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, presents 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 Duringer*, 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”.

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**Other articles:**
- **Contract drafting.**
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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.
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.

**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 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.

**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 programs 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
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Thoughts of a Chief
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Between the time the settlement agree-
ment 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 dur-
ing and after the mediation session.
Additionally, Local Counsel requested that
the Circuit Mediator consent to disclosure
of statements he made during the medi-
ation. 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 require-
mment because the matters revealed in their
submissions were heard in a confidential
forum and were not central to the mediat-
ed 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 reject-
ing 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 pro-
cedings. Although the Court concluded
that the participants breached the confi-
dentiality requirement, it declined to
impose sanctions, finding that the disclo-
sures 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 confidential-
ity to permit the VSB arbitrators to consid-
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Case Summary

**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-

**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.

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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