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Mediation Matters

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Achieving a Balance Between Absolute Neutrality and a Participant's Desires in Mediation

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This is not another article on mediation tips, tricks or practice pointers, nor is it about the benefits of mediation in bankruptcy practice. Those benefits are well known, and mediation is now accepted as a cost-effective way of resolving all sorts of bankruptcy disputes of different sizes and complexity.

Rather, this article is about the broad meaning given to "mediation" by many of its devotees in bankruptcy practice — and the desire of many judges, lawyers and parties to engage mediators who are willing to be more than neutral facilitators. Many mediation participants in bankruptcy cases want mediators who are willing to step outside of their traditional roles if and when there is consent of the parties for case evaluation and settlement direction. For some mediators, this expectation violates a fundamental precept of mediation: absolute neutrality of the mediator. For others, it presents an opportunity to strike a balance between absolute neutrality and the desires of participants.

When "Mediation" Isn't "Mediation"

Historically, mediation has been accepted by practitioners and participants as a discrete aspect of alternative-dispute resolution (ADR) involving confidential negotiations that are willingly entered into by parties who accept the assistance of a neutral facilitator known as a mediator. By training and inclination, mediators view themselves as neutral facilitators who understand that they have not been engaged to evaluate claims and defenses or to direct a result. They also know that a settlement might not be achieved in every case.

A well-trained mediator will attempt to dispel the notion that he/she is a settlement-expeditor with pointed remarks at the pre-mediation conference, a statement at the beginning of the initial mediation session and constant reminders throughout the negotiations.[2]

Alas, such disclaimers often fall on deaf ears. Parties might say that they want to mediate, they might ask the court for a referral to mediation, they might *genuinely* want the services of a judicial or private mediator, and they might be prepared for consensual resolution of a thorny dispute for any number of reasons. However, they do not always want, expect or appreciate the services of a traditional neutral facilitator.

To the contrary, in my experience, participants in bankruptcy mediation frequently expect the mediator to point the parties in the "right" direction. Their predilection for evaluation and direction is understandable. In bankruptcy cases, resources are limited and time is precious. While under intense pressure, few participants worry about the philosophy of neutrality or the proper role of a mediator. Surely, participants want a mediator with experience and training in the art of mediation. However, if given a choice between one who is a purest when it comes to neutral facilitation and one who possesses what is known in the military as command presence, they might want to choose the latter — believing that such an individual is more likely to help them achieve a settlement.

1 I wish to thank **Robert J. Keach**, practice head of the Business, Restructuring and Insolvency Group at Bernstein Shur and a former ABI president, for his support; **Andrew C. Helman** of Marcus | Clegg for his helpful comments; **Daniel Keenan** of Bernstein Shur for his research; and Karla Quirk of Bernstein Shur for her editorial assistance.

2 My own evaluative and directive tendencies were beaten out of me by the coaches and classmates at the ABI/St. John's Bankruptcy Mediation Training Program. The next training program will be held Dec. 3-7 at St. John's Manhattan campus, and it is only open to 30 attendees. More information will be posted at abi.org/events.

The reality is this: We might be witnessing a paradigm shift. Mediation has been redefined in bankruptcy practice to encompass more than neutral facilitation; mediation has become a synonym for the full range of facilitative, evaluative and directive ADR activities. Judges employ this broad definition when they assign a matter to a judicial colleague, order unwilling parties to engage in mediation or choreograph mediation into case management as the primary means of resolving post-confirmation avoidance actions and disputed claims on an expedited schedule.

Five Examples of the Paradigm Shift

Here are five personal experiences to illustrate this point and highlight issues for mediators, lawyers and judges to consider.

The first example, involving a civil case in a U.S. district court, is not a bankruptcy case, but involved a form of "jump-and-run" mediation that is not unusual in bankruptcy cases. This experience had a powerful effect on my thinking of mediation as embracing more than neutral facilitation. The second example does not involve any contribution to negotiations by a facilitator; however, it presents an extreme example of judicial engagement upon the request of parties to help them resolve a complex cross-border case. The remaining examples are composites from real life, covering three recurring ways in which mediation is used in nontraditional ways in bankruptcy cases. These include parties in multi-party adversary proceedings using mediation to drag a reluctant party to settlement, courts embracing the use of mediation as a clearing-house for post-confirmation litigation, and the way mediation might be used to educate parties on the realities of consumer issues.

Example #1: Jump-and-Run Mediation

When I was a bankruptcy judge, I was asked by a district court judge to mediate a civil case the moment before the district court judge was to have instructed the jury. The district court judge thought that I could quickly evaluate the claims and defenses, and help counsel and the parties hammer out a settlement while the jury was on hold. I accepted the task and led the parties to a settlement within a few hours. By all accounts, it was a successful afternoon. Even so, I left the courthouse with an uneasy feeling because I had forfeited the role as a neutral facilitator in order to achieve a directed settlement. Instead of letting the parties work things out in due course, I sized up the case and nudged them into an agreement.

Several factors were in play: My judicial proclivity to decide cases, the challenge of producing a settlement while a jury was on hold late on a Friday afternoon, the desire of counsel and the parties to find a quick way out of a difficult case, and perhaps my ego. Reflecting upon this experience has made me more conscious of how a mediator's role is perceived by the referring judge and the participants when time is a crucial factor.

Example #2: Using Judicial Intervention to Prompt a Negotiated Outcome

Not long ago, a train carrying a load of volatile oil crashed and burned just across the border from Maine in the town of Lac Megantic, Quebec. The devastation and loss of life was immense, as the entire downtown was destroyed and 50 lives were lost. The train was operated by a Maine entity with a Canadian affiliate. Bankruptcy reorganizations were commenced in Maine and Quebec.

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The case drew international attention because it was one among many tragedies arising from the transcontinental rail shipments of oil. Litigation was commenced in several North American jurisdictions for wrongful death, tort and property damage. There were also disputes involving insurance coverage, secured claims, and the attribution of responsibility for the tragedy. Parties included the debtors, the estate fiduciaries in each case, every entity in the trail of the oil shipment from its inception to its end point, the wrongful-death claimants, the committees, agencies of the federal and provincial governments in Canada, and many more parties. Early on, protocols for cooperation were established between the U.S bankruptcy court and the Quebec Superior Court.

After months of negotiations, several parties asked that the two bankruptcy courts hold a joint international hearing for the specific purpose of directing the parties to the negotiating table. After allowing everyone to be heard at a joint hearing, the Canadian colleague and I strongly urged the parties to engage in negotiations. Break-out sessions ensued in the courthouse for the better part of the day. It took months before agreements were reached, and more time before reorganization plans and settlement agreements were confirmed on both sides of the border. At the behest of the parties, a judicial prompt for a negotiated outcome began the process of conciliation and plan confirmation in a particularly complex case.

This example does not involve mediation, yet it shows that creative action by parties and the cooperation of the court might result in successful voluntary negotiations.

Example #3: Strategic Mediation

A common happening in bankruptcy litigation is the commencement of voluntary mediation by willing participants to a multiparty dispute who have reached an impasse in their own negotiations. With competent counsel and knowledgeable parties, neutral facilitation usually works. However, mediation is occasionally commenced for a strategic purpose, such as when there is a tacit agreement among all but one of the parties. The hold-out is sometimes a primary plaintiff or defendant; other times, it is a guarantor or an insurance company. When this occurs, the group in agreement will expect the mediator to nudge or prod the hold-out. As the day progresses, pressure on the mediator mounts. Like most mediators who have been in similar circumstances, I keep reminding myself that not every case will settle. However, it gets dicey when everyone, including the recalcitrant party,

asks for a case evaluation, or when all parties ask for help in fashioning a result.

Example #4: Post-Confirmation Mediation

Post-confirmation mediation of disputed claims and avoidance actions is now part of the landscape. It is often invoked by a rule or court order, and it is a cost-effective way of stimulating settlements. Reorganized debtors and plan trustees rely on this form of mediation to wrap up cases. The selection of mediators might be from a registry or list of approved candidates, or the mediation order might establish a category of acceptable mediators like bankruptcy judges or retired judges. The orders tend to follow an established pattern and may not allow meaningful input from claimants or defendants. The process works, and it is especially helpful in "mega" cases. Compensation of the mediator is sometimes at market rates, while at other times it is determined according to a less-than-market schedule pegged to the amount in controversy.

This form of mediation might not fall within the classic definition of confidential negotiations that are willingly entered into by parties who accept the assistance of a neutral facilitator, because limited resources and time pressures will affect the level of energy devoted to matters by the participants and mediator in each event. Yet this form clearly falls within the broad definition of mediation in bankruptcy practice.

Example #5: Consumer Cases

When I was a bankruptcy judge, I was often invited to mediate disputes in consumer cases. These invitations would come from counsel, usually at the suggestion of a judicial colleague. There was rarely any time pressure, but every case involved limited resources and small dollars (comparatively speaking). More often than not, these cases involved parties lacking sophistication in bankruptcy law. In these cases, it was impossible to sustain the posture of a neutral facilitator because doing so would have caused every case to crash and burn. To be effective, I had to educate lawyers and clients on why their claims or defenses under state law were of little consequence in bankruptcy. Of course, these comments were given with the caveat that I was not rendering legal advice, and I always sought and obtained the consent of the trustee or the other party before giving an explanation. These explanations often helped the parties reach an agreement, but sometimes the cases went back to the trial judge.

It was gratifying work most of the time, but it was rarely mediation in the classic sense of the term. Even so, this form of mediation is common and can be effective at resolving cases in which the economic circumstances of the parties or the amounts in controversy make private mediation unaffordable.

Conclusion

Bankruptcy lawyers and judges work under unique time pressures and with limited resources, which makes our practice pragmatic and creative. Given this reality, it should come as no surprise that the culture of mediation in bankruptcy practice is different than it is in general civil litigation. Mediation in bankruptcy practice now encompasses traditional mediation and other forms of ADR services. abi

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