

AMERICAN BANKRUPTCY INSTITUTE JOURNAL

The Essential Resource for Today's Busy Insolvency Professional

Mediation Matters

BY LESLIE A. BERKOFF AND NICOLE CASE

The Multiple Roles of a Mediator

Being an effective mediator requires an individual to wear many hats during the process. They need to serve as a guide, facilitator, listener, confidant, empath, evaluator, educator, problem-solver, flexible strategist and expert. At times, some of these hats are worn simultaneously, but they are often exchanged/interchanged throughout the process; thus, an effective mediator knows when to put them on and take them off. Parties to a mediation, having selected a mediator to assist in resolving their dispute, are entrusting the mediator to know how to change hats/roles, and manage the parties and the process, then guide all of this to a resolution.



**Coordinating Editor
Leslie A. Berkoff**
Moritt Hock & Hamroff
LLP; New York



Nicole Case
Moritt Hock & Hamroff
LLP; New York

Leslie Berkoff is a partner, and Nicole Case is a law clerk (pending admission to the New York State Bar), with Moritt Hock & Hamroff LLP in New York.

The Guide

At the outset, the mediator is a guide to, and an organizer of, the mediation process and should be initially connecting with counsel for the parties to the following: (1) advising how he/she intends to coordinate and manage the mediation process; (2) understanding the parties' expectations for the mediation and a potential outcome; and (3) providing insight and instruction as to how counsel should approach the process and to assist counsel in subsequently guiding their clients. In this regard, the mediator should be establishing a schedule and setting deadlines, advising what information and submissions he/she requires, and asking for input from the parties on who should attend the mediation and whether a joint session at least at the outset would be a value add or a value detractor.

Further, the mediator should be reminding the parties that all submissions that are prepared and exchanged should be settlement-focused, and that these are not litigation pleadings and should be crafted in a far different manner than what would be submitted to a court in preparation for argument and/or ruling.

The Facilitator

Throughout the process, the mediator must facilitate the exchange of communications between the parties and ensure that it is being handled effectively. In this regard, he/she may even need to repackage and/or interpret the information and positions being advanced and exchanged to ensure that the parties are not talking past each other and/or being too argumentative or aggressive as to prevent a breakdown of communication and the process. At times, he/she may choose to withhold certain positions and/or information for a period of time to avoid the process imploding based on hastily advanced positions or statements made in anger or frustration.

In addition, the mediator may need to encourage the parties to be more forthright at times to advance the process and facilitate clarity. It is important to keep in mind when listening to a mediator that he/she is the only person who knows what is going on in both rooms. The suggestion that more information could be helpful to resolution should be seriously reviewed and considered by the parties, as the mediator often knows what will move the proverbial needle.

The Listener

At all times, the mediator must be a good listener, and at the outset of the mediation, he/she must still gather as much information as possible to adequately understand the dispute, the parties' positions and their willingness to come to a resolution.

Parties at this stage may express anger and resentment toward the other side, or the fact that they are confronted with claims and a litigation that they did not bargain for or anticipate. As a neutral listener, the mediator has a unique opportunity to cut through the heated emotions underlying a dispute and focus on the facts supporting and elements underlying the legal causes of action, affirmative defenses and/or counterclaims, thus setting the stage for a successful resolution process.

The Confidant

After establishing his/her role as a neutral listener, the mediator is hopefully working toward gaining the parties' trust, as trust in the mediator is a key element to advancing any resolution. As a result, once trust has been garnered, the parties may feel comfortable sharing information with the mediator that they would otherwise not feel comfortable sharing with the opposing side. Further, being new to the dispute, the mediator is someone a party can turn to and vent.

While many mediators are not or were not judges, they stand in a place of respect and are imbued with a bit more formal authority — even though they are not decision-makers. This can be helpful to a party who simply needs to have someone else hear them and provide guidance and advice. If you can establish trust as a mediator with the party, you are on your way to hopefully having them hear you differently than — but not in place of — their own lawyer and as providing another perspective. At times, lawyers may even turn to the mediator to make headway with a client who needs that third-party perspective to start on a path toward resolution.

The Empath

A good mediator has emotional intelligence, but it is not enough for him/her to simply understand the facts and law; he/she must be able to read the parties and have good interpersonal skills. Having the right kind of personality is a key part of a successful process. The mediator needs to be able to get along with the parties, build trust and foster confidence, as without these building blocks, reaching a resolution is very difficult.

The mediator needs to know how to be patient through this process, as parties may move at their own pace in each case to get to resolution. Every mediation has its own pace and speed limit, and recognizing that is truly important. It might also be necessary to address the facts and claims, tackle various issues in stages, and work through resolution. A good mediator also recognizes that each case is different than a prior case and does not have just one set path for his/her process in attempting to resolve disputes.

At times, getting a sense of the players from the outset of a matter (early-stage process) can be truly helpful. Advise counsel for the parties to help guide the mediator on this. Who can or should be in a room? Where does the party in question sit in the hierarchy of the company? How much authority does the party have to get to a decision? What else does the party have to cope with in terms of ensuring that a result can be achieved? In addition, are there external factors impacting or impeding resolution of which the mediator needs to be aware?

The Evaluator

Upon receipt of the submissions from the parties, the mediator should start engaging with the parties to evaluate the information provided and speak to them separately concerning the information and issues contained in the statements. At this juncture, he/she should be flagging concerns and key points with the parties and may even ask the parties to consider sharing informal information and discovery

(depending on the procedural posture of the matter) to assist the parties in evaluating claims and defenses.

In this regard, certain mediations are conducted at an early stage (pre-discovery), and as such, the request for an exchange of some information can be useful to the parties in making decisions on the resolution of claims and defenses, as well as analyzing the strength or weakness of the same. This applies equally to allowing the mediator to obtain access to this information to assist in evaluating the same and provide guidance to the parties.

The Educator

At no time can/should a mediator give legal advice to the parties, but he/she should educate the parties on potential claims that they may face. To be clear, this is different than being an evaluator. A mediator should never advise a party to advance a claim or defense, or take a position that they have not independently thought of on their own, as that is not a mediator's role. However, he/she can (and should) identify for an opposing party a potential claim or defense that the other side has not yet thought of, but could in terms of risk assessment. As long as it is being identified for the party who would be adverse to this position (and not the one to raise it), this is part of the mediator's job of seeing the entire picture.

Noting that someone may have a defense to a claim that has not yet been advanced, but with time and information-gathering could be advanced, is a good way to let a party see potential risk in a case that they otherwise thought was solid. It is part of the process to guide in the evaluation of a claim and consider resolution at a certain stage of the process; the risk analysis is what is being shared, and the potential for additional claims or defenses being raised down the road are considerations for why a party should reflect on resolving a case at this point in time.

The Problem-Solver

The mediator also must be a problem-solver who should be able to bring creativity into the process and work toward a resolution by hearing what the parties want and the issues (facts and law included) at hand, and, upon evaluation, must work to find a way to solve for X. Some of the most successful mediations often involve trading "ice in winter" (something of value to one side that has no or little value to the other), or finding a way to build a path toward resolution.

In the end, creativity and ingenuity can solve a problem/dispute in a way that a court never could, because courts are constrained (and appropriately so) to rule on the facts and law in very clearly defined ways. Utilizing mediation as a process is a way to build a resolution that works for the parties based on the unique facts at hand and the desires of the parties to the dispute.

The Flexible Strategist

A mediator must also be prepared to pivot and be adaptable to the parties, counsel and the needs of the case at hand. The notion that "one size does not fit all" applies across the board. A good mediator can discern when to change gears, modes and/or tactics, as each case is truly different and must be approached with that in mind.

Of course, a mediator then needs to have the ability to be persistent in trying to achieve a resolution. He/she must remember that they are not there to take sides, but rather to assist the parties in considering and evaluating their position, as well as the strengths and weaknesses of their case, and to encourage the parties to consider all aspects of a case: the risks, the upsides and anything in between.

The Expert

A mediator is often selected based not just on experience in the mediation process, but also his/her expertise in a particular area. In this role, he/she is there to provide an additional perspective. The mediator may have experience with a specific area of law or claims/defenses and, at times, even the underlying base facts (*i.e.*, multiple actions brought in the context of a bankruptcy mega-case), as well as a perspective on the nature/type of the dispute in question.

Further, the mediator may know or have experience with the players in the room, and any trust built in prior matters can be useful in getting a deal done. Most commonly, the parties often look to the mediator to provide a knowledgeable third-party view on the dispute, with an eye toward resolution, differently than a party's counsel can — almost like early neutral case evaluation.

Conclusion

A mediator often switches among many of these identified roles depending on the point in time, the case in question or even the nature of the parties. Knowing when and how to do this — all while not undermining or infringing in any way on the client's own relationship with their counsel, not tipping into confidential information gleaned from the other side, and not telegraphing anything more than necessary at that moment in the process — is not a simple feat. It is a skill set built over many years of practice.

In the end, mediation is a complex process that requires a deft hand and a lot of competing skill sets to be employed at the same time (or in tandem). It is not something that people can just jump into without training, and the best mediators have often been doing this for years and have honed their skill sets. It may seem like there is nothing to it, but that is simply not the case.

Each time there is a mediation, the mediator needs to not only be up to speed on the law and facts of the dispute in question, but carefully consider how he/she wants to “set the table” to try to position the parties for a successful resolution. In preparing, he/she must be aware of the many hats that must be worn, and will choose carefully — and for this, the mediator looks to the counsel in the case to help choose from the collection. **abi**

Reprinted with permission from the ABI Journal, Vol. XLIII, No. 2, February 2024.

The American Bankruptcy Institute is a multi-disciplinary, non-partisan organization devoted to bankruptcy issues. ABI has more than 12,000 members, representing all facets of the insolvency field. For more information, visit abi.org.