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Mediation Matters

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Breaking Impasse



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Since 2017, this column has discussed numerous aspects of mediation in bankruptcy. Indeed, 24 articles have analyzed a range of topics, including selecting a mediator, confidentiality, ethical issues and more.[1]

This article focuses on a fundamental topic of importance to all: impasse. Specifically, it is a review of a comprehensive work on impasse released this fall called *The Art of Impasse-Breaking in Mediation: A Handbook for Mediators, Lawyers, and Other Conflict Resolvers* by David A. Hoffman, which will be published by the American Bar Association's (ABA) Dispute Resolution Section.

Hoffman is an attorney, mediator, arbitrator and founding member of Boston Law Collaborative LLC, where his practice focuses on family, business, employment and other disputes. In addition, he serves as a lecturer at Harvard Law School, where his courses include mediation and dispute resolution. He is a past chair of the ABA Section of Dispute Resolution and a Distinguished Fellow of the International Academy of Mediators. His long dedication to the area of mediation has earned him lifetime achievement awards from the Academy of Professional Family Mediators and the American College of Civil Trial Mediators. His prior writings include three books on conflict resolution and more than 100 articles on topics related to law and mediation.

The Art of Impasse-Breaking provides a comprehensive analysis of all facets of the topic of impasse, including prevention (Chapter 1); methods of process intervention (Chapter 2); strategies for substantive intervention (Chapter 3); deal points and when to address them (Chapter 4); challenges and pitfalls (Chapter 5); techniques to avoid (Chapter 6); and transformative resolutions (Chapter 7). The book also includes several helpful appendices, including a sample agenda for a pre-mediation conference call, a form agreement to mediate, a sample memorandum of understanding and a sample settlement agreement.

To be clear, neither the author nor the work is focused specifically on mediation in bankruptcy nor distressed circumstances. Rather, the work is concerned with impasse generally — whenever and wherever it may occur, and how to address it. In our view, Hoffman's broad perspectives in resolving disputes in such a variety of circumstances provides helpful insights to any area of the law and are generally applicable as well in the distressed setting. In that regard, the book's subtitle is very appropriate: *A Handbook for Mediators, Lawyers, and Other Conflict Resolvers*.

Although the book could be read from cover-to-cover, the work is very conducive to being used as a guidebook to be consulted by chapter when needed. Each chapter is well organized, with a detailed index of the chapter's main themes. Subtopics are identified and accompanied by a helpful index that allows readers to pick up the work as needed to provide insights into various strategies and methodologies on demand.

Definining "Impasse"

The book begins, logically enough, by describing "impasse" in general and offering a mediator's definition of the term. Hoffman notes that in common parlance, "impasse" means stalemate or a point at which no forward progress can be made. In mediation, however, "impasse" need not have such a pejorative meaning. Rather, "impasse" might instead be viewed as providing an opportunity for the parties and mediator to pivot and think differently to employ strategies to overcome the present obstacle. Thus, instead of signifying the end of discussions, impasse might instead signal that time is needed to reevaluate both the procedural and substantive issues driving the discussions.

1 For past articles, visit abi.org/abi-journal/column/13856.

Instead of being a roadblock, impasse is an opportunity for both the mediator and parties to head back to the proverbial drawing board.

Chapter 1 distills impasse prevention down to three main topics: (1) pre-mediation conferencing; (2) coaching the negotiation; and (3) attending to the emotional dimensions of the conflict. Each of these topics is further analyzed with clearly headed subsections that are focused on key strategies for commencing the mediation to help decrease the chances of encountering impasse later in the process. As is typical throughout the book, Hoffman helps build support for his perspectives by finding and detailing examples from his extensive background and expressing appreciation for the adage of "picking weeds when they're small."

Unfortunately, in the bankruptcy setting, many parties find themselves unwittingly in an unwieldy weed patch created by the financial distress of another party. Although Chapter's 1 focus on impasse prevention is a logical start for a book generally designed for mediators, particularly in the family law arena, we think most bankruptcy professionals might find more value in some of the later chapters.

For example, Chapter 2's focus on process interventions provides practical guidance that should apply in any mediation, including one arising in a financially distressed situation. Hoffman lists specific process interventions, then devotes significant attention to each. The types of interventions run from the mundane (food) to more advanced strategies (defanging extreme offers). Time-honored tools (such as silence) are discussed, along with new additions to the mediator's toolbox (such as the use of artificial intelligence).

Hoffman notes that when an impasse looms, he takes time to consider whether a mediation process intervention would help or whether more work is needed to focus on the substantive terms under discussion at that time. Like a good carpenter, a mediator knows (or should know) what procedural tool to deploy at what time to try to work past the problem of impasse.

Techniques for Addressing an Impasse

In presenting the procedural approaches, Hoffman is careful to note that he has organized the techniques in the approximate order in which a mediator might consider deploying them. Of course, the first step is diagnosing the cause(s) of the impasse, which is an essential step in trying to understand what other tool or technique might be helpful in addressing that cause.

The analyses and anecdotes that Hoffman provides cover the waterfront of procedural tools that might be invoked. Reading this chapter alone would be worthwhile for every professional who has had difficulty moving toward a resolution with an intractable opponent, regardless of whether the issue arises in the context of a mediation. There is an exceptionally detailed analysis and breakdown of these tools — 28 in number. Hoffman gives voice to all of these, which, as skilled mediators, we have employed often but do not usually take the time to detail out or analyze for others. They are inherently part of a good mediator's skillset. This underscores the fact that being a good mediator is a skill and an artform, and requires training and experience to effectively do this right (something that is, at times, taken for granted or not fully recognized).

Chapter 3 moves from process strategies to what Hoffman calls "substantive interventions," such as range bargaining, hypothetical proposals, conditional offers and mediator's proposals, some of which will be touched on later. He notes that mediators engaged strictly in a facilitative style of mediation, a more passive form of mediation, might consider the substantive interventions that he describes as unwelcome directive or evaluative strategies. Even on this point, however, Hoffman offers a strategy: The discussed techniques could be posed to the parties as questions that might lead them to find their own solutions, thereby tempering how "directive" the statements might be.

A few of the techniques discussed for substantive intervention include range-bargaining (also known as bracketed negotiation), hypothetical negotiation, conditional offers, and using interim agreements to preserve or change the status quo. Because the book is focused on mediation generally wherever deployed (including in family, business and employment cases), some of the techniques are more relevant than others in the insolvency context.

For example, auctions or buy/sell agreements cannot necessarily be employed, but others (such as a mediator's proposal) can and have been utilized. (As mediators, we have both utilized on certain occasions a mediator's proposal, which is a wonderful tool if — and only if — it is employed with thought and analysis after trust has been built along with an understanding of the issues and facts in dispute, as well as the law.)

Notwithstanding all of the options delineated in the book, there clearly is no universal law of substantive interventions that will be applicable to all situations. The main point is that when an impasse has arisen, the mediator can and should think about a variety of substantive interventions that might succeed in the context of the dispute to help overcome the obstacle.

Deal Points, Challenges and Pitfalls

In Chapter 4, Hoffman delves into a discussion of "deal points, and when to address them." The discussion is organized around the typical elements of a memorandum of understanding with analysis of the importance of each element, and considerations for when such points should be addressed or raised during a mediation session. The chapter contains a list of critical points that may apply across the board to every matter and certainly are in large part considerations, especially in business-related matters. Such topics as allocation of fees, nondisparagement clauses, releases, tax implications, prejudgment interest and security for future performance all frequently play a role in mediations in the bankruptcy context, especially for larger claim-related matters.

Again, as previously noted, because the book is focused on impasse in mediation generally, some of the topics covered might have less importance specifically in a distressed context depending on the nature of the dispute. However, the discussion serves as a practical guide to common elements that should be evaluated as part of reaching resolution. Moreover, the chapter should serve as a reminder to

bankruptcy mediators to identify any restructuring or liquidation-related specific points that ought to be addressed as a principal negotiating point for resolution of the dispute at hand. At a minimum, it is a good checklist for both a mediator and the parties of things that should be considered and evaluated in the context of a resolution.

Chapter 5 discusses challenges and pitfalls. Of particular interest in this chapter is the topic of mediator pressure and buyer's remorse. Specifically, Hoffman discusses the circumstances under which party self-determination can coexist with mediator pressure. He discusses his own transformation from being an advocate for settlement as a mediator early in his career to now viewing himself as a coach charged with assisting the parties in making "wise, well-informed, autonomous, and Self-led choices about whether settlement serves their interests better than their alternatives." Parties who may settle in response to mediator pressure could possibly be more inclined to feel buyer's remorse, so considering how to appropriately temper the desire to foster settlement is a critical tool for any mediator to understand and develop.

The reference to "Self-led" derives from a set of principles and techniques used to facilitate conflict resolution developed by psychologist Richard Schwartz. A summary of the approach is contained in Chapter 1 of Hoffman's book:

> In 1995, psychologist Richard Schwartz published *Internal Family Systems Therapy*, describing a model of the mind as composed of multiple parts, each with its own emotions, behaviors, and roles. Schwartz explains how these parts interact and how a core Self (our seat of consciousness) can serve as an internal mediator and leader of this internal system of parts. (Schwartz has said that if he were to name the Internal Family Systems ("IFS") model today, he would not use the term "family," even though it usefully describes the family-like relationships that our internal parts have with each other.)[2]

After describing the approach further, Hoffman notes that the IFS model can help mediators overcome an impasse in two ways: by (1) heightening the mediator's awareness of the various parts that parties bring to the table; and (2) increasing awareness for the mediator of their own parts activated by the positioning of the parties. Further introductory information about the IFS model is set forth in Hoffman's article "The Self-Led Mediator: A Brief Introduction to the Internal Family Systems Model," which will be published in this fall by the ABA's Dispute Resolution Section.

Techniques to Avoid, and Transformative Resolutions

Chapter 6 discusses techniques for a mediator to avoid in dealing with an impasse. The content is well-informed by common sense and plain good judgment, but it is well worth a review, because it serves as a reminder of the unhelpfulness of the discouraged tactics. Topics covered include the importance of not making it personal, refraining from rhetorical questions and cross-examination, and vouching for the other side's fairness.

The book concludes with a chapter reviewing transformative resolutions, which examines the powerful impact of dispute resolution not just to the affected parties, but in a larger sense as well — by helping to bring "fair, efficient, stable, and wise solutions" through negotiation rather than burdening an overwhelmed judicial system. As Hoffman notes at the beginning of the book, the "mediation process might not provide a solution in every case — a better alternative might be available to the parties in a different process (even court!) or perhaps with a different mediator." The book's value is in understanding the tools to make a mediation session as productive as possible for all involved, and in understanding as well when impasse truly cannot be overcome despite concerted, skillful effort.

Conclusion

The practical guidance on the important topic of impasse from a very experienced, thoughtful leader in the field makes *The Art of Impasse-Breaking in Mediation: A Handbook for Mediators, Lawyers, and Other Conflict Resolvers* a very valuable resource for all engaged in the challenging work of dispute resolution. abi

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2 *The Art of Impasse-Breaking in Mediation* at pp. 48-49.