

# Crowd Sourcing Mediator Ethics

**The Ethical “Bermuda Triangle”: Dealing with Attorneys, Parties, and Judges in Mediation**

**MARCH 31, 2017**

EDNY ADR DEPARTMENT

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

## Crowd Sourcing Mediator Ethics

**The Ethical “Bermuda Triangle”: Dealing with Attorneys, Parties, and Judges in Mediation**

Central Jury Room (1st Floor)  
100 Federal Plaza  
Central Islip, New York

**Friday, March 31, 2017**

11:30am – 12:00pm

Registration and Lunch

12:00pm – 12:10pm

Welcome and Introductions

12:10pm – 1:10pm

Intersection of Ethical Responsibilities Between Attorneys and Mediators

1:10pm – 1:20pm

Break

1:20pm – 1:40pm

Current Topics in Mediation Ethics: Immigration

1:40pm – 1:55pm

The Role of Judges and Mediation Confidentiality

1:55pm – 2:00pm

Q&A and Closing Remarks

## TRAINER BIOGRAPHIES

### PROFESSOR ALEXANDRA CARTER

**Alexandra Carter** is a Clinical Professor of Law and the Director of the Mediation Clinic at Columbia Law School. From 2012-2016, she also served as the Law School's Director of Clinical Programs, providing leadership in the area of experiential teaching and learning.

Professor Carter's teaching, research and publications lie in the field of alternative dispute resolution, primarily in mediation and negotiation. She has been sought as a trainer on mediation, civil procedure, negotiation and dispute systems design for many different groups from private and public sectors, including the United Nations, U.S. courts and federal agencies, private corporations and law firms. She has addressed the Chinese Academy of Social Sciences Rule of Law Conference, the 5<sup>th</sup> World Peace Conference in Jakarta, the ICU-CLS Peace Summit in Tokyo, and the Ceará Supreme Court Conference on Mediation; and has contributed as a faculty speaker at universities in South America, Asia and Europe. She has served on the Alternative Dispute Resolution Committee for the New York City Bar Association, as well as the Mediator Ethics Advisory Committee for the New York State Unified Court System.

Prior to joining the Columbia faculty, Professor Carter was associated with Cravath, Swaine & Moore LLP, where she worked as part of a team defending against a multibillion dollar securities class action lawsuit related to the Enron collapse, served as the senior antitrust associate on several multibillion dollar mergers, and handled cases involving copyright law.

Professor Carter received her Juris Doctor degree in 2003 from Columbia Law School, where she earned James Kent and Harlan Fiske Stone academic honors. She also won the Jane Marks Murphy Prize for clinical advocacy and the Lawrence S. Greenbaum Prize for the best oral argument in the 2002 Harlan Fiske Stone Moot Court Competition. After earning her degree, Professor Carter clerked for the Hon. Mark L. Wolf, U.S. District Court for the District of Massachusetts in Boston.

### PROFESSOR CARTER'S RESEARCH TEAM

#### ROBERT LONGTIN

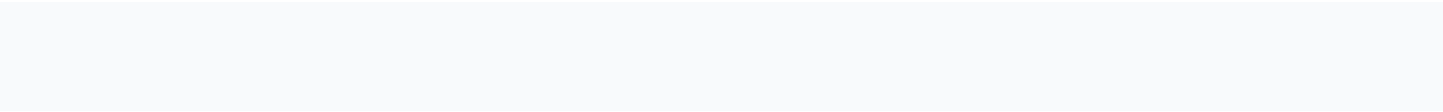
Robert Longtin is a third-year student at Columbia Law School. Although he will be practicing litigation at Quinn Emanuel Urquhart & Sullivan's New York office after graduation, he is heavily involved in, and thoroughly enjoys, Alternative Dispute Resolution Programs. Robert competed and then coached Columbia's Willem C. Vis Moot Court Arbitration Team, mediated disputes through Columbia's Mediation Clinic, and is now assisting the Clinic with various projects through the Advanced Mediation Clinic.

### **TARA RAAM**

Tara Raam is a third-year student at Columbia Law School. She first became interested in conflict-management techniques while teaching 11th and 12th grade prior to attending law school. Tara completed the Mediation Clinic at Columbia and is currently involved in the Advanced Mediation Clinic. Upon graduating, she will practice at Debevoise & Plimpton LLP in New York.

### **TOADER MATEOC**

Toader Mateoc, or Ted to most, is a third-year student at Columbia Law School. His legal education changed significantly after taking a seminar on Negotiations, which opened his mind to the possibilities of Alternative Dispute Resolution (and non-black-letter-law classes). After successfully completing the Mediation Clinic, he is now involved with Advanced Mediation as well as Native Peacemaking. Ted will practice at Gibson Dunn & Crutcher's New York office upon graduation.



## ADDITIONAL RESOURCES

Uniform Mediation Act

[http://www.uniformlaws.org/shared/docs/mediation/uma\\_final\\_03.pdf](http://www.uniformlaws.org/shared/docs/mediation/uma_final_03.pdf)

American Bar Association Section of Dispute Resolution ADR Ethics Resources

[http://www.americanbar.org/groups/dispute\\_resolution/resources/Ethics.html](http://www.americanbar.org/groups/dispute_resolution/resources/Ethics.html)

New York State Unified Court Systems Mediator Ethics Advisory Committee (MEAC)

<https://www.nycourts.gov/ip/adr/meac.shtml>

Florida Courts Mediator Ethics Advisory Committee (MEAC) Opinions

<http://www.flcourts.org/resources-and-services/alternative-dispute-resolution/information-trainers-legal-professionals/meac-opinions.shtml>

ABA National Clearinghouse for Mediator Ethics Opinions

[http://www.americanbar.org/directories/mediator\\_ethics\\_opinion.html#](http://www.americanbar.org/directories/mediator_ethics_opinion.html#)

# USING DISPUTE SYSTEM DESIGN METHODS TO PROMOTE GOOD-FAITH PARTICIPATION IN COURT-CONNECTED MEDIATION PROGRAMS

John Lande\*

*This Article discusses what can be done to promote productive behavior in mediation and reduce bad conduct. Although most participants do not abuse the mediation process, some people use mediation to drag out litigation, gain leverage for later negotiations, and generally wear down the opposition. Rules requiring good-faith participation are likely to be ineffective and possibly counterproductive. This Article proposes using dispute system design principles to develop policies satisfying the interests of stakeholders in court-connected mediation programs. After outlining important interests of key stakeholder groups, including litigants, attorneys, courts, and mediators, the Article describes specific policies that could satisfy their interests. These policies include collaborative education about good mediation practice, pre-mediation consultations and submission of documents, a limited and specific attendance requirement, and protections against misrepresentation. If faithfully implemented, these policies will enhance the integrity of mediation programs and satisfy the interests of the stakeholder groups without the problems caused by good-faith requirements.*

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## INTRODUCTION

What can be done to prevent people from behaving badly in mediation?<sup>1</sup> One litigator described his approach to mediation this way:

"[I]f . . . I act for the Big Bad Wolf against Little Red Riding Hood and I don't want this dispute resolved, I want to tie it up as long as I possibly can, and mandatory mediation is custom made. I can waste more time, I can string it along, I can make sure this thing never gets resolved because . . . I know the language. I know how to make it

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1. In general, mediation is a procedure in which the mediator helps disputing parties negotiate an agreement and in which the mediator has little or no authority to impose a decision if the parties do not reach agreement. See CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 8, 41–53 (2d ed. 1996). But see generally ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (1994) (arguing that, rather than settlement of disputes, primary goals of mediation should be empowerment of individuals to manage conflict and recognition of the concerns of others involved in conflict). Mediation is based on values that parties should voluntarily make decisions in mediation ("self-determination"), mediators should impartially help all parties in a dispute, and mediators should maintain the confidentiality of communications in mediation. See AMERICAN ARBITRATION ASSOCIATION ET AL., *MODEL STANDARDS OF CONDUCT FOR MEDIATORS* §§I–II, V (1994), available at [http://ilr.cornell.edu/alliance/model\\_standards\\_of\\_conduct\\_for\\_m.htm](http://ilr.cornell.edu/alliance/model_standards_of_conduct_for_m.htm).

look like I'm heading in that direction. I make it look like I can make all the right noises in the world, like this is the most wonderful thing to be involved in when I have no intention of ever resolving this. I have the intention of making this the most expensive, longest process but is it going to feel good. It's going to feel so nice, we're going to be here and we're going to talk the talk but we're not going to walk the walk."<sup>2</sup>

In her study of Ontario litigators, Professor Julie Macfarlane found that rather than using mediation to try to reach a settlement in good faith, some lawyers use mediation to make misleading statements, “‘smoke the other side out,’” gain leverage for later negotiations, drag out litigation, increase opponents' costs, and generally wear down the opposition.<sup>3</sup> Bad-faith tactics include purposely wasting time and money to demoralize parties less able to afford litigation.<sup>4</sup> Attorneys can do this while using mediation jargon and creating phony issues to appear sincerely interested in settling the case.<sup>5</sup> These tactics certainly do not represent the approach of all or even most of

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2. Julie Macfarlane, *Culture Change? Commercial Litigators and the Ontario Mandatory Mediation Program*, 2002 J. DISP. RESOL. (forthcoming 2002) (manuscript at 32) (quoting a Toronto litigator) (first alteration in original). Macfarlane interviewed the attorney in a study based on interviews of forty litigators who had participated in at least ten mediations. Some lawyers and litigants in the United States also take an adversarial approach to alternative dispute resolution (ADR). See 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, 17 (1991) (expressing concern that ADR has become “just another stop in the ‘litigation’ game which provides an opportunity for the manipulation of rules, time, information, and ultimately, money”).

3. Macfarlane, *supra* note 2 (manuscript at 31–32) (quoting an Ontario litigator). The Ethical Guidelines for Settlement Negotiations of the ABA Section of Litigation would prohibit attorneys from using the settlement process in bad faith. *Ethical Guidelines for Settlement Negotiations*, 2002 A.B.A. SEC. LITIG., § 4.3.1, at 49, at <http://www.abanet.org/litigation/ethics/settlementnegotiations.pdf>. The Committee Note states:

[I]t may be impermissibly deceptive, and thus an act of bad faith, for a lawyer to obtain participation in settlement discussions or mediation or other alternative dispute resolution processes by representing that the client is genuinely interested in pursuing a settlement, when the client actually has no interest in settling the case and is interested in employing settlement discussions or alternative dispute resolution processes solely as a means of delaying proceedings or securing discovery.

*Id.*

4. See Kimberlee K. Kovach, *Good Faith in Mediation—Requested, Recommended, or Required? A New Ethic*, 38 S. TEX. L. REV. 575, 591–96 (1997) (describing problems caused by bad-faith conduct); 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, 607–08 (2001) (arguing that sanctions are needed “to compensate the aggrieved party for the costs, fees, time, and anguish”); Roger L. Carter, *Oh Ye of Little [Good] Faith: Questions, Concerns and Commentary on Efforts to Regulate Participant Conduct in Mediations* 2002 J. DISP. RESOL. (forthcoming 2002) (draft at 1–2, 48 n.191, 51 n.197) (describing cases in which parties take off time from work and travel great distances for mediations that are unproductive because key participants fail to attend or to make reasonable offers).

5. Macfarlane, *supra* note 2 (manuscript at 31). Although these tactics were not typical of most of the litigators interviewed, Macfarlane found that some litigators used court-connected me-

the Ontario litigators in the study, but rather they seem to vary based on the local legal culture.<sup>6</sup> For example, the adversarial tactics apparently were concentrated especially in Toronto where the local legal culture is less supportive of mandatory mediation than in Ottawa.<sup>7</sup>

Legislatures and courts have adopted rules requiring good faith in mediation, and courts have sanctioned violators.<sup>8</sup> These requirements are pre-

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mediation as an instrument to gain partisan advantage. *Id.* Macfarlane's study focused only on attorneys; presumably some parties also act in bad faith in mediation.

In a survey of attorneys who participated in mediation in the Early Assessment Program of the U.S. District Court for the Western District of Missouri, 18 percent said that some parties did not participate in good faith in a mediation session. Almost two-thirds (63 percent) of the attorneys indicated that they had not experienced bad faith by a party in a mediation. DONNA STIENSTRA ET AL., REPORT TO THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION & CASE MANAGEMENT: A STUDY OF THE FIVE DEMONSTRATION PROGRAMS ESTABLISHED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990, at 242-44 (1997), available at <http://156.132.47.230:11301/verity/unpublished/0024.pdf>.

6. Practitioners and scholars have long known of substantial variations in local legal cultures. See Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 146-48 (1974) (collecting findings of local legal culture); Carrie Menkel-Meadow, *When Dispute Resolution Begets Disputes of its Own: Conflicts Among Dispute Professionals*, 44 UCLA L. REV. 1871, 1927 n.266 (1997) (collecting findings of local legal culture). Recent studies suggest that there are variations in local "mediation culture" as well. John Lande, *Failing Faith in Litigation? A Survey of Business Lawyers' and Executives' Opinions*, 3 HARV. NEGOT. L. REV. 1, 69-70 (1998) [hereinafter *Failing Faith*]; Macfarlane, *supra* note 2 (manuscript at *passim*); see also John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 FLA. ST. U. L. REV. 839, 845-54 (1997) [hereinafter *Lawyering and Mediation Transformation*].

7. Macfarlane, *supra* note 2 (manuscript at *passim*). Macfarlane's study involved a non-random sample that cannot provide a valid indication of the distribution of attitudes of Toronto and Ottawa commercial litigators but are suggestive about local differences. Local legal culture is only one factor affecting adversarial behavior, which is not limited to or typical of all Toronto litigators. *Id.*

8. See *infra* notes 23-26 and accompanying text for discussion of the definition of good faith. Some commentators have proposed establishing good-faith requirements to ensure good conduct in mediation. For the two main proposals for a good-faith requirement, see generally Kovach, *supra* note 4; Weston, *supra* note 4. Other commentators have expressed support for good-faith requirements. See Michael Z. Green, *Proposing a New Paradigm for EEOC Enforcement After 35 Years: Outsourcing Charge Processing by Mandatory Mediation*, 105 DICK. L. REV. 305, 337 (2001) (proposing "good faith obligation to meet and attempt mediation" in EEOC cases); 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. DISP. RESOL. 1, 49-50 (favoring a good-faith requirement for mandatory mediation but not voluntary mediation); Tony Biller, Comment, *Good Faith Mediation: Improving Efficiency, Cost, and Satisfaction in North Carolina's Pre-Trial Process*, 18 CAMPBELL L. REV. 281, 297-301 (1996) (arguing that carefully designed good-faith standards would "improve efficiency, reduce cost and increase public satisfaction with the civil court process"); Kathleen A. Devine, Note, *Alternative Dispute Resolution: Policies, Participation, and Proposals*, 11 REV. LITIG. 83, 108-09 (1991) (arguing that courts should imply good-faith requirements if statutes do not provide for them); Charles J. McPheeters, Note, *Leading Horses to Water: May Courts Which Have the Power to Order Attendance at Mediation Also Require Good-Faith Negotiation?*, 1992 J. DISP. RESOL. 377, 393 (arguing that good-faith requirements are appropriate means for efficient use of alternative dispute resolution and courts); Matthew A. Tenerowicz, Note & Comment, *"Case Dismissed"—or Is It? Sanctions for Failure to Participate in Court-Mandated ADR*, 13 OHIO ST. J. ON DISP. RESOL. 975, 998-1000 (1998) (favoring sanctions

mised on assumptions that mediation participants<sup>9</sup> would understand readily what behavior is required and would respond appropriately. This Article challenges these assumptions.<sup>10</sup>

The debate over good-faith requirements is related to the growth of court-ordered mediation.<sup>11</sup> In recent decades, courts increasingly have or-

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for bad faith in alternative dispute resolution). See also James J. Alfini, *Trashing, Bashing, and Hashing It Out: Is This the End of "Good Mediation"?*, 19 FLA. ST. U. L. REV. 47, 63–66 (1991) (presenting interviews of twenty Florida mediators and attorneys most of whom favored a good-faith requirement, with a "healthy minority" opposing it).

9. In court-connected mediation, the parties and their attorneys typically are the participants in mediation (in addition to the mediator). In some cases, experts and others also may participate.

10. Good-faith requirements have been criticized as being ill-conceived and producing unintended, adverse effects. For the three principal critiques, see Wayne D. Brazil, *Continuing the Conversation About the Current Status and the Future of ADR: A View from the Courts*, 2000 J. DISP. RESOL. 11, 30–33; Edward F. Sherman, *Court-Mandated Alternative Dispute Resolution: What Form of Participation Should Be Required?*, 46 SMU L. REV. 2079, 2089–94 (1993); Alexandria Zylstra, *The Road from Voluntary Mediation to Mandatory Good Faith Requirements: A Road Best Left Untraveled*, 17 J. AM. ACAD. MATRIMONIAL LAW. 69, 86–97 (2001); see also 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, 205–06 (2001) (arguing that vigorous judicial enforcement of a good-faith requirement may stimulate subtle forms of coercion that "threaten to erode the integrity of the mediation process"); 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, 970 (1997) (opposing a good-faith requirement because it would require the mediator to function in an "inappropriate role" and risks "proliferation of litigation"); David Hricik, *Reflections of a Trial Lawyer on the Symposium: Dialogue with the Devil in Me*, 38 S. TEX. L. REV. 745, 749–52 (1997) (arguing that a duty of good faith including a duty of disclosure would result in satellite litigation, unhappy parties, and reduced use of mediation); Lisa A. Lomax, *Alternative Dispute Resolution in Bankruptcy: Rule 9019 and Bankruptcy Mediation Programs*, 68 AM. BANKR. L.J. 55, 81 (1994) (opposing sanctions for abuse of mediation because of the risk of possible satellite litigation and threats to confidentiality, appearance of mediators' neutrality, mediators' effectiveness, and the willingness of mediators to take cases); Andreas Nelle, *Making Mediation Mandatory: A Proposed Framework*, 7 OHIO ST. J. ON DISP. RESOL. 287, 304–05 (1992) (expressing concern that a good-faith requirement would violate confidentiality protections, cause settlement pressure, and undermine voluntariness of agreements); Society of Professionals in Dispute Resolution, *Dispute Resolution as It Relates to the Courts: Mandated Participation and Settlement Coercion*, 46 ARB. J. No. 1, at 38, 46 (1991) (recommending against a good-faith requirement); 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 DISP. RESOL. 269, 296 n.100 (1999) (arguing that a good-faith requirement "may create more problems than it solves"); David S. Winston, *Participation Standards in Mandatory Mediation Statutes: "You Can Lead a Horse to Water. . ."*, 11 OHIO ST. J. ON DISP. RESOL. 187, 197–98 (1996) (arguing that good faith is "inherently ambiguous" and that a good-faith requirement would require courts to investigate the mediation process and undermine efficiency); Caroline Harris Crowne, Note, *The Alternative Dispute Resolution Act of 1998: Implementing a New Paradigm of Justice*, 76 N.Y.U. L. REV. 1768, 1803 (2001) (arguing that mandating good faith would make a "farce of the process"); Note, *Mandatory Mediation and Summary Jury Trial: Guidelines for Ensuring Fair and Effective Processes*, 103 HARV. L. REV. 1086, 1096–97 (1990) (arguing that good-faith requirements are too vague to provide sufficient guidance on what constitutes compliance).

11. These programs are referred to alternatively as court-connected, court-ordered, court-mandated, and court-annexed mediation programs. Court-connected programs differ in regard to whether they require litigants to mediate or merely offer mediation as an option for the litigants.

dered cases to mediation to help parties settle cases without trial and relieve pressure on court dockets. In general, participants have been satisfied with court-connected mediation programs.<sup>12</sup> Predictably, however, some people do not want to participate in mediation, at least not at the time and under the circumstances ordered by the court. In the past decade, numerous reported cases have adjudicated claims of bad faith in mediation. This may reflect a growing reaction against mandated mediation, especially in areas where the legal culture promotes heavy settlement pressure.<sup>13</sup>

The controversy over good-faith requirements is part of a larger debate over the purpose and nature of court-connected mediation programs. This debate focuses on competing program goals and ideas about what is needed to ensure the programs' integrity. On one side of the debate, people view mediation programs as mechanisms to dispose of a portion of court dockets. Courts order parties to spend time and money for mediation and want to be sure that the time and money are well-spent. Courts also want to ensure that parties and attorneys comply with their orders and cooperate with the courts' case management systems.<sup>14</sup> From this perspective, a good-faith requirement seems to be the logical way to ensure the integrity of court-connected mediation programs.

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See Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641, 648 n.21 (2002) (describing a continuum of voluntary and mandatory referrals to mediation). This Article refers to all these programs as court-connected regardless of whether courts order parties to mediate.

Although good-faith requirements can create problems in private (that is, non-court-connected) mediation, this Article focuses on such requirements in court-connected mediation programs. Good-faith requirements often are implemented to maintain the integrity of court-connected mediation programs, *see infra* notes 289–291 and accompanying text, and most of the reported court cases involve court-ordered mediation, *see infra* note 53 and accompanying text. In addition, the dispute system design approach recommended in Part II of this Article is particularly relevant in dealing with variations of local legal culture about court-connected mediation programs.

In private mediations, one generally can assume that the parties or their attorneys consciously choose to mediate after assessing the potential benefits and risks. Thus, each side assumes the risk of the other's bad-faith negotiation. In private mediations it generally would not be the courts' business to supervise the mediation, although if parties execute agreements to mediate requiring good-faith participation, courts could enforce those agreements. Presumably, however, agreements to mediate that are governed by the Uniform Commercial Code include an implied requirement of good faith. *See* U.C.C. § 2-103 (2002) ("Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement."); Weston, *supra* note 4, at 644. In such private mediations, the same problems could arise in enforcing the requirement as in court-ordered mediation.

12. *See* Chris Guthrie & James Levin, A "Party Satisfaction" Perspective on a Comprehensive Mediation Statute, 13 OHIO ST. J. ON DISP. RESOL. 885, 887 n.7 (1998) (summarizing studies analyzing litigant satisfaction with mediation); John Lande, *Getting the Faith: Why Business Lawyers and Executives Believe in Mediation*, 5 HARV. NEGOT. L. REV. 137, 176–79 (2000) (presenting data and summarizing other studies on lawyers' satisfaction with mediation).

13. *See infra* text accompanying note 55.

14. For further analysis of courts' interests in mediation programs, *see infra* Part II.B.3.

On the other side of the debate, people focus on the integrity of the mediation process, defined as an adherence to mediation practice norms. Many mediators are especially concerned that people participate in mediation without coercion, take advantage of opportunities for open discussion and problem-solving, and receive assurance that courts will honor confidentiality protections.<sup>15</sup> From this perspective, good-faith requirements seem to violate mediation norms and thus *undermine* the integrity of court-connected mediation programs. Although this brief summary oversimplifies the debate, it captures a real tension in the debates about the future of court-connected mediation programs.<sup>16</sup>

This Article makes two major arguments. First, good-faith requirements are likely to be ineffective and counterproductive in ensuring the integrity of court-connected mediation programs. Second, other strategies are likely to be more effective in achieving that goal. This Article proposes two types of strategies. One type of strategy involves specific policies<sup>17</sup> that satisfy stakeholders'<sup>18</sup> interests in court-connected mediation programs.<sup>19</sup> Although various writers have criticized good-faith requirements,<sup>20</sup> only two commentators have offered alternative policy proposals, and their suggestions have problems similar to those of a good-faith requirement.<sup>21</sup> Second,

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15. For further analysis of mediators' interests in mediation programs, see *infra* Part II.B.4.

16. See, e.g., Menkel-Meadow, *supra* note 2, at 6 (describing the tension between "quantitative-efficiency" and "qualitative-justice" goals).

17. This Article contemplates a range of potential policies to promote the quality and integrity of court-connected mediation programs, which could include some combination of rules, procedures, educational efforts, and other initiatives. See John Lande, *Mediation Paradigms and Professional Identities*, *MEDIATION Q.*, June 1984, at 19, 44 (advocating a variety of types of procedural policymaking including "formulating guidelines, allocating resources, . . . and providing services, in addition to enforcing rules"). For critiques of a policy strategy of rules regulating behavior in mediation, see Craig A. McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 *MINN. L. REV.* 1317, 1330-48 (1995); Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 *HARV. NEGOT. L. REV.* 1, 78-92 (2001). For similar arguments regarding the difficulty in regulating behavior in litigation more generally, see Rob Atkinson, *A Dissenter's Commentary on the Professionalism Crusade*, 74 *TEX. L. REV.* 259, 282 (1995), which argues that "incivility and litigational abuse [are] particularly difficult to regulate by legalistic means," and Gerald B. Wetlaufer, *The Ethics of Lying in Negotiations*, 75 *IOWA L. REV.* 1219, 1234-35 (1990), which argues that it is unrealistic to prohibit all lying in negotiation. This Article assumes that no dispute resolution policy will be completely effective and that the goal in policy analysis is to develop and select the best possible policies under the circumstances.

18. "Stakeholders" refers to groups affected by court-connected mediation programs, including litigants, attorneys, courts, and mediators. See *infra* Part II.B.

19. Under some policies suggested in this Article, courts could regulate the same specific conduct that courts have sanctioned under the good-faith rubric (such as submission of pre-mediation memoranda and attendance at mediation), see *infra* note 68 and accompanying text, without the problems of a vague and overbroad good-faith requirement, see *infra* Parts I.C.1 and I.C.2.

20. See *supra* note 10.

21. See Sherman, *supra* note 10, at 2094-2111; Winston, *supra* note 10, at 201-05. In place of a good-faith requirement, Edward Sherman proposes a "minimal meaningful participation" re-

this Article proposes the use of dispute system design (DSD) principles to develop policies for court-connected mediation programs. In a DSD process, representatives of all the stakeholder groups in a local mediation program would participate in developing policies. A DSD approach examines whether recurring instances of bad faith are symptoms of underlying problems and, if so, seeks to address those problems as well as the immediate symptoms. Instead of merely focusing on eliminating problematic behavior,<sup>22</sup> a DSD process could also help tailor programs to satisfy stakeholders' interests generally, reduce motivation for problematic behavior, and improve other aspects of the programs. Thus, a DSD process could result in policies not specifically designed to produce good-faith conduct but that may nonetheless promote such conduct if the policies increase participants' satisfaction with mediation programs. This Article recommends that good-faith requirements should be adopted only as a last resort, after a court uses a DSD process, seriously tries other policy options, and finds that those options do not resolve significant problems of bad faith in mediation.

The proposals offered in this Article are not a panacea for settling debates over the goals of court-connected mediation programs or ensuring their integrity. If faithfully implemented, however, they will make a substantial contribution toward enhancing the efficacy and integrity of these programs.

Part I defines good faith and summarizes the rationale for a good-faith requirement. It also surveys the use of good-faith requirements in statutes, court rules, and decisional law, and describes problems with good-faith requirements in those contexts. Part II justifies the use of local rulemaking for court-connected mediation programs and recommends use of DSD techniques in designing local mediation programs that address stakeholders' interests. Part II also proposes policy options that promote productive mediation behavior specifically and address stakeholders' interests more generally. These options include collaborative education about good mediation practice, use of pre-mediation consultations and document submissions, a narrow requirement of attendance for a limited and specified time, and pro-

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quirement. Sherman, *supra* note 10, at 2096–97. For a critique of this proposal, see *infra* note 85. Sherman and David Winston also favor a requirement of attendance at mediation by a person with full settlement authority. Sherman, *supra* note 10, at 2103–12; Winston, *supra* note 10, at 201–02. For a critique of that position, see *infra* notes 130–147 and accompanying text.

22. This Article sometimes uses the terms “inappropriate” or “problematic” to refer to the types of behavior similar to what commentators describe as bad-faith conduct. See *infra* notes 25–26 and accompanying text. The terms “inappropriate” or “problematic” avoid usage of a legal term of art and an implication that such conduct is legally sanctionable. Similarly, this Article sometimes refers to behavior as “sincere,” “appropriate,” or “productive” instead of “in good faith.” All of these terms are subjective, imprecise, and dependent on the values and perceptions of the observers. Part II.C, *infra*, proposes policy options that use more objective terms.

tections against misrepresentation. The Conclusion summarizes the arguments in this Article and proposes strict limits on the use of good-faith requirements.

## I. GOOD FAITH IN MEDIATION

### A. The Definition of Good Faith and the Rationale for a Good-Faith Requirement

Although the concept of good faith is used in many areas of the law and has become part of the legal vernacular, there is no clear definition of the concept. In one case, the court stated:

“Good faith” is an intangible and abstract quality with no technical meaning or statutory definition. It encompasses, among other things, an honest belief, the absence of malice and the absence of a design to defraud or to seek an unconscionable advantage. An individual’s personal good faith is a concept of his own mind and inner spirit and, therefore, may not conclusively be determined by his protestations alone.<sup>23</sup>

In the mediation context, statutes, rules, and cases do not provide a clear definition of good faith.<sup>24</sup> To remedy that problem, Professor Kimberlee Kovach proposes a statute with an itemized list of behaviors that constitute good-faith conduct in mediation.<sup>25</sup> Professor Maureen Weston endorses Ko-

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23. *Doyle v. Gordon*, 158 N.Y.S.2d 248, 259–60 (Sup. Ct. 1954). After analyzing the meaning of good faith in various contexts, Kimberlee Kovach suggests that “in the end, perhaps it is like obscenity: you know it when you see it.” Kovach, *supra* note 4, at 600 (citing *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)); *see also* Weston, *supra* note 4, at 626 n.176 (citing additional sources).

24. *See, e.g., Nick v. Morgan’s Foods, Inc.*, 99 F. Supp. 2d 1056, 1058 (E.D. Mo. 2000), *aff’d* 270 F.3d 590 (8th Cir. 2001). This case provides more detail about the meaning of good faith than most other authorities—discussing requirements such as pre-mediation memoranda and attendance of parties with settlement authority—but nonetheless does not provide a clear definition or indications of the boundaries of good faith. *Id.* at 1061–64.

25. Under Kovach’s proposed statute, good faith includes the following:

- a. Compliance with the terms and provisions of [the state statute or other rule governing mediation];
- 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;

vach's definition and argues that good faith should be judged under a "totality of the circumstances" standard.<sup>26</sup>

Proponents argue that a good-faith requirement is necessary because, without the threat of sanctions for bad faith, some participants might use mediation to take advantage of their opponents,<sup>27</sup> and others might merely "go through the motions" of mediating.<sup>28</sup> Although proponents recognize that court enforcement of a good-faith requirement would involve an exception to the general rule providing confidentiality in mediation, they contend that such an exception is necessary and can be limited to issues related to alleged bad faith.<sup>29</sup> Thus, they argue, a good-faith requirement would not undermine parties' faith in the confidentiality of their communications.<sup>30</sup>

## B. Current Status of Good-Faith Requirements

Statutes, court rules, mediation referral orders, and the common law establish good-faith requirements in mediation.<sup>31</sup> At least twenty-two states and the territory of Guam have such statutory requirements.<sup>32</sup> At least

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- 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; . . .

"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.

Kovach, *supra* note 4, at 622–23; *see also id.* at 612, 615; Weston, *supra* note 4, at 627, 630.

26. Weston, *supra* note 4, at 630. Kovach's proposal does not include a similar catchall provision. *See* Kovach, *supra* note 4, at 622–23.

27. *See* Kovach, *supra* note 4, at 604.

28. *Id.* at 592; *see also* Weston, *supra* note 4, at 613–14.

29. *See* Kovach, *supra* note 4, at 602–03; Weston, *supra* note 4, at 633, 638, 639.

30. *See* Kovach, *supra* note 4, at 602–03; Weston, *supra* note 4, at 622, 645.

31. *See generally* Richard D. English, Annotation, *Alternative Dispute Resolution: Sanctions for Failure to Participate in Good Faith in, or Comply with Agreement Made in, Mediation*, 43 A.L.R.5TH 545 (1996). In this Article, references to good-faith requirements refer to such requirements in mediation except where otherwise specified.

32. *See* ALASKA STAT. § 21.07.010(a)(4)(D) (Michie 2001); ARIZ. REV. STAT. ANN. § 8-116.01(G) (West 2001); CAL. FAM. CODE § 8714.7(e)(3), (f), (h)(2)(C) (West 2002); CAL. INS. CODE § 10089.81 (West 2002); COLO. REV. STAT. ANN. § 13-22-311(3) (West 2001); CONN. GEN. STAT. ANN. §§ 17a-112(g), 45a-715(m), 46a-13o(a) (West 2002); D.C. CODE ANN. §§ 5-1108(3), 5-1110(j)–(k) (2001); FLA. STAT. ANN. §§ 164.1058, 400.429, 400.629(2)(a)(3)(b),

twenty-one federal district courts<sup>33</sup> and seventeen state courts<sup>34</sup> have local

627.745(1)(d), 627.745(1)(f), 627.7015(5) (West 2001); GA. CODE ANN. §§ 12-5-23.3(5), 36-70-25.1(d)(2), 48-8-89(d)(3), 50-8-7.1(d)(5), -8-2(a)(18)(C), -8-31(20)(e) (2001); 7 GUAM CODE ANN. § 43105(c) (2001); HAW. REV. STAT. ANN. §§ 421J-10(b), 514A-94(b)(2) (Michie 2001); IND. CODE ANN. § 14-26-2-23(3)(A) (West 2001); LA. CHILDREN'S CODE ANN. art. 437(B) (West 2002); ME. REV. STAT. ANN. tit. 10, § 1487(8), tit. 19-A, §§ 251(4), § 1804, tit. 38, § 347-A(4)(E) (West 2001); MINN. STAT. ANN. §§ 115B.414(3)-(4), 583.26(5)(c)(1), 583.27 (West 2001); NEV. REV. STAT. ANN. § 40.680(6) (Michie 2001); N.C. GEN. STAT. § 115C-116(b)(9) (2001); OKLA. STAT. ANN. tit. 12, §§ 1824(3), 1825(D) (West 2002); OR. REV. STAT. §§ 109.305(4), 419B.365(7), 421.628(6) (2001); TEX. FAM. CODE ANN. §§ 6.404(a), 102.0085(a) (Vernon 2001); UTAH CODE ANN. § 30-3-10.9(7), -38(6)(b)(i), (7) (2001); WASH. REV. CODE ANN. § 26.09.184(4)(c), § 59.20.080(3) (West 2002); W. VA. CODE § 19-23-6(18) (2001). Some statutes apparently encourage good-faith participation without establishing a legal duty or consequences for bad faith. See FLA. STAT. ANN. § 718.1255(g) (West 2001); OHIO REV. CODE ANN. § 3109.401(A)(4)(d) (Anderson 2001). This list does not include statutes relating to mediation of labor disputes, which are quite distinct.

33. See S.D. ALA., LOC. R. 16.6; C.D. CAL. BANKR. CT. R. App. III § 7.8; C.D. CAL. BANKR. CT. R. 7016-6(3); D.D.C. App. B; M.D. FLA. LOC. BANKR. R. 9019-2(d)(2); S.D. FLA. ADMIN. R. 9019-2(C)(4); D. IDAHO ORDER 130(n); N.D. ILL. BANKR. CT. R. 1000 (Form); S.D. IND. ALT. DISP. RESOL. R. 2.1; D. MISS., UNIF. LOC. R. 83.7(H); E.D. MO. LOC. R. 16-6.02(B)(1), 16-6.05(A); D.N.J. R. App. Q(1); D.N.J. LOC. BANKR. R. 9019-2(d)(4); S.D.N.Y. CIV. R. 83.12(j); S.D. N.Y. LOC. BANKR. R. ORDER M-117(3.2), (5.1), M-143(3.2), (5.1); E.D.N.Y. LOC. BANKR. R. ORDER 9019-1(e); N.D.N.Y. LOC. R. 83.11-5(3), (5); E.D.N.C. LOC. R. 32.07(f), 32.10; N.D. OKLA. LOC. BANKR. R. 9070(j); D. OR. CIV. R. 16.4(f)(2)(C); D. OR. LOC. BANKR. R. 9019-2(C)(2); E.D. PA. LOC. BANKR. R. 9019-3(k)(3); E.D. WASH. LOC. R. 16.2(b); W.D. WASH. CIV. R. 39.1(c)(4)(D); N.D. W. VA. LOC. R. CIV. PROC. 5.01(d)-(e). This list does not include general orders establishing good-faith requirements in some courts. See, e.g., Lomax, *supra* note 10, at 75 n.132 (1994) (citing orders of the bankruptcy courts of the U.S. District Courts for the Eastern District of Virginia and Southern District of California).

34. ALASKA BAR R. 13(g); 16 ARIZ. ST. R. CIV. P. 72(d)(2); 17B ARIZ. ST. CIV. APP. P.R. 30(j); 17B ARIZ. ST. JUV. CT. R.P.R. 87(A); CAL. R. CT. SPEC. R. 1180(h)(2)(A); SUPER. CT. R., BUTTE COUNTY (Calif.) 5.14(b), 9.3(c); SUPER. CT. R., CONTRA COSTA COUNTY (Calif.) PROB. POL'Y MAN., R. 102(B); SUPER. CT. R., NEVADA COUNTY (Calif.) 5.04(B), (D); SUPER. CT. R., ORANGE COUNTY (Calif.) 703(C)(4); SUPER. CT. R., PLUMAS COUNTY (Calif.) 9.3(c); SUPER. CT. R., SAN BENITO COUNTY (Calif.) 11.11(j); SUPER. CT. R., SAN DIEGO COUNTY (Calif.) 4.186; SUPER. CT. R., SANTA CRUZ COUNTY (Calif.) 7.1.10; SUPER. CT. R., SONOMA COUNTY (Calif.) 16.4(D); SUPER. CT. R., STANISLAUS COUNTY (Calif.) 3.26(A)(c); SUPER. CT. R., TUOLUMNE COUNTY (Calif.) 4.04(d); SUPER. CT. R., YUBA COUNTY (Calif.) 5.5(I); DEL. CT. CH. R. 174.1(c)(1); R. CT. TAX DIV., SUPER. CT. R. 13(b); HAW. APP. CONFERENCE PROGRAM R. 6(a); HAW. PROB. R., MED. R. FOR PROB., TRUST, GUARDIANSHIP PROP. 5; 11TH JUD. CIR. (III.) CT. R. 111; 11TH JUD. CIR. (III.) CT. R., App. D(3)(j); 17TH JUD. CIR. (III.) CT. GEN. ORDER 3.09; 17TH JUD. CIRCUIT (III.) COURT FAM. MED. PROGRAM R. 4(5)(b); 18TH JUD. CIR. (III.) CT. R. 14.01; 18TH JUD. CIR. (III.) CT. R. 15.18(I)(C)(3); 19TH JUD. CIR. (III.) CT. R. 20.00; 21ST JUD. CIR. (III.) CT. R. 8.2(k); 21ST JUD. CIR. (III.) CT. R. 9.1(4)(a)(5)(ii); IND. R.P., ALT. DISP. RESOL. 2.1; IOWA CODE ANN. STANDARDS PRACTICE MED. FAM. DISPUTES 11.2(4); 30TH JUD. CIR., JEFFERSON CIR. CT. (Ky.) R. PRAC., ALT. DISP. RESOL. 1401; 30TH JUD. CIR., JEFFERSON CIR. CT. (Ky.) R. PRAC., App. C(5)(a); 15TH JUD. DIST. (La.) CT. R., App. 5; ME. FAM. CT., ADMINISTRATIVE ORDER-UNIF. DOM. REL. MED. ORDER R. 3; MASS. SUP. JUD. CT. RULE 1:18, UNIF. R. DISP. RES. 9(i)(ii); N.H. SUPER. CT. R. ALT. DISP. RESOL. 170(h); N.J. R. CT. 1:40-4(e); MONTGOMERY COUNTY (Ohio) LOC. R.P. 2.39(VII)(B); SUMMIT COUNTY (Ohio) C.P.R. 22.10; PA. R. CIV. P. 1940.2; BRADFORD COUNTY (Pa.) R. CIV. P. 1915.3-4; NORTHUMBERLAND COUNTY (Pa.) LOC. R. 1915.1(B); BEAVER COUNTY (Pa.) LOC. R. CIV. P. 1915.26(2); CRAWFORD COUNTY (Pa.) LOC. R. CIV. P. L1915.26E; GREENE COUNTY (Pa.) R.P. G1915(c); WASH. SUPER. CT. CIV. R. 53.4(f)(4);

rules requiring good-faith participation. In addition, several courts have relied on Rule 16 of the Federal Rules of Civil Procedure<sup>35</sup> as the basis of a good-faith requirement.<sup>36</sup> Only one of all these statutes and rules includes a definition of good faith; that statute applies only to farmer-lender disputes.<sup>37</sup> Many of these statutes and rules are transsubstantive.<sup>38</sup> Others apply to mediations in particular subject areas.<sup>39</sup>

In some of these statutes and rules, the reference to good faith seems incidental, as if the term is innocuous language with no particular consequence. For example, more than a third of these statutes and rules include a

KLICKITAT & SKAMANIA COUNTY (Wash.) SUPER. CT. R. 7(V)(B); WALLA WALLA COUNTY (Wash.) SUPER. CT. LOC. R. 20(A); WHATCOM COUNTY (Wash.) SUPER. CT. LOC. R. 94.08(f); YAKIMA (Wash.) SUPER. CT. LOC. R. 94.04W(D)(1)(c). In addition, several court rules include standards or guidelines encouraging good-faith participation but are not framed as mandatory requirements. See GA. CT. R. & PROC., APP. C(A)(1); IND. CT. R. ALT. DISP. RESOL. GUIDELINE 8.7; KAN. SUPER. CT. R. 901 APP., KAN. STANDARDS PRACT. LAW. MED. FAM. DISP. I.E.

35. FED. R. CIV. P. 16(f). Under Rule 16, a federal district court can sanction individuals who have not participated in good faith in pretrial conferences. See *id.*

36. Although the language of Rule 16 includes a good-faith requirement for pretrial conferences and does not explicitly refer to mediations, several courts have relied on this rule in adjudicating claims of bad faith in mediation. See, e.g., *Nick v. Morgan's Foods, Inc.*, 270 F.3d 590, 594 (8th Cir. 2001); *Raad v. Wal-Mart Stores, Inc.*, No. 4:CV97-3015, 1998 WL 272879, at \*5 (D. Neb. May 6, 1998); *Seidel v. Bradberry*, No. 3:94-CV-0147-G, 1998 WL 386161, at \*1 (N.D. Tex. July 7, 1998).

37. See MINN. STAT. ANN. § 583.27(1)(a) (West 2000).

38. The local court rules generally apply to all matters in the court's jurisdiction, with the most notable exception of rules governing mediation of child custody and visitation issues.

39. See, e.g., ALASKA STAT. § 21.07.010(a) (Michie 2001) (contracts between health care providers and managed care entities); CAL. FAM. CODE § 8714.7(e), (f), (h) (West 2002) (post-adoption contact agreements); CAL. INS. CODE § 10089.81 (West 2002) (earthquake insurance claims); CONN. GEN. STAT. ANN. § 46a-130(a) (West 2002) (duty of child advocate to mediate in good faith in all actions involving children prior to bringing suit); D.C. CODE ANN. §§ 5-1101, 5-1108(3), 5-1110(j), (k) (2001) (citizen complaints against police); FLA. STAT. ANN. §§ 164.1041(1), 164.1058 (West 2001) (intergovernmental disputes); *id.* § 400.629(1)(2) (complaints involving adult family-care homes); *id.* § 627.745(1)(d), (f) (motor vehicle insurance claims); *id.* § 627.7015(1), (5) (property insurance claims); *id.* § 718.1255(4)(g) (condominium disputes); GA. CODE ANN. § 12-5-23.3(d)(5) (2001) (contracts addressing water pollution control); *id.* § 48-8-89(d)(3) (2001) (distribution of tax proceeds); *id.* § 50-8-7.1(d)(5) (duty of good-faith mediation of all disputes by local government recipients of funding from state Department of Community Affairs); IND. CODE ANN. § 14-26-2-23(3)(A) (West 2001) (riparian disputes related to lake conservation); ME. REV. STAT. ANN. tit. 10, § 1487(8) (West 2001) (home construction contract disputes); *id.* tit. 19-A, § 251(4) (domestic relations cases); *id.* tit. 19-A, § 1804 (grandparent visitation disputes); *id.* tit. 38, § 347-A(4)(E) (violation of environmental protection orders); MINN. STAT. ANN. § 115B.414(3), (4) (West 2001) (landfill cleanup cost allocations); *id.* §§ 583.26(5), 583.27 (farmer-lender disputes); NEV. REV. STAT. § 40.680(6) (Michie 2001) (construction defects cases); N.C. GEN. STAT. § 115C-116(b)(9) (2001) (special education disputes); OR. REV. STAT. § 419B.365(7) (2001) (enforcement of guardianship orders); *id.* § 421.628(6) (rates, terms and conditions of furnishing necessary public services to corrections facilities); WASH. REV. CODE ANN. § 59.20.080(3) (West 2001) (eviction of mobile home tenants); WASH. SUPER. CT. CIV. R. 53.4(f)(4) (health care claims); W. VA. CODE § 19-23-6(18) (2001) (disputes between racetrack licensees and horse owners and trainers).

good-faith requirement without providing sanctions for noncompliance.<sup>40</sup> Thus, it is unclear if the drafters of those provisions intended to create a litigable issue.<sup>41</sup> Most of the statutes and rules, however, do provide for sanctions or other legal consequences, though many do not specify the sanctions that may be imposed.<sup>42</sup> When sanctions are specified, they frequently involve payment of fees and costs related to the mediation.<sup>43</sup> Other sanctions include holding individuals in contempt<sup>44</sup> and empowering the mediator to suspend or terminate the mediation.<sup>45</sup> Some sanctions affect the procedural status of the case, such as referral to judicial arbitration,<sup>46</sup> preclusion of a court hearing,<sup>47</sup> and even dispositive action such as dismissal.<sup>48</sup> In some instances, bad-faith participation may affect the merits of a case, for example, by constituting a factor in child custody or visitation cases.<sup>49</sup> Some statutes provide for specialized sanctions related to the subject matter of the statutes, such as employee discipline and loss of government funding.<sup>50</sup>

Most of the good-faith statutes and rules do not state whether mediation confidentiality protections would preclude admission of evidence of bad faith or preclude mediators from testifying or making recommendations for sanctions. A few statutes and rules do address these issues.<sup>51</sup>

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40. See, e.g., FLA. STAT. ANN. § 627.7015(5) (West 2001). Although many statutes and rules mandating good-faith participation do not explicitly provide for sanctions, some courts might authorize sanctions under general procedural statutes, rules, or the courts' inherent authority. See *Nick*, 270 F.3d at 594–95.

41. One court stated, in dictum, that it had no authority to assess costs and fees because the good-faith rule did not explicitly provide for such sanctions against the state. See *State v. Carter*, 658 N.E.2d 618, 624 (Ind. Ct. App. 1995).

42. See, e.g., ALASKA STAT. § 21.07.010(a)(4) (Michie 2001).

43. See, e.g., MINN. STAT. ANN. § 115B.414(3), (4) (West 2001). Under some statutes, courts may decline to award attorney's fees that otherwise would be awarded. See, e.g., FLA. STAT. ANN. § 400.429 (West 2001).

44. See, e.g., N.D. OKLA. LOC. BANKR. R. 9070(j).

45. See, e.g., 17B ARIZ. ST. CIV. APP. P.R. 30(j). Conversely, some statutes authorize courts to order parties to mediation after finding bad-faith participation. See, e.g., ME. REV. STAT. ANN. tit. 19-A, § 1804 (West 2001).

46. SUPER. CT. R., STANISLAUS COUNTY (Calif.) 3.26(A) (referring case to mandatory judicial arbitration if party fails to participate in good faith); SUPER. CT. R., SONOMA COUNTY (Calif.) 16.4(D) (restoring case to fast track if party is not participating in good faith); ME. REV. STAT. ANN. tit. 38, § 347-A(4)(E) (West 2001) (barring removal of action to superior court until after good-faith mediation); N.C. GEN. STAT. § 115C-116(b)(9) (2001) (refusing to grant continuance if party mediates in bad faith).

47. See, e.g., COLO. REV. STAT. ANN. § 13-22-311(3) (West 2001).

48. See, e.g., ME. REV. STAT. ANN. tit. 19-A, § 251(4) (West 2001).

49. See, e.g., UTAH CODE ANN. § 30-3-38(7) (2001).

50. See D.C. CODE ANN. § 5-1110 (2001) (sanctions for police failing to participate in good faith in police complaint review board mediation); GA. CODE ANN. § 50-8-7.1(d)(5) (2001) (ineligibility of local government agencies for state funding).

51. See, e.g., DEL. CT. R. 174.1(c)(1) (mediator may make recommendations regarding sanctions for bad-faith participation in mediation); E.D. MO. R. 16-6.04(A) (creating exception to confidentiality rule to permit mediators to file report indicating compliance with good-faith re-

Most of the twenty-seven reported cases dealing with bad faith in mediation<sup>52</sup> arise in court-connected mediation.<sup>53</sup> The number of reported cases increased in the 1990s.<sup>54</sup> The growth in the number of bad-faith cases may be a function of courts' increasing reliance on court-ordered mediation and an increasing legalization of mediation.<sup>55</sup> The increasing number of disputes over good faith also may be an indicator of a backlash against court-ordered mediation in some situations.

The behaviors alleged to constitute bad faith can be grouped into five categories as shown in Table 1. One such allegation is simply that a party has failed to attend.<sup>56</sup> A second allegation involves the failure of an organizational party to send a representative with sufficient settlement authority.<sup>57</sup> A third group of allegations involves activities in preparation for mediation, including failure to produce a pre-mediation memorandum<sup>58</sup> or to bring experts to mediation.<sup>59</sup> A fourth group of allegations involves the sufficiency and sincerity of efforts to resolve the matter, including claims that a party

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quirement); GA. CT. R. & P., APP. C(A)(IV), commentary (confidentiality precludes mediator from reporting bad faith); NEV. REV. STAT. § 40.680(6) (Michie 2002) (mediator report of bad faith is admissible in evidence). For discussion of confidentiality regarding bad-faith conduct, see *infra* Part I.C.5.

52. This part analyzes cases in which the court adjudicated issues of bad faith in mediation. Thus, it excludes cases in which the conduct has not been characterized as bad faith although the same behavior has been called bad faith in other cases. See, e.g., *Physicians Protective Trust Fund v. Overman*, 636 So. 2d 827, 829 (Fla. Dist. Ct. App. 1994) (failure to send representative with settlement authority was not decided based on good-faith requirement). This part also excludes some cases involving labor negotiations in which good faith is distinguishable from court-connected mediation. See *infra* notes 97–112 and accompanying text. For a review of selected cases involving allegations of bad faith in mediation, see Alfini & McCabe, *supra* note 10, at 177–95.

53. In fifteen of these cases, it was clear from the opinions that the mediations were court-connected. In most of the other cases, the mediations were probably court-connected, but there was no indication of this in the opinions.

54. Only three cases were decided before 1990. There has been at least one new reported case in every year since 1991 except for 1993. The pace has increased recently: There have been eleven reported cases since 1998. Presumably there has been a somewhat parallel growth in the number of unreported bad-faith cases.

55. See *Lawyering and Mediation Transformation*, *supra* note 6, at 845–47 (describing “liti-mediation” legal environment).

56. See *Seidel v. Bradberry*, No. 3:94-CV-0147-G, 1998 WL 386161, at \*3 (N.D. Tex. July 7, 1998); *Luxenberg v. Marshall*, 835 S.W.2d 136, 141 (Tex. Ct. App. 1992).

57. See *Nick v. Morgan's Foods, Inc.*, 270 F.3d 590, 593 (8th Cir. 2001); *Raad v. Wal-Mart Stores, Inc.*, No. 4:CV47-3015, 1998 WL 272879, at \*4–\*8 (D. Neb. May 6, 1998); *Francis v. Women's Obstetrics and Gynecology Group*, 144 F.R.D. 646, 647–48 (W.D.N.Y. 1992); *Hill v. Imperial Sav.*, No. A-91-780, 1992 U.S. Dist. LEXIS 22185, at \*73–\*74 (W.D. Tex. Nov. 24, 1992); *Semiconductors, Inc. v. Golasa*, 525 So. 2d 519, 519–20 (Fla. Dist. Ct. App. 1988) (Anstead, J., dissenting); *Stoeck v. Yost*, 765 N.E.2d 684, 687 (Ind. Ct. App. 2002); *In re Acceptance Ins. Co.*, 33 S.W.3d 443, 451–54 (Tex. Ct. App. 2000).

58. See *Nick*, 270 F.3d at 596–97; *Francis*, 144 F.R.D. at 647.

59. See *Foxgate Homeowners' Ass'n v. Bramalea Cal., Inc.*, 108 Cal. Rptr. 2d 642, 645–46 (2001).

has not made any offer or any suitable offer,<sup>60</sup> has not participated substantively and attempted to resolve the case,<sup>61</sup> has not provided requested documents,<sup>62</sup> has made inconsistent legal arguments,<sup>63</sup> or has unilaterally withdrawn from mediation.<sup>64</sup> Finally, a fifth group consists of miscellaneous allegations such as failure to sign a mediated agreement,<sup>65</sup> failure to release living expenses pending farmer-lender mediation,<sup>66</sup> or engaging in unspecified bad-faith behavior.<sup>67</sup>

Table 1. Alleged Bad-Faith Behaviors and Ultimate Rulings			
		Ruling in Final Reported Opinion	
		Bad Faith	Not Bad Faith
1	Failure to attend mediation	Luxenberg Seidel	
2	Failure to send an organizational representative with sufficient authority to settle the case	Francis Golasa Nick Raad	Acceptance Hill Stoehr
3	Failure to submit pre-mediation memorandum	Francis Nick	
	Failure to bring experts as ordered		Foxgate*
4	Failure to make a (suitable) offer		Gray Hill Hunt Stoehr Avril* Obermoller**
	Failure to participate substantively or to attempt to resolve the case	Pirtle***	Stoehr Graham* Hansen* Carter**
	Failure to provide documentary evidence		Guzman**

60. See *Hunt v. Woods*, Nos. 94-3748, 94-4179, 1996 WL 8037, at \*3-\*4 (6th Cir. Jan. 9, 1996); *Hill*, 1992 U.S. Dist. LEXIS 22185, at \*69-\*70, \*73-\*74; *Avril v. Civilmar*, 605 So. 2d 988, 989-90 (Fla. Dist. Ct. App. 1992); *Stoehr*, 765 N.E. 2d at 687-90; *Obermoller v. Fed. Land Bank of Saint Paul*, 409 N.W.2d 229, 232 (Minn. Ct. App. 1987); *Gray v. Eggert*, 635 N.W.2d 667, 668-70 (Wis. Ct. App. 2001).

61. See *Stoehr*, 765 N.E.2d at 687-90; *State v. Carter*, 658 N.E.2d 618, 620-21 (Ind. Ct. App. 1995); *Graham v. Baker*, 447 N.W.2d 397, 400-01 (Iowa 1989); *Tex. Dep't of Transp. v. Pirtle*, 977 S.W.2d 657, 657-58 (Tex. Ct. App. 1998); *Hansen v. Sullivan*, 886 S.W.2d 467, 468 (Tex. Ct. App. 1994).

62. See *Guzman v. Polisar*, No. 99-2060, 2000 WL 1335534, at \*2 (10th Cir. Sept. 15, 2000).

63. *Obermoller*, 409 N.W.2d at 231-32.

64. *In re Bolden*, 719 A.2d 1253, 1254-55 (D.C. 1998).

65. *Rizk v. Millard*, 810 S.W.2d 318, 321 (Tex. Ct. App. 1991).

66. *Wieweck v. United States Dep't of Agric.*, 930 F.2d 619, 620-22 (8th Cir. 1991).

67. See *United States v. Miller-Strauch Constr. Co.*, 904 F. Supp. 1209, 1211 (D. Kan. 1995); *Plouffe v. Lake County Sheriff's Office*, 653 So. 2d 507, 508 (Fla. Dist. Ct. App. 1995); *Herbst v. Princeton Bank*, No. C3-96-1903, 1997 WL 309441, at \*1 (Minn. Ct. App. June 10, 1997); *Tex. Parks & Wildlife Dep't v. Davis*, 988 S.W.2d 370, 375 (Tex. Ct. App. 1999); *Decker v. Lindsay*, 824 S.W.2d 247 (Tex. Ct. App. 1992).

	Use of erroneous legal argument		<i>Obermoller**</i>
	Unilateral withdrawal from mediation		<i>Bolden</i>
5	Failure to sign mediated agreement		<i>Rizk</i>
	Failure to release living expenses pending farmer-lender mediation	<i>Wieweck</i>	
	Unspecified bad-faith conduct		<i>Davis</i> <i>Herbst</i> <i>Decker*</i> <i>Plouffe*</i> <i>Miller**</i>
<p>Note: This table includes cases in which courts adjudicated issues relating to bad faith, but in some instances, the courts made rulings as a matter of law without addressing the facts of the particular cases. Some cases involved allegations of more than one type of bad-faith behavior. For citations to the cases in this table, see nn.56–67.</p> <p>*Decision based on lack of authority to sanction bad faith in mediation.</p> <p>**Decision based on insufficient evidence rather than the nature of the allegation.</p> <p>***Sanctioned party might have escaped sanction if it had objected to order requiring attendance at mediation.</p>			

The final court decisions in these cases generally have been quite consistent in each category. The courts have found bad faith in all the cases in which a party has failed to attend the mediation or has failed to provide a required pre-mediation memorandum.<sup>68</sup> In cases involving allegations that organizational parties have provided representatives without sufficient settlement authority, the courts have split almost evenly.<sup>69</sup> In virtually all of the other cases in which the courts ruled on the merits of the case, they rejected claims of bad faith.<sup>70</sup> In effect, the courts have interpreted good faith nar-

68. See *supra* notes 56–57.

69. Out of seven cases involving allegations of lack of settlement authority, the courts found bad faith in four of these cases. See *Nick v. Morgan's Foods, Inc.*, 270 F.3d 590, 596–97 (8th Cir. 2001); *Raad v. Wal-Mart Stores, Inc.*, No. 4:CV97-3015, 1998 WL 272879, at \*4–\*8 (D. Neb. May 6, 1998); *Francis v. Women's Obstetrics & Gynecology Group, P.C.*, 144 F.R.D. 646, 647 (W.D.N.Y. 1992); *Semiconductors, Inc. v. Golasa*, 525 So. 2d 519, 519–20 (Fla. Dist. Ct. App. 1988) (Anstead, J., dissenting). The court found no bad faith in three of these cases. *Hill v. Imperial Sav.*, 1992 U.S. Dist. LEXIS 22185, at \*73–\*74 (W.D. Tex. Nov. 24, 1992); *Stoehr v. Yost*, 765 N.E.2d 684, 686–90 (Ind. App. 2002); *In re Acceptance Ins. Co.*, 33 S.W.3d 443, 451–54 (Tex. Ct. App. 2000). For discussion of problems in mandating attendance of a representative with full settlement authority, see *infra* Part I.C.3.

70. See Table 1. Other than a case involving an idiosyncratic farmer-lender mediation statute, the court found bad faith in only one of these cases, *Texas Department of Transportation v. Pirtle*, 977 S.W.2d 657 (Tex. Ct. App. 1998), and that case seems wrongly decided. In that case, a plaintiff sued the Texas Department of Transportation for injuries sustained as the driver in a one-car accident. The Department refused to make an offer in mediation based on its policy of not settling cases of disputed liability. *Id.* at 658. The trial court found that the Department mediated in bad faith because it failed to file an objection to the order to mediate as authorized in the statute. Although the Department won at trial, the trial court assessed the Department all costs of court, including attorney's fees and mediator's fees. Remarkably, the appellate court affirmed this decision. *Id.* This decision was unwise for several reasons. In many cases, parties unexpectedly learn new information and change their perspectives in mediation; thus, it seems strange to penalize a party for going to mediation rather than seeking to cancel it. This decision creates a perverse incentive to cancel mediation defensively to avoid potential bad-faith claims. In a similar case, in which the defendant won at trial but the trial court imposed sanctions because the defendant attended mediation intending not to make a settlement offer, the appellate court reversed the decision sanctioning the defendant. See *Stoehr*, 765 N.E.2d at 690. For discussion of policies for cancellation of mediation, see *infra* Part II.C.4.

rowly to require compliance with orders to attend mediation, provide pre-mediation memoranda, and, in some cases, produce organizational representatives with sufficient settlement authority.

This apparent clarity in the results masks a pattern in which appellate courts frequently reversed lower court findings of bad faith. In eight of the thirteen reported cases in which findings of bad faith were appealed, the appellate court rejected the lower court's decision on this issue.<sup>71</sup>

This pattern of reversals suggests that trial courts become frustrated with one side's refusal to cooperate in mediation and that some trial courts overreach their authority to sanction mediation behavior. By comparison, only five cases were found in which a trial court's rejection of a bad-faith claim was appealed. All those trial court rulings were upheld.<sup>72</sup>

*In re Acceptance Insurance Co.*<sup>73</sup> illustrates a trial court exceeding its authority by investigating a bad-faith claim extensively. In that case, the parties did not settle in mediation. The parties tried the case and the court ruled for the plaintiff. Soon after the trial, the plaintiff filed a motion seeking \$250,000 in sanctions against the defendant's insurer for violating the mediation order by failing to mediate in good faith. At the hearing on the motion, and over strenuous objections by the insurer's attorney, the trial court permitted detailed cross-examination of the insurance adjuster who attended the mediation. The adjuster was asked about her knowledge of the case, preparation for the mediation, communications with her supervisor by telephone during the mediation, and authorization to settle the case to the full policy limit. The trial court stated: "The Court will note that the adjuster's knowledge as to the facts and potential damages of this case are [sic] so

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71. The trial court decisions on bad faith were reversed in eight cases. See *Guzman v. Polisar*, No. 99-2060, 2000 WL 1335534, at \*1 (10th Cir. Sept. 15, 2000) (basing decision on insufficiency of evidence); *In re Bolden*, 719 A.2d 1253, 1254-55 (D.C. 1998); *State v. Carter*, 658 N.E.2d 618, 621-22 (Ind. Ct. App. 1995) (basing decision on insufficiency of evidence); *Stoehr*, 765 N.E.2d at 686-90; *Acceptance Ins.*, 33 S.W.3d at 452-54; *Davis*, 988 S.W.2d at 375; *Rizk v. Millard*, 810 S.W.2d 318, 321 (Tex. Ct. App. 1991); *Gray v. Eggert*, 635 N.W.2d 667, 672 (Wis. Ct. App. 2001). The appellate court upheld the bad-faith decisions in five cases. See *Nick*, 270 F.3d at 597; *Wieweck*, 930 F.2d at 621-23; *Golasa*, 525 So. 2d at 519-20; *Pirtle*, 977 S.W.2d at 658; *Luxenberg v. Marshall*, 835 S.W.2d 136, 141 (Tex. Ct. App. 1992).

The thirteen cases mentioned in the text do not include the following cases in which appellate courts reversed lower court decisions finding an overbroad conception of what behavior constituted bad faith or reversed lower court decisions attempting to establish a duty of good-faith participation in mediation. See *Foxgate Homeowners' Ass'n v. Bramalea Cal., Inc.*, 108 Cal. Rptr. 2d 642, 655-56 (2001); *Avril v. Civilmar*, 605 So. 2d 988, 989-90 (Fla. Dist. Ct. App. 1992); *Hansen v. Sullivan*, 886 S.W.2d 467, 469 (Tex. Ct. App. 1994); *Decker*, 824 S.W.2d at 251-52.

72. See *Hunt*, 1996 WL 8037, at \*3-\*4; *Plouffe*, 653 So. 2d at 508 (finding a lack of authority to sanction bad faith); *Graham v. Baker*, 447 N.W.2d 397, 400-02 (Iowa 1989) (finding a lack of authority under statute to determine bad faith); *Herbst*, 1997 WL 309441, at \*1; *Obermoller v. Fed. Land Bank of Saint Paul*, 409 N.W.2d 229, 232 (Minn. Ct. App. 1987) (finding an insufficiency of evidence).

73. 33 S.W.3d 443 (Tex. Ct. App. 2000).

woeful as to constitute a sham of following my order [to mediate].”<sup>74</sup> The trial court continued the hearing and ordered the personal appearance of a senior vice president for the insurer.<sup>75</sup> The insurer obtained a writ from the appellate court to prevent the trial court from holding further hearings or imposing sanctions.<sup>76</sup>

The fact that the appellate courts reversed legally incorrect findings of bad faith in the eight reported lower court cases might comfort some people that the legal system works properly, but litigants may feel some anguish about the expense and uncertainty of appeal.<sup>77</sup> Moreover, the pattern of reversals suggests that some courts may pressure parties to settle in mediation in cases that are never appealed.

### C. Problems with Good-Faith Requirements

#### 1. Problems Defining and Proving Good Faith

The definition of good faith in mediation is one of the most controversial issues about good-faith requirements. Legal authorities establishing good-faith requirements and commentators’ proposals do not give clear guidance about what conduct is prohibited. As a result, mediation participants may feel uncertain about what actions mediators and judges would consider bad faith. This uncertainty could result in inappropriate bad-faith charges as well as a chilling of legitimate mediation conduct.

In practice, the courts have limited their interpretation of good faith in mediation to attendance, submission of pre-mediation memoranda, and, in some cases, attendance of organizational representatives with adequate settlement authority.<sup>78</sup> Despite the narrow scope of courts’ actual application of good-faith requirements,<sup>79</sup> good-faith language in the legal authorities and commentators’ proposals go far beyond these specific matters.<sup>80</sup>

Commentators agree that the definition of good faith needs to be clearly and objectively determinable so that everyone can know what conduct is considered bad faith.<sup>81</sup> Commentators disagree, however, about

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74. *Id.* at 447.

75. *Id.* at 446–47.

76. *Id.* at 454–55.

77. The time, expense, and uncertainty of appeal can be substantial and in most cases probably much greater than the costs involved in a mediation “wasted” due to bad faith.

78. *See supra* text accompanying notes 68–69. Policymakers could establish the three specific requirements mentioned in the text without the problems arising from establishing them as part of a vague good-faith requirement.

79. *See supra* text accompanying notes 68–69.

80. *See supra* notes 25–26 and accompanying text.

81. *See* Brazil, *supra* note 10, at 31; Kovach, *supra* note 4, at 601; Sherman, *supra* note 10, at 2093; Weston, *supra* note 4, at 628.

whether the definition of good faith can be clear, objectively determinable, and predictable, and whether good faith is a function of the reasonableness of participants' offers or their state of mind.

Kovach argues that "without an explanation or definition of just what is meant by the term good faith, each party may have in mind something different. It is important that the parties are clear about the term."<sup>82</sup> She maintains that "judg[ing] a party's state of mind is too complex and subjective" to be appropriate in determining good faith in mediation.<sup>83</sup> She also contends that bad faith does not include failure to make an offer or "come down enough," stating that "[t]he economic aspects of the negotiations—the offers and responses, in and of themselves—may not create a bad faith claim."<sup>84</sup>

Most of the elements of good-faith definitions do not satisfy Kovach's criteria. Virtually all good-faith elements depend on an assessment of a person's state of mind, which is, by definition, subjective.<sup>85</sup> Consider the following definition from *Hunt v. Woods*:<sup>86</sup>

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82. Kovach, *supra* note 4, at 596; *see also id.* at 614–15; Weston, *supra* note 4, at 628.

83. Kovach, *supra* note 4, at 610.

84. *Id.* at 603.

85. *See* Brazil, *supra* note 10, at 31–32; Sherman, *supra* note 10, at 2093–94; Winston, *supra* note 10, at 197–201; Note, *supra* note 10, at 1096–97.

Although Kovach writes that courts should not base a good-faith determination on a party's state of mind, *see* Kovach, *supra* note 4, at 610, she also writes that "[g]ood faith includes coming to the mediation with an *open mind*, not necessarily a promise to change a view, but a willingness to be open to others." *Id.* at 615–16 (emphasis added). Similarly, she states, "[G]ood faith simply requires that the parties make a genuine push towards a solution." *Id.* at 611. Kovach's proposed statute would require "participation in meaningful discussions." *Id.* at 622. How genuine and meaningful the efforts are clearly seems to be a function of one's state of mind.

Perhaps Kovach intends that these factors be assessed from an external "objective" standard, such as a reasonable person standard, rather than an internal "subjective" standard, such as a person's actual intent. While the proposed good-faith indicators may be objectively determinable from this perspective, they are highly arguable and thus unclear in practice.

Professor Edward Sherman criticizes the "inherent ambiguity" of the concept of good faith and proposes instead a "minimal meaningful participation" requirement, which he argues avoids the subjectivity of a good-faith requirement. Sherman, *supra* note 10, at 2093, 2096. Determining whether participation is minimally meaningful has the same problems as interpreting a good-faith standard. Bullock & Gallagher, *supra* note 10, at 981; Kovach, *supra* note 4, at 599; Weston, *supra* note 4, at 622 n.156; Winston, *supra* note 10, at 198–99; Zylstra, *supra* note 10, at 98–99. Participants easily could be confused about what is prohibited because of the vagueness of both standards. Observers can reasonably differ whether it would be meaningful participation if, for example, a participant (1) says that she will listen to the other side but does not have any new information to offer, (2) harshly attacks the other side's position and merely repeats arguments that she has previously made, or (3) makes an offer that is very different from what knowledgeable observers believe would be a likely court judgment. To make fair conclusions about whether the conduct is "meaningful," one would need to analyze carefully the history of the litigation and the merits of the case. Although Sherman presumably intends the qualifier "minimal" to limit the scope of sanctionable behavior, it introduces additional uncertainty about the level of participation required.

86. Nos. 94-3748, 94-4197, 1996 WL 8037 (6th Cir. Jan. 9, 1996).

A party has not “failed to make a good faith effort to settle” under [the statute] if he has (1) fully cooperated in discovery proceedings, (2) rationally evaluated his risks and potential liability, (3) not attempted to unnecessarily delay any of the proceedings, and (4) made a good faith monetary settlement offer or responded in good faith to an offer from the other party. If a party has a good faith, objectively reasonable belief that he has no liability, he need not make a monetary settlement offer.<sup>87</sup>

Good faith under this definition is not objectively determinable, readily predictable, or independent of parties’ states of mind or their bargaining positions. To assess their risk evaluations, courts must determine the merits of the case, whether parties’ evaluations are objectively reasonable, and whether their negotiation strategies are deemed acceptable by the courts. Courts make these assessments at subsequent hearings in which there is a great temptation to take advantage of hindsight. Obviously parties’ understandings of the law and the facts evolve during the course of litigation so that some things do not become clear for a period of time, perhaps not until trial or even later.<sup>88</sup> To make fair decisions, courts would need to reconstruct the information available to the parties at the time of the mediation. Courts also would need to consider the negotiation history up to the point of the alleged bad faith. Given the norms of negotiation in litigated cases, parties rarely begin negotiations by offering the amount that they believe “the case is worth.” The timing and amount of offers often depend on the context of prior offers and the conduct of the litigation more generally. Parties vary in negotiation philosophy; some prefer to negotiate early and make apparently reasonable offers whereas others prefer to engage in hard bargaining, taking extreme positions and deferring concessions as long as possible.<sup>89</sup>

87. *Id.* at \*3 (quoting *Kalain v. Smith*, 495 N.E.2d 572, 574 (Ohio 1986)). Cf. BLACK’S LAW DICTIONARY 701 (7th ed. 1999) (defining good faith as a “state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one’s duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage”). Kovach’s and Weston’s definitions of good faith include many similar elements. See Kovach, *supra* note 4, at 614–16, 622–23; Weston, *supra* note 4, at 626–27, 630.

The *Hunt v. Woods* definition of good faith assumes that people should make settlement decisions based solely on rational assessments of probable court outcomes. In practice, people often make such decisions based on additional factors, including their expectations about others’ conduct leading up to the dispute and in the dispute process, perceptions of the underlying values represented in the dispute, and experience of the fairness of their treatment. See generally Julie Macfarlane, *Why Do People Settle?*, 46 MCGILL L.J. 663 (2001). Parties should be entitled to make settlement decisions based on factors in addition to predictions of court outcomes.

88. If the issues always were clear, there would be less litigation and less disagreement among judges about the appropriate results. Indeed, parties often contest cases precisely because they differ sincerely in their evaluations of the issues.

89. This description is based on a positional negotiation strategy in which the parties exchange a series of offers to reach a settlement. See ROGER FISHER ET AL., *GETTING TO YES: NEGOTIATION* (1991).

Although Kovach argues that hard bargaining should not be considered bad faith,<sup>90</sup> courts applying the *Hunt* definition could easily interpret it as bad faith. In any event, to determine parties' good faith fairly, courts would need to assess and second-guess the parties' offers and their states of mind.

*Hunt* provides a good illustration of the subjectivity of good faith and the need for courts to investigate the parties' states of mind and bargaining positions. In that case, the plaintiff told the mediator that she would not accept less than \$25,000.<sup>91</sup> Prior to the mediation, the defendant had obtained settlement authority of more than \$10,000 but less than \$25,000.<sup>92</sup> The defendant would have made an offer if the mediator had not privately advised him against doing so because the plaintiff would not accept it.<sup>93</sup> The parties tried the case and the plaintiff received a \$37,000 verdict.<sup>94</sup> Considering that the defendant stipulated to liability at trial, he could not rely on a defense that he failed to make an offer based on a "good faith, objectively reasonable belief that he [had] no liability," as set out in the court's definition of good faith.<sup>95</sup> The *Hunt* court could determine whether the defendant had participated in good faith only by analyzing the negotiations during the mediation and evaluating the defendant's reason for failing to make an offer.<sup>96</sup>

Courts do enforce good-faith standards in other legal contexts, including labor-management collective bargaining, general contract law governing enforcement and performance of contracts, insurers' duties in handling claims, and participation in pretrial conferences under Federal Rule of Civil Procedure 16(f).<sup>97</sup> Legal rules involving good faith outside the mediation

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TIATING AGREEMENT WITHOUT GIVING IN 3-14 (2d ed. 1991). Although negotiators sometimes use other strategies, they often use a positional strategy in legal cases.

90. See Kovach, *supra* note 4, at 610-11; accord Weston, *supra* note 4, at 627.

91. *Hunt*, 1996 WL 8037, at \*3.

92. *Id.*

93. *Id.* Apparently the mediator and/or parties testified at the hearing about private caucus conversations with both parties, which usually are confidential. Without this unraveling of mediation confidentiality, all the court would have known in assessing the defendant's good faith was that the defendant stipulated to liability at trial. Under the Uniform Mediation Act, the existence and amount of any offers and related communications would be privileged communications inadmissible in evidence. See UNIF. MEDIATION ACT § 4 (2001), available at [http://www.law.upenn.edu/bll/ulc/ulc\\_final.htm](http://www.law.upenn.edu/bll/ulc/ulc_final.htm). For a discussion of problems in enforcing good-faith requirements due to confidentiality protections of mediation, see *infra* Part I.C.5.

94. *Hunt*, 1996 WL 8037, at \*3.

95. See *supra* text accompanying note 87.

96. If the mediator had not informed the defendant of the plaintiff's "bottom line" and the defendant had offered, say, \$15,000, the court would have needed evidence to determine if he had "rationally evaluated his risks and potential liability," again analyzing his state of mind and the merits of his bargaining strategy. *Id.*

97. See Kovach, *supra* note 4, at 586-87; Weston, *supra* note 4, at 622-26 (arguing that the good-faith standards in nonmediation contexts are relevant to the definition of good faith in the mediation context).

context, however, are distinguishable from mediation cases for at least two reasons.<sup>98</sup>

First, whereas proponents of a good-faith requirement in mediation argue that good faith in mediation should be independent of the parties' states of mind or negotiating positions,<sup>99</sup> in the nonmediation contexts, courts rely heavily on these factors in deciding about good faith.<sup>100</sup> For example, the U.S. Court of Appeals for the Fifth Circuit recently upheld sanctions because, in a Rule 16 settlement conference, the defendant "concealed its true position that it never intended to settle the case."<sup>101</sup> In labor law, "surface bargaining" is a violation of the duty to bargain in good faith.<sup>102</sup> Surface bargaining is the "pretense of bargaining" and includes such things as attending meetings with no intention of reaching agreement, regressive bargaining,

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98. Many areas of legal doctrine include a jurisprudence of good faith. It is beyond the scope of this Article to provide a thorough analysis of that jurisprudence. This Article focuses on a few aspects of good faith that are distinguishable in mediation and other contexts. See Robert S. Summers, *The General Duty of Good Faith—Its Recognition and Conceptualization*, 67 CORNELL L. REV. 810, 818–21 (1982) (arguing that good faith is properly conceptualized by excluding bad-faith conduct, which varies depending on the context).

99. See *supra* notes 83–84 and accompanying text.

100. In the labor context, parties must make "a sincere, serious effort to adjust differences and to reach an acceptable common ground." *NLRB v. Blevins Popcorn Co.*, 659 F.2d 1173, 1187 (D.C. Cir. 1981) (emphasis added). In preparing for pretrial conferences under Rule 16, individuals must "evaluate discovered facts and intelligently analyze legal issues." *Francis v. Women's Obstetrics & Gynecology Group*, 144 F.R.D. 646, 647–48 (W.D.N.Y. 1992) (emphasis added). Interpreting the duty of good faith in the performance and enforcement of contracts under the Uniform Commercial Code and the *Restatement of Contracts*, courts analyze whether parties demonstrate "honesty in fact." See U.C.C. §§ 1-201(19), 2-103(1)(b) (amended 2000); RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1981). Moreover, this duty of good faith in the commercial contract context does not apply to the formation of contracts, see RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. c (1981), whereas the focus of mediation is the formation of contracts. In the insurance context, many, if not most, courts hold that bad faith involves some intentional wrongdoing. Douglas R. Richmond, *An Overview of Insurance Bad Faith Law and Litigation*, 25 SETON HALL L. REV. 74, 97–98 (1994). For example, the Michigan Supreme Court stated that bad faith requires some "arbitrary, reckless, indifferent, or intentional disregard of the interests of the person owed a duty." *Commercial Union Ins. Co., v. Liberty Mutual Ins. Co.*, 393 N.W.2d 161, 164 (Mich. 1986) (emphasis added).

101. *Guillory v. Domtar Indus.*, 95 F.3d 1320, 1335 (5th Cir. 1996). This case illustrates that courts sometimes base determinations of good faith on the perceived reasonableness of settlement offers but have a hard time acknowledging that reasoning. Although the court denied that the defendant was sanctioned because it refused to make a settlement offer with "a realistic potential of being accepted," it affirmed sanctions because the defendant was never willing to make a "substantial contribution" to a settlement fund of millions of dollars and always had taken the position that it would rather try the case. *Id.* at 1334–35.

102. See *ConAgra, Inc. v. NLRB*, 117 F.3d 1435, 1444 (D.C. Cir. 1997) (defining surface bargaining as "sabotaging the negotiations to manufacture an impasse while making a show of negotiating in good faith").

and submitting proposals on a take-it-or-leave-it basis.<sup>103</sup> In some cases, the only evidence of bad faith may be the parties' offers, and thus the courts must engage in a detailed analysis of the parties' substantive bargaining positions.<sup>104</sup>

An illustration from the labor context demonstrates why it is inappropriate to transplant concepts of good faith into mediation from other areas of legal doctrine. In *Eastern Maine Medical Center v. NLRB*,<sup>105</sup> the Maine State Nurses Association (the union) filed an unfair labor practice charge against the Medical Center (the hospital) for refusing to bargain in good faith. After a nine-day hearing, an administrative law judge ruled in favor of the union; the National Labor Relations Board and the U.S. Court of Appeals for the First Circuit upheld the decision on this issue. The bargaining history was "traversed in minute detail" in administrative hearings, as well as in the proceeding in the court of appeals.<sup>106</sup> The hospital did not present an economic proposal for five months after receiving the union's first economic proposal and three months after bargaining began. It refused to engage in "serious" economic negotiations unless the union agreed to its noneconomic demands. Its proposals of 5 (and later 6) percent wage increases represented a substantial loss in the nurses' wage position compared to other hospital employees. The hospital's economic proposal was offered only as a package and was conditioned on acceptance of its noneconomic proposal. The latter included an extensive management rights clause linked to a clause requiring the union to waive its rights to bargain over all matters covered or not covered in the agreement. Despite many concessions by the union, the hospital rejected the recommendation of a Federal Mediation and Conciliation Board of Inquiry that the hospital compensate the nurses for their loss of equity position due to a wage freeze. The court found that the hospital had bargained in bad faith.<sup>107</sup>

*Eastern Maine Medical Center* demonstrates that to make factual determinations of good faith in labor negotiation, adjudicators may need to engage in extensive examinations of the parties' intentions and the merits of their negotiation positions. Without such inquiries, adjudicators could not determine whether parties are engaging in surface bargaining. Thus, an analogy from the duty to bargain in good faith in labor negotiations is inapplicable to a good-faith requirement in mediation because courts and com-

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103. See *id.* "Surface bargaining" is a term of art in the context of collective bargaining negotiations. For an analog in the litigation context, see the quote from a Toronto commercial litigator at text accompanying *supra* note 2.

104. See *E. Me. Med. Ctr. v. NLRB*, 658 F.2d 1, 10, 13 (1st Cir. 1981).

105. *Id.*

106. *Id.* at 10–13.

107. *Id.*

mentators agree that in mediation, courts should not examine the substance of the parties' positions, whether they make offers, or their states of mind.<sup>108</sup>

A second distinction between mediation and other legal contexts is that mediation communications are generally confidential and not admissible in court, unlike communications in the context of bad-faith claims involving labor negotiations, performance and enforcement of contracts, handling of insurance claims, and pretrial conference contexts. In disputes about compliance with a good-faith requirement in these nonmediation contexts, parties should expect that the courts will admit evidence of the disputed conduct.<sup>109</sup> By contrast, mediation is based on a norm of confidentiality, and a new rule creating an exception to confidentiality protections would be needed to adjudicate bad-faith claims in mediation.<sup>110</sup>

This analysis demonstrates that the definition of good faith in mediation is very uncertain, that analogies from other areas of law are misleading, and that one cannot simply "know [bad faith] when one sees it."<sup>111</sup> Most people would probably think that they "know" bad faith to mean intentionally refraining from making a "reasonable offer," but the cases and commentary indicate that this would not constitute bad faith in mediation, unlike other legal contexts.<sup>112</sup> On the other hand, most people would probably not think of bad faith as the failure to attend a mediation or to submit certain documents. Yet those are the only behaviors that courts have consistently found to be bad faith in mediation. Thus, simply borrowing the concept of good faith is very confusing and problematic. Part II.C proposes requirements for mediation participants that are more clear and objectively determinable than behaving in good faith.

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108. See *supra* text accompanying notes 60–61, 83–84.

109. As proponents of a good-faith requirement in mediation point out, it is virtually impossible to enforce good-faith requirements without admitting relevant evidence. See Kovach, *supra* note 4, at 602; Weston, *supra* note 4, at 633.

110. This is discussed further *infra* in Part I.C.5.

111. See *supra* note 23. Ambiguity in the meaning of good faith may have a beneficial effect in some situations—for example, when mortgage lenders are required to exercise good faith in decisions to foreclose on loans, if the ambiguity causes the lenders to be cautious about taking advantage of borrowers. See R. Wilson Freyermuth, *Enforcement of Acceleration Provisions and the Rhetoric of Good Faith*, 1998 B.Y.U. L. REV. 1035, 1108–10 (citing potential benefit of "in terrorem" effect due to uncertainty about meaning of good faith). Thus, in the mortgage context the ambiguity in the definition promotes the policy goals, whereas in the mediation context, proponents of a good-faith requirement argue that clarity is essential. See text accompanying *supra* note 81. Moreover, in the mortgage context, the courts analyze the merits of the decision and there is no expectation of confidentiality, unlike the good-faith context in mediation. See *supra* notes 99–110 and accompanying text.

112. See *supra* text accompanying notes 60–61, 83–84.

## 2. Overbreadth of Bad-Faith Concept

Kovach's and Weston's proposed good-faith requirements are so broad that they effectively would prohibit defensible behaviors in mediation. Under Kovach's proposed statute,<sup>113</sup> if one side claims that the other participated in bad faith, the moving party could use the legal process to investigate whether all participants adequately prepared for the mediation, "follow[ed] the rules set out by the mediator," engaged in "direct communication" with the other parties, "participat[ed] in meaningful discussions with the mediator and all other participants during the mediation," and "remain[ed] at the mediation until the mediator determine[d] that the process is at an end or excuse[d] the parties."<sup>114</sup> Under Weston's proposed "totality of the circumstances" test,<sup>115</sup> this wide-ranging inquiry would be limited only by the court's discretion.

Both proposals raise many problems. Mediators typically establish "ground rules" at the outset of a mediation, such as a requirement that the participants treat each other with respect and not interrupt each other. Under Kovach's proposed statute, courts could be required to adjudicate whether someone disobeyed the mediator's rules by being disrespectful or interrupting others during the mediation.

Kovach states that "if the parties refuse to share particular knowledge, they should not be compelled to do so. However, it is important that some information be exchanged which would provide an explanation for, or the basis of, the proposed settlement or lack thereof."<sup>116</sup> Under a duty to engage in direct communication and meaningful discussions, parties could be confused about what information they would be compelled to disclose to the mediator and opposing parties. In sensitive mediations, parties often want to withhold information justifying their bargaining strategies. Although exchanging such information in mediation can be helpful and appropriate, court-connected mediation should not be a substitute for formal discovery. Kovach presumably does not intend her proposed statute to be interpreted as such, but that could be the result.<sup>117</sup>

Relating to Kovach's proposed requirement of remaining at the mediation until the mediator declares an impasse or excuses the parties,<sup>118</sup> she

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113. See *supra* note 25.

114. Kovach, *supra* note 4, at 607–22; see also Weston, *supra* note 4, at 628 n.186 (citing Kovach's proposed good-faith statute).

115. Weston, *supra* note 4, at 630.

116. Kovach, *supra* note 4, at 611; see also *id.* at 592; Weston, *supra* note 4, at 628, 630.

117. Cf. Brazil, *supra* note 10, at 31 (criticizing the potential for a good-faith requirement to require disclosure in mediation of privileged information). For discussion of potential abuse of good-faith requirements, see *infra* text accompanying notes 151–154.

118. See Kovach, *supra* note 4, at 623; accord, Weston, *supra* note 4, at 628.

writes that “while the good faith requirement might include remaining at the mediation, the length of time to remain should be reasonable, such as two or three hours rather than overnight.”<sup>119</sup> Under Kovach’s proposal, mediation participants are effectively in the custody of the mediator for an open-ended period.<sup>120</sup> Even if the text of Kovach’s proposed statute included a requirement of reasonableness, participants who believe that continued mediation would be unproductive could legitimately wonder whether mediators or judges would second-guess those judgments.<sup>121</sup>

### 3. Inclusion of Settlement-Authority Requirement

Although mediations generally work better when organizational parties send representatives with a reasonable measure of settlement authority, courts have difficulty strictly enforcing such a requirement—and regularly doing so can stimulate counterproductive mediation tactics. Slightly more than half of the courts have found bad faith when entities fail to send representatives with sufficient settlement authority.<sup>122</sup> An element of good faith in Kovach’s proposed statute is “personal attendance at the mediation by all parties who are fully authorized to settle the dispute.”<sup>123</sup> Even Sherman, a critic of good-faith requirements, favors requiring attendance by a person with settlement authority.<sup>124</sup>

Professor Leonard Riskin provides a useful framework for analyzing the meaning of full settlement authority. He notes that this issue arises only with organizational litigants, and he argues that full settlement authority for organizational representatives should resemble certain attributes of individual litigants. These attributes are (1) authority to make a commitment, (2) sufficient knowledge of the organization’s needs, interests, and operations, (3) sufficient influence within the organization that the representative’s recommendations likely would affect the organization’s decisions, and (4) dis-

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119. Kovach, *supra* note 4, at 584.

120. The notion of mediation participants being in the custody of the mediator may not be as extreme as it sounds. In a recent case, the court upheld an order requiring an insurance representative to be deposed about whether he left the mediation without the mediator’s permission. *In re Daley*, 29 S.W.3d 915, 918–19 (Tex. Ct. App. 2000).

121. A mediation involving mediator Eric Green illustrates this potential problem. The mediation began at noon. At 11:00 P.M., the plaintiff suggested stopping for the night, but Green pressed the parties to stay because he wanted to “keep the heat on and settle tonight.” Lavinia E. Hall, *Eric Green: Finding Alternatives to Litigation in Business Disputes*, in *WHEN TALK WORKS: PROFILES OF MEDIATORS* 279, 299–300 (Deborah M. Kolb ed., 1994). Under a good-faith regime, it would be understandable if the plaintiff would hesitate to leave for fear that the mediator would report him to the court and that sanctions might follow.

122. See *supra* note 69 and accompanying text.

123. Kovach, *supra* note 4, at 622; accord Weston, *supra* note 4, at 628.

124. See Sherman, *supra* note 10, at 2103–11; accord Winston, *supra* note 10, at 201–02.

cretion to negotiate arrangements that are likely to be accepted by the organization.<sup>125</sup> He writes that possessing only two or three of these attributes would be sufficient to constitute full settlement authority, recognizing that organizations sometimes have difficulty finding representatives with all these attributes.<sup>126</sup> He argues that the representative's role as an executive, full-time general counsel, or outside part-time counsel does not necessarily indicate whether the particular individual has these attributes.<sup>127</sup> Riskin's analysis suggests that to enforce a settlement-authority requirement, courts would need to interrogate witnesses about the extent to which various actual or potential representatives possess the four listed attributes.

Many rules and court orders merely state that representatives must have "full" settlement authority, without defining the term. Some requirements are more specific, using provisions such as those in *Physicians Protective Trust Fund v. Overman*,<sup>128</sup> in which the court ordered attendance by a representative with "full and absolute authority to resolve the matter for the lesser of the policy limits or the most recent demand of the adverse party."<sup>129</sup>

*G. Heileman Brewing Co. v. Joseph Oat Corp.*<sup>130</sup> illustrates the difficulties of implementing a requirement of attendance with appropriate settlement authority. In *Heileman*, the controversy surrounded the attendance of a representative who had authority to speak for one of the parties and "his authority was to make no offer."<sup>131</sup> The district court concluded that "[n]either the fact that [the organization] did not want to settle, nor the soundness of [its] reasons for [its] positions, are relevant to the question of [its] obligation to comply with the order to attend" with settlement authority.<sup>132</sup> Sitting en banc, the U.S. Court of Appeals for the Seventh Circuit, by a six to five vote, affirmed an imposition of sanctions for failure to send a corporate representative with appropriate settlement authority.<sup>133</sup> In defining the representative's required settlement authority, the majority used a narrower formulation than in *Physicians Protective Trust Fund*. The *Heileman* majority ruled that the corporate representative attending the pretrial con-

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125. 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).

126. *Id.* at 1110–11.

127. *Id.* at 1112.

128. 636 So. 2d 827 (Fla. Dist. Ct. App. 1994).

129. *Id.* at 827; see also Riskin, *supra* note 125, at 1110 n.181 (quoting a settlement conference order with a similar provision). Much of the discussion about settlement authority focuses on defendants. Presumably the same principles should apply to plaintiffs that are organizations. If so, such plaintiffs could be required to attend with authority to dismiss the complaint or accept a nuisance-value offer.

130. 871 F.2d 648 (7th Cir. 1989) (en banc).

131. *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 107 F.R.D. 275, 279 (W.D. Wis. 1985).

132. *Id.* at 280.

133. See *Heileman*, 871 F.2d at 653–57.

ference was required to "hold a position within the corporate entity allowing him to speak definitively and to commit the corporation to a particular position in the litigation."<sup>134</sup>

Judge Frank H. Easterbrook's dissent in *Heileman* highlights the problems with settlement-authority requirements. He argues that the majority does not consider realistically the structure of most corporations<sup>135</sup> and that requiring attendance by a representative with settlement authority would force a party to make an offer it did not want to make.<sup>136</sup> Judge Easterbrook identifies a legitimate concern about courts using a settlement-authority requirement to coerce settlement, which is illustrated by *Lockhart v. Patel*.<sup>137</sup> In that case, an advisory jury in a summary jury trial had made a nonbinding award of \$200,000. Following the summary jury trial, the court held several formal and informal pretrial and settlement conferences. The attorney for the insurance carrier, St. Paul, advised the court that he had been authorized to offer no more than \$125,000 and told not to negotiate any further. The plaintiff's last demand was \$175,000. Judge William O.

134. *Id.* at 653.

135. Judge Frank H. Easterbrook writes:

Both magistrate and judge demanded the presence not of a "corporate representative" in the sense of a full-time employee but of a representative with "full authority to settle." Most corporations reserve power to *agree* (as opposed to power to discuss) to senior managers or to their boards of directors—the difference depending on the amounts involved. Heileman wanted \$4 million, a sum within the province of the board rather than a single executive even for firms much larger than Oat. [Oat's representative] came with power to *discuss and recommend*; he could settle the case on terms other than cash; he lacked only power to sign a check. The magistrate's order therefore must have required either (a) changing the allocation of responsibility within the corporation, or (b) sending a quorum of Oat's Board.

*Id.* at 664 (Easterbrook, J., dissenting).

Although it might be hard to imagine Judge Easterbrook's suggestion that a court would order attendance of the board of directors, the Florida Court of Appeals upheld an order requiring a full board of directors to attend a mediation. *Physicians Protective Trust Fund v. Overman*, 636 So. 2d 827, 829 (Fla. Dist. Ct. App. 1994).

136. Judge Easterbrook writes:

A defendant convinced it did no wrong may insist on total vindication. . . . The order we affirm today compels persons who have committed no wrong, who pass every requirement of Rules 11 and 68, who want only the opportunity to receive a decision on the merits, to come to court with open checkbooks on pain of being held in contempt. . . .

. . . .

. . . What is the point of insisting on such authority if not to require the making of offers and the acceptance of "reasonable" counteroffers—that is, to require good faith negotiations and agreements on the spot? . . . What the magistrate found unacceptable was that [Oat's representative] might say something like "I'll relay that suggestion to the Board of Directors", which might say no. Oat's CEO could have done no more. We close our eyes to reality in pretending that Oat was required only to be present while others "voluntarily" discussed settlement.

*Heileman*, 871 F.2d at 664–65 (Easterbrook, J., dissenting).

137. 115 F.R.D. 44 (E.D. Ky. 1987).

Bertelsman prided himself as “[h]aving had some success with settlement conferences” and ordered the parties to attend an additional settlement conference.<sup>138</sup> For this settlement conference, the carrier was ordered to send the person who had issued the instruction limiting St. Paul’s offer or one with equal authority, and the court instructed the attorney, “Tell them not to send some flunky who has no authority to negotiate. I want someone who can enter into a settlement in this range without having to call anyone else.”<sup>139</sup> At the settlement conference, the local office adjuster appeared and said that her instructions were to reiterate the previous offer and not to bother to call back if it was not accepted. When asked if there was a misunderstanding about who was required to attend, the adjuster said, “I doubt if anyone from the home office would have come down even if in fact this is what you said.”<sup>140</sup> The court found that this behavior was contemptuous, struck the defendant’s pleadings, and declared him in default.<sup>141</sup> The court further ordered that “the trial set for the next day would be limited to damages only [and set a hearing to] show cause why St. Paul should not be punished for criminal contempt . . . . Later that day, St. Paul settled with the plaintiff for \$175,000.”<sup>142</sup>

Sherman cites *Lockhart* as an “extreme example” of improper conduct that is “an appropriate fact situation for sanctions.”<sup>143</sup> The court appropriately imposed sanctions for *contempt* in this case, but the case illustrates the dangers of sanctions for violating a settlement-authority requirement. Certainly St. Paul did not comply with the court’s order, and the adjuster’s testimony reflected disrespect of the court’s authority. Although the *Lockhart* court repeated the familiar notion that “the court cannot require any party to settle a case,”<sup>144</sup> St. Paul may have understandably believed that the court had ordered a series of settlement conferences intending to exert heavy pressure to settle on terms that the court believed were reasonable. St. Paul might have avoided this problem if it had been less honest. It could have sent a representative with formal “authority” to settle for up to \$175,000 but with a clear understanding that any settlement above \$125,000 would be unsatisfactory to top company officials (and harmful to the representative’s prospects for advancement within the company). When the court would ask why St. Paul would not increase its offer, the representative could provide a response relating to the facts of the case rather than lack of authority. The

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138. *Id.* at 45.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. Sherman, *supra* note 10, at 2107.

144. *Lockhart*, 115 F.R.D. at 47; *see also* Kovach, *supra* note 4, at 603 (“Good faith should not coerce the parties to resolve their dispute on any particular economic basis.”).

representative might have to withstand withering criticism of St. Paul's position from a judge proud of his settlement prowess,<sup>145</sup> but St. Paul could avoid sanctions for violating the settlement-authority requirement. Regardless of whether the case was worth \$175,000 or more,<sup>146</sup> judges and mediators should not substitute their judgments in place of the parties' judgment about appropriate settlement terms. As Judge Easterbrook argues in his *Heileman* dissent, a settlement-authority requirement can effectively interfere with parties' right to make decisions about their cases.<sup>147</sup>

When courts focus heavily on settlement authority, participants may be distracted from various ways that mediation can help litigants achieve goals other than reaching final monetary settlements. Settlement-authority requirements typically focus only on monetary resolutions; mediation can be useful to explore nonmonetary aspects of disputes. These requirements also assume that cases should be settled at a single meeting; in some cases it may be appropriate to meet several times, especially when organizational representatives need to consult officials within the organization based on information learned at mediation. Moreover, settlement-authority requirements do not recognize benefits of exchanging information, identifying issues, and making partial or procedural agreements in mediation. Part II.C.3 offers an alternative to a settlement-authority requirement.

#### 4. Questionable Deterrent Effect and Potential Abuse of Bad-Faith Sanctions

Sanctioning bad faith in mediation actually may stimulate adversarial and dishonest conduct, contrary to the intent of proponents of a good-faith requirement. Proponents argue that a good-faith requirement would cause people to negotiate sincerely, would deter bad-faith behavior, and, when people violate the requirement, would provide appropriate remedies.<sup>148</sup>

Although a good-faith requirement presumably would deter and punish some inappropriate conduct, it might also encourage surface bargaining,<sup>149</sup> as well as frivolous claims of bad faith or threats to make such claims. Propo-

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145. Cf. Alfini, *supra* note 8, at 68–71 (describing the “bashing” style of mediation often used by retired judges who aggressively “bash” each side’s offers).

146. In summary jury trials, mock juries consider abbreviated presentations from each side and then issue advisory verdicts to be used by the parties as information in settlement negotiations. Although these advisory verdicts can be helpful, they are not necessarily reliable indicators of the likely outcomes in real trials due to differences in the material presented in the two proceedings. See Beverly J. Hodgson & Robert A. Fuller, *Summary Jury Trials in Connecticut Courts*, 67 CONN. B.J. 181, 197–99 (1993).

147. See *supra* note 136.

148. See Weston, *supra* note 4, at 643–44; see also Kovach, *supra* note 4, at 604.

149. For a definition of surface bargaining, see *supra* notes 103–104 and accompanying text.

nents seem to assume that participants who might act in bad faith but for the requirement would behave properly in fear of legal sanctions. It seems at least as likely that savvy participants who want to take inappropriate advantage of mediation would use surface bargaining techniques so that they can pursue their strategies with little risk of sanction. This would be fairly easy given the vagueness of a good-faith requirement.<sup>150</sup> Participants can readily make “lowball” offers that they know the other side will reject and generally go through the motions of listening to the other side and explaining the rationale for their positions. Although attorneys often are quite sincere, making arguments with feigned sincerity is a skill taught in law school and honed in practice. Because mediators are not supposed to force people to settle, participants who are determined not to settle can wait until the mediator gives up. This scenario illustrates how a good-faith requirement could ironically induce dishonesty, when providing more honest responses might put participants in jeopardy of being sanctioned.

Similarly, tough mediation participants could use good-faith requirements offensively to intimidate opposing parties and interfere with lawyers’ abilities to represent their clients’ legitimate interests. Given the vagueness and overbreadth of the concept of bad faith,<sup>151</sup> innocent participants may have legitimate fears about risking sanctions when they face an aggressive opponent<sup>152</sup> and do not know what a mediator would say if called to testify. In the typical conventions of positional negotiation in which each side starts by making an extreme offer, each side may accuse the other of bad faith. Without the threat of bad-faith sanctions, these moves are merely part of the kabuki dance of negotiation. With the prospect of such sanctions, bad-faith claims take on legal significance that can spawn not only satellite litigation, but satellite mediation as well.<sup>153</sup> After a volley of bad-faith charges in a mediation, mediators may need to focus on bad faith as a real issue rather than simply a negotiation gambit. Moreover, the mediator could be a potential witness in court about the purity of each side’s faith in the mediation, further warping the mediator’s role.<sup>154</sup>

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150. See *supra* Part I.C.1.

151. See *supra* notes 85, 114–121 and accompanying text.

152. Proponents seem to assume that mediation participants who are truly acting appropriately would have nothing to fear from good-faith requirements. Unfortunately, courts regularly make some errors (evidenced, in part, by reversals of decisions), and participants may understandably fear a threat of a bad-faith motion by a Rambo-style opponent. Indeed, in eleven out of sixteen reported cases in which the trial courts found bad faith in mediation, the appellate courts reversed those decisions. See *supra* note 71 and accompanying text. Some parties may prefer to submit to unjustified threats of bad-faith claims rather than gamble on eventual vindication in the courts.

153. See Brazil, *supra* note 10, at 33; Sherman, *supra* note 10, at 2093.

154. For further discussion of how the potential for mediator testimony would affect the mediator’s role and the mediation process, see *infra* notes 190–191, 199–209 and accompanying text.

Experience with Rule 11 of the Federal Rules of Civil Procedure<sup>155</sup> suggests how participants could abuse bad-faith sanctions in mediation. In 1983, Rule 11 was amended to provide that attorneys' signatures on court documents constitute a certification that, *inter alia*, the document is well grounded in fact and legitimate legal argument and that the document is not being used for improper purposes.<sup>156</sup> The 1983 amendment required courts to award monetary sanctions for violation of the rule.<sup>157</sup>

Professor Georgene Vairo found that the amendment to Rule 11 "triggered an avalanche of 'satellite litigation.'"<sup>158</sup> One of the reasons for this avalanche was that "once lawyers knew that the courts would grant sanctions motions, and that the likely sanction would be an award of costs and attorney's fees, lawyers had an incentive to bring sanctions motions to achieve cost-shifting, which otherwise would largely be unavailable due to the American Rule."<sup>159</sup> Reviewing numerous empirical studies of the impact of Rule 11, Vairo notes that although the 1983 amendment of Rule 11 generated some benefits, they were overshadowed by the unintended side effects. Rule 11 caused lawyers to "stop and think" before filing court documents, "raise[d] the level of lawyering across a broad spectrum of practice," and contributed to reduced filings of boilerplate documents and questionable cases.<sup>160</sup> On the other hand, Vairo finds that Rule 11 was overused<sup>161</sup> and created animosity between attorneys.<sup>162</sup> She concludes that

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155. FED. R. CIV. P. 11.

156. FED. R. CIV. P. 11 (1983) (amended 1993).

157. *See id.*

158. Georgene Vairo, *Rule 11 and the Profession*, 67 FORDHAM L. REV. 589, 598 (1998) (citing research finding frequent Rule 11 motions and threats of sanctions). Vairo reported that:

Prior to 1983, there were only a handful of reported Rule 11 decisions. Between August 1, 1983, and December 15, 1987, 688 Rule 11 decisions were published in the federal reporters, consisting of 496 district court opinions and 192 circuit court opinions. By 1989, the number of reported district court cases appears to have leveled off. The number of reported circuit court opinions continued to rise, however, as the circuit courts continued to struggle with interpreting the rule. Moreover, the number of cases reported on computerized databases continued to rise until 1993, when Rule 11 was amended again. A search as of June 1993 revealed nearly 7000 cases.

*Id.* at 625–26 (footnotes omitted). Her analysis reflects only the number of *reported* decisions. Presumably there were a great many unreported Rule 11 cases during this time as well.

159. *Id.* at 599.

160. *See id.* at 621–23. The studies suggest that other practices, such as Rule 16 status conferences and prompt rulings on summary judgment motions, may have been more effective in deterring groundless pleadings. *Id.* at 623.

161. *See id.* at 626 (citing a study finding that almost 55 percent of attorneys reported being the target of a formal or informal threat of Rule 11 sanctions).

162. *Id.* at 626–28 (citing numerous studies that found worsened relationships between attorneys as a result of Rule 11).

although Rule 11 clearly improved some attorney conduct, “the most significant impact of the rule has been to cause a decline in civility.”<sup>163</sup>

To correct problems caused by the 1983 amendment, Rule 11 was amended again in 1993.<sup>164</sup> Vairo found that the 1993 amendments substantially reduced the number of Rule 11 cases.<sup>165</sup> Even so, she found that the 1983 sanctions regime left lasting damage to the legal culture and relations between lawyers. “Though most of the changes [in 1993] were intended to scale back the more draconian aspects of Rule 11, the mindset occasioned by the 1983 amendments to Rule 11 remained.”<sup>166</sup>

Enactment of a rule authorizing sanctions for bad faith in mediation could cause the same problems as the 1983 version of Rule 11. Rather than improving the quality of interaction in mediation, it could have the perverse effect of harming it. Citing Rules 11 and 37, Weston includes a “safe harbor” provision in her proposal that would require notice and a reasonable opportunity to correct the problem before courts imposed sanctions.<sup>167</sup> Such a safe harbor provision might not solve the problem of wasted time and money in sham mediations. If one side charges the other with being unprepared or not having a representative with settlement authority, the “cure” would be to reschedule the mediation, to which the alleged offender could send a fully authorized representative to engage in surface bargaining. The result would be that the innocent party would bear the time and expense of two unproductive mediation sessions rather than only one. Thus, this well-intentioned proposal could easily backfire.

Policymakers may have difficulty predicting the extent to which mediation participants would respond to a sanction-based good-faith system by “gaming” the requirements. Perhaps participants would adopt a gaming response relatively rarely. On the other hand, the underlying problematic behavior also may be fairly infrequent, and a good-faith requirement might create more problems than it solves. This probably varies greatly by local

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163. *Id.* at 628. Although analysts can differ about whether the benefits of Rule 11 outweigh its costs, Vairo presents strong evidence that it resulted in major unintended negative consequences. *Id.* at 625–28.

164. The 1993 amendments created a “safe harbor” in which motions for sanctions are to be served but not filed for at least twenty-one days to give the alleged offender an opportunity to correct the challenged document. The revised rule also required parties to file a separate motion for Rule 11 sanctions rather than simply include a “tag-along” request in another motion. The revised rule made sanctions discretionary rather than mandatory, de-emphasized monetary sanctions, and included a provision authorizing payment to the court instead of or in addition to the opposing parties. *See* FED. R. CIV. P. 11(c). *See generally* FED. R. CIV. P. 11(c) advisory committee notes; GREGORY P. JOSEPH, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE 12–36 (2d ed. 1994).

165. *See* Vairo, *supra* note 158, at 626.

166. *Id.* at 594 (footnote omitted).

167. *See* Weston, *supra* note 4, at 631–32.

legal culture. Hence, it would be appropriate to craft solutions in response to actual local problems, where the nature and magnitude of the problems can be more accurately assessed, rather than to rely on global speculation.<sup>168</sup>

## 5. Weakened Confidentiality of Mediation Communications

Establishing a good-faith requirement undermines the confidentiality of mediation. The mere prospect of adjudicating bad-faith claims by using mediator testimony can distort the mediation process by damaging participants' faith in the confidentiality of mediation communications and the mediators' impartiality.

Proponents of a good-faith requirement cite the need for an exception to rules providing for confidentiality<sup>169</sup> of communications in mediation.<sup>170</sup> Weston contends that a good-faith requirement is "essentially meaningless if confidentiality privileges restrict the ability to report violations."<sup>171</sup> Noting the existence of some exceptions to confidentiality in mediation, she argues that reports of bad faith should be added to the list of exceptions.<sup>172</sup> Weston and Kovach assert that an exception for bad-faith participation can be clearly and narrowly limited, and that the need for an exception outweighs the general need to encourage open discussion in mediation through confidentiality protections.<sup>173</sup>

Weston recognizes that creating a bad-faith exception to the confidentiality rules is risky. "After-the-fact allegations of ADR [alternative dispute resolution] bad-faith conduct can undermine participants' trust in the confidentiality of ADR, create uncertainty, and potentially impair full use of the process."<sup>174</sup> In addition, "[r]ecognizing a privilege exception to report good-

168. See *infra* Part II.A.

169. In the mediation context, people use the term "confidentiality" to refer to several distinct concepts. These concepts include inadmissibility in evidence in legal proceedings, bar to discovery, restriction on mediator testimony, and preclusion of disclosure in any context including situations outside of legal proceedings (such as to the media). For the purpose of this Article, the term refers to inadmissibility of evidence. Confidentiality is especially important in court-connected mediation, in which court hearings loom as the alternative to a mediated settlement.

170. See Kovach, *supra* note 4, at 601–03; Weston, *supra* note 4, at 633–42. Many jurisdictions have rules precluding admissibility in evidence of communications in mediations. See SARAH R. COLE ET AL., *MEDIATION: LAW, POLICY, PRACTICE* apps. A, B (2d ed. 2001). The Uniform Mediation Act (UMA) establishes a privilege that clarifies rules on admissibility of mediation communications. See UNIF. MEDIATION ACT § 4 (2001). The National Conference of Commissioners on Uniform State Laws recently approved the UMA, which has not been enacted by any state as of this writing. Although a few court rules with good-faith requirements explicitly create confidentiality exceptions relating to good faith, see, e.g., D.C. E.D. Mo. Loc. R. 16-6.04(A) (1997), most rules reviewed for this Article do not address this issue.

171. Weston, *supra* note 4, at 633; see also Kovach, *supra* note 4, at 602.

172. See Weston, *supra* note 4, at 636–38.

173. See Kovach, *supra* note 4, at 602–03; Weston, *supra* note 4, at 638–42.

174. Weston, *supra* note 4, at 633.

faith violations carries the risk that the exception would be misused by disgruntled parties and simply swallow the confidentiality rule.”<sup>175</sup> Requiring testimony from a mediator in bad-faith hearings creates related problems. Kovach suggests solving this problem by having mediators file affidavits or testify about the conduct in question without making determinations whether the conduct constitutes bad faith.<sup>176</sup> As Weston notes, however, “[p]ermitting disclosures for good-faith-violation claims also raises the concern that the role of the third-party neutral is compromised where the neutral is a witness to the alleged bad-faith ADR conduct.”<sup>177</sup>

To solve these problems, Weston recommends that evidence of bad faith be heard by a court in camera to determine whether a confidentiality privilege exception is warranted, preferably by a judge who would not determine the underlying merits of the case. She argues that this approach, “combined with sanctions for asserting frivolous claims of bad-faith participation, balances the concerns for ensuring good-faith participation and justified confidentiality in ADR.”<sup>178</sup>

The proponents have identified correctly concerns that a good-faith requirement could undermine participants’ trust in the confidentiality of mediation because of uncertainty about what might later be used in court. An exception for bad faith does not seem as narrow and definite as the proponents suggest, however. The vagueness and overbreadth of the concept<sup>179</sup> contribute to participants’ uncertainty about whether their statements in mediation would be used against them.

Proposals for admitting mediators’ testimony presume that courts need such testimony to pursue their mission of seeking truth and justice and that mediators’ testimony is highly probative and reliable because mediators are the only source of disinterested, neutral evidence about conduct in mediation.<sup>180</sup> Certainly mediators’ testimony can be helpful, but one can overstate its value. Much discussion in mediation does not focus on facts strictly rele-

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175. *Id.* at 638.

176. Kovach, *supra* note 4, at 602.

177. See Weston, *supra* note 4, at 639. Parties have a due process right to cross-examine mediators whose bad-faith reports are considered in evidence. See *McLaughlin v. Super. Ct.*, 189 Cal. Rptr. 479, 485 (Ct. App. 1983) (requiring cross-examination of mediator who makes recommendation to court about child custody or visitation); Dwight Golann, *Making Alternative Dispute Resolution Mandatory: The Constitutional Issues*, 68 OR. L. REV. 487, 515 (1989). The prospect of cross-examination shifts the role of the mediator from a neutral facilitator to a potential adverse witness.

178. Weston, *supra* note 4, at 642; see *id.* at 645.

179. See *supra* notes 85, 114–121 and accompanying text.

180. See Kovach, *supra* note 4, at 602. In one case, the court premised its decision to require mediator testimony on this basis, deciding that mediators may be required to testify even if there is other evidence of the fact at issue because mediators “carry more weight of credibility.” *Rinaker v. Super. Ct.*, 74 Cal. Rptr. 2d 464, 473 (1998).

vant to legal issues and often involves feelings, interests, expected consequences of various options, negotiation strategy, and even analysis of hypothetical situations.<sup>181</sup> Moreover, if called to testify at such hearings, mediators may have significant biases even if the mediators have the highest integrity. Mediators would be interested in presenting themselves and their actions in mediation in a favorable light. If a mediator reports that a participant has not participated in good faith, courts should expect that the mediator might emphasize facts consistent with that conclusion and downplay inconsistent facts.<sup>182</sup> Thus, one should not simply assume that mediator testimony is necessarily neutral, probative, and reliable.

The Uniform Mediation Act's (UMA's) provisions regarding confidentiality of mediation communications are relevant to the admissibility of evidence of bad faith. The main provision establishes an evidentiary privilege for mediation communications.<sup>183</sup> Section 6 includes nine exceptions to the privilege; bad faith in mediation is not one of them.<sup>184</sup> Section 7 generally precludes mediator disclosures, with limited exceptions; again, bad faith is not among them.<sup>185</sup>

Weston's suggestion for in camera proceedings does not completely solve the problem. Relying on *Rinaker v. Superior Court*<sup>186</sup> and *Olam v. Congress Mortgage Co.*,<sup>187</sup> she argues that this procedure should be used so that the complaining party can make a threshold showing of bad faith before public disclosure of the alleged misconduct.<sup>188</sup> In *Rinaker* and *Olam*, the courts set out balancing tests for determining whether to admit mediator testimony.<sup>189</sup> As Judge Wayne Brazil notes in *Olam*, requiring mediators to

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181. See *Olam v. Cong. Mortgage Co.*, 68 F. Supp. 2d 1110, 1135 (N.D. Cal. 1999). Judge Wayne D. Brazil, an ADR leader, writes:

Under one approach to mediation, the primary goal is not to establish "the truth" or to determine reliably what the historical facts actually were. Rather, the goal is to go both deeper than and beyond history—to emphasize feelings, underlying interests, and a search for means for social repair or reorientation.

*Id.*; *Rinaker*, 74 Cal. Rptr. 2d at 469 (quoting the mediator who argued that "[t]he heart of the mediation exchange typically involves concessions, waivers, confusions, misstatements, confessions, implications, angry words, insults" (citation omitted)).

182. See *Olam*, 68 F. Supp. 2d at 1127 n.22.

183. See UNIF. MEDIATION ACT § 4 (2001).

184. See *id.* § 6.

185. See *id.* § 7. The reporter's note states, "The [prohibited] communications by the mediator to the court or other authority are broadly defined. The provisions would not permit a mediator to communicate, for example, on whether a particular party engaged in 'good faith' negotiation . . . ." *Id.* § 7 reporter's note.

186. 74 Cal. Rptr. 2d 464 (Ct. App. 1998).

187. 68 F. Supp. 2d 1110 (N.D. Cal. 1999).

188. See Weston, *supra* note 4, at 642.

189. Under the *Rinaker* procedure, if a party makes a prima facie showing that a mediation communication would be relevant, the court holds an in camera hearing to determine if the mediator is competent to testify about the issue, whether the mediator's testimony is probative, and

give evidence about events in mediation, even in camera or under seal, “threatens values underlying the mediation privileges.”<sup>190</sup>

Good mediators are likely to feel violated by being compelled to give evidence that could be used against a party with whom they tried to establish a relationship of trust during a mediation. Good mediators are deeply committed to being and remaining neutral and non-judgmental, and to building and preserving relationships with parties. To force them to give evidence that hurts someone from whom they actively solicited trust (during the mediation) rips the fabric of their work and can threaten their sense of the center of their professional integrity. These are not inconsequential matters. . . .

. . . [T]he possibility that a mediator might be forced to testify over objection could harm the capacity of mediators in general to create the environment of trust that they feel maximizes the likelihood that constructive communication will occur during the mediation session.<sup>191</sup>

Thus, a policy requiring evidence of mediation communications, especially where mediators might be compelled to testify, can cause serious harm to the overall mediation practice in a community if mediation participants do not have confidence that the courts will uphold assurances of confidentiality. Anticipating that their statements in mediation could be used against them, participants would have an incentive to posture defensively.

Comparing the *Rinaker-Olam* in camera procedure with the UMA’s comparable procedure<sup>192</sup> illustrates problems with Weston’s proposal. The UMA procedure protects confidential mediation communications more than *Rinaker* and *Olam* in two ways. First, under the UMA in camera procedure, evidence may be admitted only if the “need for the evidence *substantially* outweighs the interest in protecting confidentiality.”<sup>193</sup> *Rinaker* and *Olam* do not include such a requirement.<sup>194</sup> Second, under the UMA, courts may admit evidence of mediation communications only if the evidence is not otherwise available.<sup>195</sup> *Rinaker* and *Olam* permit exceptions to confidential-

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whether the interest in admitting the evidence outweighs the interest in maintaining the confidentiality of mediation. *Rinaker*, 74 Cal. Rptr. 2d at 472–73. The *Olam* court followed the *Rinaker* procedure and elaborated the balancing test. See *Olam*, 68 F. Supp. 2d at 1132.

190. *Olam*, 68 F. Supp. 2d at 1133. See also cases cited therein.

191. *Id.* at 1133–34.

192. Although the UMA does not recognize bad faith as an exception to a mediation privilege, the UMA establishes an in camera procedure for two other unrelated exceptions. See UNIF. MEDIATION ACT § 6(b) (2001).

193. *Id.* (emphasis added).

194. See *supra* note 189.

195. See UNIF. MEDIATION ACT § 6(b) (2001).

ity even if there is other evidence to establish the facts sought to be established with the mediation communications.<sup>196</sup>

Proposals for a confidentiality exception for reports of bad faith are not justified. The UMA includes model language describing the goals of the statute, the first of which is to “promote candor of parties through confidentiality of the mediation process, subject only to the need for disclosure to accommodate specific and compelling societal interests.”<sup>197</sup> The benefits of bad-faith sanctions (especially when offset by the problems described in Part I of this Article) do not outweigh the need for justified faith in the confidentiality of mediation.<sup>198</sup>

## 6. Encouragement of Inappropriate Mediator Conduct

A good-faith requirement gives mediators too much authority over participants to direct the outcome in mediation and creates the risk that some mediators would coerce participants by threatening to report alleged bad-faith conduct.<sup>199</sup> Courts can predict abuse of that authority given the settlement-driven culture in court-connected mediation.<sup>200</sup> The mere potential for courts to require mediators’ reports can corrupt the mediation process by instilling fear and doubt in the participants.

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196. See *Rinaker*, 74 Cal. Rptr. 2d at 473. In *Olam*, the court required testimony from the mediator even though there was sufficient evidence from the plaintiff’s own doctor and former attorney to support the court’s finding against her. *Olam*, 68 F. Supp. 2d at 1142–50. The *Olam* decision illustrates the weakness of the *Rinaker-Olam* procedure in that the *Olam* court overrode statutory confidentiality protections even though the mediator’s testimony merely corroborated other credible evidence.

197. UNIF. MEDIATION ACT prefatory note (2001).

198. Elsewhere I have suggested that confidentiality in mediation may not be needed as much as commonly assumed because some participants make statements without relying on confidentiality protections. See John Lande, *Toward More Sophisticated Mediation Theory*, 2000 J. DISP. RESOL. 321, 331–32; see also Christopher Honeyman, *Confidential, More or Less*, DISP. RESOL. MAG., Winter 1998, at 12; Scott H. Hughes, *The Uniform Mediation Act: To the Spoiled Go the Privileges*, 85 MARQ. L. REV. 9 (2001). Although people can mediate productively without assurances of confidentiality in some cases, mediation would be unproductive in many other cases if participants did not have a clear and justified expectation that mediation communications would not later be used against them in court.

199. This discussion assumes that mediators would be permitted to testify. Some statutes or rules prohibit such evidence, while other authorities permit mediator reports about bad faith. See *supra* note 51 and accompanying text. If mediators cannot provide evidence for good-faith hearings, but mediation participants are permitted to testify about mediation communications, it might reduce fear of mediator coercion, but it could encourage participants to posture in mediation in anticipation of possible bad-faith hearings.

200. To prevent mediator coercion of participants, a California statute prohibits mediator communications to courts about mediations. CAL. EVID. CODE § 1121 Law Revision Commission comment (West 2002) (“[A] mediator should not be able to influence the result of a mediation or adjudication by reporting or threatening to report to the decisionmaker on the merits of the dispute or reasons why mediation failed to resolve it.”).

Proponents of a good-faith requirement apparently assume that mediators will not abuse any good-faith reporting authority to coerce parties into accepting mediators' opinions about appropriate resolutions. The proponents also seem to assume that even if mediators do not abuse their good-faith reporting authority, participants will not fear taking positions at odds with the mediators' apparent views and will not perceive mediators as biased.<sup>201</sup>

These assumptions are troubling. Kovach warns of the dangers of evaluative mediation, in which mediators express opinions about the merits of the issues.<sup>202</sup> Weston cites risks when the parties have unequal bargaining power and mediators pressure the weaker parties.<sup>203</sup> These risks are very real.<sup>204</sup> When mediators express opinions about specific aspects of a case or its ultimate merits, they risk creating injustice through heavy-handed pressure tactics.<sup>205</sup> Even without the prospect of a later court hearing about good-faith participation, mediation participants sometimes feel pressured to change their positions in response to mediator evaluations and "reality-testing" questions.<sup>206</sup> Under a bad-faith sanctions regime, mediators might apply

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201. These assumptions are largely implicit in their proposals, though Kovach writes, "It will be assumed that the mediator is one who adheres to current established ethical guidelines, however problematic." Kovach, *supra* note 4, at 585.

202. See Kimberlee K. Kovach & Lela P. Love, "Evaluative" Mediation Is an Oxymoron, 14 ALTERNATIVES TO HIGH COST LITIG. 31 *passim* (1996); Kimberlee K. Kovach & Lela P. Love, Mapping Mediation: The Risks of Riskin's Grid, 3 HARV. NEGOTIATION L. REV. 71 *passim* (1998); Lela P. Love & Kimberlee K. Kovach, ADR: An Eclectic Array of Processes, Rather Than One Eclectic Process, 2000 J. DISP. RESOL. 295, 303–05. Though evaluative mediation may be appropriate when participants request it and when done properly, Kovach and Love have legitimate concerns about the risks of evaluative mediation techniques. See *Lawyering and Mediation Transformation*, *supra* note 6, at 872–74; Lande, *supra* note 198, at 325–27.

203. Weston, *supra* note 4, at 603–17.

204. See, e.g., Christopher Honeyman, *Patterns of Bias in Mediation*, 1985 MO. J. DISP. RESOL. 141. Honeyman wryly and insightfully cites "the well-known definition of a mediator as someone who listens to and reasons politely with both parties only until he is sure which is weaker, and then jumps on that one with both feet." *Id.* at 146. Although Honeyman's case examples took place outside the litigation context and most court-connected mediations do not operate this way, there is enough truth in this observation to raise concerns, especially where mediators commonly use an evaluative style.

205. Lande, *supra* note 198, at 325–27. Mediation participants can feel abused by mediator evaluation in some situations and can appreciate it in others, depending on how mediators express their evaluations. In studying civil mediation in Ohio courts, for example, Roselle Wissler found that parties' perception of being pressured by mediators was not related to whether mediators expressed their evaluations of a case. Wissler, *supra*, note 11, at 684. By contrast, parties whose mediators recommended a particular settlement felt more pressured to settle than parties whose mediators did not make such recommendations. *Id.* Depending on the context in particular cases, participants may experience mediators' evaluations or suggestions of settlement options as settlement pressure. For further discussion about parties' and attorneys' views about mediator evaluation, see *infra* notes 264, 268–271, 277 and accompanying text.

206. Although mediators differ about the propriety of mediators expressing evaluations regarding the merits of disputes, most would agree that mediators may appropriately ask "reality-

pressure arising from their authority to testify about bad faith. If local courts hold a sufficient number of bad-faith hearings, participants may reasonably fear the effect of mediators' reports, even if mediators do not threaten to report bad faith.<sup>207</sup>

An actual case illustrates these problems. In a wrongful employment termination case, mediator Eric Green told the defendant's representatives that they should know "that the judge has no desire to hear this case," suggesting that the court might rule against the defendant if it failed to "live up to its moral obligations" to settle the case.<sup>208</sup> When the plaintiff insisted on receiving more than \$600,000, the maximum appropriate amount under Green's litigation decision analysis, he asked the plaintiff, "How greedy can you get?"<sup>209</sup> The case report does not indicate that Green explicitly accused either side of acting in bad faith, but it would have been consistent with his approach for him to have done so. In any event, if the court would permit Green to testify at a bad-faith hearing, both sides would have reason to fear his testimony.

Although enforcing good-faith requirements in mediation might improve conduct in mediation, it risks diversion of attention and resources from the merits of the cases and creation of serious unintended problems as described in this part. The following part offers alternative approaches to achieve the goals of a good-faith requirement with fewer problematic side-effects.

## II. RECOMMENDATIONS TO ENHANCE QUALITY OF PARTICIPATION IN LOCAL MEDIATION PROGRAMS

If good-faith requirements are likely to be ineffective or counterproductive in promoting the quality and integrity of court-connected mediation programs, what policies are more likely to be effective? This part addresses that question. Some promising policy options focus specifically on preventing behaviors that have been sanctioned under good-faith requirements, such as failure to submit pre-mediation documents and failure to attend mediation. Other policy options focus on developing program features that

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testing" questions. See Love & Kovach, *supra* note 202, at 303–05. When mediators ask "reality-testing" questions, they often have different assumptions than do the participants about the likely results in court or the consequences of various options. Asking "reality-testing" questions can be a very legitimate and helpful mediation technique to help participants carefully evaluate their assumptions and expectations. Depending on how mediators ask these questions, however, this technique can create some of the same problems as overt expression of mediators' opinions. Lande, *supra* note 198, at 323 n.10.

207. See Brazil, *supra* note 10, at 32; Sherman, *supra* note 10, at 2094.

208. Hall, *supra* note 121, at 298–99.

209. *Id.* at 299.

more generally address the interests of relevant stakeholders, including litigants, attorneys, courts, and mediators. If programs satisfy mediation participants' interests generally, they are more likely to act productively, even if policymakers do not specifically design the programs to promote "good faith" behavior. This part describes how local courts can use a dispute systems design (DSD) process to design their mediation programs to satisfy stakeholders' interests generally and thus reduce the incidence of problematic conduct. Before describing the DSD process, stakeholders' interests, and some options that might address those interests, this part explains why courts may appropriately develop local rules to operate mediation programs.

A. Use of Dispute Systems Design Principles  
in Developing Local Mediation Program Policies

1. Appropriateness of Local Decisionmaking About Court-Connected  
Mediation Programs

Policy issues about handling bad faith in mediation arise in the context of a broader debate about the appropriate degree of uniformity in civil procedure.<sup>210</sup> Some civil procedure scholars favor more uniformity in rules, arguing that uniformity provides greater fairness, reduces surprise, protects against manipulative forum-shopping, generates efficiencies through standardized procedures, promotes clarity and convenience for attorneys practicing in multiple jurisdictions, increases professionalism, improves access to courts, and encourages decisions on the merits.<sup>211</sup> Others argue that local flexibility in rulemaking encourages innovation, stimulates more efficient rules, provides greater uniformity within local jurisdictions, and produces greater legitimacy and efficacy because local rules relate to the circumstances of local practice communities and users' needs.<sup>212</sup>

Some advocates of uniformity agree that local variations are appropriate in certain circumstances. These include local rules to fill gaps in uniform rules, address unique local problems, undertake innovation through carefully

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210. It is beyond the scope of this Article to provide a thorough analysis of the debate over uniformity of court rules. Much of the literature focuses on federal court rules, though state courts are likely to experience similar tensions over uniformity of state court rules. See Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2037–38 (1989).

211. See, e.g., Paul D. Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 DUKE L.J. 929, 944–52 (1996). According to Professor Paul Carrington, "[b]y the mid-1980s, the legal clutter created by local rules had become an impediment to the practice of law, a source of cost and delay, and a significant trap for the unwary." *Id.* at 951.

212. See, e.g., Robert E. Keeton, *The Function of Local Rules and the Tension with Uniformity*, 50 U. PITT. L. REV. 853, 874–75 (1989) (arguing for flexibility and adaptability and listing many advantages of local rules).

controlled experiments, simplify procedures,<sup>213</sup> handle relatively minor administrative matters,<sup>214</sup> and accommodate local legal cultural norms.<sup>215</sup> One advocate of uniformity cites settlement programs as an example of legitimate local case management because such programs are not readily susceptible to detailed national regulation.<sup>216</sup>

Despite criticism of local rulemaking by some commentators,<sup>217</sup> empirical analyses generally have been favorable. The Civil Justice Reform Act of 1990 (CJRA)<sup>218</sup> mandated local rulemaking by all federal district courts, and analysts have studied the process carefully. The act required each court to create a representative advisory group to develop local court management practices, including ADR policies.<sup>219</sup> Under the CJRA, the advisory groups were required to prepare reports including: (1) an assessment of the courts' dockets, (2) the basis for their recommendations, and (3) recommended measures, rules, and programs.<sup>220</sup> The CJRA required courts to consider the advisory group recommendations, but courts were not required to follow them in adopting "civil justice expense and delay reduction plans."<sup>221</sup> The U.S. Judicial Conference,<sup>222</sup> a recent Federal Judicial Center guidebook,<sup>223</sup>

213. See Erwin Chemerinsky & Barry Friedman, *The Fragmentation of Federal Rules*, 46 *MERCER L. REV.* 757, 787–88, 791–93 (1995).

214. See Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 *GEOR. L.J.* 887, 930–31, 939 (1999).

215. See Lauren Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 *STAN. L. REV.* 1447, 1484 (1994). But see Chemerinsky & Friedman, *supra* note 213, at 783–86 (rejecting the notion that differences in local legal culture justify variations in rules).

216. See Gregory C. Sisk, *The Balkanization of Appellate Justice: The Proliferation of Local Rules in the Federal Circuits*, 68 *U. COLO. L. REV.* 1, 38 (1997).

217. See, e.g., Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 *MINN. L. REV.* 375 (1992). Professor Linda Mullenix, a passionate critic of local rulemaking, writes:

Civil procedural rulemaking ought not to be in the hands of ninety-four local amateur rulemaking groups who are destined to wreak mischief, if not havoc, on the federal court system. Procedural rulemaking should be restored to the federal judiciary, to be accomplished in slow and deliberative fashion by procedural experts through the existing [centralized] Advisory Committee system.

*Id.* at 385.

218. Civil Justice Reform Act of 1990, 28 U.S.C. §§ 471–479 (2000).

219. See 28 U.S.C. § 472 (2000). The advisory groups were required to include attorneys and representatives of major categories of litigants. § 478(b). The Civil Justice Reform Act (CJRA) local advisory group process was an innovation similar to the dispute systems design process described *infra* in Part II.A.2. The CJRA expired on December 1, 1997, under a sunset provision in the legislation. Pub. L. No. 101-650, 104 Stat. 5090 § 103(b)(2)(A) (1990).

220. 28 U.S.C. § 472(b) (2000).

221. *Id.* § 472(a).

222. The U.S. Judicial Conference found that the "advisory group process proved to be one of the most beneficial aspects of [the Act] by involving litigants and members of the bar in the administration of justice" and recommended that the courts, in consultation with the advisory groups, continue to perform regular assessments after the CJRA expired. JUDICIAL CONFERENCE OF THE UNITED STATES, *THE CIVIL JUSTICE REFORM ACT OF 1990: FINAL REPORT* 19 (1997), available at <http://www.uscourts.gov/cjra/cjrafin.pdf>.

the RAND Institute for Civil Justice,<sup>224</sup> and analysts Douglas K. Somerlot and Barry Mahoney<sup>225</sup> have all endorsed or favorably evaluated the local advisory group process.

Local decisionmaking about court-connected mediation programs seems especially appropriate given the wide range of views about the appropriate goals and techniques for mediation.<sup>226</sup> Indeed, under the federal Alternative Dispute Resolution Act of 1998,<sup>227</sup> each federal district court must adopt local rules implementing its own ADR program.<sup>228</sup> Program planners must decide issues including whether mediation should be mandatory, which cases should be referred to mediation, when litigants may opt out of mediation (if ever), at what stage in the litigation cases should be referred to mediation, how mediators should be selected, what information should be provided to participants about the procedures, who should attend the mediation, how to deal with demographic and cultural differences, how mediators

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223. A Federal Judicial Center guidebook advises that courts “should, after consultation among bench, bar and participants, define the goals and characteristics of the local ADR program and approve it by promulgating appropriate written local rules.” ROBERT J. NIEMIC ET AL., GUIDE TO JUDICIAL MANAGEMENT OF CASES IN ADR 155 (2001).

224. The RAND Institute for Civil Justice conducted a major evaluation of the CJRA, including the operation of the court advisory groups. The RAND researchers found that the advisory group reports “generally reflected considerable independence from the court” and that the courts responded positively to the reports, adopting more than 75 percent of the advisory groups’ major recommendations. JAMES S. KAKALIK ET AL., RAND INSTITUTE FOR CIVIL JUSTICE, IMPLEMENTATION OF THE CIVIL JUSTICE REFORM ACT IN PILOT AND COMPARISON DISTRICTS 26 (1996). The researchers concluded that “the CJRA advisory group process was useful, and [that] the great majority of advisory group members thought so too.” *Id.*

Soon after the CJRA began to be implemented, Professor Lauren Robel surveyed members of local advisory groups. She found mixed reactions, with many respondents believing that these groups improved understanding and cooperation between bench and bar, and some believing that the process was not worthwhile. Some respondents were not satisfied in districts that did not have major problems to solve and where solutions required increases in resources or limitations in federal jurisdiction that were beyond the ability of local courts to implement. See Lauren K. Robel, *Grass Roots Procedure: Local Advisory Groups and the Civil Justice Reform Act of 1990*, 59 BROOK. L. REV. 879, 897–900, 905–06 (1993). The fact that Robel’s study was conducted so soon after enactment of the CJRA meant that advisory group members had little experience with those groups and may explain why her findings were somewhat less positive than in the other assessments cited in the text.

225. Douglas K. Somerlot and Barry Mahoney studied implementation of CJRA advisory groups as well as counterparts in the California state court system. They concluded that the “emergence of collaborative approaches to solving court system problems, as demonstrated by the advisory committees established under the CJRA . . . provides a very hopeful model of cooperative effort toward solving significant judicial branch problems.” Douglas K. Somerlot & Barry Mahoney, *What Are the Lessons of Civil Justice Reform? Rethinking Brookings, the CJRA, RAND, and State Initiatives*, JUDGES’ J., Spring 1998, at 4, 62.

226. See *Lawyering and Mediation Transformation*, *supra* note 6, at 849–54 (summarizing the range of mediator goals and styles). For an argument favoring pluralism in mediation, see *id.* at 854–57.

227. 28 U.S.C. §§ 651–658 (2001).

228. *Id.* § 651(b).

should be compensated (if at all), how courts should manage cases referred to mediation, and how staffing of court-connected mediation programs would affect policy options.<sup>229</sup> Although some mediation policymaking should not be delegated to local courts,<sup>230</sup> local policymakers often can make better decisions than central policymakers about these issues when there is no superior uniform resolution of the issues and when the local culture, procedures, and resources critically affect the issues.

## 2. Applying Dispute Systems Design Techniques in Court Settings

Courts contemplating a good-faith requirement should consider using a dispute systems design approach to solve problems of apparent bad faith in mediation<sup>231</sup> and to enhance the quality of mediation programs more generally.<sup>232</sup> DSD contrasts with traditional rulemaking processes in which ex-

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229. See John Maull, *ADR in the Federal Courts: Would Uniformity Be Better?*, 34 DUQ. L. REV. 245, 253–56 (1996) (listing issues in which there are differences in ADR policy, including whether participation should be mandatory, how much the court participates in structuring the procedures, setting fees, if any, for ADR services, and any compensation for neutrals); EASTERN DISTRICT OF MISSOURI PROCEDURES FOR ADR REFERRAL, Feb. 2000, at [http://www.moed.uscourts.gov/moed/Documents.nsf/e3f4f9697ee432df862568f6005592f4/6a676af1d002fc75862568f600563ebe/\\$FILE/ADRDistrict.PDF](http://www.moed.uscourts.gov/moed/Documents.nsf/e3f4f9697ee432df862568f6005592f4/6a676af1d002fc75862568f600563ebe/$FILE/ADRDistrict.PDF) (listing individual judges' preferences about ADR referral) (last visited June 23, 2002). See generally COLE ET AL., *supra* note 170, at §§ 6:3–6:11, at 6-5 to 6-33; NIEMIC ET AL., *supra* note 223; ELIZABETH S. PLAPINGER ET AL., JUDGE'S DESKBOOK ON COURT ADR 39–45, 53–60 (1993); ELIZABETH PLAPINGER & MARGARET SHAW, COURT ADR: ELEMENTS OF PROGRAM DESIGN (1992).

230. Delegating policymaking to local courts can produce unwise or ineffective policies in some situations. See, e.g., Hugh McIsaac, *Confidentiality Revisited: California Style*, 39 FAM. CT. REV. 405 (2001) (describing numerous problems caused by a statute authorizing counties to adopt local court rules permitting mediators to make recommendations to the court when parties do not reach agreement).

231. Perceived bad-faith behavior may be symptomatic of a poorly designed mediation program. If so, redesigning the program would be more appropriate than punishing mediation participants. For example, if local rules permit one side to delay a trial by demanding mediation, see, for example, Carter, *supra* note 4 (manuscript at 48 n.191), attorneys or litigants predictably would take advantage of that rule in some cases by demanding mediation without intending to settle the case. A rule permitting such trial delays might be a cause of some inappropriate conduct. Program planners might get better results by revising the rules to preclude such trial delays rather than by creating a bad-faith sanctions regime.

232. The dispute system design (DSD) field dates from the 1988 publication of *Getting Disputes Resolved*. WILLIAM L. URY ET AL., GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT (1988); see also John P. Conbere, *Theory Building for Conflict Management System Design*, 19 CONFLICT RESOL. Q. 215 (2001) (providing an overview of the DSD field). For other prominent texts on DSD, see CATHY A. COSTANTINO & CHRISTINA SICKLES MERCHANT, DESIGNING CONFLICT MANAGEMENT SYSTEMS: A GUIDE TO CREATING PRODUCTIVE AND HEALTHY ORGANIZATIONS (1996); KARL A. SLAIKEU & RALPH H. HASSON, CONTROLLING THE COSTS OF CONFLICT: HOW TO DESIGN A SYSTEM FOR YOUR ORGANIZATION 64–74 (1998). For a comparison of DSD models, see Conbere, *supra* (showing great similarities between DSD models).

perts develop proposals for adoption by authorities, often with only limited involvement of the full range of stakeholders.<sup>233</sup> An inclusive policymaking process is especially important in developing mediation program policies because judges, other court personnel, and lawyers may not be familiar with mediation theories and practices. If policies do not satisfy stakeholders' interests adequately, some people may withhold their support or actively sabotage implementation of the policies.<sup>234</sup>

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Private and public organizations use DSD to manage a continuing flow of disputes with various stakeholder groups (such as employees, customers, and suppliers) by establishing a comprehensive system usually including a range of ADR options. Thus, DSD focuses on systematically managing a series of disputes rather than handling individual disputes on an ad hoc basis. In a court setting, the process for designing a mediation program can be similar even though the stakeholder groups are likely to be different, and the outcome may include litigation procedures as well as ADR procedures. Negotiated rulemaking, which involves similar techniques, has been used in public sector rulemaking. See *infra* note 237.

DSD processes have been used increasingly in recent years. For example, General Electric, Shell Oil, and Halliburton companies used DSD procedures to revise their dispute systems. See SLAIKEU & HASSON, *supra*, at 64–74.

233. Federal rules are adopted or amended following procedures prescribed in the Rules Enabling Act, 28 U.S.C. §§ 2071–2077 (2001). The process includes initial consideration of possible amendments by the Rules Advisory Committee; publication of and public comment on proposed rules; consideration of the public comments and final approval by the Rules Advisory Committee; approval by the Judicial Conference's Committee on Rules of Practice and Procedure ("Standing Committee"), Judicial Conference, and U.S. Supreme Court; and a period of at least seven months for congressional review, during which Congress may amend or reject the proposed rule. See *id.* The Standing Committee and the Advisory Committee are composed of federal judges, practicing lawyers, law professors, state chief justices, and representatives of the Department of Justice. See *id.*; ADMINISTRATIVE OFFICE OF THE U.S. COURTS, FEDERAL RULEMAKING: THE RULEMAKING PROCESS, A SUMMARY FOR THE BENCH AND BAR (1997), available at <http://www.uscourts.gov/rules/proceduresum.htm> (last visited Dec. 13, 2001). Although the membership of these committees includes representation of various stakeholder groups, national committees are far removed from most people affected by the rules. According to Professor Jeffrey W. Stempel, "[t]hose outside the rulemaking process are not invited to brainstorm with the rulemakers but only to react to their product, often after an official proposal already supported by the Advisory Committee has gathered momentum." Jeffrey W. Stempel, *New Paradigm, Normal Science, or Crumbling Construct? Trends in Adjudicatory Procedure and Litigation Reform*, 59 BROOK. L. REV. 659, 742 (1993). Stempel advocates a "pluralist" or "civic republican model" of rulemaking in which a broader community, attempting to arrive at a shared conception of the common good, engages in deliberation and makes rules accordingly. *Id.* at 751–52.

234. Regarding one court-connected mediation program, for example, several observers have told me that the court consulted the local mediation community in developing a good-faith requirement but did not sufficiently address their concerns in developing the court's rules. The court adopted a good-faith requirement despite the concerns of many prominent local mediators. Reportedly, many mediators have decided not to comply with the rule requiring them to report bad-faith participation. Although adoption of the good-faith rule may initially induce some participants to behave appropriately, if mediators or participants do not invoke the rule periodically, repeat players may learn that they can ignore it with impunity. If so, the rule would probably be ineffective in curbing problematic behavior and might actually undermine respect for the court and the mediation program. See generally COSTANTINO & MERCHANT, *supra* note 232, at 199–217 (discussing resistance and constraints in changing dispute resolution systems and suggesting techniques for addressing them).

Although traditional rulemaking processes sometimes engage stakeholders in the process and produce good results, DSD offers significant potential advantages. Using a DSD approach may produce more effective policies because it often involves an explicit assessment of problems and stakeholders' interests, participation by diverse stakeholder groups, group facilitation techniques, and systematic procedures for implementing and evaluating new policies. In traditional rulemaking, the process typically does not include some or all of these procedures.<sup>235</sup> Policymakers may be especially effective by combining a local focus and a DSD process because stakeholders are more likely to participate actively to develop rules than in a traditional process.<sup>236</sup> Research indicates that people who participate in a process are more likely to comply with the resulting decisions.<sup>237</sup>

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235. The system of local advisory groups under the CJRA involved a process similar to local court DSD. For more information about the CJRA process, see *supra* notes 219–221 and accompanying text. For an example of a state court system initiative that promotes dispute resolution planning by local courts, see MARYLAND ALTERNATIVE DISPUTE RESOLUTION COMMISSION, PRACTICAL ACTION PLAN, at <http://www.courts.state.md.us/draftplan.html> (Oct. 8, 1999). Some courts and court systems have used collaborative processes to plan court programs and programs generally. See generally, e.g., FRANKLIN COUNTY FUTURES LAB PROJECT, REINVENTING JUSTICE: A PROJECT PLANNER (1997) (manual for collaborative local court planning, published in conjunction with the Massachusetts Supreme Judicial Court and the State Justice Institute); Lucinda S. Brown, *Court and Community Partners in Massachusetts*, 81 JUDICATURE 200 (1998). For a summary of state and local justice initiatives using collaborative processes involving the courts, the bar, and the public, see generally ABA COMMITTEE ON STATE JUSTICE INITIATIVES, SUMMARY OF STATE AND LOCAL JUSTICE INITIATIVES: THE COURTS, THE BAR AND THE PUBLIC WORKING TOGETHER TO IMPROVE THE JUSTICE SYSTEM (2000), available at <http://www.abanet.org/justice/00summary/home.html> (last visited July 19, 2002).

236. Obviously, many individual stakeholders would not participate in a local court policymaking process. It seems likely, however, that a larger proportion of affected stakeholder communities would participate in a local process than in a centralized process.

237. See Jody Freeman & Laura I. Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 9 N.Y.U. ENVTL. L.J. 60, 69 (2000). Jody Freeman and Laura Langbein analyze empirical data on regulatory negotiations (often referred to as “reg neg”), a process somewhat similar to DSD. In reg negs, a facilitator helps stakeholder groups negotiate over public policy issues such as development of environmental standards. *Id.* at 124–27. Stakeholders may include, *inter alia*, business interests, environmental groups, state and local government agencies, and federal rulemaking and enforcement agencies. If a reg neg process produces an agreement, the rulemaking agency normally uses the agreement as the basis for a conventional administrative rulemaking procedure. Citing procedural justice and game theory research, Freeman and Langbein argue that the participatory consensus process of reg neg increases the legitimacy of and compliance with resolutions reached through reg negs as compared with traditional rulemaking processes. See *id.* at 124–27, 130–32. But see Cary Coglianese, *Assessing the Advocacy of Negotiated Rulemaking: A Response to Philip Harter*, 9 N.Y.U. ENVTL. L.J. 386, 430–38 (2001) (citing methodological limitations of the sort of data which Freeman and Langbein relied on and offering possible alternative explanations for their conclusions about legitimacy and compliance). Freeman and Langbein’s conclusions are consistent with a sizeable body of research on procedural justice indicating that when people believe that a procedure is fair, they are more likely to perceive the authorities as legitimate and to comply with the resulting decisions. See Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What’s Justice Got to Do with It?*, 79 WASH. U. L.Q. 787, 817–26 (2001) (setting forth an extensive analysis of procedural justice research); see also Macfarlane, *supra* note 87, at 696–703. For further

A court using a DSD approach would appoint a facilitator to coordinate the process.<sup>238</sup> The facilitator would consult with key judges, court administrators, attorneys, mediators, regular litigants, and other stakeholders<sup>239</sup> to identify which stakeholder groups should be represented in the process and which representatives should be convened as a design team to oversee the DSD process.<sup>240</sup> The next step would be an assessment of the court's goals, the interests of the major stakeholder groups, the local legal culture, and the merits of and problems with current litigation procedures.<sup>241</sup> Based on this assessment, the design team would consider what policies would best achieve the court's goals and address problems identified in the assessment. The design team would consult with members of the stakeholder groups to solicit comments and suggestions about various policy options. The design team would develop a plan that satisfies the interests of the stakeholders and then submit the plan for approval by the necessary authorities.<sup>242</sup> A DSD approach assumes that training and education are needed to implement new procedures successfully and thus the design team would plan to arrange for appropriate training and education for key stakeholder groups.<sup>243</sup> DSD planners would undertake a careful implementation process, possibly including

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discussion of factors leading to parties' perceptions of procedural fairness, see *infra* notes 262–264 and accompanying text.

238. The facilitator might be an internal specialist, such as a court ADR administrator, or an external consultant. See COSTANTINO & MERCHANT, *supra* note 232, at 73–76.

239. Experts recommend engaging stakeholders in planning court-connected ADR processes. In addition to stakeholders listed in the text, they recommend involving ADR provider organizations, policymakers, representatives of academic institutions such as law schools, and media representatives. PLAPINGER ET AL., *supra* note 229, at 41, at 9; Melinda Ostermeyer, *Designing Dispute Resolution Systems: Key Issues and Decisions for Creating or Enhancing Mediation Programs* (2000) (on file with the author) (manuscript at 9).

The public clearly has an interest in court-connected mediation programs. Judges and court administrators represent public interests to some extent. Public officials have their own institutional interests, and thus some programs may want to use other individuals to represent the interests of the public in a DSD process.

240. To consider possible harmonization of local procedures with those in other relevant jurisdictions, the DSD process could involve consultations with attorneys with multistate practices who would be sensitive to important local variations, see Robel, *supra* note 224, at 905, and with rulemaking authorities in neighboring jurisdictions, see William D. Underwood, *Divergence in the Age of Cost and Delay Reduction: The Texas Experience with Federal Civil Justice Reform*, 25 TEX. TECH L. REV. 261, 331–32 (1994). It is beyond the scope of this Article to discuss the range of strategies that central and local authorities could use to address the legitimate concerns of advocates of uniform rules.

241. See COSTANTINO & MERCHANT, *supra* note 232, at 96–111.

242. See *id.* at 117–33. For examples of issues to be decided in planning court-connected mediation programs, see *supra* note 229 and accompanying text. If a DSD process results in a consensus for adoption or amendment of local court rules, the court would follow the normal notice and comment procedure. See, e.g., FED. R. CIV. P. 83(a)(1) (procedure for adopting local rules in federal courts). If program planners conduct a DSD process well, they will consider and address most stakeholder concerns in proposed rules and thus minimize opposition.

243. See COSTANTINO & MERCHANT, *supra* note 232, at 134–49.

an initial pilot program to test and refine the policies before implementing them indefinitely.<sup>244</sup> A DSD plan would provide for periodic evaluation and refinement of the policies.<sup>245</sup> Although using a DSD process requires some resources, especially at the outset, the amount of judicial resources required could be fairly limited.<sup>246</sup>

When considering problems of perceived bad faith in their mediation programs, courts should constitute ongoing oversight committees to serve the functions of a design team described above and review issues in the operation of the programs, including perceived bad faith.<sup>247</sup> Mediation programs are likely to differ in their operational problems and thus may need somewhat different policies. For example, some programs may not experience a serious problem of inappropriate conduct in mediation. Even in programs that do experience a significant number of such problems, different policies may be appropriate for various programs.

As an example, key stakeholders may believe that some people do not participate in mediations as productively as possible because the mediations are scheduled at times that the participants believe to be inappropriate.<sup>248</sup> Programs can use a DSD process to develop a policy about when to set cases for mediation. Some argue that courts generally should refer cases early in litigation to minimize litigation time and expense. Others argue that mediation should take place relatively late so that litigants can make informed decisions based on full discovery. Still others favor an approach based on a

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244. See *id.* at 150–67.

245. See *id.* at 168–86.

246. An effective DSD process requires some time from a few court representatives as well as other program stakeholders. After the necessary authorities approve and implement a plan, meetings to monitor the program will require a limited amount of time. The program may incur some cost in hiring someone to facilitate the process if it cannot recruit a suitable volunteer. If a program includes empirical evaluation or other research, there may be some associated cost depending on how such research is structured. The Federal Judicial Center and the National Center for State Courts may provide technical assistance in designing and evaluating procedures. See 28 U.S.C. § 620(b) (2001) (authorizing stimulation of research as well as training for federal judicial branch personnel); NATIONAL CENTER FOR STATE COURTS, HELPING COURTS IDENTIFY AND SOLVE PROBLEMS (2001), available at <http://www.ncsconline.org/Consulting/index.htm> (last visited Dec. 21, 2001). Program planners also may get assistance from various government or judicial agencies, academics, and private consultants.

247. Child protection mediation programs routinely use a standing planning and oversight committee. See JOHN LANDE, NATIONAL CENTER FOR STATE COURTS, INSTITUTE FOR COURT MANAGEMENT, CHILD PROTECTION MEDIATION, (2000), available at [http://www.ncsc.dni.us/ICM/distance/Juvenile\\_family\\_Justice/2000\\_12/index.html](http://www.ncsc.dni.us/ICM/distance/Juvenile_family_Justice/2000_12/index.html) (last visited June 10, 2001). Such committees are particularly important in child protection mediation programs because of the large number of diverse stakeholder groups affected. Other mediation programs also face a wide range of issues and could benefit from such a committee. See generally Wayne D. Brazil, *Comparing Structures for the Delivery of ADR Services by Courts: Critical Values and Concerns*, 14 OHIO ST. J. ON DISP. RESOL. 715, 805–07 (1999).

248. See, e.g., Macfarlane, *supra* note 2 (manuscript at 26–27) (describing resistance of Ontario attorneys to early referral of cases to mediation).

case-by-case assessment of the earliest time that litigants can evaluate the strengths and weaknesses of their case.<sup>249</sup> Although policy X theoretically might be optimal, if the prevailing norms in a practice community favor policy Y, program administrators can expect resistance to policy X as long as the local norms favor another approach.<sup>250</sup> Program planners can use a DSD process to identify the norms of various local stakeholder groups, consider the likely effects of various policy options given those norms, and then make and implement decisions accordingly.

Just as mediation is no panacea for solving all the problems of litigation, using DSD techniques does not guarantee optimal mediation policies. Initiating change in any institution is difficult. Court innovation is likely to be successful only with strong support from judges and an ability to overcome barriers to change.<sup>251</sup> A major barrier to change is the opposition of key stakeholder groups that fear that changes would threaten their values and interests.<sup>252</sup> Although programs may not be able to avoid resistance by all stakeholders, policymakers should anticipate and minimize legitimate resistance to planned policies.<sup>253</sup> Professor Craig McEwen and his colleagues found, for example, that Maine divorce attorneys initially resisted a mandatory divorce mediation program but became enthusiastic supporters as they appreciated how it fit with their values and served their interests.<sup>254</sup>

Part II.B briefly analyzes the interests of key stakeholders of court-connected mediation programs. Part II.C describes specific policy options that

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249. See Guthrie & Levin, *supra* note 12, at 905–06; *Lawyering and Mediation Transformation*, *supra* note 6, at 886.

250. See *supra* note 248 and accompanying text.

251. See Somerlot & Mahoney, *supra* note 225, at 61–62 (finding that reform efforts were more successful in California state courts than in federal courts under the CJRA because of differences in level of judicial leadership, staff involvement, clarity of standards and goals, use of education and training during program design and implementation, and continuing communication with advisory groups). The RAND researchers provide a detailed and thoughtful catalog of impediments to changing courts, including confusion about goals, organizational dynamics, difficulties in policy implementation, and local legal culture. JAMES S. KAKALIK ET AL., RAND INSTITUTE FOR CIVIL JUSTICE, AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT 33–37 (1996). These researchers also describe strategies for facilitating change, notably “‘action learning,’ a process in which change implementers and recipients try out new behaviors, processes, and strategies; assess them; and make modifications necessary to move in a desired direction.” *Id.* at 39 (citation omitted). For techniques to overcome resistance to new dispute procedures generally, see COSTANTINO & MERCHANT, *supra* note 232, at 199–217.

252. One can anticipate opposition from traditionalists, for example, who favor centralized decisionmaking by judges and experts with limited input from users of the legal system. See Mullenix, *supra* note 217, at 396–407.

253. See Macfarlane, *supra* note 2 (manuscript at 27) (finding that the court’s success in eliciting attorneys’ cooperation with mediation orders in Ottawa was related to the court’s flexibility in implementing the orders to fit the attorneys’ needs). See generally Lande, *supra* note 12, at 218–27 (offering advice and cautions about maintaining support for mediation).

254. Craig A. McEwen et al., *Lawyers, Mediation, and the Management of Divorce Practice*, 28 LAW & SOC’Y REV. 149, 156–63 (1994).

are consistent with those interests and are thus more likely to be effective in promoting productive behavior in mediation than a good-faith requirement.

## B. Addressing Interests of Mediation Programs' Stakeholders

To minimize problematic behavior and elicit optimal results from court-connected mediation programs, program planners must have a good understanding of stakeholders' interests. Based on empirical research and practical experience, this part sketches general interests of four key stakeholder groups: parties, attorneys, courts, and mediators.<sup>255</sup> Programs using a systems design process may consider these generalized interests and/or conduct their own inquiries about stakeholders' interests in their own particular communities.

### 1. Parties' Interests

Professors Chris Guthrie and James Levin summarize research on parties' satisfaction with mediation.<sup>256</sup> In general, Guthrie and Levin find that parties' satisfaction is related to three categories of factors: (1) parties' expectations, (2) characteristics of the process, and (3) case outcomes. Parties are more likely to feel satisfied if their actual mediation experience meets or exceeds their expectations.<sup>257</sup> Parties are more likely to feel satisfied with mediation when they feel that they have opportunities for meaningful self-expression and participation in determining the outcome. Parties also are more satisfied when they believe that the mediation process is fair,<sup>258</sup> understandable, informative, attentive to their interests, impartial, uncoerced, and private.<sup>259</sup> Regarding outcomes, parties are generally more satisfied when they settle their cases in mediation<sup>260</sup> and when they believe that they saved

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255. This part describes stakeholders' interests in mediation generally and does not focus specifically on bad-faith behavior in mediation. Generally, if mediation programs satisfy stakeholders' interests, mediation participants are less likely to act inappropriately. See *supra* note 234 and accompanying text. Professor Lisa B. Bingham advocates using DSD processes to plan court-connected dispute resolution programs and proposes a research agenda to assist in these design processes. See Lisa B. Bingham, *Why Suppose? Let's Find Out: A Public Policy Research Program on Dispute Resolution*, 2002 J. DISP. RESOL. 101, 119–26.

256. See Guthrie & Levin, *supra* note 12, at 887–97. Note that parties' interests and their attorneys' interests often overlap, as described *infra* Part II.B.2.

257. *Id.* at 888–89.

258. *Id.* at 892–93. In addition, “perceptions of fairness promote compliance with mediation agreements; compliance, in turn, may increase the likelihood of party satisfaction with the process.” *Id.* at 893 (footnote omitted).

259. *Id.* at 893–94.

260. *Id.* at 895. “Although it is true that parties who fail to settle report surprisingly high levels of satisfaction with mediation, those who do reach agreement tend to rate mediation more favorably than those who do not.” *Id.* (footnotes omitted).

money, time, or emotional distress that they otherwise would have incurred.<sup>261</sup>

Parties' interest in procedural fairness is related to, but also somewhat independent of, their satisfaction with mediation. Parties not only want satisfaction and resolution (of course, on favorable terms), but they want to feel that the process is fair. Professor Nancy Welsh analyzes "procedural justice" theory and research and identifies the following four factors that promote parties' experience of procedural fairness:

First, perceptions of procedural justice are enhanced to the extent that disputants perceive that they had the opportunity to present their views, concerns, and evidence to a third party and had control over this presentation ("opportunity for voice"). Second, disputants are more likely to perceive procedural justice if they perceive that the third party considered their views, concerns, and evidence. Third, disputants' judgments about procedural justice are affected by the perception that the third party treated them in a dignified, respectful manner and that the procedure itself was dignified. Although it seems that a disputants' [sic] perceptions regarding a fourth factor—the impartiality of the third party decision maker—also ought to affect procedural justice judgments, it appears that disputants are influenced more strongly by their observations regarding the third party's even-handedness and attempts at fairness.<sup>262</sup>

Applying these findings to contemporary practice in court-connected mediation, Welsh argues that mediation may or may not promote perceived procedural fairness depending on how it is implemented. For example, having attorneys speak for parties would contribute to parties' desire for self-expression, but only if the attorneys truly understand and express what their clients want to say.<sup>263</sup> Similarly, parties may feel that the process is fair if mediators express opinions about the merits of the case, but only if the mediators do it in an even-handed way, so that parties feel that they have been able to tell their stories and the mediators have listened respectfully.<sup>264</sup>

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261. *Id.* at 896–97.

262. Welsh, *supra* note 237, at 820–21 (footnotes omitted); see also Wissler, *supra* note 11, at 681–89 (summarizing research regarding perceptions of fairness in mediation).

263. Welsh, *supra* note 237, at 857.

264. *Id.*; see also Roselle L. Wissler, *To Evaluate or Facilitate? Parties' Perceptions of Mediation Affected by Mediator Style*, DISP. RESOL. MAG., Winter 2001, at 35 (reporting results of four studies finding that when mediators evaluated the merits of the case, parties were more likely to believe that the process was fair and that the mediator understood their views); *supra* notes 205–206 and accompanying text (describing parties' experience of settlement pressure based on mediators' evaluation of the merits of a case and recommendations). Although evaluations given by mediators can be appropriate and helpful, in my view, they also can be problematic. See Lande, *supra* note 198, at 325–27.

This research suggests characteristics that mediation program planners can try to incorporate in their programs to address parties' interests; such an incorporation, in turn, may reduce the motivation for some problematic conduct. In particular, programs may promote productive participation by encouraging (1) pre-mediation consultation between attorneys and clients and (2) opportunities for participants to express their concerns during mediation without feeling disrespected or pressured to settle by the mediator.<sup>265</sup>

## 2. Attorneys' Interests

Empirical research and clinical experience identify what lawyers generally want from mediation.<sup>266</sup> Lawyers often value mediation because they believe that it can reduce the time and expense of litigation.<sup>267</sup> Lawyers typically use mediation when they want help in settling a case. In particular, they often want help analyzing the facts and the law, and they value mediators' opinions about these matters.<sup>268</sup> A study of attorneys' opinions

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265. See *infra* Part II.C for specific policy options to address parties' interests and promote appropriate conduct in mediation.

266. Based on interviews with Ontario litigators, Macfarlane created a typology of five generic types of litigators based on their attitudes about mediation: (1) pragmatist (generally positive about mediation, seeing it as a useful opportunity for exploring settlement in many cases), (2) true believer (has made a strong personal commitment to the usefulness of mediation), (3) instrumentalist (regards mediation as a process to be used to advance clients' adversarial goals), (4) dissembler (regards mediation as a fad that differs little from the traditional model of negotiation), and (5) oppositionist (vocal about the dangers of mediation as an alternative to adjudication). She notes that respondents often had a combination of these attitudes about mediation. Macfarlane, *supra* note 2 (manuscript at 13–24). Macfarlane's study does not provide estimates of the distribution of these five types, but the data presented in the rest of this part suggests that most lawyers have a pragmatic attitude about mediation.

267. Many lawyers and parties believe that mediation saves time and money in litigation. See Lande, *supra* note 12, at 184–86 (presenting data and summarizing research showing perceived time and cost savings). A survey of Missouri lawyers found that 85 percent of attorneys chose mediation because they believed that it saved litigation expense and that 76 percent chose mediation because they believed that it accelerated settlement. Bobbi McAdoo & Art Hinshaw, *The Challenge of Institutionalizing Alternative Dispute Resolution: Attorney Perspectives on the Effect of Rule 17 on Civil Litigation in Missouri*, 67 MO. L. REV. (forthcoming 2002). A survey of Minnesota attorneys produced similar findings, with 68 percent choosing mediation to save litigation expenses and 57 percent to increase the likelihood of settlement. See Bobbi McAdoo, *A Report to the Minnesota Supreme Court: The Impact of Rule 114 on Civil Litigation Practice in Minnesota*, 25 HAMLINE L. REV. 401, 428–29 (2002).

268. In four federal court-connected mediation programs studied by the RAND Institute for Civil Justice, 60 percent of attorneys who answered a question about whether mediators gave evaluations of the case to each side said that mediators did so. Of those attorneys, 70 percent said that this was helpful, compared with only 7 percent who said that it was detrimental. KAKALIK ET AL., *supra* note 224, at 368 (percentages based on number of valid responses). The survey of Missouri lawyers found that more than two-thirds of attorneys chose mediation because it helped everyone value the case and provided a needed reality check for their client or the opposing party or counsel. McAdoo & Hinshaw, *supra* note 267. In selecting a mediator, 87 percent of attorneys said that they want a mediator who knows how to value a case, 83 percent said that the mediator should be a

about judicial settlement conferences found that “[l]awyers want judges to make settlement conferences exercises in reasoning.”<sup>269</sup> The techniques that attorneys found most effective were pointing out evidence or law that attorneys misunderstand or overlook, privately suggesting to attorneys what concessions their clients should consider making, and telling attorneys the dollar ranges of reasonable settlements.<sup>270</sup> Although the study found that lawyers want helpful analysis of their cases, it also found that “[l]awyers rebel against judicial approaches to settlement that are dominated by emotion or exercises of power.”<sup>271</sup>

McEwen and his colleagues provide an insightful analysis of why Maine divorce lawyers came to value divorce mediation.<sup>272</sup> Going beyond the specific techniques that lawyers seek in mediation, this analysis considers deeper goals that mediation fulfills for lawyers. McEwen found that mediation helped attorneys reconcile the following dilemmas:

[H]ow to pursue both negotiation and trial preparation; how to encourage client participation in case preparation while retaining one’s professional authority; how to provide clients with legal advice while addressing vitally important non-legal issues; and how to structure and manage cases so that they can be moved predictably and expeditiously.<sup>273</sup>

These findings are consistent with the results of my survey of business lawyers, which suggests that they generally believe in mediation because it helps them solve difficult problems that they encounter in litigation.<sup>274</sup> Litigation creates tensions not only with opposing parties and counsel, but also between lawyers and their own clients. When parties are organizations, law-

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litigator, 74 percent said that the mediator should know how to help parties clarify issues, and 69 percent said that the mediator should have substantive experience in the field of law. *Id.* at 51. The survey of Minnesota attorneys produced similar findings. See McAdoo, *supra* note 267, at 429, 433–35. A study of attorneys in four states regarding judicial settlement conferences reported similar results. The factor most frequently cited as facilitating settlement was willingness to express an opinion or offer an analysis. WAYNE D. BRAZIL, *EFFECTIVE APPROACHES TO SETTLEMENT: A HANDBOOK FOR LAWYERS AND JUDGES* 391, 398–402 (1988).

269. BRAZIL, *supra* note 268, at 392. Although settlement conferences and mediation differ somewhat in procedures and personnel, attorneys are likely to have similar interests in getting help from both procedures. The fact that attorneys may have similar interests in getting assistance in mediation and judicial settlement conferences does not, however, mean that good-faith requirements are equally appropriate in both procedures. See *supra* notes 97–112 and accompanying text.

270. BRAZIL, *supra* note 268, at 407.

271. *Id.* at 392.

272. See generally McEwen et al., *supra* note 254. Although this study focuses on divorce mediation, its findings are relevant to mediation in a wide range of cases involving attorneys.

273. *Id.* at 150.

274. See Lande, *supra* note 12, at 201–17.

yers may need to deal with a large number of individuals.<sup>275</sup> My survey indicates that lawyers' belief that mediation is often appropriate is related to the lawyers' ability to manage the various relationships involved in litigation.<sup>276</sup>

Taken together, these findings indicate that lawyers generally want mediation when they believe that it helps them do their job and satisfy their clients' interests.<sup>277</sup> In a legal culture with the prevailing norm of positional negotiation, lawyers often value private, neutral, and uncoercive evaluations to help them and their clients harmonize expectations and rationalize concessions. Lawyers generally appreciate mediation as an appropriate, efficient, and civilized way to resolve troubling disputes, as long as it honors their roles and their clients' interests.

Sometimes lawyers behave badly.<sup>278</sup> Given the adversarial approach that many lawyers generally use, mediation program planners can anticipate that some lawyers will bring that approach into mediation and try to use it to gain partisan advantage.<sup>279</sup> In recent decades, lawyers have used any available litigation procedure to pressure the other side into a favorable settlement.<sup>280</sup> These "Rambo tactics" include motions to disqualify attorneys for conflicts of interest, disingenuous games with discovery and motion practice, and use of lawsuits as a strategy to intimidate the other side.<sup>281</sup> Virtu-

275. For an excellent discussion of the various relationships involved in litigation, see ROBERT H. MNOOKIN ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* 204–23 (2000).

276. This belief in mediation is particularly related to the views that: (1) Mediation helps preserve business relationships, (2) top executives are satisfied with the results of litigation when mediation is used, (3) the people to whom the lawyers answer believe that mediation is often appropriate, (4) mediators often consider business needs and practices, (5) mediation often produces satisfactory process and results, (6) cases using mediation often settle in an appropriate amount of time and at an appropriate cost, and (7) businesses would be worse off using the courts even if ADR takes as much time and money as the courts. Lande, *supra* note 12, at 203–08.

277. Interviewing commercial litigators who used mediation, Macfarlane found that the "most consistently articulated outcome goal was the achievement of a business solution that would offer a commercially viable end to the dispute, without the accumulation of excessive legal fees." Macfarlane, *supra* note 2 (manuscript at 33).

278. Sometimes parties also behave badly in mediation and display some of the same behaviors (or cause their lawyers to display the behaviors) described in this part.

279. Macfarlane found that lawyers' adversarial tactics were a function of local mediation culture, occurring more often in Toronto than in Ottawa. Macfarlane, *supra* note 2 (manuscript at 19–22, 91–94). See generally *supra* note 6 and accompanying text.

280. Bryant Garth, *From Civil Litigation to Private Justice: Legal Practice at War with the Profession and Its Values*, 59 BROOK. L. REV. 931, 943 (1993); see generally ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* (2001).

281. Garth, *supra* note 280, at 939–45; Austin Sarat, *Enactments of Professionalism: A Study of Judges' and Lawyers' Accounts of Ethics and Civility in Litigation*, 67 FORDHAM L. REV. 809, 818–23, 828–32 (1998) (documenting lawyers' and judges' descriptions of hardball tactics as the norm in major civil litigation). Wayne Brazil describes "traditional litigation behaviors" as including:

self-conscious posturing, feigning emotions (even anger) or states of mind, pressing arguments known or suspected to be specious, concealing significant information, obscuring weaknesses, attempting to divert the attention of other parties away from the main analyti-

ally every aspect of a case can be disputed. Even rules to protect against frivolous actions can be used as offensive weapons in adversarial combat.<sup>282</sup> Cameron Stracher's memoir of his work at a large New York City law firm describes how such tactics were standard operating procedures<sup>283</sup> and suggests that the practical test for good faith in that context is whether one can make an argument without laughing.<sup>284</sup>

When legal culture and economic incentives strongly support rough adversarial tactics, policymakers should not expect that these tactics can be completely disarmed in mediation, with or without a good-faith requirement. Well-implemented mediation programs may help dampen use of such tactics, especially when the tactics are based on attorneys' cultural assumptions about appropriate advocacy techniques as opposed to truly malicious efforts to harm opponents. Mediation programs are likely to promote productive behavior if they provide mediation when participants are ready to mediate seriously and if the mediation techniques address the participants' interests.

### 3. Courts' Interests

Courts have several different interests in court-connected mediation programs. Many judges see themselves as case managers in addition to adjudicators.<sup>285</sup> Courts promote negotiation and settlement in the belief that, overall, settlement saves time and money and produces better results than

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cal or evidentiary chance, misleading others about the existence or persuasive power of evidence not yet formally presented (e.g., projected testimony from percipient or expert witnesses), resisting well-made suggestions, intentionally injecting hostility or friction into the process, remaining rigidly attached to positions not sincerely held, delaying other parties' access to information, or needlessly protracting the proceedings—simply to gain time, or to wear down the other parties or to increase their cost burdens.

Brazil, *supra* note 10, at 29.

282. Garth, *supra* note 280, at 949 ("Adversarial lawyers can run up the costs, generate delays and multiply the pressures to settle by, for example, charging the other side with a frivolous filing or motion."); see also Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. ON DISP. RESOL. 297, 321 (1996). For discussion of abuse of Rule 11, see *supra* notes 156–166 and accompanying text.

283. See generally CAMERON STRACHER, *DOUBLE BILLING: A YOUNG LAWYER'S TALE OF GREED, SEX, LIES, AND THE PURSUIT OF A SWIVEL CHAIR* (1998).

284. *Id.* at 163.

285. See Marc Galanter, *The Emergence of the Judge as a Mediator in Civil Cases*, 69 JUDICATURE 256, 262 (1986). Some commentators have criticized the increasing managerial role of judges. See Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 1032 (2000) (expressing concern about the "transformation of the role of trial judge into that of manager and settler, of the transformation of courthouses into office buildings, and of the transformation of the Third Branch into an administrative agency"). See generally Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

trial.<sup>286</sup> Courts value mediation as a method of screening out cases that do not need much judicial attention so that they can focus their limited resources on cases that need more.<sup>287</sup> Indeed, courts generally see settlement as an absolute necessity to process all their cases, and judges often look to mediation as a way to relieve caseload pressures.<sup>288</sup>

Courts have a strong interest in assuring the integrity of court-ordered mediation.<sup>289</sup> Courts want to ensure that mediation meets minimal quality standards and does not unfairly harm litigants.<sup>290</sup> Some courts apply good-faith requirements to achieve those results.<sup>291</sup>

Courts want to make sure that mediation does not interfere with their mission of promoting truth and justice in litigation. In adjudicated cases, courts generally want to admit all relevant evidence permitted by the evidence rules. There is an inherent tension between a general rule favoring admissibility of evidence and rules establishing testimonial privileges. Legislatures and courts must weigh the public interest in the protected activity (in this case, mediation) against the general need for evidence at trial.<sup>292</sup>

286. Galanter, *supra* note 285, at 258–62.

287. The prefatory note of the Uniform Mediation Act states:

Public policy strongly supports [expansion of mediation in many settings]. Mediation fosters the early resolution of disputes. The mediator assists the parties in negotiating a settlement that is specifically tailored to their needs and interests. The parties' participation in the process and control over the result contributes to greater satisfaction on their part. Increased use of mediation also diminishes the unnecessary expenditure of personal and institutional resources for conflict resolution, and promotes a more civil society. For this reason, hundreds of state statutes establish mediation programs in a wide variety of contexts and encourage their use.

UNIF. MEDIATION ACT prefatory note (2001) (citations omitted).

288. Sometimes caseload pressures cause judges to feel desperate about the need to settle cases. See *Lockhart v. Patel*, 115 F.R.D. 44, 47 (1987) (expressing strong need to settle at least 350 cases in order to process 400 cases on the typical court's docket).

289. See *Foxgate Homeowners' Ass'n v. Bramalea Cal., Inc.*, 92 Cal. Rptr. 2d 916, 928 (Ct. App. 2000), *aff'd on other grounds*, 108 Cal. Rptr. 2d 642 (2001) (stating that the Legislature did not intend to allow parties to "intentionally thwart[] the process" and that good-faith participation is essential to make mediation work).

290. See generally NIEMIC ET AL., *supra* note 223, at 152–64 (offering recommendations for fair and effective ADR programs to operate with integrity).

291. In a major recent case, for example, the court was concerned with controlling improper litigation tactics of a defendant who failed to bring experts to a mediation as directed, with the alleged purposes of "derailing" the mediation, re-opening discovery, and bringing a summary judgment motion. The plaintiff had complied with the directive, bringing nine experts to the mediation, and incurred more than \$30,000 in fees related to the mediation. *Foxgate*, 108 Cal. Rptr. 2d at 645–49.

292. *Folb v. Motion Picture Indus. Pension & Health Plans*, 16 F. Supp. 2d 1164, 1171–81 (C.D. Cal. 1998) (stating that encouraging mediation by adopting a federal mediation privilege provides "a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth" (citing *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996))). Although authorities struggle with the exact contours of confidentiality protection for mediation, most agree on the need for a broad confidentiality protection subject to limited exceptions. See UNIF. MEDIA-

For courts to operate effectively, they need to maintain respect for their authority and ensure compliance with their orders.<sup>293</sup> To achieve these goals, courts generally do not issue orders that they cannot enforce readily.<sup>294</sup>

Some of the courts' interests in mediation may conflict with each other. This particularly arises in connection with a good-faith requirement, given that analysts disagree about expected consequences of the requirement. How much does a good-faith requirement stimulate high-quality decision-making in mediation and how much does it unintentionally stimulate adversarial behavior? How much does it reduce demands on judicial resources by causing additional settlements, and how much does it add to judicial work load by requiring adjudication about the good-faith requirement? How much does it enhance public confidence in the quality of mediation and how much does it undermine it? How much does it protect mediation confidentiality and how much does it erode it? How easy or difficult is it to interpret and enforce a good-faith requirement? Commentators vigorously dispute all of these issues. There is little or no empirical evidence to resolve these disputes. By contrast, the alternative policies suggested in Part II.C offer the prospect of unambiguously addressing courts' interests in mediation programs.

#### 4. Mediators' Interests

Mediators also have multiple interests in the operation of court-connected mediation programs. Mediators want to provide satisfying services for mediation participants. This goal is inherent in the mediation ethos of party self-determination.<sup>295</sup>

Mediators generally want a regular and increasing flow of cases to mediate. Professional mediators want mediation cases to serve their economic

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TION ACT § 2(1) prefatory note 1 (2001) (noting that virtually all states have statutes protecting mediation confidentiality subject to limited exceptions). For discussion of confidentiality protections in mediation, see *supra* Part I.C.5.

293. See, e.g., *Nick v. Morgan's Foods, Inc.*, 270 F.3d 590, 594–95 (8th Cir. 2001) (rejecting challenge to court's authority to sanction bad faith in mediation, ruling that court had authority under federal rules, local court rules, mediation referral order, and court's inherent powers). In addition to legal challenges to their authority, courts respond to disrespect of their authority. See, e.g., *Nick*, 99 F. Supp. 2d 1056, 1064 (E.D. Mo. 2000) (rejecting suggestion that sanctions were imposed because of the court's "misplaced temper tantrum"), *aff'd* 270 F.3d 590 (8th Cir. 2001).

294. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 366 (1981) (declaring that courts will not specifically enforce a promise if the burden of enforcement or supervision is disproportionate to the benefit of enforcement or harm suffered from denial).

295. See *supra* note 1. Mediators who use evaluative techniques (which some critics argue undermine self-determination) do so because they believe that they provide services that participants really want. See generally *Lawyering and Mediation Transformation*, *supra* note 6, at 857–79.

interests and maintain identities as successful mediators. Volunteer mediators typically enter the field to gain personal satisfaction from mediating well, and some want mediation experience to develop their careers. Thus, professional and volunteer mediators are often keenly sensitive about program features that would affect their future mediation opportunities.

Mediators want mediation procedures to be consistent with their professional ideologies and role conceptions. Mediators disagree about proper goals and tactics of mediation<sup>296</sup> and even about whether there should be a uniform authoritative conception of mediation or a variety of diverse legitimate approaches.<sup>297</sup> Mediators' passionate intensity about both consensus principles<sup>298</sup> and contested issues indicates the significance to mediators of their philosophies of mediation.

Although mediators want people to participate sincerely in mediation, a good-faith requirement threatens all mediators' interests described above. Support for mediation may decline if participants fear satellite litigation, violation of expectations of confidentiality, and potential sanctions. Individual mediators may fear losing business if they develop a reputation for reporting allegations of bad faith. Mediators who are pressed to report bad faith or testify about it also are likely to feel serious role conflicts, given that this would violate widely shared norms of confidentiality and impartiality. Moreover, it would cast mediators in an adversarial role against people they intend to serve and, ironically, make it more difficult to gain participants' cooperation in some cases. By contrast, the proposals in the following part are highly consistent with mediators' interests.

### C. Policy Options to Address Stakeholders' Interests and Promote Good Faith in Mediation

In keeping with the spirit of a dispute system design approach, this part identifies promising policy options for promoting productive conduct but does not definitely recommend adoption of any of them. Some courts and mediation programs might find that some of these options would suit their situations, but other courts and programs might not. These options are alternatives to policies advocated by courts and commentators under the good-faith rubric. These options are intended to address the interests underlying good-faith requirements and avoid the problems of those require-

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296. *Id.* at 849–53 (describing debates about the primacy of empowerment or settlement as a goal for mediation and the appropriateness of explicit expression of mediator evaluations).

297. *Id.* at 854–57 (describing the division between “single-school” and “pluralist” definitions of mediation).

298. For a summary of widely shared principles of mediation, see *supra* note 1.

ments.<sup>299</sup> In considering these options, local policymakers should evaluate the likely effects (including unintended consequences), incentives created, and costs imposed in their particular settings.

### 1. Collaborative Education About Good Practice in Mediation

As Kovach suggests, education is a key element of promoting productive conduct in mediation. She advocates education both in individual cases and in general public and professional education efforts.<sup>300</sup> Whatever policies courts adopt to promote mediation, a good educational process can help in implementing them effectively. At the outset, this may involve dissemination of information by mediators and other dispute resolution experts because many judges, lawyers, and parties may be unfamiliar with mediation concepts, practices, and values. Over time, the education should be an interactive process in which mediation program planners learn about the needs and interests of the programs' stakeholders in addition to providing information and advice.<sup>301</sup> This two-way educational process is important because program outcomes depend on how participants use the program and how they choose among the various mediation goals and styles.<sup>302</sup> Thus, a good educational process should be a collaborative dialogue between mediation program planners and stakeholders.<sup>303</sup>

The same spirit of collaborative education should apply during mediations themselves. At the outset of a mediation, mediators can inform participants of an expectation that they will act appropriately, explain what that entails, and request them to mediate sincerely.<sup>304</sup> Although Kovach's definition of good faith is problematic as the basis of a legal requirement,<sup>305</sup>

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299. This part describes policy options to promote stakeholders' interests in mediation generally and is not limited to addressing specific unproductive behavior. If mediation programs satisfy stakeholders' interests generally, mediation participants are less likely to act inappropriately. See *supra* note 234 and accompanying text.

300. Kovach, *supra* note 4, at 619–20.

301. This would be what Everett Rogers calls a process of “convergence” (or decentralized diffusion) as opposed to a one-way, linear process of communication, as in lectures by experts. Decentralized diffusion of innovations tend to be focused on solving the problems of local users who tailor innovations to fit their needs. EVERETT M. ROGERS, *DIFFUSION OF INNOVATIONS* 6, 364–69 (4th ed. 1995).

302. From this perspective, mediation is not a determinate and standardized intervention that should always produce the same results as if flipping a light switch. See Craig A. McEwen, *Managing Corporate Disputing: Overcoming Barriers to the Effective Use of Mediation for Reducing the Cost and Time of Litigation*, 14 OHIO ST. J. ON DISP. RESOL. 1, 3 (1998) (arguing, in response to debates about the effectiveness of mediation, that “[i]nstead of asking whether mediation works or not, we need to examine how and why parties and lawyers ‘work’ mediation in varying ways”).

303. This kind of educational process is entailed in the planning, evaluation, and refinement stages of dispute systems design processes described in *supra* Part II.A.2.

304. Kovach, *supra* note 4, at 596–97.

305. See *supra* note 25.

it is a good starting point for discussion with participants about appropriate conduct in mediation. This discussion may work best if it is in the form of a dialogue in which participants as well as mediators express their procedural preferences.

Educational interventions can also be an important remedy for participants' problematic behavior.<sup>306</sup> If participants act uncooperatively, mediation texts typically prescribe that mediators consult with them in a caucus.<sup>307</sup> In these situations, mediators may describe their concerns about the behavior and ask participants whether it is likely to advance their interests. When mediators conclude that the participants are actually acting in bad faith,<sup>308</sup> the mediators typically encourage the participants to change their behavior. After such an educational process, if the participants persist in inappropriate behavior, mediators' ethical duties require them to terminate the mediation without violating the confidentiality obligation.<sup>309</sup> In most cases, termination of the mediation should be a sufficient remedy for the problem.

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306. The Standards of Practice of the Oregon Mediation Association prescribe education as a method for handling bad-faith behavior, both at the outset of mediation and when a participant arguably behaves in bad faith. See OREGON MEDIATION ASSOCIATION, STANDARDS OF PRACTICE, FINAL DRAFT STANDARD VI, at <http://www.mediate.com/articles/orstdsd.cfm#bio> (June 16, 2000). Comments to Standard VI state:

1. The mediator must inform participants that it is the obligation of each participant to participate in good faith. The mediator must also inform the participants of the need to be realistic in protecting themselves against possible abuse of the mediation process, since the mediator cannot guarantee that the mediation process will not be abused by any participant.
2. When a mediator believes that a participant is not participating in good faith, such as by nondisclosure or lying, the mediator must encourage that participant to alter the conduct in question. If, after being encouraged to alter the conduct, the participant does not do so, the mediator must decide whether or not to discontinue the mediation.
  - a. If, in the mediator's reasonable judgment, the participant's bad faith is so significant that the fairness and integrity of mediation cannot be maintained, then the mediator shall discontinue mediation. If the mediator discontinues mediation under these circumstances, the mediator shall do so in a manner that does not violate the obligation of confidentiality.

*Id.*

307. See, e.g., MARK D. BENNETT & MICHELE S.G. HERMANN, *THE ART OF MEDIATION* 123–24 (1996) (recommending a caucus if a party emotionally manipulates another, makes threats, or has unrealistic expectations).

308. Mediators should not simply assume participants' bad faith because sometimes a participant has good reason for what initially appears to be inappropriate behavior. Thus, mediators should inquire about this privately.

309. See SYMPOSIUM ON STANDARDS OF PRACTICE, MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION, STANDARD XI, at [http://www.afccnet.org/docs/resources\\_model\\_mediation.htm](http://www.afccnet.org/docs/resources_model_mediation.htm) (2000) (containing standards developed by symposium with representatives from more than twenty organizations, including the American Bar Association Section of Dispute Resolution and Family Law Section). Standard XI states:

A family mediator shall suspend or terminate the mediation process when the mediator reasonably believes that a participant is unable to effectively participate . . . .

In sum, a variety of collaborative educational efforts can address the interests of all the major stakeholder groups. These efforts could result in mediation programs and case procedures that reconcile procedural expectations and reduce costly disputes over allegedly inappropriate conduct. As a result, participants are likely to understand the process better and act appropriately. The proposed educational efforts can promote attorneys' confidence that they can perform their duties consistent with local norms. Facilitating such an education process is consistent with mediators' values. These efforts also are likely to lead to greater respect for court-connected mediation programs and the sponsoring courts.

## 2. Pre-Mediation Submission of Documents and Consultations

Mediation is likely to be productive when participants are well-prepared for mediation.<sup>310</sup> Participants can prepare by exchanging position papers and documents before mediation.<sup>311</sup> The position papers at a minimum might include: "(1) the legal and factual issues in dispute, (2) the party's position on those issues, (3) the relief sought (including a particularized itemization of all elements of damage claimed), and (4) any offers and coun-

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- A. Circumstances under which a mediator should consider suspending or terminating the mediation, may include, among others: . . . 6. a participant is using the mediation process to gain an unfair advantage . . . .

*Id.* See also OREGON MEDIATION ASSOCIATION, *supra* note 306, at Standard VI.2.a (terminating mediation due to bad faith and preserving confidentiality); SYMPOSIUM ON STANDARDS OF PRACTICE, MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION, STANDARD VII (duty of confidentiality). Some court rules provide that termination of mediation should be the consequence of bad faith in mediation. See, e.g., 11TH JUD. CIR. (Ill.) CT. R., App. D(j).

310. See Kovach, *supra* note 4, at 622; Weston, *supra* note 4, at 628. Participants who prepare for mediations are likely to feel a greater investment in making the process successful. Wissler found that parties were more likely to settle if they were better prepared by their attorneys. See Wissler, *supra* note 11, at 676. When attorneys prepared their clients for mediation, both groups felt that the process was more fair and the parties were less likely to report feeling pressured by the mediator. *Id.* at 687, 698–99.

311. See Sherman, *supra* note 10, at 2094–96. Some court rules and individual mediators now require each side to provide such submissions. Some courts require this as an element of a good-faith requirement and others do so independent of any such requirement. See, e.g., E.D.N.C.R. 32.07(f) (requiring all parties to be prepared to discuss, in good faith, liability and damage issues as well as their position to settlement); Nick v. Morgan's Foods, Inc., 99 F. Supp. 2d 1056, 1061–62 (E.D. Mo. 2000) (requiring a memorandum as an element of good faith), *aff'd* 270 F.3d 590 (8th Cir. 2001). Some court rules require parties to provide a pre-mediation memo to the other parties and the mediator, a confidential memo solely for the mediator, or both memos. See, e.g., E.D. WASH. LOC. R. 16.2(c)(2)(b)(3)(C). Macfarlane found that Ontario litigators commonly exchange information prior to mediation, especially in Ottawa, where the local culture is more supportive of mediation. Macfarlane, *supra* note 2 (manuscript at 26); see also Wissler, *supra* note 11, at 645 n.9 (collecting studies reporting that attorneys were required to submit pre-mediation memos and/or pleadings).

teroffers previously made.”<sup>312</sup> In addition, these papers could identify everyone who will attend from each side and identify their roles.<sup>313</sup> Programs could require that the papers include certain additional items of information.<sup>314</sup>

Courts could require each side to submit pre-mediation documents by a specified time (for example, ten days) before the scheduled mediation date. The mediator would determine whether the documents satisfy the requirement and, if not, would give prompt written notice of the deficiencies. Such a rule might establish a specified grace period to cure the deficiencies.<sup>315</sup> Parties who do not do so within that time could be subject to sanctions.<sup>316</sup> The mediator could file a brief report to the court, including the documents submitted by the alleged offender (if any) and the mediator’s notice of deficiencies. Such reports might be somewhat similar to post-mediation reports filed by mediators that list mediation attendees and indicate whether any agreements were reached.<sup>317</sup>

Establishing a legal requirement for each side to file pre-mediation submissions has at least two potential problems. First, the value of the submis-

312. Sherman, *supra* note 10, at 2095. In four federal court-connected mediation programs studied by the RAND Institute for Civil Justice, 80 percent of attorneys said that mediators required written pre-mediation submissions. Of those attorneys, 71 percent say that this practice was helpful, compared with only 1 percent who said that it was detrimental. KAKALIK ET AL., *supra* note 224, at 368 (percentages based on number of valid responses).

313. This would address problems arising when people attend without identifying their roles, or where parties do not plan to bring needed individuals, such as authorized representatives or experts. See *Foxgate Homeowners’ Ass’n v. Bramalea Cal., Inc.*, 108 Cal. Rptr. 2d 642, 645–46 (2001) (noting that plaintiff brought nine experts to mediation and defendant brought no experts); Kovach, *supra* note 4, at 594 (describing a case in which a jury consultant attended mediation pretending to be a party’s business consultant). Such a provision would not avoid all such attendance issues, but it would put the participants and the mediator on notice well before the mediation so that potential problems could be addressed ahead of time.

314. Berkeley, California mediator Ron Kelly has developed an extensive set of questions that parties can answer in advance regarding such things as their perceptions of their own interests and the others’ interests, perceptions of the facts, feelings about trust and betrayal, evidence that might affect the other side’s perceptions, alternatives to a negotiated agreement, and ways that the mediator might be able to help. RON KELLY, KEY QUESTIONS BEFORE YOU MEET, at <http://www.ronkelly.com/RonKellyTools.html#KeyQuestions> (1997). Participants, mediators, and mediation programs might use some or all items on this checklist.

315. This would be similar to a provision under Rule 11 of the Federal Rules of Civil Procedure for curing deficiencies of documents filed in court. See *supra* note 164. Weston’s good-faith proposal also incorporates a similar principle. See Weston, *supra* note 4, at 631–32.

316. In this situation, the mediation presumably would be cancelled or rescheduled. Because the noncompliance would be determined without convening all the participants, the complying parties would suffer much less cost and inconvenience compared with attending an unproductive mediation.

317. See, e.g., FLA. R. CIV. P. 1.730(a) (requiring that when parties do not reach agreement, mediators must report to the court the lack of an agreement, without comment or recommendation). Possible reports about pre-mediation submissions presumably would be strictly limited to compliance, without any other comment by the mediators.

sions arguably might be decreased if each side anticipates that the submissions might be disclosed in court. In that situation, people may be less candid. This may not be a serious problem, however, if the required submissions focus on basic objective information. If each side would provide the information to the opposing parties, participants normally would not make any damaging admissions. Thus, requiring such an exchange with the potential of disclosure in a sanctions hearing should not inhibit much candor. Although enforcing a requirement that parties provide confidential memos to mediators might result in better preparation for mediation, participants may not be candid if they fear that these memos might be disclosed in a compliance hearing.

A second problem is potentially more serious. Enforcing a rule ordering parties to provide pre-mediation submissions might conflict with mediation confidentiality rules and thus might require an exception or waiver.<sup>318</sup> The UMA articulates the principle favoring confidentiality of mediation, “subject only to the need for disclosure to accommodate specific and compelling societal interests.”<sup>319</sup> An exception for mediator reports about deficiencies in pre-mediation submissions would be more narrow and objective than an exception for good-faith violations.<sup>320</sup> Nonetheless, reasonable people can differ about the wisdom of a confidentiality exception for reports about deficiencies of pre-mediation submissions.

Even if a court or mediation program does not require an exchange of documents before mediations, it certainly can encourage these exchanges.

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318. The UMA establishes a privilege relating to a “mediation communication” which is defined as “a statement . . . that occurs during a mediation or is made for purposes of . . . initiating, continuing, or reconvening a mediation.” UNIF. MEDIATION ACT § 2(2) (2001) (emphasis added). The UMA Reporter’s Notes make clear that this definition would include “mediation ‘briefs’ prepared by the parties for the mediator.” *Id.* at § 2(2) reporter’s note. By contrast, the “mere fact that a person attended the mediation—in other words, the physical presence of a person—is not a communication” and thus is not covered by the privilege. *Id.*

319. *Id.* at prefatory note.

320. For discussion of confidentiality issues generally, see *supra* Part I.C.5.

A requirement of pre-mediation submissions could cause additional related problems. If mediators send notices of deficiencies, program planners should expect that some people receiving the notices will call the mediators to discuss what will be needed to cure the problems. If there is a dispute over the sufficiency of an attempted cure, presumably evidence would be needed about conversations between the mediator and the alleged offender, possibly including testimony by the mediator. This would greatly expand the scope of a confidentiality exception and make it much more problematic.

These additional problems would be avoided if mediators did not report deficiencies and the parties were responsible for initiating action against allegedly deficient submissions. This would not solve the basic confidentiality problem, however. Even if the submissions were routinely filed in court pursuant to a court rule, the submissions still would be considered privileged communications under the UMA as long as the submissions were oriented to initiating mediation. See *supra* note 318.

Courts and programs can cultivate local practice norms by developing standardized formats for voluntary exchange of documents.

It also usually is helpful for mediators to consult with participants before mediation.<sup>321</sup> Such consultations can help identify and remedy potential procedural problems.<sup>322</sup> These consultations can address issues about attendance of appropriate representatives and experts so that participants will not be surprised about this when they arrive at mediation.<sup>323</sup> During such consultations, mediators can help identify information and documents for participants to bring to make the mediation most productive. Even if programs do not require exchange of pre-mediation submissions, courts should authorize payment of mediators' fees for a limited and reasonable amount of pre-mediation consultation.

Establishing a system for pre-mediation submission of documents and consultations can address the interests of the major stakeholder groups. This can help litigants, attorneys, and mediators all be better prepared and have realistic expectations when they attend mediation. This pre-mediation activity can help identify and resolve potential problems in advance and possibly avoid wasted time in mediation and later court hearings. Better preparation for mediation also can help attorneys and mediators do their jobs productively and help address the parties' interests with less need to seek court adjudication. Reconciling the interests of exchanging pre-mediation documents with confidentiality rules and norms can be a difficult challenge. Using a local system design process can help craft particular arrangements that comply with applicable legal rules and fit well with local practice norms.

### 3. Requirement of Mere Attendance for a Limited and Specified Time

Courts should consider specifying how long participants must remain at mediation. Currently, attendance requirements usually do not do so.<sup>324</sup> Under Kovach's good-faith proposal, participants would be required to re-

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321. Many mediators regularly arrange such consultations. In some cases, mediators consult each side separately. In other cases, mediators have joint consultations, often through conference calls with the attorneys. In yet other cases, mediators use both approaches. In addition, opposing counsel can consult with each other to prepare for a mediation without involving the mediator.

322. For further discussion of possible education efforts to promote high-quality mediation, see *supra* Part II.C.1.

323. For discussion of attendance of organizational representatives with appropriate authority, see *infra* Part II.C.3.

324. A few court rules do specify a required period of attendance, usually two or three hours. See, e.g., 21ST JUD. CIR. (ILL.) CT. R. 9.4(a)(5)(i) ("[M]ediation can be suspended or terminated at the request of either party after two hours of mediation.").

main “at the mediation until the mediator determines that the process is at an end or excuses the parties.”<sup>325</sup> This proposed requirement is overbroad and could lead to abuse.<sup>326</sup>

Courts might require participants to attend mediation for a specific time period, such as one hour.<sup>327</sup> This would avoid uncertainty about what participants are required to do and remove an element of mediators’ discretionary authority that could be abused. If participants are required to stay for a limited period, mediators can encourage them to make the most of that time, and many people would take advantage of this opportunity.<sup>328</sup> Requiring attendance for a limited, specified time can provide an opportunity to mediate for those interested in trying mediation while imposing only a limited cost on those not interested in doing so.

Although attendance at mediation by representatives with authority to settle the case generally helps make mediation more productive, a requirement of attendance with full settlement authority is problematic because it invites resistance and easy evasion.<sup>329</sup> After the *Heileman* decision,<sup>330</sup> Rule 16 was amended to state: “If appropriate, the court may require that a party or its representatives be present or reasonably available by telephone in order to consider possible settlement of the dispute.”<sup>331</sup> In crafting the revised

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325. Kovach, *supra* note 4, at 623.

326. See *supra* notes 114–121 and accompanying text.

327. A minimal option would require attendance only for the mediator’s introduction and would permit participants to leave after that. This option reflects the interpretation of FLA. MEDIATION R., FLA. MEDIATOR ETHICS ADV. CMTE OPINION 95-009A–B, available at <http://www.flcourts.org/osca/divisions/adr/opinions.htm> (last updated May 20, 2002). This is consistent with ethical guidelines for mediators that state that “[a]ny party may withdraw from mediation at any time.” AMERICAN ARBITRATION ASSOCIATION ET AL., *supra* note 1, § 1.

Another option would be to allow parties to file a motion to cancel the mediation if they do not intend to make an offer or increase their last offer. For discussion of this option, see *infra* Part II.C.4.

In some cases, mediation is not appropriate and mediation programs rules should identify cases in which mediation is inappropriate and in which parties should not be required to attend at all. See, e.g., Jessica Pearson, *Mediating When Domestic Violence Is a Factor: Policies and Practices in Court-Based Divorce Mediation Programs*, 14 MEDIATION Q. 319, 325–26 (1997) (describing practices for screening cases for exclusion from mediation due to domestic violence).

328. Even if participants do not wish to settle at mediation, the time required for attendance could be used productively to discuss upcoming litigation issues, such as issues discussed in pretrial conferences. See FED. R. CIV. P. 16(c); *Stoehr v. Yost*, 765 N.E.2d 684, 688–89 (Ind. Ct. App. 2002).

329. Commenting on an earlier draft, a mediation program administrator suggested that mediators simply accept assertions of full settlement authority at “face value,” stating that this was the practice in her program and it never presented a problem. In essence, this would mean that participants would have to justify their positions on grounds other than settlement authority. In some mediation cultures, this may be an effective policy. In other mediation cultures, however, it may invite evasion and abuse as described *supra* in text accompanying notes 130–147.

330. *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648 (7th Cir. 1989) (en banc). For discussion of this case, see *supra* text accompanying notes 130–136.

331. FED. R. CIV. P. 16(c).

language, the Advisory Committee wisely did not include a requirement of "full settlement authority" and instead opted for a more flexible approach about attendance:

[The revised rule] refers to participation by a party or its representative. Whether this would be the individual party, an officer of a corporate party, a representative from an insurance carrier, or someone else would depend on the circumstances. Particularly in litigation in which governmental agencies or large amounts of money are involved, there may be no one with on-the-spot settlement authority, and the most that should be expected is access to a person who would have a major role in submitting a recommendation to the body or board with ultimate decision-making responsibility. The selection of the appropriate representative should ordinarily be left to the party and its counsel.<sup>332</sup>

The Advisory Committee acknowledged that courts have the inherent authority to require personal participation under *Heileman* but suggested that courts may be wise to refrain from exercising the full extent of such authority: "[T]he unwillingness of a party to be available, even by telephone, for a settlement conference may be a clear signal that the time and expense involved in pursuing settlement is likely to be unproductive and that personal participation by the parties should not be required."<sup>333</sup>

Riskin suggests framing an order to attend a settlement conference as an invitation.<sup>334</sup> Although participants would be required to attend, his point is that attendance should be something that the participants would find *inviting*. This is similar to Kovach's notions that good-faith participation might be requested or recommended by mediators and/or courts.<sup>335</sup> There is a subtle and important difference, however. Invitations generally imply that the invitees would find the subject desirable or else they would not accept the invitation. Requests and recommendations often imply that the recipients might find the experience unpleasant.

Based on research on satisfaction with mediation,<sup>336</sup> program planners can design mediation programs that participants would find inviting and

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332. *Id.* at advisory committee notes on 1993 amendments.

333. *Id.*; see also *In re Stone*, 986 F.2d 898, 900, 903–905 (5th Cir. 1993) (stating that the court has inherent power to require attendance of a representative with full settlement authority but that such power should be used "very sparingly").

334. Riskin, *supra* note 125, at 1114. Riskin was referring to judicial settlement conferences, but the logic would be the same for court-ordered mediations. Riskin distinguishes between a judicial host "[r]aising a [f]ist or [e]xtending a [h]and." Raising a fist refers to pressuring parties to settle, whereas extending a hand refers to facilitating the parties' education so that they can make their own settlement decisions. Riskin favors extending a hand. *Id.* at 1083–85.

335. Kovach, *supra* note 4, at 596–99. Kovach doubts the effectiveness of requests and recommendations to mediate in good faith, which is why she proposes a requirement of good faith.

336. See *supra* Part II.B.1.

that would minimize the need for court remedies for nonattendance. Although courts may use orders to secure participants' attendance in mediation, most are likely to attend quite willingly if the programs fit their needs and expectations. Even with the best designed program or a stringent good-faith requirement, some people may decline an invitation to mediate seriously. Program planners face a choice whether to orient their programs toward such people or toward the likely majority who will respond positively to a well-prepared invitation.<sup>337</sup> A good systems design process can help mediation programs tailor their policies to maximize productive attendance.

#### 4. Policy Governing Cancellation of Mediation

If a mediation program is generally well-designed to satisfy participants' interests, it can avoid some problematic behavior in mediation by developing a suitable cancellation policy. In some bad-faith cases, the parties had opportunities to request cancellation of mediation and the courts obviously were annoyed that they failed to do so.<sup>338</sup> *Texas Department of Transportation v. Pirtle*<sup>339</sup> is a good example. The court sanctioned the defendant because, knowing that it did not plan to make a settlement offer, it failed to object to the mediation order as authorized by statute.<sup>340</sup> Parties uninterested in mediation may fail to object for at least four possible reasons. First, they may be unaware of a procedure to object to a mediation referral order. Second, they may believe that moving to vacate such an order would be unproductive or counterproductive if they believe that the court would not grant the motion.<sup>341</sup> Third, they may believe that it would be more efficient to invest the time in a brief mediation than in a motion to vacate a mediation order.<sup>342</sup>

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337. For a discussion of that policy analysis, see *infra* notes 361–366 and accompanying text.

338. *Tex. Dep't of Transp. v. Pirtle*, 977 S.W.2d 657, 657–58 (Tex. Ct. App. 1998); see also *Nick v. Morgan's Foods, Inc.*, 99 F. Supp. 2d 1056, 1058 (E.D. Mo. 2000), *aff'd* 270 F.3d 590 (8th Cir. 2001) (noting that, three days before mediation, defense counsel assured the court that the defendant was prepared to discuss settlement in good faith at mediation, but later failed to do so at mediation); *Foxgate Homeowners' Ass'n v. Bramalea Cal., Inc.*, 92 Cal. Rptr. 2d 916, 924 (Ct. App. 2000) (noting that sanctioned party failed to object to order requiring attendance of that party's experts), *aff'd on other grounds*, 108 Cal. Rptr. 2d 642 (2001); *Stoeher v. Yost*, 765 N.E.2d 684, 686–87 (Ind. Ct. App. 2002) (citing defendant's conduct in inducing the plaintiff to mediate without intending to settle as one of the reasons for the trial court's sanction against the defendant).

339. *Pirtle*, 977 S.W. 2d 657. For further description of this case, see *supra* note 70.

340. *Id.* at 657–58.

341. In *Nick*, the defense counsel informed the plaintiff's counsel, but not the court, that he believed that the mediation would not be fruitful. *Nick*, 99 F. Supp. 2d at 1058. Defense counsel may have believed that the court would not have welcomed a motion to vacate the mediation order.

342. In Toronto, for example, some attorneys prefer to have a "20-minute mediation" than to move to adjourn the mediation. See Macfarlane, *supra* note 2 (manuscript at 26–27).

Fourth, they may be willing to listen to arguments or make partial or procedural agreements even if they expect that the mediation probably would not result in a complete settlement.

Mediation program planners face a dilemma in adopting a cancellation policy. If courts signal that they will cancel mediations easily, they risk that many appropriate cases will be cancelled. On the other hand, if they rarely permit cancellation or make it burdensome to cancel mediation, many mediations are likely to be unproductive and produce complaints of bad faith. An intermediate option would be to permit cancellations based on joint motions from all sides.<sup>343</sup> This policy could be ineffective or counterproductive, however. If D suggests to P, for example, to move jointly to vacate a mediation order and P declines to join, the resulting mediation could be quite acrimonious. In such a mediation, presumably D would be predisposed not to settle and might additionally blame P for insisting on a wasteful mediation. Given this scenario, P might feel forced to join in D's motion even if P believed that the mediation could be useful. Considering these likely dynamics, a more prudent policy might be to allow cancellations based on the motion of any party.<sup>344</sup>

This analysis suggests that no cancellation policy by itself would ensure that appropriate cases are mediated and that inappropriate cases are excused from mediation requirements. All of these options, by themselves, could undermine courts' interests in saving time and money for the litigants and the courts and in eliciting cooperation with the court management systems. The solution to this problem entails designing mediation programs to satisfy participants' interests generally.<sup>345</sup> In that situation, most participants are not likely to want to cancel mediation. By using a systems design process, mediation program planners can tailor program procedures, including a cancellation policy, to minimize participants' motivation to act inappropriately in mediation.

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343. The District Court for the Eastern District of Missouri has adopted such a rule. "If the parties agree that the referral to ADR has no reasonable chance of being productive, the parties may jointly move the court for an order vacating the ADR referral prior to the selection of the neutral." E.D. MO. LOC. R. 16-6.02(A)(1)(3).

344. Although requiring a joint motion to vacate a mediation referral order may be unwise, courts and program planners can usefully encourage opposing sides to consult with each other about whether a scheduled mediation would be productive and, if not, whether it might be productive at a later time or under different circumstances. Even if courts do not *require* a joint motion to vacate a mediation order, a joint motion would often be more influential.

345. See Macfarlane, *supra* note 2 (manuscript at 26–27) (describing greater resistance to mediation in Toronto than Ottawa, based in part on degree of flexibility in scheduling mediation when the attorneys are ready to mediate).

## 5. Protections Against Misrepresentation

Existing techniques are available to protect against misrepresentation in mediation without a good-faith requirement.<sup>346</sup> For example, under the Uniform Mediation Act, evidence may be admitted to “prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of the mediation.”<sup>347</sup> Parties can protect themselves by including representation or warranty provisions in mediated agreements when they rely on representations of material facts or promises.<sup>348</sup> If participants are uncertain about particular representations, mediators or attorneys can raise the option of warranty provisions. If particular courts repeatedly have problems with misrepresentations in mediation, they can recommend that participants consider warranty provisions in each case. Because mediated agreements are readily admissible in evidence,<sup>349</sup> warranty provisions could avoid most disputes about the content of alleged misrepresentations covered in the warranty provisions.

Another possible protection against misrepresentation would be a brief cooling-off period before mediated agreements become binding to permit investigations about any material facts on which the parties relied. Welsh proposes using a three-day cooling-off period before mediated settlement agreements become binding as a protective measure against high-pressure tactics in mediation.<sup>350</sup> Although she did not intend this proposal to address problems of misrepresentation, it could be useful for that purpose as well. Even where no rule requires a cooling-off period, mediators or attorneys can suggest including such provisions in mediated agreements when they might be appropriate. These provisions could include arrangements for exchanges of documents or assurances as necessary to avoid reliance on questionable representations made in mediation.

In general, people harmed by relying on misrepresentations are typically harmed in entering a contract. In those situations, the law provides reme-

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346. For discussion of misrepresentation as an element of bad faith, see *supra* note 25. For arguments that a good-faith requirement is needed to protect against misrepresentation, see Kovach, *supra* note 4, at 623; Weston, *supra* note 4, at 628.

347. UNIF. MEDIATION ACT § 6(b)(2) (2001). Agreements reached in mediation are subject to the same rules of interpretation and enforcement as other agreements. See generally COLE ET AL., *supra* note 170, at § 4:13, at 4-52 to 4-67.

348. See MNOOKIN ET AL., *supra* note 275, at 289–90.

349. UNIF. MEDIATION ACT § 6(a)(1) (2001).

350. Welsh, *supra* note 17, at 86–92. Cooling-off periods are potentially problematic because they could be abused. For example, a party might make an agreement in mediation intending to renege during the cooling-off period as a way to wear down the other side. Nonetheless, mediation program planners might experiment with them to see how people use them in particular mediation cultures.

dies under certain conditions.<sup>351</sup> Proponents of a good-faith requirement identify two situations in which parties in mediation may be harmed by misrepresentations even when there is no agreement. One situation is the misrepresentation of a jury consultant as a business associate.<sup>352</sup> This problem can be addressed largely by identifying mediation participants in advance.<sup>353</sup>

The second situation arises when one side attends mediation for the sole purpose of discovery.<sup>354</sup> Exchanging information is an important part of mediation.<sup>355</sup> Even when mediations do not result in settlement, the discussions may be helpful in narrowing issues and exchanging information. At root, therefore, the complaint about using mediation solely for discovery is that the alleged offender has no real intent of settling.<sup>356</sup> This complaint often arises when one side feels that the other side is not making appropriate offers and the complaining party infers a lack of sincerity. Usually both sides are willing to settle but do not want to make offers near each other's expectations at that point in the mediation. Sometimes, however, one side does attend mediation with ulterior motives and no intention of settling.<sup>357</sup> In particular cases in which individuals seem to be asking excessive or inappropriate questions, participants can ask about the purpose of the questions and decline to answer. Participants presumably can withdraw from the mediation if unsatisfied with the other side's actions.<sup>358</sup> If use of mediation solely for discovery is a recurrent problem, it probably indicates that the policy-makers have not designed the mediation program well to fit the local legal and mediation culture. In this situation, revising the mediation referral procedures may be a more appropriate policy than frequent imposition of bad-faith sanctions.

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351. See RESTATEMENT (SECOND) OF CONTRACTS ch. 7, topic 1, introductory note (1981).

352. Kovach, *supra* note 4, at 594.

353. See *supra* note 313 and accompanying text.

354. Kovach, *supra* note 4, at 593-94; Weston, *supra* note 4, at 595.

355. Exchanging information is an element of good faith under Kovach's and Weston's proposals. See Kovach, *supra* note 4, at 616; Weston, *supra* note 4, at 628.

356. Weston, *supra* note 4, at 6. Proponents of a good-faith requirement have no objection to—and indeed welcome—exchange of information if the parties negotiate sincerely. See *supra* text accompanying note 355.

357. Given that the essence of this problem is lack of intent to settle, it turns on a determination of a participant's state of mind, a factor that the proponents argue is inappropriate for courts to explore in adjudicating bad-faith claims. See *supra* notes 81-108 and accompanying text.

358. Ironically, a good-faith rule that requires parties to "remain[ ] at the mediation until the mediator determines that the process is at an end or excuses the parties" could force innocent participants to endure prolonged mediation sessions while the other side goes on a "fishing expedition." Kovach, *supra* note 4, at 623. This Article suggests that participants should be free to leave mediation after a limited and definite amount of time. See *supra* Part II.C.3. In addition, a mediator who believes that a participant is abusing the mediation process can talk privately with the participant to understand the behavior and, if the mediator concludes that the behavior is inappropriate, encourage the participant to change the behavior or terminate the mediation. See *supra* notes 306-309 and accompanying text.

Another protection against misrepresentations relates to potential lawyer discipline for untruthfulness.<sup>359</sup> Under the Uniform Mediation Act, evidence of mediation communications relating to claims of professional misconduct is not privileged.<sup>360</sup> When mediators or participants believe that a statement may be a misrepresentation, they may alert the person making the statement of the risks involved and provide opportunities to correct any misrepresentations.

Although the measures described in this part might not prevent all problems of misrepresentation, these policies are likely to deal successfully with most such problems without additional litigation or exceptions to confidentiality rules. These procedures would be consistent with attorneys' and mediators' conceptions of their responsibilities to reach sound agreements that satisfy clients' interests. These policies also would satisfy courts' interests in maintaining the integrity of mediation programs with relatively little need for judicial intervention.

## CONCLUSION

A good-faith requirement in mediation is very troublesome. Although it may deter some inappropriate conduct, it also may stimulate even more. It risks undermining the interests of all the stakeholder groups of court-connected mediation, especially interests in the integrity of the mediation process and the courts.

Kovach argues that a good-faith requirement would include "some restrictions on the behavior of a few so that the majority of participants will have positive, meaningful experiences and outcomes."<sup>361</sup> This Article suggests that it would produce precisely the opposite result. Actively enforcing a good-faith requirement would subject *all* participants to uncertainty about the impartiality and confidentiality of the process and could heighten adversarial tensions and inappropriate pressures to settle cases.<sup>362</sup> Although such a requirement could deter and punish truly egregious behavior in what Ko-

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359. See MODEL RULES OF PROF'L CONDUCT R. 4.1 (1983) (prohibiting lawyers from making false statements of material fact or failing to disclose a material fact when necessary to avoid assisting in a criminal or fraudulent act by a client). For an excellent discussion of lawyers' professional and ethical dilemmas in negotiation and advice for dealing with those dilemmas, see MNOOKIN ET AL., *supra* note 275, at 274-94.

360. UNIF. MEDIATION ACT § 6(a)(6) (2001) (stating an exception to privilege for mediation communications related to claims of professional misconduct or malpractice based on conduct occurring during a mediation). See generally Pamela Kentra, *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.

361. Kovach, *supra* note 4, at 605.

362. Kovach argues that "[a]lthough satellite litigation is not wholly preventable, benefits of good faith participation in those cases that go to mediation outweigh the detriment of any poten-

vach describes as a few cases, it would do so at the expense of overall confidence in the system of mediation. Barring evidence of a substantial number of problems of real bad faith (as opposed to loose litigation talk),<sup>363</sup> the large cost of a bad-faith sanctions regime is not worth the likely small amount of benefit, especially considering the alternative policy options available.

Given the serious foreseeable problems of a good-faith requirement, the burden should be on the proponents to demonstrate that: (1) There is a serious and recurring problem of clearly defined bad-faith conduct in mediation in a local community, (2) the requirement would be effective in deterring such conduct, (3) the benefits of the requirement would outweigh the problems, and (4) the net benefits of the requirement would exceed the net benefits of alternative policies such as those suggested in this Article. Most mediation programs would not satisfy all these conditions, and thus a good-faith requirement rarely would be justified.<sup>364</sup> Although there apparently have been no empirical studies of the impact of a good-faith requirement, the experience with Rule 11 counsels caution.<sup>365</sup> Using Riskin's metaphor, a good-faith sanctions regime would "raise a fist" when policymakers first should consider policies that "extend a hand."<sup>366</sup>

A combination of the policies described in Part II.C probably would induce most mediation participants to act productively. These policies would help attorneys advance their clients' interests. They would encourage trust in mediators by avoiding the need for them to testify against participants. They would avoid the prospect of satellite litigation and satellite mediation over accusations of bad faith, which would divert attention from the merits of the dispute and the parties' real interests. They are consistent with the norms and spirit of mediation. Court orders incorporating such policies

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tial satellite litigation." *Id.* at 604. Even though satellite litigation would occur in a relatively small number of cases, the *threat* of such litigation would hang over mediations generally.

363. See *supra* notes 153–154 and accompanying text for discussion of loose litigation talk of bad faith.

364. Several people who read earlier drafts of this Article wondered why it does not categorically reject the use of a good-faith requirement. There are two reasons. First, there is little or no empirical evidence of the effects of a good-faith requirement or alternative policies as there is, for example, about the effects of Rule 11. See *supra* notes 158–163 and accompanying text. Although the arguments against a good-faith requirement are compelling, complete confidence is not warranted without suitable empirical evidence. Second, this Article contends that local legal culture significantly affects the consequences of policies regulating behavior in mediation and that local decisionmakers should make policies calculated to be effective in their local communities. See *supra* notes 219–230, 235–242 and accompanying text. Given this perspective, it would be inappropriate to make a universal policy recommendation for all mediation programs. As a practical matter, policymakers who follow the recommendations in the text usually would reject a good-faith requirement and choose other policies.

365. See *supra* notes 158–163 and accompanying text.

366. See *supra* note 334.

would be readily enforceable with little uncertainty about what constitutes compliance.

Courts should invite all stakeholder groups to participate in designing and implementing mediation program policies that satisfy the interests of all the stakeholder groups. If the design process results in a general consensus, the resulting policies are likely to be effective in promoting the integrity of the mediation programs.

**ETHICAL CONUNDRUMS FOR THE 21<sup>ST</sup> CENTURY  
LAWYER/MEDIATOR  
“TOTO, I’VE GOT A FEELING WE’ RE NOT IN KANSAS ANY MORE”**

**Melvin A. Rubin and Brian F. Spector**

The cyclonic winds which whisked Dorothy off to The Land of Oz are still spiraling. Now in the cone of danger – mediators who also are licensed attorneys. However, the ultimate land to which the at-risk lawyer/mediator may be transported has no yellow brick road. Instead, it is characterized by conundrums. The lawyer/mediator, like many tragic historic and mythical characters, is trapped between the Scylla of one of mediation’s bedrock principles (confidentiality) and the Charybdis of the lawyer’s whistle-blowing obligation, an ethical rule widely unknown or often observed in the breach. We question whether it is fundamentally unfair for the mediation participants’ expectations of confidentiality to be frustrated because the mediator happens to be a lawyer, a question we address again at the end of this article.

**Why this article should be read by every lawyer/mediator<sup>1</sup>**

The lawyer/mediator knows that litigation is intruding into the mediation process, often resulting in court challenges to mediated settlements and attempts to invade the confidentiality of the process. Stated differently, it has become not uncommon for parties to settle and sue, seeking to set aside mediated settlement agreements on various grounds, ranging from fraud in the inducement to duress. Consequently, what is said and done during the mediation process is increasingly the subject of pretrial discovery and, ultimately, trial testimony. While the initial target is the opposing party, the lawyer/mediator is in the line of fire.

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<sup>1</sup> The article should not be misinterpreted as any disregard to or disrespect of the many other dual profession mediators, including mental health professionals and others.

For example, take the classic case of counsel advising the client that the defendant's settlement offer is the best offer which the client could ever reasonably expect and recommending that it be accepted immediately and without condition. Not infrequently, the client has no idea of the value of the claim asserted and necessarily relies completely on counsel's advice. The client's vulnerability may be exacerbated by a multitude of after-settlement maladies (otherwise known as "buyer's remorse"), *e.g.* diminished mental or physical capacity (either from advanced age, hypoglycemia, or as a consequence of the defendant's alleged wrongful conduct at issue in the lawsuit) or language barriers (as where the client's native language is not English). This paradigmatic client may very well have permitted or invited counsel's over-reaching, gross negligence and, in some instances, borderline fraud. On such occasions, the lawyer/mediator may be all that stands between the vulnerable client and the unethical or incompetent lawyer. Assuming the lawyer/mediator concludes that counsel's conduct is incompetent, the lawyer/mediator may be obligated to report the unethical conduct to the appropriate professional authority regulating lawyers. Of course, any lawyer/mediator who does so will, to borrow a phrase made famous in Hollywood, "never work in this town again." On the other hand, failing to "blow the whistle" on the unethical lawyer may render the lawyer/mediator subject to discipline by the professional authority regulating lawyers and may increase the risk of being joined as a defendant in a subsequent civil suit by the disgruntled party who entered into a mediation settlement agreement.<sup>2</sup> This article hopes to provide awareness of and guidance for the lawyer/mediator caught in this conflict. To be clear, this "conflict" is not

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<sup>2</sup> In effect, the lawyer/mediator may be deemed a knowing abettor, especially where selected by that incompetent counsel or because of the expertise of the lawyer/mediator in a particular field of law. To the unsophisticated party participating in the mediation, the lawyer/mediator may be viewed as a target to be joined as a defendant in a lawsuit as another "apparent" lawyer who provided advice upon which the party relied, even though the advice was solicited.

merely hypothetical. To borrow a phrase used in other contexts, the lawyer/mediator is faced with a “clear and present danger,” as evidenced by a recent Advisory Opinion of Florida’s Mediator Ethics Advisory Committee, discussed in detail below.<sup>3</sup>

This article begins by surveying the applicable provisions of the Model Standards of Conduct for Mediators (the “Model Mediator Standards”),<sup>4</sup> and the American Bar Association’s (the “ABA”) Model Rules of Professional Conduct (the “Model Lawyer Rules”).<sup>5</sup> We will then offer a possible protected path through this ethical labyrinth. Before concluding, we offer numerous caveats, so readers appreciate the issues we have not addressed but which are worthy of consideration and further discussion by the practicing lawyer/mediator as well as academics. In conclusion, we recommend changes to the applicable ethical standards and rules to eliminate, or at least minimize, the ethical conundrums in which the lawyer/mediator now finds herself.

## **I. Introduction**

21<sup>st</sup> Century civil mediation is increasingly dominated by lawyers escaping from private trial/commercial litigation practice. While these refugees, in fact, may leave behind the stress, strain, and aggravation of practicing law (*i.e.* judges, opposing counsel, clients, and partners),

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<sup>3</sup> Mediator Ethics Advisory Opinion (“MEAC”) Advisory Opinion 2006-005 (March 10, 2008).

<sup>4</sup> For a copy of the Model Mediator Standards see [http://www.abanet.org/dispute/documents/model\\_standards\\_conduct\\_april2007.pdf](http://www.abanet.org/dispute/documents/model_standards_conduct_april2007.pdf). To trace the genealogical development of the Model Mediator Standards see <http://www.abanet.org/dispute/webpolicy.html>.

<sup>5</sup> The Model Lawyer Rules may be found on line at the ABA’s web site: [http://www.abanet.org/cpr/mrpc/mrpc\\_toc.html](http://www.abanet.org/cpr/mrpc/mrpc_toc.html). An alphabetical list of states which have adopted the Model Lawyer Rules in some form is found on the ABA’s web site at [http://www.abanet.org/cpr/mrpc/alpha\\_states.html](http://www.abanet.org/cpr/mrpc/alpha_states.html). No lawyer/mediator’s ethics library is complete without three books published by the ABA’s Center of Professional Responsibility: A LEGISLATIVE HISTORY – THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2005 (2006); ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT (6<sup>th</sup> ed. 2007); and LAWYER LAW – COMPARING THE ABA MODEL RULES OF PROFESSIONAL CONDUCT WITH THE ALI RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (2005).

they also may be engaged in self-deception, believing the mediation side of the fence is greener and carefree when that is far from the truth. That is because most mediators, either by choice or as a condition of mediator certification, maintain their licenses to practice law. Consequently, the lawyer/mediator's conduct is now guided and constrained by two sets of professional standards, those governing mediators and others regulating lawyers.<sup>6</sup>

The purpose of this article is not to pass judgment on the increasing growth of these rules and regulations. Rather, we examine the dynamic relationship, and in many instances the tension, between the mediator standards and lawyer ethical rules, specifically what happens when the confidentiality and the sanctity of the mediation session is challenged by the obligation of disclosure under a bar requirement.<sup>7</sup> In offering possible answers to this question, we begin by identifying the source of the conflict and then review some provisions of the Model Mediator Standards and the Model Lawyer Rules which form the basis for our discussion.

## **II. The Source of the Conflict**

A conundrum may be defined as a paradoxical, insoluble, or difficult problem.<sup>8</sup> The lawyer/mediator encounters ethical conundrums because of conflicts between the Model

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<sup>6</sup> Added to the disciplinary/regulatory mix are statutory mediation schemes, discussion of which is beyond the scope of this article. For example, any treatment of statutory mediation schemes is incomplete without reference to the Uniform Mediation Act. See <http://www.pon.harvard.edu/guests/uma/>. The genealogical development of the Uniform Mediation Act may be found on the web site of the ABA's Section of Dispute Resolution (hereinafter the "Section") at <http://www.abanet.org/dispute/webpolicy.html>.

<sup>7</sup> This issue was first recognized more than a decade ago. See Pamela A. Kentra, *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 (1977).

<sup>8</sup> See Conundrum, Dictionary.com, <http://dictionary.reference.com/browse/conundrum> ((quoting *The American Heritage® Dictionary of the English Language* (4<sup>th</sup> ed. Houghton Mifflin Co. 2004)).

Mediator Standards and the Model Lawyer Rules. These conflicts are recognized by the Preamble to the Model Mediator Standards and Comment [2] to Rule 2.4 of the Model Lawyer Rules. The provisions, in pertinent part, state as follows:

### **Preamble**

Various aspects of a mediation, including some matters covered by these Standards, may also be affected by applicable law, court rules, regulations, other applicable professional rules, mediation rules to which the parties have agreed and other agreements of the parties. *These sources **may** create conflicts with, and **may** take precedence over, these Standards. However, a mediator should make every effort to comply with the spirit and intent of these Standards in resolving such conflicts. This effort should include honoring all remaining Standards not in conflict with these other sources.*

### **Rule 2.4<sup>9</sup> Comment [2]**

The role of a third-party neutral is not unique to lawyers, although, in some court-connected contexts, only lawyers are allowed to serve in this role or to handle certain types of cases. In performing this role, the lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. *Lawyer-neutrals **may** also be subject to various codes of ethics, such as . . . the Model Standards of Conduct for Mediators jointly*

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<sup>9</sup> Rule 2.4 was added to the Model Lawyer Rules by the ABA as a recommendation of the Ethics 2000 Commission. See <http://www.abanet.org/cpr/e2k/home.html>.

Rule 2.4 provides as follows:

#### **Rule 2.4 Lawyer Serving As Third-Party Neutral**

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

*prepared by the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution. (footnotes, bold and italics added).*

The italicized language does not clearly identify the trump suit, for its circular logic renders the lawyer/mediator a dog chasing his or her own tail: the Model Lawyer Rules announce that the lawyer/mediator *may* be subject to the Model Mediator Standards, and the Model Mediator Standards prescribe that professional rules (like the Model Lawyer Rules) *may* take precedence in the event of a conflict. One such conflict arises between the mediator's duty of confidentiality and the lawyer's duty to report another lawyer's unethical conduct when the person conducting the mediation is wearing two professional hats (mediator and lawyer), and subject to two sets of professional rules.

### **III. Confidentiality**

Confidentiality is addressed in Standard V of the Model Mediator Standards, which states as follows:

*A. A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, **unless otherwise** agreed to by the parties or **required by applicable law**.*

1. If the parties to a mediation agree that the mediator may disclose information obtained during the mediation, the mediator may do so.
2. A mediator should not communicate to any non-participant information about how the parties acted in the mediation. A mediator may report, if required, whether parties appeared at a scheduled mediation and whether or not the parties reached a resolution. . . .

*B. A mediator who meets with any persons in private session during a mediation shall not convey directly or indirectly to any other person, any information that was obtained during that private session without the consent of the disclosing person.*

C. A mediator shall promote understanding among the parties of the extent to which the parties will maintain confidentiality of information they obtain in a mediation.

D. Depending on the circumstance of a mediation, the parties may have varying expectations regarding confidentiality that a mediator should address. The parties may make their own rules with respect to confidentiality, or the accepted practice of an individual mediator or institution may dictate a particular set of expectations.

The “unless otherwise required by applicable law” clause is the gaping hole and disclaimer umbrella of mediation confidentiality. We turn now to the reporting requirement of Model Lawyer Rule 8.3.

#### IV. Whistle Blowing

Rule 8.3 of the Model Lawyer Rules contains what many refer to as a whistle blowing requirement. The rule, entitled “Reporting Professional Misconduct” states, in pertinent part, as follows:

*(a) A lawyer who **knows**<sup>10</sup> that another lawyer has committed a violation of the Rules of Professional Conduct that raises a **substantial**<sup>11</sup> question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority. . . .*

*(c) **This Rule does not require disclosure of information otherwise protected by Rule 1.6**<sup>12</sup> or information gained by a lawyer or judge while participating in an approved lawyers assistance program. (footnotes, italics and bold added).*

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<sup>10</sup> Rule 1.0(f) of the Model Lawyer Rules defines “knows” as “actual knowledge of the fact in question,” but adds that “knowledge may be inferred from circumstances.”

<sup>11</sup> Rule 1.0(l) of the Model Lawyer Rules defines “substantial” “when used in reference to degree or extent [as] denot[ing] a material matter of clear and weighty importance.”

<sup>12</sup> Rule 1.6 of the Model Lawyer Rules, entitled “Confidentiality Of Information,” provides in subparagraph (a) as follows:

A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

Comment [2] to Rule 8.3 makes clear that a “report about misconduct is not required where it would involve violation of Rule 1.6.”

A lawyer/mediator’s reporting obligation under Rule 8.3 is not diminished by the absence of an attorney-client relationship.<sup>13</sup> Hence, the issue for our consideration under Rule 8.3 is whether a lawyer/mediator is obligated to report the conduct of another lawyer in the mediation which violates the Model Lawyer Rules notwithstanding the confidentiality or privilege accorded mediation communications.

## **VI. The Lawyer/Mediator’s Conundrum In Action**

Lawyers have been called “workers in the mill of deceit.”<sup>14</sup> From a client’s perspective, however, “departure from truthfulness” is not a failing but often deemed “essential to the lawyer’s task,” as illustrated by the following:

Lawyer: Well, if you want my honest opinion –  
Client: No, no. I want your professional advice.<sup>15</sup>

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Because the lawyer/mediator is not acquiring information “relating to the [lawyer/mediator’s] representation of a client,” Rule 8.3(c) does not alleviate the lawyer/mediator’s reporting obligations under Rule 8.3(a).

<sup>13</sup> See Charles B. Plattsmier, *Self Regulation and the Duty to Report Misconduct: Myth or Mainstay?*, THE PROF. LAW. NOV. 2007, at 41-45; Mary T. Robinson, *A Lawyer’s Duty to Report Another Lawyer’s Misconduct. The Illinois Experience*, THE PROF. LAW. NOV. 2007, at 47-54; and Patricia A. Sallen, *Combating Himmel Angst*, THE PROF. LAW. NOV. 2007, at 55-63. See generally A.B.A.’S CENTER OF PROFESSIONAL RESPONSIBILITY, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 569-574 (6<sup>th</sup> ed. 2007) (citing Greenbaum, *The Attorney’s Duty to Report Professional Misconduct: A Roadmap for Reform*, 16 Geo. J. Legal Ethics 259 (2003), Ott & Newton, *A Current Look at Model Rule 8.3: How It is Used and What Are Courts Doing About It?*, 16 Geo. J. Legal Ethics 747 (2003); Richmond, *The Duty to Report Professional Misconduct: A Practical Analysis of Lawyer Self-Regulation*, 12 Geo. J. Legal Ethics 175 (1999)).

<sup>14</sup> MARC GALANTER, *LOWERING THE BAR \* LAWYER JOKES & LEGAL CULTURE* 36 (2005).

<sup>15</sup> *Id.* at 36 & n. 32.

Mediators may have become more skeptical since the ABA Standing Committee On Ethics and Professional Responsibility issued Formal Opinion 06-439.<sup>16</sup> But the ethical conundrum for the lawyer/mediator is not subtle or nuanced, turning on whether a statement is one of material fact or contextually viewed as mere puffery. To the contrary, the conflict between the lawyer/mediator's duty of confidentiality and the duty to report unethical conduct can arise in a variety of settings, such as:

- when a party is incapable of making an informed decision - either because of age, mental incapacity, insufficient education, life experience, or lack of sophistication - and the party's lawyer is effectively making decisions for the client, contrary to the requirements of Model Lawyer Rules 1.2(a) and 1.14;
- when a lawyer fails to explain a matter to the extent reasonably necessary to permit the client/party to make informed decisions regarding the representation and otherwise represents the client/party in an incompetent manner, contrary to the requirements of Model Lawyer Rules 1.1 and 1.4; or
- when a lawyer suffers from a conflict of interest and advises the client/party in a manner obviously designed to advance the lawyer's own personal interests (financial or otherwise) at the expense of the client/party, contrary to the requirements of Model Lawyer Rules 1.7 or 1.8.

By hypotheses, each situation involves a party's lawyer violating a clear, unambiguous rule of professional conduct which raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer. Model Lawyer Rule 8.3(a) would *not* obligate a lawyer for

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<sup>16</sup> The summary paragraph of this opinion states:

Under Model Rule 4.1, in the context of a negotiation, including a caucused mediation, a lawyer representing a client may not make a false statement of material fact to a third person. However, statements regarding a party's negotiating goals or its willingness to compromise, as well as statements that can fairly be characterized as negotiation "puffing," ordinarily are not considered "false statements of material fact" within the meaning of the Model Rules.

Interestingly, Formal Opinion 06-439 takes no position on the "validity" of the competing views of "deception synergy" (a phrase that may defy any clear definition) and "consensual deception," both of which are acknowledged as intrinsic to the mediation process.

another party in this situation to report the other lawyer's ethical misconduct to the appropriate professional authority because the information would be deemed confidential under Model Lawyer Rule 1.6 and, under Model Lawyer Rule 8.3(c), not subject to disclosure without the affected client's informed consent. In contrast, Model Lawyer Rule 8.3(a) **would** require the lawyer/mediator to report the unethical lawyer's misconduct to the appropriate professional authority because Model Lawyer Rule 8.3(c) is not applicable. Moreover, Reporter's Note 7 to Section 6 of the Uniform Mediation Act, quoted above, makes clear that the reporting requirements of Model Rule 8.3(a) operate independently of the mediation privilege and exceptions contained in the Act.

For a moment, we move from the hypothetical to the actual, a real life situation recently addressed in MEAC Advisory Opinion 2006-005.<sup>17</sup> The Florida Mediator Ethics Advisory Committee ("MEAC" or the "Committee") had the following question posed to it by a Certified Family Mediator:<sup>18</sup>

I have been recently involved in a mediation and during the mediation it was learned that there was an expenditure from funds held in escrow by one of the attorneys representing a party to the litigation.

The information about the expenditure from the escrow was made by the attorney responsible for preserving the escrowed funds while in private session with the mediator.

The mediator, in private session with the other party explained that certain monies were paid from the escrowed funds. It is not anticipated that either party will complain about the mediator.

The question is whether the confidentiality required during mediation prohibits a grievance being filed with the Bar relating to the attorney who released the funds from escrow. . . .

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<sup>17</sup> See note 3, *supra*.

<sup>18</sup> The Florida Supreme Court certifies county court, family, circuit court and dependency mediators. See Fla. R. Certified and Court-Appointed Mediators 10.100(a).

The question posed was answered, in summary, as follows:

The filing of a grievance with The Florida Bar is not necessarily precluded by statutory and rule confidentiality requirements. However, based on the facts of this question, the filing of a grievance with The Florida Bar is prohibited. **Whether any other persons may report the attorney litigant's action to The Florida Bar is beyond the scope of the Committee's function since it would involve an interpretation of the attorney ethics code.** (emphasis added)

In explaining this summary answer, the Committee noted that the revelation that funds had been expended from escrow was deemed a “mediation communication” within the statutory definition.<sup>19</sup> However, the communication was deemed not to fit with the statutory exception to mediation confidentiality under which it is permissible to “offer” a mediation communication “to report, prove, or disprove professional misconduct occurring during the mediation, solely for the internal use of the body conducting the investigation of the conduct.”<sup>20</sup> The Committee concluded that “[s]ince the misconduct which would be the subject of the report, the escrow violation, did not occur during the mediation, the misconduct statutory exception does not apply.”<sup>21</sup> The Committee also wrote that:

The Committee notes that while the statutory exceptions to confidentiality apply to all mediation participants, mediators are additionally governed by the Florida Rules for Certified and Court-Appointed Mediators. Accordingly, mediators have the obligation to maintain confidentiality (rule 10.360) and impartiality (rule 10.330), along with their more general obligations to the process

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<sup>19</sup> See FLA. STAT. § 44.403(1) (“Mediation communication” means an oral or written statement, or nonverbal conduct intended to make an assertion, by or to a mediation participant made during the course of a mediation, or prior to mediation if made in furtherance of a mediation. The commission of a crime during a mediation is not a mediation communication.)

<sup>20</sup> FLA. STAT. § 44.405(a)(6).

<sup>21</sup> One should note that under Florida law, see FLA. STAT. § 44.404(1)(a), a “court-ordered mediation begins when an order is issued by the court.” Hence, if the escrow violation occurred after entry of the order requiring mediation, the violation occurred “during the mediation.” In that instance, its revelation in a “mediation communication” falls squarely within the confidentiality exception codified in FLA. STAT. § 44.405(4)(a)(6), arguably leading to a conclusion opposite to that reached in MEAC Opinion 2006-005

(rule 10.400) and profession (rule 10.600). The Committee emphasizes that mediators are not *obligated* to report statutory exceptions by virtue of either the Mediation Confidentiality and Privilege Act, section 44.405(4)(a), Florida Statutes, or the Florida Rules for Certified and Court-Appointed Mediators. The only statutory exception requiring reporting is abuse and neglect of children and vulnerable adults, which exists by virtue of separate mandatory reporting statutes. Section 44.405(4)(a)3, Florida Statutes. **Mediators subject to other ethical codes, must, of course, guide themselves based on their concurrent codes of conduct.** (emphasis added)

As to the issue of whether the referenced communication is *required* to be reported to The Florida Bar by an attorney mediator, the Committee notes that rule 10.650 provides that in the course of providing mediation services, mediation rules control over conflicting ethical standards. **Given that the mediation communication does not appear to fit into any of the specified exceptions, the attorney mediator would be prohibited from making the disclosure to The Florida Bar.** (emphasis added, footnote omitted).

The footnote omitted from the preceding quotation states: “See also 4-1.12 Comments, Rules Regulating The Florida Bar, “A Florida Bar member who is a certified mediator is governed by the applicable law and rules relating to certified mediators.”

What MEAC Opinion 2006-005 does not address or even acknowledge is the conflict which appears to exist between the conclusion it reaches and the express lawyer reporting requirements of R. Regulating Fla. Bar 4-8.3(a), which provides:

(a) Reporting Misconduct of Other Lawyers. A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate professional authority.

Simply stated, MEAC Opinion 2006-005 prohibits the lawyer/mediator from reporting misuse of escrowed funds by counsel for one of the parties to the mediation whereas the lawyer/mediator may be subject to discipline for “misconduct” for failing to report as required by Rule 4-8.3(a). This brings us to the recommended course of conduct – both prophylactic and remedial – for the lawyer/mediator.

## VII. What The Lawyer/Mediator Should Do

In recognition of this ethical conundrum, we recommend that the lawyer/mediator clearly inform all participants of the rules of confidentiality under which the mediation will be conducted.<sup>22</sup> Among the exceptions to such confidentiality, one of the most overlooked by mediators is the lawyer/mediator's possible obligation to report another lawyer's substantial violation of the Model Lawyer Rules.<sup>23</sup> The mediator's obligation to clearly inform all participants can be done in the mediator's engagement letter<sup>24</sup> or in any mediation confidentiality agreement which the mediation participants are asked to sign.<sup>25</sup> If despite these prophylactic measures a lawyer/mediator is confronted with a situation in which the obligation to report under Model Rule 8.3(a) arises, the lawyer/mediator should remonstrate privately with the subject lawyer, outside the presence of the lawyer's client, to explain the lawyer/mediator's concerns, to ask the subject lawyer to take all steps necessary to rectify the ethical violations, and to advise that, at a minimum, the lawyer/mediator must and will withdraw from serving as mediator unless the subject lawyer "does the right thing." Should the errant lawyer demur, the question becomes whether the lawyer/mediator must withdraw from the mediation. As to whether the lawyer/mediator in fact reports the unethical lawyer to the appropriate professional authorities,

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<sup>22</sup> See Standard V of the Model Mediator Standards C and D, *supra*.

<sup>23</sup> The type of misconduct for which an obligation to report does not include the characterization of an opposing party's negotiations being in "bad faith."

<sup>24</sup> In doing so, mediator engagement letters may begin to resemble the now typical multi-page retainer letters used by lawyers.

<sup>25</sup> Readers should note that we have not recommended this issue be covered in the mediator's opening statement. Using the opening statement for this disclosure almost certainly will have a chilling effect on communication and diminish the likelihood of achieving a mediated settlement. Hopefully, such a comment should not have a chilling effect on the attorney's candor in the mediation process. See note 16, *supra*.

the lawyer/mediator should consider whether failing to do so potentially subjects the lawyer/mediator to charges of unethical misconduct (under Model Lawyer Rule 8.4(a))<sup>26</sup> or potential civil liability for aiding and abetting the subject lawyer's breach of fiduciary duties owed to a client, or breach of other duties owed to non-clients.<sup>27</sup>

### VIII. Caveats

Before recommending rule and statutory changes which potentially eliminate the ethical conundrum of mediation confidentiality versus lawyer reporting obligations, we believe it

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<sup>26</sup> Rule 8.4(a) of the Model Lawyer Rules provides that it is "professional misconduct" for a lawyer to "(a) violate or attempt to violate the Rules of Professional Conduct, *knowingly assist* or induce *another* to do so, or do so through the acts of another . . . ." The issue for a lawyer/mediator presented by Rule 8.4(a) is whether failing to withdraw from a mediation or failing to report the professional misconduct of a lawyer representing a party in the mediation constitutes "knowing assistance" of a ethical rule violation, thereby subjecting the lawyer/mediator to discipline. The Model Lawyer Rules provide no guidance on what it means to "knowingly assist" another lawyer to violate the Rules of Professional Conduct, at least as that term is used in Rule 8.4(a).

<sup>27</sup> See, e.g., RESTATEMENT (SECOND) OF TORTS § 876, which provides:

For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he

(a) does a tortious act in concert with the other or pursuant to a common design with him, or

(b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or

(c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

See generally James R. Coben & Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 HARV. NEGOT. L. REV. 43 (2006); Michael Moffitt, *Ten Ways to Get Sued: A Guide for Mediators*, 8 HARV. NEGOT. L. REV. 81 (2003). Under Florida law, a mediator conducting a court ordered mediation "shall have judicial immunity in the same manner and to the same extent as a judge." Fla. Stat. § 44.107(1). A person serving as a mediator in any noncourt-ordered mediation has immunity under Fla. Stat. § 44.107(2) under prescribed conditions and no immunity "if he or she acts in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights, safety, or property."

appropriate to identify issues which we have not addressed above. We do so because these issues are worthy of consideration by the lawyer/mediator but simply beyond our ability to cover competently in this article.<sup>28</sup>

In pre-suit mediations involving multiple parties residing in different jurisdiction - unlike court ordered mediations where an action in a particular jurisdiction has been commenced - the dispute may pose conflict of law issues, *e.g.* what professional rules govern mediation privilege, confidentiality, and other relevant ethical standards. If the participants themselves cannot agree, the lawyer/mediator (or any mediator) should select clear rules, standards, and ethical guidelines to govern the process and make the participants aware of same (preferably in writing).

We have not addressed how the issues discussed above would play out in those states with lawyer reporting requirements similar to Model Lawyer Rule 8.3 but which do not have clearly defined statutes or rules providing for mediator certification and the confidentiality of mediations. Our hope is that this article will serve as a catalyst for action in such states. Nor does this article express any opinion as to a foreign jurisdiction holding the lawyer/mediator to the rules governing attorneys in their state, especially if that state considers mediation the practice of law.

Last, but not least, and perhaps most troubling, this article merely touches upon the potential professional liability of the mediator for a civil suit for damages for breaches of conduct or giving legal advice when trapped between Scylla and Charybdis. While immunity may exist in some states,<sup>29</sup> a cause of action may be pled by invoking an exception under the

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<sup>28</sup> It bears repeating that this article focuses on the lawyer/mediator and does not address similar problems encountered by other professionals acting in the role of a mediator.

<sup>29</sup> *See, e.g.* FLA. STAT. §44.107, which provides:

44.107 Immunity for arbitrators, mediators, and mediator trainees.--

immunity statute or by the creative plaintiff's attorney recharacterizing the mediator's conduct as attorney negligence. When the "settle and sue" situation arises, the allegations of the complaint filed against the mediator will characterize the lawyer/mediator as an "expert" attorney chosen to mediate the case for precisely that reason. Moreover, the party suing the mediator will likely allege something along the lines of the following: "I thought he was my attorney, since he told me he was an expert in the field and felt I should follow his 'advise, opinion, and experience'." This is the very language that can result in liability attaching when none was expected. Unfortunately, mediators create such potential exposure by marketing themselves with substantial expertise and knowledge to mediate cases in the areas of the mediator's prior experience and expertise as a lawyer.

## **IX. Recommendations**

Lawyer/mediator ethical conundrums can possibly be eliminated, in large part, by one change to the Model Mediator Standard's Preamble, one addition to Rule 8.3(c) of the Model Lawyer Rules, and one revision to the Uniform Mediation Act,

We recommend that the Preamble to the Model Mediator Standards be changed as follows:

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- (1) . . . [M]ediators serving under s. 44.102 [Court-ordered mediation] . . . shall have judicial immunity in the same manner and to the same extent as a judge.
  - (2) A person serving as a mediator in any noncourt-ordered mediation shall have immunity from liability arising from the performance of that person's duties while acting within the scope of the mediation function if such mediation is:
    - (a) Required by statute or agency rule or order;
    - (b) Conducted under ss. 44.401-44.406 by express agreement of the mediation parties; or
    - (c) Facilitated by a mediator certified by the Supreme Court, unless the mediation parties expressly agree not to be bound by ss. 44.401-44.406.The mediator does not have immunity if he or she acts in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

Various aspects of a mediation, including some matters covered by these Standards, may also be affected by applicable law, court rules, regulations, other applicable professional rules, mediation rules to which the parties have agreed and other agreements of the parties. These sources may create conflicts with, and may take precedence over, these Standards. However, a mediator should make every effort to comply with the spirit and intent of these Standards in resolving such conflicts. This effort should include honoring all remaining Standards not in conflict with these other sources. Moreover, in the course of performing mediation services, these Standards prevail over any conflicting ethical standards to which a mediator may otherwise be bound. (double underlined words added).

This addition would have the Model Mediator Standards trump only conflicting *ethical standards* to which the lawyer/mediator may otherwise be bound. To the extent conflicts do not exist between the Model Mediator Standards and “applicable law, court rules, regulations, . . . mediation rules to which the parties have agreed and other agreements of the parties,” the Model Mediator Standards are trumped, occupying a subordinate role. In effect, therefore, the lawyer/mediator would not be obligated to report another lawyer’s ethical misconduct to the appropriate authorities, but, would be available to testify, as required by law.

This proposal is in part based on Rule 10.650 of the Florida Rules for Certified & Court-Appointed Mediators dealing with current standards. That rule provides:

Other ethical standards to which a mediator may be professionally bound are not abrogated by these rules. In the course of performing mediation services, however, these rules prevail over any conflicting ethical standards to which a mediator may otherwise be bound.

In fairness to the mediation process and participants, clarity is required to extricate the dual professional mediator from this conflict. Contrary to the Model Mediator Standards, Florida’s mediation rules take the clear, unequivocal position that mediator rules trump all other conflicting ethical standards to which the lawyer/mediator is bound. There can be only one reason for doing so - the recognition that the empowerment bestowed by mediation is more important than the rationale underlying lawyer rules of professional conduct designed to govern

litigation and transactional paradigms. Moreover, a comment to Rule 4-1.12 of Florida's Rules of Professional Conduct states that: "A Florida Bar member who is a certified mediator is governed by the applicable law and rules relating to certified mediators." However, this comment does not address: (a) conflicts which may exist between Florida's certified mediator rules and the Rules of Professional Conduct governing lawyers; and (b) lawyers who are members of The Florida Bar who mediate cases but are not certified mediators under the standards prescribed by the Florida Supreme Court.

Interestingly, and perhaps paradoxically, Florida's Mediator Ethics Advisory Committee has opined that the filing of a bar grievance is not prohibited by the confidentiality requirements imposed by statute and rule.<sup>30</sup> By statute, Florida recognizes an exception to the confidentiality accorded mediation communications where a communication is "offered to report, prove or disprove professional misconduct occurring during the mediation, solely for the internal use of the body conducting the investigation of the conduct."<sup>31</sup> On the issue of whether the lawyer/mediator is **required** to "blow the whistle" this opinion states:

As to the question of whether the referenced communication is required to be reported to The Florida Bar by an attorney mediator, the Committee must defer to The Florida Bar and the provisions of rule 4-8.3, Rules Regulating the Florida Bar, which deals with the requirement of reporting such matters. While rule 10.650 provides that in the course of providing mediation services, mediation rules control over conflicting ethical standards, the rule also specifically states that other ethical standards to which the mediator is subject are not abrogated. Therefore, as seems to be the case in your situation, concurrent non-conflicting rules would be operative.<sup>32</sup>

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<sup>30</sup> MEAC Advisory Opinion 2006-005 (September 21, 2006).

<sup>31</sup> FLA. STAT. § 44.405(4)(a)6 (2007).

<sup>32</sup> MEAC Advisory Opinion 2006-00 at 3 (footnote omitted).

To provide a clear, unequivocal answer to this question, we recommend that Model Lawyer Rule 8.3(c) be amended as follows:

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 ~~or~~ information gained by a lawyer or judge while participating in an approved lawyers assistance program, or information gained by a lawyer while serving as a third-party neutral where such information is deemed privileged or confidential by applicable law, forum rules, regulations, or other professional rules. (deletions stricken and double underlined words added).

We also recommend that an additional comment be added to Model Lawyer Rule 8.3, to be denominated as comment [6], to read as follows:

[6] Information gained by a lawyer while serving as a third-party neutral, especially as a mediator, is typically deemed privileged or confidential. Where information gained by a lawyer serving as a third-party neutral is accorded such privileged or confidential treatment, the lawyer/third-party neutral is excused from Rule 8.3(a)'s disclosure and reporting requirements. As existing alternative dispute resolution mechanisms evolve and new procedures develop, it is contemplated that law, forum rules, regulations, professional rules, and agreements among participants can and must address the extent to which information gained by the lawyer serving as a third-party neutral should be deemed privileged or confidential as necessary to promote efficacy of the process.

The law favors settlements, whether mediated or achieved via direct lawyer or party negotiations. Mediated settlements, through the efforts of the third party neutral (the mediator), enhances and protects self-determination while simultaneously promoting empowerment. To achieve these goals, the mediator must be able to represent that the mediation process is confidential, and the participants must be able to rely on such confidentiality. This expectation of confidentiality, created by the process, is shared equally by the parties, their attorneys and the mediator. In the absence of such assured confidentiality, the mediation process is significantly impaired, if not totally compromised.

Clearly, as a matter of public policy, there should be and are limited exceptions to mediation confidentiality. In many instances, those exceptions are codified by statute. Such

statutory exceptions reflect the delicate balance between confidentiality and necessary disclosures. Hence, we believe it is fundamentally unfair for the parties' expectations of confidentiality to be frustrated because the mediator happens to be a lawyer.

We believe mediator and lawyer ethical standards/rules should permit lawyer/mediators to be, first and foremost, mediators when acting as a mediator. Therefore, in striking a balance between competing interests, we believe the lawyer/mediator should not be the catalyst for a bar grievance but should be available to testify. Any other position imperils the lawyer/mediator's impartiality and impairs his or her effectiveness in helping the parties achieve the common ground of a settlement. Our recommendations are designed to minimize lawyer/mediator ethical dilemmas while empowering parties to make informed, voluntary decisions without a chilling effect not only on the participants but on the attorneys as well. This, of course, is the prime objective of mediation.

The ability of the mediator and the mediation process to assure the users of confidentiality continues the effectiveness of this very empowering and successful settlement process. At the same time it is essential that the mediator be able to perform the mediator's functions without the fear or uncertainty of being caught between two different and conflicting sets of standards and ethics. The mediator while being under the duty to properly mediate should be held accountable only for those responsibilities and not those of another profession.

## **X. Closing Observation**

This article is clearly the result of the dual profession lawyer/mediator. The ethical issues which arise from wearing two professional hats will one day, we hope, become moot when the professional mediator is truly born!

# JUDGES GONE WILD: WHY BREAKING THE MEDIATION CONFIDENTIALITY PRIVILEGE FOR ACTING IN “BAD FAITH” SHOULD BE REEVALUATED IN COURT-ORDERED MANDATORY MEDIATION

*Samara Zimmerman*

## I. INTRODUCTION

A judge has just ordered two parties in a civil suit involving the photographing and filming of underage minor girls to go to a court-ordered mandatory mediation in an attempt to avoid litigation. The defendant arrives at the mediation four hours late, bare-foot and wearing sweat shorts and a backwards baseball cap, all the while playing with an electronic device.<sup>1</sup> As plaintiffs’ counsel starts their presentation, defendant puts his exposed, filthy feet up on the table, opposite plaintiffs’ counsel.<sup>2</sup> Plaintiffs’ counsel says four words, “Plaintiffs were minor girls,” when defendant yells, “Are the girls minors now?”<sup>3</sup> Continuing, plaintiffs’ counsel says, “Plaintiffs are minor girls who were severely harmed by defendant.”<sup>4</sup> Defendant then explodes, “Don’t expect to get a f—king dime—not one f—king dime!”<sup>5</sup> Defendant then proceeds to repeat himself an estimated fifteen times.<sup>6</sup> This continues until defendant finally shouts, “I hold the purse strings. I will not settle this case, at all. I am only here because the court is making me be here!”<sup>7</sup> The plaintiffs’ attorneys then begin to leave and defendant screams, “We will bury you and your clients! I’m going to ruin you, your clients, and all of your ambulance chasing partners!”<sup>8</sup>

As mediation is an alternative dispute resolution (“ADR”) process whose core value is confidentiality, should a party’s con-

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<sup>1</sup> Victoria Pynchon, Esq., *Mediating? Bring Your Toothbrush. Joe Francis and “Girls Gone Wild,”* SETTLE IT NOW NEGOTIATION BLOG, Apr. 17, 2007, <http://www.negotiationlawblog.com/2007/04/articles/conflict-resolution/mediating-bring-your-toothbrush-joe-francis-and-girls-gone-wild/>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

duct, no matter how revolting, be grounds for breaking that confidentiality?<sup>9</sup> For Joseph Francis, the founder of the *Girls Gone Wild* adult video series,<sup>10</sup> a court-mandated mediation did not provide the security and discretion fundamentally guaranteed by a practice purporting to advance party confidentiality, self-determination, and impartiality.<sup>11</sup> As a result of abnormal behavior at a “confidential” mediation session, which included threats to “bury” and “ruin” opposing counsel and their clients, the thirty-four year old Francis found himself first in court, obliged to reveal mediation communications, and then behind bars, an adverse guest of the Federal Bureau of Prisons.<sup>12</sup> The Florida civil case of *Doe v. Francis* offers an important case study showing the impact of the “bad faith” exception to mediation confidentiality upon the process and underlying principles of mediation.<sup>13</sup> *Doe v. Francis* raises deep-seated questions involving the limits of mediation confidentiality, what is meant by negotiating in “bad faith,” and the influence courts have in directing mediation.

Having an exception to mediation confidentiality for mediating in “bad faith” should be examined in the context in which it arises, as referring court cases to mediation as a matter of course may create “process dissonance.”<sup>14</sup> When mediation is introduced into the litigation setting, “mixed messages and conflicting priorities” are thrust upon its participants.<sup>15</sup> Parties to mediation and their representatives anticipate and demand very dissimilar strategic advances than those same parties would in the adjudicative setting.<sup>16</sup> Good faith requirements intensify the “process dissonance”

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<sup>9</sup> Fran L. Tetunic, *Florida Mediation Case Law: Two Decades of Maturation*, 28 NOVA L. REV. 87 (2003).

<sup>10</sup> Mantra, <http://www.mantraent.com/about.php> (last visited Feb. 24, 2009) (*Girls Gone Wild* is a video series by the soft-core pornography production company Mantra Films, Inc. “which gained industry prominence for capturing adventurous young women expressing themselves in settings such as Mardi Gras, Spring Break and tropical islands.”).

<sup>11</sup> Michael D. Young, *Mediation Gone Wild: How Three Minutes Put an ADR Party Behind Bars*, 25 ALTERNATIVES TO HIGH COSTS LITIG. 97 (2007).

<sup>12</sup> *Id.*

<sup>13</sup> *Doe v. Francis*, No. 5:03cv260-RS-WCS, 2003 WL 24073307 (N.D. Fla. filed Oct. 8, 2003).

<sup>14</sup> Carol L. Izumi & Homer C. La Rue, *Prohibiting “Good Faith” Reports Under The Uniform Mediation Act: Keeping The Adjudication Camel Out Of The Mediation Tent*, 2003 J. DISP. RESOL. 67, 68 (defining process dissonance in the context of mediation confidentiality as the fact that despite the importance of confidentiality mediation, it is at odds with a judicial system favoring the consideration of all relevant evidence); Paul Dayton Johnson, Jr., *Confidentiality in Mediation: What can Florida Glean From the Uniform Mediation Act?*, 30 FLA. ST. U. L. REV. 487, 490 (2003).

<sup>15</sup> Izumi & La Rue, *supra* note 14, at 68.

<sup>16</sup> *Id.*

problem by “conflating litigation and mediation values.”<sup>17</sup> The United States Constitution guarantees citizens the right to a trial, which, in many cases, includes the right to a jury.<sup>18</sup> While public policy supports private resolution of disputes, on the other hand, it values sound and efficient judicial management. Although this would favor requirements to maintain the integrity of a court-ordered mediation, “those two factors do not trump the constitutional rights of citizens to have their cases heard and decided in court.”<sup>19</sup>

This Note focuses on the reasons why a good faith requirement or a bad faith exception for breaking mediation confidentiality is objectionable and offers an alternative for the Florida court system that, if implemented, could mitigate such disadvantages. I will discuss “the intersection between [a] court-ordered mediation, the confidentiality of which is mandated by law . . . and the power of a court to control proceedings,” and persons who appear before it by sanctioning conduct that taking place in mediation.<sup>20</sup> Part II of this Note will begin by providing a background to the *Doe v. Francis* civil case. It will highlight the central concerns brought by the case and compare the statutes and case law from other jurisdictions, which strongly advocate a policy against a “bad faith” exception to mediation confidentiality. In Part III, I will argue that a bad faith exception to mediation confidentiality in a court-ordered mediation goes against the central tenets of mediation as an ADR practice and undermines what the mediation process seeks to achieve. I will also describe how enabling or compelling a mediator to reveal details of a mediation through a “bad faith” exception ends up hindering the purpose of mediation by furthering “legal values over mediation values.”<sup>21</sup> Finally, in Part IV, I will provide an overview of Florida statutory law on court-ordered mediation confidentiality, presenting its weaknesses and offering a method to handle bad faith exceptions that better balance the demand for productive party conduct with the need for maintaining mediation

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<sup>17</sup> *Id.*

<sup>18</sup> U.S. CONST. amend. VII (“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.”); Section Council, *Resolution on Good Faith Requirements for Mediators and Mediation Advocates in Court-Mandated Mediation Programs*, 2004 A.B.A. SEC. DISP. RESOL. 5, available at <http://www.abanet.org/dispute/webpolicy.html#9>.

<sup>19</sup> Section Council, *supra* note 18.

<sup>20</sup> *Foxgate Homeowners’ Ass’n v. Bramalea Cal., Inc.*, 25 P.3d 1117, 1119 (Cal. 2001) (citing EVID. CODE §§ 703.5, 1115–1118, and CODE CIV. PROC., § 128).

<sup>21</sup> *Izumi & La Rue*, *supra* note 14, at 68.

confidentiality. I propose the creation of a two-tier standard for behavioral mediation confidentiality. The first tier sets out objective criteria a party must follow as requirements for mandatory mediation; such standards provide clear guidance to parties in mediation and more sufficient notice of what the process requires. The second tier offers a procedure for situations where the objective standards are met but bad faith conduct claims are still brought forward. This tier could entail an in camera review by a judge to determine whether the claim of bad faith is frivolous or deserves sanctions before anything is made public. Since confidentiality is an essential element of mediation, this two-tiered standard is important because it holds parties accountable for their actions but simultaneously preserves mediation confidentiality, except under extreme circumstances.

## II. COMPARISON OF CASE AND STATUTORY LAW IN OPPOSITION TO A "BAD FAITH" EXCEPTION FOR BREACHING MEDIATION CONFIDENTIALITY

*Doe v. Francis* is an extreme example of what can happen to a person who objectively follows a court-ordered mediation, only to end up sanctioned with criminal charges and a jail sentence because the participation was not subjectively satisfactory to the court. In this section, I will outline *Doe v. Francis* in detail, and analyze case law from other jurisdictions that do not adhere to a "good faith" requirement to mediation. Through the analysis of this case law, one is able to see why a "good faith" requirement is undesirable, as well as how the outcome of *Doe v. Francis* would have changed had Florida adopted a statutory scheme that prohibited the judiciary from allowing a bad faith exception to break mediation confidentiality.

In *Doe v. Francis*, several unidentified minor girls<sup>22</sup> and their parents filed a civil action alleging that defendant Joseph Francis was responsible for exploiting underage girls to get them to participate in salacious acts of soft pornography for the franchise's videos.<sup>23</sup> As part of litigation proceedings, the Court ordered the parties to participate in mediation.<sup>24</sup> The terms of the Mediation

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<sup>22</sup> The minor girls' names are concealed from the court records. Collectively, they are referred to as "Doe."

<sup>23</sup> Young, *supra* note 11.

<sup>24</sup> *Id.*

Order specified that all statements or declarations were confidential as a consequence of classified settlement negotiations.<sup>25</sup> During the mediation session, Francis displayed an outlandish behavior, arriving to the mediation four hours late, wearing inappropriate clothing and suggesting that he was only at the mediation because it was mandated and he would not consider settlement.<sup>26</sup> Francis then broke out in an aggressive rant, threatening to ruin the plaintiffs' lawyers and their clients.<sup>27</sup> Plaintiffs' counsel subsequently ended the mediation and filed a motion seeking financial sanctions against Francis due to his uncivil behavior.<sup>28</sup>

Plaintiffs requested the court to utilize its inherent powers to prevent abuses of the judicial process and asserted that Francis's statements made during the mediation were not confidential because he threatened violence.<sup>29</sup> Defense counsel countered that the violence exception statute did not apply because the words "bury" and "ruin" were not used to threaten violence, but only to communicate frustration.<sup>30</sup> Defense counsel further argued that Francis's behavior did not derail the mediation, as plaintiff ignored the ensuing thirteen hours of substantive mediation, which lasted until late in the afternoon of the following day, when the impasse was declared after the defendant's final offer was rejected.<sup>31</sup> They claimed that plaintiffs' motion for sanction was merely a mechanism to introduce inadmissible facts in order to provoke the court.<sup>32</sup> In making this argument, defense counsel stressed that the imposition of sanctions against Francis was inappropriate since: (1) no direct court order had been violated; (2) the parties mediated for over thirteen hours; and (3) there was no express authority empowering the court to sanction a party for behavior in a confidential mediation process.<sup>33</sup>

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<sup>25</sup> *Id.* at 104.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*; FLA. STAT. ANN. § 44.405(4)(a)(2) (West 2006) ("Notwithstanding subsections (1) and (2), there is no confidentiality or privilege attached to a signed written agreement reached during a mediation, unless the parties agree otherwise, or for any mediation communication: That is willfully used to plan a crime, commit or attempt to commit a crime, conceal ongoing criminal activity, or threaten violence.").

<sup>30</sup> Young, *supra* note 11, at 104.

<sup>31</sup> *Id.* at 107–08.

<sup>32</sup> *Id.* at 106.

<sup>33</sup> *Id.* at 105–06.

The presiding judge, Judge Smoak, ordered an evidentiary hearing into the situation.<sup>34</sup> In the end he determined that Francis's behavior was unacceptable, although not violent, and that his poor conduct violated the Court's Scheduling and Mediation Order by preventing the parties from mediating.<sup>35</sup> Judge Smoak ordered Francis to pay plaintiffs' attorneys' fees and costs.<sup>36</sup> The judge also authorized coercive incarceration for Francis, which would be removed upon his proper participation in mediation.<sup>37</sup> Francis would be released from incarceration "when the mediator certifies in person to the court that Mr. Francis has fully complied with [the] Order and has participated in the mediation in good faith."<sup>38</sup>

During the second mediation, it appeared that a settlement was almost reached.<sup>39</sup> The defendant's settlement agreement draft offered payment over time rather than a lump sum.<sup>40</sup> This type of payout benefited the defendant, and the plaintiffs strongly objected.<sup>41</sup> The mediator informed Judge Smoak of the impasse—that there had been an unconditional offer and acceptance, but the defendant later offered the plaintiffs a newly proposed agreement with considerably diverse conditions.<sup>42</sup> Plaintiffs once again sought sanctions against defendant within the full discretion of the court.<sup>43</sup> Defense counsel responded that three and a half days of mediation, which tendered substantial offers, cannot be brought under the purview of bad faith or any other violations of a court mandated mediation order.<sup>44</sup> Judge Smoak disagreed with defense counsel and scrutinized Francis's reposition as an effort to rescind his tendered offer by inflicting objectionable conditions, thereby violating the express conditions upon which Judge Smoak suspended the requirement that Francis surrender to the U.S. Marshals.<sup>45</sup> Thus, the court terminated Francis's suspended incarceration, with Francis to remain in custody until a new formal mediation in a proper setting could be arranged.<sup>46</sup>

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<sup>34</sup> *Id.* at 105.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 107.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 107-08.

<sup>45</sup> *Id.* at 108.

<sup>46</sup> *Id.*

In the end, Francis's civil case was finally settled and he was released from the sanction of coercive incarceration for the civil contempt.<sup>47</sup> With the conclusion of this case, serious questions arise about how the mediation process can be held intact when having a "bad faith" exception to mediation confidentiality undermines so many of the central values and purposes mediation inhabits. The disparities of this case and counterproductive conduct of the Florida court is best viewed from the perspective of cases and statutory law from other jurisdictions that rationally ruled out the ability of the court to break mediation confidentiality.

In *Foxgate Homeowners' Ass'n v. Bramalea California, Inc.*, the Supreme Court of California held that there were no exceptions to the confidentiality of mediation communications or to the statutory limits on the content of mediator's reports, rendering the appellate court's judicially created exception inconsistent with the language and the legislative intent of those sections.<sup>48</sup> Thus, the plaintiffs' motion for sanctions and the trial court's consideration of the motion and attached documents violated Sections 1119 (confidentiality of mediation communications)<sup>49</sup> and 1121 (confidentiality of mediator's reports and findings) of the California Evidence Code.<sup>50</sup> Neither a mediator nor a party may reveal communica-

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<sup>47</sup> *Id.*

<sup>48</sup> *Foxgate Homeowners' Ass'n v. Bramalea Cal., Inc.*, 25 P.3d 1117, 1119 (Cal. 2001).

<sup>49</sup> Cal. Evid. Code § 1119 (West 2009) (Written or oral communications during mediation process: admissibility):

Except as otherwise provided in this chapter: (a) No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given; (b) No writing, as defined in Section 250, that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given; (c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential.

<sup>50</sup> Cal. Evid. Code § 1121 (West 2009) (Mediator's reports and findings):

Neither a mediator nor anyone else may submit to a court or other adjudicative body, and a court or other adjudicative body may not consider, any report, assessment, evaluation, recommendation, or finding of any kind by the mediator concerning a mediation conducted by the mediator, other than a report that is mandated by court rule or other law and that states only whether an agreement was reached, unless all parties to the mediation expressly agree otherwise in writing, or orally in accordance with Section 1118.

tions made during mediation.<sup>51</sup> Also, while a party may do so, a mediator may not report to the court about the conduct of participants in a mediation session.<sup>52</sup>

The court in *Foxgate* stated:

The parties . . . recognize the purpose of confidentiality is to promote "a candid and informal exchange regarding events in the past. . . . This frank exchange is achieved only if the participants know that what is said in the mediation will not be used to their detriment through later court proceedings and other adjudicatory processes."<sup>53</sup>

The court further noted, "[m]ediation demands . . . that the parties feel free to be frank not only with the mediator but also with each other. . . . Agreements may be impossible if the mediator cannot overcome the parties' wariness about confiding in each other during these sessions."<sup>54</sup>

To carry out the purpose of encouraging mediation by ensuring confidentiality, the statutory scheme, including Sections 1119 and 1121, unqualifiedly barred disclosure of communications made during mediation absent an express statutory exception.<sup>55</sup> The court in *Foxgate* continued by asserting:

[T]he legislature has weighed and balanced the policy that promotes effective mediation by requiring confidentiality against a policy that might better encourage good faith participation in the process. Whether a mediator in addition to participants should be allowed to report conduct during mediation that the mediator believes is taken in bad faith and therefore might be sanctionable . . . is a policy question to be resolved by the legislature. Although a party may report obstructive conduct to the court, none of the confidentiality statutes made an exception for reporting bad faith conduct or for imposition of sanctions under that section when to do so would require disclosure of communications or a mediator's assessment of a party's conduct. . . .<sup>56</sup>

Correspondingly, Florida's statutory law, like that in California, does not provide an express exception to breaking mediation

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<sup>51</sup> *Foxgate*, 25 P.3d 1117, at 1119.

<sup>52</sup> *Id.*

<sup>53</sup> *Foxgate Homeowners' Ass'n v. Bramalea Cal., Inc.*, 25 P.3d 1117, 1124 (Cal. 2001) (quoting Nat. Conf. Comm'rs on U. St. Laws, U. Mediation Act (May 2001) § 2, Reporter's working notes, ¶ 1).

<sup>54</sup> *Id.* at 1126 (quoting Note, *Protecting Confidentiality in Mediation*, 98 HARV. L. REV. 441, 445 (1984)).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 1128.

confidentiality for parties not mediating in good faith and conducting themselves inappropriately.<sup>57</sup> For the same reason as that provided for by the California Supreme Court in *Foxgate*, Judge Smoak in *Doe* exceeded his positional authority by mandating the creation of a judicial exception for breaking mediation confidentiality. The Florida legislature was in a position to balance the need

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<sup>57</sup> See FLA. STAT. § 44.405 (2006) (Mediation Alternatives To Judicial Action: Confidentiality; privilege; exceptions):

1) Except as provided in this section, all mediation communications shall be confidential. A mediation participant shall not disclose a mediation communication to a person other than another mediation participant or a participant's counsel. A violation of this section may be remedied as provided by s. 44.406. If the mediation is court ordered, a violation of this section may also subject the mediation participant to sanctions by the court, including, but not limited to, costs, attorney's fees, and mediator's fees.

2) A mediation party has a privilege to refuse to testify and to prevent any other person from testifying in a subsequent proceeding regarding mediation communications.

3) If, in a mediation involving more than two parties, a party gives written notice to the other parties that the party is terminating its participation in the mediation, the party giving notice shall have a privilege to refuse to testify and to prevent any other person from testifying in a subsequent proceeding regarding only those mediation communications that occurred prior to the delivery of the written notice of termination of mediation to the other parties.

4)(a) Notwithstanding subsections 1) and 2), there is no confidentiality or privilege attached to a signed written agreement reached during a mediation, unless the parties agree otherwise, or for any mediation communication:

1. For which the confidentiality or privilege against disclosure has been waived by all parties;

2. That is willfully used to plan a crime, commit or attempt to commit a crime, conceal ongoing criminal activity, or threaten violence;

3. That requires a mandatory report pursuant to chapter 39 or chapter 415 solely for the purpose of making the mandatory report to the entity requiring the report;

4. Offered to report, prove, or disprove professional malpractice occurring during the mediation, solely for the purpose of the professional malpractice proceeding;

5. Offered for the limited purpose of establishing or refuting legally recognized grounds for voiding or reforming a settlement agreement reached during a mediation; or

6. Offered to report, prove, or disprove professional misconduct occurring during the mediation, solely for the internal use of the body conducting the investigation of the conduct.

(b) A mediation communication disclosed under any provision of subparagraph (a)3., subparagraph (a)4., subparagraph (a)5., or subparagraph (a)6. remains confidential and is not discoverable or admissible for any other purpose, unless otherwise permitted by this section.

5) Information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery by reason of its disclosure or use in mediation.

6) A party that discloses or makes a representation about a privileged mediation communication waives that privilege, but only to the extent necessary for the other party to respond to the disclosure or representation.

for confidentiality in the mediation context against the need for promoting productive conduct in mediation sessions. It should have been the Florida legislature's responsibility to reexamine its position and institute an exception to mediation confidentiality, not for the court to fabricate a judicially instituted exclusion.

Another important case to consider is one coming out of the Florida courts, which evidently was not taken into consideration during the *Doe v. Francis* trial. In *Avril v. Civilmar*,<sup>58</sup> the plaintiff's only basis for sanctions was that defendants were unwilling to make a satisfactory settlement offer.<sup>59</sup> The mediation statutes, however, do not require that parties actually settle cases.<sup>60</sup> Section 44.1011(2) of the Florida Statutes explains that mediation is "an informal and non-adversarial process with the objective of helping the disputing parties reach a mutually acceptable and voluntary agreement. In mediation, decisionmaking authority rests with the parties."<sup>61</sup> It is clearly not the intent to force parties to settle cases they want to submit to trial before a jury.<sup>62</sup> There is no requirement that a party even makes an offer at mediation, let alone offers what the opposition wants to settle.<sup>63</sup> Yet, in *Doe v. Francis*, Francis was coercively incarcerated for not providing the plaintiffs with an appropriate settlement agreement—such incarceration only being lifted upon the court's judgment of a suitable settlement. Judge Smoak even admitted that "Francis ultimately purged his contempt, not because he settled the case, but because the settlement demonstrated that he had finally mediated in good faith."<sup>64</sup> In that statement, Judge Smoak stated that Francis's good faith in mediation was demonstrated by his settlement with the plaintiffs, yet parties to mediation are supposed to have decisional autonomy not to settle at all and proceed to a trial. As stated in *In re Acceptance Insurance Co.*,<sup>65</sup> "a court may compel parties to participate . . . [in] mediation, but it cannot compel them to negotiate in good faith or to settle their dispute."<sup>66</sup> In this case, it was determined that the trial court improperly allowed inquiry into communications made

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<sup>58</sup> *Avril v. Civilmar*, 605 So. 2d 988 (Fla. Dist. Ct. App. 1992).

<sup>59</sup> *Id.* at 989.

<sup>60</sup> *Id.*

<sup>61</sup> FLA. STAT. ANN. § 44.1011(2) (West 2006).

<sup>62</sup> *Avril*, 605 So. 2d at 990.

<sup>63</sup> *Id.*

<sup>64</sup> *Pitt v. Francis*, No. 5:07cv169-RS-EMT, 2007 U.S. Dist. LEXIS 93047, at \*23-\*24 (N.D. Fla. 2007).

<sup>65</sup> *In re Acceptance Ins. Co.*, 33 S.W.3d 443 (Tex. App. 2000).

<sup>66</sup> *Id.* at 451.

by a participant relating to the subject matter of the mediation which were confidential, not subject to disclosure, and could not be used as evidence against the participant in any judicial or administrative proceeding.<sup>67</sup> The Texas court held that “[a]n order requiring ‘good faith’ negotiation does not comport with the voluntary nature of the mediation process and has been held void.”<sup>68</sup>

Although the court can mandate mediation, settlement determinations are supposed to rest with the parties. In *Decker v. Lindsay*,<sup>69</sup> trial Judge Lindsay ordered the Deckers to mediate their negligence action against the real party in interest. The Court’s Rules for Mediation provided in pertinent part that “all parties commit to participate in the proceedings in good faith with the intention to settle, if at all possible.”<sup>70</sup> The appellate court concluded that Judge Lindsay could not require the Deckers to negotiate in good faith and attempt to reach a settlement.<sup>71</sup> To do so would not be “consistent with a scheme where a court refers a dispute to an ADR procedure” because “no one can compel the parties to negotiate or settle a dispute unless they voluntarily and mutually agree to do so.”<sup>72</sup> Since the parties clearly indicated they wished to proceed with trial, the referral to mediation cannot require good faith negotiation. Likewise, in *Doe v. Francis*, Francis explicitly stated during the first mediation that his preference was not to settle the case.<sup>73</sup> Given that referral to mediation is not a substitute for trial, there is no foundation for breaking the inviolability of mediation confidentiality owed to Francis’s adamant refusal to provide settlement terms or provisions within the confines of court proscribed “good faith” behavior. A case is meant to be tried if not settled at mediation.<sup>74</sup>

The case of *Graham v. Baker*<sup>75</sup> is also worth noting. The Iowa Supreme Court held that defendant and his clients attending the mediation satisfied the statutory requirement that a creditor par-

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<sup>67</sup> *Id.* at 452–53.

<sup>68</sup> *Id.* at 452.

<sup>69</sup> *Decker v. Lindsay*, 824 S.W.2d 247 (Tex. App. 1992).

<sup>70</sup> *Id.* at 249.

<sup>71</sup> *Id.* at 251.

<sup>72</sup> *Id.*

<sup>73</sup> Young, *supra* note 11, at 104.

<sup>74</sup> *Decker*, 824 S.W.2d at 248.

<sup>75</sup> *Graham v. Baker*, 447 N.W.2d 397, 398 (Iowa 1989) (“Defendant refused to cooperate with mediator, denying plaintiffs any opportunity to put forward proposals resolving the situation, and demanding he be given a mediation release. Defendant was hostile to plaintiffs, the mediator, and the mediation process.”).

ticipate in mediation.<sup>76</sup> The court positioned that the word “participate” has no clear and unmistakable meaning.<sup>77</sup> In its primary sense:

[I]t means simply a sharing or taking part with others but when it is applied to a particular situation, it takes on secondary implications that render it ambiguous. Under some circumstances it may denote a mere passive sharing while under other circumstances an implication of active engagement may accompany its use.<sup>78</sup>

The court observed that defendant’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.”<sup>79</sup> The court found that the defendant’s presence at the mediation satisfied the minimal participation required by the statute.<sup>80</sup> Although recognizing that resistant parties might thwart the purposes of mediation, *Graham* stated that a narrow interpretation of the statute’s “participation” requirement is consistent with the legislature’s view of mediation as an advisory process. While Francis’s behavior in *Doe v. Francis* was inappropriate and unseemly, there is nothing in sections 44.401–dd.406 of the Florida Mediation Confidentiality and Privilege Act that prescribes guidance for what constitutes participation within a mediation nor does it provide for an exception to mediation confidentiality for behavior that equates to non-participation.<sup>81</sup> Francis may have acted in an offensive manner but he joined in the first mediation for over thirteen hours and for three and half days in the second mediation, a mediation which led to a considerable offer.<sup>82</sup> For the Florida court to independently deduce the legislature’s plain intent and conclude that Francis did not “participate” in the mediation, without having fixed guidelines to suggest what the court entails in the meaning of participation, was an unwarranted means for breaking mediation confidentiality.

*Doe v. Francis* gives rise to great concern about the “judge’s apparent failure or refusal to appreciate that the power of mediation as a peacemaking process comes from its private, consensual,

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<sup>76</sup> *Id.* at 401.

<sup>77</sup> *Id.* at 400.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 401.

<sup>80</sup> *Id.*

<sup>81</sup> See FLA. STAT. § 44.405 (2006).

<sup>82</sup> Young, *supra* note 11, at 107–08.

and voluntary nature.”<sup>83</sup> The fact the mediation was “court-sanctioned does not transform the process into something new or different that authorizes judicial intervention and interference. Nor does it allow a judge to compel a party to ‘voluntarily’ settle a case.”<sup>84</sup>

### III. HOW A GOOD FAITH REQUIREMENT AND BAD FAITH EXCEPTION TO MEDIATION CONFIDENTIALITY UNDERMINES THE MEDIATION PROCESS

Those who support a good faith requirement contend that inducing parties to “adhere to a minimal standard of conduct adds to the legitimacy of the process.”<sup>85</sup> The good faith participation requirements pertaining to party conduct in mediation proceedings are intended to guarantee process integrity and procedural fairness.<sup>86</sup> Sanction or liability would impart a disincentive to abuse power imbalances, while providing an important remedy when such misconduct occurs.<sup>87</sup> Furthermore, proponents of a good faith requirement argue that the scope of the confidentiality privilege should be narrowed to allow breach of confidentiality for acting in bad faith since ample confidentiality protection in mediation can be found in existing statutes, contractual agreements, and rules of evidence.<sup>88</sup>

While there needs to be recognition of the problem of bad faith conduct, “the cure is worse than the disease.”<sup>89</sup> The distinctive appeal of mediation is its ability to be a candid and secure setting for disputants to discuss their interests and views freely and comfortably.<sup>90</sup> Rules requiring good faith and threatening the impositions of sanctions “will hang over the parties like a Damoclean sword, inhibiting the process rather than abetting it.”<sup>91</sup> Cooperation, collaboration, confidentiality, trust, and voluntariness are am-

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<sup>83</sup> Russ Bleemer, *Update: Despite Mediation-Related Incarceration, Girls Gone Wild Founder is Headed for More ADR*, 26 ALTERNATIVES TO HIGH COSTS LITIG. 66 (2008).

<sup>84</sup> *Id.*

<sup>85</sup> Izumi & La Rue, *supra* note 14, at 73.

<sup>86</sup> *Id.* at 72.

<sup>87</sup> *Id.* at 73.

<sup>88</sup> Johnson, *supra* note 14.

<sup>89</sup> Roger L. Carter, *Oh, Ye of Little (Good) Faith: Questions, Concerns and Commentary on Efforts to Regulate Participant Conduct in Mediations*, 2002 J. DISP. RESOL. 367, 376 (2002).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 376–77.

bitions 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 parties."<sup>92</sup> Such interference can create a false perception of confidentiality, which ultimately discourages participants to mediation to be open. If their expectation is not matched with reality, it will damage the credibility of mediation to the general public.<sup>93</sup>

### A. Loss of Confidentiality

This section will discuss how a good faith requirement or a bad faith exception to mediation confidentiality can damage the core values as well as thwart the purposes of court-mandated mediation. By probing the principles and intent of mediation as an ADR process, the constructive function of a good faith requirement for court mandated mediation is shown to hinder more than help in the management of mediation.

A good faith requirement on the mediation process may have the most decisive effect on confidentiality. Some proponents of a good faith constraint to mediation claim that such a provision prevents the insertion of "Rambo-style litigators into the mediation process," thwarting fears of "lawyers playing litigation games, engaging in fishing expeditions for discovery purposes, trying to gain advantages over an opponent, or putting on a charade to comply with the court's order."<sup>94</sup> In reality, however, imparting information during negotiation that could enable the opposing party exposure to see one's vulnerabilities is, "risky and counterintuitive."<sup>95</sup> Confidentiality facilitates parties in divulging their personal feelings and private thoughts about the conflict that otherwise might not be revealed in an adversarial setting.<sup>96</sup> Because of this, "in many mediations, confidentiality does far more than enhance the candid nature of the discussion; between some adversaries, confidentiality may be akin to a precondition for any discussion."<sup>97</sup>

In addition, for the mediator to aid parties in arriving at an agreed-upon solution through the discovery of the range of com-

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<sup>92</sup> *Id.* at 392.

<sup>93</sup> Johnson, *supra* note 14, at 491.

<sup>94</sup> Izumi & La Rue, *supra* note 14, at 70.

<sup>95</sup> *Id.* at 84.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* (quoting Ellen D. Deason, *The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Reliability?*, 75 MARQ. L. REV. 79, 92 (2001)).

plex issues involved in a dispute, the protection of confidentiality becomes vitally important.<sup>98</sup> Mediators try to discover the issues and expose any underlying causes of conflict, anticipating that they will be able to draw upon this information to promote a reconciliation of the parties' differences.<sup>99</sup> Mediators frequently make use of information acquired from their discussions to generate "alternative grounds for settlement."<sup>100</sup> In the course of these discussions, "it is inevitable that the participants will be called upon to discuss facts that they would not normally be willing to concede."<sup>101</sup> Confidentiality is fundamental to the mediation process; without it, parties would not be willing to make the kind of concessions and admissions that lead to settlement.<sup>102</sup> It is the veil of confidentiality that enables parties to contribute efficiently and productively in mediation.<sup>103</sup>

Moreover, parties would reluctantly participate in mediation without the promise of confidentiality, concerned that a failed mediation would leave the opposing party free to disclose information in subsequent legal proceedings.<sup>104</sup> Advocates of a good faith requirement to mediation suggest that this type of condition is essential for the mediation process, which takes into account parties' conflicting viewpoints, to work effectively as a creative, collaborative dispute resolution process.<sup>105</sup> In fact, the opposite appears to be true. If a good faith requirement is implemented, making the promise of confidentiality conditional, parties may react cautiously and be "less likely to let down their litigation hair."<sup>106</sup> Confidentiality protection in mediation is a safeguard the public places enormous trust in, and by compromising this protection, participation in mediation could decline.<sup>107</sup> Confidentiality is crucial in surveying settlement options, and a "lack or breach of confidentiality 'limits the efficacy and the efficiency of mediation.'"<sup>108</sup> The inhibition of

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<sup>98</sup> *Id.*

<sup>99</sup> Lawrence R. Freedman & Michael L. Prigoff, *Confidentiality in Mediation: The Need for Protection*, 2 OHIO ST. J. ON DISP. RESOL. 37, 38 (1986).

<sup>100</sup> *Id.*

<sup>101</sup> Paul Dayton Johnson Jr., Note & Comment, *Confidentiality in Mediation: What can Florida Glean from the Uniform Mediation Act?*, 30 FLA. ST. U. L. REV. 487, 489 (2003).

<sup>102</sup> *Id.*

<sup>103</sup> Freedman & Prigoff, *supra* note 99.

<sup>104</sup> Izumi & La Rue, *supra* note 14, at 86.

<sup>105</sup> *Id.* at 70.

<sup>106</sup> 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).

<sup>107</sup> Izumi & La Rue, *supra* note 14, at 86.

<sup>108</sup> *Id.*

confidentiality “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.”<sup>109</sup> Consequently, the stream of information may be hindered if parties are constantly agonizing about the valuation of their participation.<sup>110</sup>

Furthermore, many good faith statutes and court rules call for mediators to report whether parties participated in good faith.<sup>111</sup> The mediator, in the event of a hearing on bad faith sanctions, will likely be compelled to testify.<sup>112</sup> Because the parties anticipate that their dialogue will remain confidential and that the mediator will not talk about these communications outside of the mediation, these expectations are deceived when there are exceptions to the mediator privilege of confidentiality.<sup>113</sup> Even if the mediator’s testimony could be restricted to a factual narration of the principal behaviors to the claim of bad faith, the parties’ trust in mediation confidentiality would be greatly damaged.<sup>114</sup> The mediator might as well open the parties’ session with the proclamation: “Mediation is a confidential proceeding—unless you do something that displeases me, the other party of the court.”<sup>115</sup> Subsequent accusations of mediation bad faith conduct will chip away at participants’ trust in the confidentiality of mediation, create hesitation in moving towards a course of action or settlement, and potentially hinder the process as a whole.<sup>116</sup>

## B. Mediator Impartiality

Essential to the mediation process is the concept of mediator impartiality.<sup>117</sup> A mediator is known as a “neutral” party to the mediation, having ethical as well as express and implied duties to be objective and keep confidences communicated during a media-

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<sup>109</sup> Alfini & McCabe, *supra* note 106.

<sup>110</sup> *Id.*

<sup>111</sup> Carter, *supra* note 89, at 393.

<sup>112</sup> *Id.*

<sup>113</sup> Izumi & La Rue, *supra* note 14, at 84.

<sup>114</sup> Carter, *supra* note 89, at 392.

<sup>115</sup> *Id.*

<sup>116</sup> 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, 633 (2001).

<sup>117</sup> Kimborlee K. Kovach, *Good Faith In Mediation-Requested, Recommended, Or Required?* *A New Ethic*, 38 *S. TEX. L. REV.* 575, 585 (1997).

tion session.<sup>118</sup> A good faith requirement for mediation would result in the “erosion of mediator impartiality and loss of trust in the mediator.”<sup>119</sup>

Given that mediators are the single resource of impartial, unbiased evidence about conduct in mediation, proponents for admitting mediator’s testimony deduce that such testimony is highly probative and reliable.<sup>120</sup> Nevertheless, parties and counsel’s interactions with the mediator can become misrepresented with good faith requirements by generating counterproductive distractions.<sup>121</sup> As parties to mediation recognize their conduct is being assessed, the participants may try to influence the mediator in an effort to “turn the mediator into their agent.”<sup>122</sup> They will also believe there is a need to “perform” for him or her.<sup>123</sup> This pressure associated with the impulse to perform builds an environment where the parties to mediation are less apt to have confidence in the process and the person at its center.<sup>124</sup> Judge Wayne Brazil explains that, “[a] duty to pass judgment would threaten a core component of the mediator’s sense of professional self—a sense at the center of which is a vision of ‘neutrality’ built around the notion that a facilitative mediator is never to express a normative or analytical critique.”<sup>125</sup>

While in some cases, where a mediator’s testimony may be the only dependable evidence as to a party’s conduct in mediation, policy concerns for disclosure might prevail over those favoring confidentiality and testimonial immunity.<sup>126</sup> At no time are mediators “quasi-policing agents” whose facilitative role as promoter of communication and understanding should be displaced by a good faith reporting requirement for mediation.<sup>127</sup> Recognizing that confidentiality and the appearance and actual impartiality of a third-party neutral are central to participants’ as well as the public’s trust

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<sup>118</sup> Weston, *supra* note 116, at 639–40.

<sup>119</sup> Alexandria Zylstra, *The Road From Voluntary Mediation to Mandatory Good Faith Requirements: A Road Best Left Untraveled*, 17 J. AM. ACAD. MATRIMONIAL L. 69, 96–97 (2001).

<sup>120</sup> John Lande, *Using Dispute System Design Methods To Promote Good-Faith Participation*, 50 UCLA L. REV. 69, 103 (2002).

<sup>121</sup> Izumi & La Rue, *supra* note 14, at 83.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> Wayne D. Brazil, *Continuing the Conversation About the Current Status and the Future of ADR: A View from the Courts*, 2000 J. DISP. RESOL. 11, 32.

<sup>126</sup> Weston, *supra* note 116, at 641.

<sup>127</sup> Izumi & La Rue, *supra* note 14, at 94.

in a mediation process, the court in *NLRB v. Joseph Macaluso, Inc.* stated:

However useful the testimony of a conciliator might be . . . in any given case . . . the conciliators must maintain a reputation for impartiality, and the parties to conciliation conference, must feel free to talk without any fear that the conciliator, may subsequently make disclosures as a witness in some other proceeding, to the possible disadvantage of a party to the conference. If conciliators were permitted or required to testify about their activities, or if the production of notes or reports of their activities could be required, not even the strictest adherence to purely factual matters would prevent the evidence from favoring or seeming to favor one side or the other.<sup>128</sup>

In addition, if called to testify at a bad faith hearing, mediators may have their own personal bias, regardless of the high standards held against mediators.<sup>129</sup> There could be a situation where a mediator would be interested in presenting his or her actions in mediation favorably, and “[i]f a mediator reports that a participant has not participated in good faith, courts should expect that the mediator might emphasize facts consistent with that conclusion and downplay inconsistent facts.”<sup>130</sup> In consequence, mediator testimony cannot automatically be assumed to be probative, neutral, and trustworthy.<sup>131</sup>

Another problem with a good faith reporting requirement upon mediator impartiality is that it leaves opportunity to encourage inappropriate mediator conduct: “[a] good faith requirement gives mediators too much authority over participants to direct the outcome in mediation and creates the risk that some mediators would coerce participants by threatening to report alleged bad faith conduct.”<sup>132</sup> There is a danger in allowing mediators to state their opinions about details of a case or its underlying merits, in that unfair pressure through heavy-handed tactics can force parties into undesired positions.<sup>133</sup> Even without the possibility of a later court inquiry about good faith participation, mediator assessments and questioning can still make mediation participants feel forced to amend their positions.<sup>134</sup> The fear is that

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<sup>128</sup> *NLRB v. Macaluso*, 618 F.2d 51, 55 (9th Cir. 1980).

<sup>129</sup> Lande, *supra* note 120, at 104.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 106.

<sup>133</sup> *Id.* at 107.

<sup>134</sup> *Id.*

mediators may use their influence arising from their “authority to testify about bad faith” if a bad faith sanctions regime is instituted.<sup>135</sup> Participants rationally may be apprehensive of the consequence of mediators’ reports, even if mediators do not threaten to report bad faith, if local courts hold a generous number of bad faith hearings.<sup>136</sup>

### C. Loss of Party Autonomy and Voluntariness

One of principal attractions of mediation lies in the voluntary nature of the process.<sup>137</sup> It is an ADR method that enables the parties of a dispute to seize control over the result of their case from the court.<sup>138</sup> If the court can require parties to behave in a particular manner while involved in mediation, mediation’s distinguishing attribute of party autonomy begins to wear away.<sup>139</sup> Moreover, “‘evaluative mediation is an oxymoron. . . . [A]n evaluative mediator, by implicitly pressuring parties to adopt a particular view of the dispute, removes an element of voluntariness from the process.’”<sup>140</sup>

According to Izumi & LaRue, “[s]elf-determination is the key principle of mediation that places settlement power solely with the parties.”<sup>141</sup> The customary motivation behind party self-determination is that parties are “happier with and more likely to honor an agreement they voluntarily choose to create.”<sup>142</sup> Leaving decision making power “with the parties instead of a judge is a vital aspect of mediation’s attractiveness and success as a dispute resolution process . . . . Thus, mediation, unlike litigation, is said to empower disputants.”<sup>143</sup>

If the court concerns itself in how the parties must behave during the mediation, “the process has morphed into something that is hardly ‘voluntary.’”<sup>144</sup> Therefore, there is a danger in a broad

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<sup>135</sup> *Id.* at 107–08.

<sup>136</sup> *Id.* at 108.

<sup>137</sup> Carter, *supra* note 89, at 394.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* (quoting Kimberlee K. Kovach & Lela P. Love, “Evaluative” Mediation is an Oxymoron, 14 ALTERNATIVES TO HIGH COSTS LITIG. 31, CPR INST. FOR DISP. RESOL. (1996)).

<sup>141</sup> Izumi & La Rue, *supra* note 14, at 80.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 80–81.

<sup>144</sup> Carter, *supra* note 89, at 395.

good faith formulation of the duty to participate in mediation in that it may create “settlement pressures, cutting back on the essential voluntariness of agreement in mediation.”<sup>145</sup> The higher the level of participation required, the greater the coercion by forcing a party to present its case in a manner not of its own choosing.<sup>146</sup> This shades into an invasion of litigant autonomy by interfering with the party’s choice of how to present its case.<sup>147</sup> According to Carter, “[i]f 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.”<sup>148</sup> Without the right to decline settlement, access to the courts does not exist.<sup>149</sup> In bad faith cases, courts insincerely give reverence to the notion that parties cannot be compelled to settle.<sup>150</sup> “Judges must recognize that the parties—not the court—own the dispute.”<sup>151</sup> Izumi and La Rue write that “[t]he good faith requirement symbolizes an effort by the courts to further the effectiveness of the judicial system, which tries to guard party autonomy surrounding negotiation and settlement deliberations.”<sup>152</sup> Such “divergent goals cannot coexist without one of these forces weakening the power of the other.”<sup>153</sup> It can be said that “[a]ssembly line coercive mediation may be efficient, but it is not good. Courts should recognize litigants’ rights to be quixotic, contentious, and un-collaborative. We should only require that parties so inclined not make a sham of mediation by concealing their true intent.”<sup>154</sup> While an agreement does not have to be realized in order to find good faith, such a requirement has the potential to restrain the “uninhibited give-and-take of facilitated negotiation” that springs from mediation.<sup>155</sup> It is quite the paradox that a good faith requirement to mediation could become a vehicle to endanger party autonomy, for “it is illogical to sanction the exercise of freedom of choice in a process designed to enhance freedom of choice.”<sup>156</sup>

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<sup>145</sup> Andreas Nelle, *Making Mediation Mandatory: A Proposed Framework*, 7 OHIO ST. J. ON DISP. RESOL. 287, 304 (1992).

<sup>146</sup> Edward F. Sherman, *Court-Mandated Alternative Dispute Resolution: What Form of Participation Should Be Required?*, 46 SMU L. REV. 2079, 2086–87 (1993).

<sup>147</sup> *Id.*

<sup>148</sup> Carter, *supra* note 89, at 395.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> Izumi & La Rue, *supra* note 14, at 81.

<sup>153</sup> *Id.*

<sup>154</sup> Carter, *supra* note 89, at 395.

<sup>155</sup> Izumi & La Rue, *supra* note 14, at 81.

<sup>156</sup> Carter, *supra* note 89, at 396.

## D. Satellite Litigation

Society's expansion has inevitable consequences, including the recurrent rise in litigation, which has "strained the resources of our judicial system."<sup>157</sup> As court dockets become more congested, litigation becomes costly and time-consuming.<sup>158</sup> This increase in litigation has steered the public into examining alternative methods of dispute resolution—one of those alternatives being mediation.<sup>159</sup> Mediation, used correctly, should produce a "less litigious culture."<sup>160</sup> When courts use underdeveloped attempts to make mediation more effective through expansive proposals for good faith requirements, however, precisely the contrary result is likely to occur.<sup>161</sup> Further legal proceedings could be the conclusion of a mediation that results in accusations of bad faith, instead of solving the impending litigation—like the hearings on the imposition of sanctions in *Doe v. Francis*.<sup>162</sup> Neither judicial economy nor a reduction in "adversariness" results when the courts intervene in bad faith conflicts.<sup>163</sup>

It is incongruous that "given mediation's mission of promoting amicable settlement, placing good faith requirements on bargaining strategies may provide a disincentive to settle."<sup>164</sup> A litigious party or attorney might redirect attention from negotiation to the pursuit of a bad faith claim if he or she senses an occasion to acquire a strategic advantage from the other party's misjudgment.<sup>165</sup> In fact, it could be argued that an attorney has an obligation on behalf of their client to look for the bad faith claim in a mediation in which they and/or their client did not particularly like the direction of the process.<sup>166</sup> Instead of focusing on mediation's ability to highlight the points of contention between the parties and bridge the gap between those conflicting views, a good faith requirement

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<sup>157</sup> Johnson, *supra* note 14, at 487.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> Carter, *supra* note 89, at 393.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> William H. Simon, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* 53 (Harvard Univ. Press 1998).

would put into operation many of the usual ways in which lawyers think about winning and gaining advantage for their clients.<sup>167</sup>

Even though a good faith requirement would most likely discourage and reprimand some unseemly conduct, there is the chance that it could additionally promote frivolous claims of bad faith and surface bargaining or intimidation tactics to make such claims.<sup>168</sup> Derisive mediation participants may possibly use good faith requirements to aggressively coerce opposing parties and obstruct the ability for their lawyers to represent the legitimate interests of their clients.<sup>169</sup> Innocent participants may have genuine concerns about placing themselves in jeopardy of sanctions when they face a tough opponent, given that the ambiguity of bad faith provides them with no understanding of what a mediator would say if called to testify:

In the typical conventions of positional negotiation in which each side starts by making an extreme offer, each side may accuse the other of bad faith. Without the threat of bad-faith sanctions, these moves are merely part of the kabuki dance of negotiation. With the prospect of such sanctions, bad faith claims take on legal significance that can spawn not only satellite litigation, but satellite mediation as well.<sup>170</sup>

Rather than encouraging cooperation between participants, parties will be principally concentrated on fighting off allegations of bad faith.<sup>171</sup> Whereas “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.”<sup>172</sup>

#### IV. AN ALTERNATIVE TO A GOOD FAITH REQUIREMENT TO MEDIATION THAT THE FLORIDA COURT IN *DOE V.* *FRANCIS* SHOULD HAVE IMPLEMENTED

In Florida, mediation confidentiality is granted by statutory privilege, not developed by judicial decision.<sup>173</sup> “Florida utilizes the statutory system and the rules of civil procedure to both en-

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<sup>167</sup> *Id.*

<sup>168</sup> Lande, *supra* note 120, at 98.

<sup>169</sup> *Id.* at 99.

<sup>170</sup> *Id.*

<sup>171</sup> Carter, *supra* note 89, at 393.

<sup>172</sup> *Id.*

<sup>173</sup> Tetunic, *supra* note 9, at 92; Johnson, *supra* note 14, at 493.

courage and require mandatory mediation.”<sup>174</sup> According to the Florida Rules of Civil Procedure, a presiding judge in any civil matter has the authority to mandate mediation before trial, and upon the request of one party to a civil action, the court is required to order both parties to attend mediation.<sup>175</sup> “Chapter 44, Florida Statutes, titled ‘Mediation Alternatives To Judicial Action,’ is the most significant legislation pertaining to mediation.”<sup>176</sup> The statute codifies a privilege of confidentiality whereby “each party has a privilege to refuse to disclose, and to prevent any person present at the proceeding from disclosing, communications made during such proceeding.”<sup>177</sup> The parties are the ones with the right to utilize the privilege; however, the mediator can claim the privilege on a party’s behalf.<sup>178</sup> Florida’s statutory law thereby makes all mediation communications confidential and all mediation participants, including the mediator, unable to disclose confidential communications.<sup>179</sup>

The confidentiality of the mediation process is consequently safeguarded in Florida by the mediators of the court.<sup>180</sup> According to Tetunic, “[a] mediator shall maintain confidentiality of all information revealed during mediation except where disclosure is required by law.”<sup>181</sup> There are five public policy exceptions, however, to Florida’s statutory law on mediation confidentiality:

1) [I]f confidentiality is waived by the parties; 2) if the communication is willfully used to plan a crime, commit or attempt to commit a crime, conceal ongoing criminal activity, or threaten violence; 3) statutorily-mandated reporting of either child abuse/neglect or abuse, neglect, or exploitation of elderly/vulnerable persons, but the participant can only disclose such information to the appropriate agency; 4) if one of the parties seeks rescission of a mediated settlement agreement, under ordinary contract law; and 5) to prove professional misconduct or malpractice alleged to have occurred during mediation.<sup>182</sup>

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<sup>174</sup> Johnson, *supra* note 14, at 493.

<sup>175</sup> *Id.* at 494.

<sup>176</sup> *Id.* at 493.

<sup>177</sup> Johnson, *supra* note 14, at 494 (quoting FLA. STAT. ANN. § 44.1011(2)(a) (West 2002)).

<sup>178</sup> Tetunic, *supra* note 9, at 92.

<sup>179</sup> Lisa Bench Nieuwveld, *Florida Continues To Lead The Nation In Mediation*, 81 FLA. B.J. 48 (2007).

<sup>180</sup> Tetunic, *supra* note 9, at 93.

<sup>181</sup> *Id.*

<sup>182</sup> Nieuwveld, *supra* note 179 (quoting FLA. RULES CERTIFIED & CT. APP’T MEDIATORS R. 10.360(a)); see FLA. STAT. § 44.405 (2006).

While it is important to have some exceptions to confidentiality, Florida's five public policy exceptions have a major weakness in that they lack clear definitions.<sup>183</sup> For example:

When is it "child" or "elderly" abuse and what point does the mediator break confidentiality (*i.e.*, when he or she merely suspects abuse or knows)? How does the mediator determine that an act is rising to the level of planning "a crime, to commit or attempt to commit a crime, conceal ongoing criminal activity, or threaten violence."<sup>184</sup>

Several court certified mediators interpret the statutes in juxtaposition with their ethical responsibility to maintain confidences apart from situations where the law mandates disclosure, as in cases of abuse or neglect; other mediators do not even believe confidentiality due to abuse or neglect should be reported.<sup>185</sup> Florida's statutes provide "inconsistent direction regarding a mediator's role in protecting confidentiality of the mediation process."<sup>186</sup> They provide that "each party to a mediation has a privilege to refuse to disclose and prevent anyone present at the mediation session from disclosing communications made during the mediation proceeding." Exceptions for when a mediator is allowed to breach confidentiality, however, are not fully defined.<sup>187</sup> These public exceptions are clearly needed for public policy concerns; however, the vagueness of their design remains too indefinite to aid the mediator.<sup>188</sup>

Furthermore, trying to fit in a good faith requirement for mediation or allowance to breach mediation confidentiality for acting in bad faith into one of Florida's five statutory exceptions, as the judge did in *Doe v. Francis*, only furthers the confusion as to a mediator's responsibilities by adding to its vagueness. In the end, it is the actor's subjective motivation that determines whether an act or omission is the result of bad faith.<sup>189</sup> As Carter writes, "[t]he word 'faith' implies something inchoate, intangible, and unmeasurable."<sup>190</sup> When questioning whether a person acted in good faith, one must inescapably use conjecture.<sup>191</sup> According to Weston, "[p]articularly because advocacy is still necessary in both arbi-

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<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> Tetunic, *supra* note 9, at 95.

<sup>186</sup> *Id.* at 94.

<sup>187</sup> *Id.*

<sup>188</sup> Nieuwveld, *supra* note 179.

<sup>189</sup> Carter, *supra* note 89, at 372.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

tration and mediation, bad faith needs to be defined and distinguished from competitive negotiation behaviors, self-interest, or even hard bargaining.”<sup>192</sup> It is just as essential to clarify what “good faith participation” prohibits as it is to provide good faith with a definition.<sup>193</sup>

In this section, I will offer an alternative that the Florida legislature and court system could adopt in order to mitigate the complications of having a bad faith exception to mediation confidentiality, while still holding parties accountable for their behavior. Such an alternative leaves the parties of mediation better informed of their respective responsibilities and more prepared for how to conduct themselves during mediation, while still promoting the underlying tenets of the mediation process.

#### A. Two-Tiered Mediation Confidentiality Standard

The circumstances surrounding a good faith participation requirement or a bad faith exception to breaking mediation confidentiality presents a so-called “catch 22” situation.<sup>194</sup> Without such a requirement, parties to a court-mandated mediation might proceed into a session with the intention to pervert the process. At the same time, this type of exception can distort the fundamental purpose of mediation as a confidential setting where parties volunteer information to try and resolve their differences under the guise of a neutral third party. While the issue of instituting a bad faith exception to breaking mediation confidentiality presents a delicate and complicated balancing of the equities between public policy rationales and the maintenance of mediation’s design, there are ways that the Florida legislature could have structured its statutory laws to make it more amenable to both interests. Participation requirements and the exception for reporting their violations must be reasonably defined. The Florida court system needs to adopt a system that provides both clearer notice of what objectively is expected from their participation in the mediation as well as the procedure for what can happen upon a claim of bad faith by

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<sup>192</sup> Weston, *supra* note 116, at 627.

<sup>193</sup> *Id.*

<sup>194</sup> A “catch-22” is a “paradox in which seeming alternatives actually cancel each other out, leaving no means of escape from the dilemma.” Samuel A. Yee, *Final Exit Or Administrative Exhaustion? The Deported Alien’s Catch-22*, 8 ADMIN. L.J. AM. U. 605, 647 (1994) (quoting AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (1976)).

an opposing party. Furthermore, reported violations of bad faith should not include "information regarding the substantive exchanges of the underlying proceeding."<sup>195</sup>

### 1. Tier One: Objective Standards for Participation

Florida should propose a set of guidelines intended to restrict a mediation participant's ability to misbehave. In this way, even though "bad faith" is subjective, perhaps the court could regulate certain negative behavior without second guessing the actor's motivation. ADR and mandatory mediation come equally with procedural rights and obligations, and parties to mediation need to be aware of them both.<sup>196</sup> Weston writes, "[m]isconduct and procedural manipulations to delay and obstruct ADR proceedings undermine the efficiency and participation benefits of ADR and affect possible outcomes."<sup>197</sup> Therefore, for the process to have legitimacy, preventive means against party misconduct, such as enumerated duties, prohibited conduct, and procedural rights, must be explained to and complied with by mediation participants as a minimum standard of good faith.<sup>198</sup>

Florida's legislature should institute the following standards for a court-mandated mediation that would provide parties with notice on what is expected of them and what behavior would constitute sanctioning:

(1) *Pre-Mediation Documents*: Before heading into the mediation, parties should provide each other and the 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>199</sup> In this way, the mediator will have a better understanding from the outset about how to aid the parties to come to a resolution and will be able to determine the most efficient ways to proceed through the mediation. These documents would enable a mediator to estimate the probability for success in the mediation, and, therefore, gauge what amount of time spent in mediation would be worthwhile for an individual dispute. In the case of *Doe v. Francis*, if the mediator had received pre-mediation documents

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<sup>195</sup> Weston, *supra* note 116, at 642.

<sup>196</sup> *Id.* at 643.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> Edward Sherman, 'Good Faith' Participation in Mediation: Aspirational, Not Mandatory, DISP. RESOL. MAG., Winter 1997, at 16.

from each party, he would have understood that the likelihood for a settlement was not very high and could have made a judgment to end the mediation within a reasonable time period. This relinquishment from mediation would not be based on the fact that the parties acted in bad faith but rather due to a realistic evaluation that the chance of settlement was low and time and finances should not be further expended on this process.

(2) *Attendance and Time Limit*: Roger L. Carter provides a framework for party attendance:

All parties . . . 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.<sup>200</sup>

If parties to mediation do not show up, how can mediation be an effective dispute resolution tool? Appearing at a mandatory court mediation is a sign of respect, and disregarding an attendance requirement is “the most obvious and least troubling example of a procedural form of good faith.”<sup>201</sup> By adding a one-hour time limit the legislature would be instituting a minimal time frame from which a productive mediation could occur while also preventing a situation that prolongs an unproductive discussion that can lead to waste in time, money, or efficiency. In the case of *Doe v. Francis*, Joe Francis would have fulfilled this requirement that he attend the mediation. But, perhaps some of his unseemly behavior would have been avoided if the mediation was discontinued earlier.

(3) *Undo Delay of the Mediation*: Parties should expect to be sanctioned if they are more than one hour late to a mediation session. If parties know ahead of time that they either cannot make the scheduled mediation or are going to be over an hour late they should send both the judge and opposing counsel a notice letter that the mediation needs to be rescheduled. Of course exceptions can be made for unforeseen circumstances that arise: the Court may evaluate such circumstances if they seem suspicious or insincere. Being on time to mediation shows respect to the opposing party and the mediator. A party who causes delay without reason

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<sup>200</sup> Carter, *supra* note 89, at 398.

<sup>201</sup> *Id.*

wastes both time and money. Furthermore, a party's tardiness can come off as a sign of contempt for his or her counterpart, creating an antagonistic environment and stifling settlement negotiations before the parties even reach the point of discussing their respective interests. In *Doe v. Francis*, Joe Francis's arrival to the mediation four hours late was not only impertinent, but it also set the stage for a contemptuous mediation. This standard would have encouraged Joe Francis to either attend the mediation on time, possibly changing the tone of the mediation at the outset, or it would have placed sanctions on Joe Francis from the beginning of the mediation for objective behavior that would not have impeded upon mediation confidentiality.<sup>202</sup>

(4) *Dress Code*: Like the provision for undue delay, a dress code mandating business attire or "neat casual" attire would be a means of respect for the opposing party and mediation as a formal institution. If a party to mediation, like Joe Francis, comes to the mediation dressed inappropriately, it is a sign to the opposing party that he or she is not taking the process seriously and does not intend to be an active participant. Such behavior stirs animosity and is an easy way to pinpoint bad faith behavior in a manner that does not conflict with mediation confidentiality.

(5) *Offers*: Mediation does not require a party to make or accept an offer.<sup>203</sup> According to Carter, "[c]ourts have no business trying to enforce standards of subjective good faith. . . . [A]ny standards for good faith participation should state explicitly that decisions about bargaining strategy are solely the province of the parties and their representatives."<sup>204</sup> Analysis of bad faith in the context of failure to extend a particular offer would involve a ruling as to the underlying merits of the case.<sup>205</sup> Such a finding would be impossible without all the evidence being obtained and all testimony received.<sup>206</sup> If this were allowed it would directly conflict with the notion of mediation confidentiality, as information regarding party behavior as well as the ultimate claim would be exposed prior to litigation. This would encourage an undesired result in

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<sup>202</sup> Mediation confidentiality would not have been compromised because Joe Francis would have been sanctioned for his behavior of undue delay. The delay itself would be proof enough for sanctions and no further inquiry into his conduct would have to be made. Therefore, there would not be the concern that by breaking mediation confidentiality and through discovery of bad faith behavior, information about the underlying claim would surface.

<sup>203</sup> Carter, *supra* note 89, at 400.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

that parties have many reasons for either not presenting or refusing an offer that has nothing to do with a malicious intent. "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."<sup>207</sup> Joe Francis may not have wanted to extend an offer because he worried about setting an unwarranted precedent for other parties to bring civil suits against him. The fact that he offered to settle the suit upon the second mediation, but failed because the opposing party did not like how he would pay the settlement, should not have been determinative of him acting in bad faith. A key philosophy of mediation is party-autonomy, and having a requirement for an offer in order to act in good faith goes against the autonomy and voluntariness of the process.

(6) *Intent Not To Make An Offer*: If a party knows before the mediation that he or she has no intention of making an offer at that mediation, that party shall notify the other party of such intent within a specified time limit before the mediation.<sup>208</sup> I would recommend a time frame of five business days before the mediation is to take place. That way the other party has enough time to contemplate how to proceed. "In the event that a party advises the other party of such intent to petition the court to cancel the mediation in the case of court-ordered mediation."<sup>209</sup> This provision would enable a judge to re-evaluate the merits of proceeding with mediation versus going forward with litigation. If this type of provision were instituted in Florida, Joe Francis would have been able to advise his opposing party and counsel of his intent not to make an offer. At that time, if the opposing party petitioned the court to cancel the mediation, Judge Smoake could have reassessed the case at hand and the benefits of going forward with mediation as opposed to proceeding with a trial. While Judge Smoake seemed to be a staunch advocate of moving parties into mediation before litigation, he at the very least might have second-guessed this procedure for *Doe v. Francis* based on plaintiff's desire to move forward with trial due to defendant's adamant refusal to provide a settlement offer. This in turn would have avoided wasting time, resources, and money on a process that was likely not to yield results under the circumstances.

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<sup>207</sup> *Id.*

<sup>208</sup> Carter, *supra* note 89, at 402.

<sup>209</sup> *Id.*

(7) *Safe Harbor Provision*: In order to avoid superfluous claims of bad faith by displeased mediation parties, “a prerequisite to judicial relief by the court should require a party to identify the offensive conduct to the other party or neutral and provide a reasonable opportunity for the conduct to cease.”<sup>210</sup> This would help avoid the problems of satellite litigation by giving the party acting inappropriately notice that he or she is acting inappropriately and the chance to rectify his or her behavior before a sanction hearing and breach in confidentiality occur. It also helps with the concern that a bad faith exception to mediation confidentiality can lead to gamesmanship by parties. A party would be less likely to make a frivolous claim of bad faith as a strategic tactic because there is a diminished probability that such a claim would be successful. If Joe Francis were provided with such a warning of sanctions, he potentially would have improved his behavior.

## 2. Tier Two: Procedure for a Claim of Bad Faith by an Opposing Party

If a party follows all of the objective criteria required of a mediation participant but a claim of bad faith is still raised, the decision of whether a confidentiality privilege exception is reasonable should be determined by making an initial in camera review of the good faith violations “to the court or neutral, ideally one who is not participating in a discussion or determination of the case’s underlying merits.”<sup>211</sup> The party that raises the complaint should have the burden of demonstrating the other party’s bad faith actions as a minimum precondition to “public disclosure of the alleged misconduct.”<sup>212</sup> Furthermore, for both an in camera review or a sanctions hearing, testimony regarding proof of a party’s supposed transgression should only be offered by the party bringing the bad faith claim. Sanctions should “only be awarded for violations that can be proved without eliciting testimony from a mediator.”<sup>213</sup> This process should be coupled with an understanding that there will be sanctions for bringing “frivolous claims of bad-faith participation or a fee-shifting provision for the prevailing party.”<sup>214</sup>

This type of procedure guards against many of the concerns arising from a bad faith exception to mediation confidentiality. By

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<sup>210</sup> Weston, *supra* note 116, at, 631–32.

<sup>211</sup> *Id.* at 642.

<sup>212</sup> *Id.*

<sup>213</sup> Carter, *supra* note 89, at 403.

<sup>214</sup> Weston, *supra* note 116, at 642.

having a neutral party who is not judging the underlying merits of the case, there is no need to worry about the judge becoming prejudiced against one of the disputing parties for the purpose of potential future litigation or pressuring one party through sanctioning to settle a case that he or she wanted off of his or her docket. This aids in the maintenance of party autonomy in mediation. If such a procedure had taken place in *Doe v. Francis*, Judge Smoake's heavy-handed demand for what appeared to be a mediation resulting in a settlement could have been averted. A neutral third party, nonaligned with the case, would have reviewed the claim of bad faith, removing the worry of subjective partiality for one party versus the other. Moreover, having this in camera review of the claim of bad faith rather than an immediate sanctioning hearing before the information becomes public is just another safeguard against loss of mediation's confidentiality.

Additionally, the provision that only the party raising the claim, not the mediator, can testify is very significant. Mediation as an ADR process cannot work without the mediator's impartiality. "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."<sup>215</sup> The destructive effects of a mediator as a witness overshadow any potential advantage of his or her testimony, and the claimant's knowledge of the breaching party's conduct, equivalent to that of the mediator and taken under sworn testimony, makes a mediator as a witness unnecessary.<sup>216</sup> Finally, the reverse threat of sanctioning and unfavorable consequence for a party bringing frivolous bad faith claims "balances the concerns for ensuring good-faith participation and justified confidentiality in ADR."<sup>217</sup> The enforcement of this provision would assist in avoiding the concern over parties playing strategic games through the threat of bad faith claims and monitor when a situation really warrants interference.

## V. CONCLUSION

*Doe v. Francis* is an extreme illustration of how the need to weigh the tenets of mediation against exposure and liability for

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<sup>215</sup> Carter, *supra* note 89, at 403.

<sup>216</sup> *Id.*

<sup>217</sup> Weston, *supra* note 116, at 642.

party misconduct can create tension amid a practice designed to protect confidentiality, party self-determination, impartiality, and judicial economy. While mediation and its promise of confidentiality should not shelter a party whose behavior distorts the essence of the process, the subjective interpretation of "good faith" leaves a party with lack of notice of expected conduct and exposed to potential liability without forewarning. If there is going to be a mediation exception to confidentiality for acting in bad faith, such an exception needs to be formalized objectively and procedures instituted to preserve the integrity and principles of the mediation process.

# Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed

Leonard L. Riskin<sup>†</sup>

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## INTRODUCTION

Not long ago, a lawyer asked me to conduct a workshop, for his firm and its clients, on how to participate in a mediation. As I began to prepare this program, I realized that my co-trainers and I could not talk sensibly about how, or even whether, to participate in a mediation without knowing the nature of the process the mediator would conduct. But a bewildering variety of activities fall within the broad, generally-accepted definition of mediation — a process in which an impartial third party, who lacks authority to impose a solution, helps others resolve a dispute or plan a transaction. Some of these processes have little in common with one another. And there is no comprehensive or widely-accepted system for identifying, describing, or classifying them. Yet most commentators, as well as mediators, lawyers, and others familiar with mediation, have a definite image of what mediation is and should be.

For these reasons, almost every conversation about mediation suffers from ambiguity, a confusion of the "is" and the "ought." This creates great difficulties when people try to determine whether and how to participate in mediation, and when they grapple with how to select, train, evaluate, or regulate mediators.

The largest cloud of confusion and contention surrounds the issue of whether a mediator may evaluate. "Effective mediation," claims lawyer-mediator Gerald S. Clay, "almost always requires some analysis of the strengths and weaknesses of each party's position should the dispute be arbitrated or litigated."<sup>1</sup> But law school Dean James Alfini disagrees, arguing that "lawyer-mediators should be prohibited from offering legal advice or evaluations."<sup>2</sup> Formal ethical standards have spoken neither clearly nor consistently on this issue.<sup>3</sup>

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1. James Alfini & Gerald S. Clay, *Should Lawyer-Mediators Be Prohibited from Providing Legal Advice or Evaluations?*, DISP. RESOL. MAG., Spring 1994, at 8.

2. *Id.* Professor Robert A. Baruch Bush agrees with Alfini. See Robert A.B. Bush, *The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications*, 1994 J. DISP. RESOL. 1, 54 (1994).

3. Several such standards seem to limit evaluative activity in the name of self-determination. For example, a Code of Professional Conduct adopted by the Colorado Council of Mediation Organizations in 1982 describes the mediator as an "active resource person" who "should be prepared to provide both procedural and substantive suggestions and alternatives . . ." COLORADO COUNCIL OF MEDIATION ORGANIZATIONS, CODE OF PROFESSIONAL CONDUCT § 2 (1982), reprinted in KIMBERLEE K. KOVACH, *MEDIATION: PRINCIPLES AND PRACTICE* 260, 261 (1994). But it cautions that "[s]ince the status, experience and ability of the mediator lend weight to his or her suggestions and recommendations, the mediator should evaluate carefully the effect of interventions or proposals and accept full responsibility for their honesty and merit." *Id.*

Ethical Guidelines adopted in 1994 by the Alternative Dispute Resolution Section of the State Bar of Texas emphasize self-determination and provide that the mediator "should not coerce a party in any way." ALTERNATIVE DISPUTE RESOLUTION SECTION, STATE BAR OF TEXAS, ETHICAL GUIDELINES FOR MEDIATORS § 1, cmt. A (1994). The mediator "may make suggestions," *id.*, but "should not give legal or other professional advice," *id.* at § 11. The question whether a mediator may evaluate caused much dissension among members of a joint committee on standards of conduct for mediators established by the American Arbitration Association, the American Bar Association, and the Society of Professionals in Dispute Resolution. The group ultimately compromised, using the following language intended to discourage evaluative activities by the mediator:

The primary purpose of a mediator is to facilitate the parties' voluntary agreement. This role differs substantially from other professional-client relationships. Mixing the role of a mediator and the role of a professional advising a client is problematic and mediators must strive to distinguish between the roles. A mediator should therefore refrain from providing professional advice. Where appropriate, a mediator should recommend that the parties seek outside professional advice, or consider resolving the dispute through arbitration, counselling, neutral evaluation, or other processes. A mediator

Other issues also bedevil the mediation field. People of good will argue about whether mediation should be employed in cases involving constitutional rights,<sup>4</sup> domestic violence,<sup>5</sup> or criminal activity.<sup>6</sup>

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who undertakes, at the request of the parties, an additional dispute resolution role in the same matter assumes increased responsibilities and obligations that may be governed by the standards of other professions.

STANDARDS OF CONDUCT FOR MEDIATORS (American Arbitration Association, Society of Professionals in Dispute Resolution, and American Bar Association Section on Dispute Resolution, 1994). According to Dean James Alfani, a member of the joint committee that prepared this language, he and some other members of the committee were concerned that if lawyer-mediators were to give legal evaluations, regulatory bodies in the profession might consider mediation as the practice of law and, therefore, seek to regulate, control, or proscribe it. Telephone interview with James Alfani, Dean of Northern Illinois University College of Law (Jan. 24, 1995).

One set of standards seems to endorse evaluations, except in one limited circumstance. The Florida Rules for Certified and Court-Appointed Mediators emphasize self-determination and prohibit coercion. See FLA. R. FOR CERTIFIED & COURT-APPOINTED MEDIATORS Rule 10.060 (1992). A committee note provides that "[w]hile a mediator has no duty to specifically advise a party as to the legal ramifications or consequences of a proposed agreement, there is a duty for the mediator to advise the parties of the importance of understanding such matters and giving them the opportunity to seek such advice if they desire." *Id.* (Committee note). Another rule, however, bars the mediator from offering "a personal or professional opinion as to how a court in which the case has been filed will resolve the dispute." *Id.* at 10.090. Professor Robert Moberly, a member of the drafting committee, explains that this language is meant to "prohibit tactics that imply some special knowledge of how a particular judge will rule." Robert B. Moberly, *Ethical Standards for Court-Appointed Mediators and Florida's Mandatory Mediation Experiment*, 21 FLA. ST. U. L. REV. 701, 715 (1994).

The ABA's Standards of Practice for Lawyer Mediators in Family Disputes treat this issue in connection with the duty it imposes on the mediator "to assume that the mediation participants make decisions based upon sufficient information and knowledge." AMERICAN BAR ASSOCIATION, STANDARDS OF PRACTICE FOR LAWYER MEDIATORS IN FAMILY DISPUTES, Standard IV (1984). A "specific consideration" provides that "[t]he mediator may define the legal issues, but shall not direct the decision of the mediation participants based upon the mediator's interpretation of the law as applied to the facts of the situation." *Id.* at Specific Consideration C.

4. See Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1082-87 (1984); Owen Fiss, *Out of Eden*, 94 YALE L.J. 1669 (1985); Andrew W. McThenia & Thomas L. Shaffer, *For Reconciliation*, 94 YALE L.J. 1660 (1985).

5. See Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991); Joshua D. Rosenberg, *In Defense of Mediation*, 33 ARIZ. L. REV. 467 (1991).

6. Compare, e.g., Albert Alschuler, *Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases*, 99 HARV. L. REV. 1808, 1808-10 (1986) with MARK S. UMBREIT, *VICTIM MEETS OFFENDER: THE IMPACT OF RESTORATIVE JUSTICE AND MEDIATION* (1994).

Program planners differ on how to select mediators.<sup>7</sup> Trainers disagree on the place of the private caucus.<sup>8</sup> Commentators debate whether the mediator should bear responsibility for the outcome of environmental mediation.<sup>9</sup> Lawyers and judges argue about whether a judge may order a represented client to attend a settlement conference along with her or his lawyer.<sup>10</sup> Disputants selecting a mediator worry about bias and whether the neutral should have "subject-matter expertise."<sup>11</sup> And many lawyers and clients wonder about what exactly mediation is and how it differs from other dispute resolution processes.

The bulk of these disagreements arise out of clashing assumptions — often unarticulated — about the nature and goals of mediation.<sup>12</sup> Nearly everyone would agree that mediation is a process in which an impartial third party helps others resolve a dispute or plan a transaction. Yet in real mediations, goals and methods vary so greatly that generalization becomes misleading. This is not simply because mediators practice differently according to the type of dispute or transaction; even within a particular field, one finds a wide range of practices. For example, in studying farm-credit mediation, I discerned two patterns of mediation, which I called "broad" and "narrow."<sup>13</sup> These patterns differed so radically that they could both be

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7. See THE TEST DESIGN PROJECT, PERFORMANCE-BASED ASSESSMENT: A METHODOLOGY FOR USE IN SELECTING, TRAINING, AND EVALUATING MEDIATORS (National Institute for Dispute Resolution ed., 1995); *Who Really is a Mediator?*, 9 NEG. J. 293 (1993).

8. See Carrie Menkel-Meadow, *Ex Parte Talks with Neutrals: ADR Hazards*, ALTERNATIVES TO THE HIGH COST OF LITIGATION, Sept. 1994, at 1.

9. See John P. McCrory, *Environmental Mediation — Another Piece for the Puzzle*, 6 VT. L. REV. 49, 64 (1981); Joseph B. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VT. L. REV. 85, 106 (1981); Lawrence Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1, 40 (1981).

10. See 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 (1991).

11. See *infra* note 123 and accompanying text.

12. See Robert A.B. Bush, *Mixed Messages in the Interim Guidelines*, 9 NEG. J. 341 (1993); Craig A. McEwen, *Competence and Quality*, 9 NEG. J. 317 (1993); Richard A. Salem, *The Interim Guidelines Need a Broader Perspective*, 9 NEG. J. 309 (1993); Joseph B. Stulberg, *Bush on Mediator Dilemmas*, 1994 J. DISP. RESOL. 57 (1994). A useful effort to clarify these assumptions appears in Robert A.B. Bush, *The Mediator's Role and Ethical Standards in Mediation*, 41 U. FLA. L. REV. 253 (1989). See also Riskin, *supra* note 10.

13. See Leonard L. Riskin, *Two Concepts of Mediation in the FMHA'S Farmer-Lender Mediation Program*, 45 ADMIN. L. REV. 21, 44-55 (1993).

called mediation only in the sense that noon meals at McDonald's and at Sardi's could both be called lunch.<sup>14</sup>

The confusion is especially pernicious because many people do not recognize it; they describe one form of mediation and ignore other forms,<sup>15</sup> or they claim that such forms do not truly constitute mediation.<sup>16</sup> I do not aim in this Article to favor one type of mediation over

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14. Similar confusion doubtless afflicts other dispute resolution processes. In their study of the early neutral evaluation program of the U.S. District Court for the Northern District of California, for example, Professor Joshua Rosenberg and Dean Jay Folberg found:

The ENE process was intended to lie somewhere between mediation, in which a third party with substantial procedural expertise facilitates communication among the parties in the interest of settling some or all of the issues in dispute, and nonbinding arbitration, in which a third party with substantial subject matter expertise reviews the case presented by the litigants and determines an appropriate outcome. As conducted, ENE ran the gamut from one extreme to the other, and sometimes bore little resemblance to any other process. Most evaluators appraised their cases in some respects, but the specificity and directness of these appraisals varied tremendously from actual predictions of jury verdicts to subtle hints about possible weaknesses of a claim or defense.

Joshua D. Rosenberg & H. Jay Folberg, *Alternative Dispute Resolution: An Empirical Analysis*, 46 STAN. L. REV. 1487, 1496 (1994).

15. See, e.g., Susan S. Silbey, *Mediation Mythology*, 9 NEG. J. 349 (1993). Proponents of particular mediation orientations sometimes appear to show disdain for other orientations. Consider, for example, the opinion of Richard Ralston, a lawyer-mediator based in Kansas City who has extensive experience as a trial lawyer and as a U.S. Magistrate-Judge:

You must define the qualities desired in a mediation in light of what is to be accomplished. Some mediators will not give an opinion or an evaluation, but *an effective mediator is not a "potted plant,"* who simply carries messages back and forth. The mediator should have a reputation for neutrality, judgment, fairness, balance and creativity. Credibility is the key. If the parties respect the mediator, a large barrier to effective negotiation is removed. Most parties who are serious about resolving the dispute will choose a mediator who can give a strong, credible and objective evaluation of the legal and factual issues in the case. A good mediator is a blend of psychotherapist, judge and negotiator who can recognize the motivations of the parties (Is it only money, or is it something else?). *An effective mediator is not "Mr. Rogers."* Most parties who truly desire a negotiated resolution of the dispute will choose a mediator who can give a strong, objective evaluation of the case and who can "close" the negotiations. Experience and effectiveness in mediation is a primary consideration in choosing a mediator.

Richard H. Ralston, *Effective Advocacy and Mediation*, in ADR FOR THE DEFENSE: ALTERNATIVE DISPUTE RESOLUTION (Defense Research Institute, Inc., 1994) H-1, at H-3 (emphasis added).

16. See Stulberg, *supra* note 9; Austin Sarat, *Patrick Phear: Control, Commitment, and Minor Miracles in Family and Divorce Mediation*, in WHEN TALK WORKS 193, 195-96 (Deborah M. Kolb ed., 1994).

another, although, like most mediators, I incline toward a certain approach.<sup>17</sup> Instead, I hope to facilitate discussions and to help clarify arguments by providing a system for categorizing and understanding approaches to mediation. I try to include in my system most activities that are commonly called mediation and arguably fall within the broad definition of the term. I know that some mediators object to such inclusiveness, and fear that somehow it will legitimize activities that are inconsistent with the goals that they associate with mediation.<sup>18</sup> Although I sympathize with this view, I also disagree with it. Usage determines meaning.<sup>19</sup> It is too late for commentators or mediation organizations to tell practitioners who are widely recognized as mediators that they are not, in the same sense that it is too late for the Pizza Association of Naples, Italy to tell Domino's that its product is not the genuine article.<sup>20</sup> Such an effort would both cause acrimony and increase the confusion that I am trying to diminish. Instead, I propose that we try to categorize the various approaches to mediation so that we can better understand and choose among them.

Part I of this Article sets forth previous efforts to categorize mediation. Although each of these served a particular purpose, none was designed for comprehensive use. My system for classifying mediator orientations, strategies, and techniques — which I depict by means of a grid — makes up Part II. Part III describes the utility of the grid, especially in selecting mediators. Part IV is the conclusion.

## I. CATEGORIES OF NEGOTIATION AND MEDIATION

Mediation is facilitated negotiation, and most commentators recognize two basic approaches to negotiation. Of the many dichotomies developed,<sup>21</sup> I find “adversarial” versus “problem-solving” the most

17. I tend to favor what I describe in Part ILC.4 as the facilitative-broad approach. See, e.g., Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29 (1982); Riskin, *supra* note 13. However, this does not keep me from seeing the virtues of other approaches in appropriate cases.

18. Memorandum from Lela P. Love to Leonard L. Riskin (April 3, 1995).

19. See LUDWIG WITTGENSTEIN, *TRACTATUS LOGICO — PHILOSOPHICUS* 9–25 (D.F. Pears & B.F. McGuinness trans., 2d ed. 1974).

20. See Florence Fabricant, *The Italian Pizza Police Are Offering Rules for the Real Thing*, N.Y. TIMES, June 7, 1995, at C6; *The Pizza Police Get Tough*, N.Y. TIMES, June 7, 1995, at C1.

21. See, e.g., DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR* 29–45, 88–153 (1986) (distinguishing bargaining to “create value” and to “claim value”); HOWARD RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* 33–34 (1982) (distinguishing “distributive” and “integrative” bargaining); RICHARD E. WALTON & ROBERT B. MCKERSIE, *A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS* 4–5, 11–183 (2d ed. 1991) (exploring differences between “distributive” and “integrative” bargaining); Gary T. Lowenthal, *A General Theory of Negotiation Process, Strategy, and Behavior*,

generally useful.<sup>22</sup> The adversarial approach usually assumes that the negotiation will focus on a limited resource — such as money — and that the parties will decide whether and how to divide it. In such a situation, the parties' goals conflict — what one gains, the other must lose.<sup>23</sup> The problem-solving approach, in contrast, seeks to bring out and meet the underlying interests of the parties — i.e., the needs that motivate their positions.<sup>24</sup> Unfortunately, negotiators generally face a tension between adversarial and problem-solving approaches, as each tends to interfere with the other.<sup>25</sup>

Some commentators have seized on this distinction as a basis for categorizing approaches to mediation,<sup>26</sup> but many writers have seen things differently, and numerous systems of categorizing mediation

31 U. KAN. L. REV. 69, 73–92 (1982) (distinguishing “competition” from “collaboration”).

Some commentators have divided negotiation into three types. *See, e.g.*, ROGER FISHER ET AL., *GETTING TO YES* 9–14 (2d ed. 1991) (differentiating “hard,” “soft,” and “principled” styles of negotiation); DONALD G. GIFFORD, *LEGAL NEGOTIATION* 14–18 (1989) (identifying “cooperative,” “competitive,” and “integrative” strategies). *See generally*, LEONARD L. RISKIN & JAMES E. WESTBROOK, *DISPUTE RESOLUTION AND LAWYERS* 115–38 (1987) (reviewing these approaches and alternative views of negotiation strategy).

22. *See* Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem-Solving*, 31 UCLA L. REV. 754, 755–62 (1984).

23. An adversarial orientation naturally fosters strategies designed to maximize a party's position with respect to the resource in question. The usual tactics, designed to uncover as much as possible about the other side's situation and simultaneously to mislead the other side about yours, include:

1. A high initial demand;
2. Limited disclosure of information about facts and one's own preferences;
3. Few and small concessions;
4. Threats and arguments; and
5. Apparent commitment to positions during the negotiation process.

*See* Donald G. Gifford, *A Context-Based Theory of Strategy Selection in Legal Negotiation*, 46 OHIO ST. L.J. 41, 48–49 (1985).

24. The most popular articulation of a problem-solving orientation is FISHER ET AL., *supra* note 21. The authors set out four guidelines for what they call “principled” negotiation:

1. Separate the people from the problem.
2. Focus on interests, not positions.
3. Invent options for mutual gain.
4. Insist on objective criteria.

*See id.* at 15. Related books include ROGER FISHER & SCOTT BROWN, *GETTING TOGETHER* (1988); WILLIAM URY, *GETTING PAST NO* (rev. ed. 1993).

25. *See* LAX & SEBENIUS, *supra* note 21, at 34–35.

26. For example, Kressel and his colleagues identified the “settlement-oriented style” and the “problem-solving style” when studying custody mediation in a New Jersey family court. *See* Kenneth Kressel et al., *The Settlement-Oriented vs. The Problem-Solving Style in Custody Mediation*, J. SOC. ISSUES 67 (1994). Employing different terminology, I relied on the same dichotomy in analyzing judicially-hosted settlement conferences. *See* Riskin, *supra* note 10, at 1081. Recently, Professor

have blossomed. Generally, the categories evolved from observations of mediation in a particular context and they enhanced the authors' abilities to understand and describe mediation practices.<sup>27</sup> Individual authors have constructed different systems of categories for different contexts and for different purposes.<sup>28</sup> Sometimes the

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Jonathan Hyman and his colleagues, in observing judicially-hosted settlement conferences in New Jersey, developed a dichotomy of styles which they called "mini-trial" and "matchmaker." JONATHAN M. HYMAN ET AL., CIVIL SETTLEMENT: STYLES OF NEGOTIATION IN DISPUTE RESOLUTION, A REPORT FOR THE NEW JERSEY OFFICE OF THE COURTS (1995).

27. For example, in studying programs that mediated family, community and neighborhood disputes, social scientists Susan Silbey and Sally Merry developed two "ideal types," representing what they called the "bargaining" and the "therapeutic" styles. See Susan S. Silbey & Sally E. Merry, *Mediator Settlement Strategies*, 8 LAW & POL'Y 7, 19 (1986) (suggesting that mediators' behavior fell along a continuum with these two styles representing the poles). Texas lawyer-mediator Eric Galton, in teaching lawyers how to use mediation in cases moving through the litigation process, distinguished between "case evaluation," or "evaluative mediation," and "pure form mediation." ERIC GALTON, REPRESENTING CLIENTS IN MEDIATION 2-4 (1994). Galton writes that "empowerment mediation" and "community model mediation" are synonymous with "pure form mediation." *Id.* at 3.

See also James Alfini, *Trashing, Bashing, and Hashing It Out: Is This the End of "Good Mediation"?*, 19 FLA. ST. U. L. REV. 47, 66-73 (1991) (exploring "trashing," "bashing" and "hashing" strategies used in court-connected mediations in Florida); Peter J.D. Carnevale, *Strategic Choice in Mediation*, 2 NEG. J. 41, 44-45 (1986) (labeling a mediator's four basic strategies as "integration," "pressing," "compensation," and "inaction").

28. For example, in her study of labor mediators, Deborah Kolb found two patterns: state mediators were "dealmakers" who constructed settlement proposals, and federal mediators were "orchestrators" who helped the parties develop their own proposals. See DEBORAH M. KOLB, *THE MEDIATORS* 23-45 (1983). More recently, Professor Kolb and Professor Kenneth Kressel developed different categories with which to view the work of the twelve mediators — operating in a wide range of fields — who were profiled in the book, *WHEN TALK WORKS*. See *supra* note 16, at 459-92. Kolb and Kressel determined that the mediators espoused either a "transformative" vision or a "pragmatic, problem-solving" vision and that the mediators organized their work through either a "settlement frame" or a "communication frame." See *id.* at 459, 466-79.

Kressel also has employed other categories in other contexts. In studying custody mediation in a New Jersey family court, he and his colleagues identified the "settlement-oriented style" and the "problem-solving style." See Kressel et al., *supra* note 26. In another work, Kressel and Pruitt developed a different dichotomy — "task-oriented" versus "socioeconomic." See KENNETH KRESSEL & DEAN G. PRUITT, *MEDIATION RESEARCH: THE PROCESS AND EFFECTIVENESS OF THIRD-PARTY INTERVENTION* 423-24 (1989).

I, too, have used different systems for different purposes. In studying farm-credit mediation, I developed a "broad-narrow" scheme. See Riskin, *supra* note 13, at 44. However, when I considered the question of how clients should participate in judicially-hosted settlement conferences, I thought it was important to distinguish the conduct of the judicial host based on two criteria: (1) the extent to which she facilitates adversarial as opposed to problem-solving negotiation; and (2) the extent to which she "raises a fist to pressure the parties to settle or extends a hand to facilitate

categories have helped the authors argue for a particular kind of mediation, either in a certain context or more generally.<sup>29</sup>

Each of these systems of categories served its author's purposes, yet the categories are not wholly consistent from one system to the other.<sup>30</sup> Moreover, a specific term can carry different meanings in different systems.<sup>31</sup> None of these systems were designed to be used comprehensively — that is, to describe orientations, strategies, and techniques employed in virtually any mediation context.<sup>32</sup> In the next part of this Article, I offer such a system.<sup>33</sup>

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an educational process that will enable the parties to learn and do what they must in order to reach a settlement decision." Riskin, *supra* note 10, at 1083.

29. Kressel and his colleagues have touted the virtues of the "problem-solving" style in custody mediation. See Kressel et al., *supra* note 26, at 82. I have argued for a "broad" approach, as opposed to a "narrow" one, in farm-credit mediation. See Riskin, *supra* note 13, at 60–64. In their recent book, Bush and Folger distinguished — as did Kolb and Kressel — between "problem-solving" and "transformative" mediation, urging that the "mediation movement" adopt the latter. See ROBERT A.B. BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (1994). Mark Umbreit uses a dichotomy of "controlling" and "empowering" styles of mediation in interpersonal disputes, see UMBREIT, *supra* note 6, at 34, and promotes what he calls "humanistic" mediation as way to achieve peace, both outer and inner. See *id.* at 198–216.

30. However, Kenneth Kressel and Dean Pruitt have created a new dichotomy of styles — "task-oriented" and "socioemotional" — based on a purported consistency among other systems of categorization. See KRESSEL & PRUITT, *supra* note 28, at 422–23.

31. For instance, the "problem-solving style" presented by Kressel and his colleagues denotes interest-based negotiation. On the other hand, Bush and Folger generally employ "problem-solving" to include any kind of mediation that emphasizes resolving specific issues in dispute, as opposed to changing, or "transforming," the parties. See BUSH & FOLGER, *supra* note 29, at 12. At one point, however, Bush and Folger recognize "the advent of an 'adversarial' form of mediation that greatly narrows and adversarializes the process, an approach often associated with mediators who are former judges." *Id.* at 73. But they add: "It is too soon to tell whether this is in fact a distinct approach or simply an extreme version of problem-solving mediation in which mediator directiveness is even more pronounced." *Id.*

32. The legal philosopher Felix Cohen wrote, "A definition of law is *useful* or *useless*. It is not *true* or *false* any more than a New Year's resolution or an insurance policy. A definition is in fact a type of insurance against certain risks of confusion." Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 835–36 (1935). Cohen's idea applies equally to systems of categorization.

33. I am aware that, although systems of categorization help us understand reality, they also distort it. I am humbled by Robert Benchly's pronouncement that "[t]here may be said to be two classes of people in the world: those who constantly divide the people of the world into two classes, and those who do not." Paul Dickson, *The Official Rules*, THE WASHINGTONIAN, Nov. 1978, at 152.

## II. THE PROPOSED SYSTEM

The system I propose describes mediations by reference to two related characteristics, each of which appears along a continuum. One continuum concerns the goals of the mediation. In other words, it measures the scope of the problem or problems that the mediation seeks to address or resolve. At one end of this continuum sit narrow problems, such as how much one party should pay the other. At the other end lie very broad problems, such as how to improve the conditions in a given community or industry.<sup>34</sup> In the middle of this continuum are problems of intermediate breadth,<sup>35</sup> such as how to address the interests of the parties or how to transform the parties involved in the dispute.

The second continuum concerns the mediator's activities. It measures the strategies and techniques that the mediator employs in attempting to address or resolve the problems that comprise the subject matter of the mediation. One end of this continuum contains strategies and techniques that *facilitate* the parties' negotiation; at the other end lie strategies and techniques intended to *evaluate* matters that are important to the mediation.

The following hypothetical, developed by Professor Charles Wiggins, will help illustrate the system of categorization that I propose.

### COMPUTEC

Golden State Savings & Loan NTC is the second largest savings and loan association in the state. Just over a year ago, it contracted with Computec, a computer consulting firm, to organize and computerize its data processing system and to operate that system for a period of ten years. Computec thus became responsible for all of the computer-related activities of

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34. A recent report of the Society of Professionals in Dispute Resolution noted the presence in dispute resolution of "conflicting values and goals, including:

1. increased disputant participation and control of the process and outcome
2. restoration of relationships
3. increased efficiency of the judicial system and lowered costs
4. preservation of social order and stability
5. maximization of joint gains
6. fair process
7. fair and stable outcomes and
8. social justice."

*Ensuring Competence and Quality in Dispute Resolution Practice*, REPORT 2 OF THE SPIDR COMMISSION ON QUALIFICATIONS 5 (Society of Professionals in Dispute Resolution, 1995).

35. Conceptually, "deep" probably would work as well as "broad," but I find it too difficult to depict graphically.

the savings and loan, such as account management, loan processing, investment activity, and payroll. Golden State agreed to pay Computec a consulting and administration fee of over one million dollars per year for the term of the contract.

At the end of the first year of operation under this contract, Computec presented Golden State with a bill for approximately \$30,000 in addition to the agreed-upon fee. This bill represented costs incurred by Computec staff in attending seminars and meetings related to the installation of computer technology in banks, and costs incurred while meeting with various outside consultants on aspects of the contract with Golden State. Upon receipt of this bill, Golden State wrote to Computec, advising Computec that because Golden State could find no express term in the contract requiring reimbursement for these charges, and because the bank had a strict policy against reimbursement for such expenses incurred by its own employees, it would not reimburse Computec staff for similar expenses. Computec responded quickly, informing Golden State that this type of charge was universally reimbursed by the purchaser of computer consulting services, and that it would continue to look to Golden State for reimbursement.

The conflict is generating angry feelings between these two businesses, who must work together closely for a number of years. Neither party can see any way of compromising on the costs already incurred by Computec, and of course Computec expects to be reimbursed for such charges in the future as well. Under applicable law, reasonable expenses directly related to the performance of a professional service contract are recoverable as an implied term of the contract if it is industry practice that they be so paid. It is unclear, however, whether the purchaser of these services must be aware of the industry practice at the time of contracting.<sup>36</sup>

A. *The Problem-Definition Continuum: Goals, Assumptions, and Focuses*

The focus of a mediation — its subject matter and the problems or issues it seeks to address — can range from narrow to broad. Here, I identify four “levels” of a mediation that correspond to different degrees of breadth.<sup>37</sup>

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37. I am grateful to Professor Lela Love for suggesting the concept of levels to explain the problem-definition continuum.

### 1. *Level I: Litigation Issues*

In very narrow mediations, the primary goal is to settle the matter in dispute through an agreement that approximates the result that would be produced by the likely alternative process, such as a trial, without the delay or expense of using that alternative process.<sup>38</sup> The most important issue tends to be the likely outcome of litigation. "Level I" mediations, accordingly, focus on the strengths and weaknesses of each side's case.

In a "Level I" mediation of the *Computec* case, the goal would be to decide how much, if any, of the disputed \$30,000 Golden State would pay to *Computec*. The parties would make this decision "in the shadow of the law."<sup>39</sup> Discussions would center on the strengths and weaknesses of each side's case and on how the judge or jury would likely determine the relevant issues of fact and law.<sup>40</sup>

### 2. *Level II: "Business" Interests*

At this level, the mediation would attend to any of a number of issues that a court would probably not reach. The object would be to satisfy business interests. For example, it might be that Golden State is displeased with the overall fee structure or with the quality or quantity of *Computec's* performance under the contract, and the mediation might address these concerns. Recognizing their mutual interest in maintaining a good working relationship, in part because they are mutually dependent, the companies might make other adjustments to the contract.

Broadening the focus a bit, the mediation might consider more fundamental business interests, such as both firms' need to continue doing business, make profits, and develop and maintain a good reputation. Such a mediation might produce an agreement that, in addition to disposing of the \$30,000 question, develops a plan to

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38. Mediation programs that sponsor narrowly-focused mediations might have closely-related goals, such as saving judicial time and resources. See *supra* note 34 and accompanying text.

39. See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

40. These include: whether the expenses were directly related to the performance of the contract, whether the expenses were reasonable, whether it was industry practice to pay such expenses, and whether, in order for the court to find an implied promise to pay such expenses, the purchaser of the services must have been aware of the industry practice. For a discussion of these issues, see *Manakuli Paving & Rock Co. v. Shell Oil Co., Inc.*, 664 F.2d 772 (9th Cir. 1981).

Such extremely narrow problem-definitions typify court-ordered arbitration, summary jury trials, early neutral evaluation, and, usually, moderated settlement conferences.

collaborate on a new business venture. Thus, by exploring their mutual business interests, both companies have the opportunity to improve their situations in ways they might not have considered but for the negotiations prompted by the dispute.

### 3. *Level III: Personal/Professional/Relational Issues*

"Level III" mediations focus attention on more personal issues and interests. For example, during the development of the \$30,000 dispute, each firm's executives might have developed animosities toward or felt insulted by executives from the other firm. This animosity might have produced great anxiety or a loss of self-esteem. On a purely instrumental level, such personal reactions can act as barriers to settlement. Although Fisher, Ury and Patton tell us to "separate the people from the problem,"<sup>41</sup> sometimes the people *are* the problem. Thus, mediation participants often must address the relational and emotional aspects of their interactions in order to pave the way for settlement of the narrower economic issues. In addition, addressing these relational problems may help the parties work together more effectively in carrying out their mediated agreement.

Apart from these instrumental justifications, addressing these personal and relational problems can be valuable in its own right. Focusing on such issues may be important even if the mediation does not produce a solution to the narrower problems.<sup>42</sup> In other words, a principal goal of mediation could be to give the participants an opportunity to learn or to change.<sup>43</sup> This could take the form of moral growth or a "transformation," as understood by Bush and Folger to include "empowerment" (a sense of "their own capacity to handle life's problems") and "recognition" (acknowledging or empathizing with others' situations).<sup>44</sup> In addition, the parties might repair their relationship<sup>45</sup> by learning to forgive one another<sup>46</sup> or by recognizing

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41. See FISHER ET AL., *supra* note 21, at 17-39.

42. See BUSH & FOLGER, *supra* note 29 *passim*; Lon L. Fuller, *Mediation — Its Forms and Functions*, 44 S. CAL. L. REV. 305, 310 (1971).

43. See THOMAS CRUM, *THE MAGIC OF CONFLICT: TURNING A LIFE OF WORK INTO A WORK OF ART* 174-75 (1987); cf. WILLIAM URY ET AL., *GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT* 170 (1988).

44. See BUSH & FOLGER, *supra* note 29 *passim*. The ability to empathize with one's counterpart can produce numerous benefits. In Gandhi's words: "Three fourths of the miseries and misunderstandings in the world will disappear if we step into the shoes of our adversaries and understand their standpoint." *ESSENTIAL GANDHI* 255 (Louis Fischer ed., 1962).

45. See James A. Wall, Jr. & Ronda R. Callister, *Ho'oponopono: Some Lessons from Hawaiian Mediation*, 11 NEG. J. 45 (1995).

their connectedness.<sup>47</sup> They might learn to understand themselves better, to give up their anger or desire for revenge,<sup>48</sup> to work for inner peace,<sup>49</sup> or to otherwise improve themselves.<sup>50</sup> They also might learn to live in accord with the teachings or values of a community to which they belong.<sup>51</sup>

#### 4. Level IV: Community Interests

"Level IV" mediations consider an even broader array of interests, including those of communities or entities that are not parties to

46. See STEVEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 137-39 (2d ed. 1992); Hank de Zutter, *Proponents Say ADR Spells Relief*, ILL. LEGAL TIMES, Jan. 1988, at 1; Comment, *Healing Angry Wounds: The Roles of Apology and Mediation in Disputes Between Physicians and Patients*, J. DISP. RESOL. 126-27 (1987).

47. See Zena D. Zumeta, *Spirituality and Mediation*, 11 MEDIATION Q. 25, 25 (1993) (discussing the creation and nurture of connectedness in mediation). See generally *Beyond Technique: The Soul of Family Mediation*, 11 MEDIATION Q. 1 (1993) (discussing the role of emotion and spirituality in family mediations).

48. See Kenneth Cloke, *Revenge, Forgiveness, and the Magic of Mediation*, 11 MEDIATION Q. 67, 67 (1993) (describing methods to encourage parties to forgive).

49. See UMBREIT, *supra* note 6, at 75-82. Shinzen Young, an American Buddhist priest and teacher of Vipassana or "insight" meditation, makes available a process he calls "meditative mediation" when members of his community are engaged in a dispute. The process involves alternating between mediation and insight meditation. During the meditation, the parties observe their own internal reactions, which promotes insight, the goal of this practice. The parties use conflict as an opportunity to enhance their own development. See SHINZEN YOUNG, *MEDITATIVE MEDIATION* (Insight Recordings, Santa Monica, CA, transcript on file with author).

50. See Lois Gold, *Influencing Unconscious Influences: The Healing Dimension of Mediation*, 11 MEDIATION Q. 55, 58-60 (1993) (characterizing mediation as part of a general "healing" paradigm).

51. The Mennonite Conciliation Service, although it avoids "creedal" approaches, seeks to do "justice" in its mediations. "To us justice is doing what is necessary to establish right relationships. Right relationships are those that honor mutual human worth, that redress past wrong as far as injuries are able to be redressed, and in which steps have been taken so that neither fear nor resentment play dominant roles." John P. Lederach & Ron Kraybill, *The Paradox of Popular Justice: A Practitioner's View*, in *THE POSSIBILITY OF POPULAR JUSTICE: A CASE STUDY OF COMMUNITY MEDIATION IN THE UNITED STATES* 357, 361 (Sally E. Merry & Neal Milner eds., 1993). In mediations provided by the Christian Conciliation Service,

The purpose . . . is to glorify God by helping people to resolve disputes in a conciliatory rather than an adversarial manner. In addition to facilitating the resolution of substantive issues, Christian conciliation seeks to reconcile those who have been alienated by conflict and to help them learn how to change their attitudes and behavior to avoid similar conflicts in the future.

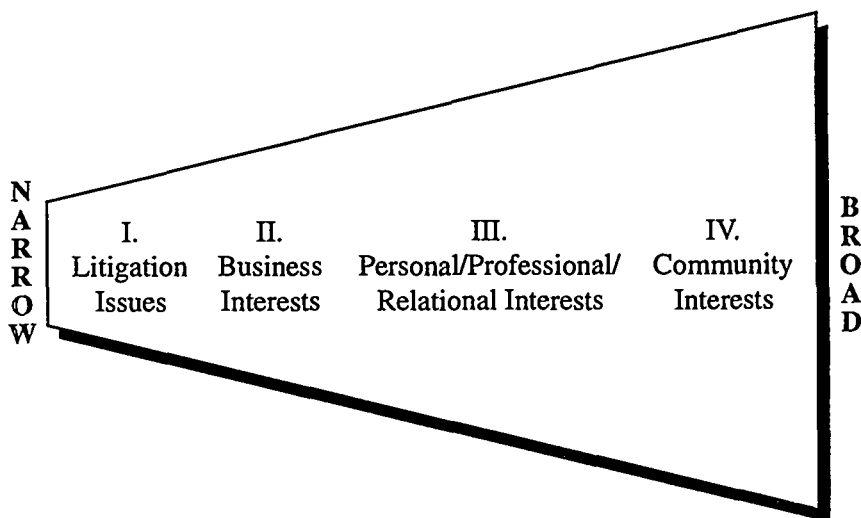
INSTITUTE FOR CHRISTIAN CONCILIATION, *CHRISTIAN CONCILIATION HANDBOOK* 19 (Revision 3.2, 1994). For an analysis of various ways to look at the transformative potential of mediation, see Carrie Menkel-Meadow, *The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices*, 11 NEG. J. 217 (1995) (book review).

the immediate dispute. For example, perhaps the ambiguity in legal principles relevant to the Computec case has caused problems for other companies; the participants might consider ways to clarify the law, such as working with their trade associations to promote legislation or to produce a model contract provision. In other kinds of disputes, parties might focus on improving, or "transforming," communities.<sup>52</sup>

Figure 1 illustrates and summarizes the type of problems that appear along the problem-definition continuum. Of course, mediations that employ broader problem-definitions can include resolution

FIGURE 1

## PROBLEM-DEFINITION CONTINUUM



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of narrower problems that appear to the left on the continuum. Thus, a mediation of the Computec case that addresses the underlying business interests also could resolve the distributive issue — how much of the \$30,000, if any, does Golden State pay to Computec? As the problem broadens, however, the distributive issue could become less important. Thus, if the two feuding executives learn to understand each other, instead of deciding how much Golden State will pay to Computec, they might arrive at an agreement that washes away that

52. See generally Lederach & Kraybill, *supra* note 51 (exploring notions of popular justice and social transformation).

distributive issue. For example, they might decide to serve the firms' underlying business interests by creating a joint venture to market computer services to financial institutions, with a \$30,000 seed-money contribution from Golden State and an employee loaned by Computec. In other words, in moving from narrow to broad definitions of the subject matter of a mediation, one's view of the conflict can change from that of a problem to be eliminated to that of an opportunity for improvement.

Within a given mediation, a particular problem or issue can have either primary or secondary significance. In a very narrow mediation of Computec, for example, the primary focus is on how much of the \$30,000, if any, Golden State will pay. Yet, even in such a mediation, the participants might benefit in secondary, broader ways. They could, for example, feel vindicated, satisfied, or enlightened as to their own situation or that of their counterpart. This might permit greater empathy and the ability to rebuild their working relationship. And any of these developments could transform them, in ways large or small. In a narrow mediation, however, such outcomes claim only secondary importance, as occasional by-products of solving the central, distributive issue. The participants — including the mediator — may not think or care about such outcomes.<sup>53</sup>

#### B. *The Mediator's Role: Goals and Assumptions Along The Facilitative-Evaluative Continuum*

The second continuum describes the strategies and techniques that the mediator employs to achieve her goal of helping the parties address and resolve the problems at issue.<sup>54</sup> At one end of this continuum are strategies and techniques that *evaluate* issues important to the dispute or transaction. At the extreme of this evaluative end of

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53. In a given mediation, of course, participants may have different goals or priorities and, therefore, may attach differing degrees of significance to resolving a particular issue.

54. Some commentators distinguish between "settlement" and "resolution," implying that settlement tends to result from a compromise on a narrow issue, whereas resolution seeks to deal with underlying problems. See J. Michael Keating, Jr. & Margaret L. Shaw, "Compared to What?: Defining Terms in Court-Related ADR Programs, 6 NEG. J. 217 (1990) (suggesting that "settlement" typifies judicially-hosted settlement conferences but that "collaboration" or "resolution" should be the goal in mediation).

the continuum fall behaviors intended to direct some or all of the outcomes of the mediation.<sup>55</sup> At the other end of the continuum are beliefs and behaviors that *facilitate* the parties' negotiation. At the extreme of this facilitative end is conduct intended simply to allow the parties to communicate with and understand one another.<sup>56</sup>

The mediator who evaluates assumes that the participants want and need her to provide some guidance as to the appropriate grounds for settlement — based on law, industry practice or technology — and that she is qualified to give such guidance by virtue of her training, experience, and objectivity.

The mediator who facilitates assumes that the parties are intelligent, able to work with their counterparts, and capable of understanding their situations better than the mediator and, perhaps, better than their lawyers.<sup>57</sup> Accordingly, the parties can develop better solutions than any the mediator might create. Thus, the facilitative mediator assumes that his principal mission is to clarify and to enhance communication between the parties in order to help them decide what to do.

To explain the facilitative-evaluative continuum more fully, I must demonstrate how it relates to the problem-definition continuum. The relationship is clearest if we show the problem-definition continuum on a horizontal axis and the facilitative-evaluative continuum on a vertical axis, as depicted in Figure 2. The four quadrants each represent a general orientation toward mediation: evaluative-narrow, facilitative-narrow, evaluative-broad, and facilitative-broad.

### C. *The Four Orientations: Strategies and Techniques*

Most mediators operate from a predominant, presumptive or default orientation<sup>58</sup> (although, as explained later, many mediators

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55. Professor Edward Dauer has called such a process "op-med." See EDWARD A. DAUER, *MANUAL OF DISPUTE RESOLUTION: ADR LAW AND PRACTICE* §§ 11–45 (1994).

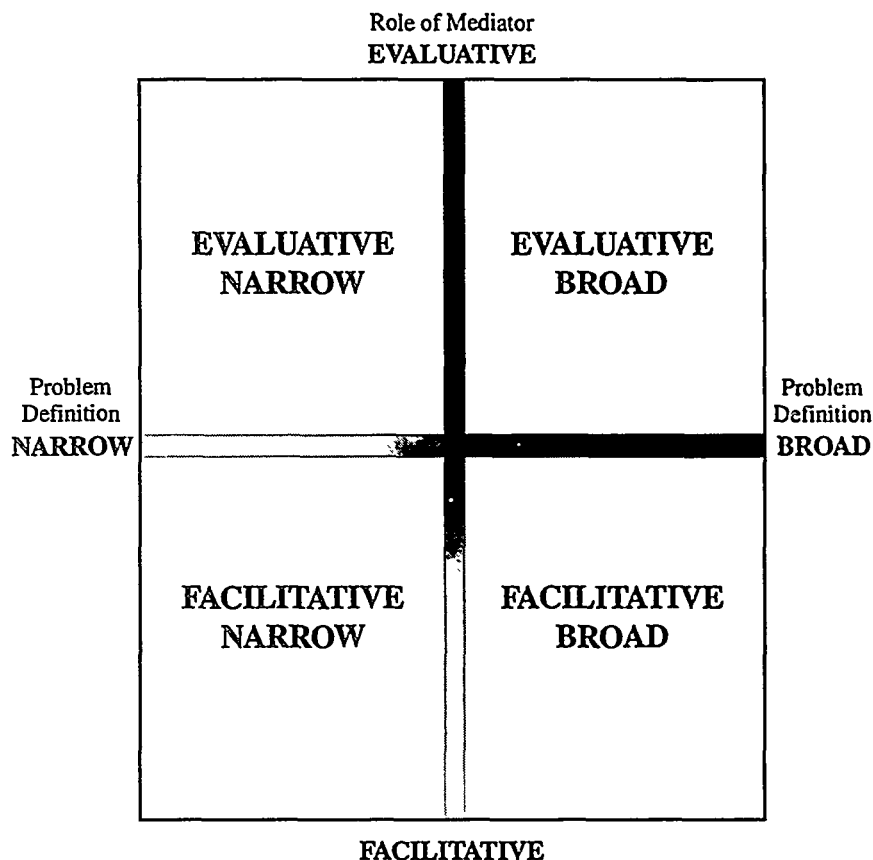
56. See Thomas Princen, *Joseph Elder: Quiet Peacemaking in a Civil War*, in *WHEN TALK WORKS*, *supra* note 16, at 428.

57. See Riskin, *supra* note 10, at 1099–1108.

58. Kressel and his colleagues said the following about the common characteristics of the mediator styles that they identified:

First, a mediator's style tended to be consistent. A given mediator was likely to enact the same style from case to case, even in the face of considerably different issues or conflict dynamics. Second, mediator style appeared to operate below the level of conscious awareness; style was something mediators "did" without fully recognizing the underlying coherence or "logic" behind their style. Mediators were capable of articulating why they adopted the style they exhibited when their style was pointed out to them, but this took a conscious effort and the assistance of other team members. Finally, mediator

FIGURE 2  
**MEDIATOR ORIENTATIONS**



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move along continuums and among quadrants).<sup>59</sup> For purposes of the following explication of mediator orientations, I will assume that

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style could be modified, but this too took explicit direction or "training." Over the course of the project, and as a result of case conferencing, team members became more aware of their intrinsic stylistic inclinations and learned to shift to a more adaptive style where indicated.

Kressel et al., *supra* note 26, at 72-73.

Kressel and Pruitt write that there are two bases that mediators use to decide what kind of interventions to make: "[t]he mediator's active monitoring of the unfolding conflict; [and] the mediator's often unarticulated preference for a particular style of mediation." Kenneth Kressel & Dean G. Pruitt, *Conclusion: A Research Perspective on the Mediation of Social Conflict*, in KRESSEL & PRUITT, *supra* note 28, at 394, 422. See also Silbey & Merry, *supra* note 27, at 19. Although they highlight the tendency of mediators to respond to circumstances, Professors Silbey and Merry note that "mediation strategies tend to be more pronounced and stylized toward one or the other mode with increased experience." *Id.*

59. See discussion *infra* Part II.D.

the mediator is acting from such a predominant orientation. For this reason, and for convenience, I will refer to the "evaluative-narrow mediator" rather than the more precise, but more awkward, "mediator operating with an evaluative-narrow approach."

A mediator employs strategies — plans — to conduct a mediation. And a mediator uses techniques — particular moves or behaviors — to effectuate those strategies. Here are selected strategies and techniques that typify each mediation orientation.<sup>60</sup>

### 1. *Evaluative-Narrow*

A principal strategy of the evaluative-narrow approach is to help the parties understand the strengths and weaknesses of their positions and the likely outcome of litigation or whatever other process they will use if they do not reach a resolution in mediation. But the evaluative-narrow mediator stresses her own education at least as much as that of the parties.<sup>61</sup> Before the mediation starts, the evaluative-narrow mediator will study relevant documents, such as pleadings, depositions, reports, and mediation briefs. At the outset of the mediation, such a mediator typically will ask the parties to present their cases, which normally means arguing their positions, in a joint

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60. At this point, I wish simply to describe — and to describe simply — the proposed system of categorization. For convenience, I sometimes will write *as if* the mediator alone defines the problem and selects the strategies and techniques she will employ. However, the question of how the mediator and the parties do, can, and should determine the scope and nature of a given mediation is extremely complex. Accordingly, I plan to avoid it in this Article and address it in a subsequent work.

My approach to describing the activities of mediators differs from that developed by Silbey and Merry. Their "ideal types" — the "bargaining style" and the "therapeutic style" — provide examples, respectively, of tendencies toward narrow or broad problem-definition. See Silbey & Merry, *supra* note 27, at 19. Silbey and Merry observed that mediators' behavior fell along a continuum, with these two styles representing the poles. They did not focus on the evaluative-facilitative dimension, however, probably because they seemed to believe that in both categories the mediator manipulated the parties into settlement. See *id.* at 14. Silbey and Merry did not intend their styles to be used to categorize mediators; in fact, they argue that all mediators that they observed used both styles. Rather, they characterize the mediation styles they constructed as model/ideal types, Weberian analytical constructs that do not exist in reality. In contrast, I believe that the orientations that I set out do accurately describe the practices of a substantial number of mediators — although some mediators draw from each quadrant. See *infra* Part II.D.

61. See Kenneth Feinberg, *Mediation — A Preferred Method of Dispute Resolution*, 16 PEPP. L. REV. S5, S12–S20 (1989).

session. Subsequently, most mediation activities take place in private caucuses in which the mediator will gather additional information and deploy evaluative techniques,<sup>62</sup> such as the following, which are listed below from the least to the most evaluative.

a. *Assess the strengths and weaknesses of each side's case.* — In the Computec case, an evaluative mediator might tell Computec's representatives that, even if a court were to interpret the law as they hoped, the firm would have trouble meeting its burden of establishing the existence of an industry custom that purchasers of such services normally pay the related travel expenses of their suppliers. The mediator would explain her reasoning, invoking her experience and knowledge.

b. *Predict outcomes of court or other processes.* — In Computec, the mediator might predict for Golden State the likely rulings on issues of law and fact, the likely outcome at trial and appeal, and the associated costs.

c. *Propose position-based compromise agreements.* — A mediator can make such proposals with varying degrees of directiveness. Some mediators might suggest resolution points so gently that they are barely evaluative — for instance, throwing out a figure at which she thinks the parties might be willing to settle, without suggesting that this corresponds to what would happen in court or is otherwise an appropriate settlement point.<sup>63</sup> A slightly more directive proposal might be to ask Computec, "Would you accept \$12,000?" or "What about \$12,000?" A still more directive proposal would be to suggest that the case might settle within a certain range, say \$10,000-\$15,000. An even more directive move would be to say, "I think \$12,000 would be a good offer."<sup>64</sup>

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62. See *id.* James C. Freund has developed his own twelve-step method for dealing with disputes over money. See JAMES C. FREUND, *THE NEUTRAL NEGOTIATOR: WHY AND HOW MEDIATION CAN WORK TO RESOLVE DOLLAR DISPUTES* 17, 37-48 (1995).

63. See Alan Alhadeff, *What is Mediation?*, in *THE ALTERNATIVE DISPUTE RESOLUTION PRACTICE GUIDE* § 23:9 (Bette J. Roth et al., eds., 1993). This soft suggestion technique also could be employed by a facilitative-narrow mediator as the most evaluative technique in his repertoire.

64. Sometimes such proposals can be quite creative. See FREUND, *supra* note 62, at 44-45. The timing of a mediator's proposal might affect its degree of directiveness. Some mediators, whose conduct I consider extremely evaluative, will make assessments and proposals immediately after learning the facts of the case. See Feinberg, *supra* note 61, at S17-S18. Others will use a less directive technique — withholding such assessments until the parties request them, which often occurs after facilitative negotiations have failed. See DAUER, *supra* note 55, at § 11.14.

d. *Urge or push the parties to settle or to accept a particular settlement proposal or range.* — In the Computec case, the mediator might tell Computec that she thinks Computec “should” accept a settlement offer of \$12,000 because that would protect it against the risk and expense of litigation or because it is “right” or “fair” or “reasonable.”<sup>65</sup> If the mediator has any sort of “clout,” she may threaten to use it. Or she may engage in “head-banging.”<sup>66</sup>

## 2. *Facilitative-Narrow*

The facilitative-narrow mediator shares the evaluative-narrow mediator’s general strategy — to educate the parties about the strengths and weaknesses of their claims and the likely consequences of failing to settle. But he employs different techniques to carry out this strategy. He does not use his own assessments, predictions, or proposals.<sup>67</sup> Nor does he apply pressure. He is less likely than the evaluative-narrow mediator to request or to study relevant documents. Instead, believing that the burden of decision-making should rest with the parties, the facilitative-narrow mediator might engage in any of the following activities.

a. *Ask questions.* — The mediator may ask questions — generally in private caucuses — to help the participants understand both sides’ legal positions and the consequences of non-settlement. The questions ordinarily would concern the very issues about which the evaluative-narrow mediator makes statements — the strengths and weaknesses of each side’s case and the likely consequences of non-settlement, as well as the costs of litigation (including expense, delay, and inconvenience).<sup>68</sup>

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65. For examples of such techniques, see Lavinia Hall, *Eric Green: Finding Alternatives to Litigation in Business Disputes*, in *WHEN TALK WORKS*, *supra* note 16, at 279.

66. Kenneth Feinberg seems to use most of the evaluative techniques in a very structured manner; he increases pressure as the mediation moves on. See Feinberg, *supra* note 61, at S12–S20.

67. The facilitative mediator believes that it is inappropriate for the mediator to give his opinion, for several reasons. First, such opinions might impair the appearance of impartiality and thereby the mediator’s ability to function. Second, if the parties know that the mediator is likely to make an assessment of the legal merits of their case, they are less likely to give the mediator a candid assessment of the strengths and weakness of their claims in a private caucus. See Alhadeff, *supra* note 63, at § 23:8. Third, the mediator might not know enough — about the details of the case or the relevant law, practices or technology — to give an informed opinion.

68. Here are examples of the types of questions the facilitative-narrow mediator might ask: 1. What are the strengths and weaknesses of your case? Of the other side’s case? 2. What are the best, worst, and most likely outcomes of litigation? How

b. *Help the parties develop their own narrow proposals.* — In the Computec case, for instance, a facilitative-narrow mediator would help each party develop proposals as to how much of the \$30,000 Golden State would pay.

c. *Help the parties exchange proposals.* — The mediator might present party proposals in private caucuses or encourage parties to make such proposals in a joint session. In either event, he would encourage participants to provide a rationale for each proposal that might help the other side accept it.

d. *Help the parties evaluate proposals.* — To do this, the mediator might ask questions that would help the parties weigh the costs and benefits of each proposal against the likely consequences of non-settlement.

The facilitative nature of this mediation approach might also produce a degree of education or transformation.<sup>69</sup> The process itself, which encourages the parties to develop their own understandings and outcomes, might educate the parties, or “empower” them by helping them to develop a sense of their own ability to deal with the problems and choices in life.<sup>70</sup> The parties also might acknowledge or empathize with each other’s situation.<sup>71</sup> However, in a narrowly-focused mediation, even a facilitative one, the subject matter normally produces fewer opportunities for such developments than does a facilitative-broad mediation.<sup>72</sup>

### 3. *Evaluative-Broad*

It is more difficult to describe the strategies and techniques of the evaluative-broad mediator. Mediations conducted with such an orientation vary tremendously in scope, often including many narrow, distributive issues, as the previous discussion of the problem-definition continuum illustrates.<sup>73</sup> In addition, evaluative-broad

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did you make these assessments? Have you thought about [other issues]? 3. How long will it take to get to trial? How long will the trial last? 4. What will be the associated costs — in money, emotions, or reputation? Note that a mediator also can use a question to make an evaluative statement. See *infra* note 97; Hall, *supra* note 65, at 297.

69. See *supra* notes 42–52 and accompanying text.

70. See BUSH & FOLGER, *supra* note 29, at 85–89.

71. See *id.* at 89–94. For a more comprehensive vision of transformation, see Menkel-Meadow, *supra* note 51.

72. See *infra* notes 83–84.

73. See discussion *supra* Part II.A.

mediators can be more-or-less evaluative, with the evaluative moves touching all or only some of the issues.

The evaluative-broad mediator's principal strategy is to learn about the circumstances and underlying interests of the parties and other affected individuals or groups, and then to use that knowledge to direct the parties toward an outcome that responds to such interests.<sup>74</sup> To carry out this strategy, the evaluative-broad mediator will employ various techniques, including the following (listed from least to most evaluative).

a. *Educate herself about underlying interests.* — The evaluative-broad mediator seeks to understand the underlying legal and other distributive issues by studying pleadings, depositions, and other documents, as well as by allowing the parties (usually through their lawyers) to argue their cases during the mediation. Unlike the narrow mediator, however, the broad mediator emphasizes the parties' underlying interests rather than their positions, and seeks to uncover needs that typically are not revealed in documents. Pleadings in the *Computec* case, for instance, would not indicate that one of the causes of the dispute was Golden State's interest in protecting the sanctity of its internal policy against reimbursing convention travel expenses of its own employees, let alone that the policy was born when the CEO observed staff members, at a convention in Bermuda, frolicking instead of attending seminars.

For this sort of information, as well as other interests, the mediator must dig. To learn about the parties' underlying interests, the evaluative-broad mediator would be more likely than the narrow mediator to encourage or require the real parties (whether actual disputants or knowledgeable representatives of corporations or other organizations who possess settlement authority) to attend and participate in the mediation. For instance, the mediator might invite such individuals to make remarks after the lawyers present their opening statements, and she might interview such individuals extensively in private caucuses. She might explain that the goal of mediation can include addressing underlying interests, ask direct questions about interests, and seek such information indirectly by questioning the parties as to their plans, situations, and the like. Often, evaluative-broad mediators will speculate aloud about the parties' interests

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74. For an excellent example of an evaluative-broad orientation, see Deborah M. Kolb, *William Hobgood: Conditioning Parties in Labor Grievances*, in *WHEN TALK WORKS*, *supra* note 16, at 149; see also KOLB, *supra* note 28, at 72–112 (discussing the practices of state labor mediators, whom the author calls “deal makers”).

(generally in private caucuses) and seek confirmation of their statements.

Evaluative-broad mediators expect to construct proposed agreements. For that reason, they generally emphasize their own education over that of the parties. Accordingly, they typically will restrict or control direct communication between the parties; thus, for example, the evaluative-broad mediator would spend more time in private caucuses than in joint sessions.

b. *Predict impact (on interests) of not settling.* — After determining the parties' underlying interests and setting the scope of the problems to be addressed in the mediation, some evaluative-broad mediators would predict how failure to settle would impact important interests.<sup>75</sup> In the Computec case, an evaluative-broad mediator might tell Golden State that unless it reaches an agreement that allows Computec executives to feel appreciated and effective, relations will sour and Computec might become less diligent, thereby impairing Golden State's ability to compete and to serve its customers.

An evaluative-broad mediator also might try to persuade the participants that her assessments are correct by providing objective criteria or additional data.

c. *Develop and offer broad (interest-based) proposals.* — An evaluative-broad mediator's goal is to develop a proposal that satisfies as many of the parties' interests, both narrow and broad, as feasible. Proposals in the Computec case, for example, might range from a payment scheme for Golden State (based on an allocation of costs), to a system for the submission and approval of travel and education expenses in future years, to the formation of a new joint venture.

d. *Urge parties to accept the mediator's or another proposal.* — The evaluative-broad mediator (like the evaluative-narrow mediator) might present her proposal with varying degrees of force or intended impact. If the mediator has clout (the ability to bring pressure to bear on one or more of the parties), she might warn them or threaten to use it.<sup>76</sup>

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75. Like the evaluative-narrow mediator, an evaluative-broad mediator in the Computec case might render her opinion as to distributive (adversarial) issues by assessing the strengths and weaknesses of the parties' legal cases, predicting the outcome at trial, or recommending how much, if anything, Golden State should pay. But the evaluative-broad mediator generally focuses on the parties' underlying interests.

76. Special masters who employ mediation strategies and techniques often have the kind of power that makes it possible to put pressure on parties. See Vincent M.

If the mediator has concluded that the goal of the mediation should include changing the people involved, she might take measures to effectuate that goal, such as appealing to shared values,<sup>77</sup> lecturing, or applying pressure.<sup>78</sup>

#### 4. *Facilitative-Broad*

The facilitative-broad mediator's principal strategy is to help the participants define the subject matter of the mediation in terms of underlying interests and to help them develop and choose their own solutions that respond to such interests. In addition, many facilitative-broad mediators will help participants find opportunities to educate or change themselves, their institutions, or their communities.<sup>79</sup> To carry out such strategies, the facilitative-broad mediator may use techniques such as the following.

a. *Help parties understand underlying interests.* — To accomplish this task, the facilitative-broad mediator will engage in many of the same activities as the evaluative-broad mediator, such as encouraging attendance and participation by the real parties, not just their lawyers,<sup>80</sup> and explaining the importance of interests. Because he expects the parties to generate their own proposals, the facilitative-broad mediator emphasizes the need for the parties to educate themselves and each other more than the mediator. Thus, in contrast to

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Nathan, *The Use of Special Masters in Institutional Reform Litigation*, 10 U. Tol. L. Rev. 419 (1979). In addition, managers or others with authority over disputants often use their authority to coerce settlements. For example, when Linda Colburn managed a public housing project in Hawaii, she often engaged in a form of mediation she calls "peacemaking"; in order to defuse violent situations, she frequently employed threats. See Neal Milner, *Linda Colburn: On-the-Spot Mediation in a Public Housing Project*, in WHEN TALK WORKS, *supra* note 16, at 417.

President Jimmy Carter's mediations in the Israel-PLO dispute and the Ethiopia-Eritrea dispute demonstrate broad and very evaluative mediation. He pushed the parties hard, making moral arguments as well as suggesting ways in which the United States could help the parties if they reached agreement. See Eileen F. Babbitt, *Jimmy Carter: The Power of Moral Suasion in International Mediation*, in WHEN TALK WORKS, *supra* note 16, at 377-78.

77. See *supra* note 50. Neutrals in the Christian Conciliation Service are "as concerned about reconciling the parties as they are about helping them settle their substantive differences." CHRISTIAN CONCILIATION HANDBOOK, *supra* note 51, at 7. In the conciliation sessions, the neutrals "teach relevant biblical principles." *Id.* at 27. They also may issue advisory opinions. See *id.* at 28.

78. See, e.g., James A. Wall, Jr. & Michael Blum, *Community Mediation in the People's Republic of China*, 35 J. CONFLICT RESOL. 3, 9, 13 (1991).

79. See *supra* notes 41-51 and accompanying text.

80. See Riskin, *supra* note 10, at 1097-1108.

the evaluative mediator, the facilitative-broad mediator will be inclined to use joint sessions more than private caucuses.<sup>81</sup>

The facilitative-broad mediator also will help the parties define the scope of the problem to be addressed in the mediation, often encouraging them to explore underlying interests to the extent that they wish to do so. This behavior stands in sharp contrast to that of narrow mediators (even most facilitative-narrow mediators), who tend to accept the obvious problem presented, and that of evaluative-broad mediators, who often define the scope of the problem to be addressed themselves.<sup>82</sup>

Many facilitative-broad mediators especially value mediation's potential for helping parties grow through an understanding of one another and of themselves. These mediators tend to offer the participants opportunities for positive change. One way to look at this is through Bush and Folger's concept of "transformation."<sup>83</sup> In this view, by encouraging the parties to develop their own understandings, options, and proposals, the facilitative-broad mediator "empowers" them; by helping the parties to understand one another's situation, the facilitative-broad mediator provides them opportunities to give "recognition" to one another.<sup>84</sup>

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81. See GARY J. FRIEDMAN, *A GUIDE TO DIVORCE MEDIATION* 36-37 (1993).

82. The facilitative-broad mediator does not ignore the litigation and other narrow issues; in fact, he might address these issues in the same fashion as the facilitative-narrow mediator. In other words, he would attempt to help the parties understand the strengths and weaknesses of each side's claims, but not by providing assessments, predictions, or proposals. Instead, he typically will allow the parties to present and discuss their legal arguments. In addition, in private caucuses, he might ask questions about litigation and other distributive issues, such as those listed for the facilitative-narrow mediator. See discussion *supra* Part II.C.2.

In a broad mediation, however, legal argument generally occupies a lesser position than it does in a narrow one. And because he emphasizes the participants' role in defining the problems and in developing and evaluating proposals, the facilitative-broad mediator does not need to fully understand the legal posture or other details of the case. Accordingly, he is less likely to request or study litigation documents, technical reports, or mediation briefs.

83. See BUSH & FOLGER, *supra* note 29, at 84. For a description of a facilitative mediator who emphasizes empowerment, see Sally E. Merry, *Albie M. Davis: Community Mediation as Community Organizing*, in *WHEN TALK WORKS*, *supra* note 16, at 245.

84. In Bush and Folger's view, "parties achieve recognition in mediation when they voluntarily choose to become more open, attentive, sympathetic and responsive to the situation of the other party, thereby expanding their perception to include an appreciation for another's situation." BUSH & FOLGER, *supra* note 29, at 89. In a mediation of the Computec case, for instance, executives from each firm who were embroiled in controversy with counterparts in the other firm might learn to understand one another's situations better; such understanding could be seen as valuable in its own right — whether or not it contributed to the resolution of the narrow issues

b. *Help parties develop and propose broad, interest-based options for settlement.* — The facilitative-broad mediator would keep the parties focused on the relevant interests and ask them to generate options that might respond to these interests.<sup>85</sup> In the Computec case, the options may include various systems through which the already-incurred expenses could be allocated to the Golden State contract, methods for handling the same issue in the future (informally or by contract amendment), and opportunities to collaborate on other projects (an example of positive change). Next, he would encourage the parties to use these options — perhaps combining or modifying them — to develop and present their own interest-based proposals.

c. *Help parties evaluate proposals.* — The facilitative-broad mediator uses questions principally to help the parties evaluate the impact on various interests of proposals and of non-settlement. In Computec, for instance, a facilitative-broad mediator might ask the Computec representative how a specific settlement would affect the parties' working relationship and how it would alter Computec's ability to deliver appropriate services.<sup>86</sup>

Figure 3 highlights the principal techniques associated with each orientation, arranged vertically with the most evaluative at the top and the most facilitative at the bottom. The horizontal axis shows the scope of the problems to be addressed, from the narrowest on the left to the broadest on the right.

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in dispute. See *supra* notes 41–50 and accompanying text. For a more comprehensive view of transformation, see Menkel-Meadow, *supra* note 51.

85. In developing a comprehensive agreement in Computec, the parties might seek to include terms that respond to their mutual interests in reestablishing and maintaining a good working relationship; in feeling fairly treated; in enhancing and maintaining Computec's ability to provide computerized financial services to Golden State; in ending this particular dispute and minimizing the costs of resolution; in continuing to make profits; or in maintaining good reputations.

86. Obviously not all facilitative mediators employ all of these techniques. In addition, some mediators are so facilitative that the broad-narrow continuum does not apply. These mediators simply help the parties define the problem and then facilitate communication. Quaker peacemaking, a form of "second-track diplomacy," offers excellent examples of this approach. See, e.g., Princen, *supra* note 56 *passim*.

FIGURE 3  
**MEDIATOR TECHNIQUES**

Role of Mediator  
**EVALUATIVE**

Problem Definition <b>NARROW</b>	<p>Urges/pushes parties to accept narrow (position-based) settlement</p> <p>Proposes narrow (position-based) agreement</p> <p>Predicts court or other outcomes</p> <p>Assesses strengths and weaknesses of each side's case</p>	<p>Urges/pushes parties to accept broad (interest-based) settlement</p> <p>Develops and proposes broad (interest-based) agreement</p> <p>Predicts impact (on interests) of not settling</p> <p>Educates self about parties' interests</p>	Problem Definition <b>BROAD</b>
	<p>Helps parties evaluate proposals</p> <p>Helps parties develop &amp; exchange narrow (position-based) proposals</p> <p>Asks about consequences of not settling</p> <p>Asks about likely court or other outcomes</p> <p>Asks about strengths and weaknesses of each side's case</p>	<p>Helps parties evaluate proposals</p> <p>Helps parties develop &amp; exchange broad (interest-based) proposals</p> <p>Helps parties develop options that respond to interests</p> <p>Helps parties understand interests</p>	

**FACILITATIVE**

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**D. Movement Along the Continuums and Among the Quadrants:  
 Limitations on the Descriptive Capabilities of the Grid**

Like a map, the grid has a static quality that limits its utility in depicting the conduct of some mediators.

It is true that most mediators — whether they know it or not — generally conduct mediations with a presumptive or predominant orientation.<sup>87</sup> Usually, this orientation is grounded in the mediator's personality, education, training, and experience. For example, most retired judges tend toward an extremely evaluative-narrow orientation, depicted in the far northwest corner of the grid. Many divorce mediators with backgrounds or strong interests in psychology or

87. See *supra* note 58 and accompanying text.

counseling — and who serve affluent or well-educated couples — lean toward a facilitative-broad approach.<sup>88</sup> Sometimes, the expectations of a given program dictate an orientation; for example, narrow mediation tends to dominate many public programs with heavy caseloads.<sup>89</sup>

Yet many mediators employ strategies and techniques that make it difficult to fit their practices neatly into a particular quadrant. First, some mediators deliberately try to avoid attachment to a particular orientation. Instead, they emphasize flexibility and attempt to develop their orientation in a given case based on the participants' needs<sup>90</sup> or other circumstances in the mediation.<sup>91</sup>

Second, for a variety of reasons, some mediators who have a predominant orientation do not always behave consistently with it.<sup>92</sup> They occasionally deviate from their presumptive orientation in response to circumstances arising in the course of a mediation. In some cases, this substantially changes the scope of the mediation. A mediator with a facilitative-broad approach handling a personal injury claim, for instance, normally would give parties the opportunity to explore underlying interests. But if the parties showed no inclination

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88. See, e.g., FRIEDMAN, *supra* note 81, at 37.

89. As Deborah Kolb has suggested, mediation tends to take on the characteristics of the process it replaces. See Deborah M. Kolb, *How Existing Procedures Shape Alternatives: The Case of Grievance Mediation*, 1989 J. DISP. RESOL. 59. Thus, court-connected mediation programs tend to be narrow. See Alfini, *supra* note 27, at 66.

90. See Letter from Donald B. Reder, President, Dispute Resolution, Inc., Hartford, Connecticut to Leonard L. Riskin (Sep. 28, 1994) (on file with author) ("In short, I think a good mediator needs to be prepared to be all the things you describe and must know when and to whom to be which. This is the art of mediation."). Advising lawyers, Eric Galton writes:

The best of all worlds is to identify a mediator who is versed in all styles and who has the capacity to be flexible. I have begun several mediations on a case evaluation track and during the process discovered, based on the personalities of the participants, that a community, more directly party-interactive, approach would be more effective. From the mediator's perspective, any variation of the process that is more likely to attain resolution should be the "right" process for that dispute.

GALTON, *supra* note 27, at 4.

91. Linda Colburn, for example, uses radically different approaches in different settings. In her "generic" mediations in the Honolulu Neighborhood Justice Center, she uses a facilitative-broad approach. But when she engages in "peacemaking," resolving disputes in a public housing project in which she has management authority, she sometimes uses threats (along with humor and other techniques designed to disorient the parties), largely in order to avoid violence. See Milner, *supra* note 76, at 395.

92. Some mediators lack a clear grasp of the essence of their own expressed orientation.

in that direction, the mediator probably would move quickly to focus on narrower issues.<sup>93</sup>

In other cases, a mediator might seek to foster her dominant approach using a technique normally associated with another quadrant. Thus, some mediators with predominantly facilitative-broad orientations might provide evaluations in order to achieve specific objectives consistent with their overall approach. Gary Friedman, an extremely facilitative-broad mediator, is a good example. When mediating divorces, Friedman typically follows the practice — standard among divorce mediators — of meeting with the parties alone, without their lawyers. In these sessions he routinely predicts judicial outcomes. He also emphasizes the principles underlying the relevant rules of law, and then encourages the parties to develop a resolution that makes sense for them and that meets their own notions of fairness. In essence, he evaluates in order to free the parties from the potentially narrowing effects of the law.<sup>94</sup>

Frances Butler, who mediates child-custody disputes for a New Jersey court, provides another example. She uses a mixture of facilitative and evaluative techniques in the service of a broad, facilitative agenda: she asks questions (a facilitative technique) to help her understand the situation, then makes proposals (an evaluative technique), and then solicits the parties' input (a facilitative technique) in order to modify the proposals.<sup>95</sup>

A narrow mediator who runs into an impasse might offer the parties a chance to broaden the problem by exploring underlying interests. This might lead to an interest-based agreement that would enable the parties to compromise on the distributive issue as part of a

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93. A mediator with a facilitative-broad orientation who faces a case that the parties seem to view narrowly may try to give the parties the opportunity to broaden the problem definition so as to explore underlying business or personal interests. Such a mediator faces a strategic choice. The mediator may wish to allow the parties first to focus narrowly on, say, the litigation issues, on the theory that they may need to go through stages of positioning and argumentation before they can settle down to look at underlying interests. See GERALD R. WILLIAMS, *LEGAL NEGOTIATION AND SETTLEMENT* 72–80 (1983). On the other hand, the mediator may try to open the parties to underlying interests as a preliminary matter on the theory that, in this way, the parties might avoid adversarial squabbling.

94. See FRIEDMAN, *supra* note 81, at 49–50.

95. See Kenneth Kressel, *Frances Butler: Questions That Lead to Answers in Child Custody Mediation*, in *WHEN TALK WORKS*, *supra* note 16, at 17.

Susan Silbey and Sally Merry, who distinguish between “bargaining” and “therapeutic” styles of mediation, conclude that an implicit negotiation determines the extent to which one or the other model prevails. See Silbey & Merry, *supra* note 27, at 19. They also note, however, that “mediation of family disputes typically begins with a therapeutic style and closes with a bargaining style.” *Id.* at 28.

more comprehensive settlement.<sup>96</sup> Similarly, a broad mediator might encourage the parties to narrow their focus if the broad approach seems unlikely to produce a satisfactory outcome.<sup>97</sup>

For these reasons it is often difficult to categorize the orientation, strategies, or techniques of a given mediator in a particular case.<sup>98</sup>

### III. EFFECTIVENESS OF THE GRID, ESPECIALLY IN SELECTING MEDIATORS

Despite these limitations, the grid can enable people to communicate with some clarity about what can, does, and should happen in a mediation. Accordingly, it can help sharpen discussions and facilitate decisions about the education, training, evaluation, and regulation of mediators. It can help disputants decide whether to mediate or to employ another process. Each of these tasks is quite complex, however. For that reason, I limit my comments in this section to a

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96. See GALTON, *supra* note 27, at 4.

97. Speaking generally, broad mediators, especially facilitative ones, are more willing and able to narrow the focus of a dispute than are narrow mediators willing and able to broaden it. Professor Robert Ackerman suggests that "[t]his is probably because it is easier to narrow one's focus after exploring alternatives than to suddenly broaden one's focus after having set out down a narrow path." Letter from Professor Robert A. Ackerman, The Dickinson School of Law, to Leonard L. Riskin (Oct. 5, 1994) (on file with author). Again speaking generally, evaluative mediators are more willing to facilitate than facilitative mediators are to evaluate. However, many evaluative mediators lack facilitation skills, and vice versa.

98. In addition, as Professor David Matz has written in the context of evaluating mediators:

Any given move made by a mediator can have many meanings. A question asked by the mediator can elicit particular information. The same question can also serve to emphasize certain facts in the case and thus help persuade the party to consider the dispute from a different point of view. And the same question can help reframe the party's awareness of the alternatives available. Did the mediator intend all of these? Any of these? Or was he/she just filling time trying to think of something useful to do?

David E. Matz, *Some Advice for Mediator Evaluators*, 9 NEG. J. 327, 328 (1993).

A case in point is Patrick Phear, a Boston divorce mediator who has an extremely broad and extremely facilitative orientation, marked by a "no advice" policy. He departs from that policy, however, and will give advice after the parties have reached "intimacy." See Sarat, *supra* note 16, at 191. Sarat explains:

When intimacy is achieved, the parties trust each other, the mediation process, and the mediator so much that the sentence "Why won't you take \$50,000 to settle this?" is heard as just one more question, not as what the mediator thinks you should settle on. Phear claims he can tell when people reach the stage of intimacy because they are "open, receptive . . . They start talking about other people's interests as well as their own, and about process needs as well as outcome needs." They have, in essence, internalized the ideology of mediation.

*Id.* at 206

brief consideration of how the grid can enhance decision-making about the selection of mediators.<sup>99</sup>

Some mediation programs give parties little or no choice in selecting mediators. Others allow parties to select from a pre-approved roster. In some situations, parties may choose virtually any mediator, constrained only by time and money. The grid may prove useful in each of these contexts, even though it does not describe all of the qualities that are important in a mediator.<sup>100</sup>

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99. The process of thoughtfully matching a mediator to a particular dispute can be quite complex, particularly in situations where the decision requires negotiations among parties, lawyers, program administrators, and mediators. For that reason, I plan to examine that subject in greater detail in a subsequent article.

The identity of the neutral party affects settlement rates and levels of satisfaction among both participants and lawyers. See KARL D. SCHULTZ, *FLORIDA'S ALTERNATIVE DISPUTE RESOLUTION DEMONSTRATION PROJECT: AN EMPIRICAL ASSESSMENT* (Fla. Dispute Resolution Center, undated); Rosenberg & Folberg, *supra* note 14, at 1496.

100. Arthur Chaykin of the Sprint Corporation has suggested that a mediator should have "the key personal qualities of honesty, integrity, courage, and persistence." Arthur A. Chaykin, *Selecting the Right Mediator*, *DISP. RESOL. J.*, Sept. 1994, at 58, 65. Jerry Conover, of the Faegre Group in Denver and Minneapolis, has tried to capture the qualities of a good mediator under the terms "creativity, diligence, and leadership." Jerry Conover, *What Makes an Effective Mediator?*, *ALTERNATIVES TO THE HIGH COST OF LITIGATION*, Aug. 1994, at 101. Hans Stucki, senior litigation counsel at Motorola, Inc., maintains that often he would choose a mediator with "credibility," which sometimes means public recognition (what he calls "flash"), over one with well-developed mediation skills. See Hans U. Stucki, *Mediator's Credibility is Key Predictor of Success in ADR*, *ALTERNATIVES TO THE HIGH COST OF LITIGATION*, Jan. 1995, at 3.

The CPR Institute for Dispute Resolution, a non-profit organization sponsored by lawyers for the largest U.S. corporations, maintains panels of neutrals who must have the following attributes:

1. Outstanding career record
2. Unquestionable integrity
3. Highest respect of the bar and community
4. Judicious temperament
5. Talent for negotiation and conciliation
6. Creativity and flexibility
7. Experience and interest in ADR.

See CPR INSTITUTE FOR DISPUTE RESOLUTION, *CPR PANELS OF DISTINGUISHED NEUTRALS* (undated).

Recently-published guidelines for selecting and training mediators list sixteen important "knowledges, skills, abilities and other attributes": reasoning, analyzing, problem-solving, reading comprehension, writing, oral communication, non-verbal communication, interviewing, emotional stability/maturity, sensitivity, integrity, recognizing values, impartiality, organizing, following procedure, and commitment. See TEST DESIGN PROJECT, *supra* note 7, at 19.

In some situations, a mediator may need a familiarity with a particular culture or group or industry in order to be effective; in other situations, an absence of such connection may be essential in order to demonstrate impartiality. See Lederach & Kraybill, *supra* note 51, at 363-69. Sometimes a mediator will need to have command of certain knowledge or technology. See *infra* notes 121-123 and accompanying text.

The grid can help in selecting a mediator because it includes virtually all activities that are widely considered mediation. Some will object to this breadth and may wish to customize the grid. For example, some will argue that an extremely evaluative-narrow approach (the northwest corner of the grid) really describes a different process, one that is closer to "neutral evaluation," "settlement," or "non-binding arbitration." People who hold this view might wish to cut off the northwest corner of the grid. Others would wish to eliminate the southeast corner, arguing that processes falling within this zone really should be called by another name, such as facilitation.<sup>101</sup> [See Figure 4 in Appendix.] And some would remove or rename the two upper quadrants on the theory that evaluative mediation is a contradiction in terms.<sup>102</sup>

Still other commentators will argue that both continuums are too long to describe mainstream approaches to mediation. They might propose to mark these continuums in order either to allow a smaller zone to describe the world of mediation or to distinguish between core and peripheral approaches to the practice.<sup>103</sup> [See Figure 5 in Appendix.]

The grid can help us envision an ideal mediator for any individual case. She would be sufficiently flexible to employ the most appropriate orientation, strategies, and techniques as the participants'

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Lois Gold writes that mediator "presence" can enhance effectiveness. It consists of "(1) being centered; (2) being connected to one's governing values and beliefs and highest purpose; (3) making contact with the humanity of the clients; and (4) being congruent." Gold, *supra* note 50, at 56.

101. In some labor mediation programs, for instance, "transformative" approaches may be seen as "virtually a separate professional practice, under the heading of labor-management cooperation." TEST DESIGN PROJECT, *supra* note 7, at 21.

Some colleagues have contended that mediation approaches in the extreme southeast corner should be called psychotherapy. But such an argument reveals a limited understanding of the varieties of psychotherapy practiced today. In fact, we could use the grid to depict approaches to psychotherapy or to professional-client relations in other professions, such as law, architecture, urban planning, and medicine. See DONALD A. SHON, *THE REFLECTIVE PRACTITIONER passim* (1983).

102. See Kimberely K. Kovach & Lela P. Love, "Evaluative" Mediation Is an Oxymoron, *ALTERNATIVES TO THE HIGH COST OF LITIGATION*, Mar. 1996, at 31; see BUSH & FOLGER, *supra* note 29 *passim*.

103. I have received many other suggestions about how to improve this grid, primarily from participants in various conferences at which I presented it. People suggested that the grid would be more effective if it were circular, instead of square; lacked outer boundaries; employed dotted, translucent, or wavy lines; included a shaded background; and were presented in colors or in three dimensions. Each of these suggestions has merit. My own limitations, as well as a desire for simplicity, kept me from adopting any of them.

needs present themselves.<sup>104</sup> This would require the ability (1) to both evaluate and facilitate, and (2) to see things both narrowly and broadly. She would have subject-matter expertise and she would be impartial. Plainly, some such mediators are available. Individual mediation programs might employ the grid to make choices about selection, training,<sup>105</sup> assignment, evaluation, or retention so as to foster flexibility in individual mediators. Flexibility is a difficult trait to foster, however. Practical reasons, such as time, cost, and knowledge, may make it difficult to identify, develop, or assign such ideal mediators in a given situation.

Assuming a shortage of such "all-purpose" mediators, mediation programs may wish to select mediators with diverse backgrounds so as to make available mediators with varying approaches to match with appropriate cases. The grid can facilitate this process. Because parties or programs often will not be able to produce a flexible mediator who has the other required qualities,<sup>106</sup> it is important that they understand that each approach to mediation carries potential advantages and disadvantages, which I will set forth below. In addition, I will demonstrate how the grid can help parties or program administrators evaluate the relative importance of two other qualities in a mediator: subject-matter expertise and impartiality.

#### A. *The Potential Advantages and Disadvantages of the Various Approaches to Mediation*

Assume that you represent Computec in its dispute with Golden State and that you and your counterpart have agreed (with the consent of both clients) to try mediation. Before considering the characteristics that you would like to see in the mediator and in the mediation process, you need to ask yourself two questions: first, what has blocked the success of the negotiations to date;<sup>107</sup> and, second, what do you hope to achieve through mediation?<sup>108</sup> You must find a

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104. See GALTON, *supra* note 27, at 4.

105. Most mediation training in the United States is grounded principally on a facilitative-broad approach. Nonetheless, vast numbers of graduates of these programs tend toward evaluative-narrow approaches.

106. See *supra* note 100.

107. For a discussion of barriers to negotiation, see Robert H. Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 OHIO ST. J. DISP. RESOL. 235 (1993).

108. Arthur Chaykin has proposed four factors to consider in choosing a mediator: (1) the type of negotiation the parties have been conducting; (2) the nature of the problem that is interfering with the negotiation process; (3) the type of negotiation the parties want to conduct to resolve the dispute; and (4)

mediator whose approach to mediation and other characteristics are most likely to remove obstacles to settlement or otherwise help you accomplish your goals.

To know which orientation on the grid is most appropriate, one must comprehend a great deal about the origins and nature of the dispute, the relationships among the concerned individuals and organizations (both behind and across party lines), and their fears, levels of competence, and goals. Before mediation begins, however, parties and lawyers often will not fully understand these matters; individuals are likely to have different perceptions of what is needed, possible, or desirable in the mediation. These divergent perceptions may interfere with the parties' ability to select the most appropriate form of mediation. Accordingly, and because mediators may fail to test their assumptions about the parties' needs and may thus exercise what Felstiner and Sarat have called "power by indirection,"<sup>109</sup> it is important for parties to understand the potential advantages and disadvantages of various points on the two continuums.

### 1. *The Problem-Definition Continuum*

a. *Narrow Problem-Definition.* — A narrow problem-definition can increase the chances of resolution and reduce the time needed for the mediation. The focus on a small number of issues limits the range of relevant information, thus keeping the proceeding relatively simple. In addition, a narrow focus can avoid a danger inherent in broader approaches — that personal relations or other "extraneous issues" might exacerbate the conflict and make it more difficult to settle.

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whether special expertise or unusual credentials are required of the third party.

Chaykin, *supra* note 100, at 59.

Frank Sander and Stephen Goldberg have developed an extensive method for helping parties choose a dispute resolution procedure based on these questions: "First, what are the client's goals, and what dispute resolution procedure is most likely to achieve those goals? Second, if the client is amenable to settlement, what are the impediments to settlement, and what ADR procedure is most likely to overcome those impediments?" Frank E.A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEG. J. 49, 50 (1994). They discuss which methods are likely to overcome the following impediments: poor communication, need to express emotions, different view of facts, different view of law, important principle, constituent pressure, linkage, multiple parties, different lawyer-client interests, and the jackpot syndrome. *See id.* at 55. A similar analysis could help determine the most appropriate approach to mediation.

109. See William L.F. Felstiner & Austin Sarat, *Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions*, 77 CORNELL L. REV. 1447, 1476 (1992).

On the other hand, in some cases the narrow approach can increase the chance of impasse because it allows little room for creative option-generation or other means of addressing underlying interests, which, if unsatisfied, could block agreement. Also, a narrow approach to mediation might preclude the parties from addressing other long-term mutual interests that could lead to long-lasting, mutually-beneficial arrangements.<sup>110</sup>

b. *Broad Problem-Definition.* — A broad problem-definition can produce an agreement that accommodates the parties' underlying interests, as well as the interests of other affected individuals or groups. Such an agreement is substantively superior. Broadening the problem-definition also can both increase the likelihood of settlement and reduce the time necessary for the mediation; when such a process addresses the parties' needs and allows room for creativity, it reduces the likelihood of impasse. In addition, it can provide opportunities for personal change.<sup>111</sup>

In some situations, however, a broad problem-definition can have the opposite effect: it can increase both the probability of an impasse and the time and expense required for mediation by focusing the parties on issues that are unnecessary to the resolution of the narrow issues and that might exacerbate conflict.<sup>112</sup> In addition, broad problem-definition can make parties and lawyers uncomfortable with the process. They may fear the expression of strong emotions and doubt their own abilities to collaborate with the other side and still protect their own interests.<sup>113</sup>

In the *Computec* case, the parties' mutual dependence and need to work together suggest the desirability of a broad problem-definition. One could also imagine, however, that it might be best simply to resolve the narrow issue, so that the disputants could get on with their work. If we change the facts slightly, we could see the possible virtue of a narrow focus. For instance, if the contract had already terminated, if the parties had no interest in future relations, and if they both believed that the matter could best be handled simply by addressing the issue of whether and how much Golden State should

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110. See *supra* Part II.B.; Kressel et al., *supra* note 26, at 73-77.

111. See BUSH & FOLGER, *supra* note 29 *passim*; Riskin, *supra* note 17, at 34.

112. This risk would be reduced, of course, if the mediator followed a facilitative approach to problem-definition.

113. See Marguerite Millhauser, *The Unspoken Resistance to Alternative Dispute Resolution*, 3 NEG. J. 29, 31 (1987); Riskin, *supra* note 17.

pay, a narrow approach might make great sense. (Of course, the danger here is that the person carrying this narrow vision of the dispute does not fully understand the situations of all concerned, and, for that reason, is unaware of the possibilities for future collaboration.)

## 2. *The Mediator Role Continuum*

a. *The Evaluative Approach.* — The evaluative mediator, by providing assessments, predictions, or direction, removes some of the decision-making burden from the parties and their lawyers. In some cases, this makes it easier for the parties to reach an agreement. Evaluations by the mediator can give a participant a better understanding of his “Best Alternative to a Negotiated Agreement” (BATNA),<sup>114</sup> a feeling of vindication, or an enhanced ability to deal with his constituency. If you were Computec’s lawyer, for example, and were having trouble educating your client about the weaknesses of its case, you might want a mediator willing to predict credibly what would happen in court.<sup>115</sup>

Yet, in some situations an assessment, prediction, or recommendation can make it more difficult for the parties to reach agreement by impairing a party’s faith in the mediator’s neutrality<sup>116</sup> or restricting a party’s flexibility.<sup>117</sup> As Arthur Chaykin of Sprint Corp. has written:

Parties often feel [an evaluation] is what they want, until they get it. Once the “opinion” is given, the parties often feel that the mediator betrayed them. They will feel that the mediator’s decision on the merits may have been influenced by perceptions of what they would be willing to swallow, not on the “merits” of the case . . . . Nevertheless, the parties should understand that once they involve a third party, and allow that “neutral” to give an opinion on the merits, that determination will almost always have a powerful impact on all further negotiations. After all,

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114. See FISHER ET AL., *supra* note 21, at 100.

115. There are ways to address this issue even in a facilitative mediation, of course. The client might be influenced by the mediator’s questions about your case and by your responses. It is also possible, in a facilitative mediation, to bring in an outside expert solely to provide an evaluation. A strong need for an outsider’s expert opinion on a legal matter might incline you to choose another process, such as early neutral evaluation or non-binding arbitration.

116. See Alhadeff, *supra* note 63, at § 23:8.

117. Professors Peter J.D. Carnevale, Rodney G. Lim, and Mary E. McLaughlin concluded that their survey of mediators showed that mediators tended to use “substantive/pressure” tactics in situations involving hostility and that the use of such tactics in the face of *high* hostility correlated negatively with settlement. See Peter J.D. Carnevale et al., *Contingent Mediator Behavior and Its Effectiveness*, in KRESSEL & PRUITT, *supra* note 28, at 213, 230–35.

how could the "prevailing party" take much less than what the mediator recommended?<sup>118</sup>

Moreover, these evaluative techniques decrease the extent of the parties' participation, and thereby may lower the participants' satisfaction with both the process and the outcome. Of course, such techniques also reduce opportunities for change and growth.

In addition, if the parties or lawyers know that the mediator will evaluate, they are less likely to be candid either with their counterparts or with the mediator. When a mediator asks such parties (in private caucus, for example) to analyze the strengths and weaknesses of their own case or to describe their situation and interests, they may be disinclined to respond honestly.<sup>119</sup> Thus, the prospect that the mediator will render an evaluation can interfere with the parties' coming to understand fully their own and each other's positions and interests, and thereby render the process more adversarial.<sup>120</sup>

b. *The Facilitative Approach.* — On the one hand, the facilitative approach offers many advantages, particularly if the parties are capable of understanding both sides' interests or developing potential solutions. It can give them and their lawyers a greater feeling of participation and more control over the resolution of the case. They can fine-tune the problem-definition and any resulting agreement to suit their interests. The facilitative approach also offers greater potential for educating parties about their own and each other's position, interests, and situation. In this way, it can help parties improve their ability to work with others and to understand and improve themselves.

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118. Chaykin, *supra* note 100, at 65 n.5. There are ways to minimize the effect of evaluation. The parties could agree in advance that the mediator will delay preparing an assessment, prediction, or recommendation — or sharing it with the parties — until after they have exhausted opportunities for negotiation or even until both parties agree, during the mediation, that they want such an opinion. See CPR LEGAL PROGRAM, *MEDIATION IN ACTION: RESOLVING A COMPLEX BUSINESS DISPUTE* (videotape, 1994).

If we change the facts in *Computec* slightly, there may be other reasons to avoid an opinion on the legal merits. For instance, if the contract was drafted by the same outside lawyer who would represent Golden State in the mediation, that lawyer might prefer to protect her reputation by avoiding the risk of a contrary opinion. If this lawyer is reasonable, a more facilitative process might more readily influence her to recommend a solution — without admitting that she was wrong.

119. See Alhadeff, *supra* note 63, at § 23:8; Stephen B. Goldberg, *The Mediation of Grievances Under a Collective Bargaining Contract: An Alternative to Arbitration*, 77 Nw. U. L. REV. 270, 304–305 (1982).

120. This is especially true in a narrow mediation and as to narrow issues in a broader mediation.

On the other hand, when participants are not sufficiently knowledgeable or capable of developing proposals or negotiating with one another, the facilitative approach holds certain risks. The participants might fail to recognize relevant issues or interests, to fully develop options, or to reach an agreement that is as "good" — by whatever standards — as they would reach with a more evaluative mediator. In addition, a poorly-conducted facilitative approach might waste a great deal of time if it does not respond to underlying interests either in the process or in the outcome.

### B. *The Importance of Subject-Matter Expertise*

In selecting a mediator, one would want to consider the relative importance of "subject-matter expertise" as compared to expertise in the mediation process.<sup>121</sup> "Subject-matter expertise" means substantial understanding of the legal or administrative procedures, customary practices, or technology associated with the dispute. In the *Computec* case, for instance, a neutral with subject-matter expertise could be familiar with the litigation of computer services contract disputes; with the structure, economics, and customary practices of the savings and loan or computer services industries; with computer technology (especially as related to financial services industries); or with all of these.

The need for subject-matter expertise typically increases in direct proportion to the parties' need for the mediator's evaluations.<sup>122</sup> In addition, the kind of subject-matter expertise needed depends on the kind of evaluation or direction the parties seek. If they want a prediction about what could happen in court, they might prefer an evaluative mediator with a strong background in related litigation. If they want ideas about how to structure future business relations, perhaps the mediator should understand the relevant industries. If they want suggestions about how to allocate costs, they may need a mediator who understands the relevant technology. If they need help in sorting out interpersonal-relations problems, they would benefit

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121. For the results of a survey that polled corporate counsel on this issue, see *CPR Fax Poll: Skills Needed for Mediation*, ALTERNATIVES TO THE HIGH COST OF LITIGATION, Dec. 1994, at 145.

122. See Chaykin, *supra* note 100, at 60, 62–64. On the other hand, some familiarity with law may be essential for mediators of any orientation who work in court mediation programs in which parties often are not represented by lawyers. This knowledge would be necessary, even for a facilitative-broad mediator — if only to enable him to know when to refer parties to a lawyer. See Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 WASH. U. L.Q. 501 (1996).

from a mediator oriented toward such issues, rather than one inclined to shy away from them. If they want to propose new government regulations, they might wish to retain a mediator who understands administrative law and procedure.

In contrast, to the extent that the parties feel capable of understanding their circumstances and developing potential solutions — singly, jointly, or with assistance from outside experts — they might, if they had to choose, prefer a mediator with great skill in the mediation process, even if she lacks subject-matter expertise.

The complexity and importance of a technical issue should influence the nature and extent of the required subject-matter expertise. In almost any mediation, the neutral must at least be able quickly to acquire a minimal level of familiarity with technical matters in order to facilitate discussions or propose areas of inquiry.<sup>123</sup> But to the extent that other participants have this expertise, the need for the mediator to possess it diminishes. In fact, too much subject-matter expertise could incline some mediators toward a more evaluative role, thereby interfering with the development of creative solutions.

### C. *The Importance of Impartiality*

The idea that the mediator should be neutral or impartial — both in fact and in appearance — is deeply imbedded in the ethos of mediation, even though observers disagree about the meaning and achievability of the notion.<sup>124</sup> The need for impartiality increases in direct proportion to the extent to which the mediator will evaluate.

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123. See CPR Fax Poll, *supra* note 121, at 164; Stephen B. Goldberg, *Reflections on Negotiated Rulemaking: From Conflict to Consensus*, WASH. LAW., Sept/Oct. 1994, at 42, 47–48.

Tom Arnold, a prominent intellectual property lawyer and mediator, has written that a mediator must be “literate” about the subject matter, “but once that literacy threshold is passed, the importance of subject matter expertise dissipates very rapidly except in a few narrow areas like computer software, patents, trademarks, antitrust, tax and perhaps bankruptcy.” Tom Arnold, *20 Common Errors in Mediation Advocacy*, ALTERNATIVES TO THE HIGH COST OF LITIGATION, May 1995, at 69.

124. See Sydney E. Bernard et al., *The Neutral Mediator: Value Dilemmas in Divorce Mediation*, 4 MED. Q. 61 (1984); Sara Cobb & Janet Rifkin, *Neutrality as a Discursive Practice: The Construction and Transformation of Narratives in Community Mediation*, in 11 STUDIES IN LAW, POLITICS AND SOCIETY 69, 70 (Austin Sarat & Susan S. Silbey eds., 1991); Sara Cobb & Janet Rifkin, *Practice and Paradox: Deconstructing Neutrality in Mediation*, 16 LAW & SOC. INQUIRY 35 (1991); John Forester & David Stitzel, *Beyond Neutrality: The Possibilities of Activist Mediation in Public Sector Conflicts*, 5 NEG. J. 251, 254–57 (1989); Christopher Honeyman, *Patterns of Bias in Mediation*, 1985 J. DISP. RESOL. 141, 148–49; McCrory, *supra* note 9, at 53–54; Stulberg, *supra* note 9; Susskind, *supra* note 9, at 86.

In other words, the greater the mediator's direct influence on the substantive outcome of the mediation, the greater the risk that one side will suffer as a result of the mediator's biases.

Imagine that you represent Computec and propose mediation to the lawyer representing Golden State. After considering the matter for a few days, she says she is ambivalent but that she would be inclined to agree to mediation if she could be satisfied with the mediator. Eventually, she proposes a neutral who is a lawyer, with substantial practice experience in both the financial services and computer industries, as well as an experienced mediator. She also tells you that the proposed mediator and she were close friends in college and that they occasionally get together for lunch or dinner. You do not know the mediator but are familiar with her fine reputation.

Your response to this proposal likely would depend in part upon your expectation as to the role the mediator would take in the process. If you wanted or expected evaluation, you might worry about this mediator's possible partiality. If you expected facilitation, this mediator might be just what you need, especially since her selection may be the only way to get the case into mediation. Of course, you would want to be certain that the proposed mediator is willing and able to commit to and carry out a facilitative process.

#### IV. CONCLUSION

Mediation seems to encompass a bewildering variety of activities. But many professionals in the field have definite, and often limited, ideas of what mediation is or should be. Accordingly, they often ignore other forms of the practice or argue that they really do not constitute mediation. As a consequence, many organizations and individuals concerned with the mediation process — courts, administrative agencies and other program sponsors, lawyers, and potential mediation participants — make decisions about mediation based on an incomplete understanding of the available choices.

One cause of this situation is the absence of any widely-shared comprehensive method for describing the various approaches to mediation practice. In writing this Article, I mean to provide such a method. My goal is to facilitate clear thinking about processes that are commonly called mediation and fall, at least arguably, within the usual understanding of mediation as negotiation facilitated by an impartial third party. The system can help people understand mediation and make sound decisions about what kind of process they want

and about selecting, training, and evaluating mediators.<sup>125</sup> In addition, I hope that individual mediators will use it to reflect on their own work. I believe the framework also could help researchers in seeking to understand how various approaches to mediation correlate with different mediation experiences and outcomes.

I do not hope or expect to have the last word on this topic. I anticipate that commentators will offer ways to improve this system, and I welcome such critiques and the refinement likely to follow from them.

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125. Since I first published an abbreviated explanation of the system, see Leonard L. Riskin, *Mediator Orientations, Strategies, and Techniques*, ALTERNATIVES TO THE HIGH COST OF LITIGATION, Sept. 1994, at 111, many teachers and trainers have begun to use it regularly, including some who harbor serious reservations about applying the term "mediation" to activities depicted on certain portions of the grid. In addition, some mediation organizations and mediators already employ the grid to explain mediation — or their version of it — to potential clients.

APPENDIX

FIGURE 4

GRID WITH NW AND SE CORNERS REMOVED

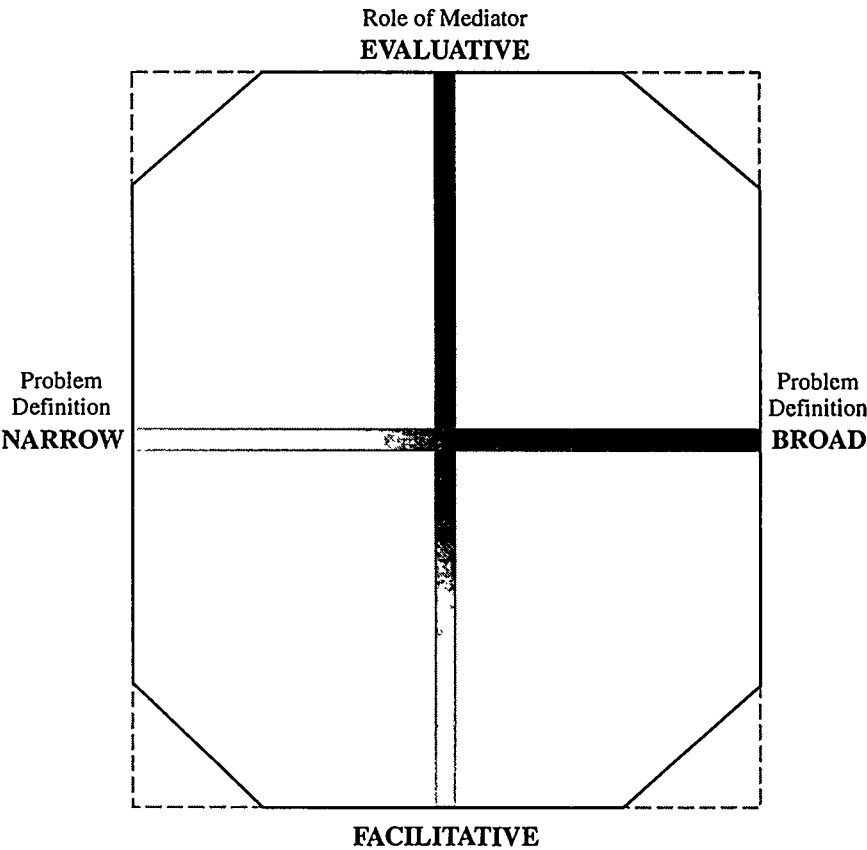
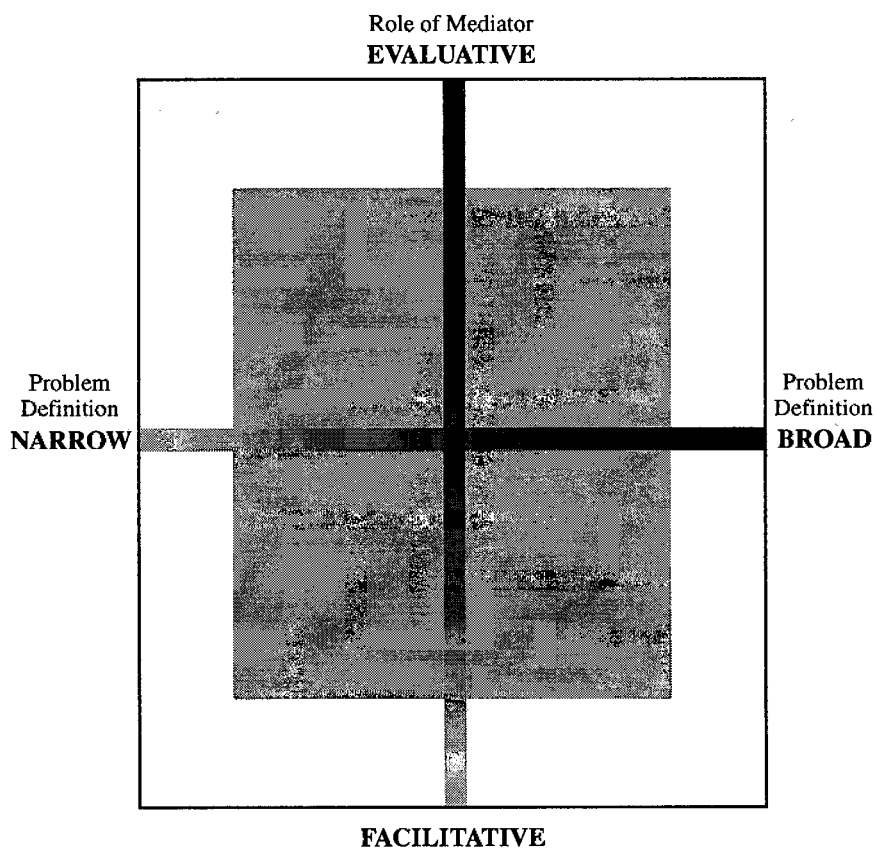


FIGURE 5

**GRID SHOWING CORE AND PERIPHERY  
OF MEDIATION PRACTICES**



**MODEL STANDARDS OF CONDUCT  
FOR MEDIATORS**

**AMERICAN ARBITRATION ASSOCIATION**  
(ADOPTED SEPTEMBER 8, 2005)

**AMERICAN BAR ASSOCIATION**  
(APPROVED BY THE ABA HOUSE OF DELEGATES AUGUST 9, 2005)

**ASSOCIATION FOR CONFLICT RESOLUTION**  
(ADOPTED AUGUST 22, 2005)

**SEPTEMBER 2005**

## **The Model Standards of Conduct for Mediators 2005**

The Model Standards of Conduct for Mediators was prepared in 1994 by the American Arbitration Association, the American Bar Association's Section of Dispute Resolution, and the Association for Conflict Resolution<sup>1</sup>. A joint committee consisting of representatives from the same successor organizations revised the Model Standards in 2005.<sup>2</sup> Both the original 1994 version and the 2005 revision have been approved by each participating organization.<sup>3</sup>

### **Preamble**

Mediation is used to resolve a broad range of conflicts within a variety of settings. These Standards are designed to serve as fundamental ethical guidelines for persons mediating in all practice contexts. They serve three primary goals: to guide the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes.

Mediation is a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute.

Mediation serves various purposes, including providing the opportunity for parties to define and clarify issues, understand different perspectives, identify interests, explore and assess possible solutions, and reach mutually satisfactory agreements, when desired.

### **Note on Construction**

These Standards are to be read and construed in their entirety. There is no priority significance attached to the sequence in which the Standards appear.

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<sup>1</sup> The Association for Conflict Resolution is a merged organization of the Academy of Family Mediators, the Conflict Resolution Education Network and the Society of Professionals in Dispute Resolution (SPIDR). SPIDR was the third participating organization in the development of the 1994 Standards.

<sup>2</sup> Reporter's Notes, which are not part of these Standards and therefore have not been specifically approved by any of the organizations, provide commentary regarding these revisions.

<sup>3</sup> The 2005 version to the Model Standards were approved by the American Bar Association's House of Delegates on August 9, 2005, the Board of the Association of Conflict Resolution on August 22, 2005 and the Executive Committee of the American Arbitration Association on September 8, 2005.

The use of the term “shall” in a Standard indicates that the mediator must follow the practice described. The use of the term “should” indicates that the practice described in the standard is highly desirable, but not required, and is to be departed from only for very strong reasons and requires careful use of judgment and discretion.

The use of the term “mediator” is understood to be inclusive so that it applies to co-mediator models.

These Standards do not include specific temporal parameters when referencing a mediation, and therefore, do not define the exact beginning or ending of a mediation.

Various aspects of a mediation, including some matters covered by these Standards, may also be affected by applicable law, court rules, regulations, other applicable professional rules, mediation rules to which the parties have agreed and other agreements of the parties. These sources may create conflicts with, and may take precedence over, these Standards. However, a mediator should make every effort to comply with the spirit and intent of these Standards in resolving such conflicts. This effort should include honoring all remaining Standards not in conflict with these other sources.

These Standards, unless and until adopted by a court or other regulatory authority do not have the force of law. Nonetheless, the fact that these Standards have been adopted by the respective sponsoring entities, should alert mediators to the fact that the Standards might be viewed as establishing a standard of care for mediators.

## **STANDARD I. SELF-DETERMINATION**

- A. A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.
  - 1. Although party self-determination for process design is a fundamental principle of mediation practice, a mediator may need to balance such party self-determination with a mediator’s duty to conduct a quality process in accordance with these Standards.
  - 2. A mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions, but, where

appropriate, a mediator should make the parties aware of the importance of consulting other professionals to help them make informed choices.

- B. A mediator shall not undermine party self-determination by any party for reasons such as higher settlement rates, egos, increased fees, or outside pressures from court personnel, program administrators, provider organizations, the media or others.

## **STANDARD II. IMPARTIALITY**

- A. A mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice.
- B. A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality.
  - 1. A mediator should not act with partiality or prejudice based on any participant's personal characteristics, background, values and beliefs, or performance at a mediation, or any other reason.
  - 2. A mediator should neither give nor accept a gift, favor, loan or other item of value that raises a question as to the mediator's actual or perceived impartiality.
  - 3. A mediator may accept or give de minimis gifts or incidental items or services that are provided to facilitate a mediation or respect cultural norms so long as such practices do not raise questions as to a mediator's actual or perceived impartiality.
- C. If at any time a mediator is unable to conduct a mediation in an impartial manner, the mediator shall withdraw.

## **STANDARD III. CONFLICTS OF INTEREST**

- A. A mediator shall avoid a conflict of interest or the appearance of a conflict of interest during and after a mediation. A conflict of interest can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator's impartiality.

- B. A mediator shall make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for a mediator. A mediator's actions necessary to accomplish a reasonable inquiry into potential conflicts of interest may vary based on practice context.
- C. A mediator shall disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator's impartiality. After disclosure, if all parties agree, the mediator may proceed with the mediation.
- D. If a mediator learns any fact after accepting a mediation that raises a question with respect to that mediator's service creating a potential or actual conflict of interest, the mediator shall disclose it as quickly as practicable. After disclosure, if all parties agree, the mediator may proceed with the mediation.
- E. If a mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation, a mediator shall withdraw from or decline to proceed with the mediation regardless of the expressed desire or agreement of the parties to the contrary.
- F. Subsequent to a mediation, a mediator shall not establish another relationship with any of the participants in any matter that would raise questions about the integrity of the mediation. When a mediator develops personal or professional relationships with parties, other individuals or organizations following a mediation in which they were involved, the mediator should consider factors such as time elapsed following the mediation, the nature of the relationships established, and services offered when determining whether the relationships might create a perceived or actual conflict of interest.

#### **STANDARD IV. COMPETENCE**

- A. A mediator shall mediate only when the mediator has the necessary competence to satisfy the reasonable expectations of the parties.
  - 1. Any person may be selected as a mediator, provided that the parties are satisfied with the mediator's competence and qualifications. Training, experience in mediation, skills, cultural understandings and other qualities are often necessary for mediator

competence. A person who offers to serve as a mediator creates the expectation that the person is competent to mediate effectively.

2. A mediator should attend educational programs and related activities to maintain and enhance the mediator's knowledge and skills related to mediation.
  3. A mediator should have available for the parties' information relevant to the mediator's training, education, experience and approach to conducting a mediation.
- B. If a mediator, during the course of a mediation determines that the mediator cannot conduct the mediation competently, the mediator shall discuss that determination with the parties as soon as is practicable and take appropriate steps to address the situation, including, but not limited to, withdrawing or requesting appropriate assistance.
- C. If a mediator's ability to conduct a mediation is impaired by drugs, alcohol, medication or otherwise, the mediator shall not conduct the mediation.

## **STANDARD V. CONFIDENTIALITY**

- A. A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law.
1. If the parties to a mediation agree that the mediator may disclose information obtained during the mediation, the mediator may do so.
  2. A mediator should not communicate to any non-participant information about how the parties acted in the mediation. A mediator may report, if required, whether parties appeared at a scheduled mediation and whether or not the parties reached a resolution.
  3. If a mediator participates in teaching, research or evaluation of mediation, the mediator should protect the anonymity of the parties and abide by their reasonable expectations regarding confidentiality.
- B. A mediator who meets with any persons in private session during a mediation shall not convey directly or indirectly to any other person, any information that was obtained during that private session without the consent of the disclosing person.

- C. A mediator shall promote understanding among the parties of the extent to which the parties will maintain confidentiality of information they obtain in a mediation.
- D. Depending on the circumstance of a mediation, the parties may have varying expectations regarding confidentiality that a mediator should address. The parties may make their own rules with respect to confidentiality, or the accepted practice of an individual mediator or institution may dictate a particular set of expectations.

## **STANDARD VI. QUALITY OF THE PROCESS**

- A. A mediator shall conduct a mediation in accordance with these Standards and in a manner that promotes diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants.
  - 1. A mediator should agree to mediate only when the mediator is prepared to commit the attention essential to an effective mediation.
  - 2. A mediator should only accept cases when the mediator can satisfy the reasonable expectation of the parties concerning the timing of a mediation.
  - 3. The presence or absence of persons at a mediation depends on the agreement of the parties and the mediator. The parties and mediator may agree that others may be excluded from particular sessions or from all sessions.
  - 4. A mediator should promote honesty and candor between and among all participants, and a mediator shall not knowingly misrepresent any material fact or circumstance in the course of a mediation.
  - 5. The role of a mediator differs substantially from other professional roles. Mixing the role of a mediator and the role of another profession is problematic and thus, a mediator should distinguish between the roles. A mediator may provide information that the mediator is qualified by training or experience to provide, only if the mediator can do so consistent with these Standards.

6. A mediator shall not conduct a dispute resolution procedure other than mediation but label it mediation in an effort to gain the protection of rules, statutes, or other governing authorities pertaining to mediation.
  7. A mediator may recommend, when appropriate, that parties consider resolving their dispute through arbitration, counseling, neutral evaluation or other processes.
  8. A mediator shall not undertake an additional dispute resolution role in the same matter without the consent of the parties. Before providing such service, a mediator shall inform the parties of the implications of the change in process and obtain their consent to the change. A mediator who undertakes such role assumes different duties and responsibilities that may be governed by other standards.
  9. If a mediation is being used to further criminal conduct, a mediator should take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.
  10. If a party appears to have difficulty comprehending the process, issues, or settlement options, or difficulty participating in a mediation, the mediator should explore the circumstances and potential accommodations, modifications or adjustments that would make possible the party's capacity to comprehend, participate and exercise self-determination.
- B. If a mediator is made aware of domestic abuse or violence among the parties, the mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.
- C. If a mediator believes that participant conduct, including that of the mediator, jeopardizes conducting a mediation consistent with these Standards, a mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

## **STANDARD VII. ADVERTISING AND SOLICITATION**

- A. A mediator shall be truthful and not misleading when advertising, soliciting or otherwise communicating the mediator's qualifications, experience, services and fees.

1. A mediator should not include any promises as to outcome in communications, including business cards, stationery, or computer-based communications.
  2. A mediator should only claim to meet the mediator qualifications of a governmental entity or private organization if that entity or organization has a recognized procedure for qualifying mediators and it grants such status to the mediator.
- B. A mediator shall not solicit in a manner that gives an appearance of partiality for or against a party or otherwise undermines the integrity of the process.
- C. A mediator shall not communicate to others, in promotional materials or through other forms of communication, the names of persons served without their permission.

#### **STANDARD VIII. FEES AND OTHER CHARGES**

- A. A mediator shall provide each party or each party's representative true and complete information about mediation fees, expenses and any other actual or potential charges that may be incurred in connection with a mediation.
1. If a mediator charges fees, the mediator should develop them in light of all relevant factors, including the type and complexity of the matter, the qualifications of the mediator, the time required and the rates customary for such mediation services.
  2. A mediator's fee arrangement should be in writing unless the parties request otherwise.
- B. A mediator shall not charge fees in a manner that impairs a mediator's impartiality.
1. A mediator should not enter into a fee agreement which is contingent upon the result of the mediation or amount of the settlement.
  2. While a mediator may accept unequal fee payments from the parties, a mediator should not allow such a fee arrangement to adversely impact the mediator's ability to conduct a mediation in an impartial manner.

## **STANDARD IX.     ADVANCEMENT OF MEDIATION PRACTICE**

- A.    A mediator should act in a manner that advances the practice of mediation. A mediator promotes this Standard by engaging in some or all of the following:
  - 1.     Fostering diversity within the field of mediation.
  - 2.     Striving to make mediation accessible to those who elect to use it, including providing services at a reduced rate or on a pro bono basis as appropriate.
  - 3.     Participating in research when given the opportunity, including obtaining participant feedback when appropriate.
  - 4.     Participating in outreach and education efforts to assist the public in developing an improved understanding of, and appreciation for, mediation.
  - 5.     Assisting newer mediators through training, mentoring and networking.
- B.    A mediator should demonstrate respect for differing points of view within the field, seek to learn from other mediators and work together with other mediators to improve the profession and better serve people in conflict.

**NEW YORK STATE UNIFIED COURT SYSTEM  
DIVISION OF PROFESSIONAL AND COURT SERVICES**

**OFFICE OF ADR PROGRAMS**



**STANDARDS OF CONDUCT FOR NEW YORK STATE COMMUNITY  
DISPUTE RESOLUTION CENTER MEDIATORS**

*Revised 2009*

# **STANDARDS OF CONDUCT FOR NEW YORK STATE COMMUNITY DISPUTE RESOLUTION CENTER MEDIATORS**

## **INTRODUCTION**

The New York State Office of Alternative Dispute Resolution Programs has developed these Standards of Conduct (“Standards”) for New York State mediators in community dispute resolution centers<sup>1</sup> located throughout New York State. These Standards have been adapted from The Revised Model Standards of Conduct created by the American Arbitration Association, the American Bar Association (Section of Dispute Resolution) and the Association of Conflict Resolution.<sup>2</sup>

The Standards are intended to serve as a general framework for the practice of mediation and aim to:

- 1.) educate mediators regarding current standards of practice;
- 2.) guide mediators in their practice;
- 3.) promote public confidence in mediation as a dispute resolution process;  
and
- 4.) inform the mediating parties about the process.

The Standards include different levels of guidance<sup>3</sup>:

- ▶ Use of the term “may” is the lowest strength of guidance and indicates a practice that the mediator should consider adopting but which can be deviated from in the exercise of good professional judgment.
- ▶ Use of the term “should” indicates that the practice described in the Standard is strongly suggested and should be departed from only with very strong reason.
- ▶ Use of the term “shall” is the highest level of guidance to the mediator, indicating that the mediator must follow the practice described.

These Standards of Conduct are applicable to those practicing mediators who mediate under the auspices of a New York State Community Resolution Center Program.

The Standards are listed and followed by Comments, where appropriate. The order of the Comments is not intended to reflect any priority in their importance. The Standards are meant to be read and interpreted in their entirety.

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<sup>1</sup>A Community Dispute Resolution Center is a community-based, private, not-for-profit program that contracts with the Chief Administrative Judge of the Unified Court System of the State of New York to provide conciliation, mediation, arbitration, or other types of dispute resolution services.

<sup>2</sup>Joint Committee Draft, January 1, 2004 (approved by the American Bar Association 2005).

<sup>3</sup>This language is adopted in large part from the *Model Standards of Practice for Family and Divorce Mediation*, developed by the Symposium on Standards of Practice (August 2000).

The Standards are to be used as a guide for ethical mediation practice. The Standards are not intended to be used as a substitute for other professional rules, applicable law, court rules, or regulations.

To the extent that a mediator cannot resolve an ethical dilemma after reading these Standards as a whole, or that the mediator finds that a certain Standard may conflict with another Standard contained therein, the mediator is encouraged to address this concern in writing to the Mediator Ethics Advisory Committee of the New York State Office of ADR Programs.<sup>4</sup> The Mediator Ethics Advisory Committee recognizes that a mediator may need to resolve a conflict in a shorter time period than the Committee may have to respond. In such a case, the mediator should exercise good professional judgment for guidance in reaching a resolution of the conflict.<sup>5</sup> Nonetheless, the mediator should consult the Mediator Ethics Advisory Committee.

The Standards are followed by “Committee Notes” that clarify, define, and expand on the statements made in the Standards and Comments, as well as a “Definitions” section and an “Appendix.”

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<sup>4</sup>The Mediator Ethics Advisory Committee (“*Committee*”) serves as an ethics advisory board, to interpret and clarify the Standards as they are raised by practicing CDRCP mediators in conjunction with an ethical dilemma. The committee is appointed and serves under the rules created by the New York State Office of ADR Programs. The Committee will consider any ethical dilemma that a mediator raises in accordance with its rules, requiring that the mediator state the dilemma in writing and send the request to: The Mediator Ethics Advisory Committee, New York State Office of ADR Programs, 25 Beaver Street, Room 859-A, New York, NY, 10004, or by e-mail to: [cdrcp@courts.state.ny.us](mailto:cdrcp@courts.state.ny.us).

<sup>5</sup>This may include looking to other applicable professional standards within the mediation field. See *Committee Notes*.

## STANDARD I. SELF-DETERMINATION

- A. A mediator shall conduct a mediation in a manner that supports the principle of party self-determination as to both process and outcome. Party self-determination means that parties are free to make voluntary and uncoerced procedural and substantive decisions, including whether to make an informed choice to agree or not agree.

### COMMENTS:

1. Parties can exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in the process, and outcomes. The mediator is responsible for supporting party self-determination in each area, tempered by a mediator's duty to conduct a quality mediation process.
2. Although party self-determination is a fundamental principle of mediation practice, a mediator may need to balance party self-determination with a duty to conduct a quality mediation process. When resolving these potentially conflicting duties, a mediator should be cautious of conflict of interest issues and avoid influencing party decisions for reasons such as higher settlement rates, egos, increased fees and outside pressures from individuals or organizations.
3. A mediator cannot personally ensure that each party has made a fully informed choice to reach a particular agreement, but the mediator can make the parties aware that they may consult other professionals to help them make informed choices at any point during the mediation process.<sup>6</sup>
4. Where a power imbalance exists between the parties such that one or both parties cannot exercise self-determination, the mediator should postpone the session, withdraw from the mediation, terminate the mediation, or consult with center staff.<sup>7</sup> (see *Committee Notes*)

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<sup>6</sup>A party is unable to make a fully informed choice where, for example, the party is unable to articulate his or her concerns or lacks substantial information regarding the dispute such that the party is unable to make procedural and substantive decisions or an informed decision to agree or not to agree.

<sup>7</sup>Indicators of a "power imbalance" that may impede a party's ability to make a decision freely and willingly include where one party threatens, intimidates, or otherwise coerces the other party into participating in or reaching a desired result in the mediation.

## STANDARD II: IMPARTIALITY

- A. A mediator shall conduct a mediation in an impartial manner and shall avoid conduct that gives the appearance of partiality toward or prejudice against a party. Impartiality means freedom from favoritism or prejudice in word, action or appearance.
- B. A mediator shall accept for mediation only those matters in which the mediator can remain impartial.
- C. If at any time a mediator is unable to conduct the process in an impartial manner, the mediator shall withdraw.
- D. In any mediation, a mediator shall neither give nor accept a gift, favor, loan or other item of value that would raise a question as to the mediator's actual or perceived impartiality.

## COMMENTS:

- 1. A mediator should not act with partiality based on any participant's race, ethnicity, sex, religion, national origin, or sexual orientation or to any other factors that may create bias on the mediator's part.(see *Committee Notes*)
- 2. During the mediation, a mediator shall maintain impartiality even while raising questions regarding the reality, fairness, equity, durability and feasibility of proposed options for resolution. In the event circumstances arise during a mediation that would reasonably be construed to impair or compromise a mediator's impartiality, the mediator is obligated to withdraw.<sup>8</sup>
- 3. The mediator's commitment is to remain impartial towards the parties and their choices in the process, in both joint and private sessions with the parties.<sup>9</sup>

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<sup>8</sup>FLA Rule 10.330, *Committee Notes*, Florida Rules for Certified and Court Appointed Mediators (2000 Revision).

<sup>9</sup>A party may request, or a mediator may offer to the parties as an option, the opportunity to meet individually with the mediator. This private session is often referred to as a "separate session" or "caucus". During such separate sessions between a party and the mediator, the mediator continues to be bound by the Standard of Impartiality and the Standard of Confidentiality (Standard V.).

### **STANDARD III. CONFLICTS OF INTEREST**

- A.** A mediator shall avoid the appearance of a conflict of interest before, during and after a mediation either by disclosing the conflict or withdrawing from the process.
- B.** Before accepting a mediation, a mediator shall make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for a mediator. Thereafter, and as soon as practical, a mediator shall disclose all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator's ability to fairly discharge his or her responsibilities. If a mediator learns any fact described above after accepting a mediation, she or he shall disclose it to the parties as soon as is practical. If all parties agree to retain the mediator after disclosure, the mediator may proceed or continue with the mediation. However, if a conflict of interest casts serious doubt on the integrity of the process, the mediator shall withdraw or decline to proceed regardless of the express agreement of the parties.
- C.** During a mediation, a mediator shall not solicit or otherwise attempt to procure any future professional services, including future mediations, beyond the sessions necessary, to obtain an outcome.
- D.** Subsequent to mediation, a mediator shall not establish another relationship with one of the parties in any matter that would raise questions about the integrity of the mediation process.

### **COMMENTS:**

- 1.** The mediator's duty to make a reasonable inquiry may be shaped by the sponsoring organization for which she or he mediates. A mediator should make an inquiry of the parties and participants prior to the time of the mediation regarding potential conflicts of interest. Given the central role that a mediator's impartiality assumes to promote the integrity and effectiveness of the mediation process, a mediator should avoid conduct that undermines the public's or party's perception of her or his impartiality. This duty to avoid conflicts of interest exists at the pre-mediation stage, during the mediation conference, and following the mediation session.
- 2.** Disclosure of relationships or circumstances that would create the potential for a conflict of interest rests on the mediator and should be made at the earliest possible opportunity and under circumstances that will allow the parties to freely exercise their right of self-determination as to both the selection of the mediator and participation in the mediation process.
- 3.** Development of relationships by the mediator following the mediation with persons, organizations or agencies that might create a perceived or actual conflict of interest depend upon considerations such as time elapsed following the mediation and the nature of the relationship established and services offered.

#### **STANDARD IV: COMPETENCE**

- A.** A mediator shall mediate only when the mediator has the necessary competence to satisfy the reasonable expectations of the parties and the sponsoring organization for which she or he mediates.
- B.** If a mediator cannot satisfy this Standard, the mediator shall immediately notify the parties and take steps reasonably appropriate under the circumstances, including declining or withdrawing from the mediation or, where appropriate, obtaining assistance from others.
- C.** A mediator shall not conduct any aspect of a mediation while impaired by drugs, alcohol, medication or otherwise.

#### **COMMENTS:**

- 1.** A mediator should obtain the training, skills, experience in mediation, cultural understanding, and other qualities that are necessary for effective mediation, consistent with the sponsoring organization for which he or she mediates.
- 2.** A mediator should inform the parties, where necessary or when asked, of information relevant to the mediator's training, education and experience.<sup>10</sup>
- 3.** A mediator should attend educational programs and related activities to enhance and strengthen his or her personal knowledge of and skills in the mediation process, consistent with the sponsoring organization for which she or he mediates.

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<sup>10</sup>Under the CDRC Program Manual and as required by Article 21-A of the New York State Judiciary Law governing all New York State community dispute resolution center programs, community mediators are required to complete a minimum of 30 hours of initial training, followed by a supervised apprenticeship at the center where they volunteer prior to becoming a community mediator for that center (CDRCP Program Manual, Ch. 7, Section I. A.(1) (revised January 1, 2007)). Additional training is required for community mediators who mediate disputes in family cases, youth cases, and civil, city, and district court cases (CDRCP Program Manual, Ch. 7, Section I. A.(5)).

## STANDARD V: CONFIDENTIALITY

- A. A mediator shall maintain the confidentiality of all information obtained by the mediator during a mediation, including information obtained from the parties, non-party participants or documents shown to the mediator, with the exception of any allegation of child abuse.<sup>11</sup>

### COMMENTS:

1. All mediations that are conducted by mediators on behalf of a New York State community resolution center are protected by a confidentiality statute, Article 21-A of the New York State Judiciary Law.<sup>12</sup>
2. If an allegation of child abuse is made during the mediation, the mediator is required to stop the mediation process, consult with each party individually for the purpose of obtaining as much information about the circumstances as possible, and consult with center program staff to determine whether to resume the mediation process.<sup>13</sup>
3. A mediator who meets with a party in private session during a mediation should not convey directly or indirectly to any other party, group or institution any information that was obtained during that private session without the consent of the disclosing party.
4. A mediator may report, pursuant to the policies of the local center, whether parties appeared at a scheduled mediation and whether or not the parties reached a resolution.<sup>14</sup>
5. Nothing in this Standard should be construed to prohibit monitoring, research, and evaluation of mediation activities or the continuing education of mediators.
6. Nothing in this Standard should be construed to prohibit a mediator from disclosing necessary information to staff of the sponsoring organization for which she or he mediates.

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<sup>11</sup>All centers deem allegations or evidence of child abuse inappropriate for mediation; accordingly, this information is not deemed confidential pursuant to Formal Opinion No. 83-F17 of the New York State Attorney General (1983).

<sup>12</sup>This statute protects all memoranda, work product and case files from disclosure in judicial or administrative proceedings and deems confidential all communications that relate to the subject matter of the dispute resolution proceeding. Mediators at community dispute resolution center programs may request participants to sign a written consent form agreeing to mediate in order to ensure full protection under Article 21-A (1981).

<sup>13</sup>CDRCP Program Manual, Ch. 5, Section II. A., Guideline IV. New York State CDRCP mediators are required to be aware of these Guidelines (revised May 10, 2012).

<sup>14</sup>See generally CDRC Program Manual.

## STANDARD VI: QUALITY OF THE PROCESS

- A. A mediator shall conduct a quality mediation process that is consistent with these Standards of Conduct.
- B. A mediator shall terminate the mediation, withdraw from service, or take other appropriate steps if she or he believes that participant conduct, including that of the mediator, jeopardizes sustaining a quality mediation process.
- C. A mediator shall not exclude a party's attorney from a mediation session, including an attorney for the child.

## COMMENTS:

- 1. A mediator should agree to mediate only when he or she is prepared to commit the attention essential to an effective mediation.
- 2. A mediator should only accept cases when she or he can satisfy the reasonable expectation of the parties concerning the timing of the process.
- 3. A mediator should only accept cases when he or she can satisfy the reasonable expectation of the parties concerning his or her experience and training based on the guidelines of the sponsoring organization for which the mediator mediates.
- 4. The mediator should respect the decision of a party who chooses not to participate in the presence of another party's attorney or another third party (see *Committee Notes*)
- 5. The primary purpose of a mediator is to help the parties communicate, negotiate, and/or make decisions. This role differs substantially from other professional client relationships. Mixing the role of a mediator and the role of a professional advising a client is problematic, and mediators should strive to distinguish between the roles. A mediator should therefore refrain from providing professional advice. Where appropriate, a mediator should recommend that parties seek outside professional advice or services, or consider resolving their dispute through arbitration, neutral evaluation, or another dispute resolution process.
- 6. A mediator should not conduct a dispute resolution procedure other than mediation but attempt to characterize it as mediation in an effort to gain the protection of rules, statutes or other governing authorities pertaining to mediation.
- 7. A mediator who undertakes, at the request of the parties, an additional dispute resolution role in the same matter assumes increased responsibilities and obligations that may be governed by the standards of other professions.
- 8. If a party appears to have difficulty comprehending the process, issues or settlement options, or difficulty participating in the mediation process, the mediator should explore the circumstances and potential accommodations, modifications or adjustments that would make possible the party's capacity to comprehend, participate and exercise self-determination. If no such option can be reasonably provided, the mediator should take other appropriate steps, including

postponing the session, withdrawing from the mediation or terminating the mediation.

9. A mediator should postpone the session or take other appropriate steps if he or she becomes aware that a party is unable to participate due to drug or alcohol use.
10. If a mediation is being used to further illegal conduct, a mediator should take appropriate steps to insure a quality process including, if necessary, postponing the session, withdrawing from the mediation or terminating the mediation.
11. A mediator has an ongoing obligation to be sensitive to power imbalances between the parties and to ensure that the mediation process is conducted in a manner consistent with these Standards. If the mediator cannot ensure a quality process, the mediator should take appropriate steps to postpone the session, withdraw from the mediation or terminate the mediation.<sup>15</sup> (see *Committee Notes*)
12. A mediator is responsible for confirming with the parties that mediation is an appropriate dispute resolution process under the circumstances of each case.<sup>16</sup>
13. A mediator should consult with center staff if a party reveals or the mediator is otherwise made aware of a credible threat of serious and imminent physical harm to the speaker or to center staff.

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<sup>15</sup>Such power imbalances include where a party threatens, intimidates, or otherwise coerces the other party into participating in or reaching a desired result in the mediation.

<sup>16</sup> FLA Rule 10.400. Mediator's Responsibility to the Mediation Process.

## **STANDARD VII: ADVERTISING AND SOLICITATION**

- A.** A mediator shall be truthful and not misleading when advertising, soliciting or otherwise communicating his or her qualifications, experience, and range of available professional services.

### **COMMENTS:**

- 1.** Communications, including business cards, letter heads, or computer based communications, should not include any statistical settlement data or any promises as to outcome.
- 2.** Communications may include references to a mediator's fulfilling state, national or private organization qualifications only if the entity referred to has a procedure for qualifying mediators, and the mediator has been duly granted the requisite status.<sup>17</sup>
- 3.** A mediator should not solicit in a manner that could give an appearance of partiality for or against a party.
- 4.** A mediator should not list names of clients or persons served in promotional materials and communications without their permission.

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<sup>17</sup>The New York State Office of ADR Programs does not certify mediators. Under the CDRC Program Manual, however, mediators may obtain certification by a local center by completing an initial community training that is at least 30 hours in duration and conducted by a trainer who has been certified by the New York State Office of ADR Programs, followed by an apprenticeship at the center, a performance evaluation under the supervision of the center's Program Director, and an assessment by the Director that the mediator is prepared to mediate pursuant to the center's performance standards (Ch. 7, Section 1.A.(1)).

## **STANDARD VIII: RESPONSIBILITIES TO THE MEDIATION PROFESSION**

- A.** A mediator shall act in a manner that enhances the growth and quality of the mediation profession.

**COMMENTS:** Any person offering mediation services under the auspices of a New York State Community Dispute Resolution Program is considered to be a member of the mediation profession. Among other activities, a mediation professional should:

1. Foster diversity in the mediation field, reaching out to individuals with differing backgrounds and perspectives.
2. Strive to make mediation accessible to those who elect to use it, including providing services at a reduced rate or on a pro bono basis as appropriate.
3. Participate in research in the field when given the opportunity, including obtaining participant feedback when appropriate.
4. Participate in outreach and education efforts to assist the public in developing an improved understanding of, and appreciation for, mediation.
5. Assist newer mediators through training, mentoring and networking.
6. Exhibit tolerance of differing points of view within the field, seeking to learn from one another and work together to improve the profession and better serve people in conflict.

## **COMMITTEE NOTES**

*These Committee Notes contain annotations to the Introduction and “Comments” listed under each Standard. The Committee Notes include both “General Notes” and “Comment Notes.” The General Notes contain introductory comments by the Committee and the Comment Notes clarify, define, and expand upon the specific Comment to which they refer. This section may be updated as necessary by the Mediator Ethics Advisory Committee (“Committee”).*

### ***Introduction to Committee Notes***

Where a mediator is unable to resolve an ethical dilemma after reading these Standards as a whole, or finds that a certain Standard conflicts with another Standard contained therein, the mediator is encouraged to address this concern in writing to the Committee. In the interim, a mediator may look to other applicable professional rules or standards within the mediation field. Specific reference should be made to the Community Dispute Resolution Program Manual as a general rule, but particularly in circumstances that require immediate and decisive action by a mediator. Such instances may include where a party is in danger by the other party due to domestic violence, or the particular protocol a mediator should employ if a party reveals or the mediator is otherwise made aware of an allegation of child abuse. A mediator might also look to the Model Standards of Practice for Family and Divorce Mediation, that specifically addresses ethical practice for mediators of family cases (Symposium on Standards of Practice August 2001).

## **STANDARD I. SELF-DETERMINATION**

### ***General Notes***

Practitioners and scholars cite self-determination as the fundamental principle of mediation. Comments for Standard I, however, identify how this principle might conflict with other Standards and suggest that a mediator’s duty, in limited circumstances, may override this principle.

### ***Comment Notes***

#### **Comment 4.**

The Committee recognizes that power imbalances are an inherent part of mediation between any two parties, based on many factors including informational, emotional, or verbal differences, or even due to the disparity between the numbers of parties at the table. However, since the issue of power at the mediation table concerns the fundamental principle of self-determination, the mediator should be sensitive to any significant challenge to a party’s ability to freely and willingly make decisions regarding his or her own future. Such circumstances include where one party is threatening, intimidating, or otherwise manipulating the other party through either words or actions. In those cases the mediator should take immediate action to either postpone the session, withdraw from the mediation or terminate the mediation.

#### **Comment 3.**

### ***General Notes***

Party self-determination means that parties are free to make voluntary and uncoerced procedural and substantive decisions, including whether to make an informed choice to agree or not agree. In order to make an informed choice, one of the mediator’s roles is to

make the parties aware that they may consult other professionals at any point in the mediation process. In addition, to ensure a quality mediation process, the mediator should not mix the role of mediator with that of any other professional role. While a mediator may hold specialized knowledge, due to the mediator's profession or area of expertise, a mediator should only be acting as a mediator when mediating and not in any other professional role.

### **Comment Notes**

The Committee recognizes that the mediator may have specialized knowledge, due to the mediator's professional role or area of expertise, as stated in Standard VI. Quality of the Process, Comment 5. Sometimes this knowledge can impact what the mediator believes to be the potential outcome of the parties' decisions (for example, the mediator is an attorney and is aware of a particular law that impacts the parties' agreement). However, even if the mediator were correct and this knowledge would impact the parties' agreement, the mediator must be careful to assist the parties in making informed choices without providing direct (professional) advice, legal, therapeutic or otherwise. Since, as Standard I. Self-Determination, Comment 3. states, the mediator's role is solely to help the parties make informed choices at any point during the mediation process, the mediator must find a balance between making the parties aware that they may consult other professionals to help them make informed choices with providing specific advice based on the mediator's specialized knowledge.

When faced with this dilemma, the mediator can assist the parties by questioning their understanding of the implications of their decisions and making them aware that they may consult with other professionals regarding any decisions they make or would like to make. The mediator should take care to question the parties in a balanced way, so that both parties are receiving the same consideration.

Committee Opinions for reference: 2008-02, 2009-01.

## **STANDARD II: IMPARTIALITY**

### **Comment Notes**

#### **Comment 1.**

The Committee's intention in this Comment is to reflect all possible bases of bias that may cause a mediator to act with partiality. The classes of persons listed under this Comment are provided as examples, and are not intended to serve as an exhaustive or exclusive list.

The Committee's emphasis is on the mediator's action with regard to any bias he or she may hold. A mediator who may have a particular bias towards a party for any reason must not act with partiality due to her or his views. A mediator who is unable to act in an impartial, neutral way towards all parties in the dispute must decline to mediate or withdraw from the mediation.

## **STANDARD V. CONFIDENTIALITY**

### **Comment 6.**

#### ***General Notes***

While a mediator shall maintain the confidentiality of all information obtained by the mediator during a mediation, except any allegation of child abuse, that does not prohibit a mediator from disclosing necessary information to staff. If a mediator becomes aware of or suspects that a crime may be or may have been committed, then the mediator should consult with staff regarding next steps without delay.

#### **Comment Notes**

The Committee does not want to put the mediator in the position of making determinations as to what is legal, since it is beyond the scope of the mediator's role. When the mediator is faced with a situation where there is a concern about the legality of a certain action or a fear of something illegal taking place, the mediator should disclose this information to center staff, as indicated in Standard V. Confidentiality, Comment 6. The mediator must also consider Standard VI. Quality of the Process, Comment 10. at this time, and, if a mediation is being used to further illegal conduct, the mediator should take appropriate steps to insure a quality process, including, if necessary, postponing the session, or withdrawing from or terminating the mediation.

Committee Opinions for reference: 2006-02, 2006-03, 2008-01.

## **STANDARD VI: QUALITY OF THE PROCESS**

### **Comment Notes**

#### **Comment 4.**

A center must permit all parties to appear with representatives, including counsel, and to present all relevant evidence relating to the dispute, including calling and examining witnesses (22 New York Code of Rules and Regulations Part 116.3(I); see also and CDRC Program Manual, Ch. 5, Section IV. B.(3)). Parties who speak another language are afforded the assistance of a court interpreter, who must be present in the mediation (although no direct authority addresses this, this practice is recognized by centers as an "equal access to justice" issue; indirectly, this practice is covered under CDRC Program Manual Ch. 5, Section IV. B.(4), centers shall not discriminate on the basis of age, sex, religion, creed, ethnic origin, sexual orientation or disability) (emphasis added). Parties may also request the presence of other third parties, such as friends and/or family for support. Prior to the mediation, both parties should determine together if these third parties will participate in the session.

#### **Comment 5.**

#### ***General Notes***

Party self-determination means that parties are free to make voluntary and uncoerced procedural and substantive decisions, including whether to make an informed choice to agree or not agree. In order to make an informed choice, one of the mediator's roles is to make the parties aware that they may consult other professionals at any point in the mediation process. In addition, to ensure a quality mediation process, the mediator should not mix the role of mediator with that of any other professional role. While a

mediator may hold specialized knowledge, due to the mediator's profession or area of expertise, a mediator should only be acting as a mediator when mediating and not in any other professional role.

### **Comment Notes**

The Committee recognizes that the mediator may have specialized knowledge, due to the mediator's professional role or area of expertise, as stated in Standard VI. Quality of the Process, Comment 5. Sometimes this knowledge can impact what the mediator believes to be the potential outcome of the parties' decisions (for example, the mediator is an attorney and is aware of a particular law that impacts the parties' agreement). However, even if the mediator were correct and this knowledge would impact the parties' agreement, the mediator must be careful to assist the parties in making informed choices without providing direct (professional) advice, legal, therapeutic or otherwise. Since, as Standard I. Self-Determination, Comment 3. states, the mediator's role is solely to help the parties make informed choices at any point during the mediation process, the mediator must find a balance between making the parties aware that they may consult other professionals to help them make informed choices with providing specific advice based on the mediator's specialized knowledge.

When faced with this dilemma, the mediator can assist the parties by questioning their understanding of the implications of their decisions and making them aware that they may consult with other professionals regarding any decisions they make or would like to make. The mediator should take care to question the parties in a balanced way, so that both parties are receiving the same consideration.

Committee Opinions for reference: 2008-02, 2009-01.

### **Comment 10.**

#### ***General Notes***

While a mediator shall maintain the confidentiality of all information obtained by the mediator during a mediation, except any allegation of child abuse, that does not prohibit a mediator from disclosing necessary information to staff. If a mediator becomes aware of or suspects that a crime may be or may have been committed, then the mediator should consult with staff regarding next steps without delay.

### **Comment Notes**

The Committee does not want to put the mediator in the position of making determinations as to what is legal, since it is beyond the scope of the mediator's role. When the mediator is faced with a situation where there is a concern about the legality of a certain action or a fear of something illegal taking place, the mediator should disclose this information to center staff, as indicated in Standard V. Confidentiality, Comment 6. The mediator must also consider Standard VI. Quality of the Process, Comment 10. at this time, and, if a mediation is being used to further illegal conduct, the mediator should take appropriate steps to insure a quality process, including, if necessary, postponing the session, or withdrawing from or terminating the mediation.

Committee Opinions for reference: 2006-02, 2006-03, 2008-01.

## **Comment 11.**

### **Comment Notes**

A mediator has a duty to conduct a quality mediation process. The quality of the process, consistent with the Standards, requires the mediator to conduct a process that supports party self-determination, with impartiality, no conflicts of interest, competence, and by upholding the confidentiality of the parties (with the exception of child abuse). Specifically, this Comment refers to the Standard of Self-Determination (Standard I.). As the Committee states in Committee Notes to Standard I. Self-Determination, Comment 4., any significant challenge to a party's ability to self-determine or freely and willingly make decisions regarding his or her own future should be a concern to the mediator, such as when one party is threatening, intimidating, or otherwise manipulating the other party through either words or actions. In such circumstances, the mediator should take immediate action to either postpone the session, withdraw from the mediation or terminate the mediation.

### **Revision to Standard VI. Quality of the Process, C.**

This new language has been added in order to ensure that a necessary party to a mediation is not excluded from the session.

While the Committee requires the mediator to not exclude the attorney for the child, the Committee also recognizes that the CDRCs play an active role in ensuring that the stakeholders in the mediation process in cases where an attorney for the child would be appointed -- generally Family Court personnel and other professionals who are integrally involved in a system based case such as a caseworker/ supervisor, in addition to the parties -- are routinely notified of scheduled mediation sessions and have an equal chance of participation

The CDRC Program Manual recognizes the importance of including all necessary parties in the mediation process (Chapter 5, Operational Policies, IV.B.1.3.) and this is reinforced through mediator's initial training as well (Chapter 7, Standards and Guidelines for Mediators and Mediation Trainers, III., 8.).

## DEFINITIONS

**Conflict of Interest:** A person has a conflict of interest when a person is in a position that requires him or her to exercise judgment on behalf of others and also has interests or obligations that might interfere with the exercise of his or her judgment.<sup>18</sup>

**Impartiality:** Impartiality means freedom from favoritism or prejudice in word, action or appearance.

**Mediation:** For the purpose of these Standards, mediation is defined as a confidential, informal procedure in which a neutral third party helps disputants communicate, negotiate, and/or make decisions. With the assistance of a mediator, parties identify issues, clarify perceptions and explore options for a mutually acceptable outcome.

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<sup>18</sup>[www.unmc.edu/ethics/words.html](http://www.unmc.edu/ethics/words.html).

## APPENDIX

### ARTICLE 21-A COMMUNITY DISPUTE RESOLUTION CENTERS PROGRAM

Section	849-a. Definitions.
	849-b. Establishment and administration of centers.
	849-c. Application procedures.
	849-d. Payment procedures.
	849-e. Funding.
	849-f. Rules and regulations.
	849-g. Reports.

#### **S 849-a. Definitions. For the purposes of this article:**

1. "Center" means a community dispute center which provides conciliation, mediation, arbitration or other forms and techniques of dispute resolution.
2. "Mediator" means an impartial person who assists in the resolution of a dispute.
3. "Grant recipient" means any nonprofit organization that administers a community dispute resolution center pursuant to this article, and is organized for the resolution of disputes or for religious, charitable or educational purposes.

#### **S 849-b. Establishment and administration of centers.**

1. There is hereby established the community dispute resolution center program, to be administered and supervised under the direction of the chief administrator of the courts, to provide funds pursuant to this article for the establishment and continuance of dispute resolution centers on the basis of need in neighborhoods.
2. Every center shall be operated by a grant recipient.
3. All centers shall be operated pursuant to contract with the chief administrator and shall comply with all provisions of this article. The chief administrator shall promulgate rules and regulations to effectuate the purposes of this article, including provisions for periodic monitoring and evaluation of the program.
4. A center shall not be eligible for funds under this article unless:
  - (a) it complies with the provisions of this article and the applicable rules and regulations of the chief administrator;
  - (b) it provides neutral mediators who have received at least twenty-five hours of training in conflict resolution techniques;
  - (c) it provides dispute resolution without cost to indigents and at nominal or no cost to other participants;
  - (d) it provides that during or at the conclusion of the dispute resolution process there shall be a written agreement or decision setting forth the settlement of the issues and future responsibilities of each party and that such agreement or decision shall be available to a court which has adjourned a pending action pursuant to section 170.55 of the criminal procedure law;
  - (e) it does not make monetary awards except upon consent of the parties and such awards do not exceed the monetary jurisdiction of the small claims part of the justice court, except that where an action has been adjourned in contemplation of dismissal pursuant to section 215.10 of the criminal procedure law, a monetary award not in excess of five thousand dollars may be made; and
  - (f) it does not accept for dispute resolution any defendant who is named in a filed felony complaint, superior court information, or indictment, charging: (i) a class A felony, or (ii) a violent felony offense as defined in section 70.02 of the penal law, or (iii) any drug offense as defined in article two hundred twenty of the penal law, or (iv) a felony upon the conviction of which defendant must be sentenced as a second felony offender, a second violent felony offender, or a persistent violent felony offender pursuant to sections 70.06, 70.04 and 70.08 of the penal law, or a

felony upon the conviction of which defendant may be sentenced as a persistent felony offender pursuant to section 70.10 of such law.

5. Parties must be provided in advance of the dispute resolution process with a written statement relating:

- (a) their rights and obligations;
- (b) the nature of the dispute;
- (c) their right to call and examine witnesses;
- (d) that a written decision with the reasons therefor will be rendered; and
- (e) that the dispute resolution process will be final and binding upon the parties.

6. Except as otherwise expressly provided in this article, all memoranda, work products, or case files of a mediator are confidential and not subject to disclosure in any judicial or administrative proceeding. Any communication relating to the subject matter of the resolution made during the resolution process by any participant, mediator, or any other person present at the dispute resolution shall be a confidential communication.

#### **S 849-c. Application procedures.**

1. Funds appropriated or available for the purposes of this article may be allocated for programs proposed by eligible centers. Nothing in this article shall preclude existing resolution centers from applying for funds made available under this article provided that they are otherwise in compliance with this article.

2. Centers shall be selected by the chief administrator from applications submitted.

3. The chief administrator shall require that applications submitted for funding include, but need not be limited to the following:

- (a) The cost of each of the proposed centers components including the proposed compensation of employees.
- (b) A description of the proposed area of service and number of participants who may be served.
- (c) A description of available dispute resolution services and facilities within the proposed geographical area.
- (d) A description of the applicant's proposed program, including support of civic groups, social services agencies and criminal justice agencies to accept and make referrals; the present availability of resources; and the applicant's administrative capacity.
- (e) Such additional information as is determined to be needed pursuant to rules of the chief administrator.

#### **S 849-d. Payment procedures.**

1. Upon the approval of the chief administrator, funds appropriated or available for the purposes of this article shall be used for the costs of operation of approved programs. The methods of payment or reimbursement for dispute resolution costs shall be specified by the chief administrator and may vary among centers. All such arrangements shall conform to the eligibility criteria of this article and the rules and regulations of the chief administrator.

2. The state share of the cost of any center approved under this section shall include a basic grant of up to twenty thousand dollars for each county served by the center and may include an additional amount not exceeding fifty per centum of the difference between the approved estimated cost of the program and the basic grant.

#### **S 849-e. Funding.**

1. The chief administrator may accept and disburse from any public or private agency or person, any money for the purposes of this article.

2. The chief administrator may also receive and disburse federal funds for purposes of this article, and perform services and acts as may be necessary for the receipt and disbursement of such federal funds.

- (a) A grant recipient may accept funds from any public or private agency or person for the purposes of this article.
- (b) The state comptroller, the chief administrator and their authorized representatives, shall have the power to inspect, examine and audit the fiscal affairs of the program.
- (c) Centers shall, whenever reasonably possible, make use of public facilities at free or nominal cost.

**S 849-f. Rules and regulations.**

The chief administrator shall promulgate rules and regulations to effectuate the purposes of this article.

**S 849-g. Reports.**

Each resolution center funded pursuant to this article shall annually provide the chief administrator with statistical data regarding the operating budget, the number of referrals, categories or types of cases referred, number of parties serviced, number of disputes resolved, nature of resolution, amount and type of awards, rate of compliance, returnees to the resolution process, duration and estimated costs of hearings and such other information the chief administrator may require and the cost of hearings as the chief administrator requires. The chief administrator shall thereafter report annually to the governor and the and the temporary president of the senate, speaker of the assembly, and chairpersons of the judiciary and children and families committees regarding the operation and success of the centers funded pursuant to this article. The chief administrator shall include in such report all the information for each center that is required to be in the report from each center to the chief administrator.

**ABA Section of Dispute Resolution**  
**Committee on Mediator Ethical Guidance**  
*October 25, 2016*

**Inquiry:**

**The mediation, in which both parties are *pro se*, proceeds up to a point, when both parties ask the mediator to leave the room. The mediator exits the room and checks back repeatedly to see if he's needed (which he is not). The parties settle the case and invite the mediator back into the mix, asking him to put into writing the terms of agreement they have reached. The mediator is concerned about whether he had sufficiently overseen the parties' interaction to be comfortable that there was not coercion, bad faith, etc. involved in reaching a final settlement. Under the Model Standards, what should the mediator do?**

Authority Referenced: Model Standards of Conduct for Mediators Standard I and VI (2005).

Summary: A mediation is a process in which an impartial third party facilitates communication and negotiation and promotes decision making by the parties to the dispute. Assuming the described process could be a mediation, the parties' exclusion of the mediator from some of their negotiations, highlights the tension between the parties' right to self-determination as to process and outcome (Standard I) and the mediator's obligation to conduct a quality process (Standard VI). The mediator should assess whether the parties' decision to exclude him was voluntary and informed, should continue to offer services as mediator and should discuss with the parties how the agreement, reached out of his/her presence, was reached. However, while the mediator could discuss the parties' agreement with them after their separate negotiation, she/he should decline their requests to act as anything more than a scrivener because, in doing so, the mediator risks assuming a different role, that of an attorney (Standard VI). Instead, the mediator should recommend that the parties consult independent counsel to draft the agreement.

**Opinion:**

This Opinion first examines whether the described process is a mediation. Then, it considers how the mediator must balance, on the one hand, respect for the parties' self-determination as to process and, on the other hand, the obligation to maintain a quality process. Finally, the Opinion addresses whether the parties' request that the mediator put the settlement in writing is consistent with the Standards.

**Mediation.**

The threshold question is whether the described process was a mediation. A process does not become a "mediation" simply because it is labeled as such.<sup>1</sup> The Preamble to the Model Standards defines mediation as follows:

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<sup>1</sup> See Standard VI(A)(6), which states: "A mediator shall not conduct a dispute resolution procedure other than mediation but label it mediation in an effort to gain the protection of rules, statutes, or other governing authorities pertaining to mediation."

Mediation is a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute.

Here, the mediator met with the parties, neither of whom was represented by counsel, and presumably facilitated communication and negotiation until the parties chose to continue negotiation on their own for a while. Whether this meets the definition of a mediation should depend on the quantity and quality of the mediator's interactions with the participants.

From a quantitative standpoint, there must be substantial interaction between the mediator and the parties. For example, the Preamble's definition would not be satisfied if the mediator had convened the process and conducted a cursory discussion of the dispute for 20 minutes, after which the parties asked the mediator to leave and then engaged in unassisted negotiations for the next two hours.

For a mediation to occur, the mediator need not be present with all of the parties during every moment of the process. It is hardly unusual for mediation participants, from time to time, to consult and negotiate with each other out of the presence of the mediator.<sup>2</sup> This is certainly true in mediations where the parties are represented by counsel and there seems no *definitional* reason to treat a process involving *pro se* disputants differently.

From a qualitative standpoint, the definition addresses the mediator's active facilitation of both communication and negotiation between the parties, and the mediator's active promotion of voluntary decision making by the parties. In the present inquiry, it is not clear how actively the mediator had fostered an exchange of information and settlement options. Nor is it evident to what extent the mediator had actively promoted the parties' voluntary decision making. The mediator did "check back repeatedly to see if he's needed" and the parties, although negotiating on their own, did not express their intention to end the mediation.<sup>3</sup> For purposes of this opinion, the Committee will assume that the described process could have satisfied the Preamble's definition.

#### Self-determination and quality of process.

A central tenet of mediation is self-determination, which relates both to outcome and to process. Model Standard I prescribes that:

- A. A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation,

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<sup>2</sup> Sometimes, counsel will need to consult with each other outside the mediator's presence; sometimes the principal clients will confer with each other. In multiparty mediations, some subset of participants may need to negotiate with another subset, while the mediator is meeting with other parties.

<sup>3</sup> Standard VI.A.3 states: "The presence or absence of persons at a mediation depends on the agreement of the parties *and the mediator*." [emphasis added] Therefore, notwithstanding the parties' intent to continue the mediation, the mediator could well conclude that the exclusion of the mediator undermined his/her ability to facilitate the negotiation or to promote voluntary decisions. If that was his/her conclusion, the mediator could terminate the process.

including mediator selection, process design, participation in or withdrawal from the process, and outcomes.

Here, allowing the parties to negotiate out of the presence of the mediator would have been consistent with self-determination “as to process,” if the choice to exclude the mediator was voluntary and informed. It was appropriate for the mediator to continue to offer mediation services. The mediator should remind the parties of his/her role in promoting voluntary and informed decision-making and to clarify what his/her continuing role would be. Nonetheless, the Committee believes that it is not inherently problematic for the mediator to be excluded from some of the party negotiations during part of the mediation.

There is, however, a tension between self-determination and the mediator’s obligation to maintain a quality process. Standard I.A.1 states that:

Although party self-determination for process design is a fundamental principle of mediation practice, a mediator may need to balance such party self-determination with a mediator’s duty to conduct a quality process in accordance with these Standards.

Standard VI (Quality of Process) requires that:

A. A mediator shall conduct a mediation in accordance with these Standards and in a manner that promotes diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants.

This tension between the Standards is discussed in the Reporter’s Notes:

[A] mediator, for example, may feel pulled in conflicting directions when the mediator, duty-bound to support party self-determination (Standard I), recognizes that parties are trying to design a process that is not mediation but want to call it mediation to gain confidentiality protections, thereby undermining the mediator’s obligation to sustain a quality process (Standard VI). Standard I(A)(1) and I(B) explicitly recognize this potential for conflict and indicates to the mediator that sustaining a quality process places limits on the extent to which party autonomy, external influences, and mediator self-interest should shape participant conduct.

Reporter’s Notes, September 9, 2005, page 9.

In the present inquiry, the mediator was concerned that when she/he was not present, one of the parties might have engaged in coercion, bad faith or other misconduct in bringing about the settlement. The mediator here may have acted to minimize the potential for misconduct by continuously offering to assist in the parties’ negotiations. Yet, not being present during the negotiations, the mediator’s ability to detect misconduct by a party is obviously reduced.

Of course, even if the mediator had attended all of the parties' negotiations, she/he cannot necessarily be able to vouch for the quality of the outcome. Standard I.A.2 recognizes this:

A mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions, but, where appropriate, a mediator should make the parties aware of the importance of consulting other professionals to help them make informed choices.

Upon resuming his/her participation after the parties had negotiated on their own, the mediator should discuss with them how the settlement was reached, its completeness and implementation, and whether they each believed that the outcome was a "free and informed" choice. Such a discussion might alleviate the mediator's concern about the quality of the process.

The mediator should also consider Standard VI. C:

If a mediator believes that participant conduct, including that of the mediator, jeopardizes conducting a mediation consistent with these Standards, a mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

In the present case, if the mediator discerned other red flags that suggest that there has been overreaching, coercion or misconduct by one of the parties here, she/he could postpone, withdraw from or terminate the process.

In any event, where parties are *pro se* – and particularly if the mediator is concerned about the outcome -- the mediator should follow the guidance of Standard I.A.2 and recommend that the parties consult independent counsel before they finalize any settlement.

#### Putting the agreement in writing.

More problematic is the request that the mediator put the agreement "into writing." When the parties have reached an agreement in the mediator's presence, the mediator is often asked to memorialize that agreement. The mediator's serving as a "scrivener" to capture the *pro se* parties' agreement reached in mediator's presence is not inconsistent with the Model Standards, although it may run contrary to court or bar rules or ethics opinions in some jurisdictions.

Here, the mediator was asked to write up the terms of an agreement reached outside the mediator's presence. When the mediator is being asked to do something beyond serving as a scrivener – such as drafting a contract -- the mediator risks assuming a different role, that of an attorney.

Standard VI.5 states:

The role of a mediator differs substantially from other professional roles. Mixing the role of a mediator and the role of another profession is problematic and thus, a mediator should distinguish between the roles. A mediator may provide information that the

mediator is qualified by training or experience to provide, only if the mediator can do so consistent with these Standards.

Acting as an attorney, while or after serving as a mediator, is particularly problematic since it implicates issues of unauthorized practice of law, dual representation, impartiality (Standard II) and Conflicts of Interests, under both the Model Rules (Standard III)<sup>4</sup> and state bar rules. Best practice suggests that here, while the mediator could discuss the parties' agreement with them after their separate negotiation, she/he should decline their requests to prepare a written agreement and should instead refer them to an attorney to draft the agreement.

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<sup>4</sup> Even if it was not discussed or contemplated by the parties, the mediator's assuming the role of the drafter might be deemed by the applicable bar as creating an attorney-client relationship with one or both of the parties. Standard III. F. of the Model Rules flags the problem: "Subsequent to a mediation, a mediator shall not establish another relationship with any of the participants in any matter that would raise questions about the integrity of the mediation."

## **How Would You Respond to this Ethical Dilemma in Mediation?**

### **June 2009**

Presented by Tim Hedeem is the co-chair of the Section Associates Committee and serves as an ex-officio liaison to the Section Council. He is a Professor at Kennesaw State University and can be reached at tkhedeem@yahoo.com.

### **The Judge Beckons**

You recently mediated a family business dissolution case that concludes in a signed agreement. A week after the mediation, the plaintiff's attorney contacts the court's ADR coordinator to ask that the settlement be set aside. The attorney explains that his client has complained that she was not feeling well for the last couple hours of the six-hour mediation; she would have signed anything to conclude the session, she has told him.

The judge calls both attorneys to a meeting at her office to learn more. The defendant's attorney attests he saw no outward distress by the plaintiff, while the plaintiff's attorney explains that on the day of mediation he thought her discomfort was "a typical case of nerves," yet he now understands that she was without her anti-anxiety medication that afternoon - and therefore should be considered to have been "incompetent to contract."

Clearly frustrated, the judge asks both counsel whether the mediator should be contacted, to seek her recollection of the day's events. Both answer affirmatively, and the judge calls you on the phone. She asks for your assessment of the plaintiff's condition during the mediation, and notes that both parties' attorneys have waived confidentiality restrictions by asking for your views.

### **Responses to *The Judge Beckons***

Astute readers will note the remarkable parallels between this scenario and the *Wilson v. Wilson* case presented in a recent *Dispute Resolution Magazine* (that the scenario and article share the same author would constitute a hint). Other readers may note echoes of *Olam v. Congress Mortgage* or *Randle v. Mid Gulf* in this case. And still other readers may not have encountered or considered this problematic issue before.

Responses to this dilemma have been both thoughtful and divergent. Most emphasize that mediation is confidential (in most jurisdictions) and that the mediator is prohibited to share any information about the content of a mediation session with any outside actor or agency. But from this starting point, a range of approaches emerge.

Some mediators rhetorically asked, "Whose self-determination is served by confidentiality in this case? If the parties', then what are we to make of their attorneys' support of the judge's contacting the mediator? Attorneys function to represent the parties' interests." Others highlighted the distinction between substance of mediation communications and a mediator's judgment of a party's demeanor and ability to

participate, noting that requested feedback was not about the specific content of any proposal or offer.

Before engaging these arguments, let's step back to admire the work of Professors Coben and Thompson, whose analysis of litigation arising from mediation found that confidentiality was the key concern in 130 recent cases; in 60 of these, courts did not uphold confidentiality protections. Among the justifications for compelling mediator testimony, they found courts "concluding the evidence was offered for a permissible purpose," as was reasoned in *Wilson*—especially given that the majority of the mediation took place in caucus sessions, only the mediator interacted with Mr. Wilson extensively that day.

Olam presents a similar rationale and represents the most detailed explanation of the court's perceived need of the mediator's account: Judge Wayne Brazil argued that "testimony from the mediator would be the most reliable and probative on the central issues." But would it?

First, is a mediator sufficiently trained in assessing a disputant's fitness for mediation? Professor Patrick Coy and I have observed, addressing differential cognitive or emotional abilities of disputants puts mediators in a dangerous and delicate situation. "It is dangerous because few, if any mediators are trained in mental health diagnosis and psychological assessment. These analytical processes are difficult enough for highly trained and skilled professionals who have ample assessment time with their clients."

And second, Richard Smullyan's knights-and-knaves puzzles hint at the predictability—and thus limited utility—of the mediator's likely response. Recall that some of Smullyan's logic games take place in a land where knights speak only truths, while knaves always lie. A close colleague has pointed out, "[What mediator] is going to say, 'The parties didn't seem competent to mediate, but I went ahead anyway'?"

While a few responses to the dilemma pointed up these concerns, others stood fast on the issue of party self-determination while setting aside the mediator's interest in protecting confidentiality. If both parties seek the mediator's revelation of communications or her judgment of parties' capacities, then the mediator should accommodate these requests. We should note that other mediators have argued compellingly against this very practice, as they note the erosion of confidentiality protections could be broadly detrimental. How the standards of self-determination and confidentiality function in relation to one another is not prescribed in the Model Standards of Conduct for Mediators.

And to the distinction between mediation communications and a mediator's judgment of a party's competence, we have another divided jury: Some readers held the mediator's assessment to be sufficiently unrelated to mediation content, and thus outside the veil of confidentiality and therefore appropriately shared with the judge. Others anticipated this line of reasoning, and rebutted that any assessment is grounded wholly in the mediator's communication with the parties (and thus should remain confidential, as any explanation or justification for the assessment would necessarily break confidences).

And so what is a mediator to do when the judge calls? The preponderant response is that the mediator should decline to offer any information regarding the mediation, aside from whether a mediation between those parties was held or not. A majority of respondents suggest it's permissible to inform the judge whether a written agreement was reached or not. Many readers pointed to local mediation rules and provisions regarding confidentiality and mediator communication guidelines. These should be any mediator's first reference, should a judge or other party call. The ABA Committee on Mediator Ethical Guidance stands ready to offer their guidance, as well.

Returning to two other concerns embedded within this case, allow me some likely-unsatisfying responses. To the issue of parties' perceptions of mediator pressure, guidance from the literature and professional codes is that the mediator apply no more pressure than the parties expect. And regarding a mediator's judgment of party competence, the essence of most recommendations is to discontinue the mediation process if a party's behaviors hint that she or he cannot participate effectively—whether to terminate or just suspend would depend on what (if any) accommodations might support the party's capability. Both of the preceding issues are delicate and complex, and to this author's thinking, unresolved at present. Further consideration and guidance on these important issues will improve future mediation practice.

## **How Would You Respond to this Ethical Dilemma in Mediation?**

July 2008

Read about the topic presented by our guest columnist Susan Nauss Exon\*, Professor of Law, University of La Verne College of Law, Ontario, California. E-mail your responses to this quandary to Roger Wolf at [rwolf@law.umaryland.edu](mailto:rwolf@law.umaryland.edu).

### **The Sleazy Attorney**

Attorney represented an elderly client in a divorce action, wherein client lost his home and his life savings of approximately \$300,000. Client's assets were wiped out partly for spousal support to a wife who had worked during most of their forty-year marriage and partly due to attorney's failure to process required paperwork to avoid foreclosure on some real property. Client paid attorney \$38,000 in fees to represent client in the divorce. Despite client's periodic requests for invoices during the divorce proceeding, attorney waited until several months after the conclusion of the matter to bill client for an additional \$30,000.

A fee dispute ensued and the parties submitted the fee dispute to the local bar association's binding arbitration program; client was awarded a judgment of \$10,000 based on a finding that reasonable attorney's fees were \$28,000. Attorney appealed the arbitration award by filing a court action for breach of contract. Client counterclaimed for legal malpractice, fraud, and breach of the covenant of good faith and fair dealing. Minimal discovery has been conducted in the action and it has been referred to you to mediate.

Based on the parties' pre-mediation briefs, you become concerned that attorney violated lawyer rules of professional conduct during the course of the divorce representation. Client's attorney has not raised this issue in his brief. You also question the propriety of suing a former client for such a small sum of money.

The day of the mediation arrives and you begin with individual caucuses rather than a joint session. When you meet privately with attorney, you are met by a man with messy hair and wrinkled clothes. He talks in a quiet, gentle voice but has difficulty laying out facts in a coherent fashion. You learn that the attorney has been practicing for over twenty years. Ten minutes into attorney's opening remarks, you are already losing respect for attorney and are having difficulty listening to his aimless drivel. You believe that if attorney's behavior at the mediation is typical for him, attorney probably committed malpractice in the underlying divorce case as well as violations of lawyer rules of professional conduct. Hence, the arbitration award was probably correct.

As the mediation session continues, attorney refuses to back off of his position, claiming that his former client owes him money. By late afternoon, you believe the parties are close to impasse. You believe that if you mention your beliefs about the malpractice and ethical violations, you can encourage settlement. Then while in caucus with client, client asks whether you believe attorney committed malpractice in the divorce case? As an

attorney-mediator, how do you respond? Do you mention to either or both parties your concern about the ethical violations? Discuss any other ethical dilemmas that you see.

## **Reader Responses**

The Client is asking the mediator for legal advice regarding malpractice. The mediator believes that discussing such information might help the parties overcome impasse. Responses recognized that the quality of the process comes into play as well as party self-determination and mediator impartiality.

Standard VI(A)(5) of the Model Standards of Conduct for Mediators (Model Standards) states that "mixing the role of a mediator and the role of another profession is problematic . . ." and a "mediator may provide information that the mediator is qualified by training or experience to provide, only if the mediator can do so consistent with these Standards." One response suggested that as an attorney, arguably the mediator is qualified to answer if she is aware of the standard of care for malpractice in her jurisdiction. The Model Standards make clear, however, that the mediator should not mix other professional roles with that of a mediator. In other words, the mediator as a neutral should not give legal advice, as would retained counsel.

In the scenario, if the client was represented by counsel, an easy response would be to refer the question to the client's counsel. As a mediator, I would limit my discussion with the client's counsel to the legal standard for malpractice and let the attorney give legal advice to the client by applying the legal standard to the specific facts of the case. If the client was not represented by counsel, the mediator would be well-advised not to provide an opinion for fear the client believed that the mediator was representing him. Again, the mediator might provide legal information, but as long as the mediator does not apply the legal information to specific facts, an argument can be made that the mediator is not providing legal advice, and hence, is not mixing the roles of attorney and mediator.

Furthermore, the mediator should encourage party self-determination by urging the parties to seek the assistance of counsel, consistent with Model Standard I(A)(2). That Standard cautions that the mediator cannot ensure that each party has made an informed choice, although the mediator can inform the parties of "the importance of consulting other professionals to help them make informed choices." This can be done in private caucus with the client. In a separate caucus with the attorney when the mediator raises the question of possible malpractice, the mediator should ask whether attorney has thought about retaining malpractice counsel, especially since the crossclaim alleges malpractice.

A third related issue pertains to mediator impartiality. Model Standard II requires a mediator to conduct a mediation in an "impartial manner" and describes impartiality as "freedom from favoritism, bias or prejudice." By providing legal information to the client in a private session without offering an opinion, the mediator can maintain impartiality. Similarly, the mediator can discuss the malpractice concern in a private caucus with the attorney. As previously noted, the mediator can ask the attorney a series of questions regarding the issue of attorney malpractice, including whether the attorney has retained

separate malpractice counsel and query about any concerns attorney may have regarding the malpractice claim. The mediator should be able to remain impartial and maintain her own credibility by simply raising questions and offering the topic for consideration without providing any opinion.

A separate issue relates to the mediator's concern about potential ethical violations. Since neither party has raised the issue, I would not add fuel to the fire by mentioning a new issue. But, should the attorney-mediator report suspected professional misconduct? ABA Model Rule 8.3 addresses a lawyer's responsibility to report another's conduct when the lawyer "knows" another lawyer has violated the Rules of Professional Conduct that raises a substantial question regarding the "lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." Although this is a tough call for any attorney, the facts indicate that the mediator *suspects* a violation, and therefore, does not *know* for certain, mediation confidentiality should govern to preclude reporting under these facts, and ABA Model Rule 3.3, Candor to the Court, does not pertain to mediation.

Several comments focused on the first part of the mediation when the mediator had a difficult time listening to the attorney's drivel while in caucus. By not paying attention, one response noted that the mediator could not be impartial and would "sabotage her credibility." Thus, the mediator should not continue to mediate. Several other responses indicated that by recognizing that she (the mediator) had "checked out," she became aware of her biases, was able to adjust her behavior, and became a better mediator. Finally, one response stated that the mediator needs to realize it is not about her agenda - what she thinks or feels - and as long as the mediator gets back on track quickly, she should be able to maintain her competence. I agree with these latter responses that by recognizing her personal biases and modifying her behavior, the mediator can maintain her level of competence and should be able to continue mediating the matter.

## **How Would You Respond to this Ethical Dilemma in Mediation?**

Our ethical dilemma for this month comes from an exciting new text on mediation written by Doug Frenkel and Jim Stark. The problem is used with the permission of Doug and Jim and is reproduced with permission of Aspen Publishers from Douglas N. Frenkel and James H. Stark's *The Practice of Mediation: A Video-Integrated Text*, Chapter 12, Problems 3, 4, copyright (c) 2008 by Aspen Publishers, [www.aspenpublishers.com](http://www.aspenpublishers.com)

### **The Unrepresented Tenant**

The would-be tenant was a first-generation immigrant from Brazil who spoke broken and somewhat limited English, was small of stature and totally unfamiliar with American courts. He brought a small claims action against a large local realty company for failure to return \$2,250 he had put down on an apartment he had rented. He appeared at the mediation by himself. The defendant was represented by the property manager, who was large and burly, an assistant property manager and by the company lawyer, who was loud and aggressive. The parties agreed that the monthly rent for the unit was \$750, and that the plaintiff's payment of \$2,250 covered the first and last month of the year-long lease, plus an additional \$750 security deposit. They disagreed about what had transpired between them: The plaintiff claimed that the defendant had pulled a "bait and switch" on his scheduled move-in day, offering him a much less attractive apartment than the one he agreed to rent. The defendant admitted that the company had switched apartments, but blamed this on the plaintiff's announcing his intention not to move in three days before the lease term was set to begin, and then showing up on his original move-in date, having changed his mind again. They also claimed that the new apartment they later offered was "identical." Finally, they defended on the ground that the plaintiff had signed an agreement that stated in bold letters: "Failure to rent will result in forfeiture of the entire deposit," and that by refusing the substitute apartment, he was entitled to nothing. (The plaintiff claimed that he did not understand this, and in any event it was unfair.) Mediator questioning revealed that defendants had been able re-rent the original apartment within 48 hours of the plaintiff's changing his mind, and that, while they claimed spending an extra \$200 in advertising fees, had no receipts in support of that claim. Defense counsel offered plaintiff \$500 to settle the case, and then put enormous pressure on him, including threatening him in the hallway during a mediator caucus, calling him "dishonest," and stating that if he insisted on going to court, "we will see that you get nothing."

You take a mediator's caucus and decide to consult the court clerk about the enforceability of the deposit "forfeiture" clause that the plaintiff admits he signed. The clerk (a lawyer with ten years of experience as chief housing court clerk) informs you that most judges view such clauses as void against public policy and not enforceable. He says that state law is clear that all unused deposits are the property of and to be held in trust for tenants, and that landlord deductions from security deposit accounts -- as well as all other charges and "penalties"-- may only be made for "provable, actual damages" suffered by the landlord. Of course, the tenant in this case does not know this.

If I were the mediator in this case, I would feel comfortable taking the following

informational steps to "balance power:"

- a) Tell the defendant's representatives in caucus about the likely non-enforceability of the forfeiture clause and encourage them to make an offer more reflective of the likely trial outcome. (VC) (SC) (SU) (VU)
- b) Ask the plaintiff in caucus whether he has consulted a lawyer or would like to do so. (VC) (SC) (SU) (VU)
- c) Suggest to the plaintiff in caucus that he might want to talk to the clerk about the forfeiture clause during the next defendant caucus, without telling him why. (VC) (SC) (SU) (VU)
- d) Tell the plaintiff in caucus that you have consulted with the clerk and the clause is almost certainly not enforceable. (VC) (SC) (SU) (VU)
- e) Tell both parties in joint session that you have consulted with the clerk and the clause is almost certainly not enforceable. (VC) (SC) (SU) (VU)

### **Reader Responses**

In this month's ethical dilemma the sides hardly seem balanced: an unrepresented, first generation immigrant plaintiff who speaks "broken and somewhat limited English" against a "large and burly" property manager, an assistant property manager, and the company's lawyer. Plus the lawyer is putting 'enormous pressure' on the plaintiff "including threatening him in the hallway during a mediator caucus, calling him 'dishonest' and stating that if he insisted on going to court, 'we will see that you get nothing.'" Concerns about party self-determination, mediator impartiality, and the quality of the process as set out in the Model Standards of Conduct were raised by many readers when they considered the problem. Some wanted to know why the mediator took a "mediator caucus" to consult with the clerk of court. Was the mediator concerned about her competence (Standard IV)? Did she need to know this information in order to continue mediating the matter? Probably not, but now that she has the information has she so compromised herself that she can no longer conduct the mediation "in an impartial manner" (Standard II B) and should withdraw completely.

Question (a) asks how comfortable you are - as the mediator - telling the defendant's representatives in caucus that the forfeiture clause is likely unenforceable and encouraging counsel to make an offer more reflective of the likely trial outcome. The Model Standards tell us that "A mediator shall conduct a mediation based on the principle of party self-determination" (Standard I A) but that self-determination may need to be balanced "with a mediator's duty to conduct a quality process in accordance with these Standards" [Standard I A (1)]. An initial question is why does the mediator want to tell the defendant's representatives the clerk's assessment? The defendants are not having "difficulty comprehending the process, issues or settlement options..." [Standard VI A (10)] Does the mediator believe defendants don't know about the likely non-

enforceability of the forfeiture clause? Then shouldn't she first be exploring with them what they think will happen if the case goes to trial and how a judge might decide on the validity of the forfeiture clause? And if they believe the clause is valid, and that they will prevail, under what theory does the mediator tell defendants what the clerk has told her? Is she providing "information that the mediator is qualified by training or experience to provide" that is consistent with the Model Standards [Standard VI A (5)]? Is she doing this to "promote honesty and candor between and among all participants," [Standard I A (2)]; or is she providing legal advice which puts her into a different role than that of mediator which Model Rule VI A (8) cautions against doing "without the consent of the parties." My assessment is that the mediator is providing legal advice which the parties have not asked her to provide and as the mediator I am (VU) --very uncomfortable-- telling the defendant's representatives about the likely non-enforceability of the forfeiture clause.

Question (b) asks if the mediator would ask the plaintiff in caucus whether he has consulted a lawyer or would like to do so. Standard I A (2) states that, "where appropriate a mediator should make the parties aware of the importance of consulting other professionals to help them make informed choices," It appears from the facts that the plaintiff is uncertain about his rights and is being overpowered by the defendant's representative and lawyer. This is precisely the type of situation anticipated by the Model Rules [Standard I A (2)] where in an effort to preserve self-determination the mediator is encouraged to make the party aware of the importance to consult appropriate professionals. I am (VC)--very comfortable-- asking the plaintiff if he has had the opportunity to consult a lawyer in this matter.

Question (c) wonders if the mediator is willing to go several levels further and "suggest to the plaintiff in caucus that he might want to talk to the clerk about the forfeiture clause during the next defendant caucus, without telling him why." Again the first question is why is the mediator doing this? I assume the reason is to make sure the plaintiff is best able to make an informed choice of how to resolve the matter and whether to accept defendant's offer. Does the clerk of court qualify as "other professionals" under Standard I A (2)? While I think the matter can be argued I think the answer is that the clerk of court is not the type of "professional" envisioned under the Standards. Yet the mediator can certainly explore with the plaintiff whether he feels he has adequate information with which to make a decision and, if not, where he might get that information. However, suggesting that the plaintiff talk with the clerk of the court crosses the line of impartiality for me. I would be (VU)--very uncomfortable-- suggesting to the plaintiff that he take this action.

In addition, I am even more uncomfortable telling plaintiff in caucus what the clerk of court said as suggested in question (d). To do this would clearly cross the line of impartiality. (VU)

Which leaves question (e) -- telling both parties in joint session what the clerk told the mediator. Reader Nancy Karkowsky ,Esq. Writes that "in the spirit of empowering the parties and not imposing my concept of a fair outcome and not wanting

to compromise my role as mediator/objective 3<sup>rd</sup> party i.e. not a source of legal advice, even indirectly via the clerk, I would feel most comfortable asking parties in joint session about the forfeiture clause and what do any of them know about the enforceability/non enforceability and on what do they base their statements." Given the disparity in information Ms Karkowsky would either break and schedule another session after both sides have had the opportunity to learn about the enforceability of the clause and possibly speak with the clerk or she would terminate the mediation because, "it would be unethical to continue the session with such a lack of knowledge on the plaintiff's part and lack of straight forwardness/honesty on the defendant's part ... I do not believe it is my role to provide them with legal information, even indirectly, either by telling them it's enforceable via the clerk or directing them to go to speak with the clerk."

While I agree with much of Ms Karkowsky's reasoning, for me this situation only arises after the mediator has explored all other options with the parties and it is clear that both want this information. If both parties agree that the clerk's assessment would be helpful I would first see if the clerk were available to provide the parties the information directly. If the clerk is not available, upon the request of both parties, I would -- although slightly uncomfortable (SU)--convey the information to the parties jointly on the reasoning that I am providing information that might be useful to the parties in making an informed decision at their request. I am conveying the information without offering my own assessment of whether or not I agree with the clerk. If the parties did not agree that they want the information then I would feel very uncomfortable (VU) providing it.

## **Opinion #2015-01**

A husband and wife contacted the center to mediate their custody and support issues that have been the subject of litigation since 2009. CDRC staff conducted a standard initial intake to determine general appropriateness for mediation. As is customary with all intimate partner cases, staff provided an additional extensive screening with each party separately, to further assess appropriateness, including the potential existence of a power and control dynamic between the parties. The case was determined to be appropriate for mediation and a certified volunteer mediator was assigned to mediate the case from the CDRC's custody and visitation roster.

Both the husband and wife are represented by attorneys; however, the parties and their attorneys agreed that the parties would attend the mediation session without their attorneys present. Prior to the initial mediation session, the husband's attorney contacted the mediator to request that the mediation be video-recorded. The attorney shared with the mediator that since he would not be present at the mediation, he wanted to have a record of it in order to best advise his client going forward. He also shared that his client, the husband, was amenable to having the session video-recorded. The mediator contacted the husband, the wife and the wife's attorney, separately, to check with them about the request, and none of them expressed an objection to video-recording the session. The mediator concluded that the husband's attorney's request stemmed from a desire to have a record of what was said in mediation for the purposes of assisting his client and not for other possible purposes. The mediator then contacted the attorney for the child, who was also unable to participate, but did not express concern about the session being video-recorded.

The mediator has brought this information to the Center Director, since she is concerned about video-recording the mediation, even with the agreement of all the necessary parties. Although the Center does not have an express policy on video-recording, the mediator and the Center are unsure how recording a session might impact confidentiality. The attorneys have not indicated that they would use the video-recording in subsequent litigation or for other purposes. However, the mediator is apprehensive about the possibility and expresses concern that the parties and their attorneys may not fully understand the possible chilling effect video-recording the mediation may have on the process. The mediator is also concerned about how video-recording the mediation could impact her ability to mediate.

### **Question:**

**Should the Center allow for the video-recording of the mediation as requested by the parties?**

**– Submitted by a CDRC Director**

### **Summary of the Opinion**

The Center should not allow for the video-recording of the mediation. Although Standard I. Self-Determination extends to the parties' rights to make decisions about the process, it is the mediator's and Center's responsibility to ensure that Standard V. Confidentiality is understood

and maintained, while providing a mediation process that is consistent with Standard VI. Quality of the Process.

### **Authority Referenced**

Standards of Conduct for NYS Community Dispute Resolution Center Mediators (rev. 2009); Standard I. Self-Determination; Standard V. Confidentiality; and Standard VI. Quality of the Process.

### **Opinion**

The decision as to whether the Center should allow for the video-recording of the mediation would have been very clear had either party or the wife's attorney, in consultation with the wife, objected or expressed reluctance or concern about video-recording. Standard I. Self-Determination, states that: "...parties are free to make voluntary and uncoerced procedural and substantive decisions"<sup>1</sup> and "...can exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in the process, and outcomes."<sup>2</sup> Those principles, however, must be balanced against "(i)ndicators of a 'power imbalance' that may impede a party's ability to make a decision freely and willingly."<sup>3</sup> Had either the wife or the husband expressed reluctance or concern about the video-recording, it would not have been permitted because there would not have been the consent of both parties. Yet, after discussion with all parties and their attorneys, and after an extensive screening for power imbalances including domestic violence that is typically performed in custody and visitation mediation cases by the Center, the mediator found no indicators that there was any coerciveness present that would have influenced the parties' decisions to video-record the mediation.<sup>4</sup> As such, the mediator, and thereby the Center, is solely faced with the question of whether to allow the video-recording of the session for the purposes of providing a record of the session for the husband's attorney. After considering the levels of guidance and whether the Center "may", "should" or "shall" take a particular course of action, the Committee concludes that the Center should not allow the video-recording of the mediation.<sup>5</sup>

Standard I. Self-Determination requires that "(a) mediator shall conduct a mediation in a manner that supports the principle of party self-determination as to both process and outcome."<sup>6</sup> Therefore, the parties have the right to make voluntary choices about the process, including whether to video-record the mediation. However, Standard I. also states that "(t)he mediator is responsible for supporting party self-determination in each area, tempered by a mediator's duty to conduct a quality mediation process."<sup>7</sup> Mediators protect Standard VI., Quality of the Process,

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<sup>1</sup> Standard I. Self-Determination, A.

<sup>2</sup> *Id.* at Comment 1.

<sup>3</sup> *Id.* at Comment 4., n 7. Comment 4. describes such power imbalances as including: "...where one party threatens, intimidates, or otherwise coerces the other party into participating in or reaching a desired result in the mediation."

<sup>4</sup> In addition to an initial and extensive screening in custody and visitation cases, CDRCs continually assess whether power and control dynamics are present through conversations with the parties by staff or by the mediator. Throughout the session, the mediator is also observing and noting the parties' interactions and communications, so as to ensure that the parties can freely and willingly make procedural and substantive decisions.

<sup>5</sup> Under the levels of guidance listed in the Introduction to the Standards, "(u)se of the term 'should' indicates that the practice described in the Standard is strongly suggested and should be departed from only with very strong reason."

<sup>6</sup> Standard I.A.

<sup>7</sup> *Id.* at Comment 1.

by offering a forum for resolution that is consistent with the guiding principles of mediation. Under the Standards, mediation is defined as “...a confidential, informal procedure in which a neutral third party helps disputants communicate, negotiate, and/or make decisions. With the assistance of a mediator, parties identify issues, clarify perceptions and explore options for a mutually acceptable outcome.”<sup>8</sup> In order to best encourage a free and open dialogue and provide creative opportunities to assist the parties in addressing their issues, the mediator must provide a safe environment for parties to have candid conversations. Having every word potentially scrutinized after the mediation can undermine the safety and candor that mediation is intended to foster.

The Committee also looks to Standard V. Confidentiality for guidance. Standard V. states: “A mediator shall maintain the confidentiality of all information obtained by the mediator during a mediation, including information obtained from the parties, non-party participants or documents shown to the mediator, with the exception of any allegation of child abuse.”<sup>9</sup>

Article 21-A of the Judiciary Law provides the statutory foundation for protecting information obtained by a mediator during a mediation, asserting that: “all memoranda, work products, or case files of a mediator are confidential and not subject to disclosure in any judicial or administrative proceeding.”<sup>10</sup> Having a video-recording of a mediation potentially impacts the confidentiality of that session.

Because confidentiality is a fundamental principle to the process of mediation, it must be protected at all reasonable costs. Allowing information about the process to be shared with the parties’ attorneys, outside of the mediation, is clearly understandable. However, while these parties and their attorneys would only allow for the video-recording to be utilized for the sole purpose of aiding in their mediation efforts, there may be unforeseen consequences in which this video-recording could be used. Unforeseen consequences could include the video being viewed by other third parties, including court personnel; or utilized for other unanticipated purposes, e.g. posting to social media and/ or an Internet website. Knowing that the substance of a mediation session could possibly be shared with third parties outside the session could further deter or discourage prospective users from engaging in the process.

In addition to the above-mentioned factors, the Committee considered whether there were other options available to the parties to capture the substance of their session. Standard VI. states that “(a) mediator shall not exclude a party’s attorney from a mediation session, including an attorney for the child.”<sup>11</sup> By participating in the session, the attorneys can exert the proper influence needed to guide and advise their clients. Having the attorneys present also increases the effectiveness of the process, since they can provide assistance contemporaneously, which reduces any misunderstandings or potential difficulties after the fact. Another option available to the parties, should their attorneys not be able to participate, is to take notes during the session. While taking notes necessarily must be balanced with participating fully, listening and

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<sup>8</sup> See Definitions to Standards.

<sup>9</sup> Standard V. Confidentiality, A.

<sup>10</sup> Cited in part in Standard V. Confidentiality, Comment 1, n 12; provided in full in Appendix to Standards.

<sup>11</sup> Standard VI. Quality of the Process, C.

considering options in the moment, notes of the session can be extremely helpful for the parties when debriefing with their respective attorneys after the mediation. Further, the fundamental principles of Self-Determination and Quality of the Process always allow for the parties to request that the session be paused so a party can reach out to his/ her attorney for guidance at any time during the mediation. Finally, any agreement or decisions made by the parties can be reviewed by their attorneys before finalizing.

## **Opinion #2013-01**

**An interpersonal conflict among co-workers was referred to a non-Community Dispute Resolution Center (“CDRC”) provider. The dispute involved the complainant and two respondents.**

**On the day of the mediation, the complainant arrived separately from the other parties and before entering the mediation room told one of the mediators (who was waiting outside of the mediation room) that he was reluctant to mediate and expressed concerns that he did not have his attorney with him and that he did not realize he should have brought his attorney. He said this notwithstanding the fact that the agreement to mediate was sent to the parties well in advance of the mediation date and is clear in stating that parties are not required to but may bring an attorney. The mediator, speaking separately with the complainant outside of the mediation room, expressed that the process was voluntary in nature so that he could stop or withdraw from the session at any time. The mediator encouraged him to contact anyone he would like before proceeding and that ultimately it was up to the complainant to decide whether he wanted to mediate. The complainant stepped away and made a phone call.**

**After his call, the complainant came back to the mediator who was waiting outside of the mediation room and stated that he wanted to start the mediation. The co-mediators began the mediation and all parties acknowledged having read the agreement to mediate and signed it. One of the mediators then asked which of the parties would like to begin. All of the parties hesitated, but eventually one of the respondents started to talk. The two respondents took turns speaking while the complainant listened intently and took copious notes. This went on for roughly forty-five minutes. One of the mediators glanced over at the complainant and saw that his notes were very specific and seemed to track who said what. The co-mediators checked in frequently with the complainant, but the complainant refused to speak and continued to take notes.**

**The co-mediators felt that they had an ethical dilemma at this point. Their concerns surrounded the complainant’s lack of communication, as well as the circumstances as a whole from the beginning of the process. Particularly, they were concerned that the complainant:**

- 1. expressed initial reluctance to participate in the mediation without having an attorney present;**
- 2. made a phone call to someone prior to the mediation and came back with a sudden change of mind about participating;**
- 3. did not speak at all during almost the first hour of the mediation and took copious notes.**

**Cumulatively, the co-mediators were concerned that the complainant was possibly using the information gleaned from the session towards discovery in a later proceeding. If the mediators continued to facilitate and the respondents continued to talk, the mediators were concerned that they would be unfairly compromising the respondents. On the other hand, the co-mediators were also worried that if they caucused with the parties and tried to**

explore the complainant's reluctance to speak then it might be perceived as forcing him to participate beyond his comfort level. The co-mediators pose their questions to the committee based on these concerns.

Fortunately, just seconds before the mediators were about to caucus, one of the respondents asked the complainant a question, the complainant responded and a dialogue began. Ultimately, the mediation was a success. However, had things not turned around when they did, the co-mediators discussed what they might have done next and what would be the ethical implications of various interventions. So, assuming the complainant had remained quiet and not said anything:

### **Questions**

1. Should the co-mediators have intervened if they reasonably believed that the complainant was using the mediation for discovery purposes or should the mediators defer to the respondents' self-determination as to whether they wish to continue talking?
2. If the co-mediators intervened and learned that the complainant was, in fact, using the mediation for discovery purposes, what should the co-mediators have done?

- submitted by co-mediators of a non-CDRC mediation provider

### **Summary of the Opinion**

Based on the facts as presented, the mediators should<sup>1</sup> intervene. Assuming their belief was reasonable, the co-mediators concluded that the complainant was misusing the process and that the complainant's sole objective was the unfair use of the respondents' statements in furtherance of discovery for litigation purposes. As presented in the facts, the respondents were speaking openly while the complainant silently took what appeared to be verbatim notes. The mediators believed that the complainant was not participating fairly in the process but was abusing it. Based on these facts, the co-mediators did have a duty to intervene to assure that the mediation was conducted in a manner that was consistent with the ABA Model Standards of Conduct for Mediators ("ABA Standards"); specifically ABA Standard I. Self Determination; Standard II. Impartiality; Standard V. Confidentiality; and Standard VI. Quality of the Process. The mediator also had a duty to confirm that all of the parties shared consistent expectations of confidentiality.

The manner of mediator intervention raises concerns of mediator impartiality. The manner of intervention should not give the parties the impression that the mediators favor one side over another. The purpose of the intervention should be to focus on the parties' understanding of the process and on confidentiality rather than on presumed motivations. While this opinion speaks only to the ethical dilemmas presented by these facts and does not address issues of best practices, the manner of intervention should be such that the mediators respect the parties' right of self-determination. Parties are free to participate in the process however they choose.

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<sup>1</sup> The Committee chose to use the level of guidance "should" for this opinion for two reasons: first, the mediators stated they reasonably believed that the mediation was progressing inconsistent with the ABA Standards (utilized because the mediation was not conducted under the auspices of a CDRC, prompting a stricter level of guidance than "may"), and secondly, even if "may" were the appropriate level of guidance, the ABA Standards do not recognize "may").

Mediators, through their intervention, should not curtail that right by imposing their personal concept of appropriate participation on anyone. If mediators reasonably believe that one side is abusing the process, such that the participant's conduct jeopardizes the mediation consistent with these Standards, then the mediators should intervene and, if the participant's conduct cannot be reconciled with these Standards, then the mediator should postpone the mediation session, withdraw from the mediation or terminate the mediation.

### **Authority Referenced**

Since the mediation was a non-CDRC mediation, the authority referenced is the ABA Model Standard of Conduct for Mediators, developed by the American Bar Association, the American Arbitration Association, and the Association for Conflict Resolution ("ABA Standards"). The Standards of Conduct for New York State Community Dispute Resolution Centers contains comparable standards to those of the ABA Standards, with the exception of one less level of guidance, and the result would be the same had the mediation taken place through the CDRC.

ABA Standards: Standard I. Self Determination; Standard II. Impartiality; Standard V. Confidentiality; Standard VI. Quality of the Process

### **Opinion**

#### **Question 1.**

**Should the co-mediators have intervened if they reasonably believed that the complainant was using the mediation for discovery purposes or should the mediators defer to the respondents' self-determination as to whether they wish to continue talking?**

The mediators should intervene in situations where the quality of the process is jeopardized. ABA Standard V.I requires mediators to conduct their mediations in a manner that promotes "fairness... party participation, and mutual respect...." Central to this opinion is the reliance on the facts as presented by the co-mediators. In this query, the co-mediators reasonably believed that the complainant was abusing the process by attending for the sole purpose of obtaining discovery. This is especially egregious if the respondents were unaware of this motivation and were fully trusting in the safety and confidentiality of the mediation. Pursuant to ABA Standard VI., the co-mediators should intervene to clarify the parties' understanding of the process and intentions.

The co-mediators state that they believe that the complainant intends to violate ABA Standard V. C. and D., Confidentiality. Pursuant to ABA Standard V., the co-mediators also did have a duty to clarify that the parties' expectations of confidentiality was mutual<sup>2</sup>. The co-mediators were concerned that the respondents might not have shared so completely and candidly had they been aware that the complainant intended to misuse the respondents' information to aid in litigation. In this case, ABA Standard V. would require the co-mediators to "promote understanding among the parties as to the extent to which the parties [would] maintain confidentiality." This would require intervention of some sort.

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<sup>2</sup> The parties' expectation of confidentiality is based on the "Agreement to Mediate" form signed by all parties prior to the mediation, which states that the parties understand that mediation is a confidential process.

Once a determination has been made that intervention is required, the choice of how to intervene implicates ABA Standard II. Whenever mediators choose to intervene in a mediation, they should do so taking care to maintain their impartiality pursuant to ABA Standard II. Even where one party may appear to be taking advantage of another party as in the facts presented by this inquiry, mediators should not favor one party over another. The mediators also must avoid appearances of partiality. A difficulty presented by this question is determining whether or not one party is in fact abusing the process. Thus, this question also implicates ABA Standard I., the principle of self-determination. Mediators should never usurp a party's right to this fundamental freedom. A party who chooses to spend the first hour silently taking copious notes is not automatically acting inconsistently with self-determination or quality of the process. Mediators should never coerce any party into speaking, sharing information or using a particular method of taking notes. Each party is free to determine not only outcome, but also process. However, the principle of self-determination is not absolute. The process, as well as the understandings about the process, must be mutual. Therefore, in this case, checking in with the parties and clarifying matters of process and confidentiality is appropriate.

This opinion will not address best practices. It is limited to identifying the fact that there are a number of ways in which the mediators can intervene. The mediators may ask questions of the parties in joint session to check their mutual understanding of and comfort with the process and its rules. The mediators may also meet with each side individually in caucus to learn about their intentions and to clarify their satisfaction with the process. The mediators may also provide information either in joint or private session as to the availability of consultations with other professionals as appropriate.

## **Question 2.**

**If the co-mediators intervened and learned that the complainant was, in fact, using the mediation for discovery purposes, what should the co-mediators have done?**

If after intervening, the co-mediators confirm that one side is in fact using the mediation for discovery purposes the co-mediators shall take appropriate action which may include termination of the mediation, withdrawal from the mediation, or postponement of the mediation session to allow both sides to consult with professionals. This opinion recognizes that these steps may impinge on the parties' rights of self-determination pursuant to ABA Standard 1. However, in this instance, considerations of confidentiality and quality of the process should trump the principle of self-determination.

## ETHICAL CONSIDERATIONS IN MEDIATION

By

Michael A. Levy  
and  
Patrick Michael McKenna

### I. Mediation Settlements: What Constitutes an Enforceable Agreement?

- A. May a party vacate a mediation settlement after it discovers that the other party withheld material documents during discovery?

The Fla. Horse Case: Garvin v. Tidwell, 126 So.3d 1224, 2012 WL5232224, 37 Fla.L. Weekly D2506 (Fla.4<sup>th</sup> DCA Oct. 24, 2012)

- B. Is a party bound by the terms of a monetary settlement if there is a change of heart or a disagreement with the enforcement terms of the written settlement agreement?

Seventh Circuit Case: Bauer v. Qwest Communications Co., LLC, F.3d (7<sup>th</sup> Cir 2014)

Fifth Circuit Case: Quesada v. Napolitano, F.3d (5<sup>th</sup> Cir 2013)

- C. Second Circuit View: Settlement must be written.

Ciaramella v. Reader's Digest Association, 131 F.3d 320 (2d Cir. 1997; *but cf.* Powell v. Omnicom, BBDO/PHD, 497 F.3d 124 (holding that a "voluntary, clear, explicit, and unqualified stipulation in court, on the record, is enforceable even if the agreement is never reduced to writing, signed or filed).

- D. Can a party renege on an informal settlement that has not been reduced to a written settlement papers and executed by the parties?

New Jersey: Willingboro Mall, LTD v 240/242 Franklin Ave, LLC, 215 NJ 242, 71 A.3d 888 (NJ 2013)

- E. Best Practices:

1. Memorandum of agreement or understanding of material terms.
2. Include limited arbitration clause to resolve differences over terms.

## II. Confidentiality in Mediations: Who can waive it and under what circumstances?

- A. Can an attorney being sued by his client for malpractice arising during a mediation assert mediation confidentiality as a shield to prevent disclosure of what transpired in the mediation? Or stated differently, can the party to the mediation waive confidentiality?

California Case: Cassel v. Superior Court, 51 Cal.4th 113, 244 P.3d 1080 (Cal 2011), reversing 179 Cal App4<sup>th</sup> 152, 101 Cal Rptr 3d 501 (Cal App 2009)

- B. May a third party defendant who was not a participant in a confidential mediation seek documents related to the mediation?

Second Circuit Case: In re Teligent, Inc. 640 F.3d 53 (2d Cir. 2011)

- C. Can a court review what transpired in a confidential mediation in order to determine whether one party was acting in bad faith?

SDNY case: In re A.T. Reynolds & Sons, Inc., 452 B.R. 374 (SDNY 2011)

- D. Best Practices:

1. Must know the confidentiality provisions of the statutes/rules/protocols/private contracts
2. Are court ADR supervisors within the ambit of confidentiality?
3. N.B.: There is no uniform mediation common law: Assume confidentiality absent express exception or clear case precedent.

- E. Food for Thought: During a caucus with the mediator and one party (and counsel), may (or must) a mediator disclose that:

1. A party threatened violence against the other party?
2. A Party admitted to having committed a crime (e.g. identifies where the body is buried)?
3. A Party confesses to egregious fraud or misconduct in the litigation?

### **III. Mediator Liability for the Conduct of a Mediation**

- A. San Francisco Murder
- B. Breach of Mediation Confidentiality

### **IV. Violence in Mediation**

- A. Prior Cases:
  - 1. Attorney and Client in Phoenix killed by defendant in a commercial case.
  - 2. Brother killed Sister during Mediation in Boca Raton, Fla. Involving Disposition of Mother's Home.
  - 3. Lawsuits against mediators.
- B. Best Practices:
  - 1. Raise the issue of potential violence with the attorneys in the pre-mediation telephone conference.
  - 2. If in doubt choose a court for the venue: metal detectors/ security presence.
  - 3. Minimize contact between warring parties; separate rooms; separate floors.
  - 4. Don't mediate in states with concealed gun carry laws.

### **V. State Ethical Opinions**

- A. NYS Mediator Ethics Advisory Committee (MEAC): Issues advisory opinions ([www.nycourts.gov/ip/adr/meac.shtml?](http://www.nycourts.gov/ip/adr/meac.shtml?))
- B. Florida Mediator Ethics Advisory Committee (MEAC); Issuing opinions since 1994 ([www.flcourts.org/gen\\_public/adr/MEACOpinions/index-opinions.shtml?](http://www.flcourts.org/gen_public/adr/MEACOpinions/index-opinions.shtml?))

126 So.3d 1224

District Court of Appeal of Florida,  
Fourth District.

Joni M. GARVIN, Appellant,

v.

Connie TIDWELL, Appellee.

No. 4D11-2712. | Oct. 24, 2012.

### Synopsis

**Background:** Horse rider brought negligence and negligent misrepresentation action against horse owner after she fell off horse. Following mediated settlement agreement, rider filed motion to rescind the agreement because owner's discovery responses failed to disclose potentially adverse information. The Circuit Court, Seventeenth Judicial Circuit, Broward County, Mily Rodriguez-Powell, J., denied the motion, and rider appealed.

**Holdings:** The District Court of Appeal, McManus, F. Shields, Associate Judge, held that:

[1] owner violated discovery obligations by failing to disclose advertisement involving horse and a calming supplement;

[2] rider was entitled to rescind agreement; and

[3] rider was not entitled to sanctions.

Reversed and remanded.

### West Headnotes (10)

#### [1] Pretrial Procedure

☞ Nature and Purpose

One of the primary functions of discovery is to enable parties to enter settlement negotiations with an understanding of their chances of success at trial.

Cases that cite this headnote

#### [2] Pretrial Procedure

☞ Sufficiency of disclosure; supplementation of responses

Lawyers, out of respect for the adversary system, should make good faith efforts to comply with one another's reasonable discovery requests.

Cases that cite this headnote

#### [3] Pretrial Procedure

☞ Failure to Disclose; Sanctions

Evasive or incomplete discovery answers can amount to a failure to answer and may also warrant the imposition of sanctions.

Cases that cite this headnote

#### [4] Pretrial Procedure

☞ Failure to Appear or Testify; Sanctions

Horse owner violated her discovery obligations, in horse rider's negligence action following fall from horse, by failing to disclose calming supplement advertisement and information known to her about horse's behavior which prompted the use of the supplement; information and advertisement, in which owner stated that horse could be "a little difficult at times," was relevant to rider's discovery requests and to some of the questions posed during the depositions and was likely to be an important exhibit at trial.

Cases that cite this headnote

#### [5] Compromise and Settlement

☞ Mistake or ignorance of law or facts

The court considering a request, based on unilateral mistake, to rescind a settlement agreement reached through mediation will look at whether the unilateral mistake goes to the very substance of the agreement. West's F.S.A. RCP Rule 1.730(c).

Cases that cite this headnote

#### [6] Appeal and Error

☞ Allowance of remedy and matters of procedure in general

The appellate court reviews a trial court's order denying a motion to rescind an agreement for an abuse of discretion. West's F.S.A. RCP Rule 1.730(c).

Cases that cite this headnote

[7] **Compromise and Settlement**

⇒ Mistake or ignorance of law or facts

Rider who was injured in fall from horse was entitled to rescind mediated settlement agreement based on horse owner's failure to disclose an advertisement for a calming supplement which indicated that horse could "be a little difficult at times," where rider's lack of knowledge about horse's use of a calming supplement did not result from her inexcusable neglect but rather from owner's discovery omissions, and there was no suggestion that horse owner already had detrimentally relied on the settlement agreement. West's F.S.A. RCP Rule 1.730(c).

Cases that cite this headnote

[8] **Appeal and Error**

⇒ In general; asserting new or inconsistent grounds

Injured horse rider failed to claim that mediated settlement agreement should be rescinded because it was unconscionable in either her written motion to rescind or at hearing before the trial court, and thus claim was not preserved for appellate review.

Cases that cite this headnote

[9] **Pretrial Procedure**

⇒ Failure to Disclose; Sanctions

Injured horse rider was not entitled to award of sanctions for horse owner's failure to comply with discovery, as rider did not file a motion to compel discovery, nor did the trial court issue an order compelling discovery.

2 Cases that cite this headnote

[10] **Pretrial Procedure**

⇒ Failure to Disclose; Sanctions

The purpose of sanctions is to promote compliance with discovery, rather than serve as a penalty.

Cases that cite this headnote

**Attorneys and Law Firms**

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Richard A. Sherman, Sr. and James W. Sherman of Law Offices of Richard A. Sherman, P.A., Fort Lauderdale, and Terry L. Watson of Law Offices of Patricia E. Garagozlo, Plantation, for appellee.

**Opinion**

McMANUS, F. SHIELDS, Associate Judge.

Appellant appeals an order denying her motion to rescind a mediated settlement agreement because the appellee's discovery responses failed to disclose an advertisement and other information potentially adverse to the defense. Because we find that appellee violated her discovery obligations, \*1226 and the trial court abused its discretion in denying the motion, we reverse.

Appellee owned a ten-year-old quarter horse named "Buster," whom she boarded at a stable. In June, 2009, after observing appellant ride other horses at the stable, appellee asked appellant, an experienced equestrian, if she would ride Buster. Appellant had limited her riding to docile horses in recent years, so she asked appellee several times whether Buster had ever exhibited any dangerous behavior. Appellee replied, "No." During appellant's third ride on Buster, he reared up on his hind legs, bolted off at a fast gallop, then stopped suddenly and abruptly changed directions. As a result, appellant fell off the horse, hit a fence, and fell to the ground. She suffered injuries to her back which required surgery.

Appellant filed a complaint against appellee alleging negligence and negligent misrepresentation. Specifically, appellant alleged that Buster had a long and well-known history of bucking and running away with riders and appellee negligently failed to disclose Buster's dangerous propensities.

During discovery, appellant sent one set of interrogatories and requests to produce. The discovery was reasonably calculated to produce the names of persons with any knowledge of facts at issue, the subject matter of their knowledge, and any "model, plat, map, drawing, motion picture, videotape, or photograph pertaining to any fact or issue involved." One interrogatory asked for the names of persons and any documents concerning the care, maintenance, and training of the horse including feeding, medical issues, and riding. The request to produce sought statements and also documents identified in answers to interrogatories.

Appellee answered the discovery by giving twenty names and producing four photographs. Appellee objected to producing statements and documents identified in the answer to interrogatories on grounds of work product privilege. No privilege log was filed. No statements or documents were identified.

Appellant never filed a motion to compel in response to any of appellee's answers. Appellant did depose appellee and her daughter, who was Buster's primary caregiver. They testified of some incidences of Buster being "spooked" or "bucking," mostly as a young horse, but said that was not a "characteristic." Buster's personality was described as "a gentleman" who was "lazy, if anything." Appellee moved for summary judgment on the grounds that the only testimony was that Buster was a good horse.

The parties went to mediation and settled in the fall of 2010. Soon thereafter, appellant's counsel received an unmarked envelope containing a magazine advertisement for a dietary supplement for horses dated "Spring 2010." This advertisement featured a page about the horse calming successes of the supplement "Ex Stress," featuring a color picture of Buster. The advertisement identified Buster's owner as appellee. The advertisement quoted appellee as saying that she decided to give Ex Stress to her horse, Buster, because he "can be a little difficult at times." Appellee is quoted as saying, "What a difference it made in him. Ever since he's been on it, we've had nothing but great rides."

Appellee had not produced this advertisement in response to appellant's discovery requests or mentioned use of any calming supplements. Neither appellee nor her daughter mentioned Buster's use of calming supplements or "difficult" behavior during their depositions.

When asked by appellant's counsel, appellee's counsel admitted that he and his client were in possession of the Ex Stress advertisement at the time of the depositions \*1227 and when they responded to the interrogatories and requests for production.

Appellant moved to reopen discovery and rescind the mediation agreement and for sanctions. She supported the motion with a verified memorandum. Appellee filed a response in which she contended the Ex Stress advertisement was not responsive to the discovery requests and was not inconsistent with the depositions. The trial court denied appellant's motion to rescind the mediation agreement and for sanctions, and granted appellee's motion to enforce the settlement.<sup>1</sup>

### *Requirement of Good Faith Discovery*

[1] Florida courts have long recognized that one of the primary functions of discovery is to enable parties to enter settlement negotiations with an understanding of their chances of success at trial.

A primary purpose in the adoption of the Florida Rules of Civil Procedure is to prevent the use of surprise, trickery, bluff and legal gymnastics. Revelation through discovery procedures of the strength and weaknesses of each side before trial encourages settlement of cases and avoids costly litigation. Each side can make an intelligent evaluation of the entire case and may better anticipate the ultimate results.

*Surf Drugs, Inc. v. Vermette*, 236 So.2d 108, 111 (Fla.1970).

[2] [3] "[L]awyers, out of respect for the adversary system, should make good faith efforts to comply with one another's reasonable discovery requests." *Summit Chase Condo. Ass'n, Inc. v. Protean Investors, Inc.*, 421 So.2d 562, 564 (Fla. 3d DCA 1982). "Evasive or incomplete" answers can amount to a failure to answer and may also warrant the imposition of sanctions. *Herold v. Computer Components Int'l, Inc.*, 252 So.2d 576, 579 (Fla. 4th DCA 1971). In *Smith v. University Medical Center, Inc.*, 559 So.2d 393, 395 (Fla. 1st DCA 1990), the court found that the appellee had "disregarded his obligation to comply with discovery"

by failing to “disclose the housekeeping map at issue after several discovery requests.”

In *Schlapper v. Maurer*, 687 So.2d 982 (Fla. 5th DCA 1997), the Fifth District concluded that counsel for a co-defendant had violated his “obligation not to lie about or misrepresent facts critical to the case” when he untruthfully represented to plaintiff’s counsel that “[the co-defendant] had nothing to do with the treatment of [the plaintiff].” *Schlapper*, 687 So.2d at 984. Based on this representation, “the attorney for [the plaintiff] did not oppose the summary judgment which dismissed [the co-defendant] from the case.” *Id.*

In *Leo's Gulf Liquors v. Lakhami*, 802 So.2d 337 (Fla. 3d DCA 2001), the Third District discussed the importance of honesty in discovery. Although this case is procedurally distinguishable from the case at bar, the court’s discussion of discovery obligations is still relevant. The court explained that,

[w]itnesses who give sworn testimony by way of interrogatories, at depositions, pretrial hearings and trial, swear or affirm to tell the truth, the whole truth, and nothing but the truth. We expect and will settle for nothing less. Lawyers who advise their clients and/or witnesses to mince words, hold back on necessary clarifications, or otherwise obstruct the truth-finding process, do so at their own, and the clients’ peril.

**\*1228** *Leo's Gulf Liquors*, 802 So.2d at 343. The Third District also made clear that a witness’s oath to tell the truth is equally demanding at depositions, and noted that “[t]he overwhelming number of law suits filed in Florida are resolved by way of settlement[,]” and that “[c]ases are regularly settled on the basis of the discovery taken during pretrial preparation.” *Id.* “Accordingly, sworn answers to interrogatories and at depositions are extremely important to a lawsuit, since the likelihood of any given case actually going to trial is remote.” *Id.*

[4] We find that appellee violated her discovery obligations by failing to disclose the Ex Stress advertisement and information known to her about Buster’s behavior which prompted the use of Ex Stress. This information was relevant to appellant’s discovery requests and to some of the questions posed during the depositions. It is likely to be an important

exhibit at trial. The appellant has referred to the advertisement in her brief and oral argument as a “smoking gun.”

### *Rescission of an Agreement for Unilateral Mistake*

[5] Florida Rule of Civil Procedure 1.730(c) affords trial courts “broad powers to grant relief as to settlement agreements reached through mediation.” *Stamato v. Stamato*, 818 So.2d 662, 664 (Fla. 4th DCA 2002). In *Stamato*, we explained that a trial court may rescind an agreement based on unilateral mistake if “(1) the mistake did not result from an inexcusable lack of due care, and (2) defendant’s position did not so change in reliance that it would be unconscionable to set aside the agreement.” *Id.* Additionally, we will look at whether the unilateral mistake goes to the “very substance of the agreement.” *Rock Springs Land Co. v. West*, 281 So.2d 555, 556 (Fla. 4th DCA 1973); *Langbein v. Comerford*, 215 So.2d 630, 631 (Fla. 4th DCA 1968).

[6] [7] We review a trial court’s order denying a motion to rescind an agreement for an abuse of discretion. See *Billian v. Mobil Corp.*, 710 So.2d 984, 990 (Fla. 4th DCA 1998). Here, under the two-part test set forth in *Stamato*, the trial court abused its discretion by not allowing appellant to rescind the mediated settlement agreement. Appellant’s lack of knowledge about Buster’s use of a calming supplement did not result from her inexcusable neglect. Despite various interrogatories and requests for production that would have required appellee to disclose the Ex Stress advertisement, she failed to do so. Appellant did not learn of Buster’s use of calming supplements due to appellee’s omissions.

The cases primarily relied upon by appellee do not support her position on this issue.

In *Stamato*, appellant sought rescission of a settlement agreement on the basis of unilateral mistake, arguing that she did not know that, before she settled, the trial court had already ruled on her motion to seek punitive damages. *Stamato*, 818 So.2d at 663-64. We held that the appellant was not entitled to rescission, because she had committed inexcusable neglect by entering into a settlement agreement “without bothering to find out if the court had ruled” on her motion. *Id.* at 665.

In *BMW of North America, Inc. v. Krathen*, 471 So.2d 585 (Fla. 4th DCA 1985), the appellants sought to rescind a settlement agreement based on unilateral mistake. *Krathen*,

471 So.2d at 588. We upheld the trial court's finding that appellants were not entitled to rescind the agreement due to their inexcusable neglect. *Id.* In support of its holding, we noted that "[t]he offer of judgment did not involve a complex transaction" and that "[t]he terms were few and easily understood." *Id.* As such, we did not consider \*1229 appellants' omission of what they characterized as an "essential term" to be such an inadvertent error as to justify rescission of the agreement. *Id.* In other words, with such a basic agreement, the appellant's legal team really had no excuse for leaving out something they considered to be so important.

In *Rachid v. Perez*, 26 So.3d 70 (Fla. 3d DCA 2010), appellant sought rescission of a settlement agreement based on unilateral mistake. *Rachid*, 26 So.3d at 71. The Third District found that the appellant failed to preserve her argument for appellate review, but even if she had, it would have failed on the merits. *Id.* at 72. Appellant failed to present any evidence that "any party misled or induced her to enter into the settlement agreement." *Id.* Instead, appellant claimed that her attorney induced her to enter into the agreement, and this caused her claim to fail as a matter of law. *Id.*

In *Sponga v. Warro*, 698 So.2d 621 (Fla. 5th DCA 1997), the appellant sought reversal of the trial court's order setting aside a "final order of dismissal based on a settlement agreement executed by the parties after mediation." *Sponga*, 698 So.2d at 622. In the trial court, appellee moved to set aside the settlement agreement she had entered into with a physician because, in entering the agreement, she relied on a report that the physician had prepared "in error," which she interpreted as stating "that her shoulder injury was not connected with the [subject] accident." *Id.* at 623-24. The Fifth District reversed, finding that the facts of the case could "not scale the barrier of lack of due care." *Id.* at 625. In support of this conclusion, the court explained that, based on the facts appellant knew before the physician drafted his report which allegedly induced her to settle, she would have known that the report was erroneous. Despite this, appellant never made an effort to specifically ask the physician whether he "would relate her injury to the accident." *Id.*

These four cases do not support an affirmance because they are factually inapposite to the case at bar. This case does not involve a plaintiff who failed to inquire about certain facts, as in *Sponga*, or a plaintiff who decided to enter into a settlement agreement that lacked an essential term, as in *Krathen*. Furthermore, in this case, appellant did not agree

to settle the case before checking on the status of other motions pending in the court, as in *Stamato*. In contrast, this case involves a plaintiff who entered into a settlement agreement believing that, after conducting discovery, she had all of the material facts in front of her, when in fact she did not. There does not appear to have been any reasonable way for appellant to find out about the advertisement or Buster's "difficult" behavior other than through the methods she had already employed. Thus, appellant's mistake lacks inexcusable neglect.

As to the second prong of the test in *Stamato*, there is no evidence in the record to suggest that it would have been inequitable to rescind the settlement agreement due to appellee's reliance upon it. During the hearing, appellee never argued that she had already detrimentally relied upon the agreement, and she did not raise this argument in either one of her written motions to enforce the settlement agreement.

Appellant has filed as supplemental authority *Jones v. Publix Super Markets, Inc.*, 114 So.3d 998 (Fla. 5th DCA 2012), in which the appellee failed to reveal the known address of the customer who witnessed appellant's fall in a puddle of water. The court stated:

Although we do not find an order disposing of the motion in the record, we note that the Joneses also asked the trial \*1230 judge to strike Publix's offers of settlement on the seemingly unassailable reasoning that, in the face of a wrongful failure to disclose the address of a key witness, such an offer could not meet the test of "good faith" and the factors set forth in section 768.79(7), Florida Statutes.

*Jones*, 114 So.3d 998 at 1002.

We find that the same principle applies when a party withholds material information in discovery. Since our system of justice depends on truthful discovery, misconduct in discovery must be discouraged by disallowing the settlement which is the fruit of such misconduct.

[8] Appellant's additional claim that the agreement should be rescinded because it was unconscionable is denied. This claim is not preserved because it was not presented in her written motion or during the hearing before the trial court.

[9] [10] Appellant's appeal of the trial court's failure to order sanctions is denied because the appellant did not file a motion to compel discovery, and the trial court did not issue an order compelling discovery. The purpose of sanctions is to promote compliance with discovery, rather than serve as a penalty. *See Winn Dixie v. Teneyck*, 656 So.2d 1348, 1351 (Fla. 1st DCA 1995). Sanctions for a discovery violation are not an appropriate remedy in this case. The trial court has not abused its discretion by failing to issue sanctions without first receiving a motion to compel from appellant and issuing an order to comply with the discovery request. *See id.*

The orders denying appellant's motion to rescind the settlement agreement and granting appellee's motion to enforce the settlement agreement are reversed and the cause is remanded for further proceedings consistent with this opinion.

POLEN and CONNER, JJ., concur.

**Parallel Citations**

37 Fla. L. Weekly D2506

**Footnotes**

- 1 Because the motion to reopen discovery was not granted, the record is silent on when Buster was given Ex Stress, when he was "difficult," and whether this was before or after appellant's injuries. There was no claim made by appellee, however, that Ex Stress was given as a remedial measure taken after the injury to the appellant.

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743 F.3d 221  
United States Court of Appeals,  
Seventh Circuit.

Brent **BAUER**, et al., Plaintiffs–Appellees,  
v.  
**QWEST COMMUNICATIONS COMPANY**,  
LLC, et al., Defendants–Appellees.  
Appeal of The Susman Group, et al., Appellants.

No. 12–3036. | Argued Feb.  
25, 2013. | Decided Feb. 14, 2014.

**Synopsis**

**Background:** Fee-division dispute arose following court approval of Illinois class settlement in litigation brought by landowners who challenged telecommunication companies' installation of fiber-optic cable on landowners' properties without consent, and, after the three factions of lawyers allegedly approved a mediated final fee allocation, some lawyers filed motion asking the court to hold that a particular attorney and his faction were bound by the written agreement, notwithstanding attorney's failure to sign it, and to order the distribution of their agreed-upon percentages from the settlement escrow. The United States District Court for the Northern District of Illinois, Rebecca R. Pallmeyer, J., granted the motion and entered order disbursing the escrow funds to the various groups according to the percentages in the agreement. Attorney and his faction appealed.

[**Holding:**] The Court of Appeals, Sykes, Circuit Judge, held that the district court did not clearly err in determining that attorney objectively manifested assent to be bound even though he did not sign the agreement.

Affirmed.

West Headnotes (8)

[1] **Contracts**

⇒ Necessity of assent

Under Illinois contract law, a binding agreement requires a meeting of the minds or mutual assent as to all material terms.

Cases that cite this headnote

[2] **Contracts**

⇒ Intent of parties

**Contracts**

⇒ Necessity of assent

Under Illinois law, whether parties to an alleged contract had a “meeting of the minds” is determined not by their actual subjective intent but, rather, based on an objective theory of intent.

Cases that cite this headnote

[3] **Contracts**

⇒ Necessity of assent

Under Illinois law, to determine whether a party assented to a contract, the court looks first to the written records, not to mental processes.

Cases that cite this headnote

[4] **Federal Courts**

⇒ “Clearly erroneous” standard of review in general

**Federal Courts**

⇒ Contracts

Whether a contract was formed is a question of law subject to plenary review, but the Court of Appeals reviews the district court's subsidiary factual findings deferentially for clear error.

Cases that cite this headnote

[5] **Contracts**

⇒ Signature

Under Illinois law, even though one of the acts forming the execution of a written contract generally is its signing, a party named in a contract may, by his acts and conduct, indicate his assent to its terms and become bound by its provisions even though he has not signed it.

Cases that cite this headnote

[6] **Contracts**

⇒ Acceptance of Offer and **Communication**  
Thereof

Under Illinois law, silence reasonably may be interpreted as acceptance of a contract in certain limited circumstances, such as where, because of previous dealings or otherwise, it is reasonable that the offeree should notify the offeror if he does not intend to accept.

Cases that cite this headnote

[7] **Contracts**

⇒ Acceptance of Offer and **Communication**  
Thereof

Under Illinois law, when, because of previous dealings or otherwise, it is reasonable that the offeree should notify the offeror if he does not intend to accept the terms of a proposed contract, the offeree's silence is acceptance, regardless of his actual intent, unless both parties understand that no acceptance is intended.

Cases that cite this headnote

[8] **Attorney and Client**

⇒ Contracts for division, and apportionment

Finding that, under Illinois law, attorney's silence should be interpreted as assent to written agreement setting forth mediated final fee allocation in fiber-optics cable litigation, despite his failure to sign agreement, was supported by evidence that parties had worked on underlying class actions for more than a decade, that they had recently worked out system for settling litigation on state-by-state basis, that they were close to ending long and contentious fight over fees, that this attorney had been a holdout and had a history of promptly speaking up when he found something objectionable, that attorney raised two minor points to initial draft within hours of its circulation which were immediately addressed and incorporated into subsequent draft, that attorney objected not to substantive fee-division issue, but to agreement's enforcement mechanism, and that despite knowing of need for immediate response, attorney remained silent concerning objected-to terms for two weeks.

Cases that cite this headnote

**Attorneys and Law Firms**

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Before **BAUER**, **POSNER**, and **SYKES**, Circuit Judges.

**Opinion**

**SYKES**, Circuit Judge.

More than 13 years ago, trial lawyers around the country began challenging the installation of fiber-optic cable on landowners' property without consent. After protracted class-action litigation in many states, these challenges began to settle on a state-by-state basis, leaving a platoon of lawyers to sort out the allocation of awarded and expected attorney's fees between themselves.

The lawyers have informally grouped themselves into three factions for purposes of the present fee-allocation dispute; the groupings are based on the lawyers' negotiation and litigation positions. This appeal requires us to determine whether the lawyers have successfully reached a global settlement of the fee-division dispute through mediation—more specifically, whether the faction consisting of Arthur Susman on behalf of himself and his colleagues (a/k/a The Susman Group, hereinafter “Susman”) is bound by a written agreement memorializing the mediated final fee allocation that all the lawyers had previously approved. The catch: Although Susman had agreed to the fee division, he balked at signing the written agreement, ostensibly because he disliked

its enforcement terms. The district court held that Susman is bound by the agreement despite his failure to sign, and Susman appealed.

We affirm. Based on the parties' lengthy course of dealing, the district court found that Susman's failure to promptly object to the written agreement can objectively be construed as assent. The court also found that Susman's eventual refusal to sign was a case of "buyer's remorse" rather than a genuine objection to the enforcement terms in the agreement. These findings are supported by the record; we find no factual or legal error.

### I. Background

This litigation has a very long history, but the story for our purposes begins on August 29, 2011, when the district court approved an Illinois class settlement in the underlying fiber-optics cable litigation and awarded attorney's fees and expenses. The award was deposited into an escrow account, and the attorneys agreed to pursue mediation—with the assistance of a court-appointed special master if necessary—to reach a division of the fees for the Illinois settlement and for other settlements nationwide. Once the fee-division question was resolved, the court would order the disbursement of the funds held in escrow.

The plaintiffs' lawyers had coalesced into three main groups for purposes of the fee dispute: Susman (the appellant here); the "48-Firm Group" (the appellees here, consisting of a coalition of 48 law firms); and William Gotfryd (a former collaborator with Susman who later asked to be treated separately in the fee-division process, also an appellee here). The first attempt to resolve the fee-division issue occurred back in 2006 when all the lawyers except Susman and Gotfryd agreed to submit the issue of attorney's fees to binding arbitration at a future time. This resulted in a 2011 proposal binding on the 48-Firm Group as to the fee allocation within that group, but this proposal did not address Gotfryd and Susman and did not bind them. The parties continued to attempt to resolve the situation through mediation after the district court so ordered, but a global agreement was not readily forthcoming.

\*224 On June 11, 2012, the mediators made one "final effort" to resolve the dispute and have the "entire fee fight settled." They offered a final "Mediators' Proposal" awarding each lawyer or group of lawyers a certain percentage of the

national gross fees.<sup>1</sup> The proposal was "blind," in the sense that each firm received an email listing only the percentage of the fee allocation that it would receive. After a long history of disagreement, the mediators recognized that the prospects for agreement would likely be improved if the parties were only offered a chance to think about their absolute—rather than relative—awards. The proposal was a take-it-or-leave-it offer, meaning that each party could only respond "Accept" or "Reject"—no more negotiation. As it turned out, the proposal allocated 87% of the fees to the 48-Firm Group, 8.5% to Gotfryd, and 4.5% to Susman. The proposal contained only the fee-division percentages and a condition that the percentages were subject to a pro rata reduction for an arbitrated award to a fourth attorney, Seth Litman, to be determined after the agreement was finalized.

Everyone accepted the proposal. When the present dispute later arose, Gotfryd and various members of the 48-Firm Group submitted declarations to the district court explaining that they had accepted the mediators' proposal despite having misgivings about it because they valued the peace and finality it would bring. One member of the 48-Firm Group stated that he

agreed to accept the mediators' proposal for the sole reason that it was the only way to prevent what would have been even more wasted time and additional cost to undertake fee litigation. The elimination of the threat of any such litigation was always presumed to be part of the mediators' proposal.

Another lawyer—the one who drafted the written agreement—told the court that

[e]limination of all future litigation was the controlling reason that the 48-Firm Group agreed to surrender several percentage points (more than two million dollars in value) from the allocation that we believe we would have received had we litigated the allocation. Based on the allocations in the original arbitration award, the nationwide scope of the [m]ediators' proposal, and the level of sophistication of the parties to the [agreement], it could not have been

reasonable for any party to think that allocation issues between the 48-Firm Group and the other parties were not final and fully resolved.

A third lawyer wrote: “[I]n the end, I voted for peace, even at an unjustified premium.... The whole point of paying a premium was to get rid of the threat of litigating fees with Mr. Gotfryd or Mr. Susman—or anyone else from their camp.” Finally, Gotfryd said that the percentage award he was offered “was not completely unreasonable if it eliminated risk and achieved a final peace among all the counsel. It was with the promise of finality and peace that I accepted the mediators’ proposal for my individual award.”

After each party accepted the proposal, the mediators notified everyone that an agreement had been reached and scheduled a follow-up conference call. During that call, the parties recognized the need to memorialize the agreement in a formal writing, and a representative of the 48-Firm Group was tasked with drafting the \*225 document. The parties contemplated a quick drafting and approval process, apparently expecting that the written agreement would not generate major objections given that the heart of the dispute and the most divisive issue—the fee allocation—was now settled.

On July 2 a draft written agreement was circulated via email. It included the approved fee-division terms and several additional enforcement-related provisions. As relevant here, the written agreement provided that the mediators, now working in the capacity of arbitrators, were authorized to (1) arbitrate any disputes arising out of or relating to the agreement; (2) deem any lawyer’s fees “forfeit[ed]” if the lawyer failed to cooperate in implementing the agreement in the state-specific settlements; and (3) adjust normal arbitration rules to further the goal of expediency.

The process of revising and approving the agreement moved quickly and, for the most part, uncontroversially. One of the mediators responded right away urging the lawyers to “get it all signed up today” if possible. Within two hours of the initial circulation, Susman responded with a suggestion that two minor points be clarified; the changes were made immediately. Other adjustments were made pursuant to comments from the other parties. For example, one lawyer suggested the addition of a provision stating that the parties would hold one another harmless for any claim for fees or

expenses by any other attorneys. A hold-harmless provision was added in a revised draft circulated on July 2.

The July 4th holiday then intervened. On July 5 the 48-Firm Group circulated a “final” revised draft with the following note (emphasis in original):

**I hope the attached draft represents our final agreement and is appropriate for signatures.**

....

I don’t presume that silence since early afternoon Tuesday through the July 4th holiday and today means that each of you assents to the attached draft, but I hope so. We need to get this done, and I would like to circulate a draft for signatures. **Please let me know if you disagree. Otherwise, please consider the attached draft as the final draft for signature, and return your signed, signature page.** If additional changes are suggested, I will circulate them and, if necessary, we will work on another draft.

Susman did not respond with any further suggestions or disagreements. Comments from other lawyers produced a few more minor revisions, and another “final” draft was circulated on July 6. After that point no further objections or suggestions were forthcoming, and the lawyers began to sign the agreement. Most signed and returned the July 6 draft immediately. A few others signed on July 9 and 10. The last (except for Susman) signed on July 12.

On July 11 the lawyer in charge of the drafting process emailed Susman reminding him to sign. Susman emailed back on the 12th saying that he was “not now in position to sign up” and needed to deal with “some loose ends on our part.” The lawyers and mediators later learned that the “loose ends” referred to an expense dispute between Susman and Gotfryd. Susman cryptically told the drafting lawyer that the timing of his signature was “not in my hands,” and the drafter passed that information along to the mediators.

On July 13 one of the mediators then emailed Susman asking him to “help us dot all the ‘i’s and cross all the ‘t’s by signing this last agreement” and suggesting that he defer resolution of any remaining issues he had “on the side.” He reminded Susman \*226 that the Litman fee issue was deferred for future arbitration and also noted that the agreement could be finalized with or without Susman’s signature.

July 13 was a Friday. Susman waited until Tuesday, July 17, to respond to the mediator's email. He acknowledged his prior approval of the fee-allocation proposal but said he could not approve the written agreement because of an ongoing disagreement with Godfryd and because "there are obligations in the proposed Agreement which were really not a part of the original mediators' proposal and which were not part of our understanding of our acceptance" of that proposal. He repeated this position in a phone call with the court-appointed special master on July 19.

The Litman arbitration was completed on July 19. On July 20 the lawyers filed a motion asking the district court to hold that Susman is bound by the written agreement notwithstanding his failure to sign and to order the distribution of their agreed-upon percentages from the settlement escrow. They submitted evidence about the unanimous approval of the mediators' fee-division proposal and the circumstances surrounding the drafting and approval process that had produced the final written agreement. After hearing argument, the district court granted the motion.

First, the judge identified several objective circumstances that supported a finding of Susman's assent to be bound: (1) Susman agreed to the mediators' fee-allocation proposal; (2) every lawyer knew that the agreement would need to be reduced to writing; (3) Susman had no objections to the initial draft aside from two minor suggestions that were immediately addressed and were unrelated to his current objections; and (4) Susman lodged no objection to the subsequent drafts, which came in quick succession until the final version of the agreement was circulated on July 6. The judge also noted that the other lawyers had signed the final agreement in reliance on Susman's silence, which they could reasonably interpret as a lack of objection. Importantly, the judge found that Susman's conduct and his comments at oral argument suggested that he had a case of "buyer's remorse." Apparently dissatisfied that Godfryd was getting a larger fee allocation, Susman objected to the enforcement provisions in a last-ditch attempt to "escape from a fee distribution to which he is admittedly bound."

Based on these findings, the judge held that Susman is bound by the final written agreement and entered an order disbursing the escrow funds to the various attorney groups according to the percentages in the agreement. Susman appealed, and while his appeal has been pending, fee-allocation orders have been entered and fees distributed in several other state settlements in accordance with the agreement. Susman has

not objected to the distributions but continues to maintain that he is not bound by the written agreement.

## II. Analysis

On appeal Susman acknowledges that he approved the mediators' fee-allocation proposal but insists that he never agreed to the additional terms that appeared in the final written agreement. More specifically, he objects to the hold-harmless clause and the enforcement provisions empowering the mediators to arbitrate future disputes and "forfeit" the fees of attorneys who do not cooperate in implementing the agreement in state-by-state settlements. Susman relies heavily on the fact that he \*227 did not sign the agreement.<sup>2</sup> Illinois contract law applies. *Abbott Labs. v. Alpha Therapeutic Corp.*, 164 F.3d 385, 387 (7th Cir.1999); *Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126, 1130 (7th Cir.1997).

[1] [2] [3] "Under Illinois contract law, a binding agreement requires a meeting of the minds or mutual assent as to all material terms." *Abbott Labs.*, 164 F.3d at 387; see also *Schafer v. UnionBank/Cent.*, 362 Ill.Dec. 349, 973 N.E.2d 449, 457 (Ill.App.Ct.2012). "Whether the parties had a 'meeting of the minds' is determined not by their actual subjective intent," *Abbott Labs.*, 164 F.3d at 387, but rather based on an "objective theory of intent," *Newkirk v. Village of Steger*, 536 F.3d 771, 774 (7th Cir.2008). See also *Urban Sites of Chi., LLC v. Crown Castle USA*, 365 Ill.Dec. 876, 979 N.E.2d 480, 496 (Ill.App.Ct.2012) ("[A]n enforceable contract must include a meeting of the minds or mutual assent as to the terms of the contract.... Generally, it is the objective manifestation of intent that controls whether a contract has been formed.... The subjective understanding of the parties is not required in order for there to be a meeting of the minds."). To determine whether a party assented, the court "look[s] first to the written records, not to mental processes." *Newkirk*, 536 F.3d at 774.

[4] Whether a contract was formed is a question of law subject to plenary review, but we review the district court's subsidiary factual findings deferentially for clear error. See, e.g., *Com'l Cas. Co. v. Am. Nat'l Ins. Co.*, 417 F.3d 727, 733 (7th Cir.2005) (explaining that review of the district court's conclusion that the parties had agreed to arbitrate was "plenary," but "insofar as the district court's decision rests on findings of fact, ... we use the clearly erroneous standard" (alterations and internal quotation marks omitted));

*Thomas v. Gen. Motors Acceptance Corp.*, 288 F.3d 305, 307 (7th Cir.2002) (explaining that the clear-error standard governs mixed questions of law and fact). The district court is in a superior position to sift and weigh the evidence and as the factfinder is entitled to draw all reasonable inferences that are supported by the record. See *Coplay Cement Co. v. Willis & Paul Grp.*, 983 F.2d 1435, 1438–39 (7th Cir.1993) (“When the judicial task is to infer meaning from disparate bits of evidence, some textual, some testimonial, none contested in themselves but the aggregate forming a confused mosaic, it is a task more appropriate for a trier of fact than for a declarer of legal rules.”). The critical question here is a factual one: Did Susman objectively manifest assent to be bound even though he did not sign the agreement? The district court answered that question “yes,” and we review that determination deferentially.

[5] [6] “Generally, one of the acts forming the execution of a written contract is its signing. Nevertheless, ‘a party named in a contract may, by his acts and conduct, indicate his assent to its terms and become bound by its provisions even though he has not signed it.’” *Carlton at the Lake, Inc. v. Barber*, 401 Ill.App.3d 528, 340 Ill.Dec. 669, 928 N.E.2d 1266, 1270 (2010) (citation omitted) (quoting *Landmark Props., Inc. v. Architects Int’l-Chi.*, 172 Ill.App.3d 379, 122 Ill.Dec. 344, 526 N.E.2d 603, 606 (1988)). Silence reasonably may be interpreted as acceptance of a contract in certain limited circumstances. RESTATEMENT (SECOND) OF CONTRACTS § 69 cmt. a (1981); see also *First Nat’l Bank of Chi. v. Atl. \*228 Tele-Network Co.*, 946 F.2d 516, 519 (7th Cir.1991) (“The law ordinarily treats silence as rejection, not acceptance, of an offer.... But that is in general, not in every case. If circumstances make it reasonable (ordinarily on the basis of previous dealings with the offeree) for the offeror to construe silence as acceptance, he may do so.”).

[7] Silence may be construed as acceptance where “because of previous dealings or otherwise, it is reasonable that the offeree should notify the offeror if he does not intend to accept.” RESTATEMENT (SECOND) OF CONTRACTS § 69(1)(c) (1981); see also *Ragan v. AT & T Corp.*, 355 Ill.App.3d 1143, 291 Ill.Dec. 933, 824 N.E.2d 1183, 1188 (2005). In this situation, “the offeree’s silence is acceptance, regardless of his actual intent, unless both parties understand that no acceptance is intended.” RESTATEMENT (SECOND) OF CONTRACTS § 69 cmt. d (1981).

[8] The district court found that under the circumstances here, Susman’s silence should be interpreted as assent to the written agreement. That was a reasonable determination. The parties had worked on the fiber-optic-cable class actions for more than a decade, whether as cocounsel or in clear awareness of the parallel litigation activity in multiple states. They had recently worked out a system for settling the litigation on a state-by-state basis, and they were close to the end of a long and contentious fight over fees. Susman in particular had been a holdout on that front, having rejected the 2006 fee-arbitration agreement; he admits that he had a history of promptly speaking up when he found something objectionable. True to form, in this case Susman raised two minor points to the initial draft of the agreement within hours of its circulation. His suggestions were immediately addressed and incorporated into a subsequent draft. Tellingly, he did *not* object to any of the terms he now complains of; the arbitration provisions were present in the initial draft, and the hold-harmless clause was added the very next day. As to these terms, he remained silent for two weeks.

By this time the lawyers were a sort of community of interest, working together toward a final resolution of the fee dispute and an end to the litigation. They accepted the mediators’ fee-division proposal with the understanding that it was a final effort to get “the entire fee fight settled” once and for all—to achieve “global peace,” as Gotfryd put it at oral argument. The declarations submitted to the district court by Gotfryd and various members of the 48-Firm Group indicate that they accepted the mediators’ proposal largely because they understood it to put an end to uncertainty and bring about an expeditious distribution of attorney’s fees with no further threat of litigation. Indeed, it’s hard to imagine that their acceptance of the fee-allocation proposal could be understood in any other way. The unanimous approval of the mediators’ proposal included the agreed-upon division of fees but also plainly contemplated an enforcement mechanism that would foreclose future litigation.

Consistent with this understanding, the written agreement provided for enforcement by arbitration if necessary. Needless to say, alternative dispute resolution is commonplace in this context, and under the particular circumstances here, the arbitration provisions could not have been unexpected. As the district court noted, it would be “remarkable ... that you would work out this kind of arrangement and it wouldn’t include some kind of arbitration or other dispute resolution mechanism in light of the fact that there are several other states that are out there.” Again, the

whole point was to secure “global peace” in the fight over fees. Cf. *First Nat'l Bank of Chi.*, 946 F.2d at 519 (explaining that a condition was “so plainly reasonable given its essentiality” to the appellee’s security that “we have trouble understanding how [the appellant] could have defended a refusal to accept it” and that “[t]his would be an additional reason why the [appellee] could presume that it *had* been accepted in the absence of an explicit rejection”).

Susman’s past hostility toward arbitration isn’t incongruous with construing his silence as a lack of objection rather than a lack of assent. His previous rejection of arbitration pertained to the substantive fee-division issue, but that issue was now resolved. The arbitration provisions he now finds objectionable cover future disagreements that may arise in the implementation of the fee-allocation agreement. Susman cannot rely on his past objection to arbitration to explain his two-week silence in the face of a sense of urgency and a need for repose that was known to all. The parties had settled their substantive dispute, and the written agreement memorializing that settlement unsurprisingly contained an enforcement mechanism ensuring that the implementation would proceed without the threat of litigation. In short, it was reasonable for the other lawyers to expect Susman to promptly raise his objections to the written agreement and to construe his two-week silence as assent.

If more evidence were needed, the July 5 email put Susman on notice that he was expected to speak up—and soon—if he had any objections to the draft agreement. Yet despite the boldface exhortation to “[p]lease let me know if you disagree” and “[o]therwise, please consider the attached draft as the final draft for signature,” Susman still maintained his silence. Thereafter everyone but Susman signed quickly, in the reasonable assumption that no further objections were forthcoming and the written agreement was now in its final form.

We cannot ignore the fact that the parties’ **communications** indicate an intention to require signatures (and indeed

every other lawyer signed the agreement) and that Susman eventually did lodge an objection and explicitly refuse to sign. But the district court interpreted Susman’s belated expression of disagreement not as a genuine objection to the additional terms but rather as an attempt to escape or reopen the substantive fee-division percentages, a tricky maneuver given his acknowledged acceptance of the mediators’ proposal. The district court’s inference is entirely reasonable and is adequately supported by the record; at the very least, it is not clearly erroneous.

Indeed, when pressed at oral argument, Susman identified the expense dispute with Gotfryd as the reason he objected to the written agreement. He also acknowledges on appeal that he considers himself bound by the fee-allocation percentages, and indeed he has been accepting distributions pursuant to the agreement. If his real complaint is the size of his share—whether in relative terms, once he saw all the numbers, or because the expense dispute with Gotfryd made him change his mind about the allocation’s fairness—then his reliance on a tardy objection to the arbitration and hold-harmless provisions in the written agreement is hard to explain as anything other than a sham. He can’t reopen the fee division now, and he claims he’s not trying to; but neither can he get out of the other terms in the written agreement by way of a late objection when the circumstances reasonably suggest that he manifested an assent to be bound.

The district court was intimately familiar with the parties’ course of conduct during the fee dispute and carefully reviewed \*230 the evidence before finding that Susman is bound by the written agreement despite his failure to sign. Given the parties’ lengthy relationship and course of dealings, the district court reasonably construed Susman’s silence as an assent to be bound.

**AFFIRMED.**

# Footnotes

- 1 “Gross fees” was later defined in the written agreement as encompassing both attorney’s fees and expenses, and neither party has challenged that definition. We therefore assume that the mediators’ proposal was to cover both fees and expenses.
- 2 Relatedly, Susman also invokes the statute of frauds, but this argument was not raised in the district court and is therefore waived. See *Fednav Int’l Ltd. v. Cont’l Ins. Co.*, 624 F.3d 834, 841 (7th Cir.2010).

701 F.3d 1080

United States Court of Appeals,  
Fifth Circuit.

Robert C. QUESADA, Plaintiff–Appellant,

v.

Janet NAPOLITANO, Secretary, Department  
of Homeland Security, Defendant–Appellee.

No. 12–50374 | Summary  
Calendar. | Nov. 30, 2012.

### Synopsis

**Background:** Employee filed suit against Department of Homeland Security alleging violation of Title VII. Following alternative dispute resolution (ADR) and settlement, plaintiff moved to reinstate case. The United States District Court for the Western District of Texas, Philip R. Martinez, J., dismissed. Plaintiff appealed.

[**Holding:**] The Court of Appeals, Patrick E. Higginbotham, Circuit Judge, held that parties had entered into valid settlement agreement.

Affirmed.

### West Headnotes (6)

[1] **Federal Courts**

⚡ Compromise and Settlement

Court of Appeals reviews a district court's order enforcing a settlement agreement for abuse of discretion.

1 Cases that cite this headnote

[2] **Federal Courts**

⚡ Employment discrimination

The validity and enforcement of a Title VII settlement agreement are matters of federal law. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

Cases that cite this headnote

[3] **Attorney and Client**

⚡ Settlements, Compromises, and Releases

**Federal Civil Procedure**

⚡ Amending, opening, or vacating

An attorney of record is presumed to have authority to compromise and settle litigation of his client, and a judgment entered upon an agreement by the attorney of record will be set aside only upon affirmative proof of the party seeking to vacate the judgment that the attorney had no right to consent to its entry.

Cases that cite this headnote

[4] **Attorney and Client**

⚡ Settlements, Compromises, and Releases

There was no evidence, as required to set aside settlement between Title VII plaintiff and his employer based on lack of attorney's authority, that plaintiff had objected to his attorney's settlement offer at any point during mediation or before employer had accepted the offer; attorney of record was presumed, therefore, to have authority to compromise and settle litigation of his client. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

Cases that cite this headnote

[5] **Compromise and Settlement**

⚡ Necessity of writing

Under federal law, Title VII settlements need not be in writing. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

Cases that cite this headnote

[6] **Constitutional Law**

⚡ Notice, hearing, proceedings, and review in general

**Constitutional Law**

⚡ Notice and Hearing; Proceedings and Review

Fifth Amendment's due process right to effective assistance of counsel is not implicated by defective representation in a Title VII proceeding. U.S.C.A. Const.Amend. 5; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

Cases that cite this headnote

### **Attorneys and Law Firms**

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Eduardo R. Castillo, Asst. U.S. Atty., El Paso, TX, for Defendant-Appellee.

Appeal from the United States District Court for the Western District of Texas.

Before HIGGINBOTHAM, OWEN and SOUTHWICK, Circuit Judges.

### **Opinion**

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Robert Quesada challenges a district court's order enforcing his Title VII settlement with his employer. We affirm.

### **I.**

In January 2011, Robert Quesada filed a Title VII discrimination suit against his employer, the Secretary of the Department of Homeland Security. In July 2011, the district court entered a scheduling order that, among other things, required the parties to complete alternative dispute resolution. The parties agreed to mediation, which occurred on March 12, 2012. Quesada attended the mediation together with his attorney. Toward the end of the negotiations, Quesada's attorney made an oral offer to settle all of Quesada's then-pending discrimination claims for \$5000. As counsel for the Secretary was unable to obtain settlement authorization that day, Quesada's attorney agreed to hold the offer open pending the Secretary's approval.

On March 13, Quesada's attorney called opposing counsel to inquire whether the Secretary had accepted the settlement

offer. On the following day, counsel for the Secretary sent an email to Quesada's attorney accepting the offer and memorializing the terms of the settlement.<sup>1</sup> On the **\*1082** same date, the Secretary notified the mediator that Quesada had settled his claims. In compliance with local rules, the mediator notified the district court, which entered an order setting forth deadlines for the parties to exchange settlement documents as well as a deadline to submit dismissal documents.

In accordance with the district court's order, counsel for the Secretary emailed Quesada's attorney a draft settlement agreement on March 20. After receiving no response, the Secretary's representative sent a follow-up email on March 21. Quesada's attorney responded that his client was reviewing the draft agreement. On March 22, Quesada's attorney emailed opposing counsel with certain suggested changes to the draft settlement documents.<sup>2</sup> Counsel for the Secretary responded on the same day indicating a willingness to address Quesada's concerns and asking for clarification.

No further communication took place between the parties until March 27, when the Secretary's representative sent an email to Quesada's attorney reminding him that the court's deadline for submission of the final settlement documents was imminent. On March 28, Quesada's attorney responded, asking whether the Secretary would be willing to join a motion for extension of the time to submit the settlement documents. Counsel for the Secretary indicated that the Secretary was amenable to an extension.

On March 29, Quesada's attorney inquired whether the Secretary would oppose a motion to reinstate the case on the district court's calendar. Counsel for the Secretary voiced strong opposition. On the same day, Quesada's attorney filed a motion to reinstate the case, which asserted that the parties had not reached an enforceable settlement agreement.<sup>3</sup> The Secretary immediately filed a response setting forth the above-referenced chronology of events and submitting various emails as proof that a valid agreement existed.

On March 30, the district court held a hearing to consider Quesada's motion to reinstate the case. At the hearing, Quesada's attorney confirmed that he had offered to settle the case at the March 12 mediation hearing, that he had agreed to hold the offer open until counsel for the Secretary received authorization, and that the Secretary had accepted the offer on March 14. Quesada's attorney also confirmed that he had voiced no objection to the Secretary's acceptance

email, indicating that he believed the parties had reached an enforceable agreement-in-principal.

The court then addressed Quesada directly. Quesada asked his attorney to step down, claiming that the attorney had failed to communicate several key settlement demands to the Secretary.<sup>4</sup> Quesada \*1083 also insisted that no valid settlement existed, reasoning that he had never signed any documentation. Counsel for the Secretary objected that Quesada had never previously mentioned any of the terms he now demanded, observing that the new terms materially departed from Quesada's original settlement offer. Counsel for the Secretary urged the court to enforce the settlement as memorialized by the Secretary's acceptance email.

After thoroughly questioning all of the parties, the district court adopted the Secretary's position, concluding that Quesada's attorney had made an authorized settlement offer at the mediation negotiations, and that this offer did not include the additional terms Quesada presently demanded. While the court "recognize[d] that [Quesada] has not signed on any piece of paper," it observed that this fact "does not preclude the existence of a settlement agreement." On the same day, the court entered an order setting forth its conclusion and dismissing Quesada's case without prejudice.

## II.

On appeal, Quesada maintains that he is not party to an enforceable settlement with the Secretary. Quesada does not dispute that his attorney communicated a settlement offer to the Secretary's representative on March 12, or that the Secretary's March 14 acceptance email reflects the terms of that offer. Instead, Quesada argues that his attorney lacked the authority to enter into the settlement. Though Quesada acknowledges that he was present at the mediation negotiations, Quesada avers that this fact "does not mean that he was in agreement to any offer made by his former counsel." According to Quesada, "the record below reflects that Quesada objected to the initial settlement offer through his emails to [his attorney]." The emails, which Quesada introduced for the first time on appeal, are all time-stamped several days after the Secretary accepted the March 12 settlement offer.

## Footnotes

[1] [2] [3] [4] [5] We review a district court's order enforcing a settlement agreement for abuse of discretion.<sup>5</sup> The validity and enforcement of a Title VII settlement agreement are matters of federal law.<sup>6</sup> Under our precedents, "an attorney of record is presumed to have authority to compromise and settle litigation of his client, and a judgment entered upon an agreement by the attorney of record will be set aside only upon affirmative proof of the party seeking to vacate the judgment that the attorney had no right to consent to its entry."<sup>7</sup> Here, the record contains no evidence that Quesada objected to his attorney's settlement offer at any point during the mediation or before the Secretary accepted the offer.<sup>8</sup> Even assuming that we can consider the new emails Quesada introduced \*1084 on appeal,<sup>9</sup> Quesada sent those emails to his attorney several days *after* the Secretary had accepted the March 12 settlement offer. Consequently, the emails have no bearing on the validity of the settlement.<sup>10</sup> We conclude that the district court did not abuse its discretion by finding that Quesada was bound by the terms of his attorney's settlement offer.

## III.

[6] Quesada next claims that his counsel's defective representation violated his Fifth Amendment due process right to effective assistance of counsel. We have never held that the Fifth Amendment's due process guarantee is implicated by defective representation in Title VII proceedings and decline to do so in this case. We ought not in fairness leave the innuendo: Quesada has introduced no evidence to suggest that his attorney's representation was anything less than competent.

## IV.

We AFFIRM the judgment of the district court.

## Parallel Citations

116 Fair Empl.Prac.Cas. (BNA) 1158, 96 Empl. Prac. Dec. P 44,690

- 1 The email provided that "the agency has accepted [Quesada's] settlement offer of \$5000 to settle all claims pending or that could  
be asserted up to the date of settlement."
- 2 Specifically, Quesada asked the Secretary's representative to (1) remove the second sentence from paragraph 2, (2) identify with  
particularity the claims Quesada was releasing, and (3) add language indicating that Quesada was not releasing any claims against  
the Department of Veterans Affairs or Office of Workers Compensation Program.
- 3 In the subsequent hearing before the district court, Quesada's attorney acknowledged that the motion to reinstate did not reflect his  
personal views, and that he believed the parties had reached an enforceable settlement.
- 4 Specifically, Quesada wanted the settlement agreement to provide that: (1) counsel for the Secretary had made improper threats  
during the mediation proceeding; (2) the Secretary would refrain from making improper threats in the future; (3) the Secretary would  
henceforth abide by its tri-bureau merit promotion guidelines, and (4) the Secretary would give Quesada priority consideration for  
any future promotions.
- 5 *Deville v. United States ex rel. Dep't of Veterans Affairs*, 202 Fed.Appx. 761, 762 (5th Cir.2006).
- 6 *Fulgence v. J. Ray McDermott & Co.*, 662 F.2d 1207, 1209 (5th Cir.1981).
- 7 *Mid-South Towing Co. v. Har-Win, Inc.*, 733 F.2d 386, 390 (5th Cir.1984).
- 8 Quesada misapprehends the burden of proof in this case, urging that the record lacks "any evidence to support the district court's  
or Secretary Napolitano's counsel's supposition that Quesada's former counsel had the authority to settle Quesada's discrimination  
claims." Under the law of this Circuit, Quesada's attorney had presumptive authority to settle Quesada's claims, and the burden is  
on *Quesada* to furnish evidence to the contrary. *See id.*
- 9 *See Theriot v. Parish of Jefferson*, 185 F.3d 477, 491 n. 26 (5th Cir.1999) ("An appellate court may not consider new evidence  
furnished for the first time on appeal and may not consider facts which were not before the district court at the time of the challenged  
ruling.").
- 10 As the district court's hearing suggests, the gravamen of Quesada's complaint is that he sent the emails to his attorney before signing  
any final settlement documents. However, under federal law, Title VII settlements need not be in writing. *Fulgence*, 662 F.2d at  
1209. As Quesada's attorney had presumptive authority to extend the settlement offer at the mediation negotiations, the Secretary's  
acceptance of that offer was sufficient to create an enforceable agreement. *See id.* ("If a party to a Title VII suit who has previously  
authorized a settlement changes his mind when presented with the settlement documents, that party remains bound by the terms of  
the agreement.").

131 F.3d 320

United States Court of Appeals,  
Second Circuit.

Bernard P. CIARAMELLA, Plaintiff–Appellant,

v.

READER'S DIGEST ASSOCIATION,  
INC., Defendant–Appellee.

No. 337, Docket 96–9638. | Argued  
Sept. 23, 1997. | Decided Dec. 15, 1997.

Employee sued his former employer for discrimination under federal and state laws. The United States District Court for the Southern District of New York, Charles L. Bricant, J., dismissed claims on basis of unsigned settlement agreement. Employee appealed. The Court of Appeals, Oakes, Circuit Judge, held that parties did not intend unexecuted draft settlement agreement to constitute binding agreement.

Vacated and remanded.

#### West Headnotes (4)

##### [1] Contracts

⇒ Date or time of making contract

New York relies on settled common law contract principles to determine when parties to litigation intended to form binding agreement.

26 Cases that cite this headnote

##### [2] Contracts

⇒ Agreements to be reduced to writing

Under New York law, parties are free to bind themselves orally, and fact that they contemplate later memorializing their agreement in executed document will not prevent them from being bound by oral agreement; however, if parties intend not to be bound until agreement is set forth in writing and signed, they will not be bound until then.

106 Cases that cite this headnote

##### [3] Compromise and Settlement

⇒ Necessity of writing

Factors that guide inquiry regarding whether parties intended to be bound by settlement agreement absent document executed by both sides are (1) whether there has been express reservation of right not to be bound in absence of signed writing; (2) whether there has been partial performance of contract; (3) whether all terms of alleged contract have been agreed upon; and (4) whether agreement at issue is type of contract that is usually committed to writing; no single factor is decisive, but each provides significant guidance.

129 Cases that cite this headnote

##### [4] Compromise and Settlement

⇒ Necessity of writing

Employee and employer did not intend unexecuted draft settlement agreement to constitute binding settlement of employee's discrimination claims without employee's signature; although employee's counsel verbally indicated "We have a deal," agreement specifically stated it would not become effective until signed, agreement specified parties were bound "hereby," agreement contained merger clause, agreement emphasized that employee's signature would signify his voluntary and informed consent, neither party had partially performed its obligation under agreement, parties had not reached agreement over letter of reference, and such settlements were generally required to be in writing or, at a minimum, made on record in open court.

88 Cases that cite this headnote

#### Attorneys and Law Firms

\*321 Susan Ritz, New York City (Miriam F. Clark, Laura Nelsen, Steel Bellman Ritz & Clark, P.C., of counsel), for Plaintiff–Appellant.

Joseph Baumgarten, New York City (Gregory Reilly, Proskauer Rose LLP, of counsel), for Defendant–Appellee.

Before OAKES, MESKILL and CALABRESI, Circuit Judges.

### Opinion

OAKES, Senior Circuit Judge:

Plaintiff filed suit against Reader's Digest Association ("RDA") alleging employment discrimination under the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (1994) ("ADA"), and article 15 of the New York State Executive Law, N.Y. Exec. Law §§ 290-301 (McKinney 1993), and also violations of the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461 (1994) ("ERISA"). Shortly after the commencement of the action, the parties negotiated a settlement which Ciaramella later refused to sign. RDA moved for an order to enforce the settlement agreement. The United States District Court for the Southern District of New York (Charles L. Brieant, J.), granted the motion and dismissed the plaintiff's complaint with prejudice. Ciaramella argues that enforcement of the settlement agreement was improper because he had never signed the written agreement and the parties had specifically agreed that the settlement would not become binding until signed by all the parties. We agree, and reverse.

## I. BACKGROUND

In November 1995, Ciaramella filed suit against his former employer, RDA, alleging that RDA failed to give him reasonable accommodations for his disability of chronic depression and subsequently terminated his employment in violation of the ADA and article 15 of New York State Executive Law. Ciaramella also raised a claim under ERISA for failure to pay severance benefits.

Before the exchange of any discovery, the parties entered into settlement negotiations. The negotiations resulted in an agreement in principle to settle the case in May, 1996. RDA prepared a draft agreement and sent it to Ciaramella's then attorney, Herbert Eisenberg, for review. This draft, as well as all subsequent copies, contained language indicating that the settlement would not be effective until executed by all the parties and their attorneys. Eisenberg explained the terms of the settlement to Ciaramella, who authorized Eisenberg to accept it. Eisenberg then made several suggestions for revision to RDA which were incorporated into a revised draft. After reviewing the revised draft, Eisenberg asked for a few

final changes and then allegedly stated to RDA's lawyer, "We have a deal." RDA forwarded several execution copies of the settlement to Eisenberg. However, before signing the agreement, Ciaramella consulted a second attorney and ultimately decided that the proposed settlement agreement was not acceptable to him and that he would not sign it. Eisenberg then moved to withdraw as plaintiff's counsel.

RDA, claiming that the parties had reached an enforceable oral settlement, filed a motion to enforce the settlement agreement on September 3, 1996. At a hearing on September 13, the district court granted Eisenberg's motion to withdraw, and stayed proceedings on the motion to enforce the settlement for thirty days to give Ciaramella time to obtain another attorney. On October 25, the district court heard RDA's motion to enforce the settlement agreement. Ciaramella had not yet obtained substitute counsel and appeared pro se at the hearing. The district court, after considering RDA's unopposed motion papers and questioning Ciaramella about the formation of the settlement agreement, granted RDA's motion to enforce the settlement by order dated October 28, 1996. The district court entered a judgment \*322 of dismissal on October 29, 1996. This Court has jurisdiction under 28 U.S.C. § 1291.

## II. DISCUSSION

### A. Choice of Law

An initial question presented is whether New York or federal common law determines whether the parties reached a settlement of claims brought under the ADA, ERISA, and state law. The district court analyzed the issue using federal common law and concluded that the parties had intended to enter into a binding oral agreement. We review the district court's findings of law under a de novo standard, and its factual conclusions under a clearly erroneous standard of review. *See Hirschfeld v. Spanakos*, 104 F.3d 16, 19 (2d Cir.1997).

[1] [2] Because we find that there is no material difference between the applicable state law or federal common law standard, we need not decide this question here. *See Bowden v. United States*, 106 F.3d 433, 439 (D.C.Cir.1997) (declining to decide whether state or federal common law governs the interpretation of a settlement agreement under Title VII where both sources of law dictate the same result); *Davidson Pipe Co. v. Laventhol & Horwath*, Nos. 84 Civ. 5192(LBS), 84 Civ. 6334(LBS), 1986 WL 2201, at \*2

(S.D.N.Y. Feb. 11, 1986) (finding no federal rule that would differ critically from New York's rule governing the validity of oral settlement agreements). New York relies on settled common law contract principles to determine when parties to a litigation intended to form a binding agreement.<sup>1</sup> See *Winston v. Mediafare Entertainment Corp.*, 777 F.2d 78, 80-81 (2d Cir.1985) (applying principles drawn from the Restatement (Second) of Contracts to determine whether a binding settlement agreement existed under New York law); see also *Jim Bouton Corp. v. William Wrigley Jr. Co.*, 902 F.2d 1074, 1081 (2d Cir.1990) (describing the New York rule of contract formation as "generally accepted"). Under New York law, parties are free to bind themselves orally, and the fact that they contemplate later memorializing their agreement in an executed document will not prevent them from being bound by the oral agreement. However, if the parties intend not to be bound until the agreement is set forth in writing and signed, they will not be bound until then. See *Winston*, 777 F.2d at 80; *V'Soske v. Barwick*, 404 F.2d 495, 499 (2d Cir.1968). The intention of the parties on this issue is a question of fact, to be determined by examination of the totality of the circumstances. See *International Telemeter Corp. v. Teleprompter Corp.*, 592 F.2d 49, 56 (2d Cir.1979). This same standard has been applied by courts relying on federal common law. See *Taylor v. Gordon Flesch Co.*, 793 F.2d 858, 862 (7th Cir.1986) (enforcing an oral settlement of a Title VII case where the parties had not specified the need for a final, signed document); *Board of Trustees of Sheet Metal Workers Local Union No. 137 Ins. Annuity & Apprenticeship Training Funds v. Vic Constr. Corp.*, 825 F.Supp. 463, 466 (E.D.N.Y.1993) (adopting the *Winston* analysis as based on "general contract principles" to uphold an oral settlement of an ERISA case); see also 1 Samuel Williston & Walter H.E. Jaeger, *A Treatise on the Law of Contracts* § 28 (3d ed. 1957) ("It is ... everywhere agreed that if the parties contemplate a reduction to writing of their agreement before it can be considered complete, there is no contract until the writing is signed.").

RDA urges us to fashion a federal rule of decision that would disregard this longstanding rule of contract interpretation and would \*323 hold parties to an oral settlement whenever their attorneys arrive at an agreement on all material terms.<sup>2</sup> We reject this suggestion. Even in cases where federal courts can choose the governing law to fill gaps in federal legislation, the Supreme Court has directed that state law be applied as the federal rule of decision unless it presents a significant conflict with federal policy. See *Atherton v. FDIC*, 519 U.S. 213, —, 117 S.Ct. 666, 670, 136 L.Ed.2d 656 (1997); *O'Melveny*

& *Myers v. FDIC*, 512 U.S. 79, 87, 114 S.Ct. 2048, 2055, 129 L.Ed.2d 67 (1994) (noting that "cases in which judicial creation of a federal rule would be justified .... are ... 'few and restricted' ") (quoting *Wheeldin v. Wheeler*, 373 U.S. 647, 651, 83 S.Ct. 1441, 1445, 10 L.Ed.2d 605 (1963)).

We can find no federal objective contained in the ADA or ERISA that would be compromised by the application of the common law rules described above. RDA is correct that at least one of the federal statutes at issue expresses a preference for voluntary settlements of claims. See 42 U.S.C. § 12212 (1994) (encouraging the use of alternative means of dispute resolution, such as settlement, to resolve claims arising under the ADA). However, the common law rule does not conflict with this policy. The rule aims to ascertain and give effect to the intent of the parties at the time of contract. Such a rule promotes settlements that are truly voluntary. See, e.g., *Winston*, 777 F.2d at 80 ("Because of this freedom to determine the exact point at which an agreement becomes binding, a party can negotiate candidly, secure in the knowledge that he will not be bound until execution of what both parties consider to be final document [sic].").

In fact, it is the rule suggested by RDA that would conflict with federal policy. Enforcing premature oral settlements against the expressed intent of one of the parties will not further a policy of encouraging settlements. People may hesitate to enter into negotiations if they cannot control whether and when tentative proposals become binding. We therefore decline to adopt a federal rule concerning the validity of oral agreements that is in conflict with federal policy and the settled common law principles of contract law.

#### B. Existence of a Binding Agreement

[3] [4] This court has articulated four factors to guide the inquiry regarding whether parties intended to be bound by a settlement agreement in the absence of a document executed by both sides. *Winston*, 777 F.2d at 80. We must consider (1) whether there has been an express reservation of the right not to be bound in the absence of a signed writing; (2) whether there has been partial performance of the contract; (3) whether all of the terms of the alleged contract have been agreed upon; and (4) whether the agreement at issue is the type of contract that is usually committed to writing. *Id.* No single factor is decisive, but each provides significant guidance. See *R.G. Group, Inc. v. Horn & Hardart Co.*, 751 F.2d 69, 74-75 (2d Cir.1984) (granting summary judgment where all four factors indicated that the parties had not intended to be bound by an oral franchise agreement). The district court

did not explicitly rely on the *Winston* test, but concluded that based on the evidence the parties intended to enter into a binding oral agreement. Considering the above factors in the context of this case, we are left with the definite and firm conviction that the district court erred in concluding that the parties intended that the unexecuted draft settlement constitute a binding agreement. *See United States v. United States Gypsum Co.*, 333 U.S. 364, 395-97, 68 S.Ct. 525, 542-43, 92 L.Ed. 746 (1948) (finding clear error where trial court's findings conflicted with uncontroverted documentary evidence); *Winston*, 777 F.2d at 83 (finding clear error where the district court had enforced an unsigned settlement and three of the four factors indicated that the parties had not intended to be bound in the absence of a signed agreement).

### \*324 1. Express Reservation

We find numerous indications in the proposed settlement agreement that the parties did not intend to bind themselves until the settlement had been signed. We must give these statements considerable weight, as courts should avoid frustrating the clearly-expressed intentions of the parties. *R.G. Group*, 751 F.2d at 75. For instance, in paragraph 10, the agreement states, "This Settlement Agreement and General Release shall not become effective ('the Effective Date') until it is signed by Mr. Ciaramella, Davis & Eisenberg, and Reader's Digest."

RDA argues that the effect of paragraph 10 was simply to define the "Effective Date" of the agreement for the purpose of establishing the time period in which RDA was obligated to deliver payment and a letter of reference to Ciaramella. RDA further urges that Ciaramella's obligation to dismiss the suit was not conditioned on paragraph 10. However, this interpretation is belied by the language of paragraph 2, which addresses RDA's payment obligation. Paragraph 2 states that RDA must proffer payment "[w]ithin ten (10) business days following the later of (a) the Effective Date of this Settlement Agreement and General Release (as defined by paragraph ten ... ) or (b) entry by the Court of the Stipulation of Dismissal With Prejudice" (emphasis added). Under the terms of the proposed settlement, RDA had no obligation to pay Ciaramella until the agreement was signed and became effective. Likewise, under paragraph 12 of the final draft, RDA was not required to send the letter of reference until the agreement was signed. The interpretation that RDA advances, that Ciaramella had an obligation to dismiss the suit regardless of whether the settlement was signed, leaves Ciaramella no consideration for his promise to dismiss the suit. The more reasonable inference to be

drawn from the structure of paragraph 2 is that it provided Ciaramella with an incentive to dismiss the suit quickly because he would receive no payment simply by signing the agreement, but that execution was necessary to trigger either parties' obligations. *See, e.g., Davidson Pipe Co.*, 1986 WL 2201, at \*4 (finding that wording in a settlement agreement that placed great significance on the execution date evinced an intent not to create a binding settlement until some formal date of execution).

Similarly, several other paragraphs of the proposed agreement indicate that the parties contemplated the moment of signing as the point when the settlement would become binding. The agreement's first paragraph after the WHEREAS clauses reads, "NOW, THEREFORE, with the intent to be legally bound *hereby*, and in consideration of the mutual promises and covenants contained herein, Reader's Digest and Ciaramella agree to the terms and conditions *set forth below*: ...." (emphasis added). This language demonstrates that only the terms of the settlement agreement, and not any preexisting pact, would legally bind the parties. Read in conjunction with paragraph 10, which provides that the settlement agreement is effective only when signed, this paragraph explicitly signals the parties' intent to bind themselves only at the point of signature. *See, e.g., R.G. Group*, 751 F.2d at 71, 76 (finding an explicit reservation of the right not to be bound absent signature in the wording of an agreement that declared, "when duly executed, [this agreement] sets forth your rights and your obligations"). In addition to the language of the first paragraph, paragraph 13 of the final draft<sup>3</sup> contains a merger clause which states,

This Settlement Agreement and General Release constitutes the complete understanding between the parties, may not be changed orally and supersedes any and all prior agreements between the parties.... No other promises or agreements shall be binding unless in writing and signed by the parties.

The presence of such a merger clause is persuasive evidence that the parties did not intend to be bound prior to the execution of a written agreement. *See, e.g., R.G. Group*, 751 F.2d at 76; *McCoy v. New York City Police Dep't*, No. 95 Civ. 4508, 1996 WL 457312, at \*2 (S.D.N.Y. Aug. 14, 1996) (refusing to enforce a settlement of a § 1983 claim \*325 where a signed copy of the settlement agreement containing a merger clause had never been returned by the plaintiff).

Other parts of the agreement also emphasize the execution of the document. Paragraph 9 states, in relevant part,

Mr. Ciaramella represents and warrants that he ... has executed this Settlement Agreement and General Release after consultation with his ... legal counsel; ... that he voluntarily assents to all the terms and conditions contained therein; and that he is signing the Settlement Agreement and General Release of his own force and will.

Ciaramella's signature was meant to signify his voluntary and informed consent to the terms and obligations of the agreement. By not signing, he demonstrated that he withheld such consent.

The sole communication which might suggest that the parties did not intend to reserve the right to be bound is Eisenberg's alleged statement to RDA's counsel, "We have a deal." However, nothing in the record suggests that either attorney took this statement to be an explicit waiver of the signature requirement. Eisenberg's statement followed weeks of bargaining over the draft settlement, which at all times clearly expressed the requirement that the agreement be signed to become effective. This Court has held in a similar situation that an attorney's statement that "a handshake deal" existed was insufficient to overcome "months of bargaining where there were repeated references to the need for a written and signed document, and where neither party had ever ... even discussed dropping the writing requirement." *R.G. Group*, 751 F.2d at 76; see also *Davidson Pipe Co.*, 1986 WL 2201, at \*5 (holding that oral statement, "we have a deal," made by one attorney to another did not in and of itself preclude a finding that the parties intended to be bound only by an executed contract).

## 2. Partial Performance

A second factor for consideration is whether one party has partially performed, and that performance has been accepted by the party disclaiming the existence of an agreement. *R.G. Group*, 751 F.2d at 75. No evidence of partial performance of the settlement agreement exists here. RDA paid no money to Ciaramella before the district court ordered the settlement enforced, nor did it provide Ciaramella with a letter of reference. These were the two basic elements of consideration

that would have been due to Ciaramella under the settlement agreement.

## 3. Terms Remaining to be Negotiated

Turning to the third factor, we find that the parties had not yet agreed on all material terms. The execution copy of the settlement agreement contained a new provision at paragraph 12 that was not present in earlier drafts. That provision required RDA to deliver a letter of reference concerning Ciaramella to Eisenberg. The final draft of the settlement contained an example copy of the letter of reference annexed as Exhibit B. Ciaramella was evidently dissatisfied with the example letter. At the October 25, 1996, hearing at which Ciaramella appeared pro se, he attempted to explain to the court that the proposed letter of reference differed from what he had expected. He stated, "The original settlement that was agreed to, the one that was reduced to writing for me to sign had a discrepancy about letters of recommendation. I had requested one thing and the settlement in writing did not represent that." Because Ciaramella's attorney resigned when Ciaramella refused to sign the settlement agreement, and RDA thereafter moved to enforce the agreement, Ciaramella never had an opportunity to finish bargaining for the letter he desired.

In *Winston*, this Court found that the existence of even "minor" or "technical" points of disagreement in draft settlement documents were sufficient to forestall the conclusion that a final agreement on all terms had been reached. *Winston*, 777 F.2d at 82-83. By contrast, the letter of reference from RDA was a substantive point of disagreement. It was also, from Ciaramella's perspective, a material term of the contract since it was part of Ciaramella's consideration for dismissing the suit. On this basis, we find that the parties here had not yet reached agreement on all terms of the settlement.

## \*326 4. Type of Agreement That Is Usually Reduced to a Writing

The final factor, whether the agreement at issue is the type of contract that is usually put in writing, also weighs in Ciaramella's favor. Settlements of any claim are generally required to be in writing or, at a minimum, made on the record in open court. See, e.g., N.Y. C.P.L.R. § 2104; Cal.Civ.Proc.Code § 664.6 (West 1996). As we stated in *Winston*, "Where, as here, the parties are adversaries and the purpose of the agreement is to forestall litigation, prudence strongly suggests that their agreement be written in order

to make it readily enforceable, and to avoid still further litigation." *Winston*, 777 F.2d at 83.

We have also found that the complexity of the underlying agreement is an indication of whether the parties reasonably could have expected to bind themselves orally. See *R.G. Group*, 751 F.2d at 76; *Reprosystem, B.V. v. SCM Corp.*, 727 F.2d 257, 262-63 (2d Cir.1984) (finding that the magnitude and complexity of a four million dollar sale of six companies under the laws of five different countries reinforced the stated intent of the parties not to be bound until written contracts were signed). While this settlement agreement does not concern a complicated business arrangement, it does span eleven pages of text and contains numerous provisions that will apply into perpetuity. For instance, paragraph 6 determines how future requests for references would be handled, and also states that Ciaramella can never reapply for employment at RDA. Paragraph 7 states that Ciaramella will not publicly disparage RDA and agrees not to disclose the terms of the settlement agreement. In such a case, the requirement that the agreement be in writing and formally

executed "simply cannot be a surprise to anyone." *R.G. Group*, 751 F.2d at 77; see also *Winston*, 777 F.2d at 83 (finding a four page settlement agreement that contained obligations that would last over several years sufficiently complex to require reduction to writing).

## CONCLUSION

In sum, we find that the totality of the evidence before us clearly indicates that Ciaramella never entered into a binding settlement agreement with his former employer. This conclusion is supported by the text of the proposed agreement and by Ciaramella's testimony at the October 25 hearing. Accordingly, the order enforcing the settlement is vacated and the case remanded for further proceedings. Costs to appellant.

## Parallel Citations

22 Employee Benefits Cas. 1046, 7 A.D. Cases 1035, 11 NDLR P 162

## Footnotes

- 1 We note that New York Civil Practice Law and Rules 2104, N.Y. C.P.L.R. 2104 (McKinney 1997), which sets out technical requirements that must be met for a settlement agreement to be enforceable under New York law, may also apply. However, we need not address the issue whether section 2104 applies in federal cases or is consistent with federal policies favoring settlement. Cf. *Monaghan v. SZS 33 Assoc.*, 73 F.3d 1276, 1283 n. 3 (2d Cir.1996) (reserving decision on whether federal courts sitting in diversity must apply section 2104 when relying on New York law). Because we agree with Ciaramella that, under common law contract principles, Ciaramella never formed an agreement with RDA, we have no reason to rely on section 2104 in this case. See *Sears, Roebuck and Co. v. Sears Realty Co.*, 932 F.Supp. 392, 401-02 (N.D.N.Y.1996) (interpreting section 2104 as a defense to contract enforcement, and not as a rule of contract formation).
- 2 RDA relies on the Fifth Circuit's opinion in *Fulgence v. J. Ray McDermott & Co.*, 662 F.2d 1207 (5th Cir.1981) as support for this standard. However, RDA's reliance on *Fulgence* is misplaced because there was no suggestion in that case that the parties had ever explicitly reserved the right not to be bound until the execution of a written agreement.
- 3 This language was contained in paragraph 12 of earlier drafts.

497 F.3d 124

United States Court of Appeals,  
Second Circuit.

Doreen POWELL, Plaintiff–Appellant,

v.

OMNICOM, BBDO/PHD, Defendants–Appellees.

Docket No. 06–0300–cv. | Argued:  
Feb. 8, 2007. | Decided: Aug. 7, 2007.

### Synopsis

**Background:** In an employment discrimination action, the United States District Court for the Southern District of New York, William H. Pauley III, J., denied employee's motion to set aside a settlement agreement and restore the civil action. Employee appealed.

**Holdings:** The Court of Appeals, John M. Walker, Jr., Circuit Judge, held that:

[1] District Court did not abuse its discretion in construing employee's motion as a motion for relief from judgment;

[2] settlement agreement was not rendered nonbinding by fact that it was not reduced to writing;

[3] employee and employer intended to be bound by settlement absent a written agreement;

[4] timing requirements under Older Workers Benefit Protection Act (OWBPA) did not apply; and

[5] District Court did not abuse its discretion in refusing to restore case.

Affirmed.

### West Headnotes (17)

#### [1] Federal Civil Procedure

⇒ Motion, complaint or bill

District Court did not abuse its discretion in construing employee's motion to set aside a

settlement and restore case to the calendar as a motion for relief from judgment, in employment discrimination action, where the Court had already approved the settlement and the case had been closed. Fed.Rules Civ.Proc.Rule 60(b), 28 U.S.C.A.

1 Cases that cite this headnote

#### [2] Federal Courts

⇒ Altering, amending, modifying, or vacating judgment or order; proceedings after judgment

The Court of Appeals reviews the denial of a motion for relief from judgment for abuse of discretion. Fed.Rules Civ.Proc.Rule 60(b), 28 U.S.C.A.

Cases that cite this headnote

#### [3] Compromise and Settlement

⇒ Construction of Agreement

A settlement agreement is a contract that is interpreted according to general principles of contract law.

33 Cases that cite this headnote

#### [4] Compromise and Settlement

⇒ Conclusiveness

Once entered into, a settlement agreement is binding and conclusive.

16 Cases that cite this headnote

#### [5] Compromise and Settlement

⇒ Mistake or ignorance of law or facts

When a party makes a deliberate, strategic choice to settle, a court cannot relieve him of that a choice simply because his assessment of the consequences was incorrect.

22 Cases that cite this headnote

#### [6] Compromise and Settlement

⇒ Necessity of writing

Frauds, Statute Of

⇒ Miscellaneous particular cases, in general

Under New York law, the requirement that an oral settlement be on the record and in open court serves as a limited exception to the statute of frauds. N.Y. McKinney's CPLR 2104.

9 Cases that cite this headnote

[7] **Contracts**

⇒ Agreements to be reduced to writing

Parties may enter into a binding contract orally, and the intention to commit an agreement to writing, standing alone, will not prevent contract formation.

12 Cases that cite this headnote

[8] **Federal Civil Procedure**

⇒ Stipulations

A voluntary, clear, explicit, and unqualified stipulation of dismissal entered into by the parties in court and on the record is enforceable even if the agreement is never reduced to writing, signed, or filed.

13 Cases that cite this headnote

[9] **Compromise and Settlement**

⇒ Making and Form of Agreement

A settlement placed on the record in open court remains binding even if a party has a change of heart between the time he agreed to the settlement and the time those terms are reduced to writing.

24 Cases that cite this headnote

[10] **Compromise and Settlement**

⇒ Necessity of writing

Oral settlement agreement in employment discrimination action was binding on employee, even though it was never reduced to writing, where the parties orally entered into a voluntary, clear, explicit, and unqualified settlement, the terms of which were recited on the record, and the employee expressly assented on the record to those terms and to the dismissal of the case.

19 Cases that cite this headnote

[11] **Contracts**

⇒ Agreements to be reduced to writing

Parties who do not intend to be bound until an agreement is reduced to a signed writing are not bound until that time.

21 Cases that cite this headnote

[12] **Contracts**

⇒ Agreements to be reduced to writing

Deciding whether the parties intended to be bound by an agreement in the absence of a writing requires a court to consider (1) whether there has been an express reservation of the right not to be bound in the absence of a writing, (2) whether there has been partial performance of the contract, (3) whether all of the terms of the alleged contract have been agreed upon, and (4) whether the agreement at issue is the type of contract that is usually committed to writing.

28 Cases that cite this headnote

[13] **Compromise and Settlement**

⇒ Necessity of writing

Employee and employer intended to be bound by settlement absent a written agreement, in employment discrimination action; even if the settlement agreement was the kind that normally would be reduced to writing, when the agreement was placed on the record in open court, employee's attorney stated without objection that the parties agreed that formal settlement documents would incorporate specific terms and conditions, which were recited on the record, employer partially performed the agreement, and all of the material terms of the settlement were agreed upon at the court hearing.

25 Cases that cite this headnote

[14] **Release**

⇒ Reality of assent in general

The failure to meet the ADEA timing requirements for a knowing and voluntary

waiver renders a release of ADEA claims unenforceable irrespective of general contract principles. Age Discrimination in Employment Act of 1967, § 7(f), 29 U.S.C.A. § 626(f).

3 Cases that cite this headnote

[15] **Compromise and Settlement**

⚡ Reality of Assent

**Release**

⚡ Reality of assent in general

Timing requirements under Older Workers Benefit Protection Act (OWBPA), that employee settling an ADEA claim be given a period of at least 21 days within which to consider the settlement agreement, and a period of at least 7 days following the execution of such agreement to revoke the agreement, did not apply to employee's agreement to settle ADEA claim against employer; settlement was placed on record in open court, employee was represented by counsel, employee was a former corporate vice president and sophisticated business woman, and she had nearly two years between the alleged discrimination and the settlement negotiations to give consideration as to how she wished to resolve the dispute. Age Discrimination in Employment Act of 1967, § 7(f), 29 U.S.C.A. § 626(f).

5 Cases that cite this headnote

[16] **Release**

⚡ Reality of assent in general

Purpose of timing requirements under Older Workers Benefit Protection Act (OWBPA), providing that employee settling an ADEA claim be given a period of at least 21 days within which to consider the settlement agreement, and a period of at least 7 days following the execution of such agreement to revoke the agreement, is to ensure that older workers are not coerced or manipulated into waiving their rights to seek legal relief under the ADEA. Age Discrimination in Employment Act of 1967, § 7(f), 29 U.S.C.A. § 626(f).

6 Cases that cite this headnote

[17] **Federal Civil Procedure**

⚡ Reconsideration, vacation, or setting aside

District Court did not abuse its discretion in refusing to grant employee's motion to reopen employment discrimination action and restore case to the court calendar, despite court order dismissing case without prejudice to application to restore action, where the parties entered into settlement agreement on the record, and the Court subsequently carefully considered, but rejected employee's contention that the agreement was unenforceable.

2 Cases that cite this headnote

**Attorneys and Law Firms**

\*126 Elizabeth A. Mason, New York, NY, for Plaintiff-Appellant.

A. Michael Weber (Christina L. Feege, on the brief), Littler Mendelson, P.C., New York, NY, for Defendants-Appellees.

Before: WINTER, WALKER, and SACK, Circuit Judges.

**Opinion**

\*127 JOHN M. WALKER, JR., Circuit Judge.

In this appeal from a May 18, 2005, judgment of the district court of the Southern District of New York (William H. Pauley III, *Judge*), the question is whether plaintiff-appellant Doreen Powell, who now has the legal equivalent of buyer's remorse, entered into a binding and enforceable settlement agreement with defendants-appellees Omnicom and BBDO/PHD that concluded their litigation. For the following reasons, we hold that the settlement agreement is fully enforceable and that the district court properly denied Powell's motion to reopen the case.

**BACKGROUND**

Powell, a 52-year-old African American woman, began working at BBDO, a subsidiary of Omnicom, in 1993. After she was promoted to vice president in 1994, she allegedly fell victim to numerous discriminatory acts relating to promotions, performance evaluations, pay, choice of

accounts, and assignment of subordinates. Despite her complaints to management, Powell says nothing was done.

On September 26, 2002, BBDO fired Powell, asserting that it was because of her lack of seniority and failure to bill enough business. Powell claims that these reasons were pretextual because BBDO did not terminate many white employees who had less seniority and billed less business. She also claims that BBDO retaliated against her by falsely reporting to the Department of Labor that she had been discharged for misconduct.

On February 3, 2004, Powell sued BBDO and Omnicom under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*; the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621 *et seq.*; and various New York State and New York City law violations. On June 23, 2004, after several hours of negotiation, Powell, who was represented by counsel, and Omnicom agreed to an in-court settlement before Magistrate Judge James C. Francis, IV. Omnicom's counsel recited the terms of the settlement on the record:

- Neither party would admit any wrongdoing
- BBDO would pay Powell \$35,000, from which no taxes would be withheld
- BBDO would write "a mutually agreed upon positive reference regarding Ms. Powell's employment with BBDO Detroit"
- BBDO would represent in writing to the Department of Labor that it made an error in stating that Powell was terminated for misconduct
- BBDO and Omnicom could still sue Powell for "malfeasance and other intentional conduct"
- Neither party would disparage the other
- Powell would never apply for employment with the defendants
- Powell would represent that she had no other claims pending against the defendants other than the federal claims being settled
- The agreement would remain confidential

The magistrate judge then asked Powell if the terms of the agreement were acceptable to her and whether "on the basis

of agreeing to those terms that this case will be terminated with prejudice and cannot be reopened." Powell responded affirmatively on the record to both questions.

On June 29, 2004, the district court issued an order stating that it had been informed that "this action has been or will be settled." It ordered the action discontinued without prejudice to restore "if the \*128 application to restore the action is made within thirty (30) days of the date of this Order."

The parties attempted to reduce their agreement to writing, but Powell refused to sign. On July 22, 2004, the district court received a letter from Powell's counsel asking that the case be restored to the calendar. Counsel also requested that they be relieved from representation due to "irreconcilable differences" with Powell. Rather than restore the case to the calendar, the district court ordered the parties to appear at a conference on August 13, 2004.

At the conference, Powell accused her counsel of misrepresenting that the \$35,000 settlement would be tax-free and pressuring her into accepting. Her counsel denied any misconduct. She also claimed that Omnicom's reference letter was unsatisfactory because it only stated that her performance at BBDO was "satisfactory"; she wanted it to say that her performance was "exemplary." Powell's counsel said that Omnicom was "really working to try to refine the language to please Ms. Powell" and had offered to state that her performance was "fully satisfactory."

Finding that Powell seemed to be "a sophisticated and knowledgeable business woman," the district court concluded that the settlement was enforceable. It gave Powell the choice of taking exception to the ruling and proceeding with the case or, alternatively, working out the settlement's details. Powell chose the first option, and the district court relieved her counsel.

On March 11, 2005, Powell submitted affidavits pro se in support of a motion to vacate and set aside the settlement and restore the case to the calendar. The district court construed the affidavits as a motion to reopen under Fed.R.Civ.P. 60(b) and denied the motion, finding that Powell "knowingly and voluntarily entered into an in-court settlement agreement." Powell timely appealed.

## DISCUSSION

[1] [2] Because Powell's case had already been closed, the district court did not abuse its discretion in construing her March 11 motion as a Rule 60(b) motion. *See Lawrence v. Wink (In re Lawrence)*, 293 F.3d 615, 623 (2d Cir.2002). We review the denial of a Rule 60(b) motion for abuse of discretion. *Rodriguez v. Mitchell*, 252 F.3d 191, 200 (2d Cir.2001); *see also Fennell v. TLB Kent Co.*, 865 F.2d 498, 503 (2d Cir.1989) (Feinberg, J., concurring) (involving decisions to restore a case to the calendar). We review the district court's factual findings, including whether a settlement agreement exists and whether the parties assented to it, for clear error. *Omega Eng'g, Inc. v. Omega, S.A.*, 432 F.3d 437, 443 (2d Cir.2005).

[3] [4] [5] A settlement agreement is a contract that is interpreted according to general principles of contract law. *Id.* Once entered into, the contract is binding and conclusive. *Janneh v. GAF Corp.*, 887 F.2d 432, 436 (2d Cir.1989), *abrogated on other grounds by Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 114 S.Ct. 1992, 128 L.Ed.2d 842 (1994). When a party makes a deliberate, strategic choice to settle, a court cannot relieve him of that a choice simply because his assessment of the consequences was incorrect. *United States v. Bank of N.Y.*, 14 F.3d 756, 759 (2d Cir.1994).

Powell argues, however, that in these particular circumstances, the agreement was not binding because (1) it was never reduced to writing; (2) the parties never intended to be bound absent a writing; (3) it was made in violation of the Older Workers Benefit Protection Act ("OWBPA"), \*129 Pub.L. No. 101-433, 104 Stat. 978 (1990) (codified as 29 U.S.C. § 626(f)); and (4) the district court's July 1, 2004 order expressly gave her the right to have the case restored to the calendar if she moved for such relief within 30 days of the issuance of the order. We hold that the settlement agreement is binding and enforceable; it therefore concluded the litigation.

### I. Requirement of a Writing

[6] [7] [8] [9] [10] Parties may enter into a binding contract orally, and the intention to commit an agreement to writing, standing alone, will not prevent contract formation. *Winston v. Mediafare Entm't Corp.*, 777 F.2d 78, 80 (2d Cir.1985) (applying New York law).<sup>1</sup> Consequently, a "voluntary, clear, explicit, and unqualified stipulation of dismissal entered into by the parties in court and on the record is enforceable even if the agreement is never reduced

to writing, signed, or filed."<sup>2</sup> *Role v. Eureka Lodge No. 434, I.A. of M & A.W. AFL-CIO*, 402 F.3d 314, 318 (2d Cir.2005) (per curiam). The settlement remains binding even if a party has a change of heart between the time he agreed to the settlement and the time those terms are reduced to writing. *Millgard Corp. v. White Oak Corp.*, 224 F.Supp.2d 425, 432 (D.Conn.2002). Here, Powell and Omnicom entered into a "voluntary, clear, explicit, and unqualified" settlement on the record in open court: Omnicom recited the terms of the agreement on the record, and Powell expressly assented on the record to those terms and the dismissal of the case. Accordingly, the fact that the settlement was never reduced to writing is insufficient to render the settlement nonbinding.

### II. The Parties' Intentions to be Bound Absent a Writing

[11] [12] Powell contends that the parties did not intend to be bound by the settlement in the absence of a writing. Parties who do not intend to be bound until the agreement is reduced to a signed writing are not bound until that time. *Ciaramella*, 131 F.3d at 322. Deciding whether the parties intended to be bound in the absence of a writing requires us to consider (1) whether there has been an express reservation of the right not to be bound in the absence of a writing; (2) whether there has been partial performance of the contract; (3) whether all of the terms of the alleged contract have been agreed upon; and (4) whether the agreement at issue is the type of contract that is usually committed to writing. *Winston*, 777 F.2d at 80; *see also Ciaramella*, 131 F.3d at 323. "No single factor is decisive, but each provides significant guidance." \*130 *Ciaramella*, 131 F.3d at 323. After considering these factors, we conclude that the parties in this case intended to be bound notwithstanding the absence of a writing.

[13] First, neither party made any express reservation to be bound only by a writing. At the June 23, 2004 hearing, Omnicom's attorney stated without objection that the "parties have agreed that the formal settlement documents will incorporate the following terms and conditions," suggesting that the settlement's reduction to writing was only a formality.

Second, there was partial performance of the settlement agreement. At the June 23, 2004 hearing, Omnicom agreed to draft a reference letter for Powell; Omnicom drafted this letter, with the only remaining detail being whether it would say that Powell's performance was "fully satisfactory" or "exemplary."

Third, the parties agreed to all of the material terms of the settlement agreement at the June 23, 2004 hearing. Granted, Powell later took issue with some of the language in the draft agreement to which she had acceded at the June 23 hearing. This includes principally BBDO's right to take legal action against her for gross malfeasance or intentional misconduct, which Omnicom ultimately removed. We have held that even "minor" or "technical" changes arising from negotiations over the written language of an agreement can weigh against a conclusion that the parties intended to be bound absent a formal writing. See *Winston*, 777 F.2d at 82–83. Such changes are relevant, however, only if they show that there were points remaining to be negotiated such that the parties would not wish to be bound until they synthesized a writing "satisfactory to both sides in every respect." See *id.*; see also *R.G. Group, Inc. v. Horn & Hardart Co.*, 751 F.2d 69, 76 (2d Cir.1984) ("A ... factor is whether there was literally nothing left to negotiate or settle, so that all that remained to be done was to sign what had already been fully agreed to."). Here, Powell and Omnicom agreed at the June 23, 2004 hearing that BBDO reserved the right to sue Powell; Powell's subsequent disagreement with, and Omnicom's eventual release of, that right do not suggest that the point was left to be negotiated after the hearing.

Powell argues that because the parties were unable to agree on a mutually satisfactory reference letter and because Omnicom has not removed the negative review from her personnel file, the parties did not agree to all the terms of the settlement. This argument, however, misses the point: They are relevant to performance of the settlement rather than assent to its terms.

Powell also refers to certain representations in the draft agreement to which she never agreed in court. These representations relate principally to the statutory requirements for validly waiving rights under the ADEA (to be discussed further, *infra*) to effectuate settlement. See 29 U.S.C. § 626(f). Because these representations simply follow the legal preconditions for waiving rights under the ADEA, which was the entire point of the settlement, we cannot view them as additional terms subject to negotiation.

The fourth factor—whether this agreement is the kind that would normally be reduced to writing—is a closer question. We have held that a settlement, whose terms were not announced in open court, for \$62,500 paid over several years "strongly suggest[ed]" that the parties would intend to be bound only by a writing. *Winston*, 777 F.2d at 83. Similarly, we have held that a settlement, also not announced

in open court, containing perpetual rights similar to those in the settlement \*131 at issue would normally be put in writing. *Ciaramella*, 131 F.3d at 326. That settlement, like this one, contained provisions concerning how future requests for employee references would be handled, prohibiting the plaintiff from reapplying for employment with the defendant, and imposing confidentiality requirements. *Id.*

Unlike in *Winston* and *Ciaramella*, however, the terms of this agreement were announced on the record and assented to by the plaintiff in open court. In *Ciaramella*, we stated that "[s]ettlements of any claim are generally required to be in writing or, at a minimum, made on the record in open court." *Id.* (emphasis added). The significance of announcing the terms of an agreement on the record in open court is to ensure that there are at least "some formal entries ... to memorialize the critical litigation events," *Willgerodt v. Hohri*, 953 F.Supp. 557, 560 (S.D.N.Y.1997) (quoting *Dolgin v. Dolgin (In re Dolgin Eldert Corp.)*, 31 N.Y.2d 1, 10, 334 N.Y.S.2d 833, 286 N.E.2d 228 (1972)), and to perform a "cautionary function" whereby the parties' acceptance is considered and deliberate, see *Tocker v. City of N.Y.*, 22 A.D.3d 311, 802 N.Y.S.2d 147, 148 (2005). The in-court announcement here functioned in a manner akin to that of a memorializing writing. As a result, this factor, viewed in the light most favorable to Powell, is neutral as to whether the parties intended to be bound only by a writing.

Consequently, at least three of the four factors favor the conclusion that the parties intended to be bound in the absence of a writing. We therefore conclude that Powell was bound by the in-court, oral settlement.

### III. Powell's Rights Under the OWBPA

Powell next argues that the settlement is invalid under the OWBPA because it did not meet the OWBPA's timing requirements. Her argument is without merit.<sup>3</sup>

[14] To protect the rights and benefits of older workers, Congress amended the ADEA in 1990 through the OWBPA by adding, *inter alia*, 29 U.S.C. § 626(f), which regulates employee waivers and releases under the ADEA. *Hodge v. N.Y. Coll. of Podiatric Med.*, 157 F.3d 164, 166 (2d Cir.1998); see also *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 426–27, 118 S.Ct. 838, 139 L.Ed.2d 849 (1998). Under the OWBPA, an individual may waive his rights only if the waiver is "knowing and voluntary." 29 U.S.C. § 626(f)(1). Section 626(f) provides specific statutory requirements for a

"knowing and voluntary" waiver that the employer must meet in order for an employee to waive his ADEA claims. *Ting v. Texaco Inc.*, 150 F.3d 206, 209 (2d Cir.1998). The failure to meet these requirements renders the release unenforceable irrespective of general contract principles. *See Oubre*, 522 U.S. at 427, 118 S.Ct. 838.

[15] Section 626(f)(1)'s requirements, which apply generally to waivers of ADEA claims, include, *inter alia*, that the individual be given "a period of at least 21 days within which to consider the agreement" \*132 and "a period of at least 7 days following the execution of such agreement ... [to] revoke the agreement." 29 U.S.C. § 626(f)(1)(F), (G).

Powell cannot rely on those timing requirements because under § 626(f)(2), they do not apply to actions such as Powell's that are filed in court and allege age discrimination under 29 U.S.C. § 623. *See also Hodge*, 157 F.3d at 166-67. Section 626(f)(2) instead requires that "the individual [be] given a reasonable period of time within which to consider the settlement agreement." The Equal Employment Opportunity Commission has interpreted this requirement to mean "reasonable under all the circumstances, including whether the individual is represented by counsel or has the assistance of counsel." 29 C.F.R. § 1625.22(g)(4).

[16] Powell had a reasonable period of time to consider the settlement. She was represented by counsel when the parties entered the settlement. Further, Powell—a former corporate vice president and sophisticated business woman—had nearly two years between her termination and settlement negotiations to give considered thought to how she wished to resolve this dispute. Congress imposed statutory requirements for waiver to ensure that "older workers are not coerced or manipulated into waiving their rights to seek legal relief under the ADEA." *Syverson v. Int'l Bus. Machs. Corp.*, 472 F.3d 1072, 1075-76 (9th Cir.2007) (quoting S.Rep. No. 101-263, at 5 (1990)). Recognizing that an employee is vulnerable and at an informational disadvantage just after he is terminated, the Senate report noted that an:

employee who is terminated needs time to recover from the shock of losing a job, especially when that job was held for a long period. The employee needs time to learn about the conditions of termination, including any benefits being offered by the employer. Time also is necessary to locate and consult with an attorney if

the employee wants to determine what legal rights may exist.

S.Rep. No. 101-263 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 1509, 1538-39. After the passage of nearly two years, Powell plainly was not under "shock" or time pressure to settle. And she advances no convincing arguments that she was. Therefore, while only a few hours elapsed between the beginning of settlement negotiations and Powell's assent to those terms in-court, this period of time was reasonable under the circumstances.

Powell does not advance any serious arguments that the other requirements of § 626(f)(2) were not met. The settlement agreement is therefore enforceable notwithstanding the OWBPA.

#### IV. District Court's Refusal to Restore the Case

[17] Powell's final argument is that the district court erred by refusing to restore her case to the calendar when she requested on July 21, 2004 that it do so. She focuses on the district court's June 29, 2004 order, which she claims gave her a 30-day option to restore the case. She argues that because she made her request within the 30-day period, that order required the district court to grant it.

We acknowledge that the district court's order lacked clarity as to whether Powell was bound by the in-court settlement. The order began by stating, "[i]t having been reported to this Court that this action has been *or will be settled*." The latter clause suggests that the parties had not settled the case. Moreover, the language with respect to restoring the action upon application suggests that the settlement was not yet binding and that she would be able to restore the action if she so chose.

\*133 Despite the order's wording, the district court did not abuse its discretion in denying Powell's motion based upon its investigation into the June 23, 2004 hearing. The district court did not simply ignore Powell's request; it promptly convened a conference to determine the settlement's enforceability and thoughtfully considered whether to restore the action to its calendar. Given the need for the district court to inquire into the matter and the district court's ability to reconsider any previous indications of its intended rulings, we cannot say that the district court abused its discretion in hearing from the parties and, as shown above, properly concluding that the settlement was binding. *See Fennell*, 865 F.2d at 503 (Feinberg, J., concurring). Moreover, we have previously

affirmed a district court's refusal to reinstate because of an enforceable oral settlement after it dismissed the suit without prejudice to reopen if the parties could not consummate settlement. *See Role*, 402 F.3d at 318. We also defer to the district court's reasonable and implicit interpretation of its own order that it did not provide the parties with an unfettered option to reopen the case. *Cf. Casse v. Key Bank Nat'l Ass'n (In re Casse)*, 198 F.3d 327, 334 (2d Cir.1999) ("[A]n appellate court reviewing bankruptcy orders should defer to a district court's interpretation of its own order ...." (internal quotation marks omitted)).

## CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED.

## Parallel Citations

101 Fair Empl.Prac.Cas. (BNA) 351, 90 Empl. Prac. Dec. P 42,920

## Footnotes

- 1 It is unclear whether the settlement of federal claims is governed by New York law or federal common law. The draft settlement agreement states that it is governed by New York law. The parties have not raised this issue and seem to agree, at least implicitly, that New York law applies. In *Ciaramella v. Reader's Digest Ass'n*, 131 F.3d 320 (2d Cir.1997), we declined to decide this question because New York law and federal common law were materially indistinguishable. *Id.* at 322; *see also Monaghan v. SZS 33 Assocs.*, 73 F.3d 1276, 1283 n. 3 (2d Cir.1996) ("[T]he federal rule regarding oral stipulations does not differ significantly from the New York rule."). The same is true here; therefore, we will apply New York and federal common law interchangeably.
- 2 Under New York law, the requirement that the settlement be on the record and in open court serves as a limited exception to the Statute of Frauds. *Jacobs v. Jacobs*, 229 A.D.2d 712, 645 N.Y.S.2d 342, 344-45 (1996); *see also* N.Y. C.P.L.R. 2104 ("An agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in a writing subscribed by him or his attorney or reduced to the form of an order and entered.").
- 3 Whether the OWBPA applies to settlements made in-court and on the record is an open question in this circuit. In the unpublished decision *Manning v. N.Y. Univ.*, No. 98-Civ.-3300(NRB), 2001 WL 963982, at \*11-16 (S.D.N.Y. Aug.22, 2001), the Southern District of New York held that the OWBPA does not apply under those circumstances. On appeal, we expressly declined to decide the question. *See Manning v. N.Y. Univ.*, 299 F.3d 156, 164 (2d Cir.2002) (*per curiam*). Because the parties assume that the OWBPA applies and we conclude that its requirements were met in any event, there is again no need for us to decide the question.

215 N.J. 242

Supreme Court of New Jersey.

WILLINGBORO MALL, LTD., a New Jersey  
Limited Partnership, Plaintiff–Appellant,

v.

240/242 FRANKLIN AVENUE, L.L.C.,  
a New York Limited Liability Company;  
Colonial Court Apartments, L.L.C., a Delaware  
Limited Liability Company; Festival Market  
At Willingboro, L.L.C., a New Jersey Limited  
Liability Company; Roy Ludwick; and  
Namik Marke, Defendants–Respondents.

Argued Feb. 27, 2013. | Decided Aug. 15, 2013.

### Synopsis

**Background:** After mortgagee filed mortgage foreclosure action against mortgagor, parties participated in non-binding mediation. Mortgagor moved to enforce purported oral settlement agreement reached in mediation. The Superior Court, Chancery Division, Burlington County, upheld purported settlement agreement. Mortgagor appealed. The Superior Court, Appellate Division, 421 N.J.Super. 445, 24 A.3d 802, affirmed. Mortgagor sought certification to appeal, which was granted.

**Holdings:** The Supreme Court, Albin, J., held that:

[1] mortgagee waived mediation-communication privilege, and

[2] a settlement agreement resulting from mediation was required to memorialized in writing.

Affirmed.

West Headnotes (12)

[1] **Privileged Communications and Confidentiality**

☞ Settlement negotiation privilege; mediation and arbitration

Communications made during the course of a mediation are generally privileged and therefore inadmissible in another proceeding.

1 Cases that cite this headnote

[2] **Privileged Communications and Confidentiality**

☞ Settlement negotiation privilege; mediation and arbitration

A signed written settlement agreement is one exception to the rule that communications made during the course of a mediation of are generally privileged.

1 Cases that cite this headnote

[3] **Privileged Communications and Confidentiality**

☞ Settlement negotiation privilege; mediation and arbitration

An express waiver of the mediation-communication privilege by the parties is an exception to the rule that communications made during the course of a mediation are generally privileged.

1 Cases that cite this headnote

[4] **Appeal and Error**

☞ Cases Triable in Appellate Court

In construing the meaning of a court rule or a statute, the Supreme Court's review is de novo.

1 Cases that cite this headnote

[5] **Appeal and Error**

☞ Credibility of witnesses; trial court's superior opportunity

**Appeal and Error**

☞ Competent or credible evidence

The Supreme Court will defer to a trial court's factual findings, particularly those influenced by the court's opportunity to assess witness testimony firsthand, provided the findings are supported by sufficient credible evidence in the record.

1 Cases that cite this headnote

[6] **Compromise and Settlement**

☞ Nature and Requisites

Public policy favors the settlement of disputes.

1 Cases that cite this headnote

[7] **Alternative Dispute Resolution**

☞ Mediation favored; public policy

The court system encourages mediation as an important means of settling disputes.

Cases that cite this headnote

[8] **Privileged Communications and Confidentiality**

☞ Settlement negotiation privilege; mediation and arbitration

Confidentiality promotes candid and unrestrained discussion, a necessary component of any mediation intended to lead to settlement. R. 1:40-4(d).

Cases that cite this headnote

[9] **Estoppel**

☞ Nature and elements of waiver

Waiver is the voluntary and intentional relinquishment of a known right.

Cases that cite this headnote

[10] **Estoppel**

☞ Nature and elements of waiver

A valid waiver requires not only that a party have full knowledge of his legal rights, but also that the party clearly, unequivocally, and decisively surrender those rights.

Cases that cite this headnote

[11] **Privileged Communications and Confidentiality**

☞ Settlement negotiation privilege; mediation and arbitration

Mortgagee waived privilege for communications made in the course of mediation in dispute concerning purported oral settlement agreement reached in mediation regarding mortgage foreclosure dispute, where, although mortgagor instituted litigation to enforce the purported agreement and breached privilege by disclosing mediation communications, only after filing a certification in opposition to enforcement of the oral agreement, participating in five discovery depositions, and one day of an evidentiary hearing, and after myriad breaches of the mediation-communication privilege, did mortgagee attempt to invoke the privilege on the second hearing date. N.J.S.A. 2A:23C-5(a); N.J.S.A. 2A:84A, App. A, Rules of Evid., N.J.R.E. 519(b)(a).

Cases that cite this headnote

[12] **Compromise and Settlement**

☞ Necessity of writing

A settlement agreement that resulted from mediation was required to be memorialized in writing at the time of mediation in order to be enforceable; rule requiring a signed, written agreement was intended to ensure, to the extent humanly possible, that the parties had voluntarily and knowingly entered into the settlement and to protect the settlement against a later collateral attack, a settlement in mediation should not have been the prelude to a new round of litigation over whether the parties reached a settlement, and the signed, written agreement requirement would greatly minimize the potential for litigation. N.J.S.A. 2A:23C-6(a)(1); N.J.S.A. 2A:84A, App. A, Rules of Evid., N.J.R.E. 519(c)(a)(1).

Cases that cite this headnote

**Attorneys and Law Firms**

**\*\*890** Glenn A. Weiner argued the cause for appellant (Klehr Harrison Harvey Branzburg, attorneys; Mr. Weiner and Michael A. Iaconelli, of counsel and on the briefs).

Joseph P. Grimes, Cherry Hill, argued the cause for respondents (Grimes & Grimes attorneys).

## Opinion

Justice ALBIN delivered the opinion of the Court.

\*245 One of the main purposes of mediation is the expeditious resolution of disputes. Mediation will not always be successful, but it should not spawn more litigation. In this case, the parties engaged in protracted litigation over whether they had reached an oral settlement agreement in mediation. Instead of litigating the dispute that was sent to mediation, the mediation became the dispute.

[1] [2] [3] Communications made during the course of a mediation are generally privileged and therefore inadmissible in another proceeding. A signed written settlement agreement is one exception to the privilege. Another exception is an express waiver of the mediation-communication privilege by the parties.

Here, defendant moved to enforce the oral settlement agreement and, in doing so, submitted certifications by its attorney and the mediator disclosing privileged communications. Instead of seeking to bar the admission of privileged mediation communications, plaintiff, in opposing the motion, litigated the validity of the oral agreement. In pursuing that course, plaintiff also disclosed mediation communications. In particular, plaintiff expressly waived the privilege on the record when questioning the mediator at a deposition and at an evidentiary hearing.

The Chancery Division found that plaintiff had waived the privilege and upheld the parties' oral agreement at the mediation session. The Appellate Division upheld the oral agreement. We affirm the judgment of the Appellate Division.

To be clear, going forward, parties that intend to enforce a settlement reached at mediation must execute a signed written agreement. Had that simple step been taken, the collateral litigation in this case might have been avoided. In responding to the motion to enforce, plaintiff did not timely interpose the lack of a signed written agreement as a defense. Moreover, if plaintiff intended to defend based on the absence of a written agreement, it was obliged not to litigate the validity of the oral agreement by \*246 waiving the mediation-communication privilege. This case should also serve as a

reminder that a party seeking to benefit from the mediation-communication privilege must timely assert it.

## I.

### A.

This case begins with a commercial dispute over the terms of the sale of the Willingboro Mall in Willingboro Township. In February 2005, Willingboro Mall, LTD. (Willingboro), the owner of the Willingboro Mall, sold the property to 240/242 Franklin Avenue, L.L.C. (Franklin). The specific terms of the contract for sale are not germane to this appeal. To secure part of Franklin's obligation, the parties executed a promissory note and mortgage on the property. Willingboro claimed that monies due on August 3, 2005, were not forthcoming and filed a mortgage-foreclosure action on the mall property. Franklin denied that it had defaulted on its contractual obligations and sought dismissal of the complaint. The Honorable Ronald E. Bookbinder, J.S.C., directed the parties to participate in a non-binding mediation for potential resolution of the dispute.

### B.

On November 6, 2007, a retired Superior Court judge conducted the mediation over the course of several hours in the offices of Franklin's attorney, Joseph P. Grimes, Esq.<sup>1</sup> Willingboro's manager, Scott Plapinger, and attorney, Michael Z. Zindler, Esq., appeared on behalf of the company. The mediator met privately with each side, conveying offers and counteroffers. At some point, Franklin offered \$100,000 to Willingboro in exchange for settlement of all claims and for a discharge of the mortgage on the mall property. On behalf of Willingboro, Plapinger orally accepted the \*247 offer in the presence of the mediator, who reviewed with the parties the terms of the proposed settlement. Plapinger also affirmed that he gave his attorney authority to enter into the settlement. The terms of the settlement, however, were not reduced to writing before the conclusion of the mediation session.

Three days later, on November 9, Franklin forwarded to Judge Bookbinder and Willingboro a letter announcing that the case had been "successfully settled." The letter set forth the purported terms of the settlement in eight numbered paragraphs. On November 20, Franklin's attorney sent a

separate letter to Willingboro stating that he held \$100,000 in his attorney trust account to fund the settlement, that Franklin had executed a release, and that the monies would be disbursed when Willingboro filed a stipulation of dismissal in the foreclosure action and delivered a mortgage discharge on the mall property.

On November 30, 2007, Willingboro's attorney told Franklin's attorney that Willingboro rejected the settlement terms and refused to sign a release or to discharge the mortgage. In December, Franklin filed a motion to enforce the settlement agreement. In support of the motion, Franklin attached certifications from its attorney and the mediator that revealed communications made between the parties during the mediation. Among other things, the mediator averred in his certification that the parties voluntarily "entered into a binding settlement agreement with full knowledge of its terms, without any mistake or surprise and without any threat or coercion" and that the settlement terms were accurately memorialized in Franklin's letter to the court.

Willingboro did not give its consent to the filing of either certification. However, Willingboro did not move to dismiss the motion, or strike the certifications, based **\*\*892** on violations of the mediation-communication privilege. Instead, in opposition to the motion to enforce, Willingboro requested an evidentiary hearing and the taking of discovery, and filed a certification from its manager, Scott Plapinger.

**\*248** In his certification, Plapinger averred that he had reluctantly agreed to participate in a mediation that his attorney told him would be non-binding. Plapinger also certified to the substance of the parties' discussions during the mediation. He asserted that as a result of his attorney's relentless insistence he went into a room where the mediator summarized the settlement terms agreed upon by the parties. Plapinger stated that the "purported terms of a final and binding settlement" had not been reduced to writing and that if it had, he would not have signed it. According to Plapinger, after the mediation, his attorney told him that the agreement was "binding" and that he had to sign the settlement papers. He refused to do so.

The trial court ordered the taking of discovery and scheduled a hearing to determine whether an enforceable agreement had been reached during mediation.

C.

The parties deposed five witnesses, including the mediator, Willingboro's manager, and Willingboro's attorney. Before deposing the mediator, the parties agreed that they were "waiv[ing] any issues of confidentiality with regard to the mediation process" and agreed that the testimony elicited could be used for purposes of the motion to enforce the settlement agreement only and not for purposes of the underlying foreclosure action. Despite the waiver, the mediator declined to testify regarding the mediation in the absence of an order from Judge Bookbinder.

After a recess, Judge Bookbinder entered the room where the deposition was being taken. Judge Bookbinder pointed out to the parties' attorneys that under *Rule 1:40-4(d)*, "unless the participants in a mediation agree, no mediator may disclose any mediation communication to anyone who was not a participant in the mediation." Willingboro's attorney stated that the parties agreed to the disclosure. The parties then consented to the court order compelling the mediator to testify. The mediator was deposed and divulged mediation communications.

**\*249 D.**

After the close of discovery, the Honorable Michael J. Hogan, P.J.Ch., conducted a four-day evidentiary hearing. Franklin called the mediator as its first witness. The mediator gave detailed testimony concerning communications made between the parties during the course of the mediation. The mediator testified that at the conclusion of the mediation, after a settlement had been reached, he asked Plapinger whether he had authorized his attorney to accept the \$100,000 settlement offer, and Plapinger answered, "yes." Moreover, Plapinger—who was standing next to his attorney—acknowledged that the settlement ended the case.

On cross-examination by Willingboro's new attorney, Michael Iaconelli, Esq., the mediator balked at disclosing "confidential type information ... conversations [he] had with Mr. Zindler and [Mr. Plapinger]." Iaconelli responded, "it's our position that the parties have waived confidentiality on that issue." Franklin's attorney agreed that "Judge Bookbinder's order is broad enough to waive confidentiality with regard to the mediation." Finally, to satisfy the mediator's concerns, Iaconelli requested that the court issue

"a standing order" requiring answers to questions that "concern discussions between [the mediator] \*\*893 and Mr. Zindler and [Mr. Plapinger] ... because we are waiving, as we've already done, based on the agreement of the parties and Judge Bookbinder's order, any confidentiality on that issue." Willingboro's attorney then continued to question the mediator concerning communications made during the mediation.

On the second day of the hearing, Willingboro reversed course and moved for an order expunging "all confidential communications" disclosed, including those in the mediator's testimony and certification and Franklin's attorney's certification, and barring any further mediation-communication disclosures. Willingboro maintained that mediation communications are privileged under the New Jersey Uniform Mediation Act (Mediation Act or Act) and Rule 1:40-4. Willingboro argued that mediation communications \*250 could not be presented in support of the motion to enforce the settlement.

Judge Hogan—after reviewing the record in detail—ruled that Willingboro had waived the mediation-communication privilege, and the hearing proceeded with the cross-examination of the mediator.

Franklin next called as a witness Michael Zindler, Willingboro's attorney at the mediation. Zindler testified that, on behalf of Willingboro, manager Scott Plapinger agreed to a settlement at the mediation, and that the terms included a payment of \$100,000 by Franklin in exchange for a release and a discharge of the mortgage by Willingboro. He also stated that Franklin's November 9, 2007, letter accurately memorialized the terms of the settlement agreement.

Willingboro called Plapinger to the stand. Plapinger testified that his attorney and the mediator pressured him into agreeing to a settlement that he believed would be non-binding. He acknowledged that the mediator read the terms of the proposed settlement to him and that he "just ... acquiesced and agreed to everything that was asked of [him]." According to Plapinger, "I said whatever I needed to say to extricate myself from an incredible uncomfortable, high pressure situation." Apparently not given to understatement, he also said, "I would have confessed to the Lindbergh kidnapping and the Kennedy assassination.... I said yes to all of it."

Bruce Plapinger, Scott's cousin and a member of Willingboro's board of managers, testified to a telephone

conversation he had with Scott during the mediation. Bruce asserted that he did not believe—based on his conversations with Scott—that the mediation proceeding would lead to a binding result.<sup>2</sup>

## \*251 II.

Judge Hogan held that "a binding settlement agreement was reached as a result of [the] court-directed mediation." He credited the testimony of the mediator and Willingboro's former attorney, Michael Zindler, and discounted the testimony of Scott Plapinger, who—Judge Hogan believed—was suffering from "buyer's remorse." Judge Hogan found that "[e]ven though the [settlement] terms were not reduced to a formal writing at the mediation session," an agreement had been reached, as confirmed by the mediator and Zindler. Judge Hogan noted that Zindler testified that Franklin's November 9 letter had accurately set forth the parties' agreement. Last, the court determined that the validity of the settlement agreement rested on Plapinger's verbal assent to the \*\*894 agreement in the presence of others, not on any unexpressed mental reservations he may have had. Thus, the court granted Franklin's motion to enforce the settlement as memorialized in its November 9 letter.

## III.

The Appellate Division affirmed the trial court's enforcement of the settlement agreement.<sup>3</sup> *Willingboro Mall, Ltd. v. 240/242 Franklin Ave., L.L.C.*, 421 N.J. Super. 445, 456, 24 A.3d 802 (App.Div.2011). The appellate panel acknowledged that parties assigned to mediation may waive the privilege that protects from disclosure any communication made during the course of the mediation, citing *N.J.S.A. 2A:23C-5* and Rule 1:40-4(d). *Id.* at 452, 24 A.3d 802. The panel found that Willingboro "waived the confidentiality normally afforded to" mediation sessions and therefore the trial court properly proceeded to "determine whether the parties had reached a settlement." *Id.* at 455, 24 A.3d 802. Additionally, the panel rejected Willingboro's argument that the mediation rule, *R. 1:40-4(i)*, "require[d] contemporaneous reduction \*252 of the terms to writing and obtaining signatures on the document at the mediation." *Id.* at 453, 24 A.3d 802. Finally, the panel held that there was substantial credible evidence in the record to support the court's findings "that the parties had reached a settlement at the mediation, the terms of the agreement

were as set forth in the November 9, 2007 letter prepared by defendants' attorney to Zindler and the court, and that Scott Plapinger's assent to the settlement was not the product of coercion." *Id.* at 455–56, 24 A.3d 802.

This Court granted Willingboro's petition for certification. *Willingboro Mall, Ltd. v. 240/242 Franklin Ave., L.L.C.*, 209 N.J. 97, 35 A.3d 680 (2012). Willingboro raises two issues in its petition: whether Rule 1:40–4(i) requires a settlement agreement reached at mediation to be reduced to writing and signed at the time of mediation, and whether Willingboro waived the mediation-communication privilege.

#### IV.

Willingboro urges this Court to hold that, under Rule 1:40–4(i), “a settlement reached at mediation [is not] enforceable” unless it is “reduced to writing at the time of the mediation and signed by the parties.” Because the writing memorializing the terms of the settlement was forwarded by Franklin after the mediation and never signed or otherwise assented to by Willingboro, Willingboro argues that both the trial court and Appellate Division erred in enforcing the oral agreement. Moreover, Willingboro disputes the trial court's and Appellate Division's findings that it waived the mediation-communication privilege. Willingboro submits that it did not waive the mediation-communication privilege “by presenting evidence in opposition” to the motion to enforce the oral agreement. Willingboro takes the position that it could not have waived the mediation-communication privilege, which “already had been destroyed by [Franklin's] disclosures” to the court through the mediator's certification. Willingboro posits that its response to Franklin's breach of the mediation-communication privilege was defensive and should not be taken as a waiver of the privilege.

**\*253** In contrast, Franklin maintains that nothing in Rule 1:40–4(i) requires that a **\*\*895** written settlement agreement resulting from mediation “be created or tendered on the actual day of the mediation” or that it be signed by the parties. Franklin argues that the Appellate Division correctly “determined that the three day gap between mediation and memorialization of the settlement was reasonable.” Moreover, Franklin relies on the reasoning and holdings of the trial court and Appellate Division that Willingboro waived the mediation-communication privilege. It therefore requests that this Court uphold enforcement of the oral settlement agreement reached at mediation between the parties.

#### V.

**[4] [5]** In construing the meaning of a court rule or a statute, our review is *de novo*, and therefore we owe no deference to the trial court's or Appellate Division's legal conclusions. *Murray v. Plainfield Rescue Squad*, 210 N.J. 581, 584, 46 A.3d 1262 (2012) (citations omitted); *see also Manalapan Realty, L.P. v. Twp. Comm.*, 140 N.J. 366, 378, 658 A.2d 1230 (1995) (citations omitted) (“A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference.”). On the other hand, we will defer to a trial court's factual findings, particularly those influenced by the court's opportunity to assess witness testimony firsthand, provided the findings are supported by “sufficient credible evidence in the record.” *Brunson v. Affinity Fed. Credit Union*, 199 N.J. 381, 397, 972 A.2d 1112 (2009) (internal quotation marks and citation omitted); *see also Cesare v. Cesare*, 154 N.J. 394, 412, 713 A.2d 390 (1998) (citation omitted).

#### VI.

##### A.

**[6]** Public policy favors the settlement of disputes. Settlement spares the parties the risk of an adverse outcome and the time and **\*254** expense—both monetary and emotional—of protracted litigation. *See State v. Williams*, 184 N.J. 432, 441, 877 A.2d 1258 (2005). Settlement also preserves precious and overstretched judicial resources. *See Herrera v. Twp. of S. Orange Vill.*, 270 N.J. Super. 417, 424, 637 A.2d 526 (App.Div.1993) (“There is a clear public policy in this state favoring settlement of litigation.” (citation omitted)), *certif. denied*, 136 N.J. 28, 641 A.2d 1039 (1994).

**[7]** Our court system encourages mediation as an important means of settling disputes. *See Williams, supra*, 184 N.J. at 446, 877 A.2d 1258 (citations omitted). Indeed, our court rules provide for Complementary Dispute Resolution Programs, which are intended to enhance the “quality and efficacy” of the judicial process. R. 1:40–1. In particular, Rule 1:40–4(a) authorizes, in certain cases, a Superior Court judge to “require the parties to attend a mediation session at any time following the filing of a complaint.”

Mediation is governed by our court rules, *R. 1:40 to 1:40-12*, the Mediation Act, *N.J.S.A. 2A:23C-1 to -13*, and our rules of evidence, *N.J.R.E. 519*. The success of mediation as a means of encouraging parties to compromise and settle their disputes depends on confidentiality—a point recognized in both our jurisprudence and our court rules. *See Williams, supra*, 184 N.J. at 446–47, 877 A.2d 1258; *R. 1:40-4(d)*.

[8] *Rule 1:40-4(d)* provides: “Unless the participants in a mediation agree otherwise or to the extent disclosure is permitted by this rule, no party, mediator, or other participant in a mediation may disclose any mediation communication to anyone \*\*896 who was not a participant in the mediation.” The rule recognizes that without assurances of confidentiality, “‘disputants may be unwilling to reveal relevant information and may be hesitant to disclose potential accommodations that might appear to compromise the positions they have taken.’” *Williams, supra*, 184 N.J. at 447, 877 A.2d 1258 (quoting *Final Report of the Supreme Court Task Force on Dispute Resolution* 23 (1990)). Confidentiality promotes candid and unrestrained discussion, a necessary component of any \*255 mediation intended to lead to settlement. *Id.* at 446–47, 877 A.2d 1258 (citations omitted). To this end, our court and evidence rules and the Mediation Act confer a privilege on mediation communications, ensuring that participants’ words will not be used against them in a later proceeding.

## B.

*Rule 1:40-4(c)* provides that a communication made during the course of mediation is privileged:

A mediation communication is not subject to discovery or admissible in evidence in any subsequent proceeding except as provided by the New Jersey Uniform Mediation Act, *N.J.S.A. 2A:23C-1 to -13*. A party may, however, establish the substance of the mediation communication in any such proceeding by independent evidence.

Although our court rule does not define “mediation communication,” the Mediation Act does. *N.J.S.A. 2A:23C-2* broadly defines a “[m]ediation communication” as any “statement, whether verbal or nonverbal or in a record,

that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator.”

The Mediation Act and our rules of evidence both, in identical language, confer a privilege on mediation communications. *N.J.S.A. 2A:23C-4(a)* and *N.J.R.E. 519(a)* provide: “Except as otherwise provided ... a mediation communication is privileged ... and shall not be subject to discovery or admissible in evidence in a proceeding unless waived or precluded as provided by ... [*N.J.S.A. 2A:23C-5*].” (Emphasis added). *N.J.S.A. 2A:23C-4(b)* and *N.J.R.E. 519(a)(b)* specifically set forth the breadth of the privilege:

b. In a proceeding, the following privileges shall apply:

(1) a mediation party may refuse to disclose, and may prevent any other person from disclosing, a mediation communication.

(2) a mediator may refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the mediator.

....

\*256 Additional support for the broad scope of the privilege is found in the drafters’ commentary to the model Uniform Mediation Act. The drafters explained that the mediation-communication privilege allows a participant “to refuse to disclose and to prevent another from disclosing particular communications.” Nat’l Conference of Comm’rs on Unif. State Laws, *Uniform Mediation Act* § 4, comment 4 (2003) (emphasis added) [hereinafter *UMA Drafters’ Comments*], available at [http://www.uniformlaws.org/shared/docs/mediation/uma\\_final\\_03.pdf](http://www.uniformlaws.org/shared/docs/mediation/uma_final_03.pdf). The drafters understood that the ability to block another from disclosing mediation communications “is critical to the operation of the privilege” and that the “parties have the greatest blocking power.” *Ibid.*

## \*\*897 C.

The mediation-communication privilege is not absolute. Our court and evidence rules and the Mediation Act carve out limited exceptions to the privilege, two of which are pertinent to this case. The first is the signed-writing exception, which allows a settlement agreement reduced to writing and

properly adopted by the parties to be admitted into evidence to prove the validity of the agreement.

Rule 1:40-4(i) specifies the manner in which settlement agreements are to be memorialized “[i]f the mediation results in the parties’ total or partial agreement.” It provides that the agreement “shall be reduced to writing and a copy thereof furnished to each party.” *Ibid.* Rule 1:40-4(i) also provides that “[t]he agreement need not be filed with the court, but if formal proceedings have been stayed pending mediation, the mediator shall report to the court whether agreement has been reached.” Although Rule 1:40-4(i) does not state specifically that a written agreement must be signed by the parties, a publication prepared by the Civil Practice Division makes clear that any settlement agreement should be reduced to writing and signed. Civil Practice Div., *Mediator’s Tool Box: A Case Management Guide for Presumptive Roster Mediators* 11 (Nov. 2011), available at <http://www.judiciary.state.nj.us/civil/mediators-toolbox.pdf> \*257 (“Before the parties leave the mediation, the mediator should insist that a short form settlement agreement (term sheet) be drafted by one of the attorneys and signed by the parties at the mediation table.”).

Although our court rule may be silent about whether a signed agreement is necessary, the Mediation Act and our evidence rules are not. *N.J.S.A.* 2A:23C-6(a)(1) and *N.J.R.E.* 519(c)(a) (1) both provide that “an agreement evidenced by a record signed by all parties to the agreement” is an exception to the mediation-communication privilege. (Emphasis added). Because a signed agreement is not privileged, it therefore is admissible to prove and enforce a settlement.

Although neither the Mediation Act nor *N.J.R.E.* 519 specifies what constitutes an “agreement evidenced by a record” and “signed,” the *UMA Drafters’ Comments* give insight regarding the intended scope of those words. The *UMA Drafters’ Comments* report that those words apply not only to “written and executed agreements,” but also to “those recorded by tape ... and ascribed to by the parties on the tape.” *UMA Drafters’ Comments*, *supra*, at § 6(a)(1), comment 2. For example, “a participant’s notes about an oral agreement would not be a signed agreement.” *Ibid.* In contrast, a “signed agreement” would include “a handwritten agreement that the parties have signed, an e-mail exchange between the parties in which they agree to particular provisions, and a tape recording in which they state what constitutes their agreement.” *Ibid.*

#### D.

The second exception to the mediation-communication privilege relevant to this case is waiver. The privilege

may be waived in a record or orally during a proceeding if it is expressly waived by all parties to the mediation and:

- (1) in the case of the privilege of a mediator, it is expressly waived by the mediator; and
- (2) in the case of the privilege of a nonparty participant, it is expressly waived by the nonparty participant.

\*258 [*N.J.S.A.* 2A:23C-5(a); *N.J.R.E.* 519(b).]

[9] [10] “Waiver is the voluntary and intentional relinquishment of a known \*\*898 right.” *Knorr v. Smeal*, 178 N.J. 169, 177, 836 A.2d 794 (2003) (citation omitted). A valid waiver requires not only that a party “have full knowledge of his legal rights,” but also that the party “clearly, unequivocally, and decisively” surrender those rights. *Ibid.* Importantly, *N.J.S.A.* 2A:23C-5(a) and *N.J.R.E.* 519(b) mandate that the waiver be express. The *UMA Drafters’ Comments* explain that “[t]he rationale for requiring explicit waiver is to safeguard against the possibility of inadvertent waiver.” *UMA Drafters’ Comments*, *supra*, at § 5(a)-(b), comment 1. Moreover, waivers “conducted on the record” do not present the problem of proving “what was said.” *Ibid.*

### VII.

#### A.

We now apply these principles of law to the facts before us. First, had the parties reduced to writing the terms of the agreement and affixed their signatures to the document at the conclusion of the mediation, Franklin would have been able to seek enforcement of the settlement with evidence that fell within an exception to the mediation-communication privilege. *N.J.S.A.* 2A:23C-6(a)(1); *N.J.R.E.* 519 (noting that “an agreement evidenced by a record signed by all parties to the agreement” is an exception to the mediation-communication privilege). But here, the signed-writing exception does not come into play because, early in the proceedings, Willingboro did not seek to bar enforcement of the settlement based on the lack of a signed written agreement. Moreover, if Willingboro intended to rely on

the signed-writing doctrine, then it was obliged to stand by this rule and not litigate the oral agreement by waiving the mediation-communication privilege.

Second, we conclude that the certifications filed by Franklin's attorney and the mediator in support of Franklin's motion to \*259 enforce the oral agreement disclosed privileged mediation communications. The certifications refer to statements made during the mediation and therefore fall squarely within the definition of a "mediation communication" contained in *N.J.S.A.* 2A:23C-2.

Moreover, the Mediation Act and our evidence rules generally prohibit a mediator from making an "oral or written communication" to a court other than to inform the court whether a settlement was reached. *N.J.S.A.* 2A:23C-7(a)-(b); *N.J.R.E.* 519(d). Here, the mediator went far beyond merely communicating to the court that the parties had reached a settlement. The mediator certified to the accuracy of Franklin's November 9 letter, which set forth in eight numbered paragraphs the terms of an oral agreement between the parties. Franklin's letter revealed mediation communications—not only Willingboro's oral assent to the settlement, but also its specific agreement to individual terms. By validating the contents of Franklin's letter, the mediator breached the privilege.

The terms of the settlement rested on privileged communications between the parties and mediator. However, Willingboro did not consent in advance to the disclosure of mediation communications to the court.

In the absence of a signed settlement agreement or waiver, it is difficult to imagine any scenario in which a party would be able to prove a settlement was reached during the mediation without running afoul of the mediation-communication privilege. The United States Court of Appeals for the Third Circuit reached a similar conclusion under its Local Appellate Rule (LAR) 33.5. \*\*899 *Beazer East, Inc. v. Mead Corp.*, 412 F.3d 429, 434–36 (3d Cir.2005) (citing 3d Cir. L.A.R. 33.5 (1995)), *cert. denied*, 546 U.S. 1091, 126 S.Ct. 1040, 163 L.Ed.2d 857 (2006).

In *Beazer*, the plaintiff attempted to enforce an alleged oral agreement made by the parties during an appellate mediation. *Id.* at 434. Like the mediation-communication privilege in *N.J.S.A.* 2A:23C-4 and *N.J.R.E.* 519(a), LAR 33.5(c) provides that no one participating in the mediation session "may disclose 'statements \*260 made or information

developed during the mediation process.' " *Beazer, supra*, 412 F.3d at 434–35 (quoting 3d Cir. L.A.R. 33.5(c) (1995)). LAR 33.5(d) "further provides that 'if a settlement is reached, the agreement shall be reduced to writing and shall be binding upon all parties to the agreement.' " *Id.* at 435 (quoting 3d Cir. L.A.R. 33.5(d) (1995)). The Third Circuit concluded that allowing oral agreements reached at mediation to bind the parties "would seriously undermine the efficacy of the Appellate Mediation Program by compromising the confidentiality of settlement negotiations." *Id.* at 434. The policy reasons supporting this approach are the encouragement of uninhibited discussion and the avoidance of contested hearings to determine whether the parties reached a settlement. *See id.* at 435–36 (citation omitted). Ultimately, the plaintiff in *Beazer* could not "prove the existence or terms of the disputed oral settlement without violating this provision's broadly stated [mediation-communication-disclosure] prohibitions." *Id.* at 435.

Third, without the use of communications made during the mediation, Franklin likely could not have proved the existence of a settlement. Despite Franklin's violation of the mediation-communication privilege in seeking to enforce the oral settlement agreement reached at mediation, Willingboro did not timely move to strike or suppress the disclosures of the mediation communications. Instead, Willingboro proceeded to litigate whether it had, in fact, entered into a binding, oral settlement agreement. In taking this tack, Willingboro followed Franklin's approach and disclosed mediation communications. Willingboro breached the mediation-communication privilege by appending to its opposition papers Scott Plapinger's certification, which revealed the substance of mediation communications. Additionally, Willingboro then engaged in the discovery process, deposing the mediator and participating in four other depositions that trenched on the mediation-communication privilege.

We reject Willingboro's assertion that its own disclosures of mediation communications were permitted by \*261 *N.J.S.A.* 2A:23C-5(b) and *N.J.R.E.* 519(b)(b). That statute and its corollary evidence rule provide: "A person who discloses ... a mediation communication that prejudices another person in a proceeding is precluded from asserting a privilege under [*N.J.S.A.* 2A:23C-4], but only to the extent necessary for the person prejudiced to respond to the representation or disclosure." This language suggests that the disclosure of some privileged communications does not necessarily open the door to disclosure of all privileged communications.

However, in this case, Willingboro expressly waived the mediation-communication privilege in responding to the motion to enforce the oral settlement agreement. In defending against Franklin's violation of the privilege, Willingboro did not have to make further disclosures of mediation communications. It merely had to invoke the protections of the Mediation Act and our evidence rules, which provide that "a mediation party may ... prevent any other person from disclosing [...] a mediation communication." *N.J.S.A. 2A:23C-4(b)(1)*; **\*\*900** *N.J.R.E. 519(a)(b)(1)*. Instead, Willingboro engaged in unrestricted litigation over the validity of the oral agreement, which involved its own wholesale disclosures of mediation communications. Willingboro completely opened the door; it cannot now find shelter in *N.J.S.A. 2A:23C-5(b)* and *N.J.R.E. 519*.

## B.

[11] The mediation-communication privilege "may be waived in a record or orally during a proceeding if it is expressly waived by all parties to the mediation." *N.J.S.A. 2A:23C-5(a)*; *N.J.R.E. 519(b)(a)*. Although Franklin instituted the enforcement litigation and fired the first shot that breached the privilege, Willingboro returned fire, further shredding the privilege. At the mediator's deposition, Willingboro agreed to "waive any issues of confidentiality with regard to the mediation process." When the mediator declined to testify in the absence of a court order, Willingboro gave its unequivocal consent to having Judge Bookbinder direct **\*262** the mediator to respond to questions that touched on communications made during the mediation.

When the mediator testified on the first day of the hearing concerning Franklin's motion to enforce the oral settlement agreement, Willingboro's attorney insisted that the mediator respond to questions that the mediator believed would elicit "confidential type information." Franklin's attorney told the court that "Judge Bookbinder's order is broad enough to waive confidentiality with regard to the mediation." Willingboro's attorney was evidently in total agreement on this issue. Indeed, Willingboro's attorney asked the court to order the mediator to answer questions about mediation discussions between the mediator and Willingboro's representatives, attorney Zindler and company manager Plapinger. Willingboro's attorney also stated that his client had waived the issue of confidentiality.

Only after filing a certification in opposition to enforcement of the oral agreement, participating in five discovery depositions, and one day of an evidentiary hearing—and after myriad breaches of the mediation-communication privilege—did Willingboro attempt to invoke the privilege on the second hearing date. However, by then, Willingboro had passed the point of no return. Willingboro had expressly waived the privilege, *N.J.S.A. 2A:23C-5(a)* and *N.J.R.E. 519(b)(a)*—it had "clearly, unequivocally, and decisively" surrendered its right to object to the admission of evidence regarding mediation communications at the evidentiary hearing. *Knorr, supra*, 178 N.J. at 177, 836 A.2d 794 (citing *Country Chevrolet, Inc. v. Twp. of N. Brunswick Planning Bd.*, 190 N.J.Super. 376, 380, 463 A.2d 960 (App.Div.1983)). Willingboro intentionally elected not to invoke the privilege in a timely manner.

## VIII.

[12] In summary, if the parties to mediation reach an agreement to resolve their dispute, the terms of that settlement must be reduced to writing and signed by the parties before the mediation **\*263** comes to a close. In those cases in which the complexity of the settlement terms cannot be drafted by the time the mediation session was expected to have ended, the mediation session should be continued for a brief but reasonable period of time to allow for the signing of the settlement. We also see no reason why an audio- or video-recorded agreement would not meet the test of "an agreement evidenced by a record signed by all parties to the agreement" under *N.J.S.A. 2A:23C-6(a)(1)* and *N.J.R.E. 519(c)(a)(1)*. See *UMA Drafters' Comments, supra*, at § 6, comment 2. To be **\*\*901** clear, going forward, a settlement that is reached at mediation but not reduced to a signed written agreement will not be enforceable.

The mediation-communication privilege is intended to encourage candid and uninhibited settlement discussions. The rule requiring a signed, written agreement is intended to ensure, to the extent humanly possible, that the parties have voluntarily and knowingly entered into the settlement and to protect the settlement against a later collateral attack. A settlement in mediation should not be the prelude to a new round of litigation over whether the parties reached a settlement. The signed, written agreement requirement—we expect—will greatly minimize the potential for litigation.

Last, this case serves as a reminder that a party seeking the protection of a privilege must timely invoke the privilege. A party that not only expressly waives the mediation-communication privilege, but also discloses privileged communications, cannot later complain that it has lost the benefit of the privilege it has breached.

**IX.**

For the reasons expressed, we affirm the judgment of the Appellate Division, which upheld the Chancery Division's confirmation of the oral settlement agreement in this case.

**\*264 For affirmance**—Chief Justice RABNER and Justices LaVECCHIA, ALBIN, HOENS, PATTERSON and Judge RODRÍGUEZ (temporarily assigned)—6.

*Not Participating*—Judge CUFF (temporarily assigned).

*Opposed*—None.

**Parallel Citations**

71 A.3d 888

**Footnotes**

- 1 This statement of facts was primarily adduced at an evidentiary hearing on a motion to enforce an alleged oral settlement agreement between the parties.
- 2 Also admitted into evidence was a videotaped deposition of Alan Braverman, a business acquaintance of the parties, who testified to an earlier attempt to settle the dispute. The court found his testimony to be “essentially irrelevant.”
- 3 We do not address other issues raised before the trial court and Appellate Division, which are not germane to this appeal.

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101 Cal.Rptr.3d 501

Review Granted

Previously published at: 179 Cal.App.4th 152

(Cal.Const. art. 6, s 12; Cal. Rules of  
Court, Rules 8.500, 8.1105 and 8.1110,  
8.1115, 8.1120 and 8.1125)

Court of Appeal, Second  
District, Division 7, California.

Michael CASSEL, Petitioner,

v.

The SUPERIOR COURT of Los  
Angeles County, Respondent,  
Wasserman, Comden, Casselman & Pearson,  
L.L.P., et al., Real Parties in Interest.

No. B215215. | Nov. 12, 2009.

| Review Granted Feb. 3, 2010. |

See 119 Cal.Rptr.3d 437, 244 P.3d 1080.

#### Synopsis

**Background:** Client brought legal malpractice action against attorneys. Attorneys moved in limine to exclude evidence of communications between attorneys and client during mediation but outside the presence of mediator and opposing parties. The Superior Court, Los Angeles County, No. LC070478, William A. MacLaughlin, J., granted motion. Client appealed.

**Holdings:** The Court of Appeal, Jackson, J., held that:

[1] mediation confidentiality did not apply to the communications, and

[2] making reference to the communications in a later action was not prohibited.

Petition granted.

Perluss, P.J., filed dissenting opinion.

#### Attorneys and Law Firms

\*503 Makarem & Associates, Ronald W. Makarem, Peter M. Kunstler and Jamie R. Greene, Los Angeles, for Petitioner.

No appearance for Respondent.

Haight Brown & Bonesteel, Peter Q. Ezzell, Nancy E. Lucas and Stephen M. Caine, Los Angeles, for Real Parties in Interest.

#### Opinion

JACKSON, J.

#### INTRODUCTION

Petitioner Michael Cassel seeks writ relief from two orders excluding evidence in favor of real parties in interest Wasserman, Comden, Casselman & Pearson L.L.P., David B. Casselman and Steve K. Wasserman. We grant the petition to vacate the orders with directions.

#### FACTUAL AND PROCEDURAL BACKGROUND

In 2005, petitioner Michael Cassel (Cassel) filed a legal malpractice action against his former attorneys, real parties in interest Wasserman, Comden, Casselman & Pearson, L.L.P., David B. Casselman (Casselmann) and Steve K. Wasserman (collectively Wasserman Comden). Wasserman Comden represented Cassel in a lawsuit regarding ownership interest in Von Dutch Originals, LLC, a famous clothing company, and a license to use the Von Dutch name (Von Dutch lawsuit).<sup>1</sup> Cassel and Wasserman Comden met with each other on August 2, 3 and 4, 2004 with respect to the Von Dutch lawsuit. Cassel (directly and through Wasserman Comden) and the opposing party (directly and through his counsel) participated in a mediation on August 4 as a result of which Cassel and the opposing party entered into a \$1.25 million settlement agreement. Cassel subsequently brought the legal malpractice action, alleging that Wasserman Comden forced him to sign the settlement agreement for \$1.25 million, rather than the higher amount he had told Wasserman Comden was acceptable.

In preparation for trial in the legal malpractice action, Wasserman Comden brought a motion in limine seeking to exclude evidence proffered by Cassel regarding certain conversations and conduct between Cassel and Wasserman Comden on August 2, 3, and 4, 2004 during meetings in which they were the sole participants and which were held outside the presence of the opposing party and the mediator. Wasserman Comden claimed that the communications were

protected from disclosure by the mediation confidentiality statutes in Evidence Code sections 1115 et seq.<sup>2</sup> Cassel argued that they were confidential communications between client and his attorneys which were subject to the law of the lawyer-client privilege in section 950 et seq. and that mediation confidentiality did not apply. The trial court and the parties acknowledged that they found no California judicial opinion dealing with \*504 communications solely between a client and his attorneys, outside the presence of the opposing party or the mediator, near or at the time a mediation was scheduled.

The trial court found that the communications were protected by mediation confidentiality and, accordingly, issued orders on April 1 and April 2, 2009 excluding them as evidence on the grounds they were inadmissible.<sup>3</sup> The court and parties discussed referring the issue to the Court of Appeal by petition for writ of mandate. At Cassel's request, on April 3, 2009, the trial court issued an order under Code of Civil Procedure section 166.1 finding that its orders excluding communications between Cassel and Wasserman Comden, based on mediation confidentiality, involve a controlling question of law for which there are substantial grounds for difference of opinion and appellate resolution of the issues could materially advance the termination of the legal malpractice action. The court nevertheless set the trial to begin on August 13, 2009. Cassel included the order in his petition for writ of mandate and stay of proceedings filed April 8, 2009 with respect to the court's orders excluding the communications from evidence.

Cassel requests that we issue a peremptory writ of mandate directing the respondent superior court to vacate its orders of April 1 and April 2, 2009 and to issue a new order denying Wasserman Comden's motion in limine to exclude the evidence and that we award him his costs on this petition.<sup>4</sup>

We issued an order to show cause on April 23, 2009 as to why the court should not be compelled to vacate its orders of April 1 and April 2, 2009 granting Wasserman Comden's in limine motion to exclude evidence and to issue a new and different order denying the motion.

## DISCUSSION

[1] The question presented is whether, as a matter of law, mediation confidentiality requires exclusion of conversations and conduct solely between a client, Cassel, and his attorneys, Wasserman Comden, on August 2, 3, and 4, 2004 during meetings in which they were the sole participants and which were held outside the presence of any opposing party or mediator. The parties present arguments as if there was a mutually exclusive dichotomy—either, according to Cassel, the lawyer-client privilege statutory scheme applies (§ 950 et seq.) or, according to Wasserman Comden, the mediation confidentiality statutes apply (§ 1115 et seq.).

\*505 In our view, resolution of the issue requires consideration of both statutory schemes. The parties apparently agree as to the initial step, application of the lawyer-client privilege statutory scheme. They do not dispute that, absent the filing of the instant malpractice action, the lawyer-client privilege statutory scheme (§ 950 et seq.) would apply to the disclosures sought by Cassel in his capacity as the client. (See § 954.)<sup>5</sup> Nor do they apparently dispute that a statutory exception (§ 958)<sup>6</sup> eliminates the disclosure protections otherwise provided by the privilege when either the lawyer or, as in this case, the client files suit against the other for breach of duties arising out of the lawyer-client relationship. Accordingly, admission of the communications would not be precluded by the lawyer-client privilege. The inquiry must continue, however, to determine whether any other limitations imposed by law preclude disclosure of all or a portion of the content of the communications.

Mediation confidentiality comes into play as a possible limitation.<sup>7</sup> Mediation confidentiality statutes include recognition that other statutes govern disclosure of particular kinds of information. Section 1120, subdivision (a), provides: "Evidence otherwise admissible or subject to discovery outside of a mediation or a mediation consultation shall not be or become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation or a mediation consultation."<sup>8</sup>

Section 1119<sup>9</sup> limits the admissibility of communications during the mediation process. \*506 In subdivisions (a) and (b), section 1119 precludes admission or other disclosure of oral and written communications made "for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation." It provides in subdivision (c) that "[a]ll communications, negotiations, or settlement discussions by and between participants in the course of a mediation

or a mediation consultation shall remain confidential.” Wasserman Comden claims that as a party’s attorney, it qualifies as a “participant” in the mediation process and, therefore, any communication made by Wasserman Comden as the attorney, regardless of the identity of the other communicant, is protected from disclosure. As we explain more fully below, we disagree.

In the instant case, the communicants are a client and his attorneys, the communications are outside the presence of, and not otherwise communicated to, any opposing party (or its attorney) or the mediator, and reveal nothing said or done in the mediation discussion. By definition, mediation is a process facilitated by a mediator between disputing parties, not between a client and his attorney. Section 1115<sup>10</sup> provides the following definition: “[¶] (a) ‘Mediation’ means a process in which a neutral person or persons facilitate *communication between the disputants* to assist them in reaching a mutually acceptable agreement.” (Italics added.)

For mediation purposes, a client and his attorney operate as a single participant. Subdivision (b) of section 1775.1 of the Code of Civil Procedure provides: “Unless otherwise specified in this title or ordered by the court, any act to be performed by a party may also be performed by his or her counsel of record.” This is consistent with the common understanding that “party” as used in numerous procedural statutes, means “not only the actual litigant, but also the litigant’s attorney of record.” (*Levy v. Superior Court* (1995) 10 Cal.4th 578, 583, 41 Cal.Rptr.2d 878, 896 P.2d 171.)

Legislative intent and policy behind mediation confidentiality are to facilitate communication by a party that otherwise the party would not provide, given the potential for another party to the mediation to use the information against the revealing party; they are not to facilitate communication between a party and his own attorney. “The legislative intent underlying the mediation confidentiality provisions of the Evidence Code is clear. The ... purpose of confidentiality is to promote ‘a candid and informal exchange regarding events in the past.... This frank exchange is achieved only if the participants know that what is said in the mediation will not be used to their detriment through later court proceedings and other adjudicatory processes.’ (Nat. Conf. of Comrs. on U. State Laws, U. Mediation Act (May 2001) § 2, Reporter’s working notes, [¶] 1; see also Note, *Protecting Confidentiality in Mediation* (1984) 98 Harv. L.Rev. 441, 445. [‘Mediation demands ... that the parties feel free to be

frank not only with the mediator but also with each other ... Agreement may be impossible if the mediator cannot overcome the parties’ wariness \*507 about confiding in each other during these sessions.’.] [¶] ... [C]onfidentiality is essential to effective mediation...” (*Foxgate Homeowners’ Assn. v. Bramalea California, Inc.* (2001) 26 Cal.4th 1, 14, 108 Cal.Rptr.2d 642, 25 P.3d 1117, italics added; accord, *Rojas v. Superior Court* (2004) 33 Cal.4th 407, 415–416, 15 Cal.Rptr.3d 643, 93 P.3d 260.)

Wasserman Comden relies on *Wimsatt v. Superior Court*, supra, 152 Cal.App.4th 137, 61 Cal.Rptr.3d 200 as support for its argument that mediation confidentiality statutes apply broadly to conversations solely between a party and his attorney. The admissibility issues before the *Wimsatt* court were in a context similar to the circumstances in the instant case. In a legal malpractice action, the client alleged that his attorneys breached their fiduciary duty by lowering the dollar amount of the client’s settlement demand without the client’s knowledge or consent on the eve of a mediation. (*Id.* at p. 144, 61 Cal.Rptr.3d 200.) The communications at issue referred to a purported \$1.5 million settlement demand made by the plaintiff’s attorney to at least one of the defendant’s attorneys, in three forms—statements in mediation briefs, emails recounting portions of the briefs’ statements, and a telephone conversation. (*Id.* at pp. 147, 158, 61 Cal.Rptr.3d 200.) The purported demand occurred after the close of the first mediation between the parties and shortly before the second mediation between them. (*Id.* at p. 147, 61 Cal.Rptr.3d 200.) The trial court denied the attorney’s motion for a protective order to seal all the communications on the basis of mediation confidentiality. (*Id.* at p. 148, 61 Cal.Rptr.3d 200.) The attorney sought a writ mandating the trial court to vacate its denial and issue the protective order. (*Id.* at p. 149, 61 Cal.Rptr.3d 200.)

Wasserman Comden points to the statement of the *Wimsatt* court that “[t]he stringent result we reach here means that when clients ... participate in mediation they are, in effect, relinquishing all claims for new and independent torts arising from mediation, including legal malpractice causes of action against their own counsel. Certainly clients, who have a fiduciary relationship with their lawyers, do not understand that this result is a by-product of an agreement to mediate.” (*Wimsatt v. Superior Court*, supra, 152 Cal.App.4th at p. 163, 61 Cal.Rptr.3d 200.) That statement is not, however, the court’s holding and, therefore, does not operate as authority for such a broad unqualified rule. The court had previously indicated that its holding was not an unqualified bar to

disclosure of all communications by a party's attorney. Specifically, the court had stated that "[p]reventing [the party/client] from accessing mediation-related communications may mean he must forgo his legal malpractice lawsuit against his own attorneys." (*Id.* at p. 162, 61 Cal.Rptr.3d 200, italics added.)

Further, the *Wimsatt* court did not reach the same decision as to all three forms of communication. The court held that, pursuant to section 1119, the disclosures of statements appearing in mediation briefs and emails that contained the statements were protected and not subject to discovery. (*Wimsatt v. Superior Court*, *supra*, 152 Cal.App.4th at pp. 158-159, 61 Cal.Rptr.3d 200.) The court required little analysis to reach its conclusion. The court stated that "[m]ediation briefs epitomize the types of writings which the mediation confidentiality statutes have been designed to protect from disclosure." (*Id.* at p. 158, 61 Cal.Rptr.3d 200.) They are, the court continued, "an integral part of the mediation process and are 'prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation,' \*508 and are to remain confidential." (*Id.* at pp. 158-159, 61 Cal.Rptr.3d 200.) The court directed the trial court to issue a protective order prohibiting disclosure of the statements from the briefs and the emails. (*Id.* at p. 165, 61 Cal.Rptr.3d 200.)

The court did not, however, reach the same conclusion with respect to a telephone conversation that "might have occurred on the 'eve' " of the second mediation and in which the plaintiff's attorney purportedly made the demand to at least one of the defendant's attorneys. (*Wimsatt v. Superior Court*, *supra*, 152 Cal.App.4th at p. 160, 61 Cal.Rptr.3d 200.) In dealing with the attorney-to-opposing attorney communication, the *Wimsatt* court provided guidelines for analyzing communications not clearly a part of the protected mediation process. The court noted that the exact number and content of conversations and which of the defendant's attorneys was involved were unclear, but "[w]hat is clear is that ... the moving party[ ] has the burden to show that the conversation is protected by mediation confidentiality. To do so, the timing, context, and content of the communication all must be considered. Mediation confidentiality protects communications and writings if they are materially related to, and foster, the mediation. [Citations.] Mediation confidentiality is to be applied where the writing or statement would not have existed but for a mediation communication, negotiation, or settlement discussion. [Citation.]" (*Ibid.*) The court explained that the

timing of a conversation in relation to a scheduled mediation session was not determinative of whether the conversation was protected by mediation confidentiality. (*Id.* at p. 161, 61 Cal.Rptr.3d 200.) The court concluded that the moving party failed to meet its "burden to link the conversation to a mediation session." (*Ibid.*) In short, the *Wimsatt* court determined that evidence of the telephone conversation between the opposing attorneys was not protected from disclosure by mediation confidentiality.

The communications in the instant case are distinguishable from the communications that the *Wimsatt* court concluded were protected by mediation confidentiality, in that there is no readily identifiable link to the mediation in the communications, such as content of a mediation brief. (Cf. *Wimsatt v. Superior Court*, *supra*, 152 Cal.App.4th at pp. 158-159, 61 Cal.Rptr.3d 200.) Furthermore, any nexus to the mediation is even more tenuous than the one which the *Wimsatt* court determined was insufficient to bring the settlement demand telephone conversation within the ambit of mediation confidentiality protection. Similarly to the *Wimsatt* conversation, some of the communications at issue here involved specific dollar figures as to the amount acceptable for settlement. As the *Wimsatt* conversation, the communications were made very close to the time for a scheduled mediation session at which a settlement figure might have been or was discussed.

As to the telephone conversation, the *Wimsatt* court observed that there was evidence that it occurred during a telephone call about scheduling experts' depositions and touching on whether a second mediation would be worthwhile. (*Wimsatt v. Superior Court*, *supra*, 152 Cal.App.4th at p. 161, 61 Cal.Rptr.3d 200.) The court explained that the moving party had not demonstrated that the conversation was "anything other than expected negotiation posturing that occurs in most civil litigation.... It is not unusual for parties to change positions as new information is developed ... [and to] revalue liability and damages." (*Id.* at pp. 160-161, 61 Cal.Rptr.3d 200.) The court continued that "[t]hus, the conversation may have occurred ... even if there was to be no \*509 mediation." (*Id.* at p. 161, 61 Cal.Rptr.3d 200.) In the instant case, there were similar indications that some of the communications were more related to the civil litigation process as a whole rather than to the mediation. For example, according to the record, Casselman expressed in his deposition that, during the course of Wasserman Comden's conference with their client that occurred after the mediation process had begun, he was evaluating the value of the case as he always does when it

appears that the case will go to trial. The *Wimsatt* court's rationale on this point would also support a conclusion that the fact that Cassel or his attorneys may have discussed a specific dollar amount for settlement with the other party, its attorneys, or the mediator would not be sufficient to render a statement solely between Cassel and his attorneys about a specific dollar amount inadmissible.

The foregoing discussion points out some similarities between the lawyer-client communications at issue here and the indicators in the *Wimsatt* case that the telephone conversation between the opposing attorneys was not protected by mediation confidentiality. There is a key factual distinction that renders the communications in the instant case even farther removed from being protected by mediation confidentiality than the *Wimsatt* conversation. In the instant case, the communications were not made by the client or his attorneys to another party (or its attorney) which was a participant in the mediation or to the mediator. That is, as we previously concluded, they were not communications between "disputants" and the "mediator," as required to come within the definition of a "mediation" or "mediation consultation" and, therefore, to qualify for protection under mediation confidentiality. (§§ 1115, 1119.)

[2] The parties have cited no California case which addresses the factual circumstances in the instant case, i.e., communications made solely between a client and his attorneys outside the presence of an opposing party, or its attorney, or the mediator, and containing no information of anything said or done or any admission by a party made in the course of the mediation. We know of none.<sup>11</sup> The mediation \*510 cases cited by Wasserman Comden are factually distinguishable, in that they involved communications between a party or its attorney to another party to the mediation about the mediated dispute or a communication to or by the mediator about the mediation.

[3] Perhaps most importantly, Wasserman Comden and Cassel are not within the class of persons which mediation confidentiality was intended to protect from each other—the "disputants," i.e., the litigants—in order to encourage candor in the mediation process. (*Rojas v. Superior Court*, *supra*, 33 Cal.4th at pp. 415–416, 15 Cal.Rptr.3d 643, 93 P.3d 260; accord, *Foxgate Homeowners' Assn. v. Bramalea California, Inc.*, *supra*, 26 Cal.4th at p. 14, 108 Cal.Rptr.2d 642, 25 P.3d 1117.) There is no indication of any legislative intent that the mediation confidentiality statutes were to protect a lawyer from his client where only the client was a disputant

in a mediation. As previously discussed, in the mediation confidentiality statutes, "the party" refers to the litigant who is one of the disputants in a mediation. (See Code Civ. Proc., § 1775.1; see also § 1115.) A party's attorney is a component of, "the party" to the mediation, rather than a free-standing, independent entity. (See Code Civ. Proc., § 1775.1.)

[4] Wasserman Comden also asserts that the trial court properly applied section 1128 to exclude the communications. Pursuant to section 1128, "[a]ny reference to a mediation during any other subsequent non-criminal proceeding is grounds for vacating or modifying the decision in that proceeding, in whole or in part, and granting a new or further hearing on all or part of the issues, if the reference materially affected the substantial rights of the party requesting relief." As we previously concluded the meetings in which the communications occurred do not qualify as mediation meetings protected by mediation confidentiality. In addition, no reference need be made to a mediation with respect to the communications. In any event, section 1128 does not apply to any and all references to a mediation, but only a reference which "materially affected the substantial rights of the party requesting relief."

[5] With start of trial within two weeks, the meetings and accompanying communications between Cassel and Wasserman Comden were for trial strategy preparation, not just for mediation or creation of any documents or other communications such as mediation briefs or witness statements intended solely for use in the mediation. The proximity in time of the meetings and communications to any part of the mediation process is not determinative. (*Wimsatt v. Superior Court*, *supra*, 152 Cal.App.4th at p. 160, 61 Cal.Rptr.3d 200.) The crux of the communications was that Cassel wanted his Wasserman Comden attorneys to honor his wishes, but they resisted to the extent, according to Cassel, that they breached their duties to him as his counsel. Neither Cassel nor Wasserman Comden assert that the communications contained information which the opposing party (or its representatives) or the mediator provided during mediation or otherwise contained any information of anything said or done or any admission by a party made in the course of the mediation. For the foregoing reasons, we conclude that the communications solely between Cassel as a client and his lawyer, Wasserman Comden, do not constitute oral and written communications made "for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation" protected by section 1119, subdivisions (a) and (b) or communications by "participants" protected by

section 1119, subdivision (c). Wasserman Comden \*511 failed to demonstrate a sufficiently close link between the communications and the mediation to require application of mediation confidentiality to the communications. (*Wimsatt v. Superior Court*, *supra*, 152 Cal.App.4th at p. 160, 61 Cal.Rptr.3d 200.) For this reason, the evidence should not be excluded.

### DISPOSITION

The petition for writ of mandate is granted. The trial court is directed to vacate its orders of April 1 and April 2, 2009, and to issue a new order denying Wasserman Comden's motion in limine to exclude evidence of Cassel's communications with his own attorneys and evidence of conduct by Cassel engaged in only in the presence of his own counsel, all of which occurred outside the presence of any opposing party (or its authorized representatives) or any mediator (as defined in § 1115, subd. (b)) prior to and on the same days as the mediation of the *Von Dutch* lawsuit. The temporary stay order is hereby terminated. Cassel shall recover his costs of this proceeding.

I concur: ZELON, J.

PERLUSS, P.J., Dissenting.

I respectfully dissent.

Evidence Code section 1119, subdivision (a),<sup>12</sup> provides, "No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any ... civil action...."<sup>13</sup> Nonetheless, the majority holds statements between a client and his or her lawyer made expressly and solely for the purpose of mediation (for example, discussions in a private strategy session immediately before or during mediation proceedings) would not be protected from compelled disclosure unless they were also communicated to, or made in the presence of, an opposing party or its attorney or the mediator.<sup>14</sup> That conclusion, in my \*512 view, is not only at odds with the clear language of section 1119, subdivision (a), but also inconsistent with the Supreme Court's repeated disapproval of "judicially crafted exception[s]" to the mediation confidentiality statutes. (See *Foxgate Homeowners' Assn. v. Bramalea California, Inc.* (2001) 26 Cal.4th 1, 14,

108 Cal.Rptr.2d 642, 25 P.3d 1117 (*Foxgate*); *Rojas v. Superior Court* (2004) 33 Cal.4th 407, 424, 15 Cal.Rptr.3d 643, 93 P.3d 260; see also *Fair v. Bakhtiari* (2006) 40 Cal.4th 189, 194, 51 Cal.Rptr.3d 871, 147 P.3d 653.) The majority's narrow interpretation of section 1119, subdivision (a), is based in large part on section 1115, subdivision (a)'s definition of "mediation" as a process in which a neutral person, the mediator, "facilitate[s] communication between the disputants to assist them in reaching a mutually acceptable agreement." Cassel was the "disputant" in the mediation in the underlying litigation; his counsel at Wasserman, Comden, Casselman & Pearson, L.L.P., was not a separate party or disputant, but operated together with Cassel as a single party. Thus, private communications between Cassel and his lawyer were not "between the disputants" or between a disputant and the mediator. To that point, I have no disagreement with the majority's analysis. And if mediation confidentiality pursuant to section 1119, subdivision (a), were limited to anything said or admissions made "in the course of" a mediation, I might well agree with its conclusion. But section 1119, subdivision (a), applies equally to statements or admissions made "for the purpose of" a mediation. For that additional statutory language to have meaning, mediation confidentiality must cover statements that were not made "in the course of" the mediation proceeding itself. (See *Metcalf v. County of San Joaquin* (2008) 42 Cal.4th 1121, 1135, 72 Cal.Rptr.3d 382, 176 P.3d 654 [courts should avoid construction of a statute that makes any word surplusage]; *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 249, 127 Cal.Rptr.2d 177, 57 P.3d 654 [same].) That is, private, unilateral statements that are materially related to the mediation are inadmissible and protected from disclosure, even if they are not communicated to another party or the mediator and do not otherwise reveal anything said or done in the course of the mediation itself. The majority's more restricted interpretation of section 1119, subdivision (a), improperly ignores this statutory language.

A broader interpretation of section 1119, subdivision (a), than the majority's is also mandated by section 1122, subdivision (a), which specifies certain circumstances in which a communication or a writing, otherwise protected by mediation confidentiality, may be disclosed or admitted into evidence in a subsequent civil action. Pursuant to this provision, if all persons who conduct or otherwise participate in the mediation expressly agree to disclosure, the communication or writing is admissible. (§ 1122, subd. (a)(1).) Even absent the express agreement of all parties to the mediation, if the communication or writing "was prepared by or on behalf of fewer than all the mediation

participants,” the communication or writing is admissible if “those participants expressly agree ... to its disclosure, and the communication, document, or writing does not disclose anything said or done or any admission made in the course of the mediation.” (§ 1122, subd. (a)(2).) As explained in the Law Revision Commission comments to this provision, “Subdivision (a)(2) facilitates admissibility and disclosure of unilaterally prepared materials, but it only applies so long as those materials may be \*513 produced in a manner revealing nothing about the mediation discussion.” (Cal. Law Revision Com. com., reprinted at 29B pt. 3B West’s Ann. Evid.Code (2009 ed.) foll. § 1122, p. 409.)

What mediation-related communications or writings are prepared by fewer than all mediation participants and reveal nothing about mediation discussions? While this category might include something more than the type of communications between a party and his or her lawyer at issue in this writ proceeding (for example, planning discussions between two codefendants relating to the mediation), plainly section 1122, subdivision (a)(2), contemplates the application of mediation confidentiality (absent express agreement to the contrary) to private statements made for the purpose of mediation that are not communicated to the opposing party or the mediator. If the majority’s interpretation of the scope of section 1119, subdivision (a), were correct, section 1122, subdivision (a)(2), would be unnecessary.

In the end, the majority’s analysis of section 1119, subdivision (a), seems to be founded primarily on its concern that protecting private communications between a client and his or her lawyer under the rubric of mediation confidentiality may shield unscrupulous lawyers from well-founded malpractice actions without furthering the fundamental policies favoring mediation. That may well be true; but, respectfully, it is not our role to make that determination. Rather, it is for the Legislature to balance competing public policies and to create an exception to the statutory scheme governing mediation confidentiality where it finds it appropriate to do so. (See *Foxgate*, *supra*, 26 Cal.4th at p. 17, 108 Cal.Rptr.2d 642, 25 P.3d 1117 [Supreme Court deferred to Legislature to balance competing public policies even though recognizing confidentiality in case before it left unpunished sanctionable conduct and, in effect, undermined the entire purpose of mediation]; *Wimsatt v. Superior Court* (2007) 152 Cal.App.4th 137, 152–153, 155, 61 Cal.Rptr.3d 200 [Supreme Court and Courts of Appeal have resisted attempts to narrow the scope of mediation confidentiality “even in situations where justice seems to call for a different result”].)

I would deny the petition for writ of mandate.

#### Parallel Citations

, 09 Cal. Daily Op. Serv. 13,757, 2009 Daily Journal D.A.R. 16,051

#### Footnotes

- 1 The action is a federal trademark and copyright lawsuit, *Von Dutch Originals, LLC v. Cassel*, Case No. CV 04–0255 CAS (CTX).
- 2 All further statutory references are to the Evidence Code unless otherwise identified.
- 3 As to the conversations at issue, the court stated that “[t]he communications that occurred on August 3rd in the meeting that in any way addressed[ ] the mediation[ ] are going to be subject to the confidentiality, as is what the communications were during the mediation and leading to the premeeting and meetings—periodic meeting during the day when the mediation was actually not in progress are going to be subject to the privilege.” Regarding the conduct at issue, the court orally ruled that if Cassel’s proffered testimony would be “that in effect his attorneys were looming over him or around him in such a manner that by their proximity, their demeanor, and their manner that they were intimidating him to force him to sign [the settlement agreement], my ruling is that is a communication and that is subject to the [mediation confidentiality] [¶] ... [¶] ... exclusion.” The court also ruled that the conduct of one of the attorneys in accompanying Cassel to the restroom during the attorney-client meetings was also communication protected by mediation confidentiality.
- 4 Cassel also requested that we issue an immediate temporary stay order in order to permit review and a final order on the petition prior to further proceedings in the trial court. We issued such an order on April 9, 2009.
- 5 In pertinent part, section 954 provides: “Subject to Section 912 and except as otherwise provided in this article, the client, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer if the privilege is claimed by: [¶] (a) The holder of the privilege; [¶] (b) A person who is authorized to claim the privilege by the holder of the privilege; or [¶] (c) The person who was the lawyer at the time of the confidential communication, but such person may not claim the privilege if there is no holder of the privilege in existence or if he is otherwise instructed by a person authorized to permit disclosure.”

- 6 Section 958 provides: "There is no privilege under this article as to a communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship."
- 7 Although some courts have chosen to refer to mediation confidentiality as the "mediation privilege," courts have also recognized that mediation confidentiality does not create a privilege, but rather operates as an extrinsic confidentiality protection. (See *Wimsatt v. Superior Court* (2007) 152 Cal.App.4th 137, 150, fn. 4, 61 Cal.Rptr.3d 200; *In re Marriage of Kieturakis* (2006) 138 Cal.App.4th 56, 61–62 and fn. 2, 41 Cal.Rptr.3d 119.)
- 8 Such recognition is similarly indicated, albeit more indirectly, by Section 1116, subdivision (b), which states: "Nothing in this chapter makes admissible evidence that is inadmissible under Section 1152 or any other statute."
- 9 Section 1119 reads in full as follows: "Except as otherwise provided in this chapter: [¶] (a) No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given. [¶] (b) No writing, as defined in Section 250, that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given. [¶] (c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential."
- 10 Section 1115 reads in full as follows: "For purposes of this chapter: [¶] (a) 'Mediation' means a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement. [¶] (b) 'Mediator' means a neutral person who conducts a mediation. 'Mediator' includes any person designated by a mediator either to assist in the mediation or to communicate with the participants in preparation for a mediation. [¶] (c) 'Mediation consultation' means a communication between a person and a mediator for the purpose of initiating, considering, or reconvening a mediation or retaining the mediator."
- 11 We note that in section 1122, the mediation confidentiality statutes recognize that there may be circumstances in which a writing or other communication is unilaterally generated by a mediation disputant, but comes within the purview of mediation confidentiality. Presumably such generation process could involve communications solely between the disputant and his attorneys. Section 1122, subdivision (a)(2), however, operates as a limit on the scope of section 1119. It allows a party to consent to the disclosure of a communication, document, or writing that the party unilaterally prepared solely for itself "for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation" if the "communication, document, or writing does not disclose anything said or done or any admission made in the course of the mediation." (§ 1122, subd. (a)(2); *Rojas v. Superior Court*, *supra*, 33 Cal.4th at pp. 418–421, 15 Cal.Rptr.3d 643, 93 P.3d 260.) The legislative intent is to facilitate "admissibility and disclosure of unilaterally prepared materials, but it only applies so long as those materials may be produced in a manner revealing nothing about the mediation discussion." (*Rojas*, *supra*, at p. 421, 15 Cal.Rptr.3d 643, 93 P.3d 260.)
- Applying section 1122, subdivision (a)(2), to the facts in the instant case, the communications between Cassel and his attorneys would not be protected from disclosure under section 1119 even if, arguably, they were "made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation." The communications were unilaterally generated by Cassel, either directly or through his attorneys as his agents. They did not disclose anything said or done or any admission made in the course of the mediation, and Cassel clearly has consented to their disclosure.
- 12 Statutory references are to the Evidence Code.
- 13 Section 1119, subdivision (b), in language substantially the same as section 1119, subdivision (a), provides no writing "prepared for the purpose of, in the course of, or pursuant to, a mediation" is admissible or subject to discovery or compelled disclosure.
- 14 Whether a particular statement or writing exchanged between a client and his or her lawyer is materially related to the mediation is a separate and different question from whether mediation confidentiality is available at all for this category of communications. The proper reach of mediation confidentiality pursuant to section 1119 presents a question of law subject to independent review by this court (see *In re Tobacco II Cases* (2009) 46 Cal.4th 298, 311, 93 Cal.Rptr.3d 559, 207 P.3d 20 [the meaning of statutory language presents a question of law that we review de novo]) and is the only issue addressed by the majority in granting petitioner Michael Cassel's request for relief. Whether the trial court erred in concluding a particular statement is sufficiently connected to a mediation to be protected from disclosure, however, is an evidentiary ruling subject to abuse-of-discretion review. (See *Wimsatt v. Superior Court* (2007) 152 Cal.App.4th 137, 160, 61 Cal.Rptr.3d 200 ["[m]ediation confidentiality protects communications and writings if they are materially related to, and foster, the mediation"]; see generally *Zhou v. Unisource Worldwide* (2007) 157 Cal.App.4th 1471, 1476, 69 Cal.Rptr.3d 273 [trial court's ruling on the admissibility of evidence generally reviewed for abuse of discretion].) Cassel does not argue in his petition that the trial court abused its discretion in concluding, after carefully reviewing each of the statements at issue here, that they were materially related to the mediation in the underlying, Von Dutch lawsuit, and that issue is not properly

**Cassel v. Superior Court, 179 Cal.App.4th 152 (2009)**

101 Cal.Rptr.3d 501, 09 Cal. Daily Op. Serv. 13,757, 2009 Daily Journal D.A.R. 16,051

before us. (Cf. *Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 216, fn. 4, 188 Cal.Rptr. 115, 655 P.2d 317 [argument asserted in the trial court but not raised on appeal is forfeited]; *Boueher v. Alliance Title Co., Inc.* (2005) 127 Cal.App.4th 262, 267, 25 Cal.Rptr.3d 440 [same].)

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Affirmed.

640 F.3d 53  
United States Court of Appeals,  
Second Circuit.

In re TELIGENT, INCORPORATED, Debtor,  
Savage & Associates, P.C., Plaintiff—  
Appellant—Cross—Appellee,  
v.  
K & L GATES LLP, Appellee—Cross—Appellant,  
and  
Alex Mandl, Defendant—Appellee—Cross Appellee.

Docket Nos. 10–2257–bk (L), 10–2411–bk (XAP).

| Argued: Jan. 11, 2011. | Decided: May 5, 2011.

**Synopsis**

**Background:** Law firm moved to lift two protective orders prohibiting disclosure of communications made during mediation. Unsecured claims representative moved to enjoin law firm from raising questions about validity of certain provisions of settlement agreement as defense to malpractice in related action. The bankruptcy court, Bernstein, Chief Judge, 417 B.R. 197, denied those motions. Parties appealed. The United States District Court for the Southern District of New York, P. Kevin Castel, J., 2010 WL 2034509, affirmed. Parties appealed.

**Holdings:** The Court of Appeals, Pooler, Circuit Judge, held that:

[1] special or compelling need did not exist for blanket lift of confidentiality provisions in protective orders;

[2] law firm did not show that “extraordinary circumstances” warranted disclosure;

[3] firm did not show that its need for mediation communications outweighed important interest in protecting confidentiality of material; and

[4] firm, as potential debtor of debtor of estate, due to alleged malpractice, could not have been considered “party in interest” with standing to contest validity of settlement agreement when motion to approve that agreement was pending before bankruptcy court.

West Headnotes (11)

[1] **Bankruptcy**

⇒ Conclusions of law; de novo review

**Bankruptcy**

⇒ Clear error

In an appeal from a district court's review of a decision of a bankruptcy court, the Court of Appeals conducts an independent and plenary review of the bankruptcy court's decision, accepting the bankruptcy court's findings of fact unless they are clearly erroneous and reviewing its conclusions of law de novo.

1 Cases that cite this headnote

[2] **Bankruptcy**

⇒ Conclusions of law; de novo review

A bankruptcy court's view of the principles governing who may contest a settlement as a party in interest is reviewed de novo. 11 U.S.C.A. § 1109(b).

Cases that cite this headnote

[3] **Bankruptcy**

⇒ Discretion

A bankruptcy court's decision to not amend a protective order is reviewed for abuse of discretion.

Cases that cite this headnote

[4] **Federal Civil Procedure**

⇒ Protective orders

**Privileged Communications and Confidentiality**

⇒ Settlement negotiation privilege; mediation and arbitration

Special or compelling need did not exist for blanket lift of confidentiality provisions in protective orders, and thus confidential mediation communications could not be

disclosed, where law firm did not submit any evidence that there was special need for disclosure of any specific communication.

2 Cases that cite this headnote

[5] **Privileged Communications and Confidentiality**

⇒ Settlement negotiation privilege; mediation and arbitration

Confidentiality is an important feature of the mediation and other alternative dispute resolution processes; promising participants confidentiality in these proceedings promotes the free flow of information that may result in the settlement of a dispute and protecting the integrity of alternative dispute resolution generally.

8 Cases that cite this headnote

[6] **Privileged Communications and Confidentiality**

⇒ Settlement negotiation privilege; mediation and arbitration

A party seeking disclosure of confidential mediation communications must demonstrate (1) a special need for the confidential material, (2) resulting unfairness from a lack of discovery, and (3) that the need for the evidence outweighs the interest in maintaining confidentiality.

7 Cases that cite this headnote

[7] **Privileged Communications and Confidentiality**

⇒ Settlement negotiation privilege; mediation and arbitration

Law firm did not show that "extraordinary circumstances" warranted disclosure, such as resulting unfairness from lack of discovery, and thus confidential mediation communications could not be disclosed, where evidence sought was available through other means, including through responses to interrogatories or depositions.

2 Cases that cite this headnote

[8] **Privileged Communications and Confidentiality**

⇒ Settlement negotiation privilege; mediation and arbitration

Law firm did not show that its need for mediation communications outweighed important interest in protecting confidentiality of material, and thus confidential mediation communications could not be disclosed, where law firm did not submit any evidence that there was special need for disclosure of any specific communication.

6 Cases that cite this headnote

[9] **Federal Civil Procedure**

⇒ Protective orders

**Privileged Communications and Confidentiality**

⇒ Settlement negotiation privilege; mediation and arbitration

Confidentiality provisions of protective orders entered in the context of mediation are entitled to a presumption against modification.

1 Cases that cite this headnote

[10] **Bankruptcy**

⇒ Reorganization cases; right to be heard

**Bankruptcy**

⇒ Judicial authority or approval

Law firm, as potential debtor of debtor of estate, due to alleged malpractice, could not have been considered "party in interest" with standing to contest validity of settlement agreement when motion to approve that agreement was pending before bankruptcy court, since firm had too remote an interest in settlement agreement in that settlement did not require firm to pay any money to estate or to estate's debtor; therefore, law firm was not estopped from asserting defense challenging validity of any provision of settlement agreement in connection with related malpractice action currently pending against law firm. 11 U.S.C.A. § 1109(b); Federal Rule of Bankruptcy Procedure 9019, 11 U.S.C.A.

1 Cases that cite this headnote

[11] **Bankruptcy**

Reorganization cases; right to be heard

Whether someone is a party in interest must be read against the purposes of Chapter 11, which are to preserve going concerns and maximize property available to satisfy creditors.

11 U.S.C.A. § 1109(b).

2 Cases that cite this headnote

**Attorneys and Law Firms**

\*54 Denise Savage, Savage & Associates, P.C., Croton on Hudson, NY, for Plaintiff-Appellant-Cross-Appellee Savage & Associates, P.C.

Luba Shur (Michael S. Sundermeyer, Mark S. Levinstein, on the brief), Williams & Connolly LLP, Washington, DC, for Appellee-Cross-Appellant K & L Gates LLP.

\*55 Andrew C. Hall, Hall, Lamb and Hall, P.A., Miami, FL, for Defendant-Appellee-Cross-Appellee Alex Mandl.

Before: POOLER, WESLEY, and CHIN, Circuit Judges.

**Opinion**

POOLER, Circuit Judge.

Appeal and cross-appeal from an order of the United States District Court for the Southern District of New York (Castel, J.) affirming the order of the bankruptcy court (Bernstein, C.B.J.), which denied K & L Gates LLP's ("K & L Gates") motion to lift two protective orders prohibiting disclosure of communications made during a mediation, and Savage & Associates, P.C.'s cross-motion to enjoin K & L Gates from raising questions about the validity of certain provisions of a settlement agreement as a defense to malpractice in a related action.

With respect to the cross-appeal, the protective orders are silent as to when their confidentiality restrictions may be lifted; therefore, disclosure would have been warranted only if the party seeking disclosure had demonstrated (1) a special need for the confidential material it sought; (2) resulting unfairness from a lack of discovery; and (3) that the need for the evidence outweighed the interest in maintaining confidentiality. K & L Gates failed to make the requisite

showing, and accordingly, we conclude there was no error in the denial of the law firm's motion.

With respect to the lead appeal, because K & L Gates was, at most, a potential debtor of a debtor of the estate, it could not have been considered a "party in interest" with standing to contest the validity of the settlement agreement when the motion to approve that agreement was pending before the bankruptcy court. There was, therefore, no error in the holding that K & L Gates is not barred from asserting a defense challenging the validity of any provision of the settlement agreement in connection with the related malpractice action currently pending against the law firm. Accordingly, we affirm the order of the district court in its entirety.

**BACKGROUND**

Since the issues are narrow, we recite only as much of the factual background as is necessary to understand the decision.

When Teligent, Inc. ("Teligent") hired Alex Mandl as its CEO in 1996, the company extended Mandl a \$15 million loan. The loan was to be due and payable immediately if Mandl resigned his employment without "good reason," but would be automatically forgiven if Teligent terminated Mandl's employment other than for "cause."

Mandl retained the law firm K & L Gates LLP around April 2001 in connection with his potential departure from Teligent. At that time, \$12 million was outstanding on the loan. K & L Gates drafted a severance agreement for Mandl that, according to the law firm, "reflect[ed] that Teligent had terminated Mandl other than for Cause effective as of April 27, 2001, thus triggering automatic loan forgiveness."

Less than a month after the parties ratified the severance agreement, Teligent filed for bankruptcy under Chapter 11. Cross-Appellee Savage & Associates, P.C. ("Savage & Associates") was appointed by the bankruptcy court to be the Unsecured Claims Estate Representative. In discharging its duties pursuant to this role, Savage & Associates filed approximately 1,000 adversary proceedings. These adversary proceedings included an action against Mandl, brought under Sections 548 and 550 of Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 548, 550, to recover the balance of the loan. Mandl again retained \*56 K & L Gates to represent him in connection with this matter.

The bankruptcy court held a one-day trial after which it concluded that Mandl had resigned before Teligent terminated his employment, and therefore, Mandl was liable for the balance of the loan. *See In re Teligent, Inc.*, 380 B.R. 324, 333–36 (Bankr.S.D.N.Y.2008). That finding was not appealed.

Shortly after the bankruptcy court issued its decision relating to the loan, Mandl retained Greenberg Traurig, LLP (“Greenberg Traurig”) as new counsel. Greenberg Traurig then filed a number of motions, including a motion for relief from the judgment based in part on a claim of newly discovered evidence. Around the same time, Savage and Associates commenced a new lawsuit in the Eastern District of Virginia against Mandl, naming as defendants Mandl's wife, Susan Mandl, and ASM Investments LLC (“ASM”), an entity associated with Mandl, and alleging that Mandl had fraudulently transferred certain property through ASM to his wife in order to shelter his assets from creditors.

All parties to the action in Virginia participated in a voluntary mediation in attempt to resolve both the motions before the bankruptcy court as well as the Virginia Action. Greenberg Traurig invited K & L Gates to participate in the mediation, to address Mandl's claim that K & L Gates committed malpractice in the course of representing him during his termination from Teligent and in the resulting adversary proceeding. K & L Gates declined to participate.

In setting up a framework for the mediation, the parties agreed to be bound by the terms of the protective orders routinely employed by the Bankruptcy Court in the Southern District of New York in the context of court-ordered mediation (the “Protective Orders”). The Protective Orders imposed limitations, inter alia, on the disclosure of information relating to the mediation. However, the Protective Orders provided no guidance on when, or if, a party might be entitled to release confidential information connected to the mediation.

Although formal mediation did not result in a settlement, the parties thereafter reached an agreement. In exchange for dismissal of the action in Virginia, Mandl agreed to pay the estate \$6.005 million and to commence a malpractice suit against K & L Gates. The terms of the agreement also required Mandl to remit to the estate 50% of the net value of any malpractice recovery. The bankruptcy court approved the settlement pursuant to a motion under Federal Rule of Bankruptcy Procedure 9019. The approval of the settlement is not before us on appeal.

On May 30, 2008, and as required by the settlement, Mandl filed a malpractice action against K & L Gates in the Superior Court of the District of Columbia. During discovery, K & L Gates sought documents relating to “the negotiations leading up to the Settlement Agreement, including all mediation and settlement communications[.]” K & L Gates argued that the discovery was “critical to issues such as causation, mitigation, and damages.” In response to K & L Gates's request, Mandl produced certain documents.

When Savage and Associates learned that Mandl had disclosed confidential mediation communications, Denise Savage, the firm's principal, contacted Mandl, insisting that he withhold all documents relating to the settlement agreement. Denise Savage also demanded that K & L Gates destroy or return any such documents in its possession. Both parties complied with these requests.

\*57 K & L Gates then filed a motion with the bankruptcy court, seeking to lift the confidentiality provisions of the Protective Orders. The bankruptcy court denied the motion, *see In re Teligent, Inc.*, 417 B.R. 197 (Bankr.S.D.N.Y.2009), reasoning, among other things, that K & L Gates had not shown a need for *all* mediation communications, though the law firm had sought discovery of the entire universe of documents. *Id.* at 207. The bankruptcy court also noted that its conclusion was “not intended to foreclose K & L's right to argue before the DC court that a specific communication is not covered by the confidentiality provisions of the [Protective] Orders (e.g., it was not made ‘during the mediation process’), or that the court should nevertheless order disclosure of a specific communication under applicable law.” *Id.* at 209. The bankruptcy court's denial of K & L Gates's motion to lift the confidentiality provisions of the Protective Orders is the subject of the cross-appeal before us.

Savage & Associates opposed the motion to lift the Protective Orders before the bankruptcy court and cross-moved for injunctive relief prohibiting K & L Gates from asserting any defense in the District of Columbia action relating to the mediation of the action filed in Virginia. Specifically, Savage & Associates sought to enjoin K & L Gates from raising as a defense to malpractice that certain provisions in the settlement agreement between Mandl and Savage were invalid. The bankruptcy court denied Savage & Associates' motion for injunctive relief, *see In re Teligent, Inc.*, 417 B.R. 197, 210 (Bankr.S.D.N.Y.2009), and the district court

affirmed, *see In re Teligent Servs., Inc.*, No. 09 Civ. 09674, 2010 WL 2034509 (S.D.N.Y. May 13, 2010). These orders are the subject of the lead appeal before us.

## DISCUSSION

[1] [2] [3] In an appeal from a district court's review of a decision of a bankruptcy court, we conduct an independent and plenary review of the bankruptcy court's decision, accepting the bankruptcy court's findings of fact unless they are clearly erroneous and reviewing its conclusions of law de novo. *Evans v. Ottimo*, 469 F.3d 278, 281 (2d Cir.2006). Further, we review de novo the bankruptcy court's view of the principles governing who may contest a settlement as a party in interest under Section 1109(b), *In re Refco Inc.*, 505 F.3d 109, 116 (2d Cir.2007), and we review for abuse of discretion the bankruptcy court's decision not to amend a protective order, *cf. SEC v. TheStreet.Com*, 273 F.3d 222, 228 (2d Cir.2001) (Fed.R.Civ.P. 26(c) protective order).

### I. The Cross-Appeal

[4] In this case, the bankruptcy court denied K & L Gates's motion to lift the confidentiality provisions of the Protective Orders based on the court's conclusion that K & L Gates failed to demonstrate a compelling need for the discovery, failed to show that the information was not otherwise available, and failed to establish that the need for the evidence was outweighed by the public interest in maintaining confidentiality. *See generally In re Teligent*, 417 B.R. 197 (Bankr.S.D.N.Y.2009). The district court affirmed these conclusions. *See In re Teligent Servs., Inc.*, No. 09 Civ. 09674, 2010 WL 2034509 (S.D.N.Y. May 13, 2010). There was no error in this conclusion.

[5] Confidentiality is an important feature of the mediation and other alternative dispute resolution processes. Promising participants confidentiality in these proceedings "promotes the free flow of information that may result in the settlement of a dispute," *In re Grand Jury Subpoena* \*58 Dated Dec. 17, 1996, 148 F.3d 487, 492 (5th Cir.1998), and protecting the integrity of alternative dispute resolution generally, *see e.g., In re Cnty. of Los Angeles*, 223 F.3d 990, 993 (9th Cir.2000); *Clark v. Stapleton Corp.*, 957 F.2d 745, 746 (10th Cir.1992) (*per curiam*); *Sheldone v. Pa. Tpk. Comm'n*, 104 F.Supp.2d 511, 517 (W.D.Pa.2000); *Fields-D'Arpino v. Rest. Assocs., Inc.*, 39 F.Supp.2d 412, 417 (S.D.N.Y.1999); *Folb v. Motion Picture Indus. Pension & Health Plans*, 16

F.Supp.2d 1164, 1170-80 (C.D.Cal.1998), *aff'd* 216 F.3d 1082 (9th Cir.2000); *Bernard v. Galen Grp., Inc.*, 901 F.Supp. 778, 784 (S.D.N.Y.1995). We vigorously enforce the confidentiality provisions of our own alternative dispute resolution, the Civil Appeals Management Plan ("CAMP"), because we believe that confidentiality is "essential" to CAMP's vitality and effectiveness. *Lake Utopia Paper Ltd. v. Connelly Containers, Inc.*, 608 F.2d 928, 930 (2d Cir.1979); *see also Calka v. Kucker Kraus & Bruh*, 167 F.3d 144, 146 (2d Cir.1999) (*per curiam*); 2d Cir. app. D, R. 4 (prohibiting parties in CAMP conferences from advising "unauthorized third parties of discussions or action taken at the conference").

[6] A party seeking disclosure of confidential mediation communications must demonstrate (1) a special need for the confidential material, (2) resulting unfairness from a lack of discovery, and (3) that the need for the evidence outweighs the interest in maintaining confidentiality. *Accord Iridium India Telecom Ltd. v. Motorola, Inc.*, 165 Fed.Appx. 878, 880 (2d Cir.2005) (summary order) (movant must show "a compelling need or extraordinary circumstances necessary to modify [a] protective order"); *see also In re Anonymous*, 283 F.3d 627, 636-37 (4th Cir.2002); *cf. TheStreet.Com*, 273 F.3d at 229 ("Where there has been reasonable reliance by a party or deponent, a District Court should not modify a protective order granted under Rule 26(c) absent a showing of improvidence in the grant of [the] order or some extraordinary circumstances or compelling need" (alteration in original, internal quotation marks omitted)); *Martindell v. Int'l Tel. & Tel. Corp.*, 594 F.2d 291, 296 (2d Cir.1979) (same). All three factors are necessary to warrant disclosure of otherwise non-discoverable documents.

We draw this standard from the sources relied upon by the learned bankruptcy court, which include the Uniform Mediation Act ("UMA"), the Administrative Dispute Resolution Act of 1996 ("ADRA 1996"), 5 U.S.C. §§ 571 et seq.,<sup>1</sup> and the Administrative Dispute Resolution Act of 1998 ("ADRA 1998"), 28 U.S.C. §§ 651 et seq.<sup>2</sup> Each of these recognizes the importance of maintaining the confidentiality of mediation communications and provides for disclosure in only limited circumstances. \*59 For example, ADRA 1996, which applies to federal administrative agency alternative dispute resolution, prohibits disclosure of confidential mediation communications unless the party seeking disclosure demonstrates exceptional circumstances, such as when non-disclosure would result in a manifest injustice, help establish a violation of law, or prevent harm to the public health or safety.

5 U.S.C. § 574(b)-(c). Relatedly, under the UMA, the party seeking disclosure of confidential mediation communications must demonstrate that the evidence is not otherwise available and that the need for the communications substantially outweighs the interest in protecting confidentiality. UMA § 6(b).

The standards for disclosure under the UMA and the ADRAs are also consistent with the standard governing modification of protective orders entered under Federal Rule of Civil Procedure 26(c). As we explained in *FDIC v. Ernst & Ernst*, 677 F.2d 230 (2d Cir.1982) (per curiam), once a protective order has been entered and relied upon, “it can only be modified if an ‘extraordinary circumstance’ or ‘compelling need’ warrants the requested modification.” *Id.* at 232 (quoting *Martindell*, 594 F.2d at 296). In *SEC v. TheStreet.Com*, 273 F.3d 222 (2d Cir.2001), we further refined this principle, explaining that there is a “strong presumption against the modification of a protective order,” and orders should not be modified “absent a showing of improvidence in the grant of the order or some extraordinary circumstance or compelling need.” *Id.* at 229 (internal quotation marks, alteration, and citations omitted).

Here, as the bankruptcy court observed, K & L Gates has sought a blanket lift of the confidentiality provisions in the Protective Orders. *In re Teligent*, 417 B.R. at 207. However, K & L Gates failed to demonstrate a special or compelling need for *all* mediation communications. *Cf. TheStreet.Com*, 273 F.3d at 229. Indeed, the law firm failed to submit any evidence to support its argument that there was a special need for disclosure of any specific communication. There was, therefore, no error in the bankruptcy court's conclusion that K & L Gates failed to satisfy prong one of the standard governing disclosure of confidential mediation communications.

[7] Likewise, the bankruptcy court committed no error in holding that K & L Gates failed to satisfy prong two of the test. As the bankruptcy court explained, the law firm failed to demonstrate a resulting unfairness from a lack of discovery, because the evidence sought by K & L Gates was available through other means, including through responses to interrogatories or depositions. *See In re Teligent*, 417 B.R. at 208. Accordingly, the law firm failed to show that “extraordinary circumstances” warrant disclosure. *Cf. TheStreet.Com*, 273 F.3d at 229.

[8] [9] Finally, because K & L Gates failed to demonstrate a special need for the mediation communications, the law firm did not satisfy prong three of the test, which requires a party seeking disclosure of confidential material to show that its need outweighs the important interest in protecting the confidentiality of the material. As we explained in the context of litigation in *TheStreet.Com*, if “protective orders have no presumptive entitlement to remain in force, parties would resort less often to the judicial system for fear that such orders would be readily set aside in the future.” *Id.* at 229–30. It follows that similar concerns arise in the context of mediation. Were courts to cavalierly set aside confidentiality restrictions on disclosure of communications made in the context of mediation, parties might be less frank and forthcoming during the mediation \*60 process or might even limit their use of mediation altogether. These concerns counsel in favor of a presumption against modification of the confidentiality provisions of protective orders entered in the context of mediation. Accordingly, we conclude that there was no error in the denial of K & L Gates's motion to lift the confidentiality provisions of the Protective Orders in this case.

## II. The Lead Appeal

[10] Appellant argues principally that K & L Gates should be enjoined from raising, as a defense in the malpractice action in D.C. Superior Court, any arguments relating to the validity of the provisions of the settlement agreement because K & L Gates did not raise its challenge to the provisions of the settlement agreement when the agreement's approval was pending before the bankruptcy court. Insofar as this argument is premised on Savage & Associates's mistaken conclusion that K & L Gates had standing to challenge the approval of the settlement agreement, we disagree. As the bankruptcy court concluded, K & L Gates could not have appeared before the bankruptcy court to challenge the settlement agreement because K & L Gates lacked both Article III and prudential standing to object to the order, and was not a “party in interest” under 11 U.S.C. § 1109(b). 417 B.R. at 210.<sup>3</sup>

Section 1109 provides that “[a] party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter.” *See* 11 U.S.C. § 1109. Beyond this non-exhaustive list, the term “party in interest” is not further defined in the statute. *In re Comcoach Corp.*, 698 F.2d 571, 573 (2d Cir.1983). “The general theory behind the section is that anyone holding

a direct financial stake in the outcome of the case should have an opportunity ... to participate in the adjudication of any issue that may ultimately shape the disposition of his or her interest." Alan Resnick & Henry J. Sommer, *Collier on Bankruptcy* ¶ 1109.01 (16th ed. 2011); *accord FutureSource LLC v. Reuters Ltd.*, 312 F.3d 281, 284 (7th Cir.2002); *In re Alplex Computer Corp.*, 71 F.3d 353, 357 (10th Cir.1995); *In re Hutchinson*, 5 F.3d 750, 756 (4th Cir.1993). However, courts have long recognized that the meaning of the term "must be determined on an 'ad hoc' basis," and the categories mentioned in Section 1109 are "not meant to exclude other types of interested parties from the purview of that section." *In re Johns-Manville Corp.*, 36 B.R. 743, 747, 748 (Bankr.S.D.N.Y.1984), *aff'd*, 52 B.R. 940 (S.D.N.Y.1985); *accord In re Martin Paint Stores*, 207 B.R. 57, 61 (S.D.N.Y.1997) ("The term 'party in interest' is broadly interpreted, but not infinitely expansive."); *see also In re Ionosphere Clubs, Inc.*, 101 B.R. 844, 849 (Bankr.S.D.N.Y.1989) (Section 1109(b) is not exclusive in its listing of parties in interest, but "if a party is not affected by the reorganization process it should not be considered a party in interest").

Although parties in interest typically have a financial stake in the outcome of the litigation, under certain limited circumstances, courts have recognized that a party with a legal (as opposed to financial) interest may appear. *See, e.g., In re Mailman Steam Carpet Cleaning Corp.*, 196 F.3d 1, 5 (1st Cir.1999) (individual creditor \*61 may maintain adversary proceeding against trustee for alleged breach of duty); *In re Brady*, 101 F.3d 1165, 1170-71 (6th Cir.1996) (trustee acts as a party in interest in seeking extension of time to object to dischargeability of a debt on behalf of creditors); *In re Co Petro Mktg. Grp., Inc.*, 680 F.2d 566, 572 (9th Cir.1982) (regulatory agency with supervisory responsibilities over the debtor's business or financial affairs); *In re Overview Equities, Inc.*, 240 B.R. 683, 686-87 (Bankr.E.D.N.Y.1999) (party with legal interest in property, rather than claim, found to be a party in interest).

[11] Whether or not someone is a party in interest must be read against the purposes of Chapter 11, which are to "preserv[e] going concerns and maximiz[e] property available to satisfy creditors," *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 453, 119 S.Ct. 1411, 143 L.Ed.2d 607 (1999) (citation omitted). Thus, any construction of the term "party in interest" must be mindful of the fact that Chapter 11 is structured the way that it is because Congress believed that "creditors and

equity security holders are very often better judges of the debtor's economic viability and their own economic self-interest than courts, trustees, or [governmental agencies such as] the SEC," *id.* at 458 n. 28, 119 S.Ct. 1411, and that is why Chapter 11 allows the intervention of third parties in limited circumstances, such as in the case of parties in interest. Although "party in interest" must be interpreted in terms of the specific provision in which it appears, *see In re Refco Inc.*, 505 F.3d at 116 n. 9 (2d Cir.2007) (noting that "party in interest" may have different meanings in different portions of the bankruptcy code), other rights afforded "parties in interest" throughout the bankruptcy code are instructive. These include: (1) the right to request the appointment of a trustee or examiner under Section 1104(a) and (b); (2) the right to request termination of a trustee's appointment under Section 1105; (3) the right to request conversion of a chapter 11 case to a case under an alternate chapter pursuant to Section 1112(b); (4) the right to file a plan under Section 1121(c); (5) the right to object to confirmation of a plan under Section 1128(b); and (6) the right to request a revocation of an order of confirmation under Section 1144.

There is no question in this case that K & L Gates had too remote an interest in the settlement agreement to have been considered a party in interest for the purposes of being heard before the bankruptcy court on the agreement's approval. As the bankruptcy court succinctly explained, the law firm "was not a creditor of Teligent; it was merely a potential debtor of Teligent's debtor (*i.e.*, Mandl). As such, it had no financial stake in the outcome of the bankruptcy case. Further, it had no stake in the outcome of the 9019 Motion [because] the Settlement did not require K & L to pay any money to the Teligent estate or to Mandl." *In re Teligent*, 417 B.R. at 210. We find no error in these conclusions. And because K & L Gates lacked standing to challenge the settlement agreement when it was pending before the bankruptcy court, the law firm is not estopped from asserting a defense in the malpractice action that relates to the validity of the settlement agreement. *See Marvel Characters, Inc. v. Simon*, 310 F.3d 280, 288-89 (2d Cir.2002) (collateral estoppel applies only where (1) the identical issue was raised in a prior proceeding; (2) the issue was actually litigated and decided; (3) the party had a full and fair opportunity to litigate the issue; and (4) the resolution of the issue was necessary to support a valid and final judgment on the merits).

\*62 We have considered Appellant and Cross-Appellant's remaining contentions and find them to be without merit for

substantially the reasons stated by the bankruptcy and district courts.

For the reasons stated herein, we **AFFIRM** the order of the district court.

### CONCLUSION

### Parallel Citations

65 Collier Bankr.Cas.2d 1264, 54 Bankr.Ct.Dec. 177, Bankr. L. Rep. P 82,000

### Footnotes

- 1 ADRA 1996 directs district courts to maintain and make available to litigants alternative dispute resolution programs. *See* 28 U.S.C. § 651(b). Although ADRA 1996 left the particulars of those programs to the local rules of each court, *see id.*, it did require courts to "provide for the confidentiality of the alternative dispute resolution processes and ... prohibit disclosure of confidential dispute resolution communications," *id.* § 652(d).
- 2 ADRA 1998 provides the authority for the bankruptcy court's Court Annexed Alternative Dispute Resolution Program, through Local Rule 9019-I and a series of general orders. *See* 28 U.S.C. § 651(b); Bankr.S.D.N.Y. R. 9019-1; *In re Adoption of Procedures Governing Mediation*, General Order M-390 Amending and reinstating M143 and M2-11 (Bankr.S.D.N.Y. Dec. 1, 2009); *see also In re Expansion of General Order M-143 to Include the Use of Early Neutral Evaluation and Mediation/Voluntary Arbitration*, General Order M-211, Amended General Order M-143 (Bankr.S.D.N.Y. Oct. 20, 1999).
- 3 Because we agree that K & L Gates was not a "party in interest," we do not reach the constitutional or prudential questions.

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452 B.R. 374  
United States District Court,  
S.D. New York.

**In re A.T. REYNOLDS & SONS, INC.,**  
d/b/a Leisure Time Spring Water, Debtor.

No. 10 Civ. 2917(WHP). | March 18, 2011.

### Synopsis

**Background:** Purchaser that acquired Chapter 11 debtor as going concern moved for payment of wage claims of debtor's employees for week preceding sale's effective date. After mediator for court-ordered mediation advised that secured creditor had failed to participate in good faith, order to show cause was issued directing secured creditor and its counsel to show cause why they should not be sanctioned for contempt. The Bankruptcy Court, Cecelia G. Morris, J., 424 B.R. 76, held secured creditor and its counsel in contempt and imposed sanctions on them for failure to comply with a mediation order, and they appealed.

**Holdings:** The District Court, William H. Pauley III, J., held that:

[1] secured creditor was within its rights to enter the mediation with the position that it would not make a settlement offer;

[2] confidentiality considerations preclude a court from inquiring into the level of a party's participation in mandatory court-ordered mediation;

[3] secured creditor sent to the mediation a representative with sufficient settlement authority; and

[4] the bankruptcy court's finding that secured creditor attempted to "control the procedural aspects of the mediation" was clearly erroneous.

Reversed.

### West Headnotes (14)

[1] **Bankruptcy**  
⚡ Discretion

Bankruptcy court's award of sanctions may be set aside only for abuse of discretion.

Cases that cite this headnote

[2] **Bankruptcy**  
⚡ Discretion

Bankruptcy court abuses its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence.

Cases that cite this headnote

[3] **Bankruptcy**  
⚡ Clear error

Bankruptcy court's finding is "clearly erroneous" when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

Cases that cite this headnote

[4] **Bankruptcy**  
⚡ Discretion

Bankruptcy court abuses its discretion if its decision, though not necessarily the product of a legal error or a clearly erroneous factual finding, cannot be located within the range of permissible decisions.

Cases that cite this headnote

[5] **Bankruptcy**  
⚡ Discretion

While a bankruptcy court's contempt orders, like its awards of sanctions, are reviewed for abuse of discretion, review of a contempt order is more exacting than under the ordinary abuse-of-discretion standard because a bankruptcy court's contempt power is narrowly circumscribed.

Cases that cite this headnote

[6] **Compromise and Settlement**

⇒ Fraud or duress

Court cannot force a party to settle, nor may it invoke “pressure tactics” designed to coerce a settlement.

1 Cases that cite this headnote

[7] **Compromise and Settlement**

⇒ Fraud or duress

Although a court may require parties to appear for a settlement conference, it may not coerce a party into making an offer to settle.

3 Cases that cite this headnote

[8] **Alternative Dispute Resolution**

⇒ Compulsory mediation; mediation as condition precedent

Party at court-ordered mediation is within its rights to adopt a “no-pay” position.

2 Cases that cite this headnote

[9] **Alternative Dispute Resolution**

⇒ Compulsory mediation; mediation as condition precedent

**Bankruptcy**

⇒ Procedure

Secured creditor was within its rights to enter mediation ordered by the bankruptcy court with the position that it would not make a settlement offer; it was also within its rights to predetermine that it was not liable, and to insist on being dissuaded of the supremacy of its legal position.

1 Cases that cite this headnote

[10] **Alternative Dispute Resolution**

⇒ Mode and course of proceedings

Parties to a mediation must listen courteously to opposing arguments and respond in kind.

Cases that cite this headnote

[11] **Privileged Communications and Confidentiality**

⇒ Settlement negotiation privilege; mediation and arbitration

Confidentiality considerations preclude a court from inquiring into the level of a party's participation in mandatory court-ordered mediation, that is, the extent to which a party discusses the issues, listens to opposing viewpoints, and analyzes its liability.

2 Cases that cite this headnote

[12] **Alternative Dispute Resolution**

⇒ Failure to mediate

Party's failure to send a representative with settlement authority to a mediation may illustrate a lack of good faith warranting sanctions. Fed.Rules Civ.Proc.Rule 16(f), 28 U.S.C.A.

1 Cases that cite this headnote

[13] **Alternative Dispute Resolution**

⇒ Compulsory mediation; mediation as condition precedent

Where a mediation order requires the presence of a person with “settlement authority,” a party satisfies this requirement by sending a person with authority to settle for the anticipated amount in controversy and who is prepared to negotiate all issues that can be reasonably expected to arise.

1 Cases that cite this headnote

[14] **Alternative Dispute Resolution**

⇒ Compulsory mediation; mediation as condition precedent

**Bankruptcy**

⇒ Procedure

Bankruptcy court clearly erred in finding that secured creditor attempted to “control the procedural aspects of the [court-ordered] mediation”; secured creditor ultimately submitted a mediation statement and attended the mediation, as required by the order, the issues raised by secured creditor in pre-mediation

exchanges with mediator were legitimate points of concern regarding the issues to be raised in the mediation and the other parties' participation in the proceeding, and there was nothing in the general mediation order preventing parties from raising such valid concerns.

<sup>1</sup> Cases that cite this headnote

#### Attorneys and Law Firms

\*376 Nicholas Anthony Pascale, Steven Louis Tarshis, Tarshis, Catania, Liberth, Mahon & Milligram Newburgh, NY, for Debtor.

#### Opinion

#### MEMORANDUM & ORDER

WILLIAM H. PAULEY III, District Judge.

Appellants Wells Fargo Bank, N.A. ("Wells Fargo") and Ruskin Moscou Faltischek, P.C. ("Ruskin") appeal from an order of the United States Bankruptcy Court, Southern District of New York (Morris, J.) dated February 5, 2010, sanctioning Wells Fargo and Ruskin for failure to comply with a mediation order and holding them in contempt. As this appeal demonstrates, the specter of sanctions and contempt spawns ancillary litigation that often eclipses the issues at the heart of the underlying proceeding. For the following reasons, the Bankruptcy Court's order is reversed.

#### BACKGROUND

##### I. Bankruptcy Proceedings

This dispute arises out of the Chapter 11 bankruptcy of A.T. Reynolds & Sons, Inc. ("A.T. Reynolds") in 2008. During the bankruptcy proceedings, A.T. Reynolds and Wells Fargo jointly stipulated to two interim orders, under which, *inter alia*, Wells Fargo provided A.T. Reynolds with a cash collateral account to use in conjunction with the sale of A.T. Reynolds assets to Boreal Water Collection, Inc. ("Boreal"). At the sale hearing, New York State Electric and Gas Corporation ("NYSEG") sought payment of \$35,256.23 for unpaid utility bills (the "Utility Payment"). (Hr'g Tr. dated March 27, 2009 ("3/27 Tr.") 37–38.) After negotiations, Wells Fargo agreed to make the Utility Payment, and Boreal

Water Collection, Inc. ("Boreal"), the prospective buyer of A.T. Reynolds assets, agreed to a small increase in the interest rate in its payments to Wells Fargo. (3/27 Tr. 67–68.) Boreal finalized the purchase of A.T. Reynolds on April 3, 2009. (Docket No. 175.)

\*377 On July 8, 2009, Boreal brought a claim against A.T. Reynolds for unpaid wages (the "Wage Claim"). (Docket No. 103.) Boreal also contended that rather than paying the Utility Payment out-of-pocket, Wells Fargo "utilized the monies in the [A.T. Reynolds] cash collateral account" (Docket No. 103 ¶ 7) that could have been used to pay the Wage Claim. (Hr'g Tr. dated Aug. 25, 2009 ("8/25 Tr.") 8.) The Bankruptcy Court ordered that the issue be mediated. (8/25 Tr. 10; Docket No. 224.)

The Bankruptcy Court's Mediation Order incorporated General Order M–390 of the United States Bankruptcy Court, Southern District of New York, which provides in relevant part:

3.2. **Mediation Conference.** A representative of each party shall attend the mediation conference, and must have *complete authority to negotiate all disputed amounts and issues*. The mediator shall control all procedural aspects of the mediation. The mediator shall also have the discretion to require that the party representative or a non-attorney principal of the party with *settlement authority* be present at any conference.... The mediator shall report any willful failure to attend or to participate in *good faith* in the mediation process of conference. Such failure may result in the imposition of sanctions by the court.

*In re Adoption of Procedures Governing Mediation*, General Order M–390 Amending and Reinstating M–143 and M–211 (Bankr. S.D.N.Y. Dec. 1, 2009) (emphasis added).

##### II. Pre-Mediation Conduct

Robert Goldman was chosen as the mediator ("Mediator") on September 24, 2009 (Docket No. 227), and Wells Fargo attempted to discern from him the topics of discussion at the

mediation. In response, counsel for A.T. Reynolds suggested the following:

1. Whether Wells Fargo represented to the Court at the ... sale of the debtor's business that the utility bill would be paid by Wells;
2. Whether there was any agreement between Boreal and Wells, as alleged by Boreal, to have an additional interest point paid by Boreal to Wells at the ... closing to make sure the utility was paid, if that point was paid, how it was applied;
3. Whether Wells (intentionally or otherwise) double-dipped by taking both the point from Boreal and by sweeping the Debtor's cash collateral account to pay the same Utility bill, which resulted in insufficient funds to pay wages to debtors employees;
4. Whether Wells violated the cash collateral order, and/or breached its deal with Boreal in so doing;

....

And, *any other issues anyone wants to discuss* of course.

(Affidavit of Jeffrey A. Wurst dated Dec. 14, 2009 ("Wurst Aff.") Ex. C: Email from Jeffrey Wurst to Robert Goldman (Oct. 16, 2009, 9:29) (emphasis added).) Wells Fargo was concerned with the catch-all "any other issue" provision and sought to confirm that only the enumerated issues would be raised. (Wurst Aff. Ex. C: Email from Jeffrey Wurst to Robert Goldman (Oct. 16, 2009, 9:29).) The Mediator responded that he "ha[d] no clue what the case is about" and that "we will go where the river takes us." (Wurst Aff. Ex. C: Email from Robert Goldman to Jeffrey Wurst (Oct. 16, 2009, 11:46).) Unsatisfied, Wells Fargo replied that:

[B]efore we can prepare any statement for you [about our legal position] we \*378 need to know what it is that is being submitted to mediation.... Nothing productive can be achieved from a "free for all" mediation. Certainly we cannot be prepared to discuss any issue that is not first on the proverbial table.... We will be prepared to discuss only the ... items enumerated.... In the event any additional issues are raised we will address them at the mediation only if

we feel we are able to without the benefit of reviewing any documents or other preparation.

(Wurst Aff. Ex. C: Email from Jeffrey Wurst to Robert Goldman (Oct. 16, 2009, 16:53).)

Wells Fargo was also concerned that Boreal would fail to send a client representative. To that end, Wells Fargo stated that "neither Wells Fargo nor its counsel will attend any mediation where Wells Fargo is the only party with client presence" because "absent the participation of a Boreal business person nothing can be accomplished." (Wurst Aff. Ex. E: Email from Jeffrey Wurst to Robert Goldman (November 13, 2009, 14:32).) The mediator responded that "[i]t is my understanding that all parties will have a party representative present" but declined to provide any further assurances. (Wurst Aff. Ex. E: Email from Robert Goldman to Jeffrey Wurst (November 13, 2009, 15:00).)

### III. The Mediation

The mediation was held on November 17, 2009 at the United States Bankruptcy Court in Poughkeepsie and was attended by Wells Fargo Vice President Evan Zwerman ("Zwerman") and Ruskin attorney Daniel McAuliffe ("McAuliffe"). (McAuliffe Aff. ¶ 2.) Although Zwerman did not have unlimited settlement authority, he had the authority to settle the dispute for up to the amount in controversy. (Zwerman Aff. ¶ 6.)

The mediation reached an impasse soon after it began. As counsel for Boreal offered a short summary of its position, McAuliffe interjected to express disagreement.<sup>1</sup> (Hr'g Tr. dated Dec. 31, 2009 ("12/31 Tr.") Tr. 81.) The Mediator requested that McAuliffe momentarily reserve his point. But McAuliffe persisted. The Mediator then spoke to the Wells Fargo representatives alone in a side session to circumvent the "complete roadblock." (12/31 Tr. 82-83.) That side session lasted over an hour. And McAuliffe reiterated to the Mediator that Wells Fargo would not agree to any solution that involved a monetary payment. (12/31 Tr. 83.) The Mediator asserts that during the side session Wells Fargo "did not go through risk analysis, [and][t]hey went simply to reiterate the position they walked into the room with...." (12/31 Tr. 85.)

After the side session, the Mediator informed the Bankruptcy Court that one of the parties was not participating in good faith. (12/31 Tr. 143.) The mediation then reconvened, and Wells Fargo made a settlement offer that was deemed

"unacceptable" by the parties. *In re A.T. Reynolds & Sons, Inc.*, 424 B.R. 76, 80 (Bankr.S.D.N.Y.2010). This offer "came after McAuliffe and Zwerman spent an extended period on the phone with an unidentified person, out of the presence of the mediator." *A.T. Reynolds*, 424 B.R. at 80-81. \*379 McAuliffe states that during this call he "discuss[ed] the severity of the allegations with [his] colleagues." (McAuliffe Aff. 4 n.2.)

Wells Fargo does not dispute this basic chronology but characterizes events differently. Zwerman maintains that Wells Fargo approached the mediation with an open mind, intending to "listen to the parties that were attending the mediation, see what relevant facts were going to be brought up, [and] to make a decision one way or the other." (12/31 Tr. 34.) According to Zwerman, he and McAuliffe considered Wells Fargo's exposure to risk, and their "conclusion was that ... what was presented to us did not make sense and that our exposure was zero...." (12/31 Tr. 43.) McAuliffe denies interrupting Boreal's counsel during the mediation. (12/31 Tr. 34.)

Based on the above events, the mediator submitted a report to the Bankruptcy Court detailing the allegations of bad faith, including the following:

3. When supplied with ... a statement [of legal issues] by counsel to [A.T. Reynolds], Wells Fargo objected to language to the effect that the mediation might cover "any other issues anyone wants to discuss, of course";

4. Wells Fargo demanded to know the identities of the individuals who would attend the mediation;

5. Wells Fargo expressed concern that if its demands were not complied with, then the mediation would be a "free for all" which would "waste everybody's time";

....

7. McAuliffe attended the mediation "prepared only to repeat a pre-conceived mantra that indicated that Wells Fargo was not open to any compromise that would involve 'taking a single dollar out of their pocket'";

8. The Mediator's attempts to see if there was any credibility to the concept that the increase in Boreal's interest rate was linked to a payment to NYSEG were deflected by McAuliffe's repeating his mantra;

....

10. Wells Fargo's only offer came after the hearing in which the Court stated the consequences of bad faith, and such offer was "unacceptable" to the other parties; and

11. The offer came after McAuliffe and Zwerman spent "an extended period on the phone with an unidentified person, out of the presence of the mediator."

*A.T. Reynolds*, 424 B.R. at 76.

The Mediator made no findings regarding Zwerman's authority to settle the case. Based on the Mediator's report, the Bankruptcy Court *sua sponte* ordered that Wells Fargo show cause why it should not be sanctioned for failure to comply with the Mediation Order. (Docket No. 231.) That Order precipitated a voluminous submission from Wells Fargo and a contentious evidentiary hearing on December 31, 2009 that drew all of the participants in the mediation into its vortex.

#### IV. The Bankruptcy Court's Decision

Based on the foregoing, the Bankruptcy Court found that Wells Fargo had failed to participate in the mediation in good faith. As an initial matter, the Bankruptcy Court held that:

Passive attendance at mediation cannot be found to satisfy the meaning of participation in mediation, because mediation requires listening, discussion and analysis among the parties and their counsel. Adherence to a predetermined resolution, without further discussion or other participation, is irreconcilable with *risk analysis*, a fundamental practice in \*380 mediation.... [T]his Court has authority to order the parties to participate in the process of mediation, which entails discussion and risk analysis.

*A.T. Reynolds*, 424 B.R. at 85-86 (emphasis added). Accordingly, the Bankruptcy Court held that "attendance without participation in the discussion and risk analysis ... constitutes failure to participate in good faith." *A.T. Reynolds*, 424 B.R. at 89.

In the Bankruptcy Court's view, Wells Fargo exhibited bad faith for three reasons. First, it failed to participate in the process of mediation meaningfully because it "insisted on

being dissuaded of the supremacy of its legal obligation, in lieu of participating in discussion and risk analysis.” *A.T. Reynolds*, 424 B.R. at 91. Of particular concern was the fact that “Wells Fargo would not discuss whether there was any link between two substantive events in the case, and ... its counsel squashed any potential legal debate by interrupting counsel to Boreal when he attempted to discuss such a link.” *A.T. Reynolds*, 424 B.R. at 91.

Second, the Bankruptcy Court found that Zwerman did not have authority to settle the matter because (i) he only had authority to settle for a “predetermined amount,” despite the “very real possibility that the amount in controversy might have turned out to be in excess of \$35,000”; (ii) he was only prepared to discuss predetermined legal issues; (iii) he did not “appear to have had the authority to enter into creative solutions that might have been brokered by the Mediator”; and (iv) “a pivotal decision was made by an absent person.” *A.T. Reynolds*, 424 B.R. at 93–94.

Third, the Bankruptcy Court found that Wells Fargo “sought to control the procedural aspects of the mediation by resisting filing a mediation statement and demanding to know the identities of the other party representatives.” *A.T. Reynolds*, 424 B.R. at 92.

Based on these findings, the Bankruptcy Court sanctioned Wells Fargo and Ruskin pursuant to Fed.R.Civ.P. 16(f) and held them in contempt for violation of the terms of the Mediation Order.

## DISCUSSION

### I. Legal Standard

[1] [2] [3] [4] Fed.R.Civ.P. 16(f) provides that a court may sanction a party or its attorney for failure to obey a pretrial order of the Court. A bankruptcy court’s award of sanctions may be set aside only for abuse of discretion. *In re Kalikow*, 602 F.3d 82, 91 (2d Cir.2010). A court abuses its discretion “if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence.” *Kalikow*, 602 F.3d at 91. “A finding is ‘clearly erroneous’ when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” *Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 168 (2d Cir.2001). A court also abuses its discretion “if its decision—though not necessarily the product of a legal error or a clearly

erroneous factual finding—cannot be located within the range of permissible decisions.” *Zervos*, 252 F.3d at 169.

[5] While contempt orders are also reviewed for abuse of discretion, “review of a contempt order is more exacting than under the ordinary abuse-of-discretion standard because a [bankruptcy] court’s contempt power is narrowly circumscribed.” *Perez v. Danbury Hosp.*, 347 F.3d 419, 423 (2d Cir.2003).

### \*381 II. Sanctions

#### A. Good Faith Participation in Court-Ordered Mediation

Mediation is typically a voluntary process. In a mandatory court-ordered mediation, however, adversary parties are forced to participate in a collaborative process that one or both parties may not desire. As a result, some states and commentators have adopted or proposed a requirement that parties to a mandatory mediation participate in “good faith.” See generally John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. Rev. 69 (2002). Courts have not developed any clear standards for evaluating good faith in court-ordered mediation. Nevertheless, “courts have interpreted good faith narrowly to require compliance with orders to attend mediation, provide pre-mediation memoranda, and, in some cases, produce organizational representatives with sufficient settlement authority.” Lande, 50 UCLA L. Rev. at 84; see also *Seidel v. Bradberry*, 94 Civ. 0147, 1998 WL 386161, at \*3 (N.D.Tex. July 7, 1998) (imposing sanctions for failing to attend a court-ordered mediation); *Nick v. Morgan’s Foods, Inc.*, 270 F.3d 590, 597 (8th Cir.2001) (imposing sanctions for, *inter alia*, failing to submit a pre-mediation memorandum); *Francis v. Women’s Obstetrics & Gynecology Grp., P.C.*, 144 F.R.D. 646, 648 (W.D.N.Y.1992) (same).

Advocates of a good faith standard argue that it forces adversary parties to take the mediation seriously, and avoids the risk of “pro forma” mediation where parties participate only to the minimal extent necessary to fulfill the court’s requirements. See Kimberlee K. Kovach, *Good Faith in Mediation*, 38 S. Tex. L. Rev. 575, 595 (1996). On the other hand, a good faith standard poses several problems. First, “[g]ood faith is an intangible and abstract quality with no technical meaning or statutory definition....” Black’s Law Dictionary (5th ed. 1979). Of further concern is the tension between inquiring into good faith while preserving the confidential nature of a mediation. Kovach,

38 S. Tex. L. Rev. at 601; Edward F. Sherman, *Court-Mandated Alternative Dispute Resolution: What Form of Participation Should be Required*, 46 SMU L. Rev. 2079, 2093 (1993). Participants—including the mediator—are typically prohibited from divulging statements made during the course of the mediation. See *Procedures Governing Mediation*, General Order M-390 § 5.1. Yet if allegations of bad faith arise, a court must investigate those allegations, endangering the mediation's confidentiality. Kovach, 38 S. Tex. L. Rev. at 601; Edward F. Sherman, *Court-Mandated Alternative Dispute Resolution: What Form of Participation Should be Required?*, 46 SMU L. Rev. 2079, 2093 (1993). Finally, inquiry into the parties' conduct in a mediation, backed by the threat of sanctions, may exact a coercive influence on the parties to settle. See Sherman, 46 SMU L. Rev. at 2093. These considerations guide this Court's review of the proper scope of the good faith standard.

The Bankruptcy Court found that Wells Fargo failed to mediate in good faith because it (1) did not “participate” sufficiently in the process of mediation, which in the Bankruptcy Court's view entails “discussion” and “risk analysis”; (2) did not send a representative with settlement authority, and (3) attempted to control the procedural aspects of the mediation.

#### B. “Participation” During Mediation Proceedings

Most courts that have addressed allegations of insufficient “participation” during \*382 mediation proceedings (i.e., the degree to which a party discusses the issues, listens to opposing viewpoints, analyzes its risk of liability, and generally participates in the “process” of mediation)<sup>2</sup> have declined to find a lack of good faith. See, e.g., *Graham v. Baker*, 447 N.W.2d 397, 401 (Iowa 1989) (sanctions inappropriate despite the fact that party's behavior “ranged between acrimony and truculency [and] precluded any beneficial result to the parties from the mediation process”); *Stoehr v. Yost*, 765 N.E.2d 684, 687 (Ind.App.2002) (no bad faith despite allegation that party was unwilling to “really listen” to arguments of the opposing party). But see *Brooks v. Lincoln Nat. Life Ins. Co.*, No. 05 Civ. 118(WJR), 2006 WL 2487937, at \*4 (D.Neb. Aug.25, 2006) (finding bad faith where party “(1) indicat[ed] [she] would not respond to the defendants' initial offer and direct [ed] the mediator to tell defendants they had five minutes to put a serious settlement offer on the table or [she] was leaving, (2) indicat[ed] defendants' second offer or proposal was unacceptable and unworthy of response, (3) [did] not allow[ ]

the mediator to explain the defendants' offers, (4)[did] not engage[e] in dialogue with defendants' counsel to correct what [her] counsel perceived as deficiencies in the mediation process, and (5) unilaterally terminat[ed] or abandon[ed] the mediation process”). Still, these courts declined to elucidate a standard for good faith participation during mediation.

[6] [7] [8] In determining the appropriate scope of inquiry into good faith participation during mediation, this Court is guided by considerations of litigant autonomy and confidentiality in mediation proceedings. It is well-settled that a court cannot force a party to settle, nor may it invoke “pressure tactics” designed to coerce a settlement. *Kothe v. Smith*, 771 F.2d 667, 669 (2d Cir.1985). Moreover, in an analogous context, although a court may require parties to appear for a settlement conference, see, e.g., *Bulkmatic Transport Co. v. Pappas*, 99 Civ. 12070(RMB)(JCF), 2002 WL 975625, at \*2 (S.D.N.Y. May 9, 2002), it may not coerce a party into making an offer to settle. See *Dawson v. United States*, 68 F.3d 886, 897 (5th Cir.1995) (“[T]here is no meaningful difference between coercion of an offer and coercion of a settlement: if a party is forced to make a settlement offer because of threat of sanctions, and the offer is accepted, a settlement has been achieved through coercion.”). And a party is within its rights to adopt a “no-pay” position. *Negron v. Woodhull Hosp.*, 173 Fed.Appx. 77, 79 (2d Cir.2006) (party was “free to adopt a ‘no pay’ position” at a court-ordered mediation).

[9] Thus, contrary to the Bankruptcy Court's determination, Wells Fargo was within its rights to enter the mediation with the position that it would not make a settlement offer. It was also within its rights to “predetermine [ ] that it was not liable” and to “insist[ ] on being dissuaded of the supremacy of its legal position.” *A.T. Reynolds*, 424 B.R. at 92. A contrary holding would be directly at odds with a party's right to adopt a “no pay” position in settlement negotiations.<sup>3</sup>

\*383 [10] [11] Although parties to a mediation must listen courteously to opposing arguments and respond in kind, ultimately the benefits of enforcing such participation by threat of sanctions are dwarfed by the significant potential for harm. Where parties do not want to settle, inquiry into a minimal level of participation (beyond objective criteria such as attendance, exchange of pre-mediation memoranda, and settlement authority) backed by threat of sanctions forces unwilling parties to engage each other civilly to satisfy a court order. But ultimately, mediation will only succeed if the parties themselves want it to, and a court's order to mediate

—even in good faith—will not change the mind of party who believes that settlement is not in their best interest. Certain disputes are simply not amenable to mediation, and it should not be a surprise when attempts to mediate them quickly deteriorate. Such a case exists where, as here, there exists a strongly contested threshold factual issue—the source of the Utility Payment—that may be fully determinative of a party's liability.

This Court does not share the Bankruptcy Court's view that the standard for determining participation is "risk analysis." Risk analysis is often an internal process, and it is difficult—if not impossible—to distinguish between a party that refuses to consider a given risk from a party that analyzes the risk and determines that the risk is zero. Indeed, this is precisely the rationale given by Wells Fargo. Zwerman testified that "[o]ur conclusion was that ... what was presented to us did not make sense and that our exposure [to risk] was zero...." (Tr. 43.) Thus, Wells Fargo did not forego risk analysis merely because it determined that it was not liable and adhered to this position at the mediation; such conduct is entirely consistent with a rational analysis of risk.

Inquiring into the parties' level of participation also imperils the confidentiality of mediation. This is illustrated by the present dispute. Throughout the sanctions hearing, the Bankruptcy Court was forced to determine the facts relevant to participation while shielding itself from the confidential aspects of the proceedings. The Bankruptcy Court consistently admonished the witnesses to refrain from discussing specific details of the mediation. (See, e.g., 12/31 Tr. 55 ("Please try to stay general. I don't want to be tainted..."); 12/31 Tr. 59 ("Let's not go into the mediation. This is a risk analysis. All Mr. Goldman was doing was risk analysis.... [L]et's go general here. He didn't agree with the risk analysis.... [T]hat's what you want to be saying"); 12/31 Tr. 83 ("I want you to emphasize and talk to me about the mediation process, not the offers, not what's going on, but the mediation process.")) But ultimately, confidential information was communicated to the Court. (See 12/31 Tr. 100 ("Do not again talk ... about the dollar value. Even though I have now sort of become aware of this stuff, I'm trying my best not ... to be.")) Moreover, the necessary exclusion of confidential information from the hearing had the unintended—but unavoidable—effect of excluding relevant facts, such as the specific issues discussed at the mediation and the parties' legal and factual positions. (See 12/31 Tr. 133–34).

Accordingly, this Court holds the confidentiality considerations preclude a court from inquiring into the level of a party's participation in mandatory court-ordered mediation, i.e., the extent to which a party discusses the issues, listens to opposing \*384 viewpoints and analyzes its liability.<sup>4</sup> This holding provides a clear and objective standard with minimal intrusion into confidentiality and a party's right to refuse to settle. This holding is also consistent with the general pattern of interpretation by the courts, which "have interpreted good faith narrowly to require compliance with orders to attend mediation, provide pre-mediation memoranda, and, in some cases, produce organizational representatives with sufficient settlement authority." Lande, 50 UCLA L. Rev. at 84. Accordingly, the Bankruptcy Court's determination that Wells Fargo did not "participate" in the mediation in good faith was clearly erroneous.

### C. Settlement Authority

[12] The Bankruptcy Court also found that Wells Fargo failed to send a representative with sufficient settlement authority. Several courts have found that a failure to send a representative with settlement authority to a mediation illustrates a lack of good faith warranting sanctions. See, e.g., *Nick*, 270 F.3d at 597; *Raad v. Wal-Mart Stores, Inc.*, 97 Civ. 3015(JK), 1998 WL 272879, at \*1 (D.Neb. May 6, 1998). This Court agrees that such conduct may constitute a lack of good faith.

[13] Here, however, in requiring Zwerman to have had the ability to (1) settle this case for *any* amount, including an amount greater than the amount in controversy; (2) discuss *any* theory of legal liability; and (3) enter into undefined "creative solutions," the Bankruptcy Court applied an unworkable and overly stringent standard for determining "settlement authority" and accordingly abused its discretion. Settlement figures are generally no more than the amount in controversy, and there is rarely a need for a party attending a mediation to have authority to settle for greater than that amount. It is also unreasonable to expect a party to be prepared to discuss *every* possible legal theory, including those about which it had no prior notice. Finally, large corporations operate under divisions of labor and authority, and a given "creative solution" may require approval of any number of corporate officers. A corporation cannot reasonably be expected to anticipate the virtually limitless range of "creative solutions" that might be raised at mediation. The Bankruptcy Court's standard would require attendance by a corporate officer with a degree

of responsibility and control that rarely exists in a single individual.

Thus, where a mediation order requires the presence of a person with "settlement authority," a party satisfies this requirement by sending a person with authority to settle for the anticipated amount in controversy and who is prepared to negotiate all issues that can be reasonably expected to arise. Here, it is undisputed that Zwerman had the authority to settle for up to the full amount in controversy. In addition, McAuliffe was prepared to advise Zwerman regarding the legal issues suggested by A.T. Reynolds as subject to discussion—a reasonable guidepost for the issues that are likely to arise. Finally, the Bankruptcy Court's finding that "a pivotal decision was made by an absent person" was clearly erroneous. The record is unambiguous that Zwerman had full authority to settle the matter. The notion that Zwerman needed to call the Wells Fargo \*385 corporate office in order to obtain permission to offer the settlement is conjecture.

Accordingly, the Bankruptcy Court's finding that Zwerman did not have "settlement authority" was clearly erroneous.

#### **D. Control of the Procedural Aspects of the Mediation**

[14] Finally, the Bankruptcy Court's finding that Wells Fargo attempted to "control the procedural aspects of the mediation" was also clearly erroneous. Wells Fargo ultimately submitted a mediation statement and attended the mediation, as required by the order. The issues raised by Wells Fargo in pre-mediation exchanges with the Mediator

were legitimate points of concern regarding the issues to be raised in the mediation and the other parties' participation in the proceeding. There is nothing in the General Mediation Order preventing parties from raising such valid concerns.

Accordingly, The Bankruptcy Court's sanctions order was an abuse of discretion and is reversed.

#### **III. Contempt**

To hold a party in civil contempt, a court must find that (1) the order the party failed to comply with is clear and unambiguous, (2) the proof of noncompliance is clear and convincing, and (3) the party has not diligently attempted to comply in a reasonable manner. *King v. Allied Vision, Ltd.*, 65 F.3d 1051, 1058 (2d Cir.1995). As discussed above, the Bankruptcy Court's finding that Wells Fargo violated the terms of the Mediation Order was clearly erroneous. Accordingly, the Bankruptcy Court's contempt order was an abuse of discretion and is reversed.

#### **CONCLUSION**

For the foregoing reasons, the Bankruptcy Court's Order imposing sanctions and holding Appellant Wells Fargo in contempt is reversed.

SO ORDERED.

#### **Footnotes**

- 1 Due to the confidential nature of the mediation, the Bankruptcy Court cautioned the parties at the December 31 hearing to speak only in general terms, has created considerable ambiguity in the record, and the above statement of facts is therefore necessarily vague. However, it appears that the particular point about which Wells Fargo interjected related to whether "the increase in Boreal's interest rate was linked to a payment to NYSEG." *A.T. Reynolds*, 424 B.R. at 80.
- 2 "Participation" in this regard is distinct from such objective criteria as attendance, exchange of pre-mediation memoranda, and settlement authority, which several courts have found to be elements of good faith in court-ordered mediation.
- 3 Indeed, rather than being hostile to mediation, "dissuasion" is in fact the core of the process, particularly in a mandatory mediation where the parties are participating only by reason of a court order. It should be presumed that each party enters a mediation confident in the strength of its legal position, and a settlement will result only if the mediator is able to persuade both parties to meet somewhere in between.
- 4 This does not mean that *all* conduct in a mandatory mediation is outside the scope of a court's inquiry into good faith. Where, for example, a party demonstrates dishonesty, intent to defraud, or some other improper purpose, the benefits of inquiry into such conduct may outweigh considerations of coercion and confidentiality. But no such allegations have been presented here and, accordingly, this Court does not reach this issue.

## Phoenix lawyer shot after mediation session dies

February 01, 2013 | By Michael Muskal

A lawyer wounded in an attack at a Phoenix office has died, bringing the toll from this week's shooting to three, including the gunman.

Mark Hummels, 43, was taken off life support Thursday night, Athia Hardt, a spokeswoman for his law firm told The Los Angeles Times on Friday. Hummels was brain-dead and was an organ donor, said Hardt, who represents the Phoenix law firm Osborn Maledon.

On Wednesday, a gunman attacked Hummels and others after a mediation session to end a lawsuit.

The gunman was identified as Arthur Douglas Harmon, 70, who was found dead early Thursday from an apparent self-inflicted gunshot wound, police said.

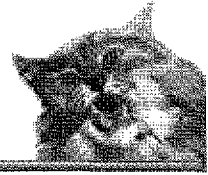
Harmon had been hired to renovate some office cubicles in a call center operated by Fusion Contact Centers LLC. The parties clashed over money owed for the work.

After the session, Harmon opened fire, hitting Hummels, his client, Steve Singer, 48, chief executive of Fusion and a female bystander who was slightly wounded in the hand.

Singer died hours later. Hummel was placed on life support until Thursday.

Hummels was a former reporter for the Albuquerque Journal and Santa Fe New Mexican before he went to law school in 2001. He was admitted to the Arizona bar in 2005.

UPBEAT

**...and in the News!****Boca Raton News**

February 21, 2002

**LOCAL NEWS**

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**Boca man kills sister, then self***Murder takes place in lawyer's office during mediation session*

Stephanie Slater/STAFF PHOTO

Boca Raton police and SWAT team members prepare to search the Mellon United National Bank building, 1801 N. Military Trail, Wednesday morning after hearing reports of shots fired. Investigators said Charles Thomas Ott, 55, shot his sister Margret Ott Jones, 53, multiple times after a dispute over the sale of their parents' home. Ott later turned the gun on himself.



Officers investigate the scene on Northeast Third Street in Boca Raton at the home where Charles Thomas Ott, 55, killed himself Wednesday. Ott had fatally shot his sister, Margret Ott Jones, prior to killing himself.

**Retired Boca firefighter fatally shoots sister before killing self***Siblings were disputing parents' estate*

Mediation Ethics 000074

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By Stephanie Slater  
STAFF WRITER

As she looked out her window across the street at yellow crime-scene tape, Rachel DiBenedetto said she wasn't completely surprised to learn of Wednesday's murder-suicide in Boca Raton.

"I knew something was going to happen," said DiBenedetto of 365 N.E., Third St. in Boca Raton. "It usually does when one wants to sell the house and one doesn't."

The 79-year-old was referring to the estate-dispute between Charles Thomas Ott, 55, and his sister, Margret Ott Jones, 53.

Police say Ott, a retired Boca Raton firefighter, shot his sister to death in a law office during a dispute over the sale of their deceased parents' Boca Raton home at about 10:26 a.m. Wednesday, then drove to the home on Northeast Third Street and fatally shot himself. Jones, of 2342 S.E. Avalon Road in Port St. Lucie, died at the scene. Ott, of 641 N.E. Harbor Drive in Boca Raton, was pronounced dead at Delray Medical Center at 12:30 p.m., police said.

The brother and sister, both graduates of Boca Raton High School, were meeting in the law office of Hodgeson Russ, 1801 N. Military Trail in the three-story Mellon United National Bank building near Town Center Mall. Ott shot Jones during an argument in a mediation session attended by an attorney and a mediator, police said.

The building was partially evacuated after witnesses told police they were unsure whether Ott was still inside. Members of the Boca Raton Police Department's SWAT team searched it room-by-room and floor-by-floor, but were unable to locate Ott.

"Officers spotted Ott driving a silver-and-teal GMC pickup on Northeast Fifth Avenue at about noon, and followed him to his parents' home at 366 N.E. Third St.," said Officer Jeff Kelly, police spokesman.

Officers briefly spoke with Ott in the driveway of the home before he shot himself in the chest, Kelly said.

The house is reportedly worth between \$300,000 and \$350,000.

Ott, married and father of one son, was employed by Boca Raton Fire Rescue Services from March 18, 1968 until his disability retirement on June 7, 1988.

His wife, Carol Ott, was aware of the estate dispute, said her attorney, Kenneth Lipman.

"Carol is obviously greatly shocked," Lipman said. "It is the family's hope that people will respect her privacy, so that she and her family can begin to overcome this great tragedy."

Jones, known to her friends as Peggy, was a divorced mother and grandmother who cared for the elderly and lived alone in her Port St. Lucie home for more than a dozen years.

"Peggy was a lovely girl," said Eleanor Cahill, who used to live down the street from Jones' parents. "He [Ott] had to be off his rocker."

*Mediation Ethics 000075*

Last year, killers in Florida used their murder weapons to take their own lives about once every six days, said Donna Cohen, a psychologist and professor at the University of South Florida's Department of Aging and Mental Health. The murder-suicides were most frequent in South Florida. In 2001, 25 of Florida's 66 cases occurred in Broward, Palm Beach or Miami-Dade counties, Cohen said.

"Tom was a fine man," said Ott's next-door neighbor on Harbor Drive - an affluent neighborhood just west of the Intracoastal Waterway. "He was a loving father and husband."

## **Mediator Liability Claims: A Survey of Recent Developments**

*Robert A. Badgley, Esq.\*  
May 2013*

Claims and lawsuits against mediators and other ADR professionals have become a commonplace. In most cases, the claims are baseless and they are ultimately defeated. Even so, defense costs can be considerable, and even staggering, and the distraction of defending a malpractice claim can work palpable wear on a mediator's business.

When confronted with the specter of a potential claim, many in the mediation community invoke quasi-judicial immunity – the kind of near-absolute immunity enjoyed by judges and arbitrators – as a basis to avoid liability. However, not all jurisdictions recognize immunity for mediators, and most states that do restrict such immunity to court-annexed mediation. Moreover, the protection is typically not absolute even where immunity is available. The mediator may still be vulnerable to suit predicated upon a wide variety of causes of action that fall outside the scope of the immunity, such as breach of confidentiality. In addition, other forms of redress that are not barred by immunity, such as state disciplinary or grievance procedures, may be pursued by a disgruntled party. Finally, it must be repeated, even if mediator defendants ultimately escape liability, they can nevertheless incur significant legal defense bills. Further, where mediators are faced with disciplinary proceedings, the imposition of disciplinary sanctions can be costly in other ways, such as the mediator's reputation. And, of course, it requires time and often money to respond to the disciplinary charges.

The following survey of fairly recent claims should underscore the fact that mediators will continue to face challenges to their conduct, even where the mediator did nothing wrong. In broad terms, the majority of claims against mediators result from a party not understanding the mediation process (many claimants allege that the mediator was biased against him or her for the simple reason that the mediator was doing what mediators often do – pointing out the potential weaknesses in the party's case to open the party's eyes to the prospect of losing the case if it proceeds to trial), or from a mediator not making it clear at the outset that he or she is not giving any legal advice to the parties, or from a mediator not disclosing his or her prior relationship with the parties or their counsel.

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\* Robert A. Badgley graduated from the University of Chicago Law School in 1991 and is a partner with Locke Lord LLP in Chicago. Among other things, he represents Underwriters at Lloyd's, London in insurance coverage matters involving professional malpractice claims. Although many of the claims discussed herein are accessible as public records, the author has chosen not to provide specifics because many of these claims involve insureds of his clients and, as a courtesy to such insureds, the author would like to maintain a measure of discretion.

## **Family Law**

One area where the use of mediation continues to proliferate is family law. The emotionally-charged context of a divorce or a child custody battle produces situations in which, even where a mediator has seemingly done everything right and has taken necessary precautions to protect both parties, he or she is still open to claims.

• **Post-Mediation Advice.** In April 2011, a mediator was sued in Tennessee for allegedly giving legal advice to the divorcing husband a few days after a mediation session. In an e-mail, the husband made comments to the mediator about the wife's allegedly threatening conduct, and the mediator allegedly responded by e-mail that the husband should ask his attorney about pursuing a restraining order or order of protection. The mediator is also alleged to have advised the husband to take measures that could shame the wife into ceasing her conduct and to save e-mails to preserve an evidentiary record. Subsequently, the husband secured an order of protection against the wife.

The wife sued the mediator for \$15 million, under theories of malpractice, breach of contract, and intentional infliction of emotional distress. The wife claims that she lost her job as a result of the actions set in motion by the mediator. She also claims to have been arrested in January 2011 as a result of the order of protection set in motion by the mediator.

Prior to filing the lawsuit, the wife had filed a grievance with the Tennessee Supreme Court Alternative Dispute Resolution Commission. The Commission gave the mediator a private reprimand. The mediator has filed a motion to strike from the civil complaint references to the ADR Commission proceedings.

In September 2011, the court granted the mediator's motion for summary judgment and dismissed the entire lawsuit. The court reasoned that, if the mediator's statements to the husband had been made in her role as mediator, then immunity applied to bar the claim. If, on the other hand, the statements were made outside the ambit of her role as mediator, then she owed no legal duty to the plaintiff. Either way, the court concluded, the case should be dismissed. The plaintiff appealed, and in June 2012 the appeal was dismissed. The defense of the lawsuit cost more than \$20,000. (2011)

• **Post-Mediation Murder.** In California, a family mediator was sued for the death of a wife stabbed by her husband in the building in which the mediation session occurred. The divorcing couple had met a week earlier at the mediator's office for an initial mediation session, which ended without incident. After the second meeting, held a week later and in the evening, the husband left the mediator's office. The wife remained for 20 minutes and spoke with the mediator. The wife then left and, on the first floor of the building, was fatally stabbed by her husband, who had gone to his car and returned to the building with a pair of scissors.

The court dismissed the complaint in 2008 on the grounds that there was no evidence of prior violence by the murderer or safety concerns at the premises. The same day as the case was dismissed, the parties settled in order to avoid an appeal. The combined settlement amount and defense costs exceeded \$100,000. It also bears noting that many professional liability policies do not afford indemnity for bodily injury or death. (2006)

- **Faulty Settlement Agreement.** A California mediator participated in the drafting of a Marital Separation Agreement. The agreement confirms that the mediator was not rendering legal services or giving legal or tax advice. In any event, the ex-husband was later audited by the IRS, and faces possible tax liability in connection with the deductibility of certain support payments made under the agreement. The ex-husband has threatened suit against the mediator. To date no lawsuit has been filed. (2010)

### **Commercial Law and Other Contexts**

Lawsuits against mediators arising from commercial law matters and other various types of disputes have proven to be just as dangerous as those which arise out of family law, employment law and personal injury.

- **Defamation.** In a Western State, a mediator has been sued for alleged defamation arising from a construction defect dispute he mediated in 2010. The plaintiff in the defamation suit was one of the lawyers participating in the underlying construction defect mediation.

It is alleged that the mediator berated this lawyer, calling him a “horrible lawyer” and commenting, unflatteringly, on the size of the lawyer’s manhood. It is alleged that these comments were repeated by the mediator outside the confines of the mediation proceeding. At a social event shortly after the mediation, the wife of one of the other lawyers at the mediation said to the plaintiff: “You’re the guy with the little \*\*\*\*\*!”

The plaintiff filed suit against the mediator, alleging defamation, false light, intentional infliction of emotional distress, and so forth. In April 2013, the mediator filed a motion for summary judgment, seeking dismissal of all counts by reason of quasi-judicial immunity, privilege, and the fact that the mediator’s statements were opinions, not assertions of fact. The summary judgment motion is pending. (2012)

- **Subpoena for Deposition.** In Ohio, a plaintiff sued her former business partner, and the case was settled by mediation. The mediation occurred in several sessions over a period of years. The plaintiff then filed a malpractice lawsuit against the law firm who had represented her in the underlying business dispute. The defendant law firm subpoenaed the mediation records of the mediator, and sought to take the mediator’s deposition.

By way of further background, it appears that the plaintiff had several discussions with the mediator throughout the lengthy mediation process during which she expressed dissatisfaction with her lawyers. The plaintiff asked the mediator whether she had a viable malpractice claim against her lawyers, and whether the mediator could recommend another lawyer to replace her lawyers in the business dispute. The mediator apparently gave the plaintiff at least one name of a possible replacement counsel. Some of these discussions with the plaintiff occurred *after* the underlying business dispute was settled.

Through defense counsel appointed by the mediator's liability insurer, the mediator invoked mediation privilege as a basis to resist the subpoena. After an exchange with defense counsel in the malpractice suit, the mediator agreed to sit for a very brief deposition in which a very limited scope of questions would be allowed. The final disposition of the legal malpractice suit is not yet known, and to date neither party to that case has made any further demand that the mediator appear at trial.

This matter illustrates that mediators may gain so much trust and credibility that they become all-purpose sounding boards for the litigants who appear before them. This additional role comes with its own set of potential problems, and mediators should keep their roles straight when litigants confer with them outside the strict confines of the mediation setting. This matter also illustrates that mediators should ensure that their liability insurance policy protects them against a subpoena to produce files or give a deposition. Not all insurance policies will provide a defense to mere discovery demands, as opposed to lawsuits seeking damages. (2012)

• ***Another Subpoena for Deposition.*** In the Midwest, a sex abuse victim's claim against an archdiocese was settled several years ago via mediation. The archdiocese later went into bankruptcy. The victim made a claim in the bankruptcy proceeding to reopen his claim against the archdiocese, arguing that the prior settlement had been procured through fraud and undue influence. The bankruptcy court initially ruled that the new claim could go forward. The archdiocese then subpoenaed the mediator, presumably to give a deposition to confirm that the mediated settlement had proceeded in good faith and without fraud or undue influence. The mediator, whose liability insurance provided coverage for discovery demands, hired defense counsel to resist the subpoena. Through counsel's efforts and those of the archdiocese's own counsel, the bankruptcy court reversed its prior decision and disallowed the new claim by the abuse victim, which had the effect of rendering the subpoena moot. Again, this matter illustrates the importance of having insurance coverage against more than just lawsuits seeking damages. It is not unusual for a party to seek the records or testimony of a mediator after a settlement comes apart. Even though mediators usually defeat such subpoenas and demands, the attorney fees required to do so can be substantial. (2012)

• ***Conspiracy and Bias.*** A commercial law mediation involved a dispute among the plaintiff company, another company who asserted cross-claims against the plaintiff, and the plaintiff's insurer. The court appointed a mediator, who presided over a mediation. The plaintiff

left the mediation before it was concluded, after which the insurer and the other company reached a settlement of part of the dispute. The plaintiff then filed suit against the mediator, alleging that he improperly continued with the mediation and conspired with the other parties to prejudice the plaintiff's rights. The trial court granted the mediator's motion for summary judgment, holding that the court-appointed mediator enjoys quasi-judicial (i.e., absolute) immunity. That ruling was affirmed on appeal, but the plaintiff filed a second lawsuit. That suit was also dismissed and was again appealed. The dismissal of the suit was affirmed again, and the plaintiff filed a petition for writ of certiorari with the U.S. Supreme Court. The Supreme Court denied that cert petition in early 2013. Despite the existence of immunity in California for court-annexed mediators, this claim went on on for years and was very costly to defend (more than \$560,000). (2005)

• ***Nondisclosure and Bias.*** A commercial law mediation involved a dispute over the creation of a popular television show. The plaintiff claimed the production company owed him compensation for his contribution to the creation of the show. The parties agreed to mediate. Unbeknownst to the plaintiff, the mediator had previously mediated a dispute between the production company and another party which involved the same attorneys. The instant case settled at mediation for \$200,000. The plaintiff later discovered the mediator's prior history with the other side and claimed that the mediator was biased against him. He further alleged that if the mediator had properly disclosed this information before the mediation, he would not have agreed to the selection of the mediator. The plaintiff filed a lawsuit, which alleged that the mediator's failure to disclose the prior mediation which involved the production company resulted in a settlement that was significantly lower than it should have been. The complaint alleged causes of action for conspiracy, fraud, breach of fiduciary duty and negligence. Although the lawsuit was eventually dismissed based on quasi-judicial immunity, the mediator incurred significant defense costs. (2002)

## Conclusion

As the foregoing relatively recent cases demonstrate, mediators are often exposed to situations with the potential to spark a variety of expensive claims. Although the defendant mediators may avoid liability in many cases, defense costs can be significant. The magnitude of the problem may not be widely known because many of the cases involve confidential settlements entered into prior to trial. Given the current trend of increased use of ADR, these examples demonstrate that mediators cannot afford to be unprotected. In many jurisdictions, mediators cannot rely on strong immunity defenses, and thus must look to other safeguards to protect their business assets. Liability insurance is an obvious first step.