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Mediation in Subchapter V Cases

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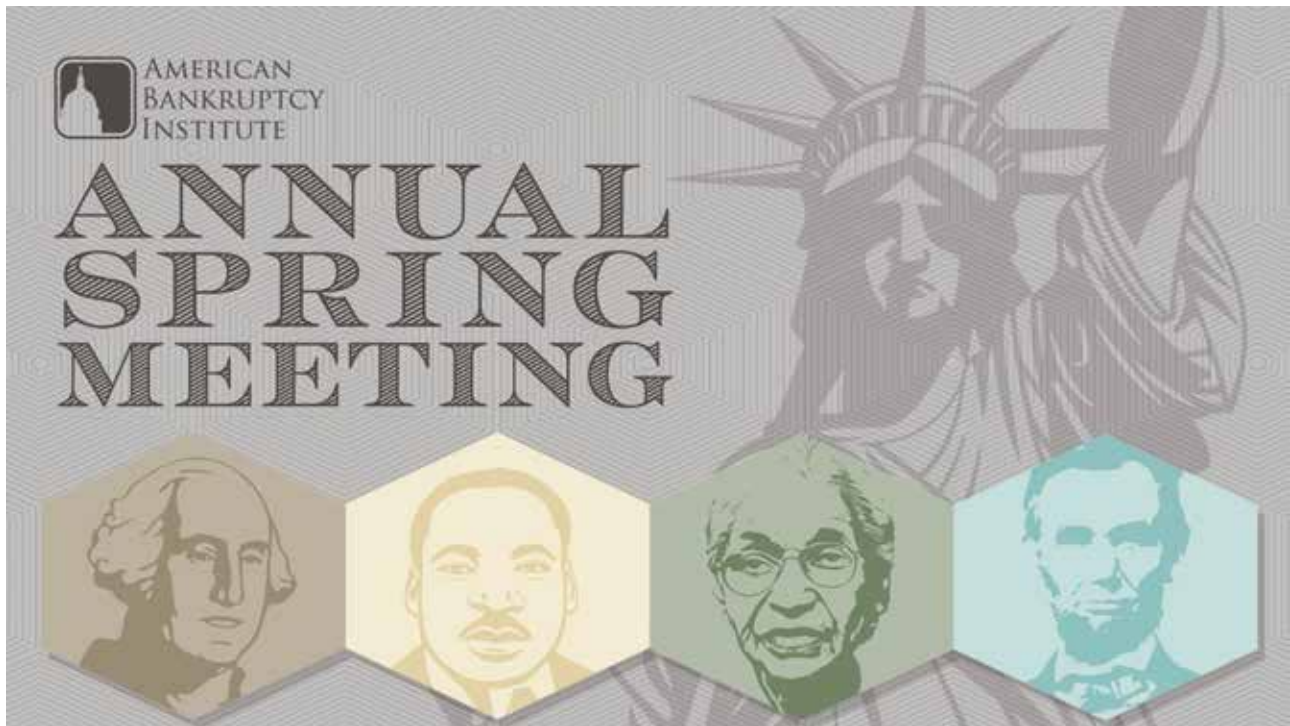
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Mediation in Subchapter V Cases

HOW TO USE MEDIATION TOOLS TO FACILITATE SENSUAL PLANS OF REORGANIZATION

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Who is this Presentation For?

- Much of this presentation focuses on Subchapter V Trustees and mediators.
- However, this presentation is NOT limited to Subchapter V Trustees and mediators.
- The concepts and skills discussed herein can be used by attorneys and their clients to negotiate better deals and resolve impasses in not only Subchapter V cases, but also consumer cases.



History Lesson

- Congress created Subchapter V with the enactment of the Small Business Reorganization Act (the “**SBRA**”) in 2019.
- In doing so, Congress created a new trustee—the Subchapter V Trustee.
- The Subchapter V Trustee is like Chapter 12 and Chapter 13 trustees because Subchapter V was modeled after these chapters (especially Chapter 12).
- However, the Subchapter V Trustee has a unique power, not bestowed on other trustees—the **duty to facilitate the development of a consensual plan**. 11 U.S.C. § 1187(b)(7).



The Duty to Facilitate

- “[I]n no other place does the Bankruptcy Code (1) authorize a trustee to help a debtor in possession develop a plan of reorganization, or (2) suggest the goal of a ‘consensual plan’ when the absolute priority rule does not apply.” Donald L. Swanson, *SBRA: Frequently Asked Questions and Some Answers*, 38-NOV AM. BANKR. INST. J. 8, 77 (Nov. 2019)



What Does Facilitate Mean?

- “Facilitate” means “to make easier or less difficult; help forward.” See *U.S. v. Coleman*, 627 F.3d 205, 212 (6th Cir. 2010); *U.S. v. One 1950 Chevrolet 4-Door Sedan, Motor No. HAA 181614*, 215 F.2d 482, 484 n.2 (10th Cir. 1954).
- “Facilitate” comes from the Latin word “facilis” which means “easy, easy to do, and without difficulty.” <https://latin-dictionary.net/definition/20176/facilis-facile-facilior> (last visited Apr. 12, 2025).
- The Spanish word “fácil” means easy.



What Does Develop Mean?

- “Development” comes from develop which means “to bring out the capabilities or possibilities of; bring to a more advanced or effective state.” See *Sullivan v. Eaglestone Ranch Homeowners Ass’n*, 2017 WL 1496933, at *5 (D. Wyo. Apr. 24, 2017)
- “Develop” comes from the French word “développer,” meaning “a gradual unfolding, a full working out or disclosure of the details of something.” <https://www.etymonline.com/word/development> (last visited Apr. 12, 2025).



What is a Mediator?

- A mediator is a neutral. See *Cook Children's Med. Ctr. v. New England PPO Plan of Gen. Consol. Mgmt. Inc.*, 491 F.3d 266, 276 (5th Cir. 2007).
- A mediator's primary duty is to ***facilitate*** communication between the parties in dispute. See *Mut. of Enumclaw v. Cornhusker Cas. Ins. Co.*, 2008 WL 4330313, at *3 (E.D. Wash. Sept. 16, 2008).
- A mediator helps the parties focus on their interests rather than their positions.



Are Subchapter V Trustees Mediators?

- “The subchapter V [trustee] will help facilitate discussions between the creditor and the debtor. It doesn’t say what ‘facilitate’ means. Does that make the subchapter V trustees have some of the role of a mediator? I think that’s probably potentially true that it will be some of the roles that a mediator has, but also the subchapter V trustees have the obligation to appear and be heard on many of the important issues that occur in the case.” Hon. Harner, Hon. Kahn, Casamatta & Keach, *Providing A “Last Word” on SBRA*, 39-APR Am. Bankr. Inst. J. 8, 86 (Apr. 2020) (comments of Hon. Michelle M. Harner).



Similar, but Different...

- A mediator...
 - Facilitates communications between the parties.
 - Does not have any case management duties.
 - May not coerce or direct the parties.
- A Subchapter V Trustee...
 - Facilitates communications between the parties.
 - Is accountable for all property received. 11 U.S.C. § 1183(b)(2)
 - May be heard at confirmation. 11 U.S.C. § 1183(b)(3)(B).
 - May object to proofs of claims. 11 U.S.C. §§ 704(a)(5) and 1183(b)(1).



The Mediator's Toolkit

- Open Statement
- Empathy and active listening
- Mirroring
- Reframing
- Labeling



Opening Statement

- Not the same as an opening statement used in court.
- Initiates the conversations between the parties.
- Frames the disputes.
- Sets the parties expectations.
- Chance to ease the parties' anxieties.



Empathy and Active Listening

- Empathy is the ability to understand and share the feelings of another.
- Active listening is engaging a party in a conversation in a positive way through listening (passive) and focused questions (active).
- A mediator uses open-ended questions—what and how—to expand the conversation and neutralize the parties' emotions.
 - What about this is important to you?
 - What do you find objectionable about ...?
 - How would you like to proceed?
 - How would that work?
- Avoid why-based questions because of judgmental overtones.



Mirroring

- Mirroring is the repetition of key words a party uses during the conversation.
- Mirroring is designed to show you are (actively) listening and you understand them (empathy).
 - *Debtor*: There is no way we can afford 18% interest. That's robbery!
 - *Subchapter V Trustee*: 18% interest is too high?
 - Debtor: Yes, that's right?
 - *Subchapter V Trustee*: Would you like to say more about that?



Labeling

- Labeling is another active listening technique that allows a mediator to identify and label a party's feeling without agreeing with them.
- Labels signal to the listener that the mediator understands them.
- Labels almost always begin as follows:
 - It sounds like ...
 - It seems like ...
 - It appears that ...
 - It looks like ...
- Avoid labeling with "I", e.g., "I am hearing" because it puts the emphasis on the Subchapter V Trustee/Mediator rather than the party.



Using the Mediator's Toolkit

- Communicate early, communicate often.
- Encourage thorough Section 1188(c) status reports.
- Call regular meetings of the parties.



Communicate Early and Often

- In a typical mediation, the parties will be there by choice, and thus, will enter mediation at the same time.
- In contrast, Subchapter V cases are initially one-sided processes because they are initiated by the debtor and it may be several days (or even weeks) before a creditor or other parties participate in the case.
- Reach out to debtor's counsel to determine the cause of the Subchapter V filing.
- Know the case just as well, if not better, than the debtor and its counsel.
- Educate the debtor on the Subchapter V process.



Section 1188—A Roadmap to the Plan

- The Section 1188 status conference is unique to Subchapter V.
- A debtor is required to submit a report about its efforts to develop a consensual plan.
- A Section 1188 status report can be used like a pre-mediation settlement agreement which outlines the possible framework for a consensual plan.
- It can also identify the debtor's interests and attempt to label the creditors' interests.
- The Section 1188 status report can be used to identify and narrow the issues for the confirmation hearing, even if not consensual.



Facilitating Communications

- A mediation is usually an in-person meeting between the parties.
- Given the speed of Subchapter V cases, it is not always possible to hold an in-person meeting when not all parties, i.e., creditors, have joined the case.
- While in-person meetings are preferred, technology such as Zoom, MS Teams, Google Meet, and GoToMeeting can be used to facilitate communications on short notice.



Conclusion

- Subchapter V trustees are unique in the bankruptcy world because they are required to make the advancement of consensual plans easier for the parties.
- With the creation of this new duty comes new challenges.
- Although not strictly mediators, subchapter V trustee can further their facilitation duty with many of the tools employed by mediators.



Additional Resources

- Business Workouts Manual, Chapter 42: Workouts and Restructurings Under Subchapter V of Chapter 11, §§ 42.55 & 42.56 (Matthew W. Kavanaugh & Randy B. Soref, eds.) (Westlaw, 2024 Update).
- The Subchapter V Trustee as Mediator: Lessons Learned Over Five Years, John-Patrick M. Fritz. ABI Mediation Committee Newsletter (Vol. 11, Num. 1, April 2025).



Questions?

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represents debtors, creditors, landlords and purchasers of assets in bankruptcy proceedings across the nation. She has extensive restructuring experience in the energy, hospitality and retail sectors. She also has experience in franchise and agriculture restructuring and bankruptcy appellate practice. Ms. Smith is the immediate past chair of the Bankruptcy Section for the State Bar of Texas and sits on the Executive Committee of the John C. Ford Bankruptcy Inn of Court. She is a frequent speaker on restructuring, bankruptcy and lending topics. Ms. Smith has been listed in *Lawdragon 500*, *The Best Lawyers in America* for Bankruptcy and Creditor/Debtor Rights/Insolvency and Reorganization Law, and in *D Magazine* as one of the “Best Lawyers in Dallas.” She received her B.A. in history in 1998 from the University of Texas at Arlington, and her J.D. *cum laude* in 2001 from SMU Dedman School of Law.