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Curbing Mendacity In Mediation Using Good Faith Participation Clauses

Ugochinyelu Anidi, Ph.D.[1]

ABSTRACT

Deception is part of life. One would therefore be mistaken to think it impossible in the mediation process. In fact, it has become so commonplace in the mediation process that it has caused some unrest in the ADR community especially amongst mediators. This essay seeks to explore the concept of mendacity in mediation. It is divided into six sections. The first section provides a brief introduction. The second section examines the concept of mendacity in the mediation process. Section III details the effects of party mendacity in mediation on the parties, the mediator and the process in general. Section IV discusses current measures for the control of party mendacity utilized by the mediators at a community mediation centre in Nigeria and the effectiveness of these measures. Section V makes an argument for the use of good faith participation clauses to curb the effects of mendacity in mediation. The final section, Section VI offers recommendations, and a brief conclusion.

Keywords: Mediation; Deception in Mediation; Good Faith Participation; Mediation Lies.

INTRODUCTION

You are a mediator in the following case (hereinafter referred to as Scenario 1): *James and John co-owned a tech company where James contributed 80% of the capital while John took care of the daily operations. Without informing John, James sold the company for N1billion. He alleged that he sold it for N200 million and offered John N50million claiming that he had spent N100million on the company's debts and kept N50million for himself. Infuriated, John sued James for N200 million but the court referred the matter to mediation. During the mediation, James reiterated his offer of N50million to John and produced documents showing a net worth of N100 million but during the private caucus, he mentioned that he had N800 million stowed away in a Swiss bank account.*

What would you do? Do you disclose this information? If yes, to whom?

Mendacity has been described as 'the act of not telling the truth'.[2] It can be used interchangeably with the word 'lying'. Black's Law Dictionary defines mendacity as

> '1. The quality of being untruthful. 2. A lie; falsehood'[3]

It goes a step further in its description of the word 'lie' to include speaking or writing falsely,

> 'to tell an untruth; to speak or write falsely'[4]

According to Sissela Bok, we lie when we undertake to deceive others intentionally, when we communicate messages meant to mislead them and make them believe what we ourselves do not believe. We can do so through gesture, disguise, action or inaction, and even through silence.[5]

She went further to specifically define as a lie,

> 'An intentional deceptive message in the form of a statement'[6]

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[1] Lecturer, Department of Private Law, Faculty of Law, University of Nigeria. ugochinyelu.okolo@unn.edu.ng

[2] A.S. Hornby, *Oxford Advanced Learner's Dictionary of Current English*, (Oxford: Oxford University Press, 2000) 736.

[3] B. A. Garner, *Black's Law Dictionary*, (Minnesota: West, 2009) 1074.

[4] Ibid.

[5] Sissela Bok, *Lying – Moral Choice in Public and Private Life*, (New York: Vintage Books, 1978) 14.

[6] Ibid.

Lying has also been defined as

> "… a false statement made by one who knows its falsity and with the intent to deceive another as to the truth.[7]

From the above, it can be deduced that the recognized form is the lie contained in a statement. These stated lies may be in written or oral form.
Mendacity can therefore, be defined as the act of communicating to another an intentionally deceptive message in the form of a written or oral statement.
By implication, mendacity in mediation can be described as the act of communicating to another, during the mediation process, an intentionally deceptive message in the form of a written or oral statement.

Mendacity in Mediation

During the mediation process, in the pursuit of their individual interests, parties sometimes intentionally set out to deceive their opponents. According to Krivis and Zadeh, deception plays an active role in mediation because every party wants to leave the dispute table with the best possible result for himself or his client.[8] They note that research on deception has yielded the following results:

> "61.5% of subject's conversations involved some form of deception; individuals reported that they averaged 16 white lies over a two-week period; the typical person lies approximately 13 times per week; 28% of negotiators lied about a common interest issue during negotiations and 100% of negotiators either failed to reveal a problem or actively lied about same if they were not questioned directly on the issue."[9]

Parties employ numerous tactics, styles and strategies during the mediation process, some of which are tough bargaining, huffing, puffing, exaggeration, etc. These, even though they do not represent the true state of things to the maker, are not perceived to be lies.
Some controversy therefore is present over what constitutes an acceptable lie during the mediation process. As stated by White, 'to conceal one's true position, to mislead an opponent as to one's true settling point is the essence of negotiation.'[10] Therefore, some statements even though not the truth may be permitted in the course of the negotiation process. These acceptable lies include:

> concealing the willingness to settle and/or the bottom line, making inflated demands, exaggerating strengths and weaknesses, concealing client intentions, claiming a lack of authority, and failing to volunteer relevant facts.[11]

However, Lord Ackner in *Watford and others v Miles and others*[12] stated thus:

> 'Each party to the negotiation is entitled to pursue his or her own interest, so long as *he avoids making misrepresentations'*[13]

From the above, some level of huffing, puffing, and probably empty threats is allowed parties in the negotiation process. These lies are said to be harmless and innocent and have no distributive effect as between the parties. Oftentimes, they improve the welfare of both parties by enabling them reach a mutually satisfactory agreement.

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[7] Peter Reilly, (2008) 'Was Machiavelli Right? Lying in Negotiation and the Art of Defensive Self-Help' 24 *Ohio. St. J. on Disp. Resol*. 8.
[8] Jeffrey Krivis and Mariam Zadeh, (2006) 'Hunting for Deception in Mediation: Winning cases by Understanding Body Language.' Available at: http://www.negotiatormagazine.com/article326_1.html Accessed 15 August 2011.
[9] Ibid.
[10] James J White, (1980) 'Machiavelli and the Bar: Ethical limitations on Lying in Negotiations' *Am.B.Found.Res.J.* 926.
[11] Jeffrey Krivis, (2002) 'The Truth About Deception in Mediation' 20 (7) *CPR Institute for Dispute Resolution* 3.
[12] (1992) 2 W.L.R 174 at 181.
[13] Emphasis mine.

These tactics are not to be confused with the intentionally deceptive actions that parties employ during the mediation process which have a negative effect on the recipient. Lies in the course of mediation take the form of a) concealments: especially, of material facts, b) omissions: failure to provide relevant information and c) overt lies: creating false information, false promises, false threats, and false predictions.[14]

Statements therefore become lies in mediation when manifestly false and the recipient relies on them to his detriment.

A good example would be in Scenario 1 where James by 'written words' - his financial statement – expressly stated that his net worth was N100million whereas he had several hundred million naira in Europe. If John relied on James' statement and settled for N50million rather than the N200million he felt he was entitled to, John, would have relied on the false statement to his detriment.

It is worthy of note that John would be without a remedy if James' lie comes to his knowledge after the mediation process. The privacy and confidentiality of the mediation process ensures that parties are unable to bring an action in court based on mediation communications. Parties therefore intentionally make false statements during the mediation process knowing that they can get away with it. In the words of Krivis, deception is particularly widespread in the mediation process because parties realistically do not feel they will get caught or pay a price in court, based on the so-called confidentiality of the process.[15]

Effects of Mendacity in Mediation

The adverse effects of party mendacity in mediation are few but far reaching. The parties, the mediator and ultimately the process suffer as a result of this occurrence.

For the parties, lies trigger a lack of trust. According to Bok, 'Truthfulness is one of the most basic elements in developing trust among parties ... Deception creates mistrust'.[16] If one party therefore feels deceived, he will generally become unwilling to trust the perpetrator. Lies also cause harm to the receiving party as more often than not, he relies on the false statement believing it to be the true state of things and subsequently performs acts, which he would not have done if he had been aware of the truth. He therefore relies on the lie to his detriment. This is of great concern because if such lies are discovered, the innocent party would be without a remedy. This may be contrasted with litigation where a party may be found guilty of perjury or fabrication of evidence and liable to a prison term of fourteen years.[17]

The adverse effects of party mendacity on the mediator have caused a great deal of concern for mediators the world over. During the 2007 CEDR Third Mediation Audit, one of the major causes of complaint by the mediators was party mendacity. In other words, the frequency of cases of deception and the options open to a mediator when he realizes that one of the parties is trying to abuse the process, either by misleading or by manipulation.[18] Mediation is an informal and private process and as such is open to abuse by parties seeking to use this informality and privacy to take undue advantages of others.[19] The mediators are therefore affected by the fact that they are bound by the confidentiality provisions of the mediation process and are therefore not at liberty to alert the innocent party of the misrepresentation of the lying party.[20] According to the *Model Standards of Conduct for Mediators*,[21]

> 'a mediator shall maintain the confidentiality of all information obtained by the mediator in the mediation, unless otherwise agreed by the parties or required by applicable law' it

[14]Reilly 23 - 24.
[15] Krivis 5.
[16] Bok 6.
[17] Section 117 and 118 of the Nigerian Criminal Code.
[18] www.cedr.com/gfx/TheMediationAudit2007.pdf. Accessed on 01 January 2010.
[19] Maureen A Weston, (2001) Checks on Participant Conduct in Compulsory ADR; Reconciling the tension in the Need for Good Faith Participation, Autonomy and Confidentiality. 76 *IND. L. J*, 604.
[20] Ibid.
[21] Standard V.

> further states that, 'a mediator who meets with any person in private sessions during a mediation shall not convey directly or indirectly to any other person, any information that was obtained during that session without the consent of the disclosing person.'

When a mediator realizes that a party to the mediation process has lied and fails to convince him to disclose the true state of things to the innocent party, the mediator is faced with a dilemma. If he reports his findings to the innocent party, (John, if we adopt **Scenario 1**) he could be liable to the defaulting party for breach of confidentiality. However, if he does not report his findings to John and settlement is reached, then not only will he have caused harm to John who could have gained more from the settlement but he would have also aided in the abuse of the mediation process. He could also be liable for professional misconduct if the matter comes to light. This is according to the wording of Standard VI (A) (4) of the Model Standard of Conduct for Mediators, which provides, '...and a mediator shall not knowingly misrepresent any material fact or circumstance in the cause of the mediation.' Party mendacity in mediation therefore puts the mediator in an unfair position. It makes his task of neutrality more difficult.

Finally, when the parties and the mediators suffer, the process in general suffers. Party mendacity increases resistance to the mediation process as the party at the receiving end of the deceptive statement is less willing to participate in the process. It therefore sets back the mediation process and leads to an impasse. It could lead to general loss of confidence in the mediation process.[22] Affected parties may feel unprotected by the process because not only have they suffered harm in the course of the process, but they are also unable to get redress as a result of the confidentiality provisions. Mediation, ADR in general, is important to the civil justice system. It has helped create access to quick and effective justice especially in Nigeria.[23] Therefore, a general lack of public confidence in the process would mean dire consequences for the entire legal system. As a result, some measures have been adopted to curb deception in mediation.

Current Measures for the Management of Mendacity in Mediation

Generally, parties to the mediation process, as well as their lawyers and mediators, are expected not to misrepresent any facts during the mediation process. Mediators and lawyers are bound by different ethical rules, guidelines, standards and professional codes of conduct which ensure that they perform certain actions such as to maintain confidentiality, and to avoid others such as, not to knowingly misrepresent any material fact, in other words, not to lie. For example, Standard VI (A) (4) of the Model Standard of Conduct for Mediators provides,

> 'The mediator should promote honesty and candor between and among all participants and a mediator shall not knowingly misrepresent any material fact or circumstance in the cause of the mediation.'

However, the disputing parties do not have any codes to regulate their conduct during the mediation and this is premised on the fact that mediation is a voluntary process *controlled* by the parties. Fundamental to the process of mediation, Alternative Dispute Resolution, ADR, in general, is the concept of party autonomy, the ability of disputing parties to determine and regulate the process in a manner that suits them, in other to achieve maximum results.[24] However, a disadvantage of this concept of party autonomy is that no guidelines have been made for the regulation of party conduct during the mediation process. To further aggravate the situation, the cloak of confidentiality, another fundamental element of the mediation process, hides communications made during the process, thereby prohibiting parties from disclosing such matters outside the mediation.[25]

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[22] Carol L Izumi (2003) 'Prohibiting "Good Faith Reports" under the Uniform Mediation Act: Keeping the adjudication camel out of the mediation tent' 2003 *J. Disp. Resol.* 72.

[23] Ugochinyelu Anidi, *Towards the Institutionalization of Divorce Mediation in Nigeria: A Case Study of Enugu State.* (unpublished Doctor of Philosophy Thesis, University of Cape Town, South Africa, 2020) 177 - 178.

[24] Izumi 69.

[25] Krivis 8.

These lapses in the law have made it possible for many a recalcitrant party to derail the process through deception.

In recent times, mediators have devised measures to check party mendacity during the mediation process. Some of these measures are provided for in Standard VI (C) of the Model Rules of Professional Conduct for Mediators which states that

> 'If a mediator believes that participant conduct, including that of the mediator, jeopardizes conducting a mediation consistent with these Standards, a mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.'

A poll of the 14 mediators at the Citizens Rights and Mediation Centre, CRMC, a community mediation center attached to the Ministry of Justice in Enugu State, Nigeria was taken to determine the measures applied by local mediators to curb deception in mediation.

Measure 1: Urge Disclosure. A mediator faced with a deceptive party may urge the lying party to retract his false statement or disclose the true state of the facts. Robert Baruch Bush in his Proposed Standards of Practice for mediators,[26] Standard VII(C) proposed that

> 'where a mediator discovers an intentional abuse of the process, such as non-disclosure of vital information or lying, the mediator is obligated to encourage the abusing party to alter the conduct in question.'

Following this measure, the mediator in scenario 1 may urge James to disclose the truth of the financial statement and the money in Europe to John. This method is the most commonly used at the CRMC. Most of the mediators at this centre utilized caucuses to 'reality test',[27] or 'appeal to the conscience' of the party[28] with the sole aim of convincing the lying party to retract or confess the lie. Some explained the benefits of the mediation process in a bid to show the parties why it was in their best interest to negotiate in good faith.[29] In summary, 13 out of the 14 mediators interviewed believed this measure to be the most effective in the management of deception by parties.

Measure 2: Postponement. Postponement becomes an option after the mediator has unsuccessfully attempted to resolve the matter. That is, after he may have unsuccessfully asked the lying party to disclose the truth. The mediator may then require the parties to postpone the mediation for many reasons. If the parties are not legally represented, he may suggest that the parties consult other professionals to acquire either legal advice or representation or the services of an investigator in the hope that this may provide the opportunity for the innocent party to discover the truth or provide the lying party with some time to rethink the necessity of his lies. None of the mediators at the Center considered this a viable option. They opined that it wasted time and most times, the lying party chose to continue with the lie.

Withdrawal. The Mediator may withdraw from the process at his/her own discretion if any of the parties acts in an unconscionable or criminal manner. This measure is only partly effective because, though the mediator's withdrawal from the process brings the abuse to a premature end it does not prevent the perpetrator of the abuse from picking up from where he left off in the event that a replacement mediator takes over the case. This is especially because the mediator is not required to give reasons for his withdrawal as he is bound by the provisions of confidentiality. It is therefore only a temporary measure of protection for the innocent party. To suggest an example: assuming the mediator in Scenario 1 withdraws from the process and a new mediator is procured, James would be more careful and the new mediator will of course not find out the true state of his accounts. James would therefore still be able to tender the falsified statements and cheat John. Withdrawal of the mediator also fails to punish James for tendering

[26] Robert A Baruch Bush, (1994) 'A Study of Ethical Dilemmas and Policy Implications' *Journal of Dispute Resolution* 1.
[27] Mediators 1, 2, 4, 8, 10, 11, 12, and 13.
[28] Mediators 1, 3, 6, and 9.
[29] Mediators 1, 6, 8, 9, 13 and the Director of the Center.

false documents. The mediators at the Centre did not consider this option as viable. They would rather invite another mediator to join them as co-mediators to enable them urge disclosure from the noncompliant party.

Termination. One last option open to the mediator would be the termination of the mediation process.[30] Termination is fully effective only in some cases of court-connected mediation, where the mediator is expected to submit a report to the court or give reasons for the termination. However, in most mediation institutions, particularly with ad hoc mediations, the mediator is bound by rules of confidentiality to keep mum about all information he acquired during the process. He therefore will not be able to give his reasons for terminating the mediation and so the possibility of substantial injustice being done to John in the future exists.

Therefore, if the case in Scenario 1 were not court referred but rather occurred in a private institution, and the mediator chooses to terminate the mediation, he cannot give reasons for terminating the process. Again, this is a temporary measure because it fails to prevent the party from perpetrating the same act in subsequent proceedings and it also fails to punish him for the act in the present case. Only one mediator[31] at the Centre considered termination a viable option in the face of deception in mediation. In summary, these measures are wholly inadequate because they are neither preventive nor punitive in nature, rather, they try to stop the lie from adversely affecting the innocent party, albeit temporarily. A possible question at this point would be: Are the disputing parties in the mediation process therefore free to lie? In essence, Yes, because there is no law or code or standard which prohibits or punishes deception.

The Argument for the Good Faith Participation Requirement

Recognizing the fact that deception in mediation frustrates proceedings, corrodes the fabric of mediation and affects possible outcomes, several jurisdictions – particularly countries where mediation is mandatory – now require good faith participation from parties. [32] In addition, current measures taken to manage mendacity in mediation have exhibited a lack of long term effectiveness. Therefore, for the process to have legitimacy, preventive means against party misconduct, such as enumerated duties, prohibited conduct, and procedural rights, must be explained to and complied with by mediation participants as a minimum standard of good faith.

The greatest problem with the good faith participation requirement is the lack of a detailed, uniform and generally accepted definition of the meaning and constituents of the principle. It has been defined as:

> 'A state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage.'[33]

Good faith participation in the mediation process has been defined as '… a directive to parties and others to participate in the mediation process … with "best efforts"',[34] ' … the obligation to tell the truth.'[35]

> … a real, honest exertion or attempt, realistically directed at resolving the issues.[36]

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[30] Erickson Stephen K (1998) 'The legal dimension of divorce mediation' in Folberg & Milne (eds) *Divorce Mediation: Theory and Practice,* 304-35.

[31] Mediator 7.

[32] Kathleen A Devine, (1991) 'Alternative Dispute Resolution: Policies, participation, and proposals' 11 *Rev. Litig.* 98; Kimberlee K Kovach, (1997) 'Good-Faith in mediation: Requested, recommended, or required? A New Ethic' 38 *S. Tex. L. Rev.* 596.

[33] Garner 762.

[34] Izumi 70.

[35] Peter N Thompson (2011) 'Good faith mediation in the federal courts' (26 *Ohio State Journal on Dispute Resolution* 365.

[36] Hilary Astor, (2008) 'Making a 'Genuine Effort' in Divorce mediation: What Does It Mean?' Available at http://ssrn.com/abstract=1294019 Accessed 12 April 2013.

Proponents of the utilization of good faith participation clauses in mediation agreements contend that the good faith requirement ensures protection of the parties and the process from abuse by recalcitrant parties,[37] and guarantees a fair and efficient process.[38] They suggest the use of incentives[39] and penalties[40] — typically cost sanctions — to enforce the good faith requirement.

The Australian Family Law Act requires that parties must 'make a genuine effort to resolve ... '[41] their disputes. It further requires family dispute resolution practitioners to submit a certificate stating that parties made an effort to resolve their dispute through family mediation before instituting an application for a parenting order in court.[42] These certificates state that the parties either participated actively or otherwise, refused to attend mediation, attended but did not reach resolution or mediation was stopped because it was found to be inappropriate for the case.[43] This certification system ensures that parties actively and genuinely participate during mediation sessions otherwise they will incur penalties such as bearing the total mediation or court costs of both parties, an order to return to mediation or go to court.[44]

While no substantial and universal definition of good faith exists, several examples have been proposed for behaviours which might imply bad faith. They include refusal to attend mediation or to participate, lying and withholding necessary information or documents.[45]

Opponents of the good faith requirement contend that is undermines the principle of confidentiality which is fundamental to the mediation process.[46] While this may seem to be the case on the face of it, the interests of all the parties must be taken into consideration in order to ensure theta upholding one does not detract from the other. In other words, one must not doggedly adhere to the confidentiality principle to the detriment of the parties for which the process and indeed the principle were made.

To mitigate the harsh effects of strict adherence to the confidentiality principle, the United States has come up with several initiatives. One of them is the Uniform Mediation Act, 2001 which provides as follows:

> A mediator may disclose:
>
> > a mediation communication evidencing abuse, neglect, abandonment, or exploitation of an individual to a public agency responsible for protecting individuals against such mistreatment.

This therefore protects innocent parties from those who negotiate in bad faith with the intention of seeking refuge under the confidentiality provisions.

Without a good faith requirement, a party can actually go into the mediation process with the intention of abusing the other party and the process and they will very well achieve this purpose because as mentioned earlier, there are currently no punitive measures in place to deter deceptive parties. The good faith participation requirements pertaining to party conduct in mediation proceedings are intended to guarantee process integrity and procedural fairness.

Section 9 of the Law establishing the CRMC confers a duty on mediators at the Centre to ensure that parties negotiate in 'good faith'.[47] However, this law fails to provide a definition of 'good faith' or

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[37] Thompson 377; Izumi 70.
[38] Weston 643.
[39] Bethany Knox, *A Consideration of a Mandatory Family Mediation model under Section 9 of the British Columbia Family Law Act* (unpublished Masters of Arts thesis, University of Victoria, 2014) 25.
[40] Izumi 73.
[41] Section 60I(1).
[42] Section 60I.
[43] Section 60I(8). Law Reform Commission of Hong Kong 'The Family Dispute Resolution Process' (2003) 62. Recommendation 6 of this report requires that the parties should have a certificate of compliance with the good faith requirement to show the court that mediation was not attempted, attempted and failed, or not attended. See pp 87, 22.
[44] Section 13C and D of the Australian Family Law Act; Astor 12.
[45] Izumi 71.
[46] Ibid 80,84.
[47] Section 9(2)*(c)*.

behaviour which constitutes good faith. The mediators are therefore forced to develop methods of ensuring good behavior and to create guidelines on a case by case basis. Mediators at the Centre noted that the task of ensuring good faith participation was arduous at best and impossible sometimes and depended a great deal on the individual mediator's skillset.[48]

RECOMMENDATION

Standard practice is that the requirement for ensuring good faith participation should fall on the parties.[49] While it appears that the mediators at the Centre have attempted to execute this duty, it is recommended that if such a duty is also placed on clients of the Centre, it will ensure a greater degree of good faith participation than is currently obtainable at the Centre and other mediation institutions in Nigeria.

Step One: Good faith participation clause

First of all, the provision for good faith participation will be agreed upon by the parties. This requirement will be inserted in any of the following: a) Court Mediation Rules guiding Mediation Procedure: In the case of court mandated or court annexed mediation, the requirement for good faith will be contained in the mediation procedure rules, and b) The Mediation Agreement: In mediations other than court connected mediations, parties may insert the good faith participation requirement in their mediation agreement. This will ensure the enforceability of the good faith participation clauses.

Step Two: Creation of Guidelines

It could be argued that as a result of the lack of a generally accepted definition of the term 'good faith' and its constituents it would be difficult if not impossible to enforce such a provision as each party would attempt to adopt a definition most suited to his circumstances. Even more problematic would be determining what constitutes good faith participation considering the fact that the circumstances of cases differ. However, this quandary can be avoided by allowing the parties to draft their guidelines themselves. These guidelines would therefore become a specific, detailed outline of the constituents of the good faith participation needs to be satisfied by the parties. In other words, just before the mediation process starts, parties would take some time to determine the guidelines best suited for their process. These guidelines would then be expected of each party as a sign of good faith and failure to abide by them would make the defaulting party in breach of the good faith participation agreement.

The basis for this proposition is the general belief that guidelines are usually more effective when the participants create them for themselves. If the parties therefore take the time at the beginning of the process to draft rules guiding their behaviour which will be made part of the good faith provisions already provided for in their mediation agreement or in the Court Rules, they will be more likely to abide by their rules. In addition, this will still ensure the preservation of party autonomy.

If a party defaults, then the other party can bring an action for breach of fundamental term of the contract (good faith participation) contained in the mediation agreement.

Back to Scenario 1: If the good faith agreement were inserted into the mediation agreement between John and James, with avoiding lies as one of such "good faith acts", then the mediator would be able to remind James of this provision and subsequently report such breach of contract to John, if James fails to disclose. This would then enable John to sue James for breach of agreement to negotiate in good faith with the mediator as his witness as in the case of *Farm Assist*. This will definitely serve as a preventive measure and would deter would-be perpetrators of deception in the mediation process. Court sanctions in the event that such defaulters are found liable will serve as punitive measures and would further prevent party mendacity in mediation.

Step Three: Certificates of Compliance

Certificates of compliance have been used worldwide to encourage good participant behaviour in mediation. They have been particularly effective in Australian Family Courts referenced above. To ensure good-faith participation of parties during the mediation, provision should be made for these

[48] Mediators 5 and 7.
[49] Izumi 23

certificates at the Centre and other mediation service providing institutions in Nigeria particularly those connected to the courts.

The use of the combination of the good faith provision as well as the guidelines and the certificates of compliance would ensure that parties are put on notice of the behaviour expected of them during the course of the mediation process. It would also ensure that they are aware that there will be cost sanctions in the event of default.

Note that the effectiveness of these recommendations depends on ensuring that acting in bad faith is made an exception to the confidentiality requirement and enshrined in an enforceable law or document. A good example is found in section 7(b) of the Uniform Mediation Act of the United States referenced above. This will ensure that parties and the mediator may utilize mediation communications to prove lack of adherence to the good faith participation provision in spite of the confidentially of mediation communications. It also ensures that parties do not further abuse the process and will ensure that the good faith participation requirement will be enforceable. Also, the mediator will be able to testify as a witness in court when the action is brought by the innocent party.[50]

CONCLUSION

Party mendacity is a cankerworm that is slowly but surely eating its way into the mediation process and if adequate preventive and punitive measures are not put in place to curb it, it will definitely erode the process. If public confidence in mediation is to develop, clear and acceptable standards of practice must be made to ensure protection against recalcitrant parties and prevent abuse of the process. The enforcement of good faith provisions in the mediation process will provide both preventive and punitive measures and will therefore preserve the integrity of the process.

[50] *Farm Assist Ltd v. The Secretary of State for the Environment, Food and Rural Affairs,* (2009) EWHC 1102 (TCC).