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I. INTRODUCTION

"I don't have authority to pay that much [or accept that little]." "I'm not authorized to do that." "Although that sounds plausible, I'm afraid my client [boss, company, board, agency head] won't go for it." "Someone else in the company [agency, institution, organization] will have to make that decision." These and similar statements of limited authority occur during negotiations. When they occur, limited authority claims affect whether negotiations continue and what outcomes result. Claiming limited authority lets negotiators influence, delay, and prevent agreements.[1]

Limited authority claims also present challenges when negotiations are mediated. Best understood as assisted and enhanced negotiation,[2] mediation has been practiced for centuries and found in some form in most of the world's cultures.[3] Mediation allows persons to negotiate in the presence of

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1. *See, e.g.*, ROGER S. HAYDOCK, NEGOTIATION PRACTICE 47 (1984) (nature and extent of authority affects negotiations); CHESTER L. KARRASS, GIVE AND TAKE: THE COMPLETE GUIDE TO NEGOTIATING STRATEGIES AND TACTICS 96-97 (1974) (limited authority can be a source of bargaining power); HOWARD RAIFFA, THE ART AND SCIENCE OF NEGOTIATION 146-47 (1982) (effects of knowing or not knowing reservation values).

2. JOHN R. VAN WINKLE, MEDIATION: A PATH BACK FOR THE LOST LAWYER 75 (2d ed. 2005).

3. *See, e.g.*, DAVID W. AUGSBURGER, CONFLICT MEDIATION ACROSS CULTURES: PATHWAYS AND PATTERNS 191 (1992) (arguing experience of mediation is universal); JOHN PAUL LEDERACH, PREPARING FOR PEACE: CONFLICT TRANSFORMATION ACROSS CULTURES 93 (stating mediation has universal facets and performs similar functions in all cultures); CHRISTOPHER W. MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT 20 (2d ed. 1996) ("[M]ediation has a long and varied history in almost all cultures of the world.").

others who provide impartial assistance.[4] To be productive, mediation requires the willingness of persons disputing or seeking deals to negotiate and talk about their concerns, perspectives, objectives, interests, and recommended solutions. It also requires skilled process management choices by mediators who help structure, frame, and focus these conversations. This process works best if participants possess full authority to negotiate and refrain from invoking authority limits to postpone, delay, or thwart agreements.[5]

Recent decades have seen increasing use of court-connected mediation where litigants are encouraged or directed to negotiate using mediators before proceeding to trial. Many states and federal judicial districts now mandate mediation by obliging parties to use this process before scheduling a trial date. Florida, for example, gives courts the power to order parties in all or any part of contested civil lawsuits to mediate, with few exceptions[6]. Other states follow this approach with numerous variations.[7] Federal district courts, acting pursuant to the mandate of the Alternative Dispute Resolution Act of 1998, have developed similar court-mandated programs.[8]

Lawyers and clients ordered to mediate in these court systems must typically attend the mediation unless they gain exemption.[9] Dispute

4. *See, e.g.*, JOHN W. COOLEY, MEDIATION ADVOCACY 2 (2d ed. 2002); ERIC GALTON, REPRESENTING CLIENTS IN MEDIATION 1 (1994); MOORE, *supra* note 3, at 8, 41-53.

5. DWIGHT GOLANN, MEDIATING LEGAL DISPUTES: EFFECTIVE STRATEGIES FOR LAWYERS AND MEDIATORS 176 (1996) ("ne of the most serious obstacles to agreement occurs when a negotiator lacks adequate authority to settle.").

6. FLA. STAT. § 44.102(2)(b) (2007) (stating that courts "may refer to mediation all or any part of a filed civil action").

7. *See, e.g.*, ALA. CIV. CT. MEDIATION R. 2 (2003) (stating that courts may order mediation upon their own motion); N.C. SETTLEMENT CONF. R. 1 (2006) ("Senior Resident Superior Court Judge . . . shall by written order require all persons and entities . . . in Rule 4 to attend a mediated settlement conference in all civil actions" with enumerated exceptions.); S.C. JUDICIAL DEP'T R. 3(a) (2007) ("All civil actions filed in the circuit court . . . are subject to court ordered mediation . . . unless the parties agree to conduct an arbitration.").

8. *See* 28 U.S.C. § 2071(b); *see also* 28 U.S.C. § 652 (stating that each federal district court shall devise and implement its own alternative dispute resolution program by local rule to encourage and promote the use of ADR. Many federal districts have mandated mediation). *See, e.g.*, M.D. FLA. R. 9.03(a) (stating that the presiding judge may refer any civil action or claim to mediation); N.D. FLA. R. 16.3(I) ("Any pending civil case may be referred to mediation by the presiding judicial office at such time as the judicial officer determines to be in the interests of justice."); S.D. FLA. R. 16.2(D)(1) (stating that in every civil case, with specified exceptions, the court shall order mediation); E.D., W.D., & M.D. LA. LOC. R. 16.3.1M, R, C (stating that a court may refer a case to mediation or early neutral evaluation at its discretion); W.D. WASH. R. 39.1 (stating that courts may designate any case for mediation under this rule).

9. Florida, for example, requires appearance at a mediation by "the party or its representative having full authority to settle without further consultation" and "the party's counsel of record, if any," unless changed by court order or stipulated by parties. FLA. R. CIV. P. 1.720(b)(1)-(2).

resolution system designers require mediation to encourage parties to explore ways to resolve or narrow their controversies.[10] Mandating mediation before trial encourages lawyers and clients to think seriously about their objectives, risks, and collateral litigation consequences including expense, delay, and stress.[11] Mediation provides mechanisms for broader information sharing than rules of procedure and evidence define as relevant for litigation.[12] It creates opportunities to generate a larger range of solutions than courts can provide through legal and equitable remedies.[13] It generates a forum allowing empathy, apology, and other forms of human connection and re-connection, paths which litigation remedies typically ignore.[14] Mandating mediation also satisfies systemic interests in avoiding unnecessary trials and focuses limited, expensive judicial resources on claims and issues that parties cannot resolve by negotiating with the help of mediators.[15]

To further these goals, courts typically seek to ensure that their mandating orders are respected, and that resulting mediations have maximum opportunities to succeed. These implementation efforts typically include requirements to attend, to bring sufficient negotiation authority, and, occasionally, to negotiate in good faith. These efforts may conflict occasionally with interests of participants and their lawyers not to

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10. John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation In Court-Connected Mediation Programs*, 50 UCLA L. REV. 69, 74, 123-24 (2002).

11. Lawrence M. Watson, *Initiating the Settlement Process—Ethical Considerations, in Dispute Resolution Ethics: A Comprehensive Guide, in* DISPUTE RESOLUTION ETHICS: A COMPREHENSIVE GUIDE 7, 15-16 (Phyllis Bernard & Bryant Garth eds., 2002).

12. Confidential communication made possible by caucusing increases chances that mediators can gather information about interests and priorities, topics that typically do not connect directly to the remedial elements involved in adjudication. Robert A. Baruch Bush, *"What do We Need Mediation For?": Mediation's "Value-Added" for Negotiators*, 12 OHIO ST. J. ON DISP. RESOL. 1 (1996). Non-monetized interests and needs lie underneath the divergent positions, justifications, and supporting and attacking argumentation that comprise the focus of litigation and are regulated by rules of evidence and procedure. *See* Don Peters, *When Lawyers Move Their Lips: Attorney Truthfulness in Mediation and a Modest Proposal*, 2007 J. DISP. RESOL. 119, 134 (2007).

13. Professor Robert Mnookin and colleagues argue that all negotiations, while inevitably involving distributive issues regarding who gets how much, also present opportunities to create joint value and find joint gain. ROBERT H. MNOOKIN ET AL., BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 4 (2000).

14. Wayne D. Brazil, *An Assessment: Court-Related ADR 25 Years After Pound*, 9 P. RESOL. AG. 4, 5 (Winter 2003).

15. Lande, *supra* note 10, at 124; *see also* Marc Galanter, *The Emergence of the Judge as a Mediator in Civil Cases*, 69 JUDICATURE 256, 258-62 (1986).

negotiate.[16] These interests can stem from desires to establish favorable legal precedent, send signals of resolve to other potential adversaries, secure the procedural protections and public visibility that trials afford, and pursue other context-specific objectives.[17]

The interests of courts and the public also may conflict with apparent needs; some clients and lawyers have to behave badly in mediations.[18] Although little empirical data exists,[19] legal scholars express concern that mediation participants occasionally behave in ways that do not enhance the opportunities mediation provides to foster resolutions.[20] These concerns include failures to attend, to bring sufficient settlement authority, or to make any, or suitable, offers.[21] Expression of these concerns, and arguments about how to handle them, typically occurs within a broader debate about whether participants have a duty to act in good faith in mandated mediations. Proponents on both sides of this question, often expressing concerns about a cottage industry of good faith satellite litigation,[22] have generated a cottage industry of articles debating the appropriateness of establishing, the

16. ABA Section of Dispute Resolution, *Resolution on Good Faith Requirements for Mediators and Mediation Advocates in Court-Mandated Mediation Programs,* http://www.abanet.org/dispute/draftres2.doc [hereinafter *Good Faith Resolution*] (last visited Oct. 22, 2007).

17. *Id.*

18. *See* Lande, *supra* note 10, at 122-23.

19. One exception is a survey of lawyers participating in mediations in the Early Assessment Program of the United States District Court of Missouri. *See* DONNA STIENSTRA ET AL., REPORT TO THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT: A STUDY OF FIVE DEMONSTRATION PROGRAMS ESTABLISHED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990 242-44 (1997), http://www.fjc.gov/public/pdf.nsf/lookup/0024.pdf (last visited Apr. 2007). This study showed that 18% of lawyers encountered parties not participating in good faith, and 63% shared that they had not experienced bad faith behavior by participants. *Id.*; *see also* Lande, *supra* note 10, at 141 n.5.

20. Many have expressed concern that lawyers will transfer adversarial negotiating tactics seeking to gain partisan advantage in mediations in ways that undermine the process' potential to develop different kinds of outcomes than litigation's win-lose results. *See, e.g.*, Lande, *supra* note 10, at 122-23; Kimberlee K. Kovach, *Ethics for Whom: The Recognition of Diversity in Lawyering Calls for Plurality in Ethical Considerations and Rules of Representational Work*, in DISPUTE RESOLUTION ETHICS: A COMPREHENSIVE GUIDE, *supra* note 11, at 57, 62-63; Carrie Menkel-Meadow, *Ethics in Negotiation, Ethics, Morality, and Professional Responsibility in Negotiation, in* DISPUTE RESOLUTION ETHICS: A COMPREHENSIVE GUIDE, *supra* note 11, at 119, 148 n.89.

21. Lande, *supra* note 10, at 82-83.

22. Scholars express concern that rules requiring good faith negotiating at mediations will create distracting collateral litigation about their breach. *See* Lande, *supra* note 10, at 98-101. An analogy is often drawn to the experience with the 1983 amendments to Federal Rule of Civil Procedure 11 which created "an avalanche of 'satellite litigation.'" *Id.* at 99 (quoting Georgene Vairo, *Rule 11 and the Profession*, 67 FORDHAM L. REV. 589, 598 (1998)).

difficulties of enforcing, and the congruence of good faith based standards with core mediation principles.[23]

At the risk of building another cottage, this article examines only one aspect of this debate—minimizing limited authority negotiating in mandatory mediations. After describing current problems and existing approaches reflected in regulatory and decisional standards, this article proposes a contextualized approach that avoids this good faith debate. It disagrees with views that invocations of authority limits necessarily fall outside the scope of objectively determinable behavior, the standard currently offered as the permissible basis for judicial regulation through sanctions for non-compliance.[24] It also argues that relying on this current standard may encourage limited authority negotiating.

This article contends that requiring mediation participants to refrain from claiming limited negotiating authority and to just say no when they lack authorization, particularly regarding dollar issues, is more likely to encourage full preparation to negotiate the economic aspects of disputes that litigation invariably generates. It suggests that encouraging attorneys to comprehensively prepare the dollar dimensions of claims and defenses may help them anticipate and gather sufficient authority to handle potential decisions if conversations move to agreement options beyond economics. It concludes by defending its proposals against concerns that they will undercut important mediation policies regarding confidentiality and mediator impartiality.

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23. Many articles advocate general good faith obligations. *See, e.g.*, 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 (1995); Kimberlee K. Kovach, *Good Faith in Mediation—Requested, Recommended, or Required? A New Ethic*, 38 S. TEX. L. REV. 575 (1997); 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 (2001). Many articles criticize general good faith standards. *ee, e.g.*, Wayne D. Brazil, *Continuing the Conversation About the Current Status and Future of ADR: A View from the Courts*, 2000 J. DISP. RESOL. 11, 30-33 (2000); Edward F. Sherman, *Court-Mandated Alternative Dispute Resolution: What Form of Participation Should Be Required?*, 46 SMU L. REV. 2079, 2089-94 (1993); Alexandria Zylstra, *The Road from Voluntary Mediation to Mandatory Good Faith Requirements: A Road Best Left Untraveled*, 17 J. AM. ACAD. MATRIMONIAL L., 69, 86-97 (2001).

24. *Good Faith Resolution*, *supra* note 16, at 2-3.

II. THE CURRENT LANDSCAPE

Limited authority problems arise in mandatory mediations only when negotiators act as representatives of ultimate decisionmakers, as lawyers invariably do.[25] Persons possessing decision making power cannot credibly invoke limited authority. This is one reason why statutes and rules creating mandatory mediations require clients or fully authorized representatives to attend them.

Human parties who attend mandatory mediations have opportunities to express their concerns and interests, to hear the perspectives of other participants, and to track evolving conversations regarding settlement options and potential terms. They can see and hear how others feel about issues and potential solutions. They can gain insights into how persuasive these perceptions and positions might be to litigation decisionmakers.

Human clients also presumably carry full decision making authority since the Model Rules of Professional Responsibility allocate decisions about objectives of representation to the clients and not to their lawyers.[26] Lawyers representing clients are bound by ethical rules to defer to client decisions regarding settlement of lawsuits.[27] Limited authority claims cannot be credibly made by attorneys when their human clients attend because lawyers or mediators can immediately explore authorization issues directly with these ultimate decisionmakers.[28]

Problems with limited authority claims in mandatory mediations arise in two litigation contexts when ultimate decisionmakers do not attend. The most common problem concerns non-human agency, entity, institutional, or organizational litigants where decision-making authority is held by individuals or groups whose physical attendance and participation may be difficult to arrange.[29] Senior company officials, directors, and agency heads are often geographically distant from places where their agencies, companies or institutions sue or are sued and ordered to mediate.[30] Representatives not possessing the same unfettered decision making powers that human clients

25. When negotiating during mediations, lawyers act as agents of their clients. Relationships between principals and agents have been identified as one of three important, inherent tensions that must be managed effectively in the negotiation process. MNOOKIN ET AL., *supra* note 13, at 4, 69-91.

26. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (1983).

27. *Id.*

28. Peters, *supra* note 12, at 132-33.

29. *See* HAROLD I. ABRAMSON, MEDIATION REPRESENTATION: ADVOCATING IN A PROBLEM-SOLVING PROCESS 188 (2004).

30. See COOLEY, *supra* note 4, at 72.

hold typically come to these mediations, and they may bring varying levels of authority on both dollar and non-monetary issues.

The second category concerns situations where lawyers are permitted to participate without their clients' attendance. This usually occurs in courts possessing jurisdiction to adjudicate claims that do not carry large dollar consequences. Mandatory mediations occur in these courts even though they may use less formal litigation procedures. One procedural relaxation that occurs in these systems concerns who must attend mandatory mediations. For example, in Florida's small claims division of its county courts, involving lawsuits that do not seek more than $5,000, lawyers are permitted to attend mandatory mediations without their clients.[31] The non-appearing clients in these mediations are frequently companies suing to collect allegedly unpaid contractual obligations. Other states follow similar procedures for low dollar claims.[32] The limited amounts in controversy, high volume of cases processed, and frequent appearances by lawyers covering for out-of-town colleagues generate frequent limited authority claims in this context.[33]

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31. Florida Rule of Small Claims Procedure 7.090(a) permits parties to appear personally or by counsel at pretrial conferences where mediations are ordered if defendants deny the claim in whole or in part. FLA. SM. CL. R. 7.090(a). Eighth Judicial Circuit Court of Florida Administrative Order No. 3.1100(D)(14)(1) and (2), regulating county mediation in Alachua County, Florida, requires appearances at mediations by parties or their representatives or their attorney of record. Admin. Order No. 3.1100(D)(14)(1), (2), 8th Jud. Cir. Fla., *available at* http://www.circuit8.org/ao/ (follow "Section 3. Civil"; then follow "3.1100(D) County Mediation in Alachua County" hyperlink).

32. *See, e.g.*, IOWA CODE § 631.14(3) (2007) (allowing any person to be represented by an attorney in a small claims action); OHIO REV. CODE ANN. § 1925.01(D) (West 2008) (permitting but not requiring appearance by an attorney); ME. R. SMALL CLAIMS P. 16(a) (allowing parties to be represented by attorneys in small claims actions).

33. These cases typically involve collection actions filed against unrepresented defendants by out-of-town lawyers representing out-of-town claimants. Don Peters, *Oiling Rusty Wheels: A Small Claims Mediation Narrative*, 50 FLA. L. REV. 761, 772 n.24 (1998). Often at the last minute, locally hired lawyers attend pretrial conferences and take default judgments if defendants do not appear. *Id.* If defendants appear and deny claims, these covering lawyers represent plaintiffs at the mediations which occur immediately thereafter. *Id.* Although these covering attorneys are supposed to be fully authorized to negotiate under applicable rules, they seldom are, in my experience. Don Peters (unpublished notes, on file with author).

In the fall term of 2005, five of the first seven small claims matters I mediated or supervised in the Virgil Hawkins County Mediation Clinic at the Levin College of Law involved covering lawyers handling collection claims for out-of-town lawyers. *Id.* None of these lawyers had full authority. All invoked limited authority early in their mediations. All of these mediations resulted in quick impasses that led to trial settings. *Id.*

To anticipate and resolve limited authority issues, legislatures and courts typically enact statutes or rules requiring attendance by "fully authorized" representatives. Florida, for example, requires attendance by parties or their representatives "having full authority to settle without further consultation" at mandated mediations.[34] When lawyers appear in mandatory small claims mediations without clients or entity representatives present, they are required to have "full authority to settle without further consultation."[35] Other states and federal districts have adopted similar language.[36] Federal judges, using Federal Rule of Civil Procedure 16 to convene pretrial conferences encompassing settlement discussions, often employ similar language.[37]

The emerging consensus on what full authority means in mandatory mediation contexts adopts a commonly held perspective that negotiation

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Instead of saying no, covering attorneys often invoke limited authority and press non-represented defendants to pay claims regardless of defenses asserted. *Id.* They also take notes on potential defenses debtors mention and send that information along to the attorneys for whom they are covering. *Id.* Often displaying no preparation other than reviewing the pleadings in court files, these covering attorneys frequently cannot answer basic questions about claims or plaintiffs. *Id.* Given the small dollar amounts and large numbers of cases involved, referring lawyers seldom are available for consultation during these mediations. *Id.* Most mediators conclude that these dynamics make meaningful mediation impossible and quickly declare impasse. *Id.* This action often frustrates defendants who need information or want to discuss reasoned reductions of claims. *Id.*

34. FLA. R. CIV. P. 1.720(b)(1). This includes circuit court claims in excess of $15,000, family matters, and county court litigation involving between $5,000 and $15,000, and small claims of less than $5,000. *See id.*

35. FLA. SM. CL. R. 7.090(a).

36. *See, e.g.*, Culbertson-Froid-Bainville Health Care Corp. v. JP Stevens & Co., 122 P.3d 431 (Mont. 2005) (requiring court ordered attendance by an officer, director or employee having full authority to settle the claim for a corporate party, or in the case of a governmental agency, a representative of that agency with full authority to negotiate on behalf of the agency and recommend a settlement to the appropriate decision making body of the agency); In re Court-Annexed ADR Rules & Amendment to Rule 601, SCACR, 2006 S.C. Lexis 159, *11-12 (S.C. 2006) (requiring attendance by officer, director, or employee having full authority to settle for corporate party, or agency representative with full authority to negotiate and recommend a settlement to appropriate agency decision-making body); M.D. FLA. L.R. 9.05(c) (requiring attendance by all parties, corporate representatives and any other claims professionals with "full authority to negotiate a settlement"); S.D. FLA. L.R. 16.2(E) ("[A]ll parties, a corporate representative, and any other required claims professionals . . . shall be present at the mediation conference with full authority to negotiate . . . . ").

37. *See, e.g.*, Turner v. Young, 205 F.R.D. 592, 595 (D. Kan. 2002) (attendance by party representative is mandatory under D. KAN R. 16.3); Reliance Nat'l Ins. Co. v. Von Paris & Sons, Inc., 153 F. Supp. 2d 808, 810 (D. Md. 2001) ("Mediation is fair and effective only if persons with settlement authority are present at the conference to listen to what the others and the mediator have to say."); Francis v. Women's Obstetrics & Gynecology Group, P.C., 144 F.R.D. 646, 648-49 (W.D.N.Y. 1992) (holding that court-ordered conference required defense counsel to see that "representatives of insurance carriers with authority to settle are present or at a minimum available by telephone, if not present" (internal quotations omitted)).

involves only distributing the value associated with issues presented by disputants.[38] These issues invariably involve dollar dimensions because litigation largely travels on asserted legal remedies that award monetary damages. Most legal remedies define issues as, and conflate interests into, monetary claims. Consequently, full authority is usually defined as the ability to pay up to the full amount of the claim and accept any amount less than the claim.[39] Essentially, this means that representatives must be able to pay what it takes to a settle a monetary claim or say no and pursue other alternatives.

Minimizing limited authority negotiating in mandatory mediations occurs in a context where most courts believe that authorized participants are not obligated to negotiate when they attend.[40] Although mandated mediations contemplate attendance by human litigants or fully authorized representatives, they do not require that attendees negotiate once there. Litigants have a right, guaranteed by state constitutional provisions and the 7th Amendment of the United States Constitution, to bring claims and defenses supported by sufficient evidence to trial if they wish to do so.[41]

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38. *See infra* notes 74-79 and accompanying text.

39. *See, e.g.*, FLA. R. CIV. P. 1.720(b)(3) (representatives of insurance carriers must have "full authority to settle up to the amount of the plaintiff's last demand or policy limits, whichever is less . . . "); G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648, 653 (7th Cir. 1989) (holding that "authority to settle" means corporate representatives holding entity positions which allow them to speak definitively and to commit organizations); Admin. Order No. 3.1100(D)(14)(1), (2), 8th Jud. Cir. Fla., *available at* http://www.circuit8.org/ao/ (follow "Section 3. Civil"; then follow "3.1100(D) County Mediation in Alachua County" hyperlink) (defining full authority to mean the authority to settle without further consultation).

40. *See, e.g.*, Avril v. Civilmar, 605 So. 2d 988 (Fla. Dist. Ct. App. 1992) (stating there is no requirement that parties make any offers at mediations); *Francis*, 144 F.R.D. at 647 (finding that courts can require attendance but not coerce parties to settle); Kothe v. Smith, 771 F.2d 667, 669 (2d Cir. 1985) (holding that the lower court abused its discretion by ordering defendant to pay sanctions for failing to settle before trial); Salfen v. United States, No. 3:00-CV-0463-G, 2000 U.S. Dist. LEXIS 17623 (N.D. Tex., Oct. 18, 2000) (stating that referral to mediation is not an order to settle case).

41. This view reflects strongly held cultural and legal commitments to individual initiative and autonomy in resolving disputes. AUGSBURGER, *supra* note 3, at 8. General American cultural traditions let individuals define what constitutes disputes, and choose whether and how to resolve them. *Id.* America's culture is undeniably individualistic in orientation and this perspective holds that conflicts are owned and should be resolved by privately asserting and negotiating rights and pursuing adjudicative remedies. *Id.* Individual perspectives promote ideas of the self as "independent, self-directed, and autonomous." MICHELLE LEBARON, BRIDGING CULTURAL CONFLICTS 60 (2003). American negotiation theory contains individualistic assumptions that bargainers are able to make proposals and concessions and maximize gains" in their self-interest. *Id.* at 61. American individuals and businesses are free to perceive situations as non-disputes. *See*

Litigation encompasses values other than creating pre-suit agreements that weigh risks and costs of adjudication against the benefits of what litigants will offer to avoid them, and what can be created to provide non-monetary, and often mutual, gain.[42] Accordingly, litigants may legitimately choose to not negotiate to pursue objectives including establishing favorable precedent, protecting themselves from future claims, and securing the procedural safeguards and public notoriety that litigation may bring.[43] Negotiation, whether done inside or outside mediation, comprises a dispute resolving process that is consensual,[44] and its consensual nature includes choosing not to engage in it.

Legislatures and courts, on the other hand, have the power to encourage litigants to consider seriously the advantages of negotiating and to engage in it if they wish.[45] Courts have invoked this power to reject constitutional and other challenges to statutes and rules requiring attendance by human parties and authorized entity representatives at court-ordered mediations.[46] Pursuant to this right, courts consistently hold that parties can be sanctioned for failing to attend mandatory mediations.[47] This facet of mandatory mediation is one in which courts across the country consistently agree.[48] As demonstrated by data suggesting that between 50 to 65% of court-ordered mediations produce settlements,[49] getting the decisionmakers to mediations after substantial discovery often produces desired results.

David M. Trubek, Austin Sarat, William F. Felstiner, Herbert M. Krtitzer, & Joel B. Grossman, *The Costs of Ordinary Litigation*, 31 U.C.L.A. L. REV. 72, 86 (1983) (estimating that lawsuits are filed in 11.2% of disputes involving more than $1,000). They are also free to pursue any of the three peaceful dispute resolution options of avoidance, consensual negotiation or mediation, and adjudication via litigation or arbitration. *E.g.*, MOORE, *supra* note 3, at 6-12; KARL A. SLAIKEU, WHEN PUSH COMES TO SHOVE: A PRACTICAL GUIDE TO MEDIATING DISPUTES 4-5 (1996).

42. *E.g.*, Stoehr v.Yost, 765 N.E.2d 684, 687-89 (Ind. Ct. App. 2002) (stating that mediation is not all about money and is aimed at more than just accomplishing settlements).

43. *See Good Faith Resolution*, *supra* note 16 and accompanying text.

44. *See* MOORE, *supra* note 3, at 6-8; SLAIKEU, *supra* note 41, at 3-4.

45. Courts have inherent power to require attendance at mandatory mediation. *See, e.g.*, G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648, 653 (7th Cir. 1989); Lande, *supra* note 10, at 134.

46. *E.g.*, Avril v. Civilmar, 605 So. 2d 988 (Fla. Dist. Ct. App. 1992).

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

48. *See* Lande, *supra* note 10, at 84.

49. *See, e.g.*, Charles E. Clawson, *The Use of Mediation in the 20thtrict*, THE ARKANSAS LAWYER, *available at* http://www.arkbar.com/Ark_Lawyer_Mag/Articles/Mediation20thDistrict Spring05.html (estimating that 70% of cases referred to mediation statewide produced full or partial agreements); Florida Dispute Resolution Center, Florida Mediation & Arbitration Programs: A Compendium 55, 102 (2006) (reporting partial data showing 70% settlement rate in county mediations and 55% in circuit court mediations); Statistics in Mediation, http://adrr.com/

Getting sufficiently authorized decisionmakers to mandatory mediations to minimize limited authority negotiating, this article's focus, has proven more difficult. Limited data and several appellate opinions suggest that lawyers and litigants encounter challenges complying with rules requiring fully authorized representative attendance. An informal survey of 30 experienced civil trial mediators showed that limited authority was the most frequently encountered problem at their mediations.[50] An analysis of 1,223 reported court opinions involving mediation issues between January 1, 1999, and December 31, 2003, found significant litigation regarding alleged failures to bring authorized representatives that reached varying conclusions.[51] More than half of the appellate courts which have reviewed disputes regarding alleged failures to send authorized representatives to mediation have found and sanctioned violations of their rules.[52] Other decisions, however, have not enforced full authorization requirements.[53]

III. THE MISTAKEN, FAITH-BASED PATH FOR ANALYZING AUTHORITY ISSUES

A major analytic challenge concerns whether requiring fully authorized attendance should be part of a good or bad faith inquiry into mediation participation.[54] This challenge sits within the larger question of whether

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adr4/statistics.htm (last visited Oct. 22, 2007) (stating a 70% settlement rate in court-ordered mediation in North Carolina).

50. Lawrence M. Watson, Presentation at the American College of Civil Trial Mediators Annual Meeting: Legislating Good Faith Standards for Civil Trial Mediations (July 16, 2007) (unpublished notes on file with author).

51. *See* James R. Coben & Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 HARV. NEGOT. L. REV. 43, 59, 62 (2006) (listing cases involving mediator testimony about attendance and authority and more than thirty opinions involving party presented evidence regarding attendance and authority issues).

52. *See* Lande, *supra* note 10, at 84. Decisions finding rule violations include Nick v. Morgan Foods, Inc., 270 F.3d 590, 596-97 (8th Cir. 2001); Raad v. Wal-Mart Stores, Inc., No.4:CV97-3015, 1998 WL 272879, 1, 4-8 (D. Neb. May 6, 1998); Francis v. Women's Obstetrics & Gynecology Group, P.C., 144 F.R.D. 646, 647 (W.D.N.Y. 1992); Semiconductors, Inc. v. Golasa, 525 So. 2d 519, 519-20 (Fla. Dist. Ct. App. 1988) (Anstead, J., dissenting).

53. *See, e.g.*, Hill v. Imperial Savings, 852 F. Supp. 1354 (W.D. Tex. 1992); Stoehr v.Yost, 765 N.E.2d 684, 687-89 (Ind. Ct. App. 2002); In re Acceptance Ins. Co., 33 S.W.3d 443, 451-54 (Tex. App. 2000).

54. Most analysis adopts this frame. *See* Lande, *supra* note 10, at 82; *Good Faith Resolution*, *supra* note 16. Twenty-two states have statutory requirements for good faith mediating, seventeen have included these provisions into their procedural rules, and this obligation appears in numerous court orders mandating mediation. Watson, *supra* note 50.

system designers should regulate how litigants must negotiate at mandatory mediations.[55]

Advocates of a broad, general duty to negotiate in good faith propose that litigants must engage in substantive bargaining, make reasonable settlement offers, and use consistent legal arguments.[56] These proposals reflect concern that insincere negotiating behaviors by some lawyers and litigants unfairly burden participants who act differently at mandatory mediations.[57] Advocates of broad good faith also emphasize that these behaviors undercut mediation's potential to develop value-creating outcomes instead of the win-lose, all or nothing distributions that litigation produces.[58]

Anecdotal evidence suggests that actual mediation behavior often justifies these concerns. A study of Ottawa lawyers concluded that some lawyers intentionally use mandatory mediation to mislead, discover information, gain negotiation leverage, stall, increase opponent's costs, and wear down participants.[59] A lawyer in this study shared that if he didn't want to settle, "mandatory mediation is custom made" because he knows how to make it look like he is heading in the direction of settlement with no intention of resolving, and how to "talk the talk" but not "walk the walk."[60]

Critics of good faith standards argue that they infringe litigants' and lawyers' discretion to decide how they want to negotiate.[61] They contend that requiring good faith negotiating creates inherently ambiguous standards that do not provide clear understandings of what behaviors are required, prohibited, and subject to sanctions.[62] They also express concerns that ambiguities and uncertainties will cause litigants to refrain from legitimate negotiation behaviors, generate satellite litigation enforcing and defending

55. *See supra* note 23 and accompanying text.

56. *See, e.g.*, Kovach, *supra* note 23, at 604; Lande, *supra* note 10, at 77; Ulrich Boettger, *Efficiency Versus Party Empowerment—Against a Good-Faith Requirement in Mandatory Mediation*, 23 REV. LITIG 1, 14 (2004).

57. *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, 373-74 (2002); Kovach, *supra* note 23, at 595; John P. McCrory, *Mandated Mediation of Civil Cases in State Courts: A Litigant's Perspective on Program Model Choices*, 14 OHIO ST. J. ON DISP. RESOL. 813, 848-49 (1999).

58. *See, e.g.*, Boettger, *supra* note 56, at 45; Kovach, *supra* note 23, at 62-63; Peters, *supra* note 12, at 138.

59. Julie Macfarlane, *Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation*, 2002 J. DISP. RESOL. 241, 256-57 (2002).

60. Macfarlane, *supra* note 59, at 267.

61. *Good Faith Resolution*, *supra* note 16, at 1-2.

62. *See, e.g.*, Lande, *supra* note 10, at 86-94; *Good Faith Resolution*, *supra* note 16, at 5-6. "One New York court defined 'good faith' as an intangible and abstract quality with no technical meaning or statutory definition." *Good Faith Resolution*, *supra* note 16, at 6.

sanctions, and stimulate inappropriate conduct by participants and mediators.[63]

The 2004 Resolution on Good Faith Requirements for Mediators and Mediation Advocates in Court-Mandated Mediation Programs adopted by the Dispute Resolution Section of the American Bar Association synthesized existing regulations and scholarly commentary and recommended best practices for mandatory mediation.[64] This Resolution recommended that courts impose sanctions only for violations of rules specifying objectively determinable conduct.[65] As examples of objectively determinable conduct, this Resolution listed failures to attend court-mandated mediations[66] and provide written pre-mediation memoranda.[67] This Resolution reasoned that actions manifesting these failures can be demonstrated without analyzing subjective negotiation tactics. As examples of subjective tactic analysis, this Resolution listed suitability of offers, substantiality of participation, consistency of arguments, and honesty of statements.[68]

Without clearly indicating why, this Resolution included failing to bring representatives with sufficient settlement authority to mandatory mediations as subjective behavior that courts should not enforce by sanctions. The Resolution did not clearly indicate whether it viewed these failures as appropriate subjects for regulation absent a faith-based analysis. This analysis apparently focused on ensuring adequate authority, which equates the standard with the actual value of claims.[69] This frame injects subjective determinations comparing authority brought to mediations with actual case values and outcomes.[70] Other critics of a broad faith-based standard have similarly concluded that enforcement difficulties make failing to bring sufficiently authorized representative to mandatory mediations not an appropriate matter for faith-based regulation.[71]

This article agrees that adding faith-based arguments about whether complying with a requirement that fully authorized representatives attend

63. *E.g.*, *Good Faith Resolution*, *supra* note 16, at 5-8.

64. *Good Faith Resolution*, *supra* note 16, at 5-8.

65. *Id.*

66. *Id.*; *see also supra* notes 48-49 and accompanying text.

67. *Good Faith Resolution*, *supra* note 16, at 2.

68. *Id.*

69. Watson, *supra* note 50.

70. *Id.*

71. *E.g.*, Lande, *supra* note 10, at 133 (arguing such a regulation is problematic because it invites "resistance and easy evasion.").

injects unnecessarily subjective ambiguities. To the extent that the Resolution's analysis concludes that provisions and orders requiring fully authorized representatives to attend should not be created or enforced, however, it goes too far. This view ignores a contextualized approach that promotes compliance with court orders, discourages abusive uses of limited authority tactics, and protects sincere participants.

IV. TOWARD A CONTEXTUALIZED APPROACH TO MINIMIZING LIMITED AUTHORITY BARGAINING IN MANDATORY MEDIATIONS

This article argues that minimizing limited authority bargaining requires precise, contextualized analysis, not a simple good or bad faith labeling approach. The analysis recommended here acknowledges the complexities and challenges caused by limited authority negotiation tactics and genuine authorization dilemmas in both dollar aspects and defenses and non-monetary resolution options.[72] It proposes contextualized and different treatment of these complexities and challenges.

Although authority limits distort, delay, and thwart both types of discussions, they probably create more harm on dollar issues for several reasons. Limited authority bargaining occurs more frequently regarding dollar issues because mandatory mediation negotiations usually require evaluating lawsuit claims and defenses. These conversations tend to occur earlier rather than later in mandatory mediations because lawsuits frame these issues, and participants usually define their interests initially as maximizing gain regarding these subjects.[73] This framing and perceiving is often described as value-claiming or adversarial negotiation.[74] Research suggests that a majority of American lawyers prefer these frames, use these perceptions, and negotiate seeking exclusively or primarily to claim value.[75]

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72. These include access to equipment, apologies, barter arrangements, bid invitations, future discounts or work opportunities, joint ventures, and structured annuities. Watson, *supra* note 11, at 16.

73. *See* Peters, *supra* note 12, at 138.

74. This way to frame negotiation theoretically captures the inescapable tension that exists in virtually all negotiations between competing to gain individual advantage and cooperating to create joint gain. *See* DAVID A. LAX & JAMES K. SEBENIUS, THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN 30-35 (1986); MNOOKIN ET AL., *supra* note 13, at 4, 11-43.

75. ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, INTERVIEWING, COUNSELING, AND NEGOTIATING SKILLS 374 (1990); Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 764-65 (1984); Don Peters, *Mapping, Modeling, and Critiquing: Facilitating Learning Negotiation, Mediation, Interviewing, and Counseling*, 48 FLA. L. REV. 875, 914 (1996).

A survey of 2,000 Denver and Phoenix lawyers showed pervasive use of value-claiming negotiating.[76] Another study revealed that about 70% of the cases in which 515 lawyers and 55 judges in New Jersey participated were settled using predominately value-claiming actions.[77] Undoubtedly, many litigants share this orientation,[78] and their lawyers probably suggest it to them when they don't.[79]

Full authority inquiries should be framed in the same effective way that mediations unfold. The emphasis in each context should not be on how lawyers value cases, a subjective process upon which ultimate agreement is unlikely, but rather on willingness to pay or accept whatever it will take to resolve claims. Lawsuit mediations evaluate claims and defenses in the context of offers and concessions. This reality generates proposals representing the most or least negotiators will pay to avoid impasse and ultimately trial. As such, lawsuit mediations should make the task of ensuring attendance by fully authorized representatives less difficult. Because this form of negotiation unfolds on linear frames, it can be planned in advance.[80] This planning can be done as part of pre-mediation counseling between lawyers and representatives of their agency, entity, organizational, or institutional clients.[81] Pretrial discovery often provides detailed information that informs these conversations. When analyzing best alternatives to mediated agreements, which invariably involve trial outcome predictions, representatives and their lawyers can develop dollar minimums and maximums beyond which they would rather go to trial than settle.

Conversations providing opportunities to invoke limited authority tactically regarding non-monetary issues, on the other hand, typically occur later in mediations, if at all.[82] These conversations encourage value-creating or problem-solving negotiating which enlarges bargaining agendas, explores high value—low cost trades, and seeks to satisfy everyone's core needs

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76. Completed by Professor Gerald Williams, this study showed that 67% of these lawyers reported that they primarily used adversarial, competitive, gain-maximizing behaviors when they negotiated. GERALD R. WILLIAMS, LEGAL NEGOTIATION AND SETTLEMENT 15-40 (1983).

77. Milton Heumann & Jonathan M. Hyman, *Negotiation Methods and Litigation Settlement Methods in New Jersey: "You Can't Always Get What You Want"*, 12 OHIO ST. J. ON DISP. RESOL. 253, 255 (1997).

78. *See* MNOOKIN ET AL., *supra* note 13, at 168-71.

79. *Id.*

80. *See* BASTRESS & HARBAUGH, *supra* note 75, at 375-76, 474-77.

81. *See, e.g.*, ABRAMSON, *supra* note 29, at 16-25; COOLEY, *supra* note 4, at 69-70; GALTON, *supra* note 4, at 81-83.

82. *See generally* VAN WINKLE, *supra* note 2, at 37.

maximally.[83] Value-creating options are often generated by questions mediators ask which explore litigants' non-monetized interests. This usually requires analysis that moves beyond the conflicting and divergent positions, justifications, and arguments that accompany value-claiming negotiation.[84] Often these conversations are not welcome until litigants first confront an apparent impasse in efforts to maximize gain based entirely on monetary offers and concessions.[85]

Predicting the direction these conversations may take is more difficult than anticipating linear value-claiming positions, justifications, moves, and final proposals. Although general possibilities exist that should be anticipated when planning ways to influence other negotiators to say yes,[86] pleadings and pretrial discovery seldom provide significant information about these topics. This may make it more difficult to find fully authorized entity or institutional representatives. It also suggests that invoking authoritative limits on these issues is more likely to result from genuine preparation difficulties than from tactical efforts to increase gain at the expense of others.

These differences should be considered when developing an approach to minimize limited authority negotiating. Below I propose a contextualized standard aimed at minimizing limited authority negotiating in mandatory mediations. It could be included in enabling legislation, implementing rules, and judicial orders mandating mediation:

Parties and their lawyers shall attend mandatory mediations unless their absence is excused by the court. Where parties are agencies, entities, institutions, or organizations, a representative fully authorized to settle all claims shall attend. Full authorization for monetary aspects of mandatory mediations includes the ability to pay up to the amount demanded and accept any lesser figure. Full authorization for non-monetary aspects of mandatory mediations includes attendance by persons with sufficient knowledge of the

83. Professors Mnookin, Peppet, and Tulumello define creating value as building negotiation outcomes that, "[W]hen compared to other possible negotiated outcomes, either makes both parties better off or makes one party better off without making the other party worse off." MNOOKIN ET AL., *supra* note 13, at 12. These scholars also argue that all negotiations, while inevitably involving distributive issues regarding who gets how much, also present opportunities to create joint value and find joint gain. *Id.* at 4.

84. *See* Peters, *supra* note 12, at 136-37.

85. *See* VAN WINKLE, *supra* note 2, at 37 (arguing that parties get stuck at least twice in most mediations, and the first occurs when they realize that they cannot reach an agreement bargaining linearly about dollar issues framed within fact and law issues raised by lawsuit claims and defenses).

86. *See, e.g.*, ABRAMSON, *supra* note 29, at 30-39; ROGER FISHER, WILLIAM URY, & BRUCE PATTON, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 40-50 (2d ed. 1991); MNOOKIN ET AL., *supra* note 13, at 28-32; WILLIAM URY, GETTING PAST NO: NEGOTIATING YOUR WAY FROM CONFRONTATION TO COOPERATION 64 (1991).

needs, interests, and operations of the agency, entity, institution, or organization, the discretion to negotiate, and the ability to make either commitments without further consultation or influential recommendations that are likely to be accepted. Representatives planning to attend who do not possess full authority as defined above shall advise the other parties, the court, and the mediator of their limits no later than fourteen days before the date the ordered mediation is scheduled. Nothing in this provision requires the parties and their lawyers to negotiate when they attend or reach agreements when they negotiate.

This proposed standard provides a better approach to requiring fully authorized participants because it addresses both monetary and non-monetary aspects of mandatory mediations. Defending this claim requires analyzing the difficulties minimizing limited authority bargaining in both value-claiming and value-creating negotiation contexts. As argued earlier, value-claiming usually presents an easier context for minimizing limited authority negotiating problems.

A. MEDIATING DOLLAR CLAIMS

Accepting the usefulness of a norm that limits regulatory and enforcement standards to objectively determinable behavior does not require eliminating current approaches to that define full authority regarding dollar issues in mandatory mediations. These definitions travel on objective, not subjective actions. They are not violated until lawyers or client representatives claim limited, monetary negotiating authority.

Lawyers and representatives either have or do not have authority to pay up to the full amount of claims. As the proposed standard clarifies, they do not have to negotiate at all.[87] They do not have to reach agreement if they do negotiate.[88] If bargaining reaches a point that exceeds their authorized limits, they can simply refuse to negotiate further. They can base refusals on different evaluations of claim elements and damage components. They can base them on different interpretations of disputed facts or applicable legal principles. They can just say no.

Litigants who decide to send representatives with limited monetary authority should know and accept the consequences of their potential inability to complete negotiations at mandatory mediations. A choice to

87. *See supra* note 40 and accompanying text.

88. *See supra* notes 42-44 and accompanying text.

send limited authority representatives often flows from decisions made within hierarchies about claim valuations or negotiating strategies.[89] While courts and legislatures should not seek to compel organizational and institutional litigants to change their decision making structures to accommodate mandatory mediations,[90] no policies prevent them from insisting that negotiators refrain from using monetary authority limits as negotiating tactics. The proposed standard above makes this distinction clear.

Once planned authorization limits are reached, lawyers, representatives and mediators retain options to explore revising and increasing monetary authorizations by phone, e-mail, or instant messaging.[91] If that does not work, mediators can adjourn to permit prompt revisions, or terminate the proceedings, thus expecting lawyers and representatives to either continue negotiating, or take disputes to trial. All of these options can be pursued based on interpretative and evaluative differences without invoking limited authority negotiating.

One challenge with invocations of limited authority is assessing whether or not they are true. Mediators report that lawyers lie frequently during mediations.[92] Some lawyers brag about resolving cases at mandatory mediations by misrepresentation.[93]

Creating and enforcing obligations to possess full settlement authorization may deter lawyers from invoking false authority limits. Uncertainly exists regarding whether lawyers must speak honestly when making statements about their authority.[94] Some lawyers contend that settlement authority lies are permissible negotiation tactics and that lying

89. Carter, *supra* note 57, at 401.

90. Carter, *supra* note 57, at 401-02.

91. GOLANN, *supra* note 5, at 178.

92. *E.g.*, Lynne H. Rambo, *Impeaching Lying Parties with their Statements During Negotiation: Dymysticizing the Public Policy Rationale Behind Evidence Rule 408 and the Mediation Privilege Statutes*, 75 WASH. L. REV. 1037, 1091 n.210 (2000) (noting a professor has taken such reports). One survey revealed that on average, occurred in twenty-five percent of the matters in which the observed participated. Peters, *supra* note 12, at 124. The average estimates regarding lies that concern material facts in caucuses showed that they occurred in seventeen percent of the mediations in which respondents participated. *Id.*

93. KIMBERLEE K. KOVACH, MEDIATION: PRINCIPLES AND PRACTICE 142 (1994).

94. *See* Peters, *supra* note 12, at 132-33. One scholar asked fifteen legal ethics scholars, lawyers, and judges about the appropriateness of a lie that a negotiator does not have authority to settle at a particular figure when they have received express authority to do so. Larry Lempert, *In Settlement Talks, Does Telling the Truth Have Its Limits?*, 2 INSIDE LITIG. 1 (1988). Seven said yes, this could be done ethically under the rules but they personally would not do this, and six said this was unethical. *Id.*

about negotiation authority is commonly done.[95] Many contend that statements regarding claim settlement intentions are ethically permissible lies that fall within the safe harbor of Comment 2 to Rule 4.1 of the American Bar Association's Model Rules of Professional Conduct.[96] A recent survey of twenty-three lawyers, five of whom were practicing mediators, showed an average of their estimates, suggesting that bargaining authority lies occurred in thirty-five percent of the negotiations in which they participated.[97]

ABA Formal Opinion 93-370 opined that lawyers may not lie or engage in misrepresentations in response to a judge's questions concerning the limits of their settlement authority in civil matters.[98] Despite recommendations, the ABA did not include mediation in its definition of tribunal as part of the Ethics 2000 Commission's revision of the Model Rules of Professional Conduct.[99] Consequently, lawyers in mediations are not bound by the more stringent standard applied to tribunals that requires

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95. *E.g.*, JETHRO LIBERMAN, CRISIS AT THE BAR: LAWYERS' UNETHICAL ETHICS AND WHAT TO DO ABOUT IT 31-32 (quoting a leading lawyer approving lying about negotiation authority); MICHAEL MELTSNER AND PHILIP SCHRAG, PUBLIC INTEREST ADVOCACY: MATERIALS FOR CLINICAL LEGAL EDUCATION 232, 237 (1974) (describing authority lies that are commonly used by lawyers while not personally endorsing them). *See* Larry Lempert, *supra* note 94, at 1.

96. MODEL RULES OF PROF'L CONDUCT R. 4.1, cmt. 2 (2002). This Comment establishes that whether statements should be regarded as material facts prohibited by Model Rule 4.1(a) depends on circumstances. *Id.* It suggests that "under generally accepted negotiation conventions certain types of statements ordinarily are not taken as statements of material fact." *Id.* This Comment then lists three examples of statements generally not deemed material facts by negotiation conventions, including "estimates of price or value placed on" transaction subjects and "intentions as to acceptable settlement of claims." *Id.* The Model Rules provide no substantiation or examples of its empirical claim about generally accepted negotiation conventions causing scholars to question who accepts these conventions. Menkel-Meadow, *supra* note 20, at 132. Research showing large and consistent differences among lawyers, judges, and academics regarding the ethical appropriateness of common negotiation statements including authority lies also undermine regulatory reliance on the actual existence of such conventions. *See* Scott S. Dahl, *Ethics on the Table: Stretching the Truth in Negotiations*, 8 REV. LITIG. 173, 176-68 (1989); Lempert, *supra* note 94, at 1.

97. Peters, *supra* note 12, at 121, 130. Law students may inadvertently learn to do this in simulation-based negotiation classes where the phrase "I'm not authorized" means there is nothing in my short set of confidential facts that relates to this.

98. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-370 (1993-98) [hereinafter ABA Formal Op. 93-370].

99. Focusing on the non-adjudicative nature of mediation rather than its frequent direct connection to judicial proceedings when mandated by courts, the Model Rules define tribunal as "a court, an arbitrator in a binding arbitration proceeding or legislative body, administrative agency or other body acting in an adjudicative capacity." MODEL RULES OF PROF'L CONDUCT R. 1.0(m) (2002).

honesty and forbids false statements regarding all facts, regardless of materiality.[100]

The uncertainties regarding how honestly lawyers need communicate regarding their authorizations suggest that mediators should not incorporate asserted authority limits into end game mediating.[101] Mediators and genuinely participating litigants are vulnerable to lies about authority limits late in mediations if conversations shift from apparent impasse to more flexible, need-based options.[102] At these times mediators may rely on these limited authority lies to encourage ultimately false value-creating proposals.[103] Believing they are promoting joint gain, mediators may help substitute deception-based outcomes for agreements based on accommodations of genuine authorizations, interests, and priorities.[104]

B. MEDIATING NON-MONETARY OPTIONS

Securing attendance of persons capable of avoiding limited authority negotiation regarding non-monetary resolution options is more challenging for several reasons. Unlike dollar dimensions of disputes, which usually reside in one department of institutional or organizational litigants, non-monetary possibilities frequently touch multiple levels. In addition, the directions non-monetary discussions may take are inherently fluid and often result from synergistic interactions between litigants, lawyers, and mediators.[105] Little in pleading and discovery phases of lawsuits focus

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100. *See* MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(1). This rule prohibits lawyers from making false statements of law or fact to tribunals. *Id.* Some Florida mediators are exploring developing a procedure whereby lawyers certify to courts ordering mediations their compliance with objective standards as part of the pre-mediation process. Watson, *supra* note 50. One option would require lawyers to file written certification describing party representatives who will attend, like the provision this article recommends, but then go further and affirmatively certifying that attendees will have full authority to settle. *Id.* This creates an ethical obligation to avoid lying to courts and may lessen limited authority claims. *Id.*

101. Professor and mediator Dwight Golann disagrees and suggests that if necessary, mediators can use asserted authority limits as a lever to induce agreement. GOLANN, *supra* note 5, at 178. Professor Golann does, however, recommend doing this only when mediators "are convinced that a claimed limit . . . affecting a negotiator's authority is real . . . " *Id.*

102. *See* Peters, *supra* note 12, at 137 (describing similar vulnerabilities regarding lies about interests or priorities occurring late in mandatory mediations).

103. *See* Peters, *supra* note 12, at 137.

104. Id.

105. *See* BASTRESS & HARBAUGH, *supra* note 75, at 393-94, 474-86. Negotiation and mediation scholars urge lawyers and their clients to engage in brainstorming discussions to stimulate searching for creative resolutions. *See, e.g.*, FISHER, URY & PATTON, *supra* note 86, at 60-65; KIMBERLEE K. KOVACH, MEDIATION: PRINCIPLES AND PRACTICE 236-50 (3d ed. 2004); PAUL J.

parties on sharing or gathering information about underlying needs, motivations, and creative resolutions.[106] Information from which outside-the-litigation box solutions can emerge is usually generated only if lawyers and client representatives share it in the informal, confidential settings that mediations afford.[107]

Professor Leonard Riskin provided a valuable framework for analyzing the meaning of full authority for institutional and organizational representatives in non-monetary contexts.[108] He argued that full mediation authorization for representatives of these types of litigants should parallel important decision making components possessed by human clients.[109] These components include adequate knowledge of needs, interests, and operations; ability to make commitments; discretion to negotiate arrangements likely to meet approval; and sufficient influence such that their recommendations are likely to be accepted.[110]

This article's proposed standard incorporates Professor Riskin's suggestions. Recognizing that agencies, entities, institutions, and organizations may have difficulty finding representatives that embody all of these criteria, it proposes an alternative for these situations. This alternative requires that representatives bring either the ability to commit without further consultation, or the discretion to negotiate and sufficient influence to make ultimate approval of terms and solutions likely.[111]

Non-monetary authority limits are not likely to surface early in mandatory mediations because sessions invariably begin with negotiating dollar issues raised by the legal remedies in lawsuits.[112] The proposed standard also requires giving at least two weeks' notice for problems, to

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ZWIER & THOMAS F. GUERNSEY, ADVANCED NEGOTIATION AND MEDIATION THEORY AND PRACTICE 151-52 (2005).

106. *See, e.g.*, Michael Moffit, *Pleadings in the Age of Settlement*, 80 IND. L.J. 727 (2005). The scope of discovery is now limited to non-privileged matters relevant to the claims and defenses of all parties, a standard which does not invite pretrial investigation of underlying needs and interests. *See* Fed. R. Civ. P.26(b).

107. *See* Bush, *supra* note 12, at 13.

108. Leonard L. Riskin, *The Represented Client in a Settlement Conference: The Lessons of G. Heileman Brewing Co. v. Joseph Oat Corp.*, 69 WASH. U. L.Q. 1059 (1991).

109. Riskin, *supra* note 108, at 1110.

110. *Id.*

111. Perhaps a different standard should apply when these types of litigants sue because they invoke the judicial process and arguably assume the cost of sending representatives authorized to make commitments on non-monetary solutions.

112. *See* Peters, *supra* note 12, at 138.

comply with the authorized representative obligation. This notice obligation may motivate added diligence by counsel and their institutional or organizational clients. It removes surprise, leverage, and other tactical advantages that accompany limited authority negotiation. Reporting anticipated limits to courts promotes honesty because the American Bar Association has concluded that lying about authority violates ethical rules requiring candid disclosure to tribunals.[113] It also provides opportunities to discuss non-monetary authorization problems and determine whether it makes sense to mediate in light of them.

V. APPLYING THIS ARTICLE'S PROPOSED STANDARD

The difficulties of enforcing violations of the proposed standard supply significant, but not controlling, arguments against adopting it. The proposed standard's explicit design of providing context-specific notice of what full authority means, in both monetary and non-monetary contexts, lessens concerns that lawyers and representatives will face subjective assessments of their behavior. This article now analyzes remaining concerns of generating collateral enforcement litigation, and infringing the essential, confidential essence of the mediation process.

Several factors suggest that enforcement opportunities may not arise often. Existing data regarding full and partial resolutions at mandatory mediations suggests that authority limits do not present problems in many, perhaps most, mandatory mediations.[114] In addition, as argued previously, representatives and lawyers possess the ability to frame authority stymies as different valuation estimates, or perceptions of controlling facts, law, and likely outcomes, rather than as authorization limits. These optional frames produce decisions not to negotiate further by just saying no.

Unlike concerns about other rules mandating ambiguous, uncertain standards of good faith negotiating behavior, this proposed reform will not produce opportunities to assert violations if negotiators just say no. Once lawyers learn to deal with genuine limited authority problems by just saying no, opportunities to litigate about this standard lessen significantly. The standard cannot be invoked unless negotiators claim limited authority. If they really do have limited authority, they can say no regarding further negotiating, and then get additional authority later if they wish.

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113. *See* ABA Formal Op. 93-370, *supra* note 98.

114. One mediation program administrator noted that mediators in her program simply accepted assertions of full settlement authority at face value and that this never presented a problem. Lande, *supra* note 10, at 133 n.329.

The proposal's requirement that litigants and lawyers notify others at least two weeks in advance of scheduled mediations of known authority limits also reduces opportunities to litigate about enforcement and sanctions. If complied with, this provision allows the parties and the mediator to seek solutions for situations presented by authority limits before mandatory mediations begin. If these issues cannot be resolved between the parties with the help of their mediator, courts can resolve problems. Doing this substitutes a problem-solving structure for the adversarial frame that concerns proponents of good faith standards. This also uses judicial resources more efficiently than enforcing and sanctioning non-compliance. If limits present problems too difficult to resolve easily, courts may exempt matters from required mediation. If easily solvable problems resulting from insincere or excessively adversarial behavior occur, courts can assess sanctions in the same way that they punish violations of pretrial discovery orders.[115]

Skilled mediators often use approaches that replicate the proposed standard and lessen the likelihood of collateral litigation regarding compliance and enforcement. They frequently initiate conversations with participants about authority issues in telephone conversations or e-mail exchanges before convening mediations.[116] These pre-mediation consultations allow surfacing, discussing, and resolving issues concerning attendance by sufficiently authorized representatives.[117] They help participants develop appropriate expectations and avoid unpleasant surprises when mediations begin.[118]

Pre-mediation consultation frequently leads to execution of agreements to mediate executed by all participants.[119] These agreements create mutual expectations regarding who attends and the authority possessed by

115. *See* FED. R. CIV. P. 37(b) (triggering sanctions for demonstrated failures of parties to comply with court orders issued after motions to compel preceded by good faith conferencing seeking to resolve issues). Some Florida mediators are starting to explore developing a motion to defer procedure for sending difficult problems that surface during pre-mediation conferencing and potentially jeopardize mediating effectiveness. Watson, *supra* note 50. Educating the bench and bar to put these kinds of issues on the table and let judges decide them will further restrict abilities of lawyers and parties to claim limited authority successfully in court-ordered mediations. *Id.*

116. Most agree that pre-mediation consultations between mediators and participants are valuable. *See, e.g.*, Lande, *supra* note 10, at 132. Many mediators regularly use these consultations, either jointly, frequently using conference calls, or separately. *Id.* at 132 n.321.

117. *See* Lande, *supra* note 10, at 132 n.321.

118. *See* Lande, *supra* note 10, at 132.

119. *See* Coben & Thompson, *supra* note 51, at 139.

representatives of agency, entity, institutional, and organizational clients.[120] Two scholars who reviewed more than 1,200 reported court decisions analyzing aspects of court-connected mediation proposed best practices to avoid collateral litigation.[121] High on their list was a recommendation that "mediators and lawyers should be particularly aggressive in insisting that decisionmakers with clear settlement authority" attend and participate throughout entire sessions.[122]

Litigants and lawyers who do not disclose authority limits in advance and then engage in limited authority negotiating present difficult challenges. One important contextual factor in determining how to respond to these challenges concerns when limited monetary authority negotiation surfaces during mandatory mediations. Early invocations of limited authority, for example, suggest use of negotiation tactics to claim value.[123] Limited monetary authority claims can provide leverage by creating incentives for fully authorized negotiators to make additional concessions to satisfy their counterparts' limits.[124] It can give asserters of limited authority time to learn potentially important information while resisting making concessions needed to generate reasonable momentum toward agreement. It often angers litigants who came to the session fully prepared to settle, causing them to feel abused when confronting no authority claims early.[125]

Mediators encountering limited authority negotiation early may pursue the same options they use later when lawyers, human participants, and entity representatives confront end game evaluation dilemmas. Contexts suggest that continued conversations may lay useful foundations for building partial or complete agreements. Many mediators are now using more than one session to narrow or resolve difficult lawsuits involving large dollar claims.[126] On the other hand, mediators confronting unprepared adjusters who showed up only to document their file and other similar contexts, may

120. Coben & Thompson, *supra* note 51, at 139.

121. Coben & Thompson, *supra* note 51, at 138-43. Noting that "there are no silver bullets to insulate mediation from litigation," the authors recommend ten "practical steps mediators, lawyers, and consumers can take" to avoid litigating about issues arising from efforts to avoid litigating. *Id.* at 138.

122. Coben & Thompson, *supra* note 51, at 142. The authors recommend this "given the significant body of duty to mediate and sanctions opinions raising issues of attendance and authority . . . " *Id.*

123. *See supra* notes 73-79 and accompanying text.

124. CHARLES B. CRAVER, EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT 245 (4th ed. 2001).

125. *E.g.*, Carter, *supra* note 57, at 401; GOLANN, *supra* note 5, at 176.

126. Comment of Jay Fraxedas, Florida mediator (Feb. 7, 2007); *see* Statistics in Mediation, *supra* note 49 (reporting that 15% of 203 mediations between July 2003 and August 2004 took more than one session).

appropriately conclude that ending sessions works best. Doing this prevents further expenditure of time and money by sincere participants. It prevents the use of mediation unfairly as a discovery device. It also may be warranted by mediators' duties to ensure that the process is conducted fairly and in a balanced manner.[127]

Later invocations of limited authority may suggest genuine uncertainty regarding bargaining parameters beyond the margins of planned authorizations.[128] Mediation usually involves discussing different perspectives regarding evaluations of claims and defenses. Participant perspectives often shift as additional information emerges during these conversations. If new or unanticipated information suggests that absent but ultimate decisionmakers would likely change their views or perspectives, lawyers and representatives possess several options besides invoking limited authority. Assuming absent ultimate decisionmakers are readily reachable by phone, email, or instant messaging, they can consult during breaks. If that doesn't work, they can just say no to proposals and, if desired and possible, request resuming mediation in the future. Finally, they can impasse the mediation and continue negotiating later.

When limited authority claims occur in caucus, mediators can explore the problems—why they were not anticipated and surfaced before convening, and what options make sense now. This may give participants using limited authority as a negotiating tactic a confidential, face-saving way to discontinue this bargaining gambit.[129] It may also reveal that the litigants'

127. Mediators are "responsible for safeguarding the mediation process." FLA. R. FOR CERT. AND COURT-APPOINTED MEDIATORS § 10.400. This rule further notes that "the benefits of the process are best achieved if the mediation is conducted in an informed, balanced, and timely fashion." *Id.*

128. Lawyers and others who are not actual decisionmakers must clarify the important question of their authority before making commitments because many states hold that their status as representatives carries no apparent authority to bind their clients. Florida, for example, follows this rule for lawyers. *See, e.g.*, Fivecoat v. Publix Supermarkets, 928 So. 2d 402, 403 (Fla. Dist. Ct. App. 2006); Sharick v. Se. Univ. Health Sciences, Inc., 891 So. 2d 562, 564 (Fla. Dist. Ct. App. 2004); Weitzman v. Bergman, 555 So. 2d 448 (Fla. Dist. Ct. App. 1990). Making commitments without authorization, followed by their clients' refusal to honor them, can expose them to malpractice liability and destroy their future credibility and effectiveness. *See generally* COOLEY, *supra* note 4, at 72.

129. *See* MARK D. BENNETT & MICHELE S. G. HERMANN, THE ART OF MEDIATION 123-24 (1996) (recommending caucuses if participants seriously misbehave during mediations); SLAIKEU, *supra* note 41, at 234-36 (describing tactful ways to confront participants regarding negotiation behaviors that are destructive to the process); OREGON MEDIATION ASSOCIATION STANDARDS OF PRACTICE, Final Draft Standard VI, Comment 2 (revised April 23, 2005),

real intentions are not to negotiate. Poorly prepared participants claiming limited authority may really be asserting that they do not accept evaluations and wish to say no to them. Clarifying whether situations involve desires not to negotiate further, or the existence of genuine authority limits helps mediators decide what to do next. Difficult choices about what to do next arise only when participants clearly indicated they based decisions only on authority limits rather than on evaluation or perception differences.

When limited authority negotiating occurs late in mediation, recessing or adjourning sessions to provide opportunities to pursue additional authorizations may make sense. Reframing limited authority claims to just saying no, and if necessary, ending mediations, also supply viable options. By this time, participants have talked and listened to each other so future negotiations can be more informed if they occur. Not all problems that might constitute rule violations require mediator whistle-blowing.[130]

If limited authority is revealed in caucus early in mediations, mediators may draw on earlier conversations and assessments of relevant context factors to predict whether foundations for future negotiating either within or outside mediation are likely to result from sharing further information without bargaining.[131] If they conclude yes, they can then suggest this course to all participants. If mediators conclude that this course would not be useful, or if participants do not agree with this proposed direction, mediators may then end sessions.

Unless mediators feel that doing this is contextually inappropriate, they can end sessions without sharing the specific reasons underlying their judgment that further mediation is not warranted. A mediator's choice not to disclose caucus assertions of authority limits lessons likelihoods of enforcement and sanction proceedings. It also avoids raising confidentiality issues that arise if mediators are asked to testify about these caucus communications in later proceedings.

A mediator's choice not to share limited authority claim probably falls within the range of nondisclosure generally accepted in caucus-based mediations.[132] Whether this choice imperils the mediator's impartiality is

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http://www.mediate.com/oma/docs/2005CoreStandardsFinalP.pdf (last visited Oct. 22, 2007) (stating that mediators must encourage participants to alter offending conduct).

130. *See* Lande, *supra* note 10, at 128 (arguing that terminating mediations in the presence of inappropriate behaviors should suffice in most instances).

131. Time can be productively spent discussing upcoming litigation issues, such as the topics frequently canvassed in pretrial conferences, even if participants do not negotiate at mandatory mediations. *See* Stoehr v.Yost, 765 N.E.2d 684, 688-89 (Ind. Ct. App. 2002); Fed. R. Civ. P. 16(c); Lande, *supra* note 10, at 133.

132. *See* Robert D. Benjamin, *The Mediator as Trickster: The Folkloric Figure as Professional Role Model,* 13 MEDIATION Q. 131, 136 (1995) (arguing that mediators must recognize the necessity

debatable. This choice deprives other participants only of collateral adversarial tools that may not convey negotiation advantages even if they result in successful imposition of sanctions.

Limited bargaining assertions that occur in joint session give other participants knowledge independent of mediator disclosures. These participants may then decide to impose sanctions. Enforcement and sanctions may also occur if mediators disclose limited authority claims made in caucus or report it to courts. Unlike broad good faith standards which require subjective, time-consuming, detailed analysis of participants' substantive bargaining behaviors, sanctioning for violating the proposed standard looks only at the specific factual question of whether litigants invoked limited authority.

The proposed standard does not require mediators to report violations to courts. Some systems prohibit this. For example, Florida's Mediator Ethics Advisory Committee has decided that mediators may not report that a participant lacked full authority even though the litigant claimed full authority to the judge before the mediation.[133]

Enforcement and sanction actions will occur only if participants initiate based on joint session limited authority claims, or mediators disclose or report which might prompt courts to initiate. Any of these may generate efforts to compel mediators to testify regarding whether limited authority claims occurred. Despite extensive efforts to create confidentiality protections deemed essential to mediation's success, reported court decisions

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of constructive uses of deception within limits to help parties make self-determined decisions); John W. Cooley, *Defining the Ethical Limits of Acceptable Deception in Mediation*, 4 PEPP. DISP. RESOL. L. J. 263, 265 (2004) (discussing that the central paradox of caucused mediation is that parties agree to be deceived as a condition of participating); *but see* James R. Coben, *Gollum, Meet Smeagol: A Schizophrenic Rumination on Mediator Values Beyond Self-Determination and Neutrality*, 5 CARDOZO J. CONFLICT RESOL. 65, 77 (2004) (arguing that litigants without counsel and unsophisticated consumers are unaware victims of tricks of influence used against them by mediators).

133. Mediator Ethics Advisory Op. 2006-003 (July 24, 2006), http://www.flcourts.org/ (search "Search" for "MEAC Opinion 2006-003"; then follow "Advisory Opinion MEAC. . ." hyperlink) (last visited Oct. 22, 2007). The Florida mediation ethics opinion that held mediators could not report failures to appear with full authority concluded that this did not fall within an exception to Florida's general confidentiality rule. *See supra,* note 137. It interpreted FLA R. CIV. P. 1.730(a) as allowing mediator's only to report the lack of an agreement without additional comments or recommendations. It also concluded that this did not fall within the six exceptions provided in the Florida mediation confidentiality statute. *See* FLA. STAT. § 44.405(4)(a)(1)-(6) (2005).

show that mediator testimony is often compelled or introduced without objection in similar contexts.[134]

If mediators are subpoenaed to testify when sanctions are sought for violating the proposed standard, they should limit their testimony to the objective factual question of whether participants asserted limited bargaining authority negotiating during the mediation.[135] This underscores the importance of mediators' using caucuses to clarify ambiguities regarding limited authority assertions.

If called as witnesses, mediators should not testify regarding their subjective thought processes or mental impressions. They should not share personal speculations regarding the thought process, motives, and negotiating strategies employed by participants in connection with limited authority claims or any other negotiation behaviors.[136]

Following these limits minimizes participant concerns that, except for prohibiting limited authority bargaining, their negotiation strategies and actions implementing them will provide ammunition for adversaries in sanctioning processes.[137] It also suggests that only failure to bring fully authorized participants to mediations should be sanctioned. Sanctioning processes should not encompass failures to notify of authority problems in advance because they can be mooted by proper mediation behaviors.

Limiting mediator testimony to the objective question of whether a limited authority statement was made during the mediation reduces the incursion on the confidential character of caucus communications in mandatory mediations. The proposed standard's clear directions lessen

134. In their review of 1,223 cases that implicated mediation issues in the five-year period from 1999 to 2003, Professors Coben and Thompson found that "uncontested mediation disclosures occurred in thirty percent" of these decisions. Coben & Thompson, *supra* note 51, at 59. This included "forty-five opinions in which mediators offered testimony, sixty-five opinions were others offered evidence about mediators' statements or actions, and 266 opinions where parties or lawyers offered evidence of their own mediation communications and conduct—all without objection or comment" regarding confidentiality. *Id.* These finding caused them to conclude that "the walls of the mediation room are remarkably transparent." *Id.*

135. Coben & Thompson, *supra* note 51, at 136-37 (arguing that "mediator testimony is most appropriate if limited to objective matters such as statements made, party comments, and documents to the extent such evidence is offered and relevant for one of the exceptions to mediation privilege.").

136. Coben & Thompson, *supra* note 51, at 136-37 (arguing that "purely subjective evidence such as the mediator's thought process, mental impressions, or speculation on the thought processes of others is rarely necessary and should be absolutely prohibited as utterly corruptive of the mediator's promise of neutrality.").

137. *See Good Faith Resolution*, *supra* note 16, at 1-2 (arguing that rules authorizing sanctions for mediation behavior "should respect litigants' and lawyers' broad discretion about how they want to negotiate").

uncertainties that participants face regarding what can subject them to potential adverse testimony by mediators in sanction proceedings.[138]

In addition, permitting occasional enforcement of this rule by sanctions is more likely to engender trust than distrust of mandatory mediation.[139] Occasional enforcement of this standard signals that everyone who negotiates should either bring full authorization to mediations or just say no. Sanctioning occasional, egregious violations of the proposed standard also should encourage, rather than impair, public confidence in the process.[140]

Critics might argue that adopting and enforcing the proposed standard will stimulate inappropriate behavior by participants and mediators.[141] Adopting and applying the proposed standard, however, is more likely to stimulate appropriate behavior by participants and mediators. Implementing the proposed standard should encourage lawyers to consult with their clients effectively before mandatory mediations.

Courts have approved requirements that lawyers and clients work together before mediation by compelling preparation and submission of written memoranda in advance of mandatory sessions.[142] Effective negotiating requires preparation,[143] and so does effective representation of

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138. This is another concern expressed by the Dispute Resolution Section's Resolution. *Good Faith Resolution*, *supra* note 16, at 2 (arguing that "giving courts . . . broad authority to sanction types of subjective behaviors does not provide participants with clear understandings of what behavior is sanctionable.").

139. *See Good Faith Resolution*, *supra* note 16, at 1.

140. *See Good Faith Resolution*, *supra* note 16, at 1-2 (arguing that sanctioning only objectively determinable conduct promotes the "public's perception of the legitimacy of mediation as a consensual, flexible, creative, party-driven process to resolve disputes").

141. *See Good Faith Resolution*, *supra* note 16, at 2.

142. Courts have consistently found violations and imposed sanctions in situations where parties have failed to provide required pre-mediation memorandums. *See, e.g.*, Lande, *supra* note 10, at 84; Nick v. Morgan's Foods, Inc., 99 F. Supp. 2d 1056, 1061-62 (E.D. Mo. 2000) (requiring a memorandum); *aff'd*, 270 F.3d 590 (8th Cir. 2001). Unlike violations of a general good faith requirement, failures to comply with these rules present objectively determinable behavior that can be sanctioned. In a study of four federal court-connected mediation programs, 80% of the lawyers responding said that mediators required written pre-mediation submissions, 71% said this practice was helpful, and only 1% indicated the practice was detrimental. JAMES S. KAKALIK ET AL.., IMPLEMENTATION OF CIVIL JUSTICE REFORM ACT IN PILOT AND COMPARISON DISTRICTS 368 (1996).

143. *See, e.g.*, BASTRESS & HARBAUGH, *supra* note 75, at 406 (contending that effective negotiating is a by-product of sound planning and preparation); G. RICHARD SHELL, BARGAINING FOR ADVANTAGE: NEGOTIATION STRATEGIES FOR REASONABLE PEOPLE 15-16 (1999) (noting that nearly every research study on negotiation has confirmed the importance of preparation); URY, *supra* note 86, at 16 (arguing the secret of effective negotiation is prepare, prepare, prepare).

clients in mediations.[144] Mediation participants who prepare for sessions are more likely to commit to making the process successful, as well as generate more personal understanding of the benefits available from such success.[145] Research suggests that parties are more likely to settle and feel the mediation process is fair when they are prepared by their attorneys.[146] The proposed standard's implicit obligation to do the necessary work to prepare full authorizations to negotiate is not meaningfully different from assembling required written memoranda.

Because the directions non-monetary conversations may go are so diverse and unpredictable, lawyers may need to insist that ultimate decisionmakers make themselves accessible for consultation during mediations. Just saying no to non-monetary proposals that promise mutual benefit because specific authority is limited seems more harmful than doing so on monetary issues. Earlier monetary predictions may prove sound, and winning litigation usually offers a way to equal or perhaps better dollar offers made during a mediation. Generally the only way to ensure getting everything desired monetarily in litigation contexts is to endure the expenses and other costs of trial, succeed, and then collect resulting judgments. Non-monetary solutions, however, typically have no readily available alternative. Trying cases usually does not provide remotely analogous ways to accomplish components of non-monetary proposals.

VI. CONCLUSION

Although no set of rules eliminates all problematic negotiation behaviors and guarantees productive bargaining in mediations, the proposed standard seeks to discourage use of a specific, objectively determinable action. It creates an approach sensitive to the different contexts presented by value-claiming and value-creating bargaining that are designed to minimize limited authority negotiating.

This proposed standard follows recommendations that mandatory mediations should include approaches that balance legitimate interests of courts, parties, and mediators.[147] This standard acknowledges judicial interests in ensuring that mandatory mediations promote opportunities for valuable conversations by designing a context specific rule to encourage

144. *See, e.g.*, Lande, *supra* note 10, at 129; Kovach, *supra* note 23, at 622; Weston, *supra* note 23, at 628.

145. Lande, *supra* note 10, at 129 n.310.

146. Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641, 676. 687, 698-99 (2002).

147. *See* Lande, *supra* note 10, at 112-17.

attendance by fully authorized representatives.[148] It creates an expectation that authorized representatives will attend and humans often respond to the expectations of others.[149] Creating this clear rule may help lawyers and representatives adapt and change non-complying behaviors. Lawyers, at least, "are generally familiar with rules and comfortable measuring their actions" against them.[150]

This proposed standard respects the broad discretion that lawyers and participants possess to decide how they want to negotiate and then act accordingly. Except for prohibiting limited authority bargaining, the proposed standard does not affect how participants choose to present and argue positions and interests, what information to reveal and not reveal, whether to make offers and counteroffers, how to value claims, and whether to settle. It does not prohibit use of hardball negotiation tactics such as extreme offers and failing to make concessions.[151] It does not prohibit other deceptive negotiation actions such as making false statements about settlement intentions, claim valuations, opinions, interests, agreement alternatives, and priorities.[152]

This standard also respects participant interests by prohibiting only invocations of limited negotiating authority. Acknowledging that agency, entity, institutional, and organizational participants occasionally may have realistic difficulties providing fully empowered representatives in both contexts, this standard permits them to just say no rather than trying to gain a potentially unfair bargaining advantage by asserting limited negotiating authority. Following established doctrine, this standard clarifies that participants who are not able to secure full authorization or secure exemption from mediating can appear and indicate their intention not to bargain. They can also talk about topics other than economic and non-monetary resolutions as long as they do not invoke limited authority. The issue of whether representatives are fully authorized will not arise unless participants create it.

This standard targets the objective, easy determination of whether negotiators have invoked limited bargaining authority. By doing so, it

148. *See supra* notes 10-15 and accompanying text.

149. *See* DAVID A. BINDER, PAUL BERGMAN, SUSAN C. PRICE, & PAUL R. TREMBLAY, LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH 29 (2d ed. 2004); RAYMOND L. GORDON, INTERVIEWING: STRATEGY, TECHNIQUES, AND TACTICS 84 (1998).

150. *See* Peters, *supra* note 12, at 141.

151. *See* MNOOKIN ET AL., *supra* note 13, at 24-25.

152. *See* Peters, *supra* note 12, at 128-30, 133-37.

provides clear guidance and removes uncertainty about what actions are prohibited. It also creates a narrow incursion on the confidentiality dimensions of mandatory mediations if mediators are subpoenaed to testify. It minimizes fears that neutrals, impartially seeking to help parties negotiate, may testify later about subjective impressions they have concerning aspects of negotiating behaviors they did not like.

Several factors constrain the likelihood that this proposed standard will spawn extensive sanctioning proceedings. It is clear, not ambiguous. It rests on objectively determinable behavior. Authority limits are likely to be disclosed in caucuses. This enhances appropriate decisionmaking about how to proceed, and lessens the likelihood of potential angry, adversarial responses seeking enforcement and sanctions for other negotiating tactics typically performed face-to-face.

The proposed standard also encourages framing authority problems as purposeful negotiation decisions rather than as efforts to exploit sincere participants or circumvent applicable rules. This perspective leads to possibilities that lawyers and institutional or organizational litigants will understand and accept the challenges involved in complying. Anything that encourages lawyers and their clients to prepare more for negotiating and mediating is advantageous.

The proposed standard advances mediators' interests in several ways. It eliminates ambiguities existing in present requirements and definitions of full authority. Its fourteen-day notice provision and clear-but-flexible approach to non-monetary issue authorization for institutional and organizational litigants enhance mediators' abilities to identify, discuss, and possibly resolve problems before mediations. It validates the common practice of using agreements to mediate to coordinate expectations and reduce surprise before mediations begin. If it successfully removes non-authority negotiating, it helps mediators fulfill their professional obligations to create and promote a fair and balanced negotiation process.

Courts generally cannot promote productive negotiation behavior by rule and sanction, but limited authority negotiating is a problematic behavior that can be minimized. What is gained if non-authorized lawyers and representatives simply say no instead of using limited authority negotiating? The minimization of limited authority as a bargaining ploy is gained. More integrity in the mediation process is gained. More preparation for the mediation process is probably gained. More accurate contexts for successful mediation conversations that narrow or resolve disputes, and give participants opportunities to communicate more fully about more topics than trial procedures and evidence doctrines allow, are probably gained.

It sounds like large gain with relatively minimal cost. Legislatures and courts should adopt this proposed standard. They clearly have full authority to do so.