

Simulation: Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs

John Lande
Associate Professor and Director,
LL.M. Program in Dispute Resolution
University of Missouri-Columbia School of Law
Columbia, MO 65211
Tel: 573-882-3914
Fax: 573-882-3343
Email: lande@missouri.edu
LL.M. Web: <http://www.law.missouri.edu/llmdr/>
Personal Web: <http://www.law.missouri.edu/lande/>

This simulation provides a good way to see how different groups perceive court-connected mediation programs and mediation more generally. It is designed to analyze issues about good-faith conduct in mediation and for designing court-connected mediation programs. It focuses on a dispute over whether a court-connected mediation program should retain a good-faith requirement. It includes roles for one or more judge, plaintiff attorney, defense attorney, facilitative mediator, evaluative mediator, business executive, social scientist, and system design consultant. This simulation could be used in a variety of dispute resolution courses including mediation, dispute resolution survey, dispute system design, or group facilitation courses or modules, among others.

Copyright 2003 John Lande. Distributed at the Fourth Annual Legal Educator's Colloquium, American Bar Association Section of Dispute Resolution Annual Meeting (March 22, 2003, Washington, D.C.). Teachers are free to copy this simulation for use in law and graduate school courses, provided that appropriate acknowledgment of the author is made. For permission to use this simulation for any other purpose, contact the author.

Teaching Notes

This simulation is based on a law review article¹ that readers can consult for detailed analysis of the issues in the simulation. It can be used to analyze issues of promoting good-faith conduct in mediation and designing court-connected mediation programs. It is suitable for students in dispute resolution courses as well as planners of court-connected dispute resolution programs.

This simulation focuses on a dispute over whether a court-connected mediation program should retain a good-faith requirement.² Some of the facts in the simulation are adapted from *Nick v. Morgan's Foods*, 99 F.Supp. 2d 1056 (E.D. Mo. 2000), *aff'd* 270 F.3d 590 (8th Cir. 2001). It includes roles for one or more judge, plaintiff attorney, defense attorney, facilitative mediator, evaluative mediator, business executive, social scientist, and system design consultant. Each role has a different perspective on the issues.

Issues of alleged bad faith behavior in mediation -- and policies to deal with it -- raise several difficult ethical issues. When mediation participants act in bad faith, mediators may be ethically required to suspend or terminate the mediation.³ Legal rules authorizing court sanctions to deter and punish bad-faith participation ironically could create additional ethical problems. Court hearings to adjudicate allegations of bad faith could compel mediators or the mediation participants to violate duties to protect the confidentiality of mediation communications.⁴ Moreover, the very existence of potential sanctions could create incentives for mediators and mediation participants to abuse the process by inappropriately threatening to invoke the legal process by alleging or reporting bad faith.⁵

¹John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. REV. 69 (2002).

²This simulation uses the local court rules for the U.S. District Court for the Eastern District of Missouri, which are among the most detailed rules establishing a good-faith requirement. See E.D. Mo. LOC. R. 16-6.01 et seq. (There is no claim to copyright of these rules.) When I can distribute copies of the simulation ahead of time, I include the full set of rules. This is especially useful for law students to see an example of court rules about mediation. When people do not have much time to read the instructions, I include only the portions of the rules that relate to good faith.

³See Lande, *supra* note 1, at 128.

⁴See *id.* at 102-06.

⁵See *id.* at 98-102, 106-08.

This simulation challenges lawyers, mediators, and other dispute resolution professionals to use our knowledge and skills to design mediation processes that promote ethical and productive behavior in mediation. The system design perspective is especially important to focus on an ongoing stream of cases and rather than focusing solely on behavior in individual cases. It encourages people to consider using an interest-based, problem-solving process to analyze the interests of various stakeholder groups and develop policy options satisfying the interests of all the groups.⁶

Dealing with Bad-Faith Behavior in Mediation⁷

What can be done to prevent people from behaving badly in mediation? Some people use mediation to “smoke out” the other side, make misleading statements, increase the opponents’ costs, and generally wear them down. Judges and legislatures are trying to control misbehavior through good-faith requirements using sanctions to induce good behavior. Is the cure worse than the disease? The good-faith rules have stirred up a lively debate in the literature with roughly equal numbers of articles favoring and opposing them.

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. From this perspective, a good-faith requirement seems to be the logical way to ensure the integrity of court-connected mediation programs.

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. From this perspective, good-faith requirements seem to violate mediation norms and thus *undermine* the integrity of court-connected mediation programs. Advocates of this perspective favor alternative policies such as collaborative education about good mediation practice, pre-mediation consultations and submission of documents, a limited and specific attendance requirement, and protections against misrepresentation.

⁶For description of the interests of various stakeholder groups, see *id.* at 118-26.

⁷For more detail on these issues, see *id.* at 70-106, 126-41.

Although this brief summary oversimplifies the debate, it captures a real tension in the debates about the future of court-connected mediation programs.

Designing Court-Connected Mediation Programs⁸

This exercise simulates a dispute systems design (DSD) process to solve problems of apparent bad faith in mediation and to enhance the quality of mediation programs more generally. DSD contrasts with traditional rulemaking processes where experts develop proposals for adoption by authorities, often with only limited involvement of the full range of stakeholders. 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. Moreover, if policies do not satisfy stakeholders' interests adequately, some people may withhold their support or actively sabotage implementation of the rules.

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 of these procedures.

A court using a DSD approach would appoint a facilitator to coordinate the process. The facilitator would consult with key judges, court administrators, attorneys, mediators, regular litigants and other stakeholders 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. 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. 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. 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. DSD planners would undertake a careful implementation process, possibly including an initial pilot program to test and refine the policies before implementing them indefinitely. A DSD plan would provide for periodic evaluation and refinement of the policies.

⁸For more detail on these issues, see *id.* at 112-18.

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. 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 case-by-case assessment of the earliest time that litigants can evaluate the strengths and weaknesses of their case. 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. Program planners can use a DSD process to identify the norms of various local stakeholder groups and, consider the likely effects of various policy options given those norms, and then make and implement decisions accordingly. Thus, although scheduling practices do not explicitly relate to good-faith issues, if a significant number of participants do not engage in serious negotiation because they feel that mediations are scheduled before they have enough information, program planners may reduce the number of complaints of bad faith by adjusting scheduling practices accordingly.

DSD techniques can be used to address a wide range of issues about court-connected mediation programs in addition to dealing with bad faith. Just as mediation is no panacea for solving all the problems of litigation, using DSD techniques does not guarantee optimal mediation policies.

De-Briefing the Simulation

In debriefing this simulation, instructors may want to focus on some or all of the following aspects of this simulation: (1) substantive issues about good-faith requirements and other policies for promoting productive participation in mediation, (2) the structure and nature of dispute system design processes, and (3) facilitation techniques for managing a committee meeting process involving diverse stakeholder representatives.

Many students and instructors will be especially interested in analyzing, out of role, the merits of good-faith requirements and other policies, just like the characters in the simulation and scholars and practitioners in real life. In assigning roles, instructors may want to assign students to take positions contrary to their actual beliefs, to encourage them to consider alternative perspectives. For example, in one playing of this simulation, I cast a student (who was an experienced mediator) to play the judge's role, with a perspective completely contrary to her actual views. Similarly, I have cast plaintiffs' lawyers to play defense attorneys etc. As in real life (and perhaps in the

simulation as well), students may be drawn to analyze the substantive issues about good faith and may need repeated prompting to focus on the process issues.

In discussing the nature of system design processes, instructors may want to discuss the process of convening a stakeholder committee, selection of representatives, and preparation to make the meeting as productive as possible. This simulation presents a very challenging problem of dealing with judges, who may have disproportionate influence and whose presence may inhibit others from participating openly.

This simulation also requires the system design consultants to facilitate the meeting to focus on the underlying interests rather than the participants' positions. The simulation instructs the stakeholder representatives to have strong conflicting positions. The instructions for the consultants directs them to encourage the stakeholders to defer discussion of the positions until after eliciting the various interests. This is a difficult task and so instructors may want to coach the consultants before the simulation and possibly intervene during the simulation if they encounter serious problems. Thus this simulation presents an opportunity to practice the difficult task of shifting discussion from positions to interests, which is especially difficult in a multi-party context. I typically assign several students to act as the consultants / meeting facilitators, thus instructors may want to discuss the dynamics of co-facilitation.

I usually distribute copies of the teaching notes and role-play instructions to students because I never have enough time to debrief all the issues raised in simulations.

General Information for All Participants

The local court retained some systems design consultants to help the court solve problems arising from its mediation program. A controversy arose after the court adopted rules requiring participants to participate in good faith and requiring the mediators to indicate in their routine reports whether any participants did not participate in good faith. (See attached copy of the rules.) After each court-ordered mediation, the mediators are required to submit a form to the court indicating that a mediation was conducted on a certain date and whether the parties settled the case. The mediators generally have no problem about submitting these forms but many of them did not want to report on whether participants acted in good faith because they felt that such reporting was inconsistent with their role as mediators and because participants would not want to hire them again if they got a reputation for reporting bad faith to the court. The judges had come to rely on mediations to dispose of a substantial part of their docket and they felt annoyed when some attorneys and litigants did not take the mediation seriously. In particular, the judges were concerned when some parties sent only an attorney to mediation or a representative with little or no settlement authority. The judges felt that this was unfair to litigants who attend mediation in good faith and waste time and money on unproductive mediations.

The situation came to a head after a case in which the defendant came with a representative who had only \$500 in settlement authority. The judge was annoyed because, a few days before the mediation, defense counsel had assured the judge that his client was prepared to mediate in good faith and that a representative would attend "with settlement authority." After the mediation, the court sanctioned the defendant for failing to participate in good faith. The court publicized that decision as a warning to litigants and attorneys about the consequences of bad-faith participation in mediation. At a continuing legal education event, a judge took an informal survey of attorneys in which 60% said that they had been in a mediation in which someone did not participate in good faith. Most of the situations that the attorneys described involved parties attending without authority or intent to settle or willingness to change their position. Several attorneys also responded referring to inadequate preparation for mediation, failing to send the required pre-mediation memo, failing to bring parties to mediation, lying or distorting the facts or law, and unwillingness to spend more than their pre-determined limit of time or leaving the mediation while meaningful discussions were taking place. These survey results reinforced the court's belief that a good-faith requirement was necessary.

Some prominent mediators became alarmed by the good-faith rule and met with the judge, expressing their opposition to it. They suggested that the court use a dispute systems design process to review the rule and consider other possible changes in the court's mediation program. The court assembled a committee to work with some consultants on this project. The committee includes one or more judges, attorneys, mediators, litigants, business executives, and social scientists. (The planners thought that it would be hard to get a suitable person to represent the perspectives of individual litigants and asked the social scientists to provide that perspective based on social

science research generally.) The committee's task is to consider any proposals that might make the program more effective, including but not limited to addressing the court's concern about bad-faith conduct in mediation. If the committee can reach agreement on mediation program policies, it will submit the agreement as recommendations for the court to adopt.

LOCAL COURT RULES - ALTERNATIVE DISPUTE RESOLUTION.

Rule16- 6.01. Mediation and Early Neutral Evaluation.

The Court may refer appropriate civil cases to Alternative Dispute Resolution (ADR): mediation or early neutral evaluation. The Court may also refer cases to any other ADR process that the parties may agree upon.

(A) Mediation.

Mediation is an informal non-binding dispute resolution process in which an impartial neutral facilitates negotiations among the parties to help them reach settlement. A mediator may not impose the mediator's own judgment on the issues for that of the parties. The following cases shall not be referred for mediation:

- 1) appeals from rulings of administrative agencies;
- 2) habeas corpus and extraordinary writs;
- 3) bankruptcy appeals;
- 4) Social Security cases; and
- 5) prisoner civil rights cases.

(B) Early Neutral Evaluation.

Early neutral evaluation brings together parties and counsel in the early pretrial period to present case summaries before and receive a non-binding assessment from an experienced neutral evaluator. Immediate settlement is not a primary purpose of this process, though it may lead to settlement negotiations. Any civil case may be appropriate for early neutral evaluation, if the judge believes the parties are likely to benefit mutually from such referral.

Rule 16 - 6.02. Referral to Alternative Dispute Resolution and Duties of Participants

(A) Order Referring Case to Alternative Dispute Resolution

(1) The Court, on its own motion or on the motion of any party, may enter an Order Referring Case to Alternative Dispute Resolution. The Order shall state whether the case is referred to mediation or early neutral evaluation or other mutually agreed ADR process, shall designate a lead counsel who is responsible for coordinating ADR, and shall inform counsel and the parties of their additional obligations regarding ADR.

(2) The Order shall specify a date on which the ADR referral will terminate. Absent good cause, this date shall not be extended. Unless otherwise ordered, referral to ADR does not abate or suspend the action, and no scheduled dates shall be delayed or deferred, including the date of trial.

(3) If all 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.

(B) Duties of Participants

(1) **Parties.** All named parties and their counsel are required to attend the ADR conference, participate in good faith, and possess the requisite settlement authority unless excused under paragraph (4), below.

(i) **Corporation or Other Entity.** A party other than a natural person (e.g., a corporation or an association) satisfies this attendance requirement if represented by a person (other than outside counsel) who has authority to settle and who is knowledgeable about the facts of the case.

(ii) Government Entity. A unit or agency of government satisfies this attendance requirement if represented by a person who has authority to settle, and who is knowledgeable about the facts of the case, the governmental unit's position, and the procedures and policies under which the governmental unit decides whether to accept proposed settlements. If the action is brought by the government on behalf of one or more individuals, at least one such individual also shall attend.

(2) Counsel. Each party shall be accompanied at the ADR conference by the lawyer who will be primarily responsible for handling the trial of the matter.

(3) Insurers. Insurer representatives are required to attend in person unless excused under paragraph (4), below, if their agreement would be necessary to achieve a settlement.

(4) Request to be Excused. A person who is required to attend an ADR conference may be excused from attending in person only after a showing that personal attendance would impose an extraordinary or otherwise unjustifiable hardship. A person seeking to be excused must submit, no fewer than 15 days before the date set for the conference, a motion to the Judge, simultaneously copying all counsel and the neutral. The motion shall:

- (i) Set forth all considerations that support the request;
- (ii) State realistically the amount in controversy in the case;
- (iii) Indicate whether the other party or parties join in or object to the request, and
- (iv) Be accompanied by a proposed order.

Rule 16 - 6.03.Neutrals

(A) Certification of Neutrals.

(1) The Court may certify those persons who are eligible to serve as neutrals (mediators or evaluators) in such numbers as the Court deems appropriate. The Court shall have the authority to establish qualifications for and monitor the performance of neutrals, and to withdraw the certification of any neutral. Lists of certified neutrals shall be maintained by the Clerk, and shall be made available to counsel, litigants, and the public for inspection and copying upon request.

(2) Any member of the bar of this Court who is certified as a neutral shall not for that reason be disqualified from appearing as counsel in any other case pending before the Court.

(3) In January of each even-numbered year, the Clerk shall examine the list of certified neutrals to determine which neutrals did not receive appointments during the previous two years. The Clerk shall notify those neutrals that the Court's record does not show any appointments for those years, and shall solicit their interest in continuing to be carried on the Court's list of certified neutrals. If the neutral desires to remain on the list, the neutral shall submit by March 1 information demonstrating ADR experience and/or training during the previous two years. If such information is not provided the neutral shall be removed from the list.

(B) Appointment of Neutrals.

(1) Within the time prescribed by the Order Referring Case to Alternative Dispute Resolution, the lead counsel must notify the Clerk in writing of the parties' choice of a neutral. If the parties fail timely to select a neutral, the Clerk shall select a neutral from the list and notify the parties.

(2) Notwithstanding subsection (B)(1), the judge, in consultation with the parties, may appoint a neutral who has special subject matter expertise germane to a particular case, whether or not such individual is on the list of certified neutrals.

(3) The Clerk shall send a Notice of Appointment of Neutral to the parties and to the individual designated by the parties, lead counsel has confirmed that individual's availability. Upon receipt of the Notice of Appointment, lead counsel shall send to the neutral a copy of the Order referring the case to Alternative Dispute Resolution. The appointment shall be effective until the neutral notifies the Court in writing that the referral has been concluded.

(C) Compensation of Neutral.

(1) Unless otherwise agreed by all parties or ordered by the court, one-half the cost of the neutral's services shall be borne by the plaintiff(s) and one-half by the defendant(s) at the rate contained in the neutral's fee schedule filed with the Court. In a case with third-party defendants, cost shall be divided into three equal shares. A neutral shall not charge or accept in connection with a particular case a fee or thing of value from any source other than the parties. The Court may review the reasonableness of the fee and enter any order modifying the fee. Compensation shall be paid directly to the neutral upon the conclusion of the ADR process. Failure to pay the neutral shall be brought to the Court's attention.

(2) A party who demonstrates a financial inability to pay all or part of that party's pro rata share of the neutral's fee may request the Court to appoint a neutral who has agreed to serve pro bono. The Court may waive all or part of that party's share of the fee. Other parties to the case who are able to pay the fee shall bear their pro rata portions of the fee.

(D) Disqualification or Unavailability of Neutral.

(1) A neutral may be disqualified for bias or prejudice pursuant to 28 U.S.C. §§ 144, and shall be disqualified in any case in which a justice, judge, or magistrate judge would be disqualified pursuant to 28 U.S.C. §§ 455.

(2) Any party who believes that an assigned neutral has a conflict of interest shall file a motion for disqualification of the neutral at the earliest opportunity, or waive the objection.

(3) A neutral who cannot serve within the period of referral shall notify lead counsel who will arrange for selection of a different neutral by agreement of the parties or by the Clerk.

Rule 16 - 6.04. Communications Concerning Alternative Dispute Resolution.

(A) Confidentiality. Alternative Dispute Resolution proceedings are private and confidential. A neutral may exclude all persons other than the named parties and their counsel from ADR conferences. Other individuals may participate with the consent of the neutral, provided they agree to the Rules pertaining to confidentiality. All written and oral communications made or disclosed to the neutral are confidential and may not be disclosed by the neutral, any party, or other participant, unless the parties otherwise agree in writing. Documents created by the parties for use by the neutral shall not be filed with the Court. The neutral shall not testify regarding matters disclosed during ADR proceedings. This rule does not prohibit or limit the enforcement of agreements or the collection of non-identifying information for Court-approved research and evaluation purposes, or the filing of the ADR compliance report.

(B) Ex Parte Communication.

Except for memoranda required by the Court to be provided to the neutral, there shall be no ex parte communications between the neutral and any counsel or party concerning the case, until the commencement of the ADR process. This rule, however, does not prohibit communication regarding scheduling matters, including discussions concerning who will attend and their authority to settle the case.

Rule 16 - 6.05. Reporting Requirements.**(A) Failure to Participate in ADR Process in Good Faith**

The neutral shall report to the judge any willful or negligent failure to attend any ADR conference, to substantially comply with the Order Referring Case to Alternative Dispute Resolution, or otherwise participate in the ADR process in good faith. The judge may impose any sanctions deemed appropriate.

(B) Compliance Certification.

Within 14 days after the ADR referral is concluded, the neutral shall file with the Court an Alternative Dispute Resolution Compliance Report on a form provided by the Clerk.

(C) Report of Settlement.

If the parties settle any claim during the ADR referral, a written settlement agreement, a stipulation for dismissal, a motion for leave to voluntarily dismiss, or a proposed consent judgment, signed by all parties and counsel, shall be filed with the Court no later than fourteen (14) days after the last ADR conference.

(D) Proposed Litigation Plan.

If an ADR referral results in decisions or agreements regarding scheduling or other case management matters, the parties shall file a proposed litigation plan or motion to amend an existing Case Management Order with the Court no later than fourteen (14) days after the last ADR conference.

Confidential Information for the Social Scientist(s)

Going into the discussion, you don't have strong positions about what the court should do. You see your role more as an expert advisor about the perspective of litigants (especially individuals) than as an advocate for a particular approach. If you believe that a particular approach would or would not promote those interests, you will certainly express those opinions.

In general, research suggests that parties' satisfaction with mediation is related to three categories of factors: (1) parties' expectations, (2) characteristics of the process, and (3) case outcome. Parties are more likely to feel satisfied if their actual mediation experience meets or exceeds their expectations. 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 are also more satisfied when they believe that the mediation process is fair, understandable, informative, attentive to their interests, impartial, uncoerced, and private. Regarding outcomes, parties are generally more satisfied when they settle their cases in mediation and when they believe that they save money, time, or emotional distress that they would otherwise have incurred.

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. Research indicates that the following four factors that promote parties' experience of procedural fairness: (1) an opportunity for the party to express their views to a third party, (2) the third party seriously considers those views, (3) the third party uses a dignified procedure and treats the party respectfully, and (4) the third party acts fairly and impartially. (Note that these factors are framed in terms of the parties' subjective perceptions rather than objective measures of the factors.) Procedural justice theory suggests that parties' desire for expression does not require them to express their views personally; rather, that desire can be satisfied by having attorneys express their views for them assuming that the attorneys do a good job of actually expressing their views. In addition, 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.

You are not sure how a good-faith requirement would affect the process. You are more concerned about developing a good program overall than taking a particular position about good-faith requirements.

Confidential Information for the Business Executive(s)

You hate the courts, which you think are virtually a form of legalized extortion. Plaintiffs file all kinds of frivolous complaints against businesses, which are often forced to settle to avoid adverse publicity and exorbitant legal costs. You wish that the courts would find a way to prevent people from filing frivolous suits. It would help if the courts didn't give so many verdicts for plaintiffs, including so many verdicts that are outrageously large, because they encourage people to file even more lawsuits hoping that they will "win the lottery" and get a huge verdict. You particularly resent the jury system because you believe that most jurors aren't competent to make fair and reasoned decisions (at least in civil cases) and jurors tend to be biased against corporate defendants.

You have participated in several mediations and have come to appreciate that mediation can sometimes be very helpful. When the parties are ready to settle, it is very useful to have a mediator to expedite the process. There are some good mediators who know how the system works and can predict realistic outcomes and they are also very good at getting the parties to settle. They can be especially helpful when the plaintiffs are very emotional and unrealistic. Some mediators are very good at getting plaintiffs to calm down and become more realistic in caucus. And sometimes mediation is helpful in providing you more information to realistically assess your case, which is often helpful so that you can go back to your boss and justify a settlement by saying that the mediator said that it was reasonable.

You don't like mediations where the mediator is putting a lot of pressure on you to settle. It is your case to decide whether you want to settle or not and the mediators and the courts shouldn't force you to give up your right to trial. Sometimes you have a valid business reason not to settle a case (for example, to demonstrate that your company will not pay frivolous claims even if it costs more to litigate some claims than to pay them off) and you are concerned that with a good-faith rule, mediators may report you to the court if you aren't willing to make a substantial settlement. So you strongly oppose the rule.

Confidential Information for the Plaintiff's Attorney(s)

You are sincerely committed to making the legal system work properly and compensate your clients reasonably. You have come to really value mediation because it helps resolve cases efficiently and it helps you deal with your clients, who are mostly individuals in various tort actions. Many of your clients have unrealistic expectations and you find that mediation is very helpful in getting them to be more realistic and reach reasonable settlements. You often have a hard time convincing them of the weaknesses in their cases without their losing confidence in you as their zealous advocate. So you really appreciate good evaluative mediators who can respectfully listen and explain the situation to your clients. Obviously the good mediators do the same thing to the other side as you can see that defendants often "come up" from unreasonable positions after caucusing with the mediators. You really like the caucuses, where your clients get a chance to tell their story and the good mediators give them the kind of caring acknowledgment that they want from a neutral third party. You generally don't like it when mediators put a lot of pressure you or your clients to settle unless your client is being extremely unreasonable.

You are thrilled that the court has adopted the good-faith rule because you are fed up with insurance companies and other defendants "playing games" with mediation. Usually, their interest is to delay and drag out the process and some of them use mediation to do that. Your clients generally want to resolve the matters as soon as possible and since you generally get paid on a contingency fee basis, you don't get compensated for time wasted on unproductive mediation. Some defense counsel do a good job for their clients by taking the mediation seriously and efficiently reaching reasonable settlements. You think that if the court slaps sanctions on the "game-players" a few times, they will take mediation more seriously and act reasonably in mediation. You aren't saying that parties and attorneys don't have a right to take strong positions. You just don't want people to use mediation to gain adversarial advantage by causing delay or additional costs without any intent to try to settle in mediation.

Confidential Information for the Defense Attorney(s)

You are deeply committed to satisfying your clients' interests in litigation. In some cases, they want to settle readily and in other cases they want to take a tough negotiation position and/or try the case. You feel strongly that they are entitled to choose their own litigation and negotiation strategies. You find that mediation is very helpful when the parties are interested in settling and have enough information to settle responsibly. There are some good mediators who know how the system works and can predict realistic outcomes and who are also very good at getting the parties to settle. They can be especially helpful when the plaintiffs are very emotional and unrealistic. These mediators seem to be very good at getting plaintiffs to calm down and become more realistic in caucus. And sometimes your clients are unrealistic as well and you find it helpful for mediators to give an opinion about the likely outcome. This can help so that your client's representatives can go back to their bosses and justify the settlement by saying that the mediators said that it was reasonable.

You are really annoyed about the good-faith rule because you see it as interference in the litigation. Litigants have a right to take even unreasonable positions in negotiation and it isn't the courts' business to tell them how to negotiate. Indeed, you see the good-faith rule as a way to pressure parties to settle so that the courts will have fewer cases to try. You like mediation because you have a lot of control over the outcome (as you can always decide not to settle) and you are afraid that the good-faith rule will take away some of that control. The last time you looked, people still have a constitutional right to trial in the USA. You don't think that the rule is unconstitutional but it can be applied oppressively to coerce defendants to settle cases that they don't want to settle. The plaintiff's bar and courts should be careful what they wish for. If they get too active in holding hearings and granting sanctions, they should expect to see a lot of bad-faith motions against plaintiffs, who often make completely outrageous demands. If they want to play hardball, defense counsel can play it even harder than the plaintiffs can. Not only that, you are smart enough to know how to make it look as if you are seriously negotiating even if you don't intend to settle. You think that the rule is not only bad for your clients but bad for the court system as well because it is actually likely to increase adversarial posturing rather than decrease it.

Of course you will temper your remarks when you meet with the committee both out of respect for the court and because you don't want to get the judge angry at you.

Confidential Information for the Judge(s)

You have become a strong believer in court-ordered mediation. There are too many cases that just don't require a trial and should be settled. The court doesn't have the resources to try all the cases and you want to focus the courts' limited resources (especially the judges' time) on the cases that really need them. You are also convinced that mediation helps save the litigants time and money, which you are concerned about because litigation has become so time-consuming and expensive. You believe that the results from settlement are usually as good or better as at trial.

You are pleased that your court's mediation program has generally worked quite well and that most attorneys and litigants have behaved responsibly. It helps to order cases to mediation because it makes people take it more seriously. Unfortunately, some lawyers see mediation as another opportunity to play adversarial games and take advantage of their opponents. Until adoption of the rule, attorneys would frequently attend mediation without their clients, which made it hard to settle cases. This kind of conduct really gets you mad because you feel responsible for ordering litigants to invest the time and money in mediation and you do not want it to be wasted. You also feel offended when people don't take your orders seriously and try to evade the orders. You feel strongly that attorneys or litigants who violate the letter or spirit of the mediation referral orders should be sanctioned. You think that this would not only compensate the damaged parties but it would also send a strong signal that your court will not tolerate bad-faith conduct in mediation. You were frankly surprised that many respected mediators oppose the good-faith rule as they, of all people, should be concerned that people act in good faith during mediation. Although it seems obvious to you that a good-faith rule is a good idea, you will listen to others about ways to make sure that the mediation program achieves the court's goals.

Confidential Information for the Facilitative Mediator(s)

You have a strong personal commitment to mediation. It is not only your profession, it is also your philosophy of life. You believe that people should make decisions for themselves and that mediation provides a valuable service in helping people do that in difficult conflicts. You initially had doubts whether court-ordered mediation could fulfill the ideal of mediation because it seemed like an oxymoron to order people to participate in a voluntary process. Over time, you have resolved those doubts based on your own experience and research on court-ordered mediation. Good mediators don't have to give their opinions or pressure parties, even in a court-ordered setting, and the process can work just fine. You disapprove of mediators giving their opinions about the merits of the issues but you have come to accept this as a fact of life for some mediators.

You are amazed and outraged at the court's good-faith rule. It is so obviously such a bad idea for so many different reasons. The judges just don't "get it." What are the problems? First, there is no definition of "good faith" in the rule. Although the judges say that bad faith doesn't mean that someone is taking an extreme position, that's what everyone understands it to mean. And people say that the other side isn't negotiating in good faith ALL THE TIME. It would be a huge distraction if you have to focus on good faith as an actual issue. You are afraid that this would actually stimulate adversarial behavior rather than inhibit it.

Second, the only way for the court to rule on a bad-faith motion would be to admit evidence of CONFIDENTIAL COMMUNICATIONS, which would create a huge loophole in the confidentiality protections for mediation. You are appalled that the court would expect mediators to report on whether participants acted in good faith. Even if mediators don't have to report or testify about bad faith, it would also be extremely inappropriate for the participants to testify about it.

Third, the judges clearly have no idea how a good-faith rule would corrupt mediators' role as a neutral facilitator. Participants might fear what mediators would report to the court even if mediators didn't mention it at all. Thus some people would be afraid to be open with the mediators. Although you are confident that facilitative mediators would not abuse the reporting authority, you are concerned that evaluative mediators would threaten to report people to pressure them to accept particular positions. The good-faith rule can be used to force people to stay in a mediation when they want to leave. The judges don't seem to understand that although it is ok to order people to initially attend, mediation should be a VOLUNTARY process and that mediation ethics indicate that parties should be able to leave at any time.

You have no problem for the court to order people to attend mediation and to submit a pre-mediation memo, but they don't need to call it "good faith" and they wouldn't need to invade the confidentiality of mediation. You don't like the idea of requiring parties to attend with settlement authority because that term is vague and can

be manipulated. You could live with that requirement, however, as long as they don't call it good faith or require evidence of confidential communications.

Although you will express your views strongly at the meeting, you will temper your tone, both out of respect for the court and because you don't want to get the judge angry at you.

Confidential Information for the Evaluative Mediator(s)

You are a very successful mediator. You have many years of litigation experience and so you are very good at “reading” how cases are likely to turn out. You also care about people and are good at communicating with people so that they can hear and respect your opinions in a way that they find helpful. You started doing mediation because you believe that, although litigation is sometimes necessary, it is often wasteful and stimulates a lot of unproductive conflict. You enjoy mediation because you like to help people reach reasonable settlements in a more efficient and dignified process. The fact that you are so much in demand indicates that your services fill an important need.

Although you personally know and respect the judges in your local court, you think that they don’t really understand the implications of the good-faith rule. The reporting requirement would transform you from a trusted advisor and facilitator into a potential “snitch” who might report people to the court. Lawyers and litigants would be reluctant to be candid in mediation. People like to hire you because they can trust that you will give them confidential assessments. If they fear that you would report them or disclose confidential information, you might lose a substantial amount of business. You have talked with other prominent mediators in the area and virtually all of them feel the same way. If the court insists on keeping its good-faith rule, you know that most mediators simply will refuse to report anyone as acting in bad faith.

You have no problem for the court to order people to attend mediation and to submit a pre-mediation document, but they don’t need to call it “good faith” and they wouldn’t need to invade the confidentiality of mediation. You don’t like the idea of requiring parties to attend with settlement authority because that term is vague and can be manipulated. You could live with that requirement, however, as long as they don’t call it good faith or require evidence of confidential communications.

Although you will express your views clearly at the meeting, you will temper your tone, both out of respect for the court and because you don’t want to get the judge angry at you.

Confidential Information for the Systems Design Consultant(s)

You are excited by the challenge of helping the court plan its court mediation program. This seems like a fascinating and important use of your facilitation skills. From your private conversations with the people who will attend the meeting, you know that the good-faith rule is very controversial. The judge(s) and plaintiff's attorney(s) are strongly in favor and the defense attorney(s), business executive(s), and mediators are strongly opposed. The social scientist(s) apparently doesn't have a strong opinion about the rule. You know that this is a sensitive political situation for the opponents because they are wary of offending the judge, so you will be alert for concerns that people may not feel comfortable expressing their views candidly to the entire group. You suspect that if the committee cannot reach an agreement on the good-faith rule that the opponents will use "self-help" to avoid or frustrate the rule. The defense bar may start using the rule offensively against plaintiffs and the mediators may simply refuse to report any bad-faith conduct. This would obviously not be a good solution. If appropriate, you might ask people to talk about what they expect would happen if the good-faith rule continues as is.

You are going to try to focus on more general, underlying interests in the mediation program. You realize that this may be difficult as people may be tempted to focus on the good-faith rule because of their strong feelings about it. To avoid getting bogged down in an unproductive debate about the rule, you will suggest that they start the meeting by seeing if they can agree to focus on underlying interests first and defer discussion of the good-faith rule. At a later stage, they could talk about various options for satisfying the everyone's interests including a good-faith rule. So you will try to get a commitment from the group to start by focusing on the underlying interests.