

John Lande, *Why a Good-Faith Requirement Is a Bad Idea for Mediation*, 23 ALTERNATIVES TO HIGH COST LITIG. 1 (2005).

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

[I]f ... I act for the Big Bad Wolf against Little Red Riding Hood and I don't want this dispute resolved, I want to tie it up as long as I possibly can, and mandatory mediation is custom made. I can waste more time, I can string it along, I can make sure this thing never gets resolved because ... I know the language. I know how to make it look like I'm heading in that direction. I make it look like I can make all the right noises in the world, like this is the most wonderful thing to be involved in when I have no intention of ever resolving this. I have the intention of making this the most expensive, longest process but is it going to feel good. It's going to feel so nice, we're going to be here and we're going to talk the talk but we're not going to walk the walk. See Julie Macfarlane, "Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation," 2002 Journal of Dispute Resolution 241, 267 (2002).

Although most people do not abuse the mediation process, some use mediation to drag out litigation, gain leverage for later negotiations, and generally wear down the opposition.

It is tempting to punish litigants and lawyers who intentionally abuse mediation in these ways. At least 22 states have statutes requiring good-faith participation in mediation. At least 21 federal district courts and 17 state courts have local rules with similar requirements. In addition, several courts have relied on Rule 16 of the Federal Rules of Civil Procedure as the basis of a good-faith requirement. Many of these provisions explicitly authorize courts to sanction bad faith, though some provisions do not mention sanctions and virtually none of them define good faith.

Educator and trainer Kimberlee K. Kovach proposes a broad good-faith requirement including specific requirements that participants have full settlement authority, adequately prepare for mediation, follow the mediator's rules, engage in direct communication, participate in meaningful discussions, and remain at the mediation until excused by the mediator. See Kimberlee K. *8 Kovach, "Good Faith in Mediation-- Requested, Recommended, or Required? A New Ethic," 38 South Texas L. R. 575, 622-23 (1997). Prof. Maureen A. Weston, of Pepperdine University School of Law, in Malibu, Calif., proposes a broad "totality of the circumstances" definition of good faith. See Maureen A. Weston, "Checks on Participant Conduct in Compulsory ADR: Reconciling the Tension in the Need for Good-Faith Participation, Autonomy, and Confidentiality," 76 Indiana Law Journal 591, 627 (2001). Violators would be subject to sanctions and thus courts would be required to adjudicate whether someone violated

the requirement.

Proponents of good-faith requirements believe that they are necessary to assure the integrity of court-ordered mediation. They contend that such requirements would make parties cooperate with the courts' case management systems and avoid the use of mediation to gain unfair advantages and waste other parties' time and money.

CONFUSING DEFINITION

In statutes and cases establishing a good-faith mediation requirement, the definition of good faith in mediation is uncertain, contrary to suggestions that people "know it when they see it." The only conduct that courts have consistently found to be required by good-faith requirements is that parties comply with orders to attend and provide pre-mediation memoranda. This is probably not what most people think of as "good faith"--and courts do not need a special good-faith requirement to enforce such orders.

On the other hand, much of the frustration about bad-faith participation is based on perceptions that the "other side" did not intend to settle and failed to make a reasonable offer--or any offer. Courts and commentators advocating good-faith requirements recognize, however, that it would be highly inappropriate for courts to force parties to make offers and for courts to second-guess whether offers are "reasonable."

Under federal and state constitutions, parties have the right to trial and so they should not be coerced to settle. Defendants who believe that they are not liable have the right to try their cases in court rather than be pressured by courts to settle with plaintiffs. Since courts cannot order parties to make settlement offers, what many people think they "know" to be "bad faith" is not legally recognized as such.

REQUIRING SETTLEMENT AUTHORITY

Proponents of broad good-faith requirements often argue that courts should sanction parties for sending representatives to mediation without sufficient settlement authority. Failure to do so certainly can be frustrating, especially when parties purposely attend mediation intending to thwart the other side rather than to negotiate sincerely. Courts have split about evenly whether a good-faith requirement allows them to sanction parties for failure to send representatives with sufficient authority.

The problem is that it is difficult for outsiders to a mediation to determine what is the "right" amount of settlement authority. As a practical matter, one cannot do so without a complex analysis of the merits of the case and history of the litigation. Courts can require defendants to give their representatives authority to pay the amount of the last demand or insurance policy limits. Doing so inappropriately assumes that organizational parties must be able to settle a case on the spot without consulting

others in an organization, even when the amounts are large and decisions must be approved by higher corporate or governmental authorities.

Moreover, this requirement could cause defendants to engage in cynical charades of supposedly giving representatives full authority that they can report to mediators and courts but privately instructing their representatives otherwise.

COURT INTRUSION

A major problem with interpretations of good-faith requirements as encompassing settlement authority is that enforcing such requirements would result in a major intrusion into the mediation process and violation of confidentiality protections.

To enforce these requirements, courts would require testimony from mediators or other participants about what happened in mediation. The Reporter's Notes to the Uniform Mediation Act state that its confidentiality provisions would "not permit a mediator to communicate ... on whether a particular party engaged in 'good faith' negotiation or to state whether a party had been 'the problem' in reaching a settlement."

In *re Acceptance Insurance Co.*, 33 S.W.3d 443 (Tex. Ct. App. 2000), illustrates the problem of a trial court exceeding its authority by investigating a bad-faith claim extensively. In that case, the parties did not settle in mediation. The parties tried the case, and the court ruled for the plaintiff. Soon after the trial, the plaintiff filed a motion seeking \$250,000 in sanctions against the defendant's insurer for violating the mediation order by failing to mediate in good faith. At the hearing on the motion, and over strenuous objections by the insurer's attorney, the trial court permitted detailed cross-examination of the insurance adjuster who attended the mediation. The adjuster was asked about her knowledge of the case, preparation for the mediation, communications with her supervisor by telephone during the mediation, and authorization to settle the case to the full policy limit.

The trial court stated: "The Court will note that the adjuster's knowledge as to the facts and potential damages of this case are [sic] so woeful as to constitute a sham of following my order [to mediate]." The trial court continued the hearing and ordered the personal appearance of a senior vice president for the insurer. The insurer obtained a writ from the appellate court to prevent the trial court from holding further hearings or imposing sanctions.

Courts should not have license to investigate communications in mediation as the trial court did in the *Acceptance* case.

INAPT ANALOGY TO DUTY TO BARGAIN IN GOOD FAITH

Proponents of broad good-faith requirements justify their positions by citing good-faith requirements in other areas of the law, especially in the negotiation of collective

bargaining agreements. Analogies to other contexts, however, are distinguishable from mediation cases.

Although proponents of a good-faith mediation requirement argue that it should be independent of the parties' states of mind or negotiating positions, in the non-mediation contexts, courts rely heavily on these factors in deciding about good faith. In labor law, for example, "surface bargaining" is a violation of the duty to bargain in good faith. Surface bargaining is the "pretense of bargaining" and includes such things as attending meetings with no intention of reaching agreement, regressive bargaining, and submitting proposals on a take-it-or-leave-it basis.

In some cases, the only evidence of bad faith may be the parties' offers, and thus the courts must engage in a detailed analysis of the parties' substantive bargaining positions. Moreover, communications in labor negotiations are admissible in court, unlike mediation communications, which generally are confidential. Thus labor negotiations are quite different from court-connected mediation and the duty to bargain in good faith in labor negotiations should not simply be transferred to court-connected mediations.

INDUCING ABUSE

Although a broad good-faith requirement proposed by some courts and commentators presumably would deter and punish some inappropriate conduct, it might also encourage abuse, including surface bargaining as well as frivolous claims of bad faith or threats to make such claims. Proponents seem to assume that participants who might act in bad faith but for the requirement would behave properly in fear of legal sanctions. It seems at least as likely that savvy participants who want to take inappropriate advantage of mediation would use surface bargaining techniques so that they can pursue their strategies with little risk of sanction. This would be fairly easy given the vagueness of a good-faith requirement.

Ironically, a broad good-faith requirement could induce dishonesty about settlement authority and rationale for offers, when providing more honest responses might put participants in jeopardy of being sanctioned.

Tough mediation participants could use broad good-faith requirements offensively to intimidate opposing parties and interfere with lawyers' abilities to represent their clients' legitimate interests. Given the vagueness of a broad good-faith requirement, innocent participants may have legitimate fears about risking sanctions when they face an aggressive opponent.

In the typical conventions of positional negotiation in which each side starts by making an extreme offer, each side may accuse the other of bad faith. Without the threat of bad-faith sanctions, these moves are merely part of the kabuki dance of

negotiation. With the prospect of such sanctions, bad-faith claims take on legal significance that can spawn satellite litigation.

REQUIREMENT OPPOSED

The American Bar Association Section of Dispute Resolution recently adopted a resolution opposing the use of broad good-faith requirements. See www.abanet.org/dispute/webpolicy.html#9. The resolution was drafted by a task force led by John W. Cooley, a neutral at Judicial Dispute Resolution in Chicago, who was the section's Mediation Committee chairman. The task force also included Homer C. LaRue, a professor at Washington, D.C.'s Howard University School of Law; Phoenix neutral and former section chairman Bruce Meyerson, and this author. The resolution states:

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.

This policy essentially codifies court decisions interpreting good-faith requirements, except that it sides with the courts that do not require settlement authority. In addition, it recommends that "[t]he content of mediators' reports to the court or court administrators should be narrowly restricted." This is a sensible approach that avoids problems with broad good-faith requirements described above.

The ABA section's policy states that "[r]ules authorizing sanctions may be necessary but not sufficient to promote productive behavior in mediation and thus additional measures may be needed." Although avoiding broad good-faith requirements can prevent some problems, this does not affirmatively improve conduct in mediation. Thus the policy recommends that "[c]ourt-mandated mediation programs should engage in collaborative planning efforts and establish educational programs about mediation procedures for participants."

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A good-faith mediation requirement is troublesome. Although it may deter some inappropriate conduct, it also may stimulate even more problems. It risks undermining the interests of all the stakeholder groups of court-connected mediation, especially interests in the integrity of the mediation process and the courts. A good-faith requirement could deter and punish truly egregious behavior in exceptional cases, but it would do so at the expense of overall confidence in the system of mediation. Barring evidence of a substantial number of problems of real bad faith--as opposed to loose litigation talk--the large cost of a bad-faith sanctions regime is not worth the likely small amount of benefit, especially considering alternative policy options.

Part II of this article in next month's Alternatives will describe how courts can conduct such planning and education efforts.

*The author is an associate professor and director of the LL.M. Program in Dispute Resolution at the University of Missouri-Columbia School of Law. This article is based on "Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs," 50 UCLA Law Review 69 (2002) (available at www.law.missouri.edu/lande/publications.htm). That article received honorable mention in the professional articles category of CPR's Awards for Excellence in ADR in 2002.