Faculty: Facilitation Skills for Subchapter V Trustees

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

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

William Krieger is a managing director and shareholder with Gleason in Pittsburgh and has nearly 30 years of experience in the areas of accounting, finance, financial analysis, business development, business valuation, forensic investigations, mergers and acquisitions and turnaround management. As the leader of the firm's Litigation, Business Valuation and Financial Reorganization Forensic Accounting practice areas, he provides project management and analysis for a full range of accounting and consulting services in the areas of litigation support, business valuation, fraud investigation, forensic analysis and financial reorganization. Mr. Krieger has experience in quantifying financial damages related to breach-of-contract claims, intellectual property infringement, warranty issues, fraudulent conveyances, shareholder disputes, class-action lawsuits and business-interruption claims. He supports counsel in all phases of litigation, including assisting with discovery, depositions and damage claims, and in providing expert-witness testimony in state and federal courts and before regulatory boards and arbitration panels. He also performs intangible-asset and business-valuation services in a variety of industries for regarding estate and gift taxes, purchase or sale agreements, divorce, shareholder disputes, employee stock awards, financial reporting and business reorganizations. Prior to joining the firm, Mr. Krieger was a vice president at the University of Pittsburgh Medical Center (UPMC), where he was chief financial officer of UPMC Behavioral Health (UPMC's $500 million behavioral health operating unit) and Western Psychiatric Institute and Clinic (the largest psychiatric research center in the U.S.). He also served as vice president of the board and treasurer of Mon Yough Community Services (an affiliated Community Mental Health provider), chief financial officer of Askesis Development Group (a software-development company) and vice president of finance of UPMC Community Medicine. Mr. Krieger has experience in evaluating, acquiring and integrating new ventures, developing and improving revenue-cycle processes, and ensuring corporate compliance with laws and regulations pertaining to health care environments. He has facilitated the operational and financial turnaround of hospital, physician and software-development corporations and served as an outside consultant to universities and nonprofits on operational improvement and financial forecasting. Before joining UPMC, Mr. Krieger was a senior audit manager in Arthur Andersen & Co.'s Houston and Pittsburgh offices, serving both public and private clients in the manufacturing, wholesale distribution, retail, financial services, mutual fund and health care industries. In addition to auditing and preparing financial statements, he also performed financial analyses and feasibility studies, assisted companies in bankruptcy and turnaround situations, and facilitated merger and acquisition due diligence investigations. Mr.

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Donald L. Swanson is a shareholder with Koley Jessen P.C., L.L.O. in Omaha, Neb., and has been practicing bankruptcy law since 1980. He grew up on a livestock farm in Nebraska's Sandhills, became Nebraska State FFA President (1973-74), and achieved FFA's "American Farmer Degree." During the 1980s farm crisis, Mr. Swanson represented debtors in more than 40 chapter 12 cases, achieving a confirmed plan and discharge in all but one. In Delaware's $1.5 billion ethanol bankruptcy (*In re VeraSun*), he held an *ex officio* seat on the creditors' committee as counsel for the ad hoc committee of grain suppliers. Additionally, he recently achieved a confirmed chapter 11 plan for a farmer in Iowa's Northern District, and he has expertise in subchapter V bankruptcy. Mr. Swanson is a mediator and serves a mediator-like role as a subchapter V trustee in Nebraska. He also publishes a blog on bankruptcy and mediation at www.mediatbankry.com and helps promote mediation as a dispute resolution tool in bankruptcy — both locally and nationally. Mr. Swanson is Board Certified in Business Bankruptcy Law by the American Board of Certification and has been recognized in *The Best Lawyers in America*, *Super Lawyers* and Martindale-Hubbell. He received his A.A. from Grace University in 1976, his B.S. in political science from the University of Nebraska - Omaha in 1977, and his J.D. from the University of Nebraska - Lincoln in 1980, where he was an associate editor of the *Nebraska Law Review*.

Observations on the Survey of Facilitation by Subchapter V Trustees

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Date Created: Wed, 2021-06-30 13:12

The Bankruptcy Code directs the trustee in "Subchapter V" small business debtor cases to "facilitate a consensual plan of reorganization."[1] Earlier this year, the ABI Mediation and Reorganization Committees invited their members to participate in a survey to assess how this mandate has been implemented in practice. Approximately 50 ABI members responded. In this article, we share the survey results to help promote discussion of the role of facilitation in Subchapter V. As discussed below, we believe all participants in Subchapter V proceedings would benefit from further understanding of the important role of facilitation.

We begin with the questionnaire.

Question 1: How much involvement have you had in a subchapter V proceeding?

—Multiple-Choice Answers

- 47.73% — Extensive involvement
- 13.64% — Moderate involvement
- 20.45% — Limited involvement
- 8.18% — No opportunity as of yet

Question 2: In what percentage of your subchapter V cases have you experienced a subchapter V trustee helping facilitate the development of a consensual plan?

—Multiple-Choice Answers

- 26.83% — 0-25%
- 19.51% — 25-50%
- 26.83% — 50-75%
- 26.83% — 75-100%

Question 3: Indicate below what action (or actions) you have seen subchapter V trustees take to satisfy the statutory duty to "facilitate the development of a consensual

plan"?

—Multiple-Choice Answers (can choose more than one)

- 82.76% — Scheduling individual calls/meeting with key constituents
- 41.38% — Scheduling all-hands calls/meetings with debtor and one or more key constituents
- 62.07% — Facilitating the exchange of written information from individual parties to the trustee/other parties
- 37.93% — Facilitating the creation of a timetable for party communication and proposed plan development

When asked to elaborate on what actions they have taken to facilitate plan confirmation, the answers reflect wide-ranging involvement in multiple aspects of the bankruptcy case.

- **Role as Quasi-Mediator**. One trustee described their experience resolving a dispute between the debtor and a creditor who sought to have its unliquidated damages claim excepted from discharge. Through discussions back-and-forth, the trustee helped the parties reach an agreement on the payment of a fixed sum in satisfaction of the claim. Another respondent reported, "I have filed four Subchapter V cases and confirmed two plans to date. In all cases, the Subchapter V Trustee communicated with contesting constituencies to solicit a consensual resolution. Both confirmed Plans were non-consensual, but the Subchapter V Trustee could not have changed that." Respondents highlighted the utility of Zoom for conducting formal mediations of pre-petition litigation matters, and informal "facilitation" meetings with creditor groups. By consistently and regularly contacting the parties, encouraging discussions and identifying potential risks to both sides, the trustee ultimately brought them to the table and agreement.
- **Compliance with Code Requirements.** The U.S. Trustee has ensured that the pool of SBRA trustees includes nonlawyers with expertise in financial and business matters, such as accountants and turnaround professionals. Respondents reported that these trustees in particular have been very helpful filling a skills gap between the debtor and debtor's counsel — *e.g.*, helping the debtor to (1) understand the importance of record-keeping, (2) identify trouble areas to be addressed in a plan, and (3) communicate more effectively with creditors about plan treatment and feasibility.

effectively with creditors about plan treatment and feasibility.

- **Creativity in Plan Design.** One respondent reported "great success" collaborating on the plan with the trustee. The respondent continued, "I treated him much as I would committee counsel, except that I was not so worried about things turning adversarial and could be forthcoming." "He then helped incorporate views of other key creditors and "sell them on the reasonableness of the Plan."
  Another respondent reported that the trustee also took positions before the court on certain plan objections, which was helpful to all stakeholders and the court.
- **Investigations**. Trustees have had the skills and trust to perform court-ordered investigations and to generally investigate the debtor's schedules and statements, assisting the U.S. Trustee and creditors at the § 341 meeting.
- **Expressions of Concern and Suggestions for Improvement.** The narrative answers also contained expressions of concern and suggestions for improvement.
    - **Role Undefined:** One respondent who regularly represents creditors questioned what the trustee actually did in their case. Where the creditors deal exclusively with debtor's counsel, it might not be apparent how much or how little the trustee is engaged with the debtor behind the scenes. Other respondents articulated a concern that trustees who are bankruptcy attorneys may simply duplicate the work of debtor's counsel and, for this reason, expressed a preference for trustees with financial and accounting backgrounds.
    - **Cost:** Aside from concerns that the trustee is participating too much or too little in the process, respondents questioned whether the cost of the trustee was in line with what Congress had intended and whether small business reorganizations truly would be cheaper than standard chapter 11.

Conclusion

Facilitation is working! Notwithstanding the practical concerns over the trustee's role and cost articulated by some respondents, the data clearly show that so far, subchapter V cases are succeeding at a clip that surpasses standard chapter 11 cases. The time from filing to confirmation is also significantly shorter. Facilitation is an important component of that success.

Work should continue by all participants in the subchapter V process to refine the facilitation role. Many trustees possess an innate ability to facilitate. Facilitation is generally understood to mean "to ease" or "to promote." Many trustees are facilitators by nature and/or experience. Yet there are aspects of facilitation that may not come naturally to trustees or have been required in any role prior to the duty now required. Some of those aspects are likely more akin to skills that mediators have developed by training and practice. We believe that opportunity exists to offer training sessions to trustees and other participants in subchapter V proceedings focused specifically on the role of facilitation. At this point, we envision a one-hour basic course and a three-hour advanced session offered at the national level through ABI webinars and conferences and at ABI regional meetings. In the meantime, the Mediation Committee continues to welcome ABI members to share their experiences with us on this topic.

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[1] *See* 11 U.S.C. § 1183(b)(7).

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On Bankruptcy and Mediation

Subchapter V Trustee As “De Facto Mediator” (In re 218 Jackson)

De facto end of the harbor? (photo by Marilyn Swanson)

By: Donald L Swanson

A Subchapter V trustee “acts more like a mediator than an adversary”; and

A “substantial part of the Subchapter V trustee’s pre-confirmation role” is to “serve as a de facto mediator between the debtor and its creditors.”

–From *In re 218 Jackson LLC*, Case No. 21-00983, Middle Florida Bankruptcy Court (*issued* August 17, 2021, Doc. 157).

The *218 Jackson* opinion deals with the requirement, in § 1183(a), that a Subchapter V trustee be a “disinterested person,” as defined in § 101(14)(C). What follows is taken from the *218 Jackson* opinion.

Unique Role

The *218 Jackson* opinion describes the "unique role" of a Subchapter V trustee: a role that is mediator-ish.

Subchapter V provides a new avenue for small business debtors to reorganize—efficiently. While many Subchapter V provisions are found elsewhere in the Bankruptcy Code, Subchapter V is also unique in many ways.

Differences from other Bankruptcy Code provisions include:

- Subchapter V encourages the confirmation of a consensual plan, but allows the debtor to confirm a plan without the approval of any creditors; and
- Subchapter V introduces a new player—the subchapter V trustee—who plays a different role from other trustees, even though many trustee duties are the same or similar [fn. 1].

Facilitate Role

The Subchapter V trustee is unique, as the ***only*** bankruptcy trustee directed to "***facilitate*** the development of a consensual plan of reorganization." § 1183(b)(7) (emphasis added). This facilitation duty is assigned to no other trustee in bankruptcy.

Moreover, this duty to "facilitate" is a ***principal*** duty of a Subchapter V trustee. Such duty is significant:

- Traditionally, trustees tend to be adversarial to the debtor as a result of their duties in protecting the estate and creditors;
- Chapter 7 trustees take possession of the estate's property and dispose of or administer those assets in order to pay creditors—such a role typically puts a trustee in conflict with the debtor and sometimes creditors;
- A chapter 11 trustee, if one is appointed, similarly takes possession of estate assets for the purpose of liquidation, sale, or less frequently, a reorganization;
- A chapter 13 trustee also gathers assets—but in the form of plan payments in order to distribute to creditors; and
- A chapter 12 trustee is most similar, but even a chapter 12 trustee is not charged with *facilitation* of a consensual plan.

Not Adversarial

The Subchapter V trustee's role is intentionally designed to be less adversarial than trustees under other chapters of the Bankruptcy Code. For example:

- Facilitation of a consensual plan requires the Subchapter V trustee to work with the creditors and debtor toward agreement—the definition of facilitate is to "make the occurrence of (something) easier; to render less difficult"; and
- A subchapter V trustee is not required to investigate the financial affairs of the debtor, unless the court orders an investigation for cause and upon request of a party.

Instead of taking an adversarial posture, the U.S. Trustee's "Handbook" declares that Subchapter V Trustees should, "as soon as possible":

- "begin discussions with the debtor and principal creditors about the plan the debtor will propose";
- "encourage communication between all parties in interest as the plan is developed";
- be proactive in "communicating with the debtor and debtor's counsel and with creditors"; and
- be proactive in "promoting and facilitating plan negotiations."

De Facto Mediator

In sum, as noted above, the Subchapter V trustee is to be a de facto mediator between the debtor and creditors.

A Subchapter V trustee, of course, is not (and cannot be) an actual mediator, because of other statutory duties, limitations on confidentiality, etc. But the duties of a Subchapter V facilitator (as established by Congress) are mediator-ish and involve the same types of skills and abilities. That's what "de facto mediator" means.

Action Item—Mediation Training

In light of the "de facto mediator" nature of a Subchapter V trustee's role, mediator training for all Subchapter V trustees (including yours truly) is advisable—if not essential.

Footnote 1. Similarities between duties of a Subchapter V trustee and other bankruptcy trustees include the following: (i) Trustees in chapters 7, 11, 12, 13 and subchapter V all have duties of accounting for property received, examining proofs of claim (if a purpose would be served), furnishing information about the estate if requested by a party in interest, and making a final report and a final accounting on the administration of the estate, (ii) Subchapter V, Chapter 12 and Chapter 13 trustees are further required to appear and be heard at any hearing concerning

the value of property subject to a lien, confirmation of a plan, and modification of a plan, and (iii) Chapter 12 and Subchapter V trustees must also appear and be heard at any hearing that concerns the sale of property of the estate.

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August 31, 2021
Bankruptcy, Bankruptcy Mediation, Closely-Held Business, Subchapter V

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