Prohibiting Good Faith Reports under the Uniform Mediation Act: Keeping the Adjudication Camel out of the Mediation Tent

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I. INTRODUCTION

This symposium article examines a narrow slice of the Uniform Mediation Act - the prohibition on mediator communication to judges about a party’s good faith participation or "problem" behavior in mediation. Early drafts of the Uniform Mediation Act (hereafter "UMA") contemplated exceptions to the mediation privilege, including claims that a party failed to negotiate in good faith. Ultimately, Section 7(a) reads in pertinent part:

(a) Except as required in subsection (b), a mediator may not make a report, assessment, evaluation, recommendation, finding or other communication regarding a mediation to a court, administrative agency, or other authority that may make a ruling on the dispute that is the subject of the mediation.

(b) A mediator may disclose:

(1) whether the mediation occurred or has terminated, whether a settlement was reached, and attendance;

(3) a mediation communication evidencing abuse, neglect, abandonment, or exploitation of an individual to a public agency responsible for protecting individuals against such mistreatment.\(^1\)

The Reporter's Notes state:

Importantly, the prohibition is limited to reports or other listed communications to those who may rule on the dispute being mediated. While the mediators are thus constrained in terms of reports to courts and others that may make rulings on the case, they are not prohibited from reporting threatened harm to appropriate authorities, for example, if

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1. Carol L. Izumi is a Professor of Clinical Law and the Associate Dean for Clinical Affairs at George Washington University Law School. Homer C. La Rue is a Professor of Law at Howard University School of Law. Their research assistants, Erika Thomas and Sherell Daniels, provided invaluable assistance in the preparation of this article.

learned during a mediation to settle a civil dispute. The provisions would not permit a mediator to communicate, for example, whether a particular party engaged in ‘good faith’ negotiation, or to state whether a party had been ‘the problem’ in reaching a settlement. Section 7(b)(1), however, does permit disclosure of particular facts, including attendance and whether a settlement was reached. For example, a mediator may report that one party did not attend and another attended for the first five minutes. States with ‘good faith’ mediation laws or court rules may want to consider the interplay between such laws and this Section of the Act.

During the past several years, there has been a robust debate within the dispute resolution community about the wisdom, practicality, and need for good faith requirements in mediation participation, which would allow or even compel mediators to report party behavior to judges. This article briefly surveys the debate and argues that good faith requirements strike at the heart of the mediation process by undermining core mediation values of party self-determination, confidentiality, and third party neutrality. Furthermore, allowing or requiring a mediator to disclose specifics about what occurred during mediation elevates legal values over mediation values. When we refer to “legal values,” we refer to those qualities of a lawyer and/or legal institutions which most in the profession would find desirable, useful, and important to their role as lawyers and/or to the integrity of various legal institutions. These legal values include judicial control, efficiency of the process, a finding of “right” and “wrong”, client advocacy, and defining client interests and needs in terms of legal remedies. Similarly, “mediation values” refer to those qualities of the process of mediation and/or those characteristics of the third-party which participants in the process find desirable, useful, and important to the ongoing viability and integrity of the process. Mediation values include confidentiality, mediator impartiality, and party self-determination.

The latter part of the article reviews fundamental considerations that may lead parties to select one dispute resolution process over another. In making that choice, it is fair to conclude that the parties subscribe to the standards and attributes of their chosen process. We suggest that referring court cases to mediation as a matter of course may create “process dissonance.” The attributes of mediation may be preferred by the parties and may be more suitable to quality dispute resolution in certain cases. Mixed messages and conflicting priorities, however, are imposed upon the participants when mediation is inserted into the litigation setting. The adjudicative process and the mediation process demand and expect vastly different approaches by the parties and their representatives. Good faith requirements exacerbate the “process dissonance” problem by conflating litigation and mediation values. As a result, both processes are ill-served and damaged.


4. For a more in depth analysis of good faith arguments, see John Lande, Using Dispute System Design Models to Promote Good-Faith Participation in Court-Connected Mediation Programs, 50 UCLA L. Rev. 69 (2002) (proposing the use of system design principles to promote desired conduct).
We conclude with the assertion that the UMA strikes the correct balance by rejecting arguments in favor of mediator reports to judges and others about the actions and statements of parties during the mediation for the purpose of assessing and sanctioning “bad faith” behavior. For the rare and extreme case, the UMA provides a mechanism to address egregious party behavior such as lying and fraudulent inducements causing another party to settle.

II. THE “GOOD FAITH” DEBATE

The task of drafting of the UMA included soliciting opinions and feedback from academics, judges, practitioners, and others in the dispute resolution community and assessing the competing arguments and considerations for alternative language. Over the past several years, a good deal of energy and paper has been dedicated to a discussion of participation standards for mandatory mediation. The vigorousness of the discussion has coincided with the expansion of mandatory mediation. During the boom years of the late 1980’s-early 1990’s,

the use of mediation proliferated dramatically; mediation was adopted in courts for civil, probate, employment, civil rights, commercial, family, and other types of cases. Originally an oxymoron, mandatory mediation became the prevailing model. With the shift from voluntary to mandatory mediation, concerns over party underutilization of programs and attorney reticence to initiate mediation were no longer paramount since participants are ordered to attend at the court’s instigation. Rather, the concern “du jour” was that parties or their lawyers would misbehave and misuse the process if they were forced to attend court-ordered mediation sessions.

A. Arguments In Favor of A Good Faith Participation Requirement

A “good faith” requirement as discussed in this article is a directive to parties and others to participate in the mediation process “in good faith” or with “best efforts.” Proponents of a good faith requirement urge that a number of sound reasons compel such a standard for participation. Their reasoning falls into three basic categories: protecting parties against abusive and inappropriate behavior in mediation; putting participants on notice of acceptable behavior in mediation; and efficiency. They maintain that good faith requirements are necessary for the mediation process to work effectively as a creative, collaborative dispute resolution process in which parties take into account differing perspectives and positions.

Now that courts routinely funnel cases to mediation before trial, the population using mediation services has grown. Lawyer-participants who have become regular attendees in court-mandated mediation have triggered the demand for firm standards for acceptable participation. Inserting “Rambo-style” litigators into the mediation process raises fears of lawyers playing litigation games, engaging in fishing expeditions for discovery purposes, trying to gain advantage over an opponent, or putting on a charade to comply with the court’s order.

Elevated numbers of pro se parties ordered to mediation create a potentially uneven setting that would allow represented parties and counsel to use the process to the disadvantage of the unrepresented. “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

7. See Kovach, supra n. 5, at 593; Biller, supra n. 5, at 281.
8. Federal Magistrate Wayne Brazil identifies the following as “traditional litigation behavior”: self-conscious posturing; feigning emotions or states of mind; pressing arguments known or suspected to be specious; concealing significant information; obscuring weaknesses; attempting to divert the attention of other parties away from the main analytical or evidentiary chance; misleading others about the existence or persuasive power of evidence not yet formally presented; resisting well-made suggestions; intentionally injecting hostility or friction into the process; remaining rigidly attached to positions not sincerely held; delaying other parties’ access to information; or needlessly protracting the proceedings. Brazil, supra n. 5, at 29.
legitimacy or potential effectiveness." Advocates of good faith requirements posit that creating some common understanding of what behavior is expected or acceptable would yield progress toward establishing a fairer environment. "In order to maintain the integrity of the mediation process, the conduct of the participants must be consistent with its goals and objectives." Proponents express doubts that the special attributes of mediation, such as collaborative problem solving, assisted-dialogue, reality testing, empowerment, flexibility, and beneficial solutions can exist where good faith is absent.

Supporters argue that explicit good faith requirements in state mediation statutes, court rules, and judicial orders inform parties of what is expected of them by prescribing or proscribing conduct. "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...to provide notice of minimal aspects of good-faith participation." The most common types of alleged bad faith behavior include failure to: attend the mediation; sign a mediated agreement; make a suitable offer; send a representative with authority to settle; provide documents; and failure to participate substantively or attempt to resolve the case. Professor Kimberlee Kovach lists aspects of conduct that could constitute elements of a good faith standard and proposes a model rule.

Professor Maureen Weston proposes a "totality of the circumstances" test for judging participation. She touts a statutory procedure with prohibited conduct, procedural safeguards, remedies, and sanctions.

According to those who champion good faith requirements, the directives would make the mediation process more efficient. Parties who appear without requested documents, settlement authority, or a negotiating mind frame waste the

11. Id. at 591.
13. Lande, supra n. 4, at 83-84 tbl.1.

[A]rriving at the mediation prepared with knowledge of the matter, in terms of both factual background and possible solutions; having all necessary decision-makers present at the mediation, not via telephone; taking into account the interests of the other parties; demonstrating a willingness to listen and attempting to understand the position and interests of the other parties; being prepared not only to discuss the issues and interests of your client, but also to listen to the issues and interests of all other participants; engaging in open and frank discussions about the case or matter in a way that might illuminate one's position for the other to know and understand better; not lying when asked a specific and direct question; not intentionally misleading the other side; having a willingness to discuss your position in detail; and explaining the rationale underlying why a specific proposal is all that will be offered, or why one is refused. Good faith also would include coming to the mediation with a willingness to be open to another perspective. Parties do not agree with one another, but only attempt to understand the differing viewpoints and, at the very least, not summarily and without consideration reject what the other party has to say. And from the lawyer's perspective, an additional guideline may be appropriate, such as allowing the client to discuss the matter directly with the other side and with the mediator.

15. Weston, supra n. 5, at 630.
16. Id. at 643-44.
17. Biller, supra n. 5, at 282.
time of other parties and the mediator. Unnecessary costs are incurred and participants who act in good faith are harmed by those who do not. Allowing mandatory mediation to include bad faith and inappropriate behavior erodes party confidence and makes a mockery of the process. 18 Nick v. Morgan’s Foods, Inc. illustrates this point. 19 In that case the court-appointed mediator informed the trial judge after the mediation of defense counsel’s “minimal level of participation” by failing to file a pre-mediation memorandum and appearing with only limited authority. 20 Two offers of settlement during the mediation were rejected. 21 The district court granted Nick’s motion for sanctions for defendant’s failure to mediate in good faith and assessed the costs of mediation, attorneys’ fees, and a fine. 22 The trial court determined that defendant failed to participate in good faith and concluded that “[t]he consequence of Morgan’s Foods’ lack of good faith participation in the ADR process, however, was the wasted expense of time and energy of the Court, the neutral, Nick, and her court-appointed counsel.” 23 The United States Court of Appeals for the Eighth Circuit found that appellant was liable for its own and its counsel’s failure to participate in good faith and “for vexatiously increasing the costs of litigation by filing a frivolous motion for reconsideration.” 24

To create the “bad faith-free” mediation environment envisioned, those who favor the requirement urge that it must be enforceable. Enforcement of the duty to participate in good faith should strike a balance between efficiency and proportionality, avoiding “overkill” and guarding against settlement pressures. 25 Party conduct must be revealed and a determination must be made whether it violates the demands of the requirement. Disclosure by the neutral of communications and party conduct in mediation is the method of proof by which bad faith often comes to light. Reports by mediators to the trial judge may recite the substance of discussions as well as mediator impressions and conclusions about party behavior and motivation. 26 Proponents assert that misconduct must be actionable and policies favoring confidentiality must be tempered to permit disclosure of misconduct. To the extent that confidentiality is compromised, an exception is warranted so the requirement will have significance. 27 “[T]he good-faith-participation requirements applied to party conduct in ADR proceedings are ...designed to ensure process integrity and procedural fairness. The requirement is

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18. Kovach, supra n. 5, at 596.
20. Id. at 1058.
21. Id.
22. Id. at 1059.
23. Id. at 1063.
26. See Foxgate Homeowners’ Assn., Inc. v. Bramalea Cal., Inc., 92 Cal. Rptr. 2d 916, 929 (Cal. App. 2d Dist. 2000) (stating 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”), superseded, 999 P.2d 666 (Cal. 2000), aff’d, 25 P.3d 1117 (Cal. 2001).
27. Kovach, supra n. 5, at 585.

https://scholarship.law.missouri.edu/jdr/vol2003/iss1/6
essentially meaningless if confidentiality privileges restrict the ability to report violations.”

Advocates of good faith requirements acknowledge that impartiality of the mediator would also be risked for the sake of enforcement. “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... Neutrals have ethical as well as express and implied contractual duties to be impartial and to maintain confidences imparted in an ADR session... In some instances, however, a neutral may feel compelled to report party misconduct in an ADR session.” Proponents view the weakening of mediator impartiality, whether it is real or merely perceived by the parties, as a trade-off for the benefits of the requirements.

Supporters argue that post-mediation litigation to enforce the good faith requirement is a necessary evil and small price to pay for a substantial payoff. They assert that court-mandated mediation will be fairer and more efficient, parties will have more confidence in the process, and the resulting settlements will be the result of collaborative participation true to the goal of mediation. A corollary result would be a change in the mindset of attorneys and parties in the process from one of adversariness to one of cooperation. The alternative, in the words of Professor Kovach, is that “[i]f good faith is not present, all we will be left with is a pro forma mediation, one more procedural task to be checked off on the long list of items to be covered in order to get to the trial.”

Those who favor good faith requirements contend that requiring parties to adhere to a minimal standard of conduct adds to the legitimacy of the process. “Sanction or liability would present a ‘deterrent’ to abuse power imbalances, yet provide meaningful redress when such misconduct occurs.” Sanctions for violations of a good faith requirement range from financial to substantive. They may include costs, fees, expenses, fines, contempt, referral to arbitration, denial of trial de novo, and dismissal with or without prejudice. Some statutes require good faith but provide no sanctions for noncompliance. Where sanctions have been imposed, parties have been ordered to pay fees and costs related to the mediation and been subject to a contempt ruling. The mediator may terminate the mediation. Procedural actions may attend such as referral to arbitration, preclusion of one’s day in court, and even dismissal. In Utah, state law permits a temporary change in custody or visitation if a parent fails to cooperate in good faith in mediation.

In short, these requirements are touted for their laudable objective of addressing potential coercion, abuse, and bad faith behavior in mediation sessions. “Despite difficult definitional and policy issues inherent in the enforcement of a good-faith requirement, the legitimate objectives of ADR - including inter alia,

29. Kovach, supra n. 5, at 585.
31. Kovach, supra n. 5, at 595.
32. Weston, supra n. 5, at 643.
33. Id. at 632; Lande, supra n. 4, at 81.
34. Lande, supra n. 4, at 80-81.
35. Id. at 81.
efficiency, effectiveness, party satisfaction, and fairness - require a duty of good faith participation."

B. Arguments Against Good Faith Participation Requirements

The definitional problem with good faith requirements is a consistent and major criticism. No clear definition exists of what constitutes good faith, or the lack thereof, in mediation participation. Good faith requirements suffer from vagueness, lack clarity and consistency, and offer few guidelines to those who must conform to or judge conduct. A finding of bad faith is too often a purely subjective assessment. Kovach concedes the indeterminacy of the standard but asserts that “you know it when you see it.” The benefit of putting parties on notice of expected behavior is lost when ambiguity exists in the concept of good faith. “A requirement of ‘good faith’ participation, which is inherently vague and subjective, unduly entrenches on the voluntariness of settlement and on the parties’ legitimate right to demand their day in court.” In defense, Kovach urges that good faith does not mean having a sincere desire to reach resolution, being “nice,” full disclosure, honesty, or making offers or counteroffers. However, her list of good faith conduct includes hard to grasp mandates such as “coming to the mediation with a willingness to be open to another perspective.”

Critics also point to the potential for misusing the good faith requirement, such as threats to “tattle” to the mediator or judge, and frivolous complaints of bad faith to intimidate the opposing party. The requirement has negative consequences, converting the shield into a sword and diverting attention from the true goals of the process. Rather than increasing dialogue, the requirement may shut down constructive communication and chill some of the passionate and useful exchange that can occur in mediation. Worse, it can induce dishonesty and nurture an environment where bargaining is superficial and disingenuous. “[F]ormalizing a requirement of ‘good faith’ participation might well have the ironic effect of intensifying the temptations to ‘litigize’ mediation -- and thus to corrupt its spirit and frustrate achievement of its potential.” Good faith requirements arguably encourage more, not less, gamesmanship and posturing. There is also the huge risk of inappropriate mediator conduct. Requiring the mediator to determine when a party has not participated in good faith gives the neutral tremendous power which may be abused for settlement pressure or to make the mediator look good for the judge or court administration.

Good faith participation requirements may similarly lower a party’s sense of procedural fairness and expectation that the process is likely to end in a settlement of choice. “The danger of this broad [good faith] formulation of the

37. Weston, supra n. 5, at 643.
38. Sherman, Court-Mandated, supra n. 5, at 2093; Winston, supra n. 5, at 198; Lande, supra n. 4, at 77; Alfini, supra n. 5, at 65 (stating that lawyers believe requirement is too subjective).
39. Lande, supra n. 4, at 77; Devine, supra n. 5, at 108.
40. Kovach, supra n. 5, at 600.
41. Sherman, Aspirational, supra n. 5, at 14.
42. Kovach, New Wine, supra n. 14, at 962.
43. Kovach, supra n. 5, at 615.
44. Brazil, supra n. 5, at 33.
duty to participate is that it may create settlement pressures, cutting back on the essential voluntariness of agreement in mediation.”

Public policy favoring mediation is rooted in party choice, a position forcefully articulated in Decker v. Lindsay. Trial Judge Lindsay ordered the Deckers to mediate their negligence action against the real party in interest. The court’s Rules for Mediation provided in pertinent part that “all parties commit to participate in the proceedings in good faith with the intention to settle, if at all possible.” The appellate court concluded that Judge Lindsay could not require the Deckers to negotiate in good faith and attempt to reach a settlement. To do so would not be “consistent with a scheme where a court refers a dispute to an ADR procedure...but no one can compel the parties to negotiate or settle a dispute unless they voluntarily and mutually agree to do so.” Since the parties clearly indicated they wished to proceed with trial (a simple case which would not last longer than 2 days), the referral to mediation cannot require good faith negotiation.

Commentators contend that courts go too far in enforcing good faith requirements. Sanctions that affect the party’s right to progress along a litigation route are troubling. Dean Edward Sherman argues that a fundamental principle of ADR process legitimacy is that the proceeding not interfere with the party’s rights and trial strategy. Dean Sherman examined the phenomenon of court institutionalization of ADR processes and measured five forms of participation against four key principles: uncoerced settlement, fairness in the proceedings, proceeding calculated to achieve its purpose, and respect for litigant autonomy. He cautioned that:

"too expansive a ‘good faith participation’ requirement may not be compatible with ... principles underlying the values and objectives of court-mandated ADR. ... [T]he higher the level of participation required, the greater the coercion by forcing a party to present its case in a manner not of its choosing. This shades into an invasion of litigant autonomy by interfering with the party’s choice of how to present its case."  

In Semiconductors, Inc. v. Golasa, Judge Anstead dissented from a denial of a writ of certiorari, stating:

"I would grant the petition which seeks to overturn a trial court order sanctioning the petitioner for failing to send a representative to a mediation proceeding with some authority to pay the respondent money damages for his claim of wrongful discharge. The petitioner’s lawyer

45. Nelle, supra n. 25, at 304.
47. Id. at 248.
48. Id. at 249.
49. Id. at 252.
50. Id. at 251.
51. Id. at 252.
52. Tenerowicz, supra n. 5 (citing cases and cautioning that courts should be mindful of notice and fairness concerns in applying sanctions).
53. Sherman, Court-Mandated, supra n. 5, at 2086-87.
54. Id. at 2094.
and another representative appeared at the conference but were not authorized to pay anything in settlement of the claim because the petitioner adhered to a position that it was not liable to the claimant. I do not believe the petitioner can be sanctioned for taking this stance at a court-ordered mediation conference. To hold otherwise is to turn mediation into a forced settlement proceeding .... [M]ediation is not designed to force a settlement in any case .... 

The problem of creating attendant or “satellite” litigation flows from enforcement. Critics analogize to the phenomenon of Rule 11 sanctions, which triggered an “avalanche” of so-called “satellite litigation.” Clearly there has been an increase in the number of reported “good faith” cases. Of 27 reported cases dealing with bad faith, most were court-connected and only three were decided before 1990; there have been 11 reported cases since 1998. One could expect a similar pattern in unreported cases. A survey of recent alternative dispute resolution (“ADR”) case law revealed that one of the most frequently litigated issues involved good faith requirements. In two-thirds of the reported cases, appellate courts reversed findings of bad faith by trial court. In contrast, five cases were reported in which a trial court’s rejection of bad faith claim were appealed. All the trial court rulings were upheld on appeal. Weston concedes that satellite litigation is an offshoot of good faith requirements, but asserts that it is warranted since the neutral cannot issue sanctions or impose penalties.

Good faith requirements have the unintended effect of immersing the dispute deeper into the litigation stream, as seen in In Re Acceptance Ins. Co. In that case the trial court ordered the parties (insurance company and real party in interest) to mediation before trial, specified that they must have representatives present in person with full settlement authority, and ordered the parties “to make a good faith effort to settle.” Mediation was unsuccessful and the case went to trial. During the trial the court issued a second order of referral to mediation; this mediation was also unsuccessful. A few days after the trial was finally completed, the insurance company’s counsel received a telephone call stating that the trial court intended to conduct a sanctions hearing in three days. At the hearing the insurance company filed objections, asserting that no notice had been provided and the proposed hearing violated mediation confidentiality. The court proceeded with the hearing and allowed opposing counsel to interrogate the

56. Lande, supra n. 4, at 100.
58. Lande, supra n. 4, at 82 n.54.
59. See Alfiniti & McCabe, supra n. 5, at 172.
60. Lande, supra n. 4, at 85.
61. Weston, supra n. 5, at 631.
63. Id. at 446.
64. Id.
65. Id.
66. Id.
67. Id. at 447.
insurance company's representative at length. She was asked about her settlement authority, her preparation for mediation, her knowledge of matters in the company's files, and communications with her supervisor by phone and with opposing counsel during the mediation. When the hearing concluded, the trial court set another hearing and ordered the senior vice president of the insurance company to personally appear; the insurance company's counsel reasserted the same objections to no avail. It then filed its petition for a writ of mandamus with a request for an emergency stay. Notwithstanding the order, the real party in interest filed a written motion for sanctions in the trial court against the insurance company based on testimony obtained at the first sanctions hearing. Sanctions were sought for the company's alleged failure to send a representative to mediation with authority, failing to participate in mediation in good faith, and failure to make a good faith effort to adhere to the trial court's mediation orders. In granting the writ, the Texas Court of Appeals held that the trial court had no authority to inquire into or enforce its order requiring good faith negotiation, citing the policy of the state "to encourage the peaceable resolution of disputes...and the early settlement of pending litigation through voluntary settlement procedures...a court may compel parties to participate in ... mediation, but it cannot compel them to negotiate in good faith or to settle their dispute." The trial court improperly allowed inquiry into communications made by a participant relating to the subject matter of the mediation which were confidential, not subject to disclosure, and could not be used as evidence against the participant in any judicial or administrative proceeding. The manner in which parties negotiate should not be disclosed to the trial court.

Finally, some would argue that good faith requirements are overreactions to a numerically small number of incidents. Little evidence exists that there is a significant problem with "bad faith" participation in mediation. Interviews with mediators in one jurisdiction showed that they believe the problem is overstated. For egregiously bad conduct in mediation, good faith requirements are unnecessary.

Given...the elusiveness of the concept of 'good faith' itself, courts are likely to feel confident that a party has violated a requirement to proceed in 'good faith' only when the offender's conduct is extreme .... But when the offending conduct is extreme, courts are likely to be able to

68. Id.
69. Id.
70. Id.
71. Id.
72. Id.
73. Id.
74. Id. at 451 (emphasis in original).
75. Id. at 452-53.
76. Id. at 452.
77. Wayne D. Brazil, Court ADR 25 Years After Pound: Have We Found a Better Way?, 18 Ohio St. J. on Disp. Resol. 93, 142 (2002) (arguing that court ADR programs fall short of their intended goals).
78. Alfini, supra n. 5, at 65.
impose an appropriate sanction without resort to any ‘good faith’ requirement.\textsuperscript{79}

These requirements run counter to important public policy considerations favoring confidentiality in mediation and voluntary settlements created by parties without judicial pressure. Critics cite their counterproductive effect, namely that “there is a substantial risk that imposing a good faith requirement would tend to defeat the goal of encouraging the more open, cooperative, and constructive participation that deserves the label ‘good faith’.”\textsuperscript{80}

Goals of efficiency and cost-effectiveness may also be elusive. Professor John Lande points out that “[t]he time, expense, and uncertainty of appeal can be substantial and in most cases probably must be greater than the costs involved in a mediation ‘wasted’ due to bad faith.”\textsuperscript{81} From the perspective of a lawyer-advocate:

People have many motivations to mediate, some purer than others. A determination of good faith is nearly impossible. Sometimes parties initially agree to mediate for dubious reasons -- free discovery or the opportunity to intimidate the other party. Even then, however, there are many instances where, once in mediation, they do effectively negotiate an agreement. For the most part good faith is not a requirement for mediation. If there is bad faith, it will become evident soon enough and all that will be lost is some time and money.\textsuperscript{82}

The deleterious effect of a good faith requirement on the mediation process, underlying dispute, parties, mediator, and court system is perhaps best illustrated by the long and drawn out case of Foxgate v. Bramalea.\textsuperscript{83} In a construction defect suit, the court-appointed mediator ordered the parties to bring their experts to the mediation and make their best effort to cooperate in the mediation process.\textsuperscript{84} When defense counsel showed up late without any experts the mediation went forward but was cancelled after the mediator concluded that they could not proceed.\textsuperscript{85} Plaintiff filed a motion alleging failure to cooperate in mediation, seeking as sanctions the cost to plaintiff for its counsel’s preparation for mediation, the cost to plaintiff of nine experts’ time for preparation and appearance at the mediation, and payment to the mediator.\textsuperscript{86} The motion was accompanied by the plaintiff’s declaration describing defense counsel’s actions and statements that were allegedly indicative of a pattern of tactics pursued in bad faith.\textsuperscript{87} The mediator filed a report to the trial court reciting defense counsel’s actions and statements during the mediation and characterized them as

\textsuperscript{79} Brazil, supra n. 5, at 31.
\textsuperscript{80} Brazil, supra n. 5, at 33.
\textsuperscript{81} Lande, supra n. 4, at 86, n.77.
\textsuperscript{83} Foxgate, 25 P.3d 1117.
\textsuperscript{84} Id. at 1120.
\textsuperscript{85} Id.
\textsuperscript{86} Id.
\textsuperscript{87} Id.
"obstructive bad faith tactics." The mediator’s report also included recommendations for further mediation sessions and his resignation.

Bramalea and its counsel, Mr. Stevenson, opposed the sanctions motion on numerous grounds and objected to the mediator’s report, giving its own version of events during mediation. The trial court denied the motion without prejudice and ordered more mediation with a new mediator. The new mediator advised the court after one session that further mediation would not be constructive. Bramalea filed a motion seeking return of mediation fees paid to the first mediator, claiming that he was biased and condemning the manner in which he conducted the mediation. In his defense, the mediator filed a declaration stating that Stevenson aborted the mediation by refusing to participate in good faith. Foxgate filed a new motion for increased sanctions. In its opposition to this second motion for sanctions, Bramalea argued for the first time that the mediator’s report and other disclosures about the mediation are inadmissible in light of statutory provisions stating: "Neither a mediator nor anyone else may submit to a court...and a court... may not consider, any report, assessment, evaluation, recommendation, or finding of any kind by the mediator concerning a mediation conducted by the mediator..." Plaintiff’s second sanctions motion was granted.

On appeal, Bramalea contended that the superior court violated mediation confidentiality by considering the mediator’s report. The California Court of Appeals reversed the sanctions order because the trial court failed to recite in detail the conduct justifying the order. However, the court of appeals rejected appellant’s argument that the mediator was barred from reporting conduct during the mediation to the court. Acknowledging that the purpose of confidentiality “is to promote mediation and that confidentiality is essential to mediation,” the appellate court concluded that the Legislature “did not intend statutory mandated confidentiality to create an immunity from sanctions that would shield parties who disobey valid orders governing the parties’ participation.” The court of appeals created an exception to mediation confidentiality; it described the exception as narrow, permitting a mediator or party to report to the court only information that is reasonably necessary to describe sanctionable conduct and place that conduct in context.

The California Supreme Court disagreed with the Court of Appeals and held that “[t]he statutes are clear. Section 1119 [on confidentiality] prohibits any person, mediator and participants alike, from revealing any written or oral

88. Id. at 1121.
89. Id. at 1121, n.4.
90. Id. at 1121.
91. Id.
92. Id.
93. Id. at 1121-22.
94. Id. at 1122.
95. Id.
96. Id.
97. Id.
98. Id.
99. Id.
100. Id.
101. Id.
102. Id. at 1123.
communication made during mediation. Section 1121 also prohibits the mediator, but not a party, from advising the court about conduct during mediation that might warrant sanctions. The court reaffirmed that "confidentiality is essential to effective mediation." Litigation over the application of a good faith requirement in this dispute consumed over four years.

III. GOOD FAITH REQUIREMENTS UNDERMINE KEY MEDIATION VALUES

More is at stake with these good faith requirements than debates over definitions and crowded dockets. Core characteristics of the mediation process are weakened and larger values are threatened. These essential values are party self-determination, mediator impartiality, and mediation confidentiality. Mediation values, not litigation values, ought to be the yardstick by which all mediation rules and standards are measured. When judged against these most basic mediation values, good faith requirements are undesirable and, moreover, destructive to the mediation process.

A. Party Self-determination

The first special power of mediation, and what some call '[l]he overriding feature...and value of mediation', is that 'it is a consensual process that seeks self-determined resolutions.' Mediation places the substantive outcome of the dispute within the control and determination of the parties themselves; it frees them from relying on or being subject to the opinions and standards of outside 'higher authorities', legal or otherwise.

Self-determination is the key principle of mediation that places settlement power solely with the parties. The premise underlying self-determination is that the parties are happier with and more likely to honor an agreement they voluntarily choose to create. Placing the decision making power with the parties instead of a judge is a vital aspect of mediation's attractiveness and success as a dispute resolution process. As a disputant-centered process, mediation allows parties to "control the substantive norms guiding their discussion and decision-making ... and control the final outcome of the dispute

103. Id. at 1125.
104. Id. at 1117.
105. 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, 267 (1989) (advocating that mediator standards should draw from the traditional theory of the mediation process and the mediator's role).
resolution process.”\textsuperscript{108} Mediation allows the parties to structure the process, define the issues, determine what is needed to resolve the issues, and, by engaging in the process, to handle disputes better in the future. Thus, mediation, unlike litigation, is said to empower disputants.\textsuperscript{109}

In the mediation process, the parties design their preferred resolution to the dispute and determine what information, principles, and terms are relevant to reach that end. The malleability of the resolution process allows parties to paint a more complete picture of the situation than would a rigid dispute resolution process governed by evidence and procedural rules.\textsuperscript{110} “The good faith requirements represent an attempt by the courts to create maximum efficiency of a system that is designed to protect the parties’ rights to self-determination regarding the discussion of issues and settlement. Such divergent goals cannot coexist without one of these forces weakening the power of the other.”\textsuperscript{111} Good faith, it is argued, does not mean an agreement must be achieved.\textsuperscript{112} Yet it is clear that good faith requirements curtail the uninhibited give-and-take of facilitated negotiation that occurs in mediation. Parties must be mindful of their behavior knowing that mediators necessarily evaluate the settlement dynamics they witness in the process. Good faith requirements exert subtle but undue pressure on parties in presenting and resolving their cases.\textsuperscript{113}

The National Standards for Court-Connected Mediation Programs [hereafter “Standards”], published in 1992, were developed to guide courts in initiating, expanding, or improving mediation programs to which they refer cases.\textsuperscript{114} The goal of the Standards was to inspire court-connected mediation programs of high quality. The Standards advise that “Courts should impose mandatory attendance only when...there is no inappropriate pressure to settle, in the form of reports to the trier of fact or financial disincentives to trial.”\textsuperscript{115} Similarly, under the heading “Inappropriate Pressure to Settle,” the Standards state that “[c]ourts should institute appropriate provisions to permit parties to opt out of mediation... There should be no adverse response by courts to nonsettlement by the parties in mediation.”\textsuperscript{116}

Concurrently, the Society of Professionals in Dispute Resolution (SPIDR) issued a report entitled “Mandated Participation and Settlement Coercion.”\textsuperscript{117} The report, a nineteen month effort by a committee of academics, practitioners, program directors, and social science researchers cautioned that


\textsuperscript{109} Bush, supra. n. 105, at 267.

\textsuperscript{110} Leonard L. Riskin, Mediation and Lawyers, 43 Ohio St. L. J. 29, 34 (1982).

\textsuperscript{111} Zylstra, supra n. 5, at 70.

\textsuperscript{112} Kovach, New Wine, supra n. 14, at 961.

\textsuperscript{113} Sherman, Court-Mandated, supra n. 5, at 2094; Zylstra, supra n. 5, at 93-94.

\textsuperscript{114} Center for Dispute Settlement, The Institute of Judicial Administration, National Standards for Court-Connected Mediation Programs, (a joint project of the Center for Dispute Settlement and The Institute for Judicial Administration). It won the Center for Public Resources Legal Program Award for “Excellence in ADR” in 1992.

\textsuperscript{115} Id. at 5.1(b).

\textsuperscript{116} Id. at 11.1 and 11.2, pp. 9-10.

mandatory dispute resolution could create coercive pressure on parties to settle. One of these pressures specifically noted was reports to the trier of fact. The SPIDR report distinguished situations where parties who are required to participate are not penalized for failing to agree with or to accept the recommendation of the neutral third party. However, it cited some jurisdictions where "a party rejecting the advice of the third party neutral concerning settlement may risk financial penalties or the communication of that advice to the trier of fact." This latter situation is considered settlement coercion.

Clearly, rules dictating behavior in a mandated process create even more issues regarding settlement coercion. The fear of having confidential communications with the mediator revealed to the judge, the likelihood of economic sanctions, the potential for an adversarial proceeding on the content of mediation sessions, and the possibility of strategic disadvantage are pressures that accompany enforcement of a good faith requirement. In Bennett v. Bennett, the court refused to look back into the mediation process because it would:

...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 and, if so, the actual terms of the agreement. This is contrary to and would undermine the basic policy of the mediation process that parties be encouraged to arrive at a settlement of disputed issues without the intervention of the court.

The thought of heavy-handed mediators using good faith sanctions to pressure parties into making agreements is alarming. Even the most ethical and cautious mediators, however, could create an environment that puts pressure on parties to settle because their role as neutral includes being a monitor of good faith behavior.

Mediators who know that the law requires the parties to participate in 'good faith' are more likely to worry about whether they have a duty to report, on their own initiative a violation of that duty...[a]pprehension about such duties or pressures could create counterproductive distractions for mediators who are trying to build relationships and to help the parties during a mediation.

B. Mediator Impartiality

The Standards of Conduct for Mediators provide:

118. Id.
119. Id.
120. 587 A.2d 463 (Me. 1991).
121. Id. at 464.
122. Lande, supra n. 4, at 107.
123. Brazil, supra n. 5, at 32.
II. Impartiality: A Mediator Shall Conduct the Mediation in an Impartial Manner.

The concept of mediator impartiality is central to the mediation process. A mediator shall mediate only those matters in which she or he remains impartial and evenhanded. If at any time the mediator is unable to conduct the process in an impartial manner, the mediator is obligated to withdraw.\(^\text{124}\)

Mediator neutrality is a fundamental aspect of mediation. The neutral’s role is limited to informing parties about the process, facilitating discussion, and assisting in option development to resolve the dispute.\(^\text{125}\) Erosion of mediator impartiality and loss of trust in the mediator would result from a good faith requirement.\(^\text{126}\) Kovach concedes that “[t]he 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.”\(^\text{127}\) Citing the incompatibility between being a judge and mediator, Judge Wayne Brazil notes that a “duty to pass judgment would threaten a core component of the [mediator’s] sense of professional self - a sense at the center of which is a vision of ‘neutrality’ built around the notion that a facilitative mediator is never to express a normative or analytical critique.”\(^\text{128}\)

Good faith requirements create counterproductive distractions which distort the ways in which parties and counsel interact with the mediator. If they feel they are being evaluated, the participants may try to manipulate the mediator in an attempt to turn the mediator into their agent.\(^\text{129}\) “They will also feel tempted to ‘perform’ for her. To the extent that they feel fear and a compulsion to perform, they are also less likely to... trust the process and the person at its center.”\(^\text{130}\) Speaking of the family law context, one critic noted: “[b]y removing the mediator from the role of the neutral and into the decision maker [to decide if good faith is breached], the process strikingly resembles an adversarial process where the parties attempt to convince a trier of their benevolence. Such a contortion of the mediation process within custody disputes negates the goal of cooperation and collaborative problem solving to assist parents in working together in the future to resolve issues concerning child-rearing.”\(^\text{131}\) If the mediator is in a position to effect outcome, parties would try to advocate to the mediator to win her favor, subverting the honest, constructive dialogue the mediator is trying to establish.

The quality of the mediation process is dependent on the participants’ confidence in the mediator’s impartiality.\(^\text{132}\) Mediators must not allow party performance during the mediation, personal bias, or other factors to cause the

\(^{124}\) Model Standards of Conduct for Mediators, Stand. II (1994).
\(^{125}\) Id.
\(^{126}\) Zylstra, supra n. 5, at 96-97.
\(^{127}\) Kovach, supra n. 5, at 585.
\(^{128}\) Brazil, supra n. 5, at 32.
\(^{129}\) Brazil, supra n. 77, at 143.
\(^{130}\) Brazil, supra n. 5, at 32.
\(^{131}\) Zylstra, supra n. 5, at 96.
\(^{132}\) Goldberg, supra n. 6, at 652.
mediator to become impartial. The mediator must facilitate discussion without showing favoritism for a particular party, and the parties are the ultimate judges of mediator neutrality. "Mediators are advocates for a fair process and not a particular settlement." Mediator neutrality would be illusory if there is an indication that the mediator favors a particular position. "Freedom from even a hint of bias is so important both to public confidence and to the productivity of a mediation program that we must try not to overlook any aspect of a program that might serve as a source of concern (in the public) about the neutrality of the mediators."

C. Mediation Confidentiality

Confidentiality of communications and actions during mediation is essential to the process. The appearance of mediator neutrality is dependent on the protection of confidentiality. The neutrality of the mediator and process are most certainly called into question if a mediator is forced to testify about the behavior and statements of a party during mediation. Because the parties expect that their communications will remain confidential and that the mediator will not discuss these communications outside of the mediation, exceptions to the mediator privilege against testifying betray these expectations. "Perhaps the most critical effect a good faith requirement has on the mediation process is its effect on confidentiality."

Sharing information that might allow an opposing party to glimpse one’s vulnerabilities is risky and counterintuitive in negotiation. Confidentiality allows the parties to reveal secrets and their most personal feelings about the conflict that might otherwise not be disclosed in an adversarial setting. Because of this, "in many mediations, confidentiality does far more than enhance the candid nature of the discussion; between some adversaries, confidentiality may be akin to a precondition for any discussion." In addition, the protection of confidentiality is crucial if the mediator is to learn the various complexities involved in the dispute so that she may aid the parties in arriving at an agreed upon solution.

Confidentiality builds a relationship of trust and understanding between the mediator and the parties that enables the mediator to facilitate an open discussion. Once the mediator establishes this relationship, the parties more willingly accept guidance from the mediator and can turn to collaborating about

133. Goldberg, supra n. 6, at 652-53.
135. Id.
136. Stone, supra n. 6, at 42.
139. Scott H. Hughes, The Uniform Mediation Act: to The Spoiled Go the Privileges, 85 Marq. L. Rev. 8, 70 (2001) (arguing that the UMA goes too far in protecting confidentiality).
140. Alfini & McCabe, supra n. 5, at 194.
possible solutions. The parties also rely on this protection when participating in private caucuses. A private caucus allows the mediator insight into the thoughts, interests, and motivations of a particular party outside the presence of the opposing party. Although the information discussed in the caucus will not be revealed without permission, the mediator will use this information to move the mediation forward, such as brainstorming possible solutions with both parties. 142

The National Standards for Court-Connected Mediation Programs advise courts to “have clear written policies relating to the confidentiality of both written and oral communications in mediation,” recognizing that “the mediators and cases [are] protected by confidentiality,” and that “[m]ediators should not make recommendations regarding the substance or recommended outcome of a case to the court.” 143 In a section specifically dealing with communications between mediators and the court, the Standards provide:

12.1 During a mediation the judge or other trier of fact should be informed only of the following:

a. the failure of a party to comply with the order to attend mediation;

b. any request by the parties for additional time to complete the mediation;

c. if all parties agree, any procedural action by the court that would facilitate the mediation; and

d. the mediator’s assessment that the case is inappropriate for mediation.144

12.2 When the mediation has been concluded, the court should be informed of the following:

a. If the parties do not reach an agreement on any matter, the mediator should report the lack of an agreement to the court without comment or recommendation.

b. If agreement is reached, any requirement that its terms be reported to the court should be consistent with the jurisdiction’s policies governing settlements in general.

c. With the consent of the parties, the mediator’s report also may identify any pending motions or outstanding legal issues, discovery

143. Center for Dispute Settlement, supra n. 114, at § § 9.1a, 9.4. Commentary adds, “[i]n weighing the benefits of confidentiality protections against the potential costs of non-disclosure of information in order to determine their policies regarding confidentiality, courts should take care to preserve the integrity of the mediation process.” Id. at § 9.1, 9-2.
144. Id. at § 12.1, 12-1.
process, or other action by party which, if resolved or completed, would facilitate the possibility of a settlement.\textsuperscript{145}

Commentary to 12.1 discusses harm to the mediation process where a mediator makes recommendations or gives evaluations to the judge who may be involved in a trial if the case does not settle. It specifically points out that a “problem exists where a statute or court rule requires parties to make a ‘good faith’ effort to mediate.”\textsuperscript{146} Commentary to 12.2 states: “These Standards reject the approach of those who propose extensive communications between the mediator and the judge after a mediation in which settlement is not reached.”\textsuperscript{147}

Without the promise of confidentiality, parties would half-heartedly participate in mediation for fear that an unsuccessful mediation would leave the opposing party free to divulge information in subsequent legal proceedings. The public places great trust in the confidentiality protection mediation provides, and by compromising this protection participation in mediation will decrease.\textsuperscript{148} Confidentiality is necessary to explore settlement options, and a lack or breach of confidentiality “limits the efficacy and the efficiency of mediation.”\textsuperscript{149} A mediation session is beneficial in that it gives participants a forum to express themselves while preventing future disagreements that would have arisen had the discussion focused solely on the surface problem between the parties.\textsuperscript{150} Without the protection of confidentiality parties are less likely to participate and will be less forthcoming in mediation.\textsuperscript{151} Even the most earnestponent acknowledges that “[a]fter-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.”\textsuperscript{152} To summarize, the difficulties of communicating with an adversary, the intervention of a neutral third party, and the potential for information to reach a judge are triple considerations that make confidentiality especially important in mediation.\textsuperscript{153}

The three core values of self-determination, mediator neutrality, and confidentiality are interdependent qualities that define mediation as it was originally envisioned and gave rise to the promise of mediation as a distinct alternative to adjudication. These values are integral to the legitimacy of mediation as a consensual, flexible, creative, party-driven process to resolve disputes. In an exhortation on threats to ADR process integrity and quality control, Judge Brazil cautioned:

\textsuperscript{145} Id. at §12.2, 12-3.
\textsuperscript{146} Id.
\textsuperscript{147} Id. at §12.2, 12.4.
\textsuperscript{148} Alan Kirtley, supra n. 5, at 9-10.
\textsuperscript{149} Hughes, supra n. 139, at 70.
\textsuperscript{150} Frank E. A. Sander, Varieties of Dispute Processing, 70 F.R.D. 111, 121 (1976).
\textsuperscript{151} Carrie Menkel-Meadow, Ethics in Alternative Dispute Resolution: New Issues, No Answers From the Adversary Conception of Lawyers’ Responsibilities, 38 S. Tex. L. Rev. 407, 436 (1997) (analyzing the way in which legal ethical rules are incompatible with the values of ADR and the roles played in ADR).
\textsuperscript{152} Weston, supra n. 5, at 633.
\textsuperscript{153} Deason, supra n. 141, at 83-84.
[W]e must vigilantly protect the neutrals who serve in our programs from role distorting pressures ... for example, we must be sensitive to the confidentiality promises that attend most ADR processes ... and we must discipline ourselves, as judges, not to press or permit our neutrals to make unauthorized, inappropriate disclosures to us of communications that were made or developments that occurred in our ADR processes... Even more fundamentally, we must protect our neutrals from feeling pressure to 'get the cases settled'.

IV. FACTORS IN CHOOSING AMONG DISPUTE RESOLUTION PROCESSES

In making the choice to utilize the court system, the disputing parties are saying something about the nature or character of their dispute. As part of this discussion of the benefits and risks of a good faith requirement report by the mediator, it is useful to determine what criteria the parties may be using, even if indirectly or unconsciously. The application of such criteria suggests that parties, in making a process selection, subscribe to the standards and attributes of their chosen process. By identifying the process selection factors, we can compare value choices as well. This section provides a bridge as we move from an exposition of mediation values to a discussion of legal values. A study done in 1984 (hereafter "Report") of the role of the courts in American society attempted to provide a way to engage in the inquiry. The Report outlines a number of criteria in determining what kinds of matters are appropriate for the courts and the types that may be more appropriately disposed of in another forum. The Report groups the criteria into two categories: (1) functional criteria; and (2) prudential criteria.

The Report defines functional criteria as including "those factors that make a court peculiarly suited (or unsuited) to hear the matter in controversy... [That is] whether the court, as a particular type of governmental institution, is competent to hear and determine the dispute." The use of the word "competence" in the context of this discussion does not include the traditional concept of the "power or the authority of the court to act" as defined by some constitutional mandate or a statutory grant of power by a legislative body. Included in the functional criteria are: (1) objectivity; (2) necessity for authoritative standards; and (3) determining past vs. future events. The

156. Id. at 102.
157. Id.
158. For example, the Constitution vests the federal judicial power in a Supreme Court and in lower courts that Congress chooses to create. U.S. Const. Art. III, § 1. The Congress has the power to "constitute Tribunals inferior to the Supreme Court." U.S. Const. Art. III, § 8. The states too have certain courts that are created by their state's constitution, usually defined as the courts of general jurisdiction. The state legislature also creates other courts with limited jurisdiction which means that the court may not hear a matter in controversy in excess of a certain amount. The competence of the lesser court may be limited by its subject matter.
159. The Role of Courts in American Society, supra n. 155, at 102-08.
element of "objectivity" is relatively clear. The question to be asked is whether the dispute demands "detached objectivity." The Report explains:

[Independence and impartiality are hallmarks of courts, and party participation in giving proof and making arguments are basic attributes of the judicial process that courts employ. . . . These in turn give integrity and respect to judicial decisions. When it is important for the decision to have the kind of integrity that the nature of the court and its process impart, the court is the proper forum. This criterion of objectivity surely applies in life-and-death cases, in constitutional claims, and in cases where liberty is at stake. It may or may not apply in cases turning on a dispute over a sum of money.]

The second element in determining the competency of the court to hear the dispute is that of the necessity for authoritative standards. The question to be asked is: "Can authoritative and ascertainable standards be applied to the facts of the dispute to produce a principled resolution?" As the Report notes, this element is a determination of degree. On the one hand an authoritative standard may be as precise as the period within which a claim of discrimination must be filed with an enforcement agency. It may also be subject to interpretation. The Report also notes that not every standard that can be applied by a person necessarily means that the dispute is one which is appropriate for adjudication by a court. For example, a sensei in a dojo, no doubt, can articulate a standard which her/his students must meet in order to qualify for promotion to the various degrees of black belt. That standard, however, cannot be stated in such precise terms that one can say that one movement in response to an attack is objectively wrong while another is objectively correct. The court's involvement in such a dispute would involve it in intractable issues of judgment without the ability to establish a sufficiently objective and widely accepted set of principles by which the integrity of its decision could be measured.

The third element requires assessing whether the dispute requires "the reconstruction of past events or the determination of existing factual circumstances, as distinguished from efforts to forecast future events or design

160. Id. at 102.
161. Id. at 102-03.
162. Id. at 103.
163. Id. at 103.
164. Id.
165. Id.
166. Lon Fuller refers to certain disputes as being polycentric because they are "many centered" each crossing of strands is a distinct center for distributing tensions. He analogizes polycentric situation with a spider web. "A pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole." The Forms and Limits of Adjudication 92 Harv. L. Rev. 353, 395 (1978). He emphasizes that the question of whether a dispute is polycentric is not an all or nothing question. The significant determination is whether the polycentric elements of the problem have become so predominant that it makes adjudication inappropriate. Adjudication becomes inappropriate because the dispute is no longer one in which the problem can be resolved by the application of an authoritative standard and the mode of participation in the resolution of the problem is not through proof and reasoned arguments. Id.
future courses of conduct.\textsuperscript{167} This essentially involves the role of the court in deciding the case or controversy based upon the facts as presented by the adversaries to the dispute. There are few, if any, cases, which involve only the resolution of the factual situation presented to the court. In deciding the case before it, the court also devises a legal principle or doctrine which will affect the way in which people, who are in similar situations, will structure their behavior. Indeed, the resolution of the case involves the court in the establishment of some sort of public policy. The key question here is whether the dispute before the court predominantly involves the evaluation of past events and their consistency or inconsistency with some applicable legal principle. If so, the method of decision-making is through the presentation of proofs and reasoned arguments by the parties to the dispute. Under such circumstances, the court is clearly competent to entertain and to resolve the dispute.\textsuperscript{168}

Where the predominant inquiry, however, is one which requires the forecasting of future events and the appropriate institutional response or behavior that should accompany the occurrence of an event, the use of the court process is more problematic. Future events are probabilities with a plethora of possible reactions to the events. The rules of procedure of the court are designed to require the parties to state their claim and response to a claim based upon what already has happened and, to some extent, those events are fixed in time. The rules of discovery permit the parties to probe one another as to what they did in the past and not what they may contemplate doing in the future.

Prudential criteria are defined as "those factors that make a court more or less suited than other institutions to hearing and resolving a dispute [assuming that] the court is competent to adjudicate the issue in controversy."\textsuperscript{169} The prudential criteria include: (1) costs; (2) particularized consideration; (3) preference of the parties; (4) vitality of another institution; (5) immediate resolution of a specialized problem; and (6) direct vs. indirect action.\textsuperscript{170} The first element of cost requires an assessment of the relationship between the cost of resolving the dispute in the courts in relation to the amount at stake.\textsuperscript{171} Where the cost of adjudication is disproportionately high in comparison with the amount in controversy, the use of the courts to resolve the dispute must be seriously questioned. Clearly, the element of cost as a factor will come into play most often where the dispute is over a monetary claim as opposed to a claim involving a significant statutory issue or a question of constitutional interpretation.

\textsuperscript{167} Izumi and La Rue: Izumi: Prohibiting Good Faith Reports "Prohibiting" 'Good Faith' Reports under UMA

\textsuperscript{168} The Role of Courts in American Society, supra n. 155, at 105.

\textsuperscript{169} Id. at 108.

\textsuperscript{170} Id. at 108-12.

\textsuperscript{171} Id. at 108.
The second prudential criterion is that of particularized consideration.\footnote{172 Id.} Here, the question is whether the case "present[s] only repetitive kinds of factual or administrative questions not calling for particularized consideration of legal issues in each case."\footnote{173 Id.} For example, the court may have entered a consent decree in a discrimination dispute. The terms of the decree may set forth the principles under which some claimants in the class are entitled to more than that to which was agreed. It would be a waste of the court's resources to hear numerous individual claims of entitlement beyond what was provided for in the decree. Most, if not all of these individual claims, would require no consideration of facts or law which were not addressed in the court's decision to approve the decree. The court's assessment of each of these individual and largely routine or repetitive issues would not be an efficient use of the court's time. A program, in which such claims are brought before an arbitrator or resolved in mediation, might be a far more appropriate way to dispose of the individual claims.

The preference of the parties is a third element to be considered.\footnote{174 Id.} The task is to determine whether a more sound resolution of the controversy would "be achieved through a process giving effect to the parties' preferences rather than through the imposition of a third-party judgment."\footnote{175 Id.} Obviously, mediation rather than adjudication would permit the parties' preference to take precedence in the resolution of such disputes. In a mediation it would be the parties who would be able to define what facts are relevant in resolving their dispute.

The fourth inquiry under the prudential considerations is whether the action by the court will likely impair the vitality of another institution.\footnote{176 Id.} "When a decision would closely affect the continued vitality of another valued institution -- a family, a school, a private political party -- a court should supplant the traditional decision maker only in compelling cases."\footnote{177 Id.} One example from the Report of such a dispute would be the setting of academic standards. The faculty of a law school, for example, should be permitted to establish what the course of study should be to qualify for graduation. Indeed, it should be able to establish the standard of performance necessary for a student to be deemed to have satisfactorily completed her/his course of study. The faculty and the administration of the law school are uniquely qualified to make such

\footnote{172 Id.} \footnote{173 Id.} \footnote{174 Id.} \footnote{175 Id.} Fuller, in his still timely article, The Forms and Limits of Adjudication, gives the example of a wealthy person who dies and leaves, "in equal shares," her valuable collection of paintings to the Metropolitan Museum and the National Gallery. The will, however, indicates no particular apportionment.

[The] problem of effecting an equal division of the paintings [is an example of a polycentric task.] [T]he disposition of any single painting has implications for the proper disposition of every other painting. If [the Metropolitan] gets the Renoir, the Gallery may be less eager for the Cézanne but all the more eager for the Bellows, etc. If the proper apportionment were set for argument, there would be no clear issue to which either side could direct its proofs and contentions. Any judge assigned to hear such an argument would be tempted to assume the role of mediator or to adopt the classical solution: Let the older brother (here the Metropolitan) divide the estate into what he regards equal shares, let the younger brother (the National Gallery) take his pick.

\textit{Supra} n. 58, at 394.

\footnote{176 Lieberman, supra note 153, at 109} \footnote{177 Id.}
determinations. Provided that the decisions of such institutions are rational, the institution should be free from interference from other non-educational bodies or tribunals.

A fifth area of inquiry is to determine if the dispute involves the immediate resolution of a specialized problem.\(^{178}\) That is: "Is the controversy one that arises in a specialized area when an immediate, on-the-spot decision must be final and necessary?"\(^{179}\) An example is one in which a legitimate question arises as to the safety of a specified plant operation which is called to management's attention by the union. Under the collective bargaining agreement, the union has the right to order its members to cease work in an environment that the union considers dangerous to its members' health. The management contends that such a cessation of work would be an illegal work stoppage. The issue is justiciable, but the court is clearly not the best forum in which to have this dispute resolved. The court does not have the immediate expertise to make a judgment about the operation. Nor can the court make an immediate on-the-scene inspection. The court would have to wait for proof to be presented in order for it to make a reasonably accurate decision. The parties' need for an immediate resolution to prevent physical harm or to avert an unnecessary work stoppage would be lost if the court were called upon to resolve the matter. On the other hand, a third-party neutral, perhaps with the power of an arbitrator with years of experience in that particular industry, could be on the scene within a few hours. In doing so, she could inspect the operation, hear the contentions of the parties at the work site, and make a decision on the spot or very shortly thereafter.

The final prudential consideration is whether resolution of the dispute calls for direct vs. indirect action.\(^{180}\) "If a court is not the best institution to decide the case directly, can it nevertheless be helpful in hastening a resolution?"\(^{181}\) The court is uniquely poised to spur settlement between the parties by holding out to both the specter of the ruling. It can also decide various procedural issues which may affect the outcome of any trial that may take place. As is often the case today in class action discrimination cases, the court can establish the process whereby non-court agencies or processes can decide controversies.\(^{182}\)

By choosing to file a lawsuit, the parties to a dispute subscribe to certain standards of expected behavior and expectations in outcome as they participate in the adjudicative process.\(^{183}\) These are reflected in the functional and prudential factors described above. What does their choice of a public court forum say about the values that should govern their actions and resulting resolution of their dispute? If, as part of their court case, the dispute is referred to mediation, how do those legal values interact with the values of the mediation process?

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178. Id. at 111.
179. Id.
180. Id.
181. Id.
182. See e.g. Pigford v. Glickman, 185 F.R.D. 82 (D.D.C. 1998). In this matter, the plaintiffs were African American farmers who claimed that they had been discriminated against by the U.S. Department of Agriculture (USDA) in the consideration for loans from various programs administered by the USDA. The consent decree entered into by the parties provides for the arbitration of certain disputes that remain unresolved following the decree.
183. See Sherman, supra n. 5.
V. Legal Values and Their Threat to the Mediation Process

As the forum comparison factors above suggest, the election to resolve a dispute through the court system implies that the parties are prepared to embrace certain qualities of the legal system and the court process. These qualities include objectivity, authoritative standards, and a determination of past events. They also include assessing the cost implications, the need for particularized consideration of legal issues, the relative speed of resolution of a specialized problem, and the desirability of direct action by the court.

By funneling these court cases into a mediation stream, parties are dipped into a pool of vastly different values and process qualities. Mediation, in contrast to litigation, highlights subjective, party-determined standards rather than externally imposed ones, focuses on future behavior to resolve the dispute, and elevates party preference above third-party decision-making. Furthermore, mediation treats the dispute as unique and impacted by the relationship of the individuals involved. In mediation, direct action by the court is avoided by the creation of a party-crafted agreement. Thus, parties can experience "process dissonance" by this clash of incompatible values when they enter a mediation as a prerequisite to the trial process.

Perhaps the overarching consideration in the discussion of mediator reporting on party behavior in mediation is that it would bring the mediation process yet one more step closer to a subset of the litigation process. Indeed some would argue that the "adjudication camel" already has more than stuck its nose under the mediation tent. It will be only a matter of time before the "ill-tempered beast" takes over the entire space.  

184 The drafting and approval of the UMA by the National Conference of Commissioners on Uniform State Laws and its concomitant adoption by the House of Delegates of the American Bar Association sends it on its way for state legislatures to adopt its statutory scheme. For some, the UMA is "...a step in the descent of mediation into something other than intended...[and] the only way...to avoid [that] fate...is to recognize the risks of over-formalizing the process and to press for the preservation of some semblance of the core purposes of mediation."  

185 In part, what we have argued in this paper is that a mediator good faith reporting requirement would have a deleterious effect on the mediation process. It potentially would focus the parties and their lawyers on the litigable issues of a good faith claim rather than on the interests and needs of the parties that might make resolution of the dispute possible and fair. What is potentially more troubling is that the identification of behavior that is inconsistent with good faith is for some as difficult to define as what constitutes pornography.

There may be a number of values in the legal culture of our society that could be named as likely leading to a legalization of the mediation process were


There is a real risk that, assuming states do adopt the Act, lawyers will tend to treat the provisions as the last word of how mediation is supposed to be practiced, and those who are not lawyers will too quickly defer and presume that mediation is the sole province of legal practice.

Id.

185. Id.
there a mediator good faith reporting requirement. Professor Carrie Menkel-Meadow has written extensively about the values of the adversarial versus the non-adversarial systems. Those values associated with the adversary system are: "zeal, client loyalty, partisanship, and nonaccountability...[while those values associated] with ADR are problem-solving, joint-gain, and future orientation."  

Here, however, we will focus on only one which we think is the most dominant. That is the characteristic of adversariness seemingly ingrained in the legal mind with the notion of zealous advocacy. While not wholly synonymous, there is a strong relationship between a lawyer’s view of all persons other than her client as “others,” potentially with interests adverse to her client. The two ethical codes promulgated by the American Bar Association – The Model Code of Professional Conduct of 1969, and its successor, the Model Rules of Professional Conduct of 1983 require zealous advocacy within the bounds of the law. The core principle of this “Dominant View” is that “...the lawyer must — or at least may — pursue any goal of the client through any arguably legal course of action and assert any nonfrivolous legal claim." William Simon, who gives an articulate explanation of the Dominant View of lawyer ethics, goes on to note that both the Code and the Rules “...legitimate the lawyer in pursuing any arguably lawful goal of the client through any arguably lawful means. And both contain categorical injunctions to keep information adverse to the client confidential, subject only to narrow exceptions."  

Simon goes on to explain the characteristics of the Dominant View by comparing it with the Public Interest View of lawyer ethics:

The basic maxim of the Public Interest View is that law should be applied in accordance with its purposes, and litigation should be conducted so as to promote informed resolution on the substantive merits. The Public Interest Approach is less defined than the Dominant one, but it tends to mandate disclosure of relevant information...; to reject manipulation of form in ways that defeat relevant legal purposes...; and to foreswear the use of procedure in a way that frustrates substantive norms....

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186. Menkel-Meadow, supra n. 149, at 409.
187. Lela Porter Love, Mediation: The Romantic Days Continue, 38 S. Tex. L. Rev. 735, 738 (May 1997). Of the adversarial paradigm, Love cites Leonard Riskin’s two-decade old and still applicable observation that "[t]he adversarial paradigm "assumes that each conflict can be reduced to findings of fact and cognizable causes of action and that the application of rules or law to the facts will result in an appropriate ‘win-lose’ outcome. Here, the disputants remain adversaries. The outcome is advantageous to one side, but disadvantageous to the others." Id. (citing Leonard R. Riskin, Mediation and Lawyers, 43 Ohio St. L. J. 29, 44 (1982)).
190. Simon, supra n. 188, at 7.
191. Id. at 8-9.
Simon further notes that for all their differences, the two perspectives have a common style of decision making which he terms "categorical." He identifies the characteristics of this decision making process in the following way:

Such decision making severely restricts the range of considerations the decision-maker may take into account when she confronts a particular problem; a rigid rule dictates a particular response in the presence of a small number of factors. The decision maker has no discretion to consider factors that are not specified or to evaluate specified factors in ways other than those prescribed by the rule.\footnote{192}

In fairness to Simon,\footnote{193} he is referring primarily to the lawyer’s decision making as to when or whether to disclose client information. What is significant for the purpose of the present discussion, however, is the formalism in the decision making process vis-à-vis a rule intended to guide behavior. It is this kind of formalism combined with the narrow view of the client’s interests that can cause problems for the mediation process. A mediator reporting requirement would dictate that the lawyer put on her adversarial role and be very much on the lookout for the way to champion the narrowly conceived client interests – that is how can she win or at least gain an advantage. If the rules imposed on the mediation process permit the winning or the gaining of an advantage on behalf of the client (i.e., the means used are not outside the legal boundaries), the values of the legal culture mandate the lawyer’s pursuit of the win or the advantage. The requirement that the mediator make a good faith report to the court certainly has the potential of setting up just such a win/advantage dynamic in the mediation process.

It is the mindset of the lawyer,\footnote{194} trained to seek only the client’s interest to the exclusion of all other concerns that gives reason for pause. A mediator good faith reporting requirement within the context of this mindset would almost necessarily have an adverse effect on the mediation process. This would come about not because of an intent by the law or the legal culture to subvert the process but because the mindset needed to guard against acting in bad faith, as well as the mindset necessary to determine whether there is a claim of bad faith, results in behaviors better suited for adjudication than for mediation. The behavior of the parties and their lawyers becomes guarded with an attitude of adversariness. This is in contrast with what the mediation process should be attempting to bring about – cooperation and collaborative problem-solving.

A good faith reporting requirement is at odds with the facilitative role of the mediator which should be that of a promoter of understanding and communication, not that of a quasi-policing agent. Professor Lela Love points out

\footnote{192. Id. at 9.}
\footnote{193. Simon goes on to contrast the Dominant View and the Public Interest views with that of the Contextual View. Here, he defends an approach to ethical decisionmaking "...in which decisions often turn on 'the underlying merits.' The "... basic maxim is that the lawyer should take such actions as, considering the relevant circumstances of the particular case, seem likely to promote justice ... An alternative formulation of the basic maxim might exhort the lawyer to act to vindicate "legal merits at hand" of the matter at hand." Id. at 9-10.}
\footnote{194. Riskin, supra n. 103.}
in an article on the lawyer’s role and responsibility in mediation that “[t]he romantic days of mediation continue because the paradigm it embodies, its underlying values and vision, are as compelling and laden with potential as ever.”\(^{195}\) If she is still correct even after the adoption of the UMA, the process of mediation must be protected against the ever-increasing encroachment of the adversarial mindset of the legal culture and its inclination to make disputes susceptible to resolution by translation into narrow claims that fit neatly into categories of legal relief.

Turning once more to the legal culture and its influence on the mediation process, it is useful to take a further look at Simon’s discussion of the Conventional View of lawyer ethics to get at the values that seem to be at work. As Simon notes, the Dominant View is the most ardently partisan, with justice being defined fairly narrowly to the interests (no matter how self-centered) of the client. Broader issues of societal justice take a back seat. The Conventional View, by contrast, would seem to allow the lawyer to take a broader view of her responsibility to further justice in representing a client in an individual matter. Even with that said, it must be kept in mind that “justice” is defined by Simon in this context as the vindication the client’s legal claim at hand. There is a sense that “justice,” therefore, is defined by the client’s perception of what is achieved on his behalf. Hence, there is a close connection between the Conventional and Dominant Views.

Even if the Conventional View does require a more expansive view of “justice” than the Dominant View, a view which might encourage the lawyer to see her client’s claim as being subject to resolution by more than simplistic court dictums and determinations, there is the problem of what Simon calls “convention.”\(^{196}\) He describes the operation of “convention” or custom and practice in the following manner:

Lawyers are drawn toward convention by both practical and normative forces. Practically, in a marketplace where lawyers compete for clients, lawyers who reject conventions that favor clients will be at a disadvantage in attracting them...Normatively, the fact that a practice is a convention is some evidence of its soundness. The widespread use of a practice may mean that most lawyers believe it has merit. This is especially true of open, visible practices. And the more open and widespread the practice, the greater the ability of authorities to assess and police it, and hence the less need for lawyers to assume that responsibility. Finally, denying a client the benefit of a conventional

\(^{195}\) Love, supra n. 172, at 743.

\(^{196}\) Simon writes:
Some lawyers feel that in the world of practice ethical analysis is typically trumped by the force of convention. Where individual responses to an issue converge, they acquire the force of custom or institutionalized practice, and once this happens, lawyers tend to follow the practice more or less unreflectively.

Supra n. 188, at 158.
practice means treating him differently from clients of other lawyers, which might be inequitable.  

The relevance for the instant discussion is that a mediator good faith reporting requirement would put into operation many of the usual ways in which lawyers think about winning and gaining advantage for their clients. Indeed, many would argue that if they did not look for the good faith claim in a mediation in which they and/or their client did not particularly like the direction of the process, the lawyer would be doing her client a disservice. Further, the lawyer might very well argue that if she did not look for that good faith claim, another lawyer would. Simon’s additional point, on the other hand, is well taken. “Some of the values that underpin a conventional practice may be patently absent in some circumstances, and some may be patently outweighed by competing considerations.”

Simon argues that:

…the strong conventionalist argument exaggerates not only the moral force of convention, but its determinacy and comprehensiveness...Lawyers lack good information about what other lawyers do in many situations [and] practices often vary widely from one geographical area to another and from one practice to another.

While these points may be true, it is difficult to see why there would not be a resort to convention with regard to the demand that the mediator report bad faith. Most lawyers would believe that they are experienced enough in legal negotiations to have a good idea when the other party has bargained in good faith or not. Determinacy and comprehensiveness in the case of whether to pursue a good faith claim would not be far removed from the lawyer’s personal knowledge and what she would consider to be reliable personal experience. Convention, therefore, would seem to have a significant impact on the lawyer’s decision making.

Even if Simon’s “convention” is not at work in the mediation process as we have outlined, there is a strong likelihood that the good faith claim will be seen peculiarly as something that the lawyer knows and understands. The good faith claim is much more likely to be seen as a routine legal conflict subject to and governed by rules of legal doctrine generally applicable to contract negotiations. This will be true even if the lawyer and client were able at the outset of the mediation process to see the substantive dispute (e.g., a case of constructive termination or a claim of age discrimination) as unique and not necessarily governed by any rules of general applicability.

A good faith reporting requirement on the part of the mediator would invite a greater degree of the legal paradigm to become a part of the mediation process. As many commentators have noted: “[T]he institutionalization of mediation...requires a clear commitment to the essential nature and core values of

197. Id. at 158-59.
198. Id. at 159.
199. Id. at 160.
mediation, or else the process will be subsumed by the status quo paradigm." Menkel-Meadow also sounds the alarm for the ADR field when she asks "...whether new forms of dispute resolution will transform the courts or whether...the power of our adversarial system will co-opt and transform the innovations designed to redress some, if not, all of our legal ills." The risks inherent in the good faith reporting by mediators are that the mediation process will be driven further in the direction of the adversarial paradigm. Such a reporting requirement invites lawyers to continue "...acting from traditional and conventional conceptions of their roles and values[]."

VI. CONCLUSION

It is still too soon to say whether the Uniform Mediation Act is the Trojan Horse as some have warned. It seems apparent to us, however, that the good faith reporting requirement, left out of the Act, is best kept out. It is one less thing in the belly of the purported beast that is likely to permit a full-scale assault by the adversarial paradigm on the values and purposes originally associated with mediation. Professor Menkel-Meadow's comments concerning her apprehensions about mandatory court institutionalized forms of ADR seem on point here with regard to any possible consideration about a mediator good faith reporting requirement. The question pondered by Professor Menkel-Meadow is "...why the adversary culture is as pervasive as it is in our legal culture and whether radical transformation is possible." The viewpoint of the instant discussion has been to assume the pervasiveness of the legal culture and to argue that a mediator good faith reporting requirement would have the effect of extending that influence even further into the mediation process. It would exacerbate "process dissonance" by infusing the mediation process with more litigation-type qualities instead of maintaining the special un-litigation type qualities of mediation.

For those who fear that unchecked "bad faith" participation will swallow up "good" mediation, the Uniform Mediation Act offers some hope. For the extreme case of party or representative misconduct, aggrieved parties may turn to the section on exceptions to the mediator privilege. The language of Section 6(b)(2) reads:

There is no [mediator] privilege under Section 4 if a court, administrative agency, or arbitrator finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality, and that the mediation communication is sought or offered in ... a proceeding

202. Menkel-Meadow, supra n. 201, at 3.
203. Benjamin, supra n. 138.
204. Menkel-Meadow, supra n. 155, at 14.
to prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of mediation.205

The Reporter’s Notes state: “This section is designed to preserve traditional contract defenses to the enforcement of the mediation settlement agreement that relate to the integrity of the mediation process, which otherwise would be unavailable if based on mediation communications.”206 Some mediator disclosure of dishonest or coercive behavior could come in through this section on a case-by-case basis.

The UMA’s provisions regarding confidentiality, and mediator reports and recommendations in particular, have received mixed reactions among dispute resolution professionals. Dr. Gregory Firestone asserts that “the prohibition against mediators making substantive reports to the court and the inadmissibility of such reports in a court proceeding outlined in Section 7 does go a long way toward preventing mediators from using the threat of an unfavorable report to compromise the self-determination of any party.”207 On the other hand, Professor Scott Hughes argues that confidentiality should yield to protect the parties’ right to self-determination, thus allowing for mediator testimony of communications made during a mediation session.208 Professor Phyllis Bernard responds that prohibitions against mediator reports and evaluations to judges protect parties against “the greatest process danger,” i.e., changing the role of the neutral from facilitator to de facto decision-maker or surrogate for a court.

The Uniform Mediation Act has been called “no one’s ideal approach” but “a very workable framework for mediation consistent across the incredible breadth of issues and across the complex of jurisdictions.”210 We have attempted in this article to present a convincing argument that the dangers of allowing mediator reports about party conduct and communications during mediation to those who may ultimately rule on the case significantly outweigh the perceived benefits. Elemental mediation values of party self-determination, mediator impartiality, and confidentiality are reaffirmed by the UMA’s prohibition against mediator reports to the court. In sum, “[s]ubtle forms of coercion through vigorous judicial enforcement of a requirement to mediate in good faith threaten to erode the integrity of the mediation process.”211

208. Hughes, supra n. 139, at 77.
211. Alfini & McCabe, supra n. 5, at 205-06.

https://scholarship.law.missouri.edu/jdr/vol2003/iss1/6