

The Road from Voluntary Mediation to Mandatory Good Faith Requirements: A Road Best Left Untraveled

by
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“The interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment.”

—Justice Rehnquist (dissent) summarizing the majority opinion in *Santosky v. Kramer*, 455 U.S. 745, 774 (1982).

Since courts began entering the living rooms and bedrooms of American families, the judicial system has struggled with applying legal precepts and rules of evidence to the resolution of emotional, often long-standing disputes affecting not only money or property, but the future of children. The adversarial model seems a poor fit for resolving such disputes. By emphasizing differences between the disputants (parents) and by advancing one party's position over the other's as “truth,” a polarizing effect arises between the parents that, unlike other civil disputants who may have little post-case interaction, must be dealt with long after the litigation ends.¹

In response to such concerns, the past three decades have seen an ever-growing trend of court-annexed alternative dispute resolution (ADR), particularly mediation, in family cases. Parties generally enter such programs after filing for divorce, paternity, motions to modify custody, or other civil proceedings where child custody or visitation is at issue. In the wake of the flood of mediation programs annexed to family courts across the country, a

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¹ Carol J. King, *Burdening Access to Justice: The Cost of Divorce Mediation on the Cheap*, 73 ST. JOHN'S L. REV. 375, 377 (1999).

new trend now seems to be lurking on the horizon — the imposition of specific rules regarding the level of participation required by those attending court-mandated mediation programs, so-called good faith requirements. This new phenomenon marks another step in the judiciary's frustration with perceived failures in ADR programs. Such frustration appears to be growing, as courts are becoming more congested and more courts have begun implementing such requirements through local court rules.

However, the good faith rules presently enforced, and changes proposed by legal scholars, all fall short, particularly in custody mediations, of protecting the objectives of mediation while also ensuring parties in mandatory mediation programs are not wasting time and money should one party decide not to “meaningfully” participate.² The good faith requirements represent an attempt by the courts to ensure maximum efficiency of a system designed to protect the parties' rights to self-determination regarding discussion of issues and settlements. Such divergent goals cannot coexist without one of these forces weakening the power of the other. When courts or legislatures decide to elevate the goal of program efficiency above the goals of self-determination and autonomy, by implementing good faith requirements, countless problems can arise. This Article examines the rise of this trend and its applications, and concludes that the benefits of good faith requirements, as applied in family custody and visitation mediations³, are greatly outweighed by the problems that plague such requirements: lack of definition, satellite litigation, undermining of litigant autonomy, and loss of mediator neutrality and confidentiality.⁴ Additionally, such requirements are *unnecessary* given the present tools available to the mediator and the courts.

More than just an examination of good faith pros and cons, this Article discusses the rise of mediation, and mandatory medi-

² Note that “mandatory” within this discussion refers to both of the following: mediations mandated by state statute or local court rule, and mediations ordered through the discretion of the judge.

³ For ease and readability, I will hereinafter refer to custody and visitation mediation solely as “custody mediation.”

⁴ This Article deals primarily with the problems arising from good faith requirements imposed upon custody and visitation mediations, rather than on other domestic issues such as property division, as the risks imposed by these requirements are greatest in the custody and visitation settings.

ation, within the family law setting, as an essential background to the understanding of the good faith dilemma in this context. Part I of this Article examines a brief history of the rise of the good faith requirements in the family law setting. Part II discusses current trends in good faith requirements, academic literature regarding these trends, and, as stated earlier, advocates against such requirements. Finally, Part III calls for a re-examination of existing principles and practices for assisting in meaningful participation of custody mediations, while not mandating a specific level of participation.

As a preliminary note, although many states and local courts have enacted good faith requirements in civil case mediations generally, rather than specifically in family law cases, this Article will focus primarily on such requirements only in the family law context, as such settings create unique dynamics not necessarily present in other civil disputes.

I. A Brief History

Early in the history of family legal disputes, litigants, attorneys and judges recognized that the adversarial process seemed ill-suited to deal with long-standing personal issues, particularly those involving children. Children are frequently the unknowing victims in the adversarial process, as the parents' anger and frustrations heighten, often resulting in using the children as bargaining chips for financial advantages.⁵ With the advent of no-fault divorce where blame and fault are no longer the focus of the divorce proceeding, reliance on the adversarial process to resolve custody disputes seems misplaced, as courts shift the *primary* focus of custody determinations away from blame and toward the vague "best interest of the child" standard.⁶

A. *The Rise of Child Custody Mediation*

In the early 1970s, attorneys began looking for better ways to resolve custody and visitation issues with which the adversarial process appeared to be ill fitted to deal. At the 1976 Pound Conference, attorneys discussed the potential benefits of family dis-

⁵ Andrew Kaplan, *The Advantages of Mediation in Resolving Child Custody Disputes*, 23 RUTGERS L. REC. 5 (1999).

⁶ *Id.*

pute mediation — a process where a neutral party would assist the parents in resolving their custody and visitation issues as an alternative to litigation.⁷ The mediation trend took off in many states across the U.S., becoming particularly popular and fast-growing in the family law arena, signaling a willingness of judges and attorneys to abdicate control over “emotionally charged” issues, and a growing sense that privatization might be the best forum for resolution of family matters.⁸

One of the earliest attractions to custody and visitation mediations was the cost benefit, both to the courts and to parties. As courts, like all institutions, are motivated by self interest, an initial attraction to court-annexed alternative dispute resolution programs was tied to hopes of providing an effective forum for resolving legal disputes that would concurrently relieve docket congestion.⁹ For the family courts, mediation appeared the most attractive alternative, for it offered the opportunity for parents to re-claim control over decisions regarding their children’s future, a decision the parents seemed better suited to make than a judge. Additionally, custody mediations in many jurisdictions do not include participation by attorneys, thus the potential cost savings to participants could be a significant advantage over litigation.¹⁰

⁷ King, *supra* note 1, at 391.

⁸ Mary Pat Treuthart, *In Harms Way? Family Mediation and the Role of the Attorney Advocate*, 23 GOLDEN GATE U.L. REV. 717, 720 (1993).

⁹ David S. Winston, *Participation Standards in Mandatory Mediation Statutes: “You Can Lead A Horse to Water. . .”*, 11 OHIO ST. J. ON DISP. RESOL. 187, 188 (1996).

¹⁰ Richard Birke, *Mandating Mediation of Money: The Implications of Enlarging the Scope of Domestic Relations Mediation from Custody to Full Service*, 35 WILLAMETTE L. REV. 485, 492-93 (1999). The American Academy of Matrimonial Lawyers found only about 25 percent of its members indicating that attorneys are sometimes present in court-ordered mediations. Mary Kay Kisthardt, *The Use of Mediation and Arbitration for Resolving Family Conflicts: What Lawyers Think About Them*, 14 J. AM. ACAD. MATRIMONIAL LAW. 353, 363 (1997). Reasons for exclusion of attorneys, whether voluntary or mandated by statute, from this type of mediation is unclear, though likely it stems from concerns that lawyers will create an adversarial atmosphere or take over the mediation, thereby eliminating the hallmark of this type of mediation - to allow the parties to discover a mutually satisfactory outcome. Opinions differ over whether there are cost savings apart from attorneys fees, and such savings would vary greatly depending upon program design, timing and settlement rates. Roselle L. Wissler, *Alternative Dispute Resolution Symposium Issue: The Effects of Mandatory Mediation: Empirical Research on the Experience of Small*

In addition to the tangible cost benefits of custody mediation, the structure and goals of mediation provide for greater flexibility than litigation, both with the process and the outcome.¹¹ Flexibility is particularly attractive in custody disputes because mediation allows parents to design parenting plans that more accurately address their lifestyles, work schedules, and unique family dynamics, than would a rigid custody plan ordered by a judge. A process that promotes a solution well suited to the litigants' interests is more likely to increase the participants' perceptions of fairness of the process, another goal important in a court's decision whether to institute such programs.¹² Further, mediation can also encourage patterns of behavior considered advantageous for long-term relationships, such as: cooperative and collaborative problem solving, reality testing, and empowerment.¹³ In custody mediation, emphasis is placed on maintaining the focus on the children, reality, reducing acrimony, and preparing parents for future communications with one another.¹⁴ Accomplishment of these goals is believed to improve the psychological adjustment of children post-divorce.¹⁵ Even if the mediation fails to generate a parenting plan, mediation can be viewed as a success by assisting the parties to narrow the issues and potentially decrease tensions, thereby making future agreement more likely.¹⁶

Despite the many benefits of mediation, custody mediation is not without its critics. For example, critics argue that the pro-

Claims and Common Pleas Courts, 33 WILLAMETTE L. REV. 565, 569 (1997). Although one might think such an attribute would draw the disdain of the practicing bar, a study of Florida family law attorneys revealed that most attorneys surveyed - 94% - believed mediation increased settlement possibilities. Seventy nine percent believed it saved the clients money, and 63% believed it created results best protecting the interests of the children. Susan W. Harrell, *The Mediation Experience of Family Law Attorneys*, 20 NOVA L. REV. 479, 488 (1995).

¹¹ Kimberlee K. Kovach, *Lawyer Ethics in Mediation: Time for a Requirement of Good Faith*, DISPUTE RESOLUTION MAGAZINE WINTER 1997 at 9, 10 (1997).

¹² Wissler, *supra* note 10, at 567.

¹³ *Id.*

¹⁴ Kaplan, *supra* note 5.

¹⁵ King, *supra* note 1, at 378. Still others argue that studies indicate no apparent impact on the children's ability to cope with the aftermath of divorce whether the parents mediated or litigated. Treuthart, *supra* note 8, at 732.

¹⁶ Winston, *supra* note 9, at 191.

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cess is an inappropriate forum for resolving legal disputes because it is premised on a disregard for legal precepts and baselines, thereby resulting in inconsistency in both application and outcome.¹⁷ Further, abdication of this responsibility to the parents may be seriously misplaced, as parents may not be in the best position at this stage in their relationship to make such decisions.¹⁸

Perhaps the largest body of criticism for mediation of custody issues comes from a feminist perspective that mediation is disadvantageous for women. Such gender arguments include disparities in education and income that might alter the ability of women to mediate as well as men, particularly in custody mediations where attorneys may not be present to “equalize” the negotiating power.¹⁹ An argument closely related to the gender

¹⁷ Treuthart, *supra* note 8, at 718-19.

¹⁸ Mary Pat Treuthart, law professor at Gonzaga University, argues that advocacy for mediation of custody matters is based on three false assumptions: “1) [P]arents act in the ‘best interests’ of their children; 2) [T]he ‘best interests’ of the child includes extensive contact with each parent; and 3) [P]arents should be the primary decision maker since they are most familiar with the previous family structure and have the greatest stake in its future structure. Treuthart argues that parents do not always act in their children’s best interest, as evidenced by the common tactic of using children as financial bargaining chips. Further, the parents may be unable at this stage in their separation to appropriately focus on the children, assuming the term “best interest” is even understood similarly between the parents. *Id.* at 733.

¹⁹ Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441, 449-52 (1992). Bryan argues that men’s advantage over women in both tangible resources (money, experts, negotiating skills) and intangible resources (status, dominance, lower incidence of depression, higher self-esteem), coupled with mediator’s coercion exerted over child custody issues and lack of training in power balance, result in mediated agreements that consistently favor husbands more than attorney negotiated agreements, thereby affirming the mother’s role in America as less worthy than the father’s. *Id.* Much support is given to the feminist theory by a study of forty couples, conducted by Robert Emery, which found women are more depressed during custody mediation than during custody litigation. Dane E. Gaschen, *Mandatory Custody Mediation: The Debate Over Its Usefulness Continues*, 10 OHIO ST. J. ON DISP. RESOL. 469, 484 (1995). Ironically, the same study found women still expressed more satisfaction with the *effects on the children* after mediation than did the litigation group. *Id.* For an extensive discussion on the disadvantages of mediation for women, see Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991). See also, Scott H. Hughes, *Elizabeth’s Story: Exploring Power Imbalances in Divorce Mediation*,

concern involves mediation as a representation of a narrow family dynamic — one modeled after a white, middle-class family structure. Critics argue that such a design ignores family dynamics and values inherent in other ethnic and financial categories.²⁰ Forcing diverse populations to fit into such a rigid mediation model arguably creates a system more likely to frustrate the parties while ignoring their real interests.²¹

B. *The Demand for Mandatory Requirements*

Despite the early criticisms of custody mediation, the trend continued to grow, but programs frequently experienced problems of under-utilization.²² In response to low usage rates, and in hopes of creating custody arrangements more responsive to the needs of the parties than those resulting from judicial orders, California, in 1980, enacted the first mandatory mediation statute for contested custody cases.²³ In the next 20 years, more

Spring 1995 GEO. J. LEGAL ETHICS 553. Note, however, Margaret Brinig, law professor at George Mason University, argues that women are not more risk averse or more altruistic than men and, therefore, if women are placing custody above financial security, it is for other reasons. Margaret F. Brinig, *Does Mediation Systematically Disadvantage Women?*, 2 WM. & MARY J. OF WOMEN & L. 1 (1995). Despite these criticisms, numerous studies indicate that women are as satisfied with the mediation process as men. Gaschen, *supra* note 19, at 483-85 (citing studies conducted by the National Center for State Courts, and a long-term study of forty couples conducted by Robert Emery). Further, the addition of a mandatory requirement seems to have little effect on the parties' satisfaction with the process or outcomes, as an Arizona study found. *Id.* at 487-88.

²⁰ For instance, the Hispanic culture represents the fastest growing population in America and, therefore, a likely growing population of mediation participants. However, where the current custody mediation model emphasizes parental decision making and joint physical custody, Hispanic critics argue that the Hispanic culture is rooted in traditions whereby motherhood is considered sacred, and the role of the extended family is paramount to any decisions regarding a child's upbringing and care. Jessica R. Dominguez, *The Role of Latino Culture in Mediation of Family Disputes*, 1 J. LEGAL ADVOC. & PRAC. 154, 162-67 (1999). Dominguez argues that Hispanic people do not value the power of bargaining, a key element of mediation and, therefore, can be greatly disadvantaged relative to a non-Hispanic opponent if dispute resolution procedures do not account for such cultural differences. *Id.* at 165.

²¹ *Id.* at 154.

²² Wissler, *supra* note 10, at 565.

²³ Gaschen, *supra* note 19, at 469-70. A unique provision of the California statute is that it permits the mediator to make a recommendation to the court

than thirty other states enacted some form of mediation program for custody and visitation issues, many of which are mandatory.²⁴ In addition to concerns about low usage of mediation programs, courts viewed mandatory mediation as a way to accelerate the settlement process by requiring parties to begin thinking about solutions earlier in the dispute process, rather than waiting for shortly before trial or pre-trial conferences.²⁵ Many studies have also shown that mandatory programs, by increasing the number of cases involved in mediation, do reduce the number of custody hearings, thus relieving docket congestion.²⁶

Further, mandatory programs assist in overcoming litigant and attorney resistance, providing education for a process unfamiliar to many lawyers and most parties, while simultaneously exposing more litigants to its potential benefits.²⁷ From the perspective of family law attorneys, mandatory mediation looks attractive both from a strategic standpoint and an educational one, as it allows neither party to appear a weak party by requesting mediation voluntarily and also exposes all parties to the process regardless of whether the attorneys are aware of the program's benefits or risks.²⁸

Just as with the development of mediation programs, mandatory mediation statutes quickly met with criticism. For example, critics argue that mandatory mediation is not *true* mediation for it eliminates a hallmark of ADR - voluntariness. They

concerning conducting an investigation or issuance of a restraining order even though all communications during mediation are allegedly privileged. CAL. FAMILY CODE §3177 & 3183 (WEST 2001). This dichotomy gives rise to due process concerns because a parent who is unhappy with the mediator's recommendation would apparently be prohibited from cross-examining the mediator. See Susan C. Kuhn, *Mandatory Mediation: California Civil Code Section 4607*, 33 EMORY L.J. 733, 733, 771-72 (1984).

²⁴ Gaschen, *supra* note 19, at 472.

²⁵ Winston, *supra* note 9, at 190.

²⁶ Studies in California, Virginia, Georgia and North Carolina support conclusions that mediation both decreases case termination times and decreases the number of custody hearings. Gaschen, *supra* note 19, at 481-82.

²⁷ Wissler, *supra* note 10, at 570-71.

²⁸ The American Academy of Matrimonial Lawyers surveyed its members and found attorneys favoring mediation of custody and visitation issues because it is seen as promoting communication between the parties and attempting to preserve a relationship that requires long-term cooperation. Kisthardt, *supra* note 10, at 356-57, 360.

assert that parties no longer control the process, or selection of the neutral; therefore, many goals of mediation are lost, such as empowerment and self-determination. Such a superficial analysis, however, fails to acknowledge that, while participation may be mandated, the parties are not ordered to settle, or even ordered to make meaningful offers. Mandatory mediation only requires the parties to sit down together, while preserving each party's right to determine level of participation, whether to make offers, and whether to accept a proposed settlement.²⁹

A more powerful criticism of mandatory custody mediations is a concern that the process results in coercion to settle the case. Critics argue this risk may be especially great with low-income parents who are required to pay for the court-ordered mediation, as the pressure to settle greatly increases because such expenditure may preclude them from the ability to afford the attorneys fees for trial should the mediation not result in an agreement.³⁰ While this fear is concerning, pressure to settle certainly is not unique to mandatory mediation programs. Parties in litigation may feel coercion to settle from judges, lawyers, or the parties' financial situations. Provision of legal services to the poor is currently being addressed in both the mandatory mediation programs and in the litigation arena. For example, sliding mediator fee schedules based on income, fee waivers for the indigent, or even free mediation for the poor are all alternatives presently being used.³¹

Finally, critics cite a concern that mandatory custody mediation in cases where domestic violence is involved is inappropriate for both safety reasons and an imbalance of bargaining power.³² In response to these concerns, approximately 80% of mediation

²⁹ Winston, *supra* note 9, at 189. As will be seen in Part II, this criticism becomes more valid when good faith requirements are imposed.

³⁰ King, *supra* note 1, at 382.

³¹ In Kansas City, Missouri, for example, unsettled custody disputes are referred to mandatory mediation, and each party pays a mediation fee based in his/her income, ranging from \$15 to \$150 for the initial two-hour session. Mediation Requirements in Disputed Child Custody and Related Parenting Issues, at <http://www.family-court.org/mediators.htm>.

³² Critics, such as Trina Grillo, argue that because mediation, unlike other forms of ADR, engages a neutral party to *assist disputants in arriving at a mutually acceptable resolution*, it is imperative that both parties are able to assess their situation and make decisions about their own behaviors in settling the

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programs screen for domestic violence, and many others impose safeguards such as private screening, or shuttle mediations.³³ Additionally, critics argue that the popular “future-focus” mediation style discourages parties from discussing past events or dynamics, and therefore allows the abuser to escape responsibility for past behavior.³⁴ Thus the perpetrator is not only excused for his actions, but this may be perceived by the victim as the mediator condoning the behavior.³⁵ Conversely, if a mediator attempts to equalize the bargaining power and make a safe environment for the victim, this will likely be perceived as bias by the abuser.³⁶

dispute. This presumes relatively equal bargaining power, a false presumption in relationships involving domestic violence. Treuthart, *supra* note 6, at 728-29.

³³ Nancy Thoennes & Peter Salem, *Mediation and Domestic Violence: Current Policies and Practices*, 33 FAM. & CONCIL. CTS. REV. 6 (1995) (analyzing a 1993 study of over 200 courts and services). However, Maxwell argues that between 50% and 80% of marriages referred to court-based family mediation involve domestic violence, yet less than 5% are excluded based on domestic violence, suggesting serious flaws in the screening process. Jennifer P. Maxwell, *Mandatory Mediation of Custody in the Face of Domestic Violence: Suggestions for Courts and Mediators*, 37 FAM. & CONCIL. CTS. REV. 335, 337, 340 (1999); and Treuthart, *supra* note 6, at 763.

³⁴ Kisthardt, *supra* note 10, at 362. *See also*, Grillo, *supra* note 19, at 1559-60. While Grillo and others take the extreme position of advocating exemption of all cases where any domestic violence is suspected, other writers advocate mediation in cases where instances of abuse was infrequent or isolated, and where the parties are able to mediate on equal footing. Alison E. Gerencser, *Family Mediation: Screening for Domestic Abuse*, 23 FLA. ST. U.L. REV. 43, 47, 59 (1995). Gerencser points to a survey conducted at Alachua County Mandatory Family Mediation Program in Florida, run by her, in which 37 out of 78 women surveyed indicated physical abuse occurred in their relationship, and 56 reported emotional or mental abuse. However, every respondent in private interviews indicated a desire to try mediation. *Id.* at 61-62.

³⁵ Treuthart, *supra* note 6, at 726.

³⁶ *Id.* at 729. While such flaws exist within the mediation model, even more serious flaws are present in the litigation model. Although the attorney may be more capable than an abuse victim to assert her rights, many litigants cannot afford attorneys and are then required to, not only master the adversarial system but, also, attempt to *prove* abuse by a preponderance of the evidence. Such hurdles appear far more challenging for someone with significantly less bargaining power. Even with the assistance of an attorney, proof of abuse must be established at trial before any precautions would be implemented by a judicial custody order. Such proof is not necessary in the mediation model, as more importance is placed on interests rather than rights. Finally, although scholars may be greatly concerned with the mediation model, at least one study indicated process satisfaction rates among domestic violence victims are still

Critics also argue that both approaches jeopardize the neutrality of the mediator. Clearly, these concerns are more difficult to address absent an alteration of the popular mediation style.³⁷

Despite such criticisms, studies suggest that parties benefit from mediation even when mandatory.³⁸ In particular, parties in mandatory mediation programs rate efficiency and process satisfaction high, expressing beliefs that the process allowed them to fashion more creative solutions than would be offered in court and solutions that were more responsive to their particular situations.³⁹ Outcome satisfaction and settlement rates both appear comparable to those found with voluntary mediation programs.⁴⁰

C. The Development of Good Faith Requirements

Concluding that mediation of custody and visitation issues is, in most cases, an effective alternative to litigation, and that mandatory statutes are necessary to overcome low usage rates and other pitfalls, leads to the question: "Does 'mandatory' refer only to a requirement to *attend* mediation, or should some level of participation be specifically mandated?" The question arises because, unlike voluntary mediation, where disputants chose the ADR process and the neutral, participants in the mandatory programs may not *want* to mediate their case. Such resentful participants often attend mediation only reluctantly, frequently refusing to meaningfully participate, and treating the process as merely another pre-trial obstacle that must be endured before they can receive their day in court. This phenomenon threatens the very attributes of mandatory mediation programs: efficiency and cost-savings. These concerns reached across state and federal programs and across all types of civil disputes. In response, the fed-

higher with mediation than with attorney-negotiated settlements. King, *supra* note 1, at 444.

³⁷ It should be noted that Constitutional challenges, such as due process, equal protection, and access to justice, have been brought against mandatory mediation programs, but have largely been unsuccessful, as mediation presents only a minor delay in justice and does not impose unreasonable (financial) burdens on the parties. King, *supra* note 1, at 397-417 (citing several family law cases upholding mandatory mediation statutes and court rules).

³⁸ Winston, *supra* note 9, at 191.

³⁹ Birke, *supra* note 10, at 491-92. *See also*, Kisthardt, *supra* note 10, at 369-70.

⁴⁰ King, *supra* note 1, at 439-40.

eral courts responded earliest, enacting in 1983 an amendment to Federal Rule 16, providing for sanctions if parties or attorneys fail to participate in good faith in court-ordered mediation programs.⁴¹ While the federal rule did not specifically address custody mediations, it did mark the beginning of a growing trend among states and individual courts of instituting statutes or procedural rules requiring that mediation participants mediate in “good faith.”

II. Good Faith Requirements for Mandatory Family Court Mediations

Because mediation is a cooperative process, designed to assist parties in reaching a mutually satisfactory resolution, non-binding, mandatory mediation appears futile if one party refuses to meaningfully participate. In order to ensure mandatory mediation is more than just an exercise in futility, thereby reducing the mediation process “to an obstacle of inefficiency,” some states, and courts through local rules, recently began enacting requirements that parties mediate in “good faith.”⁴²

Arguably, parties involved in voluntary mediation will enter the process with an intent to resolve their issues through mediation and, therefore, likely possess an intent to participate in good faith. Thus, the problems regarding good faith requirements are greatest in jurisdictions that impose mandatory mediations, where parties may be reluctant, if not hostile, toward the mediation process. Further, because mandatory custody mediations involve dynamics dissimilar to other civil disputes, such as long-

⁴¹ Edward F. Sherman, *Court-Mandated Alternative Dispute Resolution: What Form of Participation Should be Required?*, 46 SMU L. REV. 2079, 2089 (1993).

⁴² See, e.g., IND. CIVIL CT. RULES tit. 34, RULES FOR ALTERNATIVE DISPUTE RESOLUTION, GUIDELINE 8.7 PRE-SUIT MEDIATION GOOD FAITH (2000) (stating parties “should participate in the mediation in good faith”); ME. REV. STAT. ANN. tit. 19-A, §251 (West 1999) (requiring the court to determine whether the parties mediated in good faith before proceeding with a contested hearing); OKLA. STAT. tit. 12, §1824 and §1825 (1999) (requiring parties to participate in mediation in good faith, and to “put forth their best efforts with the intention to settle all issues if possible”); and TEX. FAMILY CODE ANN. §6.404 (1999) (requiring parties to submit a signed pleading agreeing to mediate in good faith).

term, future interactions and the welfare of children, it is particularly important to ensure the process in these types of mediations does not jeopardize the original benefits of mediation, including encouraging problem-solving communication skills.

A. *The Need for Good Faith Requirements Generally*

As stated previously, most good faith requirements developed in light of concerns regarding the futility of mediation absent an intent by the parties to meaningfully participate. Two concerns support the futility argument in favor of a good faith requirement. The first is a risk of “pro forma mediation” where parties and attorneys merely show up and go through the motions in order to satisfy one more requirement to get into court, often bringing parties who lack settlement authority and attorneys who lack intent to discuss settlement.⁴³ “[T]o allow parties to show up without authority, without preparation, and without a desire or an ability to even discuss options and alternatives makes a mockery of mediation.”⁴⁴ As applied to the custody mediation setting, it could be argued that such practices (i.e. a parent showing up to mediation with no intent to discuss custody or visitation issues or to consider the offers/suggestions of the other parent) may further frustrate already tense relations between parents, thus decreasing both the likelihood of future settlement and of future collaboration regarding other child-rearing issues.

The second concern presents a risk that attorneys, due to lack of mediation education or for strategic reasons, will treat mediation as they would a trial, using adversarial tactics.⁴⁵ For example, attorneys may use mediation solely as a discovery tool to assess the other parties’ strengths and weaknesses, or possibly even to fraudulently misrepresent facts in order to induce the other party to enter into an agreement they otherwise would not,

⁴³ Kimberlee K. Kovach, *Good Faith in Mediation - Requested, Recommended, or Required? A New Ethic*, 38 S. TEX. L. REV. 575, 596 (1997).

⁴⁴ *Id.* at 596.

⁴⁵ Kovach refers to this morphing of the mediation process into “adversarial mediation.” *Id.* at 593. See also Jean R. Sternlight, *Lawyers’ Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting*, 14 OHIO ST. J. ON DISP. RESOL 269, 271 (1999) (arguing attorney advocacy is consistent with mediation, but attorneys must “redefine their method of advocacy” with the mediation setting).

or wear out a financially weaker opponent.⁴⁶ Therefore, it is suggested a good faith requirement is necessary to prevent distortion of mediation into yet another pretrial obstacle.⁴⁷ Additionally, such tactics jeopardize the time and cost efficiency benefits of mediation. Thus, advocates assert that “compelled motivation,” in the form of good faith requirements, will increase settlements even in cases where one party is attempting to “delay or avoid resolution.”⁴⁸

B. *Good Faith Requirements in Practice*

1. *Statewide Good Faith Requirements*

Responding to the concerns addressed above, some states enacted “good faith” requirements for mediation programs, either by state statute or through state court rules.⁴⁹ Many of the state statutes impose a general (undefined) duty of good faith upon mediation participants, either in all civil matters referred to mediation, or in specific types of civil mediations.⁵⁰ While most

⁴⁶ Kovach, *supra* note 11, at 10; and Kovach, *supra* note 43, at 594.

⁴⁷ This argument is greatly diminished, if not eliminated, in the family law context, where attorneys are rarely present at mediations and it is unlikely parties would be savvy enough to utilize the process for discovery purposes without the assistance of counsel.

⁴⁸ Tony Biller, *Good Faith Mediation: Improving Efficiency, Cost, and Satisfaction in North Carolina’s Pre-Trial Process*, 18 CAMPBELL L. REV. 281, 292 (1996).

⁴⁹ See PA. R. CIV. P. 1940.2 DEFINITIONS (requiring good faith participation in voluntary custody mediations, but parties “are not compelled to reach an agreement”). For examples of state statutes requiring good faith in all civil case mediations, see GA. R. CIV. P. APPENDIX C(A) ETHICAL STANDARDS FOR MEDIATORS (requiring all mediators to explain to parties who participate in mediation that they are expected to negotiate in an atmosphere of good faith and full disclosure of matters material to any agreement reached); OHIO RULES OF COURT, RULE 2.39 CIVIL MEDIATION (2000) (requiring each side to discuss the facts and issues and to make a good faith effort to settle the case); OKLA. STAT. ANN. tit. 12 ch. 38 section 1824, District Court Mediation Act (2000) (parties shall participate in mediation in good faith); and IND. RULES FOR ALTERNATIVE DISPUTE RESOLUTION, Guideline 8, Pre-Suit Mediation (2000) (civil dispute parties *should* mediate in good faith).

⁵⁰ See COLO. REV. STAT. §13-22-311 (2000) (permitting a stay of the legal proceedings only if mediator and parties “agree and inform the court that the parties are engaging in good faith mediation”); KAN. STAT. ANN. §72-5430 (2000) (prohibiting participants in teacher contract mediations from refusing to participate in good faith); and WASH. REV. CODE §59.20.080(2) (2000) (requir-

good faith requirements merely state that parties involved in civil case mediations will participate in good faith, with no rules regarding how one complies in good faith, Texas, Maine, and Utah impose significant additional good faith burdens upon parties engaged in custody mediations.⁵¹

Texas, implementing a state policy of encouraging “peaceable resolution of disputes, with special consideration given to disputes involving the parent-child relationship,” enacted a statute requiring disputants with contested custody or visitation issues to sign and file a first pleading attesting that they will mediate in good faith prior to seeking resolution through trial.⁵² This statute evolved in light of a line of non-family cases addressing a judge’s ability to order good-faith participation in mediations absent statutory authority. In 1992, the Texas Court of Appeals heard an appeal from a trial judge’s order demanding counsel and parties to “proceed in a good faith effort to try to resolve this case [through mediation].”⁵³ The appellate court ruled that requiring a particular participation level violated the state’s open courts’ doctrine—the state policy encouraging, but not requiring,

ing participants in mandatory mobile home landlord-tenant eviction mediations to participate in good faith and permitting tenant to use landlord’s bad faith participation as a complete defense to eviction).

⁵¹ TEX. FAMILY CODE ANN. §6.404 (1999); ME. REV. STAT. ANN. tit. 19-A, §251 (West 1999).

⁵² “A party to a proceeding under this title shall include in the first pleading filed by the party in the proceeding the following statement: ‘I am aware that it is the policy of the State of Texas to promote the amicable and nonjudicial settlement of disputes involving children and families. I am aware of alternative dispute resolution methods, including mediation. While I recognize that alternative dispute resolution is an alternative to and not a substitute for a trial and that this case may be tried if it is not settled, I represent to the court that I will attempt in good faith to resolve before final trial contested issues in this case by alternative dispute resolution without the necessity of court intervention.’” TEX. FAMILY CODE ANN. §6.404 (1999). As of this writing, no published cases exist interpreting, applying, or challenging this statute. For the state policy encouraging mediation of such disputes, see TEX. CIV. PRAC. & REM. CODE § 154.002 (2000).

⁵³ *Decker v. Lindsay*, 824 S.W.2d 247, 248 (Tex. App. 1 Dist. 1992). *Decker* involved a personal injury suit in which the litigants were ordered to mediate, despite parties’ objection. The appellant contested the provision of the trial judge’s order stating: “While no one is asked to commit to settle their dispute in advance of mediations, all parties commit to participate in the proceedings in good faith with the intention to settle, if at all possible.” *Id.* at 249.

“peaceable resolution of disputes” through “voluntary settlement procedures.”⁵⁴ In interpreting the policy, the court stated: “A court cannot force the disputants to peaceably resolve their differences, but it can compel them to sit down with each other.”⁵⁵ The legislature, apparently dissatisfied with these rulings, particularly as they apply to the family law setting, passed the above statute now requiring good faith participation, but failing to define it.

Maine’s good faith requirement goes even further than the Texas statute in imposing affirmative duties upon custody mediation participants. Section 251 of Maine’s Domestic Relations Code, which requires all contested cases involving minor children to be mediated prior to a court hearing, additionally requires:

When agreement through mediation is not reached on an issue, the court must determine that the parties made a good faith effort to mediate the issue before proceeding with a hearing. If the court finds that either party failed to make a good faith effort to mediate, the court may order the parties to submit to mediation, may dismiss the action or a part of the action, may render a decision or judgment by default, may assess attorney’s fees and costs or may impose any other sanction that is appropriate in the circumstances.⁵⁶

Little legislative history and scarce case law surround the Maine statute. Only one case has been litigated regarding this statute. In 1991, in *Bennett v. Bennett*, Mr. Bennett appealed a grant of divorce, arguing, among other points, that a portion of

⁵⁴ *Id.* at 250.

⁵⁵ *Id.* Two years later, in a case re-affirming *Decker*, the appellate court voided a trial judge’s order that the parties “conduct settlement negotiations in good faith” finding that the court can mandate mediation, but not require good faith in the wake of *Decker*. *Hansen v. Sullivan*, 886 S.W.2d 467 (1994). Despite changes to Texas’ Family Code, non-family mediation participants still have no statutory mandate to mediate in good faith. However, awards of mediator fees and costs have been upheld for a refusal to mediate in good faith when a party failed to file a written objection to the mediation order as required by statute. *Texas Department of Transportation v. Pirtle*, 977 S.W. 2d 657, 658 (Tex. App. Ct. 1998). *See also* *In Re Acceptance Insurance Company, Relator*, 2000 Tex. App. LEXIS 7911 (state Alternative Dispute Resolution Act permits courts to compel parties to *participate* in alternative dispute resolution, including mediation, but it cannot compel them to negotiate in good faith or to settle their dispute); and *Rizk v. Millard*, 810 S.W.2d 318 (Tex. App. 1991) (reluctance or refusal to sign a binding mediated agreement the same day it was drafted is not a breach of good faith in mediation under the state’s ADR statute).

⁵⁶ ME. REV. STAT. ANN. tit. 19-A, §251 (West 1999).

the good faith statute that requires any agreement to be reduced to writing mandated the trial court to order his wife to sign and submit to the court an agreement he claims was reached in mediation.⁵⁷ The Maine Supreme Court denied Bennett's appeal on these grounds, stating that reading such a mandate into the statute:

. . . would of necessity require the trial court to engage in the time-consuming process of exploring what transpired between the parties during the course of the mediation in order to determine if they had reached any agreement and, if so, the actual terms of that agreement. Clearly, this is contrary to and would undermine the basic policy of the mediation process that parties be encouraged to arrive at a settlement of disputed issues without the intervention of the court.⁵⁸

Such a holding is surprising considering the plain language of the statute excerpted above clearly *requires* the court to make just such an inquiry when no agreement is reached in mediation.

Finally, Utah presents perhaps the most shocking sanctions for participants in the state's Expedited Visitation Enforcement Pilot Program, a seven-year pilot referring visitation enforcement cases to mandatory mediation.⁵⁹ State law permits imposition of monetary sanctions in excess of mediation fees and even a *temporary change in custody or visitation* if a parent fails to cooperate in good faith in mediation.⁶⁰ Perhaps more shocking, than the potential for custody modification based on an undefined concept of bad faith, is that good faith is not defined anywhere in the statutes.

2. Local Court Rules Imposing Good Faith Requirements

More common than statewide efforts to impose good faith requirements in custody mediations are requirements imposed through local court rules. Such rules are found both in jurisdictions where custody mediations are mandated pursuant to the judge's discretion,⁶¹ such as in Ohio and Illinois, and jurisdictions

⁵⁷ Bennett v. Bennett, 587 A.2d 463, 463 (Maine 1991).

⁵⁸ *Id.* at 464.

⁵⁹ UTAH CODE ANN. §30-3-38 (2000).

⁶⁰ *Id.*

⁶¹ See MONT. COUNTY (OHIO) COURT OF COMMON PLEAS, LOC. R. 2.39 CIVIL MEDIATION (permitting any civil case to be referred to mediation upon a party's motion, the court's motion, or party agreement, and requiring the mediator to report to the court if either party failed to make a good faith effort to

where mediation is mandatory for all contested custody and visitation issues, such as in California and Washington.⁶² As with the state rules, the local court rules also fail to define good faith.

C. *Flaws in the Good Faith Requirements*

Despite the asserted advantages of good faith requirements, in practice they undermine the positive aspects of mediation and amplify the criticisms.

1. *Lack of Definition*

The first, most obvious, flaw is a lack of definition for good faith. Not a single statute, supreme court rule, or local court rule imposing good faith duties upon participants to custody mediations actually *defines* good faith or details what level of participation is necessary to satisfy the rule. Such a failure poses a serious danger as evidenced most dramatically in the Utah statute discussed earlier that permits temporary modifications in custody or visitation if a court finds parents have participated in bad faith.⁶³ In avoiding the definitional problem, courts either attempt to

settle the case); 18TH CIR. (IL.) R. 15.18 MEDIATION & EVALUATION PROGRAM (permitting court-ordered mediation of contested family case issues and requiring good faith mediation by both parties and their representatives); 19TH CIR. (IL.) Rule 18.06 APPLICATION OF SAFEGUARDS IN CASE OF IMPAIRMENT (requiring family court mediators to “assess continuously whether the parties manifest any impairments affecting their ability to mediate safely, competently, and in good faith”).

⁶² See NEVADA COUNTY (CAL.) LOC. R. 5.04 CHILD CUSTODY AND VISITATION (mandating mediation of contested custody and visitation disputes and requiring both parties and attorneys to “make a good faith effort to support mediation proceedings”); PLUMAS COUNTY (CAL.) LOC. R. 9.3 DUTIES AND OBLIGATION OF THE PARTIES (mandating mediation of contested custody and visitation disputes and requiring parties to make a good faith effort to arrive at an agreement through mediation); SAN BENITO COUNTY (CAL.) LOC. R. 11.11 MEDIATION OF VISITATION OR CUSTODY ISSUES (mandating mediation of contested custody and visitation disputes and providing for sanctions should one or both parties not mediate in good faith); WALLA WALLA COUNTY (WASH.) LOC. R. 20 FAMILY LAW MANDATORY MEDIATION (mandating mediation of virtually all family cases and requiring parties to mediate in good faith); and WHATCOM COUNTY (WASH.) LOC. R. 94.08 FILINGS IN FAMILY LAW CASES (mandating mediation of contested family disputes and requiring parties to engage in mediation in good faith).

⁶³ UTAH CODE ANN. §30-3-38 (2000).

narrow the good faith requirement in custody mediations by applying it to a specific area of the mediation session, impose sanctions for parties failing to mediate in undefined good faith, or provide exemption from mediation for parties unable to mediate in good faith.

a. Good Faith in Participation or Process Local courts in Illinois and Washington require parties to “participate” in good faith or to “mediate” in good faith, but fail to define what either standard requires.⁶⁴ Perhaps the most vague mandate can be found in Nevada County, California, which requires parties and attorneys to “make a good faith effort to support the mediation proceedings.”⁶⁵

b. Good Faith in Reaching Settlement Montgomery County, Ohio, Local Court Rule 2.39 requires parties to attend mediation, to discuss “the facts and issues,” and to make a good faith effort “to settle the case” in mediation, but fails to define what that good faith effort entails.⁶⁶ Several California counties require good faith efforts to “arrive at an agreement” through mediation.⁶⁷

c. Sanctions for Failure to Mediate in Good Faith The harshest rules are ones imposing sanctions against parties for failure to mediate in good faith, but failing to define good faith, such as the Utah and Maine statutes discussed earlier. San Benito county in California also provides for sanctions if either party fails to participate in custody mediation in good faith, but does not define what that standard requires.⁶⁸

d. Exemption from Mediation The final category of good faith mandates for custody mediations provide for exemptions

⁶⁴ See 18TH CIR. (IL.) R. 15.18 MEDIATION & EVALUATION PROGRAM; WALLA WALLA COUNTY (WASH.) LOC. R. 20 FAMILY LAW MANDATORY MEDIATION; and WHATCOM COUNTY (WASH.) LOC. R. 94.08 FILINGS IN FAMILY LAW CASES.

⁶⁵ NEVADA COUNTY (CAL.) LOC. R. 5.04 CHILD CUSTODY AND VISITATION.

⁶⁶ MONT. COUNTY (OHIO) COURT OF COMMON PLEAS, LOC. R. 2.39 CIVIL MEDIATION.

⁶⁷ See PLUMAS COUNTY (CAL.) LOC. R. 9.3 DUTIES AND OBLIGATION OF THE PARTIES; and SANTA CRUZ COUNTY (CAL.) LOC. R. 3.3.02 CHILD CUSTODY MEDIATION.

⁶⁸ SAN BENITO COUNTY (CAL.) LOC. R. 11.11 MEDIATION OF VISITATION OR CUSTODY ISSUES.

from mediation if the court and/or mediator determines either party cannot mediate in good faith.⁶⁹ Again, even the exemption statutes, such as those found in Illinois, fail to define good faith.

This lack of adequate definition across the country leaves huge questions, not only of degree of participation required but, of what good faith refers to.⁷⁰ Does good faith only require the parties to show up to the mediation session? To stay a particular length of time? To respond to questions when asked? Or, are the parties required to make good faith offers (i.e. custody arrangement suggestions)? Are they required to make a good faith effort to settle (i.e. by compromising)? Are they required to consider every offer the other side proposes even where unreasonable?

Lord Mansfield defined good faith this way: "Good faith forbids either party from concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his believing to the contrary."⁷¹ As this definition like the statutes discussed above provides little guidance, courts, too, have not been enthusiastic about providing a clear definition. Very little case law addresses family mediation good faith definitions. Instead, the courts that have attempted to define good faith generally do so by either relegating the term to an obscenity definition - we know it when we see it - or by attempting to define it by what good faith is not.⁷²

⁶⁹ See 19TH CIR. (IL.) Rule 18.06 APPLICATION OF SAFEGUARDS IN CASE OF IMPAIRMENT (requiring family court mediators to "assess continuously whether the parties manifest any impairments affecting their ability to mediate safely, competently, and in good faith").

⁷⁰ Winston, *supra* note 9, at 189.

⁷¹ Nicola W. Palmieri, *Good Faith Disclosures Required During Precontractual Negotiations*, 24 SETON HALL L. REV. 70, 83 (1993).

⁷² Kovach, *supra* note 11, at 10. Kovach argues that such vagueness is no different than other legal concepts, such as reasonableness, that are not clearly defined. Kovach, *supra* note 43, at 599. Within the context of custody mediations, however, such vagueness can have serious detrimental consequences. For cases addressing the meaning of good faith, see *Avril v. Civilmar*, 605 So. 2d 988 (Fla. App. 1992) (auto collision case in which Florida appellate court ruled trial court could not impose sanctions of attorneys fees and costs for refusing to make an offer higher than \$1,000, ruling good faith duty is not breached merely by offering a settlement amount that is unacceptable to the opposing side); *Federal Land Bank of Wichita v. Delmas Northcutt*, 811 P.2d 1368 (Okla. Civ. App. 1991) (federal statutes requiring good-faith participation in mediation do not

The mediation context is not the only forum where courts and legislatures are failing to define good faith. Even within the context of contract negotiations, there is no uniformity of definition for the phrase good faith.⁷³ The Uniform Commercial Code defines good faith as “honesty in fact in the conduct or transaction concerned.”⁷⁴ The Restatement Second of Contracts states that good faith “emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving ‘bad faith’ because they violate community standards of decency, fairness or reasonableness.”⁷⁵ Even legal scholars are divided on the definition. Black’s Law Dictionary defines good faith as “an intangible and abstract quality with no technical meaning or statutory definition. . . .”⁷⁶

Mediation statutes mandating good faith in non-family law cases also provides little guidance. The few statutes that do define good faith generally refer only to attendance and/or settlement authority, or are field-specific with little crossover application. For example, Minnesota’s mandatory mediation statute for debtor-creditor cases requires parties to participate in good faith.⁷⁷ The statute does not define good faith, but identifies bad faith as: failure to attend without cause, failure to provide full information regarding financial obligations, failure to send representative with settlement authority, lack of written statement of debt restructuring alternatives, failure of creditor to release funds, or “other similar behavior.”⁷⁸ Montana’s workers

make such participation a condition precedent to foreclosure under the Agricultural Credit Act); and *Schulz v. Nienhuis*, 448 N.W.2d 655 (Wisc. App. 1989) (state’s medical malpractice law requiring mediation within a statutory mediation period does not *require* dismissal of an action merely because of failure to mediate within that time period). For a case addressing the duty to assess good faith, see *Production Credit Association Of Worthington v. Spring Water Dairy Farm, Inc.*, 407 N.W.2d 88 (Minn. 1987) (holding it is the mediator’s obligation to determine whether mediation failure is due to bad faith under the state Farmer-Lender Mediation Act).

⁷³ Palmieri, *supra* note 71, at 78.

⁷⁴ U.C.C. § 1-201(19).

⁷⁵ RESTATEMENT (SECOND) OF CONTRACTS § 205 comment A (1979).

⁷⁶ BLACK’S LAW DICTIONARY 693 (6th ed. 1990).

⁷⁷ MINN. STAT. ANN. §583.27 (WEST 2000).

⁷⁸ *Id.*

compensation statutes require participants in mandatory mediations to “cooperate in the mediation process.”⁷⁹ Failure to cooperate includes: failure to supply information or offer a summary of party positions, failure to attend scheduled mediations unless excused, or failure to listen to and review the information and position offered by the opposing party.

Such vagueness, and lack of guidance from non-family mediation statutes, contract law, and even mediation case law, leaves participants, and their attorneys, unsure about the level of participation required. This uncertainty is most disturbing regarding custody mediations, potentially creating a chilling effect whereby attorneys encourage their clients to disclose less information during the mediation session because of a fear of future judicial inquiry into the content of the mediation session. This practice could seriously jeopardize the appropriateness of custody and visitation agreements should parents decide not to disclose critical, but damaging, information during the mediation session.

2. *Satellite Litigation*

Definitional uncertainty leaves the responsibility for interpretation in the hands of the parties and the mediators, which leads to the next problem of good faith requirements. If one party believes that the other party has not mediated in good faith, satellite litigation must occur, thereby undermining a primary purpose of mediation.⁸⁰ Forcing the courts to make “exhaustive investigations into the bargaining during the mediation process. . . severely undermine[s] the objectives of economy and efficiency” which, as discussed in Part I, are vital to the success of custody mediations.⁸¹

The fear of satellite litigation is more than just abstract. Although little case law surrounds the family law area, both federal and state courts in other fields have struggled with good faith cases, overturning and upholding trial court sanctions with little

⁷⁹ MONT. CODE ANN. §39-71-2411 (2001).

⁸⁰ Winston, *supra* note 9, at 189.

⁸¹ *Id.* at 198. Kovach claims that specific good faith guidelines and “rational sanctions” such as cost of mediation, ordering good faith participation in a second mediation, etc., will keep satellite litigation to a minimum. Kovach, *supra* note 11, at 12; and Kovach, *supra* note 43, at 603-04.

consistency.⁸² Sanctions, usually in the form of attorney fees, mediation fees, or other costs, have been upheld for failure to submit required mediation memoranda, failure to send a representative with settlement authority, and refusal to participate,⁸³ but have been denied for failure to make offers considered “reasonable” to the opposing party, or failure to settle when parties meaningfully participated.⁸⁴ Other courts struggle with what

⁸² Courts appear more willing and consistent in sanctioning parties for failure to *attend* mandatory mediations, clearly a more easily identifiable misdeed. *See* Armenta v. Goodridge, 682 A.2d 221 (D.C. 1996) (upholding monetary sanction for defendant’s failure to appear at court-ordered mediation in personal injury case); and Seidel v. Bradberry, 1998 WL 386161 (Tex. 1998) (trust fund theft case in which federal court upheld \$1,400.00 in sanctions against defendant for failure to attend court-ordered mediation and violation of good-faith requirement for failing to communicate with plaintiff or the court before or after the mediation). For an overview of cases involving sanctions for bad faith in all forms of ADR processes, *see* Richard D. English, *Alternative Dispute Resolution: Sanctions for Failure to Participate in Good Faith In, or Comply With Agreement Made In, Mediation*, 43 A.L.R. 5th 545 (1996).

⁸³ *Nick v. Morgan’s Foods, Inc.*, 99 F. Supp.2d 1056 (Mo. 2000) (federal court denied employer’s motion for reconsideration and upheld sanctions against employer for failure to participate in court-ordered mediation due to employer’s failure to submit required mediation memorandum and failure to send a representative with settlement authority; monetary sanctions included payments to plaintiffs and to the clerk of the court); and *Texas Dept. of Transp. v. Pirtle*, 977 S.W.2d 657 (Tex. 1998) (appellate court upheld sanctions against the defendant, Department of Transportation, for failure to mediate in good faith, finding that defendant appeared to mediation but refused to participate without having filed the statutorily-required objection to mediation order).

⁸⁴ *State v. Carter*, 658 N.E.2d 618 (Ind. 1995) (appellate court overturned \$700.00 sanction against state for failure to mediate in good faith, finding the state did not mediate in bad faith by failing to make a “reasonable” offer and, even if they did, sanctions were improper as the state is immune from punitive awards); *Hunt v. Woods*, 74 F.3d 1240 (Ohio 1996) (court denied plaintiff’s motion seeking pre-judgment interest in personal injury action for defendant’s bad faith participation alleging defendant failed to make reasonable counter-offer in court-ordered mediation; court found defendant was only required under state law to attend and obtain settlement authority); *Avril v. Civilmar*, 605 So. 2d 988 (Fla. App. 1992) (auto collision case in which appellate court ruled trial court could not impose sanctions of attorneys fees, mediation fees, and expert witness fees for failure to make an offer higher than \$1,000, ruling good faith duty is not breached merely by offering a settlement amount that is unacceptable to the opposing side); and *Hansen v Sullivan*, 886 S.W.2d 467 (Tex. 1994) (dentist involved in a malpractice suit could not be sanctioned with attorneys fees and mediation fees for failing to reach agreement after three hours of participation

constitutes “appropriate” sanctions for bad faith participation in mediation. Courts seem weary of using dismissal of claims as a sanction, but vary greatly in imposing lesser punishments.⁸⁵ Sanctions for bad faith participation in arbitration cases seem more consistently upheld.⁸⁶ However, little comparison can be made because of the difference in the neutral’s authority. “The fact that the mediator has no authoritative decision-making power distinguishes the mediator from the judge or arbiter, who is designated by law or contract to make a decision for the parties based on societal norms, laws or contracts rather than the specific interests or personal concepts of justice held by the parties The mediator works to reconcile the competing interests of the two parties. The mediator’s goal is to assist the parties in examining the future and their interests or needs, and negotiating an exchange of promises and relationships that will be mutually satisfactory and meet their standards of fairness.”⁸⁷

Within the context of custody mediations, such delays may not only heighten the acrimony between disputing parents and deteriorate possibilities of future settlement, but also increase the already lengthy time the fate of the children remains in limbo. Such delays may be detrimental to the children in both

in mediation and at no time refused to participate, despite trial court’s mediation order specifically requiring parties to “conduct settlement negotiations in good faith”).

⁸⁵ *Fisher v Herrera*, 367 So.2d 204 (Fla. 1978) (Florida Supreme Court held that Florida’s medical malpractice mediation statute did not permit for dismissal of malpractice suit for plaintiff who appeared before a mediation panel but failed to introduce any evidence).

⁸⁶ See *Gilling v. E. Airlines Inc.*, 680 F. Supp. 170 (N.J.1988) (granting defendant’s motion for trial de novo but imposing sanctions on defendant for failure to meaningfully participate in mandatory arbitration); *Employer’s Consortium, Inc. v. Aaron*, 698 N.E.2d 189 (Ill. 1998) (refusing to allow plaintiff to reject arbitrator’s award and seek trial de novo where arbitrators found plaintiff had not participated in good faith and in a meaningful way (as required by ILL. SUP. CT. R. 91(b) by failing to present any evidence at mandatory arbitration); and *Kalgren v. Central Mut. Ins. Co.*, 418 N.Y.S.2d 1 (N.Y. 1979) (finding a good-faith obligation and affirmative duty of parties to inform arbitrator of prior payments).

⁸⁷ *Dep’t of Transportation v. Atlanta*, 380 S.E.2d 265, 307-308 (Ga. 1989) (trial court lacked authority to order the parties to participate in a mediation with the sanction of contempt if they failed to settle the suit). “The court may not order them to resolve their differences in mediation nor to yield on any matter they choose not to yield.” *Id.* at 267.

time spent with uncertainty and parents' growing inability to resolve parenting decisions, thus leading to the obvious conclusion that, ultimately, the best intervention by the court into the mediation process is no intervention. "[T]he mediation process is one whose vitality and success depends upon a minimum of Court involvement and interference."⁸⁸

3. *Undermining Litigant Autonomy and Increasing Coercion to Settle*

Economy and efficiency are not the only objectives of mediation compromised by a good faith requirement. Good faith is so vague and subjective that it "unduly entrenches on the voluntariness of settlement and on the parties' legitimate right to demand their day in court."⁸⁹ That is, although mandatory mediation statutes require the parties to sit down together, they do not dictate the form of participation. A good faith requirement that expands such obligations greatly jeopardizes the parties' rights to decide how to present and argue their case, what information to reveal and whether to make offers and settlement decisions.⁹⁰ Such rights are hallmarks of the American legal system. Mediation is designed as assisted negotiation in which the parties are entitled to make concessions or present offers the other side may deem unacceptable or to determine the issues to be decided at trial.⁹¹ Such positions could violate a requirement to mediate in good faith. Even if courts interpret good faith as not requiring settlement, as the level of participation necessary to satisfy the statute increases, "the greater the danger of forcing a party to present its case in a manner not of its choosing."⁹² That is, the more constraints placed on parties' actions during the mediation

⁸⁸ *Willis v. McGraw*, 177 F.R.D. 632, 632 (W.Va. 1998). "[T]he Court will not involve itself under any circumstances in sorting out disagreements amongst the parties emanating from the mediation process." *Id.* at 633.

⁸⁹ Edward F. Sherman, *Good Faith Participation in Mediation: Aspirational, Not Mandatory*, DISPUTE RESOLUTION MAGAZINE, WINTER 1997 at 14.

⁹⁰ *Id.*

⁹¹ *Id.* at 15.

⁹² *Winston*, *supra* note 9, at 199. Some critics further argue that good faith statutes conflict with a lawyers ethical duty to zealously represent their clients, but this argument is not applicable to a discussion of custody mediations where attorneys are rarely present. For a further discussion advocating a change in lawyer ethics rules, see *Kovach*, *supra* note 43, at 604.

process, the more valid the criticisms of mandatory mediation become including coercion to settle and concerns for victims of domestic violence as discussed in Part I.

In custody mediations, such pressure may lead to mediated agreements that one or both parties does not feel is in the best interest of the children but, due to fear of good faith sanctions, the parent feels compelled to agree to an otherwise unacceptable arrangement. Such a risk decreases the likelihood that higher quality parenting plans will be achieved, thus obviating another attribute of mediation as discussed in Part I. These fears all are greatly exacerbated by the complete lack of definition in the good faith statutes.

Additionally, imposing such requirements in mediations involving domestic violence issues may seriously increase the danger to both parent-victim and children if the parent-victim believes that he/she will be looked upon negatively by a judge for failure to agree to what may appear to an outsider as a fair offer. For example, a parent demanding supervised visitation with a spouse who is abusive, but aware that the abuse would be difficult to prove in court, may agree to unsupervised visitation out of fear of sanctions from what may be viewed as bad faith. As discussed in Part I, such a risk would greatly lend support to the criticism that mandatory mediation in general is unacceptable in cases of domestic violence. If we are to preserve the necessary precautions implemented in a mediation involving issues of domestic violence, the right of the parties not to feel compelled to agree must be ensured.

4. *Jeopardizing Mediator Neutrality and Confidentiality*

Finally, good faith requirements seriously jeopardize the mediator's neutrality and the need for confidentiality.⁹³ Confidentiality is vital to mediation. "[I]t provides a cloak of protection that encourages the parties to go beyond their 'positions' and discuss the interests and concerns that are really important to them, without the fear of those statements later being used against them."⁹⁴ Because custody mediation should focus on a collaborative problem-solving approach, it is critical for participants to

⁹³ Winston, *supra* note 9, at 189.

⁹⁴ Richard C. Reuben, *Strictly In Confidence?*, 43-NOV *ADVOCATE* (Idaho) 9 (2000).

discuss their “underlying interests and needs, rather than just their bargaining positions or demands.”⁹⁵ Such candor is unlikely without assurances that communications within the mediation process will not be used in subsequent legal proceedings.⁹⁶

Such assurances cannot be present in the face of good faith requirements because, once an allegation of bad faith participation is asserted, courts will be forced to invade the privacy of mediation sessions in order to make a determination of good faith compliance. For, if courts do uphold confidentiality protections with respect to claims of bad faith, the party alleging bad faith would have no way to prove his/her case.⁹⁷ As this latter approach is unlikely, with no assurances of confidentiality, mediations evolve into yet another public proceeding where parties will be instructed by their attorneys to withhold critical information for fear of future disclosure in the event of a bad faith challenge. Good faith requirements will relegate mediation to just another motion to be endured before trial, thus obviating an important goal of mediation for the courts - reducing court congestion. Additionally, within the context of custody mediations, repressing such candor presents a serious likelihood that parents will not discuss issues relevant to child-rearing, such as allegations of child abuse, thus not only decreasing the likelihood of a solution that satisfies the needs of both parents, but potentially increasing the chances an agreement may endanger the children.

Advocates of good faith requirements, such as Kimberlee Kovach, lecturer at the University of Texas School of Law, argue

⁹⁵ Jonnette Watson Hamilton, *Protecting Confidentiality in Mandatory Mediation: Lessons from Ontario and Saskatchewan*, 24 *QUEEN'S L.J.* 561, 569 (1999).

⁹⁶ *Id.* at 570. In discussing the court's refusal to investigate claims of bad faith in attorney-attended mediations, the Southern District of West Virginia, in *Willis v. McGraw*, held: “If participants cannot rely on the confidential treatment of everything that transpires during these sessions then counsel of necessity will feel constrained to conduct themselves in a cautious, tight-lipped, non-committal manner more suitable to poker players in a high-stakes game than to adversaries attempting to arrive at a just resolution of a civil dispute.” *Willis v. McGraw*, 177 F.R.D. 632, 633 (S.D.W.Va. 1998). The drafters of the Uniform Mediation Act go so far as to carve out a privilege against disclosure of communications occurring during mediation, and provide no exceptions for hearings to determine bad faith. UNIF. MEDIATION ACT (adopted by NCCUSL Aug. 16, 2001) available at <http://www.pon.harvard.edu/guests/uma>.

⁹⁷ Sherman, *supra* note 89, at 15.

that confidentiality can still be preserved by having the mediator “certify” in writing whether good faith was present, just as they now certify whether both parties complied with the order to attend mediation.⁹⁸ This model not only fails to preserve confidentiality, as Kovach suggests having a mediator utilize a checklist to inform the court of good faith compliance, but it also jeopardizes the mediator’s neutrality, which will be discussed later. Kovach also argues that confidentiality is never absolute, even in the most protective mediation statutes, as piercing sometimes occurs when the life or safety of an individual creates an overriding interest.⁹⁹ Such extreme examples hardly compare to the judiciary’s desire to have “meaningful” mediations and certainly do not justify such a huge leap of reasoning.

Once the veil of confidentiality is pierced, due process would necessarily require the disputing party be afforded the opportunity to call the mediator and to cross-examine him/her, thus obviating even the semblance of confidentiality or neutrality. Kovach asserts that the confidentiality exception for bad faith can be narrowly drawn to limit the mediator’s ability to testify and requiring substantiated allegations, but fails to actually provide a model of such an exception.¹⁰⁰ The mediator as witness also creates practical problems. For example, how will the mediator know whether a party did not fully consider an offer or did not make a reasonable parenting plan offer? The model presumes the mediator will have knowledge that may be far beyond the context of what occurred in mediation. For example, if an allegation of bad faith is premised upon an assertion that one party withheld valuable information during the mediation process, the mediator would have no way of knowing that such information was withheld, absent disclosure by the party to the mediator in a setting such as caucusing. Further, such inquiry will have a chilling affect that may be particularly detrimental in the family law cases. Because of the fear of potential future inquiry, parties may be instructed by their attorneys *not* to disclose certain facts, such as living arrangements, plans to relocate, etc. By not disclosing such information in mediation, it is unlikely a bad faith claim can be

⁹⁸ Kovach, *supra* note 11, at 10-11.

⁹⁹ *Id.* at 10.

¹⁰⁰ Kovach, *supra* note 11, at 11.

successfully alleged later, as neither the mediator nor the accusing party will be aware of the undisclosed information.

Once the assurances of confidentiality have been breached, the mediator is no longer a “neutral” third party assisting in facilitating negotiations. The mediator is now elevated by the courts to a mini-judge required to make a finding of “good faith,” a term so vague neither legislatures nor courts have successfully defined. By removing the mediator from the role of neutral and into the role of decision maker, the process strikingly resembles an adversarial process where parties attempt to convince a trier of their benevolence. Such a contortion of the mediation process within custody disputes negates the goal of cooperative and collaborative problem solving to assist parents in working together in the future to resolve issues concerning child-rearing.

D. Proposed Alternatives

In addressing these concerns, several authors have proposed solutions that address good faith requirements generally (that is, not specifically in the custody mediation context). Professor Kovach advocates clearly defining the, presently undefined, good faith requirement specifically explaining participant expectations including: requiring parties to arrive at mediation prepared with knowledge of the case, requiring all necessary decision makers to be present, engaging in open and frank discussions, refraining from lying, forbidding misleading, demonstrating a willingness to listen and discuss positions and explaining rationales.¹⁰¹ Such an approach, while seemingly clearer and more objective, in fact presents a completely subjective model virtually impossible to enforce. How will “preparation and knowledge of the case” be measured? Who will determine whether the mediation discussions were “open and frank” and would not this obviously require a level of knowledge far beyond a mediator’s brief encounter with the parties? A “willingness to listen” is even more difficult to define. Thus, Kovach’s proposal suffers from virtually the same flaws as currently existing requirements. Further, Kovach also advocates strict sanctions for failure to mediate in good faith, including: cost of mediation, orders directing good faith participation in a second mediation, attendance at a CLE,

¹⁰¹ *Id.* at 11-12; and Kovach, *supra* note 43, at 615.

and liquidated damages.¹⁰² Such sanctions appear extremely coercive, particularly for low-income disputants, and yet Kovach asserts “good faith should not be coercive.”¹⁰³ Thus Kovach’s proposal not only fails to provide a clearer definition, but also further exacerbates the problems of jeopardizing litigant autonomy and coercing settlements.

Professor Kovach’s attempt illustrates the difficulty in developing an objective, clearly understood definition of good faith. However, the definitional problem is not the only pitfall of good faith requirements, and, even assuming one could construct a well-defined requirement, they would not eliminate the other problems addressed earlier. For example, Kovach’s former colleague at the University of Texas, Edward Sherman, now the dean at Tulane, attempts to tackle more than the definitional problem of good faith by proposing a “minimal meaningful participation standard.”¹⁰⁴ Sherman argues that good faith is difficult to define, fails to protect mediation confidentiality and party autonomy, and may increase cost and time delays.¹⁰⁵ He claims that meaningful participation will be easier to define, avoids the subjectivity of good faith participation and, therefore, proposes a minimal meaningful participation standard that does not mandate the form of presentation or interaction, but merely requires the parties to state their positions and to listen to the other side’s position.¹⁰⁶ Additionally, Sherman advocates an exchange of position papers.¹⁰⁷

Sherman’s approach suffers from similar flaws as his colleague’s. He provides no guidance for determining how “listening” will be measured, nor does it protect the cost and time delay Sherman fears good faith requirements will spawn. As applied to the family law context, such arbitrary standards are likely to further exacerbate tensions between already conflicted parents when one asserts the other did not “listen.” Further, Sherman places great importance on preserving an ADR process that protects litigant autonomy, yet suggests that a minimal meaningful

¹⁰² Kovach, *supra* note 11, at 12.

¹⁰³ Kovach, *supra* note 43, at 584.

¹⁰⁴ Sherman, *supra* note 41, at 2096.

¹⁰⁵ *Id.* at 2089-94.

¹⁰⁶ *Id.* at 2096-97.

¹⁰⁷ *Id.* at 2094-96.

participation standard must include an obligation to “discuss settlement.”¹⁰⁸

A third proposal, by David S. Winston, in an Ohio State Journal on Dispute Resolution article, purports to advocate a strict good faith definition, but proposes using an objective standard that does not infringe on the parties’ right to proceed to trial.¹⁰⁹ His proposal sets out three requirements for mandatory mediation participants:

- required attendance by the parties, or a party representative;
- negotiation and settlement authority by those in attendance; and
- position letters submitted by each party to the mediator and opposing party, outlining the party’s position on each issue in dispute.¹¹⁰

The first two requirements are unlikely to address concerns regarding participation in *custody* mediations, as the parents usually do attend and are the ones with settlement authority. While it does appear that an exchange of position papers will provide “valuable information to all parties and can create momentum for a mediated settlement,” positing that such requirements are good faith requirements is misplaced.¹¹¹ That is, Winston’s proposal fails to address the issue of parties who choose not to make reasonable efforts to resolve their disputes through mediation, as he only requires parties to show up and exchange position papers.

Each of the above authors proposes variations of current good faith statutes and court rules. However, as examined, each one fails to address the flaws in the current rules.

III. Re-examining Existing Alternatives: Encouraging, Not Mandating Good Faith

A more effective mandatory mediation process would be one in which good faith is expected, encouraged, and used by the mediator as a technique to overcome impasse, while not imposing vague mandates that are difficult to define, harder to enforce, and infringe upon mediator confidentiality and neutrality. In fact, many mediators already incorporate good faith expectations

¹⁰⁸ *Id.* at 2097.

¹⁰⁹ Winston, *supra* note 9, at 197.

¹¹⁰ *Id.* at 201-02.

¹¹¹ *Id.* at 202.

into every stage of the process. Many mediators solicit each party into signing an agreement to mediate prior to the joint mediation session. Such agreements contain wording suggesting parties will mediate in good faith, along with other promises including confidentiality. While perhaps not intended to be legally binding agreements, they do set a tone of cooperation even before the mediation session begins and impose upon the parties the clear expectations of the mediator and the courts that the parties are expected to ensure the process is not futile. Mediator fees are also a strong incentive to mediate in good faith, as few parties can afford to pay up to \$200.00 per hour for a mediation session in which no agreement is reached, and then face future attorney fees.

Courts can also play a key role in expressing expectations, but not mandates, of good faith in the court orders sending the parties to mediation. A clear statement of the goals of mediation, and expectations of the parties, delivered from the court to the parties prior to mediation may be an effective tool in encouraging specific behavior, particularly in custody mediations, where attorneys are rarely present. Sanctions for failure to *attend* mediation would also be appropriate, so long as the penalty did not extend to dismissal of the action or a default judgment. As discussed earlier, ensuring someone with “settlement” authority attends the mediation is rarely an issue in family mediations.

Once in joint session, the mediator utilizes these promises, and stated expectations, of good faith at several levels. If the mediator believes one party is acting in bad faith, a caucus can be used to privately assess and discourage such actions with the party. Further, the mediator can utilize the agreement to mediate in good faith when he/she believes the parties have reached an impasse caused by failures to participate in good faith. If a mediator believes that a serious breach of good faith has occurred, such as evidence of intended relocation disclosed in caucus that the party refuses to disclose in joint session, the mediator in every mandatory mediation program has the authority to terminate the mediation session or to reschedule the mediation for a future date when further discovery is possible for the parties.

Further expansion of a mediator’s role, for example by requiring them to report bad faith to the court or requiring them to testify, jeopardizes the needs of: confidentiality, mediator neu-

trality, empowerment of the parents, and encouragement of joint problem-solving. As discussed throughout this Article, these characteristics are particularly vital in custody mediations, where parties must engage in continuing, long-term relationships with the other party long after the legal process ends.

1. *Florida's Model*

Such a philosophy is not merely speculation, but is in practice in individual counties, and in states like Florida, and should be considered by those states already plagued by good faith requirements or considering implementation of them. Florida's mandatory mediation program, governed by the state supreme court, created a Mediator Ethics Advisory Committee in 1994 that renders ethics opinions regarding the state program. In 1995, the Committee rendered an opinion clearly spelling out what is and is not expected of mediators and participants in mediation.¹¹² First, parties to court-ordered mediation are required to *attend* mediation, including orientation sessions.¹¹³ If parties are unwilling to participate in the orientation phase, the mediator may cancel the mediation and report it to the court.¹¹⁴ However, once the mediation begins and one or both parties refuse to participate in the presentation of each side's case, the mediator may cancel the mediation but may not report it to the court.¹¹⁵ The mediator ultimately has the authority to terminate mediation should he/she determine that one or both parties are unwilling to meaningfully participate in the process or the case is "unsuitable" for mediation, but there is no penalty for failure to reach an agreement in mediation.¹¹⁶ Finally, there is no requirement that a party must "negotiate in good faith."¹¹⁷

The above opinion sets a participation standard not based on the power or authority of the mediator to ensure particular levels of participation, but one based on the mediators "strong

¹¹² Florida Mediator Ethics Advisory Committee, Advisory Opinion 95-009 (1995), available at <http://www.flcourts.org/osca/divisions/adr/95-009.htm>.

¹¹³ *Id.* at 95-009A.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 95-009B.

¹¹⁶ *Id.* at 95-009D.

¹¹⁷ *Id.* at 95-009E.

communication and persuasion skills.”¹¹⁸ Further, the only reporting requirement imposed upon the mediator is whether the parties attended mediation and whether an agreement was reached.¹¹⁹ Florida’s model preserves the integrity of the mediation process, by preserving party autonomy and mediator neutrality, while not imposing vague, indefinable, or burdensome standards upon the parties or the mediator.

IV. Conclusions

Once states began instituting court-annexed mediation programs to resolve issues of child custody and visitation, low usage and lack of education necessarily led to mandatory mediation laws in many jurisdictions. While this move increased program participation, it created a new type of participant - the unwilling one. To counter this concern, some courts and legislatures enacted good faith requirements, mandating a particular, although undefined, level of participation in mediation. In the family law context, this took some unique shapes, including signed pleadings attesting to good faith participation (Texas), independent court inquiry into whether issues were not resolved due to bad faith (Maine), and potential changes in child custody for parties found to have mediated in bad faith (Utah). Good faith requirements not only infringe on the benefits of mediation but parents in mandatory custody mediation programs suffer consequences more serious than in other settings. Such requirements may encourage less disclosure out of fear of future judicial inquiry into the content of the mediation session, coercion to agree to unacceptable custody plans out of fear of bad faith sanctions, lengthen the time children’s future remain in limbo and increase the acrimony between parents already experiencing high conflict. Additionally, since the majority of custody mediations do not include attorney attendance, a significant portion of the need for good faith requirements is eliminated, as it is unlikely the parties would utilize the mediation process as a discovery tool or to gain litigation advantages.

Current precautions already exist that allow the mediator and the courts to encourage meaningful participation in the me-

¹¹⁸ *Id.* at 95-009A.

¹¹⁹ *Id.* at 95-009E.

diation process. Further encroachment into the process, particularly in mandatory custody mediations, creates far more risks, while not affecting the intended purposes.

