



THE MAYHEW-HITE REPORT

ON DISPUTE RESOLUTION AND THE COURTS

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What is “mediation”?

by Professor Sarah Rudolph Cole

A recent Ohio appellate case illustrates a common mistake courts, contract drafters and mediators make. Members of all three groups fail to use the term “mediation” correctly. The misuse of the term mediation leads to confusion among parties as well as the courts and the general public. Moreover, judicial efforts to determine the meaning of the parties’ terms may have results that defeat parties expectations.

Contract drafting. In *Oliver Design Group v. Westside Deutscher Frauen-Verein*, 2002 WL 31839158 (Ohio Ct. App. 8th Dist. 2002), the parties agreed to “binding mediation” in their contract. Noting that “binding mediation” is an oxymoron, the court determined that the parties intended to mediate rather than arbitrate. As a result, the moving party lost its motion to stay the proceeding while the parties arbitrated the dispute. In *High Valley Homes, Inc. v. Fudge*, 2003 WL 1882261 (Tex. App. 2003), the incorrect use of the term “mediation” in a contract led a party to claim it should have been in mediation rather than arbitration and that, therefore, the court should reverse the arbitration award. Not surprisingly, the Texas Appellate Court rejected the party’s claim, holding that in addition to other indicia that the parties’ intent was to resolve disputes using arbitration, the use of the term “mediation” was accompanied by the word “binding”. The Second Circuit recently interpreted a mediation agreement in which the parties agreed that a “neutral mediator” will render “a tie-breaking vote which will be binding.” *Wolf v. Wolf*, 59 Fed. Appx. 403, 2003 WL 1025378 (2d Cir. 2003). The Second Circuit enforced the mediator’s ruling, never acknowledging the parties’ misuse of the term mediation.

Judicial misuse. Courts, like contract drafters, erroneously use the term “mediation” to describe processes other than mediation. For example, in Tennessee, at least two trial courts have used the terms “mediation” and “binding mediation” to describe a process in which each party meets privately in chambers with the Court to offer testimony, pre-

sent exhibits and other documentation, after which the Court renders a verdict. See, for example, *Team Design v. Gottlieb*, 104 S.W.3d 512 (Tenn. Ct. App. 2002); *Thomas v. Thomas*, 2002 WL 1787950 (Tenn. Ct. App. 2002); and *King v. King*, 2001 Tenn. App. LEXIS 913 at *11 (Tenn. Ct. App. 2001). To ensure that prospective parties understand what mediation entails, misuse of the word should be discouraged, as it was by the appellate courts in these cases.

Mediator misuse. Similarly, problems arise when a court’s designee uses the term inaccurately. In *In re Marriage of Durringer*, 2003 WL 886844 (Cal.App. 4th Dist. 2003), the court had difficulty determining whether the mediator, who was a retired judge, acted as a referee or a mediator when he entered an order that each party would bear its own attorneys’ fees and costs and signed it “mediator.” The court reasoned that if he were acting as a mediator, the order was unenforceable because mediators do not have statutory authority to enter orders. If, by contrast, he was acting as a referee, he did have authority to enter the order. Concluding that the record was insufficiently preserved, the court determined that any argument pertaining to the document was waived. Thus, the court enforced the order. In *In re Paternity of K.R.H.*, 784 N.E.2d 985 (Ind. Ct. App. 2003), an Indiana Court of Appeals held that the Indiana Rules of Alternative Dispute Resolution did not apply even though the trial court had referred to the parties’ negotiation without a mediator as an “informal mediation.” *Id.* at 989. Had the rules applied, the settlement agreement reached through the negotiation would have been invalid because it did not comply with one of the dispute resolution rules.

These cases demonstrate that careful drafting in agreements to mediate, opinions and judgments continues to be a major concern for parties, mediators and courts wishing to resolve disputes outside traditional venues. Courts should continue to emphasize the importance of accurate drafting in decisions involving the misuse of dispute resolution terms, such as “mediation”.

THE OHIO STATE UNIVERSITY
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In This Issue

Court Profile

Cuyahoga County
Page 2

Case Summary

In re Anonymous,
283 F.3d 627
(4th Cir. 2002).
Page 3

Article Summary:
**Federal
Court-Annexed
Mediation
Page 3**

We are pleased to bring you Volume 2, Issue 1 of *The Mayhew-Hite Report on Dispute Resolution and the Courts*, formerly known as *Pass the Gavel*. Due to fiscal constraints, only two more issues of this Report will be printed and mailed. We plan to continue dissemination of the Report via e-mail. If you are interested in receiving the Report by e-mail, please send us an e-mail with your name and e-mail address to: vorysresearch@hotmail.com. Thank you.

Type of Programs:

Arbitration, Traditional Mediation, Business Mediation, Post-Arbitration Mediation

of qualified business mediators for its business mediation program, which includes attorneys with at least ten years of business litigation experience.

with the Court's approval. If a business case is referred to mediation, the parties have the opportunity to refuse mediation and pursue arbitration instead. If the parties choose to mediate, an experienced business mediator meets with the parties to facilitate settlement, similar to the traditional mediation process.

Year Program Started:

In 1989, the Court began a traditional mediation program designed to reduce the number of cases on the Court's docket and to narrow the issues in the cases. Inspired by the success of the traditional mediation program, community businesspersons contacted the ADR department to request mediation services with experienced mediators from the business and legal communities. This interest prompted the development of the Court's business mediation program in July 1996.

Process:

Traditional Mediation Program

The Court typically refers cases where the amount in controversy is less than \$50,000 to arbitration. Parties may nevertheless agree to arbitrate where the amount in controversy is greater than \$50,000. Once the court refers a case to the arbitration department, a mediator evaluates the case to determine its potential for mediation. If the mediator decides that the case would not benefit from mediation, the case continues to arbitration. If the mediator decides that the case would benefit from mediation, the mediator contacts the parties to discuss this option. The parties may then agree to mediate or continue with arbitration. If the parties agree to mediate, the mediator facilitates the settlement discussions. If the case fails to settle through mediation, the case will be arbitrated. The entire mediation/arbitration process occurs within 90 days of referral.

Strengths:

The Court referred 1306 cases to arbitration in 2002. The mediator asked the parties in 1008 (77%) of these cases whether they were interested in mediation. 523 (52%) of the cases ultimately went to mediation. Of the 523 cases, approximately 52% of the cases settled through mediation. The ADR Department's ability to fund its mediation program mainly from the cost savings it experiences by avoiding arbitration is evidence of its success. In addition, the business community's interest in adding services specifically focusing on the business litigant also evidences the public's positive perceptions of this program.

Funding Source:

The Court funds the traditional mediation program predominantly from the money it saves by avoiding the payment of arbitrator fees in the cases that are settled through mediation prior to arbitration. The Court funds the business mediation program from its general ADR fund.

Contact:

For more information regarding the Cuyahoga County Court of Common Pleas ADR Program, contact William Danko, Court Administrator at (216) 442-8560.

Mediators:

The ADR Department employs two experienced mediators in its traditional mediation program and maintains a list

Business Mediation:

The Court may refer any business case to mediation at the case management conference or at the parties' request

Article Summary

Federal Court-Annexed Mediation

Robert Rack, Chief Circuit Mediator for the U.S. Court of Appeals for the Sixth Circuit, offers his thoughts on how to build a quality staff mediation program in his article entitled *Thoughts of a Chief Circuit Mediator on Federal Court-Annexed Mediation*. In this article, Rack discusses the importance of mediator qualifications, and training, and the challenges of supervision and evaluation in ensuring the success of a staff mediation program.

mediation in appellate courts is heavily law based. In addition, Rack has found that an individual must be emotionally mature, exercise good judgment, and have integrity as well as excellent interpersonal skills. Rack contends that it is these qualities that a court should consider when hiring a mediator, rather than focusing on whether the mediator has specific education, training, experience, or subject matter expertise.

Mediator Qualifications

According to Rack, who oversees the Sixth Circuit staff mediation program, a mediator must have both a law degree and good analytical skills to mediate successfully at the federal appellate level because

Training

Once a court hires an individual as a staff mediator, it must have a training program to provide the staff mediator with the appropriate orientation and skills. According to Rack, mediator training pro-

grams serve three important purposes. First, they shorten the mediator's learning curve, enabling them to adapt their skills to the appellate mediation context. Second, training promotes uniformity within the court's mediation program. Third, training serves to acclimate the new mediator to the court's internal values and procedures. This is especially important in court mediation because the public may perceive the mediator as a representative of the court system. In these circumstances, any misuse of power or misapplication of court procedures may reduce public trust in both the mediation program and the court as a whole. Finally, the mediators need to participate in ongoing training to refresh their

Case Summary

In re Anonymous, 283 F.3d 627 (4th Cir. 2002).

Issues: This case considers the scope of mediation confidentiality, whether sanctions are warranted for breaches of confidentiality, whether confidentiality may be waived for future disclosures, and whether a mediator may disclose mediation communications.

Rule: The Fourth Circuit confidentiality rule provides, in part, that, "Information disclosed in the mediation process shall be kept confidential and shall not be disclosed to the judges deciding the appeal or to any other person outside the mediation program participants."

Facts: The Fourth Circuit ordered the parties to mediation. Client, Local Counsel, Current Counsel, the defendant and his attorneys, and the Circuit Mediator negotiated a settlement agreement. The Fourth Circuit subsequently dismissed the appeal. Between the time the settlement agreement was finalized and the dismissal of the appeal, a fee dispute arose between Client and Local Counsel, which they agreed to resolve using Virginia State Bar

(VSB) arbitration. Both Client and Local Counsel submitted to the arbitration board statements describing events that took place during the mediation. Current Counsel, who represented Client in this dispute, also submitted his own statement describing the events that took place during and after the mediation session. Additionally, Local Counsel requested that the Circuit Mediator consent to disclosure of statements he made during the mediation. The Circuit Mediator notified the Fourth Circuit of the request and, in order to determine whether such a disclosure would breach the confidentiality rule, the Client, Local Counsel, and Current Counsel were directed to appear before the Attorney Discipline Panel.

Discussion: The Fourth Circuit rejected the parties' argument that they did not breach the Fourth Circuit's confidentiality requirement because the matters revealed in their submissions were heard in a confidential forum and were not central to the mediated dispute. The Court also rejected the

argument that finding a violation of the confidentiality requirements denied parties due process because prohibiting admission of the submissions would deny them the right to resolve their fee dispute. In rejecting this argument, the Court stated that the Circuit's confidentiality rule does not deprive participants of the right to resolve their dispute. Rather, it simply limits the availability of information obtained during mediation for use in subsequent court proceedings. Although the Court concluded that the participants breached the confidentiality requirement, it declined to impose sanctions, finding that the disclosures were not made in bad faith, did not have a negative impact on the mediated dispute, and had only a limited adverse impact on the mediation process.

The participants then sought approval from the Panel for future disclosures of confidential information, specifically asking the Panel to grant a waiver of confidentiality to permit the VSB arbitrators to consid-

(Continued on back page)

skills and remain current as to evolving mediation techniques.

Supervision and Evaluation

Once the mediator has completed the initial training and is independently mediating disputes, the court needs to monitor both the mediator and the mediation program in order to ensure that the court is providing the most effective program possible. Supervision is particularly important in court-annexed programs to ensure the most efficient use of resources and maintain the reputation of the judicial system sponsoring the program. Yet the need for confidentiality makes supervision and evaluation of mediation difficult. Nevertheless, Rack has found four criteria useful for

monitoring mediators: mediation settlement rates, anecdotal participant reports, participant surveys, and direct observation of the mediators. These methods, when used together, assist a court system in assuring quality in its mediation program.

Benefits of Staff Mediators

A mediation program with well-trained staff mediators offers many benefits to the public. For instance, staff programs create a high degree of confidence in mediator neutrality. Staff mediation programs also enable parties who might otherwise be unable to pay for high quality mediation services to receive them. In order to achieve these benefits, however, the court must ensure that it employs

individuals with potential for converting all their experiences into excellence. Thus, court-sponsored programs should establish hiring criteria that focus on the qualities a mediator must have in order to be effective. Once the court establishes these requirements, it can maintain high quality mediation services through training, monitoring, and occasional evaluation of its mediators. By following this plan, courts can ensure that they are offering the best services possible to the participants.

Robert W. Rack, Jr. *Thoughts of a Chief Circuit Mediator on Federal Court-Annexed Mediation*, can be found in 17 Ohio St. J. on Disp. Resol. 609 (2002).

er their previously submitted statements. The Court employed a balancing test to determine whether waiver was appropriate, stating that disclosure should not be allowed unless "manifest injustice" would result from non-disclosure. The Court concluded that the parties could disclose limited confidential information to the arbitration panel because disclosure would occur in a confidential forum with party consent, was important to the resolution of the dispute, and would only involve disclosure of the mediation communications that related to the expense dispute.

In deciding whether to allow the Circuit Mediator to disclose confidential information, the Panel acknowledged that this posed a significantly greater concern than

allowing the other participants to disclose certain information. Permitting the mediator to disclose confidential communications would undermine the foundation of the mediation process. Consequently, the Court concluded that the Circuit Mediator could only disclose information where it would otherwise result in a "manifest injustice," was "indispensable to resolution of an important subsequent dispute, and [was] not going to damage [the Court's] mediation program." Applying this test, the Court concluded that the case could be resolved without the Circuit Mediator's disclosure of confidential information and, in addition, the mediation program might be damaged if such disclosure were permitted because one of the parties would then view the mediator as biased.

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