2022

Litigation About Mediation: A Case Study in Institutionalization

James Coben

Publication Information
28 Dispute Resolution Magazine 18 (January 2022)

Litigation About Mediation: A Case Study in Institutionalization

Keywords

Mediation, Litigation, Dispute resolution

Disciplines

Dispute Resolution and Arbitration

Litigation About Mediation:
A Case Study in Institutionalization

By James Coben

"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."

For 1994, the year this magazine began, 329 federal and 362 state court decisions are available on Westlaw that mention the word mediation.[1] Fast-forward twenty-seven years: through only the first eleven months of 2021, the word mediation appears in 3,505 federal and 1,547 state decisions.

Of course, 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, that is exactly what happened. And I should know. Since 1999, I have been a diligent (my friends and family might suggest "compulsive," "neurotic," or "obsessive") reader of federal and state court decisions that include the word "mediation."

During two five-year time spans (1999–2003 and 2013–2017), I created datasets coding cases for a wide variety of characteristics, ranging from jurisdiction, to type of mediation dispute, to case outcome (e.g., was a challenge to enforcement of a mediated settlement granted or denied).[2] In 1999, when my Mitchell Hamline colleague Peter N. Thompson and I compiled the first dataset, we skimmed a total of 1,184 cases to arrive at the 172 that actually resolved a disputed mediation issue. By 2017, the list of initial search "hits" grew to 5,137. Of those cases,

---

[1] These numbers, and the datasets described, are all based on searches run on Westlaw in the "ALLSTATES" and "ALLFEDS" databases using the search term "mediat!". Much of the analysis in this article comes from the Thomson Reuters trial practice series mediation treatise that I coauthor with Sarah R. Cole, Craig A. McEwen, Nancy H. Rogers, Peter N. Thompson, and Nadja Alexander. *See* SARAH R. COLE ET AL., MEDIATION: LAW, POLICY & PRACTICE (2020-2021), where readers can find detailed explication of cases illustrating the themes briefly touched upon here.

[2] For detailed analysis of the 1999-2003 dataset, see James R. Coben & Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 HARV. NEGOT. L. REV. 43 (2006). For detailed analysis of the 2013-2017 dataset, see James R. Coben, *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 J. CONFLICT RESOL. 1063 (*Summer 2019*).

891 involved judicial resolution of disputed mediation issues.

In celebration of the one hundredth issue of *Dispute Resolution Magazine*, what lessons might be gleaned about the evolution of our field from these two "snapshots" of litigation about mediation?

Scale and Type of Disputing

When Peter and I authored our first study analyzing our 1999–2003 dataset, we emphasized the following:

- Litigation involving mediation issues increased ninety-five percent from 1999 to 2003.
- 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.
- 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' predispute contract.
- 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.

How have things evolved over time? First, over a time period when civil filings in U.S. federal and state courts have been more or less constant or (during the 2008 recession) in decline, there has been a more than fivefold increase in disputes about mediation.

One notable trend in the data is the shift from a majority of mediation disputes coming from state courts to a majority coming from federal courts (commencing in 2007 and continuing to the current day). Much of this shift is likely attributable to the 2005 congressional enactment of the Class Action Fairness Act, designed to "federalize" class actions. There are now scores of cases each year where federal judges invoke the involvement of a private mediator as evidence that bargaining in a class action case was conducted at arms-length and without collusion between the parties.[3]

[3] For detailed analysis of class action mediation cases, see James R. Coben, *Creating a 21st Century Oligarchy: Judicial Abdication to Class Action Mediators*, 5 PENN. ST. Y.B. ARB. & MEDIATION 162 (2013).

Mediation Cases Per Year, 1999–2003 and 2013–2017

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
2013	441	351	792
2014	543	317	860
2015	570	295	865
2016	580	331	911
2017	600	291	891

Second, the type of disputed mediation issue has shifted in some interesting ways. The percentage of cases raising mediated settlement enforcement issues declined seventeen percent, from forty-seven percent of all cases in 1999–2003 down to thirty-nine percent in 2013–2017. Disputes about confidentiality also showed marked decline, down thirty-three percent (from twelve percent of all cases in 1999–2003 down to eight percent in 2013–2017). Disputes about fees and costs, court power to compel mediation, and sanctions also all declined as a percentage of total caseload, as did disputes raising ethical concerns about mediators or judges deciding disputed mediation issues.

In contrast, mediation litigation has seen growth in disputes about procedural implications of mediation requests or participation. These disputes have increased threefold, increasing from four percent of all cases in the 1999–2003 dataset to twelve percent of all cases in the 2013–2017 dataset. Cases alleging acts or omissions in mediation as a basis for new claims have also become more common, rising from just two percent of all cases in the 1999–2003 dataset to five percent of all cases in the 2013–2017 dataset.

1999–2003 (1223 total cases)		Disputed Issue(s)	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	65	2%
20	2%	Act or Omission as Basis for Independent Claims	207	5%
6	1%	Arbitration-Mediation Waiver	59	1%

A Deeper Dive into Enforcement Disputes

While the relative frequency of mediated settlement enforcement disputes has declined, the likelihood that a settlement will be enforced in the face of an alleged defense had increased from fifty-seven percent to sixty-nine percent of the time. Interestingly, the frequency with which parties raise "traditional" contract defenses, such as whether there was a meeting of the minds, fraud, mistake, duress, or lack of authority, have declined. In their place are a panoply of procedural defenses, which have increased as mediation has become institutionalized in statutes and court rules. This most rapidly expanding category of disputes, which we did not

even include in the original case coding questionnaire in 1999–2003 because cases arose so infrequently, involves such questions as whether the court had jurisdiction to hear the matter or whether the parties exhausted administrative remedies or took the necessary steps to raise or preserve the issue for review.

What About Confidentiality

A common assumption is that enforcement of mediated settlements and confidentiality are closely linked. The datasets suggest otherwise, with litigation only relatively rarely involving both issues. Between 1999 and 2003, courts considered both enforcement defenses and confidentiality challenges in thirty-eight cases, just ten percent of all enforcement defense cases during that time. Between 2013 and 2017, courts grappled with both enforcement defenses and confidentiality issues only twenty-nine times, just four percent of all cases raising an enforcement defense. Together with the overall decline in litigation about confidentiality issues, these statistics suggest that confidentiality frameworks for mediation are working efficiently and predictably for parties.

That seems especially true for the Uniform Mediation Act, first approved by the Uniform Law Commission in 2001 and now adopted in twelve states and the District of Columbia. Through the end of 2012, fewer than fifty federal and state cases published on Westlaw discussed any aspect of the UMA. A similar pattern emerged between 2013 and 2017, with federal or state courts interpreting or applying the UMA to resolve a dispute about confidentiality in mediation only twenty-nine times nationwide (approximately eight percent of all state and federal cases addressing mediation confidentiality disputes in that five-year period). Moreover, in a number of those cases, courts applied or discussed UMA principles in jurisdictions or contexts where the Act was not actually controlling—strong evidence that the drafters' uniformity objective is accomplished, at least partially, in ways other than formal Act adoption.[4]

The (Un)shocking Mundaneness of Institutionalization

I have been saying for years that I could teach my entire first-year civil procedure course using only case law decisions about disputed mediation issues.[5] For me, the sheer mundaneness of institutionalizing mediation into the litigation process is the biggest takeaway from the

---

[4] See generally, James R. Coben, *My Change of Mind on the Uniform Mediation Act*, 23 DISP. RESOL. MAG. 6 (Winter 2017).

[5] For a list of mediation cases organized by the standard required topics in a first-year law school civil procedure course, see James R. Coben, *Barnacles, Aristocracy and Truth Denial: Three Not So Beautiful Aspects of Contemporary Mediation*, 16 CARDOZO J. CONFLICT RESOL. 779, 784-787 (2015).

datasets. You name the litigation dispute, there is a mediation case on point.

First and foremost, mediation participation has become the all-purpose attorney excuse for dilatory behavior or violation of court rules. For example, belief that a case would settle in mediation has been offered to justify late amendment of complaints, failure to plead affirmative defenses, and late filings of a wide array of pretrial motions, among other things. Mediation efforts are routinely offered as a defense against sanctions for discovery failures and cited to support requests for discovery extensions or trial continuances.

Courts have treated a lack of meaningful mediation participation as a factor to justify issuing temporary restraining orders and preliminary injunctions, ordering prejudgment attachment of property in aid of security, and awarding interest. Mediation participation is also commonly invoked to support or deny awards of attorney's fees, with multiple case decisions offering Aquinas-like ruminations on the number of lawyers who may seek compensation for representing someone at a mediation. (The judicially declared short answer: not more than two.)

Parties have been deemed to have waived objections to venue and personal jurisdiction based on mediation participation. Information exchanged in mediation has been relied on to establish or negate the amount in controversy necessary to justify federal court diversity jurisdiction and removal. Venue transfers sometimes turn on availability (or non-availability) of quality mediators.

Unfortunately for some litigants, their actions (or non-actions) in mediation are also invoked by judges to justify decisions on the underlying substantive claims. For example, a parent's refusal to mediate a visitation dispute has been invoked to demonstrate inability or refusal to work in the children's best interest, thereby supporting an award of physical custody to the other parent. In employment disputes, parties frequently cite mediation behavior to support or reject allegations of post- mediation retaliatory discrimination. And insurers' acts or omissions during mediation are now routinely the subject of failure to defend and bad faith failure to insure claims.

None of this is surprising. Indeed, Carrie Menkel-Meadow presaged it in 1991 when she proposed exploring "whether new forms of dispute resolution will transform the courts or *whether, in a more likely scenario*, the power of our adversarial system will co-opt and transform the innovations designed to redress some, if not all, of our legal ills" (emphasis added).[6]

---

[6] Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or "The Law of ADR,"* 19 FLA. S. UNIV. L. REV. 1, 5 (1991).

Closing on a High Note

Though I have stopped systematically coding cases or compiling searchable datasets, I still do the Westlaw search for "mediat!" hits each month in connection with my coauthorship and annual updates of *Mediation: Law, Policy and Practice*, the Thomson Reuters trial practice series treatise I coauthor with Sarah Cole, Craig McEwen, Nancy Rogers, Peter Thompson, and Nadja Alexander. While I can no longer offer precise numbers, the shifts in disputing I have described from 1999 to 2017 seem to be holding steady. For me, that is a signal of the maturity of our field—stabilization through institutionalization.

To close on a high note: in both datasets, litigation about mediators themselves is virtually nonexistent, notwithstanding the considerable ink spilled over the last three decades in this magazine and academic journals about mediator performance. For example, the 1999–2003 dataset included just seventeen cases where parties asserted mediator misconduct as a defense to enforcement. In the much larger 2013–2017 dataset, the total number of cases alleging a mediator misconduct defense was even smaller (sixteen total), and included not a single successful case. As an optimist, I think it is fair to conclude that consumers are relatively satisfied with the product. Given that this is a one hundredth issue anniversary celebration of a magazine that has played a pivotal role in the growth of mediation and other forms of ADR, that would seem to be good news indeed.