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Good Faith Participation in Mediation: Recent Decisions in New York and California

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Introduction

In an effort to alleviate the growing congestion of court dockets around the country, judges increasingly require parties to engage in alternative dispute resolution, particularly mediation, prior to trial. Mediation is designed to be a confidential process lacking the formality and adversarial nature of court proceedings. However, participation in any court-ordered mediation is ultimately monitored by a judge. As a general rule, courts require parties to participate in mediation in good faith, and judges have the authority to sanction parties that fail to do so. The judge's authority to impose sanctions for mediation conduct is grounded in the court's inherent authority to regulate proceedings before it, and is further supported by local rules, Federal Rule of Civil Procedure 16(f) (requiring good faith participation) and statutes such as 28 U.S.C. § 1927 (prohibiting unreasonable or vexatious litigation). As in other areas of the law, however, "good faith" is not well defined.

This article examines some recent decisions by federal courts in New York and California enforcing the requirement of "good faith" participation in mediation. While it is well settled that a court may compel a party to mediate, it cannot compel a party to settle. Moreover, courts take care to protect the confidential nature of mediation proceedings. Accordingly, the requirement of "good faith" in mediation has clear limits. Federal courts in New York and California appear unwilling to probe into specific conduct at the mediation, in light of concerns over confidentiality and undue influence.

New York

Federal courts have broad authority to regulate participation in mediation under Federal Rule of Civil Procedure 16, 28 U.S.C. § 1927, and the inherent power of courts to regulate proceedings. In New York, some federal courts also codify in their local rules the requirement of good faith participation in mediation. The Western and Northern Districts have an explicit requirement that the parties participate in mediation in good faith. See, e.g., NDNY L.R. 83.11-5(c) ("Parties and counsel shall participate in good faith, without any time constraints, and put forth their best efforts toward settlement."); WDNY ADR Plan 5.8(G) ("All parties and counsel shall participate in mediation in good faith. Failure to do so shall be sanctionable by the Court."). The local rules for the Southern and Eastern Districts previously included an explicit requirement that the parties mediate in good faith, but that requirement was removed in the July 2011 update to the rules. See Local Civil Rule 83.8. Court-Annexed Mediation (Eastern District Only); Local Civil Rule 83.9. Alternative Dispute Resolution (Southern District Only). In practice, however, courts seem to apply the good faith requirement whether or not it is expressly included in local rules.

In March 2011, the Southern District of New York shed some light on the good faith requirement. See *In re A.T. Reynolds & Sons, Inc.*, 452 B.R. 374 (S.D.N.Y. 2011). The *A.T. Reynolds* Court reversed an order of the Bankruptcy Court sanctioning Wells Fargo for failure to participate in mediation in good faith. In doing so, the Court rejected a subjective approach to good faith determinations. See *id.* at 376. The Bankruptcy Court had ordered the parties to participate in mediation. The mediator informed the Court that one of the parties, Wells Fargo, was participating in bad faith. *Id.* In particular, the mediator pointed to Wells Fargo's demands to clarify the issues in dispute prior to mediation, and to know in advance the identity of party representatives that would be attending. The mediator also noted that the Wells Fargo representative apparently lacked authority to settle, and failed to engage in risk analysis regarding the available options. *Id.*

The Bankruptcy Court found that Wells Fargo was in violation of General Order M-390 of the United States Bankruptcy Court, Southern District of New York. *In re A.T. Reynolds & Sons, Inc.*, 424 B.R. 76, 78 (Bankr. S.D.N.Y. 2010). That order provided that "the mediator shall report any willful failure to attend or to participate in good faith in the mediation process of conference. Such failure may result in the imposition of sanctions by the court." *Id.* The mediator not only filed such a report, but testified at a hearing in front of the Bankruptcy Court regarding Wells Fargo's behavior.

The Bankruptcy Court held that Wells Fargo violated the good faith requirement for three reasons. First, in the Court's view, the representative sent by Wells Fargo lacked sufficient authority to settle the case. The Court noted that the representative had to make a phone call to move beyond a predetermined dollar amount, and was only prepared to discuss an inappropriately limited set of predetermined legal theories. *Id.* at 89. Second, while the Court acknowledged that parties are free to adopt a "no pay" position, he faulted Wells Fargo for "enter[ing] the mediation to assert the supremacy of its legal argument, and not to contemplate risk analysis." *Id.* at 91. Finally, the Court found that Wells Fargo attempted to improperly control the mediation by demanding, prior to the mediation, that the discussion be limited to specific topics and that the

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identities of the representatives attending be disclosed in advance. *Id.* at 91-92. For these reasons, the Court found Wells Fargo in contempt of the Mediation Order. *In re A.T. Reynolds & Sons, Inc.*, 424 B.R. 76, 95 (Bankr. S.D.N.Y. 2010). The judge ordered Wells Fargo to bear the costs of mediation.

On appeal, the District Court acknowledged the Bankruptcy Court's power to sanction parties that fail to comply with its orders, but rejected that Court's application of a subjective test of good faith. The District Court expressed concern about intruding into confidential dispute resolution, and declined to endorse the Bankruptcy Court's subjective inquiry into the quality of Wells Fargo's participation in the mediation. The Court was also concerned that admonishment of a party's "no pay" position, or a requirement that a party engage in risk analysis, could run afoul of well-settled law that "a court cannot force a party to settle, nor may it invoke 'pressure tactics' designed to coerce a settlement." *In re A.T. Reynolds & Sons, Inc.*, 452 B.R. 374, 382 (S.D.N.Y. 2011). In the Court's view, a party satisfies the good faith requirement if it attends mediation, provides pre-mediation memoranda and, when appropriate, produces organizational representatives with sufficient settlement authority. *Id.* at 384.

The District Court also addressed the Bankruptcy Court's conclusion that Wells Fargo had failed to send a representative with sufficient settlement authority, and found that the lower court applied an "unworkable and overly stringent standard" in requiring "the ability to (1) settle this case for any amount, including an amount greater than the amount in controversy; (2) discuss any theory of legal liability; and (3) enter into undefined 'creative solutions.'" *Id.* at 384. Instead, a party need only send "a person with authority to settle for the anticipated amount in controversy and who is prepared to negotiate all issues that can be reasonably expected to arise." *Id.* The District Court also found no issue raising concerns with the mediator, pre-mediation, regarding both the scope and anticipated attendance of the mediation. *Id.*

The *AT Reynolds* District Court decision is consistent with prior decisions by other New York district courts finding violations of the duty to mediate in good faith, and imposing corresponding sanctions on a party. In all prior cases finding a violation, the courts identified an objective failure on the part of one party that amounted to an actual or constructive failure to appear at the mediation. For example, in *Kerestan v. Merck & Co. Long Term Disability Plan*, the court sanctioned the plaintiff \$1,600 for failing to appear in person—not through counsel—at the settlement conference as ordered, "despite ample warning." 2008 U.S. Dist. LEXIS 50166 (S.D.N.Y. July 2, 2008). The plaintiff's failure to appear at the mediation meant plaintiff's counsel had no authority to engage in settlement discussions, and the Court found sanctions were warranted. *Id.* In *Outar v. Greno Indus.*, the plaintiff physically attended the mediation, but failed to participate in the proceedings, even after being requested to do so by his counsel. 2005 U.S. Dist. LEXIS 34657 (N.D.N.Y. Sept. 27, 2005). While the plaintiff pled ignorance of the legal system when faced with the prospect of sanctions, the court found that his "clinging ignorance of the process, refusal to listen to more knowledgeable professionals, and his level of distrust are of his own doing." *Id.* As such, his conduct amounted to abuse of the process and warranted sanctions. New York courts also take a dim view of attorneys who demonstrate a lack of respect for a scheduled mediation and fail to notify the mediator and other parties of changed circumstances.

In *Fisher v. Smithkline Beecham Corp.*, the defendant filed a motion for summary judgment on the eve of mediation, while the plaintiffs and their counsel were en route to Buffalo, where the mediation would take place. 2008 U.S. Dist. LEXIS 76207, 20-21 (W.D.N.Y. Sept. 29, 2008). Once at the mediation, the defendant's participation was limited to presenting plaintiff's counsel with a copy of the motion that had been filed the previous evening. *Id.* at 18. The Court found the defendant's failure to inform other parties of a motion that had clearly been contemplated well in advance of the mediation session, and had the predictable effect of hindering mediation efforts, caused the plaintiffs to unnecessarily incur expenses, was not in good faith, and warranted sanctions. *Id.* at 20-21.

California

Consistent with the District Court's decision in *AT Reynolds*, and decisions by other New York district courts, federal courts in California generally look to objective criteria when determining whether a party's participation in mediation was in good faith. What sets California apart is that each federal district court has adopted local rules setting forth objective guidelines to be followed by parties in mediation and settlement discussions. The local rule guidelines do not refer to a "good faith" requirement. Instead, the local rules generally require at least the following: submission of a written mediation statement; appearance by a party representative with full authority to settle the case; and appearance by lead trial counsel. See CD Cal Local Rule 16-15; ND Cal ADR Local Rule 6; ED Cal Local Rule 270, 271; SD Cal Local Rule 600.

In contrast to the court in *AT Reynolds*, and other courts in New York, courts in California have adopted a stringent view of the requirement that each party be represented at the mediation by someone with authority to settle the case. For example, courts in the Central and Eastern Districts have explicitly defined the term "full authority to settle" as meaning that "the individuals attending the mediation conference must be authorized to fully explore settlement options and to agree at that time to any settlement terms acceptable to the parties." See e.g. *Buenrostro v. Sahota*, 2011 U.S. Dist. LEXIS 127313 (E.D. Cal. Nov. 2,

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2011); *Meyer v. Portfolio Recovery Assocs., LLC*, 2011 U.S. Dist. LEXIS 53778 (S.D. Cal. May 18, 2011) And both Districts have approvingly cited cases from jurisdictions outside of California for the proposition that sending a representative with rigid limitations on their ability to settle a case may run afoul of the court's requirements. See, e.g. *Pittman v. Brinker Int'l, Inc.*, 216 F.R.D. 481, 485-86 (D. Ariz. 2003), *amended on recon. in part, Pitman v. Brinker Int'l, Inc.*, 2003 U.S. Dist. LEXIS 26202, 2003 WL 23353478 (D. Ariz. 2003) (requiring that the individual with full authority to settle have "unfettered discretion and authority" to change the settlement position of the party, if appropriate.); *Nick v. Morgan's Foods, Inc.*, 270 F.3d 590, 596-97 (8th Cir. 2001) (an authorization to settle for a limited dollar amount or sum certain can be found not to comply with the requirement of full authority to settle). However, while California courts have expressed skepticism about representatives with authorization to settle for a limited amount, it is not clear that the courts would demand more than authority to settle up to the amount in controversy, as is required under *AT Reynolds* in New York.

Notwithstanding the local rules, California courts do not completely ignore the concept of "good faith" in mediation. See, e.g., *Skylark Inv. Props., LLC v. Navigators Ins. Co.*, 2010 U.S. Dist. LEXIS 12834 (S.D. Cal. Feb. 11, 2010) ("General statements that a party will 'negotiate in good faith' is not a specific demand or offer contemplated by this Order. It is assumed that all parties will negotiate in good faith."); *Olam v. Congress Mortg. Co.*, 68 F. Supp. 2d 1110, 1116 (N.D. Cal. 1999) (noting that mediation participants are expected to participate in good faith, "but that 'good faith participation' does not mean that [a participant] would have to 'cave in' or agree to anything."). However, the requirement of good faith by itself has not been applied in California to impose sanctions for mediation conduct; in all cases imposing sanctions, the determination was based on the objective criteria set forth by the local rules.

As noted in the commentary to Northern District of California ADR Local Rule 2-4, parties are encouraged to use the informal resolution procedure set forth in the ADR Local Rules, but under *Zambrano v. City of Tustin*, 885 F.2d 1473 (9th Cir. 1989), the district court may impose fee shifting sanctions for a violation of a local rule only on a finding of bad faith, willfulness, recklessness, or gross negligence. For example, such sanctions have been imposed for, at least in part, a failure to attend the mediation absent good cause. In *Lial v. County of Stanislaus*, the District Court found that an award of attorney's fees was appropriate where the plaintiff offered what was, in the Court's view, a disingenuous reason for cancelling a scheduled mediation. 2011 U.S. Dist. LEXIS 4435 (E.D. Cal. Jan. 11, 2011). After spending over 11 hours speaking with the mediator in advance of the scheduled mediation, the plaintiff cancelled the mediation on less than a week's notice, allegedly because she did not have sufficient vacation time to attend. *Id.* The Court noted disapprovingly that the plaintiff took a vacation the day after the date the mediation was originally scheduled for. *Id.*

In contrast, although a party may be required to attend a mediation, good faith does not necessarily guarantee unfettered access by the mediator to the party. In *EEOC v. ABM Industries Inc.*, the defendants brought a motion for sanctions against plaintiffs based on plaintiffs' counsel's refusal to allow the mediator direct access to the plaintiffs. 2010 U.S. Dist. LEXIS 24570, 3-4 (E.D. Cal. Mar. 3, 2010) ("ABM argues that they are entitled to sanctions because, in essence, 'good faith' mediation efforts required the mediator to be able to directly persuade the plaintiffs to the wisdom of the defendants' position.") EEOC countered that the plaintiffs were Spanish speakers, and that the mediator's suggestion, given that the mediator did not speak Spanish, would have required counsel for plaintiffs to act as an interpreter and could easily give rise to confusion as to who was advocating a particular position. *Id.* The Court recognized that it had general authority under Federal Rule of Civil Procedure 16 (f) to impose sanctions for failure to obey a scheduling order, and under 28 U.S.C. § 1927 to sanction attorneys who act in bad faith, but declined to impose any sanctions.

As an initial matter, the district court in *EEOC* noted that this was not a mandatory mediation, and the parties appeared by agreement. But this does not appear to have affected the court's analysis of what it means for a party to participate in good faith. In particular, the court criticized the defendant for failing to request direct access to the parties by the mediator before the ground rules for mediation were entered. The court also found that good faith efforts at mediation do not require attorneys to give up their role as counselor to their clients. In fact, "in the Court's view a primary reason that people hire lawyers is so that they are not pressured into doing something that may not fully serve their interests. The plaintiffs were entitled to rely upon the advice of their counsel and the attorneys were duty-bound to zealously advocate for them." *Id.* at 14-15.

The adoption by all California district courts of local rules codifying objective criteria to assess participation in mediation proceedings may be intended to ensure compliance with state laws, and state Supreme Court precedent, relating to the confidentiality of mediation proceedings and restrictions regarding the information that can be disclosed to the court. See, e.g., *Benesch v. Green*, 2009 U.S. Dist. LEXIS 117641, 11-12 (N.D. Cal. Dec. 17, 2009) ("The broad policy of mediation confidentiality contained in the statutes is strictly enforced and the California Supreme Court has refused to allow implied exceptions: 'Where no express waiver of confidentiality exists, judicially crafted exceptions to mediation confidentiality are not appropriate.'") (citing *Foxgate Homeowners' Assn. v. Bramalea California, Inc.*, 26 Cal. 4th 1, 15 (Cal. 2001)). Limited

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exceptions are recognized in each district's local rules, but these generally relate to the ability to report failure to comply with an express local rule to the Magistrate overseeing the ADR program, not to the judge presiding over the case. *See, e.g.*, ND Cal ADR Local Rule 6-12. *See also* CD Cal Local Rule 16-15.8 ("All settlement proceedings shall be confidential. No part of a settlement proceeding shall be reported, or otherwise recorded, without the consent of the parties, except for any memorialization of a settlement and the Clerk's minutes of the proceeding").

Conclusion

While courts continue to cite a duty to mediate in "good faith," it is unclear what, if any, requirements that places on a party beyond the specific provisions set forth in a court order. When faced with a court-ordered mediation, participants should make sure that they are represented at least by counsel and someone with full authority to settle the matter. Any anticipated change in circumstances should be promptly notified to the mediator and to all parties, particularly if cancellation or postponement of the mediation may be necessary.