

**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**

**CAROLYN JOHNSEN, ESQ.**

**Jennings Strouss & Salmon, PLC**

**GARY KELTNER, ESQ.**

**Jennings Strouss & Salmon, PLC**

**LARRY FOLKS, ESQ.**

**Folks Hess Kass, PLLC**

# 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**