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Mediation Matters

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Mediation Conflicts, Conundrums and Ethical Dilemmas in Practice

Why "Informality" in Mediation Does Not Mean "Law-Free"

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Mediation has become an indispensable feature of modern bankruptcy practice. From mass-tort reorganizations to contested plan negotiations, not to mention the common clawback actions, courts and parties increasingly rely on mediation to manage cost, reduce risk and facilitate global resolution. However, the growing institutionalization of mediation has produced a recurring misconception that mediation is a more informal process that operates outside the normal constraints of the judicial process and accompanying rules and guidelines. It does not.

Regardless of whether mediation is conducted by a bankruptcy judge, a parajudicial officer or a court-appointed neutral, it remains subject to applicable legal, ethical and procedural constraints.[1] The veneer of relaxed judicial process neither suspends nor supersedes the operation of external laws, ethical codes, custom and practice, which assure professionalism, integrity, fundamental fairness and civility.

Critically, mediation's sacrosanct veil of confidentiality, which encourages the parties' efforts of conciliation, nonetheless contemplates that the mediator, lawyers and parties conduct themselves within these guardrails. This article examines recurring fault lines in bankruptcy mediation, including the authority and role of the mediator, conflicts of interest and fiduciary obligations, ethical and criminal conduct, confidentiality and transparency, enforceability of agreements, and good-faith participation.

The Expanding Role of Mediation in Bankruptcy Cases

Although the Bankruptcy Code does not expressly authorize mediation, bankruptcy courts consistently derive authority to order mediation from 11 U.S.C. § 105(a), Rule 7016 of the Federal Rules of Bankruptcy Procedure (incorporating Rule 16 of the Federal Rules of Civil Procedure), and the court's inherent authority to manage cases and dockets.[2] Many courts supplement this authority with standing mediation orders or local rules, reflecting mediation's evolution from an experimental tool to a core case-administration mechanism.[3] Therefore, many bankruptcy courts' local rules contain brief provisions describing the mediation process applicable to adversary proceedings and contested matters.

Courts routinely compel mediation in adversary proceedings, contested matters, plan negotiations and mass-claim contexts.[4] In complex cases, mediation often functions as the primary forum for dispute resolution, shaping outcomes that would otherwise require extensive litigation. Despite its importance, mediation remains procedurally anomalous. It is not an adjudication, and it is not arbitration. However, it often carries consequences as significant as any contested hearing. This tension between informality and consequence lies at the heart of many challenges in mediation.

1 *In re Atl. Pipe Corp.*, 304 F.3d 135, 140-45 (1st Cir. 2002) (identifying four potential sources of judicial authority for ordering mandatory nonbinding mediation of pending cases, namely (1) court's local rules, (2) applicable statute, (3) Federal Rules of Civil Procedure, and (4) court's inherent powers).

2 11 U.S.C. § 105(a); Fed. R. Bankr. P. 7016; *In re A.T. Reynolds & Sons Inc.*, 452 B.R. 374, 381 (S.D.N.Y. 2011).

3 *See, e.g.*, S.D.N.Y. Bankr. Local R. 9019-1; D. Del. Bankr. L.R. 9019-5.

4 *See, e.g., In re MF Global Holdings Ltd.*, 2014 WL 7011301 (Bankr. S.D.N.Y. Dec. 12, 2014).

Who Is the Mediator? Authority, Influence and Perception

Judges as Mediators: Efficiency vs. Due Process

Some bankruptcy courts permit judges, either the presiding judge or a colleague, to serve as mediators. Although this practice might offer efficiency and subject-matter expertise, it also raises some fundamental concerns.

Courts have emphasized that a judge who serves as a mediator in a matter may not later adjudicate disputed issues involving the same parties or subject matter without risking actual or perceived bias.[5] Exposure to confidential mediation communications can necessitate recusal under 28 U.S.C. § 455(a), even absent evidence of actual prejudice.[6]

Appellate courts have cautioned judges against the blurring of adjudicative and facilitative roles, particularly where judicial comments during mediation could be construed as prejudging the merits of a matter. Unsolicited or early evaluative comments, especially from a judge, risk pressuring parties to settle based on perceived judicial preferences rather than legal merit.

This risk is not merely theoretical. Because mediation takes place outside of a court in a more confined, somewhat informal setting where the client is present, the parties will naturally act differently than in court. As a result, the mediator gets a glimpse of different client/advocate interactions, not to mention a more open and unfettered view of the case in question. The parties and counsel might even discuss and share views on the presiding judge and his or her prior rulings or potential ruling in a matter as part of a risk analysis or evaluation of the case.

Although part of mediation's purpose is to encourage the parties to freely exchange information and obtain an early neutral evaluation or a risk analysis from the mediator where the mediator is a judge, practitioners might fear the potential impact of their positioning as a zealous client advocate in other matters before the same judge or other judges. This fear concerning whether judges will keep score or talk to one another persists despite jurists attempting to disabuse practitioners of such practices.

Parajudicial Officers and Court-Appointed Neutrals

To mitigate these concerns, courts frequently appoint examiners, special masters or private mediators with restructuring expertise to serve as neutrals. Although this approach reduces the foregoing concerns, it introduces other challenges, particularly regarding authority and accountability.

A mediator's role is fundamentally facilitative and at times evaluative, but should not be adjudicative. Nevertheless, in large chapter 11 cases, mediators often exert substantial influence over deal structure, sequencing and momentum. Problems arise when mediators are perceived as acting as *de facto* decision-makers. This is particularly so when their "recommendations" effectively narrow party choice in deciding how to resolve a matter.

Courts have cautioned that a mediator's authority flows solely from the mediation order and party consent, not from judicial power. Practitioners should remain sensitive to the distinction between process management and outcome direction, as crossing that line may invite fairness and legitimacy challenges.

Conflicts of Interest and Fiduciary Duties

Mediator Conflicts and Disclosure Obligations

Unlike judges, mediators are not subject to uniform statutory disqualification standards. They might come from different professions[7] governed by different ethical codes of conduct. Nevertheless, courts generally require the disclosure of any relationships that could reasonably call neutrality into question.[8]

Disclosures of connections and/or conflicts might arise more frequently in bankruptcy mediations, as mediators usually require subject-matter expertise and, as such, are often drawn from a relatively small pool of experienced restructuring or advisory professionals. Prior representations, repeat appointments, business-sector alignments or professional relationships with parties or counsel could create at least the appearance of partiality — even if the disclosure would not otherwise require an attorney being engaged as an advocate to step away from a matter.

Although mediators are not arbitrators, and are therefore not making decisions, their access to confidential information and party positions requires that the participants be aware of who is gaining access to such information and being afforded trust to neutrally facilitate conciliation or to render an unbiased evaluation of a dispute that provides guidance toward a resolution that works for the parties in the room, and not for any other party, purpose or concern. Bankruptcy courts have focused on disclosure, transparency and informed consent, recognizing that nondisclosure undermines process integrity and enforceability and invites post-hoc attacks.

Fiduciary Duties of Estate Representatives

Mediation can complicate the fiduciary duties of trustees, debtors in possession and official committees in bankruptcy. Unlike the mediation of nonbankruptcy matters, which are often two-party private disputes, in bankruptcy there are often parties outside of the mediation who will be impacted directly or indirectly by any deal cut in the room, and to which some of these players may owe an independent duty. Although encouraged or even ordered to negotiate confidentially, these parties might remain bound by their respective duties of loyalty and care to all constituents.[9]

This tension is particularly acute when mediation produces settlements affecting nonparticipating stakeholders, including equityholders, future claimants or minority creditor groups. Bankruptcy courts reviewing settlements under Rule 9019 work to ensure that fiduciary obligations have

5 *In re Kensington Int'l Ltd.*, 368 F.3d 289, 302-04 (3d Cir. 2004).
6 28 U.S.C. § 455(a); *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988).
7 Mediators do not have to be lawyers; they can be accountants or financial advisors or even experts in a particular field.
8 *In re Congoleum Corp.*, 426 F.3d 675, 689-90 (3d Cir. 2005).
9 *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343 (1985) (discussing where trustee's loyalties lie).

not been subordinated to expediency.[10] In addition, the parties entering into a resolution have to bear in mind potential objections to a resolution, as most settlements in bankruptcy will require court approval upon notice to the larger group of creditors and parties-in-interest.

Ethical Violations, Criminal Conduct and Misrepresentation

Mediation does not suspend lawyers' ethical obligations. Violations of these obligations include misrepresentation to parties, misuse of confidentiality to shield improper conduct, coercive tactics, or attempts to manipulate vulnerable parties. The courts retain authority to sanction such conduct.

Criminal conduct during the case or mediation (*e.g.*, fraud, wire fraud, tax fraud or threats of violence) simply cannot be shielded by the confidentiality of the process. Moreover, although mediators are not investigators, they cannot knowingly facilitate settlements premised on an ongoing illegality, or shirk any professional or legal responsibilities to report ethical misconduct or prospective and ongoing crimes.

Similarly, false statements in mediation that are repeated in filings or testimony in the courts can constitute perjury or Rule 11 violations. [11] Bankruptcy courts can unwind a mediated settlement and can sanction participants where misrepresentations were material and the process was tainted.

Confidentiality: Shield or Sword?

Confidentiality is central to an effective mediation process. Bankruptcy courts' rules or orders generally protect statements made during mediation, as well as information exchanged, but recognize the exceptions necessary to evaluate settlement fairness or address misconduct in limited instances.[12]

While the bankruptcy process is public, the mediation process is private. This tension might be acute when settlements involve other proceedings or parties, nonconsensual releases, channeling injunctions or global resolutions. The courts must balance the benefits of confidential negotiation with the need for transparency sufficient for *bona fide* scrutiny of parties and any subsequent appellate review. Practitioners should structure mediated resolutions to withstand scrutiny.

Enforceability and Renounced Settlements

Disputes frequently arise over whether a mediation produced an enforceable settlement agreement or merely an agreement to agree. The courts apply ordinary contract principles, focusing on intent, definiteness and mutual assent to assess any such disputes. As a general rule, most mediators will not let parties that have reached a deal at the table leave without a basic memorandum of understanding or term sheet being signed or affirmatively acknowledged. (In a pinch, an email exchange of key terms and agreement to the same can be utilized.)

In the event that subsequent to reaching a deal a party has "buyer's remorse" and seeks to back out of the settlement, the other party could look to these communications/agreements to enforce the deal reached. Courts apply ordinary contract principles, focusing on intent, definiteness and mutual assent.[13] Courts have enforced term sheets with sufficiently definite material terms, even if customary definitive documentation is incomplete.

Conversely, settlements with unresolved essential terms have been rejected. When a settlement has been renounced, a mediator must avoid advocacy or coercion, limiting their role to clarifying intent among the parties and assisting the parties as needed. Only in rare exceptions (except with the consent of the parties) should the mediator weigh in on this issue.

Good Faith, Process Compliance and Party Civility

Good-faith participation is required, even though parties cannot be compelled to settle. Manifest bad faith includes noncompliance with orders, obstruction or disruption of the mediation. Courts might sanction such behaviors but generally respect the prerogative not to settle.[14] This prerogative, however, does not include defiance to participate.

Mediators might confront unruly behavior, such as hostility, intimidation or procedural noncompliance. Courts have affirmed mediator authority to terminate sessions or report noncompliance. Counterparties can seek sanctions or fees occasioned by incivility.

Mediator Misrepresentation, Malpractice and Capacity

Although nonjudicial mediators likely enjoy at least quasi-judicial immunity in most jurisdictions, misrepresentation, coercion or material nondisclosure by a mediator can prompt court intervention. Mediators must also monitor the capacity of parties and counsel to provide informed consent, particularly when vulnerable or *pro se* stakeholders are involved.

The American Bar Association (ABA) recently issued an opinion specifically addressed to misrepresentations in the dispute-resolution process.[15] This guideline clarifies that lawyers acting as mediators face a strict ban on any misrepresentation of facts or positions that is different than lawyers acting as advocates where puffery is permissible. It is important, because parties rely on the mediator's neutrality, so lawyers/mediators must avoid dishonesty and not lend credence

10 Fed. R. Bankr. P. 9019; *In re Iridium Operating LLC*, 478 F.3d 452, 462 (2d Cir. 2007).
11 Fed. R. Bankr. P. 9011; 18 U.S.C. §§ 152, 157.
12 *See* Leslie A. Berkoff & John G. Loughnane, "Confidentiality Fundamentals: A Continuing Discussion," XLIV *ABI Journal* 1, 72-73, 92, January 2025, abi.org/abi-journal/confidentiality-fundamentals-a-continuing-discussion; Leslie A. Berkoff, "Is Your Dispute Resolution Process Truly Confidential," *New York Law Journal* (Aug. 7, 2023); Leslie A. Berkoff & John G. Loughnane, "Limitations on Confidentiality," XLI *ABI Journal* 9, 26-27, 47, September 2022, abi.org/abi-journal/limitations-on-confidentiality (unless otherwise specified, all links in this article were last visited on Jan. 21, 2026).
13 Leslie A. Berkoff & Edward L. Schnitzer, "Remedies for Refusing to Consummate a Settlement Agreement Reached at Mediation," XLI *ABI Journal* 4, 18-19, 67, April 2022, abi.org/abi-journal/remedies-for-refusing-to-consummate-a-settlement-agreement-reached-at-mediation.
14 *See In re A.T. Reynolds & Sons Inc.*, 424 B.R. 76, 80 (Bankr. S.D.N.Y. 2010).
15 ABA's Formal Opinion 518 (2025).

to false statements, even if conveyed from a party, in order to uphold their duty under ABA Model Rule 8.4(c). This means that mediators cannot endorse misleading bottom-line figures or exaggerations, as a mediator's words carry significant weight and induce reliance, requiring greater honesty and transparency in their neutral role. This carries throughout the process to both summaries of offers as well as guidance, evaluations or general analysis of a case's trajectory.

Communications with the Judge

Mediators must manage and limit communications with the presiding judge carefully. Before mediation efforts, it might not be unusual for a presiding judge to educate the mediator as to the material issues, facts and dynamics. This "learning curve" briefing should generally be disclosed to the parties by the mediator. No further dialogue with the presiding judge should take place other than scheduling matters and informing on whether resolution or impasse has been achieved.

After the mediation efforts conclude, most local rules or referral orders merely require a mediator to do little more than provide general information to the court on status, who attended, and whether there a settlement. All other details are left for any settlement agreements or for the parties to address specifically with the court. It is critical to avoid substantive disclosures that could compromise neutrality, confidentiality or due process.

Even well-intentioned reports might create appearance-of-bias issues if they convey evaluative judgments beyond those the parties agreed to. To this same end, many mediators will maintain very generic time records just noting that they spoke to a party at a specific date and time, or reviewed papers or conducted a session; contrary to general bankruptcy practice for informative time-keeping, generic entries also help preserve the integrity and privacy of the process.

Conclusion: Ethical Navigation Is the Mediator's Core Competency

A mediator's success is measured not only by the settlements achieved but by the integrity of the process maintained by them and how they conducted themselves throughout. Bankruptcy mediation depends on trust; ethical navigation, conflict-management and enforcement of fiduciary duties are essential. Where trust erodes, mediation risks become a source of conflict rather than a vehicle for resolution. As the use of mediation continues to grow, it is likely that additional rules and guidelines will be promulgated to help clarify and define the aforementioned issues and concerns. abi

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