BANKRUPTCY MEDIATION

Top 10 Frequently Asked Questions

1. What is bankruptcy mediation?

Bankruptcy mediation is a highly successful negotiation process facilitated by a neutral third-party mediator who assists the parties to resolve their dispute.

2. When is bankruptcy mediation available?

At any point during a bankruptcy proceeding when the parties and their legal counsel agree to participate in the mediation process.

3. What types of bankruptcy disputes are typically mediated?

Disputes asserted by Chapter 7 trustees and parties in adversary proceedings concerning preference, avoidance, non-dischargeability, fraudulent conveyance and claims allowance actions are frequently mediated.

Bankruptcy mediation is also useful for resolving multi-party disputes and discrete issues in all types of contested matters such as valuation, interest rate and state law specific disputes.

4. What are the primary benefits of bankruptcy mediation?

The parties control the outcome of their dispute through a voluntary, immediate, confidential and cost-effective process. In addition, the parties select a resolution that can be creative, flexible and actually complied with instead of being subject to a "winner takes all" court decision.

5. How do I select a qualified bankruptcy mediator?

The United States Bankruptcy Court of the District of Arizona (the "Bankruptcy Court") appoints attorneys and bankruptcy trustees who demonstrate significant bankruptcy expertise and mediation training to serve as both uncompensated and compensated bankruptcy mediators (the "Panel Mediators"). There are also many well qualified mediators who may be located from sources including, without limitation, the Alternative Dispute Resolution Section of the State Bar of Arizona.

The names and contact information of the Panel Mediators appointed by the Bankruptcy Court are available for review on the Bankruptcy Court's website www.azb.uscourts.gov by clicking on the following links: Court Information, ADR-Mediation and Approved Uncompensated or Compensated Mediators.

6. What rules govern a bankruptcy mediation?

Local Bankruptcy Rules 9072-1 through 9072-9 of the Bankruptcy Court, which are available at the same website location listed above, include detailed rules concerning the appointment of Panel Mediators and the procedures for scheduling and conducting a bankruptcy mediation.

7. How much does a bankruptcy mediation typically cost?

Local Bankruptcy Rule 9072-7(e) provides that the parties shall share equally all fees and expenses of a bankruptcy mediation unless the parties agree otherwise.

Counsel for the parties must submit a Confidential Mediation Position Statement in the form required by Local Bankruptcy Rule 9072-8(c), a template of which is available at the same website location above, to the mediator in advance of the mediation and, of course, participate in the mediation with the client. That cost varies depending upon the complexity of the case.

Additionally, Local Bankruptcy Rule 9072-4 provides that, unless otherwise ordered by the Bankruptcy Court, assignment of a matter to mediation does not delay or stay discovery, pre-trial hearing dates or trial schedules. As such, any fees and costs incurred by the parties to compensate their legal counsel and the mediator are an additional litigation expense. Comparatively speaking, however, any fees and costs incurred by the parties to participate in the mediation process are well spent if the process results in either: (i) an immediate resolution of the dispute; or alternatively; (ii) the parties having an improved understanding of their respective positions and the issues to be resolved through subsequent settlement negotiation or litigation.

Bankruptcy mediators typically charge their standard hourly rate for an attorney, or other professional, of their level of experience to prepare for and conduct a mediation. Most bankruptcy mediations last an entire day. The parties may, however, agree to limit the mediation to one-half day to minimize the expense of the mediation process.

Unless the mediator's fees are to be paid from assets of the bankruptcy estate, a fee application does not have to be submitted to the Bankruptcy Court to pay the mediator's fees and costs.

8. What steps are required to schedule a bankruptcy mediation?

- The parties must select a mutually acceptable mediator who satisfies the qualification requirements of the Bankruptcy Court;
- Contact the mediator to verify that the mediator is available when required and has no conflicts of interest to preclude the mediator from conducting the mediation;
- File an Application For Appointment Of Mediator and Verified Statement Of Mediator and lodge a form of Order Appointing Mediator with the Bankruptcy Court. Templates of said pleadings are available in Word format at the same website location listed above; and
- Upon appointment by the Bankruptcy Court, the mediator will arrange a conference call with counsel for the parties, or take other steps, to assist the parties to select a date, time and location for the mediation that must be attended, in person, by a representative of each party with authority to resolve the dispute and their legal counsel.

9. Is the information disclosed during a bankruptcy mediation confidential?

Absolutely. The combination of Local Bankruptcy Rule 9072-8(f), Bankruptcy Rule 9017, Federal Rule of Civil Procedure 408 and A.R.S. §12-2238 preclude all oral, or written, information revealed during a bankruptcy mediation from being disclosed outside the mediation or used as evidence in any manner in the related bankruptcy proceeding. In addition, the bankruptcy mediator may not be called as a witness in the bankruptcy proceeding.

10. What is required if the bankruptcy mediation results in a resolution of the dispute?

It is imperative that a successful mediation result in a binding settlement term sheet signed by the parties and their legal counsel on the day of the mediation. The mediator is responsible for preparing the term sheet.

Local Bankruptcy Rule 9072-9(a) provides that the mediator is authorized to designate a party to prepare and file the pleadings to seek Bankruptcy Court approval of the terms of the settlement agreed upon at the mediation. Bankruptcy Rules 2002 and 9019 apply for approval of the settlement by the Bankruptcy Court. Most counsel file a Motion For Approval Of Settlement And Compromise which appends the signed term sheet from the day of the mediation and send out a 20-day negative notice which summarizes the terms of the settlement. If no party-in-interest objects, a certification of service and no objection and form of order approving the settlement are lodged with the Bankruptcy Court.