Checks on Participant Condnct in Compnlsory ADR: Reconciling the Tension in the Need for Good-Faith Participation, Autonomy, and Confidentiality

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I. INTRODUCTION

In an effort to avoid the delay, expense, technicality, and acrimony of traditional judicial litigation, a movement has emerged for parties to use forms of alternative dispute resolution ("ADR").[1] In these processes, the parties typically agree to submit their disputes before a private third-party neutral, who would either decide, as in arbitration, or facilitate, as in mediation, a resolution of the parties' disputes. ADR is premised upon the intention that by providing disputing parties with a process that is confidential, voluntary, adaptable to the needs and interests of the parties, and within party control, a more satisfying, durable, and efficient resolution of disputes may be achieved.

Seeing the opportunities for ADR to address problems of court congestion and expense, judicial systems at both the state and federal levels have adopted court-annexed ADR programs in which litigants, often as a precondition to trial or judicial resolution, submit to some form of ADR, such as arbitration, mediation, or summary jury trial.[2] The use of court-ordered participation in ADR has been lauded for increasing settlement rates and providing a forum for more creative, efficient, and satisfying resolutions of disputes, yet criticized as "coerced settlement" and an additional obstacle and expense in the litigation process.[3]

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1. KATHERINE V.W. STONE, PRIVATE JUSTICE: THE LAW OF ALTERNATIVE DISPUTE RESOLUTION 2-4 (2000) (noting that the 1976 Pound Conference—here Chief Justice Warren Burger urged greater use of ADR and Professor Frank E. Sander proposed a "multi-door courthouse" in which judicial disputes are screened and referred to an appropriate ADR forum—signified the beginning of the modern ADR movement); *Developments in the Law—The Paths of Civil Litigation*, 113 HARV. L. REV. 1851, 1851-57 (2000) (reviewing the history of the modern ADR movement). ADR encompasses a variety of processes for dispute resolution outside of formal judicial litigation, which generally involve a third-party neutral to assist in reaching resolution of a dispute, including mediation, arbitration, early neutral case evaluation, minitrial, summary jury trial, and private judging. KIMBERLEE K. KOVACH, MEDIATION: PRINCIPLES AND PRACTICE 6 (2d ed. 2000).

2. *See* Lisa Bernstein, *Understanding the Limits of Court-Connected ADR: A Critique of Federal Court-Annexed Arbitration Programs*, 141 U. PA. L. REV. 2169, 2176-86 (1993) (describing basic features of federal court-annexed arbitration programs). In court-annexed programs, parties may elect the outcome reached in an ADR proceeding to be binding or nonbinding. *Id.*; *see also id.* at 2172 n.3 (noting that as of 1988, twenty-two states and the District of Columbia operated some type of court-annexed arbitration program for civil claims).

3. Kathleen A. Devine, Note, *Alternative Dispute Resolution: Policies, Participation, and*

A growing concern lies in the use of private compulsory ADR resulting from mandatory predispute arbitration or ADR provisions in contracts (contractual or private ADR). Contractual ADR provisions appear not only in commercial transactions between businesses, but more frequently in corporate-consumer transactions and employment contracts.[4] These provisions may require private dispute resolution of contractual as well as statutory, civil rights, and consumer protection claims. Unlike court-mandated ADR, where the parties are ordered to ADR but ultimately retain the right to a judicial trial,[5] parties subject to private mandatory ADR by contract are effectively precluded from judicial recourse.[6]

As a result of laws providing for court-annexed ADR and the proliferation of mandatory predispute contractual ADR clauses, more and more parties are ironically forced to use ADR processes. The expanded use of ADR has spawned an industry of individuals and both nonprofit and for-profit entities providing ADR services to act as third-party neutrals.[7] Although some ADR service providers have adopted precatory standards and codes of ethics for ADR neutrals,[8] and efforts are underway

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Proposals, 11 REV. LITIG. 83, 89-92 (1991) (summarizing policy arguments for and against ADR); *see also* G. Thomas Eisele, *The Case Against Mandatory Court-Annexed ADR Programs*, 75 JUDICATURE 34, 36 (1991).

4. *See* Paul H. Haagen, *New Wineskins for New Wine: The Need to Encourage Fairness in Mandatory Arbitration*, 40 ARIZ. L. REV. 1039, 1063-67 (1998); John Vail, *Defeating Mandatory Arbitration Clauses: What's a Lawyer to Do When Boilerplate Arbitration Clauses Bar the Courthouse Door?*, TRIAL, Jan. 2000, at 70, 70 (discussing widespread use of mandatory arbitration clauses in consumer transaction), *available at* http://www.atla.org/homepage/triaj00.ht; Ass'n of Trial Lawyers of Am., *Mandatory Arbitration: The Next Attack on Consumers' Rights*, *at* http://www.atla.org/ homepage/arbi0319.ht (last visited Feb. 21, 2001) (employment and consumer context).

5. Edward F. Sherman, *Court-Mandated Alternative Dispute Resolution: What Form of Participation Should Be Required?*, 46 SMU L. REV. 2079, 2092 (1993) (noting that "[t]he failure of [a court-connected] ADR proceeding simply means that the parties are relegated to their basic constitutional right to trial"). *Contra, e.g.*, Bernstein, *supra* note 2, at 2183 (noting that courts have imposed sanctions or struck a party's demand for a trial de novo for failure to participate in court-ordered ADR in good faith); *infra* Part IV.C.

6. *See infra* Part IV.B (noting limited judicial remedies for vacatur of ADR awards or agreements procured by fraud, duress, or other defenses under contract law).

7. *See* Bernstein, *supra* note 2, at 2186 (reporting that "[b]etween 1983 and 1988, the number of private ADR providers has increased tenfold.... In addition to for-profit and not-for-profit fee-for-service ADR providers, over 150 grass-roots ADR organizations currently provide dispute resolution services either free or at a minimal cost"); Jack M. Sabatino, *ADR as "Litigation Lite": Procedural and Evidentiary Norms Embedded Within Alternative Dispute Resolution*, 47 EMORY L.J. 1289, 1301 (1998) (describing three leading national private ADR service providers).

8. *See, e.g.*, MODEL STANDARDS OF CONDUCT FOR MEDIATORS (Am. Arbitrators Ass'n et al. 1994), *available at* http://www.abanet.org/ftp/pub/dispute/modstan.txt [hereinafter MODEL STANDARDS]; NAT'L RULES FOR THE RESOLUTION OF EMPLOYMENT DISPUTES 3-4 (Am. Arbitration Ass'n 1996) (providing a policy to "administer dispute resolution programs which meet the due process standards as outlined in these rules and the *Due Process Protocol*"); *JAMS/Endispute Arbitration Policy*, 9A Lab. Rel. Rep. (BNA) No. 142, 534:521 (Mar. 26, 1996) (willing to process employment disputes if a "minimum set of procedures or standards of procedural fairness" are met); *Due Process Protocol for Mediation and Arbitration of*

to establish some uniform guidelines for ADR practice,[9] the industry is largely unregulated. Individuals acting as ADR neutrals generally need not have any particular training, education, knowledge of the law, or other experience.[10] Standards of conduct for the parties and lawyers in an ADR process are even less defined and largely assumed to comport with the voluntary nature of the ADR process.[11]

The proclaimed benefits of channeling disputes through a private dispute-resolution forum are that it offers a faster, less costly, and more palatable environment for parties to resolve their disputes free from the technical, procedural, evidentiary, and appellate rigors of judicial adjudication. To encourage party candor and compromise, the ADR processes are typically conducted in a private, confidential forum between the parties (and counsel, if desired), and before a private third-party neutral, usually selected by one or more of the parties. It is precisely the informality and private environment of ADR—perceived benefits of the system—that also raise concerns about the fairness of the process. Because ADR processes are cloaked with confidentiality privileges, conducted by private third-party neutrals who are unaccountable to the public or judicial system and not bound to follow or apply the law, and often imposed on unwilling or weaker parties through the use of adhesive contractual clauses, the concern, or at least perception, that participants may abuse the ADR process comes to the forefront.

Early critics of ADR warned that the lack of formal procedural protections and ADR's privacy may disadvantage weaker parties in denying the due process protections of adjudication that can equalize power, thwart the development of legal precedent and rules, and undermine the protection of statutory rights, civil rights, and consumer protection claims by an emphasis on compromising (or disregarding) legal rights.[12] Others raised the possibility that third-party neutrals lack the expertise to

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Statutory Employment Disputes, 9A Lab. Rel. Rep. (BNA) No. 142, 534:401 (May 9, 1995).

9. *See, e.g.*, UNIF. MEDIATION ACT (Proposed Draft Feb. 2000) (drafting proposed uniform legislation and/or court rules for various aspects of mediation practice for state adoption), *available at* http://www.pon.harvard.edu/guests/uma/febwebUMA.htm.

10. *Cf.* LEONARD L. RISKIN & JAMES E. WESTBROOK, DISPUTE RESOLUTION AND LAWYERS 699 (2d ed. 1997). Neutrals associated with a particular ADR service organization or qualified to serve in connection with a court-annexed ADR program generally must satisfy the training, education, and experience qualifications set forth by that organization or program. *See supra* note 8. However, there is no licensing requirement, and one may serve as a private mediator or arbitrator simply when so engaged by the parties. *See, e.g.*, UNIF. MEDIATION ACT § 3(B)(5) (Proposed Draft Feb. 2000) (defining "mediator" to include "an individual, of any profession or background, who is appointed by a court or government entity, or engaged by parties under an agreement evidenced by a record to conduct a mediation"), *available at* http://www.pon.harvard.edu/guests/uma/febwebUMA.htm; 1 SARAH R. COLE, NANCY H. ROGERS & CRAIG A. MCEWEN, MEDIATION: LAW, POLICY, PRACTICE § 11:04 (2d ed. 1994 & Supp. 2000) (discussing mediator accountability) [hereinafter ROGERS & MCEWEN].

11. The proposed Uniform Mediation Act ("UMA") does not address participant conduct; neither do professional codes of responsibility specifically address a lawyer's role in an ADR setting. A proposed rule for adoption into the Model Rules of Professional Conduct pertains to lawyers (not to nonlawyers) serving as a third-party neutral, not to lawyers acting as representatives or advocates in an ADR proceeding. *See* MODEL RULES OF PROF'L CONDUCT R. 2.4 (Final Draft Nov. 2000), http://www.abanet.org/cpr/e2k-rule24.html.

12. *See, e.g.*, Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of*

decide the legal rights of the parties or may unduly pressure or coerce parties into settlement.[13] Questions portend that "repeat player" corporate entities have systemic advantages, due to a seeming propensity for a third-party neutral, whose employment depends upon continued referrals, to favor the stronger party over "one-shotters," or individuals with less bargaining power.[14] Acknowledging these criticisms, proponents maintain that ADR may still be preferable to litigation for both corporate entities and individuals, provided that the parties engage in the process in good faith and minimal quality safeguards exist.[15] Indeed, for ADR to achieve its intended objectives of efficiency and effectiveness, it becomes imperative, in this age of compulsory and often binding ADR, to ensure a minimal level of procedural fairness.[16]

As the use of compulsory ADR continues to rise, concerns that behind the closed doors of an ADR proceeding participants may engage in abusive conduct, use the process simply as a subterfuge for discovery, or fail to participate in a meaningful matter raise the questions of what can be done to address participant misconduct or abuse in ADR[17] and to ensure basic procedural fairness.[18] Legislation and local court

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Prejudice in Alternative Dispute Resolution, 1985 WIS. L. REV. 1359; Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984).

13. Haagen, *supra* note 4, at 1053 (noting that "arbitrators may be wholly unqualified to handle the matters submitted to them, and their judgments are generally immune from review"); Kimberlee K. Kovach, *Good Faith in Mediation—Requested, Recommended, or Required? A New Ethic*, 38 S. TEX. L. REV. 575, 583 (1997) (providing examples of mediator coercion).

14. *See, e.g.*, Sarah R. Cole, *A Funny Thing Happened on the Way to the (Alternative) Forum: Reexamining* Alexander v. Gardner-Denver *in the Wake of* Gilmer v. Interstate/Johnson Lane Corp., 1997 BYU L. REV. 591, 619-24 (discussing the advantages repeat-player employers have when negotiating contracts and later participating in dispute resolution with one-shot-player employees); Mark Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974) (discussing the systemic advantages of "repeat players" in the civil justice system over individuals or "one-shotters"); *see also* Cole v. Burns Int'l Sec. Servs., Inc., 105 F.3d 1465, 1485 nn.16-17 (D.C. Cir. 1997) (recognizing the concern that neutrals have a financial interest to favor employers, as repeat players, and that empirical studies demonstrate favoritism based on party who selects, rather than pays, the neutral).

15. *See, e.g.*, James J. Alfini, *Trashing, Bashing, and Hashing It Out: Is This the End of "Good Mediation"?*, 19 FLA. ST. U. L. REV. 47, 62-63 (1991) (reporting that attorneys interviewed regarding the problem of other attorneys or parties "just showing up" for court-ordered mandatory mediation believed the problem is best addressed by imposing a good-faith requirement, with appropriate sanctions, on the recalcitrant party); Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1344, 1349-50 (1997) (defending the enforcement of mandatory arbitration of statutory employment claims provided that a number of "essential safeguards" are in place to ensure fairness of the arbitration); Kovach, *supra* note 13, at 592 (advocating a good-faith requirement in mediation).

16. 1 ROGERS & MCEWEN, *supra* note 10, § 6:02, at 2 n.1 (noting that the "[g]oals for federal court dispute resolution include preservation of fairness, speed in resolution, and preservation of 'weaker parties' access to information and power to negotiate a dispute'" (quoting COMM. ON LONG RANGE PLANNING, JUDICIAL CONFERENCE OF THE U.S., PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS 65-66, 125-26 (1995))).

17. *See* Haagen, *supra* note 4, at 1041 (stating that "the power conferred on private parties to use mandatory pre-dispute arbitration clauses to avoid litigation in the courts has been abused"); *id.* at 1041 n.22 (citing Bard Bole, *As Arbitration Grows in Popularity, Courts Try*

rules providing for court-annexed ADR programs increasingly include provisions requiring parties to participate in court-ordered ADR "in good faith" or "in a meaningful manner."[19] Through their authority inherently, under procedural rules, or by legislation, courts sanction parties for violations of a good-faith-participation requirement such as for failing to attend or participate in an ADR process or engaging in a pattern of obstructive, abusive, or dilatory tactics.[20] Sanctions include the shifting of costs and attorneys fees, contempt, denial of trial de novo, and even dismissal of the lawsuit.[21] By contrast, participants in a private ADR setting lack comparable judicial oversight or regulation. In either forum, however, imposing participation requirements and sanctions for violations thereof creates tension with other policies designed to ensure confidentiality, third-party neutrality, process flexibility, and party autonomy.

This Article examines situations in which participants inside of an ADR procedure misuse the process, act in bad faith, or otherwise engage in improper conduct and further considers whether abuses of process or participant misconduct require disclosure, sanction, or independent liability.[22] Part II briefly describes the development and purpose of ADR and the trend toward, as well as judicial enforcement of, compulsory ADR. Part III explores fairness and process concerns with the expanded use of compulsory ADR, while Part IV examines the judicial and legislative responses to participant misconduct in court-annexed ADR. Part V focuses on legal theories that provide recourse against participant misconduct and process abuse in a private contractual, rather than court-annexed, ADR setting and examines the impact of confidentiality privileges on the viability of proving and sanctioning misconduct arising out of an ADR procedure. This Article asserts that participants in private ADR are subject, as a matter of contract law, to an implied obligation to participate in the ADR process in good faith. Accordingly, misconduct and abuse of an ADR process are actionable. Further, public policies favoring confidentiality in

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to Curb Abuses, LITIG. NEWS, Mar. 1998, at 3 ("This environment has resulted in efforts to draft arbitration clauses that clearly favor one party or, although facially neutral, have the effect of favoring one side of the dispute.")).

18. Similar concerns of misconduct or process abuses in the civil justice system are addressed through federal procedural rules such as Rule 11(providing penalties for frivolous filings or contentious or harassing or vexatious conduct in representations to the court), Rule 37 (covering abuses in discovery), and Rule 16(f) (authorizing sanctions if parties or their attorneys do not comply with terms of a court's pretrial conference order, are "substantially unprepared to participate," or fail "to participate in good faith"). FED. R. CIV. P. 11, 16(f), 37. Unlike ADR, the civil justice system also provides for a myriad of procedural and evidentiary protections, such as rights to discovery, jury trial, and appellate review.

19. *See infra* Part IV.C.

20. *See infra* Part IV.C; *infra* note 77; *see also* Richard D. English, Annotation, *Alternative Dispute Resolution: Sanctions for Failure to Participate in Good Faith in, or Comply with Agreement Made in, Mediation*, 43 A.L.R.5th 545, §§ 10-14.5, 22 (1996 & Supp. 2000).

21. *See infra* Part IV.C; *infra* note 77; English, *supra* note 20, §§ 10-14.5, 22.

22. *See infra* Part V. Professor Kovach provides an excellent analysis and endorsement of a good-faith-participation requirement in court-ordered mediation. *See* Kovach, *supra* note 13. This Article explores options for redressing misconduct or process abuse of various ADR processes in a private ADR setting where there is no court order or legislative rule mandating good-faith participation and where confidentiality privilege statutes may or may not apply.

ADR must be tempered to permit disclosure of participant misconduct in order to effectuate the good-faith obligation. The Article concludes by proposing a standard for a good-faith-participation requirement in private ADR, while balancing the competing policy concerns attendant with such an obligation, and presents a method for reconciling the need for good-faith participation, party autonomy, and confidentiality.

II. AN OVERVIEW OF ADR

A. Development and Intent

ADR is regarded by many as a welcome and desirable alternative to a costly, protracted, and adversarial process usually found in judicial litigation.[23] Voluntary binding arbitration and mediation are the most prevalent forms of ADR. In arbitration, the parties typically agree to present their cases before a third-party neutral, who, after hearing arguments and reviewing evidence, renders a final and binding decision upon the parties. Claimed benefits of arbitration are that it offers a more informal, less expensive, and efficient forum for resolving disputes.[24] The rules of evidence generally do not apply, discovery and motions practices are not used, and the decision rendered is final, with essentially no appeal.[25] The arbitrators may be selected for their expertise in a particular subject area,[26] albeit not necessarily for their

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23. *See* RISKIN & WESTBROOK, *supra* note 10, at 694-709 (citing NAT'L INST. FOR DISPUTE RESOLUTION, PATHS TO JUSTICE: MAJOR PUBLIC POLICY ISSUES OF DISPUTE RESOLUTION 3-4, 7-24, 30 (1983) (describing advantages and disadvantages of arbitration and mediation)); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 678 (1996) (noting that Chief Justice Warren Burger was a strong, early advocate touting ADR as a cheaper, quicker, and final forum to resolve disputes); Devine, *supra* note 3, at 89 (noting that ADR permits a fuller exploration of the underlying dispute, party control of the process, creative solutions, and "a more durable solution by restoring, preserving, or enhancing the parties' relationship").

24. *See, e.g.*, Arthur A. Chaykin, *Mediator Liability: A New Role for Fiduciary Duties?*, 53 U. CIN. L. REV. 731, 733 (1984) (describing advantages of arbitration). Others note that arbitration/ADR is not necessarily cheaper or more efficient. *See, e.g.*, Kim Dayton, *The Myth of Alternative Dispute Resolution in the Federal Courts*, 76 IOWA L. REV. 889, 924 (1991) (analyzing empirical data comparing federal districts that used mandatory arbitration with those that did not and finding that "ADR districts are not more efficient or effective in addressing their caseloads as a result of using ADR when compared with the peer districts"); Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 384 (noting that in most arbitrations and mediations, the parties must pay administrative fees that are generally higher than court filing fees as well as pay fees to the third-party neutral or panel of arbitrators).

25. *See* RISKIN & WESTBROOK, *supra* note 10, at 698-99, 709; Chaykin, *supra* note 24, at 734; Sabatino, *supra* note 7, at 1339; *see also* 9 U.S.C. § 10 (1994) (providing limited grounds for judicial review of arbitral awards).

26. RISKIN & WESTBROOK, *supra* note 10, at 699. Unless required by a specific court or program, a person may act as an arbitrator or mediator with neither licensing, nor an educational or law degree required. *See* Alexander v. Gardner-Denver, 415 U.S. 36, 57 (1974) (noting that arbitral process is "comparatively inferior to the judicial processes in the protection

expertise in the law. Arbitration has traditionally been used in labor and commercial arenas "where the parties have an ongoing relationship, disputes frequently arise, and resolution depends on the correct disposition of a specialized body of facts and law."[27]

Unlike arbitration, mediation is nonbinding, and the mediator has no power to impose settlement on the parties. The mediator, as a third-party neutral, ideally facilitates communication and negotiations between parties and provides a conducive forum to help them gain an understanding of each other's interests and to achieve a joint resolution.[28] Although at times criticized as compromising the sense of neutrality or even constituting the practice of law,[29] a mediator may also play the role of "evaluating" the strengths and weaknesses of a party's case. Despite the possibility of influence by a mediator, the parties retain ultimate decision making authority.[30] A mediated agreement does become an enforceable contract.[31]

The anticipated benefits of both forms of ADR include its cost-effectiveness, efficiency, confidentiality, party control, and even a therapeutic opportunity for consenting parties to tell their stories and have direct input and control over resolving conflicts.[32] Because of the frequent cost-prohibitiveness and win-or-lose risks of vindicating one's rights in a judicial forum, the intent was that willing parties could elect to use ADR to resolve their disputes.[33] A basic tenet of ADR is that both arbitration and mediation are consensual processes.[34]

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of Title VII rights" because, inter alia, the arbitrator generally has specialized knowledge in "the law of the shop, not the law of the land," whereas the courts have primary responsibility to interpret statutory or constitutional issues and ensure consistent application of important public rights).

27. Chaykin, *supra* note 24, at 734.

28. RISKIN & WESTBROOK, *supra* note 10, at 699-700; Chaykin, *supra* note 24, at 734-35 (defining mediation).

29. *See* BD. OF GOVERNORS, N.C. BAR ASS'N, GUIDELINES FOR THE ETHICAL PRACTICE OF MEDIATION AND TO PREVENT THE UNAUTHORIZED PRACTICE OF LAW (1999) (prohibiting evaluative mediation); Kimberlee K. Kovach & Lela P. Love, *"Evaluative" Mediation Is an Oxymoron*, 14 ALTERNATIVES TO HIGH COST LITIG. 31 (1996) (criticizing evaluative mediation); *see also News and Analysis: Virginia Guidelines on Mediation and Unauthorized Practice of Law Examined*, ADR REPORT, Oct. 13, 1999, at 2-4 (same); MASS. SUP. JUD. CT. R. 1:18, § 9(c)(iv) ("A neutral . . . shall not provide legal advice . . . .").

30. STONE, *supra* note 1, at 33; *see also* Sabatino, *supra* note 7, at 1297.

31. 1 ROGERS & MCEWEN, *supra* note 10, § 11:01, at 3.

32. *See also, e.g.*, RISKIN & WESTBROOK, *supra* note 10, at 699-700 (describing advantages of ADR); Robert A. Baruch Bush, *Efficiency and Protection, or Empowerment and Recognition?: The Mediator's Role and Ethical Standards in Mediation*, 41 FLA. L. REV. 253 (1989) (noting that the benefits of mediation include self-determined resolutions and empowerment); Sternlight, *supra* note 23, at 680 (noting that proponents of arbitration cite purported advantages of speed, economy, finality, privacy, and preserved relationships).

33. *See, e.g.*, UNIF. MEDIATION ACT, prefatory note (Proposed Draft Feb. 2001) (emphasizing fundamental principle of self-determination), *available at* http://www.pon.harvard.edu/guests/uma/febwebUMA.htm; Sherman, *supra* note 5, at 2083 (arguing that mediation is a voluntary, consensual process in which the parties are empowered to seek their own solutions with the aid of a mediator facilitator).

34. *See* Bernstein, *supra* note 2, at 2242-44.

B. Trend Toward Compulsory ADR

ADR has traditionally been used where both parties have agreed, either in advance or after a dispute has arisen, to submit their dispute to a private forum. In recent years, however, there has been substantial growth in the use of mandatory ADR in judicial and private contractual settings.[35]

1. Court-Annexed ADR Programs

State and federal courts increasingly order parties to utilize ADR processes, including arbitration, mediation, summary jury trial, and neutral third-party case evaluation, as a prerequisite to trial or even appellate review.[36] Although procedural rules, such as Federal Rule of Civil Procedure 16 (and state counterparts),[37] provide courts discretion to employ extrajudicial procedures for settlement purposes, the use of ADR in the civil courts has become more institutionalized and systematic. For example, the Alternative Dispute Resolution Act of 1998[38] requires all ninety-four federal district courts to implement ADR programs and authorizes the federal courts to compel parties' participation in mediation, early neutral evaluation, and arbitration.[39] Compulsory court-annexed ADR programs at the state levels are

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35. *See* STONE, *supra* note 1, at 799 (discussing court-annexed ADR programs); Haagen, *supra* note 4, at 1040-41; Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1, 5 (1997); Vail, *supra* note 4 (providing numerous examples of mandatory arbitration uses).

36. *See* STONE, *supra* note 1, at 799 (describing growth in court-connected ADR programs). Stone asserts:

> In recent years, mediation has been used increasingly in settings in which it is not the result of a voluntary agreement between two disputing parties but rather imposed by law or by a court. Some courts have adopted local rules requiring parties to attempt to mediate certain categories of disputes before they can have their dispute placed on a trial calendar. Also, some states have enacted laws requiring that all disputes of a certain type be mediated before they can be heard in court.

Id. at 34; *see also* 1 ROGERS & MCEWEN, *supra* note 10, § 5:03, at 146 (reporting that "[a]t least half the states now have mediation programs"); Peter S. Chantilis, *Mediation U.S.A.*, 26 U. MEM. L. REV. 1031 (1996) (surveying the status of ADR and mediation legislation and programs in fifty states).

37. FED. R. CIV. P. 16 (authorizing federal district courts to order litigants to participate in pretrial proceedings, including hearings to facilitate settlement, and to impose sanctions for failure to comply with pretrial orders).

38. 28 U.S.C. §§ 651-658 (1994 & Supp. IV 1998); *see also* Administrative Dispute Resolution Act, 5 U.S.C. § 571 (1994 & Supp. V 1999) (requiring federal agencies to each "adopt a policy that addresses the use of alternative means of dispute resolution and case management"); Civil Justice Reform Act of 1990, 28 U.S.C. § 473(a)-(b) (1994) (requiring "pilot" districts to refer appropriate cases to ADR programs); Sabatino, *supra* note 7, at 1299 (noting that "'ADR' has become a mantra of national policy, with governments at all levels promoting its use").

39. 28 U.S.C. § 652(a) (authorizing court-ordered ADR and requiring parties' consent to

similarly pervasive.[40]

2. Private Compulsory ADR

It has been a longstanding practice for merchants or commercial entities of relatively equal bargaining power to contract before a dispute arises for a mandatory private resolution in lieu of judicial adjudication.[41] A more controversial use of ADR lies in the use and enforcement of form-compulsory ADR or predispute binding-arbitration clauses that increasingly appear in ordinary consumer transactions, medical service provisions, and employment contracts.[42] These clauses not only preclude access to the public courts but also may set the terms of the ADR process, such as the payment of fees, the forum, and selection of the neutral and may contain other provisions restricting the limitations period, class actions, or damages recovery.[43]

C. Judicial Preference for ADR

The widespread use of private mandatory ADR provisions, particularly in consumer and employment[44] situations and where statutory and public-law disputes are involved, has been the subject of substantial debate.[45] Critics argue that, unlike

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court-annexed binding arbitration).

40. *See, e.g.*, Chantilis, *supra* note 36, at 1034-82 (surveying fifty states' rules regarding court-mandated mediation).

41. *See* Sarah R. Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. REV. 449, 459-60 (1996) (discussing reasons why merchants chose arbitration as their preferred means for resolving disputes); Sternlight, *supra* note 23, at 647 (asserting that the Federal Arbitration Act was envisioned to apply to consensual transactions between merchants).

42. Haagen, *supra* note 4, at 1041-42 (reporting that employers now subject millions of their employees to these agreements and that the EEOC "recently called the widespread use of mandatory arbitration agreements in employment 'the greatest threat to Civil Rights enforcement' today" (citation omitted)).

43. Sternlight, *supra* note 35, at 5; *see also* Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1148 (7th Cir. 1997) (holding arbitration clause in lengthy warranty at the bottom of computer box enforceable); Sagal v. First USA Bank, 69 F. Supp. 2d. 267 (D. Del. 1999) (enforcing arbitration clause in consumer class action based on amendment to credit cardholder agreement); Sternlight, *supra* note 23, at 691 ("Arbitration clauses are often buried in seemingly insignificant places, camouflaged as insignificant junk mail, written in very small print, and written in technical terms not likely to be meaningful to most.").

44. The Federal Arbitration Act ("FAA") contains ambiguous language excepting contracts of employment. 9 U.S.C. § 1 (1994). *See* Estreicher, *supra* note 15, at 1363-72 (noting controversy of whether the FAA provision excepts general employment contracts or only contracts pertaining to employment in the transportation industry). The Supreme Court recently granted review to determine whether the FAA applies to contracts of employment. Circuit City Stores, Inc. v. Adams, 194 F.3d 1070 (9th Cir. 1999) (only circuit holding that FAA does not apply to contracts of employment), *cert. granted*, 120 S. Ct. 2004 (2000).

45. *See* Thomas E. Carbonneau, *Arbitral Justice: The Demise of Due Process in American Law*, 70 TUL. L. REV. 1945, 1967 (1996) (arguing that arbitration "is being exploited as a tool

traditional agreements between commercial entities, many consumer or employee mandatory ADR agreements are not the product of an arm's-length transaction or true negotiation but are presented on a "take-it-or-leave-it" basis by the party in a position of economic power.[46] These clauses deprive parties of a jury trial, discovery, and appellate and due process rights inherent in a civil justice system.[47] Notwithstanding, courts uphold the vast majority of these provisions, guided by a substantial body of U.S. Supreme Court precedent pronouncing a strong national policy in favor of agreements to arbitrate or to resolve disputes in private forums.[48] The FAA[49] and

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by which to achieve a surreptitious reduction of justice services in our society"); Cole, *supra* note 41, at 452 (arguing that predispute arbitration agreements should be enforced only when the incentives and ability of the parties to negotiate is similar); Harry T. Edwards, *Alternative Disputes Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 684 (1986) (arguing that public-law issues should be removed from ADR); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Right Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 36 (stating "the Supreme Court has created a monster"); Sternlight, *supra* note 23, at 674-97 (arguing that the U.S. Supreme Court's preference for arbitration has no legitimate basis in legislative history and that neither economic nor other policy arguments support a policy allowing large companies to impose possibly unfair arbitration clauses on ignorant consumers and employees).

46. *See* Cole, *supra* note 41, at 475 (arguing that predispute arbitration agreements between employers and employees should not be enforced because employees have little incentive or ability to negotiate terms with an employer and routinely discount the likelihood that they will ultimately engage in a dispute with their employer); Haagen, *supra* note 4, at 1052 (noting that the traditional reasons for parties agreeing to arbitration, such as common interest, equal bargaining power, and ongoing relationships, are generally not existent in most consumer and employee cases); Sternlight, *supra* note 35, at 7 n.17 (noting the numerous contexts of consumer-binding contractual arbitration clauses and stating that "while binding arbitration is also well established in many commercial contexts where two equal parties bargain for arbitration rather than litigation to allow for application of industry standards, it is quite a different matter for companies to mandate arbitration in consumer and employee contracts" (citation omitted)).

47. Sternlight, *supra* note 35, at 26-81.

48. *See, e.g.*, Allied-Bruce Terminex Cos. v. Dobson, 513 U.S. 265 (1995) (concluding the FAA covers the full range of Congress's commerce powers and thus applying the FAA to an agreement between a homeowner and local pest-extermination company); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) ("[B]y agreeing to arbitrate, . . . a party does not forgo the substantive rights; . . . it only submits to their resolution in an arbitral, rather than a judicial, forum." (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985))); Rodriquez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 481 (1989) (citing federal policy favoring arbitration in holding that securities fraud claims are arbitrable); Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 227 (1987) (stating that because of the federal preference for arbitration, "the burden is on the party opposing arbitration . . . to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue"); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985) (finding federal statutory antitrust claim subject to foreign arbitration); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) (announcing that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration").

49. 9 U.S.C. §§ 1-16 (1994). The FAA provides for the judicial enforcement of contracts

basic contract doctrine are the basis upon which courts enforce mandatory agreements to use ADR in lieu of adjudication. For example, employers and industry saw the green light to use compulsory arbitration after the Court's 1991 decision in *Gilmer v. Interstate/Johnson Lane Corp.*,[50] which upheld the mandatory arbitration of an employee's federal statutory age-discrimination claim. The Court rejected the employee's argument that arbitration was inconsistent with statutory purposes, due to inadequate procedural protections, such as the risk of panel bias, limited discovery, lack of written opinions, or unequal bargaining power.[51] Since *Gilmer*, courts have routinely enforced mandatory arbitration clauses in employment and consumer contracts without regard to generalized arguments of process unfairness or that the plaintiff did not read, understand, or consent to the provision.[52] Just recently, the Supreme Court upheld enforcement of a mandatory arbitration clause that required consumers to submit to arbitration, even though the clause was silent as to the issue

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to arbitrate and governs the vast range of transactions involving interstate commerce. *Id.* § 2 ("[A] written provision . . . to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."); *see also* Stephen J. Ware, *Consumer Arbitration as Exceptional Consumer Law (with a Contractualist Reply to Carrington and Haagen)*, 29 MCGEORGE L. REV. 195, 202-10 (1998) (defending the contractual approach for enforcement of mandatory arbitration contracts and asserting that extant contract defenses are sufficient to protect consumers); *cf.* Sternlight, *supra* note 35, at 23 (arguing the Supreme Court interprets contractual defenses to arbitration far too narrowly).

50. 500 U.S. 20, 26 (1991).

51. *Id.*

52. *Id.* at 30; *see also* Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1485 (D.C. Cir. 1997) (acknowledging the potential inequities of arbitration in individual employment cases and the concerns about the competence of arbitrators and the arbitral forum to enforce worker protection laws but stating that *Gilmer* requires enforcement). The tide may be starting to shift, as more courts are beginning to more closely scrutinize arbitration agreements in the consumer and employment context. *See, e.g.*, Floss v. Ryan's Family Steak Houses, Inc., 211 F.3d 306, 315 (6th Cir. 2000) (holding prehire arbitration agreement between employee and private arbitration service hired by employer that authorizes provider to alter applicable rules and procedures without notice to or consent of employee is void for lack of consideration); Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 938 (4th Cir. 1999) ("Hooters materially breached the arbitration agreement by promulgating rules so egregiously unfair as to constitute complete default of its contractual obligation to draft arbitration rules and to do so in good faith."); *Cole*, 105 F.3d at 1485 (holding statutory claims not arbitrable where predispute arbitration agreement required employee to pay all or part of arbitrator's fees); *see also* Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 995 F. Supp. 190, 208 (D. Mass. 1998) (holding arbitration impermissible where one of the parties had no role in arbitrator selection); Broemmer v. Abortion Serv. of Phoenix, Ltd., 840 P.2d 1013 (Ariz. 1992) (holding adhesion contract that had patient arbitrate malpractice claim and waive jury trial right unenforceable as beyond patient's reasonable expectations). Various public and private ADR service providers have promulgated advisory rules to regulate arbitration and ADR procedures in certain consumer and employment contexts. *See* Task Force on Alternative Dispute Resolution in Employment, *A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising out of the Employment Relationship*, EU DISPUTE RESOL. J., Oct.-Dec. 1995, at 37-38 (calling for adequate discovery, right to representation by counsel, and impartial and diverse arbitrators).

of who pays and the consumer claimed arbitration expenses rendered her financially unable to vindicate her statutory rights.[53] While criticism against the Supreme Court's expanded application of the FAA to mandatory employment and consumer arbitration continues,[54] enforcement of these clauses is justified on a contractual theory. That is, the employee or consumer had a "choice" to reject the mandatory ADR clause and chose the job or service instead.[55]

III. FAIRNESS AND PROCESS CONCERNS WITH MANDATORY ADR

A. Potential Problems with Expanded Use of Compulsory ADR

Given that both court-ordered and contractual mandatory ADR practices are increasingly common, what can be done to ensure fairness within the context of these alternative processes? Whether by court order or private contract, the expanded use of ADR raises a number of serious concerns. For instance, many parties are not there "voluntarily," though voluntariness is one of the perceived tenets of making alternative resolution viable.[56] In many cases, the parties are of unequal bargaining power, usually one of whom is a "repeat player," with better familiarity of the process and selection of third-party neutrals.[57] The neutrals are "hired" by the parties and, unlike full-time judges, are "usually engaged in other occupations before, during, and after the time that they serve as [neutrals] . . . [and] purposely chosen from the same trade or industry [because of their] specialized knowledge."[58] Moreover, their prospect for future business depends on continued referrals—usually from the repeat player.[59] ADR lacks comparable judicial procedural protections and standards for

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53. Green Tree Fin. Servs. v. Randolph, 121 S. Ct. 513 (2000).

54. *See, e.g.*, Sternlight, *supra* note 23, at 661 (arguing that the U.S. Supreme Court's preference for arbitration has no legitimate basis in legislative history and that neither economic nor other policy arguments support a policy allowing large companies to impose possibly unfair arbitration clauses on ignorant consumers and employees).

55. *See* Ware, *supra* note 49, at 218. That a contract is adhesive is not alone grounds to invalidate. Badie v. Bank of Am., 79 Cal. Rptr. 2d 273, 277 n.5 (Cal. Ct. App. 1998).

56. Bernstein, *supra* note 2, at 2172-75; Haagen, *supra* note 4, at 1049.

57. *See supra* note 14.

58. CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES pmbl. (Am. Arbitration Ass'n 1999), *available at* http://www.adr.org/rules/ethics/code.html [hereinafter ARBITRATORS' ETHICS CODE].

59. A number of commercial contracts requiring ADR specify the ADR neutral or service provider. The advance contractual appointment of an inside ADR neutral raises obvious questions of potential bias. *See* Graham v. Scissor-Tail, Inc., 623 P.2d 165, 172, 176-77 (Cal. 1981) (severing as unconscionable for bias the selection provision of contract naming defendant's agent as arbitrator and stating that adhesion contracts are generally enforceable according to their terms, but must possess "'minimum levels of integrity'" (quoting Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 571 (1976))). Although provisions that specify an ADR service provider, such as the American Arbitration Association, are less susceptible to challenge, some suggest this arrangement is similarly questionable. A number of ADR service providers have entered into "exclusive contracts" with corporate entities for providing arbitrators in disputes brought by their employees; thereby allowing the corporate employer to unilaterally determine the pool of potential arbitrators. For example, JAMS/Endispute, a for-

appellate review. The process is confidential, outside of public or judicial scrutiny, and lacks enforcement mechanisms to address participant misconduct or abuse of the process.[60]

Because ADR use is largely unaccountable and the players unregulated, the potential to exploit bargaining power or abuse the process is ripe, with seemingly minimal consequences. The lack of meaningful checks for "policing" participants' behavior risks misconduct or abuse in the ADR process and undermines ADR's legitimacy or potential effectiveness.[61] Because ADR lacks the procedural protections of a judicial forum, such as rights to a jury trial, discovery, appeal, and judicial remedies for abusive conduct, the possibilities for unfairness cannot be overlooked.

B. Misconduct and Process-Abuse Scenarios in Compulsory ADR

What recourse does an individual have, for example, when the mediator or arbitrator fails to disclose a conflict of interest, bias, or lack of competence; fails to provide a party the opportunity to present its case; excludes the parties' lawyers from the session; engages in abuse or intimidation of a party; or unduly pressures a party to accept specific terms?

The public perception of a mediator pressuring a weaker party in settlement was at least raised by a news article announcing the mediated settlement in *Mena v. City of Denver*.[62] The city had requested mediation to attempt to resolve the family's action against the city for a police SWAT team no-knock raid made on the wrong house in which Ismael Mena, a Mexican immigrant, was shot dead in his own home.[63] Obviously, mediation out of the public eye was preferable for the city to avoid further adverse publicity. The news article reports that the former federal judge/mediator "kept telling us [the family] the ultimate value of the case was between $200-500K

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profit provider of ADR services, was recently in the news about its exclusive contract with MCI to serve as its neutral in all cases where MCI requires mediation or arbitration. *See* Caroline E. Mayer, *MCI's Fine Art of Fine Print: Arbitration Requirement Is Buried in Obscure FCC Filing*, WASH. POST, Dec. 14, 1999, at E1, E6 (noting that MCI customers are bound to arbitrate on the basis of arbitration rules inserted in FCC filings); John L. Guerra, *MCIW's Bill Arbitration Process Under Fire*, BILLING WORLD (Feb. 1, 2000) (describing MCI's exclusive contract for arbitration services with JAMS), *at* http://www.billingworld.com; *see also How Carriers Use Tariffs to Snare the Unsuspecting*, TELECOM MANAGER'S VOICE REP., Jan. 17, 2000, at 1, LEXIS, News Library, CURNWS File (stating that MCI's arbitration clause requires disputants to pay $1,000 fee plus share of arbitrator's $350 hourly rate). Parties opposing MCI questioned the genuine neutrality of a service provider with financial interests in the corporation. *See* Mayer, *supra*, at E6; *see also* Floss v. Ryan's Family Steakhouses, Inc., 211 F.3d 306, 315 (6th Cir. 2000) (acknowledging "potential for bias exists" where employer has exclusive contract with for-profit ADR service, which determines the pool of potential arbitrators, in disputes brought by employees); Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1485 (D.C. Cir. 1997) (speculating that any tendency to "lean" in favor of an employer "would be because the employer is a source of future arbitration business").

60. *See* Delgado et al., *supra* note 12, at 1368-74.

61. Haagen, *supra* note 4, at 1043-44, 1048.

62. *See* Bruce Finley, *$400 Settles Mena Case: Webb Steps In to Broker Deal in Fatal No-Knock Raid*, DENVER POST, Mar. 24, 2000, at 1A, LEXIS, News Library, DPOST File.

63. *Id.*

... and reminded us several times that he [the deceased] was really a potential felon by illegally living in the country."[64] Granted, the parties may have specifically requested the mediator to "evaluate" the case so that they could more realistically assess their positions. Yet here we had the mayor, the city of Denver's cadre of attorneys, and the judge/mediator (whose fees were likely paid by the city) against a solo practitioner and family who had sold their livestock to travel from Mexico to Denver.[65] The mediator's apparent repeated statements to the family that they lacked the resources to fight the city in federal court and that a jury would view the deceased's case unfavorably because of his illegal immigrant status are disturbing. While the family could have rejected the offer, the aura of authority and actions by the mediator obviously influenced their decision. Because of the secrecy of most ADR proceedings, we do not know if this type of mediator conduct is typical. Nevertheless, is this the appropriate way to resolve civil rights claims?[66]

The conduct of parties and attorneys in ADR proceedings presents similar concerns, such as when they: fail to attend or to participate in a scheduled ADR session; repeatedly cancel or delay scheduling an ADR session or appointing a neutral; show up without settlement authority or unprepared to discuss the law or facts relevant to the case; fail to present evidence or key witnesses; fail to explain their position or listen and respond to the other's contentions; secretly withhold information or repeatedly refuse reasonable requests for information and discovery; use ADR only for discovery purposes; continually delay the hearings; attempt to influence the third-party neutral; or lie or present false evidence, badger, belittle, or abuse the opposing party. Suppose a party brings a jury consultant to a mediation, identifying her as a "business associate," for the obvious purpose to size up witnesses for trial?[67]

Glaring examples of abuses in arbitration are found within the HMO industry, which routinely requires consumers to submit malpractice and coverage claims to arbitration but reportedly engages in dilatory and evasive conduct in the selection of the arbitrator, disclosure of information, and the arbitral proceeding. The court in *Engalla v. Permanente Medical Group, Inc.*[68] found that, although Kaiser Permanente's form arbitration contracts required mutual selection of an arbitrator within sixty days, statistical evidence showed that Kaiser delayed selection in ninety-nine percent of all medical malpractice actions to over two years.[69] In *Engalla*, Kaiser repeatedly delayed its obligation to select an arbitrator until the plaintiff died, thus reducing recoverable damages to nearly one-half.[70]

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64. *Id.*

65. *Id.*; *see also* Kevin Flynn, *No Knock Panel Won't Open Meetings*, DENVER ROCKY MTN. NEWS, Mar. 22, 2000, at 22A, LEXIS, News Library, RMTNEW File (noting federal government's investigation of civil rights violations against Mena).

66. *See, e.g.*, Delgado et al., *supra* note 12, at 1394-95 (asserting that members of minority and disadvantaged groups face a heightened risk of prejudice in ADR); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1559-64 (1991).

67. *See* Kovach, *supra* note 13, at 594 (describing a Texas mediation that may not be cited due to confidentiality).

68. 938 P.2d 903 (Cal. 1997).

69. *Id.* at 912-13.

70. *Id.* at 914.

Much commentary has focused on the impropriety of enforcing predispute arbitration agreements or mandatory ADR adhesion contracts on unwitting consumers and employees,[71] rather than on the conduct during the ADR process. Underlying these objections to mandatory ADR is the concern that all parties may not be treated fairly in the process or that their rights may not be adequately protected. Because of the secrecy of private ADR proceedings and restricted judicial recourse, it is difficult to determine exactly what happens once parties are inside an ADR process. In *Engalla*, the plaintiffs submitted to the compulsory private arbitration process, despite their lack of bargaining power or true consent to the provision appearing in the HMO's contracts.[72] When the plaintiffs tried to use the process, designed and administered by Kaiser, they encountered endless delay tactics.[73] Although the California Supreme Court held that sufficient evidence indicated that Kaiser had waived its contractual right to arbitration based upon its misconduct and dilatory tactics during the arbitration,[74] Kaiser effectively drew no judicial sanctions for its misconduct. The Engallas were permitted to pursue their claim in court, but the damage from Kaiser's arbitral misconduct had already been done.[75]

Engalla depicts a scenario likely to recur under the current widespread use of mandatory ADR contracts in consumer or employment transactions. If an individual consumer is contractually bound to submit a dispute to arbitration, but in that process the opposing party continuously delays the proceeding or neutral selection process, refuses reasonable discovery requests, or engages in a range of conduct just short of fraud, what are the individual's options? The FAA permits judicial assistance to compel arbitration,[76] but the problem is that arbitration itself is not working. The refusal to participate in an arbitration proceeding may be construed as a waiver of the arbitration obligation, thus freeing the aggrieved party to sue in court, as in *Engalla*. Yet a party is not assured that a court will deem misconduct to coustitute a waiver. In any event, waiver is inadequate to compensate for the lost time, expense, and aggravation incurred in enduring a misused ADR process. Similar misconduct or abuse of process in a mediation setting would also go unpenalized absent some ability to draw attention to a participant's misconduct and to seek judicial relief.

IV. JUDICIAL AND LEGISLATIVE RESPONSES TO ADR MISCONDUCT

The specific question raised is: what recourse does or should a party have for the misconduct, the bad faith, or the abuse of an ADR process by other participants, be it the third-party neutral or opposing party and counsel? The following examines how some courts and legislatures address participant bad faith or misconduct in the traditional judicial setting, as well as in court-annexed ADR proceedings, by imposition of a "good-faith-participation" requirement.

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71. *See, e.g.*, Sternlight, *supra* note 35.

72. *Engalla*, 938 P.2d at 909-10.

73. *Id.*

74. *Id.* at 922-24 (finding also sufficient evidence that HMO fraudulently induced patient to agree to arbitration to permit rescission of contract).

75. *Id.* at 908.

76. 9 U.S.C. § 4 (1994). A similar request for specific performance of an ADR agreement may be sought under contract-law principles.

A. Misconduct Sanctions in Civil Litigation

In a judicial setting, the Federal Rules of Civil Procedure authorize courts to impose sanctions against an attorney or party under Rule 11 for harassing and frivolous conduct in pleadings or representations to the court; under Rule 37 for misconduct in discovery; and under Rule 16 for misconduct or bad faith in the conduct of pretrial conferences and settlement negotiations.[77] Under 28 U.S.C. § 1927, a court can require "any attorney or other person admitted to conduct cases in any court of the United States . . . . who so multiplies the proceedings in any case unreasonably and vexatiously . . . . to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."[78] Parties also have the right to seek recusal of a judge for bias or conflicts of interest, or even a mandamus prohibiting certain action by a judge, and have the right to appeal.[79]

B. Current (Inadequate) Recourse for ADR Abuse—FAA and Contract Defenses

Existing laws and regulatory mechanisms to address participant misconduct in an ADR setting are inadequate. The current recourse under the FAA for arbitral or party misconduct, bias, or fraud is that the award is "set aside"—and the parties return for round two in the same system.[80] Contractual defenses of fraud, duress, undue

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77. FED. R. CIV. P. 11 ("By presenting to the court (whether by signing, filing, submitting or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying . . . . [that] it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."); FED. R. CIV. P. 37 (authorizing sanctions for failure to make disclosures, for false, evasive, incomplete or misleading disclosures, or failure to participate in good faith in development of discovery plan). Rule 16(f) authorizes sanctions

> [i]f a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is *substantially unprepared to participate* in the conference, or if a party or party's attorney *fails to participate in good faith.*

FED. R. CIV. P. 16(f) (emphasis added).

78. 28 U.S.C. § 1927 (1994).

79. *See, e.g., In re* Briggs, 217 F.3d 837, 837 (4th Cir. 2000).

80. The FAA permits a court to, in any of the following cases, vacate an arbitration award:

> (1) Where the award was procured by corruption, fraud, or undue means.
>
> (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> (4) Where the arbitrators exceeded their powers . . . .

9 U.S.C. § 10(a)(1)-(4) (1994).

Backed by the Supreme Court's preference for arbitration, courts narrowly interpret § 10. *See* Sobel v. Hertz, Warner & Co., 469 F.2d 1211 (2d Cir. 1972) (holding that arbitrators are not required to explain the reasons or findings underlying an award, even for purposes of the

influence, and unconscionability may be asserted to void or mediated settlement agreement.[81] Vacatur is a small consolation where a party is out for attorney fees, arbitrator or mediator fees, costs, and time, and yet must return to the same ADR forum, with the lack of procedural safeguards and regulation, for a repeated attempt to resolve the underlying claim. Merely having the outcome set aside does nothing to compensate the aggrieved party for the costs, fees, time, and anguish incurred in enduring an ADR proceeding tainted with bad faith or misconduct. Further, there is no penalty to the offending party and the odds are really in their favor that their misconduct, which may fall just short of fraud, duress, or unconscionability, will beat down the other side.[82]

C. Good-Faith or Meaningful-Participation Requirements in Court-Ordered ADR

To guard against abuse of court-annexed ADR programs, some courts and legislatures have imposed requirements that parties participate "in good faith" or "in a meaningful manner."[83] Some of these courts and legislatures have also adopted

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limited judicial review under the FAA); Morrow v. Jersey Capital Mktg. Group, [1995 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 98,634, at 91,895 (S.D.N.Y. 1995) (noting that courts impose a strict standard under the FAA to vacate an arbitration award on the basis of fraud or misconduct and that "[o]nly the most egregious error which adversely affects the rights of a party constitutes 'misconduct in refusing to hear evidence pertinent and material to the controversy' warranting vacatur of an award" (quoting Hunt v. Mobil Oil Corp. 654 F. Supp. 1487, 1512 (S.D.N.Y. 1987))).

81. *See* FDIC v. White, 76 F. Supp. 2d 736, 738 (N.D. Tex. 1999); Alan Kirtley, *The Mediation Privilege's Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest*, 1995 J. DISP. RESOL. 1, 51; Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775, 807 (1999) (noting that standard contract defenses are available in mediation). Under § 10 of the FAA, an arbitration award may be vacated where, inter alia, "the award was procured by corruption, fraud, or undue means," or the arbitrator displayed "evident partiality or corruption." 9 U.S.C. § 10(a)(1)-(2) (1994).

82. *See* Kovach, *supra* note 13, at 593; *see, e.g.*, Science Dev. Corp. v. Schonberger, 548 N.Y.S.2d 692, 693 (N.Y. App. Div. 1989) (recognizing that discovery of new evidence is generally not grounds for vacatur of an arbitration award but remanding due to party's failure to disclose critical evidence to the arbitrator); Kalgren v. Central Mut. Ins. Co., 418 N.Y.S.2d 1, 3 (N.Y. App. Div. 1979) (noting that party's lack of candor and failure to apprise arbitrator of relevant payment information did not constitute fraud but did exhibit misconduct violating good faith, warranting reexamination by the arbitrator).

83. *See, e.g.*, KAN. STAT. ANN. § 72-5430(c)(4) (1992) (requiring "participat[ion] in good faith in the mediation"); ME. REV. STAT. ANN. tit. 19, § 214.752 (repealed 1997) (requiring good-faith effort to mediate in mandatory domestic mediation); MINN. STAT. ANN. § 583.27 subds. 1, 3 (West 2000) (requiring good-faith mediation of a farm mortgage dispute until settlement or for up to sixty days, with authority in mediator to determine that a party is "not participating in good faith"); ILL. SUP. CT. R. 91(b) (requiring that all parties participate in court-annexed arbitration hearing in good faith and in a meaningful manner and providing that unanimous finding by the arbitral panel of bad faith be stated on the arbitration award); NEV.

policies that require third-party neutrals to submit "reports" to judicial officials concerning the parties' participation or that require the neutral's "evaluation" if the parties do not reach agreements.[84] Although few statutes or court orders mandating good-faith participation specify all conduct that constitutes compliance, courts have found violation of the good-faith requirement in conduct ranging from failure to attend, failure to bring a client with full settlement authority, and failure to present witnesses or relevant evidence and factual information at an ADR session, to dilatory tactics or a pattern of other conduct considered frivolous, obstructive, or abusive of the process.[85] Through its inherent authority or pursuant to legislation or court rules, courts have imposed a variety of sanctions, including costs, attorneys fees, contempt, denial of a request for a trial de novo, or dismissal for misconduct or bad faith in court-ordered ADR proceedings.[86]

ARB. R. 22(A) ("The failure of a party or an attorney to either prosecute or defend a case in good faith during the arbitration proceedings shall constitute a waiver of the right to a trial de novo"); *see also* Bernstein, *supra* note 2, at 2181 n.41 (citing examples of federal district local court rules requiring good-faith participation and providing for sanctions); Note, *Mandatory Mediation and Summary Jury Trial: Guidelines for Ensuring Fair and Effective Processes*, 103 HARV. L. REV. 1086, 1096-97 (1990) (noting that most mandatory mediation statutes or rules do not set forth participation requirements or specify how parties must behave).

84. *See, e.g.*, Gilling v. E. Airlines, Inc., 680 F. Supp. 169, 171 (D.N.J. 1988) (giving arbitrator determination of participation "in a meaningful manner"); Foxgate Homeowners' Ass'n v. Bramalea Cal., Inc., 92 Cal. Rptr. 2d 916, 918 (Cal. Ct. App. 2000) (accepting mediator's report of defense counsel's obstructive bad-faith tactics at court-ordered mediation session), *review granted*, 999 P.2d 666 (Cal. 2000); 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).

85. *See, e.g.*, *Gilling*, 680 F. Supp. at 170 (granting defendants' request for trial de novo and imposing sanctions on defendants for defendants' failure to participate in meaningful manner in court's compulsory arbitration program); New Eng. Merchs. Nat'l Bank v. Hughes, 556 F. Supp. 712, 714-15 (E.D. Pa. 1983) (holding that defendant's failure to appear at mandatory court-annexed arbitration hearing without explanation precluded defendant from demanding a trial de novo); Genovia v. Cassidy, 193 Cal. Rptr. 454, 458 (Cal. Ct. App. 1983) (upholding dismissal for "premeditated, intentional and purposeful course of action taken by [plaintiff] and his counsel to seek an avenue of escape from a clearly mandated arbitration procedure"); Wahle v. Medical Ctr. of Del., Inc., 559 A.2d 1228, 1233 (Del. 1989) (affirming dismissal based on plaintiff's failure to comply with discovery requirements imposed by state's medical malpractice arbitration procedures where plaintiff simply consented to default in arbitration and then filed a demand for trial de novo); *Aaron*, 698 N.E.2d at 190 (affirming trial court's refusal to allow plaintiffs to reject arbitrator's award and seek de novo trial where the arbitrators, in the mandatory court-ordered arbitration, found plaintiffs had not participated in good faith and in a meaningful way due to plaintiff counsel's "failure to present any evidence"); State Farm Ins. Co. v. Gebbie, 681 N.E.2d 595, 597 (Ill. App. Ct. 1997) (holding defendant's failure to appear at arbitration was failure to participate in good faith and upholding order denying defendant's rejection of arbitration award); Kalgren v. Cent. Mut. Ins. Co., 418 N.Y.S.2d 1, 3 (N.Y. App. Div. 1979) (stating that party has good-faith obligation and affirmative duty to inform arbitrator of relevant payment information); Garcia v. Mireles, 14 S.W.3d 839, 842-43 (Tex. App. 2000) (holding court has inherent power to dismiss plaintiff's suit as sanction for failure of party and her attorney to appear at court-ordered mediation).

86. *See supra* note 20. As a disincentive to requesting a trial de novo, some court-annexed

Many cases in which courts have imposed sanctions arose out of the sanctioned party's failure to abide by explicit conduct instructions in a court's ADR referral order. Thus, in *Nick v. Morgan's Foods, Inc.*,[87] where the defendant employer deliberately failed to provide a position memorandum to the mediator or to send a representative with authority to settle as required by the court's mediation referral order, the court sanctioned the employer for failure to participate in good faith.[88] The court emphasized that the absence of good faith was evidenced by the employer's actual conduct at the mediation and calculated decision to disregard the court's referral order, not by the parties' failure to reach settlement or by the hypothetical result that a defendant's verdict at trial would vindicate the employer's failure to participate in ADR.[89]

In other instances conduct has been deemed to violate statutory or court rules requiring good-faith participation in a court-annexed ADR proceeding. For example, the Illinois Supreme Court adopted Rule 91(b), requiring good-faith participation at mandatory arbitration hearings.[90] This rule provides, in part:

> (b) Good-Faith Participation. All parties to the arbitration hearings must participate in the hearing in good faith and in a meaningful manner. If a panel of arbitrators unanimously finds that a party has failed to participate in the hearing in good faith and in a meaningful manner, the panel's finding and factual basis therefor shall be stated on the award. Such award shall be *prima facie* evidence

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rules require the party requesting a new trial pay the other side's costs and fees in the new trial if the requesting party failed to improve its position in the new trial. 1 ROGERS & MCEWEN, *supra* note 10, § 7:05.

87. 99 F. Supp. 2d 1056, 1057 (E.D. Mo. 2000). The order referring parties to mediation required the parties to submit a confidential memorandum to the neutral, summarizing disputed issues and positions relative to liability and damages and identifying the corporate representative. The order also provided that all parties and counsel having full authority to settle "shall attend all mediation conferences and participate in good faith." *Id.* at 1058 (emphasis omitted). The employer did not provide the memorandum to the neutral and failed to send a representative with authority to settle. *Id.* At the ADR conference, the employee made two offers, both of which the employer rejected without any counteroffer. *Id.* Thereafter, plaintiff sought sanctions for costs and fees against the employer for failure to participate in good faith in the court-ordered ADR process. *Id.* The employer conceded that it did not comply with the referral order because to do so would have been "a waste of time" yet contended that the court lacked authority to impose sanctions to enforce an ADR referral order. *Id.* at 1059. The court based its authority to order and enforce good faith on Federal Rule of Civil Procedure 16 and its inherent authority to impose sanctions to control litigation and to preserve the integrity of the judicial process. *Id.* at 1060-61.

88. *Id.* at 1058-59.

89. *Id.* at 1061. The court had learned about the details of the mediation through the parties (and not the mediator) in two separate hearings in response to the court's show cause order and the plaintiff's motion for sanctions. E-mail from Rodney Sippel, Judge, Eastern District Court of Missouri, to Maureen Weston, Associate Professor of Law, University of Oklahoma College of Law (Mar. 6, 2001) (on file with author) (clarifying "that the mediator did not breach the confidentiality of the mediation").

90. *See, e.g.*, *Aaron*, 698 N.E.2d at 190 ("The arbitrators found the plaintiffs had not participated in good faith and in a meaningful way pursuant to [Illinois] Supreme Court Rule 91(b).").

> that the party failed to participate in the arbitration hearing in good faith and in a meaningful manner and a court, when presented with a petition for sanctions or remedy therefor, may order sanctions as provided in Rule 219(c), including, but not limited to, an order debarring that party from rejecting the award, and costs and attorney fees incurred for the arbitration hearing and in the prosecution of the petition for sanctions, against that party.[91]

Based on Rule 91(b), the court in *Employer's Consortium, Inc. v. Aaron*[92] affirmed the trial court's refusal to allow plaintiffs to reject an arbitration award and seek a trial de novo.[93] Plaintiffs' case had been referred to mandatory court-ordered arbitration, and the arbitrators found that the plaintiffs had not participated in good faith and in a meaningful way due to the plaintiffs' counsel's "failure to present any evidence."[94] The attorney had made only a brief opening statement and submitted a copy of the unverified complaint with attached exhibits to the arbitrators but declined to present any witnesses.[95]

The *Aaron* court noted that "committee comments to [Rule 91(b)] indicate the intent of the rule was to prevent parties and lawyers from abusing the arbitration process by refusing to participate."[96] This purpose is defeated whether a party's conduct is "the result of lack of preparation or an intentional disregard for the process."[97] The court stated:

> It is essential to the integrity of the mandatory arbitration process that the parties proceed at the arbitration hearing in good faith and subject their claims to the sort of adversarial testing that would be expected at trial. The trial court has discretion to enforce supreme court rules and impose sanctions on the parties as appropriate and necessary to promote the unimpeded flow of litigation and maintain the integrity of our court system.[98]

Even without a court rule or statutory provision requiring good faith or meaningful participation in a court-annexed ADR process, courts have inferred a good-faith-participation requirement and imposed sanctions pursuant either to their general authority under Federal Rule of Civil Procedure 16 (or state counterparts) or inherent authority to control the litigation process.[99] Findings of bad-faith conduct have been

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91. ILL. SUP. CT. R. 91(b).

92. 698 N.E.2d 189 (Ill. App. Ct. 1998); *see also* Hill v. Joseph Behr & Sons, Inc., 688 N.E.2d 1226, 1229 (Ill. App. Ct. 1997) (stating that arbitration panel need not find bad faith in order for trial court to deny party from rejecting arbitration award); *cf.* Webber v. Bednarczyk, 678 N.E.2d 701, 704 (Ill. App. Ct. 1997) (holding that arbitration panel is in best position to judge parties' participation in arbitration unless a transcript is provided).

93. *Aaron*, 698 N.E.2d at 193.

94. *Id.* at 190.

95. *Id.*

96. *Id.* at 191.

97. *Id.* at 193.

98. *Id.* The court also noted that the party subject to sanctions under the rule has "the burden of demonstrating that their actions were reasonable or justified by extenuating circumstances." *Id.* at 192.

99. *See* Nick v. Morgan Foods, Inc., 99 F. Supp. 2d 1056, 1059-60 (E.D. Mo. 2000); Garcia v. Mireles, 14 S.W.3d 839, 843 (Tex. App. 2000) (holding court has inherent power to

based on a party's conduct deemed to undermine the objectives of the court-ordered ADR process.[100]

Gilling v. Eastern Airlines, Inc.[101] spoke to the concern about parties simply "going through the motions" of a court-ordered ADR proceeding while intending to disregard the process and seek a trial de novo.[102] In the court-ordered arbitration, the defendant failed to appear. Defendant's lawyer failed to bring witnesses, merely summarized evidence, and told the arbitrator in response to a question on damages, "Do what you want, or, we don't care what you do, we won't pay it anyway."[103] The local rule required participation in "a meaningful manner," as determined by the arbitrator.[104] Based on the arbitrator's report of the defense's conduct, the court ruled that such conduct frustrates the rule's aim to produce nonbinding awards that would indicate likely trial results, stating:

> In order for the compulsory arbitration program to function properly, it is essential that the parties participate in a meaningful manner. This is particularly so in a case such as this in which one of the parties is a substantial corporation and the other party is one or more individuals. The purposes of the arbitration program are to provide the parties with a quick and inexpensive means of resolving their dispute while, at the same time, reducing the court's caseload.
>
> These purposes are thwarted when a party to the arbitration enters into it with the intention from the outset of rejecting its outcome and demanding a trial de novo. . . . Explicit in this court's arbitration program is the need for the parties to participate in good faith. Failure to do so warrants appropriate sanctions by the court.[105]

The *Gilling* court sanctioned the defendant for failure to participate meaningfully in the arbitration but granted defendant's motion for trial de novo,[106] thus avoiding the constitutionality of the more drastic sanction denying a trial de novo based on conduct in a court-ordered ADR proceeding. Some courts refuse to deny a trial request based on misconduct in an ADR proceeding and consider that the constitutionality of court-ordered ADR programs rests on the right to go to trial.[107]

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dismiss plaintiff's suit as sanction for party's failure to appear at court-ordered mediation); 1 ROGERS & MCEWEN, *supra* note 10, at § 7:06, at 40, 42-48; English, *supra* note 20, § 2.

100. English, *supra* note 20, §§ 15-21.

101. 680 F. Supp. 169 (D.N.J. 1988).

102. *Id.* at 170.

103. *Id.* at 169.

104. The local rule placed the determination of meaningful participation in the hands and discretion of the arbitrator, yet required court sanctions. *Id.*; *see also* Todd Shipyards Corp. v. Cunard Line Ltd., 735 F. Supp. 1463, 1468 (N.D. Cal. 1989) (stating facts regarding underlying bad-faith conduct); Wertheimer v. Acret, 5 Cal. Rptr. 2d 423, 424 (Cal. Ct. App. 1992) (affirming sanctions against plaintiffs for failing to participate in judicial arbitration in good faith by deliberately failing to produce expert witness, even though California arbitration rules had no explicit good-faith requirement).

105. *Gilling*, 680 F. Supp. at 169-70.

106. *Id.* at 171.

107. Note, *supra* note 83, at 1097 n.85; *see, e.g.*, Lyons v. Wickhorst, 727 P.2d 1019, 1023 (Cal. 1986) (holding that the court was not authorized to dismiss plaintiff's request for de novo trial based on plaintiff's failure to present any evidence at the mandatory arbitration hearing);

Other courts, however, view the right to trial as conditional upon a party's good-faith participation in pretrial and court-mandated ADR proceedings.[108]

The rationale underlying the good-faith requirement is that the purpose of the ADR program and potential for parties to achieve the benefits of ADR can only be effectuated if the parties engage in the process in a meaningful manner.[109] Without such a requirement, many litigants and attorneys may treat court-ordered ADR as one

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Schulz v. Nienhuis, 448 N.W.2d 655, 656 (Wis. 1989) (holding that "claimant's failure to participate in a mediation session within the statutory mediation period" did not require dismissal but court could determine other remedy); *cf.* Casino Props., Inc. v. Andrews, 911 P.2d 1181, 1183 (Nev. 1996) (holding that defendant's untimely responses to discovery requests that impeded preparation constituted failure to defend nonbinding arbitration in good faith and affirming trial court's refusal to grant a trial de novo). *But see* Chamberland v. Labarbera, 877 P.2d 523, 524 (Nev. 1994) (ruling that defendant's failure to conduct pre-arbitration discovery did not constitute lack of good faith and reversing denial of request for trial de novo); San-Dar Assocs. v. Adams, 643 N.Y.S.2d 880, 881 (N.Y. App. Term 1996) (ruling that party who did not appear, yet whose attorney actively participated at nonbinding arbitration hearing, was not "in default" and thus entitled to a trial de novo); Main St. Asset Corp. v. Cunningham, 778 P.2d 1003, 1004 (Or. Ct. App. 1989) (reversing order denying trial de novo to defendant who failed to attend the nonbinding arbitration hearing and whose attorney presented no evidence at the arbitration hearing).

108. *See, e.g.*, New Eng. Merchs. Nat'l Bank v. Hughes, 556 F. Supp. 712, 715 (E.D. Pa. 1983) (denying request for trial de novo where defendant offered no excuse for failing to appear at arbitration hearing and stating that the "goals of the arbitration program and the authority of this court would be seriously undermined if a defendant were permitted to refuse to attend an arbitration hearing and then demand trial de novo"); Genovia v. Cassidy, 193 Cal. Rptr. 454 (Cal. Ct. App. 1983) (affirming dismissal where plaintiff failed to appear at a court-ordered mandatory arbitration and plaintiff's counsel had asked the arbitrator for a "verdict" in favor of the defendant so that he could immediately ask for a trial de novo; the court found such conduct a substantially uncontroverted instance of premeditated, intentional, and purposeful conduct to avoid the mandatory arbitration procedure); Wahle v. Med. Ctr. of Del., Inc., 559 A.2d 1228, 1233 (Del. 1989) (affirming dismissal based on plaintiff's failure to comply with discovery requirements imposed by state's medical malpractice arbitration procedures where plaintiff simply consented to default in arbitration and then filed a demand for trial de novo); Honeywell Prot. Servs. v. Tandem Telecomm., Inc., 495 N.Y.S.2d 130, 131 (N.Y. Civ. Ct. 1985) (upholding arbitrator's dismissal of plaintiff's case based on plaintiff's failure to appear at court-ordered arbitration session and where its counsel, though in attendance, presented no evidence, but permitting plaintiff's request for trial de novo only on condition that plaintiff attest it would present no evidence at trial that it had not already produced at arbitration); Luxenberg v. Marshall, 835 S.W.2d 136, 141 (Tex. App. 1992) (upholding sanction striking a party's pleadings for bad faith due to the party's history of discovery abuse and violation of pretrial orders, including the failure to participate in a court-ordered mediation).

109. *See* Kovach, *supra* note 13, at 609, 618 (advocating a mediation-in-good-faith requirement be imposed on attorney-advocates in mediation); Tony Biller, Comment, *Good Faith Mediation: Improving Efficiency, Cost, and Satisfaction in North Carolina's Pre-trial Process*, 18 CAMPBELL L. REV. 281, 282 (1996) (asserting that "[c]reating and enforcing a duty of good faith in mediation conferences would decrease costs and improve the efficiency of litigation").

other hurdle in the path toward trial and simply a waste of time and money.[110] Despite these intentions, the requirement has generated significant controversy, raising the question whether such a participation requirement hurts more than it helps.[111] Sanctioned parties have challenged courts' imposition of sanctions based on the determination that a party has not acted in good faith in a court-annexed ADR proceeding.[112]

D. Objections to Good-Faith-Participation Requirements

Imposing participation requirements in a court-annexed ADR program creates tension with other policies designed to ensure confidentiality, third-party neutrality, due process, and party autonomy. For example, judicial determinations of bad-faith conduct may involve disclosures of the underlying ADR proceeding that seemingly infringe upon confidentiality privileges.[113] Other significant objections to sanctions for violation of a good-faith-participation requirement are that client attendance requirements impose undue burdens;[114] that requiring parties to present evidence in mandatory nonbinding ADR proceedings infringes upon work product privileges and forces disclosures of trial strategy;[115] and that financial disincentives and sanctions (particularly dismissal or contempt) for participation in a nonbinding process constitute coercion and deny a party the right to trial.[116] Finally, others contend that

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110. Kovach, *supra* note 13, at 594-96.

111. *See, e.g.*, 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, 31-33 (questioning the advisability of a good-faith requirement because of its impact on confidentiality in mediation).

112. *See infra* Part IV.D.

113. *See, e.g.*, *infra* Part V.F.

114. *Cf.* G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648, 654 (7th Cir. 1989) (rejecting arguments that federal district court order requiring represented parties to attend pretrial settlement conferences posed undue burden and exceeded court's pretrial conference authority and explaining rationale for requiring party attendance); Physicians Protective Trust Fund v. Overman, 636 So. 2d 827, 828-29 (Fla. Dist. Ct. App. 1994) (approving of trial court order compelling entire board of trustees of insurance company to attend mediation session as sanction for failing to originally send representative with full settlement authority).

115. *See* Strandell v. Jackson County, Ill., 838 F.2d 884, 888 (7th Cir. 1987) (holding trial court exceeded its Rule 16 authority in holding lawyer in contempt for refusing to participate in court-ordered nonbinding summary jury trial and ruling such compelled participation could upset a "carefully-crafted balance between the needs for pretrial disclosure and party confidentiality" in the discovery and work product privilege rules); *cf.* Fed. Reserve Bank v. Carey-Can., Inc., 123 F.R.D. 603, 606-07 (D. Minn. 1988) (holding trial court has power and discretion to compel attendance and participation in nonbinding summary jury trial and to close proceedings to the public).

116. 1 ROGERS & MCEWEN, *supra* note 10, § 7:05, at 27 (noting the recommendation of the Society for Professionals in Dispute Resolution that "'[c]oercion to settle in the form of reports to the trier of fact and of financial disincentives to trial should not be used in connection with mandatory mediation'" (quoting SOC'Y OF PROF'LS IN DISPUTE RESOLUTION, MANDATED PARTICIPATION AND SETTLEMENT COERCION: DISPUTE RESOLUTION AS IT RELATES TO THE COURTS recommendation 3 (1991))).

a good-faith standard is vague and does not define compliance.[117]

A recent case illustrating some practical and policy difficulties with enforcing a good-faith-participation requirement is *Foxgate Homeowners' Ass'n v. Bramalea California, Inc.*[118] In *Foxgate*, the defendants and their attorney failed to bring expert witnesses to a court-ordered mediation session specifically convened to have experts on both sides interact on construction defect issues.[119] At the mediation, the plaintiff's lawyer appeared with nine expert witnesses while defense counsel showed up late, alone, and with no experts.[120] After a few hours, the sessions were canceled due to the absence of defense experts.[121] The mediator later filed a report to the court recommending that defendants be sanctioned for their conduct, recounting defense counsel's conduct at the mediation session and stating that the attorney "has spent the vast majority of his time trying to derail the mediations . . . ."[122] The mediator reported that "[a]s a result of [defense counsel's] obstructive bad faith tactics, the remainder of the mediation sessions were canceled at a substantial cost to all parties."[123] Based upon the defense counsel's conduct at the mediation session and the mediator's report to the court of defendant's bad-faith conduct, the trial court imposed sanctions exceeding $30,000 against the defendant.[124]

The appellate court rejected defendant's argument that the trial court's reliance on the mediator's report, along with evidence of what happened during the mediation session, violated state statutory mediation-confidentiality rules that preclude admissibility of mediator reports and evidence of conduct occurring in a mediation proceeding.[125] Although the court reversed and remanded ouly for the trial court to prepare a written order supporting sanctions as required by a local procedural rule, it held that portions of the mediator's report about sanctionable conduct, along with evidence of statements made during the mediation relating to that conduct, could be

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117. *See id.* § 7.06, at 27-28; Sherman, *supra* note 5, at 2092; David S. Winston, Note, *Participation Standards in Mandatory Mediation Statutes: "You Can Lead a Horse to Water . . . .",* 11 OHIO ST. J. ON DISP. RESOL. 187, 193 (1996).

118. 92 Cal. Rptr. 2d 916 (Cal. Ct. App. 2000), *review granted,* 999 P.2d 666 (Cal. 2000).

119. *Id.* at 920. The court's case management order ("CMO") authorized the mediator to make any orders governing the attendance of parties at mediation conferences and provided that "[a]ll parties will make every best effort to cooperate in the mediation process." *Id.* at 919.

120. *Id.*

121. *Id.*

122. *Id.* at 920.

123. *Id.*

124. *Id.* at 922-23.

125. *Id.* at 928-29. The appellate court avoided an interesting objection raised by the defendants in the trial court, that the order to present their expert witnesses and disclose their findings at an ADR session violated the attorney work product rule, and held that the argument was raised only in passing, without discussion or citation to authority and thus waived. *Id.* at 924 n.8. The objection raises an intriguing question of whether a mediator, even pursuant to court authorization, can order parties to bring experts or otherwise present work-product-related evidence to a nonbinding court-mandated ADR proceeding. *See* Strandell v. Jackson County, Ill., 838 F.2d 884, 888 (7th Cir. 1987) (holding trial court lacked authority to require participation in court-ordered nonbinding summary jury trial where such participation was inconsistent with a "carefully-crafted balance between the needs for pretrial disclosure and party confidentiality" in the discovery and work product privilege rules).

considered when ruling on a sanctions motion.[126]

The *Foxgate* court acknowledged that statutory confidentiality privileges are essential and enable party disclosures or concessions necessary to settlement in mediation without fear that these statements will later be used in litigation.[127] Equally important is

> the meaningful, *good faith participation* of the parties and their lawyers. Without that, there will be few if any confidential statements to protect. These [confidentiality] evidentiary privileges were enacted to promote and encourage mediation. We do not believe the Legislature intended them as an immunity from sanctions, shielding parties to court-ordered mediation who disobey valid orders governing their participation in the mediation process, thereby intentionally thwarting the process to pursue other litigation tactics.[128]

The court ultimately cautioned that the confidentiality exception to report bad-faith conduct in an ADR proceeding is narrow and that "only such information as is reasonably necessary should be put before the court," and that "the report should be no more than a strictly neutral account of the conduct and statements being reported, along with such other information as required to place those matters in context."[129] Nonetheless, the court stated that the statutory confidentiality provisions were not intended to prevent a mediator from reporting to the court that counsel or a party had unilaterally and without notice violated the court's order to mediate in good faith or

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126. *Foxgate*, 92 Cal. Rptr. 2d at 928.

127. *Id.*

128. *Id.* (emphasis added). The court also noted, "[W]e are not the first court to hold that the plain language of the mediation confidentiality privileges must sometimes yield to other competing interests," and cited a case where a minor criminal defendant's "constitutional right to confront and cross-examine witnesses took precedence, permitting a mediator to be called to impeach a witness with statements the witness made during mediation." *Id.* at 928 n.14. The *Foxgate* court also posited:

> What if a party to a particularly fractious and emotional dispute attacked or threatened an opposing party or counsel during a mediation session? Should those parties and the mediator be prevented by the mediation confidentiality privileges from alerting the trial court to such conduct? We think not. . . .
>
> [T]he court would have no way of learning that its orders had been disobeyed or that some serious misconduct occurred which warrants judicial oversight, the court would be stripped of its inherent power to police and control its own processes.

Id. at 928-29.

129. *Id.* at 929 (advising trial court to disregard portions of mediator's report that contained extraneous information such as recommendations, conclusions, or characterizations of conduct or statements). The court stated that the provision preventing mediator reports focuses

> on preventing coercion. . . . [A] mediator should not be able to influence the result of a mediation or adjudication by reporting or threatening to report to the decisionmaker on the merits of the dispute or reasons why mediation failed to resolve it. Similarly, a mediator should not have authority to resolve or decide the mediated dispute, and should not have any function for the adjudicating tribunal with regard to the dispute, except as a non-decision making neutral.

Id. at 928 (quoting CAL. EVID. CODE § 1121 (West Supp. 1999)).

to preclude a court from considering either the mediator's report or evidence of such conduct when ruling on a sanctions motion.[130] As the court noted, "[i]f the mediator or an aggrieved party can not tell the court about another party's sanctionable conduct, it is hard to imagine who else would do so."[131]

By contrast, other courts hold that they are either without authority to order parties to participate in good faith in court-mandated ADR and refuse to consider reports of ADR misconduct on grounds of confidentiality, or simply decline on principle to interfere with the ADR process absent egregious conduct.[132] *Hill v. Imperial Savings*[133] declined to impose sanctions on a party who attended a mediation without full settlement authority absent grounds to award sanctions under Federal Rule of Civil Procedure 11. The court stated:

> Absent exceptional or egregious circumstances, this Court is unwilling to interfere with the mediation process because not only would this consume the Court's time but it would also subject the process to judicial review, thus placing a damper upon the likelihood for frank, open negotiations needed for future successful mediations."[134]

Similarly, *Strandell v. Jackson County*[135] vacated a contempt citation against a lawyer who refused to participate in a court-mandated summary jury trial on grounds that the order exceeded the court's pretrial conference authority and that the plaintiff's required participation would "affect seriously the well-established rules concerning discovery and work-product privilege."[136] The Iowa Supreme Court in *Graham v.*

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130. The court's decision, on certiorari to the California Supreme Court, is controversial for its willingness to consider mediation reports and evidence of conduct in a mediation in the face of statutory confidentiality provisions. Critics of *Foxgate* say that it creates a vague and unworkable standard for confidentiality by allowing consideration of mediator reports in a sanctions case. *See* Justin Kelly, *LA County Bar to Join Effort to Overturn* Foxgate *Ruling, at* http://www.adrworld.com (Oct. 13, 2000).

131. *Foxgate*, 92 Cal. Rptr. 2d at 928; *see supra* note 125.

132. *See, e.g.*, Willis v. McGraw, 177 F.R.D. 632, 633 (S.D. W. Va. 1998) (refusing to involve the court "under any circumstances in sorting out disagreements amongst the parties emanating from the mediation process"); Massey v. Beagle, 754 So. 2d 146, 147 (Fla. Dist. Ct. App. 2000) (noting that Florida Rules of Civil Procedure do not permit a court to sanction a nonparty for failure to participate in mediation in good faith); Dep't of Transp. v. City of Atlanta, 380 S.E.2d 265, 268 (Ga. 1989) (holding "a trial court [has the authority to] refer parties to mediation," but the order to engage in mediation in good faith would exceed the court's authority if construed as justifying contempt penalties if the mediation failed).

133. 852 F. Supp. 1354 (W.D. Tex. 1992).

134. Hill v. Imperial Sav., 1992 U.S. Dist. LEXIS 22185, at *74 (W.D. Tex. Nov. 24, 1992) (unpublished order); *see also* Tex. Parks & Wildlife Dep't v. Davis, 988 S.W.2d 370, 375 (Tex. App. 1999) (ruling that state mandatory mediation statute required attendance but not that parties negotiate in good faith or settle their dispute and that confidentiality statute required that communications and records made during the mediation precluded disclosure of negotiations to the trial court); *cf.* Tex. Dep't of Transp. v. Pirtle, 977 S.W.2d 657, 658 (Tex. App. 1998) (affirming sanctions against party who attended mediation but refused to participate).

135. 838 F.2d 884 (7th Cir. 1987).

136. *Id.* at 888; *see also In re* NLO, Inc., 5 F.3d 154, 156 (6th Cir. 1993) (ruling district

Baker[137] narrowly interpreted the "participation" requirement in farmer-lender mandatory mediation legislation to require only party attendance but not good-faith participation.[138] Although the attorney's conduct was "hostile to the [debtors], the mediator, and the mediation process" and the party's behavior at the session "ranged between acrimony and truculency" and "precluded any beneficial result to the parties from the mediation process," no sanctions were levied.[139] 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.[140]

V. LEGAL THEORIES TO REDRESS BAD FAITH AND PARTICIPANT MISCONDUCT IN PRIVATE ADR

In court-annexed mandatory ADR, a good-faith requirement by court or legislative rule, or simply the court's continuing jurisdiction, provides a minimal safeguard against bad-faith and abusive conduct. Although some courts may be reluctant to interfere with or inquire into ADR proceedings, and although confidentiality privileges may limit the extent of judicial inquiry, an aggrieved party in court-annexed ADR generally retains the right to a trial and the option to bring claims of bad faith to the court's attention. In private contractual ADR, similar protection and recourse are lacking though the concern for process abuse is more compelling because the process is entirely outside the auspices of the judicial system. With the focus on contractual ADR,[141] the following demonstrates that rights and obligations of good-faith participation exist as a matter of contract law. Thus, misconduct and process abuse in private ADR should be disclosed and penalized. Extreme and egregious cases of bad-faith misconduct in ADR may also give rise to independent tort liability. Having identified the good-faith-participation obligation, this section also examines how such a duty may be defined, measured, and enforced while considering policies according ADR confidentiality.

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court lacked authority to mandate participation in time-consuming and expensive summary jury trials).

137. 447 N.W.2d 397 (Iowa 1989).

138. *Id.* at 400-01.

139. *Id.* at 398, 401.

140. *Id.* at 400-01 (interpreting mediation statutory requirement of "participate"); *see also* 1 ROGERS & MCEWEN, *supra* note 10, § 7:06, at 29-30.

141. Parties may seek judicial assistance to enforce agreements to submit disputes to ADR but not for continued oversight during that process. Under the FAA a party can petition to compel arbitration and can raise contractual defenses to avoid enforcement of a compulsory agreement to arbitrate or to avoid enforcement of an arbitral award. 9 U.S.C. §§ 2, 4 (1994). Under contract law, a party may also seek specific performance of a private contractual agreement to submit disputes to ADR. Boutwell v. Kaiser Found. Health Plan, 254 Cal. Rptr. 173, 174 (Cal. Ct. App. 1988) (holding that "[i]n the arbitration context, a plaintiff may petition the superior court to assist her in expediting the proceedings by moving to appoint a neutral arbitrator, moving to set an arbitration date, moving to strike a defendant's answer, or entering a defendant's default").

A. Considering Common-Law Good-Faith Duties and Bad-Faith Liability in Private ADR

Legislation and rules requiring good-faith participation generally pertain only to court-annexed ADR programs. However, comparable duties to participate in a private ADR proceeding in good faith and redress for ADR misconduct also exist under the common law. For example, both the Uniform Commercial Code ("UCC") and *Restatement (Second) of Contracts* recognize a duty of good faith and fair dealing in the performance of a contract.[142] Although the duty does not generally extend to precontractual negotiations,[143] the duty applies to contractual relationships. Where disputing parties are bound by contract to resolve disputes by private ADR, the requisite contractual relationship exists to find, as a matter of contract law, that the parties are subject to an implied covenant of good faith and fair dealing to participate in the ADR process.[144]

Redress against misconduct or abuse of a private ADR procedure may also be available under other legal theories. For example, breach of the implied covenant of good faith and fair dealing theoretically gives rise to an action in tort for bad-faith

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142. *See* U.C.C. § 1-203 (2000); *id.* § 2-103(1)(b) (defining "good faith" as consisting of "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade"); RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. c (1981) [hereinafter RESTATEMENT] (stating that "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement"). The *Restatement* measures good faith under an objective standard. Thomas B. Romer, Comment, *"Negotiate in Good Faith as to What?" An Analysis of the Good Faith Negotiation Clause of the Telecommunications Act of 1996*, 69 U. COLO. L. REV. 257, 287-88 (1998); *see also* Mark Gergen, *A Cautionary Tale About Contractual Good Faith in Texas*, 72 TEX. L. REV. 1235 (1994); Richard E. Speidel, *The "Duty" of Good Faith in Contract Performance and Enforcement*, 46 J. LEGAL EDUC. 537 (1996).

143. U.C.C. § 1-203 applies the duty to existing contractual relationships but not to precontractual negotiations of arm's-length transactions. Failed negotiation liability has been actionable under other theories, such as (1) unjust enrichment, (2) misappropriation of ideas learned during the failed negotiations, (3) misrepresentations or specific promises made in precontractual negotiations, or (4) the existence of a specific duty or agreement to negotiate in good faith. E. ALLEN FARNSWORTH, FARNSWORTH ON CONTRACTS § 3.26a (2d ed. 1998); *see also* Hill v. Waxberg, 237 F.2d 936 (9th Cir. 1956) (affirming liability for misappropriation of ideas and design plans disclosed during negotiations); Itek Corp. v. Chicago Aerial Indus., 248 A.2d 625, 629-30 (Del. 1968) (holding that letter of intent obligated each side to attempt in good faith to reach a final agreement); Romer, *supra* note 142, at 283-85 (noting the most common reason for excluding precontractual negotiations from a good-faith duty is the "concern that limiting the freedom of negotiation might discourage parties from entering negotiations"). The exception for precontractual negotiations does not apply where disputing parties are already bound by contract to resolve disputes in an ADR proceeding.

144. STEVEN J. BURTON & ERIC G. ANDERSON, CONTRACTUAL GOOD FAITH: FORMATION, PERFORMANCE, BREACH, ENFORCEMENT §§ 2.1, 3.2.3 (1995) (noting independent cause of action for breach of implied covenant of good faith is generally available in all U.S. jurisdictions); *cf.* Chaykin, *supra* note 24, at 749-50 (stating that a party's contractual duty with the arbitrator/mediator also gives rise to implied duty of good faith and fair dealing, with the nature of the neutral's duty to be fair, unbiased, trustworthy, competent, and diligent).

breach, with potential recovery for tortlike damages.[145] As a general matter, courts have limited bad-faith actions to insurance cases due to the special relationship (characterized by elements of adhesion, public interest, and fiduciary responsibility) between the insurer and insured.[146] Interestingly, the tort claim arising out of the contractual implied covenant of good faith and fair dealing was created because contract damages were an inadequate deterrent to insurer misconduct in settlement situations.[147] Arguably, similar concerns are at stake (e.g., adhesion, public interest, waiver of jury trial, and due process protections) when more powerful parties impose and abuse private compulsory ADR procedures. In cases of egregious misconduct or abuse of a private compulsory ADR proceeding, a bad-faith claim may be warranted.[148] Recovery for mental anguish and punitive damages may also be available where egregious misconduct in an ADR process rises to the level of an independent tort, such as fraud or intentional infliction of emotional distress.[149]

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145. The tort of bad-faith breach of contract, with the availability of punitive damages, emotional distress, and attorney fees, was first recognized by the California Supreme Court "as a means of imposing liability on insurers that refused to accept reasonable settlements in such cases." FARNSWORTH, *supra* note 143, § 12.8, at 565; *see also* Best Place, Inc. v. Penn Am. Ins. Co., 920 P.2d 334 (Haw. 1996) (reviewing bad-faith cases and noting that the breach of duty of good faith and fair dealing in insurance cases "gives rise to an independent tort cause of action"); Michael H. Cohen, Comment, *Reconstructing Breach of the Implied Covenant of Good Faith and Fair Dealing as a Tort*, 73 CAL. L. REV. 1291, 1292 n.9 (1985) (noting that outrageous misconduct may be tortious even where parties have a contractual relationship).

146. FARNSWORTH, *supra* note 143, § 12.8, at 564-70. Although courts have been reluctant to extend the bad-faith tort to noninsurance contexts—such as employment relationships—absent a showing of a special relationship of trust and reliance or an independent tort for which punitive damages would be available, "[r]ejection of the tort of bad faith breach does not . . . imply rejection of the implied covenant of good faith." *Id.*

147. *Id.* at 564-65. In the 1980s, a few courts attempted to extend the bad-faith tort to cases in the noninsurance context. However, the approach has been rejected by most courts, limiting the tort to insurance cases due to the unique relationship between the insurer and insured. *Id.* at 566-69.

148. Attempts to extend the bad-faith claim to noninsurance cases has met strong judicial resistance, but the rationale appears to be based more on the pragmatic concern against expanding litigation than on theoretical legal distinctions with insurances cases (where a separate breach of fiduciary claim is available). The Delaware Supreme Court refused to extend bad-faith breach to an employment relationship, making the dubious distinction that an insurer has a "strong incentive to conserve its financial resources," whereas an employer has an incentive to maintain a reputation and to retain and motivate employees. E.I. DuPont de Nemours & Co. v. Pressman, 679 A.2d 436, 447 (Del. 1996); *see also* Foley v. Interactive Data Corp., 765 P.2d 373, 389-401 (Cal. 1988) (rejecting applieation of bad-faith breach to employment cases).

149. A participant who purposely causes emotional distress may be liable under a theory of intentional infliction of emotional distress. RESTATEMENT (SECOND) OF TORTS § 46 (1965) (noting that "[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm . . . results from it, for such hodily harm"); *see also* J.D. LEE & BARRY A. LINDAHL, MODERN TORT LAW: LIABILITY AND LITIGATION § 47.23, at 49 (rev. ed. 2000) (noting that while an insurer's denial or delay of payment may be permissible, "[w]hen an insurer employs various forms of coercion, intimidation, or harassment tactics against an

B. Practical, Legal, and Competing Policy Issues

Because contractual ADR takes place outside the judicial arena, few reported cases discuss conduct-participation issues in private ADR proceedings. However, misconduct arising out of a private ADR process has been the basis for seeking to avoid compulsory ADR proceedings, to void awards or agreements resulting from private ADR, or to establish fraud liability.[150] Frustrated by Kaiser Permanente's repeated and documented dilatory conduct, the plaintiffs in *Engalla* finally filed their medical malpractice claims in state court after years of attempting to arbitrate a resolution.[151] The court held that Kaiser's actions in delaying appointment of a neutral arbitrator constituted both fraud in the inducement of the arbitration provision and waiver of its right to compel arbitration.[152] The court's approach, in finding fraud in the inducement of the arbitration clause, was perhaps stretched to find some remedy but did not address the real problem, which was the defendant's conduct at the enforcement stage. Perhaps at the time the parties entered the contract, Kaiser did not intend to delay or obstruct the stipulated dispute resolution procedure. The misconduct occurred years after the parties entered into the contract when the plaintiffs sought to avail themselves of the arbitration process.[153] At that time the duty to participate in the contractually mandated ADR process in good faith was triggered and violated.[154] The case illustrates the inherent potential for misconduct and procedural abuse in private ADR systems as well as the need for redress against misconduct in a private ADR setting, regardless of initial intent in promulgating the mandatory ADR provision. This need for both redress and recognition of an independent cause of action for breach of a good-faith requirement, or, in egregious cases, for bad faith or tort liability based on ADR misconduct, must also be weighed against the competing policy concerns of confidentiality, flexibility in ADR, and satellite litigation.

Recognizing a duty of private ADR participants to engage in the process in good faith raises various practical, enforcement, and legal issues: (1) How is the duty of good faith defined and measured?; (2) How, when, and by whom will enforcement be made?; (3) What are the consequences, sanctions, or remedies?; and (4) Do confidentiality privileges within ADR limit the ability to prove a bad-faith claim?[155]

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insured, even to enforce its legal rights, the conduct may become extreme and outrageous enough so that liability will attach for the severe emotional distress which results").

150. *See* Todd Shipyards Corp. v. Cunard Line, Ltd., 943 F.2d 1056, 1063 (9th Cir. 1991) (affirming arbitrator's award of attorney fees under the bad-faith-conduct exception to the American rule, despite lack of contractual provision for attorney fees to prevailing party, as a consequence of defendant's improper and bad-faith conduct, which unnecessarily extended the arbitration).

151. *See supra* text accompanying notes 68-76 (discussing *Engalla*).

152. Engalla v. Permanente Med. Group, Inc., 938 P.2d 903 (Cal. 1997).

153. *Id.* at 908-09.

154. *Id.* at 921.

155. The question of whether third-party neutrals are immune from liability under doctrines of quasi-judicial immunity bars is beyond the scope of this Article. For an analysis of the debate on whether immunity should be accorded to mediators or arbitrators, see Chaykin, *supra* note 24, at 760-64 (arguing for mediator liability under a fiduciary duty standard). *See*

Against this backdrop lie competing policy concerns of whether recognizing a good-faith duty or a concomitant bad-faith liability claim as a result of private ADR conduct would induce satellite litigation and further undermine ADR goals of efficiency, flexibility, and confidentiality. While these questions appear to pose significant obstacles, a closer examination demonstrates that neither the practical and enforcement issues nor legal doctrines should preclude a requirement for fair conduct in an ADR process.

C. Analyzing Good-Faith Provisions in Related Contexts

Defining good-faith participation in an ADR context appears problematic because the concept seems vague and lacking in objective standards.[156] Such a requirement is useful only if it provides sufficient guidance to participants concerning their roles, responsibilities, and potential consequences. If a duty of good faith is implicit under contract law and arises out of the parties' contractual agreements to use ADR, then attempts must be made to define what constitutes good-faith participation in an ADR setting, regardless of whether one agrees that such a requirement or duty is good or bad. An analogous good-faith duty exists in a number of other statutes and procedural rules rooted in policies designed to ensure process integrity and fairness in bargaining and dispute resolution. Legislatures have not shied away from the need to make explicit a duty of good faith because of difficulties in defining all contours of the duty. Thus, the definitional discussions developed in other contexts help define what may constitute bad faith in an ADR process.

For example, the "duty to bargain in good faith" is codified in the National Labor Relations Act ("NLRA")[157] for collective bargaining between union and corporate

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also Arthur A. Chaykin, *The Liabilities and Immunities of Mediators: A Hostile Environment for Model Legislation*, 2 OHIO ST. J. ON DISP. RESOL. 47 (1986) (arguing for mediator liability under a fiduciary duty standard); Caroline Turner English, *Mediator Immunity: Stretching the Doctrine of Absolute Quasi-Judicial Immunity:* Wagshal v. Foster, 63 GEO. WASH. L. REV. 759 (1995) (arguing that a broad grant of immunity for mediators is unwarranted); Dennis R. Nolan & Roger I. Abrams, *Arbitral Immunity*, 11 INDUS. REL. L. J. 228 (1989) (offering justifications for arbitral immunity); Mark A. Sponseller, Note, *Redefining Arbitral Immunity: A Proposed Qualified Immunity Statute for Arbitrators*, 44 HASTINGS L.J. 421, 441-43 (1993) (recommending legislative adoption of a qualified immunity standard for arbitrators); Paul J. Dubow, *Tweaking Arbitration, Can the RUAA Fill the Gaps in the FAA?*, BUS. L. TODAY, Sept.-Oct. 1999, at 46 (noting debate of whether the Revised Uniform Arbitration Act should confer judicial immunity for arbitrators and arbitration institutions).

156. *See* Sherman, *supra* note 5, at 2093. Professor Sherman asserts that the good-faith-participation requirement is inherently ambiguous, is phrased in terms of subjective intent, and seems to require an examination into a party's motives rather than its objective conduct. *Id.* Yet Sherman advocates a seemingly indistinguishable "minimum meaningful participation" standard based on objective information and an exchange of position papers. *Id.* at 2094-96. While this seemingly more objective standard might be workable pursuant to rules in a court-annexed program, the obligation does not arise as a matter of law in a private ADR setting. The good-faith requirement does arise as a matter of law but can also be defined in objective standards. *See infra* Part V.D.

157. 29 U.S.C. §§ 151-169 (1994). In particular, § 158(d) describes the duties of both employers and employees

employers. Notably, the provision was added to counteract power imbalances in labor negotiations.[158] This duty does not require that the parties reach settlement, only that they genuinely participate in the process.[159] Courts determining whether a party acted in good faith have used both an objective and subjective test, examining whether the conduct fell within a list of enumerated per se violations,[160] or whether the conduct, under the "totality of the circumstances," violated the duty.[161]

Similarly, in the Telecommunications Act of 1996, Congress mandated that parties "negotiate in good faith . . . the particular terms and conditions of [interconnection]

> to bargain collectively [in] the performance of the mutual obligation of the employer and the representative of the employees to meet at [a] reasonable time[] and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . .

Id. § 158(d).

158. *See* Romer, *supra* note 142, at 270-74 (describing the history of the good-faith negotiation clause in labor law). In defining the meaning of good faith and fair dealing in a contractual context, Professor Farnsworth acknowledges:

> The analogy from ordinary contract negotiations to collective bargaining is, to be sure, less than perfect. In ordinary contract negotiations there is no public interest in a successful outcome that is comparable to the interest in preventing labor strife. The relationship between the parties is not necessarily a continuing one, and neither party is bound to deal exclusively with the other . . . . Nevertheless, helpful comparisons can be made, as courts applying the NLRA have recognized by drawing analogies to ordinary contract negotiations.

FARNSWORTH, *supra* note 143, § 3.26c, at 378. In a compulsory ADR context, parties are bound to deal with one another and the waiver of adjudicatory due process rights triggers public interest in ensuring a fair process. *See* Estreicher, *supra* note 15, at 1349-50 (arguing that essential safeguards are needed for compulsory arbitration).

159. Romer, *supra* note 142, at 272 (citing 29 U.S.C. § 158(d), which provides that the duty to bargain "does not compel either party to agree to a proposal or require the making of a concession"). The NLRA's statutory definition of good-faith bargaining encompasses a wide range of behavior and contemplates genuine participation in negotiation. Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369, 392-94 (1980); Archibald Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1442 (1958).

160. *E.g.*, NLRB v. Katz, 369 U.S. 736 (1962) (providing examples of per se violations); FARNSWORTH, *supra* note 143, § 3.26c, at 378 (defining categories of unfair dealing to include refusal to negotiate, imposing improper conditions or using improper tactics, making unreasonable proposals, nondisclosure, negotiation with others, reneging, and breaking off negotiations).

161. FARNSWORTH, *supra* note 143, § 3.26c, at 337. Farnsworth notes that the NLRA requires state of mind to be inferred from observable conduct:

> Because a party will rarely announce an intention to bargain in bad faith, courts have had to look for subtler manifestations such as refusing to disclose information relevant to the negotiations . . . engaging in dilatory tactics, or withholding agreement on trivial matters. Courts would have to show the same attention to all the circumstances in determining whether parties to ordinary contract negotiations have met a standard of fair dealing.

Id. (citations omitted); *see also* Romer, *supra* note 142, at 273.

agreements."[162] Following the NLRA approach, the Federal Communications Commission's ("FCC") implementing regulations also establish a two-part test to determine compliance with the duty to negotiate in good faith.[163] Liability is evidenced under an objective standard by specific prohibited actions constituting a per se violation of the duty to negotiate in good faith.[164] Alternatively, a separate subjective test for good-faith negotiation permits the adjudicating body discretion to sanction a wide range of conduct indicating whether a party "intentionally misled or coerced a party into reaching an agreement . . . [or] intentionally obstructed or delayed negotiations."[165]

Federal Rule of Civil Procedure 16(f) (and state counterparts) authorizes sanctions if parties or their attorneys do not comply with terms of a court's pretrial conference order, are "substantially unprepared to participate," or fail "to participate in good faith."[166] Thus, courts have imposed requirements for good-faith participation in pretrial conferences with defining factors including attendance by party principals, adequate preparation, providing timely discovery and position statements to opposing parties and the judge or neutral, obtaining settlement authority or advising opponents otherwise, and complying with other matters set forth in the court's pretrial order.[167]

Again, the UCC and *Restatement (Second) of Contracts* recognize a duty of good

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162. 47 U.S.C. § 251(c)(1) (Supp. IV 1998).

163. *See* Romer, *supra* note 142, at 273.

164. *Id.* at 268 n.64 (citing 47 C.F.R. § 51.301 (2000)). 47 C.F.R. § 51.301 defines per se violations of the duty to negotiate in good faith to include, inter alia,

> (5) Intentionally misleading or coercing another party into reaching an agreement that it would not otherwise have made;
>
> (6) Intentionally obstructing or delaying negotiations or resolutions of disputes;
>
> (7) Refusing throughout the negotiation process to designate a representative with authority to make binding representations, if such refusal significantly delays resolution of issues; and
>
> (8) Refusing to provide information necessary to reach agreement.

47 C.F.R. § 51.301(c)(5)-(8) (1999).

165. Romer, *supra* note 142, at 268 (emphasis omitted) (recognizing that subjective-based determination of good faith requires a case-by-case evaluation). The Bankruptcy Code also requires that a plan be proposed in good faith under 11 U.S.C. § 303(i)(2) (1994). *See In re* Bayshore Wire Prod., 209 F.3d 100, 106 (2d Cir. 2000) (noting that numerous tests have been developed for determining whether a creditor's Chapter 7 petition has been filed in "bad faith" for purposes of § 303(i)(2), which authorizes the imposition of damages against the creditor). Tests of bad faith include determining whether the filing was for an improper use or improper purpose based on what a reasonable person would have believed, or an objective analysis similar to the standard under Bankruptcy Rule 9011. *Id.*

166. FED. R. CIV. P. 16(f).

167. Francis v. Women's Obstetrics & Gynecology Group, P.C., 144 F.R.D. 646, 647-48 (W.D.N.Y. 1992) (noting that Rule 16 empowers a court to require parties to be prepared and to participate in good faith in a pretrial conference). "Thus, parties or their attorneys must evaluate discovered facts and intelligently analyze legal issues before the start of pretrial conferences." *Id.* (quoting *In re* Novak, 932 F.2d 1397, 1405 (11th Cir. 1991)); *see also* Kovach, *supra* note 13, at 611 ("Many courts agree that to impose a duty of good faith on negotiators does not mean that the parties must reach a settlement. Good faith simply requires that the parties make a genuine push towards a solution.").

faith and fair dealing in the performance of a contract, defined in the UCC as consisting of "honesty in fact in the conduct or transaction concerned."[168] The *Restatement* defines good-faith performance or enforcement of a contract as "emphasiz[ing] faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving 'bad faith' because they violate community standards of decency, fairness or reasonableness."[169]

In the insurance context, bad faith is defined to include situations where the insurer had no reasonable basis for its denial of, or refusal to, settle claims, failed to investigate a claim, or failed to keep the insured informed about all case developments, including settlement offers.[170]

Professional ethics rules also hold attorneys to a minimal obligation to act in good faith in negotiations and, by extension, in an ADR process.[171] The Model Rules of

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168. U.C.C. § 1-201(19) (2000). In the case of a merchant, good faith means "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." *Id.* § 2-103(1)(b); *see also* RESTATEMENT, *supra* note 142, § 205 (stating that "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement").

169. RESTATEMENT, *supra* note 142, § 205 cmt. a; *see also id.* cmt. d.

> Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified. But the obligation goes further: bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty. A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance.

Id.; *see also* Crisci v. Sec. Ins. Co., 426 P.2d 173 (Cal. 1967) (allowing recovery for mental distress in addition to recovery in excess of policy limits); FARNSWORTH, *supra* note 143, § 12.8, at 564-65 (citing Comunale v. Traders & Gen. Ins. Co., 328 P.2d 198 (Cal. 1958) (holding that insurer who fails to accept reasonable settlement offer from third party is liable for the entire judgment against insured though it exceeded policy limits)); *supra* Part V.A.

170. Kovach, *supra* note 13, at 612-13. A court has noted that signs of bad faith include situations in which the insurer's

> stated reason for denial makes no legal or factual sense; different reasons for denial are given on separate occasions; denial took place before there was any significant investigation of the claim; or an investigation took place, but the investigation was conducted so as to support a denial rather than to determine the validity of a claim . . . [as well as] failure to communicate with [or to provide information to] the insured.

Id. at 613; *see also* Fidelity & Cas. Co. v. Underwood, 791 S.W.2d 635, 647 (Tex. App. 1990); LEE & LINDAHL, *supra* note 149, § 47.15, at 47-40 to 47-41 (listing settlement practices that suggest possible grounds for bad-faith actions); *supra* Part V.A.

171. Biller, *supra* note 109, at 293 (asserting that "[a]ttorneys involved in court-mandated mediation owe a duty to uphold this process and to use it for its legitimate purposes" (citing N.C. RULES OF PROF'L CONDUCT pmbl. (1994) ("A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system . . . . [I]t is also a lawyer's duty to uphold legal

Professional Conduct require truthfulness in statements to others,[172] and fairness to opposing party and counsel.[173] Fairness requires truth in dealing with others on a client's behalf, as well as disclosure when necessary to avoid assisting in a client's fraud.[174] It is also professional misconduct for an attorney to "engage in conduct that is prejudicial to the administration of justice."[175]

D. Defining Good-Faith Participation in Mediation and Arbitration

Even recognizing other statutes and contexts in which a duty of good faith applies, admittedly a clear definition of such a duty in an ADR context is wanting. The tempting way out is simply to proclaim that the duty exists and then assume bad faith is "like obscenity—you know it when you see it."[176] Parties who are bound contractually to resolve disputes outside the judicial arena and in a private ADR forum have the requisite relationship to be held to an obligation to use the applicable ADR process in good faith. The duty to participate in an ADR process relates to the participants' conduct and does not create a duty for the parties to compromise or disclose work product or trial strategy.[177] This means that parties subject to a good-faith duty to participate are not precluded from self-interest, hard bargaining, or even refusal to make or accept a settlement offer.[178] How then is good faith measured and

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process." (alteration added))))); Kovach, *supra* note 13, at 622 (proposing model rule for lawyers requiring good-faith participation in the mediation process).

172. MODEL RULES OF PROF'L CONDUCT R. 4.1 cmt. 1 (1999).

173. *Id.* R. 3.4.

174. *Id.* R. 4.1.

> In the course of representing a client a lawyer shall not knowingly:
> (a) make a false statement of a material fact or law to a third person; or
> (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6 [regarding maintaining client confidences].

Id.; *see also* ROGER FISHER ET AL., GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 134 (2d ed. 1991) (stating that "[g]ood faith negotiation does not require total disclosure"); Gerald B. Wetlaufer, *The Ethics of Lying in Negotiations*, 75 IOWA L. REV. 1219, 1272 (1990).

175. MODEL RULES OF PROF'L CONDUCT R. 8.4 (stating that "[i]t is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation . . . [or] engage in conduct that is prejudicial to the administration of justice").

176. Kovach, *supra* note 13, at 600; Romer, *supra* note 142, at 289 & n.227 (characterizing Professor Robert S. Summers's description of good faith as the absence of bad-faith conduct, *see infra* note 180, as really saying, "I can't tell you what bad faith is except that I'll know it when I see it" (quoting Steven J. Burton, *More on Good Faith Performance of a Contract: A Reply to Professor Summers*, 69 IOWA L. REV. 497, 499 (1984) (developing a model for analysis to identify not only the existence of bad faith, but also of good faith, based on abuse of discretion to recapture lost opportunities))).

177. *See* Nick v. Morgan's Foods, Inc., 99 F. Supp. 2d 1056, 1061 (E.D. Mo. 2000) (good-faith participation in ADR does not require settlement).

178. Dawson v. United States, 68 F.3d 886 (5th Cir. 1995) (holding that good faith does not require a party to settle or to make a settlement offer); Feldman v. Allegheny Int'l, Inc., 850 F.2d 1217, 1223 (7th Cir. 1988). The *Feldman* court held:

defined in a process where the parties are in conflict and where advocacy, self-interest, zealous representation, and hard bargaining are still acceptable and part of the process?

Particularly because advocacy is still necessary in both arbitration and mediation, bad faith needs to be defined and distinguished from competitive negotiation behaviors, self-interest, or even hard bargaining.[179] As important as defining "good-faith participation" is clarifying what such a requirement excludes.[180] For example, failure to settle or even mere refusal to settle is not bad faith.[181] Hard bargaining and competitive negotiation on substantive matters or the merits should be distinguished from conduct that is obstreperous, coercive, and calculated to thwart the ADR process.[182]

The good-faith-participation duty pertains to the manner of the ADR proceeding and to conduct that frustrates the process, not to the merits of the underlying claims or defenses, to the substance of offers, or to whether the parties settled.[183] The objective or minimal aspects of good-faith participatiou should be clarified and distinguished from advocacy. Other conduct, when viewed in totality to evidence frustration or circumvention of the ADR process, should also be examined. In this respect, the two-step approach of the NLRA seems most helpful.

> In a business transaction both sides presumably try to get the best of the deal. That is the essence of bargaining and the free market . . . . So one cannot characterize self-interest as bad faith. No particular demand in negotiations could be termed dishonest, even if it seemed outrageous to the other party. The proper recourse is to walk away from the bargaining table, not to sue for 'bad faith' in negotiations.

Id.; *see also* Kovach, *supra* note 13, at 610 (clarifying that good faith does not require reaching an agreement, having to disclose everything about one's case, or "being nice").

179. *See* Peter Robinson, *Contending with Wolves in Sheep's Clothing: A Cautiously Cooperative Approach to Mediation Advocacy*, 50 BAYLOR L. REV. 963 (1998) (contrasting competitive and cooperative negotiation and mediation advocacy styles and behavior from bad faith).

180. Robert S. Summers, *"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195, 200-07 (1968) (using an "excluder" analysis to conceptualize the good-faith obligation and arguing that good faith is best defined by classifying instances of bad faith); *see also* RESTATEMENT, *supra* note 142, § 205 cmt. a (adopting Summers's excluder approach and providing example categories indicating bad-faith performance).

181. *See* Triplett v. Farmers Ins. Exch., 29 Cal. Rptr. 2d 741 (Cal. Ct. App. 1994) (holding insurer could not be punished for insisting on its constitutional right to a jury trial in lieu of settlement even if its motives were improper where there was no evidence the insurer impeded the progress of the litigation or refused to participate in pretrial discovery or conferences).

182. The duty of good-faith participation relates to the requirement to participate in the ADR process, not a requirement to negotiate substantive terms in good faith. Thus, a refusal to make an offer of compromise, for example, should not be construed as bad faith and may very well be justified by the merits of the case.

183. *See* Kovach, *supra* note 13, at 603.

1. Minimal Per Se Aspects of Good-Faith Participation

An objective standard of what constitutes bad-faith participation in ADR should identify minimal aspects of good-faith participation or, as a corollary, specify prohibited conduct akin to the NLRA's list of per se violations, to provide notice of minimal aspects of good-faith participation. This would include conduct such as the failure of lawyers or principals to attend, sending negotiators without authority, refusal to provide necessary and unprivileged information or witnesses, and repeated delays and postponement of meetings or hearings.[184]

Additional objective conduct inherent in good-faith participation may vary with the type of ADR procedure used. Because of the adversarial nature of arbitration and direct negotiation context of mediation, the standard in the two processes may slightly differ. In arbitration, minimal good-faith participation includes timeliness in selecting arbitrators and scheduling the arbitration, reasonable exchange and disclosure of relevant information, the right to present one's case with or without counsel, sharing reasonable expenses, and a written award.[185] In mediation, personal attendance by parties with authorization to settle, preparation and exchange of requested documents, engaging in discussions, making no misrepresentations, and remaining at the mediation for a reasonable time are minimal participation obligations.[186]

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184. Sherman, *supra* note 5, at 2096-97. Sherman recommends that minimal participation in mediation requires that parties briefly state their positions, listen to the other side, and react to the other side's positions. *Id.* More participation and case presentation may be necessary for minimal participation in other evaluative forms of ADR, such as arbitration and summary jury trial, but the requirement should not interfere with trial strategy or discovery and work product privileges. *Id.* Minnesota's Farmer-Lender Mediation Act requiring good-faith participation identifies conduct that violates the requirement, including:

> (1) a failure on a regular or continuing basis to attend and participate in mediation sessions without cause; (2) failure to provide full information regarding the financial obligations of the parties and other creditors . . . ; (3) failure of the creditor to designate a representative to participate in the mediation with authority to make binding commitments within one business day to fully settle, compromise, or otherwise mediate the matter; (4) lack of a written statement of debt restructuring alternatives and a statement of reasons why alternatives are unacceptable to one of the parties; (5) failure of a creditor to release funds from the sale of farm products to the debtor for necessary living and farm operating expenses; or (6) other similar behavior which evidences lack of good faith by the party.

MINN. STAT. ANN. § 583.27 subd. 1(a) (West 2000).

185. *See* Estreicher, *supra* note 15, at 1349-50 (defining essential safeguards to ensure a fair hearing in arbitration to include standards of competency for arbitrators, a "reasonable place for the holding of the arbitration," fair methods for obtaining information from the other side, a fair method for sharing costs, a right to counsel, "a range of remedies equal to those available from the other side, a range of remedies equal to those available through litigation," a written award, and judicial review (citing COMM'N ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, U.S. DEP'T OF COMMERCE & U.S. DEP'T OF LABOR, REPORT AND RECOMMENDATIONS 31 (1994))).

186. Kovach, *supra* note 13, at 622-23. Professor Kovach proposes a statutory basis requiring all parties and their counsel to participate in mediation in good faith. In addition to

Third-party neutrals are also subject to a good-faith duty by undertaking a contractual role to act as an ADR neutral to the parties. The duties of mediators and arbitrators set out in various ethical codes and standards promulgated by organizations such as the American Arbitration Association provide guidelines for determining the good-faith participation of neutrals.[187] Although these codes provide no enforcement mechanism, they can provide a working definition of good faith.[188] These standards oblige neutrals to uphold the integrity and fairness of the respective ADR processes and to comply, inter alia, with basic duties of impartiality, confidentiality, and competence.[189] A willful violation of these duties, bias, or undue pressure tactics to coerce settlement would violate a good-faith requirement and might provide grounds for independent third-party neutral sanction or liability.[190]

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requiring compliance with the terms and provisions of applicable statutes, rules, or court orders for mediation, Kovach defines "good faith" in mediation to include, inter alia,

> (d) Personal attendance at the mediation by all parties who are fully authorized to settle the dispute, which shall NOT be construed to include anyone present by telephone;
>
> (e) Preparation for the mediation by the parties and their representatives, which includes the exchange of any documents requested or as set forth in a rule, order, or request of the mediator;
>
> (f) Participation in meaningful discussions with the mediator and all other participants during the mediation;
>
> (g) Compliance with all contractual terms regarding mediation which the parties may have previously agreed to;
>
> (h) Following the rules set out by the mediator during the introductory phase of the process;
>
> (i) Remaining at the mediation until the mediator determines that the process is at an end or excuses the parties;
>
> (j) Engaging in direct communications and discussion between the parties to the dispute, as facilitated by the mediator;
>
> (k) Making no affirmative misrepresentations or misleading statements to the other parties or the mediator during the mediation; and
>
> (*l*) In pending lawsuits, refraining from filing any new motions until the conclusion of the mediation . . . .

Id. (emphasis in original).

187. *See, e.g.*, ARBITRATORS' ETHICS CODE, *supra* note 58; MODEL STANDARDS, *supra* note 8, *cited in* KOVACH, *supra* note 1, app. B.

188. *See* ARBITRATORS' ETHICS CODE, *supra* note 58; MODEL STANDARDS, *supra* note 8, *cited in* KOVACH, *supra* note 1, app. B; Jamie Henikoff & Michael Moffitt, *Remodeling the Model Standards of Conduct for Mediators*, 2 HARV. NEGOT. L. REV. 87, 106 (1997) (recommending standards of neutrality, self-determination, and informed consent).

189. *E.g.*, MODEL STANDARDS, *supra* note 8, R. II, IV, V (noting mediators' duties to comply with the principle of self-determination, to conduct the proceedings fairly and diligently, and to avoid coercion and pressuring parties to settle); Chaykin, *supra* note 24, at 744-54 (discussing mediator ethical duties).

190. Chaykin, *supra* note 24, at 762-63 (stating that "bad faith" in mediation should be defined as "palpable bias" towards one of the parties); *see supra* note 155 (referencing debate in whether to accord immunity to third-party neutrals).

2. A Totality-of-the-Circumstances Test of Conduct Fairness

Because a list of prohibited conduct cannot usually anticipate all violations, a test of good-faith participation should include an alternative totality-of-the-circumstances standard evidencing process abuse. Violations of the good-faith requirement can be measured objectively by a course of conduct abusive of the process, such as using the ADR process for the sole purpose of discovery or to outspend or harass the other side, and other coercion or pressure tactics.[191] Sanction provisions under the procedural rules provide similar discretion to penalize process abuse in the judicial system.[192]

In advocating a good-faith standard in mediation,[193] Professor Kovach identified examples of bad faith and process abuse in mediation.

> One specific example of process abuse is the request of mediation for the sole purpose of discovery .... Similarly, mediation has been used only to assess the other side in terms of their potential effectiveness at trial. Another objective is to wear down a litigant where one party is more financially able than the other. By scheduling a mediation or urging a court to order the process where there is no intent to settle, but where the parties share the expense equally, the process can drain the other's resources so that the financially challenged party must choose between paying for the mediation or the attorney.[194]

Other indicia of bad-faith participation include "unexpected delays in answering correspondence; postponement of meetings; sending negotiators without authority to settle; repudiating commitments made during bargaining; shifting positions; interjecting new demands; insisting on a verbatim transcript of the negotiation; refusal to sign a written agreement; unilateral action; and withholding of valuable information."[195] Bad faith is also indicated by a party structuring or forcing a patently unfair ADR process[196] and by the refusal to identify witnesses or to offer any evidence or response.[197]

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191. FARNSWORTH, *supra* note 143, § 3.26c, at 337 (noting that bad-faith intent must be inferred from observable conduct "[b]ecause a party will rarely announce an intention to bargain in bad faith"); Kovach, *supra* note 13, at 593-94.

192. *E.g.*, FED. R. CIV. P. 11(b) (authorizing courts to measure conduct deemed frivolous, harassing, or vexatious based upon an objective inquiry reasonable under the circumstances); FED. R. CIV. P. 37 (authorizing sanctions for abuses in the discovery process).

193. Kovach, *supra* note 13, at 597-98.

194. *Id.* at 593-94.

195. *Id.* at 612 (citing Cox, *supra* note 159, at 1418-25).

196. *E.g.*, Floss v. Ryan's Family Steak Houses, Inc., 211 F.3d 306, 315 (6th Cir. 2000) (holding that predispute arbitration agreement between employee and arbitration service provider engaged by employer, which gives provider "unfettered discretion" to alter applicable rules and procedures without notice of consent of employee, is void for lack of consideration); Engalla v. Permanente Med. Group, Inc., 938 P.2d 903 (Cal. 1997).

197. *See* Wahle v. Med. Ctr. of Del., Inc., 559 A.2d 1228, 1233 (Del. 1989) (considering the sanctioned party's conduct throughout the entire period and stating a "seven-month abuse of the arbitration process was followed and compounded by ten months of inaction, disregard, and breach of pretrial scheduling, discovery and production orders of the court, compliance with which is essential for the proper functioning of the judicial system").

E. Enforcement, Sanctions, and Remedies

Determining appropriate enforcement, sanctions, and remedies for breach of a duty to participate in private ADR in good faith poses both practical and policy considerations, particularly regarding the role of the neutral and of confidentiality.

1. How, Where, and When?

Enforcement of the good-faith-participation requirement in the ADR proceeding itself by the neutral, who likely witnesses the alleged misconduct, or even a finding by the neutral of a party's bad faith in the ADR process, would be most efficient promptly to address misconduct and party or process abuse.[198] In arbitration, the arbitrator could sanction a party or attorney for process abuse, unless the parties prescribe the arbitrator's powers otherwise. In mediation, however, a private neutral lacks power to impose sanctions or conduct requirements on the parties, other than to encourage the parties to commit to proceed in good faith or to terminate the session.[199] The parties may agree as part of their contract with the neutral to authorize the neutral to enforce the good-faith requirement and specify the procedure for enforcement (such as a progressive discipline/warning process) and sanctions.[200] Action by the neutral regarding party conduct in an ADR proceeding, however, may taint the parties' view of the neutral's impartiality, impair full use of the process, and infringe on confidentiality protections or assurances.[201]

The alternative is judicial recourse for violation of the duty of good faith in a separate lawsuit. While seemingly antithetical to ADR ideals, satellite litigation based on private ADR misconduct may be warranted in order to ensure enforcement and conduct fairness in ADR. The timing question is whether an action may be brought during the process or after the ADR proceeding is concluded. By waiting, the conduct may persist and the aggrieved party may be required to endure additional costs, frustration, and abuse. Yet running to the courts in the middle of an ADR process complaining of lack of good faith might induce unwarranted litigation and gamesmanship that could potentially be resolved in the ADR proceeding. To deter disgruntled parties from unwarranted claims of bad faith, the equivalent of an exhaustion requirement, fee-shifting or "safe harbor" provision used to discourage sanction threats should apply.[202] Thus, as a prerequisite to judicial relief, a court

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198. In court-ordered ADR, either the court or the third-party neutral, subject to the court's review, may determine whether a party violated the good-faith duty and impose sanctions accordingly. *See* Alfini, *supra* note 15, at 63; Biller, *supra* note 109, at 292.

199. For example, some statutes obligate a mediator to terminate a session "when it appears continuation would harm or prejudice any party." OKLA. STAT. ANN. tit. 12, ch. 37, app. A § B(1)(e)(1) (West 1993).

200. *See* Kovach, *supra* note 13, at 617-18 (suggesting another option "of automatic sanctions, which could be provided through a liquidated damages provision in the agreement to mediate").

201. Parties may be reluctant to engage in necessary dialogue and fully to disclose their positions, case strengths, and case weaknesses for fear that such disclosure could be construed or used as evidence of bad faith.

202. *See, e.g.*, FED. R. CIV. P. 11(c)(1)(a) (providing that a motion for sanctions "shall not

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.

2. Remedies and Sanctions for Bad-Faith Misconduct in ADR

Sanctions for violation of good-faith or participation standards in court-annexed programs include costs, neutral and attorney fees, contempt, denial of trial de novo (amounting to confirmation of an arbitrator's award), and dismissal of the pending litigation.[203] Under the Federal Rules of Civil Procedure, a court is authorized to impose a variety of additional sanctions for a party's failure to participate in good faith in pretrial conferences or with discovery orders.[204] These sanctions include prohibiting the disobedient party from supporting or opposing the designated claims or defenses or from introducing certain matters in evidence, striking pleadings, staying further proceedings, dismissing the action, or rendering a default judgment, in lieu of or in addition to an order to pay expenses and attorney fees.[205]

In the course of a private arbitration, the arbitrator could impose sanctions similar to the foregoing judicial sanctions. In mediation, a neutral's response to a showing of bad faith could include imposing costs and fees on the offending party,

"terminating the [session], reallocating expenses, resetting the mediation, or reporting to the court."[206] Where an independent action is filed, the traditional remedies for breach of the duty of good faith permit recovery for compensatory damages and, possibly, for attorney fees.[207] A claim for violation of the good-faith-and-fair-dealing covenant based in tort, such as for egregious bad faith, fraud, or

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be filed with or presented to the court unless, within 21 days after service of the motion . . . the challenged paper, elaim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected"); FED. R. CIV. P. 37(a)(2)(A) (requiring that a movant seeking sanctions and compelling disclosures "must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action"). Federal Rule of Civil Procedure 37(a) permits a party to file a motion to compel discovery. The rule's safeguard against frivolous motions provides that the party prevailing on the motion is entitled to recover "reasonable expenses incurred in making the motion, including attorney's fees." FED. R. CIV. P. 37(a)(4)(A). This fee-shifting provision provides deterrence to the filing of unwarranted motions. Similarly, any rule related to reporting of bad-fath-participation claims should incorporate a fee-shifting provision to cause a party seeking sanctions against another for bad faith to pause and consider the benefits and risks of claiming bad faith.

203. English, *supra* note 20, at 584-88, 589-94, 601-04.

204. FED. R. CIV. P. 16(f).

205. *Id.*; FED. R. CIV. P. 37(c)(2); *see also* FED. R. CIV. P. 37(g) (authorizing the court to require a party who fails to participate in good faith in the development of a discovery plan to pay reasonable expenses, including attorney fees, caused by the failure).

206. Kovach, *supra* note 13, at 618.

207. Damages for breach of contract are generally limited to compensatory damages. *See* LEE & LINDAHL, *supra* note 149, § 47.25, at 47-57 (noting that under the American rule, each party is responsible for his own attorney fees). However, the Ninth Circuit has recognized a bad-faith-conduct exception to the American rule based on a defendant's improper and bad-faith conduct that unnecessarily extends an arbitration. *See* Todd Shipyards Corp. v. Cunard Line, Ltd., 943 F.2d 1056, 1063-64 (9th Cir. 1991).

intentional infliction of emotional distress, expands recovery for punitive, emotional distress damages, and attorney fees.[208] Where the good-faith ADR participation standard is codified to cover both private and court-connected programs, a statutory provision for sanctions should allow recovery for compensatory damages, as well as an attorney fee-shifting option to the prevailing party, similar to the provision in Federal Rule of Civil Procedure 37, to deter unwarranted claims of bad-faith participation.[209]

F. Problems of Proof: Impact of Confidentiality Privileges on Proving Bad Faith

A critical difficulty in enforcing a good-faith-participation requirement lies in manners of proof. As illustrated in *Foxgate*, proving lack of good faith, misconduct, or abuse in an ADR process may require disclosure of information, communications, and conduct about the underlying private ADR session and testimony by the neutral and parties.[210] This disclosure seemingly abridges the confidentiality presumably or expressly accorded to such proceedings. Evidentiary exclusions, judicial or statutory confidentiality privileges, and even parties' contractual confidentiality provisions protect much of what goes on in an ADR proceeding. Confidentiality in ADR is popularly viewed as crucial to the effectiveness of ADR and to participants' willingness to use such procedures.[211] The confidentiality accorded to ADR proceedings is designed to promote the party candor, disclosures, and compromise discussions needed to resolve disputes. After-the-fact allegations of ADR bad-faith conduct can undermine participants' trust in the confidentiality of ADR, create uncertainty, and potentially impair full use of the process.[212] Yet the good-faith-participation requirements applied to party conduct in ADR proceedings are also designed to ensure process integrity and procedural fairness. The requirement is essentially meaningless if confidentiality privileges restrict the ability to report violations. The following section examines the impact of evidentiary exclusions and confidentiality privileges on the ability to report bad-faith conduct in an ADR setting.

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208. *See supra* Part V.A.

209. *See* FED. R. CIV. P. 37(a)(4) (requiring the court to order the payment of reasonable expenses, including attorney fees, by the defeated party on a motion for discovery sanctions); FED. R. CIV. P. 11(c)(1) (authorizing award of reasonable expenses and attorney fees incurred in presenting or opposing a sanctions motion to the party prevailing on the motion).

210. Foxgate Homeowners Ass'n. v. Bramalea Cal., Inc., 92 Cal. Rptr. 2d 916 (Cal. Ct. App. 2000), *review granted*, 999 P.2d 666 (Cal. 2000).

211. Parties in an ADR proceeding may generally avoid public airing of their disputes, adverse publicity, and precedent.

212. 1 ROGERS & MCEWEN, *supra* note 10, § 9:12, at 32.

> When [privilege] exceptions depend on the action of the other party after the session, such as whether the other party challenges the validity of the agreement or argues a failure to participate in good faith, they may particularly undermine confidence in the confidentiality of the session. Participants cannot know as the session unfolds whether their statements will later be discussed.

Id.

1. Evidentiary Exclusions, Statutory Confidentiality Privileges, and Contractual Provisions

Evidentiary rules provide limited protection to shield ADR communications from admissibility in a judicial setting. For example, Federal Rule of Evidence 408[213] precludes admissibility in court of evidence of offers to compromise, including conduct and statements made during settlement discussions and thus most ADR proceedings, but only when offered to prove liability for, or invalidity of, a claim or its amount.[214] Rule 408 does permit such evidence when offered for "another purpose," such as "proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution."[215] Courts have interpreted this list to be nonexhaustive, admitting compromise discussions under the "another purpose" exception for various reasons.[216] Under this exception, evidence offered to show misconduct or abuse of

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213. Federal Rule of Evidence 408 provides:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible *to prove liability* for or invalidity of the claim or its amount. Evidence of *conduct or statements* made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered *for another purpose*, such a proving *bias* or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

FED. R. EVID. 408 (emphasis added).

214. Rogers and McEwen explain:

> Offers to compromise a disputed claim and responses to them, including settlement agreements—whether made during a mini-trial, a mediation or elsewhere—have traditionally been inadmissible to prove the validity or amount of that claim in litigation. The evidentiary exclusion for compromise negotiations serves both to encourage settlement discussions and to exclude evidence generally of low probative weight, since the compromise might have been motivated by a desire to buy peace rather than an acknowledgment of liability.

1 ROGERS & MCEWEN, *supra* note 10, § 9:03, at 6-7.

215. FED. R. EVID. 408. The rule also does not require exclusion of evidence that is "otherwise discoverable" merely because it is offered in the course of negotiations. *Id.*

216. 1 ROGERS & MCEWEN, *supra* note 10, § 9:06, at 15. Rogers and McEwen note case law that has admitted compromise discussions or agreements under the "another purpose" exception

> for a variety of purposes not listed in Rule 408, including mitigation of damages, knowledge and intent (admissibility to show racial animus), conspiracy, adequacy of class representatives, fairness of a class action settlement, prior inconsistent statements, bad faith failure of an insurance carrier to settle, explanation about background of dispute, motive, lack of bias of a witness, and contradictions about evidence of settlement negotiations introduced by an adverse party.

Id. at 15-16; *see* Johnson v. Hugo's Skateway, 949 F.2d 1338, 1345-47 (4th Cir. 1991) (discussing mitigation, knowledge, and intent); Urico v. Parnell Oil Co., 708 F.2d 852, 854-55

a good-faith requirement in an ADR process may be admissible unless otherwise privileged.

ADR statutory privileges, as opposed to Rule 408's limited evidentiary exclusion, generally provide broader confidentiality protection for ADR communications and prevent disclosure not only at trial but also in discovery and other settings.[217] Although most states have some version of an ADR or mediation confidentiality statute, the scope of protection and application varies by jurisdiction.[218] For example, many statutes cover only court-annexed ADR programs.[219] Contractual agreements to maintain confidences or even assurances of confidentiality by the third-party neutral, in either private or court-annexed ADR, may create false expectations of confidentiality. Agreements to exclude evidence are disfavored and scrutinized under public policy considerations.[220] Therefore, contractual confidentiality provisions would not necessarily bar evidence of violation of a good-faith requirement, misconduct, or other process abuse under a public policy exception.[221]

(1st Cir. 1983) (admitting evidence to show bad-faith settlement negotiations made mitigation impossible); Olin Corp. v. Ins. Co. of N. Am., 603 F. Supp. 445, 450 (S.D.N.Y. 1985) (discussing fairness of class action settlement, prior inconsistent statements, and bad-faith failure to settle); *see also* Catullo v. Metzner, 834 F.2d 1075, 1078-79 (1st Cir. 1987) (finding it an error to exclude under Rule 408 testimony regarding terms of settlement agreement presented to establish parties' intent); Bradshaw v. State Farm Mut. Auto. Ins. Co., 758 P.2d 1313, 1322 (Ariz. 1988) (noting that the compromise discussion statements were offered for a purpose other than liability or amount); Sonja A. Soehnel, Annotation, *Evidence Involving Compromise or Offer of Compromises as Inadmissible Under Rule 408 of the Federal Rules of Evidence*, 72 A.L.R. FED. 592 (1985).

217. Pamela A. Kentra, *Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict for Attorney-Mediators Between the Duty to Maintain Mediation Confidentiality and the Duty to Report Fellow Attorney Misconduct*, 1997 BYU L. REV. 715, 733-34.

218. 1 ROGERS & MCEWEN, *supra* note 10, § 9:10, at 23-25. "Most mediation privileges create the right to block more than admissibility at trial for particular purposes; they also create a right to block compelled disclosure in discovery and other proceedings not governed by rules of evidence." *Id.* § 9.10, at 22. "Many states have enacted statutes that provide varying degrees of confidentiality to mediation programs. Some statutes create a full mediation privilege with no exceptions, while others create a more limited protection with specific exceptions to the confidentiality guarantee." Kentra, *supra* note 217, at 733. Adding to the confusion, many states have more than one statute. Each statute grants differing degrees of confidentiality protection to different mediation programs within the same state. *Id.*; *see also* Smith v. Smith, 154 F.R.D. 661, 674-75 (N.D. Tex. 1994) (noting lack of uniformity and disagreement among state mediation statutes on the scope of the right of confidentiality).

219. 1 ROGERS & MCEWEN, *supra* note 10, § 9:12, at 28 (noting that "[i]n the majority of statutes, the mediation privilege protects only a particular publicly administered program").

220. EEOC v. Astra USA, Inc., 94 F.3d 738, 744-45 (1st Cir. 1996) (ruling that agreements to keep evidence from a public tribunal are void as against public policy); Kirtley, *supra* note 81, at 10-11 (noting enforcement of written agreements to maintain confidences in mediation is uncertain, as public policy forbids contracting to exclude evidence).

221. Parties may be barred from disclosure in nonjudicial contexts by private contractual confidentiality provisions. Parazino v. Barnett Bank, 690 So. 2d 725, 728 (Fla. Dist. Ct. App. 1997) (affirming dismissal and sanctions on plaintiffs who divulged to the media terms of bank's settlement offer and information protected by a court-ordered and written confidentiality agreement), *case dismissed*, 695 So. 2d 700 (Fla. 1997).

Statutory confidentiality privileges provide the strongest source of protection for ADR communications. Yet even this coverage is uncertain and depends upon the jurisdiction's particular statute. Few confidentiality statutes confer absolute protection to ADR proceedings that prevent disclosures and discovery of all communications and documents obtained during the process.[222] Most statutes provide qualified confidentiality protection and pertain only to specific ADR programs.[223]

2. ADR Confidentiality Exceptions

Exceptions to ADR confidentiality privileges may be explicit in a statute or created by court rule or judicial opinion. Many state mediation privilege statutes expressly exempt certain categories from confidentiality, such as

> (1) admissions of threats to commit child abuse, a crime, a felony, physical/bodily harm, and damage to property; (2) information pertinent to a crime; an action claiming fraud or suits against the mediator; (3) information relating to the commission of a crime during mediation[;] or (4) use of mediation information for research purposes or non-identifiable reporting . . . . or when disclosure is mandated by another statute or court.[224]

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222. *See* Kirtley, *supra* note 81, at 10 (noting the limited and uncertain protection under mediation confidentiality laws); Kentra, *supra* note 217, at 733; Kristina M. Kerwin, *The Discoverability of Settlement and ADR Communications: Federal Rules of Evidence 408 and Beyond*, 12 REV. LITIG. 665, 680-81 (1993) (describing the "mixed bag" of protection afforded by state confidentiality statutes); Mindy D. Rufenacht, Comment, *The Concern over Confidentiality in Mediation—an In-Depth Look at the Protection Provided by the Proposed Note Uniform Mediation Act*, 2000 J. DISP. RESOL. 113, 114 (describing the present variations in state mediation confidentiality statutes).

223. *See* Rufenacht, *supra* note 222, at 114.

224. Kirtley, *supra* note 81, at 43-44. Kirtley also cites examples of various state confidentiality statutes. *Id.* at 43 n.291 (citing COLO. REV. STAT. § 13-22-307 (West 1997) (defining the following exceptions to mediation confidentiality: all parties consent in writing to disclosures; disclosure is required by statute; allegations involve intent to commit a felony, infliction of bodily harm, or threatening the safety of a minor child; actions against the mediator; otherwise discoverable information; and nonidentifiable disclosures for evaluation and research purposes)). Connecticut's statute declares an exception if

> (1) each of the parties agrees in writing to such disclosure, (2) the disclosure is necessary to enforce a written agreement that came out of the mediation, (3) the disclosure is required by statute or regulation, or by any court, after notice to all parties to the mediation, or (4) the disclosure is required as a result of circumstances in which a court finds that the interest of justice outweighs the need for confidentiality, consistent with principles of law.

CONN. GEN. STAT. ANN. § 52-235d(b) (West 1991 & Supp. 2000); *see also* FLA. STAT. ANN. § 44.102(4) (West 1998 & Supp. 2000) (declaring an exception for use of mediation information in disciplinary proceedings filed against mediators); MINN. STAT. ANN. § 595.02 subd. 1(a) (West 2000) (stating that ADR privilege statute provides that a mediator is incompetent to testify at a subsequent proceeding regarding statements made or conduct occurring during the mediation except if those statements or conduct: "(1) constitute a crime; (2) give rise to disqualification proceedings under the rules of professional conduct for attorneys; or (3) constitute professional misconduct").

Disclosure may also ensue where it is needed to promote the public's need for evidence or where the need for the information outweighs confidentiality concerns.[225]

Courts have similarly considered, yet rejected, confidentiality assertions when necessary to rule on motions to set aside ADR agreements on contractual defenses such as fraud, duress, or unconscionability. In *FDIC v. White*,[226] the defendants sought to set aside a mediated agreement, claiming the Federal Deposit Insurance Corporation ("FDIC") coerced them to settle in threatening criminal prosecution. The FDIC argued that the defendants' affidavits should be inadmissible because communications made during the mediation are privileged.[227] The court ruled that the Alternative Dispute Resolution Act of 1998 ("ADRA")[228] did not create a privilege that prevents litigants from challenging settlement agreements by pointing to events occurring during mediation.[229] The ADRA contains no such bar against defenses such as fraud, duress, coercion, or mutual mistake.[230] The court considered the evidence but ultimately ruled that the FDIC did not coerce the defendants into settlement, and upheld the mediated agreement.[231] Disclosure of the parties' conduct at the ADR

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225. *See* 1 ROGERS & MCEWEN, *supra* note 10, § 9:12, at 29-31 (citing examples of statutory exceptions to the mediation privilege to include allegations of crime, perjured testimony, threats of injury or damage, applications to set aside or reform a mediated agreement, actions between mediator and party for damages arising from the mediation, disagreements regarding the validity of the mediated agreement, or allegations that a party, during marital mediation, made a "'material misstatement of fact, which would have constituted perjury if made under oath'" (quoting N.H. REV. STAT. ANN. § 328-C:9(b) (1995))); Kentra, *supra* note 217, at 735-37 (noting statutory confidentiality exceptions intended to promote the public's need for evidence if the information is "otherwise discoverable" or obtainable by "independent investigation"; involves subsequent litigation between mediation participants; involves claims of professional misconduct; or is required for disclosure by statute or necessary for the conduct of the mediation session). The Federal Administrative Alternative Dispute Resolution Act of 1990 creates a qualified ADR privilege but permits disclosure of ADR communications in cases of "manifest injustice" or to protect public harm or safety. 5 U.S.C. § 574 (1994 & Supp. V 1999); *see also* UNIF. MEDIATION ACT § 8 (Proposed Draft Feb. 2001) (providing exceptions to confidentiality privilege for (1) record of an agreement, (2) meetings open by law and public policy mediations, (3) threats of bodily harm or unlawful property damage, (4) use of mediation to commit a crime, (5) evidence of abuse or neglect, (6) pretrial conferences, (7) to establish the validity and enforceability of a mediated settlement agreement, and (8) significant threat to public health or safety), *available at* http://www.pon.harvard.edu/guests/uma/febwebUMA.htm.

226. 76 F. Supp. 2d 736 (N.D. Tex. 1999).

227. *Id.* at 737.

228. 28 U.S.C. §§ 651-658 (1994 & Supp. IV 1998).

229. *White*, 76 F. Supp. 2d at 738.

230. The ADRA includes an express statement of federal policy that communications occurring in mediations sponsored by federal courts shall be confidential. *See* 28 U.S.C. § 652(d) (Supp. IV 1998) (directing federal courts to provide for confidentiality rules in court-annexed ADR proceedings).

231. *White*, 76 F. Supp. 2d at 739; *see also* Randle v. MidGulf, Inc., No. 14-95-01292-CV, 1996 WL 447954, at *1 (Tex. App. Aug. 8, 1996) (admitting evidence from mediation communications regarding duress defense in action by opposing party to enforce a mediation agreement); Olam v. Cong. Mortgage Co., 68 F. Supp. 2d 1110, 1136, 1138 (N.D. Cal. 1999) (admitting mediator testimony on the issue of whether mediation involved undue influence).

proceeding was necessary for the court to rule on the coercion claim. Adjudicating claims of misconduct or bad-faith participation would necessitate similar treatment but likewise raises confidentiality concerns.

3. Crafting a Narrow Confidentiality Exception for Good-Faith-Participation Violations

Few statutes or courts have directly addressed the question of whether evidence relating to ADR misconduct or bad-faith-participation claims warrant confidentiality-privilege exceptions.[232] *Foxgate* created considerable controversy in ruling that the trial court could rely upon mediator reports of a party's bad-faith conduct at a court-ordered mediation, despite statutory confidentiality provisions that preclude mediator reports and evidence of conduct at court-ordered ADR proceedings, to effectuate a good-faith-participation requirement.[233]

Recognizing a privilege exception to report good-faith violations carries the risk that the exception would be misused by disgruntled parties and simply swallow the confidentiality rule.[234] According to *Foxgate*, the exception to report good-faith violations is narrowly construed.[235] But how much disclosure is enough, yet not too much? A related concern arises when a party seeks to prove that an oral agreement was reached in a mediation. Ruling evidence of statements made in a mediation inadmissible to establish whether an oral settlement was reached, *Ryan v. Garcia*[236] reasoned that admission of such statements would require "judicial sifting" through

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232. The recent draft of the Uniform Mediation Act does not provide a confidentiality exception for good-faith-participation violations, but does enumerate exceptions relating to threats to public health and safety, the validity of a mediation agreement, and professional misconduct. UNIF. MEDIATION ACT § 8 (Proposed Draft Feb. 2001), *available at* http://www.pon.harvard.edu/guests/uma/febwebUMA.htm; *see* Rufenacht, *supra* note 222, at 133 (describing drafters' deletion of provision that would have permitted a court to lift the veil of privilege upon a showing of "manifest injustice"); *see also* MINN. STAT. ANN. § 583.27 (West 2000) (requiring a good-faith obligation in mandatory farmer-lender mediations); Kirtley, *supra* note 81, at 50 n.348 ("The Massachusetts and Washington general privileges specifically exclude labor disputes. In the case of the Washington statute, the exclusion was sought by interests that wanted to insure continued access to mediation information to prove claims of 'bad faith' bargaining in labor/management mediations." (citations omitted)). Note however, that 5 U.S.C. § 574(a)(4) provides an exception to ADR confidentiality in federal administrative ADR proceedings where "a court determines that such testimony or disclosure is necessary to—(A) prevent manifest injustice." 5 U.S.C. § 574(a)(4) (1994 & Supp. V 1999).

233. Foxgate Homeowners Ass'n v. Bramalea Cal., Inc., 92 Cal. Rptr. 2d 916, 928 (Cal. Ct. App. 2000), *review granted*, 999 P.2d 666 (Cal. 2000).

234. 1 ROGERS & MCEWEN, *supra* note 10, § 9:12, at 32.

> When these exceptions depend on the action of the other party after the session, such as whether the other party challenges the validity of the agreement or argues a failure to participate in good faith, they may particularly undermine confidence in the confidentiality of the session. Participants cannot know as the session unfolds whether their statements will later be disclosed.

Id. § 9:12, at 103.

235. *Foxgate*, 92 Cal. Rptr. 2d at 929.

236. 33 Cal. Rptr. 2d 158 (Cal. Ct. App. 1994).

the mediation, thereby disclosing the entire session and undermining participant confidence in the process.[237] Participants in a compulsory ADR proceeding may be confronted with the untenable choice of enduring another party's misconduct or risking sanction themselves by reporting misconduct to a court and thus potentially violating confidentiality privileges. The plaintiffs in *Bernard v. Galen Group, Inc.*[238] paid such a price after divulging details of their court-ordered mediation, including settlement offers, in an unsolicited letter sent to the presiding judge complaining of the defendant's bad-faith conduct in the mediation.[239]

4. Role of Third-Party Neutral's Testimony

Permitting disclosures for good-faith-violation claims also raises the concern that the role of the third-party neutral is compromised where the neutral is a witness to the alleged bad-faith ADR conduct. Parties as privilege holders may assert or waive the confidentiality privilege as to their communications, but many statutes are silent about whether the neutral independently may assert privilege or otherwise be subject to subpoena.[240] Neutrals have ethical as well as express and implied contractual duties

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237. *Id.* at 162-63 (ruling that evidence of statements made in the course of a mediation are inadmissible even to establish that parties had reached an oral agreement); *see also* Bennett v. Bennett, 587 A.2d 463, 464 (Me. 1991) (requiring a party to sign an agreement allegedly reached in mediation "would of necessity require the trial court to engage in the time-consuming process of exploring what transpired between the parties during the course of the mediation in order to determine if they had reached an agreement"). *But see Randle*, 1996 WL 447954, at *1 (seeking to introduce as evidence of duress that mediator refused to allow defendant to leave mediation despite chest pains and history of heart trouble in order to defend against enforcement of a mediated settlement); UNIF. MEDIATION ACT § 8(b)(2) (Proposed Draft Feb. 2001) (providing an exception to confidentiality in order to establish the validity and enforceability of a mediated settlement agreement), *available at* http://www.pon.harvard.edu/guests/uma/febwebUMA.htm.

238. 901 F. Supp. 778, 783 (S.D.N.Y. 1995). The court rejected the plaintiff's argument that he had no choice but to breach the broad confidentiality rule in order to report the defendant's misconduct, stating that he could have objected without divulging specific details of settlement offers. *Id.* at 782-83.

239. *Id.* at 784. The court in *Bernard* imposed a $2500 fine on an attorney and stated:

> "If participants cannot rely on the confidential treatment of everything that transpires during these [ADR] sessions then counsel of necessity will feel constrained to conduct themselves in a cautious, tight-lipped, non-committal manner more suitable to poker players in a high-stakes game than to adversaries attempting to arrive at a just resolution of a civil dispute." . . . Participants in the Mediation Program rely on the understanding that all matters discussed during the mediation process will be kept confidential, and the breach of the applicable confidentiality provisions threatens the integrity of the entire Program.

Id. (quoting Lake Utopia Paper Ltd. v. Connelly Containers, Inc. 608 F.2d 928, 930 (2d Cir. 1979)). The plaintiff claimed that the defendant's deliberate misrepresentations to the court about their good-faith efforts to settle compelled the plaintiff to disclose to the court the details of the parties' settlement discussions in order to set the record straight. *Id.*

240. 1 ROGERS & MCEWEN, *supra* note 10, § 9:16, at 36 (noting that "about half of the mediation privilege statutes fail to provide who may assert or waive the privilege" but

to be impartial and to maintain confidences imparted in an ADR session. Recognizing that confidentiality and the appearance and actual impartiality of a third-party neutral are essential to participants' as well as the public's trust in a mediation process, the court in *NLRB v. Joseph Macaluso, Inc.*[241] recognized a common-law testimonial-immunity privilege precluding a federal mediator from testifying, even over the parties' request, about matters in a labor mediation.[242] The court stated:

> However useful the testimony of a conciliator might be . . . in any given case, . . . [t]he 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.[243]

Even where proof of bad-faith bargaining is exempt from confidentiality privileges, third-party neutrals may be immune from testifying under a statutory or common-law testimonial privilege.[244] In some instances, however, a neutral may feel compelled to report party misconduct in an ADR session.[245] Specific legislation or court orders may

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suggesting that the appropriate accommodation of interests would be to permit the parties to waive the privilege as to their own testimony but not as to the mediators').

241. 618 F.2d 51 (9th Cir. 1980).

242. *Id.* at 55 (construing the NLRA to preclude federal labor-mediator testimony to avoid public perception of bias).

243. *Id.* (citing Tomlinson of High Point, Inc., 74 N.L.R.B. 681, 688 (1947)); *see also* 5 U.S.C. § 574(a)(4) (1994 & Supp. V 1999) (providing that a court may order disclosure by the neutral (or a party) only if the need for disclosure outweighs "the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential"); Folb v. Motion Picture Indus. Pension & Health Plans, 16 F. Supp. 2d 1164, 1178 (C.D. Cal. 1998) (recognizing a federal mediation privilege where the importance of confidentiality in mediation and in preparation for mediation outweighed a third party's need for evidence); *cf.* Smith v. Smith, 154 F.R.D. 661, 674-75 (N.D. Tex. 1994) (questioning the validity of popular arguments for recognition of a mediator privilege as a matter of common law, including the argument that the privilege is needed to create an appearance of mediator neutrality and to increase the supply of mediators; declining to recognize a federal common-law mediator privilege).

244. *See, e.g.*, MINN. STAT. ANN. § 595.02 subd. 1(a) (West 2000); *see also* Kirtley, *supra* note 81, at 50-51.

> [S]ome mediation privilege statutes eliminate confidentiality for claims of bad faith bargaining in mandatory mediations or simply exclude mediation in which negotiation in good faith is a legal obligation. While in this context parties should be free to introduce mediation communications to enforce good faith bargaining laws, the mediator should not be compelled to testify. It was on precisely that issue that the *Macaluso* and other court decisions provided the genesis of the mediation privilege.

Id.

245. *See* Kirtley, *supra* note 81, at 53 (suggesting a narrow exception to privilege for the limited situation in which a mediator may feel compelled to breach confidentiality, such as to

require neutrals to report compliance with good-faith requirements.[246] In some cases, mediator testimony may be the only reliable evidence, and policy considerations for disclosure outweigh those favoring confidentiality and testimonial immunity.[247]

Professor Kirtley finds a good-faith-reporting exception problematic where parties mediate voluntarily and can simply walk away from the process[248] but acknowledged that an exception is warranted "when mediation parties come to the table involuntarily and under a statutory obligation to bargain in good faith .... In such cases, mediation communications are essential evidence to prove or defend against a claim of bad faith bargaining."[249] Professor Kovach also argues that "where a good faith requirement exists, there should be a concurrent exception to any rule on confidentiality, since the communication during the mediation is essential evidence to address the claim of bad faith in the negotiations."[250]

Overbroad confidentiality rules should not shield misconduct or process abuse.[251] Valid exceptions to confidentiality should be recognized in order to give meaning to the good-faith requirement and to guard against the abuse potential in compulsory ADR. The obvious preference is for statutory rules explicitly to address an exception and the manner for reporting good-faith violations, rather than through post hoc judicial rules such as in *Foxgate*.[252] Participants in mandatory private ADR should be on notice that information relevant to a claim of bad faith, fraud, or misconduct by a party or neutral may be revealed. The exception for reporting allegations of misconduct should be limited to claims regarding misuse of the private dispute-

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protect a vulnerable person or to prevent an injustice); Kovach, *supra* note 13, at 585 (noting a good-faith requirement may involve an expanded role of the third-party neutral; the "mediator's role, as impartial, and in maintaining all confidences of the proceeding, may have to be compromised in order to implement a good faith requirement with substance").

246. *See supra* note 87.

247. Olam v. Cong. Mortgage Co., 68 F. Supp. 2d 1110, 1135-37 (N.D. Cal. 1999) (balancing the competing policy considerations for confidentiality and mediator statutory testimonial immunity against the court's need for establishing facts to rule on undue influence claim); Rinaker v. Superior Court, 74 Cal. Rptr. 2d 464, 471-72 (Cal. Ct. App. 1998) (compelling mediator testimony only if necessary to impeach an adverse witness and protect the defendant's constitutional right).

248. Kirtley, *supra* note 81, at 50 ("[N]egotiating in bad faith is often in the eyes of the beholder. Stonewalling or moving in small increments may be justified in particular mediations. Parties who become frustrated by their opponents' bargaining tactics have the option of withdrawing from the mediation and pursuing other means of resolving the dispute.").

249. *Id.*

250. Kovach, *supra* note 13, at 602; *see also* Kirtley, *supra* note 81, at 49 (noting that "a party, claiming mediator misconduct must have access to mediation information and the mediator's testimony"). "A privilege that bars access to such information results in de facto immunity for malpracticing mediators." *Id.*

251. Kirtley, *supra* note 81, at 39 (asserting that "privilege should not permit mediation to become a blackhole into which the parties can purposefully bury unhelpful evidence").

252. Jamie Alison Lee & Carl Giesler, Case Comments, *Confidentiality in Mediation:* Parazino v. Barnett Bank, *690 So. 2d 725 (Fla. Dist. Ct. App. 1997);* Bernard v. Galen Group, *901 F. Supp. 778 (S.D.N.Y. 1995)*, 3 HARV. NEG. L. REV. 285, 294-95 (1998) (noting that "[i]t can be difficult to prove bad faith or other participant misconduct without disclosing some information about the mediation").

resolution process, as opposed to complaints involving the underlying substantive claims, defenses, or terms of settlement offers. Neutral testimony regarding party bad faith should be limited to exceptional circumstances where strong public interests are at stake and other sources of evidence are unavailable.

5. In Camera Reporting Procedure

To balance adequately the need for confidentiality and for good-faith participation in compulsory ADR processes, good-faith participation and the exception for reporting such violations must be reasonably defined. Whether good faith is defined to comprise specific objective conduct or a pattern of obstructive tactics, reported violations would not need to include information regarding the substantive exchanges of the underlying proceeding.[253]

To permit a determination of whether a confidentiality privilege exception is warranted, reports of good-faith violations should be made initially in an in camera proceeding to the court or neutral, ideally one who is not participating in a discussion or determination of the case's underlying merits.[254] The complaining party should satisfy a threshold showing demonstrating another's good-faith-participation violation as a prerequisite to public disclosure of the alleged misconduct.[255] The in camera approach, combined with sanctions for asserting frivolous claims of bad-faith participation or a fee-shifting provision for the prevailing party, balances the concerns for ensuring good-faith participation and justified confidentiality in ADR.

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253. Kovach, *supra* note 13, at 602-03 (suggesting the option of a mediator certifying whether good faith was present, or providing a written checklist of the parties' conduct to avoid the problem of the neutral becoming a key witness in bad-faith actions among parties). Kovach also notes that the "[d]ifficulties encountered in creating a very specific, narrow limited exception [to confidentiality] for the reporting of violations of a good faith requirement will be outweighed by the benefits of such obligations." *Id.* at 602; *see also* Badie v. Bank of Am., 79 Cal. Rptr. 2d 273, 284 (Cal. Ct. App. 1998) (holding that "[t]he essence of the good faith covenant is objectively reasonable conduct" (citations omitted)).

254. Kirtley, *supra* note 81, at 51-52 n.355 (suggesting an in camera proceeding to resolve confidentiality and reporting concerns and noting the Texas "procedure to resolve conflicts between the privileged ADR information and other legal requirements for disclosure" (citing TEX. CIV. PRAC. & REM. CODE ANN. § 154.073(d) (Vernon 1997), and 5 U.S.C. § 574(a)(4), (b)(5) (1994 & Supp. V 1999) (providing that "a court determines . . . [if] disclosure[s] [are] necessary to (A) prevent a manifest injustice; (B) help establish a violation of law; or (C) prevent harm to the public health or safety"))).

255. Olam v. Cong. Mortgage Co., 68 F. Supp. 2d 1110 (N.D. Cal. 1999) (holding that despite explicit statutory provisions rendering mediator incompetent to testify, construed statute as permitting parties to waive privilege and force mediator to testify); Rinaker v. Superior Court, 74 Cal. Rptr. 2d 464, 472-73 (Cal. Ct. App. 1998) (requiring in camera hearing for judge to weigh confidentiality of mediation process against constitutional rights of minors to impeach a witness); Kirtley, *supra* note 81, at 52 n.356 (explaining that "[i]f a threshold showing was made by the proponent of the evidence, only then would the court override the privilege and permit discovery or admissibility of mediation communications").

VI. CONCLUSION: IN DEFENSE OF THE GOOD-FAITH REQUIREMENT

Despite difficult definitional and policy issues inherent in the enforcement of a good-faith requirement, the legitimate objectives of ADR—including inter alia, efficiency, effectiveness, party satisfaction, and fairness—require a duty of good-faith participation.[256] The duty is often explicit and even implicit in court-annexed ADR programs, where courts retain authority to monitor party misconduct. Because of the potential for process abuse and limits on judicial review, private mandatory ADR should ensure similar safeguards.

In recognizing a duty of good faith to participate in a contractual ADR process, the objective is to address potential coercion, abuse, and bad-faith conduct. Parties in private mandatory ADR, particularly those of inferior economic standing or bargaining power, should know that participant conduct in ADR is not completely without process rights or responsibilities. Misconduct and procedural manipulations to delay and obstruct ADR proceedings undermine the efficiency and participation benefits of ADR and affect possible outcomes. For the process to have legitimacy, participants in ADR must comply with a minimum standard of good faith. Sanction or liability would present a "deterrent" to abuse power imbalances, yet provide meaningful redress when such misconduct occurs. A common-law duty of good faith, or corresponding liability for bad faith, provides a necessary check on participant behavior in a private ADR setting.

A requirement that parties act in good faith in an ADR proceeding may be viewed as further regulation of a process designed for its flexibility.[257] Where parties are required to submit to a private process instead of a judicial forum, however, the benefits of providing some assurance of fairness to that process outweigh potential drawbacks.

After-the-fact liability for ADR misconduct is one remedy, and perhaps a necessary deterrent. A more preventive means would be to set forth specifically the duties, prohibited conduct, and process rights of the ADR participants in legislation or private contracts.

Legislative action. A statutory procedure with attendant sanctions for challenging misconduct as it occurs would provide notice to participants of the good-faith-participation requirement and deter misconduct in the ADR process.[258] Federal and

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256. Kovach has advocated a good-faith-participation requirement in mediation and proposed a model statute for good-faith participation applicable to court-annexed and private mediation. Kovach, *supra* note 13, at 595, 620, 622-23. Kovach further states that "mediation . . . will no longer be viable or of any benefit if the actions demonstrating misuse are allowed to go unchecked." *Id.* at 595.

257. Edward F. Sherman, *'Good Faith' Participation in Mediation: Aspirational, Not Mandatory*, DISP. RESOL. MAG., Winter 1997, at 14 (asserting that good-faith-participation requirements "unduly entrench[] on the voluntariness of settlement").

258. *See* Kovach, *supra* note 13, at 603-04 (recommending sanctions for noncompliance with the good-faith requirement to include "the cost of the mediation; an order directing good faith participation in a second mediation, with specific consequences, perhaps as attorneys' fees plus the cost of the second mediation"). "Such sanctions, while not inordinately punitive, serve as a deterrent to bad faith participation and encourage meaningful participation in the process." *Id.*

state ADR statutes should provide for a good-faith-participation duty in both private and court-connected ADR. This provision should identify for each ADR process the participants' duties, prohibited conduct, essential procedural safeguards, enforcement remedies, and sanctions.[259] In addition, where an award is set aside or a mediated settlement is granted on grounds of misconduct or fraud, the statute should mandate recovery for costs, attorneys' fees, and the costs of additional proceedings. Frivolous or harassing claims of bad-faith participation must also be subject to penalty similar to the fee-shifting provisions in Federal Rules of Civil Procedure.

Comparable duties under common law. Absent legislative change, the common law provides a basis for finding a duty of good faith and for redressing private ADR misconduct. As a matter of contract law, private contracts providing for mandatory arbitration or retention of neutral services carry an implied covenant of good faith and fair dealing to participate in the process. Tort law may also provide recourse against egregious misconduct or violation of one's duties under theories of bad faith, intentional infliction of emotional distress, or fraud. Tort theory opens the potential for recovery for emotional distress and punitive damages.

Explicit contractual provisions. To clarify the parties' rights and responsibilities as well as to avoid the uncertainty of a judicial determination of bad-faith participation, private ADR contracts may express and define the good-faith obligation. For example:

> By agreeing to resolve this dispute in a private, nonjudicial forum, the parties commit to participate in the process in good faith. This means that at all scheduled sessions, parties with full settlement authority will appear and will cooperate in jointly selecting the third-party neutral, abide by deadlines, and exchange reasonably requested, nonprivileged discovery.

To prevent "contracting out" of a good-faith requirement, contractual provisions that purport to absolve one or more of the participants from the good-faith requirement or limit an aggrieved party's judicial remedies should be unenforceable as against public policy.[260]

The knowledge that participants are under a duty to participate in a private ADR process in good faith as a matter of law, with attendant liability if that duty is breached, provides a check on party behavior that will prevent abuse of a dispute resolution process that is outside the auspices and protection of the judicial system. The concerns to seek process fairness and punish misconduct must be weighed against the competing considerations to resist over-regulation of ADR or to create incentives for satellite litigation, as well as to preserve ADR's flexibility and

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259. *See* Sherman, *supra* note 5, at 2089-103 (discussing the responsibilities of parties and their attorneys to participate in court-ordered ADR proceedings); *see also* Estreicher, *supra* note 15, at 1349-50 (discussing Dunlop Commission Report recommendations).

260. Kovach's suggestion that a contractual ADR agreement provide for automatic sanctions or liquidated damages in case of breach of a good-faith-participation requirement provides certainty to the parties of potential exposure and is sensible where the parties have truly consented or are of relative equal bargaining power. *See* Kovach, *supra* note 13, at 618. The danger of permitting parties to limit recovery by contract is that such provisions may be used as adhesion and effectively circumvent the good-faith obligation altogether.

confidentiality virtues. Confidentiality privileges, however, should not be used as a shield for misconduct and should not be absolute, particularly where application exacerbates the likelihood of abuse. To effectuate both the good-faith requirement and the need to promote and protect bona fide settlement negotiations and efforts, confidentiality exceptions should be carefully prescribed and claims of bad-faith participation subject to controls under Rule 11, requiring reasonable factual support and penalizing frivolous or harassing claims. An objective definition of prohibited conduct and a focus on the manner of participation, rather than content of party offers, should eliminate complaints by disgruntled parties of simply not getting enough money in settlement.[261]

Any attempt to regulate or define standards of conduct in ADR may be viewed as incompatible with the flexibility inherent in ADR philosophy. However, because the baseline tenet of voluntariness is absent in compulsory ADR and the process is now used in cases of unequal bargaining situations, minimal rules of conduct need to be explicit. Where conduct is egregious or precludes basic operation of the process necessary to ensure procedural fairness, such looming liability or oversight is warranted.[262]

Good faith is one step and one aspect of ensuring process fairness. The need to consider and implement methods for quality control and mechanisms to report complaints of party or neutral misconduct, abuse, or coercion remains ongoing, particularly where the use of ADR is mandatory.[263]

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261. *Id.* at 603.

> Good faith should not coerce the parties to resolve their dispute on any particular economic basis. Rather, the good faith requirement is essentially encouragement for the parties and their counsel to use their best efforts during the process. . . . Good faith relates to the manner of participation rather than the content.

Id.

262. *Id.* at 604 (stating that "[a]lthough satellite litigation is not wholly preventable, benefits of good faith participation in those cases that go to mediation outweigh the detriment of any potential satellite litigation").

263. *See, e.g.*, Estreicher, *supra* note 15, at 1349-50 (describing Dunlop Commission Report recommendations for minimal quality safeguards in arbitration).