ABA Section of Dispute Resolution

RESOLUTION ON GOOD FAITH REQUIREMENTS FOR MEDIATORS AND MEDIATION ADVOCATES IN COURT-MANDATED MEDIATION PROGRAMS

Approved by Section Council, August 7, 2004.

The ABA Section of Dispute Resolution ("Section") has noted the wide range of views expressed by scholars, mediators, judges, and regulators concerning the question of whether courts should have the authority to sanction participants in mediation for bad-faith conduct in court-mandated mediation programs. The Section has also noted court rules and statutes that require mediators in court-mandated programs to make reports to court administrators or specific judges concerning alleged bad-faith conduct of participants in mediation. The Section believes that the public interest, court systems, and the practice of mediation would benefit from a re-examination and revision of some of these statutes and rules to preserve the core values of the mediation process, namely, party self-determination, mediator impartiality, and mediation confidentiality. These values are integral to the public's perception of the legitimacy of mediation as a consensual, flexible, creative, party-driven process to resolve disputes.

In an effort to determine the appropriate policy to deal with these important concerns, representatives of the Section have reviewed more than 100 state and federal statutes and rules that require parties and their counsel to participate in court-mandated mediation programs in "good faith." They have also reviewed hundreds of pages of law review articles discussing the subject of good-faith participation in mediation. They also reviewed two lengthy reports on the subject, one prepared by the Center for Dispute Settlement and the other prepared by the Public Policy Committee of the former Society of Professionals in Dispute Resolution.

The Section has concluded that, in order for the core values of the mediation process to be honored and preserved, the appropriate approach to be taken by court-mandated mediation programs should address three policy areas: (1) what conduct should be sanctionable; (2) what conduct or other information may mediators be required to report to court administrators or judges; and (3) what actions court-mandated mediation programs should take to promote productive behavior in mediation. The Section emphasizes that all of these elements are needed to create an effective policy. Rules authorizing sanctions are needed to ensure attendance at mediation. Such rules should respect litigants' and lawyers' broad discretion about how they

want to negotiate in mediation. The rules must comply with statutes and rules protecting the confidentiality of mediation communications, which generally limit reports and disclosures about alleged bad-faith conduct. Rules authorizing sanctions may be necessary but not sufficient to promote productive behavior in mediation and thus additional measures may be needed.

This resolution specifically addresses statutes and rules governing court-mandated mediations. Mediators and participants in private mediations may wish to follow these recommendations or adapt them in their cases.

The re-examination of current statutes and rules or the design of new ones should be informed by the following principles:

A. Sanctions.

Sanctions should be imposed only for violations of rules specifying objectively-determinable conduct.

In a narrow class of situations, court sanctions can appropriately promote productive behavior in mediation. Sanctions are appropriate for violation of rules specifying objectively-determinable conduct. Such rule-proscribed conduct would include but is not limited to: failure of a party, attorney, or insurance representative to attend a court-mandated mediation for a limited and specified period or to provide written memoranda prior to the mediations. These rules should not be labeled as good faith requirements, however, because of the widespread confusion about the meaning of that term. Rules and statutes that permit courts to sanction a wide range of subjective behavior create a grave risk of undermining core values of mediation and creating unintended problems. Such subjective behaviors include but are not limited to: a failure to engage sufficiently in substantive bargaining; failure to have a representative present at the court-mandated mediation with sufficient settlement authority; or failure to make a reasonable offer. Giving courts such broad authority to sanction types of subjective behaviors does not provide participants with clear understandings about what behavior is sanctionable, may cause participants to refrain from legitimate behavior in mediation, may create uncertainties about what communications would be confidential, and can actually stimulate inappropriate conduct by participants and mediators. Ambiguity arising out of subjective "bad faith" conduct is likely to spawn extensive satellite litigation, thus defeating

three primary purposes of the court-mandated mediation programs – to reduce docket congestion, to aid effective judicial administration, and to promote productive negotiation.

B. Mediator Reports to the Court or Court Administrators.

The content of mediators' reports to the court or court administrators should be narrowly restricted.

Confidentiality during a mediation session is essential to the integrity of the process. To be effective, a mediator must have the trust of all participants, both in joint sessions and in private caucuses. Requiring mediators to report negotiating behaviors or alleged bad-faith conduct to the court imperils the confidentiality of the mediation process and the public's trust in it.

The Section believes it unnecessary and unwise for statutes and court rules to require mediators to report to the court or court administrators whether parties participated in good faith. Under these statutes and rules, a negative report to a court from a mediator can cause a party to face the wrath of the court in the form of a tarnished reputation, adverse rulings, or the imposition of actual sanctions. In a sanctions hearing on allegations of a party's bad-faith conduct in mediation, the mediator is typically subpoenaed to testify, thereby further breaching the confidentiality of the mediation process. The lack of confidentiality protection creates uncertainty, engenders distrust of the mediation process, and impairs the public's full use of the process.

The Uniform Mediation Act ("UMA") precludes disclosure of mediation communications regarding alleged bad faith. The American Bar Association approved the UMA, which establishes an evidentiary privilege for mediation communications in Section 4. Section 7(a) prohibits mediators from making reports to a "court, administrative agency, or other authority that may make a ruling on the dispute that is the subject of the mediation." Section 6 contains nine exceptions to the privilege and prohibition against mediator reports. Sections 7(b)(1) and 7(b)(3) provide two additional exceptions regarding mediator reports. Bad-faith conduct in mediation is not one of the exceptions. The official Reporter's Notes to Section 7 of the UMA state: "The provisions [of the UMA] would not permit a mediator to communicate, for example, on whether a particular party engaged in 'good faith' negotiation, or to state whether a party had been 'the problem' in reaching a settlement."

The Section believes that protecting mediation communications as provided in the UMA will foster the public's trust in the legitimacy and integrity of mediation as a useful process to resolve disputes. Especially in states adopting the UMA, statutes and rules should not require or permit disclosures about bad-faith conduct unless there is a valid waiver of the privilege. Given the ABA's approval of the UMA, the Section recommends that no states should adopt statutes or rules inconsistent with the UMA. Thus such statutes and rules should not permit or require disclosures about bad-faith conduct unless the individuals involved provide consent consistent with a valid waiver of the privilege under the UMA. The UMA is available at http://www.pon.harvard.edu/guests/uma/ and http://www.nccusl.org/nccusl/DesktopDefault.aspx.

This Resolution is consistent with the National Standards for Court-Connected Mediation Programs ("Standards"), which state that reports based on conduct in mediation should be narrowly limited. The Standards were established in 1992 as a result of a joint project undertaken by the Center for Dispute Settlement in Washington, D.C. and the Institute of Judicial Administration in New York City, with the active involvement of an 18-member Advisory Board comprised of experienced and respected ADR academics and professionals throughout the country. The relevant paragraphs of these Standards (12.1 and 12.2) narrowly limit information that mediators may disclose to courts during or after a mediation. Courts and legislatures may wish to consult the Standards when they are formulating court rules and statutes governing court-mandated mediation programs in order to ascertain the types of mediator-court communications they might wish to specify in those rules or statutes. (Paragraphs 12.1 and 12.2 of the Standards are reproduced in the Appendix to this Resolution.)

C. Promoting Productive Behavior in Mediation.

Court-mandated mediation programs should engage in collaborative planning efforts and establish educational programs about mediation procedures for participants.

Collaborative Planning of Court-Mandated Mediation Programs. Court-mandated mediation programs can prevent or minimize problems of bad faith by designing the programs to satisfy the interests of key stakeholder groups. These groups include judges and court administrators, lawyers, mediators, and especially the parties in mediation. By convening

committees with representatives of all the stakeholders, courts can adopt procedures to minimize foreseeable abuses of mediation. For example, rules prohibiting referrals to mediation from delaying trial dates can avoid unproductive mediations requested solely to postpone a trial date. Similarly, procedures for scheduling, canceling, or postponing mediations can increase the likelihood that participants would act productively in mediations because participants would be more likely to be ready to mediate.

Education About Mediation Procedures. For people to participate productively in mediation, it is important that they understand the purposes and procedures in the mediation program. Court-mandated mediation programs can identify their goals and the concerns of the stakeholder groups to provide information addressing these concerns and thus reduce the incidence of problematic behavior. Programs can also encourage individual mediators to talk with lawyers and/or parties before mediation so that everyone has similar expectations about the process.

COMMENTS

1. The issue of good-faith participation in mediation should be examined in the context in which it arises. The U.S. Constitution and, presumably, the constitutions of every state guarantee citizens the right to a court trial, including the right to a jury in most cases. While public policy favoring private resolution of disputes, on the one hand, and the principles of sound and efficient judicial administration , on the other, would support requirements to maintain the integrity of court-ordered mediation, those two factors do not trump the constitutional rights of citizens to have their cases heard and decided in court. Second, as a profession of dispute resolvers, we have not yet been able to come to full agreement on the definition of mediation. Does the term "mediation" include the concept of "case evaluation" or of evaluation-like behaviors? Should not advocates, in representing their clients' best interests, be able to negotiate competitively in mediation – or perhaps not at all? Members of our profession are not in general agreement on these basic issues. Thus, if we have not fully agreed on the definition of the mediation process or as to what might be permissible negotiation behavior within the context of a mediation, how can we expect to be able to define "good-faith participation" in mediation? Third, most commentators agree that "good faith," and especially substantive (as opposed to procedural) good faith, is a subjective concept that cannot be completely or

accurately defined. One New York court has defined "good faith" as an "intangible and abstract quality with no technical meaning or statutory definition." If "good faith" is "intangible and abstract," it will be difficult to arrive at a widely acceptable definition of it. Given the differences in definitions, philosophies, and styles of mediation, the concept of "good faith" is especially difficult to apply consistently. Considering this context of the good-faith issue, the Section has attempted to steer a middle course in crafting this policy statement. It has taken a moderate approach on the issues of sanctions for alleged bad-faith conduct and of the content of mediator-court communications. This approach provides for basic enforceable requirements for participants in mediation but does not entail a broad regulation of negotiation behaviors that could undermine mediation and stimulate satellite litigation. Most importantly, it recommends a proactive approach toward promoting productive participation in mediation through court-supervised collaborative planning and educational efforts.

2. Courts generally have a legitimate interest in encouraging litigants and lawyers to negotiate before using courts' limited resources to adjudicate disputes. Thus many courts require litigants to mediate. Although it is appropriate for courts to implement these requirements by ordering litigants to attend mediation and submit pre-mediation memos, courts should refrain from imposing requirements interfering with litigants' and lawyers' discretion to negotiate in ways that they believe to be in the litigants' interests. Policymakers should anticipate that litigants and lawyers will try to evade rules if they do not believe that the rules address their legitimate interests. For example, some lawyers and litigants predictably would try to evade a requirement that parties make a new offer in mediation or give notice that they do not intend to make a new offer. Although it would desirable for each side to make new offers in mediation, courts can actually create problems by authorizing sanctions against parties who fail to do so. If a party does not believe it is appropriate to make a new offer (for example, if a defendant believes that it is not liable or does not want to get a reputation for settling frivolous cases), the party could easily frustrate the intent of the rule by offering a trivial concession. Thus such a rule could actually generate disputes and satellite litigation. No mediation process can avoid all problematic behaviors or produce agreements in all cases. Courts generally cannot promote productive negotiation behavior by creating rules and imposing sanctions. Rather, the Section believes that litigants and lawyers are more likely to negotiate productively if the mediation process is well designed to meet their interests.

3. There are numerous statutes and rules that establish good-faith requirements in

mediation. Professor Lande, in his article, *Using Dispute System Design Methods to Promote Good Faith Participation in Court-Connected Mediation Programs,* 50 UCLA L. Rev. 69 (2002), notes that at least 22 states and the territory of Guam have such statutory requirements. Only one of those, he reports, includes a definition of "good faith." At least 21 federal district courts and 17 state courts have local rules requiring good-faith participation. Also, several federal district courts have relied on Rule 16 of the Federal Rules of Civil Procedure as the basis for a good-faith requirement in mediation. Professor Lande further points out that, at the time his article was written, there were 27 reported cases dealing with bad faith in mediation, and most of them arose out court-connected mediation programs. The number of reported cases increased in the 1990s, and it can be speculated that the increase was caused by the expanding use of court-mandated mediation and an accompanying legalization of the process. The behaviors alleged to constitute bad faith in the 27 cases fell into 5 categories: (1) failure to attend; (2) failure of an organizational party to send a representative with sufficient settlement authority; (3) inadequate preparation for a mediation – including failure to submit a pre-mediation memorandum or to bring experts to a mediation; (4) insincerity of efforts to resolve the dispute –including claims that a party had not made any offer or any suitable offer, had made inconsistent legal arguments, had not provided requested documents; and (5) miscellaneous allegations, including failure to sign a mediated agreement and failure to release living expenses pending farmer-lender mediation. Professor Lande describes the final outcomes in these cases as follows:

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

Representative cases include: *In re Acceptance Insurance Co.*, 33 S.W. 3d 443 (Tex. Ct. App. 2000); *Hunt v. Woods*, 1996 WL 8037 (6th Cir. Jan. 9, 1996); *Graham v. Baker*, 447 N.W. 2d 397 (Iowa 1989); *Decker v. Lindsay*, 824 S.W.2d 247 (Tex. Ct. App. 1992); *Nick v. Morgan's Foods*, 99 F.Supp. 2d 1056 (E.D. Mo. 2000) aff'd 270 F.3d 590 (8th Cir.

2001).

4. It is noted that courts do enforce good-faith standards in other legal contexts, including labor-management collective bargaining, general contract law governing enforcement and performance of contracts, insurers' duties in handling claims, and participation in pretrial conferences under Federal Rule of Civil Procedure 16(f). These legal rules involving good faith outside the mediation context are not helpful in defining requirements for good-faith participation in mediation for three reasons. First, unlike these other settings, the Constitution confers the right on litigants to have their cases heard *and decided* by a court of law. Coercing parties to negotiate or to settle their dispute and depriving them of a trial denies parties of that right. Second, in the non-mediation contexts, courts rely heavily on the parties' states of mind or negotiation positions. In labor law, for example, "surface bargaining" is considered a violation of the duty to bargain in good faith. Surface bargaining is the "pretense of bargaining" and includes conduct such as attending meetings with no intention of reaching agreement and submitting proposals on a take-it-or-leave-it basis. Sometimes the only evidence of bad faith is the parties' offers. To determine bad faith, courts must engage in a detailed analysis of the parties' substantive bargaining positions, which is a wholly subjective process. These types of hearings would take an enormous amount of judicial time and undermine an important purpose of court-mandated mediation – docket control and judicial efficiency. Finally, what distinguishes good faith in mediation from good faith in other contexts is that mediation communications, with very few exceptions, are inadmissible in court. In non-mediation contexts, because of historical tradition or relevant case law, parties have the clear expectation that the courts will admit evidence of bad-faith negotiations. There is no such expectation in mediation because its core norm is confidentiality, prohibiting mediators and mediation participants from providing evidence in court about communications in mediation.

5. In researching and drafting its Resolution, the Section reviewed the law review articles cited below, among others. The Section has referenced these articles in these Comments for the benefit of Section members, courts, policymakers, and others who may be interested in learning more about the topic of good faith and productive participation in court-mandated mediation.

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

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

Leslie A. Blau, Peter R. Bonavich, and Thomas A. Gauza, *Binding Mediation and Good Faith Mediation Deposits,* 9 Sec. Nws. 27 (1999).

Iur. Ulrich Boettger, *Efficiency Versus Party Empowerment--Against a Good-Faith Requirement in Mandatory Mediation,* 23 Rev. Litig. 1 (2004)

Roger L. Carter, *Oh, Ye of Little Good Faith: Questions and Concerns and Commentary on Efforts to Regulate Participant Conduct in Mediations,* 2002 J. Disp. Resol. 367 (2002).

Richard D. English, *Alternative Dispute Resolution: Sanctions for Failure to Participate in Good Faith in, or Comply With Agreement Made in, Mediation,* 43 A.L.R.5th 545 (April 2003).

Mori Irvine, *Serving Two Masters: The Obligation Under the Rules of Professional Conduct to Report Attorney Misconduct in a Confidential Mediation,* 26 Rutgers L. J. 155 (1994).

Carol L. Izumi and Homer C. La Rue, *Prohibiting Good Faith Reports Under the Uniform Mediation Act: Keeping the Adjudication Camel Out of the Mediation Tent,* 2003 J. Disp. Resol. 67 (2003).

Pamela A. Kentra, *Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict for Attorney-Mediators Between the Duty to Maintain Mediation Confidentiality and the Duty to Report Fellow Attorney Misconduct*, 1997 B.Y.U.L. Rev. 715 (1997).

Kimberlee K. Kovach, *Good Faith in Mediation - Requested, Recommended, or Required? A New Ethic,* 38 S. Tex. L. Rev. 575 (1997).

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

Julie McFarlane, *Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation,* 2002 J. Disp. Resol. 241 (2002).

Carrie Menkel-Meadow, *Pursuing Settlement in An Adversary Culture: A Tale of Innovation Co-Opted or 'The Law of ADR,'* 19 Fla. St. U.L. Rev. 1 (1991).

Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 Notre Dame L. Rev. 775 (1999).

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

Holly A. Streeter-Schaefer, *A Look at Court Mandated Civil Mediation*, 49 Drake L. Rev. 367 (2001).

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).

Roselle S. Wissler, *The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts,* 33 Willamette Law Review 565 (1997).

Alexandria Zylstra, *The Road from Voluntary Mediation to Mandatory Good Faith Requirements: A Road Best Left Untraveled,* 17 J. Am. Acad. Matrimonial Law. 69 (2001).

APPENDIX

The portion of the Section's Resolution addressing mediator-court/court administrators' communications is based, in part, on the approach of the National Standards for Court-Connected Mediation Programs, published jointly in 1992 by the Center for Dispute Settlement in Washington, D.C. and the Institute of Judicial Administration in New York City. The relevant part of these Standards, paragraphs 12.1 and 12.2, describing permissible mediator-court communications appear below:

> 12.1. During a mediation the judge or other trier of fact should be informed only of the following:
>
> > a. the failure of a party to comply with the order to attend mediation;
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> > b. any request by the parties for additional time to complete the mediation;
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> > c. if all parties agree, any procedural action by the court that would facilitate the mediation; and
> >
> > d. the mediator's assessment that the case is inappropriate for mediation. . . .
>
> 12.2. When the mediation has been concluded, the court should be informed of the following:
>
> > a. If the parties do not reach an agreement on any matter, the mediator should report the lack of an agreement to the court without comment or recommendation.
> >
> > b. If agreement is reached, any requirement that its terms be reported to the court should be consistent with the jurisdiction's policies governing settlements in general.
> >
> > c. With the consent of the parties, the mediator's report may identify any pending motions or outstanding legal issues, discovery process, or other action by any party which, if resolved or completed, would facilitate the possibility of a settlement.

In preparing this Resolution, the Section also took into account the 1991 Report of the Law and Public Policy Committee of the Society of Professionals in Dispute Resolution (later merged into the Association for Conflict Resolution) entitled, "Mandated Participation and Settlement Coercion." That report, a 19-month effort by a committee of academics, practitioners, program directors, and social science researchers cautioned, among other things, that mandatory dispute resolution could create coercive pressure on parties to settle. Some of the relevant recommendations are outlined below.

> 1. Mandating participation in non-binding dispute resolution processes often is appropriate. . . . Participation should be mandated only when the compulsory program is more likely to serve broad interests of the parties, the justice system, and the public than would procedures that would be used absent mandatory dispute resolution. . . .
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> 3. Coercion to settle in the form of reports to the trier of fact and of financial disincentives to trial should not be used in connection with mandated mediation. . . .
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> 4. Mandatory participation should be used only when a high quality program (i) is readily accessible, (ii) permits party participation, (iii) permits lawyer participation when the parties wish it, and (iv) provides clarity about the precise procedures that are being required. . . .
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> 6. Procedures for compulsory referrals should include, to the extent feasible, case assessment by a person knowledgeable about dispute resolution procedures and should provide for timely consideration of motions for exclusion.
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> 7. Requirements for participation and sanctions for noncompliance should be clearly defined.