34th Edition * June 2021

Bankruptcy Mediation News

A Word From The Administrator. . .

A little over a year ago, the world plunged into an unknown and horrifically challenging pandemic, a once in a century experience which transformed everyone's lives, livelihoods, and relationships with family and loved ones. We grieve for all of the lives lost and the lives forever changed. While the pandemic has not yet ended, we are hopeful that the world will soon see the end of this long and desperate crisis and that we will all somehow fashion a new, stronger and better future.

The court had contingency plans in place and an infrastructure built to deal with emergencies; however, the scope and nature of the pandemic tested every part of our operations and existing procedures. While the court closed almost entirely to the public, we continued full operations, albeit by creating and utilizing new procedures such as telework, Zoom hearings, and other specialized practices.

The judges also continued to assign matters to mediation, and we are especially grateful to all of you for your willingness to accept assignments and adapt so quickly to whatever remote means you found safest and most practicable. Due to your hard work and creative efforts, your mediations have continued to be successful and of enormously help to our judges.

We are pleased to announce that the Court has begun opening to the public and conducting hearings in person pursuant to General Order 21-04 issued on April 8, 2021. Presently, it appears that the court may employ a "hybrid" type of hearing practice, *i.e.*, a combination of both Zoom and in person hearings, as the judges decide the best way to move forward with their individual caseloads. You may wish to begin holding in person mediations as well but that is, of course, your personal decision.

This issue includes articles by new and previously contributing authors, and I once again invite all of you to send in articles that may be of interest to your ADR colleagues. Information on how and where to email your stories can be found on page 5. We have also again included our "Dear Program Staff" feature to highlight the types of inquiries that we receive about the Program's practices and procedures. The Program staff respond to each inquiry. Please email your questions to the staff at mediation_program@cacb.uscourts.gov.

Thank you all. You have been in our thoughts and prayers and we continue to wish you and your loved ones health and safety during these difficult times.

Dear Program Staff:

Q: Do all parties need to sign the proposed order assigning a matter to mediation or is it sufficient to have the attorneys sign on their behalf?

***A*:** Technically, yes; ¶ 5.4 of the Third Amended General Order mandates the use of Official Form 702 (the order assigning a matter to mediation) and requires that all parties and counsel sign the proposed order. *However*, if a judge orders a matter to mediation at an "in person" hearing and instructs counsel to prepare the order before leaving the hearing, the parties' signatures are not needed.

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: Its 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/parties. There will be times when you'll be 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 it's 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*:** You need to 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 in the applicable case or adversary proceeding on the 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, panel mediators who have been appointed as alternate mediators know that 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 that we can update our records. Email the information to mediation_program@cacb.uscourts.gov. Thanks and welcome back!

IMPASSE IN MEDIATION? THE UNSEEN 900 POUND GORILLA

By Peter T. Steinberg, Esq. *

By the time a Bankruptcy Judge orders a matter to mediation, the parties to the dispute and counsel believe that the applicable legal issues have been identified, even if the relevant facts are still a work in play. Most bankruptcy counsel handling adversary litigation in the Central District of California tend to be experienced and more than competent litigators. It is rare for experienced litigators to miss relevant justiciable issues.

But recently, sitting as the mediator of a very complex factual dispute, I came to realize that the parties and their counsel had each missed a pivotal legal issue that I felt cratered one party's legal position. The legal issue I perceived that was overlooked concerned a California law regarding a creditor's waiver of rights, post non-judicial (private) foreclosure sale, and the resultant inability of the creditor, under the circumstances, to proceed with a non-dischargeability adversary against the foreclosed out and now Chapter 7 debtor. Based on prior civil and bankruptcy litigation experience, including appellate work, I was convinced that the creditor/plaintiff would not withstand a summary judgment motion of the debtor/defendant if the issue was gleaned, and thereafter briefed to the Bankruptcy Court by defense counsel.

So the question is: "Do I, as a mediator, disclose this issue to the mediating parties, and if so, how and when to do so?"

My thoughts while presiding over the mediation were that I was apprehensive to disclose my knowledge, as if I did so, I feared that debtor and his counsel might walk from the mediation, preventing any type of settlement. In other words, if the debtor believed he had no potential liability, in an emotionally charged matter, he and his counsel would offer nothing and leave. I also pondered that creditor/plaintiff and his counsel would be no less startled that the 900 pound gorilla issue had been missed, and would find my legal analysis faulty. I feared that I would lose credibility, and they too could leave the mediation "with a jaundiced eye, and a scowling mien," as a former Central District Bankruptcy Judge used to say. So, what to do, and what not to do? After thinking the matter over, I thought of the possible scenarios/solutions:

Alternative 1: I could disqualify myself as the mediator and adjourn the mediation upon the grounds of feigned collateral knowledge making my ability to be an impartial mediator, as required, impossible. This of course would leave the parties where they were before the start of mediation.

Alternative 2: I could mention my understanding of the 900 pound gorilla to solely one party/counsel, and suggest a more reasonable demand. This is problematic, as such an alternative may be seen by one side of the mediation as "partiality," and giving "legal advice," which is a violation of the Mediator's Code of Responsibility.

Alternative 3: I could meet in full session with each party and counsel and explain that my own prior litigation experience had allowed me to notice a pivotal issue relevant to the case that neither party nor their counsel has noticed, which would in all likelihood impact the adversary should it be tried. Of course, this disclosure would cause each party and counsel to reevaluate their position and strategize accordingly. The issue involved would take a bit of time for each counsel to research and advise upon, but then a settlement could take place at a further session with seemingly all relevant law evaluated by both parties and their counsel.

Alternative 4: I could simply say nothing about my perception of the 900 pound gorilla, and let the parties otherwise try and settle, with their underinclusive vision of the appliable forest and trees, no gorilla in sight. This didn't seem right to me as the same affronted my conception of doing justice based upon all applicable law and facts. As Spike Lee might say, it wouldn't feel to me as "doing the right thing.

All of the above alternatives I pondered caused my mediator soul to question my role as the same,

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"NEWGOTIATION" IS A HUMAN ENDEAVOR

By Frank V. Zerunyan, J.D. LL.D. (hc) *

In the 33rd edition of the Bankruptcy Mediation News, my good and longtime friend and colleague J. Scott Bovitz writes, "food and drink matter." Indeed, they do because negotiation is a human endeavor. More importantly, negotiating in the 21st century does not have to be framed in a competitive structure, creating winners and losers, instead of in a collaborative frame focusing on cognitive science, relationships, and trust. The word "negotiation" finds its roots in Latin "neg," meaning to deny, and "otium," meaning leisure. The English called this being busy, occupied, or doing "business." Not surprisingly, the word "business" in Latin is "negotio." For centuries the evolution of negotiation included the management of feelings, emotions, games of persuasion, and power. The traditional negotiation taught in business and law schools promoted hard power and dominance in a competitive process. In more recent times, various scholars and practitioners have studied and defined negotiation in more legal, psychological, business, and economic expressions framing it in more collaborative terms, emotional intelligence, and cognitive power.

My colleague Yann Duzert, Ph.D., and I co-authored a book in 2019 entitled "Newgotiation for Public Administration Professionals," in which we re-define negotiation as "an ethical and elegant process of rational and collaborative decision making aimed at mutual benefits." In this short, to the point and readable book, we discuss the value of collaborative decision-making for public administration and other professionals who care about sustainable deal-making. Negotiation is between various human actors. Our book also discusses the anatomy, physiology, and pedagogy of different types of negotiators using examples of authoritarians, controllers, facilitators, entrepreneurs, and visionaries. Most of us have ingredients of these typologies, but we find our natural and comfortable space to negotiate defined by our personality and context.

Research shows that most negotiations fail. Only 30% of all negotiations conclude in a deal. While 100% of negotiators claim to seek a win/win result, only 20% achieve it. In our book, we coin the term "Newgotiation" and create a methodological framework, which we label the 4-10-10 technique of Newgotiation. This technique allows our public administration professionals to move through 4 steps involving ten elements and ten indicators every time they negotiate. In essence, we created a logic model or a road map for them to achieve the desired win/win. In the book, we attempt to create a common language for all to focus on building relationships and, therefore, trust. The Newgotiation technique is all about identifying the negotiation frame (competitive vs. collaborative), identifying potential problems, crafting solutions, and structuring value creation and value distribution based on individual and organizational priorities.

Four anatomical steps anchor our Newgotiation technique. They are preparation, value creation, value distribution, and implementation. Our study of thousands of negotiations also points to 10 remarkable but straightforward elements that directly correlate to these four steps. These elements include context, interests, options available for these interests, power dynamics, communication, relationship, concession, conformity to law, criteria or standards, and time. Finally, our Newgotiation paradigm has no value if it cannot be implemented or used to learn to improve for that elusive win/win. Therefore, our ten indicators help implement and educate for a complete negotiation process. These ten indicators include satisfaction and optimization of the deal, the rationality of the decision made, the control of emotions, fairness and ethical components of the deal, legal compliance, productivity, social and environmental responsibility, control and

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"Newgotiation" Is A Human Endeavor

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execution, technical standards, and adaptability for post-settlement.

Newgotiation is a mindset to assess the challenges and opportunities available to the negotiating parties. It is a culture of collective learning to cut a better deal. While competition is suitable for a better price or innovation, it is never a guiding principle at the outset of any negotiation. We, humans, are predisposed to compete naturally. Competition at the beginning bypasses steps one and two in our 4-step process, namely preparation and value creation. Anchoring the price or value distribution limits the zone of the possible agreement substantially. We advocate in our book that all negotiations must start with the "why" as opposed to "how much?" The alignment of interests, options, and values can only occur as a result of a thoughtful preparation to negotiate and value creation steps in our 4-step process. The better preparation and more values created, the more available to distribute, hence the higher probability of cutting a deal.

Most despise negotiation because it is too competitive and typically distributive, also known as single-issue negotiation. In an integrative negotiation where values are created and exchanged, parties compete for values to cut a better deal. This is the moment of creativity, innovation, and clear communication. This is where listening and brainstorming without commitment matter. Value creation occurs best when we capitalize on differences to create opportunities simultaneously during the negotiation of multiple issues . Good negotiators are great listeners, who pick up on disagreements to align interests and values. Steven Covey once wrote, "most people do not listen with the intent to understand; they listen with the intent to reply." My colleague at the University of Southern California, Robert Denhardt, in his short book called "Just Plain Good Management," wrote, "the first and most important idea in good management is simple: listen, listen, listen… listening carefully builds trust, engagement, and in turn, productivity."

Finally, our Newgotiation paradigm is a place to test options, improve relationships, manage power, reduce misunderstandings, respect rules, determine norms, and manage time all with empathy. All this makes Newgotiation a human endeavor and negotiators "all made of the same stardust."

**** Mr. Zerunyan is a Professor of the Practice of Governance and Director of Executive Education at the Bedrosian Center on Governance and Neeley Center on Ethical Decision Making as well as Director of Reserve Officer Training Corps (ROTC) Programs at the University of Southern California. He has authored several book chapters and articles on ethics, public private partnerships and negotiation. He is currently working on the sequel to his "Newgotiation" book focused on Sustainable Development Goals (SDG) commissioned by the United Nations Department of Economic and Social Affairs (UN DESA). Frank, before his transition to academia more than a decade ago, was a partner at SulmeyerKupetz, APC.***

ARTICLES WANTED

Do you have a story to tell? Share it with the other mediators and our bankruptcy judges through the *Bankruptcy Mediation News*.

Send J. Scott Bovitz a Word file (of any length) to bovitz@bovitz-spitzer.com. Thank you!

WHY MY ASSOCIATE SHOULD BECOME A MEDIATOR

By J. Scott Bovitz, Esq. *

Dear Associate:

I'm impressed. I yell at you, chop up your briefs with red-lined comments on Sunday night, and make you call the client with bad news. I rarely give you all the important background before I send you to so-called "warm body" appearances,

But you seem to be thriving at our law firm. Clients smile when you walk into the room. You might just have a long career ahead of you. Good job.

The law is a long apprenticeship. So, I'm going to send you back to "school" before you ask me for another raise. I know a great way for you to learn how other lawyers handle their litigation practices and clients.

Really! I can give you a sneak peek into the lives of other successful lawyers. How do they deliver long-term value to their partners and clients? How do they get clients? How do they prepare for important meetings? How do they handle client relationships?

Oh, sure. You think that I am going to assign you the task of watching re-runs of *The Good Wife*. While *The Good Wife* was very educational — and more realistic than *How To Get Away With Murder*— I am asking you (instead) to sign up to become a mediator with the United States Bankruptcy Court for the Central District of California.

People retire, change careers, or move to Yakima. So, yes, the Bankruptcy Court is always accepting applications for volunteer mediators.

The application is a little long, but don't be discouraged. You will need to read the Third Amended General Order No. 95-01. The General Order is written in Washington-speak, but you'll get the idea.

You will need to enroll for formal mediation training. Our firm will pick up the tab (though you still need to meet your billable hour requirements). I enjoyed my mediation training. It made me a better negotiator. I became a better listener. (I know. I know. I could be a BETTER listener.)

Once you qualify as a mediator, you will receive mediation assignments. These always seem to come in threes — no mediation assignments for months, then three assignments in a day or two. Never mind. You only need to handle one of these cases every quarter. Look for mediation assignments where you don't know all the lawyers; you will want to expand your list of contacts.

Once you receive your first mediation assignment, I volunteer to help (behind the scenes). But you will be in charge. I promise that you will learn a lot about the practice of law from the mediation correspondence, the mediation briefs, and the super-secret-private mediation sessions. You will hear what the client really wants. You will see how good lawyers interact with their clients. You might help the parties reach a settlement.

Once you are accepted to the mediation program, our local judges will teach you the secret mediation handshake. I don't know why, but this handshake is responsible for settling about 2/3 of the thousands of cases assigned to the local mediation program.

You can fill out the application over the weekend when you get back from your 20 mile bicycle ride. Tell you family that I'm giving you the chance to learn a few more tricks of the trade from our bankruptcy community. Now, get back to work.

**** Mr. Bovitz is Board Certified in Business Bankruptcy Law by the American Board of Certification and a Certified Specialist in Bankruptcy Law by the California State Bar Board of Legal Specialization. He is a coordinating editor of (and regular contributor to) the American Bankruptcy Institute (ABI) Journal and co-editor of its Consumer Corner column.***

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

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

Los Angeles County Bar Association
1055 W. 7th Street
Suite 2700
Los Angeles, CA 90017
(213) 627-2727 (tel)
(213) 833-6717 (fax)

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

Impasse In Mediation? The Unseen 900 Pound Gorilla

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All of the above alternatives I pondered caused my mediator soul to question my role as the same, underscoring that I was not a party to the dispute, nor an advocate for either party. Certainly my gut thoughts were not to give legal advice benefiting one side. As a mediator, how would you have handled the situation? Is there a correct way, or not, to deal with the rampages of the 900 pound unseen gorilla issue which seems to obscure the forest and the trees seen by the parties?

**** 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 a 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.***

PLEASE UPDATE YOUR CONTACT INFORMATION

Have you moved? Published an article? Become fluent in an additional language? Would you like to update your biographical information or make any other changes to the material listed for you on the court's website?

If so, please email your new information to Sue Doherty at susan_doherty@cacb.uscourts.gov or to Ann Sokolowski at ann_sokolowski@cacb.uscourts.gov.

If you wish to be removed from the panel, please let us know that by email as well. Thanks!

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' initials, 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

SANTA ANA DIVISION

TA = Judge Theodor C. Albert
SC = Judge Scott C. Clarkson
ES = Judge Erithe A. Smith
MW = Judge Mark S. Wallace

SAN FERNANDO VALLEY DIVISION

AA = Judge Alan M. Ahart **
MB = Judge Martin R. Barash
VK = Judge Victoria S. Kaufman
GM = Judge Geraldine Mund **
MT = Judge Maureen A. Tighe

NORTHERN DIVISION

MB = Judge Martin R. Barash
DS = Judge Deborah J. Saltzman

Recalled judges **

NEW MEDIATORS WELCOME!

Please feel free to encourage your fellow professionals to join the panel.

Our panel is not limited to attorneys. We also welcome non-attorney professionals such as accountants, real estate brokers, physicians, management consultants, and professional mediators.

Details are available on line at https://www.cacb.uscourts.gov or by emailing mediation_program@cacb.uscourts.gov.

Thank you!

PROGRAM STATISTICS AS OF JUNE 1, 2021

Number of Matters Assigned

6,390

Number of Matters Concluded

6,344

Number of Matters Settled

3,956

Overall Settlement Rate

63%