Mediators’ Alert

(continued from page 65)

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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ADR BRIEFS • ADR BRIEFS • ADR BRIEFS

UPDATE: DESPITE MEDIATION-RELATED INCARCERATION, GIRLS GONE WILD FOUNDER ISヘADED 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 impar-tiality 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.
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.


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

(continued on next page)
Jonathan Weston, a partner at Los Angeles’

throughput another party. (Emphasis

is in the opinion.)

* * *

Citing the Alternatives article that Francis

filed in support of his disqualification mo-

dition, Smoak analyzes three points made by

author Michael Young, noting that his

analysis “may further clarify” the rulings:

• On the admissibility of mediation state-

ments and conduct, Smoak concludes

that public policy doesn’t “protect as

privileged” Francis’s conduct. “As a for-

mer mediator,” writes Smoak, “I have

the utmost respect for the confidential-

ity of the mediation process. Indeed,

my own scheduling and mediation or-

der stated that the mediation was to be

confidential... However, the evi-

dence 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

oblige 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, with-

out being a jackass,” Smoak counters,

“I do not agree that a party is necessar-

ily required to be ‘polite’ at a mediation.

As a trial attorney for 32 years, I have

attended numerous emotionally

charged mediations... After all, litiga-

ants 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 liti-

gant to behave in such a way that phy-

sical violence becomes a real possibility.

In other words, Francis’ behavior was

far worse than ‘impolite’—it was dan-

gerous.” (Emphasis is in the opinion.)

In an E-mail response to Alternatives,

Michael Young, a partner at Los Angeles’

While Francis’s incarceration in Florida

continues after stops in Nevada and Okla-

homa prisons, nearing a year in jail, the

continuing civil suit before Smoak ar-

guably is one of his lesser worries. He’s fac-

ing 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, Ko-

rnspan & Stumpf, P.A., known for his fre-

quent television appearances and clients in-

cluding William Kennedy Smith and Rush

Limbaugh—have been unable to get him

released despite repeated bail motions.

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 ap-

preciate that the power of mediation as a

peacemaking process comes from its pri-

vate, consensual, and voluntary nature.”

Young adds that the fact that the medi-

ation was “court-sanctioned” does not

transform the process into something new

or different that authorizes judicial inter-

vention 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 ‘ut-

most 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 surround-

ing judicial disqualification. Smoak con-

cludes with 10 points that emphasize why

the defense motion was wrong on its fact

interpretations, and the law, in dismissing

the disqualification motion.

* * *

It was violent

The news: The Girls Gone Wild

producer, sent to prison for his

mediation conduct, asks a fed-

eral judge to recuse himself.

The ruling: No recusal, as Judge

Richard Smoak staunchly de-

fends his ethics, legal reasoning,

and mediation bona fides.

The stunner: More mediation is

ordered.

Young

In

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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 practitioners 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., non-profit 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. 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.”

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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 website at www.nysdra.org/M3JU/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 is 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.”

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