

The Evolution of Commercial Mediation in the Midwest: Best Practices, Confidentiality and Good Faith

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Over the past decade, the use of mediation and even co-mediation,¹ to resolve complex commercial disputes has grown exponentially. Mediation is now commonly used in every aspect of business-related litigation. In part, this growth can be attributed to modification of court rules and legislative enactments that have encouraged the use of mediation. In some jurisdictions, mediation is offered as a voluntary option. In others, mediation is mandated. Mediation may be offered early or late in the pretrial process, and may be conducted by a judge or a trained private mediator. It is no longer uncommon to conduct mediation prior to the commencement of litigation.²

In recent years, the scope of mediation has expanded to encompass class actions, mass tort settlements, and a host of complex multi-party matters. Mediation of multi-party matters may sometimes prove to be an attractive option when the anticipated costs of litigation outweigh costs of settlement. Perhaps the most notable recent use of multi-party mediation has been the Hurricane Mediation Program. This program was established by the Louisiana Department of Insurance to mediate property-damage disputes between insurers and Louisiana policyholders arising from damages to residential property caused by hurricanes Katrina and Rita.

Mediation has also grown as a necessary component to our appellate system. Currently, all 13 U.S. Courts of Appeals have mediation programs governed by Rule 33 of the Federal Rules of Appellate Procedure.³

In addition to the formal mediation programs sponsored by the courts, government agencies, bar associations, business organizations, universities, civic and religious groups, and other organizations have developed extensive training programs that have encouraged and enhanced the use of mediation. As a result, mediators and advocates alike have become more sophisticated in developing mediation strategies to resolve difficult issues in a timely and cost-effective manner.

This article will explore the continuing development of mediation practice and provide practical suggestions for the effective use of mediation in the commercial context. It will also explore emerging concepts of mediation confidentiality and good faith in Kansas and our sister state, Missouri.

I. Mediation Best Practices

In February 2008, the Task Force on Improving Mediation Quality (Task Force) of the American Bar Association Dispute Resolution Section (Section) issued its report.⁴ The Section formed the Task Force in January 2006 to address issues of quality in mediation and to provide recommendations for improving mediation practice. The 17 Task Force members included lawyers who represent clients in mediation, lawyer and nonlawyer mediators, academics, and administrators of court-annexed mediation programs. The Task Force focused its examination on mediation quality and private practice civil cases (including commercial, tort, employment, construction, and other types of disputes that are typically litigated in civil cases but not family law, or community disputes). The Task Force conducted its research by organizing a series of 10 group discussions (focus groups) in nine cities⁵ across the United States and Canada.

In addition to the focus group discussions, the Task Force

collected more than 100 responses to questionnaires from mediation users and mediators. This process included conducting telephone interviews with 13 individuals who have been parties to the mediation process.⁶

The focus group participants, questionnaire respondents, and parties who were interviewed consistently identified four issues as important to mediation quality:

- Preparation for mediation by the mediator, parties, and counsel;
- Case-by-case customization of the mediation process;
- “Analytical assistance” from the mediator; and
- “Persistence” by the mediator.⁷

A. Preparation by the mediator and mediation participants

The majority of participants in the Task Force focus groups and party interviews identified preparation by the mediator, the parties, and the parties’ counsel as important for success of the mediation’s outcome. But the Task Force found that actual premediation discussions among mediators and among parties and counsel varied widely. Traditionally, many mediation training programs have not paid substantial attention to the context of premediation discussions.⁸ The Task Force reached consensus that mediator preparation prior to the mediation was essential.⁹

1. The premediation conference

Ten or 15 years ago, it was quite common for commercial mediators, immediately following her or his engagement, to simply set the date, time, and location for the face-to-face mediation and take no further action until the mediation was convened. Upon arrival at the mediation location, the old-school mediator would often engage in a relatively inflexible fixed mediation process.

In the increasingly sophisticated world of commercial mediation, the failure of the mediator to schedule a meeting with legal counsel and/or the parties by telephone or in person in advance of the face-to-face mediation is more the exception than the rule. This meeting provides the opportunity to customize the mediation process. The more common practice today is for commercial mediators to conduct one or more premediation conferences with the attorneys who will be attending the mediation. Some mediators telephone legal counsel individually. Other mediators may conduct premediation telephone conferences jointly with all attorneys who will be attending the mediation. There is no “right” or “wrong” approach. In multi-party mediation, a common method is for the mediator to establish one or more face-to-face conferences with attorneys and/or their clients to establish a protocol or negotiation strategy for a successful face-to-face mediation.

In whatever form, the premediation conference permits the mediator to obtain an invaluable “feel for the case.” Often, the commercial mediator will request counsel to provide a general factual overview, information regarding the amount of damages sought, the status of discovery, the status of insurance coverage (if any), the persons attending mediation with settlement authority, and a general overview of previous settlement discussions between counsel. The mediator may also seek information regarding the emotional temperament of the participants, the type and form of confidential submissions to the mediator, a candid appraisal of the strengths and weaknesses

of the case, an overview of unique legal issues, and the overall “theme” of the case.

Some mediators may inquire whether the attorney or his or her client intends to make or respond to an opening statement during the mediation. Many mediators reserve opinion as to whether opening statements will be given at the face-to-face mediation until such time as the mediator has had an opportunity to discuss the relative value of an opening statement. In those cases, which have not yet been filed in court or which are mediated pursuant to an “early settlement” court order, some form of opening statement may prove to be quite beneficial. For example, in many commercial cases, particularly employment cases,¹⁰ it is common for legal counsel for plaintiff and respondent to propose joint opening statements. This is because “early settlement” cases often require that the mediation be conducted before significant discovery has taken place. Mediations undertaken with only nominal discovery may benefit from the enhanced opportunity to exchange information in the form of short, concise opening statements to clarify and establish positions.

The mediator might learn at the premediation conference that one attorney prefers to make an opening statement and the other prefers that no opening statement be conducted. This is very important information for the mediator to have well in advance of mediation. Any dispute regarding whether opening statements will be conducted may require early intervention on the mediator’s part.

If there is an agreement that opening statements will be given, it is always important for the mediator to determine and perhaps direct the proposed format of the presentation. For example, it is not unusual in employment or other complex commercial cases for plaintiff or defense counsel to suggest the use of demonstrative evidence in the form of a PowerPoint presentation or various video or audio presentations. When the mediator becomes aware that one party or the other intends to utilize an extensive PowerPoint presentation, the mediator may choose to encourage counsel to reduce the length of their planned presentation to 30 minutes more or less. PowerPoint presentations that are too long in duration tend to antagonize or polarize the other side. Naturally, if one side intends to present electronic information, it is important the opposing party be aware of this in order to avoid surprise or unnecessary time constraints.

On those occasions when the mediator has not independently initiated contact, it is increasingly common for attorneys to affirmatively seek a premediation conference with the mediator. Counsel may wish to discuss the mediator’s approach to mediation, possible settlement approaches, or modification of the overall mediation procedure. There is no prohibition to *ex parte* communication in mediation.

B. Preparation by counsel and parties

Task Force focus groups and party interviews emphasized the importance of preparation by the parties and their counsel. The Task Force found that counsel should routinely help their clients understand the issues in their case and their opponent’s case in preparation for both mediation and trial. But counsel’s explanation of what will happen during the two processes will differ, requiring a more creative discussion about the client’s possible settlement options for mediation purposes.¹¹

Just as attorneys commonly prepare their clients for trial, it is equally important that attorneys meet with their clients before mediation to consider and discuss overall strengths and weaknesses of the case and to develop a risk-benefit analysis to aid in an overall negotiation strategy. Should the client be unfamiliar with mediation, attorneys must educate their client regarding the mediation process.

To objectively evaluate a case before mediation, the attorney may wish to ask his or her client, “OK, what is really important to you about this dispute, and why?”¹² The concept of determining client needs and interests is nothing new. In their remarkable book, “Getting to Yes,” Roger Fisher and William Ury provide a powerful problem-solving model by discussing, the best alternative to a negotiated agreement (BATNA).¹³ Fisher and Ury suggest that negotiators identify their best alternative in the event the negotiated settlement is not successful. BATNA lays the groundwork for a series of questions that can be utilized in formulating a risk analysis for clients. Typical questions that may lead to a constructive risk analysis include, but are not limited to, the following:

- What is the likely monetary outcome if the trial is successful?
- What are the chances of succeeding at trial?
- What are the monetary and nonmonetary costs of litigation?
- The likelihood of collecting a monetary judgment?
- The likelihood of appeal?

Other questions that negotiators may consider discussing with their clients before mediation include:

- What client interests are at stake in this negotiation?
- What interests may be at stake for the other side?
- What additional information would you like to obtain from your opponent?
- What additional information would you be willing to reveal to your opponent?
- What information, if any, would you be careful not to reveal?
- What concessions would you be willing to make and in what order?
- What concessions will you push to receive?

C. Case-by-case customization of the mediation process

The Task Force commented that some mediators, parties, and counsel may rely upon essentially identical mediation approaches in each case. The Task Force found that “[i]n most cases, however, mediators would best be advised to make an effort to evaluate each case on its own and develop a process, in coordination with the parties and counsel, that is best suited for that particular case. Similarly, parties and counsel should pay close attention how best to prepare for mediation on a case-by-case basis.”¹⁴

1. Timing of the mediation

The Task Force survey respondents indicated that the preferred time for mediation is generally after “critical” discovery is completed, but before full completion of discovery. There was a significant disagreement among the surveyed mediators and users whether mediation would be appropriate before suit is filed.¹⁵

The timing of the mediation is a critical element to success. In general, cases should be mediated neither too early nor too

late.¹⁶ Nonetheless, mediation may be successfully conducted well before suit is filed. In an employment case, successful mediations have been conducted well in advance of the filing of the discrimination charge with the Equal Opportunity Employment Commission or other appropriate agency. If the mediator or the parties believe that each party has sufficient information to make an informed decision, mediation is likely appropriate. In the alternative, if the available information is grossly insufficient, the mediator might wish to suggest a pre-mediation discovery agreement. Certainly, the more discovery conducted, the more likely it is that “bottom line” positions become frozen and settlement opportunities lost. While each party requires sufficient information to make an informed decision, unnecessary or overly costly information gathering may needlessly run up the cost of litigation while providing only marginally useful additional benefits.

2. Confidential information to the mediator

Mediators commonly suggest that counsel prepare a written confidential statement for the mediator’s review in advance of the date of the mediation.¹⁷ It is often requested that the statement include a summary of the facts surrounding the dispute, a list of key witnesses, legal and damage analysis, an analysis of the strengths and weaknesses, and a summary of negotiations to date. Many mediators recommend that the confidential statement be no longer than two to five pages.¹⁸ Depositions, exhibits, motions, and expert witness reports should be summarized rather than attached, whenever possible. Many mediators use the confidential statement to summarize the facts of the case, including key dates and witnesses.¹⁹

3. Initial meeting at mediation

Many mediators utilize the initial meeting (sometimes referred to as the initial joint session or the mediator’s monologue) with attorneys and the parties for the purpose of:

- Allowing the opportunity for introductions,
- Reviewing the agreement to mediate,
- Discussing confidentiality,
- Establishing or revising the suggested format for the mediation,
- Describing the role of the mediator,
- Explaining the process, and
- Answering any questions the parties or their attorneys may have.

Even though counsel may have been through the mediation process many times (indeed many counsel are now themselves mediators), many of the clients are experiencing mediation for the first time. The comfort level of the participants may be enhanced if they are given the opportunity for informal personal contact at the initial meeting prior to undertaking the more formal mediation process.

The initial meeting provides the mediator with an opportunity to describe the mediation process as a means of problem solving that is distinctly different than an adversarial courtroom proceeding. The initial meeting also permits the mediator to ensure that those unfamiliar with the mediation process clearly understand the role of the mediator as a facilitator and not as a judge or jury.

A good mediator utilizes the initial meeting to build rapport and establish trust among the participants. The participants’ choice of a skilled mediator and the agreed-upon design

of the mediation process can be critical to the success of the mediation.

4. Opening Statements

There are divergent views about the usefulness of opening statements by either counsel or the parties. In focus groups, some felt that in high-conflict cases with angry clients, explosive statements can generate more hostility, thus impeding settlement.²⁰ In other situations, opening statements can help frame the issues with clarity and facilitate the process.

Mediators understand legal counsel may sometimes take the position that there may be little new information to be gleaned through the mediation process. According to this view, negotiation is used simply to determine “how much” by way of a monetary settlement. So, too, when the parties’ emotions are particularly high, there may be an understandable reluctance by counsel to present an opening statement for fear that anything said will become contentious, polarizing, and/or unproductive. Some mediators have observed opening statements that were so inappropriate or so disingenuous that chances for resolution were substantially undermined. Mediators have also described exceptional opening statements that have created an atmosphere of trust and setting the stage for mutual resolution of the problem.²¹

The opportunity for legal counsel to exchange important information during the opening statement often provides the groundwork for a satisfactory settlement. Indeed, without an effective opening statement, much more information must be exchanged through the mediator during private sessions (caucus). This third-party exchange of information prolongs the mediation and creates a risk of miscommunication.

A well-presented opening statement also presents the opportunity for counsel to paint a picture (the “theme”) of her or his case directly to the other party with little risk of miscommunication. The opening statement can also be used to communicate new information, both in terms of the facts and/or the law surrounding the case. For example, important information, such as corroborative witnesses or newly discovered evidence can be presented, as well as old information in a new context. It affords the parties an additional advantage of having their positions heard in an open forum, giving clients their “day in court.” An attorney may choose, as a matter of negotiation strategy, to permit her or his client(s) the opportunity to speak directly to the other party without intervention or interruption during the opening statement.

An effective opening statement not only gives counsel and the parties an opportunity to share different subsets of information, it also presents an opportunity for participants, sometimes for the first time, to gauge the credibility of the parties and their respective positions. Rather than a static, depersonalized process, the mediation becomes, through the communication exchange between the parties, more about the real concerns of people rather than disembodied entities. Through the strategic use of opening statements, stereotypes, false assumptions, and factual discrepancies can be clarified, thereby promoting a more productive negotiation process.

The joint session also presents litigators with the opportunity to encourage the parties to alter their perspectives and to set the stage for a psychological process directed at moving the parties toward settlement. There is, of course, the le-

gitimate fear that a joint session may exacerbate the parties' negative emotions and, therefore, create greater obstacles to resolution of the dispute. There are certainly situations where extreme animosity may exist (sometimes, even between opposing counsel). When emotions run high, there is a strong risk of miscommunication. Nonetheless, whether to conduct an opening statement is an issue that should be discussed well in advance with the mediator or through separate discussions with and/or between opposing counsel.

PRACTICE TIPS FOR A SUCCESSFUL OPENING STATEMENT

An effective opening statement often can be utilized to accomplish one or more of the following objectives:

- The opportunity to reintroduce you and your client to the other side.
- Demonstrate your complete command of the case.
- Demonstrate a willingness to listen.
- Anticipate emotional issues and do not make comments to the other party that will trigger a strong emotional response. Acknowledge that you understand, although you do not agree with, how the other party feels.
- Humanize your client.
- Demonstrate your preparedness and organization.
- Confront potential weaknesses in your case early on.
- Avoid exaggeration or overstatement.

Consider the following techniques:

- Do not understate or overstate your abilities at trial (do not "saber rattle").
- Compliment (when appropriate) the opposing party's legal counsel.
- Demonstrate that you understand the opposing party's position or concerns.
- Do the unexpected, i.e., apologize, express concern, or regret.
- Use humor, when appropriate.
- State your support for the mediation process.
- State a genuine desire to act in good faith to resolve the case.
- State a desire to be creative in developing settlement solutions.
- State that you are not there to impose solutions, but rather to listen and work through problems.
- Emphasize that settlement will be in everyone's interest.
- Express sympathy, but do not sound disingenuous or insincere.
- Consider whether to provide important documents, important evidence or case law to the opposing party during the opening statement.
- Never engage in theatrics or personal attacks.
- Direct your comments to each member of the opposing party's negotiation team (not the mediator).
- Do not discuss monetary demands.

D. "Analytical" techniques used by the mediator

The Task Force data revealed that many sophisticated mediation users expect mediators to provide certain services, including analytical techniques. For example, mediators can be helpful by asking pointed questions and suggesting options for consideration. The Task Force parties observed that the following techniques were beneficial in most cases:

- Pointed questions that raise issues (95 percent);
- Analysis of case, including strengths and weaknesses (95 percent);
- Prediction about likely court results (60 percent);
- Possible ways to resolve issues (100 percent);
- Recommend a specific settlement (84 percent); and
- Pressure to accept a specific solution (74 percent).²²

On the other hand, nearly half of the users surveyed indicated there are times when it is not appropriate for a mediator to give an assessment of strengths and weaknesses or recommend a specific settlement. There is a wide disparity of opinions on how various factors might affect a user's view of whether it was appropriate for a mediator to provide an assessment of the strengths and weaknesses,²³ including the following:

- Whether assessment is explicitly requested,
- Extent of the mediator's knowledge and expertise,
- Degree of confidence mediator expresses in assessment,
- Degree of pressure mediator exerts to accept assessment,
- Whether assessment is given in joint session or caucus,
- How early or late in process assessment is given,
- Whether assessment is given before apparent impasse or only after impasse,
- Nature of issues (e.g., legal, financial, emotional),
- Whether all counsel seem competent, and
- Whether mediator seems impartial.²⁴

E. Mediator's private meetings with the parties

The parties and litigants who have participated in a successful mediation sometimes refer to "the magic" of the mediation process. If sorcery is involved, it is more than likely apparent during and following the mediator's private meetings (caucus) with the individual parties.

Generally, one of the mediator's first strategic decisions is to determine which party to meet with first. The mediator may decide to meet with a party who appears to be more emotionally vulnerable. Often mediators meet first with the plaintiff if an initial demand has not previously been presented. It is possible the mediator might determine with whom he or she will first meet simply by "gut instinct."

The private meeting offers the participants a safe atmosphere in a confidential setting. Such a setting provides the mediator with the opportunity to discuss, directly with the individual parties, their perception of the strengths and weaknesses of legal and factual positions. The private meeting also gives the mediator an opportunity to develop personal insight into the personality and emotional state of the individual participants. This allows the mediator to focus on the parties' interests rather than legal positions, develop rapport, and consider creative approaches to settlement. The mediator must be nonjudgmental and empathetic, may use humor when appropriate, and must assist the parties in developing flexible and creative solutions.²⁵

Many mediators use an “interest-based” or “problem-solving” approach. In doing so, the mediator assists both parties with identifying and focusing on individual needs and interests, and searching for mutually satisfactory solutions. Other mediators may use an evaluative decision-tree approach. To assist the parties, the mediator may choose to ask non-judgmental questions. Generally these questions are open-ended as opposed to leading questions. The mediator may wish to summarize the answers to the questions in the form of summary or reframing statements that help the mediator ensure the information has been adequately communicated. The mediator may also make observations or suggestions should the parties get stuck during the negotiation process.

Effective mediation requires objective analysis, active listening, utilization of a wide range of people skills, and principled negotiation. A skilled, experienced mediator assists the parties in objectively evaluating their positions and in presenting those positions in a sequential and constructive manner. Mediators can and do serve as “coaches” to assist the parties in their negotiation strategy and assist in making credible offers and demands. Finally, the mediator must be alert and sensitive to volatile emotional issues as such matters can arise at any time in the process with unpredictable results.

Nonetheless, at the end of the day, the parties retain control over the outcome of their dispute. Self-determination by the parties is the central feature of mediation. In this respect, mediation is fundamentally different from adjudication, where power to determine the outcome of the dispute is ceded to a hearing officer, judge, jury, or arbiter.

F. Mediator's persistence and patience

Task Force respondents overwhelmingly stated that patience and persistence are necessary attributes of a good mediator. Persistence is needed to keep people at the table, to get the case settled by exerting some “pressure” and to get people back to the table after a first mediation fails to resolve the case.²⁶

Participants expressed great dissatisfaction if mediators are merely “messengers” or “potted plants” or gave up too easily when negotiations become difficult. If the mediation ends without agreement, but has some potential to reach one, the vast majority of Task Force participants believe that the mediator should contact the lawyers after a week or two to ask whether they want additional assistance from the mediator.²⁷

It is important that the mediator not become discouraged or give up on the mediation prematurely. Mediation sessions commonly “bog down” at some point during the day. At such a juncture, the mediator must address and fully understand the underlying issues and interests of the parties and affirmatively develop an alternative to the previously unsuccessful negotiation strategy. In purely monetary negotiations, for example, a skilled mediator might coach or suggest that the party make an offer or counteroffer in a reasonable negotiation zone by making the “first credible offer.” An approach suggesting reciprocal or even asymmetrical concessions may be a successful tactic. Other techniques might include a decision-tree analysis of the probability of prevailing, a discount-model analysis, a cost-benefit analysis, or, with the permission of all parties, an independent evaluation or analysis of the case.²⁸

Mediators commonly contact the parties following a mediation that does not fully settle the case. If the parties were particularly close to settlement, the mediator may contact the parties a few days or even a few hours after the mediation. On other occasions, the mediator may refrain from contacting the parties until after key depositions are concluded or, perhaps, in anticipation of the close of motion practice.

It is certainly not uncommon for a mediator to receive a telephone call on a confidential basis from one of the parties requesting that an attempt be made to “kick-start” settlement negotiations. In such a case, the mediator may choose to telephone or write the other side without disclosing the prior communication. Litigation counsel may also request that the mediator write a confidential letter to the insurance representative, general counsel, or client regarding the mediator's evaluation of the case. This technique often generates a useful and productive response, which can be used to facilitate additional discussion.²⁹

G. Confidentiality

Confidentiality is the bedrock of a successful mediation. Mediators work in a confidential setting to identify, assess, and understand the underlying concerns and interests of the parties. From the parties' perspective, the disclosure of certain factual information may sometimes be treated as a strategic disadvantage or be considered an admission against interest without strong confidentiality protections. To encourage candor, the parties and the mediator often execute, at the beginning of the mediation process, a written agreement not to disclose mediation discussions to others outside of the process. In addition to seeking protection from disclosures within the litigation process, the parties may also desire privacy from the press or public. The natural conflict between the competing interests of confidentiality and candor can be a challenge, requiring skill by the mediator and trust by the parties.

A number of legal mechanisms exist to afford varying degrees of protection against disclosure of communications made during mediation. These mechanisms include mediator professional responsibility requirements, evidentiary exclusionary rules, court rules, state statutory confidentiality provisions, statutory privileges, case decisions, and written agreements of the parties.

1. Mediation professional responsibility

Confidentiality within the mediation process is an obligation of the mediator as a matter of professional responsibility. Kansas Supreme Court Rule 903, Ethical Standards for Mediators, provides:

A mediator shall maintain the reasonable expectations of the parties with regard to confidentiality.³⁰

The Model Standards of Conduct for Mediators,³¹ adopted in 2005 by the American Arbitration Association, the American Bar Association, and the Association for Conflict Resolution, provide:

A mediator who meets with any persons in private session during a mediation shall not convey directly or indirectly to any other person, any information that was obtained during that private session without the consent of the disclosing person.³²

2. Federal rules of evidence

To encourage settlement of disputes, Rule 408 of the Federal Rules of Evidence provides confidentiality protection for settlement discussions. In addition to settlement offers, Rule 408 renders inadmissible evidence of conduct or statements made in compromise negotiations.

3. Kansas statutory provisions

In Kansas, dispute resolution confidentiality is governed by K.S.A. 5-512 and K.S.A. 60-452a.³³ The statutes are identical in their construction. They provide that all verbal or written information transmitted between any party to a dispute and a neutral person conducting the proceeding shall be considered confidential communications. No admission, representation, or statement made in the proceeding will be admissible as evidence or subject to discovery. In addition, the neutral person (mediator) conducting the proceeding “shall not be subject to process requiring the disclosure of any matter discussed during the proceedings unless all of the parties consent to a waiver.”³⁴

The confidentiality statutes also establish a unique “privilege” for any party participating in the proceeding and the neutral person conducting the proceeding to “refuse to disclose, and to prevent a witness from disclosing, any communication made in the course of the proceeding. The privilege may be claimed by the party or the neutral person or anyone the party or the neutral person authorizes to claim the privilege.”³⁵

The protections provided by the confidentiality statutes are not unlimited. The confidentiality and privilege requirements do not apply to:

- Information that is reasonably necessary to allow investigation of ethical violations against the neutral person conducting the proceeding or the staff of an approved program conducting the proceeding.³⁶
- Any information that the neutral person is required to report under K.S.A. 38-1522 (mandatory reporting statute).³⁷
- Any information that is reasonably necessary to stop the commission of ongoing crime or fraud or crime or fraud in the future.³⁸
- Any information that the neutral person is required to report under specific provisions of any statute or order of a court.³⁹
- Any report to the court that a party has issued a threat of physical violence against a party, party’s dependent, family member, the mediator, or officer or an employee of the court, with the apparent intention of carrying out such threat.⁴⁰

K.S.A. 5-513 provides that “no neutral person, staff member, or member of a governing board of an approved [mediation] program may be held liable for civil damages . . . unless such person acts, or fails to act, in a manner constituting gross negligence with malicious purpose or in a manner exhibiting willful disregard of the rights, safety, or property of any party” to the dispute resolution process.

4. Missouri Supreme Court rules

Missouri law likewise preserves the confidentiality of the mediation process.⁴¹ Missouri Supreme Court Rule 17.06 provides that any communication relating to the subject matter of the dispute made during the alternative dispute resolution process by a participant or any other person present at the

mediation is considered to be a confidential communication. No admission, representation, statement, or other confidential communication made either in the setting up or conduct of the process will be admissible as evidence or subject to discovery. But this protection does not immunize the facts of the case by virtue of their disclosure during mediation. If a fact is independently discoverable, it is admissible despite its disclosure during mediation.⁴²

Under Rule 17.06, no individual or organization providing alternative dispute resolution services shall be subpoenaed or otherwise compelled to disclose any matter disclosed in the process.⁴³ The rule requires that a settlement be memorialized by a written document containing the essential terms of the agreement⁴⁴ and that an individual providing dispute resolution services may be called in an action to enforce the settlement agreement only for the limited purpose of describing events.⁴⁵

5. Federal district court confidentiality rules

In addition to the dispute resolution confidentiality requirements established by state statute or Supreme Court rule, U.S. District Court Local Rules also establish confidentiality requirements for alternative dispute resolution matters under federal jurisdiction.

(a) U.S. District Court for the District of Kansas

D. Kan. Rule 16.3(i) addresses confidentiality, providing that the mediator, all counsel, the parties, and any other persons involved in the mediation shall treat as “confidential information” the contents of written mediation statements, anything that happened or was said, positions taken, and the view of the merits of the case formed by any participant. Such information shall not be:

- Disclosed to anyone not involved in the mediation process,
- Disclosed to the trial judge, or
- Discoverable or subject to compulsory process or used for any purpose.

Unless the disclosure is necessary to:

- Prevent manifest injustice,
- Help establish a violation of law or ethical violation, or
- Prevent harm to the public health or safety of such magnitude in the particular case to outweigh the integrity of the dispute resolution proceedings in general by reducing the confidence of the parties that in future cases their communications will remain confidential.⁴⁶

The Kansas rule also provides limited exceptions to confidentiality, including:

- Disclosures that may be stipulated to by all parties and the mediator,
- Disclosure of an agreement by all parties that appears to constitute a settlement agreement if necessary to determine the existence of a binding settlement contract,
- A report or inquiry by the alternative dispute resolution administrator regarding possible violation of local rules,
- A report of a possible violation of a court order,
- A response by any participant or the mediator to an appropriate request for information duly made by a person authorized by the court to monitor or evaluate the court’s ADR program, or
- Disclosures as otherwise required by law.⁴⁷

(b) U.S. District Court for the Western District of Missouri

In Missouri, the U.S. District Courts for the Western District and Eastern District have developed distinct confidentiality provisions.⁴⁸ The U.S. District Court for the Western District has established its confidentiality rules within its Early Assessment Program.⁴⁹ The court treats as confidential all written and oral communications, not under oath, made in connection with or during the Early Assessment Program session, with limited exceptions.⁵⁰ Similarly, any communication under oath made in connection with the Early Assessment Program shall not be disclosed to anyone unrelated to the program by the parties, their counsel, mediators, or any other participant in the program. Such communications cannot be used for any purpose in any pending or future proceeding in the court except by consent of the parties or as allowed under the Federal Rules of Evidence.⁵¹

The Early Assessment Program Rules establish four exceptions to confidentiality:

- The administrator may attend any program session or may discuss with any mediator, designated individual or party any communication, comment, assessment, evaluation, or recommendation;⁵²
- The administrator may require any attorney or party to provide status reports on any ADR matter;⁵³
- The administrator, mediators, and designated individuals may communicate to the assigned judge or court regarding noncompliance by parties or lawyers with this General Order;⁵⁴ and
- Nothing shall prevent any party, the administrator, mediator or designated individual from discussing with any other participant in the program, any communication made in connection with the program.⁵⁵

6. Private confidentiality provisions

Confidentiality may also be established by written agreement. At the onset of the mediation process, parties often execute agreements to keep mediation discussions confidential.

Written agreements to mediate are enforceable contracts that, if breached, could give rise to a cause of action for monetary damages.⁵⁶

Private confidentiality provisions may provide that all statements made during the course of the mediation process will remain confidential and privileged and cannot be disclosed to third parties, except in conformity with applicable law. The agreement may also disallow the introduction into evidence of any information learned in the course of the mediation unless the information may be discovered through some other means. Some agreements have a provision not to call the mediator or any staff member of the mediator to testify or submit evidence regarding any confidential aspect of the mediation in any proceeding. In addition, some agreements provide that any party to the private agreement may obtain injunctive relief to prevent disclosures of any confidential aspect of the mediation process.

7. Recent confidentiality decisions

Several states have grappled with mediation confidentiality provisions. For example, the California courts have zealously adhered to an extensive statutory scheme protecting the confidentiality of mediation proceedings which, with few exceptions, seemingly provides an absolute mediation confidentiality rule.⁵⁷ Other states, such as Virginia, Colorado, and Utah, have not construed mediation confidentiality provisions as strictly as California. *See, e.g., Perreault v. The Free Lance-Star*⁵⁸ (holding Virginia statute addressing confidentiality of written mediated settlements did not allow a court to keep confidential the terms of a mediated compromised settlement of a wrongful death claim), *GLN Compliance Group Inc. v. Aviation Manual Solutions*⁵⁹ (Colorado Court of Appeals, in a split decision, concluded it could not enforce a mediated settlement agreement in the absence of a signed writing, even though the retired judge who acted as mediator called in a stenographer and set forth the settlement terms and obtained each party's agreement "on the record"), and *Reese v. Tingey Construction*⁶⁰ (reversing trial court's order requiring deposition of counsel for

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the purpose of determining existence of oral settlement agreement, concluding the mediated settlement agreement must be reduced to writing to be enforceable).

H. Good faith/bad faith participation in mediation

K.S.A. 5-518 provides that “the avoidance of mediation ... without just cause or excuse shall constitute evidence of bad faith.” Upon a finding that a party to a dispute has acted in bad faith by deliberately and intentionally avoiding mediation, the court may order the party to pay reasonable attorney fees directly related to the mediation.⁶¹

In *Crandall v. Grbic*,⁶² the Kansas Court of Appeals held summary judgment was appropriate where home-buyer plaintiffs filed suit without first attempting to mediate as required by a mediation agreement entered into with defendant real estate agent. The home buyers’ legal action against their real estate agent for breach of fiduciary duty, fraud, misrepresentation, and violation of the Kansas Consumer Protection Act was barred by plaintiffs’ failure to honor the contract provision requiring mediation prior to filing suit.⁶³

In June 2009, the Kansas Court of Appeals reached a similar holding in *Santana v. Olguin*.⁶⁴ The contract to purchase residential real estate in *Santana* contained a provision for the buyer to elect an inspection of the property for “defects” and a provision that any dispute or claim arising out of the contract be submitted to mediation. After closing on the property, Santana discovered alleged latent defects to the property. She brought an action against three defendants for negligence, fraud, and violations of the Kansas Consumer Protection Act.⁶⁵ After defendants filed their answer, Santana offered to mediate and ultimately filed a motion to compel mediation. In response, the defendants filed motions to dismiss based on plaintiff’s failure to mediate pursuant to the contract. The district court granted defendants’ motions to dismiss and the Kansas Court of Appeals affirmed, finding the contract to be unambiguous and otherwise enforceable.⁶⁶ In determining whether the district court erred in dismissing Santana’s claims for failure to submit the claims to mediation, the court cited favorably the Court of Appeals decision in *Crandall v. Grbic* and found no abuse of discretion in the trial court’s dismissal of Santana’s claims.⁶⁷ In addition, a number of federal and state decisions have addressed the failure to mediate prior to pursuing arbitration or litigation.⁶⁸

With the growth of court-ordered mediation, the courts have increasingly required “good-faith” participation in the mediation process. Bad faith, however, is perhaps easier to identify than good faith. The spectrum of potential bad-faith issues may include:

- Counsel’s failure to submit a requested premediation statement,
- Failure to attend court-ordered mediation,
- Failure to bring a client/corporate representative with full settlement authority, or
- Failure to submit a monetary or nonmonetary offer.⁶⁹

Although the issue of good-faith participation in mediation is very complex, court rules and decisions, unfortunately, do not always give clear guidance on prohibited conduct.⁷⁰ Answers to these questions are difficult as evidenced by a lack of consensus among legal scholars supporting good-faith participation.⁷¹

Professor John Lande (University of Missouri School of Law – Columbia), estimates that at least 22 states have statutes requiring good-faith participation in mediation.⁷² At least 21 federal district courts and 17 state courts have local rules with similar requirements. Lande notes courts have consistently found that failure to attend mediation or submit premediation briefs is bad faith. In contrast, courts have split almost evenly whether the failure to attend with sufficient settlement authority is bad faith. Proponents of broad good-faith requirements often argue that courts should sanction parties for sending representatives to mediation without sufficient settlement authority. But it is difficult for outsiders to a mediation to determine what is the “right” amount of settlement authority.⁷³

Occasionally, court rules place the burden on mediators to report bad faith.⁷⁴ Placing the burden on mediators to report bad faith can compromise neutrality, intrude into mediation confidentiality, and impact negatively on the overall integrity of the process. For example, an ethics committee in Florida advised mediators that they may not report to a court that a party has failed to negotiate in good faith for the principal reasons that the mediator’s report would (1) constitute a breach of confidentiality, (2) impair parties’ right to self-determination, and (3) destroy mediator impartiality in appearance and in reality.⁷⁵

The Section of Dispute Resolution recently adopted a resolution opposing the use of broad good-faith requirements.⁷⁶ The Section suggests court-imposed sanctions be imposed only for violation of rules specifying objectively-determinable conduct. An example is failure of a party, attorney, or insurance representative to attend a court-ordered mediation or to provide a written response to the mediator prior to the mediation. The Section points out that rules and statutes that permit courts to sanction a wide-range of subjective behavior create a grave risk of undermining core values of mediation and creating unintended problems including a reduction in the overall confidence in the system of mediation.

In recent years, state and federal courts have addressed court-imposed good-faith requirements. For example, the Eighth Circuit Court of Appeals held the district court acted within its discretion by concluding a party failed to participate in good faith in a court-ordered ADR process where the party failed to provide the mediator a summary of the disputed facts and its position on liability and damages.⁷⁷ Additionally, the party appeared at the mediation through its outside legal counsel and a corporate representative who had no independent knowledge of the facts of the case and settlement authority of only \$500. Any settlement offers of more than \$500 had to be relayed by telephone to in-house counsel, who chose not to attend the mediation on advice of outside counsel.

The Eighth Circuit affirmed separate sanctions in the amount of \$1,390.63 against both the respondent and their outside counsel. The court also ordered respondent to pay a \$1,500 fine to the court and \$30 to plaintiff for the costs she incurred in attending the ADR conference. Not only did the court deny a subsequent motion to reconsider, but it imposed additional sanctions against respondent and respondent’s counsel in the amount of \$1,150 each for vexatiously increas-

ing the cost of litigation by filing a frivolous motion.

Similarly, the U.S. District Court for the District of Kansas imposed attorney fees and expenses in the amount of \$3,000 and ordered defendant to pay the plaintiff's portion of the mediator's fees and expenses.⁷⁸ The sanctions were imposed when local defense counsel appeared at the mediation without any corporate representative with settlement authority. In addition, local counsel was not able to reach his corporate representative by telephone or otherwise.

In an unpublished decision, the Tenth Circuit grappled with an attempt by plaintiff to withdraw from a settlement at the conclusion of the mediation. In *Dehning vs. Child Development Services of Fremont Co.*,⁷⁹ a former employee brought a Title VII suit for sexual harassment and retaliation. The parties engaged in mediation and reached an agreement in which the plaintiff agreed to settle her claims against the defendant in exchange for a monetary payment and the defendant's agreement to hire her as an independent contractor. Later, however, Dehning refused to follow through with the settlement, maintaining she had never agreed to compromise her sexual harassment claim. At the enforcement hearing, the mediator provided testimony regarding the issues discussed during mediation and the resulting settlement agreement. The court, noting its power to summarily enforce settlement agreements, rejected plaintiff's attempt to withdraw from the settlement and upheld the agreement. The Tenth Circuit affirmed, including the lower court's award of costs and fees against the plaintiff.

II. Conclusion

The use of mediation to resolve complex commercial disputes is likely to continue to increase. Mediation is often viewed in the corporate culture as an appropriate and preferred step prior to trial. There are various reasons supporting this perception.

First, the business community believes, whether true or not, that litigation is increasingly expensive and protracted. Many business entities who are otherwise prepared to litigate may, nonetheless, wish to first try negotiation and, if negotiation is not successful, consider a relatively inexpensive round of mediation.

Second, many business disputants prefer mediation because it permits a degree of party control, which is gradually lost as the litigation process is engaged. Even if the mediation is unsuccessful, each party can learn a great deal about their own case and the other party's position.

Third, commercial disputes are very often between parties who have a legitimate business reason to maintain long-term

relationships. Litigation has the potential to completely destroy an otherwise valuable business relationship. By contrast, mediation of relationship-based issues, if successful, avoids the disruption of the relationship and allows it to continue.

Fourth, one or both parties may be concerned about the disclosure of confidential information. Mediation avoids disclosure of sensitive information either to the public or to the other party. Generally, everything said in mediation is protected as confidential settlement discussions and cannot be introduced in litigation or discussed publicly.

Finally, in an era of declining judicial resources, it remains likely that the courts will continue to develop and enhance existing case management systems that will track cases based upon complexity, anticipated discovery, time before a trial and the overall amount of court resources required.⁸⁰ The use of case management mechanisms (including neutral evaluation, mediation, and arbitration), involve the use of different alternative dispute resolution processes. This case management approach is reminiscent of Professor Frank E.A. Sander's 1976 Proposal for the Development of a "multi-door" courthouse, in which he supports the utilization of a wide variety of alternative dispute resolution techniques.⁸¹

Increasingly, successful practitioners acknowledge the need to inform clients at the beginning of the professional relationship about the availability of mediation and other dispute resolution procedures. The practitioner's enhanced understanding of the mediator's role permits the client to be properly prepared for mediation and allows maximization of benefits that may be derived from the mediation experience. ■

About the Author

Larry R. Rute is a partner and co-founder of Associates in Dispute Resolution LLC, in Topeka. His practice encompasses a full range of dispute resolution services. He received his Juris Doctorate from Washburn University School of Law and his Masters of Law Degree from the University of Washington. He teaches Alternative Dispute Resolution at Washburn University School of Law. He is a Distinguished Fellow and member of the Board of the International Academy of Mediators. He has twice received the KBA's



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ENDNOTES

1. Joe Epstein & Susan Epstein, *Co-Mediation*, 35 COLO. LAW. 21 (June 2006).
2. See John Lande, *The Movement Toward Early Case Handling in Courts and Private Dispute Resolution*, 24 OHIO. ST. J. ON DISP. RESOL. 81, 104 (2008).
3. Fed. R. App. P. 33.
4. See ABA SECTION OF DISPUTE RESOLUTION, TASK FORCE ON IMPROVING MEDIATION QUALITY, (April 2006-February 2008), <http://www.abanet.org/dispute/documents/FinalTaskForceMediation.pdf> [hereinafter

Task Force]. For an excellent overview of the Task Force Report, see John Lande, *Doing the Best Mediation you Can*, DISP. RESOL. MAG. (Spring & Summer 2008).

5. Focus groups were conducted in Atlanta, Chicago, Denver, Houston, Miami, New York, San Francisco, Toronto, and Washington, D.C. Task Force, *id.* at 4.

6. *Id.* at 5.

7. *Id.*

8. *Id.* at 6.

9. Survey respondents felt it was important, very important, or essential

for mediators to know the file and read the documents to encourage a constructive approach to the mediation and to discuss who will attend the mediation session. *Id.* at 7.

10. For a more detailed explanation of the use of mediation in employment cases, see Larry Rute, Patrick Nichols & John R. Phillips, *Mediation Round Table: Improving the Quality & Effectiveness of Mediation*, Vol. XXVI No. 4, J. KAN. TRIAL LAW. ASS'N 11 (March 2003) [hereinafter Rute, Nichols & Phillips].

11. *Id.* at 10.

12. *Id.* at 11.

13. R. FISHER & W. URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 18 (1983).

14. *Id.* at 12-13.

15. *Id.*

16. Rute, Nichols & Phillips, *supra* note 10, at 12, 17, 20.

17. Task Force, *supra* note 4, at 12.

18. One exception to the length of the confidential statement would be the need to provide extensive background information in highly complex multi-party or class/collective action matters.

19. Rute, Nichols & Phillips, *supra* note 10, at 12, 17, 20.

20. *Id.* at 12.

21. Rute, Nichols & Phillips, *supra* note 10, at 13, 18, 23-24.

22. Task Force, *supra* note 4, at 14.

23. In recommending a specific assessment, 84 percent of users thought it would be helpful in half or more cases and 75 percent in most or almost all cases. Only 18 percent of mediators thought it would be helpful in most, all or almost all cases, and only 38 percent thought it would be helpful in half or more. *Id.* at 15.

24. *Id.* at 14-15.

25. Rute, Nichols & Phillips, *supra* note 10, at 14, 18-19, 24.

26. *Id.* at 17.

27. *Id.*

28. Rute, Nichols & Phillips, *supra* note 10, at 14, 19, 24.

29. Rute, Nichols & Phillips, *supra* note 10, at 15, 19.

30. KAN. SUP. CT. R. 903 (2009 KAN. CT. R. ANNOT. 788).

31. <http://www.abanet.org/dispute/news/ModelStandardsOfConductforMediatorsfinal05.pdf>.

32. ABA Model Standards of Conduct for Mediators V (B).

33. K.S.A. 60-452 also provides that an offer to compromise is inadmissible to prove liability. See also J. Nick Badgerow, *Honor in Battle: The Conflict Between Candor and Zealous Advocacy*, 70 J. KAN. BAR ASS'N 16 (Oct. 2001); Roger W. Badeker, *Closing Argument: The Final Fatal Flaw*, 60 J. KAN. BAR ASS'N 37, 40 (April 1991); Nancy G. Maxwell, *Keeping the Family Out of Court: Court-Ordered Mediation of Custody Disputes Under the Kansas Statutes*, 25 WASHBURN L.J. 203, 232, 233 (1986); James B. Albertson, *Evidence: Settlement Offers Not Relevant for Mitigating Punitive Damages*, 23 WASHBURN L.J. 452, 459, 461 (1984); Randall Rathbun, *Evidence of Settlement with Joint Tortfeasors*, 6 J. KAN. TRIAL LAW. ASS'N No. 1, 19, 20 (1982); and Jerry R. Palmer, *Evidence of Similar Incidents and Settlements on Proof of Defect in Products Liability Cases*, 3 J. KAN. TRIAL LAW. ASS'N No. 6, 14, 16 (1980).

34. K.S.A. 5-512 and K.S.A. 60-452a; see also Nancy G. Maxwell, *Survey of Kansas Law: Family Law*, 37 KAN. L. REV. 801, 838 (1989); and Brian Moline, *Court-Ordered Mediation: New Opportunities in Family Practice*, 54 J. KAN. BAR ASS'N 97, 104 (Summer 1985).

35. K.S.A. 5-512(a) and K.S.A. 60-452a(a).

36. K.S.A. 5-512(b)(1) and K.S.A. 60-452a(b)(1).

37. K.S.A. 5-512(b)(2) and K.S.A. 60-452a(b)(2).

38. K.S.A. 5-512(b)(3) and K.S.A. 60-452a(b)(3).

39. K.S.A. 5-512(b)(4) and K.S.A. 60-452a(b)(4).

40. K.S.A. 5-512(b)(5) and K.S.A. 60-452a(b)(5).

41. MO. REV. STAT. § 435.014, provides: "No admission, representation, statement, or other confidential communication made in setting up or conducting such proceedings not otherwise discoverable or obtainable shall be admissible as evidence or subject to discovery."

42. MO. SUP. CT. R. 17.06(a).

43. *Id.* at 17.06(b).

44. *Id.* at 17.06(c).

45. *Id.* at 17.06(d).

46. D. KAN. R. 16.3(i).

47. D. KAN. R. 16.3(j).

48. E.D. Mo. L.R. 604(a) established confidentiality requirements. The rule provides that alternative dispute resolution proceedings are private and confidential. All written and oral communications made and disclosed to the neutral are considered confidential and may not be disclosed by the neutral, any party, or other participant unless the parties otherwise agree in writing. Documents created by the party for use of the neutral shall not be filed with the court nor shall the neutral testify regarding matters disclosed during the ADR proceedings.

49. U.S. District Court for the Western District of Missouri, Early Assessment Program Rule V. The Western District of Missouri's Alternative Dispute Resolution Program was one of five federal district courts given special funding as a dispute resolution "demonstration" project under the Civil Justice Reform Act of 1994, 28 U.S.C. §§ 471-482 (1984). Kent Snapp is the administrator of the Early Assessment Program. See Kent Snapp, *Five Years of Random Testing Shows Early ADR Successful*, DISP. RESOL. MAG. 16 (Summer 1997); see also John R. Phillips, *Mediation as One Step in Adversarial Litigation; One Country Lawyer's Experience*, 2002 J. DISP. RESOL. 143; Kent Snapp & Jerome T. Wolfe, *The Early Assessment Program; A Unique Opportunity to Avoid Costs and Delay*, 51 J. Mo. B. 111, 112 (March/April 1995).

50. Early Assessment Program Rule V. A. 1.

51. *Id.* at V. A. 2.

52. *Id.* at V. B. 1.

53. *Id.* at B. 2.

54. *Id.* at B. 3.

55. *Id.* at B. 4.

56. See, e.g., *Tower Action Holding LLC v. Los Angeles Co. Waterworks Dist. No. 37*, 129 Cal. Rptr. 2d 640, 641-42, 647-49 (Ct. App. 2002).

57. In *Wimsatt v. Superior Court of California*, 152 Cal. App. 4th 137, 61 Cal. Rptr. 3d 200 (2007), the California Court of Appeals strictly construed the mediation confidentiality statutes even when the equities in the case would strongly suggest contrary results. Subsequently, in *Simmons v. Ghaderi*, 44 Cal. 4th 570, 187 P.3d 934 (2008), the California Supreme Court noted that despite the Legislature's awareness that some bad faith conduct would go unpunished, it chose to protect mediation confidentiality. But see *Cassel v. Superior Court*, __ Cal. Rptr. 3d __, 2009 WL 3766430 (Cal. App. 2 Dist., Nov. 12, 2009) (excepting from confidentiality statute communications solely between client and attorney and sought as evidence in attorney malpractice action; although occurring during the day of the mediation, communication was not part of the mediation process, did not fall within the policy reasons supporting confidentiality and, thus, was not protected from disclosure).

58. *Perreault v. The Free Lance-Star*, 276 Va. 375, 666 S.E. 2d 352 (2008).

59. *GLN Compliance Group Inc. v. Aviation Manual Solutions*, 203 P.3d 595 (Colo. App. 2009); see also consolidated appeals in *Yaeke v. Andrews*, 195 P.3d 1101, 2008 WL 4616772 (Colo. 2008) (reviewing the confidentiality provisions of the Colorado Dispute Resolution Act in determining whether binding settlements reached during mediation).

60. *Reece v. Tingey Construction*, 177 P.3d 605, 596 Utah Adv. Rep. 45 (2008).

61. K.S.A. 5-518(b); see also *Lange v. Schilling*, 163 Cal. App. 4th 1412, 78 Cal. Rptr. 3d 356 (2008) (denial of attorneys' fees to prevailing party who failed to aggressively seek presuit mediation and paid more than \$113,000 in attorneys' fees to recover a \$13,000 judgment).

62. *Crandall v. Grbic*, 36 Kan. App. 2d 179, 138 P.3d 365 (2006). For a comprehensive review of the *Crandall* decision, see Stanley A. Leisure, *Summary Judgment for Failure to Mediate; Is it Really that Simple?* 77 J. KAN. BAR ASS'N 22 (June 2008).

63. *Crandall*, 36 Kan. App. 2d at 185, 138 P.3d at 371.

64. *Santana v. Olguin*, 41 Kan. App. 2d 1086, 208 P.3d 328 (2009).

65. *Id.* at 1087.

66. *Id.* at 1089.

67. *Id.* at 1093-95.

68. See, e.g., *United States v. Beyle*, 75 F. Appx. 730 (10th Cir. 2003) (finding pretrial order compelling mediation of foreclosure action could not prevent forced sale of subject property where summary judgment granted prior to mediation); *Lynn v. Gen. Elec. Co.*, No. 03-2662-GTV-DJW, 2005 WL 701270 (D. Kan. 2005) (refusing to enforce alleged con-

tractual obligation to mediate as precondition to initiating litigation or arbitration, concluding mediation contracts are not subject to enforcement under the Federal Arbitration Act and no enforceable contract existed under state law because defendant employer could not prove employees had notice of the newly adopted mediation requirements); *Adams v. Newport Crest Homeowners Ass'n.*, 2009 WL 2875361, (Cal. App. 4 Dist. 2009) (clause in homeowner's association settlement agreement that forced parties to enter mediation prior to seeking judicial relief is enforceable); *Darling's v. Nissan N. Am. Inc.*, 117 F. Supp. 2d 54 (D. Me. 2000) (notwithstanding claims pursuant to Motor Vehicle Dealer's Act were ripe for judicial review, case dismissed without prejudice where plaintiff failed to make a written demand for mediation as required by the Act); *LBL Skysystems Inc. v. APG-America Inc.*, 2005 WL 2140240 (E.D. Penn. Aug. 31, 2005) (concluding defendant waived right to enforce contractual obligation to mediate prior to initiating legal proceedings by not filing motion to stay proceedings pending mediation and, instead, impleading other parties, asserting counterclaims and filing in limine and summary judgment motions).

69. John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. REV. 69 (2002).

70. See, e.g., *In re Acceptance Ins. Co.*, 333 S.W. 3d 433, 452 (Tex. Ct. App. 2000) (finding "an order requiring 'good faith' negotiations does not comport with the voluntary nature of the mediation process and [is] void") and *In re Magallon*, 2007 WL 2962934 (Tex. App.-Beaumont, Oct. 11, 2007) (where appellate court upheld a fine for sending only an associate from the defense firm to a mediation but reversed, on due process grounds, trial court's order prohibiting defense counsel from practicing before the court for failure to timely pay the fine). An unpublished, but highly publicized, 2007 ruling of the U.S. District Court for the Northern District of Florida, *John Doe 1 v. Francis*, 2005 WL 517847 (N.D. Fla. 2001), brought into sharp focus bad faith and mediation confidentiality issues. See Michael D. Young, *Mediation Gone Wild; How Three Minutes put an ADR Party Behind Bars*, 25 INT'L. INST FOR CONF. PREV. & RESOL. 6 (2007), available at

<http://www.wbcounsel.com/mediation/> and <http://www3.interscience.wiley.com/journal/114277984/abstract>

71. See Maureen A. Weston, *Checks on Participant Conduct in Compulsory ADR: Reconciling Attention and the Need for Good-Faith Participation Autonomy and Confidentiality*, 76 IND. L.J. 591 (2001); and Kimberlee K. Kobach, *Good Faith in Mediation-Requested, Recommended or Required? A New Ethic*, 38 S. TEX. L. REV. 575, 591-96 (1997).

72. John Lande, *Why a Good Faith Requirement is a Bad Idea for Mediation*, 23 ALTERNATIVES TO HIGH-COST LITIGATION 1 (2005).

73. *Id.*

74. E.D. Mo. L.R. 6.05 provides a "the neutral shall report to the judge any willful or negligent failure to attend any ADR conference, to substantially comply with the Order Referring Case to Alternative Dispute Resolution or otherwise participate in the ADR process in good faith. The [c]ourt may impose any sanctions deemed appropriate." See *Employer's Consortium Inc. v. Aaron*, 698 N.E.2d 189, 190 (Ill. App. Ct. 1998) (accepting neutral's report of the parties' level of participation in the ADR process).

75. *Supra* note 72.

76. Resolution on Good Faith Requirements, <http://www.abanet.org/dispute/webpolicy.html#9> (last visited Dec. 1, 2009).

77. *Gee Gee Nick v. Morgan's Foods Inc.*, 270 F.3d 590 (8th Cir. 2001).

78. *Ojiaka v. Taco Bell Corp.*, No. 05-2094-RDR-DJW (D. Kan. Dec. 27, 2005).

79. 262 Fed. Appx. 75, 2008 WL 123533 (10th Cir.).

80. See Donna Stienstra et al., Fed. Judicial Ctr. Report to the Judicial Conference Committee on Court Administration and Case Management: *A Study of Five Demonstration Projects Established Under the Civil Justice Reform Act of 1990* (1997) (describing tracks in the Differentiated Case Management system in the U.S. District Court for the N.D. of Ohio).

81. See Frank E.A. Sander, *Varieties of Dispute Processing, Address Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice* (April 7-9, 1976), reported at 70 F.R.D. 111, 130-32 (1976).