

Defining Good Faith Participation in Mediation

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Mediation is slowly being recognized as an ideal way for parties to resolve their disputes outside of court. Mediation, as a form of alternative dispute resolution, “is premised upon the intention that by providing disputing parties with a process that is confidential, voluntary, adaptable to the needs and interests of the parties, and within party control, a more satisfying, durable, and efficient resolution of disputes may be achieved.”¹ Mediation is unique, as it is nonbinding, and the mediator is present to facilitate communication and negotiation between the parties, and not to impose a settlement on them.² As a result of the voluntary nature of mediation, “the potential to exploit bargaining power or abuse the process is ripe.”³ One litigator apply described this problem when he said:

[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 possible can, and mandatory mediation is custom made. I can waste more time, I can string it along, I can make sure this thing never gets resolved because . . . I know the language. I know how to make it look like I'm heading in that direction. I make it look like I can make all the right noises in the world, like this is the most wonderful thing to be involved in when I have no intention of ever resolving this. I have the intention of making this the most expensive, longest process but is it

¹ 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, 592 (2001).

² *Id.* at 598.

³ *Id.* at 604.

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.⁴

To protect against this type of abuse, many “courts and legislatures have imposed requirements that parties participate ‘in good faith.’”⁵

A large percentage of states have statutory requirements of good faith.⁶ For example, under California’s Fire and Marine Insurance Mediation Code Section, parties to a mediation proceeding are required to negotiate in good faith and “have the authority to immediately settle claims.”⁷ Many federal district courts and state courts have local rules that require good faith participation in mediation.⁸ Out of all of these statutes and rules, only one attempts to provide an

⁴ See Julie Macfarlane, *Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation*, 2002 J. DISP. RESOL. 241, 267 (2002).

⁵ See Weston, *supra* note 1, at 608.

⁶ See, e.g., ALASKA STAT. § 21.07.010(a)(4)(D) (Michie 2001); ARIZ. REV. STAT. ANN. § 8-116.01(G) (2001); CAL. FAM. CODE § 8616.5(e)(3), (f), (h)(2)(C) (West 2004); 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), 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), (2001); HAW. REV. STAT. §§ 421J-10(b)(2), 514A-94(b)(2) (Michie 2005); Ind. CODE ANN. § 14-26-2-23(3)(A) (West 2005); LA. CHILD. CODE ANN. art. 437(B) (2005); ME. REV. STAT. ANN. tit. 10, § 1487(8), tit. 19-A, §§ 251(4), § 1804, tit. 38, § 347-A(4)(E) (West 2006); MINN. STAT. ANN. §§ 115B.414(3)–(4), 583.26(5)(c)(1), 583.27 (West 2006); NEV. REV. STAT. ANN. § 40.680(8) (Michie 2005); N.C. GEN. STAT. ANN. § 115C-116(b)(9) (West 2005); OKLA. STAT. ANN. tit. 12, §§ 1824(3), 1825(D) (West 2006); OR. REV. STAT. ANN. §§ 109.305(4), 421.628(6) (West 2003); UTAH CODE ANN. § 30-3-10.9(7) (2005); WASH. REV. CODE ANN. §§ 26.09.184(4)(c), 59.20.080(2) (West 2006); W. VA. CODE ANN. § 19-23-6(18) (West 2006).

⁷ CAL. INS. CODE § 10089.81 (West 2002).

⁸ See, e.g., M.D. Fla. Loc. Bankr. R. 9019-2(d)(2); S.D. Fla. L.R. 9019-2(C)(4); D. Miss., Unif. Loc. R. 83.7(H); 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); N.D.N.Y. Loc. R. 83.11-5(d)(7); D. Or. Civ. R. 16.4(f)(2)(C); D. Or. Loc. Bankr. R. 9019-2(C)(2); Super. Ct. R., Butte County (Calif.) 6.21, 9.3(b); Super. Ct. R., Contra Costa County (Calif.) Prob. Pol’y Man., R. 102(B); Super. Ct. R., Inyo County (Calif.)

actual definition of good faith, the rest just require good faith without ever defining it.⁹ As a result, many scholars have equated the lack of good faith definition with Justice Stewart’s approach to obscenity of “I know it when I see it.”¹⁰ Although good faith participation in mediation is often required, how are parties to know whether or not they are acting in good faith if the statutory requirement provides no definition? Many courts have faced this same question when parties file motions for sanctions against opposing parties for failure to participate in mediation in good faith.

Courts have ruled that failing to reach an agreement at mediation is not evidence of bad faith.¹¹ The Second Circuit United States Court of Appeals added that while a party is “free to

7.4(a); Super. Ct. R., Los Angeles County (Calif.) 10.203; Super. Ct. R., Nevada County (Calif.) 5.05(B); Super. Ct. R., San Benito County (Calif.) 11.11(j); Super. Ct. R., Stanislaus County (Calif.) 3.14(A)(4); Super. Ct. R., Tuolumne County (Calif.) 4.04(d); Super. Ct. R., Ventura County (Calif.) 24.09; Haw. Prob. R., Med. R. for Prob., Trust, Guardianship Prop. 5; 12th Jud. Cir. (Ill.) Ct. R. 8.17; 16th Jud. Cir. (Ill. Ct. R. 15.22; 17th Jud. Cir. (Ill.) Ct. R. 4; 18th Jud. Cir. (Ill.) Ct. R. 14.12; 18th Jud. Cir. (Ill.) Ct. R. 15.18(I)(C)(3); 19th Jud. Cir. (Ill.) Ct. R. 11.13(e)(3); Ind. R.P., Alt. Disp. Resol. 2.1; 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; N.H. Super. Ct. R. Alt. Disp. Resol. 170(e); N.J. R. Ct. 1:40-4(e); Summit County (Ohio) C.P.R. 22.10; Baker County (Or.) Loc. R. 12.015; Clatsop County (Or.) Loc. R. 12.101; Jackson County (Or.) Loc. R. 12.103; Josephine County (Or.) Loc. R. 12.100; Polk County (Or.) Loc. R. 12.015(4); Wash. Super. Ct. Civ. R. 53.4(e); Asotin, Columbia & Garfield (Wash.) Super. Ct. Loc. R. 11(A); Whatcom County (Wash.) Super. Ct. Loc. R. 94.08(f); Yakima (Wash.) Super. Ct. Loc. R. 94.04W(A)(3)(c).

⁹ See Minn. Stat. Ann. § 583.27(1)(a) (West 2000).

¹⁰ *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). See, eg., Roger L. Carter, *Oh, Ye of Little (Good) Faith: Questions, Concerns and Commentary on Efforts to Regulate Participant Conduct in Mediations*, 2002 J. DISP. RESOL. 367 (2002).

¹¹ See, eg., *Fuchs v. Martin*, No. 49S02-0602-JV-69, 2006 WL 1029752, at *2 (Ind. Apr. 20, 2006).

adopt a ‘no pay’ position, its failure to bring a principal party [with settlement authority is] a violation of a court order and impair[s] the usefulness of the mediation conference.”¹²

In addition, a party cannot “be an ostrich” and bury his head in the sand, pleading ignorance of the process of mediation. The United States District Court in the Northern District of New York addressed this issue in the case of *Outar v. Greno Industries Inc.*¹³ In *Outar*, the plaintiff filed an employment discrimination action “alleging that the defendants discriminated against him on the basis of his race and national origin.”¹⁴ A pretrial scheduling order required the parties to submit to mediation and participate in good faith.¹⁵ After the mediation, the defendants filed a motion for sanctions, alleging that the plaintiff did not participate in good faith.¹⁶ The court agreed and granted the defendants’ motion for sanctions.¹⁷ On appeal, the district court affirmed the trial court’s decision and quoted the findings of the trial judge:

From the outset, [the plaintiff] refuse to have his attorney negotiate or speak on his behalf in terms of settlement. Consistently, he refused to negotiate or speak on his behalf, though requested repeatedly. He had hamstrung his lawyer from even providing him with a basic understanding of the purpose and benefit of negotiations and, moreover, effectively curtailing the ability to craft option legal strategy. In essence, [the plaintiff] failed to listen to the basic explanation being provided by his attorney and, thus, went to this mediation substantially unprepared. Even if he was ignorant of the process, if he went to the mediation prepared to act in good faith, he would have been more receptive to the

¹² *Negron v. Woodhull Hosp.*, No. 05-4147-CV, 2006 WL 759806 (2nd Cir.(N.Y.) Mar. 23, 2006).

¹³ No. 03-CV-0916, 2005 WL 2387840 (N.D.N.Y. Sep. 27, 2005).

¹⁴ *Id.* at *1.

¹⁵ *Id.*

¹⁶ *Id.* at *2.

¹⁷ *Id.* at *3.

importunes of all of the participants, including his attorney and the mediator, and would have fairly and reasonably participated in the process. The Court finds that he did not act in good faith in abiding by this Court's Order. It is evident that [the plaintiff] had established an irrefutable and irreplaceable course for this litigation, independent of his attorneys, and had no intention of deviating from it, even if it runs afoul of court orders.¹⁸

The court summed up the problem with this plaintiff's conduct by saying, "[t]he Court can be forgiving about a lot of things but not to the extent of allowing a litigant to refuse to follow the established procedures of the Court and the Federal Rules."¹⁹ This type of conduct is automatically labeled as bad faith.

Another area where courts have *not* struggled in identifying the lack of good faith in mediation, or bad faith, is when a party uses the mediation process as a means of extortion.²⁰ In the case of *Del Fuoco v. Wells*, "the plaintiff and his attorney sought to obtain a settlement of [the] case for \$500,000, plus an attorney's fee—an amount far in excess of any credible value of the case—in exchange for not disclosing alleged campaign violations by the Sheriff, who was then conducting a re-election campaign."²¹ The United States District Court for the Middle District of Florida granted the defendant's motion for sanctions against the plaintiff and his attorney for bad faith as a result of this conduct.²² The court explained:

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *See, eg.*, *Cooper v. Austin*, 750 So.2d 711 (Fla.App. 2000); *Berger v. Berger*, 466 So.2d 1149 (Fla.App. 1985); *Paris v. Paris*, 412 So.2d 952 (Fla.App. 1982); *Drayton v. The Associates*, No. 3:97-CV-2924-BC, 2000 WL 49189 (N.D. Tex. Jan. 21, 2000).

²¹ No. 8:03CV161T-23TGW, 2005 WL 2291720, at *1 (M.D.Fla. Sept. 20, 2005).

²² *Id.* at *13.

After an evidentiary hearing, which clearly satisfied the requirements of due process, [the plaintiff] has been found to have acted in bad faith when he made the settlement demand of \$500,000, plus an attorney's fee, since the demand was predicated upon the threat to disclose alleged campaign finance violations. The use of this case as a vehicle for the bad faith demand clearly constitutes a litigation abuse defiling the judicial process. Moreover, at the hearing, [the plaintiff] sought to vindicate his demand by stating that [the judge] had admonished the parties to settle the case. That attempt to justify the bad faith demand demeans [the judge's] proper advice to the parties to resolve this case between themselves. Consequently, [the plaintiff's] bad faith conduct at the . . . meeting plainly warrants sanctions pursuant to this court's inherent power."²³

Generally, failing to appear at the mediation and blatant disregard for court orders is defined as bad faith participation.²⁴ In 1998, the District Court in the Northern District of Texas entered an order requiring all parties in the case of *Seidel v. Bradberry* to attend mediation.²⁵ The order required that "the parties must appear at the mediation, that the parties proceed in a good faith effort to resolve the case, and that failure to comply with the order may result in the imposition of sanctions pursuant to Fed.R.Civ.P. 16(f)."²⁶ One of the defendants, Michael Batten ("Batten"), "did not participate in the selection of a mediator, he did not communicate with the other parties concerning the mediation, he did not prepare a mediation summary, and he did not respond to any of the Plaintiff's correspondence concerning the mediation."²⁷

²³ *Id.* at *10 (citations omitted).

²⁴ *See, eg.*, *Luxenberg v. Marshall*, 835 S.W.2d 136 (Tex. Ct. App. 1992); *Seidel v. Bradberry*, No. 3:94-CV-0147-G, 1998 WL 386161 (N.D. Tex. July 7, 1998).

²⁵ *Seidel*, 1998 WL 386161, at *1.

²⁶ *Id.*

²⁷ *Id.*

Subsequently, Batten was the only non-incarcerated defendant who did not attend the mediation.²⁸

After the mediation, the plaintiff filed a Motion for Sanctions against Batten for failure to abide by the court's order.²⁹ Batten did not respond to the motion, nor did he appear at the hearing.³⁰ The Court found that it could not "overlook Batten's brazen disregard of the order to attend mediation. Not only did Batten fail to attend, but he . . . refused to communicate with Plaintiff or the Court either before or after the mediation."³¹ The court found that Batten's failure to respond to the court was "evidence that [he was] intentionally thwarting the authority of the court and hampering the judicial process," and so the court awarded sanctions against Batten.³²

Although the cases mentioned seem to present a clear definition of good faith, this clarity becomes muddy when these decisions are appealed.³³ In the case of *Guzman v. Polisar*, the district court found that the defendants mediated in bad faith by refusing to let the plaintiff see certain documents he requested during the mediation.³⁴ On appeal, the court of appeals reversed

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at *2.

³¹ *Id.* at *3.

³² *Id.*

³³ See, eg., *Foxgate Homeowners' Ass'n v. Bramalea Cal., Inc.*, 108 Cal. Rptr. 2d 642 (Cal. 2001); *Avril v. Civilmar*, 605 So.2d 988 (Fla. Dist. Ct. App. 1992); *Hansen v. Sullivan*, 886 S.W.2d 467 (Tex. Ct. App. 1994); *Rizk v. Millard*, 810 S.W.2d 318 (Tex. Ct. App. 1991); *Gray v. Eggert*, 635 N.W.2d 667 (Wis. Ct. App. 2001).

³⁴ No. 99-2060, 2000 WL 1335534, at *2 (C.A.10 (N.M.) Sept. 15, 2000).

the district court's decision and held that there was no evidence that supported the finding that the defendants were involved in the decision to withhold the documents from the plaintiff.³⁵

The case of *State v. Carter* is another case where the court of appeals found insufficient evidence to support a finding of bad faith in mediation.³⁶ During the mediation session in the case, “the parties remained approximately \$20,000 apart in their offers to settle and failed to reach an agreement. Later that day, [the plaintiff] made a formal offer of judgment for \$3000 [sic], the largest amount she had offered during mediation,” which the defendant did not accept.³⁷ After mediation, the plaintiff filed a motion for sanctions against the defendant for failure “to act in good faith in making a reasonable attempt to resolve [the] case.”³⁸ The court granted the motion without holding a hearing and denied the defendant's motion to set aside the order for sanctions.³⁹

On appeal, the court of appeals reasoned that “[b]ad faith amounts to more than bad judgment or negligence; [r]ather it implies the conscious doing of wrong because of dishonest purpose or moral obliquity [I]t contemplates a state of mind affirmatively operating with furtive design or ill will.”⁴⁰ The court continued that “[s]ince a bad faith determination

³⁵ *Id.* at *3.

³⁶ 658 N.E.2d 618 (Ind. Ct. App. 1995).

³⁷ *Id.* at 620.

³⁸ *Id.*

³⁹ *Id.* at 620–21.

⁴⁰ *Id.* at 621 (quoting *Oxendine v. Public Service Co.*, 423 N.E.2d 612, 620 (Ind. App. 1980)).

inherently includes an element of culpability, a finding of bad faith should require more than the unsubstantiated allegations of an adverse party.”⁴¹ The court found no evidence in the record whatsoever of any bad faith that would support the lower court’s decision.⁴² In fact, the only evidence the court found referencing the type of participation in the mediation was the mediator’s report which stated that the mediation had been conducted in accordance with the procedures of mediation.⁴³ The court of appeals stated that “the court wholly failed . . . to set forth any legal or factual basis for its finding . . . [of] bad faith,” and therefore there was no evidentiary basis to support the finding.⁴⁴

In the case of *In re Bolden*, the Superior Court judge found that an attorney participated in mediation in bad faith by “‘unilaterally aborting’ a mediation session”⁴⁵ On appeal, the court of appeals observed that “no judge [was] present at [the mediation] sessions, nor was the record of the meeting in question here transcribed or taped.”⁴⁶ The court noted that the attorney explained to the judge that the other parties “did not object to rescheduling of the mediation.”⁴⁷ The court also noted that the reason for the attorney wanting to reschedule was pertinent to whether he participated in good faith.⁴⁸ The attorney testified “that the reason he suggested

⁴¹ *Id.* at 622.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ 719 A.2d 1253, 1254 (D.C. 1998).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 1254–55.

rescheduling the mediation was the mediator’s refusal . . . to allow his . . . expert, who had become physically unavailable on short notice, to participate via telephone conference call.”⁴⁹ The court found that the attorney’s “consequent unwillingness to go forward until the expert was available [was] understandable—particularly since, as he also represented, the agreed purpose for this meeting had been to hear the expert’s opinion.”⁵⁰ The court also found that the judge’s suggestion that the views and supporting information of the expert “could have been made available to counsel, prior to the mediation, for counsel’s use during the mediation,” provided too much guesswork as to what type of presentation would have been suitable and sufficient to make the mediation successful.⁵¹

The Texas Court of Appeals in *Texas Department of Transportation v. Pirtle*, affirmed a lower court decision assessing sanctions against a party who attended a court ordered mediation, but then refused to participate.⁵² In contrast, the court of appeals in *Texas Parks and Wildlife Department v. Davis*, declined to follow *Pirtle*, because the opinion was based on a different set of facts, facts that were not present in *Davis*.⁵³ In *Davis*, the court of appeals reversed a trial court decision assessing sanctions against a party who wrote a written objection to the order for

⁴⁹ *Id.* at 1255.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² 977 S.W.2d 657 (Tex. App. 1998).

⁵³ 988 S.W.2d 370, 375 (Tex. App. 1999).

mediation ten days after the order was entered, which the trial court overruled.⁵⁴ The party did attend the mediation and made an offer.⁵⁵

These appeals show that different fact situations cannot be pushed into the same cookie cutter molds. What works for one situation, may not work for another. To write a standardized rule which would accommodate all fact patterns would become burdensome. The answer to the dilemma of defining what constitutes good faith comes from a case decided by the United States District Court of Idaho.⁵⁶ In this case the court entered an order requiring the parties to submit to a judicially supervised settlement conference.⁵⁷ The judge, a private mediator, sent each of the parties a letter just before the settlement conference setting out the details of how the mediation was to proceed.⁵⁸ In this letter the judge explained that one of his requirements was the attendance of "the most senior individual within the company with personal responsibility over the issues in litigation and who is the decision maker on the matter," and that it was "not sufficient for a party or company representative to participate only by telephone" without giving prior notice and an agreement between counsel for the parties.⁵⁹

At mediation, one of the parties did not provide such a person, and the court in turn granted a motion for sanctions. The court held that although the order requiring the parties to

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Performance Chevrolet, Inc. v. Market Scan Info. Sys.s, Inc., No. CV04-244-S-BLW, 2005 WL 1768650 (D.Idaho July 25, 2005).

⁵⁷ *Id.* at *1.

⁵⁸ *Id.*

⁵⁹ *Id.*

submit to a judicial settlement conference did not contain any explicit instructions requiring the parties to send a representative with sufficient authority to actually settle at mediation, “implicit in the Court’s Order referring the matter to ADR, was the requirement that the parties negotiate in good faith and abide by the private mediator’s procedures governing the mediation.”⁶⁰ The judge made it very clear what his procedures were by sending each of the parties a letter containing all of this information.⁶¹ By providing specific obligations and expectations to the parties before mediation, the judge put those parties on notice of what would constitute good faith participation.

This same tool can be used effectively in the future. Courts should outline specific expectations and requirements in their orders sending parties to mediation. In the event that an expectation is not met or a requirement is not fulfilled, the court can hold a hearing on the failure to meet those expectations or fulfill those requirements, i.e., the failure to participate in good faith by not complying with the court’s order. In addition, private mediators can bolster the definition of good faith by doing what the judge did in the previous case. By sending out their requirements and procedures for the mediation, the mediator is communicating directly to the participants what they will be required to do in order to participate in that mediation session in good faith. This eliminates the need for a long complicated definition of good faith, and instead allows for flexibility in the definition to fit the needs of different situations, different parties, and different facts.

⁶⁰ *Id.* at *4.

⁶¹ *Id.*

