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Mediation: Mother, May I?

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In many bankruptcy courts, using mediation to resolve complex disputes, or at least narrow issues in dispute, has become commonplace.[1] In fact, in certain jurisdictions mediation of adversary proceedings is mandatory.[2] However, one recent bankruptcy court expressed disapproval at the notion that every bankruptcy dispute should be mediated, and set forth the factors it will consider before allowing parties to expend any estate funds on mediating disputes.

In In re Cody Smith, the Chief Bankruptcy Judge Bohm of the Southern District of Texas issued an opinion questioning the need and efficiency of mediation in certain bankruptcy matters.[3] Although the issue before the court was a Rule 9019 settlement motion, Judge Bohm took the opportunity to inform the parties of his displeasure at their actions in moving forward with mediation without first seeking the court's approval.

The most interesting and informative part of the decision are the factors Judge Bohm required to be considered before authorizing parties to proceed with mediation. Specifically, Judge Bohm provided a nonexclusive list of 10 factors he considers in the context of approving mediations:

1. the subject matter of the dispute;
2. the amount of discovery completed;
3. the amount of time the attorneys have spent discussing settlement with their respective clients and whether the lines of communication with the clients have been open;
4. the amount of time the attorneys have spent discussing settlement

with opposing counsel, whether the lines of communication have been open, and whether any progress has been made toward a resolution;
5. the actual courtroom experience of the attorneys in adducing testimony and introducing exhibits;
6. whether the attorneys have explained the mediation process to their respective clients and reviewed with them the costs of mediation versus the costs of simply going forward with the scheduled hearing or trial;
7. the name, qualifications and fee of the proposed mediator;
8. the estimated cost for each client of the mediation (i.e., the client's share of the mediator's fee, the attorneys' fees for representing the client in the mediation, and any travel or other associated costs);
9. the percentage of the estimated cost to the estate (i.e., the estate's portion of the mediator's fee, plus attorneys' fees associated with the mediation, plus costs of lodging and travel, if any) to the actual amount of cash presently in the estate; and
10. whether any of the parties are opposed to mediation because they want their day in court as soon as possible.[4]

In addition to setting forth the above factors, Judge Bohm also made three rulings regarding the actual retention of a mediator. First, he held that mediators are "professional persons" and thus must be retained under § 327 of the Bankruptcy Code.[5]Next, Judge Bohm held that nunc pro tunc relief for the retention of a mediator was inappropriate. He found that there was no inherent emergency and thus parties always had an opportunity to seek advance court approval before retaining the mediator.[6] Lastly, Judge Bohm questioned what has become commonplace in many districts: the use of a retired bankruptcy judge as a mediator. Judge Bohn expressed a concern as to whether such use created the appearance of impropriety where the retired judge was from the same district as the pending action.[7]

This decision yields several practice points for practitioners. First and foremost, even when mediation is mandatory, parties should consider seeking advance approval from the court for the mediator's retention (or appointment) if that is not specifically spelled out in the relevant court order or local rule. Additionally, parties wishing to voluntarily mediate matters should be cognizant of the 10 factors discussed above, even if not appearing in Texas before Judge Bohm. One of Judge Bohm's biggest concerns was that the cost of mediation may not be warranted where the parties could simply engage in settlement discussions on their own. Practitioners are reminded that not every judge looks favorably on mediating all matters. Obtaining court approval before mediation is a must when mediation is voluntary and parties are looking to spend estate resources on the mediation.

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[1] See, e.g., In re City of Detroit, Michigan, Case No. 13-53846 (Bankr. E.D. Mich. 2013) [Dkt. No. 322] (directing creditor treatment in plan and negotiation and renegotiation of collective bargaining agreements to mediation); SIPC v. Bernard Madoff Investment Securities LLC, Adv. Proc. No. 08-01789 (Bankr. S.D.N.Y. 2010) [Dkt. No. 3141] (establishing procedures including mandatory mediation for avoidance actions).

[2] See Amendment to General Order re: Procedures in Adversary Proceedings, Bankr. D. Del. April 11, 2005 (requiring appointment of mediator within 120 days after an answer or responsive pleading).

[3] In re Cody Smith, Case No. 12-32096 (Bankr. S.D. Tex. Jan. 27, 2015) [Dkt. No. 332].

[4] Id. at *21-22.

[5] Id. at *7.

[6] Id. at *15-17.

[7] Id. at *9.

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