From "No Pay" to Play

Revisiting Good Faith in Mediation

By Edmund J. Sikorski Jr. and Randolph T. Barker

The concept of good faith has long troubled negotiators, and it is even harder to define and enforce in the mediation process. Instead of focusing on good-faith participation requirements, mediators should focus on empowering decision-makers to better understand when settlement is in their best interest.

Covenants of good faith and fair dealing

The principle of good faith derives from the law of contracts. Generally, an implied covenant of good faith and fair dealing exists "that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract."[1] Further, "an implied covenant of good faith and fair dealing…applies to the performance and enforcement of contracts," limits "the parties' conduct when their contract defers decision on a particular term, omits terms or provides ambiguous terms,"[2] or leaves the manner of performance to a party's discretion.[3] This concept is reiterated in the common law: "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."[4] The Michigan Uniform Commercial Code similarly confirms that "(e)very contract or duty within this act imposes an obligation of good faith in its performance and enforcement."[5]

Although the concept of good faith has become part of the legal lexicon, a clear definition continues to be elusive. One New York court came close to describing the abstract nature of the concept:

> "Good faith" is an intangible and abstract quality with no technical meaning or statutory definition. It encompasses, among other things, an honest belief, the absence of malice and the absence of a design to defraud or to seek an unconscionable advantage. An individual's personal good faith is a concept of his own mind and inner spirit and, therefore may not conclusively be determined by his protestations alone.[6]

Like other states, Michigan does not recognize an independent action for breach of an implied covenant of good faith and fair dealing.[7] While it is settled that good faith is required in the *performance and enforcement* of contracts, there is no corresponding common law or statutory law imposition upon the parties to *negotiate* a contract in good faith. Because of a lack of objective standards, when a court orders parties to mediate their dispute and participate in good faith, the order and the conduct of the parties are open to interpretation.[8] Perhaps a showing of bad faith might only be possible using United States Supreme Court Justice Potter Stewart's "I know it when I see it" test as a starting point.[9]

Good-faith participation in mediation

With no independent cause of action for breach of any duty of good faith outside of statutory or contractual obligations, it follows that there is no enforceable obligation to act in good faith within the context of mediation. Indeed, the Michigan Court Rules do not impose good-faith participation requirements; efforts to do so have failed. Skilled mediators must nevertheless encourage the parties to act as good-faith negotiators during the mediation.

Orders to mediate disputes are intended to help reduce docket pressures, afford the parties an opportunity to resolve their disputes on their own, and achieve a settlement that is more likely to be performed. But compulsory mediation creates opportunities for abuse by the unwilling. To lessen the risks of ADR abuse and increase the likelihood of good faith and meaningful participation, state legislatures and courts have implemented various safeguards, including:

- Adherence to the Michigan Mediator Standards of Conduct;[10]
- Training and continuing education standards for mediators as a prerequisite to appointment eligibility;[11]
- A requirement that mediators file court reports following mediation;[12]
- Allowing mediators to end the process if they feel settlement is not likely[13] or to prevent abusive behavior by one party that might compromise the process or the safety of another party.[14]

Imposing a subjective requirement of good-faith participation invites further litigation of that issue as opposed to a meaningful path toward resolution of the principal issues underlying the case, which is the goal of mediation. Explicitly requiring good faith may invite an unwilling party to be disingenuous in participation, giving the appearance of mediating in good faith and leaving only the openly foolish to engage in objectively bad-faith conduct.

For example, although a court may clearly enforce an order or rule requiring a party to attend a mediation session with a representative possessing full settlement authority, it cannot compel participants to have an open mind or attend with a predisposition to compromise their established litigation positions. Thus, a court may not force a party to settle under the veiled threat of sanctions for lack of good-faith participation. Perhaps a party might not have the information necessary (and thus any readiness) to settle. Or a party might have chosen to vigorously defend the integrity of its product or service, and the optics of a settlement might invite future litigation.

Courts will order parties to the settlement table, but they will not dictate the parties' negotiating positions. One court aptly noted the following:

> It is well-settled that a court cannot force a party to settle, nor may it invoke "pressure tactics" designed to coerce a settlement. Moreover, in an analogous context, although a court may require parties to appear for a settlement conference, it may not coerce a party into making an offer to settle. There is no meaningful difference between coercion of an offer and coercion of a settlement: if a party is forced to make a settlement offer because of threat of sanctions, and the offer is accepted, a settlement has been achieved through coercion and a party is within its rights to adopt a "no-pay" position.[15]

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AT A GLANCE

It is perfectly appropriate—and within the bounds of good faith—to have a "no pay" position at mediation.

An effective mediator can move parties past "no pay" to exploring worthwhile settlement options.

It is perfectly appropriate—and not a lack of good faith—for a party to have a no-pay position at mediation.

Imposing a direct or implied good-faith requirement necessarily involves the risk that third-party review of the mediation proceedings will violate the cornerstone principle of confidentiality in the process.[16] Enforcement of a good-faith requirement might encourage courts to call on mediators to supply information about party behavior, endangering the parties' trust in mediation's confidential nature.

The Michigan Court Rules give courts the discretion and authority to require participation by decision-makers, as well as the circumstances that govern their participation.

This problem is present whether the mediation is court-ordered or agreed upon. Even if a mediation agreement included a provision that the parties would negotiate in good faith, how would that provision be enforced in light of the confidentiality mandate? Consider the following passage from *In re AT Reynolds & Sons, Inc*:

> In determining the appropriate scope of inquiry into good faith participation, this court is guided by considerations of litigant autonomy and confidentiality in mediation proceedings.
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> Accordingly, this Court holds the confidentiality considerations preclude a court from inquiring into the level of a party's participation in mandatory court ordered mediation, i.e., the extent to which a party discusses the issue, listens to opposing viewpoints and analyzes its liability. This holding provides a clear and objective standard with minimal intrusion into confidentiality and a party's right to refuse to settle. This holding is also consistent with the general pattern of interpretation by the courts, which have interpreted good faith narrowly to require compliance with court orders to attend mediation, provide pre-mediation memoranda, and, in some cases, produce organizational representative with sufficient settlement authority.[17]

This does not mean that *all* conduct in a mandatory mediation is outside the scope of a court's inquiry. When, for example, a party demonstrates dishonesty, intent to defraud, or some other improper purpose, the benefits of inquiry into such conduct may outweigh considerations of confidentiality. This type of balancing is reflected in the Michigan Court Rule that allows an in camera hearing "to enforce, rescind, reform, or avoid liability" on a mediated settlement if the evidence is not otherwise available and "the need for the evidence substantially outweighs the interest in protecting confidentiality."[18] Even if reporting was mandated, mediators would likely remain reluctant to compromise the confidentiality of the process or to otherwise present adverse reports that could undermine mediators' ability to maintain and grow a mediation practice.

Focus on who attends, not what they say

To better meet the underlying goals of a good-faith requirement, courts and mediators alike should pay more attention to who participates in mediation.

Independent of any subjective good-faith or open-mind requirements of mandatory mediation, success in the process relies on insistence by courts, parties, advocates, and mediators that a person with full settlement authority be personally present at all mediation sessions rather than participate remotely. The Michigan Court Rules give courts the discretion and authority to require participation by decision-makers, as well as the circumstances that govern their participation.[19] Applicable court rules, when fully employed to compel in-person attendance of decision-makers, promote the exchange of adequate information among the parties and assure that information is placed before authorized decision-makers.

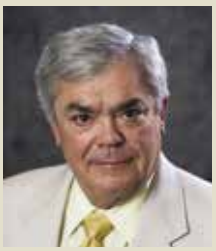
Having a decision-maker present at mediation allows a mediator to better test the weaknesses in that party's own position and gives all parties the ability to observe the personal impact the events underlying the litigation have had on the key individuals involved. If the decision-maker declines to settle despite having this information, the parties have nevertheless benefitted from the process because the decision-maker had an opportunity to revisit the facts and circumstances, explore

options for resolution, consider the risks, and make an informed decision that advances the parties' interests.

An effective mediator can establish a rapport that stands to overcome harsh negotiation tactics, present parties with an opportunity to negotiate a beneficial resolution, and identify the possible risks as a result of continuing the litigation. Thus, with this (often new) information in hand, a decision-maker might change course from a pre-mediation no-pay position. The pre-mediation insistence on refusing to settle may evolve into a business decision based on an informed comparison of the terms of a settlement to the risks of proceeding with the litigation. With the right parties present, an effective mediator can successfully appeal to the parties' self-interests and assure good faith in the negotiation process, even without a rule requiring good faith.

Conclusion

A meaningful mediation session presents the parties' respective decision-makers with the information and arguments needed to inform them fully regarding their own positions and evaluate the positions of the other litigants. Parties then may reasonably maintain or modify their previously held settlement positions driven by their own self-interests. This produces a more reliable outcome to mediation, obviating the need for compelling a party to negotiate in good faith—a subjective and untenable standard. ■



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ENDNOTES

1. *Hammond v United of Oakland, Inc*, 193 Mich App 146, 151–152; 483 NW2d 652 (1992) (quoting *Fortune v Nat'l Cash Register Co*, 373 Mass 96, 104; 364 NE2d 1251 (1977)).
2. *Hubbard Chevrolet Co v GM Corp*, 873 F2d 873, 876–877 (CA 5, 1989).
3. *Ferrell v Vic Tanny Int'l, Inc*, 137 Mich App 238, 243; 357 NW2d 669 (1984).
4. Restatement Contracts, 2d (May 17, 1979), § 205.
5. MCL 440.1304.
6. *Doyle v Gordon*, 158 NYS2d 248, 259–260 (1954).
7. See, e.g., *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 476; 666 NW2d 271 (2003).
8. Winston, *Participation Standards in Mandatory Mediation Statutes: "You Can Lead a Horse to Water…,"* 11 Ohio St J on Disp Resol 187, 193 (1996).
9. *Jacobellis v Ohio*, 378 US 184, 197; 84 S Ct 1676; 12 L Ed 2d 793 (1964).
10. See, generally, SCAO, Office of Dispute Resolution, *Mediator Standards of Conduct* (February 1, 2013) <https://courts.michigan.gov/Administration/SCAO/OfficesPrograms/ODR/Documents/SOC%20FINAL.pdf> (accessed January 11, 2019).
11. E.g., for Michigan see MCR 2.411 (civil mediation) and MCR 3.216 (domestic relations mediation). Note, however, that the parties to litigation in Michigan are generally free to select their own mediator, regardless of whether the selected mediator qualifies for court appointments under either of the previously mentioned rules.
12. MCR 2.411(C)(3) compels such reporting, but expressly limits its scope: "Completion of Mediation. Within 7 days after the completion of the ADR process, the mediator shall so advise the court, stating only the date of completion of the process, who participated in the mediation, whether settlement was reached, and whether further ADR proceedings are contemplated."
13. MCR 2.411(C)(2).
14. *Mediator Standards of Conduct for Mediators*, Standards I and VI (mediator's duties to assure fairness in the process and to terminate mediation where it is determined to be inappropriate).
15. *In re A. T. Reynolds & Sons, Inc*, 452 BR 374, 382 (SD NY 2011).
16. Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court Connected Mediation Programs*, 50 UCLA L Rev 69 (2002).
17. *In re A. T. Reynolds*, 452 BR at 382, 383–384.
18. MCR 2.412(D)(12).
19. See MCR 2.410(D)(2), under which "[t]he court may direct that the parties to the action, agents of the parties, representatives of lienholders, representatives of insurance carriers, or other persons:
    (a) be present at the ADR proceeding or be immediately available at the time of the proceeding; and
    (b) have information and authority adequate for responsible and effective participation in the conference for all purposes, including settlement."