

**BANKRUPTCY SECTION OF THE
STATE BAR OF ARIZONA**

BANKRUPTCY MEDIATION
“WHY IT WORKS”
AND
“WHEN TO USE IT”

MAY 14, 2008

PRESENTED BY:

THE HONORABLE CHARLES G. CASE, II

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CONTINUUM OF DISPUTE RESOLUTION

UNILATERAL

-*AVOIDANCE*: walking away from a dispute

BI-LATERAL

-*NEGOTIATION*: direct contact between the disputing parties, or their representatives, to communicate and resolve a dispute

TRI-LATERAL

-MEDIATION: negotiation facilitated by a neutral third-party who assists the parties in moving to resolution of a dispute

-ARBITRATION: a third-party's intervention with the power to make a decision (binding or non-binding) to resolve a dispute

-LITIGATION: state financed and administered court system of formalized rules and appealable decisions made by a judge or jury to resolve a dispute

FIVE STEPS OF THE MEDIATION PROCESS

1. CONVENING

“GET THEM TO THE TABLE”

2. OPENING

“GET IT STARTED (RIGHT)”

3. COMMUNICATING

“GET THEM TALKING”

4. NEGOTIATING

“GET THEM MOVING”

5. CLOSING

“GET THEM TO AGREE (IN WRITING)”

CONVENING

- **COMMENCES THE PROCESS
BRINGS THE DECISION MAKERS WITH
AUTHORITY TO RESOLVE THE DISPUTE
TOGETHER AT THE SAME TIME AND
LOCATION**
- **PROVIDES A NEUTRAL LOCATION AND
FORUM TO RESOLVE THE DISPUTE**

CONVENING

- **FACILITATES CONTEMPORANEOUS MULTI-PARTY COMMUNICATION AND NEGOTIATIONS**
- **FORCES THE PARTIES AND THEIR LEGAL COUNSEL TO TAKE A “STEP BACK” FROM THE LITIGATION PROCESS AND FOCUS ON THE PRESENT OF RESOLVING THE DISPUTE**

OPENING

“Why Mediation Works”

- **RESOLUTION OF THE DISPUTE IS VOLUNTARY**
- **THE PARTIES CONTROL THE OUTCOME AND MANAGE THEIR OWN RISK**
- **THOSE WITH AUTHORITY TO SETTLE ARE PRESENT**

OPENING

- **STOPS THE FIGHTING AND FOCUSES THE DISCUSSION ON A MUTUALLY ACCEPTABLE RESOLUTION AND NOT WHAT HAPPENED IN THE PAST**
- **THE PROCESS IS CONFIDENTIAL**
- **IT IS COST EFFECTIVE, IMMEDIATE AND FINAL**
- **THE PROCESS ALLOWS FOR CREATIVE SOLUTIONS NOT JUST A “WINNER TAKES ALL” RESOLUTION**

OPENING

- **THE PARTIES AND THEIR LEGAL COUNSEL GET TO “HAVE THEIR SAY” WHICH IS EQUIVALENT TO THEIR “DAY IN COURT”**
- **THE PARTIES CAN RECEIVE NEUTRAL AND INFORMED INPUT AND DEVIL’S ADVOCACY CONCERNING POSSIBLE OUTCOMES OF THEIR DISPUTE**

COMMUNICATING

- **MEDIATOR GATHERS THE FACTS**
 - **Allows everyone to explain the historical background of the dispute and vent**
 - **Verifies that the parties are working off the same set of facts**
 - **Asks relevant and exploratory questions**
 - **Checks perceptions**
 - **Listens for clues to precipitate a settlement that may not be monetary**

COMMUNICATING

- **MEDIATOR DEVELOPS CREDIBILITY AND BUILDS AN ENVIRONMENT OF TRUST AND OPTIMISM CONCERNING SETTLEMENT**
 - **Diffuses the antagonism**
 - **Moves the parties off of who is right or wrong and focuses them on what is a solution that each side can live with versus win**

COMMUNICATING

- **MEDIATOR EXPLORES AND CONFIRMS THE LAW**
 - Facilitates the parties hearing their legal position often for the first time
 - Plays “devil’s advocate” to present the opposition’s legal arguments or possible judicial viewpoints
 - May express some thoughts about possible outcomes

COMMUNICATING

- **MEDIATOR CHALLENGES THE LAWYERS' AND PARTIES' ASSUMPTIONS**

- What are the strengths of your case?
- What are the weaknesses of your case?
- What may happen if you do not settle?
- What do you think the other side views as a fair settlement?
- What are the results that you hope to achieve through this process?

COMMUNICATING

- **MEDIATOR IS THE NEUTRAL, KEEPER OF THE AGENDA, SECRETARY AND SUGGESTS ALTERNATIVES TO RESOLVE THE DISPUTE**

NEGOTIATING

- **MEDIATOR GETS THE BALL ROLLING, CONTROLS THE PACE, KEEPS THE PROCESS PRODUCTIVELY MOVING FORWARD**
- **MEDIATOR EDUCATES CONCERNING THE PROCESS AND ENCOURAGES THE NEGOTIATION DANCE TOWARD THE “ZONE OF POSSIBLE AGREEMENT”**

NEGOTIATING

- **MEDIATOR SETS THE PARAMETERS FOR THE NEGOTIATION AND SETS PRIORITIES OF ISSUES**
- **MEDIATOR DISCOURAGES UNREASONABLE OFFERS AND EXTREME POSITIONS**
- **MEDIATOR ENCOURAGES CONCESSIONS**

NEGOTIATING

- **MEDIATOR USES SHUTTLE DIPLOMACY AND IS THE SECRETARY TO KEEP TRACK OF THE COMPETING OFFERS**
- **MEDIATOR OFFERS ALTERNATIVE SOLUTIONS**
 - **Non-monetary matters**
 - **Structured settlements**
 - **Bracketing-if opponent will do “x”
will you do “y”**
 - **Use mediator to test advance a number or proposal**

CLOSING

METHODS USED BY THE MEDIATOR TO BREAK THE IMPASSE AND CLOSE THE DEAL

- **EMPHASIZES RISK**
 - **Fear of the unknown**
 - **Loss of control**
 - **Questions about recovery**
 - **Appeal**

CLOSING

- **EMPHASIZES COSTS OF PROCEEDING WITH THE LITIGATION**
 - **Attorneys' fees to get to final decision**
 - **Net recovery**
 - **Time value of money**
 - **Business and personal relationship costs**
 - **Emotional and quality of life issues**

CLOSING

- **EMPHASIZES FINALITY AND EFFICIENCY OF THE PROCESS**
 - Resolve today versus unknown period
 - Parties control the outcome not a judge
 - Closure financially and emotionally
 - Moving on with the parties' lives
 - Eliminates possibility of an appeal

THE MEDIATOR GETS THE AGREEMENT IN WRITING TO BIND THE PARTIES AND OFTEN AGREES TO ARBITRATE ANY DISPUTES OVER THE TERMS OF THE SIGNED SETTLEMENT TERM SHEET

“WHEN TO USE IT” IN BANKRUPTCY PROCEEDINGS

- **ADVERSARY PROCEEDINGS**

- Preference disputes
- Avoidance actions
- State law specific matters
- Dischargeability actions
- Disputes with continuing relationship issues
- Condition precedent to litigation in mass preference and fraudulent conveyance suits by a chapter 7 or 11 trustee or private liquidating 11 trustee

- **TURNOVER ACTIONS**
- **CLAIM DISPUTES**
 - **Lien priority issues**
 - **Liquidation of claims**
- **ASSUMPTION/REJECTION ISSUES**
- **EXTENDED CREDITOR DISPUTES**
- **VALUATION AND INTEREST RATE DETERMINATIONS**
- **UNIQUE, OR MULTI-PARTY, DISPUTES RELATED TO CHAPTER 11 PLAN FORMULATION OR CONFIRMATION ISSUES**