Good Faith, Bad Faith, No Faith: Will a Subjective Good Faith Standard Influence How Litigants Approach Mediation?[*]

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I. Introduction

Mediation as a dispute resolution mechanism does not succeed because courts, statutes, or rules impose a good faith standard on participants or sanction bad faith conduct. Mediation succeeds because litigants and their lawyers prepare their case, know their objectives, and work to achieve them. Ideally, requiring lawyers and litigants to adhere to minimal objective good faith requirements, to act professionally and civilly, and to respect the process should be sufficient to facilitate meaningful participation in mediation. Often, it is not. In some cases, lawyers and litigants misbehave and frustrate the process. Will a subjective good faith mediation standard influence how litigants approach mediation?[‡]

II. Good Faith/Bad Faith/No Faith

A. Objective Good Faith

What is good faith mediation? Most courts interpret the concept narrowly. Generally, it has been limited to requiring parties to do the following: (1) provide a mediation statement prior to the mediation date; (2) attend the mediation; and, (3) have a representative with authority to settle present. These are the most basic and widely accepted objective good faith mediation requirements.

These requirements often are memorialized in detailed pre-trial mediation orders issued pursuant to Fed. Civ. R. 16. Rule 16 authorizes the use of pretrial conferences to "formulate and narrow issues for trial and to discuss means for dispensing with the need for costly and unnecessary litigation."[i] As such, "[p]retrial settlement of litigation has been advocated and used as a means to alleviate overcrowded dockets, and courts have practiced numerous and varied types of pretrial settlement techniques for many years."[ii] Indeed, since 1983, "Rule 16 has provided that settlement

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[‡] This article does not address state statutes or state procedural rules that impose specific good faith mediation requirements.

of a case is one of several subjects which should be pursued and discussed vigorously during pretrial conferences."[iii]

Rule 16 also addresses a court's authority to sanction litigants for failing to comply with pretrial orders – including orders directing them to mediate and to do certain things prior to a scheduled mediation. Rule 16 states:

> On motion or on its own, the court may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)-(vii), if a party or its attorney:
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> (A) fails to appear at a scheduling or other pretrial conference;
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> (B) is substantially unprepared to participate – or does not participate in good faith – in the conference; or
>
> (C) fails to obey a scheduling or other pretrial order.

In addition to rule-based powers to sanction, Courts have inherent powers to control the proceedings before them and to see to "the orderly and expeditious disposition of cases" through sanctions and other means.[iv]

Complying with a court's mediation order, appearing at mediation, and sending a representative with authority to negotiate (and/or with access to higher corporate authority), are basic requirements any litigant and its lawyer can meet. If, for some reason, one of those requirements cannot be met, it behooves counsel for that litigant to contact opposing counsel, the mediator, and/or the court to obtain relief. A litigant's unexcused failure to satisfy minimal objective good faith mediation requirements likely warrants sanctions. Such sanctions should be designed to compensate the non-offending party for the fees and costs expended to prepare for and attend mediation. They should not, however, serve to influence the outcome of the case. In short, objective good faith mediation requirements should serve the interests of judicial economy and case administration without imposing punitive or coercive sanctions upon litigants.

B. Subjective Good Faith

Courts have struggled to define subjective good faith requirements intended to evaluate the quality of litigant participation in mediation. The district court in *In Re A.T. Reynolds & Sons, Inc.*, explained the pros and cons of using subjective good faith mediation standards.[v]

It vacated sanctions entered by the bankruptcy court after an unsuccessful mediation between two creditors. The bankruptcy court held that one creditor (Wells Fargo) failed to mediate with another creditor in good faith. It explained that:

> Passive attendance at mediation cannot be found to satisfy the meaning of participation in mediation, because mediation requires

> listening, discussion and analysis among the parties and their counsel. Adherence to a predetermined resolution, without further discussion or other participation, is irreconcilable with *risk analysis*, a fundamental practice in mediation…. [T]his Court has authority to order the parties to participate in the process of mediation, which entails discussion and risk analysis.[vi]

The bankruptcy court found that Wells Fargo engaged in bad faith mediation for the following reasons: (1) Wells Fargo failed to meaningfully participate in mediation because it "insisted on being dissuaded of the supremacy of its legal obligation in lieu of participating in discussion and risk analysis;" (2) the Wells Fargo corporate representative (a) only had authority to settle for a predetermined amount, despite the potential actual amount in controversy; (b) the representative was only prepared to discuss certain specific legal issues; (c) the representative had no authority to enter into "creative solutions that might have been brokered by the Mediator;" and, (3) Wells Fargo "sought to control the procedural aspects of the mediation by resisting filing a mediation statement and demanding to know the identity of the other party representatives."[vii] It then concluded that "attendance without participation in the discussion and risk analysis… constitutes failure to participate in good faith."[viii]

The district court rejected the bankruptcy court's qualitative analysis of Wells Fargo's participation in the mediation. It explained that such an analysis: (1) interferes with litigant autonomy; (2) may encroach upon confidential attorney-client communications and work product; and (3) may coerce settlement in cases where a litigant otherwise may take a "no pay" or "nuisance value" settlement position.[ix] The district court characterized the bankruptcy court's analysis of Wells Fargo's conduct as impractical and unrealistic. It concluded that an inquiry into the reasons a litigant has taken a certain settlement position, in the absence of a statute or rule authorizing such an inquiry and defining a standard, goes too far.[x]

C. Bad Faith

Defining bad faith can be an inherently vague notion that is difficult or even impossible to reasonably and logically enforce.[xi] Using a common definition of bad faith may be helpful. In the litigation context, it may include unreasonable, unprofessional, or vexatious conduct.

Specific examples of "bad faith" conduct during mediation include: refusing to discuss the mediation process with the mediator and opposing counsel before the conference; unprofessional and acrimonious statements or behavior during mediation (e.g., insulting the opposing party, counsel or the mediator); placing unreasonable time limits on offers/counteroffers; unilaterally terminating or abandoning a mediation without explanation; and disrespecting the mediator or the process (e.g., interrupting, ignoring, or refusing to engage in dialogue).[xii]

None of this conduct should require an inquiry into a litigant's motives. Rather, it should be evaluated against professional conduct rules, local standards for civility among members of the bar, and common sense. It also should be evaluated in the context of the entire litigation – i.e., has a litigant and/or its lawyer behaved badly throughout the case.

Finally, in addition to compensatory sanctions, punitive sanctions may be appropriate in the "bad faith" context. Punitive sanctions should be crafted to both punish recent unprofessional, uncivil and vexatious conduct and to deter it in the future.

D. No Faith?

It may be fair at this point to ask: What value does mediation have if litigants only must adhere to basic, non-stringent objective good faith standards? What value does it have if there is no subjective evaluation of litigant participation? These are not questions a reviewing court or appointed neutral should answer. These are questions that in-house, transactional, and trial lawyers should be asking each time they are presented with an opportunity to mediate a dispute regardless whether it is voluntary or mandatory. The answer should not be "none." If it were, it would reflect a lack of faith in mediation that should not govern our approach to dispute resolution.

Lawyers, therefore, must take responsibility for engaging in mediation consistent with their duty to zealously represent their client *and* their corresponding duties of professionalism and civility. This will facilitate adherence to both objective and subjective good faith standards, even if the latter cannot be defined precisely or enforced. It also will diminish the likelihood that litigants will engage in bad faith conduct designed to degrade the mediation process.

III. Conclusion

Lawyers should approach mediation with the intent to maximize its value regardless of the context. This takes effort and a commitment to prepare for mediation as thoroughly as one would for a hearing or argument. To maximize the value of mediation, lawyers must: know their client; know their case; know their adversary; identify their client's objectives; value the claims rationally; set the stage for mediation with their client and their adversary; time the mediation to maximize potential outcomes; negotiate from a position of strength (if possible); and, be prepared to take the case to trial. Preparing to mediate using these guidelines will serve the client's best interests and should demonstrate good faith participation in the process regardless of outcome and regardless whether objective or subjective criteria are used to evaluate it.

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[i] *Nick v. Morgan Foods, Inc.*, 99 F.Supp.2d 1056, 1060 (E.D. Mo. 2000).
[ii] *Id.*
[iii] *Id.*
[iv] *Nick*, 99 F. Supp.2d at 1060. See also *Link v. Wabash R.R.*, 370 U.S. 626 (1962) (holding that the Federal Rules of Civil Procedure are not intended to be the exclusive authority for district

courts to manage cases efficiently, to preserve the integrity of the judicial process, and to control their dockets).

[v] *A.T. Reynolds*, 452 B.R. 374 (S.D.N.Y. 2011).

[vi] *A.T. Reynolds,* 452 B.R. at 379-380.

[vii] *A.T. Reynolds,* 452 B.R. at 380.

[viii] *Id.*

[ix] *A.T. Reynolds,* 452 B.R. at 382 (citing *Kothe v. Smith*, 771 F.2d 667, 669 (2d Cir.1985); *Bulkmatic Transport Co. v. Pappas,* 2002 WL 975625 at *2 (S.D.N.Y.2002); *Dawson v. United States,* 68 F.3d 886, 897 (5th Cir.1995); *Negron v. Woodhull Hosp.,* 173 Fed. Appx. 77, 79 (2d Cir.2006) (rejecting the imposition of default judgment as a sanction for failure to meaningfully participate in settlement).

[x] *A.T. Reynolds,* 452 B.R. at 385.

[xi] See *Procaps S.A. v. Pantheon Inc.,* 2015 WL 3539737 at *1 (S.D.Fla. 2015).

[xii] See *Brooks v. Lincoln Nat. Life Inc. Co.,* 2006 WL 2487937 at *4 (D. Neb. 2006) (finding bad faith).