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UNITED STATES DISTRICT COURT
For the Northern District of California

UNITED STATES DISTRICT COURT
Northern District of California
San Francisco Division

ANGELIQUE PAIGE,
Plaintiffs,

No. C 09-0687 PJH

v.

NEW HAVEN UNIFIED SCHOOL
DISTRICT, et al.,
Defendants.

**ORDER FINDING VIOLATION OF
ADR LOCAL RULES AND OF THE
COURT’S ORDER OF APRIL 20, 2010**

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The court is in receipt of defendant New Haven Unified School District’s complaint that its carrier, Zurich North America, failed to have its representative appear by telephone at the Early Neutral Evaluation (ENE) session held on April 28, 2010. The court is also in receipt of the response submitted by counsel for the carrier. Finding these submissions, each of which is accompanied by a declaration of counsel, adequate to address the issue, the court declines to order further briefing or conduct further proceedings. The court finds that Zurich North America has violated both ADR Local Rule 5-10 and the court’s order of April 20, 2010, permitting telephone attendance at the ENE session.

FACTUAL BACKGROUND

An ENE was scheduled to occur in the captioned matter on April 28, 2010. In accordance with ADR Local Rule 5-10(d), Zurich North America, the primary insurance carrier for the New Haven Unified School District, requested that its claims representative, Deborah Kennedy, be

1 excused from appearing in person at the ENE session. By order dated April 20, 2010, the court
2 granted the request, explicitly stating “Ms. Kennedy shall be available to participate by telephone
3 during the ENE, pursuant to ADR Local Rule 5-10.”

4 The ENE session was held as scheduled. At the outset of the session, according to the
5 uncontradicted declaration of the New Haven Unified School District’s general counsel, the
6 evaluator attempted several times to call Ms. Kennedy on a speaker phone so that she could
7 participate in the proceedings, but Ms. Kennedy was not available. The ENE proceeded. Counsel
8 for Zurich North America declares that he contacted Ms. Kennedy twice during the session,
9 conveyed what had occurred to her, and obtained instructions about how to proceed. He concludes
10 that Ms. Kennedy “meaningfully participated in the ENE.” Although not expressly stated in the
11 declaration, apparently counsel’s conversations with Ms. Kennedy took place during breaks, as the
12 ENE itself is conducted entirely in joint session unless the parties agree to proceed to settlement
13 discussions, which did not occur in this case.

14
15 ANALYSIS

16 ADR Local Rule 5-10(f) provides as follows: “A person excused from appearing in person at
17 an ENE session must be available to participate by telephone for the duration of the session or until
18 excused by the neutral.” Taking counsel for Zurich North America’s recitation of the facts as true,
19 Zurich North America still violated the rule and this court’s order. Telephone participation means
20 just that - participation in the session. Ms. Kennedy was required to be on the speaker phone
21 listening to the proceedings and discussing the matter with the evaluator and the other participants
22 throughout the proceedings. Separate conversations with her lawyer during breaks in the
23 proceedings are completely inadequate.

24 The reasons for this requirement are explicitly set forth in the ADR Local Rule 5-10(a): “. . .
25 [T]he principal values of ENE include affording litigants opportunities to articulate directly to other
26 parties and a neutral their positions and interests and to hear, first hand, both their opponent’s
27 version of the matters in dispute and a neutral assessment of the merits of the case and the relative
28 strengths of each party’s legal positions.” Particularly in an ENE, in which no private caucuses are

1 permitted unless the matter proceeds to a settlement discussion, it is difficult to understand how
2 separate conversations with counsel could be deemed to constitute participation. No settlement
3 conversations were occurring, at least not yet. The point of the ENE process was for the parties
4 themselves - and the claims representative - to hear for themselves, unfiltered by counsel, the
5 presentations of each side and the questions and comments made by the neutral. Based on that
6 personal participation, decisions could be made about the risks and benefits of proceeding with the
7 litigation or perhaps engaging in settlement discussions. By failing to participate directly, in
8 violation of the ADR local rules and this court's order, Zurich North America undermined a core
9 element of the ENE process.

10
11 CONCLUSION

12 Zurich North America and its counsel, Joseph Whitecavage, are ADMONISHED for their
13 violation of the ADR local rules and this court's order of April 20, 2010. Should there be further
14 ADR proceedings in this case, the court will not entertain a further request from Zurich North
15 America for telephone participation and its representative shall appear in person.

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17 IT IS SO ORDERED.

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20 June 3, 2010

By:

Elizabeth D. Laporte

21 Dated

Elizabeth D. Laporte

22 United States Magistrate Judge
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