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Mediation Matters

By Christine E. Devine

Maximizing Mediation Success

Going Beyond the Requirements of the Model Standards

Christine E. Devine
Mirick, O'Connell, DeMallie & Lougee LLP
Westborough, Mass.

Christine Devine is a partner in Mirick, O'Connell, DeMallie & Lougee LLP's Creditors' Rights, Bankruptcy and Reorganization Group in Westborough, Mass. Her practice includes creditors' rights, bankruptcy and business restructuring, and she represents traditional and nontraditional lenders, commercial landlords, court-appointed trustees, chapter 11 debtors and creditors' committees.

Risk in professional practice takes many forms, and, as with any professional practice, there are risks for professionals serving in the role of mediator. While mediators appear to infrequently face legal claims from disgruntled parties,[1] they should remain alert to situations where there is increased risk to both the mediator and the potential success of the mediation process. While risk avoidance is often interpreted as "lawsuit avoidance,"[2] mediators can help insulate themselves against litigation exposure and help facilitate the mediation process by proactively and prospectively considering and assessing risks broadly. Specifically, actions taken by the mediator at the outset of the process to ensure that parties have a full understanding of the process can help build trust between the mediator and the parties while also serving to minimize the risk of confusion (and finger-pointing) by the parties as the process unfolds.

While the Model Standards,[3] among other things, set guidelines for "lawsuit avoidance," this article looks beyond those dictates and considers those moments at the beginning of and during the mediation process where the potential for misunderstanding between the mediator and the parties is particularly high. Misunderstandings by parties are likely to damage the trust between the mediator and parties that is required for a successful mediation and is therefore likely to risk the success of the mediation itself.[4] Further, risks surrounding misunderstandings are greater where one or more of the parties to the mediation is *pro se* and therefore lacks independent sources of legal information and advice.

A successful mediator will take steps up front to ameliorate these risks. For example, the mediator might initially take extra time to ensure full understanding and clarity by the parties regarding conflict disclosures, confidentiality issues and the mediator's role as a neutral participant throughout the process. Extra time spent at the outset might reduce the potential for misunderstanding and thereby help the parties develop trust in the mediator.

Conflicts of Interest: Meaningful vs. Boilerplate Disclosures

Model Standards

Attorneys are undoubtedly familiar with the conflict rules established by the Rules of Professional Conduct within the jurisdictions where those attorneys practice. However, a mediator serves as a "neutral" in the process rather than an advocate. This distinction is important in the context of conflicts.

For example, the level of trust that a client immediately and intuitively establishes with his/her counsel (*i.e.*, the person they know will be their advocate) is inherently different than the level of trust that a party establishes with a neutral (*i.e.*, a neutral party not "on their side"). Due to this distinction regarding the nature of the relationship, meaningful and thorough conflict disclosures are important, not only for legal reasons, but also to ensure that the mediator establishes and maintains a level of trust with all of the parties.[5]

The Model Standards include fairly straightforward guidance regarding a mediator's obligations with respect to conflicts of interest.[6] Specifically, Model Standard III, sub-part A, provides as follows:

> A mediator shall avoid a conflict of interest or the appearance of a conflict of interest

1 Michael Moffitt, "10 Ways to Get Sued: A Guide for Mediators," 8 *Harv. Negot. L. Rev.* 81 (Spring 2003) (noting that lawsuits against mediators are generally rare); *see also* Michael Moffitt, "Suing Mediators," 83 *B.U. L. Rev.* 147 (2003).
2 Michael Moffitt, "What, Me, Liable?," 9 No. 4 *Disp. Resol. Mag.* 25 (Summer 2003).
3 *See* Model Standards of Conduct for Mediators (2005).
4 Jerry M. Markowitz, *et al.*, "Participating in the Mediation," *Bankruptcy Mediation* 109, 115-20 (ABI 2016). This book is available for purchase at store.abi.org (members must log in first to obtain reduced pricing).
5 *Id.*
6 *See* Model Standards of Conduct for Mediators S. III(A) (2005).

during and after a mediation. A conflict of interest can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator's impartiality.

Model Standard III also includes guidance on additional issues related to potential conflicts of interest.[7]

Risk

Professionals in all types of practices spend significant time forming and fostering relationships that they hope will lead to a robust network of business referrals. Insolvency professionals also practice in a highly specialized area of the law. For many, referral-source networks are often formed within tightknit insolvency communities.

As a result, when provided with the opportunity to serve as mediator, the mediator may very well have a connection with one or more counsel involved and potentially one or more of the parties.[8] Mediators must be mindful that existing relationships might serve as the basis for the "appearance of a conflict of interest." The likely familiarity among one or more of the parties or their counsel might be perceived as being too familiar by a party who is an outsider to the insolvency community and, as such, be potentially harmful to the mediation process.

Further, in an effort to both comply with technical disclosure rules and maximize practice efficiencies, there might be a temptation for a mediator to develop a portion of their disclosures in a boilerplate manner. For example, a mediator might describe connections to counsel involved in the mediation in the form of "catch-all" disclosures rather than as a list of connections specific to the individual or the case at hand.[9] Over-inclusive, but nonspecific, disclosures might very well satisfy the Model Standard III, but they are unlikely to provide parties with a complete picture of important relationships that the mediator has with the opposing parties and/or counsel.

Further, where a party is *pro se*, likely with no prior connections to the insolvency community, the risk of mistrust increases. Therefore, it is crucial to ensure that relationships are not only disclosed comprehensively but also explained, discussed and understood by the parties. Providing lengthy generic written disclosures without meaningful dialogue and context might save time at the outset, but it will risk confusion and mistrust — both of which are detrimental to the process.

By its nature, successful mediation requires the parties to develop a high level of trust in the mediator.[10] If the parties fail to fully comprehend the level of contact that the mediator has with counsel for the opposing party (*e.g.*, by virtue of serving together on a committee or presenting together on a legal education panel), trust is likely to erode when the substance of the connection becomes clear through small talk and side conversations.

Recommendations

The mediator must adjust both the substance of conflict disclosures and the time and detail required to make meaningful disclosures, depending on the circumstances. Consider providing information regarding conflict disclosures well in advance and scheduling a specific time to review and discuss just those issues with the parties. Also, be mindful that *pro se* parties lack the resource of having their own counsel and will likely be wary of a mediator if they ultimately suspect that their adversary has a closer relationship with the mediator than they understood when they agreed to the mediation and signed the disclosure consent. Certainly, boilerplate disclosures held at the ready and intended to cover all or most circumstances are unlikely to provide the parties with an understanding of relationships within the bankruptcy community. Taking the time in the beginning to have necessary conversations and provide information regarding connections will help mediators develop the necessary trust with parties and avoid risks as the mediation proceeds. Of course, if a party remains concerned or noticeably uncomfortable, reconsider the assignment.

Confidentiality Issues: Important, but Nuanced

Another area of concern with respect to both legal risk and risk to the mediation process is that of confidentiality. Without question, confidentiality is incredibly important to the mediation process because the parties must be able to communicate fully and frankly in order to identify their interests and attempt to break through impasses.[11]

Model Standards

The Model Standards provide important guidance regarding confidentiality issues.[12] Specifically, Model Standard V provides the following guidance:

> A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law.

Notably, although Model Standard V explicitly provides that where parties agree, a mediator may disclose information obtained during the mediation,[13] there is no guidance in the rule regarding exceptions that might be "required by applicable law."

Risk

To be successful, parties to a mediation must be able to fully express their thoughts and concerns during media-

7 Model Standard III also addresses the need for the mediator to conduct a reasonable conflict review (sub-part B), directs disclosure of all actual or potential conflicts to parties (sub-part C), requires updated disclosures throughout the mediation as necessary (sub-part D), and, even where the parties are willing to consent after-disclosure of conflicts, requires withdrawal if "a mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation" (sub-part E).

8 It is common for certain individuals within the insolvency community to serve in roles that are recurring in many different cases. For example, individual practitioners often serve repeatedly as trustees, plan administrators and liquidating supervisors. Those frequently serving in these roles are often both members of the legal community and parties to the litigation underlying the mediation. As such, a trustee as a party to mediation is often a personal acquaintance of the mediator.

9 "Boilerplate" disclosures include indicating that the parties or their counsel might be involved in many of the same bar associations and professional organizations as counsel to one of the parties, rather than identifying specific connections to the actual attorneys.

10 Markowitz, *supra* n.4.

11 *See* David A. Hoffman, *et al.*, "Confidentiality, Privilege, and Other Legal Issues in Mediation," *Mediation: A Practice Guide for Mediators, Lawyers and Other Professionals* § 6 (Mass. Continuing Legal Educ. Inc. 2013) (noting that confidentiality is "[o]ne of the hallmarks of mediation" and detailing sources of confidentiality in mediation, including applicability of privilege and exceptions thereto).

12 *See* Model Standards of Conduct for Mediators S. V(A) (2005).

13 Model Standard V, sub-part A.1 states that "[i]f the parties to a mediation agree that the mediator may disclose information obtained during the mediation, the mediator may do so."

tion. Specifically, the mediation process requires parties to (1) assess and articulate their interests, (2) identify and consider the impasses blocking resolution, and (3) discuss potential paths to a resolution. In order to achieve those goals, parties need to speak freely during the mediation process without fear that comments made, or concessions considered, will be used against them at a point in the future. It is assumed — and in fact explicit in the Model Standards — that the mediator will keep all communications of the parties confidential, but when might this confidentiality be invaded, and at what risk to the mediator and to the process?

A common example used to clearly illustrate the potential limits on confidentiality is when the mediator receives information about a future crime.[14] Although that example is an easily understood boundary, other examples are more difficult and potentially uncomfortable for a mediator to explain (*e.g.*, if a party subsequently charges the mediator with unprofessional conduct).[15] Further, some of the limits to confidentiality are very tangible (*i.e.*, in response to a court order), while other limits are quite vague (*i.e.*, to prevent "manifest injustice").

A successful mediator will endeavor to avoid the risk that a party incorrectly believes that confidentiality is absolute. If questions arise during the mediation, it will be necessary to revisit the scope and limits of confidentiality. For example, the mediator might be required to "correct" one of the parties if during the mediation process it becomes apparent that the party misunderstands the confidentiality requirement as protecting all statements made regardless of content. Trust will be broken if a party initially believed that confidentiality was to be fully absolute, only to be admonished during mediation regarding confidentiality limits.

Not only does confidentiality have boundaries, but those boundaries are often quite complicated.[16] The challenge that the mediator must overcome is the need to discuss both the confidential nature of the mediation process (encouraging full and frank communications) and the need to explain the potential limits of confidentiality.

Recommendations

To minimize risks regarding confidentiality issues, a mediator must spend time with the parties discussing issues of confidentiality at the beginning of the process and also let parties know at the outset that confidentiality issues can be complicated, and that, as such, it might be necessary to return to the discussion at a later point in the process. The mediator's goal is to ensure that should it become necessary to have a more detailed and nuanced discussion at a midpoint in the process, neither of the parties will be surprised or unduly concerned by that need. In most cases, (1) spending a little more time up front explaining confidentiality, (2) providing parties with a chance to digest and question the parameters of confidentiality, and (3) returning to the discussion as needed throughout the mediation process as necessary will likely pay dividends regarding the integrity and success of the process.

14 C. Edward Dobbs, "Standards of Professional Conduct for Mediators," *Bankruptcy Mediation* 127, 136 (ABI 2016).
15 *Id.*
16 *See* Hon. Raymond T. Lyons, "How Confidential Are Mediation Communications?," XXXVI *ABI Journal* 8, 36-37, 67-68, August 2017, *available at* abi.org/abi-journal.

Impartiality: Knowing Your Role and Sticking to It

Model Standards

Impartiality is inherent to the role of a mediator as a "neutral." Much has been written about the occasional request of parties to be "evaluative" as mediators. Further, credible arguments can be made that there is often a need for mediators to be evaluative if the process demands.[17] The Model Standards provide the following guidance regarding the impartiality of mediators:

> A. A mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice.
>
> B. A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality.[18]

Among many circumstances that can give rise to the appearance of partiality, one recurring risk is the pressure from parties and potentially their counsel to have the mediator provide an evaluation of the legal merits of the issues being mediated.

Risk

While there are many reasons to avoid providing an evaluation while serving as mediator,[19] one of the most significant reasons is that when providing an evaluation, a mediator must engage in some level of "picking sides." The parties, along with their counsel, are likely quite invested in the narratives that they have developed regarding their theories of the case and assessments of the legal issues and risks.

Upon deciding to evaluate issues and arguments, the mediator will be required to discount, at least in part, one party's legal theory. Put another way, providing an evaluation requires the mediator to at least *appear* to be partial to certain arguments or positions. While parties might implore the mediator to provide a substantive evaluation of the merits of the dispute, having the mediator provide that evaluation might risk the success of the process. The mediator must be seen as an impartial facilitator and not as pushing one side to accept the position of the other.

Recommendations

If an evaluation would be helpful to move the mediation forward, a mediator should provide options for the parties to consider rather than provide the mediator's own evaluation of the merits of the parties' positions. For example, one option is to invite the parties to engage in a decision-tree analysis[20] to allow the parties to do their own evaluation, and potentially narrow or eliminate an impasse without requiring the mediator to evaluate. Also, depending on the circumstances, it might be helpful to bring in an outside expert to provide evaluation options.[21] Finally, in the context of complex litigation, it might be possible to request that the judge rule on

17 *See* Louis H. Kornreich, "Achieving a Balance Between Absolute Neutrality and a Participant's Desires in Mediation," XXXVI *ABI Journal* 5, 28-29, 73-74, May 2017, *available at* abi.org/abi-journal.
18 *See* Model Standards of Conduct for Mediators S. II(A), (B) (2005).
19 Lela P. Love, "The Top 10 Reasons Why Mediators Should Not Evaluate," 24 *Fla. St. U. L. Rev.* 937 (1997).
20 Elayne E. Greenberg, "What They Really Want … Bringing Objective Evaluation into Mediation," St. John's Legal Studies Research Paper No. 17-0008 (June 20, 2017), *available* at ssrn.com/abstract=2990032.
21 *Id.*

one or more discrete issues in dispute; once that impasse is cleared, the parties can move forward with mediation on the remaining issues.

Conclusion

Without question, it is essential for mediators to adhere to the directives of the Model Standards (or similar ethical rules directed at mediators). However, the success of the mediation process might turn on whether the parties have a full understanding of critical and complicated issues surrounding conflicts, confidentiality and mediator impartiality. It is important for the mediator to take the time that is necessary at the outset of the mediation process to ensure that the parties have as complete an understanding as possible regarding those issues.

The mediator will also enhance the prospects for a successful mediation by alerting the parties at the outset that it might be necessary to revisit those issues during the mediation process and engage in more detailed discussions at a later time. Finally, it is important for the mediator to be aware of moments during mediation when the potential is high for misunderstanding and, in those moments, take the time to ensure that parties have a high comfort level and full understanding of the issues. abi

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