MEDIATION NEWS FOR THE 21ST CENTURY™

MEDIATION NEWS

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CASES & RESOLUTIONS:

California Court Reverses Judicial Exception to Mediation Confidentiality

A California appeals court overturned a judicially-created exception to California's mediation confidentiality statute in Wimsatt v. Superior Court. While noting that the result may be unfair, the court felt bound by precedent prohibiting judicial exceptions to California's broad statutory scheme protecting confidentiality. Wimsatt involved a legal malpractice claim by a personal injury plaintiff against his attorneys in the underlying personal injury case, asserting that his counsel made an unauthorized settlement demand, reducing the amount he ultimately was able to recover. The appellate court concluded that confidentiality shielded mediation briefs and related emails from disclosure. Interestingly, however, the court held that the actual conversation between counsel, in which the settlement demand was allegedly lowered, was not confidential as it was routine negotiation and not related to mediation, even though the conversation followed an earlier mediation and occurred in the context of whether to proceed with a second mediation before a different mediator. The appeals court recognized that its ruling against judicial exceptions might mean that by agreeing to mediate a party gives up any new claims that arise during mediation, so suggested that the California legislature may wish to revisit the underlying statute. Wimsatt v. Superior Court, No. B196903 (Cal. App. 2d Dist., June 18, 2007)

Court Bars Deposition of Counsel about Disclosures at Mediation, But Hints Mediator May Be Considered

A U.S. District Court in Kansas prevented the deposition of opposing counsel about statements made during a mediation based on the fact that other individuals present in the mediation could provide evidence, so testimony from counsel was not the only means of obtaining needed information. The court noted in passing that mediation confidentiality might be an issue at some point, but was not yet ripe for decision. Possibly due to the compelling facts of the case, in which plaintiff was fired soon after being mentioned by a co-worker in the mediation as being able to corroborate the co-worker's claims of race discrimination, the court raised the possibility that even the mediator might be deposed if both parties had waived confidentiality by their

Mediation Quote:

"The great problem today is that we have divorced our Yeses from our Nos. Yes without No is appeasement, whereas No without Yes is war. Yes without No destroys one's own satisfaction, whereas No without Yes destroys one's relationship with others. We need both Yes and No together. Yes is the key word of community, No the key word of individuality. Yes is the key word of connection, No the key word of protection. Yes is the key word of peace, No the key word of justice.

"The great art is to learn to integrate the two – to marry Yes and No. That is the secret to standing up for yourself and what you need without destroying valuable agreements and precious relationships.

"That is what a Positive No seeks to achieve."

- William Ury, *The Power of a Positive No: How to Say No and* Still *Get to Yes* (Bantam Books 2007) at 236

Other Cases & Resolutions:

statements about what occurred in mediation, or other exceptions to mediation confidentiality were met.
Harris v. Euronet Worldwide, Inc., 2007 WL 1557415 (D. Kan., May 29, 2007) (Subscription Required)

State Agency Representatives Lack Authority to Convert Mediation into Med-Arb

A New York appellate court rejected a contractor's assertions that during a mediation the representatives of the New York City School Construction Authority had agreed to "binding mediation" but then refused to honor the "mediator's" determination. The court noted that the Authority's procedures allow only "nonbinding mediation" with written advisory opinions in cases that do not settle, and that the Authority has not provided for binding arbitration, so its representatives could not agree to a binding process.
Kafka Constr. v. New York City School Constr. Auth., No. 6580/01 (NY App. 2d, May 29, 2007)

Court Vacates Conditional Settlement

Applying basic contract law, a New Jersey appellate court held that no agreement existed when plaintiff added a condition (allowing a three-day period for attorney review) before signing a settlement agreement that had already been signed by defendant and the mediator. The new term resulted in a counteroffer, rather than acceptance of the agreement, so there was no settlement.
Kasperowicz v. Kasperowicz, 2007 WL 1201722 (N.J.Super.A.D., April 25, 2007) (Subscription Required)

Lawsuit Delayed to Allow Mediation

A Texas court delayed litigation in a suit filed by the San Antonio Housing Authority against the developer of a $48 million project and ordered the parties to mediation based on a mediation clause in their contract. The Housing Authority asserted that the developer waived any right to mediation by failing to respond to a settlement demand and informal document requests, but the court simply ordered the developer to provide all requested documents within 14 days, prior to a 30-day period for mediation.
San Antonio Express-News (May 8, 2007) (Subscription Required)

Mediation Expected to Build Consensus over Seattle Bridge

Washington state has hired two Colorado mediators to overcome roadblocks to replacing the Evergreen Point Bridge, which is vulnerable to severe storms and earthquakes. The project, which lacks full funding and a design, raises complex environmental, transportation, health and community issues and involves federal, state and local jurisdictions. A state law enacted in May requires mediation for the project, resulting in a mediation contract worth nearly $500,000. A mediation progress report is required by August 1, and the mediators must submit a final plan to the governor and legislature in December.
Seattlepi.com (June 26, 2007)

Singapore Settlements No Longer Automatically

Mediation Set in $200 Million Litigation Involving Breach of Fiduciary Duty Against Attorneys for Misuse of Fen-Phen Settlement Funds, Lexington Herald Leader (May 15, 2007) (Subscription Required)

NASCAR and Kentucky Speedway Take Antitrust Dispute to Mediation, Msn.com (June 17, 2007)

After Taking Property By Eminent Domain, City Seeks to Mediate Compensation, Upstate.com (May 31, 2007)

Zoning Dispute Goes to Mediation in Michigan Court of Appeals' Settlement Program, The Ann Arbor News (June 8, 2007)

School Board and County Commissioners Again Turn to Outside Mediator, This Time Over $15 Million Funding Issue, The Charlotte Observer (June 17, 2007) (Archive Search Required)

Multi-Faith Delegation of Mediators to Address Religious Dispute in India Between Sikh Sects and Dera Sacha Sauda, newKarala.com (May 20, 2007)

Dispute Over Future Location of World War II Aircraft Goes to Mediation in Malta, Times of Malta (May 21, 2007)

New York Times to Mediate Defamation Claim of Goldmining Company in Jakarta, ANT- LKBN Antara (July 2, 2007)

Other News & Initiatives:

ADR Preferable to Litigation

Enforceable as Judgments

Singapore's High Court held that settlement agreements reached through mediation do not have the authority of court judgments, invalidating the court order a claimant's attorney obtained from a court registrar to enforce a settlement. Singapore's Subordinate Court promptly ruled that mediated settlements reached through the country's Primary Dispute Resolution Centre may be endorsed by courts in order to be enforced as judgments. Questions remain about the status of existing judgments resulting from settlements, as nearly 10,000 cases are mediated a year.
Straits Times (May 3, 2007) (Subscription Required)

NEWS & INITIATIVES:

Final Wave of 800 MHz Spectrum Licensees Begins Mediation; Post-Mediation Costs to be Borne by Licensees

As part of the Federal Communication Commission's 800MHz spectrum reconfiguration process begun in early 2006, the third wave of public safety licensees is set to relocate and negotiate final rebanding agreements with wireless carrier Sprint Nextel Corp. It is estimated that, similar to waves one and two, approximately 85% of third-wave licensees have no rebanding agreement in place and will mediate with Sprint. The vast majority of rebanding agreements reached thus far have been achieved through the mandatory mediation program. In related action, the FCC released an order on May 30 which, among other things, denied licensees' petition to require Sprint to pay any post-mediation costs incurred by the parties. Licensees had asserted an unfair advantage to Sprint in the mediations and an incentive to appeal if Sprint did not have to pay the costs of post-mediation litigation. However, the FCC stated that it has no authority to require one party to pay another's litigation costs, and was satisfied with the cost allocation balance it set forth in earlier rulings in the process.
Mobile Radio Technology (May 2, 2007); TR Daily (May 30, 2007) (Subscription Required); FCC Order (May 30, 2007)

Mandatory Med Mal Mediation Expanding in Rhode Island

A successful pilot mediation program for medical malpractice cases in Rhode Island Superior Court is being expanded statewide and will be permanent. The program, which requires all med mal cases to go to mediation prior to trial, achieved settlement in about half its cases. Counsel for both plaintiffs and defendants support the program, especially in larger cases. In addition to saving time and money, successful mediations spare families from reliving their anguish at trial. The program also has made a difference in delays that have plagued Rhode Island, where med mal cases on average take over six years, and has reduced the need for legislative reform that many believe would harm those with legitimate claims.
Providence Business News (June 25, 2007)

Illinois Court Requires Med Mal Mediation

in Health Care Disputes, American Medical News (July 2, 2007) (Subscription Required for Full Article)

U.K. Construction Mediation Groups Merge to Gear Up for Disputes from Projects for 2012 Olympics, Lawyer (May 7, 2007) (Subscription Required)

Judge in Thailand Urges Use of Court's Mediation Program, Which Has Shown Marked Success, Thai Press Reports (May 9, 2007) (Subscription Required)

A new rule adopted by Illinois's Third Judicial Circuit Court requires early mediation by parties in medical malpractice disputes. The court committee obtained input in its drafting, and the rule has found modest approval from both lawyers and the medical community. Doctors are hopeful the rule will minimize cases filed in anger by parties without real understanding of the facts, while a leading attorney notes the benefit of conducting early mediation, before major investments of time and effort by the parties.
Telegraph (Alton, Ill.) (June 19, 2007) (Subscription Required)

New Jersey Legislation Would Require Agencies to Promote Mediation

New Jersey's Assembly Judiciary Committee has approved legislation requiring state agencies to adopt policies for alternative dispute resolution and to actively promote mediation and other forms of ADR in resolving disputes and avoiding litigation, based on 1996 federal legislation. The measure is supported by the state's Public Advocate Department, whose Office of Dispute Settlement would train agency staff in mediation skills. The Public Advocate noted significant benefits to New Jersey taxpayers from cost savings and improved government services, and issued a white paper citing a 2007 federal study showing substantial savings as a result of ADR programs, which also provide faster and often more mutually satisfying resolutions to disputes.
Public Advocate Press Release (June 14, 2007); Public Advocate White Paper (June 14, 2007); New Jersey Legislation (June 11, 2007)

Toronto Judge Avoids Court Meltdown by Enhancing Mediation Programs

Facing a potential "meltdown" of the Toronto court system, which is the third largest in Canada, the Senior Regional Justice introduced a three-phase mediation system to encourage parties to settle, and created specialized pools of judges to mediate in specific areas. Even with 30,000 civil lawsuits being filed annually, wait times for long trials are now down to one year, compared to three years in 2004.
Globe and Mail (Toronto) (May 16, 2007) (Subscription Required)

Factors in Cases Suitable for Court-Ordered Mediation

The decision by many states to permit trial courts to require litigants to mediate prior to trial, even if a party objects, may be based on the pragmatic calculation that most cases settle sooner or later – only 2% of civil cases actually reach verdict – so mandatory mediation save resources by helping parties settle more quickly and efficiently. However, not all cases are suitable for mediation, so getting input from counsel is useful. Factors favoring court-ordered mediation include cases where the parties have indicated they tried to settle but could not, the parties will have to deal with each other in the future, the costs of litigation are a significant portion of the amount in dispute, trial is likely to be long or complex, or all parties are represented by experienced counsel.
Michigan Law Weekly (June 11, 2007) (Subscription Required)

AAA Updates Mediation Procedures for

Residential Construction Disputes

The American Arbitration Association issued a new set of mediation procedures and arbitration rules for residential construction disputes on June 1. The new procedures address construction specific issues of builders and homeowners, and update the AAA's previous procedures. In its new materials, the AAA recommends using mediation whenever possible, with arbitration as a fallback. No filing fee is required for mediation, as AAA fees are included in the mediators' hourly rates; conference rooms are rented separately.
LawFuel.com (June 4, 2007); AAA Rules Update

International Reinsurance Protocol Promotes Mediation

An international reinsurance protocol for resolution of disputes between reinsurers and reinsureds has been launched by the CPR Institute (the International Institute for Conflict Prevention and Resolution), based on work with insurance companies in both the London and American markets. As in the U.S., mediation is emerging as a preferred method of resolution in the London insurance market, with insurers increasingly dissatisfied with the uncertainties, costs and delays of both arbitration and litigation. The International Reinsurance Industry Dispute Resolution Protocol sets out a comprehensive method for identifying reinsurance disputes early in the process and a short timeline for information exchange, quickly followed by negotiation and mediation as needed. Although parties do not waive rights to arbitrate or litigate, the protocol is expected to give them more control and minimize financial uncertainties, allowing companies to manage their exposure and reserves more effectively. The benefits of this general approach were highlighted by the insurance industry's response to Hurricane Katrina, where opting to mediate reinsurance disputes avoided the extensive litigation anticipated by many. However, the ultimate success of the protocol and this trend will depend on the extent to which underwriters incorporate the protocol's provisions into their contracts.
Financial Times Limited (May 31, 2007) (Subscription Required); CPR Reinsurance Protocol

U.K. Construction Mediation Robust, But Judges Disfavored as Mediators

Interim results from an ongoing survey of U.K. construction litigation conducted by the Technology and Construction Court (TCC) and King's College, London, reveal that much mediation of construction disputes is occurring, but litigants are not interested in the TCC's pilot project to provide judges as mediators. Of the many cases settled, about one-third were resolved through mediation, with most of the rest settling by direct negotiations. Of the mediations conducted, four-fifths occurred at the parties' own initiative, generally with use of a limited number of well-regarded barristers and construction professionals as mediators. During the first year of the TCC pilot program, litigants have been willing to use judges as mediators only twice.
Mondaq (June 26, 2007) (Subscription Required or Direct with Registration); The Lawyer.com (July 4, 2007)

Need for Mediation in U.K. Land Use Planning

Responding to an analysis of the U.K. land use planning process by a

government appointed reviewer in late 2006, commenters note that mediation has nominally been adopted for land use planning in papers, reports, and a limited 2005 pilot program, but the U.K. has not encouraged mediation in a meaningful way. The current system fails to provide incentives for narrowing issues or encouraging dialogue as parties prepare to argue before the authorities. Among other suggestions, emphasizing the final stages prior to appeal is advocated, where mediation may effectively resolve issues raised by authorities and avoid any appeal, along with a formal pre-appeal protocol.
Planning (UK) (June 27, 2007) (Subscription Required); Smith Institute Report (Ch. 2, pp. 24-33)

Mediation Takes Root in Poland

Mediation has proven effective in Poland since being introduced only eighteen months ago, with more than 200 cases a month now being referred to mediation by civil courts. Looking to the experiences of other European countries and the U.S., a recent legal conference in Warsaw focused on the continuing need for education on the benefits of mediation, and noted that fees paid to professional mediators often fall short of the efforts spent resolving the dispute.
Polish News Bulletin (June 6, 2007) (Subscription Required)

Bangalore Celebrates First Mediation Center

The Indian state of Bangalore is inaugurating its first mediation center in a ceremony to be attended by the Chief Justice of India, Supreme Court judges, and other dignitaries, in what is being called one of the most significant developments in the judicial history of the state. The mediation center is one of a handful in India. The center currently handles civil cases with 57 trained mediators and a success rate of nearly 50%. The High Court plans to train additional mediators from surrounding districts and expand to include minor criminal matters.
Hindu (India) (June 21, 2007) (Subscription Required)

China Emphasizes Voluntary Mediation

China's Supreme Court President recently emphasized the importance of continuing to pursue mediation as an alternative to civil trials, calling for a step-up in mediation work. However, courts should not attempt to meet mediation quotas, but should ensure that mediation remains voluntary and fully respect the will of the litigants.
World News Connection (June 25, 2007) (Subscription Required)