



AMERICAN
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2022 Winter Leadership Conference

Mediating Mass-Tort Multiparty Matters: The Four Ms

Hosted by the Mediation Committee

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MEDIATING MASS-TORT MULTIPARTY MATTERS: THE FOUR M'S ABI WINTER LEADERSHIP CONFERENCE

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MATERIALS AND DISCUSSION DISCLAIMER

- Many of the presenters involved in this panel may be involved in ongoing cases in different roles. The topics discussed in this outline, and the issues raised in our presentation, are presented for academic purposes only and do not reflect the views of the attorneys involved, their law firms, or clients they may represent in ongoing pending matters.



BANKRUPTCY MEDIATION, GENERALLY

- Mediation allows parties to avoid the unpredictability and expense of litigation, especially where litigation would be drawn-out, expensive and highly fact-driven.
- Mediation is not specifically addressed in the Bankruptcy Code or Bankruptcy Rules, but courts often rely on local rules providing for mediation.
- Prior to local rules addressing mediation, courts relied on provisions concerning the appointment of an examiner pursuant to section 1104 of the Bankruptcy Code or section 105(a) of the Bankruptcy Code.



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LOCAL RULES OFTEN ADDRESS MEDIATION

- Judicial authority to order parties to participate in mandatory, non-binding mediation derives from:
 - a) an applicable statute;
 - b) the court's local rules;
 - c) the Federal Rules of Civil Procedure; and
 - d) the court's inherent powers.
- As statutory authority, courts cite the Alternative Dispute Resolution Act ("ADR Act"), 28 U.S.C. §§ 651-658, enacted by Congress to promote the use of alternative dispute resolution ("ADR") by federal courts. The ADR Act lists mandatory mediation as an appropriate ADR process but does not authorize its use. 28 U.S.C. § 651(a).
- Instead, the ADR Act directs each district court to "devise and implement its own alternative dispute resolution program, by local rule adopted under [28 U.S.C.] section 2071(a), to encourage and promote the use of alternative dispute resolution in its district." 28 U.S.C. § 651(b). Most federal district courts and some bankruptcy courts responded to the ADR Act by adopting local rules authorizing mandatory mediation. These local rules provide a source of authority for ordering parties to participate in mediation.
- **78 of 94 districts (83%) HAVE adopted some type of local bankruptcy mediation rules, and 16 of 94 districts (17%) HAVE NOT adopted bankruptcy mediation rules.**

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BANKRUPTCY MEDIATION RULES AND POLICIES (AS OF 10/26/22)

Bankruptcy Court	Local Rule	Rule	Notes
First Circuit			
District of Maine	LBR 9019-2	Link	
District of Massachusetts	LBR 16.4, and F.R.B.P. 9019-2	Link	
District of New Hampshire	LBR 7016-1	Link	
District of Puerto Rico	LBR 7026-1(c)		Implementing mediation via discovery plan
District of Rhode Island	Implements District Court's ADR Plan	Link	
Second Circuit			
District of Connecticut	LBR 9019-2	Link	
Eastern District of New York	LBR 9019-1	Link	
Northern District of New York	LBR 9019-1	Link	Implementing Local Appendix IV mediation program for the U.S. Bankruptcy Court Northern District of New York
Southern District of New York	LBR 9019-1	Link	
Western District of New York	--	--	None
District of Vermont	VT. L.B.R. 9019-1	Link	
Third Circuit			
District of Delaware	LBR 9019 (1-7)	Link	
District of New Jersey	D.N.J. LBR 9019-1; D.N.J. LBR 9019-2	Link	
Eastern District of Pennsylvania	LBR 9019-2	Link	One of the most comprehensive rules
Middle District of Pennsylvania	LBR 9019-02 & LBR 9019-3 (Mortgage Modification Mediation Program)	Link	LBR 9019-3 = Mortgage Modification Mediation Program
Western District of Pennsylvania	LBR 9019 (1-7)	Link	
District of Virgin Islands	LBR 9019-02	Link	

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BANKRUPTCY MEDIATION RULES AND POLICIES (AS OF 10/26/22)

Bankruptcy Court	Local Rule	Rule	Notes
Fourth Circuit			
District of Maryland	LBR 9019-2	Link	
Eastern District of North Carolina	LBR 9019-2(1-7)	Link	
Middle District of North Carolina	LBR 9019-2	Link	Continues to use Mediated Settlement Conference
Western District of North Carolina	LBR 9019-2	Link	Continues to use Mediated Settlement Conference
District of South Carolina	LBR 9019-2	Link	
Eastern District of Virginia	LBR 9019-1	Link	
Western District of Virginia	--	--	None
Northern District of West Virginia	LBR 9019-1 and LBR 9019-2	Link	
Southern District of West Virginia	LBR 9019-2	Link	
Fifth Circuit			
Eastern District of Louisiana	--	--	None
Middle District of Louisiana	--	--	None
Western District of Louisiana	LBR 9019-2	Link	
Northern District of Mississippi	LBR 9019-1	Link	
Southern District of Mississippi	LBR 9019-1	Link	
Eastern District of Texas	LBR 9019-1	Link	
Northern District of Texas	LBR 9019-1 and LBR 9019-2	Link	
Southern District of Texas	District Court LR 16.4	Link	Not in local rules
Western District of Texas	LBR 1001(h) adopting Appendix L-1001-h	Link	Comprehensive rule

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BANKRUPTCY MEDIATION RULES AND POLICIES (AS OF 10/26/22)

Bankruptcy Court	Local Rule	Rule	Notes
Sixth Circuit			
Eastern District of Kentucky	LBR 9019-1	Link	
Western District of Kentucky	--	--	None
Eastern District of Michigan	LBR 7016-2	Link	
Western District of Michigan	LBR 9019-(1-20)	Link	Includes LBR 9019-5: Pro Bono Mediations
Northern District of Ohio	LBR 9019-2	Link	(Governed by L. Civil R. 16.4 – 16.7)
Southern District of Ohio	LBR 9019-2	Link	
Eastern District of Tennessee	LBR 9019-2	Link	
Middle District of Tennessee	LBR 9019-2	Link	
Western District of Tennessee	LBR 9019-1	Link	
Seventh Circuit			
Central District of Illinois	District Court Rule 16.4	Link	
Northern District of Illinois	LBR 9060-1	Link	
Southern District of Illinois	--	--	None
Northern District of Indiana	LBR 9019-2	Link	
Southern District of Indiana	LBR 9019-2	Link	
Eastern District of Wisconsin	--	Link	Per website "A committee of judges and attorneys is exploring the creation of a formal mediation program for adversary proceedings and contested matters."
Western District of Wisconsin	--	--	None. Conducts Mortgage Modification Mediation

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BANKRUPTCY MEDIATION RULES AND POLICIES (AS OF 10/26/22)

Bankruptcy Court	Local Rule	Rule	Notes
Eighth Circuit			
Eastern District of Arkansas	--	--	None
Western District of Arkansas	--	--	None
Northern District of Iowa	District Court LR 72B	Link	Not discussed in Br. Local Rules; Mentions B. Ct. in Dist. Ct. Local Rules
Southern District of Iowa	District Court LR 72B	Link	Not discussed in Br. Local Rules; Mentions B. Ct. in Dist. Ct. Local Rules
District of Minnesota	LBR 9019-2	Link	
Eastern District of Missouri	LBR 9019	Link	
Western District of Missouri	District Court LR 16.4	Link	Implemented Mediation and Assessment Program (MAP) in 2019 – includes Bankruptcy
District of Nebraska	LBR 7016-1	Link	
District of North Dakota	LBR 7016-2	Link	Adopts District Court Local Rule 16.2
District of South Dakota	--	--	None
Ninth Circuit			
District of Alaska	LBR 1001	Link	Adopts District Court Local Rule 16.2
District of Arizona	LBR 9072 (1-9)	Link	
Central District of California	LBR Appendix III	Link	General B. Website includes guidance on Bankruptcy Mediation Program
Eastern District of California	General Order 95-01 - Adoption of Mediation Program for Bankruptcy Cases and Adversary Proceedings	Link	
Northern District of California	LBR 9040 through LBR 9050	Link	
Southern District of California	LBR 7016-3; 7016-11	Link	
District of Guam	--	--	None
District of Hawaii	LBR 9019-2	Link	
District of Idaho	District Court Rule 16.4	Link	

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BANKRUPTCY MEDIATION RULES AND POLICIES (AS OF 10/26/22)

Bankruptcy Court	Local Rule	Rule	Notes
District of Montana	LBR 9019-1	Link	See Mont. LBR 9014-1 for ADR application
District of Nevada	LBR 9019	Link	
District of Northern Mariana Islands	LBR 9019-2	Link	Adopts District Court Local Rule 16.4
District of Oregon	LBR 9019-1	Link	
Eastern District of Washington	LBR 9019-2	Link	
Western District of Washington	LBR 9040 through LBR 9050	Link	Honorable Thomas T. Glover Mediation Program
Tenth Circuit			
District of Colorado	LBR 9019-2	Link	
District of Kansas	LBR 9019-2	Link	
District of New Mexico	Mediation Order	Link	Implements Mediation Order in certain cases
Eastern District of Oklahoma	LBR 9019-2	Link	
Northern District of Oklahoma	LBR 9019-2	Link	
Western District of Oklahoma	LBR 7016(f)	Link	
District of Utah	LBR 9019-2	Link	
District of Wyoming	LBR 9019-2	Link	

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BANKRUPTCY MEDIATION RULES AND POLICIES (AS OF 10/26/22)

Bankruptcy Court	Local Rule	Rule	Notes
Eleventh Circuit			
Middle District of Alabama	--	--	None
Northern District of Alabama	--	--	None
Southern District of Alabama	--	--	None
Middle District of Florida	LBR 9019-2	Link	
Northern District of Florida	LBR 7016-1	Link	
Southern District of Florida	LBR 9019-2	Link	
Middle District of Georgia	Mediation Procedures	Link	
Northern District of Georgia	Mediation Procedures	Link	
Southern District of Georgia	--	--	None
D.C. Circuit			
District of Columbia	LBR 9019-2	Link	

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BENEFITS OF MEDIATION IN COMPLEX CASES

- Mediation in bankruptcy will ideally create a pool of assets to satisfy claims, and provides a clear alternative to a “race to the courthouse” scenario that bankruptcy seeks to avoid.
- Mediation can help resolve complex insurance coverage disputes such as late notice, number of occurrences, and “expected or intended” issues.
- Mediation can be especially relevant in bankruptcy cases with significant tort claims, which can’t be addressed directly by bankruptcy courts. 28 U.S.C. 157(b)(5) provides:
 - “The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.”

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HISTORICAL RESOLUTION OF CLAIMS IN MASS TORT CASES

- Resolution of far-ranging, numerous tort claims through the bankruptcy process began with asbestos litigation. Over 700,000 asbestos personal injury and wrongful death claims were filed against over 80 asbestos firms from the mid-1980s through the early 2000s (See RAND INSTITUTE, ASBESTOS LITIGATION, at xxiv (2005)).]
- Since that time, non-asbestos mass tort cases have charted similar paths toward a global resolution for claim resolution.
- Some form of mediation or active judicial participation in the settlement of issues between the various constituents has been used to resolve a diverse collection of mass tort issues:
 - Pharmaceuticals (*Mallinckrodt PLC, Purdue Pharma*)
 - Silicon implant cases (*Dow Corning*)
 - Dalkon Shield (*A.H. Robins, Inc.*)

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PROS AND CONS OF BANKRUPTCY MEDIATION IN ABUSE CASES

- The automatic stay creates a pause in litigation that may allow for a global resolution.
- Claims have common threshold liability issues and differences in claims can be addressed through a claims administration process.
- Avoid expensive insurance coverage litigation involving numerous insurers across many coverage years.

However:

- Abuse claimants seeking jury trials and individual court actions – due process concerns.
- Aggregating claims may create a pressure to settle for more meritorious claims while creating a low bar to asserting claims and create a danger of false or unsupportable claims.

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PARTIES TO MEDIATION – WHO SHOULD BE AT THE NEGOTIATING TABLE?

- The concept of mediation between all of the parties at the same time, or several subsets of the groups below (sometimes referred to as “co-mediation”) should be carefully considered.
- Mediation should include:
 - Debtor/Diocese
 - Official Committee of Unsecured Creditors
 - The abuse claimant committee, if separately organized.
 - Insurers
 - Parishes or other non-debtor entities named in abuse claims.
- Should mediation be overseen by more than one mediator? If so, how will each mediator’s duties be defined?

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TIMING OF MEDIATION

- Prior to bankruptcy – as part of a pre-arranged or prepack plan.
- During the initial stages of the case, to facilitate a stay of actions against related parties and additional insureds.
- After the claims bar date when the universe of claims is known.
- At the plan stage, to address releases, the treatment of non-debtor entities and to determine procedures for claims administration.



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WHAT ISSUES CAN BE SETTLED THROUGH MEDIATION?

- Availability of insurance proceeds.
- Total amount available for distribution to claimants.
- Clawback actions.
- Property of the estate issues.
- Abuse claim administration procedure.
- Parish and other entity contribution.
- Non-debtor releases.
- Insurance neutrality.
- Non-monetary provisions such as policies and procedures to prevent future tort claims.

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| SCOPE OF MEDIATION PRIVILEGE

- Confidentiality of mediation communications and information is essential to its validity and effectiveness.
- It promotes a candid flow of information that informs the mediator of issues and concerns which, if resolved, could lead to settlement.
- However, parties' positions may change during and as a result of a failed or abandoned mediation, and information freely given during mediation may become useful in later stages of litigation of outstanding issues.
- Most local rules make clear that 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.
- According to the BSA court "mediation doesn't clo[a]k discovery and information that is, otherwise discoverable just because you also put it into the mediation process or communicated information you have to the mediator or other parties."

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| MEDIATION STRATEGIES

- Is there a way that Bankruptcy Courts can be involved either at the outset of mediation or later in the process to motivate parties to settle?
- How do you facilitate productive conversation rather than arguing?
- In some instances having more than one mediator through the process (either to deal with separate issues or settlement between different constituents) may facilitate the process
- How to best staff the mediation and structure the discussions to make progress instead of restating entrenched positions?
- How to build some sense of urgency to get things done?

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MEDIATION LOGISTICS OR SUBSTANTIVE DECISIONS?

- Many issues may appear like logistical issues but may have a real impact on the parties' ability to settle:
 - In-person or by Zoom?
 - Inclusion of Committee members participating individually and not through counsel
 - Will the parties meet in one room or be separated?
 - Will opening statements be permitted?
 - Is there a defined time frame or other way to incentivize parties to move quickly to a resolution?
- How much of this should be defined and decided by the parties at the outset or controlled by the mediator during the mediation process?

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MEDIATION ORDER COMPONENTS

- The Bankruptcy Court may enter an order commencing mediation that could be used by the parties to address some of the issues outlined above.
- Mediation orders may contain a recitation of the mediation privilege and boundaries of what information can and cannot be used in subsequent litigation.
- Order may include the designation of one or more mediator and the details of the mediator(s)' engagement.
- Order may include specifications on how the mediation is to be conducted (by zoom, in person, locations).
- Order may also contain a timeline and litigation deadlines that will be necessary if mediation isn't concluded by a time certain.

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CONSEQUENCES OF THE FAILURE OF MEDIATION

- Parties may seek to have the Court estimate claims for plan voting and other purposes. See, e.g., *In re Eagle-Picher Indus., Inc.*, 189 B.R. 681, 687–88 (Bankr. S.D. Ohio 1995).
- Some claimants may seek relief to allow them to litigate individual claims (most recently, in the chapter 11 case *In re The Diocese of Rochester*, Bankr. W.D.N.Y. 19-20905).
- Drawn-out insurance litigation for each policy year may create grossly unequal outcomes for claimants.

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QUESTIONS

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Judge Carey joined the firm following his time on the U.S. Bankruptcy Court, District of Delaware, where he earned a reputation as one of the nation's top bankruptcy judges. Having overseen cases worth billions of dollars with wide-ranging implications, he serves as an important resource in the role of fiduciary during multinational proceedings. Judge Carey is the current President-Elect of the American Bankruptcy Institute.

Judge Carey previously served as U.S. Bankruptcy Judge for the Eastern District of Pennsylvania from 2001 to 2005, when he was appointed to the U.S. Bankruptcy Court, District of Delaware. 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 confirmation issues, and presided over high-profile cases including Exide Technologies, Tribune Co., and New Century Financial.

He is a fellow of the American College of Bankruptcy, sits on the Executive Committee of the Board of Directors of the American Bankruptcy Institute, and serves as Vice President of Membership. He is a member of the International Insolvency Institute, and was the first judge to serve as global chair of the Turnaround Management Association. He lectures worldwide on bankruptcy issues. Judge Carey is also a contributing author to Collier on Bankruptcy, the leading treatise on U.S. bankruptcy law.

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Derek regularly works with debtors-in-possession (DIP), DIP and exit financing lenders, as well as outside and inside counsel, turnaround professionals, independent and special committees of directors, crisis management firms, and investment and non-investment bank professionals. His recent client representations include the Boy Scouts of America, John Varvatos Enterprises, Grupo AeroMexico, Papa Gino's, AT&T Inc., General Motors Corporation, Philips International, Viacom Inc., TD Bank, and Nortel Networks. He has also served as Chapter 11 Trustee and Chapter 7 Trustee of Tough Mudder. Derek frequently serves as a mediator in matters related to insolvency and distressed businesses, including both adversary proceedings and case-dispositive matters. In addition, Derek has served as an expert witness in matters involving restructuring and bankruptcy matters both domestically and internationally.

Derek is a graduate of the US Military Academy at West Point. He has made the honor, leadership, and discipline that are the hallmarks of that institution the cornerstones of his professional career. In 2016, he was invited to join the 28th Class of Fellows of the American College of Bankruptcy. In 2018, he was presented the Delaware State Bar Association's Access to Justice Commitment Award, recognizing his sterling commitment to pro bono work throughout his career. He was also the recipient of the 2011 Caleb R. Layton III Service Award, given by the judges of the U.S. District and Bankruptcy Courts for the District of Delaware to an attorney who personifies the qualities of a federal practitioner: legal acumen, professional decorum, and public service. Derek's Delaware community activities are frequent and diverse ranging from assisting the Delaware Legal Services Community with fundraising activities, to serving as legal counsel for a variety of indigent clients through Delaware Volunteer Legal Services. He chairs the Morris Nichols pro bono committee and sits on the firm's recruiting committee.

He frequently presents before national and Delaware bar associations, bankruptcy organizations and other business and professional audiences. His client and peer recommendations are numerous and have resulted in his recognition by *Chambers USA: Guide to America's Leading Lawyers for Business*.

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Sara Temes is a member of Bond Schoeneck & King, PLLC in its Syracuse, New York office. She focuses her practice on a wide range of restructuring matters throughout New York State, including out-of-court workouts, cross-border insolvency cases and representations of debtors, creditors, creditors' committees, secured lenders, landlords and purchasers in litigation and insolvency matters. She also advises senior managers and boards of directors of financially troubled companies with respect to turnaround strategies. Ms. Temes has been recognized by Super Lawyers in the area of business bankruptcy in 2019, 2020, 2021 and 2022 and as a "Rising Star" in 2017 and 2018. She serves on the Local Bankruptcy Rules Standing Committee for the United States Bankruptcy Court for the Northern District of New York. Prior to joining Bond, Schoeneck & King, she was an associate at Weil, Gotshal & Manges LLP in New York, New York. Ms. Temes received her B.A. from Wellesley College and her J.D. from the University of Pennsylvania Law School.

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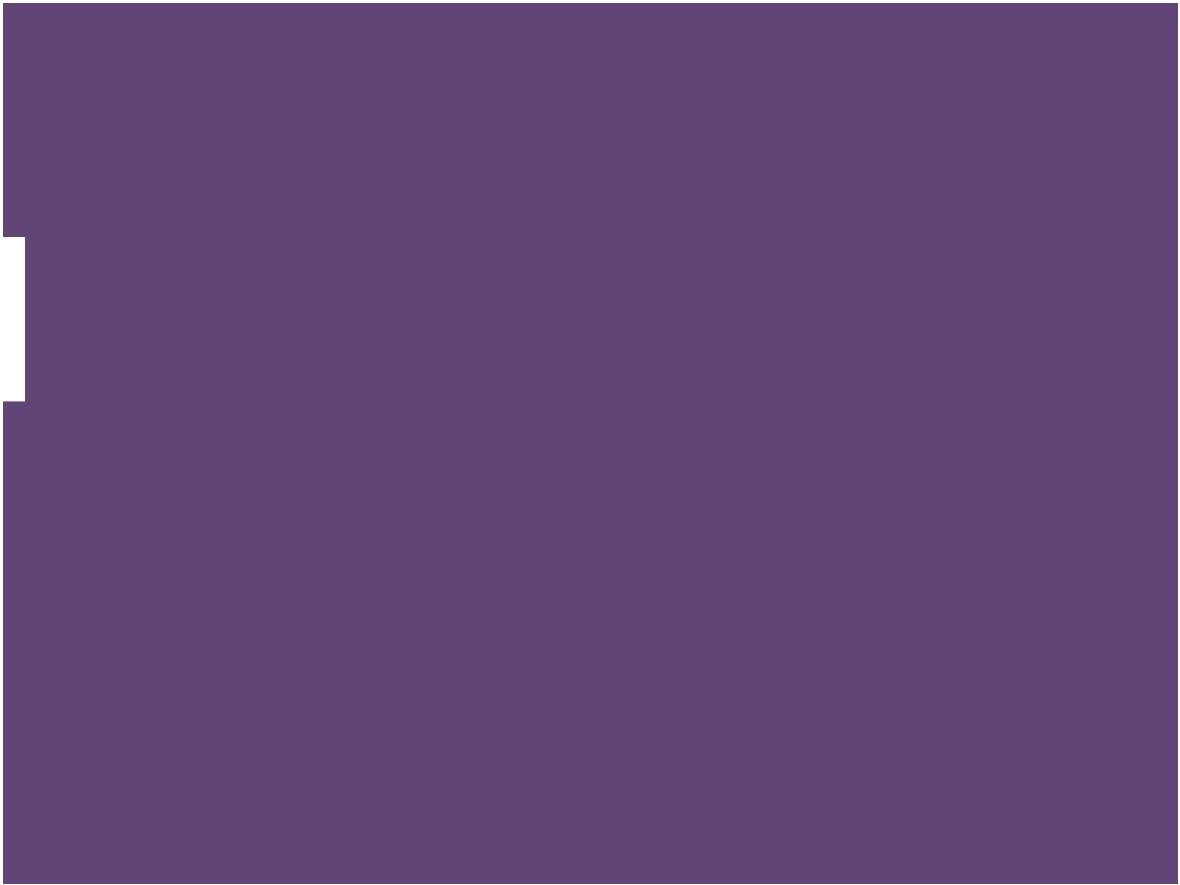


In times of crisis, companies and their stakeholders turn to Brent Weisenberg to identify and implement innovative solutions in order to solve critical business problems. Brent regularly advises businesses and their constituencies throughout periods of financial challenge and other special situations such as the negotiation and implementation of complex commercial transactions, the acquisition and disposition of distressed assets, and the prosecution and defense of complex commercial litigation.

Brent has particular experience counseling official and unofficial committees across a wide array of industries, including retail, real estate, construction, hospitality, telecommunications, manufacturing, and technology. He has served as counsel to the official creditors' committee in such widely known bankruptcies and restructurings as Century 21 Department Stores LLC, General Nutrition Centers, Inc., Modell's Sporting Goods, Big M (dba Mandeas, Annie Sez, and Afaze), Ritz Camera I and II, Signature Styles (dba Spiegel, Newport News, and ShapeFx), Orchard Brands, Steve & Barry's, The Sharper Image, Princeton Ski Shops, Montgomery Ward, CompUSA, and Footstar.

Additionally, Brent has been a member of the board of directors for several nonprofits, including Commonpoint Queens, one of the borough's largest social service agencies. As a director for the agency, Brent has helped to further its mission with pragmatic problem-solving skills and by building consensus among diverse stakeholders.

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Faculty

Derek C. Abbott is a partner with Morris, Nichols, Arsht & Tunnell LLP in Wilmington, Del., and a member of its Business Reorganization & Restructuring Group. He also chairs the firm's *pro bono* committee and sits on the Firm's recruiting committee. Mr. Abbott has represented *Fortune 1000*, local, international and other organizations as lead or Delaware counsel in bankruptcy proceedings and litigation on behalf of debtors, creditors, official and *ad hoc* committees and transactional case constituents. He regularly works with debtors in possession and exit-financing lenders, as well as outside and inside counsel, turnaround professionals, crisis-management firms, and investment and non-investment bank professionals. His recent client representations include AT&T Inc., General Motors Corp., Quality Care Properties, Philips International, Viacom Inc., TD Bank and Nortel Networks. Mr. Abbott has been recognized by *Chambers USA*, *The Best Lawyers in America*, *Law & Politics* magazine and *Delaware Super Lawyers*. In 2011, he received the Caleb R. Layton III Service Award, presented by the judges of the U.S. District and Bankruptcy Courts for the District of Delaware. Mr. Abbott is a member of the American and Delaware State Bar Associations, Turnaround Management Association and ABI, and is a frequent speaker. He also serves as legal counsel for a variety of indigent clients through Delaware Volunteer Legal Services. Mr. Abbott received his B.S. in human factors psychology in 1987 from the U.S. Military Academy and his J.D. with honors from the University of North Carolina School of Law in 1995, where he was an editor of the *North Carolina Law Review*.

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.

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