

8-11-2008

Mediation Case Law Project 1999-2007 State Supreme Courts (Sorted by Subject Matter of Case)

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State Supreme Courts

SORTED BY SUBJECT MATTER OF CASE

Alphabetical Order within subject matter (last updated 8-11-08)

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A. THE ENFORCEMENT OF MEDIATED SETTLEMENTS

Affordable Erecting, Inc. v. Neosho Trompler, Inc., 715 N.W.2d 620 (Wis. 2006) (concluding that a mediated settlement agreement signed by a party’s attorney did not comport with statutory requirements that the agreement to be enforceable must be written and subscribed by the party or attorney, where the attorney signed but noted that the settlement was contingent on the client’s approval; but nonetheless enforcing the agreement under the theory of equitable estoppel because the actions of the party, including assurances that the agreement would be signed,

¹ Copyright 2008 James Coben and Peter Thompson. Teachers/trainers are free to copy these materials for use in university or continuing education courses, provided that appropriate acknowledgment of the authors is made. For permission to use this material for any other purpose, contact the authors (jcoben@hamline.edu; pthompson@hamline.edu). A detailed analysis of mediation disputing trends can be found in J. Coben and P. Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 HARVARD NEGOTIATION LAW REVIEW 43 (Spring 2006) and J. Coben and P. Thompson, *Mediation Litigation Trends: 1999-2007*, 1 WORLD ARBITRATION & MEDIATION REVIEW 395 (2007). Both articles may be downloaded from the Mediation Case Law Project website: www.hamline.edu/law/adr, where you also will find additional mediation case law resources, including additional case summaries and video clips.

receipt of an insurance check, and silence when the court dismissed the original case for failure to prosecute, induced reasonable reliance).

Billy Barnes Enterprises, Inc. v. Williams, __ So. 2d __, No. 1050183, 2007 WL 2812768 (Ala. September 28, 2007) (reversing enforcement of mediated personal injury settlement, where defense established it reasonably relied on plaintiff's false assertion that he had made no prior recorded statements about the details of the accident, when in fact he had made prior inconsistent statements concerning timing of the accident and identity of the truck that hit him). **Quote from the Court:** "[A]t the point in time at which the settlement agreement was ultimately executed-in mediation on the eve of trial-Billy Barnes [defendant] had taken every measure to ensure that Marmon [the parent company of plaintiff's employer] or Railserve [plaintiff's employer] would produce any statement that either possessed. Indeed, it appears that no further legal process was available to Billy Barnes to require Marmon or Railserve to comply with the trial court's direct and explicit orders to produce such a statement. Billy Barnes had no cause to believe that Marmon or Railserve failed to comply with the trial court's discovery orders, and Billy Barnes possessed no other source of information that could demonstrate that Williams had given a statement. The fact that no statement was produced, coupled with Williams's testimony that he had given no statement, supports Billy Barnes's argument that, *at the time it entered into the settlement agreement*, it reasonably believed Williams's representation that no statement existed." [emphasis is original]

Buckley v. Shealy, 635 S.E.2d 76 (S.C. 2006) (affirming decision not to enforce mediated divorce settlement last seen at the 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), *reh'g denied* (Sept. 18, 2006).

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).

Capano v. State ex rel. Brady, 832 A.2d 1250 (Del. 2003) (unpublished table decision) (affirming dismissal of complaint seeking enforcement of arbitration agreement allegedly reached in mediation, where the parties disputed that an agreement ever existed and there was no written agreement other than a document purported to be an agreement signed by the attorney for the party seeking to compel arbitration). **Quote from the Court:** "Courts should not enforce a mediation agreement absent a written document signed by the parties and the mediator. As the Vice Chancellor stated: 'the candid disclosure that mediation seeks to encourage in an effort to resolve a legal dispute, would be chilled if this Court were to enforce partial agreements--agreements to resolve some of the dispute that have not reached a stage where a contract is actually signed. If such agreements were enforced, the chilling effect would discourage the type of candid discussions that are necessary in order for a mediation to work at all.'"

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 Publ’g, 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).

Chappell v. Roth, 548 S.E.2d 499 (N.C.) (mediated settlement which included promise to draft a release “mutually acceptable to both parties” held unenforceable as lacking a material term), *reh’g denied*, 553 S.E.2d 36 (N.C. 2001). **Quote from the Court’s Dissenting Opinion:** “The majority of this Court concludes that the release is material as a matter of law and that because the parties failed to agree as to the ‘terms’ of the release, there is no enforceable contract. However, only a single release term, the hold-harmless provision, remained unresolved I do not believe that every hitch encountered in ironing out the details of a mediation nullifies that mediation.”

Cincinnati Ins. Co. v. Barber Insulation, Inc., 946 So. 2d 441 (Ala. 2006) (refusing to enforce an alleged mediated settlement agreement since it was neither reduced to writing nor included in the minutes of the court as required by Ala. Code § 34-3-21).

City of Horace v. City of Fargo ex rel. City Com’n, 694 N.W.2d 1 (N.D. 2005) (rejecting argument that mediation agreement was void because an annexation map was not filed pursuant to state statute), *on remand*, No. 09-03-C-3266, 2005 WL 5643050 (N.D. Dist. Ct. July 19, 2005).

Cloutier v. Cloutier, 814 A.2d 979 (Me. 2003) (affirming trial court decision in divorce case not to enforce a mediated agreement to sell marital home with proceeds used to pay specific debts, where the agreement had not been previously presented to and approved by the court and proposed disposition would be manifestly unjust given that home equity was insufficient to pay off the specified debts). **Quote from the Court:** “In the normal course, the court should honor

an agreement reached by the parties. This assures that mediation is an effective tool for dispute resolution, and prevents the parties from unilaterally reopening matters that have been resolved. Therefore, ordinarily, when the parties have agreed to the resolution of some or all of the matters previously in dispute, the court will not address those matters at any trial on the remaining dispute issues, and will not, without more, allow the agreed upon matter to be litigated.”

Dennis v. Erin Truckways, Ltd., 188 S.W.3d 578 (Tenn. 2006) (setting aside a mediated settlement agreement because of lack of adherence to procedural safeguards intended to protect the rights of unrepresented workers’ compensation claimants, including failure to fully apprise the unrepresented claimant of the scope of benefits available, as well as failure to provide court or commissioner review of the settlement). **Quote from the Court:** “[T]he entire compensation system has been set up and paid for, not by the parties, but by the public. The public has ultimately borne the cost of compensation protection in the price of the product, and it has done so for the specific purpose of avoiding having the disabled victims of industry thrown on private charity or local relief. To this end, the public has enacted into law a scale of benefits which will forestall such destitution. It follows, then, that the employer and employee have no private right to thwart this objective by agreeing between them on a disposition of the claim that may, by giving the workman less than this amount, make him a potential public burden”).

Esser v. Esser, 586 S.E.2d 627 (Ga. 2003) (reversing trial court and granting wife’s motion in divorce action to set aside mediated settlement agreement providing that husband would discharge his child support obligation with an increased share to wife of the equitable interest in the marital home, where trial court order did “little more than adopt the parties’ settlement agreement” by failing to include written findings “as to the parties’ gross income, calculations as to the application of the statutory child support guidelines, and the presence of special circumstances justifying the trial court’s departure from guidelines”).

Flood v. Katz, 147 P.3d 86 (Idaho 2006) (refusing to set aside satisfaction of judgment and dismissal in securities fraud action granted following defendant’s payment of mediated settlement, where defendant’s misrepresentation during mediation regarding the extent of his assets available for settlement did not constitute the extreme degree of fraud necessary to justify extraordinary relief). **Quote from the Court:** “Factually, the case before the Court is more similar to *Compton* where a party to a divorce agreement was given a listing of property and its valuation [citation omitted]. The wife was on notice and free to challenge the husband's valuation, but she failed to do so. *Id.* The court stated that her ‘inadvertence or misjudgment in failing to do so when the opportunity was ripe is an excellent example of the type of conduct which the independent action to relieve a party from judgment will not lie to correct.’”

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). **Quote from the Court:** "It is true that this case would be easier for us--and would have been easier for the superior court--if the mediator had directly addressed the parties during the recorded session and confirmed that each understood the settlement and agreed with it.

Simple affirmations by the parties of their understanding and intent to be bound may have obviated the need for an extensive evidentiary hearing and for later detailed reviews of the recitations made at the recorded session. Nonetheless, we reject [the husband's] contention that, without particular questions or recitations when a settlement is put on the record, either party may successfully attack the settlement. We encourage judges and mediators who conduct settlement proceedings, and who reach settlements, to confirm on the record directly with the parties their understanding of the settlement and their intentions to enter into it, but we reject the proposition that the failure to conduct such inquiries is necessarily fatal to the entry of a settlement."

Georgos v. Jackson, 790 N.E.2d 448 (Ind. 2003) (enforcing mediated settlement of personal injury claim despite client's absence from the mediation, where there was no dispute that plaintiff's attorney had express authority to enter a settlement and literal application of court rule requiring client's attendance at mediation would improperly allow a party to take advantage of errors of their own making), *reh'g denied* (Dec. 3, 2003). **Quote from the Court:** "Nevertheless, where the agent of the party is cloaked with the authority to enter into the settlement agreement, and the party's presence is unexcused, the attorney's signature is sufficient. To hold otherwise would give an incentive to frustrate the mediation by boycott in hopes of renegotiating after the mediation in return for the signature of the absent party. That action would of course be sanctionable under [local ADR rules], so it is not risk-free. But we see no reason to reward or create an incentive to disregard the rules by permitting the improperly absent party . . . to turn his absence to his advantage."

Golding v. Floyd, 539 S.E.2d 735 (Va. 2001) (handwritten memorandum signed by parties at conclusion of a mediation conference is not a binding settlement contract where the final paragraph of the memorandum provided that it "is subject to execution of a formal agreement consistent with the terms herein"). **Note:** In reversing the trial court, which had enforced the agreement after conducting an evidentiary hearing, the court emphasized, "the Memorandum in the present case is clear and unambiguous, and no extrinsic evidence is required, or even allowed, to ascertain the intention of the parties as objectively manifested." 539 S.E.2d at 738.

Goodman v. Lothrop, 151 P.3d 818 (Idaho 2007) (enforcing a mediated settlement agreement, finding that claims of duress, intimidation, and undue influence by the mediator were not supported by specific facts, that conditions of consent by the City and obtaining title insurance, although not yet met (in part because of this dispute) still could be met, that defendant cannot void the agreement because the attorney she chose failed to advise her of the applicable law and that the mediation agreement for this boundary by agreement did not violate the statute of frauds).

Guthrie v. Guthrie, 594 S.E.2d 356 (Ga. 2004) (affirming that trial court acted erroneously in granting summary judgment denying enforcement of mediated divorce settlement agreement under rules utilized to resolve whether to incorporate a settlement agreement into a final divorce judgment, where husband died during pendency of divorce proceedings but the parties' agreement contained provisions that were to take effect immediately or shortly after the date the agreement was executed indicating it was not contingent upon issuance of a divorce judgment and in such cases enforcement is evaluated under ordinary rules of contract construction). **Note:**

The decision implicitly affirmed the additional conclusion of the Court of Appeals that summary judgment *in favor* of enforcement 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. Ct. App. 2003).

Hoglund v. Aaskov Plumbing & Heating, 895 A.2d 323 (Me. 2006) (affirming workers' compensation board conclusion that a mediated agreement on benefits would be enforced absent claimant's satisfaction of burden to prove a post-mediation change in economic or medical condition). **Quote from the Court:** "In light of the recognized 'legislative policy to equate mediated agreements with formal hearing officer decrees,' . . . it was within the hearing officer's authority in this case to require proof of changed circumstances before altering the agreed-upon payment scheme. To do otherwise, that is, to require *de novo* proof of the facts after the parties had foregone a hearing and participated in a process intended to finally resolve most disputes, would create a disincentive to settle."

Lamberts v. Lillig, 670 N.W.2d 129 (Iowa 2003) (refusing to enforce alleged mediated settlement between father and maternal grandparents regarding visitation where there was no evidence father knowingly relinquished his constitutional parental caretaking interest when he entered into the agreement). **Quote from the Court:** "[The father] held a constitutional parental caretaking interest when he entered into the mediation with Arnie and Lucy. Yet, the document ultimately generated made no mention of this constitutional interest and provides no evidence of a thoughtful relinquishment of it. In fact, the document itself and the testimony at trial reveal that the parties' approach to the document was relatively informal, with little if any discussion of the legal ramifications--much less the more specific constitutional ramifications--of its signing. Indeed, it was generated in a mediation session that was not attended by counsel for either party. The mediator, when asked whether there was 'any discussion about the facts that there may be underlying fundamental constitutional rights and issues' involved, explained, 'You know what I think that--I don't remember if that was ever mentioned or not. It--I continue to try to stay away from any legal issues. I kept saying to both parties, remember I'm not an attorney, that's not my expertise. My expertise is kids and that's what I would be arbitrating.' Although it is unnecessary to define the precise threshold at which John would have become sufficiently informed to have validly waived his constitutional parental rights, it is clear the threshold was not reached in this case. The document signed at the mediation is unenforceable."

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

Lindsey v. Cook, 82 P.3d 850 (Idaho 2003) (vacating trial court grant of summary judgment enforcing mediated settlement where party challenging enforcement raised genuine issue of material fact by asserting that the ground rules set out by the mediator "were that anything said or signed there was not binding" and further noting that the trial court erred in taking oral testimony from the mediator at the summary judgment hearing).

Mason v. Mason, 607 S.E.2d 434 (W. Va. 2004) (finding a party may withdraw consent to a mediated parenting plan before the court adopts the agreement).

McAdams v. Town of Barnard, 936 A.2d 1310 (Vt. 2007) (refusing to review trial court dismissal of the plaintiff's state law case based on a federal mediated settlement agreement because the parties failed to brief the issue -- waiving argument that the federal settlement superceded state law).

McCleery v. Wally's World, Inc., 945 A.2d 841 (Vt. 2007) (denying Rule 60(b) challenge to enforcement of mediated settlement, where plaintiff repeatedly refused to abide by the settlement and failed to challenge the merits an earlier dismissal order in a direct appeal). **Quote from the Court:** "Plaintiffs had innumerable opportunities during the pendency of this litigation to comply with the settlement agreement and collect the agreed-upon sum. Their refusal to do so resulted in the dismissal of their case. Surely, plaintiffs could not reasonably believe that under these circumstances the settlement agreement survived the dismissal of the underlying action, leaving it enforceable at plaintiffs' election."

Nielsen v. Brocksmith, 99 P.3d 181 (Mont. 2004) (affirming trial court dismissal of complaint filed to enforce a settlement agreement allegedly reached in appellate mediation where appeal was not yet dismissed). **Quote from the Court:** "The [appellate] Rule does not provide for remand to the district court when there is a dispute regarding whether a settlement agreement was reached We disagree with Nielsen that our decision leaves her without a remedy. Her remedy was our resolution of [the first appeal]. If a settlement agreement had been reached and the required stipulation of dismissal filed with this court, Nielsen could then have litigated any dispute that arose regarding the execution of the agreement."

Nungesser v. Bryant, 153 P.3d 1277 (Kan. 2007) (finding a mediated settlement agreement between plaintiff, insured and insurance company was null and void, because of the trial judge's error in not dismissing the insured's third party claim against the insurance company for failing to settle, while the underlying liability of the insured was unresolved).

Plachy v. Plachy, 652 S.E.2d 555 (Ga. 2007) (rejecting husband's argument that divorce decree should be set aside because it included an express statement that the husband's Corp of Engineers' pension benefits survived the death of his wife, because even though the statement was not included in the parties' mediated agreement, the statement was required by federal law to give effect to Georgia law and not the addition of a new substantive provision).

Ransom v. Topaz Mktg., L.P., 152 P.3d 2 (Idaho 2006) (concluding that the trial court was without authority, in the second of two cases combined against the same defendant, to order erection of a fence as required by the mediated settlement ending the first of the two combined cases, where in the second case the fence was not an issue raised by the plaintiff and the judge had acknowledged a lack of authority to resolve issues regarding the fence), *reh'g denied* (Feb. 26. 2007).

Riner v. Newbraugh, 563 S.E.2d 802 (W. Va. 2002) (reversing trial court and refusing to enforce mediated settlement agreement drafted by one party's counsel which contained terms that were not part of the original settlement prepared by the mediator).

Sierra Club v. Wayne Weber LLC, 689 N.W.2d 696 (Iowa 2004) (applying error of law standard to affirm trial court decision interpreting and enforcing by way of injunctive relief an oral agreement dictated into the record following mediation of nuisance claim, where parties could not agree on text of proposed consent decree to implement their mediated settlement).

Smith v. Tillman, 958 So.2d 333 (Ala. 2006) (finding a sheriff did not waive sovereign immunity by entering into a mediated settlement agreement in connection with a Title VII case, where the agreement was mediated between private parties and was not reached in mediation with the EEOC, but that under state law the sheriff, by agreeing to the settlement, agreed to perform a ministerial act that is not protected by sovereign immunity).

State ex rel. Wright v. Oklahoma Corp. Com'n, 170 P.3d 1024 (Okla. 2007) (permitting taxpayers to intervene and bring challenge to mediated settlement of oil company's claims for reimbursement from Petroleum Storage Tank Release Environmental Cleanup Indemnity Fund, based on claim that settlement was result of "a sham mediation").

Swanson v. Swanson, 580 S.E.2d 526 (Ga. 2003) (refusing to enforce, and finding void on public policy grounds, a mediated settlement that included a waiver of child support in exchange for taking less alimony). **Quote from the Court:** "Trial courts are reminded that should parties enter into a settlement agreement, mediated or otherwise, which includes an award of child support, courts remain obligated to consider whether the child support award is sufficient based on the needs of the child and the non-custodial parent's ability to pay."

Vernon v. Acton, 732 N.E.2d 805 (Ind. 2000) (reversing trial court order to enforce pre-trial mediated oral settlement agreement, and concluding that testimony regarding the alleged oral settlement agreement was confidential and privileged and not admissible pursuant to the ADR rules incorporated in the parties' written agreement to mediate).

VJL v. Red & DDD, 39 P.3d 1110 (Wyo. 2002) (summarily affirming adoption against challenge by *pro se* biological mother who, among other things, alleged irregularities in the mediation process that preceded termination of her visitation rights). **Quote from the Court:** "[T]he mediator, apparently on his own initiative, filed a report in response to VJL's motions in which he set forth his view of what occurred during the mediation and his "observations" of VJL's behavior.* **Footnote** -- "We make no ruling as to the propriety of the mediator's report. We note only that the function of a mediator is to be a conciliator, to bring parties together in an effort to reconcile their differences. Interjecting oneself into court proceedings after the fact of the mediation as basically a witness to discredit the truthfulness and character of a party to the mediation would not seem to comport with the functions of a mediator."

Walker v. Gribble, 689 N.W.2d 104 (Iowa 2004) (affirming trial court enforcement of mediated settlement between former law partners regarding future division of contingency fee recoveries in overtime pay cases, finding no violation of public policy based on professional responsibility

rules regarding need for client consent and award of fees in proportion to services performed, where ethical rules provide exception to consent and proportionality requirements when the fee agreements are negotiated as part of a partnership separation agreement; and further concluding that lawyer could not now renegotiate fees simply because she ended up working more than she anticipated when she finalized the fee agreement in mediation). **Quote from the Court:** “Uncertainty is a powerful incentive for parties to accept a compromise settlement agreement Much was uncertain when the parties signed the settlement agreement; such is the very nature of cases taken on a contingency-fee basis. The parties in this case assessed the situation and made their choices regarding the time and effort Walker would have to expend in the future to bring the overtime-pay cases to a successful resolution. They also gave up other claims against each other and each received some benefits. We will not interfere with their agreement – fully performed with the exception of the payment of the fees – simply because one party got the better of the bargain.”

White v. Fleet Bank of Me., 875 A.2d 680 (Me. 2005) (enforcing oral mediated settlement of probate dispute against challenge that it was an unenforceable agreement to agree, where mediator and attorneys testified that an enforceable agreement had been reached, and all of the parties’ post-mediation correspondence made references to the “agreement” reached in mediation). **Quote from the Court:** “Unfortunately, the tape recorder the mediator used to record the mediation session malfunctioned, and no recording of the session exists.”

Wilson v. Wilson, 653 S.E.2d 702 (Ga. 2007) (ruling that:

1. A mediation ordered by the court was a "court referred" mediation for purposes of whether the mediation was governed by court mediation rules that allowed a three day cooling off period, notwithstanding the fact the parties did not follow the processes of the local program, did not communicate with the program director, but hired their own mediator, who was competent, but not on the mediation center roster);
2. Appellant, by notifying the adverse party, did not properly invoke the three day cooling off period which required notice to the mediation program coordinator;
3. The "role of the mediator is to draft any agreement that the parties reached during mediation";
4. If a party defends against a mediation agreement based on lack of contractual capacity, the mediator may testify providing an opinion about the competency of the party (relying on principles set out in Uniform Mediation Act); and
- and 5. The mediated agreement, entered into after a nine hour mediation without counsel present, was enforceable despite claims that the party was bipolar, was under medication, was upset, cried and suffered from depression on the day of the mediation, does not remember signing the agreement, nor understood it was a legally binding document and that the mediator told him that he would be foolish to go to trial. **Quote from the Court:** "In this setting, refusing to compel testimony from the mediator might end up being tantamount to denying the motion to enforce the agreement-because a crucial source of evidence about the plaintiff's condition and capacities would be missing. Following that course would do considerable harm not only to the court's mediation program but also to fundamental fairness. If parties believed that courts routinely would refuse to compel mediators to testify, and that the absence of evidence from mediators would enhance the viability of a contention that apparent consent to a settlement contract was not legally viable, cynical parties would be encouraged either to try to escape commitments they made during mediations or to use threats of such escapes to try to re-

negotiate, after the mediation, more favorable terms-terms that they never would have been able to secure without this artificial and unfair leverage."

ALSO LISTED IN CONFIDENTIALITY

B. CONFIDENTIALITY

Ala. Dep't of Transp. v. Land Energy Ltd., 886 So. 2d 787 (Ala. 2004) (affirming judgment in favor of mineral rights owner in an inverse condemnation action entered after unsuccessful court-ordered mediation; 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) *reh'g denied* (Mar. 12, 2004).

Donnelly v. Donnelly, 92 P.3d 298 (Wyo. 2004) (affirming trial court's denial of a mistrial because the court refused to consider any evidence based on confidential mediation communications).

Enter. Leasing Co. v. Jones, 789 So. 2d 964 (Fla. 2001) (judge not subject to automatic disqualification from presiding over personal injury action to be tried to a jury, merely because judge is informed by plaintiff's counsel of confidential mediation information (including demand for settlement and highest offer made by defendants). **Quote from the Court:** "We recognize the important public policy concerns favoring confidential mediation proceedings and the role of confidentiality in settlement. This policy is neither furthered nor hindered by requiring a party moving to disqualify a judge to adhere to the pleading requirements [which require specific allegations of bias or prejudice]....Judges are often privy to information that is confidential or inadmissible as evidence when they review motions *in limine* or perform *in camera* inspections of proprietary information....[A] presumption of bias threatens to disqualify a judge whenever he or she is required to make '*in limine* rulings concerning plaintiff's prior settlement with a co-defendant or non-party, a litigant's DUI or other criminal history, or his or her personal habits, religious beliefs or sexual preferences.' [citation omitted]. We also agree that 'mere appraisal should not support recusal, else the statutory disqualification exception swallows the common law rule.' [citations omitted]....We can see no compelling reason to treat a trial court's knowledge of inadmissible information in the mediation context any differently from the other situations presented every day where judges are asked to set aside their personal knowledge and rule based on the evidence presented by the parties at the trial or hearing." 789 So.2d at 968.

Fair v. Bakhtiari, 147 P.3d 653 (Cal. 2006) (affirming trial court refusal to enforce mediated settlement and compel arbitration pursuant to its terms, concluding that mere inclusion of the arbitration provision in the settlement did not satisfy the statutory requirement that the agreement provide "that it is enforceable or binding or words to that effect" in order for the agreement to be admissible in evidence), *on remand to*, No. A100240, 2007 WL 1031708 (Cal. Ct. App. Apr 06, 2007). **Quote from the Majority:** "In order to preserve the confidentiality required to protect the mediation process and provide clear drafting guidelines, we hold that to satisfy the "words to that effect" provision of section 1123(b), a writing must directly express the parties' agreement to

be bound by the document they sign. Plaintiff would have us infer the parties' intent from the mention of arbitration in the settlement terms memorandum. Arbitration is a method of enforcement subject to negotiation, like other settlement terms. A tentative working document may include an arbitration provision, without reflecting an actual agreement to be bound. If such a typical settlement provision were to trigger admissibility, parties might inadvertently give up the protection of mediation confidentiality during their negotiations over the terms of settlement. Disputes over those terms would then erupt in litigation, escaping the process of resolution through mediation. Durable settlements are more likely to result if the statute is applied to require language directly reflecting the parties' awareness that they are executing an "enforceable or binding" agreement." **Quote from the Concurrence/Dissent:** "[O]nce a court has determined that a document prepared and signed by the parties during mediation is actually a 'written settlement agreement' - that it embodies a meeting of the minds on all material terms needed for settlement - the inclusion in that settlement agreement of a provision for arbitration - which is an enforcement mechanism - may properly be viewed as an acknowledgement by the parties that their settlement agreement is binding and enforceable. A statement that any dispute over a settlement agreement's terms will be subject to arbitration means that the agreement is 'enforceable' through the arbitration process." **NOTE:** Though taking issue with the majority's conclusion that an arbitration clause can never constitute "words to [the] effect" that a settlement agreement is "enforceable or binding," the concurrence/dissent nonetheless agreed that the settlement was inadmissible because "substantial evidence supports the trial court's implied finding that the mediation document at issue here was not a 'written settlement agreement.'"

Foxgate Homeowners' Assoc., Inc v. Bramalea Cal., Inc., 25 P.3d 1117 (Cal. 2001) (order for sanctions must be vacated where trial court improperly considered motion and supporting documents which recited statements made during a mediation session in violation of state statute mandating mediation confidentiality; no implied statutory exception to confidentiality authorizes mediator's disclosure to the court of sanctionable conduct), *on remand*, No. B124482, 2001 WL 1407652 (Cal. Ct. App. Nov 13, 2001), *reh'g denied* (Nov 30, 2001), *rev'd* (Feb 13, 2002).

Quote from the Court: "The mediator and the Court of Appeal here were troubled by what they perceived to be a failure of Bramalea to participate in good faith in the mediation process. Nonetheless, the Legislature has weighed and balanced the policy that promotes effective mediation by requiring confidentiality against a policy that might better encourage good faith participation in the process....[T]he Legislature has decided that the policy of encouraging mediation by ensuring confidentiality is promoted by avoiding the threat that frank expression of viewpoints by the parties during mediation may subject a participant to a motion for imposition of sanctions by another party or the mediator who might assert that those views constitute a bad faith failure to participate in mediation."

In re Estate of Stukey, 100 P.3d 114 (Mont. 2004) (affirming trial court admissibility of 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 subsequent to the mediation, was not part of the "mediation process" to which statutory confidentiality applied), *reh'g denied* (Nov. 4, 2004).

In re M.S., 115 S.W.3d 534 (Tex. 2003) (finding no error in trial court admitting into evidence during child dependency proceeding a Memorandum of Agreement signed after court-ordered

mediation, because: 1) the agreement was not inappropriate judicial testimony under Texas Rule of Evidence 605 because though signed by the judge, the agreement contained no findings of fact; 2) the agreement was not impermissible hearsay under Texas Rule of Evidence 802 because it was offered only to show that an agreement was reached and what its terms were, not as proof of the children's best interests or the parent's inability to care for them; and 3) the agreement was not a "communication" protected by state ADR rules, and "specifically noted that it could be attached to an order of the court as an exhibit"), *reh'g of cause overruled* (Oct. 17, 2003), *on remand*, 140 S.W.3d (Tex. App. 2004).

Murray v. Talmage, 151 P.3d 49 (Mont. 2006) (granting new trial to plaintiff noteholder in airplane security agreement dispute, based on improper admission of defendant debtor's testimony about what a mediator told the debtor regarding allegedly false representations made by the noteholder in a caucus, because the statements were inadmissible hearsay and highly prejudicial given that no witness other than the mediator could offer first-hand evidence about what was said).

Pierce v. St. Vrain Valley Sch. Dist., 981 P.2d 600 (Colo. 1999) (upholding confidentiality agreement regarding former school superintendent against a party to the agreement).

Rojas v. L.A. County Super. 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).

Vernon v. Acton, 732 N.E.2d 805 (Ind. 2000) (reversing trial court order to enforce pre-trial mediated oral settlement agreement, and concluding that testimony regarding the alleged oral

settlement agreement was confidential and privileged and not admissible pursuant to the ADR rules incorporated in the parties' written agreement to mediate).

C. DUTY TO MEDIATE/COND. PRECEDENT/COURT POWER TO COMPEL

Ellis v. Reynolds, 247 S.W.3d 845 (Ark. 2007) (denying on procedural grounds a writ of prohibition based on a claim that the statute authorizing mandatory mediation was unconstitutional, because, the issue of the constitutionality of the of the statute is an issue the respondent circuit court had jurisdiction to resolve and the issue could properly be reviewed by appeal of that decision, not by writ of prohibition).

Envtl. Contractors, LLC v. Moon, 983 P.2d 390 (Mont. 1999) (dismissal of appeal not warranted where party satisfied appellate mediation participation requirements by being available by telephone and having his attorney physically present at the mediation).

Fuchs v. Martin, 845 N.E.2d 1038 (Ind. 2006) (reversing appellate court and authorizing mediation as pre-condition to adjudication of any dispute in a paternity case, despite lack of express authorization in local court rules for mandatory mediation). **Quote from the Court:** “[L]ocal rules, while prescribing mediation before court hearings on certain disputes, create a minimum general requirement for mediation, absent good cause shown to the contrary, but these rules do not limit trial judges from otherwise requiring mediation in other circumstances in individual cases. The trial court's authority to order preliminary mediation as a prerequisite to seeking court resolution of the parties' post-decree disagreements did not require authorization from the local rules, and it was not precluded by those in Marion County.”

In re U.S. Home Corp., 236 S.W.3d 761 (Tex. 2007) (builder's failure to invoke mediation before seeking arbitration of purchasers' claims did not preclude arbitration, where there was no indication in the parties' agreements that they intended to dispense with arbitration if mediation did not occur first).

ALSO LISTED UNDER MED-ARB

Kent Feeds, Inc. v. Manthei, 646 N.W.2d 87 (Iowa 2002) (mandatory mediation provision of statute governing farmer-creditor disputes does not prevent creditor from seeking personal judgment against guarantor where guarantees at issue are not secured by agricultural property as defined by the statute).

Klinge v. Bentien, 725 N.W.2d 13 (Iowa 2006) (concluding that in a dispute between farmers about care and feeding contracts, a plaintiff's failure to request mediation and receive a mediation release before filing suit, as required by the farm mediation statute, deprived the court of subject matter jurisdiction over the dispute).

LLH v. SCH, No. S-10174, 2002 WL 1943659 (Alaska Aug. 21, 2002) (trial court did not abuse discretion by modifying the parties' custody agreement to delete mandatory mediation provision where record as a whole shows that parties cannot cooperate to utilize mediation).

Liang v. Lai, 78 P.3d 1212 (Mont. 2003) (denying unopposed motion to dispense with appellate mediation required by local court rule in all actions seeking monetary damages/recovery, even though issue on appeal was challenge to an order for change of venue, because the determining factor is the relief sought in the underlying action and not the type of order or judgment being appealed). **Quote from the Court:** "Nor does the Rule contemplate counsel for the parties to an appeal requesting this Court to 'dispense with mediation' pursuant to a stipulation or unopposed motion simply because counsel do[es] not believe mediation will resolve the appeal. Rule 54 is mandatory for the categories of cases set forth therein; it contemplates a good faith effort by counsel to resolve the case through mediation. Had the Rule been otherwise, it is unlikely that more than one or two cases would have been mediated on appeal, since the prevailing reaction among legal practitioners at the time the Rule was implemented was that not a single case could or would be resolved through mediation on appeal."

Lynch v. City of Jellico, 205 S.W.3d 384 (Tenn. 2006) (concluding that mandatory mediation, conducted as part of a workers' compensation benefit review process does not deny injured workers access to the courts and is not a violation of procedural and substantive due process), *cert. denied*, 127 S. Ct. 1830 (2007). **Quote from the Court:** "Because injured workers are free to file suit and have their rights judicially determined upon exhausting the benefit review process, they are not, as argued by the plaintiffs, deprived of their right to be heard by a judge. In fact, the parties agree that the legislature could, if it desired, remove workers' compensation cases from the court system and make the determination of benefits administrative in nature. Most jurisdictions have done just that."

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).

Roy v. D'Amato, 629 S.E.2d 751 (W. Va. 2006) (reversing trial court dismissal of medical malpractice complaint against physician, where physician never took up opportunity to respond to initial notice of claim or request mediation as a way to clarify and possibly resolve plaintiff's claim without court action).

State ex rel. Miller v. Stone, 607 S.E.2d 485 (W. Va. 2004) (affirming trial court conclusion that medical malpractice plaintiff prematurely filed action by failing to first file statutorily required certificate of merit which triggers health care provider's right to demand pre-litigation mediation).

State v. Ison, 135 P.3d 864 (Utah 2006) (holding that one party's failure to pursue mediation as a contractual prerequisite to litigation does not excuse the other party's breach of a substantive contract term). **Quote from the Court:** "We are aware of no contract law authority, and the State has provided us with none, to support the proposition that a party's failure to pursue an agreed-upon alternative dispute resolution method would excuse the breach that created the dispute. That is certainly not the case here, where the agreement merely required mediation as a condition to litigation."

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").

D. SANCTIONS/ATTORNEY'S FEES/MEDIATION COSTS

Elec. 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).

Foxgate Homeowners' Association, Inc v. Bramalea California, Inc., 26 Cal.4th 1, 25 P.3d 1117, 108 Cal.Rptr.2d 642 (2001) (order for sanctions must be vacated where trial court improperly considered motion and supporting documents which recited statements made during a mediation session in violation of state statute mandating mediation confidentiality; no implied statutory exception to confidentiality authorizes mediator's disclosure to the court of sanctionable conduct). **Quote from the Court:** "The mediator and the Court of Appeal here were troubled by what they perceived to be a failure of Bramalea to participate in good faith in the mediation process. Nonetheless, the Legislature has weighed and balanced the policy that promotes effective mediation by requiring confidentiality against a policy that might better encourage good faith participation in the process....[T]he Legislature has decided that the policy of encouraging mediation by ensuring confidentiality is promoted by avoiding the threat that frank expression of viewpoints by the parties during mediation may subject a participant to a motion for imposition of sanctions by another party or the mediator who might assert that those views constitute a bad faith failure to participate in mediation." 26 Cal.4th at 17, 25 P.3d at 1127-28, 108 Cal.Rptr.2d at 655.

Heng v. Rotech Med. 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, where parties had previously contractually agreed to share all mediation expenses).

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 and over expressed objection of another), *reh'g denied* (Oct. 29, 2004).

Kolupar v. Wilde Pontiac Cadillac, Inc., 735 N.W.2d 93 (Wis. 2007) (holding that prevailing plaintiff's mediation costs from two failed mediations could be awarded as "reasonable costs" under civil damages provision of Wisconsin Statute prohibiting unsavory practices in the retail sale or lease of a motor vehicle).

Lawson v. Brown's Day Care Ctr., Inc., 776 A.2d 390 (Vt. 2001) (concluding that absent finding of bad faith, trial court is without power to sanction attorney for violating confidentiality of court-ordered mediation session), *appeal after remand*, 861 A.2d 1048 (Vt. 2004).

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).

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).

Wilson v. Wilson, 653 S.E.2d 702 (Ga. 2007) (ruling that:

1. A mediation ordered by the court was a "court referred" mediation for purposes of whether the mediation was governed by court mediation rules that allowed a three day cooling off period, notwithstanding the fact the parties did not follow the processes of the local program, did not communicate with the program director, but hired their own mediator, who was competent, but not on the mediation center roster);
2. Appellant, by notifying the adverse party, did not properly invoke the three day cooling off period which required notice to the mediation program coordinator;
3. The "role of the mediator is to draft any agreement that the parties reached during mediation"; and 4. If a party defends against a mediation agreement based on lack of contractual capacity, the mediator may testify providing an opinion about the competency of the party (relying on principles set out in Uniform Mediation Act).
4. The mediated agreement, entered into after a nine hour mediation without counsel present, was enforceable despite claims that the party was bipolar, was under medication, was upset, cried and suffered from depression on the day of the mediation, does not remember signing the agreement, nor understood it was a legally binding document and that the mediator told him that he would be foolish to go to trial. **Quote from the Court:** " In this setting, refusing to compel testimony from the mediator might end up being tantamount to denying the motion to enforce the agreement-because a crucial source of evidence about the plaintiff's condition and capacities would be missing. Following that course would do considerable harm not only to the court's mediation program but also to fundamental fairness. If parties believed that courts routinely would refuse to compel mediators to testify, and that the absence of evidence from mediators would enhance the viability of a contention that apparent consent to a settlement contract was not legally viable, cynical parties would be encouraged either to try to escape commitments they made during mediations or to use threats of such escapes to try to re-negotiate, after the mediation, more favorable terms-terms that they never would have been able to secure without this artificial and unfair leverage."

ALSO LISTED UNDER ENFORCEMENT

E. MEDIATION-ARBITRATION/HYBRID PROCESS

Champagne v. Victory Homes, Inc., 897 A.2d 803 (Me. 2006) (concluding that a trial court order to engage in nonbinding arbitration is properly the subject of interlocutory appeal because said order is the functional equivalent of compelling mediation and denying binding arbitration; and further concluding that the parties' contract stating that "[a]ny dispute or claim arising out of this agreement or the property addressed in this agreement shall be decided by arbitration" is unambiguous and indicates the parties' choice for binding arbitration).

In re U.S. Home Corp., 236 S.W.3d 761 (Tex. 2007) (builder's failure to invoke mediation before seeking arbitration of purchasers' claims did not preclude arbitration, where there was no indication in the parties' agreements that they intended to dispense with arbitration if mediation did not occur first).

ALSO LISTED UNDER DUTY TO MEDIATE/CONDITION PRECEDENT

Kline v. Berg Drywall, Inc., 685 N.W.2d 12 (Minn. 2004) (where a three stage ADR process contained in a collective bargaining agreement excludes legal counsel from the stage one facilitation and limits legal counsel from communicating directly with the mediator in stage two, the resulting diminution of benefits impermissibly compromises employees' entitlement to workers' compensation and warrants grant of a new arbitration hearing to claimant denied benefits for work-related injury). **Quote from the Court's Majority Opinion:** "An injured worker is immediately disadvantaged, particularly when a trained insurance claims adjuster or an employer with legal training is allowed to participate in a facilitation that can lead to the termination of benefits." **Quote from the Court's Dissenting Opinion:** "Parties may waive their right to counsel in virtually all legal settings, including those having more serious ramifications than a workers' compensation claim. By virtue of the adoption of the rules of the Fund in the collective bargaining agreement, and the provision in the rules that counsel cannot be present at the facilitation, Kline has waived the right to have counsel present at that stage . . . [b]ecause Kline's waiver is part of a private agreement that created the ADR systems, there is no 'state action' and due process issues cannot arise."

Kruger Clinic Orthopaedics, LLC v. Regence BlueShield, 138 P.3d 936 (Wash. 2006) (concluding that Washington statutes precluded health insurance carriers from requiring binding ADR, but allowed nonbinding mediation, and that the statutes were not preempted by the FAA). **Quote from the Court:** "By expressly permitting 'nonbinding mediation,' RCW 48.43.055 indicates that any *binding* form of alternative dispute resolution (ADR) would not provide 'a fair review.' That presumption is made explicit in WAC 284-43-322(4): 'Carriers may not require alternative dispute resolution *to the exclusion of judicial remedies*; however, carriers may require alternative dispute resolution *prior to judicial remedies*.'"(Emphasis added.)

Mountain Heating & Cooling, Inc. v. Van Tassel-Proctor, Inc., 867 So. 2d 1112 (Ala.) (reversing trial court and refusing to compel arbitration of a dispute between contractors where the arbitration provision of the parties' 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*), *on remand to*, 867 So. 2d 1121 (Ala. Civ. App. 2003).

Rodrigue v. LaFourche Parish Sch. Bd., 928 So. 2d 533 (La. 2006) (analogizing to principles governing recusal of a judicial officer to grant employer's motion to recuse an arbitrator appointed to decide a workers' compensation dispute, where the arbitrator had previously acted as mediator in a failed attempt to resolve the same dispute).

Stewart v. Covill & Brasham Constr., L.L.C., 75 P.3d 1276 (Mont. 2003) (affirming motion by building contractor to compel arbitration against homeowner despite contention that contractor's request for, and participation in, mediation constituted a waiver of the right to arbitrate, where letter proposing mediation expressly stated that if mediation was unsuccessful the parties would "go forward with contested binding arbitration as required by the Contract").

F. ETHICS/MALPRACTICE (Lawyer/Neutral/Judicial)

Attorney Grievance Comm'n of Md. v. Steinberg, 910 A.2d 429 (Md. 2006) (finding violation of the rules of professional conduct for failing to appear at a client meeting, arriving an hour late at two mediation sessions, and being unprepared at the mediation session). **Quote from the Court:** "[S]uch actions do not reflect the thoroughness or preparation that the legal profession demands....Furthermore, such neglect is a clear violation of MRPC 8.4 (d) which prohibits conduct that is prejudicial to the administration of justice."

Enterprise Leasing Company v. Jones, 789 So. 2d 964 (Fla. 2001) (judge not subject to automatic disqualification from presiding over personal injury action to be tried to a jury, merely because judge is informed by plaintiff's counsel of confidential mediation information (including demand for settlement and highest offer made by defendants). **Quote from the Court:** "We recognize the important public policy concerns favoring confidential mediation proceedings and the role of confidentiality in settlement. This policy is neither furthered nor hindered by requiring a party moving to disqualify a judge to adhere to the pleading requirements [which require specific allegations of bias or prejudice]....Judges are often privy to information that is confidential or inadmissible as evidence when they review motions *in limine* or perform *in camera* inspections of proprietary information....[A] presumption of bias threatens to disqualify a judge whenever he or she is required to make '*in limine* rulings concerning plaintiff's prior settlement with a co-defendant or non-party, a litigant's DUI or other criminal history, or his or her personal habits, religious beliefs or sexual preferences.' [citation omitted]. We also agree that 'mere appraisal should not support recusal, else the statutory disqualification exception swallows the common law rule.' [citations omitted]....We can see no compelling reason to treat a trial court's knowledge of inadmissible information in the mediation context any differently from the other situations presented every day where judges are asked to set aside their personal knowledge and rule based on the evidence presented by the parties at the trial or hearing." 789 So.2d at 968.

Fla. Bar v. Neiman, 816 So. 2d 587 (Fla. 2002) (a paralegal engaged in unauthorized practice of law by, among many other things, appearing on behalf of personal injury plaintiff at a mediation

and having settlement discussions with defending insurer's attorney, and by appearing on behalf of a plaintiff in a wrongful birth case mediation and arguing issues of liability, causation and damages, while lawyer he worked for sat silent).

In re Application for Disciplinary Action Against Balerud, 719 N.W.2d 329 (N.D. 2006) (suspending an attorney from the practice of law for six months in part because he failed to attend a mediation).

In re Fine, 13 P.3d 400 (Nev. 2000) (affirming removal of judge from office in part based on nepotism and favoritism established by the judge's appointment of her first cousin as a mediator in a child custody matter).

In re Non-Member of State Bar of Arizona, 152 P.3d 1183 (Ariz. 2007) (concluding that lawyer licensed to practice in Florida and Virginia engaged in unauthorized practice of law by representing sellers in private mediation of a real estate transaction dispute in Arizona).

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 Potts, 158 P.3d 418 (Mont. 2007) (ordering public sanction for attorney who assisted client to make fraudulent misrepresentations during mediation regarding the value of a probate estate). **Quote from the Court:** "Potts's clients refused to waive confidential mediation communications, thus we do not have the privilege of reviewing Potts's version of what happened in mediation. We are convinced by the testimony of others and evidence presented at the disciplinary hearing before the Commission that Potts's clients...engaged in fraudulent conduct during their procurement of the settlement agreement."

In re Reinstatement of Singer, 735 N.W.2d 698 (Minn. 2007) (finding lawyer not entitled to reinstatement where, among other things, his failure to disclose license revocation to community mediation program showed he had not proven by clear and convincing evidence the moral change necessary to justify 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).

Metz v. Metz, 61 P.3d 383 (Wyo. 2003) (finding no abuse of discretion in trial judge's failure to disqualify himself from presiding over divorce bench trial after having first heard evidence concerning the parties' earlier mediation and denying wife's motion to enforce an alleged mediated settlement).

Nevada Yellow Cab Corp. v. Eighth Jud. Dist. Ct., 152 P.3d 737 (Nev. 2007) (finding no waiver of right to challenge opposing law firm's conflict of interest despite fact that parties participated in mediation for over a year, where the potential conflict was identified at the very start of the litigation, a motion to disqualify counsel was postponed when mediation was agreed to, and the moving party expressly reserved its right to renew the motion if mediation failed).

Penny v. Wyo. Mental Health Professions Licensing Bd., 120 P.3d 152 (Wyo. 2005) (affirming denial of social worker's application for re-licensure 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."

Shake v. Ethics Comm. of the Ky. Judiciary, 122 S.W.3d 577 (Ky. 2003) (vacating opinion of the Ethics Committee of the Kentucky Judiciary and finding no appearance of impropriety when a judicial officer serves without compensation on the board of directors of a non-profit local mediation organization). **Quote from the Court's Majority Opinion:** We find no valid basis for the Ethics Committee's fear that litigants may feel compelled to choose mediation if the judge sits on a mediation organization's board. Under Kentucky's Model Mediation Rules, [footnote omitted] which were developed under the direction of this Court, a judge may refer a case to mediation regardless of whether the parties desire mediation. [footnote omitted] Although the decision to choose mediation is frequently made by the litigants, the fact that the judge sits on a mediation organization's board is an insignificant factor in the making of that decision by litigants when compared to the litigants' knowledge that the judge has the absolute discretion to order mediation even if they choose otherwise. **Note from the Dissent:** 3 of 7 judges voted to adopt the Ethics Committee opinion that precluded judicial service on the non-profit mediation board.

Tax Auth., Inc. v. Jackson Hewitt, Inc., 898 A.2d 512 (N.J. 2006) (concluding that rules of professional conduct preclude an attorney with multiple clients from obtaining their advance consent to be bound by majority client approval of a mediated settlement, because the rules mandate that every client must have knowledge of the terms of the settlement and actually agree to them before being bound by them).

G. MISCELLANEOUS

Blase v. Brewer, 692 N.W.2d 785 (S.D. 2005) (holding that approval of a mediated agreement does not amount to a litigated judgment).

Campbell v. Burton, 750 N.E.2d 539 (Ohio 2001) (neither the school district offering the mediation program, nor the teacher mediator presiding at a mediation between high school students, is entitled to claim statutory immunity under the state's Political Subdivision Tort

Liability Act for alleged failure to report known or suspected abuse disclosed by a student participant in mediation).

Davis v. Horton, 661 N.W.2d 533 (Iowa 2003) (refusing to extend the public-policy exception to at-will employment relationships 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").

Jasch v. Anchorage Inn, 799 A.2d 1216 (Me. 2002) (a mediated agreement resolving a workers' compensation claim is properly treated as an award for purposes of statutory entitlement to payment of prejudgment interest).

Krystkowiak v. W.O. Brisben Cos., Inc., 90 P.3d 859 (Colo. 2004) (where a member and spokesperson of a neighborhood association refused to individually sign a mediated settlement agreement allegedly ending association opposition to a developer's construction project, the individual is not bound by the agreement and first amendment right to dissociate from the association makes him immune from suit for tortious interference with contract).

Marcher v. Bonzell, 104 P.3d 436 (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").

Matherly Land Surveying, Inc. v. Gardiner Park Dev., LLC, 230 S.W.3d 586 (Ky. 2007) (applying statute of limitations to bar plaintiff's claim, where participation in earlier mediation made clear that plaintiff had knowledge of potential damages more than one year before bringing suit).

Osasio v. Froedtert Mem'l Lutheran Hosp., 646 N.W.2d 381 (Wis. 2002) (filing of medical malpractice lawsuit before expiration of mandatory mediation period does not mandate dismissal of the action). **Quote from the Court's Majority Opinion:** "If the legislature intended the result the defendants urge, it could have expressly stated that a claimant's failure to participate in a mediation session within the statutory mediation period results in dismissal. It did not do so. In the absence of express language, we are unwilling to read the harsh penalty of dismissal of the lawsuit into the mediation statute. The tenor of modern law is to avoid dismissal of cases on technical grounds and to allow adjudication on the merits." **Quote from the Court's Dissenting Opinion:** "In establishing the mediation system in ch. 655, the legislature provided for flexibility by creating two options for commencing a medical malpractice case. [citations omitted]. First, under Wis. Stat. § 655.445 a plaintiff can initially file a claim in court and then

within fifteen days file a request for mediation. Second, under § 655.44, which Ocasio relied on, a plaintiff can initially request mediation and then, after the mediation period has expired, file a claim in court. These two procedures are clearly written in the statutes to provide the flexibility that the legislature intended for medical malpractice cases. The majority's decision here unnecessarily bends those procedures to allow for further options that are contrary to the unambiguous language of § 655.44."

Pagenkopf v. Chatham Elec., Inc., 165 P.3d 634 (Alaska 2007) (holding that third-party defendant's communication with insurance carrier and later participation in mediation was sufficient to establish notice of suit triggering accrual of prejudgment interest, even though service of the third-party complaint had not yet occurred).

Preston v. Transp. Ins. Co., 102 P.3d 527 (Mont. 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). **Quote from the Court's Dissenting Opinion:** "[I]t is this Court's job to ascertain the legislative intent, whenever possible, from the plain language of the statute; it is not our job to insert into those statutes what the Legislature has chosen to omit....In the present case, the Legislature has chosen not to toll the statute of limitations for an action based on fraud or mistake during the period required for the mandatory mediation prior to filing a petition in the [workers' compensation court]....The required mediation is a relatively short process readily capable of being completed soon after the carrier denies a demand to re-open and long before the running of the 2-year statute of limitations."

Quantum Elec., Inc. v. Accutitle, Inc., 136 P.3d 988 (Mont. 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."