AMERICAN BANKRUPTCY INSTITUTE
JOURNAL
The Essential Resource for Today's Busy Insolvency Professional

Building Blocks

BY PAUL A. RUBIN

10 Tips for a Successful Mediation

Editor's Note: *ABI and St. John's University School of Law co-sponsor the gold standard in mediation training — a 40-hour interactive program on the critical skills requisite for bankruptcy mediators. Register at www.abiworld.org/MT14 (spots are limited).*

Paul A. Rubin
Rubin LLC; New York

Paul Rubin is the founder of Rubin LLC in New York. His practice includes business bankruptcy law, workouts and restructurings, and distressed acquisitions, and he has served as a mediator in several well-known bankruptcy cases.

Bankruptcy courts recognize that formal litigation of disputes in bankruptcy cases often imposes significant financial burdens on parties and can delay resolution. It has become increasingly common for courts to refer adversary proceedings and contested matters to mediation in order to facilitate faster and less expensive resolutions, and in light of the substantial burdens that a large volume of pending litigation places upon counsel, their clients and judges. At least 50 of the 90 bankruptcy courts in the U.S. are using mediation pursuant to local rules, general orders or guidelines, and that number is increasing.[1]

Mediation has become mandatory in certain jurisdictions and actions. The U.S. Bankruptcy Court for the District of Delaware helped start this trend more than 10 years ago. Having more than 15,000 adversary proceedings pending before it, and expecting an avalanche of more than 10,000 new lawsuits, it adopted a general order referring to mediation adversary proceedings involving a claim to avoid alleged preferential transfers.[2] Recently, the U.S. Bankruptcy Court for the District of New Jersey issued a public notice that its judges have approved a new comprehensive, court-supervised mediation program that provides for the presumptive referral of matters to mediation.[3] Mandatory mediation has also been ordered in several cases pending in the U.S. Bankruptcy Court for the Southern District of New York in which large numbers of adversary proceedings were filed.[4]

The overwhelming majority of adversary proceedings are settled before trial, often with the aid of mediation. This article provides insights for parties from the mediator's perspective, and no deep secrets are revealed here. The impetus is the repeated observation that, by act or omission, sometimes unwittingly and with good intentions, participants in the process manage to create obstacles to the settlement. It is understandable that parties may enter the process with skepticism, feelings of uncertainty and even a certain level of mistrust. Suggestions that may be helpful at different stages of the mediation process are provided here to help overcome these doubts, avoid a stalemate and improve the likelihood of reaching a consensual resolution. Some of these suggestions may appear to simply state the obvious, but experience has unfortunately proven that even seasoned counsel and their clients need to be reminded to take these considerations to heart.

Before the Mediation

1. Furnish Your Client with Realistic Expectations Going Into the Mediation Process

Even if your side is absolutely convinced that the law, facts and equities mandate judgment in your favor, do not expect the mediator to adopt an evaluative posture and declare who, in his/her opinion, ought to win the case. Most mediators will not do that. Moreover, the goal is not to "win" at mediation; the goal is to reach a result that is satis-

1 Jacob Aaron Esher, Hon. Lisa Hill Fenning (ret.) and Hon. Erwin I. Katz (ret.), *The ABI Guide to Bankruptcy Mediation, Second Edition* (ABI, 2009), at 25. This publication is available for purchase at bookstore.abi.org (log in first to obtain member pricing).

2 General Order, Procedures in Adversary Proceedings dated April 7, 2004, *available at* www.deb.uscourts.gov/sites/default/files/general-ordes/advorder.pdf (last visited Sept. 23, 2014); amended by Amendment to General Order, Procedures in Adversary Proceedings dated April 11, 2005, *available at* www.deb.uscourts.gov/sites/default/files/general-ordes/AmendmentGeneralOrder11april05.pdf (last visited Sept. 23, 2014).

3 Important Notice to the Bar and Public Concerning General Order Adopting Mediation Program Pending Adoption and Amendment of Local Rules, Presumptive Referral to Mediation, May 1, 2014, *available at* www.njb.uscourts.gov/mediationNew (last visited Sept. 23, 2014).

4 *See, e.g.*, Order Approving Motion of Trustee of the Kodak GUC Trust for an Order Establishing Procedures Governing Avoidance Actions, *In re Eastman Kodak Co.*, Case No. 12-10202 (ALG) (Bankr. S.D.N.Y. April 3, 2014) [Dkt 6380]; Order Granting Motion of BGI Creditors' Liquidating Trust and the Liquidating Trustee to Establish Procedures Governing Adversary Proceedings Brought Pursuant to Sections 547 and 550 of the Bankruptcy Code, *In re BGI Inc., f/k/a Borders Group Inc.*, Case No. 11-10614 (MG) (Bankr. S.D.N.Y. Oct. 23, 2012) [Dkt 2922]; Order Establishing Procedures Governing Adversary Proceedings Brought Pursuant to Sections 547 and 550 of the Bankruptcy Code, *In re Oldco M. Corp. (f/k/a Metaldyne Corp.)*, Case No. 09-13412 (MG) (Bankr. S.D.N.Y. April 28, 2011) [Dkt 1726].

factory to your client. In this context, "satisfactory" means something that is more desirable, or less undesirable, than continued litigation of the dispute.

2. Attempt Meaningful Discussions with the Other Side Before the Mediation Session

Some cases settle before the mediation session. If each side shares information regarding the underlying facts and its view of the claims and defenses in the action, the dialogue may serve to narrow or clarify the salient issues before mediation. Even if pre-mediation discussions and negotiation do not produce a settlement, at least some progress toward a potential settlement can be made, which can help produce an atmosphere conducive toward settlement at the mediation session.

Should it be revealed at the outset of the mediation session in a preference case that the defendant has never made a settlement offer and the plaintiff is still demanding an amount equal to 90 percent of the amount being sought in the complaint, the mediator will know that for some reason, no serious effort has yet been made to settle the case. This is a warning sign that something is amiss. The cost of briefing, arguing and winning a motion to dismiss is never zero, and putting some money on the table may settle the case. Once, when representing an avoidance action defendant, I recommended that the client extend a settlement offer even though the defendant's in-house counsel and I were highly confident that the defendant had three separate meritorious defenses warranting dismissal of the complaint at the pre-answer stage. We were pleased when the plaintiff accepted the offer.

Defendants often express the sentiment that they prefer paying their counsel over paying anything to the plaintiff, that they are repulsed by the notion of paying to settle the claim asserted by a debtor's estate, and that they are willing to take their chances through motion practice or beyond. However, economic common sense should prevail over bravado, the perception that the system is balanced unfairly and the parties' visceral feelings.

3. Know the Ground Rules and Honor Them

Parties must familiarize themselves with any local rules of the bankruptcy court governing mediations, and with any procedures order entered by the bankruptcy court affecting the adversary proceeding. In addition, the mediator is likely to ask the parties to sign a mediation agreement, which reflects the mediator's expectations of the parties. Deadlines for submission of mediation statements should not be missed, and the parties must respect any court-imposed deadlines for concluding the mediation. Where there is a simultaneous exchange of mediation statements, it is bad form to delay the submission of your mediation statement until after your adversary has served its statement. Keep in mind at all times that the likelihood that a mediation will settle is diminished if a party engages in conduct that fosters mistrust or engages in conduct that calls its good faith into question.

4. Share a Meaningful Mediation Statement with the Other Side

Practice and procedure orders vary on whether the parties must exchange mediation statements. I firmly believe that the parties should exchange mediation statements instead of submitting them only to the mediator. A party is less likely to agree to a compromise if it does not understand and appreciate the other side's view of the facts and does not know what applicable authority the other side relies on in support of its position.

A productive mediation statement will include the pertinent facts, identify the arguments and cite relevant case law. Do not wait until the mediation session to spring a new argument on the other side. It is expected that if you have a serious argument, you will have put it in your mediation statement. Furthermore, vague or unsubstantiated arguments are unconvincing and will not help the mediator discuss your case with the other side.

In one case, a party vaguely asserted that it held a secured position without specifying which state's law it relied on to claim a secured status. I contacted the party before the mediation session and obtained its consent to share the relevant statute with the other side before the mediation session. This facilitated a frank and productive discussion regarding the statute's applicability in that case. If that issue had not been clarified before the parties met, there would have been no chance of meaningfully addressing the issue during the mediation session, and the session would have been doomed to failure.

A party might not want to share all of the fruits of its research with the other side. There might be hesitation to reveal information out of a concern that the other side will use the mediation session primarily for information-gathering purposes. Keep in mind, however, that the facts are likely to be developed during discovery if the mediation is unsuccessful. While articulation of key arguments is strongly encouraged, if a party does not want to share the full extent of its legal research with the other side, it can submit a separate and confidential memorandum for the mediator's eyes only. If you do that, the memorandum must be clearly identified as such when it is sent to the mediator.

5. Send a Suitable Representative to the Mediation Session

The parties should be represented at the mediation by individuals having knowledge of the pertinent facts and full settlement authority. In this context, "full settlement authority" does not mean that the representative is authorized to settle the case only at certain limits. It is understandable that a representative of a large corporate defendant might want to consult with colleagues at company headquarters during the course of the negotiations. However, the representative at the mediation session must have the full authority to make and respond to counteroffers, and negotiations cannot be halted because someone not present is unavailable to make a decision regarding an offer or counteroffer.

6. Be Prepared to Discuss the Facts and the Law

It is distressing if counsel attending the mediation session is not an attorney who has been handling the case to date. In one unforgettable episode, the defendant retained new counsel on the eve of the mediation session. Toward the end of the all-day session, there was spirited disagreement over whether the defendant would waive its unsecured claim against the debtor's estate as part of the settlement agreement. After extensive negotiations, the creditor agreed to do

so. Less than one hour after the mediation session, I received an email from the defendant's representative advising that he just learned that his client had sold the unsecured claim three months before the mediation session. Something like that should never happen.

At the Mediation Session

7. Listen Carefully

The mediation will begin with a joint session of all of the parties in the same room. During this session, listen carefully to the other side. Do not just listen in order to be able to respond to the opposing argument. Use the joint session to ascertain whether there is an agreement regarding the relevant facts, and identify the aspects of your opponent's statement with which you disagree. Similarly, when the mediator caucuses with you separately, do not focus only on the message that you want to convey to the mediator or the other side. Listen carefully to learn from the mediator what is influencing the other side's thought process.

8. Don't Give Up

It is common that during a mediation session, the parties will reach what appears to be an impasse. It is not uncommon for there to be a fundamental disagreement regarding how a court would rule even if the facts of the case are undisputed. It is easy to get frustrated, and you may be tempted to walk away. Recognize that this is a common occurrence. This is not the time to quit; it's a time to redouble the effort to settle.

At this point, attempt to identify the barriers to settlement. Parties and their counsel may sometimes passionately believe that their position is correct or that they have moved significantly more than the other side during the settlement negotiations, and that progress cannot and will not be made unless the other side makes the next significant move. It is always necessary to acknowledge the parties' emotions, and the mediator might understand how you feel and sympathize with your position. Nevertheless, my recommendation to each side is that no matter how correct you might be, it is always important to try to separate your emotions from the prudent exercise of your business judgment. The goal of mediation is to try to resolve a business dispute and enable the parties to move on — not to teach anyone a lesson or win a debate.

9. Focus on the Alternative to Reaching a Settlement

Each side should ask itself whether it really wants to disengage from the mediation process and resume litigation. Settlement is usually preferable to spending more time and money on a lawsuit. Each side should consider not only what outcome it would expect if the case were litigated to conclusion, but also how much it would cost to reach that result. In addition, it is safe to assume that bankruptcy judges generally prefer that parties settle rather than force them to try an avoidance action in which less than $75,000 is at issue, and testing the limits of the patience of a bankruptcy judge burdened with a full docket is never advisable.

10. One Last Thought: Selecting the Mediator

There is no uniform procedure for selection of a mediator. In some cases, the parties are asked to agree upon the selection of a mediator. In others, the bankruptcy court approves a list of proposed mediators from which the defendant may make a selection. Unless a mediator is selected without your input, it is worthwhile for counsel to make an informed decision.

You can ask other attorneys or professionals for information about the proposed mediator, and you can even ask the mediator to provide references and describe his/her prior mediation experience. You should also find out whether and to what extent the mediator has previously represented plaintiffs and defendants in cases similar to yours. Perhaps more important than anything else, find out whether the parties trusted the mediator and felt that he/she was effective, worked hard to try to reach a settlement and treated them fairly.

Conclusion

Mediation of bankruptcy disputes presents parties with an opportunity to save time and money. Much of the groundwork for a successful mediation must be laid before the date of the mediation session. If the parties prepare for the mediation, respect the process, listen to each other, and demonstrate patience and perseverance, they may achieve a settlement that each side can live with — the best definition of a "successful mediation." abi

Reprinted with permission from the ABI Journal, Vol. XXXIII, No. 11, November 2014.