Effective Commercial Bankruptcy Mediations: 10 Tips to Create a Better Win

Mediation has become a dominant tool in large and small commercial insolvency proceedings. This form of alternative dispute resolution thrives in bankruptcy because it preserves limited resources. But participation in a commercial mediation is not easy and should never be taken lightly.

What follows is a checklist of practical considerations for an attorney heading into a bankruptcy mediation. Some are obvious. Some are not.

1. Mediate after a win.

There is an art to knowing the best time to mediate. Too early in the case and the parties simply do not know enough to have the confidence to settle. Too late in the case and the parties have spent too much money and have hardened their litigation positions.

A good time to suggest mediation is after a win, no matter how small. There are many battles in a litigation war: a discovery dispute, a preliminary hearing with the judge, or after a deposition that has gone particularly well. If you are lucky enough to achieve one of these small wins, it can be a good time to be conciliatory and say: "why don't we sit down and see if this can be resolved." After a small success, you have a little leverage, but you correspondingly may have the opportunity to obtain a favorable resolution that also allows your opponent to save face.

2. Know Yourself.

Self-awareness is essential going into any negotiation.

Common thought is that aggressive individuals can bully their way to a favorable resolution. This is only occasionally true. More often, an aggressive approach will put off the other side and make settlement less likely. Boldly asserting that you are right and they are wrong will not scare anyone into submission. And obvious aggression will be tempered by the mediator. More importantly, overly aggressive negotiators will miss important clues and information because they are too consumed with thinking about what they will say next to impress their client or to intimidate the other side.

On the other hand, common thought is that a conflict avoider will make unnecessary concessions. Again, this is only occasionally true. If you know that you are a conflict avoider, you can force yourself to be assertive when necessary or simply walk away if you find you or your client are being bullied or pushed unnecessarily hard.

One possible strategy is to employ a "wingman." Say you are naturally aggressive or competitive and you want to maintain that edge in the litigation, bring one of your transactional partners to handle the mediation negotiations. Transactional lawyers are adept at doing deals. On the other hand, if you are a conflict avoider, consider using a litigator to handle the litigation as you work toward the negotiated settlement. In more complex cases, financial consultants and valuation experts might also be useful negotiators in a mediation.

Of course, limited resources in smaller cases may preclude use of a "wingman." But whether the case is big or small, self-awareness may be enough to make you a more effective negotiator. By knowing your personality type and negotiating style, you can accommodate it. Fortunately, most bankruptcy attorneys have a healthy balance of litigation and deal making expertise.

It is also important to know how you react to silence. Some people do not deal well with silence and feel an overwhelming need to fill the space that silence creates. As a result, they tend to over disclose. Negotiators who are comfortable with silence generally can obtain important information just by sitting back and listening.

3. Know Your Client.

Knowing your client is as important as knowing yourself, and perhaps more so. In a commercial context, this means knowing both your client, *i.e.*, the business, and the individual client representative(s) who will attend the mediation with you.

Business disputes rarely occur in a vacuum. A business client may be subject to regulatory concerns or may have internal management struggles. It is imperative that you know as much as possible about the business' decision-making processes, customers, inventory levels, and cash flow in addition to any other market issues relevant to the restructuring or the litigation at issue.

Client representatives, like the businesses themselves, come in many varieties. The representative might be a new executive trying to impress a board of directors, or the sole owner of a company whose whole life is on the line in the bankruptcy case, or the mid-level manager whose actions (or inactions) caused the problem giving rise to the dispute. A more than cursory interview of the client representative is a necessary part of your preparation. It will inform you of any sensitive issues. It also will allow you to prepare the representative for a mediator who may address and question them directly. And you may discover that the client representative may have talents and information that can assist you in the negotiations.

With knowledge of your client and its representatives, you can better predict a reaction to a proposal and to the circumstances of the mediation more generally. For example, if you know that your client representative hates the other side and will not behave well in a joint mediation session, you can give the mediator a heads up. Or, if the representative's job is on the line if the mediation is not successful, you need to know this information for managing expectations—including the expectations of the representative's superiors.

Self-determination is the fundamental value of mediation. Unlike a court proceeding where an attorney takes center stage, your client should be the focus of a mediation. Parties should speak and actively participate in the mediations. But most importantly, parties should have the opportunity to collectively explore potential settlements that best fit their needs and interests. Often parties will develop ideas that counsel may never have even conceived.

In litigation, someone wins and someone loses. Rarely is there an in-between. To make matters worse, even a winner can lose. A litigation win may prompt a costly and drawn-out appeal. In bankruptcy, litigation success can be even worse. There are at least two levels of appeals to consider and even a win at every level may, nonetheless, result in a zero net recovery or an inconsequential one paid in "itty bitty" bankruptcy dollars.

To successfully mediate a bankruptcy dispute—and to increase client satisfaction—your client must be the focus of the mediation. Not you.

4. Maintain Your Integrity.

Most bankruptcy attorneys understand that their word is their bond. So, misrepresentations and ethical violations in bankruptcy mediations are not as common as in non-bankruptcy mediations.

Still, it was not until 2004 that model rules of professional conduct regarding truthfulness were expressly extended to mediation and negotiations. As a result, the rules of truthfulness in a mediation context can be characterized into three groups (i) statements regarding material facts; (ii) statements regarding non-material facts, and (iii) opinions.[1]

Rule 4.1 of the American Bar Association's Model Rules of Professional Conduct ("Model Rule(s)") provides:

> ***Truthfulness in Statements to Others***
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> In the course of representing a client a lawyer shall not knowingly:
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> (a) make a false statement of material fact or law to a third person; or
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> (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.[2]

Notably, Model Rule 4.1 only prohibits misrepresentation of material facts. The rule does not apply to misrepresentations of non-material facts or opinions exchanged during mediation.

But what if a statement is partially true but still misleading? What if the attorney incorporates or affirms the statement of another while knowing that falsity of the statement? The comments to Model Rule 4.1 make clear that in each of these cases, the described conduct is prohibited.[3] Falling within this category of material facts would be statements regarding assets and ability to pay, the undisclosed death of a party, or the existence of insurance coverage.

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[1] *See generally* Donald C. Peters, *When Lawyers Move Their Lips: Attorney Truthfulness in Mediation and a Modest Proposal*, 2007 J. DISP. RESOL. 119, 120 (2007).
[2] MODEL RULES OF PROF'L CONDUCT r 4.1 (Am. Bar. Ass'n 2019).
[3] MODEL RULES OF PROF'L CONDUCT r 4.1 cmt. 1 (Am. Bar. Ass'n 2019).

Misrepresentations regarding non-material facts are *the* grey area. Some place projections, estimates of value, and prospects of litigation success into this category. Misrepresentations of non-material facts are not expressly prohibited in mediations, but they can certainly impact an attorney's reputation for honesty and integrity. And for a bankruptcy attorney, that can be fatal.

Finally, puffery or opinions are to be expected and, as a result, discounted in most negotiations. A lawyer posturing that he is the greatest litigator to ever live will be seen for what it is and hopefully ignored by all.

Of course, one reason lying flourishes in mediations is the scepter of confidentiality. If someone lies, it is difficult to bring it to the attention of a court. But again, slowly but surely, the law catches up with the deceitful. For example, Florida excepts from its confidentiality rules mediation communications "offered for the limited purpose of establishing or refuting legally recognized grounds [*e.g.,* fraud] for voiding or reforming a settlement agreement reached during a mediation[.]"[4] Federal mediation confidentiality likewise may not stop a litigant from challenging the validity of a mediated settlement.[5]

The bottom line is that an effective lawyer does not need to lie. Honesty and integrity are what builds the trust necessary to successfully negotiate in a mediation.

5. Prepare, Prepare, Prepare.

Good negotiators understand the value of preparation. Attending a mediation and winging it is likely to result in impasse, or worse, a bad deal for your client.

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[4] FLA. STAT. § 44.405(4)(a)(5) (effective July 1, 2004). *Cf.* Ala. Civ. Ct. Med. R. 11(b), (c) (available in Appendix).

[5] *See FDIC v. White*, 76 F. Supp. 2d 736, 738 (N.D. Tex. 1999):

> The Court does not read the [Alternative Dispute Resolution Act of 1998] or its sparse legislative history as creating an evidentiary privilege that would preclude a litigant from challenging the validity of a settlement agreement based on events that transpired at a mediation. Indeed, such a privilege would effectively bar a party from raising well-established common law defenses such as fraud, duress, coercion, and mutual mistake. It is unlikely that Congress intended such a draconian result under the guise of preserving the integrity of the mediation process.

Know Your Client's Options.

BATNA is a concept first introduced by Roger Fisher and William Ury in their book "Getting to Yes: Negotiating Agreement Without Giving In."[6] To this day, it remains a useful negotiation tool. BATNA is an acronym for **B**est **A**lternative **T**o a **N**egotiated **A**greement. This simply means knowing in advance what your client can do if the mediation fails. For example, in a Chapter 11 case, debtor's counsel should know alternatives for debtor-in-possession financing, if any, before entering into cash collateral and DIP financing negotiations with a current lender. In adversary proceedings and other contested matters, the BANTA may be litigation and if so, you should be prepared with an appropriate risk and cost analysis.

Risk analysis is the *objective* evaluation of your client's case and must be part of your preparation. The process can be difficult early in the case when information is limited. It is also can be difficult late in the litigation when attorneys tend to fall in love with their legal theories and arguments. Certainly, a good mediator will challenge your positions. One way to prepare is to test your arguments with another lawyer in your firm who is not involved in the case. In bankruptcy, there may also be natural allies with whom you may share a litigation privilege. For example, in an adversary proceeding intended to enhance the value of the estate, debtor's counsel may turn to counsel for the creditors' committee to be a sounding board. This has the dual purpose of assisted risk analysis and of managing the litigation expectation of unsecured creditors.

Know Your Counter Party and their Options.

Before mediation, learn everything you can about your opponent.[7] If your counterparty is the debtor, it is an easier proposition. You have the schedules, financial statements, and the meeting of creditors transcript. If your opponent is a public company or a bank, you will have a wealth of information including SEC filings and public reports. But regardless of who your counterparty is, do not fail to learn what you can. Even a simple Google search may turn up some

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[6] Roger Fisher & William Ury, *Getting to Yes: Negotiating Agreement Without Giving In* (1981).
[7] If your research shows that the counter party might be mulish, Mr. Ury's "Getting Past No: Negotiating With Difficult People" (1991) provides a five-step approach to dealing with the overly hardheaded individual.

golden nuggets. Consider this information valuable leverage.[8] You may find that you know more about your opposing party than its own lawyers.

With this "opposition research," you are better able to put yourself in your opponent's shoes and determine its BANTA or best options if the mediation fails.

Anticipate Natural Bankruptcy Alliances and Roadblocks.

Outside of bankruptcy, mediation and arbitration are chosen as vehicles to resolve disputes because the proceedings themselves and the settlements reached are confidential. Not so in bankruptcy.[9] Almost every settlement in a bankruptcy case must be approved by the court after notice and hearing on a Rule 9019[10] motion. So, if a debtor and a secured creditor reach an agreement, it may make sense to bring the creditors committee into the negotiations sooner rather than later. Anticipating objections can limit re-trading.

Remember the Details.

We all know the phrase "the devil is in the details." And at the end of a seemingly successful mediation, this is never more true. Settlements can go off the rails after the participants have left the mediation conference based on disputes that might have been avoided with a little foresight. For example, if the mediated settlement will require a release, bring one with you so that it can be discussed and finalized. Or if mediating a litigation where prevailing party fees may be an issue, be prepared to deal with the issue at the mediation.

Develop and bring with you a checklist of "usual terms" that may be quickly incorporated into the mediated term sheet. For example, a term sheet subject to further documentation (or plan drafting) might include a provision that any documentation disputes will go back to the mediator.

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[8] Of course, a prudent lawyer should anticipate that a counter party may come equally armed and should not only be aware of but also be prepared to address information that might be readily available about your client.

[9] *See, e.g.*, *In re Chitwood*, No. 6:11-BK-14441-CCJ, 2015 WL 7180624, at *2 (Bankr. M.D. Fla. July 23, 2015) (discussing the narrow exceptions to the general rule of open access to records in bankruptcy and rejecting the contention that merely because a settlement agreement contains a "no seal, no deal" provision it must be protected from disclosure); *see also In re Wells Fargo Bank, N.A.*, No. MC 17-204-GLT, 2019 WL 642850, at *2 (Bankr. W.D. Pa. Feb. 14, 2019); *In re Anthracite Cap., Inc.*, 492 B.R. 162, 172 (Bankr. S.D. N.Y. 2013); *In re Oldco M Corp.*, 466 B.R. 234 (Bankr. S.D. N.Y. 2012); *In re Hemple*, 295 B.R. 200 (Bankr. D. Vt. 2003).

[10] Fed. R. Bankr. P. 9019.

Or consider a provision that parties will return to mediation if the settlement is not ultimately approved by the bankruptcy court.

6. To Increase the Pie—Listen, Listen, Listen.

Asking searching questions and carefully listening to answers is an effective negotiator's greatest skill. It is the way to illicit the information necessary to create a settlement acceptable to all parties. It is a tool to increase the value to the parties when, as is usually the case in bankruptcy, there is not enough cash to go around. It is the cornerstone of a "win-win" strategy.

But what is a "win-win" strategy? Isn't any settlement a "win-win" by definition? More to the point, can it still be a win-win if you are trying to get as much as possible for your client?

"Win-win" does not mean to split the pot down the middle to be "fair." It does not mean making a concession just because your counter party made one. And it does not mean avoiding all conflict. Indeed, facing conflict may be cathartic and helpful in moving the parties forward toward a mutually agreeable resolution.

Rather, "win-win" is working to get the best deal possible for your client while also working to ensure that your counterpart is satisfied enough to settle. It means making offers that are good for them but great for your client. And it means using creativity to get more for your client by helping the other side get more of what they want.

Win-win is finding different interests that can be traded off for mutual gains.[11] For example:

Different priorities.

The debtor is focused on getting an affordable loan modification, and the secured creditor is focused on keeping a loan current (at all costs) to keep its regulators at bay. This difference can lead to a value creating trade-off: a loan modification that reinstates the loan at a level workable for the debtor and acceptable to the secured creditor's regulators.

[11] *See* Katie Shronk, *What is a Win-Win Negotiation*? *How trading across differences leads to mutual gains and win-win negotiation*, PROGRAM ON NEGOTIATION, HARVARD LAW SCHOOL DAILY BLOG (Mar 17, 2022), https://www.pon.harvard.edu/daily/win-win-daily/what-is-a-win-win-negotiation/.

Different cash flow projections or valuations.

When parties have different beliefs about the future, as in the instance where a lender believes that a commercial property will increase in value and a debtor believes that property values in the neighborhood will plummet over the long term, this difference should be viewed as an opportunity to restructure in a way that each side can feel comfortable based on its perception of future values. Parties may negotiate a contingent agreement whereby they stipulate what each side will receive or do if its vision of the future does or does not come true. In other words, a "*What if* . . ." agreement. If both sides truly believe their respective projections will play out, both should be happy to "bet" on those predictions—and enable a win-win deal.

An example is a contingent value instrument. This is an agreement to pay creditors only in the event of some future contingency. The possible contingencies are limited only by the imagination of the parties and the mediator.

Different attitudes toward time.

Parties often have different time horizons. Say two investors are interested in buying a business together, but one is looking for quick returns while the other is more interested in long-term gains. A shareholder's agreement may provide a smaller quicker return for the one and a long-term greater return for the other. So too, a debtor negotiating a plan with an Unsecured Creditors' Committee might offer a generous opt in convenience class for creditors who need a quick payment and a higher payout option for those creditors who can wait on payments.

7. Follow the Rules and Participate in Good Faith.

Although voluntary mediation works best, it is not uncommon for a court to order mediation over the objection of one or more parties. Virtually every such order, and most local rules addressing mediation, directs the parties to participate in "good faith." Yet, "good faith" is rarely defined.[12] Even the simple requirement that a representative attend the mediation with "full

[12] *See, e.g.*, *Miller v. Neurorecovery, Inc.*, No. CV-06-BE-205-W, 2010 WL 11565116, at *1 (N.D. Ala. July 2, 2010); Bankr. M.D. Fla. R. 9019-2.

settlement authority" is ambiguous and subject to interpretation. Further complicating matters is the heralded confidentiality of a mediation conference.

It should go without saying that you do want you or your client to be involved in a contempt hearing questioning your good faith participation in a court ordered mediation. As suggested in the cases summarized below, courts are all over the map in terms of their expectations of "good faith" and to what extent a failure to meet those expectations is sanctionable.

Richard v. Spradlin, No. 12–127–ART, 2013 WL 1571059 (E.D. Ky. Apr. 12, 2013):

The District Court affirmed the Bankruptcy Court's imposition of sanctions following a failed mediation. The Bankruptcy Court found the defendant's behavior, particularly the filing of a state-court suit during mediation, constituted bad faith. Also, the night before the mediation, the defendant's attorney informed the mediator that the defendant and the attorney needed to meet before the mediation and would be late. Ultimately, the defendant insisted on spending several hours with his attorney before joining the meeting. Importantly, the defendant did not identify any preparatory actions he took prior to the mediation.

Otto v. Hearst Commc'ns, Inc., 17-CV-4712 (GHW) (JLC), 2019 WL 1034116 (S.D. N.Y. Feb. 21, 2019):

After a mandatory mediation to discuss damages, the defendant alleged that the plaintiff's attorney mediated in bad faith by eliciting false statements and misrepresenting documents. Declining to impose sanctions, the District Court noted (i) the Court lacked the evidentiary record necessary to find bad faith because the plaintiff's alleged misrepresentations were not recorded and (ii) the misrepresentations did not induce any settlement and were eventually corrected. Thus, the defendant suffered "relatively little prejudice."

Procaps S.A. v. Patheon Inc., No. 12–24356–CIV, 2015 WL 3539737 (S.D. Fla. June 4, 2015):

In finding that the plaintiff's conduct did not amount to bad faith, the District Court noted that only objectively determinable conduct should be considered, such as whether the party attended the meetings or brought a representative with sufficient settlement authority. Subjective concepts, such as whether a party who refuses to settle during mediation is operating in bad faith, should generally not be considered. Accordingly, the plaintiff's failure to respond to the defendant's request for a current settlement value before the mediation did not itself constitute a failure to mediate in good faith.

In re A.T. Reynolds & Sons, 452 B.R. 374 (S.D. N.Y. 2011):

The District Court reversed the Bankruptcy Court's sanction for mediating in bad faith where in a mandatory court-ordered mediation the creditor informed the debtor that it would not make a settlement offer and insisted that it was not liable. In reaching this decision, the District Court recognized that considerations of coercion and confidentiality preclude a court from inquiring into the level of a party's participation during mandatory court-ordered mediations.

Freedom Sci. BLV Grp., LLC v. Orient Semiconductor Elecs., Ltd., No. 8:13–cv–569–T–30TBM, 2014 WL 201745 (M.D. Fla. Jan. 17, 2014):

In the order referring the case to mediation, representatives were directed to have full settlement authority, as required by local rule. During the mediation, the defendant's representative informed the mediator that she would not respond to the plaintiff's offer and "could not get the authority to do so." Accordingly, the plaintiff moved for sanctions on grounds that the representative's conduct failed to satisfy the good faith requirement. In turn, the defendant sought sanctions for breach of mediation confidentiality. The court found that where the mediator is not charged with the responsibility to report bad faith conduct, plaintiff's "only recourse" was to raise and present the issue notwithstanding mediation confidentiality. Nevertheless, the court found no bad faith because the mediator's report stated that both parties had full settlement authority and did not indicate bad faith during mediation. That the defendant showed up to the mediation with a valid representative was enough to satisfy the requirement.

The best approach is simply to follow the rules and always be professional. There is absolutely nothing improper about taking a principled "no way" position at a mediation.[13] You should be prepared, however, to explain your position to the mediator—privately if you must. And there is no requirement that you disclose confidential information or work product to participate in good faith. But in your preparation, you should consider if disclosing such information may facilitate a settlement. Odds are that it will come out eventually.

But even if your client is dead set against mediation, it can always be turned into a productive opportunity to learn about your counterpart's arguments or simply to advance the litigation. For example, if the mediation is going nowhere, you can still generate value for your client by suggesting that the parties mediate a discovery plan, stipulated facts, or something else that might advance and reduce the costs of an upcoming trial.

8. The First Offer.

Making the first offer is an important decision because it can anchor the negotiations. Some negotiators bristle at making a first offer for fear of underselling their case. Other relish making an aggressive first offer because it tends to focus on an optimistic recovery.

Either strategy is fine, but whatever your strategy you must be aware that a first offer, unless it is outlandish, creates a framework and anchors the negotiations from that point forward.

If you are inclined to make the first offer, do not let it be influenced by your BATNA. Remember that your BATNA is what you do if the mediation is not successful. Your first offer should be far more optimistic, but not so unreasonable that negotiations shut down as a result.

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[13] *See, e.g.*, *Nick v. Morgan's Foods, Inc.*, 99 F. Supp. 2d 1056, 1061 (E.D. Mo. 2000) ("Good faith participation in ADR does not require settlement. In fact, an ADR conference conducted in good faith can be helpful even if settlement is not reached."), *aff'd*, 270 F.3d 590 (8th Cir. 2001).

9. Don’t Sweat the Small Stuff.

Make big moves on little issues and little moves on big issues. To do this, however, you must be able to recognize the difference between the big issues and the small ones. For example, the amount of a settlement payment can be a lesser issue if the terms of repayment are controlled by the party making the payments. Control of the drafting of the settlement document also should not be a roadblock, so long as both sides can read and comment.

10. Don’t Take a Bad Settlement.

In the Wild Wild West days of mediation, mediators frequently advertised that they have settled every case they ever handled. When you see that claim, proceed with caution. Such mediators can tend to coerce the parties if they feel their personal record or reputation is at risk by an impasse. Improvident settlements can lead to buyer’s remorse and further litigation. The last thing a good negotiator wants is a settlement that generates more litigation.

No doubt, many bankruptcy disputes will settle at mediation or otherwise. But not all matters can be resolved by agreement. Some cases need to be tried, and some cases need to get closer to trial to settle. Keep in mind that the purpose of a mediated agreement should be a durable resolution that everyone finds at least tolerable. It should not be a vehicle for further disputes and litigation.

If you find yourself at impasse and a tolerable settlement cannot then be had, simply move on but keep the door open for further discussions. Perhaps later, a small win may arise that can lead you back to the negotiation table.

APPENDIX

ALA. CODE § 6-6-25 – Definitions; legislative findings; compelled testimony, etc., of mediators.

(a) For the purposes of this section, the following words shall have the following meanings:

(1) MEDIATION. A process in which a mediator acts to encourage and facilitate the resolution of a dispute without imposing a settlement.

(2) MEDIATOR. A neutral third party conducting a mediation, including any co-mediators, employees, agents, or independent contractors of the mediator or co-mediator, and any person attending or observing the mediation for purposes of training.

(b) The Legislature finds that it is desirable to encourage public confidence in the use of alternative methods of dispute resolution by preventing a mediator from being compelled to testify or produce documents about a mediation.

(c) Except as otherwise permitted by the Alabama Civil Court Mediation Rules, a mediator may not be compelled in any adversary proceeding or judicial forum, including, but not limited to, a hearing on sanctions brought by one party against another party, to divulge the contents of documents received, viewed, or drafted during mediation or the fact that the documents exist, nor may the mediator be otherwise compelled to testify in regard to statements made, actions taken, or positions stated by a party during the mediation.

ALA. CODE § 6-6-20 – Definition; instances requiring mediation; sanctions; exceptions; etc.

(a) For purposes of this section, "mediation" means a process in which a neutral third party assists the parties to a civil action in reaching their own settlement but does not have the authority to force the parties to accept a binding decision.

(b) Mediation is mandatory for all parties in the following instances:

(1) At any time where all parties agree.

(2) Upon motion by any party. The party asking for mediation shall pay the costs of mediation, except attorney fees, unless otherwise agreed.

(3) In the event no party requests mediation, the trial court may, on its own motion, order mediation. The trial court may allocate the costs of mediation, except attorney fees, among the parties.

(c) If any party fails to mediate as required by this section, the court may apply such sanctions as it deems appropriate pursuant to Rule 37 of the Alabama Rules of Civil Procedure.

(d) A court shall not order parties into mediation for resolution of the issues in a petition for an order for protection pursuant to The Protection from Abuse Act, Sections 30-5-1 through 30-5-10 or in any other petition for an order for protection where domestic violence is alleged.

(e) In a proceeding concerning the custody or visitation of a child, if an order for protection is in effect or if the court finds that domestic violence has occurred, the court shall not order mediation.

(f) A mediator who receives a referral or order from a court to conduct mediation shall screen for the occurrence of domestic or family violence between the parties. Where evidence of domestic violence exists mediation shall occur only if:

(1) Mediation is requested by the victim of the alleged domestic or family violence;

(2) Mediation is provided by a certified mediator who is trained in domestic and family violence in a specialized manner that protects the safety of the victim; and

(3) The victim is permitted to have in attendance at mediation a supporting person of his or her choice, including, but not limited to, an attorney or advocate.

(g) Where a claim of immunity is offered as a defense, the court shall dispose of the immunity issue before any mediation is conducted.

(h) A court shall not order parties into mediation in any action involving child support, adult protective services, or child protective services wherein the Department of Human Resources is a party to said action.

Alabama Civil Court Mediation Rules

Rule 1. Definition of Mediation and Scope of Rules.

(a) Mediation is an extrajudicial procedure for the resolution of disputes, provided for by statute and by the Alabama Rules of Civil Procedure. A mediator facilitates negotiations between parties to a civil action and assists the parties in trying to reach a settlement, but does not have the authority to impose a settlement upon the parties.

(b) These rules shall apply:

(1) In mediations ordered by the courts of this State as provided by statute or by the Alabama Rules of Civil Procedure;

(2) In any other mediations by parties in a pending civil action in an Alabama court, other than the Alabama Supreme Court or Alabama Court of Civil Appeals, unless the parties expressly provide otherwise; and,

(3) In other mediations if the parties agree that these Rules shall apply.

Rule 2. Initiation of Mediation; Stay of Proceedings.

Parties to a civil action may engage in mediation by mutual consent at any time. The court in which an action is pending shall order mediation when one or more parties request mediation or it may order mediation upon its own motion. In all instances except where the request for mediation is made by only one party, the court may allocate the costs of mediation, except attorney fees, among the parties. In cases in which only one party requests mediation, the party requesting mediation shall pay the costs of mediation, except attorney fees, unless the parties agree otherwise.

Upon the entry of an order for mediation, the proceedings as to the dispute in mediation may be stayed for such time as set by the court in its order of mediation. Upon motion by any concerned party, the court may, for good cause shown, extend the time of the stay for such length of time as the court may deem appropriate.

Rule 3. Appointment of a Mediator.

Upon an order for mediation, the court, or such authority as the court may designate, shall appoint a qualified mediator. The mediator appointed shall be agreed upon by the parties concerned, subject to the qualifications provisions of Rule 4, except that if the parties do not agree upon a mediator, then the selection of the mediator shall be in the discretion of the court or its designated authority. A single mediator shall be appointed unless the parties or the court determines otherwise.

Rule 4. Qualifications of a Mediator.

If a court designates or appoints a mediator, the mediator must be registered with the Alabama Center for Dispute Resolution, unless the court for good cause finds otherwise. No person shall serve as a mediator in any dispute in which that person has any financial or personal interest, except by the written consent of all parties. Before accepting an appointment, the prospective mediator shall disclose to the parties any circumstances likely to create an appearance of bias or likely to prevent the mediation from commencing within a reasonable time. Upon receipt of such disclosure, the parties may name a different person as mediator. If the parties disagree as to whether a prospective mediator should serve, the court shall appoint the mediator.

Rule 5. Vacancies.

If any mediator becomes unwilling or unable to serve, the court shall appoint another mediator. The appointment of a successor mediator shall be by the same procedures and upon the same terms as an initial appointment.

Rule 6. Assistance and Settlement Authority.

Any party not represented by an attorney may be assisted by persons of his or her choice in the mediation. Each party, or that party's representative, must be prepared to discuss during mediation sessions the issues submitted to mediation and, unless otherwise expressly agreed upon by the parties or ordered by the court before the first mediation session, someone with authority to settle those issues must be present at the mediation session or reasonably available to authorize settlement during the mediation session.

Rule 7. Time and Place of Mediation.

The mediator shall fix the time of each mediation session. The mediation sessions shall be held at any convenient location agreeable to the mediator and the parties or as otherwise designated by the court.

Rule 8. Identification of Matters in Dispute.

A mediator may require each party concerned, within a reasonable time before the first scheduled mediation session, to provide the mediator with a brief memorandum setting forth the party's position with regard to the issues that need to be resolved. The mediator shall not distribute the memoranda to the parties without their consent.

At the first session, the parties shall produce all information reasonably required for the mediator to understand the issues presented. The mediator may require either party to supplement this information.

Rule 9. Authority of Mediator.

The mediator does not have authority to impose a settlement upon the parties, but the mediator shall attempt to help the parties reach a satisfactory resolution of their dispute. The mediator is authorized to conduct joint and separate meetings with the parties, to communicate offers between the parties as the parties authorize, and, at the request of the parties, to make oral and written recommendations for settlement. Whenever necessary, the mediator may also obtain expert advice concerning technical aspects of the dispute, provided the parties agree to the mediator's obtaining such advice and assume the expenses of obtaining it. Arrangements for obtaining such advice shall be made by the mediator or by the parties. The mediator is authorized to end the mediation whenever, in the judgment of the mediator, further efforts at mediation would not contribute to a resolution of the dispute between the parties (see Rule 13(a)(2)).

Rule 10. Privacy.

Mediation sessions are private. An alleged victim of domestic or family violence may have in attendance at mediations a supporting person of his or her choice. In all other cases, persons other than the parties and their representatives may attend mediation sessions only with the permission of the parties and with the consent of the mediator.

Rule 11. Confidentiality.

(a) All information disclosed in the course of a mediation, including oral, documentary, or electronic information, shall be deemed confidential and shall not be divulged by anyone in attendance at the mediation except as permitted under this Rule or by statute. The term "information disclosed in the course of a mediation" shall include, but not be limited to:

(1) views expressed or suggestions made by another party with respect to a possible settlement of the dispute;

(2) admissions made by another party in the course of the mediation proceedings;

(3) proposals made or views expressed by the mediator;

(4) the fact that another party had or had not indicated a willingness to accept a proposal for settlement made by the mediator; and

(5) all records, reports, or other documents received by a mediator while serving as mediator.

(b) The following are exceptions to the general rule stated in Rule 11(a):

(1) A mediator or a party to a mediation may disclose information otherwise prohibited from disclosure under this section when the mediator and the parties to the mediation all agree to the disclosure.

(2) Information otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its use in mediation.

(3) The confidentiality provisions of this Rule shall not apply:

(i) to a communication made during a mediation that constitutes a threat to cause physical injury or unlawful property damage;

(ii) to a party or mediator who uses or attempts to use the mediation to plan or to commit a crime; or

(iii) to the extent necessary if a party to the mediation files a claim or complaint against a mediator or mediation program alleging professional misconduct by the mediator arising from the mediation.

(c) Except as provided in Rule 11(b) above, a court shall neither inquire into nor receive information about the positions of the parties taken in mediation proceedings; the facts elicited or presented in mediation proceedings; or the cause or responsibility for termination or failure of the mediation process.

(d) A mediator shall not be compelled in any adversary proceeding or judicial forum, including, but not limited to, a hearing on sanctions brought by one party against another party, to divulge the contents of documents received, viewed, or drafted during mediation or the fact that such documents exist nor shall the mediator be otherwise compelled to testify in regard to statements made, actions taken, or positions stated by a party during the mediation.

Rule 12. No Record.

There shall be no record made of the mediation proceedings.

Rule 13. Termination of Mediation.

(a) The mediation process may be terminated at any time after the initial mediation session by any party to the mediation. It also may be terminated by the mediator. Court-ordered mediations shall be terminated by filing with the court one of the following:

(1) Notice that the parties concerned have executed a settlement agreement. Such a notice shall be signed by all parties concerned or by their attorneys; or

(2) A written declaration signed by the mediator stating that in the mediator's judgment further efforts at mediation will not contribute to a resolution of the dispute among the parties (see Rule 9).

(b) Mediation also shall be terminated by the expiration of the period of any court-ordered stay provided by Rule 2.

(c) The fact that mediation has once been terminated as to a particular dispute shall not bar the entry of a later order to mediate that dispute.

Rule 14. Interpretation and Application of Rules.

The mediator shall interpret and apply these rules insofar as they relate to the mediator's duties and responsibilities. In other respects, they shall be interpreted and applied by the court.

Rule 15. Expenses, Mediator's Fee, and Deposits.

(a) *Expenses*. The expenses of a witness for a party shall be paid by the party producing the witness. All other expenses of the mediation, including necessary travel and other expenses of the mediator, the expenses of any witnesses called by the mediator and the cost of any evidence or expert advice produced at the direct request of the mediator, shall be borne equally by the parties unless the parties agree otherwise, or unless the court directs otherwise.

(b) *Mediator's Fee*. A mediator shall be compensated at a reasonable rate, agreed to by the parties, or as set by the court. The mediator's fee shall be borne equally by the parties, unless they agree otherwise, or unless the court directs otherwise pursuant to Rule 2.

(c) *Deposits*. Before the mediation process begins, each party to the process shall deposit with the mediator such an amount of the anticipated expenses and fees as the court shall direct or the mediator reasonably requires. When the mediation process has been terminated, the mediator shall render an accounting, requiring payment of additional expenses and fees by the appropriate parties, or returning any unexpended balance to the appropriate parties.

Local Rules for the U.S. District Court for the Northern District of Florida

Rule 16.3 Mediation

The Court may order the parties to mediate a civil case. The parties may agree to mediate a civil case even when the Court has not ordered them to do so. Mediation must be conducted in accordance with the Rules for Certified and Court-Appointed Mediators adopted by the Florida Supreme Court, except as otherwise ordered, but this sentence does not apply to a settlement conference—even if called "mediation"—conducted by a district or magistrate judge. Everything said during a mediation or settlement conference—other than the terms of any settlement agreement itself—is confidential and inadmissible as a settlement negotiation.

Local Rules for the U.S. Bankruptcy Court for the Northern District of Florida

Rule 7016-1 Pre-Trial/Mediation Procedures

(A) **Generally**. District Local Rule 16.3, concerning Mediation shall be applicable in all adversary proceedings and contested matters as directed by the Bankruptcy Court.

(B) **Mortgage Modification and Other Specialty Mediations**. For Mortgage Modification Mediations, see the Court's website for orders, procedures, forms and instructions, available at www.flnb.uscourts.gov. The Court may establish procedures, policies and orders to deal with other specialty mediations. Otherwise, other specialty mediations shall be conducted pursuant to orders or procedures adopted on a case by case basis.