

Consequences of Not Participating in Court-Ordered Mediation: What is Fair?

**CPR Mediation Committee
June 17, 2021**

**John Lande
Isidor Loeb Professor Emeritus
Center for the Study of Dispute Resolution
University of Missouri School of Law**

Overview of Today's Program

- Courts clearly have authority to order parties to mediate and sanction parties who violate these orders.
- Today's discussion is about fairness of sanctions under various circumstances.
- We will start by discussing *Breslin* case.
- I will discuss various considerations in cases where parties do not comply with orders to mediate as well as court strategies to minimize problems.
- Robyn Weinstein and Lauren Jones will discuss how their mediation programs address these issues.
- Then we will open this discussion to the committee.

Breslin Case

- Recent 2-1 decision by California Court of Appeal.
- Murky and disputed facts, including about mediation notice.
- In probate case, some potential beneficiaries did not attend mandated mediation.
- Parties who attended mediation reached agreement.
- Appellate court upheld decision enforcing mediated agreement, causing non-participating parties to forfeit their rights.
- Majority faulted non-participating parties for failing to attend initial probate hearing and object to mediation at that time.
- According to dissent, non-participating parties filed objection before probate court approved mediated agreement, which “disinherited” them and “redistributed their gifts to other parties contrary to testator’s express directions.”
- Majority ruled “mediation ordered by the probate court, like the trial in *Smith*, was an essential part of the probate proceedings.”

General Considerations

- Court goals, e.g.,
 - Promote negotiation
 - Cost savings for parties and/or courts
 - Court workload relief
- Opt-out practices – ranging from easy to hard
- Whether parties are required to make (reasonable) offer
- How long parties are required to attend
- Whether parties or mediator declares impasse
- Sanctions for non-participation, e.g.,
 - Monetary sanctions
 - Contempt
 - Dismissal of specific claims or complete default
- General policy strategy, e.g.,
 - Sanction violations of court orders
 - Design desirable mediation process

Case-Specific Issues

- Due process of notice for mediation and court proceedings
- Reasonableness of costs to attend mediation considering parties' finances and amount at stake
- Overall factual context of arguably bad-faith behavior
- Likelihood that mediation would be productive

Coercion *Into* and *In* Mediation

- Coercion INTO mediation - broad consensus that it is generally appropriate for courts to order parties to mediate.
- Coercion IN mediation
 - Consensus that this is inappropriate – but facts may not be clear in many cases.
 - Probably no coercion in vast majority of cases, but may be coercion in significant minority of cases.
 - Problematic if strong explicit or implicit pressure to stay in mediation and reach agreement, especially if court-ordered.
 - E.g., Michigan case where appellate court upheld divorce settlement without hearing on wife's claims that she was not allowed to leave and she was pressured to sign agreement by mediator and her counsel without consulting co-counsel.

Court Context

- Difficult situation – courts generally are over-burdened and under-funded.
- Most judges, administrators, and mediators are conscientious.
- Goal should be to maximize benefits of mediation and minimize risks.
- If courts order parties to mediate, courts have obligation to minimize risks – especially if parties pay market mediation rates.

Potential Goals and Strategies

- Courts differ widely – strategies should be tailored to each court’s goals.
- Design mediation system so parties WANT to mediate – emphasize “carrots” more than “sticks.”
- Improve party decision-making and mediation quality generally, not merely avoid coercion or “bad faith.”
- Build commitment of key stakeholder groups – judges, administrators, lawyers, mediators.
- Promote good party preparation.
- Courts provide standard explanations of mediation.
- Courts honor confidentiality protections.