35th Edition * December 2021

Bankruptcy Mediation News

Mediation Program

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Newsletter

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Contributing Editor

www.cacb.uscourts.gov

A Word From The Administrator. . .

Our very best wishes for the upcoming holidays and for a happy and healthy New Year. The Court continues to adapt to our challenging world, implementing and maintaining all appropriate health and safety measures. The use of Zoom for court hearings, as well as for mediations, is an important part of our current daily experience.

As a result, we have focused quite a bit in this edition on conducting mediations via Zoom. Three of our panel members have contributed articles, two of which address this subject. Howard Ehrenberg's article, "Zooming Into Mediations," provides very helpful, practical advice for conducting mediations via Zoom. David W. Meadows' article, "Zoom Mediations Have Their Benefits But Also Their Limitations," offers his perspective on the use of Zoom after having conducted numerous Zoom mediations.

In addition, Christopher L. Blank's "Response to Peter T. Steinberg's article regarding *"Impasse in Mediation? The Unseen 900 Pound Gorilla"* responds to the article by Peter Steinberg which we published in our June 2021 newsletter. David, Howard, Chris and Peter are all very experienced members of our panel and we greatly appreciate their contributions to our newsletters.

I invite all of you to send in articles that may be of interest to your ADR colleagues. Please send your articles in Word format (any length) to Scott Bovitz at bovitz@bovitz-spitzer.com and to Sue Doherty at Susan_Doherty@cacb.uscourts.gov.

Meanwhile, our current health and safety concerns have unfortunately affected the annual awards luncheons that we have co-hosted with the District Court for over 20 years. We held a luncheon on January 9, 2020 before the pandemic struck but will not be able do so this year. We have included in this edition a feature about the awards that we issue annually to our mediators (please see pages 7 and 9).

The "Dear Program Staff" feature continues to highlight our responses to inquiries that the Program staff regularly receive from mediators, attorneys and *pro se* litigants about our mediation practices and procedures. Our staff members respond by email or phone to each inquiry. We encourage you to continue to sending your questions to them at Mediation_Program@cacb.uscourts.gov. Thank you.

Dear Program Staff:

Q: Are we allowed as mediators to schedule mediations via Zoom? Are there new forms to accommodate that? I have a mediation to conduct shortly and would like to do it via Zoom if that is permitted.

***A*:** Yes, mediators are allowed and in fact encouraged to schedule mediations via Zoom, and no new forms are needed. The court is in favor of mediations being held in the most convenient and safe way possible as long as the parties and mediator consent. Many of our mediators have been conducting their mediation sessions over Zoom for the last year and a half.

Q: I recently conducted a mediation conference by Zoom and completed the mediator's confidential report of the conference (Form 709). However, given the lack of "in person" attendance, I was unsuccessful in obtaining all of the address, phone and email information from the attendees that I needed in order to complete the attendance sheet that is part of Form 709. I understand from a number of my mediator colleagues that they are having this problem too. I know you use this information in order to send out questionnaires to the attendees to get their feedback on the program. Do you have any suggestions for how to collect the information in order to submit a complete attendance sheet?

A: The information on attendance is very important to us because, as you correctly note, we use it to send questionnaires to the attendees to obtain their feedback on the mediation process. While Zoom has features that allow participant information, the easiest solution may be to ask all attendees, before the mediation begins, to send you their name, mailing address and e-mail via the Zoom "Chat" feature. If an attendee is unwilling or unable to do so, please list their name and e-mail on the attendance sheet and we can take it from there. The only "downside" to doing it this way is the fact that you (the mediator) will have to add this information to Form 709 that you send to us.

Q. I just received a questionnaire after attending a mediation session that includes questions about my experience with the mediator who, frankly, was a major disappointment. I would like to respond that (1) the matter was "not resolved by mediation and mediation had little impact on the matter," (2) I disagree with the statement that "I was satisfied with the mediation process," and (3) I feel that "the mediator was not effective in getting the clients to engage in meaningful discussion of the matter." I feel bad about responding this way but that was my experience, unfortunately. Should I send in such a negative response?

A: Yes, please send it in. A big thank you goes to everyone who responds to our questionnaires seeking feedback on all mediations, which we send out either by mail or email when we receive the mediators' confidential form indicating who attended the sessions. Even if not all of the questionnaire responses are flattering, the attendees' honest opinions help us maintain the success of the Program. If we were to receive a number of unflattering responses about a particular mediator, we would then be able to address the concerns directly with that individual while maintaining the anonymity of the respondents. Again, a big thanks for your response – and for your candor.

Q: I'm the plaintiff in a student loan adversary proceeding in which opposing counsel has just made a settlement offer. Before making a decision, I'm wondering if my prospects for settlement would be better if I agree to mediate the matter first or not. Are there any statistics on student loan case settlements that I could access in order to assess my chances for a more favorable outcome?

A. We keep many types of statistics but unfortunately do not separate student loan cases from all other § 523 nondischargeability actions. We urge you to try mediation, however, before deciding whether to accept or reject opposing counsel's offer. The settlement rate for all matters assigned to mediation has remained at a steady 63% since the program began in 1995 and has sometimes reached a high of 67%. In addition, our research over the years has shown that mediations of § 523 actions frequently take only about 3-4 hours, so it's a relatively small investment of time for a potentially very positive result.

Mediator Spotlight

"Mediation procedures have altered significantly due to Covid and this was our first time participating in a mediation under the new procedures. **[J. SCOTT BOVITZ]** was very helpful in guiding the parties so that we could conduct a meaningful mediation while eliminating the participants' exposure. Despite the new procedures, he handled the mediation professionally and efficiently. His ability to quickly synthesize the many issues and put them into a bankruptcy context was a major asset, particularly in working with plaintiff's counsel who are not bankruptcy attorneys. We appreciate the bankruptcy court's ADR program and in particular the work Mr. Bovitz did on our behalf."

"**[DIANE FABER]** was a delight: smart, funny, capable and clear-eyed about the mission. My opponent was a mercurial *pro per* defendant in a nondischargeability action between two parties who had been close. She navigated with great care, giving the parties absolution in spite of bruised feelings and resentment."

"[**MEREDITH JURY]** was literally the best mediator I have worked with. Extremely well prepared on all levels and facts, patient, engaged and forceful. I highly recommend her."

"[KATHY BAZOIN PHELPS] is an excellent mediator — prepared, thoughtful, and professional."

"[**MICHAEL KOGAN**] did a fabulous job. He was well prepared, clearly knew the end game, and was quick and efficient. This was the smoothest mediation with the court's system that I have been through."

"[SCOTT LEE] did an excellent job, especially considering the fact that the other side was completely unreasonable and appeared to lack any understanding of bankruptcy law."

"[ALAN I. NAHMIAS] did an outstanding job. He stayed later than anticipated to get the deal done. If the parties had not signed an agreement that night, no deal would have been reached. Congratulations to Alan!"

Zooming Into Mediations

*By Howard Ehrenberg, Esq.**

The seemingly ongoing pandemic has enabled us to learn new ways of how best to get our work done. Working remotely can be, in many instances, nearly as efficient as being in the office. Surprisingly, I have discovered that the same is true for conducting mediations.

We know that the bankruptcy mediation panel is a rousing success that has saved all of the parties involved countless savings in both time and money. Statistically, more than 63% of the cases handled by the panel mediators settle. Thus, if conducting mediations remotely can be as effective or even more so than mediations held in person, then even more savings may be achieved.

While there are those who say and believe that face to face meetings maximize the emotive impact which a mediator can have on the parties, I have discovered that the use of Zoom break out rooms enables me to be as quiet or loud as I need to be in order to get the party to hear and understand what it is that I am trying to say.

Let's start with my basic rules which have proven to be very successful for me and which you may wish to utilize:

- A Zoom account. While Zoom provides free accounts, the amount of time provided is limited, *i.e.,* no more than 45 minutes, after which time your session, regardless of status, will be terminated. Pay for an account. The cost of obtaining a Zoom account is minimal and the cost of obtaining an account may be recouped in parking validations.

- Familiarize yourself with the workings of Zoom. For purposes of mediation, the main skill you need is how to create break out rooms and move from one room to another. When I first started using Zoom, I asked that the parties have a practice session the day before to ensure that everyone felt comfortable logging in, could confirm that they had sufficient internet bandwidth and that their cameras were positioned correctly. Also, I could practice moving between the break out rooms.

- The Bankruptcy Court website has several very helpful videos available (for free) which may assist with learning Zoom techniques. Also, YouTube has many levels of learning on Zoom features.

- Zoom allows for the use of virtual backgrounds. I like using the "blur" background as opposed to my actual office background, which can be distracting. Also, the "blur" camera puts you in greater focus.

- I send the parties my instructions and the confidentiality agreement in advance. The lawyers also send me their confidential mediation statements of no more than 10 pages one week in advance. This ensures that the lawyers and parties have focused on the case prior to the mediation. My preference is for the statements to be confidential to allow both sides to be completely candid.

- I have found that there is generally little, if any, need for a plenary session at the beginning of the mediation. Often these cases involve parties who are emotional and if the parties are able to see one another, their positions may harden. Remember, time is precious to everyone, regardless of whether the mediator is charging for his/her services or if the mediator is serving the first *pro bono* eight hours that is required of every mediator per quarter (see the Mediation Program's General Order). Every minute matters.

- I ask the party who seems most bankruptcy savvy to be ready to prepare a bullet point short form settlement agreement if the parties reach an agreement. First, I do not prepare the agreements as I do not ever want to be a witness as to the parties' intent. Second, using Zoom, the parties can use the share screen feature to review and revise the agreement in real time. I never want to allow a mediation to end without the parties signing something that can be binding.

It has now been 18 months since I conducted my first Zoom mediation, and I can say that it has proven to me to be every bit as effective as having mediations in person. I am likely going to continue to use the remote option in the future even after things return to "normal."

**** Howard Ehrenberg has 33 years of experience representing bankruptcy trustees, receivers, businesses, creditors, government entities, purchasers and sellers of assets and litigants throughout California in matters involving bankruptcy law, receivership and commercial and business litigation. He has been a mediator for the Central District Bankruptcy Court since 1995 and can be reached at hehrenberg@sulmeyerlaw.com.***

Zoom Mediations Have Their Benefits But Also Their Limitations

*By David W. Meadows, Esq.**

Anyone who has experience with me as a mediator knows that I tend to be fairly full throttle when and if necessary. My reputation in the community surely is fairly low key and hopefully modest in court. However, perhaps the reason I regularly serve as a mediator is that it gives me wide latitude with respect to my efforts to be persuasive. Once at a panel to all the bankruptcy judges at a judicial retreat, a co-panelist told the judges that "sometimes people just need a big hug." I spoke next and told everyone in the room, "When I conduct a mediation, I don't *touch* anyone." That said, in mediations, I can be fairly direct.

Zoom mediations are substantially beneficial and work very well in many respects. Of course, they are tremendously convenient to the attorneys and clients. No one needs to leave their offices. This part is obvious. Convenience, however, is only a small part of the process.

Another beneficial part of the process is that, if the mediator and the parties are willing, the convenience of Zoom allows everyone to have sessions before the actual scheduled mediation and, if necessary, to have follow up sessions. I am willing to do that. I try to get the ducks lined up for settlement before the actual mediation. Usually, that is done by emails and phone calls, and that works fine when we know each other. For the parties, though, unless it is a trustee or an attorney we know, having a Zoom session prior to the actual Zoom mediation provides an opportunity to go over some issues, get a sense of each other, and let things sink in a bit before the actual mediation session a day or so later.

However, there are limitations to Zoom mediations as well. Consider, for example, the visual aspect of a Zoom mediation. When I look at my screen and hear the participants via my audio, both the visual and audio work well, to a degree. Zoom works *from the mediator's screen but only as well as the device being used by the participant*. Suppose a participant decided to connect via a smart phone that may not even be pointing at them. That is a miserable situation. The impact in both directions is small compared to a decent screen, let alone in person. Suppose this person is one of the parties to the mediation, such as a trustee's target. Sometimes that person is trying to exercise some control over the situation and wants to convey his or her disdain. The disdain can be conveyed by participating only via a ditzy smart phone. It conveys to all the rest of the participants that the process is not important and they do not think the situation merits their full attention.

As mediator, I can ask, "Do you have a way to sign in via a bigger screen and connection?" Once I asked a participant, "Would you mind please opening your video link? These are hard enough to do in the best of circumstances. Seeing when you roll your eyes at something I say would be helpful." Answer – "I could, but I won't." For me to point out, "I did set out some rules of the mediation at the get go" would not help the process. It would be provocative. I have to meld my approach to create the best chance of getting this person to move where I want the person to go. I cannot fight with them. From a visual point of view, Zoom can be perfectly fine if the participants *want* the process to be perfectly fine. If they want to control the process and send a negative message, they can do that too and there is not much that usefully can be done about it.

The most significant downside of a mediation via Zoom, in my experience, is the ability of a participant in a Zoom mediation to call it a day too soon. During Covid, I conducted a mediation that did not succeed. From the moment it was over and in the many times I have thought about it (and have followed up many times with one of the attorneys involved, occasionally as an add-on to an email about an unrelated case), I was hugely disappointed that I let that guy, an in-house general counsel to a company being sued by a trustee, just decide he had had enough and basically shut us down.

Had the mediation been in person, I would not have ridiculously blocked the door to prevent the guy from leaving the conference room. I would, however, have somehow begged the guy to stick around, trying to get the guy to give me a little more time to get him out of there for less than it would cost him to even defend the litigation. I needed more time to get it across to the guy that he was the piñata of the day, and to get out of it cost effectively by settling. If I'd had another hour, I could have done it. By allowing the gentleman to basically close the Zoom app, I lost whatever ability I had to try to get the guy to stay with me and let me try to get it done.

Another downside to Zoom is the inability to spontaneously talk to one of the attorneys "in the hall" between conference rooms, away from their clients. That often helps tremendously. In Zoom, I set up a breakout room for just me, and then I can ask one or more attorneys to join me in that breakout room and move them into it. It works. But it is not the same as just quickly turning in a

(Cont'd on page 9)

Response To Peter T. Steinberg's Article Regarding "Impasse in Mediation?" The Unseen 900 Pound Gorilla"

*By Christopher L. Blank, Esq.**

Peter poses an interesting and very common situation where the mediator believes he or she has knowledge about a legal issue that could affect the outcome of the case that neither side seems to have uncovered. In Peter's example, he was dealing with a dischargeability case on a debt arising after a non-judicial foreclosure. Peter posits that California's anti-deficiency laws would preclude collection on the debt.

Peter proposes four alternatives for the mediator to consider. One, disqualify himself; two, explain to the creditor's attorney why the anti-deficiency laws kill his case and suggest creditor's counsel come up with a more reasonable demand; three, mention the anti-deficiency laws to both parties and counsel in a joint session; or four, say nothing about the anti-deficiency laws to either side.

For different reasons, Peter rejects each of these alternatives and asks his readers how we might have handled the situation.

I would start by recognizing the proper role of the mediator. No one gave us black robes or gavels. It is not our job to do justice or see that justice is done as we may perceive it given our own idiosyncrasies. That is what the judge will do if the parties can't settle. It is our job to help the parties find common ground to resolve their dispute. It is our job to help them avoid bearing the risk of justice meted it out by an idiosyncratic judge.

I'm not in favor of alternative number one because that seems like a copout to me. The parties selected me as a mediator. I believe it is my duty to do my best to help them find common ground. Will they be better off with a mediator who doesn't understand the issues? Probably not.

Peter rejects option four because it does not seem to be "doing the right thing." I am not in favor of alternative four but for a different reason. I'm not worried that the parties may settle in a way that does not comport with my notion of the "right thing." Rather, I am reluctant to say nothing because leaving everyone ignorant yields unpredictable results. One of the tools in the mediator's toolbox is to help the parties form realistic expectations regarding possible outcomes. It would be tough for me to build rapport and credibility with the parties when in my heart I think they're missing the boat.

I'm not in favor of alternative number three, trying to educate both parties. When a party has unrealistic expectations because ignorance leads them to **overvalue** their position, they are unlikely to make a settlement because they will demand too much. This is not necessarily true when a party **undervalues** the strength of their position because of ignorance. Educating the overconfident facilitates settlement. Educating the underconfident does not.

Educating the ignorant party who undervalues her position might appeal to my sense of justice, but it will be counterproductive to settlement. That would also potentially overstep the line between acting as a neutral and acting as an advocate for a party by giving them legal advice.

I recommend a variant of alternative number two. Rather than tell the creditor's counsel that they missed something that I, in my infinite wisdom, will share with him, I would simply ask counsel, perhaps out of the presence of his client, whether he has considered the impact of California's anti-deficiency laws on the ability to pursue the non-dischargeability claim. I'm likely to encounter one of three responses.

1. "No, I haven't." If that's what counsel tells me, I would tell him perhaps he should, and if I'm asked, I might share what I know about that issue.

2. "No, I haven't, but I don't believe the debtor's counsel has either. Therefore, as long as they remain ignorant, I have the upper hand and I don't want to give it up." If that's what counsel tells me, I might ask what he thinks will happen if the debtor hires a different attorney who knows the law in this area.

3. "Yes, I have, and here is why it doesn't affect the outcome." If that's what counsel tells me, I might consider myself to be better informed after our discussion.

The real point is that mediators should exhibit some humility in their communications with parties and counsel. Asking them probing questions is going to work a whole lot better than telling them what you think they don't know.

**** Christopher L. Blank, Esq. specializes in business litigation, business bankruptcy, receiverships, mediation and attorney fee disputes. He has been a mediator for the Central District Bankruptcy Court since 1995 and can be reached at chris@chrisblanklaw.com.***

Mediators' Awards for 2019 & 2020

Longest mediation conference (settled):

Norman L. Hanover, 6 hours (2019)

Leonard L. Gumport, 23 hours (2020)

Shortest mediation (settled):

Sandra J. Coleman, 1.5 hours (2019)

David S. Hagen & Leonard L. Gumport, 2 hours (2020)

Conference involving largest amount of money settled:

Thomas H. Casey & Kathy B. Phelps, $5-10 million (2019)

Leonard L. Gumport, $26+ million (2020)

Conference with the most attendees:

Leslie A. Cohen (2019)

Leslie A. Cohen & Leonard L. Gumport (2020)

Most frequently chosen mediator:

Entire Central District: Howard Ehrenberg, Leonard L. Gumport & M. Jonathan Hayes (2019)

Howard M. Ehrenberg & David W. Meadows (2020)

San Fernando Valley Division: Howard Ehrenberg (2019)

Howard Ehrenberg & David R. Hagen (2020)

Los Angeles Division: Leonard Gumport & M. Jonathan Hayes (2019)

David W. Meadows (2020)

Riverside Division: Alan I. Nahmias (2019)

Lazaro E. Fernandez (2020)

Santa Ana Division: Donald W. Sieveke (2019)

Christopher L. Blank (2020)

Northern Division: Karen L. Grant (2019)

William C. Beall (2020)

Lazaro E. Fernandez

Leslie A. Cohen

Leonard L. Gumport

Kimberly S. Winick

M. Jonathan Hayes

Most conferences settled in mediation:

Entire Central District: Leonard L. Gumport, David W. Meadows & Sharon Z. Weiss (2019)

David W. Meadows (2020)

San Fernando Valley Division: David W. Meadows & Kimberly S. Winick (2019)

Howard M. Ehrenberg, Leonard L. Gumport, David R. Hagen, M. Jonathan Hayes, Kathy B. Phelps & Jason S. Pomerantz (2020)

Los Angeles Division: Leonard L. Gumport (2019)

David W. Meadows (2020)

Riverside Division: Alan I. Nahmias (2019)

Glenn Ward Calsada & David R. Hagen (2020)

Santa Ana Division: Sharon Z. Weiss (2019)

Leonard L. Gumport, Jeanne M. Jorgensen & Richard A. Marshack (2020)

Northern Division: William L. Beall, Leonard L. Gumport & David R. Hagen (2019)

Diane Faber & Michael S. Kogan (2020)

LOCAL MEDIATION TRAINING PROGRAMS

Pepperdine University School of Law
Straus Institute for Dispute Resolution
24255 Pacific Coast Highway
Malibu, CA 90263
(310) 506-4655
www.law.pepperdine.edu/straus

Los Angeles County Bar Association
1055 W. 7th Street
Los Angeles, CA 90017
(213) 627-2727
www.lacba.org

Kenneth Cloke Law Offices
Conflict Resolution Services
2411 18th Street
Santa Monica, CA 90405
(310) 399-4426
www.kencloke.com
Email: kcloke@aol.com

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

ARTICLES WANTED

Do you have a story to tell or comments you would like to make regarding our Program? Share it with our mediators and our bankruptcy judges via the *Bankruptcy Mediation News.*

Send a Word file (of any length) to J. Scott Bovitz at bovitz@bovitz-spitzer.com and to Sue Doherty at Susan_Doherty@cacb.uscourts.gov. Thank you.

PROGRAM STATISTICS AS OF 12/09/2021

Number of Matters Assigned

6,542

Number of Matters Concluded

6,397

Number of Matters Settled

3,985

Overall Settlement Rate

62.3%

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 online at https://www.cacb.uscourts.gov or by emailing mediation_program@cacb.uscourts.gov.

Thank you!

Zoom Mediations' Benefits & Limitations

(Cont'd from page 5)

conference room to counsel and saying, "Can I please speak to you for a minute in the hall?" It happens fast and spontaneously. It doesn't happen fast or spontaneously via Zoom.

Overall, Zoom mediations can work very well, despite their limitations. One additional limitation: you don't get to see your friends at the firm where you are conducting the mediation, as you would if the mediation were in person and you could say hello to them as you go back and forth in the hallways trying to get it done.

**** David W. Meadows, Esq. practices exclusively in bankruptcy, principally in chapter 11, and representing creditors who are involved in chapter 7 cases. He has been a mediator for the Central District Bankruptcy Court since 1995. He frequently is requested as a mediator on both a pro bono and on a compensated basis. A more complete resume can be found on at his website, www.davidwmeadowslaw.com.***

Mediators' Awards for 2019 & 2020

(Cont'd from page 7)

Jeanne M. Jorgensen

David R. Hagen

William C. Beall

Glenn Ward Calsada

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 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 **
DS = Judge Deborah J. Saltzman
MT = Chief Judge Maureen A. Tighe

NORTHERN DIVISION

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

Recalled judges **