Categories
1. Enforcement of Mediated Settlements 1
2. Confidentiality 24
3. Duty to Mediate/Condition Precedent/Judicial Power to Compel 38
4. Sanctions/Attorneys’ Fees/Mediation Costs 48
5. Mediation-Arbitration/Hybrid Process 59
6. Ethics/Malpractice (Lawyer; Neutral; Judicial) 67
7. Miscellaneous 74

1. THE ENFORCEMENT OF MEDIATED SETTLEMENTS

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

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

Bandera v. City of Quincy, 344 F.3d 47 (1st Cir. 2003) (staying judgment after jury verdict in favor of Title VII plaintiff, and remanding to trial court for determination of enforceability of pre-trial handwritten mediated settlement, where trial court had previously concluded there was
genuine disputed question of material fact regarding the existence or terms of the agreement, but failed to hold an evidentiary hearing on the matter). **Quote from the Court:** “[O]f this we are sure: a judge cannot refuse to enforce an otherwise valid settlement agreement on the ground initially given in this case, namely, that doing so would require the judge to conduct a mini-trial into the question whether a binding contract had been made. Contract enforcement is not normally a matter of judicial convenience. The district judge was moved by Bandera's desire to have her day in court. But settlement agreements, if valid and not against public policy, are voluntary surrenders of the right to have one's day in court.”

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

**Beyers v. Roberts**, 199 S.W.3d 354 (Tex. App. 2006) (enforcing a child custody order based on a mediated settlement agreement that did not designate a conservator who could decide the primary residence of the child as required by state statute governing parenting plans (Tex. Fam. Code Ann.§ 153.133 (a)(1)), because the mediated settlement agreement was made enforceable under a more general statute (Texas Fam. Code § 153.0071(e)), which makes mediated settlement agreements enforceable if they include in prominent type that they are not revocable and the agreement is signed by each party and the party’s attorney (if present); and further holding that if the mediated settlement agreement complies with this provision, the judge is not required to conduct a hearing to determine if the agreement is in the child’s best interests), **reh’g overruled** (Jun 14, 2006), **rev’d** (Dec 22, 2006).

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


**Bolle, Inc. v. Am. Greetings Corp.**, 109 S.W.3d 827 (Tex. App. 2003) (affirming declaratory judgment which rescinded mediated settlement based on mutual mistake where overbroad mutual release of claims unintentionally included suits in other jurisdictions involving some of the same parties), **rev’d** (December 19, 2003).
Boyd v. Boyd, 67 S.W.3d 398 (Tex. App. 2002) (a mediation divorce settlement agreement is unenforceable when one spouse intentionally withholds information about community property assets despite the existence of a "catchall clause" in the agreement which provided that "any undisclosed property is specifically awarded in equal shares to the parties").

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

Buckley v. Shealy, 635 S.E.2d 76 (S.C. 2006) (affirming decision not to enforce mediated divorce settlement last seen at the mediator’s office in 1997, where it is unclear what happened to the signed agreement, and the family court never entered a signed copy of the agreement in the record), reh’g denied (Sept. 18, 2006).

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

Caballero v. Wikse, 92 P.3d 1076 (Idaho 2004) (affirming enforcement of mediated settlement of wrongful discharge claim negotiated by plaintiff's attorney, having concluded that attorney had express authority to wholly and finally compromise all claims, where evidence showed that: 1) plaintiff's attorney and mediator made representations regarding plaintiff's attorney's authority; 2) plaintiff left the mediation before it ended knowing that ground rules required someone with settlement authority to be present; and 3) plaintiff specifically authorized attorney to make a counterproposal in response to defendant's most recent offer).

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

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

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

**Catamount Slate Prods., Inc. v. Sheldon**, 845 A.2d 324 (Vt. 2003) (reversing trial court and refusing to enforce alleged oral mediated settlement where intent of the parties to be bound was not established in light of: 1) an unsigned agreement to mediate discussed orally with the parties which expressly stated that mediation would not be “binding upon either party unless reduced to a final agreement of settlement”; 2) post-mediation letters implying that settlement was not final; and 3) evidence suggesting that material elements of a global settlement remained to be negotiated after conclusion of mediation). **Quote from the Court:** “[I]n their brief appellants encourage us to hold that a signed writing be required to bind parties to a mediated settlement even when there is no precondition of an intent not to be bound until execution of a final written document. We expressly decline to do so. As we reiterated here, parties to a mediated settlement are free to enter into a binding oral contract without memorializing their agreement in a fully executed document, even if they intend to subsequently reduce their agreement to writing. But, when parties communicate an intent not to be bound until they have achieved a final executed settlement agreement, oral agreements and draft provisions created during and after mediation will not alone constitute the formation of a binding contract.”

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

**Chantey Music Publ’g, Inc. v. Malaco, Inc.**, 915 So. 2d 1052 (Miss. 2005) (affirming enforcement of mediated copyright settlement despite plaintiff’s allegations of duress and coercion, where plaintiff was present and represented by counsel during the entire mediation and
testimony of both sides’ lawyers, as well as the mediator and opposing party, revealed arms-length bargaining, a lack of any oppression, and clear communication of all settlement terms to the plaintiff).

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

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

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

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

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

**City of Gary v. Conat**, 810 N.E.2d 1112 (Ind. Ct. App. 2004) (enforcing mediated settlement of claims brought by injured motorist against the city despite assertion that agreement was binding
only with mayor's signature, where the city's attorney at no point before, during, or even after the mediation conference disclaimed authority to represent the city; but refusing to enforce the settlement against individual city employee because he was immune from suit when acting within the scope of employment). **Quote from the Court:** "Requiring the mayor to attend every mediation conference and to sign the settlement agreement would impede the efficiency and finality of mediation proceedings."

**Cloutier v. Cloutier**, 814 A.2d 979 (Me. 2003) (affirming trial court decision in divorce case not to enforce a mediated agreement to sell marital home with proceeds used to pay specific debts, where the agreement had not been previously presented to and approved by the court and proposed disposition would be manifestly unjust given that home equity was insufficient to pay off the specified debts). **Quote from the Court:** “In the normal course, the court should honor an agreement reached by the parties. This assures that mediation is an effective tool for dispute resolution, and prevents the parties from unilaterally reopening matters that have been resolved. Therefore, ordinarily, when the parties have agreed to the resolution of some or all of the matters previously in dispute, the court will not address those matters at any trial on the remaining dispute issues, and will not, without more, allow the agreed upon matter to be litigated.”

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

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

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

**Delyanis v. Dyna-Empire, Inc.**, 465 F. Supp. 2d 170 (E.D.N.Y. 2006) (finding that a handwritten mediator-drafted agreement to settle, that was signed by the parties and attorneys was not enforceable because it specifically stated that it was "not intended to be a legally enforceable settlement agreement"; but the parties' subsequent emails stating the intent to be bound constituted an enforceable settlement agreement).
**Dennis v. Erin Truckways, Ltd.**, 188 S.W.3d 578 (Tenn. 2006) (setting aside a mediated settlement agreement because of lack of adherence to procedural safeguards intended to protect the rights of unrepresented workers’ compensation claimants, including failure to fully apprise the unrepresented claimant of the scope of benefits available, as well as failure to provide court or commissioner review of the settlement). **Quote from the Court:** “[T]he entire compensation system has been set up and paid for, not by the parties, but by the public. The public has ultimately borne the cost of compensation protection in the price of the product, and it has done so for the specific purpose of avoiding having the disabled victims of industry thrown on private charity or local relief. To this end, the public has enacted into law a scale of benefits which will forestall such destitution. It follows, then, that the employer and employee have no private right to thwart this objective by agreeing between them on a disposition of the claim that may, by giving the workman less than this amount, make him a potential public burden”).

**Deville v. U.S. ex rel. Dept. of Veterans Affairs**, 202 F. App’x 761 (5th Cir. 2006) (affirming trial court conclusion that plaintiff failed to establish duress sufficient to set aside mediated settlement in medical malpractice case, where plaintiff’s allegations that he was prevented from leaving the session and verbally pressured to settle by his attorney and was suffering from constant pain due to invasive knee surgery shortly before the mediation, were contradicted by the more credible testimony of the mediator and plaintiff’s attorney).

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

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

**Edens v. Edens**, 109 P.3d 295 (N.M. Ct. App. 2005) (affirming trial court’s denial of motion to set aside alimony provision of mediated marital settlement agreement based on claims of fraud and misrepresentation, where husband agreed to a lump sum payment based on his and wife’s expected future income, but wife’s actual post-divorce income was substantially higher than the expected income figure used during the mediation), cert. denied, 110 P.3d 506 (N.M. 2005) (unpublished table decision).
Eng’r v. Eng’r, 187 S.W.3d 625 (Tex. App. 2006) (reversing a trial court decision to enter a divorce decree and property settlement that differed from the mediated settlement agreement). Quote from the Court: “[A] court may either enter a property division agreement in its entirety or decline to enter it at all, but has no discretion to change such an agreement before entering it.”

Envtl. Abatement, Inc. v. Astrun R.E. Corp., 27 S.W.3d 530 (Tenn. Ct. App. 2000) (party’s oral consent to agreement reached at mediated settlement conference is subject to withdrawal because it was not made on the record or "in open court"), appeal denied and recommended for publ’n (Sept. 11, 2000).

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

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

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

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

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

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

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

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

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

Ford v. Ford, 68 P.3d 1258 (Alaska 2003) (affirming trial court enforcement of mediated divorce settlement orally recited on the record by the mediator despite husband's claim that his ill health precluded his understanding of the consequences of his actions, where transcript of the settlement indicated husband was an active participant in the mediation, he was represented by counsel, and there was no evidence he was in pain or otherwise incapacitated during the mediation). Quote from the Court: "It is true that this case would be easier for us--and would have been easier for the superior court--if the mediator had directly addressed the parties during the recorded session and confirmed that each understood the settlement and agreed with it.
Simple affirmations by the parties of their understanding and intent to be bound may have obviated the need for an extensive evidentiary hearing and for later detailed reviews of the recitations made at the recorded session. Nonetheless, we reject [the husband's] contention that, without particular questions or recitations when a settlement is put on the record, either party may successfully attack the settlement. We encourage judges and mediators who conduct settlement proceedings, and who reach settlements, to confirm on the record directly with the parties their understanding of the settlement and their intentions to enter into it, but we reject the proposition that the failure to conduct such inquiries is necessarily fatal to the entry of a settlement.”


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

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

*Golding v. Floyd*, 539 S.E.2d 735 (Va. 2001) (handwritten memorandum signed by parties at conclusion of a mediation conference is not a binding settlement contract where the final paragraph of the memorandum provided that it “is subject to execution of a formal agreement consistent with the terms herein”). **Note:** In reversing the trial court, which had enforced the agreement after conducting an evidentiary hearing, the court emphasized, “the Memorandum in the present case is clear and unambiguous, and no extrinsic evidence is required, or even allowed, to ascertain the intention of the parties as objectively manifested.” 539 S.E.2d at 738.
**Govia v. Burnett**, No. Civ. 685/1998, 2003 WL 21104925 (D.V.I. May 5, 2003) (enforcing mediated settlement despite plaintiff's claim that she was unaware of its terms when she signed it, where plaintiff was represented by counsel during the mediation, failed to express or articulate any dissatisfaction or objection to the terms of the settlement agreement, and strong public policy favoring enforcement of settlements would be frustrated by voiding a settlement merely because plaintiff was dissatisfied with its terms).

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

**Guthrie v. Guthrie**, 577 S.E.2d 832 (Ga. Ct. App. 2003) (reversing trial court grant of summary judgment denying enforcement of mediated divorce settlement agreement where allegations of capacity to contract -- specifically that a party "had suffered anxiety attacks, had consumed at least four doses of Valium, and was bereft of energy and mental concentration" -- raised jury questions that precluded finding as a matter of law that there was no meeting of the minds sufficient to create a contract), reconsideration denied (Feb. 19, 2003), cert. granted (May 20, 2003).

**Guthrie v. Guthrie**, 594 S.E.2d 356 (Ga. 2004) (affirming that trial court acted erroneously in granting summary judgment denying enforcement of mediated divorce settlement agreement under rules utilized to resolve whether to incorporate a settlement agreement into a final divorce judgment, where husband died during pendency of divorce proceedings but the parties' agreement contained provisions that were to take effect immediately or shortly after the date the agreement was executed indicating it was not contingent upon issuance of a divorce judgment and in such cases enforcement is evaluated under ordinary rules of contract construction).  **Note:** The decision implicitly affirmed the additional conclusion of the Court of Appeals that summary judgment in favor of enforcement also was inappropriate where allegations of capacity to contract -- specifically that a party "had suffered anxiety attacks, had consumed at least four doses of Valium, and was bereft of energy and mental concentration" -- raised jury questions about whether there was a meeting of the minds sufficient to create a contract).  See **Guthrie v. Guthrie**, 577 S.E.2d 832 (Ga. Ct. App. 2003).

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

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

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

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

Horn v. U.S. Dep’t of Army, 284 F. Supp. 2d 1 (D.D.C. 2003) (enforcing mediated settlement of discrimination and retaliation claims despite plaintiff’s allegations that he was coerced into agreement when defense counsel told him that plaintiff’s supervisor had begun the process to fire plaintiff for misconduct and his own attorney told him during a break in mediation that he would be suspended from employment if he did not settle, where plaintiff: 1) did not deny that he signed the agreement; 2) tendered his resignation the day after he signed the agreement; 3) accepted monetary payment from defendant which he has not attempted to return; and 4) was represented by able counsel who advocated on his behalf).
In re Estate of Caldwell, No. B158110, 2003 WL 22022025 (Cal. Ct. App. Aug. 28, 2003) (reversing probate court and refusing to enforce provision of mediated settlement which obligated party who left mediation early to pay from his share of trust assets all attorney fees and costs incurred by the other beneficiaries of the trust in dispute, as well as the mediator's fees and all fees relating to obtaining the probate court's approval of the mediated settlement agreement). **Quote from the Court:** "[T]here is no evidence of Craig's alleged bad faith conduct in the subject mediation. And, even if Craig did act in bad faith during the time he participated in the instant mediation, his conduct does not warrant the imposition of all attorney fees and costs relating to the mediation. The probate court ordered the parties to participate in mediation in response to Jean's Annuity Petition and Candace's objection and the executor's response thereto. Thus, the parties were going to incur costs relating to the mediation regardless of whether Craig participated and how he behaved. Moreover, after Craig left the mediation, the parties continued to mediate (for an undetermined amount of time) and ultimately reached a settlement. The cost incurred by the parties during the time Craig was absent certainly had nothing to do with Craig's alleged poor behavior earlier in the settlement discussions."

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

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

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

In re Rains, 428 F.3d 893 (9th Cir. 2005) (concluding that bankruptcy court did not clearly err in finding a debtor mentally competent to enter into a mediated settlement where witnesses to the day-long mediation testified that the debtor "participated actively and appeared to have full understanding of what was transpiring and of the terms of the settlement", notwithstanding that immediately following the conclusion of mediation the debtor drove himself to the hospital where he was admitted and diagnosed with a cerebral aneurysm and stroke and his treating physician and psychologist opined that a person with his diagnosis would not have had mental capacity to conduct business affairs).
\textit{In re Marriage of Rettke}, 696 N.W.2d 846 (Minn. Ct. App. 2005) (reversing trial court enforcement of mediated divorce property settlement, where husband died before the agreement was incorporated into a signed marital termination agreement which the court could examine, approve, and incorporate into a dissolution judgment). \textbf{Quote from the Court:} “Certain of husband's children believe that Rettke should be restricted to recovering a share of husband's property only as a surviving spouse. They argue, logically and correctly, that she cannot both take a share from the mediated dissolution settlement as if the dissolution had gone through, and also take advantage of the fact that when husband died, since the dissolution had not been finalized, she was in all respects a bona fide heir, a surviving spouse.”

\textit{In re T.D.}, 28 P.3d 1163 (Okla. Ct. App. 2001) (refusing to enforce mediated settlement absent additional factual findings, where mother with full advice and representation of counsel agreed to terminate her parental rights but the mediated agreement contained inconsistent elements raising fundamental due process questions regarding whether mother knowingly waived parental rights). \textbf{Quote from the Court’s Majority Opinion:} “At its heart, this case is about Mother's voluntary relinquishment of her parental rights in T.D. Mother is, at a minimum, entitled to the procedural safeguards specified by the legislature when it enacted the voluntary relinquishment statutes. There is nothing in the record before this court, however, to indicate that those procedural safeguards were observed in this case. Although Mother was represented by counsel throughout this proceeding and probably was aware of the full consequences of her action, her initial involvement in the process was certainly not voluntary. Moreover, the terms of the agreement indicate that Mother was trying to protect her parental rights in a newborn baby, a consideration no parent should be forced to weigh, particularly in an involuntary process. Also, one of the express conditions to Mother's agreement is the right to continued visitation with T.D., a provision at odds with the complete termination of her rights. Ultimately, Mother's full understanding and acceptance of the results of her agreement are not reflected in the record before us. They must be before this termination can be upheld.” \textbf{Quote from the Court’s Dissenting Opinion:} “I would not permit mediation of a non-voluntary proceeding by the State to terminate the rights of a parent to a child.”

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

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

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


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

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

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

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

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

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

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

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

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

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

Mardanlou v. Gen. Motors Corp., 69 F. App’x 950 (10th Cir. 2003) (refusing to grant relief from judgment entered on mediated settlement of personal injury claim based on alleged mediator bias and because plaintiff was taking medication during the settlement discussions which caused him "to be easily manipulated and persuaded", where it was undisputed that plaintiff, with advice of counsel, made a deliberate choice to settle; that he signed the settlement agreement 20 days after it was reached without expressing any dissatisfaction; and he had declared that he had discussed the agreement with his attorney and that he understood that the agreement fully settled all claims).
**Matos v. Matos**, 932 So. 2d 316 (Fla. Dist. Ct. App. 2006) (reversing trial court enforcement of an alleged oral marital termination settlement, where the mediator hired by the parties to reduce their alleged informal agreement to writing testified that there was an agreement but conceded she did not participate in its formation). **Quote from the Court:** “[W]hile the mediator testified to her understanding of the terms of the agreement, she never reduced it to writing which was the reason the parties had contacted the mediator in the first place. Under these circumstances, the parties’ failure to reduce the agreement to writing strongly indicates that the parties had not agreed to everything.”


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

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

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

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


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

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

**Nwachukwu v. St. Louis Univ.**, 114 F. App’x 264 (8th Cir. 2004) (affirming district court enforcement of final settlement prepared by parties’ counsel, concluding that terms of final settlement were not materially different from terms of handwritten agreement previously signed by plaintiff at the conclusion of mediation, where both agreements provided the same benefits and both provided that plaintiff would resign and execute a release of all claims, even though the final agreement contained “more expansive or additional clauses related to confidentiality, release of liability, disclaimer of fault, nondisparagement, and reinstatement or reemployment”).

mediated settlement agreement where both parties desired mediator’s testimony, and “interest of justice” outweighed the negative impact that compelling testimony would have on the mediation process in California, mediator was compelled to testify notwithstanding existence of independent mediator privilege not waived by the mediator).

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

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

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

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

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

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

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

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

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

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

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

**Smith v. Tillman**, 958 So.2d 333 (Ala. 2006) (finding a sheriff did not waive sovereign immunity by entering into a mediated settlement agreement in connection with a Title VII case, where the agreement was mediated between private parties and was not reached in mediation with the EEOC, but that under state law the sheriff, by agreeing to the settlement, agreed to perform a ministerial act that is not protected by sovereign immunity).
Spencer v. Spencer, 752 N.E.2d 661 (Ind. Ct. App. 2001) (oral agreement reached in mediation to resolve property issues in marital dissolution, which was immediately dictated by the mediator in the presence of the parties and circulated by fax that same day to the parties, is not enforceable when repudiated by one party before the agreement is reduced to writing and signed by both parties).

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

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

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

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

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

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

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

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

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

**Walker v. Gribble**, 689 N.W.2d 104 (Iowa 2004) (affirming trial court enforcement of mediated settlement between former law partners regarding future division of contingency fee recoveries in overtime pay cases, finding no violation of public policy based on professional responsibility rules regarding need for client consent and award of fees in proportion to services performed, where ethical rules provide exception to consent and proportionality requirements when the fee agreements are negotiated as part of a partnership separation agreement; and further concluding that lawyer could not now renegotiate fees simply because she ended up working more than she anticipated when she finalized the fee agreement in mediation). **Quote from the Court:** “Uncertainty is a powerful incentive for parties to accept a compromise settlement agreement . . . . Much was uncertain when the parties signed the settlement agreement; such is the very nature of cases taken on a contingency-fee basis. The parties in this case assessed the situation and made their choices regarding the time and effort Walker would have to expend in the future to
bring the overtime-pay cases to a successful resolution. They also gave up other claims against each other and each received some benefits. We will not interfere with their agreement – fully performed with the exception of the payment of the fees – simply because one party got the better of the bargain.”

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

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

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

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

Zhu v. Countrywide Realty Co., Inc., 66 F. App’x 840 (10th Cir. 2003) (enforcement of mediated settlement of Fair Housing Act claims is not unconscionable merely because plaintiff asserts settlement was inadequate to cover her medical expenses and other damages, where she was represented by counsel at the mediation and the record demonstrated she understood and agreed to the settlement; finding no impropriety in the same magistrate judge serving as both mediator and later as judge recommending enforcement of settlement; concluding there was no violation of mediation confidentiality rules where the magistrate revealed settlement negotiations in deciding the plaintiff's motion to reopen as the disclosure was necessary to evaluate plaintiff’s challenge to the settlement agreement), cert. denied, 540 U.S. 1123 (2004).
Zimmerman v. Zimmerman, No. 04-04-00347-CV, 2005 WL 1812613 (Tex. App. Aug. 3, 2005) (affirming enforcement of mediated divorce settlement against allegation of mediator coercion, where the only evidence presented in support of the claim was the party’s “perceptions of the mediator and how the mediator made him feel – evidence the trial court stated on the record it did not find credible”), rev’d (Dec. 2, 2005).

2. CONFIDENTIALITY

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

Abrams v. Dromy, No. B167815, 2004 WL 1559666 (Cal. Ct. App. July 12, 2004) (affirming evidentiary rulings in a jury trial on claims of breach of contract and fraud arising out of a mediation agreement, determining that: 1) it was proper to allow references to the identity of the mediator when a key issue in dispute was whether the mediator was serving as a neutral third party or acting as an agent for one of the parties; and 2) evidence of post-mediation demands, including plaintiff's threatening phone call and defendant's response not denying liability but claiming to have paid the disputed amount and not wanting to pay twice, is admissible because there was no statutorily protected offer of compromise). Quote from the Court: "No doubt, confidentiality is of utmost importance during mediation in order to foster open sessions whereby the parties feel confident that anything they reveal privately to the mediator cannot be used against them later during judicial proceedings. However, there is a threat to confidentiality where the parties acknowledge an agreement but dispute whether the mediator acted in a neutral manner or as the agent for either of the parties."

Ala. Dep’t of Transp. v. Land Energy Ltd., 886 So. 2d 787 (Ala. 2004) (affirming judgment in favor of mineral rights owner in an inverse condemnation action entered after unsuccessful court-ordered mediation; determining that tables prepared by state agency and used in the mediation to illustrate the location of coal within the mineral owner's estate were properly admitted where it appeared the tables were not prepared solely for use in mediation and the tables were provided by the state agency at the conclusion of mediation in response to pre-existing discovery requests) reh’g denied (Mar. 12, 2004).

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

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

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

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

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

observations she made during unsuccessful court-ordered mediation of the extent of scarring and redness of plaintiff's hands, because the adjuster's personal observations could not be construed as protected nonverbal conduct intended as an assertion), appeal after remand, No. C4-02-1984, 2003 WL 21266858 (Minn. Ct. App. June 03, 2003).

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

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

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

**Dedefo v. Wake**, No. MC 02-002448, 2006 WL 389738 (Minn. Ct. App. Feb. 21, 2006) (affirming dismissal of defamation claims based on alleged defamatory statements made in a letter sent to elders of the Ethiopian community, where the purpose of the letter was to initiate a traditional mediation process which the court concluded was a “qualifying dispute resolution process under the statute or common law privilege” making the letter absolutely privileged; and also affirming trial court exclusion of testimony by the elders about what was discussed during the mediation). **Quote from the Court:** “Even if respondents hoped to defame [plaintiff], that does not prohibit them from sending a letter to initiate a dispute resolution process within their larger community. The district court only concluded that in his complaint [plaintiff] had limited his basis for claiming defamation to the letter and its communication to the Oromo organization. [Plaintiff] framed his own claim. We are not prepared to say that the doors of the dispute resolution process are closed because an unidentified defamatory effort lurks in the background.
[Plaintiff] does not contest the conclusion that the legislature has decided to encourage use of an alternative dispute resolution process and that documents and activity incident to that process are privileged.”

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

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

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

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

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

**Eisendrath v. Super. Ct.,** 134 Cal. Rptr. 2d 716 (Ct. App. 2003) (in action to correct a mediated spousal support agreement, no evidence of conversations between husband and wife, including those statements made outside the presence of the mediator if materially related to the purpose of the mediation, may be admitted in evidence absent the parties' express waiver of confidentiality; concluding that trial court erred in holding in camera evidentiary hearing to consider relevance of mediator's testimony because the mediator is statutorily incompetent to testify under California law).
Embler v. Walker Elec. Sys. of Fla., Inc., No. 2:05-CV-256-FTM-33SPC, 2006 WL 1406366 (M.D. Fla. May 18, 2006) (denying motion to strike plaintiff’s response to motion for contempt, finding no prejudice in fact that response included plaintiff’s report of conversations between defendants counsel and the mediator, testimony which defendant argued was offered only to disparage counsel).

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

Fair v. Bakhtiari, 147 P.3d 653 (Cal. 2006) (affirming trial court refusal to enforce mediated settlement and compel arbitration pursuant to its terms, concluding that mere inclusion of the arbitration provision in the settlement did not satisfy the statutory requirement that the agreement provide “that it is enforceable or binding or words to that effect” in order for the agreement to be admissible in evidence), on remand to, No. A100240, 2007 WL 1031708 (Cal. Ct. App. Apr 06, 2007). Quote from the Majority: “In order to preserve the confidentiality required to protect the mediation process and provide clear drafting guidelines, we hold that to satisfy the “words to that effect” provision of section 1123(b), a writing must directly express the parties' agreement to be bound by the document they sign. Plaintiff would have us infer the parties' intent from the mention of arbitration in the settlement terms memorandum. Arbitration is a method of enforcement subject to negotiation, like other settlement terms. A tentative working document may include an arbitration provision, without reflecting an actual agreement to be bound. If such a typical settlement provision were to trigger admissibility, parties might inadvertantly give up the protection of mediation confidentiality during their negotiations over the terms of settlement. Disputes over those terms would then erupt in litigation, escaping the process of resolution through mediation. Durable settlements are more likely to result if the statute is applied to require language directly reflecting the parties' awareness that they are executing an “enforceable or binding” agreement.” Quote from the Concurrence/Dissent: “[O]nce a court has determined that a document prepared and signed by the parties during mediation is actually a ‘written settlement agreement’- that it embodies a meeting of the minds on all material terms
needed for settlement - the inclusion in that settlement agreement of a provision for arbitration - which is an enforcement mechanism - may properly be viewed as an acknowledgement by the parties that their settlement agreement is binding and enforceable. A statement that any dispute over a settlement agreement's terms will be subject to arbitration means that the agreement is ‘enforceable’ through the arbitration process.”

NOTE: Though taking issue with the majority’s conclusion that an arbitration clause can never constitute “words to [the] effect” that a settlement agreement is “enforceable or binding,” the concurrence/dissent nonetheless agreed that the settlement was inadmissible because “substantial evidence supports the trial court's implied finding that the mediation document at issue here was not a ‘written settlement agreement.’”

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

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

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

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

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

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

(affirming trial court refusal to issue a bad faith sanction against a party who submitted
confidential information to a mediator, agreeing with trial judge that “that is part of mediation”).

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

(affirming trial court quashing of subpoenas sought to compel testimony from farm-lender
mediator to clarify alleged ambiguity in mediated settlement where: 1) parties’ signed
agreement stated that “the mediator is not a witness to the parties’ negotiations and may not be
required to testify in any proceeding subsequent to the mediation,” and 2) the two relevant state
statutes -- Minn. Stat. § 583.26, subd. 7(b) and Minn. Stat. § 595.02(1)(l) – permit parties, but
not mediators, to testify under limited circumstances).

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

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

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

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

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

**In re Estate of Stukey,** 100 P.3d 114 (Mont. 2004) (affirming trial court admissibility of post-mediation letter written by estate’s attorney to attorney for decedent’s daughter seeking to clarify scope of a probate settlement reached in mediation, concluding that the letter, written one week subsequent to the mediation, was not part of the “mediation process” to which statutory confidentiality applied), **reh’g denied** (Nov. 4, 2004).

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

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

**In re M.S.,** 115 S.W.3d 534 (Tex. 2003) (finding no error in trial court admitting into evidence during child dependency proceeding a Memorandum of Agreement signed after court-ordered mediation, because: 1) the agreement was not inappropriate judicial testimony under Texas Rule of Evidence 605 because though signed by the judge, the agreement contained no findings of fact; 2) the agreement was not impermissible hearsay under Texas Rule of Evidence 802 because it was offered only to show that an agreement was reached and what its terms were, not as proof of the children’s best interests or the parent’s inability to care for them; and 3) the agreement was
not a “communication” protected by state ADR rules, and “specifically noted that it could be attached to an order of the court as an exhibit”), reh’g of cause overruled (Oct. 17, 2003), on remand, 140 S.W.3d (Tex. App. 2004).

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

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

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

Johnson v. Am. Online, Inc., 280 F. Supp. 2d 1018 (N.D. Cal. 2003) (granting plaintiff’s motion to strike defendant's supplemental briefing on remand motion where defendant's brief referred to information contained in a brief plaintiff had previously submitted in mediation under a confidentiality agreement and pursuant to California law which provides that "no aspect of the mediation shall be relied upon or introduced as evidence in any . . . judicial . . . proceeding").
Johnson v. Parchment Sch. Dist., No. 1:03-CV-917, 2006 WL 1275066 (W.D. Mich. May 5, 2006) (publishing amount of settlement reached in confidential mediation of estate claim, concluding that strong presumption in favor of public access to judicial records outweighed confidentiality concerns, including fear that “media frenzy” might adversely affect court mediation program). **Quote from the Court:** “[T]he Court gives little weight to Defendants’ suggestion that disclosure will chill the Court-endorsed mediation process . . . . [T]his district's voluntary facilitative mediation (“VFM”) program has been very successful as a means of resolving cases on the civil docket in an expeditious and cost efficient manner. Confidentiality of settlement terms is seldom an issue that this Court faces in connection with VFM settlements, because in the vast majority of cases, the Court is not required to approve the settlement. This case is an exception because it is governed by a specific statute which requires the Court to approve the proposed settlement. Moreover, even among the wrongful death subset of cases, this case is exceptional because it involves two public bodies, as to which the public's interest in access to judicial proceedings and records is especially strong. Finally, while the Court has no doubt that confidentiality was an important consideration to Defendants, the Court notes that at the April 3rd hearing, Defendants' counsel advised the Court that the settlement would stand regardless of the Court's decision to publish the settlement amount.”

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

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

Lehr v. Afflitto, 889 A.2d 462 (N.J. Super. Ct. App. Div. 2006) (reversing the trial judge's decision in this lengthy divorce proceeding that the parties at mediation had reached a meeting of the minds and also deciding that the mediator should not have been allowed to testify at the hearing, relying in part on the policy expressed in the Uniform Mediation Act). **Quote from the Court:** “The advent of mediation and other alternative dispute resolution tools to assist parties in resolving their disputes as early as possible and with the least amount of financial and emotional strain is an admirable and worthwhile effort of the court system. Ultimately, however, in an adversarial system with limited resources, the success of mediation is dependent on the good faith, reasonableness and willingness of the litigants to participate. Many are able to do so successfully. However, litigants are not fungible. For one reason or another, some are simply not good candidates for case resolution through good-faith alternative dispute resolution methods such as mediation.”
Lee v. Herbert, No. A03-1023, 2004 WL 948385 (Minn. Ct. App. May 4, 2004) (affirming denial of motion to remove parenting-time expeditor after concluding that: 1) the expeditor's letter to the court affirming the existence and terms of the parties' negotiated agreement on issues of school choice, transition location, and reservation of child support, did not improperly reveal confidential positions of the parties and was offered in direct response to the court's request; and 2) removal based on the expeditor's failure to forge agreements through mediation "would appear to demand an unrealistically high standard of an expeditor" given fact that the parties had been parenting by mediation since October 1998 with the help of four different mediators).

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

National Union Fire Ins. Co. of Pittsburgh, PA v. Price, 78 P.3d 1138 (Colo. Ct. App. 2003), cert. granted, No. 03SC527, 2003 WL 22700762, slip op. at *1 (Colo. Nov 17, 2003) (en banc) (reversing trial court and refusing to enforce alleged oral mediated settlement as contrary to requirements of Colorado's Dispute Resolution Act which mandates that settlements must be reduced to writing, be approved and signed by all parties, and presented to the court for approval; and noting further that confidentiality provisions of the Dispute Resolution Act would preclude offering evidence of an oral agreement), appeal dismissed January 29, 2004.

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

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

Olam v. Congress Mortgage Company, No. C95-2806 WDB, 1999 WL 812224 (N.D. Cal., October 6, 1999), opinion amended at 1999 WL 909371 (in action to enforce mediated settlement agreement where both parties desired mediator’s testimony, and “interest of justice” outweighed the negative impact that compelling testimony would have on the mediation process
in California, mediator was compelled to testify notwithstanding existence of independent mediator privilege not waived by the mediator).

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

*Princeton Ins. Co. v. Vergano*, 883 A.2d 44 (Del. Ch. 2005) (denying motion to permit mediator testimony in action to rescind mediated settlement of medical malpractice case where defendants sought evidence that mediator’s understanding of plaintiff’s claims of pain and impairment was inconsistent with secretly shot videotape of plaintiff dancing at a post-mediation fundraiser).

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

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

*Rojas v. L.A. County Super. Ct.*, 93 P.3d 260 (Cal. 2004) (affirming denial of tenants' motions to compel production of material produced by owners and builders in connection with mediation held in prior litigation, concluding that state mediation privilege not only protects substance of the negotiations and communications in furtherance of mediation, but also "raw evidence" exchanged at the mediation, when the evidence was compiled specifically for use in the mediation process). **Quote from the Court:** "[I]n making its recommendation regarding mediation confidentiality, the [California Law Revision] Commission specifically considered the discoverability of both expert reports and photographs and drafted its proposed confidentiality provisions to preclude discovery of such reports and photographs if they were 'prepared for the purpose of, in the course of, or pursuant to, a mediation.' [citation omitted]. These materials also show that the Commission chose language expressly designed to give a mediation participant who takes a photograph for purpose of the mediation 'control over whether it is used' in subsequent litigation, even where 'another photo' cannot be taken because, for example, 'a building has been razed or an injury has healed.'"

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

**Sheldone v. Pa. Turnpike Comm’n**, 104 F. Supp. 2d 511 (W.D. Pa. 2000) (adopting and applying a federal mediation privilege to preclude disclosure of written and oral communications made in connection with or during a mediation conducted before a neutral mediator, but not protecting from disclosure any evidence otherwise and independently discoverable merely because it was presented in the course of mediation), order aff’d (Aug. 8, 2000).

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

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

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

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

*State v. Williams*, 877 A.2d 1258 (N.J. 2005) (affirming assertion of mediation privilege to prevent mediator’s testimony sought to support self-defense claim in assault case because state interest in protecting mediation confidentiality was not outweighed by defendant’s need for the evidence where: 1) the mediator’s testimony lacked reliability because the “mediator’s description of the [mediation] session gives the overall impression of bedlam” and the mediator’s post-mediation interest in the case, including attendance at trial after being notified of the trial date by defendant, raised concerns about mediator neutrality; and 2) the defendant was able to introduce other evidence supporting his self-defense claim).

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

*Town Of Clinton v. Geological Serv. Corp.*, 21 Mass. L. Rptr. 609, 2006 WL 3246464 (Super. Ct. Nov. 8, 2006) (upholding a mediation privilege in a med-arb proceeding rejecting the claim that once the mediation failed and the arbitration began the mediation privilege was waived). **Quote from the Court:** “Given that preservation of confidentiality is considered essential to the proper functioning of mediation, once communications within a mediation falls within the privilege conferred by statute, there is no policy justification for later allowing disclosure of information acquired during the mediation. Thus, everyone with access to mediation information is burdened by the privilege.”

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

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

legislators and mediators was subject to, and conducted in violation of, the Open Meetings Act
because the meeting did not qualify for a judicial exemption from the Act).

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

3. DUTY TO MEDIATE/CONDITION PRECEDENT/COURT POWER TO COMPEL

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

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

took place more than 180 days before the plaintiff sought counseling, were time barred under the
Congressional Accountability Act). _Quote from the Court_: “Under the statutory framework of
the CAA, federal courts only have jurisdiction over civil actions brought by a covered employee
if that employee has completed mediation and counseling requirements under the statute. 2
U.S.C. §§ 1404, 1408.”

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

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

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

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

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

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

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

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

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

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

**Ferrero v. Henderson**, 341 F. Supp. 2d 873 (S.D. Ohio 2004) (concluding that a postal service supervisor engaged in a prohibited pattern of retaliatory conduct through his mishandling of a worker’s complaint, including: 1) “holding merely a single brief meaningless mediation session” at which the supervisor made no serious attempt to resolve the employee’s complaints “but instead acted angrily and leered at [the employee]”; and 2) failing to reschedule the mediation “even though the issue that had prevented it from going forward was [the supervisor’s] desire to have a Union representative present – an issue that should have been easily resolved and should not have prevented other mediation efforts from occurring”), opinion withdrawn in part on reconsideration, No. 3:00CV00462, 2005 WL 1802134 (S.D. Ohio Jul 28, 2005).

**Fisher v. GE Med. Sys.**, 276 F. Supp. 2d 891 (M.D. Tenn. 2003) (relying on the Federal Arbitration Act to compel mediation of employee's Fair Labor Standards Act claims where evidence suggests employee was aware of multi-step dispute resolution program mandating mediation and his decision to continue employment constituted acceptance of program's terms).
**Fluor Enter., Inc. v. Solutia, Inc.**, 147 F. Supp. 2d 648 (S.D. Tex. 2001) (denying motion for summary judgment based on a party’s alleged violation of the “standstill provision” in a contract which barred suit until 30 days after the commencement of a “mediation procedure”, where rules referenced in the parties’ contract suggest that the standstill provision began to run on the date that preliminary steps to hold mediation were commenced, rather than the date when the first actual mediation meeting was held).

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


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

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

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

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

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

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

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

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

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

**In re Young**, 253 F.3d 926 (7th Cir. 2001) (although Rule 33 of the Federal Rules of Civil Procedure provides authority for the court to compel lawyers to force clients to appear for appellate mediation, the lawyers’ refusal in this case to produce their clients, while unjustifiable, would not result in sanctions given the novelty of the question of the mediator’s authority to issue an order compelling attendance). **Quote from the Court:** "‘The purpose of authorizing the mediator to command the presence of the client is, of course, to enable him to communicate directly with the client; this is not ‘usurpation’; and it is particularly appropriate in circumstances where there may be a conflict of interest between lawyer and client. Of course the mediator must not attempt to coerce a settlement, but of such impropriety there is no evidence. The delegation authorized by Fed. R.App. P. 33 obviously extends to directing the lawyer to bring his client to the settlement conference; we do not understand the lawyers even to contend that the mediator cannot compel the lawyers to attend, [citation omitted] and if the lawyers refuse to obey the mediator's lawful orders, they expose themselves to discipline for unprofessional conduct. [citation omitted]. The appellants' lawyers may have believed that the presence of their clients..."
would not produce a settlement, but that is a judgment for the mediator to make; that is why he is authorized to require the clients' presence.”

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

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

*Ky. Farm Bureau Mut. Ins. Co. v. Wright*, 136 S.W.3d 455 (Ky. 2004) (affirming power of trial court to compel mediation of negligence case, including power to order appearance of parties and their adjuster at the mediation with full settlement authority; but granting writ of prohibition and precluding court from ordering that parties would face fines and penalties if the case settled after conclusion of mediation). **Quote from the Court:** "Under the trial court's order, parties who settled after the conclusion of mediation, despite a belief in their right to do so, would be required to face mandatory fines and penalties, a route most reasonable parties would avoid. We conclude that the post-mediation settlement provision imposing additional costs, fines and penalties exceeds trial court discretion and results in irreparable harm without an adequate remedy by appeal."

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

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

contractor satisfied obligation to mediate, which the court concluded was a contractual condition precedent to arbitration).


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

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

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

**Lynn v. Gen. Elec. Co.**, No. 03-2662-GTV-DJW, 2005 WL 701270 (D. Kan. Jan. 20, 2005) (refusing to enforce alleged contractual obligation to mediate as precondition to initiating litigation or arbitration, concluding: 1) mediation contracts are not subject to enforcement under the Federal Arbitration Act; and 2) no enforceable contract existed under state law because defendant employer could not prove employees actually received email and newsletter notices of the newly adopted mediation requirements). *Quote from the Court*: “Unlike enforcement of arbitration agreements, there is no historical evidence of hostility by the courts in enforcing mediation contracts; accordingly, there is no reason to believe Congress intended to encompass mediation within arbitration enforcement.”
**Marland v. Safeway, Inc.**, 65 F. App’x 442 (4th Cir. 2003) (affirming grant of summary judgment dismissing contract claim for alleged failure to mediate, concluding that although complaining party may have had a cause of action for specific performance to compel mediation pursuant to a contract clause, it chose instead to plead a claim for damages without evidence of the amount or foreseeability at the time the contract was entered into).

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


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

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

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

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


*Root v. Root*, 882 A.2d 1202 (Vt. 2005) (affirming trial court order that mother was in contempt, where she moved out-of-state with her child without first attempting to mediate as required by her divorce decree).

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


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

*Short Bros. Constr., Inc. v. Korte & Luitjohan Contractors, Inc.*, 828 N.E.2d 754 (Ill. Ct. App. 2005) (dismissing appeal of order compelling mediation of construction dispute concluding that mediation order is an administrative, ministerial, non-injunctive order not subject to interlocutory
relief). **Quote from the Court:** “[T]he purpose of the mediation process, and the mediation order in the case at bar, is to streamline the judicial process by encouraging compromise and settlement, if not of the entire controversy then at least some portions of it, thereby reducing the workload of the circuit court and lessening the expense and burden to the parties. The mediation order is clearly related to the circuit court's inherent authority to control its own docket. The mediation order is ministerial or administrative in nature, rather than injunctive in nature, because it is regulating the procedural details of the litigation, rather than affecting the rights of the parties.”

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

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

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

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

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

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

*Walsh v. Larsen*, 705 N.W.2d 638 (S.D. 2005) (affirming trial court refusal to set aside as void a judgment in a real estate foreclosure action due to creditor’s admitted failure to mediate, concluding that the unsatisfied statutory mediation requirement is not jurisdictional but “more akin to an affirmative defense, which must be pled and established”).

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

4. SANCTIONS/ATTORNEYS FEES/MEDIATION COSTS

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

*Aikens v. Deluxe Fin. Serv., Inc.*, Civil Action No. 01-2427-CM-DJW, 2006 WL 2714513 (D. Kan. Sept. 22, 2006) (refusing to exercise ancillary jurisdiction and thus denying the mediator’s motion for fees after the case was dismissed leaving the mediator with the remedy of filing a lawsuit in state court for breach of contract). *Quote from the Court*: “Finally, the court does not find that this fee dispute must be decided to protect the integrity of the underlying litigation or to insure that its disposition is not frustrated. Nor does the court find that resolution of this fee dispute is necessary to render complete justice to the parties to the lawsuit. This case was settled and the action dismissed almost two years ago. This fee dispute does not threaten the settlement or resolution of the case.”

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

*Areizaga v. Bd. of County Comm’rs of Hillsborough County*, 935 So. 2d 640 (Fla. Dist. Ct. App. 2006) (affirming the order sanctioning a party in a mandamus proceeding for failure to attend a mediation that was ordered orally by the court, but quashing the order to mediate because the Florida Rule of Civil Procedure, 1.710(b) precluded mediation of extraordinary writs), *rev’d*, 958 So. 2d 918 (Fla. May 17, 2007) (unpublished table decision).
Brady v. Wal-Mart Stores, Inc., 455 F. Supp. 2d 157 (E.D.N.Y. 2006) (reducing the claim for attorneys’ fees for sixty-two hours preparation and sixteen hours attending the court ordered mediation, but granting as reasonable the fees for two attorneys present at the mediation). Quote from the Court: “I agree that the preparation time was excessive, particularly in comparison to the hours logged by opposing counsel, which were less by half. While I appreciate that counsel had to prepare lengthy statements, I do not think that this should have required 62 hours. With regard to the actual mediation session, I do not agree with the defendants that it was inherently unreasonable for Brady to be represented by two attorneys at the mediation session. Wal-Mart was similarly represented by two attorneys. I recognize that one of Wal-Mart's attorneys was in-house counsel for whom legal fees were not incurred, and who also had a role as client that the second lawyer representing Brady did not. Nevertheless, a mediation presents challenges that a deposition or a routine court proceeding might not; I cannot say that it was unreasonable for Brady to have two lawyers present.”

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

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

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

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

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

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

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

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

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


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

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

**Elec. Man, Inc. v. Charos,** 895 A.2d. 193 (Vt. 2006) (concluding that trial court erred by categorically refusing to award attorneys fees for mediation participation, noting that denial of
fees would discourage parties from voluntary participation or encourage only minimal participation).

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

**Fabing v. Eaton**, 941 So. 2d 415 (Fla. Dist. Ct. App. 2006) (remanding to the trial judge who had refused to enforce a mediation agreement, to decide if the mediation agreement was valid but unenforceable because of subsequent actions of a third party in which case attorneys’ fees should be granted or if the mediation agreement was unenforceable because of mutual mistake, in which case no attorneys’ fees should be granted pursuant to the agreement), *reh’g denied* (Nov. 20, 2006).


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

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

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

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

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


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

**Harrelson v. Hensley**, 891 So. 2d 635 (Fla. Dist. Ct. App. 2005) (enforcing award of sanctions against party but not her lawyer, for party’s failure to attend a court-ordered mediation conference where only excuse for non-attendance was offered after the mediation and in opposition to the sanctions motion and asserted only that she “has been so disturbed by the obnoxious conduct of [opposing] counsel that she has become uncommunicative and willing only to allow counsel to continue to pursue her interests in this matter without her active involvement”).

**Heng v. Rotech Med. Corp.**, 720 N.W.2d 54 (N.D. 2006) (finding abuse of discretion where trial court awarded $1,281.50 in mediation fees to prevailing party as taxable costs and disbursements, where parties had previously contractually agreed to share all mediation expenses).
**Hernando County Sch. Bd. v. Nazar**, 920 So. 2d 794 (Fla. Dist. Ct. App. 2006) (imposing monetary sanctions on counsel and party for their failure to attend appellate mediation where they failed to notify the court of reasons for their absence or bring a motion seeking permission to be excused from personal attendance).

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


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

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

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

**In re Hoffman**, 883 So. 2d 425 (La. 2004) (finding professional misconduct warranting three month suspension from practice of law (conditionally deferred if no further violations), where attorney representing three siblings in a will contest accepted defendants' mediated settlement offer without informing all siblings about the settlement terms, and then compounded his misconduct by distributing the settlement proceeds in accordance with the wishes of one of his clients and over expressed objection of another), **reh’g denied** (Oct. 29, 2004).

exhibits obtained from the adverse party during mediation), order aff’d by No. 1:04-CV-568, 2007 WL 518866 (W.D. Mich. Feb. 15, 2007). **Quote from the Court:** "Striking an expert witness is a harsh remedy, but not an unfair one, where a party has placed its experts at risk by infusing them with knowledge to which they were not entitled. The risk should not be upon the innocent defendants in this instance. The extent of the damage done in terms of how much these mediation briefs and the highlighted documents affected the experts, again consciously or unconsciously, in shaping their approaches and their opinions, is not truly knowable nor easily remediable. Where this situation arises from a clear violation of the court's order and the settlement privilege generally, it is the plaintiff that must bear the brunt of the resolution."

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

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

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

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

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

**Lawson v. Brown’s Home Day Care Center, Inc.,** 861 A.2d 1048 (Vt. 2004) (affirming award of $2,000 in sanctions against attorney for repeatedly and in bad faith filing confidential mediation documents in support of attempt to disqualify opposing counsel for alleged obstruction of justice, subornation of perjury, and presentation of false evidence).

**Lucas Auto. Eng’g, Inc. v. Bridgestone/Firestone, Inc.,** 275 F.3d 762 (9th Cir. 2001) (affirming district court imposition of sanctions for defendant’s failure to attend mediation due to "incapacitating headache," where defendant failed to notify parties beforehand of his nonappearance).
**Mardirossian v. Guardian Life Ins. Co. of Am.**, 457 F. Supp. 2d 1038 (C.D. Cal. 2006) (granting insured’s motion for attorneys’ fees in ERISA suit but ordering compensation for only one of the two attorneys representing the insured in mediation, where there was no evidence that mediation was particularly complex or that the attorneys handled distinct aspects of mediation representation).

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

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

**Monroe v. Corpus Christi Indep. Sch. Dist.**, 236 F.R.D. 320 (S.D. Tex. 2006) (refusing to grant plaintiff’s motion for reimbursement of mediation fee and sanctions in employment discrimination case against school district, concluding the district did not act in bad faith when it participated in mediation without authority to bind the school board to a mediated settlement). **Quote from the Court:** “The Texas legislature has invested the school board with authority to manage matters such as this litigation. There is no evidence that defendant was acting with apparent authority from the school board in attending the mediation. On the other hand, there is strong support for defendant's argument that it could not have final settlement authority and that any settlement negotiated at the mediation must be ultimately approved by the school board.”


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

**Negron v. Woodhull Hosp.**, 173 F. App’x 77 (2d Cir. 2006) (vacating a default judgment entered because defendant failed to comply with the mediator's instruction to bring a principal to the mediation). **Quote from the Court:** "The grant of judgment as a sanction 'is a harsh remedy to be utilized only in extreme situations.' . . . The district court reasonably found the Hospital to have violated this order when the Hospital disobeyed the instruction of the mediator by failing to bring a principal party with settlement authority to the mediation. While the Hospital was free to adopt a "no pay" position its failure to bring a principal party was a violation of a court order and impaired the usefulness of the mediation conference. Nevertheless, the district court should have imposed less extreme sanctions before resorting to default judgment against the Hospital."
*Nielsen-Allen v. Indus. Maint. Corp.*, No. Civ. 2001/70 FR., 2004 WL 502567 (D.V.I. Jan. 28, 2004) (denying a motion for sanctions against plaintiff's counsel for allegedly disclosing to a mediator in a related employment discrimination case the amount of the settlement agreement reached in this case, finding that the state mediation privilege foreclosed either party from disclosing any matter discussed in mediation in a subsequent motion for sanctions). **Quote from the Court:** "Applying the cloak of mediation to the facts of this matter appear inequitable to [defendant] who negotiated settlement of this action and applied confidentiality thereto for the express purpose of avoiding having such settlement amount established as a benchmark in future similar employment cases. Such result highlights the need for exceptions to mediation confidentiality."

*Peoples Mortgage Corp. v. Kan. Bankers Sur. Co.*, 62 F. App’x 232 (10th Cir. 2003) (affirming award of attorneys fees against insurance company for failure to pay a claim without just cause or excuse, in part for insurer's unreasonable refusal to participate in mediation at which the parties discussed the basis for the claim).

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

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

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

*Randall v. Valor Enters., Inc.*, No. C2-03-12018, 2005 WL 1017618 (Minn. Dist. Ct. Feb. 28, 2005) (noting in response to letter raising dispute about mediator payment that under Rule 114.11(c) the court may, upon motion, issue an order for the payment of mediation costs and impose appropriate sanctions if a party fails to pay) (emphasis in original).
Ritter v. Ritter, No. A03-1472, 2004 WL 1152834 (Minn. Ct. App. May 25, 2004) (trial court did not abuse discretion in considering mother's untimely responsive motion in post-decree dispute, where mother's failure was in part caused by her attempt to comply with the decree's mediation requirement and father declined to use mediation services; and further affirming award of mother's attorney fees where father’s reluctance to mediate demonstrated bad faith that added to the length and expense of the proceedings).

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

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

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

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

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


person in a suit” to require St. Paul to pay attorneys’ fees in a suit settled after mediation, where the settlement and fees were included in the judgment).

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

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

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

**Twomey v. Twomey**, 888 A.2d 272 (Me. 2005) (affirming denial of father’s motion for continuance to allow mediation of child support dispute, where wife’s allegation that father intended to “drag-out” litigation could reasonably be considered an extraordinary circumstance sufficient to waive the statutory mediation requirement).

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

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

**Wedding & Even Videographers, Ass’n Int’l, Inc. v. Videoccasion, Inc.**, No. 8:04-CV-2506-T-23MSS., 2006 WL 1677923 (M.D. Fla. June 8, 2006) (denying award of sanctions for alleged release of confidential mediation information over the internet, where there was no evidence to contradict defendant’s assertion that the information was publicly available prior to the mediation).
Yacht Club Se., Inc. v. Sunset Harbour N. Condo. Ass’n, Inc., 843 So. 2d 917 (Fla. Dist. Ct. App. 2003) (reversing award of sanctions against Developer for communicating with unit owners about what occurred in mediation between the Developer and Condo Association in suit for purported construction defects, because the unit owners are the real parties in interest entitled to know about issues in dispute and the mediation effort), reh’g and reh’g en banc denied (May 07, 2003).

5. MEDIATION-ARBITRATION/HYBRID PROCESS

Albert M. Higley Co. v. N/S Corp., 445 F.3d 861 (6th Cir. 2006) (affirming denial of a subcontractor’s motion to compel arbitration, where the parties’ contract most logically could be interpreted to mean that upon failure to resolve any and all disputes by mediation, the general contractor would have sole discretion to decide whether to use arbitration or litigate, and not, as the subcontractor had interpreted it, to exercise discretion to decide whether or not the dispute still existed and then to proceed to arbitration only).

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

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

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

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

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

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


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

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

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

*Garrett v. Hooters-Toledo*, 295 F. Supp. 2d 774 (N.D. Ohio 2003) (finding mediation requirement as precondition to arbitration to be substantively unconscionable making entire ADR provision unenforceable, where, among other things: 1) employee had only ten days from the last day on which the claim arose to request mediation; 2) the agreement stated that failure to request mediation foreclosed the bringing of the claim against the employer; and 3) mediation was required to be held in Kentucky, not Ohio where the employee worked).
**Gaskin v. Gaskin,** No. 2-06-039-CV, 2006 WL 2507319 (Tex. App. Aug. 31, 2006) (denying allegation that mediator replaced a page of the agreement after the parties had signed and rejecting a challenge to the mediator arbitrating the dispute because the party had signed an agreement consenting to the mediator serving as arbitrator and had withdrawn the claim of mediator fraud) **reh’g overruled** (Sept. 21, 2006), **rev’d** (Mar. 9, 2007), **reh’g of petition for rev’d,** (June 1, 2007). **Quote from the Court:** [Although not grounds for reversal in this case the court noted the problems caused when a mediator serves as an arbitrator] “‘The mediation process encourages candid disclosures, including disclosures of confidential information, to a mediator. It is the potential for the use of that confidential information that creates the problem when the mediator, over the objection of one of the parties, becomes the arbitrator of the same or a related dispute. Just as it would be improper for a mediator to disclose any confidential information to another arbitrator of the parties’ dispute, it is also improper for the mediator to act as the arbitrator in the same or a related dispute without the express consent of the parties,’”

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

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

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

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

**In re Brookshire Bros., Ltd.,** 198 S.W.3d 381 (Tex. App. 2006) (denying petition for a writ of mandamus compelling arbitration because applying the arbitration clause against the employee would be unconscionable since the arbitration policy was enacted a year after the accident, after plaintiff had retained a lawyer and had a scheduled mediation with the employer), **mandamus denied** (Feb. 2, 2007).
**In re Cartwright**, 104 S.W.3d 706 (Tex. App. 2003) (trial court abused its discretion by appointing mediator of child custody dispute as arbitrator of subsequent property dispute without consent of the parties). **Quote from the Court:** “[A] mediator is in the position of receiving the parties' confidential information, which may not be revealed to the court or to any other person. If the mediator is later appointed to be the arbitrator between the same parties, he or she is likely to be in the possession of information that either or both of those parties would not have chosen to reveal to an arbitrator.”

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

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

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

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

**Kahn v. Chetcuti**, 123 Cal.Rptr.2d 606 (Cal. Ct. App. 2002) (arbitrator acted within his authority by determining that prevailing party’s act of filing a complaint before an obligatory mediation did not bar an award of attorney fees to that party pursuant to a contract clause limiting said fees “should the prevailing party attempt an arbitration or court action before attempting [to] mediate”).
Kemiron Atlantic, Inc. v. Aguakem International, Inc., 290 F.3d 1287 (11th Cir. 2002) (parties’ failure to request mediation, which was condition precedent to arbitration under the parties’ contract, precluded enforcement of the arbitration clause). **Quote from the Court:** “The FAA's policy in favor of arbitration does not operate without regard to the wishes of the contracting parties. [citation omitted]. Here, the parties agreed to conditions precedent before arbitration can take place and, by placing those conditions in the contract, the parties clearly intended to make arbitration a dispute resolution mechanism of last resort….Because neither party requested mediation, the arbitration provision has not been activated and the FAA does not apply.” 290 F.3d at 1291.

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

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

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

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

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

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

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

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

**Mountain Heating & Cooling, Inc. v. Van Tassel-Proctor, Inc.**, 867 So. 2d 1112 (Ala.) (reversing trial court and refusing to compel arbitration of a dispute between contractors where the arbitration provision of the parties' contract contained ambiguities raising doubt about their
intent to arbitrate all disputes, including the parties' promise to "settle the dispute by arbitration under the Construction Industry mediation rules of the American Arbitration Association) (emphasis added), on remand to, 867 So. 2d 1121 (Ala. Civ. App. 2003).

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

*Patten Grading & Paving, Inc. v. Skanska USA Bldg., Inc.*, 380 F.3d 200 (4th Cir. 2004) (reversing trial court denial of defendant's motion to compel arbitration and finding no waiver of right to arbitrate where defendant in construction contract dispute voluntarily engaged in the litigation process for over eight months, the parties had conducted discovery, had participated in court-ordered mediation, and had a motion decided before the court). **Quote from the Court's Majority Opinion:** "Given the comparatively restrained pre-trial activity engaged in by [defendant], the strong policy favoring arbitration, and the heavy burden borne by the non-movant, we cannot conclude that [plaintiff] has made the requisite showing of prejudice." **Quote from the Court's Dissenting Opinion:** "Regardless whether these factors alone would be sufficient for the court to find [defendant] waived its right to compel arbitration, the court finds that because [plaintiff] has thus far expended Five Thousand Eight Hundred Sixty-Two Dollars and Fifty-Two Cents ($5,862.52) to prosecute its case, compelling arbitration would result in actual prejudice to [plaintiff]. This prejudice is highlighted by the fact that [plaintiff] represents to the court it would be required to pay a substantial initial fee to engage the American Arbitration Association. Although the court is aware of the federal policy favoring arbitration, in this case the court finds that denial of [defendant's] motion to compel arbitration is appropriate based on the facts . . . ."

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

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

*Scaffidi v. Fiserv, Inc.*, No. 05-C-1046, 2006 WL 2038348 (E.D.Wis. July 20, 2006) (concluding that employer did not waive its right to compel arbitration by participating in mediation both before and after the EEOC investigated and rejected plaintiff’s claim of discrimination, where employer filed a demand for arbitration approximately one month after plaintiff renewed her discrimination claim in federal court), aff’d, 218 F. App’x 519 (7th Cir. 2007), reh’g and reh’g en banc denied (April 11, 2007).
Sheppard v. Super. Ct., No. B181857, 2006 WL 1738160 (Cal. Ct. App. June 27, 2006) (affirming trial court denial of request to confirm arbitration award, finding no enforceable arbitral contract in a mediated settlement which included the parties’ agreement that a three-judge panel would “give a ‘yes’ or ‘no’ answer to a specific legal question ‘in aid of settlement’”), rev’d (Oct. 18, 2006). Quote from the Dissent: “In this case a third-party decisionmaker chosen by the parties was asked to decide a specific legal question; each side had a full opportunity to be heard, both by written briefs and oral argument, before the panel made its decision; and there is no suggestion the decision-making process itself was not impartial. Moreover, the parties’ settlement agreement contemplated the panel's decision would be definitive and final (that is, not subject to judicial review, reconsideration by a different panel of neutrals or renewed debate by the parties) and agreed it would have a specific, predetermined effect on the otherwise final settlement agreement (that is, it would be "binding"). The panel proceedings thus appear to possess all the characteristics of an arbitration.”

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

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

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

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

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

6. ETHICS/MALPRACTICE (LAWYER/NEUTRAL/JUDICIAL)

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

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

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

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

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

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

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

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

_Fla. Bar v. Neiman_, 816 So. 2d 587 (Fla. 2002) (a paralegal engaged in unauthorized practice of law by, among many other things, appearing on behalf of personal injury plaintiff at a mediation and having settlement discussions with defending insurer’s attorney, and by appearing on behalf of a plaintiff in a wrongful birth case mediation and arguing issues of liability, causation and damages, while lawyer he worked for sat silent).

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

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

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

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

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

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

**In re Philpot**, 820 N.E.2d 141 (Ind. 2005) (issuing public reprimand to attorney who maintained a website suggesting that clients should lie and create “throw away” demands to achieve successful results in mediation). **NOTE:** One judge dissented “believing that for advising the public to lie at mediation meetings, the respondent should be suspended from the practice of law without automatic reinstatement.”

**In re UPL Advisory Opinion 2003-1**, 623 S.E.2d 464 (Ga. 2005) (concluding that a non-attorney alternative dispute resolution and mediation firm engages in unauthorized practice of law by representing debtors in negotiations with creditors’ attorneys to reduce the amount of debt or work out a payment plan).
Isaacson v. Isaacson, 792 A.2d 525 (N.J. Super. Ct. App. Div. 2002) (reversing trial court and granting motion to remove the single individual who served as both guardian *ad litem* and mediator, concluding that the roles of mediator of economic issues and guardian *ad litem* are not sufficiently distinct to avoid the inherent conflict between a mediator’s obligation to respect confidences of the parties and the responsibility as guardian *ad litem* to serve as an officer of the court), *certification denied*, 807 A.2d 195 (N.J. 2002) (unpublished table decision). **Quote from the Court:** "We do not, by recognizing the conflict between an appointed mediator and guardian *ad litem*, deprecate the role of either. Both serve purposes critical to the administration of justice in the Family Part and represent innovative and expansive methodologies necessary to insure prompt and appropriate resolution of critical issues. The mediation process provides a vehicle for allowing the parties to resolve disputes between themselves on issues beyond visitation and parenting including, as was proposed by the trial judge here, economic issues. [footnote omitted]. A mediator and guardian *ad litem* are both critical to the administration of justice in the Family Part. We conclude, however, that the roles are inherently conflicting and the same individual may not serve in both capacities."

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

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

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

Matluck v. Matluck, 825 So. 2d 1071 (Fla. Dist. Ct. App. 2002) (trial court erred in not disqualifying a law firm from representing a party in a post-dissolution custody case, when a member of the firm previously acted as a mediator in the same proceeding).
*Metz v. Metz*, 61 P.3d 383 (Wyo. 2003) (finding no abuse of discretion in trial judge’s failure to disqualify himself from presiding over divorce bench trial after having first heard evidence concerning the parties' earlier mediation and denying wife's motion to enforce an alleged mediated settlement).

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

*Penny v. Wyo. Mental Health Professions Licensing Bd.*, 120 P.3d 152 (Wyo. 2005) (affirming denial of social worker’s application for re-licensure where substantial evidence established that social worker knowingly practiced without a license, finding his assertion that his practice was limited to trial consulting, mediation, conflict resolution, and forensic social work, to be utterly lacking in credibility). *Quote from the Court:* “Although termed by [the appellant] as "conflict resolution" and "mediation" services, it is clear the clients that treated with [the appellant] believed they were receiving counseling services and that is exactly what [the appellant] was providing, treating individuals over the course of months and years.”

*Republic Serv., Inc. v. Liberty Mut. Ins. Co.*, No. CIVA 03-494 KSF, 2006 WL 3004014 (E.D. Ky. Oct. 20, 2006) (ordering disqualification of attorney and his firm from representation of plaintiff in suit against insurer for alleged improper administration of plaintiff’s self-insured workers' compensation program, where attorney had previously worked for the defendant insurer, including participation in mediation and strategy discussions that exposed the attorney to confidential information concerning the insurer’s practices and procedures, strategies for handling litigation, claims operation, general claim file management and record keeping).

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

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

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


**Sobol v. Marsh**, 130 P.3d 1000 (Ariz. Ct. App. 2006) (affirming application of absolute privilege to dismiss a defamation suit brought by a legal document preparer (LDP) against the husband in a divorce case, based on statements made by the husband in his complaint to the Board of Legal Document Preparers alleging that the LDP had improperly served as the parties’ neutral mediator while simultaneously preparing the wife’s divorce pleadings), rev’d (Oct. 23, 2006), amended by No. 1 CA-CV 05-0199, 2006 WL 864292 (Ariz. Ct. App. Apr. 5, 2006). Quote from the Court: “[A] decision conferring absolute immunity for Marsh's complaints to the Board against Sobol promotes public policy encouraging people to report ethical violations, and furthers Marsh's interest to freely and truthfully inform the Board of Sobol's alleged unethical conduct.”

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

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

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

**U.S. v. Walker River Irrigation Dist.**, No. 3:73CV127ECR, 2006 WL 618823 (D. Nev. Mar. 10, 2006) (denying motion to disqualify counsel who represented numerous clients in this water rights case, where one client was involved in a phase of the trial using mediation with a confidentiality agreement that might preclude the attorney from disclosing matters to clients not involved in the mediation). Quote from the Court: "Although there is some sense in the . . .
argument, the court cannot find that an ethical violation has occurred. There is no evidence that Mr. DePaoli has even obtained information that would cause a conflict amongst his clients . . . and there is no evidence that . . . Mr. DePaoli's . . . clients have adverse interests . . . . The court is unwilling to presume Mr. DePaoli has acted improperly based on bald allegations."

_Vannucci v. Memphis Obstetrics and Gynecological Ass’n, P.C._, No. W2005-00725-COA-R3CV, 2006 WL 1896379 (Tenn. Ct. App. July 11, 2006) (finding no basis to recuse the trial judge from presiding over remainder of medical malpractice case after having heard disputed facts during _ex parte_ proceedings to approve a mediated settlement involving some but not all defendants). _Quote from the Court:_ “Even if we were to assume, for purposes of this appeal, that Judge Williams entertained various facts at the hearing and informally examined the comparative fault of the parties, including that of the Non-Settling Defendants, we cannot agree that such action would warrant a recusal under the unique facts of this case. There is nothing in the record to indicate that Judge Williams has made comments expressing her intention to rule for or against the Non-Settling Defendants at trial . . . . Moreover, the Non-Settling Defendants have overlooked an important aspect of this case . . . [i]n her amended complaint, Vannucci expressly demanded a jury to try the allegations contained therein. Thus, it is a jury, and not Judge Williams, who will decide the issues of fact should the remainder of the case proceed to trial.”

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

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


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

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

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

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

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

settlement to obtain and maintain employment, where court failed to make findings supporting conclusion that there had been a substantial change of circumstances warranting support modification. **Quote from the Court:** “Courts may not impose the statute piecemeal—ignoring procedural safeguards and statutory guidelines—simply because the parties signed a mediation agreement.”

**Campbell v. Burton,** 750 N.E.2d 539 (Ohio 2001) (neither the school district offering the mediation program, nor the teacher mediator presiding at a mediation between high school students, is entitled to claim statutory immunity under the state’s Political Subdivision Tort Liability Act for alleged failure to report known or suspected abuse disclosed by a student participant in mediation).

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

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

**Davis v. Horton,** 661 N.W.2d 533 (Iowa 2003) (refusing to extend the public-policy exception to at-will employment relationships in order to protect participation in mediation, noting that while mediation is "encouraged and frequently beneficial, it is not an action imbued with public purpose as to satisfy the clarity element that our cases require"). **NOTE:** The Court also concluded that plaintiff’s claim failed on causation grounds, for the “mere fact that an adverse employment decision occurred after county employee’s participation in a mediation process was not sufficient to support a decision that the adverse decision was in retaliation for the mediation effort and thus violative of public policy").

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

**Dino v. Pelayo,** 145 Cal. App. 4th 347 (Ct. App. 2006) (rejecting defendants' claims that the attorney who was representing co-defendants to a cross complaint should be disqualified because the joint representation deprived defendant of the right to confidentially mediate separately with each of the parties to the cross-claim), review denied (Feb. 28, 2007). **Quote from the Court:** "Adopting the...proposed mediation-disqualification rule would [in addition to discouraging mediation] likewise discourage parties from choosing joint representation. Clients would effectively be barred from choosing joint representation if the attorneys they hired to jointly represent them faced disqualification whenever their case proceeded to mediation."
Emerson v. Comm’r of Internal Revenue, No. 5877-00, 2003 WL 1392574 (T.C. Mar. 20, 2003) (affirming IRS refusal to consider portion of mediated settlement of contract/intellectual property dispute non-taxable compensation for injuries or personal illness, where there was no mention during mediation of a claim for personal injuries, other than mediator’s suggestion, subsequently acted on by the parties, to “add a personal injury claim to the suit as a vehicle to reach settlement”; rejecting IRS accuracy-related penalty for improperly excluding settlement proceeds as received on account of physical injury or sickness, since taxpayer had relied to his detriment on the suggestion of the mediator and his own attorney to include a claim for personal injury).

Filius v. Potter, 176 F. App’x. 8 (11th Cir. 2006) (finding a prima facie case for retaliation where employee was put on non-pay, non-duty status one day after he participated in mediation of an EEOC complaint with his manager, but also concluding that the employer met its burden to assert legitimate non-discriminatory reasons for its actions and the employee failed to meet his ultimate burden to create a genuine issue of material fact as to pretext).

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

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

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

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


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

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

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

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

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

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

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

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

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


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

**Marcher v. Bonzell**, 104 P.3d 436 (Mont. 2004) (refusing to dismiss appeal of default judgment in landlord-tenant dispute for alleged failure to meaningfully participate in mandatory appellate mediation, where failure of appellant to personally appear was attributable to miscommunication with counsel, counsel who did appear at the mediation had authority to negotiate on appellant’s behalf, and last best offer in mediation was held open for appellant to consider, and its rejection showed mediation was unsuccessful “because the parties were too far apart in their positions, not because of any failure to meaningfully participate in the process”).

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

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

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

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

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

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

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

Nunez v. Res. Warehousing and Consolidation, 775 N.Y.S.2d 310 (N.Y. App. Div. 2004) (reversing trial court denial of motion to restore a personal injury action the trial calendar, where both parties appeared for mediation in the year after dismissal of the action for failure to prosecute, and the appearance demonstrated plaintiff’s intent not to abandon the litigation).
Osasio v. Froedtert Mem'l Lutheran Hosp., 646 N.W.2d 381 (Wis. 2002) (filing of medical malpractice lawsuit before expiration of mandatory mediation period does not mandate dismissal of the action). **Quote from the Court’s Majority Opinion:** "If the legislature intended the result the defendants urge, it could have expressly stated that a claimant's failure to participate in a mediation session within the statutory mediation period results in dismissal. It did not do so. In the absence of express language, we are unwilling to read the harsh penalty of dismissal of the lawsuit into the mediation statute. The tenor of modern law is to avoid dismissal of cases on technical grounds and to allow adjudication on the merits." **Quote from the Court’s Dissenting Opinion:** "In establishing the mediation system in ch. 655, the legislature provided for flexibility by creating two options for commencing a medical malpractice case. [citations omitted]. First, under Wis. Stat. § 655.445 a plaintiff can initially file a claim in court and then within fifteen days file a request for mediation. Second, under § 655.44, which Ocasio relied on, a plaintiff can initially request mediation and then, after the mediation period has expired, file a claim in court. These two procedures are clearly written in the statutes to provide the flexibility that the legislature intended for medical malpractice cases. The majority's decision here unnecessarily bends those procedures to allow for further options that are contrary to the unambiguous language of § 655.44."


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


Preston v. Transp. Ins. Co., 102 P.3d 527 (Mont. 2004) (reversing worker’s compensation court dismissal of claim as time-barred, concluding that claimant’s petition for, and participation in, statutorily-mandated mediation tolled running of the statute of limitations for the 62 days mediation was ongoing). **Quote from the Court’s Dissenting Opinion:** “[I]t is this Court’s job to ascertain the legislative intent, whenever possible, from the plain language of the statute; it is not our job to insert into those statutes what the Legislature has chosen to omit . . . . In the present case, the Legislature has chosen not to toll the statute of limitations for an action based on fraud or mistake during the period required for the mandatory mediation prior to filing a petition in the [workers’ compensation court] . . . . The required mediation is a relatively short process readily capable of being completed soon after the carrier denies a demand to re-open and long before the running of the 2-year statute of limitations.”
Quantum Elec., Inc. v. Accutitle, Inc., 136 P.3d 988 (Mont. 2006) (denying motions for stays of briefing schedules pending appellate mediation). **Quote from the Court:** “We . . . take this opportunity to emphasize to the parties and all future litigants that [the appellate mediation rule] is "self-executing" and is not amenable to motion practice.”

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

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

Sammons v. Polk County Sch. Bd., 165 F. App’x. 750 (11th Cir. 2006) (vacating a preliminary injunction in an IDEA proceeding ruling that only a request for a due process hearing, not a request for a mediation, invokes the “stay put” injunction standards in the IDEA).

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

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

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

State ex rel. T.N., 789 So. 2d 73 (La. Ct. App. 2001) (trial court has inherent authority to dismiss delinquency petition for good cause when juvenile defendants successfully complete mediation).
Sunlight Saunas, Inc. v. Sundance Sauna, Inc., 427 F. Supp. 2d 1011 (D. Kan. 2006) (concluding that defendants did not waive their right to object to lack of personal jurisdiction by participating in mediation before bringing a motion to dismiss which was filed less than two months after plaintiff joined them as parties).

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


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

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

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

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

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


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


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

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

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

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