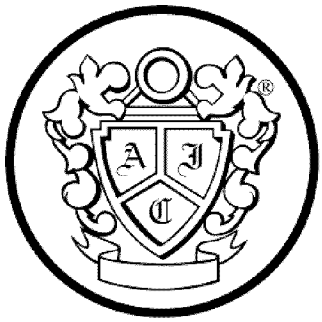

AMERICAN INNS of COURT

**DELAWARE BANKRUPTCY**
**AMERICAN INN OF COURT**

# *The Use of Mediation in Bankruptcy Proceedings*

## Guest Speaker Professor Nancy Welsh
## Penn State University, Dickinson School of Law

Followed by a Panel Discussion With
The Honorable Kevin Gross
David Stratton, Esq., Pepper Hamilton LLP
Frank Monaco, Esq., Womble Carlyle Sandridge & Rice PLLC

December 15, 2009
5:30 p.m. to 7:00 p.m.
United States Bankruptcy Court for the District of Delaware
824 Market Street
5th Floor, Courtroom No. 5
Wilmington, Delaware

# INDEX OF ACCOMPANYING WRITTEN MATERIALS

1. December 15, 2009 Agenda
2. Curriculum Vitae of Professor Nancy Welsh
3. July 23, 2004 District Court Order Requiring Mediation in Bankruptcy Appeals
4. Bankruptcy Court Order/Current Local Rules for Mediations
5. Application for Becoming a Bankruptcy Court Mediator
6. Register of Mediators
7. Sample Evaluation Forms for Mediation and/or Mediators
8. Statistical Information Regarding Mediation
9. Common Alternatives to Mediation
10. Sample Mediator Request for Pre-Mediation Information
11. Sample Mediation Statement
12. Mediator Forms (Status Report, Certificate of Completion and Instructions)
13. "Mediation – A Judge's Views on Judicially Monitored Settlement Conferences", by the Honorable David A. Katz, 2009, *Litigation*, *35:4*, p. 3-4, 59-60.
14. "You've Got Your Mother's Laugh: What Bankruptcy Mediation Can Learn from the Her/History of Divorce and Child Custody Mediation", ___ American Bankruptcy Institute L. Rev. ___ (forthcoming, 2009).

# Tab 1

# AGENDA

A. **Presentation by Professor Nancy Welsh**

1. History and Evolution of Mediation

2. Tips for Using Mediation
   a. Selecting the Right Process - Is Mediation Best for This Case?
   b. Selecting the Right Mediator
      i. Judge, Businessperson, Practitioner, Professional Mediator
      ii. Styles of Mediators
      iii. Potential for Evaluations of Mediators
   c. Drafting an Effective Mediation Statement
   d. Preparing the Client for Mediation
   e. Participating in Mediation (defining excellent representation in mediation)
   f. After the Mediation

3. Alternatives to Mediation

B. **Panel Discussion:** ***Mediation: A Discussion From Start to Finish***

1. Choosing Mediation
   a. Common Case Strategies
   b. Improper Use of Mediation
   c. Cost Considerations
   d. Topic Areas (adversary proceedings, appeals, plan confirmation and other global settlement areas)

2. Timing (pros and cons to using mediation at various case stages)

3. Choosing a Mediator (practitioners/litigators vs. current/former judges)

4. The Importance of Premediation

5. Mediation Statements
   a. Drafting an Effective Statement
   b. Exchange of Mediation Statements – A Help or A Hindrance?

6. Mediation
   a. Styles of Conducting Mediation
   b. Effective Representation in Mediation
   c. Attendance and Role of Decision-Makers

7. Ethics of Mediators
   a. Communicating With One Party
   b. Communicating With Clients Without Their Lawyers Present and Vice Versa
   c. Disclosure of Potential Conflicts

8. The Aftermath – Papering the Settlement

9. Final Words of Wisdom & Questions

# Tab 2

# NANCY A. WELSH

## PROFESSIONAL EXPERIENCE

**Professor of Law, Penn State University, Dickinson School of Law**, Carlisle, PA
July 2004 to present

- Courses: Civil Procedure, Negotiation/Mediation, Conflict Resolution Theory Seminar, Dispute Resolution: Comparative and International Perspectives, and Constitutional Law.

**Visiting Professor (Fulbright Grant Recipient), Department of Private Law, Tilburg University**
Tilburg, The Netherlands
January 2006 to June 2006

**Associate Professor and Associate Director of the Center for Dispute Resolution, Penn State University, Dickinson School of Law**, Carlisle, PA
July 2002 to June 2004

**Assistant Professor and Associate Director of the Center for Dispute Resolution, Pennsylvania State University-Dickinson School of Law**, Carlisle, PA
July 1998 to June 2002

**Senior Consultant and Independent Contractor, Mediation Center**, Minneapolis, MN
March 1998 to June 1998

**Executive Director, Mediation Center**, Minneapolis, MN
June 1989 to February 1998

**Adjunct Professor, Hamline University School of Law**, St. Paul, MN
June 1988 to June 1991

**Director of Mediation Services, Mediation Center**, St. Paul, MN
December 1986 to May 1989

**Attorney, Leonard, Street and Deinard**, Minneapolis, MN
September 1982 to December 1986

## EDUCATION

**Harvard Law School**, Cambridge, MA
J.D., June 1982

**Allegheny College**, Meadville, PA
B.A., *magna cum laude*, June 1979

- Departmental honors in English and Political Science.
- Activities: President of Allegheny Student Government (first woman to hold position); Editorial Board of *The Campus*; Music Director of WARC-FM.

## SELECTED PUBLICATIONS

### Books

DISPUTE RESOLUTION AND LAWYERS, 4th ed. (co-authored with Leonard Riskin, James Westbrook, Chris Guthrie, Richard Reuben, and Jennifer Robbennolt) (2009).

### Articles in Law Reviews and Peer-Reviewed Journals

*Is That All There Is?: "The Problem" in Court-Oriented Mediation* 15 GEORGE MASON LAW REVIEW 863 (2008) (co-authored with Leonard Riskin).

*Looking Down the Road Less Traveled: Challenges to Persuading the Legal Profession to Define Problems More Humanistically,* 2008 JOURNAL OF DISPUTE RESOLUTION 45 (2008) (part of University of Missouri-Columbia symposium entitled "Innovative Models of Lawyering: Collaborative Law and Other Processes").

*The Future of Mediation: Court-Connected Mediation in the U.S. and The Netherlands Compared*, 1 FORUM VOOR CONFLICTMANAGEMENT 19 (2007).

*En vergelijking tussen doorverwijizing naar mediation in civiele zaken: voorspelt de ervaring van de Verenigde Staten (VS) de toekomst van Nederland? (Comparing Court-Connected Non-Family Civil Mediation: Does the U.S. Experience Predict The Netherlands' Future?)*, 7 TREMA 310 (September, 2007).

*Look Before You Leap and Keep On Looking: Lessons from the Institutionalization of Court-Connected Mediation,* 5 NEVADA LAW JOURNAL 399 (2005) (co-authored with Bobbi McAdoo).

*The Place of Court-Connected Mediation in a Democratic Justice System*, 5 CARDOZO JOURNAL OF CONFLICT RESOLUTION 117 (2004).

- Excerpt in James Alfini et al., MEDIATION THEORY AND PRACTICE, 2ND ED. (LexisNexis, 2006) at pp. 562-566.

*Stepping Back Through the Looking Glass: Real Conversations with Real Disputants About Institutionalized Mediation and Its Value*, 19 OHIO STATE JOURNAL ON DISPUTE RESOLUTION 573 (2004).

*Remembering the Role of Justice in Resolution: Insights from Procedural and Social Justice Theory*, 54 JOURNAL OF LEGAL EDUCATION 49 (2004).

*Perceptions of Fairness in Negotiation*, 87 MARQUETTE LAW REVIEW 753 (2004).

- Excerpt in Jay Folberg, et al., Lawyer Negotiation: Theory, Practice and Law (Aspen, 2006) at pp. 21-25.

*The Law of Bargaining*, 87 MARQUETTE LAW REVIEW 839 (2004) (co-authored with Russell Korobkin and Michael Moffitt).

- Excerpt in Jay Folberg, et al., RESOLVING DISPUTES: THEORY, PRACTICE AND LAW (Aspen, 2005) at pp. 207-209.

*Negotiation as One Among Many Tools*, 87 MARQUETTE LAW REVIEW 853 (2004) (co-authored with Jennifer G. Brown, Marcia C. Campbell, & Jayne S. Docherty).

*Institutionalized Conflict Resolution: Have We Come to Expect Too Little?*, 18 NEGOTIATION JOURNAL 345 (October, 2002) (co-authored with Peter T. Coleman).

*Searching for a Sense of Control: The Challenge Presented by Community Conflicts Over Concentrated Animal Feeding Operations*, 10 PENN STATE ENVIRONMENTAL LAW REVIEW 295 (2002) (co-authored with Barbara Gray).

*Disputants' Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice*, 2002 JOURNAL OF DISPUTE RESOLUTION 179 (2002).

*Community Conflicts Over Intensive Livestock Operations: How and Why Do Such Conflicts Escalate?*, 7 DRAKE JOURNAL OF AGRICULTURAL LAW 7 (2002) (co-authored with Charles W. Abdalla, John C. Becker, Ralph Hanke, Celia Cook-Huffman, and Barbara Gray).

*Making Deals in Court-Connected Mediation: What's Justice Got To Do With It?*, 79 WASHINGTON UNIVERSITY LAW QUARTERLY 787 (2001).

- Excerpt in Dwight Golann & Jay Folberg, MEDIATION: THE ROLES OF ADVOCATE AND NEUTRAL (Aspen, 2006) at pp. 421-24.
- Excerpt in Leonard Riskin, et al., DISPUTE RESOLUTION AND LAWYERS, 3RD ED. (Thomson/West, 2005) at pp. 801-804.
- Excerpt in Kimberlee Kovach, MEDIATION: PRINCIPLES AND PRACTICE, 3RD ED. (Thomson/West, 2004) at pp. 224-228.
- Short excerpt in Stephen Subrin, et al., CIVIL PROCEDURE: DOCTRINE, PRACTICE AND CONTEXT, 2ND ED. (Aspen, 2004) at p.524.

*The Thinning Vision of Self-Determination in Court-Annexed Mediation: The Inevitable Price of Institutionalization?*, 6 HARVARD NEGOTIATION LAW REVIEW 1 (2001).

- Recognized as one of the three most-cited articles from the first ten years of the law review's existence.
- Excerpt in Carrie Menkel-Meadow, et al., MEDIATION: PRACTICE, POLICY AND ETHICS (Aspen, 2006) at pp. 580-581.
- Excerpt in Carrie Menkel-Meadow, et al., DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL (Aspen, 2005) at pp. 320-321.
- Excerpt in Leonard Riskin, et al., DISPUTE RESOLUTION AND LAWYERS, 3RD ED. (Thomson/West, 2005) at pp. 466-468.

*Not Quite Protocols: Toward Collaborative Research in Dispute Resolution*, 19 CONFLICT RESOLUTION QUARTERLY 75 (2001) (co-authored with Christopher Honeyman and Barbara McAdoo).

*Adaptations to the Civil Mediation Model: Suggestions from Research into the Approaches to Conflict Resolution Used in the Twin Cities' Cambodian Community*, 15 MEDIATION QUARTERLY 345 (Summer, 1998) (co-authored with Debra Lewis).

*Does ADR Really Have A Place on the Lawyer's Philosophical Map?*, 18 HAMLINE JOURNAL OF PUBLIC LAW AND POLICY 376 (1997) (co-authored with Barbara McAdoo).

*Court-Ordered ADR: What Are the Limits?,* 12 HAMLINE JOURNAL OF PUBLIC LAW AND POLICY 35 (1991).

**Chapters in Books**

*Online Communication Technology and Relational Development, in* RETHINKING NEGOTIATION TEACHING (Christopher Honeyman, James Coben & Giuseppe De Palo, eds., 2009) (co-authored with Anita Bhappu, Noam Ebner, & Sanda Kaufman).

*Mediation Confidentiality in the U.S. in* MEDIATION EN VERTROUWELIJKHEID (MEDIATION AND CONFIDENTIALITY) (Hester Montree and Alexander Oosterman, eds., 2009).

*Perceptions of Fairness in Negotiation, in* THE NEGOTIATOR'S FIELDBOOK (Andrea Schneider & Christopher Honeyman, eds., 2006).

*The Law of Bargaining, in* THE NEGOTIATOR'S FIELDBOOK (Andrea Schneider & Christopher Honeyman, eds., 2006) (co-authored with Russell Korobkin & Michael Moffitt).

*Institutionalization and Professionalization, in* THE HANDBOOK OF DISPUTE RESOLUTION (Michael Moffitt & Robert Bordone, eds., 2005).

*Court-Connected General Civil ADR Programs: Aiming for Institutionalization, Efficient Resolution and the Experience of Justice,* in ADR HANDBOOK FOR JUDGES (Donna Stienstra & Susan Yates, eds., 2004) (co-authored with Bobbi McAdoo).

*Reconciling Self-Determination, Coercion and Settlement* in DIVORCE MEDIATION: CURRENT PRACTICES AND APPLICATIONS (J. Folberg, Ann Milne and Peter Salem, eds., 2004).

*Alternative Dispute Resolution (ADR) in Minnesota--An Update on Rule 114* in COURT-ANNEXED MEDIATION: CRITICAL PERSPECTIVES ON SELECTED STATE AND FEDERAL PROGRAMS, 203 (Edward Bergman and John Bickerman, eds., 1998) (co-authored with Barbara McAdoo).

- Excerpt in Jay Folberg, et al., RESOLVING DISPUTES: THEORY, PRACTICE AND LAW (Aspen, 2005) at pp. 388-390.
- Excerpt in Dwight Golann & Jay Folberg, MEDIATION: THE ROLES OF ADVOCATE AND NEUTRAL (Aspen, 2006) at p. 426-427.

**Articles in Professional Journals**

*What's It All About?: Finding the Appropriate Problem-Definition in Mediation,* __ DISP. RESOL. MAG. __ (Summer 2009) (co-authored with Leonard Riskin).

*Eyes on the Prize: The Struggle for Professionalism*, 11 DISPUTE RESOLUTION MAGAZINE 13 (Spring 2005) (co-authored with Bobbi McAdoo).

*Institutionalizing Mediation in the Courts: What Do Empirical Studies Tell Us?, 9* DISPUTE RESOLUTION MAGAZINE 8 (Winter, 2003) (co-authored with Barbara McAdoo and Roselle Wissler).

- Excerpt in Leonard Riskin, et al., DISPUTE RESOLUTION AND LAWYERS, 3RD ED. (Thomson/West, 2005) at pp. 693-697.
- Short excerpt in James Alfini et al., MEDIATION THEORY AND PRACTICE, 2ND ED. (LexisNexis, 2006) at pp. 537-540.

*All in the Family: Darwin and the Evolution of Mediation*, 7 DISPUTE RESOLUTION MAGAZINE 20 (Winter, 2001).

*Arbitration Clauses and Beyond: Avoiding Pitfalls in Drafting Dispute Resolution Clauses in Employment Contracts*, 1 JOURNAL OF ALTERNATIVE DISPUTE RESOLUTION IN EMPLOYMENT 35 (Fall, 1999).

*The ABCs of ADR: Making ADR Work in Your Court System*, 37 THE JUDGES JOURNAL 11 (Winter, 1998) (co-authored with Barbara McAdoo).

*Grappling the Monster Case: The Next Frontier in ADR*, 54 BENCH AND BAR OF MINNESOTA 21 (September, 1997) (co-authored with Federal District Court Judge Ann Montgomery).

*System Implementation Means Difficult Choices*, 14 ALTERNATIVES TO THE HIGH COST OF LITIGATION 135 (December, 1996) (co-authored with Barbara McAdoo).

*The Times They Are A' Changin'--Or Are They? An Update on Rule 114*, 65 HENNEPIN LAWYER 8 (July-August, 1996) (co-authored with Barbara McAdoo).

**Monographs and Reports**

*One Foray into the Theory-Practice Divide: Lessons for Future Expeditions* in ENGINEERING BROAD-BASED DISCUSSIONS: ENGAGING MULTIDISCIPLINARY GROUPS TO CREATE NEW IDEAS IN CONFLICT RESOLUTION 5 (monograph) (2003) (co-authored with Grace D'Alo).

*Here There Be Monsters: At the Edge of the Map of Conflict Resolution* in MONSTERS IN THE WATERS: FEAR AND SUSPICION DIVIDE THE FIELD OF CONFLICT RESOLUTION 1 (monograph) (2001) (co-written with Christopher Honeyman and Barbara McAdoo).

ALTERNATIVE CONFLICT RESOLUTION STRATEGIES FOR ADDRESSING COMMUNITY CONFLICTS OVER INTENSIVE LIVESTOCK OPERATIONS (report submitted in June, 2000 to the Pennsylvania Department of Agriculture) (co-authored with Barbara Gray, Charlie Abdalla, John Becker and Celia Cook-Huffman).

A GUIDEBOOK ON COMMUNITY PARTICIPATION IN ADDRESSING DISPUTES OVER INTENSIVE LIVESTOCK OPERATIONS (submitted in June, 2000 to the Pennsylvania Department of Agriculture) (co-authored with Barbara Gray, Charlie Abdalla, John Becker and Celia Cook-Huffman).

**On-line Publications**

*The State of the States: Dispute Resolution in the Courts*, Symposium Issue, CARDOZO ONLINE JOURNAL OF CONFLICT RESOLUTION (sponsored by the *Cardozo Online Journal of*

*Conflict Resolution*, the National Center for State Courts, and the Policy Consensus Initiative) (September, 1999).

**Manuscripts in Progress**

*You've Got Your Mother's Laugh: What Bankruptcy Mediation Can Learn from the Her/History of Divorce and Child Custody Mediation*, __AMERICAN BANKRUPTCY INSTITUTE L. REV.__(forthcoming, 2009).

*What's "(Im)Partial Enough" in a World of Embedded Neutrals?*, __ ARIZONA L. REV. __ (part of special issue on funding justice) (forthcoming, 2010).

*I Could Have Been A Contender: Iqbal As Deterrent to Negotiation, Mediation and Other Forms of Early, Autonomous Dispute Resolution* (working title) (forthcoming, 2010).

*Driving on the Bridge—and Hoping the Railings Hold*, ___ LAW AND SOCIAL INQUIRY ___ (working title) (book review) (forthcoming, 2010).

*Talking to the Screen: Examining the Use of Videoconferencing in Legal Education and Dispute Resolution* (working title) (co-authored with Barbara Brunner).

*Comparing Mediation in the U.S. and the Netherlands: The Special Case of Confidentiality and Privilege* (working title).

## SELECTED PRESENTATIONS, SYMPOSIA AND WORKSHOPS

Presenter, ABA Section of Dispute Resolution Annual Conference and Legal Educators' Colloquium, San Francisco, CA, April 8-10, 2010.

Plenary speaker, Symposium on ADR in the Courts, co-sponsored by the ABA Section of Dispute Resolution and the California Administrative Office of the Courts, San Francisco, CA, April 7, 2010.

Invited participant, Joint Syposium on International Investment and ADR: Preventing and Managing Investment Treaty Conflict, Washington & Lee University School of Law's Frances Lewis Law Center and United Nations Conference on Trade and Development, Lexington, VA, March 29, 2010.

Moderator, Reflections on *Iqbal* Symposium, Penn State University, Dickinson School of Law, Carlisle (in-person) and University Park (simulcast), PA, March 26, 2010.

Keynote presenter, ADR Institute, Pennsylvania Bar Institute, Pittsburgh (in-person) and Philadelphia (simulcast), PA, March 4, 2010.

Invited presenter, Conflict Resolution and the Economic Crisis, William Boyd School of Law, University of Nevada at Las Vegas, Las Vegas, Nevada, February 12-13, 2010.

Invited presenter, "Moving Mediation" Conference, Dutch Council for the Judiciary, Ministry of Justice and the Netherlands Court-Connected Mediation Agency, The Hague, The Netherlands, November 19-20, 2009.

Invited presenter, Conference on User Driven Approaches in Dispute Resolution, Tilburg University Institute for Interdisciplinary Studies of Civil Law and Conflict Resolution Systems, Tilburg, The Netherlands, November 16-17, 2009.

Faculty member, Advanced Mediation and Advocacy Skills Institute, ABA Section of Dispute Resolution, Philadelphia, PA, October 15-16, 2009.

Invited presenter, "You've Got Your Mother's Laugh: What Bankruptcy Mediation Can Learn from the Her/History of Divorce and Child Custody Mediation," Symposium--ADR Meets Bankruptcy: Cross-Purposes or Cross-Pollination?, St. John's University School of Law, Queens, NY, October 2, 2009.

Co-presenter (with Barbara Brunner), "Managing the Impact of Videoconferencing on the Relational Element of Legal Education and Dispute Resolution," Online Dispute Resolution Forum, University of Haifa, Haifa, Israel, June 3-4, 2009.

Presenter, "What Is '(Im)partial Enough' in a World of Embedded Neutrals?," ABA Section of Dispute Resolution Works-in-Progress Conference, Arizona State University, Sandra Day O'Connor College of Law, October 24, 2008.

Invited presenter, "How Much (Im)partiality Can We Afford in Dispute Resolution Processes?," University of Nevada-Las Vegas, William S. Boyd School of Law, October 22, 2008.

Invited presenter, "ADR and Multi-party Disputes," Conference on Access to Justice in European Mass Disputes, Tilburg University and Ministry of Justice of the Netherlands, October 3, 2008.

Invited presenter, "What Is '(Im)partial Enough' in a World of Embedded Neutrals?," Dispute Resolution Series, Hofstra University School of Law, Hampstead, New York, September 17, 2008.

Presenter, "The New Lawyer: Is Settlement Transforming the Practice of Law?" 10th Annual ABA Section of Dispute Resolution Spring Conference, Seattle, Washington, April 3-5, 2008.

Presenter and moderator, "Balancing Client Self-Determination and Efficient Resolution of Family Cases," 44th Annual Conference of the Association of Family and Conciliation Courts, Washington D.C., May 30 – June 2, 2007.

Plenary presenter, "Recent Developments in ADR Research: What Courts and ADR Neutrals Need to Know," National Conference on Court ADR, 9th Annual ABA Section of Dispute Resolution Spring Conference, Washington D.C., April 25-28, 2007.

Presenter, "Civil vs. Common Law: Does Context Matter in ADR?" 9th Annual ABA Section of Dispute Resolution Spring Conference, Washington D.C., April 25-28, 2007.

Keynote speaker, "What Is 'Impartial Enough' in a World of Embedded Neutrals?" 2007 Northern California ADR Faculty Conference, Stanford Law School, Palo Alto, California, April 21, 2007.

Plenary presenter, "The Ethics of Impartiality and Conflicts of Interest in ADR," 3rd Annual ADR Institute, Pennsylvania Bar Institute, Philadelphia, March 1, 2007.

Presenter, Symposium honoring the work of Leonard Riskin, University of Missouri-Columbia, October 20, 2006 (with article to be published in future issue of JOURNAL OF DISPUTE RESOLUTION).

Keynote speaker and workshop presenter, 15th Annual Conference of Dispute Resolution Center of the Supreme Court of Florida, Orlando, Florida, August 24-26, 2006.

Presenter and panelist, "Comparing the Needs Currently Addressed by Court-Connected Mediation in the U.S. and The Netherlands and Looking to the Future" and "Is (Statutory) Regulation a Good Incentive for Parties to Choose Mediation?," in "The State of Affairs of Mediation in Europe. What Can Governments Do (More)?" International Expert Meeting sponsored by the Dutch Ministry of Justice, in The Hague, The Netherlands, June 29-30, 2006.

Presenter, "The Value of Mediation for 'One-Time' and 'Repeat' Disputants," Erasmus University, in Rotterdam, The Netherlands, May 29, 2006.

Presenter, "The Future of Mediation in The Netherlands," Workshop sponsored by The Netherlands Ministry of Justice and WODC, in The Hague, The Netherlands, May 24, 2006.

Presenter, "Current Developments in Mediation in the U.S.," Workshop sponsored by ACBMediation, in The Hague, The Netherlands, May 17, 2006.

Presenter, "The Rise of the Embedded Neutral: Operating Within the Shadow of the Judge or Expropriating and Undermining the Judge's Legitimacy?," with Honorary Chair Robert Mnookin, Seminar sponsored by Tilburg University, The Catholic University of Leuven, and The Francqui Foundation, in Tilburg, The Netherlands, May 16, 2006.

Presenter, "Mediation: A Trans-Atlantic Dialogue," Workshop sponsored by the Institut fur Anwaltsrecht of The University of Cologne, in Cologne, Germany, May 11, 2006.

Presenter, "The Successful Institutionalization of Alternative Processes in U.S. Courts, the Rise of the 'Embedded Neutral,' and New Concerns About Courts' Deference," sponsored by the Private Law Department at Tilburg University, in Tilburg, The Netherlands, May 8, 2006.

Presenter, "The Value of Mediation for 'One-Time' and 'Repeat' Disputants," Conference on "Advocaat en Mediation" (The Advocate and Mediation), sponsored by de Rechtspraak and Nederlandse Orde van Advocaten, Amersfoort, The Netherlands, April 24, 2006.

Presenter, "Impartiality and Neutrality: How Much Is Enough?," Legal Educators' Colloquium, Annual Conference of the ABA Section of Dispute Resolution, in Atlanta, Georgia, April 6-8, 2006.

"An Overview of Mediation with a Focus on Victim-Offender Mediation," Workshop sponsored by the International Victimology Institute of Tilburg University, in Tilburg, The Netherlands, March 14, 2006.

Presenter, "Embedded Neutrals, the Appearance of Impartiality and Unacknowledged Normative Choices," Quinnipiac University School of Law, in Hamden, Connecticut, December 8, 2005.

Participant and presenter, Conference on Court ADR Research, hosted by the Federal Judicial Center and the Moritz College of Law of the Ohio State University, in Washington D.C., November 17-18, 2005.

Presenter, "Embedded Neutrals, the Appearance of Impartiality and Unacknowledged Normative Choices," Marquette University Law School, in Milwaukee, Wisconsin, November 1, 2005

Presenter, "The Da Vinci Code, Feminist Theory and the Institutionalization of Dispute Resolution Processes and Courses in the Courts and Academia," 18th Annual Conference of the International Association for Conflict Management, in Seville, Spain, June 12-15, 2005.

Keynote Speaker, "Stepping Back Through the Looking Glass: Real Conversations with Parents and School Officials about Special Education Mediation and its Value," Conference sponsored by Connecticut SERC and the Centers on Dispute Resolution and Children and Families of the Quinnipiac University School of Law, in Hamden, Connecticut, May 18, 2005.

Presenter, "What Can Empirical Research Teach Us?," Legal Educators' Colloquium, Annual Conference of the ABA Section of Dispute Resolution, in Los Angeles, California, April 14-16, 2005

Presenter, "What Does Justice Have to Do With Mediation?," Dispute Resolution Lecture Series, William Boyd School of Law of the University of Nevada, Las Vegas, in Las Vegas, Nevada, April 1, 2005.

Presenter, "Is Mediation the Practice of Law?," ADR Institute sponsored by Pennsylvania Bar Institute and Philadelphia Bar Association, in Philadelphia, Pennsylvania, March 23, 2005.

Presenter, "Eyes on the Prize: The Struggle Toward Professionalism," Colloquium Series, University of St. Thomas School of Law, in Minneapolis, Minnesota, March 14, 2005.

Participant, "Theory/Practice in Collaborative Problem Solving," Hewlett Foundation-funded conference, in Boulder, Colorado, February 4-5, 2005.

Presenter, "Disputant Perceptions of Institutionalized Special Education Mediation Services," Consortium for Appropriate Dispute Resolution in Special Education, Third Annual Symposium on Dispute Resolution in Special Education, in Washington, D.C., December 3, 2004.

Presenter, "Symposium: Institutional Impacts on Efforts to Refine Negotiation Methods in Practice," 17th Annual Conference of the International Association for Conflict Management, Pittsburgh, PA, June 6-9, 2004.

Presenter, Symposium entitled "Justice in Mediation," hosted by the Cardozo School of Law of Yeshiva University, New York City, March 12, 2004.

Participant, Workshop organized by the Hewlett Foundation and Stanford University to discuss the evolution and future development of the field of conflict resolution, Washington DC, January 9-10, 2004.

Participant, Meeting hosted by Marquette University Law School to discuss and define a negotiation "canon," Milwaukee, WI, November 7-9, 2003.

Presenter, "Designing and Measuring ADR Performance: How to Gain Friends and Money," Pre-Conference Meeting of the Court Section of the Association of Conflict Resolution (ACR) and the Policy Consensus Initiative, 2003 Annual Conference of ACR, Orlando, FL, October 15, 2003.

Co-organizer and moderator, "Dispute Resolution and Capitulation to the Routine: Is There A Way Out?," symposium co-sponsored by The Dickinson School of Law of The Pennsylvania State University, the Broad Field Project and the Research Section of the Association for Conflict Resolution, Carlisle, PA, April 10-11, 2003.

Presenter, "Teaching Ideas from the Theory to Practice/Broad Field Initiatives" and "It's the Context, Stupid! Why the Context Matters in Institutionalizing Mediation," Fifth Annual Conference of the ABA Section on Dispute Resolution, San Antonio, TX, March 20-22, 2003.

Plenary presenter, "Insights from Social and Procedural Justice Theory," 2003 Annual Meeting Workshop on Alternative Dispute Resolution, AALS, Washington D.C., January 3, 2003.

Presenter, "Social and Procedural Justice and the Role of ADR," 2003 Annual Meeting Workshop on Alternative Dispute Resolution, AALS, Washington D.C., January 3, 2003.

Presenter, "Can Two Wrongs Make a Right? Exploring the Fuzzy Math of Mediator Ethics," 11th Annual Emerging Issues in Mediation Conference of the University of Wisconsin-Madison Division of Professional Development and Applied Studies and the Wisconsin Association of Mediators, Madison, WI, November 13, 2002.

Speaker, "Stepping Back Through the Looking Glass: Real Conversations with Real Disputants About the Place, Meaning and Value of Mediation," Quinnipiac/Yale Dispute Resolution Workshop, New Haven, CT, October 18, 2002.

Presenter, "Effects of Legal Training and Practice on Ethics and Justice Perspectives," 15th Annual Conference of The International Association for Conflict Management, Salt Lake City, UT, June 9-12, 2002.

Presenter, "Collaborating on Research Priorities in Dispute Resolution: A Theory/Practice Workshop" Osgoode Hall Law School, Toronto, ON, May 3-4, 2002.

Presenter, "Procedural Justice and Court-Connected ADR: Do Our Practices Conform to our Theories?" Legal Educators' Colloquium sponsored by ABA Section of Dispute Resolution, Seattle, WA, April 6, 2002.

Presenter and moderator, "Institutionalizing Court ADR: What Does Empirical Data Tell Us?" at the Mini-Conference on Court ADR sponsored by the ABA Sections of Dispute Resolution and Litigation, ABA Judicial Division, Ninth Circuit Standing Committee on ADR, Association for Conflict Resolution, National Association for Community Mediation, National Center for State Courts, Federal Bar Association, National Association for Court Management and Conference of State Court Administrators, Seattle, WA, April 4, 2002.

Participant, Hewlett Theory Centers 2002 conference entitled "Framing New Directions for Theory from Practitioners' Experience: What Don't We Know? What Do We Need to Know? And How Can We Find Out?" sponsored by the William and Flora Hewlett Foundation, New York City, March 21-23, 2002.

Presenter, "Mediating with High Conflict Families," ABA Section of Dispute Resolution and Association of Family and Conciliation Courts' Symposium on Family, Family-Business and Intergenerational Disputes, Philadelphia, PA, February 1, 2002.

Co-organizer, presenter and moderator, "Resolving Disputes Arising Out of the Changing Face of Agriculture: Challenges Presented by Law, Science and Public Perceptions," symposium co-sponsored by The Dickinson School of Law's Center for Dispute Resolution, The Agricultural Law Research and Education Center and the *Dickinson Journal of Environmental Law and Policy*, Carlisle, PA, January 18-19, 2002.

Participant, "ADR Evaluation Summit" sponsored by the Maryland Mediation and Conflict Resolution Office and Salisbury University's Center for Conflict Resolution, Ocean City, MD, November 8-9, 2001.

Presenter, Hamline University School of Law's 2001 Symposium on Advanced Issues in Dispute Resolution entitled "Moving to the Next Level: Intentional Conversations about Race, Mediation and Dispute Resolution," St. Paul, MN, October 27-28, 2001.

Presenter, "Judges, Attorneys, Clients, Mediators: What Do They Want From Mediation? Are They All After the Same Thing?" at the Association of Conflict Resolution Annual Conference, Toronto, ON, October 11-13, 2001.

Presenter, "Judges, Attorneys, Clients, Mediators: What Do They Want from Mediation? Are They All After the Same Thing?" at the ABA Section of Dispute Resolution Annual Conference, Washington, D.C., April 26-28, 2001.

Participant, Conference sponsored by the Theory to Practice Project to develop teaching tools based on *The Handbook of Conflict Resolution* (eds. Morton Deutsch and Peter Coleman), Boston, MA, March 2-3, 2001.

Participant, Conference entitled "Reflective Practice/Best Practice in Evaluating Court-Connected ADR," co-sponsored by the Georgia Office of Dispute Resolution and the Consortium on Negotiation and Conflict Resolution, Atlanta, GA, November 3-4, 2000.

Presenter, "Translating Theory to Practice," at the annual conference of the Wisconsin Association of Mediators, Madison, WI, November 2-3, 2000.

Presenter, "The Challenge of Walking the Talk of Self-Determination in Court-Annexed Mediation" at the University of Wisconsin's Institute for Legal Studies, Madison, WI, November 1, 2000.

Presenter, "The Challenge of Walking the Talk of Self-Determination in Court-Annexed Mediation" and "Expanding Your Mediation Practice to Include Commercial Agreement Facilitation" at 28th annual conference of Society of Professionals in Dispute Resolution, Albuquerque, NM, September 14-16, 2000.

Presenter, "Self-Determination in Court-Annexed Mediation: What Does It Mean? Can It Be Protected?" at 2nd annual conference of the ABA Section on Dispute Resolution, San Francisco, CA, April 6-8, 2000.

Plenary presenter, "The Top Ten Reasons Why ADR Ought to Transform the Law School Curriculum" for Legal Educators' Colloquium at 2nd annual conference of the ABA Section on Dispute Resolution, San Francisco, CA, April 6-8, 2000.

Plenary presenter, "Alternative to *What*? The Influences on ADR Theory and Practice" and "Is the Devil in the Details? Do We Care?" at the 5th Annual Conference on Emerging Issues in Mediation, sponsored by the University of Wisconsin-Madison and the Wisconsin Association of Mediators, Madison, WI, November 10-12, 1999.

Participant, Meeting of the Mediation Law Project Academic Advisory Committee to the ABA Section on Dispute Resolution and National Conference of Commissioners on Uniform State Laws, Arlington, VA, October 22, 1999.

Plenary Presenter, 27th Annual Conference of the Society of Professionals in Dispute Resolution, Baltimore, MD, September 23-25, 1999.

Presenter, "Darwin and the Institutionalization of Mediation: Adapting the Process So That It Survives and Thrives in New Environments," 27th Annual Conference of the Society of Professionals in Dispute Resolution, Baltimore, MD, September 23-25, 1999.

Presenter, "The State of the States: Dispute Resolution in the Courts," symposium sponsored by the *Cardozo OnLine Journal of Conflict Resolution*, the National Center for State Courts and the Policy Consensus Initiative, Baltimore, MD, September 22, 1999.

Presenter, "The Facilitative-Evaluative Debate: Implications for Regulators and ADR Providers" and "Economic Competition Between Private Mediators and Community/Volunteer Mediators–What Does the Profession of Mediation Mean?" at 26th Annual Conference of the Society of Professionals in Dispute Resolution, Portland, OR, October 15-17, 1998.

## AWARDS AND RECOGNITION

Recipient, Fulbright Grant for research and teaching, Tilburg University, The Netherlands, January-June, 2006.

Recipient, "In the Trenches" Award, Legal Education Committee of the Section of Dispute Resolution of the American Bar Association, 2005.

Selected as one of the top lawyers in Minnesota by *The Minneapolis-St. Paul Magazine* in August, 1998.

Selected as one of four U.S. Fellows to participate in August, 1997 Salzburg Seminar (held in Salzburg, Austria) on American law and legal institutions.

Selected as a Leading Minnesota Attorney, 1997 (based on survey of peers).

## SELECTED CURRENT AND PAST PROFESSIONAL ACTIVITIES

Member, American Bar Association, Association for Conflict Resolution, Association of American Law Schools (Alternative Dispute Resolution and Civil Procedure Sections).

Admitted to practice before the Minnesota Supreme Court and in all other courts of the state.

Chair and Chair-Elect, Alternative Dispute Resolution Section of the Association of American Law Schools.

Member, Section Council of the American Bar Association Section of Dispute Resolution.

Member, Independent Standards Commission, International Mediation Institute (created by Netherlands Mediation Institute, Singapore Mediation Centre/Singapore International Arbitration Centre and International Centre for Dispute Resolution/American Arbitration Association).

Member, Mediation Advisory Board of the U. S. District Court of the Middle District of Pennsylvania.

Member, Mediator Panel, U. S. District Court of the Middle District of Pennsylvania.

Member, Advisory Committee on Alternative Dispute Resolution, Joint State Government Commission of the General Assembly of the Commonwealth of Pennsylvania.

Member, Editorial Board, *Conflict Resolution Quarterly.*

Founding member, ADR Law Profs Blog (Indisputably.org).

Co-chair, Publications Board, ABA Section of Dispute Resolution.

Co-chair, James Boskey Essay Competition Committee, ABA Section of Dispute Resolution/Association for Conflict Resolution.

Member, Steering Committee of the Theory-to-Practice Project (funded by the Hewlett Foundation).

Co-chair of the Legal Educators' Colloquium and member, Executive and Steering Committees, 2nd Annual Conference of the American Bar Association Section on Dispute Resolution (held April 6-8, 2000).

Member, research team for the Conflict Resolution Project funded by the Pennsylvania Department of Agriculture (through the Agricultural Law Research and Education Center).

Member, Editorial Board, *The CCH Journal of Alternative Dispute Resolution in Employment.*

Member, ADR Review Board (appointed by Chief Justice to advise Minnesota Supreme Court regarding Rule 114 of the General Rules of Practice).

Member, ADR Implementation Committee (appointed to advise Minnesota Supreme Court regarding court-annexed ADR).

Member, Board of Directors, Minnesota Chapter of the Society of Professionals in Dispute Resolution.

Chairperson, Minnesota State Bar Association Committee on Alternative Dispute Resolution.

Co-Chairperson and Member, Lawyers Alliance for Nuclear Arms Control, Minneapolis-St. Paul Chapter.

President, Vice-President, Secretary and Member of Board of Directors, Playwrights' Center, Minneapolis, MN.

Radio Announcer and Newscaster, WRIE-AM and WLVU-FM, Erie, PA.

## SELECTED CURRENT AND PAST UNIVERSITY-RELATED SERVICE ACTIVITIES

Chair, Vice-Chair and Secretary of the Faculty of Penn State University, Dickinson School of Law.

Chair and Vice-Chair, Promotion and Tenure Committee of Penn State University, Dickinson School of Law.

Faculty Advisor, Certificate in Dispute Resolution and Advocacy.

Faculty Advisor, *Penn State Law Review.*

Faculty Advisor, ADR Society, Penn State University, Dickinson School of Law.

Faculty Advisor, ABA Law Student Division Negotiation Competition Team, Penn State University, Dickinson School of Law.

Associate Director, Center for Dispute Resolution, Penn State University, Dickinson School of Law.

Chair and Member, Faculty Development Committee, Diversity Committee.

Member, Dean Search Committee.

Member, Library Committee, Orientation Committee, Faculty Rights and Responsibilities Committee, Academic Rules Committee, Clinics and Externships Committee, Certificate Committee, Appointments Committee, International/Nonresident Educational Programs Committee.

# Tab 3

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

| | |
|---|---|
| **In Re:** | : |
| | : |
| **Procedures To Govern Mediation Of** | : |
| **Appeals From The United States** | : |
| **Bankruptcy Court For This District.** | : |

**ORDER**

WHEREAS, this Court has jurisdiction to hear appeals from the Bankruptcy Court for this District, 28 U.S.C. § 158;

WHEREAS, the Judges of this Court have determined that, in order to more efficiently and expeditiously administer justice and assist the parties to amicably resolve the disputes which are the subject of appeals before the Court, it is appropriate and necessary for there to be mandatory mediation of all appeals to this Court from the Bankruptcy Court;

NOW THEREFORE, this 23rd day of July, 2004, it is hereby ordered that the following mandatory mediation procedures shall apply to all appeals to this Court from the Bankruptcy Court:

1. Appellate Mediation Panel

(a) The Judges of the Court shall designate a panel of mediators who meet the criteria contained in 1(b) (the "Appellate Mediation Panel" or "Panel"). Panel members will serve at the pleasure of the Judges of this Court.

(b) Persons seeking to be members of the Panel must submit a letter requesting same. Said letter should state the regular hourly rate charged by that person and be accompanied by a Curriculum Vitae which demonstrates the person's experience, competence and acceptability to serve on the Panel.

(c) Following selection, the mediator's relationship is solely with the parties to the appeal, except that mediators are subject to certain reporting requirements to the Judges and Clerk of this Court.

2. Referral to Panel

Appeals in bankruptcy cases shall be referred to the Appellate Mediation Panel to facilitate settlement or otherwise to assist in the expeditious handling of the appeal. The Clerk of this Court shall establish and manage the Appellate Mediation Panel. Mediations will be conducted by members of the Panel. In all cases, the Clerk will assign the matter to a mediator on a rotating basis.

3. Initial Submissions to Mediator And Deferral of Briefing

The Clerk will provide the mediator with a copy of the judgment or order on appeal, any opinion or memorandum issued by the Bankruptcy Court, any relevant motions, and all statements by the parties of the issues to be presented on appeal.

Briefing shall be deferred during the pendency of mediation unless the Court determines otherwise. A referral to mediation, however, shall not defer or extend the time for ordering any necessary transcripts.

If a case is not resolved through mediation, it will proceed through the appellate process as if mediation had not been considered or initiated.

4. Referral of Pending Appeals to Mediation

At any time during an appeal pending as of the date of this order, the assigned Judge may refer the appeal to the Panel for mediation. The procedures set forth in paragraph 5 below are applicable to matters referred for mediation pursuant to this paragraph unless otherwise directed by the mediator. Documents, including but not limited to those specified in paragraph 5(a), may be required.

5. Proceedings After Selection of the Mediator

(a) Submission of Position Papers and Documents

Within fifteen (15) days after the selection of the mediator, each counsel shall prepare and submit to the mediator a confidential position paper of no more than ten (10) pages, stating counsel's views on the key facts and legal issues in the case, as well as on key factors relating to settlement. The position paper will include a statement of motions filed in this Court and their status. Copies of position papers submitted by the parties directly to the mediator should not be served upon opposing counsel. Documents prepared for mediation sessions are not to be filed with the Clerk's Office and are not to be of record in the case.

(b) Mediation Sessions

The mediator will notify the parties of the time, date, and place of the mediation session and whether it will be conducted in person or telephonically. Unless the

mediator directs otherwise, mediation sessions must be attended by the senior lawyer for each party responsible for the appeal and by the person or persons with actual authority to negotiate a settlement of the case. If settlement is not reached at the initial mediation session, but the mediator believes further mediation sessions or discussions would be productive, the mediator may conduct additional mediation sessions in person or telephonically.

(c) Confidentiality of Mediation Proceedings

The mediator shall not disclose to anyone statements made or information developed during the mediation process. The attorneys and other persons attending the mediation are likewise prohibited from disclosing statements made or information developed during the mediation process to anyone other than clients, principals or co-counsel, and then, only upon receiving due assurances that the recipients will honor the confidentiality of the information. Similarly, the parties are prohibited from using any information obtained as a result of the mediation process as a basis for any motion or argument to any court. The mediation proceedings shall be considered compromise negotiations under Rule 408 of the Federal Rules of Evidence. Notwithstanding the foregoing, the bare fact that a settlement has been reached as a result of mediation shall not be considered confidential.

(d) Settlement

No party shall be bound by statements or actions at a mediation session unless a settlement is reached. If a settlement is reached, the agreement shall be reduced to writing and shall be binding upon all parties to the agreement, and counsel shall file a stipulation of dismissal of the appeal. Such a stipulation must be filed within thirty (30) days after settlement is reached.

(e) Fees of the Mediator

One-half of the mediator's fees shall be paid by the appellant(s) and one-half of such fees shall be paid by the appellee(s).

FOR THE COURT:

Sue L. Robinson
SUE L. ROBINSON
CHIEF JUDGE

# Tab 4

U. S. BANKRUPTCY COURT
DISTRICT OF DELAWARE

GENERAL ORDER
RE: PROCEDURES IN ADVERSARY PROCEEDINGS

The court currently has pending over 15,000 adversary proceedings and expects another 10,000 adversary proceedings to be filed this year. The purpose of this general order is to modify certain adversary proceeding procedures in order to reduce the delay in disposition of adversary proceedings. Now therefore,

IT IS ORDERED that the following provisions shall apply to all adversary proceedings filed on or after May 1, 2004 that include a claim for relief to avoid a preferential transfer (11 U.S.C. § 547 and, if applicable, § 550) and such other adversary proceedings as the court may designate by order.

1. Responsive Pleading. Any extension of time to file a responsive pleading is not effective unless approved by order of the court. Any motion for extension of time to file a responsive pleading or stipulated order for such an extension must be filed with the court no later than ten (10) days before the initial pretrial conference in the adversary proceeding.]

2. Disclosures and Discovery Planning.

(a) The discovery planning conference described in Fed. R. Civ. P. 26(f), made applicable by Fed. R. Bankr. P. 7026, shall occur no later than thirty (30) days after the first answer is filed, or sixty (60) days after the adversary proceeding is commenced, whichever is earlier. Without limiting the responsibility of all attorneys of record and all unrepresented parties to arrange and complete the conference, it shall be the responsibility of counsel for plaintiff to propose a date, time and place for the conference within fourteen (14) days after being advised of the identity of counsel for the defendant(s) or that the defendant(s) is unrepresented. The discovery planning conference may be telephonic.

(b) Parties shall provide the initial disclosures under Fed. R. Civ. P. 26(a)(1) no later than fourteen (14) days after the initial discovery planning conference. Any extension of the deadline to provide initial disclosures must be by order of the court, and will only be granted for cause.

3. Mediation.

(a) No later than ninety (90) days after an answer or other responsive pleading is filed the parties shall file a Stipulation Regarding Appointment of Mediator unless prior to that date the parties have submitted a motion for order of dismissal or a stipulated judgment. If the parties fail to file a Stipulation Regarding Appointment of Mediator no later than ten (10) days after the deadline, the court will enter an order, without further notice or

**hearing, selecting and appointing a mediator for the adversary proceeding. The mediator shall be selected from the Register of Mediators and Arbitrators Pursuant to Local Rule 9019-4 for the United States Bankruptcy Court, District of Delaware.**

**(b) The bankruptcy estate, or if there is no bankruptcy estate the plaintiff in the adversary proceeding, shall pay the fees and costs of the mediator.**

**(c) The mediation shall be conducted, and be subject to, the provisions of Local Rule 9019-3 for the United States Bankruptcy Court, District of Delaware**

4. **Post-Mediation Procedures and Trial Date.**

**(a) Within sixty (60) days after entry of the Order Assigning Adversary to Mediation the mediator shall either (a) file the mediator's certificate of completion, or, (b) if the mediation is not concluded, file a status report that provides the projected schedule for completion of the mediation.**

**(b) Adversary proceedings will be set for trial ninety (90) days after entry of the Order Assigning Adversary Proceeding to Mediation, or as soon thereafter as the court's calendar permits.**

Dated: April 7, 2004
(rev. July 14, 2004)

/s/ Mary F. Walrath
Chief Judge

**U.S. BANKRUPTCY COURT**
**DISTRICT OF DELAWARE**

**AMENDMENT TO GENERAL ORDER**

**RE: PROCEDURES IN ADVERSARY PROCEEDINGS**

**AND NOW,** this 11th day of April, 2005, the General Order signed on April 7, 2004, establishing procedures for all adversary proceedings under 11 U.S.C. §547 is hereby **Amended** as follows:

3. Mediation.

(a) No later than **one hundred twenty (120)** days after an answer or other responsive pleading is filed the parties shall file a Stipulation Regarding Appointment of Mediator unless prior to that date the parties have submitted a motion for order of dismissal or a stipulated judgment. If the parties fail to file a Stipulation Regarding Appointment of Mediator not later than ten (10) days after the deadline, the court will enter an order, without further notice or hearing, selecting and appointing a mediator for the adversary proceeding. The mediator shall be selected from the Register of Mediators and Arbitrators Pursuant to Local Rule 9019-4 for the United States Bankruptcy Court, District of Delaware.

This Amendment to the General Order shall be effective for all adversaries filed 11 U.S.C. §547 on or after **April 11, 2005.**

Mary J. Walrath

Chief Judge

**Rule 7016-1 Fed. R. Civ. P. 16 Scheduling Conference.** In any adversary proceeding, the pretrial conference scheduled in the summons and notice issued under Local Rule 7004-2 shall be deemed to be the scheduling conference under Fed. R. Civ. P. 16(b).

(a) Attorney Conference Prior to Scheduling Conference.

(i) If the date for submitting a motion or answer to the complaint attached to the summons and notice issued under Local Rule 7004-2 is at least fourteen (14) days prior to the date of the Fed. R. Civ. P. 16(b) scheduling conference, all attorneys for all the parties shall confer at least seven (7) days prior to the Fed. R. Civ. P. 16(b) scheduling conference to discuss: (A) the nature of the case, (B) any special difficulties that counsel foresee in prosecution or defense of the case, (C) the possibility of settlement, (D) any requests for modification of the time for the mandatory disclosure required by Fed. R. Civ. P. 16(b) and 26(f) and (E) the items in Local Rule 7016-1(b).

(ii) In the event that Local Rule 7016-1(a)(i) does not apply, all attorneys for all parties shall confer on the items identified in that section at least seven (7) days prior to the Fed. R. Civ. P. 16(b) scheduling conference.

(b) Scheduling Conference. At the Fed. R. Civ. P. 16(b) scheduling conference, the Court may consider, in addition to the items specified in Fed. R. Civ. P. 16(b) and 16(c), the following matters:

(i) The schedule applicable to the case, including a trial date, if appropriate;

(ii) The number of interrogatories and requests for admissions to be allowed by any party and the number and location of depositions;

(iii) How discovery disputes are to be resolved;

(iv) The briefing practices to be employed in the case, including what matters are or are not to be briefed and the length of briefs;

(v) The possibility of settlement; and

(vi) Whether the matter could be resolved by voluntary mediation or binding arbitration.

(c) Attendance at Scheduling Conference. Unless otherwise permitted by the Court under Local Rule 7016-3, the conference described in Local Rule 7016-1(b) will be an in-person conference. All counsel who expect to have a significant role in the prosecution or defense of the case are required to attend the conference.

**Rule 9019-2 Mediator and Arbitrator Qualifications and Compensation.**

(a) Register of Mediators and Arbitrators/ADR Program Administrator. The Clerk shall establish and maintain a register of persons (the "Register") qualified under this Local Rule and designated by the Court to serve as mediators or arbitrators in the Mediation or Voluntary Arbitration 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 Delaware to serve as the Alternative Dispute Resolution ("ADR") Program Administrator. Aided by a staff member of the Court, the ADR Program Administrator shall receive applications for designation to the Register, maintain the Register, track and compile reports on the ADR Program and otherwise administer the program.

(b) Application and Certification.

(i) Application and Qualifications. Each applicant shall submit to the ADR 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 110A. 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 ADR Program. Each applicant shall certify that the applicant has completed appropriate mediation or arbitration training or has sufficient experience in the mediation or arbitration process. Each applicant hereunder shall agree to accept at least one pro bono appointment per year. If after serving in a pro bono capacity insufficient matters exist to allow for compensation, credit for pro bono service shall be carried into subsequent years in order to

qualify the mediator to receive compensation for providing service as a mediator or arbitrator.

(ii) Court Certification. The Court in its sole and absolute determination 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.

(iii) Reaffirmation of Qualifications. Each applicant accepted for designation to the Register shall reaffirm annually the continued existence and accuracy of the qualifications, statements and representations made in the application.

(c) Oath. Before serving as a mediator or arbitrator, each person designated as a mediator or arbitrator shall take the following oath or affirmation:

> "I, _____, do solemnly swear (or affirm) that I will faithfully and impartially discharge and perform all the duties incumbent upon me in the Mediation or Voluntary Arbitration Program of the United States Bankruptcy Court for the District of Delaware without respect to persons and will do so equally and with respect."

(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 or arbitration in accordance with these Local Rules and unless special circumstances exist as determined by the Court, the parties shall select a mediator or arbitrator. If the parties fail to make such selection within the time frame as set by the Court, then the Court shall appoint a mediator or arbitrator.

(ii) Inability to Serve. If the mediator or arbitrator is unable to or elects not to serve, he or she shall

file and serve on all parties, and on the ADR Program Administrator, within seven (7) days after receipt of notice of appointment, a notice of inability to accept the appointment. In such event, the parties shall select an alternate mediator or arbitrator.

(iii) Disqualification.

(A) Disqualifying Events. Any person selected as a mediator or arbitrator 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 or arbitrator 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 or arbitrator 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 or arbitrator. Within seven (7) days after receiving notice of appointment, the mediator or arbitrator shall file with the Court and serve on the parties either (1) a statement that there is no basis for disqualification and that the mediator or arbitrator 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 or arbitration who believes that the assigned mediator or arbitrator has a conflict of interest promptly shall bring the issue to the attention of the mediator or arbitrator, as applicable, and to the other parties. If the mediator or arbitrator does not withdraw, and the movant is dissatisfied with this decision, the issue

shall be brought to the attention of the ADR Program Administrator by the mediator, arbitrator or any of the parties. If the movant is dissatisfied with the decision of the ADR Program Administrator, the issue shall be brought to the Court's attention by the ADR Program Administrator or any party. The Court shall take such action as it deems necessary or appropriate to resolve the alleged conflict of interest.

(iv) Liability. Aside from proof of actual fraud or unethical conduct, there shall be no liability on the part of, and no cause of action shall arise against, any person who is appointed as a mediator or arbitrator under these Local Rules on account of any act or omission in the course and scope of such person's duties as a mediator or arbitrator.

(f) Compensation. A person will be eligible to be a paid mediator or arbitrator if that person has been trained and certified by any nationally-recognized certification program. Once eligible to serve as a mediator or arbitrator for compensation, which shall be at reasonable rates and subject to judicial review, the mediator or arbitrator may require compensation or reimbursement of expenses as agreed by the parties. Prior Court approval shall also be required if the estate is to be charged. If the mediator or arbitrator consents to serve without compensation and at the conclusion of the first full day of the mediation conference or arbitration proceeding it is determined by the mediator or arbitrator 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 or arbitrator consents to continue to serve without compensation, the parties may agree to continue the mediation conference or arbitration.

(ii) If the mediator or arbitrator does not consent to continue to serve without compensation, the fees and expenses shall be on such terms as are satisfactory to the mediator or arbitrator and the parties, subject to Court approval. 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 or arbitrator may be reimbursed for actual transportation expenses necessarily incurred in the performance of duties.

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

**Rule 9019-3 Assignment of Disputes to Mediation or Voluntary Arbitration.**

(a) Stipulation of Parties. Notwithstanding any provision of law to the contrary, the Court may refer a dispute pending before it to mediation and, upon consent of the parties, to arbitration. During a mediation, the parties may stipulate to allow the mediator, if qualified as an arbitrator, to hear and arbitrate the dispute.

(b) Safeguards in Consent to Voluntary Arbitration. Matters may proceed to voluntary arbitration by consent where

(i) Consent to arbitration is freely and knowingly obtained; and

(ii) No party is prejudiced for refusing to participate in arbitration.

**Rule 9019-4 Arbitration.**

(a) Referral to Arbitration under Fed. R. Bankr. P. 9019(c). The Court may allow the referral of a matter to final and binding arbitration under Fed. R. Bankr. P. 9019(c).

(b) Referral to Arbitration under 28 U.S.C. § 654. The Court may allow the referral of an adversary proceeding to arbitration under 28 U.S.C. § 654.

(c) Arbitrator Qualifications and Appointment. In addition to fulfilling the qualifications of a mediator found in Local Rule 9019-2(b), a person qualifying as an arbitrator hereunder must be certified as an arbitrator through a qualifying program that includes a bankruptcy component. An arbitrator shall be appointed (and may be disqualified) in the same manner as in Local Rule 9019-2(e). The arbitrator shall be liable only to the extent provided in Local Rule 9019-2(e)(iv).

(d) Powers of Arbitrator.

(i) An arbitrator to whom an action is referred shall have the power, upon consent of the parties, to

(A) Conduct arbitration hearings;

(B) Administer oaths and affirmations; and

(C) Make awards.

(ii) The Fed. R. Civ. P. and the Fed. R. Bankr. P. apply to subpoenas for the attendance of witnesses and the production of documents at a voluntary arbitration hearing.

(e) Arbitration Award and Judgment.

(i) Filing and Effect of Arbitration Award. An arbitration award made by an arbitrator, along with proof of service of such award on the other party by the prevailing party, shall be filed with the Clerk promptly after the arbitration hearing is concluded. The Clerk shall place under seal the contents of any arbitration award made hereunder and the contents shall not be known to any Judge who might be assigned to the matter until the Court has entered a

final judgment in the action or the action has otherwise terminated.

(ii) Entering Judgment of Arbitration Award. Arbitration awards shall be entered as the judgment of the Court after the time has expired for requesting a determination de novo, with no such request having been filed. 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, except that the judgment shall not be subject to review in any other court by appeal or otherwise.

(f) Determination De Novo of Arbitration Awards.

(i) Time for Filing Demand. Within thirty (30) days after the filing of an arbitration award under Local Rule 9019-4(e) with the Clerk, any party may file a written demand for a determination de novo with the Court.

(ii) Action Restored to Court Docket. Upon a demand for determination 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.

(iii) Exclusion of Evidence of Arbitration. The Court shall not admit at the determination 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.

(g) This Local Rule shall not apply to arbitration under 9 U.S.C. § 3, if applicable.

**Rule 9019-5 Mediation.**

(a) Types of Matters Subject to Mediation. The Court may assign to mediation any dispute arising in an adversary proceeding, contested matter or otherwise in a bankruptcy case.

(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 Code, the Fed. R. Bankr. P. 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.

(c) The Mediation Process.

(i) Time and Place of Mediation Conference. After consulting with all counsel and pro se parties, the mediator shall schedule a convenient time and place for the mediation conference and promptly give all counsel and pro se parties at least fourteen (14) days' written notice of the time and place of the mediation conference. The mediator shall schedule the mediation to begin as soon as practicable.

(ii) Submission Materials. Not less than seven (7) calendar days before the mediation conference, each party shall submit directly to the mediator and serve on all counsel and pro se parties any materials (the "Submission") the mediator directs to be prepared or assembled. The mediator shall so direct not less than fourteen (14) days before the mediation conference. Prior to the mediation conference, the mediator may talk with the participants to determine what materials would be helpful. The Submission shall not be filed with the Court and the Court shall not have access to the Submission.

(iii) Attendance at Mediation Conference.

(A) Persons Required to Attend. The following persons must attend the mediation conference personally, unless excused by the mediator:

(1) Each party that is a natural person;

(2) If the party is not a natural person, including a government entity, a representative who is not the party's attorney of record and who has full authority to negotiate and settle the matter on behalf of the party;

(3) If the party is a governmental entity that requires settlement approval by an elected official or legislative body, a representative who has authority to recommend a settlement to the elected official or legislative body;

(4) The attorney who has primary responsibility for each party's case; and

(5) Other interested parties, such as insurers or indemnitors or one or more of their representatives, whose presence is necessary for a full resolution of the matter assigned to mediation.

(B) Failure to Attend. Willful failure to attend any mediation conference, and any other material violation of this Local Rule, shall be reported to the Court by the mediator and may result in the imposition of sanctions by the Court. Any such report of the mediator shall comply with the confidentiality requirement of Local Rule 9019-5(d).

(iv) Mediation Conference Procedures. The mediator may establish procedures for the mediation conference.

(d) Confidentiality of Mediation Proceedings.

(i) Protection of Information Disclosed at Mediation. 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 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.

(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, 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 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.

(iii) Protection of Proprietary Information. The parties, the mediator and all mediation participants shall protect proprietary information.

(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 attorneys or pro se litigants, but not to the Court.

(f) Post-Mediation Procedures.

(i) Preparation of Orders. If a settlement is reached at a mediation, a party designated by the mediator shall submit a fully-executed stipulation and proposed order to the Court within twenty-one (21) days after the end of the mediation. If the party fails to prepare the stipulation and order, the Court may impose appropriate sanctions.

(ii) Mediator's Certificate of Completion. No later than fourteen (14) days after the conclusion of the mediation conference, unless the Court orders otherwise, the mediator shall file with the Court, and serve on the parties and the ADR Program Administrator, a certificate in the form provided by the Court showing compliance or noncompliance with the mediation conference requirements of this Local Rule and whether or not a settlement has been reached. Regardless of the outcome of the mediation conference, the mediator shall not provide the Court with any details of the substance of the conference.

(iii) Mediator's Report. In order to assist the ADR Program Administrator in compiling useful data to evaluate the Mediation Program, and to aid the Court in assessing the efforts of the members of the Register, the mediator shall provide the ADR Program Administrator with an estimate of the number of hours spent in the mediation conference and other statistical and evaluative information on a form provided by the Court. The mediator shall provide this report whether or not the mediation conference results in settlement.

(g) Withdrawal from Mediation. Any matter assigned to mediation under this Local Rule may be withdrawn from mediation by the Court at any time.

(h) Termination of Mediation. Upon the filing of a mediator's certificate under Local Rule 9019-5(f) or the entry of an order withdrawing a matter from mediation under Local Rule 9019-5(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 conference 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 order(s).

**Rule 9019-6 Other Alternative Dispute Resolution Procedures.** The parties may employ any other method of alternative dispute resolution.

# Tab 5

**UNITED STATES BANKRUPTCY COURT**
**DISTRICT OF DELAWARE**

APPLICATION FOR ADMISSION TO MEDIATION
OR VOLUNTARY ARBITRATION REGISTER

I, the undersigned, hereby apply for inclusion on the Register of Mediators for the United States Bankruptcy Court for the District of Delaware. In making this application, I certify under penalty of perjury that all of the following information is true and correct.

1. I will fully comply with the relevant provisions of the Bankruptcy Code and Federal Rules of Bankruptcy Procedure and this Court's relevant Local Rules and General Orders.

2.1 I have been licensed or accredited under the laws of the United States, Delaware, or any other state, in the professions or specialties listed below (e.g., attorney, accountant, real estate broker, appraiser, engineer, etc.) since the date indicated:

| **Profession** | **Accrediting Agency or Jurisdiction** | **Date of Admission** |
|---|---|---|

2.2 I am, or have been, a member in good standing of the professional organizations listed below which apply to my aforementioned professions:

| **Organization** | **Date of Admission** | **Active/Inactive** |
|---|---|---|

2.3 A general explanation of my experience in each of my aforementioned professions or specialties is listed below:

3.1 The following is a general statement concerning pertinent mediation experience that I have:

3.2 I have/have not participated in a mediation training program. The programs in which I have participated are described below (including course, program sponsor and hours):

4. The following is a brief explanation of my pertinent bankruptcy experience:

5. The following is a general explanation of any other pertinent experience, such as relevant business or legal activities, that I have:

6. I have:

(a) never been suspended, disbarred or had any professional license revoked;

(b) no pending adverse actions against any of my professional licenses;

(c) never been convicted of a felony; and

(d) never been sanctioned or reprimanded by any tribunal for unethical or unprofessional conduct, including a violation of Rule 11 or Rule 9011.

(Should any of the above apply, please describe the circumstances on an attached page.)

7. I will not accept appointment as a mediator in any proceeding or matter unless at the time of appointment I would qualify as a "Disinterested person" as defined by 11 U.S.C. §101; I would not be disqualified pursuant to 28 U.S.C. §455 if I were a justice, judge, or magistrate; or I know of no other reason that would disqualify me as a mediator. In accordance with the Court's amended general order M-143, each person certified as a mediator should take the oath or affirmation prescribed by 28 U.S.C. §453 before serving as a mediator. Administration of the oath will be attested by affixing your signature to the attached copy titled Exhibit "A." After acceptance of appointment as a mediator, I will immediately contact the Court to resign upon learning that I am no longer qualified to serve.

Dated: _____, 200_

_____
Signature*

_____
Print or Type Name and last four digits of SS#

_____
Address

_____

_____

_____
Telephone Number:
E-mail Address:

*I understand that if I am certified I may be asked to file this information in an electronic database. If asked I understand that I must comply with the request to be included in the register.

***Mail Completed Application to:***
*David D. Bird, Clerk of Court*
*ADR Program Administrator*
*U.S. Bankruptcy Court, District of Delaware*
*824 Market Street, 3rd Floor*
*Wilmington, DE 19801*

EXHIBIT A

I, _____, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as mediator under the Constitution and laws of the United States. So help me God.

_____

# Tab 6

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**PURSUANT TO LOCAL RULE 9019-4**
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**DISTRICT OF DELAWARE**

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Date: September 18, 2009

# Tab 7

## EVALUATION OF MEDIATION PERFORMANCE_____

***Name:***

***Raw Points:*** ***Ranking:***

***Managing the startup.***

Did the mediator's startup demonstrate planning and that "homework" was done?

Was orientation thorough, clear, accurate and concise?

1 2 3 4 5

***Gathering, comprehending and facilitating communication of facts and interests***

Did mediator ask neutral, open-ended questions?

Did mediator permit parties to fully express themselves?

Did mediator summarize and paraphrase parties' statements?

Did mediator clarify issues?

Did mediator succeed in generating information about sensitive issues?

Did mediator comprehend and protect confidentiality of information shared in caucus?

Did mediator facilitate communication of facts important to resolution?

Did mediator encourage parties to focus on problems and interests?

Did mediator demonstrate in-depth understanding of scope, intensity and contentiousness of case and of problems and interests not explicitly stated by parties?

Did mediator facilitate communication of problems and interests important to resolution?

1 2 3 4 5

***Empathy (verbal and non-verbal) and Impartiality.***

Did mediator's manner convey respect to all parties and their priorities?

Was non-verbal communication appropriate?

Did manner convey conspicuous sensitivity to cultural misunderstandings and address them effectively?

Did mediator listen respectfully?

Did mediator demonstrate understanding of issues, concerns, interests?

Did mediator help parties listen to each other?

Did mediator help parties improve understanding of each other's concerns?

Did mediator's manner of introductions and initial explanations show equal respect for all parties?

Did mediator listen to both sides?

Did mediator's questions and non-verbal communication convey neutral atmosphere and open mind?

1 2 3 4 5

***Assistance in generating options and agreements.***

Did the mediator assist the parties to develop their own options and evaluate alternatives for themselves?

Did mediator demonstrate commitment to allowing full play to parties' own values?

Did mediator vigorously pursue avenues of collaboration between the parties?

Did mediator clearly convey limitations to possible agreement and consequences of non-agreement for each party?

Did mediator assist the parties to evaluate alternative solutions?

Did mediator emphasize areas of agreement?

Did mediator clarify and frame points of agreement?

Did mediator show tenacity throughout?

Did mediator package and link issues to illustrate mutual gains from agreement?

If the mediator evaluated possible solutions, was such evaluation timely, useful, responsive, informed?

Was evaluation made only after making strong efforts to get parties to conduct own evaluations?

If mediator evaluated possible solutions, was mediator careful not to compromise party self-determination?

If and when mediator generated options directly, were options timely, responsive to parties' concerns and put forth only after making strong efforts to focus on and stimulate the parties' collaborative problem solving?

1 2 3 4 5

***Subtotal:_____***

***Managing the interaction and conclusion.***

Were decisions about caucusing, order of presentation, etc. consistent with rationale for progress toward resolution?

Did concluding statement accurately convey necessary information regarding compliance and follow-up?

Was language appropriate to parties' culture and education?

1 2 3 4 5

***Subtotal:_____***

***Overall***

1 2 3 ***4*** ***5*** ***6*** 7 8 9

**Subtotal 1:** _____

**Subtotal 2:** _____

**Subtotal 3:** _____

**Overall:** _____

**TOTAL PTS:** _____

***Modification due to level of difficulty presented by disputants:***

***Comments:***

Send to:
Multi-Option ADR Project
400 County Center- SMC 127
Redwood City, CA 94063-1655

## *San Mateo County Superior Court, Multi-Option ADR Project, MAP*

# *EVALUATION BY ATTORNEYS*

In accordance with **Local Rule 2.3(i)(5),** please submit evaluation by mail or fax within 10 days of completion of the ADR process. Telephone: (650) 599-1070 Fax: (650) 599-1754

**MAP staff and committees use this *confidential* information to assess the impact on the court, to track quality, to provide feedback to neutrals and to inform our decisions regarding redesign of program procedures. Other staff and trial judges do not see specific evaluations. This information will be aggregated for blind statistical reports to the Judicial Council, the Court and the community.**

**Case Name:** **Case Number:** **Type of Case:**

**Name of Neutral:** **Date of Session:**

1. I am: ☐ Plaintiff's attorney ☐ Defendant's attorney ☐ Other: _____

I participated in an ADR session: Yes ☐ No ☐
**If you answered NO above, please indicate the reason(s) why below. If you answered YES, continue to Question 2:**
☐ Parties unwilling ☐ Not yet scheduled ☐ Case dismissed ☐ Other (describe):_____
_____

2. Process(es) used in case (indicate if more than one): ☐ Mediation ☐ Neutral Evaluation ☐ Binding Arbitration ☐ Other:_____

3. Please indicate if the case resolved:
☐ Fully ☐ Partially ☐ Not resolved

4. If the case resolved, how much of a factor was ADR in settlement of the case?

| Not a factor | | | Very Important | |
|---|---|---|---|---|
| 1 | 2 | 3 | 4 | 5 |

5. Total # of sessions _____ Approximate total # of hour_____ Approximate # of follow-up calls _____

6. How many days elapsed (approximately) between the filing of the complaint and the ADR session?_____

7. Indicate at what phase the ADR session occurred (indicate if more than one)
☐ Within 4 months of filing ☐ After some preliminary discovery
☐ After a significant amount of discovery ☐ Trial was imminent

8. Which of the following court events were <u>avoided</u> because of the ADR session?
Please check all that apply:
☐ Discovery Motion(s) Number: _____ ☐ Summary Judgment/Adjudication Motion ☐ Trial
☐ Deposition(s) Number: _____ ☐ Pretrial Conference ☐ Other
☐ Case Management Conference ☐ Judicial Settlement Conference

9. In your opinion, using ADR in this case: ☐ Reduced or ☐ Increased costs for each party (apart from the mediator's fees) by:

☐ Under $5,000 ☐ $5—$10,000 ☐ $10— $25,000 ☐ $25—$50,000
☐ $50—$100,000 ☐ $100—$250,000 ☐ $250—$500,000 ☐ Other_____

***PLEASE SEE REVERSE SIDE.***

10. In your opinion, using the ADR process in this case,
☐ Reduced court time ☐ Increased court time

Please estimate the number of days court time was reduced/increased as a result of the parties going to ADR: (Consider the decrease /increase in the number of court days relative to motions, settlement conferences and trial.)

☐ 1-3 days ☐ 3-5 days ☐ 5-10 days ☐ 10-20 days ☐ 20+ days

11. Please indicate which, if any, of the following occurred during the ADR session (please check all that apply):
☐ Communication between the parties was improved.
☐ Parties came away with a better understanding of the case.
☐ Parties clarified, resolved and eliminated some issues.
☐ Other comments:

12. On a scale of 1 to 5, with 1 being the lowest level and 5 being the highest level, please indicate your satisfaction by rating the following statements:

| | | Lowest | | | | Highest |
|---|---|---|---|---|---|---|
| 1. | This process was fair to all parties. | 1 | 2 | 3 | 4 | 5 |
| 2. | This process allowed all to be heard. | 1 | 2 | 3 | 4 | 5 |
| 3. | This process offered a safe secure setting. | 1 | 2 | 3 | 4 | 5 |
| 4. | My client did not feel unduly pressured by neutral to reach an agreement. | 1 | 2 | 3 | 4 | 5 |
| 5. | The neutral skillfully structured the process. | 1 | 2 | 3 | 4 | 5 |
| 6. | The neutral understood key issues. | 1 | 2 | 3 | 4 | 5 |
| 7. | I would use this neutral again. | 1 | 2 | 3 | 4 | 5 |
| 8. | I would use the MAP program again | 1 | 2 | 3 | 4 | 5 |

***We welcome any other comments or suggestions you may have regarding the ADR neutral used in this case or the Multi-Option ADR Project:***

***THANK YOU.***

Send to:
Multi Option ADR Project – SMC 127
400 County Government Center
Redwood City, CA 94063-1655

# *San Mateo County Superior Court, Multi-Option ADR Project, MAP*

## *CLIENT EVALUATION*

In accordance with **Local Rule 2.3 (i) (5)**, please submit evaluation by mail or fax within 10 days of completion of the ADR process. Telephone: (650) 599-1070 Fax: (650) 599-1754

**MAP staff and committees use this *confidential* information to assess the impact on the court, to track quality, to provide feedback to neutrals and to inform our decisions regarding redesign of program procedures. Other staff and trial judges do not see specific evaluations. This information will be aggregated for blind statistical reports to the Judicial Council, the Court and the community.**

**Case Name:** **Case Number:**

**Type of Case:** **Name of Neutral:** **Date of Session:**

1. I am: ☐ Plaintiff ☐ Defendant ☐ Other _____

**I participated in an ADR Session ☐ YES ☐ NO**

**If you answered NO above, please indicate the reason(s) why below. If you answered YES continue to question 2:**

**☐ Parties unwilling ☐ Not yet scheduled ☐ Other, Describe:** _____

_____

_____

2. Please indicate which, if any, of the following occurred during the ADR session: Please check all that apply.

☐ Communication between the parties was improved.
☐ Parties came away with a better understanding of the case.
☐ Parties clarified, resolved and eliminated some issues.
☐ Other comments:

On a scale of 1 to 5, 1 being the lowest level and 5 being the highest level, please indicate your satisfaction by rating the following statements:

| | | Lowest | | | | Highest |
|---|---|---|---|---|---|---|
| 3. | This process was fair to all parties. | 1 | 2 | 3 | 4 | 5 |
| 4. | This process allowed all to be heard. | 1 | 2 | 3 | 4 | 5 |
| 5. | This process offered a safe secure setting. | 1 | 2 | 3 | 4 | 5 |
| 6. | I did not feel unduly pressured by the neutral to reach agreement. | 1 | 2 | 3 | 4 | 5 |
| 7. | The neutral skillfully structured the process. | 1 | 2 | 3 | 4 | 5 |
| 8. | The neutral understood key issues. | 1 | 2 | 3 | 4 | 5 |
| 9. | I would use this neutral again. | 1 | 2 | 3 | 4 | 5 |
| 10. | I would use the MAP program again | 1 | 2 | 3 | 4 | 5 |

**PLEASE PROVIDE ANY ADDITIONAL COMMENTS:** _____

# Tab 8

MEMORANDUM

**To:** **Court Administrators and ADR Program Administrators**
**From:** **American Bar Association Section of Dispute Resolution Task Force on Research and Statistics**
**Date:** **October 11, 2005**
**Re:** **Top Ten Pieces of Information Courts Should Collect on ADR**

The American Bar Association Section of Dispute Resolution Research and Statistics Task Force conducted a survey of court administrators and administrators of court ADR programs to assess what information they need to evaluate and demonstrate the effectiveness of their programs. What follows are the top ten pieces of information these administrators identified, together with a brief sentence or two explaining why this information is important and how courts might use it, as well as recommendations for how to collect the information.[1] The Section of Dispute Resolution is aware that there are significant constraints on the information management systems in many courts and that recording the information will impose an additional responsibility. To ease that burden, we recommend that the data collection be integrated into forms and procedures the court already uses to enhance the likelihood that some ADR information will be recorded.

The Section of Dispute Resolution urges all court administrators to consider recording these pieces of information in the court's information management system or in a database maintained by the ADR office. This recommendation envisions an electronic record for each case referred to ADR, in which information is recorded about the ADR process in that case. Ideally, the case-specific ADR information would be part of the court's regular database of cases filed in the court so that information about non-ADR cases would also be available for comparison purposes.

The top ten pieces of information are:

**#1 Was ADR used for this case (yes/no)?**

*Explanation: This indicator tracks how much ADR is used in civil litigation and provides a baseline for determining what percentage of civil litigation uses an ADR intervention. It is the fundamental minimum information necessary.*

*Recommended collection method: Integrated into the court's information management system.*

[1] A complete draft report of the survey results appears on the Section's website at: www.abanet.org/dispute/court.html. Your comments on this report are welcome. Please send them to Lbingham@indiana.edu.

#2 **What ADR process was used in this case? (Mediation, early neutral assessment, non-binding arbitration, fact-finding, mini-trial, summary jury trial, other)**

*Explanation: There is a great diversity of court ADR programs. The parties themselves elect from a variety of processes. This information permits examination of differences across courts in the type of ADR used and the frequency of use. Within courts, it allows for a comparison of the results of different processes and an examination of the kinds of cases for which parties use different processes.*

*Recommended collection method: Integrated into the court's information management system or in the database maintained by the ADR office.*

#3 **Timing Information (the date the claim was docketed; Date of referral to ADR; Date of first ADR session; Date of close of ADR referral period; At what point in the docket duration did ADR occur (Before suit, after filing suit, before discovery, just before trial) the final disposition date of the case; the date of post-trial motions).**

*Explanation: ADR is used at different points in time in the life of a case. This information will help determine what timing is most effective to use ADR and how early or late a case might be referred to ADR..*

*Recommended collection method: Integrated into the court's information management system or in the database maintained by the ADR office.*

#4 **Whether the case settled because of ADR. If settled, whether the case settled in full or settled in part.**

*Explanation: Advocates claim that ADR settles cases or at least narrows the issues in dispute. This question helps examine that claim.*

*Recommended collection method: Integrated into the court's information management system or in the database maintained by the ADR office.*

#5 **What precipitated the use of ADR? (Court order *sua sponte*, party consent to the process, party motion with one or more parties opposed and a court order for ADR following, automatic referral per court rule due to kind of case)**

*Explanation: Court programs vary widely in how cases enter ADR. This question allows for a comparison of different methods for intake and an exploration of whether voluntary or mandatory programs are more effective.*

*Recommended collection method: Q*uestionnaires of participants.

#6 **Was there a settlement without ADR (yes/no)? If so, how was the case** terminated—e.g., dispositive motion, settlement in ADR, settlement by some other process, during or after trial, removal to another court, etc.

*Explanation: Some cases referred to ADR settle before the process—or after the process but because of factors other than ADR. Many argue that 90% of all cases settle anyway, so it is hard to identify whether ADR is making a difference. This information permits comparison of the outcomes for ADR and non-ADR cases.*

*Recommended collection method: Integrated into the court's information management system or in the database maintained by the ADR office.*

#7 **Case type (general civil, criminal, domestic, housing, traffic, small claims)**

*Explanation: This information will permit examination of a number of claims and questions about ADR: For which cases is ADR most effective? Does ADR use and effectiveness vary by subject matter in dispute? Do more small claims cases settle in ADR than housing claims, for example? If the court has limited ADR funds, what kinds of cases should get priority for ADR?*

*Recommended collection practice: Integrated into the court's information management system or in the database maintained by the ADR office.* A court with an IT system should use the same coding scheme for ADR cases as it does for litigation case types.

#8 **The cost of the ADR process to the participants**

*Explanation: Critics suggest that the ADR process simply adds transaction costs to litigation. Advocates suggest ADR saves money. This question allows us to compare ADR costs to other studies on litigation costs.*

*Recommended collection practice: Questionnaires directed to the litigants and/or their attorneys. Programs may also want to query litigants about the cost savings of not proceeding. For comparison purposes, program administrators should consider surveying non-ADR cases, too.*

#9 **Did the disputants use more than one form of ADR? If so, which?**

*Explanation:* *In order to know which form of ADR is most effective for which cases, we need to be able to separate cases by process and identify those with more complex sequences of process.*

*Recommended collection practice:* *Integrated into the court's information management system or in the database maintained by the ADR office.* A court with an IT system should use the same coding scheme for ADR cases as it does for litigation case types.

**#10 Satisfaction data: How satisfied are the participants with the process, the outcome, and the neutral:**

*Explanation:* *A key value in the justice system is that people who use it believe it to be fair and to provide justice. These questions are ways to determine how people who use ADR feel about their experience.*

*Recommended collection practice:* *Questionnaires directed to the litigants and/or their attorneys.*

# STATE AND LOCAL BAR ALTERNATIVE DISPUTE RESOLUTION SURVEY

## 2001 EDITION

**Section of Dispute Resolution**
American Bar Association
740 15th Street, NW
Washington, D.C. 20005-1022
Tel: (202) 662-1680
Fax: (202) 662-1683
E-mail: dispute@abanet.org
Web: www.abanet.org/dispute

*We are pleased to present this Fourth State and Local Bar Dispute Resolution Survey. We would like to thank the State and Local Bar Associations who responded to the survey. Without their contributions, this survey would not be possible. Following is the summary report of the survey results. For more comprehensive results, please see the Section web site at http://www.abanet.org/dispute.*

**---Ben Overton,** *Section Chair*

**Section Council Officers 2000-2001**

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Robert C. Mussehl – Chair Elect
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Amanda Kelly – Intern

This survey is a project of the Section of Dispute Resolution National Dispute Resolution Resource Center and the State and Local Bar Dispute Resolution Committee. The survey and report were made possible by a grant from the William and Flora Hewlett Foundation.

*Introduction*

The State and Local Bar Committee of the ABA Section of Dispute Resolution has compiled this Survey of State and Local Bar Dispute Resolution Programs and Activities. This survey report contains information about dispute resolution programs sponsored or supported by bar associations across the country, including contact information for bar association personnel and dispute resolution committee or section chairs, descriptions of lawyer/client dispute resolution processes, training requirements for mediators and arbitrators, and information about the unauthorized practice of law.

The Committee sent surveys to 52 state bar associations (representing all 50 states, the District of Columbia and Puerto Rico) and 64 local bar associations. All 52 state bar associations completed and returned their surveys. Almost half (30) of the local bar associations completed and returned their surveys. The information summarized below is information reported to the Section of Dispute Resolution by the state and local bar associations. Not all bar associations answered every question of the survey.

*Results at a Glance*

- Twenty-eight state bar associations have sections of dispute resolution
- Twenty state bar associations have committees of dispute resolution
- The average size of a state bar section of dispute resolution is 260 members
- The average size of a state bar committee of dispute resolution is 62 members
- Thirty-three state bar associations have dispute resolution programs for lawyer/client disputes
- Sixteen state bar associations have dispute resolution programs for lawyer/lawyer disputes
- Eighteen states reported that an entity (bar, courts, legislature, etc) certifies, approves or maintains a roster of dispute resolution providers
- Forty-four state bars reported that individuals from backgrounds other than law are used as dispute resolution providers
- Thirty-five state bars reported that their state has one or more independent dispute resolution organizations
- Four states reported that a mediator in their state has been accused of the unauthorized practice of law

*Dispute Resolution Entities*

Of the 52 state bar associations, all but one reported having a dispute resolution section, committee, or some entity focused on dispute resolution. Twenty-eight state bar associations reported having dispute resolution sections, 20 reported having dispute resolution committees, and three bar associations reported having both a section and committee. In terms of membership, the average number of members in a state bar dispute resolution section is 260. The average number of members in state bar committees is 62. The State Bar of Texas Dispute Resolution Section has the largest membership of any state bar association section or committee with 1,465 members.

**Table 1. State Bars with Dispute Resolution *Sections***

| Bar Association | Entity | Members |
|---|---|---|
| Alaska Bar Association | Section | |
| State Bar Of Arizona | Section | 205 |
| Arkansas Bar Association | Section | 77 |
| Connecticut State Bar Association | Section | |
| Delaware State Bar Association | Section | 64 |
| State Bar Of Georgia | Section | 615 |
| Hawaii State Bar Association | Section | 60 |
| Idaho State Bar | Section | 100 |
| Illinois State Bar Association | Section | 453 |
| Indiana State Bar Association | Section | 350 |
| Iowa State Bar Association | Section | |
| Kansas Bar Association | Section | 40 |
| Maine State Bar Association | Section | 75 |
| Maryland State Bar Association | Section | 239 |
| Minnesota State Bar Association | Section | |
| Mississippi Bar | Section | 125 |
| Nebraska State Bar Association | Section | 25 |
| State Bar Of Nevada | Section | |
| New Hampshire Bar Association | Section | 117 |
| New Jersey State Bar Association | Section | |
| North Carolina Bar Association | Section | 456 |
| Oklahoma Bar Association | Section | |
| Oregon State Bar | Section | 336 |
| South Carolina Bar | Section | |
| Tennessee Bar Association | Section | 104 |
| State Bar Of Texas | Section | 1465 |
| Utah State Bar | Section | 48 |
| State Bar Of Wisconsin | Section | 261 |

**Table 2. State Bars with Dispute Resolution *Committees***

| Bar Association | Entity | Members |
|---|---|---|
| Alabama State Bar | Committee | 34 |
| State Bar Of California | Committee | 21 |
| Colorado Bar Association | Committee | 250 |
| Kentucky Bar Association | Committee | 23 |
| Louisiana State Bar Association | Committee | 3 |
| State Bar Of Michigan | Committee | 17 |
| Missouri Bar | Committee | 110 |
| State Bar Of Montana | Committee | 19 |
| State Bar Of New Mexico | Committee | 38 |
| New York State Bar Association | Committee | 70 |
| State Bar Association of North Dakota | Committee | |
| Ohio State Bar Association | Committee | |
| Pennsylvania Bar Association | Committee | 200 |
| Puerto Rico Bar Association | Committee | 9 |
| Rhode Island Bar Association | Committee | |
| State Bar Of South Dakota | Committee | |
| Vermont Bar Association | Committee | 72 |
| Virginia State Bar | Committee | 30 |
| West Virginia Bar Association | Committee | 40 |

Of the thirty local bars surveyed, all but two have dispute resolution committees, sections, or other entities. Fifteen local bar associations reported having a dispute resolution committee, eleven reported having sections, one has a dispute resolution task force, and another has a non-profit corporation. The Los Angeles County Bar Association Dispute Resolution Services, a nonprofit corporation of the LA County Bar Association, reported the largest local bar dispute resolution entity with 450 members.

**Table 3. Local Bars with Dispute Resolution *Sections***

| Bar Association | State | Entity | Members |
|---|---|---|---|
| Bar Association Of San Francisco | California | Section | 200 |
| Beverly Hills Bar Association | California | Section | 238 |
| San Diego County Bar Association | California | Section | 60 |
| Broward County Bar Association | Florida | Section | 30 |
| Hillsborough County Bar Association | Florida | Section | 15 |
| Louisville Bar Association | Kentucky | Section | 90 |
| Bar Association Of Montgomery County | Maryland | Section | 50 |
| Mecklenburg County Bar | North Carolina | Section | 38 |
| Houston Bar Association | Texas | Section | 350 |
| Milwaukee Bar Association | Wisconsin | Section | 78 |
| Santa Clara County Bar Association | California | Section, Committee | 132 |

**Table 4. Local Bars with Dispute Resolution *Committees***

| Bar Association | State | Entity | Number of Members |
|---|---|---|---|
| Maricopa Cnty Bar Association | Arizona | Committee | 21 |
| Dade Cnty Bar Association | Florida | Committee | 25 |
| Palm Beach Cnty Bar Association | Florida | Committee | 8 |
| The Chicago Bar Association | Illinois | Committee | 188 |
| Bar Association of Metropolitan St Louis | Missouri | Committee | 150 |
| Kansas City Metro Bar Association | Missouri | Committee | |
| Bar Association Of Erie County | New York | Committee | |
| Bar Association Of Nassau County | New York | Committee | 70 |
| Westchester County Bar Association | New York | Committee | |
| Cincinnati Bar Association | Ohio | Committee | 93 |
| Cleveland Bar Association | Ohio | Committee | 40 |
| Multnomah Bar Association | Oregon | Committee | 12 |
| Allegheny County Bar Association | Pennsylvania | Committee | 77 |
| Philadelphia Bar Association | Pennsylvania | Committee | 150 |
| Cuyahoga County Bar Association | Ohio | Committee | |

*State Bar Dispute Resolution Programs*

Thirty-two state bar associations sponsor a dispute resolution process for disputes between lawyers and clients. Most of these bar associations offer mediation or arbitration for fee disputes. A small number of bar associations offer mediation or arbitration for other types of disputes, including malpractice and other complaints. Of the thirty local bar associations that responded to the survey, 18 have dispute resolution programs for disputes between lawyers and clients.[1]

The Alabama State Bar Committee on Resolution of Fee Disputes has been administering a fee disputes program since 1997. The purpose of the program is to "provide a simple and convenient non-judicial mechanism for the resolution of disputes between lawyers and clients over fees."[2] The program offers lawyers and clients the opportunity to either mediate or submit the dispute to binding arbitration. Participation in the program is voluntary. In 2000, the program closed 46 cases. Of those cases, 17 were successfully mediated. The other cases were closed either because the mediation program could not obtain the consent of one or both parties to participate, the program did not have jurisdiction, or the mediation was not successful.

Sixteen state bar associations sponsor an ADR process for disputes between lawyers. Most of these bar ADR processes handle fee disputes between lawyers, but some also handle partnership and dissolution disputes. Ten local bar associations reported sponsoring a dispute resolution program for disputes between lawyers. The Louisiana State Bar Association (LSBA) has had a dispute resolution program since 1991. The LSBA Lawyer Dispute Resolution Program handles lawyer/client disputes as well as lawyer/lawyer disputes. The program offers voluntary binding arbitration. The number of cases submitted to the program has steadily increased since 1991. In 2000, the program opened 77 new files. The majority of the new files (69) involved disputes between attorneys and clients; 8 of the new files involved disputes between lawyers.

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[1] For more information about fee arbitration programs, see the 1999 Survey of Fee Arbitration Programs by the ABA Center for Professional Responsibility. According to the 1999 study, 26 jurisdictions (both state and local bar associations) reported having fee arbitration programs in 1999.

[2] Preamble, Rules for the Resolution of Fee Disputes by the Alabama State Bar.

**Table 5. State Bars with Dispute Resolution Programs for *Lawyer/Client* Disputes**

| | |
|---|---|
| State Bar Of New Mexico | Fees |
| North Carolina Bar Association | Fees |
| North Carolina State Bar | Fees |
| Oregon State Bar | Fees |
| Rhode Island Bar Association | Fees |
| South Carolina Bar | Fees |
| Utah State Bar | Fees |
| Washington State Bar Association | Fees |
| West Virginia Bar Association | Fees |
| Wyoming State Bar | Fees |

**Table 6. State Bars with Dispute Resolution Programs for *Lawyer/Lawyer* Disputes**

| Bar Association | Types of Disputes |
|---|---|
| Florida Bar | Fees and other disputes |
| State Bar Of Georgia | Fees, Partnership |
| Kentucky Bar Association | Fees, Partnership |
| Louisiana State Bar Association | Fees |
| Maryland State Bar Association | |
| Massachusetts Bar Association | Fees |
| State Bar Of Michigan | Fees, Partnership, Dissolution |
| Mississippi Bar | Fees |
| Missouri Bar | Partnership, Complaint Resolution |
| New Hampshire Bar Association | Fees, Partnership |
| New Jersey State Bar Association | Fees, Partnership |
| North Carolina State Bar | Partnership |
| Ohio State Bar Association | Fees |
| Oregon State Bar | Fees |
| Pennsylvania Bar Association | Fees, Partnership, Other |
| Washington State Bar Association | |

*Qualifications*

According to the state bar associations, ten states certify ADR providers, six states

register ADR providers, and two states approve ADR providers. The approval, certification, and/or registration processes vary significantly from state to state. In several states, including Illinois and Oregon, county courts approve mediators for civil and domestic relations cases. In Minnesota, providers who meet certain qualifications are listed on a published roster of professionals.

**Table 7. States with a Roster, Approval, or Certification Process**

| State | Does an entity certify, register, or approve ADR Providers? | Comments |
|---|---|---|
| Alabama | Register | |
| Arkansas | Register | |
| Delaware | Certify | |
| Georgia | Register | |
| Idaho | Certify | |
| Illinois | | The state of Illinois trains arbitrators for court-connected programs only |
| Indiana | Register | |
| Kansas | Approve | |
| Louisiana | Register | |
| Maryland | Certify | |
| Minnesota | | Qualify and publish a Roster - Rule 114 |
| Missouri | Register | |
| New Hampshire | Certify | |
| New York | | The state certifies trainers eligible to train mediators in community DR centers. |
| North Carolina | Certify | |
| Oregon | | court annexed mediators and arbitrators must be approved by the court |
| Puerto Rico | Certify and Register | |
| Rhode Island | Certify | |
| South Carolina | Certify | |
| South Dakota | Approval | Courts approve mediators for mandated domestic relations mediations |
| Tennessee | Certify | |
| Utah | Certify | |

Most state bar associations (42) reported that their state does not restrict dispute resolution practice to a particular profession (e.g. lawyers, therapists, etc.). For instance, in Massachusetts, dispute resolution providers come from a variety of professional backgrounds, including social work, business, and academia. Some states do impose restrictions on who can serve as a mediator or arbitrator in particular types of cases. In Indiana, non-lawyers cannot serve as mediators in civil cases filed in state court, but can mediate domestic relations cases if they have 40 hours of training and a B.A. or B.S. degree.

**Table 8. States with Non Lawyer ADR Providers**

| State | Non-Lawyer ADR Providers? | Comments |
|---|---|---|
| Alabama | Yes | |
| Alaska | Yes | |
| Arizona | Yes | |
| Arkansas | Yes | Arkansas has no restrictions as to who can provide ADR services |
| Colorado | Yes | |
| Connecticut | Yes | |
| Delaware | Yes | Some non-lawyers are trained by Superior Court |
| District of Columbia | Yes | For attorney/client arbitration board |
| Florida | Yes | |
| Georgia | Yes | |
| Hawaii | Yes | |
| Idaho | Yes | |
| Illinois | Yes | Providers mediate in civil, minor criminal, and juvenile cases |
| Indiana | Yes | Dispute resolution providers must have a B.A.or B.S. / 40 hour mediation course |
| Kansas | Yes | |
| Kentucky | Yes | |
| Louisiana | Yes | |
| Maine | Yes | No background required |
| Maryland | Yes | |
| Massachussetts | Yes | Dispute resolution providers include MSWs, MBAs, PhDs |
| Michigan | Yes | |
| Minnesota | Yes | Dispute resolution providers include CPAs, social workers |
| Mississippi | Yes | |
| Missouri | Yes | |
| Montana | Yes | |
| Nebraska | Yes | |
| New Jersey | Yes | |
| New York | Yes | |
| North Carolina | Yes | Providers must have 40 hr training; 5 observations; 6 hr law terminology training |
| Ohio | Yes | |
| Oregon | Yes | Volunteer arbitrators |
| Pennsylvania | Yes | Neighborhood programs use non-lawyers. |
| Puerto Rico | Yes | |
| Rhode Island | Yes | Non-attorneys can be certified in family court |
| South Carolina | Yes | |
| South Dakota | Yes | |
| Tennessee | Yes | |
| Texas | Yes | |
| Utah | Yes | |
| Vermont | Yes | |
| Virginia | Yes | According to Virginia Supreme Court guidelines |
| Washington | Yes | |
| West Virginia | Yes | Non-Lawyers can be certified as Family Mediators |

*Training*

Twenty-seven state bar associations reported that their state has mandatory training requirements for either mediators or arbitrators in the court annexed context. The number of hours and the type of mediation or arbitration training varies from state to state. The minimum number of training hours required is 14 (Mississippi). The maximum number of training hours required is 94 (Puerto Rico). Eight states require training for mediators and arbitrators in contexts other than court. For instance, in New Hampshire marital mediators must take a 60 hour training course.

**Table 9. States with Mandatory Training for Court-Annexed ADR**

| State | Mandatory Training for Court-Annexed ADR? | Course | Course Hours |
|---|---|---|---|
| Alabama | Yes | General Civil Mediator / Divorce Mediator | 20/40 |
| Arizona | Yes | | 40 |
| Colorado | No | Office of Dispute Resolution and Community Programs requires 40 hours | 40 |
| Delaware | Yes for mediators; No for arbitrators | Mediation training | 25 |
| Florida | Yes | | |
| Idaho | Yes | | |
| Illinois | Yes | | |
| Indiana | Yes | Basic Family & Civil | 40 |
| Kansas | Yes | Civil, Domestic, Adult, Adolescent, Core | 40/36/16 |
| Louisiana | Yes | Basic Mediation Training | 40 |
| Maine | Yes | Court Alternative Dispute Resolution Services has requirements for court ADR providers | |
| Maryland | Yes | | |
| Massachussetts | Yes | Basic Mediation Skills | 30 |
| Michigan | Yes | | Varies |
| Mississippi | Yes | | 14 |
| Missouri | Yes | | |
| Nevada | Yes | | |
| New Hampshire | Yes | Court conducts its own training | 21 |
| New Jersey | Yes | | |
| North Carolina | Yes | | |
| North Carolina | Yes | Certification | 40 |
| Ohio | Yes | Family-Divorce Mediation | 40 |
| Oregon | Yes | | 36 |
| Pennsylvania | Possibly | Depends on local jurisdiction | |
| Puerto Rico | Yes | Mediation/Arbitration/Neutral Evaluation | 94/18/18 |
| South Carolina | Yes | CLE Training | 40 |
| Tennessee | Yes | | |
| Texas | Yes | 40 hours of basic mediation training, plus 24 hours of family training for family dispute mediators | |
| Vermont | Yes | Family Court mediation basic course | 30 |

## Table 10. States with Mandatory Training for ADR in Other Contexts

| State | Training Requirements for Other ADR | Course | Hours |
|---|---|---|---|
| Alabama | Yes | General Civil / Divorce | 20/40 |
| Florida | Yes | | |
| Missouri | Yes | | 16 |
| Nebraska | Yes | Basic Mediation Course | 30 |
| New Hampshire | Yes | Marital mediators must be certified | 60 |
| New York | Yes | There is a 25-hour training required for mediators serving in community dispute resolution centers | 25+ |
| Rhode Island | Yes | CLE required every 2 years to maintain certification in family court | 16 |
| Tennessee | Yes | | |

*Unauthorized Practice of Law*

The Committee asked a number of questions on this survey about the unauthorized practice of law. In several states, mediators have been accused of the unauthorized practice of law. Twelve state bars reported that the unauthorized practice of law is considered a civil action. Seventeen state bars reported that the unauthorized practice of law is considered a criminal action. Another 13 state bars reported that in their state the unauthorized practice of law may be considered both civil and criminal.

**Table 11. Is the Unauthorized Practice of Law considered a Civil or Criminal Action?**

| | | |
|---|---|---|
| Arizona | | |
| Arkansas | Criminal | No |
| California | | |
| Colorado | Civil | No |
| Connecticut | Criminal | Yes |
| Delaware | Civil | No |
| District of Columbia | Civil | No |
| Florida | Civil and Criminal | No |
| Georgia | Civil and Criminal | No |
| Hawaii | Civil | No |
| Idaho | Civil and Criminal | No |
| Illinois | Civil | No |
| Indiana | Criminal | No |
| Iowa | Civil | No |
| Kansas | | No |
| Kentucky | Civil and Criminal | No |
| Louisiana | Criminal | No |
| Maine | Criminal | No |
| Maryland | Criminal | No |
| Massachussetts | | No |
| Michigan | Civil | No |
| Minnesota | Criminal | No |
| Mississippi | Civil and Criminal | No |
| Missouri | Criminal | No |
| Montana | Civil and Criminal | No |
| Nebraska | Criminal | No |
| Nevada | | No |
| New Hampshire | Civil | No |
| New Jersey | Criminal | No |
| New Mexico | | No |
| New York | Civil and Criminal | No |
| North Carolina | Civil and Criminal | No |
| North Carolina | | Yes |
| Ohio | Civil and Criminal | No |
| Oregon | Civil | No |
| Pennsylvania | Criminal | No |
| Puerto Rico | Criminal | No |
| Rhode Island | Criminal | Yes |
| South Carolina | Civil | No |
| South Dakota | Civil and Criminal | No |
| Tennessee | Civil and Criminal | No |
| Texas | Criminal | No |
| Utah | Civil | Yes |
| Vermont | Unsure, probably civil | No |
| Virginia | Civil and Criminal | |
| Washington | Criminal | No |
| West Virginia | Civil | No |
| Wyoming | Civil and Criminal | No |

Four state bar associations reported knowing of an instance in which a mediator was accused of engaging in the unauthorized practice of law: North Carolina, Rhode Island, Connecticut and Utah. In the North Carolina case, the dispute involved a family matter. The action at issue was the drafting of an agreement. A lawyer initiated the unauthorized practice of law action and the outcome was dismissal of the case. The Rhode Island also involved a family mediation. The attorney general initiated the action and the outcome was a lawsuit. In Utah, the case also involved family law. The bar association initiated the action. Finally, the Connecticut the case involved a family mediation and the specific action involved was the drafting a settlement agreement. The action was brought by judges of the Superior Court and the grievance was dismissed by a state-wide grievance committee.

**Table 12. States Where Mediator Has Been Accused of Unauthorized Practice of Law**

| State | Any mediator accused of UPL? | Type of mediation? | Action considered UPL | Who initiated UPL action? | Outcome? |
|---|---|---|---|---|---|
| Connecticut | Yes | Family mediation | Drafting settlement agreements | Judges of superior court | All grievances dismissed by state wide grievance committee |
| North Carolina | Yes | Family mediation | Drafting agreement | A Lawyer | Dismissed |
| Rhode Island | Yes | Family mediation | | Attorney General | Lawsuit |
| Utah | Yes | Family mediation | | Bar Association | Pending (as of 2/14/01) |

*Bar Association Projects*

A number of state and local bars reported new and innovative projects. The State Bar of New Mexico, in cooperation with the Better Business Bureau, established the Consumer-Business Dispute Mediation Program as a statewide program designed to resolve disputes between consumers and businesses of $2,500 or less. The program uses volunteer attorney mediators and arbitrators for cases that have not been resolved by initial efforts of the Better Business Bureau.

The Tennessee Bar Association features easily accessible information about state dispute resolution programs on the bar association web site, including the Supreme Court dispute resolution rule, a database of certified mediators, and newsletters from the Tennessee ADR Commission.

*Independent Dispute Resolution Organizations*

More than two-thirds of the state bar associations (37) identified independent dispute resolution organizations within their states.[3] Some of the independent organizations identified include court dispute resolution divisions, state dispute resolution agencies, and state dispute resolution associations. Independent organizations identified include the Ohio Commission on Dispute Resolution and Conflict Management, the South Dakota Consensus Council, the Iowa Peace Institute, and the New Hampshire Court ADR Program.

**Table 13. Independent ADR Organizations**

| State | Organization Name |
|---|---|
| Alabama | Alabama Center for Dispute Resolution |
| Arkansas | Arkansas ADR Commission |
| California | California Center for Public Dispute Resolution |
| Colorado | Colorado Office of Dispute Resolution |
| Delaware | Delaware Federation for Dispute Resolution |
| Florida | Florida Conflict Resolution Consortium; Florida Dispute Resolution Center |
| Georgia | Georgia Office of Dispute Resolution |
| Hawaii | The State Judiciary of Hawaii Center for Alternative Dispute Resolution |
| Illinois | Center for the Analysis of Alternative Dispute Resolution Systems |
| Iowa | Iowa Peace Institute |
| Kansas | |
| Kentucky | |
| Maine | Maine Association of Dispute Resolution Professionals; MAINE Court ADR Service |
| Maryland | Mediation And Conflict Resolution Office for the State of Maryland |
| Massachussetts | Massachussetts Office of Dispute Resolution |
| Michigan | Michigan State Court Administrative Office, Office of Dispute Resolution |
| Minnesota | Minnesota Division of Alternative Dispute Resolution |
| Montana | Montana Consensus Council |
| Nebraska | Nebraska Office of Dispute Resolution |
| Nevada | |
| New Hampshire | New Hampshire Court ADR Program |
| New Jersey | Office of Dispute Settlement |
| New York | New York State Unified Court System Division of Court Operations, Office of ADR Programs |
| North Carolina | North Carolina Dispute Resolution Commission |
| North Carolina | Dispute Resolution Commission; ADR Committee of State Judicial Council |
| North Dakota | The Consensus Council, Inc. |
| Ohio | Ohio Commission on Dispute Resolution and Conflict Management |
| Oklahoma | Oklahoma Administrative Office of the Courts |
| Oregon | Oregon Dispute Resolution Commission |
| Puerto Rico | |
| South Carolina | Supreme Court Joint Commission on ADR; South Carolina Council for Conflict Resolution |
| South Dakota | South Dakota Court Program |
| Tennessee | Administrative Office of the Courts Commission on Alternative Dispute Resolution |
| Texas | Center for Public Policy Dispute Resolution |
| Utah | |

*Conclusion*

[3] For additional sources of independent ADR organizations, see the web sites of the Policy Consensus Initiative (http: www.policyconsensus.org) and the National Center For State Courts (http://www.ncsconline.org)

This survey demonstrates that state and local bar dispute resolution activities are flourishing. Almost every state bar association has a dispute resolution section or committee. Most state bar associations sponsor a dispute resolution program for disputes between lawyers and clients. An increasing number of state bar associations are also providing a dispute resolution program for disputes between lawyers. As we can see from particular states, the number of cases being referred to these programs is steadily increasing. Many of the state and local bars also reported significant dispute resolution activity in their states, including court and community programs.

## Appendix - Web sites for State and Local Bar Associations and Independent ADR Organizations

| State | Organization | URL |
|---|---|---|
| Alabama | Alabama State Bar | http://alabar.org |
| Alaska | Alaska Bar Association | http://www.alaskabar.org |
| Arizona | State Bar of Arizona | http://www.azbar.org/ |
| Arkansas | Arkansas Bar Association | http://www.arkbar.com |
| Colorado | Colorado Bar Association | http://www.cobar.org/ |
| Connecticut | Connecticut Bar Association | http://www.ctbar.org/ |
| Delaware | Delaware State Bar Association | http://www.dsba.org |
| DC | District of Columbia Bar | http://www.dcbar.org |
| Florida | The Florida Bar | http://www.flabar.org/ |
| Georgia | State Bar of Georgia | http://www.gabar.org |
| | Georgia Office of Dispute Resolution | http://www.state.ga.us/courts/adr/adrhome.htm |
| Hawaii | Hawaii State Bar Association | http://www.hsba.org |
| Idaho | Idaho Supreme Court | http://www.state.id.us/judicial |
| | Idaho State Bar | http://www2.state.id.us/isb/ |
| Illinois | Illinois State Bar Association | http://www.illinoisbar.org |
| Indiana | Indiana State Bar Association | http://www.inbar.org/ |
| Iowa | Iowa State Bar Association | http://www.iowabar.org |
| Kansas | Kansas Bar Association | http://www.ksbar.org |
| Kentucky | Kentucky Bar Association | http://www.kybar.org |
| Louisiana | Louisiana State Bar Association | http://www.laba.org |
| Maine | Maine State Bar Association | http://www.mainebar.org |
| Maryland | Maryland State Bar Association | http://www.msba.org |
| Massachussetts | Massachussetts Bar Association | http://www.massbar.org |
| Michigan | State Bar of Michigan | http://www.michbar.org |
| Minnesota | Minnesota Bar Dispute Resolution Section | http://www2.mnbar.org/sec/conflict/htm |
| | Minnesota State Bar Association | http://www.mnbar.org |
| Mississippi | Mississippi Bar | http://www.msbar.org |
| Missouri | Missouri Bar | http://www.mobar.org |
| Montana | State Bar of Montana | http://www.montanabar.org |
| Nebraska | Nebraska State Bar Association | http://www.nebar.com |
| Nevada | State Bar of Nevada | http://www.nvbar.org |
| New Hampshire | New Hampshire Bar Associaton | http://www.nhbar.org |
| New Jersey | New Jersey State Bar Association | http://www.njsba.com |
| New Mexico | New Mexico State Bar | http://www.nmbar.org |
| New York | New York State Bar Association | http://www.nysba.org |
| North Carolina | North Carolina State Bar | http://www.ncbar.com |
| | North Carolina Bar Association | http://www.ncbar.org |
| Ohio | Ohio State Bar Association | http://www.ohiobar.org/ |
| Oregon | Oregon Dispute Resolution Commission | http://www.odrc.state.or.us |
| | Multnomah Bar Association | http://www.mbabar.org |
| | Oregon State Bar ADR Section | http://www.osbadr.homestead.com |
| Pennsylvania | Pennsylvania Bar Association | http://www.pabar.org |
| Puerto Rico | Puerto Rico Bar Association | http://www.capr.org |
| Rhode Island | Rhode Island Bar Association | http://www.ribar.com |
| South Carolina | South Carolina Bar | http://www.scbar.org |
| Tennessee | Tennessee Bar Association | http://www.tba.org |
| Utah | Utah State Bar | http://www.utahbar.org |
| Vermont | Vermont Bar Association | http://www.vtbar.org |
| Virginia | The Virginia Bar Association | http://www.vsb.org |
| Washington | Washington State Bar Association | http://wsba.org/sections |
| | Washington State Bar Assoc. Fee Disputes | http://www.wsba.org/lasd/adr/default.htm |

# Part I

Name of Bar Association: _____

Name of individual completing survey: _____

1. Does your bar association have a section, committee, or other entity devoted *solely* to alternative dispute resolution?

   Please Circle: None Section Committee Other (please describe): _____

   If so, how many members does the described entity have? _____

2. Who is the Chair or best volunteer contact for the entity described in #1 above?

   Name: _____

   Title: _____

   Address: _____ _____

   Phone: _____ Fax: _____

   E:mail _____ Website address: _____

3. Who is the staff contact/liaison for the entity described in #1 above?

   Name: _____

   Title: _____

   Address: _____

   Phone: _____ Fax: _____

   E:mail _____ Website address: _____

4. Does your bar association have any other entities concerned with alternative dispute resolution?

   Please Circle: Yes No

   If so, please attach any pertinent contact information and/or appropriate internet link(s).

5. May we post the information provided above on the ABA Section of Dispute Resolution Website?

   Please Circle: Yes No

RETURN TO:

*American Bar Association Section of Dispute Resolution Office*

*740 15th St., NW, Washington, DC 20005*

*Phone: (202) 662-1680; Fax: (202) 662-1683*

*dispute@abanet.org; Web: http://www.abanet.org/dispute*

Please Circle: Yes No

If so, what do these disputes concern? Please Circle: Fees Other _____

Please describe (or attach a description of) any information you may have about frequency of utilization, form of ADR used, type of disputes, ADR panel composition, neutral selection, etc.:

_____

_____

2. Does your Bar use or sponsor any ADR processes for disputes between lawyers?

Please Circle: Yes No

If so, what do these disputes concern? Please Circle: Fees Partnership Other _____

Please describe (or attach a description of) any information you may have about frequency of utilization, form of ADR used, type of disputes, ADR panel composition, neutral selection, etc.:

_____

_____

3. Does your state have one or more independent/stand-alone organizations dealing with ADR (e.g. the Georgia Office of Dispute Resolution)?

Please Circle: Yes No

4. Does any entity in your state, county, or city license, certify, register, or approve ADR providers?

Please Circle: License Certify Register Other _____

5. Are individuals from backgrounds other than law utilized as ADR providers in your state, county, or city?

Please Circle: Yes No

If so, please describe (or attach a description of) the backgrounds of these individuals and the contexts in which they are utilized as providers:

_____

_____

6. Is the Unauthorized Practice of Law considered a civil or criminal action in your city, county, or state?

Please Circle: Civil Criminal

Are you aware of any mediator being accused of engaging in the Unauthorized Practice of Law in your city, county, or state?

Please Circle: Yes No

If so, please describe (or attach a description of) the circumstances, including:

1) what type of mediation (e.g., family, commercial, etc.)

2) what specific action, if any, by the mediator was considered UPL (e.g., drafting settlement agreement, etc.)

3) who initiated the action against the mediator (e.g., bar association, Attorney General, etc.)

4) what was the outcome (e.g., law suit, informal settlement, etc.)

_____

_____

_____

_____

7. Does your state have a mandatory training requirement for court-annexed mediators and/or arbitrators?

Please Circle: Yes No

If so, what type of course is offered and how many hours of training are required?

Course: _____ Hours:

8. Are there mandatory training requirements for mediators and/or arbitrators in contexts other than court-annexed?

Please Circle: Yes No

If so, what type of course is offered and how many hours of training are required?

Course: _____ Hours:

9. May we post the information provided above on the ABA Section of Dispute Resolution Website?

Please Circle: Yes No

10. Would you like us to post any other contact information for your organization on the ABA Section of Dispute Resolution Website?

Please Circle: Yes No

If so, please attach any pertinent contact information and/or appropriate internet link(s).

RETURN TO:

*American Bar Association Section of Dispute Resolution Office*

*740 15th St., NW, Washington, DC 20005*

*Phone: (202) 662-1680; Fax: (202) 662-1683*

*dispute@abanet.org; Web: http://www.abanet.org/dispute*

For additional information about the state and local bar associations, including profiles for each bar association, please see the section web site: http://www.abanet.org/dispute.

# Tab 9

# Most Common Alternatives to Trial for Resolution of Disputes in Court-Connected, Civil, Non-Family[1] Litigation

**Negotiation (With or without presence of clients).** Lawyers attempt to reach resolution through negotiation. Their negotiations may or may not include clients. Both "collaborative law" and "cooperative law" require clients' presence in negotiations.

**Judicial Settlement Conferences (With or without presence of clients).** Judge assists parties to reach settlement. In some courts, the judge providing this assistance also will preside over the trial, if it occurs. In other courts, this assistance is provided by a "settlement judge" who will *not* preside over the trial. In the latter instance, the judge may use all or most of the mediation techniques described below.

**Mediation (Facilitative/elicitive/transformative, evaluative/directive, hybrid).** Mediation is "a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute." (Uniform Mediation Act, Sec. 2) Statements made in mediation generally are confidential. The process generally includes both joint sessions and private caucuses. The mediator is generally supposed to be a neutral third party who can play a variety of roles depending upon: the institutional context; time permitted by the program for completion of mediation; parties' expectations; lawyers' expectation; program goals; etc. These roles can include: improving communication by and among the parties; helping parties clarify their goals; structuring the process so that the parties have the opportunity to tell "their side of the story;" encouraging parties to talk about their goals, concerns, interests and emotional reactions to events; helping parties to understand each other's perceptions and points of view; helping parties to understand what will happen and how issues will be handled in the relevant default legal or administrative processes; helping parties develop, explore and evaluate options for resolving disputes; and ultimately helping parties reach voluntary resolution. Mediation may include pre-mediation: submission of relevant pleadings; submission of memoranda on parties' legal and factual positions in the dispute; submission of memoranda on parties' perceptions of relevant issues, underlying interests and negotiation/relationship dynamics; and joint or private telephone conversations with the mediator. The process is generally viewed as informal, but some courts provide mediators with default topics to cover in their premediation sessions with parties. Also, in some courts, if parties are unable to develop and reach agreement on their own settlement terms, the mediator may submit a settlement proposal to the parties that the mediator considers to be "fair and final" for the purposes of the mediation. The parties must carefully consider the proposal and discuss it with the mediator.

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[1] Mediation and other procedures used in court-connected family litigation are discussed in Nancy A. Welsh, *You've Got Your Mother's Laugh: What Bankruptcy Mediation Can Learn from the Her/History of Divorce and Child Custody Mediation*, __AMERICAN BANKRUPTCY INSTITUTE L. REV.__(forthcoming, 2009) which is also included in these materials.

**Dispositive Motions (Motions to/for dismissal at pleadings stage, summary judgment, judgment as matter of law)**

**Arbitration (Binding and Non-binding).** An arbitrator (or panel of arbitrators) hears evidence presented by the parties and makes a binding arbitral award. Arbitral awards may be accompanied by opinions, including findings of fact and conclusions of law, if so provided by the parties by contract or in program rules. Arbitral awards also may be entered as judgments if so provided by the parties. Court-connected programs generally provide for non-binding arbitration, often accompanied by a penalty if a party requests a trial *de novo* but then does not sufficiently improve upon the arbitral award that s/he received.

**Neutral Evaluation (Early and Not Early).** Neutral evaluation involves presentations to a neutral third party with subject matter expertise who may render an opinion about the case, the strengths, and weaknesses of the positions, the potential verdict regarding liability, and a possible range for damages. The evaluator generally has discretion on what assistance to give and how to structure the evaluation process. S/he may act as a mediator either before or after the evaluation is given. In courts that make substantial use of this process, the parties are required to prepare detailed written submissions including copies of all pleadings and the discovery plan, and the parties must discuss in private caucus with the evaluator their estimated litigation costs, legal fees, witnesses, damages, and discovery plans. The ENE rules in the Federal District Court of the Northern District of California provide for: brief oral presentations by the parties; assistance by the evaluator in assessing the strengths and weaknesses of the case; assistance with information exchange and discovery; assistance with assessing litigation costs realistically; and an opportunity to negotiate before the evaluation of the case. At the concluding conference, the evaluator gives an evaluation of the strengths and weaknesses of each side's case, and the probable outcome if tried, including dollar values on each claim.

**Summary jury trial/expedited trial.** A panel of jurors and presiding judge hear the evidence presented by lawyers for the parties (and sometimes, a limited number of witnesses) in an expedited (half-day or day-long) hearing. After deliberation, the panel issues a non-binding advisory opinion on liability, damages or both. The jurors generally are not told that their verdict will be a non-binding advisory opinion. After the jurors hand down this opinion, the lawyers may poll them regarding their reasons for deciding as they did. The parties then meet to attempt to negotiate a settlement, sometimes with the assistance of the judge.

# Tab 10

United States Bankruptcy Court
District of Delaware
824 N. Market Street
Wilmington, DE 19801

Chambers of Christopher S. Sontchi
(302) 252-2888

July 2, 2009

REDACTED

RE: REDACTED

Dear Counsel:

I am delighted that Judge Carey has appointed me to serve as the mediator in the captioned matter. The mediation has been scheduled for Thursday, July 23, 2009, beginning at 10:00 a.m. We will hold the mediation at 824 Market Street, 5th Floor, Courtroom 6. The parties and their lawyers must attend.

I ask that not later than Monday, July 20, 2009 at 12:00 noon, the parties submit to me their respective confidential position papers describing as follows: (1) summary of the case and facts; (2) your position with respect to the matter at issue; (3) a forthright commentary on the strengths and weaknesses of your position and your adversary's position (the latter as you perceive it); (4) the nature of any prior settlement discussions; (5) your "bottom line" settlement demand. I would welcome all background documents you believe are appropriate and will be helpful to me. As you know, mediation is a non-binding process in which an impartial, neutral third-party (the

mediator) facilitates communication between the parties to a dispute in an effort to assist the parties in reaching a mutually acceptable and voluntary settlement of their dispute and to ensure that the parties memorialize whatever settlement they may have reached in a written settlement agreement. I will not discuss the mediation with anyone other than my law clerk and, in particular, will not share any information, comments or the like with Judge Carey. Please explain to your respective clients my role as a mediator in these matters.

By participating in the mediation process, the parties and their counsel agree to cooperate and participate in good faith in the mediation. This does not mean that any party is required to compromise its position, or ultimately to settle the dispute. It does require, however, that each party cooperate with each other and with the Mediator in a good faith effort to negotiate a prompt and reasonable resolution of the dispute.

The mediation process shall be treated as a compromise or offer to compromise for the purposes of Rule 408 of the Federal Rules of Evidence and any applicable State Rules of Evidence. The Mediation Proceedings shall be and shall remain completely confidential.

Please sign the acknowledgment where indicated and return same to me as soon as possible.

I look forward to working with you in this matter.

Yours very truly,

Christopher S. Sontchi
United States Bankruptcy Judge

css/cas
cc: Chief Judge Kevin J. Carey

On behalf of my client who is a party to the above-referenced matter, I acknowledge and agree to be bound by the terms set forth herein above.

Date:_____, 2009

_____

Name:
Counsel for:

Dated:_____, 2009

_____

Name:
Counsel for:

Dated:_____, 2009

_____

Name:
Counsel for:

# Tab 11

WRITER'S DIRECT DIAL

CONFIDENTIAL
FOR MEDIATION PURPOSES ONLY

[Date]

**VIA HAND DELIVERY**

[MEDIATOR ADDRESS]

**Re: In re [DEBTOR CASE ] U.S. District Court Appeal Case Nos. ###**

Dear Mr. Mediator:

Appellee and cross-appellant the Liquidating Trust (the "Liquidating Trust"), as successor to the debtors and debtors-in-possession in the bankruptcy cases of [debtors] (the "Debtors"), respectfully submits this confidential mediation statement for the [date] mediation with appellant and cross-appellee [APPELLANT] ("APPELLANT"). Accordingly, this statement and any documents submitted herewith are subject to all protections from use in any subsequent proceeding afforded by applicable evidentiary rules, and the Liquidating Trust in no way consents or agrees to the use of this statement for any purpose other than the mediation.

## I. INTRODUCTION

This basis of this matter is simple. The Debtors rejected their lease with APPELLANT and APPELLANT seeks to gain more than its allowable damages as capped under 11 U.S.C. § 502(b)(6). The remaining disagreement between the Liquidating Trust and APPELLANT is the treatment of the damages asserted in APPELLANT's administrative claim. The Bankruptcy Court correctly denied administrative priority status for these amounts. The Bankruptcy Court, however, erroneously determined that these damages should be included in APPELLANT's ultimately allowed general unsecured claim. This portion of the Bankruptcy Court's ruling is directly contradicted by the applicable law and the evidence in this matter.

## II. FACTUAL AND PROCEDURAL BACKGROUND

On [redacted] (the "Petition Date"), the Debtors filed voluntary petitions for relief under chapter 11 the Bankruptcy Code, with the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court").

The Debtors were leading providers of [redacted] throughout the United States. On [redacted], the Bankruptcy Court entered an order authorizing the Debtors to sell substantially all of their assets pursuant to an asset purchase agreement with [redacted]

On [redacted], the Bankruptcy Court entered its order (the "Confirmation Order") confirming the [redacted] (the "Plan"). The Plan became effective on [redacted] (the "Effective Date"). On the Effective Date, the Liquidating Trust was formally established and all property of the Debtors' consolidated estate was transferred to the Liquidating Trust.

### A. The APPELLANT Claims

On or about [redacted], APPELLANT and the Debtors entered into a lease (the "Lease") for certain nonresidential real property (the "Premises") located in San Francisco, California.[1] On [redacted], the Debtors filed a notice rejecting the Lease as of June 30, [redacted].

APPELLANT has asserted two claims in the bankruptcy case: (1) a Request for Payment of Administrative Expenses for payment of allegedly accrued and unpaid post-petition amounts due under the Lease (the "Administrative Claim"), and (2) a general unsecured claim for damages as a result of the Debtor's rejection of the Lease, which has been designated as claim no. [redacted] (the "Unsecured Claim").[2]

---

[1] A copy of the Lease and amendments thereto are attached as Exhibit A to APPELLANT's Request for Payment of Administrative Expenses (Exhibit 1, attached hereto).

[2] A copy of the Unsecured Claim, without exhibits, is attached hereto as Exhibit 2.

In its Administrative Claim, APPELLANT asserts four categories of damages, in a total amount of $1,167,536.65. These are: (1) $119,309.30 for July [redacted] rent under the Lease, which APPELLANT asserts is due as hold-over rent as a result of certain personal property having been abandoned at the premises; (2) $46,276.68 for outstanding electricity bills and operating expense charges;[3] (3) $156,765.67 for certain unmetered electricity charges related to sixty-five light fixtures on the Premises which APPELLANT asserts were incurred since [redacted]; and (4) $845,185.00 for repair and restoration costs APPELLANT contends are necessary due to the removal of personal property by the Debtors and for removal of certain improvements and personal property left on the premises by the Debtors. APPELLANT also reserved its right to seek attorneys' fees incurred as a result of the rejection of the Lease.

In its Unsecured Claim, APPELLANT asserts total rejection damages of $1,037,486.72. In calculating its rejection damages, APPELLANT asserts: (1) $818,811.74 for rent under the Lease for the period of December 8, [redacted] to December 7, [redacted]; (2) $17,557.51 for certain operating costs; and (3) $191,592.72 for an annual electricity charge. APPELLANT also asserts $9,524.85 for unpaid electricity charges for the period from October 6 to November 4, [redacted]. For purposes of the Objection, the Liquidating Trust accepted the foregoing damages as APPELLANT's capped damages as calculated under § 502(b)(6). In addition to its rejection damages, APPELLANT reserved the right to assert any of the damages included in the Administrative Claim, as well as attorneys' fees incurred as a result of the rejection of the Lease as part of its Unsecured Claim.

On [redacted], the Liquidating Trust filed a substantive objection to both the Administrative Claim and the Unsecured Claim (the "Objection"). Pursuant to the Objection, the Liquidating Trust sought complete disallowance of the damages asserted in the Administrative Claim and to cap APPELLANT's rejection damages, pursuant to § 502(b)(6), at the amounts asserted in the Unsecured Claim. The Liquidating Trust also objected to the award of any attorneys' fees or costs to APPELLANT.

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[3] These post-petition electricity charges have been resolved and were paid for by [redacted].

On [redacted], APPELLANT filed its response to the Objection. After a hearing on [redacted], the Bankruptcy Court issued a written decision denying administrative priority status for the damages alleged in the Administrative Claim, but found that these damages were not subject to the cap under § 502(b)(6) and allowable as part of APPELLANT's Unsecured Claim.[4]

APPELLANT filed a notice of appeal challenging the Court's denial of its Administrative Claim. The Liquidating Trust cross-appealed challenging the allowance of the amounts asserted in the Administrative Claim as part of the Unsecured Claim.

## III. LEGAL POSITION/ ARGUMENT

**APPELLANT Appeal**

APPELLANT will have an uphill battle to overturn the Bankruptcy Court's denial of its request for payment of an administrative expense.

A. The Bankruptcy Court's Denial of the Administrative Claim is Sound

First, the facts and circumstances of this matter fall squarely within the cases of Doral Commerce Park, Ltd. v. Teleglobe Communications Corp. (In re Teleglobe Communications Corp.), 304 B.R. 79, 83-84 (D. Del. 2004) (following Montgomery Ward) and In re Treesource Industries, Inc., 363 F.3d 994, 997-98 (9th Cir. 2004). Both cases determined that a rejection of a lease is not a termination of the lease triggering the imposition of obligations associated with lease termination. Instead, the termination damages are deemed to accrue post-rejection and are therefore only allowable as part of the landlord's unsecured claim as determined under 11 U.S.C. § 502(b)(6).

Second, APPELLANT's reliance upon a March 26[redacted] letter from its counsel to the Debtors is untenable. The March 26[redacted] letter from APPELLANT's counsel states that:

[4] A copy of the Court's Order is attached hereto as Exhibit 3.

> Section 8.h of the Second Amendment to Standard Office Lease, dated [redacted], obligates DEBTOR, on or before the termination or expiration of the lease, to remove any and all Telecommunications Facilities from the building and to repair and to return all areas affected by such removal to their original condition, reasonable wear and tear excepted. Geary hereby demands that DEBTOR perform **this obligation** before rejection of the lease.[5]

The Bankruptcy Court rejected APPELLANT contention that this letter created a pre-rejection obligation under Article 10, Section 10.1 of the Lease and/or Section 8(h) of the Second Amendment to Office Lease. Furthermore, in order for the District Court to agree with APPELLANT, it must ignore the wording of APPELLANT's own demand and ignore the terms of the Lease.

Nowhere in the letter does APPELLANT make any demand under Article 10, Section 10.1 of the Lease. Instead, the March 26[redacted] letter demands that the Debtors perform "this obligation" (i.e., the obligation referred to in the letter, under Section 8(h) of the Second Amendment to Office Lease). Additionally, Section 8(h) of the Second Amendment to Office Lease permitted APPELLANT, upon 30 days written notice, to remove and dispose of the Telecommunications Facilities only **after the termination or expiration of the Lease**, if the Debtors failed to do so. By the express terms of Section 8(h), the Debtors could not be required to remove the equipment before "the termination or expiration of [the Lease]."

Third, the only basis for APPELLANT's holdover rent for July [redacted] is that certain of the Debtor's personal property had been abandoned at the Premises. APPELLANT has provided no evidence that any benefit was provided to the Debtors' estates or that the Debtors used the Premises post-rejection. Therefore, the Liquidating Trust is unaware of any basis that APPELLANT can legitimately argue it is entitled to payment of the July [redacted] holdover rent.

Fourth, as with the restoration costs, as admitted by APPELLANT, the obligation to pay for the unmetered electricity costs did not arise until post-rejection of the Lease and therefore the

[5] A copy of the March 26, 2004 letter is attached as Exhibit F to the Administrative Claim.

Debtors were not obligated to pay these charges as an administrative expense pursuant to 11 U.S.C. § 365(d)(3). Nor did APPELLANT show, nor could it, that these unmetered electricity charges going back to [redacted] conferred actual benefit to the Debtors' estates.

Lastly, the attorneys' fees clause under the Lease only allows the award of attorneys' fees to the prevailing party. Therefore, APPELLANT is not entitled to the award of attorneys' fees as an administrative expense because: (1) APPELLANT is not a prevailing party, and (2) even if APPELLANT did succeed on its Administrative Claim, it would be after rejection of the Lease and therefore no longer an obligation of the Debtors. Furthermore, post-petition attorneys' fees and costs are not allowable as part of an unsecured claim. See In re Loewen Group Intern., Inc., 274 B.R. 427, 444-45 (Bankr. D. Del. 2002).

**Liquidating Trust's Appeal**

The Bankruptcy Court's decision allowing the damages asserted in the Administrative Claim to be included in APPELLANT's allowed general unsecured claim is not supported by the law or the evidence.

B. APPELLANT Not Entitled to Amounts Above § 502(b)(6) Capped Damages

The Bankruptcy Court determined that since the restoration costs and unmetered electricity charges are not "rent reserved" under the Lease, they are not subject to the cap of § 502(b)(6). The prevailing case law, and even the case cited as support by the Bankruptcy Court, hold otherwise. The case cited by the Bankruptcy Court, In re Fifth Avenue Jewelers, Inc., 203 B.R. 372, 381 (Bankr. W.D. Pa. 1996), specifically rejected a landlord's damages that could not be classified as "rent reserved" under the lease with the debtor. 203 B.R. at 380-81. In Fifth Avenue Jewelers, the court adopted the three-part test set forth in McSheridan for determining what damages a landlord can include under § 502(b)(6). In order for an additional charge to be included it must be: (1) designated as rent or additional rent under the lease; (2) related to the value of the property; and (3) fixed, regular or periodic. 203 B.R. at 381 (citing Kuske v. McSheridan (In re McSheridan) 184 B.R. 91, 99-100 (B.A.P. 9th Cir. 1995)). As neither the restoration costs nor the unmetered electricity charges are fixed, regular or periodic, they cannot

be classified as "rent reserved" under the Lease - which is what the Bankruptcy Court found - and are therefore not allowable as part of APPELLANT's Unsecured Claim.

C. The Evidence Does Not Support Finding a Violation of Section 10.1 of the Lease.

In its order, the Bankruptcy Court acknowledged that if the restoration costs arise from termination of the Lease, they are subject to the § 502(b)(6) cap. The Bankruptcy Court, however, concluded that APPELLANT's restoration costs are unrelated to the termination of the Lease and are instead a breach of Section 10.1 of the Lease, which required the Debtors to maintain the Premises in good repair. The Bankruptcy Court did not cite to any evidence to support its conclusion.

The only evidence submitted by APPELLANT in support of its restoration costs relates to the removal of the Debtors' improvements and reconstruction of the Premises.[6] The Debtors' obligations to remove improvements and restore the Premises arose upon termination of the lease pursuant to Section 7 of the First Addendum to Standard Office Lease and Section 8(h) of the Second Amendment to Office Lease. The costs for remodeling and reconstruction necessary to make the property suitable for a new tenant constitute damages resulting from the termination of the lease and are subject to the § 502(b)(6) cap. In re Atlantic Container Corp., 133 B.R. 980, 987 (Bankr. N.D. Ill. 1991). These obligations are completely unrelated to the Debtors' day-to-day obligation to maintain the Premises in good repair pursuant to Section 10.1 of the Lease. APPELLANT did not submit any evidence that the Debtors failed to maintain the Premises in good repair prior to rejection of the Lease.

D. Unmetered Electricity Charges Are Not Unpaid Rent Under the Lease

The Bankruptcy Court's finding that the unmetered electricity charges are unpaid rent due under Section 3.5 of the Lease is the most perplexing. Section 7.1(b) of the Lease authorizes APPELLANT to make periodic inspections of all facilities and to install an electric current meter

[6] The estimates for restoration of the Premises and the testimony of APPELLANT's asset manager, [redacted], all relate to the removal of improvements at the Premises, demolition of the Premises and restoration to pre-leased condition for reletting.

to measure the amount of electric current consumed on the premises. The cost of such a meter and the costs of excess electric current shown thereby **are due upon demand by APPELLANT**.

APPELLANT admits that it did not make its demand for payment of the unmetered electricity charges until after rejection of the Lease. The Bankruptcy Court therefore denied administrative priority for these charges noting that the Debtors' obligation to pay did not accrue until after rejection of the Lease citing to Centerpoint Properties v. Montgomery Ward Holding Corp. (In re Montgomery Ward), 268 F.3d 206, 208 (3d Cir. 2001). However, when analyzing APPELLANT's unsecured claim, the Bankruptcy Court held that the portion of these charges that "accrued pre-petition should be allowed as part of the Unsecured Claim." As the Debtors' obligation under Section 7.1 of the Lease did not accrue until after rejection, the Liquidating Trust does not see how any of the unmetered electricity charges could have accrued pre-petition.

Furthermore, there is no evidence the Debtors breached the Lease related to the unmetered electricity charges prior to rejection of the Lease. The Debtors never denied APPELLANT access to the premises to determine whether or not a fixture was being metered. Further, neither the Debtors' nor APPELLANT's employees could have turned off the power to the premises during the term of the Lease due to the Debtors type of business (which APPELLANT argues is necessary to determine that the fixtures were unmetered). Lastly and most important, APPELLANT retained an electrician in 1992 to determine if all fixtures on the premises, including the 65 light fixtures, were being metered and he determined that all fixtures were being metered as required.

Any obligation to pay those electricity charges therefore did not accrue under the terms of the Lease until post-petition and after rejection of the Lease and therefore cannot be unpaid rent due under the Lease for purposes of § 502(b)(6)(B). The simple fact that these unmetered electricity charges are designated as rent under the Lease is an insufficient inquiry as to whether they qualify as rent for purposes of § 502(b)(6). A charge must still be properly classifiable as rent under the terms of the McSheridan test, which the unmetered electricity charges can not.

IV. Confidential Assessment of the Strengths and Weaknesses of the Case.

The parties do not have a significant disagreement over the facts of the case but really how the facts play under the law. And a key strength in the Liquidating Trust's case is that there is case law - controlling and persuasive - specifically on point in this matter requiring denial of the payment of the restoration costs as an administrative expense. The facts and law are also heavily on the side of the Liquidating Trust as to the denial of the remaining portion of the Administrative Claim.

The one difficulty for the Liquidating Trust is that in order to succeed on capping APPELLANT's damages as calculated under § 502(b)(6), the District Court will need to overturn the decision below allowing the damages asserted in the Administrative Claim as part of APPELLANT's Unsecured Claim. As shown above, however, the Liquidating Trust believes that both the law and the evidence support overturning the Bankruptcy Court's holding.

V. Liquidating Trustee's Settlement Position

The Liquidating Trustee believes that it owes nothing to APPELLANT above and beyond its rejection damages as calculated under 11 U.S.C. § 502(b)(6). Nevertheless, the Liquidating Trustee intends to participate in the mediation in good faith and with a rational economic approach. Therefore, the Liquidating Trust is willing to offer an increased unsecured claim to recognize the potential costs of this appeal.

We look forward to working with you on [redacted].

Respectfully yours,

[redacted]

cc:

# Tab 12

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

| | | |
|---|---|---|
| In re | ) | |
| | ) | Case No._____ |
| | ) | |
| Debtor(s) | ) | Adv. Proc. No._____ |
| | ) | |
| | ) | |
| | ) | MEDIATION STATUS REPORT |
| Plaintiff(s) | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| Defendant(s) | ) | |

In accordance with this Court's Order Assigning Adversary Proceeding to Mediation, dated _____, the undersigned mediator reports that the mediation has not been completed and hereby provides a projected schedule for completion.

The undersigned mediator expects that the mediation will be concluded no later than _____(*insert date)* for the following reason(s):

_____ A mediation session is scheduled to occur on _____.

_____ A mediation session needs to be scheduled, but the mediator has been unable to arrange a date and time.

_____ OTHER:

Dated: _____

_____
Signature of Mediator

_____
Name of Mediator

_____
Mailing Address

_____
City, State, Zip Code

_____
Phone No.

cc: Counsel of Record
Pro Se Parties

(9-24-04)

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

| | | |
|---|---|---|
| In re | ) | |
| | ) | Case No._____ |
| | ) | |
| Debtor(s) | ) | Adv. Proc. No._____ |
| | ) | |
| | ) | |
| | ) | MEDIATOR'S CERTIFICATE OF COMPLETION |
| Plaintiff(s) | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| Defendant(s) | ) | |

In accordance with this Court's Order Assigning Adversary Proceeding to Mediation, dated _____, the undersigned mediator reports that the mediation was completed on _____ and resolved in the following manner (*complete applicable provisions)*:

(a) The following individuals were present:

(1) Parties (name and capacity) -

(2) Counsel (name and party representing) -

(b) The following parties failed to appear and/or participate as ordered:

(c) The outcome of the mediation conference was:

_____ The matter has been completely resolved and counsel (or parties) have been instructed to file an appropriate stipulation and proposed order within twenty (20) days of the conference.

_____ The matter has been partially resolved and counsel (or parties) have been instructed to file an appropriate stipulation and proposed order regarding those claims or issues which have been resolved within twenty (20) days.

_____ The following issues remain for this court to resolve:

_____ The matter has not been resolved and should proceed to trial.

_____ OTHER:

Dated: _____

_____
Signature of Mediator

_____
Name of Mediator

_____
Mailing Address

_____
City, State, Zip Code

_____
Phone No.

cc: Counsel of Record
Pro Se Parties

(9-24-04)

U.S. Bankruptcy Court
District of Delaware

**Instructions for Mediators for E-Filing the Mediation Status Report, Mediator's Certificate of Completion, and Mediator's Certification that Parties have Settled Prior to Mediation**

Note: Forms for both the Mediation Status Report and the Mediator's Certificate of Completion can be found in the "Forms" section of the Court's website ~ www.deb.uscourts.gov.

## Mediation Status Report

In CM/ECF:

1. Select [Adversary]
2. Select [Mediator]
3. Enter case number(s), then click [Next]
4. Select [Mediation Status Report], then click [Next]
5. For each case number entered, click [Browse] and attach the PDF file of the Mediation Status Report. Once a Status Report has been selected for each case number, click [Next] to continue.

   > **NOTE:** If more than one case number has been entered, a separate Status Report is required to be attached for each case

6. If a "Terminate Pending Deadlines" screen appears, do not make any changes to the screen. Simply click [Next] to continue.
7. If a blank screen appears, click [Next] to continue.
8. The Final Docket Text screen displays

   - **Proof this screen carefully!** No further editing is allowed after this screen. If satisfied, click **[Next]** to submit.
   - If any part of the filing is incorrect, click the browser **[Back]** button to return to the screen you need to correct. Then process the screens again with the respective **[Next]** or **[Submit]** buttons.

     > **NOTE:** To abort or restart the transaction at any time up until the submission of the final docket text screen, click the Adversary hyperlink on the Menu Bar and start over

9. The Notice of Electronic Filing screen displays as verification that the filing has been submitted to the Court

   - Print a copy of this notice by clicking the browser **[Print]** button.

     > **NOTE:** Clicking on either the **case number** hyperlink (to view docket) or the **document** number hyperlink (to view image of document just filed) will take you to the PACER login screen. You must enter your PACER login and password to view any documents or reports or perform any queries.

# Mediator's Certificate of Completion

In CM/ECF:

1. Select [Adversary]
2. Select [Mediator]
3. Enter case number(s), then click [Next]
4. Select [Mediator's Certificate of Completion], then click [Next]
5. For each case number entered, click [Browse] and attach the PDF file of the Mediator's Certificate of Completion. Once a Certificate of Completion has been selected for each case number, click [Next] to continue.

   > **NOTE:** If more than one case number has been entered, a separate Status Report is required to be attached for each case

6. If a "Terminate Pending Deadlines" screen appears, do not make any changes to the screen. Simply click [Next] to continue.
7. If a blank screen appears, click [Next] to continue.
8. The Final Docket Text screen displays

   - **Proof this screen carefully!** No further editing is allowed after this screen. If satisfied, click **[Next]** to submit.
   - If any part of the filing is incorrect, click the browser **[Back]** button to return to the screen you need to correct. Then process the screens again with the respective **[Next]** or **[Submit]** buttons.

     > **NOTE:** To abort or restart the transaction at any time up until the submission of the final docket text screen, click the Adversary hyperlink on the Menu Bar and start over.

9. The Notice of Electronic Filing screen displays as verification that the filing has been submitted to the Court

   - Print a copy of this notice by clicking the browser **[Print]** button.

     > **NOTE:** Clicking on either the **case number** hyperlink (to view docket) or the **document** number hyperlink (to view image of document just filed) will take you to the PACER login screen. You must enter your PACER login and password to view any documents or reports or perform any queries.

## Mediator's Certification that Parties have Settled PRIOR to Mediation

(Note: no document will be attached for this filing)

In CM/ECF:

1. Select [Adversary]
2. Select [Mediator]
3. Enter case number(s), then click [Next]
4. Select [Settled Prior to Mediation], then click [Next]

   > **NOTE:** If a blank screen appears next, click [Next] to continue.

5. A screen will appear with a Settlement Due date. This sets a deadline to be tracked by the Clerk's Office for compliance with the filing of settlement or dismissal papers. Click [Next] to continue.

   > **NOTE:** If a blank screen appears next, click [Next] to continue.

6. The Final Docket Text screen displays

   - **Proof this screen carefully!** No further editing is allowed after this screen. Check over case numbers to ensure you're filing in the correct case(s). If satisfied, click **[Next]** to submit.

     > **NOTE:** To abort or restart the transaction at any time up until the submission of the final docket text screen, click the Adversary hyperlink on the Menu Bar and start over.

7. The Notice of Electronic Filing screen displays as verification that the filing has been submitted to the Court

   - Print a copy of this notice by clicking the browser **[Print]** button.

     > **NOTE:** Clicking on either the **case number** hyperlink (to view docket) or the **document** number hyperlink (to view image of document just filed) will take you to the PACER login screen. You must enter your PACER login and password to view any documents or reports or perform any queries.

*updated: June 17, 2005 to post instructions for Mediator's Certification that Parties have Settled Prior to Mediation*

*posted: October 8, 2004*

# Tab 13

# From the Bench

# Mediation—A Judge's Views on Judicially Monitored Settlement Conferences

**by David A. Katz**
**U.S. Senior District Court Judge**
**Northern District of Ohio**

Many years ago, I attended a Federal Judicial Center seminar for judges that focused on mediation and settlement of pending civil cases. To my surprise, nearly half of those in attendance indicated opposition to judicial participation in mediations. I was stunned. I inquired into the reasons and found that some were opposed because of ethical considerations, others considered it a waste of time, and a few did not believe that judges had the skills to successfully mediate cases. Later in the seminar, a well-respected judge indicated that he was successful in more than 90 percent of his mediations and felt the process was very worthwhile. This gave me reason for pause—90 percent seemed exceptionally high. When he was asked how many settlements he did annually, he responded, "not many!"

My belief in judge-monitored settlement conferences (I use the terms "mediations" and "settlement conferences" interchangeably) may be born out of my years spent in private practice of the law. For over 37 years, I concentrated on business- and tax-related matters. The exposure to hard-driving, successful businesspeople convinced me that the measure of success in the business world could be weighed by the value of negotiated conflict resolution. Concluding a transaction was the goal, and the settlement of matters that blocked that goal was more important than winning an argument or a disagreement on one component—unless, of course, it was a "deal breaker."

I conduct between 50 and 70 mediations annually, including both cases on my docket and referrals from fellow judges, and I share with you here my own views as well as anecdotes that bring context to my experience. I ask the reader for an open mind; it is my hope that the benefits of mediation will be confirmed and that any hesitation regarding judicial involvement will be eased.

As I stress to the attorneys and their clients at the outset of a mediation session, there are three ways to resolve cases (disregarding voluntary dismissal): dispositive motions, which are decided by the judge and are subject to appeal; trial, in which the outcome is generally determined by a jury and is subject to appeal; or settlement, which is crafted by the parties with the assistance of their counsel and facilitated by the judge, and which is not subject to appeal. Settlement has the advantage to the litigants of providing certainty and finality to the matter while eliminating risk. Respect for the judge, which most participants have, makes that judicial officer a potentially effective mediator. This is especially true when we inform the parties that they will not be pushed or prodded by us, that the dedication to the task will not be truncated, and that time will not be the factor that controls. Some mediators, including myself, take many hours, even days in complex cases, and sessions may be adjourned from time to time to ensure that every issue has been addressed sufficiently and without delay.

I have always believed that there is no ethical bar to judge participation in mediations when the case is to be tried to a jury. And even when there is to be no jury, I have often been asked by the parties to try the case, and they have agreed to waive the "conflict." My experience is that not all mediations are successful, but most either narrow the issues or help facilitate settlement later, including during or after trial. And, at the very least, the parties know after a mediation what

separates them from a settlement or going to trial.

Clearly, not all cases are susceptible to settlement. There are many reasons for this; for instance, cases involving the constitutionality of federal, state, or local statutes or ordinances are generally not capable of being successfully mediated. But, except for federal statutes, ways can often be found by inventive counsel and judges to resolve a matter without reaching the ultimate issue of constitutionality. It must be recognized that, particularly at the local level, "political" considerations must be addressed. This is also true with respect to such things as prison and jail regulations. A couple of examples make the point.

There was a case before me involving the constitutionality of a local ordinance governing pornography. Even counsel for the municipality finally agreed that the ordinance was overly broad and would be found to be unconstitutional. To avoid direct confrontation, with its attendant media attention, it was agreed that the ordinance would not be enforced and that an amended ordinance would be introduced at the "politically appropriate" time, which took over two years. Although judges detest keeping matters open for extended periods, we recognize the necessity to do so in unusual situations.

Another example involved a state prison regulation. The case centered around rules governing religious practices, including religious services, kosher food, and related matters. It was clear to me that a hearing would be necessary to bring the matters into focus, thus to make resolution a possibility. After more than two days of hearing evidence, including several expert witnesses, a settlement was crafted allowing kosher foods to be served to this non-Jewish, Christian sect, and permitting private religious services in a designated room or in the prisoner's cell by audiotape or CD. In addition, if an accredited local religious leader could be found, that person would be permitted to lead those services. While the foregoing issues were resolved, the more difficult matter of hair length and style needed to be resolved by a ruling.

There are many reasons why some non-constitutional cases seem to be impossible to resolve. Often it is necessary for the judge to have a settlement conference to confirm the reason, then try to address it at a later date. Many times I find it is a stiff-necked client who seemingly will not take the attorney's advice; often it is the attorney who will not advise or is fearful of advising the client of the appropriateness of settlement, and sometimes it is simply a matter of the parties' inability to conceive of a "peaceful" resolution. In those instances, judges and attorneys realize that is why the civil justice system was equipped with courtrooms! Even in those instances, I have found that most cases settle; that is the reason less than 4 percent of all cases filed in federal courts are ultimately tried.

I am aware that there are those respected judges and members of academia, as well as practicing attorneys, who do not share my enthusiastic endorsement of the settlement process. While I respect them and their views, I demur. Litigated matters are the fodder from which stare decisis is created, but to disdain settlement efforts is to fail to recognize the advantage to litigants of avoiding the exceptionally high cost of litigation by creating finality and avoiding risk through successful mediation. To disregard the benefits of settlement is to ignore the reality that, in almost all areas of our society, conflict resolution is recognized as a primary arrow in the quiver available to the combatants.

It is also clear that if not for the resolution of cases by settlement, there would not be enough judges or days in a year to try the cases not disposed of by motion. Likewise, I disagree with those who believe so strongly in settlement of cases that they believe the failure to settle is a failure of our civil justice system. Parties who fail to resolve differences by settlement clearly are entitled to proceed with dispositive motions and trial. Indeed, some cases should be tried.

As to why we as judges should encourage and participate in settlement conferences, there are many reasons. The judge, even if the case is not on his or her docket, is in a unique position to serve as a mediator from experience and the respect that wearing a robe engenders. Is it worth our time? Absolutely. If successful, it saves days of trial, reduces the judge's docket, and saves the parties money. If unsuccessful, the process has given the participants an opportunity to air their differences, which could and

*(Please turn to page 59)*

# From the Bench

*(Continued from page 4)*

often does result in ultimate resolution.

It is important that attorneys and parties, at the judge's prodding, determine the timing of mediation. I always discuss the mediation alternative at the initial case management conference and assure all that I will continue to raise the issue at each time of contact. All recognize that in many cases, some discovery, including depositions of key witnesses, may be necessary prior to a settlement conference; but in many—if not most—cases, the parties and attorneys know much of what the discovery will disclose and that discovery is but confirmatory. Mediation should be an option as to which counsel are continually reminded. Oftentimes it works in reverse; the lawyers who know their case well will initiate contact with my chambers, requesting a conference when the time is ripe.

Some attorneys are fearful that suggesting mediation to opposing counsel reflects weakness. While I disagree, I also encourage attorneys to feel free to contact my chambers to request a settlement conference. At the time of the next contact with the attorneys, it is the judge who suggests mediation. When the neutral party, the judge, raises the issue of whether mediation is timely, most of the time the parties will agree. But I never demand or order mediation unless all parties are in agreement as to participation.

But why should judges participate in settlement conferences? There are multiple reasons, all of which do not apply to any given case. Certainly, the mediation process responds to the needs of the litigants—even if at first they fail to recognize that fact. At the outset of a session, I always stress several considerations. Litigation is generally expensive, often lengthy, stressful, and it involves the risk of loss. I emphasize to the parties that during the mediation, I will ask each side, at appropriate times, to consider the risk:reward ratio. By that I mean the money at risk when demands and offers are on the table. For instance, if the plaintiff demands $100 and the defendant offers $10, the plaintiff has $10 at risk as against an additional $90 sought, or a 1:9 ratio. The closer the numbers come, the greater the risk, e.g., when the plaintiff lowers the demand to $60 and the defendant offers $40, the ratio is 1:2. Most litigants will not risk $40 in hand to gain $20, knowing the varieties of juries—and judges!

It is also important, particularly in business cases, to stress the indirect costs of litigation, such as employee time spent on the case rather than in the operation of the business. My experience is that litigators without a business practice exposure generally fail to address indirect costs with their clients. (They may also fear losing the client in the current very difficult business environment.) We all learn by example and I use those examples to make certain the parties understand what I mean by indirect costs. An example that stands out in my mind was a case referred by a fellow jurist on our court. The first session was a few months before trial and was attended by the parties' chief financial officers and their support staffs. Little was accomplished because each side was defending decisions made rather than addressing risks, costs, and the like. After about a week of trial, the judge asked me to try again. I agreed, but only if the two CEOs appeared. One party was a public company not from our state and the other a large local company. The CEOs opted to attend alone, without counsel. The entire process took less than an hour. I separated them and spoke to each. I knew the local CEO and was familiar with his work habits. When I inquired whether he could have made sales of between $500,000 and $1 million if he had been in his office since 7:00 a.m. (it was about 12:30 p.m. at the time), he answered affirmatively. "Why are you wasting your time sitting in that courtroom?" I asked. He looked at me for several seconds and responded, "Tell them the case is settled. We'll pay their demand." Later that day, he called to tell me he missed the number by $1 million but that the case was still settled! The indirect costs of litigation convinced him to resolve the conflict.

Over the years, I have been amazed at the failure of some attorneys even to consider settlement. Early in my judicial career, I inherited a case that had gone to the appellate court and was back and ready for trial. At 4:30 p.m. the day before trial, I learned that no settlement discussions had occurred in the six years the case had been pending. I ordered attorneys and parties to chambers at 7:30 a.m. the next day. The case involved a claim of fraudulent advertising and pitted a large plaintiff against a small defendant. I spoke to each CEO separately and learned from the defendant that it was near bankruptcy. When I met with the plaintiff's CEO, I asked what it would take to settle the case, to which he responded "$1 million." As I handed the CEO the defendant's financial statement, I inquired, "From where?" I suggested the two men talk. When I reported to the attorneys, I opined that the CEOs would resolve the matter in a half hour and would return friends. (The plaintiff was about 30 years older than the president and CEO of defendant, whose young daughter was very ill.) The plaintiff's attorney erupted in laughter for it had been a bitter battle to that point, which had cost the parties dearly. In 20 minutes, there was a knock on my door; the two men entered with the elder's arm around his former adversary's shoulder. They had settled the case for $50,000, payable over five years (without interest), and the older man was going to spend several days at the defendant's plant to "show him how to successfully run the business." Hundreds of thousands of dollars had been wasted in the litigation process!

Another example: When I came on the bench, I inherited a very contentious case. The judge had granted a temporary restraining order, and the appellate court reversed; there were 15 attorneys involved representing various parties, and they had filed at least two lawsuits against each other. I suggested

a settlement conference; we actually had three. The plaintiff had spent $1.2 million on the litigation, the defendant, $450,000. Over the next several weeks, the case was resolved for $150,000 payable over three years, without interest. The plaintiff fired its law firm and filed a complaint against the two primary attorneys; those attorneys were then terminated by their firm. The plaintiff was most upset because counsel had never suggested a settlement conference, even though defense counsel had requested them to engage in mediation.

I cannot over-emphasize the importance of having a "decision maker" present at the mediation session. Without that component, it has been my experience that significant, and even smaller, cases have a greatly reduced incidence of successful resolution. This is true primarily because the attorney attends the mediation armed with "marching orders" and limitations from the client, generally without authority to deviate. Because the decision maker has not heard the interaction that occurs at a mediation, the impact of that interaction, generally related through a telephone call, falls on deaf ears. Quite recently, I attempted to resolve a relatively small matter that involved a national retail chain. Counsel came prepared to put on the table the total amount authorized; it was short of settling the case by less than the cost of remaining discovery and, perhaps, the filing of a motion for summary judgment. However, while the attorney acknowledged that fact, there was no company representative present to make a considered judgment—and all left with a feeling of frustration.

My approach is to "walk the extra mile" after an unsuccessful mediation session. I keep the files on my desk and make regular contact, ex parte, with the attorneys. (All parties and attorneys always agree to ex parte contacts during settlement negotiations.) As an example, a case in which I had a nine-hour mediation in May took until early October to finally resolve, after numerous calls to each party separately in the intervening weeks involving several hours during which issues were addressed and methods of resolution were considered. It was a complicated multi-party case, and the risks, as well as the costs of going forward, were high. I find this happens quite often, especially after a long and intense mediation session during which all parties separately recognize the realities of the situation and each agree settlement is preferable—which is always kept in confidence.

Obviously, there are times when settlement fails. It is difficult for the judge to determine in advance and with certainty which cases simply will not—notice I did not say "cannot"—settle. But the effort should be made, for it may later bear fruit. Recently, I had a complex matter in which there were numerous "cases" within the single lawsuit. It was necessary to address these individually, in an unusually lengthy opinion. Some matters survived summary judgment; many did not. Less than 10 days before trial, I received that welcome call: The case had settled. From this example, we learn that the effort of the judge, whether in the form of mediation or rulings, seldom goes unrewarded.

Multi-party cases are often difficult to resolve by settlement. I recall one that involved approximately 40 to 50 plaintiffs seeking redress for alleged groundwater pollution. There were excellent attorneys involved in the case, and they all recognized the strengths, weaknesses, and potential costs involved. At the conclusion of two long mediation sessions, the matter appeared to be incapable of "peaceful" resolution. However, over the ensuing weeks, stretching into a few months, an approach was crafted. About half of the plaintiffs appeared to have no legitimate claim. I convinced counsel to resolve those claims by paying $1,000 to each claimant, but only if all accepted. Fortunately, that effort was successful and the balance of the claims were resolved for somewhere over $500,000, with the defendant undertaking additional steps to address remaining remediation issues as directed by the state environmental agency. I hesitate to estimate the cost to the parties, particularly in expert witness fees, that was avoided by successful mediation.

Several judges have confided that they do not feel they have the ability to successfully mediate cases. I urge them to consult with fellow judges they respect from whom they can learn the skills necessary to mediate matters. The abilities of judicial officers are continually honed, and this should be equally true of their skills as mediators. In almost every mediation, I learn something new, even a new approach, mainly from interaction with attorneys and litigants. As federal judges, we have ample resources, including seminars offered by the Federal Judicial Center on developing or honing mediation skills. State judges have similar opportunities.

This brings me to my final points. I always request that counsel provide me with ex parte settlement statements in which they briefly summarize the matter from their clients' perspective and present their positions regarding settlement. These statements are never given to or discussed with the opposing party nor entered into the record. At the beginning of the conference, I stress the confidentiality of those statements, as well as of that which may be shared orally with me during the conference. It must be made absolutely clear that the pledge of confidentiality has not and never will be broken. Only if authorized to discuss some of the content should the judge reveal the information contained in the ex parte statement. Stressing that as a matter of my integrity is, I believe, extremely important in gaining the confidence of both the attorneys and litigants.

I have learned over the years the importance of not placing a party at risk. By that I mean asking a party to put a final dollar offer on the table that will be an invitation to further negotiation. But this is only possible after at least a couple rounds of give and take with interim offers. My approach is to determine whether one party will accept an offer or demand, as the case may be, and thus be able to assure the opposing party that such amount will successfully resolve the case. Neither party is placed at risk of the offer or demand creating a new round of negotiation.

I do not apologize for sharing my personal beliefs and experiences concerning judge participation in the settlement process. These beliefs are, in large measure, created from experiences in mediating hundreds of cases. My position is that judges have a responsibility to both attorneys and their clients and, above all, to the civil justice system to create an atmosphere that encourages settlement discussions. Attorneys should make their clients aware of the costs, stress, and risks of litigation, and the advantages of at least exploring settlement. Mediation with a judicial officer offers the litigants an opportunity to air their differences short of the courtroom, while offering a courthouse resolution in which the litigants are active participants. In this judge's view, it is a viable tool in the disposition of cases and serves well the administration of justice.

# Tab 14

# YOU'VE GOT YOUR MOTHER'S LAUGH: WHAT BANKRUPTCY MEDIATION CAN LEARN FROM THE HER/HISTORY OF DIVORCE AND CHILD CUSTODY MEDIATION

NANCY A. WELSH*

Due to our current deep economic woes, growing bankruptcy filings, and apparent legislative unwillingness to expand the number of judges, bankruptcy courts are exploring the use of mediation to help resolve adversary proceedings, negotiate elements of reorganizations, and deal with claims that cannot be heard directly in bankruptcy proceedings.[1] There is relatively recent precedent for these uses of mediation.[2] In addition, mediation advocates have been consistent in urging greater use of the process[3] to reduce debtors' and claimants' costs,[4] bridge the

* Professor of Law, Penn State University, Dickinson School of Law. I am deeply indebted to Kelly Towns, Christopher Demetriou and Carolina Aguilar for their assistance with the substantial research that was required for this Article. My deep thanks as well to Peter Alexander, Margaret Whiteman Greecher, Christopher Honeyman, Nancy LaMont, and Peter Salem for comments on previous drafts, to fellow panel members, Hon. Elizabeth Stong, Ralph Peeples and William Woodward, for very helpful observations and inquiries before, during and after our presentations at the symposium, and to Paul Kirgis and Elayne Greenberg at St. John's University School of Law for inviting me to participate in this symposium.

[1] *See In re* Kent, No. 07-3238, 2008 WL 5047821, at *2 (Bankr. D. Ariz. July, 25 2008) (showing parties' eventual willingness to agree "to utilize the [c]ourt's mediation program"); *In re* Teraforce Tech. Corp., 347 B.R. 838, 853 (Bankr. N.D. Tex. 2006) (noting successful result from court-ordered mediation); *cf. In re* American Capital Equip., 405 B.R. 415, 422 (Bankr. W.D. Pa. 2009) (discussing alternative dispute resolution option termed "Court Approved Distribution Procedures" allowing asbestos claim holders to enter mediation instead of litigating their claims in court). Mediation also is being used to a lesser degree for preference cases and bankruptcy appeals. *See* William J. Woodward, Jr., *The Third Way: Mediation of Products Claims in the Piper Aircraft Trust*, 17 AM. BANKR. INST. L. REV. 463, 477 (2009) (discussing reasons for "inevitably-lower rate of consensual settlement" among preference cases).

[2] *See* H. Slayton Dabney Jr. & Dion W. Hayes, *Bankruptcy Lawyers Better Tune Up Their ADR Skills: Best Products Is One Case Where Mediation Really Worked*, 28 AM. BANKR. INST. J. 16, 16 (June 2009) (outlining use of mediation in Best Products liquidation following company's second chapter 11 filing and noting "failure of a claimant to participate in the mediation resulted in the disallowance and extinguishment of its claim"); Ralph R. Mabey et al., *Expanding the Reach of Alternative Dispute Resolution in Bankruptcy: The Legal and Practical Bases for the Use of Mediation and the Other Forms of ADR*, 46 S.C. L. REV. 1259, 1278–83 (1995) (describing court-connected bankruptcy mediation programs); Carolyn M. Penna, *The Greyhound ADR Program*, 204 N.Y. L.J. 114, 3 col. 1 (1990) (describing Greyhound bankruptcy and ADR program); General Order, Re: Procedures in Adversary Proceedings, 320 B.R. 574 (Bankr. D. Del. 2005) (providing for mandatory mediation). There has also been experimentation with the use of mediation to resolve appeals of bankruptcy decisions. *See, e.g.*, Order in *In Re*: Procedures to Govern Mediation of Appeals from the United States Bankruptcy Court for this District, U.S. District Court for the District of Delaware (2004) (noting mediation of all appeals before Court as mandatory).

[3] *See* Mabey et al., *supra* note 2, at 1308–12 (urging greater use of mediation by bankruptcy courts).

[4] *See, e.g.*, Dabney and Hayes, *supra* note 2, at 16 (acknowledging mediation helped unsecured creditors to receive nearly 96 cents for each dollar owed in liquidation); Penna, *supra* note 2, 3 col. 1 ("In a bankruptcy setting, the objective is to operate the debtor company at the lowest rates possible, in order to satisfy all creditors. Usually this means less left over for the creditor. A strong interest arises in the company finding an economical way of dealing with such obligations as damage claims.").

jurisdictional and standing challenges that bankruptcies can pose,[5] and offer claimants the opportunity to be heard and determine their own resolution of claims.[6]

At this point, though, relatively few judicial opinions discuss bankruptcy mediation or its impact. Not surprisingly, the few cases available demonstrate that bankruptcy courts generally favor the use of mediation to resolve claims and help with reorganizations.[7] What *is* surprising, however, are the cases in which parties have attempted to use mediation to achieve unexpected and inappropriate results[8] and those in which bankruptcy judges, parties and/or their lawyers apparently expect mediators to do much more than facilitate the parties' communication, negotiation and resolution.[9] Sometimes, for example, judicial opinions reveal an assumption that mediators will make both procedural and substantive decisions, and that in reviewing these decisions, judges should grant substantial deference to the mediators.[10] Cases such as these may suggest that the repeat players within bankruptcy—judges, lawyers, accountants, and creditors[11]—do not necessarily understand how the role of the mediator is supposed to diverge in significant ways from the "traditional neutral" roles of trustee, special master, magistrate, arbitrator, examiner or judge. An appropriate response would appear to be education of the repeat players involved in bankruptcies.

On the other hand, these few cases also may signal that mediation will not always be the most appropriate vehicle for resolving issues within, or related to, bankruptcy. Instead, it may be that bankruptcy courts should *both* incorporate

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[5] *See* Dabney and Hayes, *supra* note 2, at 17 ("As to personal injury and products liability claims specifically, which the bankruptcy court lacks jurisdiction to liquidate, the debtor was able to avoid protracted discovery and litigation in non-bankruptcy courts that would have severely delayed the distribution in the *Best* case."); Michael Moffitt, *Three Things to Be Against ("Settlement" Not Included)*, 78 FORDHAM L. REV. (forthcoming 2009) ("[L]itigation offers an answer to . . . questions [regarding standing and joinder of claims and parties] that is legally correct, but contextually dangerous, as it excludes legitimately interested people. One of settlement's contributions is that it can ask, 'Who should be at the table?' and offer a more inclusive answer than litigation. When that occurs and a more comprehensive settlement ensues, litigation is improved because it can proceed with cases in which the risk of de facto exclusion is less serious.").

[6] *See* Dabney and Hayes, *supra* note 2, at 16 (explaining how non-repeat claimants such as "customers, personal injury or products liability claimants, and landlords" appreciated the "fuller hearing" available through mediation, as well as the opportunity to participate in producing an outcome).

[7] *In* re American Capital Equip., 405 B.R. 415, 422 (Bankr. W.D. Pa. 2009) (calling alternative dispute resolution "indisputably procedurally much more favorable" to court litigation).

[8] *See infra* pp. 443–44 and note 102.

[9] *See infra* p. 444 and note 144.

[10] *See In re* Eagle-Picher Indus., 176 B.R. 143, 148 (Bankr. S.D. Ohio 1994) (explaining deference given to mediator and "no reason to question [his] judgment" because he had basis for decisions); Hickox v. Frieland (*In re* HBLS, L.P.), 01 Civ. 2025, 2001 U.S. Dist. Lexis 19112 (S.D.N.Y. Nov. 21, 2001) (applying manifest disregard standard when reviewing mediator determination).

[11] *See* Eric M. Van Horn et al., *Restructuring the Misperceptions of Lawyers: Another Task for Bankruptcy Professionals*, 28 AM. BANKR. INST. J. 44, 91 (Sept. 2009) ("Bona-fide bankruptcy practitioners are aware that we are repeat players."). States and state agencies also play the role of creditors. *See* Ralph Brubaker, *Explaining Katz's New Bankruptcy Exception to State Sovereign Immunity: The Bankruptcy Power as a Federal Forum Power*, 15 AM. BANKR. INST. L. REV. 95, 98 (2007) ("[S]tates and state agencies . . . end up as creditors in lots of [] ways . . . .").

mediation in appropriate cases *and* consider expanding the availability or functions of "traditional neutrals." In the bankruptcy context, that might mean experimenting with the use of trustees and examiners in innovative procedures that include, as one part of the procedures, facilitation of dialogue and consensual resolution.[12] Importantly, bankruptcy courts would need to ensure that both trustees and examiners receive training in facilitation skills and procedures that will help them manage this new function appropriately and achieve both procedural and substantive justice.

Though divorce and child custody matters may seem far-removed from bankruptcy proceedings, liquidations and reorganizations bear some intriguing superficial similarities to divorces and ongoing custody and support arrangements (perhaps better termed "familial reorganizations" for purposes of this Article). In addition, an examination of the use, abuse and evolution of mediation in this area of practice may prove useful for those who are now introducing mediation into bankruptcy. The story of divorce and child custody mediation, like most growing-up stories, follows a trajectory of rejection of the *status quo*, successful experimentation with alternatives, enthusiastic over-promising, overuse and consequent struggles or breakdown, disappointment, reluctant recognition of limits, and finally acceptance of the need for realistic retrenchment and more restrained growth. As in the bankruptcy context, the use of certain "traditional neutrals"—*e.g.*, custody investigators, referees, conciliators—has been curtailed in many jurisdictions as the judiciary developed a preference for the consensual and flexible process of mediation.[13] Recently, however, some commentators have begun to urge a closer look at the reality of today's court-connected divorce and child custody mediation programs.[14] These commentators have begun advocating for a more limited use of mediation, in part due to the emergence of new, hybrid dispute resolution models that confound any bright line distinction between consensual and adjudicative approaches.[15] Is it possible that bankruptcy courts, repeat players within the system and their clients could skip a couple of the stages that were involved in the evolution of divorce and child custody mediation? Only if there is

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[12] *See infra* pp. 459–61.

[13] *See* Bobbi McAdoo, *All Rise, the Court Is in Session: What Judges Say About Court-Connected Mediation*, 22 OHIO ST. J. ON DISP. RESOL. 377, 424–25 (2006) ("There is no question that many judges perceive mediation as a dispute resolution process in which clients are given the opportunity to be active participants in negotiated solutions, and that these solutions may be better and more durable than those reached in the litigation process without mediation.").

[14] *See* Janet A. Johnson, *Symposium on the Miller Commission on Matrimonial Law*, 27 PACE L. REV. 539, 542–44 (2006) (explaining commentators urge closer examination of child custody proceedings because lawyers may advocate for their goal rather than child's ultimate desire); John Lande, *The Movement Toward Early Case Handling in Courts and Private Dispute Resolution*, 24 OHIO ST. J. ON DISP. RESOL. 81, 94–95 (2008) (stating examination of interests and needs of parties necessary to determine if litigation or dispute resolution better suits parties); Peter Salem et al., *Triaging Family Court Services: The Connecticut Judicial Branch's Family Civil Intake Screen*, 27 PACE. L. REV. 741, 747–48 (2006) (positing increased demand for mediators in custody disputes results in "difficult" and "frustrating" cases).

[15] Lande, *supra* note 14, at 97–98 (explaining how "mediation-evaluation hybrid process[]" creates positive results).

willingness to consider the lessons of others' history (or as this Article's title suggests, "her/history"). In this Article, I will articulate my understanding of the unfolding stories[16] of mediation in various parts of the civil litigation system and suggest what these stories may teach.

## I. THE INTRODUCTION OF MEDIATION INTO THE COURTS

In recent years, many have written their own narratives of the story of mediation in the United States.[17] For purposes of this Article, it is sufficient to begin by noting that mediation—a process in which a third party called a 'mediator' assists disputing parties to reach their own, consensual resolution of their dispute—has existed in the United States for a very long time. Colonists[18] and Quakers[19] used a mediation process to resolve disputes. Following a period of tremendous social unrest in the late 1800s and early 1900s—as the U.S. reconceived itself after the Civil War, morphed from a pastoral to an industrial power, and experienced disruptive and sometimes-violent labor disputes as displaced citizens and waves of immigrants dealt with major economic change and deep cultural, class and wage differences—commentators again urged the use of mediation.[20] Though the process

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[16] *See* Deborah R. Hensler, *Our Court, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Out Legal System*, 108 PENN. ST. L. REV. 165, 185–88 (2003) (detailing civil litigation's trend towards mediation and positive perceptions of mediation process).

[17] *See, e.g., id.* at 167–68 (providing personal perspective on evolution of alternative dispute resolution in legal world); Carrie Menkel-Meadow, *Mothers and Fathers of Invention: The Intellectual Founders of ADR*, 16 OHIO ST. J. ON DISP. RESOL. 1, 2, 5 (2000) (examining early contributions of social theorists and empiricists as "'intellectual' founders of 'ADR'"); Douglas Yarn, *The Death of ADR: A Cautionary Tale of Isomorphism Through Institutionalization*, 108 PENN ST. L. REV. 929, 930–31 (2004) (discussing historic evolution of dispute resolution in England and analogizing it to institutionalizing alternative dispute resolution in American courts); *see also* JAMES J. ALFINI ET AL., MEDIATION THEORY AND PRACTICE 1–31 (2d ed. 2006); Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 3–4 (2001) (examining role of self-determination in alternative dispute resolution as it adapts to court culture) [hereinafter Welsh, *The Thinning Vision*].

[18] *See* Hensler, *supra* note 16, at 168–70 (recognizing Puritan settlers in New England and other utopian societies desired to avoid adversarial process).

[19] *See* JANE CALVERT, QUAKER CONSTITUTIONALISM AND THE POLITICAL THOUGHT OF JOHN DICKINSON (2009); WILLIAM OFFUTT, OF "GOOD LAWS" AND "GOOD MEN": LAW AND SOCIETY IN THE DELAWARE VALLEY, 1680–1710 146 (1995) (discussing Quaker "Gospel Order" dispute resolution system that put disputes in hands of small groups of community members to keep decisions away from outsiders).

[20] *See* Mary Parker Follett, *Constructive Conflict, in* MARY PARKER FOLLETT, PROPHET OF MANAGEMENT: A CELEBRATION OF WRITINGS FROM THE 1920S 69, 71 (Pauline Graham ed., Harvard Business School Press) (1995) (The best way to use conflict resolution in a constructive way is the concept of integration. Neither domination, in which one party wins the conflict; nor compromise, in which both parties sacrifice something toward resolution, are not the best way to make conflict work in favor of the parties. Integration is a way in which the desires of the each party can find a place and neither side has to sacrifice. Instead of dealing with what already exists, integration creates something new.); Lan Q. Hang, *Online Dispute Resolution Systems: The Future of Cyberspace Law*, 41 SANTA CLARA L. REV. 837, 841 (2001) ("ADR has been around since 1920. Its purpose is 'to avoid the costs, delays, and risks of a litigation system unresponsive to the needs of the busy industrial age.'") (citing *Past, Present & Future: Building on 70 Years of Innovation – The AAA Looks to the 21st Century*, 51 DISP. RESOL. J. 109, 110 (1996)); Menkel-Meadow, *supra* note 17, at 7–10 (writing about Mary Parker Follett, wrote: "The mother of invention saw clearly in

was rejected in some areas,[21] the U.S. Congress ultimately chose to make mediation and arbitration central to the resolution of labor disputes.[22]

Then, in the late 1960s and early 1970s, during another period of social transformation[23] and heightened distrust of authority,[24] advocates began calling for the use of mediation to resolve community and family disputes. In 1976, judges, lawyers, and others gathered for the Pound Conference[25] where Harvard Professor Frank Sander delivered a speech that is now remembered primarily for its advocacy of a "multi-door courthouse"[26] that would include mediation. By the late 1980s, largely in response to crushing dockets, courts were beginning to adopt mediation to resolve small claims, family, and non-family civil cases.[27]

Today, less than twenty years later, mediation is an integral part of the civil litigation process in the United States.[28] State, federal, and administrative courts

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the 1920s that there were better ways to make use of conflict – to embrace it and to use it for more creative and innovative solutions . . . .").

[21] *See* Amalia D. Kessler, *Deciding Against Conciliation: The Nineteenth-Century Rejection of a European Transplant and the Rise of a Distinctively American Ideal of Adversarial Adjudication*, 10 THEORETICAL INQUIRIES IN L. 423, 442 (2009) (explaining how well established European tradition of conciliation courts was rejected in United States because of the concern "that these courts encouraged a discretionary exercise of authority that would reinforce power differentials and subvert the rule of law").

[22] 29 U.S.C. § 51 (2006) (In 1913 Congress enacted legislation to facilitate mediation in labor disputes. In 1966, section 51 was repealed. By that time the National Labor Relations Act had enacted the Conciliation of Labor Disputes (1947) which states "the settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for conciliation, mediation, and voluntary arbitration to aid and encourage employers and the representatives of their employees to reach and maintain agreements . . . ." (quoting 29 U.S.C. § 171 (2006))).

[23] For example, this period included the rise of the feminist movement and the advent of no fault divorce. *See* RODERICK PHILLIPS, PUTTING ASUNDER: A HISTORY OF DIVORCE IN WESTERN SOCIETY 561, 563 (1988) (noting trends in liberalization during 60's and 70's in context of feminism and important shift to no fault divorce).

[24] *See* Orlando Patterson, *Liberty Against the Democratic State: on the Historical and Contemporary Sources of American Distrust*, *in* DEMOCRACY AND TRUST 151, 182–184 (Mark E. Warren, ed., 1999) (providing data showing generational differences in levels of distrust).

[25] Bobbi McAdoo & Nancy A. Welsh, *Look Before You Leap and Keep on Looking: Lessons from the Institutionalization of Court-Connected Mediation*, 5 NEV. L.J. 399, 401 (2004–2005) (In 1906, Dean Roscoe Pound gave a speech in St. Paul, Minnesota entitled "The Causes of Popular Dissatisfaction with the Administration of Justice." Pound suggested a wide-ranging course of court reforms. His suggestions, however, were not embraced by American Bar Association. In 1975, Chief Justice Warren Burger began a new push to finish what Pound had started. The resulting conference, jointly sponsored by the Judicial Conference of the United States, the Conference of Chief Judges, and the American Bar Association, focused on Pound's 1906 speech. To prepare for the challenges of the 21st century, the judges, lawyers and academics assembled in St. Paul offered bold ideas for change to address the problems of justice being faced by the courts.).

[26] *Id.* at 402 (Professor Sander used the term "multi-door courthouse" to suggest a variety of dispute resolution techniques that could be fit to the needs of the dispute.); Moffitt, *supra* note 5 (The phrase first "appeared as a companion to a graphic on the cover of a magazine reporting on the Pound Conference.") (citing Michael L. Moffitt, *Before the Big Bang: The Making of an ADR Pioneer*, 22 NEGOT. J. 437, 437–38 (2006)).

[27] Welsh, *The Thinning Vision*, *supra* note 17, at 20–23 (discussing courts' reasons for embracing mediation).

[28] *See* Nancy A. Welsh, *Institutionalization and Professionalization*, *in* THE HANDBOOK OF DISPUTE RESOLUTION 487, 489 (Michael L. Moffit & Robert C. Bordone eds., 2005).

rely on mediation to resolve cases.[29] Similarly, state and federal agencies regularly use the process.[30] Lawyers who were first introduced to the process in mandatory court-connected mediation programs now counsel its use on a private, voluntary basis.[31]

## II. THE DIFFERENT MODELS OF MEDIATION

But what exactly is this process called "mediation?" The Uniform Mediation Act, adopted at this point by the National Conference of Commissioners on Uniform State Laws, the American Bar Association and the American Arbitration Association, as well as ten states,[32] defines mediation as "a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute."[33] The Model Standards of Conduct for Mediators describe it as "a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute."[34] According to the Model Standards of Practice for Family and Divorce Mediation, mediation is "a process in which a mediator, an impartial third party, facilitates the resolution of family disputes by promoting the participants' voluntary agreement."[35] These definitions suggest the following common characteristics: a third party; communication and negotiation between the parties; and *voluntary* decision-making or agreement.[36]

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[29] *See, e.g.*, EARNESTINE RESHARD, FLORIDA MEDIATION & ARBITRATION PROGRAMS: A COMPENDIUM 24, 30–31, 46–47, 64–65 (19th ed., Fiscal Year 2005–2006) (2007) (reporting Florida's use of mediation in 2005–2006 fiscal year).

[30] *See, e.g.*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FISCAL YEAR 2008 PERFORMANCE AND ACCOUNTABILITY REPORT 8 (2008) (The Equal Employment Opportunity Commission reported that in 2007, in the Federal Sector Mediation Program, agencies reported "that there were 37,809 instances of pre-complaint EEO counseling across the federal government. Of that number, the parties participated in ADR in 18,262 cases, or 48.3% of the time.").

[31] *See* Roselle L. Wissler & Bob Dauber, *Leading Horses to Water: The Impact of an ADR "Confer and Report" Rule*, 26 JUST. SYS. J. 253, 263–64 (examining effects of rule requiring lawyers to use ADR processes and report results to court).

[32] UNIF. MEDIATION ACT REFERENCES & ANNOTATIONS (amended 2003), 7A Pt. III U.L.A. 91 (2006 & Supp. 2009) (noting mediation has become integral part of dispute resolution processes).

[33] UNIF. MEDIATION ACT § 2(1) (amended 2003) 7A Pt. III U.L.A. 105 (defining term "mediation").

[34] MODEL STANDARDS OF CONDUCT FOR MEDIATORS. pmbl. (2005).

[35] MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION, Overview and Definitions (2000); *see* Andrew Schepard, *An Introduction to the Model Standards of Practice for Family and Divorce Mediation*, 35 FAM. L.Q. 1, 3 (2001).

[36] Also sometimes referenced as "self-determination." *See* MODEL STANDARDS OF CONDUCT FOR MEDIATORS, Standard I (positing mediation is based on self-determination, requiring voluntary decisions); Tim Hedeen, Ensuring Self-Determination Through Mediation Readiness: Ethical Considerations (July 2003), http://www.mediate.com/articles/hedeenT1.cfm (discussing mediator's responsibility to ensure participation between parties); *see also* Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775, 777, 781 (1999) (principle of informed consent helps to "promote" self-determination and empowers parties to gain control over the outcome); Welsh, *The Thinning Vision, supra* note 17 at 39 (explaining mediators are responsible for assisting parties reach voluntary decision).

In practice, mediation takes many different forms. It can be facilitative,[37] elicitive,[38] focused on developing mutual understanding,[39] therapeutic,[40] or transformative,[41] among other possibilities. Though there are differences among them, these models share a focus on drawing out the disputing parties, understanding their values and underlying interests, helping them to communicate fully, respectfully and productively with each other, and fostering their ability to develop their own, customized solutions.[42]

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[37] *See* Barnand Mayer, *Facilative Mediation*, *in* DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS 29 (Jay Folberg, et. al eds., 2004) (discussing mediation as facilitative process); Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 24 (1996) (discussing mediation in facilitative form where mediator clarifies and enhances communications between parties in order to help them come to decision) [hereinafter Riskin, *Understanding Mediators*].

[38] *See* Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1, 23 (2003) (explaining mediation can be performed in elicitive fashion) [hereinafter Riskin, *Decisionmaking in Mediation*].

[39] *See* GARY FRIEDMAN & JACK HIMMELSTEIN, CHALLENGING CONFLICT: MEDIATION THROUGH UNDERSTANDING (2009).

[40] *See* Marsha Kline Pruett & Janet R. Johnston, *Therapeutic Mediation with High-Conflict Parents: Effective Models and Strategies*, *in* DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS 95 (Jay Folberg, et. al eds., 2004) (suggesting mediators use therapeutic methods of counseling); Susan S. Silbey & Sally E. Merry, *Mediator Settlement Strategies*, 8 LAW & POL'Y 7, 12, 19 (1986) (suggesting mediation process is similar to therapeutic event); *see also* CHRISTOPHER W. MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT, 41 (2d ed. 1996) (describing other categories such as "social network mediators," "authoritative mediators," and "independent mediators"—categories that have more to do with relationship between mediator and disputants than particular types of interventions that they tend to use).

[41] *See* ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT 46, 217–18 (Rev. ed. 2005) (describing transformative theory as based on notion people perceive conflict as interactional crisis and role of transformative-oriented mediator as assisting parties in overcoming their crisis by allowing parties to define mediation process and encouraging fully-informed voluntary resolution, rather than forcing settlement); Robert A. Baruch Bush & Sally Ganong Pope, *Changing the Quality of Conflict Interaction: The Principles and Practice of Transformative Mediation*, 3 PEPP. DISP. RESOL. L.J. 67, 77 (2002) ("In the transformative mediation process, parties can recapture their sense of competence and connection, reverse the negative conflict cycle, re-establish a constructive (or at least neutral) interaction and move forward on a positive footing, with the mediator's help."); Joseph Folger, *Harmony and Transformative Mediation Practice: Sustaining Ideological Differences in Purpose and Practice*, 84 N.D. L. REV. 825, 844–48 (2008) (articulating four types of transformative mediation techniques that "characterize the essential elements of transformative interventions": allowing parties to control process, mediator's maintenance of non-directive role, encouraging parties' expression and examination of differences, and supporting parties' transformations toward enlightenment and self-empowerment); Tina Nabatchi & Lisa B. Bingham, *Transformative Mediation in the USPS Redress Program: Observations of ADR Specialists*, 18 HOFSTRA LAB. & EMP. L. J. 399, 401–02 (2001) (examining transformative mediation in employment setting as viable alternative to traditional adversarial-based process and as vehicle for parties to seize greater control over their own conflicts and learn how to effectively manage future conflicts).

[42] *See* Leonard L. Riskin & Nancy A. Welsh, *Is That All There Is?: The "Problem" in Court-Oriented Mediation*, 15 GEO. MASON L. REV. 863, 869 (2008) (discussing power of mediation to facilitate respectful and productive cooperation among parties, enable parties' to concentrate on their fundamental needs and interests, provide an adaptable process customized to best accommodate parties' circumstances, and foster development of creative resolution); Nancy A. Welsh, *The Thinning Vision*, *supra* note 17, at 17–19 (2001) (elucidating core mediation principle of self-determination and importance of active party participation in shaping mediation process and outcome and highlighting mediator's role as "foster[ing] an environment that

On the other hand, this process called 'mediation' can also be implemented in a manner that is evaluative,[43] directive,[44] and focused on bargaining.[45] These models present a rather different picture, in which the mediator plays the central role, hopefully beginning by listening to the disputing parties but quickly shifting the focus to the provision of advice to the parties and their lawyers, to help them be realistic regarding their options (usually in civil litigation or administrative adjudication) and to guide them toward a resolution consistent with those options.[46]

The available research suggests that the most effective mediations (and mediators) are likely to combine elements of all of these models.[47] A wealth of research and theory also affirms the importance of providing a mediation process

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would enable the parties' individual and joint will to emerge").

[43] *See* L. Randolph Lowry, *Evaluative Mediation*, *in* DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPILICATIONS 72 (Jay Folberg, et al. eds., 2004); Riskin, *Understanding Mediators*, *supra* note 37, at 44–45 (noting although evaluative approach may make it easier for parties to reach resolution because evaluative mediator provides recommendations and assessments, thereby removing some of parties' decision-making burdens, mediators' evaluations may impede parties' ability to appreciate their own and each other's positions and make the process more antagonistic).

[44] *See* Riskin, *Decisionmaking in Mediation, supra* note 38, at 30 (defining term directive as "*almost any conduct* by which the mediator *directs* the mediation process, or the participants, toward a particular procedure or perspective or outcome").

[45] *See* Silbey & Merry, *supra* note 40, at 19–20 (describing bargaining style mediation as rigid process driven by mediators who "claim authority as professionals with expertise in process, law, and the court system" and blatantly control proceedings, "ignoring emotional demands and concentrating on demands that can be traded off," often preferring caucuses over direct party communication and advising parties of "the benefits of a settlement of any kind").

[46] *See* Debra Lewis & Nancy A. Welsh, *Adaptations to the Civil Mediation Model: Suggestions from Research into the Approaches to Conflict Resolution Used in the Twin Cities' Cambodian Community*, 15 MEDIATION Q. 345, 354 (1998) (revealing preference of sampled ethnic group for mediators who implement evaluative, rather than facilitative methods); Riskin & Welsh, *supra* note 42, at 865–66 (discussing "court-oriented" mediation in civil litigation contexts where mediators and other 'repeat players' focus narrowly on likely outcome of litigation and what each party is willing to pay to avoid costs and risks of litigation, and employ mediation procedures most likely to lead to settlement, often excluding consideration of parties' motivations); Welsh, *The Thinning Vision supra* note 17, at 4, 47–48 (noting court-institutionalized mediation has departed from previously dominant view, which "assumed that the disputing parties would be the principal actors and creators within the mediation process" and has become a process dominated by mediators who employ evaluative methods, such as persuading parties to accept settlement and assessing strengths and weaknesses of parties' positions, often in private caucuses); Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do with It?*, 79 WASH. U. L. Q. 787, 846 (2001) ("Court-connected mediation . . . often involves evaluative interventions by the mediator . . . . [M]ediators regularly provide disputants with 'reality-checks' by critically assessing the strengths and weaknesses of the disputants' cases and even opining regarding appropriate settlement ranges.") [hereinafter Welsh, *Making Deals*].

[47] *See* Riskin, *Decisionmaking in Mediation, supra* note 38, at 17 (reporting that same mediator was selected as best facilitative mediator and second-best evaluative mediator); Riskin & Welsh, *supra* note 42, at 868–69 (describing positive impact of various mediation theories); Nancy A. Welsh, *Stepping Back through the Looking Glass: Real Conversations with Real Disputants About Institutionalized Mediation and Its Value*, 19 OHIO ST. J. ON DISP. RESOL. 573, 671 (2004) (suggesting insignificance of "rigid distinctions" among mediation frameworks and positing that "'quality' mediation" demands the use all appropriate methods "that serve procedural justice and resolution rather than development of niches for mediators with different 'orientations'"); *see also* ABA SECTION OF DISPUTE RESOLUTION, TASK FORCE ON IMPROVING THE QUALITY OF MEDIATION, FINAL REPORT: Apr. 2006–Feb. 2008, at 12–13, 17 (2008) (recommending best practice for mediators is to tailor mediation process to each particular case rather than using the same identical approach and suggesting "techniques sometimes could be used more wisely and prudently").

that the parties will perceive as fair[48]—also described as one that offers the parties "an experience of justice."[49] To achieve this experience, the parties need: the opportunity to be fully heard; to know that what they have said has been considered (ideally, by both the mediator and the other party[50]); and to feel treated in an even-handed and respectful manner (again, ideally, by both the mediator and the other party).[51] All of these procedural characteristics are consistent with the idea of drawing out the parties and affirming their centrality to the dispute and its resolution. Importantly, they also are *not inconsistent* with a process that involves the mediator ultimately playing a central role in educating and guiding the parties toward resolution.[52]

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[48] Nancy A. Welsh, *Perceptions of Fairness, in* THE NEGOTIATOR'S FIELDBOOK: THE DESK REFERENCE FOR THE EXPERIENCED NEGOTIATOR 165, 171 (Andrea Kupfer-Scheider & Christopher Honeyman eds., 2007) (noting research has confirmed link between perceptions of process fairness in negotiation and negotiators' perceptions of fairness of proposed outcomes) [hereinafter Welsh, *Perceptions of Fairness*]. In addition to the relationship of the parties to the third-party mediator, the relationship between the parties involved in the mediation and the negotiators themselves is also important. Negotiators' relative status in the group helps to determine the impact of procedural fairness on their attitudes and behaviors. In a negotiation between two individuals that perceive themselves to be of uneven status, the lower status negotiator will likely be more satisfied with the outcome if she perceives she has been treated in a procedurally just manner by the higher status negotiator. On the other hand, the higher status negotiator will perceive the process to be fair only if there is a favorable outcome. *Id.* at 171; Welsh, *Making Deals, supra* note 46, at 818 ("Disputants who believe that they have been treated in a procedurally fair manner are more likely to conclude that the resulting outcome is substantively fair."). Researchers have found that procedural justice matters. Disputants' perceptions of the justice provided by a procedure affect their judgments of the distributive justice provided by the outcome, their compliance with that outcome, and their faith in the legitimacy of the institution that offered the procedure. Disputants use the following indicia to assess procedural justice: whether the procedure provided them with the opportunity to tell their stories; whether the third party considered their stories; and whether the third party treated them in an even-handed and dignified manner. *Id.* at 817; *see* Yuval Feldman & Tom Tyler, Mandated Justice: The Potential Promise and Possible Pitfalls of Mandating Procedural Justice in the Workplace 25–26 (Sept. 7, 2009) (unpublished manuscript, available at http://ssrn.com/abstract=1133521) (examining concept of procedural justice in company management decisions and concluding employees' behavior is positively impacted when they view their employers' methods for promotional and pay increase evaluations as fair).

[49] *See* Welsh, *Making Deals, supra* note *46*, at 791–92 (describing expectation disputants have regarding mediation process and its affect on their perception and compliance with outcome of dispute resolution process).

[50] *See* Lisa Bingham & Tina Nabatchi, Address at the International Conflict Management Association 2006 Conference: The Determinants of Outcomes in Transformative Mediation (June 27, 2006) (discussing importance of being heard by other disputant).

[51] Donna Shestowsky, *Disputants' Preferences for Court-Connected Dispute Resolution Procedures: Why We Should Care and Why We Know So Little*, 23 OHIO ST. J. ON DISP. RESOL. 549, 575 (2008) (noting people will still be satisfied with unfavorable results if they perceived the process to be a fair); *see* Friedman & Himmelstein, *supra* note 39; TAMARA RELIS, PERCEPTIONS IN LITIGATION AND MEDIATION: LAWYERS, DEFENDANTS, PLAINTIFFS, AND GENDERED PARTIES 174 (2009) (positing disputants feel they have been treated justly and fairly when mediators give due consideration to their perspectives); Welsh, *Perceptions of Fairness, supra* note 48, at 170 ("[P]eople who believe that they have been treated in a procedurally fair manner are more likely to conclude that the resulting outcome is substantively fair, even if that outcome is unfavorable."); Welsh, *Making Deals, supra* note 46, at 823–24 (noting fair treatment will lead disputant to feel procedural justice was served regardless of unfavorable outcome); Welsh, *Stepping Back, supra* note 47, at 623 (indicating perception of mediation process enhances dignity of manner in which parties conduct themselves).

[52] *See* Welsh, *Making Deals, supra* note 46, at 805–06 (positing attorneys prefer mediators who play more

So which model of mediation is best? Which model should be institutionalized in the courts, particularly courts with mandatory mediation programs? Battles have been fought over these questions[53] and research has been done,[54] fueled at least in part by the hunger for legitimacy and access to the remunerative[55] business of mediation.

The answers to these questions depend, of course, on the goals of the mediation process. If the aim of mediation is to enhance the parties' ability to communicate and negotiate directly with each other—which may be particularly important when there will be an ongoing relationship[56] and a need to collaborate in the implementation of any agreement—it appears important for the process to foster parties' ability to engage in "mutual consideration."[57] In other words, the parties

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active role by commenting on parties' argument strength and outlining settlement ranges); Welsh, *Stepping Back, supra* note 47, at 576 (identifying "transformative" interventions as process of "enhancing disputants' communication and mutual understanding to enable the disputants to find their own way to a settlement" through their own empowerment).

[53] Welsh, *The Thinning Vision, supra* note 17, at 27–29 (citing to many articles written about debates over superiority of facilitative, evaluative and transformative mediation); Welsh, *Stepping Back, supra* note 47, at 576 (noting continuing debate exists regarding level of involvement mediators should have in mediation process).

[54] Tina Nabatchi et al., Evaluating Transformative Mediation in Practice: The Premises, Principles, and Behaviors of USPS Mediators 1 (July 13, 2006) (unpublished manuscript, available at http://ssrn.com/abstract=916008) (evaluating transformative mediation program used by Unites States Postal Service.); *see* Shestowsky, *supra* note 51, at 572 (2008) (positing method should be adopted that aligns with disputants' mediation preferences) (citing Roselle Wissler, *The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts*, 33 WILLAMETTE L. REV. 565, 570 (1997) [hereinafter Wissler, *Effects of Mandatory Mediation*]); *see also* Dorothy J. Della Noce et al., *Signposts and Crossroads: A Model For Live Action Mediator Assessment*, 23 OHIO ST. J. ON DISP. RESOL. 197, 206–07 (2008) (discussing transformative mediation as function of mediator's understanding of her supporting role in parties' efforts to resolve conflict); Welsh, *Stepping Back, supra* note 47, at 580 (evaluating various models in context of school education mediation and relating it to broader field of mediation).

[55] The level of remuneration, however, can vary dramatically. *See* Andrew K. Niebler, *Getting the Most Out of Mediation: Toward a Theory of Optimal Compensation for Mediators*, 4 HARV. NEGOT. L. REV. 167, 172–73 (1999) (explaining amount of mediator compensation depends on whether mediator is paid on uniform hourly fee or variable hourly fee and duration of mediation).

[56] *See* McAdoo & Welsh, *supra* note 25, at 403 (discussing Frank Sander's description of Lon Fuller's articulation of central quality of mediation identified as maintenance of long-term relationships through solution worked out by parties); *see also* ROSEMARY O'LEARY & LISA B. BINGHAM, A MANAGER'S GUIDE TO RESOLVING CONFLICTS IN COLLABORATIVE NETWORKS 25 (2007) (identifying positive effects resulting from managers' awareness of need to listen). *But see* Dwight Golann, *Is Legal Mediation a Process of Repair – or Separation? An Empirical Study and Its Implications*, 7 HARV. NEGOT. L. REV. 301, 331 (2002) ("Even when able mediators work with parties whose dispute arises in the context of a significant prior connection with each other, relationship repairs in legal mediation appear to be uncommon events . . . ."); Bobbi McAdoo, *A Report to the Minnesota Supreme Court: The Impact of Rule 114 on Civil Litigation Practice in Minnesota*, 25 HAMLINE L. REV. 403, 429 (2002) (noting minority of lawyers voluntarily chose mediation because of its ability to preserve parties' relationship); Roselle Wissler, *The Effectiveness of Court-Connected Dispute Resolution in Civil Cases*, 22 CONFLICT RESOL. Q. 55, 67 (2004) (highest percentage from various studies stated that 43% of litigants thought mediation improved relationships with other party; most studies did not support this).

[57] *See* Nancy A. Welsh, *Stepping Back*, *supra* note 47, at 639 (describing term there as "reciprocal voice and understanding" and with thanks to Bobbi McAdoo for suggesting term).

need the opportunity to speak and be heard, but they also need the opportunity to *listen* to each other, reflect upon what was said and *demonstrate* that they have listened to each other.[58]

For a variety of reasons, the achievement of mutual consideration can be a significant challenge. At least some percentage of disputing parties—perhaps those who are less polarized, afraid or stressed; inherently creative; reasonably assertive and confident; able to achieve some distance from their dispute—will be able to engage in the elicitive, facilitative, and transformative process described *supra* and ultimately craft their own resolution, one that they will implement through good times and bad.[59] The needs of these parties—provided there is also some surplus to divide in their bargaining zone and/or the opportunity for logrolling or the creation of new, integrative options—will be fully met by a mediation in which the mediator limits herself to the use of facilitative, elicitive and perhaps transformative interventions.

Parties who do not quite match this profile may be lucky enough to be assisted by lawyers who possess the creativity, assertiveness, empathy, rationality and detachment that their clients lack. These lawyers also may fully understand, respect and be able to communicate the needs of their clients.[60] Furthermore, these lawyers may possess a full complement of the more traditional abilities of the lawyer—sufficient substantive knowledge to provide competent representation, along with the ability to analyze, speak and write "like a lawyer."[61] Parties represented by these lawyers may also find their needs sufficiently met by a facilitative, elicitive and/or transformative model of mediation.[62]

But for those parties who cannot achieve a sufficiently-positive problem-solving state—or when their lawyers do not possess the skills and knowledge

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[58] *See id.* at 639 (noting positive and negative reactions to real mediation between parents and school officials); *see also* Shestowsky, *supra* note 51, at 567 (noting main ADR goal gives individuals self-determination over mediation).

[59] *See* PRUITT ET AL., SOCIAL CONFLICT: ESCALATION, STALEMATE AND SETTLEMENT (3d ed. 2004) (describing evolution of conflict).

[60] *See* JULIE MACFARLANE, THE NEW LAWYER: HOW SETTLEMENT IS TRANSFORMING THE PRACTICE OF LAW 23 (UBC Press 2008) (arguing "the new lawyer" must have evolved beliefs and practices).

[61] Within the past couple of years, there have been increasing calls for law schools to prepare law students for the sort of skillful and ethical use of substantive legal knowledge that is suggested here. *See* ROY STUCKEY, ET AL., BEST PRACTICES IN LEGAL EDUCATION: A VISION AND A ROAD MAP 8 (2007) (outlining goals for law school classes); WILLIAM M. SULLIVAN, ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 17 (2007) (analyzing law school teaching methods); *see also* MACFARLANE, *supra* note 60, at 23 (discussing what distinguishes new lawyering from old lawyering); John Lande & Jean Sternlight, *The Potential Contribution of ADR to an Integrated Curriculum: Preparing Law Students for Real World Lawyering*, 25 OHIO ST. J. OF DISP. RESOL. (forthcoming 2010). Interestingly, as long ago as 1997, two faculty members at the Dickinson School of Law of Penn State University prepared and taught a course that specifically integrated bankruptcy law and mediation skills. Peter C. Alexander et al., *Integrating Alternative Dispute Resolution into the Bankruptcy Curriculum*, 102 DICK L. REV. 259, 260 (1998) (noting class goal in creating one form of bankruptcy resolution).

[62] I do, however, have concerns about the likelihood of such parties begin able to work through the inevitable problems that will arise in the implementation of an agreement that requires an ongoing relationship. *See* Peter Kamminga, (Aug. 15, 2009) (unpublished Ph.D. dissertation, Tilburg University) (on file with author) (regarding use of consensual processes in construction industry).

described *supra* or do not have an ideal relationship with their clients, or when there is no surplus to divide—the more appropriate mediation process may be one in which the mediator first listens with an open mind and in a manner that conveys respect and then moves toward dignified, participatory education of the parties about their options, advises them about the fairness of these options, and helps them to make an appropriate choice. These procedural characteristics, of course, are consistent with a model of mediation that begins in a facilitative manner then, if necessary, begins to include evaluative or directive elements. I hasten to add, however, that these characteristics are not consistent with coercive or muscle mediation.

Research suggests that institutional and financial pressures have forced court-connected mediation (and mediators) to become predominantly evaluative, directive—and even coercive. Many have laid the blame for this transformation at lawyers' doors,[63] observing that lawyers' participation has made the mediation process more adversarial and single-mindedly focused on the law and legal procedures. There is much to support this assessment. Lawyers tend to select other lawyers as mediators, dominate the discussions in the mediation process, seek case valuation and reality-testing, and focus on brokering a deal.[64] The achievement of mutual understanding between the parties seems to be an issue that some lawyers think about[65] but not many.[66]

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[63] *See* Kimberlee K. Kovach, *Good Faith In Mediation – Requested, Recommended or Required? A New Ethic*, 38 S. TEX. L. REV. 575, 593 (1997) (The increase of court-connected mediation and the incorporation of lawyers into the process have stripped mediation of its benefits as an alternative to the adversarial system and is in danger of becoming another "hoop" on the path to litigation. "The notion of mediation as a different paradigm for dispute resolution is being eroded with the lawyers now viewing the process as merely another tool within the litigation arena to be used combatively rather for any intended purpose."); Leonard L Riskin, *The Represented Client in A Settlement Conference: The Lessons of G Heileman Brewing Co. v. Joseph Oat Corp.*, 69 WASH. U. L.Q. 1059, 1081 (1991) (arguing lawyers adversarial nature narrows settlement visions); Riskin & Welsh, *supra* note 42, at 867 (positing courts, not lawyers, should present mediation opportunities); Welsh, *Making Deals, supra* note 46, at 797–98 (noting lawyers make mediation look like judicial settlement conferences).

[64] *See* Tamara Relis, *Consequences of Power*, 12 HARV. NEGOT. L. REV. 445, 446 (2007) (arguing "that due to disparities in knowledge, power, and interests between litigants and attorneys, plaintiffs and defendants are regularly not afforded communication opportunities to address issues of prime importance to them during the processing of their cases"); Roselle Wissler, *Court-Connected Arbitration in the Superior Court of Arizona: A Study of its Performance and Proposed Rule Changes*, 2007 J. DISP. RESOL. 65, 90–91 (2007) (arguing lawyers favor judicializing the process by having the courts provide some type of compulsory alternative process); Riskin & Welsh, *supra* note 42, at 893 (describing existing current empirical research on this point); Welsh, *The Thinning Vision, supra* note 17, at 26 (comparing lawyer involved mediations with judicial settlement conferences); *see also* Welsh, *Making Deals, supra* note 46, at 797 (claiming some believe lawyers "hijacked" mediation process).

[65] *See* MACFARLANE, *supra* note 60, at 149–50 (describing collaborative law and value of client participation and discussion between parties); John Lande, *Principles for Policymaking About Collaborative Law and other ADR Processes*, 22 OHIO ST. J. ON DISP. RESOL. 619, 626–28 (2007) (providing background of collaborative law); Nancy A. Welsh, *Looking Down the Road Less Traveled: Challenges to Persuading the Legal Profession to Define Problems Humanistically*, 2008 J. DISP. RESOL. 45, 58–59 (2008) (discussing lawyers who practice mediation and understanding of parties' interest) [hereinafter Welsh, *Looking Down the Road*]; *see also* McAdoo, *supra* note 13, at 398–99 tbl.8 (2007) (observing among top reasons judges order cases to mediation is because they believe process "gets clients directly involved in discussions").

It is also important to note, however, that this transformation may have something to do with the courts themselves—and particularly with the courts' relative lack of resources and focus on "speedy" and "inexpensive"[67] disposition. Some courts now assume that a mediation will be completed in an hour. Courts have long tracked the rate at which mediation successfully settles cases and have regularly noted mediation's value as a means to reduce the size of the court's docket.[68] None of these preferences or behaviors is inherently evil. Instead, as courts deal constantly with cost-conscious administrators, intrusive legislators, and unhappy citizens who arrive with difficult problems that require timely resolution, courts are acting in a manner consistent with institutional self-preservation.[69]

And there is one other factor that must be considered—the parties themselves. Very few people go directly to court after they have been harmed. Most people—even allegedly litigious Americans—prefer not to go to court.[70] Plaintiffs must proceed through a multi-stage psychological process—naming, blaming, and claiming[71]—before they sue defendants. Usually, at least one of the parties involved in this lawsuit has tried to negotiate with the other—and has been unsuccessful.[72] In the United States, research shows that only a small percentage of

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[66] *See* Relis, *supra* note 64, at 463–64 (noting female and/or in-house hospital lawyers were more likely to raise this possibility); Riskin & Welsh, *supra* note 42, at 869–73 (discussing goal of mediation is to attend to parties' needs but evidence shows this is rarity); Welsh, *Looking Down the Road, supra* note 65, at 50–51 (hypothesizing about why so many lawyers find it so difficult to deal with emotional issues and how those issues may benefit from acknowledgment in legal practice). Meanwhile, judges referring parties to mediation do seem impressed with this potential benefit of the process. *See* McAdoo, *supra* note 13, at 398–99 (stating judicial preference for discussion between parties as result of mediation).

[67] *See* FED. R. CIV. P. 1. (stating every action should be just, speedy and inexpensive).

[68] *See* McAdoo & Welsh, *supra* note 25, at 406 (explaining modern realization that ADR is cost and time efficient); Moffitt, *supra* note 5; Nancy A. Welsh, *The Place of Court-Connected Mediation in a Democratic Justice System*, 5 CARDOZO J. CONFLICT RESOL. 117, 129–30 (2004) (documenting trend in judicial deferral to arbitration due to efficiency and lower cost) [hereinafter Welsh, *Court-Connected Mediation*].

[69] *See* Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 936–37 (2000) (describing evolution of ADR as method of controlling judicial case overload, and its evolution from pre-trial); *see also* Judith Resnik, *"Uncle Sam Modernizes his Justice": Inventing the Federal District Courts of the Twentieth Century for the District of Columbia and the Nation*, 90 GEO. L.J. 607, 649 (2002) (discussing judicial welcome to alternative dispute resolution to ease caseload); Welsh, *Court-Connected Mediation, supra* note 68, at 141 (discussing mediator's role in keeping people happy and delivering justice).

[70] *See* Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 22 (1983) (detailing study result finding only approximately 5% of inter-organizational disputes went to trial) (citing Hurst, *The Functions of Courts in the United States*, 1950–1980, 15 LAW & SOC'Y REV. 401, 422 (1980) ("The absence of sizeable numbers of legal actions in which individuals or firms of substantial or large means appear on both sides of lawsuits.")).

[71] *See* William L. F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631, 635–36 (1980) (explaining three-step process before trial of naming injury, blaming other party, and claiming grievance by voicing to third party and instigating trial). Note that the "claiming" part also can be quite expensive, beyond many people's means. *See id.* at 636–37 (stating costs to parties may limit access to justice and ability to bring claims).

[72] *See* Richard E. Miller & Austin Sarat, *Grievances, Claims and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 525, 537 tbl.2 (1980) (showing 32% of all grievances come to no agreement following negotiation and 30.6% reach agreement after difficulty).

those who perceive that they have suffered a harm end up bringing a lawsuit.[73] It should not be surprising, then, that many of these disputing parties who have finally reached the courthouse find it hard to believe that a reasonably fair resolution with the other party is possible.[74] Many—though certainly not all[75]—have given up any hope for a voluntary, jointly-developed resolution and now prefer to trust the judgment of a stranger, someone they hope will not only be impartial but benevolent, knowledgeable, and fair.[76] Indeed, research has shown that parties are more likely to perceive a mediation process as fair if the mediator listens *but also engages at some point in an evaluative or directive intervention*—e.g., if she helps parties to assess the strengths and weaknesses of their cases.[77] I have suggested elsewhere that the parties may turn to mediators in this manner because they seek reassurance that the resolution they are considering is reasonably fair.[78] Significantly, though, parties are much less receptive to mediators who go further and try to tell the parties what to do—i.e., recommend specific settlements.[79] In

[73] Galanter, *supra* note 70, at 20 (The Civil Litigation Research Project found that only 5% median and 17% mean of organizational disputes actually go to court. The Milwaukee Consumer Dispute Study found that of the people that reported problems, only 3% took claims to third party, and another study by Best and Andreasen found that only 3.5% of those consumers that voiced complaints involved third parties); Marc Galanter, *A World Without Trial?*, 2006 J. DISP. RESOL. 7, 9–10 (2006) (The National Center for State Courts, where 98% of the trials occur, complied a bank of state trial data between 1976 and 2002 and reported that the courts of general jurisdiction in 22 states reported declines in the amount of dispositions from 1.8% in 1976 to 0.6% in 2002, as well as a reduction of overall criminal trials from 8.5% in 1976 to 3.3% in 2002. This trend is the same in federal courts.); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. OF EMPIRICAL LEGAL STUD. 459, at 459, 498 (2004) (noting portion of federal civil cases resolved by trial fell from 11.5% in 1962 to 1.8% in 2002. There was also a similar 60% decline in the absolute number of trials since the mid 1980s. Trials are declining in every case category. A similar decline in both the percentage and the absolute number of trials is found in federal criminal cases and in bankruptcy cases. In 1985, there were 9.287 trials in bankruptcy court; by 2002, there were 3.179— little more than one third of 1985 total).

[74] Sally Engle Merry & Susan S. Silbey, *What Do Plaintiffs Want? Reexamining the Concept of Dispute*, 9 JUST. SYS. J. 151, 153 (1984) (noting by the time conflict comes to court it is serious enough that plaintiff wants outside intervention because they do not want to take dispute back into their own hands).

[75] *See* Relis, *supra* note 64, at 478–79 (describing patients and doctors who wanted to talk with each other in medical malpractice mediations); *see also* Hensler, *supra* note 17, at 189 (claiming facilitative mediator, unlike evaluative mediator, would be more helpful in finding joint gains and allowing parties to come to own settlements as opposed to proposing resolution).

[76] *Compare* Donna Shestowsky & Jeanne Brett, *Disputants' Perception of Dispute Resolution Procedures: An Ex Ante and Ex Post Longitudinal Empirical Study*, 41 CONN. L. REV. 63 (2008) (finding empirical data showed parties are more attracted initially to third-party control were satisfied when they experienced adjudication), *with* Wissler, *Effects of Mandatory* Mediation, *supra* note 54, at 584–85 (discovering mixed effects on evaluations of mediation process from parties who were required to mediate as opposed to those who voluntarily mediate).

[77] *See* Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know From Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641, 664, 698 (2002) (explaining 49% of parties thought mediation gave them better understanding of strengths and weaknesses and arguing parties in mediation felt mediation process was more fair when they were better prepared) [hereinafter Wissler, *General Civil Cases*].

[78] McAdoo & Welsh, *supra* note 25, at 425 (claiming mediators produce fair outcomes especially when they provide reassurance that outcomes are consistent with rule of law).

[79] *See* Wissler, *General Civil Cases, supra* note 77, at 684–85 (showing party felt more pressure to accept settlement from mediator who recommended particular settlement, while attorney felt mediation was more

particular, *non-settling parties perceive the process as less fair when mediators engage in this intervention.*

All of this research suggests that most, though not all, parties want advice from someone they have decided they can trust. Other research, meanwhile, suggests that lawyers and other repeat players prefer an actual decision—provided that it is reached efficiently, consistent with the law and their expectations, and very likely to be complied with or enforced. They seem to care less than the average person—a one-shot player[80]—about procedural justice. Indeed, some research suggests that lawyers' and repeat players' positive perceptions regarding the process will be much less likely to influence their assessments of the fairness or unfairness of the outcome.[81]

All of these factors may combine to explain the current directive or evaluative cast of much court-connected mediation, which exists in order to assist the mass processing of cases and is dominated by repeat players.[82] Further, the factors described *supra* certainly can tempt mediators and court-connected mediation programs to use, or acquiesce in the use of, coercive or muscle mediation in order to achieve settlements.[83]

## III. INTRODUCTION OF MEDIATION INTO BANKRUPTCY COURTS

Mediation was first integrated into bankruptcy courts when the Bankruptcy Court for the Southern District of California established a mediation program in 1986.[84] Courts in other parts of the country soon followed suit.[85] After passage of the Civil Justice Reform Act of 1990, bankruptcy judges began experimenting with ADR, including mediation, on an ad hoc basis.[86] That same year, under the auspices

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fair after mediator had suggested possible settlement option); *see also* Riskin & Welsh, *supra* note 42, at 874 ("Most Lawyers . . . prefer that retired judges or experienced litigators with relevant substantive expertise serve as their mediators.").

[80] *See* Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1353 (1994) (describing one shot players as individuals who file lawsuits, settle claim instead of litigating, and are unhappy with settlement outcome).

[81] *See* Welsh, *Perceptions of Fairness in Negotiation, supra* note 48, at 170–71 (describing recent research); *see also* JANE ADLER ET AL., SIMPLE JUSTICE: HOW LITIGANTS FARE IN THE PITTSBURGH COURT ARBITRATION PROGRAM 61–62 (1983) (discussing difference between organizational and individual parties' reactions to Pittsburgh arbitration program).

[82] *See* Riskin & Welsh, *supra* note 42, at 865–66 (stating "court-oriented" mediations allow "repeat players" to settle more issues without interference).

[83] I must admit that when I think of the contrast between educating or coaching parties in evaluative/directive mediation vs. browbeating or berating parties in coercive/muscle mediation, I recall a recent episode of the Penguins of Madagascar in which the lead penguin announces, "I find reason tedious and boring. We'll use force." *The Penguins of Madagascar: Gone in a Flash* (Nickelodeon television broadcast November 28, 2008). Since this television show is a comedy, I believe that the penguins' use of force fails to achieve its intended result. In real life, of course, that is not always the case.

[84] *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 (1998).

[85] *See id.* at 199 (stating Bankruptcy courts in Middle District of Florida and Eastern District of Virginia imitated Southern District of California).

[86] *See id.* at 196 (discussing how judges experimented with different forms of alternative dispute

of the American Arbitration Association, bankrupt Greyhound Lines Inc. offered the first pre-reorganization plan mediation to thousands of individuals who had brought personal injury and property damage claims against the company, as a result of traffic accidents involving Greyhound vehicles.[87] In late 1993, the Bankruptcy Court for the influential Southern District of New York created its court-connected mediation program.[88] One of the first referrals to the program involved the chapter 11 reorganization of R. H. Macy & Co.[89] The mediator in that case was Cyrus Vance, and the mediation process, which lasted two weeks, was "called Camp Mediation by the creditors' army of lawyers and bankers."[90] By 1995, twelve bankruptcy courts had adopted court-connected ADR programs.[91] Then, with the passage of the Alternative Dispute Resolution Act of 1998, federal bankruptcy courts received express authorization to use ADR processes, including mediation.[92] By 2004, the Bankruptcy Court for the District of Delaware was requiring that before parties could proceed with certain adversary proceedings, they had to attempt to reach resolution through mediation.[93]

Today, as a result of the work of Professor Ralph Peeples, we know that 40 bankruptcy courts have rules or standing orders that permit mediation.[94] Professor William Woodward has revealed that, in addition to interesting experimentation with mediation in preference cases and bankruptcy appeals, a bankruptcy procedure spawned both the Piper Trust and a claims process that requires use of mediation.[95] Our unfortunately-difficult current economic conditions, combined with the successful use of mediation in this and other contexts, make it very likely that the use of mediation in bankruptcy will expand.[96]

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resolution).

[87] *See* Penna, *supra* note 2 (discussing program set up by bankrupt Greyhound Lines Inc to deal with personal injury and property claims).

[88] *See* Mott, *supra* note 84, at 199 (acknowledging Judge Lifland for helping bring about a court-annexed mediation program in the Bankruptcy Court for the Southern District of New York).

[89] *See id.* at 194 (noting use of mediation in Macy's chapter 11 case).

[90] Stephanie Strom, *Macy's Biggest Sale – A Special Report: Derailing a Big Bankruptcy Plan*, N.Y. TIMES, July 29, 1994, at D1.

[91] Ralph R. Mabey, et al., *Expanding the Reach of Alternative Dispute Resolution in Bankruptcy: The Legal and Practical Bases for the Use of Mediation and the Other Forms of ADR*, 46 S.C. L. REV. 1259, 1266 (1995) (establishing adoption of twelve "court-annexed ADR programs" in bankruptcy courts); Mott, *supra* note 84, at 199 ("[T]welve bankruptcy courts have court-annexed ADR programs.").

[92] *See* 28 U.S.C. § 651(b) (1998) ("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 . . . .").

[93] *See* Mark L. Desgrosseilliers, *Gimme Shelter: The Use of Alternative Dispute Resolution Procedures to Resolve Tort Claims in Bankruptcy*, 18 NORTON J. BANKR. L. & PRAC. 19, 32 (2009) (demonstrating Delaware Bankruptcy Court's mandate of mediation prior to certain proceedings).

[94] *See* Ralph Peeples, *The Uses of Mediation in Chapter 11 Cases*, 17 AM. BANKR. INST. L. REV. 401, 407 (2009) ("Mediation is explicitly authorized by local rule or order in 51 bankruptcy courts.").

[95] *See generally* Woodward, *supra* note 1.

[96] *See* Mark L. Desgrosseilliers, *supra* note 93, at 43 (2009) (suggesting ADR procedures are viable options to manage heavy load of bankruptcy litigation in future); Abigail Johnson, *Mediation growing in bankruptcy courts; Mediators help avoid costs of litigation*, IND. LAW., April 19, 2006, at 6 ("At this point in his career, Kleiman said mediation duties take up about 15 percent to 20 percent of his time. And, while

## IV. WHAT RECENT BANKRUPTCY CASES SUGGEST ABOUT COURTS' AND PARTIES' UNDERSTANDING OF MEDIATION AND MEDIATORS

As noted *supra*, relatively few judicial opinions discuss the use of mediation in bankruptcy. There are several obvious reasons for this. First, bankruptcy courts have only recently begun to use mediation.[97] Second, because mediation is confidential, can be initiated privately,[98] and requires the parties' agreement in order to produce an outcome, bankruptcy judges[99] are relatively unlikely to be called upon to resolve issues involving mediation.[100] The few cases available nonetheless demonstrate that bankruptcy courts generally favor the use of mediation to resolve claims and help with reorganizations. One case, which is a bit of an anomaly,[101] represents a cautionary tale in which creative parties attempted to use mediation as a convenient, unregulated tool that would permit them to achieve unexpected and inappropriate results.[102] A bankruptcy judge, who balked at using mediation in this manner, stopped these parties.[103] Some other bankruptcy judges and parties,

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mediation in the bankruptcy court is becoming more common, Kleiman definitely sees it as a growth area." David Kleiman was the first mediator to handle a case for the bankruptcy court in Indianapolis in the late 1990s.).

[97] *See* James R. Coben & Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 HARV. NEGOT. L. REV. 43, 52–53 (2006) (describing likely reasons for relatively recent development of bankruptcy mediation jurisprudence) [hereinafter Coben & Thompson, *Disputing Irony*]; James R. Coben & Peter N. Thompson, *Mediation Litigation Trends: 1999-2007*, 1 WORLD ARBITRATION & MEDIATION REV. 395, 414 (2007) (explaining recent trends in mediation).

[98] There may be some limitations on the ability to contract for private mediation in the bankruptcy context due to the requirement in 11 U.S.C. § 363 that the Debtor to receive court approval for payments made outside of the ordinary course. Mediation costs may be included within that scope. 11 U.S.C § 363(b)(1) (2006). My thanks to Margaret Whiteman Greecher for this observation.

[99] *See* Jeffrey J. Rachlinski et al., *Inside the Bankruptcy Judge's Mind*, 86 B.U. L. REV. 1227, 1230 (2006) (exploring whether specialization of bankruptcy judges enables superior decision making).

[100] *See* Coben & Thompson, *Disputing Irony, supra* note 97, at 52–53 (describing related reasons for relative paucity of mediation jurisprudence).

[101] Or the egregious tip of the iceberg. *See* Maureen A. Weston, *Checks on Participant Conduct in Compulsory ADR: Reconciling the Tension in the Need for Good–Faith Participation, Autonomy, and Confidentiality*, 76 IND. L.J. 591, 596 (2001) (remarking on abuses of process within ADR system). My thanks to Chris Honeyman for noting this possibility.

[102] *See In re* Am. Capital Equip., 405 B.R. 415, 422 (Bankr. W.D. Pa. 2009) (remarking on attempt by party to abuse mediation process). Reminiscent of the creative financiers whose new investment vehicles helped to create our current economic crisis. *See* Joseph Philip Forte, *Disruption in the Capital Markets: What Happened?* 22 A.B.A. SEC. PUB. REAL PROP. TR. & EST. L. 8, 11 (2008) (discussing various loan products utilized during real estate boom). However, lawyers seeking to use mediation in seemingly inappropriate ways might not be purposing these methods out of malice or to gain an unfair advantage but rather to pursue an altruistic means, such as expediating recovery for entitled and needy tort claimants. For example, see generally Penna, *supra* note 2 (reporting that Thomas Lauria, attorney for Greyhound, explained his client had intiated ADR in part to "balance bankruptcy policies which require efficient estate adminstration, on the one hand, and [responding to] the interests of personal injury and property damage claimants, on the one hand, who need and indeed are entitled to quick payments of their claims—without having to get involved in the ordinary complexity and delays associated with large corporate bankruptcy.").

[103] *See In re Am. Capital Equip.*, 405 B.R. at 423 (stating bad faith in process reason for not confirming plan).

however, apparently expect mediators to do more than facilitate communication, negotiation, and resolution. They expect mediators to make decisions and then grant substantial deference to those decisions. Admittedly, mediation is relatively ill-defined. Nonetheless, these judges and parties clearly do not understand even the existing, relatively minimal boundaries that define mediation and mediators.

One of the most significant uses of mediation in the bankruptcy context is the inclusion of the process in chapter 11 reorganization plans, in order to resolve claims that do not come within the limited jurisdiction of bankruptcy procedures. Courts appear to favor the process in this context, provided that it is being used in a manner that treats all interested parties appropriately—or at least not inappropriately. For example, in *In re Eagle Bus Manufacturing,*[104] the United States Bankruptcy Court for the Southern District of Texas approved a pre-reorganization plan involving three-tiered ADR (i.e., offer and exchange; followed by 60 days of mediation; then binding arbitration).[105] In particular, the court approved the plan's use of these ADR procedures to resolve unsecured creditors' claims of personal injury, wrongful death claims and workers compensation.[106] In all three types of claims, liability was contested but could not be resolved in the bankruptcy court.[107] In approving the ADR plan in this case, the court affirmed ADR's ability to bridge the jurisdictional difficulties created by parallel proceedings in trial and bankruptcy courts and to bridge the standing issues created by bankruptcy's hierarchy of creditors. Specifically, the ADR plan permitted unsecured creditors to reach resolution of their non-bankruptcy claims outside the context of the bankruptcy action.

In contrast, in 2009, the U.S. Bankruptcy Court for the Western District of Pennsylvania denied a fifth[108] reorganization plan proposed by Skinner Engine Company, based on the court's conclusion that the ADR plan was neither reasonable nor entered into in good faith.[109] Somewhat like the plan in *In re Eagle Bus Manufacturing*, Skinner's plan provided for mediation of personal injury, asbestos-related claims that had been brought against the debtor.[110] But Skinner's plan also required the personal injury claimants to *pay to Skinner* twenty-percent of the money they received from Skinner's insurers as a result of the mediation.[111] According to the Bankruptcy Court, Skinner planned to use these proceeds to fund its ADR plan and obtain a recovery for its general creditors.[112] Skinner thus had an

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[104] 134 B.R. 584 (Bankr. S.D. Tex. 1991). Discussed in journal articles as the "Greyhound bankruptcy or reorganization plan."

[105] *See In re Eagle Bus Mfg.*, 134 B.R. at 586, 591 (confirming reorganization plan including three-step ADR); Penna, *supra* note 2, at 3 (describing three-tiered ADR process).

[106] *See In re Eagle Bus Mfg.*, 134 B.R. at 591.

[107] *See id.* (noting Bankruptcy Court may not have jurisdiction to hear these particular claims).

[108] According to the court's opinion, this represented at least the fifth chapter 11 plan proposed "within a span of some five to six years." *In re Am. Capital Equip.*, 405 at 427.

[109] *Id.* at 422.

[110] *Id.* at 418, 422.

[111] *Id.* at 422.

[112] *Id.* at 427 & n.7.

interest in assisting claimants and "abotage[ing] its own defense or, more aptly, the Insurers' defense" of Skinner.[113] Not surprisingly, and particularly because they had never made any payments on these claims, some of which had existed for 20 years,[114] Skinner's insurers objected to this scheme.[115] The court labeled the ADR plan "collusion"[116] and held that Skinner's reorganization plan was "unconfirmable" without the insurers' consent.[117] Ultimately, the court found the reorganization plan so troublesome that it converted Skinner's chapter 11 reorganization into a chapter 7 liquidation.[118] This case is an extreme example that illustrates both abuse of the mediation process and the limits of courts' willingness to look favorably upon mediation's unique ability to bridge jurisdictional boundaries and aid reorganizing debtors.

The case also illustrates some parties' total—and seemingly willful—lack of respect for the different roles of mediator and judge. Indeed, the case may be an example of the potential for creatively manipulative parties to use mediation's and mediators' ambiguous definitions to try to avoid the limits—jurisdictional, substantive, and procedural—established by law.[119] Specifically, Skinner and its co-Proponents' proposed Alternative Dispute Resolution Process called upon the presiding judge to serve as "an arbitrator, mediator, or something else"[120] yet "to make final binding determinations as to the validity and valuation of contested opt-in Asbestos Claims"[121], thus requiring the court "in its official capacity, to finally liquidate such claims, and without any chance for review by another court."[122] One

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[113] *Id.* at 423.

[114] *Id.* at 421.

[115] *Id.* at 418.

[116] *Id.* at 423.

[117] *Id.* at 426–27 (concluding confirmable plan could not be effectuated because of failure to obtain Insurers' consent, among other reasons).

[118] *Id.* Debtors who have run out of cash before their plan can be confirmed may themselves seek to convert their chapter 11 bankruptcy into a chapter 7 bankruptcy. *See* 11 U.S.C. § 1112(b)(4) (2006) (listing causes for conversion to case under chapter 7). That does not seem to have been the case here. *See In re Am. Capital Equip.*, 405 B.R. at 426–27 (stating conversion to chapter 7 was appropriate due to inability to effectuate confirmable plan).

[119] One cannot also help but be reminded of the Bush Administration's creation of (and Congress' apparent acquiescence in) military commissions to handle the Guantanamo detainees. *See* Boumediene v. Bush, 128 S. Ct. 2229, 2240–41 (2008) (holding Military Commissions Act of 2006 did not strip alien detainees of constitutional privilege of habeas corpus); Hamdan v. Rumsfeld, 548 U.S. 557, 559–60 (2006) (concluding military commission was not authorized by Congress and violated domestic and international); Hamdi v. Rumsfeld, 542 U.S. 507, 509 (2004) ("address[ing] the process that is constitutionally owed to one who seeks to challenge his classification as" an enemy combatant); *see also* Gregory S. McNeal, *Institutional Legitimacy and Counterterrorism Trials*, 43 U. RICH. L. REV. 967, 968 (2009) (arguing design of post-September 11th military commissions focused on effectiveness and not legitimacy). At the same time, it is important to acknowledge that Skinner and its Co-Proponents may have been motivated by an altruistic goal—e.g., to ensure that the claimants received some amount of recovery despite the insurers' resistance.

[120] *See In re Am. Capital Equip.*, 405 B.R. at 426.

[121] *Id.* at 425 ("Provisions of the Alternative Dispute Resolution Process repeatedly call for this Court, in its official capacity, to make final binding determinations as to the validity and valuation of contested opt-in Asbestos Claims . . . .").

[122] *See id.* at 426 (explaining how debtor and Co-Proponent argued arbitration process requires court to liquidate claims in present case without chance of review by other courts).

problem with the parties' plan, of course, is that, by law, bankruptcy courts do not possess the authority to finally liquidate the sorts of claims that had been brought by the Asbestos Claimants. Such liquidation represents a "noncore proceeding"[123]—and as the Bankruptcy Court Judge M. Bruce McCullough went on to observe: "[T]he Court may only issue proposed findings of fact and conclusions of law to the district court with respect to noncore proceedings . . . . [T]his Court is powerless to make a final determination regarding the liquidation of any opt-in Asbestos Claims that are disputed."[124]

By simply changing the judge's title—from "judge" to "arbitrator, mediator, or something else"—the parties apparently hoped to avoid the bankruptcy court's inconvenient jurisdictional limits (and perhaps the need to pay the substantial fees that would be required for a private arbitrator, mediator or other type of neutral). And what would give the parties who had developed this Alternative Dispute Resolution Process the power to revoke the title of "judge" and replace it with "arbitrator, mediator, or something else"? Clearly frustrated, Judge McCullough summarized (and critiqued) the parties' arguments as follows:

> The Court understands the Debtor and the Co-Proponents to respond...that (a) the Alternative Dispute Resolution Process constitutes part of a settlement of the Asbestos Claims, and (b) this Court's final liquidation of contested opt-in Asbestos Claims, because it is part of such process, can be done regardless of this Court's lack of authority to so finally liquidate outside of such process. By logical extension, this Court can only presume that, by arguing that this Court can so finally liquidate within the confines of the Alternative Dispute Resolution Process notwithstanding this Court's lack of authority to otherwise so finally liquidate, the Debtor and the Co-Proponents argue, as well, that this Court (a) is free to act (and will act when finally liquidating within the confines of the Alternative Dispute Resolution Process) other than as the presiding Court that it is vis-à-vis the instant bankruptcy case—for instance, as an arbitrator, mediator, or something else, and (b) may thereby transgress the legal confines of its official position.

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[123] *Id.* at 425 ("[T]he liquidation of unliquidated personal injury tort claims, as are the opt-in Asbestos Claims, constitute(s) a noncore proceeding . . . .").

[124] *Id.* (observing Court is allowed to only issue "proposed findings of fact and conclusion of law . . . with respect to noncore proceedings" and no power exists to makes determinations on liquidation of claims in dispute); *see* 28 U.S.C. § 157(b)(2)(B) ("Core proceedings include, but are not limited to allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan . . . but not the liquidation or estimation of contingent or unliquidated personal injury tort . . . ."). It is conceivable, but beyond the scope of this Article, that the Debtor and its Co-Proponents may have claimed that an exception applied. *See, e.g.*, *In re* UAL Corp., 310 B.R. 373, 379 (Bankr. N.D. Ill. 2004) (defining bankruptcy court's decision to time-bar personal injury claim as broad view of liquidation exception because it "effectively liquidate[d] the claim for purposes of distribution" and defining narrow view as specifically "fixing the amount of the claim").

> Unfortunately for the Debtor and the Co-Proponents, *this Court is unaware of any legal authority that would permit it to so act while, at the same time, it also acts as the presiding Court.* Furthermore, the relevant provisions of the Fifth Plan and CADP cited to above refer to this Court as "the Bankruptcy Court" when it makes its final determinations thereunder, which indicates to the Court that the Debtor and the Co-Proponents expect that this Court, when making final determinations within the confines of the Alternative Dispute Resolution Process, will only act within its official capacity as the presiding Court in the instant bankruptcy case. Acting in such official capacity, this Court, as set forth above, may not finally liquidate contested opt-in Asbestos Claims, and even to the extent that it can act with respect to such claims, such action will necessarily be reviewable by another court.[125]

The parties' position here—which would have allowed them and the court to "contract out" of the legal restrictions established by statute—was not necessarily unprincipled. Within the past few years, legal commentators have urged that statutes and court rules should be understood as merely "default" rules, subject to revision by parties who can imagine and implement dispute resolution procedures that are more responsive to their needs.[126] The Supreme Court has recently dealt with parties arguing that they, not the Federal Arbitration Act, should be able to dictate the judicial standard of review to be used in determining whether to vacate an arbitral award. (The Court has rejected that argument.[127]) Professor Leonard Riskin and I have argued recently that courts should be willing to customize the mediation process.[128] In recent years, as well, the line between private and public entities has become blurred.[129] Further, there are some judges who have willingly

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[125] *In re Am. Capital Equip.*, 405 B.R. at 426 (emphasis added) (stating lack of "any legal authority" would allow court to act in two capacities). In a footnote, the court observed that the Debtor and its Co-Proponents could simply remove the court from the ADR Process and thus "rectify the flaw that the Court has just identified regarding such process." *See id.* at 426, 426 n.6. But the court added, "However, such removal of the Court would serve to make the Asbestos Claims Settlement, which incorporates the Alternative Dispute Resolution Process, even more unreasonable than it has already been determined to be by the Court." *Id.*

[126] *See* Symposium, *Competing And Complementary Rule Systems: Civil Procedure and ADR*, 80 NOTRE DAME L. REV. 481 (2005); *see also* Michael L. Moffitt, *Customized Litigation: The Case for Making Civil Procedure Negotiable*, 75 GEO. WASH. L. REV. 461, 462 (2007) ("I argue that the current set of procedural rules should be treated as default rules, rather than as nonnegotiable parameters."); Scott R. Peppet, *Lawyers' Bargaining Ethics, Contract, and Collaboration: The End of the Legal Profession and the Beginning of Professional Pluralism*, 90 IOWA L. REV. 475, 519–20 (2005) (discussing stringency of immutable rules and potential bargaining and flexibility involved with default rules).

[127] *See* Hall St. Assocs. v. Mattel, Inc., 128 S. Ct. 1396, 1401 (2008) (agreeing with Ninth Circuit's holding "terms of the arbitration agreement controlling the mode of judicial review are unenforceable and severable").

[128] *See* Riskin & Welsh, *supra* note 42, at 919 (discussing how courts should offer to "customize" mediation as new program).

[129] *See* Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1285 (2003) (advocating privatization as means to accomplish public utilitarian goals); *see also* Ellen Dannin, *Red*

become and called themselves 'mediators.'[130] Though well-intentioned and principled people can differ regarding the wisdom of this semantic choice when the mediator-judge does not and will not be required to preside over the case at trial,[131] there can be no doubt of the coercive twist that a mediation has taken when the mediator and the presiding judge are the same person.[132]

So there is some sort of precedent for the arguments made by Skinner, its co-Proponents, and their lawyers. In 2009, however, in the Bankruptcy Court for the Western District of Pennsylvania, these parties took this concept too far. They tried to use arbitration, mediation "or something else" to force Skinner's insurers into the role of (unwilling) investors in Skinner's continued operation, and they tried to force a presiding judge into the role of an (unwilling) "alternative" neutral.[133] Arguably, the parties' plan represented the creation of just another new, inoffensive hybrid

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*Tape or Accountability: Privatization, Public-ization, and Public Values*, 15 CORNELL J.L. & PUB. POL'Y 111, 151 (2006) (arguing against privatization as means for regulating public matters); Jon D. Michaels, *All the President's Spies: Private-Public Intelligence Partnership in the War on Terror*, 96 CAL. L. REV. 901, 904 (2008) (illustrating use of private sector to combat "War on Terror"). The law has evolved to permit "state action" claims against private parties engaged in a public function. *See, e.g.*, Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 291 (2001) (holding private non-profit organization regulating high school sports was state actor); Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 993–1016 (2000) (applying state action doctrine to private conduct in ADR context).

[130] Nancy A. Welsh & Bobbi McAdoo, *Eyes on the Prize: The Struggle for Professionalism*, DISP. RESOL. MAG., Spring 2005, at 13, 14 (disclosing judge's response to confidentiality concerns raised when judge is both mediator and adjudicator).

[131] *See* Elizabeth S. Stong, *Some Reflections from the Bench on Alternative Dispute Resolution in Business Bankruptcy Cases*, 17 AM. BANKR. INST. L. REV. 387, 395 (2009) (suggesting parties would be less willing to take unreasonable positions before judge serving as mediator). The line dividing mediations from judicial settlement conferences, for example, may be a fine one. *See generally* Wayne D. Brazil, *Hosting Settlement Conferences: Effectiveness in the Judicial Role*, 3 OHIO ST. J. ON DISP. RESOL. 1, 16–30 (1987) (discussing several different formats of judicial settlement conferences); Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 510–11 (1985) (describing judges' role at many settlement conferences as hybrid form of mediation-arbitration).

[132] *See* Welsh & McAdoo, *supra* note 130, at 14 (demonstrating difficulty for parties' to object to trial judge serving as mediator); *see also* James J. Alfini, *Risk of Coercion Too Great: Judges Should Not Mediate Cases Assigned to Them for Trial*, DISP. RESOL. MAG., Fall 1999, at 11, 11 (supporting judges serving as mediators unless judge is presiding over parties' trial); Frank E.A. Sander, *A Friendly Amendment*, DISP. RESOL. MAG., Fall 1999, at 21, 21 (concurring with Professor Alfini). This innovation particularly raises serious questions about the application of confidentiality or the mediation privilege to a process called mediation. *See* UNIF. MEDIATION ACT, § 3(b)(3) 7A Pt. III U.L.A. 110 (2003) (providing Act does not apply to mediation "conducted by a judge who might make a ruling on the case").

[133] They also tried to force the Asbestos Claimants into "volunteering" to assign 20% of their awards, upon electing to use the Alternative Dispute Resolution Process. There are some echoes here of the arguments made by employers, credit companies and others who insert mandatory arbitration clauses in their boilerplate agreements with employees, consumers, etc. *See* Thomas E. Carbonneau, *Arguments in Favor of the Triumph of Arbitration*, 10 CARDOZO J. CONFLICT RESOL. 395, 413 (2009) (summarizing party inequality problems present in arbitration arising from form clauses); Jean Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 12 (2001) (illustrating consumer and employee opposition to mandatory arbitration in contracts of adhesion); *see also* Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. ILL. L. REV. 695, 696–97 (2001) (outlining academic criticisms of consumer arbitration clauses).

process. To invoke a very old phrase, however, these parties tried to use mediation to 'have their cake and eat it too.' A careful judge,[134] apparently alerted by skilled lawyers representing self-interested insurers,[135] carefully examined the details of the proposed plan and its consequences and stopped the potential abuse of mediation, ADR more generally, the bankruptcy court, and federal statutes.[136]

In contrast, other cases signal that at least some bankruptcy judges do not fully understand the appropriate limits of the mediator's role. Indeed, some courts sometimes seem to view mediators largely as substitutes for trustees, special masters, arbitrators, magistrates or examiners—none of whom is a judge but all of whom have an evaluative or adjudicative function similar to that of a judge. Only mediators' enhanced ability to protect the confidentiality of what is said, done, and produced during the mediation process seems worth notice—and use.[137]

In 1998, for example, the Bankruptcy Court for the Middle District of Florida approved a joint motion to appoint a mediator.[138] In its opinion, the Bankruptcy

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[134] Reminiscent of Justice Scalia, with his dissent in *Hamdi*, noting that neither the plurality of the Supreme Court nor Congress nor the Executive had used or applied the law appropriately. Hamdi v. Rumsfeld, 542 U.S. 507, 576 (2003) (Scalia, J., dissenting) ("There is a certain harmony of approach in the plurality's making up for Congress's failure to invoke the Suspension Clause and its making up for the Executive's failure to apply what it says are needed procedures – an approach that reflects what might be called a Mr. Fix-it Mentality. The plurality seems to view it as its mission to Make Everything Come Out Right, rather than merely decree the consequences . . . .").

[135] Indeed, the court explicitly referenced the Insurers' arguments. *In re* Am. Capital Equip., 405 B.R. 415, 422–23 (Bankr. W.D. Pa. 2009) ("Debtor can obtain . . . proceeds . . . only if the Debtor's defense – or, more accurately, the Insurers' defense of the Debtor – with respect to such claim(s) is unsuccessful."). It is well beyond the scope of this Article to determine the strength of many of those arguments, particularly: whether Pennsylvania law was applicable here; whether Pennsylvania law effectively restricts parties from entering into settlements without their insurers' consent; whether such a settlement by the parties may be deemed unreasonable simply because the insurer has refused to pay such claims for 20 years, etc. *See id.* at 419–22 (discussing whether state law restricts debtor's ability to settle without insurers' consent and whether settlement was reasonable). I am also unable to determine the extent to which the judge's careful analysis was based upon the work of an astute judicial clerk.

[136] This cautionary tale may be useful fodder for those currently arguing that coverage of the law related to ADR should be "mainstreamed" in the law school curriculum. *See id.* at 425 (noting how settlement had to be rejected due to its creation through unintended use of alternative dispute resolution).

[137] *See* Nancy A. Welsh, *Mediation Confidentiality in the U.S., in* MEDIATION EN VERTROUWELIJKHEID (MEDIATION AND CONFIDENTIALITY) (Hester Montree and Alexander Oosterman, eds., 3d ed., 2009); *see also* Carrie Menkel-Meadow, *Public Access to Private Settlements, in* WHATS FAIR: ETHICS FOR NEGOTIATORS 507, 507, 511 (Carrie Menkel-Meadow & Michael Wheeler eds., 2004) (analyzing how despite movement to require disclosure of settlement agreements dealing with issues of public concern, "confidentiality and secrecy are often needed" to allow for effective resolution of disputes when disclosure may damage parties involved and noting how potential for this damage promotes confidentiality, privacy, and immunity in the mediation setting); LEONARD L. RISKIN ET AL., DISPUTE RESOLUTION AND LAWYERS 328–41 (4th ed. 2009) (discussing how mediation requires confidentiality to promote effective resolution between parties and how Uniform Mediation Act of 2003 provides mediation communications are neither subject to discovery nor admissible in evidence except in very limited circumstances); Ellen E. Deason, *The Need for Trust as a Justification for Confidentiality in Mediation: A Cross-Disciplinary Approach*, 54 U. KAN. L. REV. 1387, 1387 (2006) (observing importance of confidentiality in mediation and describing how mediator's enhanced ability to protect mediation communications is apparent from state legislatures across our nation taking steps to protect confidentiality in this setting).

[138] *See In re* Sargeant Farms, Inc., 224 B.R. 842, 844 (Bankr. M.D. Fla. 1998) (appointing mediator upon joint motion of parties to facilitate resolution of various issues within chapter 12 Bankruptcy case including

Court established the following procedures and terms for the mediation: the parties were to split the cost of the mediator's services, who was to be compensated based upon the magnitude and complexity of the proceedings; the mediator was to have the authority to order depositions or interrogatories to any person or entity that might possess information determined by the mediator to be necessary; *and* the mediation was to be covered by a broad confidentiality rule.[139] The court specified that its confidentiality provisions did not mean that evidence otherwise produced could not be used in "any further hearing in the case"[140] but confidentiality was to protect "what the parties and the mediator discuss[ed] and present[ed]"[141] in the course of the mediation. Giving a mediator the authority to order discovery—an authority generally reserved for judges, trustees, special masters, magistrates, and arbitrators—and coupling it with confidentiality covering all of what was to be discussed and presented in mediation seems to be a recipe for confusion and abuse of process.[142]

Similarly, when the Bankruptcy Court for the Northern District of Illinois[143] upheld a mediation and binding arbitration clause within a contract for the provision of auditing services, the court appeared to expect the mediator to possess the authority of an arbitrator.[144] The court appointed a trustee who filed an adversary

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valuation of debtor's property after parties were unable to select mediator pursuant to initial Court Order).

[139] *See id.* at 847–48 (determining mediation procedures will follow above guidelines and all other requirements delineated in Local Rule 9019-2 of United States Bankruptcy Court for Middle District of Florida).

[140] *Id.* at 848 (stating producible evidence could be used at further hearings despite court's that any exception to confidentiality under Local Rule 9019-2 would not apply in bankruptcy).

[141] *Id.*

[142] *See supra* note 137; *see also* Ellen E. Deason, *Enforcing Mediated Settlement Agreements: Contract Law Collides with Confidentiality*, 35 U.C. DAVIS L. REV. 33, 71–73 (2001) (discussing confusion and possible abuse in case where United States District Court for Northern District of California created its own exception to confidentiality rules, allowing mediator to testify due to allegations of duress and in interest of justice, which "justified the harms to the interests underlying the mediation privilege that would result from disclosure," despite fact California courts are not authorized to create exceptions to confidentiality by weighing necessity of disclosure).

[143] *See In re* Griffin Trading Co., 250 B.R. 667, 672–73 (Bankr. N.D. Ill. 2000) (ordering stay of adversary proceeding between trustee and accounting firm when plain language of contract between debtor and accounting firm provided differences should be resolved by mediation or arbitration).

[144] *See id.* at 673 (citing AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 648, 650 (1986)) (noting heavy presumption in favor of arbitration and stating arbitrability will be left to arbitrator when parties have explicitly agreed to arbitration provision). Along with the mediation and arbitration clause, the contract set forth specific services that Checkers, an accounting firm, would perform for Griffin, the debtor. The contract included, among other provisions, the following: 1) auditing responsibilities; 2) making "specific inquires of management and others about the representations embodied in the financial statement;" 3) examining Griffin's control system to ensure the safety of assets and that "transactions are executed in accordance with management's authorization." *Id.* at 670. The contract also stated that any "differences concerning our services or fees" will be sent to mediation, then arbitration. *Id.* at 672. During the time Checkers was auditing Griffin, Griffin's CFO was trading stocks with company money. *Id.* at 670. Although the auditors asked the CFO about a suspicious account, they did not investigate further. *Id.* A year after the audit, Griffin filed for chapter 7 protection after the CFO came forward and admitted to losing approximately $2,000,000. *Id.* at 671. Once appointed, the trustee filed a complaint against Checkers for professional negligence and breach of contract. *Id.* at 669.

complaint for professional negligence and breach of contract against Checkers, the organization that provided the auditing services.[145] The court held that the plain language of the contract required the use of mediation, then arbitration, and, therefore, the parties were bound by the clause.[146] More significantly for the purposes of this Article, the court stated "if the parties clearly and unmistakably agree to arbitrate, then the question of arbitrability is for an arbitrator."[147] Presumably, the court also understood that the question of mediability would be for the mediator.

Some courts' apparent confusion regarding the appropriate limits that should be placed upon the role of the mediator also has emerged in a couple of cases in which courts have had the opportunity to require and affirm the determinations of mediators. In *Hickox v. Friedland (In re HBLS, L.P.)*,[148] the Bankruptcy Court for the Southern District of New York determined that a dispute arising out of a mediation agreement should be submitted to the mediator for a decision and the court then deferred to that decision.[149] The facts, as so often seems to be the case in corporate reorganizations, are a little complicated. In 1993, HBLS filed for chapter 11 bankruptcy.[150] Charles Hickox ("Hickox") was a shareholder of HBLS and two other corporations, LIR and MBM.[151] The three corporations ran a resort together and were known as "Resort Entities."[152] Prior to HBLS's chapter 11 filing, it was in litigation with another group headed by Dion Friedland (for the purposes of this Article, also known as "Friedland Group").[153] With the help of a court-appointed mediator, HBLS and Friedland Group reached a settlement of their lawsuit. Included in the agreement was a "resolution clause" that stated that "any dispute or determinations arising under, relating to or in connection with this Settlement Agreement, its interpretation, performance or enforcement shall be determined solely and exclusively by the Mediator, whose decision shall be final and binding and non-appealable."[154]

The Resort Entities defaulted on a payment agreed on in the "Settlement Agreement" and after a number of disputes, the mediator made a final award to the Friedland Group.[155] Under the Settlement Agreement, the final award was to have the same force and effect as a final arbitration award due to the language of the "resolution clause."[156] The same day that the bankruptcy court adopted the

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[145] *Id.* at 669–70.

[146] *Id.* at 673. "The heavy presumption in favor of arbitration shall be extended when there is a possibility that a dispute is covered by an existing, valid arbitration clause." *Id.*

[147] *Id.* at 674 (citing *AT&T*, 475 U.S. at 649).

[148] 01 Civ. 2025, 2001 U.S. Dist. LEXIS 19112 (S.D.N.Y. Nov. 13, 2001).

[149] *Id.* at *17–18.

[150] *Id.* at *4–5.

[151] *Id.* at *5.

[152] *Id.* at *5.

[153] *Id.* at *4 (recalling HBLS had been sued for defaulting under stock purchase agreement with Friedland).

[154] *Id.* at *8.

[155] *Id.* at *9–12.

[156] *Id.* at *8 (noting Settlement Agreement "shall be determined solely and exclusively by the Mediator, whose decision shall be final and binding and non-appealable").

mediator's final award, Friedland moved for entry of a deficiency judgment.[157] Hickox opposed this motion as against LIR and MBM, claiming that under the Settlement Agreement, only HBLS was liable to Friedland Group. After some extended procedural wrangling,[158] the Bankruptcy Court submitted the specific issue of LIR's and MBM's liability to the mediator. The mediator wrote a decision declaring HBLS, LIR and MBM jointly and severally liable under the Settlement Agreement. The bankruptcy court confirmed the mediator's award on the basis that it was not in manifest disregard of the law[159] and reinstated a deficiency judgment that it had entered earlier.

Hickox appealed to the district court, claiming that by seeking a deficiency judgment, Friedland had waived the right to have the mediator arbitrate[160] the claim and also that the mediator's award was in error. As to the latter issue, the district court determined that it had to "decide *de novo* whether the mediator's ruling was in manifest disregard of the law."[161] According to the court, there was "no basis to overturn the mediator's award" because: 1) Hickox had attacked the Settlement Agreement only on the merits and failed to allege the mediator's manifest disregard of the law; 2) "the Mediator's interpretation of the terms of the Settlement Agreement is not so clearly inconsistent with the Agreement's plain terms that the Mediator could be said to have manifestly disregarded the law;" and 3) the Mediator had firsthand knowledge of the parties' spirit and intent and had found that the parties had conducted themselves as if they intended to make LIR and MBM liable.[162]

The most notable points here are that both the bankruptcy court and the district court relied on a "mediator" to arbitrate and then applied a deferential[163] standard of review that has been fashioned specifically for arbitration to this "mediator's award."

Similarly, a court upheld a mediator's determination made in *In re Eagle-Pitcher Industries, Inc.*[164] The creditors and debtor in a chapter 11 proceeding had

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[157] *Id.* at *13.

[158] *Id.*, at *10–11 (highlighting liability dispute over expenses incurred from collateral shares sale by Mediator). The Bankruptcy Court rejected Hickox's initial argument and entered a deficiency judgment declaring HBLS, LIR, and MBM jointly and severally liable to Friedland. *Id.* at *15. Hickox appealed this ruling to the United States District Court for the Southern District of New York. *Id.* Due to a lack of clarity in the record regarding the presentation of the issue to the mediator and the basis for the Bankruptcy Court's decision, the District Court remanded the case back to the Bankruptcy Court, which then held another hearing, specifically submitted the issue of LIR's and MBM's liability to the mediator, and ultimately affirmed the mediator's decision finding joint and several liability. *Id.* at *16–18.

[159] *Id.* at *31–32.

[160] *Id.* at *18. This is a bit oxymoronic.

[161] *Id.* at *10.

[162] *Id.* at *10–12.

[163] See Hall Street Assocs. v. Mattel, Inc., 128 S. Ct. 1396, 1404 (2008) (calling "manifest disregard" into question by stating that it may not be new ground for review but way to refer to all of standards collectively); Bosack v. Soward (*In re* Arbitration Between Bosack), 573 F.3d 891, 899 (9th Cir. 2009) ("Arbitrators exceed their powers when they express a 'manifest disregard of law,' or when they issue an award that is 'completely irrational.'").

[164] 176 B.R. 143 (Bankr. S.D. Ohio 2004).

difficulties creating a reorganization plan, so the court appointed a "mediator" to determine if the negotiations were at an impasse. With the help of the mediator, the parties began to make progress towards a consensual plan. As part of the process, the mediator met with "the active parties in sharpest disagreement."[165] He did not involve two of the creditor committees. When the agreement between the "active parties" was announced to the other two committees, one committee made a counterproposal.[166] The mediation stalled. The mediator indicated his intent to send a letter to the judge stating "at least for the time being, negotiations are at an impasse."[167] Several weeks later, however, the mediator sent a "clarifying" letter to counsel stating that they "should not consider those letters as declaring an impasse."[168] In the meantime, the two excluded creditor-committees had filed motions aimed at ending the period of exclusivity.[169] In order to succeed on these motions, they were required to show cause, such as delay by the debtor as a tactical device or another action in bad faith. One committee argued that it had been treated unfairly by being left out of the mediation and that this constituted sufficient cause.[170] The court responded: "In the present bankruptcy case, all of the constituencies acquiesced both in the initiation of mediation, and the selection of the mediator. The mediator has expressed the view that impasse has not occurred . . . . This court sees no reason to question the judgment of the mediator on this score."[171] The standard of review used by the court here is unclear but it certainly appears deferential. The court upheld the determination of the mediator and refused to terminate the period of exclusivity.[172]

The bankruptcy cases described here suggest that bankruptcy courts and repeat players are exhibiting some confusion regarding the appropriate roles of mediation and mediators. Further, these cases suggest that bankruptcy courts and repeat players may wish to seek neutrals who possess *both* consensual skills and adjudicative authority. This Article will now turn to the evolution of divorce and child custody mediation and the role of "traditional neutrals" in that context, who may be mining the courts' experience with mediation in order to develop innovative and tailored hybrid procedures.

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[165] *Id.* at 146.

[166] *Id.* (noting Official Unsecured Creditors' Committee "responded with a counterproposal, the contents of which, consistent with the requirement of the mediation order that the court not be informed of the proceedings before the mediator" were not disclosed to court).

[167] *Id.*

[168] *Id.*

[169] *Id.* at 146, 148 (noting objective of both motions was to propose competing plans). One was a motion "For Order Terminating or Modifying Exclusivity Period to Permit Filing of Alternative Reorganization Plan," and the second was a motion "To Declare Mediation Impasse." *Id.* at 144–45.

[170] *Id.* at 146 (claiming entitlement to level playing field in mediation plan).

[171] *Id.* at 148.

[172] *Id.* at 148–49 (finding no cause to doubt assessment of mediator since all parties agreed to both mediation and selection of mediator).

## V. EVOLUTION OF DIVORCE AND CHILD CUSTODY MEDIATION

For many years, divorce and child custody mediation was viewed as the one area of court-connected mediation that could be characterized as primarily—though not exclusively—elicitive or facilitative.[173] Particularly in custody matters, it made so much sense that the parents would want to play the primary role in determining how to care for and support their children after a divorce—and it made so much sense that the courts would want to support parents in this preference.[174] Research has affirmed that divorce and child custody mediation results in higher rates of compliance, fewer returns to the courts with post-divorce disputes, and more significant relationships between children and both of their parents.[175]

Recently, however, a few researchers[176] and well-respected mediation advocates and leaders[177] have begun to highlight concerns and challenges for court-connected divorce and child custody mediation. It appears that the process has evolved into something that is not as consensual as it once was.[178] Largely, this evolution is due

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[173] *See* Nancy A. Welsh, *Reconciling Self-Determination, Coercion, and Settlement in Court-Connected Mediation*, *in* DIVORCE AND FAMILY: MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS 420 (Folberg, et. al eds., 2004) [hereinafter Welsh, *Reconciling Self-Determination*]. *But see* Isolina Ricci, *Court-Based Mandatory Mediation: Special Considerations*, *in* DIVORCE AND FAMILY: MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS 397 (Folberg, et. al eds., 2004) (describing "recommending" model of mediation in California, which made divorce and child custody mediation mandatory in 1981).

[174] *See* Ann L. Milne, *Mediation and Domestic Abuse*, *in* DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS 304 (Folberg, et al. eds., 2004).

[175] *See* Joan B. Kelly, *A Decade of Divorce Mediation Research: Some Answers and Questions*, 34 FAM. & CONCILIATION CTS. REV. 373, 377 (1996) (stating mediation agreements have higher rate of compliance than adversarial process agreements); Joan B. Kelly, *Family Mediation Research: Is There Empirical Support for the Field?*, 22 CONFLICT RESOL. Q. 3, 28 (2004) ("Mediation has given evidence of its power to settle complex, highly emotional disputes and reach agreements that are generally durable.") [hereinafter Kelly, *Family Mediation*]; Peter Salem, *The Emergence of Triage in Family Court Services: The Beginning of the End for Mandatory Mediation?*, 47 FAM. CT. REV 371, 373–74 (2009) (discussing advantages of mediation such as quick settlement, agreement satisfaction, and improved family relationships); *see also* Ralph A. Peeples et al., *It's the Conflict, Stupid: An Empirical Study of Factors that Inhibit Successful Mediation in High-Conflict Custody Cases*, 43 WAKE FOREST L. REV. 505, 528 (2008) (finding agreements reached through mediation were more stable than court orders).

[176] *See* Salem, *supra* note 175, at 374 (citing CONNIE J. BECK & BRUCE DENNIS SALES, FAMILY MEDIATION: FACTS, MYTHS, AND FUTURE PROSPECTS (2001) (noting limited research that has been done on family mediation); *see also* Connie J. Beck et al., *Research on the Impact of Family Mediation*, *in* DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS 447 (Jay Folberg, et. al eds., 2004).

[177] *See* Hon. Leonard Edwards, *Comments on the Miller Commission Report: A California Perspective*, 27 PACE L. REV. 627, 628, 656 (2007) (advocating mediation for New York while identifying challenges in California, including one hour mediations as result of resource and funding issues); Kelly, *Family Mediation*, *supra* note 175, at 29 (acknowledging reduced time for mediation); Salem, *supra* note 175, at 385–86, 385 n. 1 (discussing differing methods of alternative dispute resolution in family setting employed by multiple jurisdictions in different regions and suggesting adaptation of type of mediation used based on context); Donald T. Saposnek, *Commentary: The Future of the History of Family Mediation Research*, 22 CONFLICT RESOL. Q. 37 (2004) (response to article by Joan Kelly articulating mediation "works, but not quite as comprehensively as . . . [was] hoped"). *But see* Steve Baron, *A Response to Peter Salem's Article*, 48 FAM. CT. REV. (forthcoming 2010); Hugh McIsaac, *A Response to Peter Salem's Article*, 48 FAM. CT. REV. (forthcoming 2010).

[178] Or perhaps simply appeared to be. *See* Salem, *supra* note 175, at 378 (noting outside findings suggesting mediators are pushing settlement rather than providing options).

to the phenomenon of increasing and more difficult caseloads, static or reduced hiring of mediators, static or reduced court funding, and no reduction in the public's or courts' expectations for the prompt disposition of cases.[179]

The divorce and child custody mediation that produced such positive results in the 1980s took time—perhaps five to six hours per case—with each mediation session lasting a couple of hours. Increasingly, due to increased caseloads and static hiring, divorce and child custody mediations must be completed in an hour.[180] Inevitably, in order to achieve settlement, mediators are tempted to adopt more evaluative, directive and even coercive approaches.[181] There is a possibility that these settlements still reflect the parents' "self-determination," but that seems unlikely.

In addition, the people being served by divorce and child custody mediation may be becoming more difficult—and expensive—for courts to handle.[182] Throughout the country, courts note the increase of *pro se* litigants.[183] More parties require translation services.[184] There is also more reporting of domestic abuse, child abuse, and substance abuse in divorce and child custody matters.[185]

Finally, though, mediation is no longer the only process besides traditional litigation that family courts can provide. This is especially true for disputing parents who want, or can benefit from, the opportunity to be directly involved in the reorganization of their family but who also need help with this profoundly important change. In some courts,[186] caring and pragmatic court administrators,

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[179] *See id.* at 377 (discussing "question as to whether court-connected mediation continues to deliver on the promise of family self-determination").

[180] *See id.* at 379 (referencing opinion that insufficient time is being offered for parents to effectively resolve differences) (citation omitted); *see also* Edwards, *supra* note 177, at 650 ("Some mediation services can only offer the parents an hour or even less to resolve their differences."); Kelly, *Family Mediation, supra* note 177, at 29 (suggesting client dissatisfaction with mediation might "reflect[ ] a more rushed or coercive mediation process").

[181] *See* Salem, *supra* note 175, at 378–79 (discussing directive and evaluative approaches for settlements in divorce and child custody cases to deal with timing issues); *see also* Welsh, *Reconciling Self-Determination, supra* note 173, at 427–34 (describing Florida case of *Vitakis-Valchine v. Valchine*).

[182] *See* Salem, *supra* note 175, at 381–82 (acknowledging families are exposed to increased financial burdens when they are required to participate in unneeded mediation).

[183] Kimberlianne Podlas, *Broadcast Litigiousness: Syndi-Court's Construction of Legal Consciousness*, 23 CARDOZO ARTS & ENT. L.J. 465, 498 (2005) (acknowledging increasing number of *pro se* litigants).

[184] *See* JAMES C. DUFF, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, 2007 ANNUAL REPORT OF THE DIRECTOR 35 (2007) (noting 17% increase in number of court events requiring interpreters across nation from 2006 to 2007).

[185] *See* Saposnek, *supra* note 177, at 38 (discussing increase in serious problems reported during divorce cases from 1980s to present day). Importantly, it is not clear whether the actual incidence of these problems is increasing, whether people are more willing to admit to dealing with such issues, or whether court personnel are more likely to detect issues of abuse now than previously. *See* JUDICIAL COUNCIL OF CALIFORNIA, ADMINISTRATIVE OFFICER OF THE COURTS, RESEARCH UPDATE: DIFFICULT CASES IN CALIFORNIA COURT-BASED CHILD CUSTODY MEDIATION 2 (2003) (reporting lack of systematic method used to collect statistical information regarding domestic violence and drug abuse in divorce mediation).

[186] *See, e.g.*, JUDICIAL COUNCIL OF CALIFORNIA, *supra* note 185, at 9 n.3 (stating only 35% of California family courts provide ADR options besides mediation). It is important to note that these alternatives are not available in all courts. For a variety of reasons, many courts can offer only mediation as an alternative. My thanks to Peter Salem for this clarification.

counselors, and judges have been able to develop new alternatives that explicitly bridge the divide between elicitive/facilitative/consensual approaches in mediation on the one hand and evaluative/directive/adjudicative procedures approaches on the other. Examples include:

- Conflict resolution conference—a "confidential dispute resolution process [that] . . . is more directive than mediation, and may include information gathering and recommendations on the part of the family relations counselor"[187]
- Non-confidential dispute resolution and assessment—a "hybrid process that includes negotiation and encourages agreements but, if necessary, includes assessment, child interviews, collateral information gathering and recommendations to the court"[188]
- Early neutral evaluation—a "confidential abbreviated process in which parties, accompanied by lawyers if represented, present their case to two evaluators who provide an early indication of their likely recommendation with the caveat that such recommendations are based on parties' ability to verify their claims and allegations"[189]
- Collaborative law—"an interest based negotiation approach to lawyer-assisted settlement negotiations that frequently incorporates mental health and financial professionals" as well as direct party participation in settlement negotiations and in which "lawyers withdraw if the case does not settle and proceeds to trial"[190]; and

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[187] Salem, *supra* note 175, at 385 n.1; *see* Peter Salem et al., *Triaging Family Court Services: The Connecticut Judicial Branch's Family Civil Intake Screen*, 27 PACE L. REV. 741, 753 (2006) (describing conflict resolution conference as "eight-week confidential service that blends the negotiation and mediation processes" in which no findings or recommendations are revealed by counselors if agreement is not reached).

[188] Salem, *supra* note 175, at 386 n.1 (citing Clarence Cramer, personal communication July 31, 2008). This hybrid, though very intriguing, has recently been discontinued. *See* E-mail from Peter Salem to Nancy Welsh (Sept. 27, 2009) (on file with author). The reasons for such discontinuance are unclear.

[189] Salem, *supra* note 175, at 386 n.1; *see* Daniel Forman, *Improving Asylum-Seeker Credibility Determinations: Introducing Appropriate Dispute Resolution Techniques into the Process*, 16 CARDOZO J. INT'L & COMP. L. 207, 234 (2008) (stating neutral evaluators may also assist in "developing a discovery schedule, streamlining issues for trial, or planning other settlement events"); Yvonne Pearson et al., *Early Neutral Evaluation: Applications to Custody and Parenting Time Cases Program Development and Implementation in Hennepin County, Minnesota*, 44 FAM. CT. REV. 672, 673 (2006) (describing Early Neutral Evaluation (ENE) as "2- to 3-hour" session in which each side, represented by its own attorney, present its case to two neutral evaluators, "one male and one female," who ask each side questions and give feedback to parties before attempting settlement negotiations); Frank E.A. Sander & Lukasz Rozdeiczer, *Matching Cases and Dispute Resolution Procedures: Detrained Analysis Leading to a Mediation-Centered Approach*, 11 HARV. NEGOT. L. REV. 1, 13, 20 (2006) (discussing helping parties reach settlement or preparing parties for trial based on strengths and weaknesses of each side's case as responsibilities of ENE evaluators).

[190] Salem, *supra* note 175, at 386 n.1; *see* Susan Daicoff, *Collaborative Law: A New Tool for the Lawyer's Toolkit*, 20 U. FLA. J.L. & PUB. POL'Y 113, 120–21 (2009) (describing contractual relationship among parties and lawyers in which attorneys agree to withdraw should case not settle and parties agree to "negotiat[e] in good faith, voluntarily disclos[e] information, maintain[ ] confidentiality . . . and refrain[ ] from litigative motions"); John Lande & Gregg Herman, *Fitting the Forum to the Family Fuss: Choosing Mediation,*

> • Cooperative negotiation agreements or cooperative law—"lawyer-assisted settlement negotiations that typically incorporate voluntary information sharing, interest based negotiation, direct involvement of clients, confidential negotiations, children's best interest as an essential ingredient and disincentives (not including withdrawal of counsel) to litigation."[191,192]

These procedures involve custody investigators, court staff, lawyers—the "traditional neutrals" and professionals who may have felt (or have actually been) supplanted by mediators. The "traditional neutrals" did not go away. They regrouped, learned new approaches and skills, and adapted to respond to both mediation's challenge and the needs of the many parties still turning to the courts for help.

Some innovative family courts seem to be adopting something akin to the multi-door courthouse. For example, some courts that formerly required all divorcing parties to attempt mediation before they could proceed to other, more intrusive and adjudicative procedures, now require divorcing parties to engage in an interactive process with a trained court services counselor. Together, the parties and the counselor use a research-based screening and assessment instrument, supplemented by the counselor's clinical judgment, to determine the most appropriate procedure.[193] This is called the "triage" model of delivering court services, as contrasted with the "tiered" service model.[194]

It may seem that all of this innovation represents a repudiation and rejection of mediation. It is not. Rather, it represents a recognition that mediation is not, cannot be, and never should have been expected to be, the cure-all for every ill. Like most

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*Collaborative Law, or Cooperative Law for Negotiating Divorce Cases*, 42 FAM. CT. REV. 280, 282–83 (2004) (elaborating upon process in which both sides enjoy strong advocacy while striving for collaboration through negotiation with help of coaches and specialists who can educate and aid parties during negotiation); *see also* MACFARLANE, *supra* note 60, at 89 (positing nature of collaborative law retainer agreement shifts attorneys' strategy and focus by taking option of litigation off of table); Lande, *supra* note 65, at 626–28 (citing "disqualification agreement" as lynchpin of increasingly popular ADR method).

[191] Salem, *supra* note 175, at 386; *see* Lande, *supra* note 65, at 632 n. 62 ("Cooperative Law is a process that includes the features of CL other than the disqualification agreement.").

[192] Other more innovative procedures that do not quite bridge this divide include interdisciplinary arbitration panels, psycho-educational programs, and parenting coordination. Salem, *supra* note 175, at 371.

[193] *See id.* at 380 ("In a triage system, parents may complete an initial screen and/or participate in an interview, and agency representatives then help identify the service they believe will best meet the needs of the family. The determination of services may be based on a combination of pre-determined criteria, clinical judgment and feedback from parents . . . ."); Salem et al., *supra* note 187, at 757–64 (2007) (outlining Connecticut's Family Civil Intake Screen and describing empirical bases and how counselors exercise clinical judgment in process); *see also* Nancy A. Welsh, *The Future of Mediation: Court-Connected Mediation in the U.S. and the Netherlands Compared*, 1 FORUM VOOR CONFLICT MANAGEMENT 19, 21 (2007) (noting some "Dutch judges in the pilot sites . . . distributed a 'self test' to all parties to encourage them to consider whether mediation might be appropriate for their case.") [hereinafter Welsh, *Future of Mediation*].

[194] *See* Salem, *supra* note 175, at 371–372 (explaining arguments in favor and against triage model in comparison to tiered model).

organisms, mediation requires structural protection in order to achieve its potential—*e.g.*, sufficient time for deliberation; mediators who are not afraid of the consequences that may be visited upon them if mediating parties refuse to settle; authority to refuse service to parties who have demonstrated their inability or unwillingness to benefit from participation in the process; and complementary services to which mediators may refer.

Mediation blazed the way in creating an alternative to traditional litigation in the family courts, but it has now been joined by other procedures, customized to respond to the characteristics and circumstances of those who must use them[195] in order to receive judicial permission to divorce and parent their children.[196] In at least some pioneering courts, there are now several paths to the resolution of divorce and child custody matters, hopefully with all processes sharing a commitment to the provision of an experience of justice.[197]

## VI. LESSONS FOR BANKRUPTCY MEDIATION

There is no doubt that mediation offers unique advantages for the resolution of disputes—the ability to deal with *all* of the issues, not just those that come within the jurisdiction of a particular court; the opportunity to exploit the parties' knowledge and skills, rather than relying exclusively on the lawyers, to develop creative, customized solutions; the opportunity to experience those moments of grace when people suddenly see each other and understand something about each other and their situation that they did not understand before.

And yet, the "fit" between mediation—especially the facilitative, elicitive, and transformative models of mediation—and the mass processing of cases in civil litigation has often been an uneasy one. Perhaps this model of mediation has been expected to do too much. The recent emergence of new, hybrid processes in the divorce and child custody area that use the knowledge, expertise, and adjudicative

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[195] *See* Goldberg v. Kelly, 397 U.S. 254, 268–69 (1970) ("The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard.").

[196] *See* Boddie v. Connecticut, 401 U.S. 371, 382–83 (1971) (requiring access to courts for indigent parties because states have monopoly on ability to adjust this fundamental human relationship). These procedures also may reflect judicial acknowledgement of the need to adapt to "the exigencies of the circumstances" that burden courts. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 533–34 (2004) (explaining that exigencies in enemy combatant proceedings might allow "[h]earsay, for example, . . . to be accepted as the most reliable available evidence from the Government").

[197] *See* Brazil, *supra* note 131, at 1 (noting importance "for judges to think systematically and carefully" regarding their role in settlement negotiation and providing pros and cons of different formats for settlement conferences); Jean R. Sternlight, *The Rise and Spread of Mandatory Arbitration as a Substitute for the Jury Trial*, 738 U.S.F. L. REV. 17, 20–21 (2004) (discussing failure of "lawyers, courts, and policy makers" to take sufficient notice of mandatory arbitration's denial of jury trial to claimants); Welsh, *Future of Mediation, supra* note 193, at 22 (explaining that "the people and government of The Netherlands seem to support the legitimacy of multiple and different, freely-chosen paths to justice . . . [including] dispute resolution paths"); *see also* Welsh, *Making Deals, supra* note 46, at 861 ("The experience of justice should not be set aside as some 'sweet old fashioned notion' that has outlived its usefulness to modern, settlement-directed civil litigation. Instead, mediation . . . should be allowed to demonstrate that justice can and should have *everything* to do with the 'world of bargaining' . . . .").

authority of "traditional neutrals" while also incorporating some of mediation's elements—aspects of self-determination, the opportunity for respectful but less formal voice and consideration, the neutral's skillful facilitation of dialogue and mutual consideration between the parties—suggests that bankruptcy judges, repeat players, and policy makers should look at all of their options and their current personnel before settling *exclusively* upon mediation and mediators as 'the brand new thing' and the only meaningful 'alternative' to traditional litigation.

It is beyond the scope of this Article to examine in detail the efficacy of potential hybrids in the bankruptcy context. Based on the experience of divorce and child custody mediation, however, a few possibilities come to mind. Currently, trustees administer debtors' estates in chapter 7 matters but assume this role in chapter 11 matters only in extreme situations in which creditors have completely lost confidence in the honesty or competence of debtors-in-possession.[198] Perhaps trustees could play a useful, potentially less intrusive role before situations have become so dire. The procedure of non-confidential dispute resolution and assessment, for example, suggests the possibility that trustees could step in to facilitate negotiations between the debtor and worried creditors, conduct an assessment, interview employees and customers, gather other information, and ultimately make a recommendation to the court *before* wresting control from the debtor-in-possession. Examiners might be empowered to begin offering a confidential, truncated process in which representatives of the debtor and creditors present their case to two examiners who then provide a tentative recommendation, recognizing that this recommendation is based on the debtor's and creditors' ability to substantiate their claims and defenses. Examiners might even follow this procedure with an opportunity for facilitated negotiation.[199] Of course, bankruptcy courts would need to ensure that trustees and examiners have sufficient training to play any such new roles and receive appropriate compensation. This presents an obvious challenge, particularly at a time of reduced resources. Outside the courts, some bankruptcy lawyers may wish to explore the application of collaborative or cooperative law to the negotiation of reorganization plans.

These broad brush ideas only begin to suggest the ways in which the divorce and child custody area might offer intriguing potential models that participants in the bankruptcy field may wish to investigate. Obviously, there are significant differences between family law and bankruptcy law. These differences need to be acknowledged, and, even if a divorce and child custody hybrid looks sufficiently

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[198] *See* Edward Janger & Jeff Ferriell, UNDERSTANDING BANKRUPTCY 143, 151 (2d ed. 2007) (There is no trustee in chapter 11 reorganization cases. Instead, the debtor's estate is administered by the debtor-in-possession, who has all of the same rights, powers, and duties of a trustee. A trustee is appointed only for cause, which includes "fraud, dishonesty, incompetence, or gross mismanagement" of the debtor or its assets, or if the court determines that the appointment of a trustee is "in the interest of creditors"); *see also* 11 U.S.C. § 1104(a) (2006) (allowing court to order trustee to be appointed to monitor fraud and mismanagement if it is in best interest of estate and creditors).

[199] *See* Joshua D. Rosenberg & H. Jay Folberg, *Alternative Dispute Resolution: An Empirical Analysis*, 46 STAN. L. REV. 1487, 1489–90 (1994) (articulating purpose of early neutral evaluation process is to encourage both parties to evaluate strength of case, identify areas in dispute, and encourage negotiations).

promising to merit investigation and adoption, adaptations almost certainly will be required.[200] This Article is meant only to stimulate curiosity and encourage further and deeper consideration of the possibilities.

## CONCLUSION

Why should we care about the confusing and conflicting uses of mediation that have surfaced in bankruptcy matters? If the process settles case, why mess with it? The response to this question is two-fold. First and simply, mediation should mean something. People entering into the process should know what to expect, how the mediator will behave toward them, and whether use of their statements and behaviors will be protected by confidentiality or the mediation privilege. Multiple paths to resolution permit parties to choose the path most appropriate to their needs and preferences.[201]

Further, it is only if mediation and mediators have a recognized (and thus valued) function and form that they can play their role and permit other processes and actors to play theirs. Ultimately, the mediation process is then more likely to receive the support it needs in order to fulfill its promise and provide an experience of justice for all of those who participate in it.

Many years ago, Owen Fiss,[202] Tina Grillo[203] and Richard Delgado[204] offered serious critiques of settlement in general and mediation in particular. For reasons that now seem almost sweetly naïve, mediation advocates and program designers thought their (or more accurately, our) good intentions would inoculate mediation from the challenges presented by reality. As a result, some of the fears expressed by Fiss, Grillo and Delgado have been realized. Today, if mediation advocates in the bankruptcy context are willing to learn from others' her/history, they can choose to structure the use of bankruptcy mediation more protectively. Hubris is said to characterize every new generation. Honestly, hubris characterizes every generation,

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[200] For example, it would be very important to learn why non-confidential dispute resolution and assessment has been discontinued recently. That information could lead to rejection of this model—or improvement upon it. *See* Riskin, *Understanding Mediators, supra* note 37, at 11 (emphasizing mediation techniques cannot be generalized because every dispute or transaction is different and varies greatly within each area of law).

[201] *See* Shestowsky & Brett, *supra* note 76, at 65–66 (noting parties in legal disputes can resolve conflict through negotiation, mediation, trial arbitration, and various other options).

[202] Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984) (arguing ADR should not be allowed because parties are often coerced to settle and absence of judicial involvement raises various concerns); *see also Against Settlement: Twenty-Five Years Later*, 78 FORDHAM L. REV. (forthcoming Dec. 2009).

[203] Tina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1045, 1549–50 (1991) (opposing mandatory family mediation because it requires parties to interact in forced setting, women often feel obliged to maintain connection with ex-partner during process, and it is potentially destructive because parties were once involved in intimate relationship).

[204] Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1387–88, 1391 (1985) (stating ADR does little to counter historical and subconscious prejudice, and arguing judicial system should be used to encourage fairness and deter prejudice because such systems are formal, subject to more control, and can reduce prejudice).

whether young or old. The real question is whether, despite our hubris, we are willing to listen and learn from each other.