

Outside Counsel

Expert Analysis

Exploring Duty of Good Faith In Mediation Proceedings

We discussed in a prior article how some courts have addressed the duty to act in good faith in the mediation context (“The Duty of Good Faith in Mediation Proceedings,” NYLJ, Aug. 25, 2010). Issues relating to good faith generally arise in the context of one party moving for sanctions, claiming that the other party did not participate in mediation in good faith. And parties have been sanctioned for failure to participate in good faith. The nature of the good faith obligation in mediation arose recently in the Southern District of New York.

Sanctions Ordered

Last year, a Bankruptcy Court judge in the Southern District sanctioned a party for failing to participate in good faith in a court-ordered mediation. See *In re A.T. Reynolds & Sons*, 424 B.R. 76 (Bankr. S.D.N.Y. 2010). The court in *A.T. Reynolds* criticized the party’s conduct prior to the mediation, finding that the party asked for a list of the issues that would be the subject of the mediation, requested the identities of the representatives of the other parties that would be attending the mediation, resisted providing a mediation statement, and



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insisted that it would only be prepared to address the issues that the debtor had expressly identified for mediation. See *id.* at 91-92.

The court also criticized the party’s conduct during the mediation. First, it found that the sanctioned party did not send someone to the mediation who was senior enough and had full settlement authority or the ability to meaningfully participate in the mediation. In the court’s view, the party representative had authority to settle for up to a “pre-determined cash amount” and had to make a telephone call in order to make an “ultimate offer of settlement.” *Id.* at 90. Having someone with full authority available by telephone was not viewed as an acceptable substitute for having a representative with full settlement authority attend the mediation. *Id.* at 90. The Bankruptcy Court found that such conduct was “tantamount to not attending the mediation.” *Id.* at 89.

Second, the court found that the party initially took and thereafter adhered to a particular position, interrupted the opposing side’s recitation

of its position, and generally refused to let the discussions proceed. *Id.* at 93. The court explained that the mediation process requires discussion, risk analysis, and consideration of other parties’ arguments, none of which the party did. *Id.* at 90. The court reasoned that “attendance at a mediation without participation in the discussion and risk analysis that are fundamental practices in mediation constitutes failure to participate in good faith.” *Id.* at 90.

This holding arguably seemed at odds with other jurisprudence on good faith in the mediation context. Sanctions have been imposed based on relatively objective failures by a party, often in violation of a court order or rule. The U.S. Court of Appeals for the Second Circuit has upheld sanctions imposed by the district court based on a party representative’s failure to attend a mediation as ordered, since such failure “impaired the usefulness of the mediation conference.” See *Negron v. Woodhull Hosp.*, No. 05 Civ. 4147, 173 Fed. Appx. 77, 79, 2006 WL 759806, at *1 (2d Cir. 2006). Another New York district court has found that certain parties failed to mediate in good faith when they moved for summary judgment the day before the scheduled mediation and made an unreasonably low settlement offer at the mediation. See *Fisher v. SmithKline Beecham Corp.*, No. 07 Civ. 0347A(F), 2008 WL 4501860, at *5 (W.D.N.Y. Sept. 29, 2008).

The U.S. Court of Appeals for the Eighth Circuit has upheld sanctions against a party for failure to submit a court-ordered pre-mediation statement and failure to send a representative to the mediation with settlement authority and the ability to meaningfully participate and make strategic decisions at the mediation. *Nick v. Morgan's Foods Inc.*, 270 F.3d 590, 596 (8th Cir. 2001); see also *Francis v. Women's Obstetrics & Gynecology Grp., P.C.* 144 F.R.D. 646, 648 (W.D.N.Y. 1992).

Order Reversed

On appeal, and in keeping with the Second and Eighth circuits' lines of reasoning, the District Court for the Southern District of New York recently reversed the *A.T. Reynolds* order imposing sanctions and holding the party in contempt. See *In re A.T. Reynolds & Sons, Inc. d/b/a Leisure Time Spring Water*, No. 10-cv-02917 (WHP), Memorandum & Order (S.D.N.Y. March 18, 2011) (*A.T. Reynolds* decision). In doing so, the district court made several important points about the nature of mediation.

First, the court held that the good faith of a party to a mediation should be discerned by relatively objective indicia, such as attendance at the mediation, exchanging pre-mediation memoranda, and having a representative with sufficient settlement authority attend the mediation.

The court was guided by considerations of litigant autonomy. Although mediation is a process designed to provide an environment for settlement, encourage parties to engage in risk analysis and readjust their positions, settlement cannot be mandatory and a court cannot force a settlement or "invoke 'pressure tactics' designed to coerce a settlement." *Id.* at 12. A party is fully within its rights to refuse to make a settlement offer, and instead adopt a "no pay" position.

A refusal to settle is not indicative of bad faith. *Id.* at 12-14. It was also not bad faith for a party to determine that it had no liability and insist on being persuaded otherwise by the other side. "Certain disputes are not amenable to mediation, and it should not be a surprise when attempts to mediate them quickly deteriorate." *Id.* at 13. The court pointed out that attempting to determine whether a party has engaged in the type of risk analysis associated with mediation is difficult if not impossible—a party may have engaged in meaningful risk analysis and determined that the risk was zero. *Id.*

The District Court in '*A.T. Reynolds*' highlighted the fact that parties must take mediation seriously, but are not required to go to extreme lengths, to participate in good faith.

The district court was also troubled about the threat to the confidentiality of the mediation process. Confidentiality is a hallmark of mediation and enables parties to freely discuss their differences in an effort to reach an agreement. Breaches of confidentiality are appropriate only in very limited contexts.

In the context of a sanctions motion, attempting to determine a party's subjective good faith requires a broad inquiry into the facts that could likely include the disclosure of confidential communications during the mediation. While the Bankruptcy Court had instructed the parties to speak about the mediation in "general terms," certain details regarding the nature of the discussions and their underlying substance were discernible. The District Court pointed out that certain lines of inquiry "imperil[ed] the confidentiality of the mediation." *Id.* at 13-14. Therefore, the court concluded that confidentiality considerations can prevent

a court from inquiring into the level of a party's participation, including the extent to which a party discussed the issues, listened to the other side and engaged in risk analysis. *Id.*

Finally, the District Court held that a party is not required to send a representative to a mediation who has authority to settle the matter in any manner that may present itself, including for a monetary amount greater than the amount in controversy, or who is prepared to discuss every possible legal theory. Indeed, few corporate representatives have that breadth of authority. Rather, a party must send a representative with authority to settle up to the anticipated amount in controversy and who can discuss knowledgeable the issues reasonably expected to arise during the mediation. *Id.* at 15-16.

The district court in *A.T. Reynolds* highlighted the fact that parties must take mediation seriously, but are not required to go to extreme lengths, to participate in good faith. The decision provides parties with relatively objective and achievable criteria for complying with good faith obligations in mediation and seeks to preserve the confidential nature of mediation. The decision can provide a guide to parties participating in mediation, as well as to mediators.