Disputing Irony: A Systematic Look at Litigation About Mediation

James R. Coben & Peter N. Thompson†

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INTRODUCTION AND PRINCIPAL CONCLUSIONS

This is a time of reassessment. Although mediation has been institutionalized successfully in courts and other contexts, questions abound regarding its impact and effectiveness. A universal complaint is the lack of relevant empirical data. Numerous scholars


2. See, e.g., Deborah R. Hensler, Suppose It’s Not True: Challenging Mediation Ideology, 2002 J. Disp. Resol. 81, 81 (2002) (asserting that evidence to support the claim that mediation saves courts and litigants time and money “has failed to materialize”); Jacqueline M. Nolan-Haley, The Merger of Law and Mediation: Lessons from Equity Jurisprudence and Roscoe Pound, 6 Cardozo J. Conflict Resol. 57, 59 (2004) (asking whether “court-connected mediation [has] lost its way on the road to justice” by becoming “so intertwined with litigation and adjudication as to be indistinguishable from judicial settlement processes or traditional bilateral negotiations”); Lela P. Love, Preface to the Justice in Mediation Symposium, 5 Cardozo J. Conflict Resol. 59, 59 (2004) (observing that a symposium created to celebrate the contributions of mediation to our system of justice instead ended up highlighting the dissonance “between what mediation promised and what is being delivered”); Joseph P. Folger, “Mediation Goes Mainstream”—Taking the Conference Theme Challenge, 3 Pepp. Disp. Resol. L.J. 1, 31 (2002) (opining that institutionalization of mediation has diminished the defining “alternative” characteristics of the mediation process and has tended to turn mediation into a forum for dispute resolution that is highly directive and evaluative in the service of reaching settlements); Nancy A. Welsh, The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?, 6 Harv. Negot. L. Rev. 1, 5 (2000) (noting that “the party-centered empowerment concepts that anchored the original vision of self-determination are being replaced with concepts that are more reflective of the norms and traditional practices of lawyers and judges, as well as the courts’ strong orientation to efficiency and closure of cases through settlement”).

have called for new research to help determine what is occurring in the mediation process.\footnote{See, e.g., Roselle L. Wissler, The Effectiveness of Court-Connected Dispute Resolution in Civil Cases, 22 CONFLICT RES. Q. 55, 82 (2004) (reviewing empirical research on mediation and neutral evaluation and concluding that future studies are needed to address critical gaps including “litigation context’s impact on the efficiency and effectiveness of court-connected mediation”); Deborah R. Hensler, ADR Research at the Crossroads, 2000 J. DISP. RESOL. 71, 78 (2000) (bemoaning a growing indifference and, in some cases, hostility to empirical research on ADR and calling for renewed vigor “to test our assumptions about what ADR is, and about what it can do, about whom it benefits, about its public and private costs, and about its contributions to the fair resolution of civil disputes”); Sander, supra note 3, at 706–08 (proposing a research agenda to examine mediation cost effectiveness, mediation satisfaction, the correlation between training and performance, the value of co-mediation, implications of mandatory mediation, and the importance of confidentiality); John Lande, Commentary, Focusing on Program Design Issues in Future Research on Court-Connected Mediation, 22 CONFLICT RES. Q. 89, 97 (2004) (urging a research agenda that focuses on program design choices rather than “trying to establish the general efficacy of mediation programs”).} Of course, mediations tend to be private, and it is difficult to determine what is going on behind closed doors. Researchers attempt to recreate what happened through surveys and interviews of participants after the mediation. These surveys and interviews are quite useful, but they are scarce and address a small sample of the mediation experience. Furthermore, surveys and interviews yield information filtered through the subjective perceptions of the participants and researchers.\footnote{See ROBERT SOMMER & BARBARA SOMMER, A PRACTICAL GUIDE TO BEHAVIORAL RESEARCH TOOLS AND TECHNIQUES 156 (2002) (discussing the limitations of research through questionnaires).} Some courts keep general statistics, but these are incomplete.

Largely overlooked in the discussion to date is one extremely large database—the reported decisions of state and federal judges forced to confront legal disputes about mediation. Learning about the mediation process by studying the adversarial opinion that the ADR process was designed to avoid may be ironic, but it can be productive. Admittedly, a written trial or appellate court decision is by no means a perfect window into the world of mediation. Only the
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rare mediated dispute shows up in a reported opinion. Moreover, court opinions, particularly appellate court opinions, do not provide a full picture of the conflicts faced by the parties. Still, given the oft-expressed mediation objective of providing an alternative to the traditional adversarial system, the phenomenon of mediation litigation is a “disputing irony”6 that warrants closer examination. Indeed, much can be learned from these “failed” mediations.

Our study is designed to address several questions. First, to what extent does the mediation process create, as opposed to resolve, subsequent litigation? Where is this litigation taking place, and what issues are being litigated? What can we learn from the litigated cases about the fairness of the mediation process and about the proper roles and conduct for counsel and for the mediator? Finally, how are the courts dealing with the conflict between the need for confidentiality in the mediation process and the need for evidence when mediation conduct becomes an issue in subsequent litigation?

Organizing and synthesizing the data we collected was a challenge. Given the volume of decisions, we have not listed every citation available to support a particular point. However, interested readers may download the entire dataset without charge by visiting the Hamline University School of Law website at http://www.hamline.edu/law/adr/mediationcaselawproject.7 We invite other researchers to provide additional analysis and criticism. The data we accumulated can be analyzed from a number of different perspectives. Our principal conclusions are as follows.

First, we did not anticipate the sheer volume of litigation about mediation. As detailed below in Part I, we have analyzed all 1223 state and federal court mediation decisions available on the Westlaw databases “allstates” and “allfeds” for the years 1999 through 2003. In this five-year span when general civil case loads were relatively

6. See Lyons v. Booker, 982 P.2d 1142, 1143 (Utah Ct. App. 1999) (stating the fundamental irony inherent in every litigated mediation conflict—that “the parties find themselves in the unenviable position of having created an additional dispute on top of the previously existing one”).

7. The dataset is organized as a searchable Excel file, and you can easily compile lists of cases by mediation issue, jurisdiction, level of court, or a wide number of other variables. Cross-tab functions within the Excel program (available as “Filter” options in the Excel “Data” toolbar) allow you to quickly tailor searches and combine variables (e.g., generate a list of state supreme court decisions where mediators testified and a mediated settlement was enforced; or a list of federal circuit court decisions in a specific year which address mediation ethics). The dataset is a work in progress that we will be updating each year. We encourage researchers to use the dataset and ask only in return that you attribute it (James R. Coben & Peter N. Thompson, Hamline University School of Law Mediation Case Law Dataset) in any published work.
steady or declining nationwide, mediation litigation increased ninety-five percent, from 172 decisions in 1999 to 335 in 2003.

Second, a major surprise from the database is how frequently courts consider evidence of what transpired in mediations. The concerns about confidentiality, paramount among ADR scholars, appear to be of much lesser importance to practitioners, lawyers, and judges in the context of adversarial litigation. As explained in Part II, there are over 300 opinions in the database in which courts considered mediation evidence without either party raising confidentiality issues. Moreover, mediators offered testimony in sixty-seven cases, with objections raised only twenty-two times, and the evidence was precluded in only nine cases. This rather cavalier approach to disclosure of mediation information is certainly at odds with the conventional wisdom positing that confidentiality is central to the mediation process.

Third, the mediation issues being litigated are quite diverse. Parts IV–X examine specific mediation issues, summarizing key trends and providing illustrative examples. We expected, and indeed found, large numbers of opinions about mediation confidentiality (152), enforcement of mediated settlements (568), duty to mediate (279), and sanctions (117). However, we did not anticipate the significant number of decisions addressing mediation fee and cost issues (243), ethics/malpractice (98), the intersection between mediation and arbitration (88), the procedural implications of a mediation request or participation (50), or acts or omissions in mediation as a basis for independent claims (20).

Equally surprising was the dearth of cases addressing mediator misconduct, which was asserted as a contract defense only seventeen times in five years. Either the concern about coercive mediators is unwarranted or the litigation process does not provide an appropriate forum to address this issue. Most of the enforcement cases raised traditional contract defenses. One general conclusion to be drawn

8. Others have noted and documented this same phenomena. See, e.g., Peter Robinson, Centuries of Contract Common Law Can’t Be All Wrong: Why the UMA’s Exception to Mediation Confidentiality in Enforcement Proceedings Should be Embraced and Broadened, 2003 J. Disp. Resol. 135, 164–65 (2003) (noting that it “may be surprising that the vast majority of the time, when enforcing a mediated agreement, courts act as if mediation confidentiality did not exist”).

9. See infra notes 40–60 and accompanying text.

10. See infra notes 40–55 and accompanying text.

11. See, e.g., Sander, supra note 3, at 708 (calling the importance of mediation confidentiality “[p]erhaps the most sacred canon in mediation”).

12. See infra notes 232–46 and accompanying text.
from the dataset is that in litigation, existing legal norms force defects in the mediation process to be framed in terms identical to those used to address issues that plague unfacilitated party-bargaining. Thus, when parties attempt to enforce mediation settlements in court, the litigation focuses on typical contract issues, such as claims of unenforceable agreements to agree, failure to have a meeting of the minds, fraud, changed circumstances, and mistake.

These traditional contract defenses may not adequately protect the fairness of the mediation process. As set forth in Part III, rarely has a mediation participant successfully defended against enforcement of a mediated agreement based on a traditional contract defense. These contractual defenses were developed in the context of a free enterprise bargaining process and may not be sufficient to ensure a fair facilitative process and a self-determined agreement.

In light of these trends and others, in Part X we make recommendations for statute and rule reform, ranging from the use of “cooling off” periods during which parties are free to exercise a right of rescission of a mediated settlement, to the adoption of special confidentiality rules regarding third party access to mediation evidence. We also offer a number of best practice suggestions for advocates, neutrals, and mediation consumers. Some discourage particular behavior, such as over-promising on mediation confidentiality or continuing mediation when decision-makers leave the room; others encourage behavior, such as obtaining a signed agreement to mediate, aggressively investigating and disclosing conflicts of interest, or anticipating that drafting releases may be difficult. The good news is that the misery and expense incurred by the unfortunate parties forced to litigate their mediation mistakes provide valuable lessons for those willing to review them. By doing so, perhaps we can help others avoid their own “disputing irony.”

I. CONSTRUCTING A DATABASE

A. Overview

We searched the Westlaw databases “allstates” and “allfeds” for the term “mediat!” for the years 1999 to 2003 and found a total of 8127 entries. After reviewing the Westlaw summary results list for each entry, we excluded opinions which merely referred to mediation or a mediator. We read each of the remaining cases, but discovered that many did not involve a significant mediation issue.13 Some of

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13. Many reported cases in Michigan referred to a “mediation” process where the parties would present their case to a case evaluation panel composed of three persons
the opinions used the term mediation or mediator, but upon closer analysis were found to involve a neutral that acted as an arbitrator, or even as a judge. Such cases were not included in the database. We selected 1223 cases that implicated mediation issues and included them in the database. For each of these cases, the authors completed a questionnaire that reported information on a number of variables.

who evaluate the case, providing “a separate award as to the plaintiff’s claim against each defendant and as to each cross-claim, counterclaim, or third-party claim that has been filed in the action.” Mich. Comp. Laws Ann. 2.403(K)(2) (West 2006). A party may reject the panel’s evaluation and proceed to trial, but if the verdict is less than the award, the rejecting party is responsible for paying the opposing party’s actual costs. Mich. Comp. Laws Ann. 2.403(L)–(O). See H.A. Smith Lumber & Hardware Co. v. Deicina, 670 N.W.2d 729, 738 (Mich. Ct. App. 2003) (holding that mediation sanctions could be imposed on the party rejecting the evaluation of the mediation panel); Dessart v. Burak, 652 N.W.2d 669, 674 (Mich. Ct. App. 2002) (addressing mediation sanctions); Cheron, Inc. v. Don Jones, Inc., 625 N.W.2d 93, 97–98 (Mich. Ct. App. 2000) (addressing mediation sanctions). We did not treat this evaluation process as a mediation. Based on the recommendations of the Michigan Supreme Court, Michigan amended its process in 2000 to include a mediation process referred to as “facilitative mediation.” Mich. R. Civ. P. 2.411.

14. If the court referred to a “mediation” process involving a judge or court personnel, we treated the process as a mediation unless we could clearly determine that the “neutral” did not act as a mediator. On the other hand, if the opinion referred to the process as a judicial “settlement conference” we did not include the case in our dataset even if the judge appeared to act as a facilitative neutral. See Cornell v. Delco Elecs. Co., 103 F. Supp. 2d 1116, 1117 (S.D. Ind. 2000) (addressing an agreement arrived at in “settlement conference” where Magistrate Judge acted as a “go-between during negotiations”).

15. The research reflects the total number of opinions reported in Westlaw. Some lawsuits involved multiple reported opinions. Because we wanted to study the extent to which mediation issues were being litigated and addressed by the courts, we treated each opinion involving a mediation issue as a separate entry. Consequently, the total number of opinions/entries is greater than the number of lawsuits. We also discovered that some decisions reported in LEXIS, usually trial decisions, are not reported on Westlaw. Performing a similar word search from 1999 through 2003 using the term “mediate!” we found 7980 total cases on LEXIS (4779 state cases and 3201 federal) compared to the 8111 produced through a Westlaw search. We also discovered that Westlaw continuously adds cases to its databases many months after they have been decided. Our final cutoff date for Westlaw search numbers and cases was January 31, 2005. Westlaw searches after this date will likely reveal some additional cases and perhaps delete some of the cases we reported. We acknowledge that our procedure did not pick up every mediation case on Westlaw. We tried. We are continually reviewing the database and our case analysis and making minor corrections or additions to be sure that it is as accurate and complete as possible.

16. This questionnaire was amended several times. We continued to refine the questionnaire and reanalyze the cases throughout the process. The final version of the questionnaire is included in Appendix A, infra.
The 1223 cases were placed in one of nine subject matter categories: Personal Injury/Tort; Contract/Commercial; Family Law; Employment (including harassment and discrimination claims); Estate; Malpractice; Tax/Bankruptcy; IDEA Claims; and Other. The specific issues addressed in each case were reported and separated into the following categories: enforcement of an alleged mediation agreement; mediation sanctions; duty to mediate; mediation confidentiality; mediation ethics or malpractice in the conduct of the mediation; mediation/arbitration issues; fees; condition precedent; or other. Many of the cases involved more than one issue. For example, numerous cases involved the issue of whether compliance with a statutory or contractual mediation clause was a condition precedent and created a duty to mediate before bringing suit. When the case involved an enforcement issue, a number of other issues relating to defenses raised were reported.

In response to current concerns about the mediation process, we included questions relating to confidentiality, mediator conduct, and litigation over sanctions and fees. The questionnaire recorded several aspects of mediation confidentiality, starting with whether the mediator provided evidence by testimony or affidavit or whether the parties introduced evidence of statements by the mediator. We also reported when the parties revealed mediation communications in subsequent litigation. We noted when a claim of privilege was raised and whether the claim of privilege was upheld. The questionnaire also kept track of misconduct claims as well as claims for sanctions or fees.

B. Raw Numbers

The initial Westlaw search for opinions using the term “mediat!” produced 8127 opinions, composed of 5124 state court cases and 3003 federal court cases. The number of opinions that mentioned mediation in some form increased steadily from 1172 in 1999 to 2169 in 2003, an eighty-five percent increase over the five-year period. As shown in Table 1, the number of opinions in our database increased

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at a similar rate from 172 in 1999 to 335 in 2003, reflecting a ninety-five percent increase. In total, we found 1223 reported opinions involving significant mediation issues in the five-year period of January 1, 1999 through December 31, 2003.

### Table 1: Number of Mediation Cases Per Year, 1999–2003

<table>
<thead>
<tr>
<th>Year</th>
<th>Federal</th>
<th>State</th>
</tr>
</thead>
<tbody>
<tr>
<td>1999</td>
<td>150</td>
<td>50</td>
</tr>
<tr>
<td>2000</td>
<td>180</td>
<td>60</td>
</tr>
<tr>
<td>2001</td>
<td>175</td>
<td>60</td>
</tr>
<tr>
<td>2002</td>
<td>190</td>
<td>60</td>
</tr>
<tr>
<td>2003</td>
<td>200</td>
<td>60</td>
</tr>
</tbody>
</table>

The increase in reported opinions is almost entirely in the state courts. The number of opinions has remained relatively flat in the federal courts. In 1999, there were sixty-two federal court opinions raising mediation issues, increasing to ninety-six in 2002 but falling back to eighty-seven in 2003.

The total number of relevant opinions (1223) may not appear significant on a national scale; the increased numbers might simply reflect the increased use of mediation in the United States. 18 On the

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18. Since many mediations are private matters, it is difficult to determine the number of mediations conducted in any jurisdiction. According to the National Center for State Courts, "[b]ecause programs and rules vary widely from state to state, and even within a single state, national data is nearly impossible to come by and even more difficult to analyze." NATIONAL CENTER FOR STATE CONCERNS, Mediation FAQ's, http://www.ncsconline.org (last visited Apr. 5, 2005). The Florida Dispute Resolution Center has documented over seventy-thousand court-connected mediations in 2002, which does not account for all the mediations in Florida. See Press, supra note 1, at 55 (citing KIMBERLY KOSCH, FLORIDA MEDIATION AND ARBITRATION PROGRAMS: A COMPENDIUM (2003)). In 2000–2001, nearly 8000 cases were mediated in just five superior courts in California. See Stipanowich, supra note 3 (citing the Judicial Council of California, Evaluation of the Early Mediation Pilot Projects (Feb. 27, 2004)). Nationally, community mediation programs handle an estimated 100,000 conflicts each year. See Timothy Hedeen, The Evolution and Evaluation of Community Mediation: Limited Research Suggests Unlimited Progress, 22 CONFLICT RES. Q. 101, 101 (citing 2003 report of the National Association for Community Mediation).
other hand, the increasing number of cases reported annually and
the concentration of the litigation in a few jurisdictions definitely
suggests that ADR is moving out of the shadows of the courthouse
into the light of public scrutiny.19

As indicated in Table 2, Texas state courts had 145 opinions, ac-
counting for nearly twelve percent of all opinions in the database.
California was next with 122 opinions (10%) followed by Florida with
eighty-three (6.8%), Ohio with forty-five (3.7%), and Washington with
thirty-four opinions (2.8%). The federal courts20 in New York, with
thirty-six opinions (3%), Texas, with thirty-three (2.7%), and Florida
with twenty-nine (2.4%), led the federal jurisdictions.

In 1999, there were only three opinions from California state
courts involving mediation issues. By 2003, there were fifty-four Cal-
ifornia opinions addressing mediation issues. The numbers almost
doubled in Florida, from thirteen in 1999 to twenty-five in 2003. In
Texas, mediation litigation increased from twenty-three cases in
1999 to twenty-nine in 2003.

<table>
<thead>
<tr>
<th>States</th>
<th>Number of Total Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>TX</td>
<td>180</td>
</tr>
<tr>
<td>CA</td>
<td>160</td>
</tr>
<tr>
<td>FL</td>
<td>140</td>
</tr>
<tr>
<td>NY</td>
<td>120</td>
</tr>
<tr>
<td>OH</td>
<td>100</td>
</tr>
<tr>
<td>NC</td>
<td>80</td>
</tr>
<tr>
<td>WA</td>
<td>60</td>
</tr>
<tr>
<td>MN</td>
<td>40</td>
</tr>
<tr>
<td>TN</td>
<td>30</td>
</tr>
<tr>
<td>AL</td>
<td>20</td>
</tr>
</tbody>
</table>

The trend of an increase in mediation litigation appears to be
continuing in 2004 and 2005. Our preliminary review of decisions

19. The ADR community may suggest a different metaphor, like moving from
the shadows into the darkness of the adversary system. See generally James J. Alfini &
Catherine G. McCabe, Mediating in the Shadow of Courts: A Survey of the Emerging

20. For ease in analysis we treated all federal district courts in the same state as
one jurisdiction.
reported in 2004 and the first six months in 2005 leads us to predict that the total number of mediation opinions in both years will exceed four-hundred cases.

C. Level of Court

Most litigated issues about mediation are handled at the trial level, usually without any reported opinion. As would be expected, most of the opinions in our database came from appellate courts (874), although we did find 350 trial court opinions. Most of the trial court opinions (290) were from federal courts. Legal issues involving mediation are increasingly finding their way up the appellate chain to state supreme courts. State supreme courts addressed mediation issues in ninety-one opinions over the five-year period. In 1999, state supreme courts addressed mediation issues in eleven cases; in 2003, that figure grew to thirty.

D. Subject Matter

Table 3 separates the cases based on the general subject matter of the underlying dispute that gave rise to the mediation process. Slightly over thirty percent of the cases (373) were contractual disputes or involved commercial litigation. These disputes ranged from large cases, such as a class action suit involving a “Y2K” software dispute,21 to smaller cases, such as those involving a partnership dissolution22 or the specific performance of a property dispute.23 The next largest group of cases (264) involved family law disputes.24


23. See, e.g., DR Lakes, Inc. v. Brandsmart U.S.A. of West Palm Beach, 819 So. 2d 971 (Fla. Dist. Ct. App. 2002) (holding that the statutory mediation privilege did not apply when a party was claiming that a mediated settlement agreement in a real property transaction was not enforceable because of mutual mistake because of a clerical error).

24. Selecting the family law cases was difficult. In several states, mediation is an established step in the divorce process. If agreement is reached in mediation, the agreement is submitted to the court to be included in a court order. Court orders in family law cases setting forth such matters as visitation rights, child support, or even property settlements are constantly subject to reevaluation as circumstances change in the lives of the family members. If parties attempted to modify a court order that in whole or part was based on a mediated agreement, we made subjective judgments whether the case involved a significant mediation issue, or simply a modification of a
Nearly half of these cases (124) came from five states where mediation is an integral part of the family law process: Texas (43); Florida (33); California (20); Ohio (14); and Washington (14). Personal injury and employment litigation each represented about twelve to thirteen percent of the total number of cases. The employment litigation cases included a number of Title VII and other statutory claims.

There were a number of claims brought under the Individuals with Disabilities Education Act (IDEA). Under this statute, schools are required to develop procedures to allow parents of children with disabilities to contest “any matter relating to the identification, evaluation, or educational placement” of their child. The Act creates a right to mediation or a due process hearing and, if necessary, a right to litigate in court. Congress provided a fee shifting provision to ease the financial burden on parents in these disputes, allowing for the recovery of attorneys’ fees if they become the “prevailing party.” Several cases addressed the question of whether parents who have obtained a settlement in mediation, rather than in a court decision, are “prevailing parties.”

Cases involving mediation issues were diverse. We placed 167 cases in a “Miscellaneous” category. These included cases involving such diverse issues as property disputes, civil rights cases outside court order. See, e.g., Goins v. Goins, 762 So. 2d 1049 (Fla. Dist. Ct. App. 2000) (contesting the language in a court order that purported to incorporate a mediated settlement).


29. See, e.g., T.D. v. LaGrange Sch. Dist. No. 102, 349 F.3d 469, 482 (7th Cir. 2003) (ruling that parents were not “prevailing parties” for private settlement, but were “prevailing parties” justifying attorneys fees to the extent they prevailed at an administrative hearing); Casey F. v. River Falls Sch. Dist., 243 F.3d 329 (7th Cir. 2001) (holding that parents who obtained a settlement agreement in mediation were not prevailing parties under the statute).

of the employment area, a class action suit challenging prison conditions, and a dispute over the proceeds of a settlement in a *qui tam* False Claims Act suit.

### Table 3: Type of Case

<table>
<thead>
<tr>
<th>Category</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commercial/Contract</td>
<td>373</td>
</tr>
<tr>
<td>IDEA</td>
<td>18</td>
</tr>
<tr>
<td>Tax/Bankruptcy</td>
<td>23</td>
</tr>
<tr>
<td>Estate</td>
<td>34</td>
</tr>
<tr>
<td>Malpractice</td>
<td>41</td>
</tr>
<tr>
<td>Personal Injury</td>
<td>153</td>
</tr>
<tr>
<td>Employment</td>
<td>153</td>
</tr>
<tr>
<td>Family Law</td>
<td>264</td>
</tr>
<tr>
<td>Miscellaneous</td>
<td>167</td>
</tr>
</tbody>
</table>

E. Mediation Issues

Table 4 shows the types of mediation issues that were addressed in the cases. The total number of issues raised far exceeds the number of opinions because some opinions addressed several mediation issues.

31. See, e.g., Brisco-Wade v. Carnahan, 297 F.3d 781 (8th Cir. 2002) (finding abuse of discretion by court ordering prevailing prison officials to pay mediation fees of prisoner’s *pro se* § 1983 action).

32. See Jones v. Mabry, 205 F.3d 1346 (8th Cir. 1999) (addressing mediated settlement agreement with prison inmates concerning grooming guidelines).


34. Almost a third of the cases involved more than one issue (377 cases out of 1223). The most common combination of issues included: duty to mediate/condition precedent (108); sanction/fees (65); mediation-arbitration/condition precedent (44); duty to mediate/fees (44) and enforcement/confidentiality (35). Enforcement disputes made up more than half of all the single-issue opinions (451 out of 847 opinions), followed by fee disputes (117), miscellaneous disputes (75), confidentiality (68) and duty to mediate (67).
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TABLE 4: MEDIATION ISSUES PRESENTED*

<table>
<thead>
<tr>
<th>Issue</th>
<th>Number of cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Enforcement of Mediated Settlements</td>
<td>569</td>
</tr>
<tr>
<td>Duty to Mediate</td>
<td>279</td>
</tr>
<tr>
<td>Fees</td>
<td>243</td>
</tr>
<tr>
<td>Confidentiality</td>
<td>152</td>
</tr>
<tr>
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*Some cases present more than one issue

II. CONFIDENTIALITY

A. Overview

The database contains 152 opinions where courts considered a mediation confidentiality issue, including fifteen state supreme court decisions and eight federal circuit court opinions. The number of cases raising confidentiality issues more than doubled between 1999 and 2003, from seventeen to forty-three.35 In a number of opinions, confidentiality issues were commonly interlinked with other mediation dispute issues: enforcement (46); ethics/malpractice (21); sanctions (21); fees (18); mediation-arbitration (9); and duty to mediate (8).

35. Predictably, state opinions in California (26), Texas (16), Florida (10), and Ohio (9) led the way.
The majority of the confidentiality opinions (130) considered whether to permit testimony or discovery from mediation participants. Courts upheld statutory or rule limitations on availability of such evidence in fifty-seven opinions (44%), upheld limitations in part in eight cases (6%), and declined to protect confidentiality in sixty opinions (46%). In five cases (4%), the issue was left undecided. The balance of the confidentiality decisions (22) address a range of questions other than admissibility or discovery, most commonly judicial disqualification or consequences for breach of confidentiality agreements.

While these confidentiality disputes certainly merit discussion, the more significant finding is the large volume of opinions in which...

36. See, e.g., Estate of Smith v. Smith, No. A097581, 2003 WL 1558280 (Cal. Ct. App. Mar. 26, 2003) (denying as moot a motion to strike portions of appendix which contained mediation statements, but noting in a footnote that such statements are confidential and inadmissible); Marple v. Homes, No. G027809, 2002 WL 657962, at *7 (Cal. Ct. App. Apr. 22, 2002) (refusing to rule on claim that party was deprived of due process and equal protection by the court’s failure to compel the mediator to testify on the question of whether parties intended to settle all or only a part of their lawsuit because the record below failed to show that the trial court considered the issue and the appellate court “does not issue advisory opinions”); Ashley Furniture Indus., Inc. v. SanGiacomo N.A. Ltd., 187 F.3d 363 (4th Cir. 1999) (remanding enforcement and confidentiality issues to trial court which could better interpret and apply local court rules).

37. See, e.g., Metz v. Metz, 61 P.3d 383 (Wyo. 2003) (finding no abuse of discretion in trial judge’s failure to disqualify himself from presiding over divorce bench trial after having first heard evidence concerning the parties’ earlier mediation and denying wife’s motion to enforce an alleged mediated settlement); Cashin v. Cashin, No. C4-02-902, 2003 WL 42269 (Minn. Ct. App. Jan. 7, 2003), appeal after remand, No. C4-02-1984, 2003 WL 21266858, at *2 (Minn. Ct. App. June 3, 2003) (finding no abuse of discretion in trial court refusal to remove a parenting-time expediter for a “technical” violation of confidentiality—the expediter’s notification to court of concerns that the parties’ children were “being emotionally abused by the punitive vagaries of [a party’s] behavior”—because the disclosure was motivated by concern for the parties’ children); Enterprise Leasing Co. v. Jones, 789 So. 2d 964 (Fla. 2001) (finding trial judge not subject to automatic disqualification from presiding over personal injury action to be tried by a jury, merely because judge is informed by plaintiff’s counsel of confidential mediation information, including demand for settlement and highest offer made by defendants).


39. See Part II.C.1, infra notes 61–81 and accompanying text.
courts considered detailed evidence of what transpired in mediations without a confidentiality issue being raised—either by the parties, or *sua sponte* by the court. Indeed, uncontested mediation disclosures occurred in thirty percent of all decisions in the database, cutting across jurisdiction, level of court, underlying subject matter, and litigated mediation issues. Included are forty-five opinions in which mediators offered testimony, sixty-five opinions where others offered evidence about mediators’ statements or actions, and 266 opinions where parties or lawyers offered evidence of their own mediation communications and conduct—all without objection or comment. In sum, the walls of the mediation room are remarkably transparent.

B. Uncontested Mediation Evidence

1. Mediator Evidence

The database contains sixty-seven opinions detailing or alluding to direct testimony or affidavits from mediators. In sixty-seven percent of these cases (45), the information was considered without judicial review of confidentiality principles and apparently without objection by either party. In an additional eighty-seven opinions, parties or lawyers offered evidence regarding what mediators said or did. In seventy-five percent of these cases (65), the evidence was considered by the court without contest.

The substance of uncontested mediator evidence was extremely wide-ranging, including testimony about:

- attendance and authority;
- quality of parties’ participation;

40. These sixty-seven opinions include six cases where others, as well as the mediator, provided mediation evidence.

41. See, e.g., *In re A.A.*, 560 S.E.2d 763 (Ga. Ct. App. 2002) (allowing mediator testimony regarding why mediation did not occur, including explanation that party did not want to pay for it); Cabellero v. Wikse, No. 27995, 2003 WL 21697914 (Idaho July 23, 2003), opinion withdrawn, No. 27995, 2004 WL 858710 (Idaho Apr. 22, 2004) (allowing mediator to testify that he would have terminated the session if he did not believe lawyer had authority); Stull v. Port Auth. of N.Y. and N.J., 701 N.Y.S.2d 430 (N.Y. 2000) (allowing evidence that mediator had instructed counsel to come to the table with full authority to enter into a settlement).

42. See, e.g., Lehrer v. Supkis, No. 01-00-00112-CV, 2002 WL 356394, *1 (Tex. App. Feb. 28, 2002) (noting that mediation was highly contentious and “that the appellant, by making offensive statements, alienated the mediator”); Nick v. Morgan’s Foods, Inc., 270 F.3d 590 (8th Cir. 2001) (allowing mediator testimony concerning appellants’ minimal level of participation); Tatarian v. Aluf Plastics, No. 01-CV-5372 (WGB), 2002 WL 1065880 (D.N.J. May 13, 2002) (considering mediator correspondence confirming that a party subverted the mediation process by repeatedly making, and then withdrawing, settlement offers).
quality of class action bargaining;\textsuperscript{43}  
party admissions and impeachment;\textsuperscript{44}  
party conduct and mental state;\textsuperscript{45}  
what issues were or were not discussed;\textsuperscript{46}  
mediator's factual assertions;\textsuperscript{47}  
mediator's valuation of the case;\textsuperscript{48}


\textsuperscript{45} See, e.g., \textit{Goad v. Ervin}, No. E033593, 2003 WL 22753688 (Cal. Ct. App. Nov. 21, 2003) (considering mediator testimony that party was angry when he checked in at beginning of mediation); \textit{In re S.H.}, 987 P.2d 735 (Alaska 1999) (allowing mediator testimony that party was acting irrationally); Jarrow Formulas, Inc. v. LaMarche, 118 Cal. Rptr. 2d 388 (Cal. Ct. App. 2002), aff'd, 74 P.3d 737 (Cal. 2003) (allowing evidence that a party was screaming and yelling and attempted to leap over the table to physically attack the other party, forcing the mediator to intervene); \textit{V.J.L. v. R.E.D.}, 39 P.3d 1110 (Wyo. 2002) (permitting mediator to file written report about party's behavior in response to \textit{pro se} party motion alleging irregularities in the mediation process).

\textsuperscript{46} See, e.g., Coulter v. Carewell Corp. of Okla., 21 P.3d 1078 (Okla. Civ. App. 2001) (considering mediator testimony about whether release would be forthcoming); Genesis Props. v. Crown Life Ins. Co., No. 98-2370, 2000 WL 178403 (6th Cir. Feb. 8, 2000) (considering mediator testimony that attorney fees were never discussed); Lambert v. Lillig, 670 N.W.2d 129 (Iowa 2003) (considering mediator testimony regarding whether fundamental constitutional rights and issues were discussed during mediation of grandparent visitation dispute).

\textsuperscript{47} See, e.g., Diebold v. Nelson Oyen & Torvik, PLLP, No. C7-02-781, 2003 WL 2582430 (Minn. Ct. App. Feb. 11, 2003) (noting evidence that mediator stated insurance policy cash value to be approximately $64,000); Kendrick v. Barker, 15 P.3d 734 (Wyo. 2001) (considering letter from mediator stating time limitation on pending offer); Brinkerhoff v. Campbell, 994 P.2d 911 (Wash. Ct. App. 2000) (including testimony that mediator mistakenly believed that insurance policy limits were $100,000 and conveyed the erroneous information to his client parties).

\textsuperscript{48} See, e.g., Streber v. Hunter, 221 F.3d 701 (5th Cir. 2000), \textit{reh'g and suggestion for \textit{reh'g en banc denied}}, 233 F.3d 576 (5th Cir. 2000) (including testimony that mediator, a former judge, told parties they should not settle because they would lose tax dispute at trial); Brehm Cmtys. v. Super. Ct., 105 Cal. Rptr. 2d 918 (Cal. Ct. App. 2001) (including party declaration that mediator, a retired judge, determined that settlement was fair); Gentry v. Wilson, 628 N.W.2d 439 (Wis. Ct. App. 2001) (noting evidence that physician member of malpractice mediation panel advised participants that there may have been negligence).
mediator’s proposals;\textsuperscript{49} 
mediator’s understanding of settlement terms;\textsuperscript{50} 
parties’ understanding of settlement terms;\textsuperscript{51} and 
coercion and duress allegations.\textsuperscript{52}

In line with the obligation to decide only matters presented for decision, and consistent with judicial officers’ inclination to hear all available evidence—especially when offered by an arguably “unbiased” witness\textsuperscript{53}—courts are in near uniformity in their silence about the open door for mediator evidence. One notable exception is \textit{VJL v.}


\textsuperscript{51} See, e.g., Herrera v. Herrera, 974 P.2d 675 (N.M. Ct. App. 1999) (considering mediator testimony concerning husband’s understanding of a divorce decree, showing fact that husband made no objection to settlement terms during the mediation, and that the final marital termination agreement reflected the terms negotiated in mediation); Gelfand v. Gabriel, No. B152557, 2002 WL 1397037, at *3 (Cal. Ct. App. June 27, 2002) (noting testimony that the mediator in the presence of all parties and counsel “explained very carefully the terms of the settlement, asked each of the parties whether they agreed to the terms and conditions, asked each of the attorneys present whether they joined in the parties’ acceptance, and was personally present when the stipulation was reduced to writing”).

\textsuperscript{52} See, e.g., Gallagher v. Gallagher, No. 125000, 1999 WL 795683 (Va. Cir. Ct. Aug. 18, 1999), \textit{aff’d in part, rev’d in part}, 546 S.E.2d 222 (Va. Ct. App. 2001) (concluding that the assertion that party was “browbeaten” into agreement was countered by evidence that she informed the mediator that she accepted the agreement’s terms); Patsky v. Suprenant Cable Corp., No. 972527A, 2001 WL 1029642, at *2 (Mass. Super. Ct. Aug. 2, 2001) (noting client’s testimony that he felt pressured when mediator “said she had another commitment at 5 p.m. and insisted on the settlement decision”); Vitakis-Valchine v. Valchine, 793 So. 2d 1094, 1096 (Fla. Dist. Ct. App. 2001) (noting that mediator’s testimony on coercion allegations “was presented prior to that of the wife, and, consequently, her allegations of potential misconduct were not directly confronted”).

\textsuperscript{53} See Ramirez v. De Coster, 142 F. Supp. 2d 104, 113 (D. Me. 2001) (crediting Senator Warren Rudman’s testimony in dispute about enforcement of mediated settlement and finding him as mediator “to be the most neutral and dispassionate observer of what was said and done”).
Red and DDD,\textsuperscript{54} where the Wyoming Supreme Court summarily affirmed an adoption against challenge by a pro se biological mother who, among other things, alleged irregularities in the mediation process that preceded termination of her visitation rights. The mediator, on his initiative, filed a report in response to the mother’s motions. The court made no ruling on the propriety of the report, but was compelled to question the wisdom of its production. According to the court,

\begin{quote}
[T]he function of a mediator is to be a conciliator, to bring parties together in an effort to reconcile their differences. Interjecting oneself into court proceedings after the fact of the mediation as basically a witness to discredit the truthfulness and character of a party to the mediation would not seem to comport with the functions of a mediator.\textsuperscript{55}
\end{quote}

2. Evidence of Mediation Communications from Others

Parties and their lawyers offered evidence of their own communications and actions in mediation even more frequently than those of the mediator. The database contains 359 opinions that include evidence of oral mediation communications other than mediator evidence. In seventy-four percent of these cases (266), the evidence came in without objection or judicial review. As with mediator evidence, parties and their lawyers shared their recollection of what was said and done in mediation on a wide range of topics, including:

- nearly one hundred opinions with evidence detailing what issues were or were not discussed in mediation;\textsuperscript{56}
- more than thirty opinions discussing attendance/authority issues;\textsuperscript{57}

\begin{flushleft}
\textsuperscript{54} 39 P.3d 1110 (Wyo. 2002). See also In re R.H. Macy & Co., Inc., 236 B.R. 583, 587 n.5 (Bankr. S.D.N.Y.1999), aff’d, 283 B.R. 140 (Bankr. S.D.N.Y. 2002) (striking all post-mediation briefing, opining that it was “inimical to the process of mediation and an unwarranted use of that process as a further discovery tool to raise new arguments”); Lyons v. Booker, 982 P.2d 1142 (Utah Ct. App. 1999) (remanding a dispute about an appellate mediation settlement but advising the parties that mediation evidence would be limited).
\textsuperscript{55} VJL v. Red and DDD, 39 P.3d 1110, 1113 n.3. (Wyo. 2002).
\textsuperscript{57} See, e.g., Behling v. Russell, 293 F. Supp. 2d 1178 (D. Mont. 2003) (citing evidence regarding who did the negotiating in mediation); Reliance Nat’l Ins. Co. v. B.
more than twenty opinions offering bargaining histories;\(^{58}\) and
more than fifteen opinions addressing parties’ assumptions
about settlement terms.\(^{59}\)
In addition, a host of opinions discuss participants’ health maladies
offered to establish impairment of meaningful mediation
participation.\(^{60}\)
While these uncontested evidence cases overwhelmingly suggest
that the walls of mediation rooms are largely transparent, parties
did, in a limited number of cases, seek to keep them opaque.

C. Contested Mediation Evidence

Parties challenged direct testimony offered by mediators in
twenty-two of sixty-seven cases where it was offered (33%). In com-
parison, parties challenged the introduction of mediator evidence pro-
vided by others only twenty-five percent of the time, in twenty-two of

\(^{58}\) See, e.g., Griffin v. Wallace, 581 S.E.2d 375 (Ga. Ct. App. 2003) (listing initial
settlement offer, initial demand, and counters, in dispute about enforcement of al-
leged oral agreement); Gen. Agents Ins. Co. of Am., Inc. v. Home Ins. Co. of Ill., 21
S.W.3d 419 (Tex. App. 2000) (detailing settlement authority, what lawyers believed
reasonable offers might be, and plaintiff demands in insurance subrogation case);
Turner v. Young, 205 F.R.D. 592 (D. Kan. 2002) (listing defense pre-mediation settle-
ment authority, plaintiff’s last mediation demand, and defendant’s final offer in opin-
ion denying sanctions for alleged failure to send a representative with settlement
authority to private mediation). For a detailed discussion of the intersection between
confidentiality and sanctions see, Part VI.B, infra notes 390–402 and accompanying
text.

\(^{59}\) See, e.g., Georgos v. Jackson, 790 N.E.2d 448 (Ind. 2003) (noting that plaintiff
and his attorney mistakenly believed insurance policy limit was $100,000, when it
was in fact $1 million); Van Pelt v. Van Pelt, No. 04-99-00430-CV, 2000 WL 682640
(Tex. App. May 17, 2000) (noting party’s assertion that settlement agreement was
merely an outline and should not have been basis for court-issued consent judgment);
(offering dramatically different interpretations of the parties’ intent with respect to
attorney fee provision in a mediated settlement).

\(^{60}\) See, e.g., Guthrie v. Guthrie, 577 S.E.2d 832 (Ga. Ct. App. 2003), aff’d, 594
S.E.2d 356 (Ga. 2004) (considering evidence that party had suffered anxiety attacks
and consumed at least four doses of Valium during course of the mediation); Jones v.
2002), reh’g denied (Dec. 13, 2002) (considering evidence that client felt under ex-
treme duress and that “her attorney’s use of prescription medication made him
‘slower’ and not capable of acting in her best interest”); Lerer v. Lerer, No. 05-99-00
a hazy memory and was completely debilitated by pneumonia at the mediation).
eighty-seven opinions. A similar challenge rate, twenty-six percent, was found for other evidence of mediation communications, in ninety-three of 359 opinions.

1. Confidentiality Upheld

Mediation confidentiality was upheld in a total of fifty-seven cases. Over twenty percent of the decisions (12) were issued by California courts, interpreting that state’s strict confidentiality statutes. Setting the standard for California courts is the well known opinion in Foxgate Homeowners’ Ass’n., Inc. v. Bramalea California, Inc. The California Supreme Court vacated an award of mediation sanctions that was based on a mediator’s report and other documents that recited statements made during a mediation session. Strictly interpreting the California mediation confidentiality statute, the court concluded there was no implied statutory exception to confidentiality authorizing a mediator’s disclosure to the court of sanctionable conduct.

The California Court of Appeals applied Foxgate in Eisendrath v. Superior Court, an action to correct a mediated spousal support agreement. The court ruled that no evidence of mediation communications between husband and wife may be admitted in evidence absent the parties’ express waiver of confidentiality, including those statements made outside the presence of the mediator as long as they were materially related to the purpose of the mediation. The appeals court further concluded that the trial court erred in holding an in camera evidentiary hearing to consider the relevance of the mediator’s testimony, reasoning the mediator was statutorily incompetent to testify under California statutes. In addition to the California

decisions, courts in sixteen other states have issued opinions upholding confidentiality, including multiple rulings from Texas, Oregon, and Indiana.

Courts protect mediation communications at the discovery stage as well as at trial. For example, in *Cason v. Builders FirstSource-Southeast Group, Inc.*, an action brought by a former employee for race-based hostile work environment and related claims, the court refused to compel production of mediation and settlement documents from a co-worker’s EEOC file.

In eight cases, confidentiality was upheld only in part. For example, in *In re RDM Sports Group, Inc.*, the court protected counsel’s memorandum of law presented to the mediator from discovery, as well as copies of slides prepared for and possibly used in mediation, but declined to protect documents prepared well in advance of mediation.


67. *See, e.g.*, *In re Bidwell*, 21 P.3d 161, 296 (Or. Ct. App. 2001) (concluding that letters exchanged between the parties’ respective counsel while appellate mediation was pending were “confidential mediation communications” and may not subsequently be offered in evidence to support a finding that a party was objectively unreasonable during the proceedings or in pursuing settlement); *In re Marriage of Reich*, 32 P.3d 904 (Or. Ct. App. 2001) (refusing to admit evidence of mediation communications in action to enforce a settlement made long after the failure of the parties’ mediation).

68. *See, e.g.*, Vernon v. Acton, 732 N.E.2d 805 (Ind. 2000) (reversing trial court order to enforce pre-trial mediated oral settlement agreement, and concluding that testimony regarding the alleged oral settlement agreement was confidential and privileged and not admissible pursuant to the ADR rules incorporated in the parties’ written agreement to mediate); *R.R. Donnelley & Sons Co. v. N. Tex. Steel Co., Inc.*, 752 N.E.2d 112 (Ind. Ct. App. 2001) (holding that trial court committed error by admitting a videotape prepared specifically for mediation).


70. 277 B.R. 415 (Bankr. N.D. Ga. 2002). *See also* *In re Anonymous*, 283 F.3d 627 (4th Cir. 2002) (permitting limited mediation disclosures by an attorney and client embroiled in a fee dispute since non-disclosure would cause manifest injustice, but foreclosed testimony by the mediator, to whom a stricter confidentiality standard applied).
2. Confidentiality Not Upheld

Courts expressly refused to protect mediation confidentiality in sixty opinions. Surprisingly, few of these decisions involve a reasoned weighing of the pros and cons of compromising the mediation process. Rather, courts routinely justify admissibility or discovery of mediation information through:

- waiver;\textsuperscript{71}
- consent;\textsuperscript{72}
- finding that the process was not mediation.\textsuperscript{73}

\textsuperscript{71} See, e.g., Chodos v. Gorin, No. B163447, 2003 WL 22464054 (Cal. Ct. App. Oct. 31, 2003) (finding that failure to object to mediation evidence results in waiver of privilege and going on to strike denial of malicious prosecution claim, in part relying on statement made in mediation about reasons lawsuit was brought); Kalof v. Kalof, 840 So. 2d 365, 367 (Fla. Dist. Ct. App. 2003) (ruling that spouse waived the mediation privilege by moving to vacate based on duress and non-disclosure); Holmes v. Concord Homes, Ltd., 115 S.W.3d 310, 318 (Tex. App. 2003) (finding no error in introduction of considerable evidence about mediation and settlement offers at contract dispute trial, where party failed to properly voice objections to introduction of specific testimony and trial court informed the jury “at some length about the mediation process and the confidentiality involved there, and then instructed counsel to avoid asking questions that invaded the mediation process”).

\textsuperscript{72} See, e.g., Fenske v. Fenske, No. C4-99-2007, 2000 WL 622589, at *3 (Minn. Ct. App. May 16, 2000) (finding no error in trial court’s use of a mediator as an “expert witness” under MINN. R. EVID. 706 by incorporating the mediator’s recommendation as an order of the court, where court had ordered parties in harassment case to meet with a mediator “within 10 days to come to an agreement for contact between the parties for exchanging information about the children” and further ordered that absent agreement the mediator “shall offer his recommendations for contact . . . to the Court”); Howard v. Ramsey, No. C-000503, 2001 WL 228015 (Ohio Ct. App. Mar. 9, 2001) (finding no violation of local mediation confidentiality rules where parties had consented to testimony from a third party’s attorney regarding nature of the mediated settlement). Cf. In re T.T., 39 S.W.3d 355 (Tex. App. 2001) (ruling that the parties’ consent to have mediator’s report submitted to the trial court for approval did not constitute waiver of their right to exclude the report if offered as evidence against them).

\textsuperscript{73} See, e.g., U.S. Fid. & Guar. Co. v. Dick Corp./Barton Malow, 215 F.R.D. 503 (W.D. Pa. 2003) (affirming special master decision to permit discovery of a settlement from an earlier case involving some but not all parties upon finding that the settlement was not protected by state mediation privilege, where a single mediation session did not result in an agreement, a second session was discussed but never scheduled, and the parties had only limited follow-up communication with the mediator in which they apprised him of the ongoing settlement negotiations); In re Home Health Corp. of Am., 268 B.R. 74 (Bankr. D. Del. 2001) (refusing to exclude memorandum prepared by debtor for ADR proceeding where the proceeding was more like an arbitration than a mediation); Kanach v. Rogers, 742 N.E.2d 987 (Ind. Ct. App. 2001) (refusing to seal report prepared by a neutral custody-evaluator, noting that mediation confidentiality rules are not implicated simply because parties choose to use the word mediation to describe their ADR process).
• finding that the provider of evidence was not a mediator;\textsuperscript{74}
• finding that confidential information was not actually disclosed,\textsuperscript{75} or that there was insufficient evidence to establish whether confidential information was disclosed;\textsuperscript{76}
• concluding the evidence was offered for a permissible purpose;\textsuperscript{77} or
• concluding the evidence was not material or its introduction constituted harmless error.\textsuperscript{78}


\textsuperscript{75} See, e.g., Riner v. Newbraugh, 563 S.E.2d 802 (W. Va. 2002) (criticizing the trial court’s questioning of the mediator regarding details of a mediated settlement, but refusing to find violation of confidentiality rules where the mediator did not disclose any confidential information); Sonii v. Gen. Elec., No. 95 C-5370, 2001 WL 1422136 (N.D. Ill. Sept. 21, 2001) (finding no disclosure of confidential communications, where party brief included references to opposing counsel’s refusal to engage in rational discussions and overall futility of settlement efforts but included no specific statements); Am. Constr. & Envtl. Servs., Inc. v. Mosleh, No. A093541, 2002 WL 31480282 (Cal. Ct. App. Nov. 7, 2002) (finding no violation of confidentiality where witness provided factual information about cost of repair even though he had first completed the cost calculations in a mediation).

\textsuperscript{76} See, e.g., Davidson v. Lindsey, 104 S.W.3d 483 (Tenn. 2003) (declining to infer impropriety where the record did not establish definitively what information, if any, was imparted to the trial judge by a settlement judge conducting mediation); In re Miriah W., No. L-02-1182, 2002 WL 31630758 (Ohio Ct. App. Nov. 22, 2002) (rejecting assertion that it was “highly probable” that the judge read a guardian’s report containing protected confidential statements made by the father in mediation, where record is devoid of evidence that the judge either reviewed the report or based any decisions on the objectionable material).

\textsuperscript{77} See, e.g., Smith v. Genstar Capital, LLC, No. C-01-3936 MMC, 2001 WL 1658315 (N.D. Cal. Dec. 20, 2001) (refusing to apply state evidentiary rules in federal court proceedings and admitting into evidence under Fed. R. Evid. 408, mediation statements by plaintiffs’ counsel regarding the nature of plaintiffs’ damages claims, where such information was introduced to show state of mind and lack of notice, rather than liability or invalidity of a claim); In re Daley, 29 S.W.3d 915 (Tex. App. 2000) (permitting deposition of a non-party participant in mediation on the narrow issue of whether he left the mediation session early and without permission of the mediator; finding such limited testimony outside the scope of statutory mediation confidentiality because it was not a communication relating to the subject matter of the mediation).

\textsuperscript{78} See, e.g., In re A.C., No. 99-0955, 1999 WL 1255793 (Iowa Ct. App. Dec. 27, 1999) (finding harmless error where district court admitted into evidence testimony of what mother said during a mediation meeting); Burgryn v. City of Bristol, 774 A.2d 1042 (Conn. App. Ct. 2001) (concluding that testimony concerning prior mediation
The most notable exception to this pattern is *Olam v. Congress Mortgage Co.* In *Olam*, an action to enforce a mediated settlement agreement where both parties desired the mediator’s testimony, Magistrate Wayne Brazil concluded, in an extensive opinion, that the “interest of justice” outweighed the negative impact that compelling testimony would have on the mediation process in California.

Concerns about justice were also at the heart of decisions to compromise mediation confidentiality in *Glover v. Torrence* and *Avary v. Bank of America, N.A.* In *Glover*, the Indiana Court of Appeals ruled that the public interest in ensuring that children receive adequate child support justified intrusion into mediation communications to determine if a father filed a fraudulent child support worksheet. In *Avary*, the court determined that an executor’s fiduciary duty may compel disclosure of otherwise protected confidential communications made during court-ordered mediation. The court’s holding applies where the evidence is sought in a claim based upon a new and independent tort committed by the executor that is factually and legally unrelated to the wrongful death and survival claims which were successfully mediated.

**D. Context of Confidentiality**

The level of vigilance for maintaining the confidentiality of mediation discussions varies depending on the context of the litigation. If the mediation settlement affects the rights of third parties, such as settlement in class action cases, the expectation of confidentiality appears to disappear or be substantially diminished. Indeed, not a single one of the thirty-four class action opinions in the database presented a confidentiality dispute. Mediators offered testimony in twelve and parties offered mediation evidence in twenty-two of these

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79. 68 F. Supp. 2d 1110 (N.D. Cal. 1999). *Olam* was decided before the California Supreme Court decision in Foxgate Homeowners’ Ass’n., Inc. v. Bramalea California, Inc., 25 P.2d 1117 (Cal. 2001).


81. 72 S.W.3d 779 (Tex. App. 2002).


84. *Id.* at 803.
cases. In short, the bargaining process in class actions is closely scrutinized and frequently placed on the public record—whether the settlement is reached through unfacilitated negotiation or with the assistance of a mediator.\textsuperscript{85}

The same pattern held for the forty-five opinions coded as third-party impact cases.\textsuperscript{86} Only two such opinions, each raising issues of child endangerment in contested divorce cases, presented confidentiality disputes for resolution.\textsuperscript{87}

Outside of California,\textsuperscript{88} and perhaps Texas,\textsuperscript{89} relevant mediation communications appear to be used regularly in court to establish or refute contractual defenses such as fraud, mistake, or duress.\textsuperscript{90} Overall, courts upheld confidentiality in enforcement cases in only thirteen of the forty-six opinions where privilege was addressed. While rules or statutes in some jurisdictions provide no privilege exceptions,\textsuperscript{91} others provide privilege exceptions to allow parties to prove a contract defense.\textsuperscript{92}

\textsuperscript{85} See, e.g., D’Amato v. Deutsche Bank, 236 F.3d 78, 85 (2d Cir. 2001) (noting that “[a] court reviewing a proposed settlement must pay close attention to the negotiating process, to ensure that the settlement resulted from ‘arm’s-length negotiations and that plaintiffs’ counsel have possessed the experience and ability, and have engaged in the discovery, necessary to effective representation of the class’s interests.’”) (quoting Weinberger v. Kendrick, 698 F.2d 61, 74 (2d Cir. 1982)).

\textsuperscript{86} Mediators offered testimony in two of the third-party impact cases; parties offered evidence in fourteen of the third-party impact cases.

\textsuperscript{87} In re Marriage of Thompson, No. 02-0387, 2003 WL 1037859 (Iowa Ct. App. Mar. 12, 2003) (denying without comment that part of father’s appeal of custody modification based on mother’s disclosure of privileged mediation communications); In re T.T., 39 S.W.3d 355 (Tex. App. 2001) (ruling that parties’ consent to have mediator’s report submitted to the trial court for approval did not constitute waiver of their right to exclude the report if offered as evidence against them).

\textsuperscript{88} See, e.g., Van Horn v. Van Horn, No. H024181, 2003 WL 21802273 (Cal. Ct. App. Aug. 6, 2003) (precluding deposition of a mediator to determine whether an agreement was entered into by mistake and was unfair); Eisendrath v. Super. Ct., 134 Cal. Rptr. 2d 716, 725 (Cal. Ct. App. 2003) (enforcing confidentiality rules to preclude evidence which party sought to use to correct a judgment to conform it to the terms actually agreed upon).


\textsuperscript{90} See generally, Ellen E. Deason, Enforcing Mediated Settlement Agreements: Contract Law Collides with Confidentiality, 35 U.C. Davis L. Rev. 33 (2001) (discussing how the application of traditional contract law conflicts with the concern for mediation confidentiality).

\textsuperscript{91} See, e.g., Minn. Gen. R. Prac. 114.08(a) (West 2006) (protecting from disclosure “any fact concerning the proceeding” absent consent of all parties, providing no exceptions for asserting contractual defenses). See generally Deason, supra note 90, at 45–50.

\textsuperscript{92} The Uniform Mediation Act provides an exception to the parties’ mediation privileges when traditional contract defenses are asserted. Unif. Mediation Act
In jurisdictions that provide confidentiality exceptions for contract defenses, counsel may choose to include a variety of potential defenses in the hopes of expanding the scope of accessible evidence. For example, in Florida, if a party asserts a defense of unilateral mistake, privilege rules prohibit evidence generated during the mediation, but if the claim is mutual mistake, the courts may consider what occurred during the mediation.  

In *Cain v. Saunders*, the Alabama Court of Appeals decided that the privilege rules did not prevent the introduction of evidence that fraud or mistake affected the settlement. Including a claim of mediator misconduct might also expand the admissibility of mediation communications. For example, the Uniform Mediation Act provides an exception to the privilege rules when there is a claim of professional misconduct or malpractice against the mediator.

An allegation of fraud successfully lifted the veil of confidentiality in most of the cases where the defense was raised. In twenty-seven of the fifty-five fraud cases, the opinion referred to oral statements made during the mediation. In four cases, the court considered written mediation communications, including a perjured child support worksheet, an extortionate note threatening arrest if the spouse did not agree to settlement, and prior drafts of the settlement agreements. The parties offered evidence of the mediator’s communications in seven cases. This evidence ranged from the mediator’s prior drafts of settlement and letters written by the mediator.

§ 6(b)(2) (2003). The mediation communication is excepted only after the court concludes that the evidence is not otherwise available, there is need for the evidence, and that the need substantially outweighs the interest of confidentiality. It also does not permit the mediator to provide the evidence giving rise to the contractual defense.


96. *Glover*, 723 N.E.2d at 931–32.


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to testimony about what the mediator said during the mediation. In _Brinkerhoff v. Campbell_, the parties offered evidence that the mediator made statements based on mistaken beliefs about the policy limits while in caucus. Mediators provided testimony in person or by deposition in three cases.

Courts cited to evidence of mediation communications in twenty-four of the thirty-six opinions addressing duress. In four cases, the mediator supplied the evidence through testimony or affidavit. The duress opinions expressly addressed privilege issues in only four cases and in each case allowed evidence of mediation communications.

In seventeen of the thirty-four mutual mistake opinions, the courts considered oral or written mediation communications. In four opinions, the court considered evidence of mediator communications, and in one case accepted testimony from the mediator. Of the nineteen unilateral mistake cases, the opinion referred to mediation communications in ten cases, including three opinions referring to


102. Matics v. Fodor, Nos. 209671 & 210440, 1999 WL 33451700, at *3 (Mich. Ct. App. Apr. 2, 1999) (considering the deposition of a person referred to as an “informal mediator” describing his recollection of the mediation); Advantage Props., Inc. v. Commerce Bank, N.A., No. 00-3014, 2000 WL 1694071, at *1 (10th Cir. Nov. 13, 2000) (noting, in evaluating a challenge to the enforcement of a mediation agreement, that the trial judge heard testimony from those present at the mediation, including the mediator); _Few_, 511 S.E.2d at 670 (remanding the case and specifically ruling that the “mediator is both competent and compellable to testify or produce evidence” on the issues of fraud, mistake, and whether an agreement was reached).


the mediator’s communications and one case involving mediator testimony. 105

As with other contractual defenses, a claim that the mediated settlement agreement was the result of a mistake puts substantial pressure on the anticipated confidentiality of the mediation. Enforcing a purported agreement that does not reflect the terms of the actual agreement or was premised on a mistake relating to the basis of the bargain is inconsistent with mediation’s goal for self-determination. To assess accurately whether the agreement was entered into or integrated by mistake requires intrusive analysis into what was said or written during the mediation.

To the extent that the mediation is a caucus style process, the mediator will likely be the communicator of the information that gives rise to the mistake. The mediator may be the only witness of what was said by and to the party that might have caused or be evidence of the mistaken belief. 106 Further, if the mediator drafts the settlement documents, the mediator may have thrust him or herself into a central role in the subsequent litigation. 107

The issue of privilege was raised in only twelve of the 117 sanctions cases. Mediation communications were reported in forty-three of the 117 sanctions cases. Mediators provided evidence in seven sanctions cases.

Courts and parties appear more vigilant in enforcing confidentiality in fee issues, upholding confidentiality in eleven out of eighteen confidentiality opinions where fees were in dispute. The rationale for the harder line on fees is best expressed in *Nwachukwu v. Jackson*. 108 In this attorneys’ fees dispute, the federal district court refused to take into account the reasonableness of the parties’ respective bargaining positions in mediation. According to the court,

> It would be hard to imagine a procedure better designed to destroy the motivation parties have to engage in the mediation process than to have a judicial officer determine how reasonable or unreasonable they were during their mediation and predicate

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105. See Dryden v. Burlington N. Santa Fe R.R., No. C00-4061 DEO, 2001 WL 34008725, at *2 (N.D. Iowa Nov. 29, 2001) (considering magistrate/mediator’s testimony that he has never told a party that they have thirty days in which to change their mind about a settlement agreement).

106. See id.

107. If the jurisdiction adopts the Uniform Mediation Act, mediator testimony may remain privileged even if the parties assert that the statement conveyed by the mediator or document drafted by the mediator serves as the basis for a claim of mutual mistake. *Unif. Mediation Act* § 6(c) (2003).

III. Enforcement of Mediated Settlement Agreements

A. Description of Enforcement Cases

The mediation issue most frequently litigated involved the attempt to enforce a mediation agreement. Enforcement issues, raised in 568 opinions (46% of the opinions in the database), include many of the highly publicized mediation cases.

For example, *Olam v. Congress Mortgage Co.*, an opinion cited in over sixty legal journal articles, involved a mortgage company's attempt to enforce an agreement reached after a lengthy mediation session with a sixty-five-year-old woman in poor health. In *Haghighi v. Russian-American Broadcasting Co.*, cited in forty-four articles, the Eighth Circuit refused to enforce a written, signed mediation agreement that did not include specific words required by a Minnesota statute. In *Vernon v. Acton*, cited in forty-eight articles, the Indiana Supreme Court did not enforce an alleged oral mediation agreement because of court rules making oral mediation communications confidential.

Hundreds of less familiar cases detail a wide range of enforcement disputes. Many focus on traditional contract defenses, but others deal with legal technicalities unique to mediation, or the impact of a mediated settlement on third parties. Included in the latter category are nearly three dozen opinions in class action cases in which the judge ruled on whether to approve a settlement that was obtained through mediation.

110. 68 F. Supp. 2d 1110 (N.D. Cal. 1999).
111. Based on Westlaw search of database TP-ALL.
112. 173 F.3d 1086, 1089 (8th Cir. 1999).
113. Based on Westlaw search of database TP-ALL.
114. 732 N.E.2d 805, 806 (Ind. 2000).
115. Based on Westlaw search of database TP-ALL.
116. See, e.g., *Great Neck Capital Appreciation Inv. P'ship v. Price-waterhouseCoopers*, L.L.P., 212 F.R.D. 400 (E.D. Wis. 2002) (holding that certification of class, approval of settlement of action, and approval of fees to both attorneys was warranted); *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85–87 (2d Cir. 2001) (holding that settlement negotiations were conducted by experienced professionals and approval of class action settlement was not abuse of discretion); *Wershba v. Apple Computer, Inc.*, 110 Cal. Rptr. 2d 145 (Cal. Ct. App. 2001) (holding that certification of class and approval of settlement against computer sellers was not an abuse of discretion by the trial court). See also supra note 85 and accompanying text regarding
B. Unsuccessful Enforcement Cases

In most of the enforcement cases (362), the courts enforced the alleged mediation agreement in whole or in part.117 Courts refused to enforce the alleged agreement in ninety-two opinions and remanded the case for further consideration in fifty-three cases.118 Some cases were resolved on procedural issues, so the court never decided whether to enforce the agreement.119 Of the ninety-two enforcement cases where the alleged mediation agreement was not enforced, twenty-eight were contract or commercial cases, and twenty-five were family law cases. In only six personal injury cases did a court refuse to enforce an alleged mediated settlement agreement.

Numerous commentators have expressed concern about fairness in the mediation process.120 If unfair practices are common in the mediation process, however, they are not causing courts to disregard the mediated settlement agreements with any frequency.

Several explanations are possible. The most obvious conclusion is that notwithstanding the commentators’ concerns, fundamental unfairness is uncommon in mediation practices. This conclusion is reinforced by numerous studies that find high satisfaction ratings among participants in mediations.121 A second explanation could be court willingness to ignore mediation confidentiality when evaluating class action settlement issues.

117. In fifteen opinions, the court enforced part of the agreement.

118. See, e.g., Ricks v. Abbott Labs., 65 F.App’x 899, 899 (4th Cir. 2003) (refusing to affirm a trial judge’s ruling enforcing an oral agreement reached during an unrecorded mediation session and remanding for an evidentiary hearing).


that courts are not carefully scrutinizing the fairness of the mediation process out of self-interest—mediation eliminates numerous cases from the court dockets. It is also possible, as discussed in Part II, that confidentiality rules in some jurisdictions may shield potentially unfair mediation processes from judicial review or that the application of traditional contract law does not adequately assure fair mediation processes.

Although the frequency with which mediation agreements are enforced suggests that mediation processes are generally fair, the increasing volume of enforcement-related litigation may suggest otherwise. The numbers are small but the trend is ominous. In 1999, there were ten enforcement opinions in which the mediation agreement was not enforced; in 2003, there were thirty-one.

There are too few reported opinions to draw conclusions, but an analysis of the 2003 opinions leads to some interesting observations. Six of the thirty-one cases refusing to enforce an agreement were from California and four were from Florida. The California cases illustrate the difficulty of merging the private mediation process with the public adversarial system. Each of the cases is published on Westlaw in what the court deems to be an “unpublished” opinion. Hence, the California courts are using public judicial powers to resolve these private disputes in a private, ad hoc manner. According to California Court Rules, courts and parties cannot cite or rely on unpublished opinions. Looking only at the 861 opinions by appellate courts in our database, over half (52%) of the opinions were unpublished. Much of the jurisprudence relating to the mediation process remains ad hoc and private. The five Florida opinions in


2003 refusing to uphold an agreement, on the other hand, were all published.124

The federal court opinions in 2003 that did not enforce an alleged mediated settlement agreement address disparate subjects. For example, in an action by farmers challenging a federal agency action, a federal court did not enforce an alleged agreement that was embodied in a confidential memorandum of understanding.125 The court explained that the agency’s representative at the mediation had no settlement authority and, therefore, no binding agreement was reached.126 United States v. Tennessee127 represents one of the few cases where a trial judge refused to enforce or approve a class action settlement obtained through mediation. The class, along with the federal government, maintained that an intermediate care facility run by the state failed to provide humane treatment to mentally retarded residents. The proposed settlement, which would have closed the facility, was objected to by many members of the class.

Many of the opinions (55) did not rule directly on the enforceability of the agreement, but remanded the matter for further proceedings. A large number of these cases raised summary judgment issues, and the courts concluded that there were factual issues in dispute.128 These cases arise in widely differing contexts. One example

126. Id. at 1210.
128. See, e.g., Gray v. State Farm Mut. Auto. Ins. Co., 734 So. 2d 1102, 1103 (Fla. Dist. Ct. App. 1999) (reversing and remanding summary judgment because of disputed fact issue of whether the carrier waived or was prejudiced by lack of notification); Lavigne v. Green, 23 P.3d 515, 520 (Wash. Ct. App. 2001) (reversing summary judgment because of material issue of fact in dispute about whether the mediated settlement agreement was disputed, and whether the parties reached an enforceable agreement); Brinkerhoff v. Campbell, 994 P.2d 911, 916 (Wash. Ct. App. 2000) (reversing grant of summary judgment because of disputed factual issue on alleged misrepresentation leading to settlement agreement).
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is Ashley Furniture Industries Inc. v. San Giacomo, Ltd., where the Fourth Circuit ruled in a trade dress infringement suit that summary judgment should not be granted because factual issues were in dispute. The court also instructed the trial judge to determine whether the local rules governing mediation settlements, which directed the parties to reduce any settlements to writing, superseded the prior state law that allowed for the enforcement of oral settlement agreements.

C. Traditional Contract Defenses

1. General Principles

Enforcement disputes commonly involve traditional contract defenses. Characterizing these contractual defenses presents a challenge. The defenses frequently are lumped together, and not all are specifically addressed in the opinions. The defenses raise general formation issues, such as whether there was a meeting of the minds or mistake, as well as challenge the fairness of the process through fraud and duress claims.

2. Specific Defenses

a. No Meeting of the Minds; Agreement to Agree

In opinions where parties were unwilling to comply with the terms of a purported mediation agreement, they frequently raised issues involving some variation of the claim that there was no meeting of the minds or no agreement. This defense implicates the core values of mediation theory, that mediation is a process based on self-determination. Any agreement that is enforced must be the agreement of the parties and not an agreement imposed on them.

129. 187 F.3d 363 (4th Cir. 1999). *See also Hanson v. Hanson, No. C2-98-1427, 1999 WL 31174, at *2 (Minn. Ct. App. Jan. 26, 1999) (remanding a case involving a mediated marital property settlement incorporated in a judgment, in part because the trial judge used the wrong legal standard in determining whether there was fraud); *In re T.D., 28 P.3d 1163, 1167-68 (Okla. Civ. App. 2001) (remanding an order terminating parental rights pursuant to a mediated settlement agreement to determine whether the mediation process provided sufficient due process protection).


131. *Id. at 378.

132. *Id. at 377-78.

Although not explicit from the opinions, some of these cases disputing whether an agreement was reached appear to represent situations where parties simply changed their minds once free from the immediate pressures of the mediation.\textsuperscript{134} Mediation theory is ambiguous about how to treat an agreement that had actual but fleeting assent. While ADR scholars might disagree about whether the goal of self-determination is fulfilled by enforcing a settlement to which a party agrees during mediation but immediately rejects,\textsuperscript{135} traditional contract law is more certain and less forgiving. Absent some well-established and narrowly drawn exception,\textsuperscript{136} courts routinely enforce parties’ settlements. Traditional contract law centers on objective manifestation of assent—what the parties said. Mediation’s core value of self-determination is concerned less with what was said and more with what the parties actually wanted or believed.\textsuperscript{137}

In a situation where a party manifests agreement at the mediation but, free from the pressure of the mediation session, has a change of heart, the party has no recognized contract defense to an enforcement claim.

While some cases reflect a change of mind, others present true misunderstandings. These cases raise difficult factual issues about whether an agreement was actually reached or whether there was agreement on some, but not all, material terms. Again, these issues are resolved based on common law rules of contract formation, absent

\textsuperscript{134} See, e.g., Esser v. Esser, 586 S.E.2d 627, 628 (Ga. 2003) (allowing spouse to contest child support award based on mediated agreement after she changed counsel); Govia v. Burnett, No. Civ. 685/1998, 2003 WL 21104925, at *3–5 (V.I. May 5, 2003) (enforcing settlement despite claim that party, who was represented by counsel, was unaware of its terms when she signed it stating that strong public policy favoring enforcing settlements would be frustrated by voiding a settlement merely because a party becomes dissatisfied with the terms); Vernon v. Acton, 732 N.E.2d 805, 810 (Ind. 2000) (allowing party to refuse to abide by oral agreement entered into in mediation).

\textsuperscript{135} See generally Welsh, supra note 2.

\textsuperscript{136} While contract principles might lead to enforcement of the agreement, withdrawn consent might preclude a court from entering a consent decree. See Envtl. Abatement, Inc. v Astrum R. E. Corp., 27 S.W.3d 530, 541–42 (Tenn. Ct. App. 2000) (ruling that because the agreement was not in writing or recited in open court, the trial judge could not enter a consent decree if a party withdrew agreement prior to the order).

\textsuperscript{137} See Kimberlee K. Kovach, New Wine Requires New Wineskins: Transforming Lawyer Ethics for Effective Representation in a Non-Adversarial Approach to Problem Solving Mediation, 28 Fordham Urb. L.J. 935, 942–43 (2001) (“The goals of mediation are quite different than the goals of the litigation system.”); Thompson, supra note 122, at 556 (“While the focus under contract law is on what the parties said, the focus in a mediation should be on what the parties want.”).
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a specific statute that adds additional requirements before enforcing mediated settlement agreements.138

What might look like an agreement frequently is nothing more than an agreement “in principle,” or an agreement to agree. Often, the purported agreement is an oral agreement with the expectation that a more formal written agreement with specific terms will be forthcoming.139 Sometimes parties actually execute an informal written memorandum or document purporting to be an agreement that contemplates the execution of a more formal written document. When this issue is raised the courts must decide whether a final agreement has in fact been reached. Did the parties contemplate only the formality of writing a memorial of the agreement, or did the parties reach a tentative agreement or agreement in principle only (which is subject to reaching later agreement when all terms are flushed out)? Again, courts usually apply general contract law principles to resolve these issues.140

In many of these cases the parties are specifically disputing the terms of releases.141 For example, in Chappell v. Roth,142 the North Carolina Supreme Court refused to enforce a purported agreement signed by the parties that contemplated a subsequent “full and complete release, mutually agreeable to the parties.”143 Either because

138. See generally Deason, supra note 90; Robinson, supra note 8; see also Thompson, supra note 122, at 541–47.

139. See, e.g., Catamount Slate Prods., Inc. v. Sheldon, 845 A.2d 324, 331 (Vt. 2003) (finding that the parties did not intend to be bound until a final fully complete document was executed); Riner v. Newbraugh, 563 S.E.2d 802, 805–06 (W. Va. 2002) (refusing to enforce an alleged agreement despite mediator testimony that the parties reached agreement when the parties subsequently refused to sign the writing); Kendrick v. Barker, 15 P.3d 734, 738–39 (Wyo. 2001) (enforcing oral mediation agreement in the face of a claim that the agreement was contingent on agreeing to a subsequent written document).

140. See generally Deason, supra note 90 (addressing the application of contract law principles to the enforcement of mediation agreements).

141. See, e.g., Coulter v. Carewell Corp. of Okla., 21 P.3d 1078, 1082–84 (Okla. Civ. App. 2001) (holding that acceptance of an offer to settle implicitly includes a promise to execute a release); Inwood Int’l Co. v. Wal-Mart Stores, Inc., 243 F.3d 567 (Fed. Cir. 2000) (enforcing a mediated settlement agreement that contemplated subsequent execution of a more formal document and releases); Am. Network Leasing Corp. v. Corp. Funding Houston, Inc., No. 01-00-00789-CV, 2002 WL 31266230 (Tex. App. Oct. 10, 2002) (refusing to enforce an alleged agreement because the writing did not include all of the material elements including the release).

142. 548 S.E.2d 499 (N.C. 2001), reh’g denied, 553 S.E.2d 36 (N.C. 2001). See also Golding v. Floyd, 539 S.E.2d 735, 738 (Va. 2001) (refusing to enforce a signed, written “Settlement Agreement Memorandum” that was made “subject to” a more formal agreement).

of physical exhaustion or a belief that the release is pro forma, parties who reach agreement on the substantive issues tend to leave formalizing the precise terms of the release until a later time. In the interest of finality and avoiding future litigation, attorneys who believe they have reached a mediated settlement would be well advised to have all parties sign off on the terms of any release before leaving the mediation session.

b. Fraud/Misrepresentation

In fifty-five opinions, mediation participants claimed that their agreement should not be enforced because it was entered into through fraud or misrepresentation. As a general rule, courts are willing to allow parties to choose to make “bad bargains.” Parties have every right to agree to a settlement that others might find unfair, but the law contemplates some integrity in the bargaining or mediation process. When fraudulent material statements induce a party to agree, the agreement should not be enforced in the name of self-determination or in the name of freedom to contract.

The fraud or misrepresentation defense was successful in whole or part in only nine cases.\(^\text{144}\) Most of these cases were family law cases that involved claims of failure to disclose\(^\text{145}\) or misrepresentation\(^\text{146}\) during the mediation. The rarity of success on these defenses

\(^\text{144}\) In three cases where fraud was alleged, the court reversed or remanded on other grounds: Long v. City of Hoover, 855 So. 2d 548, 551 (Ala. Civ. App. 2003) (reversing on procedural grounds); In re T.D., 28 P.3d 1163, 1167 (Okla. Civ. App. 2001) (finding no fraud but reversing mediated agreement terminating parental rights on grounds of fundamental due process); and Watkins v. Lundell, 169 F.3d 540, 545–47 (8th Cir. 1999) (remanding punitive damage award in action involving breach of and fraudulent inducement of mediated settlement agreement). In Cooper v. Austin, 750 So. 2d 711, 713 (Fla. Dist. Ct. App. 2000), the court found that presenting a mediated settlement agreement that was obtained by extortion was a “fraud on the court,” which presents a different type of fraud issue. This case is included here, as well as in the cases involving duress.


likely reflects the reality that judges are willing to tolerate a broad range of adversarial tactics in both the negotiation and in the mediation process. The legal standard is hard to meet. To mount a successful defense of fraud or misrepresentation, there must be proof not only that the adverse party\textsuperscript{147} made a misrepresentation of material fact that induced the agreement, but also that it was reasonable to rely on that misrepresentation. It may be unreasonable \textit{per se} to rely on statements made by an adverse party in the context of a mediation taking place in the midst of a lawsuit. Lawsuits are adversarial. For example, in \textit{In re Patterson},\textsuperscript{148} the Washington Court of Appeals rejected a claim of fraud, in part because the court believed a party had no right to rely on a representation of value made in a mediation when the party could have arranged his own appraisal.\textsuperscript{149} The clear lesson for mediation participants is to remember that negotiating in the context of litigation is part of an adversarial process. In mediation, a form of facilitated negotiation often billed as a conciliatory process, parties must retain their adversarial vigilance.\textsuperscript{150}

c. \textit{Duress}

Duress, a typical common law defense to a contract enforcement action, has been infrequently raised in published opinions addressing mediation issues. Claimants have argued some form of duress\textsuperscript{151} in


\textsuperscript{148} 969 P.2d 1106, 1110–11 (Wash. Ct. App. 1999). \textit{See also} Chitkara v. N.Y. Tel. Co., 45 F. App’x 53, 55 (2d Cir. Sept. 6, 2002) (finding it unreasonable for a party to rely on a mediator’s erroneous statement of the predicted litigation value of a claim when the statement was based on a fact that the party could have verified).

\textsuperscript{149} \textit{See also} Glover v. Torrence, 723 N.E.2d 924, 933 (Ind. Ct. App. 2000) (suggesting that the spouse should not have relied on husband’s mediation submission under oath and should have independently verified his income); \textit{UNIF. MEDIATION ACT}, prefatory note 1 (2003) (encouraging parties to verify all material representations rather than relying on what the adverse party says during mediation since rule of privilege may preclude admissibility of the statements).

\textsuperscript{150} Indeed, the prefatory note to the Uniform Mediation Act reflects the reality "that mediation is not essentially a truth-seeking process," warning parties not to trust the representations of adverse parties and instead to seek verification. \textit{UNIF. MEDIATION ACT}, prefatory note 1 (2003).

\textsuperscript{151} We included as duress opinions cases where the claimant argued that he or she was pressured, or coerced into signing the agreement. See, e.g., Poptic v. Poptic, No. CA 2002-09-215, 2003 WL 23095452, at *2 (Ohio Ct. App. Dec. 31, 2003) (refusing to enforce separation agreement because husband claimed he was pressured to agree); Richman v. Coughlin, 75 S.W.3d 334, 335–36 (Mo. Ct. App. 2002) (claiming that agreement was reached by coercion); De M. v. R. S., No CN00-07593, 2002 WL 31452433, at *1 (Del. Fam. Ct. May 14, 2002) (claiming party was intimidated at the
only thirty-six opinions in the five-year period. The opinions were evenly spread over the five years and dispersed throughout many jurisdictions. As might be expected, the largest group of duress cases, constituting sixteen opinions, were within the emotionally charged context of family law mediations.

To make a successful duress defense the proponent must establish that a wrongful threat by the adverse party deprived the proponent of free choice, resulting in an unfair agreement benefiting the adverse party. As with other contractual defenses, the standard is quite difficult to meet in a mediation context. A mediation party was successful in claiming duress in only one of the thirty-six opinions—Cooper v. Austin. But even in this successful case, the court strayed a bit from traditional duress analysis. In Cooper, a wife extracted a favorable settlement in a mediation by sending her husband a note threatening to turn over incriminating juvenile sex pictures to the prosecutor if he did not agree to the settlement. The court found the “extorted agreement” to be a “fraud on the court” and refused to enforce it. In a few other cases, courts denied summary judgment or remanded matters back to the trial court for a factual determination about whether an agreement should be enforced in the face of a claim of duress.

In seven of the cases, the claim of duress was aimed in part at the conduct of the mediator. These cases are discussed below in the Part dealing with mediator misconduct.

154. Id. Arguably, a second successful case is Poptic, 2003 WL 23095452, at *2, where the court refused to enforce a separation agreement because the husband said that he was pressured to sign it.
156. See, e.g., Wichman v. County of Volusia, 110 F. Supp. 2d 1354, 1356–57 (M.D. Fla. 2000) (denying summary judgment on the issue whether the employee voluntarily waived rights under the ADA).
157. See, e.g., Kalof v. Kalof, 840 So. 2d 365 (Fla. Dist. Ct. App. 2003) (remanding to determine whether agreement entered into by duress or fraud); Adams v. Adams, 11 P.3d 220, 221–22 (Okla. Civ. App. 2000) (remanding to determine if agreement was fair and reasonable); Vitakis-Valchine v. Valchine, 793 So. 2d 1094 (Fla. Dist. Ct. App. 2001) (remanding for consideration of wife’s allegation that mediator committed misconduct by improperly influencing coercing agreement, noting an exception to the general rule that coercion and duress by a third party is insufficient to invalidate an agreement between principals).

158. See infra notes 229–46 and accompanying text.
Concern about undue pressure placed on parties has been widely expressed in scholarly debates about the fairness of the mediation process. Rarely do courts find such pressure grounds for reversal. On the other hand, the dearth of reported cases litigating a claim of duress may not be conclusive evidence that parties to mediations are free from undue pressure. Most of the scholarly concern addresses the pressure imposed by the mediator, not by the adverse party. As discussed above, the common law defense of duress focuses on threats by the adverse party, not by third parties such as the mediator, or for that matter, by the party’s counsel. Further, a party’s belief that they were subjected to unfair pressure may be difficult to articulate and might be disregarded by their lawyer, who likely would have a different view of the process. Even if lawyers appreciated that their clients felt pressured to agree, most attorneys, knowing the near impossibility of succeeding on a duress claim, should discourage their clients from litigating based on this type of defense.

d. Undue Influence

Only thirteen opinions addressed a defense of undue influence. Magistrate Brazil’s opinion in *Olam v. Congress Mortgage Co.* provides the most intensive discussion of undue influence. Although the plaintiff was sixty-five years old, suffered from high blood pressure...
pressure, headaches and abdominal pains, and testified that she was
in pain, weak and dizzy, and that she was pressured by her lawyer,
the defendants and their counsel, the court found that this agreement
obtained at 1:00 A.M. after fifteen hours of mediation was not ob-
tained by undue influence.\textsuperscript{163} There are no opinions in our database
where a court found undue influence, although in one case, \textit{Adams v.
Adams},\textsuperscript{164} the matter was remanded back to the trial judge for a fac-
tual assessment. In several cases, the claim of undue influence was
targeted, in part, at the conduct of the party's counsel.\textsuperscript{165}

e. \textit{Mistake}

Mistake is a traditional contract defense to the enforcement of a
settlement agreement. To establish a successful mistake defense, the
proponent usually must prove that the mistake is mutual and relates
to a material fact that is basic to the agreement.\textsuperscript{166} If the mistake is
unilateral, it may be difficult, if not impossible, to establish a valid
defense.\textsuperscript{167} For unilateral mistake, the proponent must establish the
basic material fact elements of mutual mistake, and in addition that
the adverse party either had reason to know of or somehow caused
the mistake, or that enforcing the agreement would be unconsciona-
ble.\textsuperscript{168} Under both the unilateral and mutual mistake doctrine, the

\textsuperscript{163} Olam v. Congress Mortgage Co., 68 F. Supp. 2d 1110, 1139–51 (N.D. Cal.
1999).

\textsuperscript{164} 11 P.3d. 220, 221–22 (Oklahoma Civ. App. 2000) (remanding a mediated divorce
settlement agreement for a determination of whether it was fair, just, and
reasonable).

and release between a party and her lawyer obtained in conjunction with a mediated
settlement agreement negotiated by the lawyer with a third party); Mardanlou v.
Gen. Motors Corp., 69 F.App'x 950, 952 (10th Cir. 2003) (rejecting claim that medi-
atated settlement should be set aside because party was taking medications that made
him "easily manipulated and persuaded" and was pressured by the mediator, the
court, and his own attorney); Advantage Props., Inc., v. Commerce Bank, No. 00-3014,
2000 WL 1694071, at *4 (10th Cir. Nov. 13 2000) (claiming undue influence and du-
ress when the argument really was focused on whether the party's counsel provided
adequate representation).

\textsuperscript{166} See, e.g., Sheng v. Starkey Labs, Inc., 117 F.3d 1081, 1084 (8th Cir. 1997)
(stating that any mistake justifying rescission must "go to the very nature of the
deal").

\textsuperscript{167} See, e.g., Ghahramani v. Guzman, 768 So. 2d 535, 537 (Fla. Dist. Ct. App.
2000) (stating that a mediated settlement agreement should not be set aside on the
grounds of unilateral mistake).

proponent cannot have agreed expressly or implicitly to assume this risk.\textsuperscript{169}

The opinions that dealt with mistake were not always precise about whether the party claimed the mistake was unilateral or mutual. We found thirty-four opinions that appear to be claims of mutual mistake and nineteen claims of unilateral mistake. The mutual mistake cases included issues of mistake in integration—the written agreement or court order did not correctly represent the agreement\textsuperscript{170}—as well as mistakes about a material fact that went to the basis of the bargain.\textsuperscript{171} In sixteen of the mutual mistake cases, the agreement had been incorporated into a court order, triggering procedural rules with regard to relief from judgment further restricting any relief for a claimed mistake.\textsuperscript{172} The court refused to enforce the agreement in only four of the mutual mistake opinions.\textsuperscript{173} Two cases were remanded.\textsuperscript{174} None of the unilateral mistake claims were successful.\textsuperscript{175}

\textsuperscript{169} See id. at §§ 152–154.


\textsuperscript{173} Boardman, 2002 WL 31867759, at *2 (providing relief when the parties relied on an erroneous appraisal); Bolle, Inc. v. Am. Greetings Corp., 109 S.W.3d 827, 834–35 (Tex. App. 2003) (refusing to enforce settlement agreement where parties did not consider the implications of the settlement with regard to patent litigation); In re Karst, 34 P.3d at 1133 (refusing to enforce parties’ agreement of shared custody when document was drafted by non-lawyer, and the parties did not intend to use that term as defined in law); Richardson v. O’Byrne, 830 So. 2d at 1020 (refusing to enforce the agreement that was allegedly entered into based on mistake about the amount of interest owed because the offer to settle was withdrawn prior to agreement becoming final).

\textsuperscript{174} DR Lakes, Inc., 819 So. 2d at 974–75 (remanding for a factual determination whether a clerical error in the settlement document was a clerical error); Adams v. Adams, 11 P.3d 220, 221 (Okla. Civ. App. 2000) (remanding to determine whether the property settlement agreement was fair, including whether there was full disclosure).

\textsuperscript{175} However, two opinions remanded the matter back to the trial court based on other issues: Brinkerhoff v. Campbell, 994 P.2d 911, 915–16 (Wash. Ct. App. 2000) (remanding to determine whether defendant made an affirmative misrepresentation); and In re Hanson, No. C2-98-1427, 1999 WL 31174, at *2 (Minn. Ct. App. Jan. 26, 1999) (remanding to determine if there was fraud on the court).
f. Unconscionability

Many of the parties opposing the enforcement of a mediated settlement agreement raised some type of fairness argument, but few opinions specifically addressed a claim that enforcing the agreement would be unconscionable. Even when raised, the defense of unconscionability did not merit extensive analysis by the courts. Frequently, the claim of unconscionability was coupled with claims of duress and/or misrepresentation and reflected a more general argument that it would be unfair to enforce the agreement. Most of the opinions involve child support or custody agreements that implicated not only the rights of the mediating parties but also the rights of the dependent children. For example, in Smith v. Smith, a divorce proceeding, the Tennessee Court of Appeals affirmed a trial judge’s decision to modify a mediated settlement agreement that absolved the husband of any child support responsibilities on the grounds that the agreement was against public policy.

A related issue concerns the voluntariness of waivers of parental rights in family mediations. For example, the Iowa Supreme Court

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178. In some cases, the courts did not refer to the doctrine of unconscionability but construed statutes that imposed some duty on the court to consider whether the agreement was fair. See, e.g., F.B.C., III v. B.A.C., No. CN89-8431, 2002 WL 1939950, at *4 (Del. Fam. Ct. Mar. 25, 2002) (modifying a custody order based on the best interests of the child); Reno v. Haler, 734 N.E.2d 1095, 1101 (Ind. Ct. App. 2000) (ruling that a settlement agreement involving child custody and visitation must be approved by the court and will be approved unless unfair, unreasonable, or involving manifest injustice).

179. No. M2000-02186-COA-R3-CV, 2001 WL 1035174 (Tenn. Ct. App. Sept. 11, 2001). See also In re Marriage of Caffrey, No. 00-307, 2002 WL 1484015, at *3 (Mont. Apr. 11, 2002) (ruling that court need not find that the agreement was unconscionable to modify child support agreement that is not incorporated in a decree, and that the modification was not unconscionable).

in *Lamberts v. Lillig*\(^{181}\) refused to enforce an alleged mediated settlement between a father and the maternal grandparents regarding visitation where there was no evidence the father knowingly relinquished his constitutional parental caretaking interest when he entered into the agreement.

g. **Technical Defenses**

Rarely did courts refuse to enforce an agreement based on purely technical defenses. *Haghighi v. Russian-American Broadcasting Co.*\(^{182}\) is the prototypical exception in this category. Ultimately, the courts in *Haghighi* refused to enforce an otherwise fair settlement agreement signed by the parties and their attorneys, which included a clause that the writing was a “Full and Final Mutual Release of all Claims” because the document did not also include the words “It was binding,” as required by statute.\(^{183}\) California has similar legislation,\(^{184}\) as does Texas,\(^{185}\) but fortunately there are few cases that turn on such technicalities.

Twenty-five cases specifically involved a statute of frauds defense that the agreement was not in writing. A larger number (40) addressed the question of whether the agreement was signed by the appropriate parties. The lack of a signature could constitute a technical defense if the parties actually reached agreement but simply

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\(^{181}\) 670 N.W.2d 129, 134–35 (Iowa 2003). See also *In re T.D.*, 28 P.3d 1163, 1168 (Okla. Civ. App. 2001) (refusing to enforce a mediated settlement agreement absent additional factual findings where a mother with full advice and representation of counsel agreed to terminate her parental rights but the agreement contained inconsistent elements raising fundamental due process questions regarding whether the mother knowingly waived her parental rights).

\(^{182}\) 173 F.3d 1086, 1088–89 (8th Cir. 1999). The two other published opinions dealing with this case were in 1998 and not included in this database. *Haghighi v. Russ.-Am. Broad. Co.*, 945 F. Supp. 1233, 1234–35 (D. Minn. 1996) (enforcing mediation settlement agreement that did not include specific language that “it was binding”); *Haghighi v. Russ.-Am. Broad. Co.*, 577 N.W.2d 927, 929–30 (Minn. 1998) (refusing to enforce a mediated settlement agreement that stated it was a “full and final mutual release of all claims” signed by the parties and by counsel because the agreement did not include the words “this is binding” as required by statute).


\(^{184}\) See *CAL. EVID. CODE § 1123* (2002) (providing that absent consent to admit, a written mediated settlement agreement is not admissible unless it includes language that it is admissible or that it is enforceable).

\(^{185}\) See *TEX. FAM. CODE ANN. § 6.602* (2002) (providing that a mediated settlement agreement in a family law matter is enforceable only if it includes, among other matters, a “prominently displayed statement that is in boldfaced type or capital letters or underlined, that the agreement is not subject to revocation”).
failed to obtain the necessary signatures. It is always possible, however, that the parties did not sign a writing because they in fact had not reached agreement. Only three cases raised the truly technical issue that an otherwise valid agreement should not be enforced because the writings did not include certain magic words.\textsuperscript{186}

However, these technical statutes, designed to decrease litigation and increase certainty, can in fact generate litigation. In \textit{Cayan v. Cayan},\textsuperscript{187} the Texas Court of Appeals had to sort out the application of two seemingly conflicting statutes affecting the enforceability of mediation agreements. According to Section 6.602 of the Texas Family Code, a mediated settlement agreement that complies with the formality requirements set forth in the Code\textsuperscript{188} was binding and not revocable. However, Texas Family Code § 7.006(a) allowed parties who entered into a mediated property settlement to revoke agreement prior to the “rendition of the divorce ‘unless the agreement is binding under another rule of law.’”\textsuperscript{189} The court concluded that the legislative intent was to make agreements that satisfy Section 6.602 binding and irrevocable.

\paragraph{h. Other Defenses}

In 370 of the enforcement cases, the opinions addressed arguments or defenses other than traditional contract defenses. The largest group of these cases (127) involved standard issues of interpretation\textsuperscript{190} or performance.\textsuperscript{191} For the most part, these cases

\begin{footnotesize}
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\item 188. At the time of this settlement, the statute required that “the agreement: (1) provided in a separate paragraph that the agreement was not subject to revocation; (2) was signed by each party to the agreement; and (3) was signed by the party’s attorney, if any, who was present at the time the agreement was signed.” \textit{Id.} at 165 n.5.
\item 189. \textit{Id.} at 164 (quoting \textit{Tex. Fam. Code Ann.} § 7006(a) (2002)).
\item 190. Nearly all of the enforcement cases, other than the opinions raising formation issues, involved an interpretation of the contract. We attempted to include in this category only those cases that raised interpretation issues and not a specific contract defense. \textit{See, e.g.}, Butler v. Caldwell, No. 48931-3-I, 622 WL 554952, at *3–4 (Wash. Ct. App. Apr. 15, 2002) (determining that delivery of an appraisal by fax started the three day period for rejection set forth in the mediated settlement agreement); Caswell v. Anderson, 527 S.E.2d 582, 584 (Ga. Ct. App. 2000) (interpreting clause in mediated settlement agreement setting forth compensation for withdrawing partner); Goldberg v. Goldberg, No. 148, 100-B, 1999 WL 542190, at *1 (D. Tex. Apr. 27, 1999) (interpreting mediation agreement to allow for religious training of daughter in a
\end{itemize}
\end{footnotesize}
were handled by the courts as typical contract disputes. The next largest group of opinions (46) addressed some type of defense relating to changed circumstances, most typically in family law proceedings modifying custody, visitation, or support orders. Generalized claims of unfair process or public policy concerns were raised in twenty-four opinions.

Seventy-nine opinions addressed the enforcement of mediated agreements that had a direct impact on parties not present at the mediation. In thirty-four of the opinions, the courts were deciding whether to approve a mediated settlement agreement in a class action lawsuit. Third-party impact cases came up in other contexts as well. For example, in *Peoples Mortgage Corp. v. Kansas Bankers Surety Trust Co.* the court had to determine whether a mediated settlement agreement entered into by an insured was made in good faith and reasonable so that the insured could recover indemnification against the insurance company.

### IV. Conduct of Participants

#### A. Overview

In ninety-nine opinions, courts ruled on issues relating to ethics or malpractice in mediation. Sixty-one of the opinions were published decisions, including twenty-one state supreme court cases and three federal circuit court decisions. The cases break into five general categories, listed in order of frequency: neutral misconduct; lawyer malpractice; lawyer discipline; judicial ethics; mainline church, which would include Catholic and "churches in the Protestant faith such as Presbyterian, Methodist, Baptist, Christian, Episcopal but not the Metropolitan Church.


195. *In re Anonymous*, 283 F.3d 627 (4th Cir. 2002); *In re County of Los Angeles*, 223 F.3d 990 (9th Cir. 2000); *Streber v. Hunter*, 221 F.3d 701 (5th Cir. 2000), *reh'g and suggestion for reh'g en banc denied*, 233 F.3d 576 (5th Cir. 2000).
(11); and lawyer conflict of interest (5). Often, the ethics issue is part of a larger dispute about mediation. For example, seventeen ethics/malpractice opinions were raised in the context of challenges to enforcement of mediated settlements.\textsuperscript{196} Twenty-two opinions also addressed confidentiality.\textsuperscript{197} and twelve discussed issues at the intersection of arbitration and mediation.\textsuperscript{198}

While the codes of professional or judicial responsibility have been the source of substantial discussion and debate and are policed by various boards or tribunals, the roles and responsibilities of the participants in the context of mediation are less developed and a bit murky. Many jurisdictions have codes of conduct for mediators, as well as boards with some type of enforcement power. However, even in jurisdictions with these institutions, the regulatory process is just beginning to develop norms for expected behavior. Much of the regulatory effort to date has been aimed more at protecting the secrecy than the fairness of the mediation process. Litigated issues addressing the conduct of lawyers and mediators are separated into two categories: first, cases where a party raises attorney or mediator misconduct as a defense in an enforcement action; and second, malpractice or ethical actions against the attorney or mediator.

B. Attorney Conduct

1. Attorney Misconduct as a Defense to Enforcement Claims

In twenty-one enforcement cases parties argued that their attorney acted in excess of his authority in agreeing to the settlement. This defense was rarely successful.\textsuperscript{199} In \textit{Caballero v. Wikse},\textsuperscript{200} the plaintiff left the mediation, made representations that the plaintiff's


\textsuperscript{199} Several courts refused to enforce purported settlement agreements when claims that the lawyers lacked authority were coupled with other valid defenses. See, e.g., Behling v. Russell, 293 F. Supp. 2d 1178 (D. Mont. 2003) (refusing to enforce purported agreement because, inter alia, it was not filed); Heuser v. Kephart, 215 F.3d 1186 (10th Cir. 2000) (refusing to enforce purported settlement for lack of consideration). Moreover, successful lack of authority claims was not just limited to the actions of attorneys. For example, in Suarez v. Jordan, 35 S.W.3d 268 (Tex. App. 2000), the court refused to enforce a written settlement reached in court-ordered mediation of a disputed easement, where the property owner’s son (without advice of
attorney had authority, and authorized the attorney to make a counterproposal. Nonetheless, the plaintiff argued that counsel lacked authority to bind him and that the subsequent agreement should not be enforced. The Idaho Supreme Court initially agreed with the plaintiff but withdrew this opinion and substituted another opinion enforcing the settlement. In Tompkins v. Ramona Auto Services, Inc., the plaintiffs were represented by different counsel in their separate wage claim and malicious prosecution claim against their employer. Plaintiffs settled the malicious prosecution claim through mediation. Notwithstanding the plaintiffs’ lawyer informing the defendant that he did not represent the plaintiffs in the wage claim, and that they were settling only the malicious prosecution claim, the employer drafted and got the plaintiffs to sign a general release that included both claims. The court held that when the plaintiffs chose to cash the checks after realizing the mistake, the plaintiffs waived their rights, and the settlement should not be reformed.

In addition to claims of lack of authority, specific acts of misconduct were raised in twenty cases. These claims involved some variation of an argument that counsel placed undue pressure on their clients to settle. These claims were usually coupled with other defenses such as duress, mistake, or fraud. For example, in Golden
v. Hood,\textsuperscript{205} the plaintiff sought unsuccessfully to set aside a mediated settlement agreement that the plaintiff had signed. Plaintiff maintained that his lawyer, counsel for the adverse party, and the mediator all pressured him.\textsuperscript{206} They insisted that if the plaintiff went to trial he would recover very little and his lawyer would quit.\textsuperscript{207} The court analyzed and rejected these claims using legal principles based on misrepresentation theory.\textsuperscript{208} In \textit{Berg v. Bregman},\textsuperscript{209} the California Court of Appeals rejected a claim that the plaintiff’s attorney exercised undue influence by encouraging the party to settle in mediation, in part because there was no showing that the attorney received any unfair advantage as part of the settlement.

2. Attorney Ethics and Malpractice

Attorney conduct in mediation can give rise to malpractice or ethical claims against the lawyer. The two most significant malpractice cases came from opposite coasts. In \textit{Furia v. Helm},\textsuperscript{210} the California Court of Appeals concluded that, although an attorney did not establish an attorney-client relationship with a construction business owner when the attorney acted as a mediator between the owner and the attorney’s homeowner clients, the attorney was still potentially liable for legal malpractice because he breached a duty of reasonable care owed to the business owner by failing to fully and fairly disclose that he did not intend to be entirely impartial as mediator.\textsuperscript{211} The court found the disclosure obligation important because of the potential influence wielded by mediators. In particular, the court expressed concern that “[a] party to mediation may well give more weight to the suggestions of the mediator if under the belief that the mediator is neutral than if that party regards the mediator as aligned with the interests of the adversary.”\textsuperscript{212}

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\begin{enumerate}
\item[207.] \textit{Id}. at *2.
\item[208.] \textit{Id}. at *2.
\item[210.] 4 Cal. Rptr. 3d 357 (Cal. Ct. App. 2003), \textit{reh’g denied} (Sept. 24, 2003). The court ultimately found no liability, in essence finding the error harmless.
\item[211.] \textit{Id}
\item[212.] \textit{Id}. at 365.
\end{enumerate}
\end{footnotesize}
In *Lerner v. Laufer*, a New Jersey appellate decision, the court dismissed a legal malpractice action against an attorney for alleged failure to perform discovery or other investigative services necessary to evaluate the merits of a mediated divorce settlement, where the representation agreement specifically limited the scope of representation. The opinion offers critical support for a form of unbundled legal services designed to both promote the use of mediation and simultaneously lower legal fees connected with divorce.

Several opinions addressed claims of erroneous legal advice in mediation. These claims usually fail for inability to establish causation and damages. But in *Streber v. Hunter*, the court affirmed a finding of malpractice for erroneous tax advice and remanded for calculation of damages. In *Vanasek v. Underkofler*, the court reversed a grant of summary judgment in the lawyer's favor and remanded to decide whether the lawyer's agreement to recess the trial and engage in mediation without client knowledge or permission unnecessarily delayed the lawsuit and cost the claimant the opportunity to recover from a party who later went into bankruptcy.

In addition to the malpractice liability cases, the failings of attorneys in mediation are addressed in numerous disciplinary proceedings. These cases detail a wide range of alleged improper conduct, including:

- appearing for a client at mediation while under suspension from the practice of law;
- failing to communicate with client about a mediated settlement agreement forwarded by opposing counsel;
- disclosing privileged mediation communications in arbitration proceedings concerning legal fees.

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216. 221 F.3d 701 (5th Cir. 2000), *reh’g and suggestion for reh’g en banc denied*, 233 F.3d 576 (5th Cir. 2000).


failing to schedule required mediations;\textsuperscript{221} seeking to enforce mediated settlement without client consent;\textsuperscript{222} failing to pay mediation costs;\textsuperscript{223} failing to pay monetary settlement of a mediated fee dispute in a timely manner;\textsuperscript{224} violating Professional Responsibility Rule 4.2 by mediating a case with a party represented by counsel without notice to counsel;\textsuperscript{225} falsely telling a client that a wrongful termination suit had been settled in mediation;\textsuperscript{226} and engaging in a conflict of interest by serving as mediator for both parties in a matrimonial matter and then filing the final divorce documents as attorney for one party, without disclosing the service as mediator.\textsuperscript{227}

Lawyer conflict of interest in mediation also was raised in the context of motions to disqualify counsel.\textsuperscript{228}

\textsuperscript{221} See, e.g., Iowa Supreme Court Bd. of Prof. Ethics & Conduct v. Rauch, 650 N.W.2d 574 (Iowa 2002); People v. Hohertz, No. 02PDJ071, 2003 WL 21982240 (Colo. O.P.D.J. July 10, 2003); \textit{In re} Disciplinary Proceedings Against Banks, 665 N.W.2d 827 (Wis. 2003).


\textsuperscript{223} See, e.g., Inquiry Comm. v. Sexton, 102 S.W.3d 512 (Ky. 2003).

\textsuperscript{224} See, e.g., Cuyahoga County Bar Assoc. v. Maybaum, 787 N.E.2d 1180 (Ohio 2003).


\textsuperscript{228} See, e.g., Korfmann v. Kemper Nat. Ins. Co., 685 N.Y.S.2d 282 (N.Y. App. Div. 1999) (reversing trial court and granting motion to disqualify plaintiff’s counsel because she would be a key witness in suit for damages for breach of agreement to mediate, bad faith, and unfair settlement practices); Matluck v. Matluck, 825 So. 2d 1071 (Fla. Dist. Ct. App. 2002) (finding that trial court erred in not disqualifying a law firm from representing a party in a post-dissolution custody case, when a member of the firm previously acted as a mediator in the same proceeding).
C. Mediator Conduct

Despite considerable academic ink devoted to the subject of mediator liability229 and ongoing debates about quasi-judicial and statutory immunity,230 there is a surprising dearth of cases alleging mediator misconduct or ethical violations. As other authors have observed, the chance of a mediator being successfully sued is remote.231 Nor is mediator misconduct commonly used as an enforcement defense.

1. Mediator Misconduct as a Defense to Enforcement Claims

We divided the claims of mediator misconduct found in seventeen enforcement cases, into claims of mediator bias and claims of mediator duress.232 In twelve opinions,233 a party claimed some form of conflict of interest or bias on the part of the mediator. In several of the cases, the court found that the claimed conflict was cured by disclosure or knowledge.234 Certainly, mediators would be well advised to disclose liberally all contacts with the parties involved in the dispute and other potential conflicts of interest. Disclosure, however, will not cure all conflicts. For example, the Court of Appeals in New Jersey found an inherent conflict between the roles of mediator and guardian ad litem that precluded one person from fulfilling both roles.235 As mediator, the neutral would be privy to and encourage confidential communications, but as guardian ad litem,
the neutral was required to make findings and recommendations to the court.\textsuperscript{236}

In ten opinions, a party claimed that the mediator exerted undue pressure or duress to exact agreement.\textsuperscript{237} In several of these cases, the gist of the complaint centered on the mediator reciting a list of “horribles” that the parties would certainly suffer if they did not settle and had to experience the dreaded civil trial.\textsuperscript{238} It is clear that the perspectives of the judges and mediators about the propriety of this settlement technique may be different from the perspective of the parties. The courts typically see nothing wrong with this sort of “reality-testing.”\textsuperscript{239} For example, the appellate mediator in \textit{In re Young}\textsuperscript{240} ordered counsel to bring their clients to the mediation so the mediator could provide his prediction that if they did not accept the settlement offer they would jeopardize their receipt of any payments. When counsel balked at producing their clients, the Court of

\textsuperscript{236.} \textit{Isaacs v.}, 792 A.2d at 534–37. But in Scott v. District of Columbia, 197 F.R.D. 10 (D.D.C. 2000), which was not an enforcement case, a magistrate judge maintained that he could serve both as a mediator and as a magistrate judge in resolving a wrongful death action involving a minor child and her mother as plaintiffs, recognizing that as mediator the magistrate judge would be privy to confidential information. In Matluck v. Matluck, 825 So. 2d 1071 (Fla. Dist. Ct. App. 2002), another non-enforcement case, the court disqualified the husband’s law firm when the mediator of the marital dispute joined that firm.

\textsuperscript{237.} \textit{See, e.g., Chitkara v. N.Y. Tel. Co.,} 45 F.App’x 53, 55 (2d Cir. 2002) (affirming a trial court’s order to enforce a mediated settlement despite plaintiff’s claim that the settlement was procured through mediator coercion and fraudulent misrepresentation, noting that “[t]he nature of mediation is such that a mediator’s statement regarding the predicted litigation value of a claim, where that prediction is based on a fact that can readily be verified, cannot be relied on by a counseled litigant whose counsel is present at the time the statement is made.”); Gallagher v. Gallagher, No. 125000, 1999 WL 795683, at *2 (Va. Cir. Ct. Aug. 18, 1999) (claiming mediator browbeat party to exact settlement); In re BankAmerica Corp. Sec. Litig., 210 F.R.D. 694, 705 (E.D. Mo. 2002) (rejecting claim that class action settlement should not be enforced because the mediator “strong-armed” class counsel).

\textsuperscript{238.} \textit{See, e.g., Estate of Skalka v. Skalka,} 751 N.E.2d 769, 772 (Ind. Ct. App. 2001) (affirming when trial judge in settlement posture stated, “[b]ut if you people want to continue fighting, I’m no longer going to be the mediator here, I’m going to be a judge. You are going to go through the cost of this thing. It’s going to be financially draining and I can tell you you’re going to wind up losing the property”); Golden v. Hood, No. E1999-02443-COA-MR3-CV, 2000 WL 122195 (Tenn. Ct. App. Jan. 26, 2000) (complaining that mediator represented that jury would not award him full amount of medical expenses if he went to trial).

\textsuperscript{239.} \textit{Welsh, supra} note 2, at 64–78 (2000) (discussing court acceptance of pressure tactics in settlement discussions).

\textsuperscript{240.} \textit{253 F.3d 926} (7th Cir. 2001) (finding lawyer’s refusal to produce clients at mediation unjustifiable).
Appeals found that the lawyers were not justified. The court addressed, but summarily rejected, counsel’s concern that the mediator was attempting to coerce the settlement.

Perhaps the most novel, albeit unsuccessful, claim of duress occurred in 

Patterson v. Taylor,

where a party claimed the mediator coerced him into settling and not consulting with counsel by continually stating that if he “didn’t sign the agreement [he] would ruin [the mediator’s] record of being always able to settle the case.”

In 

Vitakis-Valchine v. Valchine,

the claim of mediator misconduct was successful, but the court had to invent a legal theory to justify the result. Plaintiff maintained that her divorce settlement was obtained after an eight-hour mediation in part because of coercion and undue influence exerted by the mediator. According to the plaintiff, the mediator threatened to tell the judge that she was the cause of the settlement failure, speculated that the court would rule against her, and offered opinions about the potential legal costs and how refusing to settle would affect her pensions. Traditional contract defenses of duress or undue influence were unavailable to plaintiff because under these theories the undue pressure must come from the adverse party. Nonetheless, the court concluded that plaintiff stated a claim for relief based on a theory of mediator misconduct. Florida has an elaborate set of rules governing the conduct of mediators. The rules are aimed at protecting the parties’ right to self-determination by limiting mediator coercion and the practice of some mediators to provide opinions about the expected outcome of the case.

242. 793 So. 2d 1094 (Fla. Dist. Ct. App. 2001). See also In re BankAmerica, 210 F.R.D. at 705. In re BankAmerica was the only other case involving a claim of mediator misconduct where the agreement reached was not enforced. In BankAmerica, though, the court refused to approve the mediated class action settlement on grounds of fairness, not because the mediator “strong-armed” counsel. BankAmerica 210 F.R.D. at 705.
244. Id. at 1097.
245. Id. at 1099–1100.
246. Id. at 1098–99 (citing Fla. R. Med. 10.310(b), (c) & 10.370(c)).
2. Mediator Ethics and Malpractice—Actions Against the Mediator

During the five-year period covered by the database, there were only four cases naming mediators as defendants. All four were dismissed on the pleadings or by summary judgment in the mediator’s favor.

In Lehrer v. Zwernemann, the plaintiff sued the mediator, among others, for “negligence or legal malpractice, breach of contract, breach of fiduciary duty, Texas Deceptive Trade Practices Act violations, fraud, and conspiracy to commit fraud.” The plaintiff essentially claimed that the mediator did not act as a neutral, had conflicts of interest, and did not disclose certain facts to the plaintiff. Rather than focus on particular duties or standards required of a mediator, the court took a functional approach. The court concluded that the “primary obligation” of a mediator is “to facilitate a settlement,” which the defendant accomplished. Summary judgment in favor of the mediator was affirmed because the plaintiff could cite to no injury caused by the mediator.

Two other cases alleged conspiracies between attorneys and mediators, but did not individually name mediators as defendants. These cases were also dismissed by summary judgment.

247. Goad v. Ervin, No. E033593, 2003 WL 22753608 (Cal. Ct. App. Nov. 21, 2003) (asserting quasi-judicial immunity to preclude suit against mediator for alleged defamation and filing of a false document); Jefferson v. William R. Ridgeway Family Courthouse, No, CO38059, 2002 WL 819859 (Cal. Ct. App. May 1, 2002) (relying on statutory litigation privilege to affirm dismissal of claim that alleged that mediator had falsified mediation investigation report prepared in context of child custody proceedings); Jewell v. Underwood, No 2000-CA-G1, 2000 WL 1867565, at *4 (Ohio Ct. App. Dec. 22, 2000) (dismissing claim that mediator committed fraud by falsely representing that “she was trained as a mediator and . . . could ably provide mediation services” in family law matter, where mediator’s uncontradicted affidavit stated she informed the parties' attorneys that she was not a trained divorce mediator); Lehrer v. Zwernemann, 14 S.W.3d 775, 777–78 (Tex. App. 2000) (concluding that failure by mediator to affirmatively disclose relationship with opposing counsel and to inform party in mediation that his lawyer had failed to conduct discovery could not be basis for negligence or legal malpractice, breach of contract, breach of fiduciary duty, or fraud claims, where the complaining party had “constructive knowledge” of the prior relationship between the mediator and opposing counsel and could not articulate any damages from alleged improper behavior).

248. Lehrer, 14 S.W.3d at 776.

249. Id. at 777.

250. Id.

251. Id. at 778.

While actions against mediators sound in negligence, defining the duty of care of a mediator is quite difficult, absent specific statutes or court rules. In *Chang's Imports, Inc. v. Srader*, the court ruled that a mediator should not be held to the same standard of care expected in the legal profession, even if the mediator is a lawyer. The court noted that “[t]here is almost no law on what the appropriate standard of care is, if any, for a mediator who helps negotiate a settlement between parties.”

Nor is the oft-mentioned threat of unauthorized practice of law (UPL) prosecution materializing in practice. UPL was raised in only one case in the database—*The Florida Bar v. Neiman*. In *Neiman*, the Florida Supreme Court concluded that a paralegal engaged in unauthorized practice of law. Among other things, the paralegal appeared on behalf of a personal injury plaintiff at a mediation, conducted settlement discussions with defending insurer’s attorney, appeared on behalf of a plaintiff in a wrongful birth case mediation, and argued issues of liability, causation, and damages while the lawyer he worked for sat silent.

D. The Special Challenges Posed by Hybrid Processes

The intersection between mediation and other ADR processes presents an array of thorny ethical problems. Courts usually reject challenges to arbitral awards issued by arbitrators who did not disclose related prior service as mediators. As a general principle, the presence of an earlier relationship through mediation is insufficient

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253. *Id.* at 332.
255. *Id.* at 599–600.
256. The Florida Bar v. Neiman, 816 So. 2d 587 (Fla. 2002).
to create a reasonable impression of an arbitrator’s partiality. Indeed, in the words of one Texas trial court, “[t]he mere payment of a mediation fee is insufficient to show partiality since both sides pay a fee. Indeed, mediators often antagonize the parties or force both sides to leave a mediation unhappy in order to achieve a successful mediation.”

What about the arbitrator who later serves as a mediator for one of the parties in an unrelated case? In Durone v. Cary, the California Court of Appeals declined to vacate an arbitral award for alleged bias, where after deciding liability, the arbitrator accepted a mediation position for the prevailing party.

Less frequent, but more troubling, are those cases where a neutral plays both roles in the same case. If, after assuring the parties of confidentiality for the purposes of encouraging candor, the mediator turns into a decision-maker, what is the mediator to do with information that was extracted through promises of confidentiality? How does the mediator maintain the promised neutrality? In Bowden v. Weickert, the court found that an arbitrator exceeded his authority by basing an arbitral award, at least in part, on the parties’ failed attempt at a mediated settlement. The court reasoned, “[i]t is undisputed that the arbitrator relied on information obtained through his role as mediator when he fashioned the arbitration award,” which

(E.D. Pa. 2003) (concluding that an arbitrator’s undisclosed but nearly contemporaneous service as a mediator in another case involving a party in the arbitration constituted sufficient appearance of bias to vacate an arbitral award).

260. Tex. Commerce Bank v. Universal Technical Inst. of Tex., Inc., 985 S.W.2d 678, 681 n.4 (Tex. Ct. App. 1999) (quoting the trial court below which rejected a challenge to an arbitral award that was based on undisclosed mediation service).


262. No. S-02-017, 2003 WL 21419175, at *7 (Ohio App. June 20, 2003). See also Township of Teaneck v. Teaneck Firemen’s Mut. Benevolent Ass’n Local No. 42, 802 A.2d 569 (N.J. Super. Ct. App. Div. 2002), cert. granted, 812 A.2d 1109 (N.J. 2002), aff’d, 832 A.2d 315 (N.J. 2003) (accepting withdrawal of interest arbitrator who had first tried unsuccessfully to mediate case); In re Cartwright, 104 S.W.3d 706, 714 (Tex. Ct. App. 2003) (ruling that the trial court abused its discretion by appointing mediator of child custody dispute as arbitrator of subsequent property dispute without consent of the parties, noting that “[i]f the mediator is later appointed to be the arbitrator between the same parties, he or she is likely to be in the possession of information that either or both of those parties would not have chosen to reveal to an arbitrator”), But cf. Hallam v. Fallon, No. HO23424, 2003 WL 21143014, at *10 (Cal. Ct. App. May 16, 2003) (rejecting a challenge to an arbitral award issued by a neutral who had previously tried to mediate the case where there had been a “gradual transformation from mediation to arbitration” that was recognized by all the parties and, indeed, initiated by the party challenging the arbitral award, the court confirmed the award).

violated the Ohio mediation confidentiality statute. The same concerns about mishandling of confidential information make dual service as a mediator and guardian ad litem problematic. Nonetheless, it is not uncommon for parties to craft a dual role for their neutral.

Some opinions address ethical considerations regarding information gathered in one process and used in another. In Kamaunu v. Kaaea, the Hawaii Supreme Court overruled an Intermediate Court of Appeals order prohibiting trial courts from seeking to discover during settlement conferences what occurred during the course of mandatory court-annexed arbitrations, including the specifics of arbitrators’ awards. According to the Supreme Court, the objective of resolution through compromise and settlement rather than litigation is “more readily fulfilled if trial courts—when acting as mediators—have knowledge of information regarding prior arbitration proceedings or previous settlement attempts.” However, such judicial encouragement for the sharing of information is the exception, not the rule.

264. Ohio Rev. Code Ann. § 2317.023 (“Mediation communications privileged; exceptions. . . .”)

265. See Isaacson v. Isaacson, 792 A.2d 525 (N.J. Super. Ct. App. Div. 2002) (reversing trial court and granting motion to remove the single individual who served as both guardian ad litem and mediator, concluding that the roles of mediator of economic issues and guardian ad litem are not sufficiently distinct to avoid the inherent conflict between a mediator’s obligation to respect confidences of the parties and the responsibility as guardian ad litem to serve as an officer of the court). But cf. Holtan v. Holtan, No. C6-98-1348, 1999 WL 231677 (Minn. Ct. App. Apr. 20, 1999) (denying husband’s motion to set aside judgment and decree of divorce based on argument that guardian ad litem improperly assumed a mediator role, thus becoming advocate for mother).


267. 57 F.3d 428 (Haw. 2002).

268. Id. at 432.

269. See, e.g., In re Anonymous, 283 F.3d 627 (4th Cir. 2002) (disciplining attorneys for disclosing information regarding a mediation to an arbitral panel attempting to resolve attorney and client dispute over litigation expenses); In re Cartwright, 104 S.W.3d 706 (Tex. App. 2003) (holding that trial court abused its discretion by appointing mediator of child custody dispute as arbitrator of subsequent property dispute without consent of the parties); Bowden v. Weickert, No. S-02-017, 2003 WL 21419175 (Ohio App. June 20, 2003) (concluding that arbitrator exceeded his authority by basing an arbitral award, at least in part, on the parties’ failed attempt at a mediated settlement).
E. Judicial Ethics and Malpractice

The tension of dual roles of mediator and decision-maker also is at the heart of a number of opinions regarding judicial officers and mediation. One set of problems is posed when judges initially act as mediators and later assume adjudicative functions in the same case. For example, in *Zhu v. Countrywide Realty Co., Inc.* the Tenth Circuit Court of Appeals affirmed enforcement of a mediated settlement of Fair Housing Act claims, finding no impropriety in the same magistrate judge serving as both mediator and later as judge recommending enforcement of the settlement. In rejecting the plaintiff's motion to reopen the case and set aside the mediated settlement, the magistrate revealed settlement negotiations. According to the court, this did not violate mediation confidentiality rules because the disclosure was necessary to evaluate the plaintiff's challenge to the settlement agreement.

Another case where a judge who had served as a mediator was asked to enforce the mediated settlement agreement is *DeMers v. Lee.* In *DeMers,* the Washington Court of Appeals concluded that the presiding judge had no responsibility to step down to avoid the appearance of unfairness where the record unequivocally established that the parties reached agreement on material terms and swore to the settlement in open court. The court ruled that under such circumstances a judicial order compelling parties to execute settlement documents is fair. Likewise, the Sixth Circuit Court of Appeals in *Renkoph v. REMS, Inc. * found no error in a district court judge ruling on a motion for summary judgment despite having previously participated in the case as a mediator. In addition to finding no authority for the proposition that judges must always recuse themselves after service as a mediator, the court stressed that the appealing party had consented to the judge's mediator role and had

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270. 66 F.App'x 840 (10th Cir. 2003), cert. denied, 124 S.Ct. 1083 (Jan. 12, 2004) (finding no impropriety in the same magistrate judge serving as both mediator and later as judge recommending enforcement of settlement).

271. *Id.* at 842 (citing Pueblo of San Ildefonso v. Ridlon, 90 F.3d 423, 424 (10th Cir. 1996) (finding no violation of court confidentiality rules where a party disclosed mediation communications in response to an order to show cause)). Because of confidentiality concerns, the Tenth Circuit panel ruling in *Pueblo of San Ildefonso* recused itself from all future deliberations—exactly what the magistrate did not do in *Zhu.*


273. *Id.* at *2–3.

274. *Id.* at *3.

275. 40 F.App'x 126 (6th Cir. 2002).
not sought to recuse the judge at the time of the summary judgment.\textsuperscript{276}

Assigning the mediating role to one judge and the adjudicative role to another does not necessarily eliminate all potential problems. Issues still arise about the boundary between mediation and judicial management of settlement conferences. In \textit{Estate of Skala v. Skala},\textsuperscript{277} the Indiana Court of Appeals considered whether a judge had violated local court ADR rules by mediating. Plaintiffs unsuccessfully asserted that an oral settlement reached at a pre-trial settlement conference was actually a failed mediation subject to ADR rules. To support their argument, they noted the judge’s words, including the statement that “I’m no longer going to be the mediator here, I’m going to be a judge.” Such statements, ruled the appellate court, did not prove the judge was mediating in violation of court rules; rather, the statements show that the judge “simply was attempting, in his role as judge, to assist the parties in reaching a settlement of their disputes.”\textsuperscript{278}

Even in cases where judges were not mediators, their being informed of what transpired in mediation was offered in a number of cases as a basis for judicial disqualification. Courts usually were not persuaded by this argument. For example, in \textit{Enterprise Leasing Co. v. Jones},\textsuperscript{279} the Florida Supreme Court ruled that a judge was not subject to automatic disqualification from presiding over a personal injury action to be tried to a jury, merely because the judge was informed by the plaintiff’s counsel of confidential mediation information. The information included a demand for settlement and the highest offer made by the defendants. “We recognize the important public policy concerns favoring confidential mediation proceedings and the role of confidentiality in settlement,” noted the court, but “[w]e can see no compelling reason to treat a trial court’s knowledge of inadmissible information in the mediation context any differently from the other situations presented every day where judges are asked to set aside their personal knowledge and rule based on the evidence presented by the parties at the trial or hearing.”\textsuperscript{280}

\textsuperscript{276} Renkoph v. REMS, Inc., 40 F.App’x 126, 130 (6th Cir. 2002).
\textsuperscript{277} 751 N.E.2d 769 (Ind. Ct. App. 2001).
\textsuperscript{278} Id. at 772.
\textsuperscript{279} 789 So. 2d 964 (Fla. 2001). See also Metz v. Metz, 61 P.3d 383 (Wyo. 2003) (refusing to disqualify trial judge in divorce action after judge had presided over action to enforce mediated settlement).
\textsuperscript{280} Enterprise Leasing Co. v. Jones, 789 So. 2d 964, 967–68 (Fla. 2001).
In *Panitch v. Panitch*, the appellate court affirmed the trial judge’s decision not to recuse himself for use of inappropriate language expressing frustration during a conference call with counsel and asserting in a letter to counsel that plaintiff had failed to utilize mediation. However, the *Panitch* opinion closed with cautionary remarks about the risks of too much judicial involvement in settlement efforts and the necessity, under certain circumstances, to step aside and allow another judge to try the case.

Alleged judicial impropriety also was at the heart of the issue considered in *Shake v. Ethics Committee of the Kentucky Judiciary*. The Kentucky Supreme Court, in a seven-to-three split decision, vacated an opinion of the Ethics Committee of the Kentucky Judiciary and allowed a judge to serve without compensation on the board of directors of a non-profit local mediation organization. The majority reasoned there was no valid basis for the Ethics Committee’s fear that litigants may feel compelled to choose mediation if the judge sits on a mediation organization’s board. After all, explained the majority, “[a]lthough the decision to choose mediation is frequently made by the litigants, the fact that the judge sits on a mediation organization’s board is an insignificant factor in the making of that decision by litigants when compared to the litigants’ knowledge.

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282.  Id. at 1242. The court wrote:

>When becoming too intimately involved with discovery and case management, which may inevitably lead to settlement discussions, a judge may reach a point where it may well appear to the clients that one side is being favored over another. We caution that excessive involvement in proceedings before trial in cases where that judge will ultimately be the fact finder would dictate that the judge should step aside and allow another judge to try the case because of opinions expressed. We are not addressing the usual non-jury case where a judge must necessarily be involved to some degree, although not completely immersed, in attempting to move a case or encourage settlement of a case. Settlements, of course, are always desirable from the standpoint of the litigants as well as the court system. We merely caution, without deciding now, that it may well be appropriate before this case reaches trial for the judge to consider whether he should step down from hearing the actual trial of the case because of the degree of involvement.

*See also* Davidson v. Lindsey, 104 S.W.3d 483 (Tenn. 2003) (challenging trial judge’s contact with mediator).


that the judge has the absolute discretion to order mediation even if they choose otherwise.”

V. DUTY TO MEDIATE/CONDITION PRECEDENT

Disputes about parties’ obligations to participate in mediation are detailed in 279 cases in the database, including 122 opinions coded as condition precedent cases, where mediation could be considered a mandatory pre-condition to litigation or arbitration. There were twenty-one state supreme court decisions and twenty-five federal circuit court decisions. These types of disputes more than tripled in frequency between 1999 and 2003, from twenty-one to seventy-three.

Collectively, the 279 opinions support a simple principle: courts are inclined to order mediation on their own initiative, and will generally enforce a pre-existing obligation to participate in mediation, whether the obligation was judicially created, mandated by statute or stipulated in the parties’ pre-dispute contract.

A. Judicial Authority

The best overview of judicial authority to compel mediation is provided by *In re Atlantic Pipe Corp.*, a rare advisory mandamus order issued by the First Circuit Court of Appeals. The decision exhaustively reviews the four sources of court authority to compel mediation: local court rule; applicable statutes; the Federal Rules of Civil Procedure; and the court’s inherent power.

While squarely affirming the power of courts to compel mediation, the decision also questions the wisdom of mandating mediation against parties’ wishes, noting that “[r]equiring parties to invest substantial amounts of time and money in mediation under such circumstances may well be inefficient.” A small number of courts echo this view and refuse to compel mediation when convinced the process will be futile. For example, in *In re African-American Slave Descendants’ Litigation*, an Illinois federal district court refused to exercise

286. *In re Atl. Pipe Corp.*, 304 F.3d 135 (1st Cir. 2002) (holding that a court may compel mediation pursuant to its inherent authority to manage and control dockets; but, absent an explicit statutory provision or local rule authorizing mediation, the court must first determine that a case is appropriate for mediation and then affirmatively set appropriate procedural safeguards to ensure fairness to all parties involved).
287. *Id.* at 143–44.
its inherent power to compel mediation of an action for monetary and injunctive relief brought by descendents of former enslaved African Americans against various corporate defendants. In the court’s view, mediation would not facilitate an expeditious end to the litigation because “[b]oth parties have different views pertaining to the viability of claims presented” and defendants object to imposition of mediation.

A distinctly different view of mandatory mediation is expressed in *Liang v. Lai*, in which the Montana Supreme Court denied an unopposed motion to dispense with appellate mediation required by local court rule in all actions seeking monetary damages. In the court’s view, even though the issue on appeal was a challenge to an order for change of venue, the determining factor for mediation eligibility was the relief sought in the underlying action and not the type of order or judgment being appealed. Any other approach, reasoned the court, would have doomed the appellate mediation program given initial lawyer hostility.

Successful challenges to judicially compelled mediation are rare, if for no other reason than such orders are viewed as interlocutory and unappealable. Courts favor mediation on efficiency grounds and are willing to exercise power to compel the

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289. *Id.* at 1214.


291. *See, e.g.*, In re *Enron Corp.*, No. 03 Civ. 5078(DLC), 2003 WL 22171695 (S.D.N.Y. Sept. 22, 2003) (refusing to withdraw reference of proceedings to bankruptcy court and noting that judicial efficiency, as well as uniform administration of bankruptcy proceedings, weigh in favor of allowing mediation process in bankruptcy court to proceed even for claims allegedly subject to arbitration); Lassiter v. Lassiter, Nos. C-020494, C-020370, C-020128, 2003 WL 21034193 (Ohio App. May 9, 2003) (endorsing requirement to mediate all subsequent motions as a reasonable exercise of judicial discretion designed to discourage frivolous motions).
attendance of necessary parties. Requiring non-party participation, however, is another matter.

Judicial power to compel mediation is not unlimited. For example, in In re Hough, the Iowa Court of Appeals concluded the trial court exceeded its authority by mandating mediation as a pre-condition to filing a court action, contravening the relevant state statute authorizing mandatory mediation only after actions are filed. Further, in Connolly v. National School Bus Service, Inc., the Seventh Circuit Court of Appeals opined that a party has no obligation to mediate before a District Court judge’s law clerk, and failure to participate in such mediation was found to be an impermissible basis for an attorney fee award reduction. Sometimes the limitation is not on the referral to mediate but on the extent of power delegated to the mediator. For example, in Martin v. Martin, the Florida Court of Appeals found that empowering a mediator to establish a visitation schedule was an improper delegation of judicial authority.

Courts are disinclined to enforce prior mediation orders in the face of a party who has waived the right to mediate or who has

293. See, e.g., United States v. City of Garland, 124 F. Supp. 2d 442 (N.D. Tex. 2000) (concluding that federal magistrate has authority to compel mayor and city council member to attend court-ordered mediation, and further holding that such attendance was not in violation of Texas Open Meetings Act because mediation is not a “meeting” as defined by the Act).

294. See, e.g., Marion County Jail Inmates v. Sheriff Anderson, No. IP 72-424-C B/S, 2003 WL 22425020, at *1 (S.D. Ind. Mar. 19, 2003) (refusing to compel mediation despite acknowledging that plaintiff’s complaints about prison overcrowding were problems of “enormous magnitude and grave consequence,” reasoning that “[c]ourts do not conduct town meetings, to which ‘all interested persons’ are invited to attend, to resolve public issues; that approach better serves the needs and interests of the legislative and executive branches.”).


296. 177 F.3d 593 (7th Cir. 1999).


unclean hands. Nor are pending court orders to mediate considered valid defenses to dismissal of an action on independent grounds. For example, in *United States v. Beyrle*, the Tenth Circuit Court of Appeals affirmed the trial court conclusion that a magistrate’s pre-trial order compelling mediation of a foreclosure action could not prevent forced sale of the property at issue where the court decided a dispositive summary judgment motion in defendant’s favor prior to the start of mediation. Finally, satisfying a mediation obligation is no excuse for failing to comply with other procedural requirements.

B. Contractual Obligations

Courts routinely enforce contractual obligations to mediate as a condition precedent to litigation. In *Philadelphia Housing Authority v. Dore & Associates Contracting, Inc.*, the Federal District Court of Eastern Pennsylvania granted a defense motion for summary judgment and imposed a stay of court proceedings in a breach of contract dispute where the plaintiff did not formally request internal appeal, arbitration, or mediation as required by the contract’s ADR provision.

299. See, e.g., Magann v. Magann, 848 So. 2d 496 (Fla. Dist. Ct. App. 2003) (remanding for final judgment despite unfulfilled mediation obligation where party opposing judgment had previously refused on numerous occasions to participate in mediation); Schuller v. Schuller, No. C4-02-1242, 2003 WL 282396 (Minn. Ct. App. Feb. 11, 2003) (finding that failure of prevailing party to first participate in mediation as required by the parties’ stipulated judgment and decree is insufficient basis to set aside custody modification on appeal where record suggested losing party failed to participate in mediation, unless opposing party paid all of the mediator’s fees contrary to the terms of the stipulated mediation agreement).


A stay of proceedings is not the only risk; the courts also have dismissed claims, with 303 or without prejudice. 304

In a dozen cases, courts evaluated whether participating in mediation was a condition precedent to arbitration. Both the First and Eleventh Federal Circuit Courts of Appeals emphasized that the FAA’s policy in favor of arbitration does not operate without regard to the wishes of the contracting parties. 305 Where parties agree to conditions precedent before arbitration can take place, and those conditions are not fulfilled, in effect “the arbitration provision has not been activated and the FAA does not apply.” 306 In a nutshell, be careful what you wish for. If you draft a multi-step dispute resolution clause requiring mediation before accessing arbitration or litigation, be advised that courts will likely enforce the mediation obligation. 307

C. Statutory Obligations

In addition to private contractual obligations, statutory requirements to mediate also resulted in considerable litigation. For example, in Rutter v. Carroll’s Foods of the Midwest, Co., 308 the court found the plaintiff’s failure to either mediate or obtain a statutorily required mediation release to be an unfulfilled condition precedent to an Iowa nuisance suit. Emphasizing that the failure did not affect


305. HIM Portland, LLC v. Devito Builders, Inc., 317 F.3d 41 (1st Cir. 2003) (affirming denial of motion to compel arbitration where parties’ contract required a request for mediation as a condition precedent to arbitration); Kemiron Atl., Inc. v. Aguakem Int’l, Inc., 290 F.3d 1287 (11th Cir. 2002) (ruling that the parties’ failure to request mediation, which was condition precedent to arbitration under the parties’ contract, precluded enforcement of the arbitration clause).

306. Kemiron, 290 F.3d at 1291.


308. 50 F. Supp. 2d 876 (N.D. Iowa 1999).
the claimant’s standing or the court’s subject matter jurisdiction, the court nevertheless warned the plaintiff to cure the defect or risk dismissal.309 Courts reached similar conclusions with respect to such diverse statutory mediation schemes as the Federal Congressional Accountability Act,310 the Y2K Act,311 the Maine Motor Vehicle Dealer’s Act,312 and an Oklahoma statute on grandparental visitation rights.313 However, failure to fully comply with statutory mediation schemes is not always fatal to one’s case.314

D. Consequences of Non-Participation

Parties must overcome a number of hurdles to obtain relief for another party’s alleged non-participation in mediation. First, not everyone has standing to challenge a failure to mediate.315 Second, ambiguity about the exact nature of the mediation obligation makes

309. Id. at 883. But cf. Beckman v. Kitchen, 599 N.W.2d 699 (Iowa 1999) (concluding that there had been no rescission of a contract of sale triggering a mandatory mediation obligation under the Iowa Farm Mediation Statute).
312. Darling’s v. Nisson N. Am., Inc., 117 F. Supp. 2d 54 (D. Me. 2000) (finding that claims stated by a franchisee pursuant to the Motor Vehicle Dealer’s Act were ripe for judicial review, but nonetheless dismissing case without prejudice where plaintiff failed to make a written demand for mediation as required by the Act as a precondition for filing court action).
313. Ingram v. Knippers, 72 P.3d 17 (Okla. 2003) (concluding that district court improperly denied grandparents’ visitation motion, where statute required that mediation be ordered before court decision).
314. See, e.g., Ocasio v. Froedtert Mem’l Lutheran Hosp., 646 N.W.2d 381 (Wis. 2002) (concluding that filing of medical malpractice lawsuit before expiration of mandatory mediation period does not require dismissal of the action); Kent Feeds, Inc. v. Manthei, 646 N.W.2d 87 (Iowa 2002) (finding that mandatory mediation provision of statute governing farmer-creditor disputes does not prevent creditor from seeking personal judgment against guarantor where guarantees at issue are not secured by agricultural property as defined by the statute).
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courts unwilling to take action.\textsuperscript{316} Third, sometimes there are good factual defenses.\textsuperscript{317}

Once the court determines an obligation exists and was flouted, however, a range of consequences may ensue. First, the failure to mediate can impact substantive matters in the underlying lawsuit. For example, in \textit{McEntyre v. Edwards},\textsuperscript{318} the Georgia Court of Appeals concluded that a homeowner’s choice to terminate a contract rather than enter into mediation as requested by defendant was sufficient evidence that the homeowner committed breach by terminating the contract. Second, as discussed more thoroughly in Part VII, sanctions may be granted,\textsuperscript{319} including attorneys’ fees,\textsuperscript{320} dismissal,\textsuperscript{321} and even contempt.\textsuperscript{322}

\textsuperscript{316} \textit{See}, e.g., Daugherty v. Dutiel, No. 02CA16, 2003 WL 21419178 (Ohio Ct. App. June 18, 2003) (reversing dismissal of lawsuit as improper sanction for failure to mediate where no firm mediation date had been set); Spickler v. Spickler, No. 01-C0-52, 2003 WL 21518732 (Ohio App. June 30, 2003) (affirming refusal to find mother in contempt for refusal to mediate as required by separation agreement where terms of the mediation obligation were ambiguous).\textsuperscript{317} \textit{See}, e.g., \textit{Environmental Contractors, LLC v. Moon}, 983 P.2d 390 (Mont. 1999) (finding that dismissal of appeal was not warranted where party satisfied appellate mediation participation requirements by being available by telephone and having his attorney physically present at the mediation); Nat’l Marketing Ass’n. v. Broadwing Telecomm. Inc., No. 02-2017-CM, 2003 WL 1608416 (D. Kan. Mar. 26, 2003) (finding that plaintiff’s alleged failure to seek mediation prior to initiating lawsuit was not a basis to dismiss all claims where plaintiff timely mailed mediation request to defendant’s principal place of business, rather than notice address listed in parties’ royalty agreement).\textsuperscript{318} \textit{583 S.E.2d 889 (Ga. Ct. App. 2003), cert. denied} (Oct. 20, 2003).\textsuperscript{319} \textit{See}, e.g., \textit{Lucas Automotive Eng’g, Inc. v. Bridgestone/Firestone, Inc.}, 275 F.3d 762, 769 (9th Cir. 2001) (affirming district court imposition of sanctions for defendant’s failure to attend mediation due to “incapacitating headache,” where defendant failed to notify parties beforehand of his nonappearance). \textit{See also Donohow v. Klebar}, No. 02-0656, 2003 WL 147702, *3 (Wis. Ct. App. Jan. 22, 2003), review dismissed, \textit{657 N.W.2d 710 (Wis. Feb. 24, 2003)} (affirming trial court modification of custody and quoting from party brief emphasizing that party losing custody was “the party to refuse to cooperate in mediating issues in controversy”). \textit{But cf. In re Bryan}, 61 P.3d 641 (Kan. 2003) (noting that whether or not attorney accepted offer to mediate is irrelevant in disciplinary action against attorney).\textsuperscript{320} \textit{See}, e.g., \textit{Peoples Mortgage Corp. v. Kansas Bankers Surety Co.}, 62 F.App’x. 232 (10th Cir. 2003) (affirming award of attorneys’ fees against insurance company for failure to pay a claim without just cause or excuse, in part for insurer’s unreasonable refusal to participate in mediation at which the parties discussed the basis for the claim); \textit{Segui v. Margrill}, 844 So. 2d 820, 821 (Fla. Dist. Ct. App. 2003) (awarding $1,484 in attorneys’ fees and mediator fees as a sanction for the party not attending the mediation).\textsuperscript{321} \textit{See supra} notes 305–06, 310. \textit{See also Jermar, Inc. v. L.M. Communications II of S.C., Inc.}, No. 98-1279, 1999 WL 381817 (4th Cir. June 11, 1999) (affirming trial court grant of default judgment based on failure to participate in mediation but remanding to consider sanctions).
VI. FEES AND COSTS

Courts decided mediation-related fee and cost issues in 243 opinions. There were 135 state cases, including five state supreme court decisions. Federal Circuit Courts of Appeals rendered twenty-six decisions, including at least one decision from each circuit. The total number of state fee and cost-related decisions increased from twelve to forty-six, while federal decisions declined from twenty to seventeen during the five-year period.

Fee and cost issues considered by courts divided more or less into four categories: mediation participation (76); sanctions, either for failure to mediate or for other inappropriate acts in mediation (65); compensation for actions to enforce mediated settlements (44); or compensation for the case as a whole, whether settled in mediation or not (54).

A. Allocating the Cost of Mediation Participation

Many of the fee/cost cases simply list mediation expenses without discussion as part of a laundry list of costs that were granted or denied. In some cases, attorneys' fees for mediation work were

323. California, Texas, and Florida accounted for fifty-two percent of all state court fee and cost cases (38, 21, 12 opinions, respectively), which is nearly twice the percentage (28%) of the entire database that cases from those states represent.
325. See, e.g., In re Atl. Pipe Corp., 304 F.3d 135 (1st Cir. 2002); Uy, M.D. v. Bronx Mun. Hosp. Ctr., 182 F.3d 152 (2d Cir. 1999); Spark v. MBNA Corp., 48 F.App’x. 385 (3d Cir. 2002); Brinn v. Tidewater Transp. Dist. Comm’n., 242 F.3d 227 (4th Cir. 2001); Mota v. Univ. of Tex. Health Sci. Ctr., 261 F.3d 512 (5th Cir. 2001); Jaynes v. Austin, 20 F.App’x. 421 (6th Cir. 2001); Connolly v. Laidlaw Indus., Inc., 233 F.3d 451 (7th Cir. 2000); Brisco-Wade v. Carnahan, 297 F.3d 781 (8th Cir. 2002); Lucas Auto. Eng’g v. Bridgestone/Firestone, Inc., 275 F.3d 762 (9th Cir. 2001); Jones v. Trawick, No. 98-6352, 1999 WL 273969 (10th Cir. May 5, 1999); Smalbein ex rel Estate of Smalbein v. City of Daytona Beach, 353 F.3d 901 (11th Cir. 2003).
awarded but reduced because of a failure to carry the burden to establish that all requested hours were reasonable.\textsuperscript{328}

Numerous opinions confirm taxation of mediation costs despite the lack of clear statutory or rule authority to do so. In \textit{Stevenett v. Wal-Mart Stores},\textsuperscript{329} the Utah Supreme Court opined that an award of $375 in mediation expenses to the prevailing plaintiff in a personal injury case was well within the trial court’s discretion to tax costs. According to \textit{Stevenett}:

\begin{quotation}
[I]t is good public policy to encourage exploration of alternative dispute resolution methods by allowing the prevailing party to recover costs so incurred. Without such a rule, parties may well be disinclined to seriously explore these avenues, even when ordered to do so by the court, as in this case.\textsuperscript{330}
\end{quotation}

In \textit{Reed v. Wally Conard Construction, Inc.},\textsuperscript{331} the Tennessee Court of Appeals noted that an award of mediation costs is not authorized under Civil Procedure Rule 54.04(2). The court, nonetheless, affirmed a trial court award of mediation expenses using a generous interpretation of the court’s ADR rules. Specifically, section 7 of Tennessee Supreme Court Rule 31 provided that “[t]he costs of any alternative dispute resolution proceeding, including the costs of the services of the Rule 31 dispute resolution neutral, at the neutral’s request, may be charged as court costs.”\textsuperscript{332} Because the plaintiff’s attorney sought recovery of the expense, reasoned the court, he must have been billed by the neutral.\textsuperscript{333} According to the court, billing by

\begin{itemize}
\end{itemize}

\textsuperscript{328} See, e.g., Glover v. Heart of Am. Mgmt. Co., No. Civ.A. 98-2125-KHV, 1999 WL 450895 (D. Kan. May 5, 1999) (refusing to award fees to prevailing civil rights claims plaintiffs for 6.7 hours of time spent by counsel on unsuccessful mediation); Lintz v. Am. Gen. Fin., Inc., 87 F. Supp. 2d 1161 (D. Kan. 2000) (concluding that time spent in unsuccessful mediation and settlement efforts is compensable, but reducing claim of 34.3 hours to 20.1 hours where moving party failed to meet burden that all claimed hours were reasonable); Martinez v. Hodgson, 265 F. Supp. 2d 135 (D. Mass. 2003) (awarding attorney fees to prevailing party, including mediation costs, except those claimed for preparation done the day after mediation actually took place).

\textsuperscript{329} 977 P.2d 508 (Ut. App. 1999).

\textsuperscript{330} \textit{Id.} at 516.

\textsuperscript{331} No. 03A01-9807-CH-00210, 1999 WL 817528 (Tenn. App. Oct. 13, 1999).

\textsuperscript{332} \textit{Id.} at *8.

\textsuperscript{333} \textit{Id.}
the neutral is “tantamount to ‘the neutral’s request’” as set forth in the local rule.

In *Frenz v. Quereshi*, the Oregon Federal District Court confirmed that a mediation fee is not a recoverable cost under 28 U.S.C. §§ 1920 and 1921, the uniform standards Congress intends federal courts to follow in assessing costs. Nonetheless, the court allowed the plaintiff to recover the mediation fee based on the standard for recoverable litigation expenses under 42 U.S.C. § 1988—where the critical question is whether the expense would normally be billed to a fee-paying client. By awarding expenses, the court rejected defendant’s argument that a written mediation agreement required that the fee “be paid equally by the parties unless otherwise agreed to,” and the parties did not otherwise agree. In other cases, however, courts have refused to tax mediation expenses where parties had previously agreed to split fees or local court rules promoted fee splitting.

The lack of express authority to tax mediation costs resulted in the denial of fees in a number of cases. For example, in *Brisco-

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334. *Id.*
336. 42 USC § 1988 (Proceedings in Vindication of Civil Rights). Section (b) in relevant part provides that “[i]n any action or proceeding to enforce . . . [civil rights] . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorneys’ fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity such officer shall not be held liable for any costs, including attorneys’ fees, unless such action was clearly in excess of such officer’s jurisdiction.”
338. *Id.* at *6.
339. In re Williams, No. C-5-52-237, 2000 WL 1920038, at *6 (Minn. Dist. Ct. Apr. 14, 2000), aff’d in part, rev’d in part, 631 N.W.2d 398 (Minn. Ct. App. 2001) (affirming that private agreements do not alter the court’s discretion to tax the costs of mediation, but refusing to do so where taxation would not be supportive of the mediation process because it conflicts with the parties’ prior agreement to split costs); J.P. Sedlak Ass’n v. Conn. Life & Casualty Ins. Co., No. 3:98 CV-145-DFM, 2000 WL 852331 (D. Conn. Mar. 31, 2000) (reducing fee award by $6,678.69 because prevailing plaintiff may not seek reimbursement for its share of private mediation where the parties had previously agreed to bear their own costs).
341. See, e.g., Mota v. Univ. of Tex. Houston Health Sci. Ctr., 261 F.3d 512 (5th Cir. 2001) (finding that although Title VII supports award of investigation fees as a reasonable out-of-pocket expense for a prevailing plaintiff, mediation costs do not fall
Wade v. Carnahan, the Eighth Circuit Court of Appeals concluded that the trial court abused its discretion by ordering prevailing defendants in a prisoner’s rights case to pay mediation costs. Local court rules precluded prisoner civil rights cases from being referred to mediation, and there was no express statutory authorization for taxation of mediation fees in section 1983 litigation. Moreover, the court emphasized that 28 U.S.C. § 1920 omits mediation from its “exhaustive list of what costs may be assessed,” and Rule 54(d) of the Federal Rules of Civil Procedure also fails to explicitly grant authority to tax costs against the prevailing party.

In addition to citing a lack of statutory or rule authority, courts have declined to award mediation costs based on party conduct and by drawing a distinction between private, voluntarily incurred mediation costs and costs that were incurred because of a court-order.

B. Fees as a Sanction for Failure to Mediate or Other Inappropriate Acts

Attorneys’ fees were awarded as a sanction for a variety of offenses including, failure to attend mediation, failure to have

within the limited category of expenses taxable under Title VII). See also McKenzie v. EAP Mgmt. Corp., No. 98-6062-CIV, 1999 WL 1427707 (S.D. Fla. 1999) (refusing to tax mediation fees in favor of prevailing defendant in Title VII case because such fees are not taxable under 28 USC § 1920).

342. 297 F.3d 781 (8th Cir. 2002).

343. Id. at 782.

344. Walker v. Bozeman, 243 F. Supp. 2d 1298 (N.D. Fla. 2003) (refusing to tax a mediator’s fee against the losing defendant where mediation was part of overall settlement process in which the court concluded defendant obviously tried, but plaintiff refused (based on the offers of judgment and “from the parties respective positions on damages at trial”) to settle on reasonable terms).

345. Smith v. Vill. of Ruidoso, 994 P.2d 50 (N.M. Ct. App. 1999) (reversing trial court award of mediation costs to prevailing plaintiff and suggesting such awards would be appropriate in private mediation only if the parties had agreed to permit award of mediator’s fee expense as a cost of litigation). Compare Cabral v. YMCA of Redlands, No. E028654, 2002 WL 399480 (Cal. Ct. App. Mar. 15, 2002) (affirming taxation of fees charged by the mediator where substantial evidence suggested plaintiff had agreed said fees would be recoverable as costs of suit if mediation failed and defendants were the prevailing parties at trial).

346. See, e.g., People’s Mortgage Corp. v. Kan. Bankers Surety Co., 62 F.App’x. 232 (10th Cir. 2003) (affirming award of attorneys fees against insurance company for failure to pay a claim without just cause or excuse, in part for insurer’s unreasonable refusal to participate in mediation at which the parties discussed the basis for the claim); Segui v. Margrill, 844 So. 2d 820, 821 (Fla. Dist. Ct. App. 2003) (awarding $1,484 in attorneys’ fees and mediator fees as a sanction for the party not attending the mediation.).
persons with settlement authority present at the mediation, breach of an obligation made in mediation to produce wage statements, insertion of new terms in general releases prepared post-mediation that were not included in the original mediated settlement, or filing an unsealed motion to enforce a mediated settlement in violation of the settlement’s confidentiality clause.

Examples of party conduct that courts declined to sanction through attorney fee awards included violation of confidentiality provisions in a post-mediation fee dispute, unwillingness to settle, or failing to participate in mediation with a district court judge’s law clerk. In In re Estate of Caldwell, the California Court of Appeals refused to enforce a mediated probate settlement obligating a party who left the mediation early to pay, from his share of trust assets, all attorneys’ fees incurred by the other beneficiaries of the trust in dispute.

C. Fees for the Case as a Whole

Participating in mediation, whether it results in a settlement or not, can have a significant impact on attorneys’ fee awards for the

350. Toon v. Wackenhut Corrections Corp., 250 F.3d 950 (5th Cir. 2001) (reducing attorney fees provided for by contingency fee agreement).
352. See, e.g., Fini v. Remington Arms Co., No. CIV. A. 97-12-SLR, 1999 WL 825604, at ¶8 (D. Del. Sept. 24, 1999) (refusing to award sanctions based on “conduct to which the court was not privy and which probably reflects the conduct seen with most unsuccessful mediations); In re Marriage of Hodges, Nos. D034701, D036624, 2001 WL 1452210 (Cal. Ct. App. 2001) (reversing $25,000 attorney fee sanction after finding error in trial court taking of evidence from the mediator as to a party’s willingness to settle).
353. Connolly v. Nat’l Sch. Bus Serv., Inc., 177 F.3d 593 (7th Cir. 1999) (ruling that a party has no obligation to mediate before District Court Judge’s law clerk and failure to participate in such mediation was impermissible basis for attorneys’ fee award reduction).
354. No. B158110, 2003 WL 22022025 (Cal. Ct. App. Aug. 28, 2003) (concluding that even if there had been evidence of bad faith conduct in mediation—which there was not—it would not be sufficient to justify awarding all attorneys’ fees and costs incurred by the other beneficiaries).
action as a whole. Fee-shifting statutes refer to an award of attorneys’ fees for “prevailing parties.” Fee-shifting statutes refer to an award of attorneys’ fees for “prevailing parties.” Consequent, courts have been forced to decide, with conflicting results, whether there are “prevailing parties” in cases resolved through mediation. In Quinn v. Ultimo Enterprises, Ltd., the Federal District Court of Illinois awarded over $80,000 in attorneys’ fees and costs to the plaintiff in an American with Disabilities Act case resolved in mediation. In contrast, in T.D. v. LaGrange School District No. 102, the Seventh Circuit Court of Appeals concluded that a mediated settlement of an Individuals with Disabilities Education Act claim does not confer “prevailing party” status on the child who is the subject of the settlement. According to the court, such status only comes when the settlement is the functional equivalent of a consent decree, which does not occur when the agreement was not made part of a court order, was not signed by a judge, and the district court was without enforcement power over the agreement. At least two other federal courts have reached similar conclusions.

As part of the court’s inquiry into fee awards, detailed examination of mediation bargaining history is common. For example, in Cordoba v. Dillard’s, Inc., the Florida Federal District court awarded a prevailing defendant fees after concluding that its $10,000

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358. 349 F.3d 469 (7th Cir. 2003).
359. Id. at 478.
361. See, e.g., Uy, M.D. v. Bronx Muni. Hosp. Ctr., 182 F.3d 152, 155 (2d Cir. 1999) (using details of defendant’s conduct in mediation as basis to reverse trial court disallowance of trial preparation on grounds that plaintiff should have more vigorously pursued settlement); Messina v. Bell, 581 S.E.2d 80 (N.C. Ct. App. 2003) (affirming an award of attorneys’ fees to the prevailing plaintiff in part because of the trial court’s careful review of all settlement proposals made, including mediation offers); Porterfield v. Goldkuhle, 528 S.E.2d 71 (N.C. Ct. App. 2000) (finding abuse of discretion in judge’s failure to make findings about settlement offers).
mediation settlement offer—a “scant 1.1% of what Plaintiff demanded”\textsuperscript{363}—was nominal and did not imply that plaintiff had a legitimate, non-frivolous claim.\textsuperscript{364}

However, as noted supra in Part II, when parties raise a confidentiality objection to such inquiry, courts frequently uphold confidentiality limitations.\textsuperscript{365} For example, in Greene v. Dillingham Construction, Inc.,\textsuperscript{366} the California Court of Appeals ruled that fee-shifting provisions for refusal to accept reasonable settlement offers do not apply in confidential mediation sessions.

Nine opinions addressed the propriety of fee awards to prevailing parties who had failed to mediate in alleged violation of contractual or statutory obligations to do so as a precondition to litigation or arbitration.\textsuperscript{367} In most cases, courts awarded fees finding that mediation did in fact occur\textsuperscript{368} or that the defendants, as responding parties, were not subject to the mediation obligation.\textsuperscript{369} However, in Warren

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\textsuperscript{363.} Id. at *6.
\textsuperscript{364.} Id.
\textsuperscript{365.} See supra notes 61–81 and accompanying text.
\textsuperscript{366.} 101 Cal. App. 4th 418, 425 (Cal. Ct. App. 2002) (ruling that disclosure of mediation offers would violate confidentiality legislation and frustrate public policy favoring settlement). See also Nwachukwu v. Jackson, 50 F. Supp. 2d 18 (D.D.C. 1999) (refusing to calculate a fee award based on the court’s perception of reasonableness of the parties’ mediated settlement proposals). In its ruling, the court made one of the strongest pronouncements in favor of confidentiality to be found in our five-year database: “It would be hard to imagine a procedure better designed to destroy the motivation parties have to engage in the mediation process than to have a judicial officer determine how reasonable or unreasonable they were during their mediation and predicate a decision on that determination.” Id. at 20.
\textsuperscript{367.} See, e.g., Leamon v. Krajkiewcz, 107 Cal. App. 4th 424 (Cal. Ct. App. 2003), as supplemented on denial of reh’g (Mar. 25, 2003), review denied (May 14, 2003) (affirming denial of fees to prevailing party who failed to first request mediation as required by the California standard form residential purchase agreement); Brinn v. Tidewater Transp. Dist. Comm’n., 242 F.3d 227 (4th Cir. 2001) (party waived objection to fee award for alleged failure of prevailing party to mediate before filing complaint by not raising the defense in its answer or in a pre-trial motion).
\end{footnotesize}
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v. Sharabi, the court affirmed a denial of fees based on the trial court determination that the plaintiff’s demand letter to initiate mediation was not a genuine attempt to mediate the dispute as required by the parties’ contract, but instead a tactical litigation threat.

Finally, it is worth noting that the hefty volume of enforcement litigation discussed previously was not generated by pro bono attorneys. As a result, more than forty opinions addressed whether to award attorneys’ fees for actions to enforce mediated settlements.

VII. SANCTIONS

Mediation participants sought sanctions for the adverse party’s or counsel’s conduct during mediation in 117 opinions. Courts imposed sanctions in nearly one-half of those cases (53). The litigation over sanctions was spread evenly among the different types of cases. Parties sought sanctions in thirty-one contract/commercial cases, twenty-nine personal injury cases, twenty-three family law cases and fifteen employment cases. Of the successful sanctions cases, thirteen were commercial/contract cases, eight employment, thirteen personal injury and only eight family law cases. The number of cases raising sanctions issues has more than doubled over the five-year period from thirteen in 1999 to twenty-nine opinions in 2003 but seems to have leveled off over the last three years of the database. In the five-year period, 2001 was the high point with thirty-two cases, but in 2002 the number dropped to twenty-one cases.

A. Sanctions and the Duty to Mediate

The claim for sanctions was combined with a claim involving a duty to mediate in sixty-six opinions. The typical issues involved some combination of no one appearing at the mediation, or the correct

371. See, e.g., Ghahramani v. Guzman, 768 So. 2d 535 (Fla. Dist. Ct. App. 2000) (reversing trial court and awarding fees to prevailing party in enforcement action based on prevailing party fee provision contained in the parties’ original contract); Nazimuddin v. Woodlane Forest Civic Ass'n, Inc., No. 09-00-210 CV, 2001 WL 62899 (Tex. App. Jan. 25, 2001) (affirming award of $13,106.75 in attorneys’ fees for successful enforcement action); Lazy Flamingo U.S.A., Inc. v. Greenfield, 834 So. 2d 413 (Fla. Dist. Ct. App. 2003) (affirming denial of enforcement fees where the mediated settlement contained no provision for such fees, but remanding to determine propriety of fee award under court rule authorizing sanctions, including attorneys’ fees, against a party who fails to perform under a court-ordered mediation settlement agreement).
372. See, e.g., Lucas Automotive Eng’g, Inc. v. Bridgestone/Firestone, Inc., 275 F.3d 762, 769 (9th Cir. 2001) (affirming district court imposition of sanctions for defendant’s failure to attend mediation due to “incapacitating headache,” where defendant failed to notify parties beforehand of his nonappearance); Tex. Parks and
party not appearing at the mediation. For example, in Segui v. Margrill, the party sent his attorney to the mediation with “full settlement” authority and was available by telephone during the mediation. Nonetheless, the court granted sanctions, holding that the court’s order required the presence of the parties.

Occasionally, a party who showed up at the mediation was sanctioned for mediating in bad faith. In Ferrero v. Henderson, the court granted the plaintiff’s unopposed sanction motion in an EEO dispute. The plaintiff represented that the defendant acted in bad faith when, at the mediation, the plaintiff was informed that the defendant would refuse to make any offer of settlement.

Wildlife Dep’t v. Davis, 988 S.W.2d 370 (Tex. App. 1999) (rejecting trial court monetary sanctions against Department for alleged failure to negotiate in good faith in court-ordered mediation, noting that while Department filed an objection to the mediation referral (which the trial court overruled), it did attend the mediation and even made an offer of settlement); Columbus Antiques & Decorative Ctr., Inc., v. Waste Mgmt, Inc., No. B161399, 2003 WL 21757895, at *2 (Cal. Ct. App. July 31, 2003) (assessing sanctions in part for failure to attend a mediation).

373. 844 So. 2d 820, 821 (Fla. Dist. Ct. App. 2003) (awarding attorneys’ fees and mediators’ fees as a sanction for the party not attending the mediation).


Usually the sanctions included a small fine, attorneys’ fees, or costs incurred by the adverse party. Sometimes, courts were more creative in their sanctions, ordering:

- an apology in addition to attorneys fees and mediation fees;
- five extra days of visitation for failure to attend mediation;
- requiring an attorney to read standards of professional conduct or
- criminal contempt.

If the mediation violation was combined with other discovery violations, courts ordered even stronger sanctions, including dismissal. For example, in Apostolis v. City of Seattle, the court dismissed most of the allegations in a complaint for unfair labor practices as a sanction for the deliberate disregard of case scheduling requirements that included mediation. Dismissal of the lawsuit is an extreme


383. Zdravkovic v. United States, No. 01-C-5893, 2002 WL 31744668, at *4 (E.D. Ill. Dec. 9, 2002) (ordering the lawyer to read the Standards for Professional Conduct Within the Seventh Federal Judicial Circuit and warning that that future misconduct might be referred for disciplinary proceedings).


remedy and is justified only as a last resort. In Smith v. Fairfax Village Condominium VIII Board of Directors, the trial judge dismissed the plaintiff's claim for not complying with court ordered discovery, including failing to participate in ordered mediation. Because the trial judge did not properly take into account sanctions less severe than dismissal, the District of Columbia Court of Appeals vacated the judgment and remanded the matter back to the trial judge.

B. Sanctions for Breach of Confidentiality

In several cases, the motion for sanctions was based on a claim that the adverse party breached confidentiality requirements. For example, in Concerned Citizens of Belle Haven v. Belle Haven Club, the plaintiff sought sanctions when the defendant published in its newsletter that it was willing to accept the solution proposed by the mediator, but that the plaintiff would not agree. The disclosure was in apparent violation of the confidentiality agreement which provided in part, “[a]ll statements made or documents submitted for a session are confidential and ‘for settlement purposes only.’” Nonetheless, the court denied the motion for sanctions, stating simply that “sanctions are not warranted on these facts.” The Court of Appeals for the Fourth Circuit also refused to grant sanctions for violation of mediation confidentiality rules in In re Anonymous. There, counsel and client disclosed protected mediation communications in connection with resolution of a dispute over litigation expenses in a Title VII action. The court reasoned that the disclosures were not made in bad faith or with malice, did not have an adverse impact on the dispute, and were made in a non-public forum.

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388. Id. at 1089.
389. Id. at 1095–96. See also In re Hood, 113 S.W.3d 525, 529 (Tex. App. 2003) (striking pleadings for non-compliance with pre-trial requirements including failure to attend mediation was too severe in child custody proceeding); Smith v. Smith, 75 S.W.3d 815 (Mo. Ct. App. 2002) (reversing change of custody order concluding it was not justified by failure to attend mediation); Daugherty v. Dutiel, No. 02CA16, 2003 WL 21419178 (Ohio Ct. App. June 18, 2003) (reversing dismissal of lawsuit as improper sanction for failure to mediate where no firm mediation date had been set).
391. Id. at *5.
392. Id.
393. Id. at *6.
394. 283 F.3d 627 (4th Cir. 2002).
395. Id. at 636.
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It appears that courts are reluctant to impose sanctions for violating mediation confidentiality requirements.\textsuperscript{396} Warnings about future sanctions or admonishment for improper behavior seem to be the extent of the courts’ willingness to impose sanctions\textsuperscript{397} absent some finding of bad faith.\textsuperscript{398} In \textit{Toon v. Wackenhut Corrections Corporation},\textsuperscript{399} the court did find that counsel acted in bad faith in filing an unsealed motion to enforce a mediated settlement agreement breaching the confidentiality clause in the settlement agreement. As a sanction, the court assessed a fine of $15,000, reduced attorneys’ fees, and prohibited counsel from representing other plaintiffs against defendant absent court approval.\textsuperscript{400} In \textit{Tokerud v. Pacific Gas & Electric Co.},\textsuperscript{401} the court concluded that the issue of precluding expert testimony as a sanction for violating mediation confidentiality was moot, but that the trial judge should assess monetary sanctions for the violation.\textsuperscript{402}

\section*{VIII. The Mediation-Arbitration Connection}

Increasingly, mediation and arbitration are linked through pre-dispute contract clauses obligating parties to participate in multi-step dispute resolution programs. This contractual intersection, as well as a number of problems relating to ad hoc uses of mediation and arbitration, resulted in courts rendering decisions in eighty-eight opinions during the period covered by the database. This includes fifty-four state court opinions, seven from state supreme courts,\textsuperscript{403}

\begin{itemize}
  \item \textsuperscript{397} See, e.g., \textit{Lyons v. Booker}, 982 P.2d 1142, 1143 (Utah Ct. App. 1999) (admonishing counsel and warning about more serious sanctions for repeat violation of mediation confidentiality requirements).
  \item \textsuperscript{398} See, e.g., \textit{Lawson v. Brown’s Day Care Ctr., Inc.}, 776 A.2d 390, 394 (Vt. 2001) (holding that, absent a finding of bad faith, it was improper to sanction attorney for violation of mediation confidentiality).
  \item \textsuperscript{399} 250 F.3d 950 (5th Cir. 2001).
  \item \textsuperscript{400} Id. at 954.
  \item \textsuperscript{401} 25 F.App’x. 584 (9th Cir. 2001).
  \item \textsuperscript{402} Id.
  \item \textsuperscript{403} Commercial Union Ins. Co. v. Me. Employers Mut. Ins. Co., 794 A.2d 77 (Me. 2002); \textit{Ex parte Mountain Heating & Cooling, Inc.}, 867 So. 2d 1112 (Ala. 2003); \textit{Homes of Legend, Inc. v. McCollough}, 776 So. 2d 741 (Ala. 2000); \textit{Kamaunu v. Kaaea}, 57 P.3d
and thirty-four federal opinions, including eight circuit court decisions.\footnote{404}

Most opinions fell into one of three categories: ethics issues discussed previously;\footnote{405} disputes about the enforcement of pre-dispute mediation/arbitration clauses;\footnote{406} and waiver of the right to arbitrate through mediation participation.\footnote{407} Outside of these main categories, there were a handful of miscellaneous disputes, including:

- the consequences of an arbitrator’s failure to order mediation;\footnote{408}
- whether a mediated settlement terminated the obligation to arbitrate;\footnote{409}
- the authority of a court to compel mediation while continuing indefinitely a summary judgment decision on arbitrability;\footnote{410}


\footnote{405. See supra notes 210–28, 247–58, 270–85 and accompanying text.}

\footnote{406. See infra notes 413–23 and accompanying text.}

\footnote{407. See infra notes 424–26 and accompanying text.}

\footnote{408. Peisner v. Paypoint Elec. Payment Sys., Inc., No. B157559, 2002 WL 31720292 (Cal. Ct. App. Dec. 4, 2002) (finding the arbitrator’s failure to compel mediation pursuant to a multi-step dispute resolution clause was not a basis to vacate an arbitral award, because even if the arbitrator had the power to order mediation, failure to do so amounted to an error of law or fact).}

\footnote{409. PrimeVision Health, Inc. v. Indiana Eye Clinic, No. IP00-0096-C-B/S, 2000 WL 977397 (S.D. Ind. July 13, 2000) (ruling that a dispute over an alleged mediated settlement which purported to terminate a prior contract containing an arbitration clause is subject to arbitration).}

\footnote{410. Tutu Park, Ltd. v. O’Brien Plumbing Co., Inc., 180 F. Supp. 2d 673 (D. V.I. 2002) (ruling that the order of the Territorial Court of the Virgin Islands compelling parties to mediate while continuing indefinitely a pending summary judgment motion hearing on arbitrability is interlocutory and unappealable; moreover, nothing in the FAA precludes the Territorial Court’s use of extrajudicial mediation proceedings before resolving the question of arbitrability).}
• court authority to compel mediation even for claims unequivocally subject to arbitration;411 and
• arbitrator authority to ignore fee-shifting provisions designed to punish parties who fail to invoke mediation.412

A. Enforcing Pre-Dispute Mediation/Arbitration Clauses

The most common mediation/arbitration dispute, found in twenty-nine opinions, involved whether to enforce a pre-dispute arbitration clause containing a mediation obligation. Few of these cases presented novel mediation issues; rather, a mediation obligation was simply part of a pre-dispute clause under challenge.413

However, in Garrett v. Hooters-Toledo,414 the terms of the mediation clause were at the heart of the prevailing argument that the pre-dispute clause was unenforceable because it was unconscionable. The clause mandated that an employee had only ten days to request mediation, that failure to request mediation foreclosed the claim, and mediation was required in Kentucky, not in Ohio where the employee worked. Collectively, in the court’s view, these restrictive mediation requirements were written precisely to discourage potential claimants from pursuing their claims and improperly imposed “burdens and barriers that would routinely deter former employees from vindicating their rights.”415

Perhaps less intentional, but no less costly, were the failures of pre-dispute clause drafters to unambiguously define the ADR process

411. In re Enron Corp., No. 03 Civ. 5078(DLC), 2003 WL 22171695 (S.D.N.Y. Sept. 22, 2003) (refusing to withdraw reference of proceedings to bankruptcy court and noting that judicial efficiency, as well as uniform administration of bankruptcy proceedings, weigh in favor of allowing mediation process in bankruptcy court to proceed even for claims allegedly subject to arbitration).
412. Kahn v. Chetcuti, 123 Cal. Rptr. 2d 606 (Cal. Ct. App. 2002) (holding that the arbitrator acted within his authority by determining that the prevailing party’s act of filing a complaint before an obligatory mediation did not bar an award of attorneys’ fees to that party pursuant to a contract clause limiting said fees “should the prevailing party attempt an arbitration or court action before attempting [to] mediate”).
413. See, e.g., Fe-Ri Constr., Inc. v. Intelligroup, Inc., 218 F. Supp. 2d 168 (D.P.R. 2002) (dismissing lawsuit without prejudice to allow satisfaction of contractually required ADR, including option to elect either mediation or arbitration); Gutman v. Baldwin Corp., No. Civ.A. 02-CV 7971, 2002 WL 32107938 (E.D. Pa. Nov. 22, 2002) (noting with approval that employee has right to attorney during mandatory mediation phase); In re Orkin Exterminating Co., Inc., No. 01-00-00730-CV, 2000 WL 1752900 (Tex. App. Nov. 30, 2000) (granting writ of mandamus to enforce pre-dispute clause which mandated four hours of mediation before being able to resort to binding arbitration).
415. Id. at 783.
in the contract. For example, in *Ex parte Mountain Heating & Cooling, Inc.*, the court refused to compel arbitration of a dispute between contractors where the arbitration provision memorialized the parties’ intent to “settle the dispute by arbitration under the Construction Industry Mediation Rules of the American Arbitration Association.” In *Forte v. Ameriplan Corp.*, an agreement specifically provided for mediation followed by court adjudication, but also incorporated by reference an employee manual that made disputes subject to arbitration. The resulting ambiguity resulted in a remand to determine the parties’ intent.

In other cases, the combination of the word “mediation” with terms like “binding” and “mandatory” led courts to conclude that parties intended to arbitrate their disputes. Likewise, in *Labor/Community Strategy Center v. L.A. County Metropolitan Transportation Authority*, the Ninth Circuit Court of Appeals declared that a consent decree authorizing a court-appointed special master to “resolve” disputes empowered the special master to act as a decision-maker, as well as a mediator. However, in *Team Design v. Gottlieb*, the Tennessee Court of Appeals reversed a trial court that had offered parties the opportunity to participate in “binding mediation,” then referred the case to itself, and entered an order fully adjudicating all claims. According to the appellate court, there simply was insufficient evidence that the parties knowingly waived their “right to a trial should the outcome of the mediation prove unsatisfactory.”

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416. 867 So. 2d 1112 (Ala. 2003).
417. Id. at 1116 (emphasis in original).
420. 263 F.3d 1041 (9th Cir. 2001).
421. Id. at 1050.
422. 104 S.W.3d 512, 526 (Tenn. Ct. App. 2002) (“W]hile the courts may require or compel the litigants to sit down and talk with each other, they cannot force them to resolve their differences using alternative dispute resolution in lieu of their judicial remedies.”).
423. Id. at 526, 529.
B. Waiver of Right to Arbitrate Through Mediation Participation

Six opinions evaluated whether participation in, or preparation for, mediation constituted a waiver of the right/obligation to arbitrate. In *Stewart v. Covill & Brasham Constuction, LLC*, the Montana Supreme Court affirmed a motion by a building contractor to compel arbitration against a homeowner despite a contention that the contractor’s request for, and participation in, mediation constituted a waiver of the right to arbitrate. The letter proposing mediation expressly stated that if mediation was unsuccessful the parties would “go forward with contested binding arbitration as required by the Contract.” In contrast, the court found a party waived its right to arbitrate in *Snelling & Snelling, Inc. v. Reynolds* where the party waited over a year to move to compel arbitration and participated in discovery and court-ordered mediation in the interim.

IX. MISCELLANEOUS ISSUES

One-hundred opinions (sixty-three state; thirty-seven federal) were coded as “miscellaneous” because they did not fit within our designated mediated issue categories. Included in this group were nine state supreme court decisions and seven federal circuit decisions.

424. 75 P.3d 1276 (Mont. 2003). *See also* Karl Storz Endoscopy-Am., Inc. v. Integrated Med. Sys., Inc., 808 So. 2d 999 (Ala. 2001) (concluded that a distributor did not waive its right to compel arbitration by waiting for the opposing party to satisfy reasonable conditions prior to contractually required mediation, which was a condition precedent to the right to arbitrate under the parties’ agreement).

425. 140 F. Supp. 2d 1314 (M.D. Fla. 2001). *But cf.* DeGroff v. MascoTech Forming Techs.-Fort Wayne, Inc., 179 F. Supp. 2d 896 (N.D. Ind. 2001) (enforcing an arbitration obligation and rejecting the argument that the employer waived its right to enforce arbitration by participating in EEOC conciliation efforts instead of initiating mediation as a required pre-condition to arbitration).


The vast majority of these miscellaneous cases fall into three issue categories: cases addressing various procedural implications of a mediation request or participation (50); acts or omissions in mediation as a basis for independent claims (20); and insurance issues (12). Cases outside these three main categories addressed such diverse issues as the tax consequences of mediated settlements,429 whether mediators are subject to veterans' preference law,430 the propriety of emergency motions to permit intervention in order to participate in mediation,431 or whether a mediator's valuation of a case should have any bearing on a judge's post-trial evaluation of a jury award.432

A. Procedural Implications of a Mediation Request or Participation

One of the most common procedural problems confronted by courts is how mediation requests or participation relate to the running of the statute of limitations. Often such disputes turn on

429. Emerson v. Comm'r, 85 T.C.M. (CCH) 1044 (T.C. 2003) (affirming IRS refusal to consider portion of mediated settlement of contract/intellectual property dispute non-taxable compensation for injuries or personal illness, where there was no mention during mediation of a claim for personal injuries, other than mediator’s suggestion, subsequently acted on by the parties, to “add a personal injury claim to the suit as a vehicle to reach settlement”). See also Dorroh v. Comm'r, T.C. Summ.Op. 2003-93 (T.C. 2003) (holding form attachment to mediated settlement which included a remarks section where plaintiff noted that resignation was for “medical and mental and physical trauma” insufficient to establish that cash payments were nontaxable on account of personal injuries or personal sickness); Henry v. Comm'r, 81 T.C.M. (CCH) 1498 (T.C. 2001) (finding settlement proceeds fully taxable where record failed to establish that payments were made on account of the loss of the plaintiffs business reputation or loss of their reputation as orchid growers).

430. Young, 66 F.App’x. 858 (holding that the veterans' preference law does not extend to mediators for the Federal Mediation & Conciliation Service, because, by statute mediators, are appointed without regard to the federal civil service laws).

431. Micro Elecs. Group, Inc. v. J.F. Jelenko & Co., No. 3:00CV582-MU, 2002 WL 664052 (W.D.N.C. Apr. 16, 2002) (rejecting emergency motion to intervene in mediation by a third party whose primary link to the dispute was the fact that he had been deposed and had provided copious documents to one of the parties). As noted by the court, “[t]he Court cannot dispute the validity of the assertion . . . that [mediation] is a way to avoid litigation.’ This truism does not confirm, however, that any nonparty who desires should participate in mediation. Allowing that would clutter and impede many a mediation by adding the voices of individuals who may or may not have some great or remote interest to the din.” Id. at *1.

432. Thompson v. Running Arts, Inc., No. 976181, 2000 WL 282438 at *2 n.3 (Mass. Super. Ct. Feb. 8, 2000) (“[R]eject[ing] defendant’s contention that the value of the case placed on it by a mediator at a pretrial mediation session is something the court may take into account in assessing the permissibility of the jury's ultimate award.”).
principles of statutory interpretation. Applying these technical statutes requires complicated analysis. For example, in *Michelson v. Mid-Century Insurance Co.*, the California Court of Appeals concluded that participation in a statutorily authorized earthquake insurance mediation program resulted in tolling, but still dismissed the plaintiff’s complaint because the time credited for mediation participation was insufficient to bring the claim within the statute of limitations. The court rejected plaintiff’s argument that tolling should extend to time of receipt of a letter indicating termination of the mediation effort. According to the court, the statute does not require such notice, but instead expressly ends tolling in three specific circumstances, including the date mediation is completed without agreement, as occurred in this case.

Courts may assess principles of equity or fairness in ruling on whether the statutes of limitations should be tolled. If plaintiffs are unable to establish with precision the timing and formality of a mediation effort, tolling claims also are usually denied. For example, in *Cristwell v. Veneman*, the court found that a plaintiff’s conclusory allegation that he was involved in mediation and negotiation initiated by agency officials “as a means to delay his claims,” fell short of the required showing of affirmative misconduct necessary to invoke equitable tolling to excuse a late filing. Further, in *Stewart v. Memphis Housing Authority*, defendant’s alleged delay in processing plaintiff’s arbitration and mediation requests did not tilt the equities in favor of tolling, where plaintiff “did not approach the court

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435. *Id.* at 809.


system until both the ninety-day Title VII filing period and the statute of limitations on the remaining claims had run by over two years."439

Aside from the intersection with the statute of limitations, mediation participation was offered as an excuse for changed timing on a host of procedural matters, including whether to:

- stay a trial date;440
- extend time for discovery;441
- suspend expert witness preparation;442
- accept late settlement offers under a prejudgment interest statute;443
- permit amendment of a complaint;444
- dismiss a claim without prejudice;445 or
- delay forced sale of property.446

A number of cases considered whether mediation participation results in waiver of certain claims or procedural rights.447 At least

439. Id. at 859.
441. Wieters v. Roper Hosp., Inc., No. 01-2433, 2003 WL 550327, at *4 (4th Cir. Feb. 27, 2003) (affirming district court refusal to grant extension of time for discovery where moving party argued that basis for extension was that "valuable time had been consumed in a lengthy mediation process").
443. Johnson v. Eldridge, 799 N.E.2d 29 (Ind. Ct. App. 2003) (concluding that a settlement offer made three months late because parties were awaiting mediation qualified as good cause for extension of time for purposes of making a required timely written offer of settlement under the Indiana Tort Prejudgment Interest statute).
444. Navarro v. Microsoft Corp., 214 F.R.D. 422 (N.D. Tex. 2003) (denying plaintiff's motion to amend complaint as untimely where only excuse for prolonged inaction was plaintiff's belief that the case would settle in mediation).
446. United States v. Beyrle, No. 02-3424, 2003 WL 22138999 (10th Cir. Sept. 17, 2003) (affirming trial court conclusion that magistrate's pre-trial order compelling mediation of foreclosure action could not prevent forced sale of the property at issue where the court decided a dispositive summary judgment motion in defendant's favor prior to start of mediation).
two federal opinions make clear that participating in mediation under the IDEA does not satisfy the requirement to exhaust administrative remedies before invoking judicial relief.\footnote{Weber v. Cranston Sch. Comm., 212 F.3d 41 (1st Cir. 2000); Tyler v. San Antonio Elementary Sch. Dist., 253 F. Supp. 2d 1111 (N.D. Cal. 2003).} In \textit{Louisiana ex rel. T.N. & T.B.},\footnote{789 So. 2d 73 (La. Ct. App. 2001).} the Louisiana Court of Appeals concluded that a trial court has inherent authority to dismiss a delinquency petition for good cause when juvenile defendants successfully complete mediation. In \textit{Feinberg v. Townsend},\footnote{107 S.W.3d 910 (Ky. Ct. App. 2003).} the court held that a lawyer who settles a legal malpractice action in mediation that results in voluntary dismissal of the former client’s claim against him is not eligible to bring an action for wrongful use of civil proceedings against the former client’s malpractice attorney. The mediated settlement is not considered an action terminated in favor of the client’s current attorney.

\section*{B. Acts or Omissions in Mediation as Basis for Independent Claims}

As the mediation process has become more institutionalized, it was perhaps inevitable that parties would be fashioning independent claims based on violations of newly acquired rights relating to mediation. Nowhere is this trend clearer than in the field of employment law. For example, Title VII claimants have argued that employers were responsible for a hostile work environment if they did not provide sufficient time to prepare for mediation,\footnote{Bryant v. Brownlee, 265 F. Supp. 2d 52 (D.D.C. 2003) (granting defendant summary judgment on Title VII claims where, among many other things, plaintiff complained that defendant did not provide sufficient time to prepare for mediation and failed to participate in good faith, which, in plaintiff’s view, was evidence of hostile work environment).} failed to offer mediation,\footnote{Roman v. Cornell Univ., 53 F. Supp. 2d 223 (N.D.N.Y. 1999) (failing to offer mediation to a Hispanic employee is not evidence of unlawful discrimination).} or forced some employees, but not others, to participate in mediation.\footnote{Ribando v. United Airlines, Inc., 200 F.3d 507 (7th Cir. 1999) (rejecting female employee’s claim that she was subjected to a hostile work environment on the discussions and court-ordered mediation does not estop defendant from seeking dismissal of a medical malpractice lawsuit based on plaintiffs’ failure to serve affidavit of expert identification); \textit{In re Lance v. Melody}, 108 Cal. Rptr. 2d 847 (Cal. Ct. App. 2001) (ruling that mother’s ex parte request for mediation of visitation dispute does not constitute waiver of right to visitation hearing).} Mediation also factored into allegations of improper retaliatory acts by employers, including using mediation to cancel an
employee’s contract, or terminating an employee after she disclosed a conflict of interest involving a mediator. In Johnson v. E.I. Dupont De Nemours & Co., the Federal District Court of Delaware considered whether the statement of an employer’s attorney during mediation of an employment dispute could be used as direct evidence of the employer’s retaliatory animus in connection with a subsequent workplace termination. The court ruled against using the statement as direct evidence, noting that even the plaintiff conceded he did not believe the attorney had authority to fire him.

In Davis v. Horton, the Iowa Supreme Court refused to extend the public policy exception to at-will employment relationships in order to protect participation in mediation. Plaintiff maintained that she was wrongfully discharged contrary to public policy because she participated in a mediation program with her employer. The court noted that while mediation is “encouraged and frequently beneficial, it is not an action so imbued with public purpose” to support a wrongful discharge claim by an at-will employee. The court also found as a factual matter that the discharge was not a retaliation for the mediation.

A mediation-based theory gave rise to a remedy in Department of the Air Force 436th Airlift Wing, Dover Air Force Base v. Federal Labor Relations Authority. The D.C. Circuit Court of Appeals affirmed the finding of an unfair labor practice in the agency’s failure to notify a union representative of and provide an opportunity for his participation in the mediation of a union member’s EEO grievance.

Outside the employment area, courts have decided, among other things, that breach of an alleged agreement to mediate does not state basis of sex where she was forced to appear before a mediation committee while similarly situated male employees were not.

454. Lighton v. Univ. of Utah, 209 F.3d 1213 (10th Cir. 2000) (allowing employer’s attempt to get a mediation agreement canceling employee’s contract and placing him on probation to be offered as evidence in unsuccessful employment retaliation claim).


457. Id. at 294–95 (rejecting plaintiff’s assertion that “because DuPont was required to have in attendance at mediation those with authority to settle the suit, that these people must therefore have had the authority to fire plaintiff”).

458. 661 N.W.2d 533 (Iowa 2003).

459. Id. at 536.

460. 316 F.3d 280 (D.C. Cir. 2003).

461. Id. at 287.
a claim for which damage relief can be granted.\(^{462}\) The Ohio Supreme Court has ruled that neither the school district offering a mediation program, nor the teacher mediator presiding at a mediation between high school students, is entitled to claim statutory immunity for alleged failure to report known or suspected abuse disclosed by a student-participant in mediation.\(^{463}\)

The California Court of Appeals found no cognizable claim for negligent infliction of emotional distress based on allegations that a party brought an attorney to a mediation session in violation of prearranged ground rules and because he “appeared for a brief few seconds and then abruptly departed, refusing to participate.”\(^{464}\) However, in *Overturf v. University of Utah Medical Center*,\(^{465}\) the Utah Supreme Court ruled that by holding a secretive mediation in which a settlement to distribute funds to other heirs was reached, the University of Utah could be held to have “cooperated, colluded, and connived with the other heirs to deprive plaintiff of her rightful share of compensation for her daughter’s wrongful death.”\(^{466}\)

Finally, there were claims of harm caused simply by being in mediation or, conversely, being denied the opportunity to mediate. In *Groover v. Huntington Marina Ass’n*,\(^{467}\) the participation of a condominium association in mediation was offered as evidence of breach of duty to act aggressively on behalf of individual owners. The court held that mediation was “consistent with the public policy against ‘unproductive litigation’ and favoring private dispute resolution.”\(^{468}\) In *Gamble v. Dollar General Corp.*,\(^{469}\) the Supreme Court of Mississippi affirmed dismissal of a claim for fraud based on alleged concealment of relevant insurance coverage during mediation, where the detriment to the moving party was framed as loss of opportunity for a successful mediation and an unfair opportunity for the concealing party to measure strengths and weaknesses of the moving party’s case in mediation. According to the *Gamble* Court, redress for such non-disclosure claims should have been sought under court discovery


\(^{463}\) Campbell v. Burton, 750 N.E.2d 539 (Ohio 2001).


\(^{465}\) 973 P.2d 413 (Utah 1999).

\(^{466}\) *Id.* at 415 (remanding to permit amendment of wrongful death action complaint to include claim for collusion).


\(^{468}\) *Id.* at *4.*

\(^{469}\) 852 So. 2d 5 (Miss. 2003).
rules, rather than through an independent cause of action for fraud.470

C. Insurance Cases

The Gamble case was not alone in presenting insurance-related mediation questions. In Herrin v. The Medical Protective Co.,471 the Tennessee Court of Appeals reversed a grant of summary judgment for the defendant insurer, concluding there were genuine issues of material fact precluding dismissal of claims for breach of contract, fraud, breach of fiduciary duty, and breach of duty of good faith and fair dealing based on the insurer’s decision not to renew policy after allegedly telling the insured that his consent to mediated settlement of a tort claim would not affect renewal.

More commonly, courts have confronted how to determine insurance subrogation rights in cases settled through mediation.472 For example, in British Columbia Ministry of Health v. Homewood,473 the Washington Court of Appeals concluded that an insurer was not entitled to reimbursement of medical payments made to a car accident victim where her mediated settlement with tortfeasors was for less than liability limits, leaving her less than fully compensated. Whether insurers can seek indemnification for payments made pursuant to mediated settlements also is litigated frequently.474 And, in

470. Id. at 10.
471. 89 S.W.3d 301 (Tenn. Ct. App. 2002).
474. See, e.g., Lititz Mut. Ins. Co. v. Royal Ins. Co. of Am., No. 98-2256-JWL, 1999 WL 319073 (D. Kan. Apr. 16, 1999) (concluding that where trial court journalized a settlement agreement, and terms of agreement are not found, the journal entry is treated as a decree, partly of a contractual nature, and the party’s intent regarding the journal entry must be addressed in indemnification action); Prime Hospitality Corp. v. General Star Indem. Co., No. Civ. 1997-91, 1999 WL 293865 (D.V.I. Apr. 29, 1999) (concluding that a direct insurer does not have a duty to represent interests of excess insurer in settlement negotiations); Triton Dev. Corp. v. Commerce & Indus.
American Family Mutual Insurance Co. v. Hinde, \textsuperscript{475} the Illinois Court of Appeals affirmed grant of summary judgment compelling an insurance company to arbitrate an underinsured motorist claim, concluding that a mediated settlement exhausted the underinsured tortfeasors’ policy even though portions of the settlement funds were contributed piecemeal by third-party defendants and a dramshop defendant in a companion case.

X. Lessons Learned

Although our focus has been on the minute details, stepping back and reflecting on the five years’ worth of litigated mediated issues leads us to several conclusions about the state of the mediation process, and leads us to make several recommendations for statute or rule reform. In addition, we offer some “best practice” suggestions to help readers avoid having one of their own cases end up among mediation case law updates in coming years.

A. Statute and Rule Reform

1. Enforcement

While the database as a whole provides no evidence of systematic coercion or duress corrupting the mediation process, there is a steadily increasing number of enforcement disputes. No doubt, such cases frequently are caused by the buyer’s remorse that plagues all negotiations, whether facilitated or not. Compounding the problem is the innocent, but often flawed, overconfidence that the mediated “outline” for settlement will be easily formalized into enforceable legal documents at some later point. Add to this mix the presence of a neutral third party who has a vested interest in attaining settlement, and you have the perfect recipe for an early declaration of “victory” when in reality no deal is really done.

\textsuperscript{475} 705 N.E.2d 956 (Ill. App. Ct. 1999).

See also Gray v. State Farm Mut. Auto. Ins. Co., 734 So. 2d 1102 (Fla. Dist. Ct. App. 1999) (remanding to determine whether the insured waived insurer’s obligation to pay uninsured motorist claims by failing to object at mediation); Ruddy v. State Farm Mut. Auto. Ins. Co., 596 N.W.2d 679 (Minn. Ct. App. 1999) (ruling that an insured did not forfeit an uninsured motorist claim by settling the underlying negligence claim with the tortfeasor in mediation); McDole v. Alfa Mut. Ins. Co., 875 So. 2d 279 (Ala. 2003) (foreclosing claims for alleged bad faith to pay uninsured motorist benefits where payments made by the self-insured employer pursuant to a mediated settlement meant that the employer was not “uninsured”).
For the reasons explored in Part III, traditional contract defenses have generally failed to guarantee a fair facilitative process and self-determined agreement. We have both written critically in the past about the pitfalls of highly specialized approaches to mediation enforcement issues and remain skeptics today. However, the scale of enforcement litigation merits action. Most appealing is the proposal by Professor Nancy Welsh of the Dickinson School of Law to expand the utilization of cooling-off periods, within which parties are free to exercise a right of rescission. With time to reflect, free from perceived or actual pressure, parties can best decide what is in their interest. This bright-line approach is far from perfect. It will not solve problems relating to undiscovered mistake or fraud, and is difficult to implement when settlement occurs, as it so often does, on the eve of trial. Still, it may be the single most effective way to honor self-determination and assist parties in avoiding litigation about whether they in fact reached agreement.

2. Confidentiality

At the very least, we should codify what is already a de facto standard in practice—allowing third parties to get access to mediation evidence, particularly mediation settlements, when mediation defines their legal rights. Good examples are class actions mediated without involvement of all affected class members, or insurance disputes defining subrogation and indemnification rights or obligations of others. Courts already routinely examine the mediation process creating such agreements; the authority to do so without confidentiality limitations should be express.

In addition, in light of the frequency of mediator testimony, the law should encourage a focus not just on subject matter (i.e., what are the relevant exceptions to a mediation privilege), but also on the nature of evidence, particularly by drawing a distinction between objective and subjective testimony. Mediator testimony is most

476. See Thompson, supra note 122; Coben & Thompson, supra note 183.
477. Welsh, supra note 2, at 86–92.
478. See Thompson, supra note 122, at 553 n.261 (citing examples of states which have adopted the rescission approach, including: CAL. INS. CODE § 10089.82(c) (West 2003) (providing a three-day cooling-off period for unrepresented parties in earthquake insurance mediations); FLA. STAT. ANN. § 627.7015(6) (West 2003) (allowing an insured in a property insurance mediation three days to rescind a mediated settlement agreement); MINN. STAT. § 572.35(2) (2002) (providing a 72-hour cooling-off period in debtor/creditor mediations); MINN. STAT. ANN. SPECIAL R. OF PRAC. FOR FOURTH JUDICIAL DIST. 2.7 (West 2002) (providing a seventy-two-hour right of rescission of a mediation agreement in conciliation court).
appropriate if limited to objective matters such as statements made, party conduct, and documents to the extent such evidence is offered and relevant for one of the exceptions to mediator privilege. However, purely subjective evidence such as the mediator’s thought process, mental impressions, or speculation on the thought processes of others, is rarely necessary and should be absolutely prohibited as utterly corruptive of the mediator’s promise of neutrality.479

Legislation that creates special enforceability or confidentiality rules for mediated settlements needs to be clear about when these special mediation rules apply. What is a mediation, when does it begin, and when does it end are all critical questions. The Uniform Mediation Act provides excellent guidance for defining what mediation is480 and when mediation begins—at least for the purposes of establishing when the privilege or confidentiality rules are applicable.481 Unfortunately, the issue of when a mediation ends is not addressed in the UMA.482 The drafters correctly wrote that courts will determine this issue when it is presented; unfortunately, this means that parties have to bear the expense and uncertainty posed by litigation to get an answer.

479. One approach to achieving this objective is provided by a 1999 Minnesota legislative proposal (H.F. No. 2410, 1991 Minn. Laws, 81st Sess., Apr. 19, 1999), drafted by Peter N. Thompson, which, in section 5a, provides that when mediator testimony is permitted:

The mediator is not competent to testify at a hearing, deposition, or trial about the mediator’s thought processes or mental impressions or about the parties’ thought processes except as may be relevant and admissible in a civil or criminal action or administrative or professional misconduct proceeding by or against the mediator. The mediator is competent to testify to objective matters perceived by the mediator during the mediation including statements made, conduct of the parties, conduct of the mediator, and documents produced or signed to the extent that the testimony is offered for and is relevant to one of the exceptions to the mediation privilege set forth.

See generally Peter N. Thompson, Confidentiality, Competency and Confusion: The Uncertain Promise of the Mediation Privilege in Minnesota, 18 HAMLINE J. PUB. L. & POL’Y 329, 368–74 (1997).

480. UNIF. MEDIATION ACT § 2 (1) provides that a mediation is “a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute.”

481. UNIF. MEDIATION ACT § 2 (2) provides “‘Mediation communication’ means a statement, whether oral or in a record or verbal or nonverbal, that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator.”

482. See UNIF. MEDIATION ACT, Reporter’s Notes, Section 2(2) (“Responding in part to public concerns about the complexity of earlier drafts, the Drafting Committee also elected to leave the question of when mediation ends to the sound judgment of the courts to determine according to the facts and circumstances presented by individual cases.”).
3. Taxation of Mediation Costs

Mediation expenses are now a routine part of litigation in many jurisdictions. Under current law, courts have exercised discretion to tax mediation costs. But there is no good policy reason to force parties to waste precious resources (theirs and the court’s) litigating whether mediation costs are taxable. Such authority could easily be incorporated into existing relevant federal and state statutes and court rules relating to taxation of costs.\(^{483}\)

B. Best Practice Recommendations

There are no silver bullets to insulate mediation from litigation. But there are a number of practical steps that mediators, lawyers, and consumers can take to help avoid their own “disputing irony.”

First, mediators and lawyers should be realistic about the expectations they create for clients about the extent of mediation confidentiality. With so much mediation evidence finding its way into court opinions,\(^{484}\) promising too much on this issue is grossly misleading. Mediators who make opening statements to the effect that anything said in mediation is absolutely confidential and will never leave the mediation room may be making misleading statements that can undermine party self-determination. Instead, mediators should aspire to strike a balance between advocating candor and ensuring informed consent about the limits of mediation confidentiality. This does not mean delivering a lecture on the nuances and complexity of evidence rules and statutes.\(^{485}\) For one thing, the delivery of such complex legal information raises confusion about the mediator’s role; in addition, a technical, legalistic beginning to mediation does little to promote a problem-solving atmosphere. Mediators should emphasize what they can control: they can promise not to voluntarily disclose information; they can choose to vigorously contest subpoenas to force their testimony. With respect to the use of mediation information by others, mediators are best advised to state a general principle of confidentiality but make clear there are exceptions (which vary from


\(^{484}\) See supra notes 40–109 and accompanying text.

\(^{485}\) Visit Hamline’s Mediation Case Law project website (http://www.hamline.edu/law/adr/mediationcaselawproject) to view a training video illustrating the folly of a mediator attempt to comprehensively explain the law of confidentiality under the Uniform Mediation Act as part of an opening statement. The confidentiality “presentation” runs over six minutes in length. Needless to say, such a detailed explication of law has a visibly depressing effect on party (and lawyer) enthusiasm for the mediation process.
state to state, and even from court to court). Parties needing more specific legal advice can and will seek it from their lawyers. The message for lawyer representatives in mediation is more complex. One logical response is to strategically withhold sensitive information. Of course, this response is directly at odds with the mediator’s goal of candid, full disclosure. In fact, parties often turn to mediators precisely because the informational poverty caused by adversarial bargaining presents a significant barrier to settlement.486 A better approach, though certainly not fool-proof,487 is to contract for confidentiality protections beyond those offered by state or federal statute, court rule, or common law.488

Second, mediators should always use an agreement to mediate that is executed by all participants. The signed agreement helps ensure that there are mutual expectations regarding critical issues such as who participates, when mediation ends, the role of the mediator, the extent of confidentiality, and any special conditions negotiated regarding the binding nature or enforcement of mediated settlements. Given court reluctance to sanction for breaches of confidentiality, parties should contract for liquidated damages or other remedies if breach is anticipated to be a significant concern. A signed agreement to mediate is also helpful as a “triggering mechanism” for statutory confidentiality protections.489 Finally, the agreement can also serve as the formal contract outlining the terms and conditions

486. See Robert A. Baruch Bush, What do We Need a Mediator for?: Mediation’s “Value-Added” for Negotiators, 12 OHIO ST. J. ON DISP. RESOL. 1, 8 (1996) (noting that “strategic concealment” is logical but inevitably results in less than optimal outcomes).

487. Although no case in our five-year database explicitly refused to enforce party contractual agreements to provide more confidentiality than provided by law, as a general principle courts are not necessarily bound by party stipulation on the law. See generally Stipulation of Parties as to the Law, 92 A.L.R. 663 (1934).


489. For example, parties can invoke the confidentiality protections of the Uniform Mediation Act in several ways, including where “the mediation parties and the mediator agree to mediate in a record that demonstrates an expectation that mediation communications will be privileged against disclosure.” UNIF. MEDIATION ACT § 3(a)(2). Moreover, at least one state, Minnesota, has a statutory scheme to protect mediation confidentiality that on its face only applies if mediation is conducted pursuant to an agreement to mediate. Minn. Stat. § 595.02, subd. 1(l) (“A person cannot be examined as to any communication or document, including worknotes, made or used in the course of or because of mediation pursuant to an agreement to mediate.”).
of mediator compensation. Indeed, the recently revised Model Standards of Conduct for Mediators requires that “a mediator’s fee arrangement should be in writing unless the parties request otherwise.” The superceded 1994 version of the standards were considerably less directive on the necessity of written contractual agreements, noting only that “[t]he better practice in reaching an understanding about fees is to set down the arrangements in a written agreement.”

Third, mediators and all counsel should aggressively search for conflicts of interest and err on the side of disclosure. Courts are quite accepting even of serious potential conflicts of interest if the conflicts are disclosed up front. What level of conflicts investigation are mediators required to complete? In our view, the Reporter’s notes to the revised Model Standards of Conduct for Mediators (April 2005) correctly states the answer: the extent of a conflicts check varies by practice context, ranging from firm-wide, pre-mediation screening for complex cases, to on-the-spot inquiry of participants in those programs where mediators are called to work on smaller cases “immediately upon referral.” Of course, the conflicts challenges do not end with the mediation itself. The “downstream” effects of mediation relationships also are critical. The 2002 revisions to Model Rule of Professional Conduct 1.12 provide appropriate guidance for lawyers who also serve as mediators. The rule prohibits representation of persons in connection with a matter in which the lawyer participated as a mediator “unless all parties to the proceeding give informed consent, confirmed in writing.” The prohibition applies to the lawyer’s

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490. The Model Standards of Conduct for Mediators was created in 1994 and approved and adopted by the American Arbitration Association, the American Bar Association’s Section of Dispute Resolution, and the Association of Conflict Resolution. In April 2005, a joint committee of representatives from those organizations completed a systematic revision of the standards, which are pending for approval by the drafting organizations.


492. MODEL STANDARDS OF CONDUCT FOR MEDIATORS (1994), section VIII.

493. Reporter’s Notes, Apr. 10, 2005, section V(E), http://moritzlaw.osu.edu/dr/msoc/pdf/reportersnotes-april102005final.pdf (“For a complex case that comes to a mediator through his or her law firm, best practice consists of making a firm-wide conflicts check at the pre-mediation phase. By contrast, for a mediator of an interpersonal dispute administered by a community mediation agency who is charged with mediating the case immediately upon referral, making an inquiry of the parties and participants at the time of the mediation regarding potential conflicts of interest may be sufficient.”).

494. MODEL RULES OF PROF’L CONDUCT R. 1.12(a).
firm, unless the disqualified lawyer is properly screened and written notice promptly provided to the parties and tribunal.

Unfortunately, there is no equally clear bright line governing a mediator’s future relationships with mediation participants. For example, the revised Model Code of Standards for Mediators states that, when considering such relationships, mediators should evaluate a range of factors, including “time elapsed following the mediation, the nature of the relationships established, and services offered when determining whether the relationships might create a perceived or actual conflict of interest.” In our view, better practice would be a disclosure and consent model.

Fourth, counsel and unrepresented parties need to inquire in order to understand up front the parameters of the process on which they are embarking. Make sure there is agreement on the level of confidentiality expected and the finality of agreements reached. Mediators should take responsibility to ensure that the interests and roles of the various participants, especially their own (particularly if the neutral is a court official), are expressly stated, rather than assumed. The necessity of working hard to attain clarity of role and expectations is critical given the ambiguities inherent in the intersection of non-adversarial mediation and litigation. This tension is formally addressed in the newly adopted Model Rule of Professional Conduct 2.4, which, among other things, mandates that a lawyer serving as a mediator “shall inform unrepresented parties that the lawyer is not representing them” and further directs that when “the lawyer knows or reasonably should know that a party does not understand the lawyer’s role in the matter, the lawyer shall explain the difference between the lawyer’s role as a third-party neutral and a lawyer’s role as one who represents a client.” Good practice suggestions also can be found in the February 2002 ABA Section of Dispute Resolution on Mediation and the Unauthorized Practice of Law. The resolution recommends that mediators define their role and limits of their role by making three disclosures to parties:

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495. Model Rules of Prof’l Conduct R. 1.12(c).
496. Model Rules of Prof’l Conduct R. 1.12(c)(1).
497. Model Rules of Prof’l Conduct R. 1.12(c)(2).
499. Model Rules of Prof’l Conduct R. 2.4(b).
500. Model Rules of Prof’l Conduct R. 2.4(b).
a. That the mediator's role is not to provide them with legal representation, but rather to assist them in reaching a voluntary agreement;

b. That a settlement agreement may affect the parties' legal rights; and

c. That each of the parties has the right to seek the advice of independent legal counsel throughout the mediation process and should seek such counsel before signing a settlement agreement.502

Fifth, all mediation participants should better anticipate that rights and interests of third parties are often implicated by mediation discussions and settlements. Mediators are not, in our view, overstepping their bounds by actively encouraging parties and their representatives to consider the third-party impact of mediation deliberations. Given the myriad ways that third-party impact cases routinely appear in the database—insurance disputes, class actions, public policy challenges in family cases—deliberate attention to third party consequences should be a litmus test for effective mediator practice. And as noted above in the statute/rule reform recommendations, special treatment of confidentiality is likely in such cases—a matter that should be discussed, rather than assumed.

Sixth, given the significant body of duty to mediate and sanctions opinions raising issues of attendance and authority, mediators and lawyers should be particularly aggressive in insisting that decision-makers with clear settlement authority be present throughout the entire course of mediation. Partial satisfaction of this obligation is particularly problematic. Like therapy, where the most work gets done in the final five minutes of a 30-minute session, seasoned mediators and mediation advocates know that the closing moments of mediation are often the most fluid and productive. Accordingly, the departure of a decision-maker at the eleventh hour should leave everyone in the room concerned. Rather than push to close the deal, time might be better spent negotiating the appropriate place and time to resume a mediation with all in attendance. In some jurisdictions, phone participation may not be enough.

Seventh, all involved parties should be aware of the potential for disconnect between the informal outline of agreements reached at mediation and the promised delivery by lawyers of formal settlement documents at some future point. The best option is to finalize settlement documents in their entirety at the mediation table. If that is

502. Id.
not possible, at the very least, parties should reach agreement on the consequences for failure to generate formal documents (e.g., no agreement; the informal outline becomes enforceable; a return to mediation). However, parties would be well advised to think twice before resorting to one increasingly common solution to drafting problems—having the mediator switch roles to arbitrate resolution. This hybrid ADR process raises the specter of an ethical challenge.

Eighth, one of the most common post-mediation drafting problems is the text of releases. The database is full of opinions where lawyers agreed to use “standard” releases only to thereafter litigate both the nature of claims covered and extent of release. Mediators would be doing a particularly good service if they “reality-tested” with vigor on this issue. If releases are really mere formalities, counsel should come to the mediation with standard form releases to be filled out and signed at the mediation.

Ninth, if a mediated settlement by design leaves open issues for court decision, seek clarity on the nature of anticipated court review. Attorneys’ fees are a common sore point. Are you asking the court to simply determine the amount of fees to be awarded, or looking for a decision on whether there was a “prevailing” party entitled to fees?

Finally, parties should be especially thoughtful in the drafting of pre-dispute clauses. Including a mediation obligation in a multi-step clause or conditioning attorneys’ fee awards on mediation participation gives the other party a legal right that courts are likely to uphold. Accordingly, creating the contractual obligation is unwise unless honoring it will really be in one’s best interest.

**CONCLUSION**

At the April 2005 American Bar Association annual ADR section meeting, we began a session on the topic of mediation case law by asking audience members how many times they thought U.S. state and federal judges had been forced to rule on disputed mediation issues in the time period of our study 1999–2003. Answers ranged from ten to several hundred. No one in the room offered an answer remotely close to the actual number we discovered by culling the relevant Westlaw databases—1223 opinions.

Frankly, had we known the full scale of contemporary mediation litigation at the beginning of this project, we might, quite wisely, have chosen not to undertake it. But much like mediation participants, who, having invested precious time in settlement discussions,
feel compelled by their investment to close the deal, we chose to complete the study.\textsuperscript{503}

More than anything else, the project confirms the development of a broad and evolving “common law” of mediation. This body of “common law” makes especially prescient the observation over a decade ago by Carrie Menkel-Meadow that the attempt to reform the rigid adversary system by institutionalizing court-connected ADR may have the unintended consequence of co-opting the creativity and innovation that characterizes ADR.\textsuperscript{504} Hundreds of litigated cases each year, together with efforts like the drafting of the Uniform Mediation Act, inevitably mean that mediation practice is increasingly defined and standardized by courts and legislatures. The full impact of this aspect of institutionalization remains to be seen.

For now, mediators, parties, and lawyers, must swim in a relative sea of ambiguity. They are brought together in a process designed to honor self-determination and promote collaborative approaches to dispute resolution. Yet the success or failure of such efforts, including the propriety of the individual acts and omissions of its participants, are increasingly judged in the purely adversarial world of litigation. Sophisticated players know and can plan for this ambiguity with careful strategies calculated to achieve maximum advantage. This of course inevitably skews the evolution of mediation toward a future where it begins to resemble litigation; mediation becomes an alter ego, not an alternative. This “legalization” of mediation is certainly disturbing to mediation proponents. Far more disturbing, in our view, is the impact of ambiguity on the unsophisticated participant, the one-time player, who risks being lulled into the perceived safety of a non-adversarial process not knowing or anticipating the shadow of litigation just beyond. Ignorance may be bliss. But ignorance of the increasingly common intersection of mediation and law does little to serve the principle of self-determination so commonly stated as the heart of mediation.

\textsuperscript{503} Much to the chagrin of our families, coding is underway for 2004 and 2005 mediation cases.

\textsuperscript{504} See Menkel-Meadow, \textit{supra} note 159, at 9 (“[W]e are beginning to see the development of case and statutory law and, dare I say, a ‘common law’ or ‘jurisprudence’ of ADR.”). \textit{See also} Press, \textit{supra} note 1, at 59 (“In Florida we have seen the development of a common law of mediation.”).
APPENDIX A: CASE CODING QUESTIONNAIRE

1. Case number: ________________________________

2. Year: ________________________________

3. Jurisdiction: ________________________________

4. Case Citation: ________________________________

5. Published Opinion:   Yes   No

6. Level of Court:      Trial   Trial/Appellate
                        Intermediate  Appellate  Supreme Court

7. Type of Case:        PI   K/Com   Family Law
                        Employment  Estate  Malpractice
                        Tax/Bankruptcy  IDEA  Other

8. Subject Matter Code:
   A. Enforcement        Yes   No
   B. Sanction           Yes   No
   C. Duty to Mediate    Yes   No
   D. Confidentiality    Yes   No
   E. Ethics/Malpractice Yes   No
   F. Med/Arb            Yes   No
   G. Fees               Yes   No
   H. Cond. Precedent    Yes   No
   I. Other              Yes   No

9. Confidentiality
   A. Mediator Evidence:   NK/NA  Testified Mediation
                           Evidence
   B. Mediation Communications:  NK/NA  Oral  Written
   C. Privilege or Rule Raised:  NK/NA  Upheld
                                  Upheld in Part  Not Upheld

10. Sanctions
    A. Sanctions Granted:   Yes   No   NK/NA

11. Enforcement Sub-Issues
    A. Agreement in Court Order:  Yes   No   NK/NA
    B. Agreement Enforced:       Yes   No
                                   Modified in Part  Remand  NK/NA
    C. Contract Issues Raised:
       i. No Agreement
          a. No Meeting of the Minds  Yes   No
          b. Agreement to Agree       Yes   No
c. Formality: Not in Writing Not Signed
    Not Filed Magic Words NK/NA
d. Other

ii. Own attorney Lacked Authority Misconduct
    Both NK/NA

iii. Standard Contractual Defenses
    a. Fraud Yes No
    b. Duress Yes No
c. Undue Influence Yes No
d. Mutual Mistake Yes No
e. Unilateral Mistake Yes No
f. Statute of Limitations Yes No
g. Unconscionability Yes No

iv. Mediator Misconduct
    a. Conflict of Interest/Bias Yes No
    b. Misrepresentation Yes No
c. Undue Influence Yes No
d. Duress Yes No

v. Miscellaneous Defenses
    1. Performance/Breach Yes No
    2. Public Policy Yes No
    3. Contract Interpretation Yes No
    4. Changed Circumstances/Party Change of Mind Yes No
    5. Unfair Process Yes No
    6. Other Yes No

D. Other Enforcement Issues:
    i. Class Action Approval Yes No
    ii. Third Party Impact Yes No
    iii. Miscellaneous Yes No