# Mediating Your Way Out of a Paper Bag: The Hallmarks of a Successful and Cost-Effective Mediation in a Consumer Bankruptcy Dispute

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Statistics show that well over 95 percent of all litigation settles. *Mediation of a Bankruptcy Case*, ABI JNL. (May 2003), https://www.abi.org/abi-journal/mediation-of-a-bankruptcy-case. However, as experienced litigators know, settlement is too often reached at the "courthouse steps" after the parties have spent large amounts of money, emotion, and time conducting discovery and preparing for trial. *Id.* If the dispute is part of a bankruptcy or reorganization, the failure to settle early may eliminate the opportunity to settle the lawsuit at all, due to the resources spent and opportunities lost in the battles along the way. *Id.*

Counsel (and the parties) involved in commercial bankruptcy disputes recognize that the longer the litigation proceeds, there will be fewer resources available for resolution of the dispute because they will be exhausted through the accrual of attorneys' fees and costs, which accrue as administrative expense claims. Thus, they realize the value in mediating early. As a result, mediation of disputes in commercial Chapter 11 cases has become commonplace. Indeed, many bankruptcy courts require the parties to participate in mediation in advance of the court conducting a final evidentiary hearing on a contested matter or a trial in an adversary proceeding. *See e.g.*, D.Del. L.B.R. 9019-5(a) ("Except as may be otherwise ordered by the Court, all adversary proceedings filed in a chapter 11 case and, in all other cases, all adversaries that include a claim for relief to avoid a preferential transfer (11 U.S.C. § 547 and, if applicable, § 550) shall be referred to mandatory mediation.").

The need for early settlement of disputes cannot be overstated in consumer bankruptcy cases where the stakes are high, but the resources are extremely limited. Notwithstanding that, mediation of disputes in consumer bankruptcy cases is less

common. Why? Some parties to consumer bankruptcy disputes are not savvy enough to know that mediation is an alternative to litigation. Other parties are reluctant to participate in mediation because they view it as a waste of time and money, particularly when there are lots of hands out for the last remaining piece of pie. And, some lawyers miss the opportunity to get the parties to mediation—either because they think their case is rock solid, they think the parties are too far apart to settle, or they do not know how their client will pay the expenses associated with mediation. While these are valid concerns, they should not be roadblocks to mediating consumer bankruptcy disputes.

So, how do you mediate a consumer bankruptcy dispute without breaking the bank?

**1. Agree to Mediate Early**

Often times, bankruptcy disputes arrive at mediation by way of a party's motion to refer the matter to mediation or a motion to compel mediation. Drafting and filing the motion, the notice of hearing, and the proposed order, and attending the hearing all require attorney time, which costs money. These costs can be eliminated by engaging opposing counsel in a discussion regarding mediation early. Most seasoned practitioners understand the melting ice cube concept (that is, the failure to settle early coupled with mounting litigation costs may exhaust all resources available to resolve the dispute) and agree to participate in mediation. If opposing counsel consents to mediation, the parties can: (i) file an agreed motion to refer the dispute to mediation or a stipulation and submit an accompanying order, avoiding the hearing, or (ii) file a notice of mediation if the Court does not require the entry of an order referring

the dispute to mediation. Some bankruptcy courts have forms to streamline the process and reduce costs.

**2. Take Advantage of Special Programs in Your District**

Some courts have special mediation programs designed to streamline the mediation process, save time, reduce costs, and make it easier for the parties to facilitate a resolution of their disputes. Check your local bankruptcy court's website periodically for new programs or changes to existing programs. And, take advantage of the court's programs. They are there to save you and your client time and money!

One such program is the Eastern District of New York's pro bono mediation program. *See* E.D.N.Y Bankr., Amended General Order #546, *In re: Adoption of Pro Bono Mediation Pilot Program and Procedures,* a copy of which is attached hereto as **Exhibit A**. The pro bono mediation program procedures are appliable in all bankruptcy cases and provide qualifying applicants with an order referring their dispute to a pro bono mediation, appointing a mediator on a pro bono basis, and appointing a mediator advocate for a qualifying pro se party. *See id.* The application for pro bono mediation, the declaration of financial need in support of the application for pro bono mediation, the declaration in support of the application for a mediation advocate, the opposition to assignment of contested matter to pro bono mediation, the pro bono mediation referral order, the order appointing mediation advocate, the agreement to mediate, the affidavit and disclosure statement of the mediator, the rules of mediation, the engagement agreement between the mediation

advocate and the pro se client, the mediator advocate's limited appearance for the purpose of mediation, and a form settlement agreement are attached to the pro bono mediation program procedures.

Pro bono mediation programs like this do not appear to have been adopted widely by other jurisdictions. The benefits that these programs offer to pro se parties, other litigants, and the courts are significant. I would encourage other jurisdictions to consider implementing a similar program.

Several bankruptcy courts have adopted mortgage modification mediation procedures to streamline the mortgage modification process in bankruptcy cases. Some programs apply only to residential properties in Chapter 13. See https://www.ilnb.uscourts.gov/news/new-chapter-13-mortgage-modification-mediation-program. Other programs apply only to residential properties in Chapters 7 and 13. But, some programs apply to all property types in all bankruptcy chapters. *See* http://www.flmb.uscourts.gov/proguide/documents/Procedure/Mortgage_Modification_Mediation.pdf?id=1. *See also*, N.D. Fla. L.B.R. 70166-1(B), Amended Administrative Order No. 15-001, *In re: Administrative Order Prescribing Procedures for Mortgage Modification*.

**3. Select the Right Mediator for the Case, the Dispute, and the Parties**

**a. Facilitative, Evaluative, or Transformative?**

As a young lawyer, I did not know what a mediation style was. But, after having participated in several mediations, I noticed that there were generally two types of mediators: the message carrier and the active

participant. The message carrier shuffles between conference rooms transmitting offers and counteroffers. The active participant analyzes the issues, discusses potential outcomes, provides their views on the merits, and makes suggestions regarding settlement offers. In my experience, the message carriers are largely ineffective and the mediations that they conduct often result in an impasse. The active participants are highly effective, and the mediations that they conduct generally result in a settlement.

There are a number of mediation styles, however, the primary mediation styles are: facilitative, evaluative, and transformative. Facilitative mediation is where the mediator facilitates discussions between the disputing parties. Bruce P. Matez, *What Type of Mediation is Right for You?,* NEW JERSEY ASSOCIATION OF PROFESSIONAL MEDIATORS, Mar. 22, 2022, https://njapm.org/news/599837/WHAT-TYPE-OF-MEDIATION-IS-RIGHT-FOR-YOU.htm. The mediator encourages disputants to reach their own voluntary solution by exploring each other's goals and interests rather than making recommendations or imposing a decision on them. *Id.* Mediators tend to not vocalize their own views regarding the conflict and do not give their opinions as to right or wrong but will make suggestions for resolution. *Id.* Often, the law is secondary to the needs, wants, goals, and interests of the disputing parties. *Id.* The mediator helps them fashion a result that works for them as opposed to what the law might say or what others do. *Id.*

In an evaluative mediation, the mediator will make recommendations, suggestions, and express his/her opinion about the strengths and weaknesses of each party's position based on the law and the facts. *Id.* Instead of focusing primarily on the underlying goals and interests of the parties, evaluative mediators direct settlement by evaluating openly to the parties the legal merits of the dispute and expressing his or her opinions. *Id.*

In transformative mediation, the mediator focuses on empowering the parties to resolve their conflict while encouraging them to recognize each other's needs, goals, and interests. *Id.* In that regard, it is similar to facilitative mediation. *Id.* The process aims to transform the parties' relationship by helping them develop and acquire skills they need to make constructive change and be able to communicate and cooperate with one another more effectively. *Id.* This is most helpful to parents involved in custody and parenting disputes, employment disputes, and other disputes wherein the parties need to maintain some type of ongoing relationship. *Id.* The mediator is less concerned with whether participants reach an agreement and more focused on helping them transform their relationship. *Id.*

These types of mediation are not mutually exclusive, and a mediator can utilize one style exclusively or may shift between styles during mediation based upon the needs of the parties. You should select a mediator that is comfortable utilizing the style that is best suited for your

case. Before hiring the mediator, ask which mediation style he or she utilizes primarily, communicate your view on which mediation style is best suited for your case, and confirm that the mediator is comfortable utilizing that style.

Although emotions often play into consumer bankruptcy disputes, money (albeit sometimes Monopoly money) is ultimately at the heart of most bankruptcy disputes. In my experience, evaluative mediation is the most productive for resolution of disputes that involve money.

**b. Judge, Attorney, or Other Mediator?**

There are several options when it comes to the retention of a mediator: active and retired judges, practicing and retired attorneys, bankruptcy trustees, and individuals who devote their professional career to alternative dispute resolution. These are not mutually exclusive options, as there is overlap among these. For example, some retired attorneys and judges become professional mediators who devote their practice solely to mediation. Some attorneys also serve as bankruptcy trustees.

Which option is best? The answer, of course, is it depends. Some mediators are better suited for certain matters than others. When selecting a mediator, I consider a variety of factors, including: (i) the type of bankruptcy case, (ii) the nature of the dispute(s), (iii) the number of parties, (iv) the amount in controversy, (v) the available resources to pay for the costs of mediation, (vi) the flexibility with respect to the scheduling

of mediation, (vii) the parties' motives, and (viii) the parties' personalities. I tend to select mediators based upon my previous experiences with them, as well as recommendations from my law partners and colleagues in the bankruptcy bar.

The costs of mediation are always a significant factor in bankruptcy mediations, and that is particularly so with consumer disputes. So, how do you manage the cost of mediation? Consider utilizing a sitting bankruptcy judge as a mediator.

The principal benefit to using an active bankruptcy judge as a mediator is obvious--they are prohibited from charging for their services. There are also significant non-monetary benefits associated with using an active bankruptcy judge: (i) bankruptcy judges command respect which typically leads to deference by the parties; (ii) bankruptcy judges have a command of the law; (iii) bankruptcy judges have extensive decision-making expertise, probably with respect to the precise matter in dispute, (iv) the mediating judge likely has a relationship with the presiding judge that may provide some insight into a possible ruling in the event that mediation is unsuccessful and the litigation proceeds; and (v) any mediated settlement reached likely has enhanced credibility before the presiding judge.

Some practitioners have no shame in asking active bankruptcy judges to mediate every dispute that lands on their desk. Other practitioners believe that asking an active bankruptcy judge to mediate

a dispute is “calling in a favor” because mediations are extremely time consuming and the judge is serving *pro bono*. I tend to fall into the second camp, and enlist the services of an active judge only where I perceive that settlement would be impossible but for the judicial presence. That is because the majority of my mediations last between 8 and 12 hours and involve Chapter 11 debtors with multiple parties and complex disputes.

However, I think you can utilize an active bankruptcy judge for a consumer dispute in certain circumstances: (i) you are serving as counsel on a *pro bono* basis; (ii) you have a discreet dispute (i.e., valuation issue) and put time parameters on the mediation in advance (i.e. two hours); (iii) the dispute has been mediated previously and did not settle; or (iv) the bankruptcy judge has offered to mediate consumer bankruptcy disputes.

If you choose not to utilize an active bankruptcy judge as mediator (or one is not available), you can still manage the costs of mediation by: (i) retaining a mediator who does not charge for travel time; (ii) conducting the mediation remotely; (iii) negotiating the mediator’s hourly rate; (iv) negotiating a fixed fee for the mediation; and/or (v) placing time constraints on the mediation.

**c. Certified or Not?**

Certification of mediators is regulated by the states and each state has different requirements. For example, Florida Supreme Court

Certified Mediators must be at least 21 years of age, of good moral character, and have the required number of points for the type of certification sought (i.e. county, family, dependency, circuit, appellate). *See How to Become a Florida Supreme Court Certified Mediator, Step by Step Guide*, Attachment A – Mediator Certification Qualifications (July 2022), https://www.flcourts.gov/content/download/682798/file/how-to-become-a-mediator-guide.pdf. In contrast, there is no certification of mediators in Georgia. https://godr.org/become-a-neutral/. Instead, mediators must register with the Georgia Office of Dispute Resolution and have 6-42 hours of training courses, and additional observation and practicum hours depending on the category in which they wish to register (early neutral evaluation, general civil mediation, domestic relations mediation, etc.). *Id.*

In my experience, practitioners do not view certification as a prerequisite for the retention of a mediator. And, unless the mediator provides the parties with his or her qualifications at the inception of mediation, most parties are unaware of the mediator's certification status.

However, some local bankruptcy courts require mediators to be certified or have certain minimum qualifications and to register with the clerk of the court before they can mediate bankruptcy disputes in that jurisdiction. *See e.g.*, S.D. Fla. L.B.R. 9019-2(A)(1). To qualify for

registration, the United States Bankruptcy Court for the Southern District of Florida requires mediators to: (i) have completed a minimum of 40 hours in a circuit mediation training program certified by the Florida Supreme Court, (ii) have completed the American Bankruptcy Institute/St. John's University School of Law Bankruptcy Mediation Training, or (iii) be certified by the Florida Supreme Court as a circuit court mediator; and agree to accept at least 2 mediation assignments per year in cases where at least one party lacks the ability to compensate the mediator, in which case the mediator's fees shall be reduced accordingly or the mediator shall serve pro bono if no litigant is able to contribute compensation. S.D. Fla. L.B.R. 9019-2(A)(2).

*See also*, N.D. Fla. L.B.R. 7016-1(A) incorporating N.D. Fla. L.D.R. 16.3, which provides that mediation must be conducted in accordance with the Rules for Certified and Court-Appointed Mediators adopted by the Florida Supreme Court, except as otherwise ordered. . ." In contrast to the United States Bankruptcy Courts for the Northern and Southern Districts of Florida, the Middle District permits the parties to select any person to serve as mediator. *See* M.D. Fla. L.B.R. 9019-2(c)(1). The parties are simply encouraged to choose a mediator who has sufficient knowledge and experience in mediations and in bankruptcy law. *Id.* It does not appear that any of the Georgia bankruptcy courts have local rules governing the qualifications of mediators. Some jurisdictions have

separate qualification requirements and lists of approved mediators for pro bono mediations and mortgage modification mediations.

Before you select a mediator, visit the court's website and read the current local rules, administrative, and other orders so that you select a mediator with the requisite qualifications. Noncompliance could cost you by having the bankruptcy court deny your motion to approve the compromise because the mediation was not conducted by a mediator with the requisite qualifications.

**d. Does the Mediator's Demeanor Suit the Parties and Their Counsel?**

Perhaps one of the most important but often overlooked qualities of a mediator is his or her demeanor. You should choose a mediator that both parties will respect, listen to, and perhaps identify with. For example, if one of the parties is loud, aggressive, and litigious, you probably do not want a soft spoken, passive mediator.

**4. Choose the Appropriate Format for Mediation**

Prior to the COVID-19 pandemic, mediations were conducted in-person. In-person mediations are successful, in part, because the parties and their counsel are held hostage in uncomfortable clothing in an uncomfortable setting for an inordinate amount of time, and sometimes with scarce sustenance. When the clock strikes midnight, everybody wants to get the deal done and the settlement agreement signed.

That pressure cooker environment doesn't exist when mediations are conducted via a remote platform like Zoom. However, conducting mediation

remotely can significantly reduce the costs of mediation by eliminating the mediator's and counsel's charge for travel time and travel costs. In addition, the parties and their counsel can often perform other tasks while the mediator is caucusing with the other side.

While some mediators prefer a particular format for mediation, many will allow the parties to decide the format. If the parties, their counsel, and the mediator are local, I still prefer in-person mediation due to the pressure cooker structure. However, I have participated in several successful Zoom mediations. I prefer to utilize the Zoom platform in cases where I have been appointed as Subchapter V Trustee under the Small Business Reorganization Act of 2019, as amended, and am serving as facilitator, as it significantly reduces my fees and the burden on the Subchapter V estate. For similar reasons, I suspect that Zoom would be an equally effective platform for mediation in consumer cases.

**5. Educate the Mediator**

To have a successful mediation, you must educate the mediator. Historically, mediators have required the parties to submit formal, written mediation statements containing some or all of the following:

a. Background Information Regarding the Debtor Prior to the Bankruptcy Filing
b. Events Leading to the Bankruptcy Filing
c. Significant Events During the Bankruptcy Case
d. Issues for Mediation
e. Summary of Your Position
f. History of Settlement Discussions

Preparing the mediation statement certainly serves at least dual if not triple purposes: (i) it helps counsel prepare for mediation, (ii) it helps the client

prepare for mediation, and (iii) it educates the mediator. However, preparing a formal mediation statement can be extremely time consuming and expensive.

So, how do you educate your mediator on a budget? Before you retain the mediator, discuss your budgetary constraints. And, ask the mediator if a confidential pre-mediation call would be acceptable to address the issues for mediation. Many consumer bankruptcy disputes (i.e., stay relief, adequate protection, valuation, etc.) are discreet. If you have lived and breathed the case and the dispute since the inception, preparing for the call should not be difficult or time consuming.

**6. Prepare Your Case for Mediation**

To ensure a successful mediation, you must prepare. The level of required preparedness will depend upon the nature and complexity of the case and the dispute(s). But, in every case, before you get to mediation, you should:

a. Be prepared to make an opening statement even if it is brief;
b. Be prepared to outline the disputed legal and factual issues;
c. Understand and be able to summarize the applicable legal authority (on both sides);
d. Understand your client's best case and worst-case scenarios;
e. Understand the alternatives for resolution of the issues; and
f. Draft a term sheet, settlement agreement, or agreed order (depending on the nature and complexity of the dispute and the litigiousness of the parties).

**7. Prepare Your Client for Mediation**

For many clients, this is their first foray into bankruptcy, litigation, and mediation. They are nervous, in part, because they do not know what to expect. You can alleviate the client's stress by helping them understand what mediation is, the process, and the timing.

Explain to the client that mediation is “a method of nonbinding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution.” MEDIATION, Black's Law Dictionary (11th ed. 2019). It is an opportunity for the parties to negotiate a mutually acceptable but equally painful settlement consistent with the mediation policy of self-determination. In order to achieve that result, you should encourage the client to leave the past in the past and approach mediation objectively, not emotionally.

Explain the mediation process to the client. Many mediations start with a joint session where the mediator makes introductory remarks regarding his or her qualifications, role, and the rules of mediation. While the mediator is making introductory remarks, the parties and their counsel sign-in and consent to be bound by the rules of mediation. In some cases, counsel (or the parties) make opening statements regarding the case. Most mediators will defer to the parties as to whether opening statements will be productive. The joint session is followed by individual caucuses. In some instances, the mediator will pull counsel or the parties out of the individual caucuses and meet with them separately. If a settlement is reached, the parties and their counsel will prepare and sign a settlement agreement. Often times, the mediator will assemble the parties at counsel in a joint session at the conclusion of mediation.

Explain the time commitment required for mediation. For example, we reserved a whole day with the mediator. We will be starting at 9 a.m. and the expectation is that all parties and their counsel will stay until the conclusion of

the mediation. While many mediations settle within traditional business hours, it is entirely possible that the mediation could run after business hours. If your client has a hard stop for childcare or a medical issue, discuss those issues up front and make sure the mediator and the other parties are aware.

In addition, you should have a frank discussion with the client regarding: (i) the merits of their case, including the best case and worst-case scenarios; (ii) what is important to the client in terms of settlement; (iii) potential alternatives for settlement, including your initial offer, potential counteroffers, possible counteroffers, and your client's settlement ceiling; (iv) the next steps if mediation is unsuccessful, including the timing and sequence of litigation and the costs of litigation. This should help manage the client's expectations and put the client in the right frame of mind for an objective mediation.