AMERICAN BANKRUPTCY INSTITUTE

Southeast Bankruptcy Workshop

Loose Lips Sink Ships: Mediation Confidentiality, Privilege and Ethics

CONCURRENT SESSION

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2022

Loose Lips Sink Ships: Mediation Confidentiality, Privilege, and Ethics

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American Bankruptcy Institute's
Southeast Bankruptcy Workshop
July 2022

Loose Lips Sink Ships

- **Confidentiality in Mediation**
- **Privilege in Mediation**
- **Ethics in Mediation and Negotiation**
- **Questions**

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Mediation Confidentiality, Privilege, and Ethics

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UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA

* * *

LOCAL RULES

OF THE

UNITED STATES BANKRUPTCY COURT

FOR THE

MIDDLE DISTRICT OF FLORIDA

* * *

WITH AMENDMENTS

EFFECTIVE AUGUST 1, 2021

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Rule 9019-2

ALTERNATIVE DISPUTE RESOLUTION (ADR); MEDIATION

(a) ***Definition.*** Mediation is an opportunity for the parties to negotiate their own settlement consistent with the mediation policy of self-determination. Mediation is a confidential process that includes a supervised settlement conference presided over by an impartial, neutral mediator to promote conciliation, compromise and the ultimate settlement of a civil action. The mediator's role in the settlement is to suggest alternatives, analyze issues, question perceptions, conduct private caucuses, stimulate negotiations between opposing sides, and keep order. The mediation process does not allow for testimony of witnesses. The mediator should not opine or rule upon questions of fact or law, or render any final decision in the case. At the conclusion of the mediation, the mediator shall report to the Court (1) the identity of the parties in attendance at the mediation, and (2) that parties either reached an agreement in whole or in part or that the mediation was terminated without the parties' coming to an agreement.

(b) ***Purpose.*** Mediation is intended as an alternative method to resolve civil cases, saving time and cost without sacrificing the quality of justice to be rendered or the right of the litigants to a full trial in the event that mediation does not resolve the dispute.

(c) ***Qualifications; Conflicts.***

(1) ***Qualifications of Mediators.*** The parties may select any person to serve as mediator. Parties are encouraged to choose a mediator who has sufficient knowledge and experience in mediations and in bankruptcy law. Notwithstanding the foregoing, the Court, by administrative order, may establish qualifications and maintain a list of those persons eligible to serve as mediator in a residential mortgage modification mediation.

(2) ***Conflicts of Interest.*** The mediator must disclose all actual or potential conflicts of interest involving the parties participating in the mediation process. The parties may waive a mediator's actual or potential conflict of interest, provided that the mediator concludes in good faith that the mediator's impartiality will not be compromised. The unique nature of bankruptcy cases favors the parties' ability to waive conflicts and supersedes the concept of non-waivable conflicts.

(d) ***Standards of Professional Conduct for Mediators.*** All mediators who mediate in cases pending in this District, whether or not certified under the rules adopted by the Supreme Court of Florida, shall be governed by standards of professional conduct and ethical rules adopted by the Supreme Court of Florida for circuit court mediators.

(e) ***Disqualification of a Mediator.*** After reasonable notice and hearing, and for good cause, the presiding judge shall have discretion and authority to disqualify any mediator from serving as mediator in a particular case. Good cause may include violation of the standards of professional conduct for mediators.

(f) ***Compensation of Mediators.*** Unless otherwise indicated in an order appointing a mediator, an order directing parties to mediate, or other similar court order, the mediator shall be compensated for fees and expenses as established and agreed to by the parties to the mediation. Absent agreement of the parties or order of the Court to the contrary, the cost of the mediator's services shall be paid equally by the parties to the mediation.

In cases in which one or more parties to the mediation is a Chapter 11 trustee or debtor-in-possession, payment of the mediator's charges attributable to that party shall be authorized without the necessity of filing an application with the Court.

(g) ***Confidentiality.***

(1) ***Definitions.*** As used in this section (g), "Mediation Communication" means an oral or written statement, or nonverbal conduct intended to make an assertion, by or to a participant in a mediation made during the course of the mediation, or prior to a mediation if made in furtherance of a mediation; "Mediation Participant" means a mediation party or a person who attends a mediation in person or by telephone, videoconference, or other electronic means; "Mediation Party" means a person participating in a mediation directly or through a designated representative, and who is a named party, a real party in interest, or who would be a named party or real party in interest if an action relating to the subject matter of the mediation were brought in a court of law; and "Subsequent Proceeding" means an adjudicative process that follows a mediation, including related discovery.

(2) ***Confidential Mediation Communications.*** Except as provided in this section (g), all Mediation Communications are confidential, and the mediator and the Mediation Participants shall not disclose outside of the mediation any Mediation Communication, and no person may introduce in any Subsequent Proceeding evidence pertaining to any aspect of the mediation effort. However, information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery because of its disclosure or use in mediation.

(3) ***Evidence Rules and Laws.*** Without limiting subsection (2), Rule 408 of the Federal Rules of Evidence and any applicable federal or state statute, rule, common law, or judicial precedent relating to the privileged nature of settlement discussions or mediations apply.

(4) ***Settlement Agreements.*** Notwithstanding subsections (2) and (3), no confidentiality attaches to a signed, written agreement reached during or as a result of a mediation, unless the mediation parties agree otherwise, or to any communication for which the confidentiality or privilege against disclosure has been waived by all Mediation Parties.

(5) ***Preservation of Privileges.*** The disclosure by a Mediation Participant or Mediation Party of privileged information to the mediator or to another Mediation Participant or Mediation Party does not waive or otherwise adversely affect the privileged nature of the information.

(6) ***Disclosures by Mediator.*** The mediator shall not be compelled to disclose to the Court or to any person outside the mediation conference any Mediation Communications, nor shall the mediator be required to testify in regard to the mediation in connection with any Subsequent Proceeding or be a party to any Subsequent Proceeding.

(7) ***Disclosure of Communications.*** A Mediation Participant who makes a representation about a Mediation Communication waives that privilege, but only to the extent necessary for another Mediation Participant to respond to the disclosure.

(h) ***Mediators as Counsel in Other Cases.*** Any member of the bar who selected as a mediator pursuant to this rule shall not, for that reason alone, be disqualified from appearing and acting as counsel in another unrelated case pending in this District.

(i) ***Referral to Mediation.*** Any pending case, proceeding, or contested matter may be referred to mediation by the Court at such time as the Court may determine to be in the interests of justice. The parties may request the Court to submit any pending case, proceeding, or contested matter to mediation at any time.

(j) ***Mortgage Modification Mediations and Other Specialty Mediations.*** When deemed necessary, the Court shall establish procedures, policies and necessary orders to deal with the mediation of emerging bankruptcy trends, such as residential mortgage modifications.

(k) ***Participation of Parties at Mediation.*** All parties to the mediation are required to attend the mediation in person, unless authorized by the Court or the mediator to attend by telephone. Parties are encouraged to participate in the mediation in a good faith attempt to resolve the issues between them. Parties who are not individuals shall participate in mediations through the presence of a representative with full authority to settle the matter that is the subject of the mediation.

Notes of Advisory Committee

2013 Amendment

The amendments to this rule significantly modify the rule as originally promulgated in 1989 and amended in 1995 and 1997. The amendments reflect the development of the mediation process in the Middle District of Florida.

Section (c)(2): The parties' ability to waive a mediator's actual or potential conflict of interest in bankruptcy cases differs from the Rules for Certified and Court Appointed Mediators adopted by the Florida Supreme Court, Rules 10.100 et seq., and the opinions of the Mediator Ethics Advisory Committee.

Section (g): The confidentiality provisions of section (g) are adapted in significant part from Florida's Mediation Confidentiality and Privilege Act, Sections 44.401-44.405, Florida

Statutes. Although the civil remedies provisions contained in Section 44.406 are not incorporated in this rule, parties are reminded that violations of this rule may be sanctionable under Local Rule 9011-3. By way of example, permissible disclosures in a subsequent proceeding would include statements made at a mediation to the extent necessary to support or oppose a reformation or declaratory relief action concerning an ambiguity in a settlement agreement. Additionally, a confidential settlement agreement is subject to disclosure if required by a subpoena or order of a court of competent jurisdiction.

This amendment to the rule is effective July 1, 2013.

1997 Amendment

This amendment conforms the existing Local Rules to the uniform numbering system prescribed by the Judicial Conference of the United States and to the model system suggested and approved by the Advisory Committee on Bankruptcy Rules of the Judicial Conference's Committee on Rules of Practice and Procedure. In renumbering the Local Rules to conform to the uniform numbering system, no change in substance is intended. This amendment to the rule was effective on April 15, 1997.

This rule was formerly Local Rule 2.23. The Advisory Committee Notes to the superseded rules may be helpful in interpreting and applying the current rules.

1995 Amendment

The amendment to Local Rule 2.23(b) makes clear that if the parties stipulate to a particular person on the register of mediators, the Court may appoint that person as mediator.

The amendment to Local Rule 2.23(d)(1) makes clear that the parties may agree to a shorter notice period for the mediation conference.

Paragraph (k) is new. It clarifies that the Court and the parties retain the flexibility to order or conduct mediation in ways other than that described in this rule. If the Court orders mediation other than pursuant to the methods and procedures contained in this rule, the confidentiality and compliance provisions of the rule will nevertheless apply to that mediation.

These amendments to the rule were effective on February 15, 1995.

LOCAL RULES

FOR

THE UNITED STATES BANKRUPTCY COURT

DISTRICT OF DELAWARE

(Effective February 1, 2022)

Rule 9019-2 Mediator and Arbitrator Qualifications and Compensation.

(a) Register of Mediators and Arbitrators/ADR Program Administrator. The Clerk shall establish and maintain a register of persons (the "Register of Mediators") qualified under this Local Rule and designated by the Court to serve as mediators or arbitrators in the Mediation or Voluntary Arbitration Program. The Chief Bankruptcy Judge shall appoint a Judge of this Court, the Clerk or a person qualified under this Local Rule who is a member in good standing of the Bar of the State of Delaware to serve as the Alternative Dispute Resolution ("ADR") Program Administrator. Aided by a staff member of the Court, the ADR Program Administrator shall receive applications for designation to the Register of Mediators, maintain the Register of Mediators, track and compile reports on the ADR Program and otherwise administer the program.

(b) Application and Certification.

(i) Application. Each applicant shall submit to the ADR Program Administrator a statement of professional qualifications, experience, training and other information demonstrating, in the applicant's opinion, why the applicant should be designated to the Register of Mediators. The applicant shall submit the statement substantially in compliance with Local Form 110A. The statement also shall set forth whether the applicant has been removed from any professional organization, or has resigned from any professional organization while an investigation into allegations of professional misconduct was pending and the circumstances of such removal or resignation. This statement shall constitute an application for designation to the ADR Program. Each applicant shall certify that the applicant has completed appropriate mediation or arbitration training or has sufficient experience in the mediation or arbitration process and that he/she satisfies the qualifications set forth in 9019-2(b)(ii). If requested by the Court, each applicant hereunder shall agree to accept at least one pro bono appointment per year. If after serving in a pro bono capacity insufficient matters exist to allow for compensation, credit for pro bono service shall be carried into subsequent years in order to qualify the mediator or arbitrator to receive

compensation for providing service as a mediator or arbitrator. In order to be eligible for appointment by the ADR Program Administrator, each applicant shall meet the qualifications sent forth in 9019-2(b)(ii).

(ii) Qualifications.

(A) Attorney Applicants. An attorney applicant shall certify to the Court in the Application that the applicant:

(1) Is, and has been, a member in good standing of the bar of any state or of the District of Columbia for at least five (5) years;

(2) Has served as a principal attorney of record in at least three bankruptcy cases (without regard to the party represented) from case commencement to conclusion or, if the case is still pending, to the date of the Application, or has served as the principal attorney of record for any party in interest in at least three (3) adversary proceedings or contested matters from commencement to conclusion or, if the case is still pending, to the date of the Application; and

(3) Is willing to undertake to evaluate or mediate at least one matter each year, subject only to unavailability due to conflicts, or personal or professional commitments, on a pro bono basis.

(B) Non-Attorney Applicants. A non-attorney applicant shall certify to the Court in the Application that the applicant has been a member in good standing of the applicant's particular profession for at least five (5) years, and shall submit a statement of professional qualifications, experience, training and other information demonstrating, in the applicant's opinion, why the applicant should be appointed to the Register of Mediators. Non-attorney applicants shall make the same certification required of attorney

applicants contained in Local Rule 9019-2(b)(ii)(A).

(iii) Court Certification. The Court in its sole and absolute determination on any reasonable basis shall grant or deny any application submitted under this Local Rule. If the Court grants the application, the applicant's name shall be added to the Register of Mediators, subject to removal under these Local Rules.

(iv) Reaffirmation of Qualifications. Each applicant accepted for designation to the Register of Mediators shall reaffirm annually the continued existence and accuracy of the qualifications, statements and representations made in the application. The annual reaffirmation shall be submitted to the ADR Program Administrator in conformity with Local Form 125 by March 31st of each year, and shall include a certification of such mediator's acceptance of, or availability to perform, one pro bono appointment for the prior calendar year, and whether the mediator has been selected or appointed as a mediator in a dispute within the preceding three (3) calendar years for this Court.

(c) Oath. Before serving as a mediator or arbitrator, each person designated as a mediator or arbitrator shall take the following oath or affirmation:

> "I, _____, do solemnly swear (or affirm) that I will faithfully and impartially discharge and perform all the duties incumbent upon me in the Mediation or Voluntary Arbitration Program of the United States Bankruptcy Court for the District of Delaware without respect to persons and will do so equally and with respect."

(d) Removal from Register of Mediators. A person shall be removed from the Register of Mediators (i) at the person's request, (ii) by Court order entered on the sole and absolute determination of the Court, or (iii) by the ADR Program Administrator if the person (1) has failed to timely submit the annual reaffirmation as required in 9019-2(b)(iv), or (2) has not been selected or appointed as a mediator in a dispute for three (3) consecutive calendar years. If removed from the Register of Mediators, the

person shall be eligible to file an application for reinstatement after the passage of one year from the date of removal.

(e) Appointment.

(i) Selection. Upon assignment of a matter to mediation or arbitration in accordance with these Local Rules and unless special circumstances exist as determined by the Court, the parties shall select a mediator or arbitrator. If the parties fail to make such selection within the time as set by the Court, then the Court shall appoint a mediator or arbitrator. A mediator or arbitrator shall be selected from the Register of Mediators, unless the parties stipulate and agree to a mediator or arbitrator not on the Register of Mediators.

(ii) Inability to Serve. If the mediator or arbitrator is unable to or elects not to serve, he or she shall file and serve on all parties, and on the ADR Program Administrator, within fourteen (14) days after receipt of notice of appointment, a notice of inability to accept the appointment. In such event, the parties shall select an alternate mediator or arbitrator.

(iii) Disqualification.

(A) Disqualifying Events. Any person selected as a mediator or arbitrator may be disqualified for bias or prejudice in the same manner that a Judge may be disqualified under 28 U.S.C. § 44. Any person selected as a mediator or arbitrator shall be disqualified in any matter where 28 U.S.C. § 455 would require disqualification if that person were a Judge.

(B) Disclosure. Promptly after receiving notice of appointment, the mediator or arbitrator shall make an inquiry sufficient to determine whether there is a basis for disqualification under this Local Rule. The inquiry shall include, but shall not be limited to, a search for conflicts of interest in the manner prescribed by the applicable rules of professional conduct for attorneys and by the applicable rules

pertaining to the profession of the mediator or arbitrator.

(C) Objection Based on Conflict of Interest. A party to the mediation or arbitration who believes that the assigned mediator or arbitrator has a conflict of interest promptly shall bring the issue to the attention of the mediator or arbitrator, as applicable, and to the other parties. If the mediator or arbitrator does not withdraw, and the movant is dissatisfied with this decision, the issue shall be brought to the attention of the ADR Program Administrator by the mediator, arbitrator or any of the parties. If the movant is dissatisfied with the decision of the ADR Program Administrator, the issue shall be brought to the Court's attention by the ADR Program Administrator or any party. The Court shall take such action as it deems necessary or appropriate to resolve the alleged conflict of interest.

(iv) Liability. Aside from proof of actual fraud or unethical conduct, there shall be no liability on the part of, and no cause of action shall arise against, any person who is appointed as a mediator or arbitrator under these Local Rules on account of any act or omission in the course and scope of such person's duties as a mediator or arbitrator.

(f) Compensation. A person will be eligible to be a paid mediator or arbitrator if that person has been admitted to the Register of Mediators maintained by the Court or otherwise has been appointed by the Court. Once eligible to serve as a mediator or arbitrator for compensation, which shall be at reasonable rates, the mediator or arbitrator may require compensation and reimbursement of expenses as agreed by the parties; and such compensation and reimbursement of expenses shall be paid without Court Order. If any party to the mediation or arbitration objects to the compensation or expenses required by the mediator or arbitrator, such dispute may be presented to the Court by the party or the mediator or arbitrator for disposition. If the mediator or arbitrator consents to serve without compensation and at the conclusion of the first full day of the mediation conference or arbitration proceeding it is determined by the mediator or arbitrator

and the parties that additional time will be both necessary and productive in order to complete the mediation or arbitration, then:

(i) If the mediator or arbitrator consents to continue to serve without compensation, the parties may agree to continue the mediation conference or arbitration.

(ii) If the mediator or arbitrator does not consent to continue to serve without compensation, the fees and expenses shall be on such terms as are satisfactory to the mediator or arbitrator and the parties, subject to Court approval. Where the parties have agreed to pay such fees and expenses, the parties shall share equally all such fees and expenses unless the parties agree to some other allocation. The Court may determine a different allocation, if the parties cannot agree to an allocation.

(iii) If the estate is to be charged with such expense, the mediator or arbitrator may be reimbursed for actual transportation expenses necessarily incurred in the performance of duties.

(g) Administrative Fee. The mediator or arbitrator shall be entitled to an administrative fee of $250, payable upon his or her acceptance of the appointment, in every dispute referred to mediation, except a proceeding or matter in a consumer case. The administrative fee shall be a credit against any fee actually paid to the mediator or arbitrator in such proceeding or matter.

(h) Party Unable to Afford. If the Court determines that a party to a matter assigned to mediation or arbitration cannot afford to pay the fees and costs of the mediator or arbitrator, the Court may appoint a mediator or arbitrator to serve pro bono as to that party.

Rule 9019-3 Assignment of Disputes to Mediation or Voluntary Arbitration.

(a) Stipulation of Parties. Notwithstanding any provision of law to the contrary, the Court may refer a dispute pending before it to mediation and, upon consent of the parties, to arbitration. During a mediation, the parties may stipulate to allow the mediator, if qualified as an arbitrator, to hear and arbitrate the dispute.

(b) Safeguards in Consent to Voluntary Arbitration. Matters may proceed to voluntary arbitration by consent where

(i) Consent to arbitration is freely and knowingly obtained; and

(ii) No party is prejudiced for refusing to participate in arbitration.

Rule 9019-4 Arbitration.

(a) Referral to Arbitration under Fed. R. Bankr. P. 9019(c). The Court may allow the referral of a matter to final and binding arbitration under Fed. R. Bankr. P. 9019(c).

(b) Referral to Arbitration under 28 U.S.C. § 654. The Court may allow the referral of an adversary proceeding to arbitration under 28 U.S.C. § 654.

(c) Arbitrator Qualifications and Appointment. In addition to fulfilling the qualifications of a mediator found in Local Rule 9019-2(b), a person qualifying as an arbitrator hereunder must be certified as an arbitrator through a qualifying program. An arbitrator shall be appointed (and may be disqualified) in the same manner as in Local Rule 9019-2(e). The arbitrator shall be liable only to the extent provided in Local Rule 9019-2(e)(iv).

(d) Powers of Arbitrator.

(i) An arbitrator to whom an action is referred shall have the power, upon consent of the parties, to

(A) Conduct arbitration hearings;

(B) Administer oaths and affirmations; and

(C) Make awards.

(ii) The Fed. R. Civ. P. and the Fed. R. Bankr. P. apply to subpoenas for the attendance of witnesses and the production of documents at a voluntary arbitration hearing.

(e) Arbitration Award and Judgment.

(i) Filing and Effect of Arbitration Award. An arbitration award made by an arbitrator, along with proof of service of such award on the other party by the prevailing party, shall be filed with the Clerk promptly after the arbitration hearing is concluded. The Clerk shall place under seal the contents of any arbitration award made hereunder and the contents shall not be known to any Judge who might be assigned to the matter until the Court has entered a final judgment in the action or the action has otherwise terminated.

(ii) Entering Judgment of Arbitration Award. Arbitration awards shall be entered as the judgment of the Court after the time has expired for requesting a determination de novo, with no such request having been filed. The judgment so entered shall be subject to the same provisions of law and shall have the same force and effect as a judgment of the Court, except that the judgment shall not be subject to review in any other court by appeal or otherwise.

(f) Determination De Novo of Arbitration Awards.

(i) Time for Filing Demand. Within twenty-eight (28) days after the filing of an arbitration award under Local Rule 9019-4(e) with the Clerk, any party may file a written demand for a determination de novo with the Court.

(ii) Action Restored to Court Docket. Upon a demand for determination de novo, the action shall be restored to the docket of the Court and treated for all purposes as if it had not been referred to arbitration.

(iii) Exclusion of Evidence of Arbitration. The Court shall not admit at the determination de novo any evidence that there has been an arbitration proceeding, the nature or amount of any award or any other matter concerning the conduct of the arbitration proceeding, unless

(A) The evidence would otherwise be admissible in the Court under the Federal Rules of Evidence; or

(B) The parties have otherwise stipulated.

(g) This Local Rule shall not apply to arbitration under 9 U.S.C. § 3, if applicable.

Rule 9019-5 Mediation.

(a) Types of Matters Subject to Mediation. The Court may assign to mediation any dispute arising in an adversary proceeding, contested matter or otherwise in a bankruptcy case. Except as may be otherwise ordered by the Court, all adversary proceedings filed in a business case shall be referred to mandatory mediation, except an adversary proceeding in which (i) the United States Trustee is the plaintiff; (ii) one or both parties are *pro se*; or (iii) the plaintiff is seeking a preliminary injunction or temporary restraining order. Parties may also stipulate to mediation, subject to Court approval.

(b) Effects of Mediation on Pending Matters. The assignment of a matter to mediation does not relieve the parties to that matter from complying with any other Court orders or applicable provisions of the Code, the Fed. R. Bankr. P. or these Local Rules. Unless otherwise ordered by the Court, the assignment to mediation does not delay or stay discovery, pretrial hearing dates or trial schedules.

(c) The Mediation Process.

(i) Cost of Mediation. Unless otherwise ordered by the Court, or agreed by the parties, (1) in an adversary proceeding that includes a claim to avoid and recover any alleged avoidable transfer pursuant to 11 U.S.C. §§ 544, 547, 548 and/or 550, the bankruptcy estate (or if there is no bankruptcy estate, the plaintiff in the adversary proceeding) shall pay the fees and costs of the mediator and (2) in all other matters, the fees and costs of the mediator shall be shared equally by the parties.

(ii) Time and Place of Mediation Conference. After consulting with all counsel and *pro se* parties, the mediator shall schedule a time and place for the mediation conference that is acceptable to the parties and the mediator. Failing agreement of the parties on the date and location for the mediation conference, the mediator shall establish the time and place of the mediation conference on no less than twenty-one (21) days' written notice to all counsel and *pro se* parties.

(iii) Submission Materials. Unless otherwise instructed by the mediator, not less than seven (7) days before

the mediation conference, each party shall submit directly to the mediator and serve on all counsel and *pro se* parties such materials (the "Submission") in form and content as the mediator directs. Any instruction by the mediator regarding submissions shall be made at least twenty-one (21) days in advance of a scheduled mediation conference. Prior to the mediation conference, the mediator may talk with the participants to determine what materials would be helpful. The Submission shall not be filed with the Court and the Court shall not have access to the Submission.

(iv) Attendance at Mediation Conference.

(A) Persons Required to Attend. Except as provided by subsection (j)(ix)(A) herein, or unless excused by the Mediator upon a showing of hardship, which, for purposes of this subsection shall mean serious or disabling illness to a party or party representative; death of an immediate family member of a party or party representative; act of God; state or national emergency; or other circumstances of similar unforeseeable nature, the following persons must attend the mediation conference personally:

(1) Each party that is a natural person;

(2) If the party is not a natural person, including a governmental entity, a representative who is not the party's attorney of record and who has full authority to negotiate and settle the matter on behalf of the party;

(3) If the party is a governmental entity that requires settlement approval by an elected official or legislative body, a representative who has authority to recommend a settlement to the elected official or legislative body;

(4) The attorney who has primary responsibility for each party's case, including Delaware counsel if engaged at the time of mediation regardless of

whether Delaware counsel has primary responsibility for a party, unless Delaware counsel requests to be and is excused from attendance by the mediator in advance of the mediation conference; and

(5) Other interested parties, such as insurers or indemnitors or one or more of their representatives, whose presence is necessary for a full resolution of the matter assigned to mediation.

(B) Failure to Attend. Willful failure to attend any mediation conference, and any other material violation of this Local Rule, shall be reported to the Court by the mediator and may result in the imposition of sanctions by the Court. Any such report of the mediator shall comply with the confidentiality requirement of Local Rule 9019-5(d).

(v) Mediation Conference Procedures. The mediator may establish procedures for the mediation conference.

(vi) Settlement Prior to Mediation Conference. In the event the parties reach a settlement in principle after the matter has been assigned to mediation but prior to the mediation conference, the plaintiff shall advise the mediator in writing within one (1) business day of the settlement in principle.

(d) Confidentiality of Mediation Proceedings. Confidentiality is necessary to the mediation process, and mediations shall be confidential under these rules and to the fullest extent permissible under otherwise applicable law. The provisions of this Local Rule 9019-5(d) shall apply to all mediations occurring in cases, contested matters and adversary proceedings pending before the Court, whether such mediation is ordered or referred by the Court or voluntarily undertaken by the parties provided that such mediation is approved by the Court. Without limiting the foregoing, except as may be otherwise ordered by the Court, the following provisions shall apply to any mediation under these rules:

(i) F.R.E. 408. To the fullest extent applicable, Rule 408 of the Federal Rules of Evidence (and any applicable federal or state statute, rule, common

law or judicial precedent relating to the protection of settlement communications) shall apply to the mediation conference and any communications with the mediator related thereto. In addition to the limitations of admissibility of evidence under Rule 408, no person may rely on or introduce as evidence in connection with any arbitral, judicial or other proceeding, including any hearing held by this Court in connection with the referred matter, whether oral or written, (i) views expressed or suggestions made by a party with respect to a possible settlement of the dispute, including whether another party had or had not indicated a willingness to accept a proposal for settlement, (ii) proposals made or views expressed by the mediator, or (iii) admissions made by a party in the course of the mediation.

(ii) Protection of Information Disclosed to the Mediator or During Mediation. Subject to subparagraph (iv) herein, the mediator and the participants in mediation are prohibited from divulging, outside of the mediation, any oral or written information disclosed by the parties or witnesses to or in the presence of the mediator, or between the parties during any mediation conference.

(iii) Confidential Submissions to the Mediator. Subject to subparagraph (iv) herein, any submission of information or documents to the mediator, including any Submission (as defined in Del. Bankr. L.R. 9019-5(c)(iii)), prepared by or on behalf of any participant in mediation and intended to be confidential shall not be subject to disclosure, regardless of whether such Submission is shared with other participants in the mediation during a mediation conference.

(iv) Information Otherwise Discoverable. Information, facts or documents otherwise discoverable or admissible in evidence do not become exempt from discovery or inadmissible in evidence merely by being disclosed or otherwise used in the mediation conference or in any Submission to the mediator.

(v) Discovery from the Mediator. The mediator shall not be compelled to disclose to the Court or to any person outside the mediation any records, reports, summaries, notes, communications, Submissions,

recommendations made under subpart (e) of this Local Rule, or other documents received or made by or to the mediator while serving in such capacity. The mediator shall not testify, be subpoenaed or compelled to testify regarding the mediation in connection with any arbitral, judicial or other proceeding. The mediator shall not be a necessary party in any proceedings relating to the mediation. Nothing contained in this paragraph shall prevent the mediator from reporting the status, but not the substance, of the mediation effort to the Court in writing, from filing a Certificate of Completion as required by Local Rule 9019-5(f), or from otherwise complying with the obligations set forth in this Local Rule.

(vi) Protection of Confidential Information. For the avoidance of doubt, nothing in this sub-part 9019-5(d) is intended to or shall modify any rights or obligations any entity has in connection with confidential information or information potentially subject to protection under Section 107 of the Bankruptcy Code.

(vii) Preservation of Privileges. Notwithstanding Rule 502 of the Federal Rules of Evidence, the disclosure by a party of privileged information to the mediator does not waive or otherwise adversely affect the privileged nature of the information.

(e) Recommendations by Mediator. The mediator is not required to prepare written comments or recommendations to the parties. Mediators may present a written settlement recommendation memorandum to attorneys or *pro se* litigants, but not to the Court.

(f) Post-Mediation Procedures.

(i) Filings by the Parties. If a settlement is reached at a mediation, the plaintiff shall file a Notice of Settlement or, where required, a motion and proposed order seeking Court approval of the settlement within twenty-eight (28) days after such settlement is reached. Within sixty (60) days after the filing or the Notice of Settlement or the entry of an order approving the settlement, the parties shall file a Stipulation of Dismissal dismissing the action on such terms as the parties may agree. If the

plaintiff fails to timely file the Stipulation of Dismissal, the Clerk's office will close the case.

(ii) Mediator's Certificate of Completion. No later than fourteen (14) days after the conclusion of the mediation conference or receipt of notice from the parties that the matter has settled prior to the mediation conference, unless the Court orders otherwise, the mediator shall file with the Court a certificate in the form provided by the Court ("Certificate of Completion") showing compliance or noncompliance with the mediation conference requirements of this Local Rule and whether or not a settlement has been reached. Regardless of the outcome of the mediation conference, the mediator shall not provide the Court with any details of the substance of the conference.

(g) Withdrawal from Mediation. Any matter assigned to mediation under this Local Rule may be withdrawn from mediation by the Court at any time.

(h) Termination of Mediation. Upon the filing of a mediator's Certificate of Completion under Local Rule 9019-5(f)(ii) or the entry of an order withdrawing a matter from mediation under Local Rule 9019-5(g), the mediation will be deemed terminated and the mediator excused and relieved from further responsibilities in the matter without further order of the Court. If the mediation conference does not result in a resolution of all of the disputes in the assigned matter, the matter shall proceed to trial or hearing under the Court's scheduling orders.

(i) Modification of ADR Procedure. Any party seeking to deviate from, or propose procedures or obligations in addition to, the Local Rules governing ADR shall comply with Local Rule 7001-1(a)(i).

(j) Alternative Procedures for Certain Avoidance Proceedings.

(i) Applicability. This subsection (j) shall apply to any adversary proceeding that includes a claim to avoid and/or recover any alleged avoidable transfer pursuant to 11 U.S.C. §§ 547, 548 and/or 550 from one or more defendants where the amount in controversy from any one defendant is equal to or less than $75,000.

(ii) Service of this Rule with Summons. The plaintiff shall serve with the Summons a copy of this Del. Bankr. L.R. 9019-5(j) and the Certificate (as defined hereunder) and file a certificate of service within seven (7) days of service.

(iii) Defendant's Election. On or within twenty-eight (28) days after the date that the Defendant's response is due under the Summons, the Defendant may opt-in to the procedures provided under this subsection (j) by filing with the Court on the docket of the adversary proceeding and serving on the Plaintiff, a certificate in the form of Local Form 118 ("Certificate"). The time period provided hereunder to file the Certificate is not extended by the parties' agreement to extend the Defendant's response deadline under the Summons.

(iv) Mediation of All Claims. Unless otherwise agreed by the parties, the Defendant's election to proceed to mediation under subsection (j)(iii) operates as a referral of all claims against the Defendant in the underlying adversary proceeding.

(v) Appointment of Mediator. On or within fourteen (14) days after the date that the Certificate is filed, Plaintiff shall file either: (i) a stipulation (and proposed order) regarding the appointment of a mediator from the Register of Mediators approved by the Court; or (ii) a request for the Court to appoint a mediator from the Register of Mediators approved by the Court. If a stipulation or request to appoint is not filed as required hereunder, then the Clerk of Court may appoint in such proceeding a mediator from the Register of Mediators approved by the Court.

(vi) Election in Cases Where Amount Exceeds $75,000. In any adversary proceeding that includes a claim to avoid and/or recover an alleged avoidable transfer(s) from one or more defendants where the amount in controversy from any one defendant is greater than $75,000, the plaintiff and defendant may agree to opt-in to the procedures provided under this subsection (j) by filing a certificate in the form of Local Form 119 ("Jt. Certificate") on the docket of the adversary proceeding within the time provided under subsection (j)(iii) hereof that

includes the parties' agreement to the appointment of a mediator from the Register of Mediators; provided, however, that in a proceeding that includes more than one defendant, only the defendant who agrees to opt-in is subject to the provisions hereof. The use of the term "Defendant" in this subsection (j) shall include any defendant who agrees with plaintiff to mediation hereunder.

(vii) Participation. The parties shall participate in mediation in an effort to consensually resolve their disputes prior to further litigation.

(viii) Scheduling Order.

(A) Effect of Scheduling Order. Any scheduling order entered by the Court at the initial status conference or otherwise shall apply to the parties and claims which are subject to mediation under this subsection; provided, however, that: (1) the referral to mediation under this subsection (j) shall operate as a stay as against the parties to the mediation of any requirement under Fed. R. Bankr. Proc. 7026 to serve initial disclosures, and a stay as against the parties to the mediation of such parties' right and/or obligation (if any) to propound, object or respond to written discovery requests or other discovery demands to or from the parties to the mediation; and (2) as further provided in subsection (j)(ix)(B) hereof, after the conclusion of mediation the time frames set forth in the scheduling order entered by the Court shall be adjusted so that such time frames are calculated from the date of completion of mediation (as evidenced by the date of entry on the adversary docket of the Certificate of Completion). The stay provided for under this subsection shall automatically terminate upon the filing of the Certificate of Completion.

(B) Agreement to and Filing of Scheduling Order after Conclusion of Mediation. If the mediation does not result in the resolution of the litigation between the parties to the mediation, then within fourteen (14) days after the entry of the Certificate of Completion on

the adversary docket, the parties to the mediation shall confer regarding the adjustment of the date and time frames set forth in the scheduling order entered by the Court so that such dates and time frames are calculated from the date of completion of mediation. The parties shall further agree to a related form of scheduling order or stipulation and proposed order, and the plaintiff shall file such proposed scheduling order or stipulation and proposed order on the docket of the adversary proceeding under certification of counsel. If the parties do not agree to the form of scheduling order or stipulation as required hereunder and the timely filing thereof, then the parties shall promptly contact the Court to schedule a hearing to consider the entry of an amended scheduling order.

(C) Absence of Scheduling Order. The terms of this subsection (viii) apply only if the Court enters a form of scheduling order in the underlying adversary proceeding prior to the conclusion of mediation.

(ix) The Mediation Conference.

(A) Persons Required to Attend. A representative of each party who has full authority to negotiate and settle the matter on behalf of the party must attend the mediation in person. Such representative may be the party's attorney of record in the adversary proceeding. Other representatives of the party or the party (if the party is not the representative appearing in person at the mediation) may appear by telephone, videoconference or other similar means. If the party is not appearing at the mediation in person, the party shall appear at the mediation by telephone, videoconference or other similar means as directed by the mediator.

(B) Mediation Conference Procedures. The mediator may establish other procedures for the mediation conference.

(x) Other Terms. Unless otherwise provided hereunder, the provisions of Del. Bankr. L.R. 9019-5 (including subsections (b), (c) (iv)(B), and (d) – (h)) shall apply to any mediation conducted under this subsection (j).

Rule 9019-6 Other Alternative Dispute Resolution Procedures. The parties may employ any other method of alternative dispute resolution.

Rule 9019-7 Notice of Court Annexed Alternative Dispute Resolution Program. The plaintiff, at the time of service of the complaint and summons under Local Rule 7004-2, shall give notice of dispute resolution alternatives substantially in compliance with Local Form 110B. A certificate of service shall be filed within seven (7) days of service of the notice.

PROCEDURES FOR COMPLEX CASES IN THE SOUTHERN DISTRICT OF TEXAS

(Effective August 1, 2021)

Pursuant to BANKR. LOC. R. 1075-1, these procedures apply to the administration of complex chapter 11 and 15 cases (a "Complex Case"). A Complex Case is a case or group of affiliated cases in which (i) the total liabilities of the debtors[1] and their non-filing affiliates exceed $10 million; (ii) there are more than 50 parties-in-interest; or (iii) any claims against or interests in the debtors are publicly traded. A Complex Case includes a case that meets the foregoing criteria and is initiated by the filing of an involuntary petition under 11 U.S.C. § 303.

If the debtors and their non-filing affiliates have less than $200 million in liabilities, the debtors may elect the Complex Case designation. For cases where the debtors and their non-filing affiliates have $200 million or more in liabilities, the Complex Case designation is mandatory.

The Texas Procedures for Complex Chapter 11 cases do not apply in a Complex Chapter 11 Case. The Bankruptcy Local Rules shall apply unless they conflict with these procedures.

A. FIRST-DAY HEARINGS AND COMPLEX CASE DESIGNATION

1. Albert Alonzo, case manager for Chief Judge David R. Jones, is designated as the initial point of contact for all pre-filing matters for anticipated Complex Cases. Mr. Alonzo may be contacted at (713) 250-5467 (office), (832) 993-7656 (mobile), or by electronic mail at Albert_Alonzo@txs.uscourts.gov. Counsel for proposed debtors in a Complex Case should contact Mr. Alonzo as early as possible prior to filing a Complex Case to obtain a setting for first-day hearings. Mr. Alonzo will provide first-day hearing settings for both judges assigned to the Complex Case Panel of Judges. Once a judge has been assigned, the applicable setting can then be used. If Mr. Alonzo is not available, the point of contact is LinhThu Do, case manager for Judge Marvin Isgur, who may be contacted at (713) 250-5421 (office), (832) 544-6597 (mobile), or by electronic mail at Linhthu_Do@txs.uscourts.gov.

2. A Notice of Designation of a Complex Case must be filed by the debtors with the petition in a voluntary Complex Case. If the petition is filed under 11 U.S.C. § 303, the notice of designation must be filed by a petitioning creditor or the debtors within 14 days of service of the petition. Petitions must be filed electronically. **When opening a Complex Case, the Office should be selected as "Complex Docket" regardless of the division in which the case is filed. DO NOT SELECT A CITY NAME.** Detailed filing instructions may be found at https://www.txs.uscourts.gov/sites/txs/files/nextgen%20instructions-v2.pdf.

3. Unless otherwise ordered, first-day hearings will be conducted as Virtual Hearings (no in-person attendance permitted (see **Section I**)); provided, if first-day hearings are combined with the plan confirmation hearing in a prepackaged case or a request for equitable relief in an adversary proceeding, in-person attendance will be permitted but not required.

[1] The term "debtors" is used herein for convenience and includes a single debtor as well as a group of affiliated debtors whose cases are jointly administered.

46. **Every motion, CNO and CoC should include a proposed form of order**. Proposed orders should be filed as a separate attachment and have no cover page. Proposed orders should also attach copies of any referenced exhibits. Any CNO or CoC that includes a proposed form of order that varies from the original proposed order must include (a) a redline of the revised form of order against the order filed with the subject motion and (b) a clean copy of the form of order without a cover page.

R. PROFESSIONAL RETENTION

47. Applications to retain professionals pursuant to FED. R. BANKR. P. 2014 are governed by BANKR. LOC. R. 2014-1. Proposed orders may be effective as of the original retention date if the application is filed within 30 days after the later of (i) the date the order for relief is entered and (ii) the commencement of work by the professional. BANKR. LOC. R. 9003-1 does not apply to applications to retain professionals in a Complex Case. No hearing should be self-calendared for an application to retain a professional.

S. MEDIATION

48. Matters Subject to Mediation. The Court may order mediation of any dispute arising in an adversary proceeding, contested matter or otherwise. Parties may agree to mediate any dispute without Court approval. No matter may be mediated by a sitting judge without first obtaining an order from the Court.

49. Effects of Mediation on Pending Matters. Unless otherwise ordered by the Court, the assignment to mediation does not delay or stay discovery, pretrial hearing dates or trial schedules.

50. Cost of Mediation. Unless otherwise ordered by the Court, or agreed by the parties, (1) in an adversary proceeding that includes a claim to avoid and recover any alleged avoidable transfer of less than $25,000.00 per defendant pursuant to 11 U.S.C. §§ 544, 547, 548 or 550, the plaintiff in the adversary proceeding will pay the fees and costs of the mediator and (2) in all other matters, the fees and costs of the mediator will be shared equally by the parties.

51. Time and Place of Mediation. The mediator will schedule a time and place for the mediation and any pre-mediation conferences.

52. Submission Materials. Each party must submit directly to the mediator such materials (the "Submission") in form and content as the mediator directs. Prior to the mediation, the mediator may talk with the participants to determine what materials would be helpful. The Submission must not be filed with the Court.

53. Protection of Information Disclosed at Mediation. The mediator and the participants in mediation are prohibited from divulging, outside of the mediation, any oral or written information disclosed by the parties in the course of the mediation. No person may rely on or introduce as evidence in any arbitral, judicial or other proceeding, evidence pertaining to any aspect of the mediation effort, including but not limited to: (A) views expressed or suggestions made by a party with respect to a possible settlement of the dispute; (B) the fact that another party had or had not indicated willingness to accept a proposal for settlement made by the mediator, (C)

proposals made or views expressed by the mediator; (D) statements or admissions made by a party in the course of the mediation; and (E) documents prepared for the purpose of, in the course of, or pursuant to the mediation. Without limiting the foregoing, the parties are bound by (i) FED. R. EVID. 408, and (ii) any applicable federal or state statute, rule, common law or judicial precedent relating to the privileged nature of settlement discussions, mediations or other alternative dispute resolution procedures. Information otherwise discoverable or admissible in evidence does not become exempt from discovery, or inadmissible in evidence, merely by being used by a party in the mediation.

54. Discovery from Mediator. The mediator may not be compelled to disclose to the Court or to any person any of the records, reports, summaries, notes, communications or other documents received or made by the mediator while serving in such capacity. The mediator may not testify or be compelled to testify regarding the mediation in connection with any arbitral, judicial or other proceeding. The mediator will not be a necessary party in any proceedings relating to the mediation. Nothing contained in this paragraph prevents the mediator from reporting (i) the status, but not the substance, of the mediation effort to the Court; or (ii) whether a party failed to participate in good faith in the mediation.

55. Protection of Proprietary Information. The parties, the mediator and all mediation participants shall protect proprietary information.

56. Preservation of Privileges. The disclosure by a party of privileged information to the mediator does not waive or otherwise adversely affect the privileged nature of the information.

57. Service of Process. No party may be served with a summons, subpoena, notice or other pleading during the mediation or at the location where the mediation is occurring.

T. AGENDAS

58. Hearing agendas should be filed using the CM/ECF "agenda" code at least 24 hours prior to the scheduled hearing. Hearing agendas must include instructions for remote or virtual participation, as appropriate.

U. EXHIBITS

59. In addition to the requirements of Bankruptcy Local Rule 9013-2, exhibits must be filed on CM/ECF in advance of the hearing. Each exhibit must be filed as a separate attachment to an Exhibit List. The Court will review the exhibits from CM/ECF. Exhibits must be offered into evidence by reference to the CM/ECF docket number of the filed exhibit.

V. REQUESTS FOR COMPENSATION AND REIMBURSEMENT OF EXPENSES

60. Applications for interim compensation and reimbursement of expenses filed by professionals will consist of (i) the Complex Case Fee Application Coversheet; and (ii) a copy of the invoices for the interim application period (if hourly) or a calculation of the fee due for the interim application period (if non-hourly); (iii) an itemized list of expenses for which reimbursement is requested (if not contained in the copies of the invoices); and (iv) a proposed order in the form located on the Court's website. Applications for final compensation must include

Model Rule 1
Mediation

(a) Types of Matters Subject to Mediation. The court may assign to mediation any dispute arising in a bankruptcy case, whether or not any adversary proceedings or contested matters is presently pending with respect to such dispute. Parties to an adversary proceeding, contested matter and a dispute not yet pending before the court, may also stipulate to mediation, subject to court approval.

(b) Effects of Mediation on Pending Matters. The assignment of a matter to mediation does not relieve the parties to that matter from complying with any other court orders or applicable provisions of the U.S. Code, the Bankruptcy Rules or these Local Rules. Unless otherwise ordered by the court, the assignment to mediation does not delay or stay discovery, pretrial hearing dates or trial schedules. Any party may seek such delay or stay, and the court, after notice and hearing, may enter appropriate orders.

(c) The Mediation Conference.

(i) Informal Mediation Discussions. The mediator shall be entitled to confer with any or all a) counsel, b) pro se parties, c) parties represented by counsel, with the permission of counsel to such party and d) other representatives and professionals of the parties, with the permission of a pro se party or counsel to a party, prior to, during or after the commencement of the mediation conference (the “Mediation Process”). The mediator shall notify all Mediation Participants of the occurrence of all such communications, but no advance notice or permission from the other Mediation Participants shall be required. The topic of such discussions may include all matters which the mediator believes will be beneficial at the mediation conference or the conduct of the Mediation Process, including, without limitation, those matters which will ordinarily be included in a Submission under Local Rule 1(c)(iii). . All such discussions held shall be subject to the confidentiality requirements of subsection (d) of this Local Rule 1.

(ii) Time and Place of Mediation Conference. After consulting with the parties and their counsel, as appropriate, the mediator shall schedule a time and place for the mediation conference that is acceptable to the parties and the mediator. Failing agreement of the parties on the date and location for the mediation conference, the mediator shall establish the time and place of the mediation conference on no less than twenty one (21) days' written notice to all counsel and pro se parties. The mediation conference may be concluded after any number of sessions, all of which shall be considered part of the mediation conference for purposes of this Local Rule.

(iii) Submission Materials. Each Mediation Participant (as defined below) shall submit directly to the mediator such materials (the "Submission") as are directed by the mediator after consultation with the Mediation Participants. The mediator may confer with the Mediation Participants, or such of them as the mediator determines appropriate, to discuss what materials would be beneficial to include in the Submission, the timing of the Submissions and what portion of such materials, if any, should be provided to the mediator but not to the other parties. No Mediation Participant shall be required to provide its Submission, or any part thereof, to another party without the consent of the submitting Mediation Participant. The Submission shall not be filed with the

court and the court shall not have access to the Submission. A Submission shall ordinarily include an overview of the facts and law, a narrative of the strengths and weaknesses of a party's case, the anticipated cost of litigation, the status of any settlement discussions and the perceived barriers to a negotiated settlement.

(iv) Attendance at Mediation Conference.

(A) Persons Required to Attend. Unless excused by the mediator upon a showing of hardship, or if the mediator determines that it is consistent with the goals of the mediation to excuse such party, the following persons (the " Mediation Participants") must attend the mediation conference personally:

1) Each party that is a natural person;

2) If the party is not a natural person, including a governmental entity, a representative who is not the party's attorney of record and who has authority to negotiate and settle the matter on behalf of the party, and prompt access to any board, officer, government body or official necessary to approve any settlement that is not within the authority previously provided to such representative;

3) The attorney who has primary responsibility for each party's case;

4) Other interested parties, such as insurers or indemnitors, whose presence is necessary, or beneficial to, reaching a full resolution of the matter assigned to mediation, and such attendance shall be governed in all respects by the provisions of this subparagraph (c)(iv) of this Local Rule 1.

(B) Persons Allowed to Attend. Other interested parties in the bankruptcy case who are not direct parties to the dispute, i.e., representatives of a creditors committees, may be allowed to attend the mediation conference, but only with the prior consent of the mediator and the Mediation Participants, who will establish the terms, scope and conditions of such participation. Any such interested party that does participate in the mediation conference will be subject to the confidentiality provisions of Local Rule 1(d) and shall be a Mediation Participant.

(C) Failure to Attend. Willful failure of a Mediation Participant to attend any mediation conference, and any other material violation of this Local Rule, may be reported to the court by any party, and may result in the imposition of sanctions by the court. Any such report shall comply with the confidentiality requirement of Local Rule 1(d).

(v) Mediation Conference Procedures. After consultation with the Mediation Participants or their counsel, as appropriate, the mediator may establish procedures for the mediation conference.

(vi) Settlement Prior to Mediation Conference. In the event the parties reach an agreement in principle after the matter has been assigned to mediation, but prior to the mediation conference, the parties shall promptly advise the mediator in writing. If the parties agree that a settlement in principle has been reached, the mediation conference shall be continued (to a date certain or generally as the mediator determines) to provide the parties sufficient time to take all steps necessary to finalize the settlement. As soon as practicable, but in no event later that thirty (30) days after the parties report of an agreement in principle, the parties shall confirm to the mediator that the settlement has been finalized. If the agreement in principle has not been finalized, the mediation conference shall go forward, unless further extended by the mediator, or by the court.

(d) Confidentiality of Mediation Proceedings.

(i) Protection of Information Disclosed at Mediation. The mediator and the Mediation Participants are prohibited from divulging, outside of the mediation, any oral or written information disclosed by the Mediation Participants or by witnesses in the course of the mediation (the "Mediation Communications"). No person, including without limitation, the Mediation Participants and any person who is not a party to the dispute being mediated or to the Mediation Process (a "Person") , may rely on or introduce as evidence in any arbitral, judicial or other proceeding, evidence pertaining to any aspect of the Mediation Communications, including but not limited to: (A) views expressed or suggestions made by a party with respect to a possible settlement of the dispute; (B) the fact that another party had or had not indicated willingness to accept a proposal for settlement made by the mediator; (C) proposals made or views expressed by the mediator; (D) statements or admissions made by a party in the course of the mediation; and (E) documents prepared for the purpose of, in the course of, or pursuant to the mediation. In addition, without limiting the foregoing, Rule 408 of the Federal Rules of Evidence, any applicable federal or state statute, rule, common law or judicial precedent relating to the privileged nature of settlement discussions, mediations or other alternative dispute resolution procedures shall apply. Information otherwise discoverable or admissible in evidence does not become exempt from discovery, or inadmissible in evidence, merely by being used by a party in the mediation. However, except as set forth in the previous sentence, no Person shall seek discovery from any of the Mediation Participants with respect to the Mediation Communications.

(ii) Discovery from Mediator. The mediator shall not be compelled to disclose to the court or to any Person outside the mediation conference any of the records, reports, summaries, notes, Mediation Communications or other documents received or made by the mediator while serving in such capacity. The mediator shall not testify or be compelled to testify in regard to the mediation or the Mediation Communications in connection with any arbitral,

judicial or other proceeding. The mediator shall not be a necessary party in any proceedings relating to the mediation. Nothing contained in this paragraph shall prevent the mediator from reporting the status, but not the substance, of the mediation effort to the court in writing, from filing a final report as required herein, or from otherwise complying with the obligations set forth in this Local Rule 1.

(iii) Protection of Proprietary Information. The Mediation Participants and the mediator shall protect proprietary information. Proprietary information should be designated as such by the Mediation Participant seeking such protection, in writing, to all Mediation Participants, prior to any disclosure of such proprietary information. Such designation shall not require the disclosure of the proprietary information, but shall include a description of the type of information for which protection is sought. Any disputes as to the protection of proprietary information may be decided by the court.

(iv) Preservation of Privileges. The disclosure by a party of privileged information to the mediator does not waive or otherwise adversely affect the privileged nature of the information.

(e) Recommendations by Mediator. The mediator is not required to prepare written comments or recommendations to the parties. Mediators may present a written settlement recommendation memorandum to parties, or any of them, but not to the court.

(f) Post-Mediation Procedures.

(i) Filings by the Parties. If an agreement in principle for settlement is reached (even if the agreement in principle is subject to the execution of a definitive settlement agreement or court approval, and is not binding before that date) during the mediation conference, one or more of the Mediation Participant shall file a notice of settlement or, where required, a motion and proposed order seeking court approval of the settlement.

(ii) Mediator's Certificate of Completion. After the conclusion of the mediation conference (as determined by the mediator), the mediator shall file with the court a certificate in the form provided by the court ("Certificate of Completion") notifying the court about whether or not a settlement has been reached. Regardless of the outcome of the Mediation Process, the mediator shall not provide the court with any details of the substance of the conference or the settlement, if any.

(iii) If the Agreement in Principle is not completed. If the parties are not able or willing to consummate the agreement in principle that was reached during the mediation conference, and the agreement in principal never becomes a binding contract, the substance of the proposed settlement shall remain confidential and shall not be disclosed to the court by the mediator or any of the Mediation Participants.

(g) Withdrawal from Mediation. Any matter assigned to mediation under this Local Rule may be withdrawn from mediation by the court at any time. Any Mediation Participant may file a motion with the court seeking authority to withdraw from the mediation or

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Mediation

seeking to withdraw any matter assigned to mediation by court order from such mediation.

(h) Termination of Mediation. Upon the filing of a mediator's Certificate of Completion under Local Rule 1(f) (ii) or the entry of an order withdrawing a matter from mediation under Local Rule 1(g) the mediation will be deemed terminated and the mediator excused and relieved from further responsibilities in the matter without further order of the court. If the Mediation Process does not result in a resolution of all of the disputes in the assigned matter, the matter shall proceed to trial or hearing under the court's scheduling orders. However, the court shall always have the discretion to reinstitute the Mediation Process if the court determines that such action is the most appropriate course under the circumstances. In such event, Local Rule 1 and Local Rule 2 shall apply in the same manner as if the mediation were first beginning pursuant to Local Rule 1(a).

(i) Applicability of Rules to a Particular Mediation. The court may, upon request of one or more parties to the mediation, or on the court's own motion, declare that one or more of provisions of this Local Rule may be suspended or rendered inapplicable with respect to a particular mediation except Local Rule 1(d) and Local Rule 1(j). Otherwise these Local Rules shall control any mediation related to a case under the Bankruptcy Code.

(j) Immunity. Aside from proof of actual fraud or other willful misconduct, mediators shall be immune from claims arising out of acts or omissions incident or related to their service as mediators appointed by the bankruptcy court. See, Wagshal v. Foster, 28 F.3d. 1249 (D.C. Cir. 1994). Appointed mediators are judicial officers clothed with the same immunities as judges and to the same extent set forth in Title 28 of the United States Code.

Model Rule 2
Mediator Qualifications and Compensation

(a) Register of Mediators. The Clerk shall establish and maintain a register of persons (the "Register of Mediators") qualified under this Local Rule and designated by the Court to serve as mediators in the Mediation Program. The Chief Bankruptcy Judge shall appoint a Judge of this Court, the Clerk or a person qualified under this Local Rule who is a member in good standing of the Bar of the State of _____ to serve as the Mediation Program Administrator. Aided by a staff member of the Court, the Mediation Administrator shall receive applications for designation to the Register, maintain the Register, track and compile reports on the Mediation Program and otherwise administer the program.

(b) Application and Qualifications. Each applicant shall submit to the Mediation Program Administrator a statement of professional qualifications, experience, training and other information demonstrating, in the applicant's opinion, why the applicant should be designated to the Register. The applicant shall submit the statement substantially in compliance with Local Form _____. The statement also shall set forth whether the applicant has been removed from any professional organization, or has resigned from any professional organization while an investigation into allegations of professional misconduct was pending and the circumstances of such removal or resignation. This statement shall constitute an application for designation to the Mediation Program. Each applicant shall certify that the applicant has completed appropriate mediation training or has sufficient experience in the mediation process. To have satisfied the requirement of “appropriate mediation training” the applicant should have successfully completed at least 40 hours of mediation training sponsored by a nationally recognized bankruptcy organization. To have satisfied the requirement of “sufficient experience in the mediation process” the applicant must have at least ten (10) years of professional experience in the insolvency field.

(c) Court Certification. The Court in its sole and absolute discretion, on any feasible basis shall grant or deny any application submitted under this Local Rule. If the Court grants the application, the applicant's name shall be added to the Register, subject to removal under these Local Rules.

(i) Reaffirmation of Qualifications. The Mediation Program Administrator may request from each applicant accepted for designation to the Register to reaffirm annually the continued existence and accuracy of the qualifications, statements and representations made in the application. If such a request is made and not complied with within one month of such request, the applicant shall be removed from the Register until compliance is complete (the “Suspension of Eligibility”). After the passage of six months from the Suspension of Eligibility, if compliance is not complete, the applicant shall be permanently removed from the Register and may only be placed on the Registry by reapplying in the manner set forth pursuant to the provisions of subsection (b) of this Local Rule 2.

(d) Removal from Register. A person shall be removed from the Register either at the person's request or by Court order entered on the sole and absolute determination of the Court. If removed by Court order, the person shall be eligible to file an application for reinstatement after one year.

Model Rule 2
Mediator Qualifications and Compensation

(e) Appointment.

(i) Selection. Upon assignment of a matter to mediation in accordance with these Local Rules and unless special circumstances exist, as determined by the Court, the parties shall select a mediator. If the parties fail to make such selection within the time frame as set by the Court, then the Court shall appoint a mediator. A mediator shall be selected from the Register of Mediators, unless the parties stipulate and agree to a mediator not on the Register of Mediators.

(ii) Inability to Serve. If the mediator is unable to or elects not to serve, he or she shall file and serve on all parties, and on the Mediation Program Administrator, within seven (7) days after receipt of notice of appointment, a notice of inability to accept the appointment. In such event an alternative mediator shall be selected in accordance with the procedures pursuant to Subsection (e)(i) of this Local Rule 2.

(iii) Disqualification.

(A) Disqualifying Events. Any person selected as a mediator may be disqualified for bias or prejudice in the same manner that a Judge may be disqualified under 28 U.S.C. § 44. Any person selected as a mediator shall be disqualified in any matter where 28 U.S.C. § 455 would require disqualification if that person were a Judge.

(B) Disclosure. Promptly after receiving notice of appointment, the mediator shall make an inquiry sufficient to determine whether there is a basis for disqualification under this Local Rule. The inquiry shall include, but shall not be limited to, a search for conflicts of interest in the manner prescribed by the applicable rules of professional conduct for attorneys and by the applicable rules pertaining to the profession of the mediator. Within ten (10) days after receiving notice of appointment, the mediator shall file with the Court and serve on the parties either (1) a statement disclosing to the best of the applicant's knowledge all of the applicant's connections with the parties and their professionals, together with a statement that the mediator believes that there is no basis for disqualification and that the mediator has no actual or potential conflict of interest or (2) a notice of withdrawal.

(C) Objection Based on Conflict of Interest. A party to the mediation who believes that the assigned mediator has a conflict of interest promptly shall bring the issue to the attention of the mediator and to the other parties. If after discussion among the mediator, the party raising the issue and the other parties the issue is not resolved and any of the parties requests the withdrawal of the mediator, the mediator shall file a notice of withdrawal.

(f) Compensation. A mediator shall be entitled to serve as a paid mediator and shall be compensated at reasonable rates, and, subject to any judicial review of the reasonableness of fees and expenses required by this subsection of Local Rule 2, the

mediator may require compensation and reimbursement of expenses ("Compensation") as agreed by the parties. Court approval of the reasonableness of such fees and reimbursement of expenses shall be required if the estate is to be charged for all or part of the mediator's Compensation and the Compensation to be paid by the estate for such mediation exceeds $25,000. If the Compensation to be paid by the estate for the particular mediation does not exceed $25,000, then court approval shall only be necessary if the estate representative objects to the fees sought from the estate. If the mediator consents to serve without compensation and at the conclusion of the first full day of the mediation conference it is determined by the mediator and the parties that additional time will be both necessary and productive in order to complete the mediation or arbitration, then:

(i) If the mediator consents to continue to serve without compensation, the parties may agree to continue the mediation conference.

(ii) If the mediator does not consent to continue to serve without compensation, the fees and expenses shall be on such terms as are satisfactory to the mediator and the parties, subject to Court approval, if required by subsection (f) of this Local Rule 2. Where the parties have agreed to pay such fees and expenses, the parties shall share equally all such fees and expenses unless the parties agree to some other allocation. The Court may determine a different allocation.

(iii) Subject to Court approval, if the estate is to be charged with such expense, the mediator may be reimbursed for expenses necessarily incurred in the performance of duties.

(g) Party Unable to Afford. If the Court determines that a party to a matter assigned to mediation cannot afford to pay the fees and costs of the mediator, the Court may appoint a mediator to serve pro bono as to that party.

MODEL STANDARDS OF CONDUCT FOR MEDIATORS

AMERICAN ARBITRATION ASSOCIATION
(ADOPTED SEPTEMBER 8, 2005)

AMERICAN BAR ASSOCIATION
(APPROVED BY THE ABA HOUSE OF DELEGATES AUGUST 9, 2005)

ASSOCIATION FOR CONFLICT RESOLUTION
(ADOPTED AUGUST 22, 2005)

SEPTEMBER 2005

The Model Standards of Conduct for Mediators 2005

The Model Standards of Conduct for Mediators was prepared in 1994 by the American Arbitration Association, the American Bar Association's Section of Dispute Resolution, and the Association for Conflict Resolution[1]. A joint committee consisting of representatives from the same successor organizations revised the Model Standards in 2005.[2] Both the original 1994 version and the 2005 revision have been approved by each participating organization.[3]

Preamble

Mediation is used to resolve a broad range of conflicts within a variety of settings. These Standards are designed to serve as fundamental ethical guidelines for persons mediating in all practice contexts. They serve three primary goals: to guide the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes.

Mediation is a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute.

Mediation serves various purposes, including providing the opportunity for parties to define and clarify issues, understand different perspectives, identify interests, explore and assess possible solutions, and reach mutually satisfactory agreements, when desired.

Note on Construction

These Standards are to be read and construed in their entirety. There is no priority significance attached to the sequence in which the Standards appear.

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[1] The Association for Conflict Resolution is a merged organization of the Academy of Family Mediators, the Conflict Resolution Education Network and the Society of Professionals in Dispute Resolution (SPIDR). SPIDR was the third participating organization in the development of the 1994 Standards.

[2] Reporter's Notes, which are not part of these Standards and therefore have not been specifically approved by any of the organizations, provide commentary regarding these revisions.

[3] The 2005 version to the Model Standards were approved by the American Bar Association's House of Delegates on August 9, 2005, the Board of the Association of Conflict Resolution on August 22, 2005 and the Executive Committee of the American Arbitration Association on September 8, 2005.

The use of the term “shall” in a Standard indicates that the mediator must follow the practice described. The use of the term “should” indicates that the practice described in the standard is highly desirable, but not required, and is to be departed from only for very strong reasons and requires careful use of judgment and discretion.

The use of the term “mediator” is understood to be inclusive so that it applies to co-mediator models.

These Standards do not include specific temporal parameters when referencing a mediation, and therefore, do not define the exact beginning or ending of a mediation.

Various aspects of a mediation, including some matters covered by these Standards, may also be affected by applicable law, court rules, regulations, other applicable professional rules, mediation rules to which the parties have agreed and other agreements of the parties. These sources may create conflicts with, and may take precedence over, these Standards. However, a mediator should make every effort to comply with the spirit and intent of these Standards in resolving such conflicts. This effort should include honoring all remaining Standards not in conflict with these other sources.

These Standards, unless and until adopted by a court or other regulatory authority do not have the force of law. Nonetheless, the fact that these Standards have been adopted by the respective sponsoring entities, should alert mediators to the fact that the Standards might be viewed as establishing a standard of care for mediators.

STANDARD I. SELF-DETERMINATION

A. A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.

1. Although party self-determination for process design is a fundamental principle of mediation practice, a mediator may need to balance such party self-determination with a mediator’s duty to conduct a quality process in accordance with these Standards.

2. A mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions, but, where

appropriate, a mediator should make the parties aware of the importance of consulting other professionals to help them make informed choices.

B. A mediator shall not undermine party self-determination by any party for reasons such as higher settlement rates, egos, increased fees, or outside pressures from court personnel, program administrators, provider organizations, the media or others.

STANDARD II. IMPARTIALITY

A. A mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice.

B. A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality.

1. A mediator should not act with partiality or prejudice based on any participant's personal characteristics, background, values and beliefs, or performance at a mediation, or any other reason.

2. A mediator should neither give nor accept a gift, favor, loan or other item of value that raises a question as to the mediator's actual or perceived impartiality.

3. A mediator may accept or give de minimis gifts or incidental items or services that are provided to facilitate a mediation or respect cultural norms so long as such practices do not raise questions as to a mediator's actual or perceived impartiality.

C. If at any time a mediator is unable to conduct a mediation in an impartial manner, the mediator shall withdraw.

STANDARD III. CONFLICTS OF INTEREST

A. A mediator shall avoid a conflict of interest or the appearance of a conflict of interest during and after a mediation. A conflict of interest can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator's impartiality.

B. A mediator shall make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for a mediator. A mediator's actions necessary to accomplish a reasonable inquiry into potential conflicts of interest may vary based on practice context.

C. A mediator shall disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator's impartiality. After disclosure, if all parties agree, the mediator may proceed with the mediation.

D. If a mediator learns any fact after accepting a mediation that raises a question with respect to that mediator's service creating a potential or actual conflict of interest, the mediator shall disclose it as quickly as practicable. After disclosure, if all parties agree, the mediator may proceed with the mediation.

E. If a mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation, a mediator shall withdraw from or decline to proceed with the mediation regardless of the expressed desire or agreement of the parties to the contrary.

F. Subsequent to a mediation, a mediator shall not establish another relationship with any of the participants in any matter that would raise questions about the integrity of the mediation. When a mediator develops personal or professional relationships with parties, other individuals or organizations following a mediation in which they were involved, the mediator should consider factors such as time elapsed following the mediation, the nature of the relationships established, and services offered when determining whether the relationships might create a perceived or actual conflict of interest.

STANDARD IV. COMPETENCE

A. A mediator shall mediate only when the mediator has the necessary competence to satisfy the reasonable expectations of the parties.

1. Any person may be selected as a mediator, provided that the parties are satisfied with the mediator's competence and qualifications. Training, experience in mediation, skills, cultural understandings and other qualities are often necessary for mediator

competence. A person who offers to serve as a mediator creates the expectation that the person is competent to mediate effectively.

2. A mediator should attend educational programs and related activities to maintain and enhance the mediator's knowledge and skills related to mediation.

3. A mediator should have available for the parties' information relevant to the mediator's training, education, experience and approach to conducting a mediation.

B. If a mediator, during the course of a mediation determines that the mediator cannot conduct the mediation competently, the mediator shall discuss that determination with the parties as soon as is practicable and take appropriate steps to address the situation, including, but not limited to, withdrawing or requesting appropriate assistance.

C. If a mediator's ability to conduct a mediation is impaired by drugs, alcohol, medication or otherwise, the mediator shall not conduct the mediation.

STANDARD V. CONFIDENTIALITY

A. A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law.

1. If the parties to a mediation agree that the mediator may disclose information obtained during the mediation, the mediator may do so.

2. A mediator should not communicate to any non-participant information about how the parties acted in the mediation. A mediator may report, if required, whether parties appeared at a scheduled mediation and whether or not the parties reached a resolution.

3. If a mediator participates in teaching, research or evaluation of mediation, the mediator should protect the anonymity of the parties and abide by their reasonable expectations regarding confidentiality.

B. A mediator who meets with any persons in private session during a mediation shall not convey directly or indirectly to any other person, any information that was obtained during that private session without the consent of the disclosing person.

C. A mediator shall promote understanding among the parties of the extent to which the parties will maintain confidentiality of information they obtain in a mediation.

D. Depending on the circumstance of a mediation, the parties may have varying expectations regarding confidentiality that a mediator should address. The parties may make their own rules with respect to confidentiality, or the accepted practice of an individual mediator or institution may dictate a particular set of expectations.

STANDARD VI. QUALITY OF THE PROCESS

A. A mediator shall conduct a mediation in accordance with these Standards and in a manner that promotes diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants.

1. A mediator should agree to mediate only when the mediator is prepared to commit the attention essential to an effective mediation.

2. A mediator should only accept cases when the mediator can satisfy the reasonable expectation of the parties concerning the timing of a mediation.

3. The presence or absence of persons at a mediation depends on the agreement of the parties and the mediator. The parties and mediator may agree that others may be excluded from particular sessions or from all sessions.

4. A 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 course of a mediation.

5. The role of a mediator differs substantially from other professional roles. Mixing the role of a mediator and the role of another profession is problematic and thus, a mediator should distinguish between the roles. A mediator may provide information that the mediator is qualified by training or experience to provide, only if the mediator can do so consistent with these Standards.

6. A mediator shall not conduct a dispute resolution procedure other than mediation but label it mediation in an effort to gain the protection of rules, statutes, or other governing authorities pertaining to mediation.

7. A mediator may recommend, when appropriate, that parties consider resolving their dispute through arbitration, counseling, neutral evaluation or other processes.

8. A mediator shall not undertake an additional dispute resolution role in the same matter without the consent of the parties. Before providing such service, a mediator shall inform the parties of the implications of the change in process and obtain their consent to the change. A mediator who undertakes such role assumes different duties and responsibilities that may be governed by other standards.

9. If a mediation is being used to further criminal conduct, a mediator should take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

10. If a party appears to have difficulty comprehending the process, issues, or settlement options, or difficulty participating in a mediation, the mediator should explore the circumstances and potential accommodations, modifications or adjustments that would make possible the party's capacity to comprehend, participate and exercise self-determination.

B. If a mediator is made aware of domestic abuse or violence among the parties, the mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

C. 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.

STANDARD VII. ADVERTISING AND SOLICITATION

A. A mediator shall be truthful and not misleading when advertising, soliciting or otherwise communicating the mediator's qualifications, experience, services and fees.

1. A mediator should not include any promises as to outcome in communications, including business cards, stationery, or computer-based communications.

2. A mediator should only claim to meet the mediator qualifications of a governmental entity or private organization if that entity or organization has a recognized procedure for qualifying mediators and it grants such status to the mediator.

B. A mediator shall not solicit in a manner that gives an appearance of partiality for or against a party or otherwise undermines the integrity of the process.

C. A mediator shall not communicate to others, in promotional materials or through other forms of communication, the names of persons served without their permission.

STANDARD VIII. FEES AND OTHER CHARGES

A. A mediator shall provide each party or each party's representative true and complete information about mediation fees, expenses and any other actual or potential charges that may be incurred in connection with a mediation.

1. If a mediator charges fees, the mediator should develop them in light of all relevant factors, including the type and complexity of the matter, the qualifications of the mediator, the time required and the rates customary for such mediation services.

2. A mediator's fee arrangement should be in writing unless the parties request otherwise.

B. A mediator shall not charge fees in a manner that impairs a mediator's impartiality.

1. A mediator should not enter into a fee agreement which is contingent upon the result of the mediation or amount of the settlement.

2. While a mediator may accept unequal fee payments from the parties, a mediator should not allow such a fee arrangement to adversely impact the mediator's ability to conduct a mediation in an impartial manner.

STANDARD IX. ADVANCEMENT OF MEDIATION PRACTICE

A. A mediator should act in a manner that advances the practice of mediation. A mediator promotes this Standard by engaging in some or all of the following:

1. Fostering diversity within the field of mediation.

2. Striving to make mediation accessible to those who elect to use it, including providing services at a reduced rate or on a pro bono basis as appropriate.

3. Participating in research when given the opportunity, including obtaining participant feedback when appropriate.

4. Participating in outreach and education efforts to assist the public in developing an improved understanding of, and appreciation for, mediation.

5. Assisting newer mediators through training, mentoring and networking.

B. A mediator should demonstrate respect for differing points of view within the field, seek to learn from other mediators and work together with other mediators to improve the profession and better serve people in conflict.

The following constitutes the ruling of the court and has the force and effect therein described.

Signed August 3, 2020

United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:	§	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,[1]	§	Case No. 19-34054-sgj11
Debtor.	§	

ORDER DIRECTING MEDIATION

The Court has determined that mediation would aid and assist in the resolution of numerous issues in the above-captioned case. Accordingly, pursuant to 11 U.S.C. § 105 and this Court's inherent authority to regulate its docket, **IS HEREBY ORDERED THAT:**

[1] The Debtor's last four digits of its taxpayer identification number are (6725). The headquarters and service address for the above-captioned Debtor is 300 Crescent Court, Suite 700, Dallas, TX 75201.

1. The following parties are ordered to mediate as set forth below: (i) Highland Capital Management, L.P. (the "Debtor"); (ii) the official committee of unsecured creditors appointed in the Debtor's bankruptcy case (the "Committee"); (iii) Acis Capital Management, L.P. and Acis Capital Management GP, LLC; (iv) UBS Securities LLC and UBS AG, London Branch; (v) the Redeemer Committee of the Highland Crusader Fund; and (vi) James Dondero. The foregoing are collectively referred to herein as the "Parties" and individually as a "Party."

2. One or more mediation sessions may be scheduled. Such sessions are referred to herein collectively as the "Mediation" regardless of the number of days. While exact date(s) have not yet been determined, it is currently anticipated that the Mediation will be held between August 21, 2020 and September 2, 2020. The Mediation will be conducted via video conference.

3. The Mediation will be administered by the American Arbitration Association ("AAA"). Retired Judge Allan Gropper and Sylvia Mayer are appointed to serve as co-mediators (the "Mediators"). The Mediators will confer and determine, in their discretion, whether one or both Mediators will participate in all or part of each mediation session. The Mediators' fee will be $5,000 per Mediator per mediation session. (For the avoidance of doubt, to the extent a Mediator does not participate in a particular mediation session, that Mediator will not bill for that session.) A mediation session is one day of mediation. There will not be an overtime charge if any of the mediation sessions go into the evening. In addition to the daily fee per mediation session, Judge Gropper bills at an hourly rate of $600 and Ms. Mayer bills at an

hourly rate of $425 for time spent preparing for mediation sessions, including study time and communications with the Parties and/or between the Mediators. The Mediators will each maintain time records provided that they may redact or exclude any confidential information. In addition, the Mediators will submit invoices to AAA for their hourly fees for preparation and daily fees for mediation sessions. At a minimum, the Mediators will respectively submit to AAA their first invoice prior to the start of the first mediation session and their final invoice within five (5) business days following conclusion of the last mediation session. In their discretion, the Mediators may submit additional invoices. The Mediators will provide the Parties with a copy of any invoices submitted to AAA.

4. On or as soon as reasonably practicable following the date of this Order, the Debtor will deposit with AAA the sum of $90,000 (the "Deposit"). To the extent requested by AAA, the Debtor will supplement the Deposit as needed. The Deposit will be credited against any fees or expenses incurred by AAA or invoiced by the Mediators. Following conclusion of the Mediation and payment of AAA's fees and the Mediators' respective fees, any remaining funds on deposit shall be refunded to the Debtors.

5. The Debtor will bear the costs of the Mediators' and AAA's fees and their reasonable and necessary expenses; *provided, however,* that, for the avoidance of doubt, with the exception of the Committee, each Party will bear its own legal and professional fees and expenses. Payment will be tendered to the Mediators and AAA on the day of the Mediation. Neither the Mediators nor AAA will be required to file a fee application or seek further approval from this Court for payment of the foregoing fees and expenses.

6. Each Party will attend the Mediation and must continue participating in the Mediation as requested by the Mediators. Each Party will designate a client representative with authority to settle on behalf of the respective Party any and all matters, subject to Bankruptcy Court approval in the case of any settlement(s) affecting the administration of the Debtor's bankruptcy estate; provided that, with respect to the Committee, the client representatives shall be the designated representatives of each of the members of the Committee, and the authority to settle on behalf of the Committee remains subject to the vote of such Committee member representatives in accordance with the Committee by-laws; and provided further that, it is understood that any final settlement, depending on its terms, magnitude and scope, may be subject to additional internal approvals such as Board approval. The client representative of each Party will personally attend the Mediation as requested by the Mediators.

7. The Mediators have the authority to require each Party and their client representatives and lawyers to attend additional days of Mediation, in their sole discretion, if the Mediators believe it may be fruitful.

8. Each Party shall submit a written mediation statement to the Mediators. Each Party may share some or all of their mediation statement with other parties. Any Party will, if requested to do so by the Mediators, provide written or oral proposals or counter-proposals, that can be circulated to a Party or the Parties pursuant to the Mediators' direction, during the course of Mediation.

9. The Parties acknowledge that the Mediators may have *ex parte* communications with one or more Parties prior to or during the course of the Mediation.

10. Each of the Parties and their client representatives will participate in the Mediation in good faith. The Mediators have the authority (but not the obligation) to report to this Court if they believe that any of the respective Parties is not participating in the Mediation in good faith. The Court may sanction any of the respective Parties for failure to participate in the Mediation in good faith.

11. Within five (5) business days after the conclusion of the Mediation, the Mediators will file a report with the Court stating only whether a settlement, in whole or in part, has been reached (the "Report"). Alternatively, in lieu of the Mediators filing the Report, the Mediators may provide the Parties with such a Report to be filed by the Debtors.

12. Regardless of the outcome of the Mediation, it is the order of this Court that the contents of the Mediation, including any statements or representations made by the Mediators, any Party, or any client representative (or attorney or agent of a client representative), agent, or attorney of a Party during the course of the Mediation, are confidential and privileged. None of the Parties, their client representatives (or attorney or agent of a client representative), agents, or attorneys, or the Mediators may reveal such information to any non-party or to the Court, including, without limitation, in any pleadings or submissions, and none may be examined in any judicial or administrative proceeding (or any discovery relating to such a proceeding) regarding anything they may have said, seen, or heard during the course of the Mediation. No term sheet or other document or draft thereof prepared in the course of the Mediation will ever be the subject of discovery nor will such documents ever be admissible at any trial. "In the course of the mediation" includes the Mediation sessions themselves, as well as materials

submitted to the Mediators in advance of or during the Mediation, telephone conversations with one or both of the Mediators (or including the Mediators) before or after the Mediation sessions, and communications among the Parties specifically denominated as "in the course of mediation" and memorialized as such via electronic mail or otherwise among the Parties contemporaneously or in advance of that communication. Without limiting any provision of this Order, all communications occurring, and information exchanged, in the course of the Mediation will be entitled to all protections applicable under Federal Rule of Evidence 408, or any other protections afforded to settlement and compromise communications under other applicable law.

13. Notwithstanding anything to the contrary herein, it will be the responsibility of the Mediators to determine the structure of the Mediation and which Parties should be invited or required to participate in any particular Mediation session depending upon the content of such session.

###END OF ORDER###

Mediation Privilege White Paper

The scope of the mediation "privilege" has been a topic of much debate in Chapter 11 bankruptcy cases in recent years. In an effort to address some of the mediation confidentiality issues raised in those matters, the United States Bankruptcy Court for the District of Delaware (the "Delaware Bankruptcy Court") has recently amended its local rules on the subject. A separate but related topic is the utilization of sitting or retired Bankruptcy Judges as mediators. These mediation related issues are summarized herein to help facilitate the discussion of the "Views from the Bench" panel at the 13th Annual Philadelphia Credit & Restructuring Summit on March 24, 2022.

As of February 1, 2022 the Delaware Bankruptcy Court clarified the confidentiality rules regarding mediations held under Del. Bankr. L. R. 9019-5 (the "Delaware Mediation Rule")—a blackline of the old rule versus the amended rule is attached hereto as Exhibit "A."

The old Delaware Mediation Rule provided, *inter alia*, a general prohibition against divulging, outside of the mediation, any information disclosed by parties or witnesses *in the course of the mediation*. Del. Bankr. L. R. 9019-5(d)(2020)(amended 2022). It further provided for the applicability of relevant privilege rules, and that no person shall seek discovery from any participant in the mediation with respect to information disclosed during the mediation. Lastly the old Delaware Mediation Rule mandated that all parties, mediators, and mediation participants protect *proprietary* information. *Id*.

The amended Delaware Mediation Rule refines its predecessor's language; in abandoning the "in the course of the mediation" standard, the new rule instead protects against divulgence of information disclosed by parties or witnesses "to or in the presence of the mediator or between the parties during any mediation conference." *Id*. The latest version of the rule also features an entirely new section for confidential submissions to the mediator, whereby any document or information that was prepared by any participant to the mediation and submitted to the mediator is not subject to disclosure, regardless of whether it was shared with other participants in the mediation during a mediation conference. Del. Bankr. L. R. 9019-5(d)(iii). This pivot towards clearer mediation protections appears to be meant to curtail any ambiguity about whether the disclosure of information utilized in a mediation is fair game for use at trial. This intent is further exemplified in the new Delaware Mediation Rule's prohibition against the use of a subpoena to compel a mediator to testify regarding the mediation. That provision supplements the rules language providing that "the mediator shall not testify, or be compelled to testify" in any proceeding. The rule also clarifies the "Protection of Proprietary Information" sub-section in favor of a more pointed, "Protection of Confidential Information" replacement including both information designated as confidential, as well as proprietary information subject to 11 U.S.C. §107 . *Compare* Del. Bankr. L. R. 9019-5(d)(2020)(amended 2022), *with* Del. Bankr. L. R. 9019-5(d).

Finally the new Delaware Mediation Rule bolsters the restrictions on the "Discovery from the Mediator" section of subpart (d) by expressly incorporating subparts (e) and (f) of the Delaware Mediation Rule and, importantly, clarifies that the attorney-client privilege and work-product doctrine are not waived, notwithstanding Federal Rule of Evidence Rule 502, even if a party discloses such information to the mediator. *See* Del. Bankr. L. R. 9019-5(d)(vii).

Actions Prior to the Amendment:[1]

***In re Tribune Co.*, 2011 WL 386827 (Bankr. D. Del. Feb. 3, 2011).**

In *In re Tribune* the Delaware Bankruptcy Court considered a motion to compel the production of documents related to settlement negotiations between multiple plan proponents in the context of a mediation under the old Delaware Mediation Rule. 2011 WL 386827, at *1. The movants sought the documents "to test the arms-length nature and good faith of the settlement negotiations." *Id*., at *7. The non-moving party responded with a proposal to waive certain protections of the relevant mediation order thereby allowing discovery into the mediation *process* but not *substance*. In considering this proposal, the court balanced the holding in *Dent v. Westinghouse*, 2010 WL 56054, at *1 (E.D. Pa. Jan. 4, 2010) (allowing discovery about a settlement where a particularized showing can be made that the information is relevant and is calculated to lead to the discovery of admissible evidence), with the "strong public policy" favoring confidentiality in the mediation process. *Tribune*, 2011 WL 386827, at *8 (noting that, without confidentiality, "[t]he effectiveness of mediation would be destroyed, thereby threatening the well established public needs of encouraging settlement and reducing court dockets.")(internal citations omitted). The court found the proposal reasonable, but "adjust[ed] it slightly to protect those written or oral communications between or among Mediation Parties concerning the Mediation to the extent such communications were exchanged on Mediation day, but only if the communications are between Mediation Parties who were present at the Mediation or were participating in the Mediation off-site." *Id*. (internal quotation marks and citations omitted).

***In re Woodbridge Grp. of Companies, LLC*, 2021 WL 5774217 (Bankr. D. Del. Dec. 6, 2021).**

In *In re Woodbridge* the Delaware Bankruptcy Court considered a motion to amend a complaint in an adversary proceeding wherein the defendant objected and relied on statements purportedly made by the plaintiff during mediation to assert that the motion was brought in bad faith. 2021 WL 5774217, at *8. The court struck statements defense counsel made at oral argument divulging information from mediation, and found that Defendant's reliance on the disclosure of statements made in mediation was in violation of the old Delaware Mediation Rule *Id*. The court held that the motion was not brought in bad faith, "based solely on statements properly before the Court," and ultimately granted leave to amend. *Id*., at *8, *11.

***In re AE Liquidation, Inc.*, 2012 WL 6139950 (Bankr. D. Del. Dec. 11, 2012).**

In *In re AE Liquidation* the Delaware Bankruptcy Court considered a motion for a protective order to bar the discovery of two affidavits that were created for and used in mediation. 2012 WL 6139950, at *1. The moving party contended that the old Delaware Mediation Rule grants the court power to issue such a protective order under sub-part (i) of the rule, which states: "[n]o person may rely on or introduce as evidence in any arbitral, judicial or other proceeding, evidence pertaining to any aspect of the mediation effort, including but not limited to: ... (E) documents prepared for the purpose of, in the course of, or pursuant to the mediation." Del. Bankr. L. R. 9019–5(d)(i)(2020)(amended 2022). The court was not persuaded, holding instead that the

[1] Except as otherwise provided, all references in this subheading to Rule 9019-5 are to the old Delaware Mediation Rule, Del. Bankr. L. R. 9019-5(d)(2020)(amended 2022).

rule provides "no basis . . . to grant a protective order related to the mediation, nor does it protect any documents from discovery. The rule merely prohibits any party from using as evidence any documents prepared for the purpose of mediation." 2012 WL 6139950, at *2. In so finding, the court relied on Federal Rules of Civil Procedure Rule 26(b)(1), which allows for potentially inadmissible evidence to be discoverable if it may lead to other relevant, admissible evidence. *Id*. (citing Fed. R. Civ. P. 26(b)(1)).

Transcript of Omnibus Hearing, *In re Zohar III Corp., et al., v. Tilton*, Case No. 18-10512 (KBO)(2022).[2]

In a recent ruling in *In re Zohar III Corp*., the Delaware Bankruptcy Court granted a debtor's motion to strike stakeholders' claims that sprung from information acquired during a mediation. The stakeholders argued that the disclosure of information related to the claims was appropriate on two fronts: first, that the information sought was not subject to the old Delaware Mediation Rule because it was in regard to a global settlement, which was not a mandated mediation issue per the parties' settlement agreement; and, second, to the extent any of the information was subject to the old Delaware Mediation Rule, the debtor's waived confidentiality by making prior disclosures in a different bankruptcy proceeding. The court disagreed, pointing to "explicitly and consistently acknowledged" links between the claims at-issue and the mediation talks, including discussions regarding a global settlement—which the court clarified *were* subject to the old Delaware Mediation Rule despite not being explicitly codified as a mediation issue in the settlement agreement. Transcript of Omnibus Hearing at 53, 54, *In re Zohar III Corp., et al., v. Lynn Tilton*, Case No. 18-10512 (KBO)(2022). The court explained that "confidentiality of mediation communications is a *sine qua non* for preserving the integrity of court sponsored mediation sessions . . . [and] [C]ourt's strictly enforce their rules in posing mediation confidentiality[,] permitting disclosure in only limited exceptional circumstances warranting disclosures that sufficiently counter the policy considerations underscoring confidentiality of mediation communications." *Id*. at 55. Upon this, the court found that the stakeholders had not carried the "heavy burden" necessary to obtain an exception to the old Delaware Mediation Rule, calling such exception "extreme relief" that, if granted, would "inappropriately effect the integrity of the mediation process, disrupt the expectations of all parties to the mediation . . . and would open the door to disclosure attempts by unhappy mediation participants whose offers were not accepted." *Id*. at 56. This, the court noted, "could lead to coercion in the mediation process by participants who do not wish to settle and ultimately erode party's willingness to participate in mediation and, thus, the effectiveness of mediations in [the Delaware] district." *Id*. at 21-25. The court rejected the stakeholders' waiver arguments for similar reasons, and noted that ""[n]o case law has been cited to support the idea that a waiver of [the old Delaware Mediation Rule] can occur, let alone under the circumstances presented here." *Id*. at 57.

Key Takeaways:

The holdings in *In re Tribune*, *In re Woodbridge* and *In re Zohar III Corp.* appear to support the public policy for protecting the confidentiality of mediation and the information shared in those proceedings - policy goals which seem to be clarified in the new Delaware Mediation Rule. The apparent purpose would be to solidify the integrity of the mediation practice as a whole. The

[2] Attached, in relevant part, as Exhibit B.

holding in *In re AE Liquidation* is illuminating as to the court's apparent attempt to balance the potentially competing interests of the public policy favoring mediation confidentiality with the need to prevent hurdles to obtaining discoverable information (i.e. the mediation "privilege" cannot be used to prevent the discovery of information solely because such information was utilized in a mediation).

Would the affidavits used in mediation and determined to be discoverable in *In re AE Liquidation* be discoverable under the new Delaware Mediation Rule? The new Delaware Mediation Rule creates a subpart for confidential submissions to the mediator, which abandons the previous language of, "no person shall seek discovery . . . " in favor of the stricter, "any submission of information or documents to the mediator, including any Submission . . . prepared by or on behalf of any participant in mediation and intended to be confidential *shall not be subject to disclosure*, regardless of whether such Submission is shared with other participants in the mediation during a mediation conference." *Id*. Submissions are "such materials" the mediator directs a party to submit to the mediator prior to a mediation conference. 9019-5(c)(iii).

Under the new Delaware Mediation Rule "any submission of information or documents to the mediator, *including any Submission* [under subsection c] prepared by or on behalf of any participant in mediation and intended to be confidential shall not be subject to disclosure, regardless of whether such Submission is shared with other participants in the mediation during a mediation conference." Del. Bankr. L. R. 9019-5(d)(iii)(emphasis added). The new rule also provides that "[i]nformation, facts or documents otherwise discoverable or admissible in evidence do not become exempt from discovery or inadmissible in evidence merely by being disclosed or otherwise used in the mediation conference *or in any Submission* to the mediator." Del. Bankr. L. R. 9019-5(d)(iv)(emphasis added). In contrast, the old Delaware Mediation Rule provided that, "[i]nformation otherwise discoverable or admissible in evidence does not become exempt from discovery, or inadmissible in evidence, merely by being used by a party in the mediation. However, except as set forth in the previous sentence, no person shall seek discovery from any participant in the mediation with respect to any information disclosed during mediation . . . The mediator shall not be compelled to disclose to the Court or to any person outside the mediation conference any of the records, reports, summaries, notes, communications or other documents received or made by the mediator while serving in such capacity." Del. Bankr. L. R. 9019-5(i)-(ii) (2022) (amended 2022).

Under both the new and old Delaware Mediation Rule, the underlying facts of the affidavits that were at issue in *In re AE Liquidation* are discoverable. However, it appears that, under the new Delaware Mediation Rule, the affidavits would not be discoverable because they are Submissions—this is a more precise clarification from the old Delaware Mediation Rule, under which the Court found that the affidavits were discoverable. This change, in concert with the others discussed above, may demonstrate an intent by the court to address the issue raised in *In re AE Liquidation* to leave no uncertainty that the preservation of confidentiality in mediation proceedings is of paramount concern but can only be absolutely preserved through communications to and from the mediator.

Bankruptcy Judges as Mediators:

Much of the success of mediation depends on parties' willingness to participate meaningfully; this may mean divulging information that a party would not otherwise wish to disclose and that should not later be disclosed in litigation or at trial.[3] Despite the proven success of the longstanding practice of judicial mediation in Bankruptcy cases,[4] some have questioned the ability of such judicial mediators to maintain this requisite confidentiality from their colleague-judges, and the overall power dynamics when a judge is at the mediating table. This view argues that, "[p]arties and lawyers might reasonably worry about the extent to which a mediating judge and presiding judge talk amongst themselves about the case and the behavior of lawyers and parties," and further, "[they] may not feel free to refuse mediation by a sitting judge when the presiding judge pushes it, particularly if the issue arises early in a case or if they are likely to see either judge in future cases. . . . [Judicial mediators] run the risk of increasing pressure to reach a resolution without trial, even though mediation is supposed to be purely voluntary and nonbinding."[5]

The criticism seems weak given that judicial mediators (whether sitting or retired judges) are subject to the same mediation confidentiality rules as other mediators[6], the gravitas present in judicial mediation tends to make parties "act better,[7]" and "judicial persuasion" is beneficial to the extent that it lends credibility to the judge's views in mediation.[8] Is it likely we will see a change in this practice anytime soon? If it were to change, how will it impact the resolution of critical Chapter 11 disputes?

[3] Hon. Alan S. Trust, *Is My Neutral Neutral?*, Am. Bankr. Inst. J., 28, 68 (June 24, 2015)("So much of mediation is built around getting the parties involved and getting things off their chests or expressing their concerns in a way that they cannot at trial, and building confidence in the process itself, so that they can self-direct to a resolution that they have already been told they will not like.")

[4] Kevin Eckhardt, *The Problem With Judicial Mediation, a New Sackler Settlement in Purdue and Press Freedom in LTL Management*, (last updated, Feb. 16, 2022), available at https://protectus.mimecast.com/s/0s8vC73Am8UWwzGAiBJiA7?domain=email-links.reorg-research.com (noting that judicial mediation is effective in facilitating the resolution of chapter 11 disputes and the "bulk" of the cases cited ended up settling after successful judicial mediation.).

[5] *Id*. (internal quotation marks omitted).

[6] Hon. Alan S. Trust, *supra*, at 28 (citing to his court's Local Rule governing confidentiality in mediation to support that he, a judicial mediator, will not break confidentiality.).

[7] Judith W. Ross and Jessica Voyce Lewis, *Mindful Mediation: The Ways and Means of Successful Bankruptcy Mediation*, (last updated, Feb. 12, 2019), available at https://businesslawtoday.org/2019/02/mindful-mediation-ways-means-successful-bankruptcy-mediation/; Jamie Mason, *Cooler Heads Prevail: Why Mediation Is Growing as a Tool in Bankruptcy,* (last updated, May 12, 2015), available at https://www.coleschotz.com/donald-steckroth-was-mentioned-in-article-cooler-heads-prevail-why-mediation-is-growing-as-a-tool-in-bankruptcy.

EXHIBIT A

add because he is certainly closer to the Dura matter then I am, but in the questioning in that matter we focused on very specific information relating to the value of Dura, not a global settlement, but the value specifically of the company that was being litigated and the many hats that Jefferies wore with respect to Ms. Tilton. Two issues having no way implicated Ms. Tilton's global settlement (indiscernible).

With that, Your Honor, that's all I have and I'm happy to answer any questions the court may have.

THE COURT: I have no questions. I think we have talked exhaustively about this subject. I am ready to rule and I will do so after a short break. So why don't we convene at twenty after. You can keep yourselves on the screen and just stop your video.

Thank you.

(Recess taken at 11:04 a.m.)

(Proceedings resumed at 11:30 a.m.)

THE COURT: I apologize for the delay. This is Judge Owens. We are back on the record.

Thank you for giving me an opportunity to collect my thoughts, and as I said before we took a break I am ready to rule on the motion to strike.

At our preliminary hearing on the matter when we addressed the procedure for properly bringing to my attention and decision making the Patriarch stakeholders' claims based

on the parties global mediation efforts I asked the parties several specific questions I had regarding Patriarch's request to disclose *in toto* details and communications regarding the parties mediation and their intention to, in the future, take discovery on the mediation including discovery of the judicial mediators.

At that time we were speaking very general as I had not seen any of Patriarch's claims for the supporting facts. Since that hearing the Patriarch stakeholders have put in front of me their claims through their amended equitable subordination complaint and the amended administrative expense claim, and disclosed under seal their version of the relevant facts concerning the global mediation and related communications.

Now having reviewed those in-camera and giving greater thought to the issues presented I am better positioned and prepared to rule on the debtor's motion to strike.

First, let me say I'm comfortable that the subject global mediation efforts were subject to our prior version of Local Rule 9019(5)(d). By admission of the parties the mediation sprung from the court approved settlement agreement and the mediation of the issues contemplated therein. The first judicial mediator, former Judge Kevin Gross, required that the rule apply to the mediation effort and the parties

consented. Then everyone proceeded to participate in settlement discussions under the expectation that the local rule would apply.

When Judge Gross resigned and current Judge Sontchi took him place as mediator nothing has changed. No one has disputed these facts and if not explicitly acknowledged in the parties prior submissions and discussions to the court on this topic the confidentiality and application of Local Rule 9019(5)(d) to the global settlement discussions has been implicitly and consistent acknowledged by all.

Former Local Rule 9019(5)(d) creates broad confidentiality protections over mediations. It prohibits the disclosure "outside of the mediation" of any oral and written information disclosed by the parties or by witnesses in the course of the mediation. It also prohibits any person from relying on or introducing in any arbitral, judicial, or other proceeding evidence pertaining to any aspect of the mediation effort.

Accordingly, by its clear terms, the local rule requires that all of the mediation information disclosed by the Patriarch stakeholders in their administrative claim and their equitable subordination complaint, and MBIA in its adversary proceeding, be stricken as confidential and not considered by the court.

All parties to the mediation, including the Patriarch stakeholders, took advantage of this blanket of confidentiality during the mediation process and now the Patriarch stakeholders seek exception arguing that the local rules interest of justice exception should apply.

Case law is replete with explanations as to why confidentiality of mediation communications is critical. Those cases explain that the assurance of confidentiality supports and encourages an open dialog and exchange of information between adversaries and the mediator, and that this dialog and information exchanges increases the likelihood of consensual settlements thereby benefiting litigants as well as the court system.

As one district court has described it, confidentiality of mediation communications is a *sine qua non* for preserving the integrity of court sponsored mediation sessions. Further review of the case law on this subject reveals that court's strictly enforce their rules in posing mediation confidentiality permitting disclosure in only limited exceptional circumstances warranting disclosure that sufficiently counter the policy considerations underscoring confidentiality of mediation communications.

The Patriarch stakeholders contend that they need to disclose the substance of mediation communications to support their claims against the debtor and MBIA that have

arose as a result of their bad faith behavior during the mediation. I will not go any further into the sum and substance of the claims given the sensitivity and the fact that they're under seal.

However, after reviewing and considering the substance of the claims and related allegations the arguments for and against the debtor's motion to strike and the case law addressing exceptions to mediation confidentiality I have concluded that the Patriarch stakeholders have not carried the heavy burden necessary to obtain an exception to our local rule and its imposition of absolute confidentiality which, again, sophisticated parties with sophisticated counsel agreed would apply to the global settlement discussions.

The circumstances do now warrant such extreme relief and in doing so, in my opinion, would inappropriately effect the integrity of the mediation process, disrupt the expectation of all parties to the mediation which included others in addition to MBIA, the debtors and Patriarch, and would open the door to disclosure attempts by unhappy mediation participants whose offers were not accepted. This could lead to coercion in the mediation process by participants who do not wish to settle and ultimately erode party's willingness to participate in mediation and, thus, the effectiveness of mediations in our district.

For similar reasons I reject Patriarch's argument that the debtors waived any confidentiality requirements of the local rules. No case law has been cited to support the idea that a waiver of our local rule can occur, let alone under the circumstances presented here. The motion to strike is granted with respect to the administrative expense claim and the equitable subordination proceeding. And I see no reason not to extend this ruling to the MBIA adversary.

MBIA too has asserted claims springing from the mediation. The debtors have moved to stop MBIA from disclosing details regarding the mediation in its complaint. MBIA has not objected to the relief and there is no reason, I see, to permit the disclosures. Because I am satisfied that the relief that the debtors seek is appropriate and warranted I will enter the order attached to the debtor's motion with the modification that was offered by Mr. Hershey to remove the relief requested with respect to discovery.

So with that you can submit a revised order under certification of counsel and I will enter the order after reviewing it.

With that why don't we move onto the next subject unless you think a short break would be warranted or worthwhile.

Rule 9019-5 Mediation.

(a) Types of Matters Subject to Mediation. The Court may assign to mediation any dispute arising in an adversary proceeding, contested matter or otherwise in a bankruptcy case. Except as may be otherwise ordered by the Court, all adversary proceedings filed in a business case shall be referred to mandatory mediation, except an adversary proceeding in which (i) the United States Trustee is the plaintiff; (ii) one or both parties are *pro se*; or (iii) the plaintiff is seeking a preliminary injunction or temporary restraining order. Parties may also stipulate to mediation, subject to Court approval.

(b) Effects of Mediation on Pending Matters. The assignment of a matter to mediation does not relieve the parties to that matter from complying with any other Court orders or applicable provisions of the Code, the Fed. R. Bankr. P. or these Local Rules. Unless otherwise ordered by the Court, the assignment to mediation does not delay or stay discovery, pretrial hearing dates or trial schedules.

(c) The Mediation Process.

(i) Cost of Mediation. Unless otherwise ordered by the Court, or agreed by the parties, (1) in an adversary proceeding that includes a claim to avoid and recover any alleged avoidable transfer pursuant to 11 U.S.C. §§ 544, 547, 548 and/or 550, the bankruptcy estate (or if there is no bankruptcy estate, the plaintiff in the adversary proceeding) shall pay the fees and costs of the mediator and (2) in all other matters, the fees and costs of the mediator shall be shared equally by the parties.

(ii) Time and Place of Mediation Conference. After consulting with all counsel and *pro se* parties, the mediator shall schedule a time and place for the mediation conference that is acceptable to the parties and the mediator. Failing agreement of the parties on the date and location for the mediation conference, the mediator shall establish the time and place of the mediation conference on no less than twenty-one (21) days' written notice to all counsel and *pro se* parties.

(iii) Submission Materials. Unless otherwise instructed by the mediator, not less than seven (7) days before the mediation conference, each party shall submit directly to the mediator and serve on all counsel and *pro se* parties such materials (the "Submission") in form and content as the mediator directs. Any instruction by the mediator regarding submissions shall be made at least twenty-one (21) days in advance of a scheduled mediation conference. Prior to the mediation conference, the mediator may talk with the participants to determine what materials would be helpful. The Submission shall not be filed with the Court and the Court shall not have access to the Submission.

(iv) Attendance at Mediation Conference.

(A) Persons Required to Attend. Except as provided by subsection (j)(ix)(A) herein, or unless excused by the Mediator upon a showing of hardship, which, for purposes of this subsection shall mean serious or disabling illness to a party or party representative; death of an immediate family member of a party or party representative; act of God; state or national emergency; or other circumstances of similar unforeseeable nature, the following persons must attend the mediation conference personally:

(1) Each party that is a natural person;

(2) If the party is not a natural person, including a governmental entity, a representative who is not the party's attorney of record and who has full authority to negotiate and settle the matter on behalf of the party;

(3) If the party is a governmental entity that requires settlement approval by an elected official or legislative body, a representative who has authority to recommend a settlement to the elected official or legislative body;

(4) The attorney who has primary responsibility for each party's case, including Delaware counsel if engaged at the time of mediation regardless of whether Delaware counsel has primary responsibility for a party, unless Delaware counsel requests to be and is excused from attendance by the mediator in advance of the mediation conference; and

(5) Other interested parties, such as insurers or indemnitors or one or more of their representatives, whose presence is necessary for a full resolution of the matter assigned to mediation.

(B) Failure to Attend. Willful failure to attend any mediation conference, and any other material violation of this Local Rule, shall be reported to the Court by the mediator and may result in the imposition of sanctions by the Court. Any such report of the mediator shall comply with the confidentiality requirement of Local Rule 9019-5(d).

(v) Mediation Conference Procedures. The mediator may establish procedures for the mediation conference.

(vi) Settlement Prior to Mediation Conference. In the event the parties reach a settlement in principle after the matter has been assigned to mediation but prior to the mediation conference, the plaintiff shall advise the mediator in writing within one (1) business day of the settlement in principle.

(d) Confidentiality of Mediation Proceedings. Confidentiality is necessary to the mediation process, and mediations shall be confidential under these rules and to the fullest extent permissible under otherwise applicable law. The provisions of this Local Rule 9019-5(d) shall apply to all mediations occurring in cases, contested matters and adversary proceedings pending before the Court, whether such mediation is ordered or referred by the Court or voluntarily undertaken by the parties provided that such mediation is approved by the Court. Without limiting the foregoing, except as may be otherwise ordered by the Court,

the following provisions shall apply to any mediation under these rules:

(i) ~~Protection of Information Disclosed at Mediation. The mediator and the participants in mediation are prohibited from divulging, outside of the mediation, any oral or written information disclosed by the parties or by witnesses in the course of the mediation. No~~F.R.E. 408. To the fullest extent applicable, Rule 408 of the Federal Rules of Evidence (and any applicable federal or state statute, rule, common law or judicial precedent relating to the protection of settlement communications) shall apply to the mediation conference and any communications with the mediator related thereto. In addition to the limitations of admissibility of evidence under Rule 408, no person may rely on or introduce as evidence in connection with any arbitral, judicial or other proceeding, ~~evidence pertaining to any aspect of the mediation effort,~~ including~~, but not limited to:~~ any hearing held by this Court in connection with the referred matter, whether oral or written, (~~A~~i) views expressed or suggestions made by a party with respect to a possible settlement of the dispute~~; (B) the fact that~~, including whether another party had or had not indicated a willingness to accept a proposal for settlement~~ made by the mediator;~~, (~~C~~ii) proposals made or views expressed by the mediator~~; (D) statements or~~, or (iii) admissions made by a party in the course of the mediation~~; and (E) documents prepared for the purpose of, in the course of, or pursuant to the mediation. In addition, without limiting the foregoing, Rule 408 of the Federal Rules of Evidence, any applicable federal or state statute, rule, common law or judicial precedent relating to the privileged nature of settlement discussions, mediations or other alternative dispute resolution procedures shall apply.~~ .

(ii) Protection of Information Disclosed to the Mediator or During Mediation. Subject to subparagraph (iv) herein, the mediator and the participants in mediation are prohibited from divulging, outside of the mediation, any oral or written information

disclosed by the parties or witnesses to or in the presence of the mediator, or between the parties during any mediation conference.

(iii) Confidential Submissions to the Mediator. Subject to subparagraph (iv) herein, any submission of information or documents to the mediator, including any Submission (as defined in Del. Bankr. L.R. 9019-5(c)(iii)), prepared by or on behalf of any participant in mediation and intended to be confidential shall not be subject to disclosure, regardless of whether such Submission is shared with other participants in the mediation during a mediation conference.

(iv) Information Otherwise Discoverable. Information, facts or documents otherwise discoverable or admissible in evidence ~~does~~do not become exempt from discovery~~,~~ or inadmissible in evidence~~,~~ merely by being disclosed or otherwise used ~~by a party~~ in the mediation~~. However, except as set forth in the previous sentence, no person shall seek discovery from any participant in the mediation with respect to any information disclosed during mediation~~ conference or in any Submission to the mediator.

(~~ii~~v) Discovery from the Mediator. The mediator shall not be compelled to disclose to the Court or to any person outside the mediation ~~conference~~ any ~~of the~~ records, reports, summaries, notes, communications, Submissions, recommendations made under subpart (e) of this Local Rule, or other documents received or made by or to the mediator while serving in such capacity. The mediator shall not testify~~ or be~~, be subpoenaed or compelled to testify ~~in regard to~~regarding the mediation in connection with any arbitral, judicial or other proceeding. The mediator shall not be a necessary party in any proceedings relating to the mediation. Nothing contained in this paragraph shall prevent the mediator from reporting the status, but not the substance, of the mediation effort to the Court in writing, from filing a ~~final report~~Certificate of Completion as required ~~herein~~by Local Rule 9019-5(f), or from otherwise complying with the obligations set forth in this Local Rule.

(~~iii~~vi) Protection of ~~Proprietary~~Confidential Information. ~~The parties, the mediator and all mediation participants shall protect proprietary information.~~For the avoidance of doubt, nothing in this sub-part 9019-5(d) is intended to or shall modify any rights or obligations any entity has in connection with confidential information or information potentially subject to protection under Section 107 of the Bankruptcy Code.

(~~iv~~vii) Preservation of Privileges. ~~The~~Notwithstanding Rule 502 of the Federal Rules of Evidence, the disclosure by a party of privileged information to the mediator does not waive or otherwise adversely affect the privileged nature of the information.

(e) Recommendations by Mediator. The mediator is not required to prepare written comments or recommendations to the parties. Mediators may present a written settlement recommendation memorandum to attorneys or *pro se* litigants, but not to the Court.

(f) Post-Mediation Procedures.

(i) Filings by the Parties. If a settlement is reached at a mediation, the plaintiff shall file a Notice of Settlement or, where required, a motion and proposed order seeking Court approval of the settlement within twenty-eight (28) days after such settlement is reached. Within sixty (60) days after the filing or the Notice of Settlement or the entry of an order approving the settlement, the parties shall file a Stipulation of Dismissal dismissing the action on such terms as the parties may agree. If the plaintiff fails to timely file the Stipulation of Dismissal, the Clerk's office will close the case.

(ii) Mediator's Certificate of Completion. No later than fourteen (14) days after the conclusion of the mediation conference or receipt of notice from the parties that the matter has settled prior to the mediation conference, unless the Court orders otherwise, the mediator shall file with the Court a certificate in the form provided by the Court ("Certificate of Completion") showing compliance or noncompliance with the mediation conference

requirements of this Local Rule and whether or not a settlement has been reached. Regardless of the outcome of the mediation conference, the mediator shall not provide the Court with any details of the substance of the conference.

(g) Withdrawal from Mediation. Any matter assigned to mediation under this Local Rule may be withdrawn from mediation by the Court at any time.

(h) Termination of Mediation. Upon the filing of a mediator's Certificate of Completion under Local Rule 9019-5(f)(ii) or the entry of an order withdrawing a matter from mediation under Local Rule 9019-5(g), the mediation will be deemed terminated and the mediator excused and relieved from further responsibilities in the matter without further order of the Court. If the mediation conference does not result in a resolution of all of the disputes in the assigned matter, the matter shall proceed to trial or hearing under the Court's scheduling orders.

(i) Modification of ADR Procedure. Any party seeking to deviate from, or propose procedures or obligations in addition to, the Local Rules governing ADR shall comply with Local Rule 7001-1(a)(i).

(j) Alternative Procedures for Certain Avoidance Proceedings.

(i) Applicability. This subsection (j) shall apply to any adversary proceeding that includes a claim to avoid and/or recover any alleged avoidable transfer pursuant to 11 U.S.C. §§ 547, 548 and/or 550 from one or more defendants where the amount in controversy from any one defendant is equal to or less than $75,000.

(ii) Service of this Rule with Summons. The plaintiff shall serve with the Summons a copy of this Del. Bankr. L.R. 9019-5(j) and the Certificate (as defined hereunder) and file a certificate of service within seven (7) days of service.

(iii) Defendant's Election. On or within twenty-eight (28) days after the date that the Defendant's response is due under the Summons, the Defendant may opt-in to the procedures provided under this subsection (j) by filing with the Court on the docket of the adversary

proceeding and serving on the Plaintiff, a certificate in the form of Local Form 118 ("Certificate"). The time period provided hereunder to file the Certificate is not extended by the parties' agreement to extend the Defendant's response deadline under the Summons.

(iv) Mediation of All Claims. Unless otherwise agreed by the parties, the Defendant's election to proceed to mediation under subsection (j)(iii) operates as a referral of all claims against the Defendant in the underlying adversary proceeding.

(v) Appointment of Mediator. On or within fourteen (14) days after the date that the Certificate is filed, Plaintiff shall file either: (i) a stipulation (and proposed order) regarding the appointment of a mediator from the Register of Mediators approved by the Court; or (ii) a request for the Court to appoint a mediator from the Register of Mediators approved by the Court. If a stipulation or request to appoint is not filed as required hereunder, then the Clerk of Court may appoint in such proceeding a mediator from the Register of Mediators approved by the Court.

(vi) Election in Cases Where Amount Exceeds $75,000. In any adversary proceeding that includes a claim to avoid and/or recover an alleged avoidable transfer(s) from one or more defendants where the amount in controversy from any one defendant is greater than $75,000, the plaintiff and defendant may agree to opt-in to the procedures provided under this subsection (j) by filing a certificate in the form of Local Form 119 ("Jt. Certificate") on the docket of the adversary proceeding within the time provided under subsection (j)(iii) hereof that includes the parties' agreement to the appointment of a mediator from the Register of Mediators; provided, however, that in a proceeding that includes more than one defendant, only the defendant who agrees to opt-in is subject to the provisions hereof. The use of the term "Defendant" in this subsection (j) shall include any defendant who agrees with plaintiff to mediation hereunder.

(vii) Participation. The parties shall participate in mediation in an effort to consensually resolve their disputes prior to further litigation.

(viii) Scheduling Order.

(A) Effect of Scheduling Order. Any scheduling order entered by the Court at the initial status conference or otherwise shall apply to the parties and claims which are subject to mediation under this subsection; provided, however, that: (1) the referral to mediation under this subsection (j) shall operate as a stay as against the parties to the mediation of any requirement under Fed. R. Bankr. Proc. 7026 to serve initial disclosures, and a stay as against the parties to the mediation of such parties' right and/or obligation (if any) to propound, object or respond to written discovery requests or other discovery demands to or from the parties to the mediation; and (2) as further provided in subsection (j)(ix)(B) hereof, after the conclusion of mediation the time frames set forth in the scheduling order entered by the Court shall be adjusted so that such time frames are calculated from the date of completion of mediation (as evidenced by the date of entry on the adversary docket of the Certificate of Completion). The stay provided for under this subsection shall automatically terminate upon the filing of the Certificate of Completion.

(B) Agreement to and Filing of Scheduling Order after Conclusion of Mediation. If the mediation does not result in the resolution of the litigation between the parties to the mediation, then within fourteen (14) days after the entry of the Certificate of Completion on the adversary docket, the parties to the mediation shall confer regarding the adjustment of the date and time frames set forth in the scheduling order entered by the Court so that such dates and time frames are calculated from the date of completion of mediation. The parties shall further agree to a related form

of scheduling order or stipulation and proposed order, and the plaintiff shall file such proposed scheduling order or stipulation and proposed order on the docket of the adversary proceeding under certification of counsel. If the parties do not agree to the form of scheduling order or stipulation as required hereunder and the timely filing thereof, then the parties shall promptly contact the Court to schedule a hearing to consider the entry of an amended scheduling order.

(C) Absence of Scheduling Order. The terms of this subsection (viii) apply only if the Court enters a form of scheduling order in the underlying adversary proceeding prior to the conclusion of mediation.

(ix) The Mediation Conference.

(A) Persons Required to Attend. A representative of each party who has full authority to negotiate and settle the matter on behalf of the party must attend the mediation in person. Such representative may be the party's attorney of record in the adversary proceeding. Other representatives of the party or the party (if the party is not the representative appearing in person at the mediation) may appear by telephone, videoconference or other similar means. If the party is not appearing at the mediation in person, the party shall appear at the mediation by telephone, videoconference or other similar means as directed by the mediator.

(B) Mediation Conference Procedures. The mediator may establish other procedures for the mediation conference.

(x) Other Terms. Unless otherwise provided hereunder, the provisions of Del. Bankr. L.R. 9019-5 (including subsections (b), (c) (iv)(B), and (d) – (h)) shall apply to any mediation conducted under this subsection (j).

EXHIBIT B

add because he is certainly closer to the Dura matter then I am, but in the questioning in that matter we focused on very specific information relating to the value of Dura, not a global settlement, but the value specifically of the company that was being litigated and the many hats that Jefferies wore with respect to Ms. Tilton. Two issues having no way implicated Ms. Tilton's global settlement (indiscernible).

With that, Your Honor, that's all I have and I'm happy to answer any questions the court may have.

THE COURT: I have no questions. I think we have talked exhaustively about this subject. I am ready to rule and I will do so after a short break. So why don't we convene at twenty after. You can keep yourselves on the screen and just stop your video.

Thank you.

(Recess taken at 11:04 a.m.)

(Proceedings resumed at 11:30 a.m.)

THE COURT: I apologize for the delay. This is Judge Owens. We are back on the record.

Thank you for giving me an opportunity to collect my thoughts, and as I said before we took a break I am ready to rule on the motion to strike.

At our preliminary hearing on the matter when we addressed the procedure for properly bringing to my attention and decision making the Patriarch stakeholders' claims based

on the parties global mediation efforts I asked the parties several specific questions I had regarding Patriarch's request to disclose *in toto* details and communications regarding the parties mediation and their intention to, in the future, take discovery on the mediation including discovery of the judicial mediators.

At that time we were speaking very general as I had not seen any of Patriarch's claims for the supporting facts. Since that hearing the Patriarch stakeholders have put in front of me their claims through their amended equitable subordination complaint and the amended administrative expense claim, and disclosed under seal their version of the relevant facts concerning the global mediation and related communications.

Now having reviewed those in-camera and giving greater thought to the issues presented I am better positioned and prepared to rule on the debtor's motion to strike.

First, let me say I'm comfortable that the subject global mediation efforts were subject to our prior version of Local Rule 9019(5)(d). By admission of the parties the mediation sprung from the court approved settlement agreement and the mediation of the issues contemplated therein. The first judicial mediator, former Judge Kevin Gross, required that the rule apply to the mediation effort and the parties

consented. Then everyone proceeded to participate in settlement discussions under the expectation that the local rule would apply.

When Judge Gross resigned and current Judge Sontchi took him place as mediator nothing has changed. No one has disputed these facts and if not explicitly acknowledged in the parties prior submissions and discussions to the court on this topic the confidentiality and application of Local Rule 9019(5)(d) to the global settlement discussions has been implicitly and consistent acknowledged by all.

Former Local Rule 9019(5)(d) creates broad confidentiality protections over mediations. It prohibits the disclosure "outside of the mediation" of any oral and written information disclosed by the parties or by witnesses in the course of the mediation. It also prohibits any person from relying on or introducing in any arbitral, judicial, or other proceeding evidence pertaining to any aspect of the mediation effort.

Accordingly, by its clear terms, the local rule requires that all of the mediation information disclosed by the Patriarch stakeholders in their administrative claim and their equitable subordination complaint, and MBIA in its adversary proceeding, be stricken as confidential and not considered by the court.

All parties to the mediation, including the Patriarch stakeholders, took advantage of this blanket of confidentiality during the mediation process and now the Patriarch stakeholders seek exception arguing that the local rules interest of justice exception should apply.

Case law is replete with explanations as to why confidentiality of mediation communications is critical. Those cases explain that the assurance of confidentiality supports and encourages an open dialog and exchange of information between adversaries and the mediator, and that this dialog and information exchanges increases the likelihood of consensual settlements thereby benefiting litigants as well as the court system.

As one district court has described it, confidentiality of mediation communications is a *sine qua non* for preserving the integrity of court sponsored mediation sessions. Further review of the case law on this subject reveals that court's strictly enforce their rules in posing mediation confidentiality permitting disclosure in only limited exceptional circumstances warranting disclosure that sufficiently counter the policy considerations underscoring confidentiality of mediation communications.

The Patriarch stakeholders contend that they need to disclose the substance of mediation communications to support their claims against the debtor and MBIA that have

arose as a result of their bad faith behavior during the mediation. I will not go any further into the sum and substance of the claims given the sensitivity and the fact that they're under seal.

However, after reviewing and considering the substance of the claims and related allegations the arguments for and against the debtor's motion to strike and the case law addressing exceptions to mediation confidentiality I have concluded that the Patriarch stakeholders have not carried the heavy burden necessary to obtain an exception to our local rule and its imposition of absolute confidentiality which, again, sophisticated parties with sophisticated counsel agreed would apply to the global settlement discussions.

The circumstances do now warrant such extreme relief and in doing so, in my opinion, would inappropriately effect the integrity of the mediation process, disrupt the expectation of all parties to the mediation which included others in addition to MBIA, the debtors and Patriarch, and would open the door to disclosure attempts by unhappy mediation participants whose offers were not accepted. This could lead to coercion in the mediation process by participants who do not wish to settle and ultimately erode party's willingness to participate in mediation and, thus, the effectiveness of mediations in our district.

For similar reasons I reject Patriarch's argument that the debtors waived any confidentiality requirements of the local rules. No case law has been cited to support the idea that a waiver of our local rule can occur, let alone under the circumstances presented here. The motion to strike is granted with respect to the administrative expense claim and the equitable subordination proceeding. And I see no reason not to extend this ruling to the MBIA adversary.

MBIA too has asserted claims springing from the mediation. The debtors have moved to stop MBIA from disclosing details regarding the mediation in its complaint. MBIA has not objected to the relief and there is no reason, I see, to permit the disclosures. Because I am satisfied that the relief that the debtors seek is appropriate and warranted I will enter the order attached to the debtor's motion with the modification that was offered by Mr. Hershey to remove the relief requested with respect to discovery.

So with that you can submit a revised order under certification of counsel and I will enter the order after reviewing it.

With that why don't we move onto the next subject unless you think a short break would be warranted or worthwhile.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ENTERED
04/20/2021

In re:	)	Chapter 11
SOUTHERN FOODS GROUP, LLC, *et al.*,	)	Case No. 19-36313 (DRJ)
Debtors.	)	Jointly Administered
	)	(Docket No. 3634)

ORDER ESTABLISHING PROCEDURES GOVERNING CERTAIN ADVERSARY PROCEEDINGS COMMENCED BY THE DEBTORS PURSUANT TO 11 U.S.C. §§ 547, 548, 549, AND 550

The Court has considered the Debtors' motion for entry of an order (the "**Order**") establishing procedures in connection with the prosecution of Avoidance Actions[1]. The Court finds that limited relief is appropriate. Accordingly, it is

ORDERED THAT:

1. The motion is granted as set forth herein.

2. The Scheduling Orders and Procedures attached hereto as Exhibits 1 and 2 (the "Avoidance Action Procedures") are approved. Unless otherwise ordered, all Avoidance Actions shall be governed by the Avoidance Action Procedures. The Debtors shall serve a copy of this Order with the complaint and summons.

3. Participation in the Avoidance Action Procedures will not alter, affect, or modify the rights of any Defendant to seek a jury trial, withdraw the reference, or otherwise move for a determination on whether the Court has authority to enter a final judgment unless expressly waived.

[1] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Motion.

4. Defendants in First Wave Avoidance Actions shall be governed by the deadlines contained in the attached exhibits. For Defendants in future waves of Avoidance Actions, the deadlines in the Order shall be extended by the number of days elapsed between the entry date and service of this Order, with any new deadline falling on a weekend or holiday adjusted to the immediately subsequent business day. The Plaintiff shall serve a copy of the applicable extended deadlines with service of this Order.

5. Defendants shall have **sixty (60) days** following service of this Order to opt into the Scheduling Order with Voluntary Mediation Program provided for in Exhibit 2, or the Scheduling Order provided in Exhibit 1 shall apply. Thereafter, a Defendant may only opt into the procedures in Exhibit 2 with consent of the Plaintiff or further order of the Court.

6. The Court waives the requirement for a Rule 26(f) report in all Avoidance Actions. The Court will not conduct an initial scheduling conference in any Avoidance Action. Any party may, however, file a request for a status hearing at any time.

7. The time periods set forth in this Order and the Avoidance Action Procedures shall be calculated in accordance with Bankruptcy Rule 9006(a).

EXHIBIT 1

Scheduling Order (for Defendants NOT Opting Into Voluntary Mediation Program)

The procedures (the "**Avoidance Action Procedures**") governing Avoidance Actions[1] for Defendants who do NOT affirmatively opt-in to the Voluntary Mediation Program (Exhibit 2) are as follows:

1. Initial disclosures shall be made by June 15, 2021.

2. All discovery shall be completed by December 31, 2021.

3. Any motions for summary judgment shall be filed after the close of discovery and prior to January 31, 2022. The parties may seek relief from this paragraph upon a showing of cause.

4. The party with the burden of proof shall designate its expert(s), if any, and provide a report by 5:00 P.M. (prevailing Central Time) on October 1, 2021. The responding party shall designate its expert(s), if any, and provide a report by 5:00 P.M. (prevailing Central Time) on November 15, 2021.

5. The parties shall file a Joint Pretrial Statement by February 28, 2022. All counsel and unrepresented parties shall be responsible for the filing of the jointly prepared document.

6. A Pretrial Conference shall be held in Courtroom 400, 4th Floor, 515 Rusk Street, Houston, Texas on March 14, 2022 at 2:00 P.M. (prevailing Central Time). All counsel and unrepresented parties must attend the Pretrial Conference and be prepared to argue any pending motions for summary judgment. A trial date will be assigned at the Pretrial Conference.

7. Any changes in this schedule will only be made by further order of the Court, either orally at a hearing or in writing. Motions to extend these deadlines will be granted only for good cause beyond the control of the lawyers or parties in very limited circumstances.

[1] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the *Order Establishing Procedures Governing Certain Adversary Proceedings Commenced by the Debtors Pursuant to 11 U.S.C. §§ 547, 548, 549, and 550* (the "**Order**") or the Motion, as applicable.

EXHIBIT 2

Scheduling Order (for Defendants Opting Into the Voluntary Mediation Program)

Any Defendant that wishes to opt into the Scheduling Order with Voluntary Mediation Program provided in this Exhibit 2 must do so by notifying the Plaintiff **no later than sixty (60) days after service of this Order** in writing, either via email at lmiskowiec@askllp.com or via letter correspondence addressed to ASK LLP, 2600 Eagan Woods Drive, Suite 400, St. Paul, MN 55121, Attn: Laurie Miskowiec. After the 60-day period expires, the deadlines of the Scheduling Order set forth in Exhibit 1 shall apply, unless the Plaintiff consents to or the Court orders an extension of time to opt into the Voluntary Mediation Program schedule provided below. The procedures governing the Avoidance Actions[1] for Defendants who DO affirmatively opt into the voluntary mediation schedule (Exhibit 2) are as follows (the "**Avoidance Action Procedures**"):

A. **Extensions to Answer or File Other Responsive Pleading to the Complaint**. Each Defendant's time to file an answer or other responsive pleading to a complaint filed in an Avoidance Action shall be extended by 60 days such that an answer or other responsive pleading shall be due within a total of 90 days after the issuance of the summons.

B. **Stay of Discovery**. The parties' obligations to conduct formal discovery in each Avoidance Action shall be, and hereby is, stayed until the Mediation Process (as defined herein) is concluded; provided, that the stay of discovery shall in no way preclude, with respect to any Avoidance Action, the Plaintiff and the applicable Defendant from informally exchanging documents and information in an attempt to resolve such Avoidance Action in advance of, or during, the Mediation Process.

C. **Mediation**. Any Avoidance Action subject to this scheduling order that has not been resolved by July 30, 2021 (the "Remaining Avoidance Actions") shall be referred to mediation and subject to the following procedures (the "Mediation Process"):

[1] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the *First Order Establishing Streamlined Procedures Governing Certain Adversary Proceedings Commenced by the Debtors Pursuant to 11 U.S.C. §§ 547, 548, 549, and 550* (the "**Order**") or the Motion, as applicable.

1. No later than August 15, 2021, the Plaintiff and the Defendant shall jointly agree to a mediator (the "**Mediator**") and the date for mediation. If the parties are unable to agree, the parties shall jointly request an emergency hearing before the Court.

2. The Mediator shall define the parameters for the Mediation except that all submissions to the Mediator shall be confidential unless the parties agree otherwise.

3. All Mediations shall be conducted 1) via a video conferencing service (such as Zoom, Microsoft Teams, BlueJeans, or Webex) or 2) in person, at discretion of the mediator (and with the agreement of the parties).

4. The parties shall mediate in good faith. Each party shall have a representative at the mediation with full settlement authority.

5. At the conclusion of the Mediation, the Mediator shall file a notice with the Clerk stating (i) whether the matter did or did not settle; and whether the parties mediated in good faith.

6. All Mediations must be concluded by January 31, 2022 (the "Mediation Deadline").

7. The fees and costs of the Mediator shall be paid by the Plaintiff.

8. Defendants that have Avoidance Actions commenced against their affiliates in the Debtors' bankruptcy cases may mediate all related Avoidance Actions at one time.

9. Except for issues related to the lack of a party's good faith, the Mediator shall not be called as a witness. No party shall seek to compel (i) the testimony of, or (ii) compel the production of documents from, the Mediator. At the conclusion of the Mediation, the mediator shall return all materials provided by the parties.

10. All proceedings, discussions, and written materials incident to the Mediation Process shall be privileged and confidential.

The following deadlines shall apply to any Remaining Avoidance Actions that are not resolved prior to the Mediation Deadline:

1. Initial disclosures shall be made by February 28, 2022.

2. All discovery shall be completed by September 16, 2022.

3. Any motions for summary judgment shall be filed after the close of discovery and prior to October 15, 2022.

4. The party with the burden of proof shall designate its expert(s), if any, and provide a report by 5:00 P.M. (prevailing Central Time) on June 1, 2022. The responding party shall designate its expert(s), if any, and provide a report by 5:00 P.M. (prevailing Central Time) on July 1, 2022.

5. The parties shall file a Joint Pretrial Statement by November 21, 2022. All counsel and unrepresented parties shall be responsible for the filing of the jointly prepared document.

6. A Pretrial Conference shall be held in Courtroom 400, 4th Floor, 515 Rusk Street, Houston, Texas on November 29, 2022 at 2:00 P.M. (prevailing Central Time). All counsel and unrepresented parties must attend the Pretrial Conference and be prepared to argue any pending motions for summary judgment. A trial date will be assigned at the Pretrial Conference.

7. Any changes in this schedule will only be made by further order of the Court, either orally at a hearing or in writing. Motions to extend these deadlines will be granted only for good cause beyond the control of the lawyers or parties in very limited circumstances.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	:	CHAPTER 11
	:	(Jointly Administered)
TRIBUNE COMPANY, *et. al*[1]	:	
	:	Case No. 08-13141 (KJC)
Debtors	:	

MEMORANDUM AND ORDER[2]

BY: KEVIN J. CAREY, UNITED STATES BANKRUPTCY JUDGE

Currently before the Court is a discovery dispute among parties who are proponents of competing plans of reorganization. On January 14, 2011, the Noteholder Plan Proponents[3] filed a Motion to Compel Production of Documents and Information from the Debtor/Committee/ Lender Plan Proponents and Other Parties, or, Alternatively For an Order of Preclusion Respecting Certain Issues (the "Motion to Compel")(D.I. 7527). On January 19, 2011, the

[1]The chapter 11 case filed by Tribune Media Services, Inc. (Bky. Case No. 08-13236) is being jointly administered with the Tribune Company bankruptcy case and 109 additional affiliated debtors pursuant to the Order dated December 10, 2008 (main case docket no. 43)(collectively, the "Debtors" or "Tribune"). An additional Debtor, Tribune CNLBC, LLC (f/k/a Chicago National League Ball Club, LLC) commenced a chapter 11 case on October 12, 2009 as one of the steps necessary to complete a transaction involving the Chicago Cubs and certain related assets. In all, the Debtors now comprise 111 entities.

[2]This Memorandum constitutes the findings of fact and conclusions of law as required by Fed.R.Bankr.P. 7052. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b) and §157(a). This is a core proceeding pursuant to 28 U.S.C. 157(b)(1) and (b)(2)(A) and (L).

[3]The Noteholder Plan Proponents are those parties who are proponents of the Joint Plan of Reorganization for Tribune Company and Its Subsidiaries Proposed by Aurelius Capital Management, LP, on Behalf of Its Managed Entities ("Aurelius"), Deutsche Bank Trust Company Americas, in Its Capacity as Successor Indenture Trustee for Certain Series of Senior Notes ("Deutsche Bank"), Law Debenture Trust Company of New York, in Its Capacity as Successor Indenture Trustee for Certain Series of Senior Notes ("Law Debenture"), and Wilmington Trust Company, in Its Capacity as Successor Indenture Trustee for the PHONES Notes ("Wilmington Trust")(D.I. 7073)(the "Noteholder Plan").

Debtor/Committee/Lender Plan Proponents[4] filed an objection to the Motion to Compel (D.I. 7552). A hearing to consider the Motion to Compel was held on January 24, 2011.

BACKGROUND[5]

On December 8, 2008, Tribune Company and certain of its subsidiaries (the "Debtors") filed voluntary petitions for relief under chapter 11 of the United States Bankruptcy Code (11 U.S.C. §101 *et seq.*). On April 12, 2010, the Debtors filed a proposed plan (the "April 2010 Plan") that sought to implement the terms of a settlement agreement regarding certain LBO-Related Causes of Action.[6] A confirmation hearing for the April 2010 Plan was scheduled for August 16, 2010.

By order dated April 20, 2010, the Bankruptcy Court entered an Agreed Order Directing the Appointment of an Examiner (the "Examiner Order"). On May 10, 2010, the Bankruptcy Court approved the U.S. Trustee's application appointing Kenneth N. Klee as examiner (the "Examiner"). On May 11, 2010, the Bankruptcy Court entered an order approving the

[4]The Debtor/Committee/Lender Plan Proponents are those parties who are proponents of the First Amended Joint Plan of Reorganization for Tribune Company and Its Subsidiaries Proposed by the Debtors, the Official Committee of Unsecured Creditors (the "Committee"), Oaktree Capital Management, L.P. ("Oaktree"), Angelo, Gordon & Co., L.P. ("Angelo Gordon"), and JPMorgan Chase Bank, N.A. ("JPMorgan") (D.I. 7136)(the "DCL Plan").

[5]Most of the Background is taken from the Joint Disclosure Statement (D.I. 7134), approved by order dated December 9, 2010 (D.I. 7126), as amended by order dated December 16, 2010 (D.I. 7215).

[6]The "LBO-Related Causes of Action" is defined in the DCL Plan as meaning "any and all claims, obligations, suits, judgments, damages, debts, rights, remedies, causes of action, avoidance powers or rights, liabilities of any nature whatsoever, and legal or equitable remedies against any Person arising from the leveraged buy-out of Tribune that occurred in 2007, including, without limitation, the purchase by Tribune of its common stock on or about June 4, 2007, the merger and related transactions involving Tribune on or about December 20, 2007, and any financing committed to, incurred or repaid in connection with any such transaction, regardless of whether such claims, causes of action, avoidance powers or rights, or legal or equitable remedies may be asserted pursuant to the Bankruptcy Code or any other applicable law.

Examiner's proposed work and expense plan and modifying the Examiner Order. The Examiner's principal duties were to:

(1) Evaluate the potential claims and causes of action held by the Debtors' estates that are asserted by the Parties (as defined in the Examiner Order) in connection with the leveraged buy-out of Tribune that occurred in 2007 [defined as the LBO-Related Causes of Action] which may be asserted against any entity which may bear liability, including without limitation, the Debtors, the Debtors' former and/or present management, former and/or present members of Tribune's board of directors, the Debtors' lenders and the Debtors' advisors, said potential claims and causes of action including, but not being limited to, claims for fraudulent conveyance, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and equitable subordination, and to evaluate the potential defenses asserted by the Parties to such potential claims and causes of action;

(2) evaluate whether Wilmington Trust Company violated the automatic stay under 11 U.S.C. §362 by its filing, on March 3, 2010, of its Complaint for Equitable Subordination and Disallowance of Claims, Damages, and Constructive Trust; and

(3) evaluate the assertions and defenses made by certain of the Parties in connection with the Motion of JP Morgan Chase Bank, N.A. for Sanctions Against Wilmington Trust Company for Improper Disclosure of Confidential Information in Violation of Court Order.

The Examiner conducted in-person meetings with the parties and invited the parties to share their views in writing on the issues to be considered by him. The Examiner was assisted, in addition to counsel, by a financial advisor who developed a financial analysis of issues presented, including issues concerning solvency, unreasonably small capital, the flow of funds, and matters pertaining to intercompany claims.

On July 26, 2010, the Examiner filed a report containing the results of his investigation. By Order dated August 3, 2010, the Court ordered the unsealing of the Examiner's Report, with

exhibits and transcripts.[7] The Examiner did not reach definitive conclusions regarding the issues considered in the Report, but suggested a range of potential outcomes.[8] After the Examiner's Report was filed, the April 2010 Plan and the settlement it embodied were abandoned.

The Debtors' exclusive period within which to file a chapter 11 plan and solicit acceptances, as extended by court order, expired on August 8, 2010. After the Examiner's Report was filed and the settlement in the April 2010 Plan was abandoned, interested parties continued to negotiate, but failed to reach any consensus. Thereafter, the Debtors asked the Bankruptcy Court to appoint a mediator.

On September 1, 2010, I appointed my colleague, the Honorable Kevin Gross, as a mediator (the "Mediator") to conduct non-binding mediation concerning the terms of a plan of reorganization, including appropriate resolution of the LBO-Related Causes of Action (the "Mediation"). The parties to the Mediation included (i) the Debtors, (ii) the Creditors' Committee, (iii) Angelo Gordon, (iv) the Credit Agreement Lenders, (v) the Step One Credit Agreement Lenders, (vi) Wells Fargo Bank, N.A. (vii) Law Debenture Trust Company of New York ("Law Debenture"), (viii) Deutsche Bank Trust Company Americas, (ix) Centerbridge Credit Advisors, LLC, (x) Aurelius, (xi) EGI-TRB LLC, and (xii) Wilmington Trust Company (collectively, the "Mediation Parties"). On September 20, 2010, each of the Mediation Parties submitted to the Mediator a statement setting forth such Mediation Party's position respecting

[7]The Examiner's Report (volumes 1 through 4) were docketed as D.I.s 5247, 5248, 5249, and 5250. The exhibits were docketed as D.I.s 5437, 5438, 5439, 5441, 5442, 5444, 5445, 5447, 5449, 5451, 5453, 5454, 5455, 5456, 5458, 5461, 5462, 5464, 5466, 5467, 5468, 5469, and 5480.

[8]Specifically, the Examiner framed his conclusions about the merits of various claims using the following continuum: (1) highly likely, (2) reasonably likely, (3) somewhat likely, (4) equipoise, (5) somewhat unlikely, (6) reasonably unlikely, and (7) highly unlikely.

the structure and economic substance of an acceptable plan of reorganization.

The Mediation began on September 26, 2010, and the Mediation Parties continued settlement discussions on September 27, 2010. On September 28, 2010, the Mediator filed a report which, among other things, reported a settlement agreement between the Debtors, on the one hand, and Angelo Gordon and Oaktree, on the other. The Mediator continued settlement discussions with certain parties. On October 12, 2010, the Mediator filed the Mediator's Second Report which included the terms of an expanded settlement among the Debtors, the Committee, Oaktree, Angelo Gordon, and JP Morgan (the "October Term Sheet").

Pursuant to the deadlines set forth in the Bankruptcy Court's Order dated October 18, 2010 (D.I. 6022), four competing plans of reorganization were filed: (i) the Debtor/Committee/ Lender Plan, (ii) the Noteholder Plan, (iii) the Bridge Lender Plan[9], and (iv) the Step One Credit Lender Plan.[10] The Step One Credit Lender Plan was withdrawn on December 14, 2010 (D.I. 7190). Pursuant to the procedures set forth in the Order dated December 9, 2010 (D.I. 7126), as amended by Order dated December 16, 2010 (D.I. 7215), the three competing plans were distributed for solicitation and voting.

On December 20, 2010, the Bankruptcy Court entered the Discovery and Scheduling Order for Confirmation (the "Case Management Order" or "CMO"). The parties commenced discovery, which was quickly followed by a number of discovery disputes. Through various

[9]The Bridge Lender Plan is the Amended Joint Plan of Reorganization for Tribune Company and Its Subsidiaries Proposed by King Street Acquisition Company, L.L.C., King Street Capital, L.P., and Marathon Asset Management, L.P. (D.I. 7089)(as the same may be amended from time to time, the "Bridge Lender Plan").

[10]The Step One Lender Plan is the First Amended Plan of Reorganization for Tribune Company and Its Subsidiaries Proposed by Certain Holders of Step One Senior Loan Claims (D.I. 6683).

"meet and confer" conferences, the parties resolved many of these disputes. However, when they reached an impasse on certain discovery matters, the parties sent letters to the Court, as called for in the CMO. After a teleconference held on January 10, 2011, the Court directed the parties to file discovery motions on or before January 14, 2011, with replies due by January 19, 2011. Seven discovery motions were filed, and a hearing to consider them was held on January 24, 2011. The parties are continuing efforts to resolve some of the discovery issues, and some motions have been continued to February 8, 2011. Even so, new disputes continue to arise.

At the January 24, 2011 hearing, the Court heard argument regarding the Motion to Compel, and took the matter under advisement.

DISCUSSION

The Noteholder Plan Proponents (the "Noteholders") are seeking production of documents from the DCL Plan Proponents about the proposed settlement of the LBO-Related Causes of Action embodied in the DCL Plan. To test the arms-length nature and good faith of the settlement negotiations, the Noteholders are seeking documents and communications regarding the parties' discussions concerning the merits of the LBO-Related Causes of Action, specifically in connection with negotiations concerning the DCL Plan, the April 2010 Plan, and any other negotiations during the bankruptcy case.

The parties met and conferred in an attempt to limit the scope of the Noteholders' discovery requests and the objections thereto, but three main objections to discovery remain:

(1) objections to producing documents protected by a common interest privilege,

(2) objections to producing documents protected by the Mediation Order, Local Bankruptcy Rule 9019-5(d), and Fed.R.Evid. 408, and

(3) objections to producing documents for the period December 8, 2008 (the petition date) through December 15, 2009 (the date of the Document Depository Order).[11]

(1) Community of Interest (or Common Interest) Privilege[12]

The Noteholders argue that the common interest privilege cannot apply in connection with the settlement and DCL Plan because the parties have no common legal interests. The Debtors' and Committee's interests are in maximizing the estate, and the Lenders' interest is in paying as little as possible to resolve the LBO-related claims.

The DCL Plan Proponents argue in response that "parties to a settlement or proponents of a plan of reorganization share a common legal interest in gaining court approval of the plan and settlement pursuant to section 1129 of the Bankruptcy Code and Rule 9019 of the Federal Rules of Bankruptcy Procedure."

In *Leslie Controls*, Judge Sontchi discussed the common interest privilege as follows:

> The common interest doctrine "allows attorneys representing different clients with similar legal interests to share information without having to disclose it to others." [*Teleglobe*, 493 F.3d at 364.] It expands the reach of the attorney-client privilege and the work product doctrine by providing that, under certain circumstances, the sharing of privileged communications with third parties does not constitute a waiver of the privilege. Thus, the doctrine is only applicable if an underlying privilege has been established. [*Louisiana Mun. Police Emp. Ret. Sys. v. Sealed Air Corp.*, 253 F.R.D. 300, 309 (D.N.J. 2008).]

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[11]The Document Depository Order (D.I. 2858) authorized the Debtors to establish and maintain a centralized document depository program to store certain documents produced to the Committee in connection with the Committee's investigation and analysis of the LBO-Related Causes of Action.

[12]In *Teleglobe*, the Court distinguished between "common interest" (i.e., when multiple clients hire the same counsel to represent them on a matter of common interest), and "community of interest" (i.e., when clients with separate attorneys share otherwise privileged information in order to coordinate their legal activities). *In re Teleglobe Commc'n Corp.*, 493 F.3d 345, 359 (3d Cir. 2007). While the matter before me falls into the "community of interest" category, the parties, here, as well as many courts, refer to the multiple attorney situation as "common interest" privilege.

> **The party invoking the protection of the common interest doctrine must establish: (1) the communication was made by separate parties in the course of a matter of common interest, (2) the communication was designed to further that effort, and (3) the privilege was not otherwise waived.** [*In re Mortg. & Realty Trust,* 212 B.R. 649, 653 (Bankr.C.D.Cal. 1997).]
> . . . .
>
> [T]he doctrine is not limited to communications among co-defendants to ongoing litigation. Indeed, "pending litigation is not necessary to invoke the common interest [doctrine][*Id.*] . . . Rather, the common interest doctrine "applies whenever the communication is made in order to facilitate the rendition of legal services to each of the clients involved in the conference." [*Id.*]
>
> The common interest of the parties must be "at least a substantially similar legal interest." [*Teleglobe*, 493 F.3d at 365]. Nonetheless, the parties need not be in complete accord:
>
> > The common interest privilege does not require a complete unity of interests among the participants. The privilege applies where the interests of the parties are not identical, and it applies even where the parties' interests are adverse in substantial respects. The privilege applies even where a lawsuit is foreseeable in the future between co-defendants. [*Mortg. & Realty Trust*, 212 B.R. at 653.]
>
> When the interests of the parties diverge to some extent the common interest doctrine applies "only insofar as their interests [are] in fact identical; communications relating to matters as to which they [hold] opposing interests . . . lose any privilege."[*In re Rivastigmine Patent Litig.*, 2005 WL 2319005, *4 (S.D.N.Y. Sept. 22, 2005).]

In re Leslie Controls, Inc., 437 B.R. 493, 496-98 (Bankr.D.Del. 2010)(emphasis added).

Even though the DCL Plan Proponents' interests are not completely in accord, they share the common legal interest of obtaining approval of their settlement and confirmation of the DCL Plan, thereby resolving the legal disputes between and among them. *See also Teleglobe*, 493 F.3d at 365-66 ("[I]t is sufficient to recognize that members of the community of interest must share at least a substantially similar legal interest. . . . In the community of interest context, . . . because the clients have separate attorneys, courts can afford to relax the degree to which

clients' interests must converge without worrying that their attorneys' ability to represent them zealously and single-mindedly will suffer."). Accordingly, the community of interest privilege can apply to parties whose interests are not totally in accord.

The Third Circuit has held that parties engaged in a merger negotiation may share a common interest. *Teleglobe*, 493 F.3d at 364 (noting that the common interest doctrine applies in civil and criminal litigation, and even in purely transactional contexts)). *See also Sealed Air*, 253 F.R.D. at 310 (parties engaged in a transaction may anticipate future claims that they share an interest in defending against, which can form the basis of a common interest privilege). Common interests must be determined on a case by case basis. In *Leslie Controls*, Judge Sontchi held that parties who shared information regarding "preserving and maximizing insurance available to pay asbestos claims" during the plan negotiation process shared the common interest of maximizing the asset pool. *Leslie Controls*, 437 B.R. at 502. I am satisfied that, based upon the chronology of events which took place in connection with the mediation, a community of interests was established.

(A) Date the community of interest privilege began

The question of **when** a community of interest privilege arose remains. The DCL Plan Proponents argue that a common interest among the Debtors, Committee, and lenders arose on October 12, 2010, when the mediator filed the October Term Sheet. The Debtors, Oaktree and Angelo Gordon also assert that their common interest began as early as September 27, 2010, when they agreed to resolve the LBO-Related Causes of Action and became proponents of a joint plan, pursuant to the Mediator's filing of the first Term Sheet on that date.

The Noteholders argue that no common interest privilege could arise until November 23,

2010, when the DCL Plan was actually filed with the Court. The Noteholders argue that the Term Sheet filings do not establish the emergence of a common interest because the parties continued to negotiate and certain terms changed. For example, they argue that the October Term Sheet relied on a Distributable Enterprise Value ("DEV") of $6.1 billion, while the final DCL Plan refers to a DEV of $6.75 billion. The DCL Plan Proponents respond by stating that DEV was not a material negotiated term, and was changed (ironically, they say) to address objections of the Noteholders.

Once the DCL Plan Proponents agreed upon material terms of a settlement, it is reasonable to conclude that the parties might share privileged information in furtherance of their common interest of obtaining approval of the settlement through confirmation of the plan. I conclude that the date the Mediator's Term Sheets were filed - - October 12, 2010 for all DCL Plan Proponents, and September 27, 2010 for the Debtor/Oaktree/Angelo Gordon group - - constitute dates upon which the respective parties' community of interest privilege arose.[13]

(B) Dispute concerning specific documents covered by the community of interest privilege

The Noteholders and the DCL Plan Proponents also disagree about the scope of communications that are covered by the community of interest privilege. In particular, the Noteholders argue that "common interest communications" should include only communications

[13]Of course, this does not mean that every communication between the DCL Plan Proponents occurring after those dates is privileged. Any party asserting privilege first must demonstrate that the communication at issue is subject to an underlying attorney-client or work product privilege, and that sharing the communication with the common interest parties meets the three-part test adopted by Judge Sontchi in *Leslie Controls* from the *Mortg. & Realty Trust* decision: (i) the communication was made by separate parties in the course of a matter of common interest, (ii) the communication was designed to further that effort, and (iii) the privilege was not otherwise waived.

that were written or made by lawyers,[14] citing *Teleglobe* in support of this view:

> First, to be eligible for continued protection, the communication must be shared with the *attorney* of the member of the community of interest. *Cf. Ramada Inns, Inc. v. Dow Jones & Co.,* 523 A.2d 968, 972 (Del.Super.Ct. 1986)(emphasizing that the relevant Delaware evidentiary rule protects communications disclosed to an attorney). Sharing the communication directly with a member may destroy the privilege.

Teleglobe, 493 F.3d at 364 (emphasis in original). The DCL Plan Proponents point out that the *Teleglobe* Court itself notes that this language is dicta.[15]

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[14]The Noteholders' proposed definition of what might be protected "Common Interest Communications" is as follows:

> "Common Interest Communications" means oral, written or electronic communications, draft pleadings, briefs, plans, disclosure statements or correspondence exchanged between counsel and/or non-testifying financial advisors to two or more different parties within a Common Interest Relationship and not disclosed or provided to any Person outside the Common Interest Relationship provided, however, that qualifying communications shall not lose their status as Common Interest Communications merely because clients of such outside counsel received any such written or electronic communications, or listened to or were told of any such oral communications. Common Interest Communications do not include written, electronic or oral communications by persons other than outside counsel or non-testifying financial advisors for different parties, or written, electronic or oral communications internal to any one party or any one financial advisor.

Revised Proposed Common Interest Stipulation and Order (D.I. 7587).

[15]*See Teleglobe*, 493 F.3d at 363 n.18 stating that the issue before the court involved clients of the same attorneys, not clients with separate counsel, and therefore the community of interest analysis may seem "surplusage." However, because the lower court erroneously ruled that the parties before it were in a community of interest, the Third Circuit Court explained how the community of interest and co-client privilege differ. *Id.* This guidance is helpful.

The *Teleglobe* Court also considered the "plain text" of a Delaware rule of evidence in its community of interest analysis. Delaware Rule of Evidence 502(b)(3) recognizes that a client has a privilege to protect from disclosure confidential communications "made for the purpose of facilitating the rendition of professional legal services to the client by the client or the client's representative or the client's lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another in a matter of common interest." *See Rembrandt Tech. LP v. Harris Corp.,* 2009 Del.Super. LEXIS 46, *25 (Feb. 12, 2009), in which the Delaware Superior Court determined that "separately represented clients sharing a common legal interest may, at least in certain situations and under the close supervision of counsel, communicate directly with one another regarding that shared interest." *Id.* at *30. The *Rembrandt* Court further decided that "the privilege may be extended to communications among the community of interest if the communications relate to that common interest." *Id.* at *31.

The community of interest doctrine applies only if the underlying communication was subject to the attorney-client privilege or the work product doctrine. The attorney-client privilege "protects communications between attorneys and clients from compelled disclosure" and applies to a communication that satisfies the following elements: (1) a communication (2) made between privileged persons (3) in confidence (4) for the purpose of obtaining or providing legal assistance for the client. *Teleglobe*, 493 F.3d at 359 *citing* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §68 (2000). "Privileged persons" include the client, the attorney(s), and any of their agents that help facilitate attorney-client communications or the legal representation." *Id.* "When disclosure to a third party is necessary for the client to obtain informed legal advice, courts have recognized exceptions to the rule that disclosure waives the attorney-client privilege." *WebXchange, Inc. v. Dell Inc*., 264 F.R.D. 123, 126 (D.Del. 2010) *quoting Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1424 (3d Cir. 1991).

The Third Circuit has adopted a two-part test for ascertaining whether a document is protected by the work product doctrine: (1) the first inquiry is the "reasonable anticipation test," which requires that the court determine whether "litigation could reasonably have been anticipated" (2) the second inquiry is whether the document were prepared "primarily for the purpose of litigation (i.e., documents created in the ordinary course of business, even if useful in subsequent litigation, are not protected by the work product doctrine. *Sealed Air,* 253 F.R.D. at 306-07.

The DCL Plan Proponents argue that the Noteholders' proposal to limit "common interest communications" to those prepared by lawyers limits artificially the community of

interest privilege and would needlessly increase legal costs by requiring parties to funnel all communications through their attorneys. They contend that the appropriate inquiry is whether the subject matter of the communication at issue would be protected by the attorney-client or work product privilege but for its disclosure to a party with the common interest.[16] I agree. The Noteholders' proposal to limit common interest communications to attorney-prepared communications is too restrictive. The DCL Plan Proponents will have the opportunity to assert (and, ultimately demonstrate, if challenged) that requested communications fall within the community of interest privilege.

2. Whether the DCL Plan Proponents must either (i) waive protections of the Mediation Order and Local Rule 9019-5(d), or (ii) be precluded from introducing any evidence regarding the mediation, including the Mediator's endorsement of the settlement or arguing that the DCL Plan was the result of arm's length bargaining

The Noteholders assert that they are seeking documents and communications related to the Mediation to assess (and challenge) the alleged arms-length nature of the settlement negotiations for the LBO-Related Causes of Action, and the degree to which the Debtors and Committee acted in good faith as estate fiduciaries to maximize recoveries for non-LBO lenders.

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[16]The DCL Plan Proponents propose the following language for the definition of "Common Interest Communications" in the proposed Common Interest Stipulation:

> "Common Interest Communications" means oral, written or electronic communications, draft pleadings, briefs, plans, disclosure statements or other correspondence exchanged solely between parties within a Common Interest Relationship that, if only exchanged between or among a single party, its counsel and/or advisors, would have been protected from discovery by any applicable attorney-client privileges or work product protections.

DCL Plan Proponents Objection, D.I. 7552, Ex.3.

The Noteholders argue that the DCL Plan Proponents put such discovery "in issue" by arguing that the proposed settlement is fair because it is the product of a mediation conducted by a judge.[17] In other words, the Noteholders argue, it is not fair to allow the DCL Plan Proponents to use the Mediation Order as a sword and a shield. *See Westinghouse,* 951 F.2d at 1426 n.12 ("If a partial waiver does disadvantage the disclosing party's adversary by, for example, allowing the disclosing party to present a one-sided story to the court, the privilege will be waived as to all communications on the same subject .").

The DCL Plan Proponents respond that they have offered to waive part of the protections of the Mediation Order[18] by proposing that only the following documents or communications be protected from discovery:

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[17]I suppose it is conceivable that *who* conducted a mediation may, under some presently unknowable circumstances, be relevant to a determination of whether a settlement should be approved. I have the deepest respect for my colleague, who willingly undertook this challenging mediation, but I am aware of nothing in the record before me which informs me that this factor should be accorded any special weight. Whether a settlement should be approved or a plan confirmed must rest upon the application of standards articulated in the Bankruptcy Code and by controlling decisional law.

[18]The Mediation Order provides that:

> 7. All: (a) discussions among the Mediation Parties relating to the Mediation, including discussions with or in the presence of the Mediator, (b) Mediation Statements, Ownership Statements and any other documents or information provided to the Mediator or the Mediation parties in the course of the Mediation, (c) correspondence, draft resolutions, offers, and counteroffers produced for or as a result of the Mediation, and (d) communications between the Mediator and the Examiner or the Examiner's Professionals are strictly confidential and shall not be admissible for any purpose in any judicial or administrative proceeding, and no person or party participating in the Mediation, including counsel for any Mediation Party or any other party, shall in any way disclose to any non-party or to any court, including without limitation in any pleading or other submission to any court, any such discussion, Mediation Statement, Ownership Statement, other document or information, correspondence, resolution, offer or counteroffer which may be made or provided in connection with the Mediation. Except with the express consent of the affected Mediation party, the Mediator shall not share with any Mediation Party any other Mediation Party's Mediation Statement or Ownership Statement.
>
> D.I. 5591, ¶7.

1. written or oral communications between a "Mediation Party" and Judge Gross;

2. written or oral communications between or among Mediation Parties concerning the Mediation to the extent such communications were exchanged on any Mediation Day (i.e., a day when Judge Gross convened a Mediation Session between two or more Mediation Parties)

3. written or oral communications reflecting the substance of any discussion between or among Mediation Parties on a Mediation Day or documenting any offers or counter-offers exchanged or agreements reached on a Mediation Day; and

4. written or oral communications between Judge Gross and the Examiner or the Examiner's professionals concerning the Mediation

The DCL Plan Proponents argue that this proposal provides adequate discovery to the Noteholders to assess whether the settlement was at arms-length, while preserving the confidentiality of the Mediation because it permits discovery of (i) communications relating to negotiation and abandonment of the April Plan, (ii) communications prior to the mediation, and (iii) most communications between the Mediation Parties that occurred outside the presence of the Mediator on a day that is not a Mediation Day. It also allows discovery into the Mediation *process*, but protects the *substance* of the Mediation discussions.

In *Dent v. Westinghouse*, 2010 WL 56054 (E.D.Pa. Jan. 4, 2010), Magistrate Judge Hey discussed the "crossroads" of Fed.R.Civ.P. 26 (which allows discovery of relevant information, even if that information is not admissible at trial, as long as it appears reasonably calculated to lead to admissible evidence) and Fed.R.Evid. 408 (providing that information regarding settlements and negotiations is inadmissible if offered to prove liability for, or invalidity of, the amount of a claim). The *Dent* Court joined judges in this circuit who require a party requesting discovery about a settlement to make a particularized showing that the evidence related to settlement is relevant and calculated to lead to the discovery of admissible evidence. *Id.* at *1.

There is a strong policy in promoting full and frank discussions during a mediation.

Courts have recognized that confidentiality is essential to the mediation process:

> Absent the mediation privilege, parties and their counsel would be reluctant to lay their cards on the table so that a neutral assessment of the relative strengths and weaknesses of their opposing positions could be made. Assuming they would even agree to participate in the mediation process absent confidentiality, participants would necessarily "feel constrained to conduct themselves in a cautious, tight-lipped, non-committal manner more suitable to poker players in a high-stakes game than to adversaries attempting to arrive at a just resolution of a civil dispute." The effectiveness of mediation would be destroyed, thereby threatening the well established public needs of encouraging settlement and reducing court dockets.

Sheldone v. Pennsylvania Turnpike Comm'n, 104 F.Supp.2d 511, 514 (W.D.Pa. 2000) (citations omitted) *quoting Lake Utopia Paper Ltd. v. Connelly Containers, Inc.*, 608, 928, 930 (2d Cir. 1979). This policy is also reflected in Local Delaware Bankruptcy Rule 9019-5(d).[19]

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[19]Local Bankruptcy Rule 9019-5(d) provides, in pertinent part:

(d) Confidentiality of Mediation Proceedings.

(i) Protection of Information Disclosed at Mediation. The mediator and the participants in mediation are prohibited from divulging, outside of the mediation, any oral or written information disclosed by the parties or by witnesses in the course of the mediation. No person may rely on or introduce as evidence in any arbitral, judicial or other proceeding, evidence pertaining to any aspect of the mediation effort, including but not limited to: (A) views expressed or suggestions made by a party with respect to a possible settlement of the dispute; (B) the fact that another party had or had not indicated willingness to accept a proposal for settlement made by the mediator; (C) proposals made or views expressed by the mediator; (D) statement or admissions made by a party in the course of the mediation; and (E) documents prepared for the purpose of, in the course of, or pursuant to the mediation. In addition, without limiting the foregoing, Rule 408 of the Federal Rules of Evidence, any applicable federal or state statute, rule, common law or judicial precedent relating to the privileged nature of settlement discussions, mediations or other alternative dispute resolution procedures shall apply. Information otherwise discoverable or admissible in evidence does not become exempt from discovery, or inadmissible in evidence merely by being used by a party in the mediation.

. . . .

(iv) Preservation of Privileges. The disclosure by a party of privileged information to the mediator does not waive or otherwise adversely affect the privileged nature of the information.

The Noteholders agree, as they must, that discussions with the Mediator are confidential, but complain that barring discovery of communications between Mediation Parties on a Mediation Day might protect discussions by Mediation Parties who are not actively participating in the Mediation that day, which would be discoverable if held on a non-Mediation Day. The DCL Plan Proponents' proposal to limit the protected Mediation communications generally strikes an appropriate balance between allowing discovery of potentially relevant information and protecting the confidentiality of the mediation.

This chapter 11 case is complex, involving a large, national media company, administration of which has been full of acrimony among the various constituents. The central disputes surround challenges to an $8 billion prepetition leveraged buyout. This particular mediation involved twelve parties consisting of multiple interests owed collectively billions of dollars of debt, falling into different tranches among the various Debtors. In balancing these vastly competing interests, I conclude that the DCL Plan Proponents' proposal is reasonable, but further conclude that it is appropriate to adjust it slightly and protect those "written or oral communication between or among Mediation Parties concerning the Mediation to the extent such communications were exchanged on any Mediation Day" (*see* #2 of the DCL Plan Proponents proposal, *supra*), but only if the communications are between Mediation Parties who were present at the Mediation or were participating in the Mediation off-site. The protections afforded by the Mediation Order, Fed.R.Evid. 408, and Local Rule 9019-5 will otherwise remain.

3. Whether the reasonable "start date" for discovery requests is the Petition Date (December 8, 2008) or the date of the Document Depository Order (December 15, 2009)?

The Noteholders believe that they should be able to reach back to the petition date to discover information relevant to their opposition to confirmation of the DCL Plan. The Noteholders offer examples of hypothetical emails that may have occurred between parties prior to December 15, 2009, but would not be produced just because of the proposed "random" start date.[20] The Noteholders argue that it is possible that in the immediate wake of Tribune's business failure, key persons involved in the transactions might have assessed what went wrong or engaged in some degree of finger-pointing. Further, the Committee's investigation began in Spring 2009, months before the proposed December 15, 2009 start date. Because approval of the LBO settlement is part of plan confirmation, the Noteholders claim they are entitled to discovery of all potential settlement discussions during the chapter 11 case.

The DCL Plan Proponents argue that December 15, 2009 is a reasonable and logical discovery start date because most of the events relevant to the negotiation and settlement of the LBO-Related Causes of Action occurred *after* the Court entered the Document Depository Order. The DCL Plan Proponents argue that this date is even earlier than what might also be considered a reasonable discovery start date of September 2010 - - which is when negotiations for the current DCL Plan began after the Examiner's Report and the Mediation. They also argue

[20]On December 15, 2009, the Court entered the Document Depository Order (D.I. 2858) which authorized the Debtors to establish and maintain a centralized document depository related to the LBO-Related causes of action and provided that written and oral communications between "Negotiating Parties" regarding the leveraged ESOP Transactions "shall be deemed confidential" and may not be used or disclosed except in connection with settlement discussions and may not be introduced at any trial or hearing. Following entry of that order, the Debtors and a number of parties participated in negotiations which resulted in a proposed settlement embodied in the April 2010 Plan.

that using December 15, 2009 will help to limit the costs of an already massive document production. Finally, the DCL parties argue, persuasively, that discovery regarding the merits of the LBO-Related Claims is "well trodden ground" that has been investigated by and comprehensively addressed by the Examiner.

"Discovery of relevant, nonprivileged . . . [information] is limited if the party from whom discovery is sought establishes that it is unreasonably cumulative or duplicative or that the burden or expense of the proposed discovery outweighs its likely benefit. *See* Fed.R.Civ.P. 26(b)(2)(B)." *Helmert v. Butterball, LLC*, 2010 WL 2179180, *3 (E.D.Ark. 2010).

On balance, the proposed discovery start date of December 15, 2009 will allow discovery regarding LBO settlements, while limiting the burden and expense of completing discovery within the time frame provided by the CMO. The Noteholders have not demonstrated that an earlier discovery start date is likely to yield admissible, relevant information needed to litigate approval of the proposed settlement and plan confirmation.

EPILOGUE

Lest this decision be read too broadly, I add a cautionary note: A determination involving whether a community of interest privilege applies is an intensely fact-and-circumstance-driven exercise. The balancing of tensions which arise during the search for truth may, depending upon the particular circumstances involved, fall either way. Guided by Circuit precedent, other persuasive decisional law, applicable local rule, and orders governing mediation, I have decided that the matter before me involves circumstances warranting a determination that a community of interest privilege may be invoked by co-proponents of a plan. This is not to say that parties who are co-proponents of a plan or parties who reach settlements arising from mediation are

always entitled to assert this privilege. Neither should it be said that the privilege can never be invoked unless the circumstances involve the proposal of a joint plan or a settlement resulting from mediation.

ORDER

Upon consideration of the Motion to Compel and the objection thereto, and for the reasons set forth above, it is hereby ORDERED that the Motion to Compel is GRANTED, in part, and DENIED, in part, as follows:

(A) The DCL Plan Proponents may assert a community of interest privilege for privileged communications that were shared among the community of interest parties in furtherance of their common interest beginning on October 12, 2010 for all DCL Plan Proponents, and September 27, 2010 for the Debtor/Oaktree/Angelo Gordon group;

(B) The following are protected from discovery:

(i) written or oral communications between a "Mediation Party" and Judge Gross;

(ii) written or oral communications between or among Mediation Parties concerning the Mediation to the extent such communications were exchanged by Mediation Parties who were present at the Mediation or were participating in the Mediation off-site on any Mediation Day (i.e., a day when Judge Gross convened a Mediation Session between two or more Mediation Parties);

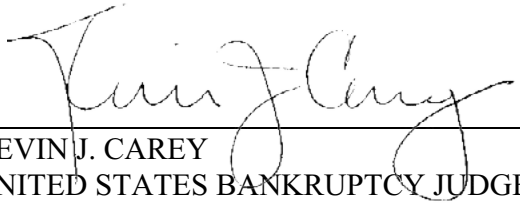
(iii) written or oral communications reflecting the substance of any discussion between or among Mediation Parties who were present at the Mediation or participating in the Mediation off-site on a Mediation Day, or documenting any offers or counter-offers exchanged or agreements reached on a Mediation Day; and

(iv) written or oral communications between Judge Gross and the Examiner or the Examiner's professionals concerning the Mediation;

(C) The Noteholder Plan Proponents may seek discovery of information for the period of time beginning December 15, 2009; and

(D) All other relief requested in the Motion to Compel is **DENIED**.

BY THE COURT:



KEVIN J. CAREY
UNITED STATES BANKRUPTCY JUDGE

Dated: February 3, 2011

cc: Norman L. Pernick, Esquire[21]

[21]Counsel shall serve copies of this Memorandum and Order on all interested parties and file a Certificate of Service with the Court.

Effective Commercial Bankruptcy Mediations: 10 Tips to Create a Better Win

Mediation has become a dominant tool in large and small commercial insolvency proceedings. This form of alternative dispute resolution thrives in bankruptcy because it preserves limited resources. But participation in a commercial mediation is not easy and should never be taken lightly.

What follows is a checklist of practical considerations for an attorney heading into a bankruptcy mediation. Some are obvious. Some are not.

1. Mediate after a win.

There is an art to knowing the best time to mediate. Too early in the case and the parties simply do not know enough to have the confidence to settle. Too late in the case and the parties have spent too much money and have hardened their litigation positions.

A good time to suggest mediation is after a win, no matter how small. There are many battles in a litigation war: a discovery dispute, a preliminary hearing with the judge, or after a deposition that has gone particularly well. If you are lucky enough to achieve one of these small wins, it can be a good time to be conciliatory and say: "why don't we sit down and see if this can be resolved." After a small success, you have a little leverage, but you correspondingly may have the opportunity to obtain a favorable resolution that also allows your opponent to save face.

2. Know Yourself.

Self-awareness is essential going into any negotiation.

Common thought is that aggressive individuals can bully their way to a favorable resolution. This is only occasionally true. More often, an aggressive approach will put off the other side and make settlement less likely. Boldly asserting that you are right and they are wrong will not scare anyone into submission. And obvious aggression will be tempered by the mediator. More importantly, overly aggressive negotiators will miss important clues and information because they are too consumed with thinking about what they will say next to impress their client or to intimidate the other side.

On the other hand, common thought is that a conflict avoider will make unnecessary concessions. Again, this is only occasionally true. If you know that you are a conflict avoider, you can force yourself to be assertive when necessary or simply walk away if you find you or your client are being bullied or pushed unnecessarily hard.

One possible strategy is to employ a "wingman." Say you are naturally aggressive or competitive and you want to maintain that edge in the litigation, bring one of your transactional partners to handle the mediation negotiations. Transactional lawyers are adept at doing deals. On the other hand, if you are a conflict avoider, consider using a litigator to handle the litigation as you work toward the negotiated settlement. In more complex cases, financial consultants and valuation experts might also be useful negotiators in a mediation.

Of course, limited resources in smaller cases may preclude use of a "wingman." But whether the case is big or small, self-awareness may be enough to make you a more effective negotiator. By knowing your personality type and negotiating style, you can accommodate it. Fortunately, most bankruptcy attorneys have a healthy balance of litigation and deal making expertise.

It is also important to know how you react to silence. Some people do not deal well with silence and feel an overwhelming need to fill the space that silence creates. As a result, they tend to over disclose. Negotiators who are comfortable with silence generally can obtain important information just by sitting back and listening.

3. Know Your Client.

Knowing your client is as important as knowing yourself, and perhaps more so. In a commercial context, this means knowing both your client, *i.e.*, the business, and the individual client representative(s) who will attend the mediation with you.

Business disputes rarely occur in a vacuum. A business client may be subject to regulatory concerns or may have internal management struggles. It is imperative that you know as much as possible about the business' decision-making processes, customers, inventory levels, and cash flow in addition to any other market issues relevant to the restructuring or the litigation at issue.

Client representatives, like the businesses themselves, come in many varieties. The representative might be a new executive trying to impress a board of directors, or the sole owner of a company whose whole life is on the line in the bankruptcy case, or the mid-level manager whose actions (or inactions) caused the problem giving rise to the dispute. A more than cursory interview of the client representative is a necessary part of your preparation. It will inform you of any sensitive issues. It also will allow you to prepare the representative for a mediator who may address and question them directly. And you may discover that the client representative may have talents and information that can assist you in the negotiations.

With knowledge of your client and its representatives, you can better predict a reaction to a proposal and to the circumstances of the mediation more generally. For example, if you know that your client representative hates the other side and will not behave well in a joint mediation session, you can give the mediator a heads up. Or, if the representative's job is on the line if the mediation is not successful, you need to know this information for managing expectations—including the expectations of the representative's superiors.

Self-determination is the fundamental value of mediation. Unlike a court proceeding where an attorney takes center stage, your client should be the focus of a mediation. Parties should speak and actively participate in the mediations. But most importantly, parties should have the opportunity to collectively explore potential settlements that best fit their needs and interests. Often parties will develop ideas that counsel may never have even conceived.

In litigation, someone wins and someone loses. Rarely is there an in-between. To make matters worse, even a winner can lose. A litigation win may prompt a costly and drawn-out appeal. In bankruptcy, litigation success can be even worse. There are at least two levels of appeals to consider and even a win at every level may, nonetheless, result in a zero net recovery or an inconsequential one paid in "itty bitty" bankruptcy dollars.

To successfully mediate a bankruptcy dispute—and to increase client satisfaction—your client must be the focus of the mediation. Not you.

4. Maintain Your Integrity.

Most bankruptcy attorneys understand that their word is their bond. So, misrepresentations and ethical violations in bankruptcy mediations are not as common as in non-bankruptcy mediations.

Still, it was not until 2004 that model rules of professional conduct regarding truthfulness were expressly extended to mediation and negotiations. As a result, the rules of truthfulness in a mediation context can be characterized into three groups (i) statements regarding material facts; (ii) statements regarding non-material facts, and (iii) opinions.[1]

Rule 4.1 of the American Bar Association's Model Rules of Professional Conduct ("Model Rule(s)") provides:

> ***Truthfulness in Statements to Others***
>
> 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 Rule 1.6.[2]

Notably, Model Rule 4.1 only prohibits misrepresentation of material facts. The rule does not apply to misrepresentations of non-material facts or opinions exchanged during mediation.

But what if a statement is partially true but still misleading? What if the attorney incorporates or affirms the statement of another while knowing that falsity of the statement? The comments to Model Rule 4.1 make clear that in each of these cases, the described conduct is prohibited.[3] Falling within this category of material facts would be statements regarding assets and ability to pay, the undisclosed death of a party, or the existence of insurance coverage.

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[1] *See generally* Donald C. Peters, *When Lawyers Move Their Lips: Attorney Truthfulness in Mediation and a Modest Proposal*, 2007 J. DISP. RESOL. 119, 120 (2007).
[2] MODEL RULES OF PROF'L CONDUCT r 4.1 (Am. Bar. Ass'n 2019).
[3] MODEL RULES OF PROF'L CONDUCT r 4.1 cmt. 1 (Am. Bar. Ass'n 2019).

Misrepresentations regarding non-material facts are *the* grey area. Some place projections, estimates of value, and prospects of litigation success into this category. Misrepresentations of non-material facts are not expressly prohibited in mediations, but they can certainly impact an attorney's reputation for honesty and integrity. And for a bankruptcy attorney, that can be fatal.

Finally, puffery or opinions are to be expected and, as a result, discounted in most negotiations. A lawyer posturing that he is the greatest litigator to ever live will be seen for what it is and hopefully ignored by all.

Of course, one reason lying flourishes in mediations is the scepter of confidentiality. If someone lies, it is difficult to bring it to the attention of a court. But again, slowly but surely, the law catches up with the deceitful. For example, Florida excepts from its confidentiality rules mediation communications "offered for the limited purpose of establishing or refuting legally recognized grounds [*e.g.,* fraud] for voiding or reforming a settlement agreement reached during a mediation[.]"[4] Federal mediation confidentiality likewise may not stop a litigant from challenging the validity of a mediated settlement.[5]

The bottom line is that an effective lawyer does not need to lie. Honesty and integrity are what builds the trust necessary to successfully negotiate in a mediation.

5. Prepare, Prepare, Prepare.

Good negotiators understand the value of preparation. Attending a mediation and winging it is likely to result in impasse, or worse, a bad deal for your client.

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[4] FLA. STAT. § 44.405(4)(a)(5) (effective July 1, 2004) (available in Appendix); *cf.* Ala. Civ. Ct. Med. R. 11(b), (c).

[5] *See FDIC v. White*, 76 F. Supp. 2d 736, 738 (N.D. Tex. 1999):

> The Court does not read the [Alternative Dispute Resolution Act of 1998] or its sparse legislative history as creating an evidentiary privilege that would preclude a litigant from challenging the validity of a settlement agreement based on events that transpired at a mediation. Indeed, such a privilege would effectively bar a party from raising well-established common law defenses such as fraud, duress, coercion, and mutual mistake. It is unlikely that Congress intended such a draconian result under the guise of preserving the integrity of the mediation process.

Know Your Client's Options.

BATNA is a concept first introduced by Roger Fisher and William Ury in their book "Getting to Yes: Negotiating Agreement Without Giving In."[6] To this day, it remains a useful negotiation tool. BATNA is an acronym for **B**est **A**lternative **T**o a **N**egotiated **A**greement. This simply means knowing in advance what your client can do if the mediation fails. For example, in a Chapter 11 case, debtor's counsel should know alternatives for debtor-in-possession financing, if any, before entering into cash collateral and DIP financing negotiations with a current lender. In adversary proceedings and other contested matters, the BANTA may be litigation and if so, you should be prepared with an appropriate risk and cost analysis.

Risk analysis is the *objective* evaluation of your client's case and must be part of your preparation. The process can be difficult early in the case when information is limited. It is also can be difficult late in the litigation when attorneys tend to fall in love with their legal theories and arguments. Certainly, a good mediator will challenge your positions. One way to prepare is to test your arguments with another lawyer in your firm who is not involved in the case. In bankruptcy, there may also be natural allies with whom you may share a litigation privilege. For example, in an adversary proceeding intended to enhance the value of the estate, debtor's counsel may turn to counsel for the creditors' committee to be a sounding board. This has the dual purpose of assisted risk analysis and of managing the litigation expectation of unsecured creditors.

Know Your Counter Party and their Options.

Before mediation, learn everything you can about your opponent.[7] If your counterparty is the debtor, it is an easier proposition. You have the schedules, financial statements, and the meeting of creditors transcript. If your opponent is a public company or a bank, you will have a wealth of information including SEC filings and public reports. But regardless of who your counterparty is, do not fail to learn what you can. Even a simple Google search may turn up some

[6] Roger Fisher & William Ury, *Getting to Yes: Negotiating Agreement Without Giving In* (1981).

[7] If your research shows that the counter party might be mulish, Mr. Ury's "Getting Past No: Negotiating With Difficult People" (1991) provides a five-step approach to dealing with the overly hardheaded individual.

golden nuggets. Consider this information valuable leverage.[8] You may find that you know more about your opposing party than its own lawyers.

With this "opposition research," you are better able to put yourself in your opponent's shoes and determine its BANTA or best options if the mediation fails.

Anticipate Natural Bankruptcy Alliances and Roadblocks.

Outside of bankruptcy, mediation and arbitration are chosen as vehicles to resolve disputes because the proceedings themselves and the settlements reached are confidential. Not so in bankruptcy.[9] Almost every settlement in a bankruptcy case must be approved by the court after notice and hearing on a Rule 9019[10] motion. So, if a debtor and a secured creditor reach an agreement, it may make sense to bring the creditors committee into the negotiations sooner rather than later. Anticipating objections can limit re-trading.

Remember the Details.

We all know the phrase "the devil is in the details." And at the end of a seemingly successful mediation, this is never more true. Settlements can go off the rails after the participants have left the mediation conference based on disputes that might have been avoided with a little foresight. For example, if the mediated settlement will require a release, bring one with you so that it can be discussed and finalized. Or if mediating a litigation where prevailing party fees may be an issue, be prepared to deal with the issue at the mediation.

Develop and bring with you a checklist of "usual terms" that may be quickly incorporated into the mediated term sheet. For example, a term sheet subject to further documentation (or plan drafting) might include a provision that any documentation disputes will go back to the mediator.

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[8] Of course, a prudent lawyer should anticipate that a counter party may come equally armed and should not only be aware of but also be prepared to address information that might be readily available about your client.

[9] *See, e.g.*, *In re Chitwood*, No. 6:11-BK-14441-CCJ, 2015 WL 7180624, at *2 (Bankr. M.D. Fla. July 23, 2015) (discussing the narrow exceptions to the general rule of open access to records in bankruptcy and rejecting the contention that merely because a settlement agreement contains a "no seal, no deal" provision it must be protected from disclosure); *see also In re Wells Fargo Bank, N.A.*, No. MC 17-204-GLT, 2019 WL 642850, at *2 (Bankr. W.D. Pa. Feb. 14, 2019); *In re Anthracite Cap., Inc.*, 492 B.R. 162, 172 (Bankr. S.D. N.Y. 2013); *In re Oldco M Corp.*, 466 B.R. 234 (Bankr. S.D. N.Y. 2012); *In re Hemple*, 295 B.R. 200 (Bankr. D. Vt. 2003).

[10] Fed. R. Bankr. P. 9019.

Or consider a provision that parties will return to mediation if the settlement is not ultimately approved by the bankruptcy court.

6. To Increase the Pie—Listen, Listen, Listen.

Asking searching questions and carefully listening to answers is an effective negotiator's greatest skill. It is the way to illicit the information necessary to create a settlement acceptable to all parties. It is a tool to increase the value to the parties when, as is usually the case in bankruptcy, there is not enough cash to go around. It is the cornerstone of a "win-win" strategy.

But what is a "win-win" strategy? Isn't any settlement a "win-win" by definition? More to the point, can it still be a win-win if you are trying to get as much as possible for your client?

"Win-win" does not mean to split the pot down the middle to be "fair." It does not mean making a concession just because your counter party made one. And it does not mean avoiding all conflict. Indeed, facing conflict may be cathartic and helpful in moving the parties forward toward a mutually agreeable resolution.

Rather, "win-win" is working to get the best deal possible for your client while also working to ensure that your counterpart is satisfied enough to settle. It means making offers that are good for them but great for your client. And it means using creativity to get more for your client by helping the other side get more of what they want.

Win-win is finding different interests that can be traded off for mutual gains.[11] For example:

Different priorities.

The debtor is focused on getting an affordable loan modification, and the secured creditor is focused on keeping a loan current (at all costs) to keep its regulators at bay. This difference can lead to a value creating trade-off: a loan modification that reinstates the loan at a level workable for the debtor and acceptable to the secured creditor's regulators.

[11] *See* Katie Shronk, *What is a Win-Win Negotiation*? *How trading across differences leads to mutual gains and win-win negotiation*, PROGRAM ON NEGOTIATION, HARVARD LAW SCHOOL DAILY BLOG (Mar 17, 2022), https://www.pon.harvard.edu/daily/win-win-daily/what-is-a-win-win-negotiation/.

Different cash flow projections or valuations.

When parties have different beliefs about the future, as in the instance where a lender believes that a commercial property will increase in value and a debtor believes that property values in the neighborhood will plummet over the long term, this difference should be viewed as an opportunity to restructure in a way that each side can feel comfortable based on its perception of future values. Parties may negotiate a contingent agreement whereby they stipulate what each side will receive or do if its vision of the future does or does not come true. In other words, a "*What if* . . ." agreement. If both sides truly believe their respective projections will play out, both should be happy to "bet" on those predictions—and enable a win-win deal.

An example is a contingent value instrument. This is an agreement to pay creditors only in the event of some future contingency. The possible contingencies are limited only by the imagination of the parties and the mediator.

Different attitudes toward time.

Parties often have different time horizons. Say two investors are interested in buying a business together, but one is looking for quick returns while the other is more interested in long-term gains. A shareholder's agreement may provide a smaller quicker return for the one and a long-term greater return for the other. So too, a debtor negotiating a plan with an Unsecured Creditors' Committee might offer a generous opt in convenience class for creditors who need a quick payment and a higher payout option for those creditors who can wait on payments.

7. Follow the Rules and Participate in Good Faith.

Although voluntary mediation works best, it is not uncommon for a court to order mediation over the objection of one or more parties. Virtually every such order, and most local rules addressing mediation, directs the parties to participate in "good faith." Yet, "good faith" is rarely defined.[12] Even the simple requirement that a representative attend the mediation with "full

[12] *See, e.g.*, *Miller v. Neurorecovery, Inc.*, No. CV-06-BE-205-W, 2010 WL 11565116, at *1 (N.D. Ala. July 2, 2010); Bankr. M.D. Fla. R. 9019-2.

settlement authority" is ambiguous and subject to interpretation. Further complicating matters is the heralded confidentiality of a mediation conference.

It should go without saying that you do want you or your client to be involved in a contempt hearing questioning your good faith participation in a court ordered mediation. As suggested in the cases summarized below, courts are all over the map in terms of their expectations of "good faith" and to what extent a failure to meet those expectations is sanctionable.

Richard v. Spradlin, No. 12–127–ART, 2013 WL 1571059 (E.D. Ky. Apr. 12, 2013):

The District Court affirmed the Bankruptcy Court's imposition of sanctions following a failed mediation. The Bankruptcy Court found the defendant's behavior, particularly the filing of a state-court suit during mediation, constituted bad faith. Also, the night before the mediation, the defendant's attorney informed the mediator that the defendant and the attorney needed to meet before the mediation and would be late. Ultimately, the defendant insisted on spending several hours with his attorney before joining the meeting. Importantly, the defendant did not identify any preparatory actions he took prior to the mediation.

Otto v. Hearst Commc'ns, Inc., 17-CV-4712 (GHW) (JLC), 2019 WL 1034116 (S.D. N.Y. Feb. 21, 2019):

After a mandatory mediation to discuss damages, the defendant alleged that the plaintiff's attorney mediated in bad faith by eliciting false statements and misrepresenting documents. Declining to impose sanctions, the District Court noted (i) the Court lacked the evidentiary record necessary to find bad faith because the plaintiff's alleged misrepresentations were not recorded and (ii) the misrepresentations did not induce any settlement and were eventually corrected. Thus, the defendant suffered "relatively little prejudice."

Procaps S.A. v. Patheon Inc., No. 12–24356–CIV, 2015 WL 3539737 (S.D. Fla. June 4, 2015):

In finding that the plaintiff's conduct did not amount to bad faith, the District Court noted that only objectively determinable conduct should be considered, such as whether the party attended the meetings or brought a representative with sufficient settlement authority. Subjective concepts, such as whether a party who refuses to settle during mediation is operating in bad faith, should generally not be considered. Accordingly, the plaintiff's failure to respond to the defendant's request for a current settlement value before the mediation did not itself constitute a failure to mediate in good faith.

In re A.T. Reynolds & Sons, 452 B.R. 374 (S.D. N.Y. 2011):

The District Court reversed the Bankruptcy Court's sanction for mediating in bad faith where in a mandatory court-ordered mediation the creditor informed the debtor that it would not make a settlement offer and insisted that it was not liable. In reaching this decision, the District Court recognized that considerations of coercion and confidentiality preclude a court from inquiring into the level of a party's participation during mandatory court-ordered mediations.

Freedom Sci. BLV Grp., LLC v. Orient Semiconductor Elecs., Ltd., No. 8:13–cv–569–T–30TBM, 2014 WL 201745 (M.D. Fla. Jan. 17, 2014):

In the order referring the case to mediation, representatives were directed to have full settlement authority, as required by local rule. During the mediation, the defendant's representative informed the mediator that she would not respond to the plaintiff's offer and "could not get the authority to do so." Accordingly, the plaintiff moved for sanctions on grounds that the representative's conduct failed to satisfy the good faith requirement. In turn, the defendant sought sanctions for breach of mediation confidentiality. The court found that where the mediator is not charged with the responsibility to report bad faith conduct, plaintiff's "only recourse" was to raise and present the issue notwithstanding mediation confidentiality. Nevertheless, the court found no bad faith because the mediator's report stated that both parties had full settlement authority and did not indicate bad faith during mediation. That the defendant showed up to the mediation with a valid representative was enough to satisfy the requirement.

Stevenson v. Delta Air Lines, Inc., No. 1:16-CV-2571-AT-LTW, 2018 WL 11337642 (N.D. Ga. July 5, 2018):

Presented with a motion by plaintiff for sanctions based upon the alleged failure to negotiate in good faith regarding a settlement conference under Fed. R. Civ. P. 16(f), the Court denied the motion, finding that the defendant's refusal to increase its initial offer prior to mediation did not amount to bad faith. The court noted that prior to the settlement conference, defendant's counsel had informed plaintiff's counsel of its offer and its steadfast position that it would not increase that offer based upon its views of the merits of the case. Citing cases, the court distinguished between the failure to comply with "objective mediation requirements" and the taking of a "fixed, inflexible position" based upon "valid and principled reasons." The court observed that while the former might justify sanctions, the latter, particularly when communicated to the opposing party in advance, likely does not as if a settlement is premised upon an offer made only under threat of sanctions that settlement has been coerced.

Usherson v. Bandshell Artist Mgmt., No. 19-CV-6368 (JMF), 2020 WL 3483661 (S.D. N.Y. June 26, 2020), *aff'd sub nom. Liebowitz v. Bandshell Artist Mgmt. in part*, 858 F. App'x 457 (2d Cir. 2021) (non-monetary sanctions) *and in part,* 6 F.4th 267 (2d Cir. 2021) (monetary sanctions):

On an extreme set of facts, the court imposed sanctions under Federal Rule of Civil Procedure 16, 28 U.S.C. § 1927, and the court's inherent authority against an attorney (jointly with his firm) for, *inter alia*, failing to follow Court's orders related to mediation and lying to the Court regarding whether the mediator had authorized his client to appear by telephone at the mediation. Among its detailed factual findings, the court concluded that the attorney made false representations in bad faith when he testified under oath about the circumstance surrounding the mediation. Counsel's statements were contradicted by the mediator as well as the communications among counsel and the mediator. The court flatly rejected the attorney's arguments that the governing rules did not require his client's in-person attendance and that he had a good faith belief that based upon the mediator's "custom and practice" he had authorization for his client to appear by phone, because the arguments were not only internally inconsistent but also inconsistent with positions he had argued in other cases before the court. Though it commented that "there may be no sanction short of disbarment that would stop [counsel] from further misconduct," the court

imposed a series of sanctions, both monetary and non-monetary, aimed at deterring the attorney from future misconduct, which the court observed was rampant in cases filed by the attorney both within the district but across the county.

The best approach is simply to follow the rules and always be professional. There is absolutely nothing improper about taking a principled "no way" position at a mediation.[13] You should be prepared, however, to explain your position to the mediator—privately if you must. And there is no requirement that you disclose confidential information or work product to participate in good faith. But in your preparation, you should consider if disclosing such information may facilitate a settlement. Odds are that it will come out eventually.

But even if your client is dead set against mediation, it can always be turned into a productive opportunity to learn about your counterpart's arguments or simply to advance the litigation. For example, if the mediation is going nowhere, you can still generate value for your client by suggesting that the parties mediate a discovery plan, stipulated facts, or something else that might advance and reduce the costs of an upcoming trial.

8. **The First Offer.**

Making the first offer is an important decision because it can anchor the negotiations. Some negotiators bristle at making a first offer for fear of underselling their case. Other relish making an aggressive first offer because it tends to focus on an optimistic recovery.

Either strategy is fine, but whatever your strategy you must be aware that a first offer, unless it is outlandish, creates a framework and anchors the negotiations from that point forward.

If you are inclined to make the first offer, do not let it be influenced by your BATNA. Remember that your BATNA is what you do if the mediation is not successful. Your first offer should be far more optimistic, but not so unreasonable that negotiations shut down as a result.

[13] *See, e.g.*, *Nick v. Morgan's Foods, Inc.*, 99 F. Supp. 2d 1056, 1061 (E.D. Mo. 2000) ("Good faith participation in ADR does not require settlement. In fact, an ADR conference conducted in good faith can be helpful even if settlement is not reached."), *aff'd*, 270 F.3d 590 (8th Cir. 2001).

9. Don't Sweat the Small Stuff.

Make big moves on little issues and little moves on big issues. To do this, however, you must be able to recognize the difference between the big issues and the small ones. For example, the amount of a settlement payment can be a lesser issue if the terms of repayment are controlled by the party making the payments. Control of the drafting of the settlement document also should not be a roadblock, so long as both sides can read and comment.

10. Don't Take a Bad Settlement.

In the Wild Wild West days of mediation, mediators frequently advertised that they have settled every case they ever handled. When you see that claim, proceed with caution. Such mediators can tend to coerce the parties if they feel their personal record or reputation is at risk by an impasse. Improvident settlements can lead to buyer's remorse and further litigation. The last thing a good negotiator wants is a settlement that generates more litigation.

No doubt, many bankruptcy disputes will settle at mediation or otherwise. But not all matters can be resolved by agreement. Some cases need to be tried, and some cases need to get closer to trial to settle. Keep in mind that the purpose of a mediated agreement should be a durable resolution that everyone finds at least tolerable. It should not be a vehicle for further disputes and litigation.

If you find yourself at impasse and a tolerable settlement cannot then be had, simply move on but keep the door open for further discussions. Perhaps later, a small win may arise that can lead you back to the negotiation table.

APPENDIX

FLA. STAT. § 44.401 – Mediation Confidentiality and Privilege Act

Sections 44.401-44.406 may be known by the popular name the "Mediation Confidentiality and Privilege Act."

FLA. STAT. § 44.402 – Scope

(1) Except as otherwise provided, ss. 44.401-44.406 apply to any mediation:

(a) Required by statute, court rule, agency rule or order, oral or written case-specific court order, or court administrative order;

(b) Conducted under ss. 44.401-44.406 by express agreement of the mediation parties; or

(c) Facilitated by a mediator certified by the Supreme Court, unless the mediation parties expressly agree not to be bound by ss. 44.401-44.406.

(2) Notwithstanding any other provision, the mediation parties may agree in writing that any or all of s. 44.405(1), s. 44.405(2), or s. 44.406 will not apply to all or part of a mediation proceeding.

FLA. STAT. § 44.403 – Mediation Confidentiality and Privilege Act; definitions

As used in ss. 44.401-44.406, the term:

(1) "Mediation communication" means an oral or written statement, or nonverbal conduct intended to make an assertion, by or to a mediation participant made during the course of a mediation, or prior to mediation if made in furtherance of a mediation. The commission of a crime during a mediation is not a mediation communication.

(2) "Mediation participant" means a mediation party or a person who attends a mediation in person or by telephone, video conference, or other electronic means.

(3) "Mediation party" or "party" means a person participating directly, or through a designated representative, in a mediation and a person who:

(a) Is a named party;

(b) Is a real party in interest; or

(c) Would be a named party or real party in interest if an action relating to the subject matter of the mediation were brought in a court of law.

(4) "Mediator" means a neutral, impartial third person who facilitates the mediation process. The mediator's role is to reduce obstacles to communication, assist in identifying issues, explore alternatives, and otherwise facilitate voluntary agreements to resolve disputes, without prescribing what the resolution must be.

(5) "Subsequent proceeding" means an adjudicative process that follows a mediation, including related discovery.

FLA. STAT. § 44.404 – Mediation; duration

(1) A court-ordered mediation begins when an order is issued by the court and ends when:

(a) A partial or complete settlement agreement, intended to resolve the dispute and end the mediation, is signed by the parties and, if required by law, approved by the court;

(b) The mediator declares an impasse by reporting to the court or the parties the lack of an agreement;

(c) The mediation is terminated by court order, court rule, or applicable law; or

(d) The mediation is terminated, after party compliance with the court order to appear at mediation, by:

1. Agreement of the parties; or

2. One party giving written notice to all other parties in a multiparty mediation that the one party is terminating its participation in the mediation. Under this circumstance, the termination is effective only for the withdrawing party.

(2) In all other mediations, the mediation begins when the parties agree to mediate or as required by agency rule, agency order, or statute, whichever occurs earlier, and ends when:

(a) A partial or complete settlement agreement, intended to resolve the dispute and end the mediation, is signed by the parties and, if required by law, approved by the court;

(b) The mediator declares an impasse to the parties;

(c) The mediation is terminated by court order, court rule, or applicable law; or

(d) The mediation is terminated by:

1. Agreement of the parties; or

2. One party giving notice to all other parties in a multiparty mediation that the one party is terminating its participation in the mediation. Under this circumstance, the termination is effective only for the withdrawing party.

FLA. STAT. § 44.405 – Confidentiality; privilege; exceptions

(1) Except as provided in this section, all mediation communications shall be confidential. A mediation participant shall not disclose a mediation communication to a person other than another mediation participant or a participant's counsel. A violation of this section may be remedied as provided by s. 44.406. If the mediation is court ordered, a violation of this section may also subject the mediation participant to sanctions by the court, including, but not limited to, costs, attorney's fees, and mediator's fees.

(2) A mediation party has a privilege to refuse to testify and to prevent any other person from testifying in a subsequent proceeding regarding mediation communications.

(3) If, in a mediation involving more than two parties, a party gives written notice to the other parties that the party is terminating its participation in the mediation, the party giving notice shall have a privilege to refuse to testify and to prevent any other person from testifying in a subsequent proceeding regarding only those mediation communications that occurred prior to the delivery of the written notice of termination of mediation to the other parties.

(4)(a) Notwithstanding subsections (1) and (2), there is no confidentiality or privilege attached to a signed written agreement reached during a mediation, unless the parties agree otherwise, or for any mediation communication:

1. For which the confidentiality or privilege against disclosure has been waived by all parties;

2. That is willfully used to plan a crime, commit or attempt to commit a crime, conceal ongoing criminal activity, or threaten violence;

3. That requires a mandatory report pursuant to chapter 39 or chapter 415 solely for the purpose of making the mandatory report to the entity requiring the report;

4. Offered to report, prove, or disprove professional malpractice occurring during the mediation, solely for the purpose of the professional malpractice proceeding;

5. Offered for the limited purpose of establishing or refuting legally recognized grounds for voiding or reforming a settlement agreement reached during a mediation; or

6. Offered to report, prove, or disprove professional misconduct occurring during the mediation, solely for the internal use of the body conducting the investigation of the conduct.

(b) A mediation communication disclosed under any provision of subparagraph (a)3., subparagraph (a)4., subparagraph (a)5., or subparagraph (a)6. remains confidential and is not discoverable or admissible for any other purpose, unless otherwise permitted by this section.

(5) Information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery by reason of its disclosure or use in mediation.

(6) A party that discloses or makes a representation about a privileged mediation communication waives that privilege, but only to the extent necessary for the other party to respond to the disclosure or representation.

FLA. STAT. § 44.406 – Confidentiality; civil remedies

(1) Any mediation participant who knowingly and willfully discloses a mediation communication in violation of s. 44.405 shall, upon application by any party to a court of competent jurisdiction, be subject to remedies, including:

(a) Equitable relief.

(b) Compensatory damages.

(c) Attorney's fees, mediator's fees, and costs incurred in the mediation proceeding.

(d) Reasonable attorney's fees and costs incurred in the application for remedies under this section.

(2) Notwithstanding any other law, an application for relief filed under this section may not be commenced later than 2 years after the date on which the party had a reasonable opportunity to discover the breach of confidentiality, but in no case more than 4 years after the date of the breach.

(3) A mediation participant shall not be subject to a civil action under this section for lawful compliance with the provisions of s. 119.07.

Local Rules for the U.S. Bankruptcy Court for the Middle District of Florida

Rule 9019-2 ALTERNATIVE DISPUTE RESOLUTION (ADR); MEDIATION

(a) Definition. Mediation is an opportunity for the parties to negotiate their own settlement consistent with the mediation policy of self-determination. Mediation is a confidential process that includes a supervised settlement conference presided over by an impartial, neutral mediator to promote conciliation, compromise and the ultimate settlement of a civil action. The mediator's role in the settlement is to suggest alternatives, analyze issues, question perceptions, conduct private caucuses, stimulate negotiations between opposing sides, and keep order. The mediation process does not allow for testimony of witnesses. The mediator should not opine or rule upon questions of fact or law, or render any final decision in the case. At the conclusion of the mediation, the mediator shall report to the Court (1) the identity of the parties in attendance at the mediation, and (2) that parties either reached an agreement in whole or in part or that the mediation was terminated without the parties' coming to an agreement.

(b) Purpose. Mediation is intended as an alternative method to resolve civil cases, saving time and cost without sacrificing the quality of justice to be rendered or the right of the litigants to a full trial in the event that mediation does not resolve the dispute.

(c) Qualifications; Conflicts.

(1) Qualifications of Mediators. The parties may select any person to serve as mediator. Parties are encouraged to choose a mediator who has sufficient knowledge and experience in mediations and in bankruptcy law. Notwithstanding the foregoing, the Court, by administrative order, may establish qualifications and maintain a list of those persons eligible to serve as mediator in a residential mortgage modification mediation.

(2) Conflicts of Interest. The mediator must disclose all actual or potential conflicts of interest involving the parties participating in the mediation process. The parties may waive a mediator's actual or potential conflict of interest, provided that the mediator concludes in good faith that the mediator's impartiality will not be compromised. The unique nature of bankruptcy cases favors the parties' ability to waive conflicts and supersedes the concept of nonwaivable conflicts.

(d) Standards of Professional Conduct for Mediators. All mediators who mediate in cases pending in this District, whether or not certified under the rules adopted by the Supreme Court of Florida, shall be governed by standards of professional conduct and ethical rules adopted by the Supreme Court of Florida for circuit court mediators.

(e) Disqualification of a Mediator. After reasonable notice and hearing, and for good cause, the presiding judge shall have discretion and authority to disqualify any mediator from serving as mediator in a particular case. Good cause may include violation of the standards of professional conduct for mediators.

(f) Compensation of Mediators. Unless otherwise indicated in an order appointing a mediator, an order directing parties to mediate, or other similar court order, the mediator shall be compensated for fees and expenses as established and agreed to by the parties to the mediation. Absent agreement of the parties or order of the Court to the contrary, the cost of the mediator's services shall be paid equally by the parties to the mediation.

In cases in which one or more parties to the mediation is a Chapter 11 trustee or debtorin-possession, payment of the mediator's charges attributable to that party shall be authorized without the necessity of filing an application with the Court.

(g) Confidentiality.

(1) Definitions. As used in this section (g), "Mediation Communication" means an oral or written statement, or nonverbal conduct intended to make an assertion, by or to a participant in a mediation made during the course of the mediation, or prior to a mediation if made in furtherance of a mediation; "Mediation Participant" means a mediation party or a person who attends a mediation in person or by telephone, videoconference, or other electronic means; "Mediation Party" means a person participating in a mediation directly or through a designated representative, and who is a named party, a real party in interest, or who would be a named party or real party in interest if an action relating to the subject matter of the mediation were brought in a court of law; and "Subsequent Proceeding" means an adjudicative process that follows a mediation, including related discovery.

(2) Confidential Mediation Communications. Except as provided in this section (g), all Mediation Communications are confidential, and the mediator and the Mediation Participants shall not disclose outside of the mediation any Mediation Communication, and no person may introduce in any Subsequent Proceeding evidence pertaining to any aspect of the mediation effort. However, information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery because of its disclosure or use in mediation.

(3) Evidence Rules and Laws. Without limiting subsection (2), Rule 408 of the Federal Rules of Evidence and any applicable federal or state statute, rule, common law, or judicial precedent relating to the privileged nature of settlement discussions or mediations apply.

(4) Settlement Agreements. Notwithstanding subsections (2) and (3), no confidentiality attaches to a signed, written agreement reached during or as a result of a mediation, unless the mediation parties agree otherwise, or to any communication for which the confidentiality or privilege against disclosure has been waived by all Mediation Parties.

(5) Preservation of Privileges. The disclosure by a Mediation Participant or Mediation Party of privileged information to the mediator or to another Mediation Participant or Mediation Party does not waive or otherwise adversely affect the privileged nature of the information.

(6) Disclosures by Mediator. The mediator shall not be compelled to disclose to the Court or to any person outside the mediation conference any Mediation Communications, nor shall the mediator be required to testify in regard to the mediation in connection with any Subsequent Proceeding or be a party to any Subsequent Proceeding.

(7) Disclosure of Communications. A Mediation Participant who makes a representation about a Mediation Communication waives that privilege, but only to the extent necessary for another Mediation Participant to respond to the disclosure.

(h) Mediators as Counsel in Other Cases. Any member of the bar who selected as a mediator pursuant to this rule shall not, for that reason alone, be disqualified from appearing and acting as counsel in another unrelated case pending in this District.

(i) Referral to Mediation. Any pending case, proceeding, or contested matter may be referred to mediation by the Court at such time as the Court may determine to be in the interests of justice. The parties may request the Court to submit any pending case, proceeding, or contested matter to mediation at any time.

(j) Mortgage Modification Mediations and Other Specialty Mediations. When deemed necessary, the Court shall establish procedures, policies and necessary orders to deal with the mediation of emerging bankruptcy trends, such as residential mortgage modifications.

(k) Participation of Parties at Mediation. All parties to the mediation are required to attend the mediation in person, unless authorized by the Court or the mediator to attend by telephone. Parties are encouraged to participate in the mediation in a good faith attempt to resolve the issues between them. Parties who are not individuals shall participate in mediations through the presence of a representative with full authority to settle the matter that is the subject of the mediation.

Local Rules for the U.S. Bankruptcy Court for the Northern District of Florida

Rule 7016-1 Pre-Trial/Mediation Procedures

(A) **Generally**. District Local Rule 16.3, concerning Mediation shall be applicable in all adversary proceedings and contested matters as directed by the Bankruptcy Court.

(B) **Mortgage Modification and Other Specialty Mediations**. For Mortgage Modification Mediations, see the Court's website for orders, procedures, forms and instructions, available at www.flnb.uscourts.gov. The Court may establish procedures, policies and orders to deal with other specialty mediations. Otherwise, other specialty mediations shall be conducted pursuant to orders or procedures adopted on a case by case basis.

Local Rules for the U.S. Bankruptcy Court for the Southern District of Florida

Rule 9019-2 Mediation

(A) Registration of Mediators.

(1) Mediation Register. The clerk shall establish and maintain a register of qualified attorneys and retired federal and state judges who have registered to serve as mediators in adversary proceedings and contested matters in cases pending in the court. Attorneys and retired federal and state judges who meet the qualifications described in subdivision (2) shall be so registered. This subdivision shall not preclude an individual from serving as a mediator if the parties to the dispute agree upon the selection of that mediator. However, a mediator selected by the parties and not registered under this rule nonetheless shall comply with the other provisions of this rule where applicable.

(2) Qualifications of Mediator. To qualify for service as a mediator under this rule, a mediator must:

(a) (i) have completed a minimum of 40 hours in a circuit mediation training program certified by the Florida Supreme Court, (ii) have completed the American Bankruptcy Institute/St. John's University School of Law Bankruptcy Mediation Training, or (iii) be certified by the Florida Supreme Court as a circuit court mediator; and

(b) agree to accept at least 2 mediation assignments per year in cases where at least one party lacks the ability to compensate the mediator, in which case the mediator's fees shall be reduced accordingly or the mediator shall serve pro bono if no litigant is able to contribute compensation.

(3) Procedures for Registration. Each mediator who wishes to be included on the register must file the Local Form "Verification of Qualification to Act as Mediator".

(4) Removal from Register. The clerk shall remove a mediator from the register of mediators at the mediator's request or at the direction of a majority of the judges of the court in the exercise of their discretion. If removed at the mediator's request, the mediator may later request to be added to the register by submitting a new verification form. Upon receipt of such request, the clerk shall add the qualified mediator to the register.

(5) Mediator's Oath. Every mediator shall take the oath or affirmation prescribed by 28 U.S.C. §453, before serving as a mediator. The oath may be administered by any person authorized to administer oaths, and proof of the oath or affirmation shall be included on the Local Form "Verification of Qualification to Act as Mediator".

(6) Compensation of Mediators. Mediators shall be compensated at the rate set by the U.S. District Court for the Southern District of Florida, and as adopted by this court by local rule or administrative order or at such rate as may be agreed to in writing by the parties and the mediator selected by the parties. Absent agreement of the parties to the contrary, the cost of the mediator's services shall be borne equally by the parties to the mediation conference, but a case trustee's or debtor in possession's share of the cost shall be an expense of the estate.

(B) Referral of Matters to Mediation.

(1) Manner of Referral. The court may order the assignment of a matter or proceeding to mediation at a pretrial conference or other hearing, upon the request of any party in interest or the U.S. Trustee, or upon the court's own motion. The court shall use the Local Form "Order of Referral to Mediation", which shall: (a) designate the trial or hearing date, (b) direct that mediation be conducted not later than 14 days before the scheduled trial or hearing, and (c) require the parties to agree upon a mediator within seven days after the date of the order. The parties shall timely file the Local Form "Notice of Selection of Mediator", failing which the clerk shall designate a mediator from the clerk's register on a random basis within court divisions using the Local Form "Notice of Clerk's Designation of Mediator" and serve this notice on the required parties. Notwithstanding the assignment of a matter or proceeding to mediation, the court shall set such matter or proceeding for trial final hearing, pretrial conference or other proceeding as is appropriate in accordance with the Bankruptcy Rules and these rules.

(2) Disqualification of Mediator for Cause. Any person selected as a mediator may be disqualified for bias or prejudice as provided in 28 U.S.C. §144, and shall be disqualified in any action in which the mediator would be required to do so if the mediator were a judge governed by 28 U.S.C. §455.

(3) Replacement of Mediator. If any party to the mediation conference, for any reason, objects to the designated mediator, then within three business days from the date of the notice of designation, the objecting party shall file with the clerk, and serve upon the mediator and all other parties to the mediation, a request for an alternate mediator including

in the request the name of any alternate mediator already agreed upon by the parties. If the alternate mediator has been agreed upon, the clerk shall designate that mediator. Otherwise, the clerk shall designate a second mediator from the register of mediators on a random basis and shall serve a second notice of designation on all parties to the mediation conference and on the designated mediator. Each party shall be entitled to one challenge to any clerk-designated mediator. A mediator who is unable to serve shall, within seven days from the date of the notice of designation, serve on the clerk and all parties to the mediation a written notice of inability to serve, and the clerk shall designate an alternate mediator in the manner described above.

(4) No Stay. Notwithstanding a matter being referred to mediation, discovery and preparation for trial or final hearing shall not be stayed by mediation.

(5) Types of Cases Subject to Mediation. Any adversary proceeding or contested matter may be referred by the court to mediation.

(C) Mediation Conference.

(1) Notice and Procedures. Upon consultation with the parties and their attorneys, the mediator shall fix a reasonable time and place for the mediation conference, except as otherwise agreed by the parties or by order of the court, and shall give the parties at least 14 days' advance written notice of the conference. The conference shall be set as soon after the entry of the mediation order and as far in advance of the final evidentiary hearing as practicable. In keeping with the goal of prompt dispute resolution, the mediator shall have the duty and authority to establish the time for all mediation activities including a deadline for the parties to act upon a settlement or upon mediated recommendations.

(2) Attendance of Parties Mandatory. An attorney who is responsible for each party's case shall attend the mediation conference. Each individual party and the representatives of each non-individual party shall appear with the full authority to negotiate the amount and issues in dispute without further consultation. The mediator shall determine when the parties are to be present in the conference room. No party can be required to participate in a mediation conference for more than two hours.

(3) Public Entity as Party. If a party to mediation is a public entity, either a federal agency or an entity required to conduct its business pursuant to Chapter 286, Florida Statutes, that party shall be deemed to appear at a mediation conference by the physical presence of a representative with full authority to negotiate on behalf of the entity and to recommend settlement to the appropriate decision-making body of the entity.

(4) Failure to Attend or to Participate in Good Faith. The mediator shall report to the court the complete failure of any party to attend the mediation conference and shall report to the court the failure of any party to participate in the mediation process in good faith, either of which failures may result in the imposition of sanctions by the court.

(D) Recommendations of Mediator. The mediator shall have no obligation to make any written comments or recommendations other than the report required by subdivision (E). If a written recommendation is prepared, no copy shall be filed with the court.

(E) Post-Mediation Procedures. Within seven days after the mediation conference, the mediator shall file with the court a report showing compliance or non-compliance by the parties with the mediation order and the results of the mediation, using the Local Form "Report of Mediator". In the event there is an impasse, the mediator shall report that there is a lack of agreement, and shall make no further comment or recommendation. If the parties have reached an agreement regarding the disposition of the matter or proceeding, they shall prepare and submit to the court within 14 days after the filing of the mediator's report an appropriate stipulation of settlement and joint motion for its approval. Failure to file such a motion shall be a basis for the court to impose appropriate sanctions. If the mediator's report shows mediation has ended in an impasse, the matter will be tried as scheduled.

(F) Confidentiality. Conduct or statements made in the course of mediation proceedings constitute "conduct or statements made in compromise negotiations" within the meaning of Rule 408 of the Federal Rules of Evidence, and no evidence inadmissible under Rule 408, shall be admitted or otherwise disclosed to the court.

(G) Withdrawal from Mediation. Any action or claim referred to mediation pursuant to this

rule may be exempt or withdrawn from mediation by the presiding judge at any time, before or after reference, upon motion of a party and/or a determination for any reason that the case is not suitable for mediation.

(H) Compliance with Bankruptcy Code and Rules. Nothing in this rule shall relieve any debtor, party in interest, or the U.S. Trustee from complying with any other orders of the court, the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, or these rules.

ETHICS IN NEGOTIATING THE SETTLEMENT OF A LAWSUIT

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A. INTRODUCTION

1. This paper addresses the ethical constraints applicable to lawyers in the negotiation of a settlement of a lawsuit or a dispute not in litigation. Lawyers involved in settlement negotiations may not always have a clear understanding of what negotiation behavior is inappropriate in light of the minimal guidance provided by the Model Rules and the dearth of ethics opinions and cases involving application of the rules in this area. When lawyers negotiate, they rely upon and are largely influenced by their core values and beliefs about lawyering and the role of the lawyer in the negotiation of a settlement.

2. A litigation attorney who, in mid-course, changes his or her role to that of a settlement negotiator often is placed in a difficult psychological (if not emotional) dilemma. As one author observed:

> *The litigating lawyer really faces a particular ethical trap when the lawyer becomes involved in settlement negotiations. Here is an advocate prepared to do battle, presenting the client's cause using any proposition - factual or legal - that can be advanced in good faith, suddenly placed in a negotiating posture in which [ethical] obligations are triggered, sometimes with no more of a transition then switching from one sentence to the next. How lawyers manage this role transition may be the difference between fulfilling one's professional responsibility and potential liability for the lawyer.*

See generally, Lawrence J. Fox, "Those Who Worry About the Ethics of Negotiation Should Never be Viewed as Just Another Set of Service Providers," 52 MERCER L. REV. 977, 983 (2001).

B. SOURCES FOR ETHICAL GUIDANCE IN NEGOTIATIONS

The sources of authority that lawyers should consult in considering their ethical obligations in this arena include the following:

- The rules of professional conduct of the state where the lawyer is admitted to practice (including admission *pro hac vice*);

- Judicial decisions issued by courts in the state whose ethical rules apply to the lawyer;

- Formal opinions and disciplinary rulings the state ethics committee or commission charged with interpreting the applicable state's ethics rules;

- The Model Rules of Professional Conduct (the "Model Rules") of the American Bar Association ("ABA");

- Formal opinions ("Formal Opinions") and informal opinions ("Informal Opinions") of the ABA Standing Committee on Ethics and Professional Responsibility (the "ABA Ethics Committee").

- ABA Section of Litigation's 2002 publication entitled "Ethical Guidelines for Settlement Negotiations" (the "Guidelines").

- The Restatement (Third) of the Law Governing Lawyers (2000) (the "Restatement").

This paper will focus on the Model Rules rather than any particular ethics rules of a state, since the state rules are largely patterned after the Model Rules.

C. COMPETENT REPRESENTATION

1. Model Rule 1.1 provides that a lawyer "shall provide competent representation to a client," which requires "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." While a lawyer may be a skilled litigator, the lawyer may have little experience in negotiating the settlement of a lawsuit, participating in the mediation of the dispute (where mediation is either ordered by the court or voluntarily undertaken by the parties), dealing with commercial or tax issues that may impact the resolution of the dispute, or drafting sophisticated settlement papers.

2. A lawyer who desires to limit the scope of representation to a client by excluding certain practice areas may normally do so with the client's informed consent and understanding of the implications and possible added costs of such an arrangement. *See* Restatement §19(1), comment c.

3. In drafting the settlement agreement, a lawyer must endeavor in good faith to record the parties' understanding both accurately and completely and identify any changes from draft to draft or otherwise bring them to the other counsel's attention. Guidelines §4.3.5. It is certainly unprofessional, if not unethical, for a lawyer knowingly to exploit a drafting or similar error by opposing counsel concerning the contents of a settlement agreement. *See* Informal Opinion 86-1518 (1986).

D. SETTLEMENT AUTHORITY -- WHO IS THE CLIENT?

1. The client is the source of all settlement authority in a civil dispute. *See* Model Rule 1.2(a). At times, however, the identity of the client (and therefore the source of settlement authority) may not be so clear. When the client is an individual, client identification and the source of settlement authority are not issues.

2. A lawyer representing a client that is an organization generally should obtain settlement authority, and take direction concerning settlement, from an authorized representative of the organization. *See* Guidelines §3.8; Restatement §96.

3. If the claim against the client is covered by insurance, the insured is ordinarily the lawyer's client even though the insurance contract may obligate the carrier to pay the legal fees and to indemnify the insured. *See* Guidelines §3.7. If the lawyer is representing the insured at the direction of the carrier, the lawyer must make known to the insured the nature of the representation and any right the carrier may have to control direction of the case. *See* Formal Opinion 96-403 (1996). A lawyer must represent the insured with undivided loyalty, whether the lawyer represents the insured alone or the insured and the carrier. *See* Formal Opinion 96-403 (1996).

E. PROMPT DISCUSSION OF SETTLEMENT OPTION

1. Model Rule 1.4(b) requires a lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation"; Model Rule 1.1 obligates lawyers to provide "competent representation"; Model Rules 1.2(a) and 1.4(a)(2) set forth a lawyer's duty to "consult with the client as to the means by which" the client's objectives are to be pursued; and Comment 5 to Model Rule 2.1 states that "when a matter is likely to involve litigation, it may be necessary . . . to advise the client of forms of dispute resolution that might constitute reasonable alternatives to litigation."

2. Guidelines §3.1.1 states that "A lawyer should consider and should discuss with the client, promptly after retention in a dispute, and thereafter, possible alternatives to conventional litigation, including settlement."

F. INITIATION OF SETTLEMENT DISCUSSIONS

1. In the course of an "off the record" conversation, a lawyer may advise the adversary's counsel that the lawyer has no "authority" to discuss settlement, but would not be surprised if a specified dollar range would lead to a settlement of the case. While such conversations frequently occur and lawyers may think they are appropriate, the safer practice is for the lawyer to obtain the client's authority to initiate settlement discussions. *See* Model Rule 1.2(a) ("lawyer shall consult with a client as to the means by which [the client's ends] are to be pursued."); Guidelines §3.1.2 (decision "whether to pursue settlement negotiations belongs to the client" and a lawyer "should not initiate settlement discussions without authorization from the client").

2. Some clients may view the initiation of settlement discussions, particularly at certain early stages of a case, to be a sign of weakness and therefore be disinclined to have such discussions. Moreover, a client facing multiple claims may adopt the policy that no cases of the type the lawyer is handling will ever be settled. *See generally*, Lawrence J. Fox, "Those Who Worry About the Ethics of Negotiation Should Never Be Viewed as Just Another Set of Service Providers," 52 MERCER L. REV. 977 (2001).

3. The Restatement, however, takes a different position and states that, in the absence of a contrary agreement or instruction, a lawyer "normally has authority to initiate or engage in settlement discussions, although not to conclude them." *See* Restatement §22(1), comment c.

G. DUTY TO COMMUNICATE AND EXPLAIN SETTLEMENT OFFERS

1. Model Rule 1.4(a) requires a lawyer to "keep a client reasonably informed about the status of a matter and to promptly comply with reasonable request for information, and to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Unless the client has otherwise made clear that a particular settlement offer would be unacceptable, a lawyer is ethically obliged to communicate all settlement offers to the client, no matter how insulting those offers may be.

2. A lawyer should review with the client provisions in the proposed settlement before the client binds itself to the settlement. *See* Model Rule 1.4(b), comment 5 (2002). A lawyer should provide a client with a professional assessment of the pros and cons of proposed settlement terms so that the client can make a fully-informed decision. *See* Guidelines §3.2.4.

3. A lawyer who does not personally keep the client informed assumes the risk that an inadequately informed client has not truly given a consent to the settlement. *See* Restatement §22, comment c(1).

H. CONFIRMING ADVERSARY'S RECEIPT OF SETTLEMENT OFFER

1. Model Rule 4.2, often referred to as the "no contact" rule, disallows a lawyer from inquiring directly of an opposing counsel's client whether the settlement offer was communicated to the client. *See* Formal Opinion 92-362 (1992). However, a lawyer should be at liberty to communicate with an in-house lawyer for a party even though the party is represented by an outside attorney. *See* Formal Opinion 06-443 (2006).

2. If a lawyer believes the settlement offer was not communicated to the opposing party, then the lawyer may advise the client that the client has the right to speak directly to the opposing party to confirm whether the settlement offer was communicated. *See* Formal Opinion 92-362 (1992).

I. PREPARATION FOR AND CONDUCT OF NEGOTIATIONS

1. A lawyer's duty to provide a client with "competent representation" requires, among other things, "thoroughness and preparation reasonably necessary for the representation" of the client in a settlement negotiation. *See* Model Rule 1.1.

2. If the client grants the lawyer the authority to conduct the negotiations on the client's behalf, that authority should be understood to be revocable at will. *See* Guidelines §3.2.2; Restatement §22, comment c. The degree of independence with which a lawyer pursues the negotiation process should be consistent with the client's wishes, as expressed after the lawyer's discussion with the client. *See* Guidelines §3.1.3.

3. However, the ultimate decision whether to settle a dispute remains solely with the client. Agreeing to settlement terms without the client's consent can pose both ethical and malpractice problems for the lawyer since the settlement agreement may be binding on the client if the lawyer has apparent authority to enter into the settlement as the client's agent. *See* Restatement §27(d); Bursten v. Green, 172 So. 2d 472 (Fla. Dist. Ct. App. 1965) (fact that client authorized lawyer to negotiate settlement terms did not in and of itself empower lawyer to conclude settlement without consulting client).

J. DUTY OF CONFIDENTIALITY

1. In a negotiation setting, a lawyer should preserve client confidences and disclose them only to the extent that doing so is essential to resolution of the dispute and therefore impliedly authorized. Model Rule 1.6 (lawyer may not reveal information relating to representation of client "unless the client gives informed consent" or disclosure is "impliedly authorized in order to carry out the representation").

2. Even though lawyers are rarely parties to a settlement agreement, they must adhere to any confidentiality provision in the agreement, either because their clients instruct them to keep a matter confidential (a request that the lawyer must comply with pursuant to Model Rule 1.6) or because violating the confidentiality provision might undo the settlement and inflict harm on their clients in violation of Model Rules 1.2 and 1.3(b).

3. Model Rule 1.6(b) exempts from confidentiality a lawyer's disclosure of criminal or fraudulent conduct to the extent necessary to prevent, mitigate, or rectify injury due to such conduct for which the lawyer's services were unwittingly used. *See also*, Model Rule 1.2(d) (prohibiting lawyer from knowingly participating in client's criminal or fraudulent conduct). A lawyer is not allowed to keep confidential any information that the lawyer has an ethical duty to report, such as opposing counsel's misconduct that warrants disciplinary sanctions or information that, if undisclosed, would make the lawyer complicit in a fraud, deceit, or misrepresentation.

K. THREATS OF CRIMINAL PROSECUTION IN CIVIL MATTERS

1. Prior to the adoption of the Model Rules, the ABA's Model Code of Professional Responsibility, Disciplinary Rule 7-1-5(a), prohibited a lawyer from making threats of criminal prosecution in order to gain an advantage in a civil matter. The Model Rules superseded the Model Code of Professional Responsibility and did not carry forward Disciplinary Rule 7-1-5(a).

2. The ABA Ethics Committee has concluded that the Model Rules do not bar a lawyer from threatening charges against an adversary to gain leverage for the settlement of a civil matter, as long as the criminal matter relates to the civil dispute, the lawyer has a well-founded belief that the law and facts support the civil claim and to potential criminal charges, and the lawyer does not exert improper influence over the criminal justice system. Formal Opinion 92-363 (1992). While some bar ethics opinions have followed the ABA Ethics Committee's analysis of the issue, *see, e.g.*, District of

Columbia Opinion 339 (2007), others have left in place the prohibition in former Disciplinary Rule 7-105 in their adaptation of the Model Rules. *See, e.g.*, Alabama Rule 3.10; Georgia Rule 3.4(h); South Carolina Rule 4.5; Tennessee Rule 4.4(b).

3. A lawyer should not attempt to extract a settlement from a counterpart by making extortionate or otherwise unlawful threats. *See* Guidelines §4.3.2. The act of making a threat of criminal prosecution may be violative of some state laws. *See, e.g.*, Fla. Stat. §836.05 (prohibiting threats of accusation of criminal conduct with the intent to extort money). While it may be permissible to observe in a settlement negotiation that a failure to settle will lead to a vigorous prosecution of the case, threats that would be illegal if made to convince a party to pay money outside of the context of a lawsuit may also be illegal if made to pressure a party to agree to a settlement. *See* State v. Harrington, 260 A.2d 692 (Vt. 1969) (lawyer guilty of attempted extortion for threatening to disclose adulterous conduct of defendant and to turn over information to IRS absent defendant's agreement to settlement terms).

L. REPORTING UNETHICAL BEHAVIOR

1. Model Rule 8.3(a) states that "[a] lawyer who knows that another lawyer has committed a violation of the Rule of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, should inform the appropriate professional authority." Because a lawyer already has an obligation under Model Rule 8.3(a) to report misconduct, the use of a threat to report such misconduct as a means of obtaining a favorable settlement concession, equally as much as the failure to make the report in the first instance, could be a violation. *See* Formal Opinion 94-383 (1994). It would also be improper for a lawyer to agree to refrain from reporting opposing counsel's misconduct as a condition of a settlement. *See* Guidelines §4.2.3.

2. Model Rule 8.3(a) requires that the misconduct must raise a "substantial" question regarding the lawyer's integrity, absent which there is no duty to report. Therefore, a suspicion or unverifiable belief as to misconduct will not trigger a reporting duty.

M. FALSE STATEMENTS TO ADVERSARY

1. It has been said that the negotiation process inherently involves some level of dissembling and misrepresentation, particularly concerning each side's "walkaway" points. *See generally*, Charles V. Craver, "Negotiation Ethics: How to be Deceptive Without Being Dishonest, How to be Assertive Without Being Offensive," 38 S. TEX. L. REV. 713 (1997).

2. Model Rule 4.1(a) states that in the course of representing a client, a lawyer shall not "knowingly" make a false statement of "material fact or law" to a third person. The key words to focus on in Model Rule 4.1 are "knowingly" and "material." A lawyer may not be held accountable for an unknowing misrepresentation or failure to disclose and cannot be held responsible for even a false statement or failure to disclose facts when the false statement or lack of disclosure relates to an immaterial fact or law. *See*

Guidelines §3.3.1. *See also*, Model Rule 8.4(c) (prohibiting a lawyer from engaging in conduct that involves "dishonesty, fraud, deceit or misrepresentation").

3. There may be a question whether a statement is one of fact or opinion and, if a fact, whether the fact is material. Certain statements are clearly not considered to be facts, such as estimates of price or value, intentions to settle, and statements regarding the strengths of a legal position. If a statement is considered to be fact-based, the question whether the factual statement is "material" will generally be determined with reference to the circumstances in which the statement was made. *See* Model Rule 4.1, comment 2. Recognizing the unique nature of settlement negotiations, the comments to Model Rule 4.1 state that under "generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact." Lawyer opinions regarding their case assessment or interpretations of the law are generally not covered by the rule. Thus, puffing about the strengths of the client's litigation position or expressions of opinion as to trial outcome or settlement value of the case are generally not considered material facts.

4. A common negotiating ploy involves misdirection regarding a client's "bottom line" settlement number. While a lawyer may state in a negotiation that the client does not wish to settle for more than a lower number (even though a client's board of directors has authorized a higher settlement), it would not be permissible for the lawyer to state that the board of directors had formally disapproved any settlement in excess of the number stated by the lawyer, when authority had in fact been granted to settle for a higher sum. *See* Formal Opinion 06-439 (2006).

5. If during the course of negotiations it is the client who lies, the attorney must be mindful of Model Rule 1.2(d), which disallows a lawyer from providing assistance to a client in committing a crime or fraud, and Model Rule 1.16(a)(1), which obliges a lawyer to withdraw from representation where to continue would cause a violation of a Model Rule. While Model Rule 4.1(a) says that a lawyer may not lie, Model Rule 4.1(b) directs a lawyer to disclose a client's lie when necessary "to avoid assisting a criminal or fraudulent act by a client" unless disclosure is prohibited by Model Rule 1.6.

6. Under the law of contracts, fraud in the inducement of a contract may render a contract voidable, potentially leading to litigation against the client and likely repercussions against a lawyer who participated in the deception. *See, e.g.*, In re McGrath, 468 N.Y.S.2d 349 (N.Y. App. Div. 1983). A settlement that is subject to court approval (as would be the case in most settlements arising in or out of a bankruptcy) and that was procured through materially false representations might be set aside pursuant to Rule 60(b)(3) of the Federal Rules of Civil Procedure(authorizing relief from a judgment or order based upon fraud, misrepresentation, or misconduct by an opposing party).

N. FAILURE TO DISCLOSE MATERIAL FACTS TO ADVERSARY

1. In addition to proscribing affirmative misrepresentation of material fact, Model Rule 4.1 also addresses nondisclosure, stating that a lawyer shall not knowingly "[f]ail 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 Rule 1.6."

2. Model Rule 1.6, which is referenced in Model Rule 4.1(b), sets forth client confidences that a lawyer is barred from disclosing. Accordingly, a lawyer who believes that failure to disclose a material fact may be a violation of Model Rule 4.1(b) must consult Model Rule 1.6 to make certain that the lawyer's potential disclosure would not betray a client confidence. *See* Formal Opinion 93-375 (1993).

3. A misrepresentation can occur in a negotiation if the lawyer incorporates or affirms a statement of another person that the lawyer knows to be false (Model Rule 4.1, comment 1); a statement that is partially true, but misleading, which may be the equivalent of affirmatively false statements (Model Rule 4.1, comment 1); and partial disclosures that are misleading and may be the equivalent of a false representation of a material fact. *See, e.g.*, Neb. State Bar Ass'n. v. Addison, 412 N.W.2d 855 (Neb. 1987) (suspending lawyer for failing to disclose existence of insurance policy when other side was under false impression that policy did not exist).

4. While Model Rule 3.3 requires candor to a tribunal concerning relevant legal authority, no such obligation is incumbent upon lawyers involved in settlement negotiations. Hence, there is generally no obligation to inform the opposing side of relevant facts or legal authority. The duty of zealous representation in the Model Rules generally prohibits a lawyer in negotiations from disclosing weaknesses in the client's case. *See* Formal Opinion 93-375 (1993).

5. Based on the foregoing, what should a lawyer do with Model Rule 4.1(b) in mind?

   - Must a plaintiff's lawyer disclose to defense counsel that the statute of limitations has run?

   - Must defense counsel disclose the existence of liability insurance when the plaintiff is prepared to settle at a substantially discounted amount based on public reports that the defendant is insolvent?

   - Must a lawyer disclose to opposing counsel that the lawyer's client has died?

   - Must a plaintiff's lawyer disclose that the statute of limitations has run on the client's claim and, if not, may the lawyer threaten to enforce the barred claim by filing suit when the lawyer knows that the claim is time-barred?

O. BARRING COUNSEL FROM SIMILAR CASES

1. Model Rule 5.6 provides in pertinent part that a "lawyer shall not participate in offering or making . . . [a]n agreement in which a restriction on the lawyer's right to practice as part of the settlement of a client controversy." *See* Guidelines §4.2.1.

2. The rationale behind Model Rule 5.6 is two-fold. First, to permit such agreements would restrict the access of the public to lawyers who, by virtue of their background and experience, might be best suitable to represent other potential parties in a dispute.

The use of such agreements may provide clients with rewards that bear less relationship to the merits of their claims than to the desire of a defendant to "buy off" plaintiff's counsel. Second, offering such an agreement puts the plaintiff's lawyer in a conflict between the interests of present clients and those of potential future clients, and forcing a lawyer to forego future representations may be asking too much. *See* Formal Opinion 93-371 (1993) (noting strong countervailing policies favoring the public's unfettered choice of counsel).

3. Similarly, a lawyer may not agree to settlement terms that restrict the lawyer's use of information gained from current representation in future litigation against the same parties, as limiting the use of such information would effectively limit the lawyer's right to practice law and therefore be violative of Model Rule 5.6. *See* Formal Opinion 00-417 (2000). Thus, a settlement provision requiring counsel to turn over work product to opposing counsel or barring counsel from using certain expert witnesses in future litigation against the opponent have been found to be prohibited. *See, e.g.*, N.M. Bar Ethics Adv. Op. Comm., Adv. Op. 1985-5 (1985); Colo. Bar Ass'n Ethics Comm., Formal Opinion 92 (1993).

4. An indirect means of restricting representation by counsel would be a provision in the settlement agreement authorizing and obligating plaintiff's counsel to consult with or otherwise be engaged by the defendant, the hope being that such a relationship will create a conflict in the event of any litigation involving plaintiff's counsel against the defendant in the future.

5. Because the practice of including settlement restrictions on future legal representation is not uncommon, some have expressed the view that such restrictions are outdated and should be rescinded. *See*, *e.g.*, Stephen Gillers, "A Rule Without Reason," 79 A.B.A. J., October 1993, at 118 (quoted with approval in Feldman v. Minars, 658 N.Y.S. 2d 614, 617 (N.Y. App. 1997)).

P. NON-COOPERATION CLAUSES

1. Parties may seek to include in a settlement a so-called "non-cooperation clause" by which the settling plaintiff agrees not to share information with other litigants or from disclosing to anyone outside of a jointly settling co-plaintiff facts that underlie the matter in litigation. Model 3.4(f) expressly prohibits a lawyer from requesting any person, other than the lawyer's client or the client's relatives or employees, to refrain from voluntarily providing relevant information to another party.

2. A lawyer who either asks for or accepts a non-cooperation condition may be found to have committed an ethical violation under Model Rule 8.4(d), which enjoins lawyers from engaging in any conduct that is "prejudicial to the administration of justice." *See generally*, John Bauer, "Buying Witness Silence: Evidence - Suppressing Settlements and Lawyers' Ethics," 87 ORE. L. REV. 481 (2008) (positing that attorneys negotiating for non-cooperation settlements are in violation of Rule 3.4(f) and that a "strong case can also be made" that attorneys who ask for non-cooperation as well as those who accept it, violate Model Rule 8.4(d)).

Q. COOPERATION CLAUSES

1. It is fairly common practice in the settlement of litigation for the settling plaintiff to request, as a condition to the settlement, that a settling defendant provide deposition testimony, an affidavit or trial testimony in support of the settling plaintiff's claim against the remaining defendants in the litigation or future defendants in later litigation.

2. It would likely be an ethical violation to require the settling defendant to provide an "acceptable affidavit" as that would violate rules prohibiting lawyers from offering a benefit to a witness based on the content of testimony. It should be permissible for a settlement to require a counterpart to give a truthful affidavit or to make himself or herself available for deposition or trial testimony so long as no conditions are placed on the content of the testimony.

R. REPRESENTING MULTIPLE CLIENTS IN SETTLEMENT

1. When representing multiple clients in settlement negotiations, the lawyer should be mindful of the possible need to obtain consent from one client to disclose information to other clients when that information is otherwise confidential and protected under Model Rule 1.6. *See* Formal Opinion 06-438 at 6 (2006).

2. A lawyer representing two or more clients must ensure the differences among client positions are considered in the settlement negotiations. A lawyer may not negotiate a settlement on their behalf if the representation of one client may be materially limited by the lawyer's responsibilities to another client. *See* Model Rule 1.7, comment 28.

3. Even if initially a representation of multiple clients is not ethically inappropriate, conflicts of interest may later arise in settlement negotiations as a result of differing strengths and weaknesses of each client's position, the capacity of each client to pay a portion of the settlement amount when clients are defendants, or when settlement proposals from opponents purport to treat clients differently. *See* Guidelines §3.5, committee notes. A lawyer should discuss these risks and potential conflicts with each prospective client to obtain that client's informed consent.

S. ISSUES ARISING IN "AGGREGATE SETTLEMENTS"

1. Model Rule 1.8(g) addresses the ethical issues that are implicated in a so-called "aggregate settlement" and provides:

> *A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients . . . unless each client gives informed consent, in a writing signed by the client. A lawyer's disclosure shall include the existence and nature of all claims or pleads involved and of the participation of each person in the settlement.*

See generally, Lester Brickman, "Anatomy of an Aggregate Settlement: The Triumph of Temptation Over Ethics," 79 GEO. WASH. L. REV. 700 (2011).

2. While the Model Rules do not define "aggregate settlement," the ABA Ethics Committee has defined the term, as follows:

> *An aggregate settlement or aggregated agreement occurs when two or more clients who are represented by the same lawyer together resolve their claims or defenses or pleas. It is not necessary that all of the lawyer's clients facing criminal charges, having claims against the same parties, or having defenses against the same claims, participate in the matter's resolution for it to be an aggregate settlement or aggregated settlement. The rule applies when any two or more clients consent to have their matters resolved together.*

Formal Opinion 06-438 (2006).

3. The purpose of Model Rule 1.8(g) is to deter "lawyers from favoring one client over another in settlement negotiations by requiring that lawyers reveal to all clients information relevant to the proposed settlement. That information empowers each client to withhold consent and thus prevent the lawyer from subordinating the interest of the client to those of another client or to those of the lawyer." *See* Formal Opinion 06-438 (2006). *But see*, Lynn A. Baker & Charles Silver, "The Aggregate Settlement Rule and Ideals of Client Service," 41 S. TEX. L. REV. 227 (1999) (criticizing requirement for unanimous consent as unworkable in many circumstances).

4. After an aggregate settlement proposal is first offered to the clients, the lawyer should advise each affected client of the total consideration in the settlement, the amount and nature of each individual share of the settlement, the amount to be paid to the lawyer from the settlement proceeds or the opposing party, and the apportionment of costs among all of the clients. *See* Formal Opinion 06-438 (2006). In addition, the lawyer should disclose to each client any conditions precedent to the settlement (including any required voting percentages of claimants to implement the settlement), the status of the litigation, the lawyer's recommendations regarding a settlement proposal, each client's right to accept or reject the proposed settlement, and each client's right to obtain an independent lawyer to represent the client in connection with the settlement.

T. CLIENT'S SETTLEMENT DECISION TO BE RESPECTED

1. The client must ultimately make the decision whether or not to accept terms for the settlement of the case. *See* Model Rule 1.2(a) ("a lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter"). *See* In re Lewis, 463 S.E.2d 862 (Ga. 1995) (contingent fee contract purporting to give lawyer full authority to settle is invalid).

2. A lawyer may not seek the client's agreement that the lawyer may withdraw if the client refuses a settlement that the lawyer recommends, Guidelines §3.2.3; or require the client to agree that a settlement is subject to the concurrence of both the client and the lawyer. *See* Restatement §22, comment c; Guidelines §3.2.3.

3. Nor may a lawyer require the client to agree that a settlement is subject to the agreement of both the client and the lawyer, as such an arrangement would unfairly

compromise the client's autonomy. *See* Restatement §22, comment c; Guidelines §3.2.3.

4. Committee notes to Section 2.1 of the Guidelines state that a lawyer "should not impede a settlement" that is favored by the client merely because the lawyer does not agree with the client or possesses a financial interest in the case. *See* Model Rule 1.5, comment 5 ("an agreement may not be made whose terms might induce the lawyer . . . to perform services . . . in a way contrary to the client's interests").

U. WITHDRAWAL FROM REPRESENTATION

1. A lawyer may not take any action that would knowingly assist a client to take action that would be violative of, or would expose the client or lawyer liability under, civil or criminal laws or discipline for violating professional rules. *See* Model Rule 1.2(d) (lawyer may not assist client in conduct lawyer knows is criminal or fraudulent); Guidelines §3.3.1; Restatement §23(1).

2. If a client does not rescind a direction to a lawyer to act in a manner that the lawyer reasonably believes is contrary to applicable law or ethical rules, the lawyer may be permitted to withdraw, but must consider whether there are any disclosure obligations to a tribunal or other decision-making authority in an organization. *See* Model Rule 1.16(a)(1); Guidelines §3.3.2.

3. While ordinarily a lawyer's withdrawal from representation should be done in a manner that does not adversely affect the client, the lawyer may be authorized to effect a so-called "noisy withdrawal" (*i.e.*, notice of withdrawal and disaffirmance of the lawyer's work product) if the lawyer knows that the client will engage in criminal or fraudulent conduct that will implicate the lawyer's past services; the lawyer's withdrawal from further representation would be ineffective to prevent the client from using the lawyer's work product to accomplish unlawful purposes; and disaffirmance of the lawyer's work product is appropriate to avoid violating Model Rule 1.2(d). *See* Formal Opinion 92-366 (1992).

V. RESPONSIBILITIES OF SUPERVISORY LAWYERS

1. So-called "supervisory lawyers" (*i.e.*, those having direct supervisory authority over another lawyer) have the responsibility to make reasonable efforts to ensure that the other lawyer conforms to the rules of professional conduct. *See* Model Rule 5.1(b).

2. A supervisory lawyer may be responsible for another lawyer's violation of ethical rules if the supervisory lawyer knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action. Model Rule 5.1(c)(2). Comment 5 to Model Rule 5.1 states that "if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension."

Straight & Narrow

By Sylvia Mayer

Ethics and the Art of Mediation

Attorneys owe a duty of candor to the tribunal and competency to their clients,[1] but what obligations does an attorney bear in mediation? This article offers practical ethical guidance to assist attorneys representing parties in bankruptcy mediation.

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Starting with the Basics

Rule 1.1 of the Model Rules of Professional Conduct (Model Rules) provides that a "lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." In the context of mediation, at a bare minimum, competency includes (1) informing your client of the date, time and place of the mediation; (2) preparing for the mediation; and (3) attending the mediation. In addition, in a bankruptcy mediation, preparation may require an understanding of factors beyond the basic facts and law specific to your dispute.

Practice Tips

As a bankruptcy mediator, preparation by counsel, parties and the mediator are often the keys to a successful mediation. As you prepare to represent clients in mediation, consider the information needed beyond the basic elements of your claims or defenses. For example, if you represent a creditor defendant in a preference action who seeks a reduced settlement amount due to its own financial distress, then be prepared to demonstrate your client's financial distress, and consider sharing that information with the plaintiff before the mediation. Another example is if the mediation is to liquate a pre-petition claim, then explore when, if and how such a claim will be paid.

Turning to the Negotiations

The critical ethical distinction for negotiations is the difference between puffing and lying. Puffing is allowed and to some degree expected, whereas lying is neither allowed, nor should it be expected. Model Rule 4.1 provides that:

> 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 Rule 1.6.

Under Model Rule 4.1, the crux of the issue is what constitutes a "material fact" in negotiations. The comments to Model Rule 4.1 recognize that it is generally accepted that, in a negotiation, estimates regarding value or price, or statements about willingness to settle, are not to be taken as statements of material fact.[2] Instead, these types of statements fall into the puffing category. The comments also acknowledge that while an attorney has a duty to be truthful, he/she does not generally have an affirmative duty to inform an opposing party of relevant facts.[3]

Further guidance regarding an attorney's ethical obligations in negotiation is offered in formal ethics opinions issued by the American Bar Association (ABA) Standing Committee on Ethics and Professional Responsibility.[4] Notably, Formal Opinion 06-439 clarifies that Model Rule 4.1 applies to negotiations in the context of mediation. In addition to the ethics opinions, in 2002 the ABA's Section of Litigation issued nonbinding ethical guidelines for settlement negotiations to serve as a resource for attorneys.[5]

Model Rule 4.1, the comments, and the ABA's ethics opinions and guidelines establish basic parameters regarding ethics in negotiation, whether in mediation or between the parties. These parameters are summarized in the exhibit. To be clear, as explained in Formal Opinion 06-439: "Rule 4.1(a) applies only to statements of material fact that the lawyer knows to be false, and thus does not cover false statements that are made unknowingly, that concern immaterial matters, or that relate to neither fact nor law."

Practice Tips

While the examples in the exhibit offer helpful guidance, there may be times when it is difficult to assess the distinction between puffery and deception. It is best to err on the side of honesty. Although

1 *See* Model Rules Prof'l Conduct 1.1 and 3.3. While this article discusses the Model Rules, consideration should also be given to ethical guidelines and rules for professional conduct in the applicable jurisdiction.

2 *See* Comments to Model Rule 4.1 (section on Statements of Facts).
3 *See* Comments to Model Rule 4.1 (section on Misrepresentation).
4 *See, e.g.*, Am. Bar Ass'n Standing Committee on Ethics and Professional Responsibility Formal Opinions 93-370, 94-387, 95-397 and 06-439.
5 *See* "Ethical Guidelines for Settlement Negotiations," Am. Bar Ass'n Section of Litigation (August 2002), *available at* americanbar.org/content/dam/aba/administrative/dispute_resolution/dispute_resolution/settlementnegotiations.pdf (last visited March 9, 2022).

national in scope, the bankruptcy bar is a comparatively small community, and your reputation for integrity matters.

It is equally important to remember that Model Rule 4.1 must be read in conjunction with Model Rule 3.4[6] regarding fairness to opposing party and counsel, and Model Rule 8.4 regarding attorney misconduct.[7] To state the obvious, in a mediation attorneys should not falsify a document, threaten or extort the other party, or lie about a material fact to achieve a settlement.

Considering Settlement Offers

Several of the Model Rules blend together to provide guidance on consideration of settlement offers. Model Rule 1.2(a) provides, in relevant part, that attorneys shall abide by their client's decisions "concerning the objectives of representation" and "whether to settle a matter." The comments to Rule 1.2 refer to Model Rule 1.4(a).

Model Rule 1.4(a) governs an attorney's duty to communicate with their client, including the duty to promptly inform a client of any decisions for which their informed consent is required. The comments to Rule 1.4 provide that this duty includes the duty to promptly inform clients of settlement offers unless the client has previously provided guidance on whether such an offer is acceptable, and authorizes the attorney to act in accordance with that guidance. However, Model Rule 1.0(e) defines "informed consent" as agreement after communication of "adequate information and explanation about the materials risks of and reasonably available alternatives to the proposed course of conduct."

> **[W]hat you most need to know about ethics in settlement negotiations and mediation you probably learned in kindergarten.**

These rules apply to the evaluation of any settlement proposals in mediation. Essentially, while the client decides whether or not to settle and on what terms, it is incumbent on the attorney to educate the client about their options, risks and alternatives. In addition, if you have a client with diminished capacity, then refer to Model Rule 1.14 for guidance. You should explore options to address capacity before starting the mediation to ensure that your client's interests can be served in the mediation.

Practice Tips

When exploring options, risks and alternatives with your client, stay attuned to your own cognitive bias. For example, confirmation bias occurs when you reject information that does not confirm your position, whereas anchoring bias occurs when you fixate on one data point (anchoring it in your mind) to the exclusion of other data. Both biases reduce objectivity, which impacts your ability to weigh options, risks, benefits and alternatives for your client.

Takeaways

In the end, what you most need to know about ethics in settlement negotiations and mediation you probably learned in kindergarten: listen, tell the truth, follow the rules and respect others. abi

6 Model Rule 3.4 provides, in relevant part, that:
A lawyer shall not:
(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
(b) falsify evidence, counsel or assist a witness to testify falsely or offer an inducement to a witness that is prohibited by law.

7 Model Rule 8.4(c) provides that it is professional misconduct for an attorney to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

Exhibit

Statement or Omission by Counsel	Guidance	Source
Claimant does not disclose that the statute of limitations has run on its claims.	No duty to disclose.	Formal Opinion 94-387.
Claimant falsely states that the statute of limitations on its claims has not run.	False statement of a material fact.	Formal Opinion 94-387.
Party understates its willingness to make concessions.	Puffing.	Comment to Rule 4.1; Formal Opinion 06-439.
Party states unwillingness to pay $X to settle.	Puffing.	Comment to Rule 4.1; Formal Opinion 06-439.
Party falsely states they lack authority to pay $X to settle.	Failure to disclose a material fact.	Formal Opinion 06-439.
Failure to disclose the death of claimant.	Failure to disclose a material fact.	Formal Opinion 95-397.
Party falsely asserts that documentary evidence exists proving its position.	False statement of a material fact.	Formal Opinion 06-439.
Party exaggerates the strengths of their factual or legal position.	Puffing.	Formal Opinion 06-439.
Party fails to disclose the weaknesses in their factual or legal position.	So long as no misrepresentations, then no duty to disclose.	Formal Opinion 94-387.
In a labor negotiation, employer falsely represents that adding a specific employee benefit would cost $X per employee when the employer knows it would cost substantially less.	False statement of a material fact.	Formal Opinion 06-439.
Buyer of a product overstates its ability to obtain the product from other sources.	Puffing.	Formal Opinion 06-439.

Faculty

Hon. Kevin J. Carey is a partner in Hogan Lovells US LLP's Business Restructuring and Insolvency practice in Philadelphia and is a retired bankruptcy judge. He also is ABI's President and represents both companies and creditors in domestic and cross-border bankruptcy proceedings. Judge Carey was first appointed to the U.S. Bankruptcy Court for the Eastern District of Pennsylvania in 2001, then in 2005 began service on the U.S. Bankruptcy Court for the District of Delaware (serving as chief judge from 2008-11). During that time, he authored more than 200 reported decisions, issued important rulings on key issues such as valuation, fiduciary duties and other complex chapter 11 and confirmation issues, and presided over such high-profile cases as Exide Technologies, Tribune Co. and New Century Financial. Judge Carey was the first judge to serve as global chair of the Turnaround Management Association and is an honorary member of the Turnaround, Restructuring and Distressed Investing Hall of Fame, as well as a Distinguished Fellow of the Association of Insolvency & Restructuring Advisors. In addition, he is a Fellow of the American College of Bankruptcy and a member of the International Insolvency Institute, as well as a contributing author to *Collier on Bankruptcy* and a member of the National Conference of Bankruptcy Judges. He also is a part-time adjunct professor in the LL.M. in Bankruptcy program at St. John's University School of Law in New York City. Judge Carey began his legal career in 1979 clerking for Bankruptcy Judge Thomas M. Twardowski, then served as clerk of court of the U.S. Bankruptcy Court for the Eastern District of Pennsylvania. He received his B.A. in 1976 from Pennsylvania State University and his J.D. in 1979 from Villanova University School of Law.

Hon. Roberta A. Colton is a U.S. Bankruptcy Judge for the Middle District of Florida in Orlando, appointed on April 1, 2016. She has an extensive background in bankruptcy mediation dating back to the early 1990s, when she worked with the Middle District of Florida to develop a pilot program that included mediation rules, training and qualifications for bankruptcy mediators. In 1992, Judge Colton presented a program on mediation in bankruptcy at the National Conference of Bankruptcy Judges and the following year co-authored "Confidentiality Issues in Bankruptcy Mediation," which was published in the *Norton Bankruptcy Advisor*. While in private practice, Judge Colton mediated numerous complex and noncomplex bankruptcy and commercial disputes. Upon taking the bench, she continued bankruptcy mediations and now conducts judicial mediations for cases pending before her colleagues on the bench. In September 2016, she served as an instructor at the Federal Judicial Center's Judicial Mediation Workshop. Before coming on the bench, Judge Colton practiced at Trenam Law in Tampa, Fla., for 33 years. Her practice included business reorganization, bankruptcy litigation, foreclosure/lender liability, creditors' committees, bankruptcy trustee representation, commercial litigation and bankruptcy asset sales. Prior to joining Trenam Law, she served as a judicial law clerk for Hon. James C. Hill of the U.S. Court of Appeals for the Eleventh Circuit. Judge Colton has served on the Board of Regents for the American College of Bankruptcy and as chair of the Local Rules Committee for the U.S. Bankruptcy Court for the Middle District of Florida. She was the former chair of the Florida Bar Business Law Section, Bankruptcy/UCC Committee, and the Tampa Bay Bankruptcy Bar Association. She currently co-chairs the Judicial Liaison Committee for the Florida Bar's Business Law Section. Judge Colton received her B.A. in commerce with distinction from the University of Virginia in 1979 and her J.D. from William & Mary Law School in 1982, where she served on its law review and was a national moot court finalist.

C. Edward Dobbs is a senior partner in the Atlanta office of Parker Hudson Rainer & Dobbs LLP and iss the founder and architect of the firm's commercial finance, debt restructuring and ADR neutral services practice areas. He has practiced law for nearly 50 years and has been involved in documenting and closing syndicated commercial loans for banks and other financial institutions; representing financial institutions in debt restructurings, workouts, litigation and bankruptcy cases; and representing debtors, unsecured creditors and creditors' committees in bankruptcy cases. For more than 25 years, a sizeable part of Mr. Dobbs's practice has included service as a neutral in both arbitrations and mediations; over the last seven years, his service as a neutral has predominated. Mr. Dobbs is a Fellow in the American College of Bankruptcy, American College of Commercial Finance Lawyers (for which he served as past president), American College of Civil Trial Mediators, Lawyers Foundation of Georgia and American Bar Foundation, and he is a member of the National Academy of Distinguished Neutrals, a Master of the Bench in the W. Homer Drake, Jr. Georgia Bankruptcy American Inn of Court, 2013 recipient of the David W. Pollard (Lifetime Achievement) Award, the author of two legal books and numerous law review articles, as well as a forthcoming treatise on the mediation of commercial disputes, and a lecturer at each of the 10 ABI/St. Johns Law School's annual mediation courses. He also serves on the panel of neutrals (for both arbitration and mediation) maintained by the American Arbitration Association for commercial cases and is frequently called upon to serve as a mediator in complex commercial disputes. Mr. Dobbs received his A.B. in 1971 from Davidson College and his J.D. in 1974 from Vanderbilt University Law School, where he was articles editor of the *Vanderbilt Law Review* and graduated Order of the Coif.

Sylvia Mayer ia the sole proprietor of S. Mayer Law PLLC in Houston and is an arbitrator, mediator and attorney with nearly 30 years of legal experience in courts nationwide. As a member of the National Academy of Distinguished Neutrals and a TMCA Credentialed Advanced Mediator, she serves on several arbitration and mediation rosters for civil, commercial, consumer, employment and health care disputes. As an experienced neutral, Ms. Mayer has served as arbitrator and mediator for disputes involving a wide variety of issues spanning a breadth of industries, including avoidance actions, banking, bankruptcy, business divorces, business separations, civil litigation, collections, commercial leasing, commercial litigation, construction, consumer, contracts, corporate governance, corporations, credit, director and officer liability, distribution, employment, energy, exploration and production, fiduciary duties, finance, financial services, fraud, fraudulent transfers, health care, hospitality, insolvency, insurance, landlord-tenant, lender liability, limited liability companies, manufacturing, mechanics and vendors liens, natural gas, oil and gas, oilfield services, partnerships, pharmaceutical, personal injury, pipelines and transportation, preference actions, professional liability, real estate, retail, royalties, sales, secured transactions, securities, surety bonds, telecommunications, torts, transportation and wholesale. She is listed on the American Arbitration Association (AAA) Arbitrator and Mediator Rosters, National Academy of Distinguished Neutrals (Texas) (NADN) Arbitrator and Mediator Rosters, American Health Law Association (AHLA) Arbitrator and Mediator Rosters, International Institute for Conflict Prevention and Resolution (CPR) Panels of Distinguished Neutrals, Financial Industry Regulatory Authority (FINRA) Arbitrator Roster, New ERA ADR, Inc. Neutrals Roster, Court Call ODR Roster for Arbitrators and Mediators, Texas Department of Insurance (TDI) Balanced Billing Arbitrator and Mediator Rosters, Michigan Department of Insurance and Financial Services Balanced Billing Arbitrator Roster, Virginia Bureau of Insurance Balanced Billing Arbitrator Roster, Washington Office of the Insurance Commissioner Balanced Billing Arbitrator Roster, U.S. Bankruptcy Court, District of Delaware, Register of Mediators and Arbitrators, U.S. District Court, Southern District of Texas, Qualified Alternative Dispute Resolu-

tion Provider and Credentialed Advanced Mediator with Texas Mediator Credentialing Association (TMCA). Ms. Mayer is the founder and chair of the Houston Pro Bono Joint Initiative and sits on the State Bar of Texas ADR Council. In addition, she is a member of the ABI and the American Bar Association, ArbitralWomen, Association of Attorney Mediators, American Health Law Association, Association of Women Attorneys, Academy of Cami-Appointed Masters, Greater Houston Women's Chamber of Commerce, Houston Bar Association, National Association of Women Lawyers, State Bar of Texas, Texas Association of Mediators and the Texas Mediators Credentialing Association. Ms. Mayer received her B.A. in theater *cum laude* in 1987 from George Washington University and her J.D. *summa cum laude* from the University of Houston Law Center.