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Alternatives

TO THE HIGH COST OF LITIGATION

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Mediators' Alert

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Mediator ethics presently are governed by a potpourri of state statutes and provider rules—with no supervising body charged with oversight. IMI-certified mediators will be required to demonstrate leadership and act as mentors in their field—first-generation requirements that may be revisited as the practice becomes a profession.

FEEDBACK WILL BE CONTROVERSIAL

Feedback forms will be available to users who will be asked to complete them. The feedback will be summarized by an IMI assessor and posted on the mediator's IMI website biography. Negative feedback will not be included unless a consistent pattern is shown.

Without a doubt, the feedback proposal will be highly controversial as feedback will inform third parties about style and competency. Mediators presently work behind a scrim of privacy. They rarely advertise their preferred style—facilitative, evaluative, transformative, etc.—partly because good mediators use a fluid range of styles in the course of a single mediation, and partly because mediators are unused to and uncomfortable with self-description—yet users are increasingly asking mediators before hire what style they use. AAA mediator website profiles now include a mediator's self-assessment of his or her style.

Competency is an even more highly charged issue. There is no universal agreement on what constitutes mediator competence. Mediators rightly fear that a failed mediation will result in a disgruntled party report. The harder a mediation, for whatever reason, the greater is the likelihood of non-settlement. Presumably, the IMI internal feedback assessment will take into account the nuanced complexities of feedback from a user in a mediation that did not resolve the dispute.

There has been to date no international push to publish lists of qualified mediators meeting rigorous standards put into play by a foundation operating globally. That this foundation is funded by *users* makes it impossible to ignore. The draft standards are receiving 500 web site hits daily, and already have generated vocal bravos as a way to make a cottage industry a profession with standards and accountability. The standards also have generated heated opposition as being unnecessary, intrusive, impossibly cumbersome and bureaucratic.

There are many in the mediation community who will vigorously oppose any regulation as a matter of principle. Others will ignore regulation out of indifference, or the assumption that if it isn't broken, then it doesn't need fixing.

For decades a vocal few have suggested we have an operating ethos and a way of assuring the delivery of quality services, but our inherent diversity and unwillingness to evolve into a defined and definable profession dissuaded us from the work involved. Our clients—the companies we look to for business—have now shouldered the task. They need greater transparency and wider access. The clients need to define us and to have a better understanding of who we are, what we do, and why we are good at what we do. Their claim is that this effort will give mediators greater acceptance and, therefore, wider use in commercial disputes.

We may not like our inner sanctum invaded by the people paying our fees, but we need pay attention if we want a voice in our own future. The IMI has asked for comment. Neutrals should make it a point to read, reflect and comment upon the Draft Standards at the IMI site.

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UPDATE: DESPITE MEDIATION-RELATED INCARCERATION, *GIRLS GONE WILD* FOUNDER IS HEADED FOR MORE ADR

A federal judge has rejected a recusal motion from the maker of the *Girls Gone Wild* videos, who challenged the judge's impartiality for first ordering mediation, and then sending the producer to jail for contempt based on his ADR conduct.

That means the civil case against still-incarcerated Joseph Francis will proceed.

And, surprisingly, the case will go back to mediation.

In an order accompanying the Dec. 19 opinion, Panama City, Fla.-based U.S. District Court Judge Richard Smoak, of Florida's Northern District, set an Aug. 4 trial date, and told the parties to try mediation again.

Smoak ordered a May 30 discovery deadline, dispositive motions by June 9, and mediation by June 27, with a "mediation report" deadline six days later.

In his 22-page opinion, Smoak strongly defends his record as a mediation supporter, and rejects claims that he tried to force Francis to settle before sending Francis to jail for contempt.

The defense charges stem from a suit brought by Francis' video subjects. The lead plaintiff alleges that she was a 16-year-old high school sophomore when she was coerced to expose herself for a spring break film Francis made and distributed. The DVD featured plaintiff Brittany Pitts on its cover, according to the opinion.

The support for the defense motion included Los Angeles attorney Michael Young's 2007 *Alternatives* article, "Mediation Gone Wild: How Three Minutes Put an ADR Party Behind Bars," 25 *Alternatives* 97 (June 2007)(available at WileyInterscience.com). Young wrote that Smoak's moves intruded into the mediation process and hurt ADR.

In his December opinion, Judge Smoak addresses and pointedly rejects Young's contentions.

Francis's federal court attorney, Jean Marie Downing, of Panama City Beach, Fla., didn't return a call requesting comment. Plaintiffs' attorney Mark Arden Casto, of Columbus, Ga.'s Bennett and Casto PC, declined comment, but confirmed Smoak's discovery, mediation and trial order.

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Francis contended that Smoak should have been disqualified because the judge refused to consider "less onerous alternatives" than incarceration for compelling compliance with the mediation order. Francis also claimed that comments indicated the judge's impartiality, as well as Smoak's requirement that Francis read a victims' impact statement on behalf of his company, Mantra Films Inc. The company had pled guilty to charges that it sold sexually explicit DVDs without following age documentation labeling laws—a federal criminal offense.

Smoak ordered Francis to jail based on his conduct at two mediation sessions held over three days a year ago. The first sessions, on March 21-22, 2007, ended with a plaintiffs' motion for sanctions against Francis. Two hearings conducted by Smoak focusing on Francis's mediation conduct resulted in an order to pay the plaintiffs' attorneys, and another mediation order.

After the second mediation, Smoak, who had suspended jail time for Francis, ordered Francis to jail.

Smoak addresses Francis's impartiality charges point by point in the December opinion—and gets personal in his rebuttal. The judge begins his analysis in *Pitts v. Francis,* et.al, Case No. 5:07cv169-RS-EMT, 2007 U.S. Dist. Lexis 93047 (Dec. 19, 2007):

> In my more than 34-year history as a trial attorney and judge, the pending motion to disqualify, filed by Joe Francis and *Girls Gone Wild*, is the first time that anyone represented by counsel has ever filed a motion questioning my ethics or moved to disqualify me from presiding over a case. I have never had, nor do I currently harbor, any animosity, bias, or prejudice toward [Francis and his company] that would cause me to question my ability to fairly and impartially preside over this case.

Smoak carefully notes that Francis didn't charge that the judge was biased, but rather claimed that "a reasonable, objective person with knowledge of all facts would *perceive* [the judge] as biased." (Emphasis is in the opinion.)

He writes that since the defendants didn't make a flat-out bias claim, they didn't have standing to request disqualification. Smoak holds that the contention "only that the public or some hypothetical, non-existent individual who is not a party to the case perceives [Smoak] as biased" is insufficient.

Smoak is even more adamant about the specific claims. "Although *Girls Gone Wild* contends in the pending motion that I have improperly acquired extrajudicial knowledge about it that has resulted in bias against it," the judge writes, "*Girls Gone Wild* incredibly attaches, as exhibits to the motion, the very same extrajudicial information—in the form of newspaper articles, an internet blog entry, and a law journal article—that it preaches is improper."

Smoak states that the exhibits "are wholly *irrelevant* to the merits of the motion." (Emphasis is in the opinion.)

* * *

First, Smoak notes that a blog entry by a Panama City, Fla., *News Herald* reporter who has followed the case, submitted by Francis, actually supports the judge's position. The reporter notes that a "Settle or Jail" headline on his print story about the case is a misconception—"almost a catchphrase at this point that is perpetuating itself."

According to the Smoak opinion, the reporter appears to recognize that the judge didn't force a settlement, but instead ordered Francis to mediate in good faith after Smoak "found him in civil contempt for exploiting a court-ordered mediation proceeding to threaten and abuse the other party in a civil lawsuit."

Smoak quotes heavily from court transcripts to back the ruling that the blog report doesn't support the defense motion.

Moving to the civil contempt ruling and again quoting heavily on transcripts from an evidentiary hearing, Smoak writes,

> Simply put, Francis' behavior was not mediation. It was not posturing. It was *violent.* Anyone attending that mediation, including Joe Francis himself, could have been injured. I will not permit a litigant in this *federal* court to exploit an order issued by me for the sole purpose of abusing an

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Cartoon by Leo Cullum

"Remember, to 'Out Lawyer' them we'll have to 'Out Legal Fee' them."

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threatening another party. (Emphasis is in the opinion.)

* * *

Citing the *Alternatives* article that Francis filed in support of his disqualification motion, Smoak analyzes three points made by author Michael Young, noting that his analysis "may further clarify" the rulings:

- On the admissibility of mediation statements and conduct, Smoak concludes that public policy doesn't "protect as privileged" Francis's conduct. "As a former mediator," writes Smoak, "I have the utmost respect for the confidentiality of the mediation process. Indeed, my own scheduling and mediation order stated that the mediation was to be confidential. . . . However, the evidence conclusively demonstrated that this so-called 'mediation' was a sham."
- On Young's focus on voluntariness, questioning the propriety of Smoak's mediation order, the judge writes that federal and Florida civil procedure rules obligate courts and litigants to consider settlement and ADR techniques, and Francis didn't object to the mediation.
- On Young's comment that the plaintiffs' sanction motion indicates refusing to negotiate must be done "politely, without being a jackass," Smoak counters, "I do not agree that a party is necessarily required to be 'polite' at a mediation. As a trial attorney for 32 years, I have attended numerous emotionally charged mediations. . . . After all, litigants attend a mediation because they are involved in a *dispute.* Thus, while it may be unreasonable to expect litigants to be 'polite' to each other, it is wholly improper and unacceptable for a litigant to behave in such a way that physical violence becomes a real possibility. In other words, Francis' behavior was far worse than 'impolite'–it was dangerous." (Emphasis is in the opinion.)

In an E-mail response to *Alternatives,* Michael Young, a partner at Los Angeles' Weston, Benshoof, Rochefort, Rubalcava & MacCuish LLP, states: "I was surprised, but pleased, to see that Judge Smoak took the effort to respond to the points raised in the article. I think it shows that the judge recognized both the importance of mediation confidentiality, and how closely his order cut to the edge of legal propriety."

But, he continues, the length of Smoak's opinion to make the argument that he isn't biased "does make one question whether he was really just trying to convince himself."

'It Was Violent'

The news: The *Girls Gone Wild* producer, sent to prison for his mediation conduct, asks a federal judge to recuse himself.

The ruling: No recusal, as Judge Richard Smoak staunchly defends his ethics, legal reasoning, and mediation bona fides.

The stunner: More mediation is ordered.

Young states that he believes Smoak's contentions for remaining in the case fail, noting he is most concerned about the "judge's apparent failure or refusal to appreciate that the power of mediation as a peacemaking process comes from its private, consensual, and voluntary nature."

Young adds that the fact that the mediation was "'court-sanctioned' does not transform the process into something new or different that authorizes judicial intervention and interference. Nor does it allow a judge to compel a party to 'voluntarily' settle a case. Judge Smoak claims to have been 'a former mediator' who holds the 'utmost respect for the confidentiality of the mediation process.' His actions, however, speak loudly to the contrary."

In his December opinion, after Smoak disposes with the media reports, the bulk of the opinion's second half analyzes the need for incarceration; Francis's objections to orders to appear; and case law surrounding judicial disqualification. Smoak concludes with 10 points that emphasize why the defense motion was wrong on its fact interpretations, and the law, in dismissing the disqualification motion.

* * *

While Frances's incarceration in Florida continues after stops in Nevada and Oklahoma prisons, nearing a year in jail, the continuing civil suit before Smoak arguably is one of his lesser worries. He's facing criminal child pornography charges in Florida, and his defense attorneys—who are now led by Miami attorney Roy Black, a name partner at Black, Srebnick, Kornspan & Stumpf, P.A., known for his frequent television appearances and clients including William Kennedy Smith and Rush Limbaugh—have been unable to get him released despite repeated bail motions.

While the mediation conduct resulted in his imprisonment, Francis has stayed there because prescription medications were found in his cell, and because he's considered a flight risk. He was denied bail for the fourth time in late January. See David Angier, "Francis Again Denied Bond," *News Herald* [Panama City, Fla.] (Jan. 25, 2008)(available at www.newsherald.com).

In part, Francis's legal problems have become his career. His website, www.meetjoefrancis.com, prominently features a lengthy diatribe about his alleged victimization at the hands of Smoak as well as the Florida state prosecutors and courts. He presents his side of the case and even champions ADR by including extensive analysis of how mediation is supposed to work. He solicits backers with CNN clips, extensive discourse on a variety of U.S. Constitution provisions he believes apply to his case, court briefs, and Michael Young's *Alternatives* article.

"People have said a lot of colorful things about me, not all of which are true, and certainly not all of which are flatter-

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ing," writes Francis on his home page. "One thing I do know for sure, for example, is that I'm not a criminal."

None of this appears to be bad for Francis's real business. As the March *Alternatives* went to press, *Advertising Age* reported that *Girls Gone Wild* announced a new bimonthly magazine version of its offerings, priced at $9.99. Each issue also will contain a DVD. The magazine launches on April 15.

SHORT CASE, LONG TRAIL: NEW YORK DIVORCE MATTER MAY HURT MEDIATION CONFIDENTIALITY

A minuscule 363-word appellate division opinion from the rural western part of New York state last fall, refusing to quash a subpoena directed at a mediator in a divorce matter, is provoking broad concerns about ADR confidentiality.

As a result, some are pushing for renewed efforts to pass the Uniform Mediation Act. Others want court rules changed. "We've got to get clarity," says Lela P. Love, director of the Kukin Program for Conflict Resolution at New York City's Benjamin N. Cardozo School of Law. "This case leaves us wide open."

And with lawyers being lawyers, the case, *Hauzinger v. Hauzinger,* No. 918 CA 07-00659 (N.Y. A.D. 4th Dept. Sept. 28, 2007)(available at www.courts.state.ny.us/ad4/Court/Decisions/2007/09-28-07/PDF/0918.pdf), has some mediation veterans taking an opposing view, suggesting that the decision helps solidify ADR's place in the judicial scheme by clarifying its relationship with basic civil procedure rules.

The potential for courts to drag neutrals into post-ADR litigation as a result of *Hauzinger* is narrowly focused, for now, on New York's divorce mediators. Many of the practioners indeed aren't lawyers, and view the terse decision as a threat to their profession.

The New York State Council on Divorce Mediation, a Garden City, N.Y., nonprofit professional group that accredits neutrals, is apoplectic. Its members are speaking out, and readying to lobby the state legislature for law changes and the courts for rules changes. Moreover, the council has taken on the representation of Olean, N.Y., attorney Carl Vahl, the *Hauzinger* divorce mediator who sought to have an order for a deposition appearance, and a subpoena of his mediation records, quashed.

Vahl had a confidentiality agreement with both parties, who were unrepresented.

> **'There needs to be a balance, and I don't think in New York we have that measure of balance.'**

The *Hauzinger* appellate panel backed the trial court decision to override the agreement, and agreed with the refusal to strike the subpoena, on public policy grounds.

So far, the council has been successful in its work on Vahl's behalf. In its first move in January, the group's lawyers got a Jan. 23 stay of Vahl's deposition, just one day before he was scheduled to appear. The council about a week later filed a motion asking the appellate court for reargument, and was considering an eventual cert petition to the New York Court of Appeals, the state's highest court.

The group has set up a web page to follow the case, available at http://nyscdm.wordpress.com.

The defendant wife of a divorcing couple had subpoenaed Vahl and his records. The Cattaraugus County, N.Y., couple had no counsel when sitting with Vahl in December 2004. The mediation session resulted in a signed separation agreement.

The woman later reneged, and sought "to establish the circumstances surrounding the execution of the separation agreement," according to the September appellate opinion. State Supreme Court Acting Judge Michael L. Nenno issued the subpoena to Vahl on July 20, 2006, which a five-judge appellate panel upheld in the memorandum and order last fall. (The Supreme Court is New York state's trial-level court.)

The divorce mediation council's president, Rod Wells, a nonlawyer practitioner in Cornwall, N.Y., says the case has resonated among ADR practitioners across disciplines and around the country because the Appellate Division disregarded mediation confidentiality almost without analysis. The opinion text barely fills a page.

Practitioners in other areas, including commercial matters, he says, are interested in *Hauzinger* because of the potential for previously confidential mediation processes, private and court-connected, to be subject to discovery and discussion in open court. "It is worse than a slippery slope," says Wells. "We have hit rock bottom."

Moreover, Wells and others suggests that the *Hauzinger* subpoena, directed at a sophisticated attorney-mediator who also has a litigation practice, could ramp up calls to invade matters involving nonattorney divorce mediators.

That, he says, could trash divorce mediation entirely. "There needs to be a balance," he says, "and I don't think in New York we have that measure of balance."

One solution that Wells' group supports, and is getting attention from the New York Dispute Resolution Association, a community mediation group, and others, is the Uniform Mediation Act. A bill proposing the UMA, which contains a mediation communications confidentiality provision, was introduced in January for the second time in the New York Legislature. Bill No. S01967. The UMA has been adopted in twelve states and the District of Columbia.

On Feb. 6, the New York City Bar Association's Alternative Dispute Resolution Committee discussed *Hauzinger* at length, and in a related move, formed a UMA subcommittee. "We had looked at the UMA in the past," says committee chairman Daniel M. Weitz, "and in light of

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Hauzinger, we are looking at it again."

But Weitz, who is ADR coordinator for the New York state court system, emphasizes that there is no agreed-upon committee path for addressing *Hauzinger*—if anything. "There's no consensus on it," he says, "and a difference of opinion on what its impact actually is."

A well-attended Jan. 17 meeting at the John Jay College of Criminal Justice, part of the City University of New York, exhibited the high interest level, and divergent opinions. "It's a really hot issue," says Julie Denny, who is president of the Association for Conflict Resolution's Greater New York Chapter, which sponsored the *Hauzinger* event.

Denny also emphasizes that the participants' and attendees' views were diverse, and not everyone believes the uniform act is the answer to confidentiality issues. Andrew Gerber, a mediator in Dobbs Ferry, N.Y., who, like Rod Wells, was a John Jay panelist, says, "I don't agree with those who think *Hauzinger* represents an unfortunate departure from the current law. I believe, on the contrary, that *Hauzinger* reflects what the law really is." [A live recording of the John Jay College event can be heard on the New York State Dispute Resolution Association's web site at www.nysdra.org/M3U/confidentiality.m3u.]

Gerber, who is former senior vice president and general counsel at Columbia House, explains that mediation cannot nullify civil procedure rules, but must coexist. "You can't properly contest a subpoena just because it deals with a matter that the subject of which was mediation," he says. "You can't properly anticipate the questions and rule in advance."

Rod Wells notes that even the UMA allows mediation discovery in "egregious circumstances." The bill under consideration by the New York State Legislature allows confidentiality subject to other state laws and rules, and would permit mediators to disclose mediation communications "evidencing abuse, neglect, abandonment, or exploitation of an individual to a public agency responsible for protecting individuals against such mistreatment."

"I worry about unrepresented divorce mediations," counters Andrew Gerber. "I do think it's appropriate when there is a plausible claim that an unrepresented party has been mistreated in a mediated settlement, the mediator should be subject to examination and discovery on what happened."

Julie Denny says that her organization takes has no position on *Hauzinger* or the UMA as a solution to the issues the case raises. But, says Denny, who is president of Resolutions, a mediation provider in Princeton, N.J., "If it's important to maintain confidentiality, then it's important to maintain standards—and then, you have to move toward certification."

"Certification is the key," she continues, "and part of what came out of that [John Jay] panel. Some are opposed to certification, however, because there are so many different mediation models." National standards should be adopted, says Denny, and the profession must recommend standards that can accommodate the variety of mediation styles.

Cardozo Law Prof. Lela Love, who also participated in the John Jay program, points out that New York Judiciary Law Article 21-A, Section 849(b)6. already provides strict confidentiality for community dispute resolution centers' programs, but the *Hauzinger* panel didn't extend the law to divorce cases. "Not being able to explain confidentiality in not-really-clear-and-certain terms has got to hurt the process," she says. "*Hauzinger* made this sort of a mush in New York."

The veteran mediator at the heart of the case, Carl Vahl, says that he had nothing to hide about his conduct in the mediation, and he is simply upholding his view of the sanctity of confidentiality principles.

The appellate division decision, says Vahl, "should be a call to arms for ADR professionals to get the UMA passed in New York." Vahl logged onto mediate.com about a month after the decision, and blasted the Appellate Division's failure to reverse.

Vahl says he fears contradictory decisions in New York counties when faced with motions based on *Hauzinger* that will hurt mediation use, parties, and ultimately, the justice system. "It's unfortunate," he says, "but judges are invested in the adversarial system. . . . Mediation isn't an 'alternative.' It should be the first option.

"But," he sighs, "that's not the way it works."

Subpoena Upheld

The issue: A New York appeals court agrees that a mediator will have to be deposed, and bring his records.

The problem: An almost-classic textbook threat to mediation confidentiality.

The contra: Civ pro law looks pretty clear on this. Just how slippery is this slope?

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