AMERICAN BANKRUPTCY INSTITUTE

Northeast Bankruptcy Conference and Consumer Forum

So You Think You Can Mediate: A Guide to Upping Your Game

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CONCURRENT SESSION

2022

ABI Northeast Conference Mediation Program
July 15, 2022
Selected Advanced Mediation Issues

A. Pre-Session Issues

What are the considerations for choice of a sitting judge vs. a private mediator?
What connections of the mediator must be disclosed?
What provisions in a mediation agreement or court order of referral should be used to protect a mediator from subpoena or suit? Is there judicial immunity for a sitting judge mediator?

B. Session Issues

1. Information Gaps

How does a mediator deal with information gaps ?
Timing of Mediation – different options
Factual issues; valuation issues
Legal issues – misunderstanding or ignorance of law
Assertion of financial inability to pay by one party

2. Unreasonableness/Disruption

How does a mediator handle unreasonable or disruptive behavior during the session ?
Lawyer misconduct or acting unreasonably, insistence on legal arguments, or frivolous or unmeritorious arguments; client unruly behavior; misunderstandings
Attorney/Client rift – differing views on outcome

3. Breaking Impasse

How does a mediator avoid or overcome an impasse to settlement ?
How does a mediator determine what is blocking settlement (positions vs. interests) ?
Techniques and strategies for breaking impasse; dispelling myths of evil, symmetry in concessions issue; positivity and agreement on nonessential issues; fee and delay projections; risk aversion; finality
Discussions without lawyers or without clients
Perspective bias and optimism bias
Mediator's proposals

C. Post-Session Issues

When is there a definitive settlement ? Is documentation necessary to bind the parties? If so, what documents are necessary?
Fed. R. Bankr. B. 9019 approval issues - range of reasonableness standard; scope of releases; what is the mediator's role in post-session issues?
Remedies for refusing to consummate a mediated settlement – who decides? Bad faith participation; (court ordered remedies; any role for mediator?)

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).

Model Rule 1
Mediation

(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.

AMERICAN BANKRUPTCY INSTITUTE

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MEDIATION IN BANKRUPTCY CASES -- A MEDIATOR'S PERSPECTIVE

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MEDIATION IN BANKRUPTCY CASES -- A MEDIATOR'S PERSPECTIVE

A. Overview of Mediation

Mediation may be generally defined as the "intervention in a negotiation or a conflict of an acceptable third party who has limited or no authoritative decision-making power, who assists the involved parties to voluntarily reach a mutually acceptable settlement of the issues in dispute." *See* Christopher W. Moore, The Mediation Process -- Practical Strategies for Resolving Conflict at 15 (3d ed. Jossey Bass 2003).

B. Overview of Law and Some Applicable Rules

1. Alternative Dispute Resolution Act of 1998, 28 U.S.C. § 651 *et seq.* (the "Act")

   (a) Requires each United States district court to authorize, by local rule, the use of alternative dispute resolution processes "in all civil actions, including adversary proceedings in bankruptcy," and to devise and implement its own alternative dispute resolution program, in order "to encourage and promote the use of alternative dispute resolution in its district." 28 U.S.C. § 651(b).

   (b) Each district court is also directed to require that litigants "in all civil cases" consider the use of an alternative dispute resolution process "at an appropriate stage in the litigation." 28 U.S.C. § 652(a).

   (c) Each district court that authorizes the use of ADR processes is required to adopt "appropriate processes for making neutrals available for use by the parties for each category of process offered" and to promulgate its "own procedures and criteria for the selection of neutrals on its panels," each of whom should be "qualified and trained to serve as a neutral" in the appropriate ADR process. 28 U.S.C. § 653(a) & (b).

2. Local Bankruptcy Court Rules, e.g.:

   (a) Local rules for the United States Bankruptcy Court for the District of Delaware, effective February 1, 2010 ("Delaware Local Rules").

   (b) Local Rules of the United States Bankruptcy Court for the Southern District of Florida ("S.D. Fla. Local Rules").

   (c) Alternative Dispute Resolution Rule 9019-1 of the United States Bankruptcy Court for the Southern District of New York, and General Order M-390, last revised and effective December 1, 2009 ("S.D.N.Y. Local Rules");

   (d) Second Amended General Order No. 95-01 (Adoption of Mediation Program for Bankruptcy Cases and Adversary Proceedings) of the United States

Bankruptcy Court for the Central District of California, filed August 24, 1999 ("C.D. Cal. Local Rules");

(e) Local Rules of the United States Bankruptcy Court for the Northern District of Illinois, adopted December 1, 2008 ("N.D. Ill. Local Rules");

(f) Local Bankruptcy Rules of the United States Bankruptcy Court for the Northern District of Texas ("N.D. Tex. Local Rules").

7. Rules and procedures of a dispute resolution service provider, e.g., Commercial Arbitration Rules and Mediation Procedures of the American Arbitration Association (effective June 1, 2009) ("AAA Mediation Rules and Procedures") which deal with, among other things, confidentiality, conflicts of interest, mediator responsibilities, mediator exoneration from liability, and cost-sharing by the parties).

C. Why Mediate?

1. Parties may be directed to do so by the bankruptcy court;

2. Parties may recognize the potential benefits of mediation because:

(a) The success rate for voluntary mediations is high;

(b) A mediation effort, even if unsuccessful at the end of the mediation conference, may pave the way for a later settlement;

(c) Mediation can provide a useful understanding of the other party's assessment of its own case;

(d) Mediation can provide an attorney's client with a neutral evaluation by a court-appointed or party-selected mediator; and

(e) The process of mediation forces parties to consider the merits of their case, the cost of proceeding with litigation, the downside of an adverse ruling and the time delay in implementing a result that would otherwise be in the control of the parties.

D. Candidates for Mediation in Bankruptcy Cases

The areas in which mediation may be useful in the resolution of disputes are many, but will often include the following:

1. Avoidance actions, including preference recoveries;

2. Disputes regarding claims, including:

(a) Objections to claims;

(b) Estimation of claims; and

(c) Equitable or statutory subordination of claims.

3. Disputes over assets, including:

(a) Asset ownership issues; and

(b) Nature, extent and priority of liens.

4. Valuation issues, including:

(a) Valuation of a going concern enterprise;

(b) Valuation of specific collateral; and

(c) Liquidation value for purposes of "best interest of creditors" test.

5. Confirmation issues, including cram downs.

6. Post-confirmation litigation, including:

(a) Professional malpractice claims;

(b) D&O claims;

(c) Avoidance claims; and

(d) Other civil litigation matters.

By local rule in the Delaware Bankruptcy Court, all adversary proceedings filed in a chapter 11 case and, in all other cases, all adversaries that include a claim for relief to avoid a preferential transfer, are referred to mandatory mediation unless otherwise ordered by the court. Parties to an adversary proceeding or contested matter may also stipulate mediation, but that stipulation is subject to court approval. See Delaware Local Rule 9019-5(a).

E. Potential Barriers to Successful Mediation

1. The following are some potential barriers that may make a successful mediation more difficult:

(a) The mediation is commenced too early in the process, before the parties have fully understood the nature and extent of the claims and counterclaims, as well as the underlying facts.

(b) One or more parties desires to overturn an adverse ruling in the bankruptcy court or to establish a favorable precedent.

(c) A party is negotiating from a position of "principle" rather than economics.

(d) There are multiple, complex issues involved, requiring significant assessment and analysis;

(e) There are numerous parties involved in the mediation with conflicting interests;

(f) There is substantial inequality of bargaining power;

(g) The parties and/or their respective legal counsel are inexperienced, or lack significant skills, in negotiating;

(h) Delay works to the advantage of a party;

(i) The stakes are high and neither party can afford to "lose";

(j) The decision maker for one party needs to "save face" within his or her organization; and

(k) There are looming deadlines that are known to affect one party more than another, such as the running of statutes of limitation, trial dates, response dates for dispositive motions, or other deadlines in the bankruptcy case (such as plan exclusivity, expiry dates and deadlines for rejection or assumption of contracts or leases).

> Note: Most local rules provide that the pendency of a mediation of a dispute does not stay or delay discovery, pre-trial hearing dates, or trials schedules unless otherwise ordered by the bankruptcy court. See, e.g., N.D. Ill. Local Rule 9019-3(A).

(l) Fear or anger in a party clouds thinking:

- Fearful people often have pessimistic risk assessment, make risk-averse choices, feel vulnerable and not in control;
- Angry people often express unduly optimistic risk assessments and risk-seeking choices;
- Expressions of anger lower the resolution rate in a mediation, in part because anger expressed by one party begets an angry response from the opposing party.

(m) Other psychological barriers:

- The "optimism bias"
- Ego issues
  - ego wrapped up in the case

- wounded pride as a reaction to conflict
- feeling of being treated disrespectfully
- recognition of imperfection of self (my side represents "the forces of light" and their side epitomizes the "forces of evil and darkness")

2. On occasion, a perceived barrier, such as a looming deadline, may actually facilitate a settlement.

F. Selecting the Mediator

1. Selection by parties:

   (a) From a service provider (such as the American Arbitration Association or JAMS); or

   (b) From a roster provided by a court.

   > Note: By local rule, most bankruptcy courts maintain a roster of eligible, qualified mediators. See, e.g., C.D. Cal. Local Rule 3.0; Delaware Local Rule 9019-2(a); S.D. Fla. Local Rule 9019-2(A)(1).

2. By court appointment, pursuant to local rule or on court's own initiative.

3. Qualities of a good mediator:

   (a) Patience and duty.

   (b) Stamina.

   (c) Creativity.

   (d) Persistence ("never give up" attitude).

   (e) Reputation for integrity.

   (f) Reputation for impartiality.

   (g) Training and experience as a mediator.

   (h) Interpersonal skills.

   (i) Negotiating skills.

   (j) Analytical skills.

   (k) Listening skills.

(i) Communication skills.

(ii) Knowledge of bankruptcy law and other legal principles applicable to the dispute;

(iii) Empathy and sincerity; and

(iv) Understanding of human nature.

4. Bankruptcy judge as mediator.

(a) If the bankruptcy judge does not preside over the case or dispute in question, the judge (depending upon training, experience and perception by the parties) can be an effective facilitator for dispute resolution. *See, e.g.*, N.D. IL Local Rule 83.10.1(c) (contemplating that a sitting bankruptcy judge may mediate a case assigned to another sitting bankruptcy judge).

> Note: Section 658(b) of the Act provides that the district court may use, "among others, magistrate judges who have been trained to serve as neutrals in alternative dispute resolution processes, professional neutrals from the private sector, and persons who have been trained to serve as neutrals in alternative dispute resolution processes," which suggests that, even if a bankruptcy judge is to serve as a mediator, the judge should be qualified to act in that capacity by virtue of training to serve as a mediator or neutral.

(b) If the bankruptcy judge does preside over the case or dispute in question, the judge's service as a mediator may present problems, including:

- concern by a party that the judge may view the party's refusal to accept an offer as "unreasonable" and therefore "hold it against" that party in a later adjudicative setting;
- understandable disinclination of the bankruptcy judge to establish a "rapport" with the parties and their counsel;
- reluctance of a party to divulge confidential information, including case assessment and litigation concerns, to the judge as trier of fact of the dispute in the absence of a settlement;
- concern by a party that the bankruptcy judge may be biased against the party as a result of information disclosed to the bankruptcy judge by the other party on a confidential basis and therefore undisclosed to the concerned party; and
- the possibility that the bankruptcy judge, despite making every effort to be uninfluenced in a later adjudicative setting by information

disclosed in the mediation, may be unduly swayed by such information.

5. Non-lawyer as mediator:

(a) Non-lawyers can be effective mediators in bankruptcy cases, particularly in matters relating to valuations (where appraisers or investment bankers may bring needed expertise to the mediation);

(b) The selection of a non-lawyer mediator, however, should take into consideration the individual's experience and training in mediation; and

(c) Non-lawyers are less likely to be effective in mediations where a neutral evaluation of litigation risks will be the primary focus of the mediation.

6. Use of co-mediators

(a) Needed language skills

(b) Industry expertise

(c) Psychologist

7. Party interviews of mediator candidates

(a) Inquiries regarding a candidate's past experience;

(b) Inquiries regarding a candidate's mediation style;

(c) Inquiries regarding a candidate's familiarity with applicable substantive law;

(d) Inquiries regarding potential conflicts; and

(e) References.

C. Mediator Styles

1. Some mediators adopt a facilitative, non-directive style, characterized by the mediator's

(a) Providing procedural assistance to the parties;

(b) Serving as a "facilitator" for ongoing discussions;

(c) Recognizing that the parties can negotiate their own solution, with little intervention by the mediator other than to move the process forward; and

(d) Serving as an "orchestrator" of the process to ensure its fairness and openness

2. Another approach taken by some mediators is the directive approach, characterized by the mediator's:

   (a) Serving as an active "deal maker," with frequent interventions in the process.

   (b) "Trashing and bashing" the parties and counsel to be realistic about their case assessments and prospects of prevailing in litigation. See Alfini, "Trashing, Bashing, and Hashing It Out: Is This the End of 'Good Mediation?'" 19 FLA. ST. U. L. REV. (1991).

      Note: Some counsel purport to prefer a "trasher/basher" mediator, often assuming that the mediator's toughness will be visited primarily upon the other party. However, such counsel may be disappointed if that approach is also directed (if not primarily directed) at counsel who advocated engagement of the trasher/basher mediator.

   (c) Rendering opinions about the controlling principles of law and the ultimate "settlement value" of the case.

      Note: While on occasion such opinions may persuade a party, a party holding a different opinion may resist the mediator's point of view and, indeed, call into question the mediator's impartiality or knowledge and full appreciation of the facts and law.

   (d) Recommending that a party accept another party's settlement offer.

3. Still other mediators strike a balance, serving in a consultative and facilitative role for the most part, but at invitation of the parties, acting as a "neutral evaluator" on specific issues.

4. In all events, the mediator should be mindful of the parties' paramount right to self-determination. See Standard I of Model Standards of Conduct for Mediators (2005), promulgated by the American Arbitration Association, the American Bar Association, and the Association for Conflict Resolution.

II. Types of Bargaining

1. Bargaining based on needs and interests of parties:

   (a) Parties look for ways to satisfy recognized needs and overlapping interests.

   (b) Parties typically can benefit from an ongoing business relationship or have mutual interest in cooperating for the balance of the bankruptcy case (e.g., to obtain confirmation of a plan).

   (c) Parties look for a "win-win" solution to the dispute.

(d) The mediator's role is to facilitate ongoing, open discussions and "brainstorming", and

(e) A non-lawyer mediator may be equally as effective as a lawyer, depending upon the subject matter of the dispute.

2. Positional bargaining:

(a) It's all about the money;

(b) The negotiation involves a "zero sum" game -- one party's gain is another's loss;

(c) The discussion is focused almost exclusively on the "value" of the adversary proceeding, contested matter or other litigation matter;

(d) The mediator's primary role is to assist the parties in their respective risk analyses; and

(e) A lawyer mediator is usually essential.

> Note: For an excellent source regarding mediation of an inherently evaluative negotiation, see J. Anderson Little, Making Money Talk (American Bar Association 2007). For an excellent source on the mediation process generally, but with particular emphasis on the mediation in the context of interest-based bargaining, see Christopher W. Moore, The Mediation Process (3d ed. Jossey-Bass 2003). For an excellent book on negotiating techniques, see Fisher and Ury, Getting to Yes: Negotiating Agreement Without Giving In (New York: Penguin Books, 1983).

I. Confidentiality

1. Pending the adoption by Congress of rules for the confidentiality of mediations under the Act, each district court as created under the Act is to provide, by local rule, for the confidentiality of all ADR resolution processes and to prohibit disclosure of confidential dispute resolution communications. 28 U.S.C. § 652(d).

2. Pursuant to the Act, many local bankruptcy court rules contain confidentiality provisions with respect to mediations. For example, Delaware Local Rule 9019-5(b) provides in part that:

> 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) 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.

See also N.D. Ill. Local Rule 9066-8(A).

3. Settlement conferences in bankruptcy matters are typically protected from disclosure by Rule 408 of the Federal Rules of Evidence, together with any applicable state statutes or common law or judicial precedents relating to the privileged nature of settlement discussions, mediations or other ADR procedures.

4. Information that is otherwise discoverable or admissible in evidence does not become exempt from discovery or inadmissible simply because the information was used by a party in a mediation.

See N.D. Ill. Local Rule 9060-8(B).

5. Confidentiality protections should also extend to discovery from the mediator:

   (a) The mediator normally should obtain a written agreement from the parties and counsel that the mediator will not be subpoenaed to testify as a witness or at discovery depositions and none of the mediator's notes will be the subject of any document production request by any party.

   (b) This would include calling the mediator as a witness to testify on behalf of any party concerning whether or not an agreement in principle was reached at the mediation that another party allegedly seeks to repudiate.

   (c) However, the mediator should be free to file any required reports with the bankruptcy court regarding the status of the mediation effort and any other reports required by local rule.

J. Pre-Mediation Procedures

1. The mediator should contact each party, early on and separately, to:

   (a) Introduce the mediator to such party and such party's counsel;

   (b) Discuss the nature of the dispute;

   (c) Discuss logistics (time, place and number of days allocated to the mediation);

   (d) Discuss mediator compensation and cost-sharing by the parties (which should be reduced to writing) unless the costs of the mediation are otherwise

governed by local bankruptcy rules. See, e.g., N.D. Tex. Local Rule 9019-2 and S.D.N.Y. Local Rule 60 (allowing parties to determine allocation of costs, requiring court approval if the estate is to be charged, and authorizing court to allocate in absence of agreement).

(e) Discuss submission of pre-mediation statements by the parties;

(f) Discuss any pre-conditions a party may have to the mediation (other than a court-ordered mediation), such as production of expert reports, appraisals, damage calculations, or exchange of documents;

(g) Discuss any confidentiality concerns, including trade secret or evidentiary privilege issues;

(h) Discuss perceived "barriers" by a party to a successful mediation and options to eliminate those barriers;

(i) Ascertain whether each party and its counsel have "bought in" to the mediation effort and are committed to bargain "in good faith";

(j) Confirm who will be attending as a representative of that party and confirm that each party representative will have appropriate settlement authority;

> Note: Attendance at the mediation should be mandatory for all parties to the dispute. If the party is not a natural person, the mediation should be attended by a representative who has full authority to negotiate and settle the matter on behalf of such party and, in the case of a governmental entity, a representative who has authority to recommend a settlement to the elected official or legislative body. See Delaware Local Rule 9019-5(c)(iii)(C); N.D. Ill. Local Rule 66(b)(3)(C). Other parties who should be obliged to attend include the attorneys primarily responsible for representing each party in the nonbankruptcy case.

(k) Confirm attendance of other interested parties, including any insurer and a representative of the creditors committee and/or its counsel, who should typically be invited to the mediation; and

(l) Failure to attend the mediation by a person or entity whose attendance is required by local rule or by a bankruptcy court order directing mediation may result in sanctions upon that person or entity. See, e.g., C.D. Cal. Local Rule 7.10 and Delaware Local Rule 9019-5(e)(i)(B).

2. The mediator should prepare for and assist, where necessary, the parties in preparing for the mediation by:

(a) Interviewing the parties, as necessary, to gain information;

(b) Assessing who are the "players" in the mediation (i.e., whether the ultimate decision makers are lawyers, party representatives or insurers);

(c) Gaining an understanding of the applicable principles of law;

(d) Determining the extent to which the parties themselves are fully educated on applicable principles of law and have a common understanding of the facts;

(e) Ascertaining what factual disputes exist;

(f) Gauging the sophistication of the parties and whether there is any significant inequality of bargaining power; and

(g) Determining whether certain documents need to be produced or exchanged by the parties to better inform the parties about matters essential to a settlement, including damage calculations, expert reports, appraisals, projections and financial statements.

Note: Parties to purely financial mediations typically reach stalemate when one party lacks essential information to make an informed decision regarding acceptance of a compromise offer from the other party. Lawyers are characteristically reluctant to provide evidentiary support for their claims or defenses, despite the fact that most of the documents that they would produce in a mediation will ultimately be produced in pre-trial discovery.

3. Most mediators will require the parties to execute a pre-mediation agreement with the mediator pursuant to which, among other things, the parties will agree upon the allocation of mediator compensation (unless otherwise governed by local bankruptcy rule), agree to bargain "in good faith," stipulate that the mediator has no liability arising in connection with the performance of his or her duties as mediator (other than liability for fraud or intentional failure to comply with confidentiality requirements of local bankruptcy rules), agree upon logistics (such as the time and place of the mediation), specify the length and time period for submission of pre-mediation statements, and confirm confidentiality requirements.

4. Pre-mediation statements generally should be required by the mediator (and may be required by local rule; see, e.g., C.D. Cal. Local Rule 7.8).

(a) The pre-mediation statement of each party, together with an exchange of essential documents to understand the nature of the dispute, serve to educate the mediator concerning the facts and applicable principles of law.

(b) Contents of the pre-mediation statement generally should include (and by local rule may be required to include, see, e.g., C.D. Cal. Local Rule 7.8(d)) some or all of the following:

- identification of each party and counsel, as well as identification of party representatives who have settlement authority;
- a description of the dispute and applicable principles of law;
- factual issues the resolution of which may reduce the scope of the dispute or contribute significantly to a settlement;
- a summary of discovery that has been undertaken and additional discovery (including an exchange of documents) that may be needed for a meaningful mediation effort;
- past settlement efforts, including any presently outstanding offers or demands;
- each party's estimate of the time and expense necessary for the completion of discovery, pre-trial motions, retention of expert witnesses, trial preparation and trial;
- a statement of any scheduled dates for the filing of dispositive motions, pre-trial conferences or trial;
- a statement of facts that a party believes are material and not disputed; and
- copies attached to the pre-mediation statement of relevant pleadings and motions, as well as any pre-existing agreements that are central to the dispute.

Note: Although the parties may be disinclined to do so, particularly if the pre-mediation statement is to be exchanged with the other party, it is sometimes helpful to have the parties set on paper their risk assessment, including a summary of the weaknesses of their case. This risk assessment should include an analysis of the probability of winning, the amount of damages that can be recovered in the event of a win, the estimated dollar cost of litigation, the intangible costs of litigation (time of business personnel devoted to litigation), the prospects of recovering anything from the defendant in the event of a win, the time period from commencement of litigation to actual recovery, the present value of the net recovery, and the discounted value of the total recovery based upon probability of success or failure. The non-monetary costs of litigation might include uncertainty, party anxiety, disruption of business focus, loss of business opportunities, regulatory pressures and litigation fatigue.

(c) Confidentiality of pre-mediation statements:

- some mediators and parties believe that a party's pre-mediation statement should not be shared with the other party and should be held in confidence by the mediator so that the party may use the pre-mediation statement as an opportunity to provide otherwise sensitive or confidential information to the mediator;
- other mediators and parties take different positions, consistent with local rules which frequently require an exchange of pre-mediation statements among the parties (see, e.g., Delaware Local Rule 9019-5(e)(iii));
- the pre-mediation statement should not be filed with or accessible by the bankruptcy court;
- the creditors' committee should be afforded an opportunity to provide a pre-mediation statement;
- if the creditors' committee is aligned with a particular party, the committee should normally receive a copy of that party's pre-mediation statement and serve upon that party any pre-mediation statement that the committee elects to submit to the mediator.

5. In dealing with the parties and counsel, the mediator should strive early in the process to establish "credibility" by:

(a) Giving the appearance of impartiality (and acting with impartiality);

(b) Establishing rapport with the parties and counsel;

(c) Evidencing knowledge or understanding for a desire and commitment to obtain knowledge and understanding of the issues and applicable principles of law;

(d) Demonstrating a sincere desire to facilitate the parties in reaching a settlement that they determine to be in their best interests; and

(e) Demonstrating empathy and sincerity in all dealings.

K. Conduct of the Mediation

1. Opening statement by the mediator:

(a) Introduction of the parties (if needed);

(b) Congratulating the parties on their reaching agreement to mediate (unless mediation is court ordered);

(c) Overview of the sequencing of the mediation process;

(d) Review and confirmation of confidentiality requirements;

(e) Inviting the parties to be creative and open minded in the mediation; and

(f) Encouraging the parties to be realistic and objective in their evaluation of their positions and the consequences of failing to settle and to be mindful of their "optimism bias".

- the bias that influences a party or counsel to believe that their case is a "sure winner";
- most Americans appear to be infected with the bias (*e.g.*, over 85% of surveyed teachers believe they are "above average," and over 60% of parents of college freshmen in highly selective colleges believe that their children will graduate in the top quartile of their class).

(g) Inviting the parties to ask questions.

2. Opening statement by parties:

(a) The mediator should encourage parties who wish to make opening statements to avoid ad hominem or other inflammatory or accusatory statements.

(b) A party's statement ideally should identify issues and end with an expression of a party's desire to reach a mutually agreed upon settlement.

(c) The opening statement should avoid "drawing a line in the sand" regarding minimally acceptable offers.

(d) In cases with a significant adversarial history and a high level of emotions, opening statements may be dispensed with on suggestion of the mediator.

(e) Competent (and calm) counsel often use an opening statement as the first opportunity to speak directly with the other side about counsel's client's position, perspective, needs, interests or institutional concerns (particularly such concerns of governmental agencies or multiple-level insurers).

3. The caucus and its role.

(a) Caucuses are customary in civil mediations:

- most parties prefer the privacy that caucuses afford in order to have confidential communications with the mediator;
- caucuses are an outgrowth of each party's natural desire to protect strategic information (*e.g.*, case assessment and settlement authority).

and to avoid inadvertent admissions or disclosure to the other party of such protected information.

(b) Parties with substantially the same interests should be segregated into separate caucus rooms for separate caucus sessions with the mediator.

(c) In each caucus, the mediator should seek to collect the party's self-assessment of its case and the perceived settlement value of it, assisting each party and counsel to articulate the bases for the assessment, as well as the costs and risks of continuing litigation, and creative solutions for resolution of issues.

(d) The mediator should be particularly sensitive to confidentiality issues by refraining from discussing in any caucus what was said in another caucus session without the consent of the communicating parties.

(e) In facilitating each discussion, the mediator should use standard mediation techniques, such as active listening, rephrasing, rhetorical questions and summations of positions to confirm that the mediator has correctly understood a party's position.

L. **Dealing with Deadlock**

1. Deadlock may result from a variety of factors, including:

(a) A dispute over which party is to make the first offer;

(b) An offeree party's "taking offense" at what it perceives to be a "low ball" offer from the other party and complaining of "bad faith" negotiation;

(c) A party's insistence, too early in the bargaining process, upon "sticking to the chase" and revealing its bottom line position;

(d) A party's imposition, early on in the process, of onerous conditions to continuation of the negotiations;

(e) A party's unrealistic view of the merits of its case and the absence of significant risks in pursuing non-settlement alternatives, including litigation; and

(f) Fatigue and exasperation with perceived lack of progress in the mediation.

Note: The local bankruptcy rules of the Southern District of Florida contain an interesting provision that limits the required participation of a party in a mediation conference to no more than two hours, but presumably authorizes a mediation conference to extend beyond that time limitation with the consent of the parties. See S.D. Fla. Local Rule 9019-2(B)(2).

2. Some steps that the mediator may recommend to break the deadlock:

(a) Reconvene the general session so that the parties can talk directly to one another instead of "through" the mediator;

(b) Suggest a "client only" meeting (particularly if lawyers for the parties become obstacles or have "bracketed" the mediation), with or without involvement of the mediator;

(c) Suggest a meeting with counsel (without clients) if client personality conflicts exist or emotions run high;

(d) Suggest adjourning and reconvening at a later hour or day, particularly if fatigue or frustration has set in;

(e) Discuss with each party, separately, how it has determined its settlement range (where monetary settlements alone are involved) and how and whether that settlement range truly reflects its assessment of the merits and risks of litigation;

(f) Invite the parties to consider binding arbitration, with an agreement to cap any award for the plaintiff at its lowest settlement demand and any award for the defendant at a number no less than its last, highest settlement offer; and

(g) Suggest to each party, separately, what the mediator believes to be a fair settlement based upon the mediator's neutral evaluation of the merits of the claims and defenses.

> Note: The mediator's suggestion of a "fair settlement" should normally be made only if the parties request it, the mediation effort appears to have run a course and the parties seem intractable in their current positions. There are clear risks in the mediator's expressing such an opinion, as the rejection of it by either party may color a party's view of the neutrality (or intelligence) of the mediator and may spell the end of the mediation. Interestingly, the local rules of a number of bankruptcy courts appear to contemplate (and even implicitly encourage) a mediator's submission of settlement recommendations to the parties (see, e.g., C.D. Cal. Local Rule 7.11(e) (authorizing the mediator to "estimate, where feasible, the likelihood of liability and the dollar range of damages") and 7.12 (authorizing the mediator to provide the parties with a written settlement recommendation memorandum); Delaware Local Rule 9019-5(e) (authorizing the mediator to "present a written settlement recommendation memorandum to" counsel but not the bankruptcy court); S.D.N.Y. Local Rule 83.9 (authorizing mediator to furnish the attorneys or parties "with a written settlement recommendation").

M. Documenting the Settlement

1. Parties who are fortunate enough to reach an "agreement in principle" at the mediation should not leave the mediation venue before documenting the settlement (i.e., seize the moment before "buyer's remorse" sets in and minds change)

2. The form of the settlement agreement will vary, depending upon the complexity of the issues, the number of the parties and the matters to be dealt with in the settlement agreement:

   (a) In relatively simple mediations, a term sheet executed by the parties may suffice; and

   (b) In more complex cases, a comprehensive settlement agreement may be necessary.

3. Where the parties recognize that a fully developed settlement agreement will be necessary, the mediator should encourage the parties to settle upon an individual to serve as the "scrivener" for a proposed settlement agreement, with drafts exchanged prior to the mediation and to set forth some of the basic terms (the exercise alone may put parties in a "settlement frame of mind")

4. In some cases, the absence of any pre-mediation undertakings to prepare settlement agreements may render the drafting and execution of a definitive settlement agreement at the mediation conference to be impractical:

   (a) Significant drafting efforts, after conclusion of the in-person mediation, may be required to reduce a definitive agreement to written form suitable for execution by the parties and submission to the bankruptcy court for approval.

   (b) In those instances, the parties may elect to prepare at the mediation conference a term sheet embodying the principal terms of the settlement, but making clear that no definitive settlement will be enforceable until later reduced to definitive form and duly executed.

   (c) By local rule, there may be deadlines imposed for the submission to the bankruptcy court of stipulated orders or joint motions for approval of settlements. *See, e.g.*, SDNY Rule 3-4 (21-day deadline to submit stipulated order or joint motion for approval of settlement)

5. The parties should be mindful of the fact that an oral agreement to settle may be enforceable under applicable non-bankruptcy law, unless the parties clearly manifest an agreement not to be bound prior to the execution of a definitive settlement agreement.

   Note: The local rules of the Bankruptcy Court for the Central District of California provide that an oral settlement agreement reached in the course of a mediation conference is not made inadmissible or protected from disclosure

if (i) the oral agreement is recorded by a court reporter, tape recorder or other reliable means of sound recording; (ii) the terms of the oral agreement are recited on the record in the presence of the parties and the mediator, and the parties express on the record that they agree to the terms recited; and (iii) the parties to the oral agreement expressly state on the record that the agreement is enforceable or binding, or words to that effect and the recording is reduced to writing signed by the parties and counsel, if any, within 72 hours after it is recorded. (see C.D. Cal. Local Rule 6.4)

6 A comprehensive settlement agreement will typically contain, among other things, the following:

(a) Recitals describing the dispute and the parties' desire and willingness to settle;

(b) A clear statement of the settlement and exchange of consideration;

(c) Procedures and timing for implementation of the settlement, including steps to obtain any necessary bankruptcy court approvals pursuant to Bankruptcy Rule 9019;

(d) Conditions precedent to effectiveness of the settlement and releases, including bankruptcy court approval;

(e) Releases and/or covenants not to sue;

(f) Confidentiality provisions;

(g) Non-disparagement provisions;

(h) Cost-sharing provisions;

(i) Dismissals with or without prejudice of pending adversary proceedings, contested matters or other litigation;

(j) Public announcements and/or press releases;

(k) Provisions dealing with cooperation for future implementation steps (such as support or dismissal of involuntary case or for confirmation of a reorganization plan); and

(l) Dispute resolution provisions.

N. Ethical Considerations

1. Lawyer mediator -- If the mediator is a lawyer, the mediator will be bound by the applicable rules of professional conduct, including applicable rules relating to:

(a) Confidentiality; and

(b) Disclosure of conflicts of interest.

2. Disclosure of conflicts of interest

(a) Although a mediator rarely is endowed with adjudicative powers, the mediator should nevertheless disclose to the parties all potential conflicting interests to the same extent as a potential arbitrator would disclose to the parties in connection with an arbitration matter).

(b) Although some local bankruptcy rules do not require a mediator candidate to make disclosures of potential conflicts of interest and simply provide for disqualification of a mediator for cause (including bias, prejudice or lack of disinterestedness), see, e.g., S.D. Fla. Local Rule 9019-2(B)(2), other local rules, together with attorney rules of professional conduct and the AAA Mediation Rules and Procedures, require affirmative disclosure. See, e.g., C.D. Cal. Local Rule § 6.

(c) Those conflicts might include (i) relationships with any of the parties; (ii) relationships with any of the counsel, including participation in past litigation or ADR matters; (iii) prior involvement in the same or similar disputes or legal issues.

3. The mediator should strictly adhere to confidentiality requirements, whether imposed by local rules, court order or rules of evidence or pursuant to agreement of the parties.

4. Mediator-arbitrator -- as a general rule, the mediator should not later serve, even if asked to do so by the parties, as an arbitrator of the dispute.

(a) This general rule stems from the fact that the mediator will be receiving confidential information from each party, which the mediator is obliged not to disclose to the other party, and such confidential information (which the other party may not have been afforded an opportunity to rebut) may have an unconscious influence upon the mediator's ultimate assessment of the case as an arbitrator.

(b) Notwithstanding that general rule, Delaware Local Rule 9019-6(a) states that the parties to a mediation may stipulate to allow the mediator, if qualified as an arbitrator, to hear and arbitrate the dispute.

5. Mediator as witness, consultant, attorney or expert -- the mediator should not appear as a witness, consultant, attorney or expert in any pending or future action relating to any aspect of the dispute that is the subject of the mediation.

6. Typical concerns that may arise in the course of the mediation and to which the mediator must be sensitive:

(a) The temptation to pressure the least sophisticated, most accommodating or most vulnerable party into a settlement;

(b) To the extent the mediator adopts an evaluative approach to the mediation, appearing to provide legal advice or call into question the legal analysis of another party's counsel;

(c) Receiving information from a party which, if not disclosed to the other party, might result in fraud or false pretenses perpetrated on the other party;

(d) Responding to a party's request as to whether the mediator recommends acceptance of an offer;

(e) Mischaracterizing the position of a party;

(f) Speculating with a party that the other party may raise its offer (when the mediator knows that the other party will do so based upon confidential disclosures to the mediator);

(g) Disclosing to a party or such party's counsel statutory or case law that they may have overlooked and that may be favorable to or even dispositive of the claim or defense of the other party.

> Note: While it may be appropriate to disclose to a party statutory or case law that has been overlooked by such party and that is unfavorable to such party's position in order to encourage a more realistic assessment of the risks of litigation by that party, it is highly questionable whether the mediator should call a party's attention to an overlooked provision of law that may significantly enhance a party's position vis-a-vis the other party, regardless of whether the other party knows of such authority.

J. The Model Standards 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.

(a) A joint committee consisting of representatives from the same successor organizations revised the Model Standards in 2005, and both the original 1994 version and the 2005 revision have been approved by each participating organization.

(b) The Model Standards contain provisions dealing with self-determination of the parties, impartiality of the mediator, conflicts of interest, competence of the mediator, confidentiality and quality of the mediation process, among others.

(c) Some courts have promulgated these standards for mediators serving in court-connected programs.

(d) The Model Standards have been endorsed for FINRA Dispute Resolution. FINRA (the Financial Industry Financial Regulatory Authority) is the largest independent regulator for securities firms doing business in the United States.

(e) The AAA Mediation Rules and Procedures require compliance with the Model Standards, except where a conflict exists, in which event the AAA Mediation Rules and Procedures govern.

(f) The ABA's Section of Dispute Resolution, Committee on Mediator Ethical Guidance, accepts inquiries and provides advisory responses with respect to ethical issues pertaining to mediation. In doing so, the committee will focus primarily on interpretations of the Model Standards and apply these standards to the issue presented, together with opinions or other guidance issued by state ethics authorities. The committee includes ADR practitioners, academics and leading ADR ethical experts from the public and private sectors. To submit an inquiry, click on the following link: http://www.abanet.org/disputes/documents/IntakeForumFinal.doc.

Mediation Agreement

I. Participants and Procedure.

The parties, and if they desire, their representatives are invited to attend mediation sessions. Mediation sessions may take place in-person, via video-conference, or hybrid. No one else may attend without the permission of the parties and the consent of the mediator. When appearing via videoconference, all participants shall confirm that they are alone in the room and cannot be overheard by anyone else. No participant shall video record or audio record any part of the mediation session. All participants agree that they will only use a secure WiFi or Ethernet connection for all conduct related to the mediation session.

During the session, the mediator may have joint and separate meetings with the parties and their counsel. If a party informs the mediator that information is being conveyed to the mediator in confidence, the mediator will not disclose the information. If, for any reason, a participant hears a communication not intended for him or her, that participant must immediately advise the mediator. The parties agree that the mediator is not acting as an attorney or providing legal advice on behalf of any party.

If a party wishes to terminate its participation for any reason, it may do so by giving notice to the mediator and the other parties. The parties will continue to be bound by the confidentiality provisions of this agreement and will also continue to be bound by their agreement to pay for those services rendered up to the point of that party's withdrawal.

II. Disclosure.

The mediator, each party, and counsel confirm that they have disclosed any past or present relationship or other information that a reasonable person would believe could influence the mediator's impartiality and that no conflict of interest or appearance of a conflict of interest exists.

In addition, the mediator practices in association with JAMS. From time to time, JAMS may enter into arrangements with corporations (including insurance companies), government entities, and other organizations to make available dispute resolution professionals in a particular locale, for a specific type of matter or training, or for a particular period of time. Also, because of the nature and size of JAMS, the parties should assume that one or more of the other neutrals who practice with JAMS may have participated in an arbitration, mediation or other dispute resolution proceeding with the parties, counsel or insurers in this case and may do so in the future. Furthermore, the parties should be aware that each JAMS neutral, including the neutral in this case, has an economic interest in the overall financial success of JAMS. The mediator is not aware of any aspect of these relationships that would create a conflict or interfere with his/her acting as a mediator in this matter. The parties acknowledge that these factors do not constitute a conflict of interest or the appearance of a conflict of interest.

III. Confidentiality.

In order to promote communication among the parties, counsel and the mediator and to facilitate settlement of the dispute, each of the undersigned agrees that the entire mediation process, including all discussion during the video-conference and in any medium, is confidential. All statements made during the course of the mediation are privileged settlement discussions, and are made without prejudice to any party's legal position, and are inadmissible for any purpose in any legal proceeding. These offers, promises, conduct and statements (a) will not be disclosed to third parties, and (b) are privileged and inadmissible for any purposes, including impeachment, under Rule 408 of the Federal Rules of Evidence and any applicable federal or state statute, rule or common law provisions.

IV. Disqualification of Mediator and Exclusion of Liability.

Each party agrees to make no attempt to compel the mediator's or any JAMS employee's testimony. Each party agrees to make no attempt to compel the mediator or any JAMS employee to produce any document provided or created by JAMS or the mediator or provided by the other party to the mediator or to JAMS, including any information regarding the video-conference. The parties agree to defend the mediator and JAMS from any subpoenas from outside parties arising out of this Agreement or mediation. Should JAMS or the mediator be required to respond to a subpoena from any party involved in this mediation, that party will be billed for time and expenses incurred in connection with such a response. The parties agree that neither the mediator nor JAMS is a necessary party in any arbitral or judicial proceeding relating to the mediation or to the subject matter of the mediation. Neither JAMS nor its employees or agents, including the mediator, shall be liable to any party for any act or omission in connection with any mediation conducted under this Agreement.

V. Records.

Any documents provided to the mediator, including those provided on the videoconference, by the parties will be destroyed by JAMS 30 days after the conclusion of the mediation, unless JAMS is otherwise instructed by the parties.

BY: _____ BY: _____

FOR: _____ FOR: _____

DATED: _____ DATED: _____

BY: _____ BY: _____

FOR: _____ FOR: _____

DATED: _____ DATED: _____

ABI NORTHEAST CONFERENCE 2022
List of Resources on Mediation

L. Berkoff, et al, Bankruptcy Mediation, (a handbook authored by the members of the ABI Mediation Committee)

T. Lane, Mediation Privilege and Confidentiality: New Local Rules and Need for National Guidance, XLI ABI J. 42 (May 2022)

L. Berkoff, E. Schnitzer, Remedies for Refusing to Consummate a Settlement Agreement Reached in Mediation, XLI ABI J. 18 (April 2022)

D. Swanson, Mandated Mediation: An Effective Mediation Tool, XL ABI J. 16 (September 2021)

L. Berkoff, J. Zaino, Mediation Allowed a Complex Dispute to be Resolved Without Protracted Litigation, XL ABI J. 16 (July 2021)

L. Kornreich, XXXIX ABI J. 16, Avoiding or Overcoming an Impasse in Mediation (November 2020).

I.Bifferato and E. Schnitzer, The Hypothetical Hits of Mediation , XXXIX ABI J. 22 (September 2020)

L. Berkoff and W. Henrich, Mediating Valuation Disputes XXXVIII ABI J. 34 (July 2019)

T. Driscoll, Mediation with Unrepresented Parties: Perils, Pitfalls, and Pointers, XXXVIII ABI J. 32 (November 2019)

Confidentiality in Mediation

- One of the more important (if not the most important), gating items for an effective mediation is that the parties have a belief that what is exchanged and said during the mediation process will not be used against the party if the mediation is not successful.
- In Lake Utopia Paper, the 2nd Circuit noted that if participants cannot rely on confidential treatment of everything that transpires during [mediation] sessions then counsel of necessity will feel constrained to conduct themselves in a cautious, tight-lipped, non-committed manner more suitable to poker players in a high-stakes game than adversaries attempting to arrive at a just solution of a civil dispute. Lake Utopia Paper Ltd. V. Connelly Containers, Inc. 608 F.2d 928 (2d. Cir. 1979).
- While it is good and important policy to promote settlements and to that end establish a mediation environment that is most conducive to reaching a settlement, there is a countervailing and important policy of insuring that all necessary facts be presented at trial that will ensure that the right and just result is reached at trial should settlement efforts be unsuccessful. The challenge is how tightly we should weave the mediation cocoon.

Privilege vs. Confidentiality

- These terms are frequently conflated. A privilege is a right at law. An example would be the privilege of non-disclosure afforded to a patient regarding information divulged to a psychiatrist during treatment. This privilege given to the patient is a right with a corresponding duty of non-disclosure impinged upon the psychiatrist. A waiver of the privilege must come from the patient.
- Confidentiality is a right of non-disclosure afforded to each participant and the mediator with a corresponding duty of non-disclosure imposed upon each party and the mediator. Thus the waiver of confidentiality must come from all parties and the mediator. There are various sources of confidentiality including common law, statutes, rules, court orders and agreement.

Suggested Confidentiality Paragraphs for Inclusion in Mediation Agreement

- **Confidentiality**

All statements made in connection with the mediation including all writings and electronic submissions by the participants, their attorneys and the mediator shall be made without prejudice to each participant's legal position in the pending case. Moreover, the participants, their attorneys and the mediator are prohibited from divulging, outside of the mediation, any oral or written information disclosed by the participants or the mediator in the course of the mediation without the consent of the mediator and each participant. No participant, attorney or the mediator may rely on or introduce as evidence in any judicial, administrative, arbitration, or other proceeding, information pertaining to any aspect of the mediation, including, but not limited to: (A) views expressed or suggestions made by a participant with respect to a possible settlement of the dispute; (B) the fact that another participant had or had not indicated a willingness to accept a proposal for settlement made by another participant or the mediator; (C) proposals made or views expressed by the mediator; (D) statements or admissions made by a participant in the course of the mediation (whether made during a mediation session, outside of such session or between sessions); and (E) documents prepared for the purpose of, in the course of or pursuant to the mediation. 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 privilege or confidentiality with respect to mediation and settlement negotiations shall apply; provided, however, that the mediator, the participants and the attorneys for the participants agree that the local rules of the U.S. Bankruptcy Court for the District of XXXXXX shall apply to this mediation and that the substantive law of the State of XXXXXXXXX with respect to privilege and confidentiality shall apply to any action to contest or enforce any settlement agreement arising out of this mediation. Information otherwise discoverable or admissible in evidence shall not become exempt from discovery or be inadmissible in any proceeding for the reason that it was used by a participant in this mediation.

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The ABI Mediation Committee

Suggested Confidentiality Paragraphs for Inclusion in Mediation Agreement

- **Exclusions**

The following exclusions shall apply to the non-disclosure provisions contained in paragraph 7 above: XXXXXXXXXXXXXXXXXXXXXX (e.g., information relating to fraud or deception in the course of the mediation, lack of good faith, mediator malpractice, and attorney malpractice.

- **No Disclosure by the Mediator**

The mediator shall not provide the presiding judge or any judicial officer, with any report other than one stating that the mediation is ongoing, that it has been suspended or that it has been concluded. If the mediation has been concluded, the mediator may report that there has or has not been a settlement agreement. No participant shall request or seek to compel the mediator to disclose any statement or writing that is protected under paragraph 7 above. The participants and their attorneys shall not take any action to compel the mediator to disclose (a) any records, reports, or other documents received or prepared by him/her or on his/her behalf, (b) information disclosed or representations made in the course of the mediation or otherwise that have been communicated to the mediator or (c) to testify in any proceeding in the Bankruptcy Court or in any proceeding in any other forum, including without limitation any in any action to enforce or contest a settlement agreement arising out of this mediation. All fees and expenses incurred by the mediator as a consequence of any request barred hereunder shall be paid by the participant or the attorney responsible for such request.

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The ABI Mediation Committee

Suggested Confidentiality Paragraphs for Inclusion in Mediation Agreement

- **Injunctive Relief**

Because the mediator and the participants are relying upon the confidentiality provisions expressed in paragraph 7 and 9 above, it is agreed that a breach of those provisions will cause irreparable injury for which monetary damages will not be an adequate remedy. Accordingly, it is agreed that the mediator and any participant may seek and obtain injunctive relief to prevent or reverse the disclosure of statements and materials.

- **Application to Non-Participants**

Information divulged during the course of the mediation may be shared with any non-participant who agrees to be bound by the provisions of paragraphs 7, 8, 9 and 10 above by executing a conforming non-disclosure agreement.

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The ABI Mediation Committee

Innovations in Mediation

ADR is no longer the alternative; it's the norm!

- Binding and Compelled Mediation
- Channeling Injunctions/ Mass Mediations
- Staged/ Multi-party Mediations
- Mediator's Report—Fairness Findings and Recommendation
- Mediation Panels
- Collaborative Law
- Online Dispute Resolution
- Integrative Mediation/ Intensive Therapeutic Mediation
- "Hot Tubing" With Experts
- Technical Mediation

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"A mediator hasn't worked, so I brought in everyone's moms."

If all else fails…

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Helpful Resource Materials

- Rachel K. Ehrlich, Emily E. Garrison, *Questions Every Litigator Should Ask About Mediation Confidentiality*, American Bar Association (Sep. 8 2017) http://apps.americanbar.org/litigation/committeeswomanadvocate/articles/summer2016-0916-questions-every-litigator-should-ask-mediation-confidentiality.html
  - This paper begins by referencing *Gatto v. Verizon Pennsylvania, Inc*. 2009, where a defendant was encouraged by the court to subpoena his mediator to testify at trial. These actions ignored the Pennsylvania Mediation Statute, the Federal Mediation Privilege and the court's own local rules. The article goes on to examine relevant statutes, privilege and rules, and describe the impact of the decision on the future of mediation confidentiality.
- Benjamin E. Wick, *Overcoming Impasse at Mediation*, 43 Colo. Law. 35, 38 (2018), http://heinonline.org/HOL/P?h=hein.barjournals/cololaw0043&i=1147
  - This article from The Colorado Lawyer provides tools to use when mediation reaches impasse.
- *Resolution on Good Faith Requirements for Mediators*, The American Bar Association (August 7, 2004) www.americanbar.org/content/dam/aba/migrated/dispute/draftres2.doc
  - The Sanctions section outlines under what circumstances sanctions might be appropriate in mediation situations. "In a narrow class of situations, court sanctions can appropriately promote productive behavior in mediation. Sanctions are appropriate for violation of rules specifying objectively-determinable conduct. Such rule-proscribed conduct would include but is not limited to: failure of a party, attorney, or insurance representative to attend a court-mandated mediation for a limited and specified period or to provide written memoranda prior to the mediations."

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Helpful Resource Materials

- Jacob A. Esher, *Alternative Dispute Resolution in U.S. Bankruptcy Practice*, University of Massachusetts Law Review (January 2009), https://scholarship.law.umassd.edu/cgi/viewcontent.cgi?refer=https://www.google.com/&httpsredir=1&article=1072&context=umlr
  - Journal article highlighting trends and practices in bankruptcy mediation.
- Morton Denlow, *Justice Should Emphasize People, Not Paper*, Judicature (1999), https://www.jamsadr.com/files/uploads/documents/articles/denlow-justice-emphasize-people-not-paper.pdf
  - Retired Judge Denlow addresses some of the faults of a justice system that has sacrificed personal interaction while emphasizing written litigation procedures. He offers several constructive solutions that will allow courts to provide better service to clients, while being more satisfying and enjoyable for judges and attorneys.
- Richard Mikels, Adrienne Walker, and Charles Azano, *Let's Try to Work this Out: Best Practices in Bankruptcy Mediation*, Southeastern Bankruptcy Law Institute (2016), http://www.sbli-inc.org/archive/2016/documents/lets_try_to_work_this_out.pdf
  - A short history and analysis of mediation in the content of bankruptcy courts, including specific treatment of judges as mediators starting on page 18. It includes the ABI "Model Local Bankruptcy Rules for Mediation" which gives very thorough and specific guidance on what to expect with mediation. The model can be found starting on page 21.

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MEDIATION ROUNDTABLE

Prepared by:
Chambers of Honorable James J. Tancredi
United States Bankruptcy Court
District of Connecticut
Hartford Division
450 Main Street
Hartford, CT 06103

Critical Considerations in Multiparty Mediations

I. Groundwork
   a. Are the parties ready?
   b. Can all key parties be included?
   c. Terms of the mediation order
   d. Restriction on jurisdiction and authority of federal bankruptcy judges
   e. Selecting the right mediator
   f. Related matters pending in other courts
   g. Subject matter expertise
   h. Pre-mediation preparation
   i. Is a co-mediator or expert required?

II. Pathfinding
   a. Cultivating trust and collaborative problem solving with mediator and other parties
   b. Identifying potential paths or pitfalls to resolution, prepare to pivot
   c. Aggregation of common interests, issues, and other alignments
   d. Sources of recovery (tangible and intangible)
   e. Strategic sequencing
   f. Leveling the playing field/avoiding information deficits
   g. Venting and listening
   h. Narrowing of issues or trial of discrete issues

III. Strategies are Holistic
   a. Role and dangers of facilitative and evaluative approaches/mediator's recommendation
   b. Cutting difficult parties loose
   c. Role of recesses, momentum, incrementalism, and isolation of hold-outs
   d. Role/voice for the real parties
   e. Fundamental fairness and integrity

IV. Process Integrity
   a. Confidentiality, neutrality
   b. Holding a settlement together
   c. Public relations
   d. *Ex parte* communications and caucuses

Multiparty Mediations Require Authenticity, Perseverance, Ingenuity, Reciprocity, and an Investment in Relationships Mired in Complex Process and Intractable Conflict.

I. Judicial Constraints
   a. "A judge should not act as an arbitrator or mediator or otherwise perform judicial functions apart from the judge's official duties unless expressly authorized by law." CODE OF JUD. CONDUCT FOR U.S. JJ., Canon 4(A)(4) (2014).

II. Judicial Authorities
   a. **Federal Rule of Civil Procedure 16** authorizes pre-trial conferences and proceedings which improve the quality of justice rendered in federal courts by sharpening the preparation and presentation of cases, tending to eliminate trial surprise, and improving, as well as facilitating, the settlement process. *See* 6A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1522 (3d ed. 2010).
   b. Alternate Dispute Resolution Act of 1998: 28 U.S.C. §§ 651–58
   c. Judges designated by the presiding judge may be assigned settlement conferences. D. CONN. L. CIV. R. 16(C)(2).
   d. "Buddy judges": Judges who are specifically and exclusively assigned to mediate cases, who do not make later rulings on the case. 26 West's Legal Forms, Alt. Disp. Res. App. 2B (4th ed.).

III. Parties' Conduct During Mediations
   a. **Complex Mediations**: Mediating disputes driven by multiple parties, complex issues of fact or law, and process conundrums; **Goal**: Facilitating communication, negotiations, and voluntary decision making, often by delineating interests and understanding the other parties' views
      i. The judiciary's role is to encourage, not coerce or compel, the parties to settle. *See* 28 U.S.C. § 455(a) (judicial impartiality is imperative); CODE OF JUD. CONDUCT FOR U.S. JJ., Canon 3(C)(1) (2014).
      ii. There is no duty to settle. *See, e.g.*, *Negron v. Woodhull Hosp.*, 173 F. App'x 77, 79 n. 1 (2d Cir. 2006) (defendant free to adopt a "no pay" posture at mediation)—Accordingly, there is no obligation to make a settlement offer and forgo a right to trial.
      iii. This proposition stokes tension between confidentiality, abuse, and the direction that the parties mediate in "good faith". The source of that direction is found in the Federal Rules of Civil Procedure, local rules, statutes, and the mediation order. Some jurisdictions may even place a duty on a mediator to report "bad faith" conduct. However, § 7(a) of the Uniform Mediation Act prohibits mediators from making any report to the court that referred the case to mediation.
      iv. The "Good Faith" duty fundamentally encompasses timely submissions, preparedness, attending the mediation, listening, rational responsiveness, and professionalism. *See generally* FED. R. CIV. P. 16(f)(1).

IV. Confidentiality v. "Good Faith"
   a. Confidentiality in mediation is a sacrosanct value. UNIF. MEDIATION ACT § 8 (2003).
   b. Courts have the inherent power to regulate pre-trial proceedings and to compel mediation. *In re Redacted*, 815 F.3d 957 (2d Cir. 2016); *In re Atl. Pipe Corp.*, 304 F.3d 135, 138 (1st Cir. 2002); SARAH R. COLE, CRAIG A. MCEWEN, NANCY H. ROGERS,

JAMES R. COBEN, & PETER N. THOMPSON, MEDIATION: LAW, POLICY AND PRACTICE § 9:2 (2018).

c. "[M]ediation order must contain procedural and substantive safeguards to ensure fairness to all parties involved." *In re Atl. Pipe Corp.*, 304 F. 3d at 147.
d. While there are conflicting views and cases which arguably invade the confidentiality of the mediation in order to sanction a lack of "good faith", the majority view favors a balance that reviews objective issues relating to the mediation (i.e. mediation attendance, timely submissions, failure to obey mediation order) rather than an intrusive or subjective inquiry. Federal Rule of Civil Procedure 16(f) and 28 U.S.C. § 1927, among other provisions, authorize sanctions for the multiplication of proceedings. The Code of Professional Responsibility is not suspended in mediations.
e. Courts routinely have not hesitated to find a lack of "good faith" where, *inter alia*, there is: failure to comply with the mediation order, failure of the directed parties to appear, misleading conduct, disruptive behaviors, hijacking of the mediation, or bleeding the process. Egregious behaviors have nonetheless motivated courts to pierce confidentiality or invoke subjective inquiries.
f. To the extent that the mediation order delineates the judicial expectations of the parties and the boundaries of confidentiality, the parameters of "good faith" conduct become distinctly clearer.

V. Conclusion

a. Notwithstanding, "Good Faith" remains an elastic measure to govern the conduct of the participants and encourage fundamental civility and professionalism.

AMERICAN BANKRUPTCY INSTITUTE
NORTHEAST BANKRUPTCY CONFERENCE
July 14-17, 2022

EXPLORING THE OUTER BOUNDARIES OF MEDIATION

Prepared by:
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United States Bankruptcy Court
District of Connecticut
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450 Main Street
Hartford, CT 06103

I. Mediation Ethics (conflicts & disclosures)

II. There is no duty to settle or to forgo a right to trial

III. Good Faith/Bad Faith

IV. Disruptive Mediation Behaviors

V. Suits vs Mediators, Immunity, Malpractice

VI. When you Need a Judge as a Mediator

VII. Discussions with Clients without Lawyers

VIII. Sanctions for Violation of Mediation Confidentiality

IX. Subpoena of the Mediator/Third-Party Proceedings

X. Documenting and Enforcing a Mediation Settlement

XI. Risks, perils, and challenges of *Pro Se* Parties in Mediation

UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT
HARTFORD DIVISION

IN RE:	:	**CHAPTER**	**11**
MYSTIC TRANSPORTATION, LTD,	:	**CASE NO.**	**20-20531 (JJT)**
DEBTOR.	:	**ECF NOS.**	**75, 87, 97, 98, 104**

MEDIATION REFERRAL ORDER

WHEREAS, on April 10, 2020, Mystic Transportation, LTD (the "Debtor") filed its petition for bankruptcy relief under Chapter 11 of the United States Bankruptcy Code; and

WHEREAS, on July 8, 2020, the Debtor filed its Plan of Reorganization under Sub-Chapter 5 (ECF No. 75, the "Plan"); and

WHEREAS, the Sub-Chapter 5 Trustee and Creditors Rebecca Matteau, Frank Piccione, and Danielle Ferris objected to confirmation of the Plan (respectively ECF Nos. 87, 97, 98, 104) (collectively with the Debtor, the "Parties"); and

WHEREAS, during a Status Conference on August 7, 2020, and again on August 25, 2020, the Parties expressed interest in exploring a possible resolution of their objections to confirmation of the Plan, including the resolution of any related state-law claims; and

WHEREAS, on August 25, 2020, the Parties agreed in open court to mediate their objections, ECF No. 125; and

WHEREAS, the Court believes that there is a benefit in allowing the Parties the opportunity to engage in mediation of their objections to confirmation of the Plan, including any related state-law claims; it is now hereby

ORDERED: That the Parties are referred to Thomas A. Gugliotti, Esq. and Albert Zakarian, Esq. for mediation; and it is further,

ORDERED: That counsel for the Parties are directed to contact, on or before August 28, 2020 at 5 PM, Attorney Gugliotti and Attorney Zakarian for potential dates and times that the Parties are available for a telephonic conference call for mediation, with the understanding that any mediation shall be conducted by video or telephonic conference,[1] as arranged by agreement with Attorney Gugliotti and Attorney Zakarian, within 40 days from the entry of this Order; and it is further,

ORDERED: That, the terms of the mediation shall be governed by this Order and the forthcoming Mediation Stipulation; and it is further,

ORDERED: That an individual with final authority to settle this controversy and to bind the party shall attend the mediation on behalf of each party.

Dated this 26th day of August, 2020, at Hartford, Connecticut.

James J. Tancredi
United States Bankruptcy Judge
District of Connecticut

[1] As the Parties are well aware, the current national emergency of COVID-19 has severely impacted court operations. However, COVID-19 alone does not require a cessation of all proceedings and given the sophisticated technology available, the mediation may proceed by video conferencing or telephonic means.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT
HARTFORD DIVISION

IN RE:	**CASE NO.**	**16-20790 (AMN)**
KRISTIN S. NORTON,		
DEBTOR.	**CHAPTER**	**7**
KRISTIN S. NORTON,	**ADV. PRO. NO.**	**19-02011 (JJT)**
PLAINTIFF		
V.	**RE: ECF NOS.**	**238, 245, 265**
TOWN OF SOUTH WINDSOR, MATTHEW GALLIGAN, MORRIS BOREA, AND ROBBIE T. GERRICK,		
DEFENDANTS.		

MEDIATION REFERRAL ORDER

WHEREAS, on May 18, 2016, Kristin S. Norton ("Debtor" or "Plaintiff") filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code; and

WHEREAS, on June 3, 2019, the Debtor commenced an Adversary Proceeding against the Town of South Windsor, Matthew Galligan, Morris Borea, and Robbie T. Gerrick (collectively, "Defendants"), Adv. Pro. No. 19-02011, seeking relief for alleged violations of the discharge injunction by the Defendants; and

WHEREAS, on November 25, 2019, the Plaintiff filed her Third Amended Complaint (ECF No. 68, "Complaint"); and

WHEREAS, on February 26, 2020, the Plaintiff filed a Motion for Summary Judgment on the Complaint as to liability only as to all Defendants; and

WHEREAS, on September 30, 2020, the Court issued its Memorandum of Decision Granting in Part and Denying in Part Plaintiff's Motion for Summary Judgment (ECF No. 115); and

WHEREAS, on December 11, 2020, the trial on the remaining issues of Plaintiff's Complaint concluded; and

WHEREAS, on September 20, 2021, this Court issued its Post-Trial Memorandum of Decision (ECF No. 235) and Judgment, Order, and Decree (ECF No. 236); and

WHEREAS, on September 21, 2021, the Court issued an Order to Appear and Show Cause as to Why the Debtor's Case and Related Disputes Should Not be Mediated (ECF No. 238, "Show Cause Order"); and

WHEREAS, on October 5, 2021, in accordance with the Court's Show Cause Order, the Plaintiff and Defendants (together, the "Parties") filed a Joint Status Report (ECF No. 245) concerning the status of various pending judicial proceedings between them ("Related Disputes"); and

WHEREAS, during a Status Conference on October 13, 2021, and again on November 9, 2021, the Parties stated on the record their agreement to participate, in good faith, in a mediation ("Mediation") which might address a partial or global resolution of the issues in the Debtor's Chapter 7 case and the Related Disputes; and

WHEREAS, the Court believes, consistent with its Order to Show Cause, that there is a substantial and material benefit in allowing the Parties the opportunity to engage in a Mediation that might facilitate resolution of all, or a portion of, the pending and interrelated matters between the Parties; IT IS NOW HEREBY

ORDERED: As they have agreed, the Parties are referred to the Honorable Julie A. Manning, United States Bankruptcy Judge, United States Bankruptcy Court, District of Connecticut and the Honorable James Sicilian, Superior Court Judge, State of Connecticut for such a Mediation; and it is further

ORDERED: Counsel for the Parties are directed to promptly contact Judge Manning's Courtroom Deputy via email at courtroomdeputy_bridgeport@ctb.uscourts.gov, with three (3) potential dates and times that the Parties are available for a telephonic conference call with Judges Manning and Sicilian to, among other things, set a schedule for Mediation, to determine what mediation statements may be filed, and such other matters as the Mediators direct, with the understanding that any Mediation shall be held within 90 days from the entry of this Order; and it is further

ORDERED: An individual with final authority to settle all controversies and to bind each party shall attend the Mediation on behalf of each party, unless excused by the Mediators; and it is further

ORDERED: The terms of the Mediation shall be governed by this Order, any ancillary orders of the Connecticut Superior Court and the United States District Court for the District of Connecticut, and the attached Mediation Stipulation; and it is further

ORDERED: The Parties are to promptly confer as to the terms of the attached Mediation Stipulation. A fully executed Mediation Stipulation, substantially in the form as attached hereto, shall be filed upon the docket by 5:00 P.M. on Friday, November 19, 2021; and it is further

ORDERED: The pending Adversary Proceeding in the Debtor's Chapter 7 case, Adv. Pro. No. 19-02011, and all deadlines therein, are stayed until further Order of the Court while the Parties engage in Mediation; and it is further

ORDERED: The Parties are to promptly confer with each other, and with the judges presiding over the Related Disputes, on the extent, if any, the Related Disputes, and all deadlines therein, shall be stayed, and to make a good faith effort to obtain any necessary and comparable orders, stays and directions concerning the Related Disputes.

Dated this 12th day of November, 2021, at Hartford, Connecticut.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT
HARTFORD DIVISION

IN RE:	:	**CASE NO. 16 – 20790-JJT**
	:	
KRISTIN S. NORTON F/K/A KRISTIN S. LANATA,	:	**CHAPTER 7**
DEBTOR		

KRISTIN S. NORTON F/K/A KRISTIN S. LANATA,	:	**ADVERSARY PROCEEDING**
PLAINTIFF	:	**CASE NO. 19-02011 JJT**
VS.	:	
	:	
TOWN OF SOUTH WINDSOR, MATTHEW GALLIGAN, MORRIS BOREA and ROBBIE T. GERRICK	:	
DEFENDANTS	:	

STIPULATED ORDER FOR REFERENCE TO MEDIATION

1. The above-captioned matter is hereby assigned to the following mediators (separately, the "Mediator" and together, the "Mediators"):

The Honorable Julie A. Manning United States Bankruptcy Court Brien McMahon Federal Building 915 Lafayette Boulevard Bridgeport, CT 06604	The Honorable James Sicilian Superior Court of Connecticut Judicial District Courthouse 95 Washington Street Hartford, CT 06106

2. The parties ("Mediating Parties") to the mediation ("Mediation") shall include: (i) the Debtor, Kristin S. Norton, (ii) the Town of South Windsor, (iii) Matthew Galligan, (iv) Morris Borea, and (v) Robbie T. Gerrick. Parties and (at least) their lead counsel shall attend the Mediation, unless excused by the Mediators.

3. The Mediating Parties have agreed, in open court and on the record, to global mediation concerning all cases and issues arising therein as follows (collectively, the "Mediated Cases"):

a. A certain adversary proceeding entitled Kristin S. Norton fka Kristin S. Lanata v. Town of South Windsor, et al, currently pending before the United States Bankruptcy Court for the District of Connecticut, bearing adversary proceeding no. 19-02011 JJT. Judgment recently entered in favor of Plaintiff Kristin Norton in the amount of $20,000 damages, and $100,000 legal fees. The ruling also enjoins Town of South Windsor from the enforcement or collection of any civil after against Kristin S. Norton exceeding $50,000 related to Lawsuit #2, as defined below.

b. A certain lawsuit entitled Town of South Windsor, et al v. Kristin Lanata n/k/a Kristin S. Norton, et al, docket no. HHD-CV-17-6083374, currently pending before the Superior Court for the Judicial District of Hartford, at Hartford. This case, commonly identified herein as the injunction action or "Lawsuit #2", was recently decided by the Connecticut Supreme Court and remanded back to the Appellate Court after the Appellate Court reversed the lower court's ruling. The lower court judgment had assessed a fine against Plaintiff in the amount of $125,000, plus an attorneys' fee of $51,674 and expenses in the amount of $1039.18. The Appellate Court (AC42973) vacated that judgment and remanded the matter back to the Superior Court for a new trial which the Town of South Windsor appealed to the Supreme Court. The Supreme Court (SC20587) reserved in part the judgment of the Appellate Court and remanded the case to that court with direction to reverse the judgment of the trial court as to count two of the complaint only as to its determination of fines and remedies, and to remand the case to the trial court for further proceedings as to damages and remedies. A Motion to Open and Vacate Judgment and For Sanctions and Other Related Relief is pending. This Court has enjoined the Town of South Windsor et al from the enforcement or collection of any civil after against Kristin S. Norton exceeding $50,000 per the ruling in no. 1, above.

c. A certain lawsuit entitled Kristin S. Norton v. Town of South Windsor, bearing case no. HHD-CV20-6125034-S, currently pending before the Superior Court for the Judicial District of Hartford, at Hartford. This lawsuit is a claim for vexatious litigation for having to defend against two separate foreclosure actions involving an unlawful blight lien that was not properly noticed. A motion to dismiss on the basis of preemption is pending.

d. A certain lawsuit entitled Luigi Satori, Health Director for the Town of South Windsor v. Kristin Norton a.k.a. Kristin Lanata, bearing case no. HHD-CV20-6125402-S, currently pending before the Superior Court for the Judicial District of Hartford, at Hartford. Town of South Windsor seeks damages of $58,500 relating to Ms. Norton's violations of the Town of South Windsor's health code as confirmed by the Connecticut Department of Public Health in Case No. 190614HN. The action remains pending and is scheduled for trial in December 2021, though pleadings have not yet been closed.

e. Motion for Additional Findings of Fact and Motion to Amend Judgment filed in the case at bar on October 4, 2021, by Defendant Morris Borea.

4. The Mediation shall be non-binding, but shall require that the Mediating Parties participate in good faith.

5. The Mediator(s) shall not have authority to render a decision that shall bind the Mediating Parties.

6. The Mediating Parties are not obligated to agree to any proposals which are made during the Mediation.

7. No party shall be bound by anything said or done during the Mediation, unless either a written and signed stipulation is entered into or the Mediating Parties enter into a written and signed agreement.

8. The Mediator(s) may meet in private conference with less than all of the Mediating Parties. At the discretion of the Mediator(s), the Mediation may be conducted in person, via video conference, or via audio conference, or any combination thereof, provided however, that all Mediating Parties and their counsel shall have the option to appear by video conference at any Mediation session. The Mediation may include one or more sessions. At the discretion of the Mediators, after consultation with the Mediating Parties, the Mediators may mediate different issues on different dates with one, some or all of the Mediating Parties.

COVENANTS AND RELIANCE OF THE PARTIES

The Mediating Parties have consented to this Mediation in reliance upon the assurances below in paragraphs 9–11, 13, and 15–16.

9. Information obtained by the Mediator(s), either in written or oral form, shall be CONFIDENTIAL and shall not be revealed by the Mediator(s) unless or until the party who provided that information agrees to its disclosure.

10. The Mediator(s) shall not, without the prior written consent of all Mediating Parties, disclose to any Court any matters which are disclosed to him or her by any of the Mediating Parties or any matters which otherwise related to the Mediation.

11. The Mediation shall be considered a settlement negotiation for the purpose of all federal and state laws protecting disclosures made during such conferences from later discovery or use in evidence. The entire procedure shall be CONFIDENTIAL, and no stenographic or other record shall be made except to memorialize a definitive settlement agreement. All communications and conduct, oral or written, during the Mediation by any party or a party's agent, employee, or attorney are CONFIDENTIAL and, where appropriate, are to be considered work product and privileged. Such conduct, statements, promises, offers, views and opinions shall not be subject to discovery or admissible for any purpose, including impeachment, in any litigation or other proceeding involving the Mediating Parties; provided, however, that evidence otherwise subject to discovery or admissible is not excluded from discovery or admission in evidence simply as a result of having been used in connect with this Mediation process.

12. The Mediator(s) and their agents shall have such absolute judicial immunity as provided under State and Federal laws, including the common law, from liability for any act or omission in connection with the Mediation, and from compulsory process to testify or produce documents in connection with the Mediation.

13. The Mediating Parties (i) shall not call or subpoena the Mediator(s) as a witness or expert in any proceeding relating to the Mediation, the subject matter of the Mediation, or any thoughts or impressions which the Mediator(s) may have about the Mediating Parties in the Mediation; (ii) shall not subpoena any notes, documents or other material prepared by the Mediator(s) in the

course of or in connection with the Mediation; and (iii) shall not offer in evidence any statements, views or opinions of the Mediator(s).

14. If a Mediator is made a party to any dispute arising from this Mediation, the party or parties making the Mediator a party to such dispute shall indemnify and hold the Mediator harmless from any liability (other than intentional conduct) and for their reasonable attorneys' fees and litigation costs incurred in connection therewith.

15. No subpoenas, summons, complaints, citations, writs or other process may be served upon any person or party at or near the site of any Mediation session or upon any person entering, attending or leaving the session.

16. As soon as practicable after the conclusion of the Mediation session(s), which shall not exceed ninety (90) days from the date of this Order, absent further agreement of the Mediating Parties, and with the consent of the Mediators, the following procedure shall be followed:

a. After the Mediation, the Mediators shall file with the Clerk of this Court a certificate indicating that the cases have settled, or not settled (in whole or in part), unless the Mediating Parties and the Mediators explicitly agree to a more detailed report (e.g. stipulations of facts, narrowing of the issues, and discovery procedures, settlement agreement);

b. If the cases settle, the Mediating Parties shall: (1) agree upon the appropriate moving papers to be filed in each respective Court, and (2) submit a fully executed Joint Motion of Settlement to the Bankruptcy Court for its approval;

c. If the case does not settle, but the Mediating Parties agree to the narrowing of factual or legal issues or the resolution of discovery disputes, then the parties shall set forth those matters in writing for further consideration by each respective Court.

17. Any Mediator serving under the terms of this Order shall be absolutely immune from claims arising out of acts or omissions incident to their service as court appointees in this

Faculty

Hon. Joan N. Feeney is a mediator, arbitrator and referee/special master for JAMS in Boston, where she provides mediation, arbitration and neutral analysis services in complex disputes worldwide. She previously was a U.S. Bankruptcy Judge for the District of Massachusetts from 1992 to May 2019 and Chief Judge from 2002-06. She is currently Chief Judge of the U.S. Bankruptcy Appellate Panel for the First Circuit. Judge Feeney is a Fellow, vice president and a member of the board of directors of the American College of Bankruptcy and served for three years on its Board of Regents. She is a co-author of the *Bankruptcy Law Manual*, a two-volume treatise published by Thomson Reuters, and a co-author of a book for consumers, *The Road Out of Debt*, published by John Wiley & Sons. Judge Feeney was the president of the National Conference of Bankruptcy Judges in 2011 and 2012 and has served that organization in numerous capacities, including on its Board of Governors,as chair of its Newsletter Committee, as editor in chief and reporter for *Conference News*, and on special projects. Judge Feeney was the business manager of the *American Bankruptcy Law Journal* from 2016-18, and was an associate editor from 2013-16. She is a founder and co-chair of the M. Ellen Carpenter Financial Literacy Project, a joint venture of the U.S. Bankruptcy Court for the District of Massachusetts and the Boston Bar Association. She was a member of the International Judicial Relations Committee of the Judicial Conference of the United States from 2006-12 and hosted many delegations of foreign judges in the U.S., as well as traveled to foreign countries on behalf of the federal judiciary. Judge Feeney co-chaired the Massachusetts Local Rules Committee for many years. She is a member of ABI and sat on its Board of Directors, and she has been judicial chair of several regional ABI educational programs and is a frequent ABI panelist. Prior to her appointment, Judge Feeney was an associate and partner in the Boston law firm Hanify & King, P.C., was a career law clerk to Hon. James N. Gabriel, U.S. Bankruptcy Judge for the District of Massachusetts, and a partner in the Boston law firm Feeney & Freeley, where her practice included service as a trustee on the U.S. Trustee's private panel of trustees. In 2005, she received the Boston Bar Association's Haskell Cohn Award for Distinguished Judicial Service, and in 2009 the American College of Bankruptcy First Circuit Fellows recognized her for contribution to bankruptcy jurisprudence and practice. She also was the 2018 recipient of the Charles P. Normandin Lifetime Achievement Award from the Boston Bar Association and the National Conference of Bankruptcy Judges Excellence in Education Award. Judge Feeney is a graduate of Connecticut College and Suffolk University Law School.

Hon. Louis H. Kornreich is a retired U.S. Bankruptcy Judge for the District of Maine in Bangor and is Of Counsel with Bernstein Shur in Bangor, where he mediates in complex cases. He was initially appointed on April 3, 2001, served as Chief Judge from 2004-11 and was redesignated as Chief Judge on July 1, 2013, until leaving the bench in April 2015. Judge Kornreich was also a member of the First Circuit Bankruptcy Appellate Panel and was a visiting judge in the Districts of New Hampshire and Delaware. In addition, he served as the representative for the First Circuit on the Bankruptcy Judges Advisory Group for the Administrative Office of the U.S. Courts from 2011-14. As a judge, he presided over some of the largest and most complex reorganization cases in Maine history, including Great Northern Paper, and two Canadian cross-border cases: Androscoggin Energy, a natural gas case covering several North American jurisdictions; and the Montreal, Maine & Atlantic Railway case arising from the Lac Megantic fire. Prior to his appointment to the bench, Judge Kornreich was a senior partner and head of the commercial law and bankruptcy section at the

law firm of Gross, Minsky & Mogul PA in Bangor. He holds a certificate of completion from the St. Johns/ABI Bankruptcy Mediation Training Program and is a registered mediator in the bankruptcy courts of the Southern District of New York, Delaware and Massachusetts. He has mediated disputes in many types of bankruptcy conflicts including plan confirmations, avoidance cases, disputed claims and adversary proceedings covering a wide range of issues. Judge Kornreich is a member of ABI and currently serves as a co-chair of Special Projects for ABI's Mediation Committee. He also is a member of the National Conference of Bankruptcy Judges and is a Fellow of the American College of Bankruptcy, and he frequently speaks on mediation and related topics. Judge Kornreich received his J.D. from Catholic University of America in 1974.

Richard E. Mikels is an attorney with Pachulski Stang Ziehl & Jones in New York and is experienced in commercial law, workouts and reorganizations. He is known for representing significant debtor companies (both in chapter 11 and in out-of-court workouts), but he also represents creditors' committees, boards of directors, insurance companies, hedge funds, claims traders and acquirers of businesses. Previously, Mr. Mikels was chair of Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, PC's Bankruptcy, Restructuring & Commercial Law Practice in Boston. He is an adjunct professor at Boston University School of Law and has been listed in *Chambers USA* directories since 2003, *The Best Lawyers in America* since 1983 and *Massachusetts Super Lawyers* since 2004. *Boston Best Lawyers* named him Bankruptcy and Creditor-Debtor Rights Lawyer of the Year in 2010 and Bankruptcy Lawyer of the Year in 2013. In 2004, Boston University awarded Mr. Mikels the Silver Shingle Award for Distinguised Service to the School of Law. He also holds an AV-Preeminent rating from Martindale-Hubbell. Mr. Mikels has conducted several mediations of commercial law disputes and co-chairs ABI's Mediation Committee. He also chaired the subcommittee that drafted ABI's Model Bankruptcy Rules for Mediation, and he is on the faculty of the ABI/St. John's University's 40-Hour Mediation Training Program. Mr. Mikels is often cited in *The Wall Street Journal*, Reuters, Dow Jones and the *Boston Globe*, and he has also appeared on CNBC. He received both his B.S. and J.D. *cum laude* from Boston University.

Hon. James J. Tancredi is a U.S. Bankruptcy Judge for the District of Connecticut in Hartford, sworn in on Sept. 1, 2016. Prior to his appointment to the bench, he was a commercial litigation and business restructuring partner at Day Pitney, LLP (f/k/a Day Berry & Howard), where, as a business litigator and commercial restructuring lawyer, he co-founded the firm's regional and national bankruptcy practice. During his 37-year career at Day Pitney, LLP, Judge Tancredi he represented financial institutions and other major constituents in a broad range of prominent insolvency-related proceedings pending in courts along the Amtrak corridor. He frequently lectured at the University of Connecticut School of Law and at bar association Continuing Legal Education programs on a broad range of commercial, real estate and restructuring issues and strategies. His professional and bar association activities included service as president and director of the Hartford County Bar Association and the Connecticut Turnaround Management Association. Judge Tancredi has been an active member of the Connecticut Bar Association, American Bar Association and American Trial Lawyers Association, and he was a director of the Hartford County Bar Foundation and Connecticut Mental Health Association. He is also a Connecticut Bar Foundation James W. Cooper Fellow. These platforms provided invaluable opportunities for enhanced legal education and service to the bench and bar and served to drive local community *pro bono* initiatives. Judge Tancredi has written widely about business restructuring issues and co-authored the Connecticut chapter in *Strategic Alternatives for and Against Distressed Businesses* (2016 Edition), published by Thomson Reuters.

He received his B.A. *magna cum laude* in urban studies and political science from the College of the Holy Cross in Worcester, Mass., and his J.D. *magna cum laude* from the University of Connecticut School of Law.