Committees:
Bankruptcy Litigation
Mediation

Maximizing the Value of Bankruptcy Mediation

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Autonomy. Flexibility. Privacy. Cost Efficiency. Closure. These are some of the many reasons that parties choose to mediate. But once the parties agree to mediate, then what? Below are suggestions to help you maximize the value of mediation in bankruptcy cases.

A. How to Get the Most Out of Your Mediation

Depending on where you practice around the country, mediation in bankruptcy may be the norm or highly unusual. Regardless of the frequency, the fundamentals to enhancing the return on your investment of time and money in mediation are the same.

1. Prepare, Prepare, Prepare

The most critical step to maximize the value of mediation is to prepare. You would never walk into court to try a case without preparation, walk into mediation without preparation.

Preparation includes (a) reviewing the case, including strengths and weaknesses; (b) analyzing your BATNA (best alternative to a negotiated agreement), WATNA (worst alternative to a negotiated agreement) and ZOPA (zone of possible agreement); (c) assessing the potential business implications, risks and benefits of various settlement scenarios; (d) considering whether there is anything non-monetary to get or give to bridge to a settlement; and (d) educating your client about mediation, including confidentiality, the process and the need to remain open-minded. [1]

2. Be Open, Present and Patient

In many respects, success in mediation may lie in your state of mind.

First, in mediation, information is currency. Early in the mediation, a significant part of the process is the sharing of information. As a result, each party learns more about the strengths and weaknesses the other parties' positions while also learning more about the strengths and weaknesses of their own positions.

Second, mediation is fluid. You are destined to fail if you arrive at mediation with a closed mind and an unwillingness to compromise. Instead, it is important that parties use the process to reassess their case evaluation, including the merits of their case, the costs, delay and distraction of continued litigation, and the risk weighted range of recovery or liability.

Third, mediation is a process. You must give the process a chance. While there are certainly predictable patterns to mediation, the key to successfully resolving a dispute in mediation is often patience. [2] Cases rarely settle after the exchange of only a few offers. In my experience, most cases settle between the 5th and 15th exchange of offers.

Fourth, in bankruptcy mediation more so than any other context, there is significant room for creativity in compromise. While the bankruptcy court must determine the winner or loser based on the law and the facts presented, mediation empowers parties to be creative in crafting a compromise.

3. Find the Hidden Benefits of Mediation

There are hidden benefits to participating in mediation even if the dispute does not settle. Mediation affords each party an opportunity to test their theory of the case on the mediator and on the other parties, which may lead to fine-tuning or wholesale changes in strategy. Mediation also allows

each party a “free look” at the other parties’ theory of the case, which can assist in trial preparation. In addition, if any of the party representatives will be witnesses, then the joint session and other interactions between the parties allows an opportunity to gauge the credibility and caliber of the witness.

This is another important reason to be patient with the mediation process. Even if there is no settlement, investing the time in exploring areas of compromise may prove to be a valuable investment in trial preparation.

4. Open by Sharing Your Strengths, Acknowledging the Benefits of Compromise and Committing to Working Toward Resolution

Joint sessions at the beginning of mediation often set the tone for the mediation. As a result, a joint session can lay the groundwork for settlement or impair any ability to settle. To maximize the likelihood of reaching a consensus, approach the joint session as an opportunity to both advocate (without bullying or derision) and peace-make. Open by sharing the strengths of your case, acknowledging the benefits of compromise and committing to work toward consensual resolution.

B. How to Waste the Opportunity of Mediation

1. Bad Timing

Like a bottle of wine or a piece of fruit, there is a moment in time when a dispute is ripe for mediation. Be strategic in determining the timing of mediation. There is no “one size fits all” metric for ascertaining when to mediate, but there are some basic considerations.

Early-stage mediation, which occurs shortly after the issue arises, is most successful when the parties have a shared interest (*i.e.*, an ongoing business relationship or, in the bankruptcy context, a desire to solve an issue between them so they can align to challenge a bigger issue with another party). Absent a strategic or business reason to mediate early, early mediations often fail because the parties lack sufficient information to evaluate settlement options and/or the parties are not yet prepared to make concessions.

Late-stage mediation, which occurs on the eve of trial, is most successful for high-stakes disputes where the outcome is recognized to be uncertain. Unless each party appreciates the high degree of risk involved in pursuing a litigated outcome, late-stage mediations often fail because the parties’ positions are cemented and/or they’ve already incurred most of the cost of litigation.

While there is no hard-and-fast rule as to the exact moment a dispute is ripe for mediation, most successful mediations occur in the “middle” of the case when discovery is largely, but perhaps not completely, complete or immediately before or after significant pretrial rulings (*i.e.*, motions for summary judgment, motions to strike experts, etc.).

2. Failing to Use Your Mediator

To get the full value of mediation, parties must actively “use” their mediator. Mediators should not simply be carrier pigeons. Help us help you by actively using your mediator.

> Use your mediator to test your legal and factual theories. The mediator comes cold to the dispute and is neutral. Let the mediator be your sounding board.
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> Use your mediator as a buffer with a difficult or unreasonable client. Let the mediator be the bad guy.
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> Use your mediator if your client is emotionally overwrought and needs someone to listen to their story — several time — before they can move beyond their pain to settle. Let the mediator play “bartender.”
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> Use your mediator to discern your client’s underlying interest, rather than position. If a mediator understands all of the parties’ underlying interests (what they need, rather than what they say or what they want), then the mediator may be able to fashion a compromise that addresses everyone’s interests. Often, parties are unaware or unable to articulate their underlying interests. Candid dialog with the mediator is the best way for the mediator to ferret out everyone’s interests. Let your mediator be the birddog.
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> Use your mediator to be creative. As the only one privy to what each of the parties is weighing, the mediator may have unique insights into some means to arrive at a settlement. To facilitate this, parties must be open with their mediator to enhance his or her ability to assist in this way. Let your mediator be a bridge-builder.

3. Make an Aggressive, No-Holds-Barred, “I’m Going to Crush You” Opening Statement

The dispute may be commercial, but the decision-makers are people. For most people, aggression triggers a fight-or-flight response. Needless to say, either is bad for the success of a mediation. Joint sessions and opening statements can be quite useful in achieving a compromise, but only if all parties can rein in their aggression. There is a stark difference between outlining your compelling facts and/or law and making an aggressive “I’m going to crush you” opening. The former will be productive, the latter destructive.

4. Walking Away Too Soon

As a corollary to the timing discussion above, sometimes parties need to wallow in an impasse for a bit before they can move beyond it to compromise. Mediators have many options for trying to bridge past an impasse, but they only work if the parties remain at the table.

C. How to Sabotage Your Mediation

1. Show Up Drunk or High

While it should go without saying, but sadly does occur, neither counsel nor parties should show up drunk or high for a mediation. Enough said.

2. During the Mediation, Confront the Other Side and Accuse Them of Lying or Bad Faith

While a confrontational opening statement or threats to walk out in caucus can, given sufficient time, be worked through, an in-your-face confrontation between opposing counsel in the middle of a mediation will undoubtedly derail the mediation. Vent your frustrations with the other side privately with the mediator, rather than publicly in person or email during the mediation.

3. Tell Your Client It's a Slam-Dunk and to Make No Concessions

If you are 100 percent confident that your case is a slam-dunk and you have advised your client to make no concessions, then why are you at mediation? Parties should come to mediation recognizing that, by its very nature, a mediated settlement is a compromise, thus they must be open to compromise.

4. Show Up with No Settlement Authority

As a corollary of the above, if you recognize that you have exposure, but come to mediation with no authority to settle, then why are you at mediation? Both parties have to give to get in a mediation.

[1] Refer to *Top Five Tips in Preparing for Bankruptcy Mediation* by Sylvia Mayer, published in ABI's Business Reorganization newsletter dated April 27, 2015, for more detailed information regarding preparing for bankruptcy mediation.

[2] For information on the patterns of mediation, *see* www.americanbar.org/content/dam/aba/uncategorized/dispute_resolution/just-resolutions/Philbin_Checkmate.authcheckdam.pdf.

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