PROGRAM MATERIALS
Program #3020
March 9, 2020

Effective Mediation Part 2 – The Art of the Opening Statement - What Should go into it and Should Your Client Speak?

Celesq® AttorneysEd Center
www.celesq.com

5301 North Federal Highway, Suite 180, Boca Raton, FL 33487
Phone 561-241-1919 Fax 561-241-1969

The Art of the Opening Statement in Mediation

Agenda

I. Introduction to Topic/Learning Points: (5 minutes)

II. Opening Statements: Understanding the Key Differences Between A Mediation Opening Statement and A Litigation Opening Statement—(20 minutes)

a. Goals:
    i. Settlement focused and collaborative vs. Winning
    ii. Persuasive
b. Advocacy skills: conciliatory vs. adversarial
    i. Common ground, not battleground
    ii. Explaining instead of attacking
    iii. Educating as to facts a low, looking for area of consensus

III. When to Utilize A Mediation Opening Statement (20 minutes)

a. Set the tone of negotiations
b. Accomplish case-specific goals
c. Risks and rewards
d. Know your audience
e. Understand opportunity to be heard and listen
f. Personalize process
g. Present old information in a new format
h. Impact on client, adversary, decision maker, etc.
i. Educating the clients

IV. Key Considerations: How to Craft an Effective Opening Statement (20 minutes)

a. Who should speak
b. Format
c. Message
d. Tone, body language, and word choice
e. Timing
f. Facts vs. Law: highlights/focus
g. Be realistic/flexible
h. Identify benefits of a resolution for both sides

V. Q&A (10 minutes)

Total CLE: 60 minutes
Total Time: 75 Minutes

SHAMPNOI
Dispute Resolution & Management Services, Inc.

The Art of the Opening Statement in Mediation

By: Leslie A. Berkoff
Moritt Hock & Hamroff LLP
&
Elizabeth J. Shampnoi
Shampnoi Dispute Resolution & Management Services, Inc.

March 9, 2020

Introduction to Topic/Learning Points:

- Mediation opening statements are an effective tool when utilized properly.
- There is a trend for counsel to forego opening statements, but this could be a lost opportunity to advocate for your client and set the stage for successful negotiations.
- There is an art to a mediation opening statement.

Understanding the Difference Between a Mediation Opening Statement and a Litigation Opening Statement

- Goals:
  - Settlement focused and collaborative vs. winning
  - Designed to persuade the other side
- Advocacy skills: conciliatory vs. adversarial
  - Common ground, not battleground
  - Explaining instead of attacking
  - Educational in nature as to law and facts

Strategy: When to Utilize a Mediation Opening Statement

- Set the tone of negotiations
- Case-specific goals
- Risks and rewards
  - Risks: could exacerbate emotion; harden parties' positions; blow up negotiations before begin; credibility assessment of the other side as a witness or effective litigator
  - Rewards: express good faith; express what mediation may not be able to portray (i.e. impact on client, personalize the process, etc.); present old information in new context; closure/opportunity to be heard

Strategy: When to Utilize a Mediation Opening Statement, *cont.*

- Know your audience
- Understand opportunity to be heard and listen
- Personalize process
- Present old information in a new format
- Impact on client, adversary, decision maker, etc.
- Educating clients – they hear the case through the other side – not their lawyer's lens

SHAMPNOI
Dispute Resolution & Management Services, Inc.

Moritt Hock & Hamroff LLP
ATTORNEYS AT LAW

Content: How to Craft an Effective Opening Statement

- Who should speak? Important: Will your client be a good witness? They will be evaluated. Is it too emotionally charged for them? Do they need to speak regardless?
- Format – Just lawyer, lawyer and client
- Message – What do you want to convey?
- Tone, body language, and word choice
- Timing – long/short – at outset or after brief – private caucus
- Facts vs. Law: highlights/focus
- Be realistic/flexible
- Identify benefits for both sides of a resolution

Questions?

#2183368

LESLIE A. BERKOFF

Practice Areas - Alternative Dispute Resolution Bankruptcy & Creditors' Rights Litigation

- Leslie A. Berkoff is a Partner with the firm where she serves as Chair of the firm's Dispute Resolution Practice Group. A skilled mediator having handled mediations in bankruptcy courts for all phases of bankruptcy-related litigation, as well as, commercial mediations in the state and federal courts and arbitration as a panel arbitrator through the American Arbitration Association. Ms. Berkoff is the past Chair of the firm's Creditors' Rights and Restructuring Department and is also involved in all aspects of creditors' rights and insolvency matters, as well as, bankruptcy cases nationwide and related litigation, including creditor, debtor, committee, and trustee representation, as well as corporate liquidations, reorganizations and out-of-court restructurings and assignments for benefits of creditors. Various concentrations including equipment and asset based lending and healthcare industries.

- Prior to joining Moritt Hock & Hamroff LLP, Ms. Berkoff served as a law clerk to the Honorable Jerome Feller, United States Bankruptcy Judge in the Eastern District of New York, from 1991 to 1993 and to the Honorable Allyne R. Ross, Federal Magistrate Judge in the Eastern District of New York, from 1990 to 1991.

- Ms. Berkoff speaks and publishes extensively and is a recognized leader in her field.

Education - Hofstra University School of Law, J.D. 1990
Editor in Chief, Hofstra Labor Law Journal
State University of Albany, B.A. 1987 *cum laude*

Admissions - Ms. Berkoff is admitted to practice in New York and Connecticut.

SHAMPNOI
Dispute Resolution & Management Services, Inc.

ELIZABETH J. SHAMPNOI

Elizabeth J. Shampnoi is President of Shampnoi Dispute Resolution and Management Services, Inc. and serves as a mediator, arbitrator, consulting expert and trainer. With 20 years of experience in the field of alternative dispute resolution (ADR), Ms. Shampnoi works with in-counsel, law firms, and executives providing strategic advice to develop and implement strategies to avoid and resolve disputes quickly and efficiently while achieving successful outcomes. Ms. Shampnoi regularly serves as a mediator and arbitrator in commercial and employment disputes and has successfully mediated and arbitrated over 200 disputes. She also provides trainings for companies concerning best practices in all areas of ADR. Ms. Shampnoi's dedication and focus in the area of ADR began early in her career when she served as the District Vice President of the New York region of the American Arbitration Association (AAA). Following her tenure at the AAA, Ms. Shampnoi served as a litigator and in-house counsel. Ms. Shampnoi is based in New York City and can be reached at (914) 522-0174 or elizabeth@shampnoiadr.com.

business law today

Business Litigation & Dispute Resolution (Https://Businesslawtoday.Org/Practice-Area/Business-Litigation-Dispute-Resolution/)

Preparing In-House Counsel and External Lawyer Advocates for Effective, Good-Faith Mediation of Mergers & Acquisitions

9 Min Read

By: Leslie Ann Berkoff (/author/leslie-berkoff/), John Levitske (/author/john-levitske/)

| February 14, 2018

IN BRIEF

- What are the best practices of some of those well-experienced in mediating an M&A dispute?
- Analyzing the process is key to a successful negotiation, and key considerations also include assessing whether the dispute is right for mediation and how to adequately prepare for the mediation.
- Another key is rethinking what success will mean for your client coming out of the mediation.

When deciding whether to mediate a mergers and acquisitions (M&A) dispute, and then preparing for the mediation, there are a variety of factors that both in-house counsel and external counsel should jointly evaluate. We recently consulted with a panel of experienced business mediation and litigation attorneys, an experienced professional business dispute mediator, and experienced in-house counsels of public companies who considered these topics. Here are some of their key thoughts.[1]

IS THE DISPUTE RIGHT FOR MEDIATION?

The initial question that should be addressed by all parties is: why mediate the dispute? The parties should first consider the cost of having to mediate an M&A dispute. This evaluation should include not only the economic loss, but also the business implications (and political implications) in proceeding to court to obtain a determination versus mediation. Of course, the parties should also consider the reality of the legal document they are working with, i.e., what it says and what their rights are under the document. Rick Duda, in-house counsel with Ingredion Incorporated, noted that counsel must ensure that there is a mediation clause in the agreement. Obviously, there are other facts to consider; for example, not obtaining a court decision may be against an entity's business interest so that it may not be the right thing to do strategically. In-house counsel must consider all these factors alongside the external legal team to ascertain the pros and cons of mediation.

Business litigation attorney Matthew Allison of Baker McKenzie noted that sometimes it is a question of timing. If both sides are willing to mediate the dispute, this is an affirmative statement that the parties are willing to resolve the claim. Also, this is a good time to walk through the process. In addition, counsel should consider that there is flexibility in terms of scope of what can be mediated as well as cost—when is the right time? In

mediation, the only thing limiting the parties is their own creativity and willingness to resolve their dispute as opposed to obtaining a ruling.

Mediation can also be a good tool to bring business partners to the table to talk things out. Ideally, this allows each party to calmly evaluate and assess its case. Time and neutral evaluation may allow tempers to cool down and avoid suit. There is a countervailing concern, which Matthew Allison identified, that one does not want to be forced into a corner to resolve an issue or prevented from pursuing their claims. The panel also referred to a famous quote by Sandra Day O'Connor: "[T]he courts of this country should not be the places where resolution of disputes begins. They should be the places where the disputes end after alternative methods of resolving disputes have been considered and tried."

PREPARING FOR THE MEDIATION

Mediator Stuart Widman of Wildman Law Offices often sends a template to the parties to be used when preparing their mediation statements. Included in this template is a request to identify the preferred type of mediation (facilitative, evaluative, or a blend). Mediation statements should include enough information to mediate, but not so much that extensive discovery results. Consider early on the key information you may want to share with the other side to the negotiations about your case. Rick Duda noted that key information will make a difference if there is going to be anything accomplished in the mediation—so why not give to the other side? Matthew Allison stated that counsel and clients must keep in mind that they are presenting their case to the other side. Therefore, having sufficient information to outline or support points and arguments may be necessary.

However, even if the information exchange is protected by privilege, counsel must consider whether full discovery still works for the company overall. Counsel and their clients may not want information in the other side's mind if at the end of the day the mediation is not successful. Counsel may want a clean slate if it falls apart, so even limited discovery could be instructive for future discovery requests if litigation goes forward.

Also consider that sometimes a reporting deadline for one side can impact negotiation and warrant holding off on resolving matters, or push matters into litigation. For example, maybe it is more up front to recognize this if no one is doing anything now to advance this process. Therefore, it may make sense to do something to move the timeline. Business litigation attorney Brian Laliberte of Tucker Ellis noted that most seasoned lawyers on both sides of a case recognize this and tend to find ways to eliminate public company reporting deadlines as an impediment to a deal, especially if the potential wait time is relatively short and the economic incentives are large enough.

KNOW YOUR CLIENT

Both in-house and external counsel must be sure to understand the client's business and its position in the marketplace. Brian Laliberte emphasized that defining the client's objectives early at the outset of a case is critical. This exercise allows for a better client relationship and more effective advocacy, especially during mediation when difficult decisions must be made. Outside counsel must therefore communicate early and often with their client as to how things are going. Risk tolerances change as cases progress, and outside counsel must stay dialed-in to their client's internal and external settlement pressures or lack thereof. Critical questions typically include:

- Is the company willing to take a case to trial?
- What is their trial experience?
- What are the internal implications for in-house counsel?
- What are the economic and noneconomic costs of a settlement?

Heather Clefisch, in-house counsel with Spectrum Brands, believes that clients should spend a lot of money on prep time, and then counsel should remind the client to compare the cost to the total cost to mediate the case versus take it to trial.

It is important early on and throughout the process to assess and critically evaluate all aspects of the dispute/case. Understand the matter and the

governing/applicable law. Also, consider the client's potential risk exposure. Brian Laliberte typically uses the following guidelines to ascertain his client's position regarding mediation and settlement early on:

- Internal—How will senior management, the board, etc. react?
- Financial—How will a settlement or adverse verdict affect the client's financial health, stock price, etc.?
- Investors—Will investors pursue claims if stock value declines?
- Public Relations—How will the public and/or customers perceive claims, settlement, or an adverse verdict?
- Regulatory—Is the client in a regulated industry? Will regulators take notice of a private civil suit? A settlement? A verdict?
- Investigate the court's track record in similar cases, e.g., scope of discovery allowed, published dispositive motion decisions, affirmances and reversals on appeal, etc.
- Determine whether jury verdicts have been reported in similar cases and the outcomes in the same or similar jurisdictions, i.e., plaintiff/defense verdicts, compensatory damages, punitive damages, etc.
- Assess the likelihood of success on the merits.

SET THE STAGE FOR MEDIATION

The lawyer should communicate regularly with both the company and with opposing counsel, avoid becoming a polarizing figure in the dispute/case, and maintain his or her integrity and credibility. Brian Laliberte and Matthew Allison agree that having integrity and credibility in the mediator's eyes also is critical. Both try to be as cooperative and accommodating as possible without compromising their respective clients' positions.

It is difficult at times for litigators to mediate effectively when there is an information deficit. Litigators must ensure that they have as much information as the discovery process can yield prior to mediation, and that they have accounted for critical facts in their settlement analysis. Mediators and litigators alike should do their

best to determine whether one side or the other is blocking or filtering important information before recommending or making a bad deal during negotiations.

Counsel should be transparent when possible during negotiations to obtain clear authority to negotiate and use specific settlement terms. Counsel should be sure to keep his or her word. This goes to build rapport and to be perceived as acting in good faith. Do not take an extreme position if it will not go anywhere. Time the mediation to maximize potential outcomes. Brian Laliberte believes that litigators, especially those with considerable trial experience, should show the other side their best case early and often. This includes "bad facts." Such facts should be acknowledged, and the reasons they do not affect the case should be explained proactively. In complex cases, demonstrative exhibits may assist counsel in demonstrating the strength of the client's claims or defenses such that a settlement looks more appealing during mediation than a jury trial.

Preparing for mediation, and setting the stage with the parties and the mediator, will facilitate a better mediation process. Remember that a mediator will measure the credibility of genuineness and good faith of parties, and it matters as to how the mediator works with them and proceeds. Matthew Allison prepares his client for the concept of a separate caucus because it is important they understand that the purpose is to allow the mediator to use all the tools in their toolkit to get a deal done. Brian Laliberte typically tries to select a solid client representative who, if necessary, can have an effective and direct conversation with the mediator about settlement considerations, monetary parameters, and broader issues that may affect whether a deal can be achieved.

WHAT IS SUCCESS IN A MEDIATION?

If counsel has prepared for the mediation and done risk analysis, then both counsel and the client can evaluate whether the result makes sense. Success is not always winning, but rather getting what the company *needs* as opposed what the company *wants*. Success could cost a lot of money and getting things resolved sooner may have more value.

IN SUMMARY

A few final takeaways from the panel's experienced business disputes mediator Stuart Widman include:

- M&A has a high potential for disputes after closing, so parties should consider putting a dispute resolution clause (including mediation) in the deal documents.
- Mediation entails lots of "Ps": preparation, persistence, patience, and possibility.
- The right mediator may reality test the parties' expectations.
- "Success" in mediation can mean many things: partial settlement, full settlement, avoiding bad precedent, saving resources, etc.
- One of The Rolling Stones' song lyrics captures an important strategic mediation concept: "[Y]ou can't always get what you want, but if you try some time, you just might find, you get what you need."

[1] This article summarizes comments from the speakers at a program from the ABA Business Law Section Annual Meeting in Chicago on September 13, 2017, in which the Dispute Resolution Committee's panel included: Matthew Allison, Esq., Partner, Baker McKenzie LLP, Chicago; Heather Clefisch, Vice President & Division General Counsel, Spectrum Brands Inc., Madison, Wisconsin; Rick Duda, Associate General Counsel, Ingredion Incorporated, Chicago; Brian Laliberte, Esq., Counsel, Tucker Ellis LLP, Columbus, Ohio; and Stuart Widman, Esq., Principal, Widman Law Offices, Chicago. Leslie Berkoff, Esq., Partner, Moritt Hock & Hamroff LLP, New York City, and John Levitske, Senior Managing Director, Ankura, Business Valuation Dispute Analysis practice, Chicago, co-chaired this program.

Searchable Keywords:
Alternative Dispute Resolution (/?S=Alternative+Dispute+Resolution),
Corporate Counsel (/?S=Corporate+Counsel),
Corporate Counsel - In-House Counsel (/?S=Corporate+Counsel+-+In-House+Counsel),

Mergers & Acquisitions (/?S=Mergers+%26amp%3B+Acquisitions), Dispute Resolution (/?S=Dispute+Resolution)

ABOUT THE AUTHORS

(/author/leslie-berkoff/)

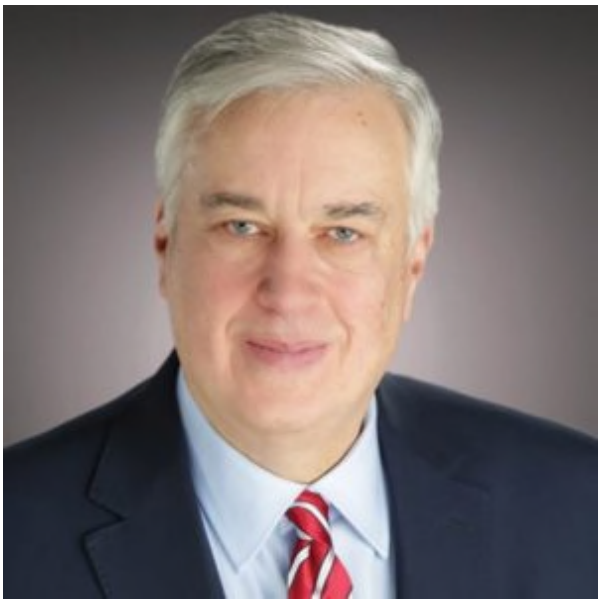
Garden City, NY

Leslie Ann Berkoff

(/author/leslie-berkoff/)

Leslie A. Berkoff is a Partner with Moritt Hock & Hamroff LLP where she serves as Chair of the firm's Bankruptcy Practice Group, as well as Advisory Co-Chair of the firm's Diversity & Inclusion...

+ Follow



Chicago, IL

John Levitske

(/author/john-levitske/)

Business Valuation and Complex Financial Disputes Expert. John Levitske is a Senior Managing Director at Ankura, focused on

(/author/john-levitske/)

business valuation and complex financial disputes. He has served as a senior...

+ Follow

MORE FROM THIS AUTHORS

(https://businesslawtoday
court-decides-applicability-section-1-federal-arbitration-act/)

12 Min Read
Business Litigation & Dispute Resolution

February 12, 2019

Supreme Court Decides on Applicability of Section 1 of the Federal Arbitration Act

(https://businesslawtoday.org/2019/02/supreme-court-decides-applicability-section-1-federal-arbitration-act/)

By: Leslie Ann Berkoff

Summary Background In a term that seems to be touching upon the Federal Arbitration Act (the FAA) with...

Read More

(https://businesslawtoday
continues-hot-topic-supreme-court/)

6 Min Read
Business Litigation & Dispute Resolution

December 18, 2018

Arbitration Continues to Be a Hot Topic Before the Supreme Court

(https://businesslawtoday.org/2018/12/arbitration-continues-hot-topic-supreme-court/)

By: Leslie Ann Berkoff

Interpretation of the Federal Arbitration Act (FAA) has been a frequent issue considered by the U.S....

Read More

(https://businesslawtoday
court-hears-argument-applicability-section-1-federal-arbitration-act/)

3 Min Read
Business Litigation & Dispute Resolution

October 16, 2018

Supreme Court Hears Argument on Applicability of Section 1 of the Federal Arbitration Act

(https://businesslawtoday.org/2018/10/supreme-court-hears-argument-applicability-section-1-federal-arbitration-act/)

By: Leslie Ann Berkoff

On October 3, 2018, the United States Supreme Court held oral argument for New Prime Inc. v. Oliveira,...

Read More

(https://businesslawtoday
on-the-1-2-3s-of-the-mediation-of-a-merger-acquisition-dispute/)

5 Min Read Mergers & Acquisitions

July 15, 2017

Reflections on the 1-2-3's of the Mediation of a Merger & Acquisition Dispute

(https://businesslawtoday.
on-the-1-2-3s-of-the-mediation-of-a-merger-acquisition-dispute/)

By: Leslie Ann Berkoff, John Levitske

On April 6 and 7, 2017, during the ABA Business Law Section Spring meeting in New Orleans, the Dispute...

Read More

By Leslie A. Berkoff

The Importance of the Right Mediator

Editor's Note: *This new column focuses on the role that mediation increasingly plays in bankruptcy. Those interested in contributing for this column can contact Ms. Berkoff at lberkoff@moritthock.com for more information.*

In order to set the stage for a successful mediation, it is crucial to select the right mediator. Not every mediator is the right fit for every kind of mediation. There are a lot of variables that go into setting the tone for a successful mediation, but one of the most important variables is the mediator.

When selecting a mediator, one must consider a variety of factors: the nature of the dispute, the personalities at the table (both lawyers and clients), and the timetable within which the dispute must be addressed. Further, and more importantly, just because someone calls themselves a mediator, or appears on a mediation panel, does not always mean that he/she is qualified to serve in that capacity. Unfortunately, some panels do not require mediators to have undertaken classes or instruction prior to being included on a list. Further, people can be too quick to try to select someone they know or have used before without truly considering the importance of making a careful and thoughtful choice in respect of the particular mediation in question.

Why does this happen? For one thing, parties can be so focused on reaching the point of agreement to go to mediation (or perhaps frustrated at being court-ordered to mediate in the first place) that they view the mediation through the lens of litigation. They might see selecting the mediator as a strategic step in the process and might believe that if they can get their friend or former colleague to serve as mediator, this will ensure that they obtain the best result. It is another way of "winning" against the other side; of course, if you have selected a good mediator, this should not be true at all. Excellent mediators will guard their reputations and the integrity of the mediation process, and will both disclose and put aside personal relationships.

How do you select the right mediator? Well, just like a client hires a new lawyer, you should evaluate the mediator's credentials. As previously stated, not all people holding themselves out as professional mediators are truly qualified, and not all mediators, if qualified, are right for the dispute at hand.

Mediator Qualifications

Let's start with the first issue: What does it mean to be a qualified mediator? This typically means that the mediator has received mediation training through a respected organization. This should usually be listed on the mediator's bio or CV. There are many good programs available to train mediators; some are run by local bar associations and usually are focused on mediation training in general. As far as the author is aware, only ABI offers mediation training geared toward bankruptcy: the ABI/St. John's 40-Hour Bankruptcy Mediation Training Program run by Prof. **Elayne Greenberg**.[1] Many mediators will have taken a variety of courses and will often seek and receive continual training. There is much to learn about mediation, and ongoing education is important, as is practicing this skill set. Mediation skills need to be honed and fine-tuned and continuously utilized.

People are sometimes surprised to learn — or fail to appreciate — that this is a skill. Just the way being a trial lawyer or being able to take a good deposition is a skill, so too is serving as a mediator. People who do not have experience with serving as a mediator can sometimes underestimate the importance of training. For example, during a recent Bar meeting discussing the *pro bono* mediation process, an attorney at a large firm was kind enough to offer to assign some of the firm's young associates to serve as mediators. While the gesture was greatly appreciated, as we cannot undervalue the donation of any attorney's time, unfortunately these young associates had neither the training nor the experience in mediation to successfully serve in any mediation, whether or not it was *pro bono*.

Advocates should be careful to stay away from the view that you just need a body to serve in the mediation role, especially if it is a *pro bono* mediation. Any reputable mediator will tell you that mediation is an artform. In order to make mediation a successful process, mediators must have the proper training, a well-developed skill set and a nuanced hand.

Mediator Experiences

Next, the parties might want to consider the mediator's experience. While it might be important to examine how many mediations this person has been engaged in and handled, parties should also focus on whether there is a unique issue at hand that might require some technical knowledge or background exposure. Why is this so important? In order

1 This next training program will be held Dec. 3-7 at St. John's Manhattan campus and is only open to 30 attendees. More information will be posted at abi.org/events.

continued on page 102

Coordinating Editor Leslie A. Berkoff
Moritt Hock & Hamroff LLP; Garden City, N.Y.

Leslie Berkoff is a partner with Moritt Hock & Hamroff LLP in Garden City, N.Y., and serves as co-chair of the firm's Litigation and Bankruptcy Practice Group. She was one of the contributors to Bankruptcy Mediation *(ABI 2016); she also serves on several mediation panels and is special projects/task force leader of ABI's Mediation Committee.*

for the mediator to successfully assist the parties in exploring their options, evaluating their risks and considering all alternatives, the mediator has to be versed in the nuances of the issues in dispute.

For example, if the dispute at issue is not simply a question of bankruptcy law but involves some other area of the law, such as trademark, copyright or licensing, you may want to consider having a mediator who is knowledgeable in all relevant areas. When dealing with the valuation and/or liquidation of claims in the bankruptcy arena, a mediator having a good understanding of the Bankruptcy Code is perhaps the most important at times. Having once handled a mediation involving claims arising out of a state court tort litigation, it is important to understand the complexities of the bankruptcy process because, at the end of the day, any claim would be part of the unsecured creditors' pool, and any claim, no matter how large, would only end up with pennies on the dollar. Thus, a mediator who only understands tort law might not appreciate how the two areas of law intersect once a claim is liquidated in bankruptcy. This knowledge and understanding of the nature of the underlying damages and law was important to assist the parties in valuing the claim.

In addition, it is important not to minimize the mediator having familiarity with the chapters of the Bankruptcy Code that are at issue. There are tremendous differences between the various chapters. As demonstrated by the *Detroit* mediation cases, knowing the nuances of chapter 9 was critically important to resolving those disputes. Moreover, some chapters are utilized less frequently than others and are unique. For example, chapter 12, in certain areas of the nation, is not utilized frequently. In 25 years of bankruptcy practice, this author has only been involved in two chapter 12 cases.

Mediator Fit

The next question that the parties should ask is whether the mediator (if otherwise qualified) is the right fit for the dispute at hand. Once the parties get past the concerns of the mediator's experience from the training and substantive expertise perspectives, the parties will want to ensure that the mediator's style and personality are the right fit for the case.

Personality matters, as well as style. In order to determine what you need, first look at who will most likely be at the table for the mediation. The parties should consider whether the mediator is a good fit for not just the lawyers and clients on your side of the table, but also for the opposing side.

At times, it is appropriate to utilize a current or former judge because some parties in some situations require an individual who can command attention and respect to bring the parties to a consensus. To be clear, that does not mean — nor does this author believe — that only judges can truly successfully mediate a dispute (all due respect to our judiciary). Rather, at times, parties will hold certain perceptions and be unwilling to explore alternative mediators for the process, but they will respond to a judge. There might be plenty of walls and hurdles to overcome during the mediation process, so there is no need to add one more if this is the mindset of the parties.

Going beyond that concern, the parties should consider the mediator's style and temperament. Do the parties need a mediator who is more apt to "take charge" of the process? Do the parties need a mediator who is more relaxed and calm in his/her style? Even if the parties have not hired a former judge, does the mediator need an air of authority, or will the parties simply respond well to someone who comes across as confident and knowledgeable? Be sure to put down your litigator's hat when considering these issues. A mediator who might get under your adversary's skin might seem great for a moment, but it will not lead to a successful mediation process since the purpose is to facilitate resolution. You are on a mediation track, so your goal and focus should be on hiring someone who will help you resolve your issues, not beat down your enemies.

Many mediators, this author included, will remind the parties during a pre-mediation call to come prepared to speak and act in a settlement-focused fashion. Moreover, many mediators will suggest that any pre-mediation submissions be focused on settlement. Remember again that the parties are not presenting their case before a court, but rather trying to convince the other side why they should settle the matter. Thus, a mediator who is stressing all of these concerns is important.

Parties should not squander the opportunity to interview the mediator before hiring him/her. The parties should be interviewing the mediator to review a variety of issues, including the mediator's experience, training, familiarity with the underlying issues and style. Mediators can and should be able to provide the parties with a *curriculum vitae* of prior mediations and training experience. While mediators will obviously not reveal what occurred during any prior mediations, they can give you the names of cases and identify (without attribution) issues that they have handled both in mediation and as litigators or advocates in the mediation process. With respect to the issue of having familiarity with the issues at hand, it is not necessarily relevant whether that knowledge was obtained by serving as a mediator or handling those issues through litigation; the question is just a knowledge base.

In addition, it is important to inquire as to whether the mediator has the time necessary to handle the matter in question, especially depending on the complexity of the mediation at issue. The parties should inquire as to whether the mediator has the time and flexibility to dedicate to the mediation, if that is needed. At times, mediations are handled in compressed time frames, as they are done on a parallel path with a pending trial or within deadlines proscribed by the court.

It is important to ensure that the mediator has the time to speak with the parties ahead of time, read any pre-mediation

statements and carve out the appropriate day(s) to engage in a process to seek a resolution. There is nothing more destructive to the mediation process than when a mediator simply does not have the time to devote to the parties. The author once served as an advocate in a mediation where both sides spent hours preparing lengthy mediation statements, and it was clear from the opening conference of the mediation that the mediator had not bothered to read any of them. It undermines the integrity of a vital tool in the lawyer's tool kit and effectively destroys any chance of resolution of the matter within the mediation process.

Mediator References

Do not be afraid to ask the mediator for references if the he/she is not familiar to you so that you can evaluate whether the mediator is the right choice. Most mediators will be able to provide you with references. While the parties to a prior or pending mediation cannot reveal what occurred during the mediation, they certainly can speak as to the mediator's style, effectiveness, attention to the process and creativity.

References are also important to assess the mediator's temperament and style. Take the references and ask their thoughts about the mediator's style and process. Ask whether they would use this mediator again. It is also important to ask whether their client responded well to the mediator and the matter was resolved, or if not, why that might have occurred. With respect to the last point, however, it is important to keep in mind that the inability to resolve a particular matter might have nothing to do with the mediator. Sometimes, a controversy is simply just not ripe for resolution and other issues might be at play. At times, matters do not get resolved during the mediation, but, unless constrained by a court order or deadline, a good mediator will often leave the door open for the parties to come back and try again.

Conclusion

As a mediator with 15 years of experience, this author can attest that a skilled mediator will often have a good chance of helping parties resolve a dispute. However, it is essential that the parties select the right mediator for the situation — one with the relevant experience needed for the particular dispute and the right personality to work with the parties involved in the dispute. If the parties have decided to try to resolve their matter through mediation, be sure to spend the time picking the right mediator for the job so that it can be an effective and rewarding process for both you and your clients. abi