Webinar Hypotheticals

Hypothetical One – Late Attendee

You are the mediator. Mediation was scheduled to start at 10am. The scheduling was agreed to in advance. All parties confirmed. One party does not show up until 11 am and offers no explanation for the late arrival and offers no excuse. The other party and their counsel are upset. What do you?

Hypothetical Two – Inaccurate Allegation

You are the mediator at a scheduled mediation. At the outset of mediation and in an open session, defense counsel makes a particular allegation concerning a partial defense. Based on that allegation, plaintiff and their counsel make a particular settlement offer. During mediation, you later learn that the particular allegation is not factually accurate, but no correction is made and plaintiff and their counsel are not aware. What do you do?

Hypothetical Three – Unresponsive Client

You are the lawyer for a defendant that has been sued and for which there is mandatory mediation. You inform your client of the order requiring mediation. The mediator reaches out to you and asks for dates that will work for you and your client. You ask your client for available dates, but your client refuses to provide them to you. You ask several more times, and you get the same non-response. what should you do?

Hypothetical Four – Mediator Contribution

I was running a mediation and it was going well. The parties were getting quite close when the defendant said that they would accept the last proposal, but only if the plaintiff would pay the entire mediator fee, as opposed to just half. I then took that offer to the plaintiff, and they asked me if I would be willing to reduce my fee in order to get the deal done.

I was flabbergasted at the suggestion. What should I have done?

Hypothetical Five – Mandatory Mediation and Who Should Pay Mediator Fees

Should mediation be mandatory, and if so, in what circumstances?

And, on a related note, should mediator fees in an adversary proceeding be paid entirely by the plaintiff or should the parties split the fee?

Hypothetical Six – Who Goes First?

I had a mediation recently and I'm not sure what I should have done. The problem I faced was that no one wanted to go first. No one wanted to make an offer. Don't get me wrong, parties were talking. They were talking to me. They were talking to each other. But what they weren't willing to do was to actually make an offer.

Was it my job to make someone make an offer? If so, who first? And how?

Hypothetical Seven – Do You Want My Opinion Or Not?

While I love serving as a mediator, I sometimes feel like I'm being pulled in two directions. You say you want me to just facilitate the process, and don't judge or arbitrate the issue, but at the end of the day, you almost always ask me my opinion on the case in terms of who will win and who will not. Sometimes you want me do you want me to be evaluative or facilitative? I feel like you want my opinion, but when I give it, you then tell me why I'm wrong.

What do you want from me?

Hypothetical Eight - 3 Painful Hours

I just had my first mediation and I wanted to know if what I experienced was normal. For the first 3 hours, I felt like we got absolutely nowhere. If you had asked me then, how was it going or what I thought of mediation, I would have likely said "I hate it, this is absolutely useless." Then, things changed. I felt like we got down to business and the parties went from being hundreds of thousands of dollars apart to reaching a settlement within less than 60 minutes.

Were the first 3 hours really necessary? Is this how all mediations go?

Hypothetical Nine – Surprise Mediation Attendee

I had a mediation yesterday and this particular client and counsel decided to bring an expert with them. While their statement mentioned that defense, no one was expecting an alleged expert to attend the mediation in person. They spent a good portion of the joint session having their "expert" speak about why they would win and why the defendant should not pay a nickel. I was kind of at a loss as to how to handle as it was the defendant's right to make any argument they wanted to, but yet at the same time, expert discovery had not even begun. The plaintiff and counsel were of course frustrated and stated that they disagreed with the defendant's expert and would produce their own should the matter not settle.

Hypothetical Ten – Mediation Location

I was picked as one of 5 mediators for a procedures order governing over 300 preference actions. The order provides that the parties should agree on a mediation location but that if they are unable to, I make the choice. One of the matters is a ~$500,000 action. The defendant wants the mediation to take place in California as that is where they are, the plaintiff wants the mediation to take place in Delaware where the bankruptcy case is located, and I'm located in New York. What would you do?

Hypothetical Eleven – To Do or Not To Do a Term Sheet

This isn't a hypothetical, but more of a simple question. If a mediation results in a settlement, should the parties execute a term sheet before leaving the mediation?

If so, should the mediator have a role in its drafting?

Operable Local Rules

Delaware Bankruptcy Court Local Rule 9019-5[1]

9019-5(c)(iv)(B) - Failure to Attend.

Willful failure to attend any mediation conference, and any other material violation of this Local Rule, shall be reported to the Court by the mediator and may result in the imposition of sanctions by the Court. Any such report of the mediator shall comply with the confidentiality requirement of Local Rule 9019-5(d).

9019-5 (d)(v) - Discovery from the Mediator.

The mediator shall not be compelled to disclose to the Court or to any person outside the mediation any records, reports, summaries, notes, communications, Submissions, 161 recommendations made under subpart (e) of this Local Rule, or other documents received or made by or to the mediator while serving in such capacity. The mediator shall not testify, be subpoenaed or compelled to testify regarding the mediation 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 Certificate of Completion as required by Local Rule 9019-5(f), or from otherwise complying with the obligations set forth in this Local Rule.

[1] https://www.deb.uscourts.gov/sites/default/files/Rule%209019-5.pdf

9019-5 (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 attorneys or pro se litigants, but not to the Court.

9019-5 (f)(ii) - Mediator's Certificate of Completion.

No later than fourteen (14) days after the conclusion of the mediation conference or receipt of notice from the parties that the matter has settled prior to the mediation conference, unless the Court orders otherwise, the mediator shall file with the Court a certificate in the form provided by the Court ("Certificate of Completion") showing compliance or noncompliance with the mediation conference requirements of this Local Rule and whether or not a settlement has been reached. Regardless of the outcome of the mediation conference, the mediator shall not provide the Court with any details of the substance of the conference.

SDNY Bankruptcy Court Procedures Governing Mediation of Matters and the Use of Early Neutral Evaluation and Mediation/Voluntary Arbitration in Bankruptcy Cases and Adversary Proceedings[2]

3.2 Mediation Conference.

A representative of each party shall attend the mediation conference, and must have complete authority to negotiate all disputed amounts and issues. The mediator shall control all procedural aspects of the mediation. The mediator shall also have the discretion to require that the party representative or a non-attorney principal of the party with settlement authority be present at any conference. The mediator shall also determine when the parties are to be present in the conference room. The mediator shall report any willful failure to attend or participate in good faith in the mediation process or conference. Such failure may result in the imposition of sanctions by the Court.

3.3 Recommendations of the Mediator.

The mediator shall have no obligation to make written comments or recommendations; provided, however, that the mediator may furnish the attorneys for the parties and any pro se party with a written settlement recommendation. Any such recommendation shall not be filed with the Court.

[2] https://www.nysb.uscourts.gov/sites/default/files/pdf/Mediation_Procedures.pdf

3.4 Post-Mediation Procedures.

Promptly upon conclusion of the mediation conference, and in any event no later than 3:00 P.M. two (2) days prior to the date fixed for hearing referred to in Rule 1.1, the mediator shall file a final report showing compliance or noncompliance with the requirements of this General Order by the parties and the mediation results. If in the mediation the parties reach an agreement regarding the disposition of the matter, they shall determine who shall prepare and submit to the Court a stipulated order or judgment, or joint motion for approval of compromise of controversy (as appropriate), within twenty-one (21) days of the conference. Failure to timely file such a stipulated order or judgment or motion when agreement is reached shall be a basis for the Court to impose appropriate sanctions. Absent such a stipulated order or judgment or motion, no party shall be bound by any statement made or action taken during the mediation process. If the mediation ends in an impasse, the matter will be heard or tried as scheduled.

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.

6.0 Immunity.

The Mediators shall be immune from claims arising out of acts or omissions incident to their service as Court appointees in this Mediation Program. See Wagshal v. Foster, 28 F.3d 1249 (D.C. Cir. 1994).

Faculty: Dear Connor & Ed: The Live Webinar Version

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Delaware Bar, the U.S. District Court for the District of Delaware, and the U.S. Third Circuit Court of Appeals. Mr. Bifferato is a member of the Delaware, Federal and American Bar Associations, and a member of the Judge Vincent A. Bifferato Superior Court Trial Practice Forum's Steering Committee, the U.S. Bankruptcy Court for the District of Delaware's Steering Committee, Mediation Panel and Appellate Mediation Panel, the Civil Rules Committee for the Delaware Superior Court, and the U.S. Bankruptcy Court Rules Committee for the District of Delaware. He received his B.A. in 1990 from the University of Delaware and his J.D. in 1994 from Widener University School of Law.

Edward L. Schnitzer is chair of Montgomery McCracken Walker & Rhoads LLP's Bankruptcy & Financial Restructuring Department in New York and serves as a member of the firm's Management Committee. He focuses his practice on bankruptcy and reorganization matters. Mr. Schnitzer has experience representing unsecured creditor committees, litigation & liquidation trustees, debtors, banks, equity committees and creditors in all aspects of bankruptcy practice, with expertise in bankruptcy litigation, including the prosecution and defense of preferences, fraudulent transfers, and other avoidance actions, claims objections, and collection and turnover actions. He is a court-approved mediator in the U.S. Bankruptcy Courts for the District of Delaware and the Southern and Eastern Districts of New York, and he has mediated disputes in the Health Diagnostic, Standard Register, Borders, and WP Steel bankruptcy cases. He also is a member of the New York City Bar Association's Pro Bono Bankruptcy Panel and has represented individuals in need of pro bono assistance in adversary proceedings. Upon graduation from law school, Mr. Schnitzer served as an Assistant District Attorney in the Bronx, where he briefed and argued appeals before the Appellate Division, New York Court of Appeals, Southern District of New York and Second Circuit, as well as tried several cases and assisted with the prosecution of a first-degree murder trial. He then joined the Enforcement Division of the Securities & Exchange Commission, where he investigated violations of the Federal Securities Laws. Prior to joining Montgomery McCracken, Mr. Schnitzer served as chair of an international law firm's bankruptcy and financial restructuring practice group. He received his B.A. cum laude from the University of Pennsylvania and his J.D. from Columbia University School of Law, and he earned a Certificate of Completion for the Inaugural Bankruptcy Mediation Class from St. John's University School of Law and the Hugh L. Carey Center for Dispute Resolution.