AMERICAN BANKRUPTCY INSTITUTE

2025 Winter Leadership Conference

Navigating Ethical Crossroads: Responsibility in Mediation and Negotiation

Hosted by the Mediation and Ethics & Professional Compensation Committees

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CONCURRENT SESSION

2025

Handout for Navigating Ethical Crossroads: Responsibility in Mediation and Negotiation
Dec. 5, 2025

Sample Rules, Guidelines, and Canons Concerning Mediation and Other Alternative Dispute Resolution

ABA Model Rules, Ethics Opinions & Guidance

ABA Model Rules of Professional Conduct- Preamble

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[2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

ABA Model Rule 1.3: Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

Comment:

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

ABA Model Rule 1.7 Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

ABA Model Rule 1.9: Duties to Former Clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

ABA Model Rule 3.3: Candor Towards the Tribunal

Advocate

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

ABA Model Rule 4.1: Truthfulness in Statements to Others

Transactions With Persons Other Than Clients

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(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.

Comment: Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions

that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

Comment: Statements of Fact

[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

ABA Model Rule 8.4: Misconduct

Maintaining The Integrity Of The Profession

It is professional misconduct for a lawyer to:

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(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

The Code of Ethics for Arbitrators in Commercial Disputes Approved by the American Bar Association House of Delegates on February 9, 2004

CANON II. AN ARBITRATOR SHOULD DISCLOSE ANY INTEREST OR RELATIONSHIP LIKELY TO AFFECT IMPARTIALITY OR WHICH MIGHT CREATE AN APPEARANCE OF PARTIALITY.

A. Persons who are requested to serve as arbitrators should, before accepting, disclose:

> (1) Any known direct or indirect financial or personal interest in the outcome of the arbitration;
>
> (2) Any known existing or past financial, business, professional or personal relationships which might reasonably affect impartiality or lack of independence in the eyes of any of the parties. For example, prospective arbitrators should disclose any such relationships which they personally have with any party or its lawyer, with any co-arbitrator, or with any individual whom they have been told will be a witness. They should also disclose any such relationships involving their families or household members or their current employers, partners, or professional or business associates that can be ascertained by reasonable efforts;

(3) The nature and extent of any prior knowledge they may have of the dispute; and (4) Any other matters, relationships, or interests which they are obligated to disclose by the agreement of the parties, the rules or practices of an institution, or applicable law regulating arbitrator disclosure.

ABA Formal Opinion 06-439

Formal Opinion 06-439
April 12, 2006

Lawyer's Obligation of Truthfulness When Representing a Client in Negotiation: Application to Caucused Mediation

Under Model Rule 4.1, in the context of a negotiation, including a caucused mediation, a lawyer representing a client may not make a false statement of material fact to a third person. However, statements regarding a party's negotiating goals or its willingness to compromise, as well as statements that can fairly be characterized as negotiation "puffing," ordinarily are not considered "false statements of material fact" within the meaning of the Model Rules [1] .

[1] This opinion is based on the Model Rules of Professional Conduct as amended by the ABA House of Delegates in August 2003 and, to the extent indicated, the predecessor Model Code of Professional Responsibility of the American Bar Association. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in the individual jurisdictions are controlling.

In this opinion, we discuss the obligation of a lawyer to be truthful when making statements on behalf of clients in negotiations, including the specialized form of negotiation known as caucused mediation.

It is not unusual in a negotiation for a party, directly or through counsel, to make a statement in the course of communicating its position that is less than entirely forthcoming. For example, parties to a settlement negotiation often understate their willingness to make concessions to resolve the dispute. A plaintiff might insist that it will not agree to resolve a dispute for less than $200, when, in reality, it is willing to accept as little as $150 to put an end to the matter. Similarly, a defendant manufacturer in patent infringement litigation might repeatedly reject the plaintiff's demand that a license be part of any settlement agreement, when in reality, the manufacturer has no genuine interest in the patented product and, once a new patent is issued, intends to introduce a new product that will render the old one obsolete. In the criminal law context, a prosecutor might not reveal an ultimate willingness to grant immunity as part of a cooperation agreement in order to retain influence over the witness.

A party in a negotiation also might exaggerate or emphasize the strengths, and minimize or deemphasize the weaknesses, of its factual or legal position. A buyer of products or services, for example, might overstate its confidence in the availability of alternate sources of supply to reduce the appearance of dependence upon the supplier with which it is negotiating. Such remarks, often characterized as "posturing" or "puffing," are statements upon which parties to a negotiation ordinarily would not be expected justifiably to rely, and must be distinguished from false statements of material fact. An example of a false statement of material fact would be a lawyer representing an employer in labor negotiations stating to union lawyers that adding a particular employee benefit will cost the company an additional $100 per employee, when the lawyer knows that it actually will cost only $20 per employee. Similarly, it cannot be considered "posturing" for a lawyer representing a defendant to declare that documentary evidence will be submitted at trial in support of a defense when the lawyer knows that such documents do not exist or will be inadmissible. In the same vein, neither a prosecutor nor a criminal defense lawyer can tell the other party during a plea negotiation that they are aware of an eyewitness to the alleged crime when that is not the case.

Applicable Provision of the Model Rules

The issues addressed herein are governed by Rule 4.1(a). [2] That rule prohibits a lawyer, "[i]n the course of representing a client," from knowingly making "a false statement of material fact or law to a third person." As to what constitutes a "statement of fact," Comment [2] to Rule 4.1 provides additional explanation:

[2] Although Model Rule 3.3 also prohibits lawyers from knowingly making untrue statements of fact, it is not applicable in the context of a mediation or a negotiation among parties. Rule 3.3 applies only to statements made to a "tribunal." It does not apply in mediation because a mediator is not a "tribunal" as defined in Model Rule 1.0(m). Comment [5] to Model Rule 2.4 confirms the inapplicability of Rule 3.3 to mediation:

> Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration (see Rule 1.0(m)), the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.

> Rule 3.3 does apply, however, to statements made to a tribunal when the tribunal itself is participating in settlement negotiations, including court-sponsored mediation in which a judge participates. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-370 (1993) (Judicial Participation in Pretrial Settlement Negotiations), in Formal and Informal Ethics Opinions 1983-1998 at 157, 161 (ABA 2000).
>
> Rule 8.4(c), which on its face broadly proscribes "conduct involving dishonesty, fraud, deceit or misrepresentation," does not require a greater degree of truthfulness on the part of lawyers representing parties to a negotiation than does Rule 4.1. Comment [1] to Rule 4.1, for example, describes Rule 8.4 as prohibiting "misrepresentations by a lawyer other than in the course of representing a client ...." In addition, Comment [5] to Rule 2.4 explains that the duty of candor of "lawyers who represent clients in alternative dispute resolution processes" is governed by Rule 3.3 when the process takes place before a tribunal, and otherwise by Rule 4.1. Tellingly, no reference is made in that Comment to Rule 8.4. Indeed, if Rule 8.4 were interpreted literally as applying to any misrepresentation, regardless of the lawyer's state of mind or the triviality of the false statement in question, it would render Rule 4.1 superfluous, including by punishing unknowing or immaterial deceptions that would not even run afoul of Rule 4.1. *See* Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyering §65.5 at 65-11 (3d ed. 2001). It is not necessary, however, for this Committee to delineate the precise outer boundaries of Rule 8.4(c) in the context of this opinion. Suffice it to say that, whatever the reach of Rule 8.4(c) may be, the Rule does not prohibit conduct that is permitted by Rule 4.1(a).

This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation. [3]

[3] The Restatement (Third) of The Law Governing Lawyers §98, cmt. c (2000) (hereinafter "Restatement") (citations omitted) echoes the principles underlying Comment [2] to Rule 4.1:

> Certain statements, such as some statements relating to price or value, are considered nonactionable hyperbole or a reflection of the state of mind of the speaker and not misstatements of fact or law. Whether a statement should be so characterized depends on whether the person to whom the statement is addressed would reasonably regard the statement as one of fact or based on the speaker's knowledge of facts reasonably implied by the statement, or instead regard it as merely an expression of the speaker's state of mind.

Truthfulness in Negotiation

It has been suggested by some commentators that lawyers must act honestly and in good faith and should not accept results that are unconscionably unfair, even when they would be to the advantage of the lawyer's own client. [4] Others have embraced the position that deception is inherent in the negotiation process and that a zealous advocate should take advantage of every opportunity to advance the cause of the client through such tactics within the bounds of the law. [5] Still others have suggested that lawyers should strive to balance the apparent need to be less than wholly forthcoming in negotiation against the desirability of adhering to personal ethical and moral standards. [6] Rule 4.1(a) applies only to statements of material fact that the lawyer knows to be false, and thus does not cover false statements that are made unknowingly, that concern immaterial matters, or that relate to neither fact nor law. Various proposals also have been advanced to change the applicable ethics rules, either by amending Rule 4.1 and its Comments, or by extending Rule 3.3 to negotiation, or by creating a parallel set of ethics rules for negotiating lawyers. [7]

[4] *See, e.g.*, Reed Elizabeth Loder, "Moral Truthseeking and the Virtuous Negotiator," 8 *Geo. J. Legal Ethics* 45, 93-102 (1994) (principles of morality should drive legal profession toward rejection of concept that negotiation is inherently and appropriately deceptive); Alvin B. Rubin, "A Causerie on Lawyers' Ethics in Negotiation," 35 *La. L. Rev.* 577, 589, 591 (1975) (lawyer must act honestly and in good faith and may not accept a result that is unconscionably unfair to other party); Michael H. Rubin, "The Ethics of Negotiation: Are There Any?," 56 *La. L. Rev.* 447, 448 (1995) (embracing approach that ethical basis of negotiations should be truth and fair dealing, with goal being to avoid results that are unconscionably unfair to other party).

[5] *See, e.g.*, Barry R. Temkin, "Misrepresentation by Omission in Settlement Negotiations: Should There Be a Silent Safe Harbor?," 18 *Geo. J. Legal Ethics* 179, 181 (2004) (clients are entitled to expect their lawyers to be zealous advocates; current literature bemoaning lack of honesty and truthfulness in negotiation has gone too far); James J. White, "Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation," 1980 *Am. B. Found. Res. J.* 921, 928 (1980) (misleading other side is essence of negotiation and is all part of the game).

[6] *See, e.g.*, Charles B. Craver, "Negotiation Ethics: How to Be Deceptive Without Being Dishonest/How to Be Assertive Without Being Offensive," 38 *S. Tex. L. Rev.* 713, 733-34 (1997) (lawyers should balance their clients' interests with their personal integrity); Van M. Pounds, "Promoting Truthfulness in Negotiation: A Mindful Approach," 40 *Willamette L. Rev.* 181, 183 (2004) (suggesting that solution to finding more truthful course in negotiation may lie in ancient Buddhist practice of "mindfulness," of "waking up and living in harmony with oneself and with the world").

[7] *See, e.g.*, James J. Alfini, "Settlement Ethics and Lawyering in ADR Proceedings: A Proposal to Revise Rule 4.1," 19 *N. Ill. U. L. Rev.* 255, 269-72 (1999) (author would amend Rule 4.1 to prohibit lawyers from knowingly assisting the client in "reaching a settlement agreement that is based on reliance upon a false statement of fact made by the lawyer's client" and would expressly apply Rule 3.3 to mediation); Kimberlee K. Kovach, "New Wine Requires New Wineskins: Transforming Lawyer Ethics for Effective Representation in a Non-Adversarial Approach to Problem Solving: Mediation," 28 *Fordham Urb. L. J.* 935, 953-59 (2001) (urging adoption of separate code of ethics for lawyers engaged in mediation and other non-adversarial forms of ADR); Carrie Menkel-Meadow, "The Lawyer as Consensus Builder: Ethics for a New Practice," 70 *Tenn. L. Rev.* 63, 67-87, (2002) (encouraging Ethics 2000 Commission to develop rules for lawyers in alternative dispute resolution context).

Although this Committee has not addressed the precise question posed herein, we previously have opined on issues relating to lawyer candor in negotiations. For example, we stated in Formal Opinion 93-370 [8] that, although a lawyer may in some circumstances ethically decline to answer a judge's questions concerning the limits of the lawyer's settlement authority in a civil matter, [9] the lawyer is not justified in lying or engaging in misrepresentations in response to such an inquiry. We observed that:

[8] ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-370, in Formal and Informal Ethics Opinions 1983-1998 at 160-61.

[9] The opinion also concluded that it would be improper for a judge to insist that a lawyer "disclose settlement limits authorized by the lawyer's client, or the lawyer's advice to the client regarding settlement terms."

> [w]hile ... a certain amount of posturing or puffery in settlement negotiations may be an acceptable convention between opposing counsel, a party's actual bottom line or the settlement authority given to a lawyer is a material fact. A deliberate misrepresentation or lie to a judge in pretrial negotiations would be improper under Rule 4.1. Model Rule 8.4(c) also prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, and Rule 3.3 provides that a lawyer shall not knowingly make a false statement of material fact or law to a tribunal. The proper response by a lawyer to improper questions from a judge is to decline to answer, not to lie or misrepresent.

Similarly, in Formal Opinion 94-387, [10] we expressed the view that a lawyer representing a claimant in a negotiation has no obligation to inform the other party that the statute of limitations has run on the client's claim, but cannot make any affirmative misrepresentations about the facts. In contrast, we stated in Formal Opinion 95-397 [11] that a lawyer engaged in settlement negotiations of a pending personal injury lawsuit in which the client was the plaintiff cannot conceal the client's death, and must promptly notify opposing counsel and the court of that fact. Underlying this conclusion was the concept that the death of the client was a material fact, and that any continued communication with opposing counsel or the court would constitute an implicit misrepresentation that the client still was alive. Such a misrepresentation would be prohibited under Rule 4.1 and, with respect to the court, Rule 3.3. Opinions of the few state and local ethics committees that have addressed these issues are to the same effect. [12]

[10] ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-387 (1994) (Disclosure to Opposing Party and Court that Statute of Limitations Has Run), in Formal and Informal Ethics Opinions 1983-1998 at 253.

[11] ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-397 (1995) (Duty to Disclose Death of Client), in Formal and Informal Ethics Opinions 1983-1988 at 362.

[12] *See* New York County Lawyers' Ass'n Committee on Prof'l Ethics Op. 731 (Sept. 1, 2003) (lawyer not obligated to reveal existence of insurance coverage during a negotiation unless disclosure is required by law; correlatively, not required to correct misapprehensions of other party attributable to outside sources regarding the client's financial resources); Pennsylvania Bar Ass'n Comm. on Legal Ethics & Prof'l Responsibility Informal Op. 97-44 (Apr. 23, 1997) (lawyer negotiating on behalf of a client who is an undisclosed principal is not obligated to disclose the client's identity to the other party, or to disclose the fact that that other party is negotiating with a straw man); Rhode Island Supreme Court Ethics Advisory Panel Op. 94-40 (July 27, 1994) (lawyer may continue negotiations even though recent developments in Rhode Island case law may bar client's claim).

False statements of material fact by lawyers in negotiation, as well as implicit misrepresentations created by a lawyer's failure to make truthful statements, have in some cases also led to professional discipline. For example, in reliance on Formal Opinion 95-397, a Kentucky lawyer was disciplined under Rule 4.1 for settling a personal injury case without disclosing that her client had died. [13] Similarly, in a situation raising issues like those presented in Formal Opinion 93-370, a New York lawyer was disciplined for stating to opposing counsel that, to the best of his knowledge, his client's insurance coverage was limited to $200,000, when documents in his files showed that the client had $1,000,000 in coverage. [14] Affirmative misrepresentations by lawyers in negotiation also have been the basis for the imposition of litigation sanctions, [15] and the setting aside of settlement agreements, [16] as well as civil lawsuits against the lawyers themselves. [17]

[13] Kentucky Bar Ass'n v. Geisler, 938 S.W.2d 578, 579-80 (Ky. 1997); *see also* In re Warner, 851 So. 2d 1029, 1037 (La.), reh'g denied (Sept. 5, 2003) (lawyer disciplined for failure to disclose death of client prior to settlement of personal injury action); Toledo Bar Ass'n v. Fell, 364 N.E.2d 872, 874 (1977) (same).

[14] In re McGrath, 468 N.Y.S.2d 349, 351 (N.Y. App. Div. 1983).

[15] *See* Sheppard v. River Valley Fitness One, L.P., 428 F.3d 1, 11 (1st Cir. 2005); Ausherman v. Bank of America Corp., 212 F. Supp. 2d 435, 443-45 (D. Md. 2002).

[16] *See, e.g.*, Virzi v. Grand Trunk Warehouse & Cold Storage Co., 571 F. Supp. 507, 512 (E.D. Mich. 1983) (settlement agreement set aside because of lawyer's failure to disclose death of client prior to settlement); Spaulding v. Zimmerman, 116 N.W.2d 704, 709-11 (Minn. 1962) (defense counsel's failure to disclose material adverse facts relating to plaintiff's medical condition led to vacatur of settlement agreement).

[17] *See, e.g.*, Hansen v. Anderson, Wilmarth & Van Der Maaten, 630 N.W.2d 818, 825-27 (Iowa 2001) (law firm, defendant in malpractice action, allowed to assert third-party claim for equitable indemnity directly against opposing counsel who had engaged in misrepresentations during negotiations); Jeska v. Mulhall, 693 P.2d 1335, 1338-39 (1985) (sustaining fraudulent misrepresentation claim by buyer of real estate against seller's lawyer for misrepresentations made during negotiations).

In contrast, statements regarding negotiating goals or willingness to compromise, whether in the civil or criminal context, ordinarily are not considered statements of material fact within the meaning of the Rules. Thus, a lawyer may downplay a client's willingness to compromise, or present a client's bargaining position without disclosing the client's "bottom line" position, in an effort to reach a more favorable resolution. Of the same nature are overstatements or understatements of the strengths or weaknesses of a client's position in litigation or otherwise, or expressions of opinion as to the value or worth of the subject matter of the negotiation. Such statements generally are not considered material facts subject to Rule 4.1. [18]

[18] Conceivably, such statements could be viewed as violative of other provisions of the Model Rules if made in bad faith and without any intention to seek a compromise. Model Rule 4.4(a), for example, prohibits lawyers from using "means that have no substantial purpose other than to embarrass, delay, or burden a third person ...." Similarly, Model Rule 3.2 requires lawyers to "make reasonable efforts to expedite litigation consistent with the interests of the client."

Application of the Governing Principles to Caucused Mediation

Having delineated the requisite standard of truthfulness for a lawyer engaged in the negotiation process, we proceed to consider whether a different standard should apply to a lawyer representing a client in a caucused mediation. [19]

[19] This opinion is limited to lawyers representing clients involved in caucused mediation, and does not attempt to explore issues that may be presented when a lawyer serves as a mediator and, in carrying out that role, makes a false or misleading statement of fact. A lawyer serving as a mediator is not representing a client, and is thus not subject to Rule 4.1, but may well be subject to Rule 8.4(c) (see note 2 above). *Cf.* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 04-433 (2004) (Obligation of a Lawyer to Report Professional Misconduct by a Lawyer Not Engaged in the Practice of Law). In our view, Rule 8.4(c) should not impose a more demanding standard of truthfulness for a lawyer when acting as a mediator than when representing a client. We note, in this regard, that many mediators are nonlawyers who are not subject to lawyer ethics rules. We need not address whether a lawyer should be held to a different standard of behavior than other persons serving as mediator.

Mediation is a consensual process in which a neutral third party, without any power to impose a resolution, works with the disputants to help them reach agreement as to some or all of the issues in controversy. Mediators assist the parties by attempting to fashion creative and integrative solutions to their problems. In the most basic form of mediation, a neutral individual meets with all of the parties simultaneously and attempts to moderate and direct their discussions and negotiations. Whatever is communicated to the mediator by a party or its counsel is heard by all other participants in the mediation. In contrast, the mediator in a caucused mediation meets privately with the parties, either individually or in aligned groups. These caucuses are confidential, and the flow of information among the parties and their counsel is controlled by the mediator subject to the agreement of the respective parties.

It has been argued that lawyers involved in caucused mediation should be held to a more exacting standard of truthfulness because a neutral is involved. The theory underlying this position is that, as in a game of "telephone," the accuracy of communication deteriorates on successive transmissions between individuals, and those distortions tend to become magnified on continued retransmission. Mediators, in turn, may from time to time reframe information as part of their efforts to achieve a resolution of the dispute. To address this phenomenon, which has been called "deception synergy," proponents of this view suggest that greater accuracy is required in statements made by the parties and their counsel in a caucused mediation than is required in face-to-face negotiations. [20]

[20] *See generally* John W. Cooley, "Mediation Magic: Its Use and Abuse," 29 *Loy. U. Chi. L.J.* 1, 101 (1997); *see also* Jeffrey Krivis, "The Truth About Using Deception in Mediation," 20 *Alternatives to High Cost Litig.* 121 (2002).

It has also been asserted that, to the contrary, less attention need be paid to the accuracy of information being communicated in a mediation—particularly in a caucused mediation—precisely because consensual deception is intrinsic to the process. Information is imparted in confidence to the mediator, who controls the flow of information between the parties in terms of the content of the communications as well as how and when in the process it is conveyed. Supporters of this view argue that this dynamic creates a constant and agreed-upon environment of imperfect information that ultimately helps the mediator assist the parties in resolving their disputes. [21]

[21] Mediators are "the conductors—the orchestrators—of an information system specially designed for each dispute, a system with ambiguously defined or, in some situations undefined, disclosure rules in which mediators are the chief information officers with near-absolute control. Mediators' control extends to what nonconfidential information, critical or otherwise, is developed, to what is withheld, to what is disclosed, and to when disclosure occurs." Cooley, *supra* note 20, at 6 (citing Christopher W. Moore, The Mediation Process: Practical Strategies for Resolving Conflict 35-43 (1986)).

Whatever the validity may be of these competing viewpoints, the ethical principles governing lawyer truthfulness do not permit a distinction to be drawn between the caucused mediation context and other negotiation settings. The Model Rules do not require a higher standard of truthfulness in any particular negotiation contexts. Except for Rule 3.3, which is applicable only to statements before a "tribunal," the ethical prohibitions against lawyer misrepresentations apply equally in all environments. Nor is a lower standard of truthfulness warranted because of the consensual nature of mediation. Parties otherwise protected against lawyer misrepresentation by Rule 4.1 are not permitted to waive that protection, whether explicitly through informed consent, or implicitly by agreeing to engage in a process in which it is somehow "understood" that false statements will be made. Thus, the same standards that apply to lawyers engaged in negotiations must apply to them in the context of caucused mediation. [22]

[22] There may nevertheless be circumstances in which a greater degree of truthfulness may be required in the context of a caucused mediation in order to effectuate the goals of the client. For example, complete candor may be necessary to gain the mediator's trust or to provide the mediator with critical information regarding the client's goals or intentions so that the mediator can effectively assist the parties in forging an agreement. As one scholar has suggested, mediation, "perhaps even more than litigation, relies on candid statements of the parties regarding their needs, interests, and objectives." Menkel-Meadow, *supra* note 7, at 95. Thus, in extreme cases, a failure to be forthcoming, even though not in contravention of Rule 4.1(a), could constitute a violation of the lawyer's duty to provide competent representation under Model Rule 1.1.

We emphasize that, whether in a direct negotiation or in a caucused mediation, care must be taken by the lawyer to ensure that communications regarding the client's position, which otherwise would not be considered statements "of fact," are not conveyed in language that converts them, even inadvertently, into false factual representations. For example, even though a client's Board of Directors has authorized a higher settlement figure, a lawyer may state in a negotiation that the client does not wish to settle for more than $50. However, it would not be permissible for the lawyer to state that the Board of Directors had formally disapproved any settlement in excess of $50, when authority had in fact been granted to settle for a higher sum.

Conclusion

Under Model Rule 4.1, in the context of a negotiation, including a caucused mediation, a lawyer representing a party may not make a false statement of material fact to a third person. However, statements regarding a party's negotiating goals or its willingness to compromise, as well as statements that can fairly be characterized as negotiation "puffing," are ordinarily not considered "false statements of material fact" within the meaning of the Model Rules.

Association of Attorney-Mediators

Ethical Guidelines for Mediators

4. Disclosure of Possible Conflicts. Prior to commencing the mediation, the mediator should make full disclosure of any known relationships with the parties or their counsel that may affect or give the appearance of affecting the mediator's neutrality. A mediator should not serve in the matter if a party makes an objection to the mediator based upon a conflict or a perceived conflict.

Comment (a). A mediator should withdraw from a mediation if it is inappropriate to serve.

Comment (b). If after commencement of the mediation the mediator discovers that such a relationship exists, the mediator should make full disclosure as soon as is practicable.

7. Convening the Mediation. Unless the parties agree otherwise, the mediator should not convene a mediation session unless all parties and their representatives ordered by the court have appeared, corporate parties are represented by officers or agents who have represented to the mediator that they possess adequate authority to negotiate a settlement, and an adequate amount of time has been reserved by all parties to the mediation to allow the mediation process to be productive.

8. **Confidentiality.** A mediator should not reveal information made available in the mediation process, which information is privileged and confidential, unless the affected parties agree otherwise or as may be required by law.

Comment (a). A mediator should not permit recordings or transcripts to be made of mediation proceedings.

Comment (b). A mediator should maintain confidentiality in the storage and disposal of records and should render anonymous all identifying information when materials are used for research, educational or other informational purposes.

Comment (c). Unless authorized by the disclosing party, a mediator should not disclose to the other parties information given in confidence by the disclosing party and should maintain confidentiality with respect to communications relating to the subject matter of the dispute. The mediator should report to the court whether or not the mediation occurred, and that the mediation either resulted in a settlement or an impassé, or that the mediation was either recessed or rescheduled.

Comment (d). In certain instances, applicable law may require disclosure of information revealed in the mediation process. For example, the Texas Family Code may require a mediator to disclose child abuse or neglect to the appropriate authorities. If confidential information is disclosed, the mediator should advise the parties that disclosure is required and will be made.

Federal Rules of Evidence

Fed. R. Evid. 408. Compromise Offers and Negotiations

(a) Prohibited Uses. Evidence of the following is not admissible — on behalf of any party — either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:

> (1) furnishing, promising, or offering — or accepting, promising to accept, or offering to accept — a valuable consideration in compromising or attempting to compromise the claim; and
>
> (2) conduct or a statement made during compromise negotiations about the claim — except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.

(b) Exceptions. The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Fed. R. Evid. 501 Privilege in General

The common law — as interpreted by United States courts in the light of reason and experience — governs a claim of privilege unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute; or
- rules prescribed by the Supreme Court.

But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.

Delaware

Bankruptcy Court for the District of Delaware

LR 9019-2: Mediator and Arbitrator Qualifications and Compensation

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(iii) Disqualification.

(A) Disqualifying Events. Any person selected as a mediator or arbitrator may be disqualified for bias or prejudice in the same manner that a Judge may be disqualified under 28 U.S.C. § 44. Any person selected as a mediator or arbitrator will be disqualified in any matter where 28 U.S.C. § 455 would require disqualification if that person were a Judge.

(B) Disclosure. Promptly after receiving notice of appointment, the mediator or arbitrator must make an inquiry sufficient to determine whether there is a basis for disqualification under this Local Rule. **The inquiry shall include, but shall not be limited to, a search for conflicts of interest in the manner prescribed by the applicable rules of professional conduct for attorneys and by the applicable rules pertaining to the profession of the mediator or arbitrato**r.

(C) Objection Based on Conflict of Interest. A party to the mediation or arbitration who believes that the assigned mediator or arbitrator **has a conflict of interest** must promptly bring the issue to the attention of the mediator or arbitrator, as applicable, and to the other parties. If the mediator or arbitrator does not withdraw, and the movant is dissatisfied with this decision, the issue must be brought to the attention of the ADR Program Administrator by the mediator, arbitrator or any of the parties. If the movant is dissatisfied with the decision of the ADR Program Administrator, the issue will be brought to the Court's attention by the ADR Program Administrator or any party. The Court shall take such action as it deems necessary or appropriate to resolve the alleged conflict of interest.

LR 9019-5: Mediation

(c) The Mediation Process

***

(iv) Attendance at Mediation Conference.

(A) Persons Required to Attend. Except as otherwise provided herein or excused by the Mediator upon a showing of hardship, which, for purposes of this subsection means serious or disabling illness to a party or party representative; death of an immediate family member of a party or party representative; act of God; state or national emergency; or other circumstances of similar unforeseeable nature, the following persons must attend the mediation conference personally:

(1) Each party that is a natural person;

(2) If the party is not a natural person, including a governmental entity, a representative who is not the party's attorney of record and who has full authority to negotiate and settle the matter on behalf of the party;

(3) If the party is a governmental entity that requires settlement approval by an elected official or legislative body, a representative who has authority to recommend a settlement to the elected official or legislative body;

(4) The attorney who has primary responsibility for each party's case, including Delaware counsel if engaged at the time of mediation regardless of whether Delaware counsel has primary responsibility for a party, unless Delaware counsel requests to be and is excused from attendance by the mediator in advance of the mediation conference; and

(5) Other interested parties, such as insurers or indemnitors or one or more of their representatives, whose presence is necessary for a full resolution of the matter assigned to mediation.

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

(d) Confidentiality of Mediation Proceedings. Confidentiality is necessary to the mediation process, and mediations are confidential under these Local Rules and to the fullest extent permissible under otherwise applicable law. The provisions of this Local Rule 9019-5(d) apply to all mediations occurring in cases, contested matters and adversary proceedings pending before the Court, whether such mediation is ordered or referred by the Court or voluntarily undertaken by the parties provided that such mediation is approved by the Court. Without limiting the foregoing, except as may be otherwise ordered by the Court, the following provisions apply to any mediation under these rules:

(i) F.R.E. 408. To the fullest extent applicable, Rule 408 of the Federal Rules of Evidence (and any applicable federal or state statute, rule, common law or judicial precedent relating to the protection of settlement communications) applies to the mediation conference and any communications with the mediator related thereto. In addition to the limitations of admissibility of evidence under Federal Rule of Evidence 408, no person may rely on or introduce as evidence in connection with any arbitral, judicial or other proceeding, including any hearing held by this Court in connection with the referred matter, whether oral or written, (i) views expressed or suggestions made by a party with respect to a possible settlement of the dispute, including whether another party had or had not indicated a

willingness to accept a proposal for settlement, (ii) proposals made or views expressed by the mediator, or (iii) admissions made by a party in the course of the mediation.

(ii) Protection of Information Disclosed to the Mediator or During Mediation. Subject to subparagraph (iv) herein, the mediator and the participants in mediation are prohibited from divulging, outside of the mediation, any oral or written information disclosed by the parties or witnesses to or in the presence of the mediator, or between the parties during any mediation conference.

(iii) Confidential Submissions to the Mediator. Subject to subparagraph (iv) herein, any submission of information or documents to the mediator, including any Submission (as defined in Local Rule 9019-5(c)(iii)), prepared by or on behalf of any participant in mediation and intended to be confidential are not subject to disclosure, regardless of whether such Submission is shared with other participants in the mediation during a mediation conference.

(iv) Information Otherwise Discoverable. Information, facts or documents otherwise discoverable or admissible in evidence do not become exempt from discovery or inadmissible in evidence merely by being disclosed or otherwise used in the mediation conference or in any Submission to the mediator.

(v) Discovery from the Mediator. The mediator may not be compelled to disclose to the Court or to any person outside the mediation any records, reports, summaries, notes, communications, Submissions, recommendations made under subpart (e) of this Local Rule, or other documents received or made by or to the mediator while serving in such capacity. The mediator may not testify, be subpoenaed or compelled to testify regarding the mediation in connection with any arbitral, judicial or other proceeding. The mediator may not be a necessary party in any proceedings relating to the mediation. Nothing contained in this paragraph shall prevent the mediator from reporting the status, but not the substance, of the mediation effort to the Court in writing, from filing a Certificate of Completion as required by Local Rule 9019- 5(f), or from otherwise complying with the obligations set forth in this Local Rule. 124

(vi) Protection of Confidential Information. Nothing in this subpart of Local Rule 9019¬5(d) is intended to or shall modify any rights or obligations any entity has in connection with confidential information or information potentially subject to protection under section 107 of the Code.

(vii) Preservation of Privileges. Notwithstanding Rule 502 of the Federal Rules of Evidence, the disclosure by a party of privileged information to the mediator does not waive or otherwise adversely affect the privileged nature of the information.

Minnesota

Bankruptcy Court for the District of Minnesota

LR 9019-2: Mediation

The court may refer any adversary proceeding or contested matter for mediation by a federal judge or a mediator agreed to by the parties.

District Court for the District of Minnesota

LR 16.5: Alternative Dispute Resolution and Mediated Settlement Conference

(d) Confidentiality of Dispute Resolution Communications.

(1) Definitions.

> (A) A "confidential dispute resolution communication" is a communication that (i) relates to a settlement proposal or to a party's considerations regarding settlement and (ii) is made by a participant to a different participant during or in connection with a court-ordered alternative dispute resolution process.
>
> (B) A "participant" is anyone that participates in a court-ordered alternative dispute resolution process, including a magistrate judge or other neutral. A party and its representatives are a single "participant" for purposes of subparagraph (A).

(2) Nondisclosure. A confidential dispute resolution communication must not be disclosed outside the alternative dispute resolution process in which it was made unless the court authorizes, or the parties agree to, the communication's disclosure.

> (A) A party may file a letter seeking authorization to disclose a confidential dispute resolution communication, but the letter must not include the content of the communication at issue, even if the letter is filed under seal. This rule authorizes a party to file such a letter by ECF.
>
> (B) This rule does not prohibit the parties from entering into an agreement that establishes greater or lesser restrictions on the disclosure of confidential dispute resolution communications.
>
> (C) This rule does not address whether the terms of a settlement, once final, will be confidential.
>
> (D) This rule does not prohibit a party from disclosing information known or learned outside the alternative dispute resolution process.

New York

Bankruptcy Court for the Southern District of New York

LR 9019-1: Alternative Dispute Resolution

Alternative dispute resolution shall be conducted in the manner required by the Procedures Governing Mediation of Matters and the Use of Early Neutral Evaluation and Mediation/Voluntary Arbitration in Bankruptcy Cases and Adversary Proceedings, which shall be available on the Court's website (http://www.nysb.uscourts.gov/content/mediationprocedures).

Procedures Governing Mediation of Matters and the Use of Early Neutral Evaluation and Mediation/ Voluntary Arbitration in Bankruptcy Cases and Adversary Proceedings

2.0 The Mediator

2.3 Disqualification of a Mediator. Any person selected as a mediator may be disqualified for bias or prejudice as provided in 28 U.S.C. § 144 or if not, disinterested under 11 U.S.C. § 101. Any party selected as a mediator shall be disqualified in any matter where 28 U.S.C. § 455 would require disqualification if that person were a justice, judge or magistrate.

> [11 U.S.C. § 101(14) The term "disinterested person" means a person that—
>
> (A)is not a creditor, an equity security holder, or an insider;
>
> (B)is not and was not, within 2 years before the date of the filing of the petition, a director, officer, or employee of the debtor; and
>
> (C)does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor, or for any other reason.]

3.0 The Mediation

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

5.0 Confidentiality

5.1 Confidentiality as to the Court and Third Parties. Any statements made by the mediator, by the parties or by others during the mediation process shall not be divulged by any of the participants in the mediation (or their agents) or by the mediator to the Court or to any third party. All records, reports, or other documents received or made by a mediator while serving in such capacity shall be confidential and shall not be provided to the Court, unless they would be otherwise admissible. The mediator shall not be compelled to divulge such records or to testify in regard to the mediation in connection with any arbitral, judicial or other proceeding, including any hearing held by the Court in connection with the referred matter. Nothing in this section, however, precludes the mediator from reporting the status (though not content) of the mediation effort to the Court orally or in writing, or from complying with the obligation set forth in 3.2 to report failures to attend or to participate in good faith.

5.2 Confidentiality of Mediation Effort. Rule 408 of the Federal Rules of Evidence shall apply to mediation proceedings. Except as permitted by Rule 408, no person may rely on or introduce as evidence in connection with any arbitral, judicial or other proceeding, including any hearing held by this Court in connection with the referred matter, any aspect of the mediation effort, including, but not limited to:

A. Views expressed or suggestions made by any party with respect to a possible settlement of the dispute;

B. Admissions made by the other party in the course of the mediation proceedings;

C. Proposals made or views expressed by the mediator.

Texas

Texas, State

Ethical Guidelines for Mediators promulgated by the State Bar of Texas Alternative Dispute Resolution Section

4. Disclosure of Possible Conflicts. Prior to commencing the mediation, the mediator should make full disclosure of any interest the mediator has in the subject matter of the dispute and of any known relationships with the parties or their counsel that may affect or give the appearance of affecting the mediator's neutrality. A mediator should not serve in the matter if a party makes an objection to the mediator based upon a conflict or perceived conflict.

Comment (a). A mediator should withdraw from a mediation if it is inappropriate to serve. Comment (b). If after commencement of the mediation the mediator discovers that such a relationship exists, the mediator should make full disclosure as soon as practicable.

7. Convening the Mediation. Unless the parties agree otherwise, the mediator should not convene a mediation session unless all parties and their representatives ordered by the court have appeared, corporate parties are represented by officers or agents who have represented to the mediator that they possess adequate authority to negotiate a settlement, and an adequate amount of time has been reserved by all parties to the mediation to allow the mediation process to be productive.

8. Confidentiality. A mediator should not reveal information made available in the mediation process, which information is privileged and confidential, unless the affected parties agree otherwise or as may be required bylaw.

Comment

(a). A mediator should not permit recordings or transcripts to be made of mediation proceedings.

Bankruptcy Court for the Southern District of Texas

[no specific rule discussing mediation]

District Court for the Southern District of Texas

LR 16.4: Alternative Dispute Resolution

16.4.A. ADR Methods Available. The Court approves the use of the following ADR methods in civil cases pending before district, magistrate, and bankruptcy judges: mediation, early neutral evaluation, mini-trial, summary jury trial, and, if the parties consent, non-binding arbitration pursuant to 28 U.S.C. § 654 (1998) (collectively, "ADR"). A judge may approve any other ADR method the parties suggest and the judge finds appropriate for a case

16.4.E. Attendance; Authority to Settle. Party representatives (in addition to litigation counsel) with authority to settle and all other persons necessary to negotiate a settlement, such as insurance carriers, must attend the ADR proceeding either in person or remotely.

16.4.H. Confidentiality, Privileges and Immunities. All communications made during ADR proceedings (other than communications concerning scheduling, a final agreement, or ADR provider fees) are confidential, are protected from disclosure, and may not be disclosed to anyone, including the Court, by the provider or the parties. Communications made during ADR proceedings do not constitute a waiver of any existing privileges and immunities. The ADR provider may not testify about statements made by participants or negotiations that occurred during the ADR proceedings. This provision does not modify the requirements of 28 U.S.C. § 657 (1998) applicable to non-binding arbitrations.

16.4.I. Standards of Professional Conduct and Disqualification of ADR Providers.

(1) All providers are subject to disqualification pursuant to standards consistent with those set forth in 28 U.S.C. § 455 (1988). In addition, all ADR providers are required to comply with the State Bar of Texas Alternative Dispute Resolution Section's Ethical Guidelines for Mediators, and the Code of Ethics for Arbitrators in Commercial Disputes promulgated by the American Arbitration Association and the American Bar Association. (Amended by General Order No. 2012-13, effective October 18, 2012).

(2) Issues concerning potential ADR provider conflicts shall be raised with the judge presiding in the case relating to the ADR proceeding

Faculty

Kara E. Casteel is a partner at ASK LLP in St. Paul, Minn., and heads its Bankruptcy Litigation group. She practices in the areas of bankruptcy, creditors' rights and litigation, and has successfully litigated preference and fraudulent-transfer matters in multiple jurisdictions, including the U.S. Bankruptcy Courts for the District of Delaware, Southern District of New York, Southern District of Texas and the Southern District of Indiana. In 2022, Ms. Casteel obtained a judgment in excess of $3.5 million in a preference trial. Her representative matters include the prosecution of avoidance actions in such large bankruptcies as Dean Foods Co., Sears Holdings Corp., Quebecor World (USA), WP Steel Venture LLC, NewPage Corp., RS Legacy Corp. (f.k.a RadioShack) and hhgregg, Inc. Prior to joining ASK LLP, Ms. Casteel clerked for Hon. Casey Christian and Hon. Joseph Bueltel in the Third Judicial District of Minnesota. She is a member of the Minnesota State Bar Association, the International Women's Insolvency & Restructuring Confederation (IWIRC), ABI and the Turnaround Management Association (TMA). In 2013, she helped found the IWIRC's Minnesota chapter, and she is a past co-chair of the IWIRC-Minnesota Network. Ms. Casteel received her B.A. in 2005 in political science and legal studies from the University of Wisconsin, and her J.D. in 2008 from the University of Minnesota Law School.

Hon. Roberta A. Colton is a U.S. Bankruptcy Judge for the Middle District of Florida in Orlando, appointed in December 2017. Contemporaneously, she was appointed as a member of the judicial mediation team involved in the Puerto Rico PROMESA cases and served in that capacity until January 2022. Prior to taking the bench, Judge Colton practiced at Trenam Law in Tampa, Fla., where she was a shareholder and a member of the firm's Management Committee. Prior to joining Trenam, she served as a judicial law clerk for Hon. James C. Hill of the U.S. Court of Appeals for the Eleventh Circuit. During her more than 30 years in practice, Judge Colton was active in service to the legal profession and has been recognized for her accomplishments. Among others, she was listed in *The Best Lawyers in America* for Bankruptcy & Creditor/Debtor Rights from 1995-2016 and named one of the top 10 *Super Lawyers* in Florida from 2011-16. Judge Colton served as Eleventh Circuit Regent for the American College of Bankruptcy and as chair of the Grievance Committee of the U.S. District Court for the Middle District of Florida. She also is the former chair of the Florida Bar Business Law Section' Bankruptcy/UCC Committee, as well as the Tampa Bay Bankruptcy Bar Association. Judge Colton received her B.A. in commerce with distinction from the University of Virginia in 1979 and her J.D. from William & Mary Law School in 1982, where she served on its law review and was a national moot court finalist.

Robert M. Fishman is vice chairman of Algon Group LLC in Delray Beach, Fla., and has decades of experience as a business bankruptcy and insolvency attorney in corporate restructurings and asset liquidations. Over the course of his legal career, he has represented a wide range of clients, including debtors in possession, trustees, creditors' committees, secured creditors, litigants in bankruptcy proceedings and buyers of distressed assets. In his current role, Mr. Fishman guides businesses and stakeholders through reorganizations, workouts and strategic asset-dispositions. He is also recognized for his extensive work as a bankruptcy mediator and fee examiner, and served as the fee examiner in the City of Detroit's chapter 9 case from 2013-15. Previously, Mr. Fishman was a member of Fox Rothschild LLP in its Chicago office. He is a past ABI president and chairman, and a Fellow

of the American College of Bankruptcy. He also served as a faculty member of the ABI/St. John's University Law School Bankruptcy Mediation Training Program. Mr. Fishman received his B.A. in 1976 from the University of Illinois, Champaign/Urbana and his J.D. in 1979 from George Washington University.

Hon. Judith K. Fitzgerald is a shareholder with Tucker Arensberg, P.C. in Pittsburgh and a former member of its board of directors. She has a trial background and frequently served as a settlement judge and mediator. Judge Fitzgerald retired from her position as a U.S. Bankruptcy Judge for the Western District of Pennsylvania after more than 25 years on the bench, having presided over matters in the Western District of Pennsylvania (where she was chief judge for five years) as well as in the District of Delaware (20 years), the Eastern District of Pennsylvania (eight years) and the U.S. Virgin Islands (nine years). During her tenure as a bankruptcy judge, Judge Fitzgerald presided over many significant corporate cases and adjudicated more mass tort bankruptcies than any other bankruptcy judge in the country. Since joining Tucker Arensberg in 2013, she has served as a mediator and arbitrator in bankruptcy, consumer and commercial transaction-related proceedings. Judge Fitzgerald has been retained as an expert witness and consultant in cases throughout the country involving bankruptcy issues, insurance and reinsurance issues, fee disputes, bankruptcy-related malpractice matters, asbestos trust issues, and various commercial and contract disputes. She has represented both debtors and creditors in bankruptcy cases and works with clients on complex bankruptcy, insolvency and commercial issues. Among her many recognitions, in 2016 Judge Fitzgerald received an honorable mention by *Law360* as one of The Ten Most Influential Bankruptcy Judges in History. She served as president of the National Conference of Bankruptcy Judges, sat on ABI's Board of Directors, and is part of the education and other committees of several professional associations. In addition, she designed the Around the Circuits ethics program for the American Inns of Court. Judge Fitzgerald is an elected member of the American Law Institute and the American College of Bankruptcy, as well as other professional organizations. Before being appointed as a bankruptcy judge in 1987, she was an Assistant U.S. Attorney in the Western District of Pennsylvania, with a concentration in complex frauds and criminal tax cases. Judge Fitzgerald received her B.S. in psychology and B.A. in English writing from the University of Pittsburgh, and her J.D. from the University of Pittsburgh School of Law.