

The Mediation Society 2011 Education Program Highlights

The Mediation Society held its Education Program on April 29, 2011 with over 60 participants. Titled “Mediating in the Dark: Strategies, Techniques and Opportunities in a Stormy Financial Climate,” the Program received rave reviews, and so we wanted to share a few of the program highlights.

Plenary Session

Introduction: Fred Hertz kicked off the day by summarizing recent news articles demonstrating the timeliness and complexity of our subject matter, and asking us to reflect on how the hard economic times have changed the way we handle our mediations and how we need to rethink our approaches to mediated solutions.

Kate Levinson, PhD: Fred introduced our keynote speaker, Kate Levinson, and her talk, titled “Emotional Dynamics of the Financial Crisis.”

Kate shared key concepts from her newly published book, “Emotional Currency, a Woman’s Guide to Building a Healthy Relationship with Money”, explaining that money is legal tender but also can be one of the most emotionally charged areas of our lives. She noted that our attitudes and actions about money vary depending on context and our personal backgrounds.

Kate gave examples of money as emotional and/or symbolic (e.g. representing self-esteem, power, love, etc.), pointing out that these attitudes flip back and forth at times. Kate urged that to understand others and help them resolve conflicts, we each need to know our own biases, associations and narratives around money and to listen actively when others talk about their own views.

Judge Randall Newsome and Andrea Porter, Esq.: Michael Carbone introduced this portion of the program, titled “The Substantive legal Challenges: The Impact of Bankruptcy on the Mediation Process.”

Bankruptcy attorney Andrea Porter set out the framework of bankruptcy law, noting among other things the importance of the pre- and post-petition filing periods for Chapter 11 cases. While most people are aware of the automatic stay that goes into effect upon the filing of the Chapter 11 petition, mediators also should focus on the 90-day period prior to the filing of the bankruptcy petition. In general, and subject to various defenses, transfers of money or property made during the 90-day pre-petition period may be clawed back into the estate of the debtor-in-possession. This rule adds complexity to the settlement of cases that involve a true risk of bankruptcy.

Judge Randall Newsome, the chief judge of the United States Bankruptcy Court, Northern District of California, and now a JAMS neutral, gave his perspective on the types of bankruptcy cases making their way through the court system over

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the last few years and gave voice to the lack of flexibility afforded by the Court system in foreclosure cases.

The panelists responded to a series of thought-provoking questions related to the mediation of cases involving bankruptcy or the threat of bankruptcy. Among other things, the panel made the point that counsel and mediators should watch for things such as the one-year pre-petition fraudulent transfer claw-back period and the categorization of certain debts as non-dischargeable, which can likewise affect settlement negotiations.

Lucie Barron, ADR Services and Derek Ryan, JAMS: TMS President Patricia Prince moderated this panel titled “The Business of Mediation in Dark Financial Times,” which focused on changes to the business of mediation as a result of the economic downturn.

Lucie and Derek provided many business insights and practice pointers, including the following: 1) in order to economize on the time required for mediation it is important to give early attention to insurance coverage issues, particularly when there are several tiers of insurance; 2) it is good to have someone submit (preferably by email so the mediator has a working draft ready to be modified) a proposed settlement agreement to the mediation in order to save time; 3) for complex cases it is important to get the mediator involved early; 4) pre-mediation conference calls are essential, and most mediators do not charge for pre-mediation conference calls or telephone follow ups; 5) more cases are being set for a half day rather than a full day (with a resulting reduction in the minimum fee payment) with follow up sessions if progress is made; 6) the average total time per case is ten to twelve hours; 7) alternative fee arrangements may be requested, and ADR Services now takes credit cards; 8) problems have arisen with insurance carriers not paying their bills; 9) there has been an increase in employment cases, along with a decrease in real estate and construction; and 10) attorneys are increasingly asking for a mediator’s proposal to facilitate a resolution of the dispute.

Interactive, Concurrent Workshops

Family & Family Business Partnerships Practice Area Facilitator: Judy Barber; Co-Facilitator: Marissa Wertheimer

This workshop focused on “listening for understanding” and “looping” during a mediation involving a hypothetical contested Pre-nuptial Agreement. The group interactively explored how looping could help the parties view the dispute in a new and more productive way. One observer noted that this workshop focused more heavily on dealing with emotions than most of the other groups.

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The group summarized looping as active listening and reflecting, which helps participants feel good and helps them clarify information if they have been misunderstood.

The group found it a valuable tool in many situations to ask the question, “What is most important to you?” The group also learned that by asking the speaker if he or she understood the point correctly, the listener is showing vulnerability and clarifying important points at the same time.

Corporate, Commercial, Finance & Bankruptcy Practice Area

Facilitator: Carol Kingsley; Co-Facilitator: Martin Dodd

This workshop focused on a hypothetical mediation involving breach of contract and fraud in the sale of a dental practice where the defendant dentist was considering bankruptcy.

The group started with a discussion about the different possible approaches to the solution; they considered going directly after the difficult financial situation/facts and/or first working out who the parties were and what motivated them. They also discussed whether the hypothetical was primarily a business, legal or human problem, or all three.

The group also spent time exploring the attorney advocate’s role and the various ways in which the case could be framed or “boxed.”

Real Estate, Construction, Landlord-Tenant Practice Area

Facilitator: Michael Carbone; Co-Facilitator: Richard Stratton

This workshop focused on a hypothetical mediation of a case where buyers sued the seller of an apartment building for fraud, misrepresentation, negligence, breach of fiduciary duty and breach of contract.

The group focused on many of the problem issues, including the question why the property had sold at a loss and the common use of rescission as a remedy in a down market.

The group noted that it is difficult for a mediator in a case like this to come into mediation without having prior discussions with the parties, and in particular that it can be important for the mediator to insist that the insurance carrier be present.

The group considered the question of what to do when the defendant has no money. They discussed generating value as a solution and finding soft dollar solutions such as paying in the future. They noted that to some parties obtaining an obligation to pay money is important even if it is unlikely they will ever collect.

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The group noted that sometimes people get so caught up in their disputes that they demand their “pound of flesh” in settlement without giving sufficient thought to the viability of the agreement, which can create future disputes and litigation. The group shared several different ways people had characterized failed mediations, including that they are the “ghost of litigation future” or like running into a brick wall or off a cliff.

Employment, Labor & Intellectual Property Practice Area

Facilitator: Cynthia Remmers; Co-Facilitator: Claudia Viera

This workshop focused on a hypothetical mediation of a case involving the termination for “economic reasons” of a 58 year old senior executive with 22 years of service at a small company in financial trouble; the employee sued for age discrimination, wrongful termination, intentional failure to pay commissions, failure to conduct a proper investigation and intentional infliction of emotional distress.

The group began by analyzing how a mediator should approach the case, including whether to have a pre-mediation conference and whether to begin with a joint or separate session. The group also considered what valuable information the mediator knew going into the mediation, including the fact that the parties had a joint interest (for different reasons) in resolving the matter quickly.

The group noted that, as outlined by the plenary speakers earlier in the day, the company might discover that these claims are non-dischargeable in bankruptcy since they are based on intentional torts. That point led to a discussion about the ethics/efficacy of a mediator sharing legal knowledge with one side or the other.

The group thought the mediator should explore what evidence the company could produce to support its claimed insolvency, noting the need to know if the bankruptcy threat was real and whether the “economic reasons” defense was real or a pretext to mask discrimination. The group also discussed the difficulties in structuring a financial payout with the threat of bankruptcy, including whether a chunk of the payout should be front loaded and what type of default clause to include.

-End of Program Highlights-