

# JUDGES GONE WILD: WHY BREAKING THE MEDIATION CONFIDENTIALITY PRIVILEGE FOR ACTING IN “BAD FAITH” SHOULD BE REEVALUATED IN COURT-ORDERED MANDATORY MEDIATION

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## I. INTRODUCTION

A judge has just ordered two parties in a civil suit involving the photographing and filming of underage minor girls to go to a court-ordered mandatory mediation in an attempt to avoid litigation. The defendant arrives at the mediation four hours late, barefoot and wearing sweat shorts and a backwards baseball cap, all the while playing with an electronic device.<sup>1</sup> As plaintiffs’ counsel starts their presentation, defendant puts his exposed, filthy feet up on the table, opposite plaintiffs’ counsel.<sup>2</sup> Plaintiffs’ counsel says four words, “Plaintiffs were minor girls,” when defendant yells, “Are the girls minors now?”<sup>3</sup> Continuing, plaintiffs’ counsel says, “Plaintiffs are minor girls who were severely harmed by defendant.”<sup>4</sup> Defendant then explodes, “Don’t expect to get a f—king dime—not one f—king dime!”<sup>5</sup> Defendant then proceeds to repeat himself an estimated fifteen times.<sup>6</sup> This continues until defendant finally shouts, “I hold the purse strings. I will not settle this case, at all. I am only here because the court is making me be here!”<sup>7</sup> The plaintiffs’ attorneys then begin to leave and defendant screams, “We will bury you and your clients! I’m going to ruin you, your clients, and all of your ambulance chasing partners!”<sup>8</sup>

As mediation is an alternative dispute resolution (“ADR”) process whose core value is confidentiality, should a party’s con-

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<sup>1</sup> Victoria Pynchon, Esq., *Mediating? Bring Your Toothbrush. Joe Francis and “Girls Gone Wild,”* SETTLE IT NOW NEGOTIATION BLOG, Apr. 17, 2007, <http://www.negotiationlawblog.com/2007/04/articles/conflict-resolution/mediating-bring-your-toothbrush-joe-francis-and-girls-gone-wild/>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

duct, no matter how revolting, be grounds for breaking that confidentiality?<sup>9</sup> For Joseph Francis, the founder of the *Girls Gone Wild* adult video series,<sup>10</sup> a court-mandated mediation did not provide the security and discretion fundamentally guaranteed by a practice purporting to advance party confidentiality, self-determination, and impartiality.<sup>11</sup> As a result of abnormal behavior at a “confidential” mediation session, which included threats to “bury” and “ruin” opposing counsel and their clients, the thirty-four year old Francis found himself first in court, obliged to reveal mediation communications, and then behind bars, an adverse guest of the Federal Bureau of Prisons.<sup>12</sup> The Florida civil case of *Doe v. Francis* offers an important case study showing the impact of the “bad faith” exception to mediation confidentiality upon the process and underlying principles of mediation.<sup>13</sup> *Doe v. Francis* raises deep-seated questions involving the limits of mediation confidentiality, what is meant by negotiating in “bad faith,” and the influence courts have in directing mediation.

Having an exception to mediation confidentiality for mediating in “bad faith” should be examined in the context in which it arises, as referring court cases to mediation as a matter of course may create “process dissonance.”<sup>14</sup> When mediation is introduced into the litigation setting, “mixed messages and conflicting priorities” are thrust upon its participants.<sup>15</sup> Parties to mediation and their representatives anticipate and demand very dissimilar strategic advances than those same parties would in the adjudicative setting.<sup>16</sup> Good faith requirements intensify the “process dissonance”

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<sup>9</sup> Fran L. Tetunic, *Florida Mediation Case Law: Two Decades of Maturation*, 28 NOVA L. REV. 87 (2003).

<sup>10</sup> Mantra, <http://www.mantraent.com/about.php> (last visited Feb. 24, 2009) (*Girls Gone Wild* is a video series by the soft-core pornography production company Mantra Films, Inc. “which gained industry prominence for capturing adventurous young women expressing themselves in settings such as Mardi Gras, Spring Break and tropical islands.”).

<sup>11</sup> Michael D. Young, *Mediation Gone Wild: How Three Minutes Put an ADR Party Behind Bars*, 25 ALTERNATIVES TO HIGH COSTS LITIG. 97 (2007).

<sup>12</sup> *Id.*

<sup>13</sup> *Doe v. Francis*, No. 5:03cv260-RS-WCS, 2003 WL 24073307 (N.D. Fla. filed Oct. 8, 2003).

<sup>14</sup> Carol L. Izumi & Homer C. La Rue, *Prohibiting “Good Faith” Reports Under The Uniform Mediation Act: Keeping The Adjudication Camel Out Of The Mediation Tent*, 2003 J. DISP. RESOL. 67, 68 (defining process dissonance in the context of mediation confidentiality as the fact that despite the importance of confidentiality mediation, it is at odds with a judicial system favoring the consideration of all relevant evidence); Paul Dayton Johnson, Jr., *Confidentiality in Mediation: What can Florida Glean From the Uniform Mediation Act?*, 30 FLA. ST. U. L. REV. 487, 490 (2003).

<sup>15</sup> Izumi & La Rue, *supra* note 14, at 68.

<sup>16</sup> *Id.*

problem by “conflating litigation and mediation values.”<sup>17</sup> The United States Constitution guarantees citizens the right to a trial, which, in many cases, includes the right to a jury.<sup>18</sup> While public policy supports private resolution of disputes, on the other hand, it values sound and efficient judicial management. Although this would favor requirements to maintain the integrity of a court-ordered mediation, “those two factors do not trump the constitutional rights of citizens to have their cases heard and decided in court.”<sup>19</sup>

This Note focuses on the reasons why a good faith requirement or a bad faith exception for breaking mediation confidentiality is objectionable and offers an alternative for the Florida court system that, if implemented, could mitigate such disadvantages. I will discuss “the intersection between [a] court-ordered mediation, the confidentiality of which is mandated by law . . . and the power of a court to control proceedings,” and persons who appear before it by sanctioning conduct that taking place in mediation.<sup>20</sup> Part II of this Note will begin by providing a background to the *Doe v. Francis* civil case. It will highlight the central concerns brought by the case and compare the statutes and case law from other jurisdictions, which strongly advocate a policy against a “bad faith” exception to mediation confidentiality. In Part III, I will argue that a bad faith exception to mediation confidentiality in a court-ordered mediation goes against the central tenets of mediation as an ADR practice and undermines what the mediation process seeks to achieve. I will also describe how enabling or compelling a mediator to reveal details of a mediation through a “bad faith” exception ends up hindering the purpose of mediation by furthering “legal values over mediation values.”<sup>21</sup> Finally, in Part IV, I will provide an overview of Florida statutory law on court-ordered mediation confidentiality, presenting its weaknesses and offering a method to handle bad faith exceptions that better balance the demand for productive party conduct with the need for maintaining mediation

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<sup>17</sup> *Id.*

<sup>18</sup> U.S. CONST. amend. VII (“In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”); Section Council, *Resolution on Good Faith Requirements for Mediators and Mediation Advocates in Court-Mandated Mediation Programs*, 2004 A.B.A. SEC. DISP. RESOL. 5, available at <http://www.abanet.org/dispute/webpolicy.html#9>.

<sup>19</sup> Section Council, *supra* note 18.

<sup>20</sup> *Foxgate Homeowners’ Ass’n v. Bramalea Cal., Inc.*, 25 P.3d 1117, 1119 (Cal. 2001) (citing EVID. CODE §§ 703.5, 1115–1118, and CODE CIV. PROC., § 128).

<sup>21</sup> *Izumi & La Rue*, *supra* note 14, at 68.

confidentiality. I propose the creation of a two-tier standard for behavioral mediation confidentiality. The first tier sets out objective criteria a party must follow as requirements for mandatory mediation; such standards provide clear guidance to parties in mediation and more sufficient notice of what the process requires. The second tier offers a procedure for situations where the objective standards are met but bad faith conduct claims are still brought forward. This tier could entail an in camera review by a judge to determine whether the claim of bad faith is frivolous or deserves sanctions before anything is made public. Since confidentiality is an essential element of mediation, this two-tiered standard is important because it holds parties accountable for their actions but simultaneously preserves mediation confidentiality, except under extreme circumstances.

## II. COMPARISON OF CASE AND STATUTORY LAW IN OPPOSITION TO A “BAD FAITH” EXCEPTION FOR BREACHING MEDIATION CONFIDENTIALITY

*Doe v. Francis* is an extreme example of what can happen to a person who objectively follows a court-ordered mediation, only to end up sanctioned with criminal charges and a jail sentence because the participation was not subjectively satisfactory to the court. In this section, I will outline *Doe v. Francis* in detail, and analyze case law from other jurisdictions that do not adhere to a “good faith” requirement to mediation. Through the analysis of this case law, one is able to see why a “good faith” requirement is undesirable, as well as how the outcome of *Doe v. Francis* would have changed had Florida adopted a statutory scheme that prohibited the judiciary from allowing a bad faith exception to break mediation confidentiality.

In *Doe v. Francis*, several unidentified minor girls<sup>22</sup> and their parents filed a civil action alleging that defendant Joseph Francis was responsible for exploiting underage girls to get them to participate in salacious acts of soft pornography for the franchise’s videos.<sup>23</sup> As part of litigation proceedings, the Court ordered the parties to participate in mediation.<sup>24</sup> The terms of the Mediation

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<sup>22</sup> The minor girls’ names are concealed from the court records. Collectively, they are referred to as “Doe.”

<sup>23</sup> Young, *supra* note 11.

<sup>24</sup> *Id.*

Order specified that all statements or declarations were confidential as a consequence of classified settlement negotiations.<sup>25</sup> During the mediation session, Francis displayed an outlandish behavior, arriving to the mediation four hours late, wearing inappropriate clothing and suggesting that he was only at the mediation because it was mandated and he would not consider settlement.<sup>26</sup> Francis then broke out in an aggressive rant, threatening to ruin the plaintiffs' lawyers and their clients.<sup>27</sup> Plaintiffs' counsel subsequently ended the mediation and filed a motion seeking financial sanctions against Francis due to his uncivil behavior.<sup>28</sup>

Plaintiffs requested the court to utilize its inherent powers to prevent abuses of the judicial process and asserted that Francis's statements made during the mediation were not confidential because he threatened violence.<sup>29</sup> Defense counsel countered that the violence exception statute did not apply because the words "bury" and "ruin" were not used to threaten violence, but only to communicate frustration.<sup>30</sup> Defense counsel further argued that Francis's behavior did not derail the mediation, as plaintiff ignored the ensuing thirteen hours of substantive mediation, which lasted until late in the afternoon of the following day, when the impasse was declared after the defendant's final offer was rejected.<sup>31</sup> They claimed that plaintiffs' motion for sanction was merely a mechanism to introduce inadmissible facts in order to provoke the court.<sup>32</sup> In making this argument, defense counsel stressed that the imposition of sanctions against Francis was inappropriate since: (1) no direct court order had been violated; (2) the parties mediated for over thirteen hours; and (3) there was no express authority empowering the court to sanction a party for behavior in a confidential mediation process.<sup>33</sup>

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<sup>25</sup> *Id.* at 104.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*; FLA. STAT. ANN. § 44.405(4)(a)(2) (West 2006) ("Notwithstanding subsections (1) and (2), there is no confidentiality or privilege attached to a signed written agreement reached during a mediation, unless the parties agree otherwise, or for any mediation communication: That is willfully used to plan a crime, commit or attempt to commit a crime, conceal ongoing criminal activity, or threaten violence.").

<sup>30</sup> Young, *supra* note 11, at 104.

<sup>31</sup> *Id.* at 107–08.

<sup>32</sup> *Id.* at 106.

<sup>33</sup> *Id.* at 105–06.

The presiding judge, Judge Smoak, ordered an evidentiary hearing into the situation.<sup>34</sup> In the end he determined that Francis's behavior was unacceptable, although not violent, and that his poor conduct violated the Court's Scheduling and Mediation Order by preventing the parties from mediating.<sup>35</sup> Judge Smoak ordered Francis to pay plaintiffs' attorneys' fees and costs.<sup>36</sup> The judge also authorized coercive incarceration for Francis, which would be removed upon his proper participation in mediation.<sup>37</sup> Francis would be released from incarceration "when the mediator certifies in person to the court that Mr. Francis has fully complied with [the] Order and has participated in the mediation in good faith."<sup>38</sup>

During the second mediation, it appeared that a settlement was almost reached.<sup>39</sup> The defendant's settlement agreement draft offered payment over time rather than a lump sum.<sup>40</sup> This type of payout benefited the defendant, and the plaintiffs strongly objected.<sup>41</sup> The mediator informed Judge Smoak of the impasse—that there had been an unconditional offer and acceptance, but the defendant later offered the plaintiffs a newly proposed agreement with considerably diverse conditions.<sup>42</sup> Plaintiffs once again sought sanctions against defendant within the full discretion of the court.<sup>43</sup> Defense counsel responded that three and a half days of mediation, which tendered substantial offers, cannot be brought under the purview of bad faith or any other violations of a court mandated mediation order.<sup>44</sup> Judge Smoak disagreed with defense counsel and scrutinized Francis's reposition as an effort to rescind his tendered offer by inflicting objectionable conditions, thereby violating the express conditions upon which Judge Smoak suspended the requirement that Francis surrender to the U.S. Marshals.<sup>45</sup> Thus, the court terminated Francis's suspended incarceration, with Francis to remain in custody until a new formal mediation in a proper setting could be arranged.<sup>46</sup>

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<sup>34</sup> *Id.* at 105

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 107.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 107–08.

<sup>45</sup> *Id.* at 108.

<sup>46</sup> *Id.*

In the end, Francis's civil case was finally settled and he was released from the sanction of coercive incarceration for the civil contempt.<sup>47</sup> With the conclusion of this case, serious questions arise about how the mediation process can be held intact when having a "bad faith" exception to mediation confidentiality undermines so many of the central values and purposes mediation inhabits. The disparities of this case and counterproductive conduct of the Florida court is best viewed from the perspective of cases and statutory law from other jurisdictions that rationally ruled out the ability of the court to break mediation confidentiality.

In *Foxgate Homeowners' Ass'n v. Bramalea California, Inc.*, the Supreme Court of California held that there were no exceptions to the confidentiality of mediation communications or to the statutory limits on the content of mediator's reports, rendering the appellate court's judicially created exception inconsistent with the language and the legislative intent of those sections.<sup>48</sup> Thus, the plaintiffs' motion for sanctions and the trial court's consideration of the motion and attached documents violated Sections 1119 (confidentiality of mediation communications)<sup>49</sup> and 1121 (confidentiality of mediator's reports and findings) of the California Evidence Code.<sup>50</sup> Neither a mediator nor a party may reveal communica-

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<sup>47</sup> *Id.*

<sup>48</sup> *Foxgate Homeowners' Ass'n v. Bramalea Cal., Inc.*, 25 P.3d 1117, 1119 (Cal. 2001).

<sup>49</sup> Cal. Evid. Code § 1119 (West 2009) (Written or oral communications during mediation process: admissibility):

Except as otherwise provided in this chapter: (a) No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given; (b) No writing, as defined in Section 250, that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given; (c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential.

<sup>50</sup> Cal. Evid. Code § 1121 (West 2009) (Mediator's reports and findings):

Neither a mediator nor anyone else may submit to a court or other adjudicative body, and a court or other adjudicative body may not consider, any report, assessment, evaluation, recommendation, or finding of any kind by the mediator concerning a mediation conducted by the mediator, other than a report that is mandated by court rule or other law and that states only whether an agreement was reached, unless all parties to the mediation expressly agree otherwise in writing, or orally in accordance with Section 1118.

tions made during mediation.<sup>51</sup> Also, while a party may do so, a mediator may not report to the court about the conduct of participants in a mediation session.<sup>52</sup>

The court in *Foxgate* stated:

The parties . . . recognize the purpose of confidentiality is to promote “a candid and informal exchange regarding events in the past. . . . This frank exchange is achieved only if the participants know that what is said in the mediation will not be used to their detriment through later court proceedings and other adjudicatory processes.”<sup>53</sup>

The court further noted, “[m]ediation demands . . . that the parties feel free to be frank not only with the mediator but also with each other. . . . Agreements may be impossible if the mediator cannot overcome the parties’ wariness about confiding in each other during these sessions.”<sup>54</sup>

To carry out the purpose of encouraging mediation by ensuring confidentiality, the statutory scheme, including Sections 1119 and 1121, unqualifiedly barred disclosure of communications made during mediation absent an express statutory exception.<sup>55</sup> The court in *Foxgate* continued by asserting:

[T]he legislature has weighed and balanced the policy that promotes effective mediation by requiring confidentiality against a policy that might better encourage good faith participation in the process. Whether a mediator in addition to participants should be allowed to report conduct during mediation that the mediator believes is taken in bad faith and therefore might be sanctionable . . . is a policy question to be resolved by the legislature. Although a party may report obstructive conduct to the court, none of the confidentiality statutes made an exception for reporting bad faith conduct or for imposition of sanctions under that section when to do so would require disclosure of communications or a mediator’s assessment of a party’s conduct. . . .<sup>56</sup>

Correspondingly, Florida’s statutory law, like that in California, does not provide an express exception to breaking mediation

<sup>51</sup> *Foxgate*, 25 P.3d 1117, at 1119.

<sup>52</sup> *Id.*

<sup>53</sup> *Foxgate Homeowners’ Ass’n v. Bramalea Cal., Inc.*, 25 P.3d 1117, 1124 (Cal. 2001) (quoting Nat. Conf. Comm’rs on U. St. Laws, U. Mediation Act (May 2001) § 2, Reporter’s working notes, ¶ 1).

<sup>54</sup> *Id.* at 1126 (quoting Note, *Protecting Confidentiality in Mediation*, 98 HARV. L. REV. 441, 445 (1984)).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 1128.

confidentiality for parties not mediating in good faith and conducting themselves inappropriately.<sup>57</sup> For the same reason as that provided for by the California Supreme Court in *Foxgate*, Judge Smoak in *Doe* exceeded his positional authority by mandating the creation of a judicial exception for breaking mediation confidentiality. The Florida legislature was in a position to balance the need

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<sup>57</sup> See FLA. STAT. § 44.405 (2006) (Mediation Alternatives To Judicial Action: Confidentiality; privilege; exceptions):

- 1) Except as provided in this section, all mediation communications shall be confidential. A mediation participant shall not disclose a mediation communication to a person other than another mediation participant or a participant's counsel. A violation of this section may be remedied as provided by s. 44.406. If the mediation is court ordered, a violation of this section may also subject the mediation participant to sanctions by the court, including, but not limited to, costs, attorney's fees, and mediator's fees.
- 2) A mediation party has a privilege to refuse to testify and to prevent any other person from testifying in a subsequent proceeding regarding mediation communications.
- 3) If, in a mediation involving more than two parties, a party gives written notice to the other parties that the party is terminating its participation in the mediation, the party giving notice shall have a privilege to refuse to testify and to prevent any other person from testifying in a subsequent proceeding regarding only those mediation communications that occurred prior to the delivery of the written notice of termination of mediation to the other parties.
- 4)(a) Notwithstanding subsections 1) and 2), there is no confidentiality or privilege attached to a signed written agreement reached during a mediation, unless the parties agree otherwise, or for any mediation communication:
  1. For which the confidentiality or privilege against disclosure has been waived by all parties;
  2. That is willfully used to plan a crime, commit or attempt to commit a crime, conceal ongoing criminal activity, or threaten violence;
  3. That requires a mandatory report pursuant to chapter 39 or chapter 415 solely for the purpose of making the mandatory report to the entity requiring the report;
  4. Offered to report, prove, or disprove professional malpractice occurring during the mediation, solely for the purpose of the professional malpractice proceeding;
  5. Offered for the limited purpose of establishing or refuting legally recognized grounds for voiding or reforming a settlement agreement reached during a mediation; or
  6. Offered to report, prove, or disprove professional misconduct occurring during the mediation, solely for the internal use of the body conducting the investigation of the conduct.
- (b) A mediation communication disclosed under any provision of subparagraph (a)3., subparagraph (a)4., subparagraph (a)5., or subparagraph (a)6. remains confidential and is not discoverable or admissible for any other purpose, unless otherwise permitted by this section.
- 5) Information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery by reason of its disclosure or use in mediation.
- 6) A party that discloses or makes a representation about a privileged mediation communication waives that privilege, but only to the extent necessary for the other party to respond to the disclosure or representation.

for confidentiality in the mediation context against the need for promoting productive conduct in mediation sessions. It should have been the Florida legislature's responsibility to reexamine its position and institute an exception to mediation confidentiality, not for the court to fabricate a judicially instituted exclusion.

Another important case to consider is one coming out of the Florida courts, which evidently was not taken into consideration during the *Doe v. Francis* trial. In *Avril v. Civilmar*,<sup>58</sup> the plaintiff's only basis for sanctions was that defendants were unwilling to make a satisfactory settlement offer.<sup>59</sup> The mediation statutes, however, do not require that parties actually settle cases.<sup>60</sup> Section 44.1011(2) of the Florida Statutes explains that mediation is "an informal and non-adversarial process with the objective of helping the disputing parties reach a mutually acceptable and voluntary agreement. In mediation, decisionmaking authority rests with the parties."<sup>61</sup> It is clearly not the intent to force parties to settle cases they want to submit to trial before a jury.<sup>62</sup> There is no requirement that a party even makes an offer at mediation, let alone offers what the opposition wants to settle.<sup>63</sup> Yet, in *Doe v. Francis*, Francis was coercively incarcerated for not providing the plaintiffs with an appropriate settlement agreement—such incarceration only being lifted upon the court's judgment of a suitable settlement. Judge Smoak even admitted that "Francis ultimately purged his contempt, not because he settled the case, but because the settlement demonstrated that he had finally mediated in good faith."<sup>64</sup> In that statement, Judge Smoak stated that Francis's good faith in mediation was demonstrated by his settlement with the plaintiffs, yet parties to mediation are supposed to have decisional autonomy not to settle at all and proceed to a trial. As stated in *In re Acceptance Insurance Co.*,<sup>65</sup> "a court may compel parties to participate . . . [in] mediation, but it cannot compel them to negotiate in good faith or to settle their dispute."<sup>66</sup> In this case, it was determined that the trial court improperly allowed inquiry into communications made

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<sup>58</sup> *Avril v. Civilmar*, 605 So. 2d 988 (Fla. Dist. Ct. App. 1992).

<sup>59</sup> *Id.* at 989.

<sup>60</sup> *Id.*

<sup>61</sup> FLA. STAT. ANN. § 44.1011(2) (West 2006).

<sup>62</sup> *Avril*, 605 So. 2d at 990.

<sup>63</sup> *Id.*

<sup>64</sup> *Pitt v. Francis*, No. 5:07cv169-RS-EMT, 2007 U.S. Dist. LEXIS 93047, at \*23-\*24 (N.D. Fla. 2007).

<sup>65</sup> *In re Acceptance Ins. Co.*, 33 S.W.3d 443 (Tex. App. 2000).

<sup>66</sup> *Id.* at 451.

by a participant relating to the subject matter of the mediation which were confidential, not subject to disclosure, and could not be used as evidence against the participant in any judicial or administrative proceeding.<sup>67</sup> The Texas court held that “[a]n order requiring ‘good faith’ negotiation does not comport with the voluntary nature of the mediation process and has been held void.”<sup>68</sup>

Although the court can mandate mediation, settlement determinations are supposed to rest with the parties. In *Decker v. Lindsay*,<sup>69</sup> trial Judge Lindsay ordered the Deckers to mediate their negligence action against the real party in interest. The Court’s Rules for Mediation provided in pertinent part that “all parties commit to participate in the proceedings in good faith with the intention to settle, if at all possible.”<sup>70</sup> The appellate court concluded that Judge Lindsay could not require the Deckers to negotiate in good faith and attempt to reach a settlement.<sup>71</sup> To do so would not be “consistent with a scheme where a court refers a dispute to an ADR procedure” because “no one can compel the parties to negotiate or settle a dispute unless they voluntarily and mutually agree to do so.”<sup>72</sup> Since the parties clearly indicated they wished to proceed with trial, the referral to mediation cannot require good faith negotiation. Likewise, in *Doe v. Francis*, Francis explicitly stated during the first mediation that his preference was not to settle the case.<sup>73</sup> Given that referral to mediation is not a substitute for trial, there is no foundation for breaking the inviolability of mediation confidentiality owed to Francis’s adamant refusal to provide settlement terms or provisions within the confines of court proscribed “good faith” behavior. A case is meant to be tried if not settled at mediation.<sup>74</sup>

The case of *Graham v. Baker*<sup>75</sup> is also worth noting. The Iowa Supreme Court held that defendant and his clients attending the mediation satisfied the statutory requirement that a creditor par-

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<sup>67</sup> *Id.* at 452–53.

<sup>68</sup> *Id.* at 452.

<sup>69</sup> *Decker v. Lindsay*, 824 S.W.2d 247 (Tex. App. 1992).

<sup>70</sup> *Id.* at 249.

<sup>71</sup> *Id.* at 251.

<sup>72</sup> *Id.*

<sup>73</sup> Young, *supra* note 11, at 104.

<sup>74</sup> *Decker*, 824 S.W.2d at 248.

<sup>75</sup> *Graham v. Baker*, 447 N.W.2d 397, 398 (Iowa 1989) (“Defendant refused to cooperate with mediator, denying plaintiffs any opportunity to put forward proposals resolving the situation, and demanding he be given a mediation release. Defendant was hostile to plaintiffs, the mediator, and the mediation process.”).

ticipate in mediation.<sup>76</sup> The court positioned that the word “participate” has no clear and unmistakable meaning.<sup>77</sup> In its primary sense:

[I]t means simply a sharing or taking part with others but when it is applied to a particular situation, it takes on secondary implications that render it ambiguous. Under some circumstances it may denote a mere passive sharing while under other circumstances an implication of active engagement may accompany its use.<sup>78</sup>

The court observed that defendant’s behavior, “which ranged between acrimony and truculency precluded any beneficial result to the parties from the mediation process. It has cost his clients considerable time and expense. Nevertheless, his inappropriate behavior is not determinative.”<sup>79</sup> The court found that the defendant’s presence at the mediation satisfied the minimal participation required by the statute.<sup>80</sup> Although recognizing that resistant parties might thwart the purposes of mediation, *Graham* stated that a narrow interpretation of the statute’s “participation” requirement is consistent with the legislature’s view of mediation as an advisory process. While Francis’s behavior in *Doe v. Francis* was inappropriate and unseemly, there is nothing in sections 44.401–dd.406 of the Florida Mediation Confidentiality and Privilege Act that prescribes guidance for what constitutes participation within a mediation nor does it provide for an exception to mediation confidentiality for behavior that equates to non-participation.<sup>81</sup> Francis may have acted in an offensive manner but he joined in the first mediation for over thirteen hours and for three and half days in the second mediation, a mediation which led to a considerable offer.<sup>82</sup> For the Florida court to independently deduce the legislature’s plain intent and conclude that Francis did not “participate” in the mediation, without having fixed guidelines to suggest what the court entails in the meaning of participation, was an unwarranted means for breaking mediation confidentiality.

*Doe v. Francis* gives rise to great concern about the “judge’s apparent failure or refusal to appreciate that the power of mediation as a peacemaking process comes from its private, consensual,

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<sup>76</sup> *Id.* at 401.

<sup>77</sup> *Id.* at 400.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 401.

<sup>80</sup> *Id.*

<sup>81</sup> See FLA. STAT. § 44.405 (2006).

<sup>82</sup> Young, *supra* note 11, at 107–08.

and voluntary nature.”<sup>83</sup> The fact the mediation was “court-sanctioned does not transform the process into something new or different that authorizes judicial intervention and interference. Nor does it allow a judge to compel a party to ‘voluntarily’ settle a case.”<sup>84</sup>

### III. HOW A GOOD FAITH REQUIREMENT AND BAD FAITH EXCEPTION TO MEDIATION CONFIDENTIALITY UNDERMINES THE MEDIATION PROCESS

Those who support a good faith requirement contend that inducing parties to “adhere to a minimal standard of conduct adds to the legitimacy of the process.”<sup>85</sup> The good faith participation requirements pertaining to party conduct in mediation proceedings are intended to guarantee process integrity and procedural fairness.<sup>86</sup> Sanction or liability would impart a disincentive to abuse power imbalances, while providing an important remedy when such misconduct occurs.<sup>87</sup> Furthermore, proponents of a good faith requirement argue that the scope of the confidentiality privilege should be narrowed to allow breach of confidentiality for acting in bad faith since ample confidentiality protection in mediation can be found in existing statutes, contractual agreements, and rules of evidence.<sup>88</sup>

While there needs to be recognition of the problem of bad faith conduct, “the cure is worse than the disease.”<sup>89</sup> The distinctive appeal of mediation is its ability to be a candid and secure setting for disputants to discuss their interests and views freely and comfortably.<sup>90</sup> Rules requiring good faith and threatening the impositions of sanctions “will hang over the parties like a Damoclean sword, inhibiting the process rather than abetting it.”<sup>91</sup> Cooperation, collaboration, confidentiality, trust, and voluntariness are am-

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<sup>83</sup> Russ Bleemer, *Update: Despite Mediation-Related Incarceration, Girls Gone Wild Founder is Headed for More ADR*, 26 ALTERNATIVES TO HIGH COSTS LITIG. 66 (2008).

<sup>84</sup> *Id.*

<sup>85</sup> Izumi & La Rue, *supra* note 14, at 73.

<sup>86</sup> *Id.* at 72.

<sup>87</sup> *Id.* at 73.

<sup>88</sup> Johnson, *supra* note 14.

<sup>89</sup> Roger L. Carter, *Oh, Ye of Little (Good) Faith: Questions, Concerns and Commentary on Efforts to Regulate Participant Conduct in Mediations*, 2002 J. DISP. RESOL. 367, 376 (2002).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 376–77.

bitions of mediation. “If parties must mediate under a microscope, these ideals will not be achieved. In fact, excessive judicial intrusion into the mediation process threatens fundamental rights of parties.”<sup>92</sup> Such interference can create a false perception of confidentiality, which ultimately discourages participants to mediation to be open. If their expectation is not matched with reality, it will damage the credibility of mediation to the general public.<sup>93</sup>

#### A. Loss of Confidentiality

This section will discuss how a good faith requirement or a bad faith exception to mediation confidentiality can damage the core values as well as thwart the purposes of court-mandated mediation. By probing the principles and intent of mediation as an ADR process, the constructive function of a good faith requirement for court mandated mediation is shown to hinder more than help in the management of mediation.

A good faith requirement on the mediation process may have the most decisive effect on confidentiality. Some proponents of a good faith constraint to mediation claim that such a provision prevents the insertion of “Rambo-style litigators into the mediation process,” thwarting fears of “lawyers playing litigation games, engaging in fishing expeditions for discovery purposes, trying to gain advantages over an opponent, or putting on a charade to comply with the court’s order.”<sup>94</sup> In reality, however, imparting information during negotiation that could enable the opposing party exposure to see one’s vulnerabilities is, “risky and counterintuitive.”<sup>95</sup> Confidentiality facilitates parties in divulging their personal feelings and private thoughts about the conflict that otherwise might not be revealed in an adversarial setting.<sup>96</sup> Because of this, “‘in many mediations, confidentiality does far more than enhance the candid nature of the discussion; between some adversaries, confidentiality may be akin to a precondition for any discussion.’”<sup>97</sup>

In addition, for the mediator to aid parties in arriving at an agreed-upon solution through the discovery of the range of com-

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<sup>92</sup> *Id.* at 392.

<sup>93</sup> Johnson, *supra* note 14, at 491.

<sup>94</sup> Izumi & La Rue, *supra* note 14, at 70.

<sup>95</sup> *Id.* at 84.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* (quoting Ellen D. Deason, *The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Reliability?*, 75 *MARQ. L. REV.* 79, 92 (2001)).

plex issues involved in a dispute, the protection of confidentiality becomes vitally important.<sup>98</sup> Mediators try to discover the issues and expose any underlying causes of conflict, anticipating that they will be able to draw upon this information to promote a reconciliation of the parties' differences.<sup>99</sup> Mediators frequently make use of information acquired from their discussions to generate "alternative grounds for settlement."<sup>100</sup> In the course of these discussions, "it is inevitable that the participants will be called upon to discuss facts that they would not normally be willing to concede."<sup>101</sup> Confidentiality is fundamental to the mediation process; without it, parties would not be willing to make the kind of concessions and admissions that lead to settlement.<sup>102</sup> It is the veil of confidentiality that enables parties to contribute efficiently and productively in mediation.<sup>103</sup>

Moreover, parties would reluctantly participate in mediation without the promise of confidentiality, concerned that a failed mediation would leave the opposing party free to disclose information in subsequent legal proceedings.<sup>104</sup> Advocates of a good faith requirement to mediation suggest that this type of condition is essential for the mediation process, which takes into account parties' conflicting viewpoints, to work effectively as a creative, collaborative dispute resolution process.<sup>105</sup> In fact, the opposite appears to be true. If a good faith requirement is implemented, making the promise of confidentiality conditional, parties may react cautiously and be "less likely to let down their litigation hair."<sup>106</sup> Confidentiality protection in mediation is a safeguard the public places enormous trust in, and by compromising this protection, participation in mediation could decline.<sup>107</sup> Confidentiality is crucial in surveying settlement options, and a "lack or breach of confidentiality 'limits the efficacy and the efficiency of mediation.'"<sup>108</sup> The inhibition of

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<sup>98</sup> *Id.*

<sup>99</sup> Lawrence R. Freedman & Michael L. Prigoff, *Confidentiality in Mediation: The Need for Protection*, 2 OHIO ST. J. ON DISP. RESOL. 37, 38 (1986).

<sup>100</sup> *Id.*

<sup>101</sup> Paul Dayton Johnson Jr., Note & Comment, *Confidentiality in Mediation: What can Florida Glean from the Uniform Mediation Act?*, 30 FLA. ST. U. L. REV. 487, 489 (2003).

<sup>102</sup> *Id.*

<sup>103</sup> Freedman & Prigoff, *supra* note 99.

<sup>104</sup> Izumi & La Rue, *supra* note 14, at 86.

<sup>105</sup> *Id.* at 70.

<sup>106</sup> James J. Alfini & Catherine G. McCabe, *Mediating in the Shadow of the Courts: A Survey of the Emerging Case Law*, 54 ARK. L. REV. 171, 180 (2001).

<sup>107</sup> Izumi & La Rue, *supra* note 14, at 86.

<sup>108</sup> *Id.*

confidentiality “strikes at the core of mediation’s attributes, the process’s ability to offer participants an open and accepting environment in which to settle disputes.”<sup>109</sup> Consequently, the stream of information may be hindered if parties are constantly agonizing about the valuation of their participation.<sup>110</sup>

Furthermore, many good faith statutes and court rules call for mediators to report whether parties participated in good faith.<sup>111</sup> The mediator, in the event of a hearing on bad faith sanctions, will likely be compelled to testify.<sup>112</sup> Because the parties anticipate that their dialogue will remain confidential and that the mediator will not talk about these communications outside of the mediation, these expectations are deceived when there are exceptions to the mediator privilege of confidentiality.<sup>113</sup> Even if the mediator’s testimony could be restricted to a factual narration of the principal behaviors to the claim of bad faith, the parties’ trust in mediation confidentiality would be greatly damaged.<sup>114</sup> The mediator might as well open the parties’ session with the proclamation: “Mediation is a confidential proceeding—unless you do something that displeases me, the other party of the court.”<sup>115</sup> Subsequent accusations of mediation bad faith conduct will chip away at participants’ trust in the confidentiality of mediation, create hesitation in moving towards a course of action or settlement, and potentially hinder the process as a whole.<sup>116</sup>

## B. Mediator Impartiality

Essential to the mediation process is the concept of mediator impartiality.<sup>117</sup> A mediator is known as a “neutral” party to the mediation, having ethical as well as express and implied duties to be objective and keep confidences communicated during a media-

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<sup>109</sup> Alfini & McCabe, *supra* note 106.

<sup>110</sup> *Id.*

<sup>111</sup> Carter, *supra* note 89, at 393.

<sup>112</sup> *Id.*

<sup>113</sup> Izumi & La Rue, *supra* note 14, at 84.

<sup>114</sup> Carter, *supra* note 89, at 392.

<sup>115</sup> *Id.*

<sup>116</sup> 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, 633 (2001).

<sup>117</sup> Kimborlee K. Kovach, *Good Faith In Mediation-Requested, Recommended, Or Required? A New Ethic*, 38 *S. TEX. L. REV.* 575, 585 (1997).

tion session.<sup>118</sup> A good faith requirement for mediation would result in the “erosion of mediator impartiality and loss of trust in the mediator.”<sup>119</sup>

Given that mediators are the single resource of impartial, unbiased evidence about conduct in mediation, proponents for admitting mediator’s testimony deduce that such testimony is highly probative and reliable.<sup>120</sup> Nevertheless, parties and counsel’s interactions with the mediator can become misrepresented with good faith requirements by generating counterproductive distractions.<sup>121</sup> As parties to mediation recognize their conduct is being assessed, the participants may try to influence the mediator in an effort to “turn the mediator into their agent.”<sup>122</sup> They will also believe there is a need to “perform” for him or her.<sup>123</sup> This pressure associated with the impulse to perform builds an environment where the parties to mediation are less apt to have confidence in the process and the person at its center.<sup>124</sup> Judge Wayne Brazil explains that, “[a] duty to pass judgment would threaten a core component of the mediator’s sense of professional self—a sense at the center of which is a vision of ‘neutrality’ built around the notion that a facilitative mediator is never to express a normative or analytical critique.”<sup>125</sup>

While in some cases, where a mediator’s testimony may be the only dependable evidence as to a party’s conduct in mediation, policy concerns for disclosure might prevail over those favoring confidentiality and testimonial immunity.<sup>126</sup> At no time are mediators “quasi-policing agents” whose facilitative role as promoter of communication and understanding should be displaced by a good faith reporting requirement for mediation.<sup>127</sup> Recognizing that confidentiality and the appearance and actual impartiality of a third-party neutral are central to participants’ as well as the public’s trust

<sup>118</sup> Weston, *supra* note 116, at 639–40.

<sup>119</sup> Alexandria Zylstra, *The Road From Voluntary Mediation to Mandatory Good Faith Requirements: A Road Best Left Untraveled*, 17 J. AM. ACAD. MATRIMONIAL L. 69, 96–97 (2001).

<sup>120</sup> John Lande, *Using Dispute System Design Methods To Promote Good-Faith Participation*, 50 UCLA L. REV. 69, 103 (2002).

<sup>121</sup> Izumi & La Rue, *supra* note 14, at 83.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> Wayne D. Brazil, *Continuing the Conversation About the Current Status and the Future of ADR: A View from the Courts*, 2000 J. DISP. RESOL. 11, 32.

<sup>126</sup> Weston, *supra* note 116, at 641.

<sup>127</sup> Izumi & La Rue, *supra* note 14, at 94.

in a mediation process, the court in *NLRB v. Joseph Macaluso, Inc.* stated:

However useful the testimony of a conciliator might be . . . in any given case . . . the conciliators must maintain a reputation for impartiality, and the parties to conciliation conference, must feel free to talk without any fear that the conciliator, may subsequently make disclosures as a witness in some other proceeding, to the possible disadvantage of a party to the conference. If conciliators were permitted or required to testify about their activities, or if the production of notes or reports of their activities could be required, not even the strictest adherence to purely factual matters would prevent the evidence from favoring or seeming to favor one side or the other.<sup>128</sup>

In addition, if called to testify at a bad faith hearing, mediators may have their own personal bias, regardless of the high standards held against mediators.<sup>129</sup> There could be a situation where a mediator would be interested in presenting his or her actions in mediation favorably, and “[i]f a mediator reports that a participant has not participated in good faith, courts should expect that the mediator might emphasize facts consistent with that conclusion and downplay inconsistent facts.”<sup>130</sup> In consequence, mediator testimony cannot automatically be assumed to be probative, neutral, and trustworthy.<sup>131</sup>

Another problem with a good faith reporting requirement upon mediator impartiality is that it leaves opportunity to encourage inappropriate mediator conduct: “[a] good faith requirement gives mediators too much authority over participants to direct the outcome in mediation and creates the risk that some mediators would coerce participants by threatening to report alleged bad faith conduct.”<sup>132</sup> There is a danger in allowing mediators to state their opinions about details of a case or its underlying merits, in that unfair pressure through heavy-handed tactics can force parties into undesired positions.<sup>133</sup> Even without the possibility of a later court inquiry about good faith participation, mediator assessments and questioning can still make mediation participants feel forced to amend their positions.<sup>134</sup> The fear is that

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<sup>128</sup> *NLRB v. Macaluso*, 618 F.2d 51, 55 (9th Cir. 1980).

<sup>129</sup> Lande, *supra* note 120, at 104.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 106.

<sup>133</sup> *Id.* at 107.

<sup>134</sup> *Id.*

mediators may use their influence arising from their “authority to testify about bad faith” if a bad faith sanctions regime is instituted.<sup>135</sup> Participants rationally may be apprehensive of the consequence of mediators’ reports, even if mediators do not threaten to report bad faith, if local courts hold a generous number of bad faith hearings.<sup>136</sup>

### C. Loss of Party Autonomy and Voluntariness

One of principal attractions of mediation lies in the voluntary nature of the process.<sup>137</sup> It is an ADR method that enables the parties of a dispute to seize control over the result of their case from the court.<sup>138</sup> If the court can require parties to behave in a particular manner while involved in mediation, mediation’s distinguishing attribute of party autonomy begins to wear away.<sup>139</sup> Moreover, “‘evaluative mediation is an oxymoron. . . . [A]n evaluative mediator, by implicitly pressuring parties to adopt a particular view of the dispute, removes an element of voluntariness from the process.’”<sup>140</sup>

According to Izumi & LaRue, “[s]elf-determination is the key principle of mediation that places settlement power solely with the parties.”<sup>141</sup> The customary motivation behind party self-determination is that parties are “happier with and more likely to honor an agreement they voluntarily choose to create.”<sup>142</sup> Leaving decision making power “with the parties instead of a judge is a vital aspect of mediation’s attractiveness and success as a dispute resolution process . . . . Thus, mediation, unlike litigation, is said to empower disputants.”<sup>143</sup>

If the court concerns itself in how the parties must behave during the mediation, “the process has morphed into something that is hardly ‘voluntary.’”<sup>144</sup> Therefore, there is a danger in a broad

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<sup>135</sup> *Id.* at 107–08.

<sup>136</sup> *Id.* at 108.

<sup>137</sup> Carter, *supra* note 89, at 394.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* (quoting Kimberlee K. Kovach & Lela P. Love, “Evaluative” Mediation is an Oxymoron, 14 ALTERNATIVES TO HIGH COSTS LITIG. 31, CPR INST. FOR DISP. RESOL. (1996)).

<sup>141</sup> Izumi & La Rue, *supra* note 14, at 80.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 80–81.

<sup>144</sup> Carter, *supra* note 89, at 395.

good faith formulation of the duty to participate in mediation in that it may create “settlement pressures, cutting back on the essential voluntariness of agreement in mediation.”<sup>145</sup> The higher the level of participation required, the greater the coercion by forcing a party to present its case in a manner not of its own choosing.<sup>146</sup> This shades into an invasion of litigant autonomy by interfering with the party’s choice of how to present its case.<sup>147</sup> According to Carter, “[i]f a party is not free to make a small offer—or no offer at all—in mediation, that party has lost, rather than gained autonomy.”<sup>148</sup> Without the right to decline settlement, access to the courts does not exist.<sup>149</sup> In bad faith cases, courts insincerely give reverence to the notion that parties cannot be compelled to settle.<sup>150</sup> “Judges must recognize that the parties—not the court—own the dispute.”<sup>151</sup> Izumi and La Rue write that “[t]he good faith requirement symbolizes an effort by the courts to further the effectiveness of the judicial system, which tries to guard party autonomy surrounding negotiation and settlement deliberations.”<sup>152</sup> Such “divergent goals cannot coexist without one of these forces weakening the power of the other.”<sup>153</sup> It can be said that “[a]ssembly line coercive mediation may be efficient, but it is not good. Courts should recognize litigants’ rights to be quixotic, contentious, and un-collaborative. We should only require that parties so inclined not make a sham of mediation by concealing their true intent.”<sup>154</sup> While an agreement does not have to be realized in order to find good faith, such a requirement has the potential to restrain the “uninhibited give-and-take of facilitated negotiation” that springs from mediation.<sup>155</sup> It is quite the paradox that a good faith requirement to mediation could become a vehicle to endanger party autonomy, for “it is illogical to sanction the exercise of freedom of choice in a process designed to enhance freedom of choice.”<sup>156</sup>

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<sup>145</sup> Andreas Nelle, *Making Mediation Mandatory: A Proposed Framework*, 7 OHIO ST. J. ON DISP. RESOL. 287, 304 (1992).

<sup>146</sup> Edward F. Sherman, *Court-Mandated Alternative Dispute Resolution: What Form of Participation Should Be Required?*, 46 SMU L. REV. 2079, 2086–87 (1993).

<sup>147</sup> *Id.*

<sup>148</sup> Carter, *supra* note 89, at 395.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> Izumi & La Rue, *supra* note 14, at 81.

<sup>153</sup> *Id.*

<sup>154</sup> Carter, *supra* note 89, at 395.

<sup>155</sup> Izumi & La Rue, *supra* note 14, at 81.

<sup>156</sup> Carter, *supra* note 89, at 396.

## D. Satellite Litigation

Society's expansion has inevitable consequences, including the recurrent rise in litigation, which has "strained the resources of our judicial system."<sup>157</sup> As court dockets become more congested, litigation becomes costly and time-consuming.<sup>158</sup> This increase in litigation has steered the public into examining alternative methods of dispute resolution—one of those alternatives being mediation.<sup>159</sup> Mediation, used correctly, should produce a "less litigious culture."<sup>160</sup> When courts use underdeveloped attempts to make mediation more effective through expansive proposals for good faith requirements, however, precisely the contrary result is likely to occur.<sup>161</sup> Further legal proceedings could be the conclusion of a mediation that results in accusations of bad faith, instead of solving the impending litigation—like the hearings on the imposition of sanctions in *Doe v. Francis*.<sup>162</sup> Neither judicial economy nor a reduction in "adversariness" results when the courts intervene in bad faith conflicts.<sup>163</sup>

It is incongruous that "given mediation's mission of promoting amicable settlement, placing good faith requirements on bargaining strategies may provide a disincentive to settle."<sup>164</sup> A litigious party or attorney might redirect attention from negotiation to the pursuit of a bad faith claim if he or she senses an occasion to acquire a strategic advantage from the other party's misjudgment.<sup>165</sup> In fact, it could be argued that an attorney has an obligation on behalf of their client to look for the bad faith claim in a mediation in which they and/or their client did not particularly like the direction of the process.<sup>166</sup> Instead of focusing on mediation's ability to highlight the points of contention between the parties and bridge the gap between those conflicting views, a good faith requirement

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<sup>157</sup> Johnson, *supra* note 14, at 487.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> Carter, *supra* note 89, at 393.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> William H. Simon, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* 53 (Harvard Univ. Press 1998).

would put into operation many of the usual ways in which lawyers think about winning and gaining advantage for their clients.<sup>167</sup>

Even though a good faith requirement would most likely discourage and reprimand some unseemly conduct, there is the chance that it could additionally promote frivolous claims of bad faith and surface bargaining or intimidation tactics to make such claims.<sup>168</sup> Derisive mediation participants may possibly use good faith requirements to aggressively coerce opposing parties and obstruct the ability for their lawyers to represent the legitimate interests of their clients.<sup>169</sup> Innocent participants may have genuine concerns about placing themselves in jeopardy of sanctions when they face a tough opponent, given that the ambiguity of bad faith provides them with no understanding of what a mediator would say if called to testify:

In the typical conventions of positional negotiation in which each side starts by making an extreme offer, each side may accuse the other of bad faith. Without the threat of bad-faith sanctions, these moves are merely part of the kabuki dance of negotiation. With the prospect of such sanctions, bad faith claims take on legal significance that can spawn not only satellite litigation, but satellite mediation as well.<sup>170</sup>

Rather than encouraging cooperation between participants, parties will be principally concentrated on fighting off allegations of bad faith.<sup>171</sup> Whereas “rules that require a party to comply with reasonable mediation procedures should not have a chilling effect on the process, a court’s scrutiny of bargaining decisions will.”<sup>172</sup>

#### IV. AN ALTERNATIVE TO A GOOD FAITH REQUIREMENT TO MEDIATION THAT THE FLORIDA COURT IN *DOE V.* *FRANCIS* SHOULD HAVE IMPLEMENTED

In Florida, mediation confidentiality is granted by statutory privilege, not developed by judicial decision.<sup>173</sup> “Florida utilizes the statutory system and the rules of civil procedure to both en-

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<sup>167</sup> *Id.*

<sup>168</sup> Lande, *supra* note 120, at 98.

<sup>169</sup> *Id.* at 99.

<sup>170</sup> *Id.*

<sup>171</sup> Carter, *supra* note 89, at 393.

<sup>172</sup> *Id.*

<sup>173</sup> Tetunic, *supra* note 9, at 92; Johnson, *supra* note 14, at 493.

courage and require mandatory mediation.”<sup>174</sup> According to the Florida Rules of Civil Procedure, a presiding judge in any civil matter has the authority to mandate mediation before trial, and upon the request of one party to a civil action, the court is required to order both parties to attend mediation:<sup>175</sup> “Chapter 44, Florida Statutes, titled ‘Mediation Alternatives To Judicial Action,’ is the most significant legislation pertaining to mediation.”<sup>176</sup> The statute codifies a privilege of confidentiality whereby “each party has a privilege to refuse to disclose, and to prevent any person present at the proceeding from disclosing, communications made during such proceeding.”<sup>177</sup> The parties are the ones with the right to utilize the privilege; however, the mediator can claim the privilege on a party’s behalf.<sup>178</sup> Florida’s statutory law thereby makes all mediation communications confidential and all mediation participants, including the mediator, unable to disclose confidential communications.<sup>179</sup>

The confidentiality of the mediation process is consequently safeguarded in Florida by the mediators of the court.<sup>180</sup> According to Tetunic, “[a] mediator shall maintain confidentiality of all information revealed during mediation except where disclosure is required by law.”<sup>181</sup> There are five public policy exceptions, however, to Florida’s statutory law on mediation confidentiality:

- 1) [I]f confidentiality is waived by the parties; 2) if the communication is willfully used to plan a crime, commit or attempt to commit a crime, conceal ongoing criminal activity, or threaten violence; 3) statutorily-mandated reporting of either child abuse/neglect or abuse, neglect, or exploitation of elderly/vulnerable persons, but the participant can only disclose such information to the appropriate agency; 4) if one of the parties seeks rescission of a mediated settlement agreement, under ordinary contract law; and 5) to prove professional misconduct or malpractice alleged to have occurred during mediation.<sup>182</sup>

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<sup>174</sup> Johnson, *supra* note 14, at 493.

<sup>175</sup> *Id.* at 494.

<sup>176</sup> *Id.* at 493.

<sup>177</sup> Johnson, *supra* note 14, at 494 (quoting FLA. STAT. ANN. § 44.1011(2)(a) (West 2002)).

<sup>178</sup> Tetunic, *supra* note 9, at 92.

<sup>179</sup> Lisa Bench Nieuwveld, *Florida Continues To Lead The Nation In Mediation*, 81 FLA. B.J. 48 (2007).

<sup>180</sup> Tetunic, *supra* note 9, at 93.

<sup>181</sup> *Id.*

<sup>182</sup> Nieuwveld, *supra* note 179 (quoting FLA. RULES CERTIFIED & CT. APP’T MEDIATORS R. 10.360(a)); *see* FLA. STAT. § 44.405 (2006).

While it is important to have some exceptions to confidentiality, Florida's five public policy exceptions have a major weakness in that they lack clear definitions.<sup>183</sup> For example:

When is it "child" or "elderly" abuse and what point does the mediator break confidentiality (*i.e.*, when he or she merely suspects abuse or knows)? How does the mediator determine that an act is rising to the level of planning "a crime, to commit or attempt to commit a crime, conceal ongoing criminal activity, or threaten violence."<sup>184</sup>

Several court certified mediators interpret the statutes in juxtaposition with their ethical responsibility to maintain confidences apart from situations where the law mandates disclosure, as in cases of abuse or neglect; other mediators do not even believe confidentiality due to abuse or neglect should be reported.<sup>185</sup> Florida's statutes provide "inconsistent direction regarding a mediator's role in protecting confidentiality of the mediation process."<sup>186</sup> They provide that "each party to a mediation has a privilege to refuse to disclose and prevent anyone present at the mediation session from disclosing communications made during the mediation proceeding." Exceptions for when a mediator is allowed to breach confidentiality, however, are not fully defined.<sup>187</sup> These public exceptions are clearly needed for public policy concerns; however, the vagueness of their design remains too indefinite to aid the mediator.<sup>188</sup>

Furthermore, trying to fit in a good faith requirement for mediation or allowance to breach mediation confidentiality for acting in bad faith into one of Florida's five statutory exceptions, as the judge did in *Doe v. Francis*, only furthers the confusion as to a mediator's responsibilities by adding to its vagueness. In the end, it is the actor's subjective motivation that determines whether an act or omission is the result of bad faith.<sup>189</sup> As Carter writes, "[t]he word 'faith' implies something inchoate, intangible, and unmeasurable."<sup>190</sup> When questioning whether a person acted in good faith, one must inescapably use conjecture.<sup>191</sup> According to Weston, "[p]articularly because advocacy is still necessary in both arbi-

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> Tetunic, *supra* note 9, at 95.

<sup>186</sup> *Id.* at 94.

<sup>187</sup> *Id.*

<sup>188</sup> Nieuwveld, *supra* note 179.

<sup>189</sup> Carter, *supra* note 89, at 372.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

tration and mediation, bad faith needs to be defined and distinguished from competitive negotiation behaviors, self-interest, or even hard bargaining.”<sup>192</sup> It is just as essential to clarify what “good faith participation” prohibits as it is to provide good faith with a definition.<sup>193</sup>

In this section, I will offer an alternative that the Florida legislature and court system could adopt in order to mitigate the complications of having a bad faith exception to mediation confidentiality, while still holding parties accountable for their behavior. Such an alternative leaves the parties of mediation better informed of their respective responsibilities and more prepared for how to conduct themselves during mediation, while still promoting the underlying tenets of the mediation process.

#### A. Two-Tiered Mediation Confidentiality Standard

The circumstances surrounding a good faith participation requirement or a bad faith exception to breaking mediation confidentiality presents a so-called “catch 22” situation.<sup>194</sup> Without such a requirement, parties to a court-mandated mediation might proceed into a session with the intention to pervert the process. At the same time, this type of exception can distort the fundamental purpose of mediation as a confidential setting where parties volunteer information to try and resolve their differences under the guise of a neutral third party. While the issue of instituting a bad faith exception to breaking mediation confidentiality presents a delicate and complicated balancing of the equities between public policy rationales and the maintenance of mediation’s design, there are ways that the Florida legislature could have structured its statutory laws to make it more amenable to both interests. Participation requirements and the exception for reporting their violations must be reasonably defined. The Florida court system needs to adopt a system that provides both clearer notice of what objectively is expected from their participation in the mediation as well as the procedure for what can happen upon a claim of bad faith by

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<sup>192</sup> Weston, *supra* note 116, at 627.

<sup>193</sup> *Id.*

<sup>194</sup> A “catch-22” is a “paradox in which seeming alternatives actually cancel each other out, leaving no means of escape from the dilemma.” Samuel A. Yee, *Final Exit Or Administrative Exhaustion? The Deported Alien’s Catch-22*, 8 ADMIN. L.J. AM. U. 605, 647 (1994) (quoting AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (1976)).

an opposing party. Furthermore, reported violations of bad faith should not include “information regarding the substantive exchanges of the underlying proceeding.”<sup>195</sup>

### 1. Tier One: Objective Standards for Participation

Florida should propose a set of guidelines intended to restrict a mediation participant’s ability to misbehave. In this way, even though “bad faith” is subjective, perhaps the court could regulate certain negative behavior without second guessing the actor’s motivation. ADR and mandatory mediation come equally with procedural rights and obligations, and parties to mediation need to be aware of them both.<sup>196</sup> Weston writes, “[m]isconduct and procedural manipulations to delay and obstruct ADR proceedings undermine the efficiency and participation benefits of ADR and affect possible outcomes.”<sup>197</sup> Therefore, for the process to have legitimacy, preventive means against party misconduct, such as enumerated duties, prohibited conduct, and procedural rights, must be explained to and complied with by mediation participants as a minimum standard of good faith.<sup>198</sup>

Florida’s legislature should institute the following standards for a court-mandated mediation that would provide parties with notice on what is expected of them and what behavior would constitute sanctioning:

(1) *Pre-Mediation Documents*: Before heading into the mediation, parties should provide each other and the mediator with “a short statement of 1) the issues in dispute; 2) the party’s position as to them; 3) the relief sought (including particularized itemization of all damages claimed) and 4) any offers or counter-offers already made.”<sup>199</sup> In this way, the mediator will have a better understanding from the outset about how to aid the parties to come to a resolution and will be able to determine the most efficient ways to proceed through the mediation. These documents would enable a mediator to estimate the probability for success in the mediation, and, therefore, gauge what amount of time spent in mediation would be worthwhile for an individual dispute. In the case of *Doe v. Francis*, if the mediator had received pre-mediation documents

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<sup>195</sup> Weston, *supra* note 116, at 642.

<sup>196</sup> *Id.* at 643.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> Edward Sherman, ‘Good Faith’ Participation in Mediation: Aspirational, Not Mandatory, *DISP. RESOL. MAG.*, Winter 1997, at 16.

from each party, he would have understood that the likelihood for a settlement was not very high and could have made a judgment to end the mediation within a reasonable time period. This relinquishment from mediation would not be based on the fact that the parties acted in bad faith but rather due to a realistic evaluation that the chance of settlement was low and time and finances should not be further expended on this process.

(2) *Attendance and Time Limit*: Roger L. Carter provides a framework for party attendance:

All parties . . . who have been ordered to participate in a mediation are required to attend that mediation. In the case of parties represented by legal counsel in a litigated matter, counsel shall also attend the mediation unless excused by the assent of the mediator and all parties. All parties and, if applicable, attorneys shall remain at the mediation until opening statements have been made and each party has made one offer, or for one hour, whichever is shorter. Parties and, if applicable, attorneys who fail to do so may be subject to sanctions.<sup>200</sup>

If parties to mediation do not show up, how can mediation be an effective dispute resolution tool? Appearing at a mandatory court mediation is a sign of respect, and disregarding an attendance requirement is “the most obvious and least troubling example of a procedural form of good faith.”<sup>201</sup> By adding a one-hour time limit the legislature would be instituting a minimal time frame from which a productive mediation could occur while also preventing a situation that prolongs an unproductive discussion that can lead to waste in time, money, or efficiency. In the case of *Doe v. Francis*, Joe Francis would have fulfilled this requirement that he attend the mediation. But, perhaps some of his unseemly behavior would have been avoided if the mediation was discontinued earlier.

(3) *Undo Delay of the Mediation*: Parties should expect to be sanctioned if they are more than one hour late to a mediation session. If parties know ahead of time that they either cannot make the scheduled mediation or are going to be over an hour late they should send both the judge and opposing counsel a notice letter that the mediation needs to be rescheduled. Of course exceptions can be made for unforeseen circumstances that arise: the Court may evaluate such circumstances if they seem suspicious or insincere. Being on time to mediation shows respect to the opposing party and the mediator. A party who causes delay without reason

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<sup>200</sup> Carter, *supra* note 89, at 398.

<sup>201</sup> *Id.*

wastes both time and money. Furthermore, a party's tardiness can come off as a sign of contempt for his or her counterpart, creating an antagonistic environment and stifling settlement negotiations before the parties even reach the point of discussing their respective interests. In *Doe v. Francis*, Joe Francis's arrival to the mediation four hours late was not only impertinent, but it also set the stage for a contemptuous mediation. This standard would have encouraged Joe Francis to either attend the mediation on time, possibly changing the tone of the mediation at the outset, or it would have placed sanctions on Joe Francis from the beginning of the mediation for objective behavior that would not have impeded upon mediation confidentiality.<sup>202</sup>

(4) *Dress Code*: Like the provision for undue delay, a dress code mandating business attire or "neat casual" attire would be a means of respect for the opposing party and mediation as a formal institution. If a party to mediation, like Joe Francis, comes to the mediation dressed inappropriately, it is a sign to the opposing party that he or she is not taking the process seriously and does not intend to be an active participant. Such behavior stirs animosity and is an easy way to pinpoint bad faith behavior in a manner that does not conflict with mediation confidentiality.

(5) *Offers*: Mediation does not require a party to make or accept an offer.<sup>203</sup> According to Carter, "[c]ourts have no business trying to enforce standards of subjective good faith. . . . [A]ny standards for good faith participation should state explicitly that decisions about bargaining strategy are solely the province of the parties and their representatives."<sup>204</sup> Analysis of bad faith in the context of failure to extend a particular offer would involve a ruling as to the underlying merits of the case.<sup>205</sup> Such a finding would be impossible without all the evidence being obtained and all testimony received.<sup>206</sup> If this were allowed it would directly conflict with the notion of mediation confidentiality, as information regarding party behavior as well as the ultimate claim would be exposed prior to litigation. This would encourage an undesired result in

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<sup>202</sup> Mediation confidentiality would not have been compromised because Joe Francis would have been sanctioned for his behavior of undue delay. The delay itself would be proof enough for sanctions and no further inquiry into his conduct would have to be made. Therefore, there would not be the concern that by breaking mediation confidentiality and through discovery of bad faith behavior, information about the underlying claim would surface.

<sup>203</sup> Carter, *supra* note 89, at 400.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

that parties have many reasons for either not presenting or refusing an offer that has nothing to do with a malicious intent. “Even if an offer is low by all estimates of the fair market value of the claim, the party may have good reason, often legitimately known only to it, to refrain from offering more.”<sup>207</sup> Joe Francis may not have wanted to extend an offer because he worried about setting an unwarranted precedent for other parties to bring civil suits against him. The fact that he offered to settle the suit upon the second mediation, but failed because the opposing party did not like how he would pay the settlement, should not have been determinative of him acting in bad faith. A key philosophy of mediation is party-autonomy, and having a requirement for an offer in order to act in good faith goes against the autonomy and voluntariness of the process.

(6) *Intent Not To Make An Offer*: If a party knows before the mediation that he or she has no intention of making an offer at that mediation, that party shall notify the other party of such intent within a specified time limit before the mediation.<sup>208</sup> I would recommend a time frame of five business days before the mediation is to take place. That way the other party has enough time to contemplate how to proceed. “In the event that a party advises the other party of such intent to petition the court to cancel the mediation in the case of court-ordered mediation.”<sup>209</sup> This provision would enable a judge to re-evaluate the merits of proceeding with mediation versus going forward with litigation. If this type of provision were instituted in Florida, Joe Francis would have been able to advise his opposing party and counsel of his intent not to make an offer. At that time, if the opposing party petitioned the court to cancel the mediation, Judge Smoake could have reassessed the case at hand and the benefits of going forward with mediation as opposed to proceeding with a trial. While Judge Smoake seemed to be a staunch advocate of moving parties into mediation before litigation, he at the very least might have second-guessed this procedure for *Doe v. Francis* based on plaintiff’s desire to move forward with trial due to defendant’s adamant refusal to provide a settlement offer. This in turn would have avoided wasting time, resources, and money on a process that was likely not to yield results under the circumstances.

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<sup>207</sup> *Id.*

<sup>208</sup> Carter, *supra* note 89, at 402.

<sup>209</sup> *Id.*

(7) *Safe Harbor Provision*: In order to avoid superfluous claims of bad faith by displeased mediation parties, “a prerequisite to judicial relief by the court should require a party to identify the offensive conduct to the other party or neutral and provide a reasonable opportunity for the conduct to cease.”<sup>210</sup> This would help avoid the problems of satellite litigation by giving the party acting inappropriately notice that he or she is acting inappropriately and the chance to rectify his or her behavior before a sanction hearing and breach in confidentiality occur. It also helps with the concern that a bad faith exception to mediation confidentiality can lead to gamesmanship by parties. A party would be less likely to make a frivolous claim of bad faith as a strategic tactic because there is a diminished probability that such a claim would be successful. If Joe Francis were provided with such a warning of sanctions, he potentially would have improved his behavior.

## 2. Tier Two: Procedure for a Claim of Bad Faith by an Opposing Party

If a party follows all of the objective criteria required of a mediation participant but a claim of bad faith is still raised, the decision of whether a confidentiality privilege exception is reasonable should be determined by making an initial in camera review of the good faith violations “to the court or neutral, ideally one who is not participating in a discussion or determination of the case’s underlying merits.”<sup>211</sup> The party that raises the complaint should have the burden of demonstrating the other party’s bad faith actions as a minimum precondition to “public disclosure of the alleged misconduct.”<sup>212</sup> Furthermore, for both an in camera review or a sanctions hearing, testimony regarding proof of a party’s supposed transgression should only be offered by the party bringing the bad faith claim. Sanctions should “only be awarded for violations that can be proved without eliciting testimony from a mediator.”<sup>213</sup> This process should be coupled with an understanding that there will be sanctions for bringing “frivolous claims of bad-faith participation or a fee-shifting provision for the prevailing party.”<sup>214</sup>

This type of procedure guards against many of the concerns arising from a bad faith exception to mediation confidentiality. By

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<sup>210</sup> Weston, *supra* note 116, at, 631–32.

<sup>211</sup> *Id.* at 642.

<sup>212</sup> *Id.*

<sup>213</sup> Carter, *supra* note 89, at 403.

<sup>214</sup> Weston, *supra* note 116, at 642.

having a neutral party who is not judging the underlying merits of the case, there is no need to worry about the judge becoming prejudiced against one of the disputing parties for the purpose of potential future litigation or pressuring one party through sanctioning to settle a case that he or she wanted off of his or her docket. This aids in the maintenance of party autonomy in mediation. If such a procedure had taken place in *Doe v. Francis*, Judge Smoake's heavy-handed demand for what appeared to be a mediation resulting in a settlement could have been averted. A neutral third party, nonaligned with the case, would have reviewed the claim of bad faith, removing the worry of subjective partiality for one party versus the other. Moreover, having this in camera review of the claim of bad faith rather than an immediate sanctioning hearing before the information becomes public is just another safeguard against loss of mediation's confidentiality.

Additionally, the provision that only the party raising the claim, not the mediator, can testify is very significant. Mediation as an ADR process cannot work without the mediator's impartiality. "If mediators take the stand to testify about the conduct of parties, confidentiality will be destroyed. Parties will likely concern themselves more with currying the mediator's favor than with working toward resolution of the dispute."<sup>215</sup> The destructive effects of a mediator as a witness overshadow any potential advantage of his or her testimony, and the claimant's knowledge of the breaching party's conduct, equivalent to that of the mediator and taken under sworn testimony, makes a mediator as a witness unnecessary.<sup>216</sup> Finally, the reverse threat of sanctioning and unfavorable consequence for a party bringing frivolous bad faith claims "balances the concerns for ensuring good-faith participation and justified confidentiality in ADR."<sup>217</sup> The enforcement of this provision would assist in avoiding the concern over parties playing strategic games through the threat of bad faith claims and monitor when a situation really warrants interference.

## V. CONCLUSION

*Doe v. Francis* is an extreme illustration of how the need to weigh the tenets of mediation against exposure and liability for

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<sup>215</sup> Carter, *supra* note 89, at 403.

<sup>216</sup> *Id.*

<sup>217</sup> Weston, *supra* note 116, at 642.

party misconduct can create tension amid a practice designed to protect confidentiality, party self-determination, impartiality, and judicial economy. While mediation and its promise of confidentiality should not shelter a party whose behavior distorts the essence of the process, the subjective interpretation of “good faith” leaves a party with lack of notice of expected conduct and exposed to potential liability without forewarning. If there is going to be a mediation exception to confidentiality for acting in bad faith, such an exception needs to be formalized objectively and procedures instituted to preserve the integrity and principles of the mediation process.