

Good Faith Mediation in the Federal Courts

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I. INTRODUCTION

“We will go where the river takes us” is not what we might expect to hear from the presiding official in today’s highly-regulated and tightly-managed federal court litigation process. The Federal Rules of Civil Procedure and a managerial judiciary ensure a predictable process consistent with approved and published rules. Yet, when counsel for Wells Fargo Bank was ordered to mediation in Bankruptcy Court in *In re A.T. Reynolds & Sons*,¹ and inquired who was attending and what issues would be addressed, the mediator’s response was “[w]e will go where the river takes us.”² Wells Fargo objected to the uncertainty of the process and was decidedly uncooperative. The bankruptcy judge ultimately sanctioned Wells Fargo and its counsel for bad faith mediation conduct. The judge added a twist to the river metaphor, making it clear that the mediator, not the parties involved in the mediation, decides which fork in the river to explore, what will take place at the mediation, and how it will be conducted.³

For the most part the “rules” of the mediation process are not written, but are committed to the discretion of the mediator. There are rules of course. Federal Rule of Civil Procedure 16(f) and the local rules sending Wells Fargo to mediation⁴ require that the parties participate in good faith. Good faith, however, is not defined. Good faith in this context meant leaving behind adversarial instincts and tactics and cooperating, or at least playing along, with the demands of the mediator.

Wells Fargo and its counsel were sanctioned, in part,⁵ because of their attempts to “wrest control” of the mediation from the mediator⁶ and their unwillingness to

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¹ *In re A.T. Reynolds & Sons*, 424 B.R. 76, 80–82 (Bankr. S.D.N.Y. 2010). Wells Fargo Bank, the court-approved entity that controlled and disbursed the funds of the debtor in bankruptcy, had notice of all proceedings but was not named as a party in the motions that preceded the mediation. *Id.* Wells Fargo argued that it had not been involved in the matter for several months, and thus could not be prepared to address issues that it was unaware of. *Id.*

² *Id.* at 82.

³ According to S.D.N.Y. GEN. ORD. M-211 § 3.2: “The mediator shall control all procedural aspects of the mediation.”

⁴ See *A.T. Reynolds & Sons*, 424 B.R. at 86.

⁵ *Id.* at 80. Wells Fargo’s cause was not helped by the mediator’s report to the court about Wells Fargo’s belligerent reaction to the mediator during the mediation. When the mediator informed Wells Fargo that he “must report the bad faith to the Court, [Counsel] advised that there were two of him . . . and just one of the Mediator; and that [the

temporarily suspend their adversarial zeal.⁷ They refused to listen to positions and arguments with which they disagreed without interrupting, and were unwilling to consider hypothetically that their legal analysis might be wrong. The river ran one direction—downstream toward settlement. Wells Fargo did not want to settle or leave the perceived safe waters provided by the adversary system, and was unwilling to plunge downstream into uncharted waters. They were lost among a conflict of cultures between the rules-based adversarial system and a largely unregulated system of mediation.

Litigation in the federal courts is a tightly-controlled, adversarial process. The federal judges who manage this process are powerful figures who wield awesome authority. Federal judges prefer that parties and counsel adhere to court orders and rules and, for the most part, they get their way. Federal judges do face challenges, however. The limits of a judge's power, skill, and temperament are regularly tested by highly talented counsel who aggressively attempt to stretch rules and court orders to maximize clients' adversarial interests. This testing is most common at the pretrial stage of the process conducted outside the presence of the judge.

For the most part, the pretrial process works well. Occasionally, however, adversarial zeal, or plain lack of professionalism, causes parties to refuse to follow orders or rules, or otherwise attempt to use the process improperly to obtain an unfair adversarial advantage. Courts respond with an elaborate enforcement system of judicial oversight and sanctions to assure that the rules are followed, parties are protected, and court orders are upheld.

The mediation process, on the other hand, is not designed to be adversarial. Mediation is championed as a private, confidential process centered on party autonomy and self-determination, where a neutral third party "facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute."⁸ Confidentiality, self-determination, and conciliation are lauded as essential features of the traditional mediation session. Superimposing this private, facilitative process in the midst of the public adversarial pretrial process is not an easy matter, and as many commentators have remarked, creates a "process dissonance" or clash of cultures.⁹

mediator] 'could be assured . . . that Wells Fargo would never agree to [his] acting as mediator in the future in which Wells Fargo might be a party.'" *Id.*

⁶ *Id.* at 89–91.

⁷ *In re A.T. Reynolds & Sons*, 424 B.R. 76, 90 (Bankr. S.D.N.Y. 2010).

⁸ UNIF. MEDIATION ACT § 2(1) (2003).

⁹ *See, e.g.,* 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, 68–69 (2003) (discussing the differing values in the litigation and mediation processes and concluding that mandatory court-connected mediation "may create 'process dissonance'"); Wayne D. Brazil, *Continuing the Conversation About the Current Status and the Future of ADR: A View From the Court*, 2000 J. DISP. RESOL. 11, 29 (2000) (The traditional litigation behaviors that should be kept out of the mediation process include "self-conscious posturing, feigning emotions

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This clash of cultures is apparent when assessing the role of the court in supervising or compelling mediation conduct in light of mediation values of confidentiality and self-determination. If self-determination and voluntary agreement are key mediation values, how can a court compel parties to mediate in good faith in circumstances where the parties do not want to settle? If confidentiality is a core value, how can a court police the mediation process and assure good faith participation without breaching the confidentiality of that process? What is required of parties who do not want to settle but are ordered to participate in mediation in good faith?

At the center of any definition of “good faith” is the obligation to tell the truth.¹⁰ Telling the truth is an expected part of the federal court litigation process.¹¹ Parties expect that if they breach, or the adverse party breaches the duty to tell the truth in these pretrial processes, the court may impose a sanction. The culture in mediation may be different.¹² The prefatory note to the Uniform Mediation Act reflects the reality that “mediation is not essentially a truth-seeking process.”¹³ Thus, the expectations that the adverse party is operating in good faith, in the sense that they are abiding by an expectation to tell the truth, might vary depending on whether the

(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 analytical or evidentiary chance, misleading others about the existence or persuasive power of evidence not yet formally presented . . . 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 proceeding—simply to gain time, or to wear down the other parties or to increase their cost burdens.”).

¹⁰ See *infra* notes 95–103 and accompanying text.

¹¹ Rules of civil procedure, statutory rules relating to perjury, and rules of professional responsibility place a duty on participants to respond truthfully in court, and authorize courts to impose sanctions for untruthful responses. See, e.g., FED. R. CIV. P. 11 (requiring that representations made to the court be to the “best of the person’s knowledge, information, and belief,” and authorizing sanctions for violating the rule); 18 U.S.C. § 1623 (2000) (making false declarations under oath before a court or grand jury a crime); MODEL RULES OF PROF’L CONDUCT R. 4.1 (1999) (imposing an obligation on lawyers representing clients not to misrepresent material facts). See generally Craig Enoch, *Incivility in the Legal System? Maybe It’s the Rules*, 47 SMU L. REV. 199, 205–06 (1994).

¹² See Don Peters, *When Lawyers Move Their Lips: Attorney Truthfulness in Mediation and a Modest Proposal*, 2007 J. DISP. RESOL. 119, 124 (reporting a survey of mediation lawyers who responded that adverse lawyers lie about material facts in 17% of mediations).

¹³ UNIF. MEDIATION ACT, *supra* note 8, prefatory note 1 (2003). The note warns parties not to trust the representations of adverse parties, which because of privilege rules may not be admissible, and instead to seek verification. Of course, the common way to seek verification in court-connected mediation is through the discovery process where litigants expect truthful responses or court-imposed sanctions.

party was in litigation or in mediation. Confusion results, of course, when the mediation is included as part of the litigation process. In this clash of cultures, do the litigation values of court control, and thus require, adherence to rules, or do the mediation values of private autonomy and confidentiality control? Is the obligation to tell the truth and participate in good faith temporarily suspended in a court-ordered mediation?

This clash of cultures is not simply an academic concept played out on the pages of law journals throughout the country. Federal courts are addressing with increasing frequency issues relating to alleged misconduct during the mediation process. While Federal Rule of Civil Procedure 16(f) seemingly imposes a unifying duty on parties ordered to mediation to participate in good faith, there is disagreement about what that entails.

This article will advance the thesis that when courts compel parties to attend mediation, these courts have a responsibility to protect the parties from adversarial abuse and to provide guidance about what is expected of the parties and the mediator. Courts can provide this oversight effectively by a more judicious use of the power to compel parties to mediate and with a better delineation of the parties' and mediator's responsibilities both before and during the mediation. Courts can supervise the mediation process with limited intrusion into the privacy of the mediation and parties' litigation strategies.

This article will provide a short history of the development of alternative dispute resolution (ADR) processes in the federal courts, examining the sources of power and authority granted to federal courts to oversee and supervise the mediation process. It will revisit the academic debate about the propriety of imposing good faith standards in light of mediation values of confidentiality and self-determination. It will discuss recent federal court decisions where courts have sanctioned parties for misuse of the mediation process and violating their duty to participate in the mediation in good faith. The article will then conclude with recommendations and a proposed amendment to Federal Rule of Civil Procedure 16.

To date, Congress has left it up to the individual district courts to design ADR processes consistent with local needs and customs. As a result, in the last decade federal district courts have introduced dozens of mediation programs, some elaborate and others quite simple. This ad hoc process has encouraged creativity and innovation, but the lack of clear standards creates uncertainty and has resulted in increasing litigation and differing standards among federal courts. Differing standards lead to misunderstanding and more litigation.

II. MEDIATION IN THE FEDERAL COURTS

Mediation is firmly entrenched as an integral part of the pretrial process in federal courts. From 1999 to 2005 the number of opinions in federal courts available on Westlaw addressing mediation-related issues more than tripled.¹⁴ In large part,

¹⁴ James R. Coben & Peter N. Thompson, *Mediation Litigation Trends: 1999–2007*, 1 *WORLD ARB. & MEDIATION REV.* 395, 398 (2007) (reporting that the number of federal

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this increase in federal mediation cases reflects the various federal district courts responding to the Alternative Dispute Resolution Act of 1998.¹⁵ The Act directed federal district courts to develop local rules to implement ADR processes for civil actions.¹⁶ The Act provided that these local rules should require litigants in all civil cases to consider the use of an ADR process.¹⁷ The ADR Act was not Congress' first attempt to bring ADR processes into the federal court system. In the Civil Justice Reform Act of 1990,¹⁸ Congress authorized but did not require districts to implement ADR programs as part of their plans to reduce civil justice expense and delay.¹⁹ If a district had a pre-existing ADR program, the ADR Act directed the district to examine the effectiveness of the existing program and adopt appropriate improvements.²⁰

In the Congressional Findings and Declaration of Policy, Congress noted that ADR processes have a variety of benefits, including party satisfaction, innovative methods, and efficiency in achieving settlements, and that certain forms of ADR have "potential to reduce the large backlog of cases now pending."²¹ Based on the positive experience with the use of mediation in the Federal Courts of Appeal, Congress specifically recommended that district courts "consider using mediation in their local" ADR programs.²² Although the legislation recommended that the district courts consider mediation, the legislation provided very little guidance in how to structure mediation programs.²³ Congress left it to the individual districts to develop ADR programs, perpetuating the policy of encouraging districts to experiment with

opinions collected on Westlaw from 1999 to 2005 increased from 63 mediation opinions in 1999 to 218 opinions in 2005).

¹⁵ 28 U.S.C. §§ 651–658. *See generally*, Lisa B. Bingham, Tina Nabatchi, Jeffrey M. Senger & Michael S. Jackman, *Dispute Resolution and the Vanishing Trial: Comparing Federal Government Litigation and ADR Outcomes*, 24 OHIO ST. J. ON DISP. RESOL. 225, 229–32 (2009); Gregory A. Litt, Note, *No Confidence: The Problem of Confidentiality by Local Rule in the ADR Act of 1998*, 78 TEX. L. REV. 1015 (2000).

¹⁶ 28 U.S.C. § 651(b) (2006).

¹⁷ *Id.* § 652(a) (2006).

¹⁸ 28 U.S.C. §§ 471–482 (1990).

¹⁹ *Id.* § 471 (1990).

²⁰ *Id.* § 651(c) (2006).

²¹ Findings and Declaration of Policy, Alternative Dispute Resolution Act of 1998 Pub. L. No. 105-315, § 22, 112 Stat. 2993 (1998).

²² *Id.* at 315.

²³ *See* 28 U.S.C. § 654 (2010). The Act does provide some specific direction about what should be included in an arbitration program. The statute addresses the types of cases that may or may not be referred to arbitration including provisions about an amount in controversy and when the action may be referred without consent. 28 U.S.C. § 657 (2010) addresses filing and sealing of the arbitration award.

creative approaches and to craft policies that are good fits for the particular needs of each district court.²⁴

The congressional decision to encourage creativity and individualized rules addressing mediation ran counter to the push in the state court systems to develop uniform laws addressing mediation. The Prefatory Note to the Uniform Mediation Act, approved in 2003, emphasized the need for uniformity as one of the underlying principles justifying the Uniform Act.²⁵ According to the note, uniformity brings predictability and “helps bring order and understanding across state lines, and encourages effective use of mediation in a number of ways.”²⁶

Predictability was particularly important to the drafters of the Uniform Mediation Act because the multi-state nature of modern litigation makes it difficult for parties to predict where matters will be mediated or litigated and which state’s laws or mediation rules will be applicable.²⁷ The argument for uniform procedures seems stronger in the context of the federal courts, a single national judicial system. Parties litigating in the federal courts may be subject to dozens of different sets of procedures and privilege rules in the varying districts’ local rules.

The districts responded with a wide variety of programs, some elaborate,²⁸ some simply repackaging current practices and effectively recasting the magistrate judge’s

²⁴ See Litt, *supra* note 15, at 1018–19; see also John Maull, *ADR in the Federal Courts: Would Uniformity Be Better?*, 34 DUQ. L. REV. 245, 271–72 (1996) (addressing a similar approach by Congress in the Civil Justice Reform Act of 1990).

²⁵ UNIF. MEDIATION ACT, *supra* note 8, prefatory note 3.

²⁶ *Id.*

²⁷ *Id.*

²⁸ See D.AK. LR 16.2 (specifying detailed mediation procedures, including selection of mediator, timing, conduct, and confidentiality); C.D. CAL. L.R. 16-15 (specifying complex settlement procedures, including conduct and procedure for settlement conference, appearance requirements, and confidentiality); E.D. CAL. L.R. 271 (specifying complex voluntary dispute resolution procedures, including neutral selection, attendance and conduct, exemption, and confidentiality); N.D. CAL. ADR L.R. (containing 48 pages of individual ADR rules); S.D. CAL. CIVLR. 600 (specifying rules for non-binding mediation and arbitration procedures); D.D.C. LCvR 84 (specifying procedures for mediation including selection of neutrals, conduct and attendance requirements, and confidentiality); M.D. FLA. L.R. 9 (specifying purpose, selection of neutrals, referral of cases, scheduling, and reporting for court annexed mediation); S.D. FLA. L.R. 16.2 (specifying purpose, selection of neutrals, referral of cases, party attendance, and mediation procedures); LR 16.7, NDGA. (identifying purpose, referral process, selection of neutrals, and procedures for ADR processes); S.D. GA. LR 16.7.5 (specifying purpose and procedures for mediation); D. HAW. LR 88.1 (specifying purpose, administration, referral of cases, selection of neutrals, and confidentiality of mediation); DIST. IDAHO LOC. CIV. R. 16.4 (specifying purpose and availability of ADR and providing some guidance regarding ADR procedures); N.D. ILL. LR app. B (specifying selection of neutrals, referral of cases, mediation procedures, and confidentiality in mediation proceedings); N.D. IND. L.R. 16.6(c) (stating that the Indiana Rules for Alternative Dispute Resolution shall apply to all ADR processes); S.D.IND.

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LOCAL A.D.R. RULES (specifying referral to ADR, confidentiality, sanctions, selection and conduct of neutrals, and procedural requirements for mediation); D. KAN. RULE 16.3 (specifying purpose, referral of cases, selection of neutrals, and confidentiality of mediation); W.D. MICH. LCIVR 16.2–16.3 (outlining referral to mediation, selection of neutrals, and the mediation process); N.D. MISS. L.U.CIV.R. 83.7 (specifying purpose, case referral, documentation, sanctions, confidentiality, and procedures for mediation); S.D. MISS. L.U.CIV.R. 83.7 (specifying purpose, case referral, documentation, sanctions, confidentiality, and procedures for mediation); E.D.MO. L.R. (specifying mediation rules including case referral, duty of participants, selection and certification of neutrals, confidentiality, and sanctions); D. NEB. MEDIATION PLAN (outlining purpose, case referral, mediation procedure, and mediator qualifications and ethical requirements); D.N.H. LR 53.1(c) (outlining mediation program, case referral, procedures, and ethical standards); D.N.J. L.CIV.R. app. Q (outlining the guidelines for mediation including case management, procedures, and attendance requirements); E.D.N.Y. L.R. 83.11 (specifying mediation procedures, attendance, and confidentiality); N.D.N.Y. L.R. 83.11-1 (outlining purpose, designation and selection of mediators, case referral, procedures, and confidentiality); W.D.N.Y. ADR PLAN (outlining the district’s Mediation Plan including purpose, referral of cases, violations, selection of neutrals, procedures, and other mediation requirements); M.D.N.C. LR 83.9a–83.10a (outlining mediation rules including case referral, selection of mediators, and mediation procedures); W.D.N.C. LCvR 16.3(B)(1) (adopting North Carolina state mediation rules for the federal district); N.D. OHIO LR 16.4, 16.6 (outlining ADR procedures including mediation referral, procedures, and confidentiality); S. D. OHIO CIV. R. 16.3 (outlining ADR and mediation procedures including case referral, procedures, and confidentiality); D. OR. LR 16-4 (outlining ADR program including selection of mediators, mediation procedures, and confidentiality); E.D. PA. COURT-ANNEXED MEDIATION PROTOCOL UNDER LOCAL CIVIL RULE 53.3 (specifying selection of mediators, case referrals, the mediation process, and other general rules pertaining to mediation); M.D. PA. LR 16.8 (outlining court-annexed ADR and mediation programs including appointment of mediators, referral of cases, case scheduling, and mediation procedures); W.D. PA. LCvR 16.2(E) (specifying case referral, scheduling, attendance, and procedure for mediation); L.Cv.R. 83J (D.P.R. 2009) (specifying selection of mediators, the mediation process, attendance and participation requirements, and confidentiality); D.R.I. ADR PLAN (outlining ADR and mediation program including case referral, scheduling, attendance requirements, and procedures); LOCAL CIVIL RULES DSC 16.03–16.12 (specifying appointment of mediators, attendance and confidentiality requirements, and duties of mediators); M.D. TENN. LR16.02–16.05 (outlining detailed ADR and mediation requirements and procedures); W.D. TENN. MEDIATION PROGRAM PLAN (outlining detailed scheduling, certification of mediators, and reporting procedures for the district mediation program); E.D. TEX. LOCAL COURT RULES app. H (outlining the purpose, selection of mediators, case referral, and scheduling and attendance requirements for mediation); E.D. WASH. LR 16.2 (specifying ADR and mediation rules including assignment to ADR, selection of mediators, scheduling, conduct and attendance requirements, and confidentiality); W.D. WASH. CR 39.1 (outlining ADR and mediation rules including scheduling, selection of mediators, mediation procedures, and writing and attendance requirements); D. WYO. L.R. 16.3 (outlining ADR and mediation case referral, selection of neutrals, procedures, and attendance and confidentiality requirements); D.V.I. LRCI. 3.2 (outlining the

settlement conference as a mediation.²⁹ Although docket control seems to be the clear mission for these programs,³⁰ many districts recognize other values in

qualifications of mediators, mediation procedure, attendance, conduct, and confidentiality requirements).

²⁹ See E.D. ARK. GEN. ORD. No. 50 (authorizing magistrate judges to conduct settlement or mediation conferences); W.D. ARK. GEN. ORD. NO. 32 (authorizing magistrate judges to conduct settlement or mediation conferences); C.D. CAL. L.R. 16-15.4 (stating that settlement conference may be conducted by magistrate judge); D. DEL. LR 72.1(a)(1) (listing magistrate judges' civil duties including conducting mediations); S.D. GA. LR 16.7.1 (requiring court clerk to give litigants information about availability of ADR processes and magistrate judges). *But see* N.D. IND. L.R. 16.6(B) ("A settlement conference conducted by a judicial officer is not an Alternative Dispute Resolution Process."); N.D. IOWA LR 16.2(a) (endorsing private mediation and, in some cases, court-sponsored settlement conference with a federal judge or other qualified neutral); S.D. IOWA LR 16.2(a) (endorsing private mediation and, in some cases, court-sponsored settlement conference with a federal judge or other qualified neutral); D. ME. L.R. 83.11(c) (authorizing district and magistrate judges to preside over settlement conferences); D. MD. L.R. 607(1) (authorizing magistrate judges to constitute the panel of neutrals available for ADR, however, the parties can agree to a non-judicial neutral); *see also* LR 16.4(b), D. MASS. (authorizing courts to refer a case to another judicial officer for settlement conference); D. MINN. LR 16.5(a)(2) (requiring eligible civil cases to proceed to a mediated settlement conference before a magistrate judge); D.N.D. CIV. L.R. 16.2(A)(2) (stating that the primary form of ADR offered is a mediated settlement conference with a judicial officer); D.S.D. CIV. LR 53.1 ("Magistrate judges are available as mediators to facilitate alternative dispute resolution procedures.").

³⁰ See M.D. ALA. LR 16.1(c) (authorizing referral to ADR processes under "Civil Justice Expense and Delay Reduction Plan"); M.D. FLA. L.R. 9.01(b) (stating that court-annexed mediation will save litigants and courts time and costs); S.D. FLA. L.R. 16.2(a)(2) (stating that mediation is intended to save litigants and the courts time and resources); LR 16.7(A), NDGA. (stating that ADR processes are intended to save litigants and courts time and costs without sacrificing the quality of justice); DIST. IDAHO LOC. CIV. R. 16.4 (stating that the purpose of ADR procedures is to "reduce the financial and emotional burdens of litigation, and to enhance the court's ability to timely provide traditional litigation services"); CDIL-LR 16.4(A) (stating that ADR processes are available to provide "quick, inexpensive and satisfying alternatives to engaging in continuing litigation"); D. NEB. MEDIATION PLAN 1 (stating that mediation is intended to "save litigants and the court time and expense"); D.N.J. L.Civ.R. app. Q(1) (stating that mediation is intended to conserve litigant and judicial resources, and enable judges "to concentrate on cases which have not been referred to mediation"); N.D.N.Y. L.R. 83.11-1(a) (stating that mediation provides savings of time and costs to litigants and the courts); W.D.N.C. LCvR. 16.3(A) (stating that mediation facilitates "efficient and orderly resolution of civil cases"); N.D. OHIO LR 16.4(a) (stating that ADR processes are designed to "provide quicker, less expensive, and generally more satisfying alternatives to continuing litigation"); W.D. WASH. CR 39.1(a)(1) (stating that ADR procedures promote "early and inexpensive resolution of disputes" and reduce calendar congestion).

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encouraging or requiring mediation.³¹ The ADR Act directed the local districts “to provide for the confidentiality of the alternative dispute resolution processes” and to prohibit disclosure of confidential dispute resolution communications.³² The various districts established different concepts of confidentiality, some providing only a general statement that the proceedings shall be confidential,³³ while others incorporated Federal Rule of Evidence 408 as the source for maintaining the confidentiality of mediations.³⁴ Others provide more specificity about the

³¹ See M.D. ALA. LR 16.2(b) (“Mediation is a process of confidential negotiation through which parties may often achieve results which could not be obtained through submission of their case to a jury.”); N.D. CAL. CIVIL L.R. 16-8 (“It is the policy of this Court to assist parties involved in civil litigation to resolve their disputes in a just, timely and cost-effective manner.”); D.D.C. LCvR 84.2 (“A hallmark of mediation is its capacity to expand traditional settlement discussion and broaden resolution options, often by exploring litigant needs and interests that may be independent of the legal issues in controversy.”).

³² 28 U.S.C. § 652(d) (2003).

³³ See M.D. ALA. LR 16.2 (“The court strictly enforces the confidentiality of mediation.”); C.D. CAL. L.R. 16-15.8 (stating that all settlement proceedings shall be confidential); LR 16.7(I)(1), NDGA. (“ADR conferences will be private.”); DIST. IDAHO LOC. CIV. R. 16.7(b)(2)(B) (stating that matters discussed during mediation will not be communicated to the assigned judge); SDIL-LR 16.3(b)(4) (stating that all communications in connection with settlement conference are confidential); E.D. KY. LR 16.2 (stating that mediation communications are not admissible in evidence); W.D. KY. LR 16.2 (stating that mediation communications are not admissible in evidence); E.D. LA. LR 16.3.1(d) (“All alternative dispute resolution proceedings shall be confidential.”); M.D. LA. LR 16.3.1(d) (“All alternative dispute resolution proceedings shall be confidential.”); W.D. LA. LR 16.3.1(d) (“All alternative dispute resolution proceedings shall be confidential.”); D. MD. L.R. 607(4) (stating that all ADR processes are confidential unless agreed by the parties); LR 16.4(c)(4)(f), D. MASS. (stating that all communications in connection with mediation are confidential); D. MONT. L. R. 16.6(b)(2) (stating that all communications made in connection with ADR are confidential); D.N.H. GUIDELINES FOR MEDIATION PROGRAM 5(d) (stating that all information presented to the mediator is confidential); D.N.J. L.CIV.R. app. Q(II)(B) (“Neither the parties nor the mediator may disclose any information presented during the mediation process without consent.”); M.D. TENN. LR 16.05(e) (stating that certain documents pertaining to mediation are not to be provided to the presiding judicial officer); D.V.I. LRCI 3.2(e)(5) (stating that all communications written and oral made during mediation are inadmissible evidence at trial). See generally Ellen E. Deason, *Predictable Mediation Confidentiality in the U.S. Federal System*, 17 OHIO ST. J. ON DISP. RESOL. 239 (2002) (urging reform to accomplish more uniform confidentiality protection for mediation communications in federal court); Charles W. Ehrhardt, *Confidentiality, Privilege and Rule 408, The Protection of Mediation Proceedings in Federal Court*, 60 LA. L. REV. 91 (1999) (urging Congress to pass a mediation privilege statute).

³⁴ See D. HAW. LR 88.1(k) (stating that all communications made in connection with mediation are confidential and subject to FED. R. EVID. 408); W.D. MICH. LCIVR 16.2(d)

confidentiality of the proceedings.³⁵ Most of the local rules lack clarity on the extent to which the trial judge has an obligation or right to oversee the conduct of the

("All ADR proceedings are considered to be compromise negotiations within the meaning of Federal Rule of Evidence 408."); E.D.TN. LR 16.4(h) (stating that all mediation proceedings are confidential and inadmissible under Federal Rule of Evidence 408).

³⁵ See D.AK. LR 16.2(f) (stating that parties cannot disclose information about the mediation unless expressly agreed by the parties or authorized by the court); E.D. ARK. GEN. ORD. NO. 50 (prohibiting disclosure of mediation communications except allowing magistrate judge to report the outcome to the court); W.D. ARK. GEN. ORD. NO. 32 (prohibiting disclosure of mediation communications except allowing magistrate judge to report the outcome to the court); E.D. CAL. L.R. 271(m)(2) (stating that no one can disclose information to the court unless stipulated by the parties in writing, provided by this rule, or ordered by the court); N.D. CAL. ADR L.R. 6-12 (requiring confidentiality of mediation communications and documents but providing exceptions for stipulations by parties and mediator, communication with ADR staff, and various other reasons); S.D. CAL. CIVLR 600-8, GEN. ORD. NO. 387-A (prohibiting mediators, counsel, and parties from disclosing written and oral communications made during mediation unless stipulated by the parties); D. CONN. L. CIV. R. 16(h)(5) (prohibiting disclosure of statements and documents made in connection with ADR processes); D.D.C. LCVR 84.9 (prohibits parties, counsel, and mediators from disclosing any oral or written communication in connection with mediation sessions); M.D. FLA. L.R. 9.07(b) (prohibiting disclosure of mediation proceedings for any purpose); S.D. FLA. L.R. 16.2(g)(2) (stating that all mediation proceedings are confidential and may not be recorded, reported, or used in litigation unless a written settlement is reached); LR 16.7(I)(5), NDGA. (requiring parties to sign a confidentiality form stating that the mediation conference is confidential and cannot be used in subsequent judicial proceedings); S.D. GA. LR 16.7.8 (stating that mediation communications are confidential and shall not be communicated to the court and are not admissible in evidence); CDIL-LR 16.4(E)(7) (stating that all mediation communications are confidential unless stipulated by the parties); N.D. ILL. LR 16.3 (stating that all mediation proceedings are privileged and shall not be reported to the court); N.D. ILL. LR app. B (VII)(B) (stating that all mediation communications are privileged and are not to be reported, recorded, placed into evidence, or submitted to the court); S.D.IND. LOCAL A.D.R. RULE 1.6 (stating that all mediation communications are confidential unless agreed by the parties and that any unauthorized disclosure may result in sanctions); N.D. IOWA LR 16.2(e) (prohibiting disclosure of mediation or settlement conference communications unless agreed upon by the parties); S.D. IOWA LR 16.2(e) (prohibiting disclosure of mediation or settlement conference communications unless agreed by the parties); D. KAN. RULE 16.3(i)-(j) (delineating elaborate confidentiality rules and exceptions); D. ME. L.R. 83.11(d) (prohibiting disclosure of ADR communications that reveal the positions of parties or opinions of neutrals); D. MINN. LR 16.5(c) (prohibiting disclosure of "[c]onfidential dispute resolution communication" unless stipulated by the parties); N.D. MISS. L.U.CIV.R. 83.7(k) (stating that all mediation communications are confidential and not subject to compelled disclosure); S.D. MISS. L.U.CIV.R. 83.7(k) (stating that all mediation communications are confidential and not subject to compelled

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mediation consistent with the principles of confidentiality. The district courts define differing roles for the mediator and usually say very little about what precisely the parties must do at mediation.³⁶

disclosure); E.D.Mo. L.R. 16-6.04(A) (prohibiting disclosure of all mediation related communications); D. NEB. MEDIATION PLAN 4(e), (g) (stating that oral and written statements during mediation are not admissible at trial, however, they may be admissible on a motion for sanctions for mediation conduct); E.D.N.Y. L.R. 83.11(d)(1)(A) (stating that all oral and written communications made in connection with mediation are confidential unless agreed to by the parties); N.D.N.Y. L.R. 83.11-5(d) (explaining all of the communications that are confidential pertaining to mediation); S.D.N.Y. L.R. 83.12(k) (stating that mediation shall be confidential and prohibits disclosure of information pertaining to the mediation process); W.D.N.Y. ADR PLAN 5.10 (stating that all ADR processes shall be confidential and outlining prohibited disclosures); E.D.N.C. LOCAL CIVIL RULE 101.1d(j) (prohibiting disclosure of all mediation communications except in proceedings for sanctions under ADR rules, proceedings to enforce or rescind the settlement agreement, or disciplinary proceedings for mediators); D.N.D. CIV. L. R. 16.2(C) (stating that mediation communications are confidential and will not be reported to the trial judge); N.D. OHIO LR 16.6(h) (stating that the “entire mediation process is confidential”); S.D. OHIO CIV. R. 16.3(c) (stating that all settlement negotiations and communications during ADR processes are confidential); W.D. OKLA. LCVR 16.3(f) (stating that all mediation communications are confidential); D. OR. LR 16-4(g) (stating that all ADR proceedings are privileged and confidential unless waived by the parties); E.D. PA. L.R. 53.3(3) (stating that all ADR processes are confidential); M.D. PA. LR 16.8.6(c) (stating that all mediation communications, both oral and written, are to remain confidential); L.Cv.R. 83J(g) (D.P.R. 2009) (stating that all mediation proceedings are confidential and may not be disclosed); D.R.I. ADR PLAN (VIII) (stating that all ADR proceedings are confidential and prohibiting disclosure of related information unless agreed by the parties); LOCAL CIVIL RULES DSC 16.08(C) (stating that all mediation communications shall be confidential); E.D. TEX. LOCAL RULE App. H(VIII) (stating that all mediation proceedings are confidential); S.D. TEX. LR 16.4.I (stating that all ADR communications are confidential); W.D. TEX. RULE CV-1 88(i) (prohibiting disclosure of ADR communications unless agreed by the parties); DUCIVR 16-2(j)(2) (prohibiting disclosure of ADR communications unless agreed by the parties); E.D. WASH. LR 16.2(c)(2) (stating that all mediation proceedings are confidential); W.D. WASH. CR 39.1(a)(6) (stating that all ADR proceedings and communications are confidential and not to be disclosed); N.D. W. VA. LR CIV P 16.06(e) (stating that mediators shall not disclose any information about the mediation to the court except for three enumerated exceptions); S.D. W. VA. LR CIV P 16.6.5 (stating that all oral and written statements in connection with mediation are confidential); E.D. WIS. CIVIL L. R. 16(d)(3) (stating that all ADR communications are confidential and prohibiting disclosure of communications); D. WYO. L.R. 16.3(c)(2) (stating that all communications made in connection with settlement conferences are confidential); E.D. VA. L.R. 83.6(e) (prohibiting disclosure of any mediation communications); W.D. VA. CIV. R. 83(e) (stating that all communications in connection with ADR processes are confidential).

³⁶ *But see* D.D.C. LCvR 84 (specifying procedures for mediation including selection of neutrals, conduct and attendance requirements, and confidentiality); LR 16.7, NDGA. (identifying purpose, referral process, selection of neutrals, and procedures for ADR

III. GOOD FAITH DEBATE

Defining parties' obligations in mediation is not an easy matter. Many argue against any attempt to provide such a definition and in particular argue against an obligation to mediate in good faith.³⁷ The arguments against imposing a duty of good faith are well-rehearsed, numerous, and tend to build upon each other. Opponents of a good faith requirement usually begin with a traditional definitional argument, maintaining that good faith is a nebulous term that provides no guidance to parties and courts as to how the standard should be applied. Usually, this argument is combined with the assertion that assessing good faith requires a subjective assessment,³⁸ and that imposing such an ambiguous standard will litigize the mediation process by encouraging attempts to "game" the mediator and by creating "satellite litigation over mediation conduct."³⁹ The possibility of sanctions for bad

processes); W.D. MICH. LCIVR 16.2-3 (outlining referral to mediation, selection of neutrals, and the mediation process).

³⁷ See Izumi & La Rue, *supra* note 9, at 70-74 (outlining the arguments); 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, 182-95 (2001) (addressing litigation proceedings where "good faith" requirements in mediation jeopardized the confidentiality and neutrality of the mediation process); David S. Winston, Notes and Comments, *Participation Standards in Mandatory Mediation Statutes: "You Can Lead a Horse to Water. . ."*, 11 OHIO ST. J. ON DISP. RESOL. 187, 198 (1996) (noting that a good faith requirement forces courts to make subjective evaluations of the parties' motives rather than conduct and leads to "exhaustive investigations" that undercut judicial economy and efficiency); Alexandria Zylstra, *The Road From Voluntary Mediation to Mandatory Good Faith Requirements: A Road Best Left Untraveled*, 17 J. AM. ACAD. MATRIM. LAW. 69, 94-97 (2001) (arguing that the good faith requirement in court-mandated mediations jeopardizes the mediator's role as a neutral and undercuts the confidentiality and trust components of mediation).

³⁸ John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. REV. 69, 75-76 (2002) (arguing that: (1) good faith requirements do not ensure integrity in mandated mediations, and (2) dispute system design principles should be implemented, which allow stakeholder groups in the mediation to develop policies that prevent "bad faith" behavior).

³⁹ Brazil, *supra* note 9, at 31-33 (arguing that the good faith requirement "corrupts" the mediation process by litigizing it, causing mediators to feel pressured into reporting the parties' level of participation, and causing parties to feel distrustful of one another and the mediator); see also Winston, *supra* note 37, at 198.

The American Bar Association Section on Dispute Resolution passed a Resolution on Good Faith Requirements for Mediators and Mediation Advocates in Court-Mandated Mediation Programs in 2004. ABA Section of Dispute Resolution, Resolution on Good Faith Requirements for Mediators and Mediation Advocates in Court-Mandated Mediation Programs (August 7, 2004), <http://www.abanet.org/dispute/webpolicy.html#9> (last visited Oct. 20, 2010). The resolution affirms that parties should be held to specific

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faith mediation can give rise to misuse by the adverse party, as well as by the mediator in imposing unfair pressure to settle. Further, it is argued that if the mediator is involved in assessing or testifying about the quality of the parties' bargaining, this practice alters the role of the mediator and affects mediator neutrality.⁴⁰

Usually, the concluding argument is the strongest. It is argued that a good faith obligation may undermine confidence and the subsequent effectiveness of the mediation process by decreasing mediation confidentiality.⁴¹ The Uniform Mediation Act (UMA) supports this position. In theory, the Act takes no position on whether parties should be required to mediate in good faith, but the Act precludes the parties and the mediator from providing evidence about mediation communications,⁴² thus making it nearly impossible to raise an issue of bad faith conduct in mediation.⁴³ The UMA allows the mediator to report to the court only whether the mediation took place, whether it has ended, whether a settlement was reached, and who attended.⁴⁴ The UMA also severely limits the evidence that the parties may produce about mediation communications.⁴⁵

Several states have adopted a similar approach, protecting confidentiality at the expense of exposing mediation parties to bad faith conduct by adverse parties. For

objective standards but rejects imposing an obligation to act in good faith, or imposing sanctions based on subjective standards. The Section believed that the lack of clear definition and proof issues would encourage litigation and jeopardize confidentiality. Thus, enforceable obligations must be objective and "include but [are] not limited to failure of a party, attorney, or insurance representative to attend a court-mandated mediation for a limited and specified period or to provide written memoranda prior to the mediations." *Id.*

⁴⁰ Zylstra, *supra* note 37, at 94–97 (arguing that the good faith requirement in court-mandated mediations jeopardizes the mediator's role as a neutral and undercuts the confidentiality and trust components of mediation).

⁴¹ Alfini & McCabe, *supra* note 37, at 182–95 (addressing litigation proceedings where "good faith" requirements in mediation jeopardized the confidentiality and neutrality of the mediation process).

⁴² UNIF. MEDIATION ACT §§ 4–6 (2003). The Reporter's Note to the Uniform Mediation Act cautions jurisdictions that impose a duty of good faith that if the jurisdiction is considering adopting the UMA it must consider the "interplay between the obligation to mediate in good faith and UMA privilege rules." Thus, the UMA privilege rules may not be a good match for the federal judicial system, which has a culture of expecting parties to participate in good faith at court-ordered mediations. *See infra* Part IV.

⁴³ Under the UMA, it might be possible to raise a claim of lack of good faith if the parties previously agreed in a signed writing, or on the record to abide by a different set of confidentiality rules or if the parties and mediator waive the privilege. *See* UNIF. MEDIATION ACT § 3(c) (2003).

⁴⁴ *Id.* § 7(a).

⁴⁵ *Id.* §§ 4–6.

example, in *Foxgate Homeowners' Ass'n, v. Bramalea California, Inc.*, the California Supreme Court affirmed an appellate court's reversal of a trial judge's ruling imposing a \$30,000 sanction on the defendant for failing to bring expert witnesses to the court-ordered mediation, as required by the Court's order.⁴⁶ The California Supreme Court ruled that the confidentiality statutes precluded consideration of the evidence of what went on in the mediation.⁴⁷ The Court held that California Evidence Code Sections 1119 and 1121, which create the confidentiality of mediation communications and prohibit mediator reporting, are not subject to judicially created exceptions to establish that one party has acted in bad faith.⁴⁸

Maine statutes and rules impose an obligation to mediate in good faith in all contested divorce and parental rights actions.⁴⁹ If the parties do not reach agreement, the court must assess whether they made a good faith effort to mediate before allowing a hearing.⁵⁰ Confidentiality rules, however, limit what evidence may be produced. In assessing good faith, the court may not consider conduct or statements made during the mediation.⁵¹

The arguments opposing a duty of good faith in mediation are powerful, and must be taken into account in the design and implementation of any court-connected mediation program, but do not necessarily require that the federal courts abandon the tradition of requiring that parties in court-ordered processes participate in good faith.⁵² The impetus for some of the opposition to a good faith requirement may stem from the clash of cultures referred to previously.⁵³ One of the driving forces in the mediation community's push for ADR was distaste for the rule-based adversary system in favor of a process that fostered self-determination and empowerment.⁵⁴

⁴⁶ *Foxgate Homeowners' Ass'n v. Bramalea Cal., Inc.*, 25 P.3d 1117 (Cal. 2001).

⁴⁷ *Id.* at 1128.

⁴⁸ *Id.*

⁴⁹ See ME. REV. STAT. ANN. tit. 19-A, § 251(4) (1995); see also ME. R. CIV. P. 92(b)(5)(E).

⁵⁰ ME. REV. STAT. ANN. tit. 19-A, § 251(4) (1995).

⁵¹ See *Nadeau v. Nadeau*, 957 A.2d 108, 117 (Me. 2008) (stating that in assessing good faith, Maine Rule of Evidence 408(b) precludes inquiry into mediation communications).

⁵² Preserving the purity of any particular view of the mediation process is not a concern of the federal courts. There may be great value in a facilitative process dedicated to self-determination and party empowerment immune from the coercive powers of the federal judge. This vision of an alternative dispute resolution that truly is a better way to resolve disputes is worth arguing about, but not likely to take over the culture of litigation in the federal courts.

⁵³ See *supra* notes 9–13 and accompanying text.

⁵⁴ See Peter N. Thompson, *Enforcing Rights Generated in Court-Connected Mediation—Tension Between the Aspirations of a Private Facilitative Process and the Reality of Public Adversarial Justice*, 19 OHIO ST. J. ON DISP. RESOL. 509, 516 (2004)

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Limiting judicial review to objective issues, such as party attendance,⁵⁵ minimizes the role of the court. In drafting uniform rules applicable to all mediation processes, not limited to federal court-connected mediation, this anti-judicial approach may make sense. This hands-off approach may not resonate well in mediation processes mandated by managerial judges in the midst of the culture of adversarial federal court litigation.

Not all ADR scholars or state jurisdictions agree with the UMA/California approach.⁵⁶ Some maintain that a good faith requirement is necessary to ensure a fair process, free from adversarial abuse.⁵⁷ There is concern that lawyers might use the mediation process as “free discovery” or to send a message to the adverse party that the litigation is going to be long, expensive, and rancorous.⁵⁸ Under this view, without a good faith requirement, it is possible for one side to engage in intimidation,⁵⁹ misrepresentation,⁶⁰ or otherwise subvert the goals of mediation.⁶¹

(observing that “the rapid growth of the ADR movement was fueled in large part by a rejection of the adversarial and inflexibility of the litigation process”).

⁵⁵ See *supra* note 39, ABA Section of Dispute Resolution, Resolution on Good Faith Requirements for Mediators and Mediation Advocates in Court-Mandated Mediation Programs (advocating limiting judicial inquiry to objective issues such as party attendance).

⁵⁶ See *supra* notes 42–48 and accompanying text for a description of this approach.

⁵⁷ See, e.g., 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, 643 (2001) (arguing that core objectives of mediation—efficiency, effectiveness, party satisfaction, and fairness—can be achieved only if the parties are held to a duty to mediate in good faith); see also Maureen A. Weston, *Confidentiality’s Constitutionality: The Incursion on Judicial Powers to Regulate Party Conduct in Court-Connected Mediation*, 8 HARV. NEGOT. L. REV. 29 (2003) (addressing the interplay between confidentiality legislation and judicial powers to regulate conduct in the pretrial process).

⁵⁸ See, e.g., 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. Roger Carter reports his experience in a mediation where his clients traveled over 200 miles on winter roads to be met by parties who refused to negotiate. *Id.* at 367–68. These parties intended only to send a message of intimidation and a determination to litigate. *Id.*; see also *Fisher v. SmithKline Beecham Corp.*, No. 07-CV-0347A(F), 2008 WL 4501860 (W.D.N.Y. Sept. 29, 2008) (imposing sanctions for failure to mediate in good faith when defendant did not inform plaintiffs it was not willing to fully participate in mediation and waited until plaintiffs’ attorney was in route to the mediation across the country to file a summary judgment motion); *Fisher v. SmithKline Beecham Corp.*, No. 07-CV-347A(F), 2009 WL 899433 (W.D.N.Y. Mar. 26, 2009) (motion for reconsideration denied).

⁵⁹ See Megan G. Thompson, Comment, *Mandatory Mediation and Domestic Violence: Reformulating the Good-Faith Standard*, 86 OR. L. REV. 599, 601 (2007) (arguing that there should be a good faith standard designed to accommodate the needs of battered women in mediation).

IV. GOOD FAITH IN FEDERAL COURT

Federal judges routinely expect parties and counsel to participate in good faith in court-ordered mediation. Judicial control, not self-determination of the parties, is the hallmark of litigation in the federal courts. Most federal judges would be quite surprised that there would be any question about the propriety of sanctioning a party who was ordered to mediate, if that party physically attended but refused to listen to or talk with the mediator or adverse party, or simply berated counsel with profanities.⁶² Federal judges treat the court-ordered mediation process as any other pretrial process, and assume the right to supervise the parties' behavior. Federal judges assume this power to supervise the mediation process based on inherent powers of the court, as well as on authority granted under the Federal Rules of Civil Procedure, local rules, and statutes.

A. *Inherent Power to Regulate Mediation*

In re Atlantic Pipe Corp.,⁶³ a 2002 decision of the First Circuit Court of Appeals, is the leading case establishing the federal court's inherent power to supervise the mediation process. The opinion expanded on a decision by the Court of Appeals for the Seventh Circuit⁶⁴ that held that federal judges have inherent authority to order parties represented by counsel to appear in person at a pretrial

⁶⁰ Misrepresentation may serve as a defense to an enforcement claim; but because of the context of mediations, substantive law requirements, and confidentiality rules, the claim is quite difficult to advocate successfully. See James R. Coben & Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 HARV. NEGOT. L. REV. 43, 80–81 (2006) (“The rarity of success on these defenses likely reflects the reality that judges are willing to tolerate a broad range of adversarial tactics in both the negotiation and in the mediation process.”).

⁶¹ See, e.g., Kathleen A. Devine, Note, *Alternative Dispute Resolution: Policies, Participation, and Proposals*, 11 REV. LITIG. 83, 98 (1991) (arguing that in order for “compulsory ADR . . . to be effective, either (1) legislatures should expressly require good-faith participation, or (2) courts should look to the spirit of the law and imply a requirement of good faith”).

⁶² *But see* Valenti v. Unum Life Ins. Co. of Am., No. 8:04-CV-1615-T-30TGW, 2006 WL 1627276, at *3 (M.D. Fla. June 6, 2006) (invoking privilege to dismiss the claim that an insurance company defendant engaged in bad faith bargaining by sending a representative to the mediation without sufficient settlement authority).

⁶³ *In re Atlantic Pipe Corp.*, 304 F.3d 135, 138 (1st Cir. 2002) (holding that a court may compel mediation pursuant to its inherent authority to manage and control dockets; but, absent an explicit statutory provision or local rule authorizing mediation, the court must first determine that a case is appropriate for mediation and then affirmatively set appropriate procedural safeguards to ensure fairness to all parties involved).

⁶⁴ *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648 (7th Cir. 1989).

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conference to discuss the “posture and settlement of the litigants’ case.”⁶⁵ In *Atlantic Pipe*, the court decided whether “a district court possess[es] the authority to compel an unwilling party to participate in, and share the costs of, non-binding mediation conducted by a private mediator.”⁶⁶

This complex case involved multiple parties and insurance companies, and suits in both federal and state court. It centered on the responsibility for significant damages caused by a burst pipeline. While motions to dismiss were pending, the federal district judge ordered the parties to mediation before a private mediator to conserve judicial resources.⁶⁷ After an unsuccessful motion to reconsider the mediation order, one of the parties filed a writ of mandamus with the court of appeals.

The Court of Appeals noted that the trial judge’s authority must come from one of four sources: (1) local rules, (2) statutes, (3) rules of civil procedure, or (4) the courts’ inherent power.⁶⁸ Although there was legislation, the Civil Justice Reform Act⁶⁹ and the ADR Act,⁷⁰ as well as court rules,⁷¹ that authorized the District Court of Puerto Rico to implement ADR, the District Court had not yet implemented an ADR program.⁷² Thus, the judge had no statutory or rule-based authority to order the parties to mediation. Ultimately, the court of appeals concluded that a trial judge had inherent power to control its docket which justified compelling parties to pay for and attend a private mediation.⁷³ The court was careful to add that this inherent power is not infinite and must be exercised consistent with four limiting principles, stating that inherent powers:

- (1) Must be used in a way reasonably suited to the enhancement of the court’s processes, including the orderly expeditious disposition of pending cases;
- (2) Cannot be exercised in a manner that contradicts an applicable statute or rule;

⁶⁵ *Id.* at 650. Federal Rule of Civil Procedure 16 expressly authorized the court to require the attendance of attorneys and unrepresented parties to attend, but was silent about parties who were represented by counsel.

⁶⁶ *Atlantic Pipe*, 304 F.3d at 138.

⁶⁷ *Id.* at 139.

⁶⁸ *Id.* at 138.

⁶⁹ 28 U.S.C. §§ 471–482 (1991).

⁷⁰ 28 U.S.C. §§ 651–658 (1998).

⁷¹ Federal Rule of Civil Procedure 16(c)(9) authorized the federal district court to “take appropriate action with respect to . . . (9) settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule.” For the current rule, see FED. R. CIV. P. 16(c)(2)(I).

⁷² The District of Puerto Rico now has a local rule authorizing court-ordered mediation. L.Cv.R. 83.10 (D.P.R. 2009).

⁷³ *In re Atlantic Pipe Corp.*, 304 F.3d 135, 138 (1st Cir. 2002).

- (3) Must comport with procedural fairness; and
- (4) Must be exercised with restraint and discretion.⁷⁴

Because of the complexity of the litigation and its prospect of consuming substantial court time for resolution, requiring mediation was appropriate, despite the parties' opposition. The court explained:

[A] party may resist mediation simply out of unfamiliarity with the process or out of fear that a willingness to submit would be perceived as a lack of confidence in her legal position. In such an instance, the party's initial reservations are likely to evaporate as the mediation progresses, and negotiations could well produce a beneficial outcome, at reduced cost and greater speed, than would a trial. While the possibility those parties will fail to reach agreement remains ever present, the boon of settlement can be worth the risk (citations omitted).⁷⁵

According to the court, mediation was particularly useful in complex cases and offered the possibility of "creative solutions—solutions that simply are not available in the binary framework of traditional adversarial litigation."⁷⁶

The court of appeals, however, was concerned about procedural fairness. The part of the trial judge's order that required the parties to attend and pay for the mediation without any limits on what the mediator would charge,⁷⁷ or on the length of the mediation commitment, was improper. Court-ordered mediation "must contain procedural and substantive safeguards to ensure fairness to all parties involved."⁷⁸ The court also required that if parties are ordered to mediate, they should be assured that participation in the mediation will not be taken as a waiver of any litigation position.⁷⁹ The limitations imposed by the Court of Appeals for the First Circuit have been followed by other courts,⁸⁰ but have been largely ignored by the district courts when they promulgate their local rules.⁸¹

⁷⁴ See *id.* at 143.

⁷⁵ *Id.* at 144.

⁷⁶ *Id.* at 145.

⁷⁷ *Id.* at 147. The court noted that the parties' briefs mentioned fees up to \$900 per hour or \$9,000 per day.

⁷⁸ *Id.*

⁷⁹ *Atlantic Pipe*, 304 F.3d at 147.

⁸⁰ See *In re African-Am. Slave Descendants' Litig.*, 272 F. Supp. 2d 755, 760 (N.D. Ill. 2003) (refusing to use inherent authority to order mediation involving unwilling participants); see also *Wells Fargo Bank Minn., N.A. v. Kobernick, C.A.*, No. 8-cv-1458, 2009 WL 2713194, at *2 (S.D. Tex. Aug. 26, 2009) (denying motion to compel mediation where the parties already tried but failed to reach agreement); *Res. Assocs. Grant Writing and Evaluation Servs., LLC v. Maberry*, No. CIV 08-0552 JB/LAM, 2009 WL 1300561, at *14 (D.N.M. Feb. 2, 2009) (declining to order mediation where one of

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While *Atlantic Pipe* authorized the trial judge to order parties to attend a mediation, to what extent does the federal trial judge control questions about what that party must do at the mediation and whether the parties must mediate in good faith? In addition to inherent authority, courts look to the Federal Rules of Civil Procedure, local rules, and statutes to derive authority for addressing these issues.

B. Federal Rule Civil Procedure 16

Federal Rule of Civil Procedure 16 provides the trial judge with great flexibility in controlling the pre-trial process. Federal Rule of Civil Procedure 16(a)(4)–(5) empowers the trial judge to order attorneys and unrepresented parties to attend pretrial conferences to improve the quality of the trial and to facilitate settlement. Federal Rules of Civil Procedure 16(c)(2)(I) and (P) authorize judges to consider and take action at a pretrial conference on matters relating to “settling the case” or “facilitating in other ways the just, speedy, and inexpensive disposition of the action.”⁸² In particular, Federal Rule of Civil Procedure 16(f) authorizes the trial judge to impose sanctions on parties or attorneys who fail to appear, are substantially unprepared to participate, or do not participate in good faith at a scheduling or other pretrial conference. While a good argument could be made that a mediation, particularly a mediation conducted by a private mediator, is not a pretrial conference under this rule, courts have found that Federal Rule of Civil Procedure 16(f) authorizes sanctions for bad faith in federal court-connected mediation.⁸³

the parties insisted on waiting for a ruling on a summary judgment motion); *Meyer v. Alpine Lake Prop. Owners' Ass'n.*, No. 2:06CV59, 2008 WL 153491, at *3 (N.D. W. Va. Jan. 14, 2008) (refusing to appoint a mediator where the parties' inability to decide on a mediation location strongly suggested futility). *But see Lewis v. Sch.* Dist. No. 70, No. 05-CV-776-WDS, 2009 WL 928874, at *7 (S.D. Ill. Apr. 6, 2009) (stating in dicta, without discussion, that courts lack the power to compel unwilling litigants to mediate).

⁸¹ For example, few of the local rules impose time limitations and literally require the parties to mediate until the mediator tells them they can stop. *See, e.g.*, M.D. FLA. L.R. 9.06(a) (providing that the mediator declares when there is an impasse); S.D. FLA. L.R. 16.2(f)(1) (providing that the mediator declares when there is an impasse); N.D. ILL. LR APP. B(VII)(A) (providing that the neutral declares an impasse); E.D.N.Y. L.R. 83.12(j) (providing that the mediation is finished when the mediator concludes that resolution is impossible); N.D.N.Y. L.R. 83.11-5(d)(8) (providing that the mediator declares an impasse); S.D.N.Y. L.R. 83.12(j) (providing that the mediator declares an impasse); E.D.N.C. LOCAL CIVIL RULE 101.1(f) (providing that the mediator declares an impasse); N.D. OHIO LR 16.6(g)(4)(B) (providing that the mediation concludes when the mediator concludes that “further efforts would not be useful”); M.D. PA. LR 16.8.6(b) (providing that the mediator declares an impasse). *See infra* Part VI.D.

⁸² FED. R. CIV. P. 16(c)(2)(I), (P).

⁸³ *See, e.g.*, *Nick v. Morgan's Foods, Inc.*, 270 F.3d 590, 595 (8th Cir. 2001) (finding authority under Fed. R. Civ. P 16 to impose obligation to mediate in good faith).

In *Nick v. Morgan's Foods, Inc.*,⁸⁴ the Eighth Circuit Court of Appeals ruled that Federal Rule of Civil Procedure 16 allowed the district judge to order the parties to mediate in good faith and to impose sanctions for failure to comply with the order.⁸⁵ The district court imposed sanctions when the plaintiff reported to the court that the defendant did not send a representative with settlement authority to the mediation and did not provide a position memorandum to the mediator as required by the court order.⁸⁶ The court reasoned that “[p]art of the purpose of the sanctioning power—the power at issue here—is to control litigation and to preserve the integrity of the judicial process.”⁸⁷

The trial judge relied on both inherent authority and on the provisions in Federal Rule of Civil Procedure 16 authorizing courts to order parties to participate in pretrial proceedings, including hearings to facilitate settlement.⁸⁸ Neither the trial judge nor the appellate court drew any distinction between a pretrial settlement conference and mediation.⁸⁹

⁸⁴ *Nick v. Morgan's Foods, Inc.*, 270 F.3d 590 (8th Cir. 2001) (including good faith mediation obligation in court order).

⁸⁵ *Id.* at 595 (citing FED. R. CIV. P. 16 (a)(4)–(5)).

⁸⁶ It is common for judges to include in the mediation order a requirement that the parties participate in good faith. *See, e.g., Scaife v. Associated Air Ctr. Inc.*, 100 F.3d 406, 408 (5th Cir. 1996) (including in court order that “counsel and parties shall proceed in a good faith effort to try to resolve this case”); *Metcalf v. Lowe's Home Ctrs., Inc.*, No. 4:09-CV-14 CAS, 2010 WL 985293, at *2 (E.D. Mo. Mar. 15, 2010) (providing in court order that “parties, counsel of record, and corporate representatives or claims professionals having authority to settle claims shall attend all mediation conferences and participate in good faith”); *Gen. Conference Corp. of Seventh-Day Adventists v. McGill*, No. 1:06-cv-01207-JDB-egb, 2009 WL 1505710, at *1 (W.D. Tenn. Apr. 16, 2009) (“Failure of any party to personally and in good faith participate in this mediation conference as the Court has directed may result in sanctions, including either dismissal of the lawsuit or default judgment against the offending party being entered.”).

⁸⁷ *Nick*, 270 F.3d at 594.

⁸⁸ The court of appeals did not reach the issue of whether inherent power also justified the sanction. *Id.* at 595.

⁸⁹ The trial judge's order referring the parties to mediation provided that there was a duty to attend and participate. “All parties, counsel of record, and corporate representatives or claims professionals having authority to settle claims shall attend all mediation conferences and participate in good faith.” *Nick*, 99 F. Supp. 2d. at 1058. Plaintiff reported to the court that the defendant did not act in good faith by failing to provide a position memorandum to the mediator and by failing to send a representative with authority to settle, both of which were required by the court's mediation referral order. *Id.* at 1056; *see also Metcalf*, 2010 WL 985293, at *2 (sanctioning parties for failure to send representatives to scheduled mediation); *Regan v. Trinity Distrib. Servs., Inc.*, 251 F.R.D. 108, 111 (S.D.N.Y. 2008) (ordering Defendant to pay Plaintiff's mediation fees and expenses because Defendant's delay in obtaining expert physical examination of Plaintiff frustrated the success of the mediation); *Monroe v. Corpus Christi Indep. Sch. Dist.*, 236 F.R.D. 320, 324 (S.D. Tex. 2006) (declining to sanction

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C. Local Rules Creating Duty to Mediate in Good Faith

Nearly two dozen local federal district court rules specifically impose an obligation to participate in good faith upon the parties ordered to mediation.⁹⁰ Many

school district for sending representative to mediation that needed to obtain school board approval before settling any claim); *Turner v. Young*, 205 F.R.D. 592, 595–96 (D. Kan. 2002) (refusing to impose sanctions on a party that sent a representative with less than full settlement authority to private mediation, but opined that Federal Rule of Civil Procedure 16(f) sanctions may prospectively extend to conduct during private mediation).

⁹⁰ SD ALA. LR 16.6 (court may order parties to participate in good faith in ADR); S.D. CAL. L.R. 16.1(b) (allowing sanctions for “failure to prepare for and participate in good faith in the pretrial conference process”); N.D. IND. L.R. 16.6(c) (declaring that the Indiana Rules for Alternative Dispute Resolution, which include a duty to mediate in good faith in Rule 2.1, apply to all alternative dispute resolution processes); S.D.IND. LOCAL A.D.R. RULE 2.1 (“Parties and their representatives are required to mediate in good faith, but are not compelled to reach an agreement.”); D. KAN. RULE 16.3(c)(5) (authorizing court to impose sanctions per Federal Rule of Civil Procedure 16(f)); N.D. MISS. L.U.CIV.R. 83.7(H) (authorizing court to impose sanctions if a “party, party representative, or attorney fails to participate in good faith during a mediation session”); S.D. MISS. L.U.CIV.R. 83.7(H) (authorizing court to impose sanctions if a “party, party representative, or attorney fails to participate in good faith during a mediation session”); E.D.MO. L.R. 16-6.02(B)(1) (All parties must attend the ADR conference and “participate in good faith.”); D. MONT. L. R. 16.6(b)(4)(B) (“[F]ailure to participate in good faith [in any ADR procedure] may result in the imposition of sanctions against the offending party.”); N.D.N.Y. L.R. 83.11-5(c) (“Parties and counsel shall participate in good faith, without any time constraints, and put forth their best efforts toward settlement.”); S.D.N.Y. L.R. 83.12(j) (attorneys must act in good faith during mediation); S.D. OHIO CIV. R. 16.3(c)(3)(A)(iii) (allowing neutrals to report instances of parties not acting in good faith); D. OR. LR 16.4(f)(2)(C) (requiring attorney to be prepared to discuss issues in good faith during mediation); M.D. PA. LR 16.8.7(a) (“[P]arties and their counsel are required to attend the mediation session, participate in good faith and be prepared to discuss all liability issues”); L.Cv.R. 83J(f) (D.P.R. 2009) (“[G]ood-faith participation shall be mandatory for all parties [in mediation].”); DRI LR 53 (VII)(E) (requiring all parties and attorneys to “attend all ADR conferences and participate in good faith”); N.D.TEX. LR 16.3(a) (“Parties in a civil action must make good-faith efforts to settle.”); W.D. TEX. RULE. CV-88(l) (authorizing court to impose sanctions per FED. R. Civ. P. 16(f)); D. VT. L.R. 16.1(i)(5) (authorizing party to report other parties that have not “complied in good faith” with early neutral evaluation rules); D.V.I. LRCI. 3.2(f)(2) (allowing sanctions for a party that “fails to participate in the mediation in good faith”); E.D. WASH. LR 16.2(b)(3)(D) (“The attorney for each party shall come prepared to [the mediation] to discuss the following matters in detail and in good faith.”); W.D. WASH. CR 39.1(c)(2) (requiring attorneys for all parties to meet “at least once, preferably in person, and engage in a good faith attempt to negotiate a settlement of the action”); N.D. W. VA. LR 16.06(d) (requiring parties and counsel to attend mediation conference and act in good faith); *see also* D.N.J. L.CIV.R. APP. Q(III) (authorizing court to impose

of the rules indicate that attendance is mandatory and specify who should attend.⁹¹ Otherwise, few of these rules provide a definition of what the duty of good faith means in the context of mediation. An exception is Local Rule 16.8.7 for the Middle District of Pennsylvania, which provides that “[p]arties and their counsel are required to attend the mediation session, participate in good faith and be prepared to discuss all liability issues, all defenses, and all possible remedies, including monetary and equitable relief. Those in attendance shall possess complete settlement

sanctions on party or attorney that “fails to participate in a meaningful manner or to cooperate with the mediator”).

⁹¹ See, e.g., N.D. CAL. ADR L.R. 6-10(a) (requiring all named parties and counsel to attend mediation and also requiring government and corporate entities to send a representative that is knowledgeable about the facts of the case and that has full or greatest possible settlement authority); S.D. FLA. L.R. 16.2(E) (“All parties, corporate representative, [sic] and any other required claims professionals (insurance adjusters, etc.), shall be present at the mediation conference with full authority to negotiate a settlement.”); S.D. IND. LOCAL A.D.R. RULES 2.6(b)(1) (“The parties, their attorneys, and other persons with settlement authority shall be present at all mediation sessions unless otherwise agreed.”); W.D. MICH. LCivR 16.3(e)(ii) (“Individual parties and representatives of corporate or government parties with ultimate settlement authority are required to attend the mediation session(s). Each party must be accompanied at the [mediation] session by the lawyer expected to be primarily responsible for handling the trial of the matter.”); N.D. MISS. L.U.CIV.R. 83.7(g) (requiring individual parties and lead trial counsel to appear in person and representatives of corporate or other entities with full settlement authority to appear or be available by telephone); E.D. MO. L.R. 16-6.02(B) (requiring all parties, counsel, insurers, and corporate and government representatives with full settlement authority to attend mediation); D. NEB. MEDIATION PLAN 3(e) (requiring all parties or representatives with full settlement authority and counsel to attend mediation sessions); S.D. N.Y. L.R. 83.12(j) (providing that the mediator has the authority to require “the party . . . or a representative of the party . . . with knowledge of the facts and full settlement authority” to attend mediation); W.D. N.Y. ADR PLAN 5.8(A) (requiring named parties, counsel, insurers, and corporate and government representatives with full or greatest possible settlement authority to attend mediation); M.D. N.C. LR 83.9e(d) (requiring parties, counsel, insurers, and representatives with settlement authority to attend all mediation sessions in person); N.D. OHIO LR 16.6(f) (requiring counsel and parties or insurance companies with full authority to settle to attend mediation); S.D. TEX. LR 16.4.F (providing that all parties “with authority to settle” or negotiate settlement, “such as insurance carriers” are required to attend mediation); E.D. WASH. R. 16.2(b)(3)(E) (requiring all parties or representatives of the parties to attend mediation “unless previously excused by the mediator for good cause”); W.D. WASH. CR 39.1(c)(4)(E) (requiring “parties and insurers having authority to settle” to attend mediation, unless the mediator made an exception, “but only in exceptional cases,” and the party still has to be “on call by telephone during the conference”); see also C.D. CA. L.R. 16-2.9 (providing that parties should “exhaust all possibilities of settlement”).

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authority, independent of any approval process or supervision”⁹² Several rules explicitly state that the duty to attend mediation or to mediate in good faith does not include an obligation to settle.⁹³

D. Legislation Creating Obligation to Mediate in Good Faith

Numerous state⁹⁴ and federal⁹⁵ statutes directly impose on parties an obligation to mediate in good faith. In addition, 28 U.S.C. § 1927 allows the court to impose sanctions in the form of excess costs, expenses, and attorneys’ fees reasonably caused by a party or attorney who “multiplies the proceedings in any case unreasonably and vexatiously.”⁹⁶ Several recent cases involving claims of bad faith mediation have relied on this statute in part for granting sanctions for mediation conduct.⁹⁷ The obligation to mediate in good faith is a well-established concept in the federal court system. What this obligation entails is less established.

⁹² M.D. PA. LR 16.8.7(a). The rule makes special provisions for corporate and government entities. *See also* E.D. TEXAS LOCAL COURT RULE CV-7(H) (“Good faith requires honesty in one’s purpose to discuss meaningfully the dispute, freedom from intention to defraud or abuse the discovery process, and faithfulness to one’s obligation to secure information without court intervention.”).

⁹³ *See infra* notes 124–25.

⁹⁴ *See* Lande, *supra* note 38, at 79 (reporting that 22 states had statutes that require parties to mediate in good faith). A Westlaw search in SARAH R. COLE, CRAIG A. MCEWEN & NANCY H. ROGERS, *MEDIATION: LAW, POLICY & PRACTICE* (2d ed. 2005), App. C, (database “Mediation”) reveals over 30 state mediation statutes that refer to good faith.

⁹⁵ *See* 7 U.S.C. § 5103(a)(1)(A) (2006) (requiring the Secretary of Agriculture to prescribe rules requiring agencies or programs involved with agricultural financing to participate in good faith in any state mediation program); *Id.* § 5103(b)(1) (requiring the Farm Credit System to cooperate in good faith with requests for information in the course of mediation regarding agricultural financing); 25 U.S.C. § 640d-1(d) (2006) (authorizing mediators to report tribal negotiating teams’ failure to bargain in good faith during mediation over rights and interests to specific Native American lands); 29 U.S.C. § 732(g)(3)(B) (2006) (defining “alternative means of dispute resolution” under a federal grant for vocational rehabilitation services statute as including good faith mediation); 39 U.S.C. § 1207(b) (2006) (requiring postal service laborers and management to negotiate in good faith at the mediator’s direction if the parties fail to reach an agreement before termination of the prior collective bargaining agreement).

⁹⁶ 28 U.S.C. § 1927 (2006).

⁹⁷ *See* Fisher v. SmithKline Beecham Corp, No. 07-CV-0347A(F), 2008 WL 4501860, at *10 (W.D.N.Y. Sept. 29, 2008) (imposing sanctions pursuant to Federal Rule of Civil Procedure 16(f) and 28 U.S.C. § 1927 when defendant filed a dispositive motion on the eve of the mediation frustrating the effectiveness of the mediation) (*see infra* Part VII.B); *In re* A.T. Reynolds & Sons, Inc., No. 08-37739, 424 B.R. 76 (Bankr. S.D.N.Y. Feb. 5, 2010) (imposing sanctions under Federal Rule of Civil Procedure 16(f) and 28 U.S.C. § 1927 for frustrating the success of the mediation) (*see supra* notes 1–7 and

V. DEFINING GOOD FAITH

A. *Good Faith: A Venerable Doctrine*

The argument that “good faith” is too nebulous of a concept to be enforced in the courts is a curious argument. Imposing good faith performance as a legal duty has ancient roots⁹⁸ and is fairly common in the law.⁹⁹ Courts have been defining good faith for years in many contexts. The Federal Rules of Civil Procedure make several references to an obligation to act in good faith.¹⁰⁰ In the commercial world, there is a duty of good faith in the performance of all contracts governed by the Uniform Commercial Code.¹⁰¹ The Code provides the standard definition that good faith means “honesty in fact and the observance of reasonable commercial standards of fair dealing.”¹⁰² Honesty in fact, of course, is a subjective standard, while reasonable commercial standards of fair dealing in the trade could include an

accompanying text); *see also* E.E.O.C. v. ABM Indus. Inc., No. 1:07-cv-01428 LJO JLT, 2010 WL 744711, at *5 (E.D. Cal. Mar. 3, 2010) (denying claim for sanctions under Federal Rule of Civil Procedure 16(f) and 28 U.S.C. § 1927 when mediator was not permitted to explain settlement proposal directly to Spanish speaking clients) (*see infra* notes 244–49 and accompanying text).

⁹⁸ *See generally* Robert S. Adler & Richard A. Mann, *Good Faith: A New Look at an Old Doctrine*, 28 AKRON L. REV. 31, 42 (1994) (stating that a legal duty to act in “good faith can be traced back to Roman Law”).

⁹⁹ *See generally* Weston, *Checks on Participant Conduct*, *supra* note 57 at 643 (discussing the “duty to bargain in good faith” in the National Labor Relations Act, 29 U.S.C. §§ 151–169 (1994) (Section 158(d) requires that the parties “meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but . . . does not compel either party to agree to a proposal or require the making of a concession”) and the obligation to “negotiate in good faith” under the Telecommunications Act of 1996 47 U.S.C. § 251(c)(1) (Supp. IV 1998)). In addition, Professor Weston cites Model Rule of Professional Conduct 4.1 (1999), which imposes an obligation on lawyers representing clients not to misrepresent material facts.

¹⁰⁰ *See, e.g.*, FED. R. CIV. P. 8(b)(5) (referring to good faith denials); FED. R. CIV. P. 26(C)(1) (requiring party to make a good faith attempt to resolve dispute before seeking protective order); FED. R. CIV. P. 37(a)(5)(i) (providing that the court may not order payment of expenses if the moving party filed the motion before attempting in good faith to obtain the information without court action); FED. R. CIV. P. 36(a)(4) (referring to good faith denial of request to admit); FED. R. CIV. P. 37(f) (imposing sanctions for failure to participate in good faith in developing and submitting a proposed discovery plan).

¹⁰¹ U.C.C. § 1-304 (2005).

¹⁰² *Id.* §§ 1-201(b)(20), 2-103(1)(j) (2005). If the transaction involved is a letter of credit, the Code requires only honesty in fact. U.C.C. § 5-102 (1995). The prior version of the U.C.C. defined good faith as “honesty in fact” but merchants must act consistently with reasonable commercial standards of fair dealing in the trade. U.C.C. § 2-103(1)(b) (2000).

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objective as well as a subjective assessment. For example, fair dealing might involve an assessment of subjective motives—was the act done to obtain unfair advantage or out of generosity? It might be consistent with reasonable, objective commercial standards of fair dealing for a bank to honor a check, but not if the bank subjectively knows that the check is part of a kiting scheme.¹⁰³ The Restatement (Second) of Contracts has incorporated similar language imposing a duty in all contracts to perform and enforce agreements consistent with principles of good faith and fair dealing in the enforcement or performance.¹⁰⁴

The concept of required good faith performance in contracts is well-established. That is not to say there is no disagreement on how to define the term. According to Summers, good faith “is a phrase without general meaning (or meanings) of its own and serves instead to exclude a wide range of heterogeneous forms of bad faith.”¹⁰⁵ The comments to the Restatement adopt Summers’ exclusionary approach, listing the following categories of “bad faith” behavior: “Evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party’s performance.”¹⁰⁶

To the extent there are specific definitions of good faith in the mediation context, these definitions are frequently framed in terms of delineating bad faith conduct.¹⁰⁷ In Minnesota, the Farmer-Lender Mediation Act¹⁰⁸ requires that the participants mediate in good faith and charges the mediator with the responsibility to report to the court if a party does not mediate in good faith. The statute defines good faith in a negative way. According to the statute:

Not participating in good faith includes: (1) a failure on a regular or continuing basis to attend and participate in mediation sessions without cause; (2) failure to provide full information regarding the financial obligations of the parties and other creditors . . . (3) failure of the creditor to designate a representative to participate in the mediation with authority to make binding commitments within one business day to fully settle, compromise, or otherwise mediate the matter; (4) lack of a written statement of debt restructuring alternatives and a statement of reasons why

¹⁰³ See generally JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 14-6 (4th ed. 1995) (providing this hypothetical to explain the application of the good faith standard for holder in due course status under U.C.C. § 3-302).

¹⁰⁴ RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981) (imposing a duty of good faith and fair dealing in the performance and enforcement of contracts).

¹⁰⁵ Robert S. Summers, “Good Faith” in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195, 262 (1968).

¹⁰⁶ RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. d. (1981).

¹⁰⁷ Carter argues that the focus should be on defining bad faith and includes an assessment of participants’ motives for their actions as a part of his test. Carter, *supra* note 58, at 372.

¹⁰⁸ MINN. STAT. ANN. § 583.27(1)(a) (West 2006).

alternatives are unacceptable to one of the parties; (5) failure of a creditor to release funds from the sale of farm products to the debtor for necessary living and farm operating expenses; or (6) other similar behavior which evidences lack of good faith by the party. A failure to agree to reduce, restructure, refinance, or forgive debt does not, in itself, evidence lack of good faith by the creditor.¹⁰⁹

Even when the definition is provided in positive terms, it still gets expressed in a negative fashion. In Ohio, the prevailing party is entitled to recover interest on a judgment in a tort action from the date of the cause of action if the prevailing party made a good faith effort to settle, and the losing party failed to make a good faith effort to settle.¹¹⁰ In *Kalain v. Smith*,¹¹¹ the Ohio Supreme Court provides a definition of good faith by stating what would not be a failure to act in good faith. According to the Court:

A party has not “failed to make a good faith effort to settle” . . . 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.¹¹²

As with many legal standards, there is a common understanding at the core of how this standard should be applied, but some indeterminacy at its edges. First-year law students soon learn the slippery slope where changing hypothetical questions stretch a sound rule to its limits. Defining those limits is a traditional function of the litigation process. Construing what is meant by good faith is no different from construing other general standards common in pretrial litigation. For example, courts

¹⁰⁹ *Id.*

¹¹⁰ OHIO REV. CODE ANN. § 1343.03(C) (West 2004). Because of the mediation privilege, it might be difficult or impossible to establish bad faith in mediation in other contexts in Ohio. *See Anthony v. Andrews*, No. 2008-P-0091, 2009 WL 4547605, at *3 (Ohio Ct. App. Dec 4, 2009) (reversing trial court determination that a party had not mediated in good faith when counsel admitted at mediation that the client, who did not attend, had not agreed to the mediation and would not give counsel authority to settle, but the mediation communication was privileged).

¹¹¹ *Kalain v. Smith*, 495 N.E.2d 572, 574 (Ohio 1986); *see also Moskowitz v. Mt. Sinai Med. Ctr.*, 635 N.E.2d 331, 348 (Ohio 1994) (applying the *Kalain* good faith definitional standard that places the burden on the party seeking the award to present evidence of a written (“or something equally persuasive”), reasonable offer to settle and objective evidence of a lack of good faith. The court noted that failing to act in good faith does not necessarily mean that the party acted in bad faith.).

¹¹² *Kalain*, 495 N.E.2d at 574.

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routinely decide, whether a party made a “reasonable inquiry under the circumstances prior to filing a pleading,”¹¹³ if the “pleading or discovery request was not presented for any improper purpose, such as to harass, cause unnecessary delay or needlessly increase the cost of litigation,”¹¹⁴ or whether a party “engaged in vexatious litigation.”¹¹⁵

A transactional lawyer looking at the debate about the propriety of imposing a good faith requirement might wonder what the fuss is all about. When parties enter into a contractual relationship they expect that both they and the adverse party will perform this contract in good faith. This standard has been imposed on parties and enforced by the courts for years. If parties are mediating pursuant to a binding contractual agreement to mediate, of course the law should impose a duty to comply with the obligation to mediate in good faith. Why should parties have a duty to act in good faith in the performance of contracts and in the performance of other pretrial obligations, yet have no duty to act in good faith in mediation? What is so special about mediation?

From the context of the mediation culture, mediation in fact may be special, and perhaps should be subject to special treatment. Many view mediation as a process of dispute resolution that is a true alternative to the adversarial litigation process, not simply a procedural step in the pretrial adversary process.¹¹⁶ Mediation relies on party empowerment and self-determination. The concern is that imposing court-enforced rules of behavior on this private process will litigize the mediation process and undermine the core values of party empowerment and self-determination. To preserve the distinctiveness and efficacy of the mediation process, judicial involvement should be minimized. To some extent, the debate may be semantic.¹¹⁷ The concerns expressed may be focused on preserving the author’s view of the

¹¹³ FED. R. CIV. P. 11(b), 26(g).

¹¹⁴ FED. R. CIV. P. 11(b), 26(g)(1)(B)(2).

¹¹⁵ 28 U.S.C. § 1927 (2006).

¹¹⁶ Compare Thompson, *supra* note 54, at 516 (2004) (asking “Is Mediation a Step in the Adversary Process or an Alternative Approach to Resolving Disputes?”), with Ellen E. Deason, *Procedural Rules for Complementary Systems of Litigation and Mediation—Worldwide*, 80 NOTRE DAME L. REV. 553, 559 (2005) (answering “To a growing extent both!”).

¹¹⁷ See generally Michael L. Moffitt, *Schmediation and the Dimensions of Definition*, 10 HARV. NEGOT. L. REV. 69 (2005) (arguing that much of the argument about proper mediation practices reflect the authors’ differing visions of the process—what constitutes mediation and what does not). Certainly not all of the argument is based on semantics. See, e.g., Wayne D. Brazil, *An Assessment, Court-Related ADR 25 Years after Pound*, 9 DISP. RESOL. MAG., Winter 2003, at 4, 7 (“Another peril lurks in the trend to devolve court-sponsored ADR into one hybrid but largely evaluative process. This fusion would compromise our ability to serve the full range of litigant needs and values, risk corrupting both ‘evaluation’ and ‘mediation,’ threaten quality control and impair the parties’ ability to predict and prepare for ADR processes [which would] imperil the productivity of ADR processes and undermine public confidence in their integrity.”).

proper or correct vision of the mediation process.¹¹⁸ There is a continuing concern that the forces in the litigation process will co-opt this vision of mediation, and that the courts will take over the process and modify it in ways that do not preserve the treasured values of self-determination and confidentiality.¹¹⁹

The comments to the Restatement (Second) of Contracts recognize that the definition of good faith changes based on the context.¹²⁰ Perhaps the context of mediation justifies a different approach. In his debate with Summers on the concept of the duty to perform in good faith, Burton argues that “the good faith performance doctrine is used to effectuate the intentions of the parties, or to protect their reasonable expectations, through interpretation and implication.”¹²¹ If good faith is derived from the intentions and expectations of the parties, it becomes immediately apparent why there is difficulty in defining good faith in the context of court-ordered mediation.¹²² What are the expectations of the parties when a party who does not

¹¹⁸ There is great value in accurately defining the process so all participants, including the neutral, know what to expect, how to behave, and what the goals of the process are. But there are many versions of “mediation” that can achieve a fair process and outcome for the parties involved. The focus should be on defining and assuring a fair process, not on what it is called.

¹¹⁹ See, e.g., Deborah Hensler, *A Research Agenda: What We Need to Know About Court-Connected ADR*, 6 DISP. RESOL. MAG., Fall 1999, at 15 (describing the court-connected mediation process as “hijacked by lawyers”); Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or “The Law of ADR*, 19 FLA. ST. U. L. REV. 1, 3 (1991) (expressing concern that courts will use mediation to reduce caseloads at the expense of achieving a better justice); Michael Moffitt, *Three Things to be Against (“Settlement” not Included)*, 78 FORDHAM L. REV. 1203, 1233 (2009) (“As far back as 1991, some within the ADR community have been sounding warnings about the end of ‘good mediation,’ and in large measure, what they were talking about was the loss of settlements in which party autonomy was a primary driver.”); Nancy A. Welsh, *Making Deals in Court Connected Mediation: What’s Justice Got to Do with it?*, 79 WASH. U. L.Q. 787, 788 (2001) (expressing concern that court-connected mediation has become nothing more than a “glorified judicial settlement conference”).

¹²⁰ RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1981) (“Its meaning varies somewhat with the context. Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving ‘bad faith’ because they violate community standards of decency, fairness or reasonableness.”).

¹²¹ Steven J. Burton, *More on Good Faith Performance of a Contract: A Reply to Professor Summers*, 69 IOWA. L. REV. 497, 499 (1984); see also Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369 (1980).

¹²² In a mediation pursuant to an agreement to mediate, clearly the parties’ expectations in entering into this contract to mediate should be that both they and the

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want to settle is ordered to go to mediation? In the context of court-mandated mediation, the substance of any good faith requirement must emanate from the expectations of the judge or from the text of the governing rules. What is it that the judge expects the parties to do when she orders them to mediation? Is this an order to plunge downstream toward settlement?

B. *Sink or Swim? Settle or Sanction? Duty to Settle?*

Courts¹²³ and court rules¹²⁴ repeatedly assure parties that there is no duty to settle a case and forego the right to trial. There also is no obligation to make a settlement offer and forego the right to trial. Yet, some court rules¹²⁵ and

adverse party will mediate in good faith, not frustrate the process, and cooperate with the mediator.

¹²³ See, e.g., *Negron v. Woodhull Hosp.*, 173 F. App'x 77, 78–79 (2d Cir. 2006) (stating that defendant was free to adopt a “no pay” position at the mediation); *Johnson v. Sun Life Assurance Co. of Canada*, No. 6:07-cv-1016-Orl-22UAM, 2007 WL 1877678, at *2 (M.D. FLA. June 28, 2007) (rejecting the claim that the defendant mediated in bad faith where defendant “made it known that it believed it had no liability” but “there is no evidence that [the defendant] entered the mediation with a firm decision not to contribute anything no matter what may be disclosed in mediation that might undermine its litigation posture”); *AMC Demolition Specialists, Inc. v. Bechtel Jacobs Co.*, No. 3:04-CV-466, 2007 WL 397426, at *1–2 (E.D. Tenn. Feb. 1, 2007) (finding that sanctions were not warranted for not making a good faith offer of settlement at the mediation).

¹²⁴ D.AK. LR 16.2(L) (stating that “settlement is entirely voluntary”); S.D. CAL. CIVLR 600-1 (ADR procedures also preserve right of parties to a conventional trial); S.D. GA. LR 16.7.5(a) (“These rules are not intended to force settlement upon any party.”); DIST. IDAHO LOC. CIV. R. 16.4(b)(2)(A) (“Whether a settlement results from a Mediation and the nature and extent of the settlement are within the sole control of the parties.”); S.D.IND. LOCAL A.D.R. RULE 2.1 (“Parties and their representatives are required to mediate in good faith, but are not compelled to reach an agreement.”); N.D.N.Y. L.R. 83.11-1(b) (“The parties themselves are responsible for negotiating any resolution(s) to their dispute.”); E.D.N.C. LOCAL CIVIL RULE 101(a) (“The rules are not intended to force settlement upon any party.”); M.D.N.C. LR83.9a (“The rules are not intended to force settlement upon any party.”); LOCAL CIVIL RULE DSC 16.04(A) (“Any settlement is voluntary.”); E.D. WASH. LR 16.2(c)(2)(b)(1) (“Whether a settlement results from a mediation is within the sole control of the parties.”); D.V.I. LRCI. 3.2(a) (“In mediation, decision making authority rests with the parties.”).

¹²⁵ See C.D. CAL. L.R. 16-15.5 (requiring parties to submit to settlement officer a “statement of the offer or demand the party is prepared to make at the settlement conference”); N.D. OHIO LR 16.6(g)(3) (requiring the parties to make “reasonable efforts” to reach a settlement and “carefully consider” the mediator’s settlement proposal); W.D.N.Y. ADR PLAN 5.6(C) (outlining specific requirements for “Mediation Memorandum” to be submitted by parties prior to mediation that requires parties to submit documents likely to “materially advance settlement prospects”); E.D. WASH. LR 16.2(c)(2)(b)(3)(C) (requiring the parties to submit a confidential memoranda to the mediator about the “strengths and weaknesses [of] that party’s case and the range in

pronouncements¹²⁶ come sufficiently close, so that it may feel to the parties that they are being ordered to settle and forego their right to trial or suffer sanctions. Thus, there is ambiguity in terms of expectations in court-compelled mediation.

For example, the local rule for the Northern District of Texas states flatly, “Parties in a civil action must make good-faith efforts to settle.”¹²⁷ Further, in many of the cases where parties are sanctioned for bad faith mediation, such as *In re A.T. Reynolds & Sons, Inc.*,¹²⁸ the courts look at the bargaining history and focus on what specific offers were made. It is a fair assumption in these cases that the sanctioned party likely would have avoided any sanction if that party would have made a significant offer to settle early in the process. It may appear to these parties that they were sanctioned because they violated some duty to settle.

If a party does not want to settle, what are its obligation to mediate in good faith? Any scheme requiring parties to attend mediation should identify the expectations for party behavior and guard against the appearance of compelling parties to give up their right to trial. Although the local rules in nearly two dozen districts require that parties ordered to mediation must mediate in good faith, few of the rules provide a definition.¹²⁹

C. Good Faith Attempts to Define Good Faith

Several commentators have attempted to provide a definition of good faith in the context of mediation.¹³⁰ Kimberlee Kovach suggests various factors in a model rule that she proposes, including such requirements as complying with applicable law, court orders, the contract to mediate, and the mediator’s rules.¹³¹ In addition, parties

which that party proposes settlement”); see also N.D.N.Y. L.R. 83.11-5(c) (“Parties and counsel shall participate in good faith without any time constraints and put forth their best efforts toward settlement.”).

¹²⁶ See, e.g., *Pitman v. Brinker Int’l, Inc.*, 216 F.R.D. 481, 484–85 (D. Ariz. 2003) (sanctioning party for failing to participate in good faith during a settlement conference by sending representative with limited settlement authority and not providing the plaintiff with a specific settlement offer).

¹²⁷ N.D. TEX. LR 16.3(a).

¹²⁸ See *supra* notes 1–7 and accompanying text.

¹²⁹ See *supra* notes 90–93 and accompanying text. The Eastern District of Texas does provide a definition of good faith in the context of the “meet and confer” requirement. According to the local rule, “Good faith requires honesty in one’s purpose to discuss meaningfully the dispute, freedom from intention to defraud or abuse the discovery process, and faithfulness to one’s obligation to secure information without court intervention.” E.D. TEX. LOCAL COURT RULES CV-7(H).

¹³⁰ See *supra* notes 57–59 and accompanying text.

¹³¹ Kimberlee K. Kovach, *Good Faith in Mediation—Requested, Recommended, or Required? A New Ethic*, 38 S. TEX. L. REV. 575, 616–17, 620–23 (1997) [hereinafter Kovach, *Good Faith*]; see also Kimberlee K. Kovach, *New Wine Requires New Wineskins: Transforming Lawyer Ethics for Effective Representation in a Non-*

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should prepare for the mediation, attend the mediation with settlement authority, and participate in meaningful discussions.¹³² Included in the obligation is a duty not to affirmatively mislead the mediator or the adverse party.¹³³ Kovach also includes an obligation not to file any new motions in the proceedings until the mediation is completed.¹³⁴

Carter provides a more generalized standard. He argues bad faith occurs when a participant “uses the mediation process primarily to gain strategic advantage in the litigation process; uses mediation to impose hardship rather than to promote understanding and conflict resolution; or neglects an affirmative material obligation owed to another participant, the mediator, or the court.”¹³⁵

Sherman advances a more limited definition that would require meaningful participation or participation that is necessary to prevent frustration of ADR process objectives.¹³⁶ This would include a duty for parties and representatives with settlement authority to attend, listen, present positions, and pay for the mediator.¹³⁷ Sherman, however, argues against broader “good faith” requirements that focus on the quality of bargaining.¹³⁸

At the very least, good faith participation in mediation requires that parties prepare for and attend the mediation with settlement authority. Imposing sanctions for these “objective” requirements usually does not involve a deep intrusion into mediation communications and parties’ litigation strategies.¹³⁹ While even these issues can give rise to some indeterminacy, the more controversial issues surround questions relating to the court’s power to police the quality of the bargaining.

Adversarial Approach to Problem Solving: Mediation, 28 FORDHAM URB. L.J. 935, 961–64 (2001) (arguing for an ethical rule imposing an obligation of good faith).

¹³² Kovach, *Good Faith*, *supra* note 131 at 615, 623.

¹³³ *Id.* at 620, 622–23 (concluding that by legislation, court rule, or ethical code, mediation parties and lawyers should be required to abide by a good faith or meaningful participation standard).

¹³⁴ *Id.* at 623.

¹³⁵ Carter, *supra* note 58, at 372.

¹³⁶ Edward F. Sherman, *Court-Mandated Alternative Dispute Resolution: What Form of Participation Should Be Required?*, 46 SMU L. REV. 2079 (1993).

¹³⁷ *Id.* at 2089–2111.

¹³⁸ *Id.* at 2100–01 (“Any attempt to tightly monitor the quality and spirit of counsel’s participation ultimately undercuts the values and objectives of court-mandated ADR.”).

¹³⁹ Assessing whether a representative appeared with full bargaining authority may require an inquiry into the subjective understanding of the representative.

VI. GOOD FAITH DUTIES—SPECIFIC OBLIGATIONS

A. Pre-Mediation Duties

A party's good faith mediation duties begin prior to the mediation. Parties may be required to select the mediator, schedule the mediation,¹⁴⁰ or produce documents and prepare for the mediation. Federal Rule of Civil Procedure 16(f)(1)(B) specifically authorizes a court to impose sanctions if a party or attorney is "substantially unprepared to participate."¹⁴¹ Usually mediators, judicial orders,¹⁴² or court rules¹⁴³ require that the parties file a pre-mediation statement.¹⁴⁴ As discussed below,¹⁴⁵ careful attention to pre-mediation statements could alleviate most of the problems associated with the cases involving sanctions for conduct at the mediation. Typically, pre-mediation statements will set forth issues, positions, strengths and

¹⁴⁰ Pinero v. Corp. Courts at Miami Lakes, Inc., No. 09-20343-CIV, 2009 WL 1424173, at *2 (S.D. Fla. May 20, 2009) (dismissing the complaint without prejudice as a sanction for failure to timely schedule the mediation and failure to attend a settlement conference).

¹⁴¹ For cases construing this requirement in the context of a judicial pretrial conference, see *Thompson v. Hous. Auth. of Los Angeles*, 782 F.2d 829, 832 (9th Cir. 1986) (affirming dismissal for plaintiff's counsel's "inexcusable delay and neglect" including the failure to prepare for a pretrial conference); *Smith v. Rowe*, 761 F.2d 360, 366 (7th Cir. 1985) (excluding documents after defense counsel was unprepared for two pretrial conferences); *Flaherty v. Dayton Elec. Mfg. Co.*, 109 F.R.D. 617, 618-19 (D. Mass. 1986) (granting sanctions for lack of preparation for pretrial conference); see also E.D.N.C. ADR R. 101.3g(6) (mandating that "[a]ll parties shall be prepared to discuss, in detail and in good faith the following: (a) all liability issues; (b) all damage issues; and (c) his or her position relative to settlement"). See generally *In re Novak*, 932 F.2d 1397, 1405 (11th Cir. 1991) (finding that "parties or their attorneys must evaluate discovered facts and intelligently analyze legal issues before the start of pretrial conferences").

¹⁴² *Nick v. Morgan's Foods, Inc.*, 99 F. Supp. 2d 1056, 1063-64 (E.D. Mo. 2000), *aff'd*, 270 F.3d 590 (8th Cir. 2001) (awarding sanctions when a party ignored a court order to file a pre-mediation memorandum and the party attended the mediation without a representative with settlement authority); *Drake v. Laurel Highlands Found., Inc.*, No. CIV.A. 07-252, 2007 WL 4205820 (W.D. Pa. Nov. 27, 2007) (awarding monetary sanctions, but not dismissal, for dilatory behavior by plaintiff, including failure to timely provide documents to allow assessment of potential for mediation).

¹⁴³ See, e.g., N.D. FLA. LOC. R. 16.3(f); N.D. CAL. ADR L.R. 6-7(a); M.D.N.C. LR83.9(c); N.D.N.Y. L.R. 83.11-5(a); E.D.N.Y. L.R. 83.11(b)(1); see also *Regan v. Trinity Distrib. Servs., Inc.*, 251 F.R.D. 108 (W.D.N.Y. 2008) (granting the defense's motion to a compel medical exam and awarding sanctions against a party for failure to complete a needed physical exam before the mediation).

¹⁴⁴ See, e.g., *Nick v. Morgan's Foods, Inc.*, 99 F. Supp. 2d 1056, 1057 (E.D. Mo. 2000), *aff'd*, 270 F.3d 590 (8th Cir. 2001).

¹⁴⁵ See *infra* Part VIII.C.

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weaknesses, impediments to settlement (including pending or planned motions), and bargaining history.¹⁴⁶ If parties intend to enter the mediation with a fixed position not subject to negotiation (e.g., that they will not increase or make an offer to settle or that they will not negotiate until dispositive motions are resolved), they are expected to make this intention known prior to the mediation.¹⁴⁷

B. *Duty to Appear*

At a minimum, a duty to participate in mediation in good faith requires that somebody appear on behalf of the party at the mediation. Most of the cases addressing sanctions for bad faith in mediation involve situations where nobody appeared at the mediation,¹⁴⁸ or the wrong parties¹⁴⁹ appeared at the mediation. Courts now require the clients or representatives with settlement authority to attend

¹⁴⁶ For a sample form see, e.g., Creative Dispute Resolutions, LLC, Home Page, www.creativedisputeresolutions.com/ (last visited Oct. 20, 2010); Satori Alternative Dispute Resolution, Guidelines for Pre-Mediation Statements, <http://www.satoriadr.com/Mediation/Guidelines-for-Pre-Mediation-Statements> (last visited Oct. 20, 2010); see also International Institute for Conflict Prevention and Resolution, Mediation Procedure, available at <http://www.uww-adr.com/pdfs/cprmediation.pdf> (last visited Oct. 20, 2010) (providing that “[a]t least 10 business days before the first substantive mediation conference, unless otherwise agreed, each party will submit to the mediator a written statement summarizing the background and present status of the dispute, including any settlement efforts that have occurred, and such other material and information as the mediator requests or the party deems helpful to familiarize the mediator with the dispute. It is desirable for the submission to include an analysis of the party’s real interests and needs and of its litigation risks”).

¹⁴⁷ See *infra* Part VIII.C.

¹⁴⁸ See, e.g., *Pueblo of San Ildefonso v. Ridlon*, 90 F.3d 423, 425 (10th Cir. 1996) (imposing sanctions for failure to appear at a mediation, when the session was scheduled by the Settlement Conference Office rather than by court order); *Scaife v. Associated Air Ctr. Inc.*, No. 95-11127, 100 F.3d 406, 412 (5th Cir. 1996) (affirming sanctions on party for failure to attend mediation as ordered by the court); *Gen. Conference Corp. of Seventh-Day Adventists v. McGill*, No. 06-cv-1207, 2009 WL 1505738 at *3–5 (W.D. Tenn. May 28, 2009) (ordering default judgment when defendant refused to appear at mediation); *Pucci v. 19th Dist. Ct.*, No. 07-10631, 2009 WL 596196, at *9 (E.D. Mich. Mar. 6, 2009) (awarding attorneys’ fees for defendant’s failure to appear at mediation in violation of court order requiring good faith participation); *Stevenson v. Orlando’s Auto Specialists, Inc.*, No. 6:07-CV-500-ORL-19GJK, 2008 WL 2445573, at *4 (M.D. Fla. June 16, 2008) (awarding sanctions for failure to appear at mediation violating court order to mediate in good faith); *Scott v. K.W. Max Invs., Inc.*, No. 6:05-cv-683-Orl-18JGG, 2007 WL 80851 at *2 (M.D. Fla. Jan. 8, 2007) (awarding sanctions for failure to appear).

¹⁴⁹ See *Metcalf v. Lowe’s Home Ctrs., Inc.*, No. 4:09-CV-14 CAS, 2010 WL 985293 at *2 (E.D. Mo. Mar. 15, 2010) (imposing sanctions because corporate representatives did not attend mediation as ordered by the court).

in order to maximize the chances of a successful mediation.¹⁵⁰ Judges have inherent authority,¹⁵¹ as well as specific authority from procedural rules, to require representatives with settlement authority to appear.¹⁵² Judges prefer to have the decisionmakers present to have an effective mediation process.¹⁵³

For example, the Local Rules of the United States District Court for the Northern District of California require “[a]ll named parties and their counsel” to attend unless excused.¹⁵⁴ The text of the rule provides an explanation:

This requirement reflects the Court’s view that the principal values of mediation include affording litigants opportunities to articulate directly to

¹⁵⁰ See, e.g., Pucci v. 19th Dist. Ct., No.07-10631, 2009 WL 596196, at *5 (E.D. Mich. Mar. 6, 2009).

¹⁵¹ See G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648, 652–53 (7th Cir. 1989).

¹⁵² See, e.g., S.D.N.Y. L.R. 83.12(j) (providing that the mediator has the authority to require “the party . . . or a representative of the party . . . with knowledge of the facts and full settlement authority” to attend mediation); S.D. TEX. LR 16.4.F (requiring that all parties “with authority to settle” or negotiate settlement, “such as insurance carriers” are required to attend mediation); E.D. WASH. LR 16.2(c)(2)(b)(3)(E) (requiring all parties or representatives of the parties to attend mediation “unless previously excused by the mediator for good cause”); W.D. WASH. CR 39.1(c)(4)(E) (requiring “parties and insurers having authority to settle” to attend mediation, unless the mediator made an exception, “but only in exceptional cases,” and the party still has to be “on call by telephone during the conference”); see also Turner v. Young, 205 F.R.D. 592 (D. Kan. 2002) (refusing to sanction party for not having a representative with settlement authority appear because the rule was not a “model of clarity”).

¹⁵³ See Nick v. Morgan’s Foods, Inc., 99 F. Supp. 2d 1056, 1062 (E.D. Mo. 2000), *aff’d*, 270 F.3d 590 (8th Cir. 2001) (concluding that “[m]eaningful negotiations cannot occur if the only person with authority to actually change their mind and negotiate is not present”); *In re Air Crash Disaster at Stapleton Int’l Airport*, 720 F. Supp. 1433, 1438–39 (D. Colo. 1988) (finding that “[s]ubstantial delay often results when lawyers authorized to negotiate to a certain point and no further must bring a halt to productive negotiations and wait several days while the latest best offer is considered by a corporate party”); see also Eric R. Max, *Bench Manual for the Appointment of a Mediator, U.S. District Court for the District of New Jersey*, 136 F.R.D. 499, 508 (1991) (listing required client attendance as the most important mediation ground rule).

Riskin argues that requiring client participation will better serve the client’s interests. He notes that lawyers sometimes perform better and better serve the client’s needs when the clients are present. He adds that an opportunity to express views and assess the situation may contribute to better problem-solving, thus increasing not only the chances of settlement, but also satisfaction with the settlement. Riskin acknowledges that it is possible that in some cases clients might hurt their case when they attend. Leonard 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, 1059–1116 (1991).

¹⁵⁴ N.D. CAL. ADR L.R. 6-10(a).

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the other parties and a neutral their positions and interests and to hear, first hand, their opponent's version of the matters in dispute. Mediation also enables parties to search directly with their opponents for mutually agreeable solutions.¹⁵⁵

In *Pucci v. 19th District Court*, the court remarked that “[t]hrough the Court’s own research and experience, the Court has determined that effectiveness declines if the decision-makers in a case do not personally attend the sessions.”¹⁵⁶ In *Pecoraro v. State Farm Fire & Casualty Co.*,¹⁵⁷ the court noted:

It is critical that mediation occur in the United States Courthouse with the Plaintiffs present. Among the reasons that the court-ordered mediations take place in the United States Courthouse are to emphasize the serious obligations undertaken by any party pursuing legal action in court, and to remind them that this is the forum in which their case will be tried. Further, easy access is available to an appropriate United States Magistrate Judge in the event that any issue must be resolved in the course of the mediation.

The Court’s successful mediation program has worked because of many factors, not the least of which is the attendance of the parties and their counsel.¹⁵⁸

It may be possible to appear by telephone. Federal Rule of Civil Procedure 16(c)(1) provides that a judge may require parties or representatives to be present or “reasonably available by other means.”¹⁵⁹ Some judges will allow appearance by telephone¹⁶⁰ and others will not.¹⁶¹

¹⁵⁵ *Id.* If the party is a corporation or other entity, it must be represented by a person, other than outside counsel, who has authority to settle and who is knowledgeable about the facts of the case. *Id.* at 6-10(a)(1); see also M.D. FLA. L.R. 9.05(c) (providing that, unless otherwise excused by a judge, all parties, corporate representatives, and any other required claims professionals shall be present); N.D. OHIO LR 16.6(f) (requiring a party’s presence unless the party is not an individual or the party’s interests are represented by an insurance company); FLA. R. CIV. P. 1.720(b).

¹⁵⁶ *Pucci v. 19th Dist. Ct.*, No. 07-10631, 2009 WL 596196, at *5 (E.D. Mich. Mar. 6, 2009).

¹⁵⁷ *Pecoraro v. State Farm Fire & Cas. Co.*, No. 1:07cv777-LTS-RHW, 2008 WL 3842912 at *1 (S.D. Miss. Aug. 13, 2008) (excusing a plaintiff who could not travel to Mississippi from attending mediation in person but requiring counsel and plaintiff’s co-party spouse to attend).

¹⁵⁸ *Id.*

¹⁵⁹ FED. R. CIV. P. 16(c)(1).

¹⁶⁰ See *Lienemann v. Glock, Inc.*, No. 08-2484, 2009 WL 2106105, at *4 (D. Kan. July 16, 2009) (denying reimbursement for travel expenses to mediation as unnecessary because the agent could have been available by telephone); *United States v. Lake County*

C. Representative with Full Settlement Authority

Defining full settlement authority can be a tricky proposition.¹⁶² In *In re A.T. Reynolds & Sons, Inc.*,¹⁶³ the court concluded that Wells Fargo violated the court order by not providing a representative with sufficient settlement authority. Wells Fargo sent a representative who was a Vice-President and Senior Banker with ten years of experience.¹⁶⁴ He had equal settlement authority with his supervisor, and within limits, did have authority to settle the dispute.¹⁶⁵ The court inferred from the fact that he made a settlement offer only after a private telephone call that this Vice-President lacked the authority required in the court order.¹⁶⁶

In *G. Heileman Brewing Co. v. Joseph Oat Corp.*,¹⁶⁷ the Court of Appeals for the Seventh Circuit provided a definition of who should attend to represent a corporate party. The court stated:

Bd. of Comm'rs, No. 2:04 cv 415, 2007 WL 1202408, at *2 (N.D. Ind. Apr. 19, 2007) (rejecting defendants' joint motion to require in-person attendance and concluding that telephonic participation poses "no apparent obstacle to the conduct of a legitimate and productive mediation").

¹⁶¹ See *Mediavation, Inc. v. Rodgers*, No. 6:08-cv-1903-Orl-19KRS, 2009 WL 2766419, at *4 (M.D. Fla. Aug. 27, 2009) (denying motion to appear by telephone); *Turner v. Young*, 205 F.R.D. 592, 595 (D. Kan. 2002) ("Attendance" means to appear in person and participate directly, not to stand by or participate by telephone."); *Reliance Nat'l Ins. Co. v. B. Von Paris & Sons, Inc.*, 153 F. Supp. 2d 808, 809-10 (D. Md. 2001) (awarding sanctions for not sending a principal with settlement authority to the mediation where the court suggested that even if the defendant had asked that the principal be available by telephone the court would have awarded compensatory sanctions); see also *supra* notes 154-55 and accompanying text; E.D. WASH. LR 16.2(c)(2)(b)(3)(E) (requiring all parties or representatives of the parties to attend mediation "unless previously excused by the mediator for good cause"); W.D. Wash. CR 39.1(c)(4)(E) (requiring "parties and insurers having authority to settle" to attend mediation, unless the mediator made an exception, "but only in exceptional cases," and the party still has to be "on call by telephone during the conference").

¹⁶² See Don Peters, *Just Say No: Minimizing Limited Authority Negotiating in Court-Mandated Mediation*, 8 PEPP. DISP. RESOL. L.J. 237, 288-89 (2008) (advocating a process that allows parties to attend mediation without full settlement authority if they provide notice of their limits fourteen days before the mediation); Edward F. Sherman, *Court-Mandated Alternative Dispute Resolution: What Form of Participation Should be Required?*, 46 SMU L. REV. 2079, 2108-11 (1993) (discussing court decisions addressing the duty to attend with settlement authority).

¹⁶³ See *supra* notes 1-7 and accompanying text.

¹⁶⁴ *In re A.T. Reynolds & Sons, Inc.*, 424 B.R. 76, 81 (Bankr. S.D.N.Y. 2010).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 95.

¹⁶⁷ *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648 (7th Cir. 1989).

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“[A]uthority to settle,” when used in the context of this case, means that the “corporate representative” attending the pretrial conference 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.¹⁶⁸

In *Lockhart v. Patel*, a non-binding summary jury trial awarded the plaintiff \$200,000 for a lost eye in a medical malpractice case.¹⁶⁹ The plaintiff subsequently agreed to settle for \$175,000, but the defendant’s attorney was authorized to offer only \$125,000.¹⁷⁰ The judge ordered the parties to a settlement conference and ordered the defendant to send a representative with authority to settle in this range without having to call for approval.¹⁷¹ The defendant was sanctioned when its representative appeared at the settlement conference with authority to settle only for the \$125,000 figure the defendant had previously offered.¹⁷² After the judge struck the pleadings, declared the defendant in default, and threatened criminal contempt, the defendant settled for the \$175,000 figure.¹⁷³ Sherman, in discussing this case,

¹⁶⁸ *Id.* at 653; *see also* *Turner v. Young*, 205 F.R.D. 592, 595 (D. Kan. 2002) (“‘Attendance’ means to appear in person and participate directly, not to stand by or participate by telephone. ‘[S]ettlement authority’ means full, meaningful, authority. A person with settlement authority does not need to pick up the phone to call anyone else to find out whether he or she can go higher or lower. A person with settlement authority is “the” decision maker. He or she is the person who has authority to meet the other party’s demand, even if he or she chooses not to do so.”); *Doe v. Nebraska*, 971 F. Supp. 1305, 1306 n.1 (D. Neb. 1997) (citing the mediation reference rule that provides: “[F]or a defendant, the representative must have authority . . . to pay a settlement amount up to plaintiff’s last prayer, or up to plaintiff’s last demand, whichever is lower; (b) for a plaintiff, such representative must have final authority . . . to authorize dismissal of the case with prejudice, or to accept a settlement amount down to defendant’s last offer, whichever is higher; (c) for a client which is controlled by a group, like a board of directors, the representative must have the authority to settle for the group as described above; [and] (d) for an insurance company with a defense or indemnity obligation, the representative must have final settlement authority to commit the company to pay, in the representative’s discretion, an amount up to [the] plaintiff’s last demand if within policy limits, or if not within policy limits, the limits of the policy, whichever is lower.” The purpose of this provision is to have a person present who can settle the case during the mediation without consulting someone else who is not present.); *see also* D. WYO. L.R. 16.3(5)(c)(1) (where authority to settle for Plaintiff would be authority to dismiss or accept Defendant’s last offer; authority for defendant must include authority to pay up to plaintiff’s prayer (excluding punitive damages over \$100,000) or up to plaintiff’s last demand).

¹⁶⁹ *Lockhart v. Patel*, 115 F.R.D. 44, 45 (E.D. Ky. 1987).

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

agrees with the court's decision finding defendant in violation of his duties.¹⁷⁴ Sherman concludes that "[a] court should be entitled to require that the representative at least be open to hearing the arguments of the other side with the possibility of settling at any amount found to be persuasive, even though the representative understands that the company has evaluated the case [prior to the conference at a lower level]."¹⁷⁵

Public entities may have difficulty complying with the obligation to send a representative with settlement authority. For example, in *Monroe v. Corpus Christi Indep. Sch. Dist.*,¹⁷⁶ the Texas federal judge ruled that the school district did not act in bad faith when it sent a representative to the mediation without authority to bind the school board to a mediated settlement.¹⁷⁷ The court explained:

The Texas legislature has invested the school board with authority to manage matters such as this litigation. There is no evidence that defendant was acting with apparent authority from the school board in attending the mediation. On the other hand, there is strong support for defendant's argument that it could not have final settlement authority and that any settlement negotiated at the mediation must be ultimately approved by the school board.¹⁷⁸

In *Schwartzman, Inc. v. ACT Industries, Inc.*,¹⁷⁹ the federal district judge in New Mexico ordered the federal government to pay attorneys' fees as sanctions for violating the court's order that required the choice of either attending with final and complete authority or arranging for means to reach others with that authority by

¹⁷⁴ Sherman, *supra* note 133, at 2107-08.

¹⁷⁵ *Id.*

¹⁷⁶ *Monroe v. Corpus Christi Indep. Sch. Dist.*, 236 F.R.D. 320 (S.D. Tex. 2006); *see also* TR v. St. Johns County Sch. Dist., No. 3:07-cv-913-J-33MCR, 2008 WL 2941281 at *2 (M.D. Fla. July 28, 2008) (finding no violation of a mediation order compelling in person attendance by a person with settlement authority where the defendant needed post-mediation approval of the school board to complete the settlement). *But see* Pucci v. 19th Dist. Ct., No. 07-10631, 2009 WL 596196 at *6 (E.D. Mich. Mar. 6, 2009) (finding breach of obligation of good faith and the judge's order by not sending representatives with settlement authority when the city council had the authority).

¹⁷⁷ *Monroe*, 236 F.R.D. at 324.

¹⁷⁸ *Id.* *But see* D. WYO. L.R. 16.3(c)(v), providing: "If board/committee approval may be required to authorize settlement, the approval of the board/committee must be obtained in advance of the conference, and the attendance of at least one sitting member of the board/committee having the full authority of the board/committee to settle (preferably the Chairman) is required."

¹⁷⁹ *Schwartzman, Inc. v. ACF Indus., Inc.*, 167 F.R.D. 694, 699 (D.N.M. 1996).

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telephone during the conference.¹⁸⁰ The court rejected the Justice Department's argument that its heavy caseload made the court's requirement impractical.¹⁸¹

In *In re Stone*,¹⁸² the Court of Appeals for the Fifth Circuit was more sympathetic to the government's plight. The trial judge issued a standing order requiring that the government send a representative with settlement authority in all cases.¹⁸³ The court of appeals reaffirmed the trial judge's inherent authority to require such a representative but encouraged the trial judge to consider the unique problems faced by the government as a litigant and urged the court to take a more practical case-by-case approach.¹⁸⁴

Some district court local rules address the issue of who should attend when a governmental unit is a party. For example, the Local Rules of Procedure of the United States District Court for the District of Montana provide:

A unit or agency of government satisfies this attendance requirement if represented by a person who has, to the greatest extent feasible, authority to settle and who is knowledgeable about the facts of the case, the governmental unit's position and the procedures and policies under which the governmental unit decides whether to accept proposed settlements.¹⁸⁵

D. Requirement to Attend Multiple Sessions

If ordered to appear at a mediation session, how long or how many sessions must a party attend? The First Circuit Court of Appeals in *In re Atlantic Pipe*, found that ordering a party to unlimited mediation sessions violated principles of procedural fairness.¹⁸⁶ In states such as California, the parties decide whether to continue mediation.¹⁸⁷ The California approach is consistent with the view that

¹⁸⁰ Counsel also failed to confer with adverse counsel prior to the conference as ordered. *Id.* at 697.

¹⁸¹ *Id.* at 698.

¹⁸² *In re Stone*, 986 F.2d 898 (5th Cir. 1993).

¹⁸³ *Id.* at 900.

¹⁸⁴ *Id.* at 903–04.

¹⁸⁵ D. MONT. L. R. 16.6(b)(4); *see also* D.D.C. LCvR 84.8 (c) (requiring representative with settlement authority or representative who is knowledgeable about the facts and will play a major role in submitting the recommendation to the decision maker—unless the mediator gets the Director of the Dispute Resolution to agree to require the decision maker or other senior manager).

¹⁸⁶ *In re Atl. Pipe Corp.*, 304 F.3d 135, 147 (1st Cir. 2002).

¹⁸⁷ *See, e.g.*, CAL. BUS. & PROF. CODE § 467.7(a) (West 2003) (providing that parties agreeing to voluntary mediation may revoke consent and withdraw at any time); *see also* MINN. STAT. ANN. § 572.33(4) (West 1986) (providing that to qualify as an agreement to mediate under the Minnesota Civil Mediation Act the parties must sign a written

mediation should be voluntary and is focused on self-determination of the parties. The Model Standards of Conduct for Mediators provides in Standard I that “[p]arties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.”¹⁸⁸ Nonetheless, federal district court rules and orders frequently send parties to mediation with no limitation, leaving it to the discretion of the mediator to decide when the mediation is at impasse. Most of the rules leave it to the mediator’s discretion.¹⁸⁹ Others say nothing at all about how long or how many sessions a party must attend.¹⁹⁰

agreement that provides, among other matters, that it can be terminated by either party or the mediator by written notice served personally or by certified mail); CAL. R. CT., R. 3.853(1)–(2) (providing that the mediator must inform the parties that participation is voluntary and that each party is to decide the extent of its participation or withdraw from mediation).

¹⁸⁸ MODEL STANDARDS OF CONDUCT FOR MEDIATORS, STANDARD I(A) (2005).

¹⁸⁹ *See, e.g.*, M.D. FLA. L.R. 9.06(a) (providing that the mediator declares when there is an impasse); S.D. FLA. L.R. 16.2(f)(1) (providing that the mediator declares when there is an impasse); N.D. ILL. LR APP. B(VII)(A) (providing that the neutral declares an impasse); E.D.N.Y. L.R. 83.12(j) (providing that the mediation is finished when the mediator concludes that resolution is impossible); N.D.N.Y. L.R. 83.11-5(d)(8)(c) (providing that the mediator declares an impasse); S.D.N.Y. L.R. 83.12(j) (providing that the mediator declares an impasse); E.D.N.C. LOCAL CIVIL RULE 101.1(f) (providing that the mediator declares an impasse); N.D. OHIO LR 16.6(g)(4)(B) (providing that the mediation ends when the mediator concludes that further efforts would not be useful); M.D. PA. LR 16.8.6(b) (providing that the mediator declares an impasse); *see also* E.D. PA. L.R. 53.3(C)(20)–(21) (providing that the mediator decides whether to adjourn and with the consent of the parties may schedule additional sessions).

¹⁹⁰ N.D. CAL. ADR L.R. 6-13 (specifying that “[a]t the close of the mediation session, the mediator and the parties shall jointly determine whether it would be appropriate to schedule some type of follow up[.]” without specifying when or how the mediation session closes); W.D. MICH. LCIVR 16.3(f) (specifying what action parties must take after mediation, without specifying how or when mediation ends); N.D. MISS. L.U.CIV.R. 83.7(j)(3) (requiring the neutral to report to the court whether the case was resolved by mediation without specifying how the mediation concludes); E.D.MO. L.R. 16-6.05(B)–(C) (specifying the report requirements for the mediator without specifying when or how mediation ends absent a settlement agreement); D. NEB. MEDIATION PLAN 4(f) (outlining the mediator’s reporting requirements without specifying how or when mediation terminates); D.R.I. ADR PLAN X(2) (authorizing the mediator to report to the court whether settlement is reached and whether additional mediation session may be beneficial, without specifying how or when individual mediation sessions end). *But see* E.D.N.Y. L.R. 83.11(c) (requiring one mandatory session but all other sessions are voluntary).

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In *Brooks v. Lincoln National Life Insurance Co.*,¹⁹¹ a Nebraska federal judge cited plaintiff's unilateral termination of the mediation as one of the justifications for sanctions for the "failure to engage in meaningful participation."¹⁹² In *Longo v. Chao*,¹⁹³ the United States District Court for the Western District of Texas left it to the parties to determine when the mediation was over. The plaintiff argued that an award of costs to the prevailing defendant should be denied because the defendant mediated for less than an hour.¹⁹⁴ Despite the plaintiff's contention that this unnecessarily strained its limited resources, the court explained that it only requires parties to attend mediation and refused to conclude that the short duration of participation provided a reasonable basis to question the defendant's conduct.¹⁹⁵

The District of Columbia Court of Appeals in *In re Bolden*¹⁹⁶ reversed an award of sanctions for breach of good faith participation when an attorney left a mediation after he was not allowed to present his expert's testimony by telephone.¹⁹⁷ The court was concerned that no judge is present at mediation sessions and the proceedings are not recorded.¹⁹⁸ The court of appeals concluded that Bolden's assertion that he was going to reschedule the mediation for a time when his expert could be available, in the absence of the opposing side's objections, did not amount to bad faith.¹⁹⁹

The issue of who decides when the mediation is over does not come up often in court opinions. At the point where parties want to walk out of mediation, it is likely that most mediators would declare an impasse consistent with the Model Standards of Conduct for Mediators.²⁰⁰ Forcing parties to attend unlimited mediation sessions may put unfair pressure on parties to reach settlement. Furthermore, lengthy sessions tend to wear down parties' will to resist, and thus can be an effective technique in pressuring parties to settle. Parties subpoenaed to depositions are given some protection against this tactic. Federal Rule of Civil Procedure 30(d) includes a seven-hour limit on the time a party can be required to attend a deposition, absent agreement or specific court order.²⁰¹ Perhaps the courts should consider offering similar protection to parties ordered to mediation.

¹⁹¹ *Brooks v. Lincoln Nat'l Life Ins. Co.*, No. 8:05CV118, 2006 WL 2487937, at *6 (D. Neb. Aug. 25, 2006) (discussed *infra* notes 237–43 and accompanying text); *see also* *Smith Wholesale Co. v. Philip Morris U.S.A., Inc.*, No. 2:03CV221, 2005 WL 1230436, at *2 (addressing sanctions for terminating a planned two day mediation).

¹⁹² *Brooks*, 2006 WL 2487937, at *5.

¹⁹³ *Longo v. Chao*, No. E.P.-06-CV-00307-KC, 2008 WL 2783509, at *3 (W.D. Tex. July 8, 2008).

¹⁹⁴ *Id.* at *2.

¹⁹⁵ *Id.* at *3.

¹⁹⁶ *In re Bolden*, 719 A.2d 1253 (D.C. 1998).

¹⁹⁷ *Id.* at 1254–55.

¹⁹⁸ *Id.* at 1254.

¹⁹⁹ *Id.* at 1255.

²⁰⁰ *See supra* note 185 and accompanying text.

²⁰¹ FED. R. CIV. P. 30(d).

VII. POLICING THE QUALITY OF THE BARGAINING PROCESS

The crux of the dispute over court enforcement of any obligation to participate in good faith centers on questions of whether, consistent with principles of confidentiality, the court can:

- (1) compel the parties to actually listen to and communicate with the adverse party or mediator about the issues in the case;
- (2) require that the parties actually bargain with each other and exchange offers to settle;
- (3) police the mediation process to protect parties from offensive, abusive conduct, or efforts to misuse the mediation process for unfair adversarial advantage.

Several recent federal court decisions shed some light on these questions.

A. Confidentiality

In *In re A.T. Reynolds & Sons*, introduced at the beginning of this article,²⁰² Wells Fargo and counsel were sanctioned for, among other things, their disruptive behavior at mediation.²⁰³ Wells Fargo's duty to mediate in good faith came from a local court rule embodied in a standing order that was specifically incorporated in the order sending the party to mediation.²⁰⁴ The bankruptcy judge had little difficulty addressing the confidentiality rules since the local rules specifically provided that the "mediator shall report any willful failure to attend or participate in good faith."²⁰⁵ Consequently, the judge concluded that the mediator was free to file a report and provide testimony about the mediator's perceptions of what went on during the mediation.²⁰⁶ The judge provided no explanation of what justified testimony from both parties about the bargaining communications at the mediation.²⁰⁷

Allowing parties to testify to mediation communications is an anathema to the mediation community. Allowing a mediator to testify is worse. The academic literature²⁰⁸ and judicial opinions²⁰⁹ are replete with testimonials extolling the

²⁰² See *supra* notes 1–7 and accompanying text.

²⁰³ *In re A.T. Reynolds & Sons, Inc.*, 424 B.R. 76, 76 (Bankr. S.D.N.Y. 2010).

²⁰⁴ The court relied on inherent power, 28 U.S.C. § 1927 (2006), FED. R. CIV. P. 16(f), and contempt powers to justify the sanction. *A.T. Reynolds*, 424 B.R. at 94.

²⁰⁵ *Id.* at 86.

²⁰⁶ The parties did not object when the mediator stated that he was going to submit a written report to the court. *Id.* at 87 n.7.

²⁰⁷ The local rule provided that "[g]enerally the substance of the mediation is confidential." *Id.* at 87.

²⁰⁸ See, e.g., Lawrence R. Freedman & Michael L. Prigoff, *Confidentiality in Mediation: The Need for Protection*, 2 OHIO ST. J. ON DISP. RESOL. 37, 43–44 (1986)

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necessity to preserve the confidentiality of mediation. The Uniform Mediation Act focuses almost entirely on protecting confidentiality, assuming that if the mediation walls stand strong to keep out the prying eyes of the court, that whatever goes on within the mediation room will encourage party empowerment and self-determination.²¹⁰

Although the expectation of confidentiality is important to successful mediation practice, absolute secrecy is not. Clearly, absolute secrecy is not the practice. Even the Uniform Mediation Act provides for numerous exceptions to the mediation privilege.²¹¹ Further, courts frequently refer to evidence of what went on in the mediation. In a study of all of the reported opinions on Westlaw implicating mediation processes from 1999 to 2003, the courts' opinions referred to mediation

(applying traditional privilege rationales to mediation); Philip J. Harter, *Neither Cop nor Collection Agent: Encouraging Administrative Settlements by Ensuring Mediator Confidentiality*, 41 ADMIN. L. REV. 315, 323–27 (1989) (contending that the benefits of mediation are achieved only if confidentiality is maintained); 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, 17 (stating that if communications are not protected from disclosure, the parties will not be as candid and will be “dissuaded from mediating”); Eileen A. Scallen, *Relational and Informational Privileges and the Case of the Mysterious Mediation Privilege*, 38 LOY. L.A. L. REV. 537, 559 (2004) (“[U]nless the parties to the relationship are assured of confidentiality, they will not communicate freely, thereby endangering the viability and utility of the relationship.”).

²⁰⁹ See *Clark v. Stapleton Corp.*, 957 F.2d 745, 746 (10th Cir. 1992) (stating that confidentiality is essential to a settlement program); *Lake Utopia Paper Ltd. v. Connelly Containers, Inc.*, 608 F.2d 928, 930 (2d Cir. 1979) (“It is essential to the proper functioning of the Civil Appeals Management Plan that all matters discussed at these conferences remain confidential.”); *Willis v. McGraw*, 177 F.R.D. 632, 633 (S.D. W. Va. 1998) (holding that the confidentiality of mediation proceedings precluded the court from hearing a motion to enforce settlement); *Doe v. Nebraska*, 971 F. Supp. 1305, 1307 (D. Neb. 1997) (stating that confidentiality in mediation is needed so that parties can have an “open, candid discussion about the dispute”); *Bernard v. Galen Group, Inc.*, 901 F. Supp. 778, 784 (S.D.N.Y. 1995) (stating that “the breach of the applicable confidentiality provisions threatens the integrity of the entire Program”).

²¹⁰ See, e.g., Gregory Firestone, *An Analysis of Principled Advocacy in the Development of the Uniform Mediation Act*, 22 N. ILL. U. L. REV. 265, 270 (2002) “[w]hile the act does address other issues, such as party representation and mediator disclosure, the vast majority of the UMA addresses the issue of privilege and confidentiality”); see also Ellen E. Deason, *The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability?*, 85 MARQ. L. REV. 79, 79 (2001) (“[b]y adopting the Uniform Mediation Act (UMA), the states would greatly advance predictability through a coordinated approach to confidentiality”).

²¹¹ See UNIF. MEDIATION ACT § 6 (2005) (setting forth exceptions to the mediation privilege).

evidence in about one of every three opinions.²¹² In sixty-seven of the opinions, the mediator provided actual testimony or an affidavit, and the parties provided evidence of the mediator's statements in another eighty-seven opinions.²¹³ In another 359 opinions, additional evidence of mediation statements or conduct was referenced in the opinion.²¹⁴ The evidence in these opinions referred to who attended, representatives' bargaining authority, what issues were or were not discussed, the mediator's proposals and statements, and actual recitation of the bargaining history.²¹⁵ In most of these cases the opinion does not mention confidentiality concerns.²¹⁶ Of course, there were many cases where privilege was raised and upheld by the court, precluding evidence about what transpired at mediation,²¹⁷ but when conduct or communications at a court-connected mediation are relevant and important to resolving a motion before the court, it is not uncommon for the court to consider mediation evidence.²¹⁸ It is less common, but also quite possible, that the court may consider evidence directly from the mediator.

The concern with permitting or requiring a mediator report on what transpired at the mediation, however, raises additional issues. There is a concern that this practice may impair the role of the mediator as an impartial, neutral facilitator. Perhaps the leading case expressing this concern is *NLRB v. Macaluso*, a federal labor case in which the court precluded the mediator's testimony on the issue of whether the parties had reached an agreement in mediation.²¹⁹ The court reasoned, "the public interest in maintaining the actual or perceived impartiality of federal mediators outweighs the benefits of relevant and decisive testimony on the issue at hand."²²⁰

²¹² Coben & Thompson, *supra* note 60, at 58–63 (analyzing all 1223 Westlaw state and federal opinions relating to mediation issues from 1999 to 2003).

²¹³ *Id.* at 69.

²¹⁴ *Id.* at 62.

²¹⁵ *Id.* at 59–61.

²¹⁶ *Id.* at 64–65.

²¹⁷ There were fifty-seven opinions that indicated that mediation privilege was asserted and upheld, and in another eight opinions the mediation privilege claim was upheld in part. *Id.* at 64–65.

²¹⁸ It is not common in all jurisdictions. It would be uncommon in California to use evidence of mediation communications in a subsequent proceeding. *See, e.g.,* Foxgate Homeowners' Ass'n, Inc. v. Bramalea Cal., Inc., 25 P.3d 1117, 1118 (Cal. 2001) (reversing sanctions against party for violating court order and not bringing experts to mediation based on mediation privilege rules). Texas also has strong mediation privilege rules. *See* Tex. Parks & Wildlife Dept. v. Davis, 988 S.W.2d 370, 375 (Tex. App. 1999) (applying privilege rules to preclude evidence of bad faith in mediation).

²¹⁹ *NLRB v. Macaluso*, 618 F.2d 51, 56 (9th Cir. 1980).

²²⁰ *Id.* at 54.

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It is not clear why a mediator's honest, objective report about what the mediator observed at a mediation session relating to compliance with court responsibilities²²¹ affects the mediator's impartiality.²²² Obviously, if the report is slanted and reflects a biased view, the mediator then would be revealing a personal bias—but that does not seem to be the concern. Providing objective testimony about matters observed relating to compliance with court orders and duties does not suggest that the mediator/witness is biased or not neutral. Mediators in med-arb processes take on an even more significant role as the decider of the underlying dispute, as opposed to the reporter. The key to insuring a fair process, of course, is full disclosure to the parties up front as to what role the mediator will play in the process and what rules of confidentiality will be applied.

If the mediator is required to assess whether the parties are bargaining in good faith, however, the mediator may be acting more in an adjudicative role than as a facilitator.²²³ It is possible that parties might take a different approach with a mediator who purely facilitates the dispute as opposed to a mediator who has a responsibility or right to judge whether the parties are mediating in good faith. It is also possible that it makes no difference at all to most parties whether they are mediating in a jurisdiction with an obligation to mediate in good faith. The hope, of course, is that parties will be deterred from acting in bad faith if they are accountable to the mediator. Numerous districts allow,²²⁴ or require,²²⁵ a mediator to report bad

²²¹ In the context of reporting on good faith, the mediator is not taking sides with either party on the merits of the case, as in *Macaluso*, but assisting the court in upholding court rules, processes, and integrity.

²²² See *In re Beazley Ins. Co.*, No. 09-20005, 2009 WL 205859, at *6–7 (5th Cir. Jan. 29, 2009) (rejecting a writ of mandamus based on a claim that the party should not be required to return to mediation before the same judge who violated the mediation privilege rules by reporting that the party was not mediating in good faith). *But see* Deason, *supra* note 207, at 81 (arguing “a mediator who testifies will inevitably be seen as acting contrary to the interests of one of the parties, which necessarily destroys her neutrality”).

²²³ See M.D. FLA. L.R. 9.05(e) (allowing mediator to recommend sanctions for any party that fails to attend mediation conference). One concept of mediation is that the neutral cannot be a person who has any decision-making power over the parties. See MINN. STAT. ANN. § 572.23(2) (West 2009) (defining a mediator as a “third party with no formal coercive power”). The UMA does not expressly adopt this definition although it does provide that the presiding judge cannot be the mediator. UNIF. MEDIATION ACT § 3(b)(3) (2003).

²²⁴ See E.D. CAL. L.R. 271(p)(1) (requiring that complaints regarding violations of the voluntary dispute resolution rules be submitted in writing to the presiding ADR judge); D.D.C. LCvR 84.9(c)(4) (implicitly stating that mediators can report violation of ADR rules to a special compliance judge rather than the presiding judge); M.D. FLA. L.R. 9.05(e) (allowing mediator to recommend sanctions for any party that fails to attend mediation conference); S.D. GA. L.R. 16.7.6(d) (authorizing the mediator to report conduct of parties that may violate local rules governing mediation to the court); D. KAN. RULE 16.3(j)(3) (authorizing mediator or others to report violations of ADR rules to the

faith conduct in mediation. This right or duty to report bad faith mediation conduct has been in place in many jurisdictions for many years.

court); D. MONT. L. R. 16.6(b)(4)(B) (authorizing the mediator or parties to motion for sanctions for any party's failure to participate in good faith in mediation); D.N.H. GUIDELINES FOR MEDIATION PROGRAM 5(b) (authorizing the mediator or others to "advise the court of an apparent failure to participate" in mediation); D.N.J. L.CIV.R. APP. Q(II)(B) (authorizing disclosure of confidential information to report a failure to participate to a compliance judge); W.D.N.Y. ADR PLAN 2.3(A) (authorizing a neutral or party to report "any failure to attend an ADR conference, to substantially comply with the ADR Referral Order, or to otherwise participate in the ADR process in good faith"); E.D.N.C. LOCAL CIVIL RULE 101.1d(e) ("The mediator may report in writing to the court, with copies to the parties, any conduct of any party that may be in violation of these rules for mediated settlement conferences."); M.D.N.C. LR83.9e(e) ("The mediator may report in writing to the court, with copies to the parties, any conduct of any party that may be in violation of these rules for mediated settlement conferences."); M.D.PA. LR 16.8.7(a) (authorizing mediator to report "willful failure to attend the mediation session"); L.Cv.R. 83J(f) (D.P.R. 2009) (authorizing the mediator to recommend to the court whether parties complied with the good faith participation requirement).

²²⁵ S.D. ALA. ADR PLAN IV(A)(8) (requiring mediator to report parties' failure to attend mediation conference to court with possibility of sanctions); N.D. CAL. ADR L.R. 2-4(b)(2) (requiring neutral to report ADR rule violation to the ADR magistrate); S.D. FLA. L.R. 16.2(e) (requiring the mediator to report non-attendance and authorizing mediator to recommend sanctions to the court); LR 16.7(I)(1), NDGA. (requiring the ADR neutral to report willful failure to attend an ADR conference to the court for possible imposition of sanctions); CDIL-LR 16.4(E)(6) (requiring mediator to report party non-attendance to the assigned judge for the possibility of sanctions); N.D. ILL. LR APP. B (VI)(H) (stating that failure to "attend the mediation conference as required shall be reported to the assigned judge and may result in the imposition of sanctions"); N.D. MISS. L.U.CIV.R. 83.7(f)(3) (stating that mediators or parties shall report any party's failure to comply with the order of referral); S.D. MISS. L.U.CIV.R. 83.7(f)(3) (stating that mediators or parties shall report any party's failure to comply with the order of referral); E.D.MO. L.R. 16-6.05(A) (requiring neutrals to report any failure to attend an ADR conference, comply with the order of referral, or participate in good faith in the ADR process); D. NEB. MEDIATION PLAN 4(g) (requiring the mediators to report to the court, *in camera*, acts or omissions that may violate the terms of the Mediation Reference Order); N.D. OHIO LR 16.6(f) (requiring the mediator to report "[w]illful failure of a party to attend the mediation conference"); S. D. OHIO CIV. R. 16.3(e)(4) (stating that "refusal to attend [ADR] and participate in good faith by a party or their counsel shall be reported to the presiding judicial officers"); D. OR. LR 16-4(f)(2)(H) (requiring the mediator to report an attorney or client's "willful failure to attend the mediation"); E.D. WASH. LR 16.2(c)(2)(b)(3)(F) (requiring the mediator to report any willful failure to attend mediation to the court for possible sanctions); W.D. WASH. CR 39.1(c)(4)(F) (requiring the mediator to report willful failure to attend mediation or comply with local mediation rules); N.D. W. VA. LR CIV P 16.06(e) (requiring the mediator to advise the court if either party disrupts the mediation process or fails to negotiate in good faith); D.V.I. LRC1. 3.2(f)(2) (requiring the mediator to report to the court whether the parties participate in good faith in the mediation).

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It is possible that the mediator's relationship with the party accused of bad faith may be jeopardized, and in situations involving repeat players and a limited number of neutrals this could cause a problem. *Macaluso*, a labor dispute, implicated issues of national industrial peace and the need to preserve confidence in the Federal Mediation and Conciliation Service.²²⁶ According to the court, "The complete exclusion of mediator testimony is necessary to the preservation of an effective system of labor mediation, and that labor mediation is essential to continued industrial stability, a public interest sufficiently great to outweigh the interest in obtaining every person's evidence."²²⁷ When *Macaluso* was decided there were only 325 federal mediators and over twenty thousand disputes.²²⁸ The personal relationship between the mediator and Wells Fargo was strained in *A.T. Reynolds*,²²⁹ but there is no indication that this impaired personal relationship will harm the bankruptcy or justice system in New York. This mediator, who was threatened by defendants,²³⁰ would not be a good choice to mediate subsequent disputes with these parties even if the mediator had not reported the bad faith conduct.

Resort to mediator evidence should be avoided, unless necessary to resolve the legitimate issue of compliance with court duties. There is a strong interest in preserving mediation confidentiality and easing the burden on mediators. Where mediator testimony is necessary,²³¹ it should be limited. The concern about neutrality may arise when the courts ask the mediator to go beyond reporting on what the mediator observed and seek the mediator's subjective views about the motivations of the parties. This assessment function is better left to adjudicators and not mediators.²³² To the extent that it is essential to have full input about what transpired at the mediation to enforce court orders, to protect parties from abusive

²²⁶ See *supra* notes 219–20 and accompanying text.

²²⁷ *Macaluso*, 618 F.2d at 56. *Macaluso* is widely cited as authority for excluding mediator testimony in many contexts. See Deason, *supra* note 33, at 266.

²²⁸ Peter N. Thompson, *Confidentiality, Competency and Confusion: The Uncertain Promise of the Mediation Privilege in Minnesota*, 18 *HAMLIN J. PUB. L. & POL'Y*, 329, 370–72 (1997) (proposing a mediation privilege statute that would permit mediator testimony, if ordered by court, but only about objective observations regarding communications or conduct related to the listed exceptions to the privilege).

²²⁹ See *supra* notes 1–7, 202–207 and accompanying text.

²³⁰ See *supra* note 5.

²³¹ If the offending conduct or threat occurs in caucus, the mediator may be the only source of evidence.

²³² Coben & Thompson, *supra* note 60, at 136–37:

Mediator testimony is most appropriate if limited to objective matters such as statements made, party conduct, and documents to the extent such evidence is offered and relevant for one of the exceptions to mediator privilege. However ... mental impressions or speculation on the thought processes of the others, is rarely necessary and should be absolutely prohibited as utterly corruptive of the mediator's promise of neutrality.

practices and to “preserve the integrity of the judicial process,”²³³ it is rarely necessary for the court to hear the mediator’s opinions about the subjective motivations of the parties.

B. Bargaining in Good Faith—Recent Decisions

In addressing the substance of the claims of mediation misconduct, the judge in *A.T. Reynolds* explained that “attendance without active participation is insufficient to constitute good-faith participation in mediation.”²³⁴ At the mediation,²³⁵ Wells Fargo repeatedly responded to inquiries with a “pre-conceived mantra” that it was not open to compromise that involved “taking a single dollar out of their pocket.”²³⁶ Wells Fargo effectively thwarted the mediator’s attempt to engage in “risk analysis.. According to the court, “attendance at a mediation without participation in the discussion and risk analysis that are fundamental practices in mediation constitutes failure to participate in good faith.”²³⁷ In reaching its conclusion of bad faith mediation, the court considered the fact that Wells Fargo made no offer to settle until after they were told the mediator was going to report them for bad faith mediation.²³⁸ The court granted sanctions based on Federal Rule of Civil Procedure 16(f) and the court’s inherent power; it also found a violation of 28 U.S.C. § 1927.²³⁹

A party’s refusal to listen to the mediator and to engage in discussions also gave rise to sanctions in *Brooks v. Lincoln National Life Insurance Co.*²⁴⁰ At mediation, counsel did not respond to the defendants’ initial offer and told the mediator that the defendants had five minutes to put a serious settlement offer on the table or they were leaving.²⁴¹ The plaintiff’s counsel found the defendants’ second offer “unacceptable and unworthy of response.”²⁴² Counsel refused to allow the mediator to explain the defendants’ offers, or to engage in dialogue with counsel for the

²³³ See *Nick v. Morgan’s Foods, Inc.*, 270 F.3d 590, 594 (8th Cir. 2001).

²³⁴ *In re A.T. Reynolds & Sons, Inc.*, 424 B.R. 76, 78 (Bankr. S.D.N.Y. 2010).

²³⁵ The court was also concerned about Wells Fargo’s pre-mediation demands, its attempt to take over the mediation, and its not sending a representative with full settlement authority. See *supra* notes 1–7 and accompanying text.

²³⁶ *A.T. Reynolds*, 424 B.R. at 80.

²³⁷ *Id.* at 90.

²³⁸ *Id.* at 93.

²³⁹ *Id.* at 95.

²⁴⁰ *Brooks v. Lincoln Nat’l Life Ins. Co.*, No. 8:05CV118, 2006 WL 2487937, at *5 (D. Neb. Aug. 25, 2006); see also *Damon v. United Parcel Serv.*, No. 04-cv-746S, 2009 WL 67368, at *1 (W.D.N.Y. Jan. 9, 2009) (reviewing bargaining history in mediation and concluding that there was no proof of bad faith).

²⁴¹ *Brooks*, 2006 WL 2487937, at *2.

²⁴² *Id.*

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defendants to correct the problems.²⁴³ Counsel terminated the mediation process, maintaining that it was in the best interest of his client to leave.²⁴⁴ Plaintiff's counsel was sanctioned for violating the court order that imposed on the parties an obligation to negotiate with "objective good faith."²⁴⁵

The court had little sympathy for counsel's argument that there were no guidelines to define acceptable behavior at mediation. The court did not provide a definition of "objective good faith" or what it called meaningful participation, but concluded that rejecting an offer without giving the mediator an opportunity to explain the reasoning behind the offer did not comply.²⁴⁶

Although there may be an obligation for someone to listen to the mediator's explanation, perhaps that person does not have to be the party. In *EEOC v. ABM Industries Inc.*,²⁴⁷ the defendants sought sanctions because the plaintiff's counsel refused to allow the mediator to present and explain the settlement offer directly to the parties who were "primarily" Spanish speakers.²⁴⁸ The mediator did not speak Spanish, and the process would have required that counsel serve as an interpreter for the mediator.²⁴⁹ The court denied the motion for sanctions.²⁵⁰ The court explained that there was no court order, rule, or agreement that imposed a duty to allow a mediator to communicate a settlement offer directly to a party, and the defendants produced no authority to show that this process is required or is an understood norm of professional conduct.²⁵¹ If the defendant believed it necessary for the mediator to have direct access to the parties, the defendant should have raised this issue while addressing the ground rules prior to the mediation.²⁵²

In *Fisher v. SmithKline Beecham Corp.*, the court sanctioned the defendant pursuant to Federal Rule of Civil Procedure 16(f) and 28 U.S.C. § 1927 for lack of

²⁴³ *Id.*

²⁴⁴ *Id.* at *4. The court ordered plaintiff's counsel to enroll in a mediation representation seminar and to send letters of apology to the plaintiff, the mediator, the defendant's representative, and counsel (with copies to the court).

²⁴⁵ *Id.* at *5.

²⁴⁶ The case is complicated by the fact that defendant was also sanctioned because he violated the mediation order by telling the mediator they were leaving early that afternoon to catch a plane, and further complicated by the fact that the mediator made a mistake by telling plaintiffs that defendants lacked full settlement authority. *Id.* at *4.

²⁴⁷ *EEOC v. ABM Indus. Inc.*, No. 1:07-cv-01428 LJO JLT, 2010 WL 744711 (E.D. Cal. Mar. 3, 2010).

²⁴⁸ *Id.* at *2 n.1. The mediator did not speak Spanish.

²⁴⁹ *Id.*

²⁵⁰ *Id.* at *4.

²⁵¹ *Id.* at *3-4. The court also noted that this was a private mediation that the court acquiesced in, not one ordered by the court that must be completed on pain of sanctions. *Id.*

²⁵² *Id.*

good faith participation in the mediation.²⁵³ On the eve of the mediation, while the plaintiffs and counsel were traveling to the mediation site, the defendant filed a motion for summary judgment.²⁵⁴ The defendant then limited its mediation presentation to providing counsel with a copy of the memorandum of law supporting the summary judgment motion.²⁵⁵ The defendant's late filing of the motion and its posture at the mediation that it would not consider substantial settlement possibilities unless the plaintiff could explain why the summary judgment motion would fail frustrated the success of the mediation.²⁵⁶ The court was particularly concerned because defendant appeared to intentionally frustrate the purpose of the mediation and added unnecessary expense to the process.²⁵⁷ If the defendant was not willing to seriously consider settlement until the dispositive motion was resolved, the defendant could have asked to opt-out of the mediation process, or with proper notice the mediation could have been delayed until after the motion was resolved.²⁵⁸

Dickey maintains that filing motions on the eve of mediation to achieve some tactical advantage at the mediation is a common practice.²⁵⁹ Common or not, this practice may, as it did in *Fisher*, frustrate the effectiveness of the mediation and add unnecessary expense to the litigation process. Discovery obstruction was once standard practice. Now discovery obstruction is subject to court sanctions, and is thus less common. Pending summary judgment motions impede the probability of obtaining a settlement in mediation.²⁶⁰ If it is standard practice to file dispositive motions on the eve of a mediation to achieve some tactical advantage and frustrate

²⁵³ *Fisher v. SmithKline Beecham Corp.*, No. 07-CV-0347A(F), 2008 WL 4501860, at *3–7 (W.D.N.Y. Sept. 29, 2008), *reconsideration denied*, No. 07-CV-037A(F), 2009 WL 899433 (W.D.N.Y. March 26, 2009).

²⁵⁴ *Fisher*, 2008 WL 4501860, at *3.

²⁵⁵ *Id.* at *4, 8.

²⁵⁶ *Id.* at *8–9.

²⁵⁷ *Id.*

²⁵⁸ *Id.* at *9.

²⁵⁹ Michael P. Dickey, *ADR Gone Wild: Is It Time for a Federal Mediation Exclusionary Rule?*, 25 OHIO ST. J. ON DISP. RESOL. 713 (2010).

²⁶⁰ See Bobbi McAdoo & Nancy Welsh, *Court-Connected General Civil ADR Programs: Aiming for Institutionalization, Efficient Resolution, and the Experience of Justice*, in ADR HANDBOOK FOR JUDGES 1, 18 (Donna Stienstra & Susan M. Yates eds. 2004) (finding that in the Eastern District of Missouri, cases were twice as likely to settle if no summary judgment was pending); see also *Res. Assocs. Grant Writing and Evaluation Servs., LLC v. Maberry*, No. CIV 08-0552 JB/LAM, 2009 WL 1300561, at *14 (D.N.M. Feb. 5, 2009) (declining to order mediation where one of the parties insisted on waiting for a ruling on a summary judgment motion). *But cf.* *Eckhardt v. Bank of Am., N.A.*, No. 3:06CV512, 2008 WL 4567310, at *1 (W.D.N.C. Oct. 9, 2008) (arguing that parties should exhaust mediation prior to the court taking the time to resolve dispositive motions).

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the mediation, perhaps this practice will be stopped by the courts by imposing sanctions as in *Fisher*.²⁶¹

In the highly publicized *Girls Gone Wild* case, a federal district judge in Florida found the defendant, Joe Francis, in contempt and imprisoned him until he complied with the obligation to mediate in good faith.²⁶² The judge has been sharply criticized in this case for allegedly coercing settlement by incarcerating the defendant until he agreed to settle.²⁶³ The judge steadfastly maintained that he never compelled Francis to “settle,” but only to mediate in good faith.²⁶⁴ The judge insisted that his order sending Francis to jail was his “duty to insure that litigants obey the orders of the Court and do not undermine the public’s confidence in the integrity and impartiality of the judiciary or the rights of other parties.”²⁶⁵

In the underlying dispute, the parents of underage girls sued Joe Francis, founder of Girls Gone Wild, and his business entities, for filming and exploiting pictures of the girls exposing their breasts while on spring break in Florida.²⁶⁶ Francis steadfastly denied liability claiming that he was defrauded because the girls showed him false IDs.²⁶⁷ Francis arrived at the mediation four hours late, wearing flip-flops and shorts.²⁶⁸ In the first session with plaintiff’s counsel, Francis immediately

²⁶¹ See *Lewis v. Sch. Dist. No. 70*, No.05-CV-776-WDS, 2009 WL 928874, at *7 (S.D. Ill. Apr. 6, 2009) (denying plaintiff’s motion for sanctions based on theory that the defendants tried to coerce plaintiff’s consent to mediation by filing a motion in limine, and that defendants tainted the mediation by sharing with the mediator the content of that motion; the court did not address “good faith” but noted that the court cannot protect plaintiff from the litigation strategies of defendant).

²⁶² *Doe v. Francis*, 5:03cv260-RS-WCS (N.D. Fla. 2007) (described in *Pitts v. Francis*, No. 5:07cv169-RS-EMT, 2007 WL 4482168 (N.D. Fla. Dec. 19 2007) (denying motion to disqualify or recuse in a related case)). For other descriptions of this case see Michael D. Young, *Federal Judge Gone Wild? Seeking Rescission, Producer Francis Claims His Mediated Settlement was Coerced by Jail Time*, 26 ALT. TO HIGH COST LITIG. 170 (2008); see also Dickey, *supra* note 256. Russ Bleemer, *Update: Despite Mediation-Related Incarceration, Girls Gone Wild Founder is Headed for More ADR*, 26 ALT. TO HIGH COST LITIG. 66 (2008); Thomas J. Campbell, *Girls Gone Wild Founder Incarcerated for Contempt Involving Mediation*, 14 DISP. RESOL. MAG., Fall 2007, at 39; Michael D. Young, *Mediation Gone Wild: How Three Minutes Put an ADR Party Behind Bars*, 25 ALT. TO HIGH COST LITIG. 97 (2007).

²⁶³ See Young, *Federal Judge Gone Wild?*, *supra* note 262, at 171–72.

²⁶⁴ *Pitts v. Francis*, No. 5:07cv169-RS-EMT, 2007 WL 4482168, at *5–7 (N.D. Fla. Dec. 19, 2007).

²⁶⁵ *Id.* at *25.

²⁶⁶ *Id.* at *1.

²⁶⁷ *Id.* at *20.

²⁶⁸ *Id.* at *11. Plaintiffs were told Francis and his lawyers were late because California counsel was delayed due to a late hearing the night before, but then this lawyer did not appear with Francis at the mediation. See Plaintiffs’ Motion for Sanctions, for

launched into a profanity laced diatribe, insisting that he would never pay a dime and ending with an in-your-face “threat” that he would bury and ruin plaintiffs’ counsel.²⁶⁹ The mediation with Francis ended abruptly, but continued with the corporate entities.²⁷⁰

Through a number of motions, the plaintiffs sought sanctions for Francis’ conduct during the mediation while the mediation with the corporate entities was continuing.²⁷¹ The court found Francis in contempt, ordered incarceration, but suspended the order to provide Francis the opportunity to purge the contempt by mediating in good faith.²⁷² The parties to the mediation reached a tentative agreement and the contempt order was lifted.²⁷³ Francis subsequently refused to finalize the agreement insisting that payments be made over a period of time.²⁷⁴ The judge held Francis in contempt and ordered incarceration.²⁷⁵

The judge freely heard from the parties and the mediator about mediation communications, showing little concern for maintaining the confidentiality of the mediation process.²⁷⁶ The judge’s approach to the conflict between confidentiality of mediation and enforcing court orders is fairly indicative of the federal judiciary’s approach. The judge stated bluntly: “I will not permit Mr. Francis to hide behind [the] Florida Mediation Code to avoid sanctions for violation of my order.”²⁷⁷

Although plaintiffs argued that the threatening statements fit within the Florida state privilege exception for threats of violence, the judge did not directly rely on Florida state privilege law.²⁷⁸ The judge, however, did focus on the threat as part of

Temporary Restraining Order, and to Compel, 5:03cv260-RS-WCS, 2007 WL 4680653 (N.D. Fla. Mar. 23, 2007).

²⁶⁹ *Pitts*, 2007 WL 4482168, at *11.

²⁷⁰ *Doe*, Plaintiffs’ Motion for Sanctions, for Temporary Restraining Order and to Compel, 2007 WL 4680653.

²⁷¹ For a compilation of the motions, pleadings, and filings, see *John Doe I v. Francis*, No. 5:03 CV260/MCR/WGS, 2005 WL 517847, at *2 (N.D. Fla. Feb. 10, 2005).

²⁷² *Pitts*, 2007 WL 4482168, at *5–9.

²⁷³ *Id.* at *16; *Dickey*, *supra* note 259, at 729.

²⁷⁴ *Pitts*, 2007 WL 4482168, at *17; *Dickey*, *supra* note 259, at 729.

²⁷⁵ *Id.* Francis eventually agreed to settle the civil cases but additional complications with criminal charges stemming from the same incident and charges for bringing contraband into the jail led to an extended imprisonment. *Dickey*, *supra* note 256, at 730.

²⁷⁶ *Young*, *Federal Judge Gone Wild?*, *supra* note 263, at 105.

²⁷⁷ *Id.*

²⁷⁸ Under Federal Rule of Evidence 501, the federal judge should apply federal rules of privilege, unless addressing an “element of a claim or defense as to which State law supplies the rule of decision.” Although Rule 501 is not easy to apply, federal law would supply the rule of decision on issues relating to the federal judge’s power to enforce its orders and the exercise of contempt power. For an excellent discussion on the choice of law issues presented by Federal Rule of Evidence 501 in the context of mediations, see *Deason*, *supra* note 33, at 280–302; *Deason*, *supra* note 207, at 95–101.

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the explanation for considering the evidence, stating: “I will not permit a litigant in this *federal* court to exploit an order issued by me for the sole purpose of abusing and threatening another party.”²⁷⁹ The judge also concluded that “Francis’ behavior was far worse than ‘impolite’—it was dangerous.”²⁸⁰ But, ultimately, the judge concluded that the evidence provided at the hearing was not entitled to protection under mediation confidentiality rules, because “this so-called mediation was a sham.”²⁸¹ It did not involve settlement negotiations ‘under [any] stretch of the imagination.’”²⁸²

In each of these cases, better or different mediation practices, particularly prior to the mediation, would have gone a long way toward avoiding the conflict at the mediation. Better communications with the mediator prior to the mediation flushing out the parties’ and mediator’s expectations for the mediation process and identifying the perceived obstacles standing in the way of successful resolution of the issues, would have helped the mediator structure the process in a more productive way.²⁸³

In each of these cases the court seemed particularly troubled by the surprise tactics of the sanctioned party undermining the mediation. The court perceived that the sanctioned party wasted the time of the mediator and adverse party.²⁸⁴ Had they informed the court or mediator of their intentions prior to the mediation, the mediation could have been cancelled, postponed, or the parties’ issues addressed.

The courts’ concern about wasting the adverse party’s time is also expressed in *Guillory v. Domtar Industries Inc.*,²⁸⁵ a sanctions case involving a judicial settlement conference. The case is somewhat unique in that the court affirmed an \$8,500 sanctions award for bad faith against a defendant company in a multi-million dollar suit even though the defendant made a \$100,000 settlement offer.²⁸⁶ Counsel failed to warn the court prior to the settlement conference, however, that the company “believed settlement to be a useless endeavor.”²⁸⁷ Despite the six-figure offer, the

²⁷⁹ *Pitts*, 2007 WL 4482168, at *12.

²⁸⁰ *Id.* at *14.

²⁸¹ The judge must be referring only to the initial brief session with Mr. Francis, because subsequently the plaintiffs did engage in settlement negotiations with the corporate entities. *See supra* note 269. To some extent this reasoning is analogous to the approach in Federal Rule of Evidence 408 which makes settlement negotiations inadmissible to prove liability but only if they are made within the context of a compromise negotiation. FED. R. EVID. 408.

²⁸² *Pitts*, 2007 WL 4482168, at *13.

²⁸³ Typically a pre-mediation report would indicate whether dispositive motions would need to be resolved before meaningful settlement discussions can take place.

²⁸⁴ *Pitts*, 2007 WL 4482168, at *14. The court in Francis noted that defendant did not bring a motion to dispense with mediation, but “chose to attend the ‘mediation’ and waste the time and money of his adversaries.” *Id.*

²⁸⁵ *Guillory v. Domtar Indus. Inc.*, 95 F.3d 1320, 1334–35 (5th Cir. 1996).

²⁸⁶ *Id.* at 1325.

²⁸⁷ *Id.* at 1334; *see also* *Pucci v. 19th Dist. Ct.*, No. 07-10631, 2009 WL 596196 at

court found that the company never intended to settle the case at the conference and thus violated the Federal Rule of Civil Procedure 16 good faith obligation.²⁸⁸ Ultimately, the jury awarded the plaintiff over \$6 million for injuries received when a piece of a forklift fell on his head.²⁸⁹

The Court of Appeals for the Fifth Circuit carefully distinguished this case from other cases that stood for the proposition that courts cannot force parties to settle or make a settlement offer.²⁹⁰ The court found it significant that the trial judge ordered the defendant company to file a pre-conference statement, and the defendant was sanctioned, not because it refused to settle, but because it “concealed its true position that it never intended to settle the case.”²⁹¹

The defendant in *Nevada Partners Fund, LLC v. United States*, received more favorable treatment when it made its position clear prior to the mediation that it would be difficult to improve upon its prior settlement offer.²⁹² The defendant had attorneys and representatives with settlement authority at the mediation, but did not vary from the offer plaintiff had previously rejected.²⁹³ The court agreed that it had

*6 (E.D. Mich. Mar. 6, 2009) (granting sanctions for bad faith and violation of court order for not sending representative with settlement authority and for fixed policy of not settling a suit until after dispositive motions when that policy was not communicated to the adverse party); *Smith Wholesale Co. v. Philip Morris U.S.A., Inc.*, No. 2:03CV221, 2005 WL 1230436, at *2 (E.D. Tenn. May 24, 2005), *order vacated on reconsideration*, 2005 WL 2030655, at *3 (Aug. 23, 2005) (Initially the good faith obligation was violated when defendant “attended the settlement conference despite the obvious high unlikelihood of a settlement and failed to notify the Court of the same.” On reconsideration, the court vacated its order because both parties were at fault.); *Pitman v. Brinker Int’l, Inc.*, 216 F.R.D. 481, 484–85 (D. Ariz. 2003) (finding that the good faith obligation was violated when the defendant attended the settlement conference but had no intention of settling and failed to notify the court of this intention).

²⁸⁸ *Guillory*, 95 F.3d at 1334.

²⁸⁹ *Id.*

²⁹⁰ *Guillory v. Domtar Indus., Inc.*, 95 F.3d 1320, 1334–35 (5th Cir. 1996) (citing *Dawson v. United States*, 68 F.3d 886, 897 (5th Cir. 1995) (reversing sanctions imposed on good faith grounds because the defendants failed to make a monetary settlement, and noting that “there is no meaningful difference between coercion of an offer and coercion of a settlement”)); *see also* *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648, 653 (7th Cir. 1989) (en banc) (suggesting that sanctions cannot be based on the refusal to make a monetary offer); *Hess v. N.J. Transit Rail Operations, Inc.*, 846 F.2d 114, 116 (2d Cir. 1988) (suggesting that sanctions would be inappropriate where the defendant failed to make what the court considered a “bonafide offer”); *Kothe v. Smith*, 771 F.2d 667, 669–70 (2d Cir. 1985) (fine reversed where the defendant failed to offer the amount recommended by the court).

²⁹¹ *Guillory*, 95 F.3d at 1335.

²⁹² *Nev. Partners Fund, LLC v. United States*, No. 3:06cv379-HTW-MTP, 2009 WL 113565, at *1 (S.D. Miss. Jan. 16, 2009).

²⁹³ *Id.* at *1.

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inherent authority to impose sanctions for bad faith.²⁹⁴ The court did not define “bad faith” but recognized that it could not coerce a party to settle or make an offer.²⁹⁵ The court found that “the Defendant prepared for and participated in the mediation in good faith.”²⁹⁶

The definition of good faith that is emerging from recent federal cases is not so complicated. Parties ordered to mediation must attend with full settlement authority. Once they get to the mediation they must listen to the adverse party’s proposal and be willing to respond honestly and express their position. A party may not attempt to frustrate the agenda of the mediator and usually must stay until dismissed by the mediator, unless the district empowers the parties to decide when the mediation is over. A party may take a no pay position, or refuse to consider any increase in their last offer, but if the party is coming to the mediation with a fixed intention not to settle, not to make any additional offers, or not to consider settlement until dispositive motions (or other issues) are resolved, they must inform the mediator or court and adverse party of this position prior to the mediation.

VIII. TIME FOR REFORM

The use of mediation in federal court litigation has moved beyond an experimental stage and is now generally accepted as an integral part of the pretrial process. While hundreds of cases are sent daily to mediation in federal courts throughout the country, there is not an accepted set of rules or expectations for what should happen at this mediation. Federal Rule of Civil Procedure 16(f) requires parties to participate in mediation in good faith but allows case-by-case determination of what this entails. The rule should be amended to specify what is required in the context of a court-connected mediation. The rule should clarify the role of the court in assuring that the parties comply with their obligations and protect the parties from abuse and sharp practices. Additional clarification as to how this right or duty fits with the obligations to maintain the confidentiality of the mediation process is essential.

In districts where the confidentiality rule is based on Federal Rule of Evidence 408 there should not be a problem.²⁹⁷ Rule 408 is an evidentiary rule that precludes the use of evidence of the mediation discussions only when offered on the issue of liability or amount of a claim.²⁹⁸ Federal Rule of Evidence 408 does not preclude the use of mediation communications to prove bad faith or breach of mediation duties, but many other district court confidentiality rules seemingly would preclude

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ *See supra* note 34.

²⁹⁸ FED. R. EVID. 408.

disclosing mediation evidence for any reason.²⁹⁹ Although judges seem reluctant to sanction parties for breach of mediation confidentiality duties,³⁰⁰ there are cases where parties in fact have been sanctioned for including mediation communications in motions.³⁰¹ The rule should clarify the extent to which the court can supervise the

²⁹⁹ See, e.g., S.D. ALA. ADR PLAN IV(A)(10)(f)(ii) (“Under no circumstances is the mediator to comment on the mediation [to the court] other than to report the failure to settle or the scheduling of another mediation conference at a later date.”); D. HAW. LR 88.1(k) (“Mediators and parties shall not communicate with the court about the substance of any position, offer, or other matter related to mediation without the consent of all parties”); CDIL-LR 16.4(E)(7) (“Neither the parties nor the mediator may disclose information regarding the [mediation] process, including terms of settlement, to the court or to third persons unless all parties otherwise agree.”); N.D. IOWA LR 16.2(e) (prohibiting disclosure of written and oral statements made during mediation unless “authorized by the court or agreed by the parties”); S.D.N.Y. L.R. 83.12(k) (stating that the “entire mediation process shall be confidential” and prohibiting parties and the mediator from disclosing information about the mediation process unless agreed by all parties); D.N.D. CIV. L.R. 16.2(C)(1) (“The settlement judge [acting as mediator] will not inform the trial judge of any positions taken by parties during the ADR process and will only advise whether or not the case settled.”).

³⁰⁰ See generally Sarah R. Cole, *Protecting Confidentiality In Mediation: A Promise Unfulfilled?*, 54 U. KAN. L. REV. 1419 (2006) (arguing that courts have been too lax in sanctioning parties for breach of mediation confidentiality duties). See, e.g., *Powell v. Carey Int’l, Inc.*, 547 F. Supp. 2d 1281, 1298–99 (S.D. Fla. 2008) (denying sanctions for defendant’s inadvertent, and immediately cured, disclosure of mediation information that did not prejudice plaintiff); *Hamilton v. Enter. Leasing Co.*, No. 4:04-CV-802 CAS, 2005 WL 2647959, at *10 (E.D. Mo. Oct. 17, 2005) (noting that the party violated the local rule but imposing no sanctions);

³⁰¹ See, e.g., *Fair Hous. Advocates Ass’n, Inc. v. Terrace Plaza Apartments*, No. 2:03-CV-0563, 2006 WL 2334851, at *6–9 (S.D. Ohio Aug. 10, 2006) (imposing sanctions for revealing confidential mediation discussions in a rule 68 offer of judgment); *Frank v. L.L. Bean Inc.*, 377 F. Supp. 2d 233, 239–41 (D. Me. 2005) (imposing a \$1,000 fine on the plaintiff’s attorney in a sexual harassment action as a sanction for breaching confidentiality of a prior mediation by disclosing to a potential witness the position the employer had taken in the prior mediation as a way of convincing the witness that the employer had in fact done something wrong); *Davis v. Kan. City Fire & Marine Ins. Co.*, 195 F.R.D. 33, 38 (N.D. Okla. 2000) (imposing a fine of \$1,500 that was to be paid to the bar association for use in CLE programs, instructing that the order imposing sanctions be published and circulated to all judges in the court, and imposed against the lawyers and their law firm who attached a confidential settlement conference statement to a motion filed in court in violation of a court order and a court rule); *Bernard v. Galen Group, Inc.*, 901 F. Supp. 778 (S.D.N.Y. 1995) (imposing \$2,500 sanction for divulging the contents of two settlement proposals). Some courts that do not sanction simply ignore the confidential evidence. See, e.g., *Gore v. Experian Info. Solutions, Inc.*, No. Civ. 303CV2949H, 2004 WL 1381034, at *1 (N.D. Tex. June 21, 2004) (denying the party’s motion that was premised on confidential mediation communications).

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mediation process consistent with the interests in preserving the parties' right to go to trial and the interests in maintaining confidentiality of the process and the neutrality of the mediator.

One possible remedy is to revitalize the confidentiality rules and in essence sweep the problem under the rug. Dickey makes a compelling case that in the interests of preserving the confidentiality of the mediation process and the neutrality of the mediator, and minimizing collateral litigation, that Federal Rule of Evidence 16 should be amended to preclude evidence of mediation communications when offered in motions for sanctions for mediation conduct.³⁰² Dickey's exclusionary rule has many benefits. It is similar to the approach of the Uniform Mediation Act, which uses privilege rules to preclude this type of evidence, but the exclusionary rule is much simpler and easier to apply.

This exclusionary approach might help preserve a particular vision of the mediation process and may reduce satellite litigation on mediation issues;³⁰³ but it is at odds with the culture of the federal courts. The federal court system has a tradition of expecting good faith participation in the pretrial process. Moreover, the goal of any court-sponsored ADR problem cannot be to simply get rid of litigation. As Professor Welsh put it: "[t]he business of the courts is not business—it is justice."³⁰⁴ Precluding evidence of bad faith mediation would limit the court's ability to protect the parties from oppression and to "preserve the integrity of the judicial process."³⁰⁵

³⁰² Dickey, *supra* note 259, at 750–69.

³⁰³ Bright line rules designed to eliminate litigation sometimes encourage litigation, particularly when they lead to harsh results. *See generally* Thompson, *Enforcing Rights*, *supra* note 54, at 541–50 (discussing how bright line rules that lead to harsh or unfair results tend to breed confusion and litigation). The application of California's strict mediation privilege rules, designed in part to reduce litigation about mediation conduct, has generated significant litigation in California's appellate courts. *See* the lengthy discussion of the numerous appellate decisions addressing California's bright line mediation privilege rule in *Wimsatt v. Super Ct.*, 61 Cal. Rptr. 3d 200, 208–14 (Cal. Ct. App. 2007).

³⁰⁴ *See* Nancy A. Welsh, *Making Deals in Court Connected Mediation: What's Justice Got to Do with it?*, 79 WASH. U. L.Q. 787, 837 (2001); Wayne D. Brazil, *Should Court-Sponsored ADR Survive?*, 21 OHIO ST. J. ON DISP. RESOL. 241, 266 (2006) ("Assessing the success of their programs by their impact on settlement rates makes the courts seem fundamentally inhospitable to the people they are supposed to serve."); *see also* Bobbi McAdoo & Nancy Welsh, *Look Before You Leap and Keep on Looking: Lessons From the Institutionalization of Court-Connected Mediation*, 5 NEV. L.J. 399 (2004–05) (arguing that the success of court-connected mediation must be measured by the extent to which mediation helps courts deliver substantive justice and procedural justice, as well as efficient justice).

³⁰⁵ *See* *Nick v. Morgan's Foods, Inc.*, 270 F.3d 590, 594 (8th Cir. 2001) ("Part of the purpose of the sanctioning power . . . is to control litigation and to preserve the integrity of the judicial process.").

If the court requires that parties attend mediation, the court has a duty to assure that the process is fair and not misused as a vehicle for adversarial abuse.³⁰⁶

The exclusionary approach would immunize parties who make threats against adverse parties or the mediator. It would protect parties who choose to use the mediation process as a vehicle to intimidate or to unnecessarily inflict additional cost on the adverse parties. This rule would place the court rule in conflict with 28 U.S.C. § 1927, which authorizes sanctions if a party “multiplies the proceedings in any case unreasonably and vexatiously.” The rule would also preclude sanctions in cases where parties obfuscate their intention to derail the mediation in their pre-mediation report or may make it difficult to sanction a party who violates the court’s order to send a representative to the mediation with settlement authority.³⁰⁷

Dickey argues that excluding evidence of mediation communications in the *Girls Gone Wild* case would still have allowed the court to sanction Joe Francis for arriving at the mediation four hours late, even if the court was never told of the misconduct at the mediation.³⁰⁸ The justification for the courts’ use of the power to sanction, however, is to encourage future compliance, to deter future wrongdoing, to punish, or to insure that an adversary does not obtain an unfair advantage through improper conduct.³⁰⁹ The sanction is supposed to fit the “crime,” and more serious sanctions, such as dismissal or contempt, are not authorized absent a finding of subjective culpability.³¹⁰ Being four hours late to a mediation may or may not

³⁰⁶ See Michael Moffitt, *Three Things to be Against (“Settlement” Not Included)*, 78 FORDHAM L. REV. 1203, 1210 (2009) (“If courts were not available to hear [complaints about bargaining misbehavior in settlement negotiations] I strongly suspect that we would encounter more bargaining misbehavior, more expensive bargaining or both.”).

³⁰⁷ Cf. *Valenti v. Unum Life Ins. Co. of Am.*, No. 8:04-CV-1615-T-30TGW, 2006 WL 1627276, at *3 (M.D. Fla. June 6, 2006) (invoking litigation privilege to dismiss the claim that an insurance company defendant engaged in bad faith bargaining by sending a representative to the mediation without sufficient settlement authority); *Foxgate Homeowners’ Ass’n, Inc. v. Bramalea Cal., Inc.*, 25 P.3d 1117 (Cal. 2001) (reversing sanctions against party for violating court order and not bringing experts to mediation based on mediation privilege rules).

³⁰⁸ Dickey, *supra* note 259, at 768.

³⁰⁹ See *Natl. Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 643 (1976) (affirming dismissal for “flagrant bad faith” in failing to answer interrogatories to punish and to deter others from violating the rules); *Martin v. DaimlerChrysler Corp.*, 251 F.3d 691, 694–95 (8th Cir. 2001) (affirming dismissal as a sanction because lesser sanctions would not sufficiently punish and deter the abusive conduct while allowing a full and fair trial on the merits).

³¹⁰ See *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 707 (1982) (“any sanction must be ‘just’”); *Nick v. Morgan’s Foods, Inc.*, 270 F.3d 590, 597 (8th Cir. 2001) (“the sanction imposed by the district court need only be proportionate to the litigant’s transgression”); see also 8B CHARLES A. WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2284 (3d ed. 2010) (“justice requires that the most drastic sanctions be reserved for flagrant cases”).

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warrant a sanction depending on why the person was late.³¹¹ Being late on September 11, 2001 because of travel difficulties is different from being late as part of a plan to intimidate and oppress the adverse party. In granting sanctions, courts must delve into the details of why the party failed to comply and take into account who is responsible for the misconduct. For example, the court may consider the extent to which the sanction will unfairly punish the client for the conduct of the attorney.³¹² It may be difficult or impossible to do this assessment without considering what happened at the mediation.

The Federal Rules of Civil Procedure, adopted in 1938, were intended to end the “sporting view” of litigation and eliminate trial by ambush and surprise.³¹³ Based on the smattering of reported cases and anecdotal reports, some litigants are attempting to misuse the mediation process improperly to advance adversarial interests, intimidate opposing parties, and inflict unnecessary expense.³¹⁴ Treating the mediation process as a protected enclave from judicial oversight where sharp practices, intimidation, and infliction of unnecessary expense to the adverse party may take place is inconsistent with these goals.³¹⁵ Rather than building up a wall of

³¹¹ See *Hijec v. Menlo Logistics, Inc.*, No. 3-07-CV-0530-G, 2007 WL 4322591, at *1 (N.D. Tex. Dec. 10, 2007) (denying sanctions and ruling that defendant’s failure to have an executive officer attend the mediation was the result of counsel’s oversight rather than bad faith); *De Nicola v. Adelphi Acad.*, No. CV-05-4231, 2006 WL 2844384, at *10–12 (E.D.N.Y. Sept. 29, 2006) (refusing to award attorneys’ fees, finding no bad faith in terminating mediation when defendant suspected plaintiffs of assaulting one of defendant’s employees).

³¹² See, e.g., *Poulis v. State Farm Fire & Cas. Co.*, 747 F.2d 863, 869 (3d Cir. 1984) (reasoning that “The most direct and therefore preferable sanction for the pattern of attorney delay such as that which the district court encountered in this case would be to impose the excess costs caused by such conduct directly upon the attorney, with an order that such costs are not to be passed on to the client, directly or indirectly. This would avoid compelling an innocent party to bear the brunt of its counsel’s dereliction.”); see also *Scaife v. Associated Air Ctr., Inc.*, 100 F.3d 406, 411–12 (5th Cir. 1996) (reversing sanctions against an attorney who advised his client not to comply with the mediation order because the sanctions were overbroad and excessive). See generally *Nick v. Morgan’s Foods, Inc.*, 270 F.3d 590 (8th Cir. 2001) (imposing sanctions on outside counsel).

³¹³ Craig Enoch, *Incivility in the Legal System? Maybe It’s the Rules*, 47 SMU L. REV. 199, 205–06 (1994) Federal Rule of Civil Procedure 1 provides that the rules “should be construed to provide a just, speedy and inexpensive determination of every action.” FED. R. CIV. P. 1.

³¹⁴ In addition to the examples previously discussed, see *Paz v. Fid. Nat. Ins. Co.*, 712 So. 2d 807, 808 (Fla. Dist. Ct. App. 1998) (alleging that an insurance company routinely demanded mediation and arbitration as a means of delaying or avoiding payment of benefits).

³¹⁵ According to the judge in *Pitts v. Francis*, No. 5:07cv169-RS-EMT, 2007 WL 4482168, at *13 (N.D. Fla. Dec. 19, 2007):

secrecy around the mediation room so that the court never hears of the misuse of process, the courts should directly address the underlying causes of bad faith mediation practices and better assure that the mediation process is a fair and productive process for all parties.

A. Reassess the Premise of Mandatory Mediation

Any assessment should start with an examination of the premise underlying mandatory mediation. The idea of compelling parties to participate in a process to arrive at a voluntary settlement has never resonated well with the mediation community.³¹⁶ There are, of course, instances where parties adamant to litigate reassess their position and become willing participants in fruitful settlement

No public policy reason exists to protect as privileged Francis' conduct. To permit a recalcitrant litigant to shield his vile and threatening behavior at a court-sanctioned proceeding from judicial review under the guise of confidentiality is tantamount to giving him full license to convert a benign, court-sanctioned event into an unrecognizable and dangerous fracas.

³¹⁶ See, e.g., G. Thomas Eisele, *The Case Against Mandatory Court-Annexed ADR Programs*, 75 JUDICATURE 34, 35 (1991) (arguing that parties should not have "their day in court encumbered by costly non-judicial diversions to which they have not consented" and that mandatory ADR should not be a "condition precedent" to parties' right to a trial); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1581 (1991) (arguing that the self determinative nature of mediation is "fundamentally altered when mediation is imposed rather than sought or offered"); Timothy Hedeem, *Coercion and Self-Determination in Court-Connected Mediation: All Mediations Are Voluntary, But Some Are More Voluntary Than Others*, 26 JUST. SYS. J. 273, 285-86 (2005) (recommending that referrals to mediation should be free of coercion, and parties should consent in writing to mediation to demonstrate informed consent); Lucy V. Katz, *Compulsory Alternative Dispute Resolution and Voluntarism: Two-Headed Monster or Two Sides of the Coin?*, 1993 J. DISP. RESOL. 1, 55 (1993) ("[T]he argument for voluntariness appears strong. First, there is little evidence that compulsion produces greater efficiency or greater justice. Second, there is at least some evidence that some participants feel undue pressure and believe their right to a fair trial is violated by compulsory procedures. Third, voluntary procedures would eliminate a great deal of potential litigation over issues of compulsion, and particularly over the troublesome question of the duty to participate in good faith. Fourth, voluntariness is consistent with the underlying philosophy of ADR."); Richard Ingleby, *Court Sponsored Mediation: The Case Against Mandatory Participation*, 56 MOD. L. REV. 441, 443 (1993) ("[M]ediation loses its defining characteristics if the parties do not enter of their own volition or the process is institutionalized."). But see Dorcas Quek, *Mandatory Mediation: an Oxymoron? Examining the Feasibility of Implementing A Court-Mandated Mediation Program*, 11 CARDOZO J. CONFLICT RESOL. 479, 490-92 (2010) (explaining the arguments against mandatory mediation, but concluding that mandatory mediation need not be an oxymoron if case referral to mediation is discretionary rather than arbitrary, and courts refrain from excessive sanctions or scrutiny of parties' non-compliance in the mediation process).

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discussions once exposed to a talented mediator. There also may be many benefits to attending mediation in addition to arriving at a settlement.³¹⁷ As a practical matter, however, the current federal court-connected mediation process is intended to inexorably move downstream in one direction—toward settlement. Mediations that do not result in settlement are referred to as unsuccessful mediations.³¹⁸ Courts send parties to mediation to get the lawsuit settled. If parties are dead-set against settlement there can be a clash.

Perhaps at one time compelled mediation was necessary to introduce this new and powerful process to a wary bar, reluctant to embrace new procedures.³¹⁹ Today, the value and power of the mediation process is well known to practicing lawyers and business leaders.³²⁰ These parties can make informed decisions about whether mediation would be useful in resolving their dispute.

In her research on Minnesota judges, Bobbi McAdoo identifies a number of situations where judges should be “sensitive” to party demands for trial when deciding whether to order parties to mediation.. These situations include: “when legal issues are at the heart of the case or when legal precedent is desired; when parties express no interest in settlement or there is very high hostility; and when the potential cost of ADR outweighs the value of the case.”³²¹ In addition, courts should take into account the ability of the parties to absorb the cost of ADR processes.

³¹⁷ See, e.g., Lon Fuller, *Mediation—Its Forms and Functions*, 44 SO. CAL. L. REV. 305, 325 (1971) (describing “the central quality of mediation, namely, its capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another”).

³¹⁸ See, e.g., *Rodriguez v. Wet Ink, LLC*, 603 F.3d 810, 811 (10th Cir. 2010) (characterizing a mediation that did not result in settlement as unsuccessful); *In re 1994 Exxon Chem. Fire*, 558 F.3d 378, 398 (5th Cir. 2009) (characterizing a mediation that did not result in settlement as unsuccessful); *Alfonso v. Aufiero*, 66 F. Supp. 2d 183, 193 (D. Mass. 1999) (refusing to award attorneys’ fees for “unsuccessful” mediation).

³¹⁹ See Frank E. Sander, H. William Allen, & Debra Hensler, *Judicial (Mis)use of ADR? A Debate*, 27 U. TOL. L. REV. 885, 886 (referring to mandatory mediation as “a temporary solution for the problem created by the fact that when people use mediation, they are very pleased with it (and the empirical research supports that conclusion) but because our system is so court- and adjudication-oriented, people do not know about the benefits of mediation and hence do not use it enough voluntarily”); see also Richard C. Reuben, *Tort Reform Renews Debate over Mandatory Mediation*, DISP. RESOL. MAG., Winter 2007, at 13, 15.

³²⁰ See generally John Lande, *Getting the Faith: Why Business Lawyers and Executives Believe in Mediation*, 5 HARV. NEGOT. L. REV. 137, 209–13 (2000) (finding widespread approval of mediation among business leaders and lawyers); Don Peters, *Can We Talk? Overcoming Barriers To Mediating Private Transborder Commercial Disputes in the Americas*, 41 VAND. J. TRANSNAT’L. L. 1251, 1272–74 (2008) (reporting on studies finding that business leaders favor mediation).

³²¹ Bobbi McAdoo, *All Rise, the Court is In Session: What Judges Say About Court-Connected Mediation*, 22 OHIO ST. J. ON DISP. RESOL. 377, 426 n.261 (2007); see also

Mediation is a terrific process. Attempts to avoid a lengthy and expensive public trial in favor of this more efficient process that allows for party determination should be encouraged. But not every case must be resolved through mediation.

If the courts insist on mandatory referral to mediation, there should be clear procedures to allow parties to move to be excluded or to opt-out of the process.³²² In several of the sanctions cases discussed previously, the insistence on continuing mediation in the face of clear and strong opposition by parties who believed that their legal claims would be upheld clearly frustrated the parties and added expense to the process.³²³

Wells Fargo and Joe Francis were convinced that the community values expressed through the rule of law would vindicate them.³²⁴ The claims involved money damages, not continuing relationships that might be more conducive to resolution by agreement. In the case involving Wells Fargo, the issue was raised in the context of a motion in an existing proceeding, and likely could have been summarily resolved by the Bankruptcy judge without undue expenditure of court resources. Arguably *Girls Gone Wild* was more complicated and involved indiscretions of minors that might better be addressed in private mediation to protect the minors. But the parents, as guardians of these minors, decided it was in the best interests of the minors to bring a public law suit. Joe Francis wanted a public determination of the propriety of his conduct. The dispute was highly publicized, and was presumably of great interest to the community. Why not let the local community give judgment? Let Joe Francis have his day in court. Let the community pronounce the judgment that Francis is entitled to.

Frank E.A. Sander & Lukasz Rozdeiczer, *Matching Cases and Dispute Resolution Procedures: Detailed Analysis Leading to a Mediation-Centered Approach*, 11 HARV. NEGOT. L. REV. 1, 37 (2006) (discussing contraindications to mediation including cases where a party needs to obtain a goal available only in court such as establishing a precedent, maximizing or minimizing recovery, public vindication, the case focuses on a matter of principle, or the claims are frivolous or a result of a jackpot syndrome); Frank E. A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOT. J. 49, 60 (1994) (finding any ADR processes inappropriate in circumstances where parties are incapable of negotiating effectively or where compliance issues are anticipated). The Alternative Dispute Resolution Act of 1996 lists cases where ADR is inappropriate in agency disputes including: cases where setting a precedent is important, where important government policy issues need to be developed, where consistency is important, where cases implicate third party rights, when public access is needed and when a private settlement would impair necessary continuing jurisdiction by the agency. 5 U.S.C. § 572(b) (2006).

³²² See McAdoo & Welsh, *supra* note 257, at 425 (“Courts should permit parties seeking a merits-based decision to opt out easily from a mandatory mediation program.”).

³²³ See, e.g., *supra* notes 1–7, 202–07, 234–39 and accompanying text (discussing *A.T. Reynolds*); *supra* notes 262–84 and accompanying text (discussing *Francis*).

³²⁴ *Id.*

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B. Reassess the Goal of Any Mediation Process

The courts should reassess and better articulate the goals of the mediation process. Should the court-ordered mediation process be designed simply to obtain settlement or should it include broader concerns about assuring procedural and substantive justice? These goals should be translated into clear rules that require extensive mediator training and continuing supervision to assure that the neutrals understand and implement the policy goals of the program.³²⁵

C. Require Pre-Mediation Conversations

In each of the sanctions cases discussed, better communications among the mediator and the parties prior to the mediation could have alleviated the problems. Wells Fargo should have been told who was attending the mediation and what issues it was expected to address at the mediation.. Perhaps Wells Fargo was being disingenuous, as the court suspects, but clearly its inquiries on these issues reflect an impediment to arriving at the mediation in a spirit of cooperation. Certainly, some additional pre-mediation work could have helped Wells Fargo's representatives to understand what was expected of them at the mediation, or led the mediator to agree that mediation would not be productive and to cancel it.

Leonard Riskin and Nancy Welsh have provided a series of questions for lawyers, clients, and mediators to address prior to mediation to "lead to a broader problem definition and to processes and solutions that [are] better suited to the parties' real needs."³²⁶ The dead ahead focus on settlement based on "risk analysis" and valuation common to court-connected litigation may be too narrow to accomplish the goals of the parties, and ultimately the goals of the courts.

D. Define with Greater Specificity Parties' Duties

Mediation rules should define with greater specificity the obligations of a party ordered to attend mediation. The rules should also specify who must attend, how long they must attend, and what they must do once they get there. Finally, the rules should clarify that the obligation to mediate in good faith does not require parties to forego their right to trial.

Certain general principles can be gleaned from the decided cases., When a party is ordered to mediation, the party and representatives with full settlement authority

³²⁵ See Brazil, *supra* note 9, at 13 ("It has happened more than once in our program that a neutral we have selected has proceeded with an understanding of the basic structure of a particular ADR process . . . that differs quite dramatically from the process our rules and teaching material prescribe.").

³²⁶ See Leonard L. Riskin & Nancy A. Welsh, *Is That All There Is?: "The Problem" in Court-Oriented Mediation*, 15 GEO. MASON L. REV. 863, 902-08 (2008); Leonard L. Riskin & Nancy A. Welsh, *What's It All About? Finding the Appropriate Problem Definition in Mediation*, DISP. RESOL. MAG., Summer 2009, at 19.

must appear at the mediation. The parties must co-operate with the mediator, listen to the position of the adverse party, and be willing to express their position and respond honestly. A party may take a no-pay position, or refuse to consider any change in their last offer. But if they are coming to the mediation with a fixed intention not to settle or make any additional offers, or they cannot consider settlement until dispositive motions are resolved, they must inform the mediator, court, or adverse party of this position prior to the mediation. While it is an impossible task to anticipate all the ingenious ways a party can intentionally disrupt mediation,³²⁷ the standards in Federal Rule of Civil Procedure 11 are appropriate: The parties may not use the mediation process “to harass, cause unnecessary delay or to needlessly increase the cost of litigation.”³²⁸

E. Clarify the Extent to Which Rules of Confidentiality are Applicable in Sanctions Motions Mediation Conduct

Protecting the confidentiality of mediation communications is important, but in a mediation sponsored by the federal court, judges need to protect the parties and mediator from abuse and enforce court orders. Parties should be permitted to seek sanctions for violation of court orders, breach of the adverse party’s duties to mediate, or other misconduct that causes them injury. The standards in Federal Rule of Civil Procedure 11(b)³²⁹ provide ample protection to avoid over-litigation of this issue.³³⁰ A motion for sanctions should be permitted to divulge what went on at the mediation to the extent necessary to protect the parties and to uphold the integrity of the court.³³¹ A mediator should be permitted to report to the court that a party violated a court order or breached a duty to mediate. To the extent that the mediator

³²⁷ Some that come to mind are repeating the same mantra to each question, engaging in profanity laced tirades, or threatening the adverse parties or mediator.

³²⁸ FED. R. CIV. P. 16(b)(1).

³²⁹ Federal Rule of Civil Procedure 11(b)(1)–(2) provides that by bringing this motion to the court the attorney or party certifies that “it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation” and the claims, defenses, and other “legal contentions are warranted.”

³³⁰ The courts are not being deluged with motions for sanctions based on bad faith mediation conduct. Dickey reports that his research revealed 35 mediation good faith cases in a five year period, most of which involved issues relating to attendance and authority. Dickey, *supra* note 259, at 765 n.254. It is possible that there are many good faith mediation motions in trial courts that are not collected on an electronic database, but at present there is no evidence of over-litigation.

³³¹ Weston suggests that any good faith sanctions motion be filed in camera to protect the confidentiality of the process. Weston, *Checks on Participant Conduct, supra* note 57, at 642. This approach would provide greater protection of confidentiality but as a practical matter might be too cumbersome for the value achieved. Very little of the evidence relevant to good faith mediation issues actually involves sensitive or private information other than perhaps the actual terms of any offer to settle.

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provides evidence to support any claim of mediation misconduct, this evidence should be limited to objective observations and recitation of what happened at the mediation and should not include the mediator's subjective views as to the parties' motives or states of mind.

While the federal courts can accomplish these changes through common law development and local rules, ultimately, to assure a consistent and fair mediation process throughout the federal court system, Federal Rule of Civil Procedure 16 needs to be amended. I include below a proposed set of amendments to Rule 16 that would address most of the issues raised.

Proposed Amendment to Federal Rule of Civil Procedure 16

Rule 16. Pretrial Conferences; Scheduling; Management

(c) Attendance and Matters for Consideration at a Pretrial Conference.

(1) Attendance. A represented party must authorize at least one of its attorneys to make stipulations and admissions about all matters that can reasonably be anticipated for discussion at a pretrial conference. If appropriate, the court may require that a party or its representative with full settlement authority or relevant insurer be present or reasonably available by other means to consider possible settlement.

(2) Matters for Consideration. At any pretrial conference, the court may consider and take appropriate action on the following matters:

(H) referring matters to a magistrate judge or a master, or ADR neutral.

(g) ADR Processes.

(1) In General. Scheduled sessions for ADR processes ordered by the court are pretrial conferences under this rule.

(2) Deciding on ADR Process. Before ordering the parties to attend an ADR process, the court should hear the parties' views on the propriety of the process for this specific case.

(3) Contents of Order to Mediate In any order directing the parties to attend a mediation the court shall provide:

(A) That the parties shall produce a confidential pre-mediation statement to the mediator including, among other items, the issues to be addressed at the mediation, past bargaining history, any impediments to a successful mediation process; and

(B) The length of time the parties must attend the mediation and provisions for compensation of the mediator, where appropriate.

(4) Required Attendance at Mediation. Unless excused by the court or mediator, counsel, parties, and representatives with full settlement authority, including relevant insurers, shall be physically present and participate in the process.

(A) Participation includes being prepared, listening to the adverse parties' positions and issues, responding, and honestly presenting the party's own positions and issues.

(B) There is no requirement that a party make an offer to settle. If, however, a party has a fixed position that is not subject to further negotiation, or the party cannot fully participate in settlement discussions until pretrial motions or other issues are resolved, the party must make that position known to the court or to the mediator in the pre-mediation statement.

(5) Sanctions. Parties who do not comply with their responsibilities under this rule or who use the process to harass, cause unnecessary delay, or needlessly increase the cost of litigation are subject to sanctions. Sanctions may include any of the matters listed in Rule 37(b)(2)(A)(i)-(vi). Instead of, or in addition to these sanctions the court must require the party, the attorney advising that party, or both, to pay the reasonable expenses, including attorney's fees, caused by the conduct, unless the conduct was justified or other circumstances make an award of expenses unjust.

(6) Raising the Issue of a Violation. The parties, after conferring or attempting to confer with the adverse party in a good faith attempt to resolve the dispute, or the mediator by a filed report, may raise the issue of a violation of this rule by motion. Evidence relating to a claim of breach of duty under this rule is not precluded by the rules of confidentiality governing mediation.

(A) Either party may move the court for a protective order to limit the disclosure of confidential mediation communications.

(B) If it is necessary to receive evidence from the mediator to resolve an issue of whether a party has violated duties under this rule, the mediator's evidence should be limited to objective observations of the events giving rise to the issue and should not include the mediator's subjective assessment of the state of mind or motives of the parties.