Mediation as a Modern Alternative Dispute Resolution Device – Issues and Discussion on Confidentiality, Participation Requirements and Enforcement of Agreements

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"Discourage litigation. Persuade your neighbors to compromise whenever they can. Point out to them how the nominal winner is often a real loser-in fees, expenses and waste of time." -Abraham Lincoln, July 1, 1850.

In the spectrum of the recognized alternative dispute resolutions devices, mediation is perhaps the most flexible device allowing party control of outcomes through a structured process.[1] Traditionally, mediation is recognized as a facilitative device appropriate for resolving disputes between parties wishing to preserve an existing relationship[2]. The mediation process itself attempts to facilitate communication between parties through a structured, confidential process conducted by a neutral third party (mediator) wherein parties can clarify the disputed issues, identify underlying interests and explore possible resolutions.[3] Since the parties ultimately craft the solution and terms (self-determination), mediation provides a more flexible process where by the parties can reach mutual satisfaction from creative remedies that may not be available through traditional litigation, or that would not have the ability to preserve the existing relationship. Perhaps the most notable distinction between mediation and litigated resolution is that mediation attempts to structure and preserve the resolution around the relationships between the parties, something that litigated resolution lacks in any consideration.[4]

The adoption of mediation as the preferred alternative dispute resolution in today's legal system can be attributed to the Roscoe Pound Conference of 1976 where various legal

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[1] See Kimberlee K. Kovach, Mediation: Principles and Practice 14 (3d ed. 2004) (defining mediation as "… the process where the third party neutral, where one person or more, acts as a facilitator to assist in resolving a dispute between two or more parties.").
[2] Ibid. 14.
[3] Ibid. 14,15.
[4] Kent L. Brown, Comment, Confidentiality in Mediation: Status and Implications, 1991 J. Disp. Resol. 307, 309 (1991).

scholars, judges and administrators met to discuss the current participant dissatisfaction with the legal system including concerns with overburdened court dockets and costs to litigate.[5] Chief Justice Warren Burger presented the keynote speech at the conference and expressed the need for alternative means to attend to various types of disputes.[6] In his speech, Chief Justice Burger advocated the need for an institutionalization of alternative dispute methods within the legal framework to address the needs of participants in dispute.[7] The outcome of the conference discussions resulted in a call for a 'multi-door' courthouse concept whereby parties in dispute would have a choice in the method of dispute resolution best suited to achieve the needs of the parties.[8]

Since the 1976 Roscoe Pound Conference, court annexed alternative dispute programs have been organized in every state with the goal to reduce strains on court dockets, to expedite resolution of disputes, and to reduce traditional costs associated with litigation leading to the courtroom.[9] Mediation is the preferred dispute device as it meets not only the needs of the legal system to help reduce court dockets, and the needs of participants to reduce litigation costs, but allows the parties to maintain a greater control in the outcome of the dispute – achieving in the majority of instances an agreement with terms that are acceptable to both parties.

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[5] Kovach, supra note 1, at 32.
[6] See Generally Warren E. Burger, Agenda for 2000 A.D.-A Need for Systematic Anticipation, 70 F.R.D. 83 (1976); see also Warren E. Burger, Isn't There a Better Way?, 68 A.B.A. J. 268 (1982).
[7] Ibid.
[8] See Frank E. A. Sander, Varieties of Dispute Processing, 70 F.R.D. 111 (1976) (advocating a multi-door dispute resolution system).
[9] See National Association for Community Mediation http://www.nafcm.org/pg35.cfm (Listing court annexed mediation centers in US states and territories).

Mediation's Success Threatened by Opposing Interest of Courts and Parties in the Mediation Process

While overall satisfaction of the courts, providers and participants appears to have been positive, critics charge that mediation's traditional and primary objectives and goals have been challenged by mandatory participation legislation that ignores preservation of party self-determination in favor of court interests in reducing their dockets. They charge that overzealous courts believe forced participation can result in the same party satisfaction that voluntary participation achieves, and that mediation is an appropriate requirement before accessing traditional litigation in the court. With an average reporting eighty percent settlement rate, one could see why courts are readily eager to mandate disputing parties to at least attempt mediation. What the courts fail to consider is that the high rate of satisfaction is directly linked to the parties' control over participation and resolution. Continued high settlement rates after implementation of mandatory mediation programs however, may be biased by parties who feel coerced, or intimidated into a settlement.

In her Harvard Law Review note, 'The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?', Nancy A. Welsh asserts that self-determination is a fundamental principle of mediation that made mediation such a boom in the 1970's and 1980's and that mediation has now been disrupted with the courts' own self interest in having civil cases settled.[10] This shift from voluntary party participation to court imposed participation in mediation results in fewer options for participants and more control of the outcome put in the hands of mediators, attorneys and

[10] Nancy Welsh, The Thinning Vision of Self-determination in Court-connected Mediation: The Inevitable Price of Institutionalization? 6 Harvard Negotiation Law Review 1,3 (2001).

courts.[11] One of the advantages to traditional mediation was a lack of any mandatory participation requirements that empowered the parties to have control of the outcome. The encouragement of voluntary participation based on self-determination of the parties was thought to foster a less hostile environment whereby the parties were empowered to reach mutually agreed upon solutions free from outside influences or defined participation rules. However, with a mandatory approach the fear is that parties may be less likely to settle without a feeling of coercion or pressure to reach an agreement as the only option, thus compromising the power of self-determination that is so critical to the mediation process for the involved parties.[12]

The number of cases that are emerging from issues stemming from the institutionalization of mediation is growing. States have adopted in various forms the Uniform Mediation Act and federal courts have adopted the Alternative Dispute Resolution Act[13]. As the state and federal courts adopt alternative dispute resolution acts that include mediation, more issues come to bear that conflict with the goals between traditional party empowerment mediation and court ordered mandatory mediation. The traditional notion that mediated settlements would be more likely to be followed if both parties had input and voluntary agreement to the settlement was challenged early on after adoption of mandatory mediation laws. With the imposition on parties to participate in mediation on the premise that mandatory mediation would conform to the parties' needs as well as meet the needs of the courts

[11] Ibid. at 3.
[12] Ibid. at 6.
[13] See Generally Uniform Mediation Act of 2003, National Conference of Commissioners on Uniform State Laws (2003) (setting a framework for states to adopt alternative dispute resolution statutes); Alternative Dispute Resolution Act of 1998, 28 U.S.C. § 652 (Supp. 1999) (encouraging federal district courts to adopt alternative dispute resolution programs).

interests to reduce dockets came a series of cases challenging the implications of harm to parties form a mandatory participation.

Inevitably most of today's litigated disputes over mediated settlements revolve around challenges to confidentiality of mediation sessions, bad faith participation (through forced participation) and court enforceability of mediated agreements.

Confidentiality as a Core Principle to Mediation Success

One of core principles that appeals to parties in dispute is the ability to reach a mutually agreed upon resolution while keeping the contents of the mediation held in confidence. Traditional mediation and successful court ordered mediation could be a means for parties to resolve their disputes away from public accessible court proceedings. Externally, this is still a marketable sales point for mandatory mediation. But what if the parties can't reach a reasonable agreement? Are the negotiations, statements and issues discovered in the mediation session excluded from use in any furtherance of the dispute in court proceedings? Parties may not be so ready to participate in mediation if they are without certainty that the entire mediation session will be held in confidence.[14] Mediators themselves may subject themselves to the loss of trust by parties in the process of mediation if the mediator himself is not immune under claim of privilege from disclosing information to the court.[15]

A key role and basic tenant of mediation is for the mediator to establish trust between the parties and the mediation process. Only after trust between the participants and the process exists will the parties be willing to openly share information in a mediation session. Parties to

[14] See Ulrich Boettger, Efficiency Versus Party Empowerment--Against a Good-Faith Requirement in Mandatory Mediation, 23 Rev. Litig. 1, 29 (2004).
[15] See Shawn P. Davisson, Balancing the Scales of "Confidential" Justice: Civil Mediation Privileges in the Criminal Arena – Indispensable, Impracticable, or Merely Unconstitutional?, 38 McGeorge L. Rev. 679, 697 (2007).

a mediation session may want to avoid public disclosure of personal facts including financial information, investigative reports, plans, etc. A mediator establishes the foundation of trust through assurances to the parties of his/her neutrality and impartiality and further that anything discussed in mediation, whether jointly or in individual caucuses, will be held in strictest confidence.[16] This is often expressed generally in a mediator's opening statement including a statement that as a neutral third party the mediator's role is limited to the mediation session and that any information gained in mediation will not be used in litigation. (This is not a foreign policy to the court system. Federal Rules of Evidence Rule 408 encourages parties to participate in settlement negotiation in liability cases and prohibits parties from using settlement offers as evidence[17]). The mediator relies on his or her position as a neutral party to remain immune from any requirement that might put him or her in a position to divulge information obtained under a presumption of confidence or impressions that would show a tendency or bias toward one party over the other and violate the trust established to facilitate the mediation process. If the mediator cannot assure the parties that the mediator is free from any reporting requirement to the courts, the parties may view the mediator as less than impartial and be more hesitant to disclose information that may be damaging in any further litigation.[18] If parties have a distrust of the litigation process initially, any perception that mediation is an extension to the litigation process where confidences may be revealed creates a valid issue where any mandatory mediation rules should address the need to define the scope of confidential communication in mediation sessions.

[16] Kovach, supra note 1, at 263.
[17] See Generally Fed. R. Evid. 408.
[18] Kovach, supra note 1, at 264.

Current Issues with Confidentiality

As courts adopt mediation as a valid option to party dispute, the need for creating laws specific to the needs of confidentiality in mediation poses new questions as to when, if ever, should the protection of the legal process supersede mediation requirements for strict confidentiality. Issues involving first amendment and freedom of information challenge this notion and at least one federal district court held that public policy could supersede any confidentiality in mediation sessions.[19] However, these are the exceptions, and courts have endorsed mediation confidentiality and this adoption by courts in the absence of any statute clearly defining mediation confidentiality may be on track to defining a common law privilege for mediation.[20] For example, in NLRB v. Joseph Macaluso, Inc., [21]mediated negotiations failed between an employee union and a retail store chain in Washington State over contracts and back pay. After many months of failed negotiations the parties agreed to attempt to settle their disputed interests enlisting the help of a Federal Mediation and Conciliation Service mediator. When mediation attempts failed to reach a favorable agreement, the parties continued their dispute in litigation. During the course of litigation, the union sought to subpoena the mediator to elicit testimony that would give credibility to the union's version of the facts that no agreement had been reached. In the absence of this credibility the court found that an agreement had been reached. A subpoena was subsequently revoked based on a contention that 1) mediator testimony is confidential, 2) that confidentiality is crucial to maintaining neutrality, and 3) that a mediator may not testify

[19] United States v. Kentucky Utils., 124 F.R.D. 146, 150 (E.D.Ky.1989).
[20] Kent , supra note 4, at 316-17.
[21] 618 F.2d 51 (9th Cir. 1980).

about the bargaining sessions they attend.[22] One can imagine the situation presented to both the mediator and the union. Upon review in the United States Court of Appeals, Judge Wallace framed the issue:

> "We must determine, therefore, whether preservation of mediator effectiveness by protection of mediator neutrality is a ground for revocation consistent with the power and duties of the NLRB under the NLRA. Stated, differently, we must determine whether the reason for revocation is legally sufficient to justify the loss of Hammond's (the mediator) testimony…[23] The facts before us present a classic illustration of the need for every person's evidence: the trier of fact is faced with directly conflicting testimony from two adverse sources, and a third objective source is capable of presenting evidence that would, in all probability, resolve the dispute by revealing the truth."[24]

After a careful analysis balancing the public's interest in preserving the mediation process with the interest in discovering the truth of party testimony regarding the mediation the court concluded:

> " …that the public interest in maintaining the perceived and actual impartiality of federal mediators outweigh the benefits from [the mediator's] testimony…[25] To execute successfully their function of assisting in the settlement of labor disputes, the conciliators must maintain a reputation for impartiality, and the parties to conciliation conferences must feel free to talk without any fear that

[22] Ibid. at 53.
[23] Ibid. at 53.
[24] Ibid. at 54.
[25] Ibid.

> the conciliator may subsequently make disclosures as a witness in some other proceeding, to the possible disadvantage of a party to the conference... The resultant injury to the public interest would clearly outweigh the benefit to be derived from making their testimony available in particular cases."[26]

While federal and state laws are emerging simultaneously regarding confidentiality in mediation, state law perhaps poses the widest variance in approaches to protecting or limiting confidential communication. The scope of these laws range from limited immunity to full immunity of any mediated communication.[27] Not all states have adopted the Uniform Mediation Act, however many have passed laws addressing confidentiality following the UMA's guidelines for confidentiality.[28] These statutes go a long way in defining what communication is confidential and a general guideline on the exceptions to the privilege. For example, many states require a mandatory reporting for any alleged abuse of children or elders discovered in the course of a mediation session. However, it should be noted that civil rules addressing confidentiality in mediation do not apply when subsequent or related issues in the mediation arise in criminal actions either in state or federal jurisdictions and that the same public policy analysis in protecting mediation confidentiality will at times allow that confidentiality to be breached. In the case of *Williams v. State*, 178 Ga.App. 216, 217, 342 S.E.2d 703,704 (1986), the court allowed evidence to be introduced from a mediation session in which the defendant admitted embezzling $60,000 from his employer and agreed to repay it as a term of the mediated settlement. He was subsequently convicted.

[26] Ibid. at 56
[27] Kent, supra note 4, at 317.
[28] Ibid.

Due to the differences in scope of confidentiality reflected in each state's unique statutes, mediators and parties would be wise to discuss any implications the current statutes present to confidentiality concerns in mediation including the creation of the privilege by statute, limiting discovery through contracts and court order, and public policy considerations that would require disclosure.[29]

Good Faith and Meaningful Participation

As legislatures and courts move toward adoption of alternative dispute resolution as a means to more efficiently settle dispute in the parties' interests, it becomes apparent that the courts have an interest in ensuring that parties participate in 'good faith' in alternative dispute resolution sessions in hopes that the parties will use the dispute resolution vehicle as it was intended, and not as a tool to delay litigation, seek information from the other party, increase overall costs associated with the dispute, or to increase emotional frustration. While this interest is valid, it does mask another interest of the court – the courts own interest to reduce overflowing court dockets using mediation and structuring its use to meet the context of court procedure to increase its own efficiency.[30] These interests of the courts come into direct conflict with one of the overarching goals of mediation – self-determination of the parties – and further threaten to undermine confidentiality and mediator neutrality.

In her 1997 South Texas Law Review article, "Good Faith in Mediation--Requested, Recommended, or Required", law professor Kimberlee K. Kovach, saw the need to address

[29] See Generally Hear No Evil, Speak No Evil: The Intolerable Conflict Between the Duty to Maintain Mediation Confidentiality and the Duty to Report Fellow Attorney Misconduct, 1997 B.Y.U.L.Rev 715 (discussing general source of confidentiality protection applied to mediation).

[30] See Steven H. Goldberg, "Wait a Minute. This Is Where I Came In." A Trial Lawyer's Search for Alternative Dispute Resolution, 1997 BYU L. Rev. 653, 655 (1997).

the gap between the traditional court and mediation structures and how the goals of both should address the parties in mediation when requiring parties to participate in good faith.[31]That same year she submitted a paper to the 'Dispute Resolution Magazine' advocating in support of a requirement of good faith in court ordered mediation, reflecting on her analysis and findings from her law review article.[32] Kovach argued that in order for mediation to be successful in the court system that good faith requirements would need to be a part of every mediation to in order to enforce party participation, creativity and invoke collaborative approaches that are all important in ensuring party satisfaction of the mediation process.[33] Otherwise, she asserts, without a mechanism to enforce these mutually beneficial party behaviors, mediation will fail.[34] Kovach does acknowledge that under an enforcement paradigm of good faith participation that there can be an abuse of the requirement by using forced participation as a litigation tactic to as means to discover information, delay proceedings, increase costs or manipulate the other party.

Other advocates of mandatory good faith participation assert that mandatory good faith participation is a part of an overall voluntary process, even though the parties are forced to the table and that good faith requirements preserve the end goals of mediation. In support of this assertion these advocates cite the parties' mutual right to decline settlement within a

[31] See Kimberlee K. Kovach, Good Faith in Mediation--Requested, Recommended, or Required? A New Ethic, 38 S. Tex. L. Rev. 575, (1997).
[32] Kimberlee K. Kovach, Lawyer Ethics in Mediation: Time for a Requirement of Good Faith, 4 No. 2 Disp. Resol. Mag. 9, **(**Winter, 1997).
[33] Ibid. at 9.
[34] Ibid.

good faith mediation session preserves the fundamental fairness and voluntariness of traditional mediation.[35]

One could easily come to the conclusion that courts and legislatures would not have instituted mandatory participation requirements if there were not some perceived advantages for the parties, even if it presented obstacles to the parties' interests. One of these advantages stems from a perception that mediation may actually expedite the settlement process. Advocates of this position cite that mediation can act as an accelerant to the dispute process by introducing mediation as a settlement event early on in the litigation process.[36] Normally, serious settlement discussions do not happen until late in the litigation process under threat of risk of a win-loss scenario in a courtroom setting. Whereas with a mandatory mediation, forced participation may enable the parties to consider their positions earlier in the litigation process. Instead of the threat of settlement in a winner take all scenario, the parties in mediation will have the opportunity to reach a mutually acceptable dispute resolution where they may better assess their position and risks without a threat or risk of winner take all. If nothing else, forced mediation earlier whereby parties can clarify the issues and interest will tend to open the door for later settlement.[37] The search for a mutually agreed upon solution in mediation not only can lead to the elimination of the one winner, one loser scenario, but also supports finding that settlements reached in mediation will result in binding out-of-court agreements that the parties will more readily follow. (Good-faith mediation requirements have

[35] See David S. Winston, Comment, Participation Standards in Mandatory Mediation Statutes: "You Can Lead A Horse to Water...", 11 Ohio St. J. on Disp. Resol. 187, 189 (1996).
[36] Ibid. at 190.
[37] Ibid. at 191.

been found to be successful and result in party satisfaction in domestic relations courts when addressing divorce and custody related disputes.)[38]

Concerns over Good Faith Participation Requirements

Critics of mandatory good faith mediation participation attack the presumption that forced participation has minimal impact on the parties, the quality of mediation or on the quality of the dispute resolution process through traditional litigation. Conflicts with established policies regarding confidentiality, third-party neutrality, due process, and party autonomy are the immediate concerns arising from forced participation.[39] But Perhaps the paramount concern is a lack of a concrete definition for good-faith participation which is tantamount in understanding the requirements for party participation, court expectations and the when and how sanctions will be applied.

In order to participate in good-faith, participants and their attorneys need to have a clear understanding of the minimal requirements of participation in order to participate in a meaningful way that is acceptable for statute compliance. A mutual understanding of 'good faith' must be ascribed to by the court, parties and mediator; otherwise, each case runs the danger of having a different interpretation of participation requirements. For example, one judge may consider a party who shows up to mediation as having participated in good faith, while another judge may view this with nothing more as a lack of any good faith attempt. Without a clear definition and understanding of expectations, the parties are left to question to

[38] Ibid. at 192, citing Lynette C. Hale & James A. Knecht, Enriching Divorced Families Through Grass Roots Development of Community-Wide Court-Referred Mediation Services, 24 CONCILIATION CTS. REV. 6, 15 (1986).
[39] See Maureen A. Weston, Checks on Participant Conduct in Compulsory ADR: Reconciling the Tension in the Need for Good-Faith Participation, Autonomy, and Confidentiality, 76 Ind. L.J. 591, 615 (2001).

what degree they must participate in mediation once they arrive to meet a good faith requirement, or run the risk of imposed sanctions for failure to meet the court's expectation of good faith participation. Does it require that a party answer questions, discuss facts and issues, make or consider an offer, participate in a set amount of time, etc. [40]

In *Graham v. Baker*[41], the Iowa Supreme Court reviewed a debtor's appeal from a writ of mandamus forcing the creditor to participate in mediation in order to attain a release from a real estate contract. At the core of the issues was not whether the creditor was required to attend mediation to secure the release, but whether the creditor had met some standard in participation in the mediation by a physical appearance. [42] In 1979, the Henrys (debtor) entered into a real estate contract with the Grahams (creditor) for the purchase of agricultural farmland. Due to a worsening agricultural economy over the next few years the Henrys renegotiated the terms of the contract, but finally were unable to make payment on the contract in December of 1987. The Grahams then retained attorney George Flagg. Flagg initiated forfeiture proceedings, but Iowa code requires that creditors obtain a mediation release before initiating forfeiture proceedings and the parties attended a mediation session in February of 1988. During the mediation session, Flagg became belligerent and refused to consider the Henrys proposals. Flagg ended the mediation session with an ultimatum that the Henrys either forfeit their farmland, or sell the land within thirty days and deliver the balance due to the Grahams. As the session continued, Flagg continued insisting that the mediator provide the mediation release. The mediator refused to issue the release citing Flagg's

[40] See generally Alexandria Zylstra, The Road From Voluntary Mediation to Mandatory Good Faith Requirements: A Road Best Left Untraveled, 17 J. Am. Acad. Matrim. Law. 69, 88 (2001).
[41] See Graham v. Baker, 447 N.W.2d 397 (Iowa 1989).
[42] Ibid.

behavior, and extended an attempt at mediation another thirty days. Flagg subsequently filed a notice of forfeiture without securing the mediation release to which the Henrys sought and obtained an injunction from the forfeiture, citing the Grahams failure to secure the mediation release. The Grahams then sought a writ of mandamus to force the issuance of the mediation release, which prompted the Henrys to appeal. [43]On review the court found that the only requirement for the parties under the state statute is that the parties participate in mediation session. The mediator interpreted the statute for its own purposes under a construct that good conduct be a component in defining the meaning of participation. The court rejected this construct and interpretation and held that the mediator's duties were only to listen, attempt to mediate, and encourage the parties in and advisory role. And while the court found Flagg's behavior to be an obstacle to any beneficial attempt at mediation and cost his client financially, it found that the only requirement imposed on him was to be present at the mediation session to satisfy the state statute.[44] The implication set forth in this case as applied to defining good faith is easily understood. If a good faith participation requirement it is not clearly defined, all parties are subject to increased costs, delay and potential sanctions if they attempt to apply their own construction and interpretation of a participatory requirement. In this case, the court addressed the issue from a minimalist definition of participation as requiring that a party only attend the session. In the next case, the court goes to the other extreme and allows an arbitrator to define the participation requirement.

[43] Ibid.
[44] Ibid. at 400, 401.

In *Gilling v. Eastern Airlines, Inc*.[45], a United States District Court in New Jersey constructs a definition of participation that includes consideration of the parties' behavior. The plaintiffs were passengers on an Eastern Air Lines flight flying from Miami to Martinique in November of 1988. Somewhere along the flight plan there were two incidents (not described) involving knives, which caused the plane to divert to St. Croix and eject the plaintiffs from the flight. The plaintiffs filed claims for breach of contract along with a list of other alleged torts inflicted upon them. The matter was referred to compulsory arbitration and the case was heard before an arbitrator in May of 1987 where the plaintiffs were in attendance with the defendant's attorney. The arbitrator found in favor of the plaintiffs citing that the attorney for the defendants did not participate meaningfully in the arbitration. The court then asked the arbitrator for a factual finding on the question of whether the defendants participated in a meaningful way. In November of 1987, the arbitrator submitted his findings stating, "I find as a fact that she [defendant's attorney] merely 'went through the motions.' I find as a fact that the foregoing was a predetermined position taken by her office, even though that position remains obscure to me. I find as a fact that her 'participation' in arbitration proceeding rendered it a sham…"[46] The arbitrator then further elaborated citing belligerent verbal retorts by the attorney when asked about settlement details. The defendants brought this request for a trial de novo, excepting to the arbitrators findings that they did not participate in the arbitration session in a meaningful way. After reviewing the applicable rule, General Rule 47, the court determined that it did not have any standard of review to guide them in determining the validity of the arbitrator's findings. General Rule 47(E)(3) allows the

[45] See Gilling v. Eastern Airlines, Inc. 680 F.Supp. 169 (D.N.J.1988).
[46] Ibid. at 170.

arbitrator to determine whether a party participates in a meaningful matter. This in essence puts the determination of the degree of party participation required or behavior required solely in the hands of the arbitrator and without being subject to court review. Allowing the findings of the arbitrator, the court found that arbitration, in order to serve property, requires that the parties participate in a meaningful manner. In support that the defendants did not participate in a meaningful manner, the court found that the defendants had thwarted the arbitration from the outset, intending to reject any outcome of the arbitration. The court found the need for parties to participate in arbitration in 'good faith' and that absent good faith participation "…such an attitude increases the costs and reduces the efficiency [of arbitration]… [and] can serve to discourage the poorer litigant and diminish his or her resolve to proceed to final judgment."[47] Additionally, the court found that absent a meaningful participation (good faith) that sanctions are appropriate. (In this case the defendants were ordered to reimburse the passengers for costs and fees incurred associated with the arbitration, as well as costs associated with opposing the defendant's demand for trial de novo.)[48]

What *Graham* and *Gilling* illustrate is how absent an object measure of good faith participation, parties are subject to the whim of the court, or mediator (or arbitrator) depending on the court's interpretation of any standard. In *Graham*, participation, without further direction by statute was relegated to a party making physical presence. In *Gilling*, participation was determined by party's actions not consistent with the object of an arbitration session, forcing an inefficient use of the process. One would have to question however, if both approaches are equally futile and inefficient when forcing a party to participate in a process

[47] Ibid. at 170.
[48] Ibid. at 169.

that it has already determined the outcome (*Graham),* or imposing sanctions on a party for failing to meet a subjective determination of a meaningful participation when that party and even the court did not have any standard available to pre-determine what was required. These cases illustrate the ongoing difficulties faced by parties, mediators and courts in determining either good faith or meaningful participation when posed as requirements to mandatory mediation.

But are there other implications when a party acts in bad faith other than threats of sanctions against that party? What if there is bad faith participation? That is about as hard to define as defining good faith participation. Perhaps it is easier to describe bad faith as intentions of parties to frustrate the process for their own motives. It would be nice to assume that both parties will have the same respect for good faith and meaningful participation when ordered to mediation. However, a more realistic assumption is that parties view mandatory mediation differently based on their positions, interests and goals. These can include financial costs, publicity concerns, emotional costs, time constraints, and any other interest the party wishes to protect. One party may or may not know some of the other party's interests, and that party may have its own goals that can only be reached through an abuse of the mediation process that would allow that party to attain information, delays, or costs that would be detrimental to the opposing party's overall protective interests. In this scenario where one party participates in mediation under the guise of a meaningful good faith participation, the vulnerable party acting in good faith is potentially subjecting itself to exposure detrimental to it own interest in the dispute. Unfortunately, bad faith conduct is often difficult to discover as its definition is as vague and subjective as good faith. However, just because we've identified that subjective good faith requirements are left to the decision maker (whether that be the

mediator, arbitrator, legislature or judge), does not mean that we should not continue to attempt to define what good faith participation looks like within particular contexts. Kimberlee Kovach, who I've already acknowledged as an advocate of mandatory good faith requirements, proposes that any defining good faith participation in the mediation context should start by examining how good faith has been used in other already established definitions in other areas of law[49] and that even if a strongly defined definition applicable to mediation cannot be found that "…in the end, perhaps it is like obscenity: you know it when you see it."[50]

Kovach offers criteria for good faith definition by discussing generally what good faith is not and then offering a list of suggested factors to include in statutes to aid in the determination of good faith participation.[51] She asserts that good faith mediation does not necessitate reaching an agreement, or that they will be more likely, as mediation can be just as beneficial and valuable to the parties even if there is not agreement. Additionally, good faith does not require the parties to have a sincere desire to resolve the dispute. Nor does it require full disclosure to the other party or mediator or that the party conform to any set behavior, although the parties should attempt to show behavior showing an attempt to participate in a meaningful way.[52] Kovach suggests the following factors as considerations in constructing a good faith definition be included in statutes as a way to present some sort of objective standard that courts, mediators, lawyers and parties in dispute can follow to assess good faith participation:

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[49] Kovach, supra note 31, at 600.
[50] Ibid. at 600, citing Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).
[51] Ibid. at 610, 615.
[52] Ibid. at 610, 611.

- arriving at the mediation prepared with knowledge of the case both in terms of the facts and possible solutions;
- taking into account the interests of the other parties;
- having all necessary decision-makers present at the mediation;
- engaging in open and frank discussions bout the case or matter in a way that allows mutual understanding;
- not lying when asked specific or direct questions;
- not misleading the other side;
- demonstrating a willingness to listen to all parties;
- being prepared to discuss you interests openly;
- having a willingness to explain specific proposals and refusals.[53]

While Kovach's suggestions have their merit, the one fact that these cannot address a party's mental unwillingness to participate or the ability for the decision maker to determine the degree to which the party believes they have attempted to participate or their willingness to forego mediation in favor of a potentially more costly and risky litigation process. No matter whether lawmakers address mandatory participation determination by a 'meaningful participation' standard, or 'good faith' standard, or some other criteria to define and to demonstrate compliance with mandatory mediation, it is obvious that some definition and review standard has not yet reached universal acceptance. In addition, concerns that address bad faith participants who act in their own interest to disrupt or avoid the benefits of mandatory mediation, and the sanctions imposed on well-meaning parties who attempt to minimally participate or choose not to participate in favor of traditional litigation are areas for

[53] Ibid. at 615.

further consideration when law makers attempt to construct mandatory mediation requirements.

Enforcement of Mediated Agreements

Mediation, whether or not court ordered, offers parties in dispute the ability to cooperatively craft settlement agreements. This allows the parties to provide the conditions by which they preserve their interests in the dispute. Additionally, mediation scholars assert that when parties mutually assent to the stipulations of mediated agreements that they will have ownership in the agreement and will likely comply with those stipulations.[54] While this may be true, not all mediated agreements result in strict compliance and the issue of enforceability of a mediated agreement arises. Most disputes involving mediated agreements that end up in traditional litigation apply common law contract and related causes of actions. However, mediated agreements subject to confidentiality rules call into question whether an agreement exists at all, what laws and remedies should be applied to non-compliance to agreements, what powers does a court have to settle challenges to the terms of the agreement, and can an agreement be enforced when it is against public policy. All of these questions exist likewise when applying traditional common law to contractual agreements. However, the kingpin to understanding the implications of mediated agreements lie with an understanding of the rules affecting confidentiality that play a defining role on the ability of a party to fully invoke traditional common law actions and their processes. More to the point, a mediated agreement cannot be fully reviewed under traditional common law if there is information that cannot be obtained due to strict confidentiality rules.

[54] Kovach, supra note 1, 356.

I've previously discussed some of the issues with confidentiality and the importance that confidentiality plays in maintaining the high integrity of mediation. While a strict confidentiality rule with no exceptions would certainly preserve the integrity of the mediation process, it would certainly as well impose constraints on common law causes of action. Just imagine two businesses that reach a mediated agreement. If one, or both, of the parties later disagrees with the terms whether from mistake, misunderstanding, coercion, and a strict construction of confidentiality would preclude the use of any discovery of information used in mediation to attain the agreement in any court action.[55] The following discussion of a Texas case shows how a determination of strict confidentiality works not as a shield to protect the party in a mediated agreement, but deprives the party from invoking common law rules that would otherwise support enforcement.[56]

In *Vick v Waits*,[57]an unpublished Texas Court of Appeals case, the parties entered into a negotiated settlement agreement regarding construction of a building and the Vicks subsequently sued the contractor and Waits for breach of the settlement and fraud in the inducement in making the agreement. The Vicks (Gary and Carolyn) petitioned the court for an appeal of a summary judgment granted in favor of the contractor, Bantam and sub-contractor, Waits. The Vicks had contracted with Bantam for the construction of an office building. After the construction the Vicks were not satisfied with Bantam's performance and attempted to mediate their differences and arrived at a settlement agreement whereby Bantam agreed to use "use its best efforts, without recourse or legal obligations to cause all said

[55] See Peter Robinson, Centuries of Contract Common Law Can't Be All Wrong: Why the UMA's Exception to Mediation Confidentiality in Enforcement Proceedings Should be Embraced and Broadened, 2003 J. Disp. Resol. 135, 160.
[56] Ibid. at 162.
[57] See Vick v. Waits, 2002 WL 1163842 (Tex. App. Dallas 2002).

subcontractors and engineers, … to cooperate with [Vicks] on said project."[58] Months later, the Vicks sued for Bantam and Waits for breach of the mediated settlement agreement alleging that they did not in good faith cooperate with the Vicks in resolving warranty issues and that the Vicks were fraudulently induced into signing the mediated settlement agreement. In support of the allegation the Vicks attempted to introduce the representations in mediation made by the Bantam used as a basis for agreeing to a settlement agreement, including 1) that the settlement agreement would be enforceable against the subcontractors, and 2) the subcontractors would use their best efforts to cooperate any corrections. Bantam and Wait filed a motion for summary judgment asserting that they had complied with the terms of the settlement agreement and denied any claim of fraud against them and that any claim of fraud created a fact issue whereby the Vicks could not produce any evidence that they misrepresented any facts in the mediation session that would have fraudulently induced the Vicks to enter the agreement. In its decision for Bantam and Waits to exclude communications from the settlement session, the court relied on Section 154.073 of the Texas Alternative Dispute Resolution Act that provides that communication relating to a dispute made by a party in an alternative dispute resolution procedure is confidential, and not subject to discloser, and may not be used as evidence in a judicial or administrative proceeding.[59] The court went on to find that since there is no evidence to support a finding of fraudulent misrepresentation that the summary judgment by the trial court in favor of Waits was affirmed.

[58] Ibid. at 2.
[59] See TEX. CIV. PRAC. & REM.CODE ANN. § 154.073(a) (Vernon Supp.2002).

Vicks show illustrates how strictly adhered to confidentiality rules can interfere with the application of common contract law to mediated agreements to the detriment of a good faith participating party - how the very evidence necessary for an analysis under contract law is made unavailable.[60] It rises the question of what sanctions can be applied to a party who secures an agreement in bad faith, yet cannot be discovered through traditional discovery means. Where there are jurisdictions that do not have clear confidentiality standards or lack exemptions to address the need to follow closely common law contract evidence admission, parties will find a number of rationales applied by the courts when piercing mediation confidentiality.[61]

The courts, of course, can pierce the confidentiality without explanation when there is statutory support supporting the piercing, or when there is not, it may allow the evidence without explanation when there is no objection. In either case the introduction of confidential-violative evidence is left to the court without any explanation to the party. However, there are other cases where courts have explained their use of statutorily permissible piercing of confidentiality and where the statute is ambiguous, have tried to look to the legislative intent of mediation confidentiality or public policy interests in allowing the breach.[62] It is desirable in most cases to support a common law exception that would allow consistency and protect against bad faith use of the mediation process to avoid disclosure that would support a clear understanding of the agreement. Enforceability of mediated agreements was once left to the honor of the parties who mediated the settlement. However, as mediation becomes a legal alternative to litigation and where the outcome is a binding agreement in law, the rules should

[60] Robinson, supra note 55, at 161.
[61] Ibid. at 164, 165.
[62] Ibid. at 165.

reflect the need to not only protect the mediation process, but should offer protection to parties who in good faith rely on the outcome of mediation as reviewable and enforceable as any other legally binding agreement.

Conclusion

Mediation in our modern legal system has grown from a grass roots alternative to help parties resolve their disputes before enlisting traditional litigation, to a mandated and statutorily ruled process that parties must minimally explore before having a cause of action heard before a court. Courts have eagerly adopted mediation for its potential to reduce overflowing court dockets only to find that at times that they are ill-equipped to address issues unique to mediation including self-determination, confidentiality of parties, neutrality of the mediator, and enforceability of mediated agreements. Statutes have tried to address the need to preserve the traditional qualities of mediation while balancing the legal ramifications resulting from this preservation that include forced participation, bad faith abuse of the process to inflict damage on the other party, and conflicts arising when attempting to apply traditional common law processes to resolve these stemming ramifications as they appear in the court system. I've attempted to touch only on three core issues where mediation and common law issues conflict are most pronounced – confidentiality, good faith/bad faith participation and enforceability of agreements. These three issues will most often form the basis or core to most litigation arising from mediation. Understanding how each of these relate to traditional mediation and the expectations of modern day court-annexed mediation will give parties, mediators, attorneys, courts and legislators a better guide for addressing future mediation issues as they arise.