

30th Edition • APRIL 2014



Bankruptcy Mediation News

Mediation Program Contact Information

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A Word From The Administrator...

I am pleased to note that the Court's ADR Program has entered its 19th year and remains the largest and most robust bankruptcy mediation program in the nation. We established the Program in 1995 to provide the public with effective and reliable help in resolving disputes without the time and expense of litigation.



We have an excellent panel of mediators consisting of attorneys and non-attorney professionals such as accountants, real estate brokers, physicians, and professional mediators, and they have maintained a consistent and very favorable 63% settlement rate over the years. The Court continues to add new members on an ongoing basis as mediators who joined the panel at its inception begin to retire. We are very proud of our entire panel and enormously grateful for their ongoing assistance.

In order to help our judges better understand the challenges our mediators face, we arranged for Prof. Peter Robinson of the Straus Institute of Dispute Resolution of Pepperdine University School of Law to conduct a one-day training session on basic mediation techniques for our judges in 2013. Judges Neil Bason, Catherine Bauer, Sheri Bluebond, Mark Houle, Robert Kwan, Victoria Kaufman, Richard Neiter, Maureen Tighe and I attended, and Prof. Robinson's written materials were circulated to all of the judges who were unable to attend.

Throughout the past year, the Court's Information & Technology Department and ADR Program staff worked diligently on revamping the Program's technology. Upgrades included adding a new mediator search feature and an online panel membership application to the mediation page of the Court's website, and replacing the software program used to track data from questionnaires completed by participants at the conclusion of mediation conferences. Additional upgrades are in progress and will include a complete revamping of the software used by the ADR staff to track all mediation assignments throughout the Central District.

On December 12, the Central District's Bankruptcy and District Courts co-hosted the 15th Annual Appreciation Luncheon to honor our mediators for the 2012-2013 term. Both courts recognized their panel members for their continued dedication and generous service in the ADR field. (Please see details and photos on pages 5 and 6).

Finally, I am pleased to include in this edition an article entitled "Why Mediation Works . . . And Why It Doesn't: One Mediator's Perspective," by Benjamin S. Seigel, Esq., a member of our panel since the Program's inception. Ben's article entitled "Meltdown Mediation" appeared in our last edition. I invite all interested mediators to submit articles that may be of interest to your ADR colleagues.

As always, I look forward to receiving your feedback on the Program. Please send any comments and suggestions to me in writing c/o the United States Bankruptcy Court, 255 East Temple Street, Room 1660, Los Angeles, CA 90012. Thank you!

MEDIATOR SPOTLIGHT

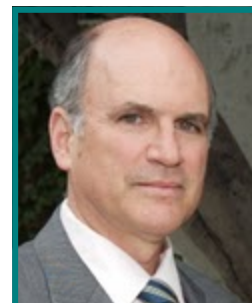


“[ASHLEIGH A. DANKER] was excellent and I would select her again. She was extremely prepared, which paid off with the resolution of the matter at the conclusion of the mediation.”



“[DANIEL J. WEINTRAUB] did a very nice job. Highly effective. Program is effective and helps more cases as well as saves parties \$.”

“[JOSEPH C. MARKOWITZ] was well informed and prepared for the mediation. He was fair and attempted to have the matter settle. He created a helpful atmosphere for the conference by not being overly formalistic in his approach.”



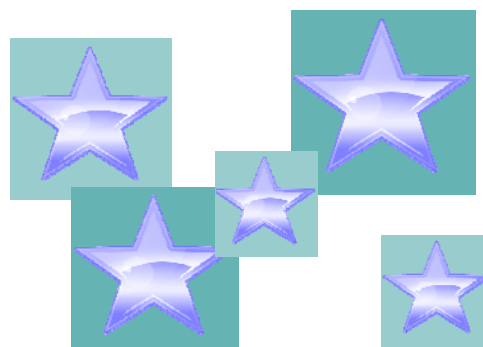
“[MARK C. SCHNITZER] did a good job as a mediator. He really made good effort toward the mediation of the case. I was very pleased and would use him again.”



“They don’t come smarter than [DAVID A. GILL]. If he couldn’t get the parties together no one could. I have the utmost respect for David A. Gill.”



“[LESLIE A. COHEN] was an excellent mediator. She did a good job with the issues presented. I think this is an effective and worthwhile program. I was very satisfied with the mediator and the process.”



“[RICHARD L. WYNNE] was outstanding. He was responsible for bringing the parties together and affecting a just, fair and equitable compromise of a complex and disputed matter.”



Why Mediation Works . . . And Why It Doesn't: One Mediator's Perspective

By Benjamin S. Seigel, Esq. ¹

My 36 years of practicing law have included both civil and criminal litigation and engagements across many practice areas including corporate, bankruptcy, probate, real estate, tax, intellectual property and family law. I have used that experience of late to act in a wide variety of matters as a mediator.

Looking back over those years and the matters that I have been privileged to mediate, I noted that when a matter settled in the course of a mediation I spent little time to analyze why it settled. I was just happy that it did. However, when a matter did not settle in mediation I struggled with why I could not get the parties to come to an agreement. What did I do, or fail to do as the mediator?

I have published several articles on mediation. After the recent publication of "Meltdown Mediation,"² a reader asked why some cases settle and others don't. Fortunately, more of my mediated matters settled than didn't. In attempting to answer that question, I came up with my own personal laundry list of "why" and "why not."

When Mediation Works: the "Why It Does" Factors

Preparation: Clients who have not been properly introduced to the mediation process in most instances cannot know what to expect when attending the mediation conference. Some think it will be like a court proceeding complete with someone in a black robe and a court reporter sitting in front of a shorthand machine. Others think they might be called upon to testify, as in a deposition. Still others are unnecessarily nervous and intimidated by the process.

Attorneys unfamiliar with the process, to some degree, often feel as their clients do. They either have not had the opportunity to participate in a mediation, or have had a bad experience with an untrained and inexperienced mediator.

One of the most important aspects of a successful mediation is the pre-mediation preparation of both attorney and client. An attorney with little or no mediation experience is wise to consult with a colleague with such experience, read an article or two on the process, and speak with a friend who serves as a mediator. A pre-mediation meeting with the client is essential. The client needs to be briefed on the mediator's instructions, the presentation that will be made by the attorney - and

possibly the client - and the approach to settlement that the mediator is likely to take.

Mediation is the exploration of settlement options. Both client and attorney should feel free to set forth and explore as many options as can be created. Options should not be limited to payment of money or turning over property. Solutions that are outside of the box often compel settlement. These may be an apology printed in a newspaper, a gift to the other side's favorite charity, the purchase of goods at a special discount in contemplation of future business — anything one might imagine. Developing options for settlement requires preparation by both the client and the attorney.

Experience: The level of experience of the selected mediator is also an important factor. With all due respect to mediators fresh from judicial retirement who have not had mediation training, one should carefully select the mediator who has had a degree of formal mediation training and a track record of experience. Mediation is not an arbitration in which the arbitrator makes a decision. Nor is mediation a judicial settlement conference in which a judge often makes a settlement recommendation and attempts to force the parties to agree. The ideal mediator has formal mediation training and experience as a mediator. The mediator need not have experience regarding the particular dispute nor be an expert on the law involved. Mediation skills apply to all disputes because the goal is to reach a settlement, not to decide on who is right or wrong under the law.

Attitude & Motivation: When both client and counsel participate in mediation with the idea of reaching an agreement that resolves the dispute, the chances of a resolution are far greater than when they approach the mediation with the proverbial "chip" on their shoulders. Often a court will recommend, or, in some cases, order the parties to mediation. If the mediation is approached as merely attending in compliance with such a recommendation or order, the mediation session is over before it begins. Focusing on the legal issues to the exclusion of the practicalities of achieving a settlement can cloud the vision of the participants.

A positive attitude that a settlement will be achieved, with both client and counsel motivated to accomplish that goal, will go a long way toward reaching it.

Risk Analysis: An important aspect of litigation is the cost involved. Beyond real costs for attorneys, expert witnesses, court reporters, court fees, jury fees and the other costs involved with litigation, are the human costs involved as well. The time involved by parties, the emotional attributes of litigation, and the effect on family members and friends, should all be considered.

(Cont'd on page 4)

Clients who take these parameters into consideration and weigh the costs of continuing litigation against the costs of settlement will achieve an appropriate result in mediation.

Forgive & Forget: Louis Smedes, a theologian, wrote a book titled, “Forgive & Forget,” in which he presented numerous illustrations about the advantages of getting past the disputes that one faces in life. Clients who understand the advantage of getting on with their lives and getting the litigation behind them are able to approach mediation with an attitude that leads to a resolution of the matter at hand. I often recommend the book to parties to mediation that I believe need the impetus the book provides.

Clients who are willing to approach mediation with the idea of forgiving their adversaries and getting on with their lives will have a much better chance of resolving the dispute than those who are unable to make forgiveness a part of their mediation preparation.

Perseverance: One element that frustrates mediators in many instances is the unwillingness of clients and attorneys to press on even though settlement appears to be impossible. After several hours of private and group discussions when everyone is starting to feel that no resolution is possible, those participants who want to give it one more chance are more likely to come to a resolution than those who want to pack up and go home. Taking a break, going for a walk, having a bite to eat, or even a cold beer, can change the atmosphere.

The parties who persevere and continue to explore ways to resolve the dispute find their efforts rewarded. Pursuing every avenue that can lead to a resolution takes time and effort, but it pays off in achieving a solution to the matter.

When Mediation Doesn’t Work: the “Why Not” factors

As a starting point, if the foregoing elements are missing—the parties are not prepared, they have selected an inexperienced mediator, they have a negative attitude or lack motivation to settle, have not done a risk analysis, they are unwilling to forgive and forget, or lack the desire to persevere—the mediation is doomed at the outset. Even when some “Why” factors are present there are other reasons a mediation may not be successful. The five “Why Not” factors that I believe result in a failed mediation are:

1. Ego,
2. Misunderstanding of the facts,
3. Misunderstanding of the law,
4. There being no incentive for settlement, and
5. Telephonic and video conferences.

Ego: A significant “Why Not” factor for achieving resolution in mediation is the ego of the parties. Sometimes it is one party, or one lawyer. Other times, it is everyone in the room. Even when every element of the “Why” factors points toward resolution, when ego comes into play, the settlement prospects become severely diminished. When a party thinks that she will not allow her opponent to get the best of her or that a settlement might make her look foolish to her peers, or she has a fixation on getting the matter to trial so a jury can decide that she is right and her opponent is wrong, mediation will not work.

One of the tasks that attorneys must undertake is to detect the ego factor early on, and take steps to eliminate it, if mediation is to be successful.

Misunderstanding of the Facts or the Law: Attorneys who represent clients in mediation sometimes have a disconnect between what the attorney understands to be the facts and the law and the understanding of the client. On occasion, in the initial mediation conference when each side makes an opening presentation, a client will turn to his attorney and whisper, “I never knew about that!” Or on other occasions, the mediation briefs of the parties will discuss a case as being controlling when the case was recently overruled. There may have been reliance by a party that the case was not only controlling but good law.

The lesson here is that clients need to spend some time with their attorneys to review the facts and be certain that both the client and the attorney know all of the facts and that every effort has been made to determine the facts known to the opponent.

Knowing the controlling law is helpful as well. However, one of the unique advantages of mediation is that settlements are often made notwithstanding the law and who is right or who is wrong. The attorney needs to be certain that the advice being given to the client as to the applicable law is not “off-the-cuff,” but is well researched so that embarrassment can be avoided.

No Incentive to Settle: There are occasions when the parties have been “encouraged” by a judge to go to mediation, or mediation is a contractual pre-requisite to litigation. Since mediation is not binding unless a signed agreement is achieved, some clients and their attorneys will go through the motions of attending a mediation conference with no interest in working toward a resolution.

Fifteenth Annual Luncheon Honors Mediators



Robbin Itkin



Jason Wallach



Shirlee Fuqua



J. Scott Bovitz

On December 12, the Central District’s Bankruptcy and District Courts co-hosted the 15th Annual Appreciation Luncheon to honor our mediators for the 2012-2013 term. Both courts recognized their panel members for their continued dedication and generous service in the ADR field.

Over 100 guests attended the event, including Bankruptcy Judges Peter H. Carroll, Scott C. Clarkson, Thomas B. Donovan, Robert Kwan, Barry Russell, Clerk of Court Kathleen J. Campbell and Chief Deputy of Administration, Steve Sloniker.

Judge Russell, the Court’s Mediation Program Administrator, spoke at the event and recognized the outstanding achievements of a number of the Court’s mediators for this term’s service, including Franklin C. Adams, Christopher L. Blank, James A. Dumas, Jr., James A. Hayes, Jr., Jeanne M. Jorgensen, David W. Meadows, Ronald E. Michelman, Judith A. Runyon, and Kimberly S. Winick. A more detailed list of the award winners and photos can be found on page 6.

Please **SAVE THE DATE** for this year’s annual luncheon, which will be held on **Thursday, October 16, 2014** at the DoubleTree by Hilton Hotel in downtown Los Angeles.



Jerry Seelig



Lana Borsook



Kathy B. Phelps



Joel B. Weinberg



Stephen H. Marcus



Scott Lee



Michael H. White



Leonard B. Gumport

(Cont’d on page 6)

(Cont'd from page 5)

Fifteenth Annual Luncheon Honors Mediators

Longest mediation conference (settled):

Christopher L. Blank/James A. Hayes, Jr./Jeanne M. Jorgensen: 8 hours

Shortest mediation conference (settled):

Judith A. Runyon/Ronald E. Michelman: 1 hour

Conference involving larges amount of money (settled):

Kimberly S. Winick: \$5-10 million

Conference with the most attendees:

Franklin C. Adams: 5 attendees

Most frequently chosen mediator:

Entire Central District: James A. Dumas, Jr./James A. Hayes, Jr./Judith A. Runyon

San Fernando Valley Division: David Gould/Benjamin S. Seigel/Joel B. Weinberg

Los Angeles Division: James A. Dumas, Jr.

Riverside Division: Judith A. Runyon

Santa Ana Division: James A. Hayes, Jr.

Northern Division: William C. Beall/J. Scott Bovitz/Susan D. Stein

Most conferences settled in mediation:

Entire Central District: James A. Dumas, Jr./David W. Meadows/Judith A. Runyon

San Fernando Valley Division: Benjamin S. Seigel

Los Angeles Division: James A. Dumas, Jr./David W. Meadows

Riverside Division: Judith A. Runyon

Santa Ana Division: Thomas H. Casey/James A. Hayes, Jr.



Christopher L. Blank



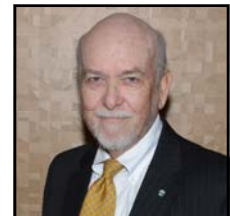
James A. Hayes, Jr.



Kimberly S. Winick



Franklin C. Adams



David Gould



Judith A Runyon

MAILING COURTESY COPIES OF MEDIATION PLEADINGS TO JUDGES

A courtesy copy of the Mediator's Certificate Regarding Conclusion of Mediation Assignment (Form 706) must be mailed to the judge to whom the bankruptcy case and/or 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
 PC = Chief Judge Peter H. Carroll
 TD = Judge Thomas B. Donovan
 SK = Judge Sandra R. Klein
 RK = Judge Robert Kwan
 RN = Judge Richard M. Neiter
 ER = Judge Ernest M. Robles
 BR = Judge Barry Russell

RIVERSIDE DIVISION

MH = Judge Mark D. Houle
 WJ = Judge Wayne E. Johnson
 MJ = Judge Meredith A. Jury
 DS = Judge Deborah J. Saltzman

**SAN FERNANDO VALLEY
DIVISION**

AA = Judge Alan M. Ahart
 VK = Judge Victoria S. Kaufman
 MT = 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

RR = Judge Robin Riblet

(Cont'd from page 4)

Why Mediation Works...And Why It Doesn't . . .

In many court-sponsored programs the mediators are unpaid volunteers. The participants have no financial investment in getting their money's worth. When the mediator is paid, normally in advance, there is a financial investment in the activity and a greater incentive in seeing that the investment pays off by moving toward a settlement. There are those mediation sessions when the client and her counsel sit and stare out the window, having no interest in what is being said; they are there to demonstrate that they have participated in the mediation to satisfy the court or a mediation clause in a contract. No matter how hard a mediator may try to motivate the parties, when one or both parties has no incentive to participate and reach an agreement, the mediation simply ends with a frustrated mediator lying awake that night trying to analyze what could have been done to incentivize the parties.

Telephonic & Videoconference Issues: When the mediation is set for a location that is at a great distance from one of the parties and a request is made to conduct the mediation by telephone conference call or by videoconference, the chances of success are greatly diminished. Face-to-face mediations work best because the mediator can caucus individually with the parties, look at them in the eye and use all manner and means of persuasion to achieve a settlement. That is not to say that long-distance mediations never work, but they present a significant

roadblock to negotiations when the mediator cannot take a participant aside for a confidential discussion, or take the lawyers into an adjacent room and explain the facts of life in a persuasive manner.

Conclusion

There are certainly other factors that might influence why a particular mediation doesn't result in an agreement: the mediation took place too early in the litigation when the facts had not been fully ascertained, or it took place too late when positions had hardened to the point of no compromise, or the room was too hot, or it was too cold, or it started too early in the day or too late. Many factors influence the outcome of any dispute. However, the "Why" and "Why Not" factors discussed above play a significant part in whether or not any mediation will be successful.

1) Benjamin S. Seigel is a Shareholder in the Insolvency and Financial Solutions Practice Group of Buchalter Nemer in Los Angeles. He serves as a mediator for the Central District Bankruptcy Court and as a panel mediator for Judicate West and the American Mediation Association, Inc. He can be reached at 213.892.5006 or bseigel@buchalter.com.



2) Seigel, Ben, "Meltdown Mediation," Dispute Resolution Magazine American Bar Association, Winter 2010, Volume 16, Number 2, ADR and the Financial Crisis.

**CONTACT INFORMATION FOR MEDIATION
TRAINING PROGRAMS**

Pepperdine University School of Law
Straus Institute for Dispute
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24255 Pacific Coast Highway
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www.law.pepperdine.edu/straus

The Loyola Law School
Center for Conflict Resolution
919 Albany Street
Los Angeles, CA 90015
(213) 736-1145 (tel)
www.lls.edu.ccr

LACBA
Center for Civic Mediation
261 S. Figueroa Street
Suite 310
Los Angeles, CA 90012
(213)896-6533 (tel)
(213) 613-1299 (fax)
(213) 627-1426 (fax)
www.centerforcivicmediation.org
Email:
aculberson@centerforcivicmediation.org

PROGRAM STATISTICS

Number of Matters Assigned

5,110

Number of Matters Concluded

4,528

Number of Matters Settled

2,852

Overall Settlement Rate

63%

**Bankruptcy Mediation News
APRIL 2014**

**United States Bankruptcy Court
Edward R. Roybal Federal Building
255 East Temple Street, Suite 1660
Los Angeles, CA 90012**

TO:

www.cacb.uscourts.gov