EQUITABLE TRANSITIONS

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Educated and Flexible Solutions to Crises of Solvency

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Points to Ponder: Ultimate Dispute Resolution by Herb Katz

Over the last several years Ultimate Dispute Resolution (U.D.R.), out of court solutions to litigation resolution, has played an increasing role in the American judicial system.

As parties, their attorneys, and the courts become more familiar with the use of U.D.R. and, in particular, with mediation, more and more people are turning to that system as a means solving problems. Why? Mediation is faster, less expensive, and the resolution resides in each party's hands. A mediator is not a third party outsider who imposes his will on the parties. Rather, a mediator guides them to a resolution of their own making.

If you or your attorney have agreed to try mediation, or if the court has ordered you into mediation to try and settle your particular matter, there are several preliminary issues you need to address.

Because many lawyers are not well versed in the mediation process they approach the problem as though it was a court settlement conference conducted by a judge This is not the case. Mediation is very different because a successful resolution depends on the contributions and consent of each party member participant.

CHOOSING THE MEDIATOR

Unlike a court case in which the parties cannot select the judge who will hear the matter, parties in mediation can select the person who will assist them in solving the problem. Thus, it is a good idea to talk to the mediator before the mediation session. Unlike improper ex parte contacts with a judge, there is nothing illegal or improper with interviewing a perspective mediator to discover how he conducts his mediation, what he expects from the parties (briefs, etc.), and to get a feel for his personality, problem solving method, and thought processes. Remember, all communications within mediation are privileged so that you need have to worried about statements made to the mediator.

What's Inside

Going, Going…Gone!

Equitable Transitions recently concluded an auction of the music rights from Beyond Music just in time for the Fourth of July fireworks. Generating its own pyrotechnics, the auction generated revenue of $500,000, 60% over initial estimates.

Now We Are Seven

Equitable Transitions is pleased to announce that Johnny Nalbandian and Barry Stern have joined our team. Johnny founded one of the nation's largest seafood retail chains. Barry brings more than 25 years of Bankruptcy Court administrative experience.

For more details visit www.equitabletransitions.com and click the "Our Team" tab.

Where's the Popcorn?

Equitable Transitions has just produced a CD-ROM, "An Introduction to General Assignments," that explains with accuracy, clarity, and humor the fundamentals of an Assignment for the Benefit of Creditors.

You can request a copy via e-mail to James Scarborough at jscarborough@equitabletransitions.com.

Words, Words, Words, We're Not Sick of Words

Equitable Transitions is pleased to announce the following firm-related coverage and publications.

David Haberbush's appearance before the United States Supreme Court merited first page coverage in the Long Beach Gazette ("Long Beach Attorney before Supreme Court," April 22, 2004).

His article, "The End of the Beginning: Alternatives to Bankruptcy," appeared in the July 6-19 edition of the Long Beach Business Journal.

His article, "Avoiding Bulk Sales Pitfalls" appeared in the August 3-16 edition of the Long Beach Business Journal.

For reprints, please e-mail James Scarborough at the address above or visit our web site (See "Publications") for printable PDF versions.

David Haberbush & the Supremes

Todd Crespi, CNN's sketch artist for the United States Supreme Court, drew an image of David Haberbush as he presented his case before the United States Supreme Court Justices. You can view the image by clicking the "Publications/Images" button on E.T.'s web site, www.equitabletransitions.com.

In Memoriam

Equitable Transitions Member Clay "Skip" Gervais recently passed away after a brief illness. Though he was with us for only a short time, we will remember with much fondness his gentle spirit, his ready smile, and his wise and guiding hand.

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Questions you should ask include "What training did you have?" "Do you approach mediation as a true mediator or more like a settlement officer?" "What are your strengths and weaknesses?" "Will you remain neutral or will you get more involved if the negotiation should falter?" "What previous personal or professional contacts have you had with the parties or their lawyers?" The answer to these questions should comfort you as to how the mediation is likely to be conducted and enable you to prepare the client or yourself.

Find out what experience the mediator has had. If it's important that the mediator be familiar with the subject matter in dispute then its best to find that out up front. There is a split between mediators and lawyers as to whether or not a mediator should have knowledge in the subject matter of the case, or is it more important that the mediator should have the skills to facilitate the negotiation. Depending on your stance with regard to this issue, be sure to get the answer as early as possible.

Mediation is a process that may take several sessions to conclude. Given patience and preparation almost any dispute can be settled.

PREPARING FOR MEDIATION

First, the client should be informed about the process of mediation. Be sure that he or she understand that mediation is not a settlement conference before a judge but rather a process designed to enable the parties to settle their disputes. As such, it is up to the parties to arrive at a settlement which will serve their purposes. The mediator is there for the sole purpose assisting the parties with that effort. Whether to settle or not is strictly up to them.

Having said that, it helps to have the parties and their lawyers fully prepare themselves for the mediation in order for the mediator to do his or her job. Some lawyers approach the process without serious thought and planning.

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Such an approach more often than not that leads to failure.

Most mediators require a short brief that will inform them about the issues. That document must lay out the client's knowledge of the facts and position of the case. Since the contents of matters prepared for mediation and divulge during the mediation are confidential and cannot be for or against the party if the case is not settled, the brief should be as open as possible, particularly if the brief will not be exchanged with opposing counsel.

The lawyer should plan carefully for the mediation session as if they were preparing for trial. He or she should be well versed in both the law and the facts as well as knowing the strengths and the weaknesses of the case. This will not only help the mediator bridge the gap between both parties but will help them arrive at a more practical settlement. Even though mediation brief has been filed a lawyer should be prepared to give an opening statement of the clients' views of the case and tell why the client would otherwise prevail in court. In preparing the opening statement remember who is being addressed: it is the other side. Since most mediators tend to start the process with a joint session before going into private caucuses, this may be the only time for the parties to address each other and lay out their respective positions.

Thought should be given to client preparation for this opening session. If the client is articulate and persuasive, it might work to have him speak and give the mediator and the other side his or her particular flavor for those issues. If the client does not wish to speak at the opening session, there will be plenty of time for him to talk it over with the Mediator in private caucus, not just to discuss the case, but to broach any issue which seems to bother the client. When planning, discuss with the client the final destination they want to reach. To determine where to start the process, you need to know where you want to end up. Obviously it shouldn't be so far out of sight that the other side will

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be turned off. You should also determine what your opponent might wish to obtain.

Once you get into mediation the tactics depend upon how your opponent reacts. It is important that you maintain flexibility so that you and your client can modify your goals. If you plan carefully, you can adhere to your strategy even as the mediator shuffles between parties and conveys offers and counter-offers. One thing to keep in mind is that a mediator cannot help settle the case unless the parties give him or her all the information necessary to move the parties to a place where settlement can be reached.

Therefore, you must disclose even your cases' bad points. Remember, every point discussed in the mediation is privileged and cannot be divulged to the other side without permission, so you need not worry about anything told to the mediator to help him or her to settle the matter.

Finally, if any agreement is reached the mediator should not adjourn the session until the parties sign a written settlement agreement. If no agreement is reached, both parties and the mediator should be encouraged to try and continue talking even after the mediation. Mediation is a process that may take several sessions to conclude. Given patience and preparation almost any dispute can be settled.

1. UDR can be used as a means to settle non-litigated disputes as well.
2. Unless it is subject to being discovered by other means.

Upon retirement, Herb Katz was the Chief Bankruptcy Judge for the Southern District of California. He now limits his practice to mediation and arbitration services. He also serves on Equitable Transitions's Advisory Board.