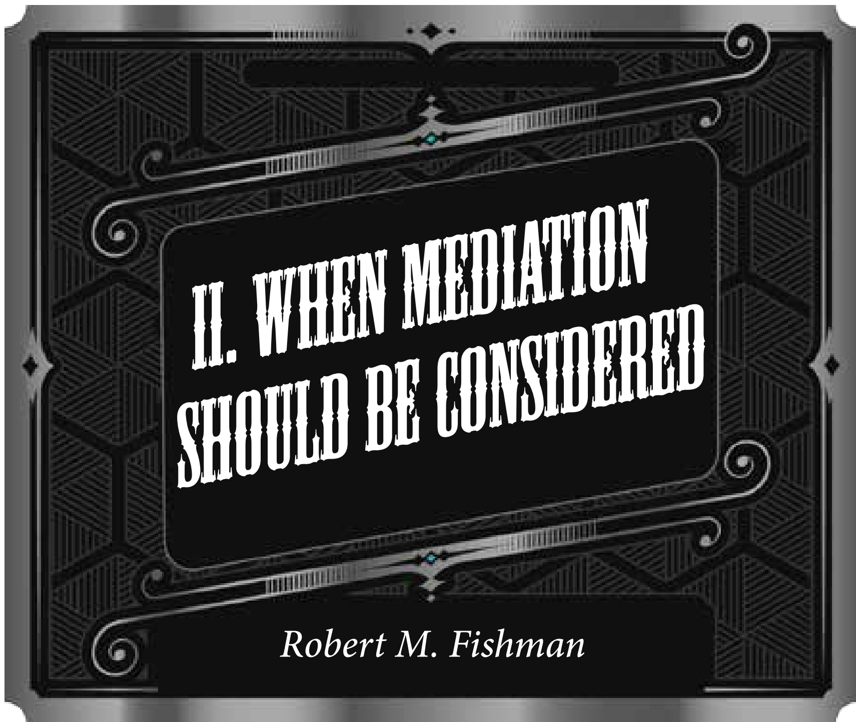

Of course, there is no one answer or even a correct answer to the question, "When should mediation be considered?" Many factors should be taken into account when determining whether mediation is an appropriate process for the parties to consider. The nature of the dispute(s), the procedural posture of the matter, and the interests of the parties are among the variables that potentially have a significant impact on this decision. However, one issue ultimately determines whether it is the right time to mediate: Are the parties ready to both engage in the self-determination process and reach a consensual resolution?

The success or failure of most mediation is directly tied to the acceptance by the relevant decision-makers that "now" is the time to attempt to solve the pending problem. This is so because mediation

is a self-determination process. There is no court to impose an outcome on the parties. The mediator cannot "make" any party agree to anything. No party should feel compelled to reach a resolution in mediation. Without the decision-makers coming to the realization that the time is ripe for resolution, it is difficult, if not impossible, for the mediation process to result in a successful outcome, that being the consensual resolution of the pending dispute(s). It is the mutual commitment to a self-determined resolution that leads to a successful mediation outcome.

Sometimes, especially in the context of court-ordered mediation, the decision-makers come to the mediation process begrudgingly. They are not optimistic about the chances of success and are not committed to the process. In that situation, it is incumbent on the mediator to provide a process that allows the parties to see the benefits of a self-determined, consensual outcome. Often, the decision-maker arrives at the right frame of mind during the mediation, rather than in advance of it.

A. The Dispute

Numerous types of disputes are appropriate for resolution by mediation. In the bankruptcy context, disputes usually fall into two categories: adversary complaints and "case outcome" issues, such as plan confirmation, asset disposition or the relative rights of competing parties. Mediation can be a useful alternative when parties want to reach resolution more quickly and less expensively than can be obtained by proceeding on the litigation track.

Adversary proceedings are often ripe for resolution through mediation. Most adversary proceedings are just disputes about money. One party (usually the trustee or the debtor in possession) claims that the defendant owes the estate money under one of many possi-

ble theories. The controversy might be about an alleged preferential transfer,[1] a fraudulent transfer[2] or the simple recovery of an obligation owed to the estate. These disputes can range from the very straightforward to the highly complex. The controversies might be about the facts, the applicable law or both.

Certain types of adversary proceedings, such as the avoidance of alleged preferential transfers, are typically susceptible to resolution by mediation because (1) the elements of the claim are pretty straightforward (with some exceptions), (2) the defenses are limited by the statute and (3) the parameters of the facts necessary to support those defenses are relatively well understood by experienced practitioners. Other disputes, such as the avoidance of alleged fraudulent conveyances or breach-of-fiduciary-duty claims, present a more complicated array of variables. While these types of disputes are regularly successfully mediated, they often require parties to wade deeper into the litigation process before the disputes are ripe for successful mediation.

“Case outcome” issues present a more complex scenario. Often, unlike adversary proceedings, multiple parties are involved (debtor, equity representatives, trustee, committees and financial institutions). The context of the mediation might be confirmation of a plan, the sale of significant assets, substantial financing commitments, or a combination of one or more of the above. The logistics of mediating such issues are much more cumbersome and complex than most typical mediations. Because the litigation of these types of disputes can be extremely expensive, and because the determination of them can be very time-sensitive, mediation may be the most efficient path to reach a consensual resolution. Currently, the bank-

1 11 U.S.C. § 547.

2 11 U.S.C. § 548 and/or 11 U.S.C. § 544.

ruptcy community does not often resort to mediation in these types of scenarios. However, mediation can be a very effective tool to find common ground and break logjams that allow for the resolution of "case outcome" disputes.

B. The Procedural Posture

Has the litigation already commenced, or are the claims at issue still in the "threatened" stage? Often, until a complaint has been filed and an answer prepared and filed, the parties are not able (or willing) to focus sufficiently and clearly on claims and defenses. Likely, at the pre-filing stage, everyone is operating under their own view of the facts, and there is not a general understanding of the relevant facts so that the parties can focus their attention on the resolution side of the equation. In many circumstances, at this early stage in the process it is premature for the parties to try mediation. While there are some cases that are capable of being successfully mediated prior to the initial pleading stage, these are the exception and not the rule.

Once the complaint and answer are filed, then discovery becomes the variable that impacts the timing of a decision to mediate. Because many cases involve disputed (or at least misunderstood) facts, it is often necessary for at least some discovery to take place in order for the parties' understanding of the situation to develop well enough to engage in meaningful resolution discussions. One way or another, the parties likely need a relatively well developed understanding of the facts and legal theories in order to be ready to mediate.

At the point in time when the parties' legal positions are established and the "facts" have been sufficiently explored so that the parties are basically talking about the same story, then such a dispute is ripe for mediation.

C. The Parties and Their Respective Interests

A successful mediation almost always involves a metamorphosis of sorts in the parties' thinking. They stop focusing on their respective legal and factual positions (positions are the essence of litigation) and instead allow their actual interests to govern their decision-making. A party's actual interests might be to stop spending time and money on a dispute, to resolve a dispute that allows a project or transaction to be completed, or to mend fences with a current or former business associate. Often, the realization and acceptance of these "interests" can lead to a prompt and satisfying resolution. And when the parties' goals change, the obstacles to a successful resolution become easier to overcome.

To the extent that parties come to the realization, prior to the commencement of mediation, that the pursuit of their respective positions is leading them to time-consuming and expensive litigation, and a transition to the pursuit of their respective interests has a greater likelihood of leading to an acceptable consensual outcome, then those parties are well positioned to successfully utilize mediation. Often, this so-called metamorphosis is not attainable prior to the mediation. It may occur during the mediation, allowing for a breakthrough in the negotiation process.

D. Conclusion

There is no formula for when the time and/or circumstances are right to mediate a dispute. Numerous variables inform that decision. The most important ingredients to a successful mediation are parties who want to engage in a self-determination process and who are ready to move past arguing their respective positions and toward meeting their respective interests.