33rd Edition * December 2019

Bankruptcy Mediation News

A Word From The Administrator. . .

Our very best wishes for the upcoming holidays and for a happy and Healthy New Year!

On Thursday, January 9, 2020, the bankruptcy and district courts will hold the next annual luncheon honoring both courts' mediators at the DoubleTree Hotel in downtown Los Angeles. We have sent invitations and RSVP forms to all of our mediators and judges, and we hope to see you there!

This issue includes several articles by new and previously contributing authors, including "Thinking Fast and Thinking Slow" by Judge Leif M. Clark, a retired bankruptcy judge from the Western District of Texas who is now conducting mediations across the country. Judge Clark's article discusses the thinking errors that can cause problems to arise in the area of interpersonal communications: "a failing that can plague not just the lawyers representing the parties but also the lawyer-trained mediator."

Peter J. Gurfein's article, "A Mediation Deadlock," offers a creative approach to a seemingly impossible situation. "Mediation Snacks," by J. Scott Bovitz, describes in an amusing manner how the "simple act of sharing a meal or snack can ease tensions" and lead to a satisfactory outcome.

Peter and Scott are members of our panel, and we previously published an article by Scott in our February 2019 newsletter. I invite all of you to send in articles that may be of interest to your ADR colleagues. Please see page 9 for information on how and where to email your stories.

We have once again included our "Dear Program Staff" feature to highlight the types of inquiries that the Program staff regularly receive from our mediators, attorneys and *pro se* litigants about the Program's practices and procedures. Our staff members respond by email or phone to each inquiry. I encourage you to email your questions to the staff at Mediation_Program@cacb.uscourts.gov. Thank you!

I am always looking forward to receiving your feedback on our 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.

Dear Program Staff:

Q: I'm interested in applying as a mediator but it appears from the electronic submission form that only attorneys are eligible. I have over 20 years' experience as a non-attorney professional and would like to be considered.

***A*:** Non-attorneys are eligible as long as they meet the criteria in ¶ 3.3.b of the Third Amended General Order, which you can find on the Mediation Program page of the court's website. Our panel includes non-attorneys such as accountants, real estate brokers, professional mediators, etc.

Q: I received an order in the mail assigning me to mediate a matter. I thought the parties were supposed to check with me before putting my name on an order. Most attorneys contact me in advance but these did not. Why did this happen?

A: It's always best (and most courteous) if the attorneys or *pro se* parties check with proposed mediators before submitting a mediation order, and we always recommend that they do so when they call to ask about mediation procedures. However, sometimes parties are ordered by a judge during a status conference to confer in the hallway, choose a primary and alternate mediator, and return on second call with a completed order for the clerk's office staff to enter. When that happens, they usually don't have a chance to call the proposed mediators first.

Alternatively, they may have simply chosen the mediators' names from the list on the court's website and submitted the order without having the courtesy to call the mediators first. That happens frequently, too. So, it's impossible to know the circumstances in this case unless you ask the attorneys. There will be times when you're called first, and other times when you'll just receive an order in the mail, as in this case.

Q: Is there any way to learn which mediators are available and which ones are willing to serve on a *pro bono* basis, other than calling each mediator individually?

A: Unfortunately, that's the only way to do it. It's time consuming, but the best way to ensure that you're choosing someone who is available and can conduct the mediation within whatever time frame the judge may have set. It also allows you to find a *pro bono* mediator so that you can avoid an unexpected fee request at the mediation session.

***Q*:** I want to decline a mediation assignment. How do I do that?

***A*:** Please complete the Notice of Mediator's or Alternate Mediator's Unavailability to Serve (Official Form 703), which can be found on the Mediation Program page of the court's website. File that form with the applicable case or adversary proceeding docket, and serve a copy on the alternate mediator, the parties, and the Program Administrator (Judge Russell). When a primary mediator files and serves that form, the panel mediators know that if they've been appointed as the alternate, they are required to step up and handle the mediation or file their own Notice of Unavailability.

Q: I was appointed to the panel years ago and then took a leave of absence for a few years. I'd like to rejoin. Do I need to submit a new application, or can you just "reactivate" me like a player coming off the injured list?

A: We can reactivate you without the need for a new application because the judges already approved you for panel membership years ago. Just be sure to give us your current contact and bio information so we can update our records. Email the information to Mediation_Program@cacb.uscourts.gov. Thanks and welcome back!

Mediator Spotlight

"Just a short note of thanks for [**BRYON Z. MOLDO**'s] services as Mediator in this difficult case. He settled this case, not only because he has "the touch", but also because he is patient, and long – suffering, and gave freely of his time."

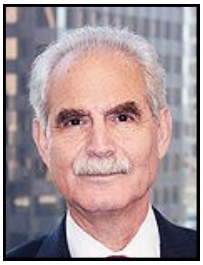
"[**MICHAEL B. LUBIC**] worked perfectly. I was impressed by Mr. Lubic's use of resources at his firm to identify issues not fully considered by the parties. This led to a meaningful consideration of the benefits and burdens of going forward with the litigation and ultimately settlement."

"**[DIANE FABER]** was well informed on the law and facts of our case. Had the mediation been ordered much earlier in the case, it might been more productive and even resulted in settlement. Because it came so late, the parties were too invested in their positions."

"[**MEREDITH JURY**] did a great job and I would mediate a matter with her again without hesitation, she is the best!"

"[JOSEPH A. WALKER] is a good mediator. He is academically sound and practical. Principals should be mandated to personally appear. Here, the trustee was on a vacation during the mediation, undermining its effectiveness."

"I am a strong supporter of alternative dispute resolution and found [**HENRY S. DAVID**], to be excellent in his role."



A Mediation Deadlock

*By Peter J. Gurfein, Esq. **

We were deadlocked barely two hours into the mediation. Neither side was willing to make an opening offer. Each wanted to know that the other side was willing to make a significant move off pre-mediation settlement proposals, but each feared showing weakness if they made the first move. How had we gotten here?

The underlying litigation involved a dispute between a consumer debtor and a financial institution. The financial institution believed they had done nothing wrong, had followed the rules, and were being defamed. The consumer felt taken advantage of by a giant corporation. Emotions ran high.

Counsel for both sides had negotiated in good faith prior to the mediation. As mediator, I had engaged in two telephone conferences in addition to the preliminary scheduling conference call among all parties. I had then taken separate calls with each individual counsel and their respective client to narrow the issues. Based upon these pre-meditation calls, I understood the dynamics of the dispute and had developed a personal rapport with each of the participants. That is how I came to understand the road block to settlement.

During separate caucus conversations with each side, I learned that each was very aware of the strengths and the weaknesses of their cases, understood the benefits of settling, and was willing to move significantly off pre-meditation proposals. But neither was willing to make the first offer, believing the other side was intransigent. Thus, each was willing to move but wrongly believed that the other side was not. Because my caucus conversations are privileged, I could not disclose this to either side.

The mediator has a limited amount of personal capital to spend in each case. The common wisdom is to save that capital to spend toward the end when settlement is close but needs a little push to get it over the finish line. Here, I decided to spend that capital early in the process to get both sides out of the starting gate.

Instead of continuing to solicit an opening offer from one side or the other, I suggested that each side give me in confidence their best opening offer. After receiving the opening offers from each side, if I did not think the offer was a meaningful offer, I would state so. However, if both sides gave me an opening offer representing significant movement, I would present both offers at the same time to each party in their separate caucus rooms. They agreed. The opening offer for each, in fact, *represented significant* movement. I put both offers side-by-side on a single sheet of paper and gave that paper to both sides at the same time in their separate caucus rooms. Each was able to see that the other side had moved significantly and to perceive, for the first time, that the zone of agreement was narrower than they had anticipated. More to the point, each understood that the other was committed to the process. I traveled back and forth to the different caucus rooms, each time getting new numbers and each time the gap narrowed. Within one hour the case settled.

What had I learned?

1. As mediator, it is not enough to understand the issues, but to also appreciate the motivation of the parties.

2. The participants not only have to buy into the process, but know that the other side does, as well.

3. While a mediator is a neutral, sometimes they must inject themselves into the mix more than other times. Recognizing when and how to do so is not easy but can make the difference in a successful mediation.

**** Peter J. Gurfein, Esq. practices law with Landau Gottfried & Berger LLP. He is a mediator for the United States Bankruptcy and District Courts for the Central District of California. He can be reached at pgurfein@lgbfirm.com.***

Mediation Snacks

*By J. Scott Bovitz, Esq.**

Food and drink matter.

Like you (our experienced bankruptcy mediators in the Central District of California), I have attended hundreds of depositions, meetings, settlement conferences, and mediations. The parties — and their bankruptcy professionals — are often troubled, angry, righteous, and anxious.

But these folks are just people. We are all made of the same stardust. Consider this universal truth.

Everyone likes to eat and drink.

So, I have a tip for your next mediation. Reach into your pocket and arrange for delivery of food and outstanding coffee.

If your mediation starts in the morning, bring in bagels, muffins, and coffee. (Lots of coffee. Seriously.)

If your mediation starts around noon, bring in a fun lunch from a local restaurant. JAMS ADR is a master of this technique. See, Hon. Scott J. Silverman (ret.), Food for Thought: How Food Might Serve You at a Mediation, October 23, 2018, https://www.jamsadr.com/blog/2018/food-for-thought-how-food-might-serve-you-at-a-mediation ("If a detective is able to obtain a confession with a burger and fries, imagine what can be accomplished with real food during a mediation. When I first visited a JAMS office several years ago, I was astounded by the amount and quality of food that the parties and their attorneys had at their disposal. … "Food can affect one's mood.").

If your mediation starts in the afternoon, you should bring in cookies and tea. (Did I mention coffee?)

If the mediation is running late, have Door Dash deliver an early dinner.

Don't just serve food to the parties in a private caucus. Put the food in a common conference room or kitchen, to facilitate random interaction between the parties and their counsel. The simple act of sharing a meal or snack can ease tension.

I know what you are thinking.

But I have yet to hear of a food fight at any mediation. Are you old enough to remember the great food fight with John Belushi and friends in Animal House? There is a short clip on You Tube — for educational purposes only — at —

https://www.bing.com/videos/search?q=Animal+House+Food&&view=detail&mid=CF1C25604980616A1504CF1C25604980616A1504&rvsmid=59F5625577AEAE900D059F56265577AEAE900D0&FORM=VDQVAP.

I don't have statistics, but mediation success seems to be proportional to the amount of food and drink consumed by the attendees. The food and drink might keep the parties on site, so that the momentum is not lost with a traditional break for a meal. See, Kentucky Bar Association, ***How to Establish a Mediation Practice***, June 7, 2012. https://cdn.ymaws.com/www.kybar.org/resource/resmgr/2012_Convention_Files/ac2012_35.pdf ("Don't send folks out to lunch. It breaks the momentum and dynamic and you lose time waiting for them to return. ... People also tend to relax a bit over meals and may make a verbal leak or two that could ultimately be helpful to your deeper understanding of the case dynamics.")

This year, I had a mediation where my snack planning fell short. One of the adverse parties was truly famished. My snacks would not suffice, so I sent the hungry party and his lawyer across the street to a local restaurant with outdoor seating. I did not want to lose momentum, so I commuted back and forth between the conference room and the restaurant. In the end, I picked up the tab and settled the case.

In short, don't forget the food and drink. But save the beer and wine until the mediation has concluded.

Mr. Bovitz is Board Certified in Business Bankruptcy Law by the American Board of Certification. He 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 Consumer Corner column in the American Bankruptcy Institute (ABI) Journal.

Thinking Fast and Thinking Slow

*By Leif M. Clark **

There are two kind of mediation articles. One for mediators, and one for participants. This article will try to bridge both.

Mediation is commonly conducted by legal professionals, because lawyers need the input and the expertise of a mediator who understands the subject matter sufficiently well to be able to identify bluff positions. Many participants like to use judges (either sitting or retired) because they are not only knowledgeable but also bring to bear the advantage of knowing how positions might play to a court. That's an important part of risk evaluation for the parties as they attempt to arrive at a settlement position.

Though many lawyers are also 'renaissance people,' few are skilled in the science of interpersonal communication. Though many trial lawyers are quite good at communication used persuasively, they often find themselves unaware of the techniques for managing the problems that can arise in the area of interpersonal communications. It's a failing that can plague not just the lawyers representing the parties but also the lawyer-trained mediator.

Daniel Kahneman received the Nobel Prize in economics for his work on behavioral economics, which challenged the then-prevailing notion of rationality in economic theory. He also published a book that exposed how many scientists easily fall prey to thinking errors in designing and interpreting their research. That book, "Thinking — Fast and Slow" (Farrar, Straus and Giroux, New York 2011), became a best seller, and it's one I highly recommend to anyone in our business. Kahneman describes how our brains may be thought of as having two speeds (fast and slow), and how, as humans, we all have a tendency to yield to the intuitions of the "fast brain." This tendency can get us into real trouble when it comes to evaluating situations and making decisions on what to do next — especially when those situations are fraught with emotion, as is so often the case in dispute resolution.

The easiest way to tell the difference between thinking fast and thinking slow is to consider the example of looking at the picture of an angry face and looking at the following: 17 x 24. The first triggers your fast brain, which quickly scans then interprets the expression and arrives at a conclusion regarding what the person in the picture is likely feeling, and what that person will likely be about to say. The reaction is quick, and seamless, and requires virtually no effort on your part. The second almost instantaneously triggered a feeling of effort on your part to arrive at the right answer (though you could intuit *about* what the right answer *might* be). In solving the problem, your brain searched for the memory of how multiplication is done, and if you try to solve it in your head, you feel the effort of holding intermediate results in your memory. This is an example of slow thinking — deliberate, effortful, and orderly. Kahneman explains:

> The computation was not only an event in your mind, your body was also involved. Your muscles tensed up, your blood pressure rose, and your heart rate increased. Someone looking closely at your eyes while you tackled this problem would have seen your pupils dilate. Kahneman, at 21.

Fast and slow thinking affect how we process information and make decisions. Our intuitive fast brain tends to rely heavily on pattern recognition, and reaches conclusions based on how a given situation fits a pattern. It does so quite quickly, too. In fact, our fast brain seems to require no effort and we often don't even notice it working. In most cases it is quite reliable. But not always. Sometimes, our fast brain can jump to conclusions that later prove to be false or premature. Our slow brain constructs thoughts and develops conclusions in a more orderly fashion, and can, when invoked, overrule the impulses and associations of our fast brain. Most of our day to day thinking is fast brain thinking, "originating the impressions and feelings that are the main sources of the explicit beliefs and deliberate choices" of our slow brain. Kahneman, at 22. Consider the complexity of thinking that goes into driving your car on a near empty road.

Thinking Fast and Thinking Slow

(Cont'd from page 6)

Yet you barely notice its function. Or the multiple calculations that allow you to read an emotion in the tone of someone else's voice. Yet you barely register that process as "thinking." Some of our fast brain thinking is built in, while some of it is acquired over our lives through repetition, practice, familiarity. But its hallmark is how effortless it is — and how "right" its inductions feel.

The slow brain, when invoked, has to literally work hard. Not surprisingly, the slow brain is also rather avoidant. In a word, the slow brain is lazy. "Though it's the slow brain that we call on to make conscious decisions, the slow brain has a maddening tendency to defer to the fast brain if that system's results seem "close enough." Indeed, this is how one of the most common thinking errors happens — we jump to conclusions, because we think we see a pattern, and "confirmation bias" sets in, so that the slow brain accepts the fast brain's conclusion.

When the fast brain's conclusions are in the thrall of strong emotions, the tendency is even more pronounced for the fast brain to overwhelm the slow brain. Indeed, we have watched this phenomenon play out in the public sphere over the past few years, as political discourse has succumbed to anger-infused conclusion jumping and confirmation bias. It also takes place in the mediation context, where strong feelings are also often at work. It is the task of the mediator, and parties' counsel, to somehow help the parties make good decisions in an environment where poor decisions are often the order of the day due to the prevalence of fast brain thinking.

> System 1 (fast brain) runs automatically and System 2 (slow brain) is normally in a comfortable low-effort mode, in which only a fraction of its capacity is engaged. System 1 continuously generates suggestions for System 2: impressions, intuitions, intentions and feelings.
>
> If endorsed by System 2, impressions and intuitions turn into beliefs, and impulses turn into voluntary actions. When all goes smoothly, which is most of the time, System 2 adopts the suggestions of System 1 with little or no modification. You generally believe your impressions and act on your desires, and that is fine — usually. Kahneman, at 24.

Kahneman adds that one of the tasks of System 2 is to overcome the impulses of System 1. But System 1 often leads us to errors of intuitive thought, biases, and the like, without System 2 even being aware of the error. This tendency is frankly a fact of life, because no one could actually function with System 2 always in charge — it would take too much effort and energy, and System 2 is too slow for routine decisions. But in a mediation context, where important decisions are being attempted in a concentrated time frame, the players need to be able to invoke System 2 and control the impulses and misimpressions that can be generated by System 1.

In mediations, I try to give a very brief "course" on being aware of our two systems of thinking, and how important it is to work on invoking System 2. One simple device is to remind them to actively listen to learn, not necessarily to be persuaded. Our tendency to come up with "yeah but" responses is System 1 thinking, fed by strong emotions. Our listening to learn, without trying to come up with answers, is System 2 thinking. It's harder, of course, but it's good exercise, especially in the joint session. I also encourage players to pay attention to their feelings — especially that certain feeling that often arises in the stomach and lower chest when we are feeling angry or resentful or irritated. No one should be expected to quash their feelings, or even ignore them, but I caution the parties about making decisions based on those feelings. Indeed, by paying attention to those feelings, players can be reminded that they need to avoid making decisions based on those feelings, and affirmatively focus on "thinking with their head instead of their gut."

Thinking Fast and Thinking Slow

(Cont'd from page 7)

With these little lessons in mind, parties are more aware of the workings of these two systems of thinking, and so more able to affirmatively use System 2 to shape their decision making process. When things sometimes get testy, I can remind the players that they might be falling into System 1 thinking, which often helps that person regain control. And yes, as the mediator, I often have to take my own advice!

**** Leif M. Clark is a former U.S. Bankruptcy Judge, W.D. Tex., and is a Mediator and Consultant. He can be reached at www.leifmclark.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

LACBA
Los Angeles County Bar Assn.
1055 W. 7th Street
Suite 2700
Los Angeles, CA 90017
Main Tele. #: (213) 627-2727
Fax #: (213) 833-6717

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

Ventura Center for Dispute Settlement
4001 Mission Oaks Blvd., Suite L
Camarillo, CA 93012
(805) 384-1313 (tel)
(805) 384-1333 (fax)
www.vcds.bz
Email: vcds@vcds.bz

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 **

Recalled judges **