

aims to make reports to court administrators or specific
of participants in mediation. The Section believes
the practice of mediation would benefit
of these statutes and rules to preserve the core values
of self-determination, mediator impartiality, and mediation
to the public's perception of the legitimacy of
the, party-driven process to resolve disputes.

appropriate policy to deal with these important concerns,
and more than 100 state and federal statutes and rules
participate in court-mandated mediation programs in
hundreds of pages of law review articles discussing the
situation. They also reviewed two lengthy reports on the
Dispute Settlement and the other prepared by the Public
Professionals in Dispute Resolution.

order for the core values of the mediation process to
approach to be taken by court-mandated mediation
: (1) what conduct should be sanctionable; (2) what
steps be required to report to court administrators or
and mediation programs should take to promote
the Section emphasizes that all of these elements are needed
and that imposing sanctions are needed to ensure attendance at
mediation and lawyers' broad discretion about how they

or violations of rules specifying

t sanctions can appropriately promote productive
appropriate for violation of rules specifying
ile-proscribed conduct would include but is not
nsurance representative to attend a court-mandated
l or to provide written memoranda prior to the
eled as good faith requirements, however, because
ning of that term. Rules and statutes that permit
e behavior create a grave risk of undermining core
d problems. Such subjective behaviors include but
ciently in substantive bargaining; failure to have a
d mediation with sufficient settlement authority; or
courts such broad authority to sanction types of
cipants with clear understandings about what behavior
efrain from legitimate behavior in mediation, may
tions would be confidential, and can actually
ants and mediators. Ambiguity arising out of
pawn extensive satellite litigation, thus defeating

ality of the mediation process and the public's trust in

y and unwise for statutes and court rules to require
administrators whether parties participated in good faith.
report to a court from a mediator can cause a party to
tarnished reputation, adverse rulings, or the
ons hearing on allegations of a party's bad-faith
ally subpoenaed to testify, thereby further breaching
. The lack of confidentiality protection creates
ation process, and impairs the public's full use of the

A") precludes disclosure of mediation

n. The American Bar Association approved the
privilege for mediation communications in Section 4.
ng reports to a "court, administrative agency, or other
pute that is the subject of the mediation." Section 6
d prohibition against mediator reports. Sections
exceptions regarding mediator reports. Bad-faith
ptions. The official Reporter's Notes to Section 7 of
[A] would not permit a mediator to communicate, for
aged in 'good faith' negotiation, or to state whether a
settlement."

the National Standards for Court-Connected Mediation reports based on conduct in mediation should be established in 1992 as a result of a joint project between the American Bar Association and the Institute of Court Services in Washington, D.C. and the Institute of Mediation with the active involvement of an 18-member advisory committee of leading and respected ADR academics and professionals. Paragraphs of these Standards (12.1 and 12.2) narrowly define the standards for use by courts during or after a mediation. Courts and legislatures should refer to these Standards when they are formulating court rules and statutes regarding mediation. Courts should refer to these Standards in order to ascertain the types of mediator-court relationships that should be mandated in those rules or statutes. (Paragraphs 12.1 and 12.2 are attached as an appendix to this Resolution.)

Mediation.

Courts should engage in collaborative planning efforts and design mediation procedures for participants.

Mandated Mediation Programs. Court-mandated mediation programs should address the problems of bad faith by designing the programs to address the needs of the parties. These groups include judges and court administrators. Courts should refer to these Standards especially the parties in mediation. By convening

ms can also encourage individual mediators to talk
n so that everyone has similar expectations about the

ation in mediation should be examined in the context
nd, presumably, the constitutions of every state
including the right to a jury in most cases. While
disputes, on the one hand, and the principles of sound
e other, would support requirements to maintain the
two factors do not trump the constitutional rights of
ed in court. Second, as a profession of dispute
e to full agreement on the definition of mediation.
cept of “case evaluation” or of evaluation-like
esenting their clients’ best interests, be able to
erhaps not at all? Members of our profession are not
. Thus, if we have not fully agreed on the definition
t be permissible negotiation behavior within the
to be able to define “good-faith participation” in
ee that “good faith,” and especially substantive (as
ective concept that cannot be completely or

educational efforts.

mediate interest in encouraging litigants and lawyers to
resources to adjudicate disputes. Thus many courts
appropriate for courts to implement these
mediation and submit pre-mediation memos, courts
interfering with litigants' and lawyers' discretion to
the litigants' interests. Policymakers should
to evade rules if they do not believe that the rules
example, some lawyers and litigants predictably would try
new offer in mediation or give notice that they do not
would be desirable for each side to make new offers in
systems by authorizing sanctions against parties who fail
appropriate to make a new offer (for example, if a
parties do not want to get a reputation for settling frivolous
content of the rule by offering a trivial concession.
disputes and satellite litigation. No mediation process
produce agreements in all cases. Courts generally cannot
by creating rules and imposing sanctions. Rather, the
parties are more likely to negotiate productively if the
their interests.

and rules that establish good-faith requirements in

the 27 cases fell into 5 categories: (1) failure to
ty to send a representative with sufficient settlement
mediation – including failure to submit a
ports to a mediation; (4) insincerity of efforts to
party had not made any offer or any suitable offer,
l not provided requested documents; and (5)
to sign a mediated agreement and failure to release
mediation. Professor Lande describes the final

ses generally have been quite consistent in each
ad faith in all the cases in which a party has failed to
provide a required pre-mediation memorandum.
rganizational parties have provided representatives
ity, the courts have split almost evenly. In virtually
courts ruled on the merits of the case, they rejected
courts have interpreted good faith narrowly to require
mediation, provide pre-mediation memoranda, and, in
representatives with sufficient settlement authority.

Insurance Co., 33 S.W. 3d 443 (Tex. Ct.
7 (6th Cir. Jan. 9, 1996); *Graham v. Baker*,
Indsay, 824 S.W.2d 247 (Tex. Ct. App. 1992);
66 (E.D. Mo. 2000) aff'd 270 F.3d 590 (8th Cir.

example, “surface bargaining” is considered a
h. Surface bargaining is the “pretense of bargaining”
meetings with no intention of reaching agreement and
t basis. Sometimes the only evidence of bad faith is
courts must engage in a detailed analysis of the
which is a wholly subjective process. These types of
of judicial time and undermine an important purpose
rol and judicial efficiency. Finally, what
good faith in other contexts is that mediation
are inadmissible in court. In non-mediation
relevant case law, parties have the clear expectation
faith negotiations. There is no such expectation in
ntiality, prohibiting mediators and mediation
rt about communications in mediation.

Resolution, the Section reviewed the law review
ection has referenced these articles in these Comments
policymakers, and others who may be interested in
and productive participation in court-mandated

be, *Mediating in the Shadow of the Courts: A Survey*
171 (2001).

Mediations, 2002 J. Disp. Resol. 367 (2002).

*ate Resolution: Sanctions for Failure to Participate in
Made in, Mediation*, 43 A.L.R.5th 545 (April 2003).

*Obligation Under the Rules of Professional Conduct
ential Mediation*, 26 Rutgers L. J. 155 (1994).

*Prohibiting Good Faith Reports Under the Uniform
amel Out of the Mediation Tent*, 2003 J. Disp. Resol.

*No Evil, Speak No Evil: The Intolerable Conflict for
aintain Mediation Confidentiality and the Duty to
B.Y.U.L. Rev. 715 (1997).*

Mediation - Requested, Recommended, or Required?
(7).

*ign Methods to Promote Good-Faith Participation in
UCLA L. Rev. 69 (2002).*

Court Mandated Civil Mediation, 49 Drake L. Rev.

*Participant Conduct in Compulsory ADR: Reconciling the
Participation, Autonomy, and Confidentiality*, 76 Ind. L.J.

*Mandatory Mediation: Empirical Research on the
Plea Courts*, 33 Willamette Law Review 565 (1997).

*From Voluntary Mediation to Mandatory Good Faith
Negotiation*, 17 J. Am. Acad. Matrimonial Law. 69 (2001).

comply with the order to attend mediation;

request for additional time to complete the mediation;

procedural action by the court that would facilitate the

request that the case is inappropriate for mediation. . . .

When concluded, the court should be informed of the

When an agreement on any matter, the mediator should report to the court without comment or recommendation.

When any requirement that its terms be reported to the court, the mediator should report to the court in accordance with the jurisdiction's policies governing settlements in

When appropriate, the mediator's report may identify any pending issues, discovery process, or other action by any party that, if completed, would facilitate the possibility of a

of the parties, the justice system, and the public than
and absent mandatory dispute resolution. . . .

reports to the trier of fact and of financial
used in connection with mandated mediation. . . .

be used only when a high quality program (i) is readily
option, (iii) permits lawyer participation when the
certainty about the precise procedures that are being

als should include, to the extent feasible, case
able about dispute resolution procedures and should
motions for exclusion.

and sanctions for noncompliance should be clearly