

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

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

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## INTRODUCTION

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

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

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

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

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

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2. Julie Macfarlane, *Culture Change? Commercial Litigators and the Ontario Mandatory Mediation Program*, 2002 J. DISP. RESOL. (forthcoming 2002) (manuscript at 32) (quoting a Toronto litigator) (first alteration in original). Macfarlane interviewed the attorney in a study based on interviews of forty litigators who had participated in at least ten mediations. Some lawyers and litigators in the United States also take an adversarial approach to alternative dispute resolution (ADR). See Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or “The Law of ADR,”* 19 FLA. ST. U. L. REV. 1, 17 (1991) (expressing concern that ADR has become “just another stop in the ‘litigation’ game which provides an opportunity for the manipulation of rules, time, information, and ultimately, money”).

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

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

*Id.*

4. See Kimberlee K. Kovach, *Good Faith in Mediation—Requested, Recommended, or Required? A New Ethic*, 38 S. TEX. L. REV. 575, 591–96 (1997) (describing problems caused by bad-faith conduct); Maureen A. Weston, *Checks on Participant Conduct in Compulsory ADR: Reconciling the Tension in the Need for Good-Faith Participation, Autonomy, and Confidentiality*, 76 IND. L.J. 591, 607–08 (2001) (arguing that sanctions are needed “to compensate the aggrieved party for the costs, fees, time, and anguish”); Roger L. Carter, *Oh Ye of Little [Good] Faith: Questions, Concerns and Commentary on Efforts to Regulate Participant Conduct in Mediations 2002* J. DISP. RESOL. (forthcoming 2002) (draft at 1–2, 48 n.191, 51 n.197) (describing cases in which parties take off time from work and travel great distances for mediations that are unproductive because key participants fail to attend or to make reasonable offers).

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

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

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

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

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

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

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

8. See *infra* notes 23-26 and accompanying text for discussion of the definition of good faith. Some commentators have proposed establishing good-faith requirements to ensure good conduct in mediation. For the two main proposals for a good-faith requirement, see generally Kovach, *supra* note 4; Weston, *supra* note 4. Other commentators have expressed support for good-faith requirements. See Michael Z. Green, *Proposing a New Paradigm for EEOC Enforcement After 35 Years: Outsourcing Charge Processing by Mandatory Mediation*, 105 DICK. L. REV. 305, 337 (2001) (proposing "good faith obligation to meet and attempt mediation" in EEOC cases); Alan Kirtley, *The Mediation Privilege's Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest*, 1995 J. DISP. RESOL. 1, 49-50 (favoring a good-faith requirement for mandatory mediation but not voluntary mediation); Tony Biller, Comment, *Good Faith Mediation: Improving Efficiency, Cost, and Satisfaction in North Carolina's Pre-Trial Process*, 18 CAMPBELL L. REV. 281, 297-301 (1996) (arguing that carefully designed good-faith standards would "improve efficiency, reduce cost and increase public satisfaction with the civil court process"); Kathleen A. Devine, Note, *Alternative Dispute Resolution: Policies, Participation, and Proposals*, 11 REV. LITIG. 83, 108-09 (1991) (arguing that courts should imply good-faith requirements if statutes do not provide for them); Charles J. McPheeters, Note, *Leading Horses to Water: May Courts Which Have the Power to Order Attendance at Mediation Also Require Good-Faith Negotiation?*, 1992 J. DISP. RESOL. 377, 393 (arguing that good-faith requirements are appropriate means for efficient use of alternative dispute resolution and courts); Matthew A. Tenerowicz, Note & Comment, *"Case Dismissed"—or Is It? Sanctions for Failure to Participate in Court-Mandated ADR*, 13 OHIO ST. J. ON DISP. RESOL. 975, 998-1000 (1998) (favoring sanctions

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

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

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

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

10. Good-faith requirements have been criticized as being ill-conceived and producing unintended, adverse effects. For the three principal critiques, see Wayne D. Brazil, *Continuing the Conversation About the Current Status and the Future of ADR: A View from the Courts*, 2000 J. DISP. RESOL. 11, 30–33; Edward F. Sherman, *Court-Mandated Alternative Dispute Resolution: What Form of Participation Should Be Required?*, 46 SMU L. REV. 2079, 2089–94 (1993); Alexandria Zylstra, *The Road from Voluntary Mediation to Mandatory Good Faith Requirements: A Road Best Left Untraveled*, 17 J. AM. ACAD. MATRIMONIAL LAW. 69, 86–97 (2001); see also James J. Alfini & Catherine G. McCabe, *Mediating in the Shadow of the Courts: A Survey of the Emerging Case Law*, 54 ARK. L. REV. 171, 205–06 (2001) (arguing that vigorous judicial enforcement of a good-faith requirement may stimulate subtle forms of coercion that "threaten to erode the integrity of the mediation process"); Stephen G. Bullock & Linda Rose Gallagher, *Surveying the State of the Mediative Art: A Guide to Institutionalizing Mediation in Louisiana*, 57 LA. L. REV. 885, 970 (1997) (opposing a good-faith requirement because it would require the mediator to function in an "inappropriate role" and risks "proliferation of litigation"); David Hricik, *Reflections of a Trial Lawyer on the Symposium: Dialogue with the Devil in Me*, 38 S. TEX. L. REV. 745, 749–52 (1997) (arguing that a duty of good faith including a duty of disclosure would result in satellite litigation, unhappy parties, and reduced use of mediation); Lisa A. Lomax, *Alternative Dispute Resolution in Bankruptcy: Rule 9019 and Bankruptcy Mediation Programs*, 68 AM. BANKR. L.J. 55, 81 (1994) (opposing sanctions for abuse of mediation because of the risk of possible satellite litigation and threats to confidentiality, appearance of mediators' neutrality, mediators' effectiveness, and the willingness of mediators to take cases); Andreas Nelle, *Making Mediation Mandatory: A Proposed Framework*, 7 OHIO ST. J. ON DISP. RESOL. 287, 304–05 (1992) (expressing concern that a good-faith requirement would violate confidentiality protections, cause settlement pressure, and undermine voluntariness of agreements); Society of Professionals in Dispute Resolution, *Dispute Resolution as It Relates to the Courts: Mandated Participation and Settlement Coercion*, 46 ARB. J. No. 1, at 38, 46 (1991) (recommending against a good-faith requirement); Jean R. Sternlight, *Lawyers' Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting*, 14 OHIO ST. J. ON DISP. RESOL. 269, 296 n.100 (1999) (arguing that a good-faith requirement "may create more problems than it solves"); David S. Winston, *Participation Standards in Mandatory Mediation Statutes: "You Can Lead a Horse to Water. . ."*, 11 OHIO ST. J. ON DISP. RESOL. 187, 197–98 (1996) (arguing that good faith is "inherently ambiguous" and that a good-faith requirement would require courts to investigate the mediation process and undermine efficiency); Caroline Harris Crowne, Note, *The Alternative Dispute Resolution Act of 1998: Implementing a New Paradigm of Justice*, 76 N.Y.U. L. REV. 1768, 1803 (2001) (arguing that mandating good faith would make a "farce of the process"); Note, *Mandatory Mediation and Summary Jury Trial: Guidelines for Ensuring Fair and Effective Processes*, 103 HARV. L. REV. 1086, 1096–97 (1990) (arguing that good-faith requirements are too vague to provide sufficient guidance on what constitutes compliance).

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

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

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

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

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

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

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

13. See *infra* text accompanying note 55.

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

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

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

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

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

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

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

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

20. See *supra* note 10.

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

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

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

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

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

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



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

## I. GOOD FAITH IN MEDIATION

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

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

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

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

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

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

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

- a. Compliance with the terms and provisions of [the state statute or other rule governing mediation];
- b. Compliance with any specific court order referring the matter to mediation;
- c. Compliance with the terms and provisions of all standing orders of the court and any local rules of the court;
- d. Personal attendance at the mediation by all parties who are fully authorized to settle the dispute, which shall not be construed to include anyone present by telephone;
- e. Preparation for the mediation by the parties and their representatives, which includes the exchange of any documents requested or as set forth in a rule, order, or request of the mediator;
- f. Participation in meaningful discussions with the mediator and all other participants during the mediation;

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

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

## B. Current Status of Good-Faith Requirements

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

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- g. Compliance with all contractual terms regarding mediation which the parties may have previously agreed to;
  - h. Following the rules set out by the mediator during the introductory phase of the process;
  - i. Remaining at the mediation until the mediator determines that the process is at an end or excuses the parties;
  - j. Engaging in direct communication and discussion between the parties to the dispute, as facilitated by the mediator;
  - k. Making no affirmative misrepresentations or misleading statements to the other parties or the mediator during the mediation; and
  - l. In pending lawsuits, refraining from filing any new motions until the conclusion of the mediation; . . .

"Good faith" does not require the parties to settle the dispute. The proposals made at mediation, monetary or otherwise, in and of themselves do not constitute the presence or absence of good faith.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

68. See *supra* notes 56-57.

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

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



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

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

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

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

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

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

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

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

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

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

### C. Problems with Good-Faith Requirements

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

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

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

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

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74. *Id.* at 447.

75. *Id.* at 446–47.

76. *Id.* at 454–55.

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

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

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

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

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

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

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

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

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

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

84. *Id.* at 603.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

92. *Id.*

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

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

95. See *supra* text accompanying note 87.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

105. *Id.*

106. *Id.* at 10–13.

107. *Id.*

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

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

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

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

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

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

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

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



## 2. Overbreadth of Bad-Faith Concept

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

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

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

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

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113. See *supra* note 25.

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

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

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

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

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

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

### 3. Inclusion of Settlement-Authority Requirement

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

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

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

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

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

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

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

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

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

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

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

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125. Leonard L. Riskin, *The Represented Client in a Settlement Conference: The Lessons of G. Heileman Brewing Co. v. Joseph Oat Corp.*, 69 WASH. U. L.Q. 1059, 1110 (1991).

126. *Id.* at 1110–11.

127. *Id.* at 1112.

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

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

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

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

132. *Id.* at 280.

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

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

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

134. *Id.* at 653.

135. Judge Frank H. Easterbrook writes:

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

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

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

136. Judge Easterbrook writes:

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

. . . .

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

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

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

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

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

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138. *Id.* at 45.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

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

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

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

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

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

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

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

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

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

147. See *supra* note 136.

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

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

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

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

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

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

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

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

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

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

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

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

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

157. *See id.*

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

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

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

159. *Id.* at 599.

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

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

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



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

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

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

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

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

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

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

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

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

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

##### 5. Weakened Confidentiality of Mediation Communications

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

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

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

168. See *infra* Part II.A.

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

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

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

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

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

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

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

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

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

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

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175. *Id.* at 638.

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

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

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

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

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

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

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

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

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

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

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

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

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

184. See *id.* § 6.

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

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

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

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

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

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

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

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

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

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

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

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

191. *Id.* at 1133–34.

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

193. *Id.* (emphasis added).

194. See *supra* note 189.

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

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

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

## 6. Encouragement of Inappropriate Mediator Conduct

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

209. *Id.* at 299.



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*Id.* at 385.

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

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

220. 28 U.S.C. § 472(b) (2000).

221. *Id.* § 472(a).

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

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

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

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

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

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

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

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

227. 28 U.S.C. §§ 651–658 (2001).

228. *Id.* § 651(b).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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244. See *id.* at 150–67.

245. See *id.* at 168–86.

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

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

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



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

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

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

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

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

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

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

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

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

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

## B. Addressing Interests of Mediation Programs' Stakeholders

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

### 1. Parties' Interests

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

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

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

257. *Id.* at 888–89.

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

259. *Id.* at 893–94.

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

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

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

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

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

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261. *Id.* at 896–97.

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

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

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

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

## 2. Attorneys' Interests

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

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

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

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

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

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

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

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

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

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

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

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

271. *Id.* at 392.

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

273. *Id.* at 150.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### 3. Courts' Interests

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

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

Brazil, *supra* note 10, at 29.

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

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

284. *Id.* at 163.

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

#### 4. Mediators' Interests

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

305. See *supra* note 25.

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

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

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

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

*Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

319. *Id.* at prefatory note.

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### 4. Policy Governing Cancellation of Mediation

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

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

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

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

340. *Id.* at 657–58.

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

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

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

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

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

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

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

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

## 5. Protections Against Misrepresentation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## CONCLUSION

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

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

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

360. UNIF. MEDIATION ACT § 6(a)(6) (2001) (stating an exception to privilege for mediation communications related to claims of professional misconduct or malpractice based on conduct occurring during a mediation). See generally Pamela Kentra, *Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict for Attorney-Mediators Between the Duty to Maintain Mediation Confidentiality and the Duty to Report Fellow Attorney Misconduct*, 1997 BYU L. REV. 715.

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

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

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

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

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

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

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

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

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

366. See *supra* note 334.



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

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

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