Alternatives

TO THE HIGH COST OF LITIGATION

INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION & RESOLUTION VOL. 25 NO. 6 JUNE 2007

DIGEST

ADR PROCESS DESIGN

Michael D. Young, of Los Angeles, read that soft-porn producer Joe Francis was put in jail in Florida for his conduct at a civil mediation during a federal suit Francis was defending. The suit alleged that Francis used underage girls in his notorious Girls Gone Wild videos. Young tracked down the documents in the case, and provides *Alternatives*' readers with a full chronology of the events leading to Francis's Mediation Spring Break in a federal penitentiary. The reach of the judge's rulings about the mediation raises many questions .....**Page 97**

CPR NEWS

Details on a CPR member's survey that found mediation to be the top ADR process choice. Also, CPR's National Task Force on Diversity in ADR releases its first product, an audit tool that companies can use to gauges law firms' ability to deploy ADR processes.....**Page 98**

ADR SYSTEMS DESIGN

Assuming a comfort level by lawyers and companies with conflict resolution processes, five top conflict resolution authorities have joined together to discuss the next step. They believe that sophisticated ADR practice will be characterized by anticipatory dispute prevention.....**Page 99**

ADR BRIEFS

Follow-ups on April items: Two primary ADR domains each sold for six-figure sums, though the ADR provider/listings company that they previously supported is still on the market. And two more U.S. Supreme Court justices include testimony before a Congressional committee on ADR luring judges away from the bench to support their calls for higher pay .....**Page 109**

DEPARTMENTS

CPR
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Mediation Gone Wild: How Three Minutes Put an ADR Party Behind Bars

BY MICHAEL D. YOUNG

Mediation may not be confidential enough as far as Girls Gone Wild founder and auteur Joseph Francis is concerned. As a result of rather unusual conduct at a "confidential" mediation session, the 34-year-old Francis found himself first in court, compelled to disclose mediation communications, and then behind bars, an unwilling guest of the Federal Bureau of Prisons.

ADR PROCESS DESIGN

Francis' unusual mediation odyssey is an interesting story, if a bit tawdry and salacious. But for students of alternative dispute resolution, it also raises fundamental–and captivating–questions dealing with mediation confidentiality limits, the meaning of negotiation "bad faith," and the power of the courts to control private mediation and imprison its participants.

The case may even challenge the notion of "voluntariness," a generally sacrosanct aspect of mediation.

Be warned: The events described in this article, which come from the federal court's Pacer system, involve raw language that some may consider offensive. The court documents obtained are posted, following the chronology below, at www.wbcounsel.com/mediation. Throughout this tale, Practice Notes are set off in boldface from the numerous mediation issues raised by the facts.

The story begins in Panama City Beach, Fla., during Spring Break 2003, where Francis set up shop to film another in his series of lucrative *Girls Gone Wild* soft porn videos, a staple of late night cable advertising and talk show monologue punch lines. As alleged in the complaint filed by unidentified minor girls and their parents, Francis and his colleagues rented local houses and condominiums in order to entice underage girls to bare their breasts, and engage in various sexual acts, for the cameras. Alcohol allegedly was involved. A civil action, *Doe v. Francis,* No. 5:03cv260 (FL ND), was filed about the same time as a parallel criminal action was asserted against the same defendants, which include Francis and his companies.

Little had happened in the civil action, which had been stayed for two years due to the pending criminal case. The fateful events were placed into motion by U.S. District Court Judge Richard Smoak last October, when he ordered the parties to mediation.

Because some of the mediation order's terms play prominent roles in Francis' jailing, the order is worth examining. Smoak "directed" the parties to jointly select a mediator, with the mediation fee to be shared equally by the parties.

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Mediation Gone Wild

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[Practice Note: Constitutional issues arise immediately: Can a court lawfully compel a plaintiff to spend money on a private dispute resolution process? A recent California opinion said no. See *Jeld-Wen Inc. v. Superior Court,* 146 Cal App 4th 536, 543, 53 Cal. Rptr. 3d 115 (2007).]

Smoak next identified those individuals who were required to attend the mediation, which included all parties. He declared that the "[f]ailure of any person to attend the mediation conference as required shall result in the imposition of sanctions." The order also contained two other provisions worth mentioning: First, it established that "[t]he mediator shall have authority to control the procedure to be followed in mediation. . . ." Second, it reaffirmed that, "All discussions, representations, and statements made at the mediation conference shall be off the record and privileged as settlement negotiations."

The parties selected Dominic M. Caparello, of Tallahasee, Fla.'s Messer, Caparello & Self, P.A, to mediate, and agreed on a two-day session beginning on March 21.

FROM MEDIATION TO PRISON

The stage was now set for the events that ultimately would imprison Francis for his mediation conduct. This chronology follows the paper trail filed with the court.

March 21 and 22: The parties came together at the mediator's private offices for the two-day confidential mediation session. The details of this session were soon to be disclosed and debated by the parties, their counsel, and the court.

To be sure, the case was not resolved at this time.

March 23: The day after the mediation, the plaintiffs filed a motion for sanctions against Francis. In their papers, the plaintiffs explained how the parties had agreed to skip the traditional joint session, wisely deciding not to have the underage women and Francis in the room together. Instead, the parties agreed to allow the attorneys for one side to make a presentation to the attorneys and clients of the other side. Of course, before that could happen, the parties actually had to be present.

This is where the story gets interesting. According to the plaintiffs, they arrived at the mediation on time, despite missing school and traveling from a number of different states. But where were Francis and his defense team?

According to what the plaintiffs were told, Francis' "private jet was 'running late' because Francis' [Los Angeles] counsel . . . had a hearing that had run late the night before." Four hours later, the defense team arrived—inexplicably without the Los Angeles attorney—and was escorted to its private room.

The motion papers pick up the story from here, with the typos left in:

> Francis was wearing sweat shorts, a backwards baseball cap, and was barefoot. He was playing on his electronic devise. As [plaintiffs' counsel] began his presentation, Francis put his bare, dirty feet up on the table, facing plaintiffs' counsel. [Plaintiffs' counsel] said four words, "Plaintiffs were minor girls," when Francis barked, "Are the girls minors now?" Continuing, [Plaintiffs' counsel] said, "Plaintiffs are minor girls who were severely harmed by Defendant."
>
> Francis then erupted. "Don't expect to get a fucking dime—not one fucking dime!" This was Francis' mantra which he repeated, about fifteen times, during his tantrum that ensued.
>
> "I hold the purse strings. I will not settle this case, at all. I am only here because the court is making me be here!" Francis shouted. Seeing there was to be no mediation in good faith, Plaintiffs attorneys got up to leave the room. Less than three minutes had passed, almost completely taken up by Francis' outburst.
>
> As plaintiffs' attorneys were leaving, Francis' threats escalated. "We will bury you and your clients!" Francis threatened.
>
> As [Plaintiffs' counsel] was walking out of the room, Francis got up and faced off with [Plaintiffs' counsel]. Right in [Plaintiffs' counsel's] face, Francis barked, "I'm going to ruin you, your clients, and all of your ambulance chasing partners!"
>
> Francis' aggressive move and threats to "bury" and "ruin" [Plaintiffs' counsel] were clearly an assault on [Plaintiffs' counsel] and clearly intended to and did prevent the mediation from ever beginning.
>
> As a result of Francis' assault on [Plaintiffs' counsel], no mediation as to Francis as an individual defendant ever occurred.
>
> Francis then made the only offer he was to make that day, "suck my dick," Francis shouted repeatedly, as plaintiffs' counsel left the mediation room.

Translation: Francis and his attorneys claimed that the women lied about their age in 2003.

According to the plaintiffs' motion, the mediation continued with respect to the corporate defendants. But the "Plaintiffs told Defense counsel that they were only moving forward with the corporations and would not move forward with Francis." The papers then continued with a litany of other alleged Francis pretrial shenanigans.

Among other things, the motion sought an order that Francis behave civilly and pay sanctions including travel expenses, lost wages, and attorneys fees, for all plaintiffs associated with the mediation.

[There's more on the facts, but first, a number of questions are already demanding attention: How is it that this information is even admissible? Not only is mediation confidential by statute and convention, Judge Smoak's mediation order expressly vested all mediation process "control" to the neutral, and confirmed that all statements in the mediation were to be "off the record" and "privileged." And where was the mediator during this tirade? Did he step in and put an end to it? Was he able to continue the mediation in private caucus? And after Francis' outburst, wasn't it the *plaintiffs* who refused to negotiate further with Francis as an individual? Nowhere do the plaintiffs assert that Francis himself refused to negotiate with plaintiffs. And while rude and abusive, can't one argue that Francis' tirade was a negotiation tactic designed to reduce the

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plaintiffs' expectations—perhaps not an effective tactic, but a tactic nevertheless? Some answers follow.]

CONFIDENTIALITY EXCEPTION SOUGHT

The admissibility issue was addressed in the motion. The plaintiffs sought to find an exception to mediation confidentiality under a Florida statute that holds all mediation communications to be confidential "except when violence is threatened." Sec. 44.405 Fla. Stat. 2006. According to the plaintiffs, because violence was threatened, "none of the statements that Francis made during the mediation were confidential."

[Was violence really threatened here? Or were the plaintiffs simply choosing to interpret statements like "I will bury you" as "violent" to give them the vehicle to get Francis' mediation behavior before the judge? And even if this was violence, does that mean none of Francis' statements can remain confidential? Or just the ones relating to the threat? Where does the court get its power to sanction a party for conduct that is completely within a private and confidential *alternative* dispute resolution process?]

The plaintiffs recognized there was no express authority empowering a court to sanction a party for behavior in a confidential mediation process. Accordingly, they rested their sanctions request on what they considered to be the court's "implied powers" to impose sanctions on parties that abuse "the judicial process, whether or not the abusive conduct occurs in the courtroom."

March 23: The plaintiffs' request was heard clearly by the court, which conducted an immediate hearing on the motion. While ordering the parties to appear for an evidentiary hearing on March 30, Judge Smoak left no mistake as to what his tentative views were. Despite a request by *both* sides that the matter be kept under seal, Smoak refused, commenting "I am not going to put things under seal to insulate Mr. Francis from his misbehavior. He is the author of his own misfortune in that regard."

Then, when faced with the defense argument that mediation confidentiality precluded admitting the plaintiffs' evidence, and the Florida statutes' "violence" exception didn't apply, the court ordered a briefing on the choice-of-law issue. Smoak flatly stated, "I will not permit Mr. Francis to hide behind [the] Florida Mediation Code to avoid sanctions for violation of my order."

With respect to the evidentiary hearing, Smoak directed Francis to appear in person, and "to be dressed in proper business attire," adding, "And you are to send him to etiquette or charm school in the meantime. He embarrassed himself when he was here for his corporation's plea."

But Smoak was just warming up. Directing his comments to Francis' counsel, he said, "If I find that this [alleged mediation behavior] is true, you need to tell [Francis] to bring his bag, because the sanction may well involve that he will go to jail. . . . Mr. Francis may have gone too far this time."

The judge concluded the hearing by again ruminating about an appropriate "coercive sanction . . . if it is warranted for Mr. Francis," to "ensure that he properly follows the order to mediate." Opining that financial sanctions would not get "anybody's attention, given the financial resources of Mr. Francis and his enterprises," the judge suggested that all he was left with "as an effective sanction, both for punishment and coercion, is for him to go into custody."

[Is coercion really an appropriate goal when attempting to explore mediation as a means of resolving a litigated dispute? What happened to mediation being a voluntary process aimed at allowing the parties to safely and creatively search for a negotiated resolution? Isn't coercion the antithesis of mediation? And should courts, which are properly the forum for a coercive dispute resolution process, be in the business of attempting to coerce parties to settle cases?]

'COLORFUL,' NOT 'OBNOXIOUS'

March 28: The defendants filed their opposition to the sanctions motion and, not surprisingly, focused on confidentiality and the inapplicability of the Florida mediation rules' violence exception. Stressing the portions of the court's original mediation order directing the mediation to be "off the record and privileged as settlement negotiations," the defendants characterized the "obnoxious" behavior as merely "colorful language to a roomful of seasoned trial lawyers, after hearing the mediator's opening remarks that by rule would have included instruction that the mediation and all statements made by both sides were strictly confidential."

The defendants argued that the "colorful language" was not a violent threat, and did not derail the mediation. As the brief pointed out, the plaintiffs' motion focused on the first few minutes of the mediation—and ignored the next 13 hours of substantive mediation, which lasted until late into the afternoon of the following day (March 22), when impasse was declared after the defendants' final offer was rejected.

The defense brief then launched into an analysis of both Florida and federal law on the mediation confidentiality issue, specifically challenging the "threat of violence" exception as inapplicable to the facts. Drawing a dubious analogy to Nikita Khrushchev's statement to Western diplomats in 1956 that "We will bury you," the defendants argued that no one could seriously interpret the Francis comments "we will bury you" or "ruin you" as threats of physical violence.

The defense brief emphasized the point with this classic line: "There is no allegation that Francis was holding a shovel when he made his comment." The sanctions motion, defendants continued, simply was a device used by the plaintiffs to introduce inadmissible facts in order to "inflame the tribunal."

[The defense argument would have had more success in California. In *Foxgate Homeowners' Assn. v. Bramalea California Inc.,* 26 Cal.4th 1, 14-15 (2001), one party sought and was awarded sanctions against the other arising out of the latter's failure to comply with a court order to bring experts to the mediation, and mediate in good faith. The California Supreme Court reversed, upholding mediation confidentiality, and refusing to create an exception for alleged bad faith mediation conduct.]

Finally, the defendants challenged the court's right to impose sanctions or other contempt penalty, since no direct court order had been violated: The court ordered the parties to mediate. The parties, including Francis, spent 13 hours mediating. So what court order was violated?

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ATTORNEY AFFIDAVIT

March 28: The defendants also filed the affidavit of one of their attorneys, also a certified mediator. Peeling back the cloak of confidentiality even farther, the attorney stated that he attended the mediation, did not perceive Francis' comments or body language as a threat to anyone, and even noticed that one of the plaintiffs' lawyers smiled as the outburst played itself out.

The attorney emphasized that the mediator continued with the mediation without anyone even suggesting that the process be terminated out of fear of violence. Finally, the attorney testified that, contrary to the plaintiffs' position, he thought that all of the defendants were participating in the negotiations, Francis included, and that no one told him that the plaintiffs were refusing to negotiate with Francis as an individual.

On the same day, the plaintiffs filed a supplemental brief supporting their motion. The brief argued that Florida state law, with its violence exception, applied. The brief noted that an attorney had contacted the "Court Operations Analysis with the Dispute Resolution Center at the Supreme Court of Florida" and was "assured" that the violence exception would apply here.

The plaintiffs also argued that even if federal law applied, the mediation conduct and communications were still admissible, since Federal Rule of Evidence 408 does not bar admission of settlement discussions for purposes of proving that "some wrong" was committed in the course of those settlement discussions.

With respect to the issue of whether Francis violated the court's mediation order, the plaintiffs engaged in a little legal dancing. They noted that the order required Francis to attend, and then argued that:

> Francis behaved in such an outrageous manner that he prevented the plaintiffs from mediating with him. In effect, Francis did not attend the mediation, and if he did attend, he failed to negotiate in good faith. Therefore, Francis violated this Court's order. The mediation did move forward, but only with the corporate defendants.

For support, the plaintiffs found a case where a party was chastised for going through the motions in a nonbinding arbitration, choosing to put its efforts in the trial de novo.

[First, putting aside the question of whether a nonbinding arbitration really is analogous to a private and confidential mediation, did Francis really "in effect" fail to attend the mediation? After all, he was there for two days–an undisputed fact. Did he really "prevent the plaintiffs from mediating with him"? It is hard to see how, since the plaintiffs admitted that it was the plaintiffs' decision not to mediate with Francis. Moreover, the plaintiffs seemed to have had no trouble mediating with Francis in his corporate capacity as head of the corporate defendants. So did Francis really violate the court order?]

[In any case, can there really be such a thing as bad faith negotiation or mediation? From a negotiation/mediation perspective, what did Francis really do, other than express his refusal to compromise his claims? Granted, he acted in an offensive and uncivil manner, showing no respect for anyone or anything. He used language and behavior more consistent with a city's tenderloin district than its legal establishment. But from a negotiation standpoint, can't one argue that he simply decided he did not want to pay money to settle, and so informed the opposing attorneys? Clearly a party does not have to compromise, or offer something in settlement, in order to avoid the bad faith label. Maybe this motion is saying that if a party refuses to negotiate, he or she must do so politely, without being a jackass? In other words, does bad faith in the context of negotiations and mediation have more to do with how one behaves in the process, rather than the substantive positions taken?]

MEDIATOR FILES REPORT

March 28: Where was the mediator in all this? Apparently right where he should have been: tucked away quietly in the background, living up to his promises and obligations of confidentiality and neutrality. In his March 28, 2007, mediation report to the court, the mediator simply stated that the mediation was held on March 21 and 22, and it resulted in an impasse.

March 30: Judge Smoak conducted the evidentiary hearing on the plaintiffs' motion. Of interest to ADR students, four witnesses were examined and cross-examined regarding the mediation conduct and communications, including some of the attorneys present at the mediation. Smoak questioned the witnesses as well.

In an effort to bolster their application of the violence exception to the Florida mediation confidentiality statute, the plaintiffs' attorney testified that when Francis confronted him at the mediation, "I thought he was going to slug me. And I—that's what I thought, or that he was going to hit somebody behind me or—I don't know what he was going to do." Another one of the plaintiffs' attorneys testified that he thought Francis "was trying to provoke a physical confrontation."

Francis also took the stand, though it likely wasn't by choice. Nor was it particularly helpful to his position. Indeed, it appears that Francis' testimony was less than credible, as his attorney was forced to make efforts to rehabilitate his witness on the stand. The attorney later sought ethics advice from the State Bar as to what his obligations were when faced with a client who the attorney believed was perjuring himself. Ultimately, the attorney sought to withdraw as counsel.

This testimony made an impression with the judge, but surely not the kind of impression defense counsel would have preferred. Indeed, the testimony led to the filing of criminal contempt charges against Francis. More on that on April 10, below.

Following the presentation of evidence, the court issued the following findings:

- Court finds that Joseph Francis has willfully and contumaciously violated the requirements of the Scheduling and Mediation Order, Paragraph 8, to appear and mediate. Rule 16 authorizes the Court to sanction.

[Query: Exactly what part of Scheduling Order Paragraph 8 did Francis contumaciously violate? He attended the mediation session for two days. No one disputes that negotiations took place. Nowhere in the order did it require parties to act in a certain way.]

- Francis made it clear that he was not

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there to mediate. Court finds no basis that his conduct or communication is entitled to the protection of any privilege.

- Court finds that Francis' conduct and statements were extreme, hostile, vulgar, obscene, and they are unacceptable.

[While the court found "no basis" for holding Francis' conduct or communication privileged, neither did it appear to rely on the Florida mediation statutes' violence exception. It found Francis' conduct to be "vulgar" and "obscene," but not "violent." So why did Francis lose his confidentiality rights?]

After the court questioned Francis, its minute order shows the court setting the groundwork for imprisoning Francis:

> Court does not think there is any question in the record about what was said and the context in which it was said. The Eleventh Circuit has said that to enforce a sanctions order for a mediation or settlement conference, . . . the Court may rely on its power to defiant parties in civil contempt and impose sanctions ranging from fines to the striking of the pleadings. Francis has violated the Court's Scheduling and Mediation Order. The burden is now shifted to Francis to produce evidence of his compliance and he has failed to do so. [] Court is concerned that financial sanctions would not have the appropriate effect against Mr. Francis.

[The minute order does not reflect which Eleventh Circuit authority permitted the court to impose civil contempt "for a mediation," nor does it appear that the unidentified authority permits imprisonment as one of the contempt sanctions.]

Ultimately, the court ordered Francis to pay attorneys fees and costs for the plaintiffs and counsel, "reluctantly" declined to enter a default, and instead ordered Francis to jail:

> Coercive incarceration is an appropriate sanction for this situation. Mr. Francis can cure his contempt and have this sanction of incarceration removed upon his proper participation in mediation.

The court then ordered the parties to participate in another mediation session, instructing them to arrive the night before. It insisted that Francis "will be dressed and groomed appropriately, i.e., business suit and tie, business shoes and socks." The court further ruled that "This mediation is ordered as an activity of this Court."

[Was this last ruling an effort to further bring the mediation process under the court's control?]

Finally, the court ruled that Francis would be released from incarceration "when the mediator certifies in person to the court that Mr. Francis has fully complied with this order and has participated in the mediation in good faith." Incarceration was delayed until 4:30 p.m. to give the attorneys time to mediate.

[The court is compelling the mediator to disclose how a party acted in mediation? Not only was this part of the order not challenged, but as was learned later, the mediator complied with the order and disclosed to the court some of what transpired at the subsequent mediation. Is there a dangerous precedent being set here?]

SUPPORTING EVIDENCE REJECTED

As an interesting aside, at the end of the hearing, the defendants' counsel proffered evidence under seal to demonstrate that defendants had in fact mediated in good faith on March 21 and 22. The court denied the defendants' request to make the showing, and refused to consider the evidence.

[Many more questions arise from this order: Did Francis really violate a court order to mediate when he was present for 13 hours over two days mediating on behalf of his corporate entities? Granted, he was late and rude and did not want to compromise his position. But is that a violation of an order to mediate? And if not, then what was the basis for jailing him?]

[While the court is incarcerating Francis only until he "mediates in good faith," what is good faith? Apparently 13 hours of mediation is not good faith if there is boorish behavior involved. Obviously the court wanted something more out of Francis. Can't this order be interpreted as subtle (or not so subtle) judicial pressure on Francis not just to mediate, but to *settle?*]

March 31: The court held the incarceration order in abeyance for another day, and the parties engaged in a new mediation on March 31. And it appeared that a settlement was reached in principal, involving a payment of an undisclosed amount.

The parties began drafting the final paperwork, which is when the next "issue" arose. As reflected in the defendants' filings with the Eleventh Circuit, the defendants' settlement agreement draft proposed payment over time, rather than in a lump sum. The delayed payment provision would benefit the defendants due to the time value of money. The plaintiffs objected vehemently. Word of a new impasse reached Judge Smoak–in fact, it appears the mediator may have disclosed this to the court in response to the court order to provide a status report.

April 4: The Court called an emergency hearing, reflecting in its minute order that the "mediator has advised there has been an unconditional offer and acceptance" but that the plaintiffs later received "a newly proposed agreement with substantially different terms." Continuing, the court noted that "Plaintiffs ask the Court to consider all sanctions that are available to the Court and consider the potential dark side of what is going on—an attempt to game this situation and taunt the plaintiffs and plaintiffs' counsel."

[These are interesting terms to put into a court minute order, even if just quoting the plaintiffs: The "dark side"? "Gaming" a situation? "Taunting" counsel? The defendants' interpretation on the negotiations was that the case ultimately did not resolve since the parties could not reach agreement on the payment terms. The plaintiffs' take was that the original offer was for a set sum, and no new terms were raised until after acceptance by the plaintiffs. Most mediators have seen situations where new terms have been raised during the drafting process, such as issues of confidentiality, scope of releases, and at times efforts to stretch out payments. Does this alone become "taunting" or "gaming"? Here, the plaintiffs and the court clearly interpreted the defense move as an effort to back out of the original deal.]

The defense argued that it had now engaged in three to three-and-a-half days of mediation, with substantial offers being made, so there cannot possibly be a bad-faith claim, or violations of any court me-

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diation orders.

Judge Smoak had a different view. He viewed Francis' move as an attempt to "revoke his unconditional offer and to impose unacceptable conditions," which Smoak held "violated the express condition upon which I suspended the requirement that he surrender" to the U.S. Marshals.

Hence, the court ended the suspension of incarceration. Smoak ordered Francis to surrender by noon the next day, April 5, or a warrant would be issued for his arrest. This sanction, declared Smoak, "will be purged by a new formal mediation in a proper setting with all appropriate players." Francis was to remain in custody until the mediation was arranged.

[Clearly, the judge believed Francis was playing games and determined that the best way to get Francis to take the process seriously was to put him in jail. From a practical perspective, this may have been the only move that would get Francis' attention. But is it right, or even lawful? Again, did Francis really violate a court order to mediate, simply because he wanted to back out of a deal?]

[Further, if there really was an agreement—an unconditional offer and an acceptance as described by the mediator and accepted by the Court—why the need for jail at all? Francis' effort to change the terms of the deal after a contract had been reached is simply a breach of contract. Why not simply enforce the agreement? Under the circumstances, can't it be interpreted that the threat of sending Francis to jail unless he again participated in a "new formal mediation in a proper setting with all appropriate players" is tantamount to saying that Francis must actually settle the case to avoid jail?]

April 5: The defense moved to stay incarceration pending appeal to the Eleventh Circuit, but this request was rejected by both the district court and the appellate court. In the papers to the circuit court, the defendants provided even more details about what happened at the mediation sessions, including certain comments by the mediator. But in light of the Eleventh Circuit's summary denial, no issues were raised about the admissibility of this information.

By noon, Francis failed to turn himself in to the U.S. Marshals, as ordered by the court. The judge issued a warrant for Francis' arrest.

April 10: Francis was arrested at the Panama City-Bay County International Airport. It was not reported what Francis was doing at the airport at that time, or why he had failed to turn himself in five days earlier, as the court ordered.

The court then issued an Order to Show Cause why Francis should not be held in criminal contempt. The primary basis for the criminal charge was making false statements at the March 30 hearing, and violating the April 4 order to surrender. The hearing was set for April 23.

April 11: The civil case finally settled. A notice of settlement and dismissal was filed with the court indicating the case has been fully resolved. The Court dismissed the case with prejudice and closed the file. As a result, Francis was "released from the sanction for coercive incarceration for the civil contempt." But this did not get him released from jail.

April 12: Francis was ordered "detained" pending his criminal contempt hearing.

A WEEPY EPILOGUE

Though the civil case settled, the Francis soap opera continued.

While in jail awaiting his criminal contempt hearing, Francis had Scott Barbour, his company's president, smuggle Francis anti-anxiety and sleeping pills, and $500 in cash. Francis tried to use the money to bribe a guard for a bottle of water. While the bribe failed, the effort landed Francis a cellmate—Scott Barbour.

And this was after Francis was indicted in early April, in Reno, Nev., for tax evasion after he claimed more than $20 million in allegedly bogus business expenses.

So Francis was not looking good at the time of his April 23 contempt hearing.

It should not be a surprise to learn that Francis pled guilty to failing to turn himself in to the U.S. Marshal as ordered on April 5. Thanks in part to an affidavit by Francis' former attorney, who testified that he believed Francis' March 30 testimony was not *intentionally* false, the court agreed to dismiss the criminal charge's first count of giving false testimony.

On April 23, Francis was sentenced to 35 days in prison, with credit for time served, and fined $5,000.

At a minimum, the sentence stripped Francis of his bravado and attitude, as news accounts described his weeping apology to Judge Smoak, and video showed him led off to prison in shackles, repeating widely circulated footage from April 12.

But just two days later, Los Angeles authorities charged Francis with misdemeanor sexual battery for allegedly groping an 18-year-old woman at a party on Jan. 10. Noting that Francis faces six months in jail and $2,000 in fines on the charge, the Associated Press reported that Francis makes an estimated $29 million annually from his videos of young women exposing their breasts and displaying themselves in other sexually provocative situations.

Is this a case of a bad guy producing bad facts that make bad law? Francis was neither a model citizen nor a welcome guest of Panama City, Fla. And he unmistakably taxed the court's patience with his disrespect for the law, and the individuals who are its caretakers.

But from a strict legal perspective, was Francis properly jailed? Was Francis' three-minute tirade the type of conduct that necessitates violating mediation confidentiality? Did Francis really cross that undefined line so that it required a judge to reach into the mediation process to control things with contempt powers?

Here is another way to consider this: Mediation is a process that is premised on parties being able to explore issues, interests, strengths, weaknesses, emotions, options, alternatives, and so much more, all in a "safe" environment. Will Smoak's orders and Francis' incarceration create a chilling effect for future mediations? Will it inhibit parties from being as open, honest, and emotionally raw as is sometimes necessary to bring peace to a dispute? Will parties be afraid of showing their true emotions for fear of being charged with bad faith or with gaming the mediation?

Maybe it's a little premature to signal the death knell for mediation confidentiality. But the Florida court's intrusion into what is generally considered to be a private and voluntary *alternative* dispute resolution process sends a message that confidentiality may not be quite all it seems.

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