

2008

## 2007 Mediation Cases: Year in Review

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**Innovative Programs at home & abroad**

**2007 MEDIATION CASES: YEAR IN REVIEW (UPDATED AUGUST 11, 2008)<sup>1</sup>**  
**(ALPHA WITHIN SUBJECT AND ORGANIZED BY LEVEL OF COURT)**

Enforcement of Mediated Settlements ..... 2  
     Supreme Court ..... 2  
     Federal Courts of Appeal ..... 4  
     State Courts of Appeal ..... 5  
     Trial Courts ..... 10  
 Confidentiality ..... 14  
     Supreme Court ..... 14  
     Federal Courts of Appeal ..... 14  
     State Courts of Appeal ..... 15  
     Trial Courts ..... 18  
 Duty to Mediate/Condition Precedent/Judicial Power to Compel..... 21  
     Supreme Court ..... 21  
     Federal Courts of Appeal ..... 22  
     State Courts of Appeal ..... 22  
     Trial Courts ..... 25  
 Sanctions/Attorney’s Fees/Mediation Costs ..... 27  
     Supreme Court ..... 27  
     Federal Courts of Appeal ..... 27  
     State Courts of Appeal ..... 28  
     Trial Courts ..... 30  
 Mediation-Arbitration/Hybrid Process ..... 34  
     Supreme Court ..... 34  
     Federal Courts of Appeal ..... 34  
     State Courts of Appeal ..... 35  
     Trial Courts ..... 37  
 Ethics/Malpractice (Lawyer/Neutral/Judicial) ..... 38  
     Supreme Court ..... 38

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Federal Courts of Appeal .....	39
State Courts of Appeal .....	39
Trial Courts .....	41
Miscellaneous.....	44
Supreme Court .....	44
Federal Courts of Appeal .....	45
State Courts of Appeal .....	46
Trial Courts .....	48

## **Enforcement of Mediated Settlements**

### *State Supreme Courts*

***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]

***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).

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settlement agreement because the parties failed to brief the issue -- waiving argument that the federal settlement superceded state law).

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

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

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

*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").

*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

### **Federal Courts of Appeal**

***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)

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

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

***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).

***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).

***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).

## *State Courts of Appeal*

*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

*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).

*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).

*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).

*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).

*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).

***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).

***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).

***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).

***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).

***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).

***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).

***In Re Marriage of Briddle***, 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 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).

***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).

*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).

*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).

*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).

*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."

*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."

*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).

*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

*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."

*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).

*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).

*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

***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

***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. . . .”

***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).

***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).

***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

***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).

***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.”

### **Trial Courts**

***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).

***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.'"

***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).

***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

*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).

*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."

*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

***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 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).

***International Longshore & Warehouse Union, Local 142 v. C. Brewer and Col, Ltd.***, 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”).

***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.”

***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).

***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’”)

*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).

*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).

*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").

*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).

*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).

*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.”

## **CONFIDENTIALITY**

### **State Supreme Court**

*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

### **Federal Courts of Appeal**

*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

*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).

### *State Courts of Appeal*

*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

*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))."

*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].

*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.”

*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).

*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.”

*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).

***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

***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

***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).

***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").

***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).

***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

### **Trial Courts**

***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).

***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).

***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).

***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

*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."

*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).

*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

*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).

*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."

***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).

***In re Fleming Packaging Corp.***, No. 03-82408, ADV. 04-8166, 2007 WL 4556981 (Bkrcty. 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 Student Finance Corp.***, No. CIV.A04-1551JJF, CIVA05-165JJF, 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."

***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

***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).

***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).

***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.”

## **DUTY TO MEDIATE/CONDITION** **PRECEDENT/JUDICIAL POWER TO COMPEL**

### **State Supreme Court**

***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).

*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

### **Federal Courts of Appeal**

*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).

*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).

*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."

### **State Courts of Appeal**

*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 refileing the lawsuit).

ALSO LISTED UNDER FEES/SANCTIONS

*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).

*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

*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).

*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 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

*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

***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).

***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).

***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 ENFORCEMENT

***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

***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

***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.”

*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

*Van Slyke v. Gibson*, 146 Cal. App.4<sup>th</sup> 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

## **Trial Courts**

*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).

*Blackmon-Malloy v. U.S. Capitol Police Bd.*, No. CIV A01-2221(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

*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."

***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

***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).

***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 disobeying court order to engage in mediation).

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."

***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.*, 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).

*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").

*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

## **SANCTIONS/ATTORNEY'S FEES/MEDIATION COSTS**

### **State Supreme Court**

*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).

### **Federal Courts of Appeal**

***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."

***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).

### **State Courts of Appeal**

***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

***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).

***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).

***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).

***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

*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).

*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).

*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

*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").

*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).

*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

*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.4<sup>th</sup> 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).

### **Trial Courts**

*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).

*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

*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

*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").

*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."

*In re Fleming Packaging Corp.*, No. 03-82408, ADV. 04-8166, 2007 WL 4556981 (Bkrcty.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 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."

*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

***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. 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”).

***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 DUTY TO MEDIATE

***King v. Turner***, No. 05-388 (JRT/FLN), 2007 WL 1219308 (D. Minn. Apr. 24, 2007) (rejecting defense assertion that plaintiff’s case was overstaffed 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).

***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).

***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).

***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).

***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).

***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).

*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

*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

*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).

*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).

*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).

*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

## **MEDIATION-ARBITRATION/HYBRID PROCESS**

### **State Supreme Court**

*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

### **Federal Courts of Appeal**

*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]."

*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).

*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).

## *State Courts of Appeal*

*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).

*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).

*Bono v. David*, 147 Cal.App.4<sup>th</sup> 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."

*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

*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).

*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 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 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 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 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

*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).

*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

*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."

*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

### **Trial Courts**

*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).

*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).

*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)).

*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).

*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).

## **Ethics/Malpractice (Lawyer/Neutral/Judicial)**

### **State Supreme Courts**

*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 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 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).

*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).

## Federal Courts of Appeal

*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).

## State Courts of Appeal

*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.”

*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).

*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 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)."

***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).

***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).

***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

***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).

***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).

*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).

### **Trial Courts**

*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."

*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).

***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

***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 ENFORCEMENT

***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).

***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.

***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).

***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

*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").

*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).

**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."

## Miscellaneous

### State Supreme Courts

*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).

*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).

*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).

## *Federal Courts of Appeal*

*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

*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."

*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).

*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).

*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).

***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).

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

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

### **State Courts of Appeal**

***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).

***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).

***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."

***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).

***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).

*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).

*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."

*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."

*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."

*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).

### **Trial Courts**

***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."

***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...."

*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).

*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).

*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).

*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).

*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).

*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."

*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)

*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).

*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).

*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).

*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).

*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").

*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."

*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).

*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."

*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).

*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).”

*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").

*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).

*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).

*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).

*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 Co.*, 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).

*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).

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*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."