

Session 56 (2006 Supplement)
Mediation Case Law Review: Lessons Learned
from State and Federal Litigation About Mediation¹

A complete sampler of the diverse range of disputes about mediation that were litigated in U.S. federal and state courts during the last three years (2003-2005) is contained on the conference CD. The squibs below are a 2006 update (including only cases issued in the last three months).

Enforcement of Mediated Settlements

Bierce v. Shorewest Realtors, Inc., No. 2004AP3209, 2006 WL 327933 (Wis. App. Feb. 14, 2006) (reversing trial court enforcement of a mediation agreement where the court incorrectly redrafted an unambiguous compromise formula for determining damages into a traditional damage formula more favorable to the defendant real estate brokerage firm, rather than enforcing the plain meaning of the parties' agreement).

Quote from the court: “[B]ecause what the parties agreed to at mediation was a compromise different from the traditional rule of damages, in examining the purpose of the agreement and the circumstances surrounding its execution, we agree that it is not logical to conclude that the [plaintiffs] would have prepared for trial and agreed to attempt to mediate the dispute only to ultimately end the mediation with a settlement agreement that agrees to [defendant’s] demands.”

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).

Calderon v. J.B. Nurseries, Inc., __ So.2d __, No. 1D04-5320, 2006 WL 263633 (Fla. Dist. Ct. App. Feb. 6, 2006) (enforcing mediated settlement of a workers' compensation claim despite claimant's failure to execute releases required by the agreement).

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

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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.”

Central Puget Sound Regional Transit Authority v. Branchflower, No. 55558-8-I, 2006 WL 763697 (Wash. App. March 27, 2006) (enforcing mediated settlement of condemnation proceeding against challenge by property owner who discovered after the mediation that a government consultant had valued the property at higher than the settled amount, where the consultant’s report was prepared in anticipation of mediation, the report was not subject to discovery because the consultant was a non-testifying expert, and the report was not used to establish the basis for the transit authority’s offer of just compensation during the mediation).

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.”

Etter v. Pigg, 623 S.E.2d 368 (N.C. App. 2006) (finding that where a mediated settlement agreement is not incorporated into a consent judgment the agreement is not subject to a Rule 60 motion, and that a subsequent motion to enforce the mediated settlement agreement should not be based on the trial judge's ruling on the Rule 60 motion.).

Quote from the court: “[M]ediated settlement agreements are governed by general principles of contract law. A party to a settlement agreement has 'two options in deciding how to specifically enforce the terms of the settlement agreement...(1) take a voluntary dismissal of his original action and then institute a new action on the contract, or (2) seek to enforce the settlement agreement by petition or motion in the original action.' Here, the settlement agreement was never reduced to a consent order and petitioner did not attempt to enforce the terms of the settlement agreement until [after the judge's] order denying respondents' Rule 60(b) motion.” (Citations omitted).

In re Marriage of Kieturakis, ___Cal.Rptr.3d___, Nos. A 101719, A104661, 2006 WL 786802 (Cal. App. March 29, 2006) (affirming trial judge's enforcement of a marital settlement agreement incorporated in a judgment in the face of claims of fraud, duress and non-disclosure where the trial judge considered evidence about the mediation from

the parties and mediator when defendant waived mediation privileges but plaintiff and mediator did not).

Quote from the court: "First we conclude that the presumption of undue influence cannot be applied to marital settlement agreements reached through mediation. 'Voluntary participation and self-determination are fundamental principles of mediation.' It can be expected that most mediators would, as [the mediator did] consider it their duty to attempt to determine whether the parties are 'acting under their own free will' in mediation.... We conclude that any error [in admitting mediation evidence] was harmless under the circumstances here.... [I]n view of our conclusion that [plaintiff] must bear the burden of proof on her challenges to the judgment, she would be compelled to fully waive the mediation privilege if the matter were retried.... We need take no position on Olam's viability because the outcome would be the same in this case whether or not the decision to compel evidence from the mediator could be sustained. While we do not think that Olam could be stretched so far as to cover the situation the trial court faced here, where one of the parties objected to the mediator's evidence, Olam could at least arguably be extended to cover the situation that would exist here if the matter were remanded for a retrial, where both sides would be waiving the mediation privilege."

Matos v. Matos, ___ So.2d ___, No. 4D04-4104, 2006 WL 229787 (Fla. Dist. Ct. App. Feb. 1, 2006) (reversing trial court enforcement of an alleged oral marital termination settlement where the mediator hired by the parties to reduce their alleged informal agreement to writing testified that there was an agreement but conceded she did not participate in its formation).

Quote from the court: “[W]hile the mediator testified to her understanding of the terms of the agreement, she never reduced it to writing which was the reason the parties had contacted the mediator in the first place. Under these circumstances, the parties' failure to reduce the agreement to writing strongly indicates that the parties had not agreed to everything.”

Peacock v. Spivey, __ S.E.2d ___, No. A05A1823, 2006 WL 820730 (Ga. App. March 22, 2006) (affirming enforcement of mediated settlement and judge's construal of settlement as requiring a dismissal with prejudice, where plaintiff's assertion that he signed the agreement under duress was countered his own lawyer's testimony).

Quote from the court: “Settlement is, in and of itself, generally construed to be a final disposition of any claim against a party to settlement by a party to the settlement arising out of the subject incident, unless remaining claims are specifically reserved by any of the parties. Such compromises are upheld by general policy, as tending to prevent litigation, in all enlightened systems of jurisprudence.... Peacock not only

failed to specifically reserve any claims in the mediation agreement, he agreed to accept payment ‘as settlement in full of all claims arising out of this matter’ and to voluntarily dismiss the lawsuit ‘finally’ and ‘forever.’ Thus, the trial court did not err in construing the mediation agreement as a final disposition which required Peacock to dismiss with prejudice all claims arising out of the lawsuit.”

Seligman-Hargis v. Hargis, No. 05-03-01818-CV, 2006 WL 22680 (Tex. App. Jan. 5, 2006) (finding that the trial judge lacked subject matter jurisdiction to enter a judgment based on a mediated settlement agreement relating to the custody of children in Germany under the Uniform Child Custody Jurisdiction Enforcement Act, requiring that portions of the judgment relating to custody be reversed, but remanding to the trial court to determine whether the portions of the judgment relating to division of property and child support should also be vacated).

Confidentiality

Atmel Corporation v. St. Paul Fire & Marine Insurance Co., No. C 04-04082 SI, 2006 WL 708944 (N.D.Cal. March 21, 2006) (allowing plaintiff to introduce evidence that defendant attended and did not pay any money in a settlement reached in mediation because these matters are not privileged; but rejecting plaintiff's claim that a mediation confidentiality agreement is unenforceable because defendant: 1) breached it by disclosing to plaintiff's insurance broker that there was a mediation, that plaintiff made a proposal, and that plaintiff filed suit before defendant could respond; 2) referred to these same facts in pleadings filed with the court; and 3) asked plaintiff's witness about the mediation in a deposition).

Quote from the court: "[Defendant] does not disclose the substance of any confidential settlement discussions. Second, . . . the attorney-client privilege extended to communications between [plaintiff and its insurance broker]...None of the pleadings at issue discuss the substance of the settlement offer made by Atmel or otherwise disclose any specific information about the ... discussion....Moreover, the Court does not view asking questions during a deposition to be ‘use’ of any confidential information in violation of the parties' agreement.”

Dedefo v. Wake, No. MC 02-002448, 2006 WL 389738 (Minn. App. Feb. 21, 2006) (affirming dismissal of defamation claims based on alleged defamatory statements made in a letter sent to elders of the Ethiopian community, where the purpose of the letter was to initiate a traditional mediation process which the court concluded was a “qualifying dispute resolution process under the statute or common law privilege” making the letter absolutely privileged; and also affirming trial court exclusion of testimony by the elders about what was discussed during the mediation).

Quote from the court: “Even if respondents hoped to defame [plaintiff], that does not prohibit them from sending a letter to initiate a dispute

resolution process within their larger community. The district court only concluded that in his complaint [plaintiff] had limited his basis for claiming defamation to the letter and its communication to the Oromo organization. [Plaintiff] framed his own claim. We are not prepared to say that the doors of the dispute resolution process are closed because an unidentified defamatory effort lurks in the background. [Plaintiff] does not contest the conclusion that the legislature has decided to encourage use of an alternative dispute resolution process and that documents and activity incident to that process are privileged.”

In re Interest of J.T., No. 05-0838, 2006 WL 782481 (Iowa App. March 29, 2006) (holding that after the hearing was closed in a prosecution for violation of a truancy mediation agreement the court should not have considered the prosecutor's evidence that the child-truant had attended and signed the mediation agreement, and that further the legislature did not intend to provide a criminal sanction for children under the age of 16 for failure to comply with their truancy mediation agreement).

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).

Lehr v. Afflitto, 889 A.2d 462 (N.J. Super. 2006) (reversing the trial judge's decision in this lengthy divorce proceeding that the parties at mediation had reached a meeting of the minds and also deciding that the mediator should not have been allowed to testify at the hearing, relying in part on the policy expressed in the UMA).

Quote from the court: “The advent of mediation and other alternative dispute resolution tools to assist parties in resolving their disputes as early as possible and with the least amount of financial and emotional strain is an admirable and worthwhile effort of the court system. Ultimately, however, in an adversarial system with limited resources, the success of mediation is dependent on the good faith, reasonableness and willingness of the litigants to participate. Many are able to do so successfully. However, litigants are not fungible. For one reason or another, some are simply not good candidates for case resolution through good-faith alternative dispute resolution methods such as mediation.”

Reifsteck v. Paco Building Supply Co., 410 F.Supp.2d 848 (E.D. Mo. 2006) (quashing a subpoena served on an EEOC mediator to provide evidence concerning an alleged firing during the mediation session, because federal regulations prevented EEOC employees from testifying absent approval from EEOC legal counsel, noting plaintiff's remedy is to proceed under the APA and challenge the legal counsel's decision).

Society of Lloyds v. Ward, No. 1:05-CV-32, 2006 WL 13221 (S. D. Ohio Jan. 3, 2006), (finding that neither state statutes nor the contractual confidentiality agreement precluded

plaintiff from using a trust document created before the mediation and filed as a public record, but disclosed to plaintiff during the mediation).

Quote from the court: "The agreement cannot be read as manifesting an understanding or intent by the parties to make privileged or confidential documents that were readily obtainable outside the mediation....[T]he agreement provides] '[t]he confidential and privileged character of any information is not altered by disclosure to the mediator.' In other words privileged and confidential information revealed in mediation shall remain privileged and confidential. Documents that are neither privileged nor confidential are not covered. Any other interpretation of the agreement would lead to nonsensical results and permit the use of mediation to perpetrate frauds and injustices in violation of public policy."

Duty to Mediate/Court Power to Compel

Wheeler v. Greene, ___S.W.3d ___, NO. 12-03-00171-CV, 2006 WL 628821 (Tex. App. March 15, 2006) (concluding that a former trustee waived for appeal the propriety of the trial court's failure to order mediation as required by terms of trust, where the former trustee did not secure a ruling on its request for mediation from the trial court).

Mediation Sanctions/Attorney Fees

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).

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).

Negron v. Woodhull Hospital, No. 05-4147-CV. 2006 WL 759806 (2d 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."

The Electric Man, Inc. v. Charos, ___A.2d. ___, No. 2004-542, 2006 WL 321185 (Vt. Feb. 10, 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).

Ethics/Malpractice

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).

United States v. Walker River Irrigation District, No. 3:73CV127ECR, 2006 WL 618823 (D. Nev. March 10, 2006) (denying motion to disqualify counsel who represented numerous clients in this water rights case, where one client was involved in a phase of the trial using mediation with a confidentiality agreement that might preclude the attorney from disclosing matters to clients not involved in the mediation).

Quote from the court: "Although there is some sense in the...argument, the court cannot find that an ethical violation has occurred. There is no evidence that Mr. DePaoli has even obtained information that would cause a conflict amongst his clients...and there is no evidence that...Mr. DePaoli's...clients have adverse interests....The court is unwilling to presume Mr. DePaoli has acted improperly based on bald allegations."

Mediation-Arbitration

In re Heritage Building Systems, Inc., ___S.W.3d ___, No. 09-05-445 CV, 2006 WL 300813 (Tex. App. Feb. 9, 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, ___P.3d ___, No. O4CA2682, 2006 WL 301096 (Colo. App. Feb. 9, 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).

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).

Miscellaneous

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).

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).

Lee v. Texas, ___S.W.3d___, No. 05-05-00574-CR, 2006 WL 475799 (Tex. App. March 1, 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).

Perry v. Parks, Nos. 2005-CA-000401-MR, 2005-CA-000493-MR, 2006 WL 658578 (Ky. App. March 17, 2006) (affirming decision to allow accident reconstruction expert to testify when the expert was not listed as an expert in the interrogatory responses because full disclosure of the witness and his proposed testimony was made at the mediation a year prior to trial and two weeks prior to trial plaintiff offered to agree to a continuance to allow defendant to prepare for this testimony.).

Quantum Electric, Inc. v. Accutitle, Inc., __P.3d __, Nos. DA-06-0014, DA-06-0062, 2006 WL 490104 (Mont. Feb. 28, 2006) (denying motions for stays of briefing schedules pending appellate mediation).

Quote from the court: “We...take this opportunity to emphasize to the parties and all future litigants that [the appellate mediation rule] is "self-executing" and is not amenable to motion practice.”

Sammons v. Polk County School Board, No. 04-02657-CV-T—24-EAJ, 2006 WL 222811 (11th Cir. Jan. 30, 2006) (vacating a preliminary injunction in an IDEA

proceeding ruling that only a request for a due process hearing, not a request for a mediation, invokes the “stay put” injunction standards in the IDEA).

Sunlight Saunas, Inc. v. Sundance Sauna, Inc., ___F.Supp.2d ___, No. CIV.A. 04-2597, 2006 WL 658903 (D. Kan. March 15, 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).

Woodhull v. County of Kent, No. 1:04-CV-203, 2006 WL 708662 (W.D. Mich. March 21, 2006) (holding that submitting expert witness statements as exhibits to a Facilitative Mediation Case Summary satisfied the procedural requirements for mandatory expert disclosure).

Young v. City of Monticello, No. Civ. 04-4551DSDJJG, 2006 WL 549392 (D. Minn. March 6, 2006) (finding that the city-employer was not entitled to fire a part time receptionist on the grounds that her exercise of free speech opposing the annexation might jeopardize a pending mediation relating to the annexation).