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Mediation Matters

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The Importance of the Right Mediator

Editor's Note: This new column focuses on the role that mediation increasingly plays in bankruptcy. Those interested in contributing for this column can contact Ms. Berkoff at lberkoff@moritthock.com for more information.



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In order to set the stage for a successful mediation, it is crucial to select the right mediator. Not every mediator is the right fit for every kind of mediation. There are a lot of variables that go into setting the tone for a successful mediation, but one of the most important variables is the mediator.

When selecting a mediator, one must consider a variety of factors: the nature of the dispute, the personalities at the table (both lawyers and clients), and the timetable within which the dispute must be addressed. Further, and more importantly, just because someone calls themselves a mediator, or appears on a mediation panel, does not always mean that he/she is qualified to serve in that capacity. Unfortunately, some panels do not require mediators to have undertaken classes or instruction prior to being included on a list. Further, people can be too quick to try to select someone they know or have used before without truly considering the importance of making a careful and thoughtful choice in respect of the particular mediation in question.

Why does this happen? For one thing, parties can be so focused on reaching the point of agreement to go to mediation (or perhaps frustrated at being court-ordered to mediate in the first place) that they view the mediation through the lens of litigation. They might see selecting the mediator as a strategic step in the process and might believe that if they can get their friend or former colleague to serve as mediator, this will ensure that they obtain the best result. It is another way of "winning" against the other side; of course, if you have selected a good mediator, this should not be true at all. Excellent mediators will guard their reputations and the integ-

riety of the mediation process, and will both disclose and put aside personal relationships.

How do you select the right mediator? Well, just like a client hires a new lawyer, you should evaluate the mediator's credentials. As previously stated, not all people holding themselves out as professional mediators are truly qualified, and not all mediators, if qualified, are right for the dispute at hand.

Mediator Qualifications

Let's start with the first issue: What does it mean to be a qualified mediator? This typically means that the mediator has received mediation training through a respected organization. This should usually be listed on the mediator's bio or CV. There are many good programs available to train mediators; some are run by local bar associations and usually are focused on mediation training in general. As far as the author is aware, only ABI offers mediation training geared toward bankruptcy: the ABI/St. John's 40-Hour Bankruptcy Mediation Training Program run by Prof. **Elayne Greenberg**.¹ Many mediators will have taken a variety of courses and will often seek and receive continual training. There is much to learn about mediation, and ongoing education is important, as is practicing this skill set. Mediation skills need to be honed and fine-tuned and continuously utilized.

People are sometimes surprised to learn — or fail to appreciate — that this is a skill. Just the way being a trial lawyer or being able to take a good deposition is a skill, so too is serving as a mediator. People who do not have experience with serving as a mediator can sometimes underestimate the importance of training. For example, during a recent Bar meeting discussing the *pro bono* mediation process, an attorney at a large firm was kind enough to offer to assign some of the firm's young associates

¹ This next training program will be held Dec. 3-7 at St. John's Manhattan campus and is only open to 30 attendees. More information will be posted at abi.org/events.

to serve as mediators. While the gesture was greatly appreciated, as we cannot undervalue the donation of any attorney's time, unfortunately these young associates had neither the training nor the experience in mediation to successfully serve in any mediation, whether or not it was *pro bono*.

Advocates should be careful to stay away from the view that you just need a body to serve in the mediation role, especially if it is a *pro bono* mediation. Any reputable mediator will tell you that mediation is an artform. In order to make mediation a successful process, mediators must have the proper training, a well-developed skill set and a nuanced hand.

Mediator Experiences

Next, the parties might want to consider the mediator's experience. While it might be important to examine how many mediations this person has been engaged in and handled, parties should also focus on whether there is a unique issue at hand that might require some technical knowledge or background exposure. Why is this so important? In order for the mediator to successfully assist the parties in exploring their options, evaluating their risks and considering all alternatives, the mediator has to be versed in the nuances of the issues in dispute.

For example, if the dispute at issue is not simply a question of bankruptcy law but involves some other area of the law, such as trademark, copyright or licensing, you may want to consider having a mediator who is knowledgeable in all relevant areas. When dealing with the valuation and/or liquidation of claims in the bankruptcy arena, a mediator having a good understanding of the Bankruptcy Code is perhaps the most important at times. Having once handled a mediation involving claims arising out of a state court tort litigation, it is important to understand the complexities of the bankruptcy process because, at the end of the day, any claim would be part of the unsecured creditors' pool, and any claim, no matter how large, would only end up with pennies on the dollar. Thus, a mediator who only understands tort law might not appreciate how the two areas of law intersect once a claim is liquidated in bankruptcy. This knowledge and understanding of the nature of the underlying damages and law was important to assist the parties in valuing the claim.

In addition, it is important not to minimize the mediator having familiarity with the chapters of the Bankruptcy Code that are at issue. There are tremendous differences between the various chapters. As demonstrated by the *Detroit* mediation cases, knowing the nuances of chapter 9 was critically important to resolving those disputes. Moreover, some chapters are utilized less frequently than others and are unique. For example, chapter 12, in certain areas of the nation, is not utilized frequently. In 25 years of bankruptcy practice, this author has only been involved in two chapter 12 cases.

Mediator Fit

The next question that the parties should ask is whether the mediator (if otherwise qualified) is the right fit for the dispute at hand. Once the parties get past the concerns of the mediator's experience from the training and substantive expertise perspectives, the parties will want to ensure that the mediator's style and personality are the right fit for the case.

Personality matters, as well as style. In order to determine what you need, first look at who will most likely be at the table for the mediation. The parties should consider whether the mediator is a good fit for not just the lawyers and clients on your side of the table, but also for the opposing side.

At times, it is appropriate to utilize a current or former judge because some parties in some situations require an individual who can command attention and respect to bring the parties to a consensus. To be clear, that does not mean — nor does this author believe — that only judges can truly successfully mediate a dispute (all due respect to our judiciary). Rather, at times, parties will hold certain perceptions and be unwilling to explore alternative mediators for the process, but they will respond to a judge. There might be plenty of walls and hurdles to overcome during the mediation process, so there is no need to add one more if this is the mindset of the parties.

Going beyond that concern, the parties should consider the mediator's style and temperament. Do the parties need a mediator who is more apt to "take charge" of the process? Do the parties need a mediator who is more relaxed and calm in his/her style? Even if the parties have not hired a former judge, does the mediator need an air of authority, or will the parties simply respond well to someone who comes across as confident and knowledgeable? Be sure to put down your litigator's hat when considering these issues. A mediator who might get under your adversary's skin might seem great for a moment, but it will not lead to a successful mediation process since the purpose is to facilitate resolution. You are on a mediation track, so your goal and focus should be on hiring someone who will help you resolve your issues, not beat down your enemies.

Many mediators, this author included, will remind the parties during a pre-mediation call to come prepared to speak and act in a settlement-focused fashion. Moreover, many mediators will suggest that any pre-mediation submissions be focused on settlement. Remember again that the parties are not presenting their case before a court, but rather trying to convince the other side why they should settle the matter. Thus, a mediator who is stressing all of these concerns is important.

Parties should not squander the opportunity to interview the mediator before hiring him/her. The parties should be interviewing the mediator to review a variety of issues, including the mediator's experience, training, familiarity with the underlying issues and style. Mediators can and should be able to provide the parties with a *curriculum vitae* of prior mediations and training experience. While mediators will obviously not reveal what occurred during any prior mediations, they can give you the names of cases and identify (without attribution) issues that they have handled both in mediation and as litigators or advocates in the mediation process. With respect to the issue of having familiarity with the issues at hand, it is not necessarily relevant whether that knowledge was obtained by serving as a mediator or handling those issues through litigation; the question is just a knowledge base.

In addition, it is important to inquire as to whether the mediator has the time necessary to handle the matter in question, especially depending on the complexity of the mediation at issue. The parties should inquire as to whether the mediator has the time and flexibility to dedicate to

the mediation, if that is needed. At times, mediations are handled in compressed time frames, as they are done on a parallel path with a pending trial or within deadlines proscribed by the court.

It is important to ensure that the mediator has the time to speak with the parties ahead of time, read any pre-mediation statements and carve out the appropriate day(s) to engage in a process to seek a resolution. There is nothing more destructive to the mediation process than when a mediator simply does not have the time to devote to the parties. The author once served as an advocate in a mediation where both sides spent hours preparing lengthy mediation statements, and it was clear from the opening conference of the mediation that the mediator had not bothered to read any of them. It undermines the integrity of a vital tool in the lawyer's tool kit and effectively destroys any chance of resolution of the matter within the mediation process.

Mediator References

Do not be afraid to ask the mediator for references if the he/she is not familiar to you so that you can evaluate whether the mediator is the right choice. Most mediators will be able to provide you with references. While the parties to a prior or pending mediation cannot reveal what occurred during the mediation, they certainly can speak as to the mediator's style, effectiveness, attention to the process and creativity.

References are also important to assess the mediator's temperament and style. Take the references and ask their thoughts about the mediator's style and process. Ask whether they would use this mediator again. It is also important to ask whether their client responded well to the mediator and the matter was resolved, or if not, why that might have occurred. With respect to the last point, however, it is important to keep in mind that the inability to resolve a particular matter might have nothing to do with the mediator. Sometimes, a controversy is simply just not ripe for resolution and other issues might be at play. At times, matters do not get resolved during the mediation, but, unless constrained by a court order or deadline, a good mediator will often leave the door open for the parties to come back and try again.

Conclusion

As a mediator with 15 years of experience, this author can attest that a skilled mediator will often have a good chance of helping parties resolve a dispute. However, it is essential that the parties select the right mediator for the situation — one with the relevant experience needed for the particular dispute and the right personality to work with the parties involved in the dispute. If the parties have decided to try to resolve their matter through mediation, be sure to spend the time picking the right mediator for the job so that it can be an effective and rewarding process for both you and your clients. **abi**

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