The Federal Bar Association
Northern Virginia Chapter

35 min

Presents:

EFFECTIVE MEDIATION SKILLS AND STRATEGIES

Featuring:

U.S. Magistrate Judge John F. Anderson
U.S. Magistrate Judge Ivan D. Davis

And

U.S. Magistrate Judge (Ret.) Barry R. Poretz
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Moderator:

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Albert V. Bryan Courthouse
401 Courthouse Square
Alexandria, Virginia
Jury Assembly Room, Third Floor

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I. General Overview of Mediation

A. Definition

1. "'Mediation is a process in which an impartial third party acts as a catalyst to help others constructively address and perhaps resolve a dispute, plan a transaction, or define the contours of a relationship.' CARRIE MENKEL-MEADOW ET AL., MEDIATION: PRACTICE, POLICY AND ETHICS 91 (2006). 'Mediation permits, indeed often requires, consideration of underlying interests, causes or values that produce conflict and thus permits the management, handling or resolution of broader concerns than just those "disputes" which crystallize at the tip of the iceberg.' *Id.* at 100-101." *In re A.T. Reynolds & Sons, Inc.*, 424 B.R. 76, 84 (Bankr. S.D.N.Y. 2010).

2. Mediation differs from arbitration in that a mediator helps the parties to identify potential issues in their cases, clarify their positions and interests, facilitate negotiations, all while giving the parties general control over the eventual disposition of the matter; in arbitration, the arbitrator listens to evidence and issues a binding determination. *In re A.T. Reynolds & Sons, Inc.*, 424 B.R. 76, 86 (Bankr. S.D.N.Y. 2010) (citing JEFF ABRAMS, MEDIATOR SKILLS TRAINING AND REFERENCE MANUAL, MEDIATION & EFFECTIVENESS TRAINING INSTITUTE, B-6 (1999)).

II. Court's Authority Regarding Mediation

A. A Court May Order Mandatory, Non-Binding Mediation of Pending Cases

1. A federal court has the authority to require the parties to participate in mandatory, non-binding mediation for most of the cases on its docket. To determine the types of mediation available to parties, and its contours, counsel should look to the court's local rules, an applicable statute (such as 28 U.S.C. § 652(a)), or the Federal Rules of Civil Procedure. Several courts have found that they also have the authority to do so in their "inherent powers" to manage their dockets, *In re Atlantic Pipe Corp.*, 304 F.3d 135, 140 (1st Cir. 2002), so past decisions of a court that address mediation are also a good source of information.

2. Counsel may also move the court to refer the case to a mediator. *See* 28 U.S.C. § 652(a) (providing that the court "shall, by local rule . . ., require that litigants in all civil cases consider the use of an alternative dispute resolution process.")

B. Sources of the District Court's Authority, and Contours

1. FED. R. CIV. P. 16 authorizes a district court to order the attorneys "to appear for one or more conferences before trial for such purposes as . . . (5) facilitating settlement." FED. R. CIV. P. 16(a)(5).

2. At any such pre-trial conference, the court "may consider and take appropriate action on . . . (I) settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule." FED. R. CIV. P. 16(c)(2)(I).

3. In such a conference, "[a] represented party must authorize at least one of its attorneys to make stipulations and admissions about all matters that can reasonably be anticipated for discussion . . . ." FED. R. CIV. P. 16(c)(1). The Court may also order a representative of the party to attend, or to be "reasonably available by other means," to discuss settling the matter. FED. R. CIV. P. 16(c)(1); *see also G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648, 652–53 (7th Cir. 1989) (finding that courts have inherent power to order parties to attend a pretrial settlement conference, even though the prior version of Rule 16(a)(5) referred only to attorneys and unrepresented parties).

4. Some courts will even conduct discovery in two stages: in the first stage, discovery is limited to only the core matters and then halted for approximately a month or more to approach a settlement. In the second stage, discovery is started again, but limited to issues and contentions remaining after settlement. 3 MOORE'S FEDERAL PRACTICE § 16.52 (3d ed. 2010).

C. Circuit Courts of Appeals' Authority

1. FED. R. APP. P. 33 provides that Circuit Courts of Appeals "may direct the attorneys — and, when appropriate, the parties — to participate in one or more conferences to address any matter that may aid in disposing of the proceedings, including simplifying the issues and discussing settlement. A judge or other person designated by the court may preside over the conference, which may be conducted in person or by telephone. Before a settlement conference, the attorneys must consult with their clients and obtain as much authority as feasible to settle the case. The court may, as a result of the conference, enter an order controlling the course of the proceedings or implementing any settlement plan."

2. All of the Circuits have some form of settlement program, and everyone but the Fifth and Seventh Circuits have local rules that modify FED. R. APP. P. 33 to some extent; counsel should review local rules to determine how programs are referred to mediation, what requirements there might be to file a separate mediation brief or materials, and whether the rules require the proceedings to remain confidential.

D. A Court's Authority to Order Mediation Is Limited by Constitutional Conditions

1. Parties are free to object to a mediation order on grounds that the court lacks jurisdiction; the policy in favor of mediation has not abolished this necessary precondition to a court's exercise of authority over the parties. *See Bouchard Transp. Co. v. Fla. Dep't of Envtl. Prot.*, 91 F.3d 1445, 1448–49 (11th Cir. 1996) (holding that a district court should have resolved Eleventh Amendment immunity question before entering a mandatory mediation order).

2. Any mediation order also must "be crafted in a manner that preserves procedural fairness and shields objecting parties from undue burdens." *In re Atlantic Pipe Corp.*, 304 F.3d 135, 145 (1st Cir. 2002).

3. It is a good idea to confer in advance with opposing counsel about mediation procedures and to have suggested procedures ready for the court to review, as a court's order regarding mediation is likely not immediately appealable as a collateral order. *See Commc'n*

Workers of Am., AFL-CIO v. Am. Tel. & Tel. Co., 932 F.2d 199, 207 (3d Cir. 1991) (noting that order compelling arbitration is not immediately appealable).

E. A Court May Enforce a Written Agreement Reached during Mediation

1. Courts may enforce settlement agreements by applying "standard contract principles" and are bound to enforce only the terms on which the parties actually agreed. *Bradley v. Am. Household, Inc.*, 378 F.3d 373, 380 (4th Cir. 2004).

2. Parties must be careful to memorialize the terms of their agreements and to state that the terms agreed upon have settled the case as soon as an agreement is reached. In Virginia, even a written memorandum of settlement terms has been found insufficient where that memorandum also stated that the settlement terms were "subject to" the execution of a later, formal agreement consistent with the terms in the memorandum. *Golding v. Floyd*, 261 Va. 190, 193–94, 539 S.E.2d 735, 737–38 (2001).

3. Because a settlement agreement is functionally a contract, breach of such a contract is treated as a state law issue. Therefore, a federal district court may only use its ancillary jurisdiction to enforce a settlement agreement, even if the original suit involved federal law claims, if the order of dismissal of the original case "shows an intent to retain jurisdiction or incorporates the settlement agreement." *Morris v. City of Hobart*, 39 F.3d 1105, 1110 (10th Cir. 1994) (discussing *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375 (1994)).

4. Confidentiality requirements for many courts' mediation programs may also prevent parties from enforcing an oral agreement. A settlement agreement should be set forth in a signed writing or be described on the record in a court proceeding to make sure it is enforceable. *Beazer E., Inc. v. Mead Corp.*, 412 F.3d 429 (3d Cir. 2005) (agreement must be in writing); *Bradley v. Am. Household, Inc.*, 378 F.3d 373, 379–80 (4th Cir. 2004) (upholding settlement based on terms in written agreement and described to court).

5. Parties also must address Statute of Frauds issues if the settlement agreement is not to be performed within one year of reaching that agreement. *See, e.g.*, *Richard Knorr Int'l, Ltd. v. Geostar, Inc.*, No. 08 C 5414, 2010 WL 3419504, at *4 (N.D. Ill. Aug. 25, 2010) (holding that the presence of a retired federal judge as an outside mediator did not "transform a nonjudicial proceeding into a judicial proceeding, much less one supervised by this court."). *Id.*

6. Finally, counsel should treat all orders and discussions with court-appointed mediators as though counsel is addressing the court. Persons authorized by the courts to conduct settlement conferences may be considered delegates of the court and, therefore, "any orders or other communications issued [by them] should be treated as if they had been issued by the court itself." *Pueblo of San Ildefonso v. Ridlon*, 90 F.3d 423, 425 (10th Cir. 1996) (admonishing attorney for failure to respond to calls from court's settlement office).

F. What Constitutes "Good Faith" in Mediation?

1. "Good faith participation in ADR [alternative dispute resolution] does not require settlement. In fact, an ADR conference conducted in good faith can be helpful even if settlement is not reached. On the other hand, the rules and orders governing ADR are designed to prevent abuse of the opponent, which can and does occur when one side does not participate in good faith." *Nick v. Morgan's Foods, Inc.*, 99 F. Supp. 2d 1056, 1061 (E.D. Mo. 2000), *aff'd*, 270 F.3d 590 (8th Cir. 2001).

2. At a minimum, good faith requires a party and its attorney to comply with the terms of the referral order, and requires that individuals participating in the mediation have full settlement authority. *Nick v. Morgan's Foods, Inc.*, 99 F. Supp. 2d 1056, 1062–63 (E.D. Mo. 2000), *aff'd*, 270 F.3d 590 (8th Cir. 2001). "[W]hen a corporate representative with the authority to reconsider that party's settlement position is not present, the whole purpose of the mediation is lost, and the result is an even greater expenditure of the parties' resources, both time and money, for nothing." *Id.* at 1063.

3. Failure to take proper steps in advance of a settlement conference, such as timely contacting the mediator to schedule the settlement conference and informing the mediator that corporate representatives will only appear by telephone, may demonstrate a lack of good faith or inappropriate preparation. *Plaza 75 Shopping Ctr., LLC v. Big Lots Stores, Inc.*, No. CV-10-592-PHX-DGC, 2010 WL 3854058, at *2 (D. Ariz. Sept. 28, 2010). Personal attendance by corporate representatives has also been held to be a necessary condition for a finding of good faith when "the settlement conference was scheduled less than two months after the Rule 16 scheduling conference and the only discovery conducted up to that time was the parties' exchange of their initial disclosures." *Id.*

G. Sanctions

1. 28 U.S.C. § 1927 provides that "Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." This has been held to support an award against an attorney and his/her client who fail to conduct settlement negotiations in good faith. *In re A.T. Reynolds & Sons, Inc.*, 424 B.R. 76, 87–88 (Bankr. S.D.N.Y. 2010).

2. FED. R. CIV. P. 16(f)(1) allows a district court to sanction a party for failing to appear at a pretrial conference, or to assess sanctions if that party is "substantially unprepared to participate — or does not participate in good faith — in the conference." These sanctions are not necessarily capped to court costs: they "need only be proportionate to the litigant's transgressions." *Nick v. Morgan's Foods, Inc.*, 270 F.3d 590, 597 (8th Cir. 2001).

3. A party may be personally liable for misconduct by its attorney in mediation, and the attorney may then be liable to the party for malpractice. *Nick v. Morgan's Foods, Inc.*, 270 F.3d 590, 596–97 (8th Cir. 2001).

III. Confidentiality in Mediation

A. Confidentiality Requirements and Expectations

1. The Model Standards of Conduct for Mediators, adopted in 2005 by the American Bar Association, American Arbitration Association, and Association for Conflict Resolution, provide that "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." MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard V(A) (2005).

2. The Alternative Dispute Resolution Act of 1998 also amended 28 U.S.C. § 652(d) to provide that "Until such time as rules are adopted under chapter 131 of this title providing for the confidentiality of alternative dispute resolution processes under this chapter, each district court shall, by local rule adopted under section 2071(a), provide for the confidentiality of the alternative dispute resolution processes and to prohibit disclosure of confidential dispute resolution communications." Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315, § 4, 112 Stat. 2995.

3. Several courts have recognized a mediation privilege that makes mediation materials inadmissible at trial, FED. R. EVID. 501, or non-discoverable, FED. R. CIV. P. 26(b). *E.g.*, *Sheldone v. Pa. Tpk. Comm'n*, 104 F. Supp. 2d 511, 517 (W.D. Pa. 2000); *Folb v. Motion Picture Indus. Pension & Health Plans*, 16 F. Supp. 2d 1164 (C.D. Cal. 1998).

4. Counsel should be extremely careful to review the local rules regarding confidentiality of mediation proceedings: courts have enforced them strictly, and failure to properly preserve certain issues — such as attorneys fees — in a settlement agreement could bar a later proceeding based on the conduct of settlement, or subject an attorney to disciplinary proceedings for disclosing such materials. *In re Anonymous*, 283 F.3d 627, 633–34 (4th Cir. 2002) (parties who submitted confidential mediation materials to Virginia state bar mediation program, which was also confidential, violated 4th Cir. R. 33).

B. Federal Rule of Evidence 501 and Federal Rule of Civil Procedure 26

1. Rule 501 provides that: "Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof 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. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law applies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law."

a. When a federal court assumes jurisdiction over a federal claim along with ancillary state law claims, privilege is determined according to federal law. *Folb v. Motion Picture Indus. Pension & Health Plans*, 16 F. Supp. 2d 1164, 1169 (C.D. Cal. 1998) (collecting authorities).

b. State privilege law applies in diversity cases. *Folb v. Motion Picture Indus. Pension & Health Plans*, 16 F. Supp. 2d 1164, 1169 (C.D. Cal. 1998) (discussing FED. R. EVID. 501 advisory committee's note).

2. The "mediation privilege" under Rule 501, to the extent a court recognizes one at common law, protects only communications in "a formal mediation with a neutral mediator," as well as "communications in preparation for" the mediation. It does *not* protect private settlement negotiations between the parties. *Folb v. Motion Picture Indus. Pension & Health Plans*, 16 F. Supp. 2d 1164, 1180 (C.D. Cal. 1998). The mediation privilege *does not* protect "any evidence otherwise and independently discoverable merely because it [wa]s presented in the course of the Mediation." *Sheldone v. Pa. Tpk. Comm'n*, 104 F. Supp. 2d 511, 517 (W.D. Pa. 2000).

3. FED. R. CIV. P. 26(b) may restrict discovery of mediation evidence as well. It provides that: "Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense — including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence."

a. Thus, after a court finds a mediation privilege exists under FED. R. EVID. 501, FED. R. CIV. P. 26(b) bars discovery of those materials prepared for the mediation. *In re RDM Sports Group, Inc.*, 277 B.R. 415, 431 (Bankr. N.D. Ga. 2002); *Cason v. Builders Firstsource-Se. Group, Inc.*, 159 F. Supp. 2d 242, 249 (W.D.N.C. 2001).

b. A party does have an avenue to redress another's filing of confidential mediation documents in collateral litigation: a court has inherent powers to strike material from the docket, including portions of documents, if that material improperly references confidential settlement negotiations. *Jones v. Metro. Life Ins. Co.*, No. C-08-03971-JW, 2010 WL 4055928, at *6 (N.D. Cal. Oct. 15, 2010).

4. The Sixth Circuit has gone so far as to recognize a discovery "privilege" in all cases involving settlement negotiations. *Goodyear Tire & Rubber Co. v. Chiles Power supply, Inc.*, 332 F.3d 975, 983 (6th Cir. 2003).

5. However, this "privilege" has its limits.

a. By itself, a settlement agreement is not exempt from discovery merely because it includes a confidentiality provision; this is especially true where there is a protective order in place. *See, e.g., Thermal Design, Inc. v. Guardian Bldg. Prods., Inc.*, No. 08-C-828, 2010 WL 3238921, at *1 (E.D. Wis. Aug. 17, 2010). Counsel should be aware that a settlement agreement reached by the parties after, but not in connection with, their participation in a court-

sponsored mediation program is not necessarily entitled to the same evidentiary privilege as a mediation communication.

b. Documents created for, and presented to, a federal agency for purposes of settling an investigation are likewise not protected by any general "settlement privilege." *In re Subpoena Issued to Commodity Futures Trading Comm'n*, 370 F. Supp. 2d 201, 209 & nn. 10–12 (D.D.C. 2005).

B. Federal Rule of Evidence 408

1. "**(a) Prohibited uses.** — Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:

(1) furnishing or offering or promising to furnish or accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise the claim; and

(2) conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.

(b) Permitted uses. — This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution."

2. The 2006 Amendment made it clear that Rule 408 does apply in criminal cases. 2 WEINSTEIN'S FEDERAL EVIDENCE §§ 408.02[5][a]–[b] (2d ed. 2010).

3. If materials are submitted to a neutral third party who conclusively determines the issue, and the parties agree to be bound by that determination, courts have characterized the procedure as arbitration, not settlement, and found such materials admissible. *E.g.*, *In re Home Health Corp. of Am., Inc.*, 268 B.R. 74, 77–78 (Bankr. D. Del. 2001).

4. Though some courts have used Rule 408 in the nature of a privilege itself, the better view is that it deals only with admissibility. *E.g. Folb v. Motion Picture Indus. Pension & Health Plans*, 16 F. Supp. 2d 1164, 1171 (C.D. Cal. 1998) ("Viewed in combination with FED. R. CIV. P. 26(b), Rule 408 only protects disputants from disclosure of information to the trier of fact, not from discovery by a third party. Consequently, without a federal mediation privilege under Rule 501, information exchanged in a confidential mediation, like any other information, is subject to the liberal discovery rules of the Federal Rules of Civil Procedure, at least where jurisdiction is premised on a federal question and the material sought in discovery is relevant to the federal claims presented.").

C. Other Potential Issues

1. Counsel should confer in advance of court proceedings and review the court's local rules. If those rules do not provide sufficient protection for the types of issues to be raised,

counsel should request of the court that the proceedings remain confidential, or reach an agreement on issues of confidentiality and waiver of privilege.

a. FED. R. CIV. P. 26(f)(3) allows parties to confer about issues of privilege and state those views to the court in a discovery plan.

b. "Disclosure of confidential information to a mediator does not, by itself, waive the attorney-client privilege." *Moe v. Sys. Transp., Inc.*, No. CV 09-157-M-DWM-JCL, 2010 WL 3925769, at *8 (D. Mont. Sept. 30, 2010) (holding, under state law that made communications to a mediator related to settlement privileged and confidential, that party had not waived attorney-client privilege for "settlement brochure" prepared for mediator).

c. However, a court order directing a party to disclose attorney-client privileged documents in connection with litigation is not immediately appealable. *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 606–07 (2009). Therefore, parties should seek to resolve these issues to their satisfaction before resorting to a court order to determine what documents they will have to disclose.

2. In light of the foregoing, any non-disclosure agreement signed by the parties relevant to mediation should be "'relatively strong and sufficiently unqualified to avoid waiver'" of the attorney work-product privilege by giving the parties a reasonable expectation of confidentiality. *Harris v. Koenig*, No. 02-618, 2010 WL 3909507, at *12 (D.D.C. Sept. 16, 2010) (quoting *United States v. Deloitte LLP*, 610 F.3d 129, 141 (D.C. Cir. 2010)).

3. It is also likely that a court's order requiring the parties to mediate, absent a jurisdictional infirmity, is not immediately appealable under the collateral order doctrine. *See Commc'n Workers of Am., AFL-CIO v. Am. Tel. & Tel. Co.*, 932 F.2d 199, 207 (3d Cir. 1991) (noting that order compelling arbitration is not immediately appealable).

IV. Ethics Considerations

A. Mediator Must Be Neutral

1. A special master, referee, or mediator should be considered a "judge" for purposes of the judicial ethics rules. *See McEnany v. W. Del. County Cmty. Sch. Dist.*, 844 F. Supp. 523, 532–33 (N.D. Iowa 1994) (discussing *In re Joint E. & S. Dists. Asbestos Litig. (Brooklyn Navy Yard Cases)*, 737 F.Supp. 735, 739 (E.D.N.Y. & S.D.N.Y. 1990)).

2. A mediator must conduct a mediation in an impartial manner and without the appearance of partiality; the mediator must decline to mediate a matter if he or she cannot meet these standards. MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard II (2005)

3. "When a court enters a mediation order, it necessarily makes an independent determination that the mediator it appoints is both qualified and neutral." *In re Atlantic Pipe Corp.*, 304 F.3d 135, 146 (1st Cir. 2002).

4. The need for a mediator to be impartial also may prohibit the mediator from testifying in subsequent proceedings. *NLRB v. Joseph Macaluso, Inc.*, 618 F.2d 51, 55–56 (9th Cir. 1980) (quoting the opinion of the administrative law judge that "If conciliators were permitted or required to testify about their activities, or if the production of notes or reports of their activities could be required, not even the strictest adherence to purely factual matters would prevent the evidence from favoring or seeming to favor one side or the other. ").

B. Potential Attorney/Disciplinary Pitfalls

1. Attorneys have been subject to disciplinary proceedings arising out of their conduct of mediation for the following reasons:

- Appearing for a client at mediation while under suspension from the practice of law;
- Failing to communicate with a client about a mediated settlement agreement forwarded by opposing counsel;
- Disclosing privileged mediation communications in arbitration proceedings concerning legal fees;
- Failing to schedule required mediations;
- Seeking to enforce mediated settlement agreements without client consent;
- Failing to pay mediation costs;
- Failing to pay monetary settlement of a mediated fee dispute in a timely manner;
- Violating Professional Responsibility Rule 4.2 by mediating a case with a party represented by counsel without notice to counsel;
- Falsely telling a client that a wrongful termination suit had been settled in mediation; and
- Engaging in a conflict of interest by serving as mediator for both parties in a matrimonial matter and then filing the final divorce documents as attorney for one party, without disclosing the service as mediator.

James R. Coben & Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation about Mediation*, 11 HARV. NEGOT. L. REV. 43, 93–94 (2006) (collecting cases).

2. A certain amount of "puffery" is expected and attorneys are permitted to negotiate over settlement terms or represent that a certain number is as low, or as high, as they might be willing to accept. *See, e.g.*, *Ascom Hasler Mailing Sys., Inc. v. U.S. Postal Serv*, Nos. 00-1401 & 00-2089, 2010 WL 4116858, at *3 (D.D.C. Oct. 19, 2010) (describing a previous settlement discussion where, "We had what I call 'the traditional parade of the bull elephants,' in which each side trumpeted that it was going to win hands down, and told me that settlement was impossible. We then went on to other things.").

3. That is circumscribed, however, by an attorney's ethical duty of candor to a tribunal. MODEL RULES OF PROFESSIONAL CONDUCT 3.3(a)(1) (2004) (providing that a lawyer shall not knowingly make a false statement of fact to the tribunal) & 3.3(a)(3) (a lawyer shall not knowingly offer evidence that the lawyer knows to be false). Generally, while it is permissible to bargain and argue, an attorney cannot personally represent, or allow his client to represent, facts that the attorney knows to be false.

a. A "tribunal" is "a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter." Rule 1.0

b. Comment 1 to Rule 3.3 states that the rule applies when participating "in the proceedings of a tribunal," as well as "in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority."

c. Comment 2 to Rule 3.3 states that "[A]lthough a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false."

V. Conflict or Recusal Concerns for Judges

A. Judges Not Typically Required to Recuse Due To Settlement Conference Participation.

1. Justices, judges and magistrate judges are required by federal law to recuse themselves "in any proceeding in which [their] impartiality might reasonably be questioned," 28 U.S.C. § 455(a), or "Where [they have] a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding," 28 U.S.C. § 455(b)(1).

2. However, counsel should be extremely careful when making such a motion, as the burden is a high one to meet.

a. Judges are not *required* to recuse themselves for participating in settlement conferences that involve the same, or similar, parties and claims; this is true whether or not the case settles. *See, e.g., Ascom Hasler Mailing Sys., Inc. v. U.S. Postal Serv*, Nos. 00-1401 & 00-2089, 2010 WL 4116858, at *4 (D.D.C. Oct. 19, 2010).

b. Prior knowledge of the disputes between the parties or the course of the proceedings, by itself, does not raise questions about the fairness of a judge; a judge is expected "to compartmentalize the information they receive and only rely on evidence relevant for a particular decision." *Clifford v. United States*, 136 F.3d 144, 149 (D.C. Cir. 1998).

c. Similarly, one court has noted that, "No reasonably well-informed observer could possibly reach the conclusion that magistrate judges can never be fair and impartial in trying a case because they presided over settlement discussions, particularly when there is not even a pretense that a party said any thing during those discussions that could possibly affect the magistrate judge's judgment." *Ascom Hasler Mailing Sys., Inc. v. U.S. Postal Serv*, Nos. 00-1401 & 00-2089, 2010 WL 4116858, at *4 (D.D.C. Oct. 19, 2010).

d. Under 28 U.S.C. § 455(b)(1), the bias must "display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky v. United States*, 510 U.S. 540, 555 (1994). "Judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." *Id.*

3. *Ascom Hasler Mailing Systems, Inc. v. U.S. Postal Service*, decided by U.S. Magistrate Judge John M. Facciola with the U.S. District Court for the District of Columbia, illustrates these principles.

a. The case concerned the Postal Service's use of technology that allowed customers to purchase postage by phone. 2010 WL 4116858, at *1. Customers had to pay for the postage in advance; private contractors accepted payments on behalf of the Postal Service, remitted the customers' payments to the Postal Service when the customers used the postage, and kept any accrued interest for themselves. *Id.* When the Postal Service later issued regulations that required customers to pay the Postal Service directly, the private contractors filed suit. *Id.*

b. The manufacturer of the technology also filed suit against the Postal Service, and then settled that suit pursuant to settlement negotiations conducted by a magistrate judge. 2010 WL 4116858, at *1. The private contractors filed suit against the Postal Service after the manufacturer had settled, asserting claims of quantum meruit and unconstitutional taking. *Id.* Judge Facciola presided over the manufacturer's settlement and also conducted settlement discussions between the private contractors and the Postal Service. *Id.*

c. Following these discussions and several other conferences, the Postal Service moved for Judge Facciola's recusal based on his role in both settlement discussions, but it made this motion three years after the private contractors' case had been referred to the magistrate judge for pretrial proceedings and a full ten years after the manufacturer's case settled. *Id.* at *2, *3 n.4.

d. Deciding the Postal Service's motion, Judge Facciola first explained that such a motion was untimely, "not even coming close to [the] requirement" in the D.C. Circuit that "a litigant must raise the disqualification issue within a reasonable time after the grounds for it are known." *Id.* at *2 (quoting *United States v. Barrett*, 111 F.3d 947, 951–52 (D.C. Cir. 1997)).

e. Second, Judge Facciola noted that, "Defendant does not protest that its representatives said or did something during those discussions that I will construe or use against it. It has not filed, for example, a submission *in camera* indicating what it said or did that supposedly had such a profound influence on me that a reasonable person would say that it would be impossible to me to be objective. In this case, that would be pure fantasy. It does not breach the confidentiality of those discussions to tell the parties what they already know." *Id.* at *3. Pointedly, Judge Facciola stated that "To throw me off this case, after all these years and my familiarity with the case and all the legal issues, is truly to cut one's throat on a good rug." *Id.*

f. Third, Judge Facciola cited the D.C. Circuit's holding that "only personal knowledge of disputed facts gained in an extrajudicial capacity is grounds for recusal" under 28 U.S.C. § 455(b)(1). *Id.* at *4 (citing *United States v. Pollard*, 949 F.2d 1011, 1031 (D.C. Cir. 1992)). The magistrate judge's statement that "I'm very familiar with this case, and I'm familiar with it because of my work on the [manufacturer's] case," was insufficient to "display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Id.*

g. Finally, Judge Facciola described as "a bit of silliness" the Postal Service's insistence that the magistrate judge was biased based on his comment during a status conference "express[ing] the view that a trial was unlikely because there was no real dispute that the [Postal Service] had issued the regulations it did, which had the consequences about which plaintiff complained." *Id.* at *5. The court wrote that, "First, I am not responsible for how other people construe what I say. Second, the defendant forgets that its counsel agreed with the utterly innocuous things I said . . ." *Id.*

B. Ethical Considerations for Judges Who Might Mediate

1. A judge may encourage settlement, but cannot coerce the parties to settle. CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3(A)(4)(d) cmt. (Judicial Conference of the U.S. 2009); MODEL CODE OF JUDICIAL CONDUCT Rule 2.6(B) (2007).

2. A judge also must be careful to assure himself or herself that knowledge gained in the settlement proceedings does not ethically require recusal.

a. Comment 3 to Rule 2.6 provides that "Judges must be mindful of the effect settlement discussions can have, not only on their objectivity and impartiality, but also on the appearance of their objectivity and impartiality. Despite a judge's best efforts, there may be instances when information obtained during settlement discussions could influence a judge's decision making during trial, and, in such instances, the judge should consider whether disqualification may be appropriate."

b. Rule 2.11(A) provides that a judge should recuse himself or herself "in any proceeding in which the judge's impartiality might reasonably be questioned."

3. A judge is also ethically prohibited from serving as a mediator or arbitrator "unless expressly authorized by law." Canon 4(A)(4); Rule 3.9

4. Ordinarily, a judge should not allow ex parte communications with parties; however, a judge may, "with the consent of the parties, confer separately with the parties and their counsel in an effort to mediate or settle pending matters." CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3(A)(4)(d) (Judicial Conference of the U.S. 2009).

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

CHAMBERS OF
THOMAS RAWLES JONES, JR.
UNITED STATES MAGISTRATE JUDGE

401 COURTHOUSE SQUARE
ALEXANDRIA, VIRGINIA 22314-5799
TELEPHONE: (703) 299-2122

June 16, 2010

Re: _____

Dear Counsel:

In the referenced matter, a settlement conference has been scheduled in my chambers on August 26, 2010 at 1:30 p.m.

I understand and expect that lead counsel for each party will be present, and that each party will be represented at the conference by a person having full authority to negotiate and settle the case on any terms at the conference.

I have already advised you that an exchange of information would be expected prior to the conference. On August 16, the parties should exchange by hand or by fax, and fax to my chambers at 703-299-2223 (but not to the Clerk of Court), Settlement Conference Statements that concisely provide the following:

(a) A summary of the facts, claims, and defenses, identifying the major factual and legal issues in dispute;

(b) A summary of the damages (and any other relief) sought;

(c) A description of any related litigation or other matter that affects case value or might otherwise have any bearing on settlement of this case;

(d) Any additional terms beyond dollar amount, such as confidentiality, limitation of a release, etc., the party expects to be part of a settlement;

(e) Who will attend the settlement conference; and

(f) The history of settlement discussions to date.

On August 23, each party should also deliver to my chambers a confidential letter, which shall not be filed or served on any other party. This confidential letter shall forthrightly address:

(1) Counsel's candid evaluation of each party's strengths, weaknesses, and likelihood of success on each claim or defense;

(2) Fees, time, and costs to date, and counsel's estimate of the fees, time and costs through a trial to judgment;

(3) Counsel's best estimate of the most and least favorable outcomes of a trial; and

(4) Counsel's *and the client's* candid evaluation, based on factors 1, 2 and 3 above, of the terms on which the case can be settled fairly.

I expect that each party's decision maker will participate in preparing that party's Settlement Conference Statement and confidential letter. I also expect that each decision maker will read the opposing party's Settlement Conference Statement and discuss it with counsel prior to preparation of the confidential letter.

I expect to begin the settlement conference with a meeting attended by both sides, at which you summarize your respective positions for me and for each other. I will then meet privately with each side, and proceed thereafter as events dictate.

I look forward to meeting with you at the settlement conference.

Sincerely,

Thomas Rawles Jones, Jr.
United States Magistrate Judge

Dear Counsel:

Re: v.
Civil Action No. 1:10cv

Dear Counsel:

This letter is to confirm the settlement conference scheduled in chambers on Monday, September 20, 2010, at 1:00 PM.

The Court will not conduct the settlement conference unless counsel previously have conducted serious settlement discussions and believe this conference would be fruitful. By their presence at the settlement conference, counsel are deemed to be making a good faith representation that they have previously met, conferred and attempted to resolve the case in controversy. The conference will be scheduled for two hours.

In the event you cannot settle the case prior to the settlement conference, you are to submit a confidential settlement statement for the Court's review by close of business on Thursday, September 16, 2010. Your confidential settlement statement must include:

- a brief statement of the facts;
- a statement describing any relevant procedural history, including any dispositive motions pending or to be filed;
- an itemized list of damages (plaintiff only);
- a statement setting forth a concise theory of liability and counsel's evaluation of the likelihood of success (plaintiff only);
- a statement setting forth defenses to plaintiff's liability theory and counsel's evaluation of the likelihood of success (defendant only);
- statement of fees, time and costs expended to date and counsel's estimate of the likely fees, time and costs through a trial to judgment;
- a statement describing the settlement history of the case, including all demands, settlement offers and counter-offers with their corresponding dates;
- counsel's evaluation of the terms on which the case can be settled fairly;
- the trial date and expected length of trial; and
- a list identifying the parties who will attend the conference.

It is preferred, but not mandatory that the parties attend the settlement conference with counsel. However, an individual with authority to settle the case should either be present or be immediately available by telephone.

Your settlement statement is confidential and need not be sent to the opposing party.

Sincerely,

Theresa Carroll Buchanan
United States Magistrate Judge
TCB:amg

October 4, 2010

Electronic Mail

Re: Settlement Conference in Civil Action No. 1:10cv------ (---/JFA)

Dear Counsel:

A settlement conference has been scheduled in the above matter on **Tuesday, November 16, 2010 at 2:00 p.m.** I expect that lead counsel for each party will be present, and that each party will be represented at the conference by a person having full authority to negotiate and settle the case on any terms at the conference.

In order to assist counsel and the court, I will require counsel to exchange information before the conference in addition to submitting a confidential statement to me. By **5:00 p.m. on November 5, 2010**, counsel for each party should exchange by hand delivery or by facsimile, and deliver to my chambers (but not to the Clerk of Court) a settlement conference statement that provides the following:

(a) A summary of the facts, claims, and defenses, identifying the major factual and legal issues in dispute;

(b) An itemized summary of the damages (and any other relief) sought;

(c) A description of any related litigation or other matter that affects case value or might otherwise have any bearing on settlement of this case;

(d) Any additional terms beyond dollar amount, such as confidentiality or limitation of a release, that the party expects to be part of a settlement;

(e) Who will attend the settlement conference; and

(f) The history of settlement discussions to date. If the parties have not already attempted to settle the case, you should notify me immediately by telephone.

By **5:00 p.m. on November 12, 2010**, each party should also deliver to my chambers a confidential letter, which shall not be filed or served on any other party. This confidential letter shall address:

(1) Counsel's candid evaluation of each party's strengths, weaknesses, and likelihood of success on each claim or defense;

(2) Fees, time, and costs to date, and counsel's estimate of the fees, time and costs through a trial to judgment;

(3) Counsel's best estimate of the most and least favorable outcomes of a trial; and

(4) Counsel's **and the client's** candid evaluation, based on factors 1, 2 and 3 above, of the terms on which the case can be settled fairly.

I expect that each party's decision maker will participate in preparing that party's settlement conference statement and confidential letter. I also expect that each decision maker will read the opposing party's settlement conference statement and discuss it with counsel prior to preparation of the confidential letter.

I expect to begin the settlement conference with a meeting attended by both sides, and I will have you summarize your respective positions orally for me and for each other. I will then meet privately with each side, and proceed thereafter as events dictate.

I look forward to meeting with you at the settlement conference.

Sincerely yours,

John F. Anderson
United States Magistrate Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

CHAMBERS OF
IVAN D. DAVIS
UNITED STATES MAGISTRATE JUDGE

401 COURTHOUSE SQUARE
ALEXANDRIA, VIRGINIA 22314
(703) 299-2119
FAX (703) 299-2219

[Date]

[Plaintiff's Counsel]
[Defendant's Counsel]

Re: Settlement Conference in [Case Name and Number]

Dear Counsel:

In the referenced matter, a settlement conference has been scheduled in my chambers on **[date of Settlement Conference]**

I understand and expect that lead counsel for each party will be present, and that each party will be represented at the conference by a person having full authority to negotiate and settle the case on any terms at the conference. I strongly prefer and urge the decision maker to be physically present at the settlement conference. However, in limited circumstances, upon my approval, the decision maker may be present by telephone, so long as the decision maker's presence is both actual and immediate throughout the conference.

My law clerk has already advised you that an exchange of information would be expected prior to the conference. On **[due date for settlement statements. It should be set for 1 week prior to conference date]**, the parties should exchange by hand or by fax, and deliver to my chambers (but not to the Clerk of Court), Settlement Conference Statements that concisely provide the following:

(a) A summary of the facts, claims, and defenses, identifying the major factual and legal issues in dispute;

(b) An itemized summary of the damages (and any other relief) sought;

(c) A description of any related litigation or other matter that affects case value or might otherwise have any bearing on settlement of this case;

(d) Any additional terms beyond dollar amount, such as confidentiality, limitation of a release, etc., the party expects to be part of a settlement;

(e) Who will attend the settlement conference; and

(f) The history of settlement discussions to date. (If the parties have not already attempted to settle the case, you should so notify me immediately by telephone.)

On **[due date for confidential letter. Set for 1 week prior to settlement conference]**, each party should also deliver to my chambers a confidential letter, which shall not be filed or served on any other party. This confidential letter shall forthrightly address:

(1) Counsel's candid evaluation of each party's strengths, weaknesses, and likelihood of success on each claim or defense;

(2) Fees, time, and costs to date, and counsel's estimate of the fees, time and costs through a trial to judgment;

(3) Counsel's best estimate of the most and least favorable outcomes of a trial; and

(4) Counsel's *and the client's* candid evaluation, based on factors 1, 2 and 3 above, of the terms on which the case can be settled fairly.

The settlement conference will occur in a conference room in chambers. Prior to commencing the settlement conference, please proceed to Courtroom 400 and wait for my Courtroom Security Officer to let you know when we are ready to begin. I expect to begin the settlement conference with a meeting attended by both sides, at which you summarize your respective positions orally for me and for each other. I will then meet privately with each side, and proceed thereafter as events dictate.

I look forward to meeting you at the settlement conference.

Very truly yours,

Ivan D. Davis
United States Magistrate Judge

IDD:ss

THE MCCAMMON GROUP

AGREEMENT TO MEDIATE

Caption:_____

1. Mediation is a voluntary, collaborative process intended to assist disputing parties in finding a legally-binding solution to their disputes. The process is informal. The parties may discuss the factual and legal issues and any other matters that they deem pertinent to the dispute. All those in attendance will have a full opportunity to be heard. The parties are seeking to determine their own solution through a negotiation facilitated by the mediator. The attending parties, or their representatives in attendance, should have authority to agree to a legally binding solution to the dispute. The parties are not required to reach a settlement. However, if the parties do reach a settlement and execute a written agreement disposing of the dispute, the agreement is enforceable in the same manner as any other written contract. The parties may terminate the mediation session at any time prior to reaching a settlement agreement. In the event that the initial mediation session does not result in a settlement agreement, the mediator may follow up with the parties to assist them in seeking a resolution of their dispute.

2. The mediator serves as a neutral and impartial facilitator of the negotiations. The mediator is not the legal representative of either party. In providing mediation services, the mediator does not engage in the practice of law. The mediator does not decide the outcome of the dispute. The mediator does not predict the specific resolution of a legal issue, nor does the mediator counsel or direct the party or parties to take any particular course of action. The mediator does not give professional advice of any kind to either party, nor does the mediator act as an advocate for either party. While the mediator may suggest possible options by which to resolve a dispute, the mediator does not recommend any particular solution since it is up to the parties to make the ultimate decision. In the event that the parties request that the mediator participate in memorializing any settlement agreement reached by the parties, it is understood and agreed by all parties that the mediator will be acting only as a scrivener. Furthermore: (i) the mediator does not provide legal advice; (ii) any mediated agreement may affect the legal rights of the parties; (iii) each party to the mediation has the opportunity to consult with independent legal counsel at any time and is encouraged to do so; and (iv) each party to the mediation should have any draft agreement reviewed by independent counsel prior to signing the agreement. The mediator is an independent contractor of The McCammon Group. The mediator and The McCammon Group, Ltd. ("The McCammon Group"), including its independent contractors, employees, officers and shareholders, shall not be liable to the parties for any act or omission relating to the mediation.

3. The fundamental style of the mediator is facilitation. This involves the personal skills of the mediator to clarify interests, identify issues, test the merits of positions and generally to assist the parties in moving toward common ground. A mediator may give legal information including, among other things, the neutral evaluation of issues. Such evaluation is provided only where (i) it is requested; (ii) the mediator thinks that the requested evaluation is appropriate and necessary; (iii) the mediator is qualified to give such evaluation; (iv) there is sufficient information on which to base such evaluation; and, (v) such evaluation is provided in reasonably broad and qualified terms. As the mediation proceeds, the needs of the parties may change, and the nature of the services provided may likewise change, as the parties may request.

4. All statements, documents and other matters generated in connection with the mediation are confidential. Furthermore:
   a. all memoranda, work products and other materials contained in the case files of a mediator or mediation program are confidential;
   b. any communication made in or in connection with the mediation which relates to the controversy being mediated, including screening, intake and scheduling a dispute resolution proceeding, whether made to a mediator or dispute resolution program staff, or to any other person, is confidential;
   c. a mediated agreement signed by the parties shall not be confidential, unless the parties otherwise agree in writing;
   d. allegations of child abuse are not confidential, as mediators are mandatory reporters of such information;
   e. in reporting on the outcome of the dispute resolution proceeding to the referring court, the neutral shall indicate whether an agreement was reached, the terms of the agreement if authorized by the parties, the fact that no agreement was reached, or the fact that the orientation session or mediation did not occur. The neutral shall not disclose information exchanged or observations regarding the conduct and demeanor of the parties and their counsel during the dispute resolution proceeding, unless the parties agree otherwise;
   f. neither the mediator nor anyone associated with The McCammon Group may be compelled to appear or to give testimony in any judicial, regulatory or administrative proceeding;
   g. no documents or materials belonging to or in the custody of the mediator or The McCammon Group may be subpoenaed or in any other way sought to be used in any judicial, regulatory or administrative proceeding;

5. Confidential materials and communications are not subject to disclosure in discovery or in any judicial or administrative proceeding except:
   a. where all parties to the mediation agree, in writing, to waive the confidentiality;
   b. in a subsequent action between the mediator and a party to the mediation for damages arising out of the mediation, but only to the extent that any such action is allowed by contract and law;
   c. statements, memoranda, materials and other tangible evidence, otherwise subject to discovery, which were not prepared specifically for use in and actually used in the mediation;
   d. where a threat to inflict bodily injury is made;
   e. where communications are intentionally used to plan, attempt to commit, or commit a crime or conceal an ongoing crime;
   f. where an ethics complaint is made against the neutral by a party to the dispute resolution proceeding to the extent necessary for the complainant to prove misconduct and the neutral to defend against such complaint;
   g. where communications are sought or offered to prove or disprove a claim or complaint of misconduct or malpractice filed against a party's legal representative based on conduct occurring during a mediation;
   h. (in proceedings in Virginia state courts where a party is seeking to vacate a mediated agreement or an order based on a mediated agreement) where communications are sought or offered to prove or disprove any of the grounds listed in Virginia Code §8.01-576.12 in a proceeding to vacate a mediated agreement; or
   i. as provided by law or rule.

6. In domestic relations cases involving divorce, property, support, or the welfare of a child, each party agrees to provide substantial full disclosure of all relevant property and financial information.

7. The persons signing below agree to the provisions of this Agreement to Mediate.

Full Name of Person Signing (Please Print)	Full Name of Person Signing (Please Print)
Signature Date	Signature Date
Full Name of Person Signing (Please Print)	Full Name of Person Signing (Please Print)
Signature Date	Signature Date
Full Name of Person Signing (Please Print)	Full Name of Person Signing (Please Print)
Signature Date	Signature Date
Full Name of Person Signing (Please Print)	Full Name of Person Signing (Please Print)
Signature Date	Signature Date
Full Name of Person Signing (Please Print)	Full Name of Person Signing (Please Print)
Signature Date	Signature Date
Full Name of Person Signing (Please Print)	Full Name of Mediator (Please Print)
Signature Date	Mediator Signature Date