Somewhere Beyond the Sea, The Challenges of Mediation, Cross Border and in the Caribbean

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ABI Mediation Committee's Model Guidelines for Mediation

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More and more, alternative dispute resolution is providing an efficient methodology for reducing the costs of bankruptcy proceedings and bankruptcy litigation. It was not that long ago that bankruptcy lawyers inherently believed that they were capable of settling their own cases and did not need outside help. (The authors were among those people.)

However, as with litigation generally, much has changed in the bankruptcy world. Now, in many bankruptcy courts, alternative dispute resolution, particularly mediation, is an accepted — and sometimes even required — part of the process. Private attorneys have found that mediation provides a mechanism for attempting to resolve disputes that often prove problematic without the help of an independent third party. The obstacles to resolution are often varied. Sometimes, the problem is as simple as a client not wanting to hear what his attorney has to say or an attorney finding it awkward (and bad business) to provide bad news to the client. In another instance, an attorney may feel that his/her adversary has fallen in love with his/her own case and that an objective third party can help shed light on the parties' relative positions and bring the parties to resolution.

People are often so emotionally invested in a case (whether as client or counsel) that they are unable to hear the other side's point of view. Having an independent person explain the other side's point of view, without the emotional component, might make it easier to digest and may lead to consensual resolution. The authors believe that many — if not most — legal disputes have a strong dose of miscommunication involved, and mediation can effectively cut through that problem. From the court's perspective, nothing is better than a dispute that has been resolved without the need for prolonged litigation. This frees up court dockets, which is much appreciated by judges who can then devote their time to other matters that require the court's attention.

The participants in a chapter 11 case often believe that mediation is worth a try because so much money can be saved by avoiding additional litigation. Further, chapter 11 itself has become far too expensive for many debtors and the use of mediation as a tool could significantly reduce the overall cost and increase the likelihood of success of a chapter 11 proceeding.

The growth of mediation as a bankruptcy tool began many years ago when pioneers like Jack Esher (MWI; Boston) first saw its possibilities. Mediation is now being utilized successfully in bankruptcy cases of all sizes. Whether it is reducing the overflow of preference cases brought by a liquidating trust, settling an adversary proceeding or other dispute that is central to the resolution of a proceeding, or helping the parties in plan negotiations, mediation has become a central tool in the bankruptcy process and its role is likely to expand with time.

ABI is always in the forefront of our profession. ABI, in conjunction with St. John's University School of Law, provides the first and, we believe, only 40-hour mediation training specifically designed for bankruptcy mediation (the "ABI Mediation Program"). In fact, the genesis of the present ABI Mediation Committee began with the members of the initial class of students at the ABI Mediation Program in 2012. Today, the Mediation Committee has grown to 116 members, indicating the substantial interest of the bankruptcy community in mediation, and Robert Fishman serves as the chair. Believing in the benefits of uniform local rules in the mediation process, Mr. Fishman appointed a subcommittee to draft proposed model bankruptcy mediation rules (the "Model Rules" or "Rules"). That subcommittee was chaired by Richard Mikels, and its members included Mr. Escher, Bonnie Glantz Fatell (Blank Rome LLP; Wilmington, Del.), ABI Director Francis A. Monaco, Jr. (Womble Carlyle Sandridge & Rice, LLP;

Wilmington, Del.), Hon. Raymond T. Lyons (Fox Rothschild LLP; Lawrenceville, N.J.), Judy W. Weiker (Manewitz Weiker Associates, LLC; Indianapolis) and Past ABI President Reginald W. Jackson (Vorys, Sater, Seymour and Pease LLP; Columbus, Ohio). Many suggestions were provided by Hon. Judith H. Wizmur (U.S. Bankruptcy Court (D.N.J.); Mount Laurel).

Renowned mediation experts such as Elayne E. Greenberg, director of Hugh L. Carey Center at St. John's, and C. Edward Dobbs (Parker, Hudson, Rainer & Dobbs LLP; Atlanta) were also consulted, and they provided important input and suggestions. The authors are pleased to report that on Feb. 5, 2015, the Model Rules were approved by ABI's Executive Committee, subject to a comment period for the members of the committee. It is presently anticipated that before ABI's Annual Spring Meeting in Washington, D.C., the rules will be disseminated as the "ABI Mediation Committee's Model Guidelines for Mediation in Bankruptcy Cases." It is the committee's goal that these model rules will be of benefit to judges and participants in the bankruptcy process around the country.

There are many reasons why the Mediation Committee undertook the Model Rules project. The differences in local rules from jurisdiction to jurisdiction are significant. More than a few jurisdictions do not have local rules governing mediation in bankruptcy cases, and many that do will see their rules evolve as the use of mediation increases. It was the Mediation Committee's belief that uniformity is a good idea, although the committee understands and respects the local customs and culture that may support different approaches to various mediation topics. While a goal was to provide a template that could be used by various jurisdictions, the Model Rules are intended to be subject to customization depending on the preferences of the judges and participants in the various communities.

There are clearly local views that may differ by district. We have taken the view in drafting the Model Rules that mediation is a facilitative process, and we have avoided provisions that might make the dividing line between litigation and mediation more blurred. The Model Rules view a mediator as a facilitator rather than a court officer, an approach that was designed to foster the feeling among participants that they are in control of the process and are not giving up their autonomy in order to participate. Self-determination is the backbone of effective mediation, and the Model Rules attempt to support that concept. The Model Rules and the time frames therein are flexible and, in many respects, depend on the views and goals of the parties to a particular mediation. In this way, mediation will provide an opportunity for the parties to come to their own resolution rather than one imposed by a court or a court officer.

The Mediation Committee spent more than two years developing the Model Rules. Committee members contacted several current and former bankruptcy judges to solicit their views on such rules and the most helpful way to present them. Every subcommittee member participated in numerous meetings and provided important contributions to the Model Rules. Subcommittee members considered the local rules in effect in various jurisdictions and the work done by other organizations (one of the members had recently completed work on the Delaware Local Rules on Mediation and suggested that we commence with those rules, and many ideas from other local rules were considered and incorporated). The subcommittee attempted to tailor the Model Rules to the needs of the bankruptcy community with a view toward producing an end result that could be beneficial either as a template for local rules or at least to help local rules committees and judges with suggestions on the various issues dealt with in mediation rules. Finally, when the draft Model Rules were submitted to the Mediation Committee and were ultimately forwarded to ABI's Executive Committee, those bodies also considered the Model Rules extensively before approving them.

It is the purpose of the Model Rules to support and even enhance the continuing trend toward the extensive use of mediation in resolving disputes in bankruptcy cases, or even the underlying cases themselves. For example, many commentators believe that the chapter 11 process has become too expensive and time-consuming to be effective, except as a sale process or as the tail end of a pre-pack negotiated pre-petition. One of the great hallmarks of the growing U.S. economy during the period of the Bankruptcy Act, and during the years after the passage of the Bankruptcy Code, was the availability of a process wherein disputes could be resolved and debtors were provided with an accessible alternative to liquidation.

The Model Rules should help provide a speedier and less-expensive method by which courts and parties can realize the goals and aspirations of the bankruptcy system. The use of mediation can be an effective aid in making the chapter 11 process speedier, less expensive and more user-friendly. It could also increase the success rates of chapter 13 cases and make chapter 7 cases more effective by providing a streamlined method of resolution that could often expedite the parties' realization of their rights and avoid the additional delay and expense of litigation.

Two Model Rules have been drafted. The first set deals with the procedures governing the mediation itself. Rule 2 governs the process of appointing a mediator. An explanation of some of the key elements of the Model Rules follows:

- *Rule 1(a) provides that any dispute may be assigned by the bankruptcy judge to mediation.* This would include adversary proceedings, contested matters and disputes that are not yet before the court, such as plan negotiations.

- *Pursuant to Rule 1(b), the assignment of a dispute to mediation does not automatically produce a delay or stay with respect to discovery, pretrial hearing dates or trial schedules.* However, any party may seek such relief from the bankruptcy court.

- *Rule 1(c) provides for flexibility and party involvement in the conduct of the mediation process.* The Mediation Committee tried to balance the need for efficiency with the need for parties to be in control of their own process. The need for efficiency is clear. The need for party control is an important element in making parties feel more invested in the process, thereby making a favorable outcome much more likely. Rule 1(c)(i) recognizes the benefit of the mediator discussing the matter with the parties prior to the actual mediation session, and allows that to occur. Rule 1(c)(ii) requires a discussion among the mediator and the parties with respect to setting the date for the mediation conference, but absent an agreement, the date will be set by the mediator. Therefore, in the first instance, party control is respected, and it is only when no agreement can be reached on this basic point that the mediator acts unilaterally. Under Rule 1(c)(iii), the scope of the mediation submissions by the parties is also determined during this consultation with the participants. Further, it is left for discussion among the mediator and the participants as to what submissions or portions of submissions are to be delivered to opposing parties. In fact, no submission, or portion thereof, may be delivered to opposing parties without the consent of the participant providing the materials. This rule also provides a suggestion as to what should be included in the submission materials, but allows the mediator and parties to determine what will actually be required. The suggested contents include an overview of the facts and law, a narrative of the strengths and weaknesses of the party's case, the anticipated cost of litigation, the status of any settlement discussions and the perceived barriers to a negotiated settlement.

- *Rule 1(c)(iv) requires that the parties attend the mediation conference.* While much is left to the parties, the rules provide no party with discretion as to whether to attend court-ordered mediation. Here, the need for efficiency is paramount, and if the court orders mediation, the rules require attendance. This rule also allows interested third parties, such as creditors' committees, to become participants in some or all aspects of the mediation, but only with the consent of the mediator and the mediation participants. Finally, this rule, in subsection (C), reflects the strongly held view of the Mediation Committee that the mediator should not be a whistle-blower. That would create adversity with a party,

and any further mediation would be less likely to succeed. Therefore, a party is given the right to notify the court of a material violation of the rules, but the mediator is not authorized to do so.

• *Rule 1(d) provides extensive protection for information disclosed at the mediation.* Mediation is unlikely to be effective if the views expressed during the mediation can be used against the party expressing such views. Information disclosed in the mediation, which is exempt from discovery, remains exempt from discovery and inadmissible. Further, the rules require strict confidentiality and bar discovery from the mediator. Items discussed between the mediator and a particular party may not be disclosed by the mediator to the other participants without the express permission of such party. Rule 1(j) also provides broad immunity for a mediator who does not engage in actual fraud or willful misconduct. This is consistent with the philosophy underlying the rules that mediation is more likely to be successful when all of the participants, including the mediator, are as protected as possible from adverse results that could flow from participating in the mediation process.

• *While the Model Rules seek to balance party control with efficiency, Rule 1(i) gives the bankruptcy court broad discretion to alter the rules for a particular case.* For example, a court may set time requirements notwithstanding the flexibility otherwise provided by the rules. However, the court may not alter the confidentiality provisions or the immunity provisions of the rules.

• *Pursuant to Rule 1(h), the mediation may be terminated in one of two ways.* An order of the court may terminate the mediation. Likewise, the filing of a mediator's certificate of completion will terminate the mediation. This is important because otherwise it is not clear when the mediation ends. Sometimes, the parties will leave the mediation room thinking that the mediation is over only to discover that there are points that still need to be mediated. Therefore, the mediator is provided some flexibility in determining when the mediation will end, but the point of termination will be clear and unequivocal. If the mediation has not led to a resolution, then the matter proceeds to litigation before the court. However, the court is provided with the discretion to reinstate the mediation process if the court determines that such action is appropriate under the circumstances The rules make it clear that a reinstated mediation is treated in all respects as if it were a new mediation, and all of the rules apply as if such were the case. This avoids uncertainty as to what rules or procedures are applicable to a reopened mediation.

• *Rule 2 provides for the establishment of a Register of Mediators (the "register") in each district.* It provides for the efficient administration of the register and provides rules setting forth the standards required for inclusion in the register.

• *Rule 2(e) governs the appointment of mediators.* The default rule is that the parties select the mediator, unless the court determines that special circumstances exist that support the court making the appointment. If the parties fail to select a mediator, the court makes the appointment. The chosen mediator must be listed in the register unless the parties all agree to a mediator that is not listed on the register.

• *Rule 2(g)[B] and [C] deals with a mediator's conflicts.* The mediator is required to file with the court and provide to the parties a statement of all of the mediator's connections with the parties and their professionals, and either a statement of why the mediator has no actual or potential conflicts of interest, or a notice of withdrawal. In the event that a party believes that the mediator has a conflict of interest, the party must timely notify the proposed mediator. The mediator is required to discuss the issue with the complaining party and the other parties, but if the matter is not consensually resolved, the mediator must withdraw. The Mediation Committee concluded that if a party is uncomfortable with the mediator's independence, this would be detrimental to the mediation. Therefore, the mediator is obligated to resign without the need for a court order.

Conclusion

Mediation will continue to expand as a resource in all types of bankruptcy cases. It is our hope, and the hope of the Mediation Committee, that these Model Rules will become a valuable resource for judges, local rules committees, professionals and parties, and that the rules will help facilitate the growth and accessibility of bankruptcy mediation to the entire bankruptcy community.

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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

Model Rule 1
Mediation

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

(iv) Attendance at Mediation Conference.

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

1) Each party that is a natural person;

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

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

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

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

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

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

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

(d) Confidentiality of Mediation Proceedings.

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

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

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

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

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

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

(f) Post-Mediation Procedures.

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

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

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

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

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

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

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

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

Model Rule 2

Mediator Qualifications and Compensation

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

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

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

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

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

Model Rule 2
Mediator Qualifications and Compensation

(e) Appointment.

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

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

(iii) Disqualification.

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

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

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

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

Model Rule 2
Mediator Qualifications and Compensation

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), for 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").

3. 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 down.

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/or 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 9060-3(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 threats
  - 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)(i).

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

3. Qualities of a good mediator:

   (a) Patience (of Job);

   (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;

(l) Communication skills;

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

(n) Empathy and sincerity; and

(o) 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. Ill. Local Rule 9060-1(c) (contemplating that a sitting bankruptcy judge may mediate a case assigned to another sitting bankruptcy judge).

> Note: Section 653(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 mediation 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 mediation 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.

G. 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.

   (d) 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.

   (e) 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, on 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 1 of Model Standards of Conduct for Mediators (2005), promulgated by the American Arbitration Association, the American Bar Association, and the Association for Conflict Resolution.

H. 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 (as, for example, 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 is directed under the Act 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 disputes; (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 9060-8(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 in 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(a); S.D.N.Y. Local Rule 4.0 (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)(A); N.D. Ill. Local Rule 9060-3(C). Other parties who should be obliged to attend include the attorneys primarily responsible for representing each party in the bankruptcy 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(c)(iii)(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 or 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-bankruptcy 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 put 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(c)(ii)).
- 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 (or 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, resources 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 ranges)

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 solicit the party's self-assessment of its case and the perceived settlement value of it (inviting each party and counsel to articulate the basis 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 "cutting 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 negotiation;

(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 authorizing a mediation conference to extend beyond that time limitation with the consent of the parties. *See*, S.D. Fla. Local Rule 9019-2(C)(2).

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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 "hijacked" 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 it 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 3.3 (authorizing mediator to furnish the attorneys for parties "with a written settlement recommendation")).

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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.,* S.D.N.Y. 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 of 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 5.6.

(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 as 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 9019-3(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. Ethical 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-à-vis* the other party, regardless of whether the other party knows of such authority.

7. 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 neutrals 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 those 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.

Roadmap for Attorneys in Mediation
10 Important Points for Party Attorneys

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This paper was presented at ABI's 2013 Southeast Bankruptcy Workshop in Amelia Island, Fla.

Roadmap for Attorneys in Mediation
10 Important Points for Party Attorneys

Mediators have been trained extensively (we hope) and have significant experience in mediations under their belt. Unfortunately, no one gives the attorneys who represent the parties a course in how to make the most of mediation.

Here are ten issues you need to know about and think about if you are going to properly represent your client in a mediation.

I. This is process is not about you . . . it's about your client and about getting a settlement.

Your client has more flexibility in this process than they can ever have in Court before a judge and or a jury. The law is relatively rigid and juries are unpredictable. Judges and juries can't horse-trade but your client can!

Ask yourself if you have your client's best interest in mind or if you have reasons to want the matter not to settle, or not to settle unless your side gets a deal too good to pass up.

If you are on a contingency and worried about your fee, if you need the work, or if you see this as a personal battle with the lawyer for the adverse parties, then you should take a second look at your commitment to your client.

II. This process is different from litigation and requires different preparation.

The issues that can be addressed may be and likely are much broader than what issues go to the trier of fact in litigation. In a common contract dispute, the issue may be whether someone breached the contract, what the contract required and what the damages are for the breach. In mediation, those issues are there, but they can be examined in a

much broader context than would be allowed or relevant in litigation. Perhaps, the parties have "history" that makes the issues emotionally charged, or maybe one side feels he was let down by a friend, or perhaps there is something other than damages which will bring the parties together.

To adequately represent your client in mediation, you must recognize and embrace these differences and the opportunities they present. It is your client's real needs that must be at issue and your job is to attempt to satisfy those needs through the mediated settlement.

Also, and importantly, the attorney should not be the focus in the mediation. This is probably the hardest task for the attorney. The underlying concept of mediation is that the parties should fashion their own solution. The attorney's job is to facilitate, explain, encourage, offer reality checks, but not to run the show! The client's interests and needs are what are critical.

III. Your first job in the mediation.

You must help your client understand the mediation process and the flexibility that it offers. Help the client identify his/her needs and interests.

Needs are more definite, tangible and measurable items like the need for money; repairs; return of goods; holding down costs; saving time and moving on; freeing up the client's time and attention; lessening the stress of litigation, etc.

Interests are less tangible but no less important and include being heard, receiving an apology, fairness, justice, honesty, preserving or restoring a relationship, etc.

These needs and interests are quite different from causes of action and defenses to causes of action which are the focus of litigation in the courtroom.

Consider the 50-year old man just terminated from a company where he has worked for 30 years. Perhaps he will assert an age discrimination cause of action. A court may find that there was or was not age discrimination and, if there was, may then award monetary damages. The amount awarded may be an amount the plaintiff is satisfied with or it may be inadequate to meet his needs. Likewise, the defendant may or may not be able to pay the amount awarded. In mediation, perhaps the plaintiff can be offered an alternative job or given a meaningful recommendation enabling him to get a new job. Perhaps the company defendant could offer re-training for a new position at the company or somewhere else. All options can be on the table in mediation, depending on the needs and interests of each party and their creativity.

IV. Choosing the best Mediator for your issues, needs and interests.

What is the mediator's style: facilitative, analytical or evaluative?

A. Facilitative (the traffic cop who keeps things moving but leaves the mediations in the parties' hands)

B. Analytical (an "assistant" who helps to analyze the issues and identify the needs, interests and risks)

C. Evaluative (a mediator who does the above but also provides guidance and perhaps his or her own opinion regarding the offers and suggests a strategy or response to one or both sides)

The evaluative approach takes the power and control away from the client. Practically, some mediators start facilitative and the, if the circumstances warrant, move to analytical and eventually evaluative.

I would add a fourth style . . . "Pushy." This is the mediator who is determined to see the parties reach a settlement and pulls out every trick in his or her bag to get them there. In this approach, hopefully not used until the very end, the mediator is taking much of the control from the parties.

V. Plan for the mediation.

You cannot rely on what you have done to prepare for litigation. This is your opportunity to be creative and help your client identify options.

A. Look at your facts -- those that are clear and those in dispute.

B. Analyze the possible outcomes at trial and honestly assess the probability and cost of each alternative outcome.

C. Help your client identify his real wants and the needs and interests that are driving him.

D. Work creatively with your client to identify non-traditional (non-legal) ways of satisfying the client's needs and interests.

E. Help the client understand the control and creativity he can have in the mediation.

VI. Craft an opening statement that sets the stage and invites mediation.

A. Consider letting your client make the opening statement.

B. If you and the other side have lived this case a while and the mediator has asked for and received party statements, there is no need to rehash the same information in the opening.

C. Consider whether the other side has needs or interests (i.e., need for apology) that can be addressed in the opening to set a positive tone.

D. Clearly communicate your side's desire to settle.

E. Communicate your side's needs and interests to help the adverse party see broader settlement possibilities. Try to stay away from the legal issues.

F. Be sensitive to avoiding anything that will drive the adverse party away from settlement.

VII. Develop skill at active listening and conflict communications.

There are volumes written on these subjects and every attorney needs these skills to deal with clients, colleagues, adverse attorneys and in mediation. The time invested is well worth it. A few pointers:

A. Use "I" messages and avoid "you" messages which escalate tensions ("I felt abandoned when the construction project was left unfinished and it cost me a great deal of time and money to restart and complete the project." vs. "You just walked away and your actions cost me a lot of time and money to restart and finish the project you dumped.")

B. Let the other party know you "heard" his needs or frustrations by echoing back his statement. ("So you were put in a difficult position time-wise and money-wise when the project was not finished.")

C. Learn to use "negative assertion" to communicate you heard the position of the other side without having to agree with their position. It accepts the hostile statement without escalating the conflict but doesn't necessarily say you agree with their position. ("Your construction on my house was shoddy." Response in negative assertion: "I certainly don't ever want to do substandard construction work.")

D. Or, if you want to explore further because there is a need to learn more, use "negative inquiry." ("Your construction on my house was shoddy." Response: "Help me understand which parts you feel were substandard.")

E. "Tone" is an important part of managing communications in a constructive fashion. There is no room for sarcasm, attack, disparagement. You must convey that you hear and understand the other side and communicate your needs, interest and issues clearly without putting the other side on the defensive or causing a confrontation.

F. Prepare yourself and your client to let attacks from the other side fall harmlessly on your side of the table. Perhaps they are not as well-schooled or well-prepared as you are.

G. Be sure your client knows the strategy and how the communications need to be handled.

VIII. Be sensitive to body language.

Watch your and your client's body language. No crossed arms or turning the body away. Have relaxed, open posture, facing the other party. Have palms open, not clinched. Make non-aggressive eye contact. Show respect by staying in eye contact and paying attention while the other side is talking. Do not communicate disagreement with what they are saying. Nod or otherwise communicate understanding of their points. Often, without realizing it, we tune in to non-verbal communication and are more influenced by it on a subconscious level than we are by verbal statements. Knowing this, be careful that you do not negatively push the other side away from your position.

IX. Know how to use the mediator.

A. Sometimes there are messages better delivered by the mediator than by you or your client. That is part of the mediator's role.

B. Be very clear with the mediator regarding what can and cannot be shared.

C. Trust the mediator and really share your weaknesses and what you really want.

D. Use the mediator to get guidance regarding how much information to share and when as the mediation progresses.

F. Encourage your client to talk to the mediator in the private caucus and really model that behavior and ask your client questions to help draw the client out. The client will "trust" where you are guiding him to go. The process often really helps to move the client into a settlement frame of mind.

G. Review the real and hidden cost of the litigation in the caucus with the mediator and encourage the client to contribute his or her non-cash costs of litigation such as loss of focus, disruption of business, negative publicity, witness costs, testimony demands, stress, longer work hours, etc. Calculate the costs of representation and business losses, depending on how the litigation may turn out.

H. Be clear and verbal about the weaknesses in the case. Your client may be unaware of these and may be refusing to accept the possibility of loss. Use the mediation to help your client see its risks.

I. Work to generate all the "gives" that might be alternative ways to settle and develop clear explanations if there reasons a demand from the other side cannot be met (i.e., share a balance sheet showing fully encumbered assets that

would make payment of a large judgment impossible). List any information you need from the other side in order to reach a settlement decision.

X. Facilitate negotiation and agreement.

Armed with the information gathered and the creative information generated in caucus, move back to general session to complete the settlement negotiations. Empower and encourage your client to be the spokesperson and to communicate details of settlement offers and, more importantly, the desire to reach an agreement. Move from the litigation/advocate role to the supportive/encouraging/guiding role of counselor.

MEDIATION IN BANKRUPTCY: RECENT DEVELOPMENTS REGARDING THE MEDIATION PRIVILEGE AND THE DUTY TO MEDIATE IN GOOD FAITH

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I. Introduction

Mediation has become an increasingly prevalent part of litigation practice. Recognizing the importance of mediation and other alternate dispute resolution options, states have enacted statutes and rules governing the attorney's duty to inform and advise clients of these alternatives to litigation. This trend is also evident in bankruptcy practice, where the entire gamut of disputes ---- from "garden variety" claims objections and avoidance actions to highly complex, multi-party Chapter 11 plan negotiations --- are now frequently resolved in a formal mediation context.

Although relatively few mediation issues result in published decisions, recent case law reflects the limited degree -- absent evidence of coercion or fraud -- to which courts will inquire into specific mediation conduct to determine whether the parties have negotiated in good faith. Courts rightfully place a high priority on protecting the mediation privilege in order to encourage confidential negotiations. Nonetheless, the mediation privilege is not absolute and can be overcome by third parties who demonstrate a compelling need for access to mediation materials.

II. Good Faith Participation in Mediation

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

The District Court for the Southern District of New York reversed the bankruptcy court's order sanctioning the secured lender and its counsel by holding them in contempt for failing to mediate in good faith. After mediation between the lender and debtor's counsel, the mediator claimed that the lender did not perform a "risk analysis," and reported to the bankruptcy court that the lender failed to participate in good faith.

Following an evidentiary hearing, the bankruptcy court held that the lender violated the good faith requirement for three reasons: (1) the lender requested the identities of the representatives attending the mediation and a list of the issues that would be the subject of the mediation, (2) the lender refused to provide a mediation statement, and (3) the lender insisted that it would only address the issues that the debtor had expressly identified. The court also found that the lender's failure to send a representative with full settlement authority or ability to meaningfully participate in the mediation was tantamount to a failure to attend the mediation.

The district court rejected the bankruptcy court's "risk analysis" standard and subjective good faith analysis for determining participation and determined that: (1) a refusal to settle is not indicative of bad faith; (2) a party must send a representative with authority to settle up to the anticipated amount in controversy and who can reasonably discuss issues anticipated to arise at the mediation; and (3) confidentiality considerations preclude a court from inquiring into the level of a party's participation in court-ordered mediation. The court stated that its narrow review of the lender's good faith participation complies with the general pattern of interpretation by the courts and articulates a clear

and objective standard with minimal intrusion into confidentiality and a party's right to refuse to settle.

III. The Mediation Privilege and Discoverability of Mediation Documents

a. *In re Teligent, Inc.*, 640 F.3d 53 (2d Cir. 2011)

The Court of Appeals for the Second Circuit affirmed the district court's order which, in turn, had affirmed the bankruptcy court's order denying a law firm's motion to lift two protective orders prohibiting disclosure of communications made during mediation. The estate of a bankrupt company and its CEO had engaged in court-ordered mediation, in which they agreed to be bound by the terms of the standard protective orders employed by the bankruptcy court for the Southern District of New York. Following mediation, the parties reached a settlement, one aspect of which required the CEO to sue his former lawyers for malpractice and to remit to the bankruptcy estate fifty percent of any amounts he recovered. During discovery, the defendant law firm sought all mediation and settlement communications and, after the estate objected, sought an order lifting the confidentiality restrictions to obtain the requested materials.

The court found a presumption against modifying confidentiality provisions contained in protective orders entered in the mediation context, and observed the importance of confidentiality in mediation to promote the free flow of information that may result in the settlement of a dispute. It set forth a three-prong test that a movant must meet to obtain mediation material: "(1) a special need for the confidential material, (2) resulting unfairness from a lack of discovery, and (3) that the need for the evidence out-weighs the interest in maintaining confidentiality. All three factors are necessary to warrant disclosure of otherwise non-discoverable documents."

As to the first prong, the court found that the firm had made a blanket request to lift the confidentiality provisions without demonstrating any special need for specific communication. The second prong was not met because the firm had access to the information sought through other means. Finally, because the firm could not demonstrate that its need outweighed the interest of maintaining confidentiality, it failed the third prong. Accordingly, the court denied the motion to lift the confidentiality provisions.

b. *Dandong v. Pinnacle Performance Ltd.*, 2012 WL 4793870 (S.D.N.Y. Oct. 9, 2012) *reconsideration denied*, 2012 WL 6217646 (S.D.N.Y. Dec. 3, 2012)

The District Court for the Southern District of New York, relying on *In re Teligent,* clarified that a third party must show extraordinary need, and one that outweighs the strong public interest in preserving a mediation's presumed confidentiality, in order to obtain disclosure of mediation materials.

The confidential materials at issue came from a prior private, confidential mediation among plaintiffs, who alleged that they had been defrauded in their purchase of certain notes created by the defendants and sold through distributors, and some of the defendants. Defendants sought to use prior mediation statements of plaintiffs to impeach them, but plaintiffs sought a protective order to shield the materials.

The court reversed the magistrate's decision that "special need" for the material had been demonstrated and concluded that a confidentiality agreement among participants in a private mediation was to be treated no differently than mediations in which confidentiality was ordered by a court. The court concluded that impeachment was not a "special need" or "compelling need" warranting medication of the protective order and thus did not meet the test established in *In re Teligent*. The court therefore did

not analyze the other two elements, *i.e.*, unfairness resulting from lack of discovery and balancing the need for the evidence against the interest in maintaining confidentiality.

c. *Burtch v. Luminescent Sys. (In re AE Liquidation, Inc.)*, 2012 Bankr. LEXIS 5710 (Bankr. D. Del. Dec. 11, 2012)

The Bankruptcy Court for the District of Delaware granted a motion to protect discovery documents drafted in preparation for mediation. A Chapter 7 trustee commenced a preference action against the two defendants, Luminescent Systems Inc. and Astronics Advanced Electronic Systems Corp. The parties participated in a court-ordered mediation, which ultimately proved unsuccessful. In preparation for mediation, defendants had gathered affidavits from two former employees of the debtor; however, the affidavits were not used in connection with the mediation.

Following mediation, the parties conducted discovery, during which the defendants prepared a privilege log asserting that the affidavits and related documents, gathered in anticipation of mediation, were protected by both the attorney work-product doctrine and the mediation privilege. The trustee challenged the privilege claims, and defendants subsequently sought a protective order to prevent discovery.

The court rejected defendants' assertion of the mediation privilege, and their argument for a broader mediation privilege that would cover all documents created in anticipation of the mediation, even if they were ultimately not used there. The court reasoned that the affidavits, though inadmissible as evidence under its local rule on mediation, were not exempt from discovery under Fed. R. Civ. P. 26. However, the court determined that the documents were prepared in anticipation of litigation and ultimately granted the protective order on the basis of the work-product privilege because the trustee

failed to demonstrate a "substantial need" for the documents beyond impeachment purposes to overcome the privilege.

d. *In re MSTG, Inc.*, 675 F.3d 1337, *reh'g denied*, 468 F. App'x 994 (Fed. Cir. 2012)

The Court of Appeals for the Federal Circuit, ruling on a petition for a writ of mandamus to vacate a discovery order compelling production of settlement negotiation documents, rejected the assertion of a settlement negotiation privilege precluding the discoverability of settlement negotiation documents. MSTG sued several cellphone providers and manufacturers for patent infringement, and eventually settled with all defendants except AT&T. MSTG produced the settlement agreements, but objected to production of the negotiation documents. AT&T moved to compel on the ground that the documents could be pertinent to the issue of computation of a reasonable royalty.

The magistrate judge denied the motion on the ground that AT&T had not met its burden to overcome the mediation privilege. However, MSTG subsequently serve its expert's report on damages, in which the expert relied on facts related to the settlement negotiations that were not contained in the final agreements. The magistrate reconsidered the earlier order denying discovery of the underlying settlement negotiations on the ground that the information was now relevant to a full evaluation of the expert's opinion and ordered production. The district judge adopted the magistrate's order.

On appeal, the Federal Circuit recognized that district courts have discretion to enter protective orders that restrict access to settlement negotiations. While the court observed that some courts have imposed heightened standards for discovery in order to protect confidential settlement discussions, it explicitly reserved judgment on the issue of what limits can appropriately be placed on discovery of settlement negotiations. It

further noted that, although Congress limited the admissibility of evidence related to compromise offers and settlement negotiations in Fed. R. Evid. 408, it did not take the additional step of protecting settlement negotiations from discovery.

IV. Ethical Obligations of Attorneys to Inform Clients About Mediation

a. Authorities Governing the Duty to Inform

Lawyers have an ethical duty to educate themselves about dispute resolution alternatives, including mediation, and to advise their clients about the advantages and disadvantages of ADR. Many jurisdictions have adopted statutes or rules strongly encouraging lawyers to investigate dispute resolution procedures and to inform clients about them. 1 Mediation: Law, Policy and Practice § 12:2. These rules are based largely on the American Bar Association (ABA) Model Rules of Professional Conduct, which every state has adopted.

Although the Model Rules do not affirmatively mandate this duty, comment 5 to Rule 2.1, states that "when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to advise the client of forms of dispute resolution that might constitute reasonable alternatives to litigation." Many states have incorporated this comment into their own rules of professional conduct. Colorado, Hawaii, New Jersey, Michigan, and Virginia have adopted statutes or rules affirmatively imposing this heightened ethical obligation.

Both Colorado and Hawaii have adopted versions of Model Rule 2.1 in their respective Rules of Professional Conduct, stating that a lawyer "should advise a client of alternative forms of dispute resolution which might reasonably be pursued to attempt to

resolve the legal dispute or to reach the legal objective sought." Colo. Rules of Prof. Conduct 2.1; Hawaii Rules of Prof. Conduct 2.1. Similarly, the Rules Governing the State of New Jersey affirmatively require attorneys to "become familiar with available [Complimentary Dispute Resolution] programs and inform their clients of them." N.J. Rules Prof. Conduct 1:40-1 to 1:40-12.

A Michigan ethics opinion interprets the Michigan rules of professional conduct similarly, suggesting "[a] lawyer has an obligation to recommend alternatives to litigation when an alternative is a reasonable course of action to further the client's interests, or if the lawyer has any reason to think that the client would find the alternative desirable." St. Bar of Michigan Standing Comm. on Prof'l and Jud. Ethics, Op. RI-255 (1996). Virginia imposes an affirmative ethical duty on attorneys to inform clients of mediation in consultative terms: "a lawyer shall advise the client about the advantages, disadvantages, and availability of dispute resolution processes that might be appropriate in pursuing [the client's] objectives." Va. Rules of Prof. Conduct 1.2, Comment [1].

Other states' rules also suggest a duty to advise clients in certain situations. For example, under the Rules Regulating the Florida Bar, "when a matter is likely to involve litigation, it may be necessary under rule 4-1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation." West F.S.A. Bar Rules 4-2.1, Comment [2]. The comment further states that, although a lawyer typically has no duty to investigate a "client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest." *Id.* Similarly, New York's Rules of Professional Conduct contain identical language that "when a matter is likely to involve litigation, it may be advisable

under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation." Rule 2.1, Comment [5].

A comment to the Massachusetts rules states that: "[t]here will be circumstances in which a lawyer should advise a client concerning the advantages and disadvantages of available dispute resolution options in order to permit the client to make informed decisions concerning the representation." Mass. Rules of Prof. Conduct 1.4, Comment [5]. Likewise, Alabama's rules direct lawyers to "exercise independent professional judgment and render candid advice. . . . A lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." Ala. Rules Prof. Conduct 2.1.

In other states, the obligation to advise clients as to alternate dispute resolution methods is implicit. For example, Georgia's Rules of Professional Conduct ("GRPC") 1.2(a) provides that "A lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued." The attorney must provide the client with the information necessary to make such decisions. Specifically, GRPC Rule 1.4(b) obligates the lawyer to explain the matter "to the extent reasonably necessary to permit the client to make an informed decision." Further, GRPC Rule 2.1 requires that the attorney candidly provide this advice and "not be deterred . . . by the prospect that the advice might be unpalatable to the client."

The Maryland Lawyers' Rules of Professional Conduct Rule 1.4(a) provides that "[a] lawyer shall ... (2) keep the client reasonably informed about the status of the matter; (3) promptly comply with reasonable requests for information .... (b) A lawyer shall

explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

Although the Illinois Rules of Professional Conduct do not explicitly mention alternative dispute resolution, comments to the Rule 2.1 on the attorney's role as an advisor state that, "when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation." Ill. Rules Prof. Conduct 2.1, Comment [5]. Further, 1.4(a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives.

California's conduct rules state that lawyers "shall keep a client reasonably informed about significant developments relating to the employment or representation . . . when necessary to keep the client so informed." Ca. Rules Prof. Conduct 3-500. The U.S. District Court for the Northern District of California requires all attorneys who practice before it to familiarize themselves with the court's alternative dispute resolution programs. U.S.Dist.Ct.Rules N.D.Cal., Civil L.R. 11-1.

A few states incorporate a requirement to advise clients about alternative dispute resolution as an aspirational goal in their lawyer's creed. For example, the Ohio Lawyer's Creed explicitly affirms that the lawyer will counsel the client "with respect to alternative methods to resolve disputes." Ohio R. Gov. B., App. 5, A Lawyer's Creed (1997). Texas also requires lawyers to pledge to advise clients "regarding the availability of mediation, arbitration and other alternative methods of resolving and settling disputes." *Courts Push Bar Creed*, 8 Alternatives to High Cost Litig. 22 (1990).

b. Recent Case Law

Aattorneys who fail to advise their clients about mediation may be subject to discipline. In *Attorney Grievance Comm'n v. Gisriel*, 409 Md. 331, 372 (2009), the Court of Appeals ordered disbarment of an attorney who, among other things, failed to discuss a contractual mediation clause with his clients in violation of MLRPC Rule 1.4. The Supreme Court of Kentucky recently disbarred an attorney for numerous violations of the state's Rules of Professional Conduct where the attorney neither advised his clients concerning the mediation of their case, nor provided them an opportunity to be present at the mediation. *Cunningham v. Kentucky Bar Ass'n*, 266 S.W.3d 808, 812 (Ky. 2008). The Wisconsin Supreme Court issued a four-month suspension to an attorney who failed to inform his client about an upcoming mediation and thus, "failed to explain a matter to the extent reasonably necessary to permit the client to make an informed decision regarding the representation." *In re Disciplinary Proceedings Against Jones*, 309 Wis. 2d 585, 594 (2008).

Florida courts have also assessed attorney fees and costs to attorneys for advising a client that the client's appearance was not necessary at a court-ordered mediation. *David S. Nunes, P.A. v. Ferguson Enterprises, Inc.*, 703 So. 2d 491 (Fla. 4th DCA 1997). In 2012, the Louisiana Supreme Court held that, by negligently failing to notify a client that his case was scheduled for mediation, an attorney "violated his duty to the legal profession by failing to uphold one of the most fundamental standards of ethical conduct." *In re Zuber*, 101 So. 3d 29, 32 (La. 2012).

The Texas Court of Appeals has similarly sanctioned an attorney for failing to appear at court-ordered mediation and subsequent hearing, where evidence reflected

that the "client was willing and eager to participate in case if given opportunity, and attorney's deliberate acts of bad faith throughout representation of client, including habitual failure to keep client informed, ultimately amounted to missed mediation session . . . ." *Roberts v. Rose*, 37 S.W.3d 31 (Tex. App. 2000).

TABLE OF AUTHORITIES

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Rules

Ill. Rules of Prof. Conduct 2.1

Md. Rules of Prof. Conduct Rule 1.4

Mass. Rules of Prof. Conduct Rule 2.1

N.J. Rules of Prof. Conduct Rule 1:40-1 to 1:40-12

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R. Regulating Fla. Bar 4-2.1

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VA Rules of Prof. Conduct Rule 2.1

Other Authorities

1 Mediation: Law, Policy and Practice § 12:2

Courts Push Bar Creed, 8 Alternatives to High Cost Litig. 22 (1990)

Ohio R. Gov. B., App. 5, A Lawyer's Creed (1997)

St. Bar of Michigan Standing Comm. on Prof'l and Jud. Ethics, Op. RI-255 (1996)

42. Calls on the Commission and the Member States to combat all forms of violence against older women, recognising the underestimation of this problem, tackling societal stereotypes and ensuring that service providers are able to take into account the specific needs of older victims of violence, in order to ensure full enjoyment of human rights and achieve gender equality, and making full use of the DAPHNE programme;

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* *

43. Instructs its President to forward this resolution to the Council and the Commission.

Directive on mediation in the Member States

P7_TA(2011)0361

European Parliament resolution of 13 September 2011 on the implementation of the directive on mediation in the Member States, its impact on mediation and its take-up by the courts (2011/2026(INI))

(2013/C 51 E/03)

The European Parliament,

— having regard to Articles 67 and 81(2)(g) of the Treaty on the Functioning of the European Union,

— having regard to its position of 23 April 2008 on the Council common position for adopting a directive on certain aspects of mediation in civil and commercial matters [1],

— having regard to the hearings held by the Committee on Legal Affairs on 20 April 2006, 4 October 2007 and 23 May 2011,

— having regard to Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters [2],

— having regard to Rules 48 and 119(2) of its Rules of Procedure,

— having regard to the report of the Committee on Legal Affairs (A7-0275/2011),

A. whereas securing better access to justice is one of the key objectives of the European Union's policy to establish an area of freedom, security and justice; whereas the concept of access to justice should, in this context, include access to adequate dispute resolution processes for individuals and businesses,

B. whereas the objective of Directive 2008/52/EC is to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings,

C. whereas in order to facilitate access to mediation as a viable alternative to the traditional adversarial approach and to ensure that parties having recourse to mediation in the European Union benefit from predictable framework legislation, the Directive introduces common principles addressing, in particular, aspects of civil procedure,

[1] OJ C 259 E, 29.10.2009, p. 122.
[2] OJ L 136, 24.5.2008, p. 3.

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D. whereas, besides predictability, the Directive aims to establish a framework that preserves the main advantage of mediation, flexibility; whereas these two requirements should guide Member States when drawing up national laws implementing the Directive,

E. whereas Directive 2008/52/EC has also been of interest to neighbouring States and has had a demonstrable influence on the introduction of similar legislation in some of these countries,

F. whereas the Member States are required to comply with this Directive before 21 May 2011, with the exception of Article 10, for which the date of compliance was 21 November 2010; whereas so far the majority of Member States have reported that they have completed the implementation process or will complete it by the deadline, and only a few Member States have not yet reported compliance with the Directive's provisions: the Czech Republic, Austria, Finland and Sweden,

G. whereas the European Parliament considers it important to examine how this piece of legislation has been implemented by the Member States, to see what practitioners and users of mediation think of it and to identify whether and how it could be improved,

H. whereas, for this purpose, a thorough analysis of the main regulatory approaches of the Member States should be conducted in order to identify good practices and draw conclusions about any further action at European level,

I. whereas the Commission's Action Plan for implementing the Stockholm Programme (COM(2010)0171) foresees a Communication on the implementation of the mediation directive in 2013,

J. whereas it is worth considering how Member States have implemented the main provisions of the Mediation Directive regarding the possibility for the courts to suggest mediation directly to the parties (Article 5), the guarantee of confidentiality (Article 7), the enforceability of agreements resulting from mediation (Article 6) and the effect of mediation on limitation and prescription periods (Article 8),

K. whereas the Commission has included in its Work Programme for 2011 a legislative proposal on Alternative Dispute Resolution,

1. Observes that the requirement of confidentiality set out by the Directive already existed in certain Member States' domestic legislation: in Bulgaria, the Code of Civil Procedure states that mediators can refuse to testify about a dispute they have mediated; in France and Poland the laws governing civil mediation establish similar provisions; notes that, among the Member States, Italy adopts a rigorous approach to the confidentiality of mediation proceedings, whilst the Swedish mediation rules state that confidentiality is not automatic and require an agreement between the parties to that effect; considers that a more coherent approach seems to be needed;

2. Observes that, pursuant to Article 6 of the Directive, the majority of Member States have a procedure for giving the mediation settlement agreement the same authority as a judicial decision; notes that this is achieved either by submitting it to the court or by having the agreement notarised, and that it appears that some national legislatures have opted for the former solution, while, by contrast, in many Member States notarisation is also an available option under national law: for instance, whereas in Greece and Slovenia the law provides that a mediation agreement record may be enforced by the courts, in the Netherlands and in Germany agreements can be rendered enforceable as notarial acts, and in other Member States, including Austria, they can, as the law currently stands, be rendered enforceable as notarial acts despite the lack of any explicit provision to that effect in the relevant national legislation; calls on the Commission to ensure that all Member States that do not yet comply with Article 6 of the Directive do so without delay;

3. Takes the view that Article 8, which deals with the effects of mediation on limitation and prescription periods, is an essential provision in that it ensures that parties who choose mediation in an attempt to settle a dispute are not subsequently prevented from having their day in court as a result of the time spent in mediation; notes that no particular issue seems to have been raised by Member States in relation to this point;

4. Points out that some Member States have chosen to go beyond the core requirements of the Directive in two areas, namely financial incentives for participation in mediation and mandatory mediation requirements; notes that national initiatives of this type help to make dispute resolution more effective and reduce the courts' workload;

5. Acknowledges that Article 5(2) allows Member States to make the use of mediation compulsory or subject to incentives or sanctions, whether before or after judicial proceedings have started, provided that this does not prevent the parties from exercising their right of access to the courts;

6. Observes that some European states have undertaken a number of initiatives to provide financial incentives to parties who refer cases to mediation: in Bulgaria, parties will receive a refund of 50 % of the state fee already paid for filing the dispute in court if they successfully resolve a dispute in mediation, and Romanian legislation provides for full reimbursement of the court fee if the parties settle a pending legal dispute through mediation; notes that similar provision is to be found in Hungarian legislation and that in Italy all mediation acts and agreements are exempt from stamp duties and charges;

7. Observes that, alongside the financial incentives, certain Member States whose judicial systems are overburdened have resorted to rules making recourse to mediation compulsory; notes that in such cases disputes cannot be filed in court until the parties have first attempted to resolve the issues by mediation;

8. Points out that the most striking example is Italian Legislative Decree No 28, which aims in this way to overhaul the legal system and make up for the notoriously congested Italian courts by reducing caseloads and the nine-year average time to complete litigation in a civil case; observes that, not surprisingly, this has not been well received by practitioners, who have challenged the decree in court and even gone on strike;

9. Points out that, despite the controversy, Member States whose national legislation goes beyond the core requirements of the Mediation Directive seem to have achieved important results in promoting the non-judicial treatment of disputes in civil and commercial matters; observes that the results achieved in particular in Italy, Bulgaria and Romania prove that mediation can bring about a cost-effective and quick extrajudicial resolution of disputes through processes tailored to the needs of the parties;

10. Observes that compulsory mediation appears to be achieving the objective in the Italian legal system by relieving congestion in the courts; nevertheless stresses that mediation should be promoted as a viable, low-cost and quicker alternative form of justice rather than a compulsory aspect of the judicial procedure;

11. Acknowledges the successful results achieved by the financial incentives provided for by the Bulgarian law on mediation; recognises, however, that these are also due to the long-standing interest in mediation shown by the Bulgarian legal system in that the mediation community has been in existence since 1990 and the Settlement Centre – staffed by mediators working in shifts – has since 2010 been providing free mediation services and information for parties in pending court cases on a daily basis; notes that in Bulgaria two thirds of the cases referred were mediated and half of those cases were brought to a successful conclusion in mediation;

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12. Notes also the successful results of the Romanian law on mediation: as well as the provisions on financial incentives, a Mediation Council – a national authority for mediation practice which exists as a separate, autonomous legal body – has been established; it is entirely devoted to promoting mediation activity, developing training standards, preparing training-course providers, issuing documents certifying mediators' professional qualifications, adopting a code of ethics, and formulating proposals for more legislation;

13. Believes that, in the light of all of the foregoing, the Member States are, as a whole, largely on track to implement Directive 2008/52/EC by 21 May 2011 and that, while Member States are using varied regulatory approaches and some states are a little behind, the fact remains that most Member States are not only compliant, but are in fact ahead of the Directive's requirements;

14. Stresses that parties who are willing to work toward resolving their case are more likely to work with one another than against one another; believes that therefore these parties are often more open to consideration of the other party's position and work on the underlying issues of the dispute; considers that this often has the added benefit of preserving the relationship the parties had before the dispute, which is of particular importance in family matters involving children;

15. Encourages the Commission, in its forthcoming Communication on the implementation of Directive 2008/52/EC, also to examine those areas where Member States have chosen to extend the measures of the Directive beyond its intended scope;

16. Highlights the consumer-friendly features of alternative dispute resolution schemes, which offer a tailored practical solution; calls in this context for the prompt presentation of a legislative proposal on alternative dispute resolution by the Commission;

17. Notes that solutions resulting from mediation and developed between parties could not be provided by a judge or a jury; believes, therefore, that mediation is more likely to produce a result that is mutually agreeable, or 'win-win', for the parties; notes that, as a result, acceptance of such an agreement is more likely and compliance with mediated agreements is usually high;

18. Believes that there is a need for increased awareness and understanding of mediation, and calls for further action relating to education, growing awareness of mediation, enhancing mediation uptake by businesses and requirements for access to the profession of mediator;

19. Considers that national authorities should be encouraged to develop programmes in order to promote adequate knowledge of alternative dispute resolution; considers that those actions should address the main advantages of mediation – cost, success rate and time efficiency – and should concern lawyers, notaries and businesses, in particular SMEs, as well as academics;

20. Acknowledges the importance of establishing common standards for accessing the profession of mediator in order to promote a better quality of mediation and to ensure high standards of professional training and accreditation across the Union;

21. Instructs its President to forward this resolution to the Council, the Commission and the parliaments of the Member States.

24.5.2008 EN Official Journal of the European Union L 136/3

DIRECTIVES

DIRECTIVE 2008/52/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 21 May 2008

on certain aspects of mediation in civil and commercial matters

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61(c) and the second indent of Article 67(5) thereof,

Having regard to the proposal from the Commission,

Having regard to the Opinion of the European Economic and Social Committee [1],

Acting in accordance with the procedure laid down in Article 251 of the Treaty [2],

Whereas:

(1) The Community has set itself the objective of maintaining and developing an area of freedom, security and justice, in which the free movement of persons is ensured. To that end, the Community has to adopt, inter alia, measures in the field of judicial cooperation in civil matters that are necessary for the proper functioning of the internal market.

(2) The principle of access to justice is fundamental and, with a view to facilitating better access to justice, the European Council at its meeting in Tampere on 15 and 16 October 1999 called for alternative, extra-judicial procedures to be created by the Member States.

(3) In May 2000 the Council adopted Conclusions on alternative methods of settling disputes under civil and commercial law, stating that the establishment of basic principles in this area is an essential step towards enabling the appropriate development and operation of extrajudicial procedures for the settlement of disputes in civil and commercial matters so as to simplify and improve access to justice.

(4) In April 2002 the Commission presented a Green Paper on alternative dispute resolution in civil and commercial law, taking stock of the existing situation as concerns alternative dispute resolution methods in the European Union and initiating widespread consultations with Member States and interested parties on possible measures to promote the use of mediation.

(5) The objective of securing better access to justice, as part of the policy of the European Union to establish an area of freedom, security and justice, should encompass access to judicial as well as extrajudicial dispute resolution methods. This Directive should contribute to the proper functioning of the internal market, in particular as concerns the availability of mediation services.

(6) Mediation can provide a cost-effective and quick extra-judicial resolution of disputes in civil and commercial matters through processes tailored to the needs of the parties. Agreements resulting from mediation are more likely to be complied with voluntarily and are more likely to preserve an amicable and sustainable relationship between the parties. These benefits become even more pronounced in situations displaying cross-border elements.

(7) In order to promote further the use of mediation and ensure that parties having recourse to mediation can rely on a predictable legal framework, it is necessary to introduce framework legislation addressing, in particular, key aspects of civil procedure.

(8) The provisions of this Directive should apply only to mediation in cross-border disputes, but nothing should prevent Member States from applying such provisions also to internal mediation processes.

(9) This Directive should not in any way prevent the use of modern communication technologies in the mediation process.

[1] OJ C 286, 17.11.2005, p. 1.
[2] Opinion of the European Parliament of 29 March 2007 (OJ C 27 E, 31.1.2008, p. 129). Council Common Position of 28 February 2008 (not yet published in the Official Journal) and Position of the European Parliament of 23 April 2008 (not yet published in the Official Journal).

(10) This Directive should apply to processes whereby two or more parties to a cross-border dispute attempt by themselves, on a voluntary basis, to reach an amicable agreement on the settlement of their dispute with the assistance of a mediator. It should apply in civil and commercial matters. However, it should not apply to rights and obligations on which the parties are not free to decide themselves under the relevant applicable law. Such rights and obligations are particularly frequent in family law and employment law.

(11) This Directive should not apply to pre-contractual negotiations or to processes of an adjudicatory nature such as certain judicial conciliation schemes, consumer complaint schemes, arbitration and expert determination or to processes administered by persons or bodies issuing a formal recommendation, whether or not it be legally binding as to the resolution of the dispute.

(12) This Directive should apply to cases where a court refers parties to mediation or in which national law prescribes mediation. Furthermore, in so far as a judge may act as a mediator under national law, this Directive should also apply to mediation conducted by a judge who is not responsible for any judicial proceedings relating to the matter or matters in dispute. This Directive should not, however, extend to attempts made by the court or judge seised to settle a dispute in the context of judicial proceedings concerning the dispute in question or to cases in which the court or judge seised requests assistance or advice from a competent person.

(13) The mediation provided for in this Directive should be a voluntary process in the sense that the parties are themselves in charge of the process and may organise it as they wish and terminate it at any time. However, it should be possible under national law for the courts to set time-limits for a mediation process. Moreover, the courts should be able to draw the parties' attention to the possibility of mediation whenever this is appropriate.

(14) Nothing in this Directive should prejudice national legislation making the use of mediation compulsory or subject to incentives or sanctions provided that such legislation does not prevent parties from exercising their right of access to the judicial system. Nor should anything in this Directive prejudice existing self-regulating mediation systems in so far as these deal with aspects which are not covered by this Directive.

(15) In order to provide legal certainty, this Directive should indicate which date should be relevant for determining whether or not a dispute which the parties attempt to settle through mediation is a cross-border dispute. In the absence of a written agreement, the parties should be deemed to agree to use mediation at the point in time when they take specific action to start the mediation process.

(16) To ensure the necessary mutual trust with respect to confidentiality, effect on limitation and prescription periods, and recognition and enforcement of agreements resulting from mediation, Member States should encourage, by any means they consider appropriate, the training of mediators and the introduction of effective quality control mechanisms concerning the provision of mediation services.

(17) Member States should define such mechanisms, which may include having recourse to market-based solutions, and should not be required to provide any funding in that respect. The mechanisms should aim at preserving the flexibility of the mediation process and the autonomy of the parties, and at ensuring that mediation is conducted in an effective, impartial and competent way. Mediators should be made aware of the existence of the European Code of Conduct for Mediators which should also be made available to the general public on the Internet.

(18) In the field of consumer protection, the Commission has adopted a Recommendation [1] establishing minimum quality criteria which out-of-court bodies involved in the consensual resolution of consumer disputes should offer to their users. Any mediators or organisations coming within the scope of that Recommendation should be encouraged to respect its principles. In order to facilitate the dissemination of information concerning such bodies, the Commission should set up a database of out-of-court schemes which Member States consider as respecting the principles of that Recommendation.

(19) Mediation should not be regarded as a poorer alternative to judicial proceedings in the sense that compliance with agreements resulting from mediation would depend on the good will of the parties. Member States should therefore ensure that the parties to a written agreement resulting from mediation can have the content of their agreement made enforceable. It should only be possible for a Member State to refuse to make an agreement enforceable if the content is contrary to its law, including its private international law, or if its law does not provide for the enforceability of the content of the specific agreement. This could be the case if the obligation specified in the agreement was by its nature unenforceable.

[1] Commission Recommendation 2001/310/EC of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes (OJ L 109, 19.4.2001, p. 56).

(20) The content of an agreement resulting from mediation which has been made enforceable in a Member State should be recognised and declared enforceable in the other Member States in accordance with applicable Community or national law. This could, for example, be on the basis of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [1] or Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility [2].

(21) Regulation (EC) No 2201/2003 specifically provides that, in order to be enforceable in another Member State, agreements between the parties have to be enforceable in the Member State in which they were concluded. Consequently, if the content of an agreement resulting from mediation in a family law matter is not enforceable in the Member State where the agreement was concluded and where the request for enforceability is made, this Directive should not encourage the parties to circumvent the law of that Member State by having their agreement made enforceable in another Member State.

(22) This Directive should not affect the rules in the Member States concerning enforcement of agreements resulting from mediation.

(23) Confidentiality in the mediation process is important and this Directive should therefore provide for a minimum degree of compatibility of civil procedural rules with regard to how to protect the confidentiality of mediation in any subsequent civil and commercial judicial proceedings or arbitration.

(24) In order to encourage the parties to use mediation, Member States should ensure that their rules on limitation and prescription periods do not prevent the parties from going to court or to arbitration if their mediation attempt fails. Member States should make sure that this result is achieved even though this Directive does not harmonise national rules on limitation and prescription periods. Provisions on limitation and prescription periods in international agreements as implemented in the Member States, for instance in the area of transport law, should not be affected by this Directive.

(25) Member States should encourage the provision of information to the general public on how to contact mediators and organisations providing mediation services. They should also encourage legal practitioners to inform their clients of the possibility of mediation.

(26) In accordance with point 34 of the Interinstitutional agreement on better law-making [3], Member States are encouraged to draw up, for themselves and in the interests of the Community, their own tables illustrating, as far as possible, the correlation between this Directive and the transposition measures, and to make them public.

(27) This Directive seeks to promote the fundamental rights, and takes into account the principles, recognised in particular by the Charter of Fundamental Rights of the European Union.

(28) Since the objective of this Directive cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the action, be better achieved at Community level, the Community may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.

(29) In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, the United Kingdom and Ireland have given notice of their wish to take part in the adoption and application of this Directive.

(30) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark does not take part in the adoption of this Directive and is not bound by it or subject to its application,

[1] OJ L 12, 16.1.2001, p. 1. Regulation as last amended by Regulation (EC) No 1791/2006 (OJ L 363, 20.12.2006, p. 1).

[2] OJ L 338, 23.12.2003, p. 1. Regulation as amended by Regulation (EC) No 2116/2004 (OJ L 367, 14.12.2004, p. 1).

[3] OJ C 321, 31.12.2003, p. 1.

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Objective and scope

1. The objective of this Directive is to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings.

2. This Directive shall apply, in cross-border disputes, to civil and commercial matters except as regards rights and obligations which are not at the parties' disposal under the relevant applicable law. It shall not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*).

3. In this Directive, the term 'Member State' shall mean Member States with the exception of Denmark.

Article 2

Cross-border disputes

1. For the purposes of this Directive a cross-border dispute shall be one in which at least one of the parties is domiciled or habitually resident in a Member State other than that of any other party on the date on which:

(a) the parties agree to use mediation after the dispute has arisen;

(b) mediation is ordered by a court;

(c) an obligation to use mediation arises under national law; or

(d) for the purposes of Article 5 an invitation is made to the parties.

2. Notwithstanding paragraph 1, for the purposes of Articles 7 and 8 a cross-border dispute shall also be one in which judicial proceedings or arbitration following mediation between the parties are initiated in a Member State other than that in which the parties were domiciled or habitually resident on the date referred to in paragraph 1(a), (b) or (c).

3. For the purposes of paragraphs 1 and 2, domicile shall be determined in accordance with Articles 59 and 60 of Regulation (EC) No 44/2001.

Article 3

Definitions

For the purposes of this Directive the following definitions shall apply:

(a) 'Mediation' means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State.

It includes mediation conducted by a judge who is not responsible for any judicial proceedings concerning the dispute in question. It excludes attempts made by the court or the judge seised to settle a dispute in the course of judicial proceedings concerning the dispute in question.

(b) 'Mediator' means any third person who is asked to conduct a mediation in an effective, impartial and competent way, regardless of the denomination or profession of that third person in the Member State concerned and of the way in which the third person has been appointed or requested to conduct the mediation.

Article 4

Ensuring the quality of mediation

1. Member States shall encourage, by any means which they consider appropriate, the development of, and adherence to, voluntary codes of conduct by mediators and organisations providing mediation services, as well as other effective quality control mechanisms concerning the provision of mediation services.

2. Member States shall encourage the initial and further training of mediators in order to ensure that the mediation is conducted in an effective, impartial and competent way in relation to the parties.

Article 5

Recourse to mediation

1. A court before which an action is brought may, when appropriate and having regard to all the circumstances of the case, invite the parties to use mediation in order to settle the dispute. The court may also invite the parties to attend an information session on the use of mediation if such sessions are held and are easily available.

2. This Directive is without prejudice to national legislation making the use of mediation compulsory or subject to incentives or sanctions, whether before or after judicial proceedings have started, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system.

Article 6

Enforceability of agreements resulting from mediation

1. Member States shall ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable. The content of such an agreement shall be made enforceable unless, in the case in question, either the content of that agreement is contrary to the law of the Member State where the request is made or the law of that Member State does not provide for its enforceability.

2. The content of the agreement may be made enforceable by a court or other competent authority in a judgment or decision or in an authentic instrument in accordance with the law of the Member State where the request is made.

3. Member States shall inform the Commission of the courts or other authorities competent to receive requests in accordance with paragraphs 1 and 2.

4. Nothing in this Article shall affect the rules applicable to the recognition and enforcement in another Member State of an agreement made enforceable in accordance with paragraph 1.

Article 7

Confidentiality of mediation

1. Given that mediation is intended to take place in a manner which respects confidentiality, Member States shall ensure that, unless the parties agree otherwise, neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process, except:

(a) where this is necessary for overriding considerations of public policy of the Member State concerned, in particular when required to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person; or

(b) where disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement.

2. Nothing in paragraph 1 shall preclude Member States from enacting stricter measures to protect the confidentiality of mediation.

Article 8

Effect of mediation on limitation and prescription periods

1. Member States shall ensure that parties who choose mediation in an attempt to settle a dispute are not subsequently prevented from initiating judicial proceedings or arbitration in relation to that dispute by the expiry of limitation or prescription periods during the mediation process.

2. Paragraph 1 shall be without prejudice to provisions on limitation or prescription periods in international agreements to which Member States are party.

Article 9

Information for the general public

Member States shall encourage, by any means which they consider appropriate, the availability to the general public, in particular on the Internet, of information on how to contact mediators and organisations providing mediation services.

Article 10

Information on competent courts and authorities

The Commission shall make publicly available, by any appropriate means, information on the competent courts or authorities communicated by the Member States pursuant to Article 6(3).

Article 11

Review

Not later than 21 May 2016, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Directive. The report shall consider the development of mediation throughout the European Union and the impact of this Directive in the Member States. If necessary, the report shall be accompanied by proposals to adapt this Directive.

Article 12

Transposition

1. Member States shall bring into force the laws, regulations, and administrative provisions necessary to comply with this Directive before 21 May 2011, with the exception of Article 10, for which the date of compliance shall be 21 November 2010 at the latest. They shall forthwith inform the Commission thereof.

When they are adopted by Member States, these measures shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 13

Entry into force

This Directive shall enter into force on the 20th day following its publication in the Official Journal of the European Union.

Article 14

Addressees

This Directive is addressed to the Member States.

Done at Strasbourg, 21 May 2008.

For the European Parliament	For the Council
The President	The President
H.-G. PÖTTERING	J. LENARČIČ

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EUROPEAN e-JUSTICE

Particularities of cross-border mediation

Timeframes

Although mediation can be started at any time, it is recommended to start mediation as soon as possible, preferably before any judicial process is initiated.

Considering the effectiveness of the recourse to mediation as a preventive system to solve the problems arising from the cross-border change of the child's residence, mediation should be highly recommended in all cross-border family conflicts and in particular in international child relocation disputes. However, as mediation is certainly not suitable in every abduction case it would be good practice to introduce a screening interview into the procedure. This could also help to lessen any concerns of the parents and to enhance their understanding of mediation.

Mediation should never serve as an excuse for one party to postpone the resolution of the conflict. This is of particular importance in child abduction cases where timing is crucial.

Mediators must inform the parties explicitly about this during the information phase or at the beginning of the mediation.

After the relocation of an abducted child to the country of his habitual residence, mediation should also be considered in order to avoid further litigation.

Close co-operation with administrative/judicial authorities

In child abduction cases where central authorities and/or judicial authorities are seised, the mediator should explain to the parties the effects of the mediation in the framework of the on-going procedure.

In some countries, the central authorities have trained in-house mediators.

On this page you will find a list of the central authorities.

Enforceability of the agreement in all jurisdictions concerned (access to relevant legal information)

To be effective, the mediated agreement must receive legal effects and must be enforceable in all the relevant jurisdictions.

Access to information on the relevant procedures in the jurisdictions concerned can be facilitated by central authorities or central contact points for international family mediation.

More information on enforceability in the Member States can be obtained on the page Mediation in Member States.

Language difficulties and modern means of communication

Generally speaking, the physical presence of the parties during the mediation is important. In this regard, appropriate measures to facilitate the provision of necessary travel documents such as a visa, should be taken by countries where the mediation should take place.

Where appropriate and possible bi-national co-mediation should be used.

It is an important advantage for the mediator to speak the language of both parties, or at least the common language (if the couple has one). In cases of bi-cultural co- mediation it might be sufficient for a mediator to speak the language of one party and understand the other if no other solution can be found. Parties must be able to understand all legal terms. The point of finding a mediator who speaks the language of the parties is not just that of limiting costs because interpretation is not required. There is also the psychological aspect and the need for the parties to understand what they are agreeing to.

The mediator should also be sensitive with the cultural background of the parties and should be aware of the cultural diversity.

The introduction of modern means of communication (telephone, (online) videoconferencing, webcams, etc.) helps to reduce costs and organise mediation if physical presence of the parties is not possible. Such technical instruments should be available in every Member State and “long distance” mediation should be tested.

Secure interactive software for mediation should be set up to support mediation.

Moreover, whatever language is used for mediation, it is important that everybody involved understands the language and the terminology used by the mediator(s).

Relationship between mediation and the child related proceedings

Several international instruments generally promote a search for amicable solutions:

- Brussels IIa Regulation: art. 46 (mechanism to give effect to mediated agreement)

- 1980 Hague convention: art. 7 c) (appropriate measures by the CA to secure the voluntary return of the child or to bring about any amicable resolution), 10 (appropriate measures in order to obtain the voluntary return of the child), 16 (no decision on the merits of rights of custody in the requested State).

- 1996 Hague Convention: art. 31 (appropriate steps by the CA to facilitate agreed solution by mediation), art. 23 and 26 (recognition and execution), art. 16 (applicable law = law of the state of the habitual residence of the child), art. 7 (jurisdiction of the State of the child’s habitual residence immediately before the abduction will retain jurisdiction to take measures for the protection of the child), art. 24 (“advance recognition”).

- 2007 Hague Convention: art.19 à 31(decision also includes a settlement or agreement)

Impact of criminal proceedings

Criminal proceedings should be taken into consideration. Judicial and administrative bodies such as central authorities should be able to provide the necessary general information on the relevant laws governing the initiation and termination of criminal proceedings to the parties.

Information on central authority/the central contact point for international family mediation.

Last update: 12/06/2015

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	Chapter 11
LIGHTSQUARED INC., *et al.*,	Case No. 12-12080 (SCC)
Debtors.	Jointly Administered
LIGHTSQUARED LP, LIGHTSQUARED INC., LIGHTSQUARED INVESTORS HOLDINGS INC. TMI COMMUNICATIONS DELAWARE, LIMITED PARTNERSHIP, LIGHTSQUARED GP INC., ATC TECHNOLOGIES, LLC, LIGHTSQUARED CORP., LIGHTSQUARED INC. OF VIRGINIA, LIGHTSQUARED SUBSIDIARY LLC, SKYTERRA HOLDINGS (CANADA) INC., AND SKYTERRA (CANADA) INC.,	Adv. Pro. No. 13-1390 (SCC)
Plaintiff-Intervenors,	
-against-	
SP SPECIAL OPPORTUNITIES LLC, DISH NETWORK CORPORATION, ECHOSTAR CORPORATION, AND CHARLES W. ERGEN,	
Defendants.	

MEDIATOR'S MEMORANDUM UNDER ¶¶ 14 AND 15 OF MEDIATION ORDER

By the Court's Order Selecting Mediator and Governing Mediation Procedure, dated May 28, 2014 (the "Mediation Order"), the Court directed the mediation of issues pertaining to a chapter 11 plan in this case, as set forth in ¶ 2 of the Mediation Order, and appointed me as the mediator. This is the mediator's memorandum, filed as directed by ¶ 14 of the Mediation Order.

As scheduled in advance as provided in ¶¶ 3 and 7 of the Mediation Order, the Court held three day-long mediation sessions, on June 9, 17 and 23, 2014. I informed the parties before the start of the mediation and at each session that the mediation would cease at the end of the June 23, 2014 session. The principal of one party, SPSO/Charles Ergen, left the mediation on June 23, 2014 without my permission; I informed that party's counsel, who remained at that the session, that I was willing to continue the mediation, notwithstanding the ground-rule that it would end at the conclusion of the June 23, 2014 session, if SPSO made a certain proposal by 5:00 p.m. on June 24, 2014. Such proposal was not made. Since June 23, 2014, I have participated in several phone calls regarding details of the agreements reached during the mediation. I am prepared to continue that role if the parties seek it; however, the global mediation directed by the Mediation Order has ended.

As contemplated by ¶¶ 4 and 5 of the Mediation Order, while scheduling the mediation sessions I informed all parties that each would be required to attend all three sessions with at least one principal or, as specifically authorized for the first two sessions for one party, SPSO, by a representative with settlement authority. A list of the participants in the mediation and, as provided in ¶ 14 of the Mediation Order, the business addresses and telephone numbers of the counsel and advisors who participated, is attached.

As provided in ¶ 14 of the Mediation Order, I report that the mediation was primarily successful. With the exception of one party, all of the parties to the mediation have agreed on the key business terms of a chapter 11 plan for the debtors that should be confirmable without the support of the one party, SPSO, which has not agreed.

There clearly is no requirement that a mediation party reach agreement with any other party. I believe, however, and report consistent with ¶ 15 of the Mediation Order, that SPSO/Charles Ergen have not participated in the mediation in good faith and have wasted the parties and the mediator's

time and resources. I understand the seriousness of this assertion; it is unique in my experience as a mediator in a field where the parties are known to assert their positions aggressively and sharp elbows in negotiations, although not welcome, are tolerated.

Dated: White Plains, New York
June 27, 2014

/s/ Robert D. Drain
Hon. Robert D. Drain

LightSquared Mediator's Report—Exhibit A

List of Mediation Participants Pursuant to the Order Selecting Mediator and Governing Mediation Procedure ¶ 14(b)

LightSquared - June 9, 2014 Mediation

	Last Name	First Name	Company	Contact Information
1.	Abbruzzese	Jerry	Harbinger Capital Partners	
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3.	Baker	Nick	Simpson Thacher & Bartlett LLP	425 Lexington Avenue New York, NY 10017-3954 Tel: (212) 455-2032
4.	Basta	Paul	Kirkland & Ellis LLP	601 Lexington Avenue New York, NY 10022 Tel: (212) 446-4750
5.	Boylan	Neil	J.P. Morgan Chase Bank, N.A.	383 Madison Avenue New York, NY 10179 Tel: (212) 270-1410
6.	Brown	C.J.	The Blackstone Group, L.P.	345 Park Avenue New York, NY 10154 Tel: (212) 583-5582
7.	Carr	Alan	Fortress Investment Group	1345 Avenue of the Americas New York, NY 10105 Tel: (212) 798-6100
8.	Court	Nathan	Houlihan Lokey	10250 Constellation Blvd., 5th Floor Los Angeles, CA 90067 Tel. (310) 553-8871

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11.	Dublin	Phil	Akin Gump Strauss Hauer & Feld LLP	One Bryant Park New York, NY 10036-6745 Tel: (212) 872-1000
12.	Ergen	Cantey	SP Special Opportunities LLC	
13.	Falcone	Phil	Harbinger Capital Partners	450 Park Avenue, 30th Floor New York, NY 10022-2637 Tel: (212) 339-5800
14.	Forman	Dan	Willkie Farr & Gallagher LLP	787 Seventh Avenue New York, NY 10019-6099 Tel: (212) 728-8196
15.	Fraser	Bryce	Fortress Investment Group	One Market Plaza Spear Tower, 42nd Floor San Francisoc, CA 94105 Tel: (415) 284-7444
16.	Friedman	David	Kasowitz Benson Torres & Friedman LLP	1633 Broadway New York, NY 10019-6799 Tel: (212) 506-1700
17.	Gartenberg	Karen	Milbank, Tweed, Hadley & McCloy LLP	One Chase Manhattan Plaza New York, NY 10005-1413 Tel: (212) 530-5630
18.	Goldstein	Jayme	Stroock & Stroock & Lavan LLP	180 Maiden Lane New York, NY 10038-4982

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23.	Joszef	Steve	J.P. Morgan Chase Bank, N.A.	383 Madison Avenue New York, NY 10179 Tel: (212) 834-5225
24.	Kleinman	Adam	Mast Capital Management, LLC	200 Clarendon Street, 51st Floor Boston, MA 02116 Tel: (617) 375-3019
25.	Kronsberg	Joe	Cyrus Capital	399 Park Avenue, 39th Floor New York, NY 10022 Tel: (212) 380-5800
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99.	Szanzer	Steven	Milbank, Tweed, Hadley & McCloy LLP	One Chase Manhattan Plaza New York, NY 10005-1413 Tel: (212) 530-5120
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102	Zelin	Steve	The Blackstone Group, L.P.	345 Park Avenue New York, NY 10154 Tel: (212) 583-5886

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105	Baker	Nick	Simpson Thacher & Bartlett LLP	425 Lexington Avenue New York, NY 10017-3954 Tel: (212) 455-2032
106	Barr	Matt	Milbank, Tweed, Hadley & McCloy LLP	One Chase Manhattan Plaza New York, NY 10005-1413 Tel: (212) 530-5194
107	Basta	Paul	Kirkland & Ellis LLP	601 Lexington Avenue New York, NY 10022 Tel: (212) 446-4750
108	Boylan	Neil	J.P. Morgan Chase Bank, N.A.	383 Madison Avenue New York, NY 10179 Tel: (212) 270-1410
109	Brown	C.J.	The Blackstone Group, L.P.	345 Park Avenue New York, NY 10154 Tel: (212) 583-5582
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142	Park	Karen	Schulte Roth & Zabel	919 Third Avenue New York, NY 10022 Tel: (212) 756-2000
143	Qusba	Sandy	Simpson Thacher & Bartlett LLP	425 Lexington Avenue New York, NY 10017-3954 Tel: (212) 455-3760
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146	Saad	Joe	J.P. Morgan Chase Bank, N.A.	383 Madison Avenue New York, NY 10179 Tel: (212) 270-6354
147	Shiff	Adam	Kasowitz Benson Torres & Friedman LLP	1633 Broadway New York, NY 10019-6799

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