32nd Edition * February 2019

Bankruptcy Mediation News

A Word From The Administrator. . .

How time flies! Our Program is now entering its 24th year but it seems like only yesterday that our mediators generously accepted our Court's invitation to volunteer their time and effort to provide effective and cost-efficient assistance to so many of the litigants who appear before the Court. We are very proud to call you "our mediators!"

In 2018, we provided a statistical report to the American Bankruptcy Institute, as well as an article for the Bankruptcy Judges Educational Committee's fall newsletter on the annual luncheons that we co-host with the District Court. A copy of the ABI Report is included in this newsletter at pages 4 to 5. A detailed description of recent luncheons can be found at pages 9 through 11.

This edition also includes articles authored by two mediators who joined our panel at its inception in 1995. An article by J. Scott Bovitz, "The Lighter Side of Mediation," is an amusing tale of his experience attending the mandatory training sessions and conducting mediations. Benjamin S. Seigel, who has provided a number of articles published in earlier newsletter editions, has provided "How Neutral Must a Mediator Be?" I invite all of you to send in articles that may be of interest to your ADR colleagues for publication in future newsletters.

A new California law regarding mediation disclosures requires attorneys to provide his or her clients with a written disclosure containing the confidentiality restrictions related to mediation. The statutes are found in California Evidence Code sections 1122 and 1129. The complete text of Senate Bill 954, including the comments, is reprinted at the end of this newsletter and can also be found at https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB954.

Our mediators, as well as attorneys and *pro se* litigants, regularly contact our Program staff with questions about the Program's practices and procedures. Our staff members respond by email or phone to each inquiry. Many of the same issues arise frequently, however, so we have added a feature called "Dear Program Staff" to answer the more common inquires. We'll continue to include this feature in future newsletters. Please feel free to email the Program Staff at mediation_program@cacb.uscourts.gov with your questions or concerns. Thank you!

Dear Program Staff:

Q: I have a docketing issue that I need help with. I conducted a mediation a few weeks ago, but can't file my certificate of completion because the judge who assigned the adversary proceeding to mediation never entered the mediation order that defendant's counsel lodged a month or so ago. (I settled the case, by the way). Also, since a mediation order was never entered, I don't know what I should link the mediator's certificate of completion to on the docket. What should I do?

***A*:** Please file your certificate of completion on the adversary docket even though a mediation order was never entered, and send a courtesy copy to the judge to whom the case was assigned. (We're sure the judge will be pleased that you settled the matter). You should also send a courtesy copy to Judge Russell as the Program Administrator. Since the mediation arose in an adversary proceeding, you should link the certificate of completion to the complaint in that proceeding. If the mediation had arisen in connection with an issue on the main docket (a fee or plan dispute, claim objection, etc.), you would link your certificate to the fee application, plan, claim objection, or whatever document gave rise to the dispute being mediated.

Q: I conducted my first mediation recently. We had only scheduled four hours and ran out of time, so we're going to schedule a continued session. Do I need to fill out any of the ADR forms now (such as the mediator's certificate of completion or the mediator's confidential questionnaire)?

A: No, you don't need to file anything until after the continued session (or after the final one, in case you continue it again).

Q: I'm having trouble finding the list of bankruptcy mediators. Where is it?

A: You can find it on the court's website at www.cacb.uscourts.gov. The Mediation Program link, which is located on the lower left side of the home page under "Programs and Services," will take you to the Mediation Program page. There you will find the list under the "Mediator Information/Search" link. In addition to the list, you'll find all sorts of other information about the mediators, such as their biographical data, type of business practice, foreign languages spoken, etc.

Q: My first mediation is still pending, and meanwhile I received a call to handle another one. Is my commitment to perform one eight hour mediation for free per quarter? Also, may I request compensation for the second mediation?

A: Yes, your commitment is one free day per quarter. By the way, "one free day" may be longer than eight hours depending on how long a mediation session takes. Under the Third Amended General Order No. 95-01, which governs the Mediation Program, the length of a "day" is intentionally not defined. You can request and receive compensation for the second mediation you were just called about if it occurs in the same quarter (assuming the parties are willing to pay).

Q: I don't have counsel and really need a mediator who will serve *pro bono* but all the mediators I've called say they've completed their free day for the quarter and won't serve unless I pay them. Is there any way to find someone who will serve for free?

A: Try starting at the bottom of the list alphabetically, maybe with S-Z, and work your way upwards, instead of starting at the top. It seems that parties tend to call mediators whose names are at the top and usually don't go past "G" or "H" so those mediators will have already conducted lots of mediations, especially toward the end of each quarter. We don't have any statistics to prove that this works but lots of parties have reported back that it does.

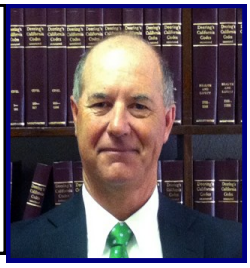
Q: I'm the plaintiff's counsel in an adversary proceeding. The judge ordered us to mediation and gave us very little time in which to hold the conference. I assume you'll assign a mediator for us and would appreciate your doing so as quickly as possible given our time constraints.

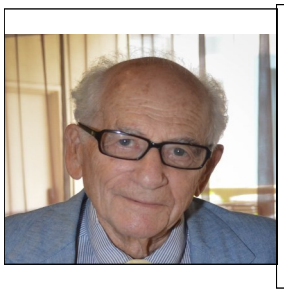
A: The Program Administrator and staff do not assign mediators. Also, as plaintiff's counsel, it's your responsibility to take the initiative in locating the primary and alternate mediators. It's unfortunate that you have such a short time frame, so you'll need to consult the list of mediators on the Mediation Program page of the court's website (www.cacb.uscourts.gov) and complete and lodge the mediation order as quickly as possible. Hopefully, opposing counsel will cooperate in the process and you'll be able to handle everything in time.

MEDIATOR SPOTLIGHT

"But for the wisdom and sage advice of **[WILLIAM M. BURD]**, this matter likely would not have settled. His knowledge, experience and impartiality was instrumental in reaching a full settlement."

"**[WILLIAM C. BEALL]** was fair, neutral, and very realistic in evaluating the situation. I felt he came to the table well prepared and understood the case."





"I have used [**LEON ALEXANDER**] multiple times now. He is excellent. He has a long career as an attorney and an extensive knowledge of the law in many areas. As such, he is a very good mediator."

"I had no expectation that the case would s**e**ttle. Settlement was extremely unlikely. However, with the help of **[ROBERT A. MERRING]**, we were able to reach an amicable settlement."

"**[WENETA M.A. KOSMALA]** was a very professional, skilled and persuasive mediator. Ms. Kosmala would be my preference for the next mediation in which I participate."

"**[THOMAS H. CASEY]** is an excellent mediator! He picked up on the fact that the debtor was uncomfortable being in the same room with the plaintiff and met with her privately. This facilitated a settlement."

"[JAMES A. HAYES, JR.] was excellent. Many thanks for his diligence and skill in a contentious dispute."

"**[HOWARD EHRENBERG]** was fantastic. Impartial, professional, and very helpful. Would absolutely use him again."

"**[KATHY PHELPS]** was an amazing mediator with an uncanny ability to engage with the parties when necessary and delicately move the parties towards settlement in what was a legally complicated issue(s). We would have never been able to reach an amicable settlement without her help."

"This letter is sent to commend the voluntary services rendered by [**KEITH S. DOBBINS**]. In over 30 years of practicing law, I have never been part of a mediation where the mediator showed the skill, compassion and insight that was exhibited in this matter. I literally felt that there was no chance that this matter would settle at mediation, yet after 3+ hours, we resolved the dispute. I would recommend him to any party or attorney that desires the services of someone that can help to effectuate a settlement."

Central District of California Bankruptcy Court Mediation Program
Statistical Report for Period from July 2, 1995– January 31, 2018

The Central District of California Bankruptcy Court established its Bankruptcy ADR Program in 1995 to provide the public with effective and reliable assistance in resolving disputes without the time and expense associated with litigation. The ADR Program entered into its 23rd year in 2018 and remains the largest and most robust bankruptcy mediation program in the nation.

The Third Amended General Order No. 95-01 governs the ADR Program in the Central District. The focus of the Program is a Court-sponsored mediation panel, which consists of attorneys and non-attorney professionals such as accountants, real estate brokers, physicians, and professional mediators. The panel currently has 180 members and the Court continues to add new members on an ongoing basis as mediators who joined the panel at its inception in 1995 retire.

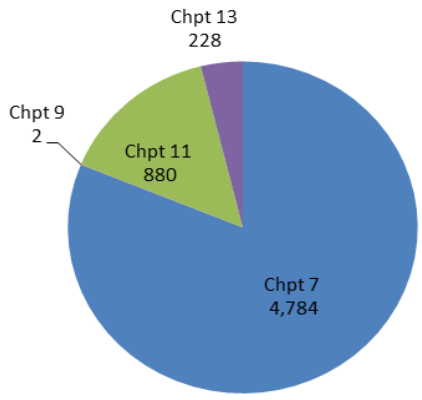
All issues which arise in bankruptcy cases are eligible for referral to the Program and all 21 of the active bankruptcy judges in the Central District's five divisional offices assign matters to the panel. From the Program's inception in 1995 through January 31, 2018, the judges have assigned 5,894 matters to mediation; 5,630 of those maters have concluded and 3,526 of the concluded matters settled. The settlement rate has held steady over the years at a very favorable rate of 63%.

The Program originally did not allow compensation for the mediators' services. The General Order was later amended to allow compensation upon the parties' agreement, but all mediators are still required to serve one full day per quarter on a *pro bono* basis. Despite the added compensation provision, only 1% of Program's mediators have reported receiving compensation for their services.

The following charts display the matters assigned to the Program by Bankruptcy Code chapter and the distribution of mediation matters within the Court's five division.

Figure 1

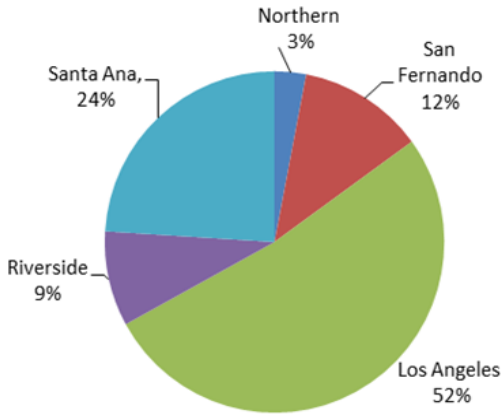
Mediation Matters by Chapter: 1995 – 2018



Total for All Chapters:
5,894

Figure 2

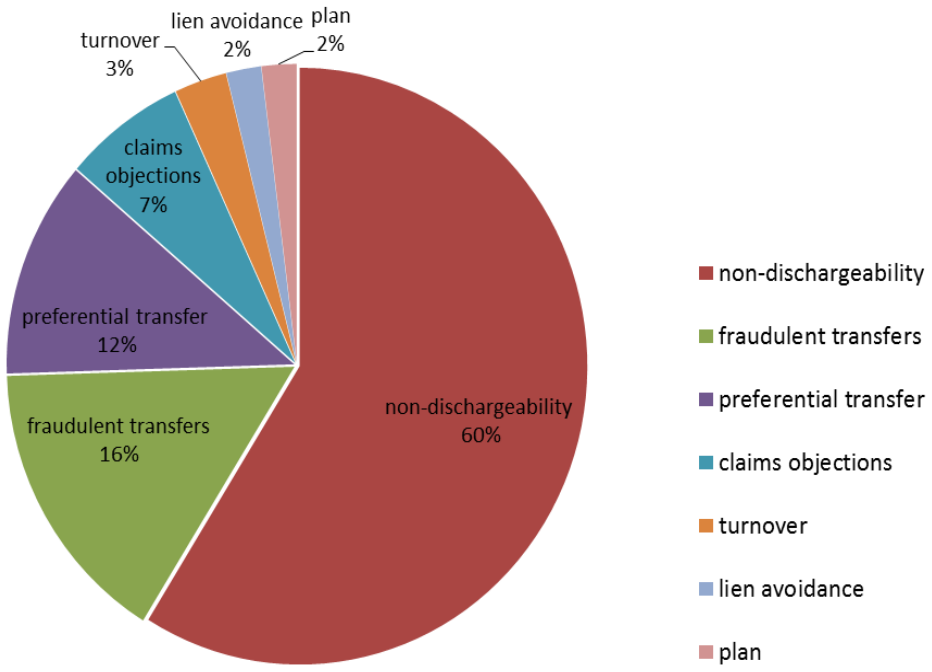
Mediation Matters by Division: 1995 – 2018



Central District of California Bankruptcy Court Mediation Program
Statistical Report for Period from July 2, 1995– January 31, 2018

Figure 3 shows the percentage breakdown of the types of matters assigned to mediation from the Program's inception in 1995 to January 31, 2018. The percentages total over 100% due to the overlap of many of these issues in the various matters assigned to the Program.

Figure 3



In addition, the Program solicits feedback about its effectiveness by way of a comprehensive, anonymous questionnaire which is sent to all of the parties and attorneys who attend mediation conferences. A customized statistics software program is used to analyze the data from the questionnaires. An analysis of the completed questionnaires from 1995 to January 31, 2018 indicates that approximately 89**%** of the respondents were satisfied with the mediation process, approximately 88**%** would use the Program again, and approximately 92**%** would use the same mediator again. These percentages, which have held steady over the years, reflect the public's continuing high regard for the Program.

"The Lighter Side of Mediation"

By: J. Scott Bovitz, Esq.

Judge Barry Russell had a crazy idea.

Judge Russell asked the bankruptcy bar to sit (and pay) for 30 hours of mediation training with the Straus Institute for Dispute Resolution. In 1995, we weren't quite sure of the difference between meditation, a mezzaluna, and mediation. Nevertheless, a number of us promised to take the training and seed Judge Russell's bankruptcy mediation program for the Central District of California.

I brought my yoga mat to the first mediation training session. (Not needed!)

I asked earnestly, "What do mediators wear to mediation?" This question was never answered to my satisfaction. A mediation professor will not provide a direct, unambiguous answer to a simple question. (Just like law professors.)

In a practice session, I negotiated a settlement with then-attorney Sheri Bluebond. As I recall, Bluebond dry-cleaned all the money and lint from my (hypothetical) debtor's pocket. (This mediation stuff is harder than it looks.)

At a break in our mediation training, I confidently told Judge Russell that mediations might be amusing or educational, but very few mediations will result in settlement. After all, bankruptcy lawyers are EXPERT negotiators and litigators. How could a mediator help? (I was wrong, as we learned that the mediation program settles almost 2/3 of the cases that are assigned. Awesome!)

Once the mediation training was completed, I took on my first assignments. From that tentative start, I have continued mediating for more than 20 years. I would like to share a few observations and mediation tips.

Judge Stick-In-The-Mud? Or Judge Plays-by-the-Rules?

In mediation breakout sessions, you find out what the lawyers REALLY think about our bankruptcy judges. The conversation can be a little like reading People Magazine while waiting in line at the market. (No, I don't like those automated checkout robots either). I use the lawyer's fear to my advantage. If the lawyer is worried, then the client is also worried about how Judge Stick-in-the-Mud or Judge Plays-by-the-Rules is going to rule.

So I remind them both that the client should take the case out of the judge's hands and SETTLE TODAY.

By the way, none of our judges are candidates for Judge Stick-in-the-Mud. I'm just sayin'.

Brief Mediation Briefs

Is it just me, or do the litigators usually skimp on their mediation briefs? Have you ever heard this one? "Here, just read the key pleadings." Fine – IF YOU ARE PAYING ME BY THE HOUR. Since almost all of my mediations are volunteer mediations under the Los Angeles program, why can't the two lawyers just write simple summaries (including the settlement offer)?

Mediation Attire

In 1980, I was sworn into the bar and started wearing a rose in the lapel of my suit. (Go figure). Given the vague instructions from the Straus Institute professors, I rarely strayed from this "look" when conducting or attending mediations. However, I have been tempted to join the slow trend toward casual wear at mediation sessions. Did you hear about the lawyer in Florida who regularly set depositions at Dunkin' Donuts and then wore t-shirts and shorts to those events? This (and other boorish behavior) eventually resulted in the disqualification of that attorney in a litigation matter. I don't think this would happen in the Central District of California, but I suspect that our clients and the mediation participants expect a little formality. (I have started serving donuts and other foodstuffs at the mediation. That seems to help, particularly in the early morning and mid-afternoon sessions).

(Cont'd on page 7)

"The Lighter Side of Mediation"

(Cont'd from page 6)

Optimum mediation starting time

When do you schedule your mediations? Michael Lubic is famous for scheduling his mediations to start in the late afternoon. Lubic has an excellent success rate, but nothing settles until 10:30 p.m. I start my mediations earlier, but tell everyone that I cannot stay past 4:00 p.m. because I am heading to the Dodgers, or Clippers, or Mark Taper Forum, or whatever. I make sure I actually have a game or a play in the evening, since this sets a hard end time for the mediation. (Mr. Lubic may be on to something. Or he may just be a night person).

I'm quitting the mediation program, but not yet

I keep trying to get up the courage to tell Judge Russell that 20+ years is long enough. "Judge Russell, I'm ready to hang up my volunteer mediation shingle and get back to the nasty (but fun) business of pure, paid litigation." But then I meet new people and still learn something new in each and every mediation.

Ok, I guess I'll keep doing this as long as I can find time to squeeze in a mediation here and there.

***Mr. Bovitz is Board Certified in Business Bankruptcy Law by the American Board of Certification. Mr. Bovitz is also a Certified Specialist, Bankruptcy Law, State Bar of California Board of Legal Specialization, and is a coordinating editor of (and regular contributor to) the humor column in the American Bankruptcy Institute (ABI) Journal.*

"How Neutral Must a Mediator Be?"

By: Benjamin S. Seigel, Esq.

Mediators are Neutrals

Mediators are taught from the very beginning of their training that they serve as neutral professionals to negotiate a resolution of a dispute between two or more parties. Neutrality requires that the mediator objectively evaluate the facts of the dispute without favoring one side's position or the other's. The resolution of the dispute should be the result of negotiation between the parties with the assistance of the mediator; not the result that the mediator believes should be the outcome of the negotiations.

Mediations are not Court Supervised Settlement Conferences

Mediation sessions are not settlement conferences that are conducted by judicial officers, judges or magistrates. Those conferences often end with the judicial officer giving an opinion of what the resolution should be based in part on what she would rule if she was trying the case with all of the procedures of a trial being observed. That is not a neutral position but one that is based on judicial reasoning. Mediation is not intended to be conducted in that fashion. Rather, mediation is intended to create a resolution based on negotiations which often ignore the law but deal only with the facts as seen by the parties and the practicalities of coming to an agreement that ends the dispute.

Neutrality as a Hindrance to Mediation

However, is there a point in a mediation session when the mediator's neutrality can be a hindrance to achieving an agreed upon resolution of the dispute? As an example of a mediator's neutrality being tested, an actual case is presented. The names of the parties and the amounts have been changed to maintain mediation confidentiality. Any resemblance to actual names is purely coincidental.

(Cont'd on page 8)

"How Neutral Must a Mediator Be?"

(Cont'd from page 7)

Consider an Actual Case

Debtor Corp. filed a case under Chapter 11 of the Bankruptcy Code and scheduled millions of dollars in assets and liabilities. Efforts to confirm a plan of reorganization were unsuccessful and the case was converted to a liquidation proceeding under Chapter 7 of the Code. A Trustee was appointed and efforts were made to maximize the liquidation value of the assets. The Trustee conducted an analysis of potential preference claims and initiated actions to recover numerous payments that were made during the 90 days preceding the commencement of the case, all as contemplated by Section 547 of the Bankruptcy Code. One such case was brought against Debtor Corp.'s major supplier, ABC Materials Corp. ("ABC"), in which the Trustee sought recovery of $1.5 million of claimed preferential payments. The Trustee's counsel had reviewed the numerous transactions between ABC and Debtor Corp. that had taken place over the past several years. An extensive analysis of those transactions was prepared as well as the preparation of numerous statistical analyses. Charts and graphs were prepared to establish the payment pattern during each year of the Debtor Corp./ABC relationship. Those statistics were compared to the payment pattern during the 90 days preceding the filing of the Chapter 11 bankruptcy case. The Trustee's analysis showed that the payment terms of net 60 days were always satisfied within a day or two. However, during the 90 day period, payments were made from 45 to 230 days after the due date. None were made within the 60 days term. The conclusion reached by the Trustee was that the payments during the 90 days preceding the bankruptcy were vastly different than the ordinary course of business established during the preceding years, supporting the Trustee's contention that all payments received during the 90 day period prior to the bankruptcy were undeniably preferential.

Mediation Commences

The Trustee and ABC agreed to mediation. ABC's accountant prepared an analysis of payments made during the two years prior to the bankruptcy. Except for the 90 days preceding the bankruptcy, all payments were made in accordance with the normal business terms between the parties. No analysis was prepared regarding the payments during the 90 day period.

The mediation statements were submitted to the mediator with the documentation supporting each side's position. ABC contended that the payments made during the crucial 90 day period were within the normal course of business between it and Debtor Corp., a complete defense if proven to be true.

The Trustee's position was that payments were so erratic during the preference period that they were not within the normal course of business, as had been the history during the several years prior to the commencement of the case.

Negotiations Toward Resolution

The mediation commenced and after several hours of joint and private sessions, the Trustee made an initial offer of settlement of $1 million. ABC flatly turned the offer down and after further discussion with the mediator presented a counter-offer of $100,000. The Trustee countered with $700,000. After continued negotiations, the Trustee generously proposed a $300,000 settlement. ABC's attorney, without consulting with his client, ABC's president, started to pack his brief case, put on his jacket and told his client, "Let's go, we are through here." The client looked startled!

The mediator picked up on the president's reaction and asked him and the ABC lawyer to meet privately with him one more time. The lawyer reluctantly consented. The mediator had thoroughly reviewed the submitted documents prior to the mediation and had observed that there was a very substantial likelihood that if the matter went to trial, ABC would be held liable for the full $1.5 million preference.

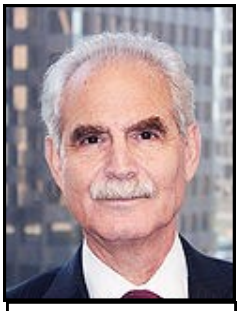
The Neutrality Dilemma

This presented a neutrality dilemma. Should the mediator give his opinion regarding his view of the merits of the case, which in his mind clearly established that ABC had no defense to the action, or should he just continue to pursue negotiations between the parties? Should he tell ABC and its attorney that he had done a complete review of the Trustee's analysis, that ABC never raised a question about the Trustee's analysis, and that ABC would lose at trial? The mediator decided to pursue negotiations. The mediator asked that ABC consider the possibility of an unfavorable decision if the matter went to trial, the costs of pretrial and trial related activities, and the time and expense of going forward with the litigation. The mediator observed the president's concerned reaction and wanted to speak but the attorney would not permit his client to enter into the discussion.

(Cont'd on page 12)

Court Honors Mediators in 2017 & 2018


Jerry Seelig


Peter J. Gurfein


Lana Borsook


James A. Dumas, Jr.


Robert A. Merring


Jayne T. Kaplan

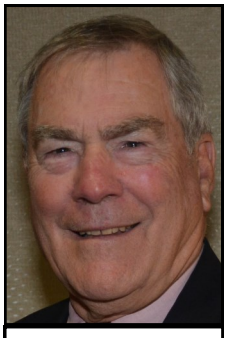
The Central District Bankruptcy Court and District Court co-hosted Annual Appreciation Luncheons on November 28, 2017 and November 8, 2018, to honor the Courts' mediators for the 2016-2017 and 2017-2018 terms, and to congratulate them for their generous service in the ADR field. Each year, over 100 guests have attended these events.

We hope you all enjoyed the luncheons. Some of our mediators who attended are pictured here. We'll send you a SAVE THE DATE email as soon as the date of the next luncheon is determined. We look forward to seeing you again this fall!


Shirlee Fuqua


Howard Ehrenberg

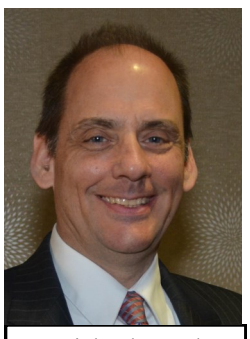

Craig C. Lang


Gary V. Spencer


Diane L. Faber


Stephen H. Marcus


Leslie A. Cohen


Michael Good

2017 Annual Luncheon

Longest mediation conference (settled):
David W. Meadows - 8 Hours

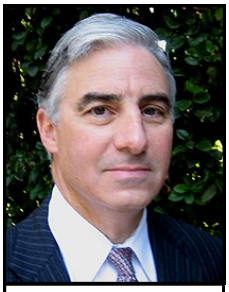
Shortest mediation (settled):
Franklin C. Adams - 45 Minutes


David W. Meadows


Franklin C. Adams


Peter A. Davidson

Conference involving largest amount of money (settled):
Peter A. Davison


Leonard L. Gumport

Conference with the most parties (settled):
Leonard L. Gumport - 10 Attendees

Most frequently chosen mediator:

Entire Central District: David W. Meadows
San Fernando Division: Alan I. Nahmias
Los Angeles Division: David W. Meadows
Riverside Division: Franklin C. Adams & Lazaro E. Fernandez
Santa Ana Division: Christopher L. Blank & Thomas H. Casey
Northern Division: William C. Beall


M. Jonathan Hayes


Howard Ehrenberg

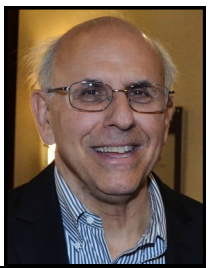
Most conferences settled in mediation:

Entire Central District: Franklin C. Adams
San Fernando Division: M. Jonathan Hayes
Los Angeles Division: Howard Ehrenberg, David W. Meadows, Nicholas S. Nassif & Joel B. Weinberg
Riverside Division: Franklin C. Adams
Santa Ana Division: Benjamin J. Breslauer, Thomas H. Casey, Keith S. Dobbins, Richard A. Marshack, Joel S. Miliband & Kathy B. Phelps
Northern Division: William C. Beall


Lazaro E. Fernandez


Joel S. Miliband


Kathy B. Phelps


Nicholas S. Nassif

2018 Annual Luncheon

Longest mediation conference (settled):
Sara L. Chenetz & David W. Meadows - 16 hrs.

Shortest mediation conference (settled):
Alan I. Nahmias - 45 minutes

Conference involving largest amount of money (settled):
N/A (too many w/ $500,000 - $1 million)

Conference with the most parties (settled):
Benjamin J. Breslauer - 7 attendees

Most frequently chosen mediator:

Entire Central District:	M. Jonathan Hayes
San Fernando Division:	Howard Ehrenberg, M. Jonathan Hayes & David W. Meadows
Los Angeles Division:	M. Jonathan Hayes
Riverside Division:	William M. Burd
Santa Ana Division:	Christopher L. Blank
Northern Division:	William C. Beall

Most conferences settled in mediation:

Entire Central District:	David W. Meadows
San Fernando Division:	David W. Meadows
Los Angeles Division:	David W. Meadows
Riverside Division:	Franklin C. Adams
Santa Ana Division:	Franklin C. Adams
Northern Division:	Alan J. Nahmias


Sara L. Chenetz


Benjamin Breslauer


David W. Meadows


M. Jonathan Hayes


William C. Beall


Howard Ehrenberg


Christopher L. Blank


Alan I. Nahmias

MAILING COURTESY COPIES OF MEDIATION PLEADINGS TO JUDGES

A courtesy copy of the Mediator's Certificate of Conclusion of Mediation Assignment (Form 706) must be mailed to the judge to whom the bankruptcy case/adversary proceeding is assigned. The last two letters of the case number specify the judge's name. The judges' names and division locations are:

LOS ANGELES DIVISION

NB = Judge Neil W. Bason
BB = Judge Sheri Bluebond
WB = Judge Julia W. Brand
TD = Judge Thomas B. Donovan
SK = Judge Sandra R. Klein
RK = Judge Robert N. Kwan
ER = Judge Ernest M. Robles
BR = Judge Barry Russell
DS = Judge Deborah J. Saltzman
VZ = Judge Vincent P. Zurzolo

RIVERSIDE DIVISION

SC = Judge Scott C. Clarkson
MH = Judge Mark D. Houle
WJ = Judge Wayne E. Johnson
MW = Judge Mark S. Wallace
SY = Judge Scott H. Yun

SAN FERNANDO VALLEY DIVISION

AA = Judge Alan M. Ahart
MB = Judge Martin R. Barash
VK = Judge Victoria S. Kaufman
GM = Judge Geraldine Mund
MT = Chief Judge Maureen A. Tighe

SANTA ANA DIVISION

TA = Judge Theodor C. Albert
CB = Judge Catherine E. Bauer
SC = Judge Scott C. Clarkson
ES = Judge Erithe A. Smith
MW = Judge Mark S. Wallace

NORTHERN DIVISION

PC = Judge Peter H. Carroll
RR = Judge Robin L. Riblet

"How Neutral Must a Mediator Be?"

(Cont'd from page 8)

Could the mediator remain neutral when it was abundantly clear to him that ABC's president wanted to settle for the $300,000 offer made by the Trustee; possibly less if the negotiations continued?

The mediator asked to speak privately with ABC's attorney. He reluctantly agreed and they went for a walk. The mediator said, "I understand your reluctance to allow your client to settle this case for the amount on the table. I must remain neutral in these negotiations so I must accept the fact that you do not want your client to settle this case but I do believe you should think more about what your client wants than what you want. You need to look closely at the Trustee's analysis of the payments made during the preference period. And, you need to recognize that your client has not presented any evidence that the payments during the preference period were other than as represented by the Trustee. Your client wants to settle this case. You must consider his desires, not your own. Perhaps the Trustee will accept less than $300,000, but you should consider discussing that with your client. You are only $200,000 apart on a potential liability of $1.5 million. If you refuse to continue the negotiations, you put yourself in jeopardy if the outcome at trial does not go your way. If you fail to continue the negotiations, I think you are being an (*expletive deleted*)!

The attorney looked shocked and felt he was being insulted by the mediator's affront. The mediator suggested that the attorney go back and talk to his client. He reluctantly did so, came back to the mediator, and sheepishly asked, "Do you think the Trustee will accept $250,000?"

The mediator presented that counter-offer to the Trustee and it was accepted.

Did the mediator overstep his neutrality boundaries? Is pressure put on the parties and their lawyer consistent with neutrality? At what point does pressure by the mediator cross the line and move to advocacy?

The Next Day

The next day, the mediator received a call from ABC's attorney, during which he thanked the mediator for bringing him to his senses. He admitted that he believed the Trustee's analysis but felt that he could punch holes in the methods used to prepare it. He further admitted that he was indeed thinking about himself and that the client was thrilled with the settlement. Was the mediator a true neutral in this episode?

Benjamin S. Seigel, Esq. is Of Counsel to the firm of Greenberg & Bass. He is a mediator for the United States Bankruptcy and District Courts for the Central District of California. He can be reached at bseigel@greenbass.com.

LOCAL MEDIATION TRAINING PROGRAMS

Pepperdine University School of Law
Straus Institute for Dispute Resolution
24255 Pacific Coast Highway
Malibu, CA 90263
(310) 506-4655 (tel)
www.law.pepperdine.edu/straus

Center for Dispute Resolution
2411 18th Street
Santa Monica, CA 90405
(310) 399-4426 (tel)
(310) 399-5906 (fax)
www.kennethcloke.com

Conflict Resolution Center (CRI)
(Formerly Ventura Center for Dispute Settlement)
555 Airport Way, Suite D
Camarillo, CA 93101
(805) 384-1313 (tel)
www.conflictresolutionvc.org

PROGRAM STATISTICS AS OF FEBRUARY 26, 2019

Number of Matters Assigned

6,059

Number of Matters Concluded

5,847

Number of Matters Settled

3,643

Overall Settlement Rate

62%

PLEASE UPDATE YOUR INFORMATION

If you've moved, send a quick email with the new details to Sue Doherty at susan_doherty@cacb.uscourts.gov or to Tina Yepes at tina_yepes@cacb.uscourts.gov.

If you wish to be removed from the panel, please let us know that by email as well. Thanks!

ARTICLES WANTED

If you have a story to tell, share it with the other mediators and our bankruptcy judges through the Bankruptcy Mediation News.

Call J. Scott Bovitz and he will write up your story. Better yet, send him a Word file (any length) to bovitz@bovitz-spitzer.com.

WE WELCOME MORE MEDIATORS

Feel free to invite solid professionals to join the panel.

Don't forget that our panel is not limited to attorneys. It also includes non-attorney professionals such as accountants, real estate brokers, physicians, management consultants, and professional mediators.

Details are available on line at https://www.cacb.uscourts.gov/news/bankrupty-mediation-program-request-applications-panel-mediators.

Senate Bill No. 954

CHAPTER 350

An act to amend Section 1122 of, and to add Section 1129 to, the Evidence Code, relating to mediation.

[Approved by Governor September 11, 2018. Filed with

Secretary of State September 11, 2018.]

LEGISLATIVE COUNSEL'S DIGEST

SB 954, Wieckowski. Mediation: confidentiality: disclosure.

Under existing law, if a person consults a mediator or consulting service for the purpose of retaining mediation services, or if persons agree to conduct and participate in a mediation for the purpose of compromising, settling, or resolving a civil dispute, anything said in the course of a mediation consultation or in the course of the mediation is not admissible in evidence nor subject to discovery, and all communications, negotiations, and settlement discussions by and between participants or mediators are confidential, except as specified.

This bill would, except in the case of a class or representative action, require an attorney representing a person participating in a mediation or a mediation consultation to provide his or her client, as soon as reasonably possible before the client agrees to participate in the mediation or mediation consultation, with a printed disclosure, as specified, containing the confidentiality restrictions related to mediation, and to obtain a printed acknowledgment signed by that client stating that he or she has read and understands the confidentiality restrictions. If an attorney is retained after an individual agrees to participate in a mediation or mediation consultation, the bill would require the attorney to comply with the printed disclosure and acknowledgment requirements as soon as reasonably possible after being retained. The bill would specify language that would be deemed compliant with the aforementioned printed disclosure and acknowledgment requirements. The bill would also provide that the failure of an attorney to comply with these disclosure requirements does not invalidate an agreement prepared in the course of, or pursuant to, a mediation. The bill would further provide that a communication, document, or writing related to an attorney's compliance with the disclosure requirements is not confidential and may be used in an attorney disciplinary proceeding if the communication, document, or writing does not disclose anything said or done or any admission made in the course of the mediation.

(Cont'd on page 15)

Ch. 350

The people of the State of California do enact as follows:

SECTION 1. Section 1122 of the Evidence Code is amended to read: 1122.

(a) A communication or a writing, as defined in Section 250, that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if any of the following conditions are satisfied:

(1) All persons who conduct or otherwise participate in the mediation expressly agree in writing, or orally in accordance with Section 1118, to disclosure of the communication, document, or writing.

(2) The communication, document, or writing was prepared by or on behalf of fewer than all the mediation participants, those participants expressly agree in writing, or orally in accordance with Section 1118, to its disclosure, and the communication, document, or writing does not disclose anything said or done or any admission made in the course of the mediation.

(3) The communication, document, or writing is related to an attorney's compliance with the requirements described in Section 1129 and does not disclose anything said or done or any admission made in the course of the mediation, in which case the communication, document, or writing may be used in an attorney disciplinary proceeding to determine whether the attorney has complied with Section 1129.

(b) For purposes of subdivision (a), if the neutral person who conducts a mediation expressly agrees to disclosure, that agreement also binds any other person described in subdivision (b) of Section 1115.

SEC. 2. Section 1129 is added to the Evidence Code, to read:

1129. (a) Except in the case of a class or representative action, an attorney representing a client participating in a mediation or a mediation consultation shall, as soon as reasonably possible before the client agrees to participate in the mediation or mediation consultation, provide that client with a printed disclosure containing the confidentiality restrictions described in Section 1119 and obtain a printed acknowledgment signed by that client stating that he or she has read and understands the confidentiality restrictions.

(b) An attorney who is retained after an individual agrees to participate in the mediation or mediation consultation shall, as soon as reasonably possible after being retained, comply with the printed disclosure and acknowledgment requirements described in subdivision (a).

(c) The printed disclosure required by subdivision (a) shall:

(1) Be printed in the preferred language of the client in at least 12-point font.

(2) Be printed on a single page that is not attached to any other document provided to the client.

(3) Include the names of the attorney and the client and be signed and dated by the attorney and the client.

(d) If the requirements in subdivision (c) are met, the following disclosure shall be deemed to comply with the requirements of subdivision (a):

(Cont'd on page 16)

Ch. 350

Mediation Disclosure Notification and Acknowledgment

To promote communication in mediation, California law generally makes mediation a confidential process. California's mediation confidentiality laws are laid out in Sections 703.5 and 1115 to 1129, inclusive, of the Evidence Code. Those laws establish the confidentiality of mediation and limit the disclosure, admissibility, and a court's consideration of communications, writings, and conduct in connection with a mediation. In general, those laws mean the following:

- All communications, negotiations, or settlement offers in the course of a mediation must remain confidential.
- Statements made and writings prepared in connection with a mediation are not admissible or subject to discovery or compelled disclosure in noncriminal proceedings.
- A mediator's report, opinion, recommendation, or finding about what occurred in a mediation may not be submitted to or considered by a court or another adjudicative body.
- A mediator cannot testify in any subsequent civil proceeding about any communication or conduct occurring at, or in connection with, a mediation.

This means that all communications between you and your attorney made in preparation for a mediation, or during a mediation, are confidential and cannot be disclosed or used (except in extremely limited circumstances), even if you later decide to sue your attorney for malpractice because of something that happens during the mediation.

I,_____ [Name of Client], understand that, unless all participants agree otherwise, no oral or written communication made during a mediation, or in preparation for a mediation, including communications between me and my attorney, can be used as evidence in any subsequent noncriminal legal action including an action against my attorney for malpractice or an ethical violation.

NOTE: This disclosure and signed acknowledgment does not limit your attorney's potential liability to you for professional malpractice, or prevent you from (1) reporting any professional misconduct by your attorney to the State Bar of California or (2) cooperating with any disciplinary investigation or criminal prosecution of your attorney.

[Name of Client]_____ [Date signed] _____

[Name of Attorney _____ [Date signed] _____

(e) Failure of an attorney to comply with this section is not a basis to set aside an agreement prepared in the course of, or pursuant to, a mediation.