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Mediating with and Without the Robe: Tips to Maximize Clients' ADR Experience

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Mediating With and Without the Robe: Tips to Maximize Clients' ADR Experience

Honorable Jose Linares

May 24, 2021

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- 2. Ethical Considerations
- 3. Rules and Legislation
- 4. Caselaw
- 5. Mediation
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Introduction

- Former Career as Chief Judge of District Court for the District of New Jersey
- Transition to firm and growing pains
- Developing protocol
- Differences between mediating with and without the robe



Protocol for Mediations

- Conflicts
- Disclosure
- Engagement letter
- Conference call with all parties
- Document submissions
- Scheduling
- Ex parte discussions
- Mediation



Ethical Considerations

"Standards of Conduct for Mediators in Court-Connected Programs" (adopted by the New Jersey Supreme Court on January 4, 2000)

Conflicts of Interest: A mediator shall always avoid conflicts of interest when recommending the services of other professionals. If requested, a mediator may provide parties with information on professional referral services or associations that maintain rosters of qualified professionals. SOCMCCP § III-A



Ethical Considerations (cont'd)

- Representation in Related Matters: A mediator who has served as a third party neutral, or any professional member of that mediator's firm/office, shall not subsequently represent or provide professional services for any party to the mediation proceeding in the same matter or in any related matter. SOCMCCP § III-B(1)
- Representation in Unrelated Matters: A mediator who has served as a third party neutral, or any professional member of that mediator's firm/office shall not subsequently represent or provide professional services for any party to the mediation proceeding in any unrelated matter for a period of six months, unless all parties consent after full disclosure. SOCMCCP § III-B(2)



Ethical Considerations (cont'd)

- Competence: A mediator shall only mediate when the mediator possesses the necessary and required qualifications to satisfy the reasonable expectations of the parties. SOCMCCP § IV
- Confidentiality: SOCMCCP § V and the 5 U.S.C.A. § 574:
 Confidentiality under the Uniform Mediation Act



Rules and Legislation

Rule 1:40-4(d): Confidentiality. Unless the participants in a mediation agree otherwise or to the extent disclosure is permitted by this rule, no party, mediator, or other participant in a mediation may disclose any mediation communication to anyone who was not a participant in the mediation. A mediator may disclose a mediation communication to prevent harm to others to the extent such mediation communication would be admissible in a court proceeding. A mediator has the duty to disclose to a proper authority information obtained at a mediation session if required by law or if the mediator has a reasonable belief that such disclosure will prevent a participant from committing a criminal or illegal act likely to result in death or serious bodily harm. No mediator may appear as counsel for any person in the same or any related matter. A lawyer representing a client at a mediation session shall be governed by the provisions of RPC 1.6.



Rules and Legislation (cont'd)

- Rule 1:40-4(h)(1): Discretionary Termination by Mediator ("may" adjourn or terminate): The mediator or a party may adjourn or terminate the session if (A) a party challenges the impartiality of the mediator, (B) a party continuously resists the mediation process or the mediator, (C) there is a failure or communication that seriously impedes effective discussion, or (D) the mediator believes a party is under the influence of drugs or alcohol.
- Rule 1:40-4(h)(2): Mandatory Termination by Mediator ("shall" adjourn or terminate): The mediator shall terminate the session if (A) there is an imbalance of power between the parties that the mediator cannot overcome, (B) there is abusive behavior that the mediator cannot control, or (C) the mediator believes continued mediation is inappropriate or inadvisable for any reason.



Caselaw

- In re Grand Jury Subpoena Dated Dec. 17, 1996, 148 F.3d 487, 492 (5th Cir. 1998): "While mediators do not have the power to issue judgments or awards, because parties are encouraged to share confidential information with mediators, those parties must have absolute trust that their confidential disclosures will be preserved."
- Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc., 332 F.3d 976, 979 (6th Cir. 2003): "Because parties are generally entrenched in their adversarial roles, negotiations often include specific, creative recommendations by the Court on how to resolve disputes."
- In re Teligent, Inc., 640 F.3d 53, 58 (2d Cir. 2011): The Second Circuit also cites several sources that "recognizes the importance of maintaining the confidentiality of mediation communications and provides for disclosure in only limited circumstances."



Additional Caselaw

- <u>Harrington v. Harrington</u>, 281 N.J. Super. 39 (App. Div. 1995): Held that a settlement need not be in writing or placed on the record which led to "case in a case" litigation.
- Willingboro Mall v. 240-242 Franklin Avenue, 215 N.J. 242 (2013): Held that settlement or agreement between the parties must be either recorded by a Court Reporter or reduced to writing and signed by the parties before they leave the mediation.
- Menkowitz v. Israeli, 433 N.J. Super. 111 (App. Div. 2013): Held that a mediator cannot later become an arbitrator for the same case.
- Spruce Environ. Tech., Inc. v. Festa Radon Tec., Co., 370 F.Supp.3d 275 (D.Mass. 2019): Allowing the Judge who had mediated for a month to become an arbitrator only after informed consent by the parties.



Additional Caselaw

 American Bar Association, Standing Committee on Ethics and Professional Responsibility, Formal Opinion 488: Rule 2.11 of the Model Code of Judicial Conduct identifies situations in which judges must disqualify themselves due to familial and personal relationships. ABA Opinion judges need not disqualify themselves if a lawyer or party is an acquaintance, nor must they disclose acquaintanceships to the other lawyers or parties. Whether judges must disqualify themselves when a party or lawyer is a friend or shares a close personal relationship with the judge or should instead take the lesser step of disclosing the friendship or close personal relationship to the other lawyers and parties, depends on the circumstances.



Additional Caselaw

- In re Zaruba, 177 N.J. 564 (N.J. 2003): Attorney was suspended for engaging in secret six-figure-dollar "bribe" of the client's adversaries by securing an agreement that barred disclosure of agreement's terms to the adverse clients and restricted the adverse lawyers' right to practice.
- In re Hager, 812 A.2d 904 (D.C. 2002): Finding that an attorney who represented clients in a potential class action, and who entered into a settlement under which defendant would pay attorney and co-counsel \$225,000 in fees and expenses in return for agreeing, in part, not to represent present or future clients on similar claims against defendant, violated ethics rule prohibiting a lawyer from entering a settlement that restricts a lawyer's right to practice.
- Adams v. BellSouth Telecomm., Inc., 2001 WL 34032759 (S.D. Fl. Jan. 29, 2001): Sanctions imposed against defense counsel who included a practice restriction for plaintiff's counsel in the form of a consulting agreement in a class action settlement.



Other Helpful Resources

- Article: "Med-Arb and the Legalization of Alternative Dispute Resolution," 20 Harv. Negotiation L. Rev. 157, 160, 169-171 (2015)
- Article: "Med-Arb: A Choice Between Scylla and Charybdis," 69
 Disp. Resol. J. 101 (2014)
- AAA Commercial Arbitration Rules and Mediation Procedures
- AAA Model Standards of Conduct for Mediators



Mediation in General

 What is Mediation: Over the last 20 plus years, mediation has become standard operating procedure in many state court systems as well as in the federal district courts. Even without a court order, mediation has become a favored settlement method – often in lieu of direct negotiations. Very few cases will go to trial. Almost all cases that are not resolved by dispositive motion will likely be mediated.



Benefits of Both Arbitration and Mediation

- Significant cost savings
- Quicker resolution of the matter
- Predictability for client's businesses and affairs



Benefits of Mediation

- Manage client's expectations
- "Outside the box" possible solutions such as business solutions, licensing contracts, other agreements not involving monetary award
- Private mediation setting is more personal
- Opportunity for parties and mediator to better understand the obstacles to amicable resolution
- Gain information about the adversary's case
- Explore with client the strengths and weaknesses of client's case



ADR During the Pandemic – Initial Concerns

- How to connect during mediation when unable to meet in person?
- How is the mediator going to gain the trust of the parties in a virtual setting?
- Would the give and take of mediation be affected?
- How will arbitration hearings be conducted and how will witnesses testify?
- Can the credibility of witnesses be properly tested virtually?



ADR During Pandemic – Benefits

- Virtual mediation and arbitration can be set up and scheduled quicker
- Mediation and arbitration costs for travel and lodging are far lower
- Parties can dedicate more time to the process without travel concerns
- Virtual arbitrations allow for flexibility in accommodating the order of witnesses and international time differences
- Virtual mediations provide a less formal setting allowing the parties to be more relaxed and less confrontational



Maximizing Benefits of Arbitration

- Meet and confer with your adversary in advance of the preliminary hearing to explore: the discovery schedule, the timing and need for motion practice, confidentiality issues, document production, and discovery needs (including ediscovery)
- Seek the arbitrators' assistance on those issues early in the process, at the time of the preliminary hearing, because the arbitrators will be more willing to cooperate at that time



Mistakes That Can Be Made During Mediation

- Refuse to mediate
- Give no real thought to the timing of the mediation
- Don't be proactive in selecting a mediator
- Wait until the night before the mediation to start preparing
- Don't send a pre-mediation statement to the mediator
- Don't prepare the client for mediation
- Don't explain the virtual process to the client



Mistakes That Can Be Made During Mediation (cont'd)

- Arrive materially late to the mediation
- Give no thought to bringing the right client representative
- Don't prepare in advance your legal, factual and practical arguments and counter-arguments to issues that will likely come up during the mediation
- Don't discuss in advance with your team and the client
- Developing a negotiation strategy that is a waste of time



Mistakes That Can Be Made During Mediation (cont'd)

- Treat the mediator as an enemy
- Why bother to take good notes at the mediation?
- Be pessimistic and encourage your client to do the same
- Refuse to consider alternative "out of the box" business solutions
- End the mediation on as poor a note as possible
- Refuse to keep mediation communications confidential



Questions?



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United States Code Annotated

Title 5. Government Organization and Employees (Refs & Annos)

Part I. The Agencies Generally

Chapter 5. Administrative Procedure (Refs & Annos)

Subchapter IV. Alternative Means of Dispute Resolution in the Administrative Process (Refs & Annos)

5 U.S.C.A. § 574

§ 574. Confidentiality

Effective: October 19, 1996

- (a) Except as provided in subsections (d) and (e), a neutral in a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any dispute resolution communication or any communication provided in confidence to the neutral, unless-
 (1) all parties to the dispute resolution proceeding and the neutral consent in writing, and, if the dispute resolution communication was provided by a nonparty participant, that participant also consents in writing;

 (2) the dispute resolution communication has already been made public;

 (3) the dispute resolution communication is required by statute to be made public, but a neutral should make such communication public only if no other person is reasonably available to disclose the communication; or
 - (4) a court determines that such testimony or disclosure is necessary to-
 - (A) prevent a manifest injustice;
 - (B) help establish a violation of law; or
 - (C) prevent harm to the public health or safety,

of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential.

| (b) A party to a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process required to disclose any dispute resolution communication, unless |
|--|
| (1) the communication was prepared by the party seeking disclosure; |
| (2) all parties to the dispute resolution proceeding consent in writing; |
| (3) the dispute resolution communication has already been made public; |
| (4) the dispute resolution communication is required by statute to be made public; |
| (5) a court determines that such testimony or disclosure is necessary to |
| (A) prevent a manifest injustice; |
| (B) help establish a violation of law; or |
| (C) prevent harm to the public health and safety, |
| of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general reducing the confidence of parties in future cases that their communications will remain confidential; |
| (6) the dispute resolution communication is relevant to determining the existence or meaning of an agreement or award that resulted from the dispute resolution proceeding or to the enforcement of such an agreement or award; or |
| (7) except for dispute resolution communications generated by the neutral, the dispute resolution communication very provided to or was available to all parties to the dispute resolution proceeding. |

- (c) Any dispute resolution communication that is disclosed in violation of subsection (a) or (b), shall not be admissible in any proceeding relating to the issues in controversy with respect to which the communication was made.
- (d)(1) The parties may agree to alternative confidential procedures for disclosures by a neutral. Upon such agreement the parties shall inform the neutral before the commencement of the dispute resolution proceeding of any modifications to the provisions of subsection (a) that will govern the confidentiality of the dispute resolution proceeding. If the parties do not so inform the neutral, subsection (a) shall apply.
- (2) To qualify for the exemption established under subsection (j), an alternative confidential procedure under this subsection may not provide for less disclosure than the confidential procedures otherwise provided under this section.
- (e) If a demand for disclosure, by way of discovery request or other legal process, is made upon a neutral regarding a dispute resolution communication, the neutral shall make reasonable efforts to notify the parties and any affected nonparty participants of the demand. Any party or affected nonparty participant who receives such notice and within 15 calendar days does not offer to defend a refusal of the neutral to disclose the requested information shall have waived any objection to such disclosure.
- (f) Nothing in this section shall prevent the discovery or admissibility of any evidence that is otherwise discoverable, merely because the evidence was presented in the course of a dispute resolution proceeding.
- (g) Subsections (a) and (b) shall have no effect on the information and data that are necessary to document an agreement reached or order issued pursuant to a dispute resolution proceeding.
- (h) Subsections (a) and (b) shall not prevent the gathering of information for research or educational purposes, in cooperation with other agencies, governmental entities, or dispute resolution programs, so long as the parties and the specific issues in controversy are not identifiable.
- (i) Subsections (a) and (b) shall not prevent use of a dispute resolution communication to resolve a dispute between the neutral in a dispute resolution proceeding and a party to or participant in such proceeding, so long as such dispute resolution communication is disclosed only to the extent necessary to resolve such dispute.
- (j) A dispute resolution communication which is between a neutral and a party and which may not be disclosed under this section shall also be exempt from disclosure under section 552(b)(3).

CREDIT(S)

(Added Pub.L. 101-552, § 4(b), Nov. 15, 1990, 104 Stat. 2740, § 584; renumbered § 574, Pub.L. 102-354, § 3(b)(2), Aug. 26, 1992, 106 Stat. 944; amended Pub.L. 104-320, § 3, Oct. 19, 1996, 110 Stat. 3870.)

5 U.S.C.A. § 574, 5 USCA § 574

Current through PL 117-11 with the exception of PL 116-283. Incorporation of changes from PL 116-283 are in progress. Some statute sections may be more current, see credits for details.

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Commercial

Arbitration Rules and Mediation Procedures

Including Procedures for Large, Complex Commercial Disputes



Available online at adr.org/commercial

Rules Amended and Effective October 1, 2013 Fee Schedule Amended and Effective July 1, 2016

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Commercial Arbitration Rules and Mediation Procedures



(Including Procedures for Large, Complex Commercial Disputes)

Important Notice

These rules and any amendment of them shall apply in the form in effect at the time the administrative filing requirements are met for a demand for arbitration or submission agreement received by the AAA®. To ensure that you have the most current information, see our web site at www.adr.org.

Introduction

Each year, many millions of business transactions take place. Occasionally, disagreements develop over these business transactions. Many of these disputes are resolved by arbitration, the voluntary submission of a dispute to an impartial person or persons for final and binding determination. Arbitration has proven to be an effective way to resolve these disputes privately, promptly, and economically.

The American Arbitration Association® (AAA), a not-for-profit, public service organization, offers a broad range of dispute resolution services to business executives, attorneys, individuals, trade associations, unions, management, consumers, families, communities, and all levels of government. Services are available through AAA headquarters in New York and through offices located in major cities throughout the United States. Hearings may be held at locations convenient for the parties and are not limited to cities with AAA offices. In addition, the AAA serves as a center for education and training, issues specialized publications, and conducts research on various forms of alternative dispute resolution.

Standard Arbitration Clause

The parties can provide for arbitration of future disputes by inserting the following clause into their contracts:

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

Arbitration of existing disputes may be accomplished by use of the following:

We, the undersigned parties, hereby agree to submit to arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules the following Controversy: (describe briefly). We further agree that the above controversy be submitted to (one) (three) arbitrator(s). We further agree that we will faithfully observe this agreement and the rules, that we will abide by and perform any award rendered by the arbitrator(s), and that a judgment of any court having jurisdiction may be entered on the award.

The services of the AAA are generally concluded with the transmittal of the award. Although there is voluntary compliance with the majority of awards, judgment on the award can be entered in a court having appropriate jurisdiction if necessary.

Administrative Fees

The AAA charges a filing fee based on the amount of the claim or counterclaim. This fee information, which is included with these rules, allows the parties to exercise control over their administrative fees. The fees cover AAA administrative services; they do not cover arbitrator compensation or expenses, if any, reporting services, or any post-award charges incurred by the parties in enforcing the award.

Mediation

Subject to the right of any party to opt out, in cases where a claim or counterclaim exceeds \$75,000, the rules provide that the parties shall mediate their dispute upon the administration of the arbitration or at any time when the arbitration is pending. In mediation, the neutral mediator assists the parties in

reaching a settlement but does not have the authority to make a binding decision or award. Mediation is administered by the AAA in accordance with its Commercial Mediation Procedures. There is no additional filing fee where parties to a pending arbitration attempt to mediate their dispute under the AAA's auspices.

Although these rules include a mediation procedure that will apply to many cases, parties may still want to incorporate mediation into their contractual dispute settlement process. Parties can do so by inserting the following mediation clause into their contract in conjunction with a standard arbitration provision:

If a dispute arises out of or relates to this contract, or the breach thereof, and if the dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by mediation administered by the American Arbitration Association under its Commercial Mediation Procedures before resorting to arbitration, litigation, or some other dispute resolution procedure.

If the parties want to use a mediator to resolve an existing dispute, they can enter into the following submission agreement:

The parties hereby submit the following dispute to mediation administered by the American Arbitration Association under its Commercial Mediation Procedures. (The clause may also provide for the qualifications of the mediator(s), method of payment, locale of meetings, and any other item of concern to the parties.)

Large, Complex Cases

Unless the parties agree otherwise, the procedures for Large, Complex Commercial Disputes, which appear in this pamphlet, will be applied to all cases administered by the AAA under the Commercial Arbitration Rules in which the disclosed claim or counterclaim of any party is at least \$500,000 exclusive of claimed interest, arbitration fees and costs. The key features of these procedures include:

- A highly qualified, trained Roster of Neutrals;
- > A mandatory preliminary hearing with the arbitrators, which may be conducted by teleconference:
- > Broad arbitrator authority to order and control the exchange of information, including depositions;
- A presumption that hearings will proceed on a consecutive or block basis.

Commercial Arbitration Rules

R-1. Agreement of Parties*

- (a) The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association (hereinafter AAA) under its Commercial Arbitration Rules or for arbitration by the AAA of a domestic commercial dispute without specifying particular rules. These rules and any amendment of them shall apply in the form in effect at the time the administrative requirements are met for a Demand for Arbitration or Submission Agreement received by the AAA. Any disputes regarding which AAA rules shall apply shall be decided by the AAA. The parties, by written agreement, may vary the procedures set forth in these rules. After appointment of the arbitrator, such modifications may be made only with the consent of the arbitrator.
- (b) Unless the parties or the AAA determines otherwise, the Expedited Procedures shall apply in any case in which no disclosed claim or counterclaim exceeds \$75,000, exclusive of interest, attorneys' fees, and arbitration fees and costs. Parties may also agree to use these procedures in larger cases. Unless the parties agree otherwise, these procedures will not apply in cases involving more than two parties. The Expedited Procedures shall be applied as described in Sections E-1 through E-10 of these rules, in addition to any other portion of these rules that is not in conflict with the Expedited Procedures.
- (c) Unless the parties agree otherwise, the Procedures for Large, Complex Commercial Disputes shall apply to all cases in which the disclosed claim or counterclaim of any party is at least \$500,000 or more, exclusive of claimed interest, attorneys' fees, arbitration fees and costs. Parties may also agree to use the procedures in cases involving claims or counterclaims under \$500,000, or in nonmonetary cases. The Procedures for Large, Complex Commercial Disputes shall be applied as described in Sections L-1 through L-3 of these rules, in addition to any other portion of these rules that is not in conflict with the Procedures for Large, Complex Commercial Disputes.
- (d) Parties may, by agreement, apply the Expedited Procedures, the Procedures for Large, Complex Commercial Disputes, or the Procedures for the Resolution of Disputes through Document Submission (Rule E-6) to any dispute.
- (e) All other cases shall be administered in accordance with Sections R-1 through R-58 of these rules.
- * A dispute arising out of an employer-promulgated plan will be administered under the AAA's Employment Arbitration Rules and Mediation Procedures. A dispute arising out of a consumer arbitration agreement will be administered under the AAA's Consumer Arbitration Rules.

R-2. AAA and Delegation of Duties

When parties agree to arbitrate under these rules, or when they provide for arbitration by the AAA and an arbitration is initiated under these rules, they thereby authorize the AAA to administer the arbitration. The authority and duties of the AAA are prescribed in the agreement of the parties and in these rules, and may be carried out through such of the AAA's representatives as it may direct. The AAA may, in its discretion, assign the administration of an arbitration to any of its offices. Arbitrations administered under these rules shall only be administered by the AAA or by an individual or organization authorized by the AAA to do so.

R-3. National Roster of Arbitrators

The AAA shall establish and maintain a National Roster of Arbitrators ("National Roster") and shall appoint arbitrators as provided in these rules. The term "arbitrator" in these rules refers to the arbitration panel, constituted for a particular case, whether composed of one or more arbitrators, or to an individual arbitrator, as the context requires.

R-4. Filing Requirements

- (a) Arbitration under an arbitration provision in a contract shall be initiated by the initiating party ("claimant") filing with the AAA a Demand for Arbitration, the administrative filing fee, and a copy of the applicable arbitration agreement from the parties' contract which provides for arbitration.
- (b) Arbitration pursuant to a court order shall be initiated by the initiating party filing with the AAA a Demand for Arbitration, the administrative filing fee, and a copy of any applicable arbitration agreement from the parties' contract which provides for arbitration.
 - The filing party shall include a copy of the court order.
 - ii. The filing fee must be paid before a matter is considered properly filed. If the court order directs that a specific party is responsible for the filing fee, it is the responsibility of the filing party to either make such payment to the AAA and seek reimbursement as directed in the court order or to make other such arrangements so that the filing fee is submitted to the AAA with the Demand.
 - iii. The party filing the Demand with the AAA is the claimant and the opposing party is the respondent regardless of which party initiated the court action. Parties may request that the arbitrator alter the order of proceedings if necessary pursuant to R-32.
- (c) It is the responsibility of the filing party to ensure that any conditions precedent to the filing of a case are met prior to filing for an arbitration, as well as any time requirements associated with the filing. Any dispute regarding whether a condition precedent has been met may be raised to the arbitrator for determination.

- (d) Parties to any existing dispute who have not previously agreed to use these rules may commence an arbitration under these rules by filing a written submission agreement and the administrative filing fee. To the extent that the parties' submission agreement contains any variances from these rules, such variances should be clearly stated in the Submission Agreement.
- (e) Information to be included with any arbitration filing includes:
 - i. the name of each party;
 - ii. the address for each party, including telephone and fax numbers and e-mail addresses:
 - iii. if applicable, the names, addresses, telephone and fax numbers, and e-mail addresses of any known representative for each party;
 - iv. a statement setting forth the nature of the claim including the relief sought and the amount involved: and
 - v. the locale requested if the arbitration agreement does not specify one.
- (f) The initiating party may file or submit a dispute to the AAA in the following manner:
 - through AAA WebFile, located at www.adr.org; or
 - ii. by filing the complete Demand or Submission with any AAA office, regardless of the intended locale of hearing.
- (g) The filing party shall simultaneously provide a copy of the Demand and any supporting documents to the opposing party.
- (h) The AAA shall provide notice to the parties (or their representatives if so named) of the receipt of a Demand or Submission when the administrative filing requirements have been satisfied. The date on which the filing requirements are satisfied shall establish the date of filing the dispute for administration. However, all disputes in connection with the AAA's determination of the date of filing may be decided by the arbitrator.
- (i) If the filing does not satisfy the filing requirements set forth above, the AAA shall acknowledge to all named parties receipt of the incomplete filing and inform the parties of the filing deficiencies. If the deficiencies are not cured by the date specified by the AAA, the filing may be returned to the initiating party.

R-5. Answers and Counterclaims

(a) A respondent may file an answering statement with the AAA within 14 calendar days after notice of the filing of the Demand is sent by the AAA. The respondent shall, at the time of any such filing, send a copy of any answering statement to the claimant and to all other parties to the arbitration. If no answering statement is filed within the stated time, the respondent will be deemed to deny the claim. Failure to file an answering statement shall not operate to delay the arbitration.

- (b) A respondent may file a counterclaim at any time after notice of the filing of the Demand is sent by the AAA, subject to the limitations set forth in Rule R-6. The respondent shall send a copy of the counterclaim to the claimant and all other parties to the arbitration. If a counterclaim is asserted, it shall include a statement setting forth the nature of the counterclaim including the relief sought and the amount involved. The filing fee as specified in the applicable AAA Fee Schedule must be paid at the time of the filing of any counterclaim.
- (c) If the respondent alleges that a different arbitration provision is controlling, the matter will be administered in accordance with the arbitration provision submitted by the initiating party subject to a final determination by the arbitrator.
- (d) If the counterclaim does not meet the requirements for filing a claim and the deficiency is not cured by the date specified by the AAA, it may be returned to the filing party.

R-6. Changes of Claim

- (a) A party may at any time prior to the close of the hearing or by the date established by the arbitrator increase or decrease the amount of its claim or counterclaim. Written notice of the change of claim amount must be provided to the AAA and all parties. If the change of claim amount results in an increase in administrative fee, the balance of the fee is due before the change of claim amount may be accepted by the arbitrator.
- (b) Any new or different claim or counterclaim, as opposed to an increase or decrease in the amount of a pending claim or counterclaim, shall be made in writing and filed with the AAA, and a copy shall be provided to the other party, who shall have a period of 14 calendar days from the date of such transmittal within which to file an answer to the proposed change of claim or counterclaim with the AAA. After the arbitrator is appointed, however, no new or different claim may be submitted except with the arbitrator's consent.

R-7. Jurisdiction

- (a) The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.
- (b) The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.
- (c) A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection. The arbitrator may rule on such objections as a preliminary matter or as part of the final award.

R-8. Interpretation and Application of Rules

The arbitrator shall interpret and apply these rules insofar as they relate to the arbitrator's powers and duties. When there is more than one arbitrator and a difference arises among them concerning the meaning or application of these rules, it shall be decided by a majority vote. If that is not possible, either an arbitrator or a party may refer the question to the AAA for final decision. All other rules shall be interpreted and applied by the AAA.

R-9. Mediation

In all cases where a claim or counterclaim exceeds \$75,000, upon the AAA's administration of the arbitration or at any time while the arbitration is pending, the parties shall mediate their dispute pursuant to the applicable provisions of the AAA's Commercial Mediation Procedures, or as otherwise agreed by the parties. Absent an agreement of the parties to the contrary, the mediation shall take place concurrently with the arbitration and shall not serve to delay the arbitration proceedings. However, any party to an arbitration may unilaterally opt out of this rule upon notification to the AAA and the other parties to the arbitration. The parties shall confirm the completion of any mediation or any decision to opt out of this rule to the AAA. Unless agreed to by all parties and the mediator, the mediator shall not be appointed as an arbitrator to the case.

R-10. Administrative Conference

At the request of any party or upon the AAA's own initiative, the AAA may conduct an administrative conference, in person or by telephone, with the parties and/or their representatives. The conference may address such issues as arbitrator selection, mediation of the dispute, potential exchange of information, a timetable for hearings, and any other administrative matters.

R-11. Fixing of Locale

The parties may mutually agree on the locale where the arbitration is to be held. Any disputes regarding the locale that are to be decided by the AAA must be submitted to the AAA and all other parties within 14 calendar days from the date of the AAA's initiation of the case or the date established by the AAA. Disputes regarding locale shall be determined in the following manner:

(a) When the parties' arbitration agreement is silent with respect to locale, and if the parties disagree as to the locale, the AAA may initially determine the place of

- arbitration, subject to the power of the arbitrator after appointment, to make a final determination on the locale.
- (b) When the parties' arbitration agreement requires a specific locale, absent the parties' agreement to change it, or a determination by the arbitrator upon appointment that applicable law requires a different locale, the locale shall be that specified in the arbitration agreement.
- (c) If the reference to a locale in the arbitration agreement is ambiguous, and the parties are unable to agree to a specific locale, the AAA shall determine the locale, subject to the power of the arbitrator to finally determine the locale.

The arbitrator, at the arbitrator's sole discretion, shall have the authority to conduct special hearings for document production purposes or otherwise at other locations if reasonably necessary and beneficial to the process.

R-12. Appointment from National Roster

If the parties have not appointed an arbitrator and have not provided any other method of appointment, the arbitrator shall be appointed in the following manner:

- (a) The AAA shall send simultaneously to each party to the dispute an identical list of 10 (unless the AAA decides that a different number is appropriate) names of persons chosen from the National Roster. The parties are encouraged to agree to an arbitrator from the submitted list and to advise the AAA of their agreement.
- (b) If the parties are unable to agree upon an arbitrator, each party to the dispute shall have 14 calendar days from the transmittal date in which to strike names objected to, number the remaining names in order of preference, and return the list to the AAA. The parties are not required to exchange selection lists. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable to that party. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of an arbitrator to serve. If the parties fail to agree on any of the persons named, or if acceptable arbitrators are unable to act, or if for any other reason the appointment cannot be made from the submitted lists, the AAA shall have the power to make the appointment from among other members of the National Roster without the submission of additional lists.
- (c) Unless the parties agree otherwise, when there are two or more claimants or two or more respondents, the AAA may appoint all the arbitrators.

R-13. Direct Appointment by a Party

- (a) If the agreement of the parties names an arbitrator or specifies a method of appointing an arbitrator, that designation or method shall be followed. The notice of appointment, with the name and address of the arbitrator, shall be filed with the AAA by the appointing party. Upon the request of any appointing party, the AAA shall submit a list of members of the National Roster from which the party may, if it so desires, make the appointment.
- (b) Where the parties have agreed that each party is to name one arbitrator, the arbitrators so named must meet the standards of Section R-18 with respect to impartiality and independence unless the parties have specifically agreed pursuant to Section R-18(b) that the party-appointed arbitrators are to be non-neutral and need not meet those standards.
- (c) If the agreement specifies a period of time within which an arbitrator shall be appointed and any party fails to make the appointment within that period, the AAA shall make the appointment.
- (d) If no period of time is specified in the agreement, the AAA shall notify the party to make the appointment. If within 14 calendar days after such notice has been sent, an arbitrator has not been appointed by a party, the AAA shall make the appointment.

R-14. Appointment of Chairperson by Party-Appointed Arbitrators or Parties

- (a) If, pursuant to Section R-13, either the parties have directly appointed arbitrators, or the arbitrators have been appointed by the AAA, and the parties have authorized them to appoint a chairperson within a specified time and no appointment is made within that time or any agreed extension, the AAA may appoint the chairperson.
- (b) If no period of time is specified for appointment of the chairperson, and the party-appointed arbitrators or the parties do not make the appointment within 14 calendar days from the date of the appointment of the last party-appointed arbitrator, the AAA may appoint the chairperson.
- (c) If the parties have agreed that their party-appointed arbitrators shall appoint the chairperson from the National Roster, the AAA shall furnish to the party-appointed arbitrators, in the manner provided in Section R-12, a list selected from the National Roster, and the appointment of the chairperson shall be made as provided in that Section.

R-15. Nationality of Arbitrator

Where the parties are nationals of different countries, the AAA, at the request of any party or on its own initiative, may appoint as arbitrator a national of a country other than that of any of the parties. The request must be made before the time set for the appointment of the arbitrator as agreed by the parties or set by these rules.

R-16. Number of Arbitrators

- (a) If the arbitration agreement does not specify the number of arbitrators, the dispute shall be heard and determined by one arbitrator, unless the AAA, in its discretion, directs that three arbitrators be appointed. A party may request three arbitrators in the Demand or Answer, which request the AAA will consider in exercising its discretion regarding the number of arbitrators appointed to the dispute.
- (b) Any request for a change in the number of arbitrators as a result of an increase or decrease in the amount of a claim or a new or different claim must be made to the AAA and other parties to the arbitration no later than seven calendar days after receipt of the R-6 required notice of change of claim amount. If the parties are unable to agree with respect to the request for a change in the number of arbitrators, the AAA shall make that determination.

R-17. Disclosure

- (a) Any person appointed or to be appointed as an arbitrator, as well as the parties and their representatives, shall disclose to the AAA any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives. Such obligation shall remain in effect throughout the arbitration. Failure on the part of a party or a representative to comply with the requirements of this rule may result in the waiver of the right to object to an arbitrator in accordance with Rule R-41.
- (b) Upon receipt of such information from the arbitrator or another source, the AAA shall communicate the information to the parties and, if it deems it appropriate to do so, to the arbitrator and others.
- (c) Disclosure of information pursuant to this Section R-17 is not an indication that the arbitrator considers that the disclosed circumstance is likely to affect impartiality or independence.

R-18. Disqualification of Arbitrator

- (a) Any arbitrator shall be impartial and independent and shall perform his or her duties with diligence and in good faith, and shall be subject to disqualification for:
 - partiality or lack of independence,
 - ii. inability or refusal to perform his or her duties with diligence and in good faith, and
 - iii. any grounds for disqualification provided by applicable law.
- (b) The parties may agree in writing, however, that arbitrators directly appointed by a party pursuant to Section R-13 shall be non-neutral, in which case such arbitrators need not be impartial or independent and shall not be subject to disqualification for partiality or lack of independence.
- (c) Upon objection of a party to the continued service of an arbitrator, or on its own initiative, the AAA shall determine whether the arbitrator should be disqualified under the grounds set out above, and shall inform the parties of its decision. which decision shall be conclusive.

R-19. Communication with Arbitrator

- (a) No party and no one acting on behalf of any party shall communicate ex parte with an arbitrator or a candidate for arbitrator concerning the arbitration, except that a party, or someone acting on behalf of a party, may communicate ex parte with a candidate for direct appointment pursuant to R-13 in order to advise the candidate of the general nature of the controversy and of the anticipated proceedings and to discuss the candidate's qualifications, availability, or independence in relation to the parties or to discuss the suitability of candidates for selection as a third arbitrator where the parties or party-designated arbitrators are to participate in that selection.
- (b) Section R-19(a) does not apply to arbitrators directly appointed by the parties who, pursuant to Section R-18(b), the parties have agreed in writing are non-neutral. Where the parties have so agreed under Section R-18(b), the AAA shall as an administrative practice suggest to the parties that they agree further that Section R-19(a) should nonetheless apply prospectively.
- (c) In the course of administering an arbitration, the AAA may initiate communications with each party or anyone acting on behalf of the parties either jointly or individually.
- (d) As set forth in R-43, unless otherwise instructed by the AAA or by the arbitrator, any documents submitted by any party or to the arbitrator shall simultaneously be provided to the other party or parties to the arbitration.

R-20. Vacancies

- (a) If for any reason an arbitrator is unable or unwilling to perform the duties of the office, the AAA may, on proof satisfactory to it, declare the office vacant. Vacancies shall be filled in accordance with the applicable provisions of these rules.
- (b) In the event of a vacancy in a panel of neutral arbitrators after the hearings have commenced, the remaining arbitrator or arbitrators may continue with the hearing and determination of the controversy, unless the parties agree otherwise.
- (c) In the event of the appointment of a substitute arbitrator, the panel of arbitrators shall determine in its sole discretion whether it is necessary to repeat all or part of any prior hearings.

R-21. Preliminary Hearing

- (a) At the discretion of the arbitrator, and depending on the size and complexity of the arbitration, a preliminary hearing should be scheduled as soon as practicable after the arbitrator has been appointed. The parties should be invited to attend the preliminary hearing along with their representatives. The preliminary hearing may be conducted in person or by telephone.
- (b) At the preliminary hearing, the parties and the arbitrator should be prepared to discuss and establish a procedure for the conduct of the arbitration that is appropriate to achieve a fair, efficient, and economical resolution of the dispute. Sections P-1 and P-2 of these rules address the issues to be considered at the preliminary hearing.

R-22. Pre-Hearing Exchange and Production of Information

- (a) Authority of arbitrator. The arbitrator shall manage any necessary exchange of information among the parties with a view to achieving an efficient and economical resolution of the dispute, while at the same time promoting equality of treatment and safeguarding each party's opportunity to fairly present its claims and defenses.
- (b) Documents. The arbitrator may, on application of a party or on the arbitrator's own initiative:
 - require the parties to exchange documents in their possession or custody on which they intend to rely;
 - ii. require the parties to update their exchanges of the documents on which they intend to rely as such documents become known to them;
 - iii. require the parties, in response to reasonable document requests, to make available to the other party documents, in the responding party's possession or custody, not otherwise readily available to the party seeking the documents, reasonably believed by the party seeking the documents to exist and to be relevant and material to the outcome of disputed issues; and

iv. require the parties, when documents to be exchanged or produced are maintained in electronic form, to make such documents available in the form most convenient and economical for the party in possession of such documents, unless the arbitrator determines that there is good cause for requiring the documents to be produced in a different form. The parties should attempt to agree in advance upon, and the arbitrator may determine, reasonable search parameters to balance the need for production of electronically stored documents relevant and material to the outcome of disputed issues against the cost of locating and producing them.

R-23. Enforcement Powers of the Arbitrator

The arbitrator shall have the authority to issue any orders necessary to enforce the provisions of rules R-21 and R-22 and to otherwise achieve a fair, efficient and economical resolution of the case, including, without limitation:

- (a) conditioning any exchange or production of confidential documents and information, and the admission of confidential evidence at the hearing, on appropriate orders to preserve such confidentiality;
- (b) imposing reasonable search parameters for electronic and other documents if the parties are unable to agree;
- (c) allocating costs of producing documentation, including electronically stored documentation:
- (d) in the case of willful non-compliance with any order issued by the arbitrator, drawing adverse inferences, excluding evidence and other submissions, and/or making special allocations of costs or an interim award of costs arising from such non-compliance; and
- (e) issuing any other enforcement orders which the arbitrator is empowered to issue under applicable law.

R-24. Date, Time, and Place of Hearing

The arbitrator shall set the date, time, and place for each hearing. The parties shall respond to requests for hearing dates in a timely manner, be cooperative in scheduling the earliest practicable date, and adhere to the established hearing schedule. The AAA shall send a notice of hearing to the parties at least 10 calendar days in advance of the hearing date, unless otherwise agreed by the parties.

American Arbitration Association

R-25. Attendance at Hearings

The arbitrator and the AAA shall maintain the privacy of the hearings unless the law provides to the contrary. Any person having a direct interest in the arbitration is entitled to attend hearings. The arbitrator shall otherwise have the power to require the exclusion of any witness, other than a party or other essential person, during the testimony of any other witness. It shall be discretionary with the arbitrator to determine the propriety of the attendance of any other person.

R-26. Representation

Any party may participate without representation (pro se), or by counsel or any other representative of the party's choosing, unless such choice is prohibited by applicable law. A party intending to be so represented shall notify the other party and the AAA of the name, telephone number and address, and email address if available, of the representative at least seven calendar days prior to the date set for the hearing at which that person is first to appear. When such a representative initiates an arbitration or responds for a party, notice is deemed to have been given.

R-27. Oaths

Before proceeding with the first hearing, each arbitrator may take an oath of office and, if required by law, shall do so. The arbitrator may require witnesses to testify under oath administered by any duly qualified person and, if it is required by law or requested by any party, shall do so.

R-28. Stenographic Record

- (a) Any party desiring a stenographic record shall make arrangements directly with a stenographer and shall notify the other parties of these arrangements at least three calendar days in advance of the hearing. The requesting party or parties shall pay the cost of the record.
- (b) No other means of recording the proceedings will be permitted absent the agreement of the parties or per the direction of the arbitrator.
- (c) If the transcript or any other recording is agreed by the parties or determined by the arbitrator to be the official record of the proceeding, it must be provided to the arbitrator and made available to the other parties for inspection, at a date, time, and place determined by the arbitrator.
- (d) The arbitrator may resolve any disputes with regard to apportionment of the costs of the stenographic record or other recording.

R-29. Interpreters

Any party wishing an interpreter shall make all arrangements directly with the interpreter and shall assume the costs of the service.

R-30. Postponements

The arbitrator may postpone any hearing upon agreement of the parties, upon request of a party for good cause shown, or upon the arbitrator's own initiative.

R-31. Arbitration in the Absence of a Party or Representative

Unless the law provides to the contrary, the arbitration may proceed in the absence of any party or representative who, after due notice, fails to be present or fails to obtain a postponement. An award shall not be made solely on the default of a party. The arbitrator shall require the party who is present to submit such evidence as the arbitrator may require for the making of an award.

R-32. Conduct of Proceedings

- (a) The claimant shall present evidence to support its claim. The respondent shall then present evidence to support its defense. Witnesses for each party shall also submit to questions from the arbitrator and the adverse party. The arbitrator has the discretion to vary this procedure, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.
- (b) The arbitrator, exercising his or her discretion, shall conduct the proceedings with a view to expediting the resolution of the dispute and may direct the order of proof, bifurcate proceedings and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case.
- (c) When deemed appropriate, the arbitrator may also allow for the presentation of evidence by alternative means including video conferencing, internet communication, telephonic conferences and means other than an in-person presentation. Such alternative means must afford a full opportunity for all parties to present any evidence that the arbitrator deems material and relevant to the resolution of the dispute and, when involving witnesses, provide an opportunity for cross-examination
- (d) The parties may agree to waive oral hearings in any case and may also agree to utilize the Procedures for Resolution of Disputes Through Document Submission, found in Rule E-6.

R-33. Dispositive Motions

The arbitrator may allow the filing of and make rulings upon a dispositive motion only if the arbitrator determines that the moving party has shown that the motion is likely to succeed and dispose of or narrow the issues in the case.

R-34. Evidence

- (a) The parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. Conformity to legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of all of the arbitrators and all of the parties, except where any of the parties is absent, in default, or has waived the right to be present.
- (b) The arbitrator shall determine the admissibility, relevance, and materiality of the evidence offered and may exclude evidence deemed by the arbitrator to be cumulative or irrelevant.
- (c) The arbitrator shall take into account applicable principles of legal privilege, such as those involving the confidentiality of communications between a lawyer and client.
- (d) An arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently.

R-35. Evidence by Written Statements and Post-Hearing Filing of Documents or Other Evidence

- (a) At a date agreed upon by the parties or ordered by the arbitrator, the parties shall give written notice for any witness or expert witness who has provided a written witness statement to appear in person at the arbitration hearing for examination. If such notice is given, and the witness fails to appear, the arbitrator may disregard the written witness statement and/or expert report of the witness or make such other order as the arbitrator may consider to be just and reasonable.
- (b) If a witness whose testimony is represented by a party to be essential is unable or unwilling to testify at the hearing, either in person or through electronic or other means, either party may request that the arbitrator order the witness to appear in person for examination before the arbitrator at a time and location where the witness is willing and able to appear voluntarily or can legally be compelled to do so. Any such order may be conditioned upon payment by the requesting party of all reasonable costs associated with such examination.
- (c) If the parties agree or the arbitrator directs that documents or other evidence be submitted to the arbitrator after the hearing, the documents or other evidence shall be filed with the AAA for transmission to the arbitrator. All parties shall be afforded an opportunity to examine and respond to such documents or other evidence.

R-36. Inspection or Investigation

An arbitrator finding it necessary to make an inspection or investigation in connection with the arbitration shall direct the AAA to so advise the parties. The arbitrator shall set the date and time and the AAA shall notify the parties. Any party who so desires may be present at such an inspection or investigation. In the event that one or all parties are not present at the inspection or investigation, the arbitrator shall make an oral or written report to the parties and afford them an opportunity to comment.

R-37. Interim Measures

- (a) The arbitrator may take whatever interim measures he or she deems necessary, including injunctive relief and measures for the protection or conservation of property and disposition of perishable goods.
- (b) Such interim measures may take the form of an interim award, and the arbitrator may require security for the costs of such measures.
- (c) A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.

R-38. Emergency Measures of Protection

- (a) Unless the parties agree otherwise, the provisions of this rule shall apply to arbitrations conducted under arbitration clauses or agreements entered on or after October 1, 2013.
- **(b)** A party in need of emergency relief prior to the constitution of the panel shall notify the AAA and all other parties in writing of the nature of the relief sought and the reasons why such relief is required on an emergency basis. The application shall also set forth the reasons why the party is entitled to such relief. Such notice may be given by facsimile or e-mail or other reliable means, but must include a statement certifying that all other parties have been notified or an explanation of the steps taken in good faith to notify other parties.
- (c) Within one business day of receipt of notice as provided in section (b), the AAA shall appoint a single emergency arbitrator designated to rule on emergency applications. The emergency arbitrator shall immediately disclose any circumstance likely, on the basis of the facts disclosed on the application, to affect such arbitrator's impartiality or independence. Any challenge to the appointment of the emergency arbitrator must be made within one business day of the communication by the AAA to the parties of the appointment of the emergency arbitrator and the circumstances disclosed.

- (d) The emergency arbitrator shall as soon as possible, but in any event within two business days of appointment, establish a schedule for consideration of the application for emergency relief. Such a schedule shall provide a reasonable opportunity to all parties to be heard, but may provide for proceeding by telephone or video conference or on written submissions as alternatives to a formal hearing. The emergency arbitrator shall have the authority vested in the tribunal under Rule 7, including the authority to rule on her/his own jurisdiction, and shall resolve any disputes over the applicability of this Rule 38.
- (e) If after consideration the emergency arbitrator is satisfied that the party seeking the emergency relief has shown that immediate and irreparable loss or damage shall result in the absence of emergency relief, and that such party is entitled to such relief, the emergency arbitrator may enter an interim order or award granting the relief and stating the reason therefore.
- (f) Any application to modify an interim award of emergency relief must be based on changed circumstances and may be made to the emergency arbitrator until the panel is constituted; thereafter such a request shall be addressed to the panel. The emergency arbitrator shall have no further power to act after the panel is constituted unless the parties agree that the emergency arbitrator is named as a member of the panel.
- (g) Any interim award of emergency relief may be conditioned on provision by the party seeking such relief for appropriate security.
- (h) A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with this rule, the agreement to arbitrate or a waiver of the right to arbitrate. If the AAA is directed by a judicial authority to nominate a special master to consider and report on an application for emergency relief, the AAA shall proceed as provided in this rule and the references to the emergency arbitrator shall be read to mean the special master, except that the special master shall issue a report rather than an interim award.
- (i) The costs associated with applications for emergency relief shall initially be apportioned by the emergency arbitrator or special master, subject to the power of the tribunal to determine finally the apportionment of such costs.

R-39. Closing of Hearing

- (a) The arbitrator shall specifically inquire of all parties whether they have any further proofs to offer or witnesses to be heard. Upon receiving negative replies or if satisfied that the record is complete, the arbitrator shall declare the hearing closed.
- (b) If documents or responses are to be filed as provided in Rule R-35, or if briefs are to be filed, the hearing shall be declared closed as of the final date set by the arbitrator for the receipt of briefs. If no documents, responses, or briefs are to be filed, the arbitrator shall declare the hearings closed as of the date of the last hearing (including telephonic hearings). If the case was heard without any oral hearings, the arbitrator shall close the hearings upon the due date established for receipt of the final submission.

(c) The time limit within which the arbitrator is required to make the award shall commence, in the absence of other agreements by the parties, upon the closing of the hearing. The AAA may extend the time limit for rendering of the award only in unusual and extreme circumstances.

R-40. Reopening of Hearing

The hearing may be reopened on the arbitrator's initiative, or by the direction of the arbitrator upon application of a party, at any time before the award is made. If reopening the hearing would prevent the making of the award within the specific time agreed to by the parties in the arbitration agreement, the matter may not be reopened unless the parties agree to an extension of time. When no specific date is fixed by agreement of the parties, the arbitrator shall have 30 calendar days from the closing of the reopened hearing within which to make an award (14 calendar days if the case is governed by the Expedited Procedures).

R-41. Waiver of Rules

Any party who proceeds with the arbitration after knowledge that any provision or requirement of these rules has not been complied with and who fails to state an objection in writing shall be deemed to have waived the right to object.

R-42. Extensions of Time

The parties may modify any period of time by mutual agreement. The AAA or the arbitrator may for good cause extend any period of time established by these rules, except the time for making the award. The AAA shall notify the parties of any extension.

R-43. Serving of Notice and Communications

- (a) Any papers, notices, or process necessary or proper for the initiation or continuation of an arbitration under these rules, for any court action in connection therewith, or for the entry of judgment on any award made under these rules may be served on a party by mail addressed to the party or its representative at the last known address or by personal service, in or outside the state where the arbitration is to be held, provided that reasonable opportunity to be heard with regard to the dispute is or has been granted to the party.
- (b) The AAA, the arbitrator and the parties may also use overnight delivery or electronic facsimile transmission (fax), or electronic (e-mail) to give the notices required by these rules. Where all parties and the arbitrator agree, notices may be transmitted by e-mail or other methods of communication.

- (c) Unless otherwise instructed by the AAA or by the arbitrator, any documents submitted by any party to the AAA or to the arbitrator shall simultaneously be provided to the other party or parties to the arbitration.
- (d) Unless otherwise instructed by the AAA or by the arbitrator, all written communications made by any party to the AAA or to the arbitrator shall simultaneously be provided to the other party or parties to the arbitration.
- (e) Failure to provide the other party with copies of communications made to the AAA or to the arbitrator may prevent the AAA or the arbitrator from acting on any requests or objections contained therein.
- (f) The AAA may direct that any oral or written communications that are sent by a party or their representative shall be sent in a particular manner. The failure of a party or their representative to do so may result in the AAA's refusal to consider the issue raised in the communication.

R-44. Majority Decision

- (a) When the panel consists of more than one arbitrator, unless required by law or by the arbitration agreement or section (b) of this rule, a majority of the arbitrators must make all decisions.
- (b) Where there is a panel of three arbitrators, absent an objection of a party or another member of the panel, the chairperson of the panel is authorized to resolve any disputes related to the exchange of information or procedural matters without the need to consult the full panel.

R-45. Time of Award

The award shall be made promptly by the arbitrator and, unless otherwise agreed by the parties or specified by law, no later than 30 calendar days from the date of closing the hearing, or, if oral hearings have been waived, from the due date set for receipt of the parties' final statements and proofs.

R-46. Form of Award

- (a) Any award shall be in writing and signed by a majority of the arbitrators. It shall be executed in the form and manner required by law.
- (b) The arbitrator need not render a reasoned award unless the parties request such an award in writing prior to appointment of the arbitrator or unless the arbitrator determines that a reasoned award is appropriate.

R-47. Scope of Award

- (a) The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract.
- (b) In addition to a final award, the arbitrator may make other decisions, including interim, interlocutory, or partial rulings, orders, and awards. In any interim, interlocutory, or partial award, the arbitrator may assess and apportion the fees, expenses, and compensation related to such award as the arbitrator determines is appropriate.
- (c) In the final award, the arbitrator shall assess the fees, expenses, and compensation provided in Sections R-53, R-54, and R-55. The arbitrator may apportion such fees, expenses, and compensation among the parties in such amounts as the arbitrator determines is appropriate.
- (d) The award of the arbitrator(s) may include:
 - i. interest at such rate and from such date as the arbitrator(s) may deem appropriate; and
 - ii. an award of attorneys' fees if all parties have requested such an award or it is authorized by law or their arbitration agreement.

R-48. Award Upon Settlement—Consent Award

- (a) If the parties settle their dispute during the course of the arbitration and if the parties so request, the arbitrator may set forth the terms of the settlement in a "consent award." A consent award must include an allocation of arbitration costs, including administrative fees and expenses as well as arbitrator fees and expenses.
- (b) The consent award shall not be released to the parties until all administrative fees and all arbitrator compensation have been paid in full.

R-49. Delivery of Award to Parties

Parties shall accept as notice and delivery of the award the placing of the award or a true copy thereof in the mail addressed to the parties or their representatives at their last known addresses, personal or electronic service of the award, or the filing of the award in any other manner that is permitted by law.

R-50. Modification of Award

Within 20 calendar days after the transmittal of an award, any party, upon notice to the other parties, may request the arbitrator, through the AAA, to correct any clerical, typographical, or computational errors in the award. The arbitrator is not empowered to redetermine the merits of any claim already decided. The other

parties shall be given 10 calendar days to respond to the request. The arbitrator shall dispose of the request within 20 calendar days after transmittal by the AAA to the arbitrator of the request and any response thereto.

R-51. Release of Documents for Judicial Proceedings

The AAA shall, upon the written request of a party to the arbitration, furnish to the party, at its expense, copies or certified copies of any papers in the AAA's possession that are not determined by the AAA to be privileged or confidential.

R-52. Applications to Court and Exclusion of Liability

- (a) No judicial proceeding by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate.
- (b) Neither the AAA nor any arbitrator in a proceeding under these rules is a necessary or proper party in judicial proceedings relating to the arbitration.
- (c) Parties to an arbitration under these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof.
- (d) Parties to an arbitration under these rules shall be deemed to have consented that neither the AAA nor any arbitrator shall be liable to any party in any action for damages or injunctive relief for any act or omission in connection with any arbitration under these rules.
- (e) Parties to an arbitration under these rules may not call the arbitrator, the AAA, or AAA employees as a witness in litigation or any other proceeding relating to the arbitration. The arbitrator, the AAA and AAA employees are not competent to testify as witnesses in any such proceeding.

R-53. Administrative Fees

As a not-for-profit organization, the AAA shall prescribe administrative fees to compensate it for the cost of providing administrative services. The fees in effect when the fee or charge is incurred shall be applicable. The filing fee shall be advanced by the party or parties making a claim or counterclaim, subject to final apportionment by the arbitrator in the award. The AAA may, in the event of extreme hardship on the part of any party, defer or reduce the administrative fees.

R-54. Expenses

The expenses of witnesses for either side shall be paid by the party producing such witnesses. All other expenses of the arbitration, including required travel and other expenses of the arbitrator, AAA representatives, and any witness and the cost of any proof produced at the direct request of the arbitrator, shall be borne equally by the parties, unless they agree otherwise or unless the arbitrator in the award assesses such expenses or any part thereof against any specified party or parties.

R-55. Neutral Arbitrator's Compensation

- (a) Arbitrators shall be compensated at a rate consistent with the arbitrator's stated rate of compensation.
- (b) If there is disagreement concerning the terms of compensation, an appropriate rate shall be established with the arbitrator by the AAA and confirmed to the parties.
- (c) Any arrangement for the compensation of a neutral arbitrator shall be made through the AAA and not directly between the parties and the arbitrator.

R-56. Deposits

- (a) The AAA may require the parties to deposit in advance of any hearings such sums of money as it deems necessary to cover the expense of the arbitration, including the arbitrator's fee, if any, and shall render an accounting to the parties and return any unexpended balance at the conclusion of the case.
- (b) Other than in cases where the arbitrator serves for a flat fee, deposit amounts requested will be based on estimates provided by the arbitrator. The arbitrator will determine the estimated amount of deposits using the information provided by the parties with respect to the complexity of each case.
- (c) Upon the request of any party, the AAA shall request from the arbitrator an itemization or explanation for the arbitrator's request for deposits.

R-57. Remedies for Nonpayment

If arbitrator compensation or administrative charges have not been paid in full, the AAA may so inform the parties in order that one of them may advance the required payment.

- (a) Upon receipt of information from the AAA that payment for administrative charges or deposits for arbitrator compensation have not been paid in full, to the extent the law allows, a party may request that the arbitrator take specific measures relating to a party's non-payment.
- (b) Such measures may include, but are not limited to, limiting a party's ability to assert or pursue their claim. In no event, however, shall a party be precluded from defending a claim or counterclaim.

- (c) The arbitrator must provide the party opposing a request for such measures with the opportunity to respond prior to making any ruling regarding the same.
- (d) In the event that the arbitrator grants any request for relief which limits any party's participation in the arbitration, the arbitrator shall require the party who is making a claim and who has made appropriate payments to submit such evidence as the arbitrator may require for the making of an award.
- (e) Upon receipt of information from the AAA that full payments have not been received, the arbitrator, on the arbitrator's own initiative or at the request of the AAA or a party, may order the suspension of the arbitration. If no arbitrator has yet been appointed, the AAA may suspend the proceedings.
- (f) If the arbitration has been suspended by either the AAA or the arbitrator and the parties have failed to make the full deposits requested within the time provided after the suspension, the arbitrator, or the AAA if an arbitrator has not been appointed, may terminate the proceedings.

R-58. Sanctions

- (a) The arbitrator may, upon a party's request, order appropriate sanctions where a party fails to comply with its obligations under these rules or with an order of the arbitrator. In the event that the arbitrator enters a sanction that limits any party's participation in the arbitration or results in an adverse determination of an issue or issues, the arbitrator shall explain that order in writing and shall require the submission of evidence and legal argument prior to making of an award. The arbitrator may not enter a default award as a sanction.
- (b) The arbitrator must provide a party that is subject to a sanction request with the opportunity to respond prior to making any determination regarding the sanctions application.

Preliminary Hearing Procedures

P-1. General

- (a) In all but the simplest cases, holding a preliminary hearing as early in the process as possible will help the parties and the arbitrator organize the proceeding in a manner that will maximize efficiency and economy, and will provide each party a fair opportunity to present its case.
- (b) Care must be taken to avoid importing procedures from court systems, as such procedures may not be appropriate to the conduct of arbitrations as an alternative form of dispute resolution that is designed to be simpler, less expensive and more expeditious.

P-2. Checklist

- (a) The following checklist suggests subjects that the parties and the arbitrator should address at the preliminary hearing, in addition to any others that the parties or the arbitrator believe to be appropriate to the particular case. The items to be addressed in a particular case will depend on the size, subject matter, and complexity of the dispute, and are subject to the discretion of the arbitrator:
 - the possibility of other non-adjudicative methods of dispute resolution, (i) including mediation pursuant to R-9;
 - (ii) whether all necessary or appropriate parties are included in the arbitration;
 - whether a party will seek a more detailed statement of claims, counterclaims or defenses;
 - (iv) whether there are any anticipated amendments to the parties' claims, counterclaims, or defenses;
 - which (v)
 - (a) arbitration rules;
 - (b) procedural law; and
 - (c) substantive law govern the arbitration;
 - whether there are any threshold or dispositive issues that can efficiently be decided without considering the entire case, including without limitation,
 - (a) any preconditions that must be satisfied before proceeding with the arbitration:
 - (b) whether any claim or counterclaim falls outside the arbitrator's jurisdiction or is otherwise not arbitrable:
 - (c) consolidation of the claims or counterclaims with another arbitration; or
 - (d) bifurcation of the proceeding.

- (vii) whether the parties will exchange documents, including electronically stored documents, on which they intend to rely in the arbitration, and/or make written requests for production of documents within defined parameters;
- (viii) whether to establish any additional procedures to obtain information that is relevant and material to the outcome of disputed issues;
- how costs of any searches for requested information or documents that would result in substantial costs should be borne;
- whether any measures are required to protect confidential information; (x)
- (xi) whether the parties intend to present evidence from expert witnesses, and if so, whether to establish a schedule for the parties to identify their experts and exchange expert reports;
- (xii) whether, according to a schedule set by the arbitrator, the parties will
 - (a) identify all witnesses, the subject matter of their anticipated testimonies, exchange written witness statements, and determine whether written witness statements will replace direct testimony at the hearing;
 - (b) exchange and pre-mark documents that each party intends to submit; and
 - (c) exchange pre-hearing submissions, including exhibits;
- (xiii) the date, time and place of the arbitration hearing;
- (xiv) whether, at the arbitration hearing,
 - (a) testimony may be presented in person, in writing, by videoconference, via the internet, telephonically, or by other reasonable means;
 - (b) there will be a stenographic transcript or other record of the proceeding and, if so, who will make arrangements to provide it;
- (xv) whether any procedure needs to be established for the issuance of subpoenas;
- (xvi) the identification of any ongoing, related litigation or arbitration;
- (xvii) whether post-hearing submissions will be filed;
- (xviii) the form of the arbitration award; and
- (xix) any other matter the arbitrator considers appropriate or a party wishes to raise.
- (b) The arbitrator shall issue a written order memorializing decisions made and agreements reached during or following the preliminary hearing.

Expedited Procedures

F-1. Limitation on Extensions

Except in extraordinary circumstances, the AAA or the arbitrator may grant a party no more than one seven-day extension of time to respond to the Demand for Arbitration or counterclaim as provided in Section R-5.

E-2. Changes of Claim or Counterclaim

A claim or counterclaim may be increased in amount, or a new or different claim or counterclaim added, upon the agreement of the other party, or the consent of the arbitrator. After the arbitrator is appointed, however, no new or different claim or counterclaim may be submitted except with the arbitrator's consent. If an increased claim or counterclaim exceeds \$75,000, the case will be administered under the regular procedures unless all parties and the arbitrator agree that the case may continue to be processed under the Expedited Procedures.

E-3. Serving of Notices

In addition to notice provided by Section R-43, the parties shall also accept notice by telephone. Telephonic notices by the AAA shall subsequently be confirmed in writing to the parties. Should there be a failure to confirm in writing any such oral notice, the proceeding shall nevertheless be valid if notice has, in fact, been given by telephone.

E-4. Appointment and Qualifications of Arbitrator

- (a) The AAA shall simultaneously submit to each party an identical list of five proposed arbitrators drawn from its National Roster from which one arbitrator shall be appointed.
- (b) The parties are encouraged to agree to an arbitrator from this list and to advise the AAA of their agreement. If the parties are unable to agree upon an arbitrator, each party may strike two names from the list and return it to the AAA within seven days from the date of the AAA's mailing to the parties. If for any reason the appointment of an arbitrator cannot be made from the list, the AAA may make the appointment from other members of the panel without the submission of additional lists.
- (c) The parties will be given notice by the AAA of the appointment of the arbitrator, who shall be subject to disqualification for the reasons specified in Section R-18. The parties shall notify the AAA within seven calendar days of any objection to the arbitrator appointed. Any such objection shall be for cause and shall be confirmed in writing to the AAA with a copy to the other party or parties.

E-5. Exchange of Exhibits

At least two business days prior to the hearing, the parties shall exchange copies of all exhibits they intend to submit at the hearing. The arbitrator shall resolve disputes concerning the exchange of exhibits.

E-6. Proceedings on Documents and Procedures for the Resolution of Disputes Through Document Submission

Where no party's claim exceeds \$25,000, exclusive of interest, attorneys' fees and arbitration costs, and other cases in which the parties agree, the dispute shall be resolved by submission of documents, unless any party requests an oral hearing, or the arbitrator determines that an oral hearing is necessary. Where cases are resolved by submission of documents, the following procedures may be utilized at the agreement of the parties or the discretion of the arbitrator:

- (a) Within 14 calendar days of confirmation of the arbitrator's appointment, the arbitrator may convene a preliminary management hearing, via conference call, video conference, or internet, to establish a fair and equitable procedure for the submission of documents, and, if the arbitrator deems appropriate, a schedule for one or more telephonic or electronic conferences.
- (b) The arbitrator has the discretion to remove the case from the documents-only process if the arbitrator determines that an in-person hearing is necessary.
- (c) If the parties agree to in-person hearings after a previous agreement to proceed under this rule, the arbitrator shall conduct such hearings. If a party seeks to have in-person hearings after agreeing to this rule, but there is not agreement among the parties to proceed with in-person hearings, the arbitrator shall resolve the issue after the parties have been given the opportunity to provide their respective positions on the issue.
- (d) The arbitrator shall establish the date for either written submissions or a final telephonic or electronic conference. Such date shall operate to close the hearing and the time for the rendering of the award shall commence.
- (e) Unless the parties have agreed to a form of award other than that set forth in rule R-46, when the parties have agreed to resolve their dispute by this rule, the arbitrator shall render the award within 14 calendar days from the date the hearing is closed.
- (f) If the parties agree to a form of award other than that described in rule R-46, the arbitrator shall have 30 calendar days from the date the hearing is declared closed in which to render the award.
- (g) The award is subject to all other provisions of the Regular Track of these rules which pertain to awards.

E-7. Date, Time, and Place of Hearing

In cases in which a hearing is to be held, the arbitrator shall set the date, time, and place of the hearing, to be scheduled to take place within 30 calendar days of confirmation of the arbitrator's appointment. The AAA will notify the parties in advance of the hearing date.

E-8. The Hearing

- (a) Generally, the hearing shall not exceed one day. Each party shall have equal opportunity to submit its proofs and complete its case. The arbitrator shall determine the order of the hearing, and may require further submission of documents within two business days after the hearing. For good cause shown, the arbitrator may schedule additional hearings within seven business days after the initial day of hearings.
- (b) Generally, there will be no stenographic record. Any party desiring a stenographic record may arrange for one pursuant to the provisions of Section R-28.

E-9. Time of Award

Unless otherwise agreed by the parties, the award shall be rendered not later than 14 calendar days from the date of the closing of the hearing or, if oral hearings have been waived, from the due date established for the receipt of the parties' final statements and proofs.

E-10. Arbitrator's Compensation

Arbitrators will receive compensation at a rate to be suggested by the AAA regional office.

Procedures for Large, Complex Commercial Disputes

I-1. Administrative Conference

Prior to the dissemination of a list of potential arbitrators, the AAA shall, unless the parties agree otherwise, conduct an administrative conference with the parties and/or their attorneys or other representatives by conference call. The conference will take place within 14 calendar days after the commencement of the arbitration. In the event the parties are unable to agree on a mutually acceptable time for the conference, the AAA may contact the parties individually to discuss the issues contemplated herein. Such administrative conference shall be conducted for the following purposes and for such additional purposes as the parties or the AAA may deem appropriate:

- (a) to obtain additional information about the nature and magnitude of the dispute and the anticipated length of hearing and scheduling;
- (b) to discuss the views of the parties about the technical and other qualifications of the arbitrators:
- (c) to obtain conflicts statements from the parties; and
- (d) to consider, with the parties, whether mediation or other non-adjudicative methods of dispute resolution might be appropriate.

L-2. Arbitrators

- (a) Large, complex commercial cases shall be heard and determined by either one or three arbitrators, as may be agreed upon by the parties. With the exception in paragraph (b) below, if the parties are unable to agree upon the number of arbitrators and a claim or counterclaim involves at least \$1,000,000, then three arbitrator(s) shall hear and determine the case. If the parties are unable to agree on the number of arbitrators and each claim and counterclaim is less than \$1,000,000, then one arbitrator shall hear and determine the case.
- (b) In cases involving the financial hardship of a party or other circumstance, the AAA at its discretion may require that only one arbitrator hear and determine the case, irrespective of the size of the claim involved in the dispute.
- (c) The AAA shall appoint arbitrator(s) as agreed by the parties. If they are unable to agree on a method of appointment, the AAA shall appoint arbitrators from the Large, Complex Commercial Case Panel, in the manner provided in the regular Commercial Arbitration Rules. Absent agreement of the parties, the arbitrator(s) shall not have served as the mediator in the mediation phase of the instant proceeding.

L-3. Management of Proceedings

- (a) The arbitrator shall take such steps as deemed necessary or desirable to avoid delay and to achieve a fair, speedy and cost-effective resolution of a Large, Complex Commercial Dispute.
- (b) As promptly as practicable after the selection of the arbitrator(s), a preliminary hearing shall be scheduled in accordance with sections P-1 and P-2 of these rules.
- (c) The parties shall exchange copies of all exhibits they intend to submit at the hearing at least 10 calendar days prior to the hearing unless the arbitrator(s) determines otherwise.
- (d) The parties and the arbitrator(s) shall address issues pertaining to the pre-hearing exchange and production of information in accordance with rule R-22 of the AAA Commercial Rules, and the arbitrator's determinations on such issues shall be included within the Scheduling and Procedure Order.
- (e) The arbitrator, or any single member of the arbitration tribunal, shall be authorized to resolve any disputes concerning the pre-hearing exchange and production of documents and information by any reasonable means within his discretion, including, without limitation, the issuance of orders set forth in rules R-22 and R-23 of the AAA Commercial Rules.
- (f) In exceptional cases, at the discretion of the arbitrator, upon good cause shown and consistent with the expedited nature of arbitration, the arbitrator may order depositions to obtain the testimony of a person who may possess information determined by the arbitrator to be relevant and material to the outcome of the case. The arbitrator may allocate the cost of taking such a deposition.
- (g) Generally, hearings will be scheduled on consecutive days or in blocks of consecutive days in order to maximize efficiency and minimize costs.

Administrative Fee Schedules (Standard and Flexible Fees)

FOR THE CURRENT ADMINISTRATIVE FEE SCHEDULE, PLEASE VISIT www.adr.org/feeschedule.

Commercial Mediation Procedures

M-1. Agreement of Parties

Whenever, by stipulation or in their contract, the parties have provided for mediation or conciliation of existing or future disputes under the auspices of the American Arbitration Association or under these procedures, the parties and their representatives, unless agreed otherwise in writing, shall be deemed to have made these procedural guidelines, as amended and in effect as of the date of filing of a request for mediation, a part of their agreement and designate the AAA as the administrator of their mediation.

The parties by mutual agreement may vary any part of these procedures including, but not limited to, agreeing to conduct the mediation via telephone or other electronic or technical means.

M-2. Initiation of Mediation

Any party or parties to a dispute may initiate mediation under the AAA's auspices by making a request for mediation to any of the AAA's regional offices or case management centers via telephone, email, regular mail or fax. Requests for mediation may also be filed online via WebFile at www.adr.org.

The party initiating the mediation shall simultaneously notify the other party or parties of the request. The initiating party shall provide the following information to the AAA and the other party or parties as applicable:

- (i) A copy of the mediation provision of the parties' contract or the parties' stipulation to mediate.
- (ii) The names, regular mail addresses, email addresses, and telephone numbers of all parties to the dispute and representatives, if any, in the mediation.
- (iii) A brief statement of the nature of the dispute and the relief requested.
- (iv) Any specific qualifications the mediator should possess.

M-3. Representation

Subject to any applicable law, any party may be represented by persons of the party's choice. The names and addresses of such persons shall be communicated in writing to all parties and to the AAA.

M-4. Appointment of the Mediator

If the parties have not agreed to the appointment of a mediator and have not provided any other method of appointment, the mediator shall be appointed in the following manner:

- (i) Upon receipt of a request for mediation, the AAA will send to each party a list of mediators from the AAA's Panel of Mediators. The parties are encouraged to agree to a mediator from the submitted list and to advise the AAA of their agreement.
- (ii) If the parties are unable to agree upon a mediator, each party shall strike unacceptable names from the list, number the remaining names in order of preference, and return the list to the AAA. If a party does not return the list within the time specified, all mediators on the list shall be deemed acceptable. From among the mediators who have been mutually approved by the parties, and in accordance with the designated order of mutual preference, the AAA shall invite a mediator to serve.
- (iii) If the parties fail to agree on any of the mediators listed, or if acceptable mediators are unable to serve, or if for any other reason the appointment cannot be made from the submitted list, the AAA shall have the authority to make the appointment from among other members of the Panel of Mediators without the submission of additional lists.

M-5. Mediator's Impartiality and Duty to Disclose

AAA mediators are required to abide by the Model Standards of Conduct for Mediators in effect at the time a mediator is appointed to a case. Where there is a conflict between the *Model Standards* and any provision of these Mediation Procedures, these Mediation Procedures shall govern. The Standards require mediators to (i) decline a mediation if the mediator cannot conduct it in an impartial manner, and (ii) disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator's impartiality.

Prior to accepting an appointment, AAA mediators are required to make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for the mediator. AAA mediators are required to disclose any circumstance likely to create a presumption of bias or prevent a resolution of the parties' dispute within the time-frame desired by the parties. Upon receipt of such disclosures, the AAA shall immediately communicate the disclosures to the parties for their comments.

The parties may, upon receiving disclosure of actual or potential conflicts of interest of the mediator, waive such conflicts and proceed with the mediation. In the event that a party disagrees as to whether the mediator shall serve, or in the event that the mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation, the mediator shall be replaced.

M-6. Vacancies

If any mediator shall become unwilling or unable to serve, the AAA will appoint another mediator, unless the parties agree otherwise, in accordance with section M-4.

M-7. Duties and Responsibilities of the Mediator

- (i) The mediator shall conduct the mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome.
- (ii) The mediator is authorized to conduct separate or ex parte meetings and other communications with the parties and/or their representatives, before, during, and after any scheduled mediation conference. Such communications may be conducted via telephone, in writing, via email, online, in person or otherwise
- (iii) The parties are encouraged to exchange all documents pertinent to the relief requested. The mediator may request the exchange of memoranda on issues, including the underlying interests and the history of the parties' negotiations. Information that a party wishes to keep confidential may be sent to the mediator, as necessary, in a separate communication with the mediator.
- (iv) The mediator does not have the authority to impose a settlement on the parties but will attempt to help them reach a satisfactory resolution of their dispute. Subject to the discretion of the mediator, the mediator may make oral or written recommendations for settlement to a party privately or, if the parties agree, to all parties jointly.
- (v) In the event a complete settlement of all or some issues in dispute is not achieved within the scheduled mediation session(s), the mediator may continue to communicate with the parties, for a period of time, in an ongoing effort to facilitate a complete settlement.
- (vi) The mediator is not a legal representative of any party and has no fiduciary duty to any party.

M-8. Responsibilities of the Parties

The parties shall ensure that appropriate representatives of each party, having authority to consummate a settlement, attend the mediation conference.

Prior to and during the scheduled mediation conference session(s) the parties and their representatives shall, as appropriate to each party's circumstances, exercise their best efforts to prepare for and engage in a meaningful and productive mediation.

M-9. Privacy

Mediation sessions and related mediation communications are private proceedings. The parties and their representatives may attend mediation sessions. Other persons may attend only with the permission of the parties and with the consent of the mediator.

M-10. Confidentiality

Subject to applicable law or the parties' agreement, confidential information disclosed to a mediator by the parties or by other participants (witnesses) in the course of the mediation shall not be divulged by the mediator. The mediator shall maintain the confidentiality of all information obtained in the mediation, and all records, reports, or other documents received by a mediator while serving in that capacity shall be confidential.

The mediator shall not be compelled to divulge such records or to testify in regard to the mediation in any adversary proceeding or judicial forum.

The parties shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial, or other proceeding the following, unless agreed to by the parties or required by applicable law:

- (i) Views expressed or suggestions made by a party or other participant with respect to a possible settlement of the dispute;
- (ii) Admissions made by a party or other participant in the course of the mediation proceedings;
- (iii) Proposals made or views expressed by the mediator; or
- (iv) The fact that a party had or had not indicated willingness to accept a proposal for settlement made by the mediator.

M-11. No Stenographic Record

There shall be no stenographic record of the mediation process.

M-12. Termination of Mediation

The mediation shall be terminated:

- (i) By the execution of a settlement agreement by the parties; or
- (ii) By a written or verbal declaration of the mediator to the effect that further efforts at mediation would not contribute to a resolution of the parties' dispute; or
- (iii) By a written or verbal declaration of all parties to the effect that the mediation proceedings are terminated; or
- (iv) When there has been no communication between the mediator and any party or party's representative for 21 days following the conclusion of the mediation conference.

M-13. Exclusion of Liability

Neither the AAA nor any mediator is a necessary party in judicial proceedings relating to the mediation. Neither the AAA nor any mediator shall be liable to any party for any error, act or omission in connection with any mediation conducted under these procedures.

M-14. Interpretation and Application of Procedures

The mediator shall interpret and apply these procedures insofar as they relate to the mediator's duties and responsibilities. All other procedures shall be interpreted and applied by the AAA.

M-15. Deposits

Unless otherwise directed by the mediator, the AAA will require the parties to deposit in advance of the mediation conference such sums of money as it, in consultation with the mediator, deems necessary to cover the costs and expenses of the mediation and shall render an accounting to the parties and return any unexpended balance at the conclusion of the mediation.

M-16. Expenses

All expenses of the mediation, including required traveling and other expenses or charges of the mediator, shall be borne equally by the parties unless they agree otherwise. The expenses of participants for either side shall be paid by the party requesting the attendance of such participants.

M-17. Cost of the Mediation

FOR THE CURRENT ADMINISTRATIVE FEE SCHEDULE, PLEASE VISIT www.adr.org/feeschedule.



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MODEL STANDARDS OF CONDUCT FOR MEDIATORS

AMERICAN ARBITRATION ASSOCIATION

(ADOPTED SEPTEMBER 8, 2005)

AMERICAN BAR ASSOCIATION

(APPROVED BY THE ABA HOUSE OF DELEGATES AUGUST 9, 2005)

ASSOCIATION FOR CONFLICT RESOLUTION

(ADOPTED AUGUST 22, 2005)

SEPTEMBER 2005

The Model Standards of Conduct for Mediators 2005

The Model Standards of Conduct for Mediators was prepared in 1994 by the American Arbitration Association, the American Bar Association's Section of Dispute Resolution, and the Association for Conflict Resolution¹. A joint committee consisting of representatives from the same successor organizations revised the Model Standards in 2005.² Both the original 1994 version and the 2005 revision have been approved by each participating organization.³

Preamble

Mediation is used to resolve a broad range of conflicts within a variety of settings. These Standards are designed to serve as fundamental ethical guidelines for persons mediating in all practice contexts. They serve three primary goals: to guide the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes.

Mediation is a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute.

Mediation serves various purposes, including providing the opportunity for parties to define and clarify issues, understand different perspectives, identify interests, explore and assess possible solutions, and reach mutually satisfactory agreements, when desired.

Note on Construction

These Standards are to be read and construed in their entirety. There is no priority significance attached to the sequence in which the Standards appear.

¹ The Association for Conflict Resolution is a merged organization of the Academy of Family Mediators, the Conflict Resolution Education Network and the Society of Professionals in Dispute Resolution (SPIDR). SPIDR was the third participating organization in the development of the 1994 Standards.

² Reporter's Notes, which are not part of these Standards and therefore have not been specifically approved by any of the organizations, provide commentary regarding these revisions.

³ The 2005 version to the Model Standards were approved by the American Bar Association's House of Delegates on August 9, 2005, the Board of the Association of Conflict Resolution on August 22, 2005 and the Executive Committee of the American Arbitration Association on September 8, 2005.

The use of the term "shall" in a Standard indicates that the mediator must follow the practice described. The use of the term "should" indicates that the practice described in the standard is highly desirable, but not required, and is to be departed from only for very strong reasons and requires careful use of judgment and discretion.

The use of the term "mediator" is understood to be inclusive so that it applies to co-mediator models.

These Standards do not include specific temporal parameters when referencing a mediation, and therefore, do not define the exact beginning or ending of a mediation.

Various aspects of a mediation, including some matters covered by these Standards, may also be affected by applicable law, court rules, regulations, other applicable professional rules, mediation rules to which the parties have agreed and other agreements of the parties. These sources may create conflicts with, and may take precedence over, these Standards. However, a mediator should make every effort to comply with the spirit and intent of these Standards in resolving such conflicts. This effort should include honoring all remaining Standards not in conflict with these other sources.

These Standards, unless and until adopted by a court or other regulatory authority do not have the force of law. Nonetheless, the fact that these Standards have been adopted by the respective sponsoring entities, should alert mediators to the fact that the Standards might be viewed as establishing a standard of care for mediators.

STANDARD I. SELF-DETERMINATION

- A. A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.
 - 1. Although party self-determination for process design is a fundamental principle of mediation practice, a mediator may need to balance such party self-determination with a mediator's duty to conduct a quality process in accordance with these Standards.
 - 2. A mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions, but, where

appropriate, a mediator should make the parties aware of the importance of consulting other professionals to help them make informed choices.

B. A mediator shall not undermine party self-determination by any party for reasons such as higher settlement rates, egos, increased fees, or outside pressures from court personnel, program administrators, provider organizations, the media or others.

STANDARD II. IMPARTIALITY

- A. A mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice.
- B. A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality.
 - 1. A mediator should not act with partiality or prejudice based on any participant's personal characteristics, background, values and beliefs, or performance at a mediation, or any other reason.
 - 2. A mediator should neither give nor accept a gift, favor, loan or other item of value that raises a question as to the mediator's actual or perceived impartiality.
 - 3. A mediator may accept or give de minimis gifts or incidental items or services that are provided to facilitate a mediation or respect cultural norms so long as such practices do not raise questions as to a mediator's actual or perceived impartiality.
- C. If at any time a mediator is unable to conduct a mediation in an impartial manner, the mediator shall withdraw.

STANDARD III. CONFLICTS OF INTEREST

A. A mediator shall avoid a conflict of interest or the appearance of a conflict of interest during and after a mediation. A conflict of interest can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator's impartiality.

- B. A mediator shall make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for a mediator. A mediator's actions necessary to accomplish a reasonable inquiry into potential conflicts of interest may vary based on practice context.
- C. A mediator shall disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator's impartiality. After disclosure, if all parties agree, the mediator may proceed with the mediation.
- D. If a mediator learns any fact after accepting a mediation that raises a question with respect to that mediator's service creating a potential or actual conflict of interest, the mediator shall disclose it as quickly as practicable. After disclosure, if all parties agree, the mediator may proceed with the mediation.
- E. If a mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation, a mediator shall withdraw from or decline to proceed with the mediation regardless of the expressed desire or agreement of the parties to the contrary.
- F. Subsequent to a mediation, a mediator shall not establish another relationship with any of the participants in any matter that would raise questions about the integrity of the mediation. When a mediator develops personal or professional relationships with parties, other individuals or organizations following a mediation in which they were involved, the mediator should consider factors such as time elapsed following the mediation, the nature of the relationships established, and services offered when determining whether the relationships might create a perceived or actual conflict of interest.

STANDARD IV. COMPETENCE

- A. A mediator shall mediate only when the mediator has the necessary competence to satisfy the reasonable expectations of the parties.
 - 1. Any person may be selected as a mediator, provided that the parties are satisfied with the mediator's competence and qualifications. Training, experience in mediation, skills, cultural understandings and other qualities are often necessary for mediator

- competence. A person who offers to serve as a mediator creates the expectation that the person is competent to mediate effectively.
- 2. A mediator should attend educational programs and related activities to maintain and enhance the mediator's knowledge and skills related to mediation.
- 3. A mediator should have available for the parties' information relevant to the mediator's training, education, experience and approach to conducting a mediation.
- B. If a mediator, during the course of a mediation determines that the mediator cannot conduct the mediation competently, the mediator shall discuss that determination with the parties as soon as is practicable and take appropriate steps to address the situation, including, but not limited to, withdrawing or requesting appropriate assistance.
- C. If a mediator's ability to conduct a mediation is impaired by drugs, alcohol, medication or otherwise, the mediator shall not conduct the mediation.

STANDARD V. CONFIDENTIALITY

- A. A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law.
 - 1. If the parties to a mediation agree that the mediator may disclose information obtained during the mediation, the mediator may do so.
 - 2. A mediator should not communicate to any non-participant information about how the parties acted in the mediation. A mediator may report, if required, whether parties appeared at a scheduled mediation and whether or not the parties reached a resolution.
 - 3. If a mediator participates in teaching, research or evaluation of mediation, the mediator should protect the anonymity of the parties and abide by their reasonable expectations regarding confidentiality.
- B. A mediator who meets with any persons in private session during a mediation shall not convey directly or indirectly to any other person, any information that was obtained during that private session without the consent of the disclosing person.

- C. A mediator shall promote understanding among the parties of the extent to which the parties will maintain confidentiality of information they obtain in a mediation.
- D. Depending on the circumstance of a mediation, the parties may have varying expectations regarding confidentiality that a mediator should address. The parties may make their own rules with respect to confidentiality, or the accepted practice of an individual mediator or institution may dictate a particular set of expectations.

STANDARD VI. QUALITY OF THE PROCESS

- A. A mediator shall conduct a mediation in accordance with these Standards and in a manner that promotes diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants.
 - 1. A mediator should agree to mediate only when the mediator is prepared to commit the attention essential to an effective mediation.
 - A mediator should only accept cases when the mediator can satisfy the reasonable expectation of the parties concerning the timing of a mediation.
 - The presence or absence of persons at a mediation depends on the agreement of the parties and the mediator. The parties and mediator may agree that others may be excluded from particular sessions or from all sessions.
 - A mediator should promote honesty and candor between and among all participants, and a mediator shall not knowingly misrepresent any material fact or circumstance in the course of a mediation.
 - 5. The role of a mediator differs substantially from other professional roles. Mixing the role of a mediator and the role of another profession is problematic and thus, a mediator should distinguish between the roles. A mediator may provide information that the mediator is qualified by training or experience to provide, only if the mediator can do so consistent with these Standards.

- 6. A mediator shall not conduct a dispute resolution procedure other than mediation but label it mediation in an effort to gain the protection of rules, statutes, or other governing authorities pertaining to mediation.
- 7. A mediator may recommend, when appropriate, that parties consider resolving their dispute through arbitration, counseling, neutral evaluation or other processes.
- 8. A mediator shall not undertake an additional dispute resolution role in the same matter without the consent of the parties. Before providing such service, a mediator shall inform the parties of the implications of the change in process and obtain their consent to the change. A mediator who undertakes such role assumes different duties and responsibilities that may be governed by other standards.
- 9. If a mediation is being used to further criminal conduct, a mediator should take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.
- 10. If a party appears to have difficulty comprehending the process, issues, or settlement options, or difficulty participating in a mediation, the mediator should explore the circumstances and potential accommodations, modifications or adjustments that would make possible the party's capacity to comprehend, participate and exercise self-determination.
- B. If a mediator is made aware of domestic abuse or violence among the parties, the mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.
- C. If a mediator believes that participant conduct, including that of the mediator, jeopardizes conducting a mediation consistent with these Standards, a mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

STANDARD VII. ADVERTISING AND SOLICITATION

A. A mediator shall be truthful and not misleading when advertising, soliciting or otherwise communicating the mediator's qualifications, experience, services and fees.

- A mediator should not include any promises as to outcome in communications, including business cards, stationery, or computerbased communications.
- A mediator should only claim to meet the mediator qualifications of a governmental entity or private organization if that entity or organization has a recognized procedure for qualifying mediators and it grants such status to the mediator.
- B. A mediator shall not solicit in a manner that gives an appearance of partiality for or against a party or otherwise undermines the integrity of the process.
- C. A mediator shall not communicate to others, in promotional materials or through other forms of communication, the names of persons served without their permission.

STANDARD VIII. FEES AND OTHER CHARGES

- A. A mediator shall provide each party or each party's representative true and complete information about mediation fees, expenses and any other actual or potential charges that may be incurred in connection with a mediation.
 - 1. If a mediator charges fees, the mediator should develop them in light of all relevant factors, including the type and complexity of the matter, the qualifications of the mediator, the time required and the rates customary for such mediation services.
 - 2. A mediator's fee arrangement should be in writing unless the parties request otherwise.
- B. A mediator shall not charge fees in a manner that impairs a mediator's impartiality.
 - 1. A mediator should not enter into a fee agreement which is contingent upon the result of the mediation or amount of the settlement.
 - 2. While a mediator may accept unequal fee payments from the parties, a mediator should not allow such a fee arrangement to adversely impact the mediator's ability to conduct a mediation in an impartial manner.

STANDARD IX. ADVANCEMENT OF MEDIATION PRACTICE

- A. A mediator should act in a manner that advances the practice of mediation. A mediator promotes this Standard by engaging in some or all of the following:
 - 1. Fostering diversity within the field of mediation.
 - 2. Striving to make mediation accessible to those who elect to use it, including providing services at a reduced rate or on a pro bono basis as appropriate.
 - 3. Participating in research when given the opportunity, including obtaining participant feedback when appropriate.
 - 4. Participating in outreach and education efforts to assist the public in developing an improved understanding of, and appreciation for, mediation.
 - 5. Assisting newer mediators through training, mentoring and networking.
- B. A mediator should demonstrate respect for differing points of view within the field, seek to learn from other mediators and work together with other mediators to improve the profession and better serve people in conflict.

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 488

September 5, 2019

Judges' Social or Close Personal Relationships with Lawyers or Parties as Grounds for Disqualification or Disclosure

Rule 2.11 of the Model Code of Judicial Conduct identifies situations in which judges must disqualify themselves in proceedings because their impartiality might reasonably be questioned—including cases implicating some familial and personal relationships—but it is silent with respect to obligations imposed by other relationships. This opinion identifies three categories of relationships between judges and lawyers or parties to assist judges in evaluating ethical obligations those relationships may create under Rule 2.11: (1) acquaintanceships; (2) friendships; and (3) close personal relationships. In short, judges need not disqualify themselves if a lawyer or party is an acquaintance, nor must they disclose acquaintanceships to the other lawyers or parties. Whether judges must disqualify themselves when a party or lawyer is a friend or shares a close personal relationship with the judge or should instead take the lesser step of disclosing the friendship or close personal relationship to the other lawyers and parties, depends on the circumstances. Judges' disqualification in any of these situations may be waived in accordance and compliance with Rule 2.11(C) of the Model Code.¹

I. Introduction

The Committee has been asked to address judges' obligation to disqualify² themselves in proceedings in which they have social or close personal relationships with the lawyers or parties other than a spousal, domestic partner, or other close family relationship. Rule 2.11 of the Model Code of Judicial Conduct ("Model Code") lists situations in which judges must disqualify themselves in proceedings because their impartiality might reasonably be questioned—including cases implicating some specific family and personal relationships—but the rule provides no guidance with respect to the types of relationships addressed in this opinion.³

Public confidence in the administration of justice demands that judges perform their duties impartially, and free from bias and prejudice. Furthermore, while actual impartiality is necessary, the public must also perceive judges to be impartial. The Model Code therefore requires judges to

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¹ This opinion is based on the Model Code of Judicial Conduct as amended by the House of Delegates through February 2019. Individual jurisdictions' court rules, laws, opinions, and rules of professional conduct control. The Committee expresses no opinion on the applicable law or constitutional interpretation in a particular jurisdiction.

² The terms "recuse" and "disqualify" are often used interchangeably in judicial ethics. *See* MODEL CODE OF JUDICIAL CONDUCT R. 2.11 cmt. 1 (2011) [hereinafter MODEL CODE] (noting the varying usage between jurisdictions). We have chosen to use "disqualify" because that is the term used in the Model Code of Judicial Conduct.

³ See MODEL CODE R. 2.11(A) (listing relationships where a judge's impartiality might reasonable be questioned, including where (1) the judge has "a personal bias or prejudice" toward a lawyer or party; (2) the judge's spouse, domestic partner, or a person within the third degree of relationship to the judge or the judge's spouse or domestic partner is a party or a lawyer in the proceeding; or (3) such person has more than a de minimis interest in the matter or is likely to be a material witness).

avoid even the appearance of impropriety in performing their duties.⁴ As part of this obligation, judges must consider the actual and perceived effects of their relationships with lawyers and parties who appear before them on the other participants in proceedings.⁵ If a judge's relationship with a lawyer or party would cause the judge's impartiality to reasonably be questioned, the judge must disqualify himself or herself from the proceeding.⁶ Whether a judge's relationship with a lawyer or party may cause the judge's impartiality to reasonably be questioned and thus require disqualification is (a) evaluated against an objective reasonable person standard;⁷ and (b) depends on the facts of the case.⁸ Judges are presumed to be impartial.⁹ Hence, judicial disqualification is the exception rather than the rule.

Judges are ordinarily in the best position to assess whether their impartiality might reasonably be questioned when lawyers or parties with whom they have relationships outside of those identified in Rule 2.11(A) appear before them. After all, relationships vary widely and are unique to the individuals involved. Furthermore, a variety of factors may affect judges' decisions whether to disqualify themselves in proceedings. For example, in smaller communities and relatively sparsely-populated judicial districts, judges may have social and personal contacts with lawyers and parties that are unavoidable. In that circumstance, too strict a disqualification standard would be impractical to enforce and would potentially disrupt the administration of justice. In other situations, the relationship between the judge and a party or lawyer may have changed over time or may have ended sufficiently far in the past that it is not a current concern when viewed objectively. Finally, judges must avoid disqualifying themselves too quickly or too often lest litigants be encouraged to use disqualification motions as a means of judge-shopping, or other judges in the same court or judicial circuit or district become overburdened.

Recognizing that relationships vary widely, potentially change over time, and are unique to the people involved, this opinion provides general guidance to judges who must determine whether their relationships with lawyers or parties require their disqualification from proceedings, whether the lesser remedy of disclosing the relationship to the other parties and lawyers involved in the proceedings is initially sufficient, or whether neither disqualification nor disclosure is required. This opinion identifies three categories of relationships between judges and lawyers or parties to assist judges in determining what, if any, ethical obligations Rule 2.11 imposes: (1) acquaintanceships; (2) friendships; ¹¹ and (3) close personal relationships. Judges need not

⁵ See MODEL CODE R. 2.4(B) (stating that a judge shall not permit family or social interests or relationships to influence the judge's judicial conduct or judgment).

⁷ Mondy v. Magnolia Advanced Materials, Inc., 815 S.E.2d 70, 75 (Ga. 2018); State v. Payne, 488 S.W.3d 161, 166 (Mo. Ct. App. 2016); Thompson v. Millard Pub. Sch. Dist. No. 17, 921 N.W.2d 589, 594 (Neb. 2019).

⁴ MODEL CODE R. 1.2.

⁶ MODEL CODE R. 2.11(A).

⁸ N.Y. Advisory Comm. on Judicial Ethics Op. 11-125, 2011 WL 8333125, at *1 (2011) [hereinafter N.Y. Jud. Adv. Op. 11-125].

⁹ Isom v. State, 563 S.W.3d 533, 546 (Ark. 2018); L.G. v. S.L., 88 N.E.3d 1069, 1073 (Ind. 2018); State v. Nixon, 254 So.3d 1228, 1235 (La. Ct. App. 2018); *Thompson*, 921 N.W.2d at 594.

¹⁰ N.Y. Jud. Adv. Op. 11-125, *supra* note 8, 2011 WL 8333125, at *2.

¹¹ Social media, which is simply a form of communication, uses terminology that is distinct from that used in this opinion. Interaction on social media does not itself indicate the type of relationships participants have with one another either generally or for purposes of this opinion. For example, Facebook uses the term "friend," but that is simply a title employed in that context. A judge could have Facebook "friends" or other social media contacts who

disqualify themselves in proceedings in which they are acquainted with a lawyer or party. Whether judges must disqualify themselves when they are friends with a party or lawyer or share a close personal relationship with a lawyer or party or should instead disclose the friendship or close personal relationship to the other lawyers and parties, depends on the nature of the friendship or close personal relationship in question. The ultimate decision of whether to disqualify is committed to the judge's sound discretion.

II. Analysis

Rule 2.11(A) of the Model Code provides that judges must disqualify themselves in proceedings in which their impartiality might reasonably be questioned and identifies related situations. Perhaps most obviously, under Rule 2.11(A)(1), judges must disqualify themselves when they have a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding. The parties may not waive a judge's disqualification based on personal bias or prejudice. ¹²

Beyond matters in which the judge's alleged or perceived personal bias or prejudice is at issue, Rule 2.11(A) identifies situations in which a judge's personal relationships may call into question the judge's impartiality. Under Rule 2.11(A)(2), these include proceedings in which the judge knows that the judge, the judge's spouse or domestic partner, or a person within the third degree of relationship to either of them, or the spouse or domestic partner of such a person (a) is a party to the proceeding, or is a party's officer, director, general partner, or managing member; (b) is acting as a lawyer in the proceeding; (c) has more than a de minimis interest that could be affected by the proceeding; or (d) is likely to be a material witness in the proceeding. Under Rule 2.11(A)(4), a judge may further be required to disqualify himself or herself if a party, the party's lawyer, or that lawyer's law firm has made aggregate contributions to the judge's election or retention campaign within a specified number of years that exceed a specified amount or an amount that is reasonable and appropriate for an individual or entity. But, while Rule 2.11(A) mandates judges' disqualification in these situations, Rule 2.11(C) provides that a judge may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers whether they waive disqualification. If the parties and lawyers agree that the judge should not be disqualified, the judge may participate in the proceeding. 13

Apart from the personal relationships identified in Rule 2.11(A), a judge may have relationships with other categories of people that, depending on the facts, might reasonably call into question the judge's impartiality. These include acquaintances, friends, and people with whom the judge shares a close personal relationship.

¹³ Disqualification may not be waived where the judge harbors a personal bias or prejudice toward a party or a party's lawyer. *See* MODEL CODE R. 2.11(A)(1) & (C).

are acquaintances, friends, or in some sort of close personal relationship with the judge. The proper characterization of a person's relationship with a judge depends on the definitions and examples used in this opinion.

¹² MODEL CODE R. 2.11(C).

A. Acquaintances

A judge and lawyer should be considered acquaintances when their interactions outside of court are coincidental or relatively superficial, such as being members of the same place of worship, professional or civic organization, or the like. For example, the judge and the lawyer might both attend bar association or other professional meetings; they may have represented coparties in litigation before the judge ascended to the bench; they may meet each other at school or other events involving their children or spouses; they may see each other when socializing with mutual friends; they may belong to the same country club or gym; they may patronize the same businesses and periodically encounter one another there; they may live in the same area or neighborhood and run into one another at neighborhood or area events, or at homeowners' meetings; or they might attend the same religious services. Generally, neither the judge nor the lawyer seeks contact with the other, but they greet each other amicably and are cordial when their lives intersect. Is

A judge and party should be considered acquaintances in the same circumstances in which a judge and lawyer would be so characterized. Additionally, a judge and party may be characterized as acquaintances where the party owns or operates a business that the judge patronizes on the same terms as any other person.

Evaluated from the standpoint of a reasonable person fully informed of the facts, ¹⁶ a judge's acquaintance with a lawyer or party, standing alone, is not a reasonable basis for questioning the judge's impartiality. ¹⁷ A judge therefore has no obligation to disclose his or her acquaintance with a lawyer or party to other lawyers or parties in a proceeding. A judge may, of course, disclose the acquaintanceship if the judge so chooses.

B. Friendships

In contrast to simply being acquainted, a judge and a party or lawyer may be friends. "Friendship" implies a degree of affinity greater than being acquainted with a person; indeed, the term connotes some degree of mutual affection. Yet, not all friendships are the same; some may be professional, while others may be social. Some friends are closer than others. For example, a judge and lawyer who once practiced law together may periodically meet for a meal when their busy schedules permit, or, if they live in different cities, try to meet when one is in the other's hometown. Or, a judge and lawyer who were law school classmates or were colleagues years before may stay in touch through occasional calls or correspondence, but not regularly see one another. On the other hand, a judge and lawyer may exchange gifts at holidays and special occasions; regularly socialize together; regularly communicate and coordinate activities because their children are close friends and routinely spend time at each other's homes; vacation together with their families; share a mentor-protégé relationship developed while colleagues before the

¹⁶ See State v. Mouelle, 922 N.W.2d 706, 713 (Minn. 2019) ("In deciding whether disqualification is required, the relevant question is 'whether a reasonable examiner, with full knowledge of the facts and circumstances, would question the judge's impartiality." (quoting *In re* Jacobs, 802 N.W.2d 748, 753 (Minn. 2011)).

¹⁴ N.Y. Jud. Adv. Op. 11-125, *supra* note 8, 2011 WL 8333125, at *2.

¹⁵ Id.

¹⁷ N.Y. Jud. Adv. Op. 11-125, *supra* note 8, 2011 WL 8333125, at *2; Va. Judicial Ethics Advisory Comm. Op. 01-08, 2001 WL 36352802, at *1, *2 (2001).

judge was appointed or elected to the bench; share confidences and intimate details of their lives; or, for various reasons, be so close as to consider the other an extended family member.

Certainly, not all friendships require judges' disqualification, ¹⁸ as the Seventh Circuit explained over thirty years ago:

In today's legal culture friendships among judges and lawyers are common. They are more than common; they are desirable. A judge need not cut himself off from the rest of the legal community. Social as well as official communications among judges and lawyers may improve the quality of legal decisions. Social interactions also make service on the bench, quite isolated as a rule, more tolerable to judges. Many well-qualified people would hesitate to become judges if they knew that wearing the robe meant either discharging one's friends or risking disqualification in substantial numbers of cases. Many courts therefore have held that a judge need not disqualify himself just because a friend—even a close friend—appears as a lawyer. ¹⁹

Judicial ethics authorities agree that judges need not disqualify themselves in many cases in which a party or lawyer is a friend.²⁰

There may be situations, however, in which the judge's friendship with a lawyer or party is so tight that the judge's impartiality might reasonably be questioned. Whether a friendship between a judge and a lawyer or party reaches that point and consequently requires the judge's

¹⁸ See, e.g., In re Complaint of Judicial Misconduct, 816 F.3d 1266, 1268 (9th Cir. 2016) (stating that "friendship between a judge and a lawyer, or other participant in a trial, without more, does not require recusal"); Schupper v. People, 157 P.3d 516, 520 (Colo. 2007) (reasoning that friendship between a judge and a lawyer is not a per se basis for disqualification; rather, a reviewing court should "look for those situations where the friendship is so close or unusual that a question of partiality might reasonably be raised"); In re Disqualification of Park, 28 N.E.3d 56, 58 (Ohio 2014) ("[T]he existence of a friendship between a judge and an attorney appearing before her, without more, does not automatically mandate the judge's disqualification"); In re Disqualification of Lynch, 985 N.E.2d 491, 493 (Ohio 2012) ("The reasonable person would conclude that the oaths and obligations of a judge are not so meaningless as to be overcome merely by friendship with a party's counsel."); State v. Cannon, 254 S.W.3d 287, 308 (Tenn. 2008) ("The mere existence of a friendship between a judge and an attorney is not sufficient, standing alone, to mandate recusal.").

¹⁹ United States v. Murphy, 768 F.2d 1518, 1537 (7th Cir. 1985).

²⁰ U.S. Judicial Conf., Comm. on Codes of Conduct Advisory Op. No. 11, 2009 WL 8484525, at *1 (2009); Ariz. Supreme Ct., Judicial Ethics Advisory Comm. Op. 90-8, 1990 WL 709830, at *1 (1990) [hereinafter Ariz. Jud. Adv. Op. No. 11]; N.Y. Jud. Adv. Op. 11-125, *supra* note 8, 2011 WL 8333125, at *2. *But see* Fla. Supreme Ct., Judicial Ethics Advisory Comm. Op. No. 2012-37, 2012 WL 663576, at *1 (2012) (stating that a judge "must recuse from any cases in which the judge's [close personal] friend appears as a party, witness or representative" of the bank where the friend was employed).

disqualification in the proceeding is essentially a question of degree.²¹ The answer depends on the facts of the case.²²

A judge should disclose to the other lawyers and parties in the proceeding information about a friendship with a lawyer or party "that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification." If, after disclosure, a party objects to the judge's participation in the proceeding, the judge has the discretion to either continue to preside over the proceeding or to disqualify himself or herself. The judge should put the reasons for the judge's decision to remain on the case or to disqualify himself or herself on the record.

C. Close Personal Relationships

A judge may have a personal relationship with a lawyer or party that goes beyond or is different from common concepts of friendship, but which does not implicate Rule 2.11(A)(2). For example, the judge may be romantically involved with a lawyer or party, the judge may desire a romantic relationship with a lawyer or party or be actively pursuing one, the judge and a lawyer or party may be divorced but communicate frequently and see one another regularly because they share custody of children, or a judge might be the godparent of a lawyer's or party's child or vice versa.

A judge must disqualify himself or herself when the judge has a romantic relationship with a lawyer or party in the proceeding, or desires or is pursuing such a relationship. As the New Mexico Supreme Court has observed, "the rationale for requiring recusal in cases involving family members also applies when a close or intimate relationship [between a judge and a lawyer appearing before the judge] exists because, under such circumstances, the judge's impartiality is questionable."²⁴ A judge should disclose other intimate or close personal relationships with a lawyer or party to the other lawyers and parties in the proceeding even if the judge believes that he or she can be impartial.²⁵ If, after disclosure, a party objects to the judge's participation in the proceeding, the judge has the discretion to either continue to preside over the proceeding or to disqualify himself or herself. The judge should put the reasons for the judge's decision to remain on the case or to disqualify himself or herself on the record.

²¹ See Schupper, 157 P.3d at 520 (explaining that friendship between a judge and a lawyer is not an automatic basis for disqualification; rather, a reviewing court should "look for those situations where the friendship is so close or unusual that a question of partiality might reasonably be raised"); Ariz. Jud. Adv. Op. No. 11, *supra* note 20, 1990 WL 709830, at *1 (suggesting that in weighing disqualification where a lawyer who is a friend appears in the judge's court, the judge should consider as one factor "the closeness of the friendship"); CHARLES G. GEYH ET AL., JUDICIAL CONDUCT AND ETHICS § 4.07[4], at 4-27 (5th ed. 2013) ("Whether disqualification is required when a friend appears as a party to a suit before a judge depends on how close the personal . . . relationship is between the judge and the party.").

²² N.Y. Jud. Adv. Op. 11-125, *supra* note 8, 2011 WL 8333125, at *1.

²³ See Model Code R. 2.11 cmt. 5 ("A judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification.").

²⁴ In re Schwartz, 255 P.3d 299, 304 (N.M. 2011).

²⁵ See Model Code R. 2.11 cmt. 5. A judge who prefers to keep such a relationship private may disqualify himself or herself from the proceeding.

D. Waiver

In accordance and compliance with Rule 2.11(C), a judge subject to disqualification based on a friendship or close personal relationship with a lawyer or party may disclose on the record the basis for the judge's disqualification and may ask the parties and their lawyers to consider whether to waive disqualification.²⁶ If the parties and lawyers agree that the judge should not be disqualified, the judge may participate in the proceeding. The agreement that the judge may participate in the proceeding must be put on the record of the proceeding.

III. Conclusion

Judges must decide whether to disqualify themselves in proceedings in which they have relationships with the lawyers or parties short of spousal, domestic partner, or other close familial relationships. This opinion identifies three categories of relationships between judges and lawyers or parties to assist judges in determining what, if any, ethical obligations those relationships create under Rule 2.11: (1) acquaintanceships; (2) friendships; and (3) close personal relationships. In summary, judges need not disqualify themselves if a lawyer or party is an acquaintance, nor must they disclose acquaintanceships to the other lawyers or parties. Whether judges must disqualify themselves when a party or lawyer is a friend or shares a close personal relationship with the judge or should instead take the lesser step of disclosing the friendship or close personal relationship to the other lawyers and parties, depends on the circumstances. Judges' disqualification in any of these situations may be waived in accordance and compliance with Rule 2.11(C) of the Model Code.

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²⁶ Disqualification may not be waived if the judge has a personal bias or prejudice concerning a party or a party's lawyer. MODEL CODE R. 2.11(C).

KeyCite Yellow Flag - Negative Treatment
Distinguished by Abromats v. Abromats, S.D.Fla., November 16, 2016
2001 WL 34032759
Only the Westlaw citation is currently available.
United States District Court,
S.D. Florida.

Linden ADAMS, et al., Plaintiffs,
v.
BELLSOUTH
TELECOMMUNICATIONS, INC., a
Georgia Corporation d/b/a Southern Bell,
Defendant.

No. 96-2473-CIV. | Jan. 29, 2001.

OMNIBUS ORDER ON MAGISTRATE'S REPORTS AND RECOMMENDATIONS

MIDDLEBROOKS, District J.

*1 THIS CAUSE came before the Court upon the receipt of Magistrate Stephen T. Brown's Consent Report and Recommendation, dated August 31, 2000 (DE# 326), and Report and Recommendation Re: Order to Show Cause, dated November 21, 2000 (DE# 356). This Court has reviewed the entire record including the Objections of the parties to these R & Rs, has heard oral argument on BellSouth's Objections to the November 21, 2000 Report and Recommendation, and is advised in the premises.

This matter arises from allegations of attorney misconduct in the settlement of this case levied at a November 3, 1997 status conference by one of the 56 named plaintiffs, Ms. Bettye Merricks. At this conference, Ms. Merricks represented to this Court that at a meeting with a Mr. Brian Neiman, paralegal for plaintiffs' counsel Mr. Norman Ganz, she was told that Bellsouth had offered her \$10,000 to settle her claim. Ms. Merricks stated that when she refused to accept, the offer to settle was raised to

\$13,500 with Mr. Neiman advising that the additional amount was to be paid by Plaintiffs' counsel. Ms. Merricks refused to accept the renewed offer and Plaintiffs' counsel moved to withdraw from representing her. In addition, Ms. Merricks stated that she never was informed about the total amount of the settlement, the method of allocation of the settlement proceeds, or the total amount of attorneys' fees and costs.

From these charges, this Court began an inquiry into the settlement agreement in this case. As explained in prior orders, this Court found serious problems with both the procurement of the settlement and the manner in which monies were allocated to individual plaintiffs. As a result, this Court appointed Magistrate Judge Stephen T. Brown as a special master to investigate allegations of attorney misconduct during the settlement of this action. Previously, Judge Brown determined, among other things, that "probable cause" existed to further pursue whether what, if any, sanctions are appropriate, and whether Florida Bar Rules 4-5.6, 4-1.7, 4-1.4, 4-8.4, and 4-5.5 had been violated. In light of this recommendation, this Court directed that Judge Brown issue an Order to Show Cause and conduct a hearing on this matter. Judge Brown has now submitted two reports and recommendations as a result of his further investigation of this matter.2

In his November 21, 2000 Report, Judge Brown made the following findings. In a letter dated January 21, 1997, Counsel for Plaintiffs, attorney Norman Ganz, suggested to Counsel for Defendant, BellSouth, that in exchange for a settlement, his firm would agree not to represent "any current or former employee of BellSouth against the company for a period of one year." BellSouth attorney Francis Semmes then confirmed in a letter that settlement was contingent upon such an agreement from Ganz. Ultimately, a settlement conference was held on July 28, 1997, and an offer of \$1.5 million was made to settle all claims. Again, the subject of an agreement not to represent persons against Bellsouth was discussed. An associate of Ruden, McCloskey (a member of Plaintiffs' counsel) opined that such an agreement was unethical. It then was suggested that perhaps Bellsouth could hire Plaintiffs' counsel via a consulting arrangement to prevent their future representation of persons against the company. In response, Plaintiffs' counsel insisted that if such a consulting agreement were to be made, additional monies would need to be allocated specifically for the arrangement. However, Bellsouth's attorneys insisted the monies be taken directly out of the \$1.5 million "global" settlement or else there would be no settlement at all. Eventually, after the meeting, additional negotiations ensued and a settlement was approved for \$1.6 million.

Subsequently, Plaintiffs' counsel prepared a closing statement that deleted several items from Plaintiffs' portion of the settlement, including \$120,000 for the consulting agreement, a \$230,000 "engagement fee" to Ganz, and a fee of \$51,500 for non-economic expenses. Plaintiffs never were told of the consulting arrangement nor the full terms of the settlement such as the total amount of the settlement or a breakdown of attorneys' fees and costs. Instead, Plaintiffs' counsel simply told each Plaintiff the specific amount they would receive under the settlement and then coerced at least one plaintiff (if not many more) to accept the settlement by threatening to withdraw representation if the settlement were not accepted.3 Of the \$1.6 settlement, \$505,275 went to Ganz (as both fees and costs), \$350,225 to Ruden McKlosky (fees and costs), \$70,000 went to Seltzer (fees and costs), and \$50,000 to Colby (fees)while all of the Plaintiffs together received a little more than \$600,000.

*2 Based on these findings, Judge Brown concluded that the collective conduct of the lawyers involved in this settlement agreement violated five separate Florida Bar Rules. Specifically, Judge Brown concluded that the following rules of the Florida Bar were violated by the previously-discussed conduct: (1) Florida Bar Rule 4-5.6 governing restrictions on the right to practice, (2) Florida Bar Rule 4-1.7 on conflicts of interest, (3) Florida Bar Rule 1.4 governing proper communication with a client, (4) Florida Bar Rule 4-8.4(a) which prohibits inducing someone to violate bar rules, (5) Florida Bar Rule 4-8.4(b) which provides that lawyers not engage in fraud, deceit, or misrepresentation, and (6) Florida Bar Rule 4-5.5 prohibiting the unauthorized practice of law. After reviewing Judge Brown's findings, conclusions, and the parties' objections thereto and conducting an independent review of the entire record (including the transcript of the August 29-30, 2000 hearing before Judge Brown), this Court agrees with Judge Brown that the settlement agreement arrived at in this case violated numerous Florida Bar Rules and was highly improper. As a result, this Court agrees with most of Judge Brown's recommendations regarding sanctions. First, it is ORDERED AND ADJUDGED that the Consent Report and Recommendation Concerning Ruden, McKlosky and attorney Mandelkorn is hereby ADOPTED in its entirety, including all sanction recommendations. Second, it is ORDERED AND ADJUDGED that the Report and Recommendation Re: Order to Show Cause be ADOPTED with respect to the discussion and sanction recommendations regarding Jonathan Colby, Valerie Shea, James Seltzer, and Norman Ganz. However, this TO ADOPT DECLINES the recommendations pertaining to BellSouth's attorneys and Brian Neiman for the following reasons.

A. BellSouth's Attorneys

In the November 21, 2000 Report, Judge Brown concluded that BellSouth attorneys Keith Kochler and Francis Semmes had violated Florida Bar Rules 4-5.6(b) and 4-8.4(a) by their conduct with respect to the settlement agreement.4 Based on this finding, Judge Brown recommended imposing the following sanctions: (1) prohibiting Kochler and Semmes from appearing in the United States Southern District of Florida for at least two years, (2) requiring their reappearance in the District to be conditioned on certified evidence that they have taken at least five hours of courses on Florida ethics, and (3) imposing a monetary sanction of \$100,000 against BellSouth. As discussed below, this Court finds that Kochler and Semmes's conduct did violate Florida Bar Rule 4-5.6 but concludes that a lesser sanction than those recommended by Judge Brown is warranted.5

Florida Bar Rule 4-5.6(b) states that a lawyer shall not participate in offering or making "an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties."6 The commentary to the Rule explains that "[s]ubdivision (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client." Id. Rule 4-5.6 is modeled after the American Bar Association's Model Rule of Professional Conduct 5.6(b) which prohibits "an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties." Id. The commentary to the Model Rule informs that "[p]aragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client." Id. Florida Bar Rule 4-5.6(b) and its attendant commentary is in all pertinent respects identical to Model Rule 5.6(b).

*3 Kochler and Semmes argue that their conduct did not violate Florida Bar Rule 4-5.6. First, they contend that Rule 4-5.6 does not prohibit the inclusion of a "consulting agreement" between Plaintiff's counsel and Defendant as a condition of an overall settlement between Plaintiffs and Defendant because such an agreement is a "limited" restriction on a lawyer's right to practice. In their view, Florida law, at the time of the settlement, supported this viewpoint. For support of this proposition, they point to a discussion of Rule 4-5.6 in Lee v. Florida Dep't of Ins. and Treasurer, 586 So.2d 1185 (1DCA, 1991), which allegedly condones the use of "limited" practice agreements restricting a lawyer's right to practice in circumstances analogous to this case. They also assert that

no governing Florida case has discussed this issue other than the *Lee* case. Finally, they claim that even if their conduct did violate Rule 4-5.6, sanctions are unwarranted as their conduct was not in bad faith or egregious.

Before addressing the merits of these arguments, it is instructive to outline the conduct of Kochler and Semmes in this matter. First, as the Magistrate Court found, it is clear that while Plaintiffs' counsel originally suggested a practice restriction as part of an overall settlement, BellSouth's attorneys seized on the concept and aggressively negotiated for its inclusion in any overall settlement of Plaintiffs's claims. The motive for this conduct is obvious from the record. Responding to litigation tactics this Court previously has described as "terrorist" and "tantamount to extortion," BellSouth's attorneys sought "finality" for their client by preventing the filing of similar future suits by Plaintiffs' counsel. While Kochler and Semmes's motives for pursuing the practice restriction were not disreputable or detrimental to the interests of their client, this Court does believe that their overzealousness in protecting their client led them to pay short shrift to the very real possibility that the proposed practice restriction/consulting arrangement violated Florida bar rules. This possibility was raised directly by a Plaintiffs' lawyer, Mr. Reves, during the settlement talks of July 28, 1997. Despite this fact, Kochler and Semmes took very few steps in investigating the ethical propriety of such a practice restriction.8 Their primary act was to assign their local counsel, Ms. Shea, to read a previously-prepared, in-house memo that touched on practice restrictions under Georgia and Florida law and determine if such an agreement could be implemented in this case. The five-page memo confirmed that Florida law prohibited a general restriction on a lawyer's right to practice as part of a settlement but noted that there was language in the Lee case suggesting that a more limited practice restriction would be acceptable. Ms. Shea read the memo and the Lee case briefly and concluded that "we can restrict the Ganz firm from representing clients on any related matter." Ms. Shea, who was about to leave for a summer vacation, instructed an associate to update the research on this issue and she forwarded the materials and her opinion to Kochler and Semmes.

*4 Hearing the answer they wanted, Kochler and Semmes relied on Ms. Shea's opinion and made no further inquiries into the matter. They then pursued a practice restriction as a necessary condition to any settlement. According to their own testimony, when Plaintiffs' counsel sought additional monies for a practice restriction/consulting agreement, Kochler and Semmes insisted that Plaintiffs' counsel take the consulting agreement from the already-offered settlement sum of

\$1.5 millionwithout any apparent concern that this arrangement might pit Plaintiffs and their lawyers in a direct conflict of interest.

While Kochler and Semmes now assert that the consulting agreement never was memorialized in a writing signed by both sides and was only a "loose understanding," it is clear that the parties acted as if a consulting agreement had been reached as part of the final settlement.11 For example, Plaintiffs' counsel Mandelkorn sent Semmes a letter on September 12, 1997 advising BellSouth to prepare an appropriate consulting agreement for Plaintiffs' counsel. Mandelkorn then put BellSouth in his firm's conflict database and his firm then behaved as if BellSouth was a client of their sinforming BellSouth in writing as to potential case conflicts and alike. 12 Neither Semmes or Kochler ever wrote Plaintiffs' counsel to tell them that there was no finalized consulting agreement in their view.¹³ In fact, Semmes confirmed the existence of the consulting agreement to a fellow BellSouth attorney almost a year later, sending him a copy of Mandelkorn's September 29, 1997 letter. Further, before this Court during a November 15, 1997 Status Conference Hearing, Semmes admitted that a practice restriction agreement had been reached with Plaintiffs' counsel as part of the overall settlement.14

Putting aside this canard, I now turn towards the two critical questions raised by Kochler and Semmes's conduct: first, whether in pursuing and consummating a consulting/practice limitation agreement they violated Rule 4-5.6; and, if so, whether this conduct warrants sanctions. The natural starting point for this inquiry is with the *Lee* caseKochler and Semmes's principal defense as to their non-violation of Rule 4-5.6.

In Lee, the First District Court of Appeals reviewed whether an administrative court judge properly refused to disqualify a Florida Department of Insurance lawyer, Mr. Porter, from a license revocation proceeding against a Mr. Lee. In a related civil action, the National Council on Compensation Insurance ("NCCI") had sued Lee and a settlement agreement was negotiated. In that agreement, NCCI's law firm, the law offices of Leo Bateman Jr., agreed to not represent the Department of Insurance ("Department") in any future proceedings to revoke or suspend Lee's insurance license. However, in subsequent license revocation proceedings against Lee, the Department was represented by L. William Porter, a former associate of Bateman's who had appeared and signed papers in the NCCI case. Lee also alleged that Porter had received and gained substantial information and knowledge through his firm's former representation against Lee. Lee then argued that the settlement

agreement disqualified Porter from the proceedings. However, the administrative judge disagreedruling that Rule 4-5.6 voided the settlement agreement and that therefore Porter was not disqualified from the case. The *Lee* Court reversed the administrative judge, holding:

*5 [T]he application of rule 4-5.6 to invalidate or render void a provision in a private contract between two parties is beyond the scope and purpose of the Rules and constitutes error. As the preamble to the Rules states, they 'simply provide a framework for the ethical practice of law.' ... Violation of a rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability.... To use rule 4-5.6 as the basis for invalidating a private contractual provision is manifestly beyond the stated scope of the Rules and their intended legal effect.

Id. at 1188. The Court then made plain that the ethical propriety of the practice restriction agreement was not the issue before it:

Whether attorney Bateman acted unethically in violation of the Rules by participating in the negotiation of a settlement agreement that included the provisions in paragraph 8 and should be disciplined therefore is not the issue in this proceeding. Rather, the critical issue is whether Porter, as an associate lawyer employed in Bateman's law office who worked on NCCI's case, can be ethically and legally disqualified from representing the Department in respect to the same transactions and events as those in which he had previously represented NCCI in view of the presumptively valid contractual provision in paragraph 8 between Lee and NCCI.

Id. at 1188-89 (emphasis added).

Despite this language, Kochler and Semmes contend that *Lee* stands for the proposition that limited practice restriction agreements do not violate Rule 4-5.6. They rely on some *dicta* in the opinion which reads as follows:

That Rule [4-5.6], as we construe it, is intended to prevent lawyers from entering into agreements that operate to restrict a lawyer's right to practice generally, for example, in the sense that an attorney agrees as part of a settlement not to represent any persons who may have interests adverse to the client regardless of the events and issues involved; that Rule does not reach agreements with or by the client to preclude the lawyer's representation of other persons with respect to cases that involve the same facts, transactions, and

events as does the case settled for the client. Failure to give effect to this distinction would defeat the protections of confidential information provided in rules 4-1.6 and 4-1.9.

Id. at 1190 (emphasis added). While it is true that this passage indicates that a particular type of limited practice agreement may not violate Rule 4-5.6, it is clear from this section and other portions of the Lee opinion that the exception envisioned in Lee is not at all the type of consulting agreement negotiated in this case. As the Lee opinion makes plain, the exception it contemplates is one in which a *client* may want to restrict her lawyer's future representation in a limited manner so that the lawyer does not disclose or take advantage of confidential information learned in the course of the case in the prosecution of a future related case. Relying on Rules 4-1.6 and 4-1.9, which govern conflict of interest situations involving former and current clients respectively, the Lee Court observed that "it has been ruled that a lawyer is bound to respect the request of a client or former client not to use or disclose information or confidences learned during that representation, and is forbidden to use such information for the advantage of himself or of a third person." Id. at 1189. The Lee Court then found that because there was a presumption of a conflict of interest as to Porter's former client (NCCI) in the revocation proceeding against Lee, Porter was disqualified from representing the Department to safeguard the potential disclosure of confidential information related to NCCI.15 Id. (noting that "[t]he client's restriction on the use or disclosure of such information could very well place Bateman or those in his firm in a conflict of interest position under rule 4-1.7 if and when confronted with the need to use or disclose it in the subsequent representation of another client").

*6 For several reasons, this Court therefore does not believe that Lee condones the practice restriction negotiated and agreed to in this case. First, there is no evidence that the practice restriction was designed in any way or constructed in any limited fashion to prevent the disclosure of confidential information. No party has revealed to this Court any serious argument along these lines. Rather, it is clear from the record and the testimony of the lawyers that BellSouth sought a practice restriction on Plaintiffs' counsel to prevent Plaintiffs' counsel from bringing future similar cases against BellSouth with the same kind of terrorist tactics used against BellSouth in this case. In short, the practice restriction was a payoff to Plaintiffs' counsel to make them go away and never come back. As I explain infra, this type of arrangement is a violation of Rule 4-5.6 for well-grounded public policy reasons.

Second, the practice restriction was not written to protect

the clients of Plaintiffs' counsel but rather to protect the opposing party, BellSouth. In fact, the evidence in this case makes clear that Plaintiffs never were informed of the existence, terms, or content of the practice restriction agreement by any of the lawyers. The Lee exception is designed to safeguard a client's confidential disclosures to her lawyer and avoid a potential violation of conflict of rules through lawyer's interest a subsequent representation of a different client in a related case.16 Here, the practice agreement was constructed for the benefit of the opposing party (without the knowledge of Plaintiffs' clients) in a manner that placed Plaintiffs' counsel in a direct conflict of interest with their clientsa scenario inconsistent with the reasoning of Lee and the spirit of the bar rules.¹⁷ I therefore find the Lee dicta inapposite. Further, I also believe that had BellSouth's lawyers engaged in the appropriate level of research into the issue, it would have been clear to them (if it already was not clear on its face) that the negotiated consulting arrangement was unethical.

For starters, any research into ABA Model Rule 5.6(b), whose language is identical to Rule 4-5.6 and was the model for Rule 4-5.6, would have led to this conclusion. The commentary to the ABA rule states in no uncertain terms "under Rule 5.6(b), it has been deemed unethical and impermissibly restrictive of a lawyer's right to practice for a lawyer to offer, or enter, an agreement settling a client's case if the agreement includes a restriction on the lawyer's ability to represent other plaintiffs against the same defendant." Id. (emphasis added). It continues:

Rule 5.6(b) prohibits lawyers from making or entering agreements that restrict a lawyer's right to represent certain clients or to sue specified parties as part of the settlement of a controversy between private parties. Settlement agreements of this sort are particularly common in class actions or cases involving mass product liability or disaster claims. These agreements attempt to prevent the plaintiffs' lawyer from representing future claimants with similar claims against the same defendant.

*7 *Id.* (emphasis added). The Commentary then quotes a 1993 ABA Ethics Committee Formal Opinion, ABA Formal Op. 93-371, which outlines three public policy goals behind this particular construction of Rule 5.6(b).

The rationale of the Model Rule 5.6 is clear. First, permitting such agreements restricts the access of the public to lawyers who, by virtue of their background and experience, might be the very best available talent to represent these individuals.... Second, the use of such agreements may provide clients with rewards that bear less relationship to the merits of their claims than they

do to the desire of the defendant to 'buy off' plaintiff's counsel. Third, the offering of such restrictive agreements places the plaintiff's lawyer in a situation where there is conflict between the interests of present clients and those of future clients.

Id. 18 In addition, the Commentary then cites to a plethora of state ethics opinions which have found practice restriction agreements as part of a final settlement, in various permutations, to be unethical. Id. Moreover, if BellSouth's attorneys had read the 1993 ABA Formal Opinion (which addressed this subject in the context of concluding that these agreements in the mass tort area were unethical),19 they would have learned that "it is instructive to note that when Model Rule 5.6 is read in conjunction with Model Rule 8.4(a)²⁰ the scope of the prohibition applies, not only to a lawyer agreeing to the restriction, but also to a lawyer offering or requiring the restriction." ABA Op. 93-371 (emphasis added). And finally, if they had read an informal ABA opinion from 1968 (referred to in previously-cited ABA opinions), they would have learned the following:

4) Is it ethical for a defense lawyer to communicate or implement his client's desire to require an opposing attorney to agree to refrain from representing any such client against such client?

The Committee concluded:

The covenant that you refer to (an agreement which settles the client's litigation when the settlement agreement contains a covenant that the lawyer will not represent other plaintiffs against the defendant ... imposes an undue restriction upon the plaintiffs' attorney and also affects the right of the client to obtain the benefit of the services to which he is entitled from his own lawyer. Because of the foregoing it is improper for the attorney representing the defendants to demand this kind of a covenant and by way of corollary it is improper for plaintiff's attorney to abandon the interests of other clients, who have depended upon his services through periods that may be invaluable and of long standing. Informal Opinion 68-1039.²¹

Moreover, the public policy rationales undergirding Model Rule 5.6(b) counsel even more strongly against the propriety of the practice restriction agreement formulated here than in other more conventional settlement agreement situations where a total settlement includes a limited practice restriction. A central purpose of both Model Rule 5.6(b) and Florida Bar Rule 4-5.6 is to prohibit corporate "buyouts" of plaintiff's attorneys.²² The traditional rationale for this prohibition is that there is a strong public interest in having available plaintiff's

attorneys for future clientsan interest which outweighs allowing lawyers to restrict their future representation autonomy even where it would increase the overall size of a settlement (and thereby maximize a present client's recovery). While some have criticized this approach as anachronistic in varying forms,²³ it is still the prevailing ethical standard as articulated by the ABA and state ethics opinions. However, whichever way you feel about this debate, the agreement in this case is much more of an ethical affront. Rather than a simple practice restriction negotiated into a final settlement, Plaintiffs' lawyers were to receive a specific consulting fee from BellSouth and that fee was to come from an already-tendered settlement offer in any amount Plaintiffs' counsel thought appropriate.

*8 BellSouth's lawyers insist this type of arrangement is perfectly ethical. They argue that because a practice restriction was discussed from the beginning of settlement talks and because their settlement offer was a substantial overpayment of Plaintiffs' claims (so that they could get the practice restriction and be rid of Plaintiffs' counsel for four years), there was nothing improper about their insistence that Plantiffs' counsel take their financial consideration for the consulting arrangement from the \$1.5 million offer BellSouth already had made to ostensibly settle all of Plaintiffs' claims. I strongly disagree. In fact, I find this insistence to be the most disturbing facet of Kochler and Semmes's conduct since it pitted Plaintiffs' counsel into a direct conflict of interest with their clients by encouraging and/or enabling Plaintiffs' counsel to take monies previously offered as part of a settlement of their clients' claims for their own "consulting arrangement" and personal remuneration. I believe this type of consulting agreement-negotiated contemporaneously with the settlement of Plaintiffs' claims and requiring Plaintiffs' counsel to dip into already-offered settlement funds for their financial consideration-is a clear violation of Rule 4-5.6(b).

Simply put, this situation thrust Plaintiffs' counsel into a direct conflict of interest with their clients. It enabled them to take a direct cut of the settlement money (in any amount)a paradigmatic payoff to a plaintiffs' lawyer if there ever was one. I find this scenario different from a lawyer who agrees to a practice restriction in exchange for a settlement in his client's interest. In the latter case, the client's interests are kept in the forefront as the bargained-for benefit (i.e., practice restriction for more settlement money) directly increases the client's settlement recovery (and only indirectly increases the attorney's financial share via his normal contingency fee structure). Here though, Plaintiffs' counsel were offered an arrangement in which they received a direct,

non-contingency payment from the total pot of money offered to their clients. The conflict of interest was further exacerbated when BellSouth's attorneys, after offering \$1.5 million to settle Plaintiffs' claims, refused Plaintiffs' counsel's request for separate and additional financial consideration for the practice restriction agreement itself. Instead, BellSouth's counsel's response was in effect "take the money out of the settlement offer."24 By co-mingling the financial consideration of the consulting agreement with the settlement monies already offered, BellSouth pitted the financial interest of Plaintiffs' counsel against their clients' interests. This stance also gave a clear financial motive to Plaintiffs' counsel to undercut their clients' interests by taking as large a percentage of the settlement as they wanted as consideration for the practice restriction/consulting agreement.

*9 Kochler and Semmes's response is that there is no conflict because the 1.5 million settlement offer was not based on the merits of Plaintiffs' claims. Rather, they assert the offer was a reflection of the nuisance value to BellSouth of ending Plaintiffs' counsel dilatory legal tactics and threats once and for all. Therefore, Plaintiffs did not lose anything from the consulting agreement but instead gained much more (in the form of an inflated settlement offer) than they had any right to expect. But this admission goes precisely to the core of what is so wrong with this type of settlement in the first place. Settlement offers should be primarily about the merits of the claims asserted. They should not be payoffs to Plaintiffs' lawyers. The very purpose of an adversarial system is to determine the financial value of a claim through a process of arm's length negotiations. It is not the business of this Court to engage in subjectivity analyses of whether BellSouth's settlement offer to Plaintiffs was or was not a true approximation of the worth of settling Plaintiffs' claims to them. Certainly, the Plaintiff themselves believe their claims had merit and that BellSouth wronged them in some way. So, how can this Court, with a wink and a nod, conclude that the settlement offer is ethical (despite the facial appearance of a conflict of interest) because the offer, like the case, was really a sham? At the very least, BellSouth's counsel's actions have created an appearance of impropriety by forcing Plaintiffs' counsel to dip into their client's settlement pie for their consulting fee. Further, the subsequent actions of Plaintiffs' counsel attest to the dangers of allowing these contemporaneous negotiations over settlement and consulting fee terms. For instance, in this case, the consulting agreement between counsel (both its existence and terms) was never disclosed to Plaintiffs, and the consulting fee was deleted from the closing statement by

Plaintiffs' counsel. Though this Court does not hold BellSouth's attorneys responsible for this clear ethical transgression, I do believe that BellSouth's offer and negotiation terms did contribute to a situation where Plaintiffs' counsel and their clients were placed in a direct conflict of interest. In short, BellSouth's offer enabled Plaintiffs' counsel to act as they did, and moreover, their negotiating tactics incentivized Plaintiffs' counsel's subsequent misconduct by financially rewarding the non-disclosure of the existence or amount of the consulting fee.

That is why I believe a bright line rule in this context is essential. While the use of ex post "consulting" agreements between Plaintiffs' attorneys and former opposing parties are becoming more common,25 ethical rules should hold firm against allowing contemporaneous negotiations over settlement and consulting agreement terms. Further, settlement and consulting fees should never be co-mingled together into a singular pool. I believe these steps are necessary to avoid any appearance of ethical wrongdoing in this area. As Justice Frankfurter famously wrote, "justice must satisfy the appearance of justice." Offutt v. United States, 348 U.S. 11, 13, 75 S.Ct. 11, 99 L.Ed. 11 (1954). Public confidence in the integrity of our legal process is essential to conferring the rule of law with moral and political legitimacy. It is therefore incumbent on the legal bar to refrain from actions which erode at this confidence and engender the belief that lawyers are placing self-interest above their client's interest. See In re Yarn Processing Patent Validity Litig., 530 F.2d 83, 89 (5th Cir.1976) (noting that "[p]ublic perception of [misconduct] will tend to undermine public confidence in the legal profession and the judicial process even if the former client is not in fact damaged").

*10 Having elucidated my views of Rule 4-5.6(b), I must now turn towards the appropriate sanction, if any, for BellSouth's attorneys. Local Rule 11.1(c) states "the standards of professional conduct of members of the Bar of this Court shall include the current Rules Regulating the Florida Bar. For a violation of any of these canons in connection with any matter pending before this Court, an attorney may be subjected to appropriate disciplinary action."26 Here, based on Kochler and Semmes's violation of Florida Bar Rule 4-5.6(b) and therefore ipsi dici Local Rule 11.1(c), Judge Brown recommends a \$100,000 monetary sanction against BellSouth, a two-year ban on Kochler and Semmes's appearing in the United States Southern District of Florida, and a requirement that Kochler and Semmes provide certified proof that they have taken at least five hours of courses on Florida ethics to be allowed to reappear in the District. I believe these recommended sanctions to be too harshparticularly in

light of the consent sanctions recommended against Plaintiffs' counsel. As explained earlier, BellSouth's counsel's conduct in this case was motivated by a desire to protect their client's interests in the face of reprehensible legal tactics from the other side which bordered on the extortionate. Kochler and Semmes did not act for self-gain unlike opposing counsel. However, instead of reporting Plaintiffs' counsel's tactics to the Florida Bar pursuant to their duty as officers of the legal bar, Kochler and Semmes engaged in an ill-advised form of self-help that violated Florida Bar Rules. In this way, they zealously pursued their client's interests without proper regard for their ethical responsibilities as lawyers. While this Court takes note of the evidence suggesting that a brief review of the ethics of a limited practice restriction was conducted by local counsel, I find that Kochler and Semmes failed to take adequate steps to check the validity of local counsel's opinion on this matter and that these omissions amounted to a willful blindness of the ethical implications of their chosen course of conduct. Making matters worse, Kochler and Semmes completely failed to construct any form of narrow practice restriction to safeguard client confidences which could be at least argued to coincide with the Lee dicta. Going well beyond the parameters of the Lee rationale, counsel blended a consulting fee agreement with Plaintiffs' counsel with settlement funds previously offered to Plaintiffs, forming a perverse hybrid of the two. It is inconceivable to this Court that the lawyers involved in this agreement could in reasonable good faith believe that paying Plaintiffs' counsel a consulting fee out of funds already offered to settle Plaintiffs' claims would be ethical under Rule 4-5.6, the Lee dicta notwithstanding. Accordingly, I believe some sanction is appropriate for Kochler and Semmes. It is therefore

ORDERED AND ADJUDGED that Kochler and Semmes must provide certified proof that they have completed at least five hours of courses on Florida ethics prior to their reappearance in this District. Moreover, they are directed to provide a copy of this Order to the regulating authority of any state bar to which they are admitted.

B. Brian Neiman

*11 With respect to Mr. Neiman, Judge Brown has recommended that he pay \$25,000 to the Plaintiffs via this Court, not work for two years as a paralegal/investigator, and take a paralegal ethics course as sanctions for his conduct in this case. In addition, Judge Brown has offered a Stipulation from Neiman as his factual findings for this Court's acceptance. In that Stipulation, it is stated that Mr.

Neiman's "poor judgment" in this case was a result of his Bipolar Disordera disorder for which Mr. Neiman has been hospitalized. I do not accept these findings or recommendations.

I reach this conclusion for several reasons. First, Mr. Neiman's objectionable conduct as a paralegal has occurred over a sustained period of time-resulting in numerous complaints and investigations related to his misconduct. Second, Mr. Neiman's Affidavit, submitted to this Court along with the proposed Stipulation, contains several statements believed by me to be false, including statements that he was always only paid an hourly paralegal rate between \$75 and \$100 dollars, and that he never received a percentage of a case settlement. These statements are contradicted by the Report of the Referee in The Florida Bar v. Brian Neiman et. al., which has been filed into the case record. In that report, among other things, the Referee found that Neiman played a principal role in a number of lawsuits, often assuming the responsibilities of a lawyer in violation of the Florida Bar's prohibition on the unauthorized practice of law, and that he personally grossed over \$1.4 million in 1995. approximately \$500,000 in 1996, and over a \$1 million in 1997. Given the evidence of this case, Neiman's prior criminal conduct, and the Referee Report detailing Neiman's role in other cases during the relevant time period, this Court finds Neiman's Affidavit not credible, and refers this matter to the United States Attorneys' Office for the Southern District of Florida for investigation of possible false statements made to this Court in Neiman's Affidavit. In addition, this Court still believes that the allegations of misconduct which have surfaced in this case against Nieman are serious enough to warrant referral to the Florida Bar for possible disciplinary action and the United States Attorneys' Office for the Southern District of Florida for investigation into possible criminal violations, including violation of federal extortion, wire fraud, and mail fraud statutes. As a result, I find the sanction recommendations of Judge Brown to be too lenient in light of Mr. Neiman's serious misconduct over the past few years. While this Court harbors doubt about its jurisdiction to sanction Neiman in this case because of his status as a paralegal (a doubt which may have led Judge Brown to recommend acceptance of Mr. Neiman's Stipulation and the agreed-upon sanctions), I cannot in good conscience accept these findings or sanction recommendations.

settlement in this case. However, in order to opt out of their prior settlement, it is ORDERED that a plaintiff must first disgorge all benefits either already received or due to be received under the terms of the settlement. Plaintiffs are cautioned that they should seek the advice of independent counsel before setting aside their settlement in this case since they have no guarantee of a favorable outcome at trial, and the case facts revealed thus far cast doubt on whether many of Plaintiffs' individual claims have much legal merit, if any. D. Conclusion For the reasons stated above, the following is ORDERED:

case was settled and the fact that Plaintiffs were not

informed of the total settlement agreement, the consulting

fee agreement, or the specific breakdowns of the amounts

awarded to other Plaintiffs, this Court reiterates its prior ruling that individual plaintiffs may set aside their

- 1. The Consent Report and Recommendation Concerning Ruden, McKlosky and attorney Mandelkorn is hereby ADOPTED in its entirety, including all sanction recommendations;
- 2. Pursuant to the provisions of 28 U.S.C. sec. 636 and pursuant to Rule 1 of the Magistrate Rules for the United States District Court, Southern District of Florida, all matters related to the administration of the \$250,000 Ruden, McCloskey is to make available for possible distribution to former clients is referred to Magistrate Judge Stephen T. Brown;
- 3. The Report and Recommendation Re: Order to Show Cause be ADOPTED with respect to the discussion and sanction recommendations regarding Jonathan Colby, Valerie Shea, James Seltzer, and Norman Ganz;
- 4. Kochler and Semmes must provide certified proof that they have completed at least five hours of courses on Florida ethics prior to their reappearance in this District;
- 5. The Report and Recommendation Re: Order to Show Cause with respect to Brian Neiman is NOT ADOPTED.
- 6. All lawyers, whom are the subjects of this Order and the Reports and Recommendations thereto, are hereby ORDERED to mail a copy of this Order to all Bar authorities to which they are either a member or subject to the jurisdiction of so that these appropriate

C. Settlement Opt-Outs by Plaintiffs

*12 Finally, because of the improper manner in which this

authorities may take any action they deem warranted by the facts of this case. Not Reported in F.Supp.2d, 2001 WL 34032759

All Citations

Footnotes

- Local Rule 11.1(c) states that "the standards of professional conduct of members of the Bar of this Court shall include the current Rules Regulating the Florida Bar. For a violation of any of these canons in connection with any matter pending before this Court, an attorney may be subjected to appropriate disciplinary action."
- Judge Brown's investigation included a hearing on the Order to Show Cause which was conducted on August 29-30, 2000.
- Judge Brown found based on the totality of the evidence that this type of coercion may have occurred on a more widespread basis.
- Judge Brown also found that Kochler had violated Florida Bar Rules prohibiting the unauthorized practice of law by not being admitted *pro hac vice*. However, Judge Brown did not recommend any sanctions based on this rules violation. This Court does not find this issue to be of any legal moment other than to observe that this Court has jurisdiction over Kochler (as Kochler concedes) for purposes of imposing sanctions.
- Judge Brown also concluded that Kochler and Semmes violated Florida Bar Rule 8.4(a). That rules reads: "[a] lawyer shall not [] violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another." *Id.* Kochler and Semmes argue that they had no notice of this rules violation inquiry from Judge Brown as the Order to Show Cause specifically referenced Plaintiffs' counsel's conduct with regard to Rule 8.4(a). This Court points out that its Order of Reference did include potential violations of Rule 8.4(a). However, the focus of this Order is Rule 4-5.6. While this Court believes certain features of Kochler and Semmes's conduct violated Rule 8.4(a)'s plain language prohibition on knowingly assisting another in violating Florida Bar Rules, any discussion of Rule 8.4(a) is an adjunct to the larger issues raised by Rule 4-5.6.
- Disciplinary Rule DR 2-108(b) of the Model Code of Professional Responsibility similarly states as follows:
 - In connection with the settlement of a controversy or suit, a lawyer shall not enter into an agreement that restricts his right to practice law.

Id.

- 7 These tactics included threats to increase defense costs through the continuous addition of "unnamed," "unfiled" plaintiffs as well as threats to join the local NAACP chapter as a party with undefined claims.
- These efforts are outlined in more detail in Judge Brown R & R at pages 11-14.
- The record evidence indicates that Kochler and Semmes did little to verify Shea's reading of Florida law besides a brief review of the materials and memo she sent.
- While this legalese might be relevant to a contract law question of whether the consulting agreement is enforceable or not, it has little import to this present inquiry.
- Plaintiffs' counsel Mandelkorn sent BellSouth a letter on August 1, 1997 containing a settlement offer for \$1,720,000 which included a four-year consulting arrangement and the statement that "the total fee for this consulting agreement is already included within the settlement." The offer was valid until August 4, 1997. On August 5, 1997, Plaintiffs' counsel Ganz sent BellSouth a letter confirming the settlement by conference call on August 4, 1997 for \$1,600,000, an increase of \$100,000 from the July 28, 1997 meeting, and stating in Paragraph 10 that a "consulting arrangement will be made with counsel for plaintiffs as discussed during our settlement conference. The consulting arrangement encompasses a four-year period. The total fee for this consulting agreement is already included within the settlement."
- 12 In addition, Mandelkorn sent a second letter several weeks later confirming that BellSouth had no objection to his firm handling

transactional matters adverse to BellSouth. Further, in August 1998, a partner in Ruden, McClosky sent a letter to BellSouth to determine if they felt there was a conflict in Ruden handling a particular matter indirectly related to BellSouth. On August 3, 1998, George Hanna, a BellSouth attorney, wrote back that the claim did not appear to pose a conflict but Ruden still refrained from taking the case based on potential conflict concerns. A copy of Hanna's letter was sent to Semmes.

- Moreover, Plaintiffs' counsel has averred that the additional \$100,000 added to BellSouth's initial settlement offer of \$1.5 million was earmarked specifically for the consulting agreement. BellSouth's counsel denies this account, insisting that the extra monies were the result of negotiations over a final amount for Plaintiffs' claims.
- Frankly, Kochler and Semmes's *post hoc* assertion that the consulting/practice restriction agreement was only a weak understanding seems part of a pattern of behavior during these proceedings to defend their conduct at the expense of a full accounting of the pertinent case facts. Kochler and Semmes's testimony before Judge Brown at the Show Cause Hearing, particularly Semmes's testimony, is not very credible on certain key matters. For instance, Semmes denied, to the best of his recollection, that at the July 28, 1997 settlement meeting there was a discussion as to whether Plaintiffs' counsel would have to take their compensation for the consulting agreement out of the offered settlement monies. This denial flies in the face of the testimony of the other principals at the meeting. Semmes and Kochler also "could not recall" whether the ethical propriety of the consulting agreement ever was discussed at the meeting. Semmes also "could not recall" whether he had read a key portion of the *Lee* case or ABA Model Rule 5.6(b) or whether anyone had compared the Georgia and Florida rules on right to practice restrictions.
- Footnote six of the opinion makes it clear that the perspective from which conflict of interest and the disclosure of confidential information is viewed for purposes of 4-5.6 is from the client's rather than from the opposing party's. There, the *Lee* Court explains that the key factor is whether Porter gained confidential information which, if used, would be to the "disadvantage of *NCCI." Id.* (emphasis added); *see also id.* at 1189 (stating "Bateman and his firm's representation of NCCI gave rise to an irrefutable presumption that confidences were disclosed during the relationship). The confidential information/conflict of interest issue is never framed with respect to Lee, the opposing party. As the Court elaborated:

Furthermore, we do not give the same construction to rule 4-5.6 as did the hearing officer. The Department contends that Porter's representation of the Department is not sufficiently adverse to the interests of NCCI to give rise to any conflict of interest. However, NCCI's agreement in paragraph 8 to prevent such representation manifests its intent to withhold consent and thereby preclude the use or disclosure of information gained during his representation of NCCI. That fact alone demonstrates sufficient adversity of interests to apply the rules on conflict of interests....

Id. at 1190. While in *Lee*, the opposing party involved in the settlement agreement (Lee) was trying to enforce the agreement in a later proceeding (rather than the former client), the validity of the agreement pursuant to Rule 4-5.6, under the *Lee* Court's confidential disclosure rationale for a limited form of practice agreement, was constructed with respect to the client and not an opposing party.

- This narrowly tailored exception to Rule 4-5.6 makes sense to prevent any conflict between the applications of the conflict of interest rules (Rules 4-1.6, 4-1.9) and Rule 4-5.6-thereby avoiding any disjunction between the operation of these rules inconsistent with their overall purposes.
- 17 This argument is elaborated *infra*.
- See also ABA Comm. on Ethics and Professional Responsibility, Formal Op. 94-381 (1994) (explaining for similar reasons that in-house counsel may not offer, and outside counsel may not accept, an agreement in which the outside lawyer agrees never to represent anyone against the corporation, even on unrelated matters); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-394 (1995) (ruling that Rule 5.6(b) applies not only when controversy is between private parties, but also when party is governmental entity).
- 19 That opinion concluded:

Given the important public policies reflected in Rule 5.6, the Committee believes that the injunction of Rule 1.2 that the lawyer shall abide a client's decision regarding settlement must be read as limited by the provisions of Rule 5.6(b) and, as a result, a lawyer cannot agree to refrain from representing present or future clients against a defendant pursuant to a settlement agreement on behalf of current clients even in the mass tort, global settlement context.

Id.

20 Rule 8.4(a) like Florida Bar Rule 4-8.4(a) states "[i]t is professional misconduct for a lawyer to ... violate or attempt to violate the

Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another." Id.

The legislative history of the predecessor Code provision of Model Rule 5.6. also counsels against the propriety of such 21 settlement agreements. The Model Code of Professional Responsibility was adopted by the House of Delegates in August 1969. DR 2-108(B) of the Code read as follows:

In connection with the settlement of a controversy or suit, a lawyer shall not enter into an agreement that broadly restricts his right to practice law, but he may enter into an agreement not to accept any other representation arising out of a transaction or event embraced in the subject matter of the controversy or suit thus settled.

Id. (emphasis added). In February 1970, just six months later, the Standing Committee on Ethics and Professional Responsibility proposed an amendment to DR 2-108(B) to the House of Delegates, repealing the italicized language. That amendment was adopted by the House, yielding the current text of DR 2-108(B): In connection with the settlement of a controversy or suit, a lawyer shall not enter into an agreement that restricts his right to practice law. Id. (emphasis added). During the debate over the amendment, Walter P. Armstrong, Jr., chair of the Committee on Ethics and Professional Responsibility, explained the need for deleting the offending language: "a covenant of that type would, in effect, restrict ... a lawyer's ability to engage in the practice of law by agreeing in advance before he had considered any of the merits, that he would not represent certain types of clients. Secondly, we [the Committee] felt that a covenant of that type would inevitably involve a conflict of interests." Op. 93-371.

- 22 For instance, in the mass tort context, the ABA's Committee on Ethics and Professional Responsibility determined that a restriction on the right of plaintiffs' counsel to represent present and future claimants against the defendant, as part of a global settlement of some of counsel's existing clients' claims against that same defendant, represents an impermissible restriction on the right to practice and may not be demanded or accepted without violating Model Rule 5.6(b). See Formal Opinion No. 371.
- 23 See generally Blue Cross & Blue Shield v. Phillip Morris, Inc., 53 F.Supp.2d 338, 341-46 (E.D.N.Y.1999); Stephen Gillers, A Rule Without a Reason, A.B.A. J., Oct. 1993 at 118.
- Of course, there are discrepancies between counsel on this point. Plaintiffs' counsel claim that the additional \$100,000 was 24 earmarked for the consulting agreement. BellSouth disagrees, stating that the extra money was simply a final settlement offer after additional negotiations.
- 25 This corporate cooption of the Plaintiff's bar is also unsettling. Plaintiff's lawyers should be available to represent clients. First and foremost, the practice of law ought to be about the needs of clients (both current and future) rather than the private enrichment of lawyers.
- 26 It also is well-established that federal courts "possess the inherent power to protect the orderly administration of justice and to preserve the dignity of the tribunal" through the implementation of disciplinary sanctions for misconduct without resort to the powers of civil or criminal contempt. Kleiner v. First Nat. Bank of Atlanta, 751 F.2d 1193, 1209 (11th Cir.1985) (citing Roadway Express, Inc. v. Piper, 447 U.S. 752, 764-65, 100 S.Ct. 2455, 2463, 65 L.Ed.2d 488 (1980)); see also Flaksa v. Little River Construction Co., 389 F.2d 885, 888 (5th Cir.1968) (noting that "[t]he inherent power of a court to manage its affairs necessarily includes the authority to impose reasonable and appropriate sanctions upon errant lawyers practicing before it"); see generally Ex parte Robinson, 86 U.S. (19 Wall.) 505, 512, 22 L.Ed. 205 (1873). Such sanctions may include anything from the assessment of attorneys' fees and costs to the disqualification of counsel to monetary penalties and alike. See Kleiner, 951 F.2d at 1209, Flaksa, 389 F.2d at 887. BellSouth's attorneys point to this Court's discussion of the inherent power to sanction in Lee to argue that sanctions are not warranted here. See Lee v. American Eagle Airlines, Inc., 93 F.Supp.2d 1322, 1331 (S.D.Fla.2000) (stating that "[a] finding that counsels' conduct 'constituted or was tantamount to bad faith' must precede any sanction levied pursuant to a court's inherent powers.... Before imposing a severe sanction based on principles of deterrence, a district court must consider whether a lesser sanction is more proportionate to the misconduct."). As explained above, this Court concludes that the sanctions recommended by the Magistrate Judge are more severe than warranted.

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Mediating with and without the Robe in the World of COVID-19 and Tips to Maximize Your Clients' ADR Experience

During my professional career, I had the privilege of serving as a United States District Court Judge for the District of New Jersey for almost 17 years.

Throughout that time, as many judges do, I mediated many diverse matters: multimillion-dollar patent cases, antitrust cases, wrongful termination of employment cases, securities cases, and personal injury cases, as well as a myriad of *pro se* and other cases that crowded my ever-expanding docket.

All the aforementioned mediations, however, were conducted pre-pandemic and with the benefit of a robe and a gavel. This, in some ways, made the process easier since, as a decision maker, my words and actions during the settlement process carried a different weight and often may have been heeded more than the words or actions of a private mediator. On the other hand, mediating without a robe, as a private mediator, brings about different challenges as well as benefits.

Since leaving the bench and coming to McCarter & English to head the firm's Alternative Dispute Resolution (ADR) practice, I have conducted numerous mediations and arbitrations, both as a member of the firm and also on behalf of FedArb, a national ADR firm with more than 100 panelists including many former Article III judges. This article seeks to provide the benefit of that experience and offers suggestions on how you can maximize your ADR experience.

Why ADR?

Both mediations and arbitrations provide significant cost savings, avoid prolonged in-court proceedings and the associated additional costs and uncertainty, and provide a quicker resolution of the matter. In addition, a successful ADR provides predictability for clients' businesses and affairs.

Mediation, regardless of whether successful or not, allows counsel to gain information about its adversary's case, explore with the client the strengths and weaknesses of its own case, and provide a more objective understanding of the challenges that lie ahead in litigation. It also gives counsel the opportunity to better manage the client's expectations and gain information that may prove to be invaluable if, at a later point in the litigation, you need to pivot and revisit settlement.

Furthermore, the private mediation setting is more personal. Mediators are open to talking to the principals in order to get to know them, their concerns, and their expectations at a deeper level. Mediation offers the opportunity for the parties and the mediator to better understand the obstacles to amicable resolution, and it fosters the exploration of different non-monetary options (like business solutions), which are often not considered in the time-challenged setting of an incourt settlement conference.

ADR in the Pandemic

Along with members of the bar and others active in ADR, I feared the impact the pandemic would have on mediation. We were worried that the inability to meet in person, an extraordinarily important component in both mediations and arbitrations, would create an

insurmountable problem. How will arbitration hearings be conducted? How will witnesses testify? Can the credibility of witnesses be properly tested virtually? How will the mediator gain the trust of the parties in a virtual setting? Would the give-and-take of mediation be affected? These were reasonable and serious concerns.

Due to the pandemic, courts began to close and, in many states, judicial vacancies expanded. The timing for resolution of cases and jury trials became more unpredictable. As a result, lawyers and litigants began to turn to ADR. Surprisingly, ADR practitioners discovered that there were significant advantages to virtual mediations and arbitrations.

Logistically, virtual mediations and arbitrations provide numerous benefits to counsel and their clients. A virtual mediation can be set up and scheduled quicker than in-person mediations. The costs for travel and lodging are far lower, or non-existent, especially when clients or attorneys are not local. These cost savings apply to arbitrations as well. The virtual setting also allows parties to dedicate more time to the process and, if needed, can allow negotiations to easily continue into the night, without travel concerns such as having to catch a plane or a train.

Another advantage of virtual arbitrations is that they allow for flexibility in accommodating the order of witnesses and international time differences. Additionally, in the context of mediations, the less formal setting allows for the parties to be more relaxed and less confrontational. They're not perfect, but virtual mediations and arbitrations offer substantial benefits.

Maximizing your ADR Experience

There are certain things you should consider to ensure that the virtual mediation or arbitration, whether virtual or in person, is as successful as possible.

For arbitrations, meet and confer with your adversary in advance of the preliminary hearing to explore (i) the discovery schedule, (ii) the timing and need for motion practice, (iii) confidentiality issues, (iv) document production, and (v) discovery needs (including ediscovery). This enables you to seek the arbitrators' assistance on those issues early in the process, at the time of the preliminary hearing. If you are ready to discuss these issues at the preliminary hearing, the arbitrators will be more willing to cooperate and work with you.

For mediations, give real thought as to the timing. Is the case ready to be mediated? Have you conducted the necessary discovery? On the other hand, consider whether a quick mediation prior to discovery is better and can avoid a discovery problem that you and your client know about. Also, determine the best strategic time to conduct a mediation, taking into consideration pending motions (or other issues) that could change the course of the case. In addition, consider anticipated expenses that may be avoided by an early mediation, such as expensive expert reports or depositions.

Be proactive in selecting a mediator who is experienced in the type of case you are involved in, and be ready to confide in the mediator any internal problems that you may need help with, such as managing client expectations or client control.

Meet with your client well in advance of the mediation, explain the mediation process, manage the client's expectations, develop a negotiation strategy, and work together in preparing the

mediation statement to be submitted to the mediator and your adversary. That way, you both will be on the same page upon arrival at the mediation. Also, make sure that the mediation papers and submissions are provided to the mediator well in advance of the mediation date, so they can give them due consideration.

This process will ensure that your client has a realistic expectation not only of what the mediation process will look like, but also of what the potential outcome can be. This avoids disproportionate emotional responses during the negotiations or an unrealistic view of the chance of success. If the mediation will be virtual, explain the virtual process and make sure the client understands that the process, although virtual, is nevertheless a formal one and is due appropriate respect. Advise the client to dress appropriately, show up on time, and be respectful of the mediator and the adversary.

Finally, in advance of the mediation, you should meet and confer with your adversary and discuss a term sheet format that encompasses all the terms that both sides can agree upon prior to the mediation. This will avoid additional angst and time after the case is settled trying to negotiate the terms of the settlement agreement.

During the mediation itself, take careful notes. They will help you negotiate accurately and effectively and will be valuable in the event the mediation needs to be continued on a later date or is unsuccessful. What you learn at the mediation can often be useful later in the context of litigation if the case does not settle. Use the mediation process to learn about the strengths and weaknesses of your client's case, as well as the strengths and weaknesses of your adversary's case. You and your client should keep an open mind and be willing to consider alternatives to settlement other than the usual monetary path. Oftentimes, when parties and litigants are willing to think outside the box, an acceptable solution that was never contemplated arises.

Finally, make sure everyone at the mediation—including the mediator, your client, opposing counsel, and their client—acknowledges and agrees that the mediation is confidential and covered by the mediation privilege. This is of special importance if the mediation needs to be continued and the parties continue to exchange information or negotiate outside of a formal mediation session. In any such subsequent exchanges, the parties should make sure to indicate in all correspondence or communications that they are being conducted pursuant to the mediation privilege and with the mediator's assistance. This will avoid thorny discovery disputes later if the matter is not settled or, even if the matter settles, there are companion cases that continue beyond the settlement of your client's case and discovery regarding the mediation may be requested.

If you give serious considerations to these issues and suggestions, you can maximize your ADR experience and will be able to better serve your clients.

Judge Linares is the former Chief Judge of the United States District Court for the District of New Jersey. He is currently the chair of the Alternative Dispute Resolution practice at McCarter & English, LLP and serves as a FedArb panelist for mediation and arbitration.

KeyCite Yellow Flag - Negative Treatment
Disagreed With by Matsushita Electric Industrial Co., Ltd. v. Mediatek,
Inc., N.D.Cal., March 30, 2007

332 F.3d 976 United States Court of Appeals, Sixth Circuit.

The GOODYEAR TIRE & RUBBER COMPANY, Plaintiff—Appellee,

CHILES POWER SUPPLY, INC., d/b/a

Heatway Systems, Defendant,
Robert S. Julian, et al.,
Petitioners–Appellants.

No. 01–3873. | Argued March 28, 2003. | Decided and Filed June 16, 2003.

Synopsis

Homeowners, who had purchased heating system, intervened in action between manufacturer of heating and snowmelt systems and rubber hose manufacturer to vacate confidentiality order and to permit discovery of any statements made during settlement talks. The United States District Court for the Northern District of Ohio at Akron, Dan A. Polster, J., denied homeowners' motion and homeowners appealed. The Court of Appeals, Suhrheinrich, Circuit Judge, as a matter of first impression, held that: (1) communications made in furtherance of settlement negotiations are privileged and protected from third-party discovery, and (2) even if such communications were not privileged, the settlement negotiations were not relevant to homeowners' action against manufacturers.

Affirmed.

West Headnotes (4)

[1] Federal Courts Depositions and discovery

An appellate court reviews a district court's

decision to deny a motion to vacate a confidentiality order for an abuse of discretion.

5 Cases that cite this headnote

[2] Privileged Communications and Confidentiality—Settlement negotiation privilege; mediation and arbitration

Communications made in furtherance of settlement negotiations are privileged and protected from third-party discovery. Fed.Rules Evid.Rule 408, 28 U.S.C.A.

164 Cases that cite this headnote

[3] Privileged Communications and Confidentiality—Settlement negotiation privilege; mediation and arbitration

Communications made in furtherance of settlement negotiations between manufacturer of heating and snowmelt systems and manufacturer of rubber hose used in such systems were confidential and protected from third-party discovery; there was a strong public policy favoring secret settlement negotiations and an inherent questionability of the truthfulness of any statements made in the context of settlement negotiations. Fed.Rules Evid.Rule 408, 28 U.S.C.A.

108 Cases that cite this headnote

[4] Federal Civil Procedure—Scope
Privileged Communications and
Confidentiality—Settlement negotiation
privilege; mediation and arbitration

Even if negotiation communications were not privileged, statements offering compromise made in settlement negotiations between

manufacturer of snowmelt system and manufacturer of rubber hose used in such systems were not relevant for purposes of discovery in third-party action brought by purchaser of snowmelt system against both manufacturers; there would be no point in introducing the statements as bias evidence given that any executive who would testify would be presumed biased, and any statements made in the course of negotiation were irrelevant for the purpose of impeaching a witness because the offer of compromise did not reflect that the hoses were defective. Fed.Rules Evid.Rule 408, 28 U.S.C.A.

65 Cases that cite this headnote

Attorneys and Law Firms

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William W. Maywhort (argued and briefed), Holland & Hart, Greenwood Village, CO, David L. Black (briefed), Joseph W. Halpern (briefed), Holland & Hart, Denver, CO, for Appellants.

Before BOGGS, SUHRHEINRICH, and SILER, Circuit Judges.

OPINION

SUHRHEINRICH, Circuit Judge.

Appellants Robert S. Julian and fifteen other Colorado homeowners ("Julian") intervened in this action and moved the district court to vacate or modify a confidentiality order. Julian now appeals from the district court's June 29, 2001, denial of his petition to vacate the order which prevents either of the named parties in the case of *Goodyear Tire & Rubber Co. v. Chiles Power Supply Inc.*, 7 F.Supp.2d 954 (N.D.Ohio 1998) ("*Goodyear P*"), from discussing the contents of settlement negotiations. The issue presented on appeal is whether statements made in furtherance of settlement are privileged and protected from third-party discovery. We affirm the decision of the district court and find that they are.

I.

Defendant Chiles Power Supply, Inc. d/b/a Heatway Radiant Floors and Snowmelting ("Heatway") is a national manufacturer of heating and snowmelt systems. Sometime prior to 1995, Heatway purchased a significant amount of "Entran II" rubber hose from Plaintiff—Appellee Goodyear Tire & Rubber Co. ("Goodyear"). Heatway subsequently incorporated the hose into a hydronic radiant heating and snowmelt system, which it then sold to Julian and other homeowners in and around Vail, Colorado.

In 1998, Julian filed suit in federal district court in Colorado against both Goodyear and Heatway after the "Entran II" hose used in Heatway's system failed and caused damage to Julian's property. See Loughridge v. Goodyear Tire & Rubber Co., No. 98–CV–1302 (D.Col. filed June 15, 1998). In that action, Goodyear defends on the ground that the failure of the hose is due to negligent installation and maintenance of the system by the homeowners. Conversely, Heatway argues that the failure is due to a defect in Goodyear's design for the hose. Significantly, Heatway co-founder Daniel Chiles gave a sworn deposition to that effect on October 29, 1997.

Between May 1995 and June 1996, prior to the Colorado lawsuit, Heatway entered into a second contract with Goodyear to obtain Goodyear's newest model rubber hose, presumably for use by Heatway in the same or a similar heating system. *978 However, Heatway refused to pay the \$2,093,000 contract price after the "Entran II" failures in Colorado began to surface. On January 21, 1997, Goodyear filed suit against Heatway in Ohio state court for non-payment on the second contract. Heatway removed the case on the basis of diversity jurisdiction to the United States District Court in Akron, Ohio; and counterclaimed, alleging, *inter alia*, breach of implied

warranty of merchantability regarding the hose that had failed in Colorado. The district court granted Goodyear summary judgment on the contract, but denied summary judgment on Heatway's counterclaims, and scheduled the case for jury trial. *Goodyear I*, 7 F.Supp.2d 954. The district court presided over settlement negotiations for the counterclaims, and admonished that all talks were to remain confidential. The negotiations ultimately proved unsuccessful. On February 4, 2000, the jury returned a verdict for Goodyear on Heatway's counterclaims. Heatway subsequently filed for bankruptcy and did not appeal the decision.

In March 2000, Chiles gave an interview to *Contractor*, a Cleveland, Ohio trade paper. The subsequent article quotes Chiles as saying, in regard to the Ohio litigation:

[T]he day before this trial began, Goodyear made us an offer. They said, we'll do away with this litigation, we'll give you cash, we'll indemnify you against lawsuits from homeowners and all you have to do is sign this paper and agree that the fault is with homeowners and contractors.

Robert P. Mader, *Goodyear Stunner*, Contractor Magazine, Mar. 1, 2000, at 1. On March 14, 2000, after a hearing, the Ohio district court determined that Chiles had improperly disclosed confidential statements made during the course of negotiations, and ordered Chiles not to make any more statements about the settlement discussions. In a written order, the court noted that "the content of settlement discussions are always confidential" and may never be disseminated, even after a case is closed. Moreover, to correct Chiles' misstep, the district court gave Goodyear permission to make a statement "in whatever form or fashion it chooses, in response to the statement of Dan Chiles published in *Contractor* Magazine." On May 1, 2000, *Contractor* published Goodyear's response:

Dan Chiles' statement was false. Heatway knows that where systems using Entran II as a component part had problems, those problems invariably are the result of improper system design, installation, operation or maintenance—not the result of any defect in the hose. Heatway failed to get sufficient information on system installation, operation or maintenance to installers and system users, leading directly to the limited problems that have occurred with systems in the field. Heatway's attacks on the hose are a cynical effort to misdirect installers, users and the public away from the real problems—problems that Heatway itself in large part created. In settlement negotiations, Heatway indicated it was willing to begin telling system installers and users the truth about the real cause of the problems—but only if Goodyear would make payments to Heatway. Goodyear refused to pay Heatway to tell the truth—something Heatway should have done (and should do) regardless.

Goodyear Responds to Chiles' Comments, Contractor Magazine, May 1, 2000, at 23.

The Colorado case, *Loughridge*, was by then, and is now still, pending. On May 1, 2001, having learned about Chiles' accusations, Julian filed a motion with the Colorado district court seeking to compel Chiles to testify about Goodyear's alleged offer to "buy" Chiles' testimony. On May 15, 2001, without addressing whether settlement *979 communications are always confidential, the Colorado court denied the motion to compel. The court simply held that it lacked jurisdiction to overrule another court's order.

On June 25, 2001, pursuant to Fed.R.Civ.P. 24, Julian joined the instant Ohio case and petitioned the Ohio district court to vacate or modify its confidentiality order and to permit discovery of any statements Goodyear made during settlement talks. Julian argued that any communications should be discoverable, notwithstanding the confidentiality order, because the communications are not privileged and are relevant to Julian's Colorado claim. On June 29, the district court denied the motion, and again found that the content of settlement talks are always confidential. The court relied on the prevailing public policy favoring secrecy in negotiations:

Public policy favors the settlement of lawsuits, a policy embodied in Rule 408 of the Federal Rules of Evidence. See, e.g., [Fed.R.Evid. 408, advisory committee note]; Affiliated Mfrs., Inc. v. Aluminum Co. of Am., 56 F.3d 521, 526 (3d Cir.1995) ("[t]he policy behind Rule 408 is to encourage freedom of discussion with regard to compromise"). The integrity of the mediation process depends on the confidentiality of discussions and offers made therein. Because parties are generally entrenched in their adversarial roles, negotiations often include specific, creative recommendations by the Court on how to resolve disputes.

Order Re: Denying Petition to Vacate or Modify Confidentiality Order, at 3. Julian filed a notice of appeal on July 30, 2001, and this matter is timely before this Court under Fed. R.App. P. 4(a)(1)(A).

II.

motion to vacate the confidentiality order for an abuse of discretion. See, e.g., First Tech. Safety Sys. v. Depinet, 11 F.3d 641, 647 (6th Cir.1993). The question of whether communications made in furtherance of settlement negotiations are discoverable by litigants in another action is a matter of first impression in this Circuit.

Rule 408 of the Federal Rules of Evidence provides that "[e]vidence of conduct or statements made in compromise negotiations is ... not admissible." Fed.R.Evid. 408. However, Rule 408 "does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution." *Id.* Julian argues that the proscriptive portions of Fed.R.Evid. 408 apply only to admissibility at trial, and that statements made in furtherance of settlement negotiations are necessarily discoverable because Rule 408 provides for their use in some aspects of trial.

Rule 26(b)(1) of the Federal Rules of Civil Procedure provides that "[p]arties may obtain discovery regarding any matter, *not privileged*, that is relevant to the claim or defense of any party...." Fed.R.Civ.P. 26(b)(1) (emphasis added). Accordingly, the right to discovery is not absolute. We must therefore first address whether settlement communications are privileged.

^[2] In Jaffee v. Redmond, 518 U.S. 1, 116 S.Ct. 1923, 135 L.Ed.2d 337 (1996), the Supreme Court discussed at length the parameters of any recognizable privilege. Rule 501 of the Federal Rules of Evidence authorizes the federal courts to determine new privileges by examining "common law principles ... in the light of reason and experience." Fed.R.Evid. 501; Jaffee, 518 U.S. at 8, 116 S.Ct. 1923; see also Wolfle v. United States, 291 U.S. 7, 12, 54 S.Ct. 279, 78 L.Ed. 617 (1934). However, the Jaffee Court noted that, although Rule 501 references the common law, the rule "did not *980 freeze the law governing the privileges of witnesses in federal trials at a particular point in our history, but rather directed federal courts to 'continue the evolutionary development of testimonial privileges.' " Jaffee, 518 U.S. at 8-9, 116 S.Ct. 1923 (quoting Trammel v. United States, 445 U.S. 40, 47, 100 S.Ct. 906, 63 L.Ed.2d 186 (1980)). To be recognized, the asserted privilege must serve some public interest "transcending the normally predominant principle of utilizing all rational means for ascertaining truth." Trammel, 445 U.S. at 50, 100 S.Ct. 906 (quoting Elkins v. United States, 364 U.S. 206, 234, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960) (Frankfurter, J., dissenting)). Moreover, the proposed privilege must promote a public

interest that is "sufficiently important ... to outweigh the need for probative evidence...." Id. at 51, 100 S.Ct. 906; see also Jaffee, 518 U.S. at 11, 116 S.Ct. 1923 (justifying need for psychotherapist privilege); Upjohn Co. v. United States, 449 U.S. 383, 389, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981) (discussing policy reasons for attorney-client privilege); Trammel, 445 U.S. at 53, 100 S.Ct. 906 (discussing reasons for spousal privilege). Thus, the recognition of a privilege should be judged on a case-by-case basis and weighed against the public interest. Jaffee, 518 U.S. at 8, 116 S.Ct. 1923; see also S.Rep. No. 93–1277, at 13 (1974), reprinted in 1974 U.S.C.C.A.N. 7051, 7059. Viewed "in the light of reason and experience," we believe a settlement privilege serves a sufficiently important public interest, and therefore should be recognized.

[3] There exists a strong public interest in favor of secrecy of matters discussed by parties during settlement negotiations. This is true whether settlement negotiations are done under the auspices of the court or informally between the parties. The ability to negotiate and settle a case without trial fosters a more efficient, more cost-effective, and significantly less burdened judicial system. In order for settlement talks to be effective, parties must feel uninhibited in their communications. Parties are unlikely to propose the types of compromises that most effectively lead to settlement unless they are confident that their proposed solutions cannot be used on cross examination, under the ruse of "impeachment evidence," by some future third party. Parties must be able to abandon their adversarial tendencies to some degree. They must be able to make hypothetical concessions, offer creative quid pro quos, and generally make statements that would otherwise belie their litigation efforts. Without a privilege, parties would more often forego negotiations for the relative formality of trial. Then, the entire negotiation process collapses upon itself, and the judicial efficiency it fosters is lost.

Moreover, confidential settlement communications are a tradition in this country. See, e.g., Palmieri v. New York, 779 F.2d 861, 865 (2d Cir.1985) (citing In re Franklin Nat'l Bank, 92 F.R.D. 468, 472 (E.D.N.Y.1981)) (stating that "[s]ecrecy of settlement terms ... is a well-established American litigation practice"). This Court has always recognized the need for, and the constitutionality of, secrecy in settlement proceedings. In In re the Cincinnati Enquirer, 94 F.3d 198, 199 (6th Cir.1996), and Cincinnati Gas & Elec. Co. v. General Elec. Co., 854 F.2d 900, 903–04 (6th Cir.1988), we denied members of the press access to pre-trial settlement procedures, relying on the historical secrecy in settlement talks. Although not recognizing a privilege as such, we stated that the need

for privacy in settlement talks outweighed any First Amendment right of access to the proceedings. In each case, we addressed whether there exists a right of access to summary jury trials. In *Cincinnati Enquirer*, we found that summary jury trials are essentially settlement proceedings, and that no "tradition of accessibility" exists *981 because "[s]ettlement proceedings are historically closed procedures." *Cincinnati Enquirer*, 94 F.3d at 199. In *Cincinnati Gas & Elec.*, we found likewise, stating that "historically settlement techniques are closed procedures rather than open." *Cincinnati Gas & Elec.*, 854 F.2d at 903–04.

Other courts have gone further and recognized the existence of some sort of formal settlement privilege. In Allen Cty. v. Reilly Indus., Inc., 197 F.R.D. 352 (N.D.Ohio 2000), the defendant filed a motion to compel discovery and sought to obtain the content of settlement negotiations between the plaintiff county and another defendant. The district court denied the request, noting the "well-established privilege relating to settlement discussions." Id. at 353 (citing Cook v. Yellow Freight System, Inc., 132 F.R.D. 548 (E.D.Cal.1990), overruled on other grounds by Jaffee, 518 U.S. 1, 116 S.Ct. 1923, 135 L.Ed.2d 337). Likewise, in Cook, the court denied a third party's motion to compel discovery. The court found that not only are statements made in settlement negotiations privileged, but such statements come with no guarantee of veracity. As the *Cook* court stated:

Settlement negotiations are typically punctuated with numerous instances of puffing and posturing since they are "motivated by a desire for peace rather than from a concession of the merits of the claim." *United States v. Contra Costa County Water Dist.*, 678 F.2d [90, 92 (9th Cir.1982)]. What is stated as fact on the record could very well not be the sort of evidence which the parties would otherwise actually contend to be wholly true. That is, the parties may assume disputed facts to be true for the unique purpose of settlement negotiations. The discovery of these sort of "facts" would be highly misleading if allowed to be used for purposes other than settlement. *See Wyatt v. Security Inn Food & Beverage, Inc.*, 819 F.2d 69, 71 (4th Cir.1987)

Cook, 132 F.R.D. at 554. We agree with the reasoning of these lower courts. The public policy favoring secret negotiations, combined with the inherent questionability of the truthfulness of any statements made therein, leads us to conclude that a settlement privilege should exist, and that the district court did not abuse its discretion in refusing to allow discovery.

The fact that Rule 408 provides for exceptions to inadmissibility does not disprove the concept of a

settlement privilege. Julian has not presented evidence of any case where the Rule 408 exceptions have been used to allow settlement communications into evidence for any purpose. Rather, the exceptions have been used only to admit the occurrence of settlement talks or the settlement agreement itself for "another purpose." See, e.g., Breuer Elec. Mfg. Co. v. Toronado Sys. of Am., Inc., 687 F.2d 182, 185 (7th Cir.1982) (holding existence of settlement negotiations admissible to rebut claim that party had no knowledge of suit); Prudential Ins. Co. of Am. v. Curt Bullock Builders, Inc., 626 F.Supp. 159, 165 (N.D.Ill.1985) (holding occurrence of settlement talks admissible to establish agency relationship); see also Bank Brussels Lambert v. Chase Manhattan Bank, N.A., Nos. 93 Civ. 5298 and 93 Civ. 8270, 1996 WL 71507, at *6 (S.D.N.Y. Feb. 20, 1996) (compelling discovery of terms of agreement only); Small v. Hunt, 152 F.R.D. 509, 511 (E.D.N.C.1994) (allowing discovery of settlement materials to show a "change in circumstances"). The confidentiality order does not prevent Julian from using the existence of Goodyear I settlement talks for "another purpose." For example, if a Goodyear representative claimed he had never met Chiles, Julian could rebut this contention, if it were relevant, by introducing evidence from the settlement talks as proof that each had negotiated with the other in Ohio. Thus, as with *982 other privileges, the relationship itself is not privileged, but only the underlying communications. See Jaffee, 518 U.S. at 15, 116 S.Ct. 1923 (recognizing psychotherapist privilege only for "communications"); Upjohn Co., 449 U.S. at 395-96, 101 S.Ct. 677 (stating that attorney-client privilege extends only to communications); In re Grand Jury Proceedings, 517 F.2d 666, 670–71 (5th Cir.1975) (stating that identity of client and amount of fees is normally not privileged); United States v. Goldfarb, 328 F.2d 280, 282 (6th Cir.1964) (implying that only communications are privileged); Vinson v. Humana, Inc., 190 F.R.D. 624, 627 (M.D.Fla.1999) (stating that information pertaining to substance not communications is outside scope of privilege); Vanderbilt v. Town of Chilmark, 174 F.R.D. 225, 230 (D.Mass.1997) (stating that "[f]acts regarding the very occurrence of psychotherapy, such as the dates of treatment, are not privileged"); Kiermeier v. Woodfield Nissan, Inc., 1999 WL 759485, at *1 (N.D.III. Sept. 8, 1999) (holding identity of psychotherapist and dates of treatment not privileged).

The settlement privilege is also necessary because permitting third-party discovery of negotiation communications would lead to other undesirable results. In general, and in this case, there is no transcript of the settlement talks. And it is unlikely that there exist any written notes reflecting Goodyear's alleged attempt to

bribe Chiles. Thus, in order to obtain or refute any evidence, the parties would have to depose each of the persons present at the negotiations. In this instance, that includes not only the representatives of Heatway and Goodyear, but the parties' lawyers and the district court judge himself.

The district court characterized Chiles' accusations as "out-of-turn comments made to the media shortly after his company lost a high-stakes trial," and therefore lacking in credibility. And although Rule 26 provides that discovery is permissible where it "appears reasonably calculated to lead to the discovery of admissible evidence," Fed.R.Civ.P. 26(b)(1), we have no reason to believe that Chiles' statement, itself of questionable credibility and not useable for any substantive purpose, would lead to the discovery of any evidence that would be admissible.

[4] In any event, even if negotiation communications were not privileged, Julian has not presented any evidence that the alleged statements are relevant to his Colorado case. Julian argues that evidence that might surface regarding Goodyear's alleged bribe attempt can be used to "impeach the credibility and demonstrate the bias or prejudice of those Goodyear witnesses who are put on the stand to 'toe the company line' concerning the supposed cause of the Entran II hose failure." Brief for Appellant, at 14. First, there is no point in introducing bias evidence against a party-opponent. Any Goodyear executive who takes the stand on Goodyear's behalf will be presumed biased in favor of the company position. See, e.g., Davis v. Rowe, No. 91 C 2254, 1993 WL 34867, at *5 (N.D.III. Feb. 10, 1993) (stating that bias by party-opponent in favor of his own cause is assumed by the jury).

Second, Julian contends that he could use Chiles' statement as impeachment evidence against Goodyear executives who claim that the malfunctioning hoses were the fault of the homeowners. Although Julian is correct that questions of admissibility ultimately are decided by the trial court, see Fed.R.Evid. 104(a), it appears that this use would constitute an attempt to circumvent the Rules of Evidence and to utilize the statement for the substantive purpose of proving the exact question at issue, to wit, whether the hoses were defectively designed. Hence, the statement would likely be inadmissible under Rules *983 4031 and 408. At best, the statement could

have been used as impeachment evidence against Chiles had he accepted the alleged bribe and perjured himself in the Colorado case. But, even then, the evidence would merely be cumulative because Chiles' own deposition testimony, as well as the basis of Heatway's counterclaims in the Ohio case, would impeach Chiles' new story.

Moreover, one of the proposed rationales for the enactment of Fed.R.Evid. 408 was that statements made in furtherance of settlement are *never* relevant. The advisory committee note to Rule 408 states that "exclusion may be based on" the fact that "[t]he evidence is irrelevant, since the offer may be motivated by a desire for peace rather than from any concession of weakness of position." *See also Contra Costa County Water Dist.*, 678 F.2d at 92. Even if Goodyear representatives had offered Chiles the alleged deal, any statements made in the course of negotiation are irrelevant for the purpose of impeaching a witness, because the offer of compromise does not reflect that Goodyear's hoses were defective.

In sum, any communications made in furtherance of settlement are privileged. Moreover, any such statement is likely not relevant to Julian's case. Julian has not demonstrated a legitimate, admissible use. Therefore, we find no abuse of discretion in the district court's denial of Julian's motion to vacate or modify the order.

III.

For the foregoing reasons, we **AFFIRM** the decision of the United States District Court for the Northern District of Ohio.

All Citations

332 F.3d 976, 55 Fed.R.Serv.3d 1104, 61 Fed. R. Evid. Serv. 949, 2003 Fed.App. 0197P

Footnotes

Fed.R.Evid. 403 provides that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice...."

| Goodyear Tire & | Rubber Co. v. | Chiles Power Supply, | Inc., 332 F.3d 976 (2003) |
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Distinguished by Peppard v. Peppard, N.J.Super.A.D., July 17, 2020
281 N.J.Super. 39
Superior Court of New Jersey,
Appellate Division.

Elise HARRINGTON, Plaintiff—Respondent, v. Kevin HARRINGTON, Defendant—Appellant.

Argued March 28, 1995.

|
Decided April 20, 1995.

Synopsis

In divorce action, the Superior Court, Chancery Division, Morris County, without holding plenary hearing, found that parties had reached binding oral property settlement agreement, and entered final divorce judgment incorporating alleged agreement, and denied husband's motions to vacate judgment of divorce, and to modify child support and alimony provisions of alleged agreement. Defendant appealed. The Superior Court, Appellate Division, Conley, J.A.D., held that husband was entitled to plenary hearing regarding whether he and wife had reached binding agreement.

Reversed and remanded.

West Headnotes (6)

[1] Child Support Contracts Relating to Support Divorce Requisites and Validity Divorce Unconscionability Divorce Validity of Assent

Matrimonial agreements are enforceable, subject to considerations for equitable property distribution, child support, and alimony, as well as considerations of unconscionability, fraud, or overreaching. R. 4:50–1.

19 Cases that cite this headnote

[2] **Divorce** Form and requisites; signature

Matrimonial agreements need not necessarily be reduced to writing or placed on record to be enforceable; where parties agree upon essential terms of settlement, so that mechanics can be finalized in writing to be thereafter executed, settlement will be enforced notwithstanding fact that writing does not materialize as result of party who later reneges.

34 Cases that cite this headnote

Divorce → Proceedings in general Divorce → Trial or hearing in general

Husband was entitled to plenary hearing regarding whether he and wife had reached binding oral property settlement agreement incident to their divorce, since, at time wife moved to enforce agreement, defendant's counsel certified that agreement had not been reached as to two issues, and, subsequently, at time of application to vacate divorce judgment, counsel certified that no settlement agreement had been reached.

47 Cases that cite this headnote

[4] Child Support Financial condition in general Divorce Change in circumstances in general; materiality

Lepis application to modify child support and alimony may be based upon substantial change in supporting spouse's financial circumstances.

4 Cases that cite this headnote

[5] **Divorce** Grounds in general

Modification of equitable distribution provisions of property settlement agreement requires proof of exceptional and compelling circumstances. R. 4:50–1.

8 Cases that cite this headnote

[6] Judgment Right to relief in general

Ordinarily, to establish right to relief from judgment, it must be shown that enforcement of order or judgment would be unjust, oppressive, or inequitable. R. 4:50–1.

11 Cases that cite this headnote

Attorneys and Law Firms

**457 *41 Noel S. Tonneman, Eatontown for appellant (Wilentz, Goldman & Spitzer, attorneys; David M. Wildstein, of counsel; Mr. Wildstein and Ms. Tonneman, on the brief).

Bruce H. Nagel, Livingston, for respondent (Nagel and Rice, attorneys; Mr. Nagel, of counsel and on the brief).

Before Judges PRESSLER, LANDAU and CONLEY.

Opinion

The opinion of the court was delivered by

CONLEY, J.A.D.

These are two consolidated appeals by defendant arising from the trial judge's factual determination, rendered without a plenary hearing, that on May 3, 1993 the parties had reached a binding oral property settlement agreement. As a consequence of that determination, on October 21,

1993 an order was entered directing that the parties' agreement was "hereby enforced", and various other more specific enforcement orders were entered on November 16, 1993, November 24, 1993, January 3, 1994, March 7, 1994 and March 25, 1994. In addition on January 3, 1994, a final judgment of divorce incorporating the unsigned disputed property *42 settlement agreement was entered. Along the way, the trial judge denied defendant's motion for reconsideration, motion to vacate the judgment of divorce pursuant to R. 4:50-1 and to modify the child support and alimony provisions of the alleged agreement pursuant to Lepis v. Lepis, 83 N.J. 139, 416 A.2d 45 (1980), and motion to stay all provisions of the judgment of divorce that required immediate payments. Defendant appeals these various orders and the entry of that part of the final judgment which incorporates the agreement. We reverse and remand for a plenary hearing to determine first whether there was an agreement. If not, all subsequent orders of enforcement must be vacated and the matter listed for trial. If it is determined that there was a binding agreement, then defendant's R. 4:50-1 and Lepis motion should be reconsidered after the filing of current case information statements and a plenary hearing. In the event of such a hearing, further enforcement of the agreement will be governed by the outcome thereof.1

Married in 1978, a complaint for divorce was filed in May 1991. The parties have two young children and their married life style was apparently fairly comfortable, funded by the defendant's successful advertising partnership. The financial complexity of *43 the parties' circumstances is not insignificant. The matter was listed for trial on May 3, 1993. Prior thereto, the only settlement effort we are advised of is plaintiff's attorney's statement in his initial certification that he had sent a "letter demand ... outlining our settlement position."

**458 On May 3, 1993, both parties, their attorneys, and defendant's accountant were present and engaged in a settlement conference in the cafeteria of the courthouse for a number of hours. It is without question that substantial progress was made and all parties were optimistic. Whether there was anything more than an agreement to draft a proposed property settlement agreement for the parties to read and, if acceptable, sign, is the critical issue. Most assuredly, as far as we can tell, the parties did not report to the judge or place on the record that a binding agreement had been reached.

The conduct of the attorneys subsequent to May 3, 1993 and up to June 15, 1993 when defendant's then attorney advised that defendant had fired him and would not execute the draft agreement, would suggest not. For instance, although, as pointed out by plaintiff's attorney in

his initial certification, defendant's attorney on May 7, 1993 did forward "one-half of certain monies which he had been holding in a trust account ... pursuant to the settlement we had agreed upon," the attorney expressly stated in the May 7, 1993 covering letter "[o]f course, the above payments are made without prejudice and shall be taken into consideration if the Property Settlement Agreement is not finalized by the parties." Moreover, although the parties dispute the materiality of various changes made to the initial proposed written agreement, it is undisputed that the document went through a series of revisions which do not seem insignificant to us. The agreement itself as it went through the revisions was variously referred to as the "proposed" property settlement agreement by defendant's accountant in his May 26, 1993 tax credit letter to defendant's attorney and as the "revised" property settlement agreement in a June 14, 1993 fax from plaintiff's attorney to defendant's attorney.

*44 To be sure, in support of her July 1993 order to show cause seeking enforcement of the agreement, both plaintiff and her attorney filed certifications asserting that an agreement was reached "on virtually every single issue in the case." Counsel's certification outlined only one remaining issue, that concerning the manner of defendant's contribution to a purchase of a new car for plaintiff. As defendant's then attorney's responding certification pointed out, and as the various revisions to the proposed agreement themselves reveal, there were at least two other issues, one relating to termination of alimony in the event plaintiff commenced co-habitation, and one relating to the tax consequences arising from the sale of the marital home.

At the time of plaintiff's order to show cause application, counsel for defendant filed a certification which neither denied nor affirmed the existence of a binding agreement but simply asserted additional outstanding issues. Defendant, however, filed a reply certification in which he adamantly disagreed that the parties had reached a final and binding agreement on May 3. "What was decided was that plaintiff's attorney would draft the proposed settlement agreement documents so that we could see the proposal in print, however, it was never stated that the oral agreement was final and binding ... I understood that the agreement was not binding until signed or put on the record."

If the parties critical disagreement as to the existence of a binding agreement on May 3, 1993 was at all unclear at the time of plaintiff's initial order to show cause, the certification subsequently filed by defendant's former attorney in support of the subsequent R. 4:50–1

application could not be clearer. Because plaintiff has made much of this attorney's initial certification, not so much for what it says but for what it does not say, we set forth verbatim the critical portions of the February 3, 1994 certification:

- 2. There is no question in my mind that we did not reach an agreement on May 3, 1993. We sat in the cafeteria and talked about a number of issues but never reached an agreement. Many issues were discussed primarily between the attorneys, subject to further discussion. At the end of the day, we agreed that we had progressed to the point where Mr. Nagel could draft a proposed document which *45 was to be forwarded to me, subject to my review and the review of my client and Mr. Nagel's client.
- **459 3. All of the discussions regarding equitable distribution which occurred on May 3rd contemplated that Mr. Harrington's business would continue to function as it has in the past. Our discussion relating to support contemplated that Mr. Harrington would continue to receive a yearly bonus which would enable him to pay the plaintiff weekly support.
- 4. Indeed, although everyone wanted to settle the case, we contemplated the possibility that the case might not be settled. Accordingly, when I forwarded certain funds to Mr. Nagel, I specifically provided that in the event that no property settlement agreement was finalized, the funds would be a credit against Mr. Harrington's obligations. (See Exhibit A to the Certification of Kevin Harrington).
- 5. On or about May 19, I received a form of agreement from Mr. Nagel. That agreement contained numerous items that were either not discussed or were inconsistent with my notes. As is my usual custom, I noted those areas with circles, questions marks. (See form of agreement with my notes attached to defendant's certification as Exhibit C).
- 6. The document forwarded by Mr. Nagel to me did not represent a meeting of the minds of the parties.
- (i) It failed to include a provision on termination of alimony in the event of cohabitation. Subsequently, Mr. Nagel wanted the terms to be subject to *Gayet*. These terms were never agreed upon.
- (ii) Mr. Nagel's proposed agreement did not accurately reflect our discussions regarding Mr. Harrington supplying a car to his wife.
- 7. The proposed document contained certain critical items that were never discussed. Specifically, Mr.

Nagel provided for \$500,000.00 in life insurance for Mrs. Harrington. Secondly, Mr. Nagel provided that Mrs. Harrington would receive one-half of all Mr. Harrington's bonuses received prior to December 1, 1993. Mr. Nagel also provided that certain insurance reimbursements would be paid to Mrs. Harrington.

The proposed agreement requires Mr. Harrington to pay for camp clothing. Mr. Nagel inserted what is essentially an anti Lepis clause in the event that Mrs. Harrington should at any time in the future receive a full-time teaching position. All of these clauses are material to any matrimonial settlement agreement. Yet, none were discussed on May 3 and none were agreed to thereafter.

8. Most important when we left court that day I was optimistic about ultimately reaching a settlement but one was not reached that day. None was reached thereafter.

The initial certifications themselves present a factual dispute as to the fundamental issue in this case. But it is perhaps unfortunate that counsel's initial certification was not then more explicit. Nothing is to be served, however, by ignoring the additional certification. At the least, it provided a basis for defendant's *R.* *46 4:50–1(f) motion for, if true, it is fairly evident that continued enforcement of an agreement that did not exist would not be equitable or just. Although defendant's *R.* 4:50–1(f) application was premised in part upon the by then breakup of his business, it also sets forth defendant's continued assertion that there never was a binding agreement.

[1] We have often acknowledged the fundamental principle "that 'settlement of litigation ranks high in [the] public policy' of New Jersey." Lahue v. Pio Costa, 263 N.J.Super. 575, 623 A.2d 775 (App.Div.), certif. denied, 134 N.J. 477, 634 A.2d 524 (1993) (quoting Pascarella v. Bruck, 190 N.J.Super. 118, 125, 462 A.2d 186 (App.Div.), certif. denied, 94 N.J. 600, 468 A.2d 233 (1983)). And see Bistricer v. Bistricer, 231 N.J.Super. 143, 147, 555 A.2d 45 (Ch.Div.1987); Davidson v. Davidson, 194 N.J.Super. 547, 477 A.2d 423 (Ch.Div.1984). Although it has been remarked that matrimonial agreements "which are fair and just, fall within the category of contracts enforceable in equity", Petersen v. Petersen, 85 N.J. 638, 642, 428 A.2d 1301 (1981), the basic contractual nature of such agreements has "long been recognized." Massar v. Massar, 279 N.J.Super. 89, 93, 652 A.2d 219 (App.Div.1995). They are enforceable, **460 subject, however, to *Lepis* and *R*. 4:50–1 considerations as well as of unconscionability, considerations fraud overreaching. Ibid. And see Peskin v. Peskin, 271 N.J.Super. 261, 275-76, 638 A.2d 849 (App.Div.), certif.

denied, 137 N.J. 165, 644 A.2d 613 (1994); Morris v. Morris, 263 N.J.Super. 237, 241–44, 622 A.2d 909 (App.Div.1993).

[2] Moreover, to be enforceable, matrimonial agreements, as any other agreements, need not necessarily be reduced to writing or placed on the record. And we recognize that "[w]here the parties agree upon the essential terms of a settlement, so that the mechanics can be 'fleshed out' in a writing to be thereafter executed, the settlement will be enforced notwithstanding the fact that the writing does not materialize because a party later reneges." Lahue, supra, 263 N.J.Super. at 596, 623 A.2d 775. But the point is, there must be an agreement as was determined, following *47 a plenary hearing, by the trial judge in Lahue. And see Davidson, supra, 194 N.J.Super. at 549-50, 477 A.2d 423 ("[t]hese negotiations resulted in a settlement of the case, the terms of which were agreed upon by plaintiff and, based upon representations made by defendant's former attorney after a number of telephone conversations with defendant, by defendant. Defendant does not now dispute this." (emphasis added)).

We recognize that not every factual dispute that arises in the context of matrimonial proceedings triggers the need for a plenary hearing. *Adler v. Adler*, 229 *N.J.Super*. 496, 500, 552 *A.*2d 182 (App.Div.1988). But we have repeatedly emphasized that trial judges cannot resolve material factual disputes upon conflicting affidavits and certifications. *E.g. Fusco v. Fusco*, 186 *N.J.Super*. 321, 329, 452 *A.*2d 681 (App.Div.1982); *Tancredi v. Tancredi*, 101 *N.J.Super*. 259, 262, 244 *A.*2d 139 (App.Div.1968).

^[3] The most fundamental issue of all here was whether there was an oral agreement on May 3, 1993, with only the mechanics of putting it in writing left for the attorneys. Even without former counsel's February 7, 1994 certification, that issue was clearly factually disputed at the time plaintiff initially moved to enforce by way of an order to show cause.

Accordingly, we remand for a plenary hearing as to that issue. Additionally, we are of the view that even if a binding agreement then existed, defendant is entitled to a plenary hearing on his R. 4:50–1 motion to set aside the equitable distribution portion of the agreement as well as his *Lepis* motion to modify the alimony and child support provisions. As we have said, in addition to contending that there never was an agreement, defendant asserted the breakup of his partnership as a basis for both. The parties factually dispute both the timing and *bona fides* of the breakup and the financial consequences upon defendant.

Most assuredly the trial judge was substantially hampered

by defendant's failure to file an updated case information statement when he filed his *Lepis* motion. *See Gulya v. Gulya*, 251 *N.J.Super.* *48 250, 253, 597 *A.*2d 1098 (App.Div.1991); *R.* 5:5–4(a). But the disputed property settlement agreement itself expressly recognized the underlying financial premise upon which, at the least, the support provisions were derived. Thus, paragraph one states "[t]he parties acknowledge that the monthly payment is based on the fact that the husband draws a salary of \$100,000 and receives a yearly bonus at year end." Moreover, a major portion of the equitable distribution provisions concerned both party's interests in the partnership.

change in the supporting spouse's financial circumstances. *Lepis, supra,* 83 *N.J.* at 157, 416 *A.*2d 45. While not every *Lepis* application requires a plenary hearing, *id.* at 159, 416 *A.*2d 45, the continued viability of defendant's business was a critical element of the parties' agreement. Its dissolution raises disputed issues of fact relevant to the *Lepis* application and presents at least a *prima facie* showing of a substantial changed circumstance entitling defendant to a hearing on the support and alimony provisions.

[5] [6] We reach this same conclusion as to the equitable distribution provisions. Modification of the equitable distribution provisions **461 of the property settlement agreement here is governed by R. 4:50-1(f). Designed to balance the interests of finality of judgments and judicial efficiency against the interest of equity and fairness, Baumann v. Marinaro, 95 N.J. 380, 392, 471 A.2d 395 (1984), relief from judgments pursuant to R. 4:50–1(f) proof of exceptional and compelling requires circumstances. Id. at 393, 471 A.2d 395. Ordinarily, to establish the right to such relief, it must be shown that enforcement of the order or judgment would be unjust, oppressive or inequitable. Ouagliato v. Bodner, 115 N.J.Super. 133, 138, 278 A.2d 500 (App.Div.1971). See Schwartzman v. Schwartzman, 248 N.J.Super. 73, 77, 590 A.2d 246 (App.Div.), certif. denied, 126 N.J. 341, 598 A.2d 897 (1991); Rosen v. Rosen, 225 N.J.Super. 33, 35–36, 541 A.2d 716 (App.Div.), certif. denied, 111 N.J. 649, 546 A.2d 558 (1988).

*49 As we understand it, the validity of defendant's business was a fundamental premise of not only the support provisions, but the equitable distribution provisions as well. It is evident that all of the support, alimony and equitable distribution provisions were part of a "unitary scheme." Cf. Melletz v. Melletz, 271 N.J.Super. 359, 368, 638 A.2d 898 (App.Div.), certif. denied, 137 N.J. 307, 645 A.2d 136 (1994); Connor v. Connor, 254 N.J.Super. 591, 602–03, 604 A.2d 158 (App.Div.1992). Under the circumstances, equity and fairness entitles defendant to at least a plenary hearing on his R. 4:50–1(f) application. But cf. Schwartzman v. Schwartzman, supra, 248 N.J.Super. at 78, 590 A.2d 246 ("[h]ere, the parties anticipated the contingencies of the sale of the business or the defendant's death. The fact that defendant failed to anticipate the failure of the business does not mean that he should not have done so. Clearly, the possibility of the failure of a business over the 20 year period of the payout was a contingency which the defendant could have provided for in the Agreement had he chosen to do so. His lack of foresight is not an exceptional circumstance beyond his control.").

Accordingly, we reverse and remand for further proceedings as we have outlined in our initial paragraph and consistent with this opinion. We do not retain jurisdiction.

All Citations

281 N.J.Super. 39, 656 A.2d 456

Footnotes

We reject plaintiff's contentions in Point I of her brief that defendant's appeal should be dismissed because of alleged fraud and improper conduct in connection with her various enforcement applications and defendant's compliance, or lack thereof. *See D'Arc v. D'Arc*, 175 *N.J.Super*. 598, 601, 421 A.2d 602 (App.Div.), *certif. denied*, 85 *N.J.* 487, 427 A.2d 579 (1980), *cert. denied*, 451 *U.S.* 971, 101 *S.Ct.* 2049, 68 *L.Ed.*2d 350 (1981). Whether defendant knew of the enforcement orders and their obligations and whether his noncompliance was willful is disputed. Moreover, we think other remedies are available to penalize any wilful, improper conduct in connection therewith short of denying defendant the right to pursue this appeal. If, as he claims, there never was an oral agreement, then to preclude his right to appeal that claim because of noncompliance with subsequent enforcement orders would not seem to be entirely just. We point out, in this respect, defendant's assertion that of all the prior orders, there remains only the turnover of \$30,000 that cannot be effectuated because, defendant contends, plaintiff refuses to execute a necessary consent order. *Cf. Sarner v. Sarner*, 45 *N.J.Super.* 216, 222–23, 132 A.2d 28 (App.Div.), *certif. denied*, 25 *N.J.* 103, 135 A.2d 59 (1957).

| Harrington v. Harrington, 281 N.J.Super. 39 (1995) | | |
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148 F.3d 487 United States Court of Appeals, Fifth Circuit.

In re: GRAND JURY SUBPOENA DATED DECEMBER 17, 1996.

No. 97–10507. | July 27, 1998.

Synopsis

Individuals who had participated in a mediation session under an agricultural loan mediation program administered by the state of Texas pursuant to the federal Agricultural Credit Act sought to quash a grand jury subpoena which had been served on the program's custodian of records and which demanded, inter alia, information relating to the session. The United States District for the Northern District of Texas, Robert B. Maloney, J., quashed the subpoena, and the federal government appealed. The Court of Appeals, W. Eugene Davis, Circuit Judge, held that: (1) the individuals had standing to challenge the subpoena; (2) the issue was not moot even though the information had been turned over to the grand jury; and (3) no evidentiary privilege existed against disclosure of the information to the grand jury.

Reversed and remanded.

West Headnotes (9)

[1] Federal Courts Preliminary proceedings; depositions and discovery

Order quashing a grand jury subpoena was a final decision and thus was appealable. 28 U.S.C.A. § 1291.

1 Cases that cite this headnote

[2] Grand Jury Objections and Determination Thereof

Third party has standing to challenge a grand jury subpoena where the third party has a claim of privilege respecting information or materials sought by the subpoena.

3 Cases that cite this headnote

[3] Federal Courts Criminal Justice

Motion to quash a grand jury subpoena is not moot even though documents have been produced in compliance with the subpoena and turned over to the grand jury, because a court can still grant a party some relief by ordering the return or destruction of the documents produced.

4 Cases that cite this headnote

[4] Federal Courts—Statutes, regulations, and ordinances, questions concerning in general

Court of Appeals reviews the district court's statutory interpretation de novo.

[5] Federal Courts Privilege and confidentiality

The Texas Alternative Dispute Resolution Procedures Act did not govern the question of whether the provision of the federal Agricultural Credit Act making state agricultural loan mediation sessions "confidential" created an evidentiary privilege against disclosure to a grand jury of information relating to such a session that had been conducted under the Texas agricultural loan mediation program. Agricultural Credit Act of 1987, § 501(c)(3)(D), 7 U.S.C.A. § 5101(c)(3)(D); V.T.C.A., Civil Practice & Remedies Code §§ 154.001 et seq., 154.073(a, d); Fed.Rules Evid.Rule 501, 28

U.S.C.A.

8 Cases that cite this headnote

[6] Privileged Communications and Confidentiality Privileged Communications and Confidentiality

Federal court determining whether to recognize an evidentiary privilege that does not exist at common law but has been enacted by a state legislature balances the polices behind the privilege against the policies favoring disclosure. Fed.Rules Evid.Rule 501, 28 U.S.C.A.

5 Cases that cite this headnote

[7] Alternative Dispute Resolution Mode and course of proceedings

Dispute over whether the provision of the federal Agricultural Credit Act making state agricultural mediation loan sessions "confidential" created an evidentiary privilege against disclosure to a grand jury of information relating to such a session that had been conducted under the Texas agricultural loan mediation program was not an "issue in controversy" relating to an administrative program; thus, the disclosure procedures of the federal Alternative Dispute Resolution Act (ADRA) did not apply. 5 U.S.C.A. §§ 571(8)(A, B), 572(a), 574(a)(4)(B), (c, e); Agricultural Credit Act of 1987, § 501(c)(3)(D), 7 U.S.C.A. § 5101(c)(3)(D); Fed.Rules Evid.Rule 501, 28 U.S.C.A.

12 Cases that cite this headnote

[8] Grand Jury Privilege

Provision of the federal Agricultural Credit Act making state agricultural loan mediation

sessions "confidential" did not create an evidentiary privilege against disclosure to a grand jury of information relating to such a session that had been conducted under the Texas agricultural loan mediation program, particularly considering that the secret nature of grand jury proceedings would prevent severe compromise of the information's confidentiality unless and until the grand jury found probable cause to believe that a criminal offense had occurred. Agricultural Credit Act of 1987, § 501(c)(3)(D), 7 U.S.C.A. § 5101(c)(3)(D); Fed.Rules Cr.Proc.Rule 6(e), 18 U.S.C.A.; Fed.Rules Evid.Rule 501, 28 U.S.C.A.

13 Cases that cite this headnote

[9] Privileged Communications and Confidentiality—Construction in general

Because evidentiary privileges are not lightly created, a federal court will not infer one where Congress has not clearly manifested an intent to create one. Fed.Rules Evid.Rule 501, 28 U.S.C.A.

2 Cases that cite this headnote

Attorneys and Law Firms

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Wes Sims, Waco, TX, for Texas Farmers Union, Amicus Curiae.

Appeal from the United States District for the Northern District of Texas.

Before KING and DAVIS, Circuit Judges, and VANCE*, District Judge.

Opinion

W. EUGENE DAVIS, Circuit Judge:

The Government appeals an order of the district court quashing a grand jury subpoena served on the custodian of records of the Texas Agricultural Mediation Program ("TAM"), a state agricultural loan mediation program operated and administered by Texas Tech University, to the extent the subpoena sought documents relating to mediation proceedings involving appellees Gervase and Ira Moczygembas and the Poth Land and Cattle Company (collectively, the "Moczygembas"). The district court ruled that such documents are protected from disclosure to the grand jury by a federal mediation privilege. For the reasons set out below, we reverse and remand.

I.

TAM is a state agricultural loan mediation program that receives federal funding under the Agricultural Credit Act of 1987, Pub.L.N. 100-233. The Agricultural Credit Act was passed in response to the growing problem of farm debt in the United States. Among other things, the Act provides for financial assistance to states for the operation and administration of agricultural loan mediation programs to assist in resolving disputes between farmers and their agricultural lenders. See 7 U.S.C. § 5102. To qualify for financial assistance, a state must obtain certification from the Secretary of Agriculture. See 7 U.S.C. § 5101(a). The Secretary will certify a state for qualification if the state has in effect an agricultural loan mediation program that, among other things, "provides that mediation sessions shall be confidential[.]" See 7 U.S.C. $\S 5101(c)(3)(D)$.

The state of Texas has received financial assistance for the operation and administration of TAM since 1988. Its proposal for certification provided that TAM would be operated in accordance with the confidentiality provisions of the Texas Alternative Dispute Resolution Procedures Act (referred to herein as the "Texas ADR statute"), Tex. Civ. Prac. & Rem.Code §§ 154.001 et seq. The Texas ADR statute provides that "a communication relating to the subject matter of any civil or criminal dispute made by

a participant in an alternative dispute resolution procedure ... is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding." See Tex. Civ. Prac. & Rem.Code §§ 154.073(a). However, if this provision "conflicts with other legal requirements for disclosure of communications or materials, the issue of confidentiality may be presented to the court having jurisdiction of the proceedings to determine, in camera, whether the facts, circumstances, and context of the communications or materials sought to be disclosed warrant a protective order of the court or whether the communications or materials are subject to disclosure." § 154.073(d).

In 1995, during the course of an audit of TAM, the Office of Investigator General ("OIG") of the United States Department of Agriculture ("USDA") discovered a number *490 of irregularities and began to suspect criminal wrongdoing. The OIG's suspicions eventually led to a grand jury investigation of TAM. In November 1996, a grand jury subpoena was served on TAM's custodian of records. On December 16, 1996, one day before the return date of the subpoena, the Moczygembas moved to intervene and quash the subpoena on the ground that documents relating to mediation proceedings involving them are protected from disclosure by a mediation privilege.

[1] The district court referred the matter to a magistrate judge. Before a hearing was held, Texas Tech fully complied with the subpoena and turned over documents relating to various mediation proceedings, including those involving the Moczygembas. The magistrate judge subsequently denied the Moczygembas' motion on the ground that federal law does not recognize a mediation privilege. The Moczygembas appealed the magistrate's denial to the district court, which held that the documents were protected from disclosure by a federal mediation privilege and vacated the magistrate's order. On remand, after making further findings as instructed by the district court, the magistrate judge entered an order quashing the subpoena to the extent it sought documents relating to mediation proceedings involving the Moczygembas. The district court denied the Government's appeal of the magistrate's order. The Government appeals that decision, which is final under 28 U.S.C. § 1291. See In re Grand Jury Subpoena for Attorney Representing Criminal Defendant Reves-Requena, 913 F.2d 1118, 1122 (5th Cir.1990) (order quashing grand jury subpoena is final decision under 28 U.S.C. § 1291); In re Grand Jury Subpoena, 646 F.2d 963, 968 (5th Cir.1981) (same).

II.

^[2] Before turning to the merits of this appeal, we quickly dispose of two arguments raised by the Government concerning the district court's exercise of jurisdiction in this case. First, the Government contends that the Moczygembas lacked standing to challenge the grand jury subpoena because the subpoena was not directed at them. nor did they have a possessory interest in the documents requested. This contention is without merit. A third party has standing to challenge a grand jury subpoena where the third party has a claim of privilege respecting information or materials sought by the subpoena. See In re Grand Jury, 111 F.3d 1066, 1073-74 (3d Cir.1997); In re Grand Jury Proceedings, 814 F.2d 61, 66 (1st Cir.1987); In re Subpoenas to Local 478, Int'l Union of Operating Engineers and Benefit Funds, 708 F.2d 65, 66 (2d Cir.1983). Because the Moczygembas raised a claim of privilege respecting the documents at issue, they had standing to challenge the subpoena.

[3] The Government also contends that the Moczygembas' motion to quash the subpoena was moot by the time the district court ruled that the documents were privileged because by then Texas Tech had fully complied with the subpoena and the documents had been turned over to the grand jury. This contention also lacks merit. A motion to quash a grand jury subpoena is not moot even though documents have been produced in compliance with the subpoena and turned over to the grand jury because a court can still grant a party some relief by ordering the return or destruction of the documents produced. See In re Grand Jury Subpoenas Duces Tecum, 78 F.3d 1307, 1310-11 (8th Cir.1996); In re Grand Jury Subpoenas Dated December 7 and 8, 40 F.3d 1096, 1100 (10th Cir.1994); see also Church of Scientology of California v. United States, 506 U.S. 9, 13, 113 S.Ct. 447, 121 L.Ed.2d 313 (1992) (appeal of summons issued by IRS not moot even though tapes sought by summons had been produced because court could render partial relief by ordering the return or destruction of the tapes).

III.

We turn now to the merits of this appeal. The Government argues that the district court erred in recognizing a federal mediation privilege that protects documents relating to mediation proceedings involving the Moczygembas from disclosure to the grand jury. The Moczygembas argue that the district court correctly

recognized and applied a *491 mediation privilege created by Congress. In ruling that the documents are protected from disclosure, the district court relied on three separate statutory schemes: 1) the Agricultural Credit Act; 2) the Texas ADR statute; and 3) the Alternative Dispute Resolution Act ("ADRA"), 5 U.S.C. § 571 et seq., a federal statute that authorizes federal agencies to use alternative dispute resolution proceedings to resolve certain disputes. The court first observed that the Agricultural Credit Act, at 7 U.S.C. § 5101(c)(3)(D), requires state agricultural loan mediation programs to provide that "mediation sessions shall be confidential" in order to qualify for federal funding. Because Texas represented that TAM would be operated in accordance with the confidentiality provisions of the Texas ADR statute and TAM was certified accordingly, the district court concluded that the Texas ADR statute "supplies the federal law of privilege in this case."

As set out above, the Texas ADR statute provides that "a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure ... is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding." See Tex. Civ. Prac. & Rem.Code § 154.073(a). However, if this provision "conflicts with other legal requirements for disclosure of communications or materials, the issue of confidentiality may be presented to the court having jurisdiction of the proceedings to determine, in camera, whether the facts, circumstances, and context of the communications or materials sought to be disclosed warrant a protective order of the court or whether the communications or materials are subject to disclosure." § 154.073(d).

The district court determined that the statute's nondisclosure provision was in conflict with the ADRA, which provides that "information concerning any [mediation] communication" may be disclosed if a court determines that such disclosure is necessary to help establish certain violations of law. See 5 U.S.C. § 574(a)(4)(B). Relying on 5 U.S.C. § 574(e)¹, the court concluded that before a court balances the equities to make such a determination in a particular case, the mediator must make reasonable efforts to notify the parties involved who must be given 15 days to offer to defend a refusal of the mediator to disclose the requested information. The court also concluded, relying on 5 U.S.C. § 574(c)², that materials disclosed in violation of the ADRA's nondisclosure provisions are inadmissible in any proceeding relating to the issues in controversy with respect to which the communication was made. Because the district court was unable to determine from the record

whether the Moczygembas were notified of the service of the grand jury subpoena on TAM but failed to offer to defend a refusal to comply within 15 days of receiving such notice, the court referred the matter to the magistrate judge, instructing the magistrate judge to grant the Moczygembas' motion to quash if TAM had not made reasonable efforts to notify the Moczygembas of the service of the subpoena. The magistrate ultimately determined that TAM had not done so and granted the motion to quash.

[4] [5] [6] We review the district court's statutory interpretation de novo. See Spacek v. Maritime Ass'n, 134 F.3d 283, 288 (5th Cir.1998). We begin by observing that neither the Texas ADR statute nor the ADRA has any application in this case. The district court determined that the Texas ADR statute "supplies the federal law of privilege in this case" because § 5101(c)(3)(D) requires states to provide that mediation sessions shall remain "confidential" and Texas represented *492 that TAM's mediation sessions would be kept confidential in accordance with the Texas ADR statute's confidentiality provisions. However, nothing in $\S 5101(c)(3)(D)$ or the Agricultural Credit Act's other provisions concerning state agricultural loan mediation programs suggests that the meaning of "confidential" is determined by resort to other sources.3

[7] The district court also concluded that the Texas ADR statute's nondisclosure provisions conflicted with the ADRA. The ADRA allows an "agency" to "use a dispute resolution proceeding for the resolution of an issue in controversy that relates to an administrative program." See 5 U.S.C. § 572(a). "Agency" is defined as "each authority of the Government of the United States," subject to certain exclusions. See 5 U.S.C. §§ 551(1), 571(1). An "issue in controversy" means "an issue which is material to a decision concerning an administrative program of an agency, and with which there is disagreement" either "between an agency and persons who would be substantially affected by the decision" or "between persons who would be substantially affected by the decision." See 5 U.S.C. § 571(8)(A), (B). There is no such "issue in controversy" involved in this case.

^[8] Accordingly, we are left to determine whether documents relating to mediation proceedings involving the Moczygembas are privileged and protected from disclosure to the grand jury under the Agricultural Credit Act. To reiterate, 7 U.S.C. § 5101(c)(3)(D) requires a state agricultural loan mediation program to provide that mediation sessions shall be confidential in order to qualify for federal funding. In imposing this requirement, Congress obviously sought to protect information relating

to mediation sessions to some extent. Confidentiality is critical to the mediation process because it promotes the free flow of information that may result in the settlement of a dispute. See, e.g., Kenneth R. Feinberg, Mediation—A Preferred Method of Dispute Resolution, 16 Pepp. L.Rev. S5, S28-29 (1989). In the absence of clear congressional intent to the contrary, however, we do not read § 5101(c)(3)(D) as creating an evidentiary privilege that protects information relating to mediation sessions from disclosure in grand jury proceedings. Section 5101(c)(3)(D) requires only that mediation sessions remain "confidential." "Confidential" does not necessarily mean "privileged." See, e.g., Nguyen Da Yen v. Kissinger, 528 F.2d 1194, 1205 (9th Cir.1975) (concluding that records were confidential but not privileged); State v. Thompson, 54 Wash.2d 100, 338 P.2d 319, 322 (1959) (holding that requirement of confidentiality in statute did not create evidentiary privilege); see also American Civil Liberties Union of Mississippi v. Finch, 638 F.2d 1336, 1342 (5th Cir.1981) (assuming arguendo that confidentiality requirement in statute created evidentiary privilege). In the ADRA, by contrast, Congress explicitly provided that, subject to certain exceptions, a mediator "shall not voluntarily disclose or through discovery or compulsory process be required to disclose any information concerning any dispute resolution communication or any communication provided in confidence" to the mediator. See 5 U.S.C. § 574(a).

*493 [9] Because privileges are not lightly created, United States v. Nixon, 418 U.S. 683, 710, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974), we will not infer one where Congress has not clearly manifested an intent to create one. Thus, we hold that § 5101(c)(3)(D) does not protect documents relating to mediation proceedings involving the Moczygembas from disclosure to the grand jury. We observe, however, that due to the secrecy of grand jury proceedings, see Fed.R.Crim.P. 6(e), the confidentiality of the Moczygembas' mediation sessions will not be severely compromised by the disclosure of information relating to those sessions to the grand jury. Of course, if the grand jury returns an indictment, such information may become public. In returning an indictment, however, a grand jury indicates that it has found probable cause to believe that a criminal offense has occurred. We are satisfied that Congress did not intend that § 5101(c)(3)(D) be used to shield wrongdoing arising out of the state agricultural loan mediation process. Indeed, even the ADRA provides for disclosure where a court determines that disclosure is necessary to "help establish a violation of law ... of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future

cases that their communications will remain confidential." See 5 U.S.C. § 574(a)(4)(B). Thus, if an indictment is returned, any interest the Moczygembas have in the confidentiality of their mediation sessions will have to give way to the public interest in the administration of criminal justice.

district court erred in ruling that documents relating to mediation proceedings involving the Moczygembas are privileged and protected from disclosure to the grand jury. We therefore reverse and remand this matter for further proceedings consistent with this opinion.

REVERSED and REMANDED.

All Citations

148 F.3d 487, 49 Fed. R. Evid. Serv. 1308

IV.

For the reasons set out above, we conclude that the

Footnotes

- * District Judge of the Eastern District of Louisiana, sitting by designation.
- 1 5 U.S.C. § 574(e) provides:

If a demand for disclosure ... is made upon a [mediator] regarding a dispute resolution communication, the [mediator] shall make reasonable efforts to notify the parties ... of the demand. Any party ... who receives such notice and within 15 calendar days does not offer to defend a refusal of the [mediator] to disclose the requested information shall have waived any objection to such disclosure.

- 2 5 U.S.C. § 574(c) provides:
 - Any dispute resolution communication that is disclosed in violation of subsection (a) or (b), shall not be admissible in any proceeding relating to the issues in controversy with respect to which the communication was made.
- The Moczygembas do not argue that the Texas ADR statute in and of itself creates an evidentiary privilege that should be recognized in federal court. Rule 501 of the Federal Rules of Evidence governs the applicability of evidentiary privileges in federal court. Rule 501 provides that "[e]xcept as otherwise required by the Constitution of the United States or provided by an act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority," and except "with respect to an element of a claim or defense as to which State law supplies the rule of decision," the recognition of privileges "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." When a party seeks to assert a privilege that does not exist at common law but is enacted by a state legislature, this court determines whether to recognize the privilege by "balancing the polices behind the privilege against the policies favoring disclosure." American Civil Liberties Union of Mississippi, Inc. v. Finch, 638 F.2d 1336, 1343 (5th Cir.1981). The Moczygembas have not argued that a mediation privilege exists at common law or that recognition of the privilege created by the Texas ADR statute is warranted.
- 4 We reviewed the legislative history of the Act but did not come across any discussion concerning this confidentiality requirement.

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812 A.2d 904
District of Columbia Court of Appeals.

In re Mark M. HAGER, Respondent. A Member of the Bar of the District of Columbia Court of Appeals.

> No. 01–BG–995. | Argued March 28, 2002. | Decided Dec. 19, 2002.

Synopsis

Attorney disciplinary proceeding was brought. The Court of Appeals, Steadman, J., held that: (1) attorney committed ethical violations during representation of clients in potential class action against shampoo manufacturer by entering settlement with under which clients would receive full purchase price refunds and manufacturer would pay \$225,000 to attorney and co-counsel in return for agreeing not to represent current or future clients on similar claims against manufacturer, not to disclose fact and amount of that payment to clients, and not to disclose information attorney had gathered during course of the litigation; (2) one-year suspension was appropriate sanction; and (3) disgorgement of fee could be imposed as a reasonable condition of reinstatement, but issue of disgorgement should be deferred until time of reinstatement.

Suspension ordered.

West Headnotes (27)

[1] Attorneys and Legal Services Disposition and punishment; sanctions

Attorneys and Legal Services Disposition and punishment; sanctions

Recommendation and Report of Board on Professional Responsibility in attorney disciplinary proceeding comes to Court of Appeals with strong presumption in favor of its correctness, and attorney bears a heavy burden to successfully establish claimed exceptions.

1 Cases that cite this headnote

[2] Attorneys and Legal Services Disposition and punishment; sanctions

Court of Appeals is required in attorney disciplinary proceeding to adopt the sanction recommended by Board on Professional Responsibility unless to do so would foster a tendency toward inconsistent dispositions for comparable conduct or would otherwise be unwarranted. Bar Rule 11, § 9(g)(1).

1 Cases that cite this headnote

[3] Attorneys and Legal Services Settlements

Attorney who represented clients in potential class action against manufacturer of head-lice shampoo was required, under bar rule relating to conflicts of interest, to obtain clients' consent before entering into settlement under which clients would receive full refunds and manufacturer would pay attorney and co-counsel \$225,000 in return for their agreement not to disclose fact and amount of that payment to clients and not to represent current or future clients on similar claims against manufacturer; such consent was required even if settlement resulted in full relief for clients. Bar Rule 1.7(b)(4).

[4] Attorneys and Legal Services Defenses, Excuses, and Justifications

Obtaining the best possible outcome for one's clients is never a viable defense to charges of

ethical misconduct; the ends do not justify the means.

[5] Attorneys and Legal Services—Conflicts of Interest

An attorney is entitled to obtain reasonable compensation as a result of negotiations, but this must be done within the boundaries of undivided loyalty to client interests. Bar Rule 1.7(b)(4).

[6] Attorneys and Legal Services—Settlements

Contingent fee agreement under which clients in potential class action against manufacturer of head-lice shampoo agreed that any attorney fees could be paid directly by manufacturer to clients' attorney did not constitute a waiver by clients of conflict of interest arising when attorney and co-counsel entered into settlement under which manufacturer would pay them \$225,000 in expenses and fees in return for their dropping case and agreeing not to disclose fact or amount of that payment to clients. Bar Rules 1.7(b)(4), 1.8(e).

[7] Attorneys and Legal Services Payments from non-clients

While clients are allowed to waive future conflicts of interest such as third-party compensation, for such a waiver to be effective it must contemplate that particular conflict with sufficient clarity so that the client's consent can reasonably be viewed as having been fully informed when it was given. Bar Rules 1.7(b)(4), 1.8(e).

[8] Attorneys and Legal Services Communications, representations,

and disclosures

1.4(a).

Attorney who represented clients in potential class action against shampoo manufacturer violated bar rule requiring that a lawyer keep client reasonably informed of the status of a matter by entering into a settlement under which manufacturer would pay attorney and co-counsel \$225,000 in return for dropping case and agreeing not to disclose to clients the fact and amount of that payment, and also by failing to

disclose to clients that the settlement agreement was not a release of their claims. Bar Rule

[9] Attorneys and Legal Services—Communications, representations, and disclosures

Under disciplinary rule requiring that a lawyer keep a client reasonably informed about the status of a matter, lawyers not only must respond to client inquiries but also must initiate contact to provide information when needed. Bar Rule 1.4(a).

[10] Attorneys and Legal Services Fees

Attorney who represented clients in potential class action against shampoo manufacturer violated bar rule prohibiting conduct involving dishonesty, fraud, deceit, or misrepresentation by entering into a settlement under which manufacturer would pay attorney and co-counsel \$225,000 in fees and expenses in return for their agreement not to disclose to clients the fact and amount of that payment and not to represent current or future clients on related claims against manufacturer; attorney's unsuccessful attempt to persuade manufacturer to disclose fee did not

negate dishonest state of mind. Bar Rule 8.4(c).

[11] Attorneys and Legal Services—Communications, representations, and disclosures

Attorney who represented clients in potential class action against shampoo manufacturer violated bar rule prohibiting conduct involving dishonesty, fraud, deceit, or misrepresentation by failing to inform clients that their claims were not released by a settlement agreement under which manufacturer would pay \$225,000 to attorney and co-counsel in return for their agreement not to represent current or future clients on similar claims against manufacturer and not to disclose fact and amount of settlement to clients. Bar Rule 8.4(c).

[12] Attorneys and Legal Services—Communications, representations, and disclosures Attorneys and Legal Services—Contingency fees and agreements

Attorney's statement to client, that he did not represent her during settlement talks with shampoo manufacturer, violated bar rule prohibiting conduct involving dishonesty, fraud, deceit, or misrepresentation, where first sentence of contingent fee agreement in connection with potential class action against manufacturer stated that client was retaining attorney and co-counsel to perform enumerated legal services, and attorney also sent letter to client clearly stating that he continued to represent her in would-be class action. Bar Rule 8.4(c).

2 Cases that cite this headnote

[13] Attorneys and Legal Services Particular

cases

Attorney received sufficient notice in disciplinary proceeding that hearing committee would consider, as an ethical violation, his failure to disclose to clients in potential class action against shampoo manufacturer that they had a continuing right to sue under settlement agreement that attorney and co-counsel reached with manufacturer; while amended specification of charges did not specifically mention the continuing right to sue, it sufficiently alerted attorney that entire settlement agreement would be subject to scrutiny for ethical violations.

2 Cases that cite this headnote

[14] Attorneys and Legal Services—Conduct as to Client

Attorney who represented clients in potential class action against shampoo manufacturer, and who entered into settlement under which clients would receive full purchase price refunds but would not release their claims, and attorney and co-counsel would be paid \$225,000 in fees and expenses in return for agreeing not to represent present or future clients on similar claims against manufacturer and not to disclose fact and amount of that payment to clients, violated bar rules requiring that a lawyer abide by client's decision regarding an offer of settlement. Bar Rule 1.2(a).

1 Cases that cite this headnote

[15] Attorneys and Legal Services Particular violations and grounds for discipline in general

Attorney who represented clients in potential class action against shampoo manufacturer, and who entered into settlement under which manufacturer would pay attorney and co-counsel \$225,000 in fees and expenses in return for agreeing, in part, not to represent present or future clients on similar claims against manufacturer, violated bar rule prohibiting a

lawyer from entering a settlement that restricts lawyer's right to practice. Bar Rule 5.6(b).

[16] Attorneys and Legal Services Scope of representation; allocation of authority Attorneys and Legal Services Proceeds of recovery or settlement

> Disciplinary rules requiring that a lawyer abide by a client's decision whether to accept an offer of settlement, and prohibiting a lawyer from entering a settlement that includes a restriction of lawyer's right to practice, envelop agreements at the outer fringes of what constitutes a "settlement." Bar Rules 1.2(a), 5.6(b).

2 Cases that cite this headnote

[17] Attorneys and Legal Services—Conduct as to Client

An agreement by lawyer that he will not represent anyone who has a claim against the settling defendant is a restriction of the lawyer's right to practice law in violation of disciplinary rule. Bar Rule 5.6(b).

[18] Attorneys and Legal Services—Settlements, Compromises, and Releases

A client's right to accept or reject a settlement offer is absolute. Bar Rule 1.2(a).

3 Cases that cite this headnote

[19] Attorneys and Legal Services Former clients

Attorney violated disciplinary rule requiring that

a lawyer take timely steps in terminating a representation to protect a client's interests, such as surrendering papers to which client is entitled, by entering settlement with shampoo manufacturer under which attorney and co-counsel would be paid \$225,000 in return for dropping case and agreeing, in part, not to reveal any information obtained as a result of attorney's work in relation to the litigation; fact that no clients were in fact denied their files after execution of settlement was not determinative. Bar Rule 1.16(d).

2 Cases that cite this headnote

[20] Attorneys and Legal Services Maintaining and returning records and files

Disciplinary rule requiring that a lawyer take timely steps in terminating a representation to protect a client's interests unambiguously requires an attorney to surrender a client's file upon termination of the representation. Bar Rule 1.16(d).

2 Cases that cite this headnote

[21] Attorneys and Legal Services Agreements and retainers in general
Attorneys and Legal Services Attorney's Personal Interests; Self-Dealing

Attorney engaged in misconduct by continuing to represent clients in potential class action against shampoo manufacturer while negotiating a secret fee agreement with manufacturer that violated multiple Rules of Professional Conduct. Bar Rule 1.16(a).

[22] Attorneys and Legal Services Definite Suspension

One-year suspension was warranted for attorney

who engaged in professional misconduct, while representing clients in potential class action against shampoo manufacturer, by entering settlement under manufacturer would make full refunds to clients and would pay attorney and co-counsel \$225,000 in fees and expenses if attorney and co-counsel agreed to drop case and not to disclose fact and amount of that payment to clients; while violations were serious and of a type that could cause serious public doubt about integrity of lawyers, there were mitigating circumstances including lack of a prior disciplinary record and attorney's extensive pro bono work. Bar Rules 1.2(a), 1.4(a), 1.7(b)(4), (c), 1.8(e), 1.16(a), (d), 5.6(b), 8.4(c).

4 Cases that cite this headnote

[23] Attorneys and Legal Services—Conditional reinstatement

Disgorgement could be imposed as a reasonable condition of reinstatement on attorney who received one-year suspension in connection with misconduct involving settlement agreement under which shampoo manufacturer paid him and co-counsel \$125,000 in return for dropping potential class action and for not disclosing the fact and amount of that payment to clients. Bar Rule 11, § 3(b).

3 Cases that cite this headnote

[24] Attorneys and Legal Services Compensation from funds or property in attorney's possession

Payment of \$125,000 in fees and expenses that attorney and co-counsel improperly received from shampoo manufacturer in return for dropping potential class action against manufacturer and agreeing not to disclose fact and amount of that payment to clients was not technically subject to restitution in attorney disciplinary proceeding; that fee, if ordered to be paid to clients, would not reimburse them for something of value that they had entrusted to

attorney in course of representation.

1 Cases that cite this headnote

[25] Implied and Constructive Contracts—Restitution

Objective of restitution, namely, preventing unjust enrichment, underlies disgorgement as well.

[26] Attorneys and Legal Services—Persons Entitled

As general rule, where an attorney violates his or her ethical duties to the client, the attorney is not entitled to a fee for his or her services.

[27] Attorneys and Legal Services—Disgorgement or restitution

Appellate court would decline, in imposing one-year suspension on attorney for ethical violations in connection with settlement reached with manufacturer on potential class-action claims, to order disgorgement of \$125,000 payment of fees and expenses that attorney and co-counsel received from manufacturer, but would defer action on disgorgement issue until time of reinstatement; record did not indicate amount of fee that attorney personally received and was inadequate to resolve whether attorney was entitled to reasonable fee for work done prior to his unethical conduct or to determine who the proper recipients of disgorged fee should be. Bar Rule 11, §§ 3(b), 16(d).

2 Cases that cite this headnote

Attorneys and Law Firms

*908 John T. Rooney, Assistant Bar Counsel, with whom Joyce E. Peters, Bar Counsel, and Elizabeth A. Herman, Senior Assistant Bar Counsel, were on the brief, for the Office of Bar Counsel.

Hamilton P. Fox, Washington, DC, III for respondent.

Brian Wolfman, Washington, DC, filed a brief for amicus Public Citizen Litigation Group.

James C. Turner filed a brief for amicus Halt, Inc.

Before STEADMAN, FARRELL and RUIZ, Associate Judges.

Opinion

STEADMAN, Associate J.:

Briefly put, the issue in this bar disciplinary proceeding is whether an attorney may ethically enter into an agreement with an opposing party in which his clients are awarded full purchase price refunds (amid other relief) but where the attorney secretly and without the knowledge of the clients 1) receives (together with his co-counsel) \$225,000 as attorneys fees and expenses, 2) agrees never to represent anyone with related claims against the opposing party, and 3) agrees to keep totally confidential and not to disclose to anyone all information learned during his investigations.

Before us is a unanimous report of the Board on Professional Responsibility ("Board") finding that respondent Mark M. Hager, a member of our bar, committed eight violations of our rules of professional conduct by, *inter alia*, entering into the above agreement. The Board recommends that respondent be suspended from the practice of law for one year. The record supports the Board's conclusions regarding the disciplinary violations, and we adopt the recommended sanction with a qualification concerning reinstatement.

I. Facts

The following statement of facts is adapted from the Hearing Committee's findings as adopted by the Board.² Respondent is a member of the District of Columbia Bar,

admitted on April 28, 1989. He is a tenured professor of law at a local university, and he engages in a part-time legal practice.

In early 1997, Debra Duke and Erika Littlewood, both health care professionals, contacted respondent. They discussed with him pursuing legal action against *909 Warner–Lambert Co. with respect to its head-lice shampoo Nix. According to Duke and Littlewood, Nix was ineffective in eradicating head lice because a Nix-resistant strain of lice had evolved. They had already informed Warner–Lambert of their concerns, but the company had denied that Nix-resistant lice existed, had refused to make labeling changes, and had refused to conduct any scientific studies.

Duke and Littlewood informed respondent that in pursuing their claims their goals would be to protect the public from Nix and to compel Warner-Lambert to change its labeling and advertising. Each woman executed a "Contingent Fee Agreement" with respondent and another attorney, John Traficonte, on or about May 13, 1997 (although Duke viewed respondent as her attorney from February 1997 on). The retainer agreement provided that Traficonte and respondent would "investigate potential bases for a class action suit brought in federal court against the manufacturers and/or suppliers of Nix shampoo, seeking refund of the purchase price, and other damages." It also specified that "one requirement of such a suit [would be] that 100 consumers be joined as class representatives," a condition resulting from respondent's plan to file a federal action under the Magnuson-Moss Warranty Act. See 15 U.S.C § 2310(d)(3)(C) (2000).

Respondent, together with Duke and Littlewood, worked to gather at least 100 claimants. Littlewood created a web site to generate names. She also sent out solicitation letters to pediatricians in Richmond, Virginia. The Roanoke, Virginia CBS affiliate broadcast an interview with Duke, and the *Richmond Times—Dispatch* published an interview with her husband. Names produced by these efforts were forwarded to respondent.

By June 1997, around 50 consumers had become clients and another 40 had expressed interest in joining the class action. Warner–Lambert then contacted Traficonte to begin settlement negotiations. Traficonte conducted the settlement talks alone, but he kept respondent aware of and involved in the negotiations.

In July 1997, respondent told Duke and Littlewood that negotiations with Warner–Lambert had begun. At the end of July, he informed them of an agreement but did not discuss any terms. On July 25, 1997, Littlewood

discharged Traficonte and respondent as her attorneys. She asked for a list of current and potential clients, but Traficonte and respondent refused her. They did, however, send her \$2,500 for her time and effort. On July 26, Traficonte informed Duke that respondent and he were only seeking refunds from Warner–Lambert and not any other forms of relief. After hearing this, Duke agreed that the attorneys could continue to represent her.

On August 8, 1997, Warner–Lambert, Traficonte and respondent entered into a "Settlement Agreement" without the knowledge of Duke, Littlewood, or any of their clients. The key provisions of the agreement may be summarized as follows:

- 1. Traficonte and respondent would not assert any Nix-related claims against Warner-Lambert on behalf of anyone, including their current clients.
- 2. Warner-Lambert would stop asserting Nix was 99% effective. It would add a money-back guarantee on the label. It would also "endeavor to form a panel of scientific experts" to study lice resistance to Nix and "would commit such resources as are reasonably necessary to follow the recommendations of the Panel."
- 3. Warner–Lambert would provide full purchase price refunds to the 90 consumers who had contacted the attorneys. If the total amount of refunds exceeded \$10,000, the attorneys would *910 reimburse the company for the difference.
- 4. Warner-Lambert would pay Traficonte and respondent "\$225,000 for investigating, developing, preparing, advancing and addressing by negotiation with Warner-Lambert" potential claims concerning Nix.
- 5. None of the consumers' claims agains Warner–Lambert would be released by the settlement.
- 6. The attorneys agreed "to maintain in strictest confidence, and to keep totally confidential and not to disclose in any manner (whether orally or in any form of writing) to any person or entity, any and all of the facts, legal theories, names of persons or potential lay or expert witnesses or any other information ... which ... was obtained ... as a result of their work in relation to the Litigation."
- 7. All parties agreed "to maintain in strictest confidence, and to keep totally confidential and not to disclose in any manner the form and content of this Agreement and the obligations set forth hereunder, as well as the existence of the Agreement," except that the

lawyers could inform the 90 consumers of:

- (a) their refund rights;
- (b) the change in the 99% effectiveness claim;
- (c) the future money-back guarantee; and
- (d) the scientific panel.

As the Board noted, "[i]t is undisputed that if Respondent and Mr. Traficonte had waived legal fees, Warner–Lambert would not have insisted on confidentiality and would have agreed to the other terms provided in the Settlement Agreement." Traficonte did at one point during negotiations ask that the fee provision not be kept confidential, but Warner–Lambert refused.

On August 26, Traficonte and respondent sent a letter to the 90 consumers that discussed only the settlement terms that the lawyers were allowed to disclose. It did not mention the fact or amount of attorneys' fees, the continuing viability of the consumers' claims, or the attorneys' promises not to bring any Nix-related suits and not to disseminate any Nix-related information. The letter concluded as follows:

[N]otwithstanding our best efforts, [we] have not assembled 100 consumers willing to agree in writing to function as class representative in a class action regarding [Nix]. Morever, the inherent scientific and legal difficulties in successfully prosecuting such a class action, together with the willingness of Warner–Lambert to make what we consider to be reasonable changes in its marketing of [Nix], have led [us] to the decision to abandon any further efforts in this regard.

Subsequently, Duke received \$700 in refunds from Warner-Lambert. On November 20, 1997, she contacted both attorneys and asked if Warner-Lambert had paid them to abandon the representation. They declined to reply, but respondent did state that he had not been acting as Duke's attorney during the settlement negotiations. Then Traficonte, with respondent's knowledge and approval, sent Duke a letter on December 2. The letter said that the attorneys had no obligation to disclose to Duke any fees received from Warner-Lambert or any other confidential settlement terms. Traficonte reminded Duke that the attorneys had never gathered at least 100 clients, as required by the Contingent Fee Agreement. As a result, they believed that they "did not ever represent [Duke] in claims against Warner-Lambert." Traficonte did add that the settlement had not released any of Duke's *911 claims and that she was free to pursue legal action

against Warner-Lambert.

In response, Duke filed a complaint with Bar Counsel concerning only respondent on December 23, 1997.³ Bar Counsel filed charges that respondent had violated eleven of the District of Columbia Rules of Professional Conduct.⁴ After a two-day hearing with five witnesses,⁵ the Hearing Committee determined that respondent had violated eight rules and proposed a three-year suspension as sanction.⁶ Respondent then filed exceptions to the Hearing Committee Report with the Board. The Board by unanimous vote likewise found that respondent had violated eight ethical rules,⁷ but recommended a one-year sanction. Respondent filed timely exceptions with this court to the Board's Report and Recommendation.

[1] [2] The Board's Report and Recommendation comes to us with a strong presumption in favor of its correctness, and respondent bears a heavy burden to successfully establish claimed exceptions. This court shall "accept the findings of fact made by the Board unless they are unsupported by substantial evidence of record." D.C. Bar R. XI, $\S 9(g)(1)$. Furthermore, under that same provision, "we are to adopt the Board's recommended sanction 'unless to do so would foster a tendency toward inconsistent dispositions for comparable conduct or would otherwise be unwarranted." In re Slattery, 767 A.2d 203, 214 (D.C.2001). The Board is composed both of experienced attorneys versed in the realities of the current practice of law and of carefully selected lay members. Here, that Board was unanimous in finding that respondent committed serious ethical violations, a view also taken by a unanimous Hearing Committee. While this court of course retains ultimate responsibility for the imposition of attorney discipline, we are cognizant of the relationship imposed by the cited Bar Rule between the Board's recommendation now before us and our proper role in addressing respondent's *912 exceptions, to which we now turn.

II. Violations

Respondent contends that Bar Counsel failed to prove by clear and convincing evidence that he violated any Rules of Professional Conduct. We address each ethical violation individually; however, we have grouped them into categories as an aid to understanding. Furthermore, there is a clear interrelationship among the factual underpinnings of the discrete violations, such as the failure to make adequate disclosure to the clients in the face of the conflict of interest.

A. Conflict of Interest Lacking Client Consent

We begin with the Board's finding that respondent violated Rule 1.7(b)(4): "a lawyer shall not represent a client with respect to a matter if: [t]he lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by the lawyer's ... own financial, business, property, or personal interests." While a client may consent to continued representation in such circumstances, such consent is contingent "upon full disclosure of the nature and existence of the possible conflict and the possible adverse consequences of such representation." R. 1.7(c). No claim is made that such consent was obtained here.

The evidence showed that during negotiations Warner–Lambert offered \$225,000 to Traficonte and respondent as long as they promised to keep the fact and amount of payment confidential. If respondent had rejected the confidentiality requirement and had waived his fee instead, his clients still would have received the relief provided by the Settlement Agreement.⁸ Nevertheless, respondent agreed to the secret fee payment.

Respondent faced a classic conflict of interest—his interest in maximizing his fee versus his clients' interest in maximizing the amount paid to them. That it occurred in the midst of secret settlement negotiations meant the conflict was even more pronounced.

Any settlement represents a total value figure that one party is willing to pay to end the controversy. Attorneys' fees, even though they may not be technically deducted from the amount paid to the litigants, represent an integral part of the overall amount that the settling party is willing to pay, and as such, they have a direct effect on the net amount that will ultimately be paid to the litigants.

Bloyed v. General Motors Corp., 881 S.W.2d 422, 435–36 (Tex.Ct.App.1994), aff'd, 916 S.W.2d 949 (Tex.1996). See also Weinberger v. Great Northern Nekoosa Corp., 925 F.2d 518, 524 (1st Cir.1991) ("there is ... a conflict inherent in cases ... where fees are paid by a quondam adversary from its own funds—the danger being that the lawyers might urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red- *913 carpet treatment on fees."). Impermissible conflicts of interest have been identified when far fewer dollars were at stake. See In re Knust, 598 A.2d 434, 437 (D.C.1991) (per curiam) (Appendix, Board Report) (\$17,000): In re James, 452 A.2d 163, 166–67

(D.C.1982) (\$40,000), cert. denied, 460 U.S. 1038, 103 S.Ct. 1429, 75 L.Ed.2d 789 (1983).¹⁰

Nevertheless, this conflict did not, by itself, preclude respondent (through Traficonte) from continuing and concluding the settlement negotiations. For if that were true, plaintiffs' lawyers would find it highly difficult, if not impossible, to engage in any settlement negotiations once the subject of attorney fees had been broached. That clearly is not the case. Rather, what was needed, and what was conspicuously lacking here, was client consent as outlined in Rule 1.7(c). Without such consent, clients would never "have the opportunity to judge and be satisfied" that their attorneys were providing them "wholehearted and zealous representation." As the Board itself noted, "[c]lient review and approval, and court review and approval of class actions settlements, provide a safeguard against attorneys selling their client interests short in order to gain advantage in their fees."

^[3] Given the potential conflict between respondent's interest with respect to his possible fee and his clients' maximal satisfaction, the Board fairly concluded that his "professional judgment on behalf of [his] client[s] ... reasonably [would have been] adversely affected by ... [his] own financial ... interest." Client consent was therefore required.

Respondent defends his conduct by arguing that no ethical violation occurred because there was no conflict of interest in actuality. According to respondent, he obtained full relief for his clients and "cannot be accused of diverting to [himself], as fees, monies that would otherwise have gone to [his] clients." Indeed, respondent asks us to applaud rather than vilify him for obtaining remedies above and beyond what Magnuson–Moss plaintiffs could have received despite the attorneys' not signing up enough clients and not having any scientific evidence on their side. Put another way, respondent's argument appears to be that no conflict exists where an attorney in fact recovers the maximum relief that a client could recover.

Respondent's theory, though, rests on two unsupportable foundations. First, the Board explicitly refused to say that respondent had obtained full relief, and we see nothing in the evidentiary record that would compel us to say otherwise. As the Board observed, "[d]isciplinary proceedings are ill-suited to be mini-trials on the merits of the clients' potential claims."

^[4] More importantly, even if respondent's clients did receive full relief in some objective sense through his actions, such a result is irrelevant in deciding whether

respondent violated Rule 1.7(b)(4), or any other Rule of Professional Conduct. Obtaining the best possible outcome for one's clients is never a viable defense to charges *914 of ethical misconduct; the ends do not justify the means. *1 See In re Fee, 182 Ariz. 597, 898 P.2d 975, 980 (1995); People v. Pautler, 35 P.3d 571, 580 (Colo.Discipl.2001); In re Mines, 523 N.W.2d 424, 427 (S.D.1994) ("A practitioner of the legal profession does not have the liberty to flirt with the idea that the end justifies the means Certainly our Rules of Professional Conduct allow no such flirtation.").

In our own jurisdiction, *In re Shay*, 749 A.2d 142 (D.C.2000) (per curiam), is also enlightening on this point. In *Shay*, the disciplined attorney represented a husband ("J.C.") and wife ("E.Y."). J.C., however, had never divorced his previous wife, a fact he confided in Shay with the understanding that she would not tell E.Y. Shay then drafted wills for J.C. and E.Y. without telling E.Y. about J.C.'s bigamy, because she was afraid that disclosure or even withdrawal from representation would "result in no wills being drawn, which would leave E.Y. and her baby unprotected in the event of J.C.'s death." 756 A.2d 465, 476 (Appendix, Board Report). The Board took note of Shay's laudable intentions but then proclaimed:

The conflict of interest rules do not permit a lawyer to be the judge of whether a ... client should be kept in the dark about information that could compromise the lawyer's goal in pursuing the client's interests. The lawyer is a representative, not a principal, in client decisions and transactions. The lawyer has no right to make judgments about what is best for clients who are not fully informed about the facts and their options.

Id.

^{15]} This is indeed the fundamental fallacy in respondent's position. It is the client, not the attorney, who decides whether full or acceptable relief has been obtained. The conflict of interest rule in the circumstances here is designed to assure that the attorney pursues the client's objectives as the client views them, unaffected by any personal interest of the attorney in the outcome. Of course an attorney is entitled to obtain reasonable compensation as a result of negotiations, but this must be done within the boundaries of undivided loyalty to client interests.

Besides the Rule 1.7(b)(4) violation, the Board also found that respondent violated Rule 1.8(e), *i.e.*, a third party may compensate an attorney only if: 1) the client consents after consultation; 2) there is no interference with the attorney's professional judgment or the attorney-client relationship; and 3) client confidentiality is protected. As the previous discussion makes clear, the fee settlement

interfered with respondent's professional judgment and his relationship with his clients. This was unsurprising, given the problems inherent in a lawyer's accepting payment from an opposing party. See Zucker v. Occidental Petroleum Corp., 192 F.3d 1323, 1327 (9th Cir.1999), cert. denied, 529 U.S. 1066, 120 S.Ct. 1671, 146 L.Ed.2d 481 (2000) ("A client who employs a lawyer to litigate against a third party has a legitimate interest in having his lawyer refrain from taking the third party's money in exchange for throwing the fight."); State ex rel. Nixon v. American Tobacco Co., 34 S.W.3d 122, 135 (Mo.2000) ("The danger is that the lawyer's own interest will prevail over the client's—or to put it another way, that the lawyer might be unduly influenced *915 by an oversized fee to recommend an inadequate settlement for the client."). Rule 1.8(e) protects against just such dangers, yet respondent failed to comply with its mandate.

^[6] Respondent argues that no violation occurred because his clients indeed consented to the third-party fee arrangement. Respondent points to the following in the Contingent Fee Agreement as proof:

I understand that any attorneys' fees for services rendered regarding the Class Action Claims: (a) will be contingent on a recovery from the defendants, (b) shall not exceed equal to the following agreed maximum percentage of the net amount collected by settlement or trial: 40%; and/or (c) will be approved and/or determined by a court; and/or (d) will be paid directly by the defendants to the attorneys and/or paid from the net amount recovered for the entire class. (emphasis added)

[7] As the Board observed, the provision is "not a model of clarity." Its obscurity is fatal to respondent's contention. While clients are allowed to waive future conflicts of interest such as third-party compensation, for such a waiver "to be effective ... [it] must contemplate that particular conflict with sufficient clarity so that the client's consent can reasonably be viewed as having been fully informed when it was given." D.C. Bar Legal Ethics Comm., Opinion 289 (1999) (quoting ABA Comm. on Ethics and Prof'l Responsibility, Formal Opinion 93–372 (1993)); see also D.C. Bar Opinion 309 (2001). We cannot say that the Contingent Fee Agreement outlined "with sufficient clarity" that Warner-Lambert might pay respondent (and his co-counsel) up to \$225,000 and that when it did so, respondent would not disclose to his clients the fact or amount of payment. Therefore, the client consent obtained by respondent was inadequate to waive the conflict of interest here.12

B. Communication with Clients

^[8] The Board found that respondent's failure to inform his clients fully regarding the Settlement Agreement violated two rules of professional conduct. We begin with Rule 1.4(a), which provides in part, "[a] lawyer shall keep a client reasonably informed about the status of a matter."

The evidence showed that respondent did not communicate to his clients many of the critical terms of the Settlement Agreement, including the fee provision, respondent's agreement not to represent any Nix clients against Warner–Lambert, and respondent's agreement not to divulge any information gained during his investigation. Furthermore, the August 26, 1997 letter to his clients did not inform them that the Settlement Agreement was not a release of their claims.

because he failed to disclose the fee arrangement or the non-release of his clients' claims. We agree that nondisclosure of these terms (as well as the other hidden terms) constituted a violation of Rule 1.4(a). Under Rule 1.4(a), lawyers not only must respond to client inquiries but also must initiate contact to provide information when needed. See In re Bernstein, 707 A.2d 371, 376 (D.C.1998); see also R. 1.4 cmt. 2. Because respondent withheld important terms from the Settlement Agreement, his clients became unable "to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued." R. 1.4 cmt. 1.

*916 The Board also found that respondent's communication (and non-communication) with his clients violated Rule 8.4(c), which prohibits "conduct involving dishonesty, fraud, deceit, or misrepresentation." The Board concluded that respondent had acted dishonestly because he had not disclosed the fee arrangement and his clients' continuing right to sue and he had told Duke in November and December 1997 that he did not represent her during the settlement talks with Warner–Lambert.¹³

We have given a broad interpretation to Rule 8.4(c), as recapitulated recently in *In re Arneja*, 790 A.2d 552, 557 (D.C.2002). "[Dishonesty] encompasses conduct evincing 'a lack of honesty, probity, or integrity in principle; [a] lack of fairness and straightforwardness" *In re Shorter*, 570 A.2d 760, 767–68 (D.C.1990) (per curiam) (citation omitted); *accord*, *Slattery*, *supra*, 767 A.2d at 213. *See In re Carlson*, 745 A.2d 257, 258 (D.C.2000) (per curiam) (dishonesty may consist of failure to provide information where there is duty to do so); *In re Jones–Terrell*, 712 A.2d 496, 499–500 (D.C.1998) (violation found despite "lack of evil or corrupt intent");

In re Reback, 487 A.2d 235, 239 (D.C.1985) (per curiam), vacated but adopted and incorporated in relevant part, 513 A.2d 226 (D.C.1986) (en banc) (dishonesty in filing second complaint to replace one dismissed because of negligent inattention.). "Dishonesty" is also the most general term in Rule 8.4(c), "encompass[ing] fraudulent, deceitful, or misrepresentative behavior." In re Wilkins, 649 A.2d 557, 561 (D.C.1994) (per curiam), but also applying to conduct not covered by the latter three terms, which describe "degrees or kinds of active deception or positive falsehood." Shorter, supra, 570 A.2d at 768. Indeed, it has been suggested that sufficiently reckless conduct is enough to sustain a violation of the rule. Jones-Terrell, supra, 712 A.2d at 499.

^[10] We agree that respondent's failure to divulge the fee provision violated Rule 8.4(c). As discussed previously, the significance of a potential defendant's willingness to pay \$225,000 in attorney fees would have been lost on no one, least of all the clients themselves. Respondent was "bound to disclose" this to his clients but declined to do so.

III As for the clients' continuing right to sue, when members of a potential class action learn that the opposing party will provide them refunds *and* their attorneys are dropping their case, it would be only natural for them to wonder if they still have any claims left to pursue. However, respondent declined to assuage their concerns in the August 26, 1997 letter and only informed Duke of her rights after she confronted him three months later.

[12] Furthermore, after having told Duke that he did not represent her during the settlement talks, respondent admitted to the Hearing Committee that he had inaccurately described his relationship with Duke. The very first sentence of the Contingent Fee Agreement states, "I hereby retain attorneys John Traficonte ... and Mark Hager ... to perform the legal services described below." Moreover, as respondent himself noted in his brief to this court, Duke received a July 26, 1997 letter that clearly stated that respondent "continue [s] to represent you in the would-be class action against the seller of head lice shampoo." Substantial evidence in the record therefore supports the Board's conclusion that respondent's statements to Duke violated Rule 8.4(c). (We further *917 note that the Hearing Committee, who had the opportunity to hear and observe Respondent firsthand, specifically found that all of the above conduct "was intentionally designed by Respondent to dupe [his clients] into believing their interests had been served.")

[13] Respondent defends himself against these charges by

arguing that his (unsuccessful) attempt to convince Warner–Lambert to disclose the fee "negates proof of dishonest state of mind, which a violation of Rule 8.4(c) requires." He also contends that he left out information regarding his clients' continuing right to sue because "it [never] even occurred to [him] that his clients would think they had waived their right to sue."¹⁴ The Board was quite unpersuaded by these contentions, and we can hardly conclude the contrary, given all the circumstances presented in this case.¹⁵

Finally, regarding the statements to Duke, respondent argues that they were at worst the result of incorrect legal analysis of a clause in the Contingent Fee Agreement. Respondent in effect argues that he engaged in a "conditional" representation of his clients. However, the Board had before it the July 26, 1997 letter to Duke acknowledging the attorney-client relationship and thus substantial evidence in the record supports its finding.

In sum, we are quite satisfied that the Board was justified in the circumstances of this case in concluding that respondent had violated Rule 8.4(c) as we have defined its scope in our holdings.

C. Proper Conduct During Settlements

The Board found that respondent's participation in the Settlement Agreement violated two rules of professional conduct specific to settlements, Rule 1.2(a), which states in part, "[a] lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter," and Rule 5.6(b), "[a] lawyer shall not participate in offering or making: [a]n agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between parties."

For purposes of these Rules, we focus on the following facets of the Settlement Agreement: 1) respondent agreed not to represent current or future clients in any Nix-related claims against Warner–Lambert: Warner-Lambert agreed that the consumers' claims would not be released; *918 and 3) respondent (and Traficonte) signed the Settlement Agreement in their individual capacities and not on behalf of their clients. Respondent argues that the last two provisions mean that no violations occurred, because the agreement is not a "settlement" within the meaning of Rules 1.2(a) ("settlement of a matter") and 5.6(b) ("settlement of a controversy between parties"). See also R. 5.6(b) cmt. 2 ("[This Rule] prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim

on behalf of a client.").

While at first blush it seems incongruous for respondent to argue that a "Settlement Agreement" is not a settlement, the agreement's particular nature raises a meaningful question as to whether these two rules are implicated. As the Board observed, case law is scarce if nonexistent on this issue. The Board concluded that while the clients did not technically waive their rights to sue in the Settlement Agreement (a long-established form of consideration, see, e.g., 4934, Inc. v. District of Columbia Dep't of Empl. Servs., 605 A.2d 50, 54 (D.C.1992)), they did lose their attorneys, their attorney's work product and the names of potential class members, which the Board believed was close to the equivalent of a release of their claims. It noted that respondent had also failed to divulge the continuing viability of their claims in the August 26, 1997 letter. Consequently, the Board believed that the Rules governing settlement were implicated by respondent's conduct.

[14] [15] We concur with the Board's reasoning. This conclusion is strengthened by the weighty reasons behind Rule 5.6(b) in particular:

First, permitting such agreements restricts the access of the public to lawyers, who by virtue of their background and experience, might be the very best available talent to represent these individuals. Second, the use of such agreements may provide clients with rewards that bear less relationship to the merits of their claims than they do to the desire of the defendant to "buy off" plaintiff's counsel. Third, the offering of such restrictive agreements places the plaintiff's lawyer in a situation where there is conflict between the interests of present clients and those of potential future clients.

ABA Formal Opinion 93-371 (1993).

Given this rationale, we would be reluctant to permit evasion of the strictures of Rule 5.6(b) (or 1.2(a)) by the creation of documents such as the Settlement Agreement, which we reiterate resulted in the clients losing both their lawyers and the work done on their behalf.

We are also persuaded by how other bodies have dealt with scenarios arguably outside the scope of Rule 5.6(b). The Illinois State Bar Association has examined whether a lawyer could agree that an accounting firm would disclose a tax reduction scheme to the lawyer and a client on condition that the lawyer not divulge this information to other clients who would also benefit. The state bar association stated that while such an agreement would not "fall squarely within Rule 5.6 ... [n]onetheless, the restrictions placed on Lawyer's ability to represent other clients similar to Client A in the future without facing a

conflict of interest may go to the spirit of Rule 5.6." Illinois State Bar Association, Advisory Opinion 00–01 (2000).¹⁷

[16] Similarly, the ABA has evaluated whether Model Rule 5.6(b), which speaks of "settlement of a controversy between private parties" (emphasis added), would *919 still apply if one of the parties was a government entity. Despite the explicit language of the rule, the ABA did not hesitate to find it applicable even when the government was a party. "We conclude, then, that the phrase in question is sensibly to be read as merely descriptive rather than prescriptive: i.e., as referring to the circumstances where such a provision, as a condition of settlement, is most likely to be proposed; rather than as limiting the kinds of settlements to which the prohibition is applicable." ABA Formal Opinion 95-394 (1995). Like the Illinois State Bar Association and the ABA, we believe the protections of Rules 1.2(a) and 5.6(b) are sufficiently important to envelop agreements at the outer fringes of what constitutes a "settlement," and we decline to read our Rules "as limiting the kinds of settlements" such that the Settlement Agreement is beyond their reach.

[17] [18] Apart from this threshold inquiry of applicability vel non, the analysis of whether respondent violated these rules is quite straightforward. "[Rule 1.2(a)] is designed to preserve the client's right to accept or reject a settlement offer, and it requires that a client be able to exercise his or her judgment at the time a settlement offer is communicated [A] client's right to accept or reject a settlement offer is absolute" D.C. Bar Opinion 289. Respondent's agreement to terms to be kept secret from his clients and his failure to inform his clients of the terms of the settlement until they were a fait accompli, and even then to withhold several material aspects, resulted in his clients never exercising their right to be aware of and to entertain and evaluate the settlement offer. Moreover, the settlement contained a provision directly contravening Rule 5.6(b). "An agreement by the lawyer that he will not represent anyone who has a claim against the settling defendant is clearly a restriction of the lawyer's right to practice law." D.C. Bar Opinion 35; see also D.C. Bar Opinion 130 ("[I]t is clear that an attorney, absent special circumstances, cannot ethically accept an arrangement restricting ... his future representation of clients").18 We therefore concur with the Board's conclusion that respondent violated Rules 1.2(a) and 5.6(b).19

*920 D. Withdrawal from Representation
We lastly turn to the Board's findings that respondent

violated Rules of Professional Conduct governing an attorney's withdrawal from representation. We first address the Board's conclusion that respondent violated Rule 1.16(d): "In connection with any termination of representation, a lawyer shall take timely steps to the extent reasonably practicable to protect a client's interests, such as ... surrendering papers and property to which the client is entitled"²²⁰

The evidence showed that Littlewood, after she ended her relationship with respondent, requested the names of persons who had agreed to join the class action or had expressed an interest. Respondent refused to provide this information. Soon thereafter, respondent agreed as part of the Settlement Agreement not to reveal any "facts, legal theories, names of persons or potential lay or expert witnesses or any other information ... obtained ... as a result of [his] work in relation to the Litigation." No clients apparently requested any of this information from respondent after the Settlement Agreement was executed.

^[19] [20] We agree with the Board that respondent's conduct violated Rule 1.16(d). "This rule unambiguously requires an attorney to surrender a client's file upon termination of the representation." *Bernstein, supra,* 707 A.2d at 375. Respondent's promise to Warner–Lambert to do exactly the opposite significantly impaired his clients' ability to pursue their claims after the representation ended, thus working the very hardship the Rule is designed to protect against. That no clients were in fact denied their files after respondent executed the Settlement Agreement is not determinative. *See In re Landesberg,* 518 A.2d 96, 101 (D.C.1986) (per curiam) (Appendix, Board Report) ("It is settled law that, while lack of prejudice may affect sanction, it has no bearing on the question of violation.").

Respondent's refusal to disclose the client names to Littlewood presents a greater difficulty. Disclosure of a client's identity falls within the scope of Rule 1.6(a)(1): "a lawyer shall not knowingly reveal a confidence or secret of the lawyer's client." The D.C. Bar Committee on Legal Ethics has held that Rule 1.6(a) applies "whenever a client requests nondisclosure of the fact of representation, or circumstances suggest that such disclosure would embarrass or detrimentally affect any client." D.C. Bar Opinion 124; see also R. 1.6(b) ("[S]ecret' refers to ... information gained in the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing, or would be likely to be detrimental, to the client.").

In rejecting respondent's confidentiality argument, the Board focused only on the clients' failure to request

nondisclosure of their names. "The clients agreed in the Contingent Fee Agreement to be named by the attorneys representatives in litigation Warner-Lambert filed in federal court. The clients had no reason to think that their identities would be secret." While we concur, we believe this reasoning does not address respondent's argument that disclosure would detrimentally affect his other clients because they would not reap the benefits of the (future) Settlement Agreement. As should be *921 clear by now, any argument that relies upon the virtues of the Settlement Agreement and the need to protect its integrity is a dubious one at best. Furthermore, given their expressed interest in pursuing class action litigation against Warner-Lambert, the other clients may very well have wished for Littlewood to contact them and provide them an alternative to respondent's advocacy efforts. Nevertheless, given the tension between Rule 1.6(a) and Rule 1.16(d), the difficulties in determining whether the other clients would have chosen to disclose their names rather than participate in the Settlement Agreement, and the obviousness of the other Rule 1.16(d) violation, we see no need to decide whether multiple violations of this Rule occurred.

^[21] The Board finally determined that respondent violated Rule 1.16(a), which requires that a lawyer withdraw from representation if it will result in violation of the Rules of Professional Conduct. We agree with the Board that respondent violated this Rule by continuing to represent his clients while negotiating a secret fee agreement with Warner–Lambert that violated multiple Rules of Professional Conduct.

III. Sanction

We turn now to the question of sanction. The Board recommended that respondent receive a one-year suspension. "In determining the appropriate sanction, the Board is to review all relevant factors, including 1) the nature of the violation; 2) the mitigating and aggravating circumstances; 3) the need to protect the public, the courts and the legal profession; and 4) the moral fitness of the attorney." *Slattery, supra,* 767 A.2d at 214. Significantly, whatever level of success respondent achieved for his clients "has no bearing on the severity of the discipline to be imposed." *In re Haar,* 698 A.2d 412, 422 (D.C.1997).

As Section II has made clear, respondent's violations were wide-ranging and included conflicts of interests, dishonesty, improper conduct during settlement negotiations, and failure to protect a client's interests once

the representation has ended. In an overall sense, it demonstrated at best an ethical numbness to the integrity of the attorney-client relationship, the very core of the active practice of law. All this "occurred because respondent accorded a higher priority to the collection of his fee than to serving his client or complying with professional standards." *James, supra*, 452 A.2d at 170. As Bar Counsel summed it up to this court:

[Respondent's] misconduct strikes at the heart of the attorney-client relationship, that is, the trust that clients place in their attorneys to pursue their legal interests. The misconduct encompasses precisely the fear clients have that their attorneys will be "bought off" by opposing counsel, or that their attorneys will use the clients' case to surreptitiously profit from the representation.

At least two additional relevant features are present here. First, respondent has not once appeared to indicate any remorse for his actions or acknowledged the nature of his misconduct, at least prior to the authoritative ruling of this court. See Shay, 756 A.2d at 481 (Appendix, Board Report). At every stage of the disciplinary proceedings, he has argued that he did not violate even one Rule of Professional Conduct, a position we find untenable in one with due sensitivity to the bounds of legal ethics. Second, respondent's actions affected an unusually large number of clients. See In re Ryan, 670 A.2d 375, 381 (D.C.1996).

On the other hand, there are some mitigating circumstances that the Board took *922 into account. Respondent has never previously been subject to disciplinary proceedings. *Haar, supra,* 698 A.2d at 422. He has an extensive record of *pro bono* service, and three witnesses testified (and four others submitted affidavits) as to respondent's good character in general. *Id.* Certain ethical violations, such as the Rule 1.2(a) and 5.6(b) violations, are cases of first impression in this jurisdiction (and perhaps nationwide). *Id.*

l²² After engaging in the above analysis, the Board looked to our prior cases of conflict of interest and dishonesty to fashion an appropriate sanction. With regard to the latter, it determined that respondent's conduct was most comparable to two cases involving such behavior, *In re Hutchinson*, 534 A.2d 919 (D.C.1987) (en banc) and *In re Reback*, 513 A.2d 226 (D.C.1986) (en banc).²¹ While the Board noted that these cases have some parallel in the seriousness and deliberateness of the conduct and the potential to undermine public confidence in lawyers, we think the facts of these cases are sufficiently distinct from those here so as not to provide a sufficient guide in themselves. With respect to conflict of interest, "[s]anctions ... have ranged from informal admonitions to

lengthy suspensions." Shay, 756 A.2d at 483 (citing examples). While, as discussed previously, the matter before us involves a significant conflict of interest, the Board noted that such prior instances of multiyear sanctions had encompassed, among additional violations, the taking of client funds, a grave offense not present here. At bottom, this case presents a congeries of violations that are, as the Board characterized, "very serious" and of a type that may cause "serious public doubt about the integrity of lawyers." On the other hand, there are mitigating circumstances here, including lack of a disciplinary record and respondent's extensive pro bono work. While the proposed sanction may well be on the lesser side of the scale,22 we think the recommended one-year suspension falls within the permissible range of sanctions, and we therefore adopt the Board's recommendation as to the length of the suspension.

However, we do not think that adoption of the Board's proposed sanction concludes this matter. *Amicus curiae* Public Citizen argues, while supporting a one-year suspension, that suspension by itself is insufficient "to maintain the integrity of the profession[,] ... protect the public and the courts, [and] ... deter other attorneys from engaging in similar misconduct." *Reback, supra,* 513 A.2d at 231. It asks what message would be sent if this court disciplined respondent but allowed him to profit from his unethical behavior. Public Citizen therefore urges that respondent be required to disgorge his fee.

[23] The Board declined to follow Public Citizen's suggestion, reasoning that "disgorgement is not among the sanctions specified in D.C. [Bar] R. XI, § 3(a)." We think the Board did not take a broad enough view of the full range of possible disciplinary actions under our rules. Public Citizen argues that disgorgement should be imposed as a "reasonable condition" of reinstatement under D.C. Bar R. XI, § 3(b). We are inclined to agree. This court has previously relied upon Section 3(b)'s open-endedness to impose special *923 reinstatement conditions that are well-matched to particular misconduct. See In re Roxborough, 775 A.2d 1063, 1064-65 (D.C.2001) (per curiam) (being supervised by a practice monitor for first year after reinstatement); In re Bernstein, 774 A.2d 309, 318-19 (D.C.2001) (completing a professional responsibility course); In re McConnell, 667 A.2d 94 (D.C.1995) (per curiam) (attending Alcoholics Anonymous meetings and submitting to random drug testing); In re Shorter, 603 A.2d 462, 463 (D.C.1992) (agreeing to monitoring of payment of federal and District of Columbia income taxes). See also D.C. Bar R. XI, § 3(b) (passing a professional responsibility exam may be condition of reinstatement).

l²⁴ l²⁵ l²⁶ Even if restitution as such may not be ordered here,²³ the objective of restitution, preventing unjust enrichment, *see Robertson, supra* note 23, 612 A.2d at 1241, underlies disgorgement as well. *See In re Corriea,* 719 A.2d 1234, 1240 (D.C.1998). Unjust enrichment is no more acceptable simply because a potential defendant and not the clients themselves paid respondent. Furthermore, "[i]t is the general rule ... that where an attorney violates his or her ethical duties to the client, the attorney is not entitled to a fee for his or her services." *Cal Pak Delivery, Inc. v. United Parcel Service, Inc.,* 52 Cal.App.4th 1, 60 Cal.Rptr.2d 207, 215 (1997). It is not a great extension to say that an attorney is not entitled to retain a fee from an opposing party if that payment was the product of multiple ethics violations.

However, several practical problems would present themselves if this court were to order, at this stage of the proceedings, that respondent disgorge his fee. First, the exact amount of the fee respondent personally received is unknown. Also, respondent may be entitled to a reasonable fee for the work he did prior to his unethical conduct. See Image Tech. Serv. v. Eastman Kodak Co.. 136 F.3d 1354, 1358 (9th Cir.1998). If so, this amount would need to be determined. Once the final amount to be disgorged was set, interest might then need to be calculated.24 Then, the proper recipients of the disgorged fee would have to be decided. Should it be the consumers who received refunds, and if so, should both actual and potential clients be included or only the former? Should an alternative recipient, such as the Clients' Security Trust Fund²⁵ or even a charity, be designated?

^[27] These are all potentially relevant questions, and it may be that other issues will be presented as well. Because of the limited view of the Board of its powers, the evidentiary record before us is inadequate to resolve them

at this point. Nor has respondent been afforded the opportunity to address at length the question of appropriate disgorgement. We believe the advisable course of action is to defer final action on the disgorgement issue until the time of reinstatement. See In re Thomas, 740 A.2d 538, 546-47 (D.C.1999), cert. denied *924, 529 U.S. 1021, 120 S.Ct. 1425, 146 L.Ed.2d 316 (2000). When respondent seeks to be reinstated, he will need to provide evidence concerning his plans, if any, to disgorge his fee, if he has not done so already. To provide a mechanism to achieve this end, we condition reinstatement upon proof of rehabilitation under D.C. Bar R. XI, § 16(d), with inquiry thereunder primarily directed to the fee disgorgement issue. Cf. In re Fair, 780 A.2d 1106, 1116 n. 25 (D.C.2001). Indeed, the fact and circumstances of disgorgement may constitute a heretofore missing recognition and acknowledgment by respondent of the ethical violations involved in his conduct, itself an element of rehabilitation.

Accordingly, it is ORDERED that respondent Mark J. Hager be, and he hereby is, suspended from the practice of law in the District of Columbia for a period of one year, with reinstatement conditioned upon compliance with D.C. Bar R. XI, § 16(d) as set forth above. Respondent's attention is called to the requirements of D.C. Bar R. XI, § 14 and the relationship of compliance therewith to eligibility for reinstatement as provided in D.C. Bar R. XI, § 16(c).

All Citations

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Footnotes

- The opposing party directly bears the costs of the refunds up to \$10,000. If the amount of the agreed refunds should exceed that limit, the attorneys would reimburse the opposing party for the difference.
- Respondent challenges several factual findings made by the Hearing Committee and adopted by the Board. We address his challenges to the "ultimate" findings, the Board's conclusion that he violated several rules of professional conduct and its corresponding rejection of his defenses, in Section II. As for his challenges to specific factual findings, we are satisfied that they are either supported by substantial evidence or not relevant to resolving the issues raised in Sections II and III.
- Traficonte was not included because he is not a member of the District of Columbia Bar.
- The charges were Rule 1.2(a) (failure to abide by clients' decisions concerning objectives of representation and/or whether to accept offer of settlement); Rule 1.4(a) (failure to keep clients reasonably informed about status of matter and/or to comply promptly with reasonable requests for information); Rule 1.4(c) (failure to inform clients of settlement offer); Rule 1.6(a)(2) (knowingly using confidence or secret of one or more clients to their disadvantage); Rule 1.7(b)(4) (representing clients in matter where attorney's professional judgment was or reasonably might have been affected by his own interests); Rule 1.8(e) (accepting

compensation from someone other than client without client consent, when there is interference in the lawyer's professional judgment or attorney-client relationship and/or no protection of information related to the representation as required by Rule 1.6); Rule 1.16(a) (failure to withdraw from representation when representation involved violation of Rules of Professional Conduct); Rule 1.16(d) (failure to take steps upon withdrawal of representation to protect clients' interests); Rule 5.6(b) (participating in agreement in which restriction on right to practice was part of settlement of controversy between parties); Rule 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit and/or misrepresentation); and Rule 8.4(d) (engaging in conduct that seriously interfered with administration of justice).

- 5 Four other witnesses submitted affidavits.
- The Hearing Committee found that respondent had violated Rules 1.4(a), 1.4(c), 1.7(b)(4), 1.8(e), 1.16(a), 1.16(d), 5.6(b), and 8.4(c) but not 1.2(a), 1.6(a)(2), and 8.4(d). The proposed three-year sanction posited a Rule 8.4(c) violation based on both dishonesty and deceit or misrepresentation.
- 7 The Board's findings were identical to the Hearing Committee except that the Board found respondent violated Rule 1.2(a) and not 1.4(c).
- The relevant testimony is as follows:

Hearing Committee: I'm correct, am I not, Professor Hager, that you could have waived the fee problem entirely, and that would have taken care of the confidentiality problem?

Respondent: Yes.

Hearing Committee: And you still would have gotten the deal for your clients; you would have gotten the return money guarantee and you would have gotten the scientific panel and the rest [of] it?

Respondent: Yes. It would have been pro bono then.

Hearing Committee: The confidentiality thing results from the fact that you wanted a fee?

Respondent: Yes.

- Because Knust was a reciprocal discipline case from Maryland, we did not directly find a conflict of interest. But we did impose the same discipline as the Maryland court that found Knust violated a conflict-of-interest rule (Md. Disciplinary Rule 5–107(A)(1), which governs third-party compensation). See Attorney Grievance Com. v. Harlan, 320 Md. 571, 578 A.2d 1196, 1197 (Md.1990).
- James involved a specialized conflict-of-interest rule governing business transactions with clients. See 452 A.2d at 167 (discussing Disciplinary Rule 5–104(a), predecessor to Rule 1.8(a)).
- As *amicus curiae* Public Citizen writes, "the ethical rules do not tolerate the kind of on-and-off regime that [respondent] proposes, which make the rules applicable only where the clients are deemed worse off, based on the results of a retrospective, necessarily subjective cost-benefit analysis."
- Respondent also contends that Rule 1.8(e) was not violated because he obtained full relief, an argument we reject for the reasons stated previously.
- 13 The Board also termed part of respondent's conduct as deceitful, a question we need not explore given the finding of dishonesty.
- Respondent argues that he was not on notice that the Hearing Committee would construe his non-disclosure as an ethical violation. However, the Amended Specification of Charges not only charged violations of Rules 1.4(a) and 8.4(c), but also discussed the Settlement Agreement and several of its terms. Although the clients' continuing rights to sue was not specifically mentioned, we believe that Bar Counsel's highlighting the Settlement Agreement sufficiently alerted respondent that the entire Agreement would be subject to scrutiny for ethical violations. See Slattery, supra, 767 A.2d at 208–09; In re Smith, 403 A.2d 296, 302 (D.C.1979) Furthermore, while respondent did not testify on this issue, his counsel did have the opportunity to argue it before the Hearing Committee and respond to its questions.
- The same may be said of respondent's argument that he reluctantly agreed to keep his fee confidential only so he could obtain favorable results for his clients, a variant of his previously rejected "ends justifies the means" defense.
- "I understand that the attorneys have agreed to represent me and assert claims on my behalf only in the event that such a class action suit may be brought and prosecuted. I understand further that one requirement of such a suit is that 100 consumers be

joined as class representatives, and that the attorneys do not now represent 100 such consumers."

- 17 Illinois Rule 5.6 is virtually identical to our Rule 5.6.
- We note that several bar opinions have stated that a defense attorney who proposes a restriction on practice provision as part of a settlement also engages in unethical conduct, even if the offer is rejected. See D.C. Bar Opinion 130; ABA Formal Opinion 93–371.
- We believe it noteworthy that respondent's conduct touched upon several of the ABA Litigation Section's "Ethical Guidelines for Settlement Negotiations," including 3.1.2 ("The decision whether to pursue settlement discussions belongs to the client. A lawyer should not initiate settlement discussions without authorization from the client."); 3.1.3 Committee Notes ("The client must be given full opportunity to assign priorities to various components of a possible settlement package."); 3.1.4 ("A lawyer must keep the client informed about settlement discussions, and must promptly and fairly report settlement offers, except when the client has directed otherwise."); 3.2.1 ("[A] lawyer must not enter into a final settlement agreement unless either (a) all of the agreement's terms unquestionably fall within the scope of [the lawyer's] authority, or (b) the client specifically consents to the agreement."); 4.2.1 ("A lawyer may not propose, negotiate or agree upon a provision of a settlement agreement that precludes one party's lawyer from representing clients in future litigation against another party."); 4.2.2 ("When an attorney's fee is a subject of settlement negotiations, a lawyer may not subordinate the client's interest in a favorable settlement to the lawyer's interest in the fee."); and 4.2.2 Committee Notes ("A lawyer may not forego other favorable settlement terms in exchange for a favorable fee."). See ABA Section of Litigation, Ethical Guidelines for Settlement Negotiations. We recognize, however, that the Guidelines were published well after the events in this case had taken place and thus they do not control our decision regarding respondent's conduct.
- If a client has not paid fees or expenses, an attorney may retain the work product in a client's file as part of a lien. See R. 1.8(i); 1.16(d).
- In *Hutchinson*, the attorney had lied under oath to the Securities and Exchange Commission and received a year's suspension. 534 A.2d at 921. In *Reback*, the attorneys had forged their client's signature on a complaint that was then notarized and filed with the court. 487 A.2d at 237. They were suspended for six months. 513 A.2d at 228.
- HALT, Inc., as *amicus curiae*, argues that respondent should be disbarred.
- Because restitution is "a payment by the respondent attorney reimbursing a former client for the money, interest, or thing of value that the client has paid or entrusted to the lawyer in the course of the representation," *In re Robertson*, 612 A.2d 1236, 1240 (D.C.1992), respondent's fee from Warner–Lambert is not technically subject to restitution.
- ²⁴ "The obligation to pay interest is intertwined with the obligation to make restitution." *In re Huber,* 708 A.2d 259, 260 (D.C.), *cert. denied,* 525 U.S. 982, 119 S.Ct. 445, 142 L.Ed.2d 400 (1998).
- The Clients' Security Trust Fund compensates clients who have been financially harmed by their attorneys' misconduct. See D.C. Bar R. XII.

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640 F.3d 53 United States Court of Appeals, Second Circuit.

In re TELIGENT, INCORPORATED, Debtor,

Savage & Associates, P.C., Plaintiff—Appellant—Cross—Appellee,

> K & L GATES LLP, Appellee–Cross–Appellant, and

Alex Mandl, Defendant–Appellee–Cross Appellee.

Docket Nos. 10–2257–bk (L), 10–2411–bk (XAP).

|
Argued: Jan. 11, 2011.

|
Decided: May 5, 2011.

Synopsis

Background: Law firm moved to lift two protective orders prohibiting disclosure of communications made during mediation. Unsecured claims representative moved to enjoin law firm from raising questions about validity of certain provisions of settlement agreement as defense to malpractice in related action. The bankruptcy court, Bernstein, Chief Judge, 417 B.R. 197, denied those motions. Parties appealed. The United States District Court for the Southern District of New York, P. Kevin Castel, J., 2010 WL 2034509, affirmed. Parties appealed.

Holdings: The Court of Appeals, Pooler, Circuit Judge, held that:

- [1] special or compelling need did not exist for blanket lift of confidentiality provisions in protective orders;
- [2] law firm did not show that "extraordinary circumstances" warranted disclosure;
- [3] firm did not show that its need for mediation

communications outweighed important interest in protecting confidentiality of material; and

[4] firm, as potential debtor of debtor of estate, due to alleged malpractice, could not have been considered "party in interest" with standing to contest validity of settlement agreement when motion to approve that agreement was pending before bankruptcy court.

Affirmed.

West Headnotes (11)

[1] Bankruptcy Conclusions of law; de novo review Bankruptcy Clear error

In an appeal from a district court's review of a decision of a bankruptcy court, the Court of Appeals conducts an independent and plenary review of the bankruptcy court's decision, accepting the bankruptcy court's findings of fact unless they are clearly erroneous and reviewing its conclusions of law de novo.

2 Cases that cite this headnote

[2] Bankruptcy Conclusions of law; de novo review

A bankruptcy court's view of the principles governing who may contest a settlement as a party in interest is reviewed de novo. 11 U.S.C.A. § 1109(b).

1 Cases that cite this headnote

[3] Bankruptcy Discretion

A bankruptcy court's decision to not amend a protective order is reviewed for abuse of

65 Collier Bankr.Cas.2d 1264, 54 Bankr.Ct.Dec. 177, Bankr. L. Rep. P 82,000

discretion.

3 Cases that cite this headnote

the interest in maintaining confidentiality.

19 Cases that cite this headnote

[4] Federal Civil Procedure Protective orders Privileged Communications and Confidentiality Settlement negotiation privilege; mediation and arbitration

Special or compelling need did not exist for blanket lift of confidentiality provisions in protective orders, and thus confidential mediation communications could not be disclosed, where law firm did not submit any evidence that there was special need for disclosure of any specific communication.

4 Cases that cite this headnote

[5] Privileged Communications and Confidentiality Settlement negotiation privilege; mediation and arbitration

Confidentiality is an important feature of the mediation and other alternative dispute resolution processes; promising participants confidentiality in these proceedings promotes the free flow of information that may result in the settlement of a dispute and protecting the integrity of alternative dispute resolution generally.

15 Cases that cite this headnote

[6] Privileged Communications and Confidentiality—Settlement negotiation privilege; mediation and arbitration

A party seeking disclosure of confidential mediation communications must demonstrate (1) a special need for the confidential material, (2) resulting unfairness from a lack of discovery, and (3) that the need for the evidence outweighs

[7] Privileged Communications and Confidentiality—Settlement negotiation privilege; mediation and arbitration

Law firm did not show that "extraordinary circumstances" warranted disclosure, such as resulting unfairness from lack of discovery, and thus confidential mediation communications could not be disclosed, where evidence sought was available through other means, including through responses to interrogatories or depositions.

4 Cases that cite this headnote

[8] Privileged Communications and Confidentiality—Settlement negotiation privilege; mediation and arbitration

Law firm did not show that its need for mediation communications outweighed important interest in protecting confidentiality of material, and thus confidential mediation communications could not be disclosed, where law firm did not submit any evidence that there was special need for disclosure of any specific communication.

14 Cases that cite this headnote

[9] Federal Civil Procedure Protective orders Privileged Communications and Confidentiality Settlement negotiation privilege; mediation and arbitration

Confidentiality provisions of protective orders entered in the context of mediation are entitled to a presumption against modification.

4 Cases that cite this headnote

[10] Bankruptcy Reorganization cases; right to be heard

Bankruptcy Judicial authority or approval

Law firm, as potential debtor of debtor of estate, due to alleged malpractice, could not have been considered "party in interest" with standing to contest validity of settlement agreement when motion to approve that agreement was pending before bankruptcy court, since firm had too remote an interest in settlement agreement in that settlement did not require firm to pay any money to estate or to estate's debtor; therefore, law firm was not estopped from asserting defense challenging validity of any provision of settlement agreement in connection with related malpractice action currently pending against law firm. 11 U.S.C.A. § 1109(b); Federal Rule of Bankruptcy Procedure 9019, 11 U.S.C.A.

6 Cases that cite this headnote

[11] Bankruptcy Reorganization cases; right to be heard

Whether someone is a party in interest must be read against the purposes of Chapter 11, which are to preserve going concerns and maximize property available to satisfy creditors. 11 U.S.C.A. § 1109(b).

4 Cases that cite this headnote

Attorneys and Law Firms

*54 Denise Savage, Savage & Associates, P.C., Croton on Hudson, NY, for Plaintiff-Appellant-Cross-Appellee Savage & Associates, P.C.

Luba Shur (Michael S. Sundermeyer, Mark S. Levinstein, on the brief), Williams & Connolly LLP, Washington,

DC, for Appellee–Cross–Appellant K & L Gates LLP.

*55 Andrew C. Hall, Hall, Lamb and Hall, P.A., Miami, FL, for Defendant-Appellee-Cross-Appellee Alex Mandl.

Before: POOLER, WESLEY, and CHIN, Circuit Judges.

Opinion

POOLER, Circuit Judge.

Appeal and cross-appeal from an order of the United States District Court for the Southern District of New York (Castel, J.) affirming the order of the bankruptcy court (Bernstein, C.B.J.), which denied K & L Gates LLP's ("K & L Gates") motion to lift two protective orders prohibiting disclosure of communications made during a mediation, and Savage & Associates, P.C.'s cross-motion to enjoin K & L Gates from raising questions about the validity of certain provisions of a settlement agreement as a defense to malpractice in a related action.

With respect to the cross-appeal, the protective orders are silent as to when their confidentiality restrictions may be lifted; therefore, disclosure would have been warranted only if the party seeking disclosure had demonstrated (1) a special need for the confidential material it sought; (2) resulting unfairness from a lack of discovery; and (3) that the need for the evidence outweighed the interest in maintaining confidentiality. K & L Gates failed to make the requisite showing, and accordingly, we conclude there was no error in the denial of the law firm's motion.

With respect to the lead appeal, because K & L Gates was, at most, a potential debtor of a debtor of the estate, it could not have been considered a "party in interest" with standing to contest the validity of the settlement agreement when the motion to approve that agreement was pending before the bankruptcy court. There was, therefore, no error in the holding that K & L Gates is not barred from asserting a defense challenging the validity of any provision of the settlement agreement in connection with the related malpractice action currently pending against the law firm. Accordingly, we affirm the order of the district court in its entirety.

BACKGROUND

65 Collier Bankr.Cas.2d 1264, 54 Bankr.Ct.Dec. 177, Bankr. L. Rep. P 82,000

Since the issues are narrow, we recite only as much of the factual background as is necessary to understand the decision.

When Teligent, Inc. ("Teligent") hired Alex Mandl as its CEO in 1996, the company extended Mandl a \$15 million loan. The loan was to be due and payable immediately if Mandl resigned his employment without "good reason," but would be automatically forgiven if Teligent terminated Mandl's employment other than for "cause."

Mandl retained the law firm K & L Gates LLP around April 2001 in connection with his potential departure from Teligent. At that time, \$12 million was outstanding on the loan. K & L Gates drafted a severance agreement for Mandl that, according to the law firm, "reflect[ed] that Teligent had terminated Mandl other than for Cause effective as of April 27, 2001, thus triggering automatic loan forgiveness."

Less than a month after the parties ratified the severance agreement, Teligent filed for bankruptcy under Chapter 11. Cross–Appellee Savage & Associates, P.C. ("Savage & Associates") was appointed by the bankruptcy court to be the Unsecured Claims Estate Representative. In discharging its duties pursuant to this role, Savage & Associates filed approximately 1,000 adversary proceedings. These adversary proceedings included an action against Mandl, brought under Sections 548 and 550 of Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 548, 550, to recover the balance of the loan. Mandl again retained *56 K & L Gates to represent him in connection with this matter.

The bankruptcy court held a one-day trial after which it concluded that Mandl had resigned before Teligent terminated his employment, and therefore, Mandl was liable for the balance of the loan. *See In re Teligent, Inc.*, 380 B.R. 324, 333–36 (Bankr.S.D.N.Y.2008). That finding was not appealed.

Shortly after the bankruptcy court issued its decision relating to the loan, Mandl retained Greenberg Traurig, LLP ("Greenberg Traurig") as new counsel. Greenberg Traurig then filed a number of motions, including a motion for relief from the judgment based in part on a claim of newly discovered evidence. Around the same time, Savage and Associates commenced a new lawsuit in the Eastern District of Virginia against Mandl, naming as defendants Mandl's wife, Susan Mandl, and ASM Investments LLC ("ASM"), an entity associated with Mandl, and alleging that Mandl had fraudulently transferred certain property through ASM to his wife in order to shelter his assets from creditors.

All parties to the action in Virginia participated in a voluntary mediation in attempt to resolve both the motions before the bankruptcy court as well as the Virginia Action. Greenberg Traurig invited K & L Gates to participate in the mediation, to address Mandl's claim that K & L Gates committed malpractice in the course of representing him during his termination from Teligent and in the resulting adversary proceeding. K & L Gates declined to participate.

In setting up a framework for the mediation, the parties agreed to be bound by the terms of the protective orders routinely employed by the Bankruptcy Court in the Southern District of New York in the context of court-ordered mediation (the "Protective Orders"). The Protective Orders imposed limitations, inter alia, on the disclosure of information relating to the mediation. However, the Protective Orders provided no guidance on when, or if, a party might be entitled to release confidential information connected to the mediation.

Although formal mediation did not result in a settlement, the parties thereafter reached an agreement. In exchange for dismissal of the action in Virginia, Mandl agreed to pay the estate \$6.005 million and to commence a malpractice suit against K & L Gates. The terms of the agreement also required Mandl to remit to the estate 50% of the net value of any malpractice recovery. The bankruptcy court approved the settlement pursuant to a motion under Federal Rule of Bankruptcy Procedure 9019. The approval of the settlement is not before us on appeal.

On May 30, 2008, and as required by the settlement, Mandl filed a malpractice action against K & L Gates in the Superior Court of the District of Columbia. During discovery, K & L Gates sought documents relating to "the negotiations leading up to the Settlement Agreement, including all mediation and settlement communications[.]" K & L Gates argued that the discovery was "critical to issues such as causation, mitigation, and damages." In response to K & L Gates's request, Mandl produced certain documents.

When Savage and Associates learned that Mandl had disclosed confidential mediation communications, Denise Savage, the firm's principal, contacted Mandl, insisting that he withhold all documents relating to the settlement agreement. Denise Savage also demanded that K & L Gates destroy or return any such documents in its possession. Both parties complied with these requests.

*57 K & L Gates then filed a motion with the bankruptcy

court, seeking to lift the confidentiality provisions of the Protective Orders. The bankruptcy court denied the motion, see In re Teligent, Inc., 417 B.R. 197 (Bankr.S.D.N.Y.2009), reasoning, among other things, that K & L Gates had not shown a need for all mediation communications, though the law firm had sought discovery of the entire universe of documents. Id. at 207. The bankruptcy court also noted that its conclusion was "not intended to foreclose K & L's right to argue before the DC court that a specific communication is not covered by the confidentiality provisions of the [Protective] Orders (e.g., it was not made 'during the mediation process'), or that the court should nevertheless order disclosure of a specific communication under applicable law." *Id.* at 209. The bankruptcy court's denial of K & L Gates's motion to lift the confidentiality provisions of the Protective Orders is the subject of the cross-appeal before us.

Savage & Associates opposed the motion to lift the Protective Orders before the bankruptcy court and cross-moved for injunctive relief prohibiting K & L Gates from asserting any defense in the District of Columbia action relating to the mediation of the action filed in Virginia. Specifically, Savage & Associates sought to enjoin K & L Gates from raising as a defense to malpractice that certain provisions in the settlement agreement between Mandl and Savage were invalid. The bankruptcy court denied Savage & Associates' motion for injunctive relief, see In re Teligent, Inc., 417 B.R. 197, 210 (Bankr.S.D.N.Y.2009), and the district court affirmed, see In re Teligent Servs., Inc., No. 09 Civ. 09674, 2010 WL 2034509 (S.D.N.Y. May 13, 2010). These orders are the subject of the lead appeal before us.

DISCUSSION

^[1] [2] [3] In an appeal from a district court's review of a decision of a bankruptcy court, we conduct an independent and plenary review of the bankruptcy court's decision, accepting the bankruptcy court's findings of fact unless they are clearly erroneous and reviewing its conclusions of law de novo. *Evans v. Ottimo*, 469 F.3d 278, 281 (2d Cir.2006). Further, we review de novo the bankruptcy court's view of the principles governing who may contest a settlement as a party in interest under Section 1109(b), *In re Refco Inc.*, 505 F.3d 109, 116 (2d Cir.2007), and we review for abuse of discretion the bankruptcy court's decision not to amend a protective order, *cf. SEC v. TheStreet.Com*, 273 F.3d 222, 228 (2d

Cir.2001) (Fed.R.Civ.P. 26(c) protective order).

I. The Cross-Appeal

^[4] In this case, the bankruptcy court denied K & L Gates's motion to lift the confidentiality provisions of the Protective Orders based on the court's conclusion that K & L Gates failed to demonstrate a compelling need for the discovery, failed to show that the information was not otherwise available, and failed to establish that the need for the evidence was outweighed by the public interest in maintaining confidentiality. *See generally In re Teligent*, 417 B.R. 197 (Bankr.S.D.N.Y.2009). The district court affirmed these conclusions. *See In re Teligent Servs.*, *Inc.*, No. 09 Civ. 09674, 2010 WL 2034509 (S.D.N.Y. May 13, 2010). There was no error in this conclusion.

[5] Confidentiality is an important feature of the mediation and other alternative dispute resolution processes. participants confidentiality Promising in proceedings "promotes the free flow of information that may result in the settlement of a dispute," In re Grand Jury Subpoena *58 Dated Dec. 17, 1996, 148 F.3d 487, 492 (5th Cir.1998), and protecting the integrity of alternative dispute resolution generally, see e.g., In re Cntv. of Los Angeles, 223 F.3d 990, 993 (9th Cir.2000); Clark v. Stapleton Corp., 957 F.2d 745, 746 (10th Cir.1992) (per curiam); Sheldone v. Pa. Tpk. Comm'n, 104 F.Supp.2d 511, 517 (W.D.Pa.2000); Fields-D'Arpino v. Rest. Assocs., Inc., 39 F.Supp.2d 412, 417 (S.D.N.Y.1999); Folb v. Motion Picture Indus. Pension & Plans. 16 F.Supp.2d 1164. (C.D.Cal.1998), aff'd 216 F.3d 1082 (9th Cir.2000); Bernard v. Galen Grp., Inc., 901 F.Supp. 778, 784 (S.D.N.Y.1995). We vigorously confidentiality provisions of our own alternative dispute resolution, the Civil Appeals Management Plan ("CAMP"), because we believe that confidentiality is "essential" to CAMP's vitality and effectiveness. Lake Utopia Paper Ltd. v. Connelly Containers, Inc., 608 F.2d 928, 930 (2d Cir.1979); see also Calka v. Kucker Kraus & Bruh, 167 F.3d 144, 146 (2d Cir.1999) (per curiam); 2d Cir. app. D, R. 4 (prohibiting parties in CAMP conferences from advising "unauthorized third parties of discussions or action taken at the conference").

^[6] A party seeking disclosure of confidential mediation communications must demonstrate (1) a special need for the confidential material, (2) resulting unfairness from a lack of discovery, and (3) that the need for the evidence outweighs the interest in maintaining confidentiality. *Accord Iridium India Telecom Ltd. v. Motorola, Inc.*, 165

Fed.Appx. 878, 880 (2d Cir.2005) (summary order) (movant must show "a compelling need or extraordinary circumstances necessary to modify [a] protective order"); see also In re Anonymous, 283 F.3d 627, 636–37 (4th Cir.2002); cf. TheStreet.Com, 273 F.3d at 229 ("Where there has been reasonable reliance by a party or deponent, a District Court should not modify a protective order granted under Rule 26(c) absent a showing of improvidence in the grant of [the] order or some extraordinary circumstances or compelling need" (alteration in original, internal quotation marks omitted)); Martindell v. Int'l Tel. & Tel. Corp., 594 F.2d 291, 296 (2d Cir.1979) (same). All three factors are necessary to warrant disclosure of otherwise non-discoverable documents.

We draw this standard from the sources relied upon by the learned bankruptcy court, which include the Uniform Mediation Act ("UMA"), the Administrative Dispute Resolution Act of 1996 ("ADRA 1996"), 5 U.S.C. §§ 571 et seq., and the Administrative Dispute Resolution Act of 1998 ("ADRA 1998"), 28 U.S.C. §§ 651 et seq.2 Each of these recognizes the importance of maintaining the confidentiality of mediation communications provides for disclosure in only limited circumstances. *59 For example, ADRA 1996, which applies to federal administrative agency alternative dispute resolution, prohibits disclosure of confidential mediation communications unless the party seeking disclosure demonstrates exceptional circumstances, such as when non-disclosure would result in a manifest injustice, help establish a violation of law, or prevent harm to the public health or safety. 5 U.S.C. § 574(b)-(c). Relatedly, under the UMA, the party seeking disclosure of confidential mediation communications must demonstrate that the evidence is not otherwise available and that the need for the communications substantially outweighs the interest in protecting confidentiality. UMA § 6(b).

The standards for disclosure under the UMA and the ADRAs are also consistent with the standard governing modification of protective orders entered under Federal Rule of Civil Procedure 26(c). As we explained in FDIC v. Ernst & Ernst, 677 F.2d 230 (2d Cir.1982) (per curiam), once a protective order has been entered and relied upon, "it can only be modified if an 'extraordinary circumstance' or 'compelling need' warrants the requested modification." Id. at 232 (quoting Martindell, 594 F.2d at 296). In SEC v. TheStreet.Com, 273 F.3d 222 (2d Cir.2001), we further refined this principle, explaining that there is a "strong presumption against the modification of a protective order," and orders should not be modified "absent a showing of improvidence in the grant of the order or some extraordinary circumstance or

compelling need." *Id.* at 229 (internal quotation marks, alteration, and citations omitted).

Here, as the bankruptcy court observed, K & L Gates has sought a blanket lift of the confidentiality provisions in the Protective Orders. *In re Teligent*, 417 B.R. at 207. However, K & L Gates failed to demonstrate a special or compelling need for *all* mediation communications. *Cf. TheStreet.Com*, 273 F.3d at 229. Indeed, the law firm failed to submit any evidence to support its argument that there was a special need for disclosure of any specific communication. There was, therefore, no error in the bankruptcy court's conclusion that K & L Gates failed to satisfy prong one of the standard governing disclosure of confidential mediation communications.

¹⁷¹ Likewise, the bankruptcy court committed no error in holding that K & L Gates failed to satisfy prong two of the test. As the bankruptcy court explained, the law firm failed to demonstrate a resulting unfairness from a lack of discovery, because the evidence sought by K & L Gates was available through other means, including through responses to interrogatories or depositions. *See In re Teligent*, 417 B.R. at 208. Accordingly, the law firm failed to show that "extraordinary circumstances" warrant disclosure. *Cf. TheStreet.Com*, 273 F.3d at 229.

[8] [9] Finally, because K & L Gates failed to demonstrate a special need for the mediation communications, the law firm did not satisfy prong three of the test, which requires a party seeking disclosure of confidential material to show that its need outweighs the important interest in protecting the confidentiality of the material. As we explained in the context of litigation in TheStreet.Com, if "protective orders have no presumptive entitlement to remain in force, parties would resort less often to the judicial system for fear that such orders would be readily set aside in the future." *Id.* at 229–30. It follows that similar concerns arise in the context of mediation. Were courts to cavalierly set aside confidentiality restrictions on disclosure of communications made in the context of mediation, parties might be less frank and forthcoming during the mediation *60 process or might even limit their use of mediation altogether. These concerns counsel in favor of a presumption against modification of the confidentiality provisions of protective orders entered in the context of mediation. Accordingly, we conclude that there was no error in the denial of K & L Gates's motion to lift the confidentiality provisions of the Protective Orders in this case.

II. The Lead Appeal

[10] Appellant argues principally that K & L Gates should be enjoined from raising, as a defense in the malpractice action in D.C. Superior Court, any arguments relating to the validity of the provisions of the settlement agreement because K & L Gates did not raise its challenge to the provisions of the settlement agreement when the agreement's approval was pending before the bankruptcy court. Insofar as this argument is premised on Savage & Associates's mistaken conclusion that K & L Gates had standing to challenge the approval of the settlement agreement, we disagree. As the bankruptcy court concluded, K & L Gates could not have appeared before the bankruptcy court to challenge the settlement agreement because K & L Gates lacked both Article III and prudential standing to object to the order, and was not a "party in interest" under 11 U.S.C. § 1109(b). 417 B.R. at 210.3

Section 1109 provides that "[a] party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter." See 11 U.S.C. § 1109. Beyond this non-exhaustive list, the term "party in interest" is not further defined in the statute. In re Comcoach Corp., 698 F.2d 571, 573 (2d Cir.1983). "The general theory behind the section is that anyone holding a direct financial stake in the outcome of the case should have an opportunity ... to participate in the adjudication of any issue that may ultimately shape the disposition of his or her interest." Alan Resnick & Henry J. Sommer, Collier on Bankruptcy ¶ 1109.01 (16th ed. 2011); accord FutureSource LLC v. Reuters Ltd., 312 F.3d 281, 284 (7th Cir.2002); In re Alpex Computer Corp., 71 F.3d 353, 357 (10th Cir.1995); In re Hutchinson, 5 F.3d 750, 756 (4th Cir.1993). However, courts have long recognized that the meaning of the term "must be determined on an 'ad hoc' basis," and the categories mentioned in Section 1109 are "not meant to exclude other types of interested parties from the purview of that section." In re Johns-Manville Corp., 36 B.R. 743, 747, 748 (Bankr.S.D.N.Y.1984), aff'd, 52 B.R. 940 (S.D.N.Y.1985); accord In re Martin Paint Stores, 207 B.R. 57, 61 (S.D.N.Y.1997) ("The term 'party in interest' is broadly interpreted, but not infinitely expansive."); see also In re Ionosphere Clubs, Inc., 101 B.R. 844, 849 (Bankr.S.D.N.Y.1989) (Section 1109(b) is not exclusive in its listing of parties in interest, but "if a party is not affected by the reorganization process it should not be considered a party in interest").

Although parties in interest typically have a financial stake in the outcome of the litigation, under certain

limited circumstances, courts have recognized that a party with a legal (as opposed to financial) interest may appear. See, e.g., In re Mailman Steam Carpet Cleaning Corp., 196 F.3d 1, 5 (1st Cir.1999) (individual creditor *61 may maintain adversary proceeding against trustee for alleged breach of duty); In re Brady, 101 F.3d 1165, 1170–71 (6th Cir.1996) (trustee acts as a party in interest in seeking extension of time to object to dischargeability of a debt on behalf of creditors); In re Co Petro Mktg. Grp., Inc., 680 F.2d 566, 572 (9th Cir.1982) (regulatory agency with supervisory responsibilities over the debtor's business or financial affairs); In re Overview Equities, Inc., 240 B.R. 683, 686–87 (Bankr.E.D.N.Y.1999) (party with legal interest in property, rather than claim, found to be a party in interest).

[11] Whether or not someone is a party in interest must be read against the purposes of Chapter 11, which are to "preserv[e] going concerns and maximiz [e] property available to satisfy creditors," Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship, 526 U.S. 434, 453, 119 S.Ct. 1411, 143 L.Ed.2d 607 (1999) (citation omitted). Thus, any construction of the term "party in interest" must be mindful of the fact that Chapter 11 is structured the way that it is because Congress believed that "creditors and equity security holders are very often better judges of the debtor's economic viability and their own economic self-interest than courts, trustees, or [governmental agencies such as] the SEC," id. at 458 n. 28, 119 S.Ct. 1411, and that is why Chapter 11 allows the intervention of third parties in limited circumstances, such as in the case of parties in interest. Although "party in interest" must be interpreted in terms of the specific provision in which it appears, see In re Refco Inc., 505 F.3d at 116 n. 9 (2d Cir.2007) (noting that "party in interest" may have different meanings in different portions of the bankruptcy code), other rights afforded "parties in interest" throughout the bankruptcy code are instructive. These include: (1) the right to request the appointment of a trustee or examiner under Section 1104(a) and (b); (2) the right to request termination of a trustee's appointment under Section 1105; (3) the right to request conversion of a chapter 11 case to a case under an alternate chapter pursuant to Section 1112(b); (4) the right to file a plan under Section 1121(c); (5) the right to object to confirmation of a plan under Section 1128(b); and (6) the right to request a revocation of an order of confirmation under Section 1144.

There is no question in this case that K & L Gates had too remote an interest in the settlement agreement to have been considered a party in interest for the purposes of being heard before the bankruptcy court on the agreement's approval. As the bankruptcy court succinctly

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explained, the law firm "was not a creditor of Teligent; it was merely a potential debtor of Teligent's debtor (i.e., Mandl). As such, it had no financial stake in the outcome of the bankruptcy case. Further, it had no stake in the outcome of the 9019 Motion [because] the Settlement did not require K & L to pay any money to the Teligent estate or to Mandl." In re Teligent, 417 B.R. at 210. We find no error in these conclusions. And because K & L Gates lacked standing to challenge the settlement agreement when it was pending before the bankruptcy court, the law firm is not estopped from asserting a defense in the malpractice action that relates to the validity of the settlement agreement. See Marvel Characters, Inc. v. Simon, 310 F.3d 280, 288-89 (2d Cir.2002) (collateral estoppel applies only where (1) the identical issue was raised in a prior proceeding; (2) the issue was actually litigated and decided; (3) the party had a full and fair opportunity to litigate the issue; and (4) the resolution of the issue was necessary to support a valid and final judgment on the merits).

*62 We have considered Appellant and Cross–Appellant's remaining contentions and find them to be without merit for substantially the reasons stated by the bankruptcy and district courts.

CONCLUSION

For the reasons stated herein, we AFFIRM the order of the district court.

All Citations

640 F.3d 53, 65 Collier Bankr.Cas.2d 1264, 54 Bankr.Ct.Dec. 177, Bankr. L. Rep. P 82,000

Footnotes

- ADRA 1996 directs district courts to maintain and make available to litigants alternative dispute resolution programs. See 28 U.S.C. § 651(b). Although ADRA 1996 left the particulars of those programs to the local rules of each court, see id., it did require courts to "provide for the confidentiality of the alternative dispute resolution processes and ... prohibit disclosure of confidential dispute resolution communications," id. § 652(d).
- ADRA 1998 provides the authority for the bankruptcy court's Court Annexed Alternative Dispute Resolution Program, through Local Rule 9019–1 and a series of general orders. See 28 U.S.C. § 651(b); Bankr.S.D.N.Y. R. 9019–1; In re Adoption of Procedures Governing Mediation, General Order M–390 Amending and reinstating M143 and M2–11 (Bankr.S.D.N.Y. Dec. 1, 2009); see also In re Expansion of General Order M–143 to Include the Use of Early Neutral Evaluation and Mediation/Voluntary Arbitration, General Order M–211, Amended General Order M–143 (Bankr.S.D.N.Y. Oct. 20, 1999).
- Because we agree that K & L Gates was not a "party in interest," we do not reach the constitutional or prudential questions.

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177 N.J. 564 Supreme Court of New Jersey.

In the Matter of Karel L. ZARUBA, an Attorney at Law (Attorney No. 003931977).

Oct. 1, 2003.

ORDER

The Disciplinary Review Board having filed with the Court its decision in DRB 03-098, concluding that **KAREL L. ZARUBA** of **NAPLES**, **FLORIDA**, who was admitted to the bar of this State in 1977, should be suspended from the practice of law for a period of one year, for violating *RPC* 5.6(b) (offering or making an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between

private parties) and *RPC* 8.4(a) (violating or attempting to violate the Rules of Professional Conduct; knowingly assisting or inducing another to do so, or doing so through the acts of another), and good cause appearing;

*318 It is ORDERED that KAREL L. ZARUBA is suspended from the practice of law for a period of one year and until the further Order of the Court, effective immediately; and it is further

ORDERED that respondent be restrained and enjoined from practicing law during the period of suspension and that respondent comply with *Rule* 1:20-20; and it is further

ORDERED that the entire record of this matter be made a permanent part of respondent's file as an attorney at law of this State; and it is further

ORDERED that respondent reimburse the Disciplinary Oversight Committee for appropriate administrative costs incurred in the prosecution of this matter.

All Citations

177 N.J. 564, 832 A.2d 317 (Mem)

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Scheinman Scholars Daniela Antona^{a1}

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MED-ARB: ACHOICEBETWEENSCYLLAANDCHARYBDIS

How "alternative" to litigation can alternative dispute resolution processes (ADR) be? Should the parties' autonomy be restricted in some cases, especially when it might affect their own interests? Do the purported benefits of ADR--mainly confidentiality, efficiency--outweigh the benefits of a due process, including independence and impartiality of the decision-maker? Can parties' autonomy to submit to, and customize ADR, irrevocably waive all such guarantees?

The significant liberty granted to parties to tailor their ADR to their initial expectations,³ may give rise to unforeseen contingencies. A typical example of such highly customized ADR is "escalation clauses" in contracts,⁴ which "provide that, in the event of a dispute between the parties, dispute resolution is to proceed through a sequence of 'multi-step levels' of dispute resolution process." A common escalation clause is the Med-Arb one.

*102 Led by the influence of Asian ADR techniques, which combine mediation and arbitration,⁶ the Med-Arb clause provides that the same neutral "first serves as a mediator. If mediation fails to produce an agreement, he or she then assumes the role of a binding arbitrator." Therefore, the same neutral is vested with two different functions. As a mediator, he or she tries to have the parties reach a settlement and to this end gets closer to both of them to better understand their positions and their interests. Next, he or she acts as an arbitrator, who, like a judge, remains distant towards the parties. Note that impartiality is expected from the neutral at both stages⁸ which means, that he shall not have pre-judged the case. However, can a Med-Arb really stay impartial, after having served as a mediator? While mediating, the neutral might meet privately and separately with each party (caucus)⁹ and gain confidential information.

Thus, the obvious problem: how can we expect a neutral, who by his role of mediator gained access to confidential information from both parties, to remain impartial in case the mediation is unsuccessful and he becomes their arbitrator? Will he be able to "keep a secret from himself" and not develop, because of such information, any bias detrimental to due process?

It is tempting to respond that the Med-Arb is simply the result of the expression of the parties' agreement, and that, as such, could not be challenged by the same parties who freely chose it as ADR. But if the parties are not assisted by counsel, is it really an "informed choice" as the widespread ethical standards require it to be? Do parties have, when drafting their agreement, a full and complete understanding of the problems that they might encounter *103 in keeping the same mediator in the subsequent (binding) arbitration? Furthermore, isn't impartiality a core ingredient of due process, which the parties' themselves should not be able to waive, regardless of the framework of an ADR? (1.)

These grounds, even by themselves may, be considered sufficient enough to discourage use of the Med-Arb process with the same person. But then, how could we explain the success that it is currently experiencing?¹² Med-Arb clearly has some advantages,¹³ the first of which is the reduced cost and time in having the same neutral serving at both stages. So, there are reasons for Med-Arb's popularity. However, its structural defects shall be addressed in order to avoid the very purposes of Med-Arb--celerity, maximized efficiency,¹⁴ cost-reduction--from being neutralized (2.).

1. MED-ARB--ADVANTAGES AND DISADVANTAGES OF KEEPING THE SAME NEUTRAL

1.1. Benefits of Med-Arb

Med-Arb is generally understood as a mediation followed by arbitration, before the same person. However, besides such "classic" Med-Arb, there are other versions of Med-Arb, such as Med-Arb with two different neutrals, one as a mediator, the other as an arbitrator (*co-Med-Arb*), or when the neutral starts serving as an arbitrator and then either upon his own initiative or upon request of the parties, is asked to serve as a mediator (*AR-Med*). In classic Med-Arb and in AR-Med, the neutral is asked to wear two similar, albeit not identical, hats. Therefore, in the present analysis, we shall refer to Med-Arb to designate any case where the same person serves as both a mediator and an arbitrator, in connection with the same dispute.

There are several reasons that explain the success of Med-Arb: the obvious cost-reduction, through the use of only one neutral for the two stages; the confidence that the parties might have placed in the neutral during the mediation and his supposed enhanced *104 understanding of the case; the incentive that parties have, to settle the case during the cheaper mediation, and avoid the more expensive arbitration that would follow; finally, the "assured finality" that the dispute will have increased chances of resolution, either through a settlement or through an award.

These benefits explain its success in many countries, such as the United States, ¹⁷ Canada, ¹⁸ Italy, ¹⁹ China, ²⁰ Hong Kong²¹ and Singapore. ²²

However Med-Arb is not allowed in all legal systems. For example, in Member States of the Organization for Harmonization in Africa of Business law (OHADA), Med-Arb with the same neutral is clearly forbidden in the regulations of their ADR centers.²³ In France, although the prohibition is not expressly written, the French Supreme Court has clearly ruled against the possibility of having the same person intervening as judge at several stages for the same dispute²⁴ and seems discourage Med-Arb,²⁵ as *105 do a majority of French legal scholars.²⁶ In the United States too, not all the scholars favor Med-Arb.²⁷ Why such reluctance and opposition?

1.2. Disadvantages of Med-Arb

Several reasons explain the reluctance to Med-Arb, which can be divided in two categories: a conflict of interest problem (1.2.1) and a confidentiality issue, which gives rise to a correlative impartiality question (1.2.2).

1.2.1. Conflict of interest

"The integrity of both mediation and arbitration is placed at risk when the same person serves as both mediator and arbitrator." In fact, a mediator that knows he was already appointed as an arbitrator may be not incentivized from having the parties reach a settlement during the mediation.

This is in contrast with commonly accepted ethical standards, which require a mediator's total commitment, during and after the mediation.²⁹ Furthermore, a mediator is required to "avoid a conflict of interest or the appearance of a conflict of interest during and after mediation"³⁰ as a conflict of interest is deemed to exist in situations where there is an "involvement by a mediator with the subject matter of the dispute [...]": how can Med-Arb survive this prohibition?

Similarly, §F of Standard III (Conflict of interest) expressly provides that "[s]ubsequent to mediation, a mediator shall not establish another relationship with any of the participants in any matter that would raise questions about the integrity of the mediation. When a mediator develops personal or professional relationships with parties, other individuals or organizations following a mediation in which they were involved, the mediator should consider factors such as time elapsed following the mediation, the nature of the relationships established, and services *106 offered when determining whether the relationships might create a perceived or actual conflict of interest."³¹

If we apply the standards established by this provision to the type of relationship created "following a mediation," during the arbitral stage of Med-Arb, it would likely be that the little "time elapsed following the mediation," coupled with the identity of "services offered" might be factors sufficient to create a "perceived or actual conflict of interest." Indeed, it is in the mediator's apparent personal economic interest to favor the failure of a mediation process in order to be able to provide its services also as an arbitrator. Without looking, through a subjective test, if the neutral really has a conflict of interest, isn't

the objective test of the "appearance" of a conflict of interest enough to determine that a conflict of interest structurally shapes the Med-Arb institution?

1.2.2. Confidentiality at the mediation stage, and its consequences on arbitration level: a conflict between Scylla & Charybdis

Confidentiality is one of the core principles of mediation, and is "dependent on the very fact that statements and suggestions made by a party remain confidential and are not passed on, neither to the other side nor to the arbitral tribunal at a later stage." Similarly, confidentiality is one of the main benefits of the arbitration process.

However, despite being essential to both mediation and arbitration procedures, the issue of confidentiality specifically in Med-Arb processes is rarely addressed, but in some rare cases, where it is expressly stated that a Med-Arb shall refrain not only from disclosing, at a later arbitral stage, confidential information which he had accessed during previous mediation,³⁴ but also from *107 using such information at the arbitral stage in "any way [which might] affect the rights or prejudice the[ir] position."³⁵

The issue is of crucial importance because, as a mediator, the neutral might have learned some confidential information, either communicated to him by the parties or simply deduced by the parties' conduct during the mediation process, which might have generated a bias in his mindset. After all "bias arises from many factors, including [...] prior involvement in or knowledge about the matter" or also "prior position taken as to the particular issue in dispute." ³⁶

Furthermore, it should be noted that, the definition and enforcement of ethical duties in mediation are particularly difficult, because of the absence of a corporatized group and the lack of any licensure or regulation over the profession.³⁷

Of course, should he be aware of such bias, he should immediately signal it to the parties and recuse himself, in compliance with his ethical duties.³⁸ However, he might simply not be conscious of it, or even consider that he is able to be biased, despite having acquired such special information. But can we seriously expect someone to "keep a secret from himself?"³⁹

More significantly, the very existence of such bias is actually of no relevance at all: in a fair and due process, impartiality shall not only be guaranteed in fact, through a subjective "test for the lack of impermissible bias in the mind of the arbitrator toward a party *108 or toward the subject-matter in dispute," but also in its appearance, through an objective test that "there should not be any objectively justified doubts concerning the impartiality of the judge in light of externally visible circumstances." The fact that the mediator has previously known both parties and was in confidence with each of them shall be considered enough to create a legitimate doubt that he developed some kind of thinking over the matter and therefore might have pre-judged the case in his mind which ... is nothing but the definition of partiality. So the real issue is: do parties waive their right to impartiality of the neutral when they elect Med-Arb as their ADR? If so, is such waiver really in their own interest?

The confidentiality issues inherent to the very structure of Med-Arb raise some serious questions which endanger the main original interests of such ADR, being the interest of a *rapid* settlement of the dispute, through a mediation first (1.2.2.1) and the certainty of obtaining, in the worst case scenario, a *final* decision, through an arbitration, in case the previous mediation failed (1.2.2.2).

1.2.2.1. Between Scylla's consequences of non-disclosure of material information

During the mediation stage, both parties might have disclosed to the neutral some confidential information that they wouldn't have, in a regular arbitration matter. In order to avoid that risk, the parties might be reluctant to engage seriously in the mediation process by, among other things, providing valuable and significant information to the neutral: "the parties are likely to be less candid than they would be with a pure mediator ... because they will fear that if no agreement is reached, the mediator turned arbitrator will use their disclosures against them."

Such hesitations might condemn the mediation process from its very beginning, which will lead to an inevitable arbitration: in this case, what is the added value of a Med-Arb, instead of starting immediately an arbitration process?

*1091.2.2.2. ... and Charybdis consequence of disclosing material information

At the stage of mediation, in a Med-Arb process, impartiality is required from the neutral but is not *per se* at issue. The neutral should, of course, be impartial both subjectively and objectively.

However, impartiality in Med-Arb is seriously called into question when it comes to the arbitration stage, because of the very structure of the Med-Arb process.

Under the Model Law adopted by UNICITRAL, an arbitral tribunal is required to strictly comply with the duty both of impartiality and independence. Article 12(2) states that "[a]n arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence."

When do "justifiable doubts as to his impartiality" exist? According to some scholars, article 12(2) of the UNICITRAL law shall be interpreted as meaning that "the fact that an arbitrator may have learned confidential information during the conciliation process allows him to be challenged because justifiable doubts as to his impartiality exist."

For instance, we could imagine that the simple fact, for a neutral, to have expressed some opinions, especially in an evaluative mediation,⁴⁵ or have suggested some ways to settle, in a facilitative mediation,⁴⁵ might be perceived by a party (or even by both of them), as favoring one party or the other.

More importantly, even when the mediator has not expressed any opinion at all, the simple fact that, during the mediation, he learnt some confidential information might be sufficient to impair his apparent impartiality. An abundance of international case law exists, where the arbitral award was not enforceable, or was deemed annullable because a breach of confidentiality was a *110 sufficient ground to establish a lack of "apparent" impartiality by the Med-Arbitrator, as a guarantee of due process.⁴⁶

The issue of whether the parties, in ADR, may freely waive their right to a fair and due process or whether, instead, this is it a public order matter, is currently debated and there is no definite answer in favor of one solution or the other.

Some scholars support the so-called "waiver doctrine", which favors an extreme version of the privatization view of ADR (as opposed to an intrusion by "public interests" of due process), and consider that the problem would be solved making sure that the parties draft their clauses properly as for the confidentiality issue in Med-Arb, through an express waiver of confidentiality challenging grounds of the arbitral award.⁴⁷

But what if the parties do not make such express waiver, or do not write it properly, especially if not assisted by counsel when drafting the agreement? Shouldn't there be a public policy safeguard for private parties choosing Med-Arb, especially if not assisted by attorneys? Shouldn't a potential issue of impartiality *111 due to the breach of confidentiality be considered a public policy issue? Some scholars favor this other, position, and consider that "being able to control the impartiality of a judge and avoid being judged by someone whose impartiality can be objectively questioned is clearly a due process requirement in arbitration as well."

On the other side of the Atlantic, the European Court of Human Rights (ECHR) has recognized the possibility, for parties in an arbitration, to waive their right to a (State) Tribunal, as long as such waiver is free, explicit and unequivocal:⁴⁹ but does such waiver implicate a waiver also to the procedural guarantees of due process provided for by article 6 of the European Convention on Human Rights?⁵⁰

Although some ECHR cases seem to have adopted this point of view, considering that the European Convention is only binding on member states, and not on private tribunals, the issue seems more a formal than a substantial one. In fact, the issue arises upon enforcement of the arbitral award, by a State Court. Indeed, article V(2)(b) of the New York Convention subjects enforcement to the respect of that States' public policy by the tribunal award.⁵¹ In this respect, most national Courts have decided that the requirements of due process as per article 6 of the ECHR are elements substantially incorporated to their public policy. Therefore, the violation of the due process guarantees is often a valid ground for non-enforcement, for violation of the public policy of the forum state, under article V(2)(b).⁵²

*112 In conclusion, the identity of the mediator and of the arbitrator can "fragilize"53 the whole Med-Arb process, through the risk of the potential annulment and/or non-enforcement of the arbitral award.

2. MED-ARB, A PROCESS TO BE CORRECTED--STUDY OF POSSIBLE SOLUTIONS

2.1. Corrections to the Conflict of Interest Issue

The conflict of interest issue could be solved if, for example, the neutral and the parties had converging interests in settling the dispute at the mediation stage. Such convergence might be encouraged, for instance, through a contingency fee agreement in case the neutral manages to get the parties to settle at the mediation stage.

However, this solution is currently generally prohibited.⁵⁴ We might attribute such prohibition to the widely spread concern that the mediator shall not exercise coercion towards the parties to have them settle.⁵⁵ Nevertheless, it seems to us that the interests of the parties are better preserved through a proactive mediator, that really engages in the process, rather than through a lax one, that simply watches the parties while they slip over to arbitration.

2.2. Corrections to the Confidentiality Issue

The benefits offered by the Med-Arb outweigh its weaknesses for some scholars⁵⁶ and its current success in the practice tend to support that view. However, it is worth studying how corrective measures could avoid the above-mentioned criticisms.

*1132.2.1. Leave the parties free to recuse the neutral before arbitration begins

Addressing the argument against those who consider that "if the parties expressly authorize mediation/arbitration, then there can be no question of the arbitrator subsequently being challenged in terms of lack of impartiality"⁵⁷ we might argue that, what the parties can do, the parties can undo. Each of the parties shall be able, then, at the end of the mediation stage, to opt-out of the process with the same neutral and "recuse" it.

Although recusal of the mediator is encouraged by many scholars,⁵⁸ it is only allowed by a few regulations⁵⁹ which, as the Italian one, for example, allow the parties to select a different neutral at the arbitration stage,⁶⁰ whereas others only allow the parties to recuse the neutral for reasons which occurred after his designation.⁶¹For instance, the Hong Kong arbitration ordinance *114 previously cited, expressly excludes the possibility to recuse an arbitrator only because he previously served as a Mediator.⁶²

In these cases, granting the possibility of recusal of a suspect neutral at the opening of the arbitration stage should be adopted as a corrective measure.

2.2.2. The sealed envelope approach

Some AR-Med rules provide for the sealed envelope approach: before the parties provide the neutral with some confidential, compromising information in the following mediation stage, the neutral delivers a decision in a sealed envelope, which the parties will have to rely upon, in case they do not manage to reach a settlement agreement during the subsequent mediation.

However, not all institutions offer such possibility to the parties:⁶³ including the possibility of a sealed-envelope mechanism might be a good correction to the structural above mentioned defects of Med-Arb. Note that this precaution would solve both the concerns of the conflict of interest and of the confidentiality.

2.2.3. The total disclosure approach

The Mediation/Conciliation rules of the German Institution of Arbitration (DIS)⁶⁴ provide that, when the parties agree that the mediator continues as arbitrator "the duty of confidentiality does not apply vis-à-vis participants in that arbitration". Similarly, the Hong Kong Arbitration Ordinance expressly provides that in a Med-Arb conducted by the same Mediator-Arbitrator, if "[...] confidential information is obtained by an arbitrator from a party *115 during the mediation proceedings conducted by the arbitrator as a mediator; and [...] those mediation proceedings terminate without reaching a settlement acceptable to the parties, the arbitrator must, before resuming the arbitral proceedings, disclose to all other parties as much of that information as the arbitrator considers is material to the arbitral proceedings."⁶⁵

This rule evens the playing field and allows the parties to structure their brief in full awareness of what the neutral will eventually consider.

2.2.4. The "mediator-in-reserve" approach

A solution that would address both concerns of a speedy dispute resolution on the one hand and of conflict of interests and confidentiality on the other hand is the "mediator-in-reserve" approach. JAMS INTERNATIONAL, for international arbitrations, ⁶⁶ and the CMAP in Paris ⁶⁷ offer this possibility, which consists in appointing at the same time an arbitrator and a mediator, each available "on demand" at the request of the parties, according to the development of the process and who should not communicate with each other.

However, the major inconvenient of such solution is the additional cost due to the intervention of two neutrals instead of just one, which will be borne by the parties.

3. CONCLUSION

In conclusion, we agree that combining mediation and arbitration may present an added value for parties and may increase the chances that both obtain a satisfying resolution to their dispute. However, some of the adjustments described above should be considered by rule-makers, in order to avoid conflict of interests and confidentiality issues that are inherent to the combination of these two ADR mechanisms. Indeed, not taking any corrective measures leaves ground to call into question the arbitral award rendered by the neutral, which would defeat the very purpose of efficiency that the Med-Arb institution rests upon.

Footnotes

- Daniela Antona is a French qualified Attorney. She holds degrees from Cornell Law School (United States), Paris 1 Pantheon Sorbonne University (France) and Florence University (Italy).
- "Party autonomy (...) [is] a core valu[e] of arbitration (...). Arbitration rests on a firm foundation of party autonomy (...)."

 Brunet Edward, Speidel Richard E., Sternlight Jean R., Ware Stephen J., Arbitration law in America: a critical assessment 3-7 (Cambridge University Press) (2006).
- US Constitution--Fifth and Fourteenth Amendments. U.S. Const. amend. V and amend. XIV. See also Article 10--Universal Declaration of Human Right, providing that "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him" and article 6 of the European Convention on Human Rights (Right to a fair trial), providing that "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. [...]"
- Standard I. (Self-determination) (A) of the Model Standards of Conduct for Mediators adopted by the American Arbitration Association (September 8, 2005), American Bar Association (August 9, 2005) (hereafter, the "Model Standards"), Association for conflict resolution (August 22, 2005) Ethical Standards.

- Tibor Varady, John J. Barcelo III, Arthur T. von Mehren, International commercial Arbitration 10-11 (Fifth edition) (2012).
- ⁵ *Id*.
- Klaus Peter Berger, Private dispute resolution in international business: negotiation, mediation, arbitration 294 (Kluwer Law & Business Frederick, MD: Aspen Publishers, 2nd edition) (2009).
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- For an example of the standard of impartiality for mediators, see standard II. (Impartiality) of the Model Standards of, available at http://www.mediate.com/articles/model_standards_of_conflict.cfm#LinkTarget_391; for an example of the standard of impartiality for arbitrators, see General Standard 4 of the IBA Guidelines on Conflicts of interests in International Arbitration, available at http://www.int-bar.org/images/downloads/pubs/Ethics arbitrators.pdf.
- 9 Coltri, Laurie S., Alternative dispute resolution: a conflict diagnosis approach 268 (Prentice Hall, Ed.) (2010).
- Blankley, Kristen M., Keeping a Secret from Yourself-- Confidentiality When the Same Neutral Serves both as Mediator and as Arbitrator in the Same Case, 63 Baylor L. Rev. 317, 317-367 (2011).
- Standard I (A) of the Model Standards (Self Determination).
- For some statistics, and high rates of success in mediation, ranging between 80%-85%, see http://www.mediate.com/tegci/pg1.cfm
- Weisman, Martin, Med-Arb: The Best of Both Worlds, 19 Dispute Resolution Magazine 40 (Spring 2013).
- Goldberg, Stephen B., Dispute resolution: negotiation, mediation, arbitration, and other processes 423 (Wolters Kluwer Law & Business, 6th Edition) (2012).
- Fiadjoe Albert, Alternative Dispute Resolution: A developing World Perspective 30 (Cavendish Publishing) (2004).
- Boulle, Laurence J., op.cit.
- Encouraged for instance by International Bar association Guidelines on Conflicts of Interests in International Arbitration General Standard 4, op. cit.
- See article 15 of the National Mediation Rules of the ADR Institute of Canada, Inc, available at http://www.adrcanada.ca/resources/documents/National Mediation Rules 2012August30.pdf.
- See, article 22 of the Arbitration Rules of the Chamber of Arbitration of Milan, providing that "at any time in the proceedings, the arbitral tribunal may attempt to settle the dispute between the parties, including by addressing them to the Mediation Service of the Chamber of Arbitration of Milan", available at http://www.camera-arbitrale.it/Documenti/cam_arbitration-rules_2010.pdf.
- See, article 45 (Combination of Conciliation with Arbitration) of the China International Economic and Trade Arbitration Commission CIETAC Arbitration Rules, providing that:
 - 2. With the consent of both parties, the arbitral tribunal may conciliate the case in a manner it considers appropriate. [...]
 - 7. Where conciliation fails, the arbitral tribunal shall resume the arbitration proceedings and render an arbitral award.

Available at (http://www.cietac.org/index.cms).

- Hong Kong Arbitration Ordinance 1996 Art.2B(3); CIETAC Arbitration Rules Art.51.
- See SIAC model clause expressly on Med-Arb, available at http://www.siac.org.sg/index.php?option=com_content&view=article&id=437&Itemid=207.
- See, for instance, the ADR regulation of the arbitration center of Benin, whose article 5.3 provides that

 The mediator or the conciliator cannot be further appointed as an arbitrator in the same dispute, after an unsuccessful attempt to mediate or conciliate", available at http://www.jadaf.fr/fichiers_site/a1585jad/contenu_pages/graphisme_global/jada2011_1.pdf.
- ²⁴ Cour de cassation. Ass. plén., 6 nov. 1998, n° 94-17709 (fr).
- ²⁵ Cour de cassation, 1re civ. 19 dec. 2012 n° 10-27.474 (fr).
- 26 Clay, Thomas, L'arbitre peut-il avoir été précédemment conciliateur? 3180 Recueil Dalloz (2004) (fr).
- Pappas, Brian A., Med-Arb: The Best of Both Worlds May Be Too Good to Be True--A Response to Weisman, 19 Dispute Resolution Magazine, 42-44 (Spring 2013).
- Goldberg, Stephen B., op.cit., 424.
- See, Standard VI(A)§(1). Quality of the process of the Model Standards, providing that "[a] mediator should agree to mediate only when the mediator is prepared to commit the attention essential to an effective mediation."
- Model Standards, Standard III. (Conflict of interests).
- Model Standards, Standard III (Conflict of interest) §F.
- Klaus Peter Berger, op. cit. 295.
- Noussia Kyriaki, Confidentiality in International Commercial Arbitration--A comparative analysis of the position under English, US, German and French Law 7-8, 15-16 (Springer) (2010).
- Article 21--(Confidentiality) of the mediation rules of Chicago international dispute resolution association (CIDRA):
 - 1) Confidential information disclosed to a mediator by the parties or by other individuals during the course of the mediation shall not be divulged by the mediator. [...]
 - 2) The parties shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence at an arbitral, judicial, or other proceeding:
 - a) views expressed or suggestions made by another party with respect to a possible settlement of the dispute;
 - b) admissions made by another party in the course of the mediation proceedings;
 - c) proposals made or views expressed by the mediator; or
 - d) the fact that another party had or had not indicated willingness to accept a proposal for settlement made by the mediator.
- See article 12 (2) of the Hong Kong International Arbitration Centre Mediation Rules, providing that "(ii) Nothing that transpires during the course of the mediation is intended to or shall in any way affect the rights or prejudice the position of the parties to the dispute in any subsequent arbitration, adjudication or litigation", available at

http://www.hkiac.org/index.php/en/mediation/mediation-rules.

- Matti S. Kurkela, Santtu Turunen, and Conflict Management Institute (COMI) Due process in international commercial arbitrationN 119 (Oxford University Press) (2nd Edition 2010).
- Nadja, Alexander, Global trends in mediation 426 (Kluwer Law International BV) (2nd Edition, 2010)
- Ethical texts are internationally convergent; on this point see General Standard 2 of the IBA Guidelines op.cit.
- ³⁹ Blankley, Kristen M., *op.cit.*, 317-367.
- Binder, quoted by Matti S. Kurkela, Santtu Turunen, in *op.cit.*, 113.
- 41 *Id.* at 114.
- Goldberg, Stephen B., op.cit., 423.
- Sato, Yasunobu, The New Arbitration Law in Japan: Will it Cause Changes in Japanese Conciliatory Arbitration Practices 22 Journal of International Arbitration 140 (2005), who argues that "while Art.38(4) of the Japanese Arbitration Law of 2003 allows the tribunal or one of the arbitrators to seek to settle the dispute if the parties agree (arbitrators having previously sought to promote a settlement as a matter of course), the fact that Art.18(1)(ii) adopts the form of Art.12(2) of the Model Law probably means that the fact that an arbitrator may have learned confidential information during the conciliation process allows him to be challenged because justifiable doubts as to his impartiality exist" quoted in Davidson Fraser, Some Thoughts on the Scottish Arbitration Code 2007, 74 The international journal of arbitration, mediation and dispute management No. 4, n. 40 (November 2008).
- Coltri, Laurie S.op.cit., 269.
- 45 *Ibidem*, 269.
- For a clear example, see, for England: Glencot Development and Design Co Ltd v Ben Barrett & Son (Contractors) Ltd [2001], B.L.R. 207, where the parties, before the first arbitration hearing, had found an agreement, had discussed it briefly with the arbitrator, and had then realized that some outstanding points were not settled yet and had therefore asked the arbitrator to act as a mediator for them. The arbitrator accepted to serve as a mediator, specifying to the parties that, in case negotiations were unsuccessful, he would re-vest his role of an arbitrator. The mediation took place and was, indeed, unsuccessful, so that the arbitration could be reinstated. An award was rendered, whose enforcement was refused by the national court, which considered that the arbitrator could not act as a mediator without losing his impartiality as an arbitrator, which was against English law. Thence, the Court considered that there was a risk of apparent partiality of the arbitrator, as a consequence of his previous conduct thence. the award could not enforced. http://www.buildingdisputestribunal.co.nz/site/buildingdisputes/files/Court%20Decisions//Glencot%20Development%C20&%C20 Desig%C20Irtd%20v %20Ben%20Barrett%C20&%C20Son%20(Contractors) %20Ltd%20[2001]%20EWHC%20TCC.pdf. Similarly, in the United States, some courts expressly refused to recognize an award where the arbitrator did not respect its confidentiality obligation: seeBowden v. Weickert, 2003 WL 21419175: "Arbitrator who initially attempted to mediate contract dispute between buyers and sellers of business exceeded his authority by basing arbitration award, at least in part, on terms of parties' failed attempt at a mediated settlement; there was no evidence that buyers and sellers agreed to be bound by terms expressed in handwritten mediation document if a final settlement agreement was not reached, and arbitrator's reliance on information obtained through his role as mediator, in fashioning arbitration award, violated statutory prohibition on disclosure of mediation communication."; Township of Aberdeen v. Patrolmen's Benevolent Association, 669 A.2d 291: "information learned by an arbitrator during the mediation process but not presented at the arbitration hearing may not be considered by the arbitrator in rendering the final decision."

- Blankley, Kristen M., op.cit., 361-362.
- Matti S. Kurkela, Santtu Turunen, and Conflict Management *op.cit.*, 114.
- ECHR, in DEWEER v. BELGIUM, 27 February 1980 n. 6903/75.
- Article 6 (Right to a fair trial) of the European Convention on Human Rights: 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
- "The lengthy history of the public policy exception represents a perception that society would oppose an arbitration system in which courts would enforce awards patently inconsistent with public policy" Brunet Edward, Speidel Richard E., Sternlight Jean R., Ware Stephen J., op.cit., 25.
- See, for Belgium: Bruxelles Court of Appeals in the Ferrara v AG 1824, deciding that "the public policy character of the guarantees contained in Article 6(1) does not preclude parties to a dispute from waiving these guarantees by freely deciding not to submit the dispute to a court established by law, but rather to submit it to an arbitration tribunal, set up according to their agreement" before, however, stating that "since the arbitrators obtained their powers by the parties' will, it is up to them to exhaust their own exclusive powers to judge and to ensure by themselves, under their own responsibility, the conditions of a fair trial, in accordance with the general and fundamental principles of our law and, as far as necessary, with the provisions of the [New York] convention (source: http://www.internationallawoffice.com/). For France: the French Cour de cassation, considered that the principles enunciated under article 6.1 of the ECHR belong to the international public order (Civ. 1ère, 1er February 2005, n° 01-13.742 B.I n° 53) (fr).
- Paraguacuto-Mahéo, Diana, Gazette du Palais, 14-16 October 2012, 19-22
- See standard VIII. Fees and Other Charges (B) that "[a] mediator shall not charge fees in a manner that impairs a mediator's impartiality. 1. A mediator should not enter into a fee agreement which is contingent upon the result of the mediation [...]".
- ⁵⁵ Coltri, Laurie S.*op.cit.*, 269.
- ⁵⁶ Blankley, Kristen M., *op.cit.*, 325-338.
- See Fraser Davidson who, commenting article 10.3 of the Scottish Code of Arbitration, which provides that "The Arbitrator shall not decide, or act as, a mediator between the parties nor reach a decision on a basis other than that founded in the law which applies by virtue of Article 10.1., unless the parties have expressly authorized the Arbitrator to do so", "Is the reference to mediation in art.10.3 meant to suggest that, if the parties expressly authorize mediation/arbitration, then there can be no question of the arbitrator subsequently being challenged in terms of lack of impartiality? That would be an interesting position for the Institute to adopt." Fraser Davidson, op.cit.
- Christian Bu hring-Uhle and for the second edition, Lars Kirchhoff and Gabriele Scherer, "Arbitration and mediation in international business 369 (Aspen Publishers) (2nd Edition, 2006).
- Note that §8 of Standard VI of the Model Standards (Quality of the process), simply laconically provides that "A mediator shall not undertake an additional dispute resolution role in the same matter without the consent of the parties. Before providing such service, a mediator shall inform the parties of the implications of the change in process and obtain their consent to the change. A mediator

who undertakes such role assumes different duties and responsibilities that may be governed by other standards", therefore allowing a doubt as for whether the consent of the partiers shall be reiterated at the later stage of the arbitration or shall be given from granted because of the original consent expressed in the Med-Arb clause and at the moment of the appointment of the neutral as mediator.

- Article 5§5 of Decreto legislativo 28 del 4.3. 2010, pertaining to mediation aimed at the settlement of civil and commercial matters (10G0050) G.U. Serie Generale n. 194 del 20.8.2013, Supplemento Ordinario n. 63: "[...] in any case, the parties may agree, even subsequent to the contract or the statute or the compromise, to the appointment of a different institution" (http://www.camera-arbitrale.it/Documenti News/d-lgs-28-2010 con-modifiche dl-69-2013.pdf).
- See article 351,1.2 of the Roumanian civil code, quoted by Andreea Pop, in

 Le Med-Arb, mode alternative de règlement des conflits, dans le droit compare", 2011 SUBB Jurisprudentia 129 (2011), 129-140. See Singapor Rule 11.2 (Challenge of Arbitrators) "A party may challenge the arbitrator nominated by him only for reasons of which he becomes aware after the appointment has been made."
- Article 38(5) of Section: 33 Power of arbitrator to act as mediator L.N. 38 of 2011 01/06/2011, "(5) No objection may be made against the conduct of the arbitral proceedings by an arbitrator solely on the ground that the arbitrator had acted previously as a mediator [...]", available at http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/C05151C760F783AD482577D900541075/\$ FILE/CAP 609 e b5.pdf.
- For instance, it's expressly forbidden by the Ethical rules of the Chamber of Arbitration of Milan, whose article 10 provides that "the arbitrator may at all stages suggest the possibility of a settlement or conciliation of the dispute to the parties but may not influence their decision by indicating that he/she has already reached a decision on the outcome of the proceeding", available at http://www.camera-arbitrale.it/Documenti/cam arbitration-rules 2010.pdf
- Deutsche Institution für Schiedsgerechtsbarkeit (DIS). See article 14(1), which provides that "The parties in conciliation proceedings may, at any stage in the proceedings, agree in writing that the conciliators continue with their mandate in the function of arbitrators. In such case, the duty of confidentiality does not apply vis-à-vis participants in that arbitration (including possible witnesses, consultants etc.)". Available at http://www.dis-arb.de/en/16/rules/dis-mediation-conciliation-rules-02-id9.
- Article 38 (4) of Section: 33 Power of arbitrator to act as mediator, Arbitration Ordinance, Cap. 609 of the Laws of Hong Kong, L.N. 38 of 2011 01/06/2011, available at http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/C05151C760F783AD482577D900541075/\$ FILE/CAP_609_e_b5.pdf.
- http://www.jamsadr.com/mediator-in-reserve-policy/.
- www.cmap.fr/dl.php?nom_file=cmap-reglt-medarb.pdf.

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Article

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MED-ARB AND THE LEGALIZATION OF ALTERNATIVE DISPUTE RESOLUTION

Abstract

Med-Arb is a dispute resolution process that combines mediation and arbitration. Interest is increasing in Med-Arb because of a growing similarity between arbitration and litigation. As attorneys legalize and formalize mediation into a more evaluative and adversarial process, Med-Arb practitioners offer a process that guarantees a final resolution but incorporates informal opportunities for settlement. Thus, as both mediation and arbitration become increasingly formalized, Med-Arb is perceived as one way to correct the adversarial disadvantages of each by providing for both "finality" and "flexibility." However, the key principles of both mediation and arbitration are compromised by Med-Arb. The core values of mediator neutrality, party self-determination, and confidentiality cannot be satisfied by Med-Arb. In arbitration, the promise of arbitrator impartiality, the due process right to equal treatment and confrontation, and the enforceability of the arbitral award are weakened. Separating the processes and utilizing different neutrals is the ideal way to gain the benefits of flexibility and finality without compromising either process's core values.

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*159 I. Introduction

Med-Arb is a dispute resolution process that combines mediation and arbitration. The most common variety of Med-Arb is 'same-neutral,' where parties utilize a combined mediator/arbitrator and only proceed to arbitration if they do not reach a settlement in mediation. This Article discusses the same-neutral Med-Arb model where the same neutral mediates and then, if unsuccessful, arbitrates.

Interest in Med-Arb is rising among neutrals who provide both mediation and arbitration services because ADR is becoming increasingly legalized. Mediation is becoming more evaluative and adversarial, arbitration and litigation are increasingly similar, and arbitration is viewed as too costly, too inefficient, and effectively, the "new litigation." Med-Arb practitioners see an opportunity to offer a process that combines the best of both mediation and arbitration by guaranteeing a final resolution ("finality") but incorporates informal opportunities for settlement ("flexibility"). The "finality" of arbitration is utilized as the stick to promote good behavior in mediation, while the "flexibility" of informal mediated discussions promotes efficiency and cost-savings over the use of arbitration. Instead of a creative solution to the legalization of ADR, Med-Arb, as it is practiced, Med-Arb is contributing to the legalization of both processes, and as a result is actually part of the problem.

*160 This Article demonstrates that despite efforts to provide flexibility and choice to prospective arbitrants, the key principles of both mediation and arbitration are compromised by Med-Arb. As presently practiced, Med-Arb cannot satisfy the core values of mediator neutrality, party self-determination, and confidentiality. Nor in arbitration are the promise of arbitrator impartiality, due process right to equal treatment and confrontation, and enforceability of the arbitral award likely to be achieved. Though Med-Arb promises to combine the best of both mediation and arbitration it does not remain faithful to the core values of their respective processes.⁴ Abandoning the Med-Arb format as an integrated unit and utilizing different neutrals is the ideal way to gain the benefits of flexibility and finality, and to counteract the negative impact of legalization all without compromising on the core values essential to the integrity and successful implementation of each process.

In Part II, this Article describes the legalization of arbitration and mediation and the rise of mediation as the primary ADR process. It argues recent interest in Med-Arb stems from the growing similarity between the practice of litigation and arbitration. It explains that Med-Arb is an effort to counter the increasing perception that arbitration is too costly, too inefficient, and is effectively, the "new litigation." Med-Arb proponents argue that the blended process accomplishes this by utilizing both the efficiency and informality of mediation to avoid prolonged arbitration discovery and hearings, and the finality of arbitration to support the weaknesses of the "evaluative" or "legalized" style of mediation. Part II concludes by arguing that these inherent weaknesses in each process that Med-Arb seeks to counteract are actually due to the negative effects of legalization on each process model. The "solution" offered by Med-Arb is built on a false premise that further legalization can correct legalization. Part III describes the ways in which Med-Arb is detrimental to the fundamental tenets of both mediation and arbitration and how, despite efforts to the contrary, Med-Arb will only further legalize both processes.

*161 II. The Legalization of ADR and the Med-Arb "Solution"

Legalization of informal processes like mediation and arbitration exemplify the tension between the problem solving goals of mediation and the adversarial system's twin aims of finality and justice. This Article argues rising interest in Med-Arb is a result of the legalization of arbitration and mediation. The following Section examines ways in which arbitrators are combining mediation with arbitration for the purposes of countering the negative effects of the legalization of both processes.

Jerold Auerbach first noted the tendency of alternative dispute mechanisms to mimic formal processes over time.⁸ He describes how non-law dispute resolution systems, particularly small claims courts, commercial arbitration, and labor arbitration, among others, over time become significant parts of the legal system.⁹ Within the ADR community, neutrals and other practitioners view legalization as the process of co-optation of ADR, and mediation in particular, by the legal field.¹⁰ Legalization of ADR processes is also often the result of greater reliance on the legal system by participants, who will often frame their demands and grievances in informal processes in a "rights conscious" way.¹¹

A. The Legalization of Arbitration

Consequently, the increasing interest in Med-Arb is primarily due to the legalization of arbitration and its resulting similarity with litigation. Despite litigation's downward trend, discontent with arbitration has never been more widespread due to: (1) arbitration's increasing similarity to litigation, (2) the rise of mediation, and (3) the enforcement of binding arbitration clauses in standardized adhesion contracts.¹² Arbitration now includes many of the features of a trial court¹³ including prehearing motion practice, prolonged discovery, extensive hearings to avoid claims of procedural injustice, and the *162 erosion of the finality of arbitration awards.¹⁴ Contrary to the initial expectation that arbitration was way to provide greater finality and efficiency at less cost than litigation,¹⁵ today, U.S. business arbitration is a formal, costly, and time-consuming mechanism.¹⁶ For example, seventy-five percent of experienced arbitrators surveyed in 2002 believe "arbitration is becoming too much like court litigation and thereby losing its promise of providing an expedited and cost-efficient means of resolving commercial disputes."¹⁷ Similar to litigation, arbitration is a formalized adversarial process designed to adjudicate rights with lawyers driving the process.¹⁸ The next Section describes the preference for mediation, and why it is leading many arbitrators to promote Med-Arb.

B. The Rise and Legalization of mediation

Due to arbitration's trend toward litigiousness, mediation is quickly becoming the ADR "process of choice." First, mediation provides parties with a high degree of control over both the process and the agreement. Second, the process is customizable and the scope of the discussion may extend beyond the dispute into communications and relationship issues. The solutions crafted can transcend the *163 typical forms of adjudicated relief into more creative, durable solutions. As a result, unlike arbitration, mediation is viewed more favorably by attorneys on issues of cost, speed, confidentiality, satisfaction, and maintaining relationships.

For example, businesses are increasingly turning to mediation as an alternative to arbitration to resolve disputes.²⁵ The International Chamber of Commerce ("ICC"), a major arbitration provider, preferences mediation in the absence of a specified settlement technique.²⁶ This is a departure from multi-step ADR clauses in contracts, which first required mediation, followed by arbitration and then litigation if necessary.²⁷ In 2007, American Institute of Architects in 2007 deleted the default arbitration provision from the AIA contract but retained mediation as a precondition to going to court.²⁸ As arbitration's popularity wanes, mediation is becoming the ADR process of choice for both disputes and pre-dispute contracts.

As mediation becomes a primary forum for dispute settlement, legalization of mediation occurs as lawyers over time default to utilizing litigation skills in informal dispute processes.²⁹ Professor Jacqueline Nolan-Haley joins a chorus of scholars³⁰ who argue that *164 mediation is becoming the "New Arbitration" because "legal mediation has taken on many of the features traditionally associated with arbitration: adversarial posturing by attorneys in the name of zealous advocacy, adjudication by third party neutrals, and the practice of mediator evaluation."³¹ Professor Robert Baruch Bush argues that this evaluative style of mediation is so similar to mediation that it is nothing more than "an arbitration substitute."³²

Not all mediation is legal or evaluative. Evaluative, or legalized, mediation can be distinguished from facilitative and transformative styles of mediation. Evaluation in mediation lacks a singular definition but operates on a continuum. On one end of the evaluative continuum, mediators predict court outcomes, provide case analysis with assessments of strengths and weaknesses, and recommend specific proposals.³³ On the other, mediators use questions or statements that implicitly suggest to the parties the mediator's opinion.³⁴ Evaluative mediators tend to have more influence over the outcome, with the most evaluative directly impacting any settlements reached.³⁵ Additionally, evaluative mediations tend to more closely resemble a court-based process, with a neutral firmly in control of the topics and the direction of the conversation. Facilitative mediators, on the other hand, refrain from providing their opinions, views, and suggestions regarding the issues being discussed. Facilitative mediators work to clarify and enhance communication between the parties, and demonstrate process control. For example, a facilitative mediator decides when or if to meet separately with the parties. A third style, in direct opposition to both facilitative and evaluative mediation, is transformative mediation. Transformative mediators believe neither facilitative nor evaluative mediation provides for true party empowerment and seeks to place parties in direct, sole control over both process and outcome.³⁶ Despite the facilitative and transformative mediation *165 styles which ensure greater mediator impartiality and party self-determination to parties than evaluative mediation, the legalized version of mediation persists where attorneys are involved.

Lawyers acting as mediators are highly likely to evaluate even if they are trained in the facilitative method of mediation.³⁷ Lawyers tend to highly prefer evaluative mediators for their mediations,³⁸ and they prepare accordingly for this style of mediation.³⁹ In order to gain advantage with an evaluative mediator, attorneys often appear inflexible and present arguments intended to influence the mediator.⁴⁰ Through this mediator "spinning," the advocate tries to persuade the mediator in the hope of gaining the mediator's support for a settlement that will favor their client.⁴¹ Spinning provides the opportunity for lawyers to operate as though in private judicial settlement conferences⁴² and engage in adversarial behavior⁴³ considered unethical in arbitration.

Adversarial behavior by attorneys in mediation is a growing problem. A 2010 survey of mediators in the New York region asked about their behavior in mediation.⁴⁴ The survey indicated lawyers *166 use adversarial behaviors in mediation, including arguing positions and contesting the other side's positions, presenting legal facts and arguments to the mediator as though they were a fact finder, or arguing as if participating in a trial.⁴⁵ Bad faith tactics persist in mediation,⁴⁶ including attorneys that lie,⁴⁷ mislead, and delay⁴⁸ to increase litigation costs, or claim limited authority to negotiate.⁴⁹ Attorneys also use mediation as an opportunity for free discovery,⁵⁰ and they often intentionally misuse confidential communications as the courts sometimes ignore and do not regularly sanction abuses of confidentiality.⁵¹

The growth of the use of mediation has primarily been in this legalized, evaluative form of the process.⁵² John Lande

predicted this pattern in 1997, commenting that "[w]here mediation becomes routinely integrated into litigation practice, we can expect that this will significantly alter both lawyers' practices in legal representation and mediators' practices in offering and providing mediation services." Thus it is the increase in legally trained mediators, in addition to the increase in advocates within mediation that is responsible for the increasing legalization of mediation. Med-Arb is promoted as a solution to arbitration's lack of flexibility and the increasingly legalized version of mediation.

C. The Med-Arb "Solution"

Med-Arb proponents allege the process resolves mediation and arbitration's problems by providing (1) finality, (2) efficiency, and *167 (3) flexibility⁵⁴ for a variety of types of disputes.⁵⁵ The Med-Arb "solution" is to combine arbitration's finality with mediation's flexibility in order to gain efficiency and the best of both processes. In reality, the problems facing the two processes are not inherent and are being utilized by neutrals seeking to gain by taking advantage of mediation's growing popularity. This Section now reviews the Med-Arb's proposed advantages of finality, efficiency, and flexibility.

Med-Arb is promoted as a process to fix the mediator's lack of formal authority to create a final and binding settlement." Specifically, Med-Arb guarantees a binding arbitration award if settlement does not occur in mediation. Finality also promotes another Med-Arb advantage: efficiency. Early neutrals argued for arbitrators mediating as a first step as parties are more efficient in identifying problems and potential solutions when the next step is a binding decision. Med-Arb proponents promote Med-Arb as a corrective strategy to combat procrastination, and the adversarial nature of legalized mediation by placing the decision-maker in the room to *168 provide the "stick" that guarantees good behavior. Pepcifically, Med-Arb proponents argue the finality of arbitration assists the process of mediation by providing the incentive to avoid posturing and bargain in good faith during mediation. Proponents argue efficiency is achieved because the legalized, evaluative form of mediation is neutralized, leading to faster settlements and cost savings. Further, using the same neutral saves time and cost by eliminating the need for parties to identify, appoint, and educate an additional neutral. Finally, flexibility is promoted as a Med-Arb benefit that will improve arbitration. Med-Arb advocates promote the use of a hybrid process as a means of infusing arbitration with many of the informal benefits of mediation. For example, in mediation parties can have a less structured and less formal conversation about the case and possibilities for resolution. Mediation allows for solutions to underlying issues as opposed to arbitration awards only addressing issues formally presented as evidence.

The Med-Arb solution provides arbitration with flexibility by adding mediation and mediation gains finality by adding arbitration and placing the decision-maker in the room to provide the "stick" that promotes settlement. As a result both processes gain efficiency by utilizing each other's natural advantages. However, the Med-Arb "solution" is not a solution at all because it relies on a false premise that mediation and arbitration as independent processes have inherent problems that need to be corrected. A more likely reason for promoting Med-Arb is that arbitration increasingly resembles litigation, and mediation's popularity is a threat to the financial viability of private arbitration practice. For example, in a 2013 Strauss Institute survey of 200 experienced College of Commercial Arbitrators ("CCA"), a majority indicated a higher proportion of their caseloads settled both pre-hearing and pre-award during the last five years than before *169 that time. To the author's knowledge (and research efforts) there are no neutrals who primarily serve as mediators who have publications advocating for the use of Med-Arb. Instead, Med-Arb is a process promoted by arbitrators to maintain and enhance the market viability of arbitration by adding a mediation component and selling the two processes as one package.

D. The Med-Arb "Solution" Is Built on a False Premise

Med-Arb appears to be a creative and effective means of accessing the benefits of both informal and formal dispute mechanisms. In reality, the increasing interest in Med-Arb is a result of the legalization of ADR and efforts to use arbitration to fix mediation and mediation to fix arbitration. Med-Arb is promoted "to cure some of the problems inherent in both mediation and arbitration." These problems are not, however, "inherent" to both processes, and instead are due to the legalization and formalization of informal processes.

For example, mediation does not have an "inherent" problem with finality. Finality is only a problem in mediation due to the legalized, evaluative form of mediation. By definition, mediation is a consensual process that is not designed to impose finality. Nor does the lack of finality does not impact mediation settlement rates. Studies of general civil and divorce mediations in Michigan in 2008 show that nearly 70% of all cases sent to mediation immediately resulted in settlement, with

a substantial number settling shortly after. Surveys of these participants indicated that over 90% of mediation participants were satisfied with mediation, even if the case did not settle at mediation. Further, a 2001 study of small claims cases in 1999 showed a voluntary compliance rate of 90% for mediated agreements *170 versus 53% for non-mediated judgments. These rates remain consistent in Georgia, where 69% of all mediated cases resulted in settlement between 2005 and 2008. In 2008, the U.S. Equal Employment Opportunity Commission's mediation program reported a 72.1% settlement rate. In the family realm, parents mediating custody disputes reached settlement in mediation at a 77% rate. In a comprehensive review of mediation studies, Professor Roselle Wissler found settlement rates as high as 63%, compliance with mediated agreements at 90% or greater, and highly favorable views of mediation among litigants. These studies tend to demonstrate mediation's effectiveness without finality. Mediation inherently does not suffer due to the lack of a guaranteed, final, and binding settlement.

Instead of resolving the legalization of these processes at their root causes, legalization, Med-Arb combines the two processes. Med-Arb formalizes and provides a mechanism of finality to a form of mediation that already looks in practice like non-binding arbitration. In effect, Med-Arb is Arb-Arb, where the first phase is non-binding arbitration followed by a binding form of arbitration if no agreement is reached. Ironically, the "new arbitration" style of mediation is more akin to the form of arbitration that existed before legalization transformed it into a process that closely resembles litigation. Legalization is mediation's problem. Evaluative mediators and adversarial advocates violate the core values of the process. The solution is not to provide the mediator with binding settlement authority, which only makes it even more impossible to fulfill the core principles central to the process.

In order to actualize mediation's core values of impartiality, self-determination, and confidentiality, lawyers and law students must be trained to effectively advocate in collaborative processes and *171 mediators must be trained to facilitate instead of evaluate. Mandatory mediation itself needs to be reassessed because it furthers the legalization of the process given the dichotomy of mandating parties into a voluntary process. With a truly voluntary mediation process, fewer instances of "bad faith" or adversarial conduct will take place, as no one will be forced to initiate mediation against their will. In order to fulfill arbitration's core values of due process and efficient justice, arbitrators' must limit extended discovery and advocates must create carefully crafted and tailored pre-dispute arbitration clauses that will guarantee efficiency. In A 2009 survey of 180 arbitrators, corporate counsel and attorneys representing clients in arbitration, 65% identified mismanaged motion practice as moderately and very much a reason why arbitration fails to meet business users desire for speed, efficiency, and economy. Instead of arbitration's lack of informality or mediation's lack of finality, both mediation and arbitration are impacted by legalization and attorneys' use of both processes as alternative forums within which they may litigate. The solution is to address the legalization itself.

The Med-Arb "solution" assumes that the initial problems of informality or lack of finality observed with mediation and arbitration are inherent to the processes, and can be resolved by combining them. However, legalization of arbitration and mediation cannot be fixed by further legalization. As the next Part describes, Med-Arb will be unable to "save" either process because harms the central tenants of each and will only further the legalization of both mediation and arbitration.

III. Med-Arb Will Further ADR's Legalization

The process of Med-Arb harms the core principles of each procedure and will accelerate the legalization of mediation by limiting informality and accelerating arbitration's legalization by increasing the likelihood of judicial review. Though Med-Arb may encourage parties to mediate, it limits the core principles of mediation--impartiality, self-determination, and confidentiality--and strips mediation of its informal character. Med-Arb also places stress on the core principles of arbitration--due process, confidentiality, and arbitral neutrality--by making the arbitral award increasingly susceptible to court-review.

*172 A. Med-Arb Is Detrimental to Candor and Confidentiality

Med-Arb harms candor and confidentiality and further legalizes both mediation and arbitration by making one neutral both mediator and arbitrator. Mediation is legalized because putting the decision-maker in the room formalizes the process and makes candid conversation, crucial to a voluntary process, unlikely. Arbitration is legalized because arbitral awards are exposed to increased judicial review through the use of confidential mediation conversations while rendering those awards.

As a result, Med-Arb severely limits mediation's effectiveness while endangering the enforceability of any resulting arbitral award by making it more susceptible to judicial review.

Mediation's confidentiality encourages candor by promoting the free expression of needs, interests, and options for resolution.85 Mediation is unique amongst the alternative dispute resolution practices because its informality allows parties to speak freely without fear that they might be harmed for their candor.86 Mediators rely on free information exchange to identify interests, assist in correcting information asymmetries, reality-test assumptions, and build trust between the parties.87 Placing the prospective decision-maker in the room as a neutral negatively impacts the candor of the parties in the "Med" phase and reduces the effectiveness of the process. When parties know that the mediator may later assume the role of arbitrator, both advocates and parties will not be as candid with the mediator about weaknesses in their arguments or offer information that may be detrimental to their positions.88 For example, a 2008 survey (described subsequently as the "Wissler Survey") asked Ohio lawyers about their experiences with mediation and settlement conferences in federal court. 99 When the judge assigned to the case oversaw a settlement conference, 71% of lawyers strongly or somewhat disagreed with the statement that parties can be candid with the neutral about interests and difficulties in the case without concerns of negative consequences. O Comparatively, lawyers strongly or somewhat disagreed *173 with the statement that parties can be candid with a judge not assigned to the case (26%), court staff mediator (7%), volunteer mediator (6%), or private mediator (2%).91 Placing the decision maker in the room is detrimental to candor, and parties in same-neutral processes will carefully guard their statements in the mediation phase. As a result, the information needed to craft lasting, reasonable settlement will not be available as parties begin to adopt, in practice, a more legalistic and formal process.93

Med-Arb promoters advance the hybrid process as a way of countering advocates' adversarial behavior by providing the mediator with decision-making authority if settlement does not occur. In reality, Med-Arb only furthers the perceived problems with mediation it intends to remedy. First, Med-Arb may increase the use of advocates in mediation as advocates are not always present in mediation but are typically utilized in arbitration. Second, Med-Arb's attempt to limit adversarial behavior of advocates by placing the judge in the session will create a more formal environment in which (1) the mediator/arbitrator is the focus of the session; and (2) candor is eliminated out of a concern of showing weakness to the prospective decision maker. In effect, without candor and confidentiality, the mediation stage of a Med-Arb becomes an informal arbitration hearing. This is especially problematic for arbitration in avoiding challenges to the enforceability of the arbitral award.

The "biggest and most obvious concern with the same-neutral [M]ed-[A] rb procedure" is the use of confidential mediation communications in determining an arbitration award. The arbitral award's enforceability of the arbitral award is open to challenge in Med-Arb due to the lack of confidentiality of mediation communications in the arbitration phase. In the role of the neutral, the future "judge" may learn information during mediation not normally introduced in arbitration such as points of flexibility in demands, potential offers, weaknesses, or prejudicial information. 96

Professor Kristin Blankley⁹⁷ provides examples of awards vacated for confidentiality issues, specifically on the basis of: (1) being *174 explicitly based on mediation communications;⁹⁸ (2) the simple use of Med-Arb not creating an implicit waiver of mediation communications;⁹⁹ (3) one party not consenting to the appointed arbitrator who earlier mediated another aspect of the case;¹⁰⁰ and (4) using mediation communications not also introduced in the arbitration as the basis for an arbitration award.¹⁰¹ Further lawsuits involve claims that the arbitrator based the award on ex parte evidence received during the mediation.¹⁰²

Professor Ellen Deason provides the context as to why the legal challenges to combined process occur. First, there is an inherent conflict created when a neutral obtains information while serving as both mediator and arbitrator.¹⁰³ Second, challenges occur because the neutral improperly used information while acting as an arbitrator (including rejected settlement proposals) obtained while mediating.¹⁰⁴ Often the mediator/arbitrator's retainer agreement requires information shared during the mediation phase to constitute the arbitral record in lieu of a hearing for the purposes of rendering the arbitration award. As a result, the mediation and the arbitral evidentiary hearing are one and the same. This results in claims of adjudicative process violations, including claims that the arbitrator did not conduct a hearing and failed to take additional evidence.¹⁰⁵

*175 These challenges occur despite the fact that both processes contemplate and address issues of candor and confidentiality in order to avoid judicial involvement in ostensibly private dispute resolution processes. Mediation and arbitration separately prohibit breaches of confidentiality that routinely occur during Med-Arb. Arbitration's right of equal treatment prevents an

arbitrator from caucusing separately with the parties.¹⁰⁶ Ethical codes for arbitrators, including the ABA and Arbitration Association ("AAA") Code of Ethics for Commercial Arbitrators and the International Bar Association ("IBA") Rules of Ethics for International Arbitrators, discourage ex parte communications with parties.¹⁰⁷ Because parties cannot rebut arguments they were not aware of, i.e. those made by the other side during a confidential mediation caucus, mediation's core principle of confidentiality is in direct conflict with a fundamental tenet of arbitration and due process: the ability to know of and confront the other side's arguments. Without knowing what was said in the other side's caucus, it is impossible to provide countering evidence or cross-examine witnesses about the information. Additionally, the IBA rules state that while an arbitrator may make settlement proposals with the parties' consent, he must inform the parties that discussing settlement terms in the absence of a party will normally lead to disqualification of the arbitrator.¹⁰⁸

Mediation's confidentiality rules prevent an adjudicator from learning of, and thus being influenced by, mediation communications. For example, the Uniform mediation Act restricts the admissibility of mediation communications in both court and arbitration proceedings. ¹⁰⁹ Mediation communications are confidential, with exceptions for abuse, neglect, or criminal activity. Most importantly, mediation *176 communications are not subject to disclosure in any formal proceeding as the UMA prohibits the mediator from making a report about the mediation to the deciding judge or arbitrator. ¹¹⁰ The UMA further requires that decision-makers obtaining information about mediation communications may not consider it in making arbitral awards. ¹¹¹ Foreign arbitration statutes echo this general prohibition against the admission of mediation communications in an arbitration. ¹¹² Confidentiality statutes do not make exceptions for arbitration ¹¹³ and courts examining mediation confidentiality in combined processes uniformly find confidentiality rules apply. ¹¹⁴ Rules governing mediation and arbitration advocate for sharply drawn lines in order to protect the confidentiality and thus the sanctity of the two processes.

Med-Arb eliminates the confidentiality between facilitators and decision-makers intended to protect the integrity of both processes. Med-Arbs structure communication so that the judge, and not just the mediator, participates with the parties-indeed, the judge and mediator are one and the same. This is as if a judge were to *177 oversee a settlement conference for their own case. Research indicates many judges in that exact situation lack understanding or concern for confidentiality. In a 2009 survey, only 54% of settlement conference judges in general civil cases reported discussing confidentiality of settlement discussions with the participants usually, often, or regularly. In a 2009 survey, only 54% of settlement conference judges in general civil cases reported discussing confidentiality of settlement discussions with the participants usually, often, or regularly.

Med-Arb inhibits candor in mediation, severely limiting the process' effectiveness. Med-Arb eliminates the confidentiality of mediation communications in arbitration, unnecessarily exposing any resulting arbitral awards to judicial review. Med-Arb proponents advance four solutions to the confidentiality problems raised by Med-Arb. First, prior to utilizing Med-Arb parties consent to the structure, the resulting confidentiality issues, and waive any resulting causes of action. As described in Part III, informed consent is difficult to achieve and does not adequately resolve the confidentiality, impartiality, and self-determination issues. By utilizing a complex contract involving waivers of liability, informed consent to Med-Arb in itself further formalizes the process.

Second, the confidentiality issue can be lessened, but not completely resolved, by the mediation all occurring in joint session without separate, private, caucuses. This does not lessen the candor concern but it does ensure that parties are able to know of, and thus confront, any statements made privately to the mediator. This solution is largely not viable as most neutrals able to serve as an arbitrator are unaccustomed to facilitating conversation between parties and rely largely on caucus.

A third solution to Med-Arb's confidentiality problem is the neutral disregarding information learned during mediation when determining the arbitral award.¹¹⁷ Judges and juries regularly ignore information deemed to be improper,¹¹⁸ and the "concept that a trier of fact can ignore improper evidence enjoys broad acceptance in American Jurisprudence."¹¹⁹ However, any claim that neutrals may be able "to keep secrets from themselves" should be regarded with suspicion.¹²⁰ The weight of psychological evidence suggests people have *178 great difficulty deliberately disregarding information.¹²¹ Evidence indicates judges do not disregard inadmissible information when making substantive decisions¹²² and even if a judge can ignore information, what was learned will still affect judgments indirectly.¹²³ Furthermore, judges are less able to ignore inadmissible evidence when making determinations that they consider at low risk of review.¹²⁴ Consequently, arbitrators facing little risk of review are probably even less able not to consider mediation communications during the arbitration phase.¹²⁵

A fourth solution and an alternative to ignoring information learned in mediation, Med-Arb proponents suggest reversing the two processes. In Arb-Med, the neutral mediating the case renders and seals the arbitral award and can be confident that

information learned in mediation will not contaminate the arbitration process.¹²⁶ Arb-Med may relieve Med-Arb's confidentiality problem, but, as discussed in the next Section, it does not resolve Med-Arb's impartiality problem.

B. Med-Arb Compromises the Neutral's Impartiality

Med-Arb's confidentiality and candor problems lead to three major impartiality problems. First, acting as a mediator/arbitrator in Med-Arb harms the mediator's impartiality by making it more difficult for the neutral to mediate. Second, acting as the mediator harms the arbitrator's impartiality as information learned during the mediation may negatively implicate the neutral's impartiality in rendering the arbitral award. The third impartiality problem is created when parties attempt to avoid these problems, because the structure incentivizes the neutral to pressure settlement prior to arbitration. The resulting Med is more formal and more akin to a judicial settlement conference and the resulting Arb is more susceptible to judicial review. The 2008 Wissler Survey of Ohio lawyers illustrate the impartiality problem: 31% strongly or somewhat agreed with the statement that the judge assigned to the case handling the settlement conference is biased, falling to 7% for judges not assigned to the case, 4% for court staff mediators, 6% for volunteer mediators, and 7% for *179 private mediators. With this in mind, the following Section describes how Med-Arb's effort to counter the legalization of mediation and arbitration actually does the opposite as it exacerbates the impartiality problem.

1. Impartiality of Med-Arbiter Acting as a Mediator

In Med-Arb, the neutral is incentivized to impose solutions and essentially turn the mediation into a faux judicial settlement conference. This is because the neutral wields significant influence over possible alternatives to a negotiated agreement. The parties will closely examine the mediator's statements as the mediator may eventually become the arbitrator and thus informally controls the Best Alternative to a Negotiated Agreement ("BATNA"). In 'normal' mediation, parties examine and analyze their BATNAs, often as the mediator elucidates and assists the parties in thinking through likely outcomes. Med-Arb changes the BATNA analysis of the parties who seek to determine from the neutral's clues, what the likely award might occur if the matter proceeds to arbitration. The mediation turns away from the issues and the parties' options and focuses on the neutral. For example, because the same neutral will hear the dispute in arbitration if mediation is unsuccessful, the frequent BATNA question of "what might happen if this dispute goes to court?" becomes an exercise without a purpose. It is no longer relevant how "a" judge may see the evidence, but instead how "the" very mediator asking the question will decide the matter. In Med-Arb, the mediation is formalized into a judicial settlement conference as the mediator will become the arbitrator if settlement does not occur.

The neutral's impartiality is also under pressure in the mediation phase because the parties have an opportunity to both influence the prospective award and to determine what that award might be, and to test whether settlement is preferred.¹³⁰ The parties and their advocates will utilize the private caucus sessions to convince the neutral of their case, attempting to "spin" the mediator. At the same time the parties will naturally examine any clues as to the neutral's preferences. Impaired perceived and actual impartiality of the neutral negatively impacts candor in the mediation because no thoughtful mediation participant would share the weaknesses in their case with a mediator who may become an arbitrator.

*180 2. Impartiality of the Med-Arbiter Acting as an Arbitrator

The second impartiality issue occurs after the mediation phase when information learned during the mediation phase not normally introduced in arbitration, will likely "cast doubt on the judge's decision-making neutrality." The suspicion of parties involved is that arbitrators may make biased awards based on information learned during the mediation phase alone. For example, mediators tend to learn the potential settlement ranges. While the arbitrator is charged with determining the arbitral award according to the evidence have the parties know that the arbitrator is aware of the boundaries of desired settlement. Even if the arbitrator is acting impartially in determining the award, it will not appear this way to at least one of the parties because the parties will assume the neutral came to their conclusion with the known settlement ranges in mind. These issues are illustrated in the 2008 Wissler Survey of Ohio lawyers, where 60% strongly or somewhat disagreed with the statement that the judge assigned to the case is "able to explore settlement without prejudice to ongoing litigation if the case is not settled." In comparison, lawyers strongly or somewhat disagreed with the same statement relating to judges not assigned to the case (16%), court staff mediators (5%), volunteer mediators (3%), or private mediators (1%). Despite fulfilling the obligations of the role, judges no longer appeared "impartial," even though the parties consented to the process. The survey provides evidence that neutrals with subsequent settlement authority will be widely viewed as partial as compared

to neutrals without such authority.

C. Impartiality of the Med-Arbiter Generally

Med-Arb's third impartiality problem is that it incentivizes the neutral to avoid the above arbitral impartiality issue by achieving a *181 mediated resolution. Neutrals pressuring settlement compromise their impartiality by abusing the "shadow" of an impending arbitration to put pressure on settlement. The self-determination issues created by such tactics are reviewed in Part III. Med-Arb's structure is similar to a judicial settlement conference, and research indicates that settlement conference judges are partial towards settlement. For example, only 25% of general civil settlement conference judges surveyed in 2009 reported usually, often, or regularly being indifferent as to whether a settlement is accomplished. No judges in settlement conferences for complex civil cases reported usually, often, or regularly being indifferent as to whether settlement is accomplished. Neutrals in a Med-Arb are similar to judges in a settlement conference, only the Med-Arb structure incentivizes the neutral to pressure settlement, and in doing so, harms the neutral's impartiality.

Not every party knows whether they want to settle when they enter the process. Consequently, neutrals pressuring settlement are not impartial and in effect become someone with whom the parties must negotiate in order to achieve their goals. For example, if a party shares their 'true' bottom line with the mediator, they will likely be pressured towards it, incentivizing the party to hide information. In reality, parties need help thinking through their options and without complete information the neutral is less likely to be able to assist. This is not a phenomenon created by Med-Arb, but is a result of the legalized form of mediation in which settlement is assumed and the mediator is there to evaluate, pressure, and cajole. Med-Arb further legalizes the situation by incentivizing the neutral to avoid confidentiality and impartiality issues in the arbitration by using their decision-making authority to pressure settlement in the mediation phase.

D. A Med-Arb Is Not a Judicial Settlement Conference

Med-Arb proponents make three main arguments to rebut the impartiality problem. First, advocates argue that a process of informed consent, often accompanied by a waiver of liability for any perceived or actual partiality, resolves the issue. Second, advocates argue there is no conflict in using the same neutral for both the Med and the Arb because this blended process is analogous to a judicial settlement conference. Finally, advocates point to Arb-Med as a *182 means of resolving impartiality concerns. Informed consent is further discussed in Part III.e. The remainder of this Part describes the second and third arguments.

1. Judicial Settlement Conferences Face Impartiality Issues

Med-Arb proponents point to ostensibly 'impartial' judges in civil cases routinely acting as mediators in settlement conferences. If settlement does not occur, the case continues into the trial or "arbitration" phase. Bolstering this argument, Peter Robinson's research found 80% of the techniques used by a judge in a "mediation" are the same as those used by a judge in a "settlement conference." Recent studies indicate that judicial settlement conferences are very similar to evaluative mediations, and that both face impartiality problems. A 2009 survey of settlement conferences judges indicated 75% of civil judges in general and complex cases request concessions from one or both parties in negotiation usually, often, or regularly. Sixty percent of civil judges in general and complex cases indicated they meet exclusively in caucus usually, often, or regularly. Only 11% of judges in general and complex cases encouraged the clients to discuss the case directly with the other side usually, often or regularly. These statistics demonstrate that judicial settlement conferences and evaluative mediation are today one and the same. The impartiality issues facing Med-Arb, including ex parte communications and the propriety of pressuring settlement, exist in judicial settlement conference. The argument that Med-Arb's impartiality is satisfied because the hybrid simply replicates a judicial settlement conference instead proves the point: A judicial settlement conference is not an impartiality model for Med-Arb to replicate.

Research from the early 1980s bolsters this conclusion and demonstrates the discomfort expressed by both lawyers and judges regarding judicial settlement techniques viewed as biased. Lawyers surveyed on judicial settlement by Wall and Schiller in 1982 found the most used techniques included: Asking both lawyers to compromise (80%), analyzing the case for a lawyer (79%), suggesting they split the difference (72%), pressuring the ill-prepared attorney (72%), evaluating one or both cases for the attorneys (69%), calling a certain *183 figure reasonable (69%), suggesting settlement figures after asking for

lawyers' inputs (67%), and informing the attorneys as to how similar cases have been settled (66%). Lawyers viewed (1) coercing lawyers to settle (2) suggesting settlement figures without asking for lawyers' inputs, (3) pointing out the case's strengths and weaknesses to the client (4) commenting on the credibility of testimony; and (5) offering advice to a lawyer to be unethical practices. Lawyers viewed judicial settlement techniques to be lacking impartiality and biased towards settlement.

Judges themselves raised concerns about conducting judicial settlement conferences in a 1984 survey by Wall, Schiller, and Ebert. 144 Reasons against participating in settlement conferences highlighted the impartiality concerns and included opinions that it was ethically improper, outside their role, represented illegal and impeachable offenses, or that they themselves resented judicial pressure when practicing as attorneys. 145 A significant number of judges also declined to become involved in settlement negotiations because they felt it prejudiced them if the negotiations were unsuccessful. 146 Others felt that judicial-led settlement resulted in parties' routinely expecting such involvement and thus doing very little settlement work prior to court involvement. 147 Early evidence suggests both attorneys and judges were uncomfortable with impartiality issues raised by judicial settlement conferences. There are impartiality issues with settlement conferences as judges serving as "informal mediators" are more powerful than either of the parties compared to other neutrals. 148 By using the specter of an unfavorable judgment as a sword, a judge can yield significant power in shaping specific settlements. There are also impartiality issues with using judicial settlement conferences as a model for Med-Arb to emulate.

*184 2. Elevating Med-Arbiters to Judge-like Status Exacerbates the Impartiality Problem and Creates a Due Process Problem

Following mediation with arbitration and using the same neutral for both processes elevates the neutral to judge-like status. Just as parties and their advocates carefully watch judges during settlement conference for signs of signaling preferences or views about the case, the parties in a Med-Arb do the same, elevating the already sensitive issue of impartiality. Due to the similarity between evaluative mediation and judicial settlement conferences, Med-Arb should not be considered a hybrid of mediation and arbitration, but instead a judicial settlement conference conducted prior to an arbitration. There is one notable difference that constitutes a key reason why the judicial settlement conference analogy fails: The arbitration in a Med-Arb lacks the due process protections provided by either trial or a traditional arbitration. The fact that many judges are involved in settlement discussions prior to litigation does not mean it is proper for a neutral to do so under private dispute resolution procedures. For example, often the neutral seeks to use the mediation as the arbitral hearing if the mediation ends in impasse instead of conducting two distinct sessions and an opportunity for presenting proofs. This makes it impossible for an appeal given the unavailability of an evidentiary record, and presents issues in terms of the right to confront all arguments. Clearly defined procedures governing litigation protect the parties from the dangers of partial settlement conference judges. Med-Arb lacks due process protections.

Blending mediation and arbitration without a clear delineation raises process concerns, including the arbitrator asking a party in arbitration what it would offer and entering this amount as an award. Problematic transitions from mediation to arbitration can also occur, notably when parties reach an incomplete agreement in mediation and are unclear as to the extent to which process is underway. The result is a Med-Arb hybrid process vulnerable to legal review--endangering the enforceability, and thus the finality, of the arbitral award.

*185 The settlement conference comparison also fails to satisfy impartiality due to the rules governing arbitration and mediation. Arbitration requires an opportunity for parties to be heard and to be treated equally.¹⁵¹ Equal treatment is significantly conditioned on a neutral's impartiality. The Texas Ethical Guidelines for Mediators provides that a neutral serving as a mediator should not subsequently serve in any other judicial or quasi-judicial capacity in matters that are the subject of the mediation.¹⁵² The Ontario Arbitration Act prohibits any process that "might compromise or appear to compromise the arbitral tribunal's ability to decide the dispute impartially."¹⁵³ The China International Economic and Trade Arbitration ("CIETAC") rules were changed to accommodate western concerns and now enable parties to have their conciliation conducted by person(s) other than the arbitration tribunal.¹⁵⁴ Existing ethical rules operate to create distinctions between formal and informal processes in order to ensure confidentiality, candor, and impartiality.

3. Research Indicates a Preference for Separating the Informal and Formal Resolution Functions

Studies indicate a clear preference for separating the informal and formal resolution functions. A 2009 Wissler Survey of

Ohio lawyers examining mediation versus settlement conferences, indicates lower satisfaction with settlement conferences overseen by judges assigned to the case. Ohio lawyers preferred mediation with staff mediators first, followed by settlement conferences with judges not assigned to the case, and then mediation with private mediators *186 ahead of settlement conferences with judges assigned to the case. Doly mediation with volunteer mediators was ranked lower.

Recent research also indicates clients are better served by court mediators, private mediators, and even judges who are not assigned to the case than they are by judges assigned by the case. When asked about client satisfaction regardless of outcome, 53% of lawyers agreed or strongly agreed with the statement that judges assigned to the case who overseeing settlement discussions left clients feeling well served.¹⁵⁷ Only volunteer mediators received a lower rating (33%) with non-assigned judges (60%), court mediators (70%) and private mediators (59%) all viewed as better able to help clients feel better served.¹⁵⁸ Separating the informal and formal aspects of resolution help to ensure the neutral's impartiality.

4. Arb-Med Does Not Resolve Med-Arb's Impartiality Problem

Finally, Med-Arb advocates advance the use of Arb-Med to rebut the impartiality problem. Arb-Med may lessen the candor and confidentiality concerns, but it does not address the impartiality problem. In Arb-Med, the neutral first conducts the arbitration, seals the award, and then mediates the dispute. The parties will still carefully watch the neutral's subsequent statements in order to glean information about the award. This makes it very difficult for the mediator in an Arb-Med to reality test the BATNA and to avoid signaling their views. Not only do the arguments advanced by Med-Arb proponents correct Med-Arb's impartiality problem, they do not address Med-Arb's fundamental flaw: The impartiality issue encourages adversarial behavior. The next Section addresses adversarial behavior in mediation.

E. Med-Arb Incentivizes Adversarial Behavior

The Med-Arb "solution" is to correct the adversarial behavior that typifies legalized mediation by placing the "judge" in the room. Med-Arb is an effort to deal with parties who refuse to bargain in good faith in mediation. The pro-good faith argument is that courts compelling mediation have a responsibility to protect parties from adversarial abuse and to provide guidance about what is expected from the parties and the mediators. While not uniformly definable, good *187 faith is described as "leaving behind adversarial instincts and tactics and cooperating, or at least playing along, with the demands of the mediator." Arguments against good faith include the inability to define or the subjective nature of good faith; the creation of additional litigation over mediation misconduct; and the impact on confidentiality and mediator impartiality by pressuring good faith behavior and being the best evidence of party misconduct. On one hand is "distaste for the rule-based adversary system" and preference for limiting judicial review to objective issues (e.g., party attendance) to minimize the court's role. On the other is the argument that a good faith requirement is necessary in order to ensure a fair process without adversarial abuse. Therefore tension exists between efforts to maintain confidential, informal, and voluntary alternatives, and mandatory means of requiring mediation to ensure efficient and effective resolution of disputes.

Med-Arb proponents argue the hybrid process resolves this tension and effectively eliminates the need for the mediator to ensure or monitor "good faith" in mediation, as he or she will assume the role of arbitrator and have decision-control if the dispute does not settle in mediation. The finality of the Med-Arb process provides an incentive to bargain with the purpose of reaching an agreement. ¹⁶⁶ Negotiating in good faith is ensured in Med-Arb by placing the decision-maker in the room as the mediator and subsequent arbitrator, and guards against adversarial abuses. ¹⁶⁷

Recent research questions whether Med-Arb is the best means of managing difficult parties and indicate that there is little difference *188 between mediators and judges in ensuring good behavior. The 2008 Wissler Survey of Ohio lawyers examining judicial settlement conferences indicated that 76% strongly or somewhat agreed with the statement that when overseeing judicial settlement conferences the judge assigned to case can help counsel manage difficult parties. Lawyers strongly or somewhat agreed with the statement relating to judges not assigned to the case (76%), court staff mediators (70%), volunteer mediators (36%), and private mediators (62%). Examining the other end of the spectrum, Lawyers strongly or somewhat disagreed with the statement for judges assigned (9%), for judges not assigned (5%), for Court staff mediators (7%), for volunteer mediators (26%), and for private mediators (5%). Aside from the views regarding volunteer mediators, these statistics do not indicate a large divide between judges and mediators in their ability to help counsel manage difficult parties.

Instead of ensuring good behavior, adding arbitration and the finality it provides to ensure "good faith" in mediation only legalizes the process. In Pruitt, et al.'s 1989 study examining mediation, different-neutral Med-Arb, and same-neutral Med-Arb, the authors found that threats and strong advocacy of a solution, described as heavy pressure tactics, were significantly greater in same-neutral Med-Arb than in mediation.¹⁷¹ Knowing the neutral has decision-making authority, advocates will seek to both determine and influence the views of the neutral who will eventually become the decision-maker.¹⁷² With impartiality under a microscope and candor inhibited as the parties attempt to "spin" the mediator, the prospects of reaching agreement are severely curtailed.

Confidential mediation caucus sessions provide Med-Arb parties to have ex parte conversations with their future arbitrator--an ideal opportunity for advocates to poison the well.¹⁷³ Advocates may utilize these separate caucus sessions to reveal unfavorable information about the other side, knowing that the other side will not know of these communications and be able to rebut them. The potential exists *189 for advocates to use the mediation, and the caucus sessions in particular, offensively in anticipation of arbitration. Utilizing this information either during the mediation to pressure settlement or afterwards while determining the arbitral award harms the mediator's impartiality. Neutral accustomed to evaluating may struggle to assist the parties in interacting productively¹⁷⁴ without compromising their impartiality.

The impending arbitration phase provides a carrot to "behave" that leads to settlement, but it also creates a competing incentive for the "Arb" to leak into the "Med." Placing the prospective decision-maker in the room changes the dynamics and encourages advocates to operate as though in the arbitration. These incentives to "arbitrate" the mediation make the session far more formal and adversarial than it might be otherwise and may limit the mediator's effectiveness and the prospects of reaching an agreement. In order to counter these tactics, the neutral must act more as a judge and less as a mediator, evaluating the legal merits, and pressuring the parties towards settlement by implicating, directly or indirectly, their authority over settlement. The impartiality and confidentiality issues described increase the formality and the adversarial nature of the process and result in a process that is increasingly legal.

F. Informed Consent to Use Med-Arb Does Not Protect Party Self-Determination

Med-Arb proponents describe self-determination and party choice as the solution to both the confidentiality and impartiality problems. Med-Arb advocates point to the importance of providing parties with a full understanding of the risk and benefits, and only undertaking Med-Arb "with the parties' full, voluntary consent."¹⁷⁵ The benefits, though, are not worth the risks. Implicitly, efforts seeking to protect and fully inform prospective parties to Med-Arb require that the process be made increasingly formal and legalistic. The next Section reviews these arguments and describes how Med-Arb limits self-determination and choice.

1. Informed Consent Corrects Med-Arb's Flaws

Proponents of Med-Arb believe that Med-Arb's detriments can be avoided through an informed and thorough mechanism of consent *190 prior to agreeing to Med-Arb. Indeed, this is the "silver bullet" argument that flexibility 176 and choice are the hallmarks of ADR and restricting the exercise of choice is overly rigid and paternalistic. Med-Arb, where sophisticated parties contract for the dispute resolution option of their choice is, they argue, the epitome of flexibility and disputant control. Med-Arb proponent John Blankenship argues "the process should be fashioned to fit the dispute, rather than the dispute to the process."177 Instead of viewing ADR processes as "unalterable process boxes" into which disputes must fit, ADR procedures should be "adaptable and combinable in order to best meet the needs of a particular dispute." ¹⁷⁸ Blankenship argues the "alternative" in ADR often means that only certain "alternatives" are available and that this harms flexibility and creativity. 179 Blind devotion to certain mechanisms is harmful to the field as a whole. 180 John Lande echoes these concerns when he noted that "[p]rocedures are inanimate phenomena that should be means to ends, not ends in themselves . . . [so] [i]nstead of investing so much of our cultural resources in myths about our most (or least) favorite procedures, we should invest more in realistic stories honoring people who work together to make good choices in using procedures to satisfy people's interest"181 Instead of arguing over the "correctness" of certain procedures, Lande and Blankenship frame the argument as one of individual preferences to tailor dispute mechanisms in ways that meet party interests. The notions that "one size does not fit all" and "flexibility and choice" are the hallmarks of ADR ignore the reality that ADR processes are now the primary mechanisms for resolving legal disputes and as a result they require careful examination.

2. Informed Consent Does Not Provide True Self-Determination

Med-Arb, even when selected through a process of informed consent, does not provide for party self-determination due to five main reasons. First, lawyers and the increased legalization of mediation *191 curtail party self-determination. Second, increasing the legality of mediation by making the mediator also the arbitrator further curtails party self-determination. Third, informed consent to formal processes is not the same as informed consent to informal processes. Fourth, barriers to educating clients and their advocates about the dangers of Med-Arb make achieving truly informed consent difficult. Finally, even assuming self-determination to use Med-Arb, issues with educated party choice exist beyond the initial agreement. The resulting picture is one in which self-determination is not protected throughout Med-Arb by often complicated initial consent forms that in and of themselves further legalize the process.

a. Lawyers and the Increased Legalization of Mediation Curtail Party Self-Determination

Med-Arb advocates argue that sophisticated, represented parties should not be restricted in their ability to make such choices. These arguments can be countered by evidence indicating that procedural choice may relate more to the attorney's inclinations than the client's preferences. 182 The weight of research highlights participant preference for non-adjudicative resolution procedures. In a 2004 study, Shestowsky found in two experiments that participants prefer dispute resolution options that provide them the most control. 183 Notably, parties preferred to present their own information without the assistance or filter of a representative. 184 Participants want "a neutral third party to do no more than help them arrive at their own decision." 185 Aspects of control that matter to disputants include "the level of formality or conversationality of the discussion, and who has the authority to determine when it is appropriate for the disputants to speak." 186 Studies also indicate disputants prefer non-adjudicative procedures to adjudicative ones. 187 The legality of the subject matter does not necessarily influence the participants' dispute mechanism preferences. 188 Simply put, disputants prefer processes that provide greater voice and participation, and these processes tend to be less *192 formal and less legalistic. Further, an important benefit of disputants' preferences guiding procedural choices and direct participation in the resolution process is voluntary compliance with agreements. 189 As a result, self-determination within the process leads to self-determined compliance after resolution.

Despite party preferences for non-adjudicative procedures, self-determination, and control, evidence suggests attorneys are the gatekeepers to ADR.¹⁹⁰ Clients look to their lawyers for guidance on how to approach the dispute,¹⁹¹ and clients are significantly influenced by their lawyer's preferences and tendencies regarding dispute resolution.¹⁹² Research indicates party self-determination to utilize informal dispute mechanisms is heavily mediated by attorney preferences. Brett and Shestowsky's research indicates that disputants' initial *193 procedural preferences do not predict which settlement mechanism they later select.¹⁹³ They posit three possible explanations for this behavior: (1) issues of time or cost may impact the procedural choice; (2) the opposing party preferred a different mechanism; or (3) attorneys were directing their clients' procedural choices.¹⁹⁴ In analyzing the data, Shestowsky and Brett believe attorneys were not guiding their clients to the newly available mediation program and were also not inclined to negotiate.¹⁹⁵ As the gatekeepers to ADR attorney preferences guide client choices, curtailing client self-determination and leading to the use of more legalized alternatives like Med-Arb or evaluative mediation.

Once in mediation, party self-determination is limited due to attorneys' preferences for evaluative processes that emphasize the law over the interests and the needs of the parties. The Model Standards of Conduct for Mediators defines the extent of self-determination. The Standards state, that "parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes." Under this definition, evaluative mediation offers parties a more limited version of self-determination. As described above, attorneys prefer evaluative mediation and seek mediators who have the legitimacy to mediate through their substantive expertise honed over years of litigating similar issues. Evaluative mediators legalize the process by often focusing exclusively on the legal issues in the case, by pressuring settlement, and by using mediation retainer agreements that may include waivers of liability, including an expressed agreement that the mediator will be evaluating the legal merits of the dispute and providing settlement options.

Ironically, when parties are dissatisfied with informal processes it is often because attorneys are primarily in control of negotiation.¹⁹⁷ This explanation is confirmed by Shestowsky and Brett's who found that 39.3% of negotiation participants were unable to identify the rules or basis for resolving their dispute.¹⁹⁸ This suggests that adjudicative procedures may involve the participation of disputants in *194 ways that non-adjudicative procedures may not.¹⁹⁹ The formal mechanisms whereby disputants are included (attending the proceeding, acting as a witness) may provide for more participation than informal

mechanisms handled exclusively by their attorneys. Ironically, with attorneys controlling informal processes, the parties' participation is limited at best. The procedural formality of adjudicative procedures may thus enhance disputants' perceptions of fairness.²⁰⁰

b. Increasing the Legality of Mediation by Making the Mediator also the Arbitrator Further Curtails Party Self-Determination.

Evidence of party perception of greater participation in more formal adjudicative processes suggests that Med-Arb may provide greater self-determination than evaluative mediation. As neutrals in Med-Arb tend to be evaluative, Med-Arb must be viewed in light of the limited self-determination provided when selecting evaluative mediation. Med-Arb "choice" looks remarkably similar, and in fact may be a natural progression from this more legalized and adjudicative form of mediation. In both instances "choice" occurs at the beginning-stage decision of whether to utilize these processes and who to utilize as the neutral. These choices often impact the types of conversations that take place in the mediation. In arbitration only legal norms will be enforced²⁰¹ whereas in mediation, parties can agree to non-legal solutions. By pairing mediation with arbitration and placing the arbitrator in the mediation, it ensures that the mediation takes a decidedly legal tone and thus inherently legalizes the mediation, reducing party self-determination in favor of more legal arguments.

c. Informed Consent to Formal Processes is Not the Same as Informed Consent to Informal Processes

As the risks of Med-Arb are difficult for most parties to understand without experiencing, legal definitions of informed consent are insufficient for ensuring self-determination to utilize the a hybrid process. Determining informed consent to mediate is not easy, complicating the process of determining informed consent to utilize Med- *195 Arb.²⁰² Generally legal informed consent is defined as "[a] person's agreement to allow something to happen, made with full knowledge of the risks involved and the alternatives."²⁰³ The Model Standards of Conduct for Mediators does not utilize the term informed consent, ²⁰⁴ but Professor Nolan-Haley defines informed consent in mediation as "requir[ing] that parties be educated about mediation before they consent to participate in it."²⁰⁵ Further, informed consent "guards against coercion, ignorance, and incapacity that can impede the consensual underpinnings of the mediation process."²⁰⁶ Informed consent in formal processes like litigation or arbitration can thus be contrasted with informed consent to utilize informal processes like mediation.

Informed consent in mediation is something that must be maintained throughout the process, and not simply achieved at the outset. Informed consent includes both "participation consent" and "outcome consent" and participation consent is not meaningful without a full understanding of the process.²⁰⁷ If "outcome consent" rests on mediator evaluation, the basis for the evaluation should be clear and include the mediator's expertise and, if applicable, highlight ways in which the evaluation is different than what a judge would recommend.²⁰⁸ Underlying informed consent are the values of individual autonomy and self-determination.²⁰⁹

Determining the degree of information needed to make decisions "informed" is difficult due to the potential complexity of the subject matter and the sophistication level of the parties. Five key elements must be addressed to achieve informed consent: disclosure, comprehension, voluntariness, competence, and consent. One "of *196 the key elements of clients having autonomy [and] decision-making. . . is the information the lawyer provides to the client. Informed consent to utilize Med-Arb is very similar to informed consent when utilizing an evaluative mediation process. Both require a greater understanding of the hidden risks to a process combining formal and informal processes. For example, the International Bar Association's Working Group, formulating Guidelines on Conflicts of Interest in International arbitration, stated:

Considering the sensitive position of the arbitrator as potential settlement facilitator. . . the taskforce and the Working Group determined that the parties must give their express agreement prior to the commencement of such a process. This express agreement will be considered an effective waiver of any potential conflict of interest that might arise from the arbitrator's participation in settlement or from any information that the arbitrator may learn in the process.²¹⁴

Understanding the limitations and risks associated with confidentiality and impartiality make informed consent to utilize Med-Arb more complicated than informed consent to utilize mediation or arbitration alone. In order to effectuate informed consent requires a discussion of the limitations and risks of Med-Arb and this in itself increases the legality of both the discussions and the result consent agreement itself.

d. Barriers to Educating Clients and Their Advocates About the Dangers of Med-Arb Make Achieving Truly Informed Consent Difficult

Entering into Med-Arb requires parties to be educated about the weaknesses inherent in the process. Love and Cooley argue that, similar to entering into a Med-Arb process, party consent to engage in evaluative mediation should be "based on a clear understanding of the benefits, limitations, and risks associated with the process." Love and Cooley argue that "relying on parties to study mediator retainer agreements (when clients may rely on their lawyers for that service) would be a mistake," just as it might be a mistake to assume "that attorneys understand the difference between mediation and an *197 evaluative process." It may be difficult for clients to understand these issues without experiencing them first hand. With informed consent overseen difficult to guarantee or even monitor, and attorney preferences weighing heavily on party choices to utilize ADR, 217 party self-determination is uncertain at best.

As an example of the challenges of educating parties about the dangers of combining formal and informal processes, Love and Cooley describe mediators who agree to offer an evaluation as a last resort in order to break impasse given the difficulty of determining what is a final impasse. Parties want an evaluation often because they believe it will be favorable. Their attorneys may want an evaluation because they believe it will benefit their clients or will make their clients more flexible. Love and Cooley thus caution that evaluations "are likely to disappoint one (or sometimes all) of the players." Therefore, mixing informal and formal processes is something that inherently pressures the impartiality and confidentiality of the informal process and makes self-determination difficult to achieve without understanding the complicated dynamics involved.

Often Med-Arb is considered at the neutral's suggestion, and in such situations it is questionable as to whether true self-determination is taking place because parties may be agreeing to the process to avoid appearing disagreeable to the neutral. Arbitrator John Kagel argued that arbitrator-suggested mediation creates a difficult tactical problem for parties not wanting to offend their potential arbitrator and that the parties "will be subject to the same kind of subtle coercion to settle in mediation as they were to getting there." Med-Arb proponent Gerald Phillips argues the risk-benefit analysis of Med-Arb should be "made by the parties and their counsel, not by the neutral." Weisman also cautions that it is imperative for the mediator-arbitrator to describe both the process's benefits and criticism and that the scope of Med-Arb should always be in the hands of the parties. Despite Weisman's best efforts to encourage self-determination, a detailed explanation of the benefits and criticisms of Med-Arb *198 requires understanding the legal risks of weakened impartiality and confidentiality. Such discussions will be inevitably legal, and clients will defer to their attorney's preferences, making true self-determination elusive. The initial self-determination to agree to the process is often uninformed and insufficient because attorneys themselves do not understand the risks and the neutral suggesting the process may not effectively detail all the limitations of Med-Arb.

In sum, the difficulties of determining self-determination and informed consent to use an evaluative mediation process are not corrected or improved by adding an arbitration component. Neither evaluative mediation nor Med-Arb provides for true informed consent about the risks of the process, and neither provides for adequate self-determination. Executing truly informed consent will increase the legality of Med-Arb. As Professor Kristin Blankley indicates, courts are hesitant to uphold arbitration awards in Med-Arb when the parties have not expressly consented to the use of mediation communications in the arbitration. Blankley argues that parties using Med-Arb must adequately provide in advance for confidentiality and informed consent. Such planning and careful drafting increases the formality and thus the legality of the process, because without such legalization, the resulting arbitration agreement arising from a Med-Arb is vulnerable to being vacated under the Federal Arbitration Act. There also may be issues about what specifically may be waiveable. While the Massachusetts Court of Appeals, for example, held parties agreeing to Med-Arb "waive[s] any due process rights attendant on the mediation and arbitration,"225 a party agreeing to arbitration does not surrender due process rights or mediation confidentiality rights.

*199 e. Even Assuming Self-Determination to Use Med-Arb, Issues with Educated Party Choice Exist Beyond the Initial Agreement

Assuming the actualization of party self-determination to utilize Med-Arb still may limit self-determination only to the decision point of entering into the process. The choice to settle in the mediation phase is certainly incentivized,²²⁷ but it is not a decision that can be made unilaterally without the other side's agreement. Thus the default, agreement notwithstanding, is

an agreement to arbitrate that is complete and binding upon agreeing to the combined process.

The parties have an incentive to retain self-determination by reaching a mediated settlement. But what if one or both sides no longer see the neutral as impartial? Self-determination in mediation occurs throughout the process, not simply at the initial agreement stage. Parties in some respect are always negotiating for the third party neutral's perception, but Med-Arb elevates this to a greater degree. Knowing that your mediator will become your arbitrator requires that you attempt to persuade the neutral to see the issues from your point of view. If a mediation party shares information detrimental to their situation to the mediator, or if the mediator indicates favoritism towards one party's position, a party may regret their decision to enter Med-Arb. Self-determination would be greater in Med-Arb if the parties could each opt out and select an alternative arbitrator.²²⁸ Touting finality and cost-savings as overriding values, Med-Arb agreements typically require parties to use the same neutral for both phases and leave no recourse if either party is unhappy with the neutral's performance in mediation.

Self-determination beyond the initial agreement also becomes an issue in deciding when the shift from mediation to arbitration will occur. If parties must jointly agree to transition to arbitration, it could indefinitely delay arbitration, but the same is true if one party refuses to participate in the arbitration phase.²²⁹ Bartel argues the transition ideally will not take place until both parties agree, but without that consent the only real solution is to vest the Med-Arbiter with the power to determine when the transition occurs.²³⁰ Such power could be used to stimulate compromise during the mediation, but might pre-maturely conclude the mediation because of slower- *200 than-desired progress.²³¹ A lack of party control or certainty over when the process proceeds to arbitration harms the self-determination of the parties over the process.

Further, the finality of arbitration impacts self-determination. While the parties are aware the neutral makes the final decision if they cannot reach an agreement, providing one neutral with the ability to mediate and render a binding decision can result in coercion by the neutral during the mediation.³³² Neutrals may unknowingly signal their opinions on the dispute and influence the outcome of the mediation.²³³ Though the resolution may appear negotiated, the parties may feel that it was imposed, which will diminish their satisfaction and commitment to the result.²³⁴ Efforts to ensure self-determination and informed consent will result in increasingly technical and legal agreements to Med-Arb, and increasingly legalistic Med-Arb "mediation" sessions as the neutral pressures the parties to settle prior to the "arbitration" session. Correcting mediation's legalization problem with arbitration raises a host of issues relating to confidentiality, and impartiality. Informed consent does not provide self-determination due to the barriers to understanding and making informed choices. Without the ability to make truly informed consent, Med-Arb encourages legalized forms of both component processes and consequently limits the most essential aspect of mediation: party self-determination and freedom of choice. The resulting story is one in which mediation's informality is severely curtailed and arbitration's finality is endangered.

IV. Conclusion

The rise of "legal" and more adversarial forms of mediation, and arbitration's increasing similarity to litigation makes Med-Arb attractive as a means of "correcting" for the legalization of these ADR processes. Parties struggling to settle in mediation need arbitration's finality, and parties unhappy with arbitration's similarity with trial need to add mediation's flexibility. Same neutral Med-Arb appears to *201 be a viable solution. But by requiring increasingly proscribed agreements to achieve informed consent and opening the door to increased judicial scrutiny, same-neutral Med-Arb, in addition to violating fundamental tenets, will accelerate the legalization of both mediation and arbitration. The result of arbitration resembling litigation and mediation resembling arbitration is that our alternative processes are beginning to look more and more like the formal system itself. Professor Nolan-Haley argues that the blurring of mediation and arbitration will leave disputing parties with little more than variations of adjudication.²³⁵

Parties are free to select same-neutral Med-Arb,²³⁶ but mediation and arbitration are available as subsequent but separate processes and can be utilized with a different neutral. Utilizing different neutrals may save money and time, given the risks posed by combing the two processes. For example, in an effort to save expense, many neutrals and parties skip the arbitral hearing as being duplicative of the mediation.²³⁷ Such a step places additional pressure on issues of candor (mediating while knowing that an informal arbitral record is being compiled), confidentiality (the ability to confront all arguments), impartiality (the arbitrator attempting to disregard certain information), procedural fairness (of having a record for purposes of appeal), and informed consent (to waive key features of both processes).

Despite speculation to the contrary,238 Med-Arb will not save time or expense for participants as it will be difficult to locate

neutrals who can adequately perform both functions. An ideal Med-Arb neutral is equally skilled in both facilitative mediation and arbitration, but these are vastly different skills and mindsets. To conduct same-neutral Med-Arb correctly requires an individual with the substantive expertise to serve as the arbitrator and the exceptional facilitative skills to remain impartial during the mediation. Few legal mediators practice in this way limiting the pool of neutrals qualified to serve as a mediator and an arbitrator.²³⁹ The skills of each role are very different. A decision-maker overseeing an adversary evidentiary *202 hearing may not be able to facilitate discussions of parties crafting their own agreements and vice versa.²⁴⁰ Many regard these diametrically opposed roles as fundamentally "incompatible."²⁴¹

In fact, same-neutral Med-Arb may actually require more time and money than different-neutral Med-Arb. Time and cost savings gained by settling a dispute in mediation are lessened considerably if attorneys must also prepare for and treat the mediation as an arbitral hearing. In the 2008 Wissler Survey of Ohio lawyers examining settlement conferences versus mediations, lawyers surveyed agreed or strongly agreed at a rate of 63% that judges assigned to the case made good use of parties' resources.²⁴² Only volunteer mediators received a lower rating (57%) with non-assigned judges (67%), court mediators (80%) and private mediators (71%) all viewed as a better use of party resources.²⁴³ This evidence suggests that mediators are a more effective use of resources than judges and suggests that a neutral's binding authority does not necessarily equate with time and cost savings.

To remedy the cost of Med-Arb, Professor Blankley proposes creating "a financial disincentive for the mediator to arbitrate," ensuring costs savings by 'pay[ing] the neutral a premium if the case settles in mediation."²⁴⁴ This proposal would save the parties money, but would put an extraordinary amount of pressure on settlement and potentially damage the neutral's impartiality and the parties' self-determination. With these risks, different-neutral Med-Arb is the better option as it avoids the confidentiality, impartiality, and other issues of utilizing the same neutral.

Further analysis is required to answer underlying questions regarding whether the careful combination of formal and informal permutations can provide access to justice at greater speed and lower cost. Arguments that these are solely private processes and it is paternalistic to proscribe limitations on dispute system choices are shortsighted as they do not examine or address systematic access to justice issues and the proper role of formal and informal dispute mechanisms. As Professor Sternlight's cautions, "it would be a real mistake . . . to simply allow our procedural system of justice to evolve *203 on its own." The use of same neutral Med-Arb has evolved on its own, and the risks clearly outweigh the rewards.

Footnotes

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- Deason, supra note 95, at 224 ("Parties are free to elect a combined process despite these practical and functional limitations.").
- Phillips, *supra* note 54, at 28.
- 238 Id. at 28 (Because selecting a new arbitrator is time-consuming, considerable time is saved by having the mediator become the arbitrator. Further, there is no need to catch up a new arbitrator on the details of the dispute if the same-neutral is used for both processes.).
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433 N.J.Super. 111 Superior Court of New Jersey, Appellate Division.

Barbara MINKOWITZ,

Plaintiff-Appellant,

V.

Ron S. ISRAELI, Defendant-Respondent.

A-2335-11T2 | Argued April 30, 2013. | Decided Sept. 25, 2013.

Synopsis

Background: After parties in a matrimonial action agreed to submit their disputes to binding arbitration, and after a majority of disagreements were settled in mediation, wife sought release of underlying documentation supporting the financial agreements. The Superior Court, Chancery Division, Family Part, Essex County, generally denied motions and ultimately confirmed the "arbitration awards" as final judgments. Wife appealed.

Holdings: The Superior Court, Appellate Division, Lihotz, J.A.D., held that:

- [1] settlement agreement to distribute parties' medical practice was valid and binding on wife;
- [2] memorandum of understanding reached through mediation was valid and binding;
- [3] inaccuracies in wife's projected income would not, standing alone, require the vacating of mediated child support and alimony agreement;
- [4] as a matter of first impression, once an arbitrator has functioned as a mediator, he may not thereafter resume the role of arbitrator and conduct arbitration hearings without the agreement of the parties;
- wife was entitled to release of documentation underlying financial agreements; and
- [6] trial court was not permitted to maintain involvement in case after parties had agreed to binding arbitration.

Affirmed in part, vacated in part, and remanded.

West Headnotes (44)

[1] Alternative Dispute Resolution Arbitration favored; public policy

New Jersey's strong public policy favors settlement of disputes through arbitration.

7 Cases that cite this headnote

[2] Alternative Dispute Resolution Nature, purpose, and right to arbitration in general

The object of arbitration is the final disposition, in a speedy, inexpensive, expeditious, and perhaps less formal manner, of the controversial differences between the parties.

3 Cases that cite this headnote

[3] Alternative Dispute Resolution Contractual or consensual basis

Arbitration is a creature of contract.

2 Cases that cite this headnote

[4] Alternative Dispute Resolution Contractual or consensual basis Alternative Dispute Resolution Mode and course of proceedings in general

When parties in dissolution of marriage proceedings agree to arbitrate their dispute, the general rules governing the conduct of

arbitration shall apply; accordingly, only those issues may be arbitrated which the parties have agreed shall be. N.J.S.A. 2A:23B-1 et seq.

1 Cases that cite this headnote

[5] Alternative Dispute Resolution Operation and Effect

Once parties agree to proceed in an arbitral forum, the court's role is significantly narrowed. N.J.S.A. 2A:23B–8b.

[6] Alternative Dispute Resolution←Scope and Standards of Review

When binding arbitration is contracted for by litigants, the judiciary's role to determine the substantive matters subject to arbitration ends.

3 Cases that cite this headnote

[7] Alternative Dispute Resolution As ousting jurisdiction of or precluding resort to courts

From the judiciary's perspective, once parties contract for binding arbitration, all that remains is the possible need to enforce orders or subpoena issued by the arbitrator, which have been ignored, confirm the arbitration award, correct or modify an award, and in very limited circumstances, vacate an award. N.J.S.A. 2A:23B–17(g), 2A:23B–22 to 2A:23B–24.

9 Cases that cite this headnote

[8] Alternative Dispute Resolution—Confirmation or Acceptance by Court

There is a strong preference for judicial confirmation of arbitration awards. N.J.S.A. 2A:23B-22.

4 Cases that cite this headnote

[9] Alternative Dispute Resolution←Scope and Standards of Review

Courts grant arbitration awards considerable deference.

3 Cases that cite this headnote

[10] Alternative Dispute Resolution Motion to Set Aside or Vacate

A party seeking to vacate an arbitration award must first obtain trial court review of the award.

30 Cases that cite this headnote

[11] Alternative Dispute Resolution Conformity to public policy

An arbitration award may be vacated where it violates a clear mandate of public policy; however, such intervention is appropriate only where the public-policy question is not reasonably debatable.

[12] Alternative Dispute Resolution←Scope and Standards of Review

Parties may agree to a broader review of arbitration award than provided for by the default provisions in the Revised Uniform Arbitration Act; their agreement must accurately reflect the circumstances under which a party

may challenge the award and the level of review agreed upon. N.J.S.A. 2A:23B-23.

1 Cases that cite this headnote

[13] Alternative Dispute Resolution Affidavits, evidence, or record

A party seeking to vacate an arbitration award bears the burden of demonstrating fraud, corruption, or similar wrongdoing on the part of the arbitrator. N.J.S.A. 2A:23B–23.

12 Cases that cite this headnote

[14] Alternative Dispute Resolution←Scope and Standards of Review

The scope of review of an arbitration award is narrow; otherwise, the purpose of the arbitration contract, which is to provide an effective, expedient, and fair resolution of disputes, would be severely undermined.

12 Cases that cite this headnote

[15] Alternative Dispute Resolution ← Questions of law or fact

As the decision to vacate an arbitration award is a decision of law, appellate court reviews the denial of a motion to vacate an arbitration award de novo.

48 Cases that cite this headnote

[16] Divorce→Execution, acknowledgement, and delivery Divorce→Validity of Assent Divorce→Counsel or trustee

Settlement agreement to distribute parties' medical practice, reached after husband and wife agreed to submit their disputes to binding arbitration in dissolution of marriage action, was valid and binding on wife, notwithstanding that underlying documentation supporting agreements was not made available to wife's substituted counsel; arbitrator did not participate in the settlement discussions, wife had necessary information regarding entities at issue, circumstances reflected no disparity in bargaining power between parties, wife's agreement was made after reflection on alternatives and upon advice of counsel, and wife accepted distribution as fair and equitable and affirmed her agreement to be bound. N.J.S.A. 2A:23B-15a.

[17] Alternative Dispute Resolution—Constitutional and statutory provisions and rules of court

Although parties contract to arbitrate, settlement negotiations are not foreclosed by the Revised Uniform Arbitration Act. N.J.S.A. 2A:23B–15a.

[18] Compromise, Settlement, and Release Enforcement in General

So long as the parties acknowledge that a settlement agreement was reached voluntarily and is for them, at least, fair and equitable, it should be enforced.

1 Cases that cite this headnote

[19] **Divorce** Execution, acknowledgement, and delivery

Memorandum of understanding reached through

mediation after husband and wife agreed to submit their disputes to binding arbitration in dissolution of marriage action was valid and binding; parties' agreement was reached freely and voluntarily, parties exchanged necessary information, and terms of mediation agreement were incorporated into written document signed and distributed to parties. N.J.S.A. 2A:23C-1 et seq.

1 Cases that cite this headnote

[20] Alternative Dispute Resolution Operation and Effect

Parties who agreed to proceed in binding arbitration in dissolution of marriage action were not precluded from later agreeing to change the process to mediation. N.J.S.A. 2A:23B-1 et seq., 2A:23C-1 et seq.

[21] Alternative Dispute Resolution Nature, purpose, and right to mediation in general

Similar to arbitration, "mediation" provides an alternate, more informal forum than litigation, allowing confidential and candid exchange of information between the parties and the mediator to aid the parties' efforts in reaching an accord on disputes.

1 Cases that cite this headnote

[22] Alternative Dispute Resolution Requisites and validity

Mediated agreements, like other contracts, must be knowingly and voluntarily reached.

or written Compromise, Settlement, and Release←Signature

A settlement agreement, reached in mediation, which is incorporated into an executed, signed written agreement is enforceable.

1 Cases that cite this headnote

[24] Child Support Contracts Relating to Support

Failure of parties' agreement on child support to include a baseline determination would not alone void mediation agreement reached in dissolution of marriage proceedings, even though the omission could create future proof problems if modification were sought.

[25] Child Support Guidelines Divorce Accident or mistake

Inaccuracies in wife's projected income would not, standing alone, require the vacating of mediated child support and alimony agreement reached through mediation in dissolution of marriage proceedings; support award was not simply a guidelines calculation, agreement as a whole integrated settlement of both support and various equitable distribution issues, wife failed to explain how any inaccuracies affected the final overall result, and support amount could be altered upon a showing of a significant change in circumstances.

[26] Alternative Dispute Resolution—Competency Alternative Dispute Resolution—Selection and qualifications

Absent the parties' agreement, an arbitrator appointed under the Revised Uniform

Arbitration Act may not assume the role of mediator and, thereafter, resume the role of arbitrator; the differences in the roles of the two types of dispute resolution professionals necessitate that a mediator, who may become privy to party confidences in guiding disputants to a mediated resolution, cannot thereafter retain the appearance of a neutral factfinder necessary to conduct a binding arbitration proceeding. N.J.S.A. 2A:23B-1 et seq., 2A:23C-1 et seq.

5 Cases that cite this headnote

[27] Alternative Dispute Resolution → Mode and course of proceedings

Mediations are not conducted under oath, do not follow traditional rules of evidence, and are not limited to developing the facts. N.J.S.A. 2A:23C-1 et seq.

[28] Alternative Dispute Resolution Nature, purpose, and right to mediation in general

Mediation encourages confidential disclosures to the mediator, whose training is designed to utilize these confidential positions to aid the parties to evaluate their positions, promote understanding of the other side's position, and reach a consensus; these confidences are insured only if the participants trust that information conveyed to the mediator will remain in confidence. N.J.S.A. 2A:23C-1 et seq.

[29] Alternative Dispute Resolution Proceedings

Mediation communications, which would not exist but for the settlement attempt, are made by parties without the expectation that they will later be bound by them. N.J.S.A. 2A:23C-1 et seq.

[30] Alternative Dispute Resolution Standards or codes of conduct

Arbitrators should conduct the proceedings in an evenhanded manner and treat all parties with equality and fairness at all stages of the proceedings. N.J.S.A. 2A:23B-1 et seq.

[31] Alternative Dispute Resolution Discovery and depositions

Arbitrators are vested with broad discretion over discovery and other procedural matters. N.J.S.A. 2A:23B–15a.

1 Cases that cite this headnote

[32] Privileged Communications and Confidentiality Settlement negotiation privilege; mediation and arbitration

Confidential communications gained in mediation are precluded from being considered in a court contest, and would similarly be precluded from consideration in a later arbitration hearing. N.J.S.A. 2A:23B-1 et seq., 2A:23C-1 et seq.

[33] Alternative Dispute Resolution Standards or codes of conduct

An arbitrator must maintain broad public confidence in the integrity and fairness of the arbitration process. N.J.S.A. 2A:23B-1 et seq.

1 Cases that cite this headnote

[34] Alternative Dispute Resolution—Compulsory mediation; mediation as condition precedent

It is advisable for parties in the family law context to exhaust all applicable dispute resolution alternatives, including settlement conferences and mediation before undertaking arbitration; once these available courses are exhausted and arbitration is chosen, the arbitrator should promptly commence hearings and resolve matters expeditiously.

[35] Alternative Dispute Resolution Competency

Where arbitrator functioned as a mediator in assisting husband and wife in drafting a memorandum of understanding concerning support in dissolution of marriage action, arbitrator could not thereafter resume the role of arbitrator and enter "arbitration awards," absent agreement of the parties.

3 Cases that cite this headnote

[36] Alternative Dispute Resolution Discovery and depositions

Where wife retained substitute counsel following execution of financial agreements reached through mediation in dissolution of marriage proceedings, wife was entitled, before proceeding to arbitration of remaining disputes, to grant of her request for release of underlying documentation supporting the agreements; documents governing arbitration gave wife the absolute right to copy all relevant information, protective order allowed documents to be reviewed by the parties along with their counsel and experts, and allowing review would not have caused incessant delay, but rather would have allowed substituted counsel the opportunity to become informed and provide informed advice to her client.

[37] Alternative Dispute Resolution Actions exceeding arbitrator's authority Alternative Dispute Resolution Error of judgment or mistake of law

Upon a request to vacate an arbitration award on grounds that it was procured by undue means or resulted from an arbitrator exceeding his designated powers, the judicial inquiry must consider more than whether a mere mistake occurred; the arbitrator must have clearly intended to decide according to law, must have clearly mistaken the legal rule, and that mistake must appear on the face of the award. N.J.S.A. 2A:24–8a.

8 Cases that cite this headnote

[38] Alternative Dispute Resolution←Mistake or Error

To be fatal to an arbitration award, an arbitrator's error must result in a failure of intent or be so gross as to suggest fraud or misconduct. N.J.S.A. 2A:24–8a.

6 Cases that cite this headnote

[39] Alternative Dispute Resolution Contractual or consensual basis

Arbitration, particularly binding arbitration, must be purposefully chosen, and the parameters must be designated in a contract between the parties.

[40] Alternative Dispute Resolution Operation and Effect

If binding arbitration is selected as the forum for resolution of disputes, a litigant cannot jump back and forth between the court and the arbitral forum; by its very nature, arbitration does not permit such a hybrid system.

1 Cases that cite this headnote

[41] Alternative Dispute Resolution Nature, purpose, and right to arbitration in general

Arbitration should be a fast and inexpensive way to achieve final resolution of disputes and not merely a way-station on route to the courthouse; attempts to return to the court, except to confirm the final arbitration award, are at odds with this objective.

1 Cases that cite this headnote

[42] Alternative Dispute Resolution Jurisdiction and powers of court

After parties to dissolution of marriage proceedings had agreed to binding arbitration and an arbitrator had been chosen, trial court was not permitted to maintain involvement by scheduling case management, entertaining motions, or checking the decisions of the arbitrator.

1 Cases that cite this headnote

[43] Alternative Dispute Resolution → Scope and Standards of Review

Once binding arbitration is chosen and the arbitrator named, the court is no longer involved in reviewing or determining the substantive issues; the court's role is circumscribed to confirm a final arbitration award, correct obvious errors, and consider whether the award should be vacated, and then only when one of the limited statutory bases has occurred.

N.J.S.A. 2A:23B-23.

1 Cases that cite this headnote

[44] Alternative Dispute Resolution Operation and Effect

Parties are urged to exhaust possible settlement alternatives prior to contracting for arbitration; if arbitration is accepted, parameters for settlement discussions should be set by the arbitrator.

Attorneys and Law Firms

**1194 Karin Duchin Haber argued the cause for appellant (Haber Silver & Simpson, attorneys; Ms. Haber, of counsel; Jani Wase Vinick, Florham Park, on the brief).

Nancy C. Richmond argued the cause for respondent (Ceconi & Cheifetz, LLC, attorneys; Cary Cheifetz, Summit, of counsel, Ms. Richmond, on the brief).

Before Judges MESSANO, LIHOTZ and OSTRER.

Opinion

The opinion of the court was delivered by

LIHOTZ, J.A.D.

*119 This matter considers what role, if any, the Family Part should play after parties in a matrimonial action agree to submit their disputes to binding arbitration and whether the arbitrator, having *120 first mediated disputes, may thereafter resume the role of arbitrator. Following the commencement of divorce proceedings, plaintiff Barbara Minkowitz and defendant Ron Israeli agreed to forgo judicial determination of all financial issues in favor of binding arbitration and agreed all custody and parenting time issues would be reviewed in non-binding arbitration. The parties consented to engage a single arbitrator and a jointly chosen forensic accounting expert. After the arbitrator met with them, but prior to the

commencement of arbitration proceedings, the parties opted to engage in settlement discussions and mediation to narrow the issues for final determination. As matters were resolved, written documents incorporating the parties' understanding were prepared. After more than one year had elapsed and a majority of their disagreements were settled without commencement of an arbitration hearing, plaintiff retained new counsel, who sought the underlying documentation supporting the financial agreements. The request was declined and, thereafter, plaintiff moved before the arbitrator for release of the documents. He barred release and counsel re-filed the requests before the Family Part. The Family Part judge generally denied the motions and ultimately confirmed the "arbitration awards" as final judgments.

On appeal, plaintiff challenges five separate orders confirming arbitration awards. She maintains each must be set aside under *N.J.S.A.* 2A:23B–23 or, alternatively, requests the final judgment of divorce be vacated, pursuant to *Rule* 4:50–1. Plaintiff argues procedural violations, the arbitrator's **1195 bias and substantive errors caused an unconscionable result, which cannot stand.

Following our review, we affirm the orders confirming the settlement agreements reached by the parties. However, we conclude once the arbitrator functioned as a mediator, he may not then conduct arbitration hearings. Consequently, we vacate those orders confirming substantive arbitration awards issued subsequent to the parties' execution of the mediated agreements. The matter is remanded to the Family Part for the parties to select a new arbitrator, who will conduct a binding arbitration hearing on *121 any remaining financial disagreements. We also conclude under the terms of the parties' arbitration agreement, plaintiff has an entitlement to the requested documentation, the provision of which shall be addressed by the new arbitrator, once appointed.

I.

Plaintiff filed her complaint for divorce on March 18, 2008, after fourteen years of marriage. The parties have two children who are now teenagers.

The parties executed an agreement engaging a designated arbitrator, to "arbitrate the matter" and "render a written opinion incorporating his findings and conclusions of law in support of the award[.]" The arbitration agreement

provided, in pertinent part:

1. The issues to be arbitrated shall be identified by the parties and placed on the record prior to the commencement of any hearing. The record will further reflect those issues that are being submitted to nonbinding, as distinguished from binding, arbitration.

...

- 7. The Arbitrator shall have the power to issue subpoenas and to order depositions or other discovery in accordance with the provisions of *N.J.S.A.* 2A:23B–17.
- 8. The [A]rbitrator shall have the power to order equitable remedies, if appropriate, unless the parties agree otherwise, in writing.

....

10. Unless waived by the parties, in writing, the Arbitrator shall render a written opinion incorporating his findings and conclusions of law in support of the award.

• • • •

13. The Agreement shall be subject to the Arbitration Act[,] ... *N.J.S.A.* 2A:23B-1 to -32[].

Attached to the three-page arbitration agreement was a two-page document, which the parties also signed, entitled "STATEMENT OF RIGHTS AND RESPONSIBILITIES OF ARBITRATING PERSONS." Among the rights listed was "[a]rbitrating [p]ersons have the right to be provided copies of all documents presented to the [a]rbitrator by their spouse."

*122 The parties and their respective counsel also executed a consent order, filed with the Family Part, memorializing the agreement to arbitrate. The order reiterated those issues submitted to binding and non-binding arbitration; recited the designated arbitrator and payment of his retainer; and allocated the party's respective obligations for future payment of arbitration fees and costs. Finally, the order directed the arbitrator to schedule a "preliminary [c]ase [m]anagement [c]onference with the parties and the [c]ourt-appointed accountant" and, concurrently, set "a case management date ... with the court for ... September 3, 2008." The parties mutually stipulated and the court subsequently appointed Seymour Rubin of Rubin-Goertz & Company as their "joint forensic accounting" expert.

Although the arbitrator had been appointed and met with

the parties, they **1196 filed a joint application before the Family Part seeking a protective order, which prescribed "[c]onfidential [m]aterial" could be disclosed only to the parties, their attorneys, their attorneys' respective staff, Rubin, the arbitrator, and the court. The protective order filed on January 27, 2009, defined "confidential material" as "information pertaining to ... parties and/or all entities" listed on an attached schedule, which included the parties' business interests.

The arbitrator met with the parties and their attorneys in August 2008. Thereafter, counsel and the parties' respective accountants, but not the parties themselves, conferenced to review Rubin's financial evaluations. The parties chose to defer commencement of arbitration, pending efforts to settle some disputes. The parties, their counsel, Rubin, and at times, the arbitrator discussed their respective positions and submitted documentation. Rubin would offer a recommendation regarding resolution, and, if the parties accepted, a written agreement would be prepared. Following this process, the parties executed four agreements in 2009, which we collectively refer to as the 2009 agreements.

The first of the 2009 agreements, reached in February 2009, was presented to the Family Part via a consent order. The April *123 1, 2009 order simply stated: "The [a]rbitration [c]onsent [o]rder as to [e]quitable [d]istribution of [m]edical [p]ractices, attached hereto, is hereby incorporated herein and made a part hereof[,] and shall have the full force and effect of an [o]rder of this [c]ourt." The "arbitration consent order" included the Superior Court caption, but was signed by the arbitrator, the parties and counsel, and provided:

Each party on the recommendation of the joint forensic accounting expert ... Rubin ... and after discussions with their respective counsel agree that he and she shall waive any right, title and/or interest ... in the medical practice of the other party and each party shall retain their own respective medical practice(s) free and clear of any claim by the other.

The "arbitration consent order" also stated it "shall be incorporated into any [p]roperty [s]ettlement [a]greement and/or [j]udgment of [d]ivorce entered into by the parties and the [c]ourt."

Informal discussions continued with an eye toward resolving the parties' respective claims for equitable distribution. On July 8, 2009, the parties executed their second agreement, a "MEMORANDUM OF UNDERSTANDING," which provided:

This memorandum ... shall describe the outline of an Agreement that was reached between the parties ...

after mediation with the assistance of ... "the [a]rbitrator" and Seymour Rubin, C.P.A.

It is understood that this Memorandum shall be binding with respect to the issues recited herein, although a formal Agreement will be prepared and subsequently executed.

This Memorandum is the result of many months of negotiations and many conferences with [the arbitrator] and Mr. Rubin. The parties are entering into this Memorandum freely and voluntarily after conferring with their attorneys and anyone else with whom they wish to confer. The parties agree that this Memorandum represents a fair compromise of the issues. They acknowledge that by entering into this Memorandum, they are waiving their rights to participate in Arbitration hearings and waive the right to have the issues set forth in this Memorandum decided by the Arbitrator.

**1197 In this agreement, the parties restated the confidentiality of the financial disclosures; mutually waived alimony, and fixed child support; divided household furnishings, disposed and distributed various realty, retirement assets, stock and bank accounts, divided other joint assets; agreed to "pay their own counsel fees[,]" "equally share" the fees of the arbitrator and Rubin; and waived *124 present and future claims for "prior, present or future claims" against one another. In the event of any further disputes, the memorandum required "written presentations from each attorney" to be submitted to the arbitrator.

Defendant's counsel prepared a draft of a proposed property settlement agreement (PSA), purportedly memorializing the parties' agreements reached on the identified issues. However, a disagreement regarding the value and disposition of the former marital home occurred, which was resolved consensually in a three-page handwritten "Amendment to Memorandum of Understanding" dated September 22, 2009, the parties' third agreement. Next, a conference call, conducted by the arbitrator, settled 2008 tax issues, the terms of which were included in a memorandum of agreement dated October 15, 2009, which represents the fourth agreement.

Plaintiff hired co-counsel to assist in drafting and finalizing the PSA. She corresponded with Rubin explaining her role and requesting a meeting "to review his forensic findings," which served as the underpinnings of the parties' agreements. Defendant objected, claiming all matters were settled, except for relatively minor financial concerns. In a series of letters, Rubin consulted the arbitrator, who advised against his meeting with co-counsel, absent a formal application. On behalf of

plaintiff, co-counsel wrote to the arbitrator requesting Rubin be instructed to meet with her and plaintiff "to review the financial information and compilation of forensic information and analyses" prepared by him. The arbitrator denied plaintiff's request to meet with Rubin in a letter dated November 23, 2009, advising:

Prior to the execution of the [m]emorandum of [u]nderstanding and the [a]mendment thereto, Mr. Rubin spent many hours discussing the financial and property issues with [plaintiff's original counsel, plaintiff] and her accountant (as he did with [defendant's counsel, defendant] and his accountant).... [Plaintiff's original counsel] and your client's accountant should be able to explain the reasons why the issues recited in both agreements were resolved to the satisfaction of both parties.

Mr. Rubin has already reviewed his forensic findings in great detail with [plaintiff's original counsel, plaintiff] and her accountant.

*125 At this point, plaintiff's original counsel filed an application before the Family Part to substitute co-counsel as plaintiff's representative and requested he be relieved. Plaintiff then moved before the Family Part for an order requiring Rubin's production of all evaluations of the parties' respective incomes and/or cash flow prepared "in accordance with the [p]rotective [c]onsent [o]rder entered in this matter." On the return date, substituted counsel, now acting as plaintiff's attorney, challenged the lack of disclosure provided to her and argued the 2009 agreements were "invalid." The Family Part judge dismissed the motion stating, "[t]he parties ha[d] previously agreed that all financial aspects [we]re subject to binding arbitration. Any application seeking to modify this agreement must be made to the agreed upon arbitrator." Later that afternoon, the parties reached a settlement on custody and parenting time, which was placed on the record.

A consent dual judgment of divorce (JOD) was filed on March 8, 2010. The **1198 JOD specifically referenced and incorporated the parties' custody and parenting time agreement, set forth a timeline for resolving remaining financial issues, and noted any subsequent confirmed arbitration awards would be incorporated into the JOD, nunc pro tunc. Finally, plaintiff's demand for the production of financial documents was referred to the arbitrator.

As provided in the JOD, plaintiff filed a motion before the arbitrator, using the Family Part caption, seeking his recusal, or alternatively, requiring production of Rubin's financial documents, including reports regarding the

parties' respective incomes and/or cash flow. Plaintiff's supporting certification inferred bias, stating the arbitrator had acted as both mediator and arbitrator throughout the proceeding. She also explained her need to obtain copies of Rubin's underlying documentation and attached a certification from her accountant, asserting the meeting with Rubin did not allow sufficient time to review the calculations or the underlying documentation.

Defendant opposed plaintiff's requests and filed a cross-motion for payment of attorney's fees. He included certifications from his *126 accountant, who refuted the characterization of the Rubin meetings. Rubin also filed a certification challenging facts asserted by plaintiff. He avowed the conference resulting in the agreement to distribute the medical practices lasted more than two-and-one-half hours, during which he presented "a detailed analysis of the federal income tax returns for the calendar years 2003, 2004, 2005 and 2006 as filed jointly by [the parties]."

An April 27, 2010 arbitration hearing addressed the issues raised in the cross-motions. In his decision, later incorporated in a May 25, 2010 award, the arbitrator denied plaintiff's application for recusal, explaining: "My role ... was to make recommendations, when requested, on the various financial issues.... At no time did I assume the role of mediator. I did not participate in the discussions of the financial information." The arbitrator rejected plaintiff's contention she was denied sufficient information to knowledgeably make the decisions set forth in the 2009 agreements, quoting extensively from correspondence sent by her former counsel. The arbitrator also drew an adverse inference because plaintiff had not included a certification from former counsel, who the arbitrator found interacted directly with Rubin and participated in the conferences.

Plaintiff returned to the Family Part seeking to set aside the May 25, 2010 arbitration order, requesting the same relief denied by the arbitrator. Defendant opposed plaintiff's motion in all respects and moved to disqualify counsel, confirm the May 25, 2010 arbitration order, and finalize outstanding issues.

On July 16, 2010, the trial court entered an order summarily denying plaintiff's motion in its entirety, denying defendant's cross-motion to disqualify counsel and confirming the May 25, 2010 arbitration decision. Plaintiff moved for reconsideration, which was summarily denied.

The parties returned to arbitration. In a November 10, 2010 proceeding conducted by the arbitrator, the parties

agreed to a proposed allocation of debits and credits as computed by Rubin. Also, Rubin testified as to his proposed net distribution of assets *127 based on the 2009 agreements. The arbitrator stopped plaintiff's cross-examination of Rubin, when he determined she attempted to open the issues resolved by the 2009 agreements. During these proceedings, defendant requested a reduction in the amount of his child support, claiming plaintiff no longer incurred child care and counseling costs. Plaintiff objected, asserting defendant failed to show any change of circumstances because the underlying **1199 calculation of the child support award and his current income were not disclosed. Finalization of the issue was adjourned pending additional submissions.

On December 10, 2010, for the first time, Rubin agreed to meet with plaintiff, her counsel, her accountant and Thomas Hoberman, plaintiff's newly hired forensic accounting expert. Following the meeting Hoberman prepared a report, challenging Rubin's findings regarding plaintiff's projected 2008 income and identifying errors in his analysis.

The arbitrator corresponded with the parties, who had not complied with his directions for further submissions. More specifically, neither party had filed proposed resolutions regarding the outstanding property issues, and defendant had not submitted information supporting his child support modification request. Shortly thereafter, plaintiff renewed her demand for the arbitrator to recuse himself, this time claiming he engaged in ex parte communications with Rubin, in violation of *Rule* 5:3–3(e).¹

In a decision letter, the arbitrator provided a procedure for distributing personalty, noting neither party provided proof of value. He denied plaintiff's request to set aside the 2009 agreements, stating his "communications with Mr. Rubin have been limited to scheduling issues and most recently to correct a factual *128 error[.]" The arbitrator noted defendant had withdrawn his child support modification request; however, he ordered each party to address the basis for the award's deviation from the child support guidelines. Defendant responded; plaintiff renewed her request to set aside the 2009 agreements. The arbitrator, after reading certifications, made "credibility determinations" and defendant's explanation of the calculation of the amount of support, Rubin's recommendation for proposed credits and allocation of debts. In doing so, the arbitrator again drew an adverse inference from plaintiff's omission of the certification of prior counsel regarding his participation in the Rubin conferences. The arbitrator relied on prior counsel's correspondence sent on behalf of plaintiff, wherein the parties relinquished "any equitable distribution claims against their respective practices only." The arbitrator again reserved finalization of the allocation of fees and costs.

Rubin submitted a certification supporting the calculation of child support, reporting he met with the parties and their attorneys in the arbitrator's office on June 24, 2009 (the arbitrator was not present). At that time, Rubin made adjustments to the income figures supplied by the parties' accountants, calculating plaintiff's and defendant's 2008 incomes. Rubin found defendant's annual salary from all sources exceeded plaintiff's by less than \$5000. Rubin attached the schedules he had prepared and discussed with the parties at that conference. The schedules were used to fix defendant's child support obligation and promote the mutual waiver of alimony. Plaintiff again requested the 2009 agreements be voided and discovery reopened based on Hoberman's March 2, 2011 letter, which rebutted Rubin's methodology used to calculate plaintiff's projected 2008 income. After correcting what he asserted were errors, Hoberman concluded plaintiff's **1200 projected 2008 income would be less than half the sum Rubin calculated.

On March 17, 2011, the arbitrator entered an arbitration order incorporating the parties' 2009 agreements, Rubin's spreadsheets calculating debits and credits, and the income schedules Rubin *129 prepared supporting the calculation of child support, all of which were attached to the order. The order also directed "the final [a]rbitration [a]wards/[d]ecision shall be incorporated into an [a]mended [JOD], effective nunc pro tunc to February 4, 2010." The arbitrator reserved determination of any allocation of counsel, expert, and arbitration fees, pending further submissions by the parties. A subsequent agreement resolved distribution of personal property which also was incorporated in the JOD.

Plaintiff continued to press her request to vacate the 2009 agreements along with the arbitration orders. Relying on the certification of defendant's ex-fiancée, Jamie Silverman, plaintiff believed Rubin was not objective and had been aiding defendant. Silverman certified defendant "advised" he actually earned almost twice the sum Rubin had calculated and frequently spoke with Rubin, whom he allegedly referred to as "Uncle Seymour." Further, Silverman reportedly overheard a telephone conversation between defendant and Rubin, after which defendant informed her Rubin "was going to make sure everything was 'taken care of.... [A] little birdie told me Seymour got it covered.' "Plaintiff sought to subpoena records of Rubin's telephone communications with defendant.

Defendant opposed the application and cross-moved for an order requiring plaintiff to "pay 100 percent of the counsel fees and costs incurred by ... defendant for having to respond." Rubin also submitted a certification denying plaintiff's allegations of bias, refuting the suggestion he merely accepted defendant's assertions. He explained "[defendant] supplied voluminous credit card information to me for the five years preceding the date of the complaint[.]"

The arbitrator issued a decision on July 1, 2011. He found Silverman "[wa]s not completely objective[,]" given her recent break-up with defendant, whereas Rubin was "selected as a neutral accountant by both parties[,]" had "no apparent dog in the race," and had as many private conversations with plaintiff as with defendant. The arbitrator rejected plaintiff's claims and reserved *130 his decision on defendant's fee request. Plaintiff subsequently moved for reconsideration, relying on certifications from plaintiff's accountant and Hoberman. Defendant opposed the request and reasserted his demand for payment of his fees. The arbitrator denied plaintiff's motion for reconsideration.

In a separate submission the arbitrator addressed the allocation of fees. Finding "both parties have the income. ability and financial resources to pay counsel and expert fees and the costs of arbitration[,]" the arbitrator held each party responsible for his and her own fees, as well as "50% of the arbitration fees incurred ... and 50% of Mr. Rubin's fees ... as of December 1, 2009." However, as for fees incurred after December 1, 2009, the arbitrator found plaintiff "conducted her ... litigation in bad faith" and repeatedly asserted unreasonable positions, which warranted an award to defendant in order to protect him from the costs of unnecessary litigation. The arbitrator allocated \$37,000 of Rubin's post-December 1, 2009 fees to plaintiff, and \$9,281.25 to defendant. Further, he awarded defendant \$50,000 for his attorney's work after December 1, 2009, to be paid by plaintiff.

Defendant moved before the Family Part to confirm the March 17, 2011 arbitration award. Plaintiff cross-moved to vacate the award and all underlying agreements **1201 that were incorporated therein. She further requested to terminate services by the arbitrator and Rubin, to reopen discovery, and to select a new arbitrator and expert to "commence de novo arbitration of all financial issues[.]" The judge granted defendant's motion to confirm the March 17, 2011 award and denied plaintiff's cross-motion in a November 30, 2011 order. A separate motion to confirm the arbitrator's August 11, 2011 fee award was filed and granted, over plaintiff's objection. In a November 30, 2011 order, the judge also declined

plaintiff's motion to stay enforcement pending her appeal and denied defendant's motion for an additional fee award.

On appeal, plaintiff requests we reverse the orders by the court confirming the May 25, 2010, March 17, 2011, and August 11, 2011 *131 awards by the arbitrator, whom she maintains committed misconduct, displayed partiality, and exceeded the scope of arbitral authority.

II.

Neither party contests the consensual agreement to submit all financial disputes to binding arbitration. The record supports the parties clearly opted out of judicial review of their matrimonial matter in favor of arbitration. The proceeding's emphasis on confidentiality, coupled with defendant's resistance to release of income information, suggest a motive to maintain financial secrecy.

On appeal, plaintiff seeks to vacate the arbitration awards and the orders confirming them, emphasizing procedural defects during proceedings conducted by the arbitrator infected the fundamental fairness of the process and resulted in an unconscionable outcome. Before we examine plaintiff's challenges, we need to consider the arbitral forum choice, governed by the Revised Uniform Arbitration Act (the Act), *N.J.S.A.* 2A:23B-1 to -32.

[1] "In New Jersey, arbitration ... is a favored means of dispute resolution." Hojnowski v. Vans Skate Park, 187 N.J. 323, 342, 901 A.2d 381 (2006). It is well-settled that New Jersey's strong public policy favors settlement of disputes through arbitration. Id. at 343, 901 A.2d 381; see also Block v. Plosia, 390 N.J.Super. 543, 551, 916 A.2d 475 (App.Div.2007) (stating the Act "continues our state's long-standing policy to favor voluntary arbitration as a means of dispute resolution"). Increasingly, parties elect "to side step the judicial process" and enter arbitration agreements in a myriad of areas other than labor-management disputes. Fawzy v. Fawzy, 199 N.J. 456, 477, 973 A.2d 347 (2009). See also Wein v. Morris, 194 N.J. 364, 375-76, 944 A.2d 642 (2008) ("Our courts have long noted our public policy that encourages the use of arbitration proceedings as an alternate forum.") (internal quotation marks and citation omitted).

*132 In Fawzy, the Supreme Court reinforced the benefits of using arbitration in family litigation, which the Court first discussed in Faherty v. Faherty, 97 N.J. 99, 477 A.2d

1257 (1984). In *Faherty*, the question considered was the enforceability of an arbitration clause in a separation agreement. *Id.* at 105, 477 *A*.2d 1257. The Court concluded:

It is fair and reasonable that parties who have agreed to be bound by arbitration in a formal, written separation agreement should be so bound. Rather than frowning on arbitration of alimony disputes, public policy supports it. We recognize that in many cases arbitration of matrimonial disputes may offer an effective alternative method of dispute resolution.

[Faherty, supra, 97 N.J. at 107, 477 A.2d 1257.]

**1202 ^[2] A significant advantage of arbitration, likely the controlling motivation in this matter, is "the opportunity for resolution of sensitive matters in a private and informal forum," rather than presentation of the matter in the public arena of an open courtroom. *Id.* at 107–08, 477 *A*.2d 1257. The Court observed:

arbitration conducted in a less formal atmosphere, often in a shorter time span than a trial, and always with a fact-finder of the parties' own choosing, is often far less antagonistic and nasty than typical courthouse litigation. In sum, the benefits of arbitration in the family law setting appear to be well established.

[Fawzy, supra, 199 N.J. at 472, 973 A.2d 347 (internal quotation marks and citation omitted).]

"'The object of arbitration is the final disposition, in a speedy, inexpensive, expeditious, and perhaps less formal manner, of the controversial differences between the parties.' "Hojnowski, supra, 187 N.J. at 343, 901 A.2d 381 (quoting Carpenter v. Bloomer, 54 N.J.Super. 157, 162, 148 A.2d 497 (App.Div.1959)).

[3] [4] Arbitration is a "creature of contract[.]" Kimm v. Blisset, LLC, 388 N.J.Super. 14, 25, 905 A.2d 887 (App.Div.2006) (citations omitted), certif. denied, 189 N.J. 428, 915 A.2d 1051 (2007). Like its federal counterpart, the Federal Arbitration Act (FAA), 9 U.S.C.A. § 1–16, the Act strives for uniformity. See N.J.S.A. 2A:23B-29 ("In applying and construing this uniform act, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among States that enact it."). Accordingly, the Act "recognizes the contractual nature of *133 the arbitration remedy and sets forth the details of the arbitration procedure that will apply unless varied or waived by contract, N.J.S.A. 2A:23B-4." Fawzy, supra, 199 N.J. at 469, 973 A.2d 347. It is understood that "when parties in dissolution proceedings agree to arbitrate their dispute, the general rules governing the conduct of arbitration shall apply, *N.J.S.A.* 2A:23B–1 to –32." *Id.* at 480, 973 *A.*2d 347. Accordingly, "'only those issues may be arbitrated which the parties have agreed shall be.'" *Id.* at 469, 973 *A.*2d 347 (quoting *In re Arbitration Between Grover & Universal Underwriters Ins. Co.*, 80 *N.J.* 221, 229, 403 *A.*2d 448 (1979)).

The written arbitration agreement may, subject to the restriction of *N.J.S.A.* 2A:23B–4b, define the arbitration procedures, including the method for initiation of arbitration proceedings, *N.J.S.A.* 2A:23B–9; the manner the process is conducted, *N.J.S.A.* 2A:23B–15; and the issuance of the award, *N.J.S.A.* 2A:23B–19. The Act authorizes courts to recognize and enforce arbitration agreements. *N.J.S.A.* 2A:23B–5, –6; *Spaeth v. Srinivasan*, 403 *N.J.Super.* 508, 513, 959 *A.*2d 290 (App.Div.2008). In adopting the Act, the Legislature intended to follow the FAA, "which states that arbitration agreements 'shall be valid[,] irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.' " *Id.* at 513 n. 1, 959 *A.*2d 290 (quoting 9 *U.S.C.A.* § 2).

¹⁵I Further, as discussed in detail below, once parties agree to proceed in an arbitral forum, the court's role is significantly narrowed. *Fawzy, supra,* 199 *N.J.* at 462, 470, 973 *A.*2d 347. Although, pending the arbitrator's appointment, the court may act provisionally to address "urgent" relief, *see N.J.S.A.* 2A:23B–8b(2), "[a]fter an arbitrator is appointed and is authorized and able to act," it is the arbitrator who

may issue orders for provisional remedies, including interim awards, as ... necessary to protect the effectiveness of the arbitration proceeding and to promote **1203 the fair and expeditious resolution of the controversy, to the same extent and pursuant to the same conditions as if the controversy were the subject of a civil action[.]

[N.J.S.A. 2A:23B-8b(1).].

*134 The Act permits a less formal process than a court proceeding. As provided by *N.J.S.A.* 2A:23B–15a:

An arbitrator may conduct an arbitration in such manner as the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding. The authority conferred upon the arbitrator includes the power to hold conferences with the parties to the arbitration proceeding before the hearing and, among other matters, determine the admissibility, relevance, materiality, and weight of any evidence.

Once arbitration commences, the arbitrator may subpoena witnesses or records; permit depositions; permit

appropriate discovery to consider, among other things, the "desirability of making the proceeding fair, expeditious, and cost effective"; order compliance with discovery orders or subpoenas the arbitrator issues "and take action against a noncomplying party to the extent a court could if the controversy were the subject of a civil action in this State"; and issue protective orders. *N.J.S.A.* 2A:23B–17a to e.

[6] [7] We underscore this point: when binding arbitration is contracted for by litigants, the judiciary's role to determine the substantive matters subject to arbitration ends. "Arbitration should spell litigation's conclusion, rather than its beginning." N.J. Tpk. Auth. v. Local 196, I.F.P.T.E., 190 N.J. 283, 292, 920 A.2d 88 (2007). " '[I]t is, after all, meant to be a substitute for and not a springboard for litigation.' "Fawzy, supra, 199 N.J. at 468, 973 A.2d 347 (quoting Barcon Assocs., Inc. v. Tri-County Asphalt Corp., 86 N.J. 179, 187, 430 A.2d 214 (1981)). From the judiciary's perspective, once parties contract for binding arbitration, all that remains is the possible need to: enforce orders or subpoena issued by the arbitrator, which have been ignored, N.J.S.A. 2A:23B-17(g); confirm the arbitration award, N.J.S.A. 2A:23B-22; correct or modify an award, N.J.S.A. 2A:23B-24, and in very limited circumstances, vacate an award N.J.S.A. 2A:23B-23. If not for this limitation on judicial intervention of arbitration awards, "the purpose of the arbitration contract, which is to provide an effective, expedient, and fair resolution of disputes, would be severely undermined." Fawzy, supra, 199 N.J. at 470, 973 A.2d 347 (citing Barcon, supra, 86 N.J. at 187, 430 A.2d 214).

*135 ^{[8] [9]} It also is well settled that "there is a strong preference for judicial confirmation of arbitration awards." *Linden Bd. of Educ. v. Linden Educ. Ass'n*, 202 *N.J.* 268, 276, 997 *A.*2d 185 (2010). *See also Martindale v. Sandvik, Inc.*, 173 *N.J.* 275, 800 *A.*2d 872 (1993). Consistent with the defined "salutary purposes ... courts grant arbitration awards considerable deference." *Borough of E. Rutherford v. E. Rutherford PBA Local* 275, 213 *N.J.* 190, 201, 61 *A.*3d 941 (2013).

to vacating the arbitration award. "A party seeking to vacate an arbitration award must first obtain trial court review of the award." *Manger v. Manger*, 417 *N.J.Super*. 370, 376, 9 *A.*3d 1081 (App.Div.2010) (citing *Hogoboom v. Hogoboom*, 393 *N.J.Super*. 509, 515, 924 *A.*2d 602 (App.Div.2007)). The court's review is informed by the authority bestowed on the arbitrator by the Act. The Act states a court may vacate an arbitration award *only* upon proof:

- (1) the award was procured by corruption, fraud, or other undue means;
- (2) the court finds evident partiality by an arbitrator; corruption by an arbitrator; **1204 or misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;
- (3) an arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to section 15 of this act, so as to substantially prejudice the rights of a party to the arbitration proceeding;
- (4) an arbitrator exceeded the arbitrator's powers.... [*N.J.S.A.* 2A:23B–23.]²

^[12] Further, "parties may agree to a broader review than provided for by the default provisions in the ... Act." *Fawzy, supra,* 199 *N.J.* at 482 n. 5, 973 *A.*2d 347. Their agreement must "accurately reflect the circumstances under which a party may challenge the award and the level of review agreed upon." *Ibid.*

*136 For those who think the parties are entitled to a greater share of justice, and that such justice exists only in the care of the court, ... the parties are free to expand the scope of judicial review by providing for such expansion in their contract; that they may, for example, specifically provide that ... awards may be reversed either for mere errors of New Jersey law, substantial errors, or gross errors of New Jersey law and define therein what they mean by that.

[Tretina v. Fitzpatrick & Assocs., 135 N.J. 349, 358, 640 A.2d 788 (1994) (internal quotation marks and citations omitted).]

bears the burden of demonstrating "fraud, corruption, or similar wrongdoing on the part of the arbitrator[]." *Id.* at 357, 640 *A*.2d 788. (internal quotation marks and citations omitted); *see also Del Piano v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 372 *N.J.Super*. 503, 510, 859 *A*.2d 742 (App.Div.2004) ("[B]ecause of the strong judicial presumption in favor of the validity of an arbitral award, the party seeking to vacate it bears a heavy burden."), *certif. granted*, 183 *N.J.* 218, 871 *A.*2d 95 (2005), *appeal dismissed*, 195 *N.J.* 512, 950 *A.*2d 901 (2005).

^[14] Having outlined these statutory parameters, we note, "the scope of review of an arbitration award is narrow. Otherwise, the purpose of the arbitration contract, which is to provide an effective, expedient, and fair

resolution of disputes, would be severely undermined." Fawzy, supra, 199 N.J. at 470, 973 A.2d 347 (citing Barcon Assocs., supra, 86 N.J. at 187, 430 A.2d 214). "As the decision to vacate an arbitration award is a decision of law, this court reviews the denial of a motion to vacate an arbitration award de novo." Manger, supra, 417 N.J.Super. at 376, 9 A.3d 1081 (citation omitted). See also Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378, 658 A.2d 1230 (1995) (holding no "special deference" is accorded the trial judge's "interpretation of the law and the legal consequences that flow from established facts").

III.

A.

Plaintiff advances several arguments for vacating the March 17, 2011 arbitration award. She contends the 2009 agreements were *137 not the product of arbitration and, therefore, should be set aside. Further, she maintains the arbitrator exceeded his powers by acting as both mediator and **1205 arbitrator, presided over issues not subject to arbitration, and exercised undue means in repeatedly denying plaintiff access to "relevant financial documents."

Defendant counters, stating plaintiff's request to vacate was filed beyond the 120–day window set forth in *N.J.S.A.* 2A:23B–23b. We need not address defendant's procedural challenge, in light of the fact that the March 17, 2011 arbitration award was not a final, conclusive determination of all issues concluding the arbitration.

li6| This case unraveled because the parties agreed to arbitration, then chose to do something else. That said, we analyze what actually occurred resulting in the 2009 agreements and whether our intervention is warranted. Even though the process employed was not an arbitration hearing as envisioned by the Act or as agreed by the parties, we conclude the procedures were not fundamentally unfair, the process was not infirm, and the 2009 agreements need not be vacated.

Regarding the first agreement to distribute the medical practice, the arbitrator did not participate in the settlement discussions; Rubin had the lead role. The parties funneled information to him, he made recommendations, the parties' attorneys and experts asked questions, and a decision to accept, modify or reject the recommendations was individually made. Plaintiff never states she and her original attorney did not discuss these issues, or claims she was deprived of the ability to consider documentation prior to reaching the February 2009 agreement. Rather, her complaint is the documents were not kept by her original attorney and, therefore, were not available to substituted counsel.³ Plaintiff also complains that when she sought subsequent review of the financial information regarding the business interests she was *138 denied access. We find the process employed did not violate the Act and plaintiff's challenges are insufficient to vacate the agreement dividing the medical practices.

[17] [18] Although parties contract to arbitrate, settlement negotiations are not foreclosed by the Act. See, e.g., N.J.S.A. 2A:23B-15a (authorizing an arbitrator to hold conferences with the parties to the arbitration proceeding before the hearing). Indeed, New Jersey courts have found that the "'[s]ettlement of litigation ranks high in [the] public policy'" of this State. Puder v. Buechel, 183 N.J. 428, 437, 874 A.2d 534 (2005) (quoting Nolan ex rel. Nolan v. Lee Ho, 120 N.J. 465, 472, 577 A.2d 143 (1990) (internal quotation marks and citation omitted) (alterations in original)). We have held, "so long as the parties acknowledge that the agreement was reached voluntarily and is for them, at least, fair and equitable" it should be enforced. Lerner v. Laufer, 359 N.J.Super. 201, 217, 819 A.2d 471 (App.Div.2003). "Advancing that public policy is imperative ... where matrimonial proceedings have increasingly overwhelmed the docket." Puder, supra, 183 N.J. at 430, 874 A.2d 534; see also Davidson v. Davidson, 194 N.J.Super. 547, 550, 477 A.2d 423 (Ch.1984) ("With more divorces being granted now than in history, and with filings on the rise, fair, reasonable, equitable and, to the extent possible, conclusive settlements must be reached, or the inexorable and inordinate passage of time from initiation of suit to final trial will be absolutely devastating[.]").

Plaintiff's suggestion she was uninformed is rejected as this record contains no evidence to show her decision **1206 dividing the medical practice was not made with full knowledge or was the result of coercion. Plaintiff is a highly educated, successful, professional businesswoman. The parties were married for fourteen years, and, even if some of defendant's enterprises were founded late in the marital relationship, their existence was disclosed and plaintiff was able to gain necessary information regarding these entities. The circumstances here reflect no disparity in bargaining power between plaintiff and defendant.

*139 Moreover, plaintiff's agreement, guided by the advice of her independently chosen legal counsel and aided by her individual accountant, was made after reflection on alternatives. In fact, the record shows that immediately following plaintiff's initial acceptance of Rubin's recommendation, her accountant and attorney repudiated assent, asserting errors were found in Rubin's calculations. Following further review, plaintiff withdrew her objection and reaffirmed her agreement to be bound, accepting through counsel, the distribution as fair and equitable. The record supports plaintiff's decision was reasoned, voluntary and deliberate, making it a binding contract between the parties.

^[19] These same reasons uphold the memorandum of understanding reached on July 8, 2009, along with its amendments dated September 22, 2009, and October 15, 2009. These detailed documents, fully executed by the parties and counsel, were not the product of arbitration, but mediation. Following our review, we find no basis to set them aside.

l²⁰ Certainly, mediation, although a form of alternate dispute resolution, differs from binding arbitration, which raises the next question posed by plaintiff: can parties who agree to proceed in binding arbitration change the process to mediation? We conclude they can. Even though the parties contracted to pursue "binding arbitration," their change of course to utilize mediation will not invalidate their settlement agreements.

leaf Mediation Act (UMA), N.J.S.A. 2A:23C-1 to -13, R. 1:40-4, and R. 1:40-5(b). Similar to arbitration, mediation provides an alternate, more informal forum than litigation, allowing confidential and candid exchange of information between the parties and the mediator to aid the parties' efforts in reaching an accord on disputes. Mediated agreements, like other contracts, must be knowingly and voluntarily reached. A settlement agreement, reached in mediation, which is incorporated into an executed, signed written agreement *140 is enforceable. Willingboro Mall, Ltd. v. 240/242 Franklin Ave., L.L.C., 215 N.J. 242, 250-51, 263, 71 A.3d 888 (2013).

The July 8, 2009 memorandum of understanding executed by the parties is direct and expressly states:

This Memorandum between [the parties] shall describe the outline of an Agreement that was reached between the parties on July 8, 2009 after mediation with the assistance of [the arbitrator] and [Rubin].

This Memorandum is the result of many months of negotiations and many conferences with [the arbitrator] and Mr. Rubin. The parties are entering into this Memorandum freely and voluntarily after conferring with their attorneys and anyone else with whom they wish to confer. The parties agree that this Memorandum represents a fair compromise of the issues. They acknowledge that by entering into this Memorandum they are waiving their rights to participate in [the] Arbitration hearing and waive the right to have the issues set **1207 forth in this Memorandum decided by the Arbitrator.

The amendment further provides "the parties agree to the foregoing freely and voluntarily."

Despite her protests, plaintiff offers no evidence to repudiate these pronouncements. Nothing supports the failure of the parties to exchange necessary information. See R. 1:40–5(b)(3) ("In mediation of economic aspects of family actions, parties are required to provide accurate and complete information to the mediator and to each other, including but not limited to tax returns, Case Information Statements, and appraisal reports."). Also, the mediation agreement satisfies the prerequisites for enforcement as the terms were incorporated into a written document signed and distributed to all parties. Willingboro Mall, supra, 215 N.J. at 263, 71 A.3d 888. Our review of this record unearths no basis to undo the consensual 2009 agreements.

l²⁴ We also reject plaintiff's claims of legal insufficiency. Although we agree, for example, the child support agreement omitted a baseline determination, that fact may cause future proof problems if modification is sought, but it alone would not void the agreement.

*141 [25] Plaintiff points to Hoberman's analysis of her projected 2008 income to suggest the alimony and child support provisions in the 2009 agreements must be vacated. We conclude if plaintiff's projected income were inaccurate, standing alone that fact is insufficient to vacate the July 8, 2009 agreement.

First, the support award was not simply a guidelines calculation. Necessary information required by *N.J.S.A.* 2A:34–23a, includes not only plaintiff's income, but also defendant's income, the children's needs, and other funds available, including any income or assets of the children.

Second, the support calculation did not stand alone as the agreement as a whole integrated settlement of both support and various equitable distribution issues. Often these matters are "interrelated" amidst compromise of parties' myriad economic concerns. *Lehr v. Afflitto*, 382

N.J.Super. 376, 396, 889 A.2d 462 (App.Div.2006). See also Lynn v. Lynn, 165 N.J.Super. 328, 342, 398 A.2d 141 (App.Div.) (noting the necessary interrelationship between property distribution, alimony and child support), certif. denied, 81 N.J. 52, 404 A.2d 1152 (1979). "[T]he termination of a marriage involves an 'economic mosaic' comprised of equitable distribution, alimony and child support and ... these financial components interface." Koelble v. Koelble, 261 N.J.Super. 190, 192, 618 A.2d 377 (App.Div.1992).

Third, plaintiff's argument does not explain how Hoberman's conclusions affect the final overall result. Hoberman refuted Rubin's inclusion of certain items in the 2008 income projections, but he did not specify plaintiff's actual reported 2008 income or compare it to Rubin's projected computations.

Fourth, even if Rubin's calculations of plaintiff's income were wrong, it is well established that significant changes in circumstances warrant review and potential modification of a child support award. *Lepis v. Lepis*, 83 *N.J.* 139, 145, 416 *A.*2d 45 (1980). Therefore, were plaintiff to prove such a change along with the children's needs, the support amount could be altered.

*142 As a result of our review, we decline to vacate the 2009 agreements, finding unfounded plaintiff's claims that the procedures followed to reach them were defective or her acceptance unreliable. As noted, the parties agreed to mediate and conduct settlement discussions, rather than commence an arbitration hearing. **1208 That procedure is permissible and the agreements are enforceable.

B.

l²⁶ We turn to plaintiff's next challenge asserting the arbitrator's change of role to a facilitator of a mediated agreement obviated his ability to thereafter proceed as an arbitrator. Plaintiff argues the arbitrator "committed misconduct and exceeded his powers by acting as both a mediator and an arbitrator." She further explains the arbitrator aided mediation of the disputes, then, when she sought underlying documentation, he "enforced the [agreements] that he had written [as a mediator] as if they were the result of an actual arbitration," converting the result to a binding arbitration award. This is an issue of first impression.

Our review considers the compatibility of the same party

assuming the role of mediator and arbitrator. Mediation and arbitration both allow for resolution of disputes outside the court process, and the hallmark of a mediator and an arbitrator is neutrality. See R. 1:40-2(1)(a)(1) (defining arbitration as "[a] process by which each party and/or its counsel presents its case to a neutral third party, who then renders a specific award"). Nevertheless, we conclude the differences in the roles of these two types of dispute resolution professionals necessitate that a mediator, who may become privy to party confidences in guiding disputants to a mediated resolution, cannot thereafter retain the appearance of a neutral factfinder necessary to conduct a binding arbitration proceeding. Consequently, absent the parties' agreement, an arbitrator appointed under the Act may not assume the role of mediator and, thereafter, resume the role of arbitrator.

*143 Mediation is included as a "Facilitative Process[,]" which is defined as "a process by which a mediator facilitates communication between parties in an effort to promote settlement without imposition of the mediator's own judgment regarding the issues in dispute." R. 1:40-2(c), "A mediator, although neutral, often takes an active role in promoting candid dialogue by identifying issues [and] encouraging parties to accommodate each other['s] interests." Lehr. supra. 382 N.J.Super. at 394. 889 A.2d 462 (internal quotation marks and citations omitted) (alteration in original); see also James R. Coben & Peter N. Thompson, "Disputing Irony: A Systematic Look at Litigation About Mediation," 11 Harv. Negot. L. Rev. 43 (" 'As a facilitator, a mediator is not tasked with reaching a final decision in a matter, but rather instills trust and confidence of the participants in the mediation process, allowing them to resolve their differences." (quoting V.J.L. v. Red, 39 P.3d 1110, 1113 n. 3 (Wyo.2002))).

[27] [28] [29] Mediations are not conducted under oath, do not follow traditional rules of evidence, and are not limited to developing the facts. Admittedly, mediation encourages confidential disclosures to the mediator, whose training is designed to utilize these confidential positions to aid the parties to evaluate their positions, promote understanding of the other side's position, and reach a consensus. These confidences are "insured only if the participants trust that information conveyed to the mediator will remain in confidence." Lehr, supra, 382 N.J.Super. at 395, 889 A.2d 462. "Mediation communications, which 'would not exist but for the settlement attempt,' are made by parties 'without the expectation that they will later be bound by them.' "State v. Williams, 184 N.J. 432, 447, 877 A.2d 1258 (2005) (quoting Michael L. Prigoff, Toward Candor or Chaos: The Case of Confidentiality in Mediation, 12 Seton Hall Legis. J. 2, 13 (1988)). "Successful mediation,

with its emphasis on conciliation, depends on confidentiality **1209 perhaps more than any other form of [alternate dispute resolution]." *Williams, supra,* 184 *N.J.* at 447, 877 *A.*2d 1258 (citation omitted). "Indeed, mediation stands in stark contrast to formal adjudication, *144 and [] arbitration, in which the avowed goal is to uncover and present evidence of claims and defenses in an adversarial setting." *Ibid.*

[30] On the other hand, an arbitrator's role is evaluative, requiring the parties to present their evidence for a final determination. See R. 1:40-2(b)(2) (defining "Evaluative Process" to include "Neutral Fact Finding: A process by which a neutral, agreed upon by the parties, investigates and analyzes a dispute involving complex or technical issues, and who then makes non-binding findings and recommendations."). Arbitrators essentially weigh evidence, assess credibility, and apply the law when determining whether a party has proven his or her request for relief. See Lela P. Love, Symposium: The Top Ten Reasons Why Mediators Should Not Evaluate, 24 Fla. St. U.L.Rev. 937, 938 (1997). An arbitrator makes a final decision, which binds the parties. See N.J.S.A. 2A:23B-1 (defining an "arbitrator" as "an individual appointed ... to render an award ... in a controversy that is subject to an agreement to arbitrate"). Thus, "arbitrators should conduct the proceedings in an evenhanded manner and treat all parties with equality and fairness at all stages of the proceedings." Barcon, supra, 86 N.J. at 190, 430 A.2d 214 (internal quotation marks and citations omitted).

[31] Toward this end, the Act vests arbitrators with broad discretion over discovery and other procedural matters to "conduct an arbitration in such manner as the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding. The authority conferred upon the arbitrator includes the power to hold conferences with the parties ... before the hearing [.]" N.J.S.A. 2A:23B-15a. The statute's broad conferral of authority "does not require any particular procedures, mandate discovery, compel the maintenance of a record, command a statement by the arbitrator regarding his findings and conclusions, or an expression of the reasons why he reached the result that he did[,]" unless expressly required under the parties' arbitration *145 agreement. Johnson v. Johnson, 204 N.J. 529, 546, 9 A.3d 1003 (2010) (citing *N.J.S.A.* 2A:23B−1 to −32).

^[32] While we recognize the Act envisions a need for flexibility to meet a wide variety of situations presented in arbitration proceedings, we are not persuaded the Act intended an appointed arbitrator may first assume the role of mediator then switch back to conduct final arbitration hearings. As noted, an effective mediator gains each

party's confidence and offers advice to steer them toward settlement. Those confidential communications gained in mediation are precluded from being considered in a court contest, *Isaacson v. Isaacson*, 348 *N.J.Super.* 560, 577, 792 *A.*2d 525 (App.Div.), *certif. denied*, 174 *N.J.* 364, 807 *A.*2d 195 (2002), and would similarly be precluded from consideration in an arbitration hearing. *See also Willingboro Mall, supra*, 215 *N.J.* at 245 ("Communications made during the course of a mediation are generally privileged and therefore inadmissible in another proceeding.").

In researching this issue, we found limited discussion of the subject. Initially, we are aware *Rule* 1:40–2(d) identifies as a "Hybrid Process" of complementary dispute resolution "[m]ediation-arbitration," which it defined as "[a] process by which, after an initial mediation, unresolved issues are then arbitrated." The rule does not address whether the same party may perform both functions or whether issues **1210 attempted to be mediated may then be arbitrated.

In *Isaacson*, we discussed the efficacy of assuming the dual role of custody mediator and guardians ad litem (GAL), examining the applicable court rules governing appointments of custody and parenting time mediators, *R*. 1:40–5(a) and GALs, *R*. 5:8B. We noted *Rule* 1:40–5(c) specifies a custody and parenting time mediator may not subsequently act as an evaluator in the proceeding or make any recommendation to the court respecting the issues. *Isaacson*, *supra*, 348 *N.J.Super*. at 577, 792 *A.*2d 525. We concluded "[a] practical reading of the rules and common sense preclude[d] the [possible] dual role of mediator and GAL." *146 *Id.* at 575, 792 *A.*2d 525. We find *Isaacson*'s distinction between an evaluative versus facilitative role helpful.

Canon IV.H of the Code of Ethics for Arbitrators in Commercial Disputes, approved by the American Bar Association and the American Arbitration Association, states "an arbitrator should not be present or otherwise participate in the settlement discussions unless requested to do so by all parties. An arbitrator should not exert pressure on any party to settle." This guideline is also directed to the evaluator-facilitator dichotomy. Despite the code's applicability to commercial matters, such a concern certainly exists and may even be heightened in the arbitration of an emotionally charged matrimonial matter.

We uncovered one regulatory provision presumably suggesting an appointed arbitrator may mediate or assist the parties to reach a settlement during compulsory interest arbitration to resolve collective bargaining

disputes between police and fire departments and their employees. *N.J.A.C.* 19:16–5.7(c). However, upon examination of the statutory authority governing the regulation, we find a marked distinction between the two proceedings, as the statute requires: "Any mediation or factfinding invoked pursuant to ... this section shall terminate immediately upon the filing of a petition for arbitration." *N.J.S.A.* 34:13A–16(b)(2). Again, the distinction between the roles of the facilitator in a mediation and the factfinder in an arbitration is important.

[33] Based on our review of the distinctly different proceedings of arbitration and mediation, we conclude the positions of arbitrator and mediator are in conflict. An arbitrator must "maintain 'broad public confidence in the integrity and fairness of the [arbitration] process." " Barcon, supra, 86 N.J. at 190, 430 A.2d 214 (quoting Holtzmann, The First Code of Ethics for Arbitrators in Commercial Disputes, 33 The Business Lawyer 309, 312 (1977)). If the same person acts as a mediator, obtains party confidences or offers opinions on the issues in dispute, a conflict arises were he or she to then switch roles to act as an arbitrator, making the final call. We find the need for an arbitrator's *147 complete objectivity bears heavily on the integrity of the arbitration process. This concern becomes even more problematic when arbitrating matrimonial disputes between suspicious adverse parties.

In the family law context, we could envision parties agreeing in writing to allow one person to perform these roles regarding separate issues; for example, mediation of custody matters and arbitration of financial issues. However, this should be the parties' choice. Absent a specific agreement clearly defining and accepting the complementary dispute resolution professional's roles, dual roles are to be avoided.

l³⁴ It is advisable for parties to exhaust all applicable dispute resolution alternatives, including settlement conferences and mediation before undertaking arbitration. Once these available courses are exhausted and arbitration is chosen, **1211 the arbitrator should promptly commence hearings and resolve matters expeditiously.

^[35] In this matter, the arbitrator disavowed any mediation role, suggesting he merely performed conferencing. The record supports the arbitrator's position regarding the agreement dividing the parties' medical practices. Unfortunately, however, we cannot reach that same conclusion in light of the unequivocal introductory paragraph contained in the July 8, 2009 memorandum of understanding, which is described as "an Agreement that was reached between the parties ... after mediation with

the assistance of [the arbitrator and Rubin]." The agreement's terms place the arbitrator in the role of moving the parties toward compromise in mediation. We will not infer that the written document is inartful or accept the suggestion the arbitrator merely brought to bear his informed judgment in order to reach a fair solution. Rather, we can only conclude the agreement means what it says: it is a product of mediation reached with the assistance of both the arbitrator and Rubin.

Based on our determination, absent the parties' contract to the contrary, once a neutral assumes the role of mediator, he or she *148 may not assume the role of arbitrator. Therefore, any "arbitration awards" based on the arbitrator's finding, entered following the 2009 mediated agreements must be set aside. After guiding mediation, the arbitrator could no longer proceed, and by doing so here, he exceeded his powers. *N.J.S.A.* 2A:23B–23a(4).

Applying this holding to the entered arbitration awards, we reach the following conclusions. The November 30, 2011 Family Division order confirming the August 11, 2011 arbitration order adjudicating the award of counsel fees and costs is vacated. Next, examining the March 17, 2011 arbitration award, paragraph (1) adopts Rubin's allocation of credits and disposition of marital assets. which the parties agreed to accept. Although reached during arbitration after the 2009 mediations, the provisions adopt a settlement agreement and were not the product of the arbitrator's determination. Paragraphs (2) through (5) entered the parties' 2009 agreements as final. For the reasons set forth earlier in our opinion upholding the parties' 2009 agreements, these provisions need not be disturbed. Paragraph (7), like paragraph (1), included a post-mediation agreement for a credit due plaintiff, not an arbitration award and may stand. Paragraphs (6), (8), (10) through (13) are procedural provisions, which also need not be set aside. Only paragraph (9) of the March 17, 2001 arbitration award, addressing the underlying calculation of child support, represents a post-mediation award made by the arbitrator, which must be vacated.

The Family Division's August 19, 2011 order, which confirmed the March 17, 2011 arbitration award is vacated, to the extent the order confirmed paragraph (9) of the arbitration award. However, we need not set aside confirmation provisions incorporating the parties' 2009 agreements into the JOD.

Also, we vacate the provisions in the July 16, and September 23, 2010 Family Part's orders confirming the arbitrator's awards that conflict with the provisions of this opinion. Specifically, the provisions adopting the arbitrator's denial of plaintiff's document requests and

confirm the May 25, 2010 arbitration decision, excepting, however, those provisions regarding the 2009 agreements.

*149 The matter is remanded to the Family Part for the sole purpose of supervising the parties' selection of a new arbitrator, to conduct arbitration proceedings under the Act to determine unresolved financial **1212 issues, that are not otherwise covered by their mediated and other settlement agreements.

^[36] The final issue for discussion centers on plaintiff's request for financial disclosure following the execution of the 2009 agreements. We are at a loss to understand why this request was met with such resistance, in light of the express terms of the arbitration agreement and the parties' protective order.

The record contains no agreement to limit copying or review of the other side's financial disclosures rendered to Rubin. Rather, the documents governing arbitration gave plaintiff the absolute right to copy all relevant information. Specifically, the appended statement of rights of arbitrating parties included "the right to be provided copies of all documents presented to the [a]rbitrator by their spouse." Further, the protective order allowed the documents to be reviewed by the parties along with their counsel and experts. Allowing review of the documents would not have caused incessant delay, but rather would have allowed substituted counsel the opportunity to become informed.

A concern often arises that post-settlement remorse may motivate a party to retract a valid agreement. However, such tactics can effectively be thwarted through sanctions or an award of attorney's fees for frivolous conduct. *See N.J.S.A.* 2A:23B–21 (affording arbitrator's authority to award exemplary relief and reasonable attorney's fees). Further, the request could have been temporally conditioned, and payment for Rubin's time could have been allocated solely to plaintiff.

Defendant relies on our decision in *Manger*, to suggest an arbitrator's discovery decisions must be upheld. Certain discovery limitations must be made in "the interest of making the hearing 'fair, expeditious, and cost effective [.]' "*Manger, supra,* 417 *N.J.Super.* at 376, 9 *A.*3d 1081 (quoting *N.J.S.A.* 2A:23B–17c). In *Manger*, we reviewed defendant's claim of misconduct alleging *150 the arbitrator improperly denied submission of expert evaluations of the parties' business. *Id.* at 374, 9 *A.*3d 1081. We found no basis to disturb the arbitrator's award, upholding "the arbitrator's broad authority to conduct the proceeding[.]" *Id.* at 377, 9 *A.*3d 1081. However, the facts in *Manger* are distinguishable. The arbitrator in that case

had determined to follow pre-arbitration orders that were entered by the Family Part, which included a deadline for submission of expert evaluations. *Id.* at 373, 9 *A*.3d 1081.

Consistent with her authority to "conduct an arbitration in such manner as the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding," *N.J.S.A.* 2A:23B–15(a), the arbitrator could have ignored or revised the orders entered in the trial court. On the other hand, the arbitrator could apply any and all orders previously entered in the trial court and fashion new discovery and case management orders for the arbitration proceeding. Here, the arbitrator exercised her broad authority to follow the latter course.

[*Id.* at 376, 9 *A*.3d 1081.]

More important, "the arbitrator provided an opportunity for each party to identify and exchange the documents on which they intended to rely at the hearing." *Id.* at 377, 9 *A*.3d 1081.

Here, although there was some review of documentation, Rubin and the parties' counsel apparently had not retained the considered information. When plaintiff's substituted counsel sought to gain background for the underlying agreements, the arbitrator denied the request and restrained **1213 Rubin from further discussion of those issues with substituted counsel. As a result of these determinations, substituted counsel faced an untenable and even suspicious situation, precluding her from providing informed advice to her client and prompting repeated motions to reopen discovery.

^[37] [^{38]} A court may vacate an arbitration award when it is procured by undue means or resulted from an arbitrator exceeding his designated powers. *N.J.S.A.* 2A:24–8a. The judicial inquiry must consider more than whether a mere mistake occurred. *Tretina, supra,* 135 *N.J.* at 356–57, 640 *A.*2d 788 (quotation marks and citation omitted). Rather, that

formulation requires that the arbitrator[] must have clearly intended to decide according to law, must have clearly mistaken the legal rule, and that mistake must *151 appear on the face of the award. In addition, the error, to be fatal, must result in a failure of intent or be so gross as to suggest fraud or misconduct.

[*Id.* at 357, 640 *A*.2d 788 (internal quotation marks and citations omitted).]

Although we agree the arbitrator properly determined discovery would not be reopened, we cannot similarly uphold the order precluding plaintiff from obtaining documents to which she was unquestionably entitled. The

contract to arbitrate specifically granted plaintiff this right and nothing reflects she waived that right. Barring substituted counsel from this information represents an egregious remaking of the arbitration contract, which cannot stand. The Family Part's order confirming this determination must also be vacated. Once appointed, the new arbitrator shall consider plaintiff's document requests, in light of our opinion.

To the extent plaintiff has presented arguments not specifically addressed in our opinion, we reject them as lacking sufficient merit to warrant discussion. R. 2:3-11(e)(1)(E).

l³⁹ [40] [41] We close with these observations. Arbitration, particularly binding arbitration, must be purposefully chosen, and the parameters must be designated in a contract between the parties. If binding arbitration is selected as the forum for resolution of disputes, a litigant cannot jump back and forth between the court and the arbitral forum. By its very nature, arbitration does not permit such a hybrid system. Further, arbitration "should be a fast and inexpensive way to achieve final resolution of ... disputes and not merely a way-station on route to the courthouse," *Borough of E. Rutherford, supra, 213 N.J.* at 201, 61 *A.3d* 941 (internal quotation marks and citations omitted). Attempts to return to the court, except to confirm the final arbitration award, are at odds with this objective.

[42] [43] In the matter at bar, the parties' contract concisely defined matters to be addressed in arbitration, yet from commencement, the Family Part maintained involvement such as scheduling case management and entertaining a motion for a protective order, both of which fall directly within the adjudicatory responsibilities of the arbitrator. N.J.S.A. 2A:23B-17e. Moreover, *152 the parties held a mistaken belief that court intervention was permitted to check the decisions of the arbitrator. This is untenable. The Act's provisions are unmistakable: once binding arbitration is chosen and the arbitrator(s) named, the court is no longer involved in reviewing or determining the substantive issues. The **1214 court's role is circumscribed to confirm a final arbitration award, correct obvious errors, and consider whether the award should be vacated, only when one of the limited bases set forth in N.J.S.A. 2A:23B-23 has occurred. The piecemeal approach demonstrated here prolonged the final result and eliminated the main benefit of arbitration, "to provide an effective, expedient, and fair resolution of disputes[.]" Fawzy, supra, 199 N.J. at 470, 973 A.2d 347 (citations omitted).

Finally, had the parties actually followed the path of

binding arbitration, the need for a PSA would be obviated because an issued arbitration award would be confirmed by court order assuring compliance. No separate agreement memorializing the order is needed. Insistence upon preparation of a PSA appears to result from habit, not necessity.

^[44] Lastly, we do not mean to suggest parties who seek to arbitrate disputes should abandon all hope of amicable resolution. We urge parties to exhaust possible settlement alternatives prior to contracting for arbitration. If arbitration is accepted, parameters for settlement discussions should be set by the arbitrator.

IV.

In summary, the parties' agreements dated February, (incorporated by a Family Part order dated April 1), July 8, September 22, and October 15, 2009 are valid and enforceable. The custody and parenting time consent order reached on February 4, 2010 also is not challenged and remains unchanged. Consequently, the March 8, 2010 JOD as originally filed need not be disturbed because it adopts the 2009 agreements reached and finalized the custody agreement. The JOD further accepts the parties' agreed allocation of debits and credits. The arbitration record suggests this issue was also settled, not resolved by orders following an arbitration *153 hearing. That resolution, occurring after the arbitrator's disqualification, stands on its own as a voluntary agreement.

We vacate the trial court's November 30, 2011 confirmation of the August 11, 2011 arbitration award, allocating attorney's fees and costs as it was rendered following what we have identified arbitrators' unauthorized action. These issues along with any unresolved financial matters, and consideration of release of financial documents shall be addressed by the new arbitrator, once chosen by the parties.

Affirmed in part, vacated in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

All Citations

433 N.J.Super. 111, 77 A.3d 1189

Footnotes

- Rule 5:3–3(e) provides "[t]he expert shall not communicate with the court except upon prior notice to the parties and their attorneys who shall be afforded an opportunity to be present and to be heard during any such communication between the expert and the court." However, nothing in the retainer agreement prohibits the expert's communication with the arbitrator, and, in fact, the agreement expressly permits discretionary rule relaxation.
- The Court has also instructed an arbitration award may be vacated where it violates "a clear mandate of public policy[.]" Weiss v. Carpenter, 143 N.J. 420, 443, 672 A.2d 1132 (1996). However, such intervention is appropriate only where "the public-policy question is not reasonably debatable[.]" Ibid.
- 3 The record is not entirely clear, but it appears Rubin reviewed submissions from each side, which he returned after issuing his recommendation.

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370 F.Supp.3d 275 United States District Court, D. Massachusetts.

SPRUCE ENVIRONMENTAL TECHNOLOGIES, INC., Plaintiff,

FESTA RADON TECHNOLOGIES, CO., Defendant.

Civil Action No. 18-11828-NMG | Filed March 30, 2019

Synopsis

Background: Manufacturer of radon mitigation fans sued competitor, claiming false advertisement campaign regarding manufacturer and its products, and competitor counterclaimed for commercial disparagement, under Lanham Act. Following unsuccessful mediation, parties entered stipulation affirming that, upon informed consent, parties agreed to mediation-arbitration (med-arb) process whereby same mediator was authorized to serve as arbitrator. Subsequently, arbitrator issued interim award in favor of manufacturer, and then issued final award granting manufacturer attorney fees and costs, under Lanham Act. Manufacturer moved to confirm final award, and competitor moved to vacate award.

Holdings: The District Court, Nathaniel M. Gorton, J., held that:

- [1] parties knowingly waived mediation privilege by entering stipulation;
- [2] arbitrator did not exceed her authority by referring to prior settlement offer;
- [3] arbitrator did not exceed her authority by exceeding timing rules;
- [4] award of attorney fees and costs for exceptional case was warranted; and
- [5] award of attorney fees and costs did not manifestly disregard Lanham Act.

Plaintiff's motion granted; defendant's motion denied.

West Headnotes (9)

[1] Alternative Dispute Resolution Waiver or Estoppel

Under federal and Massachusetts law, radon fan manufacturer and competitor knowingly waived mediation privilege, and thus, arbitration was properly convened, in which arbitrator issued interim award in favor of manufacturer and then final award granting manufacturer attorney fees and costs, under Lanham Act; after unsuccessful mediation, parties entered stipulation agreeing, upon informed consent, that same mediator was authorized to serve as arbitrator, that mediation-arbitration (med-arb) process would only proceed with knowing waiver of parties' right to have arbitrator's decision solely on information received in presence of each other, and that parties waived any defect in procedure and right to oppose confirmation or to seek vacatur of any award rendered by arbitrator. Lanham Trade-Mark Act § 35, 15 U.S.C.A. § 1117(a); Mass. Gen. Laws Ann. ch. 233, § 23C.

1 Cases that cite this headnote

[2] Alternative Dispute Resolution Scope of inquiry in general

District court's review of an arbitration award is extremely narrow and exceedingly deferential.

[3] Alternative Dispute Resolution Error of judgment or mistake of law
Alternative Dispute Resolution Mistake of fact and miscalculation

Upon review under the Federal Arbitration Act (FAA), district courts do not sit to hear claims of

factual or legal error by an arbitrator, and such limited review applies even where such error is painfully clear. 9 U.S.C.A. § 10(a).

of submitting invited supplemental briefs on fees and costs. 9 U.S.C.A. § 10(a); Lanham Trade-Mark Act § 35, 15 U.S.C.A. § 1117(a).

[4] Alternative Dispute Resolution Actions exceeding arbitrator's authority

In final arbitration award granting attorney fees and costs to manufacturer, under Lanham Act, after interim award in favor of manufacturer on false advertisement claim and competitor's commercial disparagement counterclaim, arbitrator's passing statement, taken out of context by competitor, that manufacturer was willing to accept preliminary settlement offer but competitor responded by bringing counterclaim, did not exceed arbitrator's authority, under rule prohibiting arbitrator from admitting into record or considering prior settlement offers unless permitted by law; arbitrator's finding that manufacturer's fees request was reasonable was made in context of competitor's overall pattern of conduct including bringing counterclaim and continued false advertising during arbitration. 9 U.S.C.A. § 10(a); Lanham Trade-Mark Act § 35, 15 U.S.C.A. § 1117(a).

[5] Alternative Dispute Resolution Actions exceeding arbitrator's authority

Arbitrator's issuance of interim award in favor of radon fan manufacturer on its false advertisement claim against competitor and on competitor's commercial disparagement counterclaim one day after deadline and then subsequent delay in issuing final arbitration award granting attorney fees and costs to manufacturer, under Lanham Act, did not exceed arbitrator's authority under arbitration rule requiring final or partial final award to be rendered within 30 calendar days after close of hearings but allowing extension for good cause, since one-day delay was negligible, and subsequent delay was warranted for good cause

[6] Alternative Dispute Resolution Error of judgment or mistake of law

Under the "manifest disregard doctrine," district court must consider whether the arbitration award was: (1) unfounded in reason and fact, (2) based on reasoning so palpably faulty that no judge, or group of judges, ever could conceivably have made such a ruling, or (3) mistakenly based on a crucial assumption that is concededly a non-fact.

[7] Antitrust and Trade Regulation Attorney fees

"Exceptional cases," within the meaning of the Lanham Act attorney fees provision, include circumstances where the acts of infringement were malicious, fraudulent, deliberate or willful, or when equitable considerations justify such awards. Lanham Trade-Mark Act § 35, 15 U.S.C.A. § 1117(a).

[8] Alternative Dispute Resolution Costs

Arbitrator's final award granting attorney fees and costs to manufacturer, as prevailing party in "exceptional case," within meaning of Lanham Act, after issuing interim award in favor of manufacturer on its false advertisement claim and on competitor's commercial disparagement counterclaim, was justified, including arbitrator's refusal to separate fees between claims and counterclaims; arbitrator fully explained that competitor's misconduct created exceptional circumstances by knowingly using

factually inaccurate photograph in false advertising campaign and by continuing campaign even after being permanently enjoined, fees reduction was not required for secondary issues as they arose during arbitration, and legal work was required for fees petition that included denied motion for damages. Lanham Trade-Mark Act § 35, 15 U.S.C.A. § 1117(a).

[9] Alternative Dispute Resolution Error of judgment or mistake of law

Under doctrine of manifest disregard of law, arbitrator's final award granting attorney fees and costs to manufacturer, after issuing interim award in favor of manufacturer on its false advertisement claim and on competitor's commercial disparagement counterclaim, but refusing to separate fees between claims and counterclaims, did not manifestly disregard Lanham Act, providing for award of attorney fees to prevailing party in exceptional cases, since arbitrator's findings of exceptional circumstances all related to competitor's misconduct, so fees award was not unfounded in reason and fact, so palpably faulty, or based on mistaken crucial assumption. Lanham Trade-Mark Act § 35, 15 U.S.C.A. § 1117(a).

Attorneys and Law Firms

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MEMORANDUM & ORDER

Nathaniel M. Gorton, United States District Judge

This suit arises from a dispute as to the validity of an arbitration award. While Spruce Environmental Technologies, Inc. ("Spruce" or "plaintiff") moves to confirm the award, Festa Radon Technologies, Co. ("Festa" or "defendant") moves to vacate it on grounds that 1) the arbitration was improperly conducted and 2) the award was not justified.

I. Background

The parties to this suit have engaged in protracted litigation over crossclaims that 1) Festa perpetuated a false advertisement campaign about Spruce and its products and 2) Spruce engaged in commercial disparagement pursuant to the Lanham Act, 15 U.S.C. § 1125(a), and M.G.L. c. 93A. In October, 2015, the parties agreed to mediation before retired Massachusetts Superior Court Judge Nancy Holtz ("Judge Holtz" or "the arbitrator") of Judicial Arbitration and Mediation Services, Inc. ("JAMS").

Attempts to mediate were unsuccessful and the parties entered into an Arbitration Agreement in April, 2017. That agreement specifically named Judge Holtz, who had attempted to mediate the dispute, as the arbitrator. In May, 2017, eight months before the arbitration commenced, the parties entered into a stipulation, which among other things, required counsel to affirm that upon informed consent, the parties agreed to the mediation-arbitration ("med-arb") process whereby the mediator (Judge Holtz) was authorized to serve as the arbitrator.

*278 Judge Holtz conducted a four-day arbitration hearing during January and February of 2018, without objection from counsel as to any of the med-arb proceedings. Shortly after the end of the hearing, Judge Holtz issued an Interim Award which found for Spruce on all federal and state claims and counterclaims. Following the Interim Award, Judge Holtz allowed the parties to submit supplemental briefing in light of her finding that Spruce was entitled to attorneys' fees and costs under the Lanham Act. She then issued a Final Award with respect

to fees and costs.

Spruce moved for this Court to confirm the Final Award. Festa did not oppose that motion but, instead, filed a motion to vacate the award. Those conflicting motions are pending.

II. Legal Analysis

A. Valid Arbitration Agreement

1. Applicable Law

Festa argues that the stipulation entered into by the parties violates Massachusetts public policy because of the Commonwealth's applicable mediation privilege statute, M.G.L. c. 233, § 23C. That argument presumes that the mediation privilege represents a general policy concern that cannot be waived. Beacon Hill Civic Ass'n v. Ristorante Toscano, Inc., 422 Mass. 318, 662 N.E.2d 1015, 1018–19 (1996) (finding that certain general policy concerns protected by the legislature are not waivable).

This Court does not doubt Festa's contention that the mediation privilege embodies important policies of confidentiality and neutrality but none of its cited cases supports its claim that the mediation privilege, as codified by § 23C, represents a non-waivable right. Cf. Leary v. Geoghan, No. 2002-J-0435, 2002 WL 32140255, at *3 (Mass. App. Ct. Aug. 5, 2002) (precluding the mediator from testifying about the mediation even with party consent because it conflicts with the "plain intent" of the statute to preserve neutrality); Town of Clinton v. Geological Servs. Corp., No. 04-0462A, 2006 WL 3246464, at *3 (Mass. Super. Nov. 8, 2006) (denying the production of mediation documents in a valid med-arb proceeding).

In fact, some Massachusetts courts have suggested that the privilege is waivable. See Bobick v. United States Fid. & Guar., Co., 439 Mass. 652, 790 N.E.2d 653, 658 n.11 (2003) (noting that the party "implicitly" waived the mediation privilege under § 23C by accusing the defendant of failing to make a reasonable settlement offer); ZVI Const. Co., LLC v. Levy, 90 Mass.App.Ct. 412, 60 N.E.3d 368, 375 (2016) (rejecting a fraud exception to the mediation privilege on the grounds that counsel specifically negotiated a confidentiality

agreement that was broader than the Massachusetts mediation statute). Given the paucity of case law on this issue, Festa's claim that § 23C confers a non-waivable "absolute privilege" is dubious.

Notwithstanding the dearth of Massachusetts case law on this issue, this Court agrees with Spruce that in a case arising out of a federal question, as alleged here, federal common law controls the existence and application of evidentiary privilege. Fed. R. Evid. 501; In re Admin. Subpoena Blue Cross Blue Shield of Massachusetts, Inc., 400 F.Supp.2d 386, 391 (D. Mass. 2005). Recently, another session of this Court and several district courts elsewhere have recognized the federal mediation privilege, consistent with the holding of the Supreme Court in Jaffee v. Redmond, 518 U.S. 1, 116 S.Ct. 1923, 135 L.Ed.2d 337 (1996). See ACQIS, LLC v. EMC Corp., 2017 WL 2818984, at *1, 2017 U.S. Dist. LEXIS 100856, at *3 (D. Mass. 2017) (concluding that there was "no reason to depart *279 from the conclusions of [other] district courts that a federal mediation privilege exists").

While the contours of the federal mediation privilege have not been firmly established, federal courts have also implied that the privilege can be waived. See Sheldone v. Pennsylvania Turnpike Comm'n, 104 F.Supp.3d 511, 516-17 (W.D. Pa. 2000) (finding that a party had not waived its mediation privilege by putting the mediation communications at issue); Folb v. Motion Picture Indus. Pension & Health Plans, 16 F.Supp.2d 1164, 1180 (C.D. Ca. 1998) (finding that the mediation privilege had not been waived because there was no "intentional relinquishment of a known right"). Accordingly, the Court will assess whether Festa knowingly waived the mediation privilege by entering into the stipulation.

2. Waiver

^[1]Festa contends that it did not waive the mediation privilege and therefore the arbitration itself was invalid. That argument is unavailing because this Court finds that Festa intentionally relinquished and abandoned its mediation privilege. <u>Johnson v. Zerbst</u>, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938) (holding that waiver requires an "intentional relinquishment or abandonment of a known right or privilege").

Here, the Arbitration Agreement and subsequent stipulation explicitly acknowledge that the parties, with informed consent, agreed to the med-arb proceedings before Judge Holtz. Specifically, the Arbitration Agreement provides that the parties 1) consent to resolving the dispute through binding arbitration before Judge Holtz, 2) agree that her decision will be binding and 3) approve her authority to issue injunctive relief, attorneys fees and costs. At the time counsel signed the Arbitration Agreement, the parties had been in mediation with Judge Holtz for at least one month. Festa, a sophisticated corporate party, represented by competent counsel, cannot plausibly claim a lack of informed consent because counsel knew or should have known of the risks of the med-arb process.

In any event, Festa's concerns about an alleged lack of informed consent are vitiated by the stipulation that was signed prior to arbitration. The stipulation provides that counsel specifically 1) request Judge Holtz to "conduct an arbitration in an action previously mediated by Judge Holtz", 2) recognize that ex parte communications occurred during mediation and 3) confirm that without "consent of the parties and counsel" the combined med-arb process could not proceed. Because the stipulation explicitly states that the med-arb will only proceed with

a knowing waiver of the parties' right to have the arbitrator's decision solely on information received in the presence of each other,

counsel knowingly waived the mediation privilege.

To the extent Festa suggests that the stipulation is ambiguous as to non-ex parte communications, the stipulation further provides that the parties

waive any defect in the procedure and the right to oppose confirmation or to seek vacatur[] of any award rendered by the neutral....

Accordingly, the Court finds that the parties were fully informed of the risks of the med-arb process (to which counsel attested in the stipulation) and waived the mediation privilege. The Court therefore declines to vacate the arbitration award on the alleged grounds that the arbitration was improperly convened in the first place.

*280 B. Vacatur of Award

1. Legal Standard

Festa, in the alternative, moves this Court to vacate and/or modify the arbitration award pursuant to the Federal Arbitration Act ("the FAA"), 9 U.S.C. § 10(a) and the

doctrine of manifest disregard of the law.

^[2] [3]The Court's review of an arbitration award "is extremely narrow and exceedingly deferential". Ortiz-Espinosa v. BBVA Sec. of Puerto Rico, Inc., 852 F.3d 36, 47–48 (1st Cir. 2017) (internal citations omitted). Upon review under the FAA, "courts do not sit to hear claims of factual or legal error by an arbitrator" and such limited review applies "[e]ven where such error is painfully clear". Id.

Moreover, the claimant carries the burden of establishing that the award should be set aside and the grounds for vacating an award under § 10 include only the following exceptions:

- 1) where the award was procured by corruption, fraud, or undue means;
- 2) where there was evident partiality or corruption in the arbitrators, or either of them;
- 3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
- 4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a).

2. JAMS Rules

Festa submits that Judge Holtz violated JAMS rules which govern the arbitration proceeding and, as a consequence, this Court must vacate the Final Award. The Court declines to do so under any of the noted exceptions for the following reasons.

^[4]JAMS Rule 22(f) provides that an arbitrator shall not admit into the record or consider prior settlement offers by the parties unless an applicable law permits the admission of such evidence. In her Final Award, Judge Holtz notes that Spruce was willing to accept a preliminary settlement offer but that Festa, in response, brought a counterclaim.

Judge Holtz's finding that Spruce's request for fees was

reasonable was made in the context of Festa's overall pattern of conduct, which included the decision by Festa to prosecute counterclaims. Her passing reference to the prior settlement offer is not grounds for vacatur. Moreover, it is clear that Festa's settlement posture at mediation was maintained throughout the arbitration because it did not curtail its allegedly false and disparaging advertising campaign, including its "Dare to Compare" advertisement. As such, the Court finds that Judge Holtz did not exceed her authority based on a passing reference taken out of context.

[5] JAMS Rule 24(a) provides that an arbitrator shall render a final award or a partial final award within 30 calendar days after the "close of the hearing". The parties' final post-hearing briefs, which marked the close of the hearing, were submitted on March 19, 2018. Judge Holtz issued her Interim Award 31 days later. The parties, upon invitation, then submitted supplemental briefing on fees and costs on or about June 1, 2018. Judge Holtz issued the Final Award on July 24, 2018. The Court finds that Judge Holtz did not overstep her authority by exceeding the time limits set forth in the JAMS *281 rules. Not only was the initial one-day delay negligible but the subsequent delay, after the submission of supplemental briefs, was warranted under Rule 24, which provides that an extension to render the Award may be allowed for "good cause". Considering the repeated extensions that Festa requested and received throughout the arbitration, its argument that this Court should mechanically apply JAMS timing rules, without any indication of harm, prejudice or bad faith on the part of Judge Holtz, is disingenuous and therefore rejected.

3. Fees and Costs

[6] Festa contends that Judge Holtz exceeded her authority and manifestly disregarded the Lanham Act (the governing law) in awarding attorneys' fees to Spruce. Both the Supreme Court and the First Circuit have cast doubt on the doctrine of "manifest disregard of the law" as grounds for vacatur, suggesting that the doctrine deserves only "judicial gloss". Mountain Valley Prop., Inc. v. Applied Risk Servs., Inc., 863 F.3d 90, 94 (1st Cir. 2017). Nevertheless, the First Circuit has not explicitly disavowed the doctrine and the Court will consider it. Under the doctrine of manifest disregard, the Court must consider whether the award was 1) unfounded in reason and fact, 2) based on reasoning so "palpably faulty that no judge, or group of judges, ever could conceivably have made such a ruling", or 3) mistakenly based on a crucial assumption that is concededly a non-fact. Id. at 95.

¹⁷¹The Lanham Act provides that a court may award reasonable attorneys' fees to the prevailing party in "exceptional cases". 15 U.S.C. § 1117(a). Those "exceptional cases" include circumstances where the acts of infringement were malicious, fraudulent, deliberate or willful, or when "equitable considerations justify such awards". Tamko Roofing Prod., Inc. v. Ideal Roofing Co., 282 F.3d 23, 31 (1st Cir. 2002) (internal citations and quotations omitted).

^[8]Here, the arbitrator found in favor of Spruce on all federal and state claims and counterclaims. She concluded that Festa's actions created "exceptional circumstances" based on 1) Festa's knowledge and use of a factually inaccurate photograph and 2) Festa's continued marketing campaign even after it was permanently enjoined and Spruce no longer used the photograph as part of its campaign. The Court agrees with plaintiff that the "exceptional circumstances" in this case were related to Festa's underlying misconduct that sought to harm Spruce's business and thus Judge Holtz's refusal to separate fees incurred with respect to the claims from those related to the counterclaims was appropriate.

^[9]Moreover, Spruce contends that it never asserted that the Lanham Act claims amounted to 25% of counsel's time spent in litigation. Thus, because Judge Holtz's findings of "exceptional circumstances" relate to all of Festa's conduct, her award is not 1) unfounded in reason and fact, 2) so "palpably faulty" or 3) based on a mistaken crucial assumption. Accordingly, even under Festa's tenuous manifest disregard of law claim, it has failed to meet its burden.

Festa further contests the arbitrator's refusal to reduce fees based on tangible issues that were not litigated during the arbitration. Not only does Spruce dispute Festa's argument that those issues ("Made in USA" advertising, "Energy Star" certification and "HVI" listing) were resolved prior to arbitration but also Judge Holtz found that Festa's entire marketing strategy centered on destroying Spruce's market share which encompassed those peripheral *282 issues. Thus, in accordance with the exceedingly deferential standard afforded to the arbitrator, the Court affirms Judge Holtz's finding that those secondary issues arose during the course of the arbitration.

Moreover, the Court is convinced that Spruce's petition for fees, which included a motion for damages that was subsequently denied, required legal work. Specifically, it included Spruce's effort to vindicate its rights and defend against a counterclaim as evidenced by Judge Holtz's discussion of the legal arguments Spruce advanced in its fee petition for damages.

Finally, Festa's argument that Judge Holtz proffered no basis for awarding fees is unavailing. Advest, Inc. v. McCarthy, 914 F.2d 6, 11 (1st Cir. 1990) (finding that just because the arbitration panel chose a remedy "in the realm of what a judge might decide, [the reviewing court] cannot object to it", for "[t]here is often more than one satisfactory method for ascertaining the quantum of damages"). As discussed previously, Judge Holtz in her Interim and Final Awards fully explained her reasons for finding exceptional circumstances under the Lanham Act and her decisions to award fees. As such, Festa's motion to vacate and/or modify the award, including attorneys' fees, will be denied.

ORDER

For the foregoing reasons, the plaintiff's motion to confirm the arbitration award (Docket No. 2) is **ALLOWED**, and defendant's motion to vacate (Docket No. 22) is **DENIED**.

So ordered.

All Citations

370 F.Supp.3d 275

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KeyCite Yellow Flag - Negative Treatment
Distinguished by CIBA Specialty Chemicals, Corp. v. Township of
Dover, N.J.Super.A.D., February 24, 2021
215 N.J. 242
Supreme Court of New Jersey.

WILLINGBORO MALL, LTD., a New Jersey Limited Partnership, Plaintiff—Appellant,

240/242 FRANKLIN AVENUE, L.L.C., a New York Limited Liability Company; Colonial Court Apartments, L.L.C., a Delaware Limited Liability Company; Festival Market At Willingboro, L.L.C., a New Jersey Limited Liability Company; Roy Ludwick; and Namik Marke, Defendants—Respondents.

> A-62 September Term 2011, 069082 | Argued Feb. 27, 2013. | Decided Aug. 15, 2013.

Synopsis

Background: After mortgagee filed mortgage foreclosure action against mortgagor, parties participated in non-binding mediation. Mortgagor moved to enforce purported oral settlement agreement reached in mediation. The Superior Court, Chancery Division, Burlington County, upheld purported settlement agreement. Mortgagor appealed. The Superior Court, Appellate Division, 421 N.J.Super. 445, 24 A.3d 802, affirmed. Mortgagor sought certification to appeal, which was granted.

Holdings: The Supreme Court, Albin, J., held that:

- [1] mortgagee waived mediation-communication privilege, and
- [2] a settlement agreement resulting from mediation was required to memorialized in writing.

Affirmed.

West Headnotes (12)

[1] Privileged Communications and Confidentiality Settlement negotiation privilege; mediation and arbitration

Communications made during the course of a mediation are generally privileged and therefore inadmissible in another proceeding.

- 2 Cases that cite this headnote
- [2] Privileged Communications and Confidentiality Settlement negotiation privilege; mediation and arbitration

A signed written settlement agreement is one exception to the rule that communications made during the course of a mediation of are generally privileged.

- 8 Cases that cite this headnote
- [3] Privileged Communications and Confidentiality Settlement negotiation privilege; mediation and arbitration

An express waiver of the mediation-communication privilege by the parties is an exception to the rule that communications made during the course of a mediation are generally privileged.

- 12 Cases that cite this headnote
- [4] Appeal and Error Statutory or legislative law Appeal and Error Rules of court in general

In construing the meaning of a court rule or a statute, the Supreme Court's review is de novo.

8 Cases that cite this headnote

[5] Appeal and Error Competent or credible evidence in general
Appeal and Error Credibility and Number of Witnesses

The Supreme Court will defer to a trial court's factual findings, particularly those influenced by the court's opportunity to assess witness testimony firsthand, provided the findings are supported by sufficient credible evidence in the record.

11 Cases that cite this headnote

[6] Compromise, Settlement, and Release—Status as favored or disfavored; public policy

Public policy favors the settlement of disputes.

18 Cases that cite this headnote

[7] Alternative Dispute Resolution Mediation favored; public policy

The court system encourages mediation as an important means of settling disputes.

5 Cases that cite this headnote

[8] Privileged Communications and Confidentiality Settlement negotiation privilege; mediation and arbitration

Confidentiality promotes candid and unrestrained discussion, a necessary component of any mediation intended to lead to settlement. R. 1:40–4(d).

1 Cases that cite this headnote

[9] Estoppel Nature and elements of waiver

Waiver is the voluntary and intentional relinquishment of a known right.

2 Cases that cite this headnote

[10] Estoppel Nature and elements of waiver

A valid waiver requires not only that a party have full knowledge of his legal rights, but also that the party clearly, unequivocally, and decisively surrender those rights.

1 Cases that cite this headnote

[11] Privileged Communications and Confidentiality—Settlement negotiation privilege; mediation and arbitration

Mortgagee waived privilege for communications made in the course of mediation in dispute concerning purported oral settlement agreement reached in mediation regarding mortgage foreclosure dispute, where, although mortgagor instituted litigation to enforce the purported agreement and breached privilege by disclosing mediation communications, only after filing a certification in opposition to enforcement of the oral agreement, participating in five discovery depositions, and one day of an evidentiary hearing, and after myriad breaches of the mediation-communication privilege, mortgagee attempt to invoke the privilege on the second hearing date. N.J.S.A. 2A:23C-5(a); N.J.S.A. 2A:84A, App. A, Rules of Evid.,

N.J.R.E. 519(b)(a).

6 Cases that cite this headnote

[12] Compromise, Settlement, and Release—Oral or written

A settlement agreement that resulted from mediation was required to be memorialized in writing at the time of mediation in order to be enforceable; rule requiring a signed, written agreement was intended to ensure, to the extent humanly possible, that the parties had voluntarily and knowingly entered into the settlement and to protect the settlement against a later collateral attack, a settlement in mediation should not have been the prelude to a new round of litigation over whether the parties reached a settlement, and the signed, written agreement requirement would greatly minimize the potential litigation. for N.J.S.A. 2A:23C-6(a)(1); N.J.S.A. 2A:84A, App. A, Rules of Evid., N.J.R.E. 519(c)(a)(1).

11 Cases that cite this headnote

Attorneys and Law Firms

**890 Glenn A. Weiner argued the cause for appellant (Klehr Harrison Harvey Branzburg, attorneys; Mr. Weiner and Michael A. Iaconelli, of counsel and on the briefs).

Joseph P. Grimes, Cherry Hill, argued the cause for respondents (Grimes & Grimes attorneys).

Opinion

Justice ALBIN delivered the opinion of the Court.

*245 One of the main purposes of mediation is the expeditious resolution of disputes. Mediation will not always be successful, but it should not spawn more litigation. In this case, the parties engaged in protracted litigation over whether they had reached an oral settlement agreement in mediation. Instead of litigating

the dispute that was sent to mediation, the mediation became the dispute.

^[1] ^[2] ^[3] Communications made during the course of a mediation are generally privileged and therefore inadmissible in another proceeding. A signed written settlement agreement is one exception to the privilege. Another exception is an express waiver of the mediation-communication privilege by the parties.

Here, defendant moved to enforce the oral settlement agreement and, in doing so, submitted certifications by its attorney and the mediator disclosing privileged communications. Instead of seeking to bar the admission of privileged mediation communications, plaintiff, in opposing the motion, litigated the validity of the oral agreement. In pursuing that course, plaintiff also disclosed mediation communications. In particular, plaintiff expressly waived the privilege on the record when questioning the mediator at a deposition and at an evidentiary hearing.

The Chancery Division found that plaintiff had waived the privilege and upheld the parties' oral agreement at the mediation session. The Appellate Division upheld the oral agreement. We affirm the judgment of the Appellate Division.

To be clear, going forward, parties that intend to enforce a settlement reached at mediation must execute a signed written agreement. Had that simple step been taken, the collateral litigation in this case might have been avoided. In responding to the motion to enforce, plaintiff did not timely interpose the lack of a signed written agreement as a defense. Moreover, if plaintiff intended to defend based on the absence of a written agreement, it was obliged not to litigate the validity of the oral agreement by *246 waiving the mediation-communication privilege. This case should also serve as a reminder that a party seeking to benefit from the mediation-communicationnnnnnn **891 n privilege must timely assert it.

I.

A.

This case begins with a commercial dispute over the

terms of the sale of the Willingboro Mall in Willingboro Township. In February 2005, Willingboro Mall, LTD. (Willingboro), the owner of the Willingboro Mall, sold the property to 240/242 Franklin Avenue, L.L.C. (Franklin). The specific terms of the contract for sale are not germane to this appeal. To secure part of Franklin's obligation, the parties executed a promissory note and mortgage on the property. Willingboro claimed that monies due on August 3, 2005, were not forthcoming and filed a mortgage-foreclosure action on the mall property. Franklin denied that it had defaulted on its contractual obligations and sought dismissal of the complaint. The Honorable Ronald E. Bookbinder, J.S.C., directed the parties to participate in a non-binding mediation for potential resolution of the dispute.

B.

On November 6, 2007, a retired Superior Court judge conducted the mediation over the course of several hours in the offices of Franklin's attorney, Joseph P. Grimes, Esq.1 Willingboro's manager, Scott Plapinger, and attorney, Michael Z. Zindler, Esq., appeared on behalf of the company. The mediator met privately with each side, conveying offers and counteroffers. At some point, Franklin offered \$100,000 to Willingboro in exchange for settlement of all claims and for a discharge of the mortgage on the mall property. On behalf of Willingboro, Plapinger orally accepted the *247 offer in the presence of the mediator, who reviewed with the parties the terms of the proposed settlement. Plapinger also affirmed that he gave his attorney authority to enter into the settlement. The terms of the settlement, however, were not reduced to writing before the conclusion of the mediation session.

Three days later, on November 9, Franklin forwarded to Judge Bookbinder and Willingboro a letter announcing that the case had been "successfully settled." The letter set forth the purported terms of the settlement in eight numbered paragraphs. On November 20, Franklin's attorney sent a separate letter to Willingboro stating that he held \$100,000 in his attorney trust account to fund the settlement, that Franklin had executed a release, and that the monies would be disbursed when Willingboro filed a stipulation of dismissal in the foreclosure action and delivered a mortgage discharge on the mall property.

On November 30, 2007, Willingboro's attorney told Franklin's attorney that Willingboro rejected the settlement terms and refused to sign a release or to

discharge the mortgage. In December, Franklin filed a motion to enforce the settlement agreement. In support of the motion, Franklin attached certifications from its attorney and the mediator that revealed communications made between the parties during the mediation. Among other things, the mediator averred in his certification that the parties voluntarily "entered into a binding settlement agreement with full knowledge of its terms, without any mistake or surprise and without any threat or coercion" and that the settlement terms were accurately memorialized in Franklin's letter to the court.

Willingboro did not give its consent to the filing of either certification. However, Willingboro did not move to dismiss the motion, or strike the certifications, based **892 on violations of the mediation-communication privilege. Instead, in opposition to the motion to enforce, Willingboro requested an evidentiary hearing and the taking of discovery, and filed a certification from its manager, Scott Plapinger.

*248 In his certification, Plapinger averred that he had reluctantly agreed to participate in a mediation that his attorney told him would be non-binding. Plapinger also certified to the substance of the parties' discussions during the mediation. He asserted that as a result of his attorney's relentless insistence he went into a room where the mediator summarized the settlement terms agreed upon by the parties. Plapinger stated that the "purported terms of a final and binding settlement" had not been reduced to writing and that if it had, he would not have signed it. According to Plapinger, after the mediation, his attorney told him that the agreement was "binding" and that he had to sign the settlement papers. He refused to do so.

The trial court ordered the taking of discovery and scheduled a hearing to determine whether an enforceable agreement had been reached during mediation.

C.

The parties deposed five witnesses, including the mediator, Willingboro's manager, and Willingboro's attorney. Before deposing the mediator, the parties agreed that they were "waiv[ing] any issues of confidentiality with regard to the mediation process" and agreed that the testimony elicited could be used for purposes of the motion to enforce the settlement agreement only and not for purposes of the underlying foreclosure action. Despite

the waiver, the mediator declined to testify regarding the mediation in the absence of an order from Judge Bookbinder.

After a recess, Judge Bookbinder entered the room where the deposition was being taken. Judge Bookbinder pointed out to the parties' attorneys that under *Rule* 1:40–4(d), "unless the participants in a mediation agree, no mediator may disclose any mediation communication to anyone who was not a participant in the mediation." Willingboro's attorney stated that the parties agreed to the disclosure. The parties then consented to the court order compelling the mediator to testify. The mediator was deposed and divulged mediation communications.

*249 D.

After the close of discovery, the Honorable Michael J. Hogan, P.J.Ch., conducted a four-day evidentiary hearing. Franklin called the mediator as its first witness. The mediator gave detailed testimony concerning communications made between the parties during the course of the mediation. The mediator testified that at the conclusion of the mediation, after a settlement had been reached, he asked Plapinger whether he had authorized his attorney to accept the \$100,000 settlement offer, and Plapinger answered, "yes." Moreover, Plapinger-who was standing next to his attorney—acknowledged that the settlement ended the case.

On cross-examination by Willingboro's new attorney, Michael Iaconelli, Esq., the mediator balked at disclosing "confidential type information ... conversations [he] had with Mr. Zindler and [Mr. Plapinger]." Iaconelli responded, "it's our position that the parties have waived confidentiality on that issue." Franklin's attorney agreed that "Judge Bookbinder's order is broad enough to waive confidentiality with regard to the mediation." Finally, to satisfy the mediator's concerns, Iaconelli requested that the court issue "a standing order" requiring answers to questions that "concern discussions between [the mediator] **893 and Mr. Zindler and [Mr. Plapinger] ... because we are waiving, as we've already done, based on the agreement of the parties and Judge Bookbinder's order, any confidentiality on that issue." Willingboro's attorney then continued to question the mediator concerning communications made during the mediation.

On the second day of the hearing, Willingboro reversed course and moved for an order expunging "all

confidential communications" disclosed, including those in the mediator's testimony and certification and Franklin's attorney's certification, and barring any further mediation-communication disclosures. Willingboro maintained that mediation communications are privileged under the New Jersey Uniform Mediation Act (Mediation Act or Act) and *Rule* 1:40–4. Willingboro argued that mediation communications *250 could not be presented in support of the motion to enforce the settlement.

Judge Hogan—after reviewing the record in detail—ruled that Willingboro had waived the mediation-communication privilege, and the hearing proceeded with the cross-examination of the mediator.

Franklin next called as a witness Michael Zindler, Willingboro's attorney at the mediation. Zindler testified that, on behalf of Willingboro, manager Scott Plapinger agreed to a settlement at the mediation, and that the terms included a payment of \$100,000 by Franklin in exchange for a release and a discharge of the mortgage by Willingboro. He also stated that Franklin's November 9, 2007, letter accurately memorialized the terms of the settlement agreement.

Willingboro called Plapinger to the stand. Plapinger testified that his attorney and the mediator pressured him into agreeing to a settlement that he believed would be non-binding. He acknowledged that the mediator read the terms of the proposed settlement to him and that he "just ... acquiesced and agreed to everything that was asked of [him]." According to Plapinger, "I said whatever I needed to say to extricate myself from an incredible uncomfortable, high pressure situation." Apparently not given to understatement, he also said, "I would have confessed to the Lindbergh kidnapping and the Kennedy assassination.... I said yes to all of it."

Bruce Plapinger, Scott's cousin and a member of Willingboro's board of managers, testified to a telephone conversation he had with Scott during the mediation. Bruce asserted that he did not believe—based on his conversations with Scott—that the mediation proceeding would lead to a binding result.²

*251 II.

Judge Hogan held that "a binding settlement agreement was reached as a result of [the] court-directed mediation." He credited the testimony of the mediator and

Willingboro's former attorney, Michael Zindler, and discounted the testimony of Scott Plapinger, who—Judge Hogan believed—was suffering from "buyer's remorse." Judge Hogan found that "[e]ven though the [settlement] terms were not reduced to a formal writing at the mediation session," an agreement had been reached, as confirmed by the mediator and Zindler. Judge Hogan noted that Zindler testified that Franklin's November 9 letter had accurately set forth the parties' agreement. Last, the court determined that the validity of the settlement agreement rested on Plapinger's verbal assent to the **894 agreement in the presence of others, not on any unexpressed mental reservations he may have had. Thus, the court granted Franklin's motion to enforce the settlement as memorialized in its November 9 letter.

III.

The Appellate Division affirmed the trial court's enforcement of the settlement agreement.3 Willingboro Mall, Ltd. v. 240/242 Franklin Ave., L.L.C., 421 N.J.Super. 445, 456, 24 A.3d 802 (App.Div.2011). The appellate panel acknowledged that parties assigned to mediation may waive the privilege that protects from disclosure any communication made during the course of the mediation, citing N.J.S.A. 2A:23C-5 and Rule 1:40-4(d). *Id.* at 452, 24 A.3d 802. The panel found that Willingboro "waived the confidentiality normally afforded to" mediation sessions and therefore the trial court properly proceeded to "determine whether the parties had reached a settlement." Id. at 455, 24 A.3d 802. Additionally, the panel rejected Willingboro's argument that the mediation rule, R. 1:40–4(i), "require[d] contemporaneous reduction *252 of the terms to writing and obtaining signatures on the document at the mediation." Id. at 453, 24 A.3d 802. Finally, the panel held that there was substantial credible evidence in the record to support the court's findings "that the parties had reached a settlement at the mediation, the terms of the agreement were as set forth in the November 9, 2007 letter prepared by defendants' attorney to Zindler and the court, and that Scott Plapinger's assent to the settlement was not the product of coercion." Id. at 455-56, 24 A.3d 802.

This Court granted Willingboro's petition for certification. *Willingboro Mall, Ltd. v. 240/242 Franklin Ave., L.L.C.,* 209 *N.J.* 97, 35 *A.*3d 680 (2012). Willingboro raises two issues in its petition: whether *Rule* 1:40–4(i) requires a settlement agreement reached at

mediation to be reduced to writing and signed at the time of mediation, and whether Willingboro waived the mediation-communication privilege.

IV.

Willingboro urges this Court to hold that, under Rule 1:40-4(i), "a settlement reached at mediation [is not] enforceable" unless it is "reduced to writing at the time of the mediation and signed by the parties." Because the writing memorializing the terms of the settlement was forwarded by Franklin after the mediation and never signed or otherwise assented to by Willingboro, Willingboro argues that both the trial court and Appellate Division erred in enforcing the oral agreement. Moreover, Willingboro disputes the trial court's and Appellate findings Division's that it waived mediation-communication privilege. Willingboro submits that it did not waive the mediation-communication privilege "by presenting evidence in opposition" to the motion to enforce the oral agreement. Willingboro takes the position that it could not have waived the mediation-communication privilege, which "already had been destroyed by [Franklin's] disclosures" to the court through the mediator's certification. Willingboro posits that its response to Franklin's breach of the mediation-communication privilege was defensive and should not be taken as a waiver of the privilege.

*253 In contrast, Franklin maintains that nothing in Rule 1:40-4(i) requires that a **895 written settlement agreement resulting from mediation "be created or tendered on the actual day of the mediation" or that it be signed by the parties. Franklin argues that the Appellate Division correctly "determined that the three day gap between mediation and memorialization of the settlement was reasonable." Moreover, Franklin relies on the reasoning and holdings of the trial court and Appellate Division that Willingboro waived mediation-communication privilege. It therefore requests that this Court uphold enforcement of the oral settlement agreement reached at mediation between the parties.

V.

[4] [5] In construing the meaning of a court rule or a statute,

our review is de novo, and therefore we owe no deference to the trial court's or Appellate Division's legal conclusions. Murray v. Plainfield Rescue Squad, 210 N.J. 581, 584, 46 A.3d 1262 (2012) (citations omitted); see also Manalapan Realty, L.P. v. Twp. Comm., 140 N.J. 366, 378, 658 A.2d 1230 (1995) (citations omitted) ("A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference."). On the other hand, we will defer to a trial court's factual findings, particularly those influenced by the court's opportunity to assess witness testimony firsthand, provided the findings are supported by "sufficient credible evidence in the record." Brunson v. Affinity Fed. Credit Union, 199 N.J. 381, 397, 972 A.2d 1112 (2009) (internal quotation marks and citation omitted); see also Cesare v. Cesare, 154 N.J. 394, 412, 713 A.2d 390 (1998) (citation omitted).

VI.

A.

Settlement spares the parties the risk of an adverse outcome and the time and *254 expense—both monetary and emotional—of protracted litigation. See State v. Williams, 184 N.J. 432, 441, 877 A.2d 1258 (2005). Settlement also preserves precious and overstretched judicial resources. See Herrera v. Twp. of S. Orange Vill., 270 N.J.Super. 417, 424, 637 A.2d 526 (App.Div.1993) ("There is a clear public policy in this state favoring settlement of litigation." (citation omitted)), certif. denied, 136 N.J. 28, 641 A.2d 1039 (1994).

¹⁷¹ Our court system encourages mediation as an important means of settling disputes. *See Williams, supra,* 184 *N.J.* at 446, 877 *A.*2d 1258 (citations omitted). Indeed, our court rules provide for Complementary Dispute Resolution Programs, which are intended to enhance the "quality and efficacy" of the judicial process. *R.* 1:40–1. In particular, *Rule* 1:40–4(a) authorizes, in certain cases, a Superior Court judge to "require the parties to attend a mediation session at any time following the filing of a complaint."

Mediation is governed by our court rules, *R*. 1:40 to 1:40–12, the Mediation Act, *N.J.S.A.* 2A:23C–1 to –13,

and our rules of evidence, *N.J.R.E.* 519. The success of mediation as a means of encouraging parties to compromise and settle their disputes depends on confidentiality—a point recognized in both our jurisprudence and our court rules. *See Williams, supra,* 184 *N.J.* at 446–47, 877 *A.*2d 1258; *R.* 1:40–4(d).

[8] Rule 1:40-4(d) provides: "Unless the participants in a mediation agree otherwise or to the extent disclosure is permitted by this rule, no party, mediator, or other participant in a mediation may disclose any mediation communication to anyone **896 who was not a participant in the mediation." The rule recognizes that without assurances of confidentiality, "'disputants may be unwilling to reveal relevant information and may be hesitant to disclose potential accommodations that might appear to compromise the positions they have taken." Williams, supra, 184 N.J. at 447, 877 A.2d 1258 (quoting Final Report of the Supreme Court Task Force on Dispute Resolution 23 (1990)). Confidentiality promotes candid and unrestrained discussion, a necessary component of any *255 mediation intended to lead to settlement. Id. at 446–47, 877 A.2d 1258 (citations omitted). To this end, our court and evidence rules and the Mediation Act confer a privilege on mediation communications, ensuring that participants' words will not be used against them in a later proceeding.

B.

Rule 1:40–4(c) provides that a communication made during the course of mediation is privileged:

A mediation communication is not subject to discovery or admissible in evidence in any subsequent proceeding except as provided by the New Jersey Uniform Mediation Act, *N.J.S.A.* 2A:23C-1 to -13. A party may, however, establish the substance of the mediation communication in any such proceeding by independent evidence.

Although our court rule does not define "mediation communication," the Mediation Act does. *N.J.S.A.* 2A:23C-2 broadly defines a "[m]ediation communication" as any "statement, whether verbal or nonverbal or in a record, that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator."

The Mediation Act and our rules of evidence both, in identical language, confer a privilege on mediation communications. *N.J.S.A.* 2A:23C–4(a) and *N.J.R.E.* 519(a)(a) provide: "Except as otherwise provided ... a mediation communication is privileged ... and shall not be subject to discovery or admissible in evidence in a proceeding unless *waived* or precluded as provided by ... [*N.J.S.A.* 2A:23C–5]." (Emphasis added). *N.J.S.A.* 2A:23C–4(b) and *N.J.R.E.* 519(a)(b) specifically set forth the breadth of the privilege:

b. In a proceeding, the following privileges shall apply:

- (1) a mediation party may refuse to disclose, and may prevent any other person from disclosing, a mediation communication.
- (2) a mediator may refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the mediator.

• • • •

*256 Additional support for the broad scope of the privilege is found in the drafters' commentary to the model Uniform Mediation Act. The drafters explained that the mediation-communication privilege allows a participant "to refuse to disclose and to prevent another from disclosing particular communications." Nat'l Conference of Comm'rs on Unif. State Laws, Uniform Mediation Act § 4, comment 4 (2003) (emphasis added) [hereinafter UMA Drafters' Comments], available at http://www.uniformlaws.org/shared/docs/mediation/uma_final_03.pdf. The drafters understood that the ability to block another from disclosing mediation communications "is critical to the operation of the privilege" and that the "parties have the greatest blocking power." Ibid.

****897** C.

The mediation-communication privilege is not absolute. Our court and evidence rules and the Mediation Act carve out limited exceptions to the privilege, two of which are pertinent to this case. The first is the signed-writing exception, which allows a settlement agreement reduced to writing and properly adopted by the parties to be admitted into evidence to prove the validity of the agreement.

agreements are to be memorialized "[i]f the mediation results in the parties' total or partial agreement." It provides that the agreement "shall be reduced to writing and a copy thereof furnished to each party." Ibid. Rule 1:40-4(i) also provides that "[t]he agreement need not be filed with the court, but if formal proceedings have been stayed pending mediation, the mediator shall report to the court whether agreement has been reached." Although Rule 1:40-4(i) does not state specifically that a written agreement must be signed by the parties, a publication prepared by the Civil Practice Division makes clear that any settlement agreement should be reduced to writing and signed. Civil Practice Div., Mediator's Tool Box: A Case Management Guide for Presumptive Roster Mediators 11 (Nov. 2011), available http://www.judiciary.state.nj.

us/civil/mediators-toolbox.pdf *257 "Before the parties leave the mediation, the mediator should insist that a short form settlement agreement (term sheet) be drafted by one of the attorneys and signed by the parties at the mediation table.").

Although our court rule may be silent about whether a signed agreement is necessary, the Mediation Act and our evidence rules are not. *N.J.S.A.* 2A:23C-6(a)(1) and *N.J.R.E.* 519(c)(a)(1) both provide that "an agreement evidenced by a record *signed by all parties to the agreement*" is an exception to the mediation-communication privilege. (Emphasis added). Because a signed agreement is not privileged, it therefore is admissible to prove and enforce a settlement.

Although neither the Mediation Act nor *N.J.R.E.* 519 specifies what constitutes an "agreement evidenced by a record" and "signed," the *UMA Drafters' Comments* give insight regarding the intended scope of those words. The *UMA Drafters' Comments* report that those words apply not only to "written and executed agreements," but also to "those recorded by tape ... and ascribed to by the parties on the tape." *UMA Drafters' Comments, supra,* at § 6(a)(1), comment 2. For example, "a participant's notes about an oral agreement would not be a signed agreement." *Ibid.* In contrast, a "signed agreement" would include "a handwritten agreement that the parties have signed, an e-mail exchange between the parties in which they agree to particular provisions, and a tape recording in which they state what constitutes their agreement." *Ibid.*

D.

The second exception to the mediation-communication privilege relevant to this case is waiver. The privilege

may be waived in a record or orally during a proceeding if it is expressly waived by all parties to the mediation and:

- (1) in the case of the privilege of a mediator, it is expressly waived by the mediator; and
- (2) in the case of the privilege of a nonparty participant, it is expressly waived by the nonparty participant.

*258 [N.J.S.A. 2A:23C-5(a); N.J.R.E. 519(b).]

relinquishment of a known **898 right." *Knorr v. Smeal*, 178 *N.J.* 169, 177, 836 *A.*2d 794 (2003) (citation omitted). A valid waiver requires not only that a party "have full knowledge of his legal rights," but also that the party "clearly, unequivocally, and decisively" surrender those rights. *Ibid.* Importantly, *N.J.S.A.* 2A:23C–5(a) and *N.J.R.E.* 519(b) mandate that the waiver be express. The *UMA Drafters' Comments* explain that "[t]he rationale for requiring explicit waiver is to safeguard against the possibility of inadvertent waiver." *UMA Drafters' Comments, supra*, at § 5(a)-(b), comment 1. Moreover, waivers "conducted on the record" do not present the problem of proving "what was said." *Ibid.*

VII.

A.

We now apply these principles of law to the facts before us. First, had the parties reduced to writing the terms of the agreement and affixed their signatures to the document at the conclusion of the mediation, Franklin would have been able to seek enforcement of the settlement with evidence that fell within an exception to privilege. mediation-communication 2A:23C-6(a)(1); *N.J.R.E.* 519 (noting that "an agreement evidenced by a record signed by all parties to the agreement" exception an the mediation-communication privilege). But here, the signed-writing exception does not come into play

because, early in the proceedings, Willingboro did not seek to bar enforcement of the settlement based on the lack of a signed written agreement. Moreover, if Willingboro intended to rely on the signed-writing doctrine, then it was obliged to stand by this rule and not litigate the oral agreement by waiving the mediation-communication privilege.

Second, we conclude that the certifications filed by Franklin's attorney and the mediator in support of Franklin's motion to *259 enforce the oral agreement disclosed privileged mediation communications. The certifications refer to statements made during the mediation and therefore fall squarely within the definition of a "mediation communication" contained in *N.J.S.A.* 2A:23C-2.

Moreover, the Mediation Act and our evidence rules generally prohibit a mediator from making an "oral or written communication" to a court other than to inform the court whether a settlement was reached. N.J.S.A. 2A:23C-7(a)-(b); N.J.R.E. 519(d). Here, the mediator went far beyond merely communicating to the court that the parties had reached a settlement. The mediator certified to the accuracy of Franklin's November 9 letter, which set forth in eight numbered paragraphs the terms of an oral agreement between the parties. Franklin's letter revealed mediation communications—not Willingboro's oral assent to the settlement, but also its specific agreement to individual terms. By validating the contents of Franklin's letter, the mediator breached the privilege.

The terms of the settlement rested on privileged communications between the parties and mediator. However, Willingboro did not consent in advance to the disclosure of mediation communications to the court.

In the absence of a signed settlement agreement or waiver, it is difficult to imagine any scenario in which a party would be able to prove a settlement was reached during the mediation without running afoul of the mediation-communication privilege. The United States Court of Appeals for the Third Circuit reached a similar conclusion under its Local Appellate Rule (LAR) 33.5. **899 Beazer East, Inc. v. Mead Corp., 412 F.3d 429, 434–36 (3d Cir.2005) (citing 3d Cir. L.A.R. 33.5 (1995)), cert. denied, 546 U.S. 1091, 126 S.Ct. 1040, 163 L.Ed.2d 857 (2006).

In *Beazer*, the plaintiff attempted to enforce an alleged oral agreement made by the parties during an appellate mediation. *Id.* at 434. Like the mediation-communication privilege in *N.J.S.A.* 2A:23C–4 and *N.J.R.E.* 519(a), LAR

33.5(c) provides that no one participating in the mediation session "may disclose 'statements *260 made or information developed during the mediation process." Beazer, supra, 412 F.3d at 434-35 (quoting 3d Cir. L.A.R. 33.5(c) (1995)). LAR 33.5(d) "further provides that 'if a settlement is reached, the agreement shall be reduced to writing and shall be binding upon all parties to the agreement.' " Id. at 435 (quoting 3d Cir. L.A.R. 33.5(d) (1995)). The Third Circuit concluded that allowing oral agreements reached at mediation to bind the parties "would seriously undermine the efficacy of the Appellate Mediation Program by compromising the confidentiality of settlement negotiations." Id. at 434. The policy reasons supporting this approach are the encouragement of uninhibited discussion and avoidance of contested hearings to determine whether the parties reached a settlement. See id. at 435-36 (citation omitted). Ultimately, the plaintiff in Beazer could not "prove the existence or terms of the disputed oral settlement without violating this provision's broadly [mediation-communication-disclosure] prohibitions." Id. at 435.

Third, without the use of communications made during the mediation, Franklin likely could not have proved the existence of a settlement. Despite Franklin's violation of the mediation-communication privilege in seeking to enforce the oral settlement agreement reached at mediation, Willingboro did not timely move to strike or suppress the disclosures of the mediation communications. Instead, Willingboro proceeded to litigate whether it had, in fact, entered into a binding, oral settlement agreement. In taking this tack, Willingboro followed Franklin's approach and disclosed mediation communications. Willingboro breached the mediation-communication privilege by appending to its opposition papers Scott Plapinger's certification, which revealed the substance of mediation communications. Additionally, Willingboro then engaged in the discovery process, deposing the mediator and participating in four other depositions that trenched on mediation-communication privilege.

We reject Willingboro's assertion that its own disclosures of mediation communications were permitted by *261 N.J.S.A. 2A:23C-5(b) and N.J.R.E. 519(b)(b). That statute and its corollary evidence rule provide: "A person who discloses ... a mediation communication that prejudices another person in a proceeding is precluded from asserting a privilege under [N.J.S.A. 2A:23C-4], but only to the extent necessary for the person prejudiced to respond to the representation or disclosure." This language suggests that the disclosure of some privileged communications does not necessarily open the door to

disclosure of all privileged communications.

However, in this case, Willingboro expressly waived the mediation-communication privilege in responding to the motion to enforce the oral settlement agreement. In defending against Franklin's violation of the privilege, Willingboro did not have to make further disclosures of mediation communications. It merely had to invoke the protections of the Mediation Act and our evidence rules, which provide that "a mediation party may ... prevent any other person from disclosing [] a mediation communication." N.J.S.A. 2A:23C–4(b)(1); **900 N.J.R.E. 519(a)(b)(1). Instead, Willingboro engaged in unrestricted litigation over the validity of the oral agreement, which involved its own wholesale disclosures of mediation communications. Willingboro completely opened the door; it cannot now find shelter in N.J.S.A. 2A:23C–5(b) and N.J.R.E. 519.

В.

III The mediation-communication privilege "may be waived in a record or orally during a proceeding if it is expressly waived by all parties to the mediation." *N.J.S.A.* 2A:23C-5(a); *N.J.R.E.* 519(b)(a). Although Franklin instituted the enforcement litigation and fired the first shot that breached the privilege, Willingboro returned fire, further shredding the privilege. At the mediator's deposition, Willingboro agreed to "waive any issues of confidentiality with regard to the mediation process." When the mediator declined to testify in the absence of a court order, Willingboro gave its unequivocal consent to having Judge Bookbinder direct *262 the mediator to respond to questions that touched on communications made during the mediation.

When the mediator testified on the first day of the hearing concerning Franklin's motion to enforce the oral settlement agreement, Willingboro's attorney insisted that the mediator respond to questions that the mediator believed would elicit "confidential type information." Franklin's attorney told the court that "Judge Bookbinder's order is broad enough to waive confidentiality with regard to the mediation." Willingboro's attorney was evidently in total agreement on this issue. Indeed, Willingboro's attorney asked the court to order the mediator to answer questions about mediation discussions between the mediator Willingboro's representatives, attorney Zindler and company manager Plapinger. Willingboro's attorney also

stated that his client had waived the issue of confidentiality.

Only after filing a certification in opposition to enforcement of the oral agreement, participating in five discovery depositions, and one day of an evidentiary hearing—and after myriad breaches mediation-communication privilege—did Willingboro attempt to invoke the privilege on the second hearing date. However, by then, Willingboro had passed the point of no return. Willingboro had expressly waived the 2A:23C-5(a) privilege. N.J.S.A.and 519(b)(a)—it had "clearly, unequivocally, and decisively" surrendered its right to object to the admission of evidence regarding mediation communications at the evidentiary hearing. Knorr, supra, 178 N.J. at 177, 836 A.2d 794 (citing Country Chevrolet, Inc. v. Twp. of N. Brunswick Planning Bd., 190 N.J.Super. 376, 380, 463 A.2d 960 (App.Div.1983)). Willingboro intentionally elected not to invoke the privilege in a timely manner.

The mediation-communication privilege is intended to encourage candid and uninhibited settlement discussions. The rule requiring a signed, written agreement is intended to ensure, to the extent humanly possible, that the parties have voluntarily and knowingly entered into the settlement and to protect the settlement against a later collateral attack. A settlement in mediation should not be the prelude to a new round of litigation over whether the parties reached a settlement. The signed, written agreement requirement—we expect—will greatly minimize the potential for litigation.

Last, this case serves as a reminder that a party seeking the protection of a privilege must timely invoke the privilege. A party that not only expressly waives the mediation-communication privilege, but also discloses privileged communications, cannot later complain that it has lost the benefit of the privilege it has breached.

VIII.

[12] In summary, if the parties to mediation reach an agreement to resolve their dispute, the terms of that settlement must be reduced to writing and signed by the parties before the mediation *263 comes to a close. In those cases in which the complexity of the settlement terms cannot be drafted by the time the mediation session was expected to have ended, the mediation session should be continued for a brief but reasonable period of time to allow for the signing of the settlement. We also see no reason why an audio- or video-recorded agreement would not meet the test of "an agreement evidenced by a record signed by all parties to the agreement" under N.J.S.A. 2A:23C-6(a)(1) and N.J.R.E. 519(c)(a)(1). See UMA Drafters' Comments, supra, at § 6, comment 2. To be **901 clear, going forward, a settlement that is reached at mediation but not reduced to a signed written agreement will not be enforceable.

IX.

For the reasons expressed, we affirm the judgment of the Appellate Division, which upheld the Chancery Division's confirmation of the oral settlement agreement in this case.

*264 For affirmance—Chief Justice RABNER and Justices LaVECCHIA, ALBIN, HOENS, PATTERSON and Judge RODRÍGUEZ (temporarily assigned)—6.

Not Participating—Judge CUFF (temporarily assigned).

Opposed—None.

All Citations

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Footnotes

- This statement of facts was primarily adduced at an evidentiary hearing on a motion to enforce an alleged oral settlement agreement between the parties.
- Also admitted into evidence was a videotaped deposition of Alan Braverman, a business acquaintance of the parties, who testified to an earlier attempt to settle the dispute. The court found his testimony to be "essentially irrelevant."

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| 3 | We do not address other issues raised before the trial court and Appellate Division, which are not germane to this appeal. | | | | |
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