AMERICAN BANKRUPTCY INSTITUTE
JOURNAL
The Essential Resource for Today's Busy Insolvency Professional

Mediation Matters

By Leslie A. Berkoff and John G. Loughnane

Limitations on Confidentiality

Coordinating Editor
Leslie A. Berkoff
Moritt Hock & Hamroff LLP; New York

John G. Loughnane
Nutter McClennen & Fish LLP; Boston

Leslie Berkoff is a partner with Moritt Hock & Hamroff LLP in New York and chairs the firm's Dispute Resolution Practice Group. John Loughnane is a partner in the Corporate and Transactions Department of Nutter McClennen & Fish LLP in Boston and co-chair of ABI's Commercial and Regulatory Law Committee.

Confidentiality is a core component of, and integral to, the mediation process. Parties entering into mediation reasonably expect that communications and disclosures will be treated as confidential to the fullest extent permissible under applicable law. Protection and fulfillment of that expectation is thus important, as is understanding limitations on confidentiality in the mediation context.

Of course, not every mediation is successful. In some small number of instances, unfortunately, participants committed to a litigation strategy may attempt to seek discovery of documents or discussions obtained or exchanged during a prior mediation in furtherance of continued litigation.

A prudent mediator understands this risk and will take steps to promote and ensure the confidentiality of the mediation process. Moreover, parties to a mediation, and the mediator, should consider the issue of confidentiality prior to sharing information or making any disclosures in contemplation of a mediation, both during the process itself and after the conclusion of the mediation.

As discussed in a recent article,[1] there is no national rule that provides any certainty of confidentiality. Rather, parties must ensure that applicable rules governing the mediation provide such protection or reach a similar result through court approval of a consensual agreement governing the process from start to finish. In addition, recently amended Local Rule 9019-5(d) of the Local Rules of the U.S. Bankruptcy Court for the District of Delaware (effective Feb. 1, 2022) provides an example of a local rule promoting confidentiality.[2]

The lack of a national standard for ensuring confidentiality stands in contrast to the protection afforded ordinary settlement communications pursuant to Rule 408 of the Federal Rules of Evidence, as made applicable to bankruptcy proceedings by Rule 9017 of the Federal Rules of Bankruptcy Procedure. The confidentiality rule governing settlement communications under Rule 408 is generally well understood and provides effective guidance in protecting against the admissibility of communications focused on settlement.[3]

This article first discusses issues arising in two Delaware cases (both arising prior to the recent rule amendment) to demonstrate how courts have grappled with limitations on confidentiality. It then suggests some strategies for improving confidentiality given the absence of a comprehensive national rule.

Cases of Significant Import

In the ongoing case of *In re Boy Scouts of America and Delaware BSA LLC*,[4] Hon. **Laurie Selber Silverstein** recently wrestled with limitations on confidentiality in a complex mediation. The issue before the court was the debtor's motion for a protective order in connection with ongoing mediation proceedings, and related requests for discovery concerning that process that were tied to upcoming confirmation hearings.

The debtor (BSA) had sought to mediate certain plan-related issues with various parties. The governing mediation order previously entered by the court included a provision providing that "no person shall seek discovery from any participant in the mediation with respect to any information disclosed during mediation."[5] The BSA mediation order further included a specific exception providing that "if a party puts at issue any good-faith finding

1 Tyler Layne, "Mediation Privilege and Confidentiality: New Local Rules and the Need for National Guidance," XLI *ABI Journal* 5, 42-43, May 2022, *available at* abi.org/abi-journal.

2 *Id.*

3 The recently amended Delaware rule specifically provides that Federal Rule of Evidence 408 applies "[t]o the fullest extent applicable ... to the mediation conference and any communications with the mediator related thereto."

4 Case No. 20-10343 (LSS) (Bankr. D. Del. 2021).

5 References to "BSA TR" refer to the Oct. 25, 2021, transcript of hearings before Judge Silverstein in this matter, a copy of which is available for purchase at cle.abi.org (2022 ABI Annual Spring Meeting session titled "Privileges & Confidentiality in Bankruptcy Litigation" at p. 13). Order (I) Appointing Mediators, (II) Referring Certain Matters to Mediation, and (III) Granting Related Relief (the "BSA Mediation Order"), dated June 9, 2020 Dkt. No. 812; Tr. at 2.

concerning the Mediation in any subsequent action concerning insurance coverage, the [party's] right to seek discovery, if any, is preserved."[6]

In connection with various pending hearings, BSA filed a motion and sought to protect certain documents on various grounds, including, but not limited to, an assertion of a mediation privilege. In analyzing the existence of such a privilege, the court noted that only the Sixth Circuit had adopted and recognized the existence of a mediation privilege in *In re Lake Lotawana Community Improvement District*.[7] The court concluded that "without the existence of a federal mediation privilege, relevant information in a confidential mediation is subject to discovery, when jurisdiction is based on a federal statute. But notwithstanding the lack of binding precedent in this circuit, Local Rule 9019-5 exists and was incorporated into my order [quoted above]," allowing for discovery with respect to information disclosed during a mediation.[8] The court further recognized how this provision was inconsistent with the construct of mediation and suggested that this was a bit of a "square peg, round hole" situation.[9] In so doing, the court noted the distinction between a smaller dispute that goes to mediation based on the consent of the two impacted parties, with self-determination and the ability to fully control the outcome of the process, as opposed to a larger case with a multi-party mediation where not all parties were involved in every aspect of the comprehensive resolution and a plan vote by all creditors was still necessary.

The court recognized that in the context of BSA and the mediation in that case, not all parties were involved in the mediation process, and like most large cases, any resolution would need to be approved by the creditor body as a whole. As a result, the court found that certain communications were not protected by the construct of a mediation privilege. The court was focused on questions of proof related to confirmation of the existence of good faith, stating that "it cannot be the case that if a party is relying on the very fact of mediation to meet its standard of proof, that discovery is prohibited regarding the *bona fides* of the mediation."[10] However, while the court allowed some discovery, it did not rule on admissibility of that evidence at future hearings, and further explicitly noted that the denial of the motion seeking protective relief was without prejudice to the debtors raising the request again at a future time, as the court noted that the request might have been premature at that point in the cases.

Separate and apart from the issues previously discussed, the court also considered and rejected the attempt to raise and apply mediation privilege to protect the production of documents by Prof. Eric Green, who had been initially proposed as a mediator in the *BSA* case, but not ultimately selected by the court.[11] The court found that any information provided to Prof. Green or exchanged in contemplation of his engagement, and communications related thereto, could not be subject to a mediation privilege on any grounds, as he never was approved as a mediator.[12]

Another case emanating out of the Delaware Bankruptcy Court years ago, *In re Tribune Co., et al.*,[13] also required a balancing of competing tensions between the needs of multiple parties over a discovery dispute and the need for information contrasted with the need to protect and preserve the integrity of the mediation process. In that case, various parties sought information concerning a pending settlement arising out of a mediation conducted by Hon. **Kevin Gross**. The documents sought were withheld from production on grounds of being both procured during or related to that mediation, as well as a common-interest privilege asserted by various parties to that process. The proponents of the settlement were in a "catch-22" situation, faced with either waiving the protections of the mediation order or being precluded from introducing evidence that they would need to provide to buttress the mediator's endorsement of the settlement and evidence that the plan itself was the result of arm's-length bargaining.

In balancing all of these competing interests, presiding Bankruptcy Judge **Kevin J. Carey** (ret.) recognized that there was a strong policy promoting the full and frank discussions during the mediation process and that confidentiality was essential for an effective mediation.[14] As a result, the court crafted an order to protect communications between the mediator and mediation parties, as well as communications between the mediation parties on mediation days (but not on off mediation days) and, as a result, worked out a solution that allowed for areas that opened the door to information that fell outside the context of the mediation to move forward.[15]

Strategies for Improving Confidentiality

As these cases demonstrate, challenges to confidentiality can (and do) arise in various settings. Mediators and parties participating in a mediation can strengthen claims of confidentiality by carefully reviewing at the outset proposed forms of order governing the proceeding. If the order will be entered in a jurisdiction lacking a robust local rule that might independently cover confidentiality, then parties should seek to provide as much protection as possible by incorporating provisions specifically geared toward maximizing confidentiality provisions.

For example, parties should carefully consider provisions similar to the language found in the amended Delaware Local Rule 9019 providing that the "mediator shall not be compelled to disclose to the Court or to any person outside the mediation any records, reports, notes, communications ... or other documents receive[d] or made by or to the mediator." Language contained in this Rule further providing that the mediator shall not testify or be sub-

6 *Id.*

7 563 B.R. 909 (2016). Tr. at 11.

8 Tr. at 11-12. As previously noted above and in footnote 2, the BSA Mediation Order was entered on June 9, 2020, and important amendments to Local Rule 9019-5 became effective on Feb. 1, 2022. The amended rule explicitly acknowledges that "[c]onfidentiality is necessary to the mediation process, and mediations shall be confidential under these rules and to the fullest extent permissible under otherwise applicable law."

9 *Id.*

10 Tr. at 13-14.

11 In the *BSA* case, the parties were not free to choose their mediator and the court had selected the mediators, which is why there was an exchange of information prior to approval of the mediator.

12 The court noted that to the extent that Prof. Green might have a basis to assert other privileges (such as the attorney/client privilege), he was free to have those independently considered by the court.

13 No. 08-13141 (KJC) (Bankr. D. Del.).

14 Memorandum and Order entered by Judge Carey, dated Feb. 3, 2011, at p. 16 (citing *Sheldone v. Pennsylvania Turnpike Comm'n*, 104 F. Supp. 2d 511, 514 (W.D. Pa. 2000) (citations omitted) (quoting *Lake Utopia Paper Ltd. v. Connelly Containers Inc.*, 608, 928, 930 (2d Cir. 1979), which is also embraced by Local Delaware Rule 9019-5(d))). A copy of both the memorandum and order are available at "Privileges & Confidentiality in Bankruptcy Litigation," *supra* n.5, at p. 32.

15 *Id.*

poenaed or compelled to testify regarding the mediation is also supportive in protecting confidentiality and should be incorporated into any order authorizing mediation. Even in situations where a mediation is not directed by a court, parties can choose to seek approval of (or stipulate and agree upon) such provisions to govern a consensual mediation in the interest of judicial efficiency.

Further, any order approving a mediation should clearly state that the only communication authorized to the court about the session is limited to a basic report or certificate of completion of the mediation. Such a report should be limited to indicating compliance with the order of referral by the court (or agreement to mediate) and noting either a successful mediated resolution or not. Nothing more should be or needs to be said to preserve the integrity and confidentiality of the process.

In addition to ensuring an acceptable form of order and the incorporation of language mirroring robust local rules, a mediator and participating parties should enter into a binding agreement (with court approval) that recognizes the obligation of confidentiality. A mediator should also inform the parties at the outset of the meditator's standard practice of shredding mediation notes and materials promptly upon the conclusion of the final mediation session to ensure that no documents with confidential information from the process remain going forward that are capable of being discovered.

Parties can also consider not sending certain highly confidential pieces of information by way of email to the mediator and/or the other party. Wiping information off an email trail or server is far more difficult than shredding hard copies of information at the conclusion of a mediation. While this step might not be necessary or practical for every piece of information, some consideration should be given to guarding more sensitive information in order to protect it from resting on a server or document-management system. The convenience of email might be outweighed by the need to ensure privacy and confidentiality down the road.

Other steps that can be taken are for mediators to keep time records in a very generic form so that there is little to no detail contained within such records. Unlike professional fee time records that require detail under § 330 of the Bankruptcy Code, there is simply no reason for specific details to be contained within a mediator's time records, other than to ensure the time in question related to the mediation. Moreover, many mediations are flat-fee-based, so time record might be irrelevant.

Conclusion

Confidentiality is a fundamentally important concept in any mediation. While it is generally upheld and recognized in most situations, there have been cases (including the two noted, for example) where challenges to confidentiality have been asserted. Sometimes, such challenges arise in cases involving settlements that need to be approved pursuant to Rule 9019. The disclosure and scrutiny that comes along with that process can create additional conflict or tension with the sanctity of confidentiality in the mediation process. As previously noted, the best time for a mediator and participating parties to deal with potential confidentiality issues is at the outset of the mediation through a well-developed order that incorporates robust protections combined with the approval of a well-negotiated consensual agreement binding all parties participating in the process. abi

Reprinted with permission from the ABI Journal, Vol. XLI, No. 9, September 2022.