AMERICAN BANKRUPTCY INSTITUTE

2019 Northeast Bankruptcy Conference and Northeast Consumer Forum

Achieving Consensus in Bankruptcy Disputes Through Mediation

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CONCURRENT SESSION

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AMERICAN BANKRUPTCY INSTITUTE
NORTHEAST CONFERENCE 2019

Mediation in Bankruptcy Cases

By Berry Mitchell

I. STATUTORY PREDICATES

a) **Civil Justice Reform Act of 1990 (CJRA)**
   i. See Pub.L. 101–650.
   ii. Congress enacted the CJRA to explore the causes of cost and delay in civil litigation.
   iii. The Act requires all 94 federal district courts to implement "civil justice expense and delay reduction plans" that "facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes" See 28 U.S.C. § 471.
   iv. CJRA expressly recommended that ADR be considered by the federal courts as a case management principle. See 28 U.S.C. §§ 471-482.

b) **Alternative Dispute Resolution Act of 1998 (ADR Act of 1998)**
   i. See 28 U.S.C. §§ 651-658.
      1. ADR Act of 1998 requires:
         a. Each District Court to "devise and implement its own alternative dispute resolution program,"
            i. **District of Rhode Island (DRI) initiated its ADR program in November 1993**.
         b. The ADR Act of 1998 provides that "[e]ach . . . district court shall authorize, by local rule[1] . . ., the use of alternative dispute resolution processes **in all civil actions, including adversary proceedings in bankruptcy**, in accordance with [the ADR Act]." See 28 U.S.C. § 651(b).
         c. Each district court must provide litigants in all civil cases with **at least one ADR process**, including but not limited to mediation, early neutral evaluation, mini-trial, and arbitration . . ." See 28 U. S. C. § 652(a).

[1] See DRI L.R. Civ. 53.

d. "**Encourage and promote the use of alternative dispute resolution in its district**".

e. The Act **requires litigants in all civil cases to consider using ADR at an appropriate stage** in the case. 28 U.S.C. § 652(a).

i. **In the Federal District Court here in RI**, this is accomplished in several ways:

1. **Via information provided on the DRI website**.
   a. See: https://www.rid.uscourts.gov/alternative-dispute-resolution-adr
2. **DRI ADR Plan**
   a. See: https://www.rid.uscourts.gov/sites/rid/files/documents/adr/ADRPlan-030106.pdf
3. **L.R. Civ. 53**
   a. See https://www.rid.uscourts.gov/sites/rid/files/documents/12-01-2018-Rules.pdf
4. **Rule 16 Conference (Initial Scheduling Conference)**
   a. "Since 1983, Rule 16 has expressly provided that settlement of a case is one of several subjects which should be pursued and discussed vigorously during pretrial conferences." See Nick v. Morgan's Foods, Inc., 99 F. Supp. 2d 1056, 1060 (E.D. Mo. 2000), citing G. Heileman Brewing Co. v. Joseph Oat Corporation, 871 F.2d 648, 651 (7th Cir.1989).
   b. "Rule 16 expressly gives the court the authority in its discretion, to order litigants to participate in pretrial proceedings, including hearings to facilitate settlement." Id.
   c. **DRI Example: Judge McConnell**:

i. Among other things, in order to facilitate an informed discussion of the merits of the case and the prospect for settlement, lead counsel is required to confer prior to the Rule 16 Conference pursuant to counsel's obligations under Fed. R. Civ. P. 26(f) to explore the possibility of settlement before substantial expenditures of time and money are made and possible referral to ADR in the form of a mandatory of a Settlement Conference before a Magistrate Judge or with the court's staff Mediator.[2]

ii. In the Bankruptcy Court in the DRI

1. **Via the DRI Bankruptcy Court's website**.

a. See http://www.rib.uscourts.gov/mediation

II. Mandatory Referral to Mediation

a) Courts may assign to mediation any dispute arising in an adversary proceeding, contested matter or otherwise in a bankruptcy case.

III. Good Faith

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[2] In appropriate cases, the court has inherent power to order parties to participate in ADR procedures not specifically authorized by local rules, provided adequate procedural safeguards are imposed. *In re Atl. Pipe Corp. , 304 F. 3d 135, 143 (1st Cir. 2002)*. Only mediation, early neutral evaluation, and voluntary arbitration may be required. See *28 U. S. C. § 652(d)*. Subject to certain exceptions, district courts are generally authorized, with the parties' consent, to refer to nonbinding arbitration cases seeking money damages of $150,000 or less. See *28 U. S. C. §§ 654–658*. Courts may not refer civil actions to arbitration where either: The parties do not consent; relief sought is money damages exceeding $150,000; action is based on an alleged violation of constitutional rights; action is based in whole or in part on an alleged deprivation of civil rights (jurisdiction under 28 U.S.C. § 1343); district court has exempted the specific case or cases of the same category as not "appropriate" for alternative dispute resolution. See *28 U. S. C. §§ 654(a), 652(b)*.

To facilitate referral to arbitration, a district court may presume damages are not in excess of $150,000, unless counsel certifies that damages exceed such amount.25

To overcome this presumption, counsel must certify that the damages reasonably recoverable exceed $150,000. The prayer of the complaint is not sufficient.

Pending adoption of national rules, local rules must ensure that "consent to arbitration is freely and knowingly obtained" and that "no party or attorney is prejudiced for refusing to participate in arbitration."27

a) Actions or postures that convey blatant disrespect for the mediation process, the parties, and the mediator may be sanctionable, even where no rule or order mandates "good faith" participation.
    i. According to the Court in *Procaps*, such conduct includes:
        1. **not attending a court-ordered mediation**;
        2. not having a representative with sufficient settlement authority attend the mediation;
        3. failing to submit a court-required written mediation summary;
        4. leaving a mediation after a few minutes (or some other inadequate amount of time); and

b) failing to timely give notice before a court-required mediation that it did not intend to make a settlement offer at a mediation.
    i. See Procaps S.A. v. Patheon Inc., 2015 U.S. Dist. LEXIS 72464 (S.D. Fla., June 4, 2015).
    ii. Under Rule 16 the Bankruptcy Court could sanction the parties on either of the two primary grounds it identified. See Fed. R. Civ. P. 16(f)(1)(B), (2) (empowering courts to issue sanctions, including the opposing party's attorney fees, when a party or its attorney is "substantially unprepared to participate—or does not participate in good faith"); see also Pinero v. Corp. Courts At Miami Lakes, Inc., 389 F. App'x 886, 889 (11th Cir. 2010) (upholding monetary sanction for failure to comply with requirements for a settlement conference).
    iii. A "district court's local rules may provide an appropriate source of authority for ordering parties to participate in mediation." In Re Atlantic Pipe Corp., 304 F.3d 135, 140 (1st Cir. 2002).

IV. STATISTICS

a) **Trials in the District Courts**
    i. **Nationally**, for the12 month Period ended September 30, 2018 of the 275,879 civil cases terminated, only 0.9 % reached trial.
    ii. During the same reporting period, of the 7,312 civil cases terminated in the **First Circuit**, only 1.2 reached trial.
    iii. For the same reporting period, in the **District of Rhode Island (DRI)**, of the 621 civil cases terminated, only 0.5% reached trial.

b) **Vanishing Trials?**
    i. Civil trials have not vanished, but they are the exception.

V. Policy Favoring Settlement

a) "It is a truism that the law favors a policy of settlement and compromise." See *The Policy in Favor of Settlement in an Adversary System, 44 Hastings L.J. 1 (1992)*.

b) "The "general policy of the law is to favor the settlement of litigation ...." *Schering-Plough Corp. v. FTC, 402 F.3d 1056, 1072 (11th Cir. 2005)*; *Kothe v. Smith, 771 F.2d 667, 669 (2d Cir. 1985)* (noting that "the law favors the voluntary settlement of civil suits");

Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 616 F.2d 1006, 1013 (7th Cir. 1980) ("The law generally favors and encourages settlements."). See *DeepGulf, Inc. v. Moszkowski, 2019 WL 1751876,*9 (Jan. 2019)*.

c) **Rhode Island Cases Favoring Settlement:**
   i. "Clear policy in favor of encouraging settlements" Durrett v. Housing Authority of City of Providence, 896 F.2d 600, 604 (1st Cir., R.I.1990).
   ii. "Strong public policy in favor of settlements..." United States v. Davis, 261 F.3d 1, 27 (1st Cir.2001)
   iii. "In Rhode Island, courts favor the settlement of litigation disputes" Arruda v. Sears, Roebuck & Co., 273 B.R. 332, 345 (D.R.I.2002) citing Ross-Simons of Warwick, Inc. v. Baccarat, Inc., 66 F.Supp.2d 317, 324-25 (D.R.I.1999), aff'd, 217 F.3d 8 (1st Cir.2000).
   iv. "It is very much an important part of the policy of the courts of Rhode Island (and courts in general) to encourage the amicable settlement of disputes, whether by mediation or otherwise". Zarrella v. Minnesota Mutual Life Insurance Co., 824 A.2d 1249, 1253, n. 2 (R.I.2003) (observing that "the parties would have been better served by mediation")
   v. "In Rhode Island, courts favor the settlement of litigation disputes" Skaling v. Aetna Insurance Co., 799 A.2d 997, 1012 (R.I.2002).
   vi. "As any litigator or judge can attest, the best case is a settled case." Mathewson Corp. v. Allied Marine Industries, Inc., 827 F. 2d 850, 852 (1987).

VI. ADR PROGRAMS

a) A look at ADR Programs Across Districts.
   i. There is no uniformity of ADR programs across districts.
   ii. All 94 federal district courts offer at least 1 ADR method. Many, like the DRI offer more than one.
   iii. Mediation is the most common method offered by federal courts.
   iv. Some district courts have Staff Mediators.
      1. Very few.
         a. 18 out of 94 districts.

VII. D.R.I. ADR PLAN

a) **In General**
   i. The Court's ADR program offers litigants several non-binding alternative dispute resolution (ADR) options.
      1. **Arbitration**.
         a. Notwithstanding any provision of law to the contrary and except as provided in subsections (a), (b), and (c) of 28 U.S.C. 8 652 and subsection (d) of 28 U.S.C. 654, the District Court may allow the referral to arbitration of any civil action (including any adversary proceeding in bankruptcy) when the parties' consent.
            1. Except: Arbitration shall not be allowed when:

a. the action is based on an alleged violation of a right secured by Constitution of the United States;
b. jurisdiction is based in whole or in part on section 28 U.S.C. 9 1343 ; or
c. the relief sought consists of money damages in an amount greater than $150,000.

2. **Mediation-Settlement Conferencing before**:
    a. District Judges
        i. District Judges do not preside over their own cases.
    b. Magistrate Judges
3. **Mediation**:
    a. Before Court's full-time staff Mediator

b) **Means of Referral**
    i. Voluntary.
    ii. Mandatory.

c) **Cases Subject to Referral**
    i. **All civil cases** filed in this district **except bankruptcy appeals and social security appeals** are eligible for referral.
    ii. By cooperative agreement between the District and Bankruptcy Courts bankruptcy **adversary proceedings are eligible for referral from the Bankruptcy Court**.

d) **ADR Panel**
    i. The Court has established a panel of neutrals (the "Panel") comprised of individuals whose education, experience, training, and character qualify them to act as neutrals in one or more of the ADR options implemented by the Court.
    ii. The Panel consists of persons appointed by the Chief Judge in consultation with the other district judges.
        1. There are presently fourteen (14) members on the Court's ADR Panel, including the Court's Staff Mediator.
    iii. Panel members are lawyers who have been admitted to the practice of law for at least ten years and who are currently members of the bar of the United States District Court for the District of Rhode Island.
    iv. The panel also includes non-lawyers who possess special or unique expertise in particular fields and/or have substantial experience or training in one of the dispute resolution options.
    v. All panel members are reviewed and certified for inclusion on the Panel by the Court.

vi. All persons selected as Panel members have undergone dispute resolution training prescribed by the Court, have taken the oath set forth in 28 U.S.C. 453, and have agreed to follow the guidelines for the various options established by the Court.

vii. **Compensation**

1. Magistrate judges presiding over settlement conferences and the Court's Staff Mediator serving in the capacity of arbitrator or mediator serve without compensation.
2. Non-Court Panel Members
   a. Receive no compensation for the first hour of their service.
   b. Thereafter, the parties are equally responsible for the neutral's compensation at a rate agreed to by the parties, but not to exceed $200 per hour.

VIII. BAD BEGINNINGS

a) Experienced mediators are often struck with the frequency of mistakes made by counsel, parties and mediators contribute to what I refer to as "bad beginnings".

b) Some of these mistakes are repetitive occurrences.

c) While it may appear that some of what I cover is basic, some bad beginnings are so recurring and can have such devastating effects on the mediation process, that I feel they must be included in the content of my remarks.

d) Some bad beginnings have their genesis before parties, counsel and the mediator convene at mediation. So that's where I will begin.

e) **So here is my list of bad beginnings:**

PRE-MEDIATION PHASE

MISTAKES OF COUNSEL:

THINKING MEDIATION DOESN'T BEGIN UNTIL ALL PARTIES AND COUNSEL MEET IN SESSION

AILURE OF COUNSEL TO BE KNOWLEDGEABLE ABOUT ADR METHODS, COURT RULES AND PRACTICE REQUIREMENTS[3]

QUESTION: Is there a duty that requires attorneys to be knowledgeable regarding Alternative Dispute Resolution (ADR) and court-connected ADR practice?

1. ADR has become institutionalized in both the federal appellate and district courts.
   a. All 96 FDC's offer at least one ADR method.

[3] Suzanne J. Schmitz, *Giving Meaning to the Second Generation of ADR Education: Attorneys' Duty to Learn about ADR and What They Must Learn,* Journal of Disp. Res. Issue 1, Vol, 1 (1999,).

b. Each of the Circuits offers mandatory mediation (except 8th Cir.)
    i. 8th Cir. Voluntary
c. As a direct result of ADR becoming part of the routine landscape both federal appellate and district courts:
    i. Expect attorneys to understand:
        1. ADR local rules
        2. Local ADR practices and procedures, and
        3. Unique ADR requirements of individual judges
            a. Such knowledge of course helps both counsel and client traverse the landscape of the ADR process in the court in which ADR process is being undertaken.
d. Despite ADR's institutionalization, many lawyers remain largely uninformed about ADR and ADR practice and how ADR can be utilized in practice.
e. Even though lawyers have a duty to be familiar with court rules, including local rules relating to ADR, as a mediator **I don't assume that they have read and passed this information on to their client**.
f. Many courts publish and disseminate ADR information on-line.
    i. I encourage counsel and clients to review this information.
        - Make sure clients know how they can view the information on-line as well as obtain hard copies of the information.
g. Encourage lawyers to avail themselves of court sponsored or private seminars on court-connected ADR (Good place to pick up CLE credits).

2. Take advantage of holding pre-mediation conferences, wherein you can remind counsel and parties of the availability of ADR information and answer questions. More on pre-mediation conferences later.

FAILURE OF COUNSEL TO FULLY INFORM THE CLIENT REGARDING ADR AND AVAILABLE ADR OPTIONS

1. Is there a duty on the part of counsel **to inform and discuss ADR with clients?**
2. "There appears to be a growing view that lawyers should discuss ADR with clients." Gerald F. Phillips, *The Obligation off Attorneys to Inform Clients About ADR.* 32 W.St. U. L. Rev. 239 (Spring 2004).
3. Is there an ethical obligation to tell a client about ADR options?
4. Some argue that failing to inform a client about ADR options can amount to malpractice. Others say no such ethical duty exists.
    a. "A lawyer has a duty to inform his client about the existence and availability of alternative dispute resolution procedures." Id., citing Professor Kimberlee K. Kovack, who testified at a public hearing of the Ethics 2000 Commission, held in Montreal Quebec, Canada, urging the adoption of a rule that an Attorney has a Duty to inform his Client about the Existence and availability of Alternative Dispute Resolution."
5. **My own opinion is that this is both an ethical and legal duty**.

6. If there is a duty to inform the client about ADR options, in order to meet this ethical obligation, the lawyer must first understand available alternatives.
7. This is why in the first instance it is so important for both courts and mediators to make certain that before lawyers and litigants come together in mediation, that they have court sponsored means and opportunities to learn about ADR process and opportunities to ask questions of court staff who manage and direct ADR programs, and as well of the mediators who serve as neutrals.
8. This simple step is one way to avoid a programmatic and fundamental void that can have the effect of both confusing both lawyer and litigant and cause both to be less functional in navigating and using ADR processes.
9. When the client is fully informed regarding ADR options, client goals and objectives can be better integrated into settlement efforts and that helps both counsel and the parties effectively plan prior to mediation.
10. If the client opts to pursue ADR or is mandated by the court to do so, the duty of the attorney would seem clear, to both inform and prepare the client for participation in the ADR process.

FAILURE OF TO MANAGE CLIENT EXPECTATIONS.

1. Counsel and the mediator need to manage client expectations.
    a. Unrealistic Expectations
    b. In an article written by Marshall H. Tanick, entitled, "Seven More Sins of Mediators", Mr. Tanick notes that one of the additional sins committed by some mediators involve allowing clients to hold on to unrealistic positions relating to their claims or defenses.
    c. He goes on to suggest that the "best way to curb unrealistic positions is to prevent them from cropping up in the mediation in the first place." Id.
    d. The economic difficulties of building and sustaining a law practice may in some cases give rise to lawyers turning a blind eye to clients who harbor unrealistic expectations regarding the strength of their claims or defenses and the economic value of the same.
    e. Unrealistic expectations on the part of both attorney and client are is a common problem encountered by mediators.
    f. The problem of unrealistic expectations is sometimes compounded by attorneys who are way too focused on litigation and not settlement.
    g. Mediators have a responsibility to encourage lawyers and litigants to be reasonable and realistic about what they expect to be achieved at mediation.
        i. Tools Mediators can Use
            1. Pre-Mediation
            2. Things I do:
                a. Send an email to all lead counsel (be sure to include "sent and read receipts") which outlines the topic areas you wish counsel to be prepared to discuss.

b. More important than the actual topics themselves is the opportunity to encourage counsel to have frank discussions with their clients as part of their preparation.
c. Lawyers often spend more time preparing themselves and their clients for trial than settlement.
d. One of the major goals of my pre-mediation communication with counsel is to shift the focus of both counsel and client away from litigation and re-direct them to settlement.
e. I make this a continuous task from the pre-mediation stage right through the course of the mediation itself.
f. If a lawyer is hell bent on trying the case, a lawyer may subconsciously fear that a frank, realistic review of the case may prompt the client to have second thoughts.
g. Two areas that should always be covered by counsel prior to and during mediation are: (1) litigants' prospects for success, and (2) the anticipated cost of reaching a decision in court. Both have a tempering effect on unrealistic expectations.

FAILURE OF COUNSEL TO PREPARE FOR MEDIATION AND PREPARE THE CLIENT AS WELL.

1. "Never forget the 7 lucky P's : Proper, Prior, Preparation Prevents, Piss, Poor, Performance". See Uncle Anthony's Unabridged Analogies: Quotes, Proverbs, Blessings & Toast for Lawyers, Lecturers & Laypeople, Third Edition, West (2012)
2. This topic is so important.
3. As one author has noted, **"*Good trial results and good settlement results don't just happen; both require diligent, thorough preparation*.**
4. Yet, counsel often approach settlement casually and almost impetuously, while at the same time methodically and thoroughly preparing for trial. **"Preparation for trial will not adequately prepare counsel or the client for settlement."**
5. A lawyer who focuses too much time focusing on the legal merits and giving very little time to preparation for mediation makes a serious mistake.
6. In a final report issued by the ABA Section of Dispute Resolution: Task Force on Improving Mediation Quality, the Task Force in its summary findings and observations, identified four issues as important to mediation quality, relevant here among them: **preparation on the part of the mediator, parties and counsel.**
7. No single approach to mediation preparation can be said to be necessarily right or wrong, but what can be said is that **some level of mediator preparation, including some form of pre-mediation communication with participants, is important in conducting quality mediation**.

8. This problem is not germane just to lawyers and their clients, but some mediators as well. Repeatedly some lawyers and their clients come to mediation with little or no prior preparation.
9. A lack of preparation on any participant's part, including the mediator, signals a lack of professionalism and commitment to the ADR process.

FAILURE OF COUNSEL OR CLIENT TO PREPARE THE MEDIATOR

1. Failing to assist in making sure that parties exchange all information necessary for a meaningful mediation to occur.
2. Failing to communicate to counsel, what information that you would like to review in advance of the mediation, including mediation statements.
3. Failure of counsel to take advantage of using pre-mediation statement.
4. Failure of counsel to actively use the pre-mediation conference with the mediator.

THE PRE-MEDIATION CONFERENCE AS RECONNAISSANCE AND PREPARATION TOOL

1. A tool I utilize that has yielded great benefits over the course of my career as a mediator is the use of pre-mediation conferences.
2. Pre-mediation conferences can be a great way to prime counsel and parties for the mediation, allowing everyone, including the mediator, to hit the ground running when the mediation actually takes place.
3. As one mediator put it, "you learn way more in a twenty-minute phone conversation with each counsel than you ever do in a twenty-page brief."
4. It is my practice, only the attorneys and the mediator participate in the pre-mediation conference.
5. I always require lead counsel, that is, counsel who will try the case to verdict if settlement efforts fail, to participate in the conference.
6. The Pre-mediation Conference can serve to enhance communication, information gathering, explore the parties expectations of the mediation process and attempt to unearth obstacles to settlement.
    a. Under the DRI ADR Plan, at the actual mediation, lead counsel and the parties are required to be present in person with full settlement authority ("the individual with control of the full financial settlement resources involved in the case, including insurance and the full financial authority and ability to agree to a binding settlement agreement.")
        i. In practical terms, the person appearing should be able to negotiate and settle the case on any terms without having to make a phone call to anyone else.

7. One way the District of Rhode Island encourages and enhances compliance by counsel, parties and party representative is by embedding in both the ADR Plan and the court's ADR Referral Order a duty to be present and to participate in good faith (Section VII (E) of the court's ADR Plan)
    a. "Unless expressly excused by the judicial officer or neutral assigned to the case, all parties, counsel of record, and corporate representatives or claims professionals having full Settlement Authority as defined in Section IV, shall attend all ADR conferences (this includes Pre-Mediation Conferences) and participate in good faith. Failure to meet obligations under these rules may lead to disciplinary action." Id.
    b. It is worth noting here that "Rule 16 expressly gives the court the authority in its discretion, to order litigants to participate in pretrial proceedings, including hearings to facilitate settlement." Nick v. Morgan Foods Inc., 99 F. Supp 2d 1056, 1959 (E.D. Mo. 2000).
    c. The court in Nick went on to note, "Implicit in the concept of good faith participation is the assurance that the parties will participate in ADR in accordance with the Court's order. Nick at 1061, citing Raad v. Wal–Mart Stores, Inc., 1998 WL 272879, at 6 (D.Neb. May 6, 1998).
    d. I typically schedule the pre-mediation conferences about a month in advance of the mediation and hold the conferences over the telephone.
        i. Although where I believe a face-to-face conference with counsel is necessary, I will convene an in-person meeting.
    e. During the conference I cover such things as:
        i. scheduling of the mediation,
        ii. discuss the mediation process,
        iii. expectations of counsel and the parties,
        iv. evaluate party personalities,
        v. hot-button issues, and
        vi. brief conversation about key legal and non-legal issues germane to the dispute.
        vii. I always make ertain that the real decision makers with full settlement authority will present at the forthcoming mediation.
    f. The pre-mediation conference serves as an early opportunity to begin to shift counsel and parties away from litigation and focus instead on settlement.
    g. The pre-mediation conference allows the mediator to explore what the parties are trying to accomplish in mediation and aid the mediator in uncovering underlying needs and interests.

ASSUMING THAT WHEN PARTIES VOLUNTARILY AGREE TO MEDIATE OR ARE MANDATORILY REFERRED TO MEDIATION THAT THEY ARE WILLING AND MOTIVATED TO DO SO.

1. One lawyer has observed, "s*ometimes counsel are there to appease the court; sometimes the parties are there to appease their counsel; and there are even times when one party is simply there to test the resolve of the other side.*"

FAILURE TO TAKE ADVANTAGE OF HAVING PARTIES SUBMIT MEDIATION STATEMENTS

1. Mediation briefs or statements constitute essential homework that must be undertaken by counsel, parties, and the mediator as part of their preparation.
2. Without an advance opportunity to explore the details concerning the parties, their history, positions and interests, the mediator may have to spend valuable mediation time attempting to learn where parties stand on the issues and what their real interests might be. It also impairs a mediator's ability to evaluate the strengths and weaknesses of claims and defenses.
3. My practice:
    a. It is my practice to require parties to prepare and submit to me mediation statements not less than five days in advance of the mediation.
4. In the D.R.I., counsel are reminded in a number key places, e.g., the ADR Plan, ADR Referral Order and during pre-mediation conferences that compliance with the ADR Plan, order of the court and my own requirements are important and should followed.

MEDIATION OF BANKRUPTCY CASES

GOALS

Important goals encompassed in the Bankruptcy Code are an expeditious resolution of a debtor's financial affairs and maximum recovery for creditors. Those goals become frustrated by any unnecessary delay, burdensome expense, unnecessary litigation or duplication of efforts. J. Thomas Corbett, Mediation, Bankruptcy and The Bankruptcy Administrator, 65 Ala. Law. 410 (November, 2004).

AUTHORITY FOR ADR USE

At least four sources exist for the use of Alternative Dispute Resolution (ADR) procedures in bankruptcy cases. Those sources include: (1) a court's inherent power to manage and control its docket; (2) statutes enabling district courts to use ADR through local district court rules; (3) Section 105 of the Bankruptcy Code; and (4) Bankruptcy Rule of Procedure 7016. Id.

Since time and costs are such critical elements of a bankruptcy case, mediation is well suited for furthering the goals of the Bankruptcy Code.

11 U.S.C. § 105(a) permits bankruptcy judges to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions" of the Bankruptcy Code. See 11 U.S.C. § 105(a) (2009).

Arguably, courts and litigants could rely on Bankruptcy Code Section 105 to provide for the use of ADR as a "necessary or appropriate" procedural means for carrying out the provisions of the Bankruptcy Code.

EXAMPLES OF BANKRUPTCY MATTERS THAT ARE CANDIDATES FOR REFERRAL TO MEDIATION:

avoidance actions
valuation disputes
claim issues
disputes over lien priorities
confirmation issues
post-confirmation litigation
objections to discharge

CONDUCT OF A BANKRUPTCY MEDIATION

1. The Mediation Referral Order – research local rules
2. The Mediation Agreement
    a. Confidentiality Provisions
    b. Privilege; Fed. R. Evid. 408; other protecdtions
    c. Requirement of Good Faith
    d. Compensation of the Mediator
    e. Ex parte communications with counsel
3. Pre-Mediation Issues
    a. Logistics
    b. Joint call – agenda items include: who can and should attend; discussion of process; other issues and special needs
    c. Individual Calls – agenda for calls with counsel include agreed facts, disputed facts, status of information

gathering, history of negotiations and offers of settlement, reasons for impasse to date

d. Mediator's, Counsels' and Parties' Post- Call Preparation
e. Pre-mediation statements
    i. Options - confidential vs. served
    ii. Contents
f. Consideration of documents

4. The Mediation Session – Phases
    a. Mediator's Opening - why do?
    b. Parties' and Counsels' Opening Statements - When a good idea? When a bad idea?
    c. Joint Sessions – when to do; when not to do
    d. Private Caucuses; shuttle diplomacy
    e. Bargaining – dealing with incremental crawls
    f. Evaluative vs. Facilitative Methods
        1. Breaking an impasse – discussion of costs of failure to resolve
        2. Creating doubt
        3. Reasoning with argumentative or angry people
    g. Best Practices and Mistakes Mediators Make
    h. Guarding against bias and cultural differences
5. Reaching Agreement
    a. Term Sheets
    b. Settlement Agreements
    c. Fed. R. Bankr P. 9019
6. Options for a failed mediation
    a. Next session
    b. Follow up calls
    c. Arbitration

ABI NORTHEAST CONFERENCE
Bankruptcy Mediation

July 12, 2019
Newport, Rhode Island

Presenters

Hon. Joan N. Feeney
United States Bankruptcy Judge Ret. D. Mass.
JAMS Neutral, Boston, Massachusetts

Hon. Louis S. Kornreich
United States Bankruptcy Judge Ret. D. Me.
Bernstein Shur, Portland, Maine

Berry Mitchell
United States District Court, D.R.I. ADR Administrator
Providence, Rhode Island

Materials

- *2016 ABI Bankruptcy Mediation*
  - Table of Contents
  - Chapter 10 (ABI Model Rule)
  - Chapter 11 (Form of Order Assigning Matters)
- U. S. Bankruptcy Court, D. Mass. MLBR 7016-1(a) and Appendix 7
- U.S. District Court, D.R.I., ADR Plan; LR 53
- *What Happens in Mediation, Stays in Mediation . . . Or Does It?* ABI live webinar series—May 15, 2018.

ADR in the United States Courts

- CJRA of 1990
- ADR Act of 1998, 28 U.SC. § 651-658
- Types of ADR
  - Arbitration
  - Mediation
  - Settlement Conferences
- D.R.I. ADR Plan
  - Panel of neutrals
  - Compensation
- Massachusetts Mediation Referrals, Local Rule 7016(a) and Appendix 7

Litigation Alternatives

- Statistics: Are trials in the United States courts vanishing?
- Policy favoring settlement
- D.R.I. ADR Plan
  - In general
  - Arbitration
  - Mediation
  - Settlement Conferences
  - ADR Panel of Neutrals
  - Compensation

Advantages of Mediation

- Control
- Certainty
- Confidentiality
- Costs
- Creativity
- Conclusion
- Catharsis

Mediation in Bankruptcy Cases

- To mediate or not to mediate?
- Benefits of mediation
  - Party control
  - Flexible outcome
  - Expedited resolution
  - Lower costs than litigation
- Timing of mediation

Mediation of Bankruptcy Disputes

- Goal to expedite resolution frustrated by delay and expense of litigation in main case contested matters and adversary proceedings
- Authority
- Examples of referrals:
  - Avoidance Actions
  - Claims litigation
  - Confirmation issues
  - Discharge litigation
  - Valuation Disputes

Mandatory Mediation

- Can mediation be compelled by a bankruptcy judge?
- See Fed. R. Civ. P. Rule 16 as applicable to bankruptcy cases and proceedings under Fed. R. Bankr. P. 7016 (c) (2) (I), (L), (P)

Bankruptcy Court Approval of Mediation

- Mediation referral order
  - Private - court lists
  - Judicial and court-annexed programs
  - *Pro bono* mediations
  - Mediation agreement

Mediation Confidentiality Checklist

- Review local rules and applicable law governing mediation in the district
- Draft mediation agreement; include choice of law provisions, confidentiality non-disclosure and other provisions:
  - Oral and written statements made during mediation are confidential without prejudice to positions, cannot be divulged or relied on as evidence;
  - All privileges apply;
  - Define scope of confidential information and exclusion for fraud;
  - Mediator shall not disclose any information to judicial officer other than settlement or no settlement;
  - Parties may not compel mediator to disclose communications or testify;
  - Include provisions for injunctive relief.
- Seek order approving mediation agreement and confidentiality provisions and NDA

Mediation Procedures Overview

- Assisted negotiation by a neutral facilitator, with or without evaluation
- Voluntary, agreed, tailored procedures
- Trained mediator moves process
- Preliminary Conferences – joint, individual
- Joint sessions of parties and counsel
- Opening statements
- Caucuses of individual parties and counsel
- Evaluation and risk assessment
- Settlement agreement; Fed. R. Bankr. P. Rule 9019 approval

Mediation Phases – Preliminary Obligations

- Selection of Mediator
  - Choosing the mediator
  - Ethical standards for mediator; connections and conflicts

- Obligations of parties
  - Good faith participation duty
  - What is bad faith?
  - Enforcement of good faith obligation
  - Who decides?

Preliminary Procedures

- Preliminaries: exchanging information and discovery
- Mediation agreement, court order
- Preparation by advocates; preparation of parties
- Neutral location
- Mediator's preparation, preliminaries, ground rules; authority issues
- Written statements; shared vs. confidential
- Preliminary phone calls - joint; individual

Bad Beginnings: Top Ten Mistakes

1. Lack of knowledge of ADR options
2. Failure to discuss ADR with clients
3. Failure to hold pre-mediation conferences
4. Unrealistic expectations
5. Failure to prepare for mediation
6. Confusing preparation for mediation with trial preparation
7. Excessive focus on the merits
8. Inadequate sharing of information
9. Importance of mediation statements
10. Focusing on legal arguments

Mediation Session – Joint and Breakout Meetings

- Establish and maintain connections and trust with parties and counsel
- Joint Sessions – initial and subsequent; concluding
- Individual caucuses and breakouts with parties and counsel
- Questioning Types
  - Open ended – gathering information
  - Focused – drawing out
  - Closed ended – making a point
  - Reframing questions – restating another way
  - Conversion of positions to interests
  - Convert negative statements to constructive action

Mediators' Methods

- Importance of garnering trust
- Facilitative
- Evaluative
- Ascertaining interests
- Bargaining
- Resolution

Identifying Interests – as opposed to positions

- Shared
- Differing
- Conflicting

Strategies for Effective Negotiations

- Identify purpose, goals, stakes
- Identify interests, standards, and positions
- Focus on interests and influences vs. positions
- Use leverage appropriately
- Reconcile interests
- Discuss options
- Make reasonable concessions

Creating Doubt

- Timing of evaluative discussion
- Generating options
- Discussing worst case scenarios
- Discussing best case scenarios
- Exploring alternatives
  - Risks of litigation
  - Strengths and weakness of each party's positions
  - Costs of litigation and appeals
  - Delays of litigation and appeals
  - Consequences of no settlement

Attorney – Client Relationships

- Mediator's assessment of status
- Understanding dynamics
- Dealing with difficulties
  - Conflicts
  - Fee issues
  - Inadequate preparation or knowledge
  - Unreasonableness

Breaking Impasse

- Correcting informational imbalances
- Exposing agency problems
- Diffusing issues of principle
- Analyzing emotional issues
- Predicting potential outcomes of litigation

Tips & Traps for Participants

- Learn to listen
- Express positions and ideas clearly
- Reconcile interests, not positions
- Stop arguing about right and wrong
- Abandon blame
- Positional bargaining is unwise and inefficient

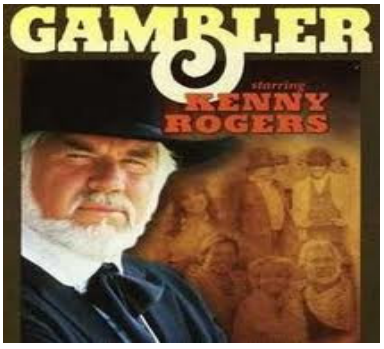
Reaching an Agreement

- Term sheets
- Complete agreement
- Putting agreement on the record
- Requirement of further approvals, including Fed. R. Bankr. P. 9019 compliance and court order

Options When Mediation Fails

- Mediator follow-up
- Additional negotiations
- Additional mediation sessions
- Mediator's proposal
- Neutral analysis
- Retention of experts
- Arbitration

" You got to know when to hold 'em,
Know when to fold 'em,
Know when to walk away and know when to run."



Questions and Answers