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The Smith Case: Is the Glass Half Full?

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Ethical Compass
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By Elayne E. Greenberg

Introduction

Many in our ADR community have already chosen to side with one of the choruses of polarized voices that are either supportive of or critical of the recent judicial decision *In re Cody W. Smith*.[1] In that decision, Chief United States Bankruptcy Judge Jeff Bohm disallowed the trustee's appointment of a mediator, because, *inter alia*, the trustee didn't first secure the approval of the presiding bankruptcy judge. A cursory read of Judge Bohm's decision mistakenly leads us to believe that the case is just about a bankruptcy trustee's obligation to follow section 327(a) of the Bankruptcy Code, requiring a trustee to obtain the approval of the court *prior* to spending the estate's money on professionals such as a mediator. The rationale for this rule is to "contain the estate's expenses and avoid intervention by unnecessary participants."[2] However, a more nuanced read of the case ethically challenges us to question existing practices about how mediators get appointed to cases, which cases are appropriate for mediation, and the distinct, but sometimes overlapping, contribution both attorneys and mediators offer in resolving a case.

The Relevant Context *In re Cody W. Smith*

Cody W. Smith, the Debtor, filed for a Chapter 7 bankruptcy.[3] The appointed trustee identified Mr. Cody's assets that could be liquidated and used to pay off his debts. Included in Mr. Smith's assets to be liquidated was Mr. Cody's one-third interest in a limited partnership of a 14,857-acre ranch.[4] However, Mr. Smith's mother, who happened to be the general partner of the limited partnership, strongly objected to the liquidation of the ranch.[5]

Seeking to overcome this impasse, the trustee *sua sponte* appointed retired Judge Clark as the mediator.[6] The cost of the mediator was to be paid from the Debtor's estate.[7] Judge Clark had served on the bankruptcy bench in Texas from 2004-2012 and had retired from the bench in late 2012. However, the trustee on the case failed to get Judge Bohm's *prior approval* for the appointment of Judge Clark as the mediator and didn't even notify Judge Bohm of the trustee's plan to try mediation.[8]

Beyond the procedural errors for disallowing the mediator's appointment, Judge Bohm discussed two ethical issues that are the focus of this month's column: How does the court ensure transparency in the selection of neutrals? Which cases are appropriate for mediation?

Freedom of the Appearance of Bias in Mediator Appointment

If courts and ADR providers are to preserve the integrity of their neutral selection process, and mediators are to preserve their impartiality, the process of appointing mediators must be transparent. In the *Smith* case, Judge Bohm explained that when a sitting bankruptcy judge appoints an ex-bankruptcy judges as a mediator without the protection of section 327, such an appointment might create either a real or apparent abuse of the appointing bankruptcy judges' power.[9] However, if section 327 mandates are followed and there is a hearing disclosing the relationship of the sitting and former judge, there is then a more transparent process that provides the creditors an opportunity to object to this appointment if they so choose.[10] As Judge Bohm reminds, the bankruptcy bar was plagued with "cronyisms" and "patronage" prior to the Bankruptcy Reform Act of 1978, and we have an ethical obligation to prevent that from happening again.[11]

The polarized reactions to Judge Bohm's decision reflects, in part, our divided world views about "cronyism." For some, referring a case to your friend, a respected colleague or political supporter is just a reality of everyday business. And that reality extends to the appointment of neutrals. This group speculates that the decision was probably a reaction to challenged personality dynamics among the involved parties. Reacting from a different vantage point, others applaud Judge Bohm's decision for requiring a transparency in the mediation selection process that is too often blurred by cronyism.

Beyond bankruptcy and into our broader ADR world, we have all wondered at times why certain mediators seem to be favored over others and to what degree "cronyism" and "patronage" influence mediator selection. And even though as neutrals we may have adopted as our mantra the words "disclose, disclose, disclose," ADR providers, courts and mediators sometimes don't consider these professional relationships to be a conflict and the subject of disclosure. After all, isn't this just the way business gets done? And, as mediators, if we receive a case from a judge or ADR provider who wants to refer us more cases, how does this, if at all, affect the way we mediate and our bias towards promoting settlement? As

we know all too well, the "cronyism" and "patronage" that influence neutral selection also contribute to the lack of diversity that continues to plague our profession. Some ADR providers such as FINRA have sought to minimize such contamination by selecting mediators through rotating lists. What else can we do to achieve even greater transparency in neutral selection?

Value Added of Mediators

In his opinion, Judge Bohm identified the following ten factors that he minimally would consider before appointing a mediator:[12]

1) The subject matter of the dispute.
2) The amount of discovery completed.
3) The amount of time the attorneys have spent discussing settlement with their respective clients and whether the lines of communication with the clients have been open.
4) The amount of time the attorneys have spent discussing settlement with opposing counsel, whether the lines of communication have been open, and whether any progress has been made towards a resolution.
5) The actual courtroom experience of the attorneys in adducing testimony and introducing exhibits.
6) Whether the attorneys have explained the mediation process to their respective clients and reviewed with them the costs of mediation versus the costs of simply going forward with the scheduled hearing or trial.
7) The name, qualifications, and fee of the proposed mediator.
8) The estimated cost for each client of the mediation (i.e. the client's share of the mediator's fee, the attorney's fees for representing the client in the mediation, and any travel or other associated costs).
9) The percentage of the estimated cost to the estate (i.e. the estate's portion of the mediator's fee, plus attorneys' fees associated with the mediation, plus costs of lodging and travel, if any) to the actual amount of cash presently in the estate.
10) Whether any of the parties are opposed to mediation because they want their day in court as soon as possible.

This author agrees that it is important to send appropriate cases to mediation. However, there remains a pervasive lack of understanding about how mediation works and what the possible "value added" mediation contributes to case resolution. As one glaring example of such misunderstanding, there remains chronic confusion between the overlapping, yet distinct, contributions an effective mediator and competent settlement lawyers each bring to the resolution of a case. This confusion impacts judges' and lawyers' decisions about which are the appropriate cases to refer to mediation and when it is appropriate to make that referral. Some share Judge Bohm's thinking in *In re Smith*, believing that if you have two good settlement lawyers, you don't need a mediator.

Yes, competent lawyers can and do settle cases, and many don't need a mediator. As my colleague Dwight Golann reminds us in his book, *Sharing a Mediator's Powers: Effective Advocacy in Settlement*, skilled lawyers can integrate into their advocacy approach many of a mediator's skills to settle their own cases.[13] However, even the most competent settlement lawyers may find that they can't settle every case.

A good mediator may provide the "day in court" that each party needs before he can even consider resolution options and a more client-centered process that allows a party to finally focus on settlement rather than revenge. Or, a skilled mediator can provide a welcomed "third side" that helps lawyers and clients understand the impasse and its resolution from a needed alternative perspective. And, we may all recall mediations where the appointment of a mediator expedited discovery and kept parties focused on resolution. In these situations, the appointment of a mediator may make economic and settlement sense.

Mediators have an ethical obligation to correct this misinformation. Specifically, Standard IX Advancement of Mediation Practice of the ABA Model Standards of Conduct (2005) provides:

> A. A mediator should act in a manner that advances the practice of mediation. A mediator promotes this Standard by engaging in some or all of the following:
>
> 1. Fostering diversity within the field of mediation.
>
> 2. Striving to make mediation accessible to those who elect to use it, including providing services at a reduced rate or on a pro bono basis as appropriate.
>
> 3. Participating in research when given the opportunity, including obtaining participant feedback when appropriate.
>
> 4. Participating in outreach and education efforts to assist the public in developing an improved understanding of, and appreciation for, mediation.
>
> 5. Assisting newer mediators through training, mentoring and networking.

> B. A mediator should demonstrate respect for differing points of view within the field, seek to learn from other mediators and work together with other mediators to improve the profession and better serve people in conflict.[14]

Thus in our work, writings and professional engagements, we need to continue to clarify these misconceptions. Within the bounds of ethical and agreed-upon confidentiality, we need to continue to speak with judges, lawyers and dispute resolution consumers and publicize the range of cases that have benefited from mediation so that even more appropriate cases may access mediation. We also need to refine our understanding about the nuances of effective mediation so that we continue to make mediation a responsive process to the expanding range of parties and cases.

Conclusion

Dispute resolution professionals regard conflict as an opportunity. The discordant reactions to the *In re Cody W. Smith* decision provides us an opportunity to re-visit two important issues with ethical underpinnings: the appointment of neutrals and the referral of cases to mediators. This mediator sees the glass as half full.

Endnotes

1. *In re Smith*, 524 B.R. 689 (Bankr. S.D. Tex. 2015).
2. *Id.* at 696 (citing *In re Garden Ridge Corp.*, 32 B.R. 278, 280 (Bankr. D. Del. 2005)).
3. *Id.* at 692.
4. *Id.*
5. *Id.*
6. *Id.* at 693.
7. *Id.*
8. *Id.*
9. *Id.* 697.
10. *Id.* at 700.
11. *Id.* at 698.
12. *Id.* at 704.
13. Dwight Golann, Sharing a Mediator's Powers: Effective Advocacy in Settlement (ABA Publishing 2013).
14. Model Standards of Conduct for Mediators § 9 (2005).

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