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Court Issues Major Ruling on Mediation Confidentiality

A prominent federal court judge has issued an important ruling on mediation confidentiality, one that promises to influence both doctrinal and legislative development.

The case is *Olam v. Congress Mortgage Co.*, 1999 WL 909731 (N.D.Cal.), and in it, federal Magistrate Judge Wayne Brazil ultimately compels testimony by a California mediator, despite California's categorical exclusion of evidence arising from mediations. The lengthy opinion is most scholarly, and well worth taking the time to read.

The facts are complicated, but the dispute is fairly straightforward: a woman defaulted on her mortgage and ultimately sued the mortgage company alleging fraud and duress, among other things. The parties mediated through a voluntary court program, reaching agreement after a lengthy single session. The woman had a change of heart the next day, and the mortgage company moved to enforce the mediated settlement agreement.

Both parties wanted the mediator to testify in the case, and agreed to waive any confidentiality rights conferred by California law. Seeking to avoid putting the neutral — a highly respected mediator on the court's staff — in "an awkward position," the court assumed the mediator to have asserted the categorical bar on mediator testimony recently enacted by the state, Cal.Ev.Code 1119.

After hearing the testimony in a sealed proceeding, however, the court determined the mediator's testimony was necessary and ordered it unsealed.

In so doing, the court took a couple of crucial steps. First, it construed California's categorical exclusion of mediation evidence to be, in fact, a privilege of the parties and the mediator. Second, it essentially balanced the benefits to justice of receiving the evidence against the burden on the mediator and the mediation process, concluding the benefit was great and the burden was modest.

Assuming the opinion stands as written, it promises to be powerfully influential. Wayne Brazil is one of the most respected members of the federal bench on matters relating to ADR in general, and mediation in particular. His willingness to compel the mediator's testimony upon party waiver and a showing of necessity will be especially notable.

As a doctrinal matter, the opinion will likely serve as a beacon to other courts with regard to the strength of the mediator's independent, institutional interest in confidentiality. *Olam* provides yet more evidence that judges sworn to uphold the law will tend to view independent mediator assertions of confidentiality as secondary to the specific interests of the parties and the broader interests of the

courts in achieving justice in individual cases. (Indeed, in terms of protecting mediation confidentiality, California's new law is 0-2 in the courts so far. *See also Rinnaker v. Superior Court*, 62 Cal.App.4th 155 (1998)). In this sense, mediators suddenly find themselves in the same boat as ombuds, who a couple of years ago found their institutional claims of privilege squarely rejected as secondary to the larger requirements of justice. *Carmen v. McDonnell Douglas Corp.*, 114 F.3d 790 (8th Cir. 1997).

As a legislative matter, Brazil's opinion may also change the nature of the debate over the proposed Uniform Mediation Act's controversial "manifest injustice" exception. This provision has been severely criticized by the mediation community for introducing uncertainty into the mediation process on the important question of confidentiality.

Olam should give critics of this exception some pause. As a co-reporter for the UMA project, it seems to me fairly clear that the mediator's testimony likely would not have been unsealed in *Olam* if Brazil had applied the UMA's manifest injustice standard instead of the lower-level balancing Brazil used in *Olam*. The possibility of independent judicial override of the UMA's strong statutory protections for confidentiality in mediation is one of the concerns that is leading the UMA drafters to consider providing specific guidance in the form of a "manifest injustice" exception.

Fair-minded people can reasonably disagree on whether the matter of judicial discretion on matters of mediation confidentiality is better addressed directly in a statute, or left to resolution in individual cases. However, the question of whether judges may act on their own in the absence of specific statutory guidance — or, as in *Olam*, even despite statutory guidance — is no longer academic. It is a reality, brought to the community by a friend.

The ABA Section of Dispute Resolution has given fitting tribute to the late ADR professor and columnist Jim Boskey by naming its student writing competition in his memory. The deadline for the James B. Boskey Award for student writing in ADR is Jan. 20, 2000. Students at all levels are eligible to compete for the \$1,000 prize awarded to the winner. Essays should be no longer than 3,000 words.

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Deborah Hensler has been named the new director of the Stanford Center on Conflict and Negotiation, succeeding Nobel Laureate Kenneth Arrow.