MEDIATION LITIGATION TRENDS: 1999–2007

By James R. Coben and Peter N. Thompson*

I. INTRODUCTION

In the Spring of 2006, we published the results of our national study on the reported judicial opinions addressing mediation issues from 1999 to 2003.[1] Our article was entitled *Disputing Irony: A Systematic Look at Litigation About Mediation*. We, of course, found it ironic and unfortunate that mediation, a process designed as an alternative to litigation, can, in some circumstances, encourage rather than eliminate additional litigation. The study was designed to address a number of issues. 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?[2]

II. 1999–2003 FINDINGS

We reached the following conclusions based on the 1999–2003 data:

- Litigation involving mediation issues increased at a rapid rate from 172 opinions in 1999 to 335 in 2003, a ninety-five percent increase.[3]

- Although there was litigation involving mediation throughout the country, most of the litigation in this five-year period took place in a few states with Texas (178 state and federal opinions), California (134 state and federal opinions), and Florida (112 state and federal opinions) leading the way.[4]

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[1] James R. Coben and Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 HARV. NEGOT. L.REV. 43 (2006) (hereafter, "*Disputing Irony*").

[2] *Id.* at 47.

[3] *Id*. at 47-48.

[4] *Id*. at 53.

- The subject matter context for disputing about mediation was diverse, including:

  - Commercial or contract (373 opinions)
  - Family law (264 opinions)
  - Employment (153 opinions)
  - Personal injury (153 opinions)
  - Malpractice (41 opinions)
  - Estate/probate (34 opinions)
  - Tax/bankruptcy (23 opinions)
  - IDEA (18 opinions)
  - Miscellaneous (167 opinions)[5]

- Equally diverse was the nature of the disputed mediation issues[6]:

  - Enforcement of Mediated Settlements (569 opinions)
  - Duty to Mediate (279 opinions)
  - Fees (243 opinions)
  - Confidentiality (152 opinions)
  - Condition Precedent (123 opinions)
  - Sanctions (117 opinions)
  - Ethics/Malpractice (99 opinions)
  - Arbitration-Mediation (88 opinions)
  - Miscellaneous (100 opinions)

- Courts frequently consider evidence of what occurs in mediation; indeed, in over three hundred opinions, courts addressed mediation communications without any mention of privilege or mediation confidentiality.[7] Mediators offered testimony in sixty-seven cases, with objections raised only twenty-two times, and the evidence was precluded in only nine cases.[8]

- Nearly half of all court opinions about mediation addressed enforcement of settlement agreements. Traditional contract defenses, although frequently raised in enforcement cases, were rarely successful.[9]

- Very few opinions raised the issue of mediator misconduct;[10] in fact, only seventeen times in five years did parties assert a contract defense based on mediator conduct.[11]

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[5] *Id*. at 56.
[6] *Id.* at 56-57.
[7] *Id*. at 58-59.
[8] *Id*. at 48.
[9] *Id.* at 48-49.
[10] *Id*.

- 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.[12]

- Numerous opinions confirm taxation of mediation costs despite the lack of clear statutory or rule authority to do so.[13]

- Opinions about sanctions more than doubled over the five-year period (from thirteen in 1999 to twenty-nine opinions in 2003);[14] courts awarded sanctions in forty-five percent of the cases in which they were sought.

- Disputes about the linkage of mediation and arbitration resulted in courts rendering decisions in eighty-eight opinions during the five-year period covered by the database. Most opinions fell into one of three categories: conflict of interest/disclosure disputes; disputes about the enforcement of pre-dispute mediation/arbitration clauses; and waiver of the right to arbitrate through mediation participation.[15]

- Mediation requests or participation pose complex procedural questions in litigation, ranging from tolling of statutes of limitation, to extension of time for discovery, to exhaustion of administrative remedies.[16]

- Acts or omissions in mediation are increasingly seen as the basis for independent claims, especially in employment disputes where employers' conduct in mediation is, with increasing frequency, invoked as proof of a hostile work environment or retaliation.[17]

In the year following publication of our initial study, we systematically analyzed an additional 996 opinions from 2004–05. Our primary purpose for this follow-up work was to see if the five-year trends we identified in our initial study would continue. In large part, the answer is yes. We report our findings and analysis of those opinions here, as well as make general

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[11] *Id.*
[12] *Id.* at 105.
[13] *Id*. at 113.
[14] *Id.* at 119.
[15] *Id.* at 123-124.
[16] *Id.* at 130-131.
[17] *Id.* at 131-132.

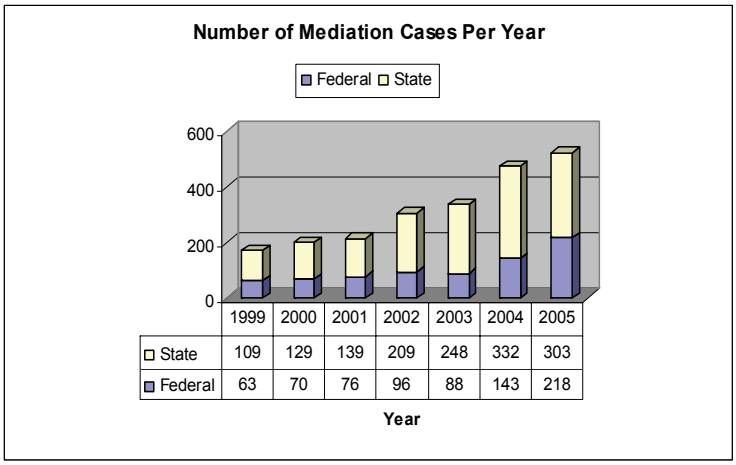
observations about the 2006 cases summarized in our annual mediation case law review,[18] and what lies ahead for 2007.

III. 2004–05 FINDINGS

1. Scale of Mediation Litigation

To construct our database, we searched Westlaw for opinions using the term "mediat!" In addition to opinions addressing mediation issues, this search brings up a large number of "hits" on opinions that include some form of the term "mediate" but do not address mediation issues. The number of hits per year has increased from 1176 in 1999 to 2582 in 2005, a 120 percent increase.[19]

We identified 1223 opinions in the 1999–2003 database that implicated mediation issues. The number of cases increased dramatically, from 172 in 1999 to 335 in 2003, a ninety-five percent increase over the five year period. The litigious trend continued in 2004 with 475 opinions, a whopping forty-two percent annual increase, and with 521 opinions in 2005, a more "reasonable" ten percent annual increase.



	1999	2000	2001	2002	2003	2004	2005
State	109	129	139	209	248	332	303
Federal	63	70	76	96	88	143	218

[18] James R. Coben and Peter N. Thompson, *Mediation Case Law Review Part I: January-June 2006*, 1 WORLD ARBITRATION & MEDIATION REVIEW 139 (2007); James R. Coben and Peter N. Thompson, *Mediation Case Law Review Part II: July-December 2006*, 1 WORLD ARBITRATION & MEDIATION REVIEW, Issue 1.1 (2007).

[19] Although we have not systematically analyzed the 2006 cases, the total number of hits in 2006 (3054) increased at a rate of eighteen percent. Projecting year-to-date hits for 2007 (1121 cases between January and end of April), we would expect a total 2007 count of 3363, another ten percent annual increase.

The percentage of opinions selected, or yield, was quite consistent in the 1999–2003 database. The lowest percentage was fourteen percent of the total hits in 2001, and the highest was fifteen percent in 2003. The yield for the 2004 and 2005 cases jumped considerably. In 2004, the yield was twenty-one percent, and in 2005, twenty percent of the hits were selected for the database.[20] As discussed below, the higher yield in 2004–2005 is in large part a result of a significant jump in the number of federal cases. Otherwise, with few exceptions, the types of cases and issues found in the 2004–2005 database are quite similar to the results from the 1999–2003 opinions. Surprisingly, the number of state mediation cases actually dropped from 332 in 2004 to 303 in 2005.

2. Continued Concentration in Key States

In 1999–2003, opinions issued by federal and state courts in just three states – California, Texas, and Florida – comprised more than one-third of the database. The same dominance continued in 2004–2005, with opinions from those three states constituting thirty-five percent of all cases. In 2004-2005, California (179 federal and state opinions) surpassed Texas (104 federal and state opinions) as the jurisdiction with the most reported litigation of mediation issues. Florida was again a distant third (68 federal and state opinions), followed by North Carolina (40), New York (38), Ohio (38), Minnesota (25), Wisconsin (25), Massachusetts (22) and Pennsylvania (22).

3. A Recent Increase in Federal Opinions

To a large extent, the increased litigation on mediation issues in 2004-2005 took place in the federal courts. Indeed, the number of federal opinions addressing mediation increased 151 percent, from eighty-seven opinions in 2003 to 218 in 2005. In 2004–2005 federal opinions represented thirty-six percent of all opinions. Reported federal trial court opinions nearly tripled, from sixty-five in 2003 to 174 in 2005, while appellate court opinions merely doubled from twenty-two in 2003 to forty-four in 2005. While litigation was up in all categories, federal employment opinions nearly quadrupled from twenty in 2003 to seventy-seven in 2005. Likewise, the number of contract/commercial cases also jumped considerably, from thirty-four in 2003 to seventy-eight in 2005, a 129 percent increase. Several

[20] It is possible that, after publishing the 1999–2003 data, we became much more sensitive or inclusive in selecting cases for the database when we looked at the 2004-05 cases. If that is true, we may have under-reported the 1999–2003 cases. It is also possible that we have been consistent in our analysis, and there has been an increase in the proportion of opinions using the term "mediate" that actually involve mediation issues.

federal jurisdictions that had no reported mediation opinions from 1999–2003 had multiple opinions in 2004–2005.[21]

In contrast, the ninety-five percent increase in opinions from 1999 to 2003 was almost entirely the result of litigation in state courts. Litigation in federal courts remained fairly flat during that period.[22]

4. Employment and Contract/Commercial Cases Show Greatest Increases

The subject matter context of cases did not change dramatically when comparing the 1999–2003 cases with the 2004–2005 data. There simply was a lot more litigation. Contract and commercial cases, which represented the largest category of opinions in the database in 1999–2003 (31%), increased to nearly thirty-five percent of the opinions in 2004–2005. There also was a significant increase in the employment cases, from twelve percent of the opinions in 1999–2003 to fifteen percent of the opinions in 2004–2005. Family disputes remained the second most common subject matter category in both datasets (264 opinions, comprising twenty-two percent of the 1999–2003 database; 197 opinions, comprising twenty percent of the 2004–05 database).

TYPE OF CASE

1999–2003 (1223 opinions)			**2004–2005 (996 opinions)**	
Number of Opinions	Percentage of Total Opinions		Number of Opinions	Percentage of Total Opinions
373	31	Contract/ Commercial	347	35
264	22	Family	197	20
152	12	Employment	153	15
153	13	Personal Injury	124	12
41	3	Malpractice	38	4
33	3	Estate	22	2
23	2	Tax/ Bankruptcy	30	3
17	1	IDEA	11	1
167	14	Miscellaneous	72	7

[21] Arkansas (5 opinions), Hawaii (3 opinions), Idaho (3 opinions), Mississippi (2 opinions), and Nebraska (3 opinions).

[22] In 1999, there were sixty-three federal court opinions, increasing to a high of ninety-two in 2002 but dropping to eighty-seven in 2003. For the five-year period 1999–2003, federal cases represented thirty-two percent of all the opinions reported.

The increased litigation on employment issues took place in federal courts. From 2003 to 2005, federal employment opinions addressing mediation issues increased 230 percent. In 1999–2003, employment cases represented twenty-seven percent (105 out of 387 opinions) of all federal mediation opinions, while in 2004–05, employment opinions represented thirty-four percent (123 out of 360 opinions) of the federal cases.

5. Continued Diversity of Litigated Issue

Although enforcement issues still were by far the most common issue raised, the percentage of opinions raising enforcement issues dropped from forty-seven percent of the opinions in 1999–2003 to thirty-nine percent of the opinions in 2004–2005. Confidentiality opinions dropped from twelve percent of the opinions in 1999–2003 to nine percent in 2004–2005. In contrast, the "miscellaneous" category jumped six percentage points from eight percent to fourteen percent of all opinions.[23]

MEDIATION ISSUE

1999–2003 (1223 opinions)			**2004–2005 (996 opinions)**	
Number of Opinions	Percentage of Total Opinions[24]		Number of Opinions	Percentage of Total Opinions[25]
569	47	Enforcement	384	39
279	23	Duty to Mediate	212	21
243	20	Fees	210	21
152	12	Confidentiality	85	9
123	10	Condition Precedent	84	8
117	10	Sanctions	63	6
99	8	Miscellaneous	141	14
98	8	Ethics	62	6
88	7	Mediation-Arbitration	56	6

6. The Walls of the Mediation Room Remain Porous

When deciding issues relating to mediations, judges frequently consider what went on or what was said during the mediation, usually without any reference to confidentiality. There may, however, be an emerging trend toward reinvigorating the concern for confidentiality. In 2004–2005,

[23] *See infra* notes 42–45 and accompanying text for analysis of this increase.

[24] Since opinions often address more than one disputed mediation issue, the total exceeds 100 percent.

[25] *Id*.

mediators supplied testimony in six percent of the cases,[26] quite similar to the 1999–2003 data, but reliance on other types of mediation evidence (oral or written mediation communications supplied by the parties) dropped from thirty-three percent in 1999–2003 to twenty-eight percent in the past two-year period.

MEDIATOR TESTIMONY

1999–2003 (1223 opinions)			**2004–2005 (996 opinions)**	
Number of Opinions	Percentage of Total Opinions		Number of Opinions	Percentage of Total Opinions
67	6	Testimony About What the Mediator Said	59	6
45 (of 67)	67	No privilege or other rule invoked by either party or the court	40 (of 59)	68

OTHER MEDIATION COMMUNICATIONS

1999–2003 (1223 opinions)			**2004–2005 (996 opinions)**	
Number of Opinions	Percentage of Total Opinions		Number of Opinions	Percentage of Total Opinions
402	33	Testimony About What the Parties or Lawyers Said	274	28
293 (of 402)	73	No privilege or other rule invoked by either party or the court	201 (of 274)	73

Further, in 1999–2003, the claim of privilege was upheld in forty-three percent of the cases in which privilege was raised; but in the recent two years, privilege claims were upheld in fifty-seven percent of the cases in which they were raised.[27]

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[26] *See, e.g.*, McMahan v. McMahan, No. E2004-03032-COA-R3-CV, 2005 WL 3287475 (Tenn. App., Dec. 5, 2005) (allowing mediator to testify to mental capacity of party and whether the party was confused, exhibited slurred speech, was able to understand and participated in the proceedings).

[27] *See, e.g.*, State v. Williams, 877 A.2d 1258 (N.J. 2005) (affirming assertion of mediation privilege to prevent mediator's testimony sought to support self-defense claim in assault case because state interest in protecting mediation

COURT DECISIONS ON CONFIDENTIALITY

1999–2003 (1223 opinions)			2004–2005 (996 opinions)	
Number of Opinions	Percentage of Total Opinions		Number of Opinions	Percentage of Total Opinions
152 (of 1223)	12	Confidentiality Raised by the Court or Parties	85 (of 996)	9
65 (of 152)	43	Privilege Upheld	48 (of 85)	57
60 (of 152)	39	Privilege Not Upheld	24 (of 85)	28
27 (of 152)	18	No Decision	13 (of 85)	15

6. Courts Remain Pre-disposed to Enforce Agreements

Nearly half (47% percent) of the opinions in the 1999–2003 database were enforcement cases where parties were attempting to enforce an alleged agreement arrived at during mediation. While the total number of enforcement cases increased from 140 in 2003 to 194 in 2005, only thirty-nine percent of the 2004–05 cases involved enforcement issues. Again, parties had great success in getting court assistance to enforce an agreement reached during mediation. In 2004–05, the courts enforced a settlement agreement in sixty-two percent of the cases (exactly the same rate as for 1999–2003) and refused to enforce an agreement in twenty percent of the cases (compared to sixteen percent in 1999–2003).[28]

ENFORCEMENT RESULT

1999–2003 (569 enforcement opinions)			2004–2005 (384 enforcement opinions)	
Number	Percentage		Number	Percentage
351	62	Enforced	236	62
93	16	Not Enforced	78	20
61	11	Remand	32	8
49	9	NK/NA	30	8
15	2	Modified	8	2

confidentiality was not outweighed by defendant's need for the evidence); Hemphill v. San Diego Assoc. of Realtors, 225 F.R.D. 616 (S.D.Cal. 2005) (refusing to allow objectors discovery relating to settlement negotiations in mediated class action settlement).

[28] In the other cases, the court remanded the matter (8%), modified the agreement (2%), or decided on procedural grounds without addressing the enforceability of the agreement (8%).

Contract formation issues were the most common defenses litigated. Claims of no meeting of the minds were raised in forty-three (11%) of the enforcement opinions, "agreement to agree" issues in twenty-two opinions (6%), and various claims of lack of formality including no writing, no signature, and lack of statutorily required language were raised in forty-one (11%) of the enforcement opinions. Many (70) of the disputes simply involved issues of interpretation of the mediation agreement.

ENFORCEMENT ISSUE

1999–2003 (569 opinions)			**2004–2005 (384 opinions)**	
Number of Opinions	Percentage of Total Enforcement Opinions[29]		Number of Opinions	Percentage of Total Enforcement Opinions[30]
148	26	Contract Interpretation	70	18
78	14	No meeting of minds	43	11
62	11	Lack of formality	41	11
54	10	Fraud	26	7
47	8	Agreement to Agree	22	6
46	8	Changed Circum/change of mind	23	6
43	8	Third party impact	51	13
36	6	Duress	20	5
34	6	Class Action Approval	36	9
33	6	Mutual Mistake	16	4
20	4	Attorney acted without Authority	11	3
19	3	Unilateral mistake	7	2
17	3	Mediator Misconduct	9	2
15	3	Attorney Misconduct	13	3
15	3	Unfair process	13	3
12	2	Undue influence	6	2
11	2	Unconscionability	4	1
11	2	Other	39	10
10	2	Public policy	32	8

[29] Since opinions often evaluate more than a single enforcement defense, the total exceeds 100 percent.

[30] *Id.*

Traditional contract defenses of fraud (26 opinions), duress (20 opinions), or mistake (23 opinions) were raised less frequently. Rarely were any of the defenses successful. The 2004–2005 data is consistent with our previous findings[31] that if there is widespread overreaching and unfairness in the thousands of mediations throughout the country, it is not showing up in great numbers in the reported cases. Parties have some success defending enforcement claims based on contract interpretation issues, or by convincing the court that no enforceable agreement was reached. Rarely are parties successful in defending an enforcement case based on the traditional contract defenses of fraud, mistake, duress, or undue influence.

In only ninety-three of the 569, or sixteen percent of the enforcement opinions, did the court refuse to enforce the agreement from 1999–2003.[32] In the 2004–2005 enforcement opinions, the courts refused to enforce the agreement in seventy-eight of the 384 cases, or in twenty percent of the cases. Again, many of these cases involved contract formation and interpretation issues. In sixteen of the cases, the defense was based on a claim that there was no meeting of the minds or simply an agreement to agree. Fifteen of the opinions raised contract formality issues, ranging from whether the agreement needed to be signed or reduced to writing. There were no successful mediator misconduct cases. A defense based on mediator misconduct was raised in nine opinions. In one case, a successful defense was based, in part, on attorney misconduct.[33] There were no successful duress defenses; in two cases, claimants who raised duress found some relief based on other grounds.[34] Fraud or misrepresentation was raised

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[31] *See Disputing Irony*, *supra* note 1, at 49, ("[R]arely 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").

[32] The matter was remanded for further consideration in sixty-one cases.

[33] *See* Ledbetter v. Ledbetter, 163 S.W.3d 681 (Tenn. 2005) (refusing to enforce divorce settlement orally dictated by mediator and affirmed by parties and their counsel at mediation, which was later repudiated by one of the parties claiming bad legal advice and never reduced to writing and presented to the court for approval). In two other opinions addressing an issue of attorney misconduct, the matter was remanded to the lower court. *See* Libra v. Dewitt, No. GC028258, 2004 WL 2153555 (Cal. Ct. App. Sept. 27, 2004) (reversing summary judgment for attorneys charged with intentionally misrepresenting that the estate taxes payable by the estate on a portion of the settlement amount were part of the plaintiffs' gross recovery for purposes of calculating the contingent fee); Yoo v. Wong, No. SC073953, 2004 WL 2568186 (Cal. Ct. App. Nov. 2, 2004) (vacating a dismissal that was entered because counsel failed to appear).

[34] *See* Luna v. Guillem, No. H2002040304, 2005 WL 1663922 (Cal. Ct. App. July 18, 2005) (declining to decide duress claim brought by an 80 year old woman who wanted to rescind a settlement agreement in part because she had recent heart surgery, was medicated, dizzy, hungry, and unable to concentrate, but nonetheless refusing to enforce the agreement because no one filed a motion to enter judgment based on the agreement and there were no objections to trying the issues at trial);

in twenty-six opinions, but none of the claims were upheld.[35] There were sixteen mutual mistake and seven unilateral mistake opinions. Mutual mistake defenses were successful in three cases.[36] As in the 1999–2003 database, there were no successful unilateral mistake cases.

We did see a rise in the category of issues described as "other" defenses. In the 1999–2003 data, we recorded only eleven opinions or two percent of the enforcement cases in this category. Yet in 2004–2005, we included thirty-nine opinions, or ten percent of the enforcement cases. The increase in this category of cases may reflect the added complexity court-connected mediation processes add to an already complex litigation process. These cases represent two general categories of issues. A few of the "other" opinions (5 opinions) addressed questions relating to the contractual capacity or the legal competency of a party who signed a mediation settlement agreement.[37] The bulk of the remaining cases involved

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Crump v. Crump, No. 05-04-01515-CV, 2005 WL 2841146 (Tex. App. Oct. 31, 2005) (reversing trial judge decision to incorporate a mediated settlement agreement into final judgment where one party had withdrawn consent, claimed duress, and was entitled to an evidentiary hearing).

[35] In two of the fraud cases, the matter was remanded. *See* Carlson v. Carlson, Nos. A103163, 2005 WL 723685 (Cal. Ct. App. March 30, 2005) (remanding for a factual determination ruling that spouse did not waive claim that mediated agreement was entered into by way of fraud, breach of fiduciary duty, non-disclosure, and mistake); *Spitz v Spitz*, No. FA010557616S, 2005 W l2008789 (Conn. Super July 6, 2005) (reopening judgment of divorce and allowing discovery on issue of fraud and non-disclosure).

[36] *See* Roberts v. Century Contractors, Inc., 592 S.E.2d. 215 (N.C. App. 2004) (refusing to enforce mediated settlement in workers' compensation where there was a mutual mistake as to whether the party had reached maximum medical improvement); Barber v. Barber, 878 So.2d 449 (Fla. Dist. Ct. App. 3 Dist., 2004) *appeal after remand* Barber v. Barber, 911 So.2d 245 (Fla. App. 2005) (granting rescission of mediated settlement in divorce proceeding where both parties claimed mutual mistake); Brandsmart U.S.A. of West Palm Beach, Inc. v. DR Lakes, Inc., 901 So.2d 1004 (Fla. App. 2005)(reforming a settlement agreement based on mutual mistake). *See also* Lee v. Lee, No. 10-03-00182-CV, 2004 WL 1794473 (Tex. App., Aug. 11, 2004) *rehearing overruled* (Sept. 7, 2004), *petition for review filed* (Nov. 24, 2004) (refusing to enforce mediated settlement agreement where party claimed mistake; decision based on other grounds).

[37] *See* Domanque v. Domanque, 2005 WL 1828553 (Tex. App. Aug. 3, 2005) (finding party competent to settle at mediation, despite suffering from Hepatitis C and medication that allegedly caused severe depression, memory loss, and "brain fog"); McMahan v. McMahan, No. E2004-03032-COA-R3-CV, 2005 WL 3287475 (Tenn. Ct. App., Dec. 5, 2005) (agreeing with mediator's opinion that party was not confused, did not slur speech, and was able to understand and participate in the mediation); In re Guardianship of McNeel, 109 P.3d 510 (Wyo. 2005) (enforcing mediation agreement where parties agreed to a divorce and to an appointment of a guardian and conservator for the husband to help with the property settlement); In re Rains, 428 F.3d 893 (9th Cir. 2005) (affirming decision that the defendant had the capacity to enter into a binding settlement despite contrary opinions from treating

procedural issues relating to whether the matter was properly before the court. These issues ranged from whether the court had jurisdiction to hear the matter,[38] whether the parties had exhausted administrative remedies,[39] or had taken the necessary steps in the prior proceeding or in this proceeding to raise the issue or preserve the issue for review.[40]

7. Robust Growth in the Number of "Miscellaneous" Opinions

The most significant growth in any single category of mediation dispute occurred with those opinions we labeled "miscellaneous." Representing just eight percent of the 1999–2003 database (100 out of 1223 opinions), these opinions divided into three distinct categories — cases addressing various procedural implications of a mediation request or participation; acts or omissions in mediation as a basis for independent claims; and insurance issues.[41] In 2004–2005, these "miscellaneous" disputes constituted fourteen percent of the database, increasing from just thirty-six opinions in 2003, to sixty opinions in 2004, to eighty-one opinions in 2005. Such steady growth is clear evidence of mediation's institutionalization. As the process is more frequently utilized, courts grapple with myriad procedural intersections between mediation and the traditional litigation process.[42] Moreover,

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physician who treated the party for a ruptured cerebral aneurysm subarachnoid hemorrhage and stroke immediately after the mediation).

[38] *See* Ibele v. Tate, 594 S.E.2d 794 (N.C.App. 2004) (concluding that the court lacked jurisdiction to enforce through contempt powers a consent order that was not adjudicated); In re Lee, No 10-04-00286-CV, 2004 WL 2306686 (Tex. App., Oct. 13, 2004) (concluding the court of appeals had no jurisdiction to enjoin spouse from trying to enforce a mediated settlement agreement rejected by the trial judge); Jacobsen v. Ross Stores, 882 So.2d 431 (Fla. Dist. Ct. App. 2004) *appeal after remand* Quinlan v. Ross Stores, 932 So.2d 428 (Fla. Dist. Ct. App. 1 Dist., 2006) *rehearing denied* (July 3, 2006) (reversing Compensation Claims decision that the Compensation Claims Judge lacked subject matter jurisdiction to enforce settlement agreement).

[39] *See, e.g.,* Medina v. Potter, 92 Fed.App'x. 608 (10th Cir. 2004) (affirming dismissal for failure to exhaust administrative remedies).

[40] Melton v. Melton, No. 3767, 2004 WL 63437 (Tenn. App. Jan. 14, 2004) *appeal denied* (June 14, 2004) (finding party waived the right to seek appellate review of an issue concerning the mediation settlement because the issue was not raised in the first appeal); Luna v. Guillem, 2005 WL 1663922 (Cal. Ct. App. July 18, 2005) (refusing to enforce mediated settlement agreement, where party did not move to enter judgment based on the agreement and did not object to trying the issues at trial); Ricks v. Ricks, 169 S.W.3d 523 (Tex. App. 2005) (failing to preserve issue of whether divorce decree complied with mediated settlement).

[41] *Disputing Irony*, *supra* note 1 at 128.

[42] *See, e.g.*, Preston v. Transportation Insurance Co., 2004 MT 339, No. 02-522, 2004 WL 2726187 (Mont., Dec. 1, 2004) (reversing worker's compensation court dismissal of claim as time-barred, concluding that claimant's petition for, and participation in, statutorily-mandated mediation tolled running of the statute of limitations for the 62 days mediation was ongoing); Nunez v. Resource

despite confidentiality limitations, parties' behavior and bargaining patterns in mediation influence court perception and decision on the merits of disputes.[43] And, perhaps inevitably, events in the mediation become sources for new disputes independent of the original conflict.[44]

8. The Obligation to Mediate

There was little discernable difference in the quantity or quality of decisions dealing with court power to compel mediation. In both 1999–2003 and 2004–2005, such decisions were the second most common mediation dispute (279 opinions in 1999–2003 representing twenty-three percent of the database; 212 opinions in 2004–2005, representing twenty-one percent of the database). Successful challenges to judicially compelled mediation remain rare, if for no other reason than such orders are generally viewed as interlocutory and unappealable.[45] Courts continue to favor mediation on

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Warehousing and Consolidation, 775 N.Y.S.2d 310 (N.Y. App. Div. 2004) (reversing trial court denial of motion to restore a personal injury action to the trial calendar, where both parties appeared for mediation in the year after dismissal of the action for failure to prosecute, and the appearance demonstrated plaintiff's intent not to abandon the litigation).

[43] *See, e.g.*, Cloutier v. Costco Wholesale Corp., 390 F.3d 126 (1st Cir. 2004) (declining to address on a limited summary judgment record whether a post-termination offer extended during the EEOC mediation process can ever be a reasonable accommodation, and instead affirming dismissal of employee's religious discrimination claims on alternate grounds that the only accommodation acceptable to the employee would pose an undue hardship on the employer); Hatten v. Clay, No. CIV.A.203:CV548LTSJM, 2005 WL 3334546 (S.D. Miss., Dec. 7, 2005) (granting summary judgment for employer in race discrimination case, where the record shows that conflict between employee and supervisor was not racially motivated, and specifically noting that employer made substantial efforts to resolve the conflict by mediation, an effort that failed due to the employee's unwillingness to cooperate).

[44] *See ,e.g.,* Torres v. American Employers Insurance Co., No. 04-6246, 2005 WL 2496484 (6th Cir. Oct. 7, 2005) (affirming dismissal of plaintiff's state law claims of illegal and tortious conduct by defendant insurance companies during mediation of an underlying tort claim relating to pool construction, where sole basis for claims against the insurers was fact that defendants' counsel in the underlying tort claim initially denied there were any coverage defenses or coverage questions, but defendants' insurers' counsel later raised the possibility of such issues at a mediation, which plaintiff then terminated), *rehearing denied*, Oct. 25, 2005; Foreman v. Foreman, 701 N.W.2d 167 (Mich. Ct. App. 2005)(affirming jury award of $1.4 million for husband's fraud in connection with representations made during divorce mediation, including false statements about the value of his automobile dealership, his intention to keep operating the dealership, and his desire to retain the parties' vacation home).

[45] In re Hall, No. 09-05-240 CV, 2005 WL 1413311 (Tex. App. June 10, 2005) (labeling a trial court's enforcement of the parties' agreement not to file motions until after participation in mediation "an incidental procedural ruling" for which

efficiency grounds and are willing to exercise power to compel the attendance of necessary parties.[46] And, courts routinely enforce contractual or statutory obligations to mediate as a condition precedent to litigation."[47] Two categories of exceptions to this general principle, however, have emerged: parties will be foreclosed from enforcing a duty to mediate when they are responsible for previously undermining the mediation effort[48] or where mediation would be moot.[49]

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mandamus is inappropriate); Short Brothers Construction, Inc. v. Korte & Luitjohan Contractors, Inc., 828 N.E.2d 754 (Ill. Ct. App. 2005) (dismissing appeal of order compelling mediation of construction dispute, concluding that mediation order is an administrative, ministerial, non-injunctive order not subject to interlocutory relief). *Compare with* Kentucky Farm Bureau Mutual Ins. Co. v. Wright, 136 S.W.3d 455 (Ky. 2004) (affirming power of trial court to compel mediation of negligence case, including power to order appearance of parties and their adjuster at the mediation with full settlement authority; but granting writ of prohibition and precluding court from ordering that parties would face fines and penalties if the case settled after conclusion of mediation).

[46] *See, e.g.*, Abele v. Hernando County, No. 05-12686, 2005 WL 3501869, (11th Cir., Dec. 23, 2005) (affirming denial of request for non-lawyer mediator and confirming power of district court to compel mediation despite party's contention that it would be "act of futility" posing unreasonable costs, where local court rules provide that any action may be referred by the court to mediation).

[47] *See, e.g.*, Root v. Root, 882 A.2d 1202 (Vt. 2005) (affirming trial court order that mother was in contempt, where she moved out-of-state with her child without first attempting to mediate as required by her divorce decree); MG v. EG, No. 99-005242, 2005 WL 2782925 (N.Y. Sup. Sept. 8, 2005) (compelling mediation pursuant to terms of marital termination agreement). *But compare* Twomey v. Twomey, 888 A.2d 272 (Me. 2005) (affirming denial of father's motion for continuance to allow mediation of child support dispute, where wife's allegation that father intended to "drag-out" litigation could reasonably be considered an extraordinary circumstance sufficient to waive the statutory mediation requirement).

[48] *See, e.g.,* Maurer v. Maurer, 872 A.2d 326 (Vt. 2005) (rejecting father's appeal of a custody modification order based on the parties' failure to mediate as required by a provision in parties' final divorce decree, where evidence showed father was the one who had refused to engage in mediation); Kiser v. Kiser, 595 S.E.2d 816 (Table), 2004 WL 1098730 (N.C. Ct. App. May 18, 2004) (affirming trial court custody award despite failure to schedule statutorily required mediation, where the party challenging the award for failure to mediate had: 1) herself filed a motion for exemption from mediation based on plaintiff's alleged domestic violence; 2) asserted during trial that she was ready to proceed and did not request mediation; and 3) and did not take issue with the case not being sent to mediation until after the court issued an adverse custody order).

[49] *See, e.g.*, Parker v. Sunlife Assurance Co. of Canada, No. 304CV151J99MCR, 2005 WL 1866406 (M.D. Fla. 2005) (granting defense summary judgment dismissing case and denying plaintiff's motion to mediate as moot); Moore v. Ashcroft, 401 F.Supp.2d 1 (D.D.C. 2005) (denying as moot plaintiff's motion for reconvening mediation where case dismissed by grant of defense summary judgment).

9. Fees and Sanctions

The frequency of fee disputes was remarkably consistent across the two databases. From 1999–2003, there were 243 opinions dealing with allocation of mediation expenses and attorneys' fees, representing twenty percent of the database as a whole. For 2004–2005, there were 210 opinions addressing the same topic,[50] representing twenty-one percent of the database. All told, fee opinions per year quadrupled in number between 1999 (32 opinions) and 2005 (124 opinions).

In contrast, the number of sanctions opinions was remarkably static. After nearly doubling in number between 1999 (12 opinions) and 2000 (22 opinions), subsequent year-to-year changes were marginal.[51] While sanctions opinions represented ten percent of the 1999–2003 database, the rate declined to six percent in 2004–2005. Remarkably, courts granted sanctions at nearly the same rate in both databases: For 1999–2003, sanctions were granted in forty-five percent of the cases in which they were requested (53 out of 117); for 2004–2005, sanctions were granted in forty-eight percent of the cases in which they were requested (30 out of 63 cases).[52]

10. The Mediation-Arbitration Connection

From 1999–2003, opinions dealing with disputes at the intersection of mediation and arbitration constituted seven percent of the database, starting with only six opinions in 1999 and ending with twenty-eight opinions in 2003. In 2004–2005, the rate was six percent, with a drop in 2004 to twenty opinions and then an increase to thirty-six opinions in 2005. Given the increased use of pre-dispute mediation/arbitration clauses, greater utilization

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[50] *See, e.g.*, Firestine v. Parkview Health System, Inc., 374 F.Supp.2d 658 (N.D. Ind. 2005) (denying award of mediation costs to prevailing plaintiff in employment discrimination case, concluding such costs are non-compensable under 28 U.S.C. § 1920 and finding no authority to include mediation cost reimbursement as part of an attorney's fee award); Elder v. Islam, 869 So.2d 600 (Fla. 5th Dist. Ct. App. 2004) (affirming the award of a *pro rata* share of mediation costs to an employee in a successful claim for unpaid wages because the costs were incurred pursuant to a court order to engage in mediation).

[51] In 2001 (28 opinions); 2002 (24 opinions); 2003 (31 opinions); 2004 (31 opinions); and 2005 (32 opinions).

[52] *See, e.g.*, Holler v. De Hoyos, 898 So.2d 1216 (Fla. Dist. Ct. App. 2005) (sanctioning party for unexplained failure to appear at court-ordered appellate mediation, but refusing to compel enforcement of the mediated settlement agreement negotiated at the mediation in the party's absence); Office Environments, Inc. v. Lake States Ins. Co., 833 N.E.2d 489 (Ind. App. 2005) (affirming dismissal of complaint with prejudice for plaintiff's failure over two and one-half years to comply with court order to mediate, basing authority for dismissal not on local court mediation rules (which would limit sanction authority to costs and attorney fees), but on general trial rules permitting dismissal for failure to prosecute).

of hybrid processes such as mediation-arbitration, and recent legislative and institutional focus on conflict of interest and disclosures, we were expecting a greater increase in this category of disputing than we found. Nonetheless, as was the case in 1999–2003, in 2004–2005, courts primarily grappled with enforcement of multi-step clauses,[53] arguments about waiver of the right to arbitration caused by use of mediation,[54] and conflicts of interest.[55]

IV. THE 2006 CASES AND THE FUTURE

Although we have stopped systematically coding mediation cases, we continue to monitor the gross annual count and squib the year's most significant cases. In our two-part 2006 Mediation Case Law Review,[56] we have included 192 case summaries,[57] including descriptions of 26 state supreme court cases and 15 federal circuit cases.

The steady increase in federal court opinions continues. In 2006, federal opinions represented forty-eight percent of all cases in the database (compared to the 1999–2003 average of 32%). As the case summaries make clear, a considerable amount of litigation seems to focus on mediation expenses – ranging from such issues as how many lawyers does it take to

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[53] *See, e.g.*, Lakeland Fire District v. East Area General Contractors, Inc., 791 N.Y.S.2d 594 (App. Div., N.Y. 2005) (affirming stay of arbitration of contractor's claim where evidence failed to prove contractor satisfied obligation to mediate, which the court concluded was a contractual condition precedent to arbitration); BBS Technologies, Inc. v. Remington Arms Co., Inc., No CIV.A. 05-98-DLB, 2005 WL 3132307 (E.D. Ky., Nov. 22, 2005) (finding no bar to arbitration posed by defendant's alleged failure to satisfy contractual pre-condition to first negotiate in good faith and participate in mediation, where plaintiff's allegation that defendant engaged in "low ball" negotiating tactics was insufficient to establish that defendant bargained in bad faith, and where parties first agreed to stay arbitration pending mediation and later mutually agreed to cancel the mediation).

[54] *See, e.g.*, Brooks v. Cintas Corp., 91 Fed. Appx. 917, No. 03-20719, 2004 WL 57704 (5th Cir. Jan. 12, 2004) (affirming denial of employee's motion to reconsider an adverse arbitration decision on his discrimination claim, concluding that the employer's refusal to participate in EEOC mediation was not a waiver of the arbitration provision, but noting that the refusal to mediate might be a breach of the employment agreement that could have been presented to the arbitrator); Santos v. GE Capital, 397 F.Supp.2d 350 (D. Conn., Oct 11, 2005) (refusing to find waiver of employer's right to compel arbitration of Americans with Disabilities Act claim solely by virtue of employer's participation in a one-day EEOC mediation of the claim).

[55] *See, e.g.*, Schauf v. Schauf, 107 P.3d 1237 (Kan. Ct. App. 2005) (expressing strong disagreement with dual appointment of same person as special master and mediator in partnership dispute, but refusing to find judicial error where parties failed to make a timely and/or specific objection), *review denied*, Sept. 22, 2005.

[56] *See supra* note 19.

[57] Selected from 667 opinions culled from 3054 hits.

mediate,[58] to who is a prevailing party entitled to statutory attorneys' fees,[59] to penalties for breach of confidentiality.[60]

Our anticipated jump in mediation-arbitration opinions may well have occurred in 2006. There were multiple conflict of interest opinions regarding the consequences of prior undisclosed service as a mediator.[61] Waiver continued to be a hot topic.[62] And courts confronted use of confidential information in dual-role hybrid process.[63]

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[58] *See, e.g.*, Mardirossian v. Guardian Life Ins. Co. of America, 457 F.Supp.2d 1038 (C.D. Cal. 2006) (granting insured's motion for attorneys' fees in ERISA suit but ordering compensation for only one of the two attorneys representing the insured in mediation, where there was no evidence that mediation was particularly complex or that the attorneys handled distinct aspects of mediation representation); *Brady v. Wal-Mart Stores, Inc*., 455 F.Supp.2d 157 (E.D.N.Y. 2006) (reducing the claim for attorneys' fees for sixty-two hours preparation and sixteen hours attending the court ordered mediation, but granting as reasonable the fees for two attorneys present at the mediation).

[59] *See, e.g.,* A.B. v. Newark Bd. of Educ., No. 05-CV-702 (DMC), 2006 WL 343909 (D. N.J. Feb. 14, 2006) (concluding that a parent who settled an individual educational plan dispute with a school board through mediation could not be a "prevailing party" entitled to attorneys' fees under the Individuals with Disabilities Education Act (IDEA) because: 1) the dispute ended with an "agreement" rather than an "order"; 2) the agreement was not signed by a judge; and 3) the agreement did not provide for judicial enforcement).

[60] *See, e.g.,* Fair Housing Advocates Ass'n., Inc. v. Terrace Plaza Apartments, No. 2:03 CV 0563, 2006 WL 2334851 (S.D. Ohio Aug. 10, 2006) (concluding that sanctions are appropriate where defendants improperly revealed confidential discussions and negotiations from court-ordered mediation as part of a Rule 68 offer of judgment); Irwin Seating Company v. International Business Machines Corp., No. 1:04CV568, 2006 WL 3446584 (W.D. Mich. Nov. 29, 2006) (striking expert witnesses and awarding costs and attorneys' fees where the party violated mediation confidentiality by showing trial experts confidential mediation statements and exhibits obtained from the adverse party during mediation), *order affirmed by* No. 1:04-CV-568, 2007 WL 518866 (W.D. Mich. Feb. 15, 2007).

[61] *See, e.g.*, Rodrigue v. LaFourche Parish Sch. Bd., 928 So. 2d 533 (La. 2006) (analogizing to principles governing recusal of a judicial officer to grant employer's motion to recuse an arbitrator appointed to decide a workers' compensation dispute, where the arbitrator had previously acted as mediator in a failed attempt to resolve the same dispute); Guseinov v. Burns, 145 Cal.App.4th 944 (Cal. Ct. App. 2006) (refusing to vacate arbitral award based on the arbitrator's failure to disclose prior service as a volunteer mediator in an unrelated matter involving the plaintiff's attorney, concluding that a single prior uncompensated mediation did not constitute a "professional relationship" required to be disclosed); Fininen v. Barlow, 47 Cal. Rptr. 3d 687 (Cal. Ct. App. 2006) (rejecting contractor's claim that an arbitration award should be set aside because the arbitrator failed to disclose that he served as a mediator in a case involving the contractor, where the contractor was aware of the arbitrator's participation and consented to the arbitrator serving in the matter), *review denied* (Dec. 13, 2006).

[62] *See* Scaffidi v. Fiserv, Inc., No. 05-C-1046, 2006 WL 2038348 (E.D.Wis. July 20, 2006) (concluding that employer did not waive its right to compel

There also was a noticeable increase in ethics/malpractice opinions. As before, it was the work of the lawyers, not the mediators, that was the focus of this litigation.[64] That said, several significant challenges to mediator conduct were made with contradictory conclusions on the application of immunity.[65]

Finally, the year show continued growth and diversity in miscellaneous cases. There continues to be significant employment litigation arising from acts or omissions in the mediation process,[66] including multiple cases

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arbitration by participating in mediation both before and after the EEOC investigated and rejected plaintiff's claim of discrimination, where employer filed a demand for arbitration approximately one month after plaintiff renewed her discrimination claim in federal court), *affirmed,* 2007 WL 648178 (7th Cir. Feb 28, 2007).

[63] *See, e.g.,* U.S. Steel Mining Co., L.L.C. v. Wilson Downhole Services, No. 02:00CV1758, 2006 WL 2869535 (W.D. Pa. Oct. 5, 2006) (enforcing arbitral award against challenge that the arbitrator improperly relied on fraudulent *ex parte* information conveyed during mediation in choosing among the parties' last offers, noting that the parties' amended arbitration agreement stated that the arbitrator "may rely on information which he deems relevant, whether obtained in *ex parte* communication or otherwise").

[64] *See e.g.,* Attorney Grievance Com'n of Maryland v. Steinberg, 910 A.2d 429 (Md. 2006) (finding violation of the rules of professional conduct for failing to appear at a client meeting, arriving an hour late at two mediation sessions, and being unprepared at the mediation session); Sealed Party v. Sealed Party, No. CIV. A. H-04-2229, 2006 WL 1207732 (S.D. Tex. May 4, 2006) (concluding that attorney breached fiduciary duty to his former client not to disclose the non-public fact that the parties had reached a mediated settlement when he issued a press release about the settlement, but dismissing the client's fiduciary duty claim because of lack of damages).

[65] *Compare* Morgan Phillips, Inc. v. JAMS/Endispute, L.L.C., 44 Cal.Rptr.3d 782 (Cal. Ct. App. June 20, 2006) (concluding that arbitrator's withdrawal from arbitration proceeding without stated reason and continued service as a mediator was not sufficiently associated with adjudicative phase of arbitration to justify arbitral immunity in a suit brought against the neutral for alleged breach of contract and other claims) *with* Simpson v. JAMS/Endispute, LLC, No. A110634, 2006 WL 2076028 (Cal. Ct. App. July 26, 2006) (affirming applicability of quasi-judicial immunity to dismiss complaint against mediation provider for ineffective service, including alleged failure to ensure participation of opposing party and trying to "force" a settlement).

[66] *See, e.g.*, Montgomery v. U.S. Postal Serv., 177 F.App'x 963 (11th Cir. 2006) (affirming trial court conclusion that plaintiff was not unfairly surprised at trial by evidence regarding reasons for him not being hired, where the reasons were discussed in an EEOC mediation prior to the lawsuit, and the employer's interrogatory responses during discovery so lacked detail that it "should have been obvious" to the plaintiff to seek elaboration), r*ehearing and rehearing en banc denied,* 186 F.App'x. 984 (llth Cir. June 13,2006); *cert. denied,*127 S.Ct.513 (Oct. 30, 2006); Celli v. Wynne, No. 1:06CV1DAK, 2006 WL 2708359 (D. Utah Sept. 19, 2006) (concluding that failure to mediate is not an adverse employment action sufficient to support a retaliation claim).

examining administrative exhaustion problems.[67] And, mediation participation played a pivotal role in deciding a variety of dismissal motions.[68]

What will 2007 show? It is still too early in the year for systematic conclusions, although gross hits in the Westlaw database January-April, suggest we are on pace for annual growth of at least ten percent. Given the continued upward trend, perhaps it is fitting to close with the words of the Colorado Supreme Court from its February 23, 2007 decision in *Yaekle v. Andrews*.[69] There, in choosing to enforce a post-mediation settlement document never formally executed by both parties, the court noted:

> We are mindful that the practical implication of this opinion may be that parties and mediators end up working harder and longer to make sure they have reached a full and final settlement agreement by the end of the mediation. Of course, the settlement memorandum could state that, if the parties do not reach agreement on additional documentation within a stated period of time, then any party shall be entitled to have the case resolved solely on the terms in the settlement memorandum. ***In contrast to either of these approaches, however, is the practice of leaving for another day additional terms to be negotiated, which, ironically, invites the potential for further litigation rather than ending it. This dispute is a case in point [Emphasis added].***[70]

One thing is certain – the irony of litigation about mediation is with us to stay.

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[67] *See, e.g.*, Bexley v. Dillon Co., Inc., No. 04 CV 01661 MEH MJW, 2006 WL 650236 (D. Colo. Mar. 13, 2006) (concluding that raising a new claim during an EEOC mediation is insufficient to satisfy administrative exhaustion requirements; instead, plaintiff must amend her EEOC charge or file a second charge); Hoppe v. Legacy Property Management Services, LLC, No. 04-CV-1099, 2006 WL 1388832 (E.D. Wis. May 16, 2006) (concluding that letter from plaintiff's counsel to EEOC mediator outlining claim of retaliatory constructive discharge was sufficient to avoid dismissal for failure to exhaust administrative remedies, where the alleged retaliatory conduct arose from conduct already being investigated).

[68] *See, e.g.*, Noughton v. Hooker, 941 So.2d 1176 (Fla. Dist. Ct. App. 2006) (reversing trial court's decision to dismiss a breach of contract claim for failure to prosecute where defendants actively engaged in discovery and participated in mediation during the time at issue, which effectively constituted an abandonment of their motion to dismiss); Sunlight Saunas, Inc. v. Sundance Sauna, Inc., 427 F.Supp.2d 1011 (D. Kan. 2006) (concluding that defendants did not waive their right to object to lack of personal jurisdiction by participating in mediation before bringing a motion to dismiss which was filed less than two months after plaintiff joined them as parties).

[69] Yaekle v. Andrews , __P.3d __, No. 05CA1569, 2007 WL 609872 (Colo. 2007).

[70] *Id*. at *4.