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# OH, YE OF LITTLE [GOOD] FAITH: QUESTIONS, CONCERNS AND COMMENTARY ON EFFORTS TO REGULATE PARTICIPANT CONDUCT IN MEDIATIONS

*Roger L. Carter\**

## I. INTRODUCTION

*My client, her husband, the workers' advocate who had been working with my client, and I all had driven more than 200 miles to the mediation. My client's husband had taken the day off from work so he could attend. The mediation was in January—definitely not an ideal time to be traveling across the northern Midwest. The volunteer mediator was also from out of town. She met us after working a full day at her “regular” job. The mediation was held at 6:00 p.m. so we all faced the choice of renting a hotel room for the night or driving home in the dark on treacherous icy roads. By contrast, the other party and its attorney were both located near the mediation site.*

*The case involved an alleged violation of the Americans With Disabilities Act.<sup>1</sup> The Civil Rights Commission had screened our complaint and found it had merit. The agency asked both parties if they wished to mediate the case and both had agreed. Following a brief opening session we met in private caucuses. My client and I explained the nature of her claim to the mediator and made an initial settlement demand. The mediator then met with the employer and its attorney. That caucus lasted over an hour. When the mediator returned, she was obviously agitated. “They say they won’t pay you one cent until they are ordered to by the highest court that will hear their appeal,” she reported.*

*My client's husband—not a man possessed of a serene disposition—turned to me and asked, “What the [expletive deleted] are we going to do about this?” I tried to make*

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\*. B.A. (1976), J.D. with high distinctions (1979) University of Iowa; LL.M. in Dispute Resolution University of Missouri-Columbia School of Law (2002). Managing Director, Carter Law Firm, P.C. Many people have assisted me in the preparation of this article. I am indebted to Professors John Lande, Leonard Riskin, and Jean Stermlight, and to my fellow LL.M students at the University of Missouri-Columbia: Ruth Carter, Anita Mortimer, Van Pound, and Cindy Zhu for their valuable insight.

1. 42 U.S.C.A. §§ 12101-12213 (West 1995); 47 U.S.C.A. §§ 225, 611 (West 2001).

*soothing noises, but all the while I was thinking, "There's not a thing we can do about it."*<sup>2</sup>

When one person abuses the mediation process, many suffer. In the anecdote above, the complainant and her spouse were inconvenienced—they wasted time and money. Worse, they had their hopes of a quick and relatively painless resolution of the case dashed. They left the session disappointed, deceived, and disillusioned. I doubt that either will voluntarily participate in another mediation. I know that neither will recommend that their neighbors and friends resolve disputes through mediation. Spillover from one negative experience reaches far. Even the mediator told me that she was frustrated and that she would “think twice” before accepting another pro bono mediation assignment. We all felt that we had been the victims of a dirty trick by the employer. The employer had engaged in deceit, but what could be done? What *should* be done?

The dialog over sanctions for bad faith conduct in mediation threatens to become the most profound debate of the ADR movement. Writers who have addressed the question—and there are many—cluster into three camps. The “pro-sanctions” group holds that, without sanctions, bad conduct by parties is inevitable.<sup>3</sup> The “anti-sanctions” writers consider imposing sanctions for bad faith a very bad idea.<sup>4</sup> A handful of moderates argue for sanctions in very limited circumstances<sup>5</sup> or insist that good faith should be enforced through existing laws or the inherent power of the courts.<sup>6</sup> For some, it matters whether a mediation is court-sanctioned or private.<sup>7</sup> In this article, I will examine the views of commentators and offer my own. I will then propose a set of standards for participant conduct in mediation that I hope will both deter bad faith, and promote party and mediator autonomy.

There are many types of mediation.<sup>8</sup> This article focuses exclusively on mediations within Professor Lande’s “liti-mediation culture”<sup>9</sup>—those dealing with disputes that are or may become the subject of litigation. I address both court-connected and private mediations as I believe that the potential for bad faith exists in both. Following this Introduction, in Part II, I examine definitions of “good faith” in mediation. I then review commentary and case law on good faith requirements. In Part III, I argue that certain objectively determinable behavior ought to be proscribed. By contrast, some good faith standards adopted by courts or advocated by scholars, in my view, infringe upon parties’ rights of self-determination. These include requirements that parties make specific offers or that representatives possess

2. In a subsequent telephone conversation, the employers’ attorney acknowledged that his client deliberately lured us to the mediation intending to make no offer. “We wanted to send a message,” he explained.

3. See *infra* nn. 17, 29-38 and accompanying text.

4. See *infra* nn. 41-44 and accompanying text.

5. See *infra* nn. 50-53 and accompanying text.

6. See *infra* n. 119 and accompanying text.

7. See John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. Rev. 69, 73 n. 11 (2002).

8. See e.g. Alison E. Gerencser, *Alternative Dispute Resolution Has Morphed into Mediation: Standards of Conduct Must Be Changed*, 50 Fla. L. Rev. 843, 862 (1998).

9. John Lande, *How Will Lawyering and Mediation Practices Transform One Another?*, 24 Fla. St. U. L. Rev. 839 (1997).

“adequate” settlement authority. Part IV contains my suggestions for standards of good faith in mediation and a discussion of how such standards might be implemented. My conclusions are set forth in Part V.

## II. SANCTIONS FOR “BAD FAITH” CONDUCT—COMMENTARY AND CASES

Mediation, as an alternative to adjudication or private negotiation of litigated disputes, has grown at Information Age speed in the United States.<sup>10</sup> Thirty years ago, most lawyers had not heard of mediation. By 1997, seven percent of civil cases in this country were mediated.<sup>11</sup> Sound reasons exist for mediation’s popularity: Mediation offers some clear advantages over adversary processing: it is cheaper, faster, and potentially more hospitable to unique solutions that take more fully into account nonmaterial interests of the disputants. It can educate the parties about each other’s needs and those of their community. Thus, it can help them learn to work together and to see that through cooperation both can make positive gains. One reason for these advantages is that mediation is less hemmed-in by rules of procedure or substantive law and certain assumptions that dominate the adversary process.<sup>12</sup>

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10. See e.g. James J. Brudney, *Mediation and Some Lessons from the Uniform State Law Experience* 13 Ohio St. J. on Dis. Res. 795, 813 (1998) (referring to “[T]he dynamic growth of mediation and its numerous areas of current controversy”); Stephen G. Bullock & Linda Rose Gallagher, *Surveying the State of the Mediative Art: A Guide to Institutionalizing Mediation in Louisiana*, 57 La. L. Rev. 885, 925 (1997) (“The growth of mediation in Florida’s circuit courts has been explosive and frequently applied in large civil cases.”); Robert A. Baruch Bush, Symposium, *A Study of Ethical Dilemmas and Policy Implications*, 1994 J. Dis. Res. 1, 1 (1994) (“Over the past two decades, mediation has been developing as a means of resolving conflicts of many kinds, including interpersonal or community disputes, divorce and custody conflicts, and civil legal claims for personal injury or business dealings.”); Fiona Furlan, et al, *Ethical Guidelines for Attorney-Mediators: Are Attorneys Bound by Ethical Codes for Lawyers When Acting as Mediators?*, 14 J. Am. Acad. Matrim. Law. 267, 331 (1997) (“The growth of mediation is testimony to the fact that, despite the problems, mediation is a viable alternative method of dispute resolution in many circumstances.”); Michael B. Getty et al., *Preface to Symposium on Drafting a Uniform/Model Mediation Act*, 13 Ohio St. J. on Dis. Res. 787, 788 (1998) (“Over the last fifteen years, mediation-related law has grown from a few statutes to thousands of statutes, rules and regulations.”); John Lande, *Getting the Faith: Why Business Lawyers and Executives Believe in Mediation* 5 Harv. Negot. L. Rev. 137, 144 (2000) (“Since the 1960s and 1970s, there has been a remarkable growth in the ADR field.”); Leonard L. Riskin, *Mediation and Lawyers*, 43 Ohio St. L.J. 29, 30-31 (1982) (“Ten years ago, most American lawyers would have associated mediation with international or labor relations disputes, and probably confused it with arbitration. But in the last decade, mediation programs have proliferated at a breathtaking rate in this country.”); Brian D. Shannon, *Confidentiality of Texas Mediations: Ruminations on Some Thorny Problems*, 32 Tex. Tech L. Rev. 77, 78 (2000) (referring to “the booming growth of mediation and other alternative processes” in Texas.); Ellen A. Waldman, *Identifying the Role of Social Norms in Mediation: A Multiple Model Approach*, 48 Hastings L.J. 703, 703 (1997) (“Reports from the field suggest that the “quiet revolution” in dispute settlement continues. The steady growth of mediation supplies persuasive evidence. Once primarily limited to labor-management negotiations and neighborhood disputes, mediation has spread to a wide variety of settings.”); Harry M. Webne-Behrman, *The Emergence of Ethical Codes and Standards of Practice in Mediation: The Current State of Affairs*, 1998 Wis. L. Rev. 1289, 1298 (referring to “the explosive growth of mediation in our country.”).

11. Forrest S. Mosten, *Mediation Career Guide, A Strategic Approach to Building a Successful Practice* 10 (2001)(citing Rand Institute for Civil Justice, Rand Corporation, *An Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act* (Rand 1996)).

12. Riskin, *supra* n. 10, at 34.

Still, mediation remains in its infancy. The rules by which it is conducted continue to evolve. Courts and scholars struggle to define the responsibilities of the parties, attorneys, and neutrals.<sup>13</sup> Many practitioners, particularly trial lawyers, are uncomfortable and unfamiliar with collaborative methods of dispute resolution.<sup>14</sup> They view mediation as an obstacle to overcome, or an opportunity to exploit solely to their clients' advantage. Some simply reject the notion of mediation out of hand.<sup>15</sup> If mediation is to fulfill its promise as a cheaper, faster, and more hospitable method of dispute resolution,<sup>16</sup> participants must act in good faith.<sup>17</sup> To date, however, we

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13. See e.g. Mark D. Bennett & Michele S. G. Hermann, *The Art of Mediation* 15 (National Institute for Trial Advocacy 1996); James J. Alfini, *Evaluative Versus Facilitative Mediation: A Discussion*, 24 Fla. St. U. L. Rev. 919 (1997); Robert A. Baruch Bush, *Efficiency and Protection, or Empowerment and Recognition?: The Mediator's Role and Ethical Standards in Mediation*, 41 Fla. L. Rev. 253 (1989); John Feerick et al., *Standards of Professional Conduct in Alternative Dispute Resolution*, 1995 J. Dis. Res. 95, 106-08; Samuel J. Imperati, *Mediator Practice Models: The Intersection of Ethics and Stylistic Practices in Mediation*, 33 Willamette L. Rev. 703, 713 (1997); Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 Harv. Negot. L. Rev. 71 (1998); John Lande, *supra* n. 9, at 856-79; Barbara A. Phillips, *Mediation: Did We Get It Wrong?*, 33 Willamette L. Rev. 649, 701 (1997); Leonard L. Riskin, *Mediation Quandaries*, 24 Fla. St. U. L. Rev. 1007 (1997); Jeffrey W. Stempel, *Beyond Formalism and False Dichotomies: The Need for Institutionalizing a Flexible Concept of the Mediator's Role*, 24 Fla. St. U. L. Rev. 949 (1997); Jean R. Sternlight, *Lawyers' Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting*, 14 Ohio St. J. on Dis. Res. 269 (1999); Douglas H. Yarn, *Lawyer Ethics in ADR and the Recommendations of Ethics 2000 to Revise the Model Rules of Professional Conduct: Considerations for Adoption and State Application*, 54 Ark. L. Rev. 207 (2001).

14. See e.g. Peter A. Carfagna, "SHOW ME THE MONEY" In *Lucrative Sports Contracts, an ADR Clause Makes all the Difference*, 57 Dis. Res. J. 8, 9 (2002) ("I now truly consider myself a 'reformed' or 'recovering' litigator, as I have begun to take the '12 steps' away from the bar and into the mediation/arbitration arena."); Charles B. Craver, *The Use of Non-Judicial Procedures to Resolve Employment Discrimination Claims*, 11 Kan. J.L. & Pub. Policy 141, 147 (2001) ("Litigators often underestimate the benefits that may be derived from proficient mediation assistance."); Kimberlee Kovach, *New Wine Requires New Wineskins: Transforming Lawyer Ethics for Effective Representation in a Non-Adversarial Approach to Problem Solving: Mediation*, 28 Fordham Urb. L.J. 935, 946-47 (2001) ("In other instances, it was perceived that discussions of mediation and the idea of party participation and empowerment would be considered too 'touchy-feely' for litigators, those charging into the battle of the courtroom.")

15. See generally Andreas Nelle, *Making Mediation Mandatory: A Proposed Framework*, 7 Ohio St. J. on Dis. Res. 287, 295-96 (1992).

16. See *supra* n. 12 and accompanying text.

17. See e.g. Kovach, *supra* n. 14, at 964; Michael Z. Green, *Proposing a New Paradigm for EEOC Enforcement After 35 Years: Outstanding Charge Processing by Mandatory Mediation*, 105 Dick. L. Rev. 305, 336 (2001) ("Parties are expected to participate in mediation in good faith but they are not expected to reach an agreement."); Jeremy A. Matz, *We're All Winners: Game Theory, the Adjusted Winner Procedure and Property Division at Divorce*, 66 Brook. L. Rev. 1339, 1356 (2001) ("Furthermore, since mediation requires both parties to negotiate in good faith, individuals who insist on strategic behavior may simply refuse to mediate."); Maureen A. Weston, *Checks on Participant Conduct in Compulsory ADR: Reconciling the Tension in the Need for Good-Faith Participation, Autonomy, and Confidentiality*, 76 Ind. L.J. 591, 613-14 (2001) ("The rationale underlying the good-faith requirement is that the purpose of the ADR program and potential for parties to achieve the benefits of ADR can only be effectuated if the parties engage in the process in a meaningful manner. Without such a requirement, many litigants and attorneys may treat court-ordered ADR as one other hurdle in the path toward trial and simply a waste of time and money."). *But see e.g.* Martin A. Frey, *Does ADR Offer Second Class Justice?* 36 Tulsa L.J. 727, 766 n. 81 (2001) ("As with a negotiation without a mediator, in mediation neither party has a duty to negotiate in good faith.").

lack both a widely accepted definition of good faith and consensus as to how to ensure that it is practiced.

### *A. Definitions*

Many authors have lamented the difficulty of defining good faith in the context of mediation.<sup>18</sup> More than one have considered a Justice Stewart-like approach,<sup>19</sup> and analogized good faith to obscenity—"I know it when I see it."<sup>20</sup> Kimberlee Kovach, a proponent of good faith standards, has said that a definition should include:

- a. Compliance with the terms and provisions of [. . . a state statute or other rule . . .];
- b. Compliance with any specific court order referring the matter to mediation;
- c. Compliance with the terms and provisions of all standing orders of the court and any local rules of the court;
- d. Personal attendance at the mediation by all parties who are fully authorized to settle the dispute, which shall not be construed to include anyone present by telephone;
- e. Preparation for the mediation by the parties and their representatives, which includes the exchange of any documents requested or as set forth in a rule, order, or request of the mediator;
- f. Participation in meaningful discussions with the mediator and all other participants during the mediation;
- g. Compliance with all contractual terms regarding mediation which the parties may have previously agreed to;
- h. Following the rules set out by the mediator during the introductory phase of the process;
- i. Remaining at the mediation until the mediator determines that the process is at an end or excuses the parties;
- j. Engaging in direct communication and discussion between the parties to the dispute, as facilitated by the mediator;
- k. Making no affirmative misrepresentations or misleading statements to the other parties or the mediator during the mediation; and
- l. In pending lawsuits, refraining from filing any new motions until the conclusion of the mediation[.]<sup>21</sup>

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18. See e.g. Kimberlee K. Kovach, *Good Faith in Mediation—Requested, Recommended, or Required? A New Ethic*, 38 S. Tex. L. Rev. 575, 599 (1997) ("Struggling with a precise, usable definition of good faith may, in fact, lead to more in-depth scrutiny of mediation and its uses, particularly as implemented with legalized disputes."); Lande, *supra* n. 7, at 80 ("In the mediation context, statutes, rules, and cases do not provide a clear definition of good faith."); Edward F. Sherman, *Court-Mandated Alternative Dispute Resolution: What Form of Participation Should Be Required?*, 46 S.M.U. L. Rev. 2079, 2092 (1993) ("The lack of a substantive entitlement in ADR makes it especially difficult to define the content of good faith participation."); Weston, *supra* n. 17, at 626-27; Alexandria Zylstra, *The Road from Voluntary Mediation to Mandatory Good Faith Requirements: A Road Best Left Untraveled*, 17 J. Am. Acad. Matrim. Law. 69, 86-90 (2001) (noting the lack of satisfactory definitions of good faith).

19. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

20. Kovach, *supra* n. 18, at 600; Weston, *supra* n. 17 at 626.

21. Kovach, *supra* n. 18 at 622-23.

Even this litany does not purport to be an all-inclusive definition—Kovach merely itemizes behaviors *included* in good faith. Apparently legislators and courts have an equally hard time defining good faith. Professor Lande compiled an exhaustive list of statutes and court rules containing requirements of good faith in mediation.<sup>22</sup> Only one statute—dealing with agricultural lending mediations—contains a definition.<sup>23</sup> None of the court rules do.<sup>24</sup> Ultimately, I wonder if chasing a definition of good faith is worthwhile. Since it is bad faith that we seek to quash and since bad faith is presumably the rarer form of conduct, a focus on defining what is *inappropriate* behavior by mediation participants seems to make more sense. In other words, “good faith” is anything that is not “bad faith.”<sup>25</sup> I believe that whether an act or omission is the result of bad faith depends ultimately on the actor’s subjective motivation. The word “faith” implies something inchoate, intangible, and unmeasurable. Judgments about whether another has acted in good faith will inevitably entail guess work.

Mediation assists disputants in better understanding one another and in reaching a well-informed and mutually-acceptable resolution of their conflict.<sup>26</sup> Ideally, through an open sharing of interests, parties learn more about each other and increase their ability to work collaboratively. Mediation’s legitimate purposes are defeated when a participant acts contrary to this goal.<sup>27</sup> Bad faith participation in a mediation occurs, I therefore submit, when one participant:

- uses the mediation process primarily to gain strategic advantage in the litigation process;
- uses mediation to impose hardship rather than to promote understanding and conflict resolution; or
- neglects an affirmative material obligation owed to another participant, the mediator, or the court.

I recognize that a definition so dependent on a person’s state of mind is subjective to the point of being amorphous. Later in this paper, however, I propose a set of guidelines intended to constrain the ability of a mediation participant to perpetrate

22. Lande, *supra* n. 7, at 78-80.

23. Minn. Stat. Ann. § 583.27(1)(a) (West 2001) (not participating in good faith debtor/creditor mediation includes: failure on a regular or continuing basis to attend and participate in mediation sessions without cause; failure to provide relevant financial information; failure to designate a mediation representative with authority to make binding commitments, settle, compromise or mediate the matter; failure to provide written statements regarding alternatives; and participating in “other similar behavior which evidences lack of good faith.”)

24. Lande, *supra* n. 7, at 80.

25. See Robert S. Summers, *The General Duty of Good Faith—Its Recognition and Conceptualization*, 67 Cornell L. Rev. 810, 818-21 (1982).

26. See Wayne D. Brazil, *Comparing Structures for the Delivery of ADR Services by Courts: Critical Values and Concerns*, 14 Ohio St. J. on Dis. Res. 715, 726 (1999); Carol J. King, *Burdening Access to Justice: The Cost of Divorce Mediation on the Cheap*, 73 St. John’s L. Rev. 375, 378 n. 11 (and authorities cited therein) (1999); Maureen E. Laflin, *Preserving the Integrity of Mediation Through the Adoption of Ethical Rules for Lawyer-Mediators*, 14 Notre Dame J.L., Ethics & Pub. Policy 479, 526 (2000); Peter Robinson, *Contending with Wolves in Sheep’s Clothing: A Cautiously Cooperative Approach to Mediation Advocacy*, 50 Baylor L. Rev. 963, 970-971 (1998); Sternlight, *supra* n. 13, at 291; but see e.g., Robert Baruch Bush & Joseph Folger, *The Promise of Mediation* 108-111 (1st ed., Jossey-Bass 1994) (arguing that “empowerment” and “recognition” are the sole legitimate concerns of mediation).

27. See *Graham v. Baker*, 447 N.W.2d 397, 400-401 (Iowa 1989).

mischievous.<sup>28</sup> In this way, even though “bad faith” is subjective, perhaps we can regulate negative behavior without second guessing the actor’s motivation.

## *B. Thesis, Antithesis & Synthesis—Three Views on Imposing Sanctions for Bad Faith*

### *1. “Pro-Sanctions” Advocates*

Proponents of enforceable good faith requirements contend that mediation just will not work absent the threat of sanctions for misconduct. They argue that litigants and attorneys accustomed to an adversarial “no holds barred” adjudicatory environment will not comport with mediation’s ideals of openness, disclosure and fair play without the coercive threat of sanctions.<sup>29</sup> Professor Kovach summarizes the perceived problem succinctly:

If good faith is not present, all we will be left with is a pro forma mediation, one more procedural task to be checked off of the long list of items to be covered in order to get to the trial. In fact, now, the term “pro forma mediation” is one that is heard when the parties, or more often their lawyers, arrive at mediation only because the court mandated them to do so. They unequivocally state that they have no intention of resolving the matter and really do not participate. These mediations are usually a waste of time for the

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28. See *infra* text accompanying nn. 238-271.

29. Kathleen A. Devine, *Alternative Dispute Resolution: Policies, Participation, and Proposals*, 11 Rev. Litig. 83, 108-09 (1991); Alan Kirtley, *The Mediation Privilege’s Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest*, 1995 J. Dis. Res. 1, 49-50 (1995); Kovach, *supra* n. 14, at 966; Kovach, *supra* n. 18, at 591; Kimberlee K. Kovach, *Lawyer Ethics in Mediation: Time for a Requirement of Good Faith*, Dispute Res. Mag. 9 (Winter 1997); John P. McCrory, *Mandated Mediation of Civil Cases in State Courts: A Litigant’s Perspective on Program Model Choices*, 14 Ohio St. J. on Dis. Res. 813, 848-49 (1999) (“Courts routinely sanction parties for failing to meet their obligations in other court proceedings, such as settlement conferences, and some courts and legislatures have adopted and enforced a good faith requirement for civil case mediation. For litigants who take the mediation mandate seriously and spend the time and resources necessary to fully participate, there is a legitimate expectation that their opponent will do the same. Program sponsors should honor and enforce that expectation. Sanctioning a party for failing to appear for mediation without cause should not raise serious issues. The difficult issues concern regulating the course of mediation and the quality of participation.”); Weston, *supra* n. 17, at 613-14 (“The rationale underlying the good-faith requirement is that the purpose of the ADR program and potential for parties to achieve the benefits of ADR can only be effectuated if the parties engage in the process in a meaningful manner. Without such a requirement, many litigants and attorneys may treat court-ordered ADR as one other hurdle in the path toward trial and simply a waste of time and money.”); Charles J. McPheeters, Student Author, *Leading Horses to Water: May Courts Which Have the Power to Order Attendance at Mediation Also Require Good-Faith Negotiation?*, 1992 J. Dis. Res. 377, (advocating that courts imply good-faith requirement if statutes do not provide for them); Matthew A. Tenerowicz, Student Author, *“Case Dismissed”—or is it? Sanctions for Failure to Participate in Court-Mandated ADR*, 13 Ohio St. J. on Dis. Res. 975, 998-1000 (1998) (favoring sanctions for bad faith in alternative dispute resolution).



mediator, a waste of time for the attorneys, unless it is used for free discovery or as trial preparation, and a waste of expense for the parties.<sup>30</sup>

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30. Kovach, *supra* n. 18, at 595; See McCrory, *supra* n. 29, at 847 (“A party who dutifully complies with the mandate and comes to mediation ready for serious negotiation should be justified in the belief that the other party will do the same. This sharpens the focus on issues regarding the responsibility of program sponsors to enforce the mandate by requiring a reasonable level of participation by all parties.”).

Kovach has proposed rules for good faith participation in mediation.<sup>31</sup> Her proposals are extensive.<sup>32</sup> Her proposed remedies are severe.<sup>33</sup> Professor Weston argues that parties to a private mediation who feel aggrieved by an opponent's lack of good faith possess a common law cause of action in contract and possibly tort.<sup>34</sup> "Every

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31. Kovach, *supra* n. 18, at 622-623 The following are Kovach's suggestions for standards of good faith:

**Rule 1.7 Good Faith in Mediation**

A lawyer representing a client in mediation shall participate in good faith.

(a) Prior to the mediation, the lawyer shall prepare by familiarizing herself with the matter, and discussing it with her client.

(b) At the mediation, the lawyer shall comply with all rules of court or statutes governing the mediation process, and counsel her client to do likewise.

(c) During the mediation, the lawyer shall not convey information that is intentionally misleading or false to the mediator or other participants.

**Statutory Basis for Good Faith Requirement**

**MEDIATION CODE 001.** All parties and their counsel shall participate in mediation in good faith.

....

002. "Good Faith" does not require the parties to settle the dispute. The proposals made at mediation, monetary or otherwise, in and of themselves do not constitute the presence or absence of good faith.

**003. Determination of Good Faith**

a. In court-annexed cases, the court shall make the final determination of whether good faith was present in the mediation.

b. Where a lawsuit has not been filed, the responsibility for finding a violation of the good faith duty rests upon the mediator, who shall use the elements of this statute and context of any contract between the parties as a basis for deliberation and decision-making.

004. Consequences for the Failure to Mediate in Good Faith If it is determined that a party or a representative of a party has failed the [sic] mediate in good faith, the following actions can be instituted at the discretion of the court or mediator:

a. The individual shall pay all fees, costs, and reasonable expenses incurred by the other participants.

b. The individual will pay the costs of another mediation.

c. The individual will be fined in an amount no greater than \$5,000.00.

d. The individual, at their [sic] own cost, will attend a seminar or other educational program on mediation, for a minimum or eight (8) hours.

*Id.* at 622-23.

32. *Id.*

33. *Id.*

34. Weston, *supra* n. 17, at 644.

contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."<sup>35</sup> Weston reasons that every voluntary mediation involves a contract, either oral or written.<sup>36</sup> In essence, the parties say to one another, "In consideration of you agreeing to meet and mediate this dispute, I agree to meet and mediate it as well."<sup>37</sup> The implied covenant of good faith would, according to Weston, attach to such a contract.<sup>38</sup> She theorizes that victims of particularly egregious bad faith may even be entitled to recover punitive damages.<sup>39</sup> Weston believes that sanctions will compensate parties injured by bad faith conduct for their time and inconvenience.<sup>40</sup>

Good faith issues also arise in areas such as insurance and labor law. Some authors suggest that case law from those fields can be instructive in the mediation context.<sup>41</sup> I, however, do not believe that such analogies help in the analysis of claims of bad faith in mediation. In labor law, good faith bargaining is required by law.<sup>42</sup> In insurance law, there exists an ascertainable standard for determining whether a carrier has acted in bad faith.<sup>43</sup>

## 2. "Anti-Sanctions" Advocates

Commentators opposed to sanctions recognize the problem of bad faith conduct, but believe that the cure is worse than the disease.<sup>44</sup> They see mediation's unique

35. Restatement (Second) of Contracts, § 205 (1981); U.C.C. § 1-102(3) (1999).

36. Weston, *supra* n. 17, at 644.

37. *Id.*

38. *Id.*

39. *Id.* ("Tort law may also provide recourse against egregious misconduct or violation of one's duties under theories of bad faith, intentional infliction of emotional distress, or fraud. Tort theory opens the potential for recovery for emotional distress and punitive damages.")

40. *Id.* at 643. ("Sanction or liability would present a 'deterrent' to abuse power imbalances, yet provide meaningful redress when such misconduct occurs."). Superficially, Professor Weston's suggestions seem reasonable. On closer examination, however, they present the same problems as traditional good faith analysis does—defining good faith, overcoming subjectivity, and chilling open participation in the mediation process.

41. See e.g. Kovach, *supra* n. 18, at 586-87; Sherman, *supra* n. 18, at 2102 n.100. *But see* Lande, *supra* n. 7, at 90-91.

42. See e.g. Michael C. Harper, *Leveling the Road from Borg-Warner to First National Maintenance: The Scope of Mandatory Bargaining*, 68 Va. L. Rev. 1447 (1982); Keith N. Hylton, *An Economic Theory of the Duty to Bargain*, 83 Geo. L.J. 19, 53 (1994); Frederick R. Post, *Do Compelling Economic Considerations Actually Exist Under the National Labor Relations Act?*, 25 Conn. L. Rev. 321, 322 (1993) ("Section 8(a)(5) of the NLRA requires employers to bargain in good faith with the employees' exclusive bargaining unit regarding wages, hours, and other terms and conditions of employment, which are considered mandatory bargaining subjects under section 8(d)."); Evelyn M. Tenenbaum, *The Application of Labor Relations and Discrimination Statutes to Lay Teachers at Religious Schools: The Establishment Clause and the Pretext Inquiry*, 64 Alb. L. Rev. 629, 645 (2000).

43. See e.g. David R. Anderson & John W. Dunfee, *No Harm, No Foul: Why a Bad Faith Claim Should Fail When an Insurer Pays the Excess Verdict*, 33 Tort & Ins. L.J. 1001 (1998); Roger M. Baron, *When Insurance Companies Do Bad Things: The Evolution of the "Bad Faith" Causes of Action in South Dakota*, 44 S.D. L. Rev. 471, 486 (1999); Karon O. Bowdre, *Enhanced Obligation of Good Faith: A Mine Field of Unanswered Questions After L & S Roofing Supply Co.*, 50 Ala. L. Rev. 755, 764-65 (1999).

44. See e.g. Ellen S. Pryor & Will Pryor, *Concurrent Mediation of Liability and Insurance Coverage Disputes*, 4 Conn. Ins. L.J. 485, 499 n. 42 (1997).

appeal as being its open and safe environment where disputants can freely and comfortably discuss their interests and views. Rules requiring good faith and threatening the imposition of sanctions, they contend, will hang over the parties like a Damoclean sword, inhibiting the process rather than abetting it. Alfini and McCabe write:

Imposition of a requirement to participate in good faith may also adversely affect the way the parties interact with each other and with the mediator. Parties may react cautiously and be "less likely to let down their litigation hair." This potential inhibition strikes at the core of mediation's attributes, the process's ability to offer participants an open and accepting environment in which to settle disputes. If parties are worried about the mediator's evaluation of their participation, the flow of information may be stemmed.<sup>45</sup>

Opponents of sanctions contend that such rules could be abused just as proponents claim mediation is abused.<sup>46</sup> They believe that sanctions will cause mediation to become one more adversarial proceeding.<sup>47</sup> This concern is exacerbated by the vagueness of the good faith standards that have been proposed.<sup>48</sup> Weston, for example, proposes:

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45. James J. Alfini & Catherine G. McCabe, *Mediating in the Shadow of the Courts: A Survey of the Emerging Case Law*, 54 Ark. L. Rev. 171, 180 (2001).

46. See e.g. Alfini & McCabe, *supra* n. 45, at 205-06 ("More subtle forms of coercion through vigorous judicial enforcement of a requirement to mediate in good faith threaten to erode the integrity of the mediation process."); Wayne D. Brazil, *Continuing the Conversation About the Current Status and the Future of ADR: A View From the Courts*, 2000 J. Dis. Res. 11, 30-33 (2000); Bullock & Gallagher, *supra* n. 10, at 970 ("It is not worth the risk posed to the mediation process to impose a legally enforceable good faith requirement in order to achieve a highly uncertain benefit. A much more accessible alternative—and one which may be equally effective in practice—is for the mediator to request from the parties a voluntary commitment that they will use their best efforts to settle the case and that they will engage in good faith negotiations toward that end at the beginning of the mediation session. Such an approach is much more in keeping with the realities of what brings parties to settlement and with mediation's role as a facilitator of the parties' self-determination."); David Hricik, *Reflections of a Trial Lawyer on the Symposium: Dialogue with the Devil in Me*, 38 S. Tex. L. Rev. 745, 748-749, 752 (1997); Lande, *supra* n. 7, at 98-99; Lande, *supra* n. 10 at 223 n.248; Sherman, *supra* n. 18, at 2089; Zylstra, *supra* n. 18, at 99 ("A more effective mandatory mediation process would be one in which good faith is expected, encouraged, and used by the mediator as a technique to overcome impasse, while not imposing vague mandates that are difficult to define, harder to enforce, and infringe upon mediator confidentiality and neutrality."); Caroline Harris Crowne, Student Author, *The Alternative Dispute Resolution Act of 1998: Implementing a New Paradigm of Justice*, 76 N.Y.U. L. Rev. 1768, 1802-03 (2001) ("It would not be a good idea, however, to compel parties to stay for a certain period of time or make a good-faith effort to resolve the dispute. If a disputant is strongly resistant to negotiation, the court should not compel the disputants to participate in mediation, so as not to jeopardize important benefits like efficiency and party control. Mediation requires genuine good faith to be effective; court-ordered good faith would make a farce of the process.")

47. Hricik, *supra* n. 46, at 753; Sherman, *supra* n. 18, at 2094.

48. A prime example is Kovach's proposed standards. She suggests, for instance, a requirement of "[p]articipation in meaningful discussions with the mediator and all other participants during the mediation." She then places the onus of determining compliance with either the court or the mediator. Kovach, *supra* n. 18, at 622-23.

Because a list of prohibited conduct cannot usually anticipate all violations, a test of good-faith participation should include an alternative totality-of-the-circumstances standard evidencing process abuse. Violations of the good-faith requirement can be measured objectively by a course of conduct abusive of the process, such as using the ADR process for the sole purpose of discovery or to outspend or harass the other side, and other coercion or pressure tactics.<sup>49</sup>

Critics of sanctions fret that such vagueness will lead to “satellite” litigation in which parties would fight endlessly over whether a violation has occurred.<sup>50</sup> Rather than being an alternative to litigation, mediation could become a catalyst for litigation.

The threat of hearings on whether a party acted in bad faith raises a possibility abhorrent to most mediation supporters: the mediator would likely be called to testify as to what happened. This threatens a fundamental premise of mediation—confidentiality.<sup>51</sup> Indeed, advocates of good faith standards acknowledge the inevitable erosion in standards of mediator confidentiality that their proposals would cause. Weston contends:

Confidentiality in ADR is popularly viewed as crucial to the effectiveness of ADR and to participants' willingness to use such procedures. The confidentiality accorded to ADR proceedings is designed to promote the party candor, disclosures, and compromise discussions needed to resolve disputes. After-the-fact allegations of ADR bad-faith conduct can undermine participants' trust in the confidentiality of ADR, create uncertainty, and potentially impair full use of the process. Yet the good-faith-participation requirements applied to party conduct in ADR proceedings are also designed to ensure process integrity and procedural fairness. The requirement is

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49. Weston, *supra* note 17, at 630.

50. See e.g. Hricik, *supra* n. 46, at 748-52; Lisa A. Lomax, *Alternative Dispute Resolution in Bankruptcy: Rule 9019 and Bankruptcy Mediation Programs*, 68 Am. Bankr. L.J. 55, 81 (1994) (“Furthermore, increased regulation of mediation encourages satellite litigation much like that which has occurred over rule 11 sanctions under the Federal Rules of Civil Procedure.”); Nelle, *supra* n. 15, at 301-02; Zylstra, *supra* n. 18, at 70.

51. See e.g. Ellen E. Deason, *Enforcing Mediated Settlement Agreements: Contract Law Collides with Confidentiality*, 35 U. Cal. Davis L. Rev. 33 (2001); Kevin Gibson, *Confidentiality in Mediation: A Moral Reassessment*, 1992 J. Dis. Res. 25, 29; Philip J. Harter, *Neither Cop nor Collection Agent: Encouraging Administrative Settlements by Ensuring Mediator Confidentiality*, 41 Admin. L. Rev. 315, 324 (1989); Jonathan M. Hyman, *The Model Mediator Confidentiality Rule: A Commentary*, 12 Seton Hall Legis. J. 17, 21 (1988); Pamela A. Kenra, *Hear no Evil, See no Evil, Speak no Evil: The Intolerable Conflict for Attorney-Mediators Between the Duty to Maintain Mediation Confidentiality and the Duty to Report Fellow Attorney Misconduct*, 1997 BYU L. Rev. 715, 722 (“Mediation would not be nearly as effective if the parties were not assured their discussions would remain private.”); Michael A. Perino, *Drafting Mediation Privileges: Lessons from the Civil Justice Reform Act*, 26 Seton Hall L. Rev. 1, 5 (1995); Cletus C. Hess, Student Author, *To Disclose or Not to Disclose; The Relationship Between Confidentiality in Mediation and the Model Rules of Professional Conduct*, 95 Dick. L. Rev. 601, 604 (1991); Colleen N. Kotyk, Student Author, *Tearing Down the House: Weakening the Foundation of Divorce Mediation Brick by Brick*, 6 Wm. & Mary Bill Rights J. 277, 288 (1997).

essentially meaningless if confidentiality privileges restrict the ability to report violations.<sup>52</sup>

### 3. "The Moderate Approach"

A few commentators have tried to bridge the abyss between opponents and advocates of good faith standards. Some have suggested a distinction between "objective" and "subjective" good faith.<sup>53</sup> Objective good faith involves matters such as compliance with procedural rules and orders, completion and exchange of pre-mediation forms, and physical presence at the mediation. Subjective good faith entails matters more closely linked to a party's intent. It might include bargaining in good faith or bringing representatives with "adequate" settlement authority. Dean Edward Sherman states:

I have no trouble with requirements imposed by rules or court orders as to reasonably objective conduct. These would include providing the other party and mediator with a short statement of 1) the issues in dispute, 2) the party's position as to them, 3) the relief sought (including particularized itemization of all damages claimed), and 4) any offers or counter-offers already made.<sup>54</sup>

Sherman speaks in terms of "the 'minimal meaningful participation' necessary to ensure the process is not futile."<sup>55</sup> I believe a more useful dichotomy exists between good faith in procedural matters (e.g., physical presence at the mediation, completion of pre-mediation paperwork), and good faith in substantive participation in the mediation (e. g., bargaining strategy, making or refraining from making offers, selection of representatives).<sup>56</sup>

### C. Case Law

Only a few dozen reported cases deal with allegations of bad faith in mediation.<sup>57</sup> Most claims of bad faith participation in mediation likely are brought in state trial courts since most litigation occurs there. Because such matters are interlocutory and involve relatively small sums, appeals are rare. The extant cases

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52. Weston, *supra* n. 17, at 633. *But see* Michael A. Perino, *Drafting Mediation Privileges: Lessons from the Civil Justice Reform Act*, 26 Seton Hall L. Rev. 1, 5 (1995) n. 48 ("To protect the role of the mediator as a neutral party, the courts should avoid all situations which might force the mediator to choose one party over the other.").

53. Edward Sherman, 'Good Faith' Participation in Mediation: Aspirational, Not Mandatory, *Disp. Resol. Mag.*, Winter 1997, at 16; David S. Winston, Student Author, *Participation Standards in Mandatory Mediation Statutes: "You Can Lead a Horse to Water . . ."*, 11 Ohio St. J. on Disp. Res. 187, 201 (1996).

54. Sherman, *supra* n. 53, at 16.

55. *Id.* Kovach discusses this minimal meaningful participation standard and acknowledges that "it is certainly worth additional deliberation and reflection." Kovach, *supra* n. 14, at 966. *See* Lande, *supra* n. 7 at 81, n. 350.

56. *See infra* nn. 65-132 and accompanying text.

57. *See infra* nn. 68-178 and accompanying text.

reveal an embryonic and unsettled jurisprudence. Results are inconsistent. Appeals frequently succeed.<sup>58</sup> Almost all reported cases involve court-ordered mediations.<sup>59</sup>

I think it is helpful to divide "bad faith" cases into four categories<sup>60</sup>—(1) those involving alleged bad faith failure to comply with procedural requirements of mediation<sup>61</sup> (purely procedural);<sup>62</sup> (2) those involving alleged failures to bargain in good faith<sup>63</sup> (purely substantive);<sup>64</sup> (3) those involving the failure to bring a representative with "sufficient" settlement authority;<sup>65</sup> (I would argue that these cases involve another form of subjective bad or good faith); and (4) those involving allegations of multiple forms of bad faith.<sup>66</sup> Generally, courts have been receptive to claims of bad faith in the first category. At the appellate level, at least, very few cases in the second category have resulted in sanctions. Courts are divided as to those in the third and fourth categories.

### 1. Procedural Compliance Cases

Cases dealing with purely procedural matters typically involve a failure to attend a court-ordered mediation or to complete required pre-mediation paperwork. In such cases, a party has allegedly violated a term of the court's referral order. The court presumably, therefore, possesses inherent power to enforce its order regardless

58. Lande *supra* note 7, at 85.

59. See *infra* nn. 67-177 and accompanying text.

60. Professor Lande describes five categories of bad faith cases. Lande, *supra* n. 7, at 82-83. The five categories include: (1) failure to attend mediation; 2) failure to send an organizational representative with sufficient authority to settle the case; 3) failure to submit pre-mediation memorandum and failure to bring experts as ordered; 4) failure to make a (suitable) offer, participate substantively, or attempt to resolve the case, failure to provide documentary evidence, making erroneous legal arguments, unilaterally withdrawing from mediation; and 5) failure to sign a mediated agreement, failure to release financial information, and "unspecified bad-faith conduct.")

61. See e.g. *Foxgate Homeowners' Assn. v. Bramalea California, Inc.*, 92 Cal. Rptr. 2d 916 (Cal. App. 2000), review granted, 999 P.2d 666 (Cal. 2000)(failure to bring expert witnesses to mediation as ordered by court); *Tobin v. Marriott Hotels, Inc.*, 683 A.2d 784 (Md. App. 1996) (failure to attend); *Roberts v. Rose*, 37 S.W.3d 31 (Tex. App. 2000)(attorney sanctioned for client failure to attend mediation); *Garcia v. Mireles*, 14 S.W.3d 839, 842-43 (Tex. App. 2000)(failure to attend mediation); *Schulz v. Nienhuis*, 448 N.W.2d 655 (Wis. 1989)(failure to attend).

62. See *supra* nn. 67-81 and accompanying text.

63. See e.g. *In re Bolden*, 719 A.2d 1253 (D.C. App. 1998); *Avril v. Civilmar*, 605 So. 2d 988 (Fla. Dist. App. 1992)("There is no requirement that a party even make an offer at mediation, let alone offer what the opposition wants to settle."); *Dept. of Transp. v. City of Atlanta*, 380 S.E.2d 265, 268 (Ga. 1989)("It is incongruous to say one may order another to mediate a dispute as that violates the first premise of mediation, that it is a voluntary process."); *Anderson v. Howley*, 429 N.W.2d 646 (Mich. Ct. App. 1988); *Prod. Credit Assn. v. Spring Water Dairy Farm, Inc.*, 407 N.W.2d 88, 91 (Minn. 1987); *Hansen v. Sullivan*, 886 S.W.2d 467 (Tex. App. 1994).

64. See *supra* nn. 82-116 and accompanying text.

65. See e.g. *Semiconductors, Inc. v. Golasa*, 525 So.2d 519 (Fla. Dist. App. 1988); *Keene Corp. v. Gardner*, 837 S.W.2d 224 (Tex. App. 1992).

66. See e.g. *Nick v. Morgan's Foods, Inc.*, 99 F. Supp.2d 1056 (Mo. App. E.D. 2000), *aff'd*, 270 F.3d 590 (8th Cir. 2001); *Francis v. Women's Obstetrics & Gynecology Group*, 144 F.R.D. 646 (W.D.N.Y. 1992); *Triad Mack Sales & Service, Inc. v. Clement Bros. Co.* 438 S.E.2d 485 (N.C. App. 1994) (failure to attend and lack of settlement authority).

of the existence of standards of good faith.<sup>67</sup> These cases often involve foolhardy, careless, or insolent behavior by a party or attorney.

*Roberts v. Rose*<sup>68</sup> typifies procedural compliance cases. Attorney Roberts represented A.D. Murr in a suit to collect a debt from former baseball player Pete Rose.<sup>69</sup> On January 21, 1999, the court ordered the parties to participate in a mediation.<sup>70</sup> Attorney Roberts apparently had a conflict on the date of the scheduled mediation.<sup>71</sup> He faxed a letter to the mediator telling of the conflict, but took no action to confirm that the mediation had been rescheduled.<sup>72</sup> Roberts did not mention the mediation to his client until some time after the mediation date.<sup>73</sup> The trial court originally fined both Roberts and his client for failing to attend the mediation.<sup>74</sup> After learning that Roberts' client had not been told of the mediation, the court ordered Roberts to pay the entire amount.<sup>75</sup> Roberts was also ordered to pay \$945.00 in fees to his client's new attorney.<sup>76</sup> On appeal, Roberts argued that the trial court erred in granting sanctions against him because there was neither an allegation or finding of bad faith against him.<sup>77</sup> The Texas Court of Appeals, however, found that Roberts had not been sanctioned for failure to mediate in good faith, but rather for failure to appear at the mediation.<sup>78</sup> "[W]hile parties cannot be forced to peaceably resolve their disputes through alternative dispute resolution procedures, a trial court can compel the parties to sit down with each other."<sup>79</sup> The appellate court concluded:

The only evidence of bad faith is not in Murr's failure to appear at the mediation . . . but in Roberts's deliberate acts of bad faith throughout his representation of Murr. Roberts's habitual failure to keep his client informed during the litigation, ultimately amounting to a missed mediation session resulting in sanctions against Murr, indicates bad faith on the part of Roberts.<sup>80</sup>

The Court of Appeals affirmed the trial court's imposition of sanctions.<sup>81</sup>

## 2. Failure to Bargain Cases

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67. See generally *Peacock v. Thomas*, 516 U.S. 349 (1996); *Shillitani v. United States*, 384 U.S. 364 (1966).

68. *Roberts v. Rose*, 37 S.W.3d 31 (Tex. App. 2000).

69. *Id.* at 32.

70. *Id.* at 33.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 34.

78. *Id.*

79. *Id.*, citing *Decker v. Lindsay*, 824 S.W.2d 247, 250 (Tex. App. 1992).

80. *Id.*

81. *Id.* at 35.



Cases in which a party is accused of failing to bargain in good faith entail the highest degree of subjective judgment on the part of courts. A party does not bargain in bad faith if he or she offers a settlement consistent with the fair value of the case. To determine that a party has not bargained in good faith, therefore, the court must form an opinion as to the ultimate value of the case, and then determine that the party's position was so obviously inconsistent with that value as to exceed the limits of reasonableness. Later in this paper, I will argue that implicit in any such finding of bad faith is a holding that a party no longer has a right to put the other party to its proof at trial.

In *Texas Department of Transportation v. Pirtle*,<sup>82</sup> Defendant Texas Department of Transportation ("DOT") attended the court-ordered mediation "but refused to participate."<sup>83</sup> The appellate decision does not identify who attended on behalf of the DOT. The Department had a policy of not settling disputed liability claims.<sup>84</sup> The case was eventually tried and the jury found for the DOT.<sup>85</sup> Even though the defendant prevailed, the trial court assessed all costs including the mediator's fees and attorney's fees against the defendant.<sup>86</sup> The trial judge explained this ruling by stating, "[T]hey pretty much told me from the beginning they weren't going to mediate . . . ."<sup>87</sup> The Texas Court of Appeals affirmed the assessment of costs. In dicta, the appellate court suggested that, had the defendant objected to mediation, a different result might have ensued.<sup>88</sup>

*Graham v. Baker*<sup>89</sup> involved a farmer/creditor mediation. Iowa law required that an agricultural creditor mediate with the debtor before commencing a foreclosure action.<sup>90</sup> The creditors retained Attorney George Flagg to bring suit against the debtors.<sup>91</sup> Flagg initially served a notice of forfeiture in violation of the mediation statute but later withdrew that notice.<sup>92</sup> A mediation then occurred.<sup>93</sup> The Iowa Supreme Court described Attorney Flagg's conduct in the mediation:

At that session, Flagg refused to cooperate with the mediator, denying the Henrys any opportunity to put forward their proposals for resolving the situation, and demanding that he be given a mediation release. It was clear that Flagg was hostile to the Henrys, the mediator, and the mediation process.

82. *Tex. Dept. of Transp. v. Pirtle*, 977 S.W.2d 657 (Tex. App. 1998).

83. *Id.* at 658.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* See *Tex. Parks & Wildlife Dept. v. Davis*, 988 S.W.2d 370 (Tex. App. 1999) (defendant objected to mediation and was, therefore, relieved of good faith obligation). If the defendant in *Pirtle* told the judge from the beginning that it would not mediate, I do not understand why a formal objection would have been necessary. To the extent that bad faith involves acting deceptively, no such bad faith appears to have been present. I also note that the defendant had no assurance that an objection to mediation would have been sustained. The *Pirtle* decision evinces the need for clear standards of conduct in mediations.

89. *Graham v. Baker*, 447 N.W.2d 397 (Iowa 1989).

90. Iowa Code § 654A.6 (1987).

91. *Graham*, 447 N.W.2d at 398.

92. *Id.*

93. *Id.*

He issued an ultimatum that the Henrys either sell the land within thirty days and remit the balance due on the contract to the Grahams or acquiesce in its forfeiture. As the meeting went on, Flagg became increasingly more agitated and belligerent, seizing upon statements made by the Henrys' attorney to accuse them of bad faith in failing to pay and continuing to demand that his client be given a mediation release.<sup>94</sup>

The mediation service, citing Flagg's behavior, refused to issue a mediation release.<sup>95</sup> Instead, the agency granted an additional thirty days to conduct another mediation.<sup>96</sup> Flagg refused to mediate further, and again served a notice of forfeiture.<sup>97</sup> The defendants sought a stay of the forfeiture proceeding based on Flagg's failure to obtain a mediation release.<sup>98</sup> The trial court initially granted a stay, but subsequently ordered that a mediation release be issued.<sup>99</sup> On appeal, the Iowa Supreme Court held that the statutory requirement that a creditor "participate" in a mediation was satisfied by Flagg and his clients attending the mediation.<sup>100</sup> The court observed:

Flagg's behavior which ranged between acrimony and truculency precluded any beneficial result to the parties from the mediation process. It has cost his clients considerable time and expense. Nevertheless, his inappropriate behavior is not determinative. We find that Flagg's presence at the mediation meeting satisfied the minimal participation required by the statute.<sup>101</sup>

In *Graham*, the plaintiff had to participate in mediation in order to proceed with foreclosure.<sup>102</sup> In *Pirtle*, the defendant had the option to object to mediation but failed to do so.<sup>103</sup> Does this difference adequately distinguish the decisions? The *Pirtle* court held that mere attendance did not satisfy a party's obligation to mediate in good faith.<sup>104</sup> *Graham* says that appearance at the mediation suffices regardless of a party's conduct during mediation.<sup>105</sup> Certainly *Graham* involved more offensive and boorish behavior than did *Pirtle*. I conclude that the cases are irreconcilable in their views of a party's obligations in mediation.

In *Avril v. Civilmar*<sup>106</sup> the plaintiff requested mandatory mediation just over a month after serving the lawsuit.<sup>107</sup> The mediation was held less than three months

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94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 401.

101. *Id.*

102. *Graham*, 447 N.W.2d at 398.

103. *Pirtle*, 877 S.W.2d at 658.

104. *Id.*

105. *Graham*, 447 N.W.2d at 401.

106. 605 S.2d 988 (Fla. Dist. App. 1992).

107. *Id.* at 989.

after suit was filed.<sup>108</sup> Prior to mediation, the injured plaintiff had been evaluated by a chiropractor who assigned a small impairment rating.<sup>109</sup> The defendant had neither obtained an independent medical examination nor conducted discovery.<sup>110</sup> The defendant's insurance carrier apparently believed that it had a defense to liability.<sup>111</sup>

At the mediation, the carrier offered \$1,000.00 to settle the case.<sup>112</sup> Following mediation, the plaintiffs moved for sanctions, claiming the defendant had acted in bad faith.<sup>113</sup> The trial court ordered the defendant to pay sanctions of \$1,037.50 to the plaintiffs within ten days.<sup>114</sup> In a brief opinion, the Florida Court of Appeals reversed the trial court's award of sanctions, holding that:

At bottom, plaintiff's only basis for sanctions is merely that defendants were unwilling to make an offer of settlement satisfactory to him. The mediation statutes, however, do not require that parties actually settle cases. Section 44.1011(2), Florida Statutes (1991), explains that mediation: "is an informal and nonadversarial process with the objective of helping the disputing parties reach a mutually acceptable and voluntary agreement. In mediation, decisionmaking authority rests with the parties." It is clearly not the intent to force parties to settle cases they want to submit to trial before a jury. There is no requirement that a party even make an offer at mediation, let alone offer what the opposition wants to settle.<sup>115</sup>

The reported decision does not contain enough information to understand the trial court's reasons for imposing sanctions. The judge may have believed that defense counsel was dilatory in failing to conduct discovery more promptly.<sup>116</sup> If, however, the sole basis for the assessment of sanctions was an inadequate offer at mediation, the court must have formulated an opinion of the fair settlement value of the case. How can a judge predict, months or years in advance, the result of a trial. Litigation is rife with uncertainty. Furthermore, non-economic interests play an important role in settlement strategy. The defendant may have wanted to use this case to establish a precedential point of law. It may have believed, but could not yet prove, that the plaintiff's claim was fraudulent. If a party does not have an absolute right to offer as little as it chooses during mediation, then an important element of party autonomy will be lost. Parties should not have to defend a decision not to settle a claim before an appellate court.

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108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 989, n.1.

112. *Id.* at 989.

113. *Id.*

114. *Id.* at 989.

115. *Id.* at 989-90.

116. The Court of Appeals, however, found no basis for charging the defense with foot dragging. *Id.* at 990.

### 3. *Inadequate Authority Cases*

In several reported cases, sanctions were requested because an institutional party's representative at the mediation possessed allegedly inadequate settlement authority.<sup>117</sup> I contend that these cases constitute a sub-species of the "failure to bargain in good faith" cases.<sup>118</sup> Whether a representative's authority is adequate turns on the actual value of the case. In failure to bargain cases, the court must compare its view of the case's value to the party's best offer.<sup>119</sup> In inadequate authority cases, it must compare the amount of authority the party's representative possessed. If the representative possessed no authority to settle, the case resembles *Pirtle*<sup>120</sup> and *Graham*.<sup>121</sup>

In *Keene v. Gardner*,<sup>122</sup> the trial court ordered the parties to mediate an asbestos case after the matter had been submitted to the jury, but before a verdict was reached.<sup>123</sup> The court directed that, "an executive officer from each corporate defendant, with authority to negotiate a settlement, attend the mediation."<sup>124</sup> Keene advised the court that only its president had such authority and that he could not be in Dallas in time for the mediation.<sup>125</sup> The court maintained that someone with settlement power would have to attend.<sup>126</sup> Keene sent a representative to the mediation but that representative had no authority to settle.<sup>127</sup> The mediator then excused Keene from the mediation.<sup>128</sup> The plaintiffs subsequently moved for sanctions against Keene.<sup>129</sup> The court ordered Keene to pay all costs of mediation.<sup>130</sup> The Court of Appeals reversed the award of sanctions because Keene was not allowed ten days to object to the order to mediate.<sup>131</sup>

*Keene* differs from *Pirtle* in that the party accused of bad faith did object to the mediation. That distinction aside, the cases are nearly identical. In each instance, the party charged with bad faith attended the court-ordered mediation, but its representative was not authorized to make a settlement offer. Such similarities seem to support my premise that "inadequate authority" cases are closely related to "failure to bargain" cases and should be resolved in the same fashion.<sup>132</sup>

In *Semiconductors, Inc. v. Golasa*,<sup>133</sup> the corporate defendant in a wrongful discharge claim attended a mediation.<sup>134</sup> The representative present, however, had

117. See *supra* n. 66.

118. See *supra* nn. 84-116 and accompanying text.

119. See *supra* n. 84 and accompanying text.

120. See *supra* nn. 84-88 and accompanying text.

121. See *supra* nn. 89-101 and accompanying text.

122. 837 S.W.2d 224 (Tex. App. 1992).

123. *Id.* at 231.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 232.

132. See *supra* text accompanying n. 118.

133. 525 S.2d 519 (Fla. Dist. App. 1988).

134. *Id.* at 519.

no authority to make any settlement offer, because the defendant believed that it had no liability to the plaintiff.<sup>135</sup> The trial court awarded sanctions against the defendant for failing to produce a representative with settlement authority.<sup>136</sup> The Florida Court of Appeals affirmed per curiam.<sup>137</sup> In dissent, Judge Anstead wrote:

Few cases will fail to benefit in some way from . . . a mediation experience and many disputes will be resolved at that stage thereby benefitting both the parties, who should be much happier with an agreed resolution than a court-imposed one, and an overtaxed court system. However, mediation is not designed to *force* a settlement in any case, especially those cases where the lines are so clearly and solidly drawn that the parties, in absolute good faith, simply take diametrically opposed positions that ultimately require a court-imposed resolution after a trial on the merits. In the routine case involving the ultimate terms of a divorce or the amount of damages in a personal injury action, both sides have a substantial range of resolutions that they would probably find satisfactory. That's why mediation will work well in those cases. But that will not be true in all cases, and the parties cannot be sanctioned in those few instances for not agreeing to some settlement. If they can be sanctioned, it means mediation can be used to *force* a settlement and the words force and settlement simply do not fit together any more than mediation can be likened to a court-imposed resolution after a trial.<sup>138</sup>

Would the result have changed if the defendant's representative at the mediation had possessed unlimited settlement authority but had chosen not to make any offer? The pitfalls of such a distinction seem obvious. Parties would have powerful incentives to misrepresent the authority of their representatives to the mediator and to the other parties. If the result would not change, we must be looking at another case of sanctions for not bargaining in "good faith."

#### 4. Hybrid Bad Faith Cases

In many cases, a party stands accused of multiple forms of bad faith. *Nick v. Morgan's Foods, Inc.*,<sup>139</sup> for example, reads like a law school exam on bad faith in mediation. Gee Gee Nick sued her employer, alleging sexual harassment and retaliation.<sup>140</sup> The court referred the case to mediation.<sup>141</sup> The order of referral directed the parties to provide a memorandum to the mediator at least seven days before the mediation.<sup>142</sup> The order also directed that, "All parties, counsel of record, and corporate representatives or claims professionals having authority to settle

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135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 520 (Emphasis in original).

139. 99 F. Supp.2d 1056 (E.D. Mo. 2000) *aff'd* 270 F.3d 590 (8th Cir. 2001).

140. *Id.* at 1057.

141. *Id.*

142. *Id.*

claims shall attend all mediation conferences and participate in good faith.”<sup>143</sup> The defendant failed to provide the required memorandum.<sup>144</sup>

At the mediation, Ms. Nick made two settlement offers.<sup>145</sup> The defendant did not make any offers.<sup>146</sup> As a result of the defendant’s conduct, the court entered an order to show cause<sup>147</sup> and Nick moved for sanctions.<sup>148</sup> In its resistance, Defendant claimed that the court’s referral order was “merely a ‘guideline’ suggesting a manner in which [the parties] might participate in the ADR process.”<sup>149</sup> Remarkably, “Morgan’s Foods admitted that it made a calculated strategic decision not to comply with the ‘guideline,’ because Morgan’s Foods felt compliance would be a waste of time.”<sup>150</sup> At the hearing on sanctions, Defendant’s counsel advised the court that the representative who attended the mediation had only \$500.00 in settlement authority.<sup>151</sup> Defense counsel also took full responsibility for the decision not to provide the required memorandum.<sup>152</sup> The court found that Defendant had failed to mediate in good faith and awarded sanctions.<sup>153</sup> Morgan’s Foods was required to pay the costs of the mediation and Nick’s expenses in preparing for and attending the mediation.<sup>154</sup>

The defendant filed a “Motion for Reconsideration and Vacation of the Court’s Order Granting Plaintiff’s Motion for Sanctions.”<sup>155</sup> This motion came to the displeasure of the court. The judge affirmed his prior award of sanctions, and imposed additional sanctions as a result of “the frivolous nature of this motion and Morgan’s Foods’ vexatious multiplication of these proceedings.”<sup>156</sup>

The court found that Morgan’s Foods had been guilty of bad faith both in failing to provide the required memorandum<sup>157</sup> (procedural bad faith) and in failing to send a representative with adequate settlement authority to the mediation.<sup>158</sup> With respect to preparation of the memorandum, the court held:

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143. *Id.* at 1058.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* at 1059.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* In addition, the court ordered defense counsel to obtain a copy of the transcript of the hearing on sanctions and to certify to the court that his client had read that transcript. *Id.*

155. *Id.* As one of the grounds for sustaining this motion, Defendant alleged that, “The Court’s order is really just a product of ‘understandable frustration [by the Court] that cases like this one which the Plaintiff foists upon this Court clog the Court’s docket.’” (bracketed language in original). *Id.* A more ill-advised argument would be difficult to imagine. In responding to this claim, the court stated, “It is unfortunate that when confronted with its willful violation of the Court’s Order, Morgan’s Foods refused to acknowledge the failings of its own behavior and instead attacked the Court. Admittedly the Court felt frustration at the way this case was handled, but that frustration stemmed completely from Morgan’s Foods’ flagrant and willful disregard of the Court’s August 2, 1999 Order referring the matter to ADR.” *Id.* at 1064.

156. *Id.* at 1057.

157. *Id.*

158. *Id.*

Morgan's Foods' contention that a mediation memorandum is a waste of time is simply wrong. The memorandum would have permitted the neutral to prepare for the ADR conference. At a minimum the memorandum might have alerted the neutral that Morgan's Foods' corporate representative was not an appropriate participant in the ADR conference. It is even possible that Morgan's Foods' memorandum would have compelled the neutral to delay or even cancel the conference.<sup>159</sup>

The court concluded that it could enforce the order to provide a memorandum by virtue of its "inherent authority."<sup>160</sup>

As to the question of settlement authority, the court first noted that good faith does not require settlement. It concluded, however, that "the rules and orders governing ADR are designed to prevent abuse of the opponent, which can and does occur when one side does not participate in good faith."<sup>161</sup> Noting that Morgan's Foods had violated the referral order by failing to have a representative present with adequate settlement authority, the court offered an extensive discussion of the importance of decision makers being physically present for the mediation:

During the ADR conference, all parties have the opportunity to argue their respective positions. In the Court's experience, this is often the first time that parties, especially corporate representatives, hear about the difficulties they will face at trial. As a practical matter this may also be the first time that firmly held positions may be open to change. For ADR to work, the corporate representative must have the authority and discretion to change her opinion in light of the statements and arguments made by the neutral and opposing party.

Meaningful negotiations cannot occur if the only person with authority to actually change their mind and negotiate is not present. Availability by telephone is insufficient because the absent decision-maker does not have the full benefit of the ADR proceedings, the opposing party's arguments, and the neutral's input. The absent decision-maker needs to be present and hear first hand the good facts *and* the bad facts about their case. Instead, the absent decision-maker learns only what his or her attorney chooses to relate over the phone. This can be expected to be largely a recitation of what has been conveyed in previous discussions. Even when the attorney attempts to summarize the strengths of the other side's position, there are problems. First, the attorney has a credibility problem: the absent decision-maker wants to know why the attorney's confident opinion expressed earlier has now eroded. Second, the new information most likely is too much to absorb and analyze in a matter of minutes. Under this dynamic it becomes all too easy for the

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159. *Id.* at 1062.

160. *Id.* at 1059-60.

161. *Id.* at 1061.

absent decision-maker to reject the attorney's new advice, reject the new information, and reject any effort to engage in meaningful negotiations.<sup>162</sup>

The court discussed abuse of mediation through its use as a covert discovery mechanism.<sup>163</sup> It noted the economic hardship that befalls the party who does participate in good faith.<sup>164</sup>

The representative who attended on behalf of Morgan's Foods had \$500.00 settlement authority. The court did not explain why that authority was inadequate. Would the court have reached a different result had a representative with greater authority attended but still not made an offer? Does it matter that the defendant did not actively resist mediating the case?

Morgan's Foods appealed the trial court's award.<sup>165</sup> The United States Court of Appeals for the Eighth Circuit, employing an "abuse of discretion" standard,<sup>166</sup> affirmed the trial court's order. The appellate decision contains little discussion of standards of good faith. The Court of Appeals notes that defense counsel failed to provide the required memorandum, and that Morgan's representative at mediation possessed only \$500.00 settlement authority.<sup>167</sup> The court did not explain why these facts compel a finding of bad faith.

*Francis v. Women's Obstetrics & Gynecology Group, P.C.*<sup>168</sup> resembles *Nick* in that the defendant failed to provide a required memorandum prior to the mediation, and then appeared at mediation without satisfactory settlement authority.<sup>169</sup> The court ordered the parties to mediate during the Monroe County Bar Association's "Settlement Week."<sup>170</sup> Defendant's attorney wrote to the court asking that the case not be mediated during settlement week.<sup>171</sup> The attorney indicated that Defendant did not know the "scope of plaintiff's claims."<sup>172</sup> The court denied defendant's request and ordered that the mediation occur during Settlement Week.<sup>173</sup>

Defendant's attorney did attend the mediation but declined to make any offer because of unsettled insurance coverage issues.<sup>174</sup> The plaintiff moved for sanctions.<sup>175</sup> In granting the plaintiff's motion, the court analogized mediations to settlement conferences:

But the authority to direct parties to attend a settlement conference would be meaningless if parties were under no obligation to be prepared to participate in the conference, for "[t]he success of pretrial settlement conferences

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162. *Id.* at 1062-63.

163. *Id.* at 1063.

164. *Id.*

165. 270 F.3d 590 (8th Cir. 2001).

166. *Id.* at 594.

167. *Id.* at 596.

168. 144 F.R.D. 646 (W.D.N.Y. 1992).

169. *Id.* at 647.

170. *Id.*

171. *Id.*

172. *Id.* at 648.

173. *Id.*

174. *Id.*

175. *Id.*



depends primarily upon the preparedness of the participants. If the participants are unprepared, these conferences, rather than assisting in the resolution and management of the case, are simply cathartic exercises” (citation omitted). [Fed. R. Civ. P.] 16(f) specifically authorizes the court to sanction a party or its attorney if they attend a pretrial conference substantially unprepared. “Thus, parties or their attorneys must evaluate discovered facts and intelligently analyze legal issues before the start of pretrial conferences.”<sup>176</sup>

The court was upset that defense counsel had not raised the question of insurance coverage prior to the mediation even though that question may have arisen as a result of the amended complaint filed on the day of the mediation.<sup>177</sup> The fact that the defendant requested a later date for mediation did not suffice to forestall sanctions. I wonder whether a more savvy defendant might have avoided a finding of bad faith. Would the court have sanctioned Defendant had its attorney and representative provided the required memorandum, appeared at mediation, and then declined to make an offer based on a purported belief that Defendant had no liability to Plaintiff?

If judges and academicians are unable to achieve a uniform definition of good faith or appropriate repercussions for an act of bad faith, how are mediation participants to avoid sanctions? How should courts address the inevitable tension between the desire to promote a productive mediation process and the need to preserve party autonomy?

In the next part of this article, I discuss the need for good faith participation in mediation. I then describe the dangers of over-zealous efforts to ensure “good” behavior in mediations. I then try to differentiate the types of bad faith that can and that cannot be effectively regulated.

### III. EVALUATION OF GOOD FAITH REQUIREMENTS

The question of good faith in mediation turns on balancing two reasonable postulates. Sincere collaborative dispute resolution—the undeniably commendable mantra of proponents of sanctions—requires cooperation from all participants. Opponents of sanctions respond that mediation will never be an effective tool if parties’ behavior is coerced or second guessed.

I believe that we can regulate some of the behavior of mediation participants without impinging their autonomy. In this Part, I examine the consequences of bad faith conduct. I then consider the dangers of employing coercive sanctions to regulate behavior beyond the merely procedural.

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176. *Id.* at 647.

177. *Id.* at 648.

### A. *The Need for Good Faith in Mediation*

Earlier in this paper I discussed the impact of bad faith on mediation participants.<sup>178</sup> The threat is real—not hypothetical. Studies of party satisfaction with mediation indicate either slightly more<sup>179</sup> or slightly less<sup>180</sup> satisfaction than exists with adjudication. Given the advantages of mediation, why isn't the percentage of satisfied parties even higher? I speculate that many of the disillusioned mediation participants experienced bad faith conduct. Certainly decreasing bad faith should result in increasing party satisfaction.

Most forms of bad faith related to procedural matters can be regulated by courts employing their inherent power to enforce orders. In the case of voluntary mediation, acts of objective bad faith might violate the covenant of good faith and fair dealing implied in the contract to mediate. The fact that remedies already exist does not, however, vitiate the need to clearly identify what "bad faith" behavior is proscribed. Mediation participants should know in advance what conduct is sanctionable. In *Pirtle*, *Avril*, *Semiconductors*, and *Francis*, the parties charged with bad faith all complied with the objective terms of the mediation referral orders.<sup>181</sup> In each case, however, the referring court awarded sanctions. Under very similar circumstances, including the appellate decision in *Avril*, courts have declined to grant sanctions.<sup>182</sup> Parties, I think, need greater certainty. Furthermore, for mediation to gain widespread acceptance, participants who invest emotionally and financially in the process should be rewarded with fair and honest treatment from all others involved. A clear statement of the type of objectively measurable behavior expected in mediations would further these ends. By contrast, I believe that efforts to regulate bargaining strategies and other substantive decision-making behaviors of participants will not.

### B. *The Dark Side of ADR: The Threat Implicit in Standards of Subjective Good Faith*

The potential collateral damage that results from overbroad attempts to punish bad faith includes loss of confidentiality, satellite litigation over whether bad faith has occurred, inhibition of free expression, and loss of party autonomy—all results antithetical to the goals of ADR. Mediation, ideally, permits disputants to come

178. See *supra* n. 2 and accompanying text.

179. See e.g. Jeanne M. Brett et al., *The Effectiveness of Mediation: An Independent Analysis of Cases Handled by Four Major Service Providers*, 12 *Negot. J.* 259 (1996); Chris Guthrie & James Levin, *A "Party Satisfaction" Perspective on a Comprehensive Mediation Statute*, 13 *Ohio St. J. of Disp. Res.* 885, 890 n. 10, 891 n. 19 (1998); John Lande, *Failing Faith in Litigation? A Survey of Business Lawyers' and Executives' Opinions*, 3 *Harv. Negot. L. Rev.* 1 (1998).

180. See, e.g., Deborah R. Hensler, *ADR Research at the Crossroads*, 2000 *J. Disp. Resol.* 71 (2000); Deborah R. Hensler, *A Glass Half Full, a Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 *Tex. L. Rev.* 1587 (1995).

181. In *Francis*, the defendant provided the required memorandum at the time of the mediation rather than seven days earlier as required by the court's referral order. *Francis*, 144 F.R.D. at 648. The decision does not indicate how, if at all, the plaintiff or the mediator was harmed by this delay.

182. See e.g. *Hunt v. Woods*, 74 F.3d 1240 (6th Cir. 1996); *Hill v. Imperial Sav.*, 1992 *Lexis* 22185 (W.D. Tex. 1992)

together, without fear of reprisal, and share their interests and concerns. Together, they explore ways in which a *mutually* satisfying resolution can be fashioned. Through this kinder and gentler form of dispute resolution, parties are empowered to control their destinies rather than surrendering dominion to the courts. Cooperation, collaboration, confidentiality, trust, and voluntariness are aspirations of mediation. If parties must mediate under a microscope, these ideals will not be achieved. In fact, excessive judicial intrusion into the mediation process threatens fundamental rights of the parties.

### *Loss of Confidentiality*

Even advocates of far-reaching good faith standards acknowledge the importance of confidentiality to the success of mediation.<sup>183</sup> To be effective, a mediator must have the trust of all participants. Particularly in private caucuses, mediators encourage parties to discuss the strengths and weaknesses of their case openly. Disputants need to hear, "Anything you say can't and won't be used against you in a court of law." This reverse Miranda warning<sup>184</sup> does much to set the stage for collaborative conflict resolution.

Zealous enforcement of good faith standards in substantive areas of mediation imperils the confidentiality of the process. Many "good faith" statutes<sup>185</sup> and court rules<sup>186</sup> require mediators to report whether parties participated in good faith.<sup>187</sup> A negative report from the mediator will presumably cause a party to face the wrath of, if not sanctions from, the court. In the event of a hearing on bad faith sanctions, the mediator will likely be required to testify. Even if it were somehow possible to confine the mediator's testimony to a factual recitation of the behaviors underlying the claim of bad faith,<sup>188</sup> the parties' trust in the confidentiality of mediation would be shattered. The mediator's opening statement might just as well be, "Mediation is a confidential proceeding—unless you do something that displeases me, the other party or the court."

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183. See *supra* n. 51 and accompanying text.

184. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

185. See e.g. Zylstra, *supra* n. 18 at 85, n. 61.

186. See e.g. Cassandra E. Joseph, *The Scope of Mediator Immunity: When Mediators Can Invoke Absolute Immunity*, 12 Ohio St. J. on Disp. Res. 629, 668 (1997). See generally Brazil, *supra* n. 46 at 32:

Mediators who know that the law requires the parties to participate in "good faith" are more likely to worry about whether they have a duty to report, on their own initiative, perceived violations of that duty. They also are more likely to fear that they will be pressed by a court or a party to divulge their private views on these matters, or to give testimony in a proceeding to determine whether sanctions should be imposed. Apprehension about such duties or pressures could create counter-productive distractions for mediators who are trying to build relationships and to help the parties during a mediation, and even could discourage some good mediators from agreeing to serve.

187. Apart from the confidentiality implications, requiring such a report forces the mediator to make subjective judgments about the parties and their case. Such judgments are inconsistent with the mediator's role as a third party *neutral*. See e.g. Lande, *supra* n. 7 at 107; Weston, *supra* n. 17 at 639. Even if the mediator is not called to testify, enforcing subjective standards of good faith will require some form of evidence concerning conduct during the mediation. Even if that evidence comes from the other party or attorney, the confidentiality of the process will still be breached.

188. See Kovach, *supra* n. 18 at 602.

*Satellite Litigation*

Mediation, widely and properly used, should result in a less litigious culture. In a well-intentioned but naive effort to make mediation more effective, overly broad proposals for good faith requirements threaten exactly the opposite result. Rather than resolving pending litigation, a mediation that results in charges of bad faith may lead to additional legal proceedings—hearings on imposition of sanctions. Courts neither achieve judicial economy nor decrease adversariness when they condone bad faith battles.

Professor Lande<sup>189</sup> discusses parallels between good faith requirements and Rule 11 of the Federal Rules of Civil Procedure.<sup>190</sup> From 1983 to 1993, Rule 11 permitted sanctions against attorneys who signed pleadings not well grounded in fact and law.<sup>191</sup> The authors of the 1983 amendments to Rule 11 hoped to decrease frivolous filings. Instead, their work produced pandemic litigation.<sup>192</sup> Lawyers all but trampled one another racing to the courthouse to charge their siblings at the bar with misconduct.<sup>193</sup> In 1993, Rule 11 was amended to soften the consequences of alleged violations.<sup>194</sup> Ten years of the previous rule, however, left a bitter taste.<sup>195</sup> Professor Lande argues persuasively that permitting sanctions for bad faith in mediation would produce a similar experience.<sup>196</sup>

Ironically, given mediation's mission of promoting amicable settlement,<sup>197</sup> placing good faith requirements on bargaining strategies may provide a disincentive to settle. If a contentious party or attorney senses an opportunity to gain strategic advantage from another's faux pas, he or she may re-direct attention away from negotiation to pursuit of a bad faith claim. By the same token, the other party may react with defensiveness. Fending off bad faith charges, rather than working collaboratively, will become that party's primary focus. While rules that require a party to comply with reasonable mediation procedures should not have a chilling effect on the process, a court's scrutiny of bargaining decisions will. This should represent a significant concern for mediation policymakers.

*Repression of Expression*

Parties should take part in mediations openly and honestly. The threat of sanctions inhibits both openness and honesty. In more than one case, an attorney has been sanctioned because the court believed that he or she was inadequately prepared for the mediation. Fear of being charged with bad faith for not knowing every detail of the case may now inhibit lawyers from asking questions of other parties that

189. Lande, *supra* n. 7 at 100.

190. Fed. R. Civ. P. 11 (1983).

191. Lande, *supra* n. 7 at 100.

192. Georgene Vairo, *Rule 11 and The Profession*, 67 *Fordham L. Rev.* 589, 598 (1998).

193. *Id.*

194. Lande, *supra* n. 7 at 101, (citing Gregory P. Joseph, *Sanctions: The Federal Law of Litigation Abuse 12-36* (2d. Ed. 1994)).

195. Lande, *supra* n. 7 at 100-01, (citing Vairo, *supra* n. 205 at 626).

196. Lande, *supra* n. 7 at 101.

197. *See supra* n. 10 and accompanying text.

would lead to greater understanding for everyone. A corporate representative may avoid disclosing that his or her company has decided that it has no liability and intends to defend the case. Instead, he or she might make insignificant offers to avoid bad faith charges. A pointless mediation may occur simply because the defendant fears revealing its true position.

Excessively broad good faith requirements imperil the highest aspirations of mediation. In a genuinely collaborative mediation, advocates work together even though their interests and those of their clients differ. Cooperation of this sort requires a certain mindset, one that seeks a good solution for all parties rather than individual triumph. Potential sanctions make such a mindset much more difficult to achieve. As parties contemplate statements of interest or settlement offers, their attention will inevitably be drawn to ways to avoid sanctions. Advocates will circle one another warily, looking for opportunities, and looking out for vulnerability. Problem solving necessarily will take a back seat. Mediating in this sort of environment would challenge even the most dedicated peacemaker.<sup>198</sup>

### *Loss of Party Autonomy*

For many, alternative dispute resolution's (and especially mediation's) greatest appeal lies in the voluntary nature of the process.<sup>199</sup> ADR permits parties to wrest control of the case outcome from the court. Requiring parties to behave in a particular way erodes that voluntariness. In a frequently-cited article, Professors Kovach and Love claimed that, "evaluative mediation is an oxymoron."<sup>200</sup> They argue that an evaluative mediator, by implicitly pressuring parties to adopt a particular view of the dispute, removes an element of voluntariness from the process.<sup>201</sup> I have often wondered whether "mandatory mediation" could be an even more significant oxymoron. A few commentators have argued that parties should not be compelled to mediate their disputes. How, they ask, can someone be compelled to participate in a "voluntary" process?<sup>202</sup>

198. Surprisingly, a survey of attorneys indicated that a majority favored good faith standards in mediation. James J. Alfini, Symposium, *Trashing, Bashing, and Hashing It Out: Is This the End of "Good Mediation"?*, 19 Fla. St. U. L. Rev. 47, 66 (1991).

199. See, e.g., Edward F. Sherman, Symposium, *A Process Model and Agenda for Civil Justice Reforms in the States*, 46 Stan. L. Rev. 1553, 1571 (1994) ("The further 'institutionalization' of ADR as a settlement device has raised additional fears of undermining the voluntary nature of ADR and subordinating its problem-solving and relationship-building goals to cost-efficiency and docket-clearing objectives."); Weston, *supra* n. 17, at 592. ("ADR is premised upon the intention that by providing disputing parties with a process that is confidential, voluntary, adaptable to the needs and interests of the parties, and within party control, a more satisfying, durable, and efficient resolution of disputes may be achieved.")

200. Kimberlee K. Kovach & Lela P. Love, "Evaluative" Mediation Is an Oxymoron, 14 Alternatives to High Costs of Litig. 31 (CPR Institute for Dispute Res. 1996).

201. *Id.* at 31.

202. See e.g. *Mandated Participation and Settlement Coercion: Dispute Resolution as It Relates to the Courts* 12 (Soc'y. of Profs. in Dispute Res. 1991) (examining the benefits and possible disadvantages of mandated participation and settlement coercion in dispute resolution); William F. Coyne, Jr., *The Case For Settlement Counsel*, 14 Ohio St. J. on Dis. Res. 367, 391 (1999) ("Court-ordered settlement, like court-ordered mediation, is an oxymoron.") Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 Yale L.J. 1545, 1581 (1991) ("When mandatory mediation is part of the court

Oxymoronic or not, court-ordered mediation now resides on the judicial landscape of this country. Every United States District Court participates in some form of ADR.<sup>203</sup> Many, perhaps most, state courts do as well. Judges and court personnel have embraced mediation, in no small part, because they believe that it clears dockets.<sup>204</sup> A “try it, you’ll like” order to mediate for an hour or two probably does not place an untoward burden on any party. If, in addition however, the court involves itself in how the parties must act during the mediation, the process has morphed into something that is hardly “voluntary.” If a party is not free to make a small offer-or no offer at all-in mediation, that party has lost, rather than gained, autonomy.

Disputants have many reasons to not settle. Some institutional defendants believe that paying any amount on a disputed claim will encourage others to initiate similar litigation. Litigants may want an issue adjudicated for its precedential value. Both plaintiffs and defendants at times feel that vindication of their position outweighs any economic efficiency associated with settlement. If, for any reason, a party does not want to make an offer to settle—even a token offer --they should have that right. Access to the courts does not exist absent the right to refuse to settle. In bad faith cases, courts inevitably give lip service to the principle that parties cannot be compelled to settle. When those same courts hold that offering \$500.00 or \$1,000.00 to settle a case is an act of bad faith, their credibility falters. Judges must recognize that the parties—not the court—own the dispute.

The drafters of the Bill of Rights considered access to the courts fundamental:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.<sup>205</sup>

Any contrivance that works against this right deserves condemnation. Overworked judges understandably want to clear their dockets. Mediation programs may help. I think, however, that we err if we see docket clearing as a primary goal of any form of ADR. Mediation processes should be designed to improve the quality of settlements. Any attendant increase in the quantity of settlements ought to be seen as a secondary benefit. Assembly line coercive mediation may be efficient, but it is not good. Courts should recognize litigants’ rights to be quixotic, contentious, and uncollaborative. We should only require that parties so inclined not make a sham of mediation by concealing their true intent.

The most strident advocates of good faith requirements appear to advocate something akin to a dictatorship of the proletariat (in this case, the enlightened few who appreciate mediation’s value) in order to achieve a transformation of dispute resolution. They seem to believe that the force of the state is needed to protect good

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system, the notion that parties are actually making their own decisions is purely illusory.”).

203. 28 U.S.C. §§ 651-658 (2000) (“The Alternative Dispute Resolution Act of 1998”).

204. See e.g. Steven H. Goldberg, *“Wait a Minute. This Is Where I Came In.” A Trial Lawyer’s Search for Alternative Dispute Resolution*, 1997 B.Y.U. L. Rev. 653, 665 (“Courts have discovered ADR. They think it will clear dockets. State courts, as well as federal, are jumping on the bandwagon.”).

205. U.S. Const. amend. VII.

faith participants and the courts from the tactics of bourgeoisie litigators. They reason that courts can compel parties to behave properly through the coercive use of sanctions. If parties behave, mediation will work. If mediation works, people will like it. If people like mediation, they will participate willingly, even happily, in good faith. Once universal good faith arrives, sanctions will fade away, replaced by a more Utopian form of dispute resolution.

Many scholars have embraced mediation, as well as other forms of ADR, because they believe it will offer people more freedom to steer the course of their dispute.<sup>206</sup> By taking control away from the courts and placing it in the hands of the parties, "better" dispute resolution should occur. Empowerment and ADR go hand-in-hand. Autonomy and ADR go hand-in-hand.<sup>207</sup> ADR promotes such democratic values as self-determination and freedom from interference by the state. Early backers of alternative dispute resolution believed they had found a solution to some of the worst problems of adversary justice.<sup>208</sup> As ADR has become "less alternative" and more institutionalized, disturbing trends have emerged. Binding pre-dispute arbitration "agreements"<sup>209</sup> have stripped consumers and employees of their day in court.<sup>210</sup> Mediation—once a purely voluntary process—has become mandatory. Will courts now use mediation to usurp control of the decision to settle? In a powerful irony, mediation could become the instrumentality by which party autonomy is threatened. Plowshares will be beaten into swords.

My junior high principal once told me, "We can't keep this country free if we let people say whatever they want."<sup>211</sup> The illogic of his logic closely tracks the reasoning of courts that would sanction the exercise of freedom of choice in a process designed to enhance freedom of choice.

#### IV. STANDARDS FOR GOOD FAITH CONDUCT:

The tension between the need for good faith in mediation and the desire to preserve party autonomy creates a dilemma. Permitting one party to use mediation

206. See e.g. Edward Brunet, *Replacing Folklore Arbitration with a Contract Model of Arbitration*, 74 Tul. L. Rev. 39, 65 (1999) ("Party autonomy is a significant feature of all ADR, and constitutes an especially critical underpinning to arbitration theory and practice."); Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. Rev. 485, 505 (1985); Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 Ohio St. J. on Dis. Res. 211 (1995).

207. See e.g. Bush & Folger, *supra* n. 26; Albie M. Davis, *Community Mediation as Community Organizing*, in *When Talk Works: Profiles of Mediators 245* (Deborah M. Kolb et al. eds., 1994) (ADR is opportunity for party empowerment).

208. See e.g. Tia Schneider Denenberg & R.V. Denenberg, *The Future of the Workplace Dispute Resolver*, 49 Dis. Res. J. 48, 53 (1994) ("To strive for consensus by means of ADR is to honor democratic values and avoid the divisive tendencies inherent in cultural and ethnic Balkanization.").

209. See e.g. *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997), *cert. denied*, 139 L.Ed.2d 13 (1997) (arbitration clause printed on the third page of an unsigned document packed in the shipping container with the computer that plaintiffs purchased was held to be an enforceable arbitration "agreement."). For a vigorous and well-reasoned critique of the *Gateway* decision, see Jean R. Sternlight, *Gateway Widens Doorway to Imposing Unfair Binding Arbitration on Consumers*, 71 Fla B. J. 8 (1997).

210. See e.g. Sternlight, *supra* n. 226.

211. Conversation with Fred C. Omer (1969).

as a club with which to abuse the other seems unacceptable. Conversely, courts should not impinge upon party autonomy. I believe that a partial solution to this quandary lies in identifying behaviors that are undeniably inappropriate. This would include failure to comply with reasonable and clearly defined procedural rules. Beyond this point, however, I caution against enhancing the mediation process through use of coercive sanctions. We must reconcile ourselves to the fact that many forms of bad faith behavior cannot be avoided by the use of after-the-fact sanctions.<sup>212</sup>

By opposing sanctions for certain types of bad faith, I do not mean to suggest that the problem should not be addressed. Rather, I believe that the solution lies in preventing—not punishing—such bad faith. While a thorough discussion of alternative means to achieve good faith conduct is beyond the scope of this article, two suggestions merit mention. First, educating future mediation participants with respect to mediation’s potential will likely result in more attorneys and parties buying into the process. This, in turn, will result in less abuse of mediation. Second, Professor Lande suggests that effective systems design will decrease bad faith behavior.<sup>213</sup> If participants understand the process (and if the process is well-designed), mediation should offer cheaper, faster, and more creative resolution of disputes.<sup>214</sup> This should result in widespread acceptance of the mediation process as an alternative to adjudication or negotiation. Enlightened self interest will do what the coercive force of sanctions will not. By virtue of a sort of jurisprudential Darwinism, mediation should survive and flourish.

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212. Professor Lande argues for the use of education and systems design to diminish the likelihood of negative behavior in mediation. Lande, *supra* n. 7. I believe that I have been victimized by a form of “bad faith” that only appropriate systems design could avoid. The following is the text of a letter I received from a well-respected workers’ compensation defense attorney:

Dear Roger:

My clients will pay [your client] \$3,000.00 and not a penny more for a full and final settlement of this case. If [your client] does not accept this offer, I will request a mediation. At the mediation my clients will still only offer \$3,000.00 but the mediation will take your case off the hearing docket for at least six months.

If you ultimately prevail at hearing, we will appeal to the Commissioner. If you win the appeal, we will seek judicial review. If judicial review fails, we will appeal to the Supreme Court. Any way you look at this, [your client] isn’t going to see any money from his case for at least four years. I understand that [your client] is about to have his truck repossessed. I would think he would prefer a bird in the hand right now.

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This case was pretty clearly worth \$10,000 to \$12,000. I thought that the defense lawyer’s plan to use a mandatory mediation to delay the hearing on the claim constituted bad faith. My client, contrary to my advice, accepted the \$3,000 offer and the question of sanctions was never addressed. I can’t imagine a rule that would have prevented this tactic. The potential for mediation abuse arose from a poorly designed dispute resolution system. One party could compel arbitration. Once arbitration was scheduled, the case was removed from the hearing docket occasioning a delay of many months. This system was designed by a single individual with little, if any, input from stakeholders.

213. Lande, *supra* n. 7, at 113-15.

214. Riskin, *supra* n. 10, at 34.



### A. Proposed Rules of Conduct for Mediation Participants

Before she penned her proposals for good faith standards, Professor Kovach commendably acknowledged that they “have not benefitted from the wisdom of deliberation and debate. They are set out herein for the sole purpose of initiating the discussion process.”<sup>215</sup> In much the same spirit, I offer my proposed rules of conduct in mediation.

**Rule 1. Attendance.** All parties who have agreed to participate in or who have been ordered to participate in a mediation are required to attend that mediation. In the case of parties represented by legal counsel in a litigated matter, counsel shall also attend the mediation unless excused by the assent of the mediator and all parties. All parties and, if applicable, attorneys shall remain at the mediation until opening statements have been made and each party has made one offer, or for one hour, whichever is shorter. Parties and, if applicable, attorneys who fail to do so may be subject to sanctions.

Mediation will not work if the parties do not attend. If a court orders parties to a mediation, they ought to go. If they voluntarily agree to mediate, they ought to go.<sup>216</sup> Nonetheless, more than one reported case<sup>217</sup> involves the failure of a party or attorney to attend a scheduled mediation.<sup>218</sup> Attendance at the mediation session is the most obvious and least troubling example of a procedural form of good faith. Commentators have wrestled with the question of requiring parties to remain at the mediation for a specified period of time.<sup>219</sup> I have tried to strike a balance by requiring a brief but “meaningful” period of attendance.<sup>220</sup> If this proposal interjects an element of untoward formalism into the mediation process, at least the parties will understand what is required of them in terms of attendance.

215. Kovach, *supra* n. 18, at 622.

216. See Zylstra, *supra* n. 18, at 100 (“Sanctions for failure to attend mediation would also be appropriate, so long as the penalty did not extend to dismissal of the action or a default judgment.”).

217. E.g. *Luxenberg v. Marshall*, 835 S.W.2d 136, 141 (Tex. App. 1992); *Roberts, supra* n. 66; *Seidel v. Bradberry*, 1998 WL 386161 (N.D. Tex. July 7, 1998); *Triad Mack Sales & Service, Inc. v. Clement Bros. Co.*, 438 S.E.2d 485 (N.C. App. 1994).

218. In my own practice, I have encountered such a failure to attend. In that case, the order granting our application for mediation stated, “The parties shall jointly appear with legal counsel fully prepared to enter into meaningful discussions. . . .” My client and I both drove over 100 miles to attend the 8:00 a.m. mediation. The mediator, an administrative law judge, had driven even farther. Three employees of the self-insured defendant were present but their lawyer was not. When the mediator inquired as to the whereabouts of the defense attorney, the defendant’s human resources director replied that, “We have handled hundreds of these [cases]. We don’t need a lawyer.”

The mediator was furious. She refused to go forward with the mediation and pointedly advised me that she would entertain a motion for sanctions. Proving that I can take a hint, I filed my motion that afternoon. A few days later I received an order awarding me \$500.00 attorneys’ fees and my client and me each our mileage to the mediation cite. The award was not appealed. The employer paid the sanctions.

219. See e.g. Kovach, *supra* n. 18, at 623; Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 Harv. Negot. L. Rev. 1, 57 n. 231 (2001).

220. See Sherman, *supra* n. 18, at 2089.

**Rule 2. Telephonic Participation.** A party who desires to attend a mediation telephonically should advise the mediator, the opposing party and (in the case of court-annexed mediation) the court of its desire at least fourteen days in advance of the scheduled mediation. In the case of court-annexed mediation, telephonic participation shall be permitted only with approval of the court granted after the opposing party has been given the opportunity to be heard on the matter. Permission to participate by telephone shall be granted only for good cause shown and shall not be routinely granted. In the case of voluntary mediation, the other party shall have the right to cancel the mediation as a result of the decision to participate telephonically.

In my experience, key players often want to participate in mediations by telephone. Claims adjusters and corporate executives often reside far from the mediation site. Telephonic participation saves time and travel. Nonetheless, we should discourage this practice. As the court said in *Nick*:

It is quite likely that the telephone call is viewed as a distraction from other business being conducted by the absent decision-maker. In that case the absent decision-maker will be preoccupied with some other matter demanding her attention at the time she is asked to evaluate new information in a telephone call. Confronted with distractions and inadequate time to evaluate the new information meaningfully, the absent decision-maker's easiest decision is to summarily reject any offer and get back to the business on her desk. Even a conscientious decision-maker cannot absorb the full impact of the ADR conference when they are not present for the discussion. The absent decision-maker cannot participate in good faith in the ADR conference without being present for the conference.<sup>221</sup>

Something as simple as a sincere facial expression can influence the course of a mediation. Decision makers should not underestimate the benefit of face-to-face contact. If parties do nothing more than come to appreciate one another's humanity, a mediation has been a partial success. Telephone participation will not foster such a process. I do not think attendance via speaker phone (as opposed to mere availability by phone) substitutes satisfactorily for a party's physical presence. Even with a speaker phone at the mediation site, all non-verbal communication will be lost.<sup>222</sup> Professor Gregory states the case for in-person mediation well:

People are most comfortable in face to face contact which provides a richness of cues and information. Body language, tonal variations, and pauses all become part of the conversation. We also like to know as much as we can about

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221. *Nick*, 99 F. Supp. 2d at 1062-63.

222. *But see* Donna Riselli, *Appellate Mediation at the First District Court of Appeal: How and Why It Works*, 75 Fla. B.J. 58, 58 (2001) (describing successful use of telephone mediation at appellate court level).

the people with whom we are interacting. We want to know their age, gender, ethnicity, how they dress and wear their hair.<sup>223</sup>

**Rule 3. Pre-mediation Document Preparation.** All parties who have agreed to participate in, or who have been ordered to participate in a mediation, are required to cooperate in preparing pre-mediation forms and reports required by the court or the mediator. Parties who fail to do so may be subject to sanctions.

Failure to prepare pre-mediation paperwork represents a classic form of bad faith non-compliance with reasonable procedural requirements. Courts and mediators normally specify exactly what information the parties are to exchange prior to the mediation. A failure to comply may result from neglect or a conscious choice as in *Nick*. Some participants may find the task burdensome. I have included this requirement for two reasons. First, if a court orders parties to complete pre-mediation paperwork, only the most foolhardy would defy such an order. Few judges will tolerate open disregard of their orders. A comprehensive set of standards for mediation conduct, must, therefore, include matters likely to be included in a judge's referral order. Second, a pre-mediation exchange of information can be a very helpful exercise. Knowing more about the other party's interests and views will aid participants in preparing for the mediation. The same information will enable the mediator to know what challenges he or she faces.

**Rule 4. Offers.** Subject to Rule 6 of these Rules, no party is under any obligation to make any offer at the mediation.

This rule codifies my belief that courts have no business trying to enforce standards of subjective good faith. I believe any standards for good faith participation should state explicitly that decisions about bargaining strategy are solely the province of the parties and their representatives. For a court to determine that failure to extend a particular offer constitutes bad faith requires a finding as to the ultimate merits of the case. This cannot be done until all evidence has been received and all testimony heard. Even then, the outcome often turns on factors not predictable at the time of mediation. The personality of the fact finder(s), the skill of the lawyers, and bits of circumstantial serendipity utterly unknowable prior to the actual trial all have an impact on the result. I have yet to meet a judge with the clairvoyance to make such decisions. Even if an offer is low by all estimates of the fair market value of the claim, the party may have good reason, often legitimately known only to it, to refrain from offering more.

**Rule 5. Representatives.** In the case of institutional parties, the individual employee or agent who has been primarily responsible for handling the dispute shall attend the mediation. If that representative is required to obtain

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223. David L. Gregory, *The Internationalization of Employment Dispute Mediation*, 14 N.Y. Intl L. Rev. 2, 20-21 (2001).

approval from supervisors, claims committees, boards, governing bodies, or any other person or entity prior to entering into a binding settlement, the party shall advise all other parties, the court, and the mediator of such facts at least fourteen days prior to the mediation. If such individual is unable to attend or the institutional party wishes to be represented by another party, it shall advise all other parties, the court, and the mediator of such facts at least fourteen days prior to the mediation. Any substitute representative shall possess no less settlement authority than the individual employee or agent who has been primarily responsible for handling the dispute possesses.<sup>224</sup>

Courts become frustrated when a mediation “fails” because the representative of an institutional party possessed limited authority to settle. Parties who attend fully prepared to settle the case feel abused when they collide with the “no more authority” wall.<sup>225</sup> Parties sincerely committed to the mediation process ought to entrust their representatives with settlement authority reasonably calculated to achieve a fair settlement. Those who do not want to settle ought to withdraw from the mediation. When, however, an institutional party determines that its interests are best served by sending a representative with limited authority, courts should not second guess that decision. Often the reason a corporate representative lacks “adequate” authority to settle grows out of a pre-mediation decision within the institutional hierarchy about bargaining strategy or case valuation. Institutional parties should control their own internal decision-making processes. If a committee or board is charged with determining the party’s settlement position, the entire body should not be required to attend the mediation. Furthermore, the institution should

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224. Professor Riskin offers a more rigorous definition of what individual would possess sufficient settlement authority. Leonard L. Riskin, *The Represented Client in a Settlement Conference: The Lessons of G. Heileman Brewing Co. v. Joseph Oat Corp.*, 69 Wash. U. L.Q. 1059, 1110 (1991).

225. I have experienced this sensation personally. I represented a client who had been a “911 dispatcher” for a municipal police department for over twenty years. Her personnel file indicated that she had been an ideal employee, always willing to work double shifts or to stay late if another employee did not show. She had gradually damaged her vocal cords as a result of the constant talking that her job required. The medical evidence was 100% in her favor. The city had refused to pay her weekly benefits or provide medical care. This gave rise to a “bad faith” tort claim in addition to her workers’ compensation case. Furthermore, shortly after she filed her claim, my client was fired because the city claimed it had no job for her within her medical restrictions. I believed that we had a good lawsuit premised on theories of retaliation and discriminatory discharge based on disability and/or sexual orientation. Prior to going to mediation, I reviewed this case with several other attorneys, all of whom agreed it was rock solid. The workers’ compensation case alone was easily worth \$50,000.00.

The city was represented by an assistant city attorney who was handling both her first workers’ compensation case and her first mediation. During the opening session, this young attorney announced, “I’m going to offer \$100.00 and nothing more. That’s all the authority I have and I would have to go to the City Council to get more.” I was furious since applying for mediation had taken the case off the hearing docket for several months and my client was without a job or other source of income. The mediator/administrative law judge explained to the assistant city attorney that normally we would negotiate with the understanding that any settlement would be subject to council approval. She refused to enter into such negotiations. “Besides,” she said, “I don’t think this is a very good case.” “Why?” the mediator and I asked in unison. “That’s just what I think,” she responded petulantly, “and I have a perfect right to think that.”

I filed a motion for sanctions alleging that the city had acted in bad faith. My motion was denied but it attracted the attention of the city attorney who reviewed the entire case. Shortly thereafter, we settled the entire matter on terms quite favorable to my client.

not be compelled to modify its governing structure in order to accommodate rules of mediation. The arguments against interfering with a party's bargaining strategy apply with equal force to interfering with its decision to grant or withhold settlement authority.

**Rule 6. Notice of Intention.** In the event that a party intends to make no offer (or no offer more favorable to the other party than one made prior to the mediation) at the mediation, that party shall advise the other party of such intent at least seven days prior to the mediation. Parties who fail to do so may be subject to sanctions. In the event that a party advises the other party of such intent, the other party shall have the right to cancel the mediation (in the case of voluntary mediation), or to petition the court to cancel the mediation (in the case of court-ordered mediation).

This proposal will prove controversial. A critic might argue that such a rule impinges on party autonomy in the same way sanctions for subjective good faith do. I acknowledge that this is a legitimate concern. Certainly some parties come to mediation intending to make no offer and are swayed by what they hear. Enactment of this rule might result in a missed opportunity to achieve a resolution. By the same token, a party might enter the mediation planning to negotiate but then decide that the other party's case is so weak that the matter should be adjudicated. Any attempt to direct behavior in mediation, however, must balance competing concerns. No rule at all would leave innocent participants vulnerable to the sort of dirty tricks described elsewhere in this article.<sup>226</sup> Furthermore, many courts would be reluctant to accept a set of guidelines that permits flagrant abuse of the mediation process. As stakeholders in the mediation process, judges' interests in achieving resolution of cases merit consideration.

Critics might also object that this rule will foster "surface bargaining."<sup>227</sup> This may be true, but court decisions such as those in *Pirtle*, *Avril* (trial court), *Semiconductors*, *Nick* and *Francis* are even more likely to encourage surface bargaining. I also wonder if surface bargaining is really such a bad thing. Psychotherapists sometimes tell their refractory patients, "If you can't think your way into acting, act your way into thinking." Is it unimaginable that negotiators might surface bargain their way into serious bargaining?

I emphasize that I do not intend this Rule to require any party to make any offer. Rule 4, above, states that parties are not required to make offers. Rule 6 merely requires a party to divulge its intent not to make an offer. This may present a risk that a mediation that would have been productive will be canceled. I consider this a fair trade for assurance that parties will not be duped into attending a mediation that was foredoomed.

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226. See *supra* nn. 1-2 and accompanying text.

227. See Lande, *supra* n. 7, at 129-30. "Surface bargaining" is a term commonly used in labor law jurisprudence referring to superficial changes in bargaining position designed to avoid charges of bad faith bargaining. *N.L.R.B. v. Herman Sausage Co.*, 275 F.2d 229, 232 (5th Cir. 1960).

**Rule 7. Sanctions.** Sanctions awarded shall be payable to the party or parties damaged by a violation of these rules, and shall be in an amount calculated to compensate such wronged party or parties for its actual losses incurred including reasonable attorneys' and mediator's fees.

I submit this proposal with considerable reluctance. I am concerned with establishing understandable rules of conduct, and not with meting out punishment. The purpose of any set of rules should be to secure compliance, and not to punish disobedience. At some level, sanctions and mediation simply "feel" incompatible. Later in this paper, I discuss possible alternatives to economic sanctions. If, however, sanctions are to be imposed, some means of determining an appropriate amount will be needed.

I believe policymakers should explore alternatives to the use of sanctions. Physicians learn to employ the most conservative means that will cure the patient's ills. I advocate a similar approach to deterring inappropriate behavior in mediations. As a possible alternative to economic sanctions, courts could require violators to attend a mediation-oriented continuing legal education event.<sup>228</sup> A more conservative approach to the adoption of standards of participant conduct would entail making the rules precatory. A person who commits an act of bad faith would pay no penalty other than suffering the condemnation of his or her peers. Information travels rapidly within the legal community. Loss of professional standing may well be a greater blow to an attorney than a small fine. In terms of achieving the least restrictive and least intrusive form of regulation, precatory standards merit consideration. If they fail, more burdensome sanctions could be considered. Certainly rules without sanctions will do little for those wronged by bad faith, but I would argue that retributive justice has never been the aim of ADR.

**Rule 8. Proof of Violation.** Sanctions shall only be awarded for violations that can be proved without eliciting testimony from a mediator. Nothing contained in these rules shall be construed to in any way limit or modify statutes, rules, or agreements protecting the confidentiality of the mediation.

If mediators take the stand to testify about the conduct of parties, confidentiality will be destroyed. Parties will likely concern themselves more with currying the mediator's favor than with working toward resolution of the dispute. I consider this situation unacceptable. I also believe that the proposed rule will not work much of a hardship on those seeking to prove bad faith. The other party or parties should possess the same knowledge of the alleged transgressor's actions as the mediator. If sworn testimony from participants is inadequate to prove an infraction, I doubt that mediator testimony would alter the outcome. In my view, the negative consequences of a mediator testifying far outweigh any possible benefit.

**Rule 9. Persons Permitted to Attend.** At least fourteen days prior to a mediation, each party shall advise the mediator and all other parties of the identity of the persons who will be attending the mediation on behalf of the

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228. Professor Kovach suggests mandatory education as a possible sanction. *See supra* n. 18.

party giving notice. All parties to a dispute and their legal representatives shall be entitled to attend a mediation. The term "legal representative" shall include one or more attorneys and persons employed in such attorneys' offices. In the case of institutional parties, no more than three employees, agents or board members of such party shall be entitled to attend. Additional individuals may be permitted to attend a mediation at the sole discretion of the mediator. If a party wishes additional persons to attend the mediation, that party shall make a written request to the mediator (with a copy provided to all other parties) at least fourteen days prior to the mediation. Such request shall identify additional persons whose attendance is desired and state the reason for their attendance. For good cause shown, the mediator may, but need not, permit such attendance. In the event that any party makes a deliberate and intentional misrepresentation in connection with a notice or request permitted by this rule, such party shall be subject to sanctions.

At least one bad faith case involved misrepresentations about the role of a person attending the mediation.<sup>229</sup> The decision of who to admit to the mediation room will be difficult. Often, a "support person" helps to correct power imbalances. The presence of a friend or family member may put a party at ease and thereby facilitate meaningful participation. Conversely, a divorcing spouse's new love interest will do little but provoke hostility. I have left this decision to the sound judgment of the mediator.

**Rule 10. Parties Sanctioned.** The court may, in its discretion, order sanctions to be paid by a party, the party's legal representative, or both.

As with any malfeasance, the court must separate the guilty from the innocent. In some instances, bad faith occurs because a lawyer has failed to properly inform or advise the client. In others, the client may have rejected sound legal advice.<sup>230</sup>

229. Kovach describes an unreported incident in which a party brought a jury consultant to a mediation, identifying her as a "business associate," for the purpose of evaluating witnesses for trial? See Kovach, *supra* n. 18, at 594.

230. I have experienced this phenomenon. Teresa (not her real name) is a forty-two year old unmarried childless client of mine. When she first came to me, I thought she might have a decent case. The medical records she brought with her indicated she had a fairly serious back injury. She told me that she sustained the injury at work, and that she reported the injury to her supervisor at the time. I filed a petition on her behalf. Through the discovery process I learned some very bad facts. First, Teresa wasn't even working for the defendant on the day she said she was injured. When I asked her about this, she said she had been mistaken about the month in which the injury had happened. Accordingly, I amended the petition to reflect a new injury date. The doctors who have examined her (including the one I hired to give an opinion) all agreed that her condition was degenerative in nature, and not caused by the type of trauma Teresa described. They all noted "symptom magnification." One doctor thought it was significant that Teresa had worked less than six months during her entire life.

To make matters worse, Teresa's medical records (which automatically come into evidence in a workers' compensation case) describe her as a drug and alcohol abuser, and indicate that she has "six regular sex partners." These matters, while theoretically irrelevant, clearly do influence administrative law judges. After reviewing all of the discovery, I felt that I was in an ethical dilemma. On the one hand, I had undertaken to represent Teresa, and I had an obligation to do so zealously. On the other hand, this was beginning to look like a frivolous claim. I called Teresa into my office and explained the facts to her. She indicated that she understood. I told her that she had, at best, a nuisance value case.

At times, the court may have difficulty making this determination. Attorney/client privilege may prevent appropriate inquiry. In all instances, courts should refrain from imposing sanctions absent clear unequivocal evidence.

### *B. Rule Implementation.*

Because we have many forms of mediation, rules of participant conduct must be implemented in many different contexts. In the case of private mediation, the parties can incorporate the standards into the mediation agreement.<sup>231</sup> In court-ordered mediations, the rules could be included in individual referral orders, or made a part of the local rules of court. No set of standards will serve as a prescription for good conduct in all circumstances. Adjustments for the nuances of local legal cultures must be made. Nonetheless, I advocate the adoption of general guidelines for participant behavior on a more global and authoritative level. Supporters of mediation as a form of dispute resolution need to communicate to the uninitiated what is expected of participants. This can be accomplished through widespread promulgation of standards of conduct.

## V. CONCLUSION

A well-traveled joke holds that a liberal is a conservative who has been arrested, and a conservative is a liberal who has been mugged. At the beginning of this article,<sup>232</sup> I described a mediation experience that left me feeling as if I had been mugged. A worthwhile tool of dispute resolution had been turned against my client and me. I do not know if the rules I have proposed would have prevented or punished what happened to us. I am convinced, however, that both the process and the participants will benefit if we define our expectations concerning conduct in mediation as clearly as possible. I also believe that mediation's high aspirations will only be met if parties are free to shape outcomes unburdened by the fear of retributive sanctions.

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She indicated that she understood and agreed. I suggested that we mediate the case and see how much we could get. Again, she agreed.

The mediation was a disaster. The minute we went into private caucus Teresa started sobbing uncontrollably. She said that the "work injury" had ruined her entire life and that no one understood. This continued for the entire three hours allocated for the mediation. Teresa never authorized the mediator to convey any offer to the employer, even though we had requested the mediation. We reviewed the medical records and she claimed that the doctors, the mediator and I had all sold out to the other side. Throughout this session she kept indicating that the injury was to her upper back although the medical records indicated that she had reported an injury to her lower back. At the conclusion of the mediation I explained to the defense lawyer what had happened. She offered \$3,000.00, which I thought was a great deal. I conveyed this to Teresa who mixed some extremely vulgar metaphors in rejecting the offer.

I was concerned that we would face bad faith sanctions. Happily, the defense lawyer is one of the most gracious people I know, and she made no complaint whatsoever. We eventually tried Teresa's case. The judge found that she had fabricated her account of the "injury" and awarded her nothing. He assessed the costs of the action against her.

231. Professor Kovach suggests such an approach. Kovach *supra* n. 18, at 617 .

232. See *supra* nn. 1-2 and accompanying text.



