AMERICAN BANKRUPTCY INSTITUTE/

NATIONAL CONFERENCE BANKRUPTCY JUDGES

SEPTEMBER 26 – SEPTEMBER 30, 2015

MEDIATION PANEL OUTLINE

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NATIONAL CONFERENCE OF BANKRUPTCY JUDGES
MEDIATION PANEL

A. Model Rules

   a. Brief summary/highlights of the rules including a couple of examples indicating philosophy of rules;

   b. Efforts on outreach/awareness amongst the judiciary;

   c. Summary of implementation goals.

B. Attributes of a good mediator and how to deal with 'bad' mediators

   a. Facilitation verses Evaluation

      i. Brief definition of the difference.

      ii. Evaluative Mediators- Does it help the process?

         1. may help an attorney with difficult client who is in denial about the likely results;

         2. helps focus parties quickly;

         3. parties may think this approach gives mediator credibility;

         4. lawyers and client may expect mediator to take on this role.

      iii. Evaluative Mediators- Does it hinder the process?

         1. Mediator in role of arbiter rather than facilitator;

         2. Undermines efforts to have parties reach agreement on own terms;

         3. Mediator appears to have bias;

         4. Parties now feel burdened to attempt to have mediator adjust approach to not be evaluative

      iv. Query –

         1. Is an evaluative mediator a 'good mediator'?

         2. How to manage expectations of attorneys and clients that look to mediator to evaluate strengths and weaknesses of case if mediator takes different approach;

3. Does an evaluative mediator hurt the mediation process? E.g. mediator tells one side they have weak case. Reaction may be that mediator is biased.

4. What if parties desire an evaluative mediator? What is the mediator's role in that situation? Should the mediator agree to do this? If so, at what point in the mediation?

b. Mediator not prepared or approaches mediation with a bias

   i. Examples of biases that panelists have seen.

   ii. Can parties select an alternative mediator?

   iii. Can attorneys step in to change structure of the mediation - e.g. insist on a joint session so each side may present their case to educate an unprepared mediator on case?

c. Judge Mediators—Pros and Cons

   i. Views of attorneys for parties –

      1. Would an attorney feel constrained not to challenge mediator on her view of law or facts?

      2. Do parties have concerns judge will report back to colleague overseeing the litigation?

      3. Are lawyers that appear before judge comfortable pushing back on judge?

   ii. Sometimes not trained as mediator; experienced in being arbiter of facts and law but not as a neutral.

   iii. Is a Judge that has been on the bench for many years too far removed from practice of law to appreciate practical considerations driving parties to litigate or to settle?

   iv. Is a Judge likely to be too authoritative? Is a Judge more likely to take evaluative approach?

   v. Are parties more likely to defer to a Judge's authority and prestige making settlement more likely?

   vi. What if the parties reach a settlement that is so lopsided that the Bankruptcy Judge does not want to approve it under Rule 9019? Will a Bankruptcy Judge feel comfortable denying a settlement that was reached by her colleague as mediator? After all sometime Bankruptcy Judges ask

colleagues to handle mediations for each other's disputes. Under those circumstances will the Bankruptcy Judge feel constrained about denying the settlement? The standards for a mediator are very different than the standards applied by a Judge in approving a settlement.

vii. Is a Judge that employs the evaluative approach more likely to be helpful than a non-judge mediator using the same approach?

d. Ethical issues

i. What if settlement seems unfair, lopsided? What is the mediator's responsibility?

ii. How does mediator handle knowing confidential facts that might change outcome?

iii. Is it role of mediator to be certain settlement will pass court scrutiny under Rule 9019 standard?

iv. Should mediator be involved in documenting settlement?

v. If mediator reviews settlement agreement should she point out any inaccuracies or deficiencies?

MODEL LOCAL BANKRUPTCY RULES FOR MEDIATION

AMERICAN BANKRUPTCY INSTITUTE
MEDIATION COMMITTEE
2015

The American Bankruptcy Institute, Mediation Committee appointed a Subcommittee to draft Model Local Bankruptcy Rules for Mediation as a resource for bankruptcy courts in adopting or revising local bankruptcy rules regarding mediation. The American Bankruptcy Institute's Executive Committee approved the Model Local Bankruptcy Rules for Mediation on February 5, 2015.

Mediation has been used effectively in bankruptcy cases in a number of contexts, for example, adversary proceedings, contested matters, and plan negotiations. Use of mediation is likely to expand in the future. Some districts have adopted detailed local rules for mediation. Other districts have not yet adopted local rules for mediation. In order to assist the bankruptcy courts, the Mediation Committee of the American Bankruptcy Institute promulgated Model Local Bankruptcy Rules for Mediation. These Model Rules can be used as a template for districts contemplating adopting local bankruptcy rules for mediation or for districts considering amending their existing local bankruptcy rules for mediation. The Model Rules may be adopted in whole or in part and may be modified as preferred by a particular district.

The members of the Subcommittee of the Mediation Committee of the American Bankruptcy Institute who drafted the Model Local Bankruptcy Rules for Mediation are:

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Other ABI members who contributed to the Model Local Bankruptcy Rules for Mediation are:

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Model Rule 1 Mediation.

(a) Types of Matters Subject to Mediation. The court may assign to mediation any dispute arising in a bankruptcy case, whether or not any adversary proceedings or contested matters is presently pending with respect to such dispute. Parties to an adversary proceeding, contested matter and a dispute not yet pending before the court, may also stipulate to mediation, subject to court approval.

(b) Effects of Mediation on Pending Matters. The assignment of a matter to mediation does not relieve the parties to that matter from complying with any other court orders or applicable provisions of the U.S. Code, the Bankruptcy Rules or these Local Rules. Unless otherwise ordered by the court, the assignment to mediation does not delay or stay discovery, pretrial hearing dates or trial schedules. Any party may seek such delay or stay, and the court, after notice and hearing, may enter appropriate orders.

(c) The Mediation Conference.

(i) Informal Mediation Discussions. The mediator shall be entitled to confer with any or all a) counsel, b) pro se parties, c) parties represented by counsel, with the permission of counsel to such party and d) other representatives and professionals of the parties, with the permission of a pro se party or counsel to a party, prior to, during or after the commencement of the mediation conference (the "Mediation Process"). The mediator shall notify all Mediation Participants of the occurrence of all such communications, but no advance notice or permission from the other Mediation Participants shall be required. The topic of such discussions may include all matters which the mediator believes will be beneficial at the mediation conference or the conduct of the Mediation Process, including, without limitation, those matters which will ordinarily be included in a Submission under Local Rule 1(c)(iii). All such discussions held shall be subject to the confidentiality requirements of subsection (d) of this Local Rule 1.

(ii) Time and Place of Mediation Conference. After consulting with the parties and their counsel, as appropriate, the mediator shall schedule a time and place for the mediation conference that is acceptable to the parties and the mediator. Failing agreement of the parties on the date and location for the mediation conference, the mediator shall establish the time and place of the mediation conference on no less than twenty one (21) days' written notice to all counsel and pro se parties. The mediation conference may be concluded after any number of sessions, all of which shall be considered part of the mediation conference for purposes of this Local Rule.

(iii) Submission Materials. Each Mediation Participant (as defined below) shall submit directly to the mediator such materials (the "Submission") as are directed by the mediator after consultation with the Mediation Participants. The mediator may confer with the Mediation Participants, or such of them as the mediator

determines appropriate, to discuss what materials would be beneficial to include in the Submission, the timing of the Submissions and what portion of such materials, if any, should be provided to the mediator but not to the other parties. No Mediation Participant shall be required to provide its Submission, or any part thereof, to another party without the consent of the submitting Mediation Participant. The Submission shall not be filed with the court and the court shall not have access to the Submission. A Submission shall ordinarily include an overview of the facts and law, a narrative of the strengths and weaknesses of a party's case, the anticipated cost of litigation, the status of any settlement discussions and the perceived barriers to a negotiated settlement.

(iv) Attendance at Mediation Conference.

(A) Persons Required to Attend. Unless excused by the mediator upon a showing of hardship, or if the mediator determines that it is consistent with the goals of the mediation to excuse such party, the following persons (the "Mediation Participants") must attend the mediation conference personally:

1) Each party that is a natural person;

2) If the party is not a natural person, including a governmental entity, a representative who is not the party's attorney of record and who has authority to negotiate and settle the matter on behalf of the party, and prompt access to any board, officer, government body or official necessary to approve any settlement that is not within the authority previously provided to such representative;

3) The attorney who has primary responsibility for each party's case;

4) Other interested parties, such as insurers or indemnitors, whose presence is necessary, or beneficial to, reaching a full resolution of the matter assigned to mediation, and such attendance shall be governed in all respects by the provisions of this subparagraph (c)(iv) of this Local Rule 1.

(B) Persons Allowed to Attend. Other interested parties in the bankruptcy case who are not direct parties to the dispute, i.e., representatives of a creditors committees, may be allowed to attend the mediation conference , but only with the prior consent of the mediator and the Mediation Participants, who will establish the terms, scope and conditions of such participation. Any such interested party that does participate in the mediation conference will be subject to the confidentiality provisions of Local Rule 1(d) and shall be a Mediation Participant.

(C) Failure to Attend. Willful failure of a Mediation Participant to attend any mediation conference, and any other material violation of this Local Rule, may be reported to the court by any party, and may result in the imposition of sanctions by the court. Any such report shall comply with the confidentiality requirement of Local Rule 1(d).

(v) Mediation Conference Procedures. After consultation with the Mediation Participants or their counsel, as appropriate, the mediator may establish procedures for the mediation conference.

(vi) Settlement Prior to Mediation Conference. In the event the parties reach an agreement in principle after the matter has been assigned to mediation, but prior to the mediation conference, the parties shall promptly advise the mediator in writing. If the parties agree that a settlement in principle has been reached, the mediation conference shall be continued (to a date certain or generally as the mediator determines) to provide the parties sufficient time to take all steps necessary to finalize the settlement. As soon as practicable, but in no event later that thirty (30) days after the parties report of an agreement in principle, the parties shall confirm to the mediator that the settlement has been finalized. If the agreement in principle has not been finalized, the mediation conference shall go forward, unless further extended by the mediator, or by the court.

(d) Confidentiality of Mediation Proceedings.

(i) Protection of Information Disclosed at Mediation. The mediator and the Mediation Participants are prohibited from divulging, outside of the mediation, any oral or written information disclosed by the Mediation Participants or by witnesses in the course of the mediation (the "Mediation Communications"). No person, including without limitation, the Mediation Participants and any person who is not a party to the dispute being mediated or to the Mediation Process (a "Person"), may rely on or introduce as evidence in any arbitral, judicial or other proceeding, evidence pertaining to any aspect of the Mediation Communications, including but not limited to: (A) views expressed or suggestions made by a party with respect to a possible settlement of the dispute; (B) the fact that another party had or had not indicated willingness to accept a proposal for settlement made by the mediator; (C) proposals made or views expressed by the mediator; (D) statements or admissions made by a party in the course of the mediation; and (E) documents prepared for the purpose of, in the course of, or pursuant to the mediation. In addition, without limiting the foregoing, Rule 408 of the Federal Rules of Evidence, any applicable federal or state statute, rule, common law or judicial precedent relating to the privileged nature of settlement discussions, mediations or other alternative dispute resolution procedures shall apply. Information otherwise discoverable or admissible in evidence does not become exempt from discovery, or inadmissible in evidence, merely by being used by a party in the mediation. However, except as set forth in the previous sentence, no

Person shall seek discovery from any of the Mediation Participants with respect to the Mediation Communications.

(ii) Discovery from Mediator. The mediator shall not be compelled to disclose to the court or to any Person outside the mediation conference any of the records, reports, summaries, notes, Mediation Communications or other documents received or made by the mediator while serving in such capacity. The mediator shall not testify or be compelled to testify in regard to the mediation or the Mediation Communications in connection with any arbitral, judicial or other proceeding. The mediator shall not be a necessary party in any proceedings relating to the mediation. Nothing contained in this paragraph shall prevent the mediator from reporting the status, but not the substance, of the mediation effort to the court in writing, from filing a final report as required herein, or from otherwise complying with the obligations set forth in this Local Rule 1.

(iii) Protection of Proprietary Information. The Mediation Participants and the mediator shall protect proprietary information. Proprietary information should be designated as such by the Mediation Participant seeking such protection, in writing, to all Mediation Participants, prior to any disclosure of such proprietary information. Such designation shall not require the disclosure of the proprietary information, but shall include a description of the type of information for which protection is sought. Any disputes as to the protection of proprietary information may be decided by the court.

(iv) Preservation of Privileges. The disclosure by a party of privileged information to the mediator does not waive or otherwise adversely affect the privileged nature of the information.

(e) Recommendations by Mediator. The mediator is not required to prepare written comments or recommendations to the parties. Mediators may present a written settlement recommendation memorandum to parties, or any of them, but not to the court.

(f) Post-Mediation Procedures.

(i) Filings by the Parties. If an agreement in principle for settlement is reached (even if the agreement in principle is subject to the execution of a definitive settlement agreement or court approval, and is not binding before that date) during the mediation conference, one or more of the Mediation Participant shall file a notice of settlement or, where required, a motion and proposed order seeking court approval of the settlement.

(ii) Mediator's Certificate of Completion. After the conclusion of the mediation conference (as determined by the mediator), the mediator shall file with the court a certificate in the form provided by the court ("Certificate of Completion") notifying the court about whether or not a settlement has been reached.

Regardless of the outcome of the Mediation Process, the mediator shall not provide the court with any details of the substance of the conference or the settlement, if any.

(iii) If the Agreement in Principle is not completed. If the parties are not able or willing to consummate the agreement in principle that was reached during the mediation conference, and the agreement in principal never becomes a binding contract, the substance of the proposed settlement shall remain confidential and shall not be disclosed to the court by the mediator or any of the Mediation Participants.

(g) Withdrawal from Mediation. Any matter assigned to mediation under this Local Rule may be withdrawn from mediation by the court at any time. Any Mediation Participant may file a motion with the court seeking authority to withdraw from the mediation or seeking to withdraw any matter assigned to mediation by court order from such mediation.

(h) Termination of Mediation. Upon the filing of a mediator's Certificate of Completion under Local Rule 1(f) (ii) or the entry of an order withdrawing a matter from mediation under Local Rule 1(g) the mediation will be deemed terminated and the mediator excused and relieved from further responsibilities in the matter without further order of the court. If the Mediation Process does not result in a resolution of all of the disputes in the assigned matter, the matter shall proceed to trial or hearing under the court's scheduling orders. However, the court shall always have the discretion to reinstitute the Mediation Process if the court determines that such action is the most appropriate course under the circumstances. In such event, Local Rule 1 and Local Rule 2 shall apply in the same manner as if the mediation were first beginning pursuant to Local Rule 1(a).

(i) Applicability of Rules to a Particular Mediation. The court may, upon request of one or more parties to the mediation, or on the court's own motion, declare that one or more of provisions of this Local Rule may be suspended or rendered inapplicable with respect to a particular mediation except Local Rule 1(d) and Local Rule 1(j). Otherwise these Local Rules shall control any mediation related to a case under the Bankruptcy Code.

(j) Immunity. Aside from proof of actual fraud or other willful misconduct, mediators shall be immune from claims arising out of acts or omissions incident or related to their service as mediators appointed by the bankruptcy court. See, Wagshal v. Foster, 28 F.3d. 1249 (D.C. Cir. 1994). Appointed mediators are judicial officers clothed with the same immunities as judges and to the same extent set forth in Title 28 of the United States Code.

Model Rule 2 Mediator Qualifications and Compensation.

(a) Register of Mediators. The Clerk shall establish and maintain a register of persons (the "Register of Mediators") qualified under this Local Rule and designated by the Court to serve as mediators in the Mediation Program. The Chief Bankruptcy Judge shall appoint a Judge of this Court, the Clerk or a person qualified under this Local Rule who is a member in good standing of the Bar of the State of _____ to serve as the Mediation Program Administrator. Aided by a staff member of the Court, the Mediation Administrator shall receive applications for designation to the Register, maintain the Register, track and compile reports on the Mediation Program and otherwise administer the program.

(b) Application and Qualifications. Each applicant shall submit to the Mediation Program Administrator a statement of professional qualifications, experience, training and other information demonstrating, in the applicant's opinion, why the applicant should be designated to the Register. The applicant shall submit the statement substantially in compliance with Local Form _____. The statement also shall set forth whether the applicant has been removed from any professional organization, or has resigned from any professional organization while an investigation into allegations of professional misconduct was pending and the circumstances of such removal or resignation. This statement shall constitute an application for designation to the Mediation Program. Each applicant shall certify that the applicant has completed appropriate mediation training or has sufficient experience in the mediation process. To have satisfied the requirement of "appropriate mediation training" the applicant should have successfully completed at least 40 hours of mediation training sponsored by a nationally recognized bankruptcy organization. To have satisfied the requirement of "sufficient experience in the mediation process" the applicant must have at least ten (10) years of professional experience in the insolvency field.

(c) Court Certification. The Court in its sole and absolute discretion, on any feasible basis shall grant or deny any application submitted under this Local Rule. If the Court grants the application, the applicant's name shall be added to the Register, subject to removal under these Local Rules.

(i) Reaffirmation of Qualifications. The Mediation Program Administrator may request from each applicant accepted for designation to the Register to reaffirm annually the continued existence and accuracy of the qualifications, statements and representations made in the application. If such a request is made and not complied with within one month of such request, the applicant shall be removed from the Register until compliance is complete (the "Suspension of Eligibility"). After the passage of six months from the Suspension of Eligibility, if compliance is not complete, the applicant shall be permanently removed from the Register and may only be placed on the Registry by reapplying in the manner set forth pursuant to the provisions of subsection (b) of this Local Rule 2.

(d) Removal from Register. A person shall be removed from the Register either at the person's request or by Court order entered on the sole and absolute determination of the Court. If removed by Court order, the person shall be eligible to file an application for reinstatement after one year.

(e) Appointment.

(i) Selection. Upon assignment of a matter to mediation in accordance with these Local Rules and unless special circumstances exist, as determined by the Court, the parties shall select a mediator. If the parties fail to make such selection within the time frame as set by the Court, then the Court shall appoint a mediator. A mediator shall be selected from the Register of Mediators, unless the parties stipulate and agree to a mediator not on the Register of Mediators.

(ii) Inability to Serve. If the mediator is unable to or elects not to serve, he or she shall file and serve on all parties, and on the Mediation Program Administrator, within seven (7) days after receipt of notice of appointment, a notice of inability to accept the appointment. In such event an alternative mediator shall be selected in accordance with the procedures pursuant to Subsection (e)(i) of this Local Rule 2.

(iii) Disqualification.

[A] Disqualifying Events. Any person selected as a mediator may be disqualified for bias or prejudice in the same manner that a Judge may be disqualified under 28 U.S.C. § 44. Any person selected as a mediator shall be disqualified in any matter where 28 U.S.C. § 455 would require disqualification if that person were a Judge.

[B] Disclosure. Promptly after receiving notice of appointment, the mediator shall make an inquiry sufficient to determine whether there is a basis for disqualification under this Local Rule. The inquiry shall include, but shall not be limited to, a search for conflicts of interest in the manner prescribed by the applicable rules of professional conduct for attorneys and by the applicable rules pertaining to the profession of the mediator. Within ten (10) days after receiving notice of appointment, the mediator shall file with the Court and serve on the parties either (1) a statement disclosing to the best of the applicant’s knowledge all of the applicant’s connections with the parties and their professionals, together with a statement that the mediator believes that there is no basis for disqualification and that the mediator has no actual or potential conflict of interest or (2) a notice of withdrawal.

[C] Objection Based on Conflict of Interest. A party to the mediation who believes that the assigned mediator has a conflict of interest promptly shall bring the issue to the attention of the mediator and to the other parties. If after discussion among the mediator, the party raising the issue and the other parties the issue is not resolved and any of the parties requests the withdrawal of the mediator, the mediator shall file a notice of withdrawal.

(f) Compensation. A mediator shall be entitled to serve as a paid mediator and shall be compensated at reasonable rates, and, subject to any judicial review of the reasonableness of fees and expenses required by this subsection of Local Rule 2, the mediator may require compensation and reimbursement of expenses ("Compensation") as agreed by the parties. Court approval of the reasonableness of such fees and reimbursement of expenses shall be required if the estate is to be charged for all or part of the mediator's Compensation and the Compensation to be paid by the estate for such mediation exceeds $25,000. If the Compensation to be paid by the estate for the particular mediation does not exceed $25,000, then court approval shall only be necessary if the estate representative objects to the fees sought from the estate. If the mediator consents to serve without compensation and at the conclusion of the first full day of the mediation conference it is determined by the mediator and the parties that additional time will be both necessary and productive in order to complete the mediation or arbitration, then:

(i) If the mediator consents to continue to serve without compensation, the parties may agree to continue the mediation conference.

(ii) If the mediator does not consent to continue to serve without compensation, the fees and expenses shall be on such terms as are satisfactory to the mediator and the parties, subject to Court approval, if required by subsection (f) of this Local Rule 2. Where the parties have agreed to pay such fees and expenses, the parties shall share equally all such fees and expenses unless the parties agree to some other allocation. The Court may determine a different allocation.

(iii) Subject to Court approval, if the estate is to be charged with such expense, the mediator may be reimbursed for expenses necessarily incurred in the performance of duties.

Party Unable to Afford. If the Court determines that a party to a matter assigned to mediation cannot afford to pay the fees and costs of the mediator, the Court may appoint a mediator to serve pro bono as to that party.

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MEDIATION IN BANKRUPTCY CASES -- A MEDIATOR'S PERSPECTIVE

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MEDIATION IN BANKRUPTCY CASES -- A MEDIATOR'S PERSPECTIVE

A. Overview of Mediation

Mediation may be generally defined as the "intervention in a negotiation or a conflict of an acceptable third party who has limited or no authoritative decision-making power, who assists the involved parties to voluntarily reach a mutually acceptable settlement of the issues in dispute." *See* Christopher W. Moore, The Mediation Process -- Practical Strategies for Resolving Conflict at 15 (3d ed. Jossey-Bass 2003).

B. Overview of Law and Some Applicable Rules

1. Alternative Dispute Resolution Act of 1998, 28 U.S.C. § 651 *et seq*. (the "Act")

   (a) Requires each United States district court to authorize, by local rule, the use of alternative dispute resolution processes "in all civil actions, including adversary proceedings in bankruptcy," and to devise and implement its own alternative dispute resolution program in order "to encourage and promote the use of alternative dispute resolution in its district." 28 U.S.C. § 651(b).

   (b) Each district court is also directed to require that litigants "in all civil cases" consider the use of an alternative dispute resolution process "at an appropriate stage in the litigation." 28 U.S.C. § 652(a).

   (c) Each district court that authorizes the use of ADR processes is required to adopt "appropriate processes for making neutrals available for use by the parties for each category of process offered" and to promulgate its "own procedures and criteria for the selection of neutrals on its panels," each of whom should be "qualified and trained to serve as a neutral" in the appropriate ADR process. 28 U.S.C. § 653(a) & (b).

2. Local Bankruptcy Court Rules, *e.g.*,

   (a) Local rules for the United States Bankruptcy Court for the District of Delaware, effective February 1, 2010 ("Delaware Local Rules");

   (b) Local Rules of the United States Bankruptcy Court for the Southern District of Florida ("S.D. Fla. Local Rules")

   (c) Alternative Dispute Resolution Rule 9019-1 of the United States Bankruptcy Court for the Southern District of New York, and General Order M-390, last revised and effective December 1, 2009 ("S.D.N.Y. Local Rules");

   (d) Second Amended General Order No. 95-01 (Adoption of Mediation Program for Bankruptcy Cases and Adversary Proceedings), for the United States

Bankruptcy Court for the Central District of California, filed August 24, 1999 ("C.D. Cal. Local Rules");

(e) Local Rules of the United States Bankruptcy Court for the Northern District of Illinois, adopted December 1, 2008 ("N.D. Ill. Local Rules");

(f) Local Bankruptcy Rules of the United States Bankruptcy Court for the Northern District of Texas ("N.D. Tex. Local Rules").

3. Rules and procedures of a dispute resolution service provider, *e.g.*, Commercial Arbitration Rules and Mediation Procedures of the American Arbitration Association (effective June 1, 2009) ("AAA Mediation Rules and Procedures")(which deal with, among other things, confidentiality, conflicts of interest, mediator responsibilities, mediator exoneration from liability, and cost-sharing by the parties).

C. Why Mediate?

1. Parties may be directed to do so by the bankruptcy court;

2. Parties may recognize the potential benefits of mediation, because:

(a) The success rate for voluntary mediations is high;

(b) A mediation effort, even if unsuccessful at the end of the mediation conference, may pave the way for a later settlement;

(c) Mediation can provide a useful understanding of the other party's assessment of its own case;

(d) Mediation can provide an attorney's client with a neutral evaluation by a court-appointed or party-selected mediator; and

(e) The process of mediation forces parties to consider the merits of their case, the cost of proceeding with litigation, the downside of an adverse ruling and the time delay in implementing a result that would otherwise be in the control of the parties.

D. Candidates for Mediation in Bankruptcy Cases

The areas in which mediation may be useful in the resolution of disputes are many, but will often include the following:

1. Avoidance actions, including preference recoveries;

2. Disputes regarding claims, including:

(a) Objections to claims;

(b) Estimation of claims; and

(c) Equitable or statutory subordination of claims.

3. Disputes over assets, including:

(a) Asset ownership issues; and

(b) Nature, extent and priority of liens.

4. Valuation issues, including:

(a) Valuation of a going concern enterprise;

(b) Valuation of specific collateral; and

(c) Liquidation value for purposes of "best interest of creditors" test.

5. Confirmation issues, including cram down.

6. Post-confirmation litigation, including:

(a) Professional malpractice claims;

(b) D&O claims;

(c) Avoidance claims; and

(d) Other civil litigation matters.

By local rule in the Delaware Bankruptcy Court, all adversary proceedings filed in a chapter 11 case and, in all other cases, all adversaries that include a claim for relief to avoid a preferential transfer, are referred to mandatory mediation unless otherwise ordered by the court. Parties to an adversary proceeding or contested matter may also stipulate mediation, but that stipulation is subject to court approval. *See* Delaware Local Rule 9019-5(a).

E. Potential Barriers to Successful Mediation

1. The following are some potential barriers that may make a successful mediation more difficult:

(a) The mediation is commenced too early in the process, before the parties have fully understood the nature and extent of the claims and/or counterclaims, as well as the underlying facts;

(b) One or more parties desires to overturn an adverse ruling in the bankruptcy court or to establish a favorable precedent;

(c) A party is negotiating from a position of "principle" rather than economics;

(d) There are multiple, complex issues involved, requiring significant assessment and analysis;

(e) There are numerous parties involved in the mediation with conflicting interests;

(f) There is substantial inequality of bargaining power;

(g) The parties and/or their respective legal counsel are inexperienced, or lack significant skills, in negotiating;

(h) Delay works to the advantage of a party;

(i) The stakes are high and neither party can afford to "lose";

(j) The decision maker for one party needs to "save face" within his or her organization; and

(k) There are looming deadlines that are known to affect one party more than another, such as the running of statutes of limitation, trial dates, response dates for dispositive motions, or other deadlines in the bankruptcy case (such as plan exclusivity, expiry dates and deadlines for rejection or assumption of contracts or leases).

> Note: Most local rules provide that the pendency of a mediation of a dispute does not stay or delay discovery, pre-trial hearing dates, or trials schedules unless otherwise ordered by the bankruptcy court. *See, e.g.*, N.D. Ill. Local Rule 9060-3(A).

(l) Fear or anger in a party clouds thinking

- Fearful people often have pessimistic risk assessment, make risk-averse choices, feel vulnerable and not in control;
- Angry people often express unduly optimistic risk assessments and risk-seeking choices;
- Expressions of anger lower the resolution rate in a mediation, in part because anger expressed by one party begets an angry response from the opposing party.

(m) Other psychological barriers:

- The "optimism bias"
- Ego threats
  - ego wrapped up in the case

- wounded pride as a reaction to conflict
- feeling of being treated disrespectfully
- recognition of imperfection of self (my side represents "the forces of light" and their side epitomizes the "forces of evil and darkness")

2. On occasion, a perceived barrier, such as a looming deadline, may actually facilitate a settlement.

F. Selecting the Mediator

1. Selection by parties:

   (a) From a service provider (such as the American Arbitration Association or JAMS); or

   (b) From a roster provided by a court.

   Note: By local rule, most bankruptcy courts maintain a roster of eligible, qualified mediators. *See, e.g.*, C.D. Cal. Local Rule 3.0; Delaware Local Rule 9019-2(a); S.D. Fla. Local Rule 9019-2(A)(i).

2. By court appointment, pursuant to local rule or on court's own initiative.

3. Qualities of a good mediator:

   (a) Patience (of Job);

   (b) Stamina;

   (c) Creativity;

   (d) Persistence ("never give up" attitude);

   (e) Reputation for integrity;

   (f) Reputation for impartiality;

   (g) Training and experience as a mediator;

   (h) Interpersonal skills;

   (i) Negotiating skills;

   (j) Analytical skills;

   (k) Listening skills;

(l) Communication skills;

(m) Knowledge of bankruptcy law and other legal principles applicable to the dispute;

(n) Empathy and sincerity; and

(o) Understanding of human nature.

4. Bankruptcy judge as mediator:

(a) If the bankruptcy judge does not preside over the case or dispute in question, the judge (depending upon training, experience and perception by the parties) can be an effective facilitator for dispute resolution. *See*, *e.g.*, N.D. Ill. Local Rule 9060-1(c) (contemplating that a sitting bankruptcy judge may mediate a case assigned to another sitting bankruptcy judge).

> Note: Section 653(b) of the Act provides that the district court may use, "among others, magistrate judges who have been trained to serve as neutrals in alternative dispute resolution processes, professional neutrals from the private sector, and persons who have been trained to serve as neutrals in alternative dispute resolution processes," which suggests that, even if a bankruptcy judge is to serve as a mediator, the judge should be qualified to act in that capacity by virtue of training to serve as a mediation neutral

(b) If the bankruptcy judge does preside over the case or dispute in question, the judge's service as a mediator may present problems, including:

- concern by a party that the judge may view the party's refusal to accept an offer as "unreasonable" and therefore "hold it against" that party in a later adjudicative setting;

- understandable disinclination of the bankruptcy judge to establish a "rapport" with the parties and their counsel;

- reluctance of a party to divulge confidential information, including case assessment and litigation concerns, to the judge as trier of fact of the dispute in the absence of a settlement;

- concern by a party that the bankruptcy judge may be biased against the party as a result of information disclosed to the bankruptcy judge by the other party on a confidential basis and therefore undisclosed to the concerned party; and

- the possibility that the bankruptcy judge, despite making every effort to be uninfluenced in a later adjudicative setting by information

disclosed in the mediation, may be unduly swayed by such information.

5. Non-lawyer as mediator:

   (a) Non-lawyers can be effective mediators in bankruptcy cases, particularly in matters relating to valuations (where appraisers or investment bankers may bring needed expertise to the mediation);

   (b) The selection of a non-lawyer mediator, however, should take into consideration the individual's experience and training in mediation; and

   (c) Non-lawyers are less likely to be effective in mediation where a neutral evaluation of litigation risks will be the primary focus of the mediation.

6. Use of co-mediators

   (a) Needed language skills

   (b) Industry expertise

   (c) Psychologist

7. Party interviews of mediator candidates:

   (a) Inquiries regarding a candidate's past experience;

   (b) Inquiries regarding a candidate's mediation style;

   (c) Inquiries regarding a candidate's familiarity with applicable substantive law;

   (d) Inquiries regarding potential conflicts; and

   (e) References.

G. Mediator Styles

1. Some mediators adopt a facilitative, non-directive style, characterized by the mediator's:

   (a) Providing procedural assistance to the parties;

   (b) Serving as a "facilitator" for ongoing discussions;

   (c) Recognizing that the parties can negotiate their own solution, with little intervention by the mediator other than to move the process forward; and

   (d) Serving as an "orchestrator" of the process to ensure its fairness and openness.

2. Another approach taken by some mediators is the directive approach, characterized by the mediator's:

(a) Serving as an active "deal maker," with frequent interventions in the process.

(b) "Trashing and bashing" the parties and counsel to be realistic about their case assessments and prospects of prevailing in litigation, *see* Alfini, "Trashing, Bashing, and Hashing it Out: Is This the End of 'Good Mediation,'" 19 FLA. ST. U. L. REV. (1991):

> Note: Some counsel purport to prefer a "trasher/basher" mediator, often assuming that the mediator's toughness will be visited primarily upon the other party. However, such counsel may be disappointed if that approach is also directed (if not primarily directed) at counsel who advocated engagement of the trasher/basher mediator.

(d) Rendering opinions about the controlling principles of law and the ultimate "settlement value" of the case:

> Note: While on occasion such opinions may persuade a party, a party holding a different opinion may resist the mediator's point of view and, indeed, call into question the mediator's impartiality or knowledge and full appreciation of the facts and law.

(e) Recommending that a party accept another party's settlement offer.

3. Still other mediators strike a balance, serving in a consultative and facilitative role for the most part, but, on invitation of the parties, acting as a "neutral evaluator" on specific issues.

4. In all events, the mediator should be mindful of the parties' paramount right to self-determination. *See* Standard 1 of Model Standards of Conduct for Mediators (2005), promulgated by the American Arbitration Association, the American Bar Association, and the Association for Conflict Resolution.

H. Types of Bargaining

1. Bargaining based on needs and interests of parties:

(a) Parties look for ways to satisfy recognized needs and overlapping interests;

(b) Parties typically can benefit from an ongoing business relationship or have mutual interest in cooperating for the balance of the bankruptcy case (as, for example, to obtain confirmation of a plan);

(c) Parties look for a "win/win" solution to the dispute;

(d) The mediator's role is to facilitate ongoing, open discussions and "brainstorming"; and

(e) A non-lawyer mediator may be equally as effective as a lawyer, depending upon the subject matter of the dispute.

2. Positional bargaining:

(a) It's all about the money;

(b) The negotiation involves a "zero sum" game -- one party's gain is another's loss;

(c) The discussion is focused almost exclusively on the "value" of the adversary proceeding, contested matter or other litigation matter;

(d) The mediator's primary role is to assist the parties in their respective risk analyses; and

(e) A lawyer mediator is usually essential.

> Note: For an excellent source regarding mediation of an inherently evaluative negotiation, *see* J. Anderson Little, Making Money Talk (American Bar Association 2007). For an excellent source on the mediation process generally, but with particular emphasis on the mediation in the context of interest-based bargaining, *see* Christopher W. Moore, The Mediation Process (3d ed. Jossey-Bass 2003). For an excellent book on negotiating techniques, *see* Fisher and Ury, Getting to Yes: Negotiating Agreement Without Giving In (New York: Penguin Books, 1983).

I. Confidentiality

1. Pending the adoption by Congress of rules for the confidentiality of mediations under the Act, each district court is directed under the Act to provide, by local rule, for the confidentiality of all ADR resolution processes and to prohibit disclosure of confidential dispute resolution communications. 28 U.S.C. § 652(d).

2. Pursuant to the Act, many local bankruptcy court rules contain confidentiality provisions with respect to mediations. For example, Delaware Local Rule 9019-5(b) provides in part that:

> The mediator and the participants in mediation are prohibited from divulging, outside of the mediation, any oral or written information disclosed by the parties or by witnesses in the course of the mediation. No person may rely on or introduce as evidence in any arbitral, judicial or other proceeding, evidence pertaining to any aspect of the mediation effort, including but not limited to: (A) views

expressed or suggestions made by a party with respect to a possible settlement of the disputes; (B) the fact that another party had or had not indicated willingness to accept a proposal for settlement made by the mediator; (C) proposals made or views expressed by the mediator; (D) statements or admissions made by a party in the course of the mediation; and (E) documents prepared for the purpose of, in the course of, or pursuant to the mediation.

See also N.D. Ill. Local Rule 9060-8(A).

3. Settlement conferences in bankruptcy matters are typically protected from disclosure by Rule 408 of the Federal Rules of Evidence, together with any applicable state statutes or common law or judicial precedents relating to the privileged nature of settlement discussions, mediations or other ADR procedures.

4. Information that is otherwise discoverable or admissible in evidence does not become exempt from discovery or inadmissible simply because the information was used by a party in a mediation.

See N.D. Ill. Local Rule 9060-8(B).

5. Confidentiality protections should also extend to discovery from the mediator:

   (a) The mediator normally should obtain a written agreement from the parties and counsel that the mediator will not be subpoenaed to testify as a witness or in discovery depositions and none of the mediator's notes will be the subject of any document production request by any party.

   (b) This would include calling the mediator as a witness to testify on behalf of any party concerning whether or not an agreement in principle was reached at the mediation that another party allegedly seeks to repudiate.

   (c) However, the mediator should be free to file any required reports with the bankruptcy court regarding the status of the mediation effort and any other reports required by local rule.

J. Pre-Mediation Procedures

1. The mediator should contact each party, early on and separately, to:

   (a) Introduce the mediator to such party and such party's counsel;

   (b) Discuss the nature of the dispute;

   (c) Discuss logistics (time, place and number of days allocated to the mediation);

   (d) Discuss mediator compensation and cost-sharing by the parties (which should be reduced to writing) unless the costs of the mediation are otherwise

governed by local bankruptcy rules. *See, e.g.*, N.D. Tex. Local Rule 9019-2(a); S.D.N.Y. Local Rule 4.0 (allowing parties to determine allocation of costs, requiring court approval if the estate is to be charged, and authorizing court to allocate in absence of agreement);

(e) Discuss submission of pre-mediation statements by the parties;

(f) Discuss any pre-conditions a party may have to the mediation (other than a court-ordered mediation), such as production of expert reports, appraisals, damage calculations, or exchange of documents;

(g) Discuss any confidentiality concerns, including trade secret or evidentiary privilege issues;

(h) Discuss perceived "barriers" by a party to a successful mediation and options to eliminate those barriers;

(i) Ascertain whether each party and its counsel have "bought in" to the mediation effort and are committed to bargain "in good faith";

(j) Confirm who will be attending as a representative of that party (and confirm that each party representative will have appropriate settlement authority):

> Note: Attendance at the mediation should be mandatory for all parties to the dispute. If the party is not a natural person, the mediation should be attended by a representative who has full authority to negotiate and settle the matter on behalf of such party and, in the case of a governmental entity, a representative who has authority to recommend a settlement to the elected official or legislative body. *See* Delaware Local Rule 9019-5(c)(iii)(A); N.D. Ill. Local Rule 9060-3(C). Other parties who should be obliged to attend include the attorneys primarily responsible for representing each party in the bankruptcy case.

(k) Confirm attendance of other interested parties, including any insurer and a representative of the creditors' committee and/or its counsel, who should typically be invited to the mediation; and

(l) Failure to attend the mediation by a person or entity whose attendance is required by local rule or by a bankruptcy court order directing mediation may result in sanctions upon that person or entity. *See, e.g.*, C.D. Cal. Local Rule 7.10 and Delaware Local Rule 9019-5(c)(iii)(B):

2. The mediator should prepare for (and assist, where necessary, the parties in preparing for) the mediation by:

(a) Interviewing the parties, as necessary, to gain information;

(b) Assessing who are the "players" in the mediation (*i.e.*, whether the ultimate decision makers are lawyers, party representatives or insurers);

(c) Gaining an understanding of the applicable principles of law;

(d) Determining the extent to which the parties themselves are fully educated on applicable principles of law and have a common understanding of the facts;

(e) Ascertaining what factual disputes exist;

(f) Gauging the sophistication of the parties and whether there is any significant inequality of bargaining power; and

(g) Determining whether certain documents need to be produced or exchanged by the parties to better inform the parties about matters essential to a settlement, including damage calculations, expert reports, appraisals, projections and financial statements.

Note: Parties to purely financial mediations typically reach stalemate when one party lacks essential information to make an informed decision regarding acceptance of a compromise offer from the other party. Lawyers are characteristically reluctant to provide evidentiary support for their claims or defenses, despite the fact that most of the documents that they would produce in a mediation will ultimately be produced in pre-trial discovery.

3. Most mediators will require the parties to execute a pre-mediation agreement with the mediator pursuant to which, among other things, the parties will agree upon the allocation of mediator compensation (unless otherwise governed by local bankruptcy rule), agree to bargain "in good faith," stipulate that the mediator has no liability arising in connection with the performance of his or her duties as mediator (other than liability for fraud or intentional failure to comply with confidentiality requirements or local bankruptcy rules), agree upon logistics (such as the time and place of the mediation), specify the length and time period for submission of pre-mediation statements, and confirm confidentiality requirements.

4. Pre-mediation statements generally should be required by the mediator (and may be required by local rule, *see, e.g.,* C.D. Cal. Local Rule 7.8):

(a) The pre-mediation statement of each party, together with an exchange of essential documents to understand the nature of the dispute, serve to educate the mediator concerning the facts and applicable principles of law.

(b) Contents of the pre-mediation statement generally should include (and by local rule may be required to include, *see, e.g.*, C.D. Cal. Local Rule 7.8(d) some or all of the following:

- identification of each party and counsel, as well as identification of party representatives who have settlement authority;

- a description of the dispute and applicable principles of law;

- factual issues the resolution of which may reduce the scope of the dispute or contribute significantly to a settlement;

- a summary of discovery that has been undertaken and additional discovery (including an exchange of documents) that may be needed for a meaningful mediation effort;

- past settlement efforts, including any presently outstanding offers or demands;

- each party's estimate of the time and expense necessary for the completion of discovery, pre-trial motions, retention of expert witnesses, trial preparation and trial;

- a statement of any scheduled dates for the filing of dispositive motions, pre-trial conferences or trial;

- a statement of facts that a party believes are material and not disputed; and

- copies attached to the pre-mediation statement of relevant pleadings and motions, as well as any pre-bankruptcy agreements that are central to the dispute.

  Note: Although the parties may be disinclined to do so, particularly if the pre-mediation statement is to be exchanged with the other party, it is sometimes helpful to have the parties put on paper their risk assessment, including a summary of the weaknesses of their case. This risk assessment should include an analysis of the probability of winning; the amount of damages that can be recovered in the event of a win; the estimated dollar cost of litigation; the intangible costs of litigation (time of business personnel devoted to litigation); the prospects of recovering anything from the defendant in the event of a win; the time period from commencement of litigation to actual recovery; the present value of the net recovery; and the discounted value of the total recovery based upon probability of success or failure. The non-monetary costs of litigation might include uncertainty, party anxiety, disruption of business focus, loss of business opportunities, regulatory pressures and litigation fatigue.

(c) Confidentiality of pre-mediation statements:

- some mediators and parties believe that a party's pre-mediation statement should not be shared with the other party and should be held in confidence by the mediator so that the party may use the pre-mediation statement as an opportunity to provide otherwise sensitive or confidential information to the mediator.

- other mediators and parties take different positions, consistent with local rules which frequently require an exchange of pre-mediation statements among the parties (*see, e.g.*, Delaware Local Rule 9019-5(c)(ii)).

- the pre-mediation statement should not be filed with or accessible by the bankruptcy court.

- the creditors' committee should be afforded an opportunity to provide a pre-mediation statement.

- if the creditors' committee is aligned with a particular party, the committee should normally receive a copy of that party's pre-mediation statement and serve upon that party any pre-mediation statement that the committee elects to submit to the mediator.

5. In dealing with the parties and counsel, the mediator should strive early in the process to establish "credibility" by:

(a) Giving the appearance of impartiality (and acting with impartiality);

(b) Establishing rapport with the parties and counsel;

(c) Evidencing knowledge or understanding (or a desire and commitment to obtain knowledge and understanding) of the issues and applicable principles of law;

(d) Demonstrating a sincere desire to facilitate the parties in reaching a settlement that they determine to be in their best interests; and

(e) Demonstrating empathy and sincerity in all dealings.

K. Conduct of the Mediation

1. Opening statement by the mediator:

(a) Introduction of the parties (if needed);

(b) Congratulating the parties on their reaching agreement to mediate (unless mediation is court ordered);

(c) Overview of the sequencing of the mediation process;

(d) Review and confirmation of confidentiality requirements;

(e) Inviting the parties to be creative and open minded in the mediation; and

(f) Encouraging the parties to be realistic and objective in their evaluation of their positions and the consequences of failing to settle and to be mindful of their "optimism bias":

- the bias that influences a party or counsel to believe that their case is a "sure winner";

- most Americans appear to be infected with the bias (*e.g.*, over 85% of surveyed teachers believe they are "above average," and over 60% of parents of college freshmen in highly selective colleges believe that their children will graduate in the top quartile of their class).

(g) Inviting the parties to ask questions.

2. Opening statement by parties:

(a) The mediator should encourage parties who wish to make opening statements to avoid ad hominem or other inflammatory or accusatory statements.

(b) A party's statement ideally should identify issues and end with an expression of a party's desire to reach a mutually agreed upon settlement.

(c) The opening statement should avoid "drawing a line in the sand" regarding minimally acceptable offers.

(d) In cases with a significant adversarial history and a high level of emotions, opening statements may be dispensed with on suggestion of the mediator.

(e) Competent (and calm) counsel often use an opening statement as the first opportunity to speak directly with the other side about counsel's client's position, perspective, needs, resources or institutional concerns (particularly such concerns of governmental agencies or multiple-level insurers).

3. The caucus and its role:

(a) Caucuses are customary in civil mediations:

- most parties prefer the privacy that caucuses afford in order to have confidential communications with the mediator.

- caucuses are an outgrowth of each party's natural desire to protect strategic information (*e.g.*, case assessment and settlement ranges)

and to avoid inadvertent admissions or disclosure to the other party of such protected information.

(b) Parties with substantially the same interests should be segregated into separate caucus rooms for separate caucus sessions with the mediator.

(c) In each caucus, the mediator should seek to solicit the party's self-assessment of its case and the perceived settlement value of it (inviting each party and counsel to articulate the basis for the assessment, as well as the costs and risks of continuing litigation), and creative solutions for resolution of issues.

(d) The mediator should be particularly sensitive to confidentiality issues by refraining from discussing in any caucus what was said in another caucus session without the consent of the communicating parties.

(e) In facilitating each discussion, the mediator should use standard mediation techniques, such as active listening, rephrasing, rhetorical questions and summations of positions to confirm that the mediator has correctly understood a party's position.

L. Dealing with Deadlock

1. Deadlock may result from a variety of factors, including:

(a) A dispute over which party is to make the first offer;

(b) An offeree party's " taking offense" at what it perceives to be a "low ball" offer from the other party and complaining of "bad faith" negotiation;

(c) A party's insistence, too early in the bargaining process, upon "cutting to the chase" and revealing its bottom line position;

(d) A party's imposition, early on in the process, of onerous conditions to continuation of the negotiation;

(e) A party's unrealistic view of the merits of its case and the absence of significant risks in pursuing non-settlement alternatives, including litigation; and

(f) Fatigue and exasperation with perceived lack of progress in the mediation.

Note: The local bankruptcy rules of the Southern District of Florida contain an interesting provision that limits the required participation of a party in a mediation conference to no more than two hours, but presumably authorizing a mediation conference to extend beyond that time limitation with the consent of the parties. *See*, S.D. Fla. Local Rule 9019-2(C)(2).

2. Some steps that the mediator may recommend to break the deadlock:

(a) Reconvene the general session so that the parties can talk directly to one another instead of "through" the mediator;

(b) Suggest a "client only" meeting (particularly if lawyers for the parties become obstacles or have "hijacked" the mediation), with or without involvement of the mediator;

(c) Suggest a meeting with counsel (without clients) if client personality conflicts exist or emotions run high;

(d) Suggest adjourning and reconvening at a later hour or day, particularly if fatigue or frustration has set in;

(e) Discuss with each party, separately, how it has determined its settlement range (where monetary settlements alone are involved) and how and whether that settlement range truly reflects its assessment of the merits and risks of litigation;

(f) Invite the parties to consider binding arbitration, with an agreement to cap any award for the plaintiff at its lowest settlement demand and any award for the defendant at a number no less than its last, highest settlement offer; and

(g) Suggest to each party, separately, what the mediator believes to be a fair settlement based upon the mediator's neutral evaluation of the merits of the claims and defenses.

> Note: The mediator's suggestion of a "fair settlement" should normally be made only if the parties request it, the mediation effort appears to have run it course and the parties seem intractable in their current positions. There are clear risks in the mediator's expressing such an opinion, as the rejection of it by either party may color a party's view of the neutrality (or intelligence) of the mediator and may spell the end of the mediation. Interestingly, the local rules of a number of bankruptcy courts appear to contemplate (and even implicitly encourage) a mediator's submission of settlement recommendations to the parties (*see, e.g.*, C.D. Cal. Local Rule 7.11(e) (authorizing the mediator to "estimate, where feasible, the likelihood of liability and the dollar range of damages") and 7.12 (authorizing the mediator to provide the parties "with a written settlement recommendation memorandum"); Delaware Local Rule 9019-5(e) (authorizing the mediator to "present a written settlement recommendation memorandum to" counsel but not the bankruptcy court); S.D.N.Y. Local Rule 3.3 (authorizing mediator to furnish the attorneys for parties "with a written settlement recommendation")).

M. Documenting the Settlement

1. Parties who are fortunate enough to reach an "agreement in principle" at the mediation should not leave the mediation venue before documenting the settlement (*i.e.*, seize the moment before "buyer's remorse" sets in and minds change).

2. The form of the settlement agreement will vary, depending upon the complexity of the issues, the number of the parties and the matters to be dealt with in the settlement agreement:

   (a) In relatively simple mediations, a term sheet executed by the parties may suffice; and

   (b) In more complex cases, a comprehensive settlement agreement may be necessary.

3. Where the parties recognize that a fully developed settlement agreement will be necessary, the mediator should encourage the parties to settle upon an individual to serve as the "scrivener" for a proposed settlement agreement, with drafts exchanged prior to the mediation and to set forth some of the basic terms (the exercise alone may put parties in a "settlement frame of mind").

4. In some cases, the absence of any pre-mediation undertakings to prepare settlement agreements may render the drafting and execution of a definitive settlement agreement at the mediation conference to be impractical:

   (a) Significant drafting efforts, after conclusion of the in-person mediation, may be required to reduce a definitive agreement to written form suitable for execution by the parties and submission to the bankruptcy court for approval.

   (b) In those instances, the parties may elect to prepare at the mediation conference a term sheet embodying the principal terms of the settlement, but making clear that no definitive settlement will be enforceable until later reduced to definitive form and duly executed.

   (c) By local rule, there may be deadlines imposed for the submission to the bankruptcy court of stipulated orders or joint motions for approval of settlements. *See, e.g.,* S.D.N.Y. Rule 3.4 (21-day deadline to submit stipulated order or joint motion for approval of settlement).

5. The parties should be mindful of the fact that an oral agreement to settle may be enforceable under applicable non-bankruptcy law, unless the parties clearly manifest an agreement not to be bound prior to the execution of a definitive settlement agreement.

   Note: The local rules of the Bankruptcy Court for the Central District of California provide that an oral settlement agreement reached in the course of a mediation conference is not made inadmissible or protected from disclosure

if (i) the oral agreement is recorded by a court reporter, tape recorder or other reliable means of sound recording; (ii) the terms of the oral agreement are recited on the record in the presence of the parties and the mediator, and the parties express on the record that they agree to the terms recited; and (iii) the parties to the oral agreement expressly state on the record that the agreement is enforceable or binding or words to that effect and the recording is reduced to writing signed by the parties and counsel (if any) within 72 hours after it is recorded (*see* C.D. Cal. Local Rule 6.4).

6. A comprehensive settlement agreement will typically contain, among other things, the following:

(a) Recitals describing the dispute and the parties' desire and willingness to settle;

(b) A clear statement of the settlement and exchange of consideration;

(c) Procedures and timing for implementation of the settlement, including steps to obtain any necessary bankruptcy court approvals pursuant to Bankruptcy Rule 9019;

(d) Conditions precedent to effectiveness of the settlement and releases, including bankruptcy court approval;

(e) Releases and/or covenants not to sue;

(f) Confidentiality provisions;

(g) Non-disparagement provisions;

(h) Cost-sharing provisions;

(i) Dismissals (with or without prejudice) of pending adversary proceedings, contested matters or other litigation;

(j) Public announcements and/or press releases;

(k) Provisions dealing with cooperation for future implementation steps (such as support of dismissal of involuntary case or for confirmation of a reorganization plan); and

(l) Dispute resolution provisions.

N. Ethical Considerations

1. Lawyer mediator -- if the mediator is a lawyer, the mediator will be bound by the applicable rules of professional conduct, including applicable rules relating to:

(a) Confidentiality; and

(b) Disclosure of conflicts of interest.

2. Disclosure of conflicts of interest:

(a) Although a mediator rarely is endowed with adjudicative powers, the mediator should nevertheless disclose to the parties all potential conflicting interests (to the same extent as a potential arbitrator would disclose to the parties in connection with an arbitration matter).

(b) Although some local bankruptcy rules do not require a mediator candidate to make disclosures of potential conflicts of interest and simply provide for disqualification of a mediator for cause (including bias, prejudice or lack of disinterestedness), *see, e.g.*, S.D. Fla. Local Rule 9019-2(B)(2), other local rules (together with attorney rules of professional conduct and the AAA Mediation Rules and Procedures) require affirmative disclosure. *See, e.g.*, C.D. Cal. Local Rule 5.6.

(c) Those conflicts might include (i) relationships with any of the parties; (ii) relationships with any of the counsel, including participation in past litigation or ADR matters; (iii) prior involvement in the same or similar disputes or legal issues.

3. The mediator should strictly adhere to confidentiality requirements, whether imposed by local rules, court order or rules of evidence or pursuant to agreement of the parties.

4. Mediator as arbitrator -- as a general rule, the mediator should not later serve, even if asked to do so by the parties, as an arbitrator of the dispute.

(a) This general rule stems from the fact that the mediator will be receiving confidential information from each party, which the mediator is obliged not to disclose to the other party, and such confidential information (which the other party may not have been afforded an opportunity to rebut) may have an unconscious influence upon the mediator's ultimate assessment of the case as an arbitrator.

(b) Notwithstanding that general rule, Delaware Local Rule 9019-3(a) states that the parties to a mediation may stipulate to allow the mediator, if qualified as an arbitrator, to hear and arbitrate the dispute.

5. Mediator as witness, consultant, attorney or expert -- the mediator should not appear as a witness, consultant, attorney or expert in any pending or future action relating to any aspect of the dispute that is the subject of the mediation.

6. Ethical concerns that may arise in the course of the mediation and to which the mediator must be sensitive:

(a) The temptation to pressure the least sophisticated, most accommodating or most vulnerable party into a settlement;

(b) To the extent the mediator adopts an evaluative approach to the mediation, appearing to provide legal advice or call into question the legal analysis of another party's counsel;

(c) Receiving information from a party which, if not disclosed to the other party, might result in fraud or false pretenses perpetrated on the other party;

(d) Responding to a party's request as to whether the mediator recommends acceptance of an offer;

(e) Mischaracterizing the position of a party;

(f) Speculating with a party that the other party may raise its offer (when the mediator knows that the other party will do so based upon confidential disclosures to the mediator);

(g) Disclosing to a party or such party's counsel statutory or case law that they may have overlooked and that may be favorable to (or even dispositive of) the claim or defense of the other party.

> Note: While it may be appropriate to disclose to a party statutory or case law that has been overlooked by such party and that is *unfavorable* to such party's position (in order to encourage a more realistic assessment of the risks of litigation by that party), it is highly questionable whether the mediator should call a party's attention to an overlooked provision of law that may significantly *enhance* a party's position *vis-à-vis* the other party, regardless of whether the other party knows of such authority.

7. The Model Standards for Mediators was prepared in 1994 by the American Arbitration Association, the American Bar Association's Section of Dispute Resolution, and the Association for Conflict Resolution:

(a) A joint committee consisting of representatives from the same successor organizations revised the Model Standards in 2005, and both the original 1994 version and the 2005 revision have been approved by each participating organization.

(b) The Model Standards contain provisions dealing with self-determination of the parties, impartiality of the mediator, conflicts of interest, competence of the mediator, confidentiality and quality of the mediation process, among others.

(c) Some courts have promulgated these standards for neutrals serving in court-connected programs.

(d) The Model Standards have been endorsed for FINRA Dispute Resolution. FINRA (the Financial Industry Financial Regulatory Authority) is the largest independent regulator for securities firms doing business in the United States.

(e) The AAA Mediation Rules and Procedures require compliance with the Model Standards, except where a conflict exists, in which event the AAA Mediation Rules and Procedures govern.

(f) The ABA's Section of Dispute Resolution, Committee on Mediator Ethical Guidance, accepts inquiries and provides advisory responses with respect to ethical issues pertaining to mediation. In doing so, the committee will focus primarily on interpretations of the Model Standards and apply those standards to the issue presented, together with opinions or other guidance issued by state ethics authorities. The committee includes ADR practitioners, academics and leading ADR ethical experts from the public and private sectors. To submit an inquiry, click on the following link: http://www.abanet.org/disputes/documents/IntakeForumFinal.doc.

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WE CAN WORK IT OUT: ENTERTAINING A DISPUTE RESOLUTION SYSTEM DESIGN FOR BANKRUPTCY COURT

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WE CAN WORK IT OUT: ENTERTAINING A DISPUTE RESOLUTION SYSTEM DESIGN FOR BANKRUPTCY COURT

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On October 2, 2009, dispute resolution scholars and bankruptcy court jurists courageously began the difficult conversation[1] about the feasibility of an expanded dispute resolution system design for bankruptcy court.[2] This commentary will distill that conversation through a dispute resolution system design lens. Dispute resolution system design offers a framework for organizations to more effectively manage and resolve recurring conflicts.[3] The design of a dispute resolution system requires clarifying ideas, elucidating values, prioritizing goals, considering options and incorporating that information into a more workable process to respond to conflict.[4] All the while, the stakeholders and dispute resolution designers work together to clarify, prioritize and mediate which values will shape the design of the dispute resolution process. For those inevitable times when doubts emerge and commitment waivers, participants might be inspired by the supportive mantra, "We Can Work It Out."[5]

The convening of the dispute resolution scholars and bankruptcy court jurists signaled a critical first step in any dispute resolution system design: the stakeholder assessment.[6] Stakeholders and designers collaborate to gain a more comprehensive understanding of the problem to be addressed.[7] In this beginning phase, stakeholders are identified, interests are understood, the interrelationships among the stakeholders are delineated and the current organizational approach to handling the conflicts in question are understood.[8]

> *Try to see it my way*
> *Do I have to kept on talking till I can't go on?*
> *While you see it your way*

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[1] *See generally* DOUGLAS STONE, BRUCE PATTON, & SHEILA HEEN, DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST (Penguin Books) (1999).

[2] ADR Meets Bankruptcy: Cross-Purpose or Cross-Pollination, sponsored by American Bankruptcy Institute Law Review, the Hugh L. Carey Center for Dispute Resolution and St. John's Institute for Bankruptcy Policy (October 2, 2009).

[3] *See* Amy J, Cohen, *Dispute Systems Design, Neoliberalism, and the Problem of Scale*, 14 HARV. NEGOT. L. REV. 51, 51 (2009).

[4] *See* Stephanie Smith & Janet Martinez, *An Analytic Framework for Dispute Systems Design*, 14 HARV. NEGOT. L. REV. 123, 129–30 (2009).

[5] THE BEATLES, *We Can Work It Out*, *on* WE CAN WORK IT OUT / DAY TRIPPER (Capitol Records 1965).

[6] *See* Smith & Martinez, *supra* note 4, at 129–30.

[7] *Id*.

[8] *Id.*

Run the risk of knowing that our love may soon be gone
We can work it out
We can work it out.[9]

Dispute resolution system design, like any innovation,[10] is not for the faint-hearted. Premature evaluations and generic prescriptions are contraindicated. Rather, open-mindedness, patience, perseverance, tentativeness, humbleness and an agility to negotiate the labyrinth of omnipresent obstacles are requisites for successful dispute resolution design innovation. Undaunted by the reality that many good ideas remain just good ideas that are never fully realized, the system design innovator optimistically proceeds, ignoring the odds against success. So, too, dispute resolution and bankruptcy representatives tentatively began the difficult conversation about the feasibility of working together. *We can work it out.*[11]

A predicate to having a meaningful conversation with the dispute resolution and bankruptcy communities is acknowledging why this conversation is so difficult for all those involved.[12] As with any difficult conversation, this discussion was really three intertwined discussions folded into one: the story, the feelings and the identities of all involved.[13] First, if the bankruptcy and dispute resolution communities are even going to consider such a project, how should they go forward? Second, as participants in this exploration, what do the bankruptcy and dispute resolution communities feel about this venture? Critically, what does this having this conversation say about the representative participants as individuals and the members of each profession?

From the bankruptcy jurists' perspective, they questioned the value of even having the discussion. Why fix something that isn't broken especially when the bankruptcy courts work so well. After all, two skilled bankruptcy attorneys know how to settle a case. Why add another unnecessary layer of dispute resolution professionals and muck everything up? Bankruptcy court is about efficiency, and that's what we do well.

Not surprisingly, the dispute resolution professionals approached the discussion from a very different vantage point. Justice for all should include access to dispute resolution. The dispute resolution profession is a higher calling. and of course, we will enhance the functioning of bankruptcy court. Efficiency may be important, but it is a distant third after party choice and self-determination.

Think of what you're saying

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[9] *See* THE BEATLES, *supra* note 5.

[10] *See, e.g., The Model T Ford: A Short History of Ford's Innovation*, available at http://www.modelt.ca/background.html (last visited Nov. 24, 2009); *see also* John Battelle, *The Birth of Google*, WIRED MAGAZINE, Aug. 2005, http://www.wired.com/wired/archive/13.08/battelle.html?tw=wn_tophead_4.

[11] THE BEATLES, *supra* note 5.

[12] *See generally* STONE, PATTON, & HEEN, *supra* note 1.

[13] *Id.*

> *You can get it wrong and still you think it's alright*
> *Think of what I'm saying*
> *We can work it out and get it straight, or say good night.*
> *We can work it out*
> *We can work it out.*[14]

And so, the conversation began. Ideas were shared. Participants listened, listened and then listened some more, questioning and learning from each other. Tentatively, they explored how each might interface. Perspectives shifted and a new openness about the possibility of collaboration became evident.

Bankruptcy is a court of dispute resolution where qualified debtors reapportion their debt allocation. Efficiency is the priority.[15] Chapters seven, eleven and thirteen provide specific procedures for defined categories of debtors to follow.[16] Within this statutory framework, judges, trustees, and credit counselors serve dispute resolution roles identifying the creditors that are to be involved, facilitating the development of the plan and deciding on how the debt allocation will proceed. Like any "med/arb" model, the neutrals of bankruptcy court do not interpret their role in a uniform way. Instead, some judges and trustees opt to focus more on their mediative roles, spending time listening to all those involved, culling out interests and encouraging contesting parties to devise their own resolutions.[17] Other judges and neutrals emphasize their decision-making role, believing that their decision-making role will ensure the efficient disposition of cases.[18]

Unbeknownst to many, bankruptcy courts have been using mediation as part of the case management of bankruptcy cases since 1986 when the Southern District of California established the first mediation program.[19] The Civil Justice Reform Act of 1990 stimulated further piloting of mediation programs.[20] Although the Federal Rules of Bankruptcy Procedure are silent about the mediation of bankruptcy cases, fifty-one bankruptcy courts have opted to create court rules that authorize the use of mediation; other courts have used mediation on an ad hoc basis. There is a paucity of information about this patchwork quilt of mediation initiatives. In one of the few surveys conducted on mediation of bankruptcy issues, the Federal Judicial Center in 1998 surveyed mediators and attorneys, but omitted judges.[21]

Better quality information about these mediation programs is essential to formulating a viable dispute resolution design. For example, what is meant by the

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[14] THE BEATLES, *supra* note 5.

[15] Hon. Elizabeth S. Stong, *Some Reflections From the Bench on Alternative Dispute Resolution in Business Bankruptcy Cases*, 17 AM. BANKR. INST. L. REV. 387, 390 (2009).

[16] Ralph Peeples, *The Use of Mediation in Chapter 11 Cases*, 17 AM. BANKR. INST. L. REV. 401, 402 (2009).

[17] Stong, *supra* note 15, at 392.

[18] *Id.*

[19] *See* Cassandra G. Mott, Note, *Macy's Miracle on 34th Street: Employing Mediation to Develop the Reorganization Plan in a Mega-Chapter 11 Case*, 14 OHIO ST. J. ON DISP. RESOL. 193, 198–99 (1998).

[20] *See id.* at 196.

[21] Peeples, *supra* note 16, at 405–06.

term mediation? How was the program first initiated? In the development of the program, what preliminary education was offered to judges, referees, attorneys and parties? Who are the neutrals and what are their training and qualifications? Which cases are directed to mediation? Who initiates the referral to mediation: the parties, attorneys, judge or trustee? What percentages of cases are referred to mediation? What are the parameters of confidentiality? Are these mediation programs sustainable? Why?

As the conversation continued and the dispute resolution scholars developed a better understanding of bankruptcy court, they then questioned whether the arbitration agreements made by creditor and debtors prior to the commencement of bankruptcy proceedings would be enforced once bankruptcy proceeding began. One dispute resolution scholar noted the irony in spending time litigating this issue, when litigation actually slows down the efficient resolution that both arbitration and bankruptcy proceedings promise.[22] Another dispute resolution scholar posited that an agreement to arbitrate should be characterized as a contract term, not a competing dispute resolution forum. As a contract term, agreements to arbitrate should be honored and allowed to go forward. Approaching the issue from a different perspective, a third dispute resolution scholar addressed the waiver of the right to a jury in bankruptcy and questioned whether arbitration rights should be considered waivable in bankruptcy.[23]

> *Life is very short, and there's not time*
> *For fussing and fighting, my friend*
> *I have always thought that it's a crime*
> *So I will ask you once again.*[24]

The discussion then shifted to examining which dispute resolution processes and models might be integrated into bankruptcy proceedings to further the efficient disposition of cases.[25] As the dispute resolution scholars began to appreciate the extent that efficiency is an overarching priority in bankruptcy courts, sometimes at the exclusion of existing rights, they recalibrated their thinking. Any dispute resolution process that might be integrated into bankruptcy proceedings has to be compatible with and advance that priority. Thus, mediation standing alone as a forum that promotes party self-determination would not be a preferred option unless it also had a decision-making component. Possibly, a med/arb intervention would be a more realistic fit. Clarity about which, if any, arbitration agreements made

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[22] *See* Marianne B. Culhane, *Limiting Litigation Over Arbitration in Bankruptcy*, 17 AM. BANKR. INST. L. REV. 493, 494–95 (2009).

[23] *See* Stephen J. Ware, *Bankruptcy Law's Treatment of Creditors' Jury-Trial and Arbitration Rights*, 17 AM. BANKR. INST. L. REV. 479, 483–84 (2009).

[24] *See* THE BEATLES, *supra*, note 5.

[25] *See* James R. Coben & Peter N. Thompson, *Disputing Irony*: *A Systematic Look at Litigation About Mediation*, 11 HARV. NEGOT. L. REV. 43, 45–49 (2006) (describing likely reasons for relative recency of mediation jurisprudence).

prior to the commencement of bankruptcy proceedings would be enforced, is essential to promoting the efficiency of bankruptcy proceedings.

As the dispute resolution participants began to gain a better understanding about the challenges of helping design a better fit between the bankruptcy forum and the bankruptcy fuss, they cautioned about the importance of using accurate labels to describe dispute resolution interventions. Mischaracterizing a dispute resolution intervention as "mediation" when, in fact, you are describing a dispute resolution intervention with a decision-making component is problematic. Not only does such a misnomer create ambiguity about the purpose and practice of the intervention, but it also dilutes the integrity of the design of a dispute resolution system.

Finally, the conference participants examined the dispute resolution model that was used by Piper Aircraft Company.[26] When the company filed for Chapter 11 as a way to mange some of the pending and anticipated product liability claims against them, Piper Trust was formed to help resolve the outstanding litigation.[27] Piper Trust then designed its own mandatory mediation process for all pending liability action. Notably, there was a one hundred percent settlement rate.

Although the terms of settlement remain confidential, we may speculate about the lessons gleaned from this successful mandatory mediation program. Departing from common practice in which parties split the cost of mediation. Piper Trust paid all the costs of mediation including the travel expenses of the claimant.[28] Another distinguishing feature is that the Trustee of the Trust personally appeared at each and every mediation, listening to the personal devastation experienced by claimants and personally apologizing for any wrong Piper committed.[29] Thus, the Piper trustee took affirmative steps to ensure the successful resolution of the pending claims, when Piper personalized the justice that claimants received and removed the additional costs involved in participating in mediation.[30]

Stepping back and gaining a meta perspective about enhancing the quality of case disposition in bankruptcy courts, the dispute resolution scholars and bankruptcy jurists have their interest piqued, energized about the prospect of collaborating. This first meeting helped clarify how much more information is needed about the current functioning and challenges in bankruptcy courts. What do other bankruptcy judges, trustees and attorneys advise to improve the case management and disposition of bankruptcy cases? What additional skills would judges and trustees find helpful to carry out their roles? What wisdom can be learned there from the existing and failed mediation initiatives in bankruptcy court?

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[26] *See In re* Piper Aircraft Corp., 162 B.R. 619, 621 (Bankr. S.D. Fl. 1994).

[27] *See* Jeffery Davis, *Cramming Down Future Claims in Bankruptcy*: *Fairness, Bankruptcy Policy, Due Process, and the Lessons of the Piper Reorganization*, 70 AM. BANKR. L. J. 329, 349 (1996).

[28] *See* ADR Meets Bankruptcy, Pt. 2: Designing Dispute Systems, *available at* http://www.indisputably.org/?p=549 (last visited on Nov. 23, 2009).

[29] *Id.*

[30] William J. Woodward, Jr., *The Third Way: Mediation of Products Claims in the Piper Aircraft Trust*, 17 AM. BANKR. INST. L. REV. 463, 472–73 (2009).

Dispute resolution system designers also welcome the opportunity to re-group, process what they have learned, and assess how they might collaborate more effectively with bankruptcy court. Respecting that efficiency is a priority, and self-determination a benefit, what value-added might dispute resolution professionals bring to the current bankruptcy disposition process so that the forum fits the fuss? What menu of dispute resolution processes might be offered? What hybrid processes might be developed? Are there other dispute resolution models that might be instructive?

Yes, dispute resolution system design is not for the faint-hearted. We will continue to proceed tentatively, with an open-mind, remaining patient, humble, and maintaining an agility to negotiate the labyrinth of obstacles to successful dispute resolution design innovation. We remain motivated that together we can create a more effect dispute resolution design for bankruptcy court. And we remain optimistic, mindful that we have just begun to take the very first step in dispute resolution design. *We Can Work It Out.*[31]

[31] *See* THE BEATLES, *supra* note 5.

By Richard E. Mikels and Robert M. Fishman

ABI Mediation Committee's Model Guidelines for Mediation

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More and more, alternative dispute resolution is providing an efficient methodology for reducing the costs of bankruptcy proceedings and bankruptcy litigation. It was not that long ago that bankruptcy lawyers inherently believed that they were capable of settling their own cases and did not need outside help. (The authors were among those people.)

However, as with litigation generally, much has changed in the bankruptcy world. Now, in many bankruptcy courts, alternative dispute resolution, particularly mediation, is an accepted — and sometimes even required — part of the process. Private attorneys have found that mediation provides a mechanism for attempting to resolve disputes that often prove problematic without the help of an independent third party. The obstacles to resolution are often varied. Sometimes, the problem is as simple as a client not wanting to hear what his attorney has to say or an attorney finding it awkward (and bad business) to provide bad news to the client. In another instance, an attorney may feel that his/her adversary has fallen in love with his/her own case and that an objective third party can help shed light on the parties' relative positions and bring the parties to resolution.

People are often so emotionally invested in a case (whether as client or counsel) that they are unable to hear the other side's point of view. Having an independent person explain the other side's point of view, without the emotional component, might make it easier to digest and may lead to consensual resolution. The authors believe that many — if not most — legal disputes have a strong dose of miscommunication involved, and mediation can effectively cut through that problem. From the court's perspective, nothing is better than a dispute that has been resolved without the need for prolonged litigation. This frees up court dockets, which is much appreciated by judges who can then devote their time to other matters that require the court's attention.

The participants in a chapter 11 case often believe that mediation is worth a try because so much money can be saved by avoiding additional litigation. Further, chapter 11 itself has become far too expensive for many debtors and the use of mediation as a tool could significantly reduce the overall cost and increase the likelihood of success of a chapter 11 proceeding.

The growth of mediation as a bankruptcy tool began many years ago when pioneers like **Jack Esher** (MWI; Boston) first saw its possibilities. Mediation is now being utilized successfully in bankruptcy cases of all sizes. Whether it is reducing the overflow of preference cases brought by a liquidating trust, settling an adversary proceeding or other dispute that is central to the resolution of a proceeding, or helping the parties in plan negotiations, mediation has become a central tool in the bankruptcy process and its role is likely to expand with time.

ABI is always in the forefront of our profession. ABI, in conjunction with St. John's University School of Law, provides the first and, we believe, only 40-hour mediation training specifically designed for bankruptcy mediation (the "ABI Mediation Program"). In fact, the genesis of the present ABI Mediation Committee began with the members of the initial class of students at the ABI Mediation Program in 2012. Today, the Mediation Committee has grown to 116 members, indicating the substantial interest of the bankruptcy community in mediation, and **Robert Fishman** serves as the chair. Believing in the benefits of uniform local rules in the mediation process, Mr. Fishman appointed a subcommittee to draft proposed model bankruptcy mediation rules (the "Model Rules" or "Rules"). That subcommittee was chaired by **Richard Mikels**, and its members included Mr. Escher, **Bonnie Glantz Fatell** (Blank Rome LLP; Wilmington, Del.), ABI Director **Francis A. Monaco, Jr.** (Womble Carlyle Sandridge & Rice, LLP; Wilmington, Del.), Hon. **Raymond T. Lyons** (Fox Rothschild LLP; Lawrenceville, N.J.), **Judy W. Weiker** (Manewitz Weiker Associates, LLC; Indianapolis) and Past ABI President **Reginald W. Jackson** (Vorys, Sater, Seymour and Pease LLP; Columbus, Ohio). Many suggestions were provided by Hon. **Judith H. Wizmur** (U.S. Bankruptcy Court (D.N.J.); Mount Laurel).

Renowned mediation experts such as **Elayne E. Greenberg**, director of Hugh L. Carey Center at St. John's, and **C. Edward Dobbs** (Parker, Hudson, Rainer & Dobbs LLP; Atlanta) were also consulted, and they provided important input and suggestions. The authors are pleased to report that on Feb. 5, 2015, the Model Rules were approved by ABI's Executive Committee, subject to a comment period for the members of the committee. It is presently anticipated that before ABI's Annual Spring

Meeting in Washington, D.C., the rules will be disseminated as the "ABI Mediation Committee's Model Guidelines for Mediation in Bankruptcy Cases." It is the committee's goal that these model rules will be of benefit to judges and participants in the bankruptcy process around the country.

There are many reasons why the Mediation Committee undertook the Model Rules project. The differences in local rules from jurisdiction to jurisdiction are significant. More than a few jurisdictions do not have local rules governing mediation in bankruptcy cases, and many that do will see their rules evolve as the use of mediation increases. It was the Mediation Committee's belief that uniformity is a good idea, although the committee understands and respects the local customs and culture that may support different approaches to various mediation topics. While a goal was to provide a template that could be used by various jurisdictions, the Model Rules are intended to be subject to customization depending on the preferences of the judges and participants in the various communities.

There are clearly local views that may differ by district. We have taken the view in drafting the Model Rules that mediation is a facilitative process, and we have avoided provisions that might make the dividing line between litigation and mediation more blurred. The Model Rules view a mediator as a facilitator rather than a court officer, an approach that was designed to foster the feeling among participants that they are in control of the process and are not giving up their autonomy in order to participate. Self-determination is the backbone of effective mediation, and the Model Rules attempt to support that concept. The Model Rules and the time frames therein are flexible and, in many respects, depend on the views and goals of the parties to a particular mediation. In this way, mediation will provide an opportunity for the parties to come to their own resolution rather than one imposed by a court or a court officer.

The Mediation Committee spent more than two years developing the Model Rules. Committee members contacted several current and former bankruptcy judges to solicit their views on such rules and the most helpful way to present them. Every subcommittee member participated in numerous meetings and provided important contributions to the Model Rules. Subcommittee members considered the local rules in effect in various jurisdictions and the work done by other organizations (one of the members had recently completed work on the Delaware Local Rules on Mediation and suggested that we commence with those rules, and many ideas from other local rules were considered and incorporated). The subcommittee attempted to tailor the Model Rules to the needs of the bankruptcy community with a view toward producing an end result that could be beneficial either as a template for local rules or at least to help local rules committees and judges with suggestions on the various issues dealt with in mediation rules. Finally, when the draft Model Rules were submitted to the Mediation Committee and were ultimately forwarded to ABI's Executive Committee, those bodies also considered the Model Rules extensively before approving them.

It is the purpose of the Model Rules to support and even enhance the continuing trend toward the extensive use of mediation in resolving disputes in bankruptcy cases, or even the underlying cases themselves. For example, many commentators believe that the chapter 11 process has become too expensive and time-consuming to be effective, except as a sale process or as the tail end of a pre-pack negotiated pre-petition. One of the great hallmarks of the growing U.S. economy during the period of the Bankruptcy Act, and during the years after the passage of the Bankruptcy Code, was the availability of a process wherein disputes could be resolved and debtors were provided with an accessible alternative to liquidation.

The Model Rules should help provide a speedier and less-expensive method by which courts and parties can realize the goals and aspirations of the bankruptcy system. The use of mediation can be an effective aid in making the chapter 11 process speedier, less expensive and more user-friendly. It could also increase the success rates of chapter 13 cases and make chapter 7 cases more effective by providing a streamlined method of resolution that could often expedite the parties' realization of their rights and avoid the additional delay and expense of litigation.

Two Model Rules have been drafted. The first set deals with the procedures governing the mediation itself. Rule 2 governs the process of appointing a mediator. An explanation of some of the key elements of the Model Rules follows:

• *Rule 1(a) provides that any dispute may be assigned by the bankruptcy judge to mediation.* This would include adversary proceedings, contested matters and disputes that are not yet before the court, such as plan negotiations.

• *Pursuant to Rule 1(b), the assignment of a dispute to mediation does not automatically produce a delay or stay with respect to discovery, pretrial hearing dates or trial schedules.* However, any party may seek such relief from the bankruptcy court.

• *Rule 1(c) provides for flexibility and party involvement in the conduct of the mediation process.* The Mediation Committee tried to balance the need for efficiency with the need for parties to be in control of their own process. The need for efficiency is clear. The need for party control is an important element in making parties feel more invested in the process, thereby making a favorable outcome much more likely. Rule 1(c)(i) recognizes the benefit of the mediator discussing the matter with the parties prior to the actual mediation session, and allows that to occur. Rule 1(c)(ii) requires a discussion among the mediator and the parties with respect to setting the date for the mediation conference, but absent an agreement, the date will be set by the mediator. Therefore, in the first instance, party control is respected, and it is only when no agreement can be reached on this basic point that the mediator acts unilaterally. Under Rule 1(c)(iii), the scope of the mediation submissions by the parties is also determined during this consultation with the participants. Further, it is left for discussion among the mediator and the participants as to what submissions or portions of submissions are to be delivered to opposing parties. In fact, no submission, or portion thereof, may be delivered to opposing parties without the consent of the participant providing the materials. This rule also provides a suggestion as to what should

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be included in the submission materials, but allows the mediator and parties to determine what will actually be required. The suggested contents include an overview of the facts and law, a narrative of the strengths and weaknesses of the party's case, the anticipated cost of litigation, the status of any settlement discussions and the perceived barriers to a negotiated settlement.

• *Rule 1(c)(iv) requires that the parties attend the mediation conference.* While much is left to the parties, the rules provide no party with discretion as to whether to attend court-ordered mediation. Here, the need for efficiency is paramount, and if the court orders mediation, the rules require attendance. This rule also allows interested third parties, such as creditors' committees, to become participants in some or all aspects of the mediation, but only with the consent of the mediator and the mediation participants. Finally, this rule, in subsection (C), reflects the strongly held view of the Mediation Committee that the mediator should not be a whistle-blower. That would create adversity with a party, and any further mediation would be less likely to succeed. Therefore, a party is given the right to notify the court of a material violation of the rules, but the mediator is not authorized to do so.

• *Rule 1(d) provides extensive protection for information disclosed at the mediation.* Mediation is unlikely to be effective if the views expressed during the mediation can be used against the party expressing such views. Information disclosed in the mediation, which is exempt from discovery, remains exempt from discovery and inadmissible. Further, the rules require strict confidentiality and bar discovery from the mediator. Items discussed between the mediator and a particular party may not be disclosed by the mediator to the other participants without the express permission of such party. Rule 1(j) also provides broad immunity for a mediator who does not engage in actual fraud or willful misconduct. This is consistent with the philosophy underlying the rules that mediation is more likely to be successful when all of the participants, including the mediator, are as protected as possible from adverse results that could flow from participating in the mediation process.

• *While the Model Rules seek to balance party control with efficiency, Rule 1(i) gives the bankruptcy court broad discretion to alter the rules for a particular case.* For example, a court may set time requirements notwithstanding the flexibility otherwise provided by the rules. However, the court may not alter the confidentiality provisions or the immunity provisions of the rules.

• *Pursuant to Rule 1(h), the mediation may be terminated in one of two ways.* An order of the court may terminate the mediation. Likewise, the filing of a mediator's certificate of completion will terminate the mediation. This is important because otherwise it is not clear when the mediation ends. Sometimes, the parties will leave the mediation room thinking that the mediation is over only to discover that there are points that still need to be mediated. Therefore, the mediator is provided some flexibility in determining when the mediation will end, but the point of termination will be clear and unequivocal. If the mediation has not led to a resolution, then the matter proceeds to litigation before the court. However, the court is provided with the discretion to reinstate the mediation process if the court determines that such action is appropriate under the circumstances The rules make it clear that a reinstated mediation is treated in all respects as if it were a new mediation, and all of the rules apply as if such were the case. This avoids uncertainty as to what rules or procedures are applicable to a reopened mediation.

• *Rule 2 provides for the establishment of a Register of Mediators (the "register") in each district.* It provides for the efficient administration of the register and provides rules setting forth the standards required for inclusion in the register.

• *Rule 2(e) governs the appointment of mediators.* The default rule is that the parties select the mediator, unless the court determines that special circumstances exist that support the court making the appointment. If the parties fail to select a mediator, the court makes the appointment. The chosen mediator must be listed in the register unless the parties all agree to a mediator that is not listed on the register.

• *Rule 2(g)[B] and [C] deals with a mediator's conflicts.* The mediator is required to file with the court and provide to the parties a statement of all of the mediator's connections with the parties and their professionals, and either a statement of why the mediator has no actual or potential conflicts of interest, or a notice of withdrawal. In the event that a party believes that the mediator has a conflict of interest, the party must timely notify the proposed mediator. The mediator is required to discuss the issue with the complaining party and the other parties, but if the matter is not consensually resolved, the mediator must withdraw. The Mediation Committee concluded that if a party is uncomfortable with the mediator's independence, this would be detrimental to the mediation. Therefore, the mediator is obligated to resign without the need for a court order.

Conclusion

Mediation will continue to expand as a resource in all types of bankruptcy cases. It is our hope, and the hope of the Mediation Committee, that these Model Rules will become a valuable resource for judges, local rules committees, professionals and parties, and that the rules will help facilitate the growth and accessibility of bankruptcy mediation to the entire bankruptcy community. abi

Editor's Note: *For in-depth mediation training, don't miss ABI/St. John's Fifth Annual 40-Hour Bankruptcy Mediation Training on May 17-21 in New York. Register today at abi.org/events (spots are limited).*