

Confidentiality or Control: Which will Prevail as Confidentiality and “Good Faith” Negotiation Statutes Collide in Court-Annexed Mediations?

I. Introduction

With the increasing use of court-annexed mediation,¹ statutes and court rules have attempted to regulate two contradictory goals of this alternative dispute resolution process: confidentiality and negotiation in “good faith.” Confidentiality statutes are commonplace in almost every jurisdiction, while statutes allowing one party to recover sanctions against the other for not participating in “good faith” are a relatively recent development. However, few, if any, of the jurisdictions enacting *both* confidentiality and “good faith” negotiation have reconciled the inherent dissonance between these two requirements—namely that confidentiality must be sacrificed in order to show that one party has breached the requirement to negotiate in good faith.

This paper will examine the conflict between these two requirements and propose a solution to this new problem. Section Two will explore the policies underlying both confidentiality and “good faith” requirements. Section Three will discuss the ways in which courts and the Uniform Mediation Act (UMA) have interpreted the interplay between these competing requirements. Section Four will highlight ways in which this tension can be resolved, and Section Five sets forth the conclusion that “good faith” requirements should be eliminated in favor of the objective requirement of attending the mediation with settlement authority.

II. Policies Underlying Confidentiality and “Good Faith” Requirements

Both confidentiality and negotiation in “good faith” are valuable to mediation. The assurance of confidentiality helps create an atmosphere in which the parties feel comfortable to

¹ See SARAH R. COLE ET AL., *MEDIATION: LAW, POLICY, PRACTICE* § 5:01, at 1 (2d ed. 2001); see also 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, 597–603 (2001); Tony Biller, Note, *Good Faith Mediation: Improving Efficiency, Cost, and Satisfaction in North Carolina’s Pre-Trial Process*, 18 *CAMPBELL L. REV.* 281, 283–89 (1996).

exchange information, and “good faith” requirements encourage participation and fair bargaining. However, the parties will have to sacrifice some confidentiality in order to prove to a judge that one party has not acted in “good faith.” This section will examine the benefits and shortcomings of both confidentiality and “good faith” requirements.

A. Confidentiality

Confidentiality statutes create an environment in which disputants can overcome their fears of disclosure, and they help encourage the free flow of information. “Confidentiality” commonly means that communications made in mediation will not be disclosed to a judge, jury, or others connected with a legal proceeding.² Without this sense of security, the parties may not disclose all of the relevant facts, especially facts detrimental to one party.³ Candor is essential to mediation, and the confidentiality statutes help encourage this openness.⁴ The mediator should be able to use the guarantee of confidentiality in order to encourage a party to make concessions or to admit “bad facts” in their case. Similarly, mediators can utilize the guarantee of confidentiality in conjunction with the ability to caucus to make the parties feel sufficiently at ease to speak.⁵ The primary goal of a mediator is to facilitate discussion, and reminding the parties of the guarantee of confidentiality should help create an environment in which the participants can speak candidly.

Confidentiality statutes also create the perception that the mediation procedure is fair to the parties. When the parties realize that confidentiality applies equally to all parties—including the mediator—they should feel that the process treats all of the participants in a fair and equal

² See Laurence Freedman, *Confidentiality: A Closer Look*, in CONFIDENTIALITY IN MEDIATION: A PRACTITIONER’S GUIDE 47, 19 (Anne Clare ed., 1985).

³ Paul Dayton Johnson, Jr., Note, *Confidentiality in Mediation: What can Florida Glean from the Uniform Mediation Act?*, 30 FLA. ST. U.L. REV. 487, 489 (2003); see also Ellen E. Deason, *Predictable Mediation Confidentiality in the U.S. Federal System*, 17 OHIO ST. J. DISP. RESOL. 239, 245 (2002).

⁴ See Lawrence R. Freedman & Michael L. Prigoff, *Confidentiality in Mediation: The Need for Protection*, 2 OHIO ST. J. ON DISP. RESOL. 37, 38 (1986).

manner.⁶ Similarly, the parties should feel confident in the mediation knowing that the *mediator* is prohibited from revealing the mediation communications.⁷ If the mediator were allowed to testify at a trial or in a deposition, the “so called” neutral will have to testify on behalf of one of the parties. If this occurs, both parties will presume that the mediator is taking sides, thereby tainting both the particular mediation as well as the mediation process in general.⁸ Thus, maintaining the confidentiality of mediation communications enhances the credibility of both the mediator and the court-annexed program.

Although confidentiality is crucial to mediation, the privilege should not be limitless. A confidentiality clause without limits could be used as vehicle to commit or plan serious wrongdoings.⁹ Although these instances are rare, having some limitations give the courts a predictable course of action when they do happen. Furthermore, it is unlikely that anyone would expect that the privilege would extend to such heinous abuses. Broad confidentiality rules and statutes are necessary, but this discussion demonstrates the necessity for some limitations.

B. “Good Faith” Negotiations

The most obvious reason to enact a requirement to negotiate in “good faith” is to prevent tolerance of abusive behavior in mediation. As the number of participants in court-annexed mediation grows, sophisticated repeat players have begun to develop tactics to take advantage of less astute disputants.¹⁰ Increasingly common tactics include engaging in “fishing expeditions”

⁵ Johnson, *supra* note 3, at 489.

⁶ *Id.* 489–90.

⁷ Carol L. Izumi & Homer C. LaRue, *Prohibiting “Good Faith” Reports Under the Uniform Mediation Act: Keeping the Adjudication Camel Out of the Mediation Tent*, 2003 J. DISP. RESOL. 67, 84 (2003).

⁸ *See* Deason, *supra* note 3, at 246 (noting that confidentiality is crucial to mediator neutrality).

⁹ *See id.* at 248.

¹⁰ *See* John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. REV. 69, 78 (2002) (noting that without a “good faith” standard of some sort, participants may just “go through the motions” during the mediation or may try to take advantage of lesser-situated opponents).

for information or using mediation to harass an opponent.¹¹ These tactics can be difficult for a lawyer to combat, and their effect on a pro se participant may be especially dangerous.¹²

Implementation of “good faith” requirements help create a fairer playing ground for all participants; however, these statutes or rules need to be enforced to have effect. If the participants can be obligated to act consistently with the goals and objectives of mediation, then the participants should be able to utilize the many benefits of mediation.¹³

“Good faith” requirements can also help define the norm of what constitutes bad faith, so future participants will know how to conduct themselves in mediation.¹⁴ This is a benefit for the system as a whole, though not necessarily one for any one participants. Presumably, after many lawsuits over many years, the courts will define a consistent meaning of “good faith,” and then parties to future mediations will be able to comport themselves in an acceptable manner.¹⁵

Although this is a laudable goal, there are problems with this policy. First, participants *today* do not have a clear idea on how to act in a mediation. Second, of the cases that go to litigation, the opinions have conflicting outcomes.¹⁶ Finally, given the fluid nature of the phrase “good faith,” it is doubtful that a clear definition will ever come to light.

Another benefit of the “good faith” requirements is that this requirement should increase efficiency.¹⁷ Parties that participate in good faith are presumably more likely to reach a

¹¹ 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, 29 (2000); see also Kimberlee K. Kovach, *Good Faith in Mediation—Requested, Recommendation, or Required? A New Ethic*, 38 S. TEX. L.R. 575, 591–94 (1997) (noting that lawyers who are used to the adversarial tactics of litigation may use the mediation process in a coercive way).

¹² See Weston, *supra* note 1, at 604 (“Because ADR use is largely unaccountable and the players unregulated, the potential to exploit bargaining power or abuse the process is ripe, with seemingly little consequences.”).

¹³ Kovach, *supra* note 11, at 581 (“In order to maintain the integrity of the mediation process, the conduct of the participants must be consistent with its goals and objectives.”).

¹⁴ *Id.*

¹⁵ See *id.*

¹⁶ See *infra* Part III.A .

¹⁷ Izumi & LaRue, *supra* note 6, at 71–72.

settlement, so the parties save the time and money associated with going to court.¹⁸ Mediation is not only efficient for the parties but also for the court system because it can remove cases from a busy docket. It may also increase the likelihood of settlement because the parties have begun to speak with one another.

Despite all of the benefits of “good faith” requirements, these statutes have some disadvantages. The first problem with “good faith” statutes is that the phrase is not defined. Neither practitioners nor the courts have a grasp on the definition. In 1991, Professor Alfini conducted a survey of lawyers and found that while most lawyers supported the “good faith” requirement, few were able to define its scope and method of enforcement.¹⁹ The concept is vague. It lacks clarity, and the phrase does not suggest any guidelines.²⁰ The problems of defining “good faith” are so pervasive that one scholar referred to the famous profanity test to describe bad faith: “you know it when you see it.”²¹ Debates over whether “good faith” should be defined with subjective standards or objective standards or a combination of the two have produced little, if any, common understanding of the concept.²²

A few jurisdictions have attempted to define the conduct that constitutes “bad faith.”²³ However, most statutes are vague, leaving the question of what constitutes “good” or “bad faith” for the courts. Courts, in turn, have found that following behaviors lack good faith: failing to

¹⁸ Kovach, *supra* note 11, at 591; David S. Winston, Note, *Participation Standards in Mandatory Mediation Statutes: “You Can Lead a Horse to Water . . .”*, 11 OHIO ST. J. DISP. RESOL. 187, 190 (1996) (one of the advantages of court-ordered mediation is that if the parties settle, they save the expenses associated with a full trial).

¹⁹ James J. Alfini, *Trashing, Bashing, and Hashing It Out: Is This the End of “Good Mediation”?*, 19 FLA. ST. U.L. 47, 63–64 (1991). .

²⁰ Izumi & LaRue, *supra* note 6, at 74.

²¹ Kovach, *supra* note 11, at 600.

²² See, e.g., *Doyle v. Gordon*, 158 N.Y.S.2d 248, 259–60 (N.Y. App. Div. 1954) (“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.”); *Hunt v. Woods*, 1996 WL 8037, *3 (6th Cir. 1996) (“good faith” requires 1) cooperation with discovery proceedings, 2) that the participant evaluated the case, 3) that the participants have not unnecessarily delayed the underlying proceedings, and 4) made a “good faith” offer for settlement); see also Kovach, *supra* note 11, at 610 (stating that “to judge a person’s state of mind is too complex and subjective”).

²³ See Weston, *supra* note 1, at 609.

attend the mediation session; failing to bring a person with full settlement authority to the mediation session; failing to bring all relevant evidence and witnesses; and using tactics that the court found to be frivolous, obstructive, or an abuse of the process.²⁴ Interestingly, the courts have been willing to impose sanctions when the unwilling party has *done something* objective to defeat the purposes of mediation, and not when the party has *said something* offensive.²⁵

Another fundamental problem with “good faith” statutes is that they directly conflict with confidentiality statutes. Courts cannot enforce amorphous “good faith” standards without delving into a particular mediation and determining in detail what each party did or said. Parties are often assured by the mediator that their communications will be confidential—or even privileged in some jurisdictions—but if one party acts in bad faith, the entire proceeding may be reviewed if the opposing party requests sanctions.²⁶ The enforcement of “good faith” negotiation standards is usually contrary to at least one parties’ expectation of confidentiality.

Surprisingly, little of the scholarship on “good faith” negotiation obligations deals directly with the issue of confidentiality. Most authors debate whether or not “good faith” standards actually fix the problems associated with mediation abuse, or whether they are necessary at all.²⁷ Although the courts have rarely addressed the issue of “good faith” negotiation standards and their interplay with confidentiality statutes, it is not uncommon for participants to be held accountable to both of these standards. It is a matter of time before more

²⁴ See, e.g. Gilling v. E. Arilines, Inc. 680 F. Supp. 169, 170 (D.N.J. 1988)(awarding sanctions for the defendant’s failure to participate meaningfully in a court-annexed arbitration); New England Merchs. Nat’l Bank v. Hughes, 556 F. Supp. 712, 714–15 (E.D. Pa. 1983)(defendant failed to attend court-connected arbitration, so defendant’s request for trial de novo was rejected); Genovia v. Cassidy, 193 Cal. Rptr. 464, 458 (Cal. Ct. App. 1983)(upholding the dismissal of the case for “premeditated, intentional and purposeful course of action taken by plaintiff and his counsel to seek an avenue of escape from a clearly mandated arbitration procedure).

²⁵ For a more thorough evaluation of the case law, see *infra* Part III.A.

²⁶ See Lande, *supra* note 10, at 75 (2002).

²⁷ See, Izumi & LaRue, *supra* note 6, at 77–78. (noting that some scholars believe that there is insufficient evidence to prove that the issue of compliance with “good faith” requirements are even necessary and that most people abide by these standards whether or not they are aware of their existence).

jurisdictions will hear cases on the inherent conflict between “good faith” negotiation and confidentiality requirements.

There are a variety of other potential shortcomings to the “good faith” requirements in mediation. First, the “good faith” requirement could be used, ironically, as a threat to make false “bad faith” complaints to the judge.²⁸ Similarly, “good faith” negotiation requirements could reduce participant choice in dispute resolution process.²⁹ A participant in mediation may feel pressured to settle because of the “good faith” requirement, rather refusing to settle and await his or her day in court. If motions for sanctions based on acting in “bad faith” becomes common, this would also have the effect of prolonging litigation or creating satellite litigation.³⁰ Furthermore, if a mediator discloses confidential information to a court in a hearing for sanctions or on collateral litigation, public confidence in mediation could wane.³¹ Although “good faith” statutes can benefit mediation, these consequences must be kept in mind.

III. The Resolution of the Collision

Because enforcement of the “good faith” negotiation statutes requires a breach of confidentiality,³² the courts and legislatures have had to confront these conflicting requirements. With little legislative history for either the confidentiality statutes or the “good faith” statutes to use as guidance, the courts have been left with the task of fitting these incompatible jigsaw pieces together. In this part, this paper will focus on how the courts have weighted the benefits

²⁸ Izumi & LaRue, *supra* note 6, at 74 (noting that either one party or the mediator could threaten to report false abuse to the judge).

²⁹ *Id.*

³⁰ *Id.* (purpose of ADR is defeated if satellite litigation becomes commonplace); *see also* Winston, *supra* note 18, at 189 (1996) (“One danger of an amorphous participation standard is that it may spawn satellite litigation over compliance which could undermine the effectiveness of the mediation process.”).

³¹ *See* Kovach, *supra* note 11, at 602 (stating that mediators will understandably be hesitant to testify at a trial because the mediator will be viewed as having had taken sides with one party or the other); Winston, *supra* note 18, at 189 (noting that any time a mediator testifies in adjudication, the parties and the public will view the mediator as taking sides, thus eroding the public’s confidence in the mediator’s neutrality).

of confidentiality and “good faith” negotiation statutes in order to determine which policies will control the case. It will also examine how the UMA has dealt with the conflict.

A. The Reaction from the Courts

Few courts have directly addressed the issue of whether confidentiality statutes can be breached in order to prove that parties violated a duty to act in “good faith.” Only courts in two states, California and Texas, have decided this issue, and these courts held that confidentiality provisions generally prohibit the disclosures of mediation communications.

The Supreme Court of California ruled that there should be no judicially created exception to confidentiality in situations of “bad faith” participation.³³ In *Foxgate*, the superior court ordered the parties to a construction dispute to attend mediation conducted by Judge Smith, who acted as both the mediator and the special master for ruling on the discovery motions.³⁴ The mediation order required the parties make their “best efforts to cooperate in the mediation process.”³⁵ The plaintiff reported to the mediation with nine expert witnesses; the defendant appeared late and did not bring any experts.³⁶ The mediator, then, cancelled the session.³⁷ As a result, the plaintiff sued for sanctions in the amount of \$24,744.55 to cover the plaintiff’s preparation and the expenses of the expert witnesses.³⁸ Judge Smith filed a report to the court detailing the misdeeds of the defendant and divulging mediation communications.³⁹

³² See *supra* Part II.B for a more complete discussion of the collision of confidentiality statutes and a requirement to negotiate in good faith or in a meaningful manner.

³³ *Foxgate Homeowners’ Assoc. v. Bramalea California, Inc.*, 25 P.3d 1117, 1128 (Cal. 2001).

³⁴ *Id.* at 1119–20.

³⁵ *Id.*

³⁶ *Id.* at 1120.

³⁷ *Id.*

³⁸ *Foxgate*, 25 P.3d at 1120.

³⁹ *Id.* at 1121 (mediator’s report noted in detail what the defendant did and said during mediation).

The court denied the motion and ordered the parties to attend another mediation with a different mediator.⁴⁰ Following a second unsuccessful mediation, the defendant filed a motion for return of mediation fees, and the plaintiff's motion in opposition was supported by another statement from Judge Smith.⁴¹ In the defendant's motion, he stated—for the first time—that the mediation communications are confidential and the court cannot consider them.⁴² Plaintiff's motion was granted.⁴³

The court of appeals held that, in order to prevent an absurd result, the confidentiality statutes should be subject to a judicially-created exception for hearing cases involving bad faith participation.⁴⁴ The California Supreme Court reversed and disagreed with this “absurd result” analysis. The court held that the legislature's promotion of confidentiality was clear because it enacted two statutes providing for the confidentiality of alternative dispute resolution and settlement communications.⁴⁵ Furthermore, the language of the statutes proves that the legislature chose to promote the policy of confidentiality over other policies, including the policy of “good faith” negotiation.⁴⁶ Thus, the California mediation privilege is broad, and it will trump a motion for mediation sanctions based on one party's negotiation in “bad faith.”

Aside from California, few courts have addressed this issue. Texas courts of appeals have consistently held that orders to mediate in good faith are void in the face of the state's confidentiality statutes.⁴⁷ According to one Texas Court of Appeals: “While a court may compel

⁴⁰ *Id.*

⁴¹ *Id.* at 1122. The plaintiff also asked for \$30,578.43 to cover the fees and expenses of preparation and expert witnesses for both unsuccessful mediations.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Foxgate*, 25 P.3d at 1122–23.

⁴⁵ *Id.* at 1124 (“The language of sections 1119 and 1121 is clear and unambiguous . . .”).

⁴⁶ *Id.* The parties did note that the confidentiality scheme allowed an exception for criminal misconduct. *Id.*

⁴⁷ *See, e.g., In re Acceptance Insurance Co*, 33 S.W.3d 443, 452 (Ct. App. Tex. 2000)(although the court can inquire into whether or not a party attended a mediation, the court cannot ask about another party's preparedness because that relates to “good faith” and not to either attendance or participation); *In re Daley*, 29 S.W.3d 915, 918 (Ct. App.

parties to participate in mediation, it cannot compel the parties to negotiate in good faith or to settle their dispute,” and the ADR statutes require “that communications and records made in an ADR procedure remain confidential; consequently, the manner in which the participants negotiate should not be disclosed to the trial court.”⁴⁸ Although the Texas courts do not allow an exception to the confidentiality statutes to show “bad faith” negotiations, confidentiality is not limitless. However, if the Rules of Evidence allow disclosure, this disclosure would have to take place *in camera* to determine if the disclosure is appropriate.⁴⁹ The Texas courts, as with the California courts, pay considerable deference to the legislature’s policy choices on what is considered confidential and what can be disclosed.

Based on a survey of cases by Professor Lande, there are some patterns to these “good faith” cases. First, the courts appear to hold that parties who do not arrive at all are acting in bad faith. However, the courts are split on the issue of whether arriving to mediation without the appropriate amount of settlement authority should be considered an act in bad faith. Finally, the courts have been very reluctant to deem that any other types of violations constitute mediation in “bad faith.”⁵⁰ Based on these conclusions, the courts are already using some type of objective criteria in order to assess whether parties are acting in “good faith.”

B. The Uniform Mediation Act Approach

Tex. 2000)(attendance can be mandated, but “good faith” participation cannot); Texas Parks and Wildlife Dept. v. Davis, 988 S.W.3d 370, 375 (Ct. App. Tex. 1999)(while attendance and participation can be mandated; “good faith” participation cannot; attending and making any offer constitutes participation); Decker v. Lindsay, 824 S.W.2d 247, 252 (Ct. App. Tex. 1992)(court may order attendance, even over party objection, but it cannot order “good faith” participation).

⁴⁸ Davis, 988 S.W.3d at 375. A similar outcome was reached in an Iowa Supreme Court case dealing with the satisfactory level of participation in a mandatory mediation. See *Graham v. Baker*, 477 N.W.2d 397 (Iowa 1989). In *Graham v. Baker*, the court held that a creditor’s lawyer who merely attended the mediation and stated that his position was non-negotiable had met the minimum level of participation. *Id.* at 398. See Winston, *supra* note 18, at 193–94 for a more thorough discussion of this case and its consequences.

⁴⁹ *Acceptance Insurance Co.*, 33 S.W.3d at 453; see also Brian D. Shannon, *Confidentiality of Texas Mediations: Ruminations on Some Thorny Problems*, 32 TEX. TECH L. REV. 77, 106–108 (discussing the line of cases beginning with *Decker v. Lindsay*, and the consequences of these decisions).

⁵⁰ Lande, *supra* note 10, at 84–85.

Generally speaking, the UMA rejects the use of negotiation in “good faith” in favor of a broad confidentiality protection.⁵¹ This is accomplished in a number of ways. First, the UMA prohibits mediators from making reports to the court following a mediation, with certain limited exceptions.⁵² And second, the UMA elevates the status of the confidential mediation communications to that of a evidentiary privilege, with certain exceptions.⁵³ Each participant, including the mediator, is a holder of his or her own privilege, so, in practice, there is a strong likelihood that the mediation communications will not be disclosed at any time in the future.⁵⁴

Under Section 7 of the UMA, mediators are virtually prohibited from making any report to the court that referred the case to mediation.⁵⁵ The Reporter’s Notes specifically state that this law would prevent a mediator from disclosing mediation communications, even if one party is accused of acting in “bad faith” negotiation.⁵⁶ However, the Act does contain certain exceptions to the broad prohibition on making reports.⁵⁷ The three enumerated exceptions are: 1) whether the mediation occurred at all; whether the parties reached a settlement; and whether the parties were in attendance; 2) exceptions to the mediation privilege under Section 6 of the UMA; and 3) mediation communications regarding abuse to an individual such as a child or an adult under the state’s protective services.⁵⁸

The permitted disclosures under Section 7(b)(1) would not reveal any mediation *communications*, but they would reveal specific mediation *conduct*. The drafters of the UMA determined that revealing these specific types of conduct would not jeopardize the confidentiality of the mediation. Note, however, that the UMA only provides that three types of conduct may be

⁵¹ See UNIF. MEDIATION ACT §7; see also Weston, *Checks on Participant Conduct*, *supra* note 1, at 638 n.232.

⁵² UNIF. MEDIATION ACT §7.

⁵³ UNIF. MEDIATION ACT §§4, 6.

⁵⁴ UNIF. MEDIATION ACT §4(b).

⁵⁵ UNIF. MEDIATION ACT §7(a).

⁵⁶ UNIF. MEDIATION ACT §7 and Reporter’s Notes.

⁵⁷ UNIF. MEDIATION ACT §7(b).

revealed: status of the mediation; whether a settlement was reached; and attendance. Other objective criteria, such as attendance of a person with settlement authority or the requirement to make an offer are not on the UMA's list.

Due to the prohibition on reporting and the privileged status of mediation communications, the UMA largely rejects the use of "good faith" statutes. Although the UMA Reporter's Notes state that the UMA and "good faith" statutes can be read together, the UMA largely limits the determination of what is or is not "good faith." Only the communications and actions specifically stated as exceptions would be admissible in court without a waiver by the parties or the mediator. Therefore, the only real test of whether parties negotiated in "good faith" is whether the parties attended the mediation or whether they settled. Most other information is inadmissible.

IV. Ways to Resolve the Conflict

Although the number of ways to resolve this conflict is certainly limitless, this paper will only discuss three types of solutions. The first potential solution would be to carve—either judicially or by statute—an exception from general confidentiality statutes in "bad faith" motions or cases. Second, legislatures could follow the lead of the UMA by eliminating the "good faith" requirement and implementing some exceptions. Finally, the legislatures could replace their "good faith" statutes with statutes defining objective criteria that would otherwise constitute "good faith." For the reasons defined below, this third option is the most viable and the one that best protects confidential communications.

A. Create an Exception for "Good Faith" within Confidentiality Statutes

One way to resolve the conflict would be to concurrently create a "good faith" requirement and an exception to the confidentiality rules when enforcing the "good faith"

⁵⁸ *Id.*

negotiation statutes.⁵⁹ However, because the public currently views mediation as a confidential process, mediators in jurisdictions with “good faith” negotiation requirements will have to carefully explain this exception to the general rule of confidentiality, noting that a “good faith” requirement could never be enforced without an exception to confidentiality.⁶⁰

Although an exception to confidentiality for enforcement of violations of “good faith” negotiations is feasible, there may be some difficulties in how to police violations of “good faith” requirements. The first difficulty involves the manner in which the court will hear evidence of “bad faith” participation in mediation. The second difficulty involves the appropriate sanction for violating either the “good faith” negotiation requirement *or* the confidentiality requirements.

There are numerous ways a court could enforce violations of the requirement to negotiate in “good faith.” The referring court could either hear motions for violations, or the court could require that any violations be addressed in separate lawsuit. Between these two options, the former is more feasible because it would only involve a motion, rather than initiating an entire new lawsuit.⁶¹ After the court decides this preliminary issue, it will then have to determine how it will hear the evidence of “bad faith.” This could be done either in open court or *in camera*. There are benefits to each of these. Parties may want this hearing to be in open court because motions are commonly heard in open court. Or, the parties may want the proceeding to be *in camera* to protect any communications that were said during the mediation. Although this is a decision for each jurisdiction, the expectation of confidentiality in mediation would probably require an *in camera* hearing.

⁵⁹ Kovach, *supra* note 11, at 602 (“It has been recognized that where a good faith requirement exists, there should be a concurrent exception to any rule on confidentiality, since the communication during the mediation is essential evidence to address the claim of bad faith in the negotiations.”).

⁶⁰ See Lande, *supra* note 10, at 92 (“[M]ediation 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.”).

⁶¹ See *supra* note 30 and accompanying text for a more complete discussion on the issue of satellite litigation.

B. Completely Eliminate the “Good Faith” Requirement

A jurisdiction could also decide to simply eliminate the requirement to mediate in “good faith.” This is exactly the recommendation of the UMA.⁶² If there is no requirement to negotiate in “good faith,” the courts will not have to entertain motions or cases dealing with violations of these statutes or rules.⁶³ Furthermore, the courts would not have to worry about sacrificing confidentiality in order to enforce “good faith” provisions.⁶⁴ However, by removing “good faith” requirements, the court might lose the ability to try to force the parties to deal with each other in a civil manner.⁶⁵

If a jurisdiction decided to eliminate a “good faith” negotiation requirement, this would not necessarily create an impenetrable mediation privilege. Even though the UMA and many state mediation schemes do not currently have “good faith” exceptions, they do institute some limitations on absolute confidentiality. The UMA does have exceptions to the mediation privilege if certain types of misconduct occur or are spoken about at the session.⁶⁶ Texas law has similar restrictions on the limits of confidentiality. For example, if allegations of child or elder abuse surface during mediation, the mediator is required to report it to the authorities.⁶⁷ Similarly, if malpractice occurs during a mediation, public policy would probably require that certain communications be disclosed in order to prove or disprove such allegations.⁶⁸ Other situations that might compel disclosure of confidential communications include evidence of

⁶² See *supra* Part III.B.

⁶³ See *supra* notes 17–18 and accompanying text for a discussion of the efficiency argument associated with “good faith” provisions.

⁶⁴ See *supra* Part II.B.2.

⁶⁵ See *supra* notes 10–13 and accompanying text.

⁶⁶ See UNIF. MEDIATION ACT § 6 (a).

⁶⁷ TEX. FAM. CODE § 34.01 (2002)

⁶⁸ See Irene Stanley Said, *The Mediator’s Dilemma: The Legal Requirements Exception to Confidentiality Under the Texas ADR Statute*, 36 S. TEX. L. REV. 579, 612–16 (1995).

perpetration of crimes, threats of imminent harm, and evidence of fraud or fraudulent conduct.⁶⁹ These issues do not directly deal with “good faith” negotiations, but they may be essential limits on a broad right to confidentiality.

C. Eliminate the “Good Faith” Requirement, but Implement Objective Criteria

Instead of either wholeheartedly accepting or rejecting the “good faith” requirements, courts or legislatures could instead replace “good faith” statutes or rules with similar ones eliminating the words “good faith” and inserting specific objective criteria. The two most obvious criteria are attendance and settlement authority requirements. These particular requirements do not require the disclosure of any mediation *communication*, even though they would require the mediator or other party to disclose certain mediation *conduct*. Other requirements could exist, such as requiring that an offer be made or to have a “catchall” category.

1. Attendance Requirements

One of the simplest requirements is an attendance requirement. Although attendance cannot guarantee that the parties will settle or even attempt to settle, it is an essential step to compromise. In his Note, David Winston states: “Requiring attendance will encourage the parties to become more involved with the mediation, which, in itself, makes settlement more likely.”⁷⁰ Attendance need not be in person; for some individuals or businesses, mediation via telephone or videoconferencing may be necessary in order to not disrupt the participants’ daily lives. Furthermore, attendance is not a “hard” requirement to meet. Aside from the costs

⁶⁹ See *id.* at 616–625 (giving policy reasons why each of these situations should be afforded an exception from broad confidentiality statutes).

⁷⁰ Winston, *supra* note 45, at 201.

associated with travel and the time spent in session,⁷¹ mere attendance does not require a great sacrifice of the parties.

Similarly, reporting on mediation attendance does not divulge any the mediation communications. Noting whether or not a participant was available solely reports on the conduct of the participants. If the mediator or the party's report to the judge is limited to the fact of whether or not attendance occurred, there is little chance that the integrity or the neutrality of the process will be compromised. However, if the mediator proceeds to divulge information learned from the party in attendance, that report would exceed the mediator's reporting power.

Along with attendance at mediation, some scholars recommend that the parties should be required to submit position briefs before attending.⁷² If the parties are required to submit a position paper, then the parties would have presumably exerted at least some amount of preparation before the joint session.⁷³ At best, the parties will examine their respective BATNAs⁷⁴ and arrive at the mediation ready to begin discussing the problem and working towards a solution. If the parties fail to submit a brief, either the mediator or the opposing party could ask the judge for sanctions based on this failure. If the person who reports only states the fact that the brief was not submitted, no superfluous mediation communications should be disclosed, thus protecting confidentiality.

2. Settlement Authority Requirements

Another commonly recommended objective criteria constituting "good faith" is that the parties must attend the mediation with authority to make settlement proposals and authority to

⁷¹ *Id.* at 202 (citing *G. Heileman Brewing Co., Inc. v. Joseph Oat Corp.*, 871 F.2d 648 (7th Cir. 1989).

⁷² *See id.* at 202.

⁷³ *Id.* at 202–03.

⁷⁴ ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 99 (2d ed. 1991).

settle the dispute.⁷⁵ Obviously, mediation will be futile if the wrong parties attend the mediation. If an agreement is reached between the parties, but one of the parties is not authorized to settle, then the whole session would have proceeded for nothing. Settlement authority need not be with the person actually at the mediation session, provided that a person with settlement authority can be reached by telephone. As with the proposed attendance and position paper requirements, the mediator or a participant could report this abuse to the judge without revealing any confidential communications. If the reporting party offered too much information to the judge, then the confidentiality of the proceeding will have been violated and sanctions would be in order.

Unlimited settlement authority, however, should not be required. If a statute or court rule required unlimited settlement authority, businesses would be reluctant to enter into the mediation at all. Some entities might risk sanctions in order to avoid entering into these sessions. Business representatives and lawyers have a limited amount of settlement authority, so a statute requiring unlimited authority would be contrary to ordinary business practices.⁷⁶ If the agents have a reasonable amount of settlement authority, this should be sufficient for a successful mediation.⁷⁷ The term “reasonable” is ambiguous and open to interpretation, but perhaps parties can do simple searches of local judgments in similar cases to determine the likely range of settlement.

3. Requirements to Make an Offer

Another possible objective criterion constituting “good faith” negotiation is the requirement to make an offer.⁷⁸ This requirement could also be satisfied if a party who is not in a position to make a counter-offer explains why no counter-offer could be made. As with the

⁷⁵ Winston, *supra* note 18 at 201–02.

⁷⁶ See, e.g., RESTATEMENT (SECOND) OF AGENCY § 13 (1958) (“An agent is a fiduciary with respect to matter within the scope of his agency.”); RESTATEMENT (SECOND) OF AGENCY § 33 (1958) (“An agent is authorized to do, and to do only, what it is reasonable for him to infer that the principal desires him to do in the light of the principal’s manifestations and the facts as he knows or should know them at the time he acts.”).

⁷⁷ *Contra Lande*, *supra* note 10, at 98 (focusing only on attendance and settlement authority misses the point).

other objective criteria stated above, if one party is in violation of this requirement, the other party or the mediator could alert the judge of the violation without divulging mediation confidences. If one party does not make an offer and explains why he or she cannot make an offer, the act of explaining could be told to a judge, but the *actual communication* must still be kept confidential. At no point should these offers be disclosed or admitted into evidence.⁷⁹

One potential difficulty with this requirement is that a person could make a disingenuous offer of settlement yet still be within the requirements of the statute. For example, a defendant could offer to settle a case for only one dollar. Because reporting anything other than the fact that the defendant *made* an offer would violate confidentiality, the defendant could “beat the system” by making a disingenuous offer. However, if the parties could report the amounts of the offers, this would violate confidentiality in two ways. First, it would reveal what was said in mediation—the amount of the offer. Second, it would reveal other information—such as the perceived strength of the case—that can be deduced from knowing the amount of the offer.

4. A “Catchall” Category

Some jurisdictions may be tempted to list a number of objective requirements, but then add some type of “catchall” category that would cover any other egregious conduct. However, the problems of the ambiguity of “good faith” negotiation requirements will also be present if a “catchall” were introduced.⁸⁰ Perhaps the courts can use doctrines of legislative interpretation to interpret “catchall” categories to include only conduct, rather than communications.⁸¹ However, there is nothing in a “catchall” that would require the courts to interpret it as applying only to

⁷⁸ See Winston, *supra* note 18, at 195 (“A participation standard can be made more strict by requiring both parties to submit an opening offer, consider their opponent’s offer, and then propose a counteroffer.”).

⁷⁹ Offers to compromise are confidential under the Federal Rules of Evidence and the comparable state laws. See Fed. R. Evid. R. 407.

⁸⁰ See *supra* Part III.B. for a discussion of the difficulties associated with “good faith” requirements.

⁸¹ See Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed*, 3 Vand. L. Rev 395, 405 (1950).

conduct, thus potentially allowing the exception to swallow up the whole. Because of the danger of broad interpretation, this paper urges that legislatures and individual courts resist the temptation to include a “catchall” provision.

V. Conclusion

Confidentiality is an essential part of mediation. Without confidentiality, parties would be hesitant to reveal sensitive information, and the objectivity of the mediator may be called into question. Although legislatures and courts have attempted to effectively facilitate mediation through the use of “good faith” negotiation requirements, these requirements are often directly in conflict with the broad confidentiality statutes enacted in most jurisdictions. In these jurisdictions, one or the other must necessarily give way. Because the benefits of confidentiality far outweigh the benefits of “good faith” negotiation requirements, the confidentiality statutes and rules should be enforced at the expense of the “good faith” requirements.

Although the benefits of confidentiality outweigh the benefits of “good faith” requirements, creating a series of objective requirements for participants in court-connected mediation could alleviate the difficulties associated with the “good faith” standard. These statutes could include any number of objective criteria, but this paper advocates a statute with both attendance and settlement authority requirements. Reporting violations of these criteria to a judge would not require the parties to divulge confidential communications. If there is a violation of the attendance or settlement authority requirements, then the presiding judge could simply award the wronged party damages associated with attendance at the mediation or the mediator fees.

Mediators in court-connected mediation are usually trained professionals. Many are skilled mediators who have worked for a number of years. If the law requires the parties to

attend the mediation and to come to the mediation with settlement authority, the public can trust that the mediators will “work their magic” in order to help the parties reach settlement. The mediators in many cases will not need to view position briefs, especially in cases involving simple issues or small amounts of damages. The mediator should be able to help the parties offer *some* settlement figure, even if it appears absurd to the other side. If the legislature or the court can get the parties into the mediation room with a reasonable amount of settlement authority, the mediator should be able to handle the rest.