Mediation/Bankruptcy Litigation

War and Peace: Recent Trends and Developments in Bankruptcy Litigation and Mediation

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COMMITTEE EDUCATIONAL SESSION

2016

WAR AND PEACE: RECENT TRENDS AND DEVELOPMENTS IN BANKRUPTCY LITIGATION AND MEDIATION

Friday, April 15, 2016
10:00-11:00 a.m.

Speakers:
Honorable Gregg W. Zive
United States Bankruptcy Court for the District of Nevada

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I. Introduction of Panelists

II. Overview of Mediation

Panelists will discuss the mediation process generally. This discussion will include an analysis of the various styles of mediation and when they may or may not be effective.

A copy of the "ABI Mediation Committee's Model Guidelines for Mediation in Bankruptcy Cases", released in the spring of 2015, is attached as **Addendum 1**. Two comprehensive Model Rules have been drafted. The first rule addresses the procedures governing the mediation itself. The second Rule governs the process of appointing a mediator.

III. The Role of Mediation in Bankruptcy and Related Litigation

A. Candidates for Mediation

Mediation may be useful for the resolution of a variety of disputes such as:

1. Avoidance actions, including preference recoveries;
2. Disputes regarding claims;
3. Disputes over assets;
4. Valuation disputes;
5. Confirmation issues, including cram down; and
6. Post confirmation litigation.

Panelists will discuss the use of mediation in these contexts and others and will consider the following issues, among others:

1. Why parties may choose to mediate;
2. Selecting a mediator;

a. Qualities of a good mediator

b. Judge as mediator

c. Knowledge of special matters at issue

B. The Increasing Role of Mediation in Bankruptcy and Recent Cases

Mediation is playing an ever increasing role in both consumer and business bankruptcy cases. In April of 2014, for example, the Bankruptcy Court for the Middle District of Florida adopted a uniform Mortgage Modification Mediation ("MMM") program that is applicable to all debtors in all chapters of bankruptcy and for any type of real property. The new MMM expanded the scope of loans that can be compelled to mediation to include investment properties, whereas the prior program had included only homestead properties. Under this program the debtor may request mediation through the MMM program. Provided the request is timely made, the request will be granted and the parties will be sent to mediation absent a showing by the lender of "good cause" for the request to be denied.

The prevalence of mediation in bankruptcy is highlighted in the Chapter 11 bankruptcy case of Caesars Entertainment, filed in the Northern District of Illinois on January 15, 2015 (Case No.15-01145). On February 3, 2016, debtors filed Debtors' Motion for the Entry of an Order Approving Appointment of a Mediator to Mediate Issues Related to the Chapter 11 Plan of Reorganization, seeking the appointment of a mediator to mediate issues related to the debtors' proposed plan of reorganization.

The Motion states that mediation "has been the successful path in other large chapter 11 cases" and cites several examples of cases in which mediation was utilized as a tool to successfully confirming a plan of reorganization. These examples include:

- *In re Quiksilver, Inc.*, Case No. 15-11880 (Delaware);
- In re LightSquared Inc., Case No. 12-12080 (S.D.N.Y.);
- In re Longview Power, LLC., Case No. 13-12211 (Delaware); and
- *In re Cengage Learning, Inc.*, Case No. 13-44106 (S.D.N.Y.).

Panelists will discuss these bankruptcy cases and others in which mediation has been utilized.

C. Mediation and Municipal Bankruptcy

Mediation has also been utilized in the context of municipal bankruptcies. In the bankruptcy case of Detroit, for example, mediation is viewed as having been crucial to the speedy and efficient resolution of key disputes. In fact, Judge Gerald E. Rosen and Eugene Driker, mediators in the Detroit bankruptcy case, published an article in the Detroit Free Press on January 18, 2015 entitled, "Detroit Bankruptcy Shows Mediation Can Get the Job Done", touting the benefits of mediation.

Although mediation can be effective, there are potential challenges and conflicting interests to be considered, particularly in the context of municipal bankruptcies. Among these issues include:

- How can the "closed-door", confidential nature of mediation be reconciled with Open Meeting and Sunshine Laws?
- A key component to mediation generally is that parties must come to the mediation with the ability to give final settlement approval in the event an agreement is reached. For municipalities, however, settlement authority is typically subject to approval by the relevant governing body. How might this distinction impact the efficacy of mediation in municipal cases?

The panelists will discuss municipal cases in which mediation has been utilized and will discuss some of the unique challenges that arise in municipal cases.

IV. Ethics in Mediation

Ethical behavior is important, regardless of whether a dispute is litigated or resolved through mediation. Panelists will discuss ethical considerations in the context of mediation. Attached as **Addendum 2** is a bullet point outline of issues to consider with respect to ethics in mediation.

V. Tips and Insights for Counsel in Mediation

Panelists will share insights from the perspective of seasoned mediators and attorneys experienced in mediation. Attached as **Addendum 3** is a collection of tips for a successful mediation.

VI. Question & Answer and Conclusion

ADDENDUM 1

ABI Mediation Committee's Model Guidelines for Mediation in Bankruptcy Cases

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

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.

ADDENDUM 2

Ethics in Mediation for the Advocate and Mediator

1. Negotiating Ethics for a Party Advocate
    a) Sources of Guidance
        - ABA Model Rules
        - Formal Opinions
        - Restatement (3rd) of the Law Governing Lawyers
        - ABA Litigation Section 2002 Guidelines
    b) Areas of Focus
        - Settlement authority
        - Initiation of settlement discussions
        - Duty to communicate offers
        - Duty of confidentiality
        - Threats of criminal prosecution
        - False statements
        - Failure to disclose
        - Barring counsel from similar cases
        - Representing multiple clients in settlement
        - Aggregate settlements
        - Settlement of lawyer's fee
        - Drafting settlement agreement

2. Mediator Standards of Conduct
    a) Sources of Guidance
        - Local Rules
        - Model Standards of Conduct
        - CPR Model Rule
        - Formal ethics opinions
    b) Areas of Focus
        - Party self-determination
        - Conflicts and disclosure

- Confidentiality
- Impartiality
- Competence
- Arbitrator of same dispute
- Evaluative mediation style
- Drafting settlement documents
- Mediator compensation
- Post-mediation conflicts
- Ethics in marketing

ADDENDUM 3

Tips for a Successful Mediation

Given the steady increase in the use of mediation as a means to resolving disputes, how might counsel to the parties help increase the likelihood of success in mediation? If the ultimate goal is to resolve the dispute through mediation, foresight and planning can help to better ensure a negotiated resolution. The suggestions below are aimed at increasing the effectiveness of the mediation process.

A. Preparation/Planning

- Know the elements of the claims and/or defenses and be prepared to present them
- Just as you should never attend court unprepared, always be fully prepared for mediation
- Know your mediator and consider the arguments he or she might find compelling or, conversely, troubling
- Consider for strategic purposes, the points you may or may not want to focus on in the mediation
- Talk through with the client the settlement outcomes that are realistic, in light of the law and the facts
- Talk through with the client the possible expected and possible outcomes in the event the case is not settled
- Identify primary and secondary goals

B. Conduct at the Mediation

- Do not underestimate the importance of the presentation of your position in joint session
- Remember that your client, opposing counsel, opposing party and the mediator likely have different objectives and perspectives and that planning an effective presentation requires consideration of those different interests.
- As you should in court, state your position clearly and succinctly
- Be prepared to discuss key pieces of evidence (whether contrary to or supportive of your position)
- Avoid using inflammatory language (particularly in front of the opposing party) and encourage your client to do the same

- When possible, utilize both the joint sessions with the opposing party and your caucus sessions with the mediator to learn more about the opposing party's position and acceptable outcome – Listening is key
- The waiting game – There can be a lot of "down-time" in mediation, particularly when multiple parties are involved. Be patient and encourage your client to do the same

C. Argument/Persuasion

- Remember that mediation is not a trial; attempting to litigate to victory should not be the approach
- Do not read your presentation; maintain eye contact with the mediator and opposing party; take note of and/or respond to facial reactions, when appropriate
- Tie the facts and law together
- Respond to questions from the mediator and, as appropriate, to questions from the opposing party

D. Use of Technology

- Become familiar with the technology that will be available and be prepared to use technology to your advantage
- Consider the benefits of demonstrative charts, graphs, etc.
- Consider highlighting the essential sections of exhibits