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INTEGRATING “ALTERNATIVE” DISPUTE RESOLUTION INTO BANKRUPTCY: AS SIMPLE (AND PURE) AS MOTHERHOOD AND APPLE PIE?

Nancy A. Welsh*

I. INTRODUCTION

Today, there can be little doubt that “alternative” dispute resolution is anything *but* alternative. Courts, public agencies, and private companies have embraced, and now regularly use, a wide range of dispute resolution procedures, such as arbitration, mediation, negotiation, med-arb, early neutral evaluation, and summary jury trial, to name just a few. Indeed, current empirical data regarding the disposition of litigated matters indicates that *trial* may be among the most “alternative” of the various procedures available to resolve disputes.¹ Even law schools, which often lag behind developments in legal practice and model much of their curriculum on trial and appellate advocacy, now generally offer specialized dispute resolution courses. Moreover, law schools increasingly are incorporating dispute resolution procedures and skills into many traditional doctrinal courses.² Meanwhile, the plethora of available

* Professor of Law, Penn State University, Dickinson School of Law. My thanks to Laurel Terry, Mark Desgrosseilliers, Art Hinshaw, Marie Reilly, William Woodward, Nancy Rapoport and the Hon. Samuel Bufford for their comments during the development of this Article and to the participants at the Conference on Conflict Resolution and the Economic Crisis, held at the William S. Boyd School of Law, University of Nevada Las Vegas. My thanks as well to Jean Sternlight for the invitation to participate in the Conference, David Brown for his excellent research assistance throughout, Nicole Kalis for her assistance with parts of the Article, and Kelly Towns and Carolina Aguilar, upon whose initial research this Article continues to build. Any mistakes are, of course, my own.

¹ See, e.g., Marc Galanter, *A World Without Trials?*, 2006 J. DISP. RESOL. 7, 12 (2006) (“When the federal rules of civil procedure were enacted in 1938, about 18 percent of civil cases in federal court were resolved by trial. That figure fell to about 12 percent in 1962 and today it is 1.7 percent.”); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. OF EMPIRICAL LEGAL STUD. 459, 459 (2004).

² See John Lande & Jean R. Sternlight, *The Potential Contribution of ADR to an Integrated Curriculum: Preparing Law Students for Real World Lawyering*, 25 OHIO ST. J. ON DISP. RESOL. 247, 252 (2010) (urging “greater integration of instruction of legal doctrine and reasoning, litigation skills, transactional skills, and ADR”). See generally Michael Moffitt, *Islands, Vitamins, Salt, Germs: Four Visions of the Future of ADR in Law Schools (and a Data-Driven Snapshot of the Field Today)*, 25 OHIO ST. J. ON DISP. RESOL. 25 (2010) (reporting various data regarding the status of ADR topics, courses and faculty in the legal academy).

dispute resolution procedures continues to expand, thus confounding attempted bright line distinctions between “adjudicative” and “consensual” categories.³

Nonetheless, many judges, lawyers (and law students) do not truly understand the dispute resolution processes that are available and how they should be used. In the shadow of the current economic crisis, this lack of knowledge is likely to have negative consequences, particularly in those areas of practice such as bankruptcy and foreclosure in which clients, lawyers, regulators, and courts work under pressure, often with inadequate time and financial resources to permit careful analysis of procedural options. Potential negative effects can include: (1) impairment of a lawyer’s ability to provide her clients with competent advice regarding the appropriate application of these procedures; (2) impairment of a lawyer’s ability to suggest new dispute resolution hybrids that are both creative *and* implementable; (3) inappropriate use of dispute resolution procedures, adversely affecting clients, third party beneficiaries/victims, sponsoring institutions, and the integrity of dispute resolution as a field; (4) inadequate regulation, monitoring, and use of dispute resolution procedures; (5) the temptation of some lawyers, clients, and institutions to make *intentionally* inappropriate and even unethical use of dispute resolution procedures; and (6) new, and sometimes entirely unnecessary, satellite litigation arising out of the use of dispute resolution procedures.⁴ Meanwhile, the current ethics rules for lawyers, which are based largely on the American Bar Association (ABA) Model Rules of Professional Conduct⁵ and are supposed to provide some sort of an ethical and professional brake upon “sharp practices”⁶ by lawyers,⁷ are either so ambiguous or so insufficient in their treatment of “non-adjudicative” dispute

³ See Nancy A. Welsh, *You’ve Got Your Mother’s Laugh: What Bankruptcy Mediation Can Learn from the Her/History of Divorce and Child Custody Mediation*, 17 AM. BANKR. INST. L. REV. 427, 456-57 (2009) (describing hybrids).

⁴ See generally James R. Coben & Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 HARV. NEGOT. L. REV. 43 (2006) (describing litigation arising out of mediation); James R. Coben & Peter N. Thompson, *Mediation Litigation Trends: 1999-2007*, 1 WORLD ARB. & MEDIATION REV. 395 (2007) (updating previous research regarding litigation arising out of mediation).

⁵ The American Bar Association (ABA) maintains several websites regarding state implementation of ethical rules for lawyers. See, e.g., *Charts Comparing Individual Professional Conduct Model Rules as Adopted or Proposed by States to ABA Model Rules*, ABA, http://www.abanet.org/cpr/pic/rule_charts.html (last visited Feb. 26, 2011) (showing state comparisons on a rule-by-rule basis); *CPR Policy Implementation Committee*, ABA, <http://www.abanet.org/cpr/pic/mrpc.html> (last visited Feb. 26, 2011) (state implementation of ethics rules); *Status of State Review of Professional Conduct Rules*, ABA, http://www.abanet.org/cpr/pic/ethics_2000_status_chart.pdf (last updated Nov. 3, 2010) (showing states that have adopted the ABA Model Rules and considered the Ethics 2000 revisions). My thanks to my colleague, Laurel Terry, for making me aware of these resources.

⁶ See *Hickman v. Taylor*, 329 U.S. 495, 511 (1947) (explaining that despite the provision for discovery in the then-relatively new Federal Rules of Civil Procedure, requiring a lawyer to provide his work product to opposing counsel would inevitably result in “[i]nefficiency, unfairness and sharp practices . . . in the giving of legal advice and in the preparation of cases for trial”).

⁷ Of course, the threat of a legal malpractice claim is also supposed to discourage violations of lawyers’ professional and fiduciary duties. This Article, however, will deal only with ethics issues.

resolution procedures⁸ that they may invite bad behavior⁹ by clever clients or their lawyers.¹⁰

Currently, there is limited evidence of these potential negative consequences. This Article, however, tells two tales—one fictional, the other real—to illustrate some of the negative effects described *supra*. The Article begins with a hypothetical and considers guidance provided by the relevant provisions of the Model Rules of Professional Conduct.¹¹ The Article then turns to *In re American Capital Equipment, Inc.*,¹² the 2009 case that inspired key elements of the hypothetical. Ultimately, this Article will urge that while now is the time to advocate for the increased use of dispute resolution procedures in bankruptcy and foreclosure matters, now is also the time to demand more stringent education and regulation of lawyers to assist them in making sufficiently knowledgeable, skillful, and ethical use of “alternative” dispute resolution procedures,

⁸ In 2002, the Commission on Ethics and Standards in ADR drafted a proposed Model Rule 4.5 as an alternative to Model Rule 2.4. It would have provided for four different types of process: adjudicative, evaluative, facilitative, and hybrid. See CPR-GEORGETOWN COMM’N ON ETHICS & STANDARDS IN ADR, MODEL RULE FOR THE LAWYER AS THIRD-PARTY NEUTRAL (2002) [hereinafter MODEL RULE FOR THE LAWYER AS THIRD-PARTY NEUTRAL], available at <http://www.cpradr.org/Portals/0/Resources/ADR%20Tools/Clauses%20&%20Rules/CPR%20Model%20Rule%20for%20The%20Lawyer%20as%20Third-Party%20Neutral.pdf>; Duane W. Krohnke, *ADR Ethics Rules to Be Added to Rules of Professional Conduct*, ALTERNATIVES, June 2000, at 108, 115 (comparing the different potential approaches and observing that the Model Rule approach offers an “‘exit door’ from the lawyers’ ethical rules linked to an ‘entrance’ door to an ADR neutral’s ethical rules”).

⁹ The definition of “bad behavior” is inevitably contested. Professor Leonard Riskin, for example, has noted that while mindfulness has the potential to foster ethical behavior, others have urged that it might make its practitioners “too ethical” for the real world that lawyers inhabit. See Leonard L. Riskin, *Awareness and Ethics in Dispute Resolution and Law: Why Mindfulness Tends to Foster Ethical Behavior*, 50 S. TEX. L. REV. 493, 502-03 (2009) (citing Scott Peppet, *Can Saints Negotiate? A Brief Introduction to the Problems of Perfect Ethics in Bargaining*, 7 HARV. NEGOT. L. REV. 83, 96 (2002)).

¹⁰ See Symposium, *Ethics in the Expanding World of ADR: Considerations, Conundrums, and Conflicts*, 49 S. TEX. L. REV. 787 (2008); see, e.g., Robert C. Bordone, *Fitting the Ethics to the Forum: A Proposal for Process-Enabling Ethical Codes*, 21 OHIO ST. J. ON DISP. RESOL. 1, 2-3 (2005); Christopher M. Fairman, *Ethics and Collaborative Lawyering: Why Put Old Hats on New Heads?*, 18 OHIO ST. J. ON DISP. RESOL. 505, 505-08 (2003); Kimberlee K. Kovach, *Lawyer Ethics Must Keep Pace with Practice: Plurality in Lawyering Roles Demands Diverse and Innovative Ethical Standards*, 39 IDAHO L. REV. 399, 420 (2003); 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, 948-49 (2001); Kimberlee K. Kovach, *The Intersection (Collision) of Ethics, Law, and Dispute Resolution: Clashes, Crashes, No Stops, Yields, or Rights of Way*, 49 S. TEX. L. REV. 789, 819 (2008) (“One of the primary purposes of this symposium was to highlight those arenas where current existing rules and parameters have little or no relevance.”); Carrie Menkel-Meadow, *Maintaining ADR Integrity*, ALTERNATIVES, Jan. 2009, at 1, 8 (noting that “there is fear that clever lawyers and manipulative and profit-hungry (and cost-minimizing) business owners and legal clients have learned to misuse some forms of ADR for less-than-honest purposes”).

¹¹ There have been some calls for bankruptcy-specific ethics rules for lawyers. See e.g., Nancy B. Rapoport, *Our House, Our Rules: The Need for a Uniform Code of Bankruptcy Ethics*, 6 AM. BANKR. INST. L. REV. 45, 46-47 (1998); Nancy B. Rapoport, *The Intractable Problem of Bankruptcy Ethics: Square Peg, Round Hole*, 30 HOFSTRA L. REV. 977, 979 (2002).

¹² *In re Am. Capital Equip., Inc.*, 405 B.R. 415 (Bankr. W.D. Pa. 2009).

especially in the court-connected context. Further, both the hypothetical and *In re American Capital Equipment, Inc.* illustrate law schools' essential role in educating students regarding existing dispute resolution procedures and their application. Ideally, such education should include opportunities to consult with real (or, at the very least, simulated) clients regarding procedural issues, represent clients in such dispute resolution procedures, and experiment with the development and testing of new and hybrid procedures. Law schools, meanwhile, are much more likely to incorporate such material into their curricula if bar exams test for future lawyers' knowledge and thoughtful application of dispute resolution procedures. Legal continuing education programs also should deal with the law and ethics of dispute resolution procedures in more detail to ensure that practicing lawyers have sufficient knowledge of these matters. Last, the Model Rules of Professional Conduct and states' ethics rules for lawyers should be updated to respond to the many ethical ambiguities that currently haunt non-adjudicative court-connected dispute resolution.

II. THE HYPOTHETICAL

The following hypothetical describes an evolving set of facts in a bankruptcy matter. The hypothetical begins with the foundational facts and the situation that creates the first of several decision points. At each decision point, we seek guidance from the Model Rules of Professional Conduct before moving on. The hypothetical is designed to mirror the evolving reality of lawyers' legal and ethical decision-making and their relationships with clients.¹³

We represent the rather unimaginatively-named XYZ Company, a privately held corporation. XYZ has fallen on hard economic times and has decided to file for bankruptcy. Rather than liquidate, however, XYZ will attempt to stay in business by reorganizing under Chapter 11. Chapter 11 will permit our client to continue to control its assets and run its affairs under the supervision of the Office of the United States Trustee and under the watchful eyes of creditors and likely other official committees. Once XYZ develops its plan of reorganization, its proposed plan will be subject to review by these parties and the federal bankruptcy court. Further, the creditors will be able to vote upon the plan. The bankruptcy court ultimately will determine whether to confirm the proposed plan.¹⁴

Unfortunately, there are 1,000 pending lawsuits that name XYZ as a defendant; our client manufactured a product that contained asbestos, and all of the plaintiffs in these lawsuits allege that their asbestos-related injuries were due, at least in part, to exposure to XYZ's product. XYZ's insurer, Tightfist, has not authorized the settlement of a single case, and XYZ has been wrangling with Tightfist over coverage issues. Resolution of the pending lawsuits do not appear to come within the jurisdiction of the federal bankruptcy court,¹⁵ though

¹³ Like all hypotheticals, however, this one is likely to be an imperfect reflection of that reality.

¹⁴ JEFF FERRIELL & EDWARD J. JANGER, UNDERSTANDING BANKRUPTCY 762 (2d ed. 2007).

¹⁵ See Mark L. Desgrosseilliers, *Gimme Shelter: The Use of Alternative Dispute Resolution Procedures to Resolve Tort Claims in Bankruptcy*, 18 NORTON J. BANKR. L. & PRAC. 19, 21-23 (2009); see also 11 U.S.C. §§ 362(a)(1), 524(g) (2006); 28 U.S.C. §§ 157(b)(2)(B),

the court might be able to hear and decide all or some of the cases with the parties' consent. The judge, however, has indicated an unwillingness to play that role.¹⁶ The continued existence of the asbestos-related lawsuits has the potential to hinder our client's ability to secure funding and solicit potential buyers, among other things. XYZ's CEO has asked for our legal advice on how to deal with the pending lawsuits. Not surprisingly, he would like them to go away. He also would like the insurer to pay any claims.

A. *Understanding Dispute Resolution Options and the Potential Consequences*

We may want to advise XYZ to consider the use of a dispute resolution procedure to resolve these lawsuits. Obviously, we will be guided by our client's needs, goals, and legal obligations. Given the situation, we also may choose¹⁷ or be required to consider, the needs and goals of the plaintiffs in the

(c)(2), (d), (e), 1334(b) (2006); *In re Gorilla Companies*, 429 B.R. 308, 315 (Bankr. D. Ariz. 2010). Some commentators and courts prefer to describe statutory limits upon district courts' referrals of personal injury and wrongful death claims to bankruptcy courts as merely "procedural," rather than "jurisdictional," limits. The boundary between these two categories can be less than distinct and has been the subject of some study. Nonetheless, because the question is whether bankruptcy courts possess the constitutional and statutory authority to adjudicate final and enforceable decisions regarding such claims, I have chosen to use the language of jurisdiction in this Article. See CHARLES ALAN WRIGHT ET AL., 17 FEDERAL PRACTICE AND PROCEDURE § 4106 (3d ed. 1998) ("The district court may refer bankruptcy cases to a bankruptcy judge, who is empowered to determine only the so[-]called 'core proceedings' specifically enumerated in the statute. A bankruptcy court lacks subject matter jurisdiction to liquidate or estimate contingent or unliquidated personal injury tort or wrongful death claims for purposes of distribution.") (footnotes omitted); Howard M. Wasserman, *The Demise of "Drive-By" Jurisdictional Rulings*, 105 NW. U. L. REV. COLLOQUY 184, 184-85 (2011) ("Jurisdiction essentially means 'legitimate authority.' Adjudicative jurisdiction refers to a court's constitutional and statutory authority (or power) to hear a class of cases and to consider and resolve the legal and factual issues raised. Adjudicative-jurisdictional rules contrast, and often are confused, with two other types of rules: 1) substantive merits rules that control real-world conduct and function as rules of decision determining the validity and success of a plaintiff's claim for relief from a defendant over a particular transaction or occurrence; and 2) procedural, or 'claim-processing,' rules, which determine how a court processes and adjudicates the claim for relief, and how the parties and the court behave within the litigation process.") (footnotes omitted). The current practice of permitting parties to consent to bankruptcy courts' adjudication of such claims is, of course, inconsistent with the general understanding that parties do not have the power to waive deficiencies of subject matter jurisdiction. See Wasserman, *supra*, at 197-98.

¹⁶ This is due to the needs of the hypothetical. In real life, a judge might make this choice as a result of lack of time, the number of parties involved, etc.

¹⁷ See Amy J. Schmitz, *Ethical Considerations in Drafting and Enforcing Consumer Arbitration Clauses*, 49 S. TEX. L. REV. 841, 877 (2008) (urging that "[a]ttorneys representing companies in drafting or enforcing consumer arbitration clauses should . . . remain committed to justice and ethical considerations that transcend stark professional conduct rules. This means that they should go beyond rote assumptions of arbitration's benefits to consider the real risks and impacts of onerous arbitration provisions. It also means that they should refuse to draft provisions that, upon reflection, appear likely to conceal companies' illegal conduct or squelch consumers' procedural and substantive rights."). The attorneys for XYZ will need to assist their client in meeting its obligations as a debtor-in-possession under the Bankruptcy Code. Thus, these attorneys may have less discretion to accommodate the interests of those who have not been judged to be creditors. See generally C. R. ("Chip")

asbestos-related lawsuits as well as XYZ's other creditors. But what type(s) of dispute resolution would be most appropriate? Would advising XYZ regarding dispute resolution options be consistent with our ethical obligations as lawyers? Would we have any concerns about any of the consequences of any of these dispute resolution procedures for our client? Would we have any obligation to disclose these concerns? Would we need to do any special planning for these procedures or special preparation of our client?

Model Rules of Professional Conduct 1.1, 1.2, 1.4, and 2.1 are relevant in responding to these questions. Rule 1.1 states: "A lawyer shall provide competent representation to a client."¹⁸ It further defines "competent representation" as "requir[ing] the *legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.*"¹⁹ Comment 2 is particularly helpful here:

A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. . . . Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study . . .²⁰

Clearly, we must have sufficient knowledge about the dispute resolution options available to our client. The most frequently used "alternative" procedures are negotiation, mediation, and arbitration. Based on the limited information currently available, it seems that any of these could be appropriate here. Potentially, we also could advise XYZ to use med-arb, which is a hybrid of mediation and arbitration. We could even recommend a tiered—or three step—procedure: offer and exchange as the first step (consisting of a plaintiff's submission, a responsive take-it-or-leave-it settlement offer from XYZ, and plaintiff's decision whether or not to take the offer), followed by sixty days for mediation as the second step, if the offer and exchange do not result in settlement, and a third step of binding arbitration in the event that mediation does not produce a settlement.²¹ We will need to do more research regarding our client, its insurance, likelihood of liability, extent of damages, and the impact of our Chapter 11 posture in order to choose the most appropriate procedure.

Bowles, Jr. & Nancy B. Rapoport, *Debtor Counsel's Fiduciary Duty: Is There A Duty to Rat in Chapter 11?*, 29 AM. BANKR. INST. J. 16 (2010); C. R. Bowles, Jr. & Nancy B. Rapoport, *Has the DIP's Attorney Become the Ultimate Creditors' Lawyer in Bankruptcy Reorganization Cases?*, 5 AM. BANKR. INST. L. REV. 47 (1997); Jonathan Lipson, *Directors' Duties to Creditors: Power Imbalance and the Financially Distressed Corporation*, 50 UCLA L. REV. 1189 (2003).

¹⁸ MODEL RULES OF PROF'L CONDUCT R. 1.1 (2007).

¹⁹ *Id.* (emphasis added).

²⁰ *Id.* R. 1.1 cmt. 2 (emphasis added).

²¹ See *In re Eagle Bus Mfg., Inc.*, 134 B.R. 584, 591 (Bankr. S.D. Tex. 1991) (describing three-tiered procedure); H. Slayton Dabney, Jr. & Dion W. Hayes, *Bankruptcy Lawyers Better Tune Up Their ADR Skills: Best Products Is One Case Where Mediation Really Worked*, 18 AM. BANKR. INST. J. 16, 16-17 (1999); William J. Woodward, Jr., *The Third Way: Mediation of Products Claims in the Piper Aircraft Trust*, 17 AM. BANKR. INST. L. REV. 463, 468-69 (2009); Carolyn M. Penna, *The Greyhound ADR Program*, N.Y. L.J., Dec. 13, 1990, at 3 (describing Greyhound bankruptcy and ADR program).

We also need to be aware that the use of *any* dispute resolution procedure, or set of procedures, may predictably involve particular legal problems. Let's begin by returning to the options of negotiation, mediation, and arbitration. The fact that these procedures have names suggests that those names mean something very concrete. In fact, these procedures can vary dramatically depending upon the specific procedural elements that the lawyers and clients select or that the designated dispute resolution neutral imposes.

Negotiation may involve only the lawyers or, consistent with the approach now used in collaborative and cooperative law,²² could involve the clients in "four-way meetings." Mediation, conversely, involves the addition of a mediator to assist with reaching settlement. The mediator could be a judge, a lawyer, other professional, or someone who has simply decided to call himself a mediator. The mediator may focus on facilitating the parties' communications and decision-making processes, or the mediator may offer his own non-binding assessment of the claim and propose a settlement range. The mediator may even try to help the plaintiffs' and defendants' representatives see each other as fellow human beings, with needs for affiliation, autonomy, and understanding.²³ These different approaches to mediation are described in a variety of ways; "facilitative,"²⁴ "elicitive,"²⁵ "evaluative,"²⁶ "directive,"²⁷ "transformative,"²⁸ and "understanding-based"²⁹ are just some of the names used to

²² See NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, UNIFORM COLLABORATIVE LAW RULES AND UNIFORM COLLABORATIVE LAW ACT 1 (2010), available at http://www.law.upenn.edu/bll/archives/ulc/ucla/2010_final.pdf.

²³ See Leonard Riskin & Nancy A. Welsh, *Is That All There Is?: "The Problem" in Court-Oriented Mediation*, 15 GEO. MASON L. REV. 863, 886-87 (2008) (regarding application of Fisher and Shapiro categories).

²⁴ See Bernard Mayer, *Facilitative Mediation*, in DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS 29 (Jay Folberg et al. eds., 2004) (discussing mediation as facilitative process); Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 24 (1996) (discussing mediation in facilitative form where mediator clarifies and enhances communications between parties in order to help them come to decision).

²⁵ See Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1, 23 (2003).

²⁶ See Riskin, *supra* note 24, at 44-45 (noting that although evaluative approach may make it easier for parties to reach resolution because evaluative mediator provides recommendations and assessments, thereby removing some of parties' decision-making burdens, the mediator's evaluations may impede parties' ability to appreciate their own and each other's positions and make the process more antagonistic).

²⁷ See Riskin, *supra* note 25, at 30 (defining term directive as "almost any conduct by [which] the mediator directs the mediation process, or the participants, toward a particular procedure or perspective or outcome").

²⁸ See ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT 46, 217-18 (rev. ed. 2005) (describing the transformative theory as based on the notion that people perceive conflict as an interactional crisis and the role of a transformative-oriented mediator as assisting parties in overcoming their crisis by allowing parties to define the mediation process and encouraging fully-informed voluntary resolution, rather than forcing settlement); Robert A. Baruch Bush & Sally Ganong Pope, *Changing the Quality of Conflict Interaction: The Principles and Practice of Transformative Mediation*, 3 PEPP. DISP. RESOL. L.J. 67, 77 (2002) ("In the transformative mediation process, parties can recapture their sense of competence and connection, reverse the negative conflict cycle, re-establish a constructive (or at least neutral) interaction and

describe different models. Some mediators specialize in one approach while others use a mix of approaches and techniques.

Arbitration, meanwhile, also comes in many variations. It may result in a binding award, or it may be non-binding. The process can involve one arbitrator or a three-member panel. The arbitrator(s) may exercise complete discretion in determining an award or be limited by a provision for “high-low” or “final offer”³⁰ (also called “baseball”) arbitration. The parties may choose to be bound by pre-existing rules of evidence—or not. Med-arb (mediation followed by arbitration) and the tiered provisions described *supra*³¹ could involve a single neutral serving first as the mediator and then becoming the arbitrator, or we might select a different neutral for each phase.

Each named procedure, meanwhile, could invoke different legal obligations and limits. This is relatively obvious for arbitration, in light of the decisions that must be made regarding the binding nature of the arbitrator’s award, the scope of the arbitrator’s authority, the relevance of federal or state rules of evidence, etc. Many mediation advocates (and opponents), however, still view the mediation process as primarily “non-legal.”³² In actuality, the process can be laden with legal issues. Most mediators, for example, will promise to keep “confidential” any communication that occurs in mediation, even if the communication constitutes an admission of liability or could lead to evidence undermining a claim. This all seems quite self-evident until problems arise. Will the communications between the mediator and one or more of the lawyers

move forward on a positive footing, with the mediator’s help.”); Joseph Folger, *Harmony and Transformative Mediation Practice: Sustaining Ideological Differences in Purpose and Practice*, 84 N.D. L. REV. 823, 844-48 (2008) (articulating four types of transformative mediation techniques that “characterize the essential elements of transformative interventions”: allowing parties to control the process, mediator’s maintenance of the non-directive role, encouraging parties’ expression and examination of differences, and supporting parties’ transformations toward enlightenment and self-empowerment); Tina Nabatchi & Lisa B. Bingham, *Transformative Mediation in the USPS Redress Program: Observations of ADR Specialists*, 18 HOFSTRA LAB. & EMP. L.J. 399, 401-02 (2001) (examining transformative mediation in the employment setting as a viable alternative to the traditional adversarial-based process and as a vehicle for parties to seize greater control over their own conflicts and learn how to effectively manage future conflicts).

²⁹ See generally GARY FRIEDMAN & JACK HIMMELSTEIN, CHALLENGING CONFLICT: MEDIATION THROUGH UNDERSTANDING (2008).

³⁰ See Elissa M. Meth, *Final Offer Arbitration: A Model for Dispute Resolution in Domestic and International Disputes*, 10 AM. REV. INT’L ARB. 383, 384 (1999); see also Jason B. Shorter, *Final-Offer Arbitration for Health Care Billing Disputes: Analyzing One State’s Proposed Dispute Resolution Process*, 9 APPALACHIAN J.L. 191, 199-201 (2010).

³¹ See *supra* text accompanying note 21.

³² See Brian Jarrett, *The Future of Mediation: A Sociological Perspective*, 2009 J. DISP. RESOL. 49, 74 (anticipating a growing divide between “legal and non-legal” parts of the mediation field); Sida Liu, *Beyond Global Convergence: Conflicts of Legitimacy in a Chinese Lower Court*, 31 LAW & SOC. INQUIRY 75, 95 (2006) (observing that “skills required in mediation are no longer legal knowledge, but mostly interpersonal skills and familiarity with the customs of the local community” or “nonlegal skills”); see also Jacqueline M. Nolan-Haley, *The Merger of Law and Mediation: Lessons from Equity Jurisprudence and Roscoe Pound*, 6 CARDOZO J. CONFLICT RESOL. 57, 64 n.60 (2004) (noting that “the practice of mediation has evolved to accommodate a diverse range of mediator and party expectations, which are highly dependent on context” and that key contextual elements are whether disputes are legal or non-legal and whether mediation is conducted within or outside the court).

occurring prior to the date set for the mediation session, or after it, be considered “mediation communications?” Will the parties’ actions during mediation be considered “mediation communications?” If the definition of “mediation communications” that is contained in the agreement to mediate varies from the definition contained in the relevant court’s local rule, which controls? Many states’ legislatures and courts have adopted mediation privilege statutes.³³ Under what circumstances will parties be deemed to have waived the privilege? What findings must a court make in order to permit testimony by the mediator or entry of a document into evidence, regardless of the claimed privilege? If the “mediator” is an employee of the one of the parties, will this “mediation” come within the privilege statute? The answers to these questions can vary dramatically from state to state, though several states now pattern their mediation privilege after the provisions of the Uniform Mediation Act.³⁴ The federal courts have also developed their own evidentiary privilege for mediation.³⁵ Which definition of the privilege will prevail in the event that a state’s evidentiary rules differ from federal common law?³⁶

We had also considered recommending med-arb or a tiered process that might result in the same neutral serving as mediator and then arbitrator. If the neutral conducts part of the mediation phase in caucus—thus engaging in *ex parte* communications with each party—and the case fails to settle and then proceeds to the binding arbitration phase, may the neutral—now the arbitrator—consider what she learned in caucus? Because neither party would be aware of what was said in caucus by the other party, it would seem that the due process right to confront adverse witnesses would be violated.³⁷ Generally, such a Constitutional right would not apply to private arbitration,³⁸ but if the

³³ See, e.g., FLA. STAT. ANN §§ 44.401-.406 (West 2003 & Supp. 2011); 42 PA. CONS. STAT. ANN. § 5949 (West 2000).

³⁴ NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS, UNIFORM MEDIATION ACT (2003), available at <http://www.law.upenn.edu/bll/archives/ulc/mediat/2003finaldraft.pdf>; see, e.g., OHIO REV. CODE ANN. §§ 2710.01-.10 (West 2004); WASH. REV. CODE ANN. §§ 7.07.010-.904 (West 2005).

³⁵ See Lisa A. Lomax, *Alternative Dispute Resolution in Bankruptcy: Rule 9019 and Bankruptcy Mediation Programs*, 68 AM. BANKR. L.J. 55, 76 (1994).

³⁶ See FED. R. EVID. 501. In cases involving both federal and state claims, this has the potential to raise interesting *Erie Railroad Co. v. Tompkins* issues, but I will save that discussion and analysis for another day.

³⁷ See *Hamdan v. Rumsfeld*, 548 U.S. 557, 721-22 (2006) (recognizing Hamdan’s right to confront witnesses against him); *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (finding that the military commission violated due process, due to detainee’s lack of knowledge of evidence against him and subsequent inability to question such evidence); *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970) (identifying the opportunity to question adverse witnesses as one of the elements of due process); see also *Boumediene v. Bush*, 553 U.S. 723, 784 (2008).

³⁸ See Sarah Rudolph Cole, *Arbitration and State Action*, 2005 BYU L. REV. 1, 47-48; Sarah Rudolph Cole, *Fairness in Securities Arbitration: A Constitutional Mandate?*, 26 PACE L. REV. 73, 76 (2005); Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 994-1009 (2000); Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court’s Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1, 40-47 (1997); Nancy A. Welsh, *What Is “(Im)Partial Enough” in a World of Embedded Neutrals?*, 52 ARIZ. L. REV. 395, 431 (2010) (citing

Federal Arbitration Act applied, perhaps the due process jurisprudence could be imported into one of the provisions for vacatur.³⁹

The resolution of these legal issues involving mediation could lead to very different consequences for lawyers, clients, third party beneficiaries/victims, and mediators. In fact, satellite litigation has already arisen, most often when one of the parties seeks to set aside or enforce a mediated settlement agreement or discover information revealed in mediation in order to pursue related claims.⁴⁰ Fortunately, the incidence of such litigation is not high, but it is increasing.⁴¹ Meanwhile, there are significant numbers of lawsuits filed to vacate arbitral awards or set aside or enforce negotiated agreements or pre-

Richard C. Reuben, *Public Justice: Toward A State Action Theory of Alternative Dispute Resolution*, 85 CAL. L. REV. 577, 615-19 (1997) (summarizing arguments made regarding the potential for private arbitration to represent state action).

³⁹ See 9 U.S.C. § 10(a)(3) (2006) (providing for vacatur “where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced”).

⁴⁰ See, e.g., *Cassel v. Superior Court*, 244 P.3d 1080, 1097 (Cal. 2011) (communications between lawyer and client while in caucus found to be confidential under California statutes and thus excluded from evidence in subsequent legal malpractice action); *Rojas v. Superior Court*, 93 P.3d 260, 270 (Cal. 2004) (plaintiff-tenant was not permitted access to photographs taken by building owner for use in her own mediation with contractor); *Foxgate Homeowners’ Ass’n, Inc. v. Bramalea Cal., Inc.*, 25 P.3d 1117 (Cal. 2001) (court had no inherent power to fashion exception to California’s rigorous mediation confidentiality statute that would permit mediator to disclose sanctionable conduct); *Porter v. Wyner*, 107 Cal. Rptr. 3d 653, 660-61 (Cal. Ct. App. 2010) (involving the admissibility of communications between attorney and client while in caucus during mediation); *In re Waller*, 573 A.2d 780, 785 n.5 (D.C. 1990) (lawyer-mediator in court-ordered mediation acted properly in reporting counsel’s misconduct to judge, who then reported it to bar counsel; mediation confidentiality order not applicable); see also NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS, *supra* note 34, at 30 (“Mediators . . . are not precluded by the Act from reporting misconduct to an agency or tribunal other than one that might make a ruling on the dispute being mediated.”); *In re A.T. Reynolds & Sons, Inc.*, 424 B.R. 76 (Bankr. S.D.N.Y. 2010) (sanctioning counsel for failure to engage in sufficient discussion and risk analysis while in court-ordered mediation). See generally Ellen Deason, *The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability?*, 85 MARQ. L. REV. 79 (2001); Rebecca H. Hiers, *Navigating Mediation’s Uncharted Waters*, 57 RUTGERS L. REV. 531, 576-78 (2005); Mori Irvine, *Serving Two Masters: The Obligation Under the Rules of Professional Conduct to Report Attorney Misconduct in a Confidential Mediation*, 26 RUTGERS L.J. 155 (1994); Pamela A. Kenra, *Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict for Attorney-Mediators Between the Duty to Maintain Mediation Confidentiality and the Duty to Report Fellow Attorney Misconduct*, 1997 BYU L. REV. 715, 733-34.

⁴¹ See Coben & Thompson, *Mediation Litigation Trends: 1999-2007*, *supra* note 4, at 395 (reporting 95 percent increase in litigation involving mediation issues between 1999 and 2003; also reporting a steady increase in federal opinions); Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 87 (2001) (proposing use of a three-day cooling off period for mediated agreements in order to reduce likelihood of legal enforcement battles and increase likelihood of good mediation practice). There is also potential for mediator liability claims. See Michael Moffitt, *Ten Ways to Get Sued: A Guide for Mediators*, 8 HARV. NEGOT. L. REV. 81, 87-88 (2003); Michael L. Moffitt, *The Four Ways to Assure Mediator Quality (and Why None of Them Work)*, 24 OHIO ST. J. ON DISP. RESOL. 191, 222-23 (2009) (noting that cases finding a mediator liable are unlikely to occur, but could nonetheless have strong deterrent effects).

dispute mandatory arbitration clauses. Rule 1.1, along with Comment 2, make clear that if we choose to advise XYZ regarding the selection, contractual creation, and implementation of any dispute resolution procedures, we are likely to violate our obligation to provide competent representation if we do not understand the differences among the primary dispute resolution procedures writ large *as well as* the differences among each procedure's variations arising out of its different component parts and placement within different substantive and jurisdictional contexts.

Do we *need* to advise XYZ regarding these procedures and the differences among them? According to Rule 1.2, we must abide by XYZ's decisions regarding the objectives of our representation, but are required only to "consult" with our client regarding the means by which we will try to achieve these objectives.⁴² Rule 1.4(a)(2) elaborates that "[a] lawyer shall. . . *reasonably* consult with the client about the means by which the client's objectives are to be accomplished,"⁴³ while Rule 2.1 provides that "a lawyer shall exercise independent professional judgment and render candid advice."⁴⁴ Comment 5 to Rule 2.1 specifically references the counseling of clients regarding the potential use of dispute resolution:

In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. *Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation.* A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.⁴⁵

These rules suggest that we certainly will not violate our ethical obligations if we choose to advise XYZ about the potential use of dispute resolution procedures that might assist with its planned reorganization.⁴⁶ At the same time, the conditional language of Comment 5 makes it less than clear that we have an affirmative obligation to provide this advice. Some states, on the other hand, have found such an obligation.⁴⁷

If we decide to provide this advice to XYZ, how much does the CEO need to know? The significant differences among dispute resolution procedures, described *supra*, suggest the importance of ensuring that clients are *sufficiently*

⁴² MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2007).

⁴³ *Id.* R. 1.4(a)(2) (emphasis added).

⁴⁴ *Id.* R. 2.1.

⁴⁵ *Id.* R. 2.1 cmt. 5 (emphasis added).

⁴⁶ Comment 5 may even suggest that we missed an important opportunity to advise our client about alternatives to litigation when plaintiffs first began filing their asbestos-related claims.

⁴⁷ See Kristin L. Fortin, *Reviving the Lawyer's Role as Servant Leader: The Professional Paradigm and a Lawyer's Ethical Obligation to Inform Clients About Alternative Dispute Resolution*, 22 GEO. J. LEGAL ETHICS 589, 626, n.268 (2009) (listing Virginia, Michigan, Pennsylvania, Oregon, Massachusetts, and Missouri as states that have statutes or ethics opinions requiring lawyers to advise clients about ADR).

informed about the procedures and their potential consequences. Rule 1.4(b) provides that “[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”⁴⁸ Comment 5 to Rule 1.4 expands upon this requirement *and* muddies the waters:

The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation *and the means by which they are to be pursued*, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. *For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement.* In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. *On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client’s best interests, and the client’s overall requirements as to the character of representation.*⁴⁹

In deferring to “reasonable client expectations”⁵⁰ and “the client’s overall requirements as to the character of representation,”⁵¹ Comment 5 unfortunately seems to substitute the ethics of the marketplace for a general professional ethic that is consistently applicable. Sophisticated clients with substantial experience with dispute resolution options are likely to know enough to demand advice regarding the potential legal consequences of using a particular procedure within a particular context, regardless of the cost or time restrictions. Unsophisticated clients—or clients swept up in financial turmoil—are much less likely to make this demand or even know they could make it.⁵² And then, of course, a lawyer who would prefer to operate autonomously may question whether such client expectations are objectively “reasonable,” especially if time is short and the client has no resources to fund the research that will be required.

This Article only raises these issues in order to suggest the importance of lawyers’ and clients’ understanding of the dispute resolution processes they propose to use and the likelihood that the time-and-resource-limited bankruptcy and foreclosure contexts will make such understanding both more important and less likely. This Article will now return to the hypothetical.

B. Developing Creative Dispute Resolution Options That Respond to Client Needs

XYZ’s CEO reminds us that the company’s insurer, Tightfist, has affirmatively refused to settle any of the pending lawsuits. XYZ still wants to settle

⁴⁸ MODEL RULES OF PROF’L CONDUCT R. 1.4(b).

⁴⁹ *Id.* R. 1.4 cmt. 5 (emphasis added).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² See David B. Wilkins, *Everyday Practice Is the Troubling Case: Confronting Context in Legal Ethics*, in *EVERYDAY PRACTICES AND TROUBLE CASES*, at 68, 84-86 (1998) (contrasting the needs of corporate clients with the needs of individual clients and comparing lawyers’ treatment of these two types of clients).

these plaintiffs' claims—for both financial and reputational reasons—and the CEO asks for our advice on how to achieve this. He adds, though, that we cannot spend any of XYZ's limited money on settlement. This presents quite a challenge.

A law student intern who sat in on the meeting with XYZ's CEO asks to speak with us after the meeting. She suggests that XYZ could offer mediation to the plaintiffs, and any plaintiff using the process could be required to give XYZ 20 percent of any amount received in settlement. By using the process, a plaintiff would automatically consent to the 20 percent payment. This idea is brilliantly creative⁵³ and responds directly to the CEO's request. The plan would settle the lawsuits, fund XYZ's administration of its mediation program, get some money to injured plaintiffs, pay the mediators and lawyers, and possibly even expand the estate to permit distribution of additional funds to some of XYZ's other creditors. Would proposing this means of funding a dispute resolution procedure be consistent with our ethical obligations? Are there any potential disadvantages to our client or third parties that we would need to discuss?

At the risk of stating the obvious, this proposal transforms XYZ and the asbestos plaintiffs from adversaries into uneasy allies, in league against Tightfist. XYZ, which wants to settle these lawsuits and now stands to gain financially from each settlement, will have every incentive to assist the plaintiffs in winning as much compensation as possible for their injuries. XYZ may even perceive a form of rough justice in this proposal if it has regularly paid insurance premiums to its insurers in order to gain protection from the potential liability currently posed by plaintiffs' lawsuits. After all, it is Tightfist's refusal to settle these cases that is arguably the cause of the additional and unnecessary financial difficulties currently faced by XYZ as it scrambles to find new financing to support its reorganization. While Tightfist is likely to charge XYZ and us with "sharp practices" if we successfully persuade XYZ to pursue this idea, XYZ could argue that it was Tightfist's refusal to settle that represented the first aggressive, inappropriate move. Indeed, we may have good reason to suspect that Tightfist's refusal to settle is motivated by its own interest in conserving money; if XYZ is liquidated rather than reorganized, the plaintiffs will be unlikely to pursue their claims against XYZ, especially if the plaintiffs' lawyers also learn about Tightfist's reservations regarding the scope of XYZ's insurance coverage. Tightfist may not have to make any payments at all.

What a mess. Of course, this dispute is all about money and who should get it or keep it. It is also about how the involvement of insurers regularly violates key assumptions underlying the adversarial system. Further, it is about the use of settlement with some to encourage payment by others.⁵⁴ And last, it

⁵³ See generally Jennifer Gerarda Brown, *Creativity and Problem-Solving*, 87 MARQ. L. REV. 697 (2004) (providing several tools to encourage creative thinking); Carrie Menkel-Meadow, *Aha? Is Creativity Possible in Legal Problem Solving and Teachable in Legal Education?*, 6 HARV. NEGOT. L. REV. 97 (2001).

⁵⁴ "Mary Carter" agreements represent an example of plaintiffs and settling defendants entering into agreements that lead to shared interest in the success of plaintiffs' suit against the non-settling defendants. See, e.g., *Hatfield v. Cont'l Imports, Inc.*, 610 A.2d 446, 448 (Pa. 1992) (describing "Mary Carter" agreements in the course of determining the admissi-

is about the challenge of making difficult moral choices in a world where other people often are the only means⁵⁵ available to allow us to achieve our own ends.

The Model Rules at this point are not very helpful. Regarding our own obligations as advocates, Rule 3.1 provides that we “shall not . . . assert or controvert an issue [in a proceeding], unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law,”⁵⁶ while Rule 4.4 directs that we “shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person.”⁵⁷ Though the law student’s financing idea has some uncomfortable consequences, it is not frivolous and has substantial purposes other than the imposition of a burden upon Tightfist or the plaintiffs. And as Comment 1 to Rule 3.1 observes, “[T]he law is not always clear and never is static.”⁵⁸

Meanwhile, we recall that Rule 1.4 provides that we “shall . . . reasonably consult with the client about the means by which the client’s objectives are to be accomplished” and “shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”⁵⁹ But what exactly shall we say about the creative financing incorporated into the law student’s proposal? Comment 5 deserves a second look on this point, particularly its instruction that in litigation, we “ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others.”⁶⁰ While our proposal will help any injured plaintiffs, it also could significantly reduce the amount they will receive from any settlements. Tightfist received premiums from our client, but our proposal may cause the insurer to suffer an otherwise-unlikely and significant expense. Still, Comment 5 describes what we “should” do; it does not use the word “shall.” That is obviously significant. Perhaps we do not need to talk with XYZ about the potential negative impacts upon the plaintiffs or insurer after all.

Rule 2.1, meanwhile, provides that “[i]n representing a client, a lawyer shall exercise independent professional judgment and render candid advice”⁶¹ and “[i]n rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors that may be relevant to the client’s situation.”⁶² XYZ’s CEO is likely to welcome a proposal that helps his beleaguered company to meet its needs. He may be less

bility of evidence regarding settling defendants’ financial interest in plaintiffs’ success at trial). The next step, of course, has been the rise of third parties who view litigation as just another investment vehicle. *See generally* Maya Steinitz, *Whose Claim Is This Anyway? Third Party Litigation Funding*, 95 MINN. L. REV. (forthcoming 2011).

⁵⁵ *See generally* Jonathan R. Cohen, *When People Are the Means: Negotiating with Respect*, 14 GEO. J. LEGAL ETHICS 739 (2001).

⁵⁶ MODEL RULES OF PROF’L CONDUCT R. 3.1.

⁵⁷ *Id.* R. 4.4.

⁵⁸ *Id.* R. 3.1 cmt. 1.

⁵⁹ *Id.* R. 1.4.

⁶⁰ *Id.* R. 1.4 cmt. 5.

⁶¹ *Id.* R. 2.1.

⁶² *Id.*

likely to welcome any cautionary words regarding the potential negative effects of implementing the proposal. Again, the operative verb in the rule is “may” rather than “shall.” Comments 1 and 2 to Rule 2.1 also appear relevant and provide:

A client is entitled to straightforward advice expressing the lawyer’s honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client’s morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.⁶³

Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost *or effects on other people*, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. *Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.*⁶⁴

The last sentence in Comment 2 may be especially helpful to us here. Though the law student’s proposal is clearly responsive and may not present any obvious illegalities, it is very possible that its consequences and moral ambiguities could give rise to serious legal problems if XYZ remains a going concern.⁶⁵ Still, the language is “may”—and XYZ is fighting for its survival.

C. *The Candor of Communications in Mediation*

Our meeting with XYZ’s CEO to discuss the potential use of dispute resolution has not yet occurred. The law student provides us with a memorandum describing mediation in more detail. We find ourselves particularly interested in her description of the advantages of the communication that can occur in this process.

The law student’s memorandum notes that mediation is a “facilitated negotiation” and a “non-adjudicative process” that allows more flexibility for the parties, both in terms of its outcomes and its procedures. Though the mediator may offer his or her assessment of a case’s strengths and weaknesses and may even suggest solutions, a mediator is “not authorized to make a decision that is binding upon the parties.” The memorandum also points out that mediation communications are supposed to be confidential⁶⁶ and often are protected from admission at trial in order to encourage “frank conversation that may have the potential to result in creative, customized solutions.” Given this student’s

⁶³ *Id.* R. 2.1 cmt. 1.

⁶⁴ *Id.* R. 2.1 cmt. 2 (emphasis added).

⁶⁵ See, for example, the mandatory arbitration clauses in boilerplate contracts that provided for payment of all fees by employees or customers or location of the arbitral forum in a location thousands of miles away, etc. To the extent that lawyers were involved in the drafting of these clauses, it seems that Comment 2 might have served as a useful touchstone for appropriate advising of clients regarding potential lawsuits and their costs and merits. See Schmitz, *supra* note 17, at 872 (considering the ethical obligations of lawyers advising clients regarding consumer arbitration clauses in boilerplate contracts).

⁶⁶ See cases cited *supra* note 40.

gift for creative problem solving, we are not surprised that her memorandum extols the value of the creativity offered by the mediation process.

Some of the language used by the law student to describe the frank conversation that can occur in mediation, however, sounds strangely familiar. We return to the Model Rules for guidance regarding lawyers' ethical obligations in the process, especially regarding candor. We discover several relevant rules and comments. Though the focus of Rule 2.4 is on lawyers serving as neutrals, Comment 5 addresses lawyers representing clients in various dispute resolution processes. It provides:

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 4.1.⁶⁷

Essentially, this Comment provides us with a road map to navigate through the other relevant rules. Rule 3.3(a) provides that "[a] lawyer shall not knowingly . . . 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."⁶⁸ Comment 1 informs us that Rule 3.3 "governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. . . . It also applies when the lawyer is representing a client in an *ancillary* proceeding conducted pursuant to the *tribunal's* adjudicative authority, such as a deposition."⁶⁹ Comment 2, meanwhile, explains the rationale for this rule:

This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the *integrity of the adjudicative process*. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal⁷⁰

Obviously, the definition of a "tribunal" is important here. We need to know whether representations to a mediator must meet these requirements. Rule 1.0(m) provides that 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.⁷¹

Meanwhile, Rule 3.9 applies selected portions of Rule 3.3 to *some* non-adjudicative proceedings:

A lawyer representing a client before a *legislative body or administrative agency* in a *nonadjudicative* proceeding shall disclose that the appearance is in a representative

⁶⁷ MODEL RULES OF PROF'L CONDUCT R. 2.4 cmt. 5 (emphasis added).

⁶⁸ *Id.* R. 3.3 (emphasis added).

⁶⁹ *Id.* R. 3.3 cmt. 1 (emphasis added).

⁷⁰ *Id.* R. 3.3 cmt. 2 (emphasis added).

⁷¹ *Id.* R. 1.0(m) (emphasis added).

capacity and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5.⁷²

Somewhat unbelievably, these rules suggest that unless mediation is considered “an ancillary proceeding conducted pursuant to the . . . adjudicative authority”⁷³ of the federal bankruptcy court or the trial courts involved in the disposition of XYZ’s bankruptcy and plaintiffs’ asbestos claims, neither we nor opposing counsel will be required to correct or avoid making knowingly false statements of fact or law to the mediator. In contrast, we *would* have those obligations in a *private* arbitration.⁷⁴ If the bankruptcy judge has to approve

⁷² *Id.* R. 3.9 (emphasis added); see ABA Standing Comm. on Ethics & Prof’l Responsibility, Formal Op. 93-375 (1993) (lawyer representing bank in routine examination by banking agency not subject to duty of candor required by Rule 3.3 by virtue of Rule 3.9, but “lawyer may not under any circumstances lie to or mislead agency officials” and “may not be a party to fraud on the part of the client, and must take all steps necessary to avoid assisting the client in a course of action she reasonably believes to be fraudulent”); cf. Phila. Bar Ass’n. Prof’l Guidance Comm., Ethics Op. 2002-3 (2002) (lawyer who learns client misstated material fact to Immigration and Naturalization Service required to reveal misstatement; Rules 3.3 and 3.9 require disclosure if INS is deemed a tribunal, but, even if it is not a tribunal, Pennsylvania Rules 1.6, 3.9, and 4.1 require disclosure). See generally Lawrence G. Baxter, *Reforming Legal Ethics in a Regulated Environment: An Introductory Overview*, 8 GEO. J. LEGAL ETHICS 181 (1995) (urging that Rule 3.9 does not adequately require disclosure of fraud).

⁷³ See, e.g., *In re* Cleaver-Bascombe, 892 A.2d 396, 404 (D.C. 2006) (lawyer who submitted fraudulent Criminal Justice Act voucher to court for payment violated Rule 3.3(a)(1); the committee erred in holding that neither the accounting branch of the superior court nor the judge functioned as “tribunal” when processing the voucher); *In re* Diggs, 544 S.E.2d 628, 629 (S.C. 2001) (lawyer violated Rule by knowingly submitting false information on CLE compliance report filed with commission on continuing legal education). But see Fla. Bar v. Rotstein, 835 So. 2d 241, 248 (Fla. 2002) (lawyer who lies to bar grievance committee not guilty of making false statement to “tribunal” for Rule 3.3 purposes); *In re* Brigandi, 843 So. 2d 1083, 1088 n.4 (La. 2003) (declining to find Rule 3.3 violation for failure to make full disclosure to Office of Disciplinary Counsel when giving sworn statement; “while the ODC acts under the auspices of this court, it is not the type of ‘tribunal’ contemplated by the professional rules”).

⁷⁴ In 2002, the Commission on Ethics and Standards in ADR drafted a proposed Model Rule 4.5 as an alternative to Model Rule 2.4. It would have provided for four different types of process: adjudicative, evaluative, facilitative, and hybrid. See MODEL RULE FOR THE LAWYER AS THIRD-PARTY NEUTRAL, *supra* note 8, at 2-3; Duane W. Krohnke, *supra* note 8, at 108; Margaret L. Shaw & Elizabeth Plapinger, *Ethical Guidelines: ADR Provider Organizations Should Increase Transparency, Disclosure*, DISP. RESOL. MAG., Spring 2001, at 14, 14; see also Richard M. Calkins, *Caucus Mediation—Putting Conciliation Back into the Process: The Peacemaking Approach to Resolution, Peace, and Healing*, 54 DRAKE L. REV. 259, 268-71 (2006); Maureen E. Laflin, *Preserving the Integrity of Mediation Through the Adoption of Ethical Rules for Lawyer-Mediators*, 14 NOTRE DAME J.L. ETHICS & PUB. POL’Y 479, 483-91 (2000); Matt Wise, *Separation Between the Cross-Practice of Law and Mediation: Emergence of Proposed Model Rule 2.4*, 22 HAMLINE J. PUB. L. & POL’Y 383, 398-411 (2001). See generally Bobbi McAdoo & Nancy Welsh, *Court-Connected General Civil ADR Programs: Aiming for Institutionalization, Efficient Resolution, and the Experience of Justice*, in ADR HANDBOOK FOR JUDGES 1, 37-38 (Donna Stienstra & Susan Yates eds., 2004); Carrie Menkel-Meadow, *Ethics in ADR: The Many “Cs” of Professional Responsibility and Dispute Resolution*, 28 FORDHAM URB. L.J. 979 (2001); Carrie Menkel-Meadow, *The Lawyer as Consensus Builder: Ethics for a New Practice*, 70 TENN. L. REV. 63, 74 (2002) (questioning what duty of candor applies when Rule 3.3 does not apply); Carrie Menkel-Meadow, *The Silences of the Restatement of the Law Governing Lawyers: Lawyering as Only Adversary Practice*, 10 GEO. J. LEGAL ETHICS 631, 639-40 (1997) (not-

the plan to use mediation as a component part of the reorganization plan,⁷⁵ this may mean that the process could be considered “an ancillary proceeding” occurring pursuant to the court’s “adjudicative authority.”⁷⁶ Then we would need to meet the requirements of candor that apply to our communications with tribunals.

If neither the bankruptcy judge nor the trial judge is involved with the mediation, however, it appears that only the lesser obligations of Rule 4.1 will apply. We are not permitted to “knowingly . . . make a false statement of *material* fact or law to a third person; or . . . 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.”⁷⁷ Comment 2 to Rule 4.1 will be important to consider as we try to distinguish between “puffery” and statements “of material fact.”⁷⁸ Indeed, we should probably do some research to be sure we are clear regarding what constitute material facts

ing a similar ambiguity in the Restatement regarding whether an early neutral evaluation or mediation session would be considered a tribunal); Douglas H. Yarn, *Lawyer Ethics in ADR and the Recommendations of Ethics 2000 to Revise the Model Rules of Professional Conduct: Considerations for Adoption and State Application*, 54 ARK. L. REV. 207 (2001).

⁷⁵ See, e.g., 11 U.S.C. § 502 (2006) (regarding the allowance of claims in bankruptcy). My thanks to Marie Reilly for raising this potential application within the bankruptcy context.

⁷⁶ The argument that mediation represents an ancillary proceeding conducted pursuant to the court’s adjudicative authority may be stronger in bankruptcy than in the usual civil litigation context because the reorganization plan will be enforceable—or “binding,” to use one of the key terms contained in Rule 1.0(m)—only with the bankruptcy court’s approval. In contrast, most settlements emerging from court-ordered mediation sessions do not require court approval to be enforceable. There are exceptions, of course—e.g., settlements of class actions and shareholder derivative suites, as well as divorce and child custody agreements. See Russell Korobkin et al., *The Law of Bargaining*, in *THE NEGOTIATOR’S FIELDBOOK* 183, 187 (Andrea Kupfer Schneider & Christopher Honeyman eds., 2006).

⁷⁷ MODEL RULES OF PROF’L CONDUCT R. 4.1 (2007) (emphasis added); see ABA Standing Comm. on Ethics & Prof’l Responsibility, Formal Op. 06-439 (2006) (obligation of truthfulness is the same whether or not mediation is “caucused”); see also Don Peters, *When Lawyers Move Their Lips: Attorney Truthfulness in Mediation and a Modest Proposal*, 2007 J. DISP. RESOL. 119, 121 (“Communications regarding material facts constitute the category of information most directly regulated by existing ethical rules and substantive doctrines. Nothing in the [ABA’s] Model Rules of Professional Conduct (Model Rules), as enacted by the forty-four states which pattern their ethical governance substantially on these guidelines, directly addresses lawyers’ obligations to be truthful when negotiating during mediations. Despite arguments to do so, the Ethics 2000 Commission charged with making necessary amendments to the Model Rules, chose not to recommend for mediation the more stringent standard of honesty that applies to trials and forbids false statements regarding all facts regardless of materiality. This makes it safe to assume that the regulations regarding truthfulness in negotiation apply to mediations.”).

⁷⁸ Comment 2 provides:

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.

MODEL RULES OF PROF’L CONDUCT R. 4.1 cmt. 2 (emphasis added).

and law in the context of bankruptcy and asbestos claims,⁷⁹ as well as considering the likelihood of fraud and criminal activity in these contexts. We will need to do this research in order to ensure our own ethical conduct—and to be aware of how far opposing counsel might go. Comment 1, meanwhile, suggests that we also will need to be certain we can determine the statements—or failures to speak—that could count as misrepresentations.⁸⁰

Rule 8.4, which is referenced in Comment 1 to Rule 3.3, provides that “[i]t is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation[.]”⁸¹ Comment 2 to Rule 8.4 offers the following: “Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. *Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses,*

⁷⁹ See Art Hinshaw & Jess K. Alberts, *Doing the Right Thing: An Empirical Study of Attorney Negotiation Ethics*, 16 HARV. NEGOT. L. REV. (forthcoming 2011); see also Robert P. Burns, *Some Ethical Issues Surrounding Mediation*, 70 FORDHAM L. REV. 691, 696 (2001) (the minimalist approach of Rule 4.1 in imposing the obligation of truthfulness is due to “moral ambiguity of truthfulness as an ideal in the context of share bargaining” and difficulties of enforcing truth-telling rule in “community of two”); Charles B. Carver, *Negotiation Ethics: How to Be Deceptive Without Being Dishonest/How to Be Assertive Without Being Offensive*, 38 S. TEX. L. REV. 713, 715 (1997) (“[T]he fundamental question is not whether legal negotiators may use misrepresentations to further client interests, but when and about what they may permissibly dissemble.”); Nathan M. Crystal, *The Lawyer’s Duty to Disclose Material Facts in Contract or Settlement Negotiations*, 87 KY. L.J. 1055, 1083 (1999); Monroe H. Freedman, *In Praise of Overzealous Representation—Lying to Judges, Deceiving Third Parties, and Other Ethical Conduct*, 34 HOFSTRA L. REV. 771, 778 (2006); E. Cliff Martin & T. Karena Dees, *The Truth About Truthfulness: The Proposed Commentary to Rule 4.1 of the Model Rules of Professional Conduct*, 15 GEO. J. LEGAL ETHICS 777, 778-79 (2002); Scott R. Peppet, *Can Saints Negotiate? A Brief Introduction to the Problems of Perfect Ethics in Bargaining*, 7 HARV. NEGOT. L. REV. 83, 94 (2002) (taking issue with implication in Rule 4.1 and Comment that “barring all types of misrepresentation would demand too much”); Barry R. Temkin, *Misrepresentation by Omission in Settlement Negotiations: Should There Be a Silent Safe Harbor?*, 18 GEO. J. LEGAL ETHICS 179, 186-87 (2004); Daniel Walfish, *Making Lawyers Responsible for the Truth: The Influence of Marvin Frankel’s Proposal for Reforming the Adversary System*, 35 SETON HALL L. REV. 613 (2005) (analyzing the impact of the 1975 argument that ethics rules should forbid material omissions and should affirmatively compel certain disclosures); Gerald Wetlaufer, *The Ethics of Lying in Negotiations*, 75 IOWA L. REV. 1219, 1220-23 (1990); Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 GEO. WASH. L. REV. 1, 51 & n.287, 52 (2005).

⁸⁰ Comment 1 provides:

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.

MODEL RULES OF PROF’L CONDUCT R. 4.1 cmt. 1.

⁸¹ *Id.* R. 8.4.

*even ones of minor significance when considered separately, can indicate indifference to legal obligation.*⁸²

Rule 8.4 does not seem entirely consistent with Rule 4.1. Perhaps the Preamble to the Model Rules would help us in determining how we and opposing counsel should behave in mediation. It provides that in addition to being a representative of clients, a lawyer is “an officer of the legal system and a public citizen having special responsibility for the quality of justice.”⁸³ The Preamble even references lawyers’ role in negotiation: “As negotiator, a lawyer seeks a result advantageous to the client *but consistent with requirements of honest dealings* with others.”⁸⁴ The lofty aspiration of engaging in “honest dealings with others” also does not sound consistent with the language of Rule 4.1 and the way in which it permits the duty of candor in negotiation and other consensual procedures to vary from the requirements of Rules 3.3 and 3.9—even in *court-connected and agency-connected* mediation. The Preamble is merely aspirational, however, while Rule 4.1 is enforceable.⁸⁵

D. *Bringing the Power of Judicial Enforcement into Mediation*

Our follow-up meeting with XYZ’s CEO still has not taken place. We have discussed the law student’s idea and memorandum internally, and there are concerns that some of the plaintiffs will refuse to give 20 percent of their mediated settlements to XYZ. If the plaintiffs refuse, the plan will then fail to achieve one of XYZ’s key goals. Our relentlessly creative law student sends an e-mail with the responsive proposal that any such enforcement issues could be taken to the bankruptcy judge. The bankruptcy judge, however, has already indicated an unwillingness to make final determinations in the asbestos-related lawsuits. Even if the judge were willing, we strongly suspect that Tightfist would object that the judge was exceeding his jurisdictional limits.⁸⁶ But the law student says that if our “ADR Plan” specifies that the bankruptcy judge is being asked to serve as an “appellate mediator” (which, admittedly, has no recognizable meaning in and of itself) and *not* as a “judge,” the jurisdictional limitations would not seem to apply.

This is another creative and responsive idea. It is consistent with the idea that litigants should be able to customize what they will receive from the courts,⁸⁷ though the courts have not always agreed to go along.⁸⁸ Would pro-

⁸² *Id.* R. 8.4 cmt. 2 (emphasis added).

⁸³ *Id.* pmbl.

⁸⁴ *Id.* (emphasis added).

⁸⁵ See Carrie Menkel-Meadow, *Ethics and Professionalism in Non-Adversarial Lawyering*, 27 FLA. ST. U. L. REV. 153, 166 (1999) (referencing the classic dilemma of whether legal ethics should focus upon the expression of aspirations or the regulation of bad behavior).

⁸⁶ See *supra* note 15 and accompanying text. Tightfist’s standing in this case, particularly its standing to deny consent in this context, is somewhat unclear and well beyond the scope of this Article.

⁸⁷ See Symposium, *Competing and Complementary Rule Systems: Civil Procedure and ADR*, 80 NOTRE DAME L. REV. 481 (2005); see also Michael L. Moffitt, *Customized Litigation: The Case for Making Civil Procedure Negotiable*, 75 GEO. WASH. L. REV. 461, 462 (2007) (arguing “that the current set of procedural rules should be treated as default rules, rather than as nonnegotiable parameters); Scott R. Peppet, *Lawyers’ Bargaining Ethics, Contract, and Collaboration: The End of the Legal Profession and the Beginning of Professional*

posing this re-designation of the bankruptcy judge present any ethical issues for us?

The Model Rules are not very helpful on this question either. This most recent idea might represent “knowingly assist[ing] a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law”⁸⁹ which is prohibited by Rule 8.4, if this arrangement is inconsistent with the jurisdictional limits that federal law places upon bankruptcy judges.⁹⁰ Language in the Preamble also appears relevant even though it has no practical binding effect: “A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials.”⁹¹ Asking a bankruptcy judge to call himself an “appellate mediator” and potentially overstep his jurisdictional bounds may, indeed, demonstrate a lack of respect for the position of judge and the judicial system. Tellingly, some have recently argued that we can best demonstrate our respect for the judicial system by respecting the limits of its capacities and power.⁹² As Justice Scalia recently noted, the nation’s courts are not a Mr. (or Ms.) Fix-It⁹³ available to clean up every mess made by every executive officer, legislator, private party—or lawyer.⁹⁴

E. A Pause for Reflection

There is so much that is unclear, and there are so many issues raised by this hypothetical. What *is* clear is that we should not advise our client regarding this ADR plan for mediation, or recommend its use, until we have thor-

Pluralism, 90 IOWA L. REV. 475, 519-20 (2005) (discussing the stringency of immutable rules and the potential bargaining and flexibility involved with default rules); Riskin & Welsh, *supra* note 23, at 919-21 (discussing how courts should offer to “customize” mediation).

⁸⁸ See *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581 (2008) (agreeing with Ninth Circuit’s holding that “terms of the arbitration agreement controlling the mode of judicial review are unenforceable and severable”); *ATSI Commc’ns, Inc. v. Shaar Fund Ltd.*, 547 F.3d 109, 113-15 (2d Cir. 2008) (finding that court was not obligated, absent exceptional circumstances, to grant parties’ joint motion to vacate a district court’s judgment granting sanctions against plaintiffs’ counsel, even though the parties had made their settlement contingent upon the granting of the motion).

⁸⁹ MODEL RULES OF PROF’L CONDUCT R. 8.4.

⁹⁰ See *supra* note 15 (identifying the current lack of clarity regarding categorization of these limits as “jurisdictional” or merely “procedural,” with a consequent lack of clarity regarding parties’ power to consent to judges’ assumption of roles and behaviors not specifically identified as permissible by statute or rule).

⁹¹ *Id.* pmbl.

⁹² See, e.g., IAN SHAPIRO, *THE STATE OF DEMOCRATIC THEORY* 66 (2003).

⁹³ See *Hamdi v. Rumsfeld*, 542 U.S. 507, 576-77 (2004) (Scalia, J., dissenting) (“There is a certain harmony of approach in the plurality’s making up for Congress’s failure to invoke the Suspension Clause and its making up for the Executive’s failure to apply what it says are needed procedures—an approach that reflects what might be called a Mr. Fix-it Mentality. The plurality seems to view it as its mission to Make Everything Come Out Right, rather than merely to decree the consequences, as far as individual rights are concerned, of the other two branches’ actions and omissions.”).

⁹⁴ Despite these concerns, it is important to note that bankruptcy judges are permitted to step beyond their jurisdictional limits with the parties’ consent. See *supra* note 15 and accompanying text.

oughly researched the relevant law and ethics. What is also clear is that our client, XYZ, does not have the resources to fund such research. And therefore, if we (or plaintiffs' counsel) nonetheless propose this idea, we (and our client, plaintiffs, opposing counsel, the insurer and its counsel, the mediator and the court) will be flying blind—an obviously risky venture.

This hypothetical also makes clear that advocates for the institutionalization of mediation and other dispute resolution procedures in bankruptcy and foreclosure cases have many questions to answer: Regardless of our good intentions,⁹⁵ how can (or *are*) mediation and other “non-adjudicative” procedures being used? How do we *want* mediation and other non-adjudicative procedures involving third party neutrals to be used? What protections or counter-balances exist to help ensure the appropriate and ethical use of these procedures? What protections or counter-balances *should* exist?⁹⁶

This hypothetical may seem fantastical. It was, however, inspired by an actual bankruptcy case in which the lawyers proposed the use of baseball arbitration rather than mediation. At least in some respects, the actual case is even more fantastical than the hypothetical.⁹⁷ This Article will now turn to that case.

⁹⁵ See Welsh, *supra* note 3, at 460 (observing that “[f]or reasons that now seem almost sweetly naïve, mediation advocates and program designers thought their (or more accurately, our) good intentions would inoculate mediation from the challenges presented by reality”). But see Michael Moffitt, *Three Things to Be Against (“Settlement” Not Included)*, 78 FORDHAM L. REV. 1203, 1204 (2009) (urging realism in judging the extent to which both litigation and settlement have achieved their goals).

⁹⁶ Some commentators are advising negotiators to rely on self-help measures rather than assuming that ethics rules will be strengthened or enforced. See, e.g., Peter Reilly, *Was Machiavelli Right? Lying in Negotiation and the Art of Defensive Self-Help*, 24 OHIO ST. J. ON DISP. RESOL. 481, 532 (2009) (advocating the strategic use of “come clean” questions at critical moments and careful listening because responses to such questions may serve as the basis for a claim of fraudulent non-disclosure). There are parallels here to some commentators' skepticism regarding the efficacy of using additional regulation to improve lawyers' and mediators' conduct in mediation. See, e.g., John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. REV. 69, 76 (2002) (opposing rules and sanctions to ensure good faith participation in mediation, instead urging courts to use dispute system design processes involving stakeholder groups in designing and implementing policies that satisfy their interests, thus building understanding of, and commitment to the integrity of mediation programs and avoiding satellite litigation); Moffitt, *supra* note 41, at 207, 224 (observing that “public back-end mechanisms” for assuring mediator quality, such as enforcement of ethics rules, do not work because mediation is generally an unlicensed activity and there are so many variations in mediation practice; also urging that we “too often conflate the concepts of ‘progress’ and ‘regulation.’”).

⁹⁷ For another example of a real life situation that rivals fiction, see E-mail from AALS Dispute Resolution List on behalf of Jean Sternlight, Professor, UNLV Boyd Sch. of Law, to aals-adr-l@po-missouri.edu (Jan. 11, 2011, 1:48 EST) (on file with author) (reporting that a Texas hamburger restaurant had recently taped the following notice to its door: “By entering these premises, you hereby agree to resolve any and all disputes or claims of any kind whatsoever, which arise from the products, services or premises, by way of binding arbitration, not litigation. No suit or action may be filed in any state or federal court. Any arbitration shall be governed by the FEDERAL ARBITRATION ACT, and administered by the American Mediation Association”; further reporting that review of the website of the American Mediation Association suggested that its arbitral services were limited to the Dallas area and personal injury or tort cases “with pleadings above \$100,000”).

III. THE REAL CASE OF *IN RE* AMERICAN CAPITAL EQUIPMENT, INC.

Skinner Engine Company (Skinner) was founded in Erie, Pennsylvania in 1868.⁹⁸ In 1998, American Capital Equipment (American Capital) purchased Ryco Holdings and, in the process, acquired an 86 percent ownership interest in Skinner.⁹⁹ At the conclusion of this transaction, Skinner was very highly leveraged.¹⁰⁰ Unfortunately, the company did not perform as well as projected and experienced difficulties in maintaining the cash flow required to meet its operational expenses and service its secured debt.¹⁰¹ Skinner also was unable to meet the obligations imposed upon it under a put and call agreement that had been part of American Capital's purchase of Ryco Holdings.¹⁰² Further, Skinner's most significant creditor—PNC Bank—imposed limits on Skinner's access to credit.¹⁰³ Skinner and American Capital sought Chapter 11 reorganization in April 2001.¹⁰⁴

Skinner had had an illustrious history, designing and manufacturing uniflow steam engines and engine components for merchant ships until the 1970s.¹⁰⁵ Skinner used asbestos material in its designs and manufacturing processes, and by the early 1980s, was being named as a defendant in personal injury lawsuits brought by merchant marines alleging exposure to asbestos.¹⁰⁶ At the time that Skinner filed for bankruptcy protection, *more than 29,000* asbestos-related claims were pending against it.¹⁰⁷ These claims represented Skinner's largest liability.¹⁰⁸

⁹⁸ See Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code Relating to the Modified Chapter 11 Plan of Skinner Engine Company, Inc. Dated March 15, 2006, at 4, *In re Am. Capital Equip., Inc.*, 405 B.R. 415 (Bankr. W.D. Pa. 2009) (No. 01-23987) [hereinafter Disclosure Statement].

⁹⁹ *Id.* It appears that the remainder of Skinner's stock was held by Fairchild Corporation. *Id.*

¹⁰⁰ According to Skinner's Disclosure Statement:

To finance this purchase, pay the existing obligations of Ryco and Skinner and provide Skinner with working capital, Skinner borrowed a total of \$5,848,000 from PNC [Bank] and an additional \$1,500,000 from Liberty BIDCO Investment Company. As a result of these transactions, the former owners of Ryco were paid \$2,633,837 in cash at closing and received a note in the original principal amount of \$750,000. In addition, Gerald Ryan and Richard Seidel, the former owners of Ryco, were issued shares of preferred stock in Skinner, which they had the right to put to American Capital pursuant to the terms of a Put and Call Agreement dated August 24, 1998. Messrs. Ryan and Seidel, along with Edward Allegier, Eleanor Nevett and Robert M. Sok were also granted a mortgage on property owned by Skinner at 337 W. 12th Street, Erie, Pennsylvania, in order to secure an obligation in the amount of \$750,000 of American Capital to the mortgagees and guaranteed by Skinner.

Id.

¹⁰¹ *Id.* at 5.

¹⁰² Apparently, Skinner was found liable for this obligation and judgment was entered against it. *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 1.

¹⁰⁵ *Id.* at 5.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* But see Objections of Travelers Casualty and Surety Company to the *Modified* Disclosure Statement Relating to the *Modified* Chapter 11 Plan of Skinner Engine Company, Inc. Dated March 15, 2006 and Filed May 1, 2006, app. A, at 1-2, *In re Am. Capital Equip.*,

In October 2003, upon the order of the bankruptcy court, Skinner sold substantially all of its personal property to several purchasers for the sum of \$1,165,000.¹⁰⁹ The bankruptcy court released these purchasers from any successor liability for the asbestos-related claims against Skinner.¹¹⁰ PNC received the funds and applied all but \$35,000 of the purchase amount to its secured claim against Skinner.¹¹¹ By March 2006, Skinner estimated that its most significant asset consisted of “the obligations owed by its insurers to cover asbestos liabilities”¹¹² and that the value of this insurance was “\$11 million in primary coverage and at least \$135 million in excess coverage per occurrence.”¹¹³ Skinner claimed that its coverage was based on many different policies involving eleven different asbestos insurance companies.¹¹⁴

Over the course of several years, Skinner proposed five reorganization plans to the United States Bankruptcy Court for the Western District of Pennsylvania.¹¹⁵ Beginning with the third plan, proposed in 2004, Skinner incorporated a plan to distribute its assets—i.e., insurance proceeds—to the plaintiffs in the outstanding asbestos-related lawsuits.¹¹⁶ The court did not approve this reorganization plan. By the fifth plan, Skinner specifically proposed the use of ADR—modeled after baseball arbitration—to deal with the lawsuits.¹¹⁷ Ultimately, in May 2009, the bankruptcy court found that Skinner’s fifth reorganization plan was unconfirmable, concluding that its ADR process was neither reasonable nor entered into in good faith.¹¹⁸ The court also converted Skinner’s and American Capital’s Chapter 11 reorganizations into Chapter 7 liquidations.¹¹⁹ The United States District Court for the Western District of Pennsylvania affirmed the Bankruptcy’s Court’s rulings.¹²⁰

405 B.R. 415 (No. 01-23987) [hereinafter *Objections of Travelers*] (asserting that approximately 27,950 of these asbestos claims had been administratively dismissed in the multidistrict litigation process due to “lack of proof of asbestos-related impairment or medical condition and exposure to a Skinner product” and that at the time of the Petition Date, only about fifty asbestos-related claims were pending against Skinner).

¹⁰⁹ Disclosure Statement, *supra* note 98, at 5.

¹¹⁰ *Id.*

¹¹¹ *Id.* Apparently, as security for its loans totaling \$5,848,000, “PNC Bank took a first priority security interest in substantially all of Skinner’s assets.” Appellants’ Opening Brief at 4, *In re Am. Capital Equip., L.L.C.*, 2006 WL 5304204 (W.D. Pa. July 20, 2006) (Nos. 06-891, 06-892, 06-917).

¹¹² Disclosure Statement, *supra* note 98, at 6.

¹¹³ *Id.*

¹¹⁴ *Id.* at 5-6.

¹¹⁵ Appellants’ Opening Brief, *supra* note 111, at 5; *In re Am. Capital Equip., Inc.*, 405 B.R. 415, 427 (Bankr. W.D. Pa. 2009).

¹¹⁶ See Appellants’ Opening Brief, *supra* note 111, at 8.

¹¹⁷ *Objections of Travelers*, *supra* note 108, at 4, 11.

¹¹⁸ *In re Am. Capital Equip.*, 405 B.R. at 423. I have described elsewhere the specifics of the bankruptcy court’s objections to Skinner’s proposed “ADR Process.” The bankruptcy court understood Skinner’s proposed plan to include the use of both arbitration and mediation. In actuality, the CADP involved only baseball arbitration. See Welsh, *supra* note 3, at 446-47.

¹¹⁹ *In re Am. Capital Equip.*, 405 B.R. at 427.

¹²⁰ *Skinner Engine Co. v. Allianz Global Risk U.S. Ins. Co.*, No. 09-0886, 2010 WL 1337222, at *2 (W.D. Pa. Mar. 29, 2010).

The focus of this Article is on what lawyers should know as they select, create and implement dispute resolution options—and why the inevitable pressures of the bankruptcy and foreclosure context may hinder careful analysis and decision-making. Therefore, we will now turn to an exploration of exactly what Skinner and American Capital proposed in their ADR Process, speculate a bit about why they proposed what they did, and consider again the ethical implications of *In re American Capital Equipment, Inc.*

A. *The Emergence of the ADR Process*

As noted *supra*, Skinner's third plan first proposed a mechanism to deal with the company's potential liabilities as a result of the asbestos-related lawsuits.¹²¹ In particular, Skinner proposed the establishment of a trust under section 524(g) of the Bankruptcy Code to assume such liabilities.¹²² The trust was to pay these claims using Skinner's \$35,000 in cash assets, the common stock of the reorganized corporation, and any amounts received as a result of the resolution of Skinner's claims or causes of action against its insurers regarding coverage for asbestos claims.¹²³ Skinner's insurers objected to this plan, arguing that it provided the trust with control in contravention of the insurers' "contractual rights to defend, investigate, or settle these claims."¹²⁴ Ultimately, the insurers charged that the third plan "sought to compel Skinner's insurers to fund the Trust, which would in turn divert a portion of the asbestos insurance recoveries to pay the administrative and unsecured claims."¹²⁵ The court never ruled on this plan because Skinner moved to stay the proceedings in order to file a new plan.¹²⁶

Skinner filed its fourth plan in November 2005. This plan continued to propose the establishment of a trust.¹²⁷ But there were a couple of interesting funding twists. First, the fourth plan provided that the asbestos plaintiffs' law firm would "advance" \$500,000 to fund the trust's initial administrative costs.¹²⁸ Once plaintiffs' personal injury claims were decided, 20 percent of the funds they received from Skinner's insurers would be used to fund the continued administration of the claims procedure.¹²⁹ The law firm would then be reimbursed for its "advance" to the trust.¹³⁰

¹²¹ See Appellants' Opening Brief, *supra* note 111, at 8.

¹²² *Id.*

¹²³ Joint Plan of Reorganization of Skinner Engine Company, Inc. Under Chapter 11 of the United States Bankruptcy Code at 1-2, 11, *In re Am. Capital Equip.*, 405 B.R. 415 (No. 01-23988) (definition of "asbestos insurance action" and description of Trustee's establishment of Initial Payment Sum Percentage as an anchor to determine payments to plaintiffs).

¹²⁴ Appellants' Opening Brief, *supra* note 111, at 9.

¹²⁵ *Id.* But see Woodward, *supra* note 21, at 471 (describing how the Piper Aircraft Trust, rather than the parties, funded the costs associated with the use of mediation).

¹²⁶ See Appellants' Opening Brief, *supra* note 111, at 10.

¹²⁷ See Summary Pursuant to Local Rule 3016-2 of the Chapter 11 Plan of Liquidation of Skinner Engine Company, Inc. at 1, *In re Am. Capital Equip.*, 405 B.R. 415 (No. 01-23987).

¹²⁸ See *id.*

¹²⁹ See *id.*

¹³⁰ Appellants' Opening Brief, *supra* note 111, at 11.

The bankruptcy court held a lengthy hearing on this plan on January 10, 2006.¹³¹ The discussions between the judge and lawyers quickly turned to the processes being proposed to decide claims and fund the resolution of the asbestos claims.¹³² Skinner's counsel described the claims process as "a mechanism, as has been done in every major class action in every asbestos case."¹³³ Judge McCullough derided the process as "a scheme."¹³⁴ He worried that the proposed funding of the reorganization was speculative,¹³⁵ that Skinner was not statutorily permitted to use a trust mechanism in a reorganization,¹³⁶ and that the proposed procedures had not been tested.¹³⁷ Skinner's counsel was consistently ready to respond to the concerns raised by the Judge and the insurers, indicating willingness to amend the plan to provide for a "claims administrator" rather than a "trustee"¹³⁸ and to place a cap on the insurers' potential liability.¹³⁹

Plaintiffs' counsel and the judge, meanwhile, engaged in a nearly-heart-breaking colloquy as plaintiffs' counsel tried to persuade the judge that the

¹³¹ See Transcript of Hearing on Jan. 10, 2006, *In re Am. Capital Equip.*, 405 B.R. 415 (Nos. 01-23987 & 01-23988) [hereinafter Jan. 10 Transcript].

¹³² See *id.* at 9.

¹³³ *Id.* at 11.

¹³⁴ *Id.* Meanwhile, counsel for the insurers, debtors, and asbestos plaintiffs traded self-interested bootstrapping charges, and *all* of these charges were probably legitimate. See, e.g., *id.* at 33-34 (one of insurers' counsel urged, "What's happening in the case is the bankruptcy process is being used to take the claims that outside of bankruptcy are not generating value for these claimants, and it's creating value for them by allowing them, and using that allowance as a lever in coverage litigation. That's what's happening. That is obtaining litigation advantage, plain and simple."); *id.* at 48-49 (one of plaintiffs' counsel explained to the court, "Judge, if you go and you look at the numbers of the multi-district Court, the number of cases that are being remanded and being tried are very, very small [estimates of 10-20 per year]. . . . We had four to 500 [asbestos-related cancer] cases that were set for trial when the multi-district Court order came out in 1991. It wasn't our idea and we opposed it. And if you want to talk about a litigation advantage, the fact of the matter is is [sic] that the litigation advantage for the MDL rests with the insurers because they get to sit back and watch."); *id.* at 73 (another one of plaintiffs' counsel criticized the insurers' unwillingness to participate in the development of the claims process, pointing out, "They have a veto. . . . [W]e went out and got the most independently constructed state-of-the-art settlement standards from *Manville* [sic], put together by that Court, and said these are our standards. . . . And you're not getting them to go for that. What can you do when someone doesn't want to say yes? . . . And we're not trying to change or enlarge anybody's contractual rights. All this plan does is attempt to enforce them, period, on a level—getting a level playing field, we're just enforcing your contractual rights. That's not a litigation advantage, unless somebody thinks that your role in life is to be a victim, stuck in a dead end, going nowhere.").

¹³⁵ See *id.* at 18.

¹³⁶ Insurers' counsel had urged that, in Chapter 11, the proposed reorganization had to "create or preserve some value that would otherwise be lost, not merely distributed to a different stakeholder outside of bankruptcy" and that this was "what the Third Circuit calls the boundary between fulfilling the purposes of Chapter 11 and the perversion of those purposes." *Id.* at 37-38. The legitimacy of these claims is beyond the scope of this Article, though it seems that a key question is whether or not the asbestos plaintiffs whose claims had not yet been decided or settled—apparently languishing for decades in the multi-district litigation process—would be considered stakeholders or creditors under bankruptcy law principles.

¹³⁷ See *id.* at 25.

¹³⁸ See *id.* at 20.

¹³⁹ See *id.* at 12.

claims process proposed by Skinner was essential due to the difficulties and delay involved in navigating the various and uncertain requirements imposed by the multi-district litigation process, the particular judges administering that process, and the jurisdictional limits of the bankruptcy court.¹⁴⁰ In response, Judge McCullough proposed trying ninety of the asbestos claims in his own

¹⁴⁰ See *id.* at 41-51. I will quote here from just one portion of this transcript:

- Mr. Campbell: You go down there [to the multi-district litigation (MDL) process] and it's supposed to be some highly coordinated effort at doing discovery and coordinating discovery.
- The Court: So you're saying those Judges are crazy?
- Mr. Campbell: It's a dead end.
- The Court: You're saying those Judges are crazy?
- Mr. Campbell: I don't say that the Judges are crazy. I don't even think there's a Judge assigned to it at this point. The man that was handling it has passed away. But it doesn't move. Now, all we're trying to do is sort out the good claims, find the valid claims. And I know and I've listened to you today, and I know that you're skeptical about them, but there are good claims here. Let's presume there are. We must presume that there may be good claims. We cannot assume there are no good claims. We have—
- The Court: I'm assuming that somebody can look at somebody and see if they're dying. That's a good claim.
- Mr. Campbell: Well, they have to be dying. It has to be a disease that is caused by asbestos, and there has to be some—
- The Court: I understand. And—
- Mr. Campbell: —exposure.
- The Court: And why can't that just go through the—if there's only 20, or 30, or 40, or whatever Mr. Kellman said, I don't think—the District Courts are a little bit overworked, but I don't think they are so overworked they can't take on another 30 or 40 cases.
- Mr. Campbell: They don't move. You don't get out of the MDL. It's not being done. That's where you're being unrealistic, and Pollyanna-ish, and naive. I hate to say it, but it's true.

Id. at 70-72. If the colloquy quoted here accurately reflects the plight of asbestos claimants who are suffering from cancer and then find themselves caught among the complex and conflicting requirements of the MDL process, the bankruptcy process, and the self-interest of all of the professionals involved in the resolution of their claims, there is tragedy here that is eminently deserving of academic and media scrutiny—as well as legislative, executive, judicial and industry reform. At the same time, it is essential to recall that there are two sides (at least) to nearly every story. See *Objections of Travelers*, *supra* note 108, app. A, at 1 (describing administrative dismissal of claims made by the Maritime Asbestos Legal Clinic due to “the inability or refusal of the asbestos claimants to comply with orders issued by Judge Weiner in 1995 that required claimants to provide certain proof of an asbestos-related condition and exposure to a defendant’s products”). The requirement of “proof of exposure” could have been particularly challenging if these claimants had not yet gained access to the sort of information only gained through discovery. It also may be worthwhile to reflect on the difficulty of relying entirely on the courts to resolve polycentric human and environmental tragedies grounded in the uncertainties of technological advancement. When the judiciary is the governmental branch designated to make a judgment and declare a remedy, there must be someone identified as the blameworthy one. See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394-404 (1978) (regarding courts’ ability to handle polycentric disputes); ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 180, 206, 233-42 (2001) (discussing alternative bureaucratic approaches to handling social needs—though even Western European countries appear to be re-thinking their social safety net in light of the worldwide economic downturn).

court.¹⁴¹ When it appeared that this was not procedurally feasible,¹⁴² debtors' and plaintiffs' counsel offered to make another set of revisions to the reorganization plan with the goal of using bankruptcy to "try to get the value from the people that have the value to the people who need the value"¹⁴³ by requiring the insurers to consider individual claims and giving the court the ability to override an insurer's veto if appropriate.¹⁴⁴

Not surprisingly, insurers' counsel objected to this plan of action, focusing on the 20 percent surcharge on the plaintiffs¹⁴⁵ and the plan's alleged inconsistency with "a Chapter 11 purpose,"¹⁴⁶ and urging that perhaps a "hardworking and innovative" Chapter 7 trustee might develop a sensible distributional scheme in collaboration with the insurers.¹⁴⁷ The insurers' counsel objected strenuously to the emergence of such a scheme from "a Chapter 11 debtor-in-possession in a case in which the gat[e-keep]ing question about whether you're doing anything more than distributing assets[—i.e.,] are you maximizing value without creating litigation advantage[—]just can't be answered."¹⁴⁸ All of these objections were for naught. Apparently, Judge McCollough had been moved by what he heard during this lengthy hearing:

Let me just tell you, I'm sympathetic with your [insurers'] arguments, but I'm also sympathetic with where the debtor comes from. And I'm also a little tired of hearing this has been going on for 25 years, because the insurance companies have screwed the dog, and so ha[s] the debtor. Okay? And I'm looking for a little bit of a chance for some—a little creative thinking, and see if there's some way to get around the log jam that we apparently have. And I don't think you really mind, as a lawyer, to charge your clients for a little more time to see if we can come to that end of that log jam.¹⁴⁹

Later, in response to the objections of another insurer's counsel that this case was "not like any other asbestos bankruptcy case" and that it was "based on a novel theory" and "completely unorthodox," Judge McCollough pointed out, "That's how new law gets [developed]. . . . [H]ow do you think the *Johns*

¹⁴¹ See Jan. 10 Transcript, *supra* note 131, at 74.

¹⁴² See *id.* at 75.

¹⁴³ *Id.* at 76.

¹⁴⁴ See *id.* at 76-77.

¹⁴⁵ They described it as an attempt to "rewrite the [insurance] contract and insert administrative claimants, priority claimants, and other non-asbestos unsecured creditors as beneficiaries to the insurance policies." *Id.* at 77. A different counsel urged that debtors' counsel should be required to develop a liquidation analysis under Chapter 7 saying, "[W]e think that what that's going to show is that the administrative creditors obviously will fare much better under the Chapter 11 [reorganization] than under the Chapter 7 liquidation, and there are certain potential conflicts of interest that arise that ought to be fleshed out in the disclosure statement." *Id.* at 96. This argument is somewhat reminiscent of *Marek v. Chesny*, 473 U.S. 1, 4-5 (1985), in which defendants successfully argued that because the plaintiff rejected a Rule 68 settlement offer that exceeded the ultimate judgment he received, they were not responsible for the payment of plaintiff's post-offer attorneys fees pursuant to the relevant fee-shifting statute.

¹⁴⁶ Jan. 10 Transcript, *supra* note 131, at 82. The insurers' counsel also acknowledged, though, that the "distributional scheme" proposed by the debtors' and plaintiffs' counsel might be "sensible" or "creative." *Id.*

¹⁴⁷ *Id.* at 83.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 83-84.

Mansville case ever got resolved? Somebody actually thought about it, and they came up with a theory that was not 524(g). 524(g) came out of *Mansville*. So, give creative man an option[.]”¹⁵⁰ The Judge added encouragement to all counsel to talk with each other before submitting the next plan¹⁵¹ and by the end of the hearing, it appeared that all of the lawyers were committed to being collaborative and creative.¹⁵²

In Spring 2006, Skinner filed its fifth and final reorganization plan, with a variety of complex and interconnected provisions in a proposed Court Approved Distribution Procedure for Asbestos Claims Against Skinner Engine Company, Inc. (CADP).¹⁵³ These provisions apparently were designed to be responsive to the court’s encouragement of creative problem solving. Specifically, the CADP provided that the asbestos plaintiffs would be given the opportunity to opt into the CADP or opt out “and enter the tort system.”¹⁵⁴ If they opted into the CADP, they would be required to pay a filing fee to participate in the CADP.¹⁵⁵ If their claim qualified for categorization as one of seven “Scheduled Diseases,” they could elect to accept the “Scheduled Value” for that disease or receive an “Individual Evaluation” of their claims by the Plan Trustee,¹⁵⁶ and they would receive a share of the Scheduled Value (or, presumably, the Individual Evaluation) based on a percentage set by the Plan Trustee.¹⁵⁷

An insurer, however, could dispute the Plan Trustee’s categorization of a claim and seek a “Court Determination of the Individual Evaluation.”¹⁵⁸ The court’s “Determination” was to be made “solely on the basis of the documentation in the Asbestos Claim file when the Asbestos Claim was categorized” by the Plan Trustee.¹⁵⁹ If the bankruptcy court ruled in favor of the plaintiff, the court could then be asked to approve either the value of the claim as determined by the Plan Trustee or an amount contained in a counter-offer from the insurer, which could be “any or no amount.”¹⁶⁰ According to a footnote in the CADP, this provision was modeled after baseball arbitration:

This process is similar to “baseball arbitration” in that the Bankruptcy Court may select either the amount proposed by the Plan Trustee or the counteroffer of the Asbestos Insurance Company. The Bankruptcy Court may not select another amount as part of the Court Determination. The process does not affect the Bankruptcy Court’s discretion to award counsel fees under this section.¹⁶¹

¹⁵⁰ *Id.* at 94-95.

¹⁵¹ *See id.* at 98.

¹⁵² *See id.* at 104.

¹⁵³ Court Approved Distribution Procedures for Asbestos Claims Against Skinner Engine Company, Inc. at 1, *In re Am. Capital Equip., Inc.*, 405 B.R. 415 (Bankr. W.D. Pa. 2009) (No. 1-23987) [hereinafter CADP].

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 2.

¹⁵⁶ *Id.* at 1.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 3.

¹⁵⁹ *Id.*; *see* Objections of Travelers, *supra* note 108, at 11 (objecting to CADP’s failure to specify what would be contained in the Asbestos Claim file).

¹⁶⁰ CADP, *supra* note 153, at 9.

¹⁶¹ *Id.* at 9, n.8.

Baseball arbitration is a relatively well-known model of arbitration. In it, the parties make their “last best offers,” and the arbitrator must choose one or the other.¹⁶² The process is designed to motivate the parties to be as realistic as possible.¹⁶³ The arbitrator may know the parties’ numbers ahead of time or may not (“night baseball”)¹⁶⁴ If the arbitrator knows the numbers ahead of time, she will choose the number that she feels is fairer at the conclusion of the arbitration hearing.¹⁶⁵ If she does not know the numbers, she will arrive at her own arbitral award and then conform her award to the party-provided number that is closer to hers.¹⁶⁶

The reorganization plan continued to provide for a 20 percent surcharge to be paid by the plaintiffs.¹⁶⁷ In addition, as suggested *supra*, the CADP also provided for the shifting of attorneys’ fees if the court determined that:

an Asbestos Claimant or an Asbestos Insurance Company, and/or their respective counsel, has contested an Asbestos Claim in bad faith or as part of bad faith conduct with respect to Asbestos Claims and their resolution and/or determination, which conduct includes, but is not limited to, the repeated filing of frivolous requests for Court Determinations, the relitigation through Court Determinations of the same factual issues, such as the use of Skinner products on a particular vessel, in a particular location and/or at a particular time and/or a history of requests for Court Determinations that deviate from normal requests for the review of Asbestos Claims.¹⁶⁸

No hearing was held on the fifth plan for reorganization until May 7, 2009.¹⁶⁹ Counsel for one insurer quickly alleged “collusion.”¹⁷⁰ Judge

¹⁶² See Meth, *supra* note 30, at 384; John L. Fixel, *Play Ball: Baseball Arbitration After 20 Years*, DISP. RESOL. J., June 1994, at 42, 43.

¹⁶³ See Meth, *supra* note 30, at 388.

¹⁶⁴ Gerald Lebovits & Lucero Ramirez Hidalgo, *Alternative Dispute Resolution in Real Estate Matters: The New York Experience*, 11 CARDOZO J. CONFLICT RESOL. 437, 442 (2010).

¹⁶⁵ See Loukas A. Mistelis, *ADR in England and Wales*, 12 AM. REV. INT’L ARB. 167, 203 (2001).

¹⁶⁶ See *id.*

¹⁶⁷ See *Objections of Travelers*, *supra* note 108, at 33-34 (alleging that surcharge was designed to pay debtors’ lawyers and other Chapter 11 professionals “who would otherwise recover an extremely small fraction of their fees”).

¹⁶⁸ CADP, *supra* note 153, at 9.

¹⁶⁹ According to the Third Circuit’s opinion in *In re American Capital Equipment, L.L.C.*, 296 Fed. App’x 270, 272-73 (3d Cir. 2008), there was considerable activity in the approximately three years that elapsed from the filing of the fifth reorganization plan until this hearing. Apparently and somewhat inexplicably, the *third* reorganization plan was put to a vote with the following results:

Skinner’s unsecured creditors and asbestos claimants voted in support of this plan. Skinner’s insurers then initiated an adversary proceeding alleging that such an arrangement violated their contractual rights under the insurance policies.

. . . Appellants [insurers] filed a motion to dismiss the Chapter 11 petitions, arguing that the case no longer served a legitimate purpose under Chapter 11[,] and . . . alleged that the plan was not designed to maximize the value of the assets to the creditors, but instead was designed to gain an improper litigation advantage over the insurers by allowing the asbestos claimants to use truncated, court-monitored procedures to access the insurance policies in exchange for claimants’ agreement to hand over a portion of their insurance recoveries to other non-asbestos creditors. Following a series of hearings, the Bankruptcy Court ultimately issued an order denying the motion and staying the proceedings pending appeal. Appellants appealed the Bankruptcy Court’s order denying the motion to dismiss to the District Court. In a May 11, 2007 order, the

McCullough questioned Skinner's settlement with the asbestos claimants "when there's nothing to insure, there's never been a claim successfully brought against the company, and there's not even a piece of paper that suggests they have a valid claim."¹⁷¹ Perhaps most telling, however, was the colloquy regarding the judge's potential role in the dispute resolution process, modeled after baseball arbitration, that had suddenly appeared as an integral part of the CADP:

- Ms. Alcabes: [I]t sets up, you know, this novel baseball arbitration procedure which we just don't think can possibly work or stand up to any kind of judicial scrutiny.
- The Court: While we're at the baseball—where in the law does it say you can tell me as the Court what to do and what I can't do and what I can see and what I can't see. Where is there any case law that says that . . . ?
- [I]t says in there that I can only consider certain pieces of paper, I can only consider certain stuff, and then I only get to choose between A and B.
- Ms. Alcabes: Your Honor, that was an attempt—this Court raised issues about the way claims would be processed, and I think, if I recall correctly, the Court asked to be involved in the process and asked that the insurance companies be involved in the process. And that was an attempt on our part to involve the Court and the insurance companies in the process. And the client plan also leaves open the ability of the Court to add more procedures or more . . . requirements.
- The Court: Not the way I read it.
- Ms. Alcabes: You're allowed to pick the trustee and you're allowed to set a lot of the terms about how the claims are handled and processed through your court.
- The Court: Not the way I read it. It says I can and I can't.
- Ms. Alcabes: It was just our attempt to comply with what you had asked for when we revised the plan.
- The Court: And then at the end of Section A of that thing, the last sentence says, "And the asbestos insurance company shall have the right to seek a Court determination of the asbestos claims." What's the difference between a Court determination and a trial?
- Ms. Alcabes: Well, these claims are being settled, they're not being tried.
- The Court: Oh. You're putting up a bunch of paper, you're putting up an agreement, you're putting up a proposed settlement, and I'm supposed to determine it. What's the difference between that and a trial . . . ?

District Court affirmed the Bankruptcy Court's order denying Appellants' motion to dismiss, *finding that the plan maximized value to creditors and was not filed solely to gain a litigation advantage over creditors*, and concluding that the Bankruptcy Court did not abuse its discretion in declining to dismiss Debtors' Chapter 11 case for a lack of good faith. This timely appeal [to the Third Circuit] followed.

Id. (emphasis added). The Third Circuit affirmed the District Court. *Id.* at 272.

¹⁷⁰ Transcript of Hearing on May 7, 2009, at 6-7, *In re Am. Capital Equip., Inc.*, 405 B.R. 415 (Bankr. W.D. Pa. 2009) (No. 01-23987) [hereinafter May 7 Transcript].

¹⁷¹ *Id.* at 7.

Mr. Horkovich: We did not mean to burden the Court. The Court has expressed grave concerns on numerous occasions that this was not a fair process and that the process is improper. So we tried to involve the Court to try to address the Court's concerns[, for] example on the selection of the trustee[. If we just selected the trustee, then it might be seen as, Your Honor, as collusive or such other terms as Your Honor has used with regard to the plan proponents' position. So we tried to leave that up to Your Honor, to the Court. If our selection of the trustee is a scam, then if Your Honor could select a trustee, then maybe that would address Your Honor's concern.

....

... [W]e did our best to try to craft a procedure that would be more expeditious, relieve the judicial system of the burden and yet address Your Honor's concerns about lack of judicial involvement and review.¹⁷²

Judge McCullough returned to this point, regarding his involvement, later on:

The Court: In Section 2A of this document, "If a Court determination is elected, the Bankruptcy Court shall decide—shall decide—solely, solely on the basis of the documentation in the asbestos claim file when the asbestos claim was categorized, whether the asbestos claim should be categorized as a scheduled disease." Where do you get off telling me what I can decide and what I can't decide on?

Mr. Horkovich: No disrespect, Your Honor. And Your Honor can—

The Court: It's not a matter of disrespect. I'm just saying where in the law does it say you can tell a Judge what he can decide on?

Mr. Horkovich: Well, Your Honor can look at whatever evidence Your Honor would want to look at. The intent behind submitting this document was that this would be a settlement which would structure—minimize the burden on the Court, minimize the burden on the parties as part of that settlement.

The Court: And kind of screw some people out of their rights.¹⁷³

Again, Judge McCullough returned to the uncomfortable fit between the terms proposed by Skinner and the role of a public judge. The resulting exchange highlighted the contrast between a private arbitrator and a public judge, particularly in terms of neutrals' autonomy from the will of individual parties. The exchange also suggested the difference between the procedural reforms that are possible when all parties agree compared to the much more limited possibilities that exist when a less powerful party attempts to impose a set of procedures upon a more powerful party:¹⁷⁴

¹⁷² *Id.* at 8-12.

¹⁷³ *Id.* at 15.

¹⁷⁴ I make this observation due to the strikingly greater deference shown by courts to the pre-dispute mandatory arbitration provisions imposed by institutional actors upon consumers, employees, franchisees, individual securities investors, etc. *See, e.g.*, *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 453 (2003); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 56 (1995); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). Courts have, however, become

- The Court: Okay. Then at the top of Page 3, it says, “If the Bankruptcy Court agrees with the asbestos claimants’ position, the decision shall be binding against the asbestos claimant and the asbestos insurance companies and not subject to further review.” How can you limit the further review, Number one? Number two, there’s no discussion about what happens if the Bankruptcy Court disagrees.
- Mr. Horkovich: If this were not—if the Court were not involved, if you could just imagine that for a second. If there was a separate settlement and agreement, parties could agree in a settlement to an arbitration and certain limitations. A limited number of witnesses, a limited number of papers that would be presented. A limited time for presentation—
- The Court: That’s if both parties, both sides were parties were parties to the agreement. If you had the insurance company’s agreement, I’d agree with you. But that’s not what you’ve got here.
- Mr. Horkovich: Absolutely not. That’s correct, Your Honor. So then the issue is, can we do that without their consent or their involvement? Our respectful belief is that we can if the plan is reasonable. If the settlement is reasonable, we’re able to—
- The Court: Let me tell you, with no basis for any claim here, nothing to insure, no prior claim being paid, I’m going to tell you I don’t see any basis to find it reasonable.¹⁷⁵

Near the end of the hearing, Judge McCullough tried to understand what he was being asked to do one more time:

- The Court: I understand that the plan proponents’ distinction between trying a case and determining a case is that I’m not being asked to have a trial, I’m just asked to determine it. That’s the distinction?
- Mr. Horkovich: Yes, Your Honor. This would be a settlement rather than a trial with a judgment. And Your Honor’s determination—
- The Court: No, no, no. That’s not what the document says. The document says I shall determine. It doesn’t say I shall approve or disapprove a settlement. It says I shall determine.
- Mr. Horkovich: The word determine has no special meaning to us, Your Honor.

more willing to find unconscionability. *See, e.g.,* Amy J. Schmitz, *Embracing Unconscionability’s Safety Net Function*, 58 ALA. L. REV. 73, 94 n.170 (2006); Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757, 761-62 (2004); Jeffrey W. Stempel, *Mandating Minimum Quality in Mass Arbitration*, 76 U. CIN. L. REV. 383, 401 nn.44-45 (2008). The recent Supreme Court decision in *Rent-a-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772 (2010), however, may effectively end this development. *See* Jean R. Sternlight, *The Role of Courts in Interpreting and Enforcing Arbitration Clauses: A Process Viewed Through Two Different Lenses 2* (2011) (unpublished manuscript) (on file with author) (anticipating that *Rent-A-Center* will remove unconscionability determinations from courts and place them in the hands of the same arbitrators who will conduct the arbitration proceedings).

¹⁷⁵ May 7 Transcript, *supra* note 170, at 16-17; *see also id.* at 18-20 (counsel returning to parties’ ability to reach agreement on the procedures that will be used to determine liability and damages—including limitations on evidence, witnesses, and range of the award—without their insurers’ consent; also referencing procedures used by insurance companies pursuant to the Wellington Agreement).

The Court: Okay, then what word would you substitute for determine?
 Mr. Horkovich: Decide, approve, disapprove, whatever word—¹⁷⁶

As noted *supra*, in baseball arbitration, the arbitrator subordinates her judgment regarding the right arbitral award to the judgment of the parties in making their last best offers. This approach is clearly appropriate in an arbitration that is the creature of a contract between informed and sophisticated parties. But can litigating parties agree between themselves to force a publicly appointed judge to decide in this way? Dubious. Could one party force this form of dispute resolution upon another unwilling party *and* upon a publicly appointed judge? In this case, at least, the answer was no. In the Skinner bankruptcy, one of the insurers' counsel reminded everyone of the limitations imposed by the law:

[T]heir fifth plan, which is neither really a settlement under 9019 nor really a claims allowance process under 502 is really a stranger to the [Bankruptcy C]ode. One could go through the process of allowance or disallowance of claims in which the Court has the role that the code gives it subject to everyone's rights. Or there could be a settlement. What they've done is neither, and that is one of the many reasons why the fifth plan is unconfirmable.¹⁷⁷

One other problem with the plan was, of course, the 20 percent surcharge. Though debtors' counsel were willing to reduce the percentage of the surcharge, they were unwilling to abandon it.¹⁷⁸

Ultimately, in his May 26, 2009 opinion, Judge McCullough labeled the proposed CADP "collusion"¹⁷⁹ and found that Skinner's reorganization plan was "unconfirmable" without the insurers' consent.¹⁸⁰ He therefore converted Skinner's Chapter 11 reorganization into a Chapter 7 liquidation.¹⁸¹ Judge McCullough also rejected the CADP's attempt to provide for his service as "an arbitrator, mediator, or something else"¹⁸² responsible for "mak[ing] final binding determinations as to the validity and valuation of contested opt-in Asbestos

¹⁷⁶ *Id.* at 25-26.

¹⁷⁷ *Id.* at 23; *see also* Great American Insurance Company's Objections to Debtors' Disclosure Statement & Joinder in Other Parties' Objections and Renewed Motion to Dismiss at 10, *In re Am. Capital Equip., Inc.*, 405 B.R. 415 (Bankr. W.D. Pa. 2009) (No. 01-23987) (quoting *Myers v. Martin (In re Martin)*, 91 F.3d 389, 393 (3d Cir. 1996)) (urging that under Bankruptcy Rule 9019, the following four factors must be considered in determining whether to approve a settlement: "1. the probability of success in the litigation; 2. the likely difficulties in collection; 3. the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and 4. the paramount interest of the creditors.").

¹⁷⁸ May 7 Transcript, *supra* note 170, at 25.

¹⁷⁹ *In re Am. Capital Equip.*, 405 B.R. at 423

¹⁸⁰ *Id.* at 426-27 (concluding that a confirmable plan could not be effectuated because of failure to obtain Insurers' consent, among other reasons).

¹⁸¹ *Id.* at 427. Debtors who have run out of cash before their plan can be confirmed may themselves seek to convert their Chapter 11 bankruptcy into a Chapter 7 bankruptcy. *See* 11 U.S.C. § 1112(b)(4) (2006) (listing causes for conversion of case under chapter 7). That does not seem to have been the case here. *See In re Am. Capital Equip.*, 405 B.R. at 426-27 (stating conversion to Chapter 7 was appropriate due to inability to effectuate confirmable plan).

¹⁸² *See In re Am. Capital Equip.*, 405 B.R. at 426.

Claims”¹⁸³ and thus “finally liquidat[ing] such claims, and without any chance for review by another court.”¹⁸⁴ As suggested by Judge McCullough’s questions during the hearings, the jurisdiction of federal bankruptcy courts is limited. Though parties may explicitly consent (or at least not object) to a bankruptcy judge’s exercise of extra-jurisdictional service,¹⁸⁵ such consent apparently did not occur here. Therefore, the sorts of claims that had been brought by the asbestos claimants¹⁸⁶ represented “noncore proceedings”¹⁸⁷—and as Judge McCullough went on to observe: “[T]he Court may only issue proposed findings of fact and conclusions of law to the district court with respect to noncore proceedings . . . this Court is powerless to make a final determination regarding the liquidation of any opt-in Asbestos Claims that are disputed”¹⁸⁸

Procedures and titles seemed to mean so little to counsel for the debtors and plaintiffs in the Skinner bankruptcy. A “trustee” could just as easily be called “claims administrator.” “Determine” could become “approve.” A “judge” could convert into a “baseball arbitrator.” Even Judge McCullough revealed a lack of understanding regarding the procedures involved, observing that he was being asked to play the role of “arbitrator, mediator, or something else.”¹⁸⁹ The debtors’ and plaintiffs’ counsel definitely wanted the asbestos cases to be heard and decided—regardless of the procedures used. The insurers’ counsel were just as adamant in not wanting the cases to be heard. Judge McCullough wanted to resolve this matter and was worried about the deserving asbestos plaintiffs whose claims had never been heard.

But procedure matters, and the words used to prescribe procedures matter. Lawyers should know better than most that different words can lead to different expectations, duties, and entitlements. In the end, Judge McCullough found that:

Unfortunately for the Debtor and the Co-Proponents, this Court is unaware of any legal authority that would permit it to so act [as proposed in the Fifth Plan] while, at the same time, it also acts as the presiding Court. Furthermore, the relevant provisions of the Fifth Plan and CADP cited to above refer to this Court as “the Bank-

¹⁸³ *Id.* at 425 (“[P]rovisions of the Alternative Dispute Resolution Process repeatedly call for this Court, in its official capacity, to make final binding determinations as to the validity and valuation of contested opt-in Asbestos Claims”).

¹⁸⁴ *Id.* at 425.

¹⁸⁵ See *supra* note 15 and accompanying text.

¹⁸⁶ See *In re Am. Capital Equip.*, 405 B.R. at 426.

¹⁸⁷ *Id.* at 425 (“[T]he liquidation of unliquidated personal injury tort claims, as are the opt-in Asbestos Claims, constitute(s) a noncore proceeding”).

¹⁸⁸ *Id.*; see 28 U.S.C. § 157(b)(2) (2006) (“Core proceedings include, but are not limited to . . . allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan . . . but not the liquidation or estimation of contingent or unliquidated personal injury tort[s]”). It is conceivable, but beyond the scope of this Article, that the debtor and its co-proponents may have claimed that an exception applied. See, e.g., *In re UAL Corp.*, 310 B.R. 373, 379-80 (Bankr. N.D. Ill. 2004) (defining the bankruptcy court’s decision to time-bar a personal injury claim as the broad view of the liquidation exception because it “effectively liquidate[d] the claim for purposes of distribution” and defining the narrow view as specifically “fixing the amount of the claim”).

¹⁸⁹ *In re Am. Capital Equip.*, 405 B.R. at 426.

ruptcy Court” when it makes its final determinations thereunder, which indicates to the Court that the Debtor and the Co-Proponents expect that this Court, when making final determinations within the confines of the Alternative Dispute Resolution Process, will only act within its official capacity as the presiding Court in the instant bankruptcy case. Acting in such official capacity, this Court, as set forth above, may not finally liquidate contested opt-in Asbestos Claims, and even to the extent that it can act with respect to such claims, such action will necessarily be reviewable by another court.¹⁹⁰

Arguably, Judge McCullough invited just the sort of creativity that counsel demonstrated here. He sought innovation and noted that creative lawyers are the source of new law; he himself indicated a willingness to try asbestos cases; he urged all counsel to work together to try to respond to the plight of worthy plaintiffs. In the end, though, counsel’s creative problem solving crossed too many boundaries.

IV. GUESSING AT THE UNDERLYING DYNAMICS THAT LED TO A PROPOSED “CREATIVE” AND “ALTERNATIVE” SOLUTION

It is so tempting to guess at the underlying dynamics that led to the procedures proposed in *In re Skinner Engine Company, Inc.* The pleadings and hearings suggest the following: Debtors’ counsel had not been paid all of their fees due to the insurers’ decision to contest coverage and thus had an interest in “monetizing” Skinner’s insurance policies.¹⁹¹ The Chapter 11 professionals, including debtors’ counsel, may even have been forced to disgorge some of the fees they had received if the reorganization was converted into a Chapter 7 liquidation.¹⁹² The multi-district litigation process had failed to serve the plaintiffs in the asbestos cases, or Skinner as one of the defendants, in part because there were so many cases and the responsible judge had died.¹⁹³ The insurers had calculated that payment to the asbestos plaintiffs on behalf of Skinner would be so small and unlikely that it did not make economic sense to participate in a creative dispute resolution procedure. If these guesses regarding the dynamics are accurate, the proposed CADP in Skinner could be understood as a creative work-around, developed by desperate lawyers trying to do their best to achieve their clients’ various and difficult interests. The CADP borrowed heavily from the operation of trusts established in several other noteworthy bankruptcies, particularly in the definition of Scheduled Diseases and the valuation of claims. The dispute resolution procedure in the CADP, its financing and the involvement of the judge, however, were new.

Unfortunately, the lawyers’ procedural innovations were insufficiently informed. The lawyers—and even the bankruptcy judge—did not appear to

¹⁹⁰ See *id.* In a footnote, the court observed that the debtor and its co-proponents could simply remove the court from the ADR Process and thus “rectify the flaw that the Court has just identified regarding such process.” *Id.* at 426 n.6. But the court added, “However, such removal of the Court would serve to make the Asbestos Claims Settlement, which incorporates the Alternative Dispute Resolution Process, even more unreasonable than it has already been determined to be by the Court.” *Id.*

¹⁹¹ See Jan. 10 Transcript, *supra* note 131, at 90-92.

¹⁹² See Objections of Travelers, *supra* note 108, at 35-36.

¹⁹³ See *id.* app. A, at 2; Jan. 10 Transcript, *supra* note 131, at 45-49.

consider all of Skinner's dispute resolution options, the consequences of such options, and their appropriate relationship with the public institution of the federal bankruptcy courts. It is likely that they did not have enough time or money to do the careful research, analysis, and consultation that might have resulted in a better, potentially confirmable, plan. This dynamic seems likely to characterize many bankruptcies and foreclosures—and likely to result in the sorts of difficult, largely-unanswered ethical questions raised in this Article's discussion of the troubles of the hypothetical XYZ Company.

The lawyers' and the judge's apparent lack of knowledge regarding available dispute resolution options did not need to exist. Legal educators and regulators, for example, can and should do more to prevent the occurrence of another *In re Skinner Engine Company, Inc.* As noted *supra*, some law schools now integrate dispute resolution (and even dispute system design) into their core and elective doctrinal courses, regardless of whether students plan to pursue litigation, transactional work, or careers in business or government. Not surprisingly, integration is more widespread in some doctrinal areas than others. In part, this may be due to the availability of helpful resources. Many civil procedure texts, for example, now include sections that introduce "alternative" court-connected dispute resolution processes.¹⁹⁴ Not all civil procedure professors, however, teach these sections. In addition, the texts' coverage of the topic can be spotty, and the focus sometimes tends toward assessing whether the inclusion of these processes in civil litigation is "good" or "bad." Frankly, such a framing is no longer relevant. Dispute resolution procedures are here to stay, as integral parts of civil litigators' practice. Law students need to learn enough about the variety of available dispute resolution procedures to ensure their ability to engage in knowledgeable, skillful and ethical practice¹⁹⁵ in all of these forums. Ideally, inclusion of this topic will also help law students understand how to use the processes in a manner that will be consistent with the important mission and ethics of serving as "officer[s] of the legal system and . . . public citizen[s] having special responsibility for the quality of justice."¹⁹⁶

Law schools, meanwhile, are much more likely to invest in courses that introduce students to dispute resolution if states intentionally include this topic in their bar exams. Such a reform need not be difficult. Essay questions may

¹⁹⁴ See, e.g., STEPHEN N. SUBRIN ET AL., CIVIL PROCEDURE: DOCTRINE, PRACTICE, AND CONTEXT 577-607 (3d ed. 2008).

¹⁹⁵ See ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 8-9 (2007); WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 114 (2007) (calling for law schools to introduce programs and revise their curricula to integrate the cognitive skills of legal analysis, the humanistic skills of client service, and the internalization of the identity and moral values of civil professionals).

¹⁹⁶ MODEL RULES OF PROF'L CONDUCT pmbl. para. 1 (2009). Consistent with this goal and under the leadership of Professors John Lande, Jean Sternlight, and Sean Nolon, the ABA Section of Dispute Resolution has begun an initiative to provide traditional, "podium" civil procedure professors with a range of easily-accessible, customized tools to assist with the incorporation of dispute resolution procedures, problem-solving skills and a humanistic approach to the practice of law into doctrinal courses. As part of this initiative, interested academics have also formed other committees focusing on other doctrinal areas.

arise out of events occurring in a negotiation, judicial settlement conference, mediation session, med-arb or arbitration hearing. Bar questions may focus on issues covered in doctrinal courses as varied as civil procedure, evidence, contracts, employment discrimination, or remedies, just to name a few—but the events' occurrence within a dispute resolution process also will require students to know the relevant law and ethics that apply there.¹⁹⁷

Hopefully, this Article has also illustrated why and how the ABA Model Rules of Professional Conduct need to be updated to respond to the real dilemmas arising in today's mediation sessions and other court-connected non-adjudicative processes. During the Ethics 2000 process, Professors Carrie Menkel-Meadow, Kimberlee Kovach, Robert Cochran, and Doug Yarn, as well as Dean Jim Alfini, current ABA Dispute Resolution Section Chair Wayne Thorpe, and others, advocated for dispute resolution-related changes.¹⁹⁸ Many of their proposals were not adopted, or adopted only in part. They foresaw some of the difficulties that have now arisen. Timing is everything, and now may be the time to revisit these pragmatic visionaries' proposals.

Finally, mediation advocates (including this author) need to inform ourselves about the worlds we propose to enter. To return to the focus of this Article, that means learning about the substantive and procedural law of bankruptcy and both the goals and limits (legal, ethical and practical) of the dominant players in bankruptcy. We can—and probably will—still advocate for procedural reform and inclusion of new forms of dispute resolution, but we can—and should—be informed advocates.¹⁹⁹ It is what we expect of our children, employees, and students. We should lead by example. It is so much work, though, to behave as we should. Indeed, it is often a thankless task and, even worse, one that is likely to draw criticism from those who are sufficiently content with the *status quo*.

¹⁹⁷ The Pennsylvania Bar Association Alternative Dispute Resolution Committee recently proposed to the Pennsylvania Board of Law Examiners that the state's bar exam include ADR. See Memorandum from Herbert R. Nurick, Chair of the Subcomm. on Legislation & Policy of the Pa. Bar Ass'n Alternative Dispute Resolution Comm. to Karen Engro, Chair of the Pa. Bar Exam'rs (Oct. 21, 2009) (on file with the author).

¹⁹⁸ See generally James J. Alfini, *Settlement Ethics and Lawyering in ADR Proceedings: A Proposal to Revise Rule 4.1*, 19 N. ILL. U. L. REV. 255 (1999); Robert F. Cochran, Jr., *Professional Rules and ADR: Control of Alternative Dispute Resolution Under the ABA Ethics 2000 Commission Proposal and Other Professional Responsibility Standards*, 28 FORDHAM URB. L.J. 895 (2001); Kovach, *supra* note 10, at 935; Menkel-Meadow, *Ethics of ADR* *supra* note 74, at 979; Yarn, *supra* note 74, at 213-17; James Alfini, *E2K Leaves Mediation in an Ethics "Black Hole,"* DISP. RESOL. MAG., Spring 2001, at 3; Kimberlee K. Kovach, *New Ethics for the New Lawyer: Fitting the Standards to the Process*, DISP. RESOL. MAG., Winter 1997, at 2; Douglas Yarn & Wayne Thorpe, *Ethics 2000: The ABA Proposes New Ethics Rules for Lawyer-Neutrals and Attorneys in ADR*, DISP. RESOL. MAG., Spring 2001, at 3.

¹⁹⁹ See, e.g., Lande, *supra* note 96, at 69 (describing one approach to reform, involving use of dispute system design principles to encourage good faith participation in court-connected mediation and to handle allegations of lack of good faith).

V. CONCLUSION

This Article did not begin as a morality story, but both the hypothetical involving XYZ and the story of *In re Skinner Engine Company* represent cautionary tales. Dispute resolution procedures, like any other set of tools, have the potential to be misused and even abused. It is time, once again, for education and reform. Certainly, this will not be simple, and advocates likely will need to get our hands uncomfortably dirty as we fight for the legitimacy and virtue of dispute resolution.

Sometimes, it is difficult to understand how the fight can be so difficult and why it recurs so frequently. The value and appropriate use of dispute resolution procedures can seem so simple (and pure)—like “motherhood and apple pie.” Despite their reputation, though, even motherhood (or, more accurately, parenthood) and apple pie are neither simple nor pure. They only look that way after the fact, when the children are thriving and the dessert is proclaimed delicious. Let’s hope we experience similar success as we move to the next stage in the evolution and integration of dispute resolution, even if part of the price is insufficient acknowledgement of our work, doubts and pain. The satisfaction of knowing that we played our part may need to be reward enough.