sign releases even though, represented by counsel, he had agreed in writing to execute 'any releases E/C may require,' made the agreement voidable at the other parties' election, but not void. Appellant could not escape the binding effect of the settlement agreement by breaching his obligation to execute a release."

**Quote from the Dissent:** "In my judgment, the execution of the release was an essential element of the contract and, without such element's satisfaction, there simply could be no determination that a meeting of the minds had been accomplished."

**City of Gary v. Conat**, 810 N.E.2d 1112 (Ind. Ct. App. 2004) (enforcing mediated settlement of claims

brought by injured motorist against the city despite assertion that agreement was binding only with mayor's signature, where the city's attorney at no point before, during, or even after the mediation conference disclaimed authority to represent the city; but refusing to enforce the settlement against individual city employee because he was immune from suit when acting within the scope of employment).

**Quote from the Court:** "Requiring the mayor to attend every mediation conference and to sign the settlement agreement would impede the efficiency and finality of mediation proceedings."

**Edens v. Edens**, 109 P.3d 295 (N.M. App. 2005) (affirming trial court's denial of motion to set aside alimony provision of mediated marital settlement agreement based on claims of fraud and misrepresentation, where husband agreed to a lump sum payment based on his and wife's expected future income, but wife's actual post-divorce income was substantially higher than the expected income figure used during the mediation), *cert. denied*, 110 P.3d 506 (N.M. Mar. 2, 2005)(Table No. 29,055).

**Engineer v. Engineer**, No. 14-03-00660-CV, 2006 WL 220842 (Tex. App. Jan. 31, 2006) (reversing a trial court decision to enter a divorce decree and property settlement that differed from the mediated settlement agreement).

**Quote from the Court:** "[A] court may either enter a property division agreement in its entirety or decline to enter it at all, but has no discretion to change such an agreement before entering it."

**Fivecoat v. Publix Super Markets, Inc.**, 928 So.2d 402 (Fla. App. 2006) (reversing order enforcing mediated workers' compensation settlement where claimant's attorney did not have clear and unequivocal authority to settle on claimant's behalf).

**In re O.R. v. J.R.**, No. E034376, 2004 WL 585583 (Cal.Ct. App., Mar. 25, 2004) (affirming a visitation order based on the parties' mediated agreement despite fact that father called the mediator and had the agreement reached in mediation changed without the mother's knowledge or consent, determining that the mother's claims of extrinsic fraud and mistake lacked merit because she would have discovered the change if she had chosen to carefully review the agreement before it was signed and subsequently approved by the court).

*In re Terrence*, 833 N.E.2d 306 (Ohio Ct. App. 2005) (reversing termination of mother's parental rights based on a mediated settlement conducted by telephone during mother's incarceration, where record failed to show clear consent and waiver of rights).

**Quote from the Court:** "Mediating with the government, which has far more resources than an individual, must be carefully scrutinized, as the parties come with unequal bargaining positions. Here, ...[t]he mother had nothing real to gain and everything to lose. [The government agency] had everything to gain and nothing to lose. Mediation is more beneficial to the state, as consent is more efficient than trial.

*Krebs v. United Refining Co. of Pennsylvania*, 893 A.2d 776 (Pa. Super. 2006) (affirming denial of motion to enforce mediated settlement where the record failed to show a meeting of the minds as to the terms of a release).

*L.B. ex rel. L.R. v. Department of Children and Families*, 914 So.2d 1054 (Fla. Dist. Ct. App. 2005) (reversing trial court and setting aside mediated settlement agreement in child dependency proceeding notwithstanding that mother had signed written consent to the petition for dependency, where mother had not received notice and opportunity to attend a mediation conference involving the father of the child).

*Lee v. Lee*, 158 S.W.3d 612 (Tex. App. 2005) (concluding that divorce settlement negotiated directly by the parties could not be considered an irrevocable mediated settlement because the parties reached agreement without the assistance of a mediator).

*Texas A & M Univ.- Kingsville v. Lawson*, 127 S.W.3d 866 (Tex. App. 2004) (rejecting the University's argument that a mediated settlement of an employee's wrongful termination action was unenforceable due to the failure to obtain approval of the governor, comptroller, and attorney general of Texas when nothing in the appropriation statutes required such approval and the final mediated agreement superseded and extinguished a prior settlement which contained such a requirement), *review denied* (May 15, 2005).

*Walters v. Walters*, 673 N.W.2d 585 (Neb. Ct. App. 2004) (vacating the visitation provisions of a divorce decree as an unlawful delegation of judicial authority, where the decree provided "overnight visitation and other specific visitation details shall be as mediated by [wife's] counselor and the children's counselor," noting that it is the responsibility of the court to

determine questions of custody and visitation which cannot be controlled by an agreement or stipulation, and because it is a judicial function that cannot be delegated to a third party).

*Wheatcraft v. Wheatcraft*, 825 N.E.2d 23 (Ind. Ct. App. 2005) (rejecting attack on mediated divorce settlement based on husband's alleged fraudulent misrepresentation of valuation of business, where valuation was based on appraisal and wife had ample opportunity to, but did not, procure her own valuation).

## TRIAL COURTS

*Govia v. Burnett*, No. Civ. 685/1998, 2003 WL 21104925 (Terr. V. I. May 5, 2003) (enforcing mediated settlement despite plaintiff's claim that she was unaware of its terms when she signed it, where plaintiff was represented by counsel during the mediation, failed to express or articulate any dissatisfaction or objection to the terms of the settlement agreement, and strong public policy favoring enforcement of settlements would be frustrated by voiding a settlement merely because plaintiff was dissatisfied with its terms).

*Horn v. United States Department of Army*, 284 F.Supp.2d 1 (D.D.C. 2003)(enforcing mediated settlement of discrimination and retaliation claims despite plaintiff's allegations that he was coerced into agreement when defense counsel told him that plaintiff's supervisor had begun the process to fire plaintiff for misconduct and his own attorney told him during a break in mediation that he would be suspended from employment if he did not settle, where plaintiff: 1) did not deny that he signed the agreement; 2) tendered his resignation the day after he signed the agreement; 3) accepted monetary payment from defendant which he has not attempted to return; and 4) was represented by able counsel who advocated on his behalf).

## CONFIDENTIALITY

### STATE SUPREME COURTS

*Alabama Dept. of Transp. v. Land Energy Ltd.*, 866 So.2d 787 (Ala. 2004) (determining that tables prepared by state agency and used in the mediation to illustrate the location of coal within the mineral owner's estate were properly admitted where it appeared the tables were not prepared solely for use in mediation and the tables were provided by the state agency at the conclusion of mediation in response to pre-existing discovery requests), *rehearing denied* (Mar. 12, 2004).

*In re Estate of Stukey*, 100 P.3d 114 (Mont. 2004) (admitting post-mediation letter written by estate's attorney to attorney for decedent's daughter seeking to clarify scope of a probate settlement reached in mediation, concluding that the letter, written one week after the mediation, was not part of the "mediation process" to which statutory confidentiality applied), *rehearing denied* (Nov. 4, 2004).

*Rojas v. Los Angeles County Superior Ct.*, 93 P.3d 260 (Cal. 2004) (affirming denial of tenants' motions to compel production of material produced by owners and builders in connection with mediation held in prior litigation, concluding that state mediation privilege not only protects substance of the negotiations and communications in furtherance of mediation, but also "raw evidence" exchanged at the mediation, when the evidence was compiled specifically for use in the mediation process).

**Quote from the Court:** "[I]n making its recommendation regarding mediation confidentiality, the [California Law Revision] Commission specifically considered the discoverability of both expert reports and photographs and drafted its proposed confidentiality provisions to preclude discovery of such reports and photographs if they were 'prepared for the purpose of, in the course of, or pursuant to, a mediation.' [citation omitted]. These materials also show that the Commission chose language expressly designed to give a mediation participant who takes a photograph for purpose of the mediation 'control over whether it is used' in subsequent litigation, even where 'another photo' cannot be taken because, for example, 'a building has been razed or an injury has healed.'"

*State v. Williams*, 877 A.2d 1258 (N.J. 2005) (affirming assertion of mediation privilege to prevent mediator's testimony sought to support self-defense claim in assault case because state interest in protecting mediation confidentiality was not outweighed by defendant's need for the evidence where: 1) the mediator's testimony lacked reliability because the "mediator's description of the [mediation] session gives the overall impression of bedlam" and the mediator's post-mediation interest in the case, including attendance at trial after being notified of the trial date by defendant, raised concerns about mediator neutrality; and 2) the defendant was able to introduce other evidence supporting his self-defense claim).

## STATE COURTS OF APPEAL

*Alford v. Bryant*, 137 S.W.3d 916 (Tex. App. 2004) (reversing trial court judgment of legal malpractice against an attorney for failure to advise client of the risks and benefits of mediated settlement, where the mediator, who allegedly was a witness to the attorney's statements, was not allowed to testify), *review denied* (May 13, 2005).

**Quote from the Court:** "One cannot invoke the jurisdiction of the courts in search of affirmative relief, and yet, on the basis of privilege, deny a party the benefit of evidence that would materially weaken or defeat the claims against her [citation omitted]. Such offensive, rather than defensive, use of a privilege lies outside the intended scope of the privilege."

*Allen v. Day*, No. M2005-00989-COA-R3-CV, 2006 WL 2354799 (Tenn. Ct. App. Aug. 11, 2006) (holding that mediated settlement agreement is not excepted from disclosure under the Public Records Act where court mediation confidentiality rules do not clearly delineate an exception to the Public Records Act).

*Bridges v. Metromedia Steakhouse Co., L.P.*, 807 N.E.2d 162 (Ind. Ct. App. 2004) (admitting testimony by defendant's insurance adjuster concerning observations she made during unsuccessful court-ordered mediation of the extent of scarring and redness of plaintiff's hands, because the adjuster's personal observations could not be construed as protected nonverbal conduct intended as an assertion).

*Doe v. Superior Court*, 34 Cal.Rptr.3d 248 (Cal. Ct. App. 2005) (barring disclosure of specific summaries of priest personnel files prepared for mediation of child-molestation cases, where record shows parties agreed they were participating in mediation, not a judicially-managed, mandatory settlement conference which would not be subject to strict mediation confidentiality protections).

*Fair v. Bakhtiari*, 19 Cal.Rptr.3d 591 (Cal. Ct. App. 2004) (reversing trial court and enforcing arbitration clause in a mediated settlement agreement finding that the agreement fit within an exception to mediation confidentiality according to the statute that makes settlements admissible if they state that they "are binding" or include "words to that effect"), *review granted and opinion superseded* (January 12, 2005).

*Holmes v. Concord Homes, LTD.*, 115 S.W.3d 310 (Tex. App. 2003) (finding no error in introduction of considerable evidence about mediation and settlement

offers at contract dispute trial, where party failed to properly voice objections to introduction of specific testimony and trial court informed the jury “at some length about the mediation process and the confidentiality involved there, and then instructed counsel to avoid asking questions that invaded the mediation process”), *rehearing overruled* (Sept. 30, 2003).

**Kraft v. Texas**, No. 03-04-00355-CR, 2006 WL 151935 (Tex. App. Jan. 19, 2006) (finding that improper testimony from the complaining witness that the witness and appellant had attended a mediation session was harmless error in light of a defense witness' reference to the mediation on cross-examination that was not objected to), *petition for discretionary review denied June 28, 2006*.

**Stewart v. Preston Pipeline Inc.**, 36 Cal.Rptr.3d 901 (Cal. Ct. App. 2005) (affirming trial court admission of mediated settlement agreement lacking defendants' signature, where: 1) the agreement stated it was an enforceable full and final settlement of all claims exempt from California confidentiality requirements; 2) the agreement was signed by defendants' counsel, the plaintiff, and plaintiff's attorney, and 3) plaintiff is the party challenging enforcement of the agreement and its admission in evidence).

**Quote from the Court:** “Were we to adopt plaintiff's position, then (in an extreme example) a settlement agreement signed personally by the parties after mediation would be inadmissible in a subsequent motion or action enforcing that settlement, if the parties' counsel (as opposed to the parties themselves) signed the mediation-confidentiality waiver. We do not believe that the Legislature intended to permit the tail (mediation confidentiality) to wag the dog (agreed-upon settlement) in such instances.”

## **TRIAL COURTS**

**Armstrong v. HRB Royalty, Inc.**, No. Civ.A. 03-0148-WS-C, Civ. A. 03-0635-WS-C, 2005 WL 3371087 (S.D. Ala., Dec. 12, 2005) (denying motion to exclude evidence of a settlement proposal initially conveyed during a two-day mediation conference but offered again seven weeks later in subsequent settlement negotiations, concluding that the parties' pre-mediation confidentiality agreement did not protect post-mediation communications made so long after mediation, where there was no evidence that the communications were part of an effort to formalize an agreement reached at the mediation or that the communications were facilitated by the mediator).

**Fair Housing Advocates Ass'n, Inc. v. Terrace Plaza Apartments**, No. 2:03 CV 0563, 2006 WL 2334851 (S.D. Ohio Aug. 10, 2006) (concluding that sanctions are appropriate where defendants improperly revealed confidential discussions and negotiations from court-ordered mediation as part of a Rule 68 offer of judgment).

**Frank v. L.L. Bean Inc.**, 377 F.Supp.2d 233 (D. Me. 2005) (imposing \$1,000 fine on plaintiff's attorney in sexual harassment action as sanction for breaching confidentiality of prior mediation by disclosing to a potential witness the position the employer had taken in the prior mediation as a way of convincing the witness that the employer had in fact done something wrong).

**Quote from the Court:** “It is essential for the effectiveness of mediation in this district that all but the most *de minimis* breaches of confidentiality, whether perpetrated by the opposing party or her counsel be punished with sanctions.”

**Hamilton v. Enterprise Leasing Company of St. Louis**, No. 4:04-CV-802 CAS, 2005 WL 2647959 (E.D. Mo. Oct. 17, 2005) (denying request for sanctions against plaintiff in discrimination lawsuit for disclosing in summary judgment memorandum the amount offered by employer to settle the dispute, where plaintiff claimed his disclosure was only an unintentional violation of confidentiality rules because “he believed that the session was only confidential if a settlement were reached in the case”).

**Johnson v. Parchment School Dist.**, No. 1:03-CV-917, 2006 WL 1275066 (W.D. Mich. May 5, 2006) (publishing amount of settlement reached in confidential mediation of estate claim, concluding that strong presumption in favor of public access to judicial records outweighed confidentiality concerns, including fear that “media frenzy” might adversely affect court mediation program).

**Quote from the Court:** “[T]he Court gives little weight to Defendants' suggestion that disclosure will chill the Court-endorsed mediation process....[T]his district's voluntary facilitative mediation (“VFM”) program has been very successful as a means of resolving cases on the civil docket in an expeditious and cost efficient manner. Confidentiality of settlement terms is seldom an issue that this Court faces in connection with VFM settlements, because in the vast majority of cases, the Court is not required to approve the settlement. This case is an

exception because it is governed by a specific statute which requires the Court to approve the proposed settlement. Moreover, even among the wrongful death subset of cases, this case is exceptional because it involves two public bodies, as to which the public's interest in access to judicial proceedings and records is especially strong. Finally, while the Court has no doubt that confidentiality was an important consideration to Defendants, the Court notes that at the April 3rd hearing, Defendants' counsel advised the Court that the settlement would stand regardless of the Court's decision to publish the settlement amount."

***Reifsteck v. Paco Bldg. Supply Co.***, No. 4:04CV742 RWS, 2005 WL 2674941 (E.D. Mo., Oct. 20, 2005) (denying defendant employer's motion for summary judgment on employment discrimination/retaliation claims and specifically rejecting employer's argument that evidence of retaliatory termination that allegedly occurred at a mediation is inadmissible under Federal Rule of Evidence 408).

**Quote from the Court:** "If such evidence was kept from a jury it would enable employers to discriminate against employees in the guise of mediation and settlement negotiations. The federal statutes against employment discrimination cannot be compromised by cloaking discrimination in the form of such negotiations").

***Sealed Party v. Sealed Party***, No. CIV. A. H-04-2229, 2006 WL 1207732 (S.D. Tex. May 4, 2006) (concluding that attorney breached fiduciary duty to his former client not to disclose the non-public fact that the parties had reached a mediated settlement, when he issued a press release about the settlement, but dismissing the client's fiduciary duty claim because of lack of damages).

***U.S. Fidelity & Guar. Co. v. Dick Corp./Barton Malow***, 215 F.R.D. 503 (W.D. Pa. 2003) (affirming special master decision to permit discovery of a settlement from an earlier case involving some but not all parties upon finding that the settlement was not protected by state mediation privilege where a single mediation session did not result in an agreement, a second session was discussed but never scheduled, and the parties had only limited follow-up communication with the mediator in which they apprised him of the ongoing settlement negotiations).

**Quote from the Court:** "It seems to us that the mediation process requires the presence,

or a least the active participation, of a mediator...otherwise, we would be hard pressed to distinguish between garden variety settlement discussions, which are not protected, and those which are a part of the mediation process and are privileged."

### **DUTY TO MEDIATE/COURT POWER TO COMPEL**

#### **STATE SUPREME COURTS**

***Kentucky Farm Bureau Mutual Ins. Co. v. Wright***, 136 S.W.3d 455 (Ky. 2004) (affirming power of trial court to compel mediation of negligence case, including power to order appearance of parties and their adjuster at the mediation with full settlement authority; but granting writ of prohibition and precluding court from ordering that parties would face fines and penalties if the case settled after conclusion of mediation).

**Quote from the Court:** "Under the trial court's order, parties who settled after the conclusion of mediation, despite a belief in their right to do so, would be required to face mandatory fines and penalties, a route most reasonable parties would avoid. We conclude that the post-mediation settlement provision imposing additional costs, fines and penalties exceeds trial court discretion and results in irreparable harm without an adequate remedy by appeal."

***Marcher v. Bonzell***, 323 Mont. 364 (Mont. 2004) (refusing to dismiss appeal of default judgment in landlord-tenant dispute for alleged failure to meaningfully participate in mandatory appellate mediation, where failure of appellant to personally appear was attributable to miscommunication with counsel, counsel who did appear at the mediation had authority to negotiate on appellant's behalf, and last best offer in mediation was held open for appellant to consider, and its rejection showed mediation was unsuccessful "because the parties were too far apart in their positions, not because of any failure to meaningfully participate in the process").

***Maurer v. Maurer***, 872 A.2d 326 (Vt. 2005) (rejecting father's appeal of a custody modification order based on the parties' failure to mediate as required by a provision in parties' final divorce decree, where evidence showed father was the one who had refused to engage in mediation).

*Twomey v. Twomey*, 888 A.2d 272 (Me. 2005) (affirming denial of father's motion for continuance to allow mediation of child support dispute, where wife's allegation that father intended to "drag-out" litigation could reasonably be considered an extraordinary circumstance sufficient to waive the statutory mediation requirement).

*Walsh v. Larsen*, 705 N.W.2d 638 (S.D. 2005) (affirming trial court refusal to set aside as void a judgment in a real estate foreclosure action due to creditor's admitted failure to mediate, concluding that the unsatisfied statutory mediation requirement is not jurisdictional but "more akin to an affirmative defense, which must be pled and established").

### FEDERAL CIRCUIT COURTS

*Abele v. Hernando County*, No. 05-12686, 2005 WL 3501869, (11th Cir., Dec. 23, 2005) (affirming denial of request for non-lawyer mediator and confirming power of district court to compel mediation despite party's contention that it would be "act of futility" posing unreasonable costs, where local court rules provide that any action may be referred by the court to mediation).

*U.S. v. Beyrle*, 65 Fed. Appx. 442, No. 02-3424, 2003 WL 22138999 (10th Cir. Sept. 17, 2003) (affirming trial court ruling that magistrate's pre-trial order compelling mediation of foreclosure action was no longer applicable after the court granted summary judgment disposing of the issue).

### STATE COURTS OF APPEAL

*Frei v. Davey*, 22 Cal.Rptr.3d 429 (Cal. Ct. App. 2004) (reversing trial court and refusing to award attorneys fees to prevailing party in action for specific performance of residential real estate purchase agreement, where prevailing party had failed to mediate prior to commencement of the litigation).

**Quote from the Court:** "[T]his case is a textbook example of why agreements for attorney fees conditioned on participation in mediation should be enforced. It is also a graphic illustration of a case that should have been mediated at an early stage when the parties were only \$18,540 plus expenses apart in their settlement positions. Hundreds of thousands of dollars in attorney fees have been spent and the parties have litigated through two trials and three appeals. The lesson? There is a good reason the mediation clause was in the Agreement and the legal

consequences specified by the Agreement for refusing to mediate will be enforced."

*Fuchs v. Martin*, 836 N.E.2d 1049 (Ind. App. 2005) (reversing trial court order compelling mediation as pre-condition to adjudication of any dispute in paternity case, where order could be read as foreclosing a party's right to file motions with the court in contravention of local court rules on mediation which merely empower court to order mediation after receiving a petition or motion and prior to holding a hearing; and also concluding that trial court erred by explicitly naming the only two mediators the parties could use, where local court rules mandate more flexibility in mediator selection).

### TRIAL COURTS

*Buschkoetter v. Johanns*, No. 8:05CV115, 2006 WL 1479165 (D. Neb. May 24, 2006) (granting defendants' motion to dismiss farmers' action seeking declaratory and injunctive relief against the Federal Crop Insurance Corporation for alleged failures in administration of crop insurance program, where plaintiffs failed to exhaust required administrative remedies of mediation and arbitration).

*Fisher v. GE Med. Sys.*, 276 F. Supp.2d 891 (M.D. Tenn. 2003) (relying on the Federal Arbitration Act to compel mediation of employee's Fair Labor Standards Act claims where evidence suggests employee was aware of multi-step dispute resolution program mandating mediation and his decision to continue employment constituted acceptance of program's terms).

*Hood v. Terminix Inter. Co., L.P.*, No. C 06-0024 SBA, 2006 WL 1329678 (N.D. Cal. May 15, 2006) (denying as premature defendant's motion to dismiss or alternatively stay action pending arbitration, where parties had not yet fulfilled contractual obligation to mediate).

**Quote from the Court:** "Plaintiff maintains that the parties' failure to submit to mediation renders this Motion premature. Defendant agrees to participate in mediation, however, requests the Court to rule on this Motion first. The Court declines to render what would be tantamount to an advisory opinion.....A mediation between the parties may resolve their dispute. The parties' agreement to arbitrate is only triggered by an unsuccessful mediation. If and when that occurs, disputes regarding arbitration will be ripe for the adjudication by this Court."

*LBL Skysystems, Inc. v. APG-America, Inc. v. XL Specialty Insurance Co.*, No. Civ.A. 02-5379, 2005 WL 2140240 (E.D. Penn. Aug. 31, 2005) (concluding that defendant waived right to enforce contractual obligation to mediate prior to initiating legal proceedings by not filing a motion to stay proceedings pending mediation and instead impleading other parties, making counterclaims, and filing *in limine* and summary judgment motions).

## **SANCTIONS/ATTORNEYS' FEES/MEDIATION**

### **COSTS**

#### **STATE SUPREME COURTS**

*Heng v. Rotech Medical Corp.*, 720 N.W.2d 54 (N.D. 2006) (finding abuse of discretion where trial court awarded \$1,281.50 in mediation fees to prevailing party as taxable costs and disbursements when parties had previously contractually agreed to share all mediation expenses).

*Lawson v. Brown's Home Day Care Center, Inc.*, 861 A.2d 1048 (Vt. 2004) (affirming award of \$2,000 in sanctions against attorney for repeatedly and in bad faith filing confidential mediation documents in support of attempt to disqualify opposing counsel for alleged obstruction of justice, subornation of perjury, and presentation of false evidence).

*Root v. Root*, 882 A.2d 1202 (Vt. 2005) (affirming trial court order that mother was in contempt, where she moved out-of-state with her child without first attempting to mediate as required by her divorce decree).

*The Electric Man, Inc. v. Charos*, 895 A.2d. 193 (Vt. 2006) (concluding that trial court erred by categorically refusing to award attorneys fees for mediation participation, noting that denial of fees would discourage parties from voluntary participation or encourage only minimal participation).

#### **FEDERAL CIRCUIT COURTS**

*Finger Furniture Company Inc. v. Commonwealth Insurance Company*, 404 F.3d 312 (5th Cir. 2005) (affirming denial of attorney's fees sought by insured for pre-lawsuit mediation attempt, where its business interruption insurance policy required the party to "assist in effecting settlements").

*Negron v. Woodhull Hospital*, No. 05-4147-CV, 2006 WL 759806 (2nd Cir. March 23, 2006) (vacating a default judgment entered because defendant failed to

comply with the mediator's instruction to bring a principal to the mediation).

**Quote from the Court:** "The grant of judgment as a sanction 'is a harsh remedy to be utilized only in extreme situations.' . . . The district court reasonably found the Hospital to have violated this order when the Hospital disobeyed the instruction of the mediator by failing to bring a principal party with settlement authority to the mediation. While the Hospital was free to adopt a "no pay" position its failure to bring a principal party was a violation of a court order and impaired the usefulness of the mediation conference. Nevertheless, the district court should have imposed less extreme sanctions before resorting to default judgment against the Hospital."

*Praseuth v. Rubbermaid, Inc.*, 406 F.3d 1245 (10th Cir. 2005) (affirming trial court reduction of compensable attorney's fees owed prevailing ADA plaintiff, where record showed practice of "spending large amounts of time for relatively straightforward, discrete tasks", best illustrated by 119 hours claimed for mediation work, including time spent writing a mediation brief and client meetings to review settlement numbers which were the basis of plaintiff's single mediation settlement offer, numbers which plaintiff later conceded were inaccurate).

*Quintana v. Jenne*, 414 F.3d 1306 (11th Cir. 2005) (affirming district court award of attorneys' fees for defense of frivolous retaliation claim in discrimination lawsuit despite inability to determine whether value of employer's mediation settlement offer militated against a finding of frivolity, but expressly noting the absence of authority precluding consideration of mediation settlement offers when evaluating the frivolity issue).

*T.D. v. LaGrange Sch. Dist. No. 102*, 349 F.3d 469 (7th Cir. 2003) (ruling that a mediated settlement of Individuals with Disabilities Education Act (IDEA) claim does not confer "prevailing party" status on a child for purposes of right to attorneys fees because agreement was not made part of a court order, was not signed by a judge, and the district court was without enforcement power over the agreement).

#### **STATE COURTS OF APPEAL**

*Elder v. Islam*, 869 So.2d 600 (Fla. Dist. Ct. App. 2004) (affirming the award of a *pro rata* share of mediation costs to an employee in a successful claim for unpaid wages because the costs were incurred pursuant to a court order to engage in mediation).

**Quote from the Court:** "In closing we note that, since the Statewide Uniform Guidelines for Taxation of Costs in Civil Actions do not currently address mediation costs in any way, we would encourage the drafters thereof to address this issue to avoid these disputes in the future."

*Erickson v. Smith*, 909 So.2d 1173 (Miss. App. 2005) (finding no abuse of discretion in trial court's refusal to award costs for unsuccessful mediation where moving party failed to offer evidence regarding conduct of the mediation other than unsubstantiated allegation that opposing party failed to mediate in good faith by refusing to make a counter offer).

*Harrelson v. Hensley*, 891 So.2d 635 (Fla. Dist. Ct. App. 2005) (enforcing award of sanctions against party, but not her lawyer, for party's failure to attend a court-ordered mediation conference, where only excuse for non-attendance was party's assertion offered only after the mediation and in opposition to the sanctions motion that she "has been so disturbed by the obnoxious conduct of [opposing] counsel that she has become uncommunicative and willing only to allow counsel to continue to pursue her interests in this matter without her active involvement").

*Hernando County School Board v. Nazar*, 920 So.2d 794 (Fla. Dist. Ct. App. 2006) (imposing monetary sanctions on counsel and party for their failure to attend appellate mediation where they failed to notify the court of reasons for their absence or bring a motion seeking permission to be excused from personal attendance).

*Holler v. De Hoyos*, 898 So.2d 1216 (Fla. Dist. Ct. App. 2005) (sanctioning party for unexplained failure to appear at court-ordered appellate mediation, but refusing to compel enforcement of the mediated settlement agreement negotiated at the mediation in the party's absence).

*In re Marriage of Davidson*, 126 P.3d 76 (Wash.App. Div. 2006) (affirming contempt sanction for mother who made unilateral school decision over father's objection without participating in mediation as required by the parties' parenting plan).

*Matajek v. Skowronska*, 893 So.2d 700 (Fla. Dist. Ct. App. 2005) (sanctioning attorney for failing to demonstrate excusable neglect in filing appellate mediation questionnaire nearly two months late where attorney claimed delay was due to office relocation, negotiation of new law firm, office closures due to hurricanes, and client leaving the country with health problems).

*Morgan v. Steiner*, 619 S.E.2d 516 (N.C. App. 2005) (reversing trial court order requiring plaintiff to pay cost of defendants' lunch during mediated settlement conference, finding such expense unauthorized by relevant state statute).

*Office Environments, Inc. v. Lake States Ins. Co.*, 833 N.E.2d 489 (Ind. App. 2005) (affirming dismissal of complaint with prejudice for plaintiff's failure over two and one-half years to comply with court order to mediate, basing authority for dismissal not on local court mediation rules (which would limit sanction authority to costs and attorney fees), but on general trial rules permitting dismissal for failure to prosecute).

**Quote from the Dissent:** "Many counties require mediation in all civil cases, and I do not believe that is a good practice. Some cases simply cannot be productively dealt with through mediation. When mediation is imposed without any inquiry into whether that process suits the dispute or the litigants, parties will often be ordered into mediation when both sides (and perhaps the judge, as well) know the process will be futile. In some situations, like the one before us, a party alleges its financial difficulties are attributable to an act or omission by the other party. Forcing the financially challenged party into mediation, and forcing that party to pay mediation costs, will often be counter-productive."

*QC Const. and Engr., Inc. v. Fu*, No. B160831, 2004 WL 418381 (Cal. Ct. App. Mar. 8, 2004) (affirming the award of \$180,000 in attorneys fees to the prevailing party seller of property despite seller's failure to demand mediation pursuant to a "no mediation, no attorneys fees" clause in the purchase agreement, where the seller did not initiate the underlying action, filed cross-complaints only after cross-complaints were filed against him, and the buyers challenging the award of fees had effectively waived their right to mediation by cross-complaining against the seller).

**Quote from the Court:** "To put it in the vernacular, Fu was dragged into the lawsuit 'kicking and screaming' and not as an initiator or willing participant."

## TRIAL COURTS

*A.B. v. Newark Board of Education*, No. 05-CV-702 (DMC), 2006 WL 343909 (D. N.J. Feb. 14, 2006) (concluding that a parent who settled an individual educational plan dispute with a school board through

mediation could not be a “prevailing party” entitled to attorneys fees under the Individuals with Disabilities Education Act (IDEA) because the dispute ended with an “agreement” rather than an “order”, the agreement was not signed by a judge, and the agreement did not provide for judicial enforcement).

**Brooks v. Lincoln National Life Ins. Co.**, No. 8:05CV118, 2006 WL 2487937 (D. Neb. Aug. 25, 2006) (affirming award of sanctions against plaintiff’s counsel for violating obligation in mediation order to negotiate with objective good faith by: (1) indicating plaintiff would not respond to the defendants’ initial offer and directing the mediator to tell defendants they had five minutes to put a serious settlement offer on the table or plaintiff was leaving; 2) indicating defendants’ second offer or proposal was unacceptable and unworthy of response, (3) not allowing the mediator to explain the defendants’ offers, (4) not engaging in dialogue with defendants’ counsel to correct what Brooks’s counsel perceived as deficiencies in the mediation process, and (5) unilaterally terminating or abandoning the mediation process).

**Firestine v. Parkview Health System, Inc.**, 374 F.Supp.2d 658 (N.D. Ind. 2005) (denying award of mediation costs to prevailing plaintiff in employment discrimination case, concluding such costs are non-compensable under 28 U.S.C. § 1920 and finding no authority to include mediation cost reimbursement as part of an attorney’s fee award).

**Lamastus v. Bethany Home Association of Lindsborg**, No. 05-1309-MLB, 2006 WL 1360578 (D. Kan. May 18, 2006) (denying motion for sanctions against bankruptcy trustee for failure to appear in person at mediation, because at time of the mediation the trustee was not yet a party to the lawsuit and local court rules merely encourage but do not require attendance by “interested third parties”).

**Smith Wholesale Co., Inc. v. Philip Morris USA, Inc.**, No. 2:03CV221, 2005 WL 1230436 (E.D. Tenn. May 24, 2005) (ordering defendant to pay plaintiffs’ mediation expenses, including mediator’s fees, as sanction for failure to mediate in good faith, where plaintiffs spent significant time preparing for, and traveling to mediation, and defendant refused to mediate after five hours but had previously failed to communicate to the court or opposing counsel that mediation was likely to be futile, *order vacated upon reconsideration*, 2005 WL 2030655 (August 23, 2005) (finding that neither party acted with “complete good faith” with respect to court’s mediation order).

**Valenti v. Unum Life Insurance Company of America**, No. 8:04-CV-1615-T-30TGW, 2006 WL

1627276 (M.D. Fla. June 6, 2006) (granting defendant judgment on claim it acted in bad faith during mediation by sending a corporate representative without sufficient settlement authority because the conduct upon which Plaintiff bases his complaint took place during litigation and “the litigation privilege attaches and the conduct is not actionable”).

## ETHICS/MALPRACTICE

### STATE SUPREME COURTS

**In re Hoffman**, 883 So.2d. 425 (La. 2004) (finding professional misconduct warranting three month suspension from practice of law (conditionally deferred if no further violations), where attorney representing three siblings in a will contest accepted defendants’ mediated settlement offer without informing all siblings about the settlement terms, and then compounded his misconduct by distributing the settlement proceeds in accordance with the wishes of one of his clients over expressed objection of another), *rehearing denied* (Oct. 29, 2004).

**In re Philpot**, 820 N.E.2d 141 (Ind. 2005) (issuing public reprimand to attorney who maintained a website suggesting that clients should lie and create “throw away” demands to achieve successful results in mediation). **NOTE:** One judge dissented “believing that for advising the public to lie at mediation meetings, the respondent should be suspended from the practice of law without automatic reinstatement.”

**In re UPL Advisory Opinion 2003-1**, 623 S.E.2d 464 (Ga. 2005) (concluding that a non-attorney alternative dispute resolution and mediation firm engages in unauthorized practice of law by representing debtors in negotiations with creditors’ attorneys to reduce the amount of debt or work out a payment plan).

**Penny v. Wyoming Mental Health Professions Licensing Board**, 120 P.3d 152 (Wyo. 2005) (affirming denial of social worker’s application for relicensure where substantial evidence established that social worker knowingly practiced without a license, finding his assertion that his practice was limited to trial consulting, mediation, conflict resolution, and forensic social work, to be utterly lacking in credibility).

**Quote from the Court:** “Although termed by [the appellant] as “conflict resolution” and “mediation” services, it is clear the clients that treated with [the appellant] believed they were receiving counseling services and that is exactly what [the appellant] was providing,

treating individuals over the course of months and years.”

### **FEDERAL CIRCUIT COURTS**

*In re Fletcher*, 424 F.3d 783 (8th Cir. 2005) (affirming suspension of attorney from practice for three years for a pattern of demeaning and abusive behavior while participating in depositions and mediation, including the use of profanity in one mediation and the threat in another to publicize confidential information that his client had illicitly photocopied), *rehearing and rehearing en banc denied*, Nov. 10, 2005.

### **STATE COURTS OF APPEAL**

*Home Depot, U.S.A., Inc., Saul Subsidiary I Ltd. Partn.*, 159 S.W.3d 339 (Ky. Ct. App. 2004) (affirming grant of mandatory injunction to demolish a retail store for owner's breach of land covenants, and rejecting claim that trial judge should have recused herself after conducting an unsuccessful mediation session instead of deciding the matter without an evidentiary hearing, where: 1) the Code of Judicial conduct specifically authorizes judges to "mediate or settle matters pending before the judge"; 2) the store owner suggested or at least acquiesced in the trial court's mediation efforts; and 3) there was no affirmative showing of bias or partiality, and absent such showing the trial court's hint that it might pass the case on to another judge if mediation was unsuccessful is alone insufficient to justify recusal), *review denied* (April 13, 2005).

*Lerner v. Laufer*, 819 A.2d 471 (N.J. Super. 2003) (dismissing legal malpractice action after finding no breach of standard of care in attorney's failure to perform discovery or other investigative services necessary to evaluate merits of mediated divorce settlement, where representation agreement specifically limited scope of representation), *cert. denied*, 827 A.2d 290 (N.J. June 20, 2003):

**Quote from the Court:** “In a mediated agreement, all of those things are self-determined. We, therefore, see no just reason in law or policy to deny attorneys practicing matrimonial law the right to assert as a defense to claims of malpractice that they were engaged under a precisely drafted consent limiting the scope of representation.”

*Morgan Phillips, Inc. v. JAMS/Endispute, L.L.C.*, 44 Cal.Rptr.3d 782 (Cal. App. 2 Dist. June 20, 2006) (concluding that arbitrator's withdrawal from arbitration proceeding for no stated reason and continued service as mediator was not sufficiently

associated with adjudicative phase of arbitration to justify arbitral immunity).

*Schauf v. Schauf*, 107 P.3d 1237 (Kan. Ct. App. 2005) (expressing strong disagreement with dual appointment of same person as special master and mediator in partnership dispute, but refusing to find judicial error where parties failed to make a timely and/or specific objection), *review denied*, Sept. 22, 2005.

*Simpson v. JAMS/Endispute, LLC*, No. A110634, 2006 WL 2076028 (Cal.App. 1 Dist. July 26, 2006) (affirming dismissal of complaint brought against mediation provider for alleged failure to deliver adequate service by not ensuring presence of opposing party at the mediation and because the organization's mediator advised plaintiff to “cut his losses and settle the case”).

*Travelers Casualty and Surety Company v. Superior Court*, 24 Cal.Rptr.3d 751 (Cal. App. 2005) (vacating valuation order issued by judicial mediator who determined the good faith settlement value of claims in childhood sexual abuse case, where the order violated prohibitions against fact-finding and was coercive with respect to insurers, since the valuation “cut off the insurers' right to declare a coverage forfeiture in the event of an unauthorized settlement” and “dangled over the insurer's heads the threat of a bad faith action that was already forfeited with the weight of a judge's findings”), *review denied* June 15, 2005.

**Quote from the Court:** “[W]e do not believe Judge Lichtman erred by providing the parties and the insurers with his evaluation of the plaintiffs' prospects for victory or the reasonable settlement value of their cases. To the extent the Valuation Order includes such information, it was proper. Judge Lichtman should not have characterized his settlement valuations as findings, however. Neither should he have purported to make findings concerning ... actual trial requirements ... nor otherwise taken a position concerning whether the insurers' conduct was in bad faith.”

### **TRIAL COURTS**

*In re First Quality Realty, LLC*, No. 02-14758 (PCB), 2006 WL 686868 (Bankr. S.D.N.Y. Feb. 17, 2006) (vacating arbitral award based on appearance of partiality where, among other things, the arbitrator, prior to submission of post-arbitration briefs, accepted appointment as a mediator for a dispute involving one of the arbitration parties without disclosure to the other party).

*Sealed Party v. Sealed Party*, No. CIV. A. H-04-2229, 2006 WL 1207732 (S.D. Tex. May 4, 2006) (concluding that attorney breached fiduciary duty to his former client not to disclose the non-public fact that the parties had reached a mediated settlement when he issued a press release about the settlement, but dismissing the client's fiduciary duty claim because of lack of damages).

## **MEDIATION-ARBITRATION**

### **STATE SUPREME COURTS**

*Mountain Heating & Cooling, Inc. v. Van Tassel-Proctor, Inc.*, 867 So.2d 1112 (Ala. 2003) (reversing trial court and refusing to compel arbitration of a dispute between contractors where the arbitration provision of the contract contained ambiguities raising doubt about their intent to arbitrate all disputes, including the parties' promise to "settle the dispute by arbitration under the Construction Industry *mediation* rules of the American Arbitration Association) (*emphasis added*).

### **FEDERAL CIRCUIT COURTS**

*HIM Portland, LLC v. Devito Builders, Inc.*, 317 F.3d 41 (1st Cir. 2003) (affirming denial of motion to compel arbitration where parties' contract required a request for mediation as a condition precedent to arbitration).

*Safer v. Nelson Financial Group, Inc.*, 422 F.3d 289 (5th Cir. 2005) (reversing trial court denial of motion to compel arbitration and noting in footnote that "weak" mediation clause in the parties' agreement ("[i]f we...are not able to resolve your concerns, we ask that we first seek to resolve any conflicts in Mediation before resorting to any other forum") is merely a request to mediate prior to arbitration, rather than a condition precedent).

### **STATE COURTS OF APPEAL**

*Bates v. Malvestuto*, No. D0445699, 2005 WL 3476527 (Cal. Ct. App., Dec. 20, 2005) (affirming trial court conclusion that defendant waived his contractual right to arbitrate by requesting a jury trial and failing to indicate desire for arbitration on case management statement, and thereafter engaging in discovery and participating in a court-annexed, two-day mediation that would have been unavailable if arbitration had been timely requested rather than sought less than one month before trial).

*In re Heritage Building Systems, Inc.*, 185 S.W.3d 539 (Tex. App. 2006) (granting writ of mandamus to vacate a trial court mediation order issued in lieu of ruling on a motion to compel arbitration, concluding that the Federal Arbitration Act contemplates not just a stay of trial but a stay of all trial proceedings other than "threshold issues such as whether the parties entered into a valid and enforceable arbitration agreement").

*In re Marriage of McSoud*, 131 P.3d 1208 (Colo. App. 2006) (finding no error in trial court's divorce judgment delegating arbitration authority to a mediator to resolve parenting disputes, where the order was ambiguous and could be read to merely allow, rather than require, the mediator selected by the parties to arbitrate disputes with the parties' consent).

*Lakeland Fire District v. East Area General Contractors, Inc.*, 791 N.Y.S.2d 594 (App. Div., N.Y. 2005) (affirming stay of arbitration of contractor's claim where evidence failed to prove contractor satisfied obligation to mediate, which the court concluded was a contractual condition precedent to arbitration).

*Nabors Drilling USA, LP v. Carpenter*, Nos. 04-05-00842-CV, 04-05-00933-CV, 2006 WL 708275 (Tex. App. March 22, 2006) (concluding that trial court erred in finding a dispute resolution clause ambiguous and unenforceable merely because it mentioned both mediation and arbitration, where clause required arbitration unless both parties agreed to mediation and notified the designated organizational provider in a timely manner).

### **TRIAL COURTS**

*BBS Technologies, Inc. v. Remington Arms Co., Inc.*, No CIV.A. 05-98-DLB, 2005 WL 3132307 (E.D. Ky., Nov. 22, 2005) (finding no bar to arbitration posed by defendant's alleged failure to satisfy contractual precondition to first negotiate in good faith and participate in mediation, where plaintiff's allegation that defendant engaged in "low ball" negotiating tactics was insufficient to establish that defendant bargained in bad faith, and where parties first agreed to stay arbitration pending mediation and later mutually agreed to cancel the mediation).

*Crow Construction Company v. Jeffrey M. Brown Assoc. Inc.*, 264 F.Supp.2d 217 (E.D. Pa. 2003) (vacating arbitral award on obvious appearance of bias where one arbitrator failed to disclose prior, but nearly contemporaneous, service as a mediator in another case involving a party in the arbitration).

*Garrett v. Hooters-Toledo*, 295 F.Supp.2d 774 (D. N.D. Ohio 2003) (finding mediation requirement as precondition to arbitration to be substantively unconscionable making entire ADR provision unenforceable, where, among other things: 1) employee had only ten days from the last day on which the claim arose to request mediation; 2) the agreement stated that failure to request mediation foreclosed the bringing of the claim against the employer; and 3) mediation was required to be held in Kentucky, not Ohio where the employee worked).

*Lynn v. General Electric Company*, No. 03-2662-GTV-DJW, 2005 WL 701270 (D. Kan. Jan. 20, 2005) (refusing to enforce alleged contractual obligation to mediate as precondition to initiating litigation or arbitration, concluding: 1) mediation contracts are not subject to enforcement under the Federal Arbitration Act; and 2) no enforceable contract existed under state law because defendant employer could not prove employees actually received email and newsletter notices of the newly adopted mediation requirements).

**Quote from the Court:** “Unlike enforcement of arbitration agreements, there is no historical evidence of hostility by the courts in enforcing mediation contracts; accordingly, there is no reason to believe Congress intended to encompass mediation within arbitration enforcement.”

*Santos v. GE Capital*, 397 F.Supp.2d 350 (D. Conn., Oct 11, 2005) (refusing to find waiver of employer’s right to compel arbitration of Americans with Disabilities Act claim solely by virtue of employer’s participation in a one-day EEOC mediation of the claim).

## MISCELLANEOUS

### STATE SUPREME COURTS

*Davis v. Horton*, 661 N.W.2d 533 (Iowa 2003) (refusing to extend the public-policy exception to a wrongful discharge claim of an at will employed in order to protect participation in mediation, noting that while mediation is "encouraged and frequently beneficial, it is not an action so imbued with public purpose as to satisfy the clarity element that our cases require"). NOTE: The Court also concluded that plaintiff’s claim failed on causation grounds, for the “mere fact that an adverse employment decision occurred after county employee’s participation in a mediation process was not sufficient to support a decision that the adverse decision was in retaliation for

the mediation effort and thus violative of public policy”).

*Preston v. Transportation Insurance Co.*, 2004 MT 339, No. 02-522, 2004 WL 2726187 (Mont., Dec. 1, 2004) (reversing worker’s compensation court dismissal of claim as time-barred, concluding that claimant’s petition for, and participation in, statutorily-mandated mediation tolled running of the statute of limitations for the 62 days mediation was ongoing).

### FEDERAL CIRCUIT COURTS

*Dep’t of the Air Force 436th Airlift Wing, Dover Air Force Base v. Fed. Labor Relations Auth.*, 316 F.3d 280 (D.C. Cir. 2003) (affirming finding of unfair labor practice in agency’s failure to notify and provide opportunity for participation of union representative in mediation of union member’s EEO grievance).

*Filius v. Potter*, No. 02-60761-CV-KAM, 2006 WL 679016 (11th Cir. March 15, 2006) (finding a *prima facie* case for retaliation where employee was put on non-pay, non-duty status one day after he participated in mediation of an EEOC complaint with his manager, but also concluding that the employer met its burden to assert legitimate non-discriminatory reasons for its actions and the employee failed to meet his ultimate burden to create a genuine issue of material fact as to pretext).

*Torres v. American Employers Insurance Co.*, No. 04-6246, 2005 WL 2496484 (6th Cir. Oct. 7, 2005) (affirming dismissal of plaintiff’s state law claims of illegal and tortious conduct by defendant insurance companies during mediation of an underlying tort claim relating to pool construction, where sole basis for claims against the insurers was fact that defendants’ counsel in the underlying tort claim initially denied there were any coverage defenses or coverage questions, but defendants’ insurers’ counsel later raised the possibility of such issues at a mediation, which plaintiff then terminated), *rehearing denied*, Oct. 25, 2005.

### STATE COURTS OF APPEAL

*Lee v. Texas*, 186 S.W.3d 649 (Tex. App. 2006) (rejecting arguments that defendant’s conviction for aggravated sexual assault on a child should be overturned because of newly discovered evidence relating to the mother’s allegedly false testimony that her attorney and a mediator told her not to raise defendant’s molestation of the child in a custody mediation and for ineffective assistance of counsel for failure to refute the mother’s testimony by calling her

attorney and the mediator), *petition for discretionary review denied* (May 24, 2006).

**Foreman v. Foreman**, 701 N.W.2d 167 (Mich. Ct. App. 2005) (affirming jury award of \$1.4 million for husband's fraud in connection with representations made during divorce mediation, including false statements about the value of his automobile dealership, his intention to keep operating the dealership, and his desire to retain the parties' vacation home).

**In re Marriage of Craze**, No. 55319-4-I, 2006 WL 1670195 (Wash. App. Div. 1, June 19, 2006) (rejecting husband's argument that personal service of summons and petition of divorce should be deemed void because served at a mediation he was invited to from out of state, where husband and his counsel agreed to participate knowing wife wanted to dissolve the marriage in that state; that he had already been served under the states' long arm statute; and that she might serve him again in person).

**Short Brothers Construction, Inc. v. Korte & Luitjohan Contractors, Inc.**, 828 N.E.2d 754 (Ill. Ct. App. 2005) (dismissing appeal of order compelling mediation of construction dispute, concluding that mediation order is an administrative, ministerial, non-injunctive order not subject to interlocutory relief).

**Uhrich v. State Farm Fire & Casualty Co.**, 135 Cal. Rptr. 2d 131 (Cal. Ct. App. 2003) (finding no cognizable claim for negligent infliction of emotional distress based on allegations that a party brought an attorney to a mediation session in violation of pre-arranged ground rules and because he "appeared for a brief few seconds and then abruptly departed, refusing to participate"), *review denied* (September 24, 2003).

## TRIAL COURTS

**Bexley v. Dillon Companies, Inc.**, No. 04 CV 01661 MEH MJW, 2006 WL 650236 (D. Colo. March 13, 2006)(raising a new claim during an EEOC mediation is not sufficient to satisfy exhaustion requirements, plaintiff must amend her EEOC charge or file a second charge).

**Ferrero v. Henderson**, 341 F.Supp.2d 873 (S.D. Ohio 2004)(concluding that a postal service supervisor engaged in a prohibited pattern of retaliatory conduct through his mishandling of a worker's complaint, including: 1) "holding merely a single brief meaningless mediation session" at which the supervisor made no serious attempt to resolve the employee's complaints "but instead acted angrily and leered at [the employee]"; and 2) failing to reschedule

the mediation "even though the issue that had prevented it from going forward was [the supervisor's] desire to have a Union representative present – an issue that should have been easily resolved and should not have prevented other mediation efforts from occurring").

**Hatten v. Clay**, No. CIV.A.203:CV548LTSJM, 2005 WL 3334546 (S.D. Miss., Dec. 7, 2005) (granting summary judgment for employer in race discrimination case, where the record shows that conflict between employee and supervisor was not racially motivated, and specifically noting that employer made substantial efforts to resolve the conflict by mediation, an effort that failed due to the employee's unwillingness to cooperate).

**Navarro v. Microsoft Corp.**, 214 F.R.D. 422 (N.D. Tex. 2003) (denying plaintiff's motion to amend complaint as untimely where the only excuse for prolonged inaction was plaintiff's belief that the case would settle in mediation).

**Sunlight Saunas, Inc. v. Sundance Sauna, Inc.**, 427 F.Supp.2d 1011 (D. Kan. 2006) (concluding that defendants did not waive their right to object to lack of personal jurisdiction by participating in mediation before bringing a motion to dismiss which was filed less than two months after plaintiff joined them as parties).

**Weatherspoon v. North Oakland General Hospital**, No. Civ. 04-40184, 2006 WL 126615 (E.D. Mich. Jan. 17, 2006) (ruling that the defendant's employee's participation as a fact witness at an EEOC mediation between plaintiff and her immediate employer did not create a sufficient identity of interest between the employer and defendant to excuse plaintiff from naming the defendant in an EEOC charge before bringing a law suit).

## U.S.TAX COURT

**Emerson v. Commissioner of Internal Revenue**, T.C. Memo. 2003-82, No. 5877-00, 2003 WL 1392574 (T.C. 2003) (affirming IRS refusal to consider portion of mediated settlement of contract/intellectual property dispute non-taxable compensation for injuries or personal illness, where there was no mention during mediation of a claim for personal injuries, other than mediator's suggestion, subsequently acted on by the parties, to "add a personal injury claim to the suit as a vehicle to reach settlement;" but rejecting IRS accuracy-related penalty for improperly excluding settlement proceeds as received on account of physical injury or sickness, since taxpayer had relied to his detriment on the suggestion of the mediator and his own attorney to include a claim for personal injury).