



BANKRUPTCY MEDIATION NEWS

A Word From The Administrator. . .

We offer our very best wishes to all of you for a happy and healthy New Year. Since this is our final letter this year, I wanted to offer some of the highlights of 2022:

On June 9 and June 22, the United States District Court offered Advanced Mediation Training. Many thanks to our colleagues and to those of you who had the benefit of these zoom educational sessions. The first session, held on June 9, 2022, featured Opening Remarks by District Court Judge Dolly M. Gee with presentations by Jan Frankel Schau and Steve Paul on communication techniques, an overview of insurance basics by Philip Cook and Peter Rosen and Jean Lawler offered her insight on mediating ADA cases.

In the second session held on June 22, 2022, we are still applauding Professor Peter Robinson's presentation on the tension between neutrality and fairness, Judge Jacqueline Connor and Stacie Hausner on closing the deal and finally Leonard Levy and Lee Jay Berman on how far do we go in bending the rules to get a deal.

Our health and safety concerns have once again affected the annual awards luncheons that we had co-hosted with the District Court for over 20 years. We will not be able to have our annual awards luncheon in person, however, we have included in this edition the awards that we issue annually to our mediators (please see page 6).

Our contributing author this month is Peter Steinberg, who writes about "Discovery Interplay With Mediation; To Propound Or Not To Propound That Is The Question".

The "Dear Program Staff" feature continues to highlight our responses to inquiries that the Program staff regularly receive from mediators, attorneys and *pro se* litigants about our mediation practices and procedures. We also present a column on "What Would You (Mediator) Do?" in which we submit a real life mediation question and ask that you share your thoughts on how best to deal with the issue (page 7). And, we are offering a column featuring various comments on our program which we have received.



MEDIATION PROGRAM

Administration

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Program Administrator

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Program Coordinator

Advisory Board

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Pasadena, CA

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Newsletter

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DISCOVERY'S INTERPLAY WITH MEDIATION; TO PROPOUND OR NOT TO PROPOUND, THAT IS THE QUESTION

By Peter T. Steinberg*
Bankruptcy Attorney & Mediator

Unequivocally, one of the major objectives of bankruptcy adversary mediation is to foster early settlement of controversies to save litigants attorneys' fees and costs. Bankruptcy adversaries are governed by the Federal Rules of Civil Procedure and Federal Rules of Evidence, which are incorporated into bankruptcy adversary proceedings by statute. (See Fed. Rule of Bankruptcy Procedure, Section 1001, and Fed. Rule of Evidence, Section 1101.) Experience in litigating bankruptcy adversaries teaches that the closer the litigants get to trial the more exponentially expensive the litigation becomes. This is underscored by Local Bankruptcy Rule 7016(6) *et seq.* which requires the litigants to prepare and file before trial a Joint Pre-Trial Order ("JPTO") which stipulates to admitted facts, issues of facts to be litigated, issues of law to be litigated, and requires the parties to exchange witness lists and exhibits. In complex disputes involving dischargeability of debt, general discharge, preference or fraudulent conveyance, tens of thousands of dollars are often spent preparing the JPTO for filing, trial, not to mention post-trial motions and potential appellate filings.

To mitigate the heavy litigation expenses which are unavoidable in complex adversary litigation which are tried, bankruptcy judges in the Central District encourage the mediation opt-in at the initial status conference, which occurs normally within 60-90 days of the initiation of the adversary complaint. The joint status conference statement (F7016-A) filed no later than 14 days before the initial status conference requests that the litigants inform the court whether or not mediation is requested. At present, a significant percentage of bankruptcy adversaries are ordered into mediation. Once ordered into mediation, the mediation hearing generally takes place within 60-90 days, allowing the parties and counsel a "gap period" to prepare for the same.

Notwithstanding that the gap period allows time for counsel and parties to effectively prepare for the mediation, too often I have found as a mediator that the parties and their counsel have "relaxed" in the gap period, and have failed to use the gap period to get mediation ready. This begs the question of "what is mediation ready," and what litigation, if any, to do during the gap period to become mediation ready.

Bankruptcy adversaries are similar to general federal and state court litigation in that almost always "liability" and "damages" are at issue. Counsel for the parties need to "canvas the issues" of liability and damages to assess whether or not there are any gaps in the evidence necessary to prove an essential element of a claim or a defense to the same, and if so, propound written discovery, at a minimum, to fill in the blank(s). It is suggested that failed mediation efforts are more often than not matters wherein counsel for the parties have not determined accurately whether or not evidentiary problems of proof exist or not, preventing an understanding of and a proper evaluation of the approximate percentage of success or failure at trial. It is therefore the author's suggestion that counsel use the gap period to assist evaluation of each essential element of either the claim or defense. Specially tailored written discovery, followed up by party or non-party depositions, are bound to assist the gap period evaluation. As an example, if counsel in a non-dischargeability matter are able to identify strengths and weaknesses before mediation, and posit an estimated percentage success rate of their clients' positions at trial, mediation efforts have a higher chance of success.

Nothing is more detrimental to mediation success than a counsel and his or her client's lack of understanding of an objective position of success or failure in the litigation. This may be minimized by using discovery prior to mediation to pinpoint problems of proof or evidence in the adversary should it be tried, and to adjust one's settlement position accordingly. A well informed mediation position (preferably of all counsel) at mediation, assisted by verified discovery, and a resulting settlement at mediation, may well save the litigants, to borrow language from Shakespeare's Hamlet, from the "slings and arrows of outrageous attorneys' fees and costs" spent at trial, post-trial, and potential appeal.

** Mr. Steinberg is a founding member of Steinberg, Nutter & Brent and has been practicing in the counties of Los Angeles, Ventura, Orange and Santa Barbara for over 35 years. Expert in a variety of fields such as bankruptcy, civil, litigation and real estate, his main emphasis is bankruptcy-related matters, as well as federal and state court litigation. He has served as a bankruptcy mediator since 1997.*

BANKRUPTCY MEDIATION NEWS

WE ARE SO HAPPY TO BE ABLE TO SHARE THE FOLLOWING KUDOS RECEIVED IN 2022 AND ARE ENCOURAGED WITH THE COLLEGIAL NATURE OF THE MEDIATION PROGRAM :

LEONARD GUMPORT

Excellent job. Took time to discuss with clients, attorneys. Great at managing time and breakout sessions. Would use again. Did not push one side. Fair. He was very prepared and took his time with the parties. He should take credit for this settlement!

DAVID S. HAGEN

It was a great pleasure working with Mr. Hagen and I would 100% work with him again. He was very professional, intelligent, and also made an effort to stay late to make sure everything was done right. I really appreciate him!

ROBBIN ITKIN

Ms. Itkin was prepared and tried her hardest to engage the parties in meaningful settlement discussions. All such attempts were made very difficult by the aggressive state court attorney that only was interested in threatening malicious prosecution against the Trustee and the Trustee's counsel. It was evident that the defendants never intended to settle the matter and despite indicating an interest to mediate in the joint status conference report stated at the mediation that they were only participating because the Judge ordered the mediation. It was apparent that Ms. Itkin spent time reviewing the briefs and the issues and showed up to the mediation very prepared. We will definitely use Ms. Itkin again as a mediator. We are disappointed that we were unable to make any progress toward settlement but at least we now know the position of the defendants and will proceed accordingly.

DAVID MEADOWS

David was very, very well prepared. I wish I knew a little bit more about the Trustee's support for his position.

BRYON MOLDO

The best...calm, intelligent, practical, even-tempered, very knowledgeable, knew the material very well, very personable, and made himself available for issues to be discussed before the mediation as well.

JASON POMERANTZ

Jason S. Pomerantz is very professional and takes the time to prepare for the mediation. I would recommend him to others.

ZEV SHECHTMAN

Mr. Shechtman helped the parties close the gap on the last issues. The matter was finally settled, disposing of the adversary proceeding without discovery or a trial.

YOU ASKED . . . OUR PROGRAM ADMINISTRATOR ANSWERS:

QUESTION: I am a potential creditor in a bankruptcy case in this district. How can I submit my dispute with the debtor to mediation?

ANSWER: Most importantly, in order for a case to be sent to mediation, there has to be an actual dispute filed with the Court after which you should speak with debtor's counsel regarding potential mediation in the bankruptcy case. As the Administrator of the Mediation Program, I cannot assign others judges' disputes to mediation.

SECOND PART OF THE QUESTION: What purposes do the forms and orders serve? I read somewhere that if a party objects to a request for assignment to mediation, the court may still order it to mediation. I'm just trying to understand if I need to file something in the case before opening that discussion with the parties and then making a request to the court.

ANSWER: Generally speaking, the parties mutually agree to mediate. Also, the Joint Status Report (Mandatory Form F 7016-1) does offer the parties (at page 3, section E. (Settlement) an opportunity to inform the Court as to whether the matter has been mediated and if the parties would like the matter sent to mediation. At the first status conference held in the case, your Judge may order the parties to mediation if the circumstances are ripe for potential agreement.

QUESTION: I'm on the Central District's bankruptcy mediator panel and have been contacted by parties about possibly mediating their adversary proceeding. I have not done a mediation during the pandemic yet. The parties have asked for the conference to be conducted remotely via Zoom which would be my preference as well. I'm not aware of any specific provision allowing for Zoom mediations, I just want to confirm that it's acceptable to conduct the conference via Zoom consistent with the Third Amended General Order 95-01. In fact, we use Microsoft Teams instead of Zoom since our firm has an account with Microsoft Teams, I'm not sure if we still have an account for hosting Zoom events.

ANSWER: You bet! It is absolutely permissible to conduct by either method - in fact, on the Court's website, one of our newsletters has terrific articles about using Zoom for mediations which may be of interest! (June 2022) ." As for using Teams instead of Zoom, yes - we use Teams here a lot of the time and we find it to be just as efficient.

MORE QUESTIONS AND ANSWERS:

QUESTION: I was chosen as a mediator in a matter assigned to this district. I would like to obtain a fee exemption on CM/ECF access for all cases filed in the Central District. I am not listed on the available panel of mediators. Would that even be possible?

ANSWER: Our Mediation Program will not opine on whether a fee exemption is appropriate for a mediator to acquire. However, given the facts in this particular situation, such access does not seem appropriate. It is within the mediator's discretion to request that the parties involved supply the mediator with all relevant pleadings and filed documentation for the mediator's consideration.

QUESTION: Surprise! I was recently appointed a mediator in a matter that I have never even heard about! No one contacted me as to my availability. What is the proper procedure?

ANSWER: Although the Third Amended General Order No. 95-01, does not require that the parties contact the mediator, please note: at pages 7-8 of the Order, "7.1: **Selection Of Mediator.** Counsel for the parties (or the parties, where proceeding in *pro per*), are encouraged to contact the proposed Mediator and Alternate Mediators as soon as practicable . . ." (emphasis added). Mediators, if appropriate, mention this to your attendees as to the courtesy of contacting the proposed mediator (and alternate mediator) before setting a date.

QUESTION: The Judge has suggested that the parties consider mediation. Please let me know what we need to do to schedule a mediation through the program.

ANSWER: In my Court when the parties agree to mediate (often at the first or second status conference, generally held in person), I encourage the parties to step outside the courtroom and contact the proposed mediator/alternate mediator. Alternatively, go to our Court's website at www.cacb.uscourts.gov where, under the "Mediation Program" selection, you will find under "Mediation Program" a "Mediator Information/Search" which lists all of our currently available mediators. The proposed mediator(s) should be contacted to check on availability to conduct the conference. Counsel will need to complete the Form 702 "Order Assigning Matter to Mediation" and lodge that with the Court for its review/approval. Stay in contact with the mediator to ascertain the mediator's procedures for conducting a successful mediation.

Mediators' Awards for 2022

LONGEST MEDIATION CONFERENCE

(SETTLED):

Kimberly S. Winick

SHORTEST MEDIATION CONFERENCE

(SETTLED):

George E. Schulman

CONFERENCE INVOLVING LARGEST AMOUNT OF MONEY:

Kimberly S. Winick

CONFERENCE WITH THE MOST ATTENDEES:

Kimberly S. Winick

MOST FREQUENTLY CHOSEN MEDIATOR:

Entire Central District:

David W. Meadows

San Fernando Valley:

Beth Ann R. Young

Los Angeles:

David W. Meadows

Riverside:

Sara L. Chenetz

Santa Ana:

Leslie A. Cohen

Northern Division:

Peter T. Steinberg

MOST CONFERENCES SETTLED IN MEDIATION:

Entire Central District:

David W. Meadows

San Fernando Valley:

Daniel I. Barness

Los Angeles:

Howard M. Ehrenberg

Riverside:

Donald W. Sieveke

Santa Ana:

David W. Meadows

Northern Division:

James K. Cameron



Building a new mediation program progress continues.

Teamwork.

We salute our Court staff and all members of every department who continue to contribute to our success. Too numerous to name but we see you and thank every single one of you.



HERE IS THE QUESTION, MEDIATORS:

Q: Parties have entered into mediation. First mediation session lasts one day. It appears there is hope for settlement. Parties and mediator agree to conduct a second day of mediation and enter into an agreement to pay the mediator for that second day of mediation. All parties are represented by counsel. The matter is settled! The mediator seeks payment as previously agreed. One of the parties does in fact pay the proper portion of the agreed upon amount. The balance of the parties refuse to pay.

MEDIATORS, WHAT ARE YOUR SUGGESTIONS?



Mediators, we turn to you for your ideas and solutions. Please, drop us an e-mail and suggestions will be offered in our next newsletter. Submit possible solutions to mediation_program@cacb.uscourts.gov for publication in future editions. Your name will not be used—only your offered possible solution.

HOW DID MEDIATORS AND PARTICIPANTS RESPOND TO THE FOLLOWING QUESTION POSED ON OUR MEDIATION PROCESS:

DO YOU HAVE ANY SUGGESTIONS FOR IMPROVEMENTS TO OUR BANKRUPTCY MEDIATION PROGRAM?

- ◆ The mediation was great and I am thankful for the program.
- ◆ Put all the mediation forms online, like this one. (Good job.)
- ◆ Update list with mediator's availability. (The list is updated at least once a month.)
- ◆ I find the Bankruptcy Mediation Program to be exceedingly helpful and an important program. Unfortunately, due to the counsel representing the defendants in the matter, mediation was never going to be helpful in this case. Defendants are represented by state court litigators and a bankruptcy attorney but neither demonstrated any interest in settlement nor demonstrated respect for the mediator, trustee or trustee's counsel. This was truly an unfortunate experience and should not reflect on the mediation program or the mediator.
- ◆ It is sometimes better to have the parties speak to each other, state their case to each other, and then disappear into separate rooms for the mediator to do his/her magic.
- ◆ Great program! No suggestions.

BANKRUPTCY MEDIATION NEWS



Our Local Mediation Training Programs Include:

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

Los Angeles County Bar Association
1055 W. 7th Street
Los Angeles, CA 90017
(213) 627-2727
www.lacba.org

Kenneth Cloke Law Offices
Conflict Resolution Services
2411 18th Street
Santa Monica, CA 90405
(310) 399-4426
www.kencloke.com
kcloke@aol.com

Conflict Resolution Institute
(Ventura Center for Dispute Resolution)
555 Airport Way, Suite D
Camarillo, CA 93010
(805) 384-1313
www.conflictresolutionvc.org
aculberson@centerforcivicmediation.org

There may be others who offer courses. In order to qualify for membership, the Applicant must list any state or federal mediation or other ADR training that has been completed which has been qualified as continuing professional education credit or which has been approved by a court of competent jurisdiction. [NOTE: IT IS MANDATORY THAT ALL APPLICANTS CERTIFY HAVING COMPLETED AT LEAST 30 HOURS OF MEDIATION (NOT ARBITRATION) TRAINING PRIOR TO APPLYING FOR PANEL MEMBERSHIP.]

UC Davis has recently been brought to our attention as offering mediation training.



LOS ANGELES DIVISION

NB = Judge Neil W. Bason
 BB = Judge Sheri Bluebond
 WB = Judge Julia W. Brand
 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

NORTHERN DIVISION

MB = Judge Martin R. Barash
 RC = Judge Ronald A. Clifford III
 DS = Judge Deborah J. Saltzman

RIVERSIDE DIVISION

SC = Judge Scott C. Clarkson
 MH = Judge Mark D. Houle
 WJ = Judge Wayne Johnson
 RB = Judge Magdalena Reyes-Bordeaux
 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 **
 DS = Judge Deborah J. Saltzman
 MT = Maureen A. Tighe**

SANTA ANA DIVISION

TA = Chief Judge Theodor C. Albert
 SC = Judge Scott C. Clarkson
 ES = Judge Erithe A. Smith**

Recalled judges **

WE ACKNOWLEDGE ALL OF OUR MEDIATORS WHO TAKE TIME OUT FROM BUSY SCHEDULES TO DONATE THEIR TIME WHILE ALSO NEEDING TO MAKE A LIVING. WE CONTINUE TO BE VERY THANKFUL FOR YOU AND FOR ALL OF YOUR EFFORTS.

