



THERE IS A PLACE FOR MEDIATION IN THE BANKRUPTCY COURT

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Mediation – State and Federal Courts v. Bankruptcy Court



- Mediation has become more popular in both State and Federal Courts but appears to be not so much in demand in Bankruptcy Court. Why?
- Many Bankruptcy Court disputes do not lend themselves to mediation because of their simplicity, expediency, and in many instances, the parties may not be in a position to bear the cost of the mediation process.
- Attorneys' unfamiliarity or discomfort with the process may come into play, and some practitioners may not realize how effective mediation can be in many instances.
- Many highly trained and qualified mediators are simply not familiar with discrete bankruptcy issues, which can easily impact a mediator's effectiveness.

How It All Started

- The savings and loan collapse of 1990/91 triggered a dramatic downturn in the economy and, in particular, in Arizona, due to the large numbers of these institutions that dominated our financial marketplace.
- As the RTC intervened, the number of bankruptcy cases skyrocketed, and the Bankruptcy Court dockets became, in many instances, overwhelmingly crowded.
- Many forward thinking individuals in the bankruptcy field recognized the benefit of alternative dispute resolution and, in particular, mediation, which had rarely been considered prior to the early 1990s.

How It All Started (cont.)

- An Arizona-based committee was formed to investigate other districts' progress in this area.
- Even though I do not believe the committee succeeded in drafting and implementing the mediation standards that were eventually adopted by the local courts, it set the groundwork for what we have today:
 - a) a pool of certified bankruptcy mediators, both compensated and uncompensated;
 - b) a much higher level of sophistication among our bankruptcy judges to conduct mediations; and
 - c) professional mediators are now very sophisticated in this area.

How It All Started (cont.)

- During the course of the mediations that I engaged in during the 90s and through the beginning of the century, I concluded the following.
 - a) it was cost effective for most participants;
 - b) the success rate of it was higher than I thought, probably 70 to 80%;
 - c) the judges sincerely seemed to enjoy it;
 - d) most of the lawyers involved enthusiastically participated but did not fully understand the process;
 - e) additional training for the judges would be helpful, though the judges were doing a fine job without that training; and
 - f) a more formal structure for the process would benefit everyone.

How It All Started (cont.)

- The difference between evaluative mediation and facilitative mediation became quickly apparent.
- Some judges tried to direct the parties towards what they believed would be the ultimate result if the matter proceeded to Court.
- Other judges were only concerned with trying to facilitate a settlement regardless of how the matter would ultimately be resolved through formal proceedings.



So, What Is Mediation And When Is It Appropriate?

- Mediation is a procedure in which the parties to litigation voluntarily agree to meet with a third party, the mediator, in hopes of settling the outstanding disputes between the parties.
- The purpose of mediation is to achieve a settlement relatively quickly and inexpensively and to bring a dispute to a final close.
- Mediation requires the active participation of all parties involved and requires that those parties are willing to listen to a third party and consider what he or she may recommend.

When Do You Mediate?

- Since the overall goal of mediation is to save money, how far does the litigation have to progress for mediation to be most cost effective?
- Normally you do not need to engage in extensive discovery before mediating.
- If you believe that in most cases the earlier the mediation, the better, one may ascribe to the view that mediation should be attempted before litigation ensues.
- In certain instances, initiating mediation may be premature. Once the complaint is filed and the issues are joined, waiting for at least initial disclosure may be advantageous in many cases.
- Separate and apart from the timing of the mediation relative to the age of the case, a party needs to consider certain psychological and practical factors as well.

Selecting A Mediator



- The first factor to take into account when selecting a mediator is whether the mediator uses an evaluation approach versus a facilitative one.
- Sometimes, you need a mediator who can be an absolute “hammer.”
- This can backfire when: a) a mediator of this type decides your case would lose and will not listen; or b) the client is so intimidated that the client wants to fold notwithstanding your advice.
- Some of the mediators prepare far more carefully and meticulously than others but this comes with an associated cost.
- Some mediators are brilliant at being able to incorporate detailed financial data into the analysis.

Selecting A Mediator (cont.)

- Some mediators are warm and fuzzy and do an excellent job promoting a soothing environment to encourage reconciliation.
- The mediator who quickly recognizes the case may not settle but uses the mediation process to create an atmosphere in which settlement may be possible later on, or advises your client that the client's position is strong and the other side is being unreasonable, can be highly beneficial.
- Should you consider an ex-bankruptcy Judge or another standing bankruptcy Judge?
- If a Judge is an option, consider this alternative, especially since the cost is right (i.e. free) but conduct research first.
- Avoid confrontation over the selection of the mediator.

Mediation Strategies



- Now that you have picked the appropriate time and the perfect mediator, the lawyer's work is far from over.
- Drafting the mediation memorandum can be as crucial as any aspect of the procedure.
- Its length can be a very important strategic determination since in certain cases, a short brief can be far more effective.
- Think about whether you want confidential briefs, either in lieu of exchanged briefs or in addition to the primary briefing.

Mediation Strategies (cont.)

- A short confidential brief can educate the mediator as to certain aspects of the dispute without inciting the other side.
- If the other side is acting irrationally, information in a confidential brief can be far less confrontational.
- Educate the client about the specific mediator selected, his/her style, and prepare the client through an actual but condensed mediation session.
- Ask the client to agree in advance as to how much he or she will volunteer without your direct input. Some clients want a chance to talk to the mediator, whereas others do not.

Mediation Strategies (cont.)

- Ask the client to dress comfortably, but professionally, as a show of respect for the mediator.
- Reduce any settlement to writing at the mediation regardless of how late it may be and how brief the settlement document may be. A hand-written agreement is better than an oral understanding.
- This may seem obvious but make sure that your client understands the financial obligation of the mediation and that the mediator needs to be paid.



Mediation Pitfalls

- If the mediator appears to be unprepared, spend time early in the mediation educating the mediator. Do not focus on settling the case until the mediator has a full grasp of the background.
- The mediator may advise you early in the mediation that the other side does not appear to be reasonable or does not fully understand the process. In that case, grant the mediator permission to spend as much time as necessary to ascertain whether the opposing party's attitude can be changed.
- Your own client may go sideways during the mediation process. A private meeting with the mediator to advise the mediator about what may be prompting your client to take certain positions may be helpful.

Mediation Pitfalls (cont.)

- Advise your client in advance that you may have private sessions with the mediator to ensure the client will be comfortable with this process.
- Similarly, if your client feels like the mediator is picking on him or her, talk with the mediator privately and let the mediator know that the effectiveness of the process is being impacted by the client's perception of what is going on.
- Finally, and this happens very rarely, if for whatever reason the mediation seems counterproductive, which is extremely rare, stop the mediation process as professionally as possible.

Confidentiality of Mediation



- A fundamental and crucial aspect of mediation is the confidentiality of the process. Mediation is intended to encourage an open and free exchange of information and concerns, and confidentiality helps advance those principles.
- Confidentiality exists on two different levels during the mediation process.
- The entire procedure itself is confidential, which means that unless a binding settlement is reached or the parties agree to waive confidentiality, nothing that occurs during the mediation is admissible during any legal proceedings or otherwise can be used by a party for any purpose.

Confidentiality of Mediation (cont.)

- Secondarily, during the course of the mediation, communications of a party with the mediator are otherwise confidential unless that party specifically agrees that any such discussions can be disseminated to the other side.
- Though in 2011, one Ninth Circuit case suggests that in certain instances mediation may not be unconditionally confidential, a party cannot assume that whatever happens in mediation is absolutely confidential, no “ifs, ands or butts.” *See Facebook, Inc. v. Pacific Northwest Software, Inc.*, 640 F.3d 1034 (9th Cir. 2011).

Confidentiality of Mediation (cont.)

- It is important that a practitioner fully appreciates what this means. Without an adversary's consent, regardless of what may have happened in the mediation, a party cannot utilize anything that occurred in mediation for any purpose whatsoever.
- This is totally different than if during the course of ordinary negotiations a party was advancing an unsupportable position. In that case, the successful party could utilize such negotiations to bolster an attorney fee claim.

Confidentiality of Mediation (cont.)

- Arizona case law has not only consistently upheld the confidentiality of mediation but also has prevented a party from suing an attorney for malpractice because of a position that may have been argued during the mediation. See the case of *Grubaugh vs. Hon Blomo, County of Maricopa, et al.*, 238 Ariz. 264, 359 P.3d 1008 (App. 2015).
- One cannot stress enough the reality that even though any offer made during mediation cannot be used for any other purpose during the course of the litigation, once an offer is uttered to the other side, that party will necessarily assume such an offer is the new baseline amount or offer for future negotiations.

Confidentiality of Mediation (cont.)

- Similarly, educating the mediator of your bottom line position at the beginning of the mediation itself is also very risky unless you are dealing with a very experienced and skilled mediator.
- You should be candid and forthright with the mediator but remember that the mediator's goal in almost all instances is to see the case settled and not be overly concerned if the result is similar to what a judge would determine.
- If a mediator receives the impression that your client is extremely flexible and pliable and wants to settle regardless of the cost of doing so, it is almost impossible for even the best mediator to not utilize that knowledge to force a settlement.

Conclusion

I sincerely believe that almost any dispute can be resolved at mediation if the other side is rational, you select the correct mediator, and you and your client are properly prepared. Since in almost all instances it is in your client's best interest to settle the case if possible, it is incumbent upon you as counsel to do everything possible to ensure a satisfactory result at the mediation.