

8-11-2008

Mediation Case Law Project 1999-2007 Federal Circuit Courts (Sorted by Subject Matter of Case)

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**Mediation Case Law Project
1999-2007 Case Squibs¹
Federal Circuit 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

Atkinson v. Sellers, Nos. 05-2064, 05-2184, 2007 WL 1493987 (4th Cir. May 23, 2007) (finding no federal court jurisdiction over a claim for breach of a mediated settlement resolving a Title VII claim)

Bandera v. City of Quincy, 344 F.3d 47 (1st Cir. 2003) (staying judgment after jury verdict in favor of Title VII plaintiff, and remanding to trial court for determination of enforceability of pre-trial handwritten mediated settlement, where trial court had previously concluded there was

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genuine disputed question of material fact regarding the existence or terms of the agreement, but failed to hold an evidentiary hearing on the matter). **Quote from the Court:** “[O]f this we are sure: a judge cannot refuse to enforce an otherwise valid settlement agreement on the ground initially given in this case, namely, that doing so would require the judge to conduct a mini-trial into the question whether a binding contract had been made. Contract enforcement is not normally a matter of judicial convenience. The district judge was moved by Bandera's desire to have her day in court. But settlement agreements, if valid and not against public policy, are voluntary surrenders of the right to have one's day in court.”

Beazer East, Inc. v. Mead Corp., 412 F.3d 429 (3rd Cir. 2005) (refusing to enforce alleged oral mediated settlement in light of “sound judicial policy” compelling conclusion that parties in appellate mediation can only be bound by a written settlement, especially where the existence or terms of the disputed agreement cannot be proved without violating the confidentiality provisions of the local appellate rules), *cert. denied*, 546 U.S. 1091 (2006).

Chitkara v. N.Y. Tel. Co., No. 01-7274, 2002 WL 31004729 (2nd Cir. Sept. 6, 2002) (affirming a trial court's order to enforce a mediated settlement despite plaintiff's claim that the settlement was procured through mediator coercion and fraudulent misrepresentation, noting that “[t]he nature of mediation is such that a mediator's statement regarding the predicted litigation value of a claim, where that prediction is based on a fact that can readily be verified, cannot be relied on by a counseled litigant whose counsel is present at the time the statement is made”), *cert. denied*, 538 U.S. 1034 (2003).

Davis v. Educ. Dept. Serv., Inc., 205 F. App'x 711 (11th Cir. 2006) (denying plaintiff's motion to reopen a suit that was dismissed pursuant to plaintiff's notice of dismissal, because the motion involved loans by plaintiff's son that were not the subject of the original settlement agreement, despite plaintiff's argument that she had assumed her son's loans were part of the settlement agreement “as a result of her discussions with the mediator”).

Deville v. U.S. ex rel. Dep't of Veterans Affairs, 202 F. App'x 761 (5th Cir. 2006) (affirming trial court conclusion that plaintiff failed to establish duress sufficient to set aside mediated settlement in medical malpractice case, where plaintiff's allegations that he was prevented from leaving the session and verbally pressured to settle by his attorney and was suffering from constant pain due to invasive knee surgery shortly before the mediation, were contradicted by the more credible testimony of the mediator and plaintiff's attorney).

Haghighi v. Russian-American Broad. Co., 173 F.3d 1086 (8th Cir. 1999) (whether agreement to mediate conformed with Civil Mediation Act was implicitly decided by nature of question certified to Minnesota Supreme Court in earlier case and could not be relitigated on appeal; Civil Mediation Act not inapplicable because settlement was written after negotiations in mediation were completed; court cannot consider whether clause in agreement stating it is a “Full and Final Mutual Release of All Claims” is sufficient to establish parties' intent to be bound by mediated settlement because issue was not raised in the trial court; there was no waiver of Civil Mediation Act requirements through a party's failure to include binding language in later settlement proposals its counsel drafted).

In re Beverly, 374 B.R. 221 (B.A.P. 9th Cir. 2007) (holding there was no genuine issue of material fact regarding the claim of fraudulent transfer by virtue of negotiation being completed in mediation).

In re Literary Works in Electronic Databases Copyright Litigation, 509 F.3d 116 (2d Cir. 2007) (vacating approval of class action settlement for lack of subject matter jurisdiction, based in part on inconsistency of position taken on jurisdiction taken by defendant in mediation).

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

Kean v. Adler, 65 F. App’x 408 (3rd Cir. 2003) (vacating consent decree based on mediated settlement of property dispute, where the United States government was a party in interest which had attended and participated in mediation but did not consent to the mediated settlement or join other parties in the application to formalize the agreement in a consent decree).

Koehler v. Brody, 483 F.3d 590 (8th Cir. 2007) ((holding that named plaintiff who had unsuccessfully contested the approval of a class action settlement arguing that the settlement was too low, that named plaintiffs were not present at the final day of mediation, that counsel had breached ethical obligations and had made misrepresentations to the court, may not later bring a separate suit challenging the same judgment based on the same claims with some newly discovered evidence).

L.J. Pettyjohn v. Estes Express Lines, 124 F. App’x(4th Cir. March 2, 2005) (affirming enforcement of resignation provision in mediated settlement of workers’ compensation claim, finding no violation of public policy because: 1) mediation was arms-length negotiation, with all parties represented by counsel; 2) plaintiff offered no evidence that at the time of mediation defendant “required” him to resign as a condition of settlement; 3) plaintiff was compensated for his resignation; and 4) statutory limitation on releasing of rights in workers’ compensation settlements does not apply to voluntary resignation).

Lindstrom v. U.S., 510 F.3d 1191 (10th Cir. 2007) (finding no federal court jurisdiction under EEOC regulations to enforce a mediated settlement of a disability discrimination claim; rather, the aggrieved employee must sue on his original discrimination claim).

Mardanlou v. Gen. Motors Corp., 69 F. App’x 950 (10th Cir. 2003) (refusing to grant relief from judgment entered on mediated settlement of personal injury claim based on alleged mediator bias and because plaintiff was taking medication during the settlement discussions which caused him "to be easily manipulated and persuaded", where it was undisputed that plaintiff, with advice of counsel, made a deliberate choice to settle; that he signed the settlement

agreement 20 days after it was reached without expressing any dissatisfaction; and he had declared that he had discussed the agreement with his attorney and that he understood that the agreement fully settled all claims).

McClaskey v. La Plata R-II School Dist., 256 F.Appx. 867 (8th Cir. 2007) (unpublished) (concluding that trial court was not clearly erroneous in enforcing mediated settlement agreement notwithstanding that some defendants signed the agreement after the mediation deadline had expired).

McDermott v. City of N. Olmsted, Ohio, 178 F. App'x 515 (6th Cir. 2006) (affirming enforcement of a mediated settlement of ADEA claims, concluding that the plaintiff employee had a reasonable period of time to consider the settlement even though he was forced to sign at the mediation session itself, by virtue of the parties' prior six-weeks of negotiations, involving three revised versions of the written agreement (the last of which had been first presented to plaintiff for consideration 12 days before mediation). **Quote from the Dissent:** "By threatening to withdraw the final settlement agreement the day that the agreement was reached, Defendant failed to meet the strict requirements of Section 626(f)(2), so that Plaintiff's waiver of his ADEA claims was invalid. I therefore respectfully dissent."

Mudrick v. Cross Serv., Inc., 200 F. App'x 338 (5th Cir. 2006) (concluding that a mediated wrongful death settlement by an employer with a widow, acting on behalf of herself, her children and the estate, where the parties agreed the deceased was a Jones Act seaman, did not preclude a separate Texas Wrongful Death Act claim against the manufacturer brought by the parents for non-pecuniary loss; whether deceased was a Jones Act seaman remains a question of fact).

Nw. Env't Advocates v. U.S. Envtl. Prot. Agency, 340 F.3d 853 (9th Cir. 2003) (granting parties' joint motion to enter stipulated consent decree negotiated in appellate mediation program). **But note strong dissent** questioning authority of appellate court to issue an equitable decree, as opposed to a simple order of dismissal -- "Unlike a district court, we do not try cases, we do not hold evidentiary hearings, and we do not make findings of fact. Our lack of fact-finding ability makes us unsuitable to enforcement of a consent decree. Also, consent decrees often enmesh the issuing court in management for many years, with new parties joining those already at the table, and the court working out terms consistent with those in some prior judicial decision. Not only are we ill-equipped for this sort of management, but we have not issued any overarching judicial decision that would establish controlling principles. There is thus no authoritative basis for determining who ought to be allowed to join, or what future terms should be accepted or rejected Either we should have adjudicated the case, or the parties should have settled it. It is imprudent for us to assume the role of a chancellor to enforce the decree in our discretion as guided by the parties as time goes on."

Nwachukwu v. St. Louis Univ., 114 F. App'x 264 (8th Cir. 2004) (affirming district court enforcement of final settlement prepared by parties' counsel, concluding that terms of final settlement were not materially different from terms of handwritten agreement previously signed by plaintiff at the conclusion of mediation, where both agreements provided the same benefits and both provided that plaintiff would resign and execute a release of all claims, even though the

final agreement contained “more expansive or additional clauses related to confidentiality, release of liability, disclaimer of fault, nondisparagement, and reinstatement or reemployment”).

Palmer v. U.S. W. Commc'ns, Inc., 36 F. App'x 644 (10th Cir. 2002) (rejecting a duress challenge), *cert. denied*, 537 U.S. 1117 (2003).

Parsons v. Orthalliance, Inc., 130 F. App'x 353 (11th Cir. 2005) (finding agreement unenforceable because the agreement indicated the parties' intent that it was not binding until later agreements were signed), *reh'g and reh'g en banc denied* (Aug. 25, 2005).

Pettyjohn v. Estes Express Lines, 124 F. App'x 174 (4th Cir. 2005) (rejecting claim that mediation agreement was unenforceable as against public policy).

Ricks v. Abbott Labs., 65 F. App'x 899 (4th Cir. 2003) (vacating dismissal of Title VII claims where trial court had erroneously enforced an alleged oral mediated settlement without holding an evidentiary hearing to consider whether the oral agreement reached during mediation was considered binding by the parties or whether they agreed as to the settlement terms).

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

Stroman v. W. Coast Grocery Co., 884 F.2d 458 (9th Cir. 2006) (holding that Title VII settlements must be “voluntary, deliberate, and informed” and that one aspect of this inquiry is whether the agreement was executed in a “noncoercive atmosphere”), *cert. denied*, 498 U.S. 854 (1990).

Zhu v. Countrywide Realty Co., Inc., 66 F. App'x 840 (10th Cir. 2003) (enforcement of mediated settlement of Fair Housing Act claims is not unconscionable merely because plaintiff asserts settlement was inadequate to cover her medical expenses and other damages, where she was represented by counsel at the mediation and the record demonstrated she understood and agreed to the settlement; finding no impropriety in the same magistrate judge serving as both mediator and later as judge recommending enforcement of settlement; concluding there was no violation of mediation confidentiality rules where the magistrate revealed settlement negotiations in deciding the plaintiff's motion to reopen as the disclosure was necessary to evaluate plaintiff's challenge to the settlement agreement), *cert. denied*, 540 U.S. 1123 (2004).

B. CONFIDENTIALITY

Babasa v. LensCrafters, Inc., 498 F.3d 972 (9th Cir. 2007) (remanding removed case as untimely, where letter sent in anticipation of mediation provided sufficient notice of amount in controversy to begin running of the thirty day time period to remove the case; noting that federal, rather than state, privilege law would control the question of admissibility of the letter but also noting that defendant waived any argument on admissibility by failing to raise the issue before the trial court. **Quote from the Court:** "State law does not supply the rule of decision here. Federal law governs the determination whether a case exceeds the amount in controversy necessary for a diversity action to proceed in federal court.")

ALSO LISTED UNDER MISCELLANEOUS

Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc., No. 01-3873, 2003 WL 21378369 (6th Cir. June 16, 2003) (considering a number of factors including the “strong public interest in favor of secrecy of matters discussed by parties during settlement negotiations,” the American tradition of confidential settlement communications, the need for confidentiality to ensure effective negotiations, and the inherent questionability of the truthfulness of statements made during negotiations, in balancing those factors against the litigant’s contention that the material was “relevant” and useful as impeachment evidence, the court held that any communications made in furtherance of settlement are privileged, although the court rejected litigant’s claims in the instant case, it appeared to leave open the possibility that a litigant could demonstrate “a legitimate, admissible use” for the evidence that would overcome the privilege).

In re Anonymous, 283 F.3d 627 (4th Cir. 2002) (in an arbitration over a fee dispute between an attorney and client stemming from attorney’s representation in an earlier successful mediation, disclosures made by the client and attorney of information obtained during the earlier mediation violated confidentiality provisions of local court rules, but these violations did not warrant sanctions; limited additional disclosures by the attorney and client would be authorized since non-disclosure would cause manifest injustice, but disclosure by the mediator, to whom a stricter confidentiality standard applied, would not be allowed).

In re Literary Works in Electronic Databases Copyright Litigation, 509 F.3d 116 (2d Cir. 2007) (arguing against approving a class action settlement in part by referring to defendant's argument made during the mediation that was inconsistent with the position taken in the motion settlement approval).

In re Subpoena Duces Tecum Issed to Commodity Futures Trading Comm’n, 439 F.3d 740 (D.C. Cir. 2006) (rejecting the notion of a federal privilege protecting documents related to settlement, at least on the record the appellant presented and reversing the district court because the court did not have a “sufficient factual context within which to evaluate whether withholding the listed eight sets of documents advanced important public interests, satisfied the justified expectations of the parties, or would have been treated as privileged under various State laws—each of which can be important consideration under Jaffe and other relevant caselaw”).

Tokerud v. Pac. Gas & Elec. Co., 25 F. App’x 584 (9th Cir. 2001) (holding that disclosure of mediation documents to experts violated confidentiality agreement and could result in sanctions).

Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96 (2d Cir.) (reviewing mediator's testimony to determine whether a large antitrust class action agreement was fair), *cert. denied*, 544 U.S. 1044 (2005).

Zhu v. Countrywide Realty Co., Inc., 66 Fed. Appx. 840, No. 02-3087, 2003 WL 21399026 (10th Cir. June 18, 2003) (enforcement of mediated settlement of Fair Housing Act claims is not unconscionable merely because plaintiff asserts settlement was inadequate to cover her medical expenses and other damages, where she was represented by counsel at the mediation and the record demonstrated she understood and agreed to the settlement; finding no impropriety in the same magistrate judge serving as both mediator and later as judge recommending enforcement of settlement; concluding there was no violation of mediation confidentiality rules where the magistrate revealed settlement negotiations in deciding the plaintiff's motion to reopen as the disclosure was necessary to evaluate plaintiff's challenge to the settlement agreement), *cert. denied* 124 S. Ct. 1083 (January 12, 2004).

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

Abele v. Hernando County, 161 F. App'x 809 (11th Cir. 2005) (affirming denial of request for non-lawyer mediator and confirming power of district court to compel mediation despite party's contention that it would be "act of futility" posing unreasonable costs, where local court rules provide that any action may be referred by the court to mediation).

Boler-Phillips Body Shop, Inc. v. Employers Mut. Cas. Co., 251 Fed.Appx. 912 (5th Cir. 2007) (insurer's refusal to submit to additional mediation or arbitration does not constitute denial of insured's claim).

Connolly v. Nat'l Sch. Bus Serv., Inc., 177 F.3d 593 (7th Cir. 1999) (a party has no obligation to mediate before District Court Judge's law clerk and failure to participate in such mediation was impermissible basis for attorney fee award reduction), *on remand*, 77 F. Supp. 2d 903 (N.D. Ill. 1999), *aff'd*, 223 F.3d 451 (7th Cir. 2000).

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

In re Atl. Pipe Corp., 304 F.3d 135 (1st Cir. 2002) (a court may compel mediation pursuant to its inherent authority to manage and control dockets, but absent an explicit statutory provision or local rule authorizing mediation, the court must first determine that a case is appropriate for mediation and then affirmatively set appropriate procedural safeguards to ensure fairness to all parties involved).

In re Young, 253 F.3d 926 (7th Cir. 2001) (although Rule 33 of the Federal Rules of Civil Procedure provides authority for the court to compel lawyers to force clients to appear for

appellate mediation, the lawyers' refusal in this case to produce their clients, while unjustifiable, would not result in sanctions given the novelty of the question of the mediator's authority to issue an order compelling attendance). **Quote from the Court:** "The purpose of authorizing the mediator to command the presence of the client is, of course, to enable him to communicate directly with the client; this is not 'usurpation'; and it is particularly appropriate in circumstances where there may be a conflict of interest between lawyer and client. Of course the mediator must not attempt to coerce a settlement, but of such impropriety there is no evidence. The delegation authorized by Fed. R.App. P. 33 obviously extends to directing the lawyer to bring his client to the settlement conference; we do not understand the lawyers even to contend that the mediator cannot compel the lawyers to attend, [citation omitted] and if the lawyers refuse to obey the mediator's lawful orders, they expose themselves to discipline for unprofessional conduct. [citation omitted]. The appellants' lawyers may have believed that the presence of their clients would not produce a settlement, but that is a judgment for the mediator to make; that is why he is authorized to require the clients' presence."

Kemiron Atl., Inc. v. Aguakem Int'l, Inc., 290 F.3d 1287 (11th Cir. 2002) (parties' failure to request mediation, which was condition precedent to arbitration under the parties' contract, precluded enforcement of the arbitration clause). **Quote from the Court:** "The FAA's policy in favor of arbitration does not operate without regard to the wishes of the contracting parties. [citation omitted]. Here, the parties agreed to conditions precedent before arbitration can take place and, by placing those conditions in the contract, the parties clearly intended to make arbitration a dispute resolution mechanism of last resort....Because neither party requested mediation, the arbitration provision has not been activated and the FAA does not apply."

Marland v. Safeway, Inc., 65 F. App'x 442 (4th Cir. 2003) (affirming grant of summary judgment dismissing contract claim for alleged failure to mediate, concluding that although complaining party may have had a cause of action for specific performance to compel mediation pursuant to a contract clause, it chose instead to plead a claim for damages without evidence of the amount or foreseeability at the time the contract was entered into).

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

Murray v. Northrup Grumman Info. Tech., Inc., 444 F.3d 169 (2d Cir. 2006) (denying negligence liability for breach of duty to mediate an employment dispute, where federal regulations required employers participating in a federal employment training program to agree to permit, but did not compel, the program administrator to mediate employee terminations). **Quote from the Court:** "The existence of an opportunity to mediate is not the equivalent of a requirement to do so should the [program administrator] determine that mediation is inappropriate. Mediation, like reinstatement, is subject to the [program administrator's] discretionary decision."

Sigg v. District Court of Allen County, 253 Fed. Appx. 746 (10th Cir. 2007) (unpublished) (affirming trial judge's order of dismissal refusing to address writ of mandamus requiring trial judge to order mediation when the issue was reviewable by direct appeal).

U.S. v. Beyrle, 75 F. App'x 730 (10th Cir. 2003) (affirming trial court conclusion that magistrate's pre-trial order compelling mediation of foreclosure action could not prevent forced sale of the property at issue where the court decided a dispositive summary judgment motion in defendant's favor prior to start of mediation).

USA Flea Market, LLC v. EVMC Real Estate Consultants, Inc., 248 Fed.Appx. 108 (11th Cir. 2007) (unpublished) (reversing trial court grant of summary judgment based on parties' failure to engage in contractually mandated mediation). **Quote From the Court:** "The district court concluded that EVMC was entitled to summary judgment because USA Flea Market admittedly did not attempt mediation before filing suit and failed to comply with what EVMC contends was a condition precedent to commencing a lawsuit for breach of contract. We disagree. The district court overlooked a genuine issue of material fact...USA Flea Market contends that, under paragraph 27.1, the contract terminated after EVMC defaulted, EVMC received notice of the default, and the default was not cured. USA Flea Market persuasively explains that, under the express terms of the default provision, the mediation provision does not survive termination of the contract. If the allegations of USA Flea Market, that EVMC defaulted, received notice of the default, and failed to cure the default, are true, the mediation provision abated upon the termination of the contract."

D. SANCTIONS/ATTORNEY'S FEES/MEDIATION COSTS

Brisco-Wade v. Carnahan, 297 F.3d 781 (8th Cir. 2002) (a district court abused its discretion by ordering prevailing defendants in prisoner's rights case to pay mediation costs, when: 1) local court rules preclude prisoner civil rights cases from being referred to mediation; 2) there is no express statutory authorization for taxation of mediation fees in section 1983 litigation; 3) 28 U.S.C. § 1920, the uniform standard Congress intends federal courts to follow in assessing costs, omits mediation from its "exhaustive list of what costs may be assessed" and 4) Fed. R. Civ. P. 54(d) does not explicitly grant authority to tax costs against the prevailing party).

Cook Children's Medical Center v. New England PPO Plan of General Consol. Management Inc., 491 F.3d 266 (5th Cir. 2007) (refusing to tax mediation costs and explicitly noting that mediators are not court-appointed experts). **" from the Court:** [I]n contrast to guardians *ad litem*, mediators lack the essential characteristics of court appointed experts....First, the role of mediators is to facilitate negotiations between the parties in an unbiased manner, not to liaise with the court. As a result, mediators "usually deal[] directly with the parties" during mediation and need not communicate with the court at all....In addition, because the discussions in mediation are frequently confidential, it is questionable whether a mediator could ethically communicate an opinion to a court at all."

Corwin v. Walt Disney Co., 468 F.3d 1329 (11th Cir. 2006) (finding no basis for trial court to allow mediation costs to be taxed under 28 U.S.C. § 1920), *opinion vacated and superseded on reconsideration*, 475 F.3d 1239 (11th Cir. 2007) (affirming award of costs because trial court, absent proof of excusable neglect to justify late filing, properly declined to consider merits of cost objections).

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

In re Anonymous, 283 F.3d 627 (4th Cir. 2002) (in an arbitration over a fee dispute between an attorney and client stemming from attorney's representation in an earlier successful mediation, disclosures made by the client and attorney of information obtained during the earlier mediation violated confidentiality provisions of local court rules, but these violations did not warrant sanctions; limited additional disclosures by the attorney and client would be authorized since non-disclosure would cause manifest injustice, but disclosure by the mediator, to whom a stricter confidentiality standard applied, would not be allowed).

In re Fletcher, 424 F.3d 783 (8th Cir. 2005) (affirming suspension of attorney from practice for three years for a pattern of demeaning and abusive behavior while participating in depositions and mediation, including the use of profanity in one mediation and the threat in another to publicize confidential information that his client had illicitly photocopied), *reh'g and reh'g en banc denied* (Nov. 10, 2005), *cert. denied*, 547 U.S. 1071 (2006).

Lucas Auto. Eng'g, Inc. v. Bridgestone/Firestone, Inc., 275 F.3d 762 (9th Cir. 2001) (affirming district court imposition of sanctions for defendant's failure to attend mediation due to "incapacitating headache," where defendant failed to notify parties beforehand of his nonappearance).

Mota v. Univ. of Tex. Houston Health Sci. Ctr., 261 F.3d 512 (5th Cir. 2001) (although Title VII supports the award of investigation fees as a reasonable out-of-pocket expense for a prevailing plaintiff, mediation costs do not fall within the limited category of expenses taxable under Title VII).

Negron v. Woodhull Hosp., 173 F. App'x 77 (2d Cir. 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."

Peoples Mortgage Corp. v. Kan. Bankers Sur. Co., 62 F. App'x 232 (10th Cir. 2003) (affirming award of attorneys fees against insurance company for failure to pay a claim without just cause

or excuse, in part for insurer's unreasonable refusal to participate in mediation at which the parties discussed the basis for the claim).

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

Quintana v. Jenne, 414 F.3d 1306 (11th Cir. 2005) (affirming district court's award of attorney's fees for defense of frivolous retaliation claim in discrimination lawsuit, where it was unknown whether value of employer's mediation settlement offer was of a sufficient amount to support a determination that plaintiff's claim was not frivolous and noting the absence of authority precluding consideration of settlement offers made during mediation on the frivolity issue).

Scott v. K.W. Max Investments, Inc., 256 Fed.Appx. 244 (11th Cir. 2007) (unpublished) (finding no jurisdiction over appeal of granting of sanctions for failing to attend mediation in person, rather than by phone, where party failed to include issue in notice of appeal).

T.D. v. LaGrange Sch. Dist. No. 102, 349 F.3d 469 (7th Cir. 2003) (mediated settlement of Individuals with Disabilities Education Act claim does not confer "prevailing party" status on a child for purposes of right to attorney fees because agreement was not made part of a court order, was not signed by a judge, and the district court was without enforcement power over the agreement), *on remand*, No. 98C2071, 2005 WL 483415 (N.D. Ill. Feb. 28, 2005).

Tokerud v. Pac. Gas & Elec. Co., 25 F. App'x 584 (9th Cir. 2001) (holding that disclosure of mediation documents to experts violated confidentiality agreement and could result in sanctions).

E. MEDIATION-ARBITRATION/HYBRID PROCESS

Advanced Bodycare Solutions, LLC v. Thione Intl., Inc., 524 F.3d 1235 (11th Cir. 2008) (concluding that Federal Arbitration Act remedies, including mandatory stays and motions to compel, may not be invoked to compel mediation). **Quote from the Court:** "Simply stated, mediation does not resolve a dispute, it merely helps the parties do so. In contrast, the FAA presumes that the arbitration process itself will produce a resolution independent of the parties' acquiescence—an award which declares the parties' rights and which may be confirmed with the force of a judgment. That a typical mediation produces no award is highly probative evidence that an agreement to mediate a dispute is not 'an agreement to settle by arbitration a controversy' [as defined by 9 U.S.C. § 2]."

Albert M. Higley Co. v. N/S Corp., 445 F.3d 861 (6th Cir. 2006) (affirming denial of a subcontractor's motion to compel arbitration, where the parties' contract most logically could be interpreted to mean that upon failure to resolve any and all disputes by mediation, the general

contractor would have sole discretion to decide whether to use arbitration or litigate, and not, as the subcontractor had interpreted it, to exercise discretion to decide whether or not the dispute still existed and then to proceed to arbitration only).

Brooks v. Cintas Corp., 91 F. App'x 917 (5th Cir. 2004) (affirming denial of employee's motion to reconsider an adverse arbitration decision on his discrimination claim, concluding that the employer's refusal to participate in EEOC mediation was not a waiver of the arbitration provision, but noting that the refusal to mediate might be a breach of the employment agreement that could have been presented to the arbitrator).

Davis v. O'Melveny & Myers, 485 F.3d 1066 (9th Cir. 2007), *cert. dismissed by O'Melveny & Myers v. Davis*, 128 S.Ct. 1117, 169 L.Ed.2d 845 (U.S. 2008) (refusing to compel arbitration and finding dispute resolution program imposed on employees to be substantively unconscionable where, among other things, the program's claim notice provision required a demand for mediation within one year from when the claim was known or reasonably should have been known, effectively disallowing claims for continuing violations).

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

In re Anonymous, 283 F.3d 627 (4th Cir. 2002) (in an arbitration over a fee dispute between an attorney and client stemming from attorney's representation in an earlier successful mediation, disclosures made by the client and attorney of information obtained during the earlier mediation violated confidentiality provisions of local court rules, but these violations did not warrant sanctions; limited additional disclosures by the attorney and client would be authorized since non-disclosure would cause manifest injustice, but disclosure by the mediator, to whom a stricter confidentiality standard applied, would not be allowed).

Kemiron Atlantic, Inc. v. Aguakem International, Inc., 290 F.3d 1287 (11th Cir. 2002) (parties' failure to request mediation, which was condition precedent to arbitration under the parties' contract, precluded enforcement of the arbitration clause). **Quote from the Court:** "The FAA's policy in favor of arbitration does not operate without regard to the wishes of the contracting parties. [citation omitted]. Here, the parties agreed to conditions precedent before arbitration can take place and, by placing those conditions in the contract, the parties clearly intended to make arbitration a dispute resolution mechanism of last resort....Because neither party requested mediation, the arbitration provision has not been activated and the FAA does not apply." 290 F.3d at 1291.

Patten Grading & Paving, Inc. v. Skanska USA Bldg., Inc., 380 F.3d 200 (4th Cir. 2004) (reversing trial court denial of defendant's motion to compel arbitration and finding no waiver of right to arbitrate where defendant in construction contract dispute voluntarily engaged in the litigation process for over eight months, the parties had conducted discovery, had participated in court-ordered mediation, and had a motion decided before the court). **Quote from the Court's Majority Opinion:** "Given the comparatively restrained pre-trial activity engaged in by [defendant], the strong policy favoring arbitration, and the heavy burden borne by the non-

movant, we cannot conclude that [plaintiff] has made the requisite showing of prejudice." **Quote from the Court's Dissenting Opinion:** "Regardless whether these factors alone would be sufficient for the court to find [defendant] waived its right to compel arbitration, the court finds that because [plaintiff] has thus far expended Five Thousand Eight Hundred Sixty-Two Dollars and Fifty-Two Cents (\$5,862.52) to prosecute its case, compelling arbitration would result in actual prejudice to [plaintiff]. This prejudice is highlighted by the fact that [plaintiff] represents to the court it would be required to pay a substantial initial fee to engage the American Arbitration Association. Although the court is aware of the federal policy favoring arbitration, in this case the court finds that denial of [defendant's] motion to compel arbitration is appropriate based on the facts"

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

Scaffidi v. Fiserv, Inc., 218 F. App'x 519 (7th Cir. 2007) (unpublished decision) (finding no waiver of right to arbitrate where delay in filing request for arbitration was caused by the parties' attempts at mediation, and moving party demanded arbitration just one month after filing of federal complaint and formally moved to compel arbitration one month later), *reh'g and reh'g en banc denied* (April 11, 2007).

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

Baldwin Hills Med. Group v. L.A. County Metro. Transp. Auth., 196 F. App'x 567 (9th Cir. 2006) (refusing to disqualify a judge based on a claim that the mediator said the trial judge was "a conservative Republican and had no intention of letting this matter get to trial"), *petition for cert. filed*, 75 U.S.L.W. 3598 (U.S. Dec. 11, 2006)(No. 06-1425).

St. Paul Fire & Marine Ins., Co. v. Vedatech Int'l, Inc., 245 F.Appx. 588 (9th Cir. 2007) (unpublished) (affirming award of sanctions against a *pro se* defendant based on his repeated requests for extensions and admission that his pleadings of mediator misconduct were inaccurate and incomplete, and also affirming that the mediator was "fulfilling a quasi-judicial function intimately related to the judicial process" and thus entitled to immunity from suit).

Zhu v. Countrywide Realty Co., Inc., 66 Fed. Appx. 840, No. 02-3087, 2003 WL 21399026 (10th Cir. June 18, 2003) (enforcement of mediated settlement of Fair Housing Act claims is not unconscionable merely because plaintiff asserts settlement was inadequate to cover her medical expenses and other damages, where she was represented by counsel at the mediation and the record demonstrated she understood and agreed to the settlement; finding no impropriety in the same magistrate judge serving as both mediator and later as judge recommending enforcement of settlement; concluding there was no violation of mediation confidentiality rules where the magistrate revealed settlement negotiations in deciding the plaintiff's motion to reopen as the

disclosure was necessary to evaluate plaintiff's challenge to the settlement agreement), *cert. denied* 124 S. Ct. 1083 (January 12, 2004).

G. MISCELLANEOUS

Babasa v. LensCrafters, Inc., 498 F.3d 972 (9th Cir. 2007) (remanding removed case as untimely, where letter sent in anticipation of mediation provided sufficient notice of amount in controversy to begin running of the thirty day time period to remove the case; noting that federal, rather than state, privilege law would control the question of admissibility of the letter but also noting that defendant waived any argument on admissibility by failing to raise the issue before the trial court. **Quote from the Court:** "State law does not supply the rule of decision here. Federal law governs the determination whether a case exceeds the amount in controversy necessary for a diversity action to proceed in federal court."

ALSO LISTED UNDER CONFIDENTIALITY

Cloutier v. Costco Wholesale Corp., 390 F.3d 126 (1st Cir. 2004) (declining to address on a limited summary judgment record whether a post-termination offer extended during the EEOC mediation process can ever be a reasonable accommodation, and instead affirming dismissal of employee's religious discrimination claims on alternate grounds that the only accommodation acceptable to the employee would pose an undue hardship on the employer), *cert. denied*, 545 U.S. 1131 (2005).

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

EEOC v. Jefferson Dental Clinics, PA, 478 F.3d 690 (5th Cir. 2007) (concluding that attendance by two EEOC lawyers at mediation of plaintiff's state law claims and by one EEOC lawyer at subsequent state trial, was insufficient showing of control over litigation to support finding of privity between parties to allow application of *res judicata* to bar claims for injunctive and equitable relief by the EEOC in subsequent federal court litigation). **Quote from the Court:** "The EEOC explains that its lawyers attended the mediation so that [the defendant employer] could potentially settle all of the disputes at one time. This type of informal participation in the prior trial and mediation by the EEOC's attorneys does not constitute control sufficient to establish privity."

Filius v. Potter, 176 F. App'x. 8 (11th Cir. 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).

Gaviria v. Reynolds, 476 F.3d 940 (D.C. Cir. 2007) (finding no abuse of discretion in failure to appoint new pro bono counsel in medical malpractice case, where plaintiff previously had benefit

of pro bono counsel for limited purpose of mediation and that mediation counsel had assisted with discovery which was now completed).

George v. McClure, 87 F. App'x 914 (4th Cir. 2004) (affirming dismissal of federal claims brought in connection with partnership break-up despite allegation that a related state court action was dismissed only by virtue of fraudulent misrepresentations made during mediation because the state case dismissal based on a mediated settlement had res judicata effect which could be collaterally attacked only on the ground of extrinsic, not intrinsic, fraud). **Quote from the Court:** "Plaintiff contends that Defendant's misrepresentations constituted fraud upon the court due to the fact that the misrepresentations were made during the court-ordered mediation. While the mediation was court ordered, the settlement was not. Plaintiff was not required to settle and was entitled to proceed with his suit. Plaintiff, however, elected to settle and with that election voluntarily accepted a certain level of risk that the facts as represented by Defendant may not be accurate. Such risk is inherent in every decision to settle prior to full discovery and does not constitute fraud upon the court."

Heffington v. Sedgwick County Dist. Court, No. 05-3372, 2007 WL 211280 (10th Cir. Jan. 29, 2007) (affirming trial judge determination that magistrate's scheduling order which according to plaintiff required mediation, did not take precedence over or preclude the trial judge's order of dismissal filed the same day).

Kay v. Likins, 160 F. App'x 605 (9th Cir. 2005) (rejecting University employee's procedural due process challenge to her termination, where "she was given ample opportunity and notice to mediate the dispute with the University and to defend against the allegations with an attorney at administrative hearings").

Ky. Nat'l Ins. Co. v. Lawrence, 187 F. App'x 423 (6th Cir. 2006) (affirming trial court decision that plaintiff insurer had a duty to insure under the policy, but not deciding whether the trial court erred in concluding that the insurer was estopped from denying coverage and effectively waived exclusion rights based on its attorney's representations made at an unsuccessful mediation).

Labor/Cnty. Strategy Ctr. v. L.A. County Metro. Transp. Auth., 263 F.3rd 1041 (9th Cir. 2001) (consent decree authorizing court appointed special master to "resolve" disputes, empowers the special master to act as a decision-maker and not just as a mediator), *cert. denied*, 535 U.S. 951 (2002).

Martinez v. State Farm Lloyds, 204 F. App'x 435 (5th Cir. 2006) (ruling that the statute of limitations began to run when the insurance company sent its final determination of the claims and was not extended by the insurance company's discussing possible mediation).

Montgomery v. U.S. Postal Serv., 177 F. App'x 963 (11th Cir.) (affirming trial court conclusion that plaintiff was not unfairly surprised at trial by evidence regarding reasons for him not being hired, where the reasons were discussed in an EEOC mediation prior to the lawsuit, and the employer's interrogatory responses during discovery so lacked detail that it "should have been obvious" to the plaintiff to seek elaboration), *reh'g and reh'g en banc denied*, 186 F. App'x. 984 (11th Cir.), *cert. denied*, 127 S. Ct. 513 (2006).

Motiva Enterprises, L.L.C. v. St. Paul Fire & Marine Ins. Co., 445 F.3d 381 (5th Cir.) (affirming that an insurer's failure to tender an unqualified defense on behalf of an insured did not excuse enforcement of a consent to settlement clause in the insurance policy, and further concluding that the insured breached the consent to settlement clause and would be foreclosed from seeking reimbursement for amounts owed on a mediated settlement, where the insured excluded the insurance representative from the mediation), *reh'g and reh'g en banc denied*, 457 F.3d 459 (5th Cir. 2006).

Mudrick v. Cross Equipment Ltd., 250 Fed.Appx. 54 (5th Cir. 2007) (unpublished) (relying in part on mediation position statements to prove decedent's status as Jones Act seaman).

National Union Fire Ins. Co. of Pittsburg, PA v. General Star Indemnity Co., No. 05-3392, 2007 WL 495018 (3d Cir. Feb. 16, 2007) (concluding it was harmless error for the district court to misstate the mediator's valuation of the case as support for its conclusion that pre-trial written notice of potential liability in excess of policy limits should have been issued, where the written notice provision of the insurance policy was triggered only after a favorable jury verdict).

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).

Sammons v. Polk County Sch. Bd., 165 F. App'x. 750 (11th Cir. 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).

Texas v. United States, 497 F.3d 491 (5th Cir. 2007) (holding that the Secretary's Class III Procedures for regulating gambling in the Indian Nation was not a reasonable interpretation of the Indian Gaming Regulatory Act, because: 1) the act conferred upon the Secretary the ability to require the state to attend mediation without a prior finding of bad faith negotiation; 2) empowers the Secretary to unilaterally choose the mediator which creates a strong impression of bias, and 3) permits the Secretary to disregard a mediator's proposal).

Torres v. Am. Employers Ins. Co., 151 F. App'x 402 (6th Cir. 2005) (affirming dismissal of plaintiff's state law claims of illegal and tortious conduct by defendant insurance companies during mediation of an underlying tort claim relating to pool construction, where sole basis for claims against the insurers was fact that defendants' counsel in the underlying tort claim initially denied there were any coverage defenses or coverage questions, but defendants' insurers' counsel later raised the possibility of such issues at a mediation, which plaintiff then terminated), *reh'g denied* (Oct. 25, 2005).

Twin City Fire Ins. Co., Inc. v. Ohio Cas. Ins. Co., Inc., 480 F.3d 1254 (11th Cir. 2007) (considering the insurer's failure to participate in mediation as evidence of waiver of a no-action clause.)

Vigil v. South Valley Academy, 247 Fed.Appx. 982 (10th Cir. 2007) (unpublished) (citing fact that employee negotiated circumstances of her departure from employment during a mediation as evidence that she received due process).

Young v. Fed. Mediation & Conciliation Serv., 66 F. App'x 858 (Fed. Cir. 2003) (holding that the veterans preference law does not extend to mediators for the Federal Mediation & Conciliation Service, because by statute mediators are appointed without regard to the federal civil service laws).