

8-11-2008

Mediation Case Law Project 1999-2007 Master List (Sorted by Subject Matter of Case)

James Coben
Hamline University

Peter Thompson
Hamline University

Follow this and additional works at: http://digitalcommons.hamline.edu/dri_mclsummaries



Part of the [Dispute Resolution and Arbitration Commons](#)

Recommended Citation

Coben, James and Thompson, Peter, "Mediation Case Law Project 1999-2007 Master List (Sorted by Subject Matter of Case)" (2008).
Mediation Case Law Summaries. Paper 2.
http://digitalcommons.hamline.edu/dri_mclsummaries/2

This PDF is brought to you for free and open access by the DRI Practice Projects at DigitalCommons@Hamline. It has been accepted for inclusion in Mediation Case Law Summaries by an authorized administrator of DigitalCommons@Hamline.



Innovative Programs at home & abroad

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

SORTED BY SUBJECT MATTER OF CASE

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

Table of Contents

A. THE ENFORCEMENT OF MEDIATED SETTLEMENTS 1
B. CONFIDENTIALITY 42
C. DUTY TO MEDIATE/COND. PRECEDENT/COURT POWER TO COMPEL..... 68
D. SANCTIONS/ATTORNEY'S FEES/MEDIATION COSTS..... 83
E. MEDIATION-ARBITRATION/HYBRID PROCESS 101
F. ETHICS/MALPRACTICE (Lawyer/Neutral/Judicial) 113
G. MISCELLANEOUS 125

A. THE ENFORCEMENT OF MEDIATED SETTLEMENTS

Academy Homes of Tyler, Ltd. v. Lakeside Park Homes, Inc., No. 6:06-CV-159, 2007 WL 1428662 (E.D. Tex. May 11, 2007) (finding lack of jurisdiction to enforce parties’ settlement agreement that was not incorporated into the court’s dismissal order).

Acosta v. Trans Union, LLC, 243 F.R.D. 377 (C.D. Cal. 2007) (denying class action settlement approval where objecting plaintiffs did not participate in, and were never informed of, initial mediation sessions that led to agreement).

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.

Addesa v. Addesa, 919 A.2d 885 (N.J. Super. Ct. App. Div. April 13, 2007) (finding trial court erred in ordering family mediator to be deposed and his written records examined in a dispute over conscionability of marital termination settlement, concluding that ‘private mediations must remain confidential or they will have no beneficial impact’, but nonetheless affirming trial court conclusion that agreement should be vacated as unconscionable even though defendant wife acted unreasonably in failing to retain an attorney and an appraiser for the mediation). **Quote from the Court:** “As the parties decided to engage in voluntary mediation in order to avoid the costs and expenses related to counsel and litigation, defendant’s failure to retain counsel cannot be held against her, particularly where her husband had a contractual and moral obligation to be open and honest, and he suggested or believed that the family could be spared the expense of counsel. The mediation was intended to be a joint effort to amicably resolve the dissolution of the parties’ marriage and to do so at minimal cost. In any event, we have detailed why the record supports Judge Farber’s finding of unconscionability and believe that a property settlement agreement resulting from a voluntary mediation, like any privately negotiated PSA, may be reformed where there is unconscionability, fraud, or mistake and concealment. Indeed, there may be more reason to apply the principle in this context, since the mediator has no authority to compel disclosure and the process is dependent upon the candor and forthrightness of the parties.”

ALSO LISTED UNDER CONFIDENTIALITY

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

Alexander v. Nadin, 130 Wash. App. 1036 (2005) (upholding trial court’s enforcement of mediated settlement agreement in face of one party’s claim of mental incapacity to contract, finding that “a history of mental incapacity or even allegations of mental instability at the moment of signing are insufficient offers of proof”; instead, a party must provide expert testimony “that she was unable to understand what she was doing when she signed”), *rev’d*, 142 P.3d 608 (Wash. 2006) (unpublished table decision).

Ammons v. Cordova Floors, Inc., 904 So. 2d 185 (Miss. Ct. App. 2005) (affirming enforcement of mediated settlement agreement, where homeowners waived procedural objection to the trial court’s consideration of conflicting affidavits on issue of whether a meeting of the minds occurred between the parties, and where the preponderance of evidence supported the trial court’s finding that a mediated settlement had been reached between the homeowners and their contractor when immediately after the mediation the contractor delivered building materials and homeowners in turn delivered a check in payment).

Anderton v. Schindler, 154 S.W.3d 928 (Tex. App. 2005) (finding mediation agreement enforceable based on contract law), *rule 53.7(f) motion granted* (June 9, 2005).

Arze v. Arze, No. E2004-01325-COA-R3-CV, 2005 WL 1212609 (Tenn. Ct. App. May 23, 2005) (enforcing a voluntary mediated settlement agreement in which the father agreed to pay child support, even though the trial court could not have ordered the father to pay support had there been a trial where the father was designated the primary residential parent).

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 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.”

Bardowell v. Davidian, No. B168104, 2005 WL 503972 (Cal. Ct. App. Mar. 4, 2005) (finding oral mediation agreement binding because the agreement was presented in open court and both parties affirmed the agreement), *rev'd* (May 18, 2005).

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).

Berg v. Bregman, No. B149130, 2002 WL 31256677 (Cal. Ct. App. Oct. 8, 2002) (rejecting duress, undue influence and fraud charges even though party's car was struck and sustained significant damage during mediation, the mediation was long and difficult, and the party was taking Prozac at the time she signed the mediated settlement agreement).

Bernard-Thomas Bldg. Sys., LLC. v. Weitz Co., No. CIV.A. 3:04CV810CFD, 2005 WL 734175 (D. Conn. Mar. 28, 2005) (enforcing an unequal contractual mediation provision because the parties were knowledgeable and sophisticated).

Beyers v. Roberts, 199 S.W.3d 354 (Tex. App. 2006) (enforcing a child custody order based on a mediated settlement agreement that did not designate a conservator who could decide the primary residence of the child as required by state statute governing parenting plans (Tex. Fam. Code Ann. § 153.133 (a)(1)), because the mediated settlement agreement was made enforceable under a more general statute (Texas Fam. Code § 153.0071(e)), which makes mediated

settlement agreements enforceable if they include in prominent type that they are not revocable and the agreement is signed by each party and the party's attorney (if present); and further holding that if the mediated settlement agreement complies with this provision, the judge is not required to conduct a hearing to determine if the agreement is in the child's best interests), *reh'g overruled* (Jun 14, 2006), *rev'd* (Dec 22, 2006).

Bierce v. Shorewest Realtors, Inc., 712 N.W.2d 86 (Wis. Ct. App. 2006) (unpublished table decision) (reversing trial court enforcement of a mediation agreement where the court incorrectly redrafted an unambiguous compromise formula for determining damages into a traditional damage formula more favorable to the defendant real estate brokerage firm, rather than enforcing the plain meaning of the parties' agreement). **Quote from the Court:** "[B]ecause what the parties agreed to at mediation was a compromise different from the traditional rule of damages, in examining the purpose of the agreement and the circumstances surrounding its execution, we agree that it is not logical to conclude that the [plaintiffs] would have prepared for trial and agreed to attempt to mediate the dispute only to ultimately end the mediation with a settlement agreement that agrees to [defendant's] demands."

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]

Boardman v. Boardman, No. C7-02-974, 2002 WL 31867759 (Minn. Ct. App. Dec. 24, 2002) (permitting amendment of a mediated property settlement read into the record but not yet incorporated into a judgment where parties through mutual mistake relied on an erroneous property appraisal presented at the mediation).

Bolle, Inc. v. Am. Greetings Corp., 109 S.W.3d 827 (Tex. App. 2003) (affirming declaratory judgment which rescinded mediated settlement based on mutual mistake where overbroad mutual release of claims unintentionally included suits in other jurisdictions involving some of the same parties), *rev'd* (December 19, 2003).

Boyd v. Boyd, 67 S.W.3d 398 (Tex. App. 2002) (a mediation divorce settlement agreement is unenforceable when one spouse intentionally withholds information about community property assets despite the existence of a "catchall clause" in the agreement which provided that "any undisclosed property is specifically awarded in equal shares to the parties").

Breceda v. Whi, 187 S.W.3d 148 (Tex. App. 2006) (finding that a mediated settlement signed by one landlord and the attorney for the second landlord was summarily enforceable against both landlords, despite the missing signature and despite a claim that there was not a certified interpreter present).

Browning v. YahooA Inc., NO. C04-01463 HRL, 2007 WL 4105971 (N.D. Cal. Nov. 16, 2007) (approving class action settlement relying in part on the status and recommendation of the mediator). **Quote from the Court:** "Finally, the parties engaged in multiple rounds of mediation. As a result, the parties and this Court are well positioned to assess the strength of this case and the comparative benefits of the proposed settlement Moreover, the settlement was the product of mediation by a qualified and experienced lawyer, Rodney A. Max, who reported that the case was 'professionally, ethically, and reasonably mediated, negotiated and resolved.' The mediator recommended the settlement to the Court as being 'fair, reasonable, and adequate.'"

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).

Buntrock v. Terra, 810 N.E.2d 991 (Ill. App. Ct. 2004) (affirming trial court approval of a mediated settlement reached after four months of negotiation between current and former arts foundation directors, and rejecting contention by directors who voted in the minority against the settlement that court approval was erroneous absent the trial court's independent inquiry into the fairness, adequacy, and reasonableness of the agreement), *appeal denied*, 823 N.E.2d 963 (Ill. 2004) (unpublished table decision). **Quote from the Court:** "An appellate court will not review a consent order because an order entered by consent is no more than a court's recording of an agreement reached by the parties in settlement of a dispute and is not a judicial determination of their rights."

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).

Cain v. Saunders, 813 So. 2d 891 (Ala. Civ. App. 2001) (holding that Alabama court civil mediation rules do not prohibit a court from admitting evidence of fraud or mistake occurring during the negotiation of a mediated settlement agreement where the issue is whether that fraud or mistake impacted the resulting settlement agreement), *cert. denied* (Aug. 31, 2001).

Calderon v. J.B. Nurseries, Inc., 933 So. 2d 553 (Fla. Dist. Ct. App. 2006) (enforcing mediated settlement of a workers' compensation claim despite claimant's failure to execute releases required by the agreement), *rehearing denied* (Mar. 15, 2006), *rev'd*, 946 So. 2d 1069 (Fla. 2006) (unpublished table decision). **Quote from the Majority:** "That the claimant later refused to sign releases even though, represented by counsel, he had agreed in writing to execute 'any releases E/C may require,' made the agreement voidable at the other parties' election, but not void. Appellant could not escape the binding effect of the settlement agreement by breaching his obligation to execute a release." **Quote from the Dissent:** "In my judgment, the execution of the release was an essential element of the contract and, without such element's satisfaction, there simply could be no determination that a meeting of the minds had been accomplished."

Cantu v. Moore, 90 S.W.3d 821 (Tex. App. 2002) (enforcing a mediated settlement resolving a fee dispute between attorneys, notwithstanding claims that the agreement: 1) was conditioned on client approval of a list of additional covered claims; and 2) failed to address the source from which payment would be made and the terms of indemnity – terms which the court held were not material as a matter of basic contract law), *rev'd* (Dec. 5, 2002), *reh'g of petition for rev'd* (Jan. 30, 2003).

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.'"

Carney v. Carozza, 792 N.Y.S.2d 642 (N.Y. App. Div. 2005) (suggesting agreement based on mutual mistake may not be enforceable if there is clear and convincing evidence of the mistake).

Carpenter v. Morris, 645 S.E.2d 902 (N.C. Ct. App. 2007) (construing a release signed by plaintiff as part of a mediated settlement with a co-defendant, as drafted broadly enough to release defendant).

Carson v. Carson, No. 03-04-00521-CV, 2005 WL 2978343 (Tex. App. Nov. 4, 2005) (affirming lower court's enforcement of mediated divorce settlement in face of wife's claims of coercion and intimidation, ruling that wife was represented by counsel during mediation proceedings and no evidence established that coercion or intimidation were present).

Castano v. San Felipe Agric., Mfg., & Irrigation Co., 147 S.W.3d 444 (Tex. App. 2004) (rejecting arguments that a mediation agreement's contemplation of final documentation

rendered it unenforceable when it contained the material terms and was signed by the parties), *reh'g overruled* (Aug. 9, 2004), *rule 53.7(f) motion granted* (Oct. 22, 2004).

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.”

Cent. Puget Sound Reg'l Transit Auth. v. Branchflower, 132 Wash. App. 1011 (Ct. App. 2006) (enforcing mediated settlement of condemnation proceeding against challenge by property owner who discovered after the mediation that a government consultant had valued the property at higher than the settled amount, where the consultant's report was prepared in anticipation of mediation, the report was not subject to discovery because the consultant was a non-testifying expert, and the report was not used to establish the basis for the transit authority's offer of just compensation during the mediation), *rev'd*, 153 P.3d 195 (Wash. 2007) (unpublished table decision).

Cerbone v. Farb, 225 S.W.3d 764 (Tex. App. 2007) (finding no personal jurisdiction in an action to enforce a mediated settlement agreement of a Texas lawsuit, signed by defendant in Illinois, where defendant, an out-of-state resident, was not a named party in the underlying suit, did not travel to Texas, did not attend mediation to settle prior litigation in Texas, made no payments under the settlement, nor did the defendant receive any personal benefit from the settlement agreement).

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.”

Chesney v. Hypertension Diagnostics, Inc., No. A05-2210, 2006 WL 2256590 (Minn. Ct. App. Aug. 8, 2006) (affirming trial court conclusion that mediated memorandum agreement is binding and enforceable despite parties’ failure to complete a more comprehensive settlement document, where the memorandum agreement included Civil Mediation Act advisories and specifically noted the parties’ intent not to have their settlement be dependent on the subsequent, more comprehensive, settlement document). **Quote from the Parties’ Memorandum Agreement:** “We intend that this memorandum shall bind each of us” and “[w]hile we understand that formal documents will be prepared to facilitate the detail of our agreement contained here, we do not intend our settlement to be dependent upon our agreement as to any such detail, and agree that our agreements contained here are fully enforceable against us.”

Chavez v. Ballard, No. C045234, 2004 WL 1059291 (Cal. Ct. App. May 12, 2004) (finding enforcement of a mediation agreement that established temporary custody and visitation was not appealable, because it contemplated future mediation).

Child v. Leverton, 210 S.W.3d 694 (Tex. App. 2006) (affirming trial judge’s modification of mediated court decree relating to the residency of the children based on scant evidence of a material change (mother would have more difficulty obtaining degree, would earn less and child had become more stable in his environment) focusing on what was in the best interests of the child). **Quote from the Dissent:** “[Noting the strong public policy favoring mediation of these issues] allowing spouse to modify the decree without requiring proof of a material and substantial change in circumstance is counter to this policy.”

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).

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 Demorest v. Roberts & Dunahoo Properties, LLC, 655 S.E.2d 617 (Ga. Ct. App. 2007) (applying parole evidence rule to bar use of evidence from mediation to determine scope of mediated settlement).

City of Gary v. Conat, 810 N.E.2d 1112 (Ind. Ct. App. 2004) (enforcing mediated settlement of claims brought by injured motorist against the city despite assertion that agreement was binding

only with mayor's signature, where the city's attorney at no point before, during, or even after the mediation conference disclaimed authority to represent the city; but refusing to enforce the settlement against individual city employee because he was immune from suit when acting within the scope of employment). **Quote from the Court:** "Requiring the mayor to attend every mediation conference and to sign the settlement agreement would impede the efficiency and finality of mediation proceedings."

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).

City of San Rafael v. Zitek, Nos. A101292 & A102317, 2004 WL 2005971 (Cal. Ct. App. 2004) (finding agreement not enforceable because it was not approved by the necessary parties, material terms were not agreed to, and the parties did not treat it as binding).

Clark v. Clark, 862 N.E.2d 9 (Ind. App. 2007) (affirming trial court power to modify a mediated child support order, where husband's misrepresentation of his gross weekly income prevented his wife from seeking the correct amount of support).

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."

Cohen Schatz Assocs., Inc. v. Perry, 611 S.E.2d 229 (N.C. Ct. App. 2005) (refusing to enforce agreement not signed by one party even though that party was seeking enforcement).

Cole v. Chevron USA, Inc., No. Civ.A 206CV24KSJMR, 2007 WL 3013207 (S.D. Miss. Sep 24, 2007) (dismissing Consumer Protection Act claims by thirty-nine named plaintiffs for failure to comply with statutory requirement that the parties first participate in an informal dispute resolution process approved by the Attorney General, rejecting the argument that such a requirement was unreasonable in light of the large number of plaintiffs).

Commodity Futures Trading Com'n v. Equity Financial Group, No. CIV. 04-1512 (RBK), 2007 WL 2139399 (D. N.J. July 23, 2007) (citing fact that mediator recommended final settlement offer as evidence of its reasonableness).

Cooper v. Austin, 750 So. 2d 711 (Fla. Dist. Ct. App. 2000) (finding that wife's threat, made during mediation, to ensure husband's incarceration should he fail to settle with her, constitutes duress sufficient to vitiate mediated agreement), *reh'g denied* (Feb. 9, 2000).

Coulter v. Carewell Corp. of Okla., 21 P.3d 1078 (Okla. Ct. App. 2001) (acceptance of settlement offer at conclusion of mediation session in wrongful death action carries implied promise to subsequently sign a release; trial court did not abuse discretion in taking parole evidence, including evidence provided by the mediator, to determine parties' intent regarding the release). **Quote from the Court:** “[The mediator] attested that it was his custom to advise that the attorneys would prepare a release and a dismissal with prejudice which would be exchanged for the settlement amount. He stated, ‘I have no reason to believe that I did not make the same comments to the parties in this action at the close of mediation, and I am confident that the parties understood that the attorneys would prepare a Dismissal with Prejudice as well as a Release of all Claims to be executed by the Plaintiff.’”

Crump v. Crump, No. 05-04-0515-CV, 2005 WL 2841146 (Tex. App. Oct. 31, 2005) (reversing probate court's enforcement of mediated settlement agreement, ruling that one party had withdrawn her consent prior to the judgment by the court, meaning the judgment was not an agreed entry).

Crupi v. Crupi, 784 So. 2d 611 (Fla. Dist. Ct. App. 2001) (holding that although party may traditionally challenge post-nuptial agreement on grounds of fraud, duress, coercion, misrepresentation, overreaching or "unfairness", when post-nuptial agreement is created through mediation, a party may challenge only on the bases of fraud, misrepresentation or coercion but not on the basis of "unfairness").

C.T. ex rel. D.T. v. Vacaville Unified Sch. Dist., No. CV.05 06 197 FCD JFM, 2006 WL 2092613 (E.D. Cal. July 27, 2006) (finding that a mediation agreement settling an IDEA claim may be enforced in either state or federal court and requires no specific language in the agreement referring to federal court enforcement).

Daniels v. Daniels, --- So.2d ----, 2007 WL 2893755, Ala. Civ. App., October 05, 2007 (NO. 2060348) (affirming denial of motion to set aside mediated settlement where moving party failed to present evidence of the status of his mental health in support of the motion).

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”).

D.B. v. W.J.P., 962 So.2d 949 (Fla. Dist. Ct. App. 2007) (holding when the mediation is between parents and a third party the parent can withdraw consent to a mediation agreement granting temporary custody to the grandmother anytime before the court approved the agreement based on the parental preference), *reh'g denied*, No. 5D07-910, 2007 Fla. App. LEXIS 14632 (Fla.

Dist. Ct. App. Aug. 22, 2007), *rev'd*, No. SC07-1659, 2007 Fla. LEXIS 2029 (Fla. Oct. 26, 2007).

De Gonzalez v. Maese-Nevarez, 160 S.W.3d 280 (Tex. App. 2005) (refusing to find that an earlier mediation agreement resolving some issues established the law regarding property distribution that was still pending before the court).

Delyanis v. Dyna-Empire, Inc., 465 F. Supp. 2d 170 (E.D.N.Y. 2006) (finding that a handwritten mediator-drafted agreement to settle, that was signed by the parties and attorneys was not enforceable because it specifically stated that it was "not intended to be a legally enforceable settlement agreement"; but the parties' subsequent emails stating the intent to be bound constituted an enforceable settlement agreement).

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").

DePass v. DePass, 839 N.Y.S.2d 609 (N.Y. App. Div. 2007) (setting aside a default judgment for divorce against the defendant based on a mediated separation agreement prepared by a mediator who was a friend of the plaintiff, the favorable terms towards the plaintiff, and the plaintiff's efforts to answer before the default judgment was entered).

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).

Domangue v. Domangue, No. 12-04-00029-CV, 2005 WL 1828553 (Tex. App. Aug. 3, 2005) (upholding mediated divorce settlement agreement in face of wife's claims that she was incompetent to enter into the agreement, finding that the issue of "mental capacity is to be determined as of the time of the execution of the mediated settlement agreement" and holding that the trial court "impliedly found that [the wife] did not overcome the presumption of capacity when it granted the divorce and entered judgment on the mediated settlement agreement").

Dows v. Nike, Inc., 846 So. 2d 595 (Fla. Dist. Ct. App. 2003) (reversing trial court and refusing to enforce a pre-suit mediation agreement as merely evincing the parties' unenforceable agreement to agree, where the mediation established a three tiered settlement structure for resolving a negligence claim against a sports shoe manufacturer that was dependent upon a subsequent independent examining physician's opinions on the nature and prognosis of the injury), *reh'g denied* (June 17, 2003).

DR Lakes Inc. v. Brandsmart of USA of West Palm Beach, 819 So. 2d 971 (Fla. Dist. Ct. App. 2002) (reversing trial court and remanding for trial after concluding that statutory mediation confidentiality protections are inapplicable to preclude testimony by the parties and mediator in enforcement proceeding alleging clerical error due to mutual mistake), *on remand*, No. CL98-9922AI, 2003 WL 25552927 (Fla. Cir. Ct. Nov. 19, 2003), *aff'd*, 901 So. 2d 1004 (Fla. Dist. Ct. App. 2005). **Quote from the Court:** "The reason for confidentiality as to statements made during mediation where a settlement agreement is not reached is obvious. Mediation could not take place if litigants had to worry about admissions against interest being offered into evidence at trial, if a settlement was not reached. Once the parties in mediation have signed an agreement, however, the reasons for confidentiality are not as compelling."

Durham v. Durham, No. 03-03-00303-CV, 2004 WL 579224 (Tex. App. Mar. 25, 2004) (holding a wife's claims of duress and fraud insufficient to overturn mediated settlement agreement).

Edens v. Edens, 109 P.3d 295 (N.M. Ct. App. 2005) (affirming trial court's denial of motion to set aside alimony provision of mediated marital settlement agreement based on claims of fraud and misrepresentation, where husband agreed to a lump sum payment based on his and wife's expected future income, but wife's actual post-divorce income was substantially higher than the expected income figure used during the mediation), *cert. denied*, 110 P.3d 506 (N.M. 2005) (unpublished table decision).

Elliott v. Fedich, No. C044226, 2004 WL 1775643 (Cal. Ct. App. Aug. 10, 2004) (enforcing an oral mediation agreement under Section 664.6).

Endre v. Bancorp Bank, No. 606CV-1696-ORL-19KRS, 2007 WL 3023980 (M.D. Fla. Oct. 15, 2007) (filing of mediated settlement agreement in the public record voids the agreement's confidentiality provision, but does not preclude settlement enforcement by virtue of agreement's severability provision).

ALSO LISTED UNDER CONFIDENTIALITY

Eng'r v. Eng'r, 187 S.W.3d 625 (Tex. App. 2006) (reversing a trial court decision to enter a divorce decree and property settlement that differed from the mediated settlement agreement). **Quote from the Court:** "[A] court may either enter a property division agreement in its entirety or decline to enter it at all, but has no discretion to change such an agreement before entering it."

Envtl. Abatement, Inc. v. Astrun R.E. Corp., 27 S.W.3d 530 (Tenn. Ct. App. 2000) (party's oral consent to agreement reached at mediated settlement conference is subject to withdrawal because

it was not made on the record or "in open court"), *appeal denied and recommended for publ'n* (Sept. 11, 2000).

Epling v. Liberty Mut. Ins. Co., No. 2005-CA-001695-MR, 2007 WL 1954107 (Ky. Ct. App. July 06, 2007) (denying the insurance company's subrogation claim where the company failed to disclose amounts paid previously under the policy and holding a mediation settlement agreement enforceable because the other parties relied on the finality of the agreement, the pay out was not mentioned in mediation, and the insurance company failed to tell their attorney of any amount paid).

E.S. ex rel. S.S. v. Indep. Sch. Dist. No. 271, No. A05-2298, 2006 WL 1985571 (Minn. Ct. App. July 18, 2006) (affirming approval of a mediated minor settlement in a sexual abuse case brought against a school district based on the actions of its janitor, but reversing the trial court's refusal to include specific settlement language characterizing the claim as involving bodily and physical harm as defined by the tax code). **Quote from the Court:** "A fair reading of appellant's suggested language is that the district court would be simply acknowledging the fact that the claim was brought as a claim of battery and the parties' mutual intent concerning future tax treatment of the damages received. The settling parties concede that the Internal Revenue Service is the ultimate decisionmaker in matters of taxation. The district court is not constrained on remand to use this specific language in its order. But because the district court has determined that the settlement is fair and reasonable for appellant and because the district court is being asked only to acknowledge the parties' intent with respect to the ultimate tax treatment of the damages, we ask the district court on remand to use language that acknowledges the parties' intent."

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").

Estate of Barber v. Guilford County Sheriff's Dep't, 589 S.E.2d 433 (N.C. Ct. App. 2003) (1. A plaintiff's obligation not to defame a wrongful death action defendant is not unenforceable as a prior restraint on speech, where record showed the mediated agreement was based on a knowing, voluntarily and intelligent waiver of constitutionally protected rights; 2. A trial court is without authority to sanction a party for violation of a mediated settlement, because sanctioning power only extends to violation of mediation rules themselves, such as attendance; and 3. [O]nce a defendant voluntarily dismisses claims with prejudice as part of a mediated settlement, the court is without power to enforce the settlement absent defendant's motion to withdraw the voluntary dismissal or the bringing of a new court action based on breach of contract).

Etter v. Pigg, 623 S.E.2d 368 (N.C. Ct. App. 2006) (unpublished table decision) (finding that where a mediated settlement agreement is not incorporated into a consent judgment the agreement is not subject to a Rule 60 motion, and that a subsequent motion to enforce the

mediated settlement agreement should not be based on the trial judge's ruling on the Rule 60 motion.), *on remand to*, No. 01-SP-287, 2006 WL 4386425 (N.C. Super. Ct. Mar. 25, 2006). **Quote from the Court:** "[M]ediated settlement agreements are governed by general principles of contract law. A party to a settlement agreement has 'two options in deciding how to specifically enforce the terms of the settlement agreement . . . (1) take a voluntary dismissal of his original action and then institute a new action on the contract, or (2) seek to enforce the settlement agreement by petition or motion in the original action.' Here, the settlement agreement was never reduced to a consent order and petitioner did not attempt to enforce the terms of the settlement agreement until [after the judge's] order denying respondents' Rule 60(b) motion." [Citations omitted].

Fast v. Moore, 135 P.3d 387 (Or. Ct. App. 2006) (finding mediated Post Adoption Communication Agreement unenforceable if not approved by the court as part of the adoption proceeding).

F.D.I.C. v. White, 76 F. Supp. 2d 736 (N.D. Tex. 1999) (alleged threat of criminal prosecution made by government attorney during mediation found insufficient to establish duress or coercion necessary to set aside settlement agreement reached in mediation, where evidence established that defendants were concerned about potential criminal exposure long before the mediation, the defendants themselves sought non-prosecution agreement during the course of the settlement negotiations, and defendants agreed to the settlement even after their request was rejected by the government attorney).

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

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."

Foreman v. Foreman, 701 N.W.2d 167 (Mich. Ct. App. 2005) (affirming jury award of \$1.4 million for husband's fraud in connection with representations made during divorce mediation, including false statements about the value of his automobile dealership, his intention to keep operating the dealership, and his desire to retain the parties' vacation home), *appeal denied*, 714 N.W.2d 288 (Mich. 2006), *reconsideration denied*, 717 N.W.2d 881 (Mich. 2006).

F.W.F., Inc. v. Detroit Diesel Corp., 494 F. Supp. 2d 1342 (S.D. Fla. 2007) (applying federal maritime law in an action to enforce a mediated settlement agreement of a suit by a yacht owner against the manufacturer for failure to repair the yacht engine).

Garcia-Udall v. Udall, 141 S.W.3d 323 (Tex. App. 2004) (reversing a trial court judgment that differed from the terms of the agreement without a finding that the provisions were illegal and noting the family code statutes on mediation do not allow a court to modify an agreement even if it is in the best interest of the child).

Garcia v. Wallace, No. 04-98-00066-CV, 1999 WL 391846 (Tex. App. June 16, 1999) (holding that a mediated agreement is a contract that can be breached, not a consent decree).

Gardner v. Gardner, 229 S.W.3d 747 (Tex. App. May 09, 2007) (finding trial judge abused its discretion in modifying mediated summer possession agreement absent a material and substantial change in conditions).

Garrett v. Delta Queen Steamboat Co., Inc., No. CIV.A. 05-1492-CJB-S, 2007 WL 837177 (E.D. La. March 14, 2007) (1. denying recusal motion based solely on party's concern that judge who had participated in a mediation with attorneys would be so vested in the outcome of the settlement to be prejudiced in evaluating the settlement's validity; and 2. holding oral settlement of maritime personal injury case enforceable). **Quote from the court:** "The undersigned appreciates the importance of this case to Mr. Garrett. It is his only case. It is not, however, the only the case referred to the undersigned for a settlement conference. It was not an exceptional case nor did it require exceptional effort on the undersigned's part. If Garrett's position were accepted, then any judge or magistrate judge who conducted a settlement conference would be precluded in all such cases from considering the validity of the settlement. Section 455(a) does not command this result. It is recommended that the motion to recuse be denied."

Gay v. Aramark Uniform and Career Apparel, Inc., No. CIV.A. H-07-1161, 2007 WL 4190781 (S.D. Tex. Nov. 21, 2007) (granting summary judgment to enforce a mediated settlement against

charges of economic duress and a claim that the release was ambiguous). **Quote from the Court:** “Aramark contends that Momon voluntarily and knowingly executed the release in exchange for receiving a settlement payment and that she has neither identified nor submitted evidence of fraud, duress, or incompetence. Although Momon asserts that she needed the money so badly that she felt compelled to sign the release, Aramark argues that such personal financial hardship does not rise to the level of economic duress. Aramark also points out that the settlement and release were negotiated during an EEOC mediation, when Momon had the assistance of an EEOC investigator, and that she accepted and kept the \$3,923.20 Aramark paid. * * *Momon's contention that she signed the release, “without the benefit of counsel or an explanation,” does not raise a fact issue as to whether the release is valid or enforceable.

Gelfand v. Gabriel, No. B152557, 2002 WL 1397037 (Cal. Ct. App. June 27, 2002) (rejecting a party's challenges to mediated settlement agreement based on misrepresentation and lack of signature and finding that signature could be made *nunc pro tunc* and discovery of facts after mediation does not constitute misrepresentation).

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."

Golden v. Hood, No. E1999-02443-COA-MR3-CV, 2000 WL 122195 (Tenn. Ct. App. Jan. 26, 2000) (plaintiff failed to establish prima facie case for duress sufficient to vacate mediated settlement merely by asserting that his attorney threatened withdrawal if plaintiff did not accept the settlement; psychologist's statement that plaintiff was receiving weekly treatment for depression and was “submissive” when being unduly pressured by others found insufficient to establish lack of capacity; allegations that mediator and attorneys falsely stated possible maximum recoveries held insufficient to establish ground for rescission where record does not establish that plaintiff would have likely received more than settlement amount had he proceeded to trial).

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.

Golka v. Brockton Family Life Ctr., Inc., Nos. 291637 & 293197, 2005 WL 1864148 (Mass. Land Ct. Aug. 8, 2005) (enforcing a mediated settlement agreement regarding a property easement despite plaintiff's claim of "mistake," where the mistake was actually "an opinion respecting future conditions as a result of present facts (a misapprehension of the consequences of [the] agreement)—and thus not a 'mistake' sufficient to void the agreement"), *judgment entered*, Nos. 291637 & 293197, 2005 WL 1864147 (Mass. Land Ct. Aug. 8, 2005).

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).

Goodrich Corp. v. Autoliv ASP, Inc., No. A106077, 2005 WL 535370 (Cal. Ct. App. Mar. 8, 2005) (finding mediation agreement was unenforceable because the resolution of a material issue was ambiguously drafted and the parties disagreed on its interpretation).

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

Griffin v. Wallace, 581 S.E.2d 375 (Ga. Ct. App. 2003) (refusing to enforce alleged settlement of probate dispute where fact issue remained as to whether offer made in mediation was still open for acceptance nearly two months later).

Guthrie v. Guthrie, 577 S.E.2d 832 (Ga. Ct. App. 2003) (reversing trial court grant of summary judgment denying enforcement of mediated divorce settlement agreement 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 that precluded finding as a matter of law that there was no meeting of the minds sufficient to create a contract), *reconsideration denied* (Feb. 19, 2003), *cert. granted* (May 20, 2003).

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).

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).

Hall v. Hall, No. 12-03-00417-CV, 2005 WL 1000619 (Tex. App. Apr. 29, 2005) (finding mediation agreement irrevocable because it met statutory requirements even though it did not expressly state it was irrevocable).

Hall v. George Washington Univ., No. CIV.A. 99-1136 (RMU), 2005 WL 1378761 (D.D.C. May, 13 2005) (enforcing executed mediated settlement agreement where client deferred to her attorney's actual authority to execute a settlement, despite client's later attempt to renege on the agreement).

Hanselman v Hanselman, No. 21615, 2007 WL 127692 (Ohio. Ct. App. Jan. 19, 2007) (finding trial judge erred by entering over objection a mediated temporary parenting agreement into the final judgment and decree of divorce without an evidentiary hearing).

Harkrader v. Farrar Oil Co., No. 2004-CA-000114-MR, 2005 WL 1252379 (Ky. Ct. App. Oct. 12, 2005) (refusing to reverse a court order enforcing a settlement agreement even though the trial court considered an affidavit a mediator submitted to the court following mediation in deciding whether to enforce the agreement), *rev'd* (Oct. 12, 2005).

Haynes v. Hayes, 180 S.W.3d 927 (Tex. App. 2006) (ruling that lower court's entry of divorce degree did not improperly vary the terms of the mediated settlement agreement, but rather carried those terms into effect, observing: "The law does not require the parties to dictate and agree to all of the provisions to be contained in all of the documents necessary to effectuate the purposes of the agreement; it only requires the parties to reach an agreement as to all material terms of the agreement and prevents the trial court from supplying additional terms to which the parties have not agreed.").

Hazlewood Patterson Co. v. Hancock, No. 10-03-00274-CV, 2004 WL 2903861 (Tex. App. Dec. 15, 2004) (upholding jury award finding fraud and breach of fiduciary duty caused by

plaintiff's representatives' refusal to disclose to plaintiffs the entire settlement amount), *reh'g overruled* (Jan. 4, 2005), *rev'd* (May 6, 2005), *reh'g of petition for rev'd* (Aug 26, 2005).

Heaven & Earth, Inc. v. Wyman Props. Ltd. P'ship, No. Civ. 03-3327, 2004 WL 2931347 (D. Minn. Dec. 14, 2004) (enforcing handwritten mediated settlement of lease extension by night club against challenge that parties' failure to reach full agreement on limitations and notice requirements for sound checks was a missing essential element that precluded enforcement).

Herszage v. Herszage, No. 13-06-257-CV, 2007 WL 2323979 (Tex. App. Aug. 16, 2007) (affirming the trial court's enforcement of an irrevocable mediated settlement agreement, because there was sufficient evidence to show the nonrevocation clause was in the agreement at the time of signing and there was no basis for finding the consent was fraudulently induced).

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."

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

Holmes v. Potter, No. 2:05cv447, 2007 WL 778307 (N.D. Ind. Mar. 12, 2007) (applying federal common law to the settlement agreement between a federal employee and the Postmaster General, the court granted summary judgment for the postmaster despite claims that the mediator made misrepresentations at the caucus style mediation). **Quote from the Court:** "Holmes' use of the mediator's comments provide an example of his misplaced reliance on extrinsic evidence. Holmes has not offered an affidavit of the mediator and instead relies on his own representations of the mediator's conduct. Even assuming that the mediator mistakenly represented to Holmes that this deduction would not be made in his case, and further assuming Holmes could clear the hearsay objections to this evidence, evidence of the mediator's conduct remains outside the scope of admissible evidence because this agreement is not ambiguous."

ALSO LISTED IN ETHICS

Horn v. U.S. Dep't of Army, 284 F. Supp. 2d 1 (D.D.C. 2003) (enforcing mediated settlement of discrimination and retaliation claims despite plaintiff's allegations that he was coerced into agreement when defense counsel told him that plaintiff's supervisor had begun the process to fire plaintiff for misconduct and his own attorney told him during a break in mediation that he would be suspended from employment if he did not settle, where plaintiff: 1) did not deny that he signed the agreement; 2) tendered his resignation the day after he signed the agreement; 3)

accepted monetary payment from defendant which he has not attempted to return; and 4) was represented by able counsel who advocated on his behalf).

Hughes v. Matchless Metal Polish Co., NO. 2:04-CV-485-FTM-29DN, 2007 WL 2774214 (M.D. Fla. Sept. 24, 2007) (enforcing a mediated settlement agreement despite claims that plaintiff misrepresented his smoking history when defendant was put on notice that plaintiff may have smoked more than he let on, as well as information that a doctor may have prescribed Nicorette Gum to help plaintiff quit smoking).

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 Circone, 122 S.W.3d 403 (Tex. App. 2003) (holding that a court may not look "behind the signed [settlement] agreement of the parties" as long as agreement satisfies statutory guidelines).

In re Estate of Caldwell, No. B158110, 2003 WL 22022025 (Cal. Ct. App. Aug. 28, 2003) (reversing probate court and refusing to enforce provision of mediated settlement which obligated party who left mediation early to pay from his share of trust assets all attorney fees and costs incurred by the other beneficiaries of the trust in dispute, as well as the mediator's fees and all fees relating to obtaining the probate court's approval of the mediated settlement agreement).

Quote from the Court: "[T]here is no evidence of Craig's alleged bad faith conduct in the subject mediation. And, even if Craig did act in bad faith during the time he participated in the instant mediation, his conduct does not warrant the imposition of all attorney fees and costs relating to the mediation. The probate court ordered the parties to participate in mediation in response to Jean's Annuity Petition and Candace's objection and the executor's response thereto. Thus, the parties were going to incur costs relating to the mediation regardless of whether Craig participated and how he behaved. Moreover, after Craig left the mediation, the parties continued to mediate (for an undetermined amount of time) and ultimately reached a settlement. The cost incurred by the parties during the time Craig was absent certainly had nothing to do with Craig's alleged poor behavior earlier in the settlement discussions."

In re Gilat Satellite Networks, Ltd., No. CV-02-1510, 2007 WL 1191048 (E.D.N.Y. April 19, 2007), *order issued*, No. CV-02-1510 CPS, 2007 WL 1191137 (E.D.N.Y. Apr 19, 2007) (involvement of third-party mediator cited as evidence that proposed settlement is non-collusive).

In re Kasschau, 11 S.W.3d 305 (Tex. App. 1999) (enforcing mediated settlement agreement even though agreement required performance of the illegal act of destroying illegally taped recordings made by husband of conversations between wife and third party), *reh'g overruled* (Feb. 14, 2000).

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 Marriage of Bridle, 732 N.W.2d 887 (Iowa Ct. App. 2007) (reversing the trial judge's refusal to enforce a mediated settlement based on fraud, when the parties were represented by experienced lawyers, there had been extensive discovery, and the wife was aware that the husband had additional income other than salary).

In re Marriage of Brown, No. A102126, 2004 WL 928243 (Cal. Ct. App. Apr. 29, 2004) (rejecting claims that a party did not understand the mediated agreement, undue influence, duress, and inequity), *rev'd* (July 14, 2004).

In re Marriage of Carlson, Nos. A103163 & A103820, 2005 WL 723685 (Cal. Ct. App. Mar. 30, 2005) (reversing enforceability of agreement that eliminated fiduciary duty to update agreement regarding marital property and remanding for fact finding to determine whether a breach of duty, perjury, or mistake of fact provided grounds for setting aside agreement).

In re Marriage of Jennings, 50 P.3d 506 (Kan. Ct. App. 2002) (modification of custody and support hearing can be ordered absent proof of changed circumstances where initial order was based on mediated agreement without court hearing), *rev'd* (Sept. 24, 2002). **Quote from the Court:** "The mediator's job is to listen to the parties and bring the matter to consensus. A mediated custody agreement incorporated into a decree of divorce or other court order does not have the same effect as a court order that is issued after a hearing where evidence is presented and the trial court makes specific findings of fact."

In re Marriage of Kieturakis, 41 Cal. Rptr. 3d 119 (Ct. App. 2006) (affirming enforcement of a marital settlement agreement incorporated into a judgment and decree in the face of claims of fraud, duress and non-disclosure, where the trial judge considered evidence about the mediation from the parties and mediator, but only the defendant waived mediation privileges and the plaintiff and mediator did not), *reh'd denied* (April 17, 2006), *rev'd* (July 19, 2006). **Quote from the Court:** "First we conclude that the presumption of undue influence cannot be applied to marital settlement agreements reached through mediation. 'Voluntary participation and self-determination are fundamental principles of mediation.' It can be expected that most mediators would, as [the mediator did] consider it their duty to attempt to determine whether the parties are 'acting under their own free will' in mediation We conclude that any error [in admitting mediation evidence] was harmless under the circumstances here [I]n view of our conclusion that [plaintiff] must bear the burden of proof on her challenges to the judgment, she would be compelled to fully waive the mediation privilege if the matter were retried We need take no position on Olam's viability because the outcome would be the same in this case whether or not the decision to compel evidence from the mediator could be sustained. While we do not think that Olam could be stretched so far as to cover the situation the trial court faced here, where one of the parties objected to the mediator's evidence, Olam could at least arguably be extended to cover the situation that would exist here if the matter were remanded for a retrial, where both sides would be waiving the mediation privilege."

In re Marriage of Kraft, 868 N.E.2d 1181 (Ind. Ct. App. 2007) (allowing modification of a mediated stipulation of child support based on the statutorily authorized reductions based on changed circumstances).

In re N.R.C. & L.A.C., No. 14-04-00891-CV, 2005 WL 2875367 (Tex. App. Nov. 3, 2005) (ruling that while a trial court may not enforce a mediated settlement agreement that is illegal or against public policy, it did not have authority to enter an order that differed from a mediated child-custody agreement).

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

In re Patterson, 969 P.2d 1106 (Wash. Ct. App. 1999) (mediated settlement agreement signed by the parties held enforceable notwithstanding absence of attorneys' signature; mere assertion that mediator coerced settlement by telling party that non-settlement would ruin mediator's record of being able to settle cases held insufficient to vacate settlement).

In re Marriage of Pebbles, 695 N.W.2d 334 (Iowa Ct. App. 2004) (unpublished table decision) (holding a mediation agreement unenforceable because lower court failed to determine whether agreement was fair or contrary to law).

In re Marriage of Stanbrough, 695 N.W.2d 505 (Iowa Ct. App. 2005) (unpublished table decision) (enforcing agreement despite claims that not all property was disclosed because each party was independently able to investigate).

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).

In re Marriage of Rettke, 696 N.W.2d 846 (Minn. Ct. App. 2005) (reversing trial court enforcement of mediated divorce property settlement, where husband died before the agreement was incorporated into a signed marital termination agreement which the court could examine, approve, and incorporate into a dissolution judgment). **Quote from the Court:** "Certain of husband's children believe that Rettke should be restricted to recovering a share of husband's property only as a surviving spouse. They argue, logically and correctly, that she cannot both take a share from the mediated dissolution settlement as if the dissolution had gone through, and also take advantage of the fact that when husband died, since the dissolution had not been finalized, she was in all respects a bona fide heir, a surviving spouse."

In re T.D., 28 P.3d 1163 (Okla. Ct. App. 2001) (refusing to enforce mediated settlement absent additional factual findings, where mother with full advice and representation of counsel agreed to

terminate her parental rights but the mediated agreement contained inconsistent elements raising fundamental due process questions regarding whether mother knowingly waived parental rights).

Quote from the Court's Majority Opinion: "At its heart, this case is about Mother's voluntary relinquishment of her parental rights in T.D. Mother is, at a minimum, entitled to the procedural safeguards specified by the legislature when it enacted the voluntary relinquishment statutes. There is nothing in the record before this court, however, to indicate that those procedural safeguards were observed in this case. Although Mother was represented by counsel throughout this proceeding and probably was aware of the full consequences of her action, her initial involvement in the process was certainly not voluntary. Moreover, the terms of the agreement indicate that Mother was trying to protect her parental rights in a newborn baby, a consideration no parent should be forced to weigh, particularly in an involuntary process. Also, one of the express conditions to Mother's agreement is the right to continued visitation with T.D., a provision at odds with the complete termination of her rights. Ultimately, Mother's full understanding and acceptance of the results of her agreement are not reflected in the record before us. They must be before this termination can be upheld." **Quote from the Court's Dissenting Opinion:** "I would not permit mediation of a non-voluntary proceeding by the State to terminate the rights of a parent to a child."

In re T.M.G.R., 164 S.W.3d 851 (Tex. App. 2005) (finding that father challenging lower court's modified order of parentage failed to prove that the lower court's order deviated from the parties' mediated settlement agreement).

In re Terrence, 833 N.E.2d 306 (Ohio Ct. App. 2005) (reversing termination of mother's parental rights based on mediated settlement conducted by telephone during mother's incarceration, where record failed to show clear consent and waiver of rights). **Quote from the Court:** "Mediating with the government, which has far more resources than an individual, must be carefully scrutinized, as the parties come with unequal bargaining positions. Here, . . . [t]he mother had nothing real to gain and everything to lose. [The government agency] had everything to gain and nothing to lose. Mediation is more beneficial to the state, as consent is more efficient than trial."

International Longshore & Warehouse Union, Local 142 v. C. Brewer and Col, Ltdl., NO. CIV. CV0600260SOMLEK, 2007 WL 4145228 (D. Haw. Nov. 20, 2007) (approving a class action settlement in part because "[t]he assistance of an experienced mediator in the settlement process confirms that the settlement is non-collusive").

Int'l Truck & Engine Corp. v. Quintana, No. CIV.A. 302CV168L, 2004 WL 1380181 (N.D. Tex. June 18, 2004) (refusing to unilaterally add terms to a mediation agreement based on the claim that the mediator neglected to include them).

Irvine v. Regents of University of California, 57 Cal.Rptr.3d 500 (Cal. Ct. App. 2007) (finding good cause to restore a dismissed claim back to the active list based on a claim that the mediated settlement was conditioned on a subsequent release and was obtained through duress and misrepresentation).

Jistel v. Tiffany Trail Owners Ass'n, Inc., 215 S.W.3d 474 (Tex. App. 2006) (enforcing a judgment entered pursuant to a mediated settlement agreement between a condominium unit owner and the condominium owners association, despite a property code provision stating that obligations under the property code could not be waived or varied by agreement).

JM Agency, Inc. v. NAS Fin. Servs., Inc., No. A-5898-05T5, 2007 WL 2215393 (N.J. Super. Ct. App. Div. Aug. 3, 2007) (reversing trial court enforcement of a mediated agreement because the plaintiff did not have intent to be bound by the agreement without the defendant's admission of liability and the parties failed to agree on the admission, which was a material term).

JN Int'l, Inc. v. M/S Transgene Biotek, Ltd., Nos. 8:05CV67, 8:05CV158, 2006 WL 1559709 (D. Neb. June 5, 2006) (denying plaintiff's motion to enforce mediated settlement agreement and defendant's motion for a hearing to consider alleged fraud on the court by plaintiff, because the settlement was not timely based on the court's order and because the parties did not submit the agreement to the court for approval before asking the court to enforce its terms). **Quote from the Court:** "Litigation spawned by attempts to settle litigation almost always waste time and money. That is the case here. More importantly, since the parties did not comply with our deadlines and they did not comply with our rules, and for other good reasons, I refuse to be drawn into their dispute about settlement While continuing to have high regard for the lawyers and the mediator, the phrase 'a pox on all your houses' is particularly apt in this circumstance").

Jones v. Crum, No. E2006-02420-COA-R3-CV, 2007 WL 1574282 (Tenn. Ct. App., May 31, 2007) (affirming trial court refusal to affirm mediated settlement that did not provide for child support in accordance with state guidelines).

Joseph v. Edison Control Corp., No. A-3856-04T1, 2006 WL 2033666 (N.J. Super. Ct. App. Div. July 21, 2006) (affirming enforcement of an oral mediated settlement based on a conference call with all parties, the mediator and the judge where the parties told the judge the matter was settled and the mediator subsequently wrote a letter confirming the settlement).

Joseph Lorenz, Inc. v. Harder, 694 N.W.2d 510 (Wis. Ct. App.) (unpublished table decision) (upholding enforceability of mediation contract although one party inserted three words into the contract after it was signed), *rev'd*, 700 N.W.2d 273 (Wis. 2005) (unpublished table decision).

Kakani v. Oracle Corp., No. C 06-06493 WHA, 2007 WL 1793774 (N.D. Cal. June 19, 2007), *subsequent determination*, No. C06 06493 WHA, 2007 WL 2221073 (N.D. Cal. Aug. 02, 2007) (denying joint motion to preliminarily approve proposed class action settlement and specifically rejecting assertion that involvement of a mediator helps prove lack of collusion). **Quote from the Court:** "It is also no answer to say that a private mediator helped frame the proposal. Such a mediator is paid to help the immediate parties reach a deal. Mediators do not adjudicate the merits. They are masters in the art of what is negotiable. It matters little to the mediator whether a deal is collusive as long as a deal is reached. Such a mediator has no fiduciary duty to anyone, much less those not at the table. Plaintiffs' counsel has the fiduciary duty. It cannot be delegated to a private mediator."

Kalof v. Kalof, 840 So. 2d 365 (Fla. Dist. Ct. App. 2003) (holding that duress and lack of disclosure are bases for challenging mediated settlement agreement).

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).

Kirsch v. Kirsch, 933 So. 2d 623 (Fla. Dist. Ct. App. 2006) (finding latent ambiguity in a mediated parenting agreement providing for appointment of a child therapist, and considering parole evidence to conclude that the parties had agreed to counseling, not to appointment of a specific counselor), *reh'g denied* (Aug. 8, 2006).

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

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).

Lahodik v. Lahodik, 969 So.2d 533 (Fla. Dist. Ct. App., 2007) (finding appellant's claim frivolous when he argued that the law of the case doctrine precluded the trial judge from modifying the parties' mediated child support agreement based on changed circumstances).

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."

LeBlanc v. State Farm Ins. Co., 878 So. 2d 715 (La. Ct. App.) (affirming enforcement of mediation agreement despite claims that an attorney had coerced his clients into signing), *writ not considered*, 883 So. 2d 1023 (La. 2004).

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).

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

Lee v. Wake County, 598 S.E.2d 427 (N.C. Ct. App.) (reversing Industrial Commission denial of motion to enforce a mediated workers' compensation settlement, determining that the Commission erred in concluding the County's agent had no authority to negotiate a binding settlement over \$100,000 where the only evidence of such limitation was a County Ordinance adopted **after** the parties executed the mediated settlement), *rev'd*, 607 S.E.2d 275 (N.C. 2004).

Leff v. Ecker, 972 So.2d 965 (Fla. Dist. Ct. App. 2007) (refusing to set aside mediated settlement based on parties' alleged mutual misunderstanding of insurance policy limits). **Quote from the Court:** "[T]he record amply establishes that plaintiff went into the mediation conference without a clear picture of what the policy limits were for the incidents in question. In fact, this was plaintiff's first question at mediation. Notwithstanding this limited knowledge, plaintiff chose to go ahead with the mediation and entered into an agreement at the end thereof. Despite his admitted suspicions about the policy limits, plaintiff made the decision to enter into the agreement. The doctrine of mutual mistake was not created to relieve litigants of agreements entered into improvidently. The all-out efforts plaintiff later engaged in to go behind the policy and ascertain, without question, what policies applied and what policy limits were, could have been performed before the mediation."

Lerer v. Lerer, No. 05-99-00474-CV, 2000 WL 567020 (Tex. App. May 3, 2000) (enforcing a mediated settlement agreement despite claims of mental incapacity, lack of certainty and noncompliance with statute of frauds), *appeal after remand*, No. 05-02-00124-CV, 2002 WL

31656109 (Tex. App. Nov. 26, 2002), *rev'd* (May 8, 2003), *reh'g on petition granted* (June 26, 2003).

Lewis v. Potter, No. 1:05CV34 (STAMP), 2007 WL 419374 (N.D. W.Va. Feb. 2, 2007) (rejecting complaint that defendant illegally retaliated against Title VII claimant by engaging in bad faith “sham” mediation, and further concluding that mediation did not result in an enforceable, binding agreement, where the settlement agreement form specifically noted that settlement was contingent on subsequent employer approval which was rejected, and the mediator completed a post-mediation “No Agreement Letter”). **Quote from the Court:** “Although extrinsic evidence is not necessary to reach this conclusion, the actions of the mediator confirm that it was the intent of the parties that an agreement be formed only upon approval of USPS management.... Clearly, if an agreement had already been formed between the parties, it would have been illogical for the mediator to send the No Agreement Letter to the EEO. By including the No Agreement Letter, the mediator's actions confirm that the parties contemplated two potential outcomes following the execution of the Settlement Agreement Form: (1) that the USPS would approve the Settlement Agreement Form and it would *then* become a binding contract or (2) that the USPS would not approve the Settlement Agreement form and no agreement would exist.” (Emphasis is original).

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).

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).

Linn v. Miller, --- S.W.3d ----, 2007 WL 2481950 (Ark. Ct. App. 2007) (reversing the trial court’s exercise of jurisdiction to grant relief from divorce decree based on a mediated agreement). **Quote from the Court:** “The amended order did not merely clarify or interpret the [mediated] 2005 decree. The court went beyond these parameters and supplemented the prior decree by deciding issues that were not previously before it, and which the parties had never agreed upon: the consequences of one party selling a portion of his or her land; the acceleration of Phillip's mortgage payment; and the particular manner of dividing the 192 acres. Essentially, the court tried to reform or re-write the parties' independent property-settlement and mediation agreements, which were incorporated in the prior decree, to include these new features. However, no grounds for reformation, such as fraud or mutual mistake, were asserted here, and there is no evidence that any existed.”

Lyons v. Booker, 982 P.2d 1142 (Utah Ct. App. 1999) (dispute as to whether agreement was reached in appellate mediation remanded to trial court for resolution, with appeals court wryly noting “the parties find themselves in the unenviable position of having created an additional dispute on top of the previously existing one”).

Maldonado v. Novartis Pharmaceuticals Corp., 836 N.Y.S.2d 663 (N.Y. App. Div. 2007) (refusing to enforce an oral stipulation negotiated by the parties in the presence of a court-appointed mediator because it did not comply with statutory requirement that the agreement be on the record in open court).

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).

Makins v. District of Columbia, 861 A.2d 590 (D.C.) (refusing to find an attorney had apparent authority to bind the client based on the attorney's presence and participation in negotiation and finding ethics rules create the presumption an attorney does not have apparent authority), *answer to cert. questioned conformed to*, 389 F.3d 1303 (D.C. Cir. 2004).

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).

Matos v. Matos, 932 So. 2d 316 (Fla. Dist. Ct. App. 2006) (reversing trial court enforcement of an alleged oral marital termination settlement, where the mediator hired by the parties to reduce their alleged informal agreement to writing testified that there was an agreement but conceded she did not participate in its formation). **Quote from the Court:** "[W]hile the mediator testified to her understanding of the terms of the agreement, she never reduced it to writing which was the reason the parties had contacted the mediator in the first place. Under these circumstances, the parties' failure to reduce the agreement to writing strongly indicates that the parties had not agreed to everything."

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).

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).

McCoy v. Potter, No. 01-Civ. 1984, 2002 WL 31028691 (S.D.N.Y. Sept. 12, 2002) (dismissing pro se complaint alleging civil rights violations under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, finding plaintiff bound by a settlement agreement reached in a Project REDRESS mediation, notwithstanding that plaintiff was unrepresented by counsel, signed settlement immediately at conclusion of the mediation, and his contractual relinquishment of

rights was unsupported by consideration), *aff'd*, 98 F. App'x 28 (2d Cir. 2004), *cert. denied*, 543 U.S. 1013 (2004), *reh'g denied*, 543 U.S. 1085 (2005).

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."

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."

McGraw v. Marchioli, 812 N.E.2d 1154 (Ind. Ct. App. 2004) (where condominium owners and developer entered into a mediated settlement agreement that contained an explicit condition precedent requiring the developer to procure an additional easement from a third-party neighboring landowner and the developer could have obtained the easement but was unwilling to pay for it and then used two easements created by the agreement, the developer waived its right to challenge enforcement of the settlement for inability to satisfy the condition precedent).

McMahan v. McMahan, No. E2004-03032-COA-R3-CV, 2005 WL 3287475 (Tenn. Ct. App. Dec. 5, 2005) (affirming lower court's enforcement of mediated settlement agreement, ruling that wife did not provide evidence of duress or lack of mental capacity, and that the signed, handwritten agreement was a valid and enforceable contract, despite the parties' intentions to create a more formal document later).

Meinke v. Meinke, No. 277033, 2007 WL 4209344 (Mich. Ct. App. Nov. 29, 2007) (ruling that: 1. an unsigned mediation agreement was enforceable despite a court rule that required the agreements to be signed or acknowledged on an audio or video recording, based in part on mediator testimony (which was allowed by the parties) that the parties had reached an agreement and had not signed the agreement because of the pending bankruptcy; and 2. the trial court, with the consent of the parties, could order the parties to facilitative mediation despite a bankruptcy stay).

ALSO LISTED UNDER CONFIDENTIALITY

Meyer v. Alpine Lake Property Owners' Ass'n, Inc., Civ. No. 2:06 CV 59, 2007 WL 709304 (N.D. W.Va. March 5, 2007) (refusing to enforce an alleged mediated settlement agreement after

both parties reported that an agreement had been reached because a subsequent disagreement over a term led the court to conclude there was no meeting of the minds). **Quote from the Court:** “While ‘[t]he law favors and encourages the resolution of controversies by contracts of compromise and settlement, rather than by litigation; it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy’ that ‘[p]ublic policy did not compel the enforcement of a settlement agreement and release prepared by defendants after the mediator prepared a settlement agreement; the defendants' document included terms that differed in substance from those set forth in the mediation settlement agreement’”)

Mills v. Vilas County Bd. of Adjustments, 660 N.W.2d 705 (Wis. Ct. App. 2003) (affirming trial court refusal to enforce mediated settlement agreement between seller of real estate and sovereign tribal nation purchaser based on comity principles, where the mediated settlement specifically conditioned the sale on possibility that tribe would need to hold referendum of its membership to approve the purchase).

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).

Murphy v. Potter, NO. 07-CV-145-PB, 2007 WL 2688893 (D. N.H. September 13, 2007) (finding jurisdiction to enforce a predetermination settlement agreement under Title VII).

Myers v. Myers, No. E2004-01362-COA-R3CV, 2005 WL 936925 (Tenn. Ct. App. Apr. 22, 2005) (enforcing a mediated agreement because it was in writing and signed by the parties), *appeal denied* (Oct. 24, 2005).

Nanni v. Dino Corp., NO. CV044000159S, 2007 WL 3317795 (Conn. Super., Oct. 25, 2007) (enforcing mediated settlement where uncontroverted evidence proved existence of agreement and lack of ambiguity).

Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Price, 78 P.3d 1138 (Colo. Ct. App. 2003) (reversing trial court and refusing to enforce alleged oral mediated settlement as contrary to requirements of Colorado's Dispute Resolution Act which mandates that settlements must be reduced to writing, be approved and signed by all parties, and presented to the court for approval; and noting further that confidentiality provisions of the Dispute Resolution Act would preclude offering evidence of an oral agreement), *reh'g denied* (July 3, 2003), *cert. granted*, No. 03SC527, 2003 WL 22700762 (Colo. Nov. 17, 2003) (en banc), *appeal dismissed* (Jan. 29, 2004).

New Jersey Div. of Youth and Family Services v. S.E., NO. A-2169-06T4, 2007 WL 2593063 (N.J. Super Ct. App. Div. Sept. 11, 2007) (affirming denial of motion to vacate mediated surrender of parental rights where there was no evidence of fraud, misrepresentation, duress or undue means to secure the surrender of rights). **Quote from the Court:** "The pressure to which

the person giving consent has succumbed must be wrongful and not all pressure is wrongful....A difficult choice, made under less than ideal circumstances, is not synonymous with duress."

Newman v. Johanns, NO. CV 05-36-M-DWM, 2007 WL 3047141 (D. Mont., Oct. 16, 2007) (rejecting coercion defense to mediated settlement, where plaintiff "admits he discussed the agreement with an attorney who specialized in federal workers compensation law before signing it").

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).

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."

Norwood Co. v. RLI Ins. Co., No. 01-6153, 2005 WL 273244 (E.D. Pa. Feb. 2, 2005) (finding agreement enforceable despite claims that attorneys lacked authority to bind their clients).

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”).

O’Connell v. Paris Maintenance Col, Inc., No. 34556/2002, 2007 WL 1113050 (N.Y. Sup. Ct. April 13, 2007) (finding that counsel lacked express authority to bind his client, and despite counsel’s claims of authority there was no apparent authority absent communications from the client giving rise to the appearance of authority to settle the case).

Olam v. Cong. Mortgage Co., No. C95-2806 WDB, 1999 WL 812224 (N.D. Cal. Oct. 6, 1999), *opinion amended and superseded*, 68 F. Supp. 2d 1110 (N.D. Cal. 1999) (in action to enforce mediated settlement agreement where both parties desired mediator’s testimony, and “interest of justice” outweighed the negative impact that compelling testimony would have on the mediation process in California, mediator was compelled to testify notwithstanding existence of independent mediator privilege not waived by the mediator).

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).

Patsky v. Suprenant Cable Corp., No. 972527A, 2001 WL 1029642 (Mass. Super. Ct. Aug. 2, 2001) (rejecting a duress argument because the agreement was signed three weeks after mediation concluded).

Peacock v. Spivey, 629 S.E.2d 48 (Ga. Ct. App. 2006) (affirming enforcement of mediated settlement and judge’s construal of the settlement as requiring a dismissal with prejudice, where plaintiff’s assertion that he signed the agreement under duress was countered by his own lawyer’s testimony). **Quote from the Court:** “Settlement is, in and of itself, generally construed to be a final disposition of any claim against a party to settlement by a party to the settlement arising out of the subject incident, unless remaining claims are specifically reserved by any of the parties. Such compromises are upheld by general policy, as tending to prevent litigation, in all enlightened systems of jurisprudence Peacock not only failed to specifically reserve any claims in the mediation agreement, he agreed to accept payment ‘as settlement in full of all claims arising out of this matter’ and to voluntarily dismiss the lawsuit ‘finally’ and ‘forever.’ Thus, the trial court did not err in construing the mediation agreement as a final disposition which required Peacock to dismiss with prejudice all claims arising out of the lawsuit.”

Petrik v. FN Projects, Inc., No. G033528, 2005 WL 775425 (Cal. Ct. App. Apr. 6, 2005) (enforcing mediation agreement despite claims of lack of authority because plaintiffs did not indicate the attorney lacked authority), *reh’g denied* (May 2, 2005), *rev’d* (Aug. 10, 2005).

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).

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

Phillip Services Corp. v. City of Seattle, No. CIV.A H-06-2518, 2007 WL 3396436 (S.D. Tex. Nov. 14, 2007) (rejecting a claim that the prior decision should be vacated because the case was now settled through the Fifth Circuit's mediation process).

Pickelner v. Adler, 229 S.W.3d 516 (Tex. App. 2007) (affirming refusal to enforce a mediated estate asset settlement where distribution was adverse to rights of those who had not signed the settlement).

Pinette v. Petosa, No. HHBCV065000722S, 2007 WL 969761 (Conn. Super. Ct. Mar. 21, 2007) (enforcing a mediated settlement agreement despite plaintiff's claims that discovery was not complete and plaintiff was not aware of statements defendant made at a deposition). **Quote from the Court:** "Finally, the fact that discovery was not complete at the time of the mediation hardly serves to invalidate the results of that mediation. Indeed, parties frequently request the assistance of a mediator in part in order to help them avoid the added time, effort, and expense that additional discovery would entail. When the parties and their counsel agree to mediate on a certain date, and they reach an unambiguous settlement agreement on that date, it is fair to assume that they have concluded that they have conducted sufficient discovery to enable them to make intelligent settlement decisions, even if that discovery is less than complete....The court also understands that the plaintiff regrets, in retrospect, that he did not receive a larger settlement. That is part of the nature of compromise. That the plaintiff now has a post-mediation case of 'buyer's remorse,' however, is not a valid reason for undoing the results of that mediation or for denying the defendant's motion to enforce the settlement agreement on its original and admittedly unambiguous terms."

Pollard v. Ogden, 868 N.E.2d 921 (Ind. Ct. App. 2007) (refusing to set aside a dismissal of a suit notwithstanding a claim that defense counsel obtained the dismissal by misrepresenting the fact that the mediated settlement agreement had been complied with where plaintiff did not appear or otherwise raise the issue at the hearing).

Prewitt v. Rodrigues, 893 So. 2d 927 (La. Ct. App. 2005) (finding settlement agreement not enforceable because a final document was never executed and court approval was not obtained).

Pryde v. Bjorn, No. 58333-6-I, 2007 WL 3348297, 1 (Wash. Ct. App. Nov. 13, 2007) (ruling that:

1. Although the writing requirement for enforceability of a mediated settlement agreement may be satisfied by informal writings and emails, the exchange of emails in this case did not comply because they did not acknowledge that the proposed terms accurately reflected the agreement nor did they state a present intent to be bound prior to signing a formal document);

2. The parties through an agreement to mediate, adopted the confidentiality provisions of the UMA;
 3. The mediator's testimony describing what happened at the mediation session was admissible under the UMA provision allowing mediator testimony about whether a settlement had been reached;
 4. Although the mediator "assumed counsel had the authority to settle the case, the attorney lacked that authority. **Quote from the Court:** "Generally, an attorney's authority to settle an action is presumed but that authority is limited. "As an attorney, he is impliedly authorized to enter into stipulations and waivers concerning procedural matters to facilitate the hearing. However, in his capacity as attorney, he has no authority to waive any substantial right of his client. Such waiver, to be binding upon the client, must be specially authorized by him. Absent express authority or an informed consent or ratification, attorneys may not waive, compromise or bargain away a client's substantive rights (*citations omitted*)."
- ALSO LISTED UNDER CONFIDENTIALITY

R.J. Marco Constr., Inc. v. Whyte Builders, Inc., No. A04-1107, 2004 WL 2940923 (Minn. Ct. App. Dec. 21, 2004) (enforcing mediated settlement of three related construction lawsuits against challenge that settlement's ambit did not include breach of contract claim for refusal to pay for unpaid work out of mechanic's lien proceeds which were not received until the settlement was reached, where settlement included release of "any and all claims, demands or causes of action" and use of term "claim" rather than "cause of action" evidenced parties' intent to settle all existing claims, whether accrued or not), *rev'd* (Mar. 15, 2005).

Rabe v. Dillard's Inc., 214 S.W.3d 767 (Tex. App. 2007) (granting summary judgment enforcing a mediated settlement agreement rejecting a claim of duress supported by an affidavit setting forth the alleged threat made by counsel during the mediation, because communications made during mediations are privileged).
ALSO LISTED UNDER CONFIDENTIALITY

Ramirez v. DeCoster, 142 F. Supp. 2d 104 (D. Me. 2001) (mediated settlement dictated to a paralegal by the mediator and signed by attorneys for each party held enforceable as a binding contract even though it contained a paragraph added at the request of one party that a "written settlement agreement would be executed upon agreement to all material terms"). **Note:** In so ruling, the court rejected testimony by proponent of the paragraph who argued it was intended to prevent the mediator's document from being considered a binding settlement agreement. The court instead credited the mediator's testimony (former U.S. Senator Warren Rudman) as "the most neutral and dispassionate observer of what was said and done."

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).

Raphael v. Raphael, 817 So. 2d 462 (La. Ct. App. 2002) (release contained in mediated settlement did not apply to preclude cause of action for damages for non-compliance with the mediated settlement where the terms of the release foreclosed causes of action existing at time of settlement but not future causes of action), *appeal after remand*, 929 So. 2d 825 (La. Ct. App. 2006).

Reno v. Haler, 734 N.E.2d 1095 (Ind. Ct. App. 2000) (holding that the statutory requirement that a mediated settlement agreement be reduced to writing and signed by both parties is satisfied where the parties and their attorneys' signed the mediator's handwritten notes articulating the terms of the agreement reached during mediation), *adhered to on reh'g*, 743 N.E.2d 1139 (Ind. Ct. App. 2001), *transfer denied*, 753 N.E.2d 17 (Ind. 2001) (unpublished table decision).

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).

Ricks v. Ricks, 169 S.W.3d 523 (Tex. App. 2005) (upholding trial court's denial of wife's motion to overturn mediated divorce settlement agreement, rejecting wife's claims that the agreement did not comply with Texas Family Code and finding no evidence that the husband had committed fraud and/or misrepresentation during the mediation).

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).

Ryles v. Palace Hotel, No. C 04-5326 SBA, 2006 WL 3093678 (N.D. Cal. Oct. 27, 2006) (denying employer's motion to enforce mediated employment discrimination settlement, where totality of the evidence established a coercive atmosphere around the execution of the settlement, including specifically that plaintiff was advised by her own attorney that "she would have to pay \$10,000 and would lose her home if she did not settle the case" and that she would not get a fair trial because the court is unsympathetic to employment plaintiffs). **Quote from the Court:** "Where Plaintiff was misled about whether she would be given a fair hearing, and threatened with the loss of her home and other serious financial consequences, this Court cannot conclude that the atmosphere was noncoercive. Defendant's frustration is understandable, given that a good deal of effort went into reaching this settlement. However, the Court is obligated to examine the circumstances surrounding execution of this [Title VII] agreement more closely than it would an ordinary contract."

Sandoval v. Pillowtex Corp., 652 S.E.2d 751 (Table), 2007 WL 4106123 (N.C. Ct. App. 2007) (enforcing a mediated settlement agreement when plaintiff refused to sign the "clincher agreement" rejecting claims that the Spanish speaking plaintiff did not understand the terms of the agreement). **Quote from the Court:** "[T]he better practice would be for the parties to execute a clincher agreement which contains all the required terms and language at the conclusion of the mediated settlement conference if an agreement is reached. . . ."

Schwarz v. Adamson, C8-98-1416, 1999 WL 170676 (Minn. Ct. App. Mar. 30, 1999) (settlement agreement drafted by mediator which lacked clause stating that it was binding and which remained unsigned by the parties held unenforceable).

Scott v. Carter, 521 S.E.2d 835 (Ga. Ct. App. 1999) (holding that an attorney has power to bind client to a settlement at the mediation), *reconsideration denied* (Sept. 09, 1999), *cert. dismissed* (Jan. 28, 2000).

Seligman-Hargis v. Hargis, 186 S.W.3d 582 (Tex. App. 2006) (finding that the trial judge lacked subject matter jurisdiction to enter a judgment based on a mediated settlement agreement relating to the custody of children in Germany under the Uniform Child Custody Jurisdiction Enforcement Act, requiring that portions of the judgment relating to custody be reversed, but remanding to the trial court to determine whether the portions of the judgment relating to division of property and child support should also be vacated), *reh'g denied* (Mar. 23, 2006).

Seman v. Graham, No. 265969, 2007 WL 1491866 (Mich. Ct. App. May 22, 2007) (refusing to enforce an oral settlement agreement valid under contract law, because under court rules (MCR 2.507(G)) the mediated settlement must be in writing or on the record).

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).

Spencer v. Spencer, 752 N.E.2d 661 (Ind. Ct. App. 2001) (oral agreement reached in mediation to resolve property issues in marital dissolution, which was immediately dictated by the mediator in the presence of the parties and circulated by fax that same day to the parties, is not enforceable when repudiated by one party before the agreement is reduced to writing and signed by both parties).

Spiegel v. KLRU Endowment Fund, 228 S.W.3d 237 (Tex. App. 2007), *review denied* (Sept. 28, 2007), *rehearing of petition for review denied* (Feb. 15, 2008) (enforcing a mediated divorce settlement agreement that was never incorporated into a final divorce decree because one party died).

Stamato v. Stamato, 818 So. 2d 662 (Fla. Dist. Ct. App. 2002) (holding that a party was not entitled to rescind mediated settlement agreement for unilateral mistake even though plaintiff had not, as the result of clerical error, received court order in her favor in the case prior to signing the settlement agreement).

Stanton v. Fleischman, No. B158265, 2004 WL 790321 (Cal. Ct. App. Apr. 14, 2004) (affirming the lower court's ruling that an attorney who sought enforcement of a mediation agreement that provided for the payment of his fees lacked standing to enforce the mediation agreement because he was not a party to the agreement), *reh'g denied* (May 07, 2004).

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").

State v. Noah, 9 P.3d 858 (Wash. Ct. App. 2000) (rejecting the theory put forth by one party who attempted to avoid the consequences of a settlement agreement reached following a mediation on the ground that settlement of a first amendment claim is a violation of public policy, whereby the court held that the public policy interest in enforcing settlement agreements and other contracts outweighs any competing public policies present in the case), *amended on reconsideration*, (Oct. 30, 2000), *rev'd*, 22 P.3d 802 (Wash. 2001) (unpublished table decision).

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).

Stoll v. Port Auth. of N.Y. & N.J., 268 A.D.2d 379 (N.Y. App. Div. 2000) (holding that plaintiff's attorney has apparent authority to enter into enforceable settlement agreement when participating in mediation with plaintiff's knowledge and authorization).

Stone Age Equip., Inc. v. Nelson Sports, Inc., No. B176721, 2005 WL 1208522 (Cal. Ct. App. May 23, 2005) (finding breach of settlement agreement must be brought in second lawsuit because original court did not maintain jurisdiction to enforce).

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).

Suarez v. Jordan, 35 S.W.3d 268 (Tex. App. 2000) (refusing to enforce written settlement reached in court-ordered mediation of a disputed easement, where the property owner's son, without advice of counsel and against wishes of his father, participated in the mediation and signed the agreement).

Sunshine Properties, L.L.C. v. State Dep't of Transp., 900 So. 2d 714 (Fla. Dist. Ct. App. 2005) (finding nonparty not bound to mediation agreement determining value of condemned property because it was not a party to the mediation or agreement and its interests were not represented).

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."

Taylor's Nursery, Inc. v. Baylor Boys, Inc., 575 S.E.2d 73 (N.C. Ct. App.) (unpublished table decision) (holding a mutual mistake insufficient to undermine mediated settlement agreement where mediation occurred at arms' length and mistakes related to non-material facts), *rev'd*, 583 S.E.2d 290 (N.C. 2003).

Tender Loving Things, Inc. v. Robbins, No. A103989, 2005 WL 902648 (Cal. Ct. App. Apr. 20, 2005) (enforcing a mediation agreement after concluding it was sufficiently certain regardless of the requirement for additional documentation and rejecting claims of illegality, fraud, or mistake), *rev'd* (July 13, 2005), *cert. denied*, 546 U.S. 1172 (2006).

Tex. A & M Univ.- Kingsville v. Lawson, 127 S.W.3d 866 (Tex. App. 2004) (rejecting the University's argument that a mediated settlement of an employee's wrongful termination action was unenforceable due to the failure to obtain approval of the governor, comptroller, and attorney general of Texas when nothing in the appropriation statutes required such approval and the final mediated agreement superseded and extinguished a prior settlement which contained such a requirement; also rejecting the assertion that complying with the agreement and representing the employee as an assistant professor, rather than instructor, would be lying and against public policy when the University failed to show how this was injurious to the public good and it could have avoided the public policy concerns simply by retroactively promoting the employee), *reh'g overruled* (Mar. 4, 2004), *rev'd* (May 13, 2005).

Thomas v. Georgas, No. E034745, 2004 WL 1465831 (Cal. Ct. App. June 30, 2004) (rejecting claims that agreement was unenforceable due to omission of material terms, unfairness, and lack of capacity).

Tilden Groves Holding Corp. v. Orlando/Orange County Expressway, 816 So. 2d 658 (Fla. Dist. Ct. App. 2002) (unilateral mistake by county expressway authority in failing to reference rights of third party in mediated settlement agreement is not a sufficient reason to set aside judgment based on the mediated settlement), *reh'g denied* (May 21, 2002).

Tompkins v. Ramona Auto Servs., Inc., Nos. E030870 & E031073, 2003 WL 22905330 (Cal. Ct. App. Dec. 10, 2003) (holding that to ensure that a written mediated settlement agreement is enforceable and admissible in California, parties must indicate in the agreement that it is binding and that its terms may be disclosed for the purposes of enforcing the terms of the agreement).

Venturini v. Smith, No. F050520, 2007 WL 1218027 (Cal.App. 5 Dist., April 24, 2007)

(affirming arbitral award against challenges that underlying contract reached in mediation suffered from lack of mutual consent; no meeting of the minds; was procured by fraud; and was against public policy).

ALSO LISTED UNDER MED-ARB

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).

Vitakis v. Valchine, 793 So. 2d 1094 (Fla. Dist. Ct. App. 2001) (remanding to trial court for consideration of wife's allegation that mediator committed misconduct by improperly influencing her and coercing her into agreement, noting an exception to the general rule that coercion and duress by a third party is insufficient to invalidate an agreement between principals). **Quote From The Court:** "During a court-ordered mediation, the mediator is no ordinary third party, but is, for all intent and purposes, an agent of the court carrying out an official court-ordered function. We hold that the court may invoke its inherent power to maintain the integrity of the judicial system and its processes by invalidating a court-ordered mediation settlement agreement obtained through violation and abuse of the judicially-prescribed mediation procedures." 793 So.2d at 1099.

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."

W. Beach Marina, Ltd. v. Erdeljac, 94 S.W.3d 248 (Tex. App. 2002) (holding an attorney's signature on mediated settlement agreement enforceable against party under agency principles).

W.E. Lott Co. v. D.A. Int'l Casting Co., Nos. 3-2000-02, 3-2000-03, & 3-2000-04, 2000 WL 799091 (Ohio Ct. App. June 21, 2000) (holding that enforceability was jeopardized when the party attending the mediation does not have authority to settle the dispute), *appeal not allowed*, 737 N.E.2d 55 (Ohio 2000) (unpublished table decision).

Waddell v. Krueger, No. A04-552, 2004 WL 2710948 (Minn. Ct. App. Nov. 30, 2004) (affirming motion to enforce mediated settlement and dismiss with prejudice landowner's complaint seeking removal of neighbor's dam, road, and culvert, concluding that district court did not abuse its discretion in rejecting landowners' expert evidence that U.S. Fish and Wildlife Service (USFWS) failed to install levelers on beaver dams within tolerances contemplated by the

agreement, where the agreement did not condition a determination of USFWS's performance on review and approval of a third-party expert).

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.”

Wall v. Tex. Dep't of Family & Protective Serv., No. 03-04-00716-CV, 2006 WL 1502094 (Tex. App. June 2, 2006) (enforcing mediated settlement of parental termination case and finding no coercion or undue influence sufficient to void mother's consent to settlement, where she was represented by one, and at times, two lawyers during the mediation process). **Quote from the Court:** “There can be no doubt that a mediation in which a parent is asked to sign an affidavit forever terminating her relationship with her children is an extremely stressful event. This was exacerbated by the fact that Wall was faced with the unsavory dilemma of choosing between voluntarily relinquishing her rights to [her children], and risking trial and the establishment of new grounds to terminate the parent-child relationship with her unborn child. [citation omitted]. But these are inherent pressures in the process and do not alone establish that Wall's actions were involuntary.”

Weaver v. Saint Joseph of the Pines, Inc., 652 S.E. 2d 701 (N.C. Ct. App. 2007) (affirming summary judgment enforcing a mediated settlement agreement despite claims that :

1. the party lacked contractual capacity (finding the decedents heirs or representatives ratified the agreement);
2. the agreement was entered into based on mutual mistake (the affidavit alleged only unilateral mistake); and
3. the agreement was unconscionable (the release reflected a benefit to both parties and simply because the party was not represented by counsel does not establish procedural unconscionability).

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

Whitaker v. Whitaker, 611 S.E.2d 899 (N.C. Ct. App. 2005) (unpublished table decision) (suggesting court may modify terms of a settlement agreement to give meaning to unspecific terms).

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

Wolf v. Wolf, No. 1111700, 2006 WL 171513 (Cal. Ct. App. Jan. 25, 2006) (enforcing divorce judgment based on mediated settlement and finding "nothing inherently nefarious" about a divorce mediator communicating privately with husband's attorney about the terms of a settlement proposal, especially where the wife failed to establish that the mediator was even aware that the wife had retained an attorney at the time).

Yaekle v. Andrews, 169 P.3d 196 (Colo. Ct. App. 2007), *cert. granted*, No. 07SC420, 2007 WL 2917227 (Colo. Oct. 09, 2007) (concluding that a settlement memorandum drafted at the conclusion of mediation, although independently enforceable, was replaced by a more formal settlement document required by the initial agreement, and the subsequent document though never formally executed by both parties was enforceable by virtue of the parties' conduct and representations to the trial court). **Quote from the Court:** "We are mindful that the practical implication of this opinion may be that parties and mediators end up working harder and longer to make sure they have reached a full and final settlement agreement by the end of the mediation. Of course, the settlement memorandum could state that, if the parties do not reach agreement on additional documentation within a stated period of time, then any party shall be entitled to have the case resolved solely on the terms in the settlement memorandum....In contrast to either of these approaches, however, is the practice of leaving for another day additional terms to be negotiated, which, ironically, invites the potential for further litigation rather than ending it. This dispute is a case in point."

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).

Zimmerman v. Zimmerman, No. 04-04-00347-CV, 2005 WL 1812613 (Tex. App. Aug. 3, 2005) (affirming enforcement of mediated divorce settlement against allegation of mediator coercion, where the only evidence presented in support of the claim was the party's "perceptions of the mediator and how the mediator made him feel – evidence the trial court stated on the record it did not find credible"), *rev'd* (Dec. 2, 2005).

B. CONFIDENTIALITY

ABM Indus., Inc. v. Zurich Am. Ins. Co., 237 F.R.D. 225 (N.D. Cal. 2006) (permitting amendment of complaint to include allegation of bad faith settlement practices based on conduct in mediation, and specifically rejecting challenge that Fed. R. Evid. 408 would bar introduction of evidence). **Quote from the Court:** "Plaintiffs allege that Defendants' coverage counsel came to the mediation and refused coverage....Under Rule 408, the evidence is not excluded if it is offered for another purpose. For example, if Defendants dispute the fact that they denied coverage, Plaintiffs may offer evidence of Defendants' counsel's conduct and statements made during the settlement negotiations in the Underlying Action to prove that they did."

Abrams v. Dromy, No. B167815, 2004 WL 1559666 (Cal. Ct. App. July 12, 2004) (affirming evidentiary rulings in a jury trial on claims of breach of contract and fraud arising out of a

mediation agreement, determining that: 1) it was proper to allow references to the identity of the mediator when a key issue in dispute was whether the mediator was serving as a neutral third party or acting as an agent for one of the parties; and 2) evidence of post-mediation demands, including plaintiff's threatening phone call and defendant's response not denying liability but claiming to have paid the disputed amount and not wanting to pay twice, is admissible because there was no statutorily protected offer of compromise). **Quote from the Court:** "No doubt, confidentiality is of utmost importance during mediation in order to foster open sessions whereby the parties feel confident that anything they reveal privately to the mediator cannot be used against them later during judicial proceedings. However, there is a threat to confidentiality where the parties acknowledge an agreement but dispute whether the mediator acted in a neutral manner or as the agent for either of the parties."

Addesa v. Addesa, 919 A.2d 885 (N.J. Super. 2007) (finding trial court erred in ordering family mediator to be deposed and his written records examined in a dispute over conscionability of marital termination settlement, concluding that 'private mediations must remain confidential or they will have no beneficial impact', but nonetheless affirming trial court conclusion that agreement should be vacated as unconscionable even though defendant wife acted unreasonably in failing to retain an attorney and an appraiser for the mediation).

ALSO LISTED UNDER ENFORCEMENT

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).

Alkop Agriservices, Inc. v. Giampaoli, No. C051609, 2007 WL 1068150 (Cal. Ct. App. Apr. 10, 2007) (letters exchanged between parties without involvement of the mediator or their attorneys nonetheless qualify for protection under the mediation privilege as they were made "in the course of, or pursuant to, a mediation"). **Quote from the court:** "Plaintiffs contend the letters were not 'in the course of mediation' because they were not presented in front of the mediator or during a mediation session. Rather, they were directly exchanged between principals, without the involvement of the mediator or the parties' attorneys....The letters at issue had no existence independent of the mediation; they were prepared in response to settlement offers made by Allen during mediation and, at least as to the first letter, made in response to an order by the mediator. In these circumstances the letters qualify for the mediation privilege as they were made 'in the course of, or pursuant to, a mediation.'" (Evid.Code, § 1119, subs.(a) & (b))."

Angelella v. Pittston Township, No. 3:06-CV-00120, 2007 WL 2688724 (M.D. Pa. Sept. 11, 2007) (rejecting plaintiff's allegation of First Amendment retaliation based on defendants' disclosing the date of a confidential mediation and discussing the underlying case on a TV news show, where the use of mediation and its date is a matter of public record, and the interest of the public in receiving information from defendants as public officials outweighs the interest of the plaintiff to be free from unwanted publicity).

Allen v. Day, 213 S.W.3d 244 (Tenn. Ct. App. 2006) (holding that mediated settlement agreement is not excepted from disclosure under the Public Records Act, where court mediation confidentiality rules do not clearly delineate an exception to the Public Records Act), *appeal denied* (Dec. 27, 2006).

Alford v. Bryant, 137 S.W.3d 916 (Tex. App. 2004) (reversing trial court judgment of legal malpractice against attorney for failure to disclose the risks and benefits of mediated settlement, where the mediator's outcome determinative testimony was erroneously excluded from trial), *reh'g overruled* (Jul. 19, 2004), *rev'd* (May 13, 2004). **Quote from the Court:** "One cannot invoke the jurisdiction of the courts in search of affirmative relief, and yet, on the basis of privilege, deny a party the benefit of evidence that would materially weaken or defeat the claims against her [citation omitted]. Such offensive, rather than defensive, use of a privilege lies outside the intended scope of the privilege."

Allison v. Fire Ins. Exch., 98 S.W.3d 227 (Tex. App. 2002) (rejecting evidence insurer attempted to introduce of the insured's behavior from mediation into a subsequent proceeding involving her insurance claim on the ground that the focus of the dispute was not the insured's but rather the insurer's behavior), *reh'g overruled* (Feb. 13, 2003), *reh'g overruled*, (Feb. 21, 2003), *petition withdrawn* (Nov 21, 2003), *petitions for review abated* (Mar 02, 2004), *rev'g, judgment vacated, and remanded by agreement* (Mar 26, 2004).

Am. Guarantee & Liab. Ins. Co. v. King, No. 02CA0927, 2003 WL 22413835 (Colo. Ct. App. Oct. 23, 2003) (holding that the trial court properly considered mediator's opinion that insurance company did not have a subrogation claim in subsequent claim regarding whether insurance company acted in bad faith), *cert. denied*, No. 03SC784, 2004 WL 1965762 (Colo. Sep 07, 2004).

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

Atmel Corp. v. St. Paul Fire & Marine Ins. Co., 421 F. Supp. 2d 1265 (N.D. Cal. 2006) (allowing plaintiff to introduce evidence that defendant attended a mediation and did not pay any money in a settlement reached in mediation because these matters are not privileged; but rejecting plaintiff's claim that a mediation confidentiality agreement is unenforceable because defendant: 1) breached it by disclosing to plaintiff's insurance broker that there was a mediation, that plaintiff made a proposal, and that plaintiff filed suit before defendant could respond; 2) referred to these same facts in pleadings filed with the court; and 3) asked plaintiff's witness about the mediation in a deposition). **Quote from the Court:** "[Defendant] does not disclose the substance of any confidential settlement discussions. Second,...the attorney-client privilege extended to communications between [plaintiff and its insurance broker]....None of the

pleadings at issue discuss the substance of the settlement offer made by Atmel or otherwise disclose any specific information about the ... discussion....Moreover, the Court does not view asking questions during a deposition to be 'use' of any confidential information in violation of the parties' agreement."

Avary v. Bank of Am., 72 S.W.3d 779 (Tex. App. 2002) (executor's fiduciary duty of disclosure warrants disclosure of otherwise protected confidential communications made during court-ordered mediation when evidence is sought in the context of a claim based upon a new and independent tort committed by the executor that is factually and legally unrelated to the wrongful death and survival claims which were successfully mediated), *reh'g overruled* (May 6, 2002), *rev'd* (Feb. 6, 2003).

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

Banks v. Office of Senate Sergeant-at-Arms, 222 F.R.D. 7 (D.D.C. 2004) (finding mediation documents filed under the Congressional Accountability Act were discoverable because they may form the basis of a defense unless the plaintiff could show cause why they should be kept confidential).

Battle v. Pilgrim's Pride Corp., 935 So. 2d 336 (La. Ct. App.) (ruling in workers' compensation proceeding that the admission of mediation testimony regarding statements made by a claims adjuster was not error, but if error, it was harmless error because the judge did not rely on it), *writ denied*, 939 So. 2d 1288 (La. 2006).

Bernabei v. St. Paul Fire & Marine Ins. Co., No. 2004CA00148, 2005 WL 351754 (Ohio Ct. App. Feb. 14, 2005) (admitting mediator's testimony to determine whether an agreement had been reached when apparently no one objected based on privilege).

Bradley v. Fontaine Trailer Co., No. 3:06CV62 (WWE), 2007 WL 2028115 (D. Conn. July 10, 2007) (denying the defendant's request for discovery of confidential mediation materials because the interests of justice did not outweigh the need for confidentiality where the defendant did not show there was a substantial need for the materials, however, the court did view the mediation evidence *in camera* and the defendant was assured there were no indemnity agreements reached in mediation).

Bridges v. Metromedia Steakhouse Co., L.P., 807 N.E.2d 162 (Ind. Ct. App. 2004) (affirming admission at negligence trial of testimony by defendant's insurance adjuster concerning observations she made during unsuccessful court-ordered mediation of the extent of scarring and

redness of plaintiff's hands, because the adjuster's personal observations could not be construed as protected nonverbal conduct intended as an assertion), *appeal after remand*, No. C4-02-1984, 2003 WL 21266858 (Minn. Ct. App. June 03, 2003).

Butler v. Ingersoll Rand, No. D049201, 2007 WL 4217157 (Cal. Ct. App. Nov. 30, 2007) (admitting plaintiff's testimony that referred to the mediation where defendant "refused to talk to us" was error but harmless error in this trial without a jury). [Note--In the appellate court opinion, the court itself refers to a settlement demand made at a mediation].

California Service Employees Health & Welfare Trust Fund v. Advance Bldg. Maintenance, NO. C06-3078 CW BZ, 2007 WL 2669823 (N.D. Cal. September 07, 2007) (noting that the court lacked the power to summarily enforce a confidentiality agreement; the court also concluded that certain communications were not protected by the agreement since they occurred the day after the termination of the mediation and did not involve the mediator).

Carver v. Deerfield Twp., 742 N.E.2d 1182 (Ohio Ct. App. 2000) (interpreting Ohio Rev. Code Ann. § 121.22 to require open meetings for pre- and post-mediation sessions even though actual mediation sessions are not subject to the open meeting law).

Cashin v. Cashin, No. C4-02-1984, 2003 WL 42269 (Minn. App. June 3, 2003) (when negotiations are fruitless, a parenting-time expediter is not subject to removal for deciding, rather than mediating, a dispute between parents; finding no abuse of discretion in trial court refusal to remove expediter for a "technical" violation of confidentiality -- the expediter's notification to court of concerns that the parties' children were "being emotionally abused by the punitive vagaries of [a party's] behavior" -- because the disclosure was motivated by concern for the parties' children). **Quote from the Court's Dissenting Opinion:** "Had the judge been able to consider our concern that '[u]nder a less deferential standard of review, we might be persuaded that a different expediter could resolve the Cashins' parenting-time disputes more harmoniously,' perhaps the broad discretion vested in the district court would have been exercised differently."

Cason v. Builders FirstSource-Se. Group, Inc., 159 F. Supp. 2d 242 (W.D.N.C. 2001) (in action by black former employee against former employer for race-based hostile work environment and related claims, court would compel production of EEOC charging documents and notes of employer's investigation of a black co-worker's case, but would not compel production of mediation and settlement documents from the same co-worker's EEOC file). **Quote from the Court:** "[T]here are significant policy reasons for promoting fair, speedy, and confidential settlements of employment discrimination charges, as well as prompt and effective remediation of discriminatory work environments. Such results will be more difficult to attain if employers believe that such settlement agreements might be subject to disclosure to third parties."

Chambers v. Cooney, No. CIV.A. 07-0373-WSB, 2007 WL 2493682 (S.D. Ala. Aug. 29, 2007) (holding that: 1. place of injury, not jurisdiction where mediation occurs, is controlling for choice of law purposes in claim for breach of contract; and 2. denying defendant's motion for failure to state a tortious interference claim simply because evidence on which it is predicated consists of statements made in mediation). **Quote from the Court:** "This kind of evidentiary objection is inappropriate at the Rule 12(b) stage. Despite defendant's repeated attempts to

characterize the facts this way, nothing in the Complaint would confine Dr. Cooney's allegedly interfering conduct to statements made during a mediation. The pattern of conduct described in the Complaint as allegedly interfering with the Merger Agreement is far broader than that and was in no way limited to things Dr. Cooney said or did during formal mediation sessions. As such, even if defendant were correct that Rule 408 bars admission of defendant's statements during the Minneapolis mediation (a questionable proposition which the Court does not reach today), Count II still states a claim upon which relief can be granted because on its face it is not predicated exclusively on statements made by defendant during a mediation."

ALSO LISTED UNDER MISCELLANEOUS

Cleveland Constr. Inc. v. Whitehouse Hotel Ltd. P'ship, No. Civ. A. 01-2666, 2004 WL 385052 (E.D. La. Feb. 25, 2004) (denying a nonparty's motion to quash a subpoena and ordering the production of a settlement agreement reached in mediation with the defendant concerning the same construction project, concluding that a settlement agreement is not shielded from discovery merely because it contains a confidentiality provision if it is otherwise relevant, especially when a protective order can be entered to protect against disclosure of the agreement outside of the litigation).

Cooper v. County of Sonoma, NO. A116197, 2007 WL 2601475 (Cal. Ct. App. September 11, 2007) (affirming denial of motion to disqualify attorney based on use of confidential mediation information). **Quote from the Court:** "That a lawyer's conduct was unquestionably unprofessional, ill-advised, and a manifestation of poor judgment does not, ipso facto, mandate disqualification . . . Taken as a whole, the evidence on this record does not establish that Flatt obtained information from Jenkins that could be unfairly used to her client Cooper's advantage. Therefore, we cannot say the trial court abused its discretion in denying the motion to disqualify."

Cooper v. Bd. of Supervisors of La. State Univ. & Agric. & Mech. College, Nos. Civ.A. 01-1560 & Civ.A. 02-3054, 2004 WL 1208517 (E.D. La. June 1, 2004) (interpreting the confidentiality statute that applies to anything said or done in conciliation as not applying to the settlement agreement and allowing the third-party beneficiary of the E.E.O.C. conciliation agreement to sue for enforcement).

Daar & Newman v. Obagi, No. B162809, 2004 WL 1344917 (Cal. Ct. App. June 16, 2004), unpublished/noncitable (overruling lower court's order of nonsuit based on the confidentiality of a handwritten and signed mediation agreement).

Dedefo v. Wake, No. MC 02-002448, 2006 WL 389738 (Minn. Ct. App. Feb. 21, 2006) (affirming dismissal of defamation claims based on alleged defamatory statements made in a letter sent to elders of the Ethiopian community, where the purpose of the letter was to initiate a traditional mediation process which the court concluded was a "qualifying dispute resolution process under the statute or common law privilege" making the letter absolutely privileged; and also affirming trial court exclusion of testimony by the elders about what was discussed during the mediation). **Quote from the Court:** "Even if respondents hoped to defame [plaintiff], that does not prohibit them from sending a letter to initiate a dispute resolution process within their larger community. The district court only concluded that in his complaint [plaintiff] had limited

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

Deluca v. Allied Domec Quick Serv. Rest., No. 03-CV-5142 (JFB)(AKT), 2006 WL 2713944 (E.D.N.Y. Sept. 22, 2006) (concluding that statements made by defendant’s associate general counsel in mediation, while admissible under the confidentiality provisions of the Alternative Dispute Resolution Act and Fed. R. Evid. 408 because the underlying claim for retaliation is based on statements made in the mediation, are nonetheless excluded from evidence by virtue of the parties’ more restrictive confidentiality agreement).

Dent v. Farmers Ins. Group of Cos., No. B182249, 2007 WL 2111016 (Cal. Ct. App. July 24, 2007) (concluding that termination review board proceedings are not mediation or arbitration and therefore confidentiality provisions do not apply), *reh’g denied* (Aug. 14, 2007), *rev’d* (Oct. 17, 2007).

Diggs v. Osceola Police Dep’t, No. 3:05CV00261, 2006 WL 2390479 (E.D. Ark. Aug. 18, 2006) (denying plaintiff’s request for a subpoena compelling an EEOC mediator to appear at a deposition and produce documents for inspection based on EEOC regulations that preclude EEOC from producing documents or testifying without prior approval of the EEOC legal counsel).

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

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).

DR Lakes Inc. v. Brandsmart of USA of West Palm Beach, 819 So. 2d 971 (Fla. Dist. Ct. App. 2002) (reversing trial court and remanding for trial after concluding that statutory mediation confidentiality protections are inapplicable to preclude testimony by the parties and mediator in enforcement proceeding alleging clerical error due to mutual mistake). **Quote from the Court:** "The reason for confidentiality as to statements made during mediation where a settlement agreement is not reached is obvious. Mediation could not take place if litigants had to worry about admissions against interest being offered into evidence at trial, if a settlement was not reached. Once the parties in mediation have signed an agreement, however, the reasons for confidentiality are not as compelling." 819 So. 2d at 973-74.

Duarte v. City of Nampa, No. CV 06-480-S-MHW, 2007 WL 1792325 (D. Idaho June 20, 2007) (refusing to allow defendant to discover conciliation communications between the Idaho Human Rights Commission and plaintiff's attorney relying on "strong policy" in Idaho statutory law, federal statutory law and federal common law). **s from the Court:** "Disclosing these communications would have a potentially damaging impact on the conciliation process, a process which is vital to IHRC's role in resolving employment discrimination claims."

Dunne v. Hunt, No. 06 C 170, 2006 WL 1371445 (N.D. Ill. May 16, 2006) (concluding that a federal circuit court mediator properly removed a state action regarding enforcement of a subpoena to force the mediator to testify in a legal malpractice case, but concluding the federal court lacked jurisdiction to enforce the subpoena because the court's jurisdiction is derivative of the state court which did not have jurisdiction over the matter in the first instance because of sovereign immunity).

E.E.O.C. v. Albion River Inn, Inc., No. C 06-05356 SI, 2007 WL 2667430 (N.D. Cal. September 06, 2007) (refusing to reconsider a ruling that if there was a federal common law of mediation privilege it was not applicable, and not consistent with the public good to preclude discovery of communications defendants had with their financial planner and friend who was asked to help and assist in resolving their dispute with the plaintiff).

Eisendrath v. Super. Ct., 134 Cal. Rptr. 2d 716 (Ct. App. 2003) (in action to correct a mediated spousal support agreement, no evidence of conversations between husband and wife, including those statements made outside the presence of the mediator if materially related to the purpose of the mediation, may be admitted in evidence absent the parties' express waiver of confidentiality; concluding that trial court erred in holding *in camera* evidentiary hearing to consider relevance of mediator's testimony because the mediator is statutorily incompetent to testify under California law).

Embler v. Walker Elec. Sys. of Fla., Inc., No. 2:05-CV-256-FTM-33SPC, 2006 WL 1406366 (M.D. Fla. May 18, 2006) (denying motion to strike plaintiff's response to motion for contempt, finding no prejudice in fact that response included plaintiff's report of conversations between defendants counsel and the mediator, testimony which defendant argued was offered only to disparage counsel).

Endre v. Bancorp Bank, No. 606CV-1696-ORL-19KRS, 2007 WL 3023980 (M.D. Fla. Oct. 15, 2007) (filing of mediated settlement agreement in the public record voids the agreement's confidentiality provision, but does not preclude settlement enforcement by virtue of agreement's severability provision).

ALSO LISTED UNDER ENFORCEMENT

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.

Equal Employment Opportunity Comm’n v. Bay Ridge Toyota, Inc., 327 F. Supp. 2d 167 (E.D.N.Y. 2004) (finding the inclusion of a confidential conciliation agreement in a complaint for breach of contract did not result in unclean hands).

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.’”

Fair v. Bakhtiari, No. A100240, 2007 WL 1031708 (Cal. Ct. App. April 6, 2007) (concluding that clause of mediated settlement providing that “[a]m’t of settlement will be confidential with appropriate exceptions” is insufficient to establish exception to inadmissibility of the written document based on statutory requirement that it “provides that it is admissible or subject to disclosure, or words to that effect”; finding no judicial estoppel of defendant’s right to object to admission of settlement document, where defendant consistently objected to admissibility and the trial court never ruled the document was admissible; and further finding no waiver of right to claim mediation confidentiality where defendant submitted copies of the mediation settlement to the court and introduced declarations describing mediation communications but did so only after plaintiff had already submitted similar documents, and defendant’s disclosures were all offered in attempt to demonstrate inadmissibility of the settlement document). **Quote from the Court:** “The Supreme Court held that the arbitration clause in the settlement terms document did not constitute words to the effect that the document was ‘enforceable or binding’ under section 1123, subdivision (b), explaining that ‘words to that effect’ must be narrowly interpreted and the writing ‘must directly express the parties’ agreement to be bound by the document they sign.’ (*Fair, supra*, 40 Cal.4th at p. 197.) In light of this holding, we certainly cannot now find that a provision in the settlement terms document providing for confidentiality of the settlement amount provides words to the effect that the rest of the document ‘is admissible or subject to disclosure.’ (§ 1123, subd. (a).) It is plain that this provision does not ‘directly express’ any agreement whatsoever regarding the admissibility of the settlement terms document.”

Feldman v. Kritch, 824 So. 2d 274 (Fla. Dist. Ct. App. 2002) (finding statutory confidentiality protections inapplicable in mediation enforcement proceeding alleging mutual mistake regarding alleged set-off for prior payment; but finding only unilateral mistake insufficient to set aside settlement, where insurer agreed to pay \$75,000 and did not discuss set-off until after mediation was over and post-settlement, and mediator confirmed that \$75,000 was the only number mentioned by the insurer during the mediation).

Fenske v. Fenske, No. C4-99-2007, 2000 WL 622589 (Minn. Ct. App. May 16, 2000) (finding no error in trial court’s use of a mediator as an “expert witness” under Minn. R.Evid. 706 by incorporating the mediator’s recommendation as an order of the court, where court had ordered parties in harassment case to meet with a mediator “within 10 days to come to an agreement for contact between the parties for exchanging information about the children” and further ordered that absent agreement the mediator “shall offer his recommendations for contact . . . to the Court”).

Few v. Hammack Enters., Inc., 511 S.E.2d 665 (N.C. Ct. App. 1999) (holding that the existence of a statute that precludes admission of evidence regarding negotiations into evidence in a subsequent proceeding does not prevent a mediator from reporting to the court both whether settlement was reached and the terms of the 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."

Frank v. L.L. Bean Inc., 377 F. Supp. 2d 233 (D. Me. 2005) (imposing \$1,000 fine on plaintiff's attorney in sexual harassment action as sanction for breaching confidentiality of prior mediation by disclosing to a potential witness the position the employer had taken in the prior mediation as a way of convincing the witness that the employer had in fact done something wrong). **Quote from the Court:** "It is essential for the effectiveness of mediation in this district that all but the most *de minimis* breaches of confidentiality, whether perpetrated by the opposing party or her counsel be punished with sanctions."

Gannett Pac. Corp. v. City of Asheville, 632 S.E.2d 586 (N.C. Ct. App. 2006) (affirming that a mediation held between a City Council and the County Board of Commissioners is not an official meeting subject to Open Meeting Laws, where only one representative of each public body attended the mediation, along with their respective attorneys), *rev'd*, 638 S.E.2d 466 (N.C. Nov. 16, 2006).

Garber v. Omegbu, 719 N.W.2d 799 (Wis. Ct. App. 2006) (unpublished table decision) (affirming trial court refusal to issue a bad faith sanction against a party who submitted confidential information to a mediator, agreeing with trial judge that "that is part of mediation").

Gast v. Hall, 858 N.E.2d 154 (Ind. Ct. App. 2006) (admitting affidavit testimony regarding what testator said during a will contest mediation session, where the affidavit was being offered in a second will contest proceeding on the issue of the testator's testamentary capacity, rather than to prove liability for or invalidity of the claims being litigated in the first will contest proceeding), *reh'g denied* (Feb. 16, 2007), *transfer denied*, 869 N.E.2d 459 (Ind. 2007) (unpublished table decision).

Ginsburg v. Philadelphia Stock Exch., Inc., No. CIV.A. 2202-CC, 2007 WL 2982238 (Del. Ch. Oct. 9, 2007) (permitting discovery by class action objectors of materials prepared for mediation subject to their agreeing to be bound by a new confidentiality order).

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).

Gore v. Experian Info. Solutions, Inc., No. Civ. 303CV2949H, 2004 WL 1381034 (N.D. Tex. June 21, 2004) (denying motion for sanctions based on bad faith participation because motion was based on confidential mediation communications).

Harris v. Euronet Worldwide, Inc., No. 06-2537-JTM-DWB, 2007 WL 1557415 (D. Kan. May 29, 2007) (refusing to permit deposition of opposing counsel where he was not the only person available to testify about what was or was not said at mediation). **Quote from the Court:** "Although Mr. Donelon may be the only person remaining who can *corroborate* Mr. Matthews' statements, he is not the only person who can testify as to what Mr. Matthews did or did not say at the mediation. Thus, Mr. Donelon is not the only means available to obtain the information at issue. Because Defendants have failed to establish the first *Shelton* factor, the Court need not address whether the information is relevant, nonprivileged, and/or crucial to Defendants' preparation of the case."

Hauzinger v. Hauzinger, 842 N.Y.S.2d 646 (N.Y. App. Div. 2007) (refusing to quash a subpoena for the testimony of the mediator choosing not to enforce the parties' confidentiality agreement where the party not represented at the mediation was attempting to establish the circumstances surrounding entering into the separation agreement challenging whether it was fair and reasonable). [The court refused to apply the provisions of the Uniform Mediation Act which had not been adopted in New York].

Hoglund v. Meeks, 170 P.3d 37 (Wash. Ct. App. 2007) (permitting evidence of the mediation solely to prove the plaintiff's entitlement to a share of the attorney's fees because the requested information was completely separate from the issue of the litigation; in addition, the court noted the mediation privilege only extended to the parties in the mediation, not to the attorneys).

Holasek v. Holasek, No. A04-2199, 2005 WL 2008721 (Minn. Ct. App. Aug. 23, 2005) (affirming trial court quashing of subpoenas sought to compel testimony from farm-lender mediator to clarify alleged ambiguity in mediated settlement where: 1) parties' signed agreement stated that "the mediator is not a witness to the parties' negotiations and may not be required to testify in any proceeding subsequent to the mediation," and 2) the two relevant state statutes -- Minn. Stat. § 583.26, subd. 7(b) and Minn. Stat. § 595.02(1)(l) – permit parties, but not mediators, to testify under limited circumstances).

Holmes v. Concord Homes, LTD., 115 S.W.3d 310 (Tex. App. 2003) (finding no error in introduction of considerable evidence about mediation and settlement offers at contract dispute trial, where party failed to properly voice objections to introduction of specific testimony and trial court informed the jury "at some length about the mediation process and the confidentiality involved there, and then instructed counsel to avoid asking questions that invaded the mediation process.").

Howard v. Ramsey, No. C-000503, 2001 WL 228015 (Ohio Ct. App. Mar. 9, 2001) (holding that parties to a mediation, who agree to abide by the understanding of a third party to the mediation regarding terms of their agreement, may not later preclude admission of that party's testimony using mediation confidentiality statute), *appeal denied*, 751 N.E.2d 481 (Ohio July 25, 2001) (unpublished table decision).

Houck Const., Inc. v. Zurich Specialties London Ltd., No. CV 06 3832 AG(PLAX), 2007 WL 1739711 (C.D. Cal. June 4, 2007) (upholding the assertion of mediation privilege to bar a statement about how much defense was willing to pay, but not precluding admission of a statement that a party violated the court order regarding who should attend the mediation).

I.L.G.W.U. Nat'l Retirement Fund v. Cuddlecoat, Inc., No. 01 CIV 4019(BSJ)(DFE), 2002 WL 265167 (S.D.N.Y. Feb. 25, 2002) (refusing to subpoena a mediator to testify when such testimony would violate both the court's order in the case as well as the parties' agreement to mediate).

In re A.C., No. 99-0955, 1999 WL 1255793 (Iowa Ct. App. Dec. 27, 1999) (excluding from parental termination hearing evidence that during mediation mother had said she did not care if her parental rights were terminated, as long as she was still allowed contact with her children).

In re Acceptance Ins. Co., 33 S.W.3d 443 (Tex. App. 2000) (holding that the trial court violated the ADR Act's confidentiality provisions when it required the party it believed to be recalcitrant to testify about the manner in which she negotiated and her communications with other representatives of the insurer during the mediation).

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 Bidwell, 21 P.3d 161 (Ore. Ct. App. 2001) (letters exchanged between the parties' respective counsel during pendency of appellate mediation are "confidential mediation communications" and may not subsequently be offered in evidence to support a finding that a party was objectively unreasonable during the proceedings or in pursuing settlement). **Quote from the Court:** "Both 1999 letters embodied the type of communication to which [the mediation confidentiality statute applies]. They were direct settlement communications *made to* one of the disputants' representatives. The letters had no independent significance apart from the communications that they contained....In addition, although each letter reflected a different phase of negotiations, each was sent in *connection with* the mediation. [footnote omitted]. Both letters followed the mediation conference closely in time, referred to mediation, and were sent before the director of the mediation program referred the case back to this court for decision."

In re Daley, 29 S.W.3d 915 (Tex. App. 2000) (permitting deposition of a non-party participant in mediation on the narrow issue of whether he left the mediation session early and without permission of the mediator; finding such limited testimony outside the scope of statutory mediation confidentiality because not a communication relating to the subject matter of the mediation).

In re E.K., No. C050497, 2006 WL 1196576 (Cal. Ct. App. May 5, 2006) (ruling that the juvenile court properly refused to take judicial notice of a family court mediator's report, and that precluding the mediator's testimony without first calling the mediator to determine if the mediator would assert a privilege was harmless error).

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 Fleming Packaging Corp., No. 03-82408, ADV. 04-8166, 2007 WL 4556981 (Bkrtcy. C.D. Ill. Dec. 20, 2007 (denying award of sanctions for improper disclosure of confidential statements from mediation which to court found "immaterial").
SEE ALSO SANCTIONS

In re J.T., 715 N.W.2d 770 (Iowa App. 2006) (unpublished table decision) (holding that after the hearing was closed in a prosecution for violation of a truancy mediation agreement the court should not have considered the prosecutor's evidence that the child-truant had attended and signed the mediation agreement, and further concluding that the legislature did not intend to provide a criminal sanction for children under the age of sixteen for failure to comply with their truancy mediation agreement).

In re Keely S., No. E035138, 2004 WL 1588336 (Cal. Ct. App. July 16, 2004) (finding a party to a confidential mediation agreement waived confidentiality because her counsel voluntarily presented the agreement to the court).

In re Learjet, Inc., 59 S.W.3d 842 (Tex. App. 2001) (denying writ of mandamus challenging trial court decision compelling discovery of videotapes of expert witnesses shown in mediation, where the tapes were made for the express purpose of presentation of factual information to the opposing parties at the mediation session and thus not protected by attorney-client privilege), *mandamus dismissed* (June 13, 2002).

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 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).

In re Marriage of Bidwell, 21 P.3d 161 (Or. Ct. App. 2001) (holding that letters sent while a mediation is pending were inadmissible under Oregon statutes governing mediation communications).

In re Marriage of Curnes, 690 N.W.2d 701 (Iowa Ct. App. Sept. 9, 2004) (unpublished table decision) (admitting testimony from opposing party and former attorney regarding whether the plaintiff was under duress or undue influence when she signed the mediation agreement).

In re Marriage of Hodges, Nos. D034701 & D036624, 2001 WL 1452210 (Cal. Ct. App. Nov. 16, 2001) (interpreting Evidence Code sections 1119 and 1121 to prohibit testimony by a judge *pro tem* who had presided over one of the parties' settlement conferences in a motion by one of the parties for sanctions against the other party), *rev'd* (Feb. 13, 2002).

In re Marriage of Logan, NO. F051606, 2007 WL 2994640 (Cal. Ct. App. Oct. 16, 2007) (affirming confirmation of arbitration award against challenge that the arbitrator, who had previously acted as mediator, improperly disclosed confidential information he obtained during the mediation and used it in determining the issues in the arbitration).

ALSO LISTED UNDER MED-ARB

In re Marriage of Malcolm, No. A104832, 2004 WL 2669309 (Cal. Ct. App. Nov. 23, 2004) (affirming denial of husband's motion to seek disclosure of mediation communications sought to substantiate allegations of his attorney's malpractice in the mediation, where state confidentiality statute provides no relevant exception for such disclosure). **Quote from the Court:** "The public policy, as expressed by the California Legislature in the mediation statutes, is to ensure absolute confidentiality absent a specific statutory exception. (*Foxgate*, 26 Cal. 4th at 17.) The mediation sections are clear and unambiguous and this Court may not create an exception. (*Ibid.*)...In closing, we also note that Husband has made no showing that the lower court's ruling has prejudiced his substantive rights to pursue a malpractice action....The property settlement agreement is not confidential as it expressly provides that it is enforceable, and it is part of the public record...Husband is free to prosecute his malpractice action...using the property settlement agreement and other nonconfidential evidence."

In re Marriage of Reich, 32 P.3d 904 (Or. Ct. App. 2001) (holding that a party cannot use confidential mediation communications to support a motion to enforce a settlement agreement, however the court did not voice strong disapproval of the party's action and rejected the other side's motion to sanction the party for attaching the mediation communications, and, rather than

sanction the party who violated the statute, the court simply struck the communications from the motion and ordered that they be disregarded).

In re Marriage of Van Horn, No. H024181, 2003 WL 21802273 (Cal. Ct. App. Aug. 6, 2003) (holding that a mediator could not be compelled to testify about mediation communications “absent an express statutory exception to the mediation confidentiality provisions” and the statutory exception based on mediator bias claims applies only to a decision maker and that because a mediator is not a decision maker, the statutory exception is inapplicable).

In re Paternity of Emily C.B., 677 N.W.2d 732 (Wis. Ct. App. 2004) (unpublished table decision) (affirming transfer of daughter’s primary placement to her mother, determining that a tape of a mediation session from a civil litigation between the father and an older daughter was properly admitted into evidence pursuant to a statutorily authorized manifest injustice exception to the general principle of mediation confidentiality and admission was necessary because the mental stability of both parties was the principle issue in dispute).

In re RDM Sports Group, Inc., 277 B.R. 415 (Bankr. N.D. Ga. 2002) (recognizing a federal mediation privilege and holding that documents prepared for mediation, communications made to the mediator, communications between the parties in preparation for or during the mediation are privileged, although drawing a line between documents prepared for mediation and those prepared in advance of mediation).

In re Student Finance Corp., No. CIV.A04-1551JJF, CIV.A05-165JJF, 2007 WL 4643881 (D. Del. May 25, 2007) (striking reports of three testifying experts because they received and considered confidential and privileged mediation statements). **QUOTE FROM THE COURT:** "Further, and perhaps more importantly, there is well-established judicial policy protecting the confidentiality of the settlement process. The judicial system encourages the resolution of disputes by mediation and settlement. It is axiomatic that the assurance of confidentiality for communications made during the course of settlement negotiations is a critical component of the process. Particularly, in the event that settlement discussions do not resolve the dispute, the parties must be able to litigate their claims in the courtroom without the pall-like presence of confidential negotiation statements influencing the arguments. In this case, the Court is also not persuaded by Plaintiffs argument that disclosure of the statements to their experts is not harmful to Defendants because the statements do not contain prejudicial information. Regardless of any effect of the content, the courts must remain blind to any confidential statements made during the course of settlement negotiations, particularly where the parties have guaranteed non-disclosure and confidentiality in an agreement."

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”).

In re T.T., 39 S.W.3d 355 (Tex. App. 2001) (holding that the admission of a mediator's report was reversible error because the report, which made the same findings as the judge had in her temporary order, would be viewed by a "normal juror" as judicial findings, making it seem as though "two judges had already ruled against [the party].").

Iron & Silk, Inc. v. Champion Arts, Inc., No. A105775, 2004 WL 2418098 (Cal. Ct. App. Oct. 29, 2004) (interpreting section 1119 as requiring communication[s] to be for the purpose of or in furtherance of the objects of litigation to be privileged, which is the standard for California litigation, but not its mediation privilege).

Irwin Seating Co. v. Intl. Business Machines Corp., No. 1:04-CV-568, 2007 WL 518866 (W.D. Mich. Feb. 15, 2007) (affirming the striking of plaintiff's expert witnesses, where plaintiff intentionally violated mediation confidentiality order by providing the witnesses with copies of defendant's mediation brief and exhibits). **Quote from the Court:** "Plaintiff cannot identify an alternate sanction that will adequately address these experts' improper knowledge. No admonition, reprimand, mediation training or assessment of costs can remove from the experts' minds the information to which they have been exposed. And, because of the ongoing confidentiality of the mediation process, such alternatives cannot remove the obstacle to Defendants' cross-examination of the experts."

ALSO LISTED UNDER SANCTIONS

Isaacson v. Isaacson, 792 A.2d 525 (N.J. Super. Ct. 2002) (reversing trial court and granting motion to remove the single individual who served as both guardian *ad litem* and mediator, concluding that the roles of mediator of economic issues and guardian *ad litem* are not sufficiently distinct to avoid the inherent conflict between a mediator's obligation to respect confidences of the parties and the responsibility as guardian *ad litem* to serve as an officer of the court). **Quote from the Court:** "We do not, by recognizing the conflict between an appointed mediator and guardian *ad litem*, deprecate the role of either. Both serve purposes critical to the administration of justice in the Family Part and represent innovative and expansive methodologies necessary to insure prompt and appropriate resolution of critical issues. The mediation process provides a vehicle for allowing the parties to resolve disputes between themselves on issues beyond visitation and parenting including, as was proposed by the trial judge here, economic issues. [footnote omitted]. A mediator and guardian *ad litem* are both critical to the administration of justice in the Family Part. We conclude, however, that the roles are inherently conflicting and the same individual may not serve in both capacities." 792 A.2d at 536.

Johnson v. Am. Online, Inc., 280 F. Supp. 2d 1018 (N.D. Cal. 2003) (granting plaintiff's motion to strike defendant's supplemental briefing on remand motion where defendant's brief referred to information contained in a brief plaintiff had previously submitted in mediation under a confidentiality agreement and pursuant to California law which provides that "no aspect of the mediation shall be relied upon or introduced as evidence in any...judicial...proceeding").

Johnson v. Parchment Sch. Dist., No. 1:03-CV-917, 2006 WL 1275066 (W.D. Mich. May 5, 2006) (publishing amount of settlement reached in confidential mediation of estate claim, concluding that strong presumption in favor of public access to judicial records outweighed

confidentiality concerns, including fear that “media frenzy” might adversely affect court mediation program). **Quote from the Court:** “[T]he Court gives little weight to Defendants’ suggestion that disclosure will chill the Court-endorsed mediation process....[T]his district’s voluntary facilitative mediation (“VFM”) program has been very successful as a means of resolving cases on the civil docket in an expeditious and cost efficient manner. Confidentiality of settlement terms is seldom an issue that this Court faces in connection with VFM settlements, because in the vast majority of cases, the Court is not required to approve the settlement. This case is an exception because it is governed by a specific statute which requires the Court to approve the proposed settlement. Moreover, even among the wrongful death subset of cases, this case is exceptional because it involves two public bodies, as to which the public’s interest in access to judicial proceedings and records is especially strong. Finally, while the Court has no doubt that confidentiality was an important consideration to Defendants, the Court notes that at the April 3rd hearing, Defendants’ counsel advised the Court that the settlement would stand regardless of the Court’s decision to publish the settlement amount.”

Komuves v. Twp. of Edison, No. A-3152-03T1, 2006 WL 2389633 (N.J. Super. Ct. App. Div. Aug. 21, 2006) (affirming trial judge’s decision not to turn over materials presented to a special master/mediator in a builder’s remedy action when requested by a citizen under the Open Public Records Act, because the issue was moot; not deciding how to resolve the conflict between the Open Public Records Act and the Uniform Mediation Act). **Quote from the Court:** “Although the issues raised by the intersection of OPRA and the UMA, and the issue of whether the UMA trumps the common law right to know are interesting and important issues, our discussion should await a case that directly raises these issues).”

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

Ladiser v. Huff, 121 Wash. App. 1039 (Ct. App. 2004) (admitting privileged mediation statements to determine whether attorney’s fees were appropriate sanction for bad faith participation).

Lehr v. Afflitto, 889 A.2d 462 (N.J. Super. Ct. App. Div. 2006) (reversing the trial judge’s decision in this lengthy divorce proceeding that the parties at mediation had reached a meeting of the minds and also deciding that the mediator should not have been allowed to testify at the hearing, relying in part on the policy expressed in the Uniform Mediation Act). **Quote from the Court:** “The advent of mediation and other alternative dispute resolution tools to assist parties in resolving their disputes as early as possible and with the least amount of financial and emotional strain is an admirable and worthwhile effort of the court system. Ultimately, however, in an adversarial system with limited resources, the success of mediation is dependent on the good faith, reasonableness and willingness of the litigants to participate. Many are able to do so successfully. However, litigants are not fungible. For one reason or another, some are simply not good candidates for case resolution through good-faith alternative dispute resolution methods such as mediation.”

Lee v. Herbert, No. A03-1023, 2004 WL 948385 (Minn. Ct. App. May 4, 2004) (affirming denial of motion to remove parenting-time expeditor after concluding that: 1) the expeditor's letter to the court affirming the existence and terms of the parties' negotiated agreement on issues of school choice, transition location, and reservation of child support, did not improperly reveal confidential positions of the parties and was offered in direct response to the court's request; and 2) removal based on the expeditor's failure to forge agreements through mediation "would appear to demand an unrealistically high standard of an expeditor" given fact that the parties had been parenting by mediation since October 1998 with the help of four different mediators).

Microsoft Corp v. Suncrest Enter., No. C 03-5424 JF(HRL), 2005 WL 3555721 (N.D. Cal. Dec. 28, 2005) (denying a motion to enforce an alleged settlement agreement, holding that the court could not consider evidence of statements agreeing to the settlement made during mediation proceedings, that the mediation privilege extended to the substance of a mediator-sponsored telephone conference call, but that the privilege did not extend to telephone conference calls conducted by the parties without the aid of the mediator).

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).

Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Price, 78 P.3d 1138 (Colo. Ct. App. 2003) (reversing trial court and refusing to enforce alleged oral mediated settlement as contrary to requirements of Colorado's Dispute Resolution Act which mandates that settlements must be reduced to writing, be approved and signed by all parties, and presented to the court for approval; and noting further that confidentiality provisions of the Dispute Resolution Act would preclude offering evidence of an oral agreement), *reh'g denied* (July 3, 2003), *cert. granted*, No. 03SC527, 2003 WL 22700762 (Colo. Nov. 17, 2003) (en banc), *appeal dismissed* (Jan. 29, 2004).

New Horizon Fin. Servs., LLC v. First Fin. Equities, Inc., 278 F. Supp. 2d 259 (D. Conn. 2003) (permitting testimony of the judge who had served as mediator in motion hearing regarding parties' intent to settle, noting that judge would be subject to cross examination eliminating hearsay concerns, and that his testimony as to what the parties or their attorneys said at the mediation would be considered admissions under Fed. R. Evid. 801(d)(2)).

Nielson-Allen v. Indus. Maint. Corp., No. Civ. 2001/70 FR, 2004 WL 502567 (D.V.I. Jan. 28, 2004) (denying a motion for sanctions against plaintiff's counsel for allegedly disclosing to a mediator in a related employment discrimination case the amount of the settlement agreement reached in this case, finding that the state mediation privilege foreclosed either party from disclosing any matter discussed in mediation in a subsequent motion for sanctions). **Quote from the Court:** "Applying the cloak of mediation to the facts of this matter appear inequitable to [defendant] who negotiated settlement of this action and applied confidentiality thereto for the express purpose of avoiding having such settlement amount established as a benchmark in future

similar employment cases. Such result highlights the need for exceptions to mediation confidentiality."

Norco Window, Inc. v. Hartford Fin. Servs. Group, Inc., No. CV-04-190-S-BLW, 2005 WL 1353832 (D. Idaho June 7, 2005) (stating that evidentiary exclusions for compromise discussions differ from privileges, which usually provide protection against any disclosure rather than merely protection against admission into evidence at a court hearing, and thereby distinguishing among FRE 403, 408 and the Colorado Dispute Resolution Act).

Olam v. Cong. Mortgage Co., No. C95-2806 WDB, 1999 WL 812224 (N.D. Cal. Oct. 6, 1999), *opinion amended and superseded*, 68 F. Supp. 2d 1110 (N.D. Cal. 1999) (in action to enforce mediated settlement agreement where both parties desired mediator's testimony, and "interest of justice" outweighed the negative impact that compelling testimony would have on the mediation process in California, mediator was compelled to testify notwithstanding existence of independent mediator privilege not waived by the mediator).

Orlando v. Carolina. Cas. Ins. Co., No. CIV F 07-0092 AWI SMS, 2007 WL 781598 (E.D. Cal. March 13, 2007) (suggesting, but not ruling, that the California mediation privilege rules, rather than Federal Rule of Evidence 501, might be applicable to preclude the admissibility of allegedly fraudulent statements in this diversity case alleging only violations of California law).

Parking Co. v. R.I. Airport Corp., No. Civ.A. P.B.2004-4189, 2005 WL 419827 (R.I. Super. Ct. Feb. 18, 2005) (denying motion to dismiss a breach of contract claim based on disclosure of mediation in violation of the mediation agreement).

Paul v. Friedman, 117 Cal. Rptr. 2d 82 (Ct. App. 2002) (holding that where the parties sign a written confidentiality agreement prior to mediation, one party's decision to disclose mediation communications to the media and the court in a civil proceeding will subject the party to a lawsuit for breach of that agreement), *reh'g denied* (Feb. 26, 2002), *rev'd* (May 15, 2002).

Pine Terrace Assocs. v. Tri-Calc Indus., Inc., No. B157585, 2003 WL 21983867 (Cal. Ct. App. Aug. 21, 2003) (extending the mediation privilege and holding that the administrative decision could not be admitted at trial because the "administrative decision is tainted by consideration, to some degree, however slight, of the mediation proceedings").

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).

Price v. City of Boynton Beach, 847 So. 2d 1051 (Fla. Dist. Ct. App. 2003) (reversing issuance of temporary injunction for protection against repeat violence because based on impermissible hearsay evidence, including witness testimony that a worker's compensation mediator had expressed concerns about threats made by appellant), *reh'g denied* (July 3, 2003).

Princeton Ins. Co. v. Vergano, 883 A.2d 44 (Del. Ch. 2005) (denying motion to permit mediator testimony in action to rescind mediated settlement of medical malpractice case where defendants sought evidence that mediator's understanding of plaintiff's claims of pain and impairment was

inconsistent with secretly shot videotape of plaintiff dancing at a post-mediation fundraiser).
Quote from the Court: “Furthermore, the testimony they seek to proffer is of marginal, if any relevance. Again, it is simply the opinion of a lay person that the behavior he observes on the [video] is inconsistent with [plaintiff’s] claims of pain and impairment. The court is just as well positioned to come to that opinion itself....All that they are being denied is the opportunity to present the opinion of the mediator about whether the post-settlement evidence convinces him that [plaintiff] was lying about her pain and impairment. Enlisting a mediator in this partisan manner is unseemly, violates the mediation agreement, and involves an attempt to obtain the admission of testimony that is clearly prejudicial, while having minimal relevance.”

Pryde v. Bjorn No. 58333-6-I, 2007 WL 3348297, 1 (Wash. Ct. App. Nov. 13, 2007)

(ruling that:

1. Although the writing requirement for enforceability of a mediated settlement agreement may be satisfied by informal writings and emails, the exchange of emails in this case did not comply because they did not acknowledge that the proposed terms accurately reflected the agreement nor did they state a present intent to be bound prior to signing a formal document);
2. The parties through an agreement to mediate, adopted the confidentiality provisions of the UMA;
3. The mediator's testimony describing what happened at the mediation session was admissible under the UMA provision allowing mediator testimony about whether a settlement had been reached;
4. Although the mediator "assumed counsel had the authority to settle the case, the attorney lacked that authority.

ALSO LISTED UNDER ENFORCEMENT

Rabe v. Dillard’s Inc., 214 S.W.3d 767 (Tex. App. 2007) (granting summary judgment enforcing a mediated settlement agreement rejecting a claim of duress supported by an affidavit setting forth the alleged threat made by counsel during the mediation, because communications made during mediations are privileged).

ALSO LISTED UNDER ENFORCEMENT

R.R. Donnelley & Sons Co. v. N. Tex. Steel Co., 752 N.E.2d 112 (Ind. Ct. App. 2001) (refusing to admit a videotape prepared for mediation at trial under Indiana A.D.R. Rule 2.12, which incorporates Indiana Rules of Evidence 408), *reh’g denied* (Sept. 24, 2001), *transfer denied*, 774 N.E.2d 508 (Ind. 2002) (unpublished table decision).

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

Rendon v. Avance, 67 S.W.3d 303 (Tex. App. 2001) (refusing to overturn a trial court's decision not to allow a mediator's deposition to establish the terms of an oral mediated settlement agreement), *rev’g and cause remanded* (May 9, 2002).

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.'"

Saeta v. Super. Ct., 11 Cal. Rptr. 3d 610 (Ct. App. 2004) (holding that the mediation privilege will not protect review board or panels created for purposes of issuing a ruling).

Schumacker v. Zoll, No. L-00-1199, 2001 WL 1198641 (Ohio Ct. App. Oct. 5, 2001) (holding that all references to mediation communications be stricken from the trial court's judgment entry and hearing transcript; however, the Court neither ordered sanctions nor did it offer any words of disapproval).

Schuneman v. Bellrose, No. A100588, 2004 WL 542237 (Cal. App. Mar. 19, 2004) (denying wife's motion for attorney fees based on her husband's alleged failure to participate in good faith in appellate mediation, finding the request "wholly inappropriate" when based on information regarding failed settlement efforts both during and after mediation and on privileged communications between the parties and the mediator, all in violation of mediation confidentiality rules).

Sharbono v. Universal Underwriters Ins. Co., 161 P.3d 406 (Wash. Ct. App. 2007), *as amended on denial of reconsideration* (Oct. 9, 2007) (finding mediation evidence: (1) was not precluded by the mediation privilege, RCW § 560.070(1) because the proponent did not produce evidence that the mediation was pursuant to a court order, written agreement or statute, as required in the privilege statute; and (2) was not precluded by ER 408 because it was offered to prove the state of mind of the plaintiffs and the harm caused by the insurance company's failure to produce the file and not offered to prove liability).

Sharon Motor Lodge, Inc. v. Tai, No. CV980077828S, 2001 WL 1659516 (Conn. Super. Ct. Dec. 3, 2001) (balancing confidentiality against the need for the evidence and compelling a mediator to respond to interrogatories to establish whether the parties had reached an agreement during mediation), *appeal dismissed*, 842 A.2d 1140 (Conn. Ct. App. 2004), *cert. denied*, 852 A.2d 738 (Conn. 2004).

Sheldone v. Pa. Turnpike Comm'n, 104 F. Supp. 2d 511 (W.D. Pa. 2000) (adopting and applying a federal mediation privilege to preclude disclosure of written and oral communications

made in connection with or during a mediation conducted before a neutral mediator, but not protecting from disclosure any evidence otherwise and independently discoverable merely because it was presented in the course of mediation), *order aff'd* (Aug. 8, 2000).

Simmons v. Ghaderi, 49 Cal. Rptr. 3d 342 (Ct. App. 2006) (affirming enforcement of oral mediated agreement despite defendant's post-mediation revocation of consent, and specifically noting inapplicability of mediation confidentiality through estoppel by virtue of defendant's conduct – specifically, her own use of mediation statements during 15 months of litigation and her concession that the facts were undisputed), *rev'g and opinion superseded by* 149 P.3d 737 (Cal. 2006.) **Quote from the Majority:** “Recognition of mediation confidentiality in this case would not help to ensure open communication in mediation; but it would allow a disgruntled litigant to use the shield of mediation confidentiality as a convenient place behind which to hide facts, although indisputably true, she no longer believes are favorable.” **Quote from the Dissent:** “It is tempting to prohibit Dr. Ghaderi from escaping the deal to which she agreed. But, such a result would encourage a flexible approach to the statutes....The Legislature has articulated explicit steps that a party must take to admit evidence of an oral agreement made for the purpose of, in the course of, or pursuant to, a mediation. Because the parties did not take these steps here, such as by memorializing the agreement in a recording or in a writing, the evidence of the...oral agreement was inadmissible....By focusing on estoppel, the majority in essence is attempting to create a new exception to the comprehensive scheme. This cannot be done.”

Soc'y of Lloyd's v. Moore, No. 1:06-CV-286, 2006 WL 3167735 (S.D. Ohio Nov. 1, 2006) (applying Ohio's version of the Uniform Mediation Act to exclude from evidence a mediator's email setting forth his assessment of the strengths and weaknesses of the case in this arb-med proceeding where the parties first arbitrated the issue and then the arbitrator, without disclosing his decision, proceeded to mediate the dispute; specifically the court ruled: 1) the privilege statute was applicable to this arb-med proceeding; 2) the scope of the statute covered all mediation communications not just those relating to a specific clause in the agreement to mediate; 3) the mediator's email is not a document that is “otherwise discoverable”; and 4) by authorizing the arbitrator/mediator to discuss the weaknesses and strengths of the parties' case during the mediation process, the parties did not waive the mediation privilege).

Soc'y of Lloyds v. Ward, No. 1:05-CV-32, 2006 WL 13221 (S.D. Ohio Jan. 3, 2006), (finding that neither state statutes nor the parties' confidentiality agreement precluded plaintiff from introducing in evidence a trust document produced in mediation, where the document was created before the mediation and filed as a public record). **Quote from the Court:** "The agreement cannot be read as manifesting an understanding or intent by the parties to make privileged or confidential documents that were readily obtainable outside the mediation [T]he agreement provides] '[t]he confidential and privileged character of any information is not altered by disclosure to the mediator.' In other words privileged and confidential information revealed in mediation shall remain privileged and confidential. Documents that are neither privileged nor confidential are not covered. Any other interpretation of the agreement would lead to nonsensical results and permit the use of mediation to perpetrate frauds and injustices in violation of public policy."

Solorzano v. Shell Chem. Co., No. Civ.A.99-2831, 2000 WL 1145766 (E.D. La. Aug. 14, 2000) (holding that no federal privilege protects ombudsman's files or records from discovery by a party in subsequent litigation; and further holding that, although a confidentiality privilege was available in Louisiana based on the Louisiana Mediation Act, the privilege did not apply in a federal case).

Sw. Nurseries, LLC v. Florists Mut. Ins., Inc., 266 F. Supp. 2d 1253 (D. Colo. 2003) (admitting compromise discussions or agreements to establish bad faith failure of an insurance carrier to settle despite inapplicability of any listed exceptions to confidentiality in Rule 408).

State v. Trejo, 979 P.2d 1230 (Idaho Ct. App. 1999) (settlement by defendant's wife during divorce mediation that she wanted to see him "six feet under" was not excluded under mediation privilege in a subsequent criminal proceeding where the wife was not a party).

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).

Steele v. Lincoln Financial Group, No. 05-C-7163, 2007 WL 1052495 (N.D. Ill. April 3, 2007) (rejecting employee's argument, as unsupported by case law or valid policy reasons, that statements made in EEOC mediation by an employer are automatically discoverable in subsequent litigation between the employee and employer, and further concluding that an email exchange between the employer's in-house counsel and an EEOC investigator during the mediation process is not producible where the employee has failed to explain how production might lead to the discovery of admissible evidence).

Stewart v. Preston Pipeline Inc., 36 Cal. Rptr. 3d 901 (Ct. App. 2005) (affirming trial court admission of mediated settlement agreement lacking defendants' signature, where: 1) the agreement stated it was an enforceable full and final settlement of all claims exempt from California confidentiality requirements; 2) the agreement was signed by defendants' counsel, the plaintiff, and plaintiff's attorney, and 3) plaintiff is the party challenging enforcement of the agreement and its admission in evidence). **Quote from the Court:** "Were we to adopt plaintiff's position, then (in an extreme example) a settlement agreement signed personally by the parties after mediation would be inadmissible in a subsequent motion or action enforcing that settlement, if the parties' counsel (as opposed to the parties themselves) signed the mediation-confidentiality waiver. We do not believe that the Legislature intended to permit the tail (mediation confidentiality) to wag the dog (agreed-upon settlement) in such instances."

Swearingen v. Swearingen, No. 06AP-698, 2007 WL 828691 (Ohio. Ct. App. Mar. 20, 2007) (concluding that trial court properly admitted in evidence a proposed mediated settlement and permitted questioning of a party regarding statements made in the mediation, where the evidence

was offered in connection with a motion to establish appropriate venue, as opposed to merits of “operative issues surrounding the divorce”).

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).

Town Of Clinton v. Geological Serv. Corp., 21 Mass. L. Rptr. 609, 2006 WL 3246464 (Super. Ct. Nov. 8, 2006) (upholding a mediation privilege in a med-arb proceeding rejecting the claim that once the mediation failed and the arbitration began the mediation privilege was waived).

Quote from the Court: “Given that preservation of confidentiality is considered essential to the proper functioning of mediation, once communications within a mediation falls within the privilege conferred by statute, there is no policy justification for later allowing disclosure of information acquired during the mediation. Thus, everyone with access to mediation information is burdened by the privilege.”

Treasurer of State v. Ballard Spahr Andrews & Ingersoll LLP, 866 A.2d 479 (Pa. Commw. Ct. 2005) (reviewing mediator’s testimony in camera regarding the breadth of the parties’ claims investigation in determining whether to enforce agreement).

Tumino's Towing, Inc. v. Marin, No. SC-2774-06, 2007 WL 3397818 (N.J. Super. Ct. App. Div. Nov. 16, 2007) (relying on statements made in mediation in an unsuccessful appeal).

U.S. Fid. & Guar. Co. v. Bilt-Rite Contractors, Inc., No. Civ.A.04-1505, 2005 WL 1168374 (E.D. Pa. May 16, 2005) (finding that documents created after mediation lacked sufficient nexus to mediation to preclude admissibility).

U.S. Fid. & Guar. Co. v. Dick Corp./Barton Malow, 215 F.R.D. 503 (W.D. Pa. 2003) (affirming special master decision to permit discovery of a settlement from an earlier case involving some but not all parties upon finding that the settlement was not protected by state mediation privilege where a single mediation session did not result in an agreement, a second session was discussed but never scheduled, and the parties had only limited follow-up communication with the mediator in which they apprised him of the ongoing settlement negotiations). **Quote from the Court:** "It seems to us that the mediation process requires the presence, or a least the active participation, of a mediator . . . otherwise, we would be hard pressed to distinguish between garden variety settlement discussions, which are not protected, and those which are a part of the mediation process and are privileged."

U.S. Fidelity & Guar. Co. v. Liberty Surplus Ins. Corp., No. 6:06-CV-1180ORL31UAM, 2007 WL 3023488 (M.D. Fla. Oct. 12, 2007) (refusing to apply work product privilege to preclude discovery of report prepared by insurance adjusting firm to investigate a claim and represent insurance company at a mediation, where the report was provided only after the mediation and evidence was unclear whether the report included both factual investigation and liability analysis or that litigation was anticipated prior to the final denial of coverage).

U.S. v. Union Pacific R. Co., No. CIV 06-1740 FCD KJM, 2007 WL 1500551 (E.D. Cal. May 23, 2007) (rejecting privilege claims and ordering the production of documents). **Quote from**

the Court: "Neither the Supreme Court nor the Ninth Circuit have recognized a blanket settlement privilege as a matter of federal common law.... the court also reviews the communications to determine whether any were prepared for or in the course of a formal mediation,[which would be protected under Local Court Rule 16-270(d)] which this court construes to include a court-ordered settlement conference....Applying this approach in a careful review of the documents submitted by defendant for *in camera* review leads this court to conclude that all of these documents should be disclosed to plaintiff. A few documents appear on their face to be public records, which, even if attached to purported settlement communications, should not have been withheld in the first instance. Certain other documents could be admitted to prove bias or prejudice or scope of intent to release; this characterization applies most aptly to the settlement agreement entered into with PG & E, which contains release and cooperation clauses.None of the other documents reflect that it was prepared in connection with a formal mediation or court-ordered settlement conference."

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).

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).

Warren v. Giambra, 813 N.Y.S.2d 892 (N.Y. Sup. Ct. 2006) (private meeting of county legislators and mediators was subject to, and conducted in violation of, the Open Meetings Act because the meeting did not qualify for a judicial exemption from the Act).

Wilmington Hospitality, L.L.C. v. New Castle County, 788 A.2d 536 (Del. Ch.) (holding that letters exchanged after mediation that purportedly outlined a three-party settlement agreement were mediation communications under the Court of Chancery Rule 174 because they were sent in "connection" with a mediation), *appeal denied*, 781 A.2d 697 (Del. 2001) (unpublished table decision).

Wimsatt v. Superior Court, 61 Cal.Rptr.3d 200 (Cal. Ct. App. 2007) (reluctantly reversing a judicially-created perjury exception to confidentiality, and precluding the client in this legal malpractice action from discovering mediation briefs and emails that would support the allegation that his lawyer lowered his settlement demand without authority; but refusing to issue a protective order for the contents of the conversation in which the lawyer purportedly lowered the demand, reasoning that plaintiff failed to meet his burden to establish that the conversations actually occurred in mediation). **Quote from the Court:** "Given the number of cases in which the fair and equitable administration of justice has been thwarted, perhaps it is time for the Legislature to reconsider California's broad and expansive mediation confidentiality statutes and to craft ones that would permit countervailing public policies be considered. In light of the harsh and inequitable results of the mediation confidentiality statutes . . . the parties and their attorneys should be warned of the unintended consequences of agreeing to mediate a dispute. If they do

not intend to be bound by the mediation confidentiality statutes, then they should ‘make [it] clear at the outset that something other than a mediation is intended.’” (citation omitted).

ALSO LISTED UNDER ETHICS/MALPRACTICE

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

Abdalla v. Hojabri, No. B190707, 2007 WL 1192388 (Cal. Ct. App. Apr. 24, 2007) (awarding attorneys' fees to the prevailing party, despite the fact that the party initially brought a law suit in violation of the mediation clause, but immediately dismissed that suit upon discovering the mediation clause, and attempted mediation before refiling the lawsuit).

ALSO LISTED UNDER FEES/SANCTIONS

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).

Amundson v. Amundson, No. A06-514, 2007 WL 152132 (Minn. Ct. App. Jan. 23, 2007) (concluding that a dispute resolution obligation contained in the joint legal-custody provision of a judgment and decree could not be relied upon by father to compel mediation of a post-decree dispute about physical custody and child support).

A.T. Chadwick Co. v. PFI Constr. Corp., Nos. 01998 SEPT.TERM 2003, CONTROL 011431, & CONTROL 031986, 2004 WL 2451372 (Pa. Com. Pl. July 27, 2004) (dismissing case for plaintiff's failure to seek contractually required mediation).

B & O Mfg., Inc. v. Home Depot U.S.A., Inc., No. C 07-02864 JSW, 2007 WL 3232276 (N.D. Cal. Nov. 01, 2007) (finding no waiver of the obligation to mediate when the party made an argument that mediation was premature according to the terms of the agreement).

BBS Technologies, Inc. v. Remington Arms Co., Inc., No CIV.A. 05-98-DLB, 2005 WL 3132307 (E.D. Ky., Nov 22, 2005) (finding no bar to arbitration posed by defendant's alleged failure to satisfy contractual pre-condition to first negotiate in good faith and participate in

mediation, where plaintiff's allegation that defendant engaged in "low ball" negotiating tactics were insufficient to establish that defendant's settlement offer was made in bad faith, and where parties first agreed to stay arbitration pending mediation and later mutually agreed to cancel the 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).

Blackmon-Malloy v. U.S. Capitol Police Bd., No. CIV01-2221(EGS/JMF), 2007 WL 841019 (D. D.C. Mar. 19, 2007) (dismissing discrimination claims with prejudice for plaintiff's failure to complete counseling and mediation requirements under the Congressional Accountability Act), *supplemented by* 2007 WL 1438763 (D.D.C. May 15, 2007). ALSO LISTED UNDER SANCTIONS

Brady v. Livingood, 456 F. Supp. 2d 1 (D.D.C. 2006) (finding allegations of discrimination that took place more than 180 days before the plaintiff sought counseling, were time barred under the Congressional Accountability Act). **Quote from the Court:** "Under the statutory framework of the CAA, federal courts only have jurisdiction over civil actions brought by a covered employee if that employee has completed mediation and counseling requirements under the statute. 2 U.S.C. §§ 1404, 1408."

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

Cafarelli v. Colon-Collazo, No. CV055000279S, 2006 WL 1828608 (Conn. Super. Ct. June 20, 2006) (concluding that, although the parties' contract made mediation a condition precedent to court action, the failure of the parties to take advantage of this opportunity does not deprive the court of subject matter jurisdiction). **Quote from the Court:** "The distinctions between arbitration and mediation help resolve the ultimate issue of whether the failure to mediate, when made a condition precedent to litigation, can deprive a court of subject matter jurisdiction. It makes sense to conclude that the failure to arbitrate deprives the court of the power to hear a case because arbitration typically is a binding, trial-like procedure that fairly substitutes for court proceedings. A party should not have the right to bypass arbitration on the contradictory ground that it seeks a trial-like proceeding. It makes far less sense, however, to conclude that the failure to mediate deprives the court of the power to hear a case. Mediation is non-binding, does not involve a contested hearing, and, in general, does not duplicate proceedings in court. The court should retain the power to hear such a case even when the parties have failed to mediate, because no prior trial-like opportunity existed. Accordingly, the court concludes that, although mediation is a condition precedent to court action, the failure of the parties to take advantage of this opportunity does not deprive the court of subject matter jurisdiction."

Cavalcanti v. Silver State Helicopters, LLC, No. A116236, 2007 WL 2834554 (Cal. Ct. App. Oct. 2, 2007) (affirming denial of motion to compel arbitration, where contract required mediation and only ambiguously referred to arbitration).

ALSO LISTED UNDER MED-ARB

CertainTeed Corp. v. Celotex Corp., No. Civ. A. 471, 2005 WL 217032 (Del. Ch. Jan. 24, 2005) (refusing to compel specific performance or award damages for alleged breach of contractual obligation to mediate where moving party's substantive claims were time-barred by running of the statute of limitations). **Quote from the Court:** "[T]he only possible relief CertainTeed could receive for any failure of Celotex to mediate is an order of specific performance. By its very nature, an obligation to mediate is simply an obligation to attempt, with the aid of a third party neutral, to resolve a dispute in good faith. It is an 'agreement to try to agree'....CertainTeed cannot revive its time-barred substantive claims through the guise of arguing that Celotex's failure to mediate them somehow tolled the statute of limitations as to those claims."

Chillari v. Chillari, 583 S.E.2d 367 (N.C. Ct. App. 2003) (vacating award of physical custody entered before parties had opportunity to mediate child custody and visitation issues, where there was neither a stipulation by the parties to waive mediation, nor a decision by the court on its own motion to waive mediation for good cause).

CK DFW Partners Ltd. v. City Kitchens, Inc., No. CIV.A.3:06-CV-1598-D, 2007 WL 2381259 (N.D. Tex. Aug. 17, 2007) (holding that alleged failure to mediate pursuant to a contractual obligation does not nullify the contract's forum selection clause). **Quote from the Court:** "Although failure to mediate may conceivably support an independent claim for breach of contract, that claim must be litigated in the contractually-specified forum under the terms of the Agreements. Plaintiffs have not established how, under the terms of the contracts, defendants' purported failure to mediate vitiates the contractual obligation to file suit in a California forum. Applying principles of California contract law, the court therefore rejects the contention that the terms of the Agreements can reasonably be interpreted to provide that a party's putative failure to mediate nullifies the forum selection clauses."

Cohen v. Cohen, No. A-1216-06T2, 2007 WL 2081471 (N.J. Super. Ct. App. Div. July 23, 2007) (affirming the trial court's denial of plaintiff's motion to terminate child support where plaintiff failed to first utilize mediation in attempt to resolve the issue, as required by the parties stipulated divorce decree).

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).

Crandall v. Grbic, 138 P.3d 365 (Kan. Ct. App. 2006) (affirming summary judgment for defendant real estate agent because the plaintiff's claims against the real estate agent regarding the leaky patio roof were in the nature of fraud or misrepresentation claims, which according to the purchase contract should have been submitted to mediation).

Darling's v. Nisson N. Am., Inc., 117 F. Supp. 2d 54 (D. Me. 2000) (notwithstanding that claims stated by a franchisee pursuant to the Motor Vehicle Dealer's Act were ripe for judicial review, the case is dismissed without prejudice where plaintiff failed to make a written demand for mediation as required by the Act as a precondition for filing court action).

DeRolph v. State of Ohio, 760 N.E.2d 351 (Ohio 2001) (in mediation concerning state's system of funding public education, representatives of the minority party as well as the governor, president of the senate, and speaker of the house should participate to ensure representation of all those with authority to implement the settlement).

Drake v. Laurel Highlands Foundation, Inc., No. CIV.A. 07-252, 2007 WL 4205820 (W.D. Pa. Nov. 27, 2007) (awarding monetary sanctions, but not dismissal, for dilatory behavior by plaintiff, including failure to timely provide documents to allow assessment of potential for mediation).

ALSO LISTED IN SANCTIONS

Durlach v. Durlach, 596 S.E.2d 908 (S.C. 2004) (affirming a contempt order against the husband for mismanaging funds of a business transferred to the wife in a divorce decree, noting it was within the court's discretion to conduct the hearing that resulted in the contempt order without first requiring the parties to mediate when the obligation to mediate disputes prior to hearing was contained in a consent order which applied to an appeal period which had expired one year prior to the contempt hearing).

DVDPlay, Inc. v. DVD 123 LLC, 930 So. 2d 816 (Fla. Dist. Ct. App. 2006) (concluding that franchisee, whose attempts to mediate its dispute with franchisor were rejected by franchisor on the ground that franchisor's termination of the agreement between the parties left nothing to mediate, waived the mediation provision in the agreement by filing litigation against franchisor rather than seeking judicial enforcement of the mediation provision, although the mediation provision survived termination of the agreement).

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).

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

have a Union representative present – an issue that should have been easily resolved and should not have prevented other mediation efforts from occurring”), *opinion withdrawn in part on reconsideration*, No. 3:00CV00462, 2005 WL 1802134 (S.D. Ohio Jul 28, 2005).

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

Fluor Enter., Inc. v. Solutia, Inc., 147 F. Supp. 2d 648 (S.D. Tex. 2001) (denying motion for summary judgment based on a party's alleged violation of the “standstill provision” in a contract which barred suit until 30 days after the commencement of a “mediation procedure”, where rules referenced in the parties' contract suggest that the standstill provision began to run on the date that preliminary steps to hold mediation were commenced, rather than the date when the first actual mediation meeting was held).

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.”

Halcomb v. Office of the Senate Sergeant-at-Arms of U.S. Senate, 209 F. Supp. 2d 175 (D.D.C. 2002) (dismissing without prejudice federal employee's action alleging retaliation in violation of the Congressional Accountability Act, after concluding that the Act's counseling and mediation requirements are jurisdictional prerequisites to filing a retaliation lawsuit).

Hawkes v. Hawkes, No. C1-02-1666, 2003 WL 21060771 (Minn. Ct. App. May 6, 2003) (where parties agreed to mediate support issues because of their mutual erroneous belief that their judgment and decree of divorce mandated mediation, trial court did not abuse its discretion to *sua sponte* decide the pending support issues once informed by the father's attorney that mediation was not required by the judgment and decree as "there is no inherent right to mediate support issues"), *rev'd* (July 15, 2003).

Hestekin v. Hestekin, 587 N.W.2d 308 (Minn. Ct. App. 1998) (no error in trial court's failure to vacate mandatory mediation provisions of judgment and decree of divorce based on allegation of domestic abuse, when objection to mediation based on abuse was not raised to the trial court and the trial court determined that no abuse occurred).

Hill v. Morehouse Med. Assoc., Inc., 236 F.R.D. 590 (N.D. Ga.2006) (denying plaintiff's motion to compel mediation because defendant's "present attitude toward mediation and settlement would make mediation an exercise in futility").

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).

Hoffer v. Moyer, No. A05-2388, 2006 WL 2601301 (Minn. Ct. App. Sept. 12, 2006) (concluding that trial court did not abuse discretion in refusing to grant husband's request that all future custody and parenting-time disputes be mediated, where the husband had been the one who previously "walked out of the mediation sessions on all occasions" and the husband's counsel conceded that the parties had mediated in the past and that it "wasn't terribly successful").

In re African-American Slave Descendants' Litig., 272 F. Supp. 2d 755 (N.D. Ill. 2003) (refusing to exercise court's inherent power to compel mediation of action for monetary and injunctive relief brought by descendants of former enslaved African-Americans against various corporate defendants out of belief that mediation would not facilitate an expeditious end to the litigation because "[b]oth parties have different views pertaining to the viability of claims presented" and defendants object to imposition of mediation), *appeal dismissed* (Mar. 18, 2005).
Quote from the Court: "When mediation is forced upon unwilling litigants, it stands to reason that the likelihood of settlement is diminished. Requiring parties to invest substantial amounts of time and money in mediation under such circumstances may well be inefficient,"

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 Enron Corp., No. 03 Civ. 5078(DLC), 2003 WL 22171695 (S.D.N.Y. Sept. 22, 2003) (refusing to withdraw reference of proceedings to bankruptcy court and noting that judicial efficiency, as well as uniform administration of bankruptcy proceedings, weigh in favor of allowing mediation process in bankruptcy court to proceed even for claims allegedly subject to arbitration).

In re Federated Mut. Funds Excessive Fee Litigation, No. 2:04CV352, 2:05CV201, 2:04CV702, 2:06CV241, 2:04CV855Slip Copy, 2007 WL 3232210 (W.D. Pa. Oct. 30, 2007) (concluding that alleged lack of merit of plaintiff's claims is insufficient basis to deny enforcement of parties' agreement to mediate).

In re Igloo Products Corp., 238 S.W.3d 574 (Tex. App. 2007) (refusing to decide whether an employee's arbitration agreement was binding on representatives in a wrongful death claim, but denying the motion to compel arbitration because the arbitration clause required that first the claims be mediated).

ALSO LISTED UNDER MED-ARB

In re Patchell, 344 B.R. 8 (D. Mass. 2006) (concluding that creditors' refusal to participate in non-binding mediation during the course of bankruptcy proceedings did not invalidate their right to pursue their underlying claim, including award of attorneys' fees and costs, where the debtor's zeal to be released from obligations to pay her mortgage and to be granted substantial damages would have rendered the mediation fruitless and only added to the overall costs of the case).

In re Pisces Foods, L.L.C., 228 S.W.3d 349 (Tex. App. 2007) (holding that trial court properly refused to compel arbitration where party failed to satisfy contractual precondition to mediate).

Quote from the Court: "We do not express any opinion regarding whether relator has waived the right to arbitrate upon satisfaction of the preconditions, only that the right to compel arbitration has not yet accrued under the terms of the contract. Nor do we express any opinion regarding whether this lawsuit should continue in the trial court despite the fact that an alternative dispute resolution and arbitration agreement exists (whether enforceable or not), but Jimenez has not complied with it and the relator has not properly invoked it. On the undisputed record presented here, the trial court did not abuse its discretion by refusing to compel arbitration."

ALSO LISTED UNDER MED-ARB

In re SSP Partners, No. 13-07-031-CV, 2007 WL 2318131 (Tex. App. August 14, 2007) (holding that satisfaction of mediation pre-condition in parties' contract is a matter of procedural arbitrability for the arbitrator, not the court, to decide).

ALSO LISTED UNDER MED-ARB

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

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."

Jeld-Wen, Inc. v. Superior Court, 146 Cal.App.4th 536 (Cal. Ct. App. 2007) (holding that the trial court did not have authority to require the cross-defendant to attend and pay for private mediation over its objection). **Quote from the Court:** "The essence of mediation is its voluntariness and we reject the suggestion that trial courts presiding over complex cases have the inherent authority to force a party to attend and pay for mediation over the party's express objection because such an order conflicts with the statutory scheme pertaining to mediation.... Moreover, it serves no purpose to force Jeld-Wen, an uninsured litigant and minor player in this complex action, to attend mediation where the combined costs of the mediator and attorneys' fees expended to attend multiple mediation sessions could exceed the amount of the claim against it." ALSO LISTED UNDER FEES/SANCTIONS

Kayser Properties, LLC v. Fidelity Nat. Property & Cas. Ins. Co., Inc., No. 3:06cv150/MCR/EMT, 2007 WL 1490693 (N.D. Fla. May 21, 2007) (cautioning, but otherwise not sanctioning, counsel for disregarding court order to mediate, where both counsel argued that they believed mediation would not be productive).
ALSO LISTED UNDER FEES/SANCTIONS

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."

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).

Kindred Hosps. Ltd. P'ship v. Luttrell, No. 2006-CA-000221-MR, 2007 WL 2141810 (Ky. Ct. App. July 27, 2007) (holding a daughter did not have actual or implied authority to bind her mother to an ADR agreement in nursing home admission paperwork, because the daughter's only authority would derive from her status as a relative, which, by itself, is not sufficient to show authority to legally bind another), *rev'd* (Nov. 15, 2007).

Ky. Farm Bureau Mut. Ins. Co. v. Wright, 136 S.W.3d 455 (Ky. 2004) (affirming power of trial court to compel mediation of negligence case, including power to order appearance of parties and their adjuster at the mediation with full settlement authority; but granting writ of prohibition and precluding court from ordering that parties would face fines and penalties if the case settled after conclusion of mediation). **Quote from the Court:** "Under the trial court's order, parties who settled after the conclusion of mediation, despite a belief in their right to do so, would be required to face mandatory fines and penalties, a route most reasonable parties would avoid. We conclude that the post-mediation settlement provision imposing additional costs, fines and

penalties exceeds trial court discretion and results in irreparable harm without an adequate remedy by appeal."

Kiser v. Kiser, 595 S.E.2d 816 (N.C. Ct. App. 2004) (unpublished table decision) (affirming trial court custody award despite failure to schedule statutorily required mediation, where the party challenging the award for failure to mediate had: 1) herself filed a motion for exemption from mediation based on plaintiff's alleged domestic violence; 2) asserted during trial that she was ready to proceed and did not request mediation; and 3) and did not take issue with the case not being sent to mediation until after the court issued an adverse custody order). **Quote from the Court:** "[W]hile we recognize it is the better practice of a trial court to affirmatively approve or deny a waiver of mediation for child custody/visitation issues or find that there is good cause to waive mediation on its own, defendant was not prejudiced by the lack of mediation in this case."

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).

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

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

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."

Looney v. Raby, --- S.W.3d ----, 2007 WL 3357639 (Ark. Ct. App. Nov. 14, 2007) (finding no error in trial court refusal to enforce mediation under the Farm Mediation Act, where farmer did not provide evidence to establish that his claims were about indebtedness covered by the Act).

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."

Lynn v. Gen. Elec. Co., No. 03-2662-GTV-DJW, 2005 WL 701270 (D. Kan. Jan. 20, 2005) (refusing to enforce alleged contractual obligation to mediate as precondition to initiating litigation or arbitration, concluding: 1) mediation contracts are not subject to enforcement under the Federal Arbitration Act; and 2) no enforceable contract existed under state law because defendant employer could not prove employees actually received email and newsletter notices of the newly adopted mediation requirements). **Quote from the Court:** "Unlike enforcement of arbitration agreements, there is no historical evidence of hostility by the courts in enforcing mediation contracts; accordingly, there is no reason to believe Congress intended to encompass mediation within arbitration enforcement."

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).

McNeill v. McNeill, 981 So.2d 1158 (Ala. Ct. App. 2007) (dismissing an appeal because an order for mediation is not a final, appealable judgment).

Meinke v. Meinke, No. 277033, 2007 WL 4209344 (Mich. Ct. App. Nov. 29, 2007) (ruling that: 1. an unsigned mediation agreement was enforceable despite a court rule that required the agreements to be signed or acknowledged on an audio or video recording, based in part on mediator testimony (which was allowed by the parties) that the parties had reached an agreement and had not signed the agreement because of the pending bankruptcy; and 2. the trial court, with the consent of the parties, could order the parties to facilitative mediation despite a bankruptcy stay).

ALSO LISTED UNDER ENFORCMENT

Morriss v. Concordia Univ. at Austin, No. A-05-CA-043 LY, 2006 WL 1347918 (W.D. Tex. May 11, 2006) (granting defense summary judgment on ADEA claim, where employee among other things, failed to attend 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.”

Nat’l Mktg. Ass’n v. Broadwing Telecomm., Inc., No. CIV. A. 02-2017-CM, 2003 WL 1608416 (D. Kan. Mar. 26, 2003) (plaintiff’s alleged failure to seek mediation prior to initiating lawsuit was not a basis to dismiss all claims, where plaintiff timely mailed mediation request to defendant’s principal place of business, rather than notice address listed in parties’ royalty agreement).

Office Env’ts, Inc. v. Lake States Ins. Co., 833 N.E.2d 489 (Ind. Ct. App. 2005) (affirming dismissal of complaint with prejudice for plaintiff’s failure over two and one-half years to comply with court order to mediate, basing authority for dismissal not on local court mediation rules (which would limit sanction authority to costs and attorney fees), but on general trial rules permitting dismissal for failure to prosecute). **Quote from the Court’s Dissenting Opinion:** “Many counties require mediation in all civil cases, and I do not believe that is a good practice. Some cases simply cannot be productively dealt with through mediation. When mediation is imposed without any inquiry into whether that process suits the dispute or the litigants, parties will often be ordered into mediation when both sides (and perhaps the judge, as well) know the process will be futile. In some situations, like the one before us, a party alleges its financial difficulties are attributable to an act or omission by the other party. Forcing the financially challenged party into mediation, and forcing that party to pay mediation costs, will often be counter-productive.”

People of the State of N.Y. v. Royal York Liberatore Family Ltd. P’ship, No. 05-CV-718S(Sc), 2006 WL 1144619 (W.D.N.Y. April 28, 2006) (denying motion to vacate mediation referral based on parties’ preference for judicially-managed settlement conference). **Quote from the Court:** “The instant motion suggests the parties are willing to engage in meaningful negotiations aimed at resolving this dispute, but do not wish to do so within the context of the Court’s ADR program. The parties’ stated preference for a judicial settlement conference does not constitute sufficient cause for vacatur of the Referral Order”

Phila. Hous. Auth. v. Dore & Assocs. Contracting, Inc., 111 F. Supp. 2d 633 (E.D. Pa. 2000) (precluding court action on alleged contract breach where plaintiff failed to formally request internal appeal, arbitration, or mediation as required by contract’s ADR provision).

PJL Properties, LLC v. Recla, 745 N.W.2d 89 (table) (Wis. Ct. App. 2007) (refusing to vacate default where defendant failed to appear at a mediation orientation or notify court of his incarceration).

ALSO LISTED UNDER FEES/SANCTIONS

R.C. v. Juv. Ct. Judges of Fifteenth Jud. Cir., 942 So. 2d 1007 (Fla. Dist. Ct. App. 2006) (striking circuit order compelling mediation of legal challenge to general policy of shackling juveniles, finding no statute or rule of procedure authority for mediation of such issues).

Richardson v. Richardson, No. C6-02-1002, 2003 WL 105378 (Minn. Ct. App. Jan. 14, 2003) (divorce decree provision requiring mediation of disputes regarding parental access schedule does not require mediation prior to motion seeking modification of physical custody).

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).

Samuels v. Merrill, No. B190158, 2007 WL 2084093 (Cal. Ct. App. July 23, 2007) (affirming award of attorney's fees where plaintiff made a meaningful attempt to mediate as required in their real estate purchase agreement, and defendant failed to respond to plaintiff's faxed mediation request).

ALSO LISTED UNDER FEES/SANCTIONS

Sanchez v. Garcia, No. 13-05-557-CV, 2006 WL 2076752 (Tex. App. July 27, 2006) (affirming dismissal of case for non-prosecution even though delay was, in part, due to defendant's failure to mediate, where plaintiff failed to bring a motion to compel mediation or explain her failure to do so), *rev'd* (Dec. 1, 2006).

Schuller v. Schuller, No. C4-02-1242, 2003 WL 282396 (Minn. Ct. App. Feb. 11, 2003) (failure of prevailing party to first participate in mediation as required by the parties' stipulated judgment and decree is insufficient basis to set aside custody modification on appeal where record suggested losing party failed to participate in mediation unless opposing party paid all of the mediator's fees contrary to the terms of the stipulated mediation agreement). **Quote from the Court:** "Further, any benefits of mediation here are now gone. Mediation is favored as a way to achieve an expeditious result in a relatively inexpensive way that saves the time and resources of the courts. But, the district court has ruled on respondent's motion. To order mediation now would delay the final outcome and add unnecessary expenses to the litigation process, contrary to the purpose of mediation."

Short Bros. Constr., Inc. v. Korte & Luitjohan Contractors, Inc., 828 N.E.2d 754 (Ill. Ct. App. 2005) (dismissing appeal of order compelling mediation of construction dispute concluding that

mediation order is an administrative, ministerial, non-injunctive order not subject to interlocutory relief). **Quote from the Court:** “[T]he purpose of the mediation process, and the mediation order in the case at bar, is to streamline the judicial process by encouraging compromise and settlement, if not of the entire controversy then at least some portions of it, thereby reducing the workload of the circuit court and lessening the expense and burden to the parties. The mediation order is clearly related to the circuit court's inherent authority to control its own docket. The mediation order is ministerial or administrative in nature, rather than injunctive in nature, because it is regulating the procedural details of the litigation, rather than affecting the rights of the parties.”

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).

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.”

Stevermer v. Stevermer, Nos. A07-594, A07-669, 2007 WL 2472642 (Minn. Ct. App. Sept. 4, 2007) (reversing denial of mother's motion to modify custody and parenting time, where trial court refused to order mediation as required by the parties' Illinois 2004 divorce judgment; and compelling mediation on remand despite allegation of domestic abuse). **Quote from the Court:** “Appellant insists that the parties' dispute cannot be resolved through mediation because she makes a claim of domestic abuse....Although appellant alleges that an OFP was issued against respondent in December 2002, that OFP is not part of the record and was issued one and one-half years before the parties agreed to mediate any future disputes involving custody.... Appellant does not claim that the child is endangered and does not allege any facts that would support a finding that domestic abuse has occurred since 2002.”

Stoehr v. Yost, 765 N.E.2d 684 (Ind. Ct. App.) (affirming trial court determination that insurer did not act in bad faith simply by failing to tell plaintiff in advance of mediation that insurer would not offer money to settle the claim), *transfer denied*, 783 N.E.2d 692 (Ind. 2002) (unpublished table decision). **Quote from the Court:** “Because mediation is aimed at accomplishing more than just reaching a settlement, we do not find that it was bad faith for State Farm to wait until the start of the mediation to notify the Yosts that it did not intend to offer them a money settlement on their claim. However, this is not to say that a party could not be found to

have engaged in bad faith by failing to offer a settlement amount if there exists other evidence of dishonest purpose or moral obliquity.”

Strawser v. Langmaack, No. E040014, 2007 WL 1810704 (Cal. Ct. App. June 25, 2007), *review denied* (Oct. 10, 2007) (ruling that defendants were not entitled to attorneys’ fees under the contract because they refused plaintiffs’ pre-litigation offer to mediate and their informal attempt to settle through direct negotiation did not satisfy the mediation requirement in the contract).

ALSO LISTED UNDER FEES/SANCTIONS

Thompson v. Ohio State Univ. Hosps., No. 06AP-1117, 2007 WL 2668745 (Ohio Ct. App. 2007) (counsel's failure to attend mediation indicative of overall claim of dilatory conduct sufficient to affirm dismissal with prejudice).

ALSO LISTED UNDER FEES/SANCTIONS

Tian-Rui Si v. CSM Inv. Corp., No C-06-7611 PVT, 2007 WL 2601098 (N.D. Cal. Sept. 6, 2007) (finding undue burden for plaintiff to participate in mediation and deposition in the same week). ALSO LISTED UNDER MISCELLANEOUS

Travel Supreme, Inc. v. NVER Enterprises, Inc., No. 3:07CV194PPS, 2007 WL 2962641 (N.D. Ind. Oct. 5, 2007) (rejecting argument that likelihood of mediation in transfer jurisdiction favors grant of motion to transfer venue, given that mediation is mandatory in current court). **Quote from the Court:** "Given that this lawsuit has already been filed and has been pending for some time, any benefit to sending it back to Washington for pre-litigation mediation is silly since the litigation is well on its way anyway."

Tutu Park, Ltd. v. O'Brien Plumbing Co., Inc., 180 F. Supp. 2d 673 (D.V.I. 2002) (order of the Territorial Court of the Virgin Island compelling parties to mediate while continuing indefinitely a pending summary judgment motion hearing on arbitrability is interlocutory and unappealable; moreover, nothing in the FAA precludes the Territorial Court’s use of extrajudicial mediation proceedings before resolving the question of arbitrability).

United States 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).

United States v. City of Garland, Tex., 124 F. Supp. 2d 442 (N.D. Tex. 2000) (federal magistrate held to have authority to compel mayor and a city council member to attend court-ordered mediation, and further holding that such attendance was not in violation of Texas Open Meetings Act because mediation is not a “meeting” as defined by the Act).

U.S. v. Lake County Bd. of Com'rs, No. 2:04 CV 415, 2007 WL 1202408, *1 (N.D. Ind. Apr. 19, 2007) (denying defendants’ joint motion for an order requiring attendance at the mediation where the DOJ had indicated that the Assistant Attorney General, the person with authority, would participate by telephone. **Quote from the Court:** "Mediation must be an effort that

permits the parties to 'confront the dispute, in dialogue [and] participate fully in the attempt to resolve it.' . . . 'Good faith participation of a qualified representative,' even if not the absolute settlement authority, is central to full, effective participation. *Schwartzman, Inc.*, 167 F.R.D. 694, 688-699 (D.N.M. 1996) (quoting the 1993 Advisory Committee Notes to Federal Rule of Civil Procedure 16(c))('Particularly in litigation in which governmental agencies or large amounts of money are involved, there may be no one with on-the-spot settlement authority, and the most that should be expected is access to a person who would have a major role in submitting a recommendation to the body or board with ultimate decision-making authority).'"

U.S. v. Stallsmith, NO. 8:06-CV-1738-T-27MAP, 2007 WL 171073 (M.D. Fla. Jan. 18, 2007) (concluding court has authority to compel mediation but refusing to do so, where not all defendants not yet served).

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."

USA Flea Market, LLC v. EVMC Real Estate Consultants, Inc., No. 8:06-cv-0431-T-24-TBM, 2007 WL 470501 (M.D. Fla. Feb. 13, 2007) (concluding that the court's requirement that parties engage in pre-trial court-annexed mediation does not excuse a party's failure to satisfy an otherwise enforceable contractual obligation to engage in mediation as condition precedent to litigation).

Van Slyke v. Gibson, 146 Cal. App.4th 1296 (Cal. Ct. App. 2007) (concluding that defendant's filing a counterclaim, that was later dismissed, without first seeking mediation would not preclude defendant, as prevailing party, from collecting attorneys' fees incurred in defending the initial claim).

ALSO LISTED UNDER FEES/SANCTIONS

Ventre v. Ventre, No. CV00377148S, 2001 WL 100326 (Conn. Super. Ct. Jan. 9, 2001) (holding that parties must comply with agreements to mediate that appear in settlement agreements as a condition precedent to filing a lawsuit in court).

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”).

W. Sunview Properties, LLC v. Federman, No. CIV 03-00463 JMS-LEK, 2007 WL 2010290 (D. Haw. July 5, 2007) (awarding attorney’s fees to third party defendant despite the party's failure to participate in mediation, where the plaintiffs amended their complaint adding the third party defendant only after the dispute was sent to mediation). **Quote from the Court:** “The requested mediation solely involved Plaintiffs’ dispute with the Federmans, however, as Plaintiffs had not yet made any claims against the Association. Because Plaintiffs did not submit their claims against the Association to mediation prior to amending their Complaint, the Association is not barred from recovering attorneys’ fees and costs”

ALSO LISTED UNDER FEES/SANCTIONS

Western Sur. Co. v. Beck Elec. Co., Inc., No. CIVA 306CV-383MRDCK, 2007 WL 3165679 (W.D.N.C., Oct. 26, 2007) (granting plaintiff's motion to extend deadline for mediation, where defendant had yet to respond to written discovery requests and plaintiff believed "mediation at this stage is unlikely to be productive").

Wheeler v. Greene, 194 S.W.3d 1 (Tex. App. 2006) (concluding that a former trustee waived for appeal the propriety of the trial court's failure to order mediation as required by terms of trust, where the former trustee did not secure a ruling on its request for mediation from the trial court), *reh’g overruled* (May 2, 2006).

Woodruff v. Peters, Civil Action No. 05-2071 (PLF) Slip Copy, 2007 WL 1378486, D. D.C., May 09, 2007 (concluding that Title VII does not create an independent cause of action for the mishandling of an employee's discrimination complaint by refusal to consider mediation).

ALSO LISTED UNDER MISCELLANEOUS

D. SANCTIONS/ATTORNEY'S FEES/MEDIATION COSTS

A.B. v. Newark Bd. of Educ., No. 05-CV-702 (DMC), 2006 WL 343909 (D.N.J. Feb. 14, 2006) (concluding that a parent who settled an individual educational plan dispute with a school board through mediation could not be a “prevailing party” entitled to attorneys fees under the Individuals with Disabilities Education Act (IDEA) because: 1) the dispute ended with an “agreement” rather than an “order”; 2) the agreement was not signed by a judge; and 3) the agreement did not provide for judicial enforcement).

Abdalla v. Hojabri, No. B190707, 2007 WL 1192388 (Cal. Ct. App. Apr. 24, 2007) (awarding attorneys' fees to the prevailing party, despite the fact that the party initially brought a law suit in violation of the mediation clause, but immediately dismissed that suit upon discovering the mediation clause, and attempted mediation before refiling the lawsuit).

ALSO LISTED UNDER DUTY TO MEDIATE

Aikens v. Deluxe Fin. Serv., Inc., Civil Action No. 01-2427-CM-DJW, 2006 WL 2714513 (D. Kan. Sept. 22, 2006) (refusing to exercise ancillary jurisdiction and thus denying the mediator’s

motion for fees after the case was dismissed leaving the mediator with the remedy of filing a law suit in state court for breach of contract). **Quote from the Court:** “Finally, the court does not find that this fee dispute must be decided to protect the integrity of the underlying litigation or to insure that its disposition is not frustrated. Nor does the court find that resolution of this fee dispute is necessary to render complete justice to the parties to the lawsuit. This case was settled and the action dismissed almost two years ago. This fee dispute does not threaten the settlement or resolution of the case.”

Allapattah Serv., Inc. v. Exxon Corp., 454 F.Supp.2d 1185 (S.D.Fla. 2006) (justifying an incentive award to class representatives in an action against Exxon, in part because Exxon counsel during mediation “[d]irect[ed] his words directly to the named Plaintiffs and their spouses, [told] them that when Exxon won the case, it was going to obtain cost judgments against them personally and financially ruin each and every one of them”).

Anderson v. Duke Energy Corp., No. CIV. 3:06CV399, 2007 WL 4284904 (W.D.N.C. Dec. 4, 2007) (holding premature plaintiff’s motion to seek indigent status for purposes of paying mediator fee, where relevant court rule specifically states that any such motion would be heard only after completion of mediation). **Quote from the Court:** “The Court notes, however, that it does not look favorably upon the Plaintiff having gone through the entire mediation process without informing opposing counsel and particularly the mediator of the Plaintiff’s intent to seek indigent status for the purposes of the payment of the mediator’s fee.”
SEE ALSO LISTING UNDER ETHICS for unrelated “ghost-writing” concern

Andjelic v. Marken Mktg., Inc., No. 6:05CV1877ORL22JGG, 2007 WL 2021960 (M.D. Fla. July 11, 2007) (holding that the mediator’s fee is not taxable under USC § 1920, but nonetheless awarding costs based on the fact that the motion was unopposed and the ADA provides that reasonable litigation expenses and costs can be awarded to the prevailing party).

Areizaga v. Bd. of County Comm’rs of Hillsborough County, 935 So. 2d 640 (Fla. Dist. Ct. App. 2006) (affirming the order sanctioning a party in a mandamus proceeding for failure to attend a mediation that was ordered orally by the court, but quashing the order to mediate because the Florida Rule of Civil Procedure, 1.710(b) precluded mediation of extraordinary writs), *rev’d*, 958 So. 2d 918 (Fla. May 17, 2007) (unpublished table decision).

Bates v. Islamorada, Vill. of Islands, No. 04-10114-CIV, 2007 WL 2113586 (S.D. Fla. July 23, 2007) (denying defendant’s motion to tax mediation costs under Rule 54(d) or 28 USC § 1920 and further denying defendant’s motion for attorneys’ fees, after examining the defendant’s non-monetary settlement offer in mediation, which the court noted could be seen as evidence that the plaintiff’s claims were not frivolous; however, because there was no evidence as to the value of the settlement offer, the court held the factor did not weigh in favor of either party).

Blackmon-Malloy v. U.S. Capitol Police Bd., No. CIVA01-2221(EGS/JMF), 2007 WL 841019 (D.D.C. Mar. 19, 2007) (dismissing discrimination claims with prejudice for plaintiff’s failure to complete counseling and mediation requirements under the Congressional Accountability Act), *supplemented by* 2007 WL 1438763 (D.D.C. May 15, 2007).
ALSO LISTED UNDER DUTY TO MEDIATE

Borror v. MarineMax of Ohio, Inc., No. OT-06-010, 2007 WL 431737 (Ohio Ct. App. Feb. 9, 2007) (affirming award of prejudgment interest to plaintiff where defendant failed to bargain in good faith during mediation).

Brady v. Wal-Mart Stores, Inc., 455 F. Supp. 2d 157 (E.D.N.Y. 2006) (reducing the claim for attorneys' fees for sixty-two hours preparation and sixteen hours attending the court ordered mediation, but granting as reasonable the fees for two attorneys present at the mediation). **Quote from the Court** : "I agree that the preparation time was excessive, particularly in comparison to the hours logged by opposing counsel, which were less by half. While I appreciate that counsel had to prepare lengthy statements, I do not think that this should have required 62 hours. With regard to the actual mediation session, I do not agree with the defendants that it was inherently unreasonable for Brady to be represented by two attorneys at the mediation session. Wal-Mart was similarly represented by two attorneys. I recognize that one of Wal-Mart's attorneys was in-house counsel for whom legal fees were not incurred, and who also had a role as client that the second lawyer representing Brady did not. Nevertheless, a mediation presents challenges that a deposition or a routine court proceeding might not; I cannot say that it was unreasonable for Brady to have two lawyers present."

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).

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

Burton v. Madix Store Fixtures, No. CIV.A. 3:05-CV-1081, 2006 WL 3247329 (N.D. Tex. Nov. 9, 2006) (denying a motion for default judgment that was based on defendant failure to mediate the case).

Carbino v. Ward, 801 So. 2d 1028 (Fla. Dist. Ct. App. 2001) (sanctions for defendant party non-attendance at mediation are appropriate even though defendant's insurer sent a representative to the mediation who had full authority to settle the matter up to the policy limit; however, sanctions could not include plaintiff's lost wages).

Cargill, Inc. v. Lone Star Techs., Inc., No. A04-2137, 2005 WL 1514631 (Minn. Ct. App. June 28, 2005) (affirming award of pre-verdict interest and costs, including one-half of a mediator's fee, to prevailing party in breach of asset purchase agreement dispute, but explicitly rejecting district court's reasoning that the award of mediator's costs was justified by the defendant's unreasonable refusal to consider any settlement proposals greater than the termination fee specified in the disputed asset purchase agreement because such party conduct should have no bearing on award of costs or disbursements). **Quote from the Court:** "We note that, if such evidence were admissible, appellant's good faith in the settlement process could be inferred from the presence of the \$10 million termination fee clause in the parties' agreement."

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).

Craven v. Tex. Dep't of Criminal Justice-Institutional Div., 151 F. Supp. 2d 757 (N.D. Tex. 2001) (an employer defendant in Title VII litigation who refuses to participate in mediation and who brings a motion to stay mediation just three weeks before the mediation deadline is not subject to sanctions for unreasonable behavior, where the employer acted out of belief that pending summary judgment motion would resolve all of the outstanding issues in the case, and court in fact subsequently issued a summary judgment in employer's favor).

Davis v. Kan. City Fire & Marine Ins. Co., 195 F.R.D. 33 (N.D. Okla. 2000) (imposing financial and reputational sanctions against a law firm that attached confidential settlement conference statement to a motion filed in court).

De Nicola v. Adelphi Acad., No. CV-05-4231, 2006 WL 2844384 (E.D.N.Y. Sept. 29, 2006) (refusing to award attorneys' fees for COBRA violation finding no bad faith in terminating mediation when defendant suspected plaintiffs of assaulting one of their employees).

Doorstep Beverages of Longwood, Inc. v. Collier, 928 So. 2d 482 (Fla. Dist. Ct. App. 2006) (imposing sanctions on counsel (at counsel's request) for the failure of the client to appear at the appellate mediation where counsel admitted to the court that he failed to advise his client that this attendance was required).

Drake v. Laurel Highlands Foundation, Inc., NO. CIV.A. 07-252, 2007 WL 4205820 (W.D. Pa. Nov. 27, 2007) (awarding monetary sanctions, but not dismissal, for dilatory behavior by plaintiff, including failure to timely provide documents to allow assessment of potential for mediation). ALSO LISTED IN DUTY TO MEDIATE

Drayton v. Assocs., No. 3:97-CV-2924-BC, 2000 WL 49189 (N.D. Tex. Jan. 21, 2000) (ordering attorney's fees as a sanction where challenge to mediated agreement was found to be made in bad faith).

Dumas v. Tyson Foods, Inc., 139 F. Supp. 2d 1243 (N.D. Ala. 2001) (approving claim by Title VII plaintiff for mediation expenses).

Dunn v. Canoy, 636 S.E.2d 243 (N.C. Ct. App. 2006) (denying a claim that the trial judge lacked the authority to sanction an attorney for disrupting settlement, concluding that Code of Judicial Conduct rules precluding judge from acting as an arbitrator or mediator might limit ability to preside over continued proceedings regarding the merits of the action, but not the ability to administer judicial sanctions), *appeal dismissed and rev'd*, 645 S.E.2d 766 (N.C. 2007).

Education Station Day Care Center, Inc. v. Yellow Book USA, Inc., Nos. A-1653-05T1, A-1834-05T1, A-1693-05T1, 2007 WL 1245971 (N.J. Super. Ct. App. Div. May 1, 2007), *certification denied*, --- N.J. ---, --- A.2d --- (N.J. Feb. 21, 2008) (Table, No. C-592 Sept. Term 2007, 61,199) (Text Not Available on Westlaw) (awarding plaintiffs' class action counsel an enhancement in attorneys' fees, in part because the matter was resolved expeditiously through mediation).

Elder v. Islam, 869 So. 2d 600 (Fla. Dist. Ct. App. 2004) (affirming the award of a *pro rata* share of mediation costs to an employee in a successful claim for unpaid wages because the costs were incurred pursuant to a court order to engage in mediation). **Quote from the Court:** "In closing we note that, since the Statewide Uniform Guidelines for Taxation of Costs in Civil Actions do not currently address mediation costs in any way, we would encourage the drafters thereof to address this issue to avoid these disputes in the future."

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).

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

Fabing v. Eaton, 941 So. 2d 415 (Fla. Dist. Ct. App. 2006) (remanding to the trial judge who had refused to enforce a mediation agreement, to decide if the mediation agreement was valid but unenforceable because of subsequent actions of a third party in which case attorneys' fees should

be granted or if the mediation agreement was unenforceable because of mutual mistake, in which case no attorneys' fees should be granted pursuant to the agreement), *reh'g denied* (Nov. 20, 2006).

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

Farhat v. Hartford Life & Accident Ins. Co., No. C 05-0797 PJH, 2006 WL 2521571 (N.D. Cal. Aug. 30, 2006) (reducing fee request for time spent preparing for and attending a mediation).

Quote From the Court: "It is true that because the junior attorney bills at a lower hourly rate, it is less expensive than having the senior attorney expend the same number of hours preparing the mediation statement. However, it is also true that the more senior attorney, here Ms. Renaker, could have undoubtedly prepared the statement in far fewer hours because of her vast experience in this area. Moreover, the attendance of the mediation by two attorneys is neither required nor encouraged by this court's ADR Local Rules; the only requirement is that lead counsel attend. This requirement necessarily contemplates that lead counsel will be sufficiently familiar with the facts and supporting evidence to be effective."

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").

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

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.

Frank v. L.L. Bean Inc., 377 F.Supp.2d 233 (D. Me. 2005) (imposing \$1,000 fine on plaintiff's attorney in sexual harassment action as sanction for breaching confidentiality of prior mediation by disclosing to a potential witness the position the employer had taken in the prior mediation as a way of convincing the witness that the employer had in fact done something wrong). **Quote from the Court:** "It is essential for the effectiveness of mediation in this district that all but the most *de minimis* breaches of confidentiality, whether perpetrated by the opposing party or her counsel be punished with sanctions."

Gore v. Experian Info. Solutions, Inc., No. Civ. 303CV2949H, 2004 WL 1381034 (N.D. Tex. June 21, 2004) (denying motion for sanctions based on bad faith participation because motion was based on confidential mediation communications).

Gordon v. Virtumundo, Inc., No. 06-0204-JCC, 2007 WL 2253296 (W.D. Wash. Aug. 1, 2007) (holding the defendants can recover mediation costs under 28 USC §1920 as a component of reasonable attorneys' fees).

Gould v. Plummer, NO.06-04225-CV-C-NKL, 2007 WL 4268792 (W.D. Mo. Nov. 30 2007) (refusing to award attorneys fees to dismissed attorney based on contingent basis (allowing fees on hourly basis only) when the attorney argued he had the case prepared "ready for mediation").

Gunter v. Gunter, No. A03-352, 2004 WL 119856 (Minn. Ct. App. Jan. 27, 2004) (affirming the denial of mother's request for attorney fees based on father's failure to first mediate disputes concerning the welfare of the children as required by the parties' judgment and decree, where both parties had filed motions without requesting mediation; and finding no abuse of discretion in trial court ordering mediation of all issues not resolved by the court's order), *appeal after remand*, No. A04-2114, 2005 WL 3289311 (Minn. Ct. App. Dec. 06, 2005).

Hameed Agencies (PVT) Ltd. V. J.C. Penney Purchasing Corp., No. 11-05-00140-CV, 2007 WL 431339 (Tex. App. Feb. 8, 2007) (affirming trial court power to include mediator's fee in taxable costs, even if parties voluntarily chose to attend mediation, rather than being ordered to do so by the court).

Hamilton v. Enter. Leasing Co. of St. Louis, No. 4:04-CV-802 CAS, 2005 WL 2647959 (E.D. Mo. Oct. 17, 2005) (denying request for sanctions against plaintiff in discrimination lawsuit for disclosing in summary judgment memorandum the amount offered by employer to settle the dispute, where plaintiff claimed his disclosure was only an unintentional violation of confidentiality rules because "he believed that the session was only confidential if a settlement were reached in the case"), *aff'd*, 211 F. App'x (8th Cir. 2007), *cert. denied*, 127 S. Ct. 2262 (2007).

Harrelson v. Hensley, 891 So. 2d 635 (Fla. Dist. Ct. App. 2005) (enforcing award of sanctions against party but not her lawyer, for party's failure to attend a court-ordered mediation conference where only excuse for non-attendance was offered after the mediation and in opposition to the sanctions motion and asserted only that she "has been so disturbed by the obnoxious conduct of [opposing] counsel that she has become uncommunicative and willing

only to allow counsel to continue to pursue her interests in this matter without her active involvement”).

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).

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

Herrick v. Sanguinetti, No. F047461, 2006 WL 2789288 (Cal. Ct. App. Sept. 29, 2006) (affirming award of attorneys’ fees despite no prior mediation, in part because the defendant did not agree to the prevailing party’s request prior to filing, that defendant not sell the property during mediation). **Quote from the Court:** “We begin by noting the attorney fee provision in the contract was permissive rather than mandatory; the Herricks were not *required* to attempt mediation as a precondition to recovery of their attorney fees In these circumstances, the Herricks request that Sanguinetti agree not to sell Parcel 2 during mediation proceedings seems to us to have been entirely reasonable.”

Hijek v. Menlo Logistics, Inc., NO. 3-07-CV-0530-G, 2007 WL 4322591 (N.D. Tex. Dec. 10, 2007) (denying sanctions and ruling that defendant's failure to have an executive officer attend mediation was result of counsel oversight rather than bad faith). **Quote from the Court:** "Moreover, defendant participated in the mediation through its lead counsel and a corporate representative who had full authority to settle the case within a predetermined range. While the failure to bring an executive officer to the mediation violated the court's order, there is no evidence that the mediation process was rendered meaningless as plaintiff suggests."

Himes v. Himes, 833 A.2d 1124 (Pa. Super. Ct. 2003) (affirming criminal contempt conviction of divorce attorney for his failure to appear on behalf of his client at a child custody mediation).

Immedient Corp. v. Healthtrio, Inc., No. CIV.A. 01C-08-216RRC, 2007 WL 1982838 (Del. Super. Ct. July 06, 2007) (awarding the plaintiff mediation fees where the court found against the defendants on all counterclaims).

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 Dimas, LLC, 357 B.R. 563 (Bankr. N.D. Cal. 2006) (ruling that it was reasonable for special counsel retained to represent Chapter 11 debtor in litigation to communicate with a prospective mediator even absent debtor's express consent to mediation, and concluding that such services are compensable given the strong preference for consensual settlement).

In re Fleming Packaging Corp., No. 03-82408, ADV. 04-8166, 2007 WL 4556981 (Bkrtcy.C.D. Ill. Dec. 20, 2007 (denying award of sanctions for improper disclosure of confidential statements from mediation which to court found "immaterial").
SEE ALSO CONFIDENTIALITY

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).

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).

In re Immune Response Securities Litigation, 497 F.Supp.2d 1166 (S.D. Cal. 2007) (awarding mediation expenses in class action securities case). **Quote from the Court:** "[M]ediation expenses in this case are both reasonable and necessary. This case involved protracted litigation, which would not have come to an end prior to trial without the assistance of a mediator."

In re J.V.G., No. 09-06-015CV, 2007 WL 2011019 (Tex. App. July 12, 2007) (affirming the trial court's award of sanctions against the respondent's attorney partly based on the attorney's failure to timely request a continuance for mediation, which resulted in late discovery and expense of attending mediation to the petitioner).

In re Marriage of Schuneman & Bellrose, No. A100588, 2004 WL 542237 (Cal. Ct. App. Mar. 19, 2004) (denying wife's motion for attorney fees based on her husband's alleged failure to participate in good faith in appellate mediation, finding the request "wholly inappropriate" when based on information regarding failed settlement efforts both during and after mediation and on privileged communications between the parties and the mediator, all in violation of mediation confidentiality rules).

Irwin Seating Co. v. Int'l Bus. Mach. Corp., No. 1:04CV568, 2006 WL 3446584 (W.D. Mich. Nov. 29, 2006) (striking expert witnesses and awarding costs and attorneys' fees where the party violated mediation confidentiality by showing trial experts confidential mediation statements and exhibits obtained from the adverse party during mediation), *order aff'd by* No. 1:04-CV-568, 2007 WL 518866 (W.D. Mich. Feb. 15, 2007). **Quote from the Court:** "Striking an expert witness is a harsh remedy, but not an unfair one, where a party has placed its experts at risk by

infusing them with knowledge to which they were not entitled. The risk should not be upon the innocent defendants in this instance. The extent of the damage done in terms of how much these mediation briefs and the highlighted documents affected the experts, again consciously or unconsciously, in shaping their approaches and their opinions, is not truly knowable nor easily remediable. Where this situation arises from a clear violation of the court's order and the settlement privilege generally, it is the plaintiff that must bear the brunt of the resolution."

Irwin Seating Co. v. Intl. Business Machines Corp., No. 1:04-CV-568, 2007 WL 518866 (W.D. Mich. Feb. 15, 2007) (affirming the striking of plaintiff's expert witnesses, where plaintiff intentionally violated mediation confidentiality order by providing the witnesses with copies of defendant's mediation brief and exhibits). **Quote from the Court:** "Plaintiff cannot identify an alternate sanction that will adequately address these experts' improper knowledge. No admonition, reprimand, mediation training or assessment of costs can remove from the experts' minds the information to which they have been exposed. And, because of the ongoing confidentiality of the mediation process, such alternatives cannot remove the obstacle to Defendants' cross-examination of the experts."

ALSO LISTED UNDER CONFIDENTIALITY

Jeld-Wen, Inc. v. Superior Court, 146 Cal.App.4th 536 (Cal. Ct. App. 2007) (holding that the trial court did not have the authority to require the cross-defendant to attend and pay for private mediation over its objection). **Quote from the Court:** "The essence of mediation is its voluntariness and we reject the suggestion that trial courts presiding over complex cases have the inherent authority to force a party to attend and pay for mediation over the party's express objection because such an order conflicts with the statutory scheme pertaining to mediation.... Moreover, it serves no purpose to force Jeld-Wen, an uninsured litigant and minor player in this complex action, to attend mediation where the combined costs of the mediator and attorneys' fees expended to attend multiple mediation sessions could exceed the amount of the claim against it."

ALSO LISTED UNDER DUTY TO MEDIATE

J.N. v. Mt. Ephraim Bd. of Educ., No. 05-02520, 2007 WL 928478, *3 (D. N.J. Mar. 26, 2007) (finding plaintiff to be a prevailing party entitled to attorneys' fees under 20 U.S.C. § 1415(i)(3)(B)(i) because the mediated consent order was "judicially sanctioned" and "plaintiff succeeded on significant issues in litigation which achieved some of the benefit Plaintiff sought in bringing suit").

Johnson v. Johnson, No. A05-1790, 2006 WL 1891773 (Minn. Ct. App. July 11, 2006) (finding no abuse of discretion in trial court refusal to award conduct-based attorneys' fees as sanction for wife's failure to attend a court-ordered divorce mediation, where the conduct could be characterized as "an isolated incident").

Johnson v. Sun Life Assur. Co. of Canada (U.S.), No. 6:07-CV 1016-Ori-22UAM, 2007 WL 1877678 (M.D. Fla. June 28, 2007) at * 2 (rejecting claim that defendant mediated in bad faith where defendant "made it known that it believed it had no liability" but "there is no evidence that [defendant] entered the mediation with a firm decision not to contribute anything no matter what may be disclosed in mediation that might undermine its litigation posture").

Johnson v. Thigpen, No. 10-06-00174, 2007 WL 4157247 (Tex. App. Nov. 21, 2007) (dismissing for failure to prosecute based in part on the failure to participate in discovery and mediation).

Kahn v. Chetcuti, 123 Cal. Rptr. 2d 606 (Ct. App. 2002) (arbitrator acted within his authority by determining that prevailing party's act of filing a complaint before an obligatory mediation did not bar an award of attorney fees to that party pursuant to a contract clause limiting said fees "should the prevailing party attempt an arbitration or court action before attempting [to] mediate"), *rev. denied* (Oct. 30, 2002).

Kayser Properties, LLC v. Fidelity Nat. Property & Cas. Ins. Co., Inc., No. 3:06cv150/MCR/EMT, 2007 WL 1490693 (N.D. Fla. May 21, 2007) (cautioning, but not sanctioning counsel for disregarding court order to mediate, where both counsel argued that they believed mediation would not be productive).

ALSO LISTED UNDER DUTY TO MEDIATE

Keith v. Keith, 221 S.W.3d 156 (Tex. App. 2006) (awarding sanctions including attorneys fees because wife brought an emergency petition to modify a parent child relationship without cause and without first mediating as required by the divorce decree).

King v. Turner, No. 05-388 (JRT/FLN), 2007 WL 1219308 (D. Minn. Apr. 24, 2007) (rejecting defense assertion that plaintiff's case was overstuffed at mediation, where presence of second attorney was necessary because of the relationship the attorney had developed with the plaintiff during the course of litigation).

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).

Jose Luis R. v. Joliet Twp. H.S. Dist. 204, No. 01 C 4798, 2001 WL 1000734 (N.D. Ill. Aug. 29, 2001) (treating a mediated settlement agreement as a consent decree rather than a settlement agreement because the hearing officer read the terms of the agreement into the record of a due process hearing designed to obtain educational services for the plaintiff; and further concluding that plaintiff was a "prevailing party" entitled to obtain attorney's fees).

Ladiser v. Huff, 121 Wash. App. 1039 (Ct. App. 2004) (admitting privileged mediation statements to determine whether attorney's fees were appropriate sanction for bad faith participation).

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

Laube v. Allen, 506 F. Supp. 2d 969 (M.D. Ala. 2007) (rejecting allegation of overstaffing and holding that use of four attorneys was appropriate for this complex, lengthy case and each lawyer showed a distinct contribution to the mediation).

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).

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).

Maersk, Inc. v. Hartmann Metals Corp., No. CV 04-00652 HGBMK, 2007 WL 294223 (D. Haw. Jan. 29, 2007) (ordering defendant to pay all charges related to mediation in absence of evidence that plaintiff prolonged mediation solely to increase its fees).

Mardirossian v. Guardian Life Ins. Co. of Am., 457 F. Supp. 2d 1038 (C.D. Cal. 2006) (granting insured's motion for attorneys' fees in ERISA suit but ordering compensation for only one of the two attorneys representing the insured in mediation, where there was no evidence that mediation was particularly complex or that the attorneys handled distinct aspects of mediation representation).

Massey v. Beagle, 754 So. 2d 146 (Fl. Dist. Ct. App. 2000) (court without authority to impose sanctions against independent insurance adjuster for failure to negotiate in good faith during court-ordered mediation, where the adjuster appeared on behalf of defendant and defendant's insurance carrier (who were separately represented by counsel at the mediation) but was not himself a party to the litigation and did not have a legal obligation to pay or claim any damages in the litigation and mediation).

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

Monroe v. Corpus Christi Indep. Sch. Dist., 236 F.R.D. 320 (S.D. Tex. 2006) (refusing to grant plaintiff's motion for reimbursement of mediation fee and sanctions in employment discrimination case against school district, concluding the district did not act in bad faith when it participated in mediation without authority to bind the school board to a mediated settlement).

Quote from the Court: “The Texas legislature has invested the school board with authority to manage matters such as this litigation. There is no evidence that defendant was acting with apparent authority from the school board in attending the mediation. On the other hand, there is strong support for defendant's argument that it could not have final settlement authority and that any settlement negotiated at the mediation must be ultimately approved by the school board.”

Moore v. Rural Health Services, Inc., NO. CIV.A.1:04 376 RBH, 2007 WL 666796 (D. S.C. Feb. 27, 2007) (denying counterclaim for abuse of process based on plaintiff's alleged bad faith failure to settle, where both plaintiff and defendant declined opportunity to mediate).

Morgan v. Steiner, 619 S.E.2d 516 (N.C. Ct. App. 2005) (reversing trial court order requiring plaintiff to pay cost of defendants' lunch during mediated settlement conference, finding such expense unauthorized by relevant state statute), *rev'd*, 636 S.E.2d 808 (N.C. 2006).

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."

Nielson-Allen v. Indus. Maint. Corp., No. Civ. 2001/70 FR., 2004 WL 502567 (D.V.I. Jan. 28, 2004) (denying a motion for sanctions against plaintiff's counsel for allegedly disclosing to a mediator in a related employment discrimination case the amount of the settlement agreement reached in this case, finding that the state mediation privilege foreclosed either party from disclosing any matter discussed in mediation in a subsequent motion for sanctions). **Quote from the Court:** "Applying the cloak of mediation to the facts of this matter appear inequitable to [defendant] who negotiated settlement of this action and applied confidentiality thereto for the express purpose of avoiding having such settlement amount established as a benchmark in future similar employment cases. Such result highlights the need for exceptions to mediation confidentiality."

Northeast Iowa Citizens For Clean Water v. Agriprocessors, Inc., 489 F.Supp.2d 881 (N.D. Iowa 2007) (disallowing attorneys' fees for the third lawyer attending the mediation).

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).

Philip Ledington, Inc. v. Assurance Co. of America, No. 2:06CV208FTM29SPC, 2007 WL 2714095 (M.D. Fla. Sept. 17, 2007) (refusing to apply fee multiplier in relatively simple case resolved in mediation).

Pitts v. Francis, NO. 5:07CV169-RS-EMT, 2007 WL 4482168 (N.D. Fla. Dec. 19, 2007) (denying motion to recuse which was, in part, based on allegation that incarceration was too stiff a sanction for failing to participate in mediation). **Quote from the Court:** "[M]y order did not require that Joe Francis settle the lawsuit; rather, it unambiguously required that Joe Francis *mediate* his case in good faith after I found him in civil contempt for exploiting a court-ordered mediation proceeding to threaten and abuse the other party in the civil lawsuit....I had no inclination to punish Francis or to cause him to "lose" the civil lawsuit. The sanction imposed was simply intended to force Joe Francis to obey an order of this Court-my order to mediate. A reasonable sanction for a party who fails to participate in mediation as required by court order is to require that party to "go back and do it again."

ALSO LISTED UNDER ETHICS

PJL Properties, LLC v. Recla, 745 N.W.2d 89 (table) (Wis. App. 2007) (refusing to vacate default where defendant failed to appear at a mediation orientation or notify court of his incarceration).

ALSO LISTED UNDER DUTY TO MEDIATE

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).

QC Constr. & Eng'g, Inc. v. Luan Fu, No. B160831, 2004 WL 418381 (Cal. Ct. App. Mar. 8, 2004) (affirming the award of \$180,000 in attorney fees to the prevailing party seller of property despite seller's failure to demand mediation pursuant to a "no mediation, no attorney fees" clause in the purchase agreement, where the seller did not initiate the underlying action, filed cross-complaints only after cross-complaints were filed against him, and the buyers challenging the award of fees had effectively waived their right to mediation by cross-complaining against the seller). **Quote from the Court:** "To put it in the vernacular, Fu was dragged into the lawsuit 'kicking and screaming' and not as an initiator or willing participant."

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).

Randall v. Valor Enters., Inc., No. C2-03-12018, 2005 WL 1017618 (Minn. Dist. Ct. Feb. 28, 2005) (noting in response to letter raising dispute about mediator payment that under Rule 114.11(c) the court may, *upon motion*, issue an order for the payment of mediation costs and impose appropriate sanctions if a party fails to pay) (emphasis in original).

Reason v. Wilson Concrete Prods., Inc., No. 19999, 2004 WL 1178759 (Ohio Ct. App. May 28, 2004) (affirming revocation of attorney's *pro have vice* status because of his deliberate disclosure of confidential mediation communication in attempt to pressure another party to settle).

Reuille v. E.E. Brandenberger Const., Inc., 873 N.W.2d 116 (Ind. Ct. App. 2007) (refusing to award fees because plaintiff "did not qualify as a prevailing party because although the parties entered into a settlement agreement, [Plaintiff] had neither a consent decree nor an enforceable judgment entered along with his settlement agreement").

Ritter v. Ritter, No. A03-1472, 2004 WL 1152834 (Minn. Ct. App. May 25, 2004) (trial court did not abuse discretion in considering mother's untimely responsive motion in post-decree dispute, where mother's failure was in part caused by her attempt to comply with the decree's mediation requirement and father declined to use mediation services; and further affirming award of mother's attorney fees where father's reluctance to mediate demonstrated bad faith that added to the length and expense of the proceedings).

Roth v. Harrah's Tunica Corp., No. 05-80704-CIV, 2007 WL 1098522 (S.D. Fla. Apr. 12, 2007) (*sua sponte* denying mediation fees as not authorized under 28 USC § 1920).

Samuels v. Merrill, No. B190158, 2007 WL 2084093 (Cal. Ct. App. July 23, 2007) (affirming award of attorney's fees where plaintiff made a meaningful attempt to mediate as required in their real estate purchase agreement, and defendant failed to respond to plaintiff's faxed mediation request).

ALSO LISTED UNDER DUTY TO MEDIATE

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).

Simon T. v. Miller, No. B185299, 2006 WL 2556217 (Cal. Ct. App. Sept. 6, 2006) (refusing to impose sanctions for not physically appearing at the voluntary appellate mediation conference because the court had ordered that defendant stay at least 100 feet from plaintiff, defendant's lawyer was present and defendant agreed to attend by telephone).

Sines v. Serv. Corp. Int'l, No. 03 CIV. 5465 (PKC), 2006 WL 1148725 (S.D.N.Y. May 1, 2006) (refusing to increase class action fee award from 20 to 30% of common fund, where the settlement was negotiated with the assistance of an experienced mediator, much of the time charges were for data analysis and mediation preparation, and no motions to dismiss or for summary judgment were needed).

Smith v. Smith, 934 So. 2d 636 (Fla. Dist. Ct. App. 2006) (reversing trial court allocation of mediation fees to husband as a liability under the court's equitable distribution scheme, finding that mediation fees are not marital liability subject to distribution, but instead should be evaluated on remand as a cost of litigation) .

Smith Wholesale Co., Inc. v. Philip Morris USA, Inc., No. 2:03-CV-221, 2005 WL 1230436 (E.D. Tenn. May 24, 2005) (ordering defendant to pay plaintiffs' mediation expenses, including mediator's fees, as sanction for failure to mediate in good faith, where plaintiffs spent significant time preparing for, and traveling to mediation, and defendant refused to mediate after five hours but had previously failed to communicate to the court or opposing counsel that mediation was likely to be futile), *order vacated upon reconsideration*, No. 2:03-CV-221, 2005 WL 2030655 (E.D. Tenn. Aug. 23, 2005) (finding that neither party acted with "complete good faith" with respect to court's mediation order).

Soucie v. Hess, No. A04-1881, 2005 WL 1432262 (Minn. Ct. App. June 21, 2005) (reversing and remanding award of punitive damages in adverse possession case where the trial court improperly based award on defendant's bad faith mediation participation, conduct not listed among the statutory factors provided to measure punitive damage awards).

St. Paul Fire & Marine Ins. Co. v. Hebert Constr., Inc., 450 F. Supp. 2d 1214 (W.D. Wash. 2006) (construing the clause stating that St. Paul will "pay all costs taxed against any protected person in a suit" to require St. Paul to pay attorneys' fees in a suit settled after mediation, where the settlement and fees were included in the judgment).

Strawser v. Langmaack, No. E040014, 2007 WL 1810704 (Cal. Ct. App. June 25, 2007), *review denied* (Oct. 10, 2007) (ruling that defendants were not entitled to attorneys' fees under the contract because they refused plaintiffs' pre-litigation offer to mediate and their informal attempt to settle through direct negotiation did not satisfy the mediation requirement in the contract).

ALSO LISTED UNDER DUTY TO MEDIATE

Sullivan v. Anderson, No. 2006-CA-000586-MR, 2007 WL 1201654 (Ky. Ct. App. April 20, 2007) (finding that Kentucky courts have inherent power to award attorneys' fees and expenses as a sanction for bad faith conduct in canceling a mediation).

Sw. Ctr. for Biological Diversity v. Bartel, No. 98-CV-2234 BJMA, 2007 WL 2506605 (S.D. Cal. Aug. 30, 2007) (refusing to order defendant to pay attorney's fees for mediation which related to appeal filed by intervenors).

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).

Tex. Parks & Wildlife Dep't v. Davis, 988 S.W.2d 370 (Tex. App. 1999) (rejecting trial court monetary sanctions against Department for alleged failure to negotiate in good faith in court ordered mediation, noting that while Department filed an objection to the mediation referral (which the trial court overruled), it did attend the mediation and even made an offer of settlement. NOTE: Court also observed that “manner in which the participants negotiate should not be disclosed to the trial court.”), *rule 53.7(f) motion granted* (Apr. 15, 1999).

Thompson v. Ohio State Univ. Hosps., No. 06AP-1117, 2007 WL 2668745 (Ohio Ct. App. 2007) (counsel's failure to attend mediation indicative of overall claim of dilatory conduct sufficient to affirm dismissal with prejudice).
ALSO LISTED UNDER DUTY TO MEDIATE

Those Certain Underwriters at Lloyd's, London v. GMC Land Services, Inc., NO. 06-60325-CIV, 2007 WL 3306964 (S.D. Fla. November 06, 2007) (refusing to sanction plaintiffs for failing to have an individual with full settlement authority at mediation, where in addition to counsel of record, a claims professional with settlement authority participated on behalf of the plaintiff).

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).

Top Tobacco, L.P. v. North Atlantic Operating Co., Inc., No. 06 C 950, 2007 WL 2688452 (N.D. Ill. Sept. 6, 2007) (disallowing significant portion of attorneys fee request where block entries made it impossible to determine what portion of the entry was for mediation, which the claiming party had agreed not to seek).

Tungett v. Papierski, No. CIV. 3:05-CV-289, 2006 WL 2370155 (E.D. Tenn. Aug. 14, 2006) (denying motion to compel defendant to produce a surveyor for deposition in accordance with the discovery plan and in preparation for the mediation (or in the alternative, prohibit defendant from using the testimony of a surveyor at trial, at a hearing, or at any future mediation), as sanction not authorized by the federal rules of civil procedure or the court's scheduling order).

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).

Vaden v. Dombrowski, 653 S.E.2d 543 (N.C. Ct. App. 2007) (finding no authority to award costs for traveling to mediation).

Van Slyke v. Gibson, 146 Cal. App.4th 1296 (Cal. Ct. App. 2007) (concluding that defendant's filing a counterclaim, that was later dismissed, without first seeking mediation would not preclude defendant, as prevailing party, from collecting attorneys' fees incurred in defending the initial claim). ALSO LISTED UNDER DUTY TO MEDIATE

Vasquez v. State, 65 Cal.Rptr.3d 73 (Cal. Ct. App. 2007) (holding that attorney's fees were properly awarded to the plaintiff, because the plaintiff's participation in mediation was necessary and not overzealous), *rev'g and opinion superceded*, 171 P.3d 546 (Cal. 2007).

W. Sunview Properties, LLC v. Federman, No. CIV 03-00463 JMS-LEK, 2007 WL 2010290 (D. Haw. July 5, 2007) (awarding attorney's fees to third party defendant despite the party's failure to participate in mediation, where the plaintiffs amended their complaint adding the third party defendant only after the dispute was sent to mediation). **Quote from the Court:** "The requested mediation solely involved Plaintiffs' dispute with the Federmans, however, as Plaintiffs had not yet made any claims against the Association. Because Plaintiffs did not submit their claims against the Association to mediation prior to amending their Complaint, the Association is not barred from recovering attorneys' fees and costs" ALSO LISTED UNDER DUTY TO MEDIATE

Walker v. Bozeman, 243 F. Supp. 2d 1298 (N.D. Fla. 2003) (refusing to tax mediator's fee against losing defendant where mediation was part of overall settlement process in which defendant plainly tried, but plaintiff refused (based on the offers of judgment and "from the parties respective positions on damages at trial") to settle on reasonable terms).

Walters v. Walters, 673 N.W.2d 585 (Neb. Ct. App. 2004) (vacating the visitation provisions of a divorce decree as an unlawful delegation of judicial authority, where the decree provided "overnight visitation and other specific visitation details shall be as mediated by [wife's] counselor and the children's counselor," noting that it is the responsibility of the court to determine questions of custody and visitation which cannot be controlled by an agreement or stipulation, and because it is a judicial function that cannot be delegated to a third party).

Wedding & Even Videographers, Ass'n Int'l, Inc. v. Videoccasion, Inc., No. 8:04-CV-2506-T-23MSS., 2006 WL 1677923 (M.D. Fla. June 8, 2006) (denying award of sanctions for alleged release of confidential mediation information over the internet, where there was no evidence to contradict defendant's assertion that the information was publicly available prior to the mediation).

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

Yacht Club Se., Inc. v. Sunset Harbour N. Condo. Ass'n, Inc., 843 So. 2d 917 (Fla. Dist. Ct. App. 2003) (reversing award of sanctions against Developer for communicating with unit owners about what occurred in mediation between the Developer and Condo Association in suit for purported construction defects, because the unit owners are the real parties in interest entitled to know about issues in dispute and the mediation effort), *reh'g and reh'g en banc denied* (May 07, 2003).

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]."

Air Pegasus of New York, Inc. v. Liberty Helicopter Tours, Inc., No. A-3703-05T5, A-3656-05T5, 2007 WL 2188250 (N.J. Super. Ct. App. Div. Aug. 1, 2007 (reversing confirmation of arbitrator's awards where undisputed evidence showed arbitrator never conducted an arbitral proceeding and instead was mediating the parties' dispute without consent and in the face of repeated process objections).

Am. Safety Indem. Co. v. Stollings Trucking Co., No. CIV A 204-0752, 2007 WL 2220589 (S.D. W.Va. July 30, 2007) (holding a contract provision barring an insurer from "appealing . . . arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements" did not apply to conduct in a mediation, and further concluding that merely stating in mediation the party might appeal does not indicate a policy of appealing awards).

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).

Amador v. San Diego Country Club, No. D049438, 2007 WL 1991193 (Cal. Ct. App. July 11, 2007) (affirming waiver of right to compel arbitration and rejecting defendant's argument that it delayed seeking arbitration because of a contractual obligation to mediate, where mediation occurred months after the complaint was filed and was initiated by the court).

Bates v. Malvestuto, No. D0445699, 2005 WL 3476527 (Cal. Ct. App. Dec. 20, 2005) (affirming trial court conclusion that defendant waived his contractual right to arbitrate by requesting a jury trial and failing to indicate desire for arbitration on case management statement, and thereafter engaging in discovery and participating in a court-annexed, two-day mediation that would have been unavailable if arbitration had been timely requested rather than sought less than one month before trial), *reh'g denied* (Jan. 11, 2006), *rev'd* (Mar. 1, 2006).

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

Bono v. David, 147 Cal.App.4th 1055 (Cal. Ct. App. 2007) (affirming denial of motion to compel mediation and arbitration of a defamation action between co-tenants in a real property development project, because the defamation claim did not involve the construction or application of any provision of the property agreement which would trigger enforcement of the agreement's dispute resolution provision). **Quote from the Court:** "Here, five years and much else had passed under the proverbial bridge between the execution of the land development agreement and the filing of Bono's defamation lawsuit against David. Clearly, and as the trial court held in other proceedings before it, many if not all of the other disputes between the parties did, indeed, involve 'the construction or application of any provision' of the agreement. And, clearly, whatever was going on between Bono and David which precipitated the latter's e-mail to Van Donk was 'related to' that agreement. But the arbitration clause before us here contains no language similar to the fairly standard 'related to' or 'arising from' terminology. Its terminology is much narrower than that, and far too narrow to permit us to reverse the ruling of the trial court."

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).

Cashin v. Cashin, No. C4-02-1984, 2003 WL 42269 (Minn. Ct. App. June 3, 2003) (when negotiations are fruitless, a parenting-time expediter is not subject to removal for deciding, rather than mediating, a dispute between parents; finding no abuse of discretion in trial court refusal to remove expediter for a "technical" violation of confidentiality -- the expediter's notification to court of concerns that the parties' children were "being emotionally abused by the punitive vagaries of [a party's] behavior" -- because the disclosure was motivated by concern for the parties' children), *appeal after remand*, No. C4-02-1984, 2003 WL 21266858 (Minn. Ct. App. June 03, 2003). **Quote from the Court's Dissenting Opinion:** "Had the judge been able to consider our concern that '[u]nder a less deferential standard of review, we might be persuaded that a different expediter could resolve the Cashins' parenting-time disputes more harmoniously,' perhaps the broad discretion vested in the district court would have been exercised differently."

Cavalcanti v. Silver State Helicopters, LLC, No. A116236, 2007 WL 2834554 (Cal. Ct. App. Oct. 2, 2007) (affirming denial of motion to compel arbitration, where contract required mediation and only ambiguously referred to arbitration).

ALSO LISTED UNDER DUTY TO MEDIATE

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).

Conkle & Olesten v. Goodrich, Goodyear & Hinds, Nos. G033972, G034063, 2006 WL 3095964 (Cal. Ct. App. Nov. 1, 2006) (ruling that the arbitrator's failure to disclose his participation as a mediator in an earlier part of the dispute does not invalidate the judgment based on the arbitration where the parties had expressly waived the right to contest the arbitration based on lack of disclosure), *rev'd* (Feb. 7, 2007).

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

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).

Deshazo v. Estate of Clayton, No. CV-05-202-S-EJL, 2006 WL 1794735 (D. Idaho June 28, 2006) (denying order to compel arbitration where parties' contract required mediation and/or arbitration and parties stipulated to submit their dispute to a settlement conference as their choice of alternative dispute resolution).

Fininen v. Barlow, 47 Cal. Rptr. 3d 687 (Ct. App. 2006) (rejecting contractor's claim that an arbitration award should be set aside because the arbitrator failed to disclose that he served as a mediator in a case involving the contractor, where the contractor was aware of the arbitrator's participation and consented to the arbitrator serving in the matter), *rev'd* (Dec. 13, 2006).

Frog Creek Partners, LLC v. Vance Brown, Inc., No. A111059, 2006 WL 1903106 (Cal. Ct. App. July 12, 2006) (affirming denial of motion to compel arbitration because of the lack of a valid signed contract requiring arbitration, and rejecting the claim that Frog Creek should be estopped from denying the existence of the contract because Frog Creek initially requested mediation, which was the precursor to arbitration under the alleged contract).

G.A. White Ents. v. Black, No. 06-CA-95, 2007 WL 588998 (Ohio Ct. App. Feb. 23, 2007) finding waiver of right to arbitrate by virtue of, among other things, participation in multiple mediation scheduling conferences and appearance at a mediation session).

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

Gaskin v. Gaskin, No. 2-06-039-CV, 2006 WL 2507319 (Tex. App. Aug. 31, 2006) (denying allegation that mediator replaced a page of the agreement after the parties had signed and rejecting a challenge to the mediator arbitrating the dispute because the party had signed an agreement consenting to the mediator serving as arbitrator and had withdrawn the claim of mediator fraud) *reh'g overruled* (Sept. 21, 2006), *rev'd* (Mar. 9, 2007), *reh'g of petition for rev'd*, (June 1, 2007). **Quote from the Court:** [Although not grounds for reversal in this case the court noted the problems caused when a mediator serves as an arbitrator] “‘The mediation process encourages candid disclosures, including disclosures of confidential information, to a mediator. It is the potential for the use of that confidential information that creates the problem when the mediator, over the objection of one of the parties, becomes the arbitrator of the same or a related dispute. Just as it would be improper for a mediator to disclose any confidential information to another arbitrator of the parties’ dispute, it is also improper for the mediator to act as the arbitrator in the same or a related dispute without the express consent of the parties.’”

Guseinov v. Burns, 145 Cal. App. 4th 944 (Cal. Ct. App. 2006) (refusing to vacate arbitral award based on the arbitrator’s failure to disclose prior service as a volunteer mediator in an unrelated matter involving the plaintiff’s attorney, concluding that a single prior uncompensated mediation did not constitute a “professional relationship” required to be disclosed).

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).

Hood v. Terminix Intl. Co., L.P., No. C 06-0024 SBA, 2006 WL 1329678 (N.D. Cal. May 15, 2006) (denying as premature defendant's motion to dismiss or alternatively stay action pending arbitration, where parties had not yet fulfilled contractual obligation to mediate). **Quote from the Court:** "Plaintiff maintains that the parties' failure to submit to mediation renders this Motion premature. Defendant agrees to participate in mediation, however, requests the Court to rule on this Motion first. The Court declines to render what would be tantamount to an advisory opinion....A mediation between the parties may resolve their dispute. The parties' agreement to arbitrate is only triggered by an unsuccessful mediation. If and when that occurs, disputes regarding arbitration will be ripe for the adjudication by this Court."

Hudson Co., Inc. v. King, No. 35601-5-II, 2007 WL 2482150 (Wash. Ct. App. Sept. 05, 2007) (refusing to vacate an arbitral award in a med-arb where the neutral disclosed his relationships with both attorneys prior to the mediation and arbitration, yet no objection was raised until after the award).

ALSO LISTED UNDER MED-ARB

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 Brookshire Bros., Ltd., 198 S.W.3d 381 (Tex. App. 2006) (denying petition for a writ of mandamus compelling arbitration because applying the arbitration clause against the employee would be unconscionable since the arbitration policy was enacted a year after the accident, after plaintiff had retained a lawyer and had a scheduled mediation with the employer), *mandamus denied* (Feb. 2, 2007).

In re Cartwright, 104 S.W.3d 706 (Tex. App. 2003) (trial court abused its discretion by appointing mediator of child custody dispute as arbitrator of subsequent property dispute without consent of the parties). **Quote from the Court:** "[A] mediator is in the position of receiving the parties' confidential information, which may not be revealed to the court or to any other person. If the mediator is later appointed to be the arbitrator between the same parties, he or she is likely to be in the possession of information that either or both of those parties would not have chosen to reveal to an arbitrator."

In re Estate of McDonald v. Smith, No. BPO72816, 2007 WL 259872 (Cal. Ct. App. Jan. 31, 2007) (enforcing a report and findings of a mediator that were confirmed in a probate order, where the mediator's findings were made pursuant to a mediated agreement in which the parties

agreed that the mediator would make binding findings on issues necessary to effectuate the intent of the parties in executing the agreement).

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

In re Igloo Products Corp., 238 S.W.3d 574 (Tex. App. 2007) (refusing to decide whether an employee's arbitration agreement was binding on representatives in a wrongful death claim, but denying the motion to compel arbitration because the arbitration clause required that first the claims be mediated).

In re Marriage of Davis, Nos. A109310, A110829, A112432, 2006 WL 3445589 (Cal. Ct. App. Nov. 30, 2006) (rejecting a claim that appointment of a special master was improper because the stipulation called for the appointment of a mediator). **Quote from the Court:** "Mediation is 'a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement...' (Evid. Code § 1115). 'Traditionally, a mediator has no power to impose a settlement. Indeed, in “classic” mediation..., the mediator expresses no opinion on the merits of either party's case...' The 2002 special master order conferred extensive authority on a special master to resolve disputes relating to custody and visitation, to make determinations that would have the effect of court orders and to make fee awards. Thus, by its very nature, the stipulation set forth in the 2002 special master order disproves Ives's contention that the parties agreed only to appoint a mediator."

In re Marriage of Logan, No. F051606, 2007 WL 2994640 (Cal. Ct. App. Oct. 16, 2007) (affirming confirmation of arbitration award against challenge that the arbitrator, who had previously acted as mediator, improperly disclosed confidential information he obtained during the mediation and used it in determining the issues in the arbitration).

ALSO LISTED UNDER CONFIDENTIALITY

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

In re Pisces Foods, L.L.C., 228 S.W.3d 349 (Tex. App. 2007) (holding that trial court properly refused to compel arbitration where party failed to satisfy contractual precondition to mediate). **Quote from the Court:** "We do not express any opinion regarding whether relator has waived the right to arbitrate upon satisfaction of the preconditions, only that the right to compel arbitration has not yet accrued under the terms of the contract. Nor do we express any opinion regarding whether this lawsuit should continue in the trial court despite the fact that an alternative dispute resolution and arbitration agreement exists (whether enforceable or not), but Jimenez has not complied with it and the relator has not properly invoked it. On the undisputed

record presented here, the trial court did not abuse its discretion by refusing to compel arbitration.”

ALSO LISTED UNDER DUTY TO MEDIATE/CONDITION PRECEDENT

In re SSP Partners, No. 13-07-031-CV, 2007 WL 2318131 (Tex. App. Aug. 14, 2007) (holding that satisfaction of mediation pre-condition in parties' contract is a matter of procedural arbitrability for the arbitrator, not the court, to decide).

ALSO LISTED UNDER DUTY TO MEDIATE/CONDITION PRECEDENT

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

Jones v. TT of Longwood, Inc., No. 6:06-CV-651-ORL-19, 2006 WL 2682836 (M.D. Fla. Sept. 18, 2006) (refusing to enforce a mediation/arbitration clause in a rescinded contract). **Quote from the Court:** “Under Florida law, Plaintiff cannot be required to submit to mediation and arbitration under the agreements she signed....The duty to arbitrate does not end when a contract is terminated as long as the dispute concerns matters arising under the contract....However, [t]he effect of rescission is to render the contract abrogated and of no force and effect from the beginning. If there is no contract, there can be no arbitration clause ‘of the contract.’”

Kahn v. Chetcuti, 123 Cal.Rptr.2d 606 (Cal. Ct. App. 2002) (arbitrator acted within his authority by determining that prevailing party’s act of filing a complaint before an obligatory mediation did not bar an award of attorney fees to that party pursuant to a contract clause limiting said fees “should the prevailing party attempt an arbitration or court action before attempting [to] mediate”), *rev. denied* (Oct. 30, 2002).

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.

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.)

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

Langfitt v. Jackson, 644 S.E.2d 460 (Ga. Ct. App. 2007) (finding no waiver of right to arbitrate where defendant sought extension of time within which to answer complaint and participated in court-ordered mediation before filing motion to compel arbitration, but did nothing else to invoke any other aspect of the litigation process).

Lee v. Herbert, No. A03-1023, 2004 WL 948385 (Minn. App., May 4, 2004) (affirming denial of motion to remove parenting-time expeditor after concluding that: 1) the expeditor's letter to the court affirming the existence and terms of the parties' negotiated agreement on issues of school choice, transition location, and reservation of child support, did not improperly reveal confidential positions of the parties and was offered in direct response to the court's request; and 2) removal based on the expeditor's failure to forge agreements through mediation "would appear to demand an unrealistically high standard of an expeditor" given fact that the parties had been parenting by mediation since October 1998 with the help of four different mediators).

Lindsay v. Lewandowski, 43 Cal. Rptr. 3d 846 (Ct. App. 2006) (reversing trial court and refusing to enforce a "binding mediation ruling", where the evidence established that the parties did not consider binding mediation to be the equivalent of arbitration), *reh'g denied* (June 28, 2006). **Quote from the Court:** "If binding mediation is to be recognized, what rules apply? The arbitration rules, the court-ordered mediation rules, the mediation confidentiality rules, or some mix? If only some rules, how is one to chose? Should the trial court take evidence on the parties' intent or understanding in each case? A case-by-case determination that authorizes a "create your own alternate dispute resolution" regime would impose a significant burden on appellate courts to create a body of law on what can and cannot be done, injecting *more*

complexity and litigation into a process aimed at less.” [Emphasis is original].

Lynn v. Gen. Elec. Co., No. 03-2662-GTV-DJW, 2005 WL 701270 (D. Kan. Jan. 20, 2005) (refusing to enforce alleged contractual obligation to mediate as precondition to initiating litigation or arbitration, concluding: 1) mediation contracts are not subject to enforcement under the Federal Arbitration Act; and 2) no enforceable contract existed under state law because defendant employer could not prove employees actually received email and newsletter notices of the newly adopted mediation requirements). **Quote from the Court:** “Unlike enforcement of arbitration agreements, there is no historical evidence of hostility by the courts in enforcing mediation contracts; accordingly, there is no reason to believe Congress intended to encompass mediation within arbitration enforcement.”

Markman v. O’Hare, No. 04CC01342, 2007 WL 915108 (Cal. Ct. App. Mar. 28, 2007) (refusing to vacate an arbitral award where, during arbitration, the arbitrator accepted work as a mediator in an unrelated matter involving one of the defendant’s law firms, given that the arbitrator had indicated on a disclosure form at the commencement of arbitration that he would entertain offers of employment in another case involving a lawyer for a party, subsequently provided notice when he was retained, and plaintiff failed to object or seek disqualification but instead merely sent a letter “castigating defendants’ counsel for seeking to ‘curry favor,’ but specifically did ‘not question for a moment [the arbitrator’s] impartiality or neutrality’”). **Quote from the Court:** “Plaintiff’s lawyer characterizes the statements in that letter as being a ‘prayer,’ not a waiver. He complains he was presented with a Hobson’s choice—he either had to object and risk the arbitrator’s wrath that would negatively affect the decision as to his client, or ignore the event. We cannot accept this cynical view. Disqualifying an arbitrator is routine and not such that the arbitrator would be offended by it. Certainly nothing in the record shows plaintiff would have been harmed by it. And, contrary to plaintiff’s argument, we see no evidence that the arbitrator’s decision or conduct in accepting new employment was based solely on his interest in obtaining money.”

ALSO LISTED UNDER ETHICS

Massa v. Ruskin, No. A110704, 2006 WL 2474885 (Cal. Ct. App. Aug. 29, 2006) (rejecting argument that construction contract term stating that disputes will “be decided by mediation or arbitration as determined by the parties” could be interpreted to mean that the outcome of any dispute resolution would be “determined by the mutual agreement of the parties” meaning arbitration could not be binding), *reh’g denied* (Sept. 25, 2006), *rev’d* (Nov. 15, 2006). **Quote from the Court:** “[A]lthough under the terms of the construction contract, the parties were not obligated to arbitrate, having agreed to submit the dispute to arbitration and having failed to unambiguously specify that the award would not be binding, both parties are bound by the arbitrator’s decision.”

Medallion Ne. Ohio Inc. v. SCO Medallion Healthy Homes, Ltd., No. 23214, 2006 WL 3825204 (Ohio Ct. App. Dec. 29, 2006) (refusing to compel arbitration and finding contract’s dispute resolution provision unenforceable for lack of finality where it mandated that parties “exhaust all means, including mediation or arbitration, prior to filing litigation”). **Quote from the Court:** “The provision fails to define how or when a party has ‘exhausted all means.’ Furthermore, the provision fails to address whether the alternative dispute resolution methods

would be binding on the parties. We therefore find that this provision lacks the necessary finality to warrant enforcement under Ohio law.”

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).

Nabors Drilling USA, LP v. Carpenter, 198 S.W.3d 240 (Tex. App. 2006) (concluding that trial court erred in finding a dispute resolution clause ambiguous and unenforceable merely because it mentioned both mediation and arbitration, where clause required arbitration unless both parties agreed to mediation and notified the designated organizational provider in a timely manner).

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"

Perdue Farms, Inc. v. Design Build Contracting Corporation, No. 3:06CV245, 2007 WL 87667 (W.D. N.C. Jan. 9, 2007) (finding the parties were not required to arbitrate their dispute where the contractual language provided that "claims not resolved by mediation shall be decided by arbitration," but mediation was required only if the parties mutually agreed to mediate, and the parties did not agree to mediate).

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).

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).

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

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).

Segal v. Silberstein, 156 Cal.App.4th 627 (Cal. Ct. App. 2007) (reversing denial of petition to compel arbitration after concluding that reference in contract to arbitration as a nonexclusive dispute resolution process outside of the home state did not mean arbitration was not binding, but instead meant that parties could pursue less costly and time consuming ADR processes such as mediation and conciliation). **Quote from the Court:** “[T]his interpretation produces a result grounded in logic: instead of allowing full-blown civil litigation outside the company’s home state, this interpretation mandates arbitration in all states, but allows the parties to consider even less formal and less costly alternative dispute resolution processes when dealing with a dispute outside the home state.”

Sheppard v. Super. Ct., No. B181857, 2006 WL 1738160 (Cal. Ct. App. June 27, 2006) (affirming trial court denial of request to confirm arbitration award, finding no enforceable arbitral contract in a mediated settlement which included the parties’ agreement that a three-judge panel would “give a ‘yes’ or ‘no’ answer to a specific legal question ‘in aid of settlement’”), *rev’d* (Oct. 18, 2006). **Quote from the Dissent:** “In this case a third-party decisionmaker chosen by the parties was asked to decide a specific legal question; each side had a full opportunity to be heard, both by written briefs and oral argument, before the panel made its decision; and there is no suggestion the decision-making process itself was not impartial. Moreover, the parties’ settlement agreement contemplated the panel’s decision would be definitive and final (that is, not subject to judicial review, reconsideration by a different panel of neutrals or renewed debate by the parties) and agreed it would have a specific, predetermined effect on the otherwise final settlement agreement (that is, it would be “binding”). The panel proceedings thus appear to possess all the characteristics of an arbitration.”

Smith v. Sara Lee Fresh, Inc., No. CIV. S-07-01374, 2007 WL 4356725 (E.D. Cal. Dec. 11, 2007) (finding no substantive unconscionability and enforcing obligation to arbitrate (after review of intersection between mediation and arbitration provisions)).

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").

Stones River Electric, Inc. v. Chevron Energy Solutions Co., No. 5:06CV-115-R, 2007 WL 433083 (W.D. Ky. Feb. 2, 2007) (concluding that contract terms requiring that "the parties *shall* agree to either submit to non-binding mediation or either Party may file a written demand for arbitration" was a choice between two exclusive alternatives that deprived the court of subject matter jurisdiction over the parties' dispute).

Taylor Bldg. Corp. of Am. v. Benfield, 860 N.E.2d 1058 (Ohio Ct. App.) (finding mediation and arbitration clauses unconscionable because home buyer was not represented by counsel, home builder would not negotiate the pre-printed contract's terms, and the alternative dispute resolution clauses did not contain any information regarding costs), *motion to certify allowed*, 859 N.E.2d 556 (Ohio) (unpublished table decision), *appeal allowed*, 859 N.E.2d 557 (Ohio 2006) (unpublished table decision).

Templeton Dev. Corp. v. Super. Ct., 51 Cal. Rptr. 3d 19 (Ct. App. 2006) (refusing to enforce contractual obligation to mediate out-of-state as precondition to initiating arbitration or litigation of construction contract dispute, concluding that state civil procedure code section rendering void and unenforceable provisions in construction contracts "which purport to require any dispute between the parties to be litigated, arbitrated, or otherwise determined outside this state" would apply to mediation), *rev'd* (Feb. 21, 2007). **Quote from the Court:** "Viewing the statute as a whole, it is clear the Legislature enacted section 410.42 to prevent one party to a construction contract to be performed in California from forcing the other party to suffer the inconvenience and expense of resolving contractual disputes outside California. In light of this purpose, we read the phrase "otherwise determined" to include mediation."

Timber Source, LLC v. Cahaba Valley Timber Co., No. CIV.A. 06-9239, 2007 WL 2332318 (E.D. La. Aug. 13, 2007) (holding that non-binding arbitration is not considered arbitration under Louisiana law, as evidenced by the Louisiana Mediation Act).

U.S. Steel Mining Co., L.L.C. v. Wilson Downhole Serv., No. 02:00CV1758, 2006 WL 2869535 (W.D. Pa. Oct. 5, 2006) (enforcing arbitral award against challenge that the arbitrator improperly relied on fraudulent *ex parte* information conveyed during mediation in choosing among the parties' last offers, noting that the parties' amended arbitration agreement stated that the arbitrator "may rely on information which he deems relevant, whether obtained in *ex parte* communication or otherwise").

Venturini v. Smith, No. F050520, 2007 WL 1218027 (Cal. Ct. App. April 24, 2007) (affirming arbitral award against challenges that underlying contract reached in mediation suffered from lack of mutual consent; no meeting of the minds; was procured by fraud; and was against public policy).

ALSO LISTED UNDER ENFORCEMENT

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

Alford v. Bryant, 137 S.W.3d 916 (Tex. App. 2004) (reversing trial court judgment of legal malpractice against attorney for failure to disclose the risks and benefits of mediated settlement, where the mediator's outcome determinative testimony was erroneously excluded from trial).

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

Al-Ghezzi v. McCoy, 134 Wash. App. 1066 (Ct. App. 2006) (granting defendant's motion for summary judgment in this attorney malpractice claim because the evidence was insufficient to establish that but for the attorney's alleged negligence in mediation, the plaintiff would have prevailed in the medical malpractice claim, relying in part on a declaration of counsel who represented the adverse party at the mediation stating that no settlement offer was proposed at the mediation).

Anderson v. Duke Energy Corp., No. CIV. 3:06CV399, 2007 WL 4284904 (W.D.N.C., Dec. 4, 2007) (expressing concern that the Plaintiff appeared at court-ordered mediation with counsel but professes to be *pro se* in this action). **Quote from the Court:** The mediation was ordered by this Court and constitutes a proceeding in this matter. Counsel's appearance at that proceeding without making a general appearance in this action is suspect. Furthermore, if counsel is preparing the documents being filed by the Plaintiff in this action, the undersigned would take a dim view of that practice. The practice of "ghostwriting" by an attorney for a party who otherwise professes to be *pro se* is disfavored and considered by many courts to be unethical."

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."

Aubin v. Barton, 98 P.3d 126 (Wash. Ct. App. 2004) (reversing trial court judgment of legal malpractice against attorney representing grantee of stock options in a mediation of a marital dissolution action, finding that failure to allow expert witness to testify in lawyer's defense about whether the stock options were granted primarily for past services rendered or for future services was sufficiently prejudicial to warrant new trial).

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).

Cooper v. County of Sonoma, NO. A116197, 2007 WL 2601475 (Cal. Ct. App. September 11, 2007) (affirming denial of motion to disqualify attorney based on use of confidential mediation

information). **Quote from the Court:** “That a lawyer's conduct was unquestionably unprofessional, ill-advised, and a manifestation of poor judgment does not, ipso facto, mandate disqualification . . . Taken as a whole, the evidence on this record does not establish that Flatt obtained information from Jenkins that could be unfairly used to her client Cooper's advantage. Therefore, we cannot say the trial court abused its discretion in denying the motion to disqualify.”

CSX Transp., Inc. v. Gilkison, No. 5:05cv202, 2007 WL 858423 (N.D. W.Va. Mar. 16, 2007) (ruling that a plaintiff's attorney in a mediation had no duty of care to the adverse party that would permit the adverse party to sue the attorney for negligence in presenting false information at the mediation).

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.

Estate of Skala v. Skala, 751 N.E.2d 769 (Ind. Ct. App. 2001) (while unorthodox, it is not improper or a basis for vacating an oral settlement reached in the judge's chambers for the judge to have met alone with parties without their lawyers; statement by the judge during a pre-trial conference that he “was no longer going to be the mediator here” but was “going to be the judge” did not compel conclusion that judge improperly was serving as a mediator in violation of ADR rules).

Feinberg v. Townsend, 107 S.W.3d 910 (Ky. Ct. App. 2003) (a lawyer who settles a legal malpractice action in mediation that results in voluntary dismissal of the former client's claim against him is not eligible to bring an action for wrongful use of civil proceedings against the former client's malpractice attorney because the mediated settlement is not considered an action terminated in the lawyer's favor).

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).

Furia v. Helm, 4 Cal. Rptr. 3d 357 (Ct. App. 2003) (although an attorney did not establish an attorney-client relationship with a construction business owner when the attorney acted as a mediator between the owner and the attorney's homeowner clients, the attorney is still potentially liable for malpractice because he breached a duty of reasonable care owed the owner by failing to fully and fairly disclose to the owner that he did not intend to be entirely impartial as mediator; but nonetheless affirming dismissal of the malpractice claim for inability to allege recoverable damages), *reh'g denied* (September 24, 2003). **Quote from the Court:** "In agreeing to act as neutral mediator, [the attorney] did not assume the duties of [the construction business owner's] attorney, but he did assume the duty of performing as a mediator with the skill and prudence ordinarily to be expected of one performing that role Mediators may not provide legal advice, but they are in a position to influence the positions taken by the conflicting parties whose dispute they are mediating A party to mediation may well give more weight to the suggestions of the mediator if under the belief that the mediator is neutral than if that party regards the mediator as aligned with the interests of the adversary. For the same reasons that full disclosure is necessary before an attorney may represent divergent interests, before an attorney agrees to serve for compensation as a mediator, there must be 'complete disclosure of all facts and circumstances which, in the attorney's honest judgment, may influence [the party's] choice, holding the attorney civilly liable for loss caused by lack of disclosure.' [citation omitted]."

Garrett v. Delta Queen Steamboat Co., Inc., No. CIV.A. 05-1492-CJB-S, 2007 WL 837177 (E.D. La. March 14, 2007) (1. denying recusal motion based solely on party's concern that judge who had participated in a mediation with attorneys would be so vested in the outcome of the settlement to be prejudiced in evaluating the settlement's validity; and 2. holding oral settlement of maritime personal injury case enforceable). **Quote from the court:** "The undersigned appreciates the importance of this case to Mr. Garrett. It is his only case. It is not, however, the only the case referred to the undersigned for a settlement conference. It was not an exceptional case nor did it require exceptional effort on the undersigned's part. If Garrett's position were accepted, then any judge or magistrate judge who conducted a settlement conference would be precluded in all such cases from considering the validity of the settlement. Section 455(a) does not command this result. It is recommended that the motion to recuse be denied."

ALSO LISTED UNDER ENFORCEMENT

Granger v. Middleton, 948 So.2d 1272 (La. Ct. App. 2007) (barring a legal malpractice claim against attorney for failing to procure judgment on a mediated child custody agreement, where plaintiff waited to bring suit more than one year after discovering the alleged failure).

Hall v. Cohen, No. 270949, 2007 WL 258311 (Mich. Ct. App. Jan. 30, 2007) (reversing trial court's dismissal of attorney malpractice claim finding that Plaintiff's testimony after the mediated settlement that she was satisfied with the settlement, satisfied with defendant's legal

representation and was acting free of threat or coercion did not constitute collateral estoppel precluding her malpractice claim).

Hartmann v. Maybee-Freud, No. Civ. 06-340-KAJ, 2006 WL 2406535 (D. Del. Aug. 21, 2006) (rejecting prisoner's claim "that state-appointed mediators fail to do their duty and to be neutral advocates"). **Quote from the Court:** "The allegations as set forth by Hartmann do not rise to the level of a constitutional violation. Also, as with many of his claims, there is no reference to any individual who allegedly violated his rights nor is there reference to when the alleged violation occurred."

Holmes v. Potter, No. 2:05cv447, 2007 WL 778307 (N.D. Ind. Mar. 12, 2007) (applying federal common law to the settlement agreement between a federal employee and the Postmaster General, the court granted summary judgment for the postmaster despite claims that the mediator made misrepresentations at the caucus style mediation). **Quote from the Court:** "Holmes' use of the mediator's comments provide an example of his misplaced reliance on extrinsic evidence. Holmes has not offered an affidavit of the mediator and instead relies on his own representations of the mediator's conduct. Even assuming that the mediator mistakenly represented to Holmes that this deduction would not be made in his case, and further assuming Holmes could clear the hearsay objections to this evidence, evidence of the mediator's conduct remains outside the scope of admissible evidence because this agreement is not ambiguous."

ALSO LISTED UNDER ENFORCMENT

Home Depot, U.S.A., Inc. v. Saul Subsidiary I Ltd. P'ship, 159 S.W.3d 339 (Ky. Ct. App. 2004) (affirming grant of mandatory injunction to demolish a retail store for owner's breach of land covenants, and rejecting claim that trial judge should have recused herself after conducting an unsuccessful mediation session instead of deciding the matter without an evidentiary hearing, where: 1) the Code of Judicial conduct specifically authorizes judges to "mediate or settle matters pending before the judge"; 2) the store owner suggested or at least acquiesced in the trial court's mediation efforts; and 3) there was no affirmative showing of bias or partiality, and absent such showing the trial court's hint that it might pass the case on to another judge if mediation was unsuccessful is alone insufficient to justify recusal), *reh'g denied*, (Oct. 8, 2004), *rev'd* (April 13, 2005).

Hudson Co., Inc. v. King, No. 35601-5-II, 2007 WL 2482150 (Wash. Ct. App. Sept. 05, 2007) (refusing to vacate an arbitral award in a med-arb where the neutral disclosed his relationships with both attorneys prior to the mediation and arbitration, yet no objection was raised until after the award).

In re Antosh, 169 P.3d 1091 (Kan. 2007) (publicly censuring attorney for improperly acting as "de facto" mediator in divorce case and accepting fees from both parties).

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 Estate of Romero, No. CA2006-06-015, 2007 WL 1310192 (Ohio Ct. App. May 07, 2007) (finding nothing in the record to support allegation that probate judge threatened to "report somebody to the ethics committee" if mediation did not succeed). **Quote from the Court:** "We note at the outset that there is nothing in the record to support the probate court's alleged threat to report somebody to the ethics committee. Upon reviewing the voluminous record and the numerous pleadings filed by the parties to dismiss one another, we cannot say that the probate court abused its discretion. The probate court was faced with parties that were unable and/or unwilling to settle their differences so that the proceeds could be deposited with the court (and earn interest)."

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

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).

Isaacson v. Isaacson, 792 A.2d 525 (N.J. Super. Ct. App. Div. 2002) (reversing trial court and granting motion to remove the single individual who served as both guardian *ad litem* and mediator, concluding that the roles of mediator of economic issues and guardian *ad litem* are not sufficiently distinct to avoid the inherent conflict between a mediator's obligation to respect confidences of the parties and the responsibility as guardian *ad litem* to serve as an officer of the court), *certification denied*, 807 A.2d 195 (N.J. 2002) (unpublished table decision). **Quote from the Court:** "We do not, by recognizing the conflict between an appointed mediator and guardian *ad litem*, deprecate the role of either. Both serve purposes critical to the administration of justice in the Family Part and represent innovative and expansive methodologies necessary to insure prompt and appropriate resolution of critical issues. The mediation process provides a vehicle for allowing the parties to resolve disputes between themselves on issues beyond visitation and parenting including, as was proposed by the trial judge here, economic issues. [footnote omitted]. A mediator and guardian *ad litem* are both critical to the administration of justice in the Family Part. We conclude, however, that the roles are inherently conflicting and the same individual may not serve in both capacities."

Janis v. Gorry, Meyer & Rudd, Nos. B187991, B188794, 2007 WL 1806853 (Cal. Ct. App. 2007) (reversing grant of defense summary judgment on plaintiff's complaint for legal malpractice based on alleged disclosure of privileged and confidential information to plaintiffs' adversaries during mediation and failure to protect plaintiff from harassing comments made by the mediator).

Jaufman v. Levine, No. 1:06-CV-1295 NAM/DRH, 2007 WL 2891987 (N.D.N.Y., Sept. 28, 2007) (granting defense motions to dismiss fraud and legal malpractice claims brought against mediation service created by the Roman Catholic Diocese of Albany to compensate victims of clergy sexual abuse and to investigate and mediate their claims and cases; but allowing claims to proceed based on allegations of deceptive business practices, breach of contract, negligence and breach of fiduciary duty).

Joynes v. Meconi, No. 05-332 GMS, 2006 WL 2819762 (D. Del. Sept. 30, 2006) (dismissing action against family court mediator based on quasi-judicial absolute immunity). **Quote from the Court** "Quasi-judicial absolute immunity attaches when a public official's role is "functionally comparable" to that of a judge....In order to accomplish her tasks, Fitzgerald [mediator] must use her discretion or independent judgment, which has been described as a 'key feature of the tasks sheltered by judicial immunity.'"

Kearny v. Milwaukee County, No. 05-C-834, 2007 WL 3171395, E.D. Wis. Oct. 26, 2007) (stating that "absent exceptional circumstances, it is, and shall remain, my practice to recuse myself from proceeding as a trial judge in any case in which I conducted a mediation based upon a referral from another judge"). **Quote from the Court:** "The role of mediator is quite distinct from the role of a judge. During a mediation, it is not uncommon for me to candidly offer my view as to the viability of any party's position, speculate as to possible outcome of any pending or prospective motion, offer my view as to what may be reasonable damages, or offer any number of other candid opinions that I would never provide to parties in a case I am presiding over as judge. ...Suffice it to say that during the course of any mediation, especially when I meet

on an ex parte basis with each party, I often assume the role of a devil's advocate on various issues. As a result, if I were to subsequently become the presiding judge, my ruling on pending motions, evidentiary matters, requests for jury instructions and the like, may cause a party to question my impartiality, especially if that party thought my decision as the trial judge was inconsistent with a personal opinion I may have expressed during the mediation.....It is certainly possible for a presiding judge to ethically conduct a mediation in a case over which he or she presides. However, in doing so, the role as a presiding judge must remain foremost in the judge's mind and the judge must be constantly cognizant that the ethical obligations incumbent upon a presiding judge predominate, thus limiting the judge's ability to speak candidly. However, when a case is referred to a magistrate judge for mediation, that magistrate judge is able to proceed unencumbered by the unique ethical obligations that apply to a presiding judge, and therefore is able to speak far more candidly and offer frank opinions about the merits of the case. No doubt, this additional freedom encourages and facilitates settlement; I have certainly found it invaluable and essential when conducting mediations....Once a magistrate judge has shed the role of a presiding judge and acted solely in the role of mediator, it is impossible to un-ring that bell; a magistrate judge who acts as a mediator without the expectation that the case may be re-assigned to him or her for the purposes of proceeding as the trial judge will almost invariably be presented with a case where impartiality may reasonably be questioned, thereby necessitating a recusal pursuant to 28 U.S.C. § 455(a)....Although it may be possible for a magistrate judge to simply proceed with all mediations in the guarded manner required of any presiding judge, this would handcuff the effectiveness of the mediation process. This approach would benefit no one—certainly not the parties who seek a mutually beneficial resolution of their dispute without the complications and expense of trial or the referring court who similarly seeks the expeditious resolution of the case. *See* Civil L.R. 16.4. Further, it would undermine the rationale of utilizing magistrate judges to conduct mediations; if every magistrate judge was forced to limit his or her conduct in the mediation to the methods available to the presiding judge, then a presiding judge may as well conduct the mediation. But it is precisely because a magistrate judge is uniquely able to proceed comparatively unencumbered when conducting a mediation that this district has elected to utilize the process of referring cases to magistrate judges for mediation under its alternative dispute resolution policy.

Kuberka v. Anoka Mediation, Inc., No. A05-2490, 2007 WL 3525 (Minn. Ct. App. Jan. 2, 2007) (denying a court-appointed custody evaluator's summary judgment motion rejecting a claim that quasi-judicial immunity protected her actions as a court-appointed custody evaluator, because the alleged misconduct (misrepresentation of her qualifications and claim that she should not have accepted the position) involved actions prior to becoming the custody evaluator and because the complaint alleged that she acted outside the scope of the court appointment).

Lehrer v. Zwernemann, 14 S.W.3d 775 (Tex. App. 2000) (failure by mediator to affirmatively disclose relationship with opposing counsel and to inform party in mediation that his lawyer had failed to conduct discovery could not be basis for negligence or legal malpractice, breach of contract, breach of fiduciary duty, or fraud claims, where the complaining party had “constructive knowledge” of the prior relationship between the mediator and opposing counsel and could not articulate any damages from alleged improper behavior), *rev'd* (June 8, 2000).

Lerner v. Laufer, 819 A.2d 471 (N.J. Super. Ct.) (dismissing legal malpractice action after finding no breach of standard of care in attorney’s failure to perform discovery or other investigative services necessary to evaluate merits of mediated divorce settlement, where representation agreement specifically limited scope of representation), *cert. denied*, 827 A.2d 290 (N.J. 2003) (unpublished table decision). **Quote from the Court:** “In a mediated agreement, all of those things are self- determined. We, therefore, see no just reason in law or policy to deny attorneys practicing matrimonial law the right to assert as a defense to claims of malpractice that they were engaged under a precisely drafted consent limiting the scope of representation.”

Markman v. O’Hare, No. 04CC01342, 2007 WL 915108 (Cal. Ct. App. Mar. 28, 2007) (refusing to vacate an arbitral award where, during arbitration, the arbitrator accepted work as a mediator in an unrelated matter involving one of the defendant’s law firms, given that the arbitrator had indicated on a disclosure form at the commencement of arbitration that he would entertain offers of employment in another case involving a lawyer for a party, subsequently provided notice when he was retained, and plaintiff failed to object or seek disqualification but instead merely sent a letter “castigating defendants’ counsel for seeking to ‘curry favor,’ but specifically did ‘not question for a moment [the arbitrator’s] impartiality or neutrality”). **Quote from the Court:** “Plaintiff’s lawyer characterizes the statements in that letter as being a ‘prayer,’ not a waiver. He complains he was presented with a Hobson’s choice—he either had to object and risk the arbitrator’s wrath that would negatively affect the decision as to his client, or ignore the event. We cannot accept this cynical view. Disqualifying an arbitrator is routine and not such that the arbitrator would be offended by it. Certainly nothing in the record shows plaintiff would have been harmed by it. And, contrary to plaintiff’s argument, we see no evidence that the arbitrator’s decision or conduct in accepting new employment was based solely on his interest in obtaining money.”

ALSO LISTED UNDER MED-ARB

Matluck v. Matluck, 825 So. 2d 1071 (Fla. Dist. Ct. App. 2002) (trial court erred in not disqualifying a law firm from representing a party in a post-dissolution custody case, when a member of the firm previously acted as a mediator in the same proceeding).

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).

Mex. Constr., LLC v. Thompson, No. CV075002988S, 2007 WL 2390838 (Conn. Super. Ct. Aug. 7, 2007) (denying plaintiff’s motion for summary judgment on complaint count alleging fraudulent misrepresentation of mediation skills by a lawyer who offered his services as a mediator to assist in settlement of a personal injury dispute).

Morgan Phillips, Inc. v. JAMS/Endispute, L.L.C., 44 Cal. Rptr. 3d 782 (Ct. App. 2006) (concluding that arbitrator’s withdrawal from arbitration proceeding without stated reason and continued service as a mediator was not sufficiently associated with adjudicative phase of arbitration to justify arbitral immunity in a suit brought against the neutral for alleged breach of

contract and other claims).

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."

Pitcher v. City of Preston, No. CV 05-407-E-FVS, 2007 WL 605017 (D. Idaho 2007) (vacating order to attend settlement conference and recusing self from mediation effort where one of six parties objected to magistrate's role as mediator). **Quote from the Court:** " I do not feel comfortable, or frankly interested, in presiding over one portion of the action, especially where a judicially supervised mediation requires ex parte, in camera, private and close consultation with counsel and the parties, along with open, candid, honest and objective communications and interaction with the parties and their counsel, where one of those parties or their counsel do not wish to have me preside over another portion of the case."

Pitts v. Francis, No. 5:07CV169-RS-EMT, 2007 WL 4482168 (N.D. Fla. Dec. 19, 2007) (denying motion to recuse which was, in part, based on allegation that incarceration was too stiff a sanction for failing to participate in mediation). **Quote from the Court:** "[M]y order did not require that Joe Francis settle the lawsuit; rather, it unambiguously required that Joe Francis mediate his case in good faith after I found him in civil contempt for exploiting a court-ordered mediation proceeding to threaten and abuse the other party in the civil lawsuit....I had no inclination to punish Francis or to cause him to "lose" the civil lawsuit. The sanction imposed was simply intended to force Joe Francis to obey an order of this Court-my order to mediate. A reasonable sanction for a party who fails to participate in mediation as required by court order is to require that party to "go back and do it again."

ALSO LISTED UNDER SANCTIONS

Ramboot, Inc. v. Lucas, 640 S.E.2d 845 (N.C. Ct. App. 2007) (dismissing on statute of limitations grounds a malpractice claim against law firm that allegedly undervalued claim and gave bad advice during mediation, where court determined that last act of attorney-client relationship was the clients' signature on a release and possession of settlement check, not the court filing of the release and dismissal documents).

Republic Serv., Inc. v. Liberty Mut. Ins. Co., No. CIVA 03-494 KSF, 2006 WL 3004014 (E.D. Ky. Oct. 20, 2006) (ordering disqualification of attorney and his firm from representation of

plaintiff in suit against insurer for alleged improper administration of plaintiff's self-insured workers' compensation program, where attorney had previously worked for the defendant insurer, including participation in mediation and strategy discussions that exposed the attorney to confidential information concerning the insurer's practices and procedures, strategies for handling litigation, claims operation, general claim file management and record keeping).

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

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

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.

Simpson v. JAMS/Endispute, LLC, No. A110634, 2006 WL 2076028 (Cal. Ct. App. July 26, 2006) (affirming applicability of quasi-judicial immunity to dismiss complaint against mediation provider for ineffective service, including alleged failure to ensure participation of opposing party and trying to "force" a settlement).

Sklar v. Clough, No. CIV.A.1:06CV0627JOF, 2007 WL 3407533 (N.D. Ga., Oct. 30, 2007) (denying motion to recuse mediator absent showing of actual bias; here, defendants merely alleged that the mediator, a federal magistrate, "had filed a motion for attorney's fees in a related case").

Sobol v. Marsh, 130 P.3d 1000 (Ariz. Ct. App. 2006) (affirming application of absolute privilege to dismiss a defamation suit brought by a legal document preparer (LDP) against the husband in a divorce case, based on statements made by the husband in his complaint to the Board of Legal Document Preparers alleging that the LDP had improperly served as the parties' neutral mediator

while simultaneously preparing the wife's divorce pleadings), *rev'd* (Oct. 23, 2006), amended by No. 1 CA-CV 05-0199, 2006 WL 864292 (Ariz. Ct. App. Apr. 5, 2006). **Quote from the Court:** "[A] decision conferring absolute immunity for Marsh's complaints to the Board against Sobol promotes public policy encouraging people to report ethical violations, and furthers Marsh's interest to freely and truthfully inform the Board of Sobol's alleged unethical conduct."

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).

Statewide Grievance Comm. v. Kennelly, No. CV040833515S, 2005 WL 758055 (Conn. Super. Ct. Feb. 25, 2005) (reprimanding inexperienced attorney for misrepresenting in joint session of mediation the amount of available insurance, where he disclosed to mediator in caucus that "he had more money" but did not volunteer the actual balance remaining on the liability policy).

Sweringen v. N.Y State Dispute Resolution Ass'n, No. 05-CV-428 (NAM/DRH), 2006 WL 2811825 (N.D.N.Y. Sept. 28, 2006) (denying motion to dismiss claims of deceptive business practices, breach of fiduciary duty and negligence brought by child abuse victims who participated in mediation conducted by defendant NYSDRA, a mediation provider supported by the Albany Diocese and run by the Albany Diocese civil defense attorneys, but dismissing claims of fraud, breach of oral contract, and negligence brought by plaintiffs who had not yet participated in child abuse mediation conducted by defendant NYSDRA).

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).

Teague v. St. Paul Fire and Marine Ins. Co., 964 So.2d 1015 (La. Ct. App. 2007), *writ granted*, 964 So.2d 375 (La. 2007), *ND judgment reversed*, 974 So.2d 1266 (La. 2008), *rehearing denied* (Mar 07, 2008) (reversing a jury verdict on an attorney malpractice claim that defendants settled the claim without consent, because the statute of limitations began to run once the client was informed of the settlement).

Trahan v. Lone Star Title Co. of El Paso, Inc., 247 S.W.3d 269 (Tex. App. 2007) (affirming refusal to recuse trial judge based on his alleged adverse comments about counsel's assessment that mediation would be ineffective).

U.S. v. Walker River Irrigation Dist., No. 3:73CV127ECR, 2006 WL 618823 (D. Nev. Mar. 10, 2006) (denying motion to disqualify counsel who represented numerous clients in this water rights case, where one client was involved in a phase of the trial using mediation with a confidentiality agreement that might preclude the attorney from disclosing matters to clients not involved in the mediation). **Quote from the Court:** "Although there is some sense in the..."

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

Vannucci v. Memphis Obstetrics & Gynecological Ass'n, P.C., No. W2005-00725-COA-R3CV, 2006 WL 1896379 (Tenn. Ct. App. July 11, 2006) (finding no basis to recuse the trial judge from presiding over remainder of medical malpractice case after having heard disputed facts during *ex parte* proceedings to approve a mediated settlement involving some but not all defendants).

Quote from the Court: "Even if we were to assume, for purposes of this appeal, that Judge Williams entertained various facts at the hearing and informally examined the comparative fault of the parties, including that of the Non-Settling Defendants, we cannot agree that such action would warrant a recusal under the unique facts of this case. There is nothing in the record to indicate that Judge Williams has made comments expressing her intention to rule for or against the Non-Settling Defendants at trial....Moreover, the Non-Settling Defendants have overlooked an important aspect of this case...[i]n her amended complaint, Vannucci expressly demanded a jury to try the allegations contained therein. Thus, it is a jury, and not Judge Williams, who will decide the issues of fact should the remainder of the case proceed to trial."

Vitakis v. Valchine, 793 So. 2d 1094 (Fla. Dist. Ct. App. 2001) (remanding to trial court for consideration of wife's allegation that mediator committed misconduct by improperly influencing her and coercing her into agreement, noting an exception to the general rule that coercion and duress by a third party is insufficient to invalidate an agreement between principals). **Quote From The Court:** "During a court-ordered mediation, the mediator is no ordinary third party, but is, for all intent and purposes, an agent of the court carrying out an official court-ordered function. We hold that the court may invoke its inherent power to maintain the integrity of the judicial system and its processes by invalidating a court-ordered mediation settlement agreement obtained through violation and abuse of the judicially-prescribed mediation procedures."

Wilson v. Kautex, Inc., No. 1:07-CV-60 TS, 2007 WL 1650105 (N.D. Ind. June 04, 2007) (refusing to recuse the trial judge on the basis that during mediation defense counsel told plaintiff that her case would be dismissed and she knew which judge would do it).

Wimsatt v. Superior Court, 61 Cal.Rptr.3d 200 (Cal. Ct. App. 2007) (reluctantly reversing a judicially-created perjury exception to confidentiality, and precluding the client in this legal malpractice action from discovering mediation briefs and emails that would support the allegation that his lawyer lowered his settlement demand without authority; but refusing to issue a protective order for the contents of the conversation in which the lawyer purportedly lowered the demand, reasoning that plaintiff failed to meet his burden to establish that the conversations actually occurred in mediation). **Quote from the Court:** "Given the number of cases in which the fair and equitable administration of justice has been thwarted, perhaps it is time for the Legislature to reconsider California's broad and expansive mediation confidentiality statutes and to craft ones that would permit countervailing public policies be considered. In light of the harsh and inequitable results of the mediation confidentiality statutes . . . the parties and their attorneys should be warned of the unintended consequences of agreeing to mediate a dispute. If they do

not intend to be bound by the mediation confidentiality statutes, then they should ‘make [it] clear at the outset that something other than a mediation is intended.’” (citation omitted).

ALSO LISTED UNDER CONFIDENTIALITY

Wong v. Hoffman, 973 So.2d 4 (La. Ct. App. 2007) (reversing a dismissal of an attorney malpractice case which included a claim that the attorney committed malpractice by failing to object to the adverse party's expert witness on the grounds that the witness had served as a mediator in the same case).

Yee v. Michigan Supreme Court, No. 06-15142-DT, 2007 WL 118931 (E.D. Mich. Jan. 10, 2007) (dismissing claim against Mediator/Case Evaluators and their law firms on the grounds of quasi-judicial immunity). **Quote from the Court:** “Absolute immunity also extends to non-judicial officers who perform ‘quasi-judicial duties when (1) the functions of the official in question are comparable to those of a judge; (2) the nature of the controversy is intense enough that future harassment or intimidation by litigants is a realistic prospect; and (3) adequate safeguards exist to justify dispensing with private damage suites (sic) to control unconstitutional conduct. . . Included among this class of individuals to whom quasi-judicial immunity has been extended are mediators and arbitrators.”

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

Alexander v. Cornett, 961 So.2d 622 (La. Ct. App. 2007) (refusing to consider insurer's agreement to schedule mediation as an admission of coverage and waiver of policy exclusion defense), *writ denied*, 966 So.2d 603 (La. 2007).

Anderson v. Anderson, 514 S.E.2d 369 (Vir. Ct. App. 1999) (finding that when a litigant attempted to exclude the testimony of a therapist in a child custody proceeding on the ground that the therapist had acted as a mediator, rather than a therapist, the Court correctly concluded that when a subject matter expert, such as a psychologist or therapist is sought out for advice, the process the parties engage in cannot be characterized as mediation if "(a) it involved advice from the mental health professional; (b) it was entered into as an evaluation or therapy; (c) it was entered into without any formal agreement to mediate or any other indication that the parties and the therapist considered it a mediation.").

Anderson v. Stanley, No. 14-00-00123-CV, 2000 WL 854990 (Tex. App. June 29, 2000) (appeal dismissed based on appellant's failure to submit names of two acceptable mediators for mandatory appellate mediation effort).

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

Banco Ficohsa v. Aseguradora Hondurena, S.A., 937 So. 2d 161 (Fla. Dist. Ct. App. 2006) (affirming summary judgment for reinsurer against the assignee of the insured's interest finding that the reinsurer, who was not aware of the assignment, had no duty to ascertain possible assignees before complying with a mediated settlement with the insured), *reh'g denied* (Sept. 11, 2006).

Bexley v. Dillon Co., Inc., No. 04 CV 01661 MEH MJW, 2006 WL 650236 (D. Colo. Mar. 13, 2006) (concluding that raising a new claim during an EEOC mediation is insufficient to satisfy administrative exhaustion requirements; instead, plaintiff must amend her EEOC charge or file a second charge).

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).

Borah, Goldstein, Altschuler, Schwartz, & Nahins, PC v. Lubnitzki, 822 N.Y.S.2d 425 (Civ. Ct. 2006) (ruling that attorneys who promptly commenced an action for attorneys' fees against a client without providing the required notice to the client about mediation or arbitration rights, could not remedy the error in this protracted litigation by, amending the complaint to take advantage of the exception in the rules that provided that stale claims, where there were no new legal services for over two years, were not subject to the requirement). **Quote from the Court:** "Given these worthy goals, those responsible for establishing the Part could not have intended that the mere passage of time warrants litigation in court, and thus, it ought not cure this plaintiff's initial failure to notify defendant of her right to arbitrate or mediate fee disputes. Rather, having actively litigated for its fees and obtained a default judgment against defendant well within the two-year period, plaintiff ought not be permitted to seek refuge from a dismissal despite the two years that passed before it amended its complaint solely to allege an exemption that was inapplicable when it first brought the action. To permit plaintiff the benefit of the exemption in these circumstances would give insufficient consideration to the Part's intent that clients be given notice of the availability of arbitration and mediation, something that was concededly not done here."

Boudreau v. Gonzalez, No. 3:04CV1471 (PCD), 2006 WL 3462655 (D. Conn. Nov. 29, 2006) (finding a lawyer retained to investigate claims was functioning as an attorney giving legal advice for purposes of the attorney client privilege, despite a reference that the attorney was functioning as a mediator).

Burgess v. CIGNA Life Ins. Co. of N.Y., No. SA-04-CA-0841-XR, 2006 WL 1851391 (W.D. Tex. June 23, 2006) (concluding that recognition of need for witness testimony, which first arose during a mediation that occurred after the deadline for designating witnesses passed, is substantial justification for not timely designating the witness).

Burkley v. Burkley, 911 So. 2d 262 (Fla. Dist. Ct. App. 2005) (reversing trial court modification of child support based on husband's breach of contractual obligation in mediated divorce settlement to obtain and maintain employment, where court failed to make findings supporting conclusion that there had been a substantial change of circumstances warranting support modification). **Quote from the Court:** "Courts may not impose the statute piecemeal—ignoring procedural safeguards and statutory guidelines—simply because the parties signed a mediation agreement."

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).

Celli v. Wynne, No. 1:06CV1DAK, 2006 WL 2708359 (D. Utah Sept. 19, 2006) (concluding that failure to mediate is not an adverse employment action sufficient to support a retaliation claim).

Chambers v. Cooney, No. CIV.A. 07-0373-WSB, 2007 WL 2493682 (S.D. Ala. Aug. 29, 2007) (holding that: 1. place of injury, not jurisdiction where mediation occurs, is controlling for choice of law purposes in claim for breach of contract; and 2. denying defendant's motion for failure to state a tortious interference claim simply because evidence on which it is predicated consists of statements made in mediation). **Quote from the Court:** "This kind of evidentiary objection is inappropriate at the Rule 12(b) stage. Despite defendant's repeated attempts to characterize the facts this way, nothing in the Complaint would confine Dr. Cooney's allegedly interfering conduct to statements made during a mediation. The pattern of conduct described in the Complaint as allegedly interfering with the Merger Agreement is far broader than that and was in no way limited to things Dr. Cooney said or did during formal mediation sessions. As such, even if defendant were correct that Rule 408 bars admission of defendant's statements during the Minneapolis mediation (a questionable proposition which the Court does not reach today), Count II still states a claim upon which relief can be granted because on its face it is not predicated exclusively on statements made by defendant during a mediation."

ALSO LISTED UNDER CONFIDENTIAL

Chambers Med. Found. v. Chambers, No. 05CV0786, 2007 WL 2350261 (W.D. La. Aug. 03, 2007) (concluding that contract clause stating mediation should take place in Louisiana was not a

forum selection clause under 28 USC § 1404(a), because the clause selected the forum for mediation, not litigation).

Christian Builders, Inc. v. Cincinnati Ins. Co., 501 F. Supp. 2d 1224 (D. Minn. 2007) (refusing to conclude that insurer's refusal to pursue negotiations after failed mediation is evidence of bad faith refusal to settle). **Quote from the Court:** "When a case does not settle, an insured can *always* claim that the insurer should have made one more phone call or asked for one more meeting. If the insurer makes three phone calls, the insured can argue that it should have made four. If the insurer makes 3000 phone calls, the insured can argue that it should have made 3001. All that the law requires is that the insurer behave reasonably."

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).

CTX Mortgage Company v. Rodriguez, No. G036120, 2007 WL 512755 (Cal. Ct. App. Feb. 20, 2007) (rejecting plaintiff's argument that running of statute of limitations was tolled by court-ordered mediation, where evidence showed only a judge's informal statement "let's go to mediation" during a status conference, but the status conference minutes fail to reflect that the court actually ordered the parties into mediation and no written mediation order was ever issued).

Conax Florida Corp. v. Astrium Ltd., 499 F.Supp.2d 1287 (M.D. Fla. 2007) (declining to decide propriety of service at mediation, where plaintiff also perfected substituted service by mail). Quote from the Court: "[T]here is a substantial dispute as to whether the plaintiff's actions in effecting personal service of process constitute bad faith. Its resolution would require an evidentiary hearing involving the disturbing circumstance of testimony from the lawyers involved in the mediation process. However, this issue need not be resolved...."

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").

DeFrietas v. Horizon Invest. & Management Corp., NO. 2:06-CV-0092DBPMW, 2007 WL 3463716 (D. Utah Nov. 14, 2007) (compelling discovery after rejecting the argument that the parties agreed to forego discovery obligations during the mediation effort).

Denike v. Cupo, 926 A.2d 869 (N.J. Super. Ct. App. Div. 2007) (refusing to use valuation date agreed to in mediation, where the plaintiff had specifically requested the date not be used if

mediation failed, and the court did not want to deter mediation participation), *cert. granted*, 934 A.2d 640 (N.J. 2007) (unpublished table decision). **Quote from the Court:** "We will not accept a valuation date agreed to in the mediation for the sole purpose of mediation without a clear agreement by the parties that the date would remain viable should mediation fail. A contrary rule has the potential of deterring a party's willingness to mediate."

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).

Dino v. Pelayo, 145 Cal. App. 4th 347 (Ct. App. 2006) (rejecting defendants' claims that the attorney who was representing co-defendants to a cross complaint should be disqualified because the joint representation deprived defendant of the right to confidentially mediate separately with each of the parties to the cross-claim), *review denied* (Feb. 28, 2007). **Quote from the Court:** "Adopting the...proposed mediation-disqualification rule would [in addition to discouraging mediation] likewise discourage parties from choosing joint representation. Clients would effectively be barred from choosing joint representation if the attorneys they hired to jointly represent them faced disqualification whenever their case proceeded to mediation."

Eagles Nest Ranch & Academy v. Bloom Tp. Bd. of Trustees, No. 2:06-CV-242, 2007 WL 2359763 (S.D. Ohio Aug. 16, 2007) (concluding that expenses incurred by defendant in connection with cancelled mediation constituted evidence of prejudice sufficient to support motion to dismiss for failure to prosecute).

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."

Ellison v. Hill, 654 S.E.2d 158 (Ga. Ct. App. 2007) (affirming denial of plaintiff's untimely request to join additional defendants, where only excuse for delay was that defendant was "foot-dragging" in connection with discovery and failed to engage in meaningful mediation).

Enzo Biochem, Inc. v. Applera Corp., 243 F.R.D. 45 (D. Conn. 2007) (denying defendant's motion to amend answer to include unclean hands defense, where defendant's mediation statement showed it knew predicate facts underlying the defense nearly a year before filing motion to amend).

Emerson v. Comm'r of Internal Revenue, No. 5877-00, 2003 WL 1392574 (T.C. Mar. 20, 2003) (affirming IRS refusal to consider portion of mediated settlement of contract/intellectual

property dispute non-taxable compensation for injuries or personal illness, where there was no mention during mediation of a claim for personal injuries, other than mediator's suggestion, subsequently acted on by the parties, to "add a personal injury claim to the suit as a vehicle to reach settlement"; rejecting IRS accuracy-related penalty for improperly excluding settlement proceeds as received on account of physical injury or sickness, since taxpayer had relied to his detriment on the suggestion of the mediator and his own attorney to include a claim for personal injury).

Equal Employment Opportunity Comm'n v. Tri-State Plumbing, Heating & Air Conditioning Contractors, Inc., 502 F.Supp.2d 767 (W.D. Tenn. 2007) (rejecting allegations of conspiracy between the EEOC and the intervening plaintiff's attorney to subvert EEOC conciliation process, because the attorney later expressed hope the conciliation process would work and there was no evidence the EEOC followed the attorney's advice to not mediate).

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).

Fortenberry v. Cavanaugh, No. 03-04-00816-CV, 2005 WL 1412103 (Tex. App. June 16, 2005) (concluding that trial court erred in appointing receiver for a family business where the only evidence of inadequacy of other remedies available at law or equity to resolve the dispute was the failure of mediation to sort out management difficulties), *reh'g overruled* (July 14, 2005).

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."

Gerber v. Riordan, No. 3:06CV1525, 2007 WL 2460026 (N.D. Ohio Aug. 24, 2007) (denying plaintiff's motion to mediate claims in Ohio and instead ordering mediation in California,

because California courts would be more familiar with the governing law, most of the evidence was in California, and the contract was formed partly in California).

Gibson v. Lafayette Manor, Inc., No. 05-1082. 2007 WL 951473 (W.D. Pa. March 27, 2007) (characterizing the interactive process under the ADA as a “less formal, less costly, form of mediation” although the interactive process does not involve a neutral).

Gray v. Arkansas Dept. of Human Services, No. 4:04CV00490 GH, 2007 WL 1020535 (E.D. Ark. March 30, 2007) (considering statement made during mediation as possible evidence of racial animus).

Griggs v. Triple S Indus. Corp., 197 S.W.3d 408 (Tex. App. 2006) (concluding that former employee could not argue she was fired in anticipation of her future, potentially hostile testimony in proceedings regarding her husband, where the proceedings were fully settled without testimony in a mediation completed before the termination), *petition for review filed* (Aug. 11, 2006).

Hackworth v. Progressive Halcyon Ins. Co., No. CIV-05-1467-M, 2007 WL 397080 (W.D. Okla. Feb. 1, 2007) (finding genuine issue of material fact precluding summary judgment on employee’s retaliation claim, where plaintiff presented sufficient evidence of a causal connection between her termination and her charge of discrimination, specifically that she was fired only after calling to accept an offer made by the employer at mediation, which had occurred less than two months after she filed her charge).

Halverson v. University of Utah School of Medicine, No. 2:06CV228 DAK, 2007 WL 2892633 (D. Utah September 28, 2007) (concluding that alleged ruse to engage in mediation not cognizable as constitutional violation in context of 1983 suit). **Quote from the Court:** "Plaintiff further alleges that the Individual Defendants delayed Plaintiff's access to Human Resources available to her at the University and engaged in a ruse designed to make the plaintiff believe that Dr. Allen was a mediator who would reconcile plaintiff back into her residency program.....These allegations fail to state a claim because they do not allege a constitutional violation."

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

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).

Hitachi, Ltd. v. AmTRAN Tech. Co. Ltd., No. C 05-2301 CRB (JL), 2006 WL 2038248 (N.D. Cal. July 18, 2006) (deciding that Hitachi had sufficient control and therefore must produce

documents in the possession of its agent, InProII, in part, because InproII had participated in the litigation and attended the mediation).

His Grace the Duke of Westminster v. Cessna Aircraft Co., No. 02-2054-DJW, 2003 WL 21384320 (D. Kan. May 30, 2003) (granting plaintiff's motion for dismissal of product liability claims without prejudice and rejecting defendant's argument that plaintiff excessively delayed the lawsuit by, among other things, aggressively pursuing mediation).

Hoppe v. Legacy Prop. Mgmt. Serv., LLC, No. 04-CV-1099, 2006 WL 1388832 (E.D. Wis. May 16, 2006) (concluding that letter from plaintiff's counsel to EEOC mediator outlining claim of retaliatory constructive discharge was sufficient to avoid dismissal for failure to exhaust administrative remedies, where the alleged retaliatory conduct arose from conduct already being investigated).

In re Hefley, 157 P.3d 1129 (Kan. Ct. App. 2007) (rejecting party's assertion that trial court abused its discretion by allowing mediator to participate in a meeting in chambers with the minor child of the parties without making a record, where the parties requested the meeting and failed to request in advance that the meeting be recorded).

In re Marriage of Carnohan, No. D043903, 2005 WL 288815 (Cal. Ct. App. Feb. 8, 2005) (upholding determination that mediator's report was credible after mediator testified and was cross-examined), *rev'd* (Apr. 13, 2005), *cert. denied*, 546 U.S. 853 (2005).

In re Marriage of Craze, 133 Wash. App. 1023 (Ct. App. 2006) (rejecting husband's argument that personal service of summons and petition of divorce should be deemed void because served at a mediation he was invited to from out of state, where husband and his counsel agreed to participate knowing wife wanted to dissolve the marriage in that state; that he had already been served under the states' long arm statute; and that she might serve him again in person), *rev'd*, 158 P.3d 614 (Wash. May 01, 2007) (unpublished table decision).

International Floor Crafts, Inc. v. Adams 529 F.Supp.2d 174 (D. Mass. 2007) (extending discovery deadline based in part on delay caused by mediation effort)

Ishola v. Ishola, No. C3-99-1625, 2000 WL 310544 (Minn. Ct. App. March 28, 2000) (absent evidence that the district has a mandatory visitation expediter program, the court is precluded from "adding" mandatory visitation mediation provisions to a judgment and decree memorializing the parties' oral stipulation, where the parties' agreement did not address mediation).

Jalovec v. Synagro Midwest, Inc., NO. 05-C-250, 2007 WL 2900237 (E.D. Wis. September 24, 2007) (disclosing a document during mediation moots the defense motion to preclude plaintiff from using the document during trial for not previously disclosing the document during discovery).

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).

Johnson v. Eldridge, 799 N.E.2d 29 (Ind. Ct. App. 2003) (settlement offer made three months late because parties were awaiting mediation qualified as good cause for extension of time for purposes of making a required timely written offer of settlement under the Indiana Tort Prejudgment Interest statute), *reh'g denied* (Jan. 20, 2004), *transfer denied*, 812 N.E.2d 801 (Ind. 2004) (unpublished table decision).

Jordan v. U.S. Dep't of Educ., No. 1:05CV1066, 2006 WL 1305073 (N.D. Ohio May 10, 2006) (concluding that employee set forth a *prima facie* case for retaliation with regard to the denial of a promotion, where supervisor's participation in mediation of the employee's grievance, together with ongoing friction between the employee and supervisor, and the supervisor's refusal to recommend the promotion, established a causal link between the protected grievance and subsequent adverse employment action; but ultimately granting summary judgment for defendant because plaintiff failed to meet her burden of persuasion to prove pretext in employer's proffer of non-discriminatory reasons justifying the promotion refusal).

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").

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).

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).

Kyoei Fire & Marine Ins. Co., Ltd. v. M/V Maritime Antalya, 248 F.R.D. 126 (S.D.N.Y. 2007) (refusing to grant continuance and specifically noting parties "lengthy and failed effort" to select a mediator supports propriety of promptly moving to trial).

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).

Lanzi v. Bucci, No. A-4907-04T1, 2006 WL 1687421 (N.J. Super. Ct. App. Div. June 21, 2006) (reversing trial court refusal to award attorneys fees as sanction for filing of frivolous complaint,

where the court overvalued plaintiff's allegations in mediation, at oral argument, and in self-serving certification).

Lee v. State, 186 S.W.3d 649 (Tex. App. 2006) (rejecting arguments that defendant's conviction for aggravated sexual assault on a child should be overturned because of: 1) availability of newly discovered evidence relating to the mother's allegedly false testimony that her attorney and a mediator told her not to raise defendant's molestation of the child in a custody mediation; and 2) the alleged ineffective assistance of counsel for failure to refute the mother's testimony by calling her attorney and the mediator), *petition for discretionary rev'd* (May 24, 2006).

Legacy Healthcare Services, Inc. v. Provident Foundation, Inc., No 1:03CV00515, 2007 WL 188301 (N.D. Oh. Jan. 22, 2007) (finding defendant waived its venue objection by waiting more than three years to file its motion and by participating in a mediation conference, settlement conferences and conducting discovery).

LendingTree, LLC v. Cyber Fin. Network, Inc., No. 305-CV-00388, 2007 WL 2410663 (W.D.N.C. Aug. 21, 2007) (concluding that existence of pending action in another state does not weigh against transfer but is instead a neutral factor, when that action is in mediation and the risk of divergent judgments and conflict of laws is low).

Lewis v. Potter, No. 1:05CV34 (STAMP), 2007 WL 419374 (N.D. W.Va. Feb. 2, 2007) (rejecting complaint that defendant illegally retaliated against Title VII claimant by engaging in bad faith "sham" mediation, and further concluding that mediation did not result in an enforceable, binding agreement, where the settlement agreement form specifically noted that settlement was contingent on subsequent employer approval which was rejected, and the mediator completed a post-mediation "No Agreement Letter"). **Quote from the Court:** "Although extrinsic evidence is not necessary to reach this conclusion, the actions of the mediator confirm that it was the intent of the parties that an agreement be formed only upon approval of USPS management.... Clearly, if an agreement had already been formed between the parties, it would have been illogical for the mediator to send the No Agreement Letter to the EEO. By including the No Agreement Letter, the mediator's actions confirm that the parties contemplated two potential outcomes following the execution of the Settlement Agreement Form: (1) that the USPS would approve the Settlement Agreement Form and it would *then* become a binding contract or (2) that the USPS would not approve the Settlement Agreement form and no agreement would exist." (Emphasis is original).

Logan v. Potter, No. 06-297, 2007 WL 1652268 (D. N.J. June 06, 2007) (rejecting plaintiff's claim that defendant failed to accommodate his condition, in part because defendant engaged in mediation with plaintiff).

MacClymonds v. IMI Investments, Inc., No. H-05-2595, 2007 WL 1306761 (S.D. Tex. May 02, 2007) (denying plaintiff's motion for voluntary dismissal where "[d]efendants have expended considerable sums in attorney's fees, mediation fees, expert fees and costs" and plaintiff moved to dismiss only after magistrate issued adverse ruling).

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").

Martinez v. Crayton, No. B187989, 2007 WL 765959 (Cal. Ct. App. March 15, 2007) (finding no abuse of discretion in rejecting laches defense where communications about possibility of mediation justified delay in prosecution).

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).

McKay v. Triborough Bridge and Tunnel Authority, NO. 05 CIV.8936(RJS), 2007 WL 3275918 (S.D.N.Y. Nov. 05, 2007) (refusing to reopen discovery merely because defendant "realized" at the mediation that certain documents, if they existed "could be relevant").

McKenzie v. Potter, No. Civ. A. 02-10727-DPW, 2004 WL 1932766 (D. Mass. Aug. 20, 2004) (granting defendant summary judgment on gender discrimination claims, where among other things, plaintiff failed to establish that alleged denial of mediation constituted an actionable adverse employment decision for purposes of establishing a prima facie case).

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).

Merrill Iron & Steel, Inc. v. Bechtold, No. 06-C-110-S, 2006 WL 1515619 (W.D. Wis. May 25, 2006) (granting summary judgment on contract claim as time barred because it was unreasonable for plaintiff to rely on defendant's representation that the claim would be paid after a mediation in which the parties discussed whether defendant had an obligation to make the payment).

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).

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

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).

New Century Mortgage Corp. v. Great N. Ins. Co., No. 05 C 2370, 2006 WL 2088198 (N.D. Ill. July 25, 2006) (concluding that insurer did not breach a duty to settle by refusing to participate in mediation and settlement discussions concerning claims the insurer considered to be outside the scope of policy coverage).

Noughton v. Hooker, 941 So. 2d 1176 (Fla. Dist. Ct. App. 2006) (reversing trial court's decision to dismiss a breach of contract claim for failure to prosecute where defendants actively engaged in discovery and participated in mediation during the time at issue, which effectively constituted an abandonment of their motion to dismiss).

Nunez v. Res. Warehousing & Consolidation, 775 N.Y.S.2d 310 (N.Y. App. Div. 2004) (reversing trial court denial of motion to restore a personal injury action the trial calendar, where both parties appeared for mediation in the year after dismissal of the action for failure to prosecute, and the appearance demonstrated plaintiff's intent not to abandon the litigation).

Ocean-Yachts, Inc. v. Florida Yachts Intern., Inc., 960 So.2d 44 (Fla. Dist. Ct. App. 2007) (enforcing a contractual venue provision stating that if the required mediation or arbitration fails any suit must be filed in the jurisdiction of the prevailing party). **Quote from the Court:** "Thus, according to the trial court, because mediation ends without declaring a winner, the 'prevailing party' venue privilege provided by the agreement, does not apply. We cannot agree....according to AAA rules, mediators are authorized to make 'oral and written recommendations for settlement.' *See* AAA, Commercial Arbitration Rule M-10. We see no reason why these

recommendations cannot either indicate, upon request, or be utilized to determine which of the parties prevailed, as the parties here agreed."

Orlando v. Carolina Cas. Ins. Co., No. CIV.F 07-0092 AWI SM, 2007 WL 2155708 (E.D. Cal. July 26, 2007) (concluding that plaintiffs satisfactorily alleged fraud under FRCP 9, by claiming that defendant falsely stated during mediation that "a third party creditor was necessary, that a third party creditor actually existed, that Defendants would make good faith attempts to procure the consent of the third party creditor, that [a third party's] financial ability to pay was less than it actually was, and that Defendant's promise to pay was false."

Ocasio 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).

Palmer v. Erlandson, No. C8-99-891, 2000 WL 2621 (Minn. Ct. App. Dec. 27, 1999) (participation in settlement discussions and court-ordered mediation does not estop defendant from seeking dismissal of a medical malpractice lawsuit based on plaintiffs' failure to serve affidavit of expert identification).

Passa v. City of Columbus, No. 2:03-CV-81, 2007 WL 756703 (S.D. Ohio Mar. 6, 2007) (concluding that there is a genuine issue of material fact whether the city is a debt collector under the Fair Debt Collection Practices Act based on the city's Check Resolution Program, labeled a mediation by the city, but described as a program that "assists in the collection of money").

Pedraza v. Alameda Unified School Dist., No. C 05-04977 VRW, 2007 WL 949603, *4 (N.D. Cal. Mar. 27, 2007) (finding that entering into a mediated settlement agreement does not satisfy the exhaustion of administrative remedies requirement in the IDEA).

Perry v. Parks, Nos. 2005-CA-000401-MR, 2005-CA-000493-MR, 2006 WL 658578 (Ky. Ct. App. Mar. 17, 2006) (affirming decision to allow accident reconstruction expert to testify even though the expert was not listed in interrogatory responses, where full disclosure of the witness and his proposed testimony was made at a mediation a year prior to trial, and two weeks prior to trial plaintiff offered to agree to a continuance to allow defendant to prepare for this testimony), *reh'g denied* (May 17, 2006), *rev'd* (Nov. 15, 2006).

Philip Services Corp. v. City of Seattle, No. CIV.A. H-06-2518, 2007 WL 3396436 (S.D. Tex. November 14, 2007) (denying vacatur of prior decision based on parties' mediated settlement). **Quote from the Court:** "The cases are clear that settlement alone is not a sufficient basis for vacating a prior court decision [citations omitted]. The fact that the settlement was facilitated through court-annexed mediation is not a principled basis for relaxing the showing for vacatur."

Piazza Bros., Inc. v. Bd. of Educ. of Mahopac Cent. Sch. Dist., 814 N.Y.S.2d 726 (N.Y. App. Div. 2006) (pre-mediation settlement discussions tolled statute of limitations under state education law; statute began running once school district notified plaintiff that it would not participate in a mediation).

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."

Reifsteck v. Paco Bldg. Supply Co., No. 4:04CV742 RWS, 2005 WL 2674941 (E.D. Mo. Oct 20, 2005) (denying defendant employer's motion for summary judgment on employment discrimination/retaliation claims and specifically rejecting employer's argument that evidence of retaliatory termination that allegedly occurred at a mediation is inadmissible under Federal Rule of Evidence 408). **Quote from the Court:** "If such evidence was kept from a jury it would enable employers to discriminate against employees in the guise of mediation and settlement negotiations. The federal statutes against employment discrimination cannot be compromised by cloaking discrimination in the form of such negotiations."

Roes v. Roes, No. A04-2041, 2005 WL 2008699 (Minn. Ct. App. Aug. 23, 2005) (rejecting challenge to appointment of parenting-time expeditor based on mother's argument that expeditor statute does not authorize modification of a parenting-time schedule and mediation would better serve the parties' goal of not returning to court, concluding that not all parenting-time disputes require modification of a parenting-time order and appointment of an expeditor does not preclude mediation).

Roofers Local No. 20 Health and Welfare Fund v. Memorial Hermann Hosp. System, No. 05-1206-CV-W-FJG, 2007 WL 912591 (W.D. Mo. Mar. 23, 2007) (granting default judgment and noting that attorney's appearance on behalf of defendant at a mediation does not excuse failure to timely file an answer).

Safeco Ins. Co. of America v. Emerson Elec. Co., No. C 05-133 JF (HRL), 2007 WL 832964, *1 (N.D. Cal. 2007) (conditionally granting late motion to amend complaint where party had failed to act earlier because "it was under the impression that the new claim had been disclosed informally in mediation and in discovery").

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).

Saylor v. Wilde, NO. 2006-P-0114, 2007 WL 2579396, 2007 (Ohio Ct. App. September 07, 2007) (using evidence of what happened at a prior mediation to support a defense of lack of authority in an action to enforce an agreement allegedly reached in subsequent negotiation).

Quote from the Court: "In this case, the only indication Mr. Leneghan possessed authority to settle was gleaned from the mediation, where Ms. Saylor evidently authorized settlement for no less than \$52,500. Nothing in the record, apart from Mr. Leneghan's continued representation of Ms. Saylor, indicated he had authority to settle for the \$45,000 offered by Westfield. Ms. Saylor never signed a release. ..Ms. Saylor did not accept the fruits of the alleged settlement; rather, she specifically disavowed Mr. Leneghan's authority to settle. ..There was no meeting of the minds between Ms. Saylor and Ms. Wilde regarding settlement."

Scannavino v. Florida Dept. of Corrections, 242 F.R.D. 662 (M.D. Fla. 2007) (relying on evidence from mediation to support a finding that plaintiff was incompetent and in need of the appointment of a guardian). **Quote from the Court:** "The plaintiff's mental incapacity has twice precluded mediation of this action. Peter Grilli, a seasoned and judicious mediator, twice attempted and twice failed to mediate the plaintiff's claims against the defendants. Following each attempted mediation, Mr. Grilli filed a mediation report stating that the mediation was cancelled pursuant to Rule 10.310(d), Florida Rules for Certified and Court-Appointed Mediators, which rule requires cancellation of a mediation if 'for any reason a party is unable to freely exercise self-determination' (Doc. 56, 107)."

Sessa v. Province, 910 A.2d 992 (Conn. App. Ct. 2006) (affirming denial of motion to set aside default for failure to appear at court-ordered mediation, where the only proffered explanation for non-appearance was the attorney's negligence in recording the wrong date for the mediation), *cert. denied*, 916 A.2d 51 (Conn. 2007).

Shamrock Development, Inc. v. Smith, 737 N.W.2d 372 (Minn. Ct. App. 2007), review granted (Nov. 13, 2007) (concluding that failure to include alternative dispute resolution information in summons, as required by Minn. Stat. §543.22, was mere technical defect, rather than fatal to court's jurisdiction). **Quote from the Court:** "The statute does not provide a remedy for failure to comply with the statute. Rule 114 of the general rules of practice provides that ADR is required for nearly all civil cases filed in district court....But the rules do not refer to Minn. Stat. § 543.22 or provide a remedy for failure to comply. Thus, we discern no legislative intent that the failure to include the required ADR information in the summons is fatal to jurisdiction. Clearly, the legislature intended to leave to the courts the enforcement of the statute through the rules of general practice.....Although the summons did not include the ADR information, this omitted information was not essential for appellants to answer and defend the claim and was, therefore, in the nature of a technical defect."

Smith v. Smith, No. CT2005-0040, 2006 WL 1728050 (Ohio Ct. App. June 20, 2006) (holding that judicial estoppel precludes a parent from asserting that a "change of circumstances" standard should have been used to decide a disputed school placement issue, where the parent previously had agreed to future mediation of a parenting schedule indicating an implied agreement to further review even absent a change of circumstances).

Sonn v. Wal-Mart Stores, Inc., No. CV 06-1816 (FB)(JO), 2006 WL 2546545 (E.D.N.Y. Sept. 1, 2006) (justifying a two month delay in amending the complaint to substitute the fictitiously-named Dianne Doe with a specific Wal Mart employee because plaintiff did not want to bring the motion until after the scheduled mediation conference)."

Spirtas Co. v. Federal Ins. Co. 481 F.Supp.2d 993 (E.D. Mo.2007) (denying declaratory relief based on an insurance company's failure to participate in mediation, where the insurance company was not liable for coverage under the policy), *aff'd*, 521 F.3d 833 (8th Cir. 2008).

State ex rel. T.N., 789 So. 2d 73 (La. Ct. App. 2001) (trial court has inherent authority to dismiss delinquency petition for good cause when juvenile defendants successfully complete mediation).

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

Sun Valley Homeowners, Inc. v. Am. Land Lease, Inc., 927 So. 2d 259 (Fla. Dist. Ct. App. 2006) (concluding that a state statute depriving mobile home owners of standing to challenge increase in lot rental amounts, reduction in service or utilities, or rule changes, absent written consent of a majority of the affected homeowners applies to litigation, not just to the detailed mediation process set forth in the statute). **Quote from the Court:** "[W]e observe that it would be an odd policy indeed to have a more restrictive standing requirement for the initiation of mediation--which by its very nature is not binding--than for the institution of litigation. Nothing in the statutory scheme indicates that the legislature adopted such a policy."

Swift & Co. v. Elias Farms, Nos. CIV. 05-2775 PAM/JJG, CIV. 05-2776 PAM/JJG, CIV. 05-2777 PAM/JJG, 2007 WL 1364691 (D. Minn. May 9, 2007) (refusing to void agricultural commodity contracts merely because they failed to include mediation or arbitration provisions required by Minn Stat. § 17.91). **Quote from the Court:** “There is no indication that the legislature intended that a violation of § 17.91 should void a contract. Moreover, allowing a party to avoid their contractual obligations does little to promote the efficiency of litigation or the interests of justice. Finally, the record does not demonstrate that the parties knowingly and intentionally failed to abide by Minnesota law or that illegality permeated the transaction.”

Synergetics, Inc. v. Hurst, No. 4:04CV318CDP, 2007 WL 2422871 (E.D. Mo. Aug. 21, 2007) (holding the plaintiff engaged in misconduct justifying monetary sanctions, where plaintiff conditioned a mediated settlement agreement on a party’s promise not to testify).

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).

Thompson v. Capitol Police Bd., 120 F. Supp. 2d 78 (D.D.C. 2000) (participation by employer in a mediation requested by victim of alleged employment discrimination did not constitute a waiver of employer’s right to assert untimely filing of conciliation request under the Congressional Accountability Act), *reconsideration denied*, No. CIV.A.97-2624 (RMU), 2001 WL 797876 (D.D.C. Apr. 25, 2001), *order aff’d*, 22 F. App’x 14 (D.C. Cir. 2001).

Thornapple Associates, Inc. v. Sahagen, No. 06 Civ. 6412 (JFK), 2007 WL 747861 (S.D. N.Y. Mar. 12, 2007) (treating the failure to participate in mediation as a factor justifying a pre-judgment attachment in aid of security).

Tian-Rui Si v. CSM Inv. Corp., No C-06-7611 PVT, 2007 WL 2601098 (N.D. Cal. Sept. 6, 2007) (finding undue burden for plaintiff to participate in mediation and deposition in the same week).

Toland v. Toland, No. 35070-0-II, 2007 WL 2379722 (Wash. Ct. App., Aug. 21, 2007) (finding no abuse of discretion in trial court’s stay of Washington dissolution action pending developments in competing Japanese proceeding, where father’s participation in Tokyo family court mediation and his requests for affirmative relief demonstrated submission to that court’s jurisdiction).

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).

Travelers Cas. & Sur. Co. v. Super. Ct., 24 Cal. Rptr. 3d 751 (Ct. App. 2005) (vacating valuation order issued by judicial mediator who determined the good faith settlement value of claims in childhood sexual abuse case because the order violated prohibitions against fact-finding and was coercive with respect to insurers, since the valuation “cut off the insurers’ right to declare a coverage forfeiture in the event of an unauthorized settlement” and “dangled over the insurer’s heads the threat of a bad faith action that was already forfeited with the weight of a judge’s findings”), *rev'd* (June 15, 2005). **Quote from the Court:** “[W]e do not believe Judge Lichtman erred by providing the parties and the insurers with his evaluation of the plaintiffs’ prospects for victory or the reasonable settlement value of their cases. To the extent the Valuation Order includes such information, it was proper. Judge Lichtman should not have characterized his settlement valuations as findings, however. Neither should he have purported to make findings concerning...actual trial requirements...nor otherwise taken a position concerning whether the insurers’ conduct was in bad faith.”

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.)

Uhrich v. State Farm Fire & Cas. Co., 135 Cal. Rptr. 2d 131 (Ct. App. 2003) (finding no cognizable claim for negligent infliction of emotional distress based on allegations that a party brought an attorney to a mediation session in violation of pre-arranged ground rules and because he “appeared for a brief few seconds and then abruptly departed, refusing to participate”), *as modified on denial of reh'g* (July 9, 2003), *rev'd* (Sept. 24, 2003).

United States v. Baker, No. 1:05-CV-685, 2006 WL 1806485 (W.D. Mich. June 29, 2006) (affirming determination that defendant had no excuse to avoid default judgment simply because he erroneously believed that choosing to mediate the dispute before a settlement judge meant mediation was the exclusive means for decision).

U.S. Fire Ins. Co. v. Mikes, No. 804-CV-2783-T-23TBM, 2007 WL 3046671 (M.D. Fla. Oct. 16, 2007) (concluding that statement in mediation to effect that insurance company would “bring no money to the table” does not constitute outright denial of coverage).

Utility Service Company, Inc. v. St. Paul Travelers Insurance Company, No. 5:06-CV-207 (CAR), 2007 WL 188237 (M.D.Ga. Jan. 22, 2007) (ruling that that the insurance company’s denial of coverage during a mediation session did not constitute a denial of the duty to defend).

Valenti v. Unum Life Ins. Co. of Am., No. 8:04-CV-1615-T-30TGW, 2006 WL 1627276 (M.D. Fla. June 6, 2006) (invoking litigation privilege to dismiss claim that an insurance company defendant engaged in bad faith bargaining by sending a representative to the mediation without sufficient settlement authority).

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).

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

Williams v. Harvey, No. CIV A. 4:05CV 161, 2006 WL 2456406 (E.D. Va. Aug. 21, 2006) (rejecting plaintiff's assertion that her termination close in time to her scheduled mediation creates a strong inference of retaliation, noting that "speculation alone is insufficient to establish pretext" underlying defendant's non-discriminatory justification for plaintiff's termination).

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

Woodruff v. Peters, Civil Action No. 05-2071 (PLF) Slip Copy, 2007 WL 1378486, D.D.C., May 09, 2007 (concluding that Title VII does not create an independent cause of action for the mishandling of an employee's discrimination complaint by refusal to consider mediation).
ALSO LISTED UNDER DUTY TO MEDIATE

Yarborough v. Integrated Mgmt. Res. Group, Inc., No. CIVA1:05CV2313-MHS, 2006 WL 1209918 (N.D. Ga. May 1, 2006) (concluding, for purposes of determining whether plaintiff's case was frivolous, that defendant's participation in EEOC conciliation and mediation did not prove that defendant offered to settle the case).

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

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).

Zurich American Ins. Co. v. Frankel Enterprises, Inc., 509 F.Supp.2d 1303 (S.D. Fla. Aug 28, 2007 (NO. 04-80727-CIV) (rejecting argument that insurer's duty to defend includes a duty to settle). **Quote from the Court:** "Such a rule, as proposed by the Defendants, would lead to incongruous results such that every time an insurer defends under a reservation of rights and does not offer to settle during mediation (or, any time after suit is filed), the insured, without rejecting the defense, could unilaterally settle with the plaintiff beyond the policy limits and bind the insurer."

Zurich Capital Mkts., Inc. v. Coglianesci, 236 F.R.D. 379 (N.D. Ill. 2006) (granting motion to intervene as matter of right, where intervenor’s participation in informal mediation demonstrated his direct interest in the subject matter of the litigation). **Quote from the Court:** “The Liquidator's informal participation in mediation efforts does not provide a basis for the Court to deny intervention. Instead, it demonstrates that the Liquidator has a direct interest in the litigation before the Court. For these reasons, the Liquidator has met his burden under FRCP Rule 24(a)(2) of showing that he has an interest in the subject matter of the litigation.”