AMERICAN BANKRUPTCY INSTITUTE

2018 Annual Spring Meeting

CONCURRENT SESSION

Is Mediation the Antidote for Health Care Disputes?

Hosted by the Mediation and Health Care Committees

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2018

HEALTHCARE MEDIATION: WHEN DOES IT MAKE SENSE?

A. Mediation can be a successful tool in healthcare cases. Many healthcare cases cannot withstand the time and expense to fully litigate issues. Thus, mediation can be used as a method to resolve important case issues in order to allow the Debtor to sell or reorganize its business.

B. The success or failure of mediation in healthcare cases may be related to the nature of the parties involved, for example, regulatory agencies, lenders, other claimants and the type of claims, for example, perceived or real health and safety claims versus monetary claims or fine and penalty claims.

C. Almost every healthcare business is regulated by HHS/ CMS and State agencies. These federal and state regulatory agencies are responsible for health and safety issues, recoupments, bed taxes, fines and penalties. The success or failure of mediation can sometimes relate to the type of claim. For instance, in In re Bayou Shores SNF, LLC, 828 F.3d 1297, 1300 (11th Cir. 2016), cert. denied sub nom. Bayou Shores SNF, LLC v. Fla. Agency for Health Care Admin., 137 S. Ct. 2214, 198 L. Ed. 2d 658 (2017), the Florida Agency regulating Medicaid, AHCA, issued several Immediate Jeopardy tags to the facility pre-petition. The agency then refused to re-survey the facility as generally occurs in such situations. Faced with the loss of its license due to the IJ's and the lack of a new survey, the Debtor filed chapter 11. The Debtor pushed for an early mediation, but CMS and AHCA refused to mediate. After the plan was confirmed, CMS and AHCA appealed. There were two mediations associated with the appeal. Neither were successful. In Bayou, CMS and AHCA clearly were not willing to mediate the issues due to their reluctance to deal with jurisdictional, health and safety issues and licensure. The Bayou case also demonstrates the overlap that can occur between CMS and State agencies. Although AHCA is charged with performing

surveys, they are performed for CMS. Additionally, AHCA could have been required to remit funds to CMS if they were improperly paid to the Debtor. Thus, both CMS and AHCA were parties and both would be needed to mediate matters. The government has been equally unwilling to mediate false claims issues which are criminal in nature and which could involve a realtor party. Mediation of these cases is not necessarily without benefit even if the chance of settlement is low. The mediation can give the Debtor information about the government's concerns that may not have been set forth in pleadings and that might not be discoverable. Likewise, the government can essentially "size up" the debtor, which may lead it to reconsider some of its positions.

D. When government agencies are owed funds for bed tax or penalties there has been more likelihood of a successful mediation. Essentially, the willingness to mediate these issues appear to be based on the facts of the case. In cases where a facility will close down because of the inability to pay, the government's claim mediation has been successful when the agencies want the Debtor to remain open in order to be sold or reorganized. An issue for the parties and the mediator is that often times the actual decision maker is not available to attend the mediation. First, the parties should push to have someone with authority available even if it means going to another city. A second option is to have the decision maker available telephonically. If the decision maker is not available to approve an agreement it is important to document any proposed agreement and limit the time for approval by the governmental or regulatory agency.

E. Mediation related the extent, validity, priority and amount of certain claims generally is more successful than mediation of certain health and welfare type claims. The type of healthcare claims that can be mediated include issues regarding perfection, the priority of certain claims such as WARN claim and fines and penalties of governmental agencies.

F. The following is a list of issues involved in healthcare cases that have been successfully mediated. The parties should consider mediation in a healthcare case to resolve disputes related to:

1. The extent or validity of liens ;
2. The amount and treatment of secured claims.
3. The amount and/or methodology for recoupments;
4. The treatment of fines and penalties;
5. Priority claims such as WARN claims ;
6. Substantial contribution claims :
7. Tort claims ;
8. Avoidance actions .

G. Even when the mediation is not healthcare specific, for example, a mediation regarding lender lien issues in a healthcare case, it is important that the mediator have a familiarity with the issues that arise in healthcare cases. Settling a lenders lien claim will not be effective if the regulatory agency asserts, or may assert, a recoupment claim. A basic understanding of the regulatory scheme and the issues related thereto will assist the parties in crafting an agreement that considers all of the issues.

2018 ABI Spring Meeting

Saturday, April 21, 2018

Panel Title: IS MEDIATION THE ANTIDOTE FOR HEALTH CARE DISPUTES?

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The Healthcare Industry Environment

Healthcare bankruptcies are on the rise and their complex nature pose many interesting challenges to restructuring professionals. There are numerous pressures on today's hospitals, nursing homes, cancer treatment facilities and other healthcare providers. Technology, cybersecurity, HIPAA requirements, and increased professional liability litigation all pose challenges for the majority of healthcare providers and those that provide services to the industry. Changes in the delivery of healthcare services such as the shift from inpatient to outpatient services, the demands of organized labor, changing reimbursements methodologies, and employee retention are just a few examples of the pressures facing today's healthcare industry.

Constituent Groups in a Healthcare Bankruptcy

In addition to the numerous pressures on the healthcare industry, the structure of a healthcare bankruptcy can be different. The traditional constituent groups in a Chapter 11 case tend to be the Debtor, the secured lender and the Official Committee of Unsecured Creditors and other official committees. In a healthcare bankruptcy, there are additional influencers and constituents, such as Federal, State and Local government and regulatory bodies.

Various government regulatory agencies tend to play a key role in a healthcare restructuring, often overshadowing the traditional constituents. Of particular importance is that governmental entities and regulatory bodies typically do not subject themselves to mediation. In almost every healthcare case, the Federal and State governmental entities often wear "multiple hats" – as regulators, creditors, lenders, payors, and pension guarantors, as is the case with the Pension Benefit Guaranty Corporation. The healthcare industry is regulated by agencies such as Health and Human Services (HHS), the Centers for Medicare and Medicaid (CMS), the Joint Commission on Accreditation of Health Care Organizations (JCAHO) and various State agencies like the Department of Health (DOH), just to name a few.

These regulatory agencies are responsible for various matters, such as health, safety, and privacy issues for patients, accreditation and licensing for practitioners and facilities, Medicaid/Medicare reimbursements rates, recoupment processes, various taxes, fines, and penalty structures. When any of these regulatory agencies are involved, the issues at hand are difficult to mediate, but like most things, that depends on the type of matter and/or claim.

Mediation in the Healthcare Environment – The Chapter 11 of Bayou Shores SNF, LLC

The success or failure of mediation often relates to the type of claim. For instance, jurisdictional or regulatory health and safety issues, like those in Bayou Shores SNF, LLC, 525 B.R. 160 (Bankr. M.D. Fla. 2014), are not typically accepted by the government as opportunities to mediate.

Bayou Shores SNF, LLC was a skilled nursing home which was almost completely funded by Medicare and Medicaid reimbursements. Ninety percent of its revenue is compensation for Medicare and Medicaid services paid through provider agreements entered into with Federal and State governments. After a series of inspections, the Agency for Health Care Administration (AHCA), which regulates Medicaid, issued a series of warnings relating to violations of health and safety requirements. No improvements were made by management, therefore Immediate Jeopardy tags were issued and HHS communicated its intention to terminate the company's Medicare provider agreement. Bayou Shores SNF, LLC filed for protection under Chapter 11 of the Bankruptcy Code as a means to stay that enforcement and protect its licenses.

The Debtor pushed for an early mediation, but CMS and AHCA refused to mediate. After the plan was confirmed, which included the assumption of the provider agreements, CMS and AHCA appealed. There were two mediations associated with this appeal, but neither were successful. CMS and AHCA won their appeal. Currently, Bayou Shores is seeking U.S. Supreme Court assistance to save it licenses from being excluded from the Medicaid and Medicare programs. A response to their petition from HHS and/or AHCA is due by March 6, 2018. This is an example where CMS and AHCA

clearly were not willing to mediate the issues due to their reluctance to deal with jurisdictional, regulatory health and safety issues and licensing under mediation.

To make matters more complicated, often times government agencies share workflow, therefore an overlap can occur, i.e. in the Bayou Shores SNF, LLC example above, CMS was the agency responsible for performing the surveys for AHCA, and, additionally, is often compensated from AHCA if improperly paid to the Debtor. This means that if any of these matters are mediated, both CMS and AHCA would need to be participating parties. Mediations like these are unlikely and the chance of settlement is low.

When to Mediate in Healthcare?

A government agency might be more willing to mediate a tax claim and/or penalty and/or an individual Medicare/Medicaid reimbursement matter, rather than a regulatory matter.

Although the government role is significant in healthcare, there are still many other issues that arise throughout a healthcare bankruptcy for which the tool of mediation could be useful. Not all are unique to healthcare, but below is a list of issues involved in healthcare cases that have been successfully mediated. The parties should consider mediation in a healthcare case to resolve disputes related to:

- Asset Purchase Agreement disputes;
- Medicare/Medicaid recoupment disputes;
- The extent or validity of liens;
- The amount and treatment of secured claims;
- The amount and/or methodology for recoupments;
- The treatment of fines and penalties;
- Priority claims such as WARN claims;
- Substantial contribution claims;
- Tort claims/Medical Malpractice claims; and
- Avoidance actions.

Even when the mediation is not healthcare specific, for example, a mediation regarding lender lien issues in a healthcare case, it is important that the mediator have a familiarity with the issues that arise in healthcare cases. Settling a lenders lien claim will not be effective if the regulatory agency asserts, or may assert, a recoupment claim. A basic understanding of the regulatory scheme and the issues related thereto will assist the parties in crafting an agreement that considers all of the issues.

In addition, in healthcare, unlike other industries, financial distress can interfere with patient wellbeing and patient safety. Many healthcare cases cannot withstand the time and expense to fully litigate matters. So when an entity has the opportunity to mediate,

it can be a successful tool and used as a method to resolve important case issues, just don’t expect regulatory agencies to participate.

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SOME THOUGHTS ON JUDICIAL MEDIATION

Judge Robert E. Nugent III
U.S. Bankruptcy Court, D. Kan.

I. In many districts, bankruptcy judges are often asked to mediate cases or disputes in bankruptcy court. Though there is no specific national bankruptcy rule authorizing this, authority to do it can be inferred from a combination of the Federal Rules of Bankruptcy Procedure, and many courts' local alternative dispute resolution rules.[1] These are one judge's thoughts about preparing for and conducting mediations and the substantive and ethical expectations and duties that accompany them.

[1] *See* D. Kan. L.B.R. 9019.2 and D. Kan. R. 16.3. Fed. R. Bank. P. 7016 makes Fed. R. Civ. P. 16(c)(2)(I) applicable in adversary proceedings: "At any pretrial conference, the court may consider and take appropriate action on … (I) settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule." Bankruptcy Rule 7016 doesn't specifically apply in contested matters under Bankruptcy Rule 9014(c), "unless the court directs otherwise." Not all bankruptcy courts have local mediation rules (though most district courts do—and their bankruptcy courts are generally bound by those rules). *See e.g., Preface to the Local Rules of the United States Bankruptcy Court for the District of Kansas,* at § 3, Applicability of District Court Local Rules (March 17, 2016) (making D. Kan. Rules applicable to bankruptcy proceedings where applicable). Read an interesting take on this in Donald L. Swanson, *Five Reasons Why Mediation Must be Added to the Federal Bankruptcy Rules*, https://mediatbankry.com/2016/12/01/five-reasons-why-mediation-authorization-and-confidentiality-must-be-added-to-federal-bankruptcy-rules/ (August 16, 2016).

A. Collaborative v. Coercive: Some mediators are coercive—settle this or else. Others are more collaborative—seeking areas of common interest and concern while keeping parties invested. Judges naturally incline toward the coercive model because hearing, deciding, and ordering (*i.e.* "coercing") are more consistent with our day to day lives than "collaborating," at least in court. Sometimes a strong desire to cut through to the deep issue may be seen as coercive; really, it's the judge's effort to understand what is keeping the parties apart.

1. Some states' rules specifically regulate a mediator's conduct by adopting the Model Standards of Conduct for Mediators which include rules that require "self-determination." *See* Model Standards, Standard I: "A mediator shall respect and encourage self-determination by the parties and their decision whether, and on what terms, to resolve their dispute and shall refrain from being directive and judgmental regarding the issues in dispute and the options for settlement.").[2]

B. Mediate or settle? To me, "mediation" connotes seeking some sort of consensus that the deal you reach is beneficial to all concerned. It involves looking at legal, business, economical, and emotional bases for the dispute and how to resolve them. "Settlement" connotes negotiating

[2] Model Standards, Standard I; Ga. Ethical Standards, Standard I; N.C. Standards, V, *cited in* Berkoff, et al., "Standards of Professional Conduct for Mediators," *ABI Guide to Bankruptcy Mediation* (2016) (hereafter "ABI Guide").

through strengths of legal and factual positions and, to me, involves a lot of "difference-splitting" as opposed to "consensus-seeking."

C. Using Judicial Mediation: Judicial mediation provides clients with an excellent opportunity for informal communication about their case with a judge. Several different classes of cases that can benefit are:

1. Complex and multi-party cases;
2. Cases that involve the need for secrecy or confidentiality;
3. Cases with governmental parties who might respond better with a judge than a civilian neutral; and
4. Cases with parties unable to afford a commercial mediator—we're free, at least.

D. Limitations on Judges as Mediators: A federal judge's conduct as a mediator is governed by applicable law and the Code of Conduct for United States Judges, specifically Canon 4A, which provides that "A judge should not act as an arbitrator or mediator or otherwise perform judicial functions apart from the judge's official duties unless expressly authorized by law." Canon 4A(4). That Canon's commentary provides "This Canon generally prohibits a judge from mediating a state court matter, except in unusual circumstances (*e.g.*, when a judge is mediating a federal matter that cannot be resolved effectively without addressing the related state court matter)." Judges may participate in mediation of cases pending in their court (though not of cases assigned to them).

E. Finding Common Ground:

1. What interests, present and future do the parties share?
    a. Opportunities to do business later?
    b. Shared interest in being done, but unable to back down in adversary setting?
    c. What do we agree on? Sometimes the holdback is a small issue.
2. Is there a business solution? Whether a party is right or wrong may be less relevant than how certain results serve that party's economic interests. Unless you're a lawyer or a patent troll, litigating is not likely to be your first pursuit.
3. Encouraging creativity: is there another way to resolve the dispute that hasn't been tried or communicated?

F. Avoiding Impasse

1. Emotion v. Rationality: All human endeavor involves some emotion and rationality, but frequently these are out of balance in litigation. Parties and counsel become so invested in their positions that they cannot see the other side's point of view. This colors their ability to honestly assess their chances of prevailing on the merits.
    a. Sometimes counsel's views hold clients hostage to positions and ideas that may not have much actual legal traction or, even if they do, need to be resolved for the parties to return to normal pursuits.

2. Assessing Progress: Where did we start and where are we now? Are we making progress and is it enough to stay at the table?

   a. Does each party want to be here? Mediation will not be successful if one or more of the counterparties is uninterested or unmotivated.

3. Legal assessment of merits:

   a. Is it more important to win or simply to be done?

   b. Do the anticipated litigation costs, as well as the sunk costs, justify going forward?

   c. You say's it's a "matter of princip**le**;" I say it's a "matter of princip**al**." In other words, there's always economic cost to not resolving a dispute even if a noble principle is at stake.

   d. "Some state ethics rules for mediators discourage mediators from offering opinions on the merits of a controversy or the value of a settlement."[3] Others do not. While it is not a mediator's job to decide a case, some insight into likelihood of success on the merits can move a mediation along.

G. Confidentiality: whatever happens in mediation is kept confidential, subject to the legal and ethical exceptions below. Judge mediators do not disclose to the case-assigned judge any statements or other comments

[3] *See* ABI Guide, Ch. 7, 132.

about what went on in the session. Likewise, once mediation has concluded, all documents submitted are destroyed.

H. When should we mediate? Scheduling too early in the case may require the parties to proceed with too little information. Too late in the case means the parties have already heavily invested in trial preparation and may be just as willing to take their chances. Finding the sweet spot is the key.

I. Preparing for mediation:

1. I benefit greatly from concise written submissions that go to the deep issues in the matter; lengthy briefs that are filled with argument are not as helpful. *See* J. Nugent, Mediation Guidelines (2016) attached as Exhibit A.

2. I also conduct *ex parte* pre-mediation telephone conferences with each side. This helps me understand the personalities, physical needs, and dynamics of the meeting.

3. Attendance:

a. Each party must bring someone who has authority to settle. I rarely allow parties to appear telephonically, but will do so if both sides consent. It is beneficial to the mediator judge to be in a position to communicate directly with the parties and, likewise, for the parties to see that a judge is personally invested in solving their issue. Also, it is sometimes helpful for difficult clients to hear the "good"

and "bad" directly from the judge, particularly if the judge echoes their lawyer.

b. This is your only chance to let your client communicate with a judge outside of an adversary setting. It is an opportunity to help them develop trust in a system they may inherently distrust. It is also a chance for them to be "listened to."

c. The parties should come to the mediation if asked; just as lawyers are invested in their cases, they should be invested in mediating, too. Nothing focuses the mind like a drive to, say, Wichita.

4. Joint openings: This tends to exacerbate emotions and works against creating a collaborative environment. Many judge mediators avoid this.

5. Successful mediation sometimes requires getting through the lawyer's filter to the client directly by direct discussions with parties without their lawyers being present. Consistent with the idea of self-determination, mediators should not force this, but it is often helpful.

6. Likewise, don't be surprised if I speak to any combination of people present in an effort to generate some discussion toward reaching a consensus.

7. Remember: the judge mediator is not there to decide or be convinced about your case. You already have an assigned trial judge for that. Rather, we are here to help you navigate whatever obstacles have stood in the way of a non-adjudicative resolution so far.

J. Closing: When agreement is reached, I like to prepare, with the parties' input, a term sheet that sets out the agreement as I and they understand it. They sign with the understanding that deal will likely need to be more fully documented (agreement, motion for compromise, motion to sell, *etc.*).

K. Failure: Even if mediations don't come together on the first attempt, most judge mediators will keep open the possibility of further discussions. Sometimes parties who aren't ready to settle at the first session "see the light" later on. There's no reason for the judge mediator to waste his or her preparation effort if a chance to resolve remains in prospect.

II. Selected Ethical Considerations:

A. Sources of Rules: Rules governing the mediation process can be found in our courts' local rules, the Model Standards, federal and state ethics rules, and statute. *See* ABI Guide, Ch. 7, 128.

B. Confidentiality: It goes without saying that judge mediators must maintain what is said, done, and submitted at sessions confidential. Most courts' local rules require that.

1. D. Kan. L.B.R. 9019.2(a)(5): No mediation statements are placed in the court file and the mediator must not communicate with the judge assigned to the matter except "whether the case has been settled or that a party or attorney has failed to appear." The local rule adds: "Fed. R. Evid. 408 governs the admissibility of statements … made during or in connection with the extrajudicial [mediation] process."

2. D. Kan. R. 16.3(i) provides that any communication must be treated as "confidential information" and that none of it will be discoverable except to prevent a manifest injustice, establish a legal or ethical violation, or prevent harm to the public health or safety.

   a. State Court Rules: The Kansas Supreme Court has also established mediation rules that address this, *see* Kan. Sup. Ct. R. 903(e):

      > (e) Confidentiality. A Mediator Shall Maintain the Reasonable Expectations of the Parties with Regard to Confidentiality. The reasonable expectations of the parties with regard to confidentiality shall be met by the mediator. The parties' expectations of confidentiality depend on the circumstances of the mediation and any agreements they may make. A mediator shall not disclose any matter that a party expects to be confidential unless given permission by all parties or unless required by law or other public policy.

3. Exceptions to Confidentiality:

a. D. Kan. R. 16.3(j) provides for "limited exceptions" to confidentiality requirements as follows:

> (1) disclosures as may be stipulated by all parties and the mediator;
> (2) disclosure of an agreement, by all parties to the agreement, which appears to constitute a settlement contract, if necessary in proceedings to determine the existence of a binding settlement contract;
> (3) a report to or an inquiry by the ADR administrator regarding a possible violation of these Local Rules;
> (4) a report of a possible violation of a court order to the judge or magistrate judge signing the order;
> (5) any participant or the mediator from responding to an appropriate request for information duly made by persons authorized by the court to monitor or evaluate the court's ADR program; or
> (6) disclosures as are otherwise required by law.

4. Admissibility, Fed. R. Evid. 408. Rule 408 conditions or prohibits the uses of evidence obtained in mediation. As (b) shows, mediation communication is not entirely inadmissible. Rather, it may be admitted for purposes other than those listed in (a). *Coakley & Williams Const., Inc. v. Structural Concrete Equipment, Inc.,* 973 F.2d 349 (4th Cir. 1992) (settlement evidence is inadmissible only if offered to prove liability or damages of underlying claim). Those "other" purposes include proof of bias or prejudice, negating a delay contention, or proving an effort to obstruct justice in a criminal investigation. Note that these are inclusive, not exclusive bases to admit mediation communications. *See In re Suiter,* 560 B.R. 333 (Bankr. D. Hawaii

2016) (Rule 408 does not require exclusion of settlement evidence when it is offered for purpose of interpreting or enforcing the settlement); *In re Home Health Corp. of America, Inc.,* 268 B.R. 74 (Bankr. D. Del. 2001) (distinguishing admissibility of pleadings submitted in arbitration versus pleadings submitted in mediation that are inadmissible in subsequent litigation as in the nature of settlement discussions.) That rule provides:

> Rule 408. Compromise Offers and Negotiations
>
> (a) Prohibited Uses. Evidence of the following is not admissible--on behalf of any party--either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:
> (1) furnishing, promising, or offering--or accepting, promising to accept, or offering to accept--a valuable consideration in compromising or attempting to compromise the claim; and
> (2) conduct or a statement made during compromise negotiations about the claim--except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.
> (b) Exceptions. The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

C. Conflicts of Interest and Impartiality: Federal judges are disqualified from hearing cases in which their impartiality might reasonably be questioned. *See* 28 U.S.C. § 455(a). Likewise, judges acting as mediators should disclose potential conflicts issues before undertaking mediations. These include relationships to parties, their lawyers, and stock or other

ownership interests in parties. Lawyers who mediate must abide by similar rules. *See, e.g.*, D. Kan. R. 16.3(g) ("Required Disclosures by Mediators").

D. Professional Conduct Concerns: As in all conduct as a lawyer, the Rules of Professional Conduct govern your actions during a mediation session. *See* Kan. Sup. Ct. R. 226, Kansas Rules of Professional Conduct (as amended July 1, 2007) ("KRPC"), KAN. CT. RULES AND PROC., Vol. I – State (Thomson Reuters 2016).

1. Loyalty and Confidence: The Rules of Professional Conduct outline an attorney's duties to her client. Principal among them is the duty of loyalty and confidence set out in KRPC 1.6. In particular, that rule prohibits attorneys from revealing information their client has confided without the client's consent. Exceptions to that rule include an attorney defending against a claim or ethical allegation made by the client and complying with another law or a court order. Statements made in mediation could potentially, and inadvertently run afoul of this rule.

2. Duty to Advise: KRPC 2.1, provides the parameters for an attorney's role as the client's "advisor." The lawyer is required to exercise "independent professional judgment" and "render candid advice." In doing that, she can impart advice that is not only legal, but also involves "moral, economic, social and political factors that may be relevant." This part of the role is particularly

relevant to mediation where the focus may be less on "can I win" than on "how is it in my general interest to resolve this dispute." Kansas Comment [1] to this rule provides, in part, that "a client is entitled to straightforward advice expressing the lawyer's honest assessment" of what is in controversy. That is also critical to mediation—straight talk about "getting it done" and why that is in the client's interests. But ultimately, the client has the final say whether to settle a matter and the lawyer must abide by the client's decision. *See* KRPC 1.2(a).

3. Duty of Candor: Just because you are not in a courtroom on the record doesn't mean you are unbound from the Rules of Professional Conduct. Comment [5] to KRPC 2.3 provides that lawyers representing clients in mediation are governed by all of the Rules and that their duty of candor is specifically governed by KRPC 4.1. That rule states:

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

a. Notice that nothing in this rule permits you to violate KRPC 1.6 concerning client information and communication, even when disclosure might be necessary

to prevent a criminal or fraudulent act by your client. Compare this with KRPC 3.3, "Candor Toward the Tribunal" which prohibits making a false statement of fact or law, failing to correct a false statement, failing to disclose controlling adverse legal authority, and offering false evidence, even if complying with this rule would violate KRPC 1.6. Because a mediation is not an adjudicative proceeding, KRPC 3.3 doesn't apply, but the general duty of candor found in KRPC 4.1 does. *See* KRPC 1.0(n), defining a "tribunal" as a court, an arbitrator in a binding arbitration proceeding, or other body "acting in an adjudicative capacity."

4. KRPC 2.3: "Lawyer Serving as Third Party Neutral": This rule requires lawyers to disclose to unrepresented litigants that the lawyer acting as a mediator does not represent them and explain the difference between the role of a mediator and that of an advocate. *See* KRPC 2.3(b) and Kansas Comment [3].

III. Conclusion: Most judges are more than willing to conduct mediations. It helps their colleagues who have been assigned the cases, but even more importantly, it allows us to help solve client's problems in a more informal setting. Judge mediation is an inexpensive and effective way to get to the bottom of an intractable dispute.

EXHIBIT A

MEDIATION GUIDELINES

Judge Robert E. Nugent, III
2016

1. Before beginning mediation, counsel must have made a good faith effort to settle the case and have either exhausted their efforts or reached an impasse.

2. Each party should prepare and submit to the court a settlement brief not to exceed 15 pages in length that contains at a *minimum*:

    A. Background of the underlying bankruptcy case and causes;
    B. A specific description of nature of the dispute;
    C. The present position of the parties, *i.e.*, latest offer(s) and counter-offer(s);
    D. Nature of the damages, if any, and a summary of same;
    E. Your client's legal position and a frank comparison of it with that of your opponent;
    F. Any demonstrative or documentary exhibits you think might be helpful;
    G. Other and further information counsel think relevant to settlement efforts.

3. Counsel must submit their candid assessments of the following as a separate section of the settlement brief:

    A. Strongest and weakest points in case (legal/factual).
    B. Strongest and weakest points in opponents' case (legal/factual).
    C. Settlement proposal you believe would be fair.
    D. Settlement proposal you would be willing to make in order to conclude matter and stop expense of litigation.
    E. Estimate of costs of future litigation.

4. The above information must be submitted to the court at least three (3) working days prior to the settlement conference or as directed in the mediation letter to which this is attached.

5. This information will NOT be shared with your opponent and I will destroy it once the mediation is concluded.

R.E.N.