AMERICAN BANKRUPTCY INSTITUTE

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CONCURRENT SESSION

Mediation at Center Stage: When to Mediate, Mediator Selection and Recent Developments Affecting Chapter 11 Mediation

Hosted by the Business Reorganization and Mediation Committees

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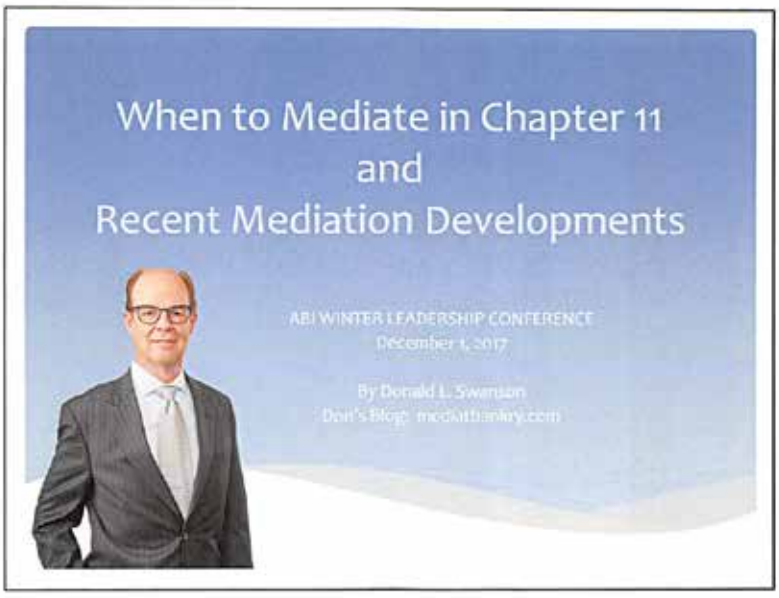
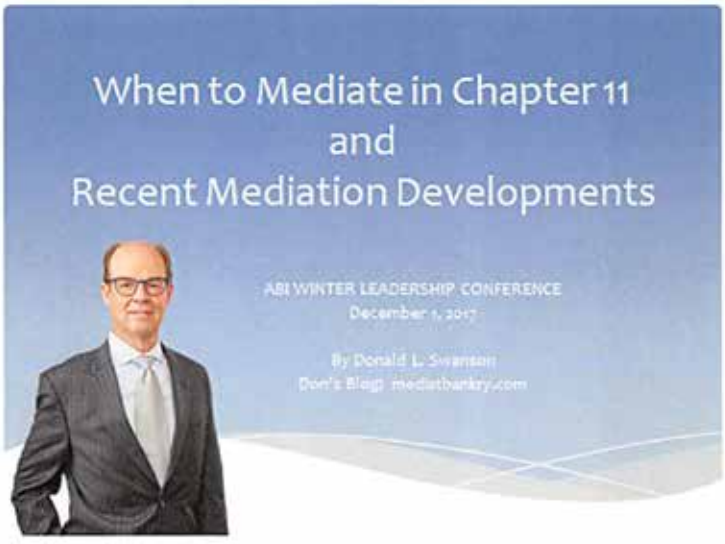

When to Mediate in Chapter 11
and
Recent Mediation Developments
ABI WINTER LEADERSHIP CONFERENCE
December 1, 2017
By Donald L. Swanson
Don's Blog: mediatbankry.com



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Reorganization Mediation ≠ Regular Mediation
Regular litigation has overlapping stages:
Pleadings
Discovery
Pretrial
Trial
Appeal
• Mediation often happens:
–As discovery begins winding down,
–In a caucus format, and
–In a one-and-done session.

6 Reasons Why Bankruptcy Mediation is a Process, not a One-and-Done Session: PART ONE — A DIFFERENT MEDIATION MODEL

By: Donald L. Swanson

Bankruptcy needs a larger mediation process than the one-and-done-session model that's common in non-bankruptcy cases

An iteration of the title above ["Bankruptcy mediation is a process, not a one-and-done session"] is often greeted by bankruptcy professionals with blank stares. They can't imagine why they'd want to mediate bankruptcy disputes any differently from how they mediate disputes in other courts.

This model is great! But a different model is needed for today's roads.
[This car is at the Museum of Speed in Lincoln, NE]

And reactions that go beyond blank stares tend to be something like this:

–"We need a different model of mediation for bankruptcy? Right. Sure thing." [Cue high voltage sarcasm here.]

–"You want a larger role for mediators? . . . So we have to pay them more? That's a winner. Good luck with that one." [Again, cue high voltage sarcasm.]

But a different model, a more-intensive and more-extensive mediation process, and a larger role for mediators, are precisely what I mean—and precisely what is needed in contested matters and many adversary proceedings.

The reality is that bankruptcy mediation processes often involve multiple parties and can last "for months." So says Judge Gerald Rosen, an innovator in bankruptcy mediation who served as chief mediator in Detroit's bankruptcy case (*see* this **Wall Street Journal interview**).

This post is Part One in a series of six articles explaining how and why bankruptcy mediation needs a different model from the one-and-done session commonly used in non-bankruptcy cases.

Action Item. Before blindly following a one-and-done mediation model from non-bankruptcy cases, we need to consider how each bankruptcy mediation might differ from non-bankruptcy contexts.

Reorganization Mediation ≠ **Regular** Mediation

Reorganization efforts are entirely different and need a different mediation mode. *E.g.:*

- *A need for speed to maximize value*
- A discovery vacuum (collectability v. liability)
- Freshness of the fight

6 Reasons Why Bankruptcy Mediation is a Process, not a One-and-Done Session: PART TWO — NEED FOR QUICK RESOLUTION

By: Donald L. Swanson

"You can't fight every battle all the time," and "You have to get as many settlements as you can—as fast as you can." These are truisms for debtor's bankruptcy counsel.

In a Chapter 11 case, the debtor's best-interest is to identify resolvable disputes promptly, get each of them settled as quickly as possible, and move on toward a final resolution of all disputes in a confirmed plan.

A Need for Speed

This best-interests lesson arrives in my early career: Debtor's counsel in a Chapter 11 case resigns shortly after filing the case, and I step in. A couple weeks later, a trial occurs on motions filed by many creditors to convert the case to Chapter 7. The motions are based on all the usual grounds of continuing loss to the estate, gross mismanagement, etc.

The trial lasts a full day, with my client's CEO the prime witness. A dozen attorneys do a tag-team job of pummeling my guy into the ground. It's brutal. And the gallery is filled with a couple dozen creditors—all of whom, I quickly learn, hate my guy . . . or, at least, think he's a rat and wish him ill.

At the late-afternoon recess, my guy is feeling beat-up and bloodied. He asks how I think it's going. "I'm not sure we can survive this," is the most gracious-but-accurate response I can muster.

At trial's conclusion, the Judge, (i) recites a long list of . . . let's say . . . not-good findings about Debtor's conduct, and (ii) lectures me on some of my deficiencies.

But, to my utter surprise, the Judge denies all conversion motions, without prejudice, for one reason: because we had already reached a settlement with one of the major creditors in the case. And we deserve, he rules, a chance to pursue resolutions of other disputes.

Opposing attorneys are as stunned as I at this development. And for the very first time, they begin to entertain a vague idea that settlements might be necessary and possible.

The next day would have been a perfect time to begin discussions about appointing a mediator. Unfortunately, neither the Judge nor I are thinking about mediation possibilities back in those days.

As to the need for speed, keep in mind that this trial and ruling occur within the first 60 days of the case filing. In non-bankruptcy cases, 60 days is barely beyond the service of process and answer day timeline—and a year or more will pass before a mediation is even considered.

Action Item. At every significant development in a bankruptcy case, beginning at its earliest stages, parties should consider whether a mediation process might be helpful immediately in resolving remaining disputes.

This post is Part Two in a series of six articles explaining how and why bankruptcy mediation needs a different model from the one-and-done session commonly used in non-bankruptcy cases.

6 Reasons Why Bankruptcy Mediation is a Process, Not a One-and-Done Session: PART THREE — DISCOVERY VACUUM

By: Donald L. Swanson

I'm mediating a bankruptcy valuation dispute between a bank secured creditor and debtor. The asset is a building in need of repair. The dispute has been pending for a short while, and a hearing on declaration evidence is to occur soon.

During the mediation, the banker says: "We need to see the building. We can't settle without seeing the building."

These words may not seem like a major problem. But I know, in real time, that we have a problem: this mediation is at a crossroads—and the problem is probably insurmountable.

I know that, as soon as the parties walk out my door, the mediation is over. Period. No matter what I say or do, when they leave to inspect the property, all parties will view the mediation as a failed effort and will not come back.

Here's why:

The Mime Artist: An Information Vacuum

–The mediation experience of the attorneys is in non-bankruptcy cases. In their experience, mediation commonly occurs after they've been through a year or more of interrogatories, requests for admission, requests for production, inspections of property, depositions and disputes over all such discovery things.

–In their experience, mediation rarely happens when a large discovery vacuum exists. So, they view mediation as a one-and-done session: if a settlement doesn't happen during the one session, the mediation is over. Period.

–In bankruptcy, by contrast, the discovery vacuum is often huge. The timeline for bankruptcy disputes is often measured in weeks or a few months . . . not the one-or-more-years commonly seen in other courts. In fact, traditional discovery is often nonexistent in contested matters and many adversary proceedings.

Back to the mediation session: I suggest, in multiple and varying ways, that we recess for a time so the bank can inspect the building with an appraiser—and then reconvene the mediation session.

"Sure. We'll call back and reschedule after the inspection is accomplished," I'm assured.

"Yeah . . . Right," I'm thinking. "That'll never happen."

The mediation session ends. They all walk out the door. And, sure enough, that's the end of the mediation.

Action Item. All participants in a bankruptcy mediation need to understand, in advance, that a discovery vacuum, (1) might require a recess in the mediation session until the discovery vacuum can be filled, or (2) needs to be identified and addressed in pre-session communications..

This post is Part Three in a series of six articles explaining how and why bankruptcy mediation needs a different model from the one-and-done session commonly used in non-bankruptcy cases.

6 Reasons Why Bankruptcy Mediation is a Process, Not a One-and-Done Session: PART FOUR — FRESHNESS OF THE FIGHT

By: Donald L. Swanson

Image Source: Kuriositas.com

I'm in a mediation session for a state court commercial case. The parties have been at it for a couple years. And everyone's expectation is that this will be a one-and-done session.

One of the first things Plaintiff's president says to me is, "Can you believe we've paid over [$xxx] in attorney fees?!"

One of the first things Defendant's president says to me is, "I absolutely hate sitting through depositions!"

Additionally, it's obvious from the beginning that everyone grasps this concept: "Our case will be a close-call at trial, and we might lose."

And I'm thinking, "The parties are weary of the fight and want to get it over. This case will settle today—100% certainty."

Sure enough, both parties are highly motivated to settle—and they get it done.

By contrast, I'm in another mediation session over Chapter 11 plan confirmation disputes between two parties.

Denial of confirmation, with opportunity to amend, occurred recently. And trial on the amended plan is scheduled in about a month.

The confirmation battle has been running for several months. But the battle has been limited:

–no written discovery, no depositions, no inspection of property, no preliminary motions, no pretrial motions; and

–fees incurred to date are relatively small on both sides.

In the mediation session, no one is complaining about fees or about depositions. No one is weary of the fight. Gloves are up!

Yet, it's clear that expectations are for a one-and-done session.

And I'm thinking, "This could be a tough day. Is a successful one-and-done session possible? . . . I don't know . . ."

Sure enough: one-and-done doesn't work. The fight is too fresh.

So . . . here is where the one-and-done model breaks down. In a one-and-done, the mediation is now over. And the parties are not going to reconvene the session.

A conscientious mediator might follow-up informally with the attorneys to encourage additional discussions. But such follow-up is, typically, a gratuity: the mediator's follow-up is without additional charge.

Such a freebie follow-up model is inadequate in bankruptcy — for the various reasons discussed in this series of articles.

Action Item. In every bankruptcy mediation where the fight is still fresh, we need to recognize that a one-and-done session expectation is probably unrealistic—and adjust our expectations accordingly.

This post is Part Four in a series of six articles explaining how and why bankruptcy mediation needs a different model from the one-and-done session commonly used in non-bankruptcy cases.


Reorganization Mediation ≠ Regular Mediation
Multi-party realities
Different priorities from regular mediation

6 Reasons Why Bankruptcy Mediation is a Process, Not a One-and-Done Session: PART FIVE — MULTIPLE PARTY REALITIES

By: Donald L. Swanson

Two-party and three-party mediations can fit well into a one-and-done session model.

But four and more parties are difficult to manage in a one-and-done. Consider this: in a four-party mediation that begins at 9:30 a.m. with a 30 minute joint meeting and a 30 minute caucus with each party, it'll be noon before the mediator concludes the first round of caucuses.

Many bankruptcy disputes are inherently multi-party, such as (i) plan confirmation disputes in the reorganization chapters: 9, 11, 12 and 13, and (ii) priority disputes among all types of competing claims.

Multip-Party Kaneko Art

Additionally, many bankruptcy cases tee-up a cluster of disputes that are interrelated, intertwined and collectively multi-party.

Extensive preparation efforts are needed in multi-party situations, before the parties can be ready for final mediation sessions.

Such preparation efforts must bring structure and organization to the mediation process. There's no sense having multiple parties show up at a mediation session, with a one-and-done expectation, only to find confusion about what all the disputes might be—let alone trying to find middle ground for them all.

Such preparation efforts must identify and immediately address disputes that are ripe for prompt resolution. Some parties will want to settle quickly, while others want to continue fighting. The ripe-for-settlement disputes need to be identified and addressed as quickly as possible.

Such preparation efforts must narrow the issues in dispute. It's often surprising what some advance discussions can accomplish toward finding common ground and minimizing the scope of disputed issues.

Once a structure and organization are established, once early settlements are accomplished and once disputed issues are narrowed, the multiple parties will be ready for final mediation sessions to resolve remaining disputes.

Action Item. Preparation efforts must be made in a multi-party mediation before the parties will be ready for final mediation sessions.

This post is Part Five in a series of six articles explaining how and why bankruptcy mediation needs a different model from the one-and-done session commonly used in non-bankruptcy cases.

6 Reasons Why Bankruptcy Mediation is a Process, Not a One-and-Done Session: PART SIX — DIFFERING PRIORITIES

By: Donald L. Swanson

Non-bankruptcy cases usually have a different priority than bankruptcy cases: namely painting a picture v. maximizing value.

In non-bankruptcy cases, an event or series of events occur, and the focus is, typically, on (i) painting a clear picture of what happened, and (ii) assigning or absolving liability accordingly.

In non-bankruptcy cases, the picture to be painted might be:

–What happened when a collision occurred at the intersection of Main and 38th Streets?
–What happened when an invasive cervical cancer diagnosis is preceded by five consecutive years of negative Pap test results?
–What happened when a single-engine plane crashes in a cornfield?

Differing Priorities

There is no particular urgency in non-bankruptcy cases to paint the picture quickly. A leisurely-timed painting process is usually sufficient. So, discovery takes a long time. And mediation often happens as discovery winds down.

In business bankruptcy cases, by contrast, painting an accurate picture is certainly important. But the primary aim is something different: it's to preserve and maximize value of the business and its assets.

If value is lost or destroyed, the bankruptcy case is a failure.

Here's an example of bankruptcy failure:

–A production facility requires $120 million financing to construct and begin production
–The facility then runs out of cash, shuts down and files bankruptcy–at bankruptcy filing, the debtor represents its total debts to be in excess of $138 million
–DIP financing cannot be obtained, so a § 363 auction occurs without a stalking horse bid—professionals assure everyone that bidding will be "robust"
–The highest cash bid at auction is $12.75 million; and the sale is made to the only other bid–the first lienholder's $36 million credit bid.
–The facility remains idle for a couple years thereafter.

A Bankruptcy Failure

This case is an unmitigated disaster for nearly everyone. Forget what pictures might thereafter be painted. Value has not been preserved or maximized. It's the worst-possible result: a dirt-cheap sale and an idle facility.

A one-and-done mediation session at the end of discovery may be an adequate model for non-bankruptcy cases, but it is totally non-responsive to the value preservation and maximization needs of business bankruptcy cases.

Action Item. An urgency and an immediacy exist in business bankruptcy cases to preserve and maximize value—otherwise there will be nothing for creditors to fight over. Mediation plans, strategies and models must provide immediate help in these urgent situations.

This is the final post in a series of six articles explaining how and why bankruptcy mediation needs a different model from the one-and-done session commonly used in non-bankruptcy cases.

When/How: "Hallway Mediation" for Contentious Reorganization Cases

- Type of Case: Multiple parties are fighting hard, with no clear path forward
- When: Early in the case once it's clear Debtor is remaining in possession
- How it's done: Put multiple warring parties into a room to discuss their disputes face to face
  - Like what happens in the hallway during a motion day
  - Mediator "referees" the session(s), doesn't "control" it

"Hallway Mediation" for Multi-Party Disputes that are Stuck and Going Nowhere

By: Donald L. Swanson

A Court-Side Hallway

"Hallway Mediation" is this:

Putting multi-party disputants into a room to talk about their disputes, with the mediator orchestrating (or maybe it's refereeing) the event.

I call it "Hallway Mediation" because that's where I first saw it happen and learned to do it: in the hallways outside the Bankruptcy Courtrooms in Omaha, Lincoln and North Platte, Nebraska.

Some History

This all happened back in the Farm Crisis days of the 1980s, when I was first learning to practice law (I'm still trying to figure it out). The Bankruptcy Court consists, back then, of one Judge, one law clerk, one secretary, and a handful of people in the Clerk's Office. And bankruptcy filings are exploding.

The Judge sets a hearing day for once or twice a week with, typically, a half-dozen matters scheduled for each hour, all day long. That means lots of standing-around time for all the attorneys: invariably, an early hearing goes long, pushing all other hearings back.

So, attorneys mill around the hallway, awaiting their turn. They start talking to opposing counsel, and negotiations begin. If they settle that day's dispute, they advise the Court and go home. Most hearing disputes settle.

In multi-party disputes, a couple attorneys start talking in the hallway. Other interested attorneys eaves-drop and then join the discussion. Some attorneys break away for private negotiations and then rejoin the pack. Discussions always range beyond the immediate hearing to broader issues in the case.

When the scheduled hearings are finally called, the immediate disputes are often settled. But more importantly, everyone has a better understanding of the case, where it's going, what the issues might be, and what actions and further negotiations are needed.

A week or two later, a new round of hearings happens in the same multi-party case, and the Hallway Mediation process repeats.

Meanwhile, discussions and negotiations continue between hearings. But attorneys come to rely on, plan for and utilize Hallway Mediation as an organizing strategy in every case.

Judge as Mediator

The Judge, back then, is filling a mediator-type role: he brings disputing parties together, gets them talking, and helps make settlements happen . . . albeit, in a round-about and indirect sort of way.

It works great . . . really, it does! . . . and especially-so in multi-party disputes that are stuck and getting nowhere.

We attorneys, back then, do not see this as mediation: heck, I didn't even know mediation was a thing. But the process is, in retrospect, most definitely mediation-ish.

The End . . . and a Beginning

But then, improvements in telephone conferencing allow for hearings-by-telephone. This solves a major problem for Nebraska attorneys: namely, traveling long distances for court hearings — often through inclement weather and over icy roads.

But telephone hearings mark the end of Hallway Mediation in its original form. Those days are gone.

–And, it's the death of the original Hallway Mediation that highlighted the need for mediation (in its more-usual form) in the Nebraska Bankruptcy Court, resulting in the adoption of Local Rules on mediation, encouragement and support of mediation efforts by the Bankruptcy Judge, and general acceptance of mediation by the bankruptcy bar in Nebraska.

A Common Experience — Which is Why it Works!

The description of my Hallway Mediation history above is neither unique nor unusual. Most, if not all, bankruptcy attorneys have similar experiences with negotiations in court side hallways. The details of each attorney's experience will vary widely, but the essence of such experiences is in common. And that's why the "Hallway Mediation" defined above works today: because we're all experienced at doing it.

Conclusion

"Hallway Mediation" for today is, in essence, a remake of what actually happened (back in the old days) in the hallway outside the Bankruptcy Courtrooms in Nebraska — and outside bankruptcy courtrooms everywhere.

Hallway Mediation is a remedy for multi-party disputes in every reorganization case that is stuck and going nowhere. Hallway Mediation will help get it going!

When/How: "Hallway Mediation" for Contentious Reorganization Cases

- Goal: Bring order out of chaos to maximize value
  - Develop a direction and organization for addressing multi-party disputes
  - Actual settlements are a bonus

Early Mediation of Plan Confirmation Issues in Difficult Chapter 11 Cases

By Donald L. Swanson
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> Bankruptcy courts "generally presume that good chapter 11 lawyers can and should negotiate without the help of an outside mediator." However, some Chapter 11 cases are "so inherently complex" or "riddled" with "high levels of distrust" that "the presiding judge (or more rarely, the parties) views the appointment of a plan mediator as a virtual necessity from the outset."
>
> Hon. Lisa Hill Fenning (Ret.), in "Bankruptcy Mediation," ABI 2016.

A Contrast

Mediation processes for plan confirmation in a Chapter 11 case are different from mediation processes in a typical lawsuit.

A typical lawsuit wends its way, at a leisurely pace, from the pleadings stage, into written discovery and then depositions, followed by pre-trial wrangling, then into trial, and concluding with appellate action (with the possibility of a remand restarting the entire process). And mediation in a typical lawsuit occurs toward the end of the case in a one-and-done session: either the case settles in that session, or the mediation is viewed as a failure.

Chapter 11 plan confirmation processes are nothing like a typical lawsuit.

First, the "leisurely pace" component does not exist. A Chapter 11 case is about a business that must either, (i) remain alive, or (ii) liquidate in an orderly manner. The value of the business, in a liquidation or as a going concern, must be maintained and maximized at-all-costs. This necessity creates a sense of urgency and a need to resolve pressing business disputes quickly and efficiently.

Second, there is no such thing as a pleadings stage in the early portions of a Chapter 11 plan process. The plan and disclosure statement are the closest-thing to that, but many issues relating to plan confirmation are being addressed and resolved from the earliest days of the bankruptcy case—and long before a plan is ever proposed.

Third, written discovery, followed by depositions, is a luxury that is something of a rarity in Chapter 11 processes. Disputes over first day motions, cash collateral use, relief from automatic stay and adequate protection are immediate, must be addressed in haste and have little tolerance for delays in any form. The reality is that formal discovery is non-existent for many Chapter 11 disputes.

Fourth, the number of disputing parties in a Chapter 11 case can be enormous: *e.g.*,

hundreds of vendors, unsecured creditors and customers, dozens of landlords, a variety of secured creditors, numerous employees, taxing authorities from all levels and other priority claimants, government regulators, multiple owners, etc. This is a light-years difference from the number of constituencies in a typical lawsuit with its limited group of plaintiffs and defendants.

Timing and Goals

Because of these differences, the timing and goals of a Chapter 11 plan mediation need to be dramatically different from—and perhaps the polar opposite of—mediation in a typical lawsuit. Here is a suggested mediation model for Chapter 11 plan confirmation:

Timing: Chapter 11 plan mediation consists of multiple sessions that begin in the early stages of the case—an optimum time is after the initial flurry of motions for use of cash collateral and relief from stay are resolved and it's clear that debtor will remain in possession.

Goals: Chapter 11 plan mediation needs to focus, in early sessions, on bringing order out of chaos and on creating an organization and structure for identifying, addressing and resolving disputes through subsequent legal action and negotiations.

An Example

Many bankruptcy attorneys, parties, mediators and judges can tell stories of how this Chapter 11 plan mediation model works. Below is an example of a successful early-mediation effort in a Chapter 11 case.

We're at the beginning of a Chapter 11 case with lots of competing interests. Everyone is in a fight-every-battle mode. We're past the initial flurry of motions, and it's clear that debtor will continue in possession. But creditors remain hostile. And there is no clear path to a confirmable plan.

The case has a chaotic existence. Efforts to bring order and structure to the case fail to gain traction. And the case is going nowhere. So, a dozen-or-more parties and their attorneys schedule a mediation session. The session has many participants and lasts all day. It begins with an around-the-conference-room discussion. Then groups of two and three disputing parties break into closed-door meetings.

The mediator acts as an orchestrator (as opposed to a controller) of the mediation session. As the day wears along, parties continue acting on their own initiative: grabbing a disputing party and holding an impromptu discussion, then adding in another party, and then breaking up and beginning anew with another group.

As the afternoon wears along, the mediation effort begins to bear fruit. As everyone leaves the session that evening, the sense of chaos and confusion is gone. Few issues are actually resolved, but an organization and a structure and a direction are beginning to emerge for solving the problems of the case.

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Many more negotiation and mediation and litigation efforts are still needed to bring the case to conclusion. But the case is now well on its way toward a successful resolution.

This is but one example of how an early-mediation model for Chapter 11 plan confirmation can – and should -- work.

Topics for Discussion

Every case is different. But here are some topics that might be discussed in early-mediation efforts in a small or medium-sized business case:

--What are debtor's intentions for terms of a plan?
--Are such terms realistic and feasible?
--How does debtor intend to deal with requirements of the absolute priority rule?

--What would the various creditors and other bankruptcy constituencies like to see the debtor do?
--Primary secured creditors?
--Landlords / tenants?
--Executory contract holders?
--General unsecured creditors?
--Insurance companies?
--Employees?
--Others?

--Is there a direction that might be identified where everyone could get on board?

--What Chapter 5 avoidance and similar claims exist?
--Against insiders?
--Against non-insiders?

--If creditors are demanding liquidation and, if debtor were to pursue liquidation in a manner designed to maximize value for everyone:
--What would such an effort look like?
--Might creditors be willing to make concessions on guaranty, Chapter 5 and other claims against insiders?

--What about taxes?

--Which non-debtor constituencies are in disputes with each other?
--Are lien interests or priorities in dispute? If so.
--Who are the disputing parties?
--How might these disputes be addressed?
--Is there anything non-insiders might to do minimize Chapter 5 and similar claims against them?

Conclusion

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The idea behind early-mediation efforts in a Chapter 11 case, toward plan confirmation, is to begin developing an organization and a structure and a direction for the case. The rest of the case can, then, build on that with further negotiation, mediation and litigation efforts to bring the case to a successful conclusion.

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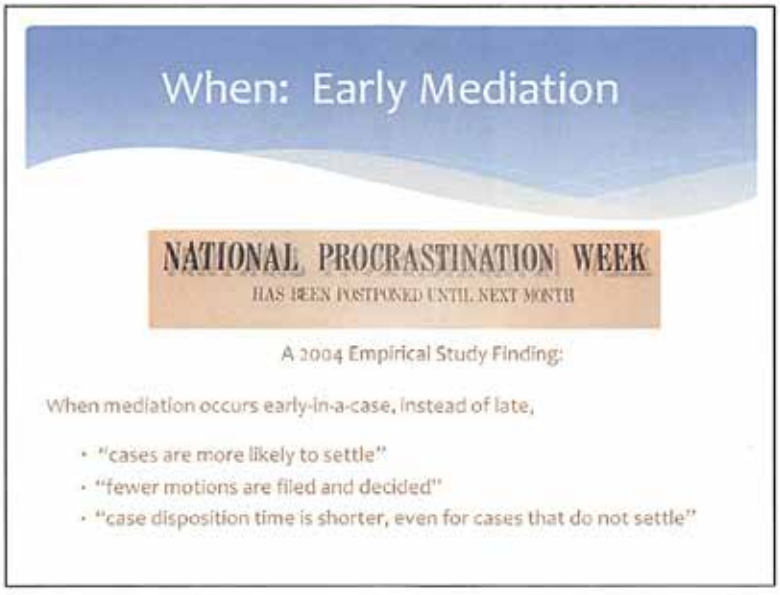
When: Early Mediation
NATIONAL PROCRASTINATION WEEK
HAS BEEN POSTPONED UNTIL NEXT MONTH
A 2004 Empirical Study Finding:
When mediation occurs early-in-a-case, instead of late,
• "cases are more likely to settle"
• "fewer motions are filed and decided"
• "case disposition time is shorter, even for cases that do not settle"

How Mediation at the End of a Case is Wasteful

By: Donald L. Swanson

When mediation occurs early-in-a-case, instead of late, "cases are more likely to settle, fewer motions are filed and decided, and case disposition time is shorter, even for cases that do not settle."

–B. McAdoo, N. Welsh & R. Wissler, "**What Do Empirical Studies Tell Us About Court Mediation?**" (2004)

A lawsuit consists of these overlapping phases: (i) pleadings, (ii) discovery, (iii) dispositive motions, (iv) pretrial steps, and (v) trial with final verdict or judgment.

The study linked above concludes, obviously, that an early-in-the-case mediation is more effective than a late-in-the-case mediation.

Wasteful

Nevertheless, the customary time for mediation is late-in-the-case: as discovery winds down, pretrial steps are in process, and trial is in the offing. Unfortunately, this late-in-the-case time (without an early mediation effort first) is about as wasteful as can be imagined. Consider this:

–A huge amount of time, effort, energy and fees are spent before a late-in-the-case mediation begins, and avoiding many of such costs can be a powerful incentive to settle in an early-mediation; and

–If the optimum time for mediating is early-in-the-case, then all the time, effort, energy and fees spent between an unused early/optimum time and the late/customary time is a pure and unmitigated waste!

A Wasteland

A Faulty Rationale: More Time is Needed

One faulty rationale for end-of-the-case mediation is that the parties need more time to, (i) recognize the risks of their legal position, and (ii) come to grips with the reality of what it takes to resolve the case. Here are two examples of how this rationale is faulty.

1. A lack of opportunity. I remember representing a business defendant who gives ten reasons why they are not responsible for the bad things that happened. The months-

long discovery process turns into a ten-step effort that proves each and every one of the reasons wrong. No early-settlement overtures occur in the case from either side, and my client appears ready to engage in meaningful settlement discussions only after all ten reasons are refuted. In retrospect, however, I'm pretty sure that, (i) they knew or suspected, all along, that they were in the wrong, and (ii) would have jumped at the end-of-case settlement terms, had those terms been available early in the case.

2. A lack of imagination. I remember representing a plaintiff against a business defendant that had clearly breached standards of care. But defense counsel refuses, in numerous different contexts, all early settlement overtures (he blames his client for the refusals). We settle at the end with defendant paying much more than defendant would ever have had to pay in an early-stage settlement. The early-refusals cost defendant dearly! I've often wondered why all early olive branches were rebuffed . . . and attribute it to a lack of imagination from the other side.

Another Faulty Rationale: Exhaustion Helps

Another faulty rationale for end-of-the-case mediation is the exhaustion element: when parties are weary of paying fees, weary of the time and energy consumed by the lawsuit, and concerned about risks of losing, they become more-inclined to settle. But this exhaustion element bears an unreasonably high price to pay for getting into a better mood for settling the case.

Bankruptcy Experience

This early-mediation idea is now institutionalized in the Delaware Bankruptcy Court. In 2013, the Delaware Court establishes an early-mediation program for preference cases (*see* **this article**).

And it should be noted that early-mediation benefits are particularly in-play for bankruptcy reorganization disputes. Reorganization cases are best served when many disputes are resolved as quickly as possible. The business needs of a debtor, typically, cannot survive long and protracted battles. A debtor, simply, cannot afford to fight every battle all the time. So, early-mediation can be critical to the success of the reorganization process.

Conclusion

Early-mediation is optimal for resolving legal disputes, especially in bankruptcy cases. But end-of-the-case mediation is what usually happens (without any attempt at early mediation). This is wasteful and needs to change!

Development: Districts Without Local Mediation Rules – 20 of 94 (21.3%)

- Alabama – Middle, Northern & Southern
- Arkansas – Eastern & Western
- Dakotas – North Dakota & South Dakota
- Illinois – Northern & Southern
- Kentucky – Eastern & Western
- Louisiana – Eastern & Middle
- Missouri – Western
- New York – Western
- Northern Mariana Islands
- Virginia – Western
- West Virginia – Northern
- Wisconsin – Eastern & Western

A Resource: Model Local Rules and Commentary (on ABI Mediation Committee's webpage)

LIST OF BANKRUPTCY DISTRICTS WITHOUT LOCAL MEDIATION RULES

Listed Alphabetically by State – In Three Parts

PART I: BANKRUPTCY DISTRICTS WITH NO LOCAL MEDIATION RULE

1. Alabama -- Middle District
2. Alabama – Northern District
3. Alabama – Southern District
4. Arkansas – Eastern District
5. Arkansas – Western District
6. Illinois – Northern District
7. Illinois – Southern District
8. Kentucky – Eastern District
9. Kentucky – Western District
10. Louisiana – Eastern District
11. Louisiana – Middle District
12. Missouri – Western District
13. New York – Western District
14. North Dakota
15. Northern Mariana Islands
16. South Dakota
17. Virginia – Western District
18. West Virginia – Northern District
19. Wisconsin – Eastern District
20. Wisconsin – Western District

20 districts with no mediation rule is 21.3% of all 94 bankruptcy districts

4831-4910-0879.1

PART II: BANKRUPTCY DISTRICTS WITH A MINIMAL MEDIATION RULE (*i.e.*, a one or two sentence rule)

1. Maine
2. Minnesota
3. New Hampshire
4. Texas – Northern District
5. West Virginia – Southern District

PART III: BANKRUPTCY DISTRICTS COVERED BY DISTRICT COURT RULES

1. District of Columbia (District Court's LCvR 84.4(e) says, "Mediation is also available to litigants in bankruptcy proceedings")

2. Guam (District Court's CVLR 16-2 mediation rule applies in "proceedings in bankruptcy")

3. Iowa – Northern District (District Court's LR 72B mediation rule applies in "adversary proceedings in bankruptcy")

4. Iowa – Southern District (District Court's LR 72B mediation rule applies in "adversary proceedings in bankruptcy")

5. Puerto Rico (District Court's Rule 83.1 mediation rule applies to, "All civil cases arising under the jurisdiction of this Court"; and Bankruptcy Court's Rule 1001(b) incorporates District Court rules when "a procedural matter is not covered")

4831-4910-0879.1


Development:
Districts With Minimal Mediation Rule (one or two sentences):
Maine
Minnesota
New Hampshire
Texas – Northern
West Virginia – Southern
Districts Covered by District Court's Local Mediation Rules:
District of Columbia
Guam
Iowa – Norther & Southern
Puerto Rico

MEDIATBANKRY

On Bankruptcy and Mediation

A List of Bankruptcy Districts that HAVE and HAVE-NOT Adopted Local Mediation Rules

An old-time courtroom: hanging onto the past

By: Donald L. Swanson

I've been asked many times for the number of bankruptcy court districts who, (i) HAVE adopted local rules on mediation, and (ii) HAVE-NOT adopted such rules.

–The have-not courts, it seems, are hanging on to the past — for reasons that are unknown . . . and not readily apparent.

In response, I've offered information on what I've read — that it's, roughly, a 50/50 split. But such information is from several years ago and isn't satisfactory.

So, I asked a legal assistant in our office, Sarah O'Callaghan, to do the research and come up with a list of districts that HAVE and HAVE-NOT adopted local mediation rules.

Here's her list, consisting of 74 of 94 districts (78.72%) that HAVE adopted some type of such rules (listed as, "Yes") and 20 of 94 districts (21.28%) that HAVE NOT adopted any such rules (listed as, "No").

We are asking everyone who reads this article to review the following list for districts that are familiar to you and let us know of any corrections that need to be made — thanks!

[**Note:** This article is updated to include information available as of July 20, 2017.]

1st Circuit	District of Maine	Yes – Rule 9019-02
	District of Massachusetts	Yes – Rule 7016-1 & Appendix 7
	District of New Hampshire	Yes – LBR 7016-1(c)
	District of Puerto Rico	Yes — District Court Rule 83.1 applies, per Bkry LR 1001(b)
	District of Rhode Island	Yes – Alternative Dispute Resolution Plan *(Amended March 1, 2006)*
2nd Circuit	District of Connecticut	Yes – LBR 9019-2
	Eastern District of New York	Yes – Rule 9019-1
	Northern District of New York	Yes – Rule 9019-1 & Appendix IV
	Southern District of New York	Yes – Rule 9019-1
	Western District of New York	No
	District of Vermont	Yes – Rule 16.1 (ENE)
3rd Circuit	District of Delaware	Yes – Rule 9019 (1-7)
	District of New Jersey	Yes – LBR 9019-1 & LBR 9019-2
	Eastern District of Pennsylvania	Yes – Rule 9019-3
	Middle District of Pennsylvania	Yes – Rule 9019-02 & Rule 9019-3 *(Mortgage Modification Mediation Program)*
	Western District of Pennsylvania	Yes – Rule 9019 (2-7)
	District Court of the Virgin Islands	Yes – Rule 9019-2
4th Circuit	District of Maryland	Yes – Rule 9019-2
	Eastern District of North Carolina	Yes – Rule 9019-2

	Middle District of North Carolina	Yes – LR 9019-2 *(Mediation Settlement Conference)*
	Western District of North Carolina	Yes – LR 9019-2 *(Mediated Settlement Conference)*
	District of South Carolina	Yes – LR 9019-2
	Eastern District of Virginia	Yes — LR 9019-1 (adopting District Court Rule 83.6)
	Western District of Virginia	No
	Northern District of West Virginia	No
	Southern District of West Virginia	Yes – 9019-2 (a one-sentence Rule)
5th Circuit	Eastern District of Louisiana	No
	Middle District of Louisiana	No
	Western District of Louisiana	Yes – Voluntary Mediation Program Order
	Northern District of Mississippi	Yes – Rule 9019-1
	Southern District of Mississippi	Yes – Rule 9019-1
	Eastern District of Texas	Yes – LR 9019
	Northern District of Texas	Yes – L.B.R. 9012-2(a) (a one-sentence Rule) & Form BTXN 002
	Southern District of Texas	Yes — Adopts District Court LR 16.4
	Western District of Texas	Yes – L. Rule 1001(h) & Appendix L-1001-h
6th Circuit	Eastern District of Kentucky	No
	Western District of Kentucky	No
	Eastern District of Michigan	Yes – Rule 7016-1(h)(13) & 7016-2
	Western District of Michigan	Yes – LBR 9016-1
	Northern District of Ohio	Yes – Rule 9019-2 (Governed by L.C.R. 16.4 – 16.7)
	Southern District of Ohio	Yes – Rule 9019-2
	Eastern District of Tennessee	Yes –Rule 9019-2
	Middle District of Tennessee	Yes – Rule 9019-2
	Western District of Tennessee	Yes — Rule 9019-1

7th Circuit	Central District of Illinois	Yes — Adopts District Court Rule 16.4
	Northern District of Illinois	No
	Southern District of Illinois	No
	Northern District of Indiana	Yes – B-9019-2
	Southern District of Indiana	Yes – B-9019-2
	Eastern District of Wisconsin	No — But does have MMM
	Western District of Wisconsin	No — But does have MMM
8th Circuit	Eastern District of Arkansas	No
	Western District of Arkansas	No
	Northern District of Iowa	Yes — District Court LR 72B applies
	Southern District of Iowa	Yes — District Court LR 72B applies
	District of Minnesota	Yes – Rule 9019-2 (a one-sentence Rule)
	Eastern District of Missouri	Yes – Rule 9019
	Western District of Missouri	No
	District of Nebraska	Yes – Rule 7016-1 & 9014-1(C)
	District of North Dakota	No
	District of South Dakota	No
9th Circuit	District of Alaska	Yes — BDRP
	District of Arizona	Yes – Rule 9072
	Central District of California	Yes – LBR Appendix III
	Eastern District of California	Yes — BDRP
	Northern District of California	Yes – 9040-1 through 9050-1 *(Bankruptcy Dispute resolution Program)*
	Southern District of California	Yes – 7016-11
	District of Hawaii	Yes – LBR 9019-2
	District of Idaho	Yes — Mediation Program Procedures
	District of Montana	Yes – 9019-1
	District of Nevada	Yes – LR 9019 & LR 3015 *(Mortgage Modification Mediation)*

	District of Oregon	Yes – Rule 9019-2
	Eastern District of Washington	Yes – Rule 9019-2
	Western District of Washington	Yes – Rule 9040-1 *(Honorable Thomas T. Glover Mediation Program)*
	District of Guam	Yes — District Court CVLR 16-2 applies
	District of the Northern Mariana Islands	No
10th Circuit	District of Colorado	Yes – LBR 9019-2
	District of Kansas	Yes – LBR 9019.2
	District of New Mexico	Yes — Form Mediation Order
	Eastern District of Oklahoma	Yes – Rule 9019-2
	Northern District of Oklahoma	Yes – Rule 9019-2
	Western District of Oklahoma	Yes – Rule 7016(f)
	District of Utah	Yes – Rule 9019-2
	District of Wyoming	Yes – 9019-2
11th Circuit	Middle District of Alabama	No
	Northern District of Alabama	No
	Southern District of Alabama	No
	Middle District of Florida	Yes – Rule 9019-2
	Northern District of Florida	Yes – Rule 7016-1 & Addendum B
	Southern District of Florida	Yes – Rule 9019-2
	Middle District of Georgia	Yes — Mediation Procedures
	Northern District of Georgia	Yes — Mediation Procedures
	Southern District of Georgia	Yes — Mediation Procedures
D.C. Circuit	District of Columbia	Yes — District Court LCvR 84.4(e) applies

Published by mediatbankry

My name is Donald L. Swanson (please call me "Don"). I'm an attorney in Omaha, Nebraska, and am a shareholder in the law firm of Koley Jessen P.C., L.L.O. I've been practicing business bankruptcy law for more than three decades and represent all types of bankruptcy constituencies, including debtors, creditors, committees, trustees, and § 363 purchasers. I have extensive mediation experience in both bankruptcy and non-bankruptcy courts. Moreover, I have a decades-long background in resolving multi-party disputes while representing

committees and trustees. □ View all posts by mediatbankry

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Bankruptcy Mediation, Mediation Confidentiality

Bankruptcy Mediation, Mediation, Mediation Confidentiality

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Development:
Federal Mediation Rule is Needed
A Federal Bankruptcy Rule on mediation is needed to:
(i) authorize mediation, and
(ii) provide confidentiality.
Many local districts have no such rules.
Uniformity is lacking in existing confidentiality rules.
ABI Commission on Chapter 11 recommends an "Estate Neutral" for small and medium size cases.

§ 652. Jurisdiction.

United States Statutes

Title 28. JUDICIARY AND JUDICIAL PROCEDURE

Part III. COURT OFFICERS AND EMPLOYEES

Chapter 44. ALTERNATIVE DISPUTE RESOLUTION

Current through P.L. 115-46

§ 652. Jurisdiction

(a) CONSIDERATION OF ALTERNATIVE DISPUTE RESOLUTION IN APPROPRIATE CASES.-Notwithstanding any provision of law to the contrary and except as provided in subsections (b) and (c), each district court shall, by local rule adopted under section 2071(a), require that litigants in all civil cases consider the use of an alternative dispute resolution process at an appropriate stage in the litigation. Each district court shall provide litigants in all civil cases with at least one alternative dispute resolution process, including, but not limited to, mediation, early neutral evaluation, minitrial, and arbitration as authorized in sections 654 through 658. Any district court that elects to require the use of alternative dispute resolution in certain cases may do so only with respect to mediation, early neutral evaluation, and, if the parties consent, arbitration.

(b) ACTIONS EXEMPTED FROM CONSIDERATION OF ALTERNATIVE DISPUTE RESOLUTION.-Each district court may exempt from the requirements of this section specific cases or categories of cases in which use of alternative dispute resolution would not be appropriate. In defining these exemptions, each district court shall consult with members of the bar, including the United States Attorney for that district.

(c) AUTHORITY OF THE ATTORNEY GENERAL.-Nothing in this section shall alter or conflict with the authority of the Attorney General to conduct litigation on behalf of the United States, with the authority of any Federal agency authorized to conduct litigation in the United States courts, or with any delegation of litigation authority by the Attorney General.

(d) CONFIDENTIALITY PROVISIONS.-Until such time as rules are adopted under chapter 131 of this title providing for the confidentiality of alternative dispute resolution processes under this chapter, each district court shall, by local rule adopted under section 2071(a), provide for the confidentiality of the alternative dispute resolution processes and to prohibit disclosure of confidential dispute resolution communications.

Cite as 28 U.S.C. § 652

Source: Added Pub. L. 100-702, title IX, §901(a), Nov. 19, 1988, 102 Stat. 4659; amended Pub. L. 105-315, §4, Oct. 30, 1998, 112 Stat. 2994.

Notes from the Office of Law Revision Counsel

current through 5/31/2017

AMENDMENTS1998- Pub. L. 105-315 amended section generally, substituting provisions relating to alternative dispute resolution jurisdiction for provisions relating to arbitration jurisdiction.

EXCEPTION TO LIMITATION ON MONEY DAMAGES Pub. L. 100-702, title IX, §901(c), Nov. 19, 1988, 102 Stat. 4663, provided that notwithstanding establishment by former section 652 of this title of a $100,000 limitation on money damages with respect to cases referred to arbitration, a district court listed in former section 658 of this title whose local rule on Nov. 19, 1988, provided for a limitation on money damages of not more than $150,000, could continue to apply the higher limitation, prior to repeal by Pub. L. 105-315, §12(a), Oct. 30, 1998, 112 Stat. 2998.

Public Law 105–315
105th Congress

An Act

To amend title 28, United States Code, with respect to the use of alternative dispute resolution processes in United States district courts, and for other purposes

Oct. 30, 1998
[H.R. 3528]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Alternative Dispute Resolution Act of 1998.
28 USC 1 note.

SECTION 1. SHORT TITLE.

This Act may be cited as the "Alternative Dispute Resolution Act of 1998".

28 USC 651 note.

SEC. 2. FINDINGS AND DECLARATION OF POLICY.

Congress finds that—

(1) alternative dispute resolution, when supported by the bench and bar, and utilizing properly trained neutrals in a program adequately administered by the court, has the potential to provide a variety of benefits, including greater satisfaction of the parties, innovative methods of resolving disputes, and greater efficiency in achieving settlements;

(2) certain forms of alternative dispute resolution, including mediation, early neutral evaluation, minitrials, and voluntary arbitration, may have potential to reduce the large backlog of cases now pending in some Federal courts throughout the United States, thereby allowing the courts to process their remaining cases more efficiently; and

(3) the continued growth of Federal appellate court-annexed mediation programs suggests that this form of alternative dispute resolution can be equally effective in resolving disputes in the Federal trial courts; therefore, the district courts should consider including mediation in their local alternative dispute resolution programs.

SEC. 3. ALTERNATIVE DISPUTE RESOLUTION PROCESSES TO BE AUTHORIZED IN ALL DISTRICT COURTS.

Section 651 of title 28, United States Code, is amended to read as follows:

"§ 651. Authorization of alternative dispute resolution

"(a) DEFINITION.—For purposes of this chapter, an alternative dispute resolution process includes any process or procedure, other than an adjudication by a presiding judge, in which a neutral third party participates to assist in the resolution of issues in controversy, through processes such as early neutral evaluation, mediation, minitrial, and arbitration as provided in sections 654 through 658.

"(b) AUTHORITY.—Each United States district court shall authorize, by local rule adopted under section 2071(a), the use of alternative dispute resolution processes in all civil actions, including adversary proceedings in bankruptcy, in accordance with this chapter, except that the use of arbitration may be authorized only as provided in section 654. Each United States district court shall devise and implement its own alternative dispute resolution program, by local rule adopted under section 2071(a), to encourage and promote the use of alternative dispute resolution in its district.

"(c) EXISTING ALTERNATIVE DISPUTE RESOLUTION PROGRAMS.—In those courts where an alternative dispute resolution program is in place on the date of the enactment of the Alternative Dispute Resolution Act of 1998, the court shall examine the effectiveness of that program and adopt such improvements to the program as are consistent with the provisions and purposes of this chapter.

"(d) ADMINISTRATION OF ALTERNATIVE DISPUTE RESOLUTION PROGRAMS.—Each United States district court shall designate an employee, or a judicial officer, who is knowledgeable in alternative dispute resolution practices and processes to implement, administer, oversee, and evaluate the court's alternative dispute resolution program. Such person may also be responsible for recruiting, screening, and training attorneys to serve as neutrals and arbitrators in the court's alternative dispute resolution program.

"(e) TITLE 9 NOT AFFECTED.—This chapter shall not affect title 9, United States Code.

"(f) PROGRAM SUPPORT.—The Federal Judicial Center and the Administrative Office of the United States Courts are authorized to assist the district courts in the establishment and improvement of alternative dispute resolution programs by identifying particular practices employed in successful programs and providing additional assistance as needed and appropriate.".

SEC. 4. JURISDICTION.

Section 652 of title 28, United States Code, is amended to read as follows:

"§ 652. Jurisdiction

"(a) CONSIDERATION OF ALTERNATIVE DISPUTE RESOLUTION IN APPROPRIATE CASES.—Notwithstanding any provision of law to the contrary and except as provided in subsections (b) and (c), each district court shall, by local rule adopted under section 2071(a), require that litigants in all civil cases consider the use of an alternative dispute resolution process at an appropriate stage in the litigation. Each district court shall provide litigants in all civil cases with at least one alternative dispute resolution process, including, but not limited to, mediation, early neutral evaluation, minitrial, and arbitration as authorized in sections 654 through 658. Any district court that elects to require the use of alternative dispute resolution in certain cases may do so only with respect to mediation, early neutral evaluation, and, if the parties consent, arbitration.

"(b) ACTIONS EXEMPTED FROM CONSIDERATION OF ALTERNATIVE DISPUTE RESOLUTION.—Each district court may exempt from the requirements of this section specific cases or categories of cases in which use of alternative dispute resolution would not be appropriate. In defining these exemptions, each district court shall consult

with members of the bar, including the United States Attorney for that district.

"(c) AUTHORITY OF THE ATTORNEY GENERAL.—Nothing in this section shall alter or conflict with the authority of the Attorney General to conduct litigation on behalf of the United States, with the authority of any Federal agency authorized to conduct litigation in the United States courts, or with any delegation of litigation authority by the Attorney General.

"(d) CONFIDENTIALITY PROVISIONS.—Until such time as rules are adopted under chapter 131 of this title providing for the confidentiality of alternative dispute resolution processes under this chaptor, each district court shall, by local rule adoptod under section 2071(a), provide for the confidentiality of the alternative disputo resolution processes and to prohibit disclosure of confidential dispute resolution communications.".

SEC. 5. MEDIATORS AND NEUTRAL EVALUATORS.

Section 653 of title 28, United States Code, is amended to read as follows:

"§ 653. Neutrals

"(a) PANEL OF NEUTRALS.—Each district court that authorizes the use of alternative dispute resolution processes shall adopt appropriate processes for making neutrals availahle for use by the parties for each category of process offered. Each district court shall promulgate its own procedures and criteria for the selection of neutrals on its panels.

"(b) QUALIFICATIONS AND TRAINING.—Each person serving as a neutral in an alternative dispute resolution process should be qualified and trained to serve as a neutral in the appropriate alternative dispute resolution process. For this purpose, 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 secter, and persons who have been trained to serve as neutrals in alternative dispute resolution processes. Until such time as rules are adoptod under chapter 131 of this title relating to the disqualification of neutrals, each district court shall issue rules under section 2071(a) relating to the disqualification of neutrals (including, where appropriate, disqualification under section 455 of this title, other applicable law, and professional responsibility standards).".

SEC. 6. ACTIONS REFERRED TO ARBITRATION.

Section 654 of title 28, United States Code, is amended to read as follows:

"§ 654. Arbitration

"(a) REFERRAL OF ACTIONS TO ARBITRATION.—Notwithstanding any provision of law to the contrary and except as provided in subsections (a), (b), and (c) of section 652 and subsection (d) of this section, a district court may allow the referral to arbitration of any civil action (including any adversary proceeding in bankruptcy) pending before it when the parties consent, except that referral to arbitration may not be made where—

"(1) the action is based on an alleged violation of a right secured by the Constitution of the United States;

"(2) jurisdiction is based in whole or in part on section 1343 of this title; or

"(3) the relief sought consists of money damages in an amount greater than $150,000.

"(b) SAFEGUARDS IN CONSENT CASES.—Until such time as rules are adopted under chapter 131 of this title relating to procedures described in this subsection, the district court shall, by local rule adopted under section 2071(a), establish procedures to ensure that any civil action in which arbitration by consent is allowed under subsection (a)—

"(1) consent to arbitration is freely and knowingly obtained; and

"(2) no party or attorney is prejudiced for refusing to participate in arbitration.

"(c) PRESUMPTIONS.—For purposes of subsection (a)(3), a district court may presume damages are not in excess of $150,000 unless counsel certifies that damages exceed such amount.

"(d) EXISTING PROGRAMS.—Nothing in this chapter is deemed to affect any program in which arbitration is conducted pursuant to section title IX of the Judicial Improvements and Access to Justice Act (Public Law 100–702), as amended by section 1 of Public Law 105–53.".

SEC. 7. ARBITRATORS.

Section 655 of title 28, United States Code, is amended to read as follows:

"§ 655. Arbitrators

"(a) POWERS OF ARBITRATORS.—An arbitrator to whom an action is referred under section 654 shall have the power, within the judicial district of the district court which referred the action to arbitration—

"(1) to conduct arbitration hearings;

"(2) to administer oaths and affirmations; and

"(3) to make awards.

"(b) STANDARDS FOR CERTIFICATION.—Each district court that authorizes arbitration shall establish standards for the certification of arbitrators and shall certify arbitrators to perform services in accordance with such standards and this chapter. The standards shall include provisions requiring that any arbitrator—

"(1) shall take the oath or affirmation described in section 453; and

"(2) shall be subject to the disqualification rules under section 455.

"(c) IMMUNITY.—All individuals serving as arbitrators in an alternative dispute resolution program under this chapter are performing quasi-judicial functions and are entitled to the immunities and protections that the law accords to persons serving in such capacity.".

SEC. 8. SUBPOENAS.

Section 656 of title 28, United States Code, is amended to read as follows:

"§ 656. Subpoenas

"Rule 45 of the Federal Rules of Civil Procedure (relating to subpoenas) applies to subpoenas for the attendance of witnesses and the production of documentary evidence at an arbitration hearing under this chapter.".

SEC. 9. ARBITRATION AWARD AND JUDGMENT.

Section 657 of title 28, United States Code, is amended to read as follows:

"§ 657. Arbitration award and judgment

"(a) FILING AND EFFECT OF ARBITRATION AWARD.—An arbitration award made by an arbitrator under this chapter, along with proof of service of such award on the other party by the prevailing party or by the plaintiff, shall be filed promptly after the arbitration hearing is concluded with the clerk of the district court that referred the case to arbitration. Such award shall be entered as the judgment of the court after the time has expired for requesting a trial de novo. The judgment so entered shall be subject to the same provisions of law and shall have the same force and effect as a judgment of the court in a civil action, except that the judgment shall not be subject to review in any other court by appeal or otherwise.

"(b) SEALING OF ARBITRATION AWARD.—The district court shall provide, by local rule adopted under section 2071(a), that the contents of any arbitration award made under this chapter shall not be made known to any judge who might be assigned to the case until the district court has entered final judgment in the action or the action has otherwise terminated.

"(c) TRIAL DE NOVO OF ARBITRATION AWARDS.—

"(1) TIME FOR FILING DEMAND.—Within 30 days after the filing of an arbitration award with a district court under subsection (a), any party may file a written demand for a trial de novo in the district court.

"(2) ACTION RESTORED TO COURT DOCKET.—Upon a demand for a trial de novo, the action shall be restored to the docket of the court and treated for all purposes as if it had not been referred to arbitration.

"(3) EXCLUSION OF EVIDENCE OF ARBITRATION.—The court shall not admit at the trial de novo any evidence that there has been an arbitration proceeding, the nature or amount of any award, or any other matter concerning the conduct of the arbitration proceeding, unless—

"(A) the evidence would otherwise be admissible in the court under the Federal Rules of Evidence; or

"(B) the parties have otherwise stipulated.".

SEC. 10. COMPENSATION OF ARBITRATORS AND NEUTRALS.

Section 658 of title 28, United States Code, is amended to read as follows:

"§ 658. Compensation of arbitrators and neutrals

"(a) COMPENSATION.—The district court shall, subject to regulations approved by the Judicial Conference of the United States, establish the amount of compensation, if any, that each arbitrator or neutral shall receive for services rendered in each case under this chapter.

"(b) TRANSPORTATION ALLOWANCES.—Under regulations prescribed by the Director of the Administrative Office of the United States Courts, a district court may reimburse arbitrators and other neutrals for actual transportation expenses necessarily incurred in the performance of duties under this chapter.". Regulations.

28 USC 651 note.

SEC. 11. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated for each fiscal year such sums as may be necessary to carry out chapter 44 of title 28, United States Code, as amended by this Act.

SEC. 12. CONFORMING AMENDMENTS.

(a) LIMITATION ON MONEY DAMAGES.—Section 901 of the Judicial Improvements and Access to Justice Act (28 U.S.C. 652 note), is amended by striking subsection (c).

(b) OTHER CONFORMING AMENDMENTS.—(1) The chapter heading for chapter 44 of title 28, United States Code, is amended to read as follows:

"CHAPTER 44—ALTERNATIVE DISPUTE RESOLUTION".

(2) The table of contents for chapter 44 of title 28, United States Code, is amended to read as follows:

"Sec.
"651. Authorization of alternative dispute resolution.
"652. Jurisdiction.
"653. Neutrals.
"654. Arbitration.
"655. Arbitrators.
"656. Subpoenas.
"657. Arbitration award and judgment.
"658. Compensation of arbitrators and neutrals.".

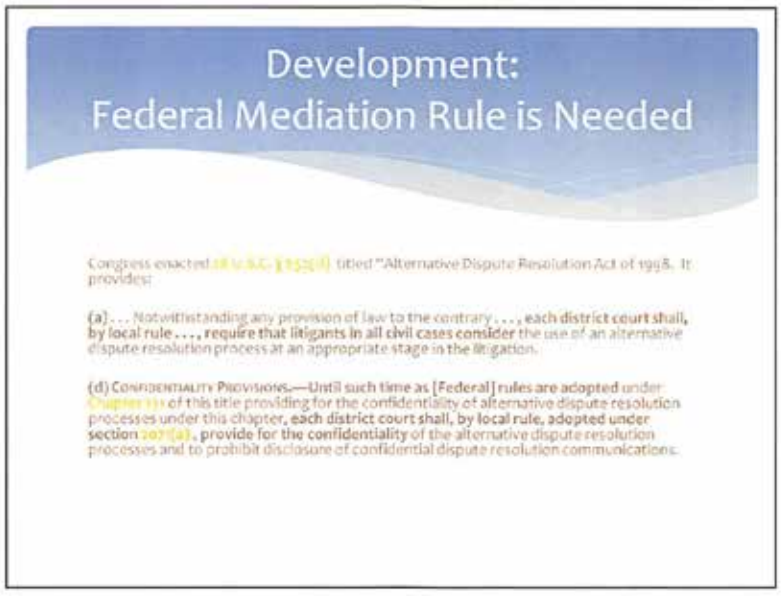
(3) The item relating to chapter 44 in the table of chapters for Part III of title 28, United States Code, is amended to read as follows:

"44. Alternative Dispute Resolution ..... 651".

Approved October 30, 1998.

LEGISLATIVE HISTORY—H.R. 3528:

HOUSE REPORTS: No. 105–487 (Comm. on the Judiciary).
CONGRESSIONAL RECORD, Vol. 144 (1998):
Apr. 21, considered and passed House.
Oct. 7, considered and passed Senate, amended.
Oct. 10, House concurred in Senate amendments.


Development:
Federal Mediation Rule is Needed
Congress enacted 28 U.S.C. § 652(a) titled "Alternative Dispute Resolution Act of 1998. It provides:
(a) . . . Notwithstanding any provision of law to the contrary . . . , each district court shall, by local rule . . . , require that litigants in all civil cases consider the use of an alternative dispute resolution process at an appropriate stage in the litigation.
(d) Confidentiality Provisions.—Until such time as [Federal] rules are adopted under Chapter 131 of this title providing for the confidentiality of alternative dispute resolution processes under this chapter, each district court shall, by local rule, adopted under section 2071(a), provide for the confidentiality of the alternative dispute resolution processes and to prohibit disclosure of confidential dispute resolution communications.

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U.S. Code › Title 28 › Part V › Chapter 131

28 U.S. Code Chapter 131 - RULES OF COURTS

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U.S. Code › Title 28 › Part V › Chapter 131 › § 2071

28 U.S. Code § 2071 - Rule-making power generally

(a) The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title.

(b) Any rule prescribed by a court, other than the Supreme Court, under subsection (a) shall be prescribed only after giving appropriate public notice and an opportunity for comment. Such rule shall take effect upon the date specified by the prescribing court and shall have such effect on pending proceedings as the prescribing court may order.

(c)

(1) A rule of a district court prescribed under subsection (a) shall remain in effect unless modified or abrogated by the judicial council of the relevant circuit.

(2) Any other rule prescribed by a court other than the Supreme Court under subsection (a) shall remain in effect unless modified or abrogated by the Judicial Conference.

(d) Copies of rules prescribed under subsection (a) by a district court shall be furnished to the judicial council, and copies of all rules prescribed by a court other than the Supreme Court under subsection (a) shall be furnished to the Director of the Administrative Office of the United States Courts and made available to the public.

(e) If the prescribing court determines that there is an immediate need for a rule, such court may proceed under this section without public notice and opportunity for comment, but such court shall promptly thereafter afford such notice and opportunity for comment.

(f) No rule may be prescribed by a district court other than under this section.

(June 25, 1948, ch. 646, 62 Stat. 961; May 24, 1949, ch. 139, § 102, 63 Stat. 104; Pub. L. 100–702, title IV, § 403 (a)(1), Nov. 19, 1988, 102 Stat. 4650.)

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About LII

"The courts of this country should not be the places where resolution of disputes begins. They should be the places where the disputes end after alternative methods of resolving disputes have been considered and tried." — Sandra Day O'Connor

"You've got to know when to hold 'em, know when to fold 'em, know when to walk away, know when to run." — Kenny Rogers

"A small benefit obtained is better than a great one in expectation." – Irish Proverb

"If we manage conflict constructively, we harness its energy for creativity and development." – Kenneth Kaye

"Let us never negotiate out of fear. But let us never fear to negotiate." — John F. Kennedy

"Negotiating in the classic diplomatic sense assumes parties are more anxious to agree than to disagree." – Dean Acheson

"Our power is in our ability to decide." — Buckminster Fuller

"The easiest, the most tempting, and the least creative response to conflict within an organization is to pretend it does not exist." – Lyle E. Schaller

"The greatest trust between man and man is the trust of giving counsel." — Francis Bacon

"The most important trip you may take in life is meeting people half way." — Henry Boyle

"Win/win is an attitude, not an outcome." — Don Boyd

"Peace is not absence of conflict, it is the ability to handle conflict by peaceful means." – Ronald Reagan

"Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often the real loser — in fees, and expenses, and waste of time. As a peace-maker the lawyer has a superior opportunity of being a good man. There will still be business enough." – Abraham Lincoln

"You can't always get what you want, but if you try sometimes, you might find, you get what you need." - Mick Jagger

"An ounce of mediation is worth a pound of arbitration and a ton of litigation!" — Joseph Grynbaum

"In the middle of every difficulty lies opportunity." – Albert Einstein

"You can't shake hands with a clenched fist." — Indira Gandhi

"You got to be careful if you don't know where you're going, because you might not get there." - Yogi Berra

"Do not find fault, find a remedy." — Henry Ford

"Distance doesn't matter. It is only the first step that is difficult." – Marie de Vichy-Chamrond Deffand


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When to Mediate in Chapter 11 and Recent Mediation Developments

ABI WINTER LEADERSHIP CONFERENCE
December 1, 2017

Panelists: Donald L. Swanson, Hon. Louis H. Kornreich, Judith W. Ross
Moderator: Daniel B. Besikof

Donald L. Swanson

- **Donald L. Swanson** publishes a blog on bankruptcy and mediation topics at www.mediatbankry.com and is a shareholder in the Koley Jessen P.C., L.L.O., law firm of Omaha, Nebraska. Don has been practicing bankruptcy law longer than he cares to admit (for a point of reference, he can discuss the 1980s Farm Crisis from personal experience). He has been promoting bankruptcy mediation since 2011 but has been doing mediation-type work throughout his career while representing trustees, committees, debtors and others. Don is a Court-Approved Mediator in both the U.S. District and Bankruptcy Courts of Nebraska, is a Certified Specialist in Business Bankruptcy Law (American Board of Certification), and is active in the American Bankruptcy Institute. Don received his B.S. from the University of Nebraska in 1977 and his J.D. from the University of Nebraska in 1980.

Judith W. Ross

- **Judith Ross** is a highly experienced bankruptcy attorney who has been recognized on multiple occasions for her accomplishments. She was included 8 times in D Magazine's "Best Lawyers in Dallas" list (2003, 2005, 2007, 2008, 2009, 2010, 2011, and 2012), and also was selected for inclusion 18 times in "Texas Super Lawyer" (2003 – 2014); Top 50 Women, 2003 – 2007; and DFW Top 100, 2003 and 2004), a Thomson Reuters legal division service published in Texas Monthly. The final published "Super Lawyers" list represents no more than 5% of the lawyers in Texas. In addition, Ms. Ross was recently named in WHO'S WHO LEGAL, 2014, by clients and peers as being amongst 435 of the world's leading insolvency and restructuring lawyers. She also recently received, once again, an award of excellence from Chambers for the year 2014.

Hon. Louis H. Kornreich

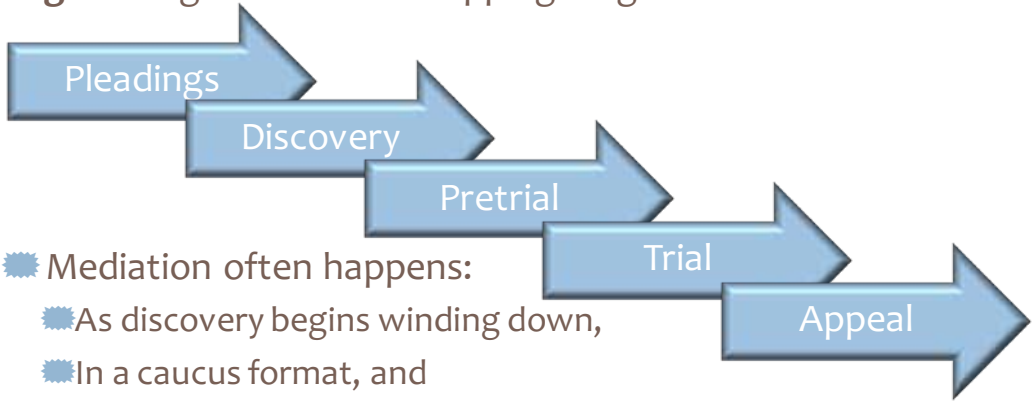
- Until his retirement in 2015, **Lou Kornreich** was a U.S. Bankruptcy Judge for the District of Maine and a member of the Bankruptcy Appellate Panel for the First Circuit. In addition, Kornreich served as a visiting judge in the Districts of Delaware and New Hampshire. After retirement, he joined Bernstein, Shur, Sawyer & Nelson, P.A. in Portland, Maine, to establish a mediation division within the firm's well established bankruptcy practice group. Kornreich holds a certificate from the St Johns/ABI Bankruptcy Mediation Training Program. He is a registered mediator in the bankruptcy courts of the Southern District of New York, Delaware and Massachusetts. Kornreich has mediated disputes in many types of bankruptcy conflicts including plan confirmations, avoidance cases, disputed claims and adversary proceedings covering a wide range of issues.

Daniel B. Besikof

- **Daniel Besikof** represents a wide variety of stakeholders in chapter 11 bankruptcy proceedings, corporate restructurings and liquidations, including debtors, lenders, administrative and collateral agents, indenture trustees, lessors, lessees, licensors, licensees, trade creditors, committees, investors and chapter 7 and liquidating trustees. Mr. Besikof's practice also focuses on representing defendants in bankruptcy-related litigation, including avoidance actions. Mr. Besikof also advises clients in commercial litigation matters and has represented lenders and agents in the negotiation and documentation of secured and unsecured credit facilities involving term loans, revolving lines of credit and letters of credit.

Reorganization Mediation ≠ ***Regular*** Mediation

Regular litigation has overlapping stages:



- Mediation often happens:
  - As discovery begins winding down,
  - In a caucus format, and
  - In a one-and-done session.

Reorganization Mediation ≠ *Regular* Mediation

Reorganization efforts are entirely different and need a different mediation mode. *E.g.*:

- ***A need for speed to maximize value***
- A discovery vacuum (collectability v. liability)
- Freshness of the fight

Reorganization Mediation ≠ *Regular* Mediation

- Multi-party realities
- Different priorities from regular mediation

"An ounce of mediation is worth a pound of arbitration and a ton of litigation!" — Joseph Grynbaum

When/How: "Hallway Mediation" for Contentious Reorganization Cases

- *Type of Case*: Multiple parties are fighting hard, with no clear path forward
- *When*: Early in the case once it's clear Debtor is remaining in possession
- *How it's done*: Put multiple warring parties into a room to discuss their disputes face to face
  - Like what happens in the hallway during a motion day
  - Mediator "referees" the session(s), doesn't "control" it

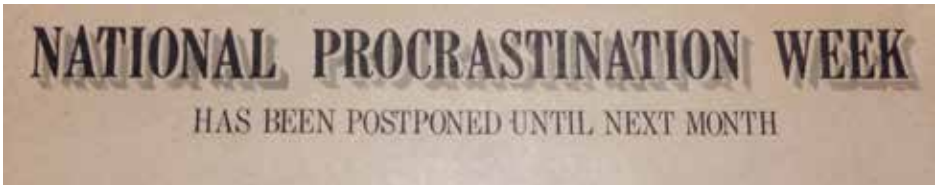
When/How: "Hallway Mediation" for Contentious Reorganization Cases

- Goal: Bring order out of chaos to maximize value
  - Develop a direction and organization for addressing multi-party disputes
  - Actual settlements are a bonus

When: Early Mediation

A 2004 Empirical Study Finding:

- When mediation occurs early-in-a-case, instead of late:
  - "cases are more likely to settle"
  - "fewer motions are filed and decided"
  - "case disposition time is shorter, even for cases that do not settle"



Development: Districts Without Local Mediation Rules – 20 of 94 (21.3%)

- Alabama – Middle, Northern & Southern
- Arkansas – Eastern & Western
- Dakotas – North Dakota & South Dakota
- Illinois – Northern & Southern
- Kentucky – Eastern & Western
- Louisiana – Eastern & Middle
- Missouri – Western
- New York – Western
- Northern Mariana Islands
- Virginia – Western
- West Virginia – Northern
- Wisconsin – Eastern & Western

A Resource: Model Local Rules and Commentary
(on ABI Mediation Committee's webpage)

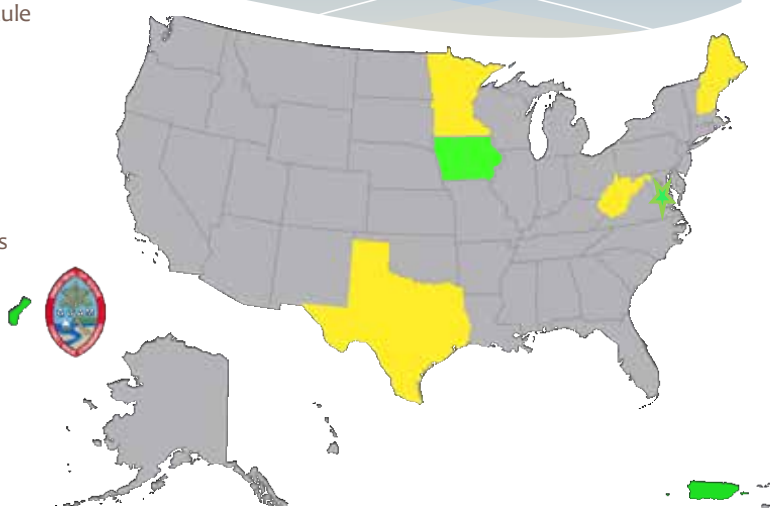
Development:

Districts With Minimal Mediation Rule (one or two sentences):

- Maine
- Minnesota
- New Hampshire
- Texas – Northern
- West Virginia – Southern

Districts Covered by District Court's Local Mediation Rules:

- District of Columbia
- Guam
- Iowa – Northern & Southern
- Puerto Rico



A List of Bankruptcy Districts that HAVE and HAVE-NOT Adopted Local Mediation Rules

Development: Federal Mediation Rule is Needed

A Federal Bankruptcy Rule on mediation is needed to:

(i) authorize mediation, and

(ii) provide confidentiality.

- Many local districts have no such rules.
- Uniformity is lacking in existing confidentiality rules.
- ABI Commission on Chapter 11 recommends an "Estate Neutral" for small and medium size cases.

Development: Federal Mediation Rule is Needed

- Congress enacted 28 U.S.C. § 652(d) titled "Alternative Dispute Resolution Act of 1998. It provides:

> (a) . . . Notwithstanding any provision of law to the contrary . . . , each district court shall, by local rule . . . , require that litigants in all civil cases consider the use of an alternative dispute resolution process at an appropriate stage in the litigation.
>
> (d) Confidentiality Provisions.—Until such time as [Federal] rules are adopted under Chapter 131 of this title providing for the confidentiality of alternative dispute resolution processes under this chapter, each district court shall, by local rule, adopted under section 2071(a), provide for the confidentiality of the alternative dispute resolution processes and to prohibit disclosure of confidential dispute resolution communications.

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Selecting a Mediator – Private Mediation

Things to look for in retaining a mediator

- Experience
- Temperament
- Training
- Lawyer or Non-Lawyer
- Proclivities
  - Absolute neutrality
  - Evaluative
  - Directive
  - Flexibility

Selecting a Mediator – Private Mediation

Considerations in selecting a sitting judge or retired judge

- Sitting Judges
  - Free
  - Gravitas
  - Limited Availability
  - Willingness
  - Next case syndrome
  - Perceived connections
- Retired Judges
  - Fees
  - Gravitas
  - Availability
  - Willingness

Selecting a Mediator – Private Mediation

Best Practices in Making the Selection

- Interview
- Conflicts and written waivers
- Written Agreement
  - Fees and expenses
  - Confidentiality
  - Special Provisions

Selecting a Mediator – Court-directed Mediation

Type of Dispute

- Adversary Proceeding or Contested Matter
- Confirmation
- Post-confirmation

Selecting a Mediator – Court-directed Mediation

- Written Order
  - Open or closed selection
  - Registries
  - Input from parties
  - Case Specific
  - Fees and Expenses
    - Fixed or hourly
    - Market or Discounted

How to Get the Most Out of Your Mediation as a Party

- Preparation, preparation, preparation!
- Key to getting most out of your mediation, especially a bankruptcy mediation, is preparation.
  - How do you effectively prepare when you don't have all the information and you are a creditor with no access to debtors' records except through discovery?
    - Ideas: establishment of a shortened period for initial discovery to at least get parties some information informally.
      - Otherwise, Debtor controls the process.
    - Other Ideas?

How to Get the Most Out of Your Mediation as a Party

- This may be the only chance your client has to have its case evaluated by a "neutral."
- Would you go into a courtroom to present a case without preparation and good briefing?
- Amazingly, lawyers bring their clients to mediations all the time without preparation.

How to Get the Most Out of Your Mediation as a Party

Consequences of not preparing are ***DIRE***

- Value of your case is dramatically impacted if you are seeking to recover against the debtor.
- Ability to resist creditor pressure is dramatically impacted if you are the debtor and there is no preparation.
- You might settle the case, but if you are not prepared, your client will not get the best settlement it can negotiate.

How to Get the Most Out of Your Mediation as a Party

Preliminary Guidelines for Ensuring Your Mediation will ***Fail***

- Fail to send the mediator a written mediation statement.
- Fail to call the mediator to discuss the case ahead of time.
- Send the mediator hundreds of pages of random and useless pleadings and briefing.
- Send the mediator the entire court docket, without discrimination.
- Not know the answer to relevant questions raised by the mediator. And instead of checking on the answer in response, just saying "I don't know."

How to Get the Most Out of Your Mediation as a Party

Preliminary Guidelines for Ensuring your Mediation will ***Succeed***

- Prepare and send a short and succinct mediation statement with the facts and the law clearly set forth.
- If you feel compelled to send pleadings to the mediator, only send the most relevant pleadings. Ideally, don't send them at all. If you can't summarize your case for the mediator, you won't be more successful in front of a court.
- If the mediator offers phone calls in advance, schedule a call to discuss the case in advance.
- Prepare for the mediation as you would prepare for court, but without the witnesses.

How to Get the Most Out of Your Mediation as a Party

- Conduct that will not help your client during the mediation.
  - Refusing to hold an opening session.
    - Frequently, the parties say that there is too much "emotion" to hold an opening session. It is the mediator's job to set rules of the opening session – civility is required.
    - Opening session is critical to helping parties understanding how a case against them will sound to the judge.
  - Leaving before the mediator tells you that you can leave. The mediator should declare any impasse, not the parties.
  - Refusing to make an opening offer, or worse, arguing about who should make the first offer.

How to Get the Most Out of Your Mediation as a Party

Conduct that will not help your client during the mediation (continued).

- Making "ping pong" offers, rather than strategic offers. (Insurance company lawyers: this point is directed at you!)
- Disrespecting the other side – no matter how bad the other lawyers and clients are.
  - Who do you think a mediator believes when a party is speaking to the mediator about the quality of the lawyers on the other side, or the lack of honesty on the other side?
    - If opposing counsel is stupid, the mediator will figure it out on his own.
    - If the other side is lying, the mediator will likely figure that out as well.
  - Better approach – stick with the facts.