American College of Bankruptcy

Mediation in Bankruptcy

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I. Introduction

In 1998, Congress enacted the Alternative Disputes Resolution Act of 1998, which 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."[1]

Mediation has been described as "a staple" of large chapter 11 bankruptcy cases, particularly those involving mass torts.[2] As one commentator has observed, "without mediation it may be impossible to get consensus around, or litigate to conclusion, the plan treatment of tort claimants or whether the releases sought by the debtor in exchange for distributions to tort claimants are reasonable and appropriate."[3] Thus, mediation has been utilized in multiple high-profile cases, such as *In re Purdue Pharma L.P.*,[4] *In re Boy Scouts of America*,[5] *In re Mallinckrodt plc, et al.*,[6] and *In re PG&E Corporation*,[7] among many others.

Mediation, with its often complex interplay of financial, legal, and at times emotional interests, provides a framework for the timely and cost-efficient resolution of bankruptcy-related disputes. Given the sensitive nature of disclosures and the inherent vulnerabilities of the parties involved, confidentiality is critical. Confidentiality assures parties that their financial data, strategies and other non-public information exchanged during mediation will not be misused or publicly exposed. It also encourages open and honest discussions, which assist the mediation process. Similarly, mediator immunity is essential. This dual approach – strict confidentiality and the protection of mediators – ensures that bankruptcy mediation remains an attractive, viable option for the resolution of bankruptcy-related disputes.

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1 28 U.S.C. § 651.

2 Julia Winters, *Mediation in Bankruptcy – an Important, Albeit Unwieldy Tool*, 38 BANKING & FINANCIAL SERVICES 121 (Nov. 2022).

3 *Id.*, at 122.

4 Case No. 19-23649 (RDD) (S.D.N.Y.).

5 Case No. 20-10343 (LSS) (Bankr. D. Del.).

6 Case No. 20-12522 (JDD) (Bankr.D. Del.).

7 Case No. 19-30088 (DM) (Bankr. N.D. Ca.).

II. Mediator Qualifications

Because of the complexities of mediation, prospective mediators typically are required to undergo training before becoming eligible for service. For example, the Local Rules for the United States Bankruptcy Court for the District of Delaware provides for the maintenance of a registry of persons qualified to mediate disputes; anyone seeking to be placed on such registry:

> (b)(i) . . . shall submit to the ADR 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 of Mediators. . . . 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. . . . Each applicant shall certify that the applicant has completed appropriate mediation or arbitration training or has sufficient experience in the mediation or arbitration process . . . .[8] [9]

III. Mediator Impartiality

Impartiality also is required. For example, the Local Rules for the United States Bankruptcy Court for the District of Delaware provide that "[a]ny person selected as a mediator or arbitrator shall be disqualified in any matter where 28 U.S.C. § 455[10] would require

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[8] Local Rules 9019-2(b)(i), United States Bankruptcy Court for the District of Delaware. Similar requirements govern mediator applications by non-attorneys. See also Local Rules 9019-2(b)(ii) - (iii), United States Bankruptcy Court for the District of Delaware.

[9] The American Bankruptcy Institute has historically offered an annual 40-hour mediation training program. See generally abi.org/events.

[10] 28 U.S.C. § 455 provides that:

> (a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
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> (b) He shall also disqualify himself in the following circumstances:
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> > (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
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> > (2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
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> > (3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv)Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate judge, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time

disqualification if that person were a Judge."[11] The Delaware Local Rules also require a proposed mediator to promptly "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 or arbitrator."[12]

These requirements are not unique.[13]

IV. Attributes of an Effective Mediator & Criteria for Optimal Selection

a. Goldberg's Exploration of Mediator Efficacy: Emphasizing Empathy, Integrity, and Astute Dispute Awareness

Professor Stephen Goldberg of Northwestern University investigated behaviors emblematic of successful mediators. Key attributes identified were: (i) friendliness, empathy, and likability; (ii) integrity; and (iii) informed intelligence about the parties' dispute. Patience and persistence followed closely. Conversely, traits indicating an unsuccessful mediator included a lack of integrity and insufficient initiative. Goldberg's research emphasized the critical role of mediator rapport in dispute resolution, as further detailed in his seminal papers in 2005 and a subsequent 2007 collaboration with Margaret L. Shaw.[14]

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has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate judge, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

11 Local Rule 9019-2(e)(iii)(A) of the United States Bankruptcy Court for the District of Delaware.

12 Local Rule 9019-2(e)(iii)(B) of the United States Bankruptcy Court for the District of Delaware.

13 *See, e.g.*, Local Rule 83.8 of the Local Rules for the United States Bankruptcy Court for the Eastern District of New York, which provides that:

> No mediator may serve in any matter in violation of the standards set forth in 28 U.S.C. § 455. If a mediator is concerned that a circumstance covered by subparagraph (a) of that section might exist, e.g., if the mediator's law firm has represented one or more of the parties, or if one of the lawyers who would appear before the mediator at the mediation session is involved in a case on which an attorney in the mediator's firm is working, the mediator shall promptly disclose that circumstance to all counsel in writing. A party who believes that the assigned mediator has a conflict of interest shall bring this concern to the attention of the Clerk's Office in writing, within fourteen (14) days of learning the source of the potential conflict or the objection to such a potential conflict shall be deemed to have been waived. Any objections that cannot be resolved by the parties in consultation with the Clerk's Office shall be referred to the Judge or Magistrate Judge who has designated the case for inclusion in the mediation program.

14 Stephen B. Goldberg and Margaret L. Shaw, *The Secrets of Successful (and Unsuccessful) Mediators Continued: Studies Two and Three*, 23 NEGOT. J. 393 (2007).

His initial study from 2005 ("Study One") engaged 30 seasoned mediators. Significantly, 75% of participants posited that the establishment of rapport, marked by mutual understanding, empathy, and trust, was indispensable to successful settlement agreements. While some mediators attributed the achievement of this rapport to techniques like empathic listening, others emphasized facets such as ethical behavior, honesty, and trustworthiness. Upon the foundation of rapport, mediators identified innovative problem-solving, patience, persistence, and the use of humor as instrumental in advancing settlements. Significantly, Study One was limited in its scope, as it exclusively captured the *mediator's* viewpoint, excluding the perceptions of parties involved in the mediation process.[15]

Study Two sought feedback from individuals who had engaged with the mediators featured in Study One – in other words, from the applicable mediation parties. Of the 329 representatives approached, 216 responded. A predominant theme from this feedback was the critical role of mediator credibility, with 60% of respondents identifying qualities like friendliness, empathy, and likability as quintessential. Further, 53% underscored the value of high integrity, and 47% emphasized the necessity for mediators to be fully informed about the dispute. Overall, the study distilled that a combination of empathy and integrity was pivotal for mediator efficacy. In addition to these attributes, patience and persistence emerged as salient characteristics of successful mediators.[16]

Study Three, encompassing 96 participants from Study Two, centered on identifying unsatisfactory mediator behaviors. Foremost among the critiques was a perceivable lack of integrity, accompanied by mediators' passive engagement, characterized by a mechanical approach devoid of genuine initiative. Specific instances of compromised integrity encompassed breaches of confidentiality, misrepresentations regarding opposing stances, overt biases, and undue pressures to reach settlements, often at imprudent costs. These behaviors, the study found, not only eroded trust but frequently culminated in the derailment of the mediation process.[17]

b. Berkoff's Insight on Mediator Selection: Beyond Credentials to Suitability and Multi-Disciplinary Expertise

In *The Importance of the Right Mediator*,[18] Leslie Berkoff underscores the importance of several factors when considering the right mediator for a dispute. She emphasizes the need to evaluate the nature of the dispute, the characteristics of the parties involved, and the timetable in which the dispute must be resolved. Berkoff further points out that when a dispute encompasses multiple areas of law, such as bankruptcy and trademark or copyright law, it is vital to have a mediator well-versed in such areas.[19]

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15 *Id.*, at p. 395.

16 *Id.*, at 407.

17 *Id.*, at 413-414.

18 Leslie A. Berkoff, *The Importance of the Right Mediator*, AM. BANKR. INST. J. 101 (2017).

19 *Id.*, at 102.

For instance, she recalls a mediation of claims based on state court tort litigation. She highlights the importance of understanding the intricacies of the bankruptcy process in such cases, because ultimately any claim resulting from mediation (or claim adjudication) would be part of the unsecured creditors' pool. In such a scenario, even a substantial claim might only result in minimal returns. This may not be understood by a mediator familiar only with tort law. Berkoff also suggests that selecting the appropriate mediator involves more than just examining credentials. While a qualified mediator is indeed someone trained by a respected organization, it is equally essential to consider the mediator's style, temperament, and availability to ensure he/she is the right fit for the case.[20]

c. Izumi's Analysis of Mediator Neutrality: The Interplay of Trust, Impartiality, and Challenges in Mediation

In her scholarly examination, *Implicit Bias and the Illusion of Mediator Neutrality*,[21] Carol Izumi analyzes the critical role of mediator neutrality. The essence of mediation, as explained in the article, is an impartial third party's facilitation of communication and the promotion of voluntary decision-making by disputing entities. With the common thread across definitions emphasizing terms such as "impartial," "neutral," and "disinterested," Izumi underscores the significance of neutrality as the bulwark against bias, ensuring a conducive atmosphere for justice claims, open dialogue, and collaboratively constructed agreements.[22]

The article emphasizes that a neutral mediator refrains from taking a partisan stance, thereby empowering the involved parties to steer the decision-making process and trustingly disclose information.[23] This foundation of neutrality is inextricably linked with trust, which is fostered when mediators are perceived as understanding, skilled, impartial, honest, and dedicated to ensuring a resolution in the parties' best interests, devoid of any ulterior motives or conflicts.

d. Judicial Oversight in Boy Scouts Bankruptcy Mediation: The Imperative of Mediator Neutrality

In an article titled *Bankruptcy Judge Ousts Boy Scouts Mediator; Extends Deadline*,[24] published in the Insurance Journal on December 9, 2021, Randall Chase examines a critical legal decision in the bankruptcy case of the Boy Scouts of America, and showcases a significant judicial intervention in the mediation process. The subject of the article is Judge Laurie Selber Silverstein's disqualification of a mediator, which was precipitated by the Boy Scouts' proposal that the mediator serve as the initial "special reviewer" under a proposed settlement – a role designed to assist a proposed fund to be established to compensate child sexual abuse victims.

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20 *Id.*

21 Carol Izumi, *Implicit Bias and the Illusion of Mediator Neutrality*, 34 WASH. U. J.L. & POL'Y 71 (Jan. 2010).

22 *Id.*, at 74-75.

23 *Id.*, at 76.

24 Randall Chase, *Bankruptcy Judge Ousts Boy Scouts Mediator; Extends Deadline*, INS. J. (Dec. 9, 2021), https://www.insurancejournal.com/news/national/2021/12/09/645085.htm (last visited October 13, 2023).

Judge Silverstein disqualified the mediator because his proposed role as "special reviewer," in her view, vested him with a stake in the outcome of the mediation. This development, she concluded, compromised his impartiality, and called into question the sanctity of the mediation process, given the importance of a mediator's neutral role in such negotiations. This decision underscores the judicial emphasis on maintaining the impartiality of mediators, particularly in cases entailing sensitive matters such as compensation for abuse victims.

V. The Judge as Mediator

a. *McAdams v. Robinson*

In *McAdams v. Robinson*,[25] Magistrate Judge Timothy Sullivan mediated the settlement of a class action and granted preliminary approval over the agreement. Judge Sullivan then scheduled a fairness hearing, in which he overruled the plaintiff's objection that the agreement was unfair. Although McAdams appealed the approval of the settlement on the grounds that it "'present[ed] a potentially serious conflict of interest' because the magistrate judge both mediated and approved the settlement", the Fourth Circuit declined to consider the argument because it concluded that McAdams had not preserved the issue for appeal, had not moved for the magistrate judge's recusal and had not otherwise objected on this basis to approval of the settlement.[26] Instead, the Court concluded that "[b]ecause McAdams takes a mere "passing shot" at the issue, we don't consider it."[27]

b. *Evans v. State*

Evans v. State[28] involved an underlying civil claim brought by baseball great Ted Williams against, among other parties, Vincent Antonucci. During a case management conference, the state court trial judge offered to mediate the parties' disputes, provided that all of the parties and their attorneys agreed that they would not use the trial judge's role as mediator as a basis for disqualification. The mediation failed. Shortly thereafter, Antonucci's lawyer (Evans) filed a motion to disqualify the trial judge based on statements made by the trial judge during the mediation. The trial judge then cited Evans for criminal contempt.[29] On appeal, Evans provided uncontroverted evidence that the trial court judge, during the mediation, stated that "they'll always be people like [Antonucci] around, but let's face it, there's only one Ted Williams."[30] The appellate court concluded that the parties' "agreement not to seek recusal was

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25 26 F.4th 149 (4th Cir. 2022).

26 *Id.*, at 163 n.5.

27 *Id.*

28 603 So.2d 15 (Fla. Dist. Ct. App. 1992).

29 *Id.*, at 16.

30 *Id.*

limited to the trial judge acting as mediator and not to the nature of any comments that the trial judge would make during the mediation proceedings."[31]

In considering the propriety of a trial judge mediating a case before him/her, the appellate court noted as follows:

> . . . regardless of the good faith of all concerned, this case more than points out the basic fallacy in such an agreement—that a judge can act as both mediator and judge. The function of a mediator and a judge are conceptually different. The function of a mediator is to encourage settlement of a dispute and a mediator uses various techniques in an attempt to achieve this result. A mediator may separate the parties and conduct *ex parte* proceedings in which the mediator may either subtly or candidly point out weaknesses in a particular party's factual or legal position. A mediator, through training and experience, approaches different parties in different ways. Because a mediator will not be deciding the case, both the mediator and the parties are free to discuss without fear of any consequence the ramifications of settling a particular dispute as opposed to litigating it. This is one of the reasons that a mediator must generally preserve and maintain the confidentiality of all mediation proceedings.[32]

The court then concluded that ". . . mediation should be left to the mediators and judging to the judges." The criminal contempt sanction against Evans was reversed.[33]

VI. Confidentiality

Confidentiality of non-public information, as well as settlement proposals, exchanged during mediation is universally required.[34] For example, the Local Rules for the United States Bankruptcy Court for the District of Delaware state that "[c]onfidentiality is necessary to the mediation process, and mediations shall be confidential under these rules and to the fullest extent permissible under otherwise applicable law."[35] Towards these ends:

> the mediator and the participants in mediation are prohibited from divulging, outside of the mediation, any oral or written information disclosed by the parties

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31 *Id.*, at 17.

32 *Id.*

33 *Id.* at 17-18.

34 See, generally, Kent L. Brown, *Confidentiality in Mediation: Status and Implications*, 1991 J. OF DISP. RESOL. 1 (1991), https://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=1223&context=jdr (last visited October 13, 2023); *Ethical Guidelines for Mediators*, ASS'N OF ATTORNEY-MEDIATORS, https://www.attorney-mediators.org/ethicalguidelines#:~:text=Unless%20authorized%20by%20the%20disclosing,subject%20matter%20of%20the%20dispute (last visited October 13, 2023); and Lawrence R. Freedman & Michael L. Prigoff, *Confidentiality in Mediation: The Need for Protection*, 2 J. of DISP. RESOL. 37 (1986).

35 Local Rule 9019(d) for the United States Bankruptcy Court for the District of Delaware.

or witnesses to or in the presence of the mediator, or between the parties during any mediation conference.[36]

These confidentiality requirements are far from unique; for example, the procedures governing mediation in the United States Bankruptcy Court for the Southern District of New York provide, among other things, that:

> 5.1 **Confidentiality as to the Court and Third Parties**. Any statements made by the mediator, by the parties or by others during the mediation process shall not be divulged by any of the participants in the mediation (or their agents) or by the mediator to the Court or to any third party. All records, reports, or other documents received or made by a mediator while serving in such capacity shall be confidential and shall not be provided to the Court, unless they would be otherwise admissible. The mediator shall not be compelled to divulge such records or to testify in regard to the mediation in connection with any arbitral, judicial or other proceeding, including any hearing held by the Court in connection with the referred matter. Nothing in this section, however, precludes the mediator from reporting the status (though not content) of the mediation effort to the Court orally or in writing, or from complying with the obligation set forth in 3.2 to report failures to attend or to participate in good faith.
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> 5.2 **Confidentiality of Mediation Effort**. Rule 408 of the Federal Rules of Evidence shall apply to mediation proceedings. Except as permitted by Rule 408, no person may rely on or introduce as evidence in connection with any arbitral, judicial or other proceeding, including any hearing held by this Court in connection with the referred matter, any aspect of the mediation effort, including, but not limited to:
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> > A. Views expressed or suggestions made by any party with respect to a possible settlement of the dispute;
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> > B. Admissions made by the other party in the course of the mediation proceedings;
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> > C. Proposals made or views expressed by the mediator.[37]

Sanctions for breaching mediation confidentiality have included: striking offensive material from motions/pleadings, assessing fines, awarding attorney's fees, civil contempt for a party or attorney, striking expert witnesses, striking lawyer from representation, revocation of pro hac vice, denying the motion that the breached communication was being used to support,

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36 Local Rule 9019(d)(ii) for the United States Bankruptcy Court for the District of Delaware.

37 See, e.g., *Procedures Governing Mediation of Matters and the Use of Early Neutral Evaluation and Mediation/Voluntary Arbitration in Bankruptcy Cases and Adversary Proceedings*, U.S. BANKR. S.D. N.Y (2013), https://www.nysb.uscourts.gov/sites/default/files/pdf/Mediation_Procedures.pdf (last visited October 13, 2023).

vacating the judgment that was entered under the mediation agreement, awarding costs of sanctions motion, awarding contract damages, and denying award of fees to prevailing party.[38]

a. Hand v. Walnut Valley Sailing Club

In *Hand v. Walnut Valley Sailing Club*[39], the plaintiff (a former member of a sailing club) and the defendant (the club) participated in court-ordered mediation that did not result in a settlement. Shortly after the mediation ended, the plaintiff sent an email to approximately 44 members of the club, as well as to certain non-members. This email contained confidential information about the mediation process, including insights into the mediator's statements, the plaintiff's settlement offer, and the defendant's subsequent response.[40]

In reaction to this breach of confidentiality, the defendant filed a motion to dismiss, based on the plaintiff's disclosure of confidential information. The court agreed that the plaintiff had violated confidentiality; the issue before the court was the appropriate sanction. The court began its analysis by noting that dismissal has been imposed when violations of confidentiality has been either intentional or due to gross negligence. See., *e.,g., Salmeron v. Enterprise Recovery Systems, Inc.*, 579 F.3d 787 (7th Cir. 2009) (affirming dismissal with prejudice due to attorney's unauthorized disclosure of a document subject to an attorneys'-eyes-only agreement); *Assassination Archives & research Center v. C.I.A.*, 48 F.Supp.2d 1 (D.D.C. 1999) (dismissing action due to attorney's disclosure of records attorney became aware of during settlement negotiations in violation of confidentiality agreement); *Hi-Tek Bags, Ltd. v. Bobtron Intern., Inc.* 144 F.R.D. 379 (C.D.Cal. 1992) (dismissing complaint with prejudice due to attorney's gross negligence in failing to file confidential business records under seal, in violation of court's discovery order).

Based on guidance from the Court of Appeals for the Tenth Circuit[41], the court conducted an in-depth evaluation based on the following criteria:

*Degree of actual prejudice to the defendant***:** The court concluded that the plaintiff's dissemination of confidential information damaged the defendant's relationship with club members by, among other things: promoting incivility; prompting club members to resign; and fostering divisions among club members. Given the fact that the defendant was a social club, these consequences were significant, particularly because the defendant was prohibited – by mediation confidentiality – from responding to the improperly disseminated information. The defendant also was prejudiced because certain of the club members who had received confidential information were potential witnesses in the litigation.[42]

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38 See generally Sarah R. Cole. Craig A. McEwen, Nancy H. Rogers, James R. Coben, & Peter N. Thompson, *Consequences for Breach of Duty – Sanctions for Breach of Confidentiality, in* MEDIATION: LAW, POLICY AND PRACTICE (2022).

39 No. 10-1296-SAC, 2011 WL 3102491 (D. Kan. July 20, 2011).

40 *Id.*, at 1.

41 See *Lee v. Max Intern, LLC*, 638 F.3d 1318 (10th Cir. 2011).

42 *Id.*, at 3.

Amount of interference with the judicial process: The court concluded that the plaintiff's breach of confidentiality significantly jeopardized the district's mandatory mediation process and that, if left unsanctioned, would illustrate to other litigants that the district's confidential mediation rules are enforceable. Absent sanction, parties would not "feel free to engage in candid settlement talks if they fear that their positions can be later disclosed at will, whether in attempts to turn potential witnesses against them, or otherwise."[43]

Culpability of the litigant: The plaintiff was deemed to have acted both willfully and knowingly in breaching confidentiality.

Advance warning: The court dismissed the plaintiff's claim of a lack of due process – that is, the fact that he had not been previously warned that his suit could be dismissed as a result of a breach of confidentiality – noting, "[p]laintiff knew the mediation was court-ordered, knew the mediation was confidential, and knew or should have known that his complete disregard for the required confidentiality would subject himself to a just and corresponding sanction."[44]

Efficacy of lesser sanctions: The plaintiff contended that dismissal would be excessively punitive, and proposed instead that the defendant be permitted to respond to member criticisms via monthly newsletters. The court found this alternative untenable, because it would require the defendant to breach confidentiality requirements.[45]

Based upon the foregoing analysis, the court dismissed the case with prejudice.[46]

b. State v. Williams

The importance of confidentiality is further highlighted by *State v. Williams*, in which the defendant tried to introduce the mediator's testimony into evidence, in a criminal trial.[47] After being involved in a violent altercation with his brother-in-law, the court referred the parties' dispute to a mediator, who was a local pastor. The mediation failed. The matter was referred to a grand jury, which indicted the defendant for third-degree aggravated assault. During trial, the defendant unsuccessfully sought to call the pastor as a defense witness, due to the defendant's belief that his brother-in-law had made certain statements during the mediation that could exculpate the defendant. On appeal, the New Jersey Supreme Court affirmed. In agreeing with the trial court that the pastor's testimony should not be admitted, the Court noted although that mediation confidentiality may not apply in criminal matters if the court determines that "there is a need for the evidence that substantially outweighs the interest in protecting confidentiality" and that "the proponent of the evidence has shown that the evidence is not otherwise available," the

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43 *Id.*, at 5.

44 *Id.*, at 6.

45 *Id.*

46 *Id.*, at pp. 6-7.

47 877 A.2d 1258 (N.J. 2005).

defendant had not met his burden of proving these standards had been met.[48] The Court noted that "[s]uccessful mediation, with its emphasis on conciliation, depends on confidentiality perhaps more than any form of ADR", and that "[i]f mediation confidentiality is important, the appearance of mediator impartiality is imperative."[49] As a result, courts "should be especially wary of mediator testimony because 'no matter how carefully presented, [it] will inevitably be characterized so as to favor one side or the other."[50]

c. In re Anonymous

In *In re Anonymous*[51] involved a dispute between an attorney and his client after a successful mediation, regarding the attorney's litigation expenses. After the dispute arose, the parties attempted to resolve their dispute through arbitration. Each submitted statements in the arbitration that included confidential information from the mediation. These actions came to the attention of the Standing Panel on Attorney Discipline, which directed the parties to submit briefs and argument regarding the propriety of their action.[52] The court identified this as a clear violation of confidentiality, because the parties had shared confidential mediation information with individuals – arbitrators – who had not partaken in the mediation process.

To determine whether sanctions were appropriate for the parties' violation of confidentiality, the court considered several factors: (i) whether the mediator's explanation, to the parties, of confidentiality requirements were comprehensive and unambiguous; (ii) whether the parties entered into a formal agreement delineating the confidentiality parameters; and (iii) whether the breach of confidentiality manifested bad faith or deliberate intention.[53]

Although the court concluded that the mediator had proactively clarified the confidentiality principles prior to initiating the mediation, and that both parties agreed to abide by such principles, the court determined that the improper disclosures were not made in bad faith. The court also observed that the improper disclosures, which were made within a confidential, non-public arbitration setting, did not undermine the original mediated dispute. Consequently, the infringements of confidentiality were deemed not severe enough to necessitate sanctions.[54]

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48 *Id.*, at 445.

49 *Id.*, at 447.

50 *Id.*, at 448.

51 283 F.3d 627 (4th Cir. 2002).

52 *Id.*, at 630.

53 *Id.*, at 635.

54 *Id.*, at 640.

Significantly, the court also addressed the parties' request to allow the mediator to disclose information relating to the mediation.[55] The court denied this request, and noted that:

> If [mediators] were permitted or required to testify about their activities, or if the production of notes or reports of their activities could be required, not even the strictest adherence to purely factual matters would prevent the evidence from favoring or seeming to favor one side or the other. The inevitable result would be that the usefulness of the [mediation program] in the settlement of future disputes would be seriously impaired, if not destroyed.[56]

Although the court did not state that it would never authorize mediators to disclose confidential mediation information, it ruled that "the threshold for granting of consent to disclosures by [a] mediator is substantially higher than that for disclosures by other participants."[57]

VII. Mediator Immunity

Courts have extended absolute immunity to a wide range of persons playing a role in the judicial process, including prosecutors,[58] law clerks,[59] probation officers,[60] a court-appointed committee monitoring the unauthorized practice of law[61] and persons performing binding arbitration.[62] As explained by one commentator, "a majority of states and the District of Columbia . . . have statutes, court rules (both state and federal), or case law creating immunity for mediators to insulate them from most, if not all, civil liability for wrongdoing during the mediation."[63] Thus, "absolute immunity" has been granted in some cases to court-appointed

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55 *Id.,* at 639.

56 *Id.*, at 639 (citing NLRB v. Macaluso, Inc., 618 F.2d 51, 54 (9th Cir. 1980).

57 *Id.*

58 *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976).

59 *Sindram v. Suda*, 986 F.2d 1459 , 1460 (D.C. Cir. 1993).

60 *Turner v. Barry*, 856 F.2d 1539, 1541 (DC. Cir. 1988).

61 *Simons v. Bellinger*, 643 F.2d 774, 779-82 (D.C. 1980).

62 *Austern v. Chicago Bd. Options Exch., Inc.*, 898 F.2d 882, 886 (2d Cir 1990).

63 Scott H. Hughes, *Mediator Immunity: The Misguided and Inequitable Shifting of Risk*, 83 Or. L. Rev. 107, 110 (2004) (Appendix, listing the states and their immunity laws). See, e.g., Local Rules for the United States District Court for the District of Columbia, at LCvR 84.3(c) ("[a]ll lawyers serving as mediators in the Court's Mediation Program are performing quasijudicial functions and shall be entitled to absolute quasi-judicial immunity for acts performed within the scope of their official duties).

mediators or neutral "case evaluators," performing tasks within the scope of their official duties.[64] Nevertheless, the grant of this immunity has not always been automatic.

a. *Wagshal v. Foster*

In *Wagshal v. Foster*,[65] the question posed was whether a court-appointed "case evaluator" – which the court equated to a mediator[66] – was entitled to immunity from potential damages arising from a suit initiated by a dissatisfied litigant. Foster was designated to mediate a case in which Wagshal was a party. When Wagshal accused Foster of lacking impartiality, Foster recused himself from the proceedings. In his correspondence to the presiding judge, Foster opined that a reasonable resolution could be achieved if all parties approached the matter with a sense of reasonableness. He also suggested that the court order Wagshal, "as a pre-condition to any further proceedings in [the] case, to engage in a good faith attempt at mediation." Further, he urged the court to "consider who should bear the defendant's cost in participating" in the mediation to date.[67] Although his underlying case was settled, Wagshal sued Foster. Wagshal argued that Foster's actions as mediator transgressed his constitutional rights—specifically, his rights to due process and a jury trial, as enshrined in the Fifth and Seventh Amendments.[68]

In order to determine whether Foster was entitled to quasi-judicial immunity, the court engaged in a meticulous analysis of three pivotal factors, based on the ruling of the Supreme Court in *Butz v. Economou*:[69] "(1) whether the functions of the official in question are comparable to those of a judge; (2) whether the nature of the controversy is intense enough that future harassment or intimidation by litigants is a realistic prospect; and (3) whether the system contains safeguards which are adequate to justify dispending with private damage suits to control unconstitutional conduct."[70]

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64 *Wagshal v. Foster*, 28 F.3d 1249 (D.C. Cir. 1994) (civil suit dismissed against mediator and members of mediator's law firm). See also *Todd v. Shoopman*, 2012 WL 3531563 (E.D. Cal. 2012) (court-appointed mediator was "absolutely immune" from liability for civil damages). In *Todd*, the court said, "[t]here is no meaningful distinction between a mediator and an arbitrator for purposes of immunity." Another 2003 California case applied absolute immunity to the acts of a private family-law mediator to whom the court had referred a case. *Goad v. Ervin*, 2003 WL 22753608 (Cal. Ct. App. 2003). But see, *DiGiuseppe v. Talbot*, 2017 WL 2324303 (Conn. Super. Ct. 2017) (rejecting absolute immunity for a mediator-lawyer who was "neither a court-appointed mediator nor a judicial branch employee").

65 28 F.3d 1249 (D.C. Cir. 1994).

66 *Id.*, at 1254 n.2 ("We use the terms "case evaluator" and "mediator" interchangeably in this opinion. Each acts as a neutral third party assisting the parties to a dispute in exploring the possibility of settlement, the principal difference being that implicit in the name: the case evaluator focuses on helping the parties assess their cases, which the mediator acts more directly to explore settlement possibilities.")

67 *Id.*, at 1251.

68 *Id.*

69 438 U.S. 478, 512 (1978).

70 28 F.3d at 1252.

Towards these ends, the court first considered whether Foster, as "case evaluator," performed judicial functions. The court saw a clear parallel between the functions of a mediator and those inherent to a judge. Foster's assigned responsibilities included the identification of factual and legal issues, scheduling discovery and motions with the parties, and coordinating settlement efforts. These tasks were deemed to inherently require the exercise of "substantial discretion", which the court considered to be a hallmark of duties protected by judicial immunity. Moreover, these functions mirrored the cognitive processes that judges engage in during adjudication and case management.[71]

Second, the court considered whether allowing Wagshal's case to proceed could result in the potential for harassment or intimidation. The court concluded it could. It observed that due to the nature of a mediator's role – in which they might often be the bearers of unfavorable news but do not possess final adjudicative authority – absent immunity there "may be a great temptation to sue the messenger whose words foreshadowed the final loss."[72]

Finally, the court considered the existence of adequate system safeguards. The court observed that Wagshal could have sought relief from any alleged Foster misconduct from the trial court or – if he thought Foster's communication with the court could have prejudiced the judge - sought the judge's recusal.[73]

For these reasons, the court concluded that Foster was protected by quasi-judicial immunity, and that his actions fell squarely within the ambit of his duties. The court accordingly dismissed Wagshal's case.[74]

VIII. Good Faith Mediation

In *Procaps S.A. v. Patheon Inc.*[75], the court considered whether a plaintiff violated a requirement to mediate in good faith when it did not respond to the defendant's request for a settlement demand ahead of a court-mandated mediation. The court noted that although a representative with full settlement authority was required to attend mediation, there was no requirement to "mediate in good faith." The court observed that while it could sanction a party for failing to attend a mediation, for not having a representative attend the mediation with sufficient settlement authority, or for failing to timely give notice before a court-required mediation that it did not intend to make a settlement offer at the mediation, the court concluded that "a court should not require or pressure parties to make an actual offer at mediation…a party is allowed to not make any offer when attending a court required mediation."[76]

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71 *Id.*

72 *Id.*, at 1253.

73 *Id.*

74 *Id.*, at 1254.

75 No. 12-24356-CIV, 2015 WL 3539737 (S.D. Fla. June 4, 2015).

76 *Id.*, at *1. Compare with *In re Bambi*, 492 B.R. 183 (Bankr. S.D.N.Y. 2013), in which a creditor/mortgagee was sanctioned for failing to participate in good faith in a loss mitigation program that

Chancey v. Hartford Life & Acc. Ins. Co.[77] addressed a party's obligation to attend a mediation. The court noted in relevant part that ". . . a party must attend the mediation unless the party can resoundingly argue an extraordinary circumstance. A close call ends with attendance, and a party cannot escape the efficient application of the rule with an unsupported 'trump' – a difficulty that sounds superficially forbidding but that remains conveniently vague and unelaborated."[78] The court accordingly rejected the defendant's argument that traveling to Florida for a mediation was a significant burden; because the defendant operated in Florida, it should anticipate being taken into litigation in Florida.[79]

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was similar to mediation. The subject creditor had "chosen to 'move the goalpost' at every opportunity—stringing the Debtors and the Court along through a costly and drawn out process by failing to inform the Court and other parties about its modification policy, failing to provide investment guidelines as required by Court order, failing to obtain an appraisal of Debtors' property in a timely fashion, failing to provide written terms of the modification placed on the record . . ., and failing to appear at [a] hearing."

77 844 F.Supp.2d 1239 (M.D. Fla. 2011).

78 *Id.*, at 1241.

79 *Id.*