Mediation: Law, Policy & Practice,
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2019-2020 Edition

This edition adds an international and comparative approach, both in a new last chapter, Chapter 17, and throughout the appendices, thanks to our newest co-author, Professor Nadja Alexander of Singapore Management University. Well-situated to write about international and comparative mediation, Professor Alexander has written several books on the topic, including *International Comparative Mediation: Legal Perspectives*, which won the 2011 CPR Award for Outstanding ADR Book. She has mediated in more than thirty nations.

Chapter 17 provides a detailed analysis of the amended UNCITRAL Model Law on International Commercial Mediation and the new Singapore Convention on Mediation. The Singapore Convention was signed by 46 countries including the United States at its opening ceremony in August 2019 and potentially marks a new era for international commercial mediation.

Regarding the United States, this edition reports on a recent study of reported cases involving mediation that revealed a slowing in the continuing trend toward increased litigation of mediation issues since the turn of this century. Now most of the litigation involving mediation issues is in federal court and a large portion of that litigation involves approval of class action settlements (Chapter 7; see also Chapter 16).

A number of reported cases continue to relate to enforcement of mediated settlements. While courts continue to allow parties to assert traditional contract defenses of mistake, fraud, duress or undue influence, rarely is a party successful in defeating an enforcement claim, particularly in cases where the party defending the agreement is represented by counsel (Chapter 7).

A number of rulings reflect courts hesitant to order a case to mediation when participation would be burdensome. In separate rulings, courts declined to order mediation after litigation had concluded, when a party resisted, when a party was in prison, when a less expensive settlement process was available, when it seemed futile because of a high conflict relationship, and when one participant was a non-party to the litigation (Chapter 9).

In jurisdictions that have not adopted the Uniform Mediation Act, some courts continue to require “good faith” participation and “settlement authority.” These requirements have been criticized for employing ambiguous terms, giving too much power to the mediator, not giving sufficient respect to a party’s choice about whether to settle, and invading the confidentiality of the mediation process. This year, once again, courts and rule makers tried to define what those terms meant (Chapter 9). In Design Basics, LLC v. Forrester Wehrle Homes, Inc., 337 F. Supp. 3d 722, 725 (N.D. Ohio 2018), the Court defined “full settlement authority” as:

[F]ull authority to settle” means that the representative has complete discretion, which he or she can exercise independently during the settlement/mediation session, to spend as much, or take as little, as seems, in light of the judge’s or mediator’s views and the representative’s own evolving assessment, best for those whom he or she represents [emphasis the Court’s].
Again this year, despite additional rulings, it remains unclear whether there is a common law federal mediation privilege and, if so, its limits (Chapter 8). California continues to have a disproportionate volume of litigation regarding its mediation privilege. California’s legislature added an unusual requirement, effective beginning in 2019, that attorneys ask clients to sign a statement indicating their understanding of the potential negative implications of the state’s broad mediation privilege (Chapter 8).

2019 was a year in which New York attorneys were also compelled to interact with their clients about mediation in targeted ways. New York’s court rules for its commercial division require attorneys to certify that they discussed with clients the availability of dispute resolution and calls for them to categorize the case so that the court can determine likelihood of settlement through mediation (§ 12:2).

In the family mediation area, as research continues to accumulate on the positive results achieved through a facilitative mediation model, commentators report that courts and parties struggle to pay for that model. Financial concerns led to experimentation with online mediation for family cases. They have also led to employing more directive processes such as parental coordinators for time-consuming and more minor disputes arising post-judgment (§§ 15:2, 15:15-18).

Voluntary mediator certification, supported by the Association for Conflict Resolution (ACR) as a viable road toward mediator quality without the burdens of licensure, gained a key adherent in 2019. The Mediation Certification Consortium of California (MC3) offers certification to a mediator who has 80 hours of mediator education and training, a background check, and commitment to abide by the Model Standards of Conduct for Mediators (Appendix A-6). As recommended by ACR, California’s MC3 also requires continuing education and offers a grievance system for complaints against mediators (§ 11:5).

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