

**THE MEDIATION MINUTE**  
**Vol. 2 – July 2015**  
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*In 2013, the Judges of the Middle District adopted new Local Rule 9019-2 to respond to the development of the mediation process in the Middle District. The Mediation Minute will be a regular feature of The Court Connection and will feature select mediation topics.*

**THE OPENING SESSION**

While mediation has become more and more common in bankruptcy cases, there appears to be a split among professionals concerning the importance of the opening session in the mediation. I have often heard comments, and much has been written in mediation literature, that the opening session is “useless” or “counter-productive”, or that “we all know what this case is about so let’s move right into the real mediation phase.”

In my view, the opening session and opening statements by the parties are a valuable and often critical part of the mediation process. Certainly, there may be cases where having the parties sit in a room together is not advisable, particularly when there is a severe level of discord among the parties. In such instances, the mediator and the mediation participants should discuss this fact in advance of the mediation session and determine how best to proceed. But those instances are very rare, and even if the parties are not initially inclined to participate in a joint opening session because of the potential for inciting hostility and anger, an effective mediator can often control the situation and diffuse the hostilities to allow for a productive session. Of course, one of the hallmarks of the mediation process is that the parties are in control of the process and the mediator should initially communicate with the parties and their counsel to navigate the opening session in the most effective manner.

Parties involved in a mediation should be aware that it is important, and in fact required, to have some form of opening session where the mediator explains the mediation process to the parties. Rule 10.420(a) of the Florida Standards of Professional Conduct, for mediators, which is applicable to mediations in the Bankruptcy Court for the Middle District of Florida pursuant to Local Bankruptcy rule 9019-2(d), provides as follows:

***Rule 10.420 Conduct of Mediation***

- (a) ***Orientation Session.*** Upon commencement of the mediation session, a mediator shall describe the mediation process and the role of the mediator, and shall inform the mediation participants that:
- (1) *mediation is a consensual process;*
  - (2) *the mediator is an impartial facilitator without authority to impose a resolution or adjudicate any aspect of the dispute; and*
  - (3) *communications made during the process are confidential, except where disclosure is required or permitted by law.*

A typical mediation session will commence with an opening session with all parties and counsel present. The mediator will explain the above information, and often provide more detail regarding the process of the mediation, as well as information about himself or herself that will help the mediator gain the trust and confidence of the parties. Then, the opening session typically includes a presentation by each party about their case.

The primary arguments against having an opening session in this fashion is that it is “counter-productive” or a “waste of time.” If one believes that the purpose of the opening statement is to convince the mediator or the other side that a party is “right” or that their side will “win” then that may be true. In most cases the parties are entrenched in their positions in the case, and have been arguing their positions to each other, and also to the Court, for several months or even years. The parties, or at least their attorneys, are aware of the strengths and weaknesses of the case. They have likely provided mediation statements to the mediator so the mediator is knowledgeable about the case.

But the purpose of the mediation is to attempt to settle the case. The opening statement provides a valuable opportunity to humanize your client and to speak directly to the other party. In most cases, prior to this time the other party has only heard what his/her lawyer has told them about you, your client, and your case. This is an opportunity to present your case directly to the other side, unfiltered by the language of the opposing lawyer. Conversely, it is also an opportunity for your client to hear the position of the other side directly from their lawyer and from the other party, and for your client to perhaps get a different perspective on the case or to better understand the position of your adversary.

I had a recent mediation where the lawyer for one side was unexpectedly unavailable during the opening session and the parties agreed to commence the opening session with the lawyer on the phone. The opening session lasted much longer than typical opening sessions, with both clients speaking freely to each other. Because the lawyer was on the phone (again this was an unusual situation as I believe parties should always be present in person at mediation for the mediation to be effective) that lawyer did not appreciate the openness of the dialogue and attempted to cut off some of the dialogue from the opposing party. Notwithstanding the advice from his attorney, the client continued to engage in the direct discussions as he wanted to hear from the party on the other side. As is often the case, these two individuals had never directly communicated before. I believe this open dialogue facilitated the ultimate resolution of the case a few hours later.

Mediation is a process. Our recently enacted Middle District Local Rule on mediation defines mediation as “a confidential process that includes a supervised settlement conference presided over by an impartial, neutral mediator to promote conciliation, compromise and the ultimate settlement of a civil action.” Local Bankruptcy Rule 9019-2(a). Additionally, Rule 10.210 of the Florida Standards of Professional Conduct for mediators defines mediation as “a process whereby a neutral and impartial third person acts to encourage and facilitate the resolution of a dispute without prescribing what it should be. It is an informal and non-adversarial process intended to help disputing parties reach a mutually acceptable agreement.”

The opening session is a critical first step in the fascinating process of mediation. If used appropriately and effectively, and not jettisoned because of the parties' disdain for each other or because it is simply viewed as a waste of time, it can pave the way for a negotiated, consensual resolution of the parties' dispute that will also serve to alleviate some of the strain on the busy bankruptcy courts in the Middle District of Florida.

*Bradley M. Saxton served as the Chair of the subcommittee of the Local Rules Committee which drafted proposed amendments to Local Rule 9019-2.*