



Mediation's Dirty Little Secrets: A Case Study in Institutionalization

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With Special Thanks To

Justin Rooney, Timothy Morrow,
and the Minnesota CLE for production assistance

AND the 2015 and 2022 ADR Institute Players

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The Michael Landrum Disclaimer

The video enactments you are about to see portray “less than optimal” mediator performance. Rest assured that you are not at risk by hiring any of the ADR Players as neutrals (or lawyers), despite what you might see in the next hour.

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Overview

For 1993, 263 federal and 327 state court decisions are available on Westlaw that mention the word mediation.

Fast-forward nearly three decades: the word mediation appears in 4300 federal and 1733 state decisions.

Not all of these database “hits” involve situations where federal and state judges actually decided a disputed mediation issue. But roughly fifteen to twenty percent of the time over the last quarter century, that is exactly what happens.

This presentation will explore this litigation history and tease out practical lessons to be learned about the evolution of our field.

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Building the 5-year Datasets (1999-2003; 2013-2017)

- Westlaw searches in the “ALLSTATES” and “ALLFEDS” databases that include the term “mediat!”.
- Total hits per year on the search term has increased from 1,176 in 1999 to 5,137 in 2017 (up to 5,522 in 2022).
- We asked: did the judge "decide" anything about mediation?
- 172 yes in 1999; 891 yes in 2017 (a five-fold increase occurring over a time period when civil filings in U.S. Federal and State courts have been more or less constant).

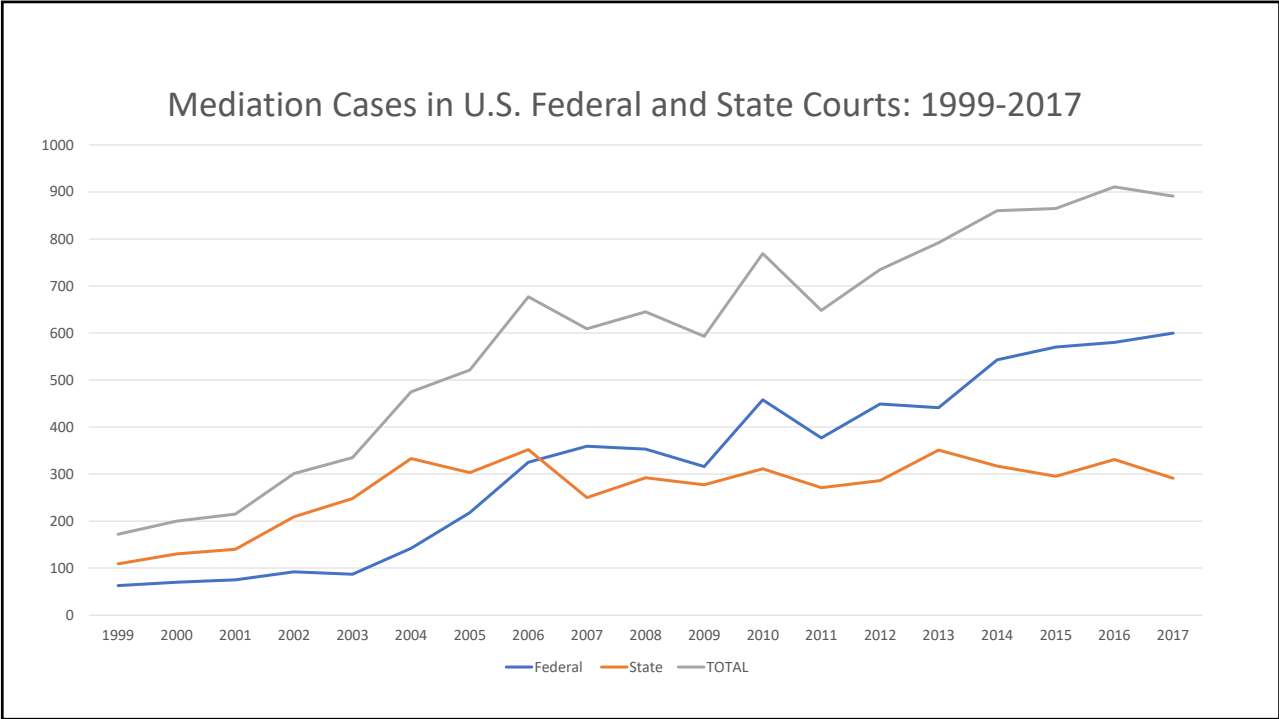


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Important Caveats

- Case opinions published on Westlaw by no means capture the full range of disputing in American courts.
- In many jurisdictions, jurists have discretion regarding which cases to publish.
- **While a steadily increasing number of federal trial court decisions (of all types of disputes, not just mediation) are on Westlaw, far fewer state court trial decisions make it into the online database.**
- Presumably, a huge number of mediation disputes of all types are resolved at the trial court level with unreported decisions that are not appealed by any party to the dispute.
- It is quite possible that the big picture trends I report here could differ considerably from the reality of work in nation's courthouses.

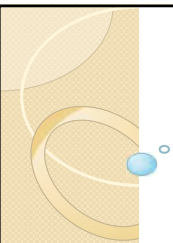
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Year	Federal Cases	State Cases	Total Cases
1999	63	109	172
2000	70	129	200
2001	76	139	215
2002	96	209	301
2003	88	248	335
2004	143	332	475
2005	218	303	523
2006	325	352	677
2007	359	250	609
2008	353	292	645
2009	316	277	593
2010	458	311	769
2011	377	271	648
2012	449	286	735
2013	441	351	792
2014	543	317	860
2015	570	295	865
2016	580	331	911
2017	600	291	891

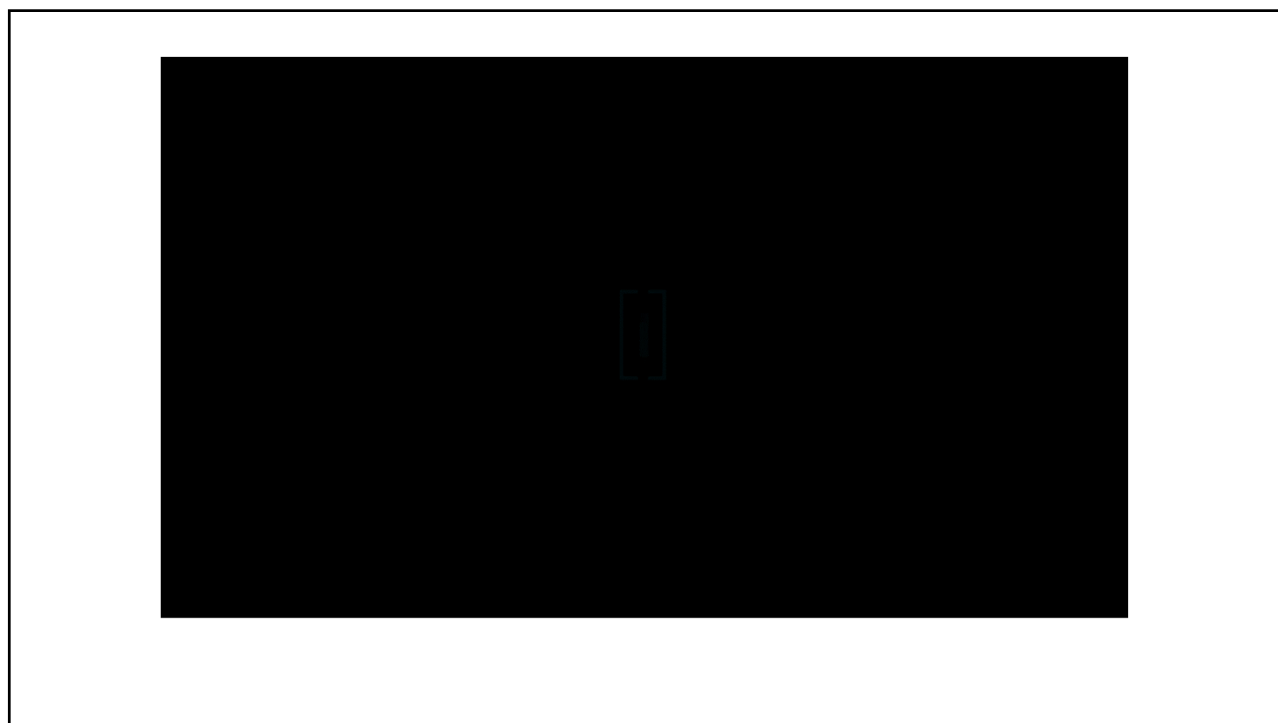
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The Poster Child for "Institutionalization"

Might just be this 2021 case from California...

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You decide

Those absent potential beneficiaries:

- Should they be bound by the mediated settlement they elected not to participate in creating?

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Breslin v. Breslin, 62 Cal.App. 5th 801, 276 Cal. Rptr. 3d 913 (2021), rehearing denied (April 20, 2021), review denied (July 14, 2021)

Precluding trust beneficiaries from challenging a mediated settlement because they were notified of the mediation but chose not to attend; dissent deemed the majority's decision to be an improper terminating sanction against the non-appearing beneficiaries.

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Breslin: The Dueling Perspectives

Majority:

"The Pacific parties do not claim they lacked notice of the mediation. Had they participated, they would have been informed of all the developments, including the trustee's willingness to sign the settlement agreement.

The Pacific parties apparently believe that after the trustee and participating parties have gone through mediation and reached a settlement, they should have been notified before the settlement was signed. Then they could have registered their objection. But that would defeat the purpose of the court-ordered mediation."

62 Cal.App.5th at 808, 276 Cal.Rptr.3d at 919

Dissent:

"Here...the probate court exalted principles of forfeiture over Kirchner's express wishes, concluding that the Pacific parties forfeited their rights to the gifts Kirchner wanted them to have because they did not satisfy a requirement Kirchner did not impose: participation in mediation at their expense. In effect, the court imposed a terminating sanction against the nonappearing beneficiaries. The majority countenances this result. I would not.

62 Cal.App.5th at 810, 276 Cal.Rptr.3d at 920

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Bottom Line

"Had the Pacific parties appeared at the initial probate hearing, for which they received notice, they would have had the opportunity to object to mediation. Instead, they waited until after the mediation, for which they also received notice, in addition to notices of continuances, to finally object to the result.

The dissent expresses concern for the due process rights of parties who ignored these multiple notices, and apparently no concern for the parties who responded to the notices and spent time and effort complying with the probate court's order for mediation."

62 Cal.App.5th at 807, 276 Cal.Rptr.3d at 918.

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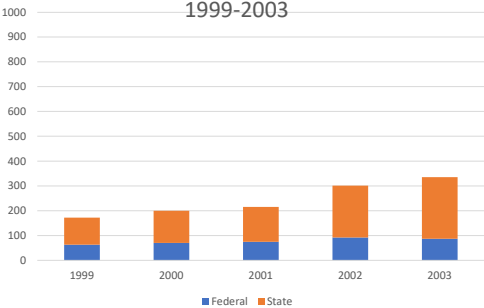


In-Depth Look

Comparing 5-year datasets: 1999-2003 and 2013-2017

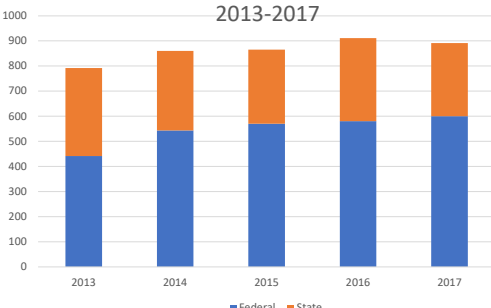
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Number of Mediation Cases Per Year, 1999-2003




	Total	1999	2000	2001	2002	2003
Total	1223	172	200	215	301	335
Federal	387	63	70	75	92	87
State	836	109	130	140	209	248

Number of Mediation Cases Per Year, 2013-2017



	Total	2013	2014	2015	2016	2017
Total	4319	792	860	865	911	891
Federal	2731	441	543	570	580	600
State	1588	351	317	295	331	291

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What's Being Disputed?

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1999-2003 (1223 total cases)		DISPUTED ISSUE	2013-2017 (4319 total cases)	
569	47%	Enforcement	1668	39%
243	20%	Fees/Costs	566	13%
157	13%	Court Power to Compel Mediation	238	6%
152	12%	Confidentiality	358	8%
123	10%	Condition Precedent	404	9%
117	10%	Sanctions	172	4%
68	6%	Ethics (Judicial and Mediator)	96	2%
50	4%	Procedural Implications of Mediation Request or Participation	498	12%
31	3%	Lawyer Malpractice/Discipline	65	2%
20	2%	Acts or Omission as Basis for Independent Claims	207	5%
6	1%	Arb-Med Waiver	59	1%

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Let's Focus on Enforcement

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Stories Mediation Parties Tell
With Apologies to My Dear Friend Lela Love and her co-author Eric Galton

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Stories Mediation Parties Tell, Part 1

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So...

A Process to be Proud of?

Anyone willing to wager which ones were “coercion/duress” winners?

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Every one ... a Loser

- ❑ *In re Marriage of Shah*, No. G046488, 2013 WL 1898317 (Cal.App. 4th Dist. May 8, 2013)
- ❑ *Menaged v. City of Jacksonville Beach, Fla.*, No. 3:11-cv-586-J-12JBT, 2013 WL 461999 (M.D. Fla. Jan. 14, 2013)
- ❑ *Jing Jing Dan v. Rambla Vista Enterprises, LLC*, No. B252050, 2014 WL 6679922 (Cal.App. 2d Dist. Nov. 25, 2014)
- ❑ *Barnes v. Fischer*, No. 9:11-CV-583 (NAM/DEP), 2015 WL 364236 (N.D. N.Y. Jan. 27, 2015)
- ❑ *In re A.R.*, No. 11012-00266-CV, 2014 WL 2767119 (Tex.App. Eastland June 12, 2014)
- ❑ *Pierce v. Pierce*, 128 So.3d 204 (Fla. 1st DCA 2013)

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A bit more detail on that last one (Pierce v. Pierce)

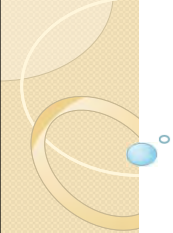
TRIAL COURT REASONING (**REFUSING TO ENFORCE!!**):

- “The Court believes that the request for additional time to review was not given the priority or emphasis it should have because Ms. Linda Pierce was fatigued and emotionally distraught from the extensive mediation efforts. However, it is clear that Ms. Linda Pierce, after taking one night to reflect and review the terms of the Agreement, immediately went to the office of the mediator on Saturday morning and hand delivered a note requesting that the Agreement be rescinded. Ms. Linda Pierce also met with her attorney early the next Monday morning and instructed him to file a Motion to Vacate the Settlement Agreement. When Mr. Cummings suggested he could not file such a motion as it would put him in a position of a conflict of interest, Ms. Linda Pierce asked him to draft the Motion, which she then filed pro se.”

COURT OF APPEALS REASONING (**REVERSING** the trial court):

- “While at one point during the day-long mediation, appellee might have asked if she could have taken the agreement home over the weekend to review it, the record shows only that, at the end of the day, she read and signed the settlement agreement without requesting additional time.
- That appellee may have been fatigued and distressed by the labor, and later suffered second thoughts, these facts, without more, do not provide grounds for setting aside an otherwise valid agreement.”

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Stories Mediation Parties Tell, Part 2

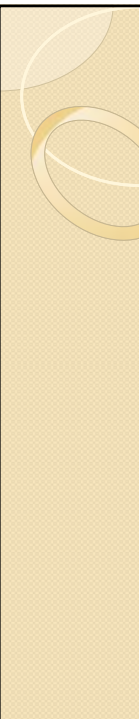
The "Rashomon" Version

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Stories Mediation Parties Tell, Part 3

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Rodriguez v Hiday & Ricke PA, No. 14-CV-61509, 2015 WL 1470513 (S.D. Fla. Mar. 31, 2015)

Finding no coercion by the mediator who “simply served his facilitative function of relaying Defendant’s settlement offer, together with their posturing, to Plaintiff.”

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Mediator Said/Party Heard...

What the Mediator Claims to Have Said

Plaintiff was upset that we started late (due to defendant’s late flight arrival) and kept mentioning that it was important for him to get to work. So I just kept repeatedly telling him, if you want to terminate, we’ll terminate. But I also reminded him we were making progress. I also challenged him to consider that it was in his best interest to see if we can get this case resolved.

I communicated *defense counsel’s posturing* that Plaintiff essentially “had two choices”— either accept the offer, or be on the hook for the full amount of the Final Judgment, which defense counsel claimed was \$10,146.60 plus fees and costs.

I never said *anything* about what the judge would or wouldn’t do.

What the Plaintiff Claims to Have Heard

The mediation started late (due to Defendants’ flight delay) and, consequently, ended late; I really needed the mediation to end as soon as possible because I couldn’t afford to pay the mediator’s hourly fees and I desperately needed to go to work in the afternoon. I tried to leave the mediation on several occasions, but the mediator kept telling me that an agreement had to be reached that day.

The mediator told me that the defendant’s initial global settlement offer of \$6,000 was “fair,” and that if I did not accept it, then I would be responsible for the then-total amount due under Defendants’ Final Judgment, which was purportedly \$10,146.60 plus fees and costs.

The mediator told me that if I didn’t accept Defendants’ settlement offer, then “the Judge is going to become very angry and is not going to be in any position to be giving you any kind of a discount [off the Final Judgment].”

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Stories Mediation Parties Tell, Part 3

What does it take to win one of these?

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Stories Mediation Parties Tell, Part 2

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Chambers v. Tennessee Fair Housing Council, No. 3:12-0190, 2013 WL 1284333 (M.D.Tenn. Mar. 28, 2013)

Denying motion to dismiss where plaintiff alleged that defendant told her she would be fired if she did not participate in mediation and if terminated would lose her salary and medical benefits necessary to pay for ongoing cancer treatment.

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And by the way...

New Jersey offers another rare recent example of duress claims surviving an initial motion to dismiss:

***Moore-Jensen v. Hous. Auth. of City of Newark*, No. A-0788-20, 2022 WL 17410598, at *4 (N.J. Super. Ct.App. Div. Dec. 5, 2022)**

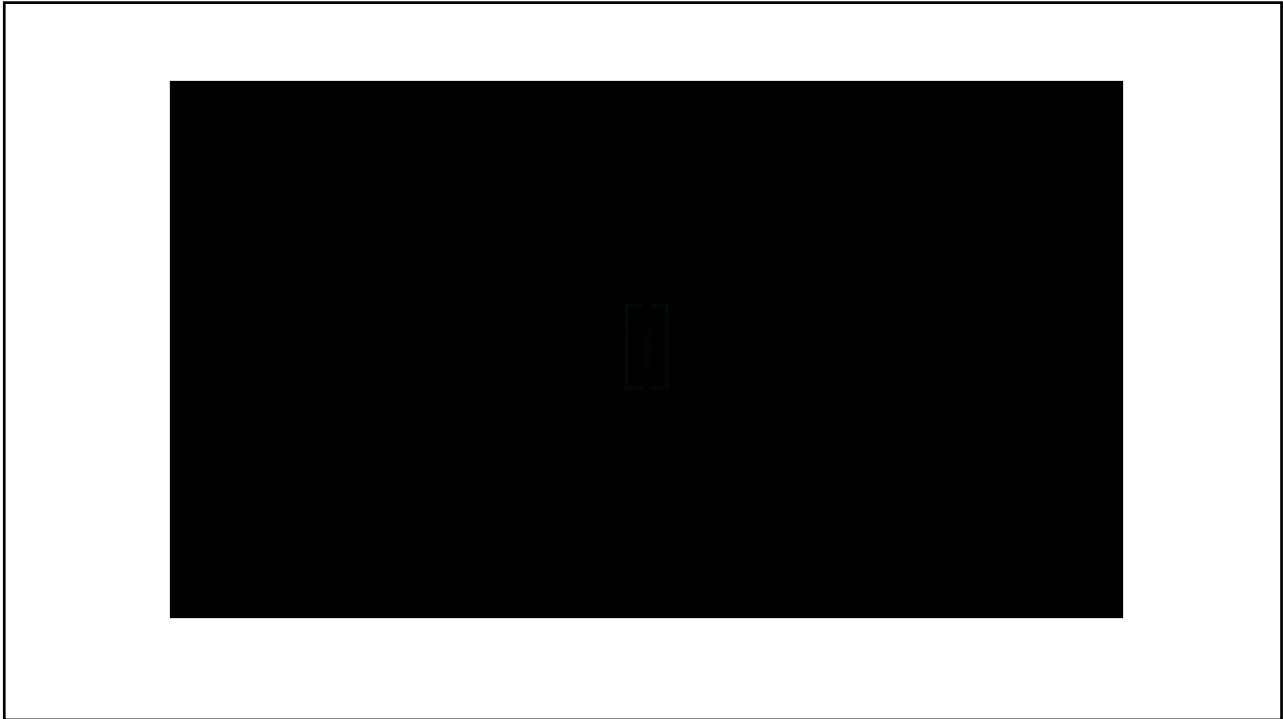
[W]e conclude the facts as pled state a claim for relief under the theory of duress. Plaintiff alleged ... that defendants and their representatives threatened her with criminal charges of theft because she took [Newark Housing Authority] human resources documents to give them to the United States Department of Housing and Urban Development Inspector General. Taken as true, defendants' threat to file criminal charges against plaintiff, a putative federal whistleblower, states a claim for relief.

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Other Enforcement Problems

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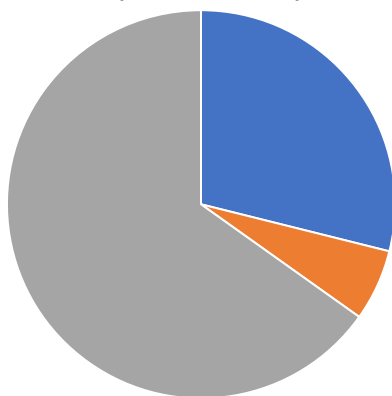
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Donna S. v. Travis S., 246 W.Va. 634, 874 S.E.2d 746 (2022)

Finding mediated divorce settlement invalid and illusory where it required husband's parents, who were not parties to the divorce (nor third-party beneficiaries of the agreement), to transfer a right of way to wife and to pay real estate transfer costs.

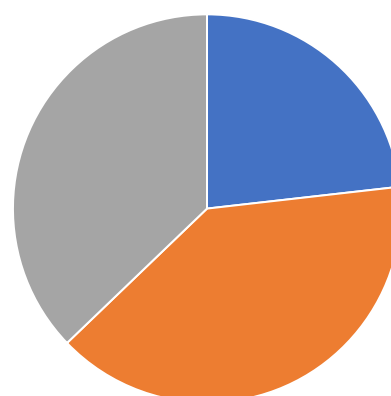
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1999-2003 Enforcement Cases
(569 cases total)




■ Interpretation and Breach (29%) 165
■ Class Action Approval (6%) 34
■ Enforcement Defense (65%) 372

2013-2017 Enforcement Cases
(1668 cases total)



■ Interpretation and Breach (23%) 387
■ Class Action Approval (37%) 661
■ Enforcement Defense (40%) 620

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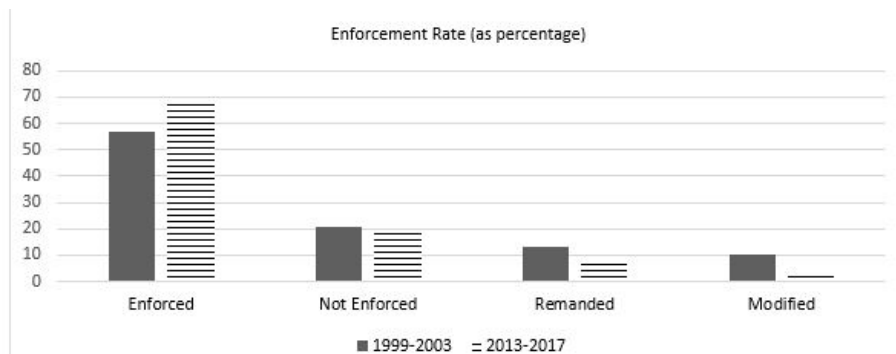
Enforcement Defenses

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1999–2003 (372 opinions)			2013–2017 (620 opinions)	
Number of Opinions	Percentage of Total Enforcement Opinions	Enforcement Defense	Number of Opinions	Percentage of Total Enforcement Opinions
78	21%	No Meeting of Minds	78	13%
62	17%	Lack of Formality	76	12%
54	15%	Fraud	63	10%
52	14%	Mistake	43	7%
47	12%	Agreement to Agree	38	6%
36	10%	Duress	65	10%
20	5%	Attorney Lack of Authority	36	6%
17	5%	Mediator Misconduct	16	3%
15	4%	Procedural/Jurisdictional Challenges	148	24%
13	3%	Public Policy	26	4%
12	3%	Undue Influence	6	1%
11	3%	Unconscionability	15	2%
3	1%	Incapacity	23	4%
61	16%	Miscellaneous	69	11%

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How Often Settlements Enforced When Defense Raised



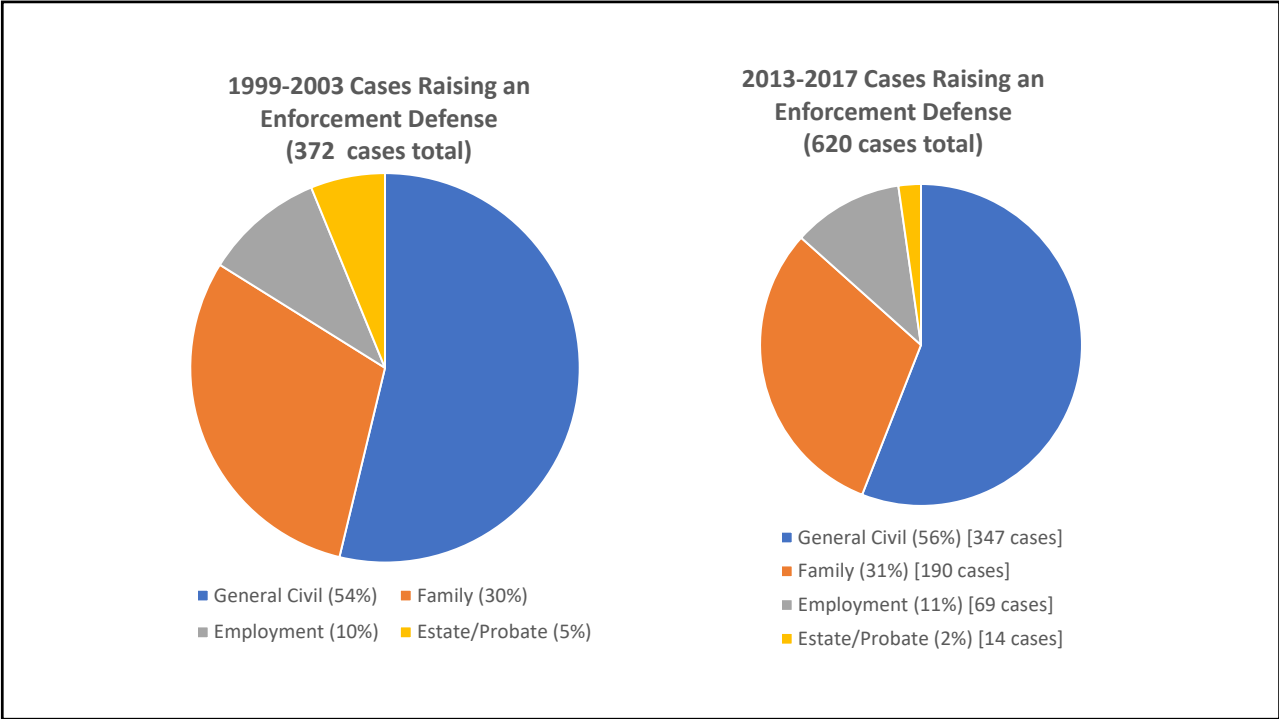
1999–2003 (372 cases)		DISPOSITION	2013–2017 (620 cases)	
Number of Cases	Percentage of Cases		Number of Cases	Percentage of Cases
210	57%	Enforced	426	69%
77	21%	Not Enforced	118	19%
47	13%	Remanded	50	8%
38	10%	Modified or decided on other grounds	26	4%

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Enforcement Rate (by defense type)

How Often Agreement Enforced Despite Defense Raised	Enforcement Defense	How Often Agreement Enforced Despite Defense Raised
75%	Undue Influence	83%
71%	Mediator Misconduct	100%
69%	Fraud	86%
69%	Mistake	74%
66%	Incapacity	87%
64%	Duress	88%
64%	Unconscionability	93%
60%	Attorney Lack of Authority	75%
59%	Miscellaneous	74%
57%	No Meeting of Minds	60%
55%	Agreement to Agree	68%
50%	Lack of Formality	67%
46%	Public Policy	69%
33%	Procedural/Jurisdictional Challenges	53%

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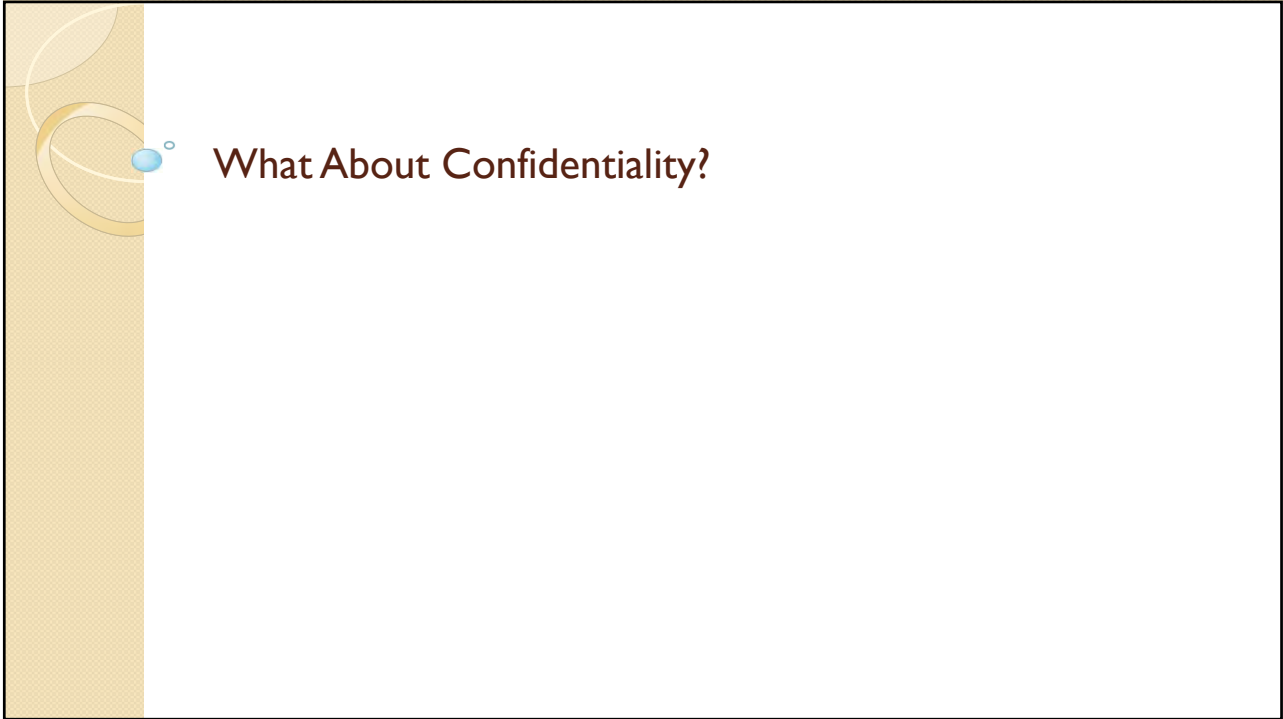


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Enforcement Rates by Subject Matter

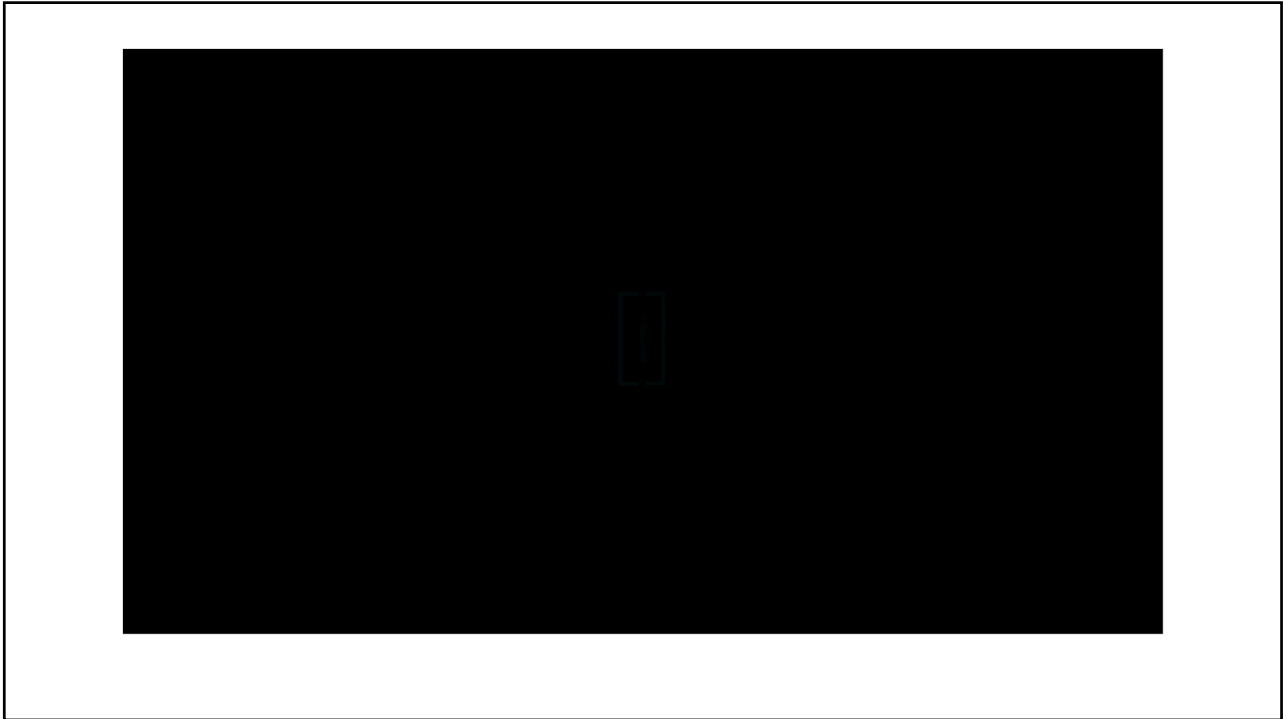
1999–2003 (372 opinions) 57% Overall Enforcement Rate		2013–2017 (620 opinions) 69% Overall Enforcement Rate	
How Often Agreement Enforced Despite Defense Raised	Subject Matter of Underlying Dispute	How Often Agreement Enforced Despite Defense Raised	
57%	General Civil	69%	
56%	Family	69%	
57%	Employment	71%	
52%	Estate/Probate	50%	

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What About Confidentiality?

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Tyler v. Findling, 508 Mich. 364, 972 N.W.2d 833 (2021), reh'g denied, 508 Mich. 940, 964 N.W.2d 41 (Mem)(Sept. 22, 2021)

Deeming conversation between a court-appointed receiver and plaintiff's counsel to be protected mediation communications when made within the mediator's designated "plaintiff's room" while parties to the mediation were waiting for the mediation session to start.

"There is no requirement in MCR 2.412 that a "mediation communication" be uttered by any particular party or participant. Rather, the rule simply explains to whom confidential mediation communications can be disclosed. All mediation communications made by participants are afforded confidentiality protections."

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By the way...not cool to secretly record mediations!

Glaser v. Mitchel, No. A155815, 2019 WL 5800428 (Cal. Ct. App. Nov. 7, 2019), as modified on denial of reh'g (Nov. 27, 2019) (affirming liability on a crossclaim for invasion of privacy based on the crossclaim defendant's surreptitious recording of the crossclaim plaintiff at a mediation session, reasoning that all parties to the mediation had a reasonable expectation of privacy).

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1999-2003 (372 total) 38 cases also raising confidentiality (10%)		DISPOSITION	2013-2017 (620 total) 29 cases also raising confidentiality (5%)	
11	29%	Enforced	19	66%
13	34%	Not Enforced	8	28%
7	18%	Remanded	2	7%
7	18%	Modified or decided on other grounds	0	0%

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The “Big” Picture

- ❑ Disputing about enforcement is on the decline (but still the most common type of mediation litigation).
- ❑ When there are disputes, the agreement will most likely be enforced.
- ❑ Mediator acts or omissions are rarely (if ever) a concern.
- ❑ Perhaps surprisingly, confidentiality is rarely raised in enforcement disputes.

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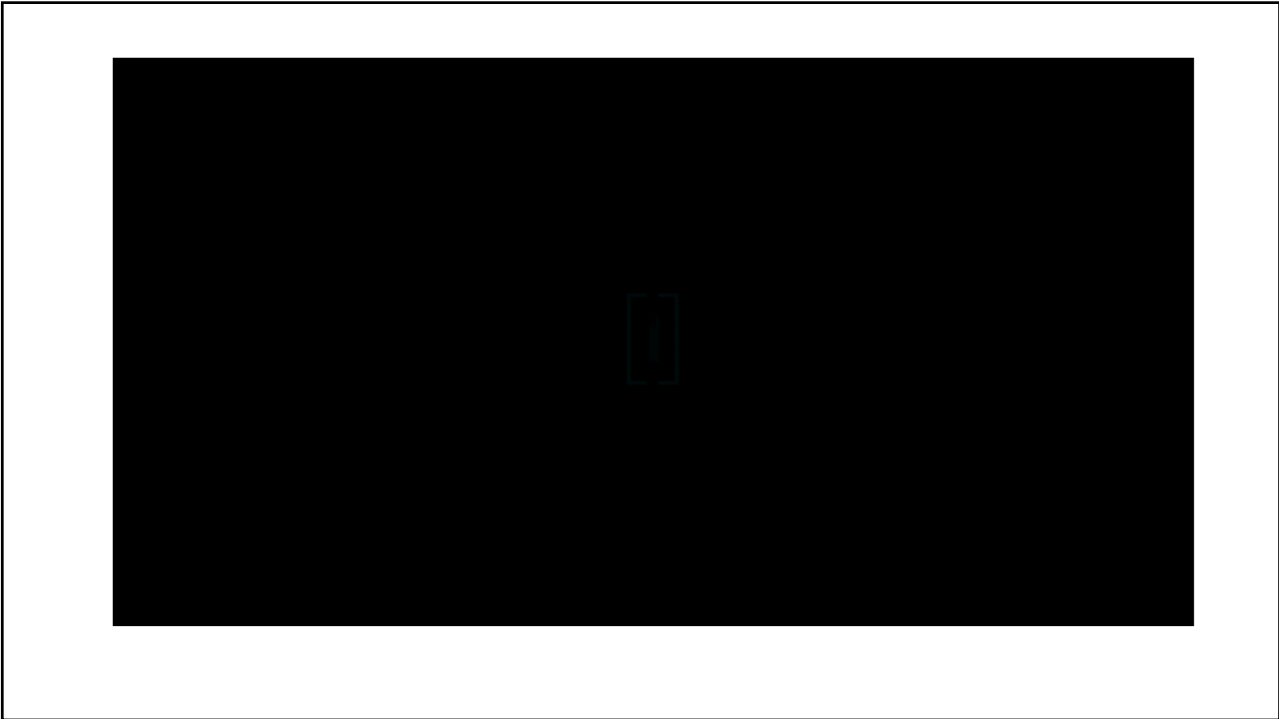
Decorative vertical bar with gold circles and a blue dot.

"The Dog Ate My Paper"



A black and tan dog is lying on a blue background, surrounded by several pieces of white paper that have been torn. One of the pieces of paper in the foreground has the word "Homework" written on it in black ink.

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Benavidez v. Andrus-Maxwell, No. CV 21-320 JHR/SCY, 2021 WL 4820643, at *1 (D.N.M. Oct. 15, 2021)

Rejecting plaintiff's contention that he does not have to include the computation of damages in initial disclosures "simply because plaintiff also included this information in a mediation statement," reasoning that mediation statements are confidential which would preclude defendant's use of the damage calculation.

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"The Dog Ate My Paper" Problem

Belief that a case would settle in mediation offered as:

- Justification for late amendment of a complaint
- Late filings of motions
- Reason to extend time for discovery
- Basis for trial continuance
- Defense against sanctions for failure to designate witnesses and exhibits (and a variety of other discovery failures)

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“Traps” for the Unwary

- ❑ Tolling (or not) of the statute of limitations
- ❑ Waiver of rights
- ❑ Notice of claims
- ❑ Exhaustion of remedies

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"Trap" Examples

Castillo v. DHL Express (USA), 243 Cal.App. 4th 1186, 197 Cal. Rptr. 3d 210, 2015 Wage & Hour Cas. 2d (BNA) 447962 (2d Dist. 2015) (only court-ordered mediation, not the parties' voluntary use of private mediation, triggers application of the state's tolling statute).

Cristwell v. Veneman, 224 F. Supp. 2d 54 (D. D.C. 2002) (party's allegation that government officials engaged him in mediation and negotiation in order to delay the prosecution of his claim did not establish the affirmative misconduct necessary to convince the court to exercise its equitable tolling power to excuse the party's late filing).

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Procedural Implications of Mediation Participation

- eligibility for a continuance or a stay of proceedings;
- justification for withdrawal of counsel or award or denial of attorney's fees;
- **propriety of an injunction or temporary restraining order;**
- permission to amend pleadings;
- whether to permit intervention
- justification to compel discovery or award discovery sanctions;
- rationale for administrative closure;
- entitlement to a jury trial;
- entitlement to notice of impending default judgment;
- malicious prosecution liability;
- application of first-filed rule
- interlocutory nature of proceedings
- entitlement to prejudgment interest;
- right to enforce an arbitration clause;
- immunity from service of process; and
- entitlement to dismissal, summary judgment, or finding of contempt.

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Injunction Examples

Crosscode Inc. v. Sharma, No. 20-cv-00104-VC, 2020 WL 1031266 (N.D. Cal. Mar. 3, 2020) (granting a preliminary injunction after concluding that a party's attempt to first seek a mediated resolution does not foreclose a finding of irreparable harm or establish that plaintiff impermissibly delayed seeking interim relief).

Chanel, Inc. v. Pu, No. 07–2502–KGS, 2009 WL 722050 (D. Kan. Mar. 18, 2009) (citing failure to participate meaningfully in mediation as evidence of defendant's continuing disregard of plaintiff's rights, justifying injunction against trademark infringement).

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What Court are we in/should be in?

SUBJECT MATTER JURISDICTION: AMOUNT IN CONTROVERSY TO SUPPORT REMOVAL OR JUSTIFY REMAND

Ali v. Setton Pistachio of Terra Bella, Inc., No. 1:19-cv-00959-LJO-BAM, 2019 WL 6888590 (E.D. Cal. 2019) (denying remand for untimely removal where plaintiff failed to actually prove that defendant received a damages model allegedly delivered by the mediator).

PERSONAL JURISDICTION: PURPOSEFUL CONTACT

RXDC, LP v. PharmaStrategies, LLC, No. 3:20-CV-01743-E, 2021 WL 2823571 (N.D. Tex. July 7, 2021) (finding insufficient purposeful contacts in Texas to justify personal jurisdiction over a contract claim, notwithstanding that the parties' mediation occurred in Texas and the settlement agreement was executed there; but finding minimum contacts established for a fraudulent inducement claim because the misrepresentations of material fact and partial disclosures at the heart of plaintiff's claim were allegedly made by defendant and its counsel during the Dallas mediation).


VENUE AND TRANSFER

Obourn v. American Well Corporation, No. NO. 3:15-CV-48 (JCH), 2015 WL 6131151, *2 (D. Conn. Oct. 19, 2015) (granting defendant's request for transfer of venue from Connecticut to Massachusetts where, among other things, the plaintiff's offer to mediate in the state suggested it was not an inconvenient forum).

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Sanctions

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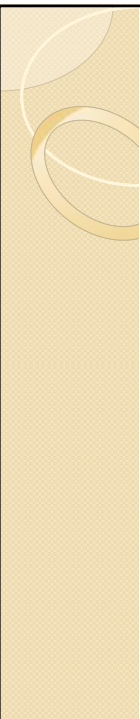
“Warm” Bodies
Not exactly what the Judge ordered

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Bakken Waste, L.L.C.
v.
Great Am. Ins. Co. of New York
(D. Colo. 2015)

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Bakken Waste, LLC v. Great Am. Ins. Co. of New York, 2015 WL 4036191 (D. Colo. 2015)

Granting sanctions against defendant for not providing a representative with full settlement authority and failing to advise the Court that it would refuse to pay anything over nuisance value to settle the case.

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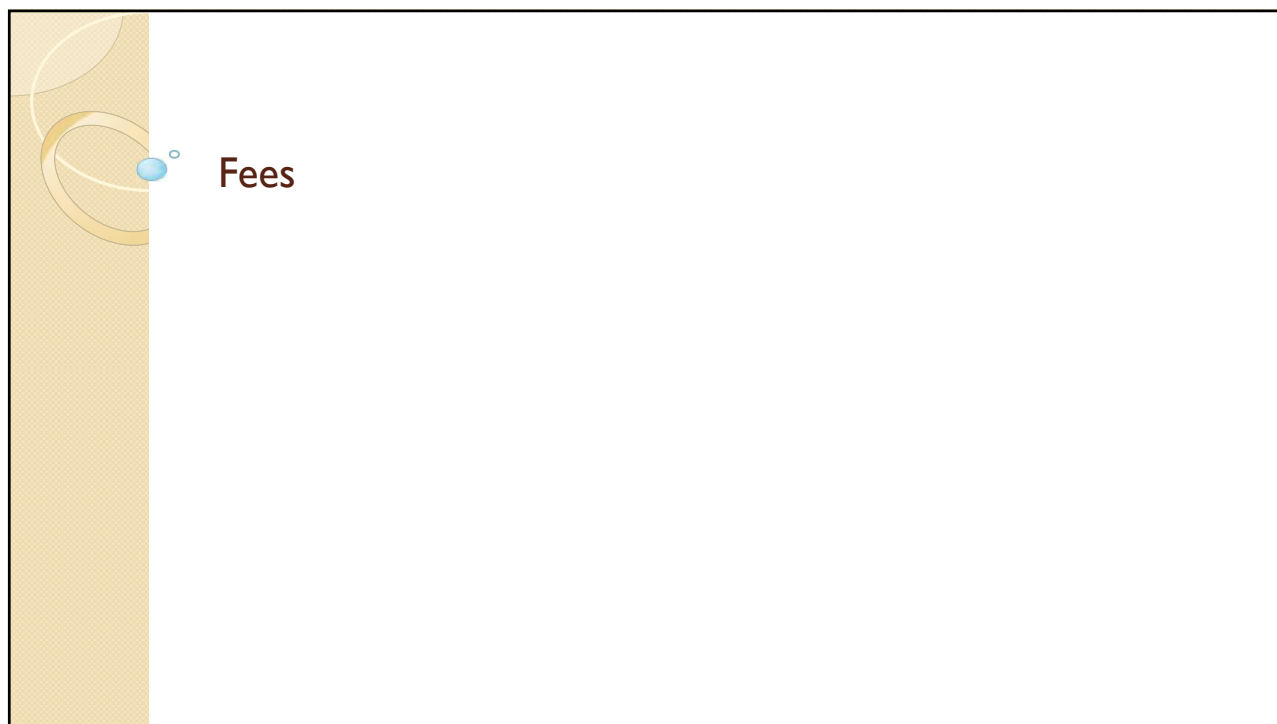
A Very Angry Judge

“This case is a perfect example of why full authority needs to be present at the conference. Sometimes, as in this case, information is revealed during the conference that may change the entire complexion of the case, and the perceived risk by the defendant....

“An effective mediator draws this type of information out during a mediation, thereby necessitating real time consideration and analysis by true decision-makers.

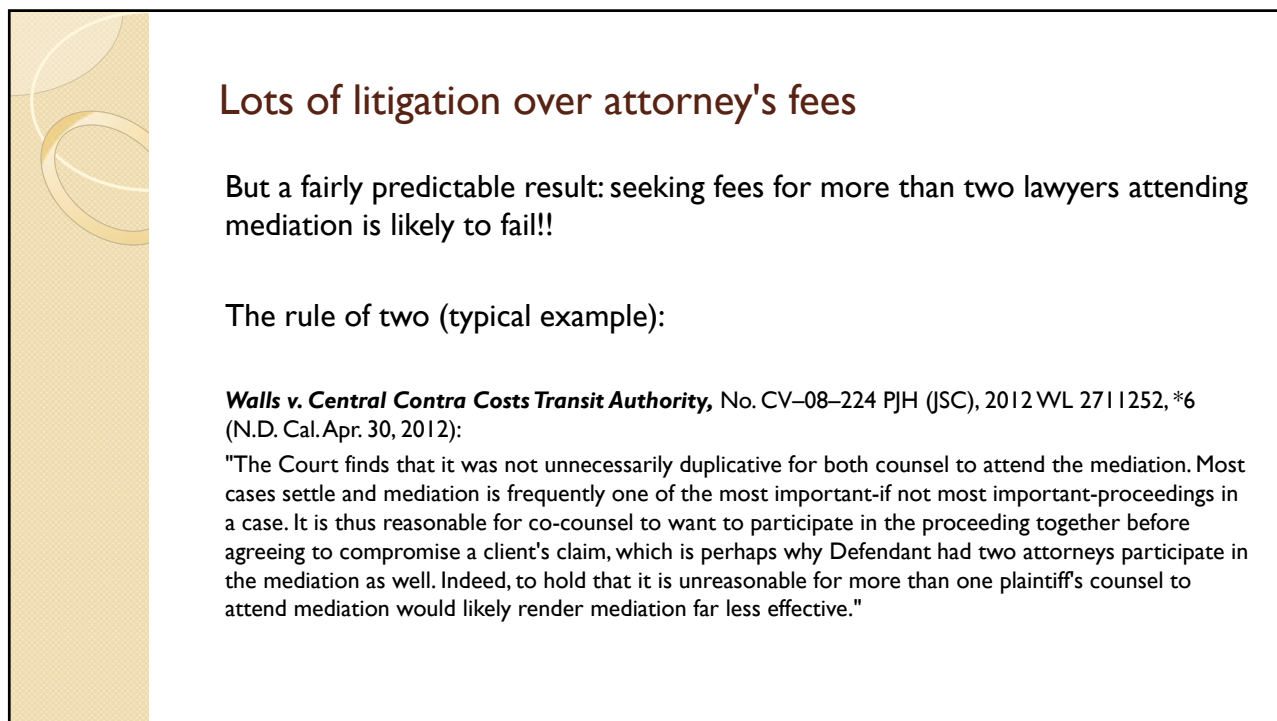
“The parties certainly do not need a mediator, let alone a United States Magistrate Judge, when all they intend to do is show up and submit a predetermined number from which they do not mean to deviate regardless of what happens.”

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Fees

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Lots of litigation over attorney's fees

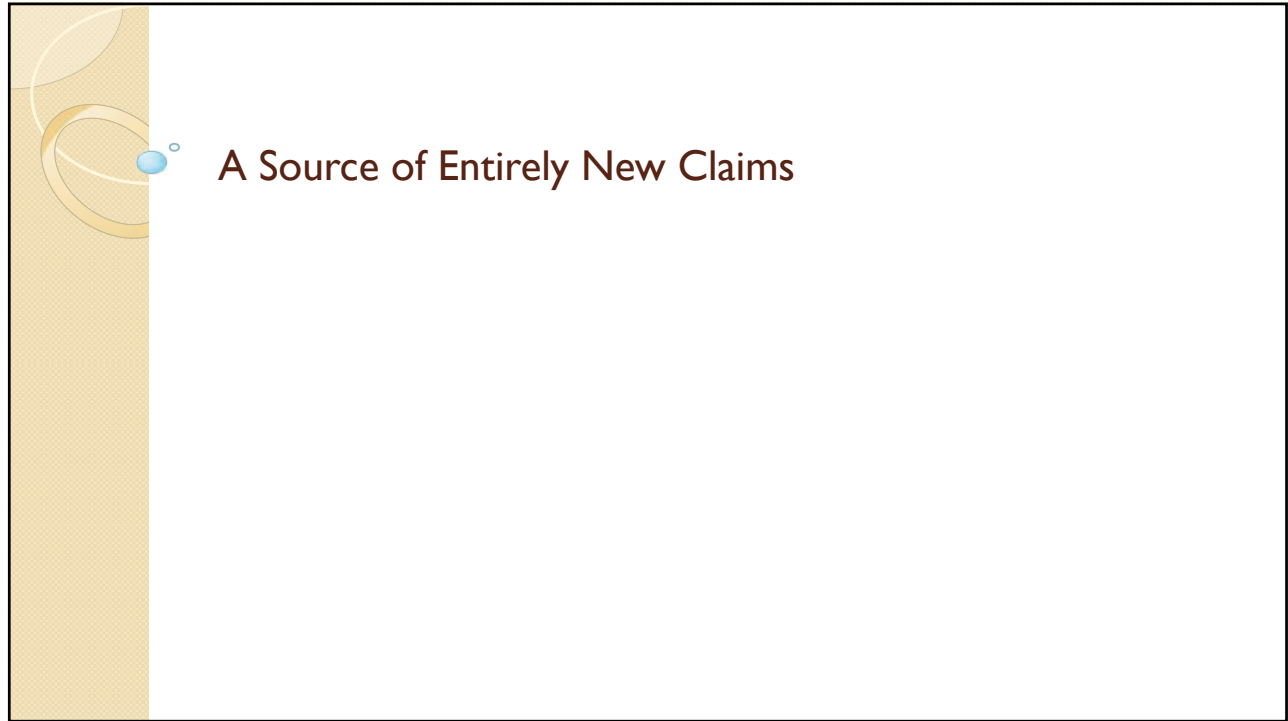
But a fairly predictable result: seeking fees for more than two lawyers attending mediation is likely to fail!!

The rule of two (typical example):

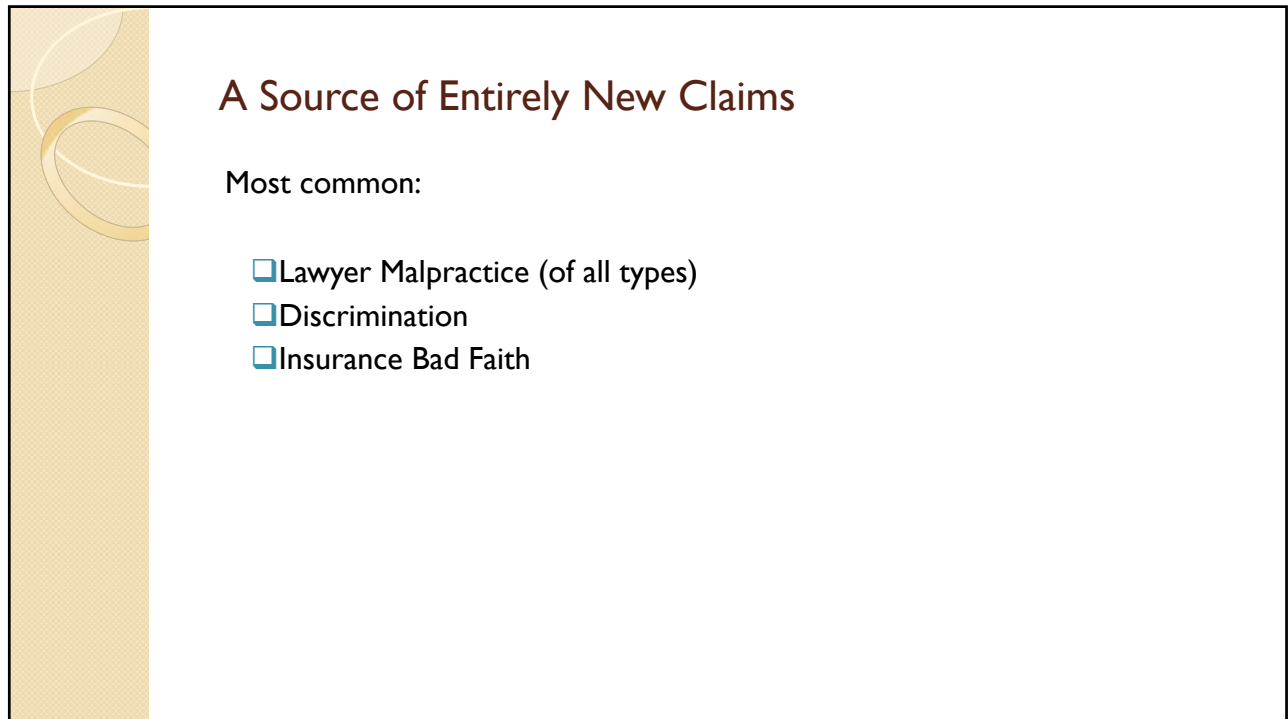
Walls v. Central Contra Costa Transit Authority, No. CV-08-224 PJH (JSC), 2012 WL 2711252, *6 (N.D. Cal. Apr. 30, 2012):

"The Court finds that it was not unnecessarily duplicative for both counsel to attend the mediation. Most cases settle and mediation is frequently one of the most important-if not most important-proceedings in a case. It is thus reasonable for co-counsel to want to participate in the proceeding together before agreeing to compromise a client's claim, which is perhaps why Defendant had two attorneys participate in the mediation as well. Indeed, to hold that it is unreasonable for more than one plaintiff's counsel to attend mediation would likely render mediation far less effective."

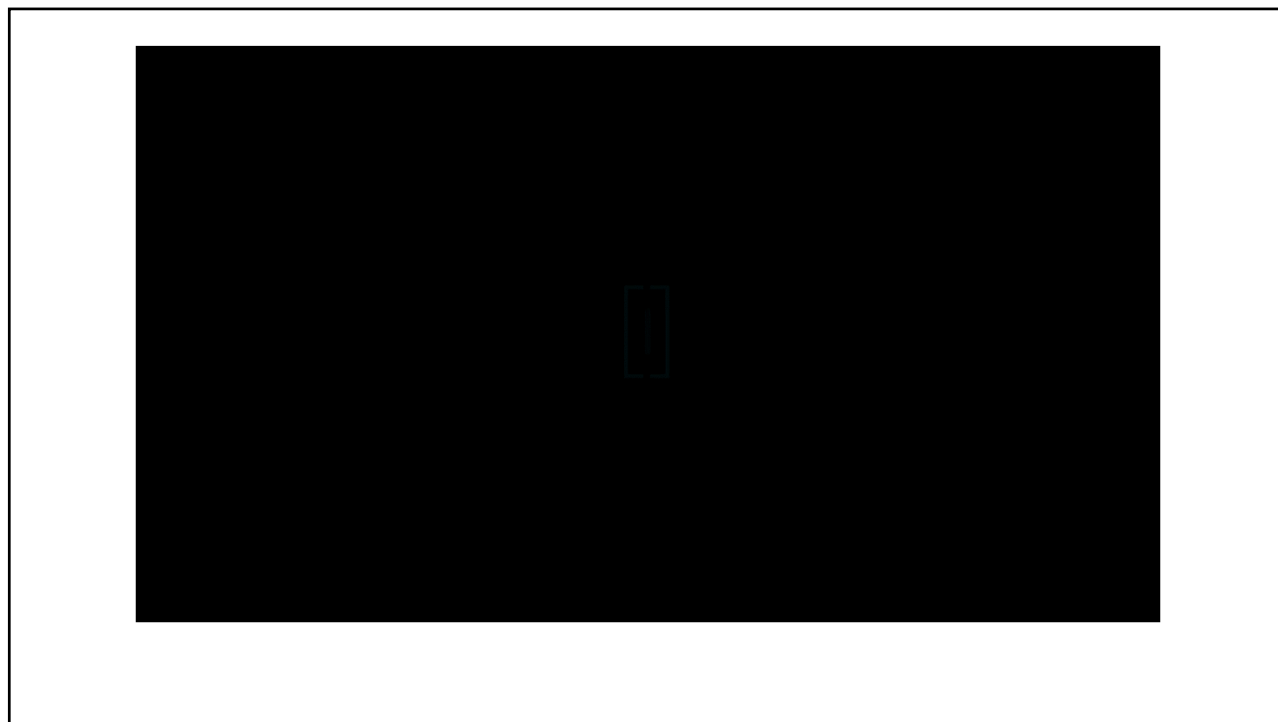
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67

M.A. B. v. Buell, 366 Or. 553, 466 P.3d 949 (2020)

Finding sufficient evidence of imminent danger to wife sufficient to justify issuance of protective order against, including conduct at divorce mediation which the trial court characterized as “incidents of intimidation.”


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Some Good News?

Virtually no litigation about mediators themselves

69



But there continues to be litigation/ethics opinions addressing

The boundaries between mediating and lawyering

70

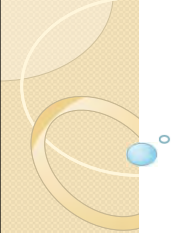


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Reid v. Kroll, No. 2181CV00769, 2021 WL 5711257 (Mass. Super. Nov. 29, 2021)

Refusing to extend hold harmless provisions of the parties' written consent to mediate to preclude suit against the mediator for alleged malpractice in providing legal advice and services when drafting the parties' separation agreement.

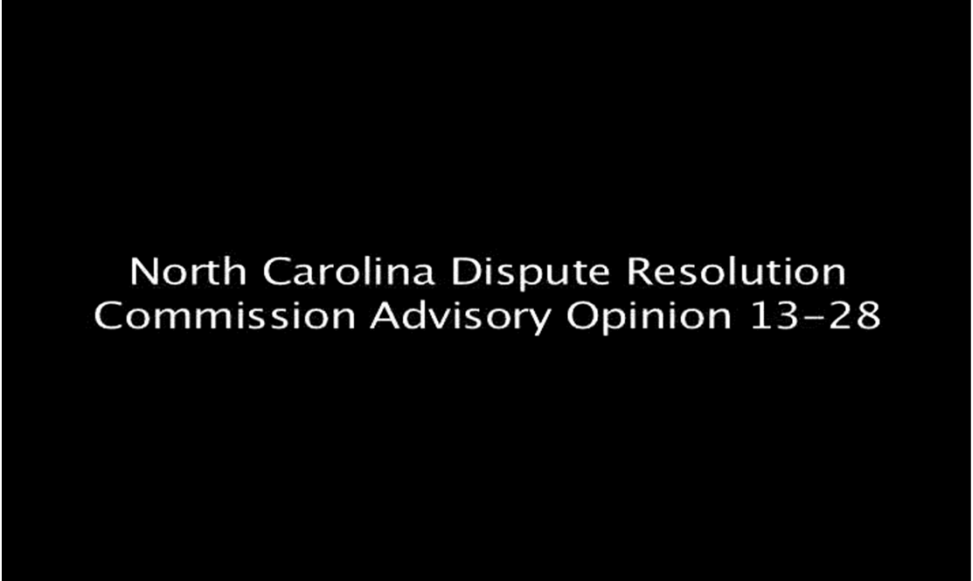
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One Stop Shop, Take 2

The “Full Service” Mediator?

73



North Carolina Dispute Resolution
Commission Advisory Opinion 13-28

74




**North Carolina Dispute Resolution
Commission Advisory Opinion 13-28 (2013)**

Lawyer-mediator impermissibly engages in practice of law (and with conflict of interest) by:

- 1) preparing final divorce settlement for divorcing parties; and/or
- 2) initiating a divorce action for the sole purpose of getting the agreement incorporated into a court order by consent.


75



**Divorce Mediation, Ltd. Scope Legal Servs., Non-Resident Laws.,
Ghostwriting, NY Eth. Op. 1236, at *2-3 & 6 (Jan. 18, 2022)**

Holding that a New York lawyer may conduct divorce mediation sessions from another state as long as they effectively explain their role as a mediator as one who does not represent either party. The opinion further holds that if mediation is successful, an out of state lawyer who acted as a mediator may prepare a settlement agreement so long as the party files it pro se and the out of state lawyer obtains informed written consent from the other party.

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The One-Stop Shop Approach

A Cautionary Tale About Judicial Mediation (again)

77



In re Marriage of Levy
(Cal.App.4th Dist. 2014)

78



In re Marriage of Levy, 2014 WL 6968600 (Cal. App. 4th Dist. 2014)

Permitting trial court judge to mediate and then preside over contested trial where wife failed to object “on the record” at the beginning of the trial.

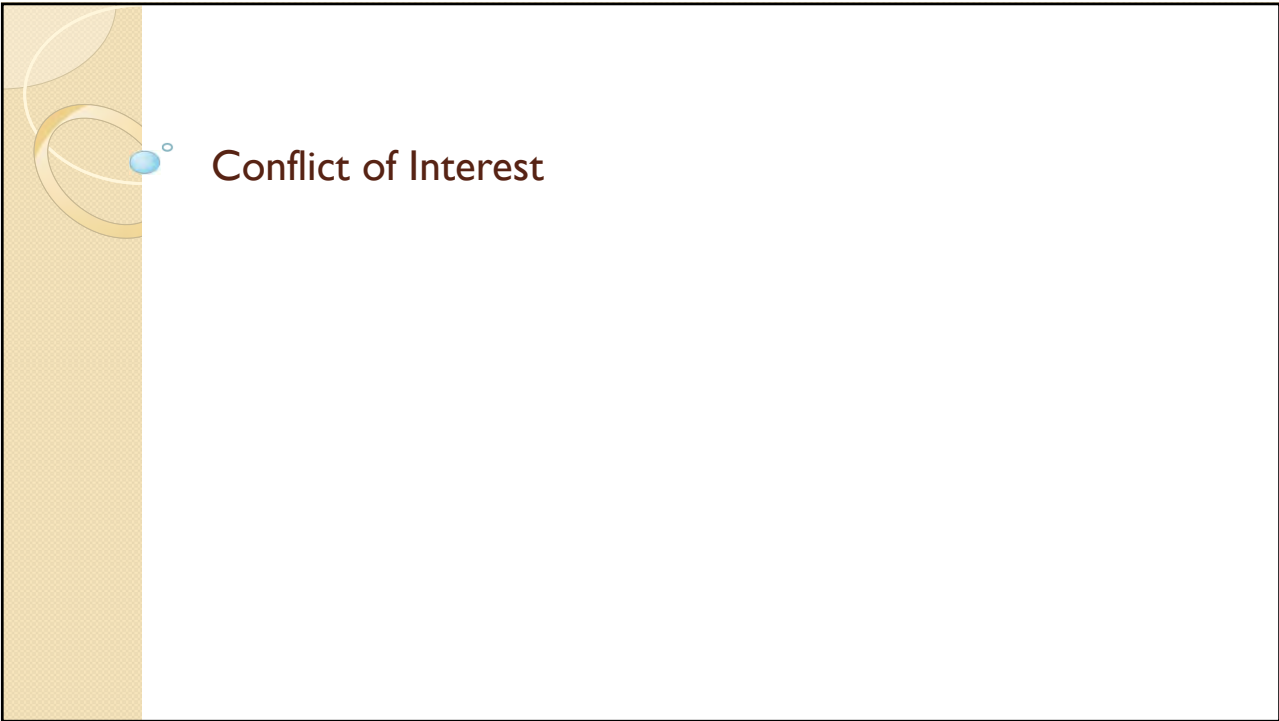
79



From Appellant’s Brief

“Judge Ashworth circulated a document requesting that Respondent and Appellant provide their signatures affirming they both desire for Judge Ashworth to continue serving in his dual capacity. Appellant never provided Judge Ashworth her signature to continue serving in this dual capacity, which he clearly stated required the signature of both parties to proceed. This letter provided specific procedural direction in the event both parties’ signatures were not provided to include Judge Ashworth referring the case to another Justice, a procedure that Judge Ashworth outlined, yet never followed.”


80



81



82




Time for you to weigh in

Is this degree of conflicts disclosure necessary?

- A. Yes
- B. No

83




ABA Committee on Mediator Ethical Guidance Advisory Opinion SODR-2015-2 (2015)

Concluding that a mediator must disclose to prospective parties that she has conducted prior mediations for one of the parties or its attorneys and is also obligated to disclose prior mediations with insurance representatives.

Limitations on what can be said?

“If the mediator is asked by a prospective party, for example, what happened in the previous mediation or whether that case settled, the mediator should demur and refer the inquiry to the counsel (or party) in the previous mediation. The Standards of Conduct apply to the mediator but do not prevent the parties or counsel from revealing information about the previous mediations, including the performance of the mediator.”

84

 Conflict of Interest, Take 2

85



86

You decide

Was there an obligation to make the disclosure?

- A. Yes
- B. No

Will the plaintiff succeed in setting aside the adverse judgment which was imposed after the unsuccessful mediation?

- A. Yes
- B. No

87

CEATS, Inc. v. Cont'l Airlines, Inc., 755 F.3d 1356 (Fed. Cir. 2014)

Concluding that mediator had obligation and failed to disclose conflict of interest but refusing to vacate judgment because failure did not pose a risk of undermining public confidence in mediation and justice processes.

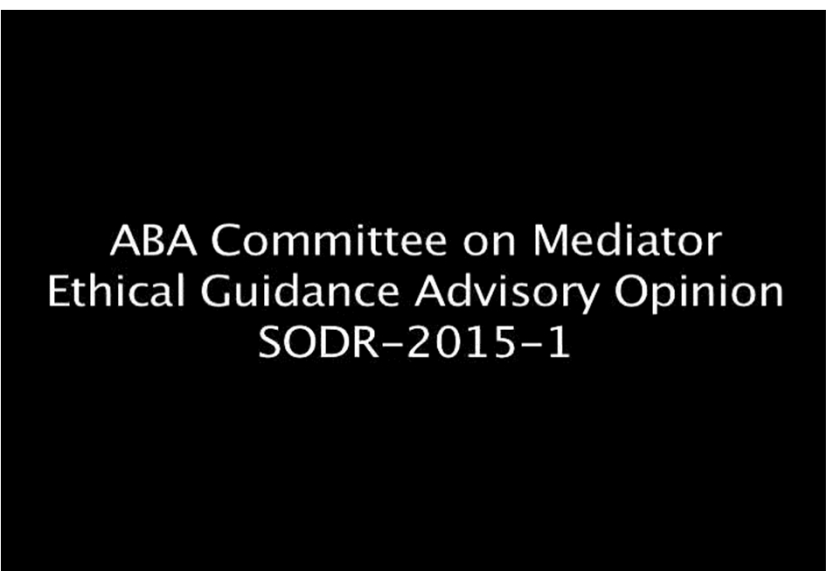
“We too have concerns about failing to provide a remedy for a mediator’s non-compliance with his or her disclosure obligations. We certainly do not want to encourage similar non-disclosures. On this record, however, we do not believe there is a sufficient threat of injustice in other cases to justify the extraordinary step of setting aside a jury verdict. We find it unlikely that mediators will simply ignore their disclosure obligations if we deny relief here.”

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Proud of that Last Settlement?
Might want to keep it to yourself...

89



**ABA Committee on Mediator
Ethical Guidance Advisory Opinion
SODR-2015-1**

90



Your thoughts

Ethical Advertising?

- A. Yes
- B. No

91



ABA Committee on Mediator Ethical Guidance Advisory Opinion SODR-2015-1 (2015)

A mediator may not advertise that he mediated “the largest settlement in the history of the county” because it creates an appearance of partiality in favor of plaintiffs in future mediations.

92

For More Detailed Analysis



MEDIATION: LAW, POLICY AND PRACTICE (Thomson Reuters Trial Practice Series Treatise 2022-2023 ed.), available in hard copy and online in the Westlaw database entitled “mediation”)

Litigation About Mediation: A Case Study in Institutionalization, 28(1) DISPUTE RESOLUTION MAGAZINE 18 (January 2022)

Evaluating the Singapore Convention through a U.S.-Centric Litigation Lens: Lessons Learned from Nearly Two Decades of Mediation Disputes in American Federal and State Courts, 20 CARDOZO JOURNAL OF CONFLICT RESOLUTION 1063 (Summer 2019)

It's a Fairy Tale: An Illusion of Beauty; A Reality Much Darker, 16 CARDOZO JOURNAL OF CONFLICT RESOLUTION 779 (2015 symposium issue “Is Mediation a Sleeping Beauty?”)

Creating a 21st Century Oligarchy: Judicial Abdication to Class Action Mediators, 5 PENN. ST. Y.B. ARB. & MEDIATION 162 (2013)

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