

January 1996

Good Faith Mediation: Improving Efficiency, Costs, and Satisfaction in North Carolina's Pre-Trial Process

Tony Biller

Follow this and additional works at: <http://scholarship.law.campbell.edu/clr>

 Part of the [Dispute Resolution and Arbitration Commons](#)

Recommended Citation

Tony Biller, *Good Faith Mediation: Improving Efficiency, Costs, and Satisfaction in North Carolina's Pre-Trial Process*, 18 CAMPBELL L. REV. 281 (1996).

This Comment is brought to you for free and open access by Scholarly Repository @ Campbell University School of Law. It has been accepted for inclusion in Campbell Law Review by an authorized administrator of Scholarly Repository @ Campbell University School of Law.

COMMENT

GOOD FAITH MEDIATION: IMPROVING EFFICIENCY, COST, AND SATISFACTION IN NORTH CAROLINA'S PRE-TRIAL PROCESS

One thing I supplicate your majesty; that you will give orders, under a great penalty, that no bachelors of law should be allowed to come here [to the new world]; for not only are they bad themselves, but they also make and contrive a thousand iniquities.

— Vasco Nuñez de Balboa, to King Ferdinand V of Spain, 1513¹

That meanness, that infernal knavery, which multiplies needless litigations, which retards the operation of justice, which, from court to court, upon the most trifling pretence, postpones trial to glean the last emptyings of a client's pocket, for unjust fees of everlasting attendance, which artfully twists the meaning of law to the side we espouse, which seizes unwarrantable advantages from the prepossessions, ignorance, interests, and prejudices of a jury, you will shun rather than death or infamy.

— Timothy Dwight, president of Yale College, addressing the graduating class of 1776²

Dissatisfaction with the legal profession's role in dispute resolution is as old as the profession itself.³ It is disturbing that although the rule of law is the hallmark of advanced societies, the individuals dedicated to the mechanisms of justice have long been vilified. Though many of the characteristics for which "society" condemns lawyers are the same characteristics for which "citizens" pay top dollar in resolving their own disputes, there is a growing movement toward legal reform.

One problem is "the *perception* that lawyers instigate litigation rather than promot[e] amicable solutions and fair and just

1. JESS M. BRALLIER, *LAWYERS AND OTHER REPTILES* 63 (1992).

2. *Id.* at 90-91.

3. Edward D. Re, *The Causes of Popular Dissatisfaction with the Legal Profession*, 68 ST. JOHN'S L. REV. 85, 86 (1994).

settlements. As a result, lawyers are regarded as instigators of strife and not as peacemakers and problem solvers.⁴ Not surprisingly, lawyers have thus been blamed for a "litigation explosion."⁵ This societal attitude is based in part on exaggerations of the lawyer's common law duty to zealously advocate for the client.⁶ Many jurisdictions have responded by adopting alternative mechanisms of dispute resolution which promote negotiation, conciliation and compromise. One such mechanism is based on the concept of mediation.

The issue this comment addresses is whether a court, in compelling parties to mediate, should also require the parties to act honestly and reasonably in attempting to resolve their disputes. Creating and enforcing a duty of good faith in mediation conferences would decrease costs and improve the efficiency of litigation. The purpose of this comment is to promote a duty of good faith in civil cases directed to mediated settlement conferences in North Carolina superior courts. This comment discusses the foundation for the duty and suggests a procedure for enforcement.⁷

4. *Id.* at 105. "Many of the most successful trial lawyers are driven by an overriding desire to win - preferably in a way that makes the enemy's defeat most public and unmistakable. Listening to someone else's views, understanding someone else's interests, solving someone else's problems - these essential aspects of settlement are likely to rank fairly lowly on the litigator's list of fun ways to spend a busy day." Paul J. Mode & Deanne C. Siemer, *The Litigation Partner and the Settlement Partner*, 12 LITIG. No. 4 at 33, 34 (1986).

5. *Re, supra* note 3, at 107.

6. *Id.* at 91. At the beginning of this century, Dean Pound identified this problem as the "Sporting Theory of Justice." Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. Rep. 395, 404-06 (1906).

7. This comment is not intended to address the fundamentals of mediation. For an overview of mediation in North Carolina, see STEVEN H. CLARKE ET AL., COURT-ORDERED CIVIL CASE MEDIATION IN NORTH CAROLINA: AN EVALUATION OF ITS EFFECTS (1995); JACK P. ETHERIDGE, COMING TO THE TABLE, A GUIDE TO MEDIATION IN NORTH CAROLINA (1994); Lex K. Larson, *Mediation Of Industrial Commission Cases*, 17 CAMPBELL L. REV. 395 (1995); John G. Mebane III, Comment, *An End To Settlement On The Courthouse Steps? Mediated Settlement Conferences In North Carolina Superior Courts*, 71 N.C. L. REV. 1857 (1993). For an in depth review of mediation related law and social science research, see NANCY H. ROGERS & CRAIG A. McEWEN, MEDIATION: LAW POLICY PRACTICE (2d ed. 1994). For guidance on negotiation, see STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION (1992); ROGER FISHER ET AL., GETTING TO YES (1991); ROGER FISHER & SCOTT BROWN, GETTING TOGETHER (1988).

I. OVERVIEW

A. *The Evolution of Mediation In the United States*

Mediation first became popular in the United States at the end of the nineteenth century when it was used to resolve difficult conflicts between labor and management.⁸ Lawmakers enacted mediation legislation as a resolution for failed labor negotiations and strikes. This legislation was not intended as an alternative to adjudication.⁹ Instead, it was a tool to prevent social disruption.¹⁰

During the early decades of this century, however, attorneys and judges recognized that mediation could be a cost-effective and conciliatory option to adjudication.¹¹ For example, domestic relation courts relied increasingly on mediation to address the rising divorce litigation of the post-war 1940's and 1950's.¹² In the 1960's, the American Arbitration Association and other organizations promoted privately funded mediation efforts.¹³ In 1972, the United States Department of Justice initiated mediation mechanisms to resolve civil rights disputes. Congress fully funded the program as a means to reduce discriminatory practices and promote racial harmony.¹⁴

Beginning in the 1970's, as caseloads began to increase, conflict and dispute resolution methods gained widespread attention.¹⁵ Commentators, judges and policy-makers began promoting mediation for different purposes.¹⁶ Advocates argue that mediation streamlines case processing, provides quicker and more effi-

8. ROGERS & MCEWEN, *supra* note 7, § 5:01, at 1.

9. *Id.*

10. *Id.* at 2.

11. *Id.* at 2 & nn. 6-8. At a 1923 American Bar Association meeting, speakers recognized the improved speed, cost, accessibility, satisfaction and fairness that conciliation offered to the adjudication process. A.B.A. J. 746-51 (1923).

12. ROGERS & MCEWEN, *supra* note 7, § 5:01, at 5-6.

13. *Id.* at 3 & n.11

14. *Id.* at 3-4.

15. *Id.* at § 5:02.

16. See Warren E. Burger, *Isn't There A Better Way?*, 68 A.B.A. 274 (March 1982). But see Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366 (1986). Making settlement cheaper is not the solution to reducing the caseload crisis; it would be more effective

to make the parties bear a larger fraction of the total costs of trial, including queuing costs that trials impose on other parties. . . More realistic filing fees would be a simpler as well as more efficacious method of dealing with the caseload crisis than new ways of inducing people to settle lawsuits before trial.

cient resolutions, and increases access to the judicial system by making adjudication more accommodating.¹⁷ Further, mediated remedies require less post-judgment motions for enforcement.

Others believe that mediation presents better remedies and standards of decisions.¹⁸ This process is well fitted for parties with long-term relationships or complex conflicts.¹⁹ Mediation can promote the exchange of information and perspectives, provide an opportunity for emotional venting, stimulate creative settlements and can reveal each party's fundamental interests.²⁰ Many mediators have reported parties settling nearly unresolvable conflicts after one party simply apologized.²¹

Some see mediation as a mechanism that allows parties to take control of their disputes without dependence on attorneys and the courts.²² Still others view mediation as a tool for rebuilding communities.²³ As mediation becomes increasingly popular, lawmakers choose among these different policy objectives in implementing mediation processes.

B. North Carolina

In 1983 when the General Assembly established and funded a child custody and visitation mediation pilot program, North Carolina joined the national trend favoring alternative dispute resolution (ADR).²⁴ This program was established on a state wide basis in 1989.²⁵ In the early 1990's, a planning committee began a study for a process of court-ordered mediation. The committee's directive was to provide a system which would dispose of cases in a more efficient manner while proving more satisfactory to the liti-

Id. at 393. See also Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology*, 9 OHIO ST. J. ON DISP. RESOL. 1 (1993). ADR movement trades justice for harmony, and is premised on the "litigation explosion," which is a baseless ideological construction. This false premise was and is left unchallenged because of intense influence and mind colonization.

17. ROGERS & MCEWEN, *supra* note 7, § 5:02, at 4-6.

18. *Id.* at 6.

19. *Id.*

20. STEPHEN B. GOLDBERG ET AL., *supra* note 7, at 103.

21. *Id.* at 137-39.

22. ROGERS & MCEWEN, *supra* note 7, § 5:02, at 6.

23. *Id.* at 6-7.

24. ETHERIDGE, *supra* note 7, at 253-54.

25. *Id.* See N.C. GEN. STAT. § 7A-494 (1995) and N.C. Gen. Stat. § 50-13.1 (1995).

gants.²⁶ In 1991, the General Assembly authorized a pilot program for court-ordered mediated settlement conferences for civil cases filed in Superior Court.²⁷ The Administrative Office of the Courts (AOC) was directed to evaluate whether the program made operation of the superior courts “more efficient, less costly, and more satisfying to the litigants.”²⁸

The AOC requested the Institute of Government (IOG) to carry out a study evaluating the mediated settlement conference (MSC) program.²⁹ The IOG discovered that only 65.8 percent of cases receiving³⁰ MSC orders³¹ actually went to mediation.³² Participants were generally satisfied with their mediated conference, although there was no increased satisfaction with the entire lawsuit experience.³³ The program was only marginally successful in achieving greater efficiency.³⁴ The IOG suggested that settlement rates, efficiency, and lower costs could be enhanced by procedures

26. CLARKE ET AL., *supra* note 7, at 1.

27. N.C. GEN. STAT. § 7A-38 (Supp. 1989 & 1991).

28. N.C. GEN. STAT. § 7A-38.1(a) (1995).

Purpose. The General Assembly finds that a system of court-ordered mediated settlement conferences should be established to facilitate the settlement of superior court civil actions and to make civil litigation more economical, efficient, and satisfactory to litigants and the State. Therefore, this section is enacted to require parties to superior court civil actions and their representatives to attend a pretrial, mediated settlement conference conducted pursuant to this section and pursuant to rules of the Supreme Court adopted to implement this section.

29. “Mediated settlement conference” means a pretrial, court-ordered conference of the parties to a civil action and their representatives conducted by a mediator.” N.C. GEN. STAT. § 7A-38.1(b)(1) (1995).

30. CLARKE ET AL., *supra* note 7, at 26.

31. *Order by Senior Resident Superior Court Judge.* The Senior Resident Superior Court Judge of any district, or part thereof, authorized to participate in the mediated settlement conference program may, by written order, require all persons and entities identified in Rule 4 to attend a pre-trial mediated settlement conference in any civil action except an action in which a party is seeking the issuance of an extraordinary writ or is appealing the revocation of a motor vehicle operator’s license.

N.C. Rules of Mediated Settlement Conferences Rule 1.A. (1) (1995).

32. CLARKE ET AL., *supra* note 7, at 26. The IOG found that of all the cases, only 49% went to MSCs. The courts did not order MSCs in 25.5% of the cases. *Id.* The statute does not mandate that all cases go to MSCs, and the rules give judges discretion in ordering cases, but the program’s planners anticipated that most cases would receive orders and attend MSCs.

33. *Id.* at 42-44.

34. *Id.* at 44-46.

that would more quickly direct a greater number of cases to mediation.³⁵ The IOG recommended stricter rules and more vigorous case management³⁶.

On July 27, 1995, the General Assembly enacted North Carolina General Statutes § 7A-38.1, which established the program on a permanent, state-wide basis.³⁷ The General Assembly included mandatory prelitigation mediation of farm nuisance disputes,³⁸ which had not been included in the pilot program,³⁹ and authorized a mediation program in the Office of Administrative Hearings.⁴⁰

On September 7, 1995, the North Carolina Supreme Court promulgated amended rules for MSCs. Instead of acting on the recommendations of the IOG and requiring quicker direction to mediation, the amended rules require parties to wait even longer before attending an MSC.⁴¹ The issue of case management is not

35. *Id.* at 56-58.

36. *Id.*

37. "Statewide implementation. Mediated settlement conferences authorized by this section shall be implemented in all judicial districts as soon as practicable, as determined by the Director of the Administrative Office of the Courts." N.C. GEN. STAT. § 7A-38.1(d) (1995).

38. For insights into farm mediation statutes, see Contemporary Studies Project, *The Iowa Mediation Service: An Empirical Study of Iowa Attorneys' Views on Mandatory Farm Mediation*, 79 IOWA L. REV. 653 (1994).

39. N.C. GEN. STAT. § 7A-38.3(c) (1995):

Mandatory Mediation. Prior to bringing a civil action involving a farm nuisance dispute, a farm resident or any other party shall initiate mediation pursuant to this section. If a farm resident or any other party brings an action involving a farm nuisance dispute, this action shall, upon motion of any party prior to trial, be dismissed without prejudice by the court unless any one or more of the following apply: (1) The dispute involves a claim that has been brought as a class action. (2) The nonmoving party has satisfied the requirements of this section and such is indicated in a mediator's certification issued under subsection (g) of this section. (3) The court finds that a mediator improperly failed to issue a certification indicating that the nonmoving party satisfied the requirements of this section. (4) The court finds good cause for a failure to attempt mediation. Good cause includes, but is not limited to, a determination that the time delay required for mediation would likely result in irreparable harm or that injunctive relief is otherwise warranted.

40. N.C. GEN. STAT. § 150B-23.1 (1995).

41. "... The court's order issued pursuant to Rule 1(b) shall clearly state a date of completion for the conference. Said date shall not be less than 90 days nor more than 180 days after issuance of the court's order." N.C. RULES OF MEDIATED SETTLEMENT CONFERENCES Rule 3.B. (1993) (emphasis added). "...

addressed. There is also no requirement within the rules for parties in a mediated settlement conference to act in good faith.

C. Criticisms of Mandatory Mediation

Critics of mandatory mediation are concerned that these alternative mechanisms are being co-opted and blunted by the status-quo institutions which the mechanisms originally challenged.⁴² Alternative dispute mechanisms were considered valuable because they provided an "alternative" to the established methods of conflict resolutions. Disputants were no longer confined to the rules, procedures, advocacy and formalism of government courts. Alternative dispute resolution appeared confined only by the imaginations and goals of the participants. When mediation is institutionalized, it is controlled by legal professionals who import legal procedure and definitions. Mediators are standardized⁴³ and volume increases.⁴⁴ Some fear that these factors threaten to routinize and dehumanize the process, create pressures for "acceptable" outcomes, and destroy self-determination.⁴⁵ In short, mediation may simply become another step in the adversarial pre-litigation process.

The court's order issued pursuant to Rule 1.A.(1) shall state a date of completion for the conference which *shall be not less than 120 days nor more than 180 days after issuance of the court's order.*" N.C. RULES OF MEDIATED SETTLEMENT CONFERENCES Rule 3.B. (1995) (emphasis added).

42. Carrie Menkel-Meadow, *Pursuing Settlement In An Adversary Culture: A Tale of Innovation Co-Opted Or "The Law Of ADR"*, 19 FLA. ST. U. L. REV. 1, 3 (1991). James Alfini et al., *What Happens When Mediation Is Institutionalized?: To The Parties, Practitioners, and Host Institutions*, 9 OHIO ST. J. ON DISP. RESOL. 307, 309-10 (1994) (Quoting professor Baruch Bush).

43. N.C. RULES OF MEDIATED SETTLEMENT CONFERENCES Rule 8 (1995) states the prerequisites for being a MSC mediator. The mediator must have completed a 40 hour training program approved by the Dispute Resolution Commission (DRC), Rule 8.A. Attorneys must be members of the North Carolina State Bar with 5 years experience. Rule 8.B. It is possible for a non-attorney to qualify. The requirements are 20 additional hours of mediation training, acceptable to the DRC, followed by 5 years experience, in which the person mediated at least 12 cases each year for at least 20 hours each year, an additional six hours training in procedure, terminology, ethics and confidentiality by a trainer certified by the DRC, three letters of recommendation to the DRC, and a four year college degree. *Id.* These requirements should ensure that nearly all mediators in the MSC process are attorneys and members of the state bar. Rule 8 contains six additional requirements for attorneys and non-attorneys.

44. Alfini et al., *supra* note 42, at 309-13 (Quoting Professor Baruch Bush and Professor Carol Liebman).

45. *Id.*

Another concern is that mandatory mediation will decrease judicial efficiency and increase costs. Satellite litigation may be instituted upon a belief that the opposing party failed to properly mediate.⁴⁶ Drawing lessons from the 1983 amendment to Rule 11 of the Federal Rules of Civil Procedure, high penalties combined with unclear definitions of what constitutes compliance encourages parties to seek sanctions.⁴⁷ These costs could exceed the savings that result from additional and quicker settlements.

An early concern was that informal dispute resolution procedures would become second class courtrooms for the poor.⁴⁸ Individuals across the entire economic spectrum have, however, adopted ADR mechanisms. The criticism is now that the procedures favor the rich⁴⁹ and prejudice employees.⁵⁰ It has also been claimed that court-mandated ADR is a violation of the Seventh Amendment to the United States Constitution.⁵¹

46. ROGERS & McEWEN, *supra* note 7, § 7:03 at 13.

47. *Id.* at 14 & n.19. The experience of Rule 11 "cautions against adding substantial sanctions at the same time that more than mere attendance at mediation (and, when applicable, payment of a fee) is required." The Society for Professionals in Dispute Resolution recommend that

[c]oercion to settle in the form of reports to the trier of fact and of financial disincentives to trial should not be used in connection with mandated mediation. In connection with court-annexed arbitration, the financial disincentives should be clear, commensurate with the interests at stake, and used only when the parties can afford to risk their imposition and proceed to trial.

The Society of Professionals in Dispute Resolution, *Mandated Participation and Settlement Coercion*, ARBITRATION J, Mar. 1991, at 38. Reports concerning the substance of mediation should not be sent to the trier of fact, however, incentives to use the process for its intended purpose and to negotiate in good faith should not be confused as a disincentive to trial. Trial should be the natural result of two parties that can not in good faith reconcile their differences. "As a policy matter, it is important to distinguish settlement pressures from sanctions for vexatious or frivolous conduct in litigation and from provisions shifting attorney's fees to the losing party. Unlike these penalties, settlement pressures also punish the party with a meritorious claim." ROGERS & McEWEN, *supra* note 7, § 7:05 at 22-23. The financial disincentives to abusing the process and negotiating in bad faith should also be clear and commensurate with the additional costs such conduct imposes. See discussion *infra* parts II.B. and II.C.

48. ROGERS & McEWEN, *supra* note 7, § 5:03 at 11.

49. *Id.* William R. Wilson Jr., *Only Voluntary ADR Programs Ensure Constitutional Rights*, NAT'L L.J., April 11, 1994, at C6.

50. Micheal Yablonski, *ADR Backlash*, LITIG. NEWS, February / March 1995, at 1, 4.

51. Wilson, *supra* note 49, at 34. This is questionable. Since 1938, the Federal Rules of Civil Procedure have authorized federal judges to require

D. Brothers get Run Over by a Mediation Mack Truck

The North Carolina Court of Appeals recently confronted its first § 7A-38 litigation. In 1990, Clement Brothers entered into a contract to buy two new Mack trucks from Blue Ridge Mack Sales and Service, Inc. (Blue Ridge).⁵² When Blue Ridge tendered the two trucks for delivery, Clement Brothers refused to accept.⁵³ Blue Ridge subsequently merged into Triad Mack Sales and Service, Inc. (Triad Mack), and filed a claim for breach of contract against Clement Brothers.⁵⁴ June 26 1992, Judge J.D. DeRamus entered an order for a mediated settlement conference pursuant to N.C.G.S. § 7A-38, which required both parties to send "a representative (officer, director, employee, or in-house counsel) with full authority to settle the claim"⁵⁵ Triad Mack was represented by its attorney and president; Clement Brothers was represented by outside counsel who had no settlement authority.⁵⁶ The conference made no progress toward settlement.⁵⁷

Triad Mack filed a motion to sanction Clement Brothers for their failure to comply with the MSC order by not sending a representative with authority to settle.⁵⁸ At the subsequent hearing,

parties' attendance at pre-trial conferences. FED. R. CIV. P. 16. Since the 1983 amendments, the rules specify that parties can be compelled to attend in order to facilitate settlement. *Id.* A party may also be sanctioned for failing to participate in good faith at the pre-trial conference. *Id.* See Francis v. Women's Obstetrics and Gynecology Group, P.C., 144 F.R.D. 646 (W.D.N.Y. 1992) (Sanctioning party under Rule 16 for failure to prepare for pre-trial conference and failure to act in good faith.). See also Department of Transp. v. City of Atlanta, 259 Ga. 305, 309, 380 S.E.2d 265, 269 (1989) (J. Clarke, concurring.) (Discussing requiring good faith efforts in mediation, and state Constitution's reference to "speedy, efficient and effective resolution of disputes" points courts in the direction of using mediation.) Courts have long upheld the constitutionality of mandatory pre-trial requirements. For a review of cases finding pre-trial conference requirements valid in other contexts see: Kristine C. Karnezis, Annotation, *Validity and Construction of State Statutory Provisions Relating To Limitations In Amount of Recovery In Medical Malpractice Claim and Submission Of Such Claim To Pretrial Panel*, 80 A.L.R.3d 583 (1977); Gavin L. Phillips, Annotation, *Mortgage Foreclosure Forbearance Statutes - Modern Status*, 83 A.L.R.4th 243 (1991).

52. Triad Mack Sales and Serv., Inc. v. Clement Bros. Co., 113 N.C. App. 405, 406, 438 S.E.2d 485, 486 (1994).

53. *Id.*

54. *Id.*

55. *Id.* at 406-07, 438 S.E.2d at 486.

56. *Id.* at 407, 438 S.E.2d at 486-87.

57. *Id.* at 407, 438 S.E.2d at 487.

58. *Id.*

the attorney for Clement Brothers offered an unsworn statement that he failed to attend because the company president was ill and all other officers, directors, and employees were outside the state.⁵⁹ Judge DeRamus found that there was no good cause for Clement Brothers' failure to attend and entered an order striking their answer.⁶⁰ The judge entered a default order against Clement Brothers.⁶¹

Prior to final judgment, the North Carolina Court of Appeals granted an interlocutory appeal.⁶² The Court of Appeals held that the trial court's order was in compliance with the mediation statute and relevant court rules.⁶³ The Court of Appeals held that it was immaterial that the failure to attend did not prejudice Triad Mack.⁶⁴ Because the unsworn statement by Clement's attorney was not admissible as evidence, the record supported a finding of no good cause for the failure to attend.⁶⁵ Even though there were less drastic sanctions available,⁶⁶ the trial court did not abuse its discretion by its severe sanctions.⁶⁷ The trial court correctly found

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 408, 438 S.E.2d 487.

63. *Id.* N.C. GEN. STAT. § 7A-38.1(f) (1989 & Supp.) requires:

Attendance of parties. The parties to a superior court civil action which a mediated settlement conference is ordered, their attorneys and other persons or entities with authority, by law or contract, to settle the parties' claims shall attend the mediated settlement conference unless excused by rules of the Supreme Court or by order of the senior resident superior court judge. Nothing in this section shall require any party or other participant in the conference to make a settlement offer or demand which it deems is contrary to its best interests.

All individual parties and an attorney of record for each party must attend the MSC. An officer, employee or agent of a non-natural party with authority to settle must attend. Representatives of liability insurance companies involved must also attend and have authority to make a decision on behalf of the carrier or be able to "promptly communicate during the conference with persons who have such-decision making authority." N.C. RULES OF MEDIATED SETTLEMENT CONFERENCES Rule 4 (1995).

64. *Triad Mack Sales and Serv., Inc. v. Clement Bros. Co.*, 113 N.C. App. 405, 409, 438 S.E.2d 485, 488.

65. *Id.*

66. Rule 37 (b)(2)(C) lists as sanctions: "An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering judgment by default against the disobedient party;" N.C. R. Civ. P. 37.

67. *Triad*, 113 N.C. App. at 409, 438 S.E.2d at 488.

that Clement Brothers lacked good cause for their failure to attend and the order reflected that less severe sanctions were considered and rejected.⁶⁸ The sanctions entered are specifically authorized by Rule 37(b)(2)c.⁶⁹

This case is valuable as an indicator of future litigation and the questions the courts will be faced with.⁷⁰ In *Triad Mack*, Clement Brothers violated the plain language of the court-order and of the Rules Implementing Mediated Settlement Conferences. The sanctions were also clearly allowed by the North Carolina Rules of Civil Procedure. Despite clear rules, the losing party sought and was granted an appeal. The objectives of § 7A-38 were frustrated. Costs increased and efficiency decreased. If parties will pursue costly and time consuming appeals to contest issues that the rules address, parties are even more likely to appeal where the rules are silent.

II. ARGUMENT

General Statutes § 7A-38.1 and the Rules of Mediated Settlement Conferences require each party, or the party's substitute, to come to the MSC with the authority to settle the dispute.⁷¹ The legislation and accompanying rules fail to clarify the parties' responsibilities in the negotiation process. This lack of clarity will encourage additional litigation as participants seek to interpret the statutory language and its underlying principles. Additional litigation will defeat the underlying policy of the legislature by increasing costs and reducing efficiency thereby decreasing satisfaction with the process. The North Carolina Supreme Court can avoid this result by defining the parties' duties and clarifying the procedures for measuring compliance. Two possibilities are a good faith duty to negotiate a settlement, or no duty beyond strict compliance with the rules. The court should establish an objective

68. *Id.*

69. *See supra* note 66.

70. Can the party show up and refuse to negotiate? Must a party's claim that it refused an offer because it was "deemed contrary to its best interests" be a reasonable or honest belief? Can the party's representative satisfy the requirements by having the authority to settle the dispute for a peppercorn? Can the party's representative have no express authority to settle because the principle believes there is no legal merit to the claim, or because of a desire to litigate?

71. *See supra* note 63.

duty of good faith, define how the court will measure compliance, and how sanctions will be imposed.

A. *Foundation of the Duty*

The objectives of the MSC legislation - increased efficiency, reduced costs, and the satisfaction of participants- mandate a duty of good faith in the mediation process.⁷² Reducing cost and increasing efficiency are intertwined objectives. Efficient dispute resolution will result in lower costs. In voluntary mediation, participation occurs because both parties desire to resolve the conflict without litigation.⁷³ A party who is forced to mediate may lack this desire.⁷⁴ Economic incentives hinged on an objective criteria of good faith would provide motivation for parties to negotiate in good faith.⁷⁵ This "compelled motivation" will result in increased settlements in cases where one party wishes to delay or avoid resolution.

Another factor inhibiting efficiency and decreased costs is the attorney's financial interests. The public policy of reducing costs means reducing attorney fees. A more efficient process means less possible hours billable to a client. Quick dispute resolution coupled with client involvement will also lead to smaller contingent fees. MSC's promote quick settlements with mandatory client involvement. Attorneys mandated to attend the MSC's are required to promote a mechanism whose stated purpose opposes most attorneys' economic self-interest. This creates a *prima facie* conflict of interest.⁷⁶ Economic incentives based on an objective good faith standard would alleviate this conflict.

72. See *supra* note 28.

73. See *Department of Transp. v. City of Atlanta*, 380 S.E.2d 265, 268 (Ga. 1989) (stressing the importance of the voluntary nature of mediation).

74. At least one commentator has observed that one party to a conflict is often in favor of the status quo and will have no desire to resolve the conflict, therefore it makes no sense to mandate the party's participation in mediation. Andrea Nelle, *Making Mediation Mandatory: A Proposed Framework*, 7 OHIO ST. J. ON DISP. RESOL. 287, 294-95 (1992). This conclusion is questionable. It means that it makes more sense for all sides and the court to incur additional costs and forego a possible resolution because of one party's desire to prolong litigation. This perspective contradicts the public policies behind § 7A-38: improving the overall costs, efficiency and satisfaction of the process.

75. An efficient method for providing an economic incentive will be further developed. See discussion *infra* parts II.B. and II.C.

76. Nelle, *supra* note 74, at 295-96. While mandating mediation will overcome an attorney's self-interested avoidance of mediation, the effectiveness of mediation "depends largely on the content and enforcement of the duty to

Each attorney in a court appointed MSC should be held to a duty of good faith. The public policies behind coopting mediation into the adversarial process are advanced only when the parties make an effort to resolve their disputes. Attorneys involved in court-mandated mediation owe a duty to uphold this process and to use it for its legitimate purposes.⁷⁷ Attorneys owe an additional duty as negotiators to deal honestly with others.⁷⁸ It is professional misconduct for an attorney to engage in conduct that is dishonest or deceitful, or that is prejudicial to the administration of justice.⁷⁹ The Rules of Professional Conduct hold attorneys to a duty of honesty;⁸⁰ this duty can only be intensified when the attorney is utilizing the court's mechanisms of justice. The duties of honesty and good faith and the duty towards upholding the court's process should be recognized and enforced by an objective standard during mediation.

mediate" *Id.* at 296. *See also* Alfini et al., *supra* note 42, at 329 (quoting Professor Barkai).

77. "A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system [I]t is also a lawyer's duty to uphold legal process." N.C. RULES OF PROFESSIONAL CONDUCT Preamble (1994).

78. "As negotiator, a lawyer seeks a result advantageous to the client but consistent with *requirements of honest dealing with others.*" *Id.* (emphasis added).

79. *Id.*, Rule 1.2. "It is professional misconduct for a lawyer to:

. . . (c) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) Engage in conduct that is prejudicial to the administration of justice;"

80. In the fiduciary context, a lawyer may have a general duty to seek alternatives to litigation for a client.

Litigation. "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough. Never stir up litigation. A worse man can scarcely be found than one who does this.

J. Robert McClure Jr., *On the Practice of Law*, A.B.A. J., Oct. 1990, at 98 (excerpts from a Lincoln autobiography). Abe Lincoln's advice on a lawyer's honesty:

Let no young man choosing the law for a calling for a moment yield to the popular belief—resolve to be honest at all events; and if in your own judgment you cannot be an honest lawyer, resolve to be honest without being a lawyer. Choose some other occupation, rather than one in the choosing of which you do, in advance, consent to be a knave.

Mediation is a forum for precontractual negotiation. Participants in an MSC seek to exchange a set of promises that will resolve their conflict and that the court will enforce. Under the common law, there is no duty to act in good faith when negotiating a contract.⁸¹ The traditional view is that parties should be provided the freedom to negotiate without risk of precontractual liability.⁸² The basis for this view is that

a party that enters negotiations in the hope of the gain that will result from ultimate agreement bears the risk of whatever loss results if the other party breaks off the negotiations. That loss includes out-of-pocket costs All is hazarded on a successful outcome of the negotiations; all is lost on failure. . . . This aleatory view of negotiations rests upon a concern that limiting the freedom of negotiation might discourage parties from entering negotiations.⁸³

This traditional view should not be applied to court directed mediation for three reasons. First, the "aleatory view"⁸⁴ and concept of "risk" is inapplicable when the venture is mandated by the court. A party ordered to negotiate is not a fortuitous risk taker.

Second, two purposes of § 7A-38 are to reduce costs and improve efficiency for participants and the court. The disappointed party to the MSC does not bear the risk of failed negotiation alone. The risk is "compelled," and all parties, including the court itself, bear the increased costs of a failed negotiation. If a compulsory MSC fails, dissatisfaction and total costs in terms of time, effort, and dollars will be greater than if the MSC had not been ordered. It is illogical to mandate a process to reduce costs

81. "Before the contract is signed, the parties confront each other with a natural wariness. Neither expects the other to be particularly forthcoming, and therefore there is no deception when one is not." *Market St. Assoc. Ltd. Partnership v. Frey*, 941 F.2d 588, 594 (7th Cir. 1991). See also *Haver v. Union State Bank of Wautoma*, 532 N.W.2d 456 (Wis. Ct. App. 1995) (No duty under the U.C.C. for good faith in pre-contractual negotiation. Good faith only directs attention to the parties' reasonable expectations and does not create independent rights or duties.). But see *Satellite Broadcasting Cable, Inc. v. Telefonica De Espana*, 807 F. Supp. 210 (D.P.R. 1992) (In Puerto Rico, "parties which undertake negotiations of a contract are bound by a duty of good faith."). *Id.* at 216-17.

82. E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COLUM. L. REV. 217, 221 (1987).

83. *Id.*

84. "Aleatory transaction. An event dependent on a fortuitous or uncertain happening." BLACK'S LAW DICTIONARY 70 (6th ed. 1990).

and increase efficiency and satisfaction, while not mandating participation that accomplishes these objectives.⁸⁵ Failure to mandate conduct that promotes these objectives will often lead to the opposite result.

An individual who is directed to mediate may often have higher costs and lower satisfaction than if the MSC had not been ordered. This will occur when the opposing party either wants to preserve the status quo or when it uses the cost of litigation to enhance questionable damages. In this second situation, an MSC will actually increase the opposing sides "economic leverage" as another cost is added to the equation. However, if parties are held to a duty of negotiating towards a "just" resolution, the bad faith⁸⁶ party will have an incentive to bargain in good faith or will have to bear the costs of their behavior. The cost of refusing to honestly negotiate includes, at a minimum, all parties' cost of mediation and possibly the costs of subsequent litigation. Enforcing the duty by shifting costs must not impede the goals of reduced costs and increased efficiency.⁸⁷

Third, the "concern" of inhibiting negotiations, which is the foundation of the traditional view in contract theory, is entirely misplaced in a process where the negotiations are mandatory. The superior court judge's evaluation of the case, not the parties' inhibitions, will decide whether mediation occurs. The traditional view on precontractual liability is inappropriate in the context of court-mandated MSC's, and is hostile to the public policies behind § 7A-38.⁸⁸

85. *But see* Decker v. Lindsay, 824 S.W.2d 247 (Tex. Ct. App. 1992) (Policy behind state code allowed the lower court to compel parties to attend mediation, but did not allow the court to compel them to sit down, negotiate or settle the dispute.).

86. Bad faith behavior should not be confused with an honest disagreement on a material question of fact or on the status of the law. Parties negotiating in good faith should be able to articulate the reasons behind their valuation of the dispute, and thus be able to identify the reason(s) negotiation failed.

87. *See* discussion *infra* part II.C.

88. *See* Nicola W. Palmieri, *Good Faith Disclosures Required During Precontractual Negotiations*, 24 SHLR 70 (1993). Discusses

the modern legal trends that support a heightened duty of good faith and fair dealing in precontractual negotiations. Such trends include the rise of the doctrine of good faith in the context of contract performance, the recognition that the duty of good faith and fair dealing is not limited solely to post-contractual dealings, the statutory use of the duty of good faith, the application of the doctrine of good faith as a duty imposed by

A good faith standard in mediation can also be demonstrated in contract theory. Civil litigants enter into an implied-in-fact contract with the court.⁸⁹ By paying fees and filing documents, litigants manifest an intent to use the judicial process. By accepting the fees and documents, and by docketing the case, the court manifests an intent to provide its mechanisms of law and justice for resolving the dispute. The court provides a valuable service by agreeing to be a neutral arbiter. This contract with the court is silent on duties owed and on whether there are any conditions to the court's performance. The omitted provisions are supplied by rules of law.⁹⁰ The pertinent rule of law describing the party's duty at an MSC merely addresses attendance.⁹¹ The court may implicate a duty based on the parties' expectation or based on principles of justice.⁹² It is likely that both the court and the party

law, the increasing application of ethics and morality in the law and the decline of caveat emptor doctrine.

In order to show similarities between United States' and civil law's concept of the duty of good faith and fair dealing, and of good faith disclosures, author concludes with an analysis of Italian and German laws' requirement of good faith in negotiations and contract formation. *Id.* at 77-78, 201-213.

89. When parties manifest their agreement by their conduct, the contract is said to be implied in fact. JOSEPH D. CALAMARI & JOSEPH M. PERILLO, *CONTRACTS* § 1-12 (3d. ed. 1987). "The distinction between this kind of contract and a contract expressed in words is unimportant: both are true contracts formed by a mutual manifestation of assent." *Id.* See also *RESTATEMENT (SECOND) OF CONTRACTS* §§ 5, 19 (1979).

90. In contracting with the court, the majority of provisions are omitted from the contract. There are two reasons why a party may tolerate an omission in a contract. First, the party may have foreseen the problem but made a conscious decision not to deal with it. . . .

[A] reason why parties may fail to deal with these nonroutine contingencies is that they are confident that the law will provide reasonable terms if necessary. For this reason, much goes without saying, especially in informal agreements. . . . If all terms were expressly agreed to, even the simplest contracts would become intolerably long.

E. ALLAN FARNSWORTH, *CONTRACTS* § 7.15 at 541-42 (2d. ed. 1990). A party contracting with the court to resolve a dispute, recognizes that there is a process to follow and that the requirements for the conflict's resolution depend on compliance with the rules and laws pertaining to the process.

91. See *supra* note 63.

92. Once the court determines that the parties have omitted the relevant circumstance from the contract, it must supply a term to the contract that deals with the case. FARNSWORTH, *supra* note 90, § 7.16 at 546. There are two basis for supplying a term: actual expectations of the parties and basic principles of justice. *Id.*

expected each other to comply with the most efficient and expeditious means to arrive at a just resolution. As discussed above, mediation is most efficient when both parties undertake good faith efforts to reach a resolution. When the court compels the individual to participate in a court process, it is just to expect the court to regulate the process in the most efficient and economical means possible.

B. *Standards of Review*

The North Carolina Supreme Court must define a clear standard of what constitutes good faith in a MSC order to promote the public policies behind § 7A-38.1. Once a duty of good faith in MSC's is established, a standard will have to be set for guiding negotiating parties and the courts. Announcing the duty without clear guidelines will require additional litigation to define the scope of the duty. Additional litigation would frustrate the public policies behind MSCs.

One commentator has identified at least six different judicial standards for reviewing intent.⁹³ The first is strict compliance and absolute immunity.⁹⁴ Under this analysis, the party only has to abide by the letter of the rules. Under the current Rules, if all the necessary individuals for the party are present with the authority to settle, the party is immune from liability. The second standard is that a party is liable for failing to act in subjective⁹⁵ and objective⁹⁶ good faith.⁹⁷ A subjective standard requires that

93. R. Randall Kelso, *Three Years Hence: An Update on Filling Gaps in the Supreme Court's Approach to Constitutional Review of Legislation*, 36 S. TEX. L. REV. 1, 40 (1995).

94. *Id.*

95. Good faith is usually used to refer to the individuals intent. The U.C.C. defines good faith as "honesty in fact in the conduct or transaction concerned," N.C. GEN. STAT. § 25-1-201(19) (1995), and implies it in every contract. N.C. GEN. STAT. § 25-1-203 (1995). *See also* the Uniform Fiduciary Act, N.C. GEN. STAT. § 32-2 (1991). It has also been defined as being faithful to one's duty or obligation. *Efron v. Kalmanovitz*, 57 Cal.Rptr. 248, 251 (Cal. Ct. App. 1967). In the context here, "subjective" is used to distinguish it from the "objective" standard of good faith.

96. The most familiar standard of objective good faith is in U.C.C. § 2-103 (b): "Good faith" in the case of a merchant means "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." N.C. GEN. STAT. § 25-2-103 (1986). North Carolina has shifted from a subjective good faith standard to an objective standard for purposes of N.C. Rules of Civ. Proc., Rule 11. "The standard is one of reasonableness under the circumstances. This standard is more stringent than the original good-faith formula and thus it is

the party have the requisite subjective mental intent.⁹⁸ "In contrast, an objective standard focuses on reasonable expectations and the behavior of the reasonably prudent person."⁹⁹ The third standard is a pretext inquiry, whether the party lacked subjective good faith.¹⁰⁰ The fourth standard is to determine whether there was a lack of objective good faith.¹⁰¹ Did the party do what a reasonably prudent individual would have done? The fifth standard finds liability for a lack of subjective or objective good faith.¹⁰² The sixth standard bases liability on what the actual facts are as determined by the court, "without regard to what subjectively the person knew, or objectively what the individual should have known"¹⁰³

A subjective good faith standard would not be conducive to efficiency and lower costs. It would be easy for a disappointed party to allege a lack of subjective good faith and difficult for a court to determine.¹⁰⁴ Resolving the question would involve additional hearings and review of witnesses and evidence. It would

expected that a greater range of circumstances will trigger its violation." *Turner v. Duke*, 325 N.C. 152, 164, 381 S.E.2d 706, 713 (1989). An objective standard is used to determine whether a client has made a "reasonable inquiry" into the validity of their pleadings;

[i]f, given the knowledge and information which can be imputed to a party, a reasonable person under the same or similar circumstances would have terminated his or her inquiry and formed the belief that the claim was warranted under existing law, then the party's inquiry will be deemed objectively reasonable.

Bryson v. Sullivan, 330 N.C. 644, 661-62, 412 S.E.2d 327, 336 (1992). The same standard is used to evaluate an attorney's conduct for purposes of Rule 11.

If an attorney's conduct appears to fall within the scope of Rule 11, the court must first examine the action at issue according to a standard of objective reasonableness. At this stage, the inquiry focuses only on whether a reasonable attorney in like circumstances would believe his actions to be factually and legally justified. If the standard of objective reasonableness is not met, sanctions are mandatory.

Lyles v. K Mart Corp., 703 F. Supp. 435, 440 (W.D.N.C. 1989).

97. Kelso, *supra* note 93.

98. *Id.* at 39.

99. *Id.*

100. *Id.* at 40.

101. *Id.*

102. *Id.*

103. *Id.*

104. For the same reasons, the federal and North Carolina courts found the subjective standard ineffective for purposes of Rule 11 and switched to an objective standard. *Turner v. Duke*, 325 N.C. 152, 163-64, 381 S.E.2d 706, 713.

present questions of fact and require testimony from the mediator. The possibility of mediator testimony would destroy the confidentiality inherent in mediation.¹⁰⁵ The increased costs, decreased efficiency, and threat to mediator confidentiality would more than negate any gain that would result from a requirement of subjective good faith.

An objective good faith standard is determined by what a reasonably prudent person would have known and done.¹⁰⁶ In the context of negotiating a settlement, a reasonably prudent person's behavior will usually be guided by economic rationality. A reasonable party will negotiate a settlement based on the amount of perceived damages balanced against the risks and costs of trial.¹⁰⁷ The objective value of the claim is best defined by what the trier of fact determines after being presented with both sides of the evidence. If a party refuses an offer that was reasonably within the amount ultimately determined at final judgment, there is evidence of an economically irrational decision. If a party refuses an offer that was better than the amount determined at final judgment, there is a presumption of economic irrationality. Assuming that a reasonably prudent person is economically rational, a final judgment that is less than or nearly the same as that offered at the MSC creates a presumption of a failure to act in good faith. This presumption should be overcome by clear and convincing evidence of a good faith dispute over a legitimate question of law or material fact. If the presumption is not rebutted, costs and attorney fees, from the date of the offer, should be shifted onto the presumed bad-faith party.

In the context of mandatory MSCs, this objective standard is a fact determinative presumption that is rebutted by objective proof of good faith. The only evidence needed to determine the presumption is the final offers of both sides at the mediation and the value at final judgment. If the parties are negotiating in good faith, they will possess articulated reasons substantiating their valuation of the dispute. If the parties are unable, in good faith, to negotiate a settlement, they should be able to identify where the

105. See, James J. Alfani, *Trashing, Bashing, And Hashing It Out: Is This The End Of "Good Mediation"?*, 19 FLA. ST. U. L. REV. 47, 63-65 (1991); Mebane, *supra* note 7, at 1868.

106. See *supra* note 96.

107. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 21.5 (4th ed. 1992) (Economic analysis of deciding to settle. Demonstrates the key role anticipated costs of litigation play, aside from the merits of the claim.).

valuations of the dispute are irreconcilable. This process will focus the parties on the underlying issue(s). If the issue is a reasonable question of the law or a question of material fact, both parties should offer the explanation to the court upon the MSC's failure. Both parties should then be deemed to have participated in good faith regardless of the ultimate decision. Determining the reasonableness of the offered explanations should be left to the discretion of the trial judge. The trial judge is in the best position to determine how reasonable each side's beliefs were after considering the legal analysis and viewing the evidence.

A party can immediately submit to the court its objective good faith reason for refusing what appears to be a rational offer.¹⁰⁸ Therefore, evidence used for rebutting the presumption should be admitted after the MSC and before trial.

C. *Economic Presumption*

To avoid additional litigation and out of fairness to the parties, the court should establish an economic bright line for the presumption that a party negotiated in bad faith.¹⁰⁹ An economic bright line would provide a clear, simple, low-cost and efficient method of analysis. The entire process could be driven by a joint affidavit from the parties stating their final offers at the close of the failed MSC. Each party could attach a separate affidavit stating their objective reasons, if any, for rejecting the other side's offer. These affidavits would be reviewed by the court upon final judgment without need for motions, hearings, or additional evidence. This suggested process would not threaten mediator neutrality and would not punish parties with legitimate disputes. The method and implications of this analysis would be clear, effi-

108. If a party has a reason for wanting a public decision the court can be informed and the MSC waived. If evidence is discovered after the MSC that changes the worth of the claim, the court can be informed and the parties can renegotiate. A duty to disclose material facts, analogous to the new Federal Rules of Civil Procedure, Rule 26, would reduce the possibility of the latter occurrence.

109. In Wayne County, MI, parties may be directed to an information hearing. The rules permit the court to impose costs and attorney fees on the party who rejects a unanimous recommendation of the hearing panel but does not improve on it by at least ten percent at trial. ROGERS & McEWEN, *supra* note 7, § 7:04, at 17-18 & nn. 2, 3 (Discussing Wayne County, Mich Local Court Rule 403.15-404.16 and Mich Gen Court Rule 316.7).

cient and require little additional effort by the court.¹¹⁰ It would provide a strong and clear economic incentive for parties to make good faith efforts in assessing and making offers at MSCs.

III. CONCLUSION

The adoption of a good faith standard for mandatory MSC's may not "transform"¹¹¹ the adversarial process, but if done carefully, it will improve efficiency, reduce cost and increase public satisfaction with the civil court process. Such a standard simply requires parties to act honestly and reasonably towards resolving their dispute before incurring the costs of the adversarial system. Greater efficiency, lower costs and higher satisfaction may not change North Carolinians' perception of lawyers, but it would be a step in the right direction.

Tony Biller

110. Sanctions would be subject to a three part appellate review. The first inquiry would be whether the rejected offer fell within the economic bright line. If the offer did, the second inquiry would be whether the rejecting party provided a legitimate reason for their rejection. The trial judge's determination on the legitimacy of the reason should not be disturbed absent an abuse of discretion. The sanctions imposed would also be subject to an abuse of discretion standard. This review is more simple than the bifurcated appellate review of mandatory Rule 11 sanctions. Under Rule 11, the appellate court reviews *de novo* the decision to grant or deny sanctions; this review is determined by

(1) whether the trial court's conclusions of law support its judgment or determination,(2) whether the trial court's conclusions of law are supported by findings of fact, and(3) whether the findings of fact are supported by a sufficiency of the evidence.

Turner v. Duke, 325 N.C. 152, 165, 381 S.E.2d 706, 714. If the appellate court finds these three factors in favor of the lower court, the lower court's decision is upheld. *Id.* The reviewing court then uses an abuse of discretion standard in reviewing sanctions that were imposed. *Id.*

111. [I]f people are able to find ways of working through conflict that involve acting with somewhat greater strength and compassion, and with somewhat less weakness and self-absorption, this is transformation. Perhaps this is possible at least to some degree much more often than we think; and perhaps this is what people want — much more often than we think. Maybe lawyers are even interested in providing or helping people to achieve this much more often than we think.

Alfani et al., *supra* note 42, at 331 (Quoting Professor Baruch Bush).