THE USES OF MEDIATION IN CHAPTER 11 CASES

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INTRODUCTION

To paraphrase Neil Diamond,[1] at least we know where it began. Using mediation in bankruptcy started in San Diego, in 1986.[2] But what else do we know? Not that much, perhaps.

Start with mediation itself. Defining mediation, in or outside of bankruptcy, is not easy. In and outside of bankruptcy, what mediation entails varies greatly. Mediation can be very simple, consisting of two or more people united by a grievance, led through a negotiation by a neutral third party who lacks authority to impose a resolution.[3] Mediation in some contexts has a therapeutic aspect to it, particularly in family mediation.[4] As known by most lawyers, however, mediation means settlement mediation, in which the goal is simple: find a settlement to the dispute, using the assistance of a neutral third party.[5] Settlement mediation need not, but often does, have a more coercive flavor than other forms of mediation; the

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[1] NEIL DIAMOND, *Sweet Caroline, on* SWEET CAROLINE (Uni Records 1969).

[2] *See* STEVEN HARTWELL & GEORGE BERMANT, FED. JUDICIAL CTR., ADR IN A BANKRUPTCY COURT: THE MEDIATION PROGRAM IN THE SOUTHERN DISTRICT OF CALIFORNIA (1988) (assigning first mediators in bankruptcy proceeding in 1986); *see also* J. Thomas Corbett, *Mediation, Bankruptcy and the Bankruptcy Administrator*, 65 ALA. LAW. 410, 410 (Nov. 2004) (citing four sources allowing alternative dispute resolution procedures in bankruptcy cases); Jacob Ziegel, *What Can The United States Learn From The Canadian Means Testing System*, 2007 U. ILL. L. REV. 195, 203 (2007) (discussing revisions to Bankruptcy and Insolvency Act, allowing mediation of disputed payments).

[3] BLACK'S LAW DICTIONARY 1003 (8th ed. 2004) (defining mediation as "[a] method of nonbinding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution"); 4 AM. JUR. 2d *Alternative Dispute Resolution* § 7 (2009) (defining mediation); Larry Spain & Kristine Paranica, *Considerations For Mediation and Alternative Dispute Resolution for North Dakota*, 7 N.D. L. REV. 391, 391 (2001) (viewing mediation as a non-adversarial approach to resolving disputes).

[4] ALAN SCOTT RAU ET AL., PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS 304–05 (4th ed. 2006); Lewit v. Lewit, No. SX-06-DI-265, 2009 WL 2997037, at *1 (Super. Ct. V.I. Sept. 2, 2009) (showing common practice to send parties in divorce proceeding to mediation); Robert A. Baruch Bush et al., *Supporting Family Strength; The Use of Transformative Mediation in a Pins Mediation Clinic*, 47 FAM. CT. REV. 148, 163 (2009) (noting mediation strengthens families by allowing family members to address conflicts).

[5] *See* Jeffrey W. Stempel, *Beyond Formalism and False Dichotomies: The Need for Institutionalizing a Flexible Concept of the Mediator's Role*, 24 FLA. ST. U. L. REV. 949, 982 (1997) (observing parties benefit from presenting case to neutral third party); *see also* Elizabeth Chamblee Burch, *Procedural Justice in Nonclass Aggregation*, 44 WAKE FOREST L. REV. 1, 50 (2009) (claiming mediator can best incorporate all parties' goals by creating collaborative, harmonious environment); Jordan Hellman, *Racing for the Arctic? Better Bring a Flag*, 10 CARDOZO J. CONFLICT RESOL. 627, 640 (2009) (stating neutral third parties facilitate settlements acceptable to all parties).

parties mediate because they have been ordered to do so, usually by a court.[6] For all their differences, however, all types of mediation have at least two attributes in common: (1) they are led by a neutral third party who lacks the authority to impose a resolution, and (2) because the mediator lacks the authority to impose a resolution, any agreement reached by the parties will be voluntary.[7] If an agreement cannot be reached, an impasse will be declared.

Within bankruptcy, mediation varies as well, and it should. It varies by chapter, if only because the purposes of chapter 7 and chapter 11, for example, are different. In chapter 7, the concerns are orderly liquidation of the debtor's assets, and a fresh start.[8] In chapter 11, the concerns are different. Liquidation, partial or complete, of the debtor's assets may be involved, but the emphasis shifts to the preparation and confirmation of a plan that is "feasible."[9] The point is a simple one. Whether mediation, however defined, seems to work, or not work, in chapter 7 does not mean that mediation, however defined, actually works in chapter 11 reorganizations. How, and how widely, is mediation used in chapter 11 proceedings? When mediation is used, in what settings does it seem to work, and not work? These are the questions this paper addresses.

At first glance, the use of mediation, and other forms of alternative dispute resolution, should be a natural fit with bankruptcy. As other observers have noted, bankruptcy is itself a form of ADR.[10] The fact that the parties with a stake in a bankruptcy proceeding are unable to agree as to whether a challenged transfer is a

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[6] *See, e.g.*, N.C. GEN. STAT. § 7A-38.4A(d) (2009) (indicating mediated settlement conferences are required by courts); STEPHEN GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 147 (5th ed. 2007); Nancy Welsh, *The Place of Court-Connected Mediation in a Democratic Justice System*, 5 CARDOZO J. CONFLICT RESOL. 117, 134 (2004) (stating courts place decision-making power in hands of third parties).

[7] *See* Robert A. Baruch Bush, *Staying in Orbit, or Breaking Free: The Relationship of Mediation to the Courts Over Four Decades*, 84 N.D. L. REV. 705, 718 (2008) (stating "[t]he ultimate authority in mediation belongs to the parties . . ."); Douglas A. Henderson, *Mediation Success: An Empirical Analysis*, 11 OHIO ST. J. ON DISP. RESOL. 105, 127 (1996) (focusing on informal process where parties make ultimate decision, only to be assisted by third party); *see also* BLACK'S LAW DICTIONARY 996 (8th ed. 2004) (defining nonbinding dispute resolution as parties reaching "a mutually agreeable solution").

[8] *See* R. Stephen Painter, Jr., *Subprime Lending, Suboptimal Bankruptcy: A Proposal to Amend §§ 522(f)(1)(B) and 548(a)(1)(B) of the Bankruptcy Code to Protect Subprime Mortgage Borrowers and Their Unsecured Creditors*, 38 LOY. U. CHI. L.J. 81, 100 (2006) (stating "[b]y permitting the [c]hapter 7 debtor to keep her exempt assets, the Bankruptcy Code provides the debtor a core group of assets with which to make a fresh financial start."); *see also* 11 U.S.C. § 725 (2006) (discussing disposition of property in chapter 7 proceeding); Ryan J. Donohue, Comment, *Thou Shalt Not Reorganize: Sacraments for Sale*, 22 EMORY BANKR. DEV. J. 293, 305–06 (2005) (comparing chapter 11 and chapter 7 liquidation).

[9] *See In re* Iverson, 24 B.R. 227, 234 (Bankr. W.D. La. 1982) (confirming plan due to its feasibility); *see also* 11 U.S.C. § 1129(a) (2006) (setting forth requirements before court should confirm plan); *In re* Gillette Assocs., 101 B.R. 866, 882 (Bankr. N.D. Ohio 1989) (indicating debtors' proposed plan confirmed because it was "fair and equitable").

[10] *See, e.g.*, ROBERT J. NIEMIC ET AL., FED. JUDICIAL CTR., GUIDE TO JUDICIAL MANAGEMENT OF CASES IN ADR at III.D (2001) ("[B]ankruptcy itself is a form of alternative dispute resolution."); *see also* William J. Woodward, Jr., *Evaluating Bankruptcy Mediation*, 1999 J. DISP. RESOL. 1, 5 (1999) (observing mediation's "relatively-permanent" overlap with bankruptcy); Jacob Aaron Esher, *ADR Comes To Bankruptcy*, 9 DISP. RESOL. MAG. 29, 29 (2003) ("[S]everal basic attributes of bankruptcy protection support and strengthen an ADR procedure for resolving claims.").

preference, or whether a particular claim or group of claims should be allowed, or whether a plan of reorganization satisfies one or more of the requirements for confirmation does not mean that the issue must be resolved by a trial or formal hearing, replete with discovery, pretrial motions, and a determination by the bankruptcy judge.[11] If limiting the overhead costs of a bankruptcy proceeding is important, then mediation and other forms of ADR ought to have a place in bankruptcy.[12]

It is rarely that simple, of course. Sometimes delay seems attractive to one or more parties – perhaps the debtor, perhaps one or more creditors. There is never a guarantee, either, that the use of mediation will reduce the costs of the proceedings. There is instead the risk that mediation will only result in more costs incurred by creditors and the estate, in the form of additional attorney time, the cost of the mediator, and, perhaps, delay in the resolution of the case.

The literature on the use of mediation in chapter 11 proceedings is quite sparse.[13] The studies that exist tend to discuss mediation in bankruptcy proceedings generally; the specific challenges that a chapter 11 proceeding might pose are rarely the subject of separate scrutiny.[14] When mediation in chapter 11 is written about, the discussion tends to be about a single case, and not conducive to generalization.[15]

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[11] *See, e.g.*, Corbett, *supra* note 2, at 410 (noting cost and time-consuming nature of litigation, advocating for mediation in the alternative); Lester J. Levy, *FAQ On Bankruptcy Mediation*, 22 AM. BANKR. INST. J. 1, 1 (Apr. 2003) (discussing how mediation may help cut transactional costs and shorten bankruptcy proceedings); 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, 1261–64 (1995) (describing burgeoning use of Alternate Dispute Resolution methods as response to inefficiencies and costs of litigation).

[12] *See, e.g.*, Michael S. Wilk & Rik H. Zafar, *Mediation of a Bankruptcy Case*, 22 AM. BANKR. INST. J. 12, 12, 58 (May 2003) (indicating cost of mediation, even in complex cases, is relatively low compared to the cost of litigation); Stephen R. Wirth & Joseph P. Mitchell, *A Uniform Structural Basis for Nationwide Authorization of Bankruptcy Court-Annexed Mediation*, 6 AM. BANKR. INST. L. REV. 213, 213–14 (1998) (acknowledging increased use of mediation in bankruptcy as method to reduce high costs and inefficiencies of litigation); Woodward, *supra* note 10, at 5 (analyzing results from court-sponsored mediation program to indicate how mediation saves participants money).

[13] Good studies of mediation in bankruptcy do exist, however. *See, e.g.*, HARTWELL & BERMANT, *supra* note 2, at 1 (analyzing development of mediation program in Bankruptcy Court of Southern District of California)*;* Mabey et al., *supra* note 11, at 1265–69 (reviewing decisions and orders in bankruptcy proceedings utilizing ADR, current characteristics of ADR programs used in bankruptcy proceedings, and statutory authority for imposition of ADR in bankruptcy proceedings); Robert J. Niemic, *Mediation in Bankruptcy*, 18 AM. BANKR. INST. J. 1, 1 (Sept. 1999) (examining survey conducted by Federal Judicial Center intended to identify problems in mediation as used in bankruptcy context); Woodward, *supra* note 10, at 4 (demonstrating value of "local" bankruptcy studies by examining Eastern District of Pennsylvania's study of bankruptcy mediation program).

[14] *See* Lisa A. Lomax, *Alternative Dispute Resolution in Bankruptcy: Rule 9019 and Bankruptcy Mediation Programs*, 68 AM. BANKR. L.J. 55 (1994) (analyzing bankruptcy mediation programs in regards to Rule 9019(c) without specifying challenges of chapter 11 proceedings); *see also* Corbett, *supra* note 2, at 412 (taking note of only one chapter 11 case within its general discussion of mediation and bankruptcy); Woodward, *supra* note 10, at 4 (providing no discussion for specific issues relating to chapter 11 cases in its general evaluation of bankruptcy mediation).

[15] *See, e.g.*, H. Slayton Dabney, Jr. & Dion W. Hayes, *Bankruptcy Lawyers Better Tune Up Their ADR Skills: Best Products is One Case Where Mediation Really Worked*, 18 AM. BANKR. INST. J. 16, 16 (June 1999) (observing successful use of mediation in one of largest chapter 11 cases in 1996); Wilk & Zafar,

Thus, the use of mediation in the R.H. Macy reorganization,[16] the Greyhound Lines ADR program,[17] and the second Best Products chapter 11 filing[18] all received favorable notice in the literature.[19]

In 1995, Mabey et al. identified twelve bankruptcy courts with formalized ADR programs.[20] The fact that twelve bankruptcy courts were using mediation and other forms of ADR by 1995 was itself notable, since court-annexed mediation programs were then a relatively new development.[21] Almost fifteen years ago, the authors noted the variety found in the mediation programs, on such things as compensation, selection of the mediator, and the manner in which a case is assigned to mediation.[22]

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supra note 12, at 59 (highlighting details of large chapter 11 case filed in Southern District of New York in 1996); 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, 194, 194 n.10 (1998) (providing in-depth examination of Southern District of New York's use of mediation in large chapter 11 case).

[16] *See* Karen M. Gebbia-Pinetti, *First Report of the Select Advisory Committee on Business Reorganization*, 57 BUS. LAW. 163, 189 n.44 (2001) (documenting court appointed mediator to R.H. Macy & Co.); *see also* Mabey et al., *supra* note 11 at 1282 (positing R.H. Macy & Co.'s general order appointing mediator was infamous); Mott, *supra*, note 15, at 194 (stating Macy's filed chapter 11 protection on January 27, 1992).

[17] *See* Elizabeth Baker Murrill, *Mass Disaster Mediation: Innovative ADR, or a Lion's Den?*, 7 PEPP. DISP. RESOL. L.J. 401, 406 (2007) (stating Greyhound used ADR to streamline bankruptcy litigation); Leif M. Clark, *Bankruptcy*, 28 TEX. TECH. L. REV. 299, 312–13 (1997) (remarking Greyhound used ADR process to assess its liabilities); Carolyn Penna, *The Greyhound ADR Program*, 204 N.Y.L.J. 3, 3 (1990) (providing Greyhound established ADR program).

[18] *See* Dabney & Hayes, *supra* note 15, at 16–17 (summarizing success of mediation in *Best Products* case); *see also* Gebbia-Pinetti, *supra* note 16, at 184 n.30 (discussing Best Products fostered resolution through mediation); Wilk & Zafar, *supra* note 12, at 59 (reporting Best Products used mediation in filing its second chapter 11).

[19] *See* Mott, *supra* note 15, at 193 (positing mediation becoming prominent in bankruptcy field); Wilk & Zafar, *supra* note 12, at 12 (stating over last decade, mediation has become "acceptable method of resolving disputes in bankruptcy cases . . ."); *see also* ADR News, *AAA Administers Macy's ADR Program*, DISP. RESOL. J., Oct. 1996, at 5 (explaining American Arbitration Association has administered mediation programs for bankruptcy courts). See Wilk & Zafar, *supra* note 12, at 58 for a more detailed list of chapter 11 cases in which mediation has been used successfully.

[20] *See* Mabey et al., *supra* note 11, at 1314–15 (listing twelve bankruptcy courts utilizing formal ADR program); *see also* Anne M. Burr, *Building Reform From the Bottom Up: Formulating Local Rules For Bankruptcy Court-Annexed Mediation*, 12 OHIO ST. J. ON DISP. RESOL. 311, 312–13 (1997) (explaining increase in amount of bankruptcy courts using ADR programs); Kathleen M. Scanlon, *Briefing the ADR Landscape in U.S. Bankruptcy Practice*, 21 ALT. TO HIGH COST LITIG. 1, (2003) (recognizing increasing number of bankruptcy courts using mediation).

[21] *See* 28 U.S.C. § 473(a)(6) (1994) (allowing federal courts to refer cases to alternative dispute resolution); Burr, *supra* note 20, at 329 (noting Civil Justice Reform Act of 1990, allowed court-annexed mediation for district and bankruptcy courts); Rodney S. Webb, *Court-Annexed "ADR"—A Dissent*, 70 N.D. L. REV. 229, 230–31 (1994) (asserting Judicial Improvements and Access to Justice Act of 1988 authorized experimental arbitration programs, leading to court-annexed mediation under Civil Justice Reform Act).

[22] *See, e.g.*, Mabey et al., *supra* note 11, at 1279–80 (observing some ADR programs allow non-attorneys to serve as mediator while others do not, some mediators are compensated while others are not, and some matters assigned to ADR through parties' agreement while some assigned by court); *see also* Burr, *supra* note 20, at 346 (recognizing Southern District of California, unlike other districts, does not require mediators to undergo formal training nor does it compensate mediators); ROBERT J. NIEMIC, FED. JUDICIAL CTR., MEDIATION IN BANKRUPTCY (1998), *available at*

Differences from court to court are to be expected when the subject matter is left to the local rules of the court. Not surprisingly, Mabey et al. called for a uniform national rule on the use of mediation and ADR in bankruptcy.[23] They would not be the last to call for a uniform rule.[24] Nonetheless, mediation in bankruptcy is still governed by local rules and general orders.[25] Not only does this mean that mediation is used in different ways in different districts, if it is used at all; it implies that when mediation is used, its use may vary from judge to judge, even within a single court.

Mabey et al. saw a key point about the use of mediation in chapter 11 reorganizations earlier than most other observers.[26] Many chapter 11 plans succeed or fail on the ability of parties with different interests to reach a negotiated resolution of their differences. In the words of the authors, "traditionally and typically bankruptcy reorganizations have benefitted from negotiated settlements among parties who must yet live together under the aegis of a plan of reorganization."[27] When the parties realize they need one another, the chances of a successful mediation increase.[28] *Wanting* to live together is beside the point. It is enough that the parties understand that they "must yet live together."[29]

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http://www.fjc.gov/public/pdf.nsf/lookup/bankrmed.pdf/$file/bankrmed.pdf (stating some mediation matters assigned *sua sponte* where some are assigned only through parties' consent).

[23] Mabey et al., *supra* note 11, at 1310 (asserting litigants benefit from national uniform rules).

[24] *See, e.g.*, Advisory Committee on Bankruptcy Rules Minutes (March. 13–14, 1996), http://www.uscourts.gov/rules/ Minutes/bk3-97.htm (calling for survey of ADR in bankruptcy courts to identify how national rules could apply); *see also* NIEMIC, *supra* note 22, at 6–8 (discussing national rule debate among leading legal groups). *But see* Burr, *supra* note 20, at 349–50 (arguing individual districts should define own terms).

[25] *See infra* note 42 and accompanying text (noting fifty-one bankruptcy courts' local rules or orders authorize mediation, as shown in Table 1, Rules Authorizing Mediation in the Bankruptcy Courts, pp. 411–16); *see also* Burr, *supra* note 20, at 343 (observing bankruptcy court-annexed mediation established by local rules or general orders); Mabey et al., *supra* note 11, at 1278 (stating bankruptcy court-annexed ADR programs established by local rules or general orders); NIEMIC, *supra* note 22, at 5 (listing bankruptcy courts in which local rules or general orders govern mediation).

[26] *See* Mabey et al., *supra* note 11, at 1312–13 (endorsing expanded use of ADR in bankruptcy reorganizations to preserve relationships between parties expecting future interaction); *see also* Kim Dayton, *The Myth of Alternative Dispute Resolution in the Federal Courts*, 76 IOWA L. REV. 889, 957 (1991) (questioning merits of ADR in federal court in 1991); Mott, *supra* note 15, at 193 (observing controversial nature of use of mediation in bankruptcy in 1998).

[27] Mabey et al., *supra*, note 11, at 1313; *see also* KAREN GROSS, FAILURE AND FORGIVENESS: REBALANCING THE BANKRUPTCY SYSTEM 133–34 (1997) (citing ADR as tool in bankruptcy for improving debtor-creditor relations); Mott, *supra* note 15, at 203 (noting importance of maintaining relationship between creditor and debtor in reorganization).

[28] *See* Mabey et al., *supra* note 11, at 1313 (stating reorganizations have benefited from negotiated settlements between parties needing to work with each other); Mott, *supra* note 15, at 203 (citing value of mediation in chapter 11 cases for parties needing to maintain relationships with each other); Wirth & Mitchell, *supra* note 12, at 234 (concluding parties who will communicate regularly in future will "benefit greatly from consensual conflict resolution").

[29] Mabey et al., *supra* note 11, at 1313; *see* Mott, *supra* note 15, at 203 (stating reduction of hostility between parties is advantage of mediation because parties must work together towards goal of reorganization); Wirth & Mitchell, *supra* note 12, at 234 ("Mediation is the most likely ADR method to foster ongoing relationships ").

Three years later, the Federal Judicial Center published the results of its survey of mediation participants in bankruptcy proceedings.[30] Mediators and attorneys, but not bankruptcy judges, were surveyed.[31] The number of bankruptcy courts with mediation programs had grown to at least twenty-eight.[32] When mediation was used, it was usually at the request of the parties. Bankruptcy judges referred matters to mediation, on their own motion, in less than 24% of the mediated cases.[33] An order to mediation was even less likely, when at least one party objected; court-ordered referrals to mediation when a party objected occurred less than 7% of the time.[34] Notwithstanding the authority of the court (usually supported by either a local rule or standing order) to order a matter to mediation on its own, mediation was, apparently, being treated as voluntary on both ends: the decision to participate, and the decision whether to reach an agreement. These numbers, of course, relate to all bankruptcy matters, regardless of chapter. When the focus was narrowed to chapter 11, about 9% of the mediator respondents indicated that they had participated in the development of a plan of reorganization.[35]

One year after the Federal Judicial Center report, Professor William Woodward of Temple University Law School published a docket study of mediation in a single bankruptcy court, the bankruptcy court for the Eastern District of Pennsylvania.[36] The study was primarily concerned with measuring time to disposition in a jurisdiction using mediation extensively. Among other findings, Woodward reported that merely scheduling a matter for a mediation hearing seemed to shorten the time to disposition of the matter.[37] As with the Niemic study, Woodward was concerned with the effect of mediation in all bankruptcy matters, regardless of chapter.[38] The Woodward article is also notable for its discussion of the benefits and drawbacks of mediation in bankruptcy.[39]

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[30] *See generally* NIEMIC, *supra* note 22.

[31] *Id.* at 9 (indicating Federal Judiciary Center submitted questionnaires to counsel and mediators only).

[32] *Id.* at 5 ("At least twenty-eight bankruptcy courts (approximately 30% of all bankruptcy courts) currently have local rules, general orders, or guidelines that govern judicial referral of bankruptcy matters to mediation."); *see, e.g.*, Bankr. N.D. Ala. R. 9019–2 (providing general rules of Alabama's Alternative Dispute Resolution program); Bankr. N.D. Cal. R. 9040–1 (setting forth governing rules of Bankruptcy Dispute Resolution Program in Northern District of California).

[33] NIEMIC, *supra* note 22, at 28–29 (noting *sua sponte* referrals occurred infrequently). Even a rate of 24% may be an overstatement. The report placed the rate of court-initiated referrals at between 11.6% and 23.3%.

[34] *Id.* at 30 (stating bankruptcy judges referred matters to mediation over objection of party in small amount of cases).

[35] *Id.* at 33 (calculating rate at which mediators formulated plans of reorganization or facilitated negotiations regarding such plan).

[36] *See generally* Woodward, *supra* note 10.

[37] *Id.* at 20 (comparing 70.14 average days to disposition when mediation hearing not scheduled, to 63.75 average days to disposition when mediation hearing scheduled).

[38] *See id.* at 3 (refraining from segregating bankruptcy chapters while emphasizing need for local level empirical study of bankruptcy mediation).

[39] *See id.* at 6–9 (discussing cost of mediation).

I. THE STUDY AND ITS RESULTS

This study consists of two components. First, the study offers a survey of the bankruptcy courts that have and have not authorized mediation, by either local rule or standing order. Second, the study reports on a survey of bankruptcy judges conducted in August 2009 regarding the use of mediation in chapter 11 cases.

A. The Use of Mediation in Bankruptcy Courts

The Federal Rules of Bankruptcy Procedure neither prohibit nor provide for mediation of disputes in bankruptcy.[40] Instead, mediation and other forms of ADR are left to local rule making.[41] Mediation is explicitly authorized by local rule or order in 51 bankruptcy courts (Table 1).[42] Thus, more than half of the federal bankruptcy courts at least permit the use of mediation, in some form, by local rule. This is a count, however, only of the bankruptcy courts that provide for mediation somewhere in their local rules or standing orders. Nothing prohibits the use of mediation in or outside of bankruptcy. We found evidence in our research, even in districts with no mention of mediation in their local rules, of mediation being employed on an *ad hoc* basis.[43] Survey respondents from eighteen different

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[40] *See* 1 COLLIER ON BANKRUPTCY ¶ 11.02, at 11-4.1 to -6 (Alan N. Resnick et al. eds., 15th ed. rev. 2009) (identifying authority to implement mediation before and after Alternative Dispute Resolution Act of 1998); 8 NORTON BANKRUPTCY LAW & PRACTICE 3d, § 168:2 (2009) (presenting history of alternative dispute resolution in bankruptcy courts); *see also* Mabey et al., *supra* note 11, at 1308 (proposing bankruptcy rules amendment providing more standardized procedures for alternative dispute resolution, including mediation).

[41] *See* Burr, *supra* note 20, at 350 (observing establishing mediation and other ADR programs by local rule benefits individual districts' needs); John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. REV. 69, 111–12 (2002) (discussing how under Alternative Dispute Resolution Act of 1998, each federal district court must adopt local rules implementing its own ADR programs); Wirth & Mitchell, *supra* note 12, at 224 (stating local bankruptcy rules best suited to court-annexed mediation programs). There have been attempts at crafting and adopting a uniform rule regarding mediation and ADR in bankruptcy, but no such rule exists. *See* Niemic, *supra* note 13, at 1 (examining survey conducted by Federal Judicial Center determining need for national rules governing mediation); *see also* Burr, *supra* note 20, at 348–49 (acknowledging supporters of national bankruptcy court-annexed mediation rule assert national rule promotes "formality, enforceability and uniformity."); Mabey et al., *supra* note 11, at 1309–10 (concluding litigants will benefit from national uniform rule).

[42] *See infra* Table 1, Rules Authorizing Mediation in Bankruptcy Courts, pp 411–16 (highlighting bankruptcy courts whose local rules or orders expressly provide for mediation); *see also* Harvey R. Miller, *The Changing Face of Chapter 11: A Reemergence of the Bankruptcy Judge as Producer, Director, and Sometimes Star of the Reorganization Passion Play*, 69 AM. BANKR. L.J. 431, 436–37 (1995) (discussing increased interest in ADR procedures in local districts); Niemic, *supra* note 13, at 1 (stating "about 30 bankruptcy courts have local rules or other procedures that govern referral of bankruptcy matters to mediation").

[43] *See* Gebbia-Pinetti, *supra* note 16, at 191 n.147 (noting parties may take advantage of process on ad hoc basis in districts with no court-annexed mediation program in place); Mott, *supra* note 15, at 213 ("Bankruptcy courts will undoubtedly continue to use mediation either through a court-annexed mediation program or on an ad hoc basis."); *Reports from Winter Meeting*, 16 AM. BANKR. INST. J. 18, 18 (1997) (finding about ten bankruptcy courts had been noted for frequent ad hoc use of ADR). Several survey

bankruptcy courts – all lacking a local rule authorizing the use of mediation – indicated they had used mediation in chapter 11 cases.[44] It would be inaccurate to assume that mediation is not used simply because an enabling local rule or order does not exist.

A review of the local rules and standing orders also suggests – strongly – that mediation is easily the ADR technique of choice in bankruptcy proceedings. Some bankruptcy courts authorize only mediation;[45] most authorize both mediation and other forms of ADR.[46] Very few, however, authorize forms of ADR in which mediation is not included.[47] This should come as no surprise. Mediation is non-coercive, at least as to the outcome.[48] Any resolution reached in mediation will be voluntary; the parties can shape their own agreement. The costs of the process can be placed on the parties.[49] Other than perhaps the cost of administering the ADR program, mediation costs the courts nothing. For these reasons, mediation is probably the most widely used form of ADR in the state and federal courts.

The number of bankruptcy courts that authorize the judge to order the parties into mediation has continued to grow. Forty bankruptcy courts now permit, by rule or standing order, a bankruptcy judge to order the parties to a dispute to attempt

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respondents suggested that mediation of bankruptcy matters takes place, in the absence of an enabling local rule. In addition, a highly unscientific search of bankruptcy courts' websites indicated that mediation of bankruptcy matters is not unknown in jurisdictions without a local rule authorizing the use of mediation.

[44] *See infra* Table 1, Rules Authorizing Mediation in Bankruptcy Courts, pp 411–16.

[45] *See id*. (indicating bankruptcy courts authorizing only mediation). Sixteen courts authorize mediation only: California (Southern); Florida (Northern, Middle and Southern); Indiana (Southern); Michigan (Eastern); Missouri (Eastern); New Jersey; New York (Eastern); New York (Northern); Oregon; Pennsylvania (Western); Rhode Island; South Carolina; Virginia (Eastern); Washington (Eastern).

[46] *See id*. (indicating bankruptcy courts authorizing both mediation and other forms of alternative dispute resolution). Thirty-five courts authorize both mediation and other forms of ADR: Alabama (Northern); Arizona; California (Central); California (Northern); California (Eastern); Connecticut; Delaware; Hawaii; Idaho; Illinois (Central); Illinois (Northern); Indiana (Northern); Kansas; Louisiana (Eastern); Louisiana (Western); Maine; Maryland; Massachusetts; Montana; Nevada; New York (Southern); North Carolina (Eastern); North Carolina (Middle); Ohio (Northern); Ohio (Southern); Oklahoma (Northern); Oklahoma (Western); Pennsylvania (Eastern); Pennsylvania (Middle); Tennessee (Middle); Texas (Northern); Texas (Southern); Texas (Western); Utah, and Vermont.

[47] *See id*.

[48] *See* Beazley Ins. Co. v. Doctors Hosp. (*In re* Beazley), No. 09-20005, 2009 WL 205859, at *6 (5th Cir. Jan. 29, 2009) (indicating any resolution at mediation would be voluntary); Demetra Edwards, *New Amendments To Resolving Special Education Disputes: Any Good Ideas?*, 5 PEPP. DISP. RESOL. L.J. 137, 144 (2005) (discussing mediation as form of dispute resolution where parties are encouraged, but not forced to agree upon resolution); Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 54 (2001) (recognizing "self-determination" nature of mediation).

[49] *See* Reyes v. Equifax Credit Info. Servs., No. 03 C 1377, 2003 WL 22922190, at *1 (N.D. Ill. Dec. 10, 2003) (noting parties agreed to equally share costs of mediation); *In re* Enron Corp., No. 01-16034, 2003 WL 22331271, at *1 (S.D. Tex. June 16, 2003) (ordering parties to share expenses of mediation); *see also In re* Plassein Int'l Corp., 377 B.R. 126, 136 (Bankr. D. Del. 2007) (observing trustee paid mediator fees). Several courts do require court approval if any portion of the mediator's fee is to be paid by the estate. *See, e.g.*, Bankr. D. Ariz. R. 9072–7 (subjecting ADR fees to court approval if estate will be charged); Bankr. D. Del. R, 9019–2 (requiring approval if estate is paying mediator); *see also* Burr, *supra* note 20, at 353 (requiring local rules to provide for court approval if estate is to pay mediator).

mediation (Table 1).[50] That number, however, is still less than half of the bankruptcy courts in the United States. Forty-nine bankruptcy courts do not authorize the use of court-ordered mediation. Of those forty-nine courts, eleven permit the use of mediation in other settings, most commonly at the request of all parties to the dispute.[51]

In the bankruptcy courts that authorize mediation, compensation for the mediator is usually, but not always, addressed by the local rules. Twenty-six courts allow the parties to the mediation to agree among themselves on the compensation for the mediator, subject, presumably, to court review; six courts set a fixed rate for mediators; and two other courts are directed to determine the rate of compensation for mediators.[52] Fifteen courts either do not address the question of compensation in their rules, or require all mediators to serve *pro bono*.[53]

In the bankruptcy courts that authorize the use of mediation, the dominant way of selecting the mediator is for the parties to confer and agree; only if the parties are unable to agree will the court (or clerk, or administrator) appoint a mediator (n=26).[54] Four courts leave it to the parties to determine the mediator, without court

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[50] *See, e.g.*, Bankr. D. Haw. R. 88.1 (setting forth duty of parties to consider ADR); Bankr. D. Idaho R. 16.5 ("Through this rule, the court authorizes and regulates the use of mediation and arbitration."); *cf.* Burr, *supra* note 20, at 351 (observing court-ordered mediation may raise constitutional concerns).

[51] *See, e.g.*, Bankr. N.D. Ill. R. 9060–1 (stating "[a] party to any dispute pending before the court may, at any time, request entry of an order referring the dispute to mediation under these Rules . . . ."); Bankr. D. Mass. R. 7016–1 (stating court may refer case to mediation upon consent of parties). *See generally infra* Table 1, Rules Authorizing Mediation in the Bankruptcy Courts, pp. 411–16.

[52] Courts from New York to South Carolina require parties to attempt mediator agreement before program approval. *See, e.g.*, Bankr. N.D. Ill. R. 9060–6 (requiring written compensation agreement between parties before mediation commencement); Bankr. E.D.N.Y. R. 9019–1(b) (requiring "Mediation Order" outlining mediator compensation agreement between parties); Bankr. D. S.C. R. 9019–2(a) (allowing court mediation compensation determination absent party agreement). The six courts that establish mediation rates are equally diverse. *See, e.g.*, Bankr. S.D. Cal. R. 7016–6(f)(4) (imposing $200 mediation fee per half day session); Bankr. D. N.J. R. 9019–2(b)(1)–(2) (compensating mediators $200 per hour); Bankr. E.D. Pa. R. 9019–3(f) (limiting mediator compensation $150 per hour). The two courts mandating mediation rates are outliers. *See* Bankr. S.D. Fla. R. 9019–2(A)(6) (requiring court mediation rate establishment absent contrary written agreement by parties); Bankr. D. Utah R. 9019–2 (stating parties will compensate mediators at hourly rate mandated by court). One court's rules require the party requesting the mediation to pay the mediator's fee, unless the parties agree otherwise. *See* Bankr. W.D. Okla. R. 7017(f) (requiring party requesting ADR bear costs unless parties agree otherwise).

[53] *See, e.g.*, Bankr. D. Conn. R. 9019–2 (leaving mediator compensation unaddressed); Bankr. E.D. Cal. Gen. Ord. 95–1, § 7.2 (requiring all mediators serve *pro bono*); *see also* Burr, *supra* note 20, at 353 (noting some local rules provide for pro bono compensation of mediators). A number of courts, however, require at least some volunteered service from the mediator before compensation will be paid. *See, e.g.*, Bankr. E.D. Pa. R. 9019–3) (allowing mediator to be paid after completion of four hours in mediation conference); *see also* Burr, *supra* note 20, at 353 n.212 (commenting about supply and demand in market where mediators volunteer services); Woodward, *supra* note 10, at 21 (noting study suggested some mediators did not complete volunteer obligations).

[54] *See, e.g.*, Robert B. Millner & Elizabeth L. Perris, *Bankruptcy Disputes in* ALTERNATIVE DISPUTE RESOLUTION: THE LITIGATOR'S HANDBOOK 327, 333 (Nancy F. Atlas et al. eds., ABA) (2000) (noting party agreement "most common" neutral selection method); Mabey et al., *supra* note 11, app. A at 1314–24 (illustrating prevalence of mediator selection through party agreement); Wirth & Mitchell, *supra* note 12, at 219 (noting parties usually choose mediator from court list).

assistance.[55] In one court, the court appoints the mediator;[56] in a second court, the court appoints the mediator, but only after consultation with the parties.[57] The remainder of the courts that authorize mediation do not address the subject of mediator selection in their rules.[58]

Restrictions on the types of disputes that may be mediated occasionally appear in the local rules.[59] For example, five courts limit the use of mediation to adversary proceedings, and fifteen courts permit mediation only in adversary proceedings and contested matters.[60] The majority of courts, however, take a broader approach, permitting the use of mediation in "any dispute" that arises in the case.[61] The distinction may matter in chapter 11 proceedings. To the extent that plan negotiations – a potentially fruitful area for the services of a mediator – cannot be classified as either a contested matter or an adversary proceeding, the use of mediation in chapter 11 may be limited in those bankruptcy courts that limit the use of mediation to adversary proceedings and contested matters.

The confidential nature of statements made in mediation is addressed specifically in the rules of 38 of the courts that authorize mediation; the rules of the remaining 13 courts are silent on the subject.[62] This does not mean that in the

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[55] *See* Bankr. D. Conn. R. 9019–2(b)(1) (requiring mediator agreement between parties before judicial ADR program approval); Bankr. D. Mass. R. 7016–1(a) (stating parties must agree on terms and conditions of mediation); Bankr. D. Or. R. 9019–2(b)(1) (requiring mediator agreement between parties, otherwise judicial selection from party-created lists); Bankr. E.D. Va. R. 83.6(B) (requiring mutual party agreement of mediator or neutral).

[56] *See* Bankr. M.D. Fla. R. 9019–2(b)(1) (mandating court mediator appointment, although permitting parties to present preferred candidate from list).

[57] *See, e.g.*, Bankr. E.D. Mich. R. 7016–2 ("[T]he parties may request the court's assistance in selecting a mediator if they cannot agree."); Bankr. M.D. N.C. R. 9019–2 (allowing court to appoint certified attorney or non-attorney after considering motion submitted by plaintiff that states parties' preferences); *see also infra* Table 1, Rules Authorizing Mediation in the Bankruptcy Courts, pp. 411–16.

[58] *See, e.g.*, Bankr. D. Colo. R. 919 (authorizing alternative dispute resolution proceeding without addressing mediator selection); Bankr. D. Idaho R. 16.5(a)(3)(A) (failing to specify how mediators are selected); Bankr. E.D. La. R. 9019–2 (authorizing court to refer case to private mediation but failing to specify how mediator should be selected); *see also infra* Table 1, Rules Authorizing Mediation in the Bankruptcy Courts, pp. 411–16.

[59] *See, e.g.*, Bankr. M.D. Fla. R. 9019–2(b)(2) (prohibiting discovery and preparation for final hearing from being stayed by mediation); Bankr. D. Md. R. 9019–2(a) (disallowing mediation in situations such as employment, compensation of professionals, and matters involving contempt or other types of sanctions); Bankr. D. Utah Civ. R. 16–2(c) (forbidding cases where prisoner is party from ADR).

[60] *See, e.g.*, Bankr. D. Del. R. 9019–5(a) ("The Court may assign to mediation any dispute arising in an adversary proceeding, contested matter or otherwise in a bankruptcy case."); Bankr. E.D.N.C. R. 9019–2 (limiting mediation to adversary proceedings and contested matters); Bankr. S.D. Ohio R. 9019–2 (limiting Alternative Dispute Resolution program to adversary proceedings).

[61] *See, e.g.*, Bankr. N.D. Ill. R. 9060–1 (stating party to "any dispute" may request referral to mediation); Bankr. E.D.N.Y. R. 9019–1(a) (allowing any dispute arising in case to be directed to mediation); Bankr. N.D. Ohio R. 16.6 (illustrating "any civil case" may be referred to mediation).

[62] *See, e.g.*, Bankr. D. Ariz. R. 9072–8(f) (affirming all information obtained through mediation process is prohibited from being disclosed by participants); Bankr. D. Del. R. 9019–5(d)(i) (providing protection for information disclosed at mediation); Bankr. N.D. Ill. R. 9060–8(A) (stating all participants in mediation process must keep disclosed information confidential).

absence of a bankruptcy rule, disclosures made in mediation are not protected.[63] It suggests, however, that in those courts that do not make statements made in mediation confidential, the parties may have to invoke other rules for protection. Far fewer courts provide immunity for mediators under their local rules.[64] In summary, the local rules regarding mediation vary considerably, although patterns can be identified. About half of the rules can be characterized as "detailed." The remaining half tend to authorize mediation, and say little else.

Table 1: Rules Authorizing Mediation in the Bankruptcy Courts

State	Court	Local Rule/ Order	Mediation Authorized?	Other ADR Authorized?	Court-Ordered Mediation Authorized?
Alabama	Northern	9019-2	Yes	Yes	Yes
	Middle	None	No	No	No
	Southern	None	No	No	No
Alaska		None	No	No	No
Arizona		L.R.907 2-1-9; Order 92	Yes	Yes	Yes
Arkansas	Western and Eastern	None	No	No	No
California	Central	App. III to Rules; Order 95-01	Yes	Yes	Yes
	Northern	L.R. 9040-	Yes – "Bankruptcy	Yes	Yes

[63] *See generally* 28 U.S.C. § 652(d) (1998) ("[E]ach district court shall . . . provide for the confidentiality of the alternative dispute resolution processes . . . ."); FED. R. EVID. 408 (discussing confidentiality of settlement talks); 8 NORTON BANKRUPTCY LAW & PRACTICE, *supra* note 40, at § 168:3 (discussing how, in absence of local rules, parties can protect themselves against abuse of mediation process by using mediator-implemented rules).

[64] *See* SARA R. COLE ET AL., MEDIATION: LAW, POLICY, PRACTICE § 11:3 (2d ed. 2007) ("[A] minority of states have enacted statutory mediator immunities."). *But see* Amanda K. Esquibel, *The Case of the Conflicted Mediator: An Argument for Liability and Against Immunity*, 31 RUTGERS L.J. 131, 132–33 (1999) (remarking many states enacted statutes shielding mediators from liability in order to promote ADR); Scott H. Hughes, *Mediator Immunity: The Misguided and Inequitable Shifting of Risk*, 83 OR. L. REV. 107, 110 (2004) **(**stating many states insulate mediators from civil liability). Ten courts provide for mediator immunity by rule: Arizona, Delaware, Hawaii, Illinois (Northern), Indiana (Northern), New York (Eastern), New York (Northern), New York (Southern), Pennsylvania (Western), and Ohio (Northern).

		9050	Dispute Resolution Program"		
	Southern	L.R. 7016-2 – 7016-6	Yes	No	Yes
	Eastern	Order 95-1	Yes	Yes	Yes, but intended to be voluntary
Colorado		L.R. 919	Not explicitly	Yes	Yes
Connecticut		L.R. 9019-2	Yes	Yes	No – use of ADR subject to court approval
Delaware		9019-2,3,5; General Order in Adversary Proceedings	Yes	Yes	Yes
District of Columbia		None	No	No	No
Florida	Northern	District Court L.R. 16.3; L.R. 7016-1, Addendum	Yes	No	Yes
	Middle	9019-2	Yes	No	Yes
	Southern	9019-2	Yes	No	Yes
Georgia	Northern	None	No	No	No
	Middle	None	No	No	No
	Southern	None	No	No	No
Hawaii		District Court L.R.	Yes	Yes	Yes

		88.1, L.R. 9019-2			
Idaho		District Court L.R. 16.5	Yes	Yes	Yes
Illinois	Central	District Court L.R. 16.4	Yes	Yes	Yes
	Northern	L.R. 9060-1 through -10	Yes	Yes	No
	Southern	None	No	No	No
Indiana	Northern	L.R. 9019-2 and Order 2001-02	Yes	Yes	Yes
	Southern	L.R. 9019-2	Yes	No	Yes
Iowa	Northern	None	No	No	No
	Southern	None	No	No	No
Kansas		L.R. 9019-2	Yes	Yes	Yes
Kentucky	Eastern	None	No	No	No
	Western	None	No	No	No
Louisiana	Eastern	L.R.901 9-2	Yes	Yes	No
	Middle	None	No	No	No
	Western	Order filed 9/17/20 04	Yes	Yes	No
Maine		L.R.701 6-1, 9019-2	Yes	Yes	No
Maryland		L.R.901 9-2	Yes	Yes	Yes, but intended to be voluntary
Massachu-		L.R.701	Yes	Yes	No

setts		6-1			
Michigan	Eastern	L.R.7016-2	Yes	No	Yes
	Western	None	No	No	No
Minnesota		None	No	No	No
Mississippi	Northern	None	No	No	No
	Southern	Proposed L.R.9019-1	Not at present	No	No
Missouri	Eastern	L.R.9019	Yes	No	Yes
	Western	None	No	No	No
Montana		L.R.9019-1	Yes	Yes	No
Nebraska		None	No	No	No
Nevada		L.R.7016(e), 9019(a)	Yes	Yes	Yes
New Hampshire		None	No	No	No
New Jersey		L.R.9019-2	Yes	No	Yes
New Mexico		None	No	No	No
New York	Eastern	L.R.9019-1	Yes	No	Yes
	Northern	L.R.9019-2, Appendix II	Yes	No	Yes
	Southern	L.R.9019-1, Order M-143, M-211	Yes	Yes	Yes
	Western	None	No	No	No
North Carolina	Eastern	L.R.7016-1, 9019-2	Yes	Yes	Yes
	Middle	L.R.9019-2	Yes	Yes	Yes
	Western	None	No	No	No

North Dakota		None	No	No	No
Ohio	Northern	District Court L.R. 16.4-16.10	Yes	Yes	Yes
	Southern	L.R.901 9-2	Yes	Yes	Yes
Oklahoma	Eastern	L.R.701 6-1d	No	Yes	No
	Northern	L.R.901 9-2	Yes	Yes	Yes
	Western	L.R.701 6(f)	Yes	Yes	No
Oregon		L.R.901 9-2	Yes	No	Yes
Pennsyl-vania	Eastern	L.R.901 9-3	Yes	Yes	Yes
	Middle	L.R.901 9-2	Yes	Yes	Yes
	Western	L.R.901 9-2, GCP #4	Yes	No	No
Rhode Island		L.R.702 6-1	Yes	No	No
South Carolina		L.R.901 9-2	Yes	No	Yes
South Dakota		None	No	No	No
Tennessee	Eastern	None	No	No	No
	Middle	L.R.901 9-2	Yes	Yes	Yes
	Western	None	No	No	No
Texas	Eastern	None	No	No	No
	Northern	L.R.901 9.2	Yes	Yes	Yes
	Southern	District Court L.R. 16.4	Yes	Yes	Yes
	Western	App. L-1001-1	Yes	Yes	Yes

		to Local Rules			
Utah		L.R.9019-2, District Court L.R.16.2	Yes	Yes	Yes
Vermont		L.R.9019-1	Yes	Yes	Yes
Virginia	Eastern	District Court L.R. 83.6	Yes	No	No
	Western	None	No	No	No
Washington	Eastern	Order Filed 1/28/2000	Yes	No	No
	Western	None	No	No	No
West Virginia	Northern	None	No	No	No
	Southern	None	No	No	No
Wisconsin	Eastern	None	No	No	No
	Western	None	No	No	No
Wyoming		None	No	No	No

B. THE JUDGES' SURVEY

1. In General

In August 2009, the survey reproduced in Appendix 1 was sent to all of the bankruptcy judges in the United States. The survey was an attempt to gather data about how and when mediation is used in chapter 11 proceedings. 158 of the 361 sitting judges returned surveys, a response rate of 43.8%. The initial survey was conducted by e-mail, with a conventional, mailed request used as a follow-up. Surveys were received from 69 different bankruptcy courts, representing over 75% of the bankruptcy courts located in the United States. We received responses from judges with widely varying caseloads, including judges from the four bankruptcy courts with the highest number of chapter 11 cases: Delaware, the Central District of California, and the Southern District of New York, and the Middle District of

Florida.[65] We also received responses from judges with relatively few chapter 11 cases. Overall, the number of chapter 11 cases assigned, as of summer 2009, ranged from 1 to 360. The median number of chapter 11 cases assigned was thirty-six; the average number of cases was fifty-four.

A very high percentage of the judges (81% overall, 91% of all responding to the question) reported some experience with mediation in chapter 11 proceedings. Even in districts without a local rule authorizing the use of mediation, we found judges who had either used or permitted mediation in a chapter 11 case. In fact, 68 of the respondent judges indicated that there was no rule regarding mediation in their courts. Mediation is no stranger to the bankruptcy courts. A wide range of practices regarding mediation emerged from the survey, perhaps a function of the use of local rules. However, the surveys also reflected, at times, a range of practices within a single bankruptcy court. Diversity of opinion — and the use of mediation — among the judges of a given bankruptcy court was quite common.

Most judges when asked to characterize mediation in his or her district characterized it as "voluntary" (82% overall, 88% of those reporting that mediation was used in their court). Very few respondents reported no use of mediation. Four judges characterized mediation in their districts as a hybrid, a combination of voluntary and involuntary attributes.

2. Initiation of Mediation and Types of Disputes

Mediation, when used, was initiated in a number of ways, but with a common theme: party involvement and court approval. While a substantial number of judges indicated that mediation was initiated at the discretion of the court, very few reported that they routinely ordered chapter 11 matters to mediation (Table 2). On this question –how is mediation initiated in your court, if at all – the different practices of judges within a single court, operating under the same rules was apparent. Within a single bankruptcy court, one judge might report never using mediation, while another judge would report ordering it routinely;[66] or one judge might report using mediation only at the request of the parties, while another judge would report suggesting mediation to the parties, or occasionally ordering it.[67] In other words, the preferences of the individual judge seemed to matter.

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[65] *See supra* Table 1, Rules Authorizing Mediation in Bankruptcy Courts, pp 411–16. *See generally* U.S. Courts, Business and Nonbusiness and Bankruptcy Cases Commenced, By Chapter of the Bankruptcy Code, During the Twelve Month Period Ended Dec. 31, 2008, *available at* http://www.uscourts.gov/Press_Releases/2009/bankrupt_f2table_dec2008.xls (providing statistics by location and type for calendar year 2008).

[66] Examples of variation within a single bankruptcy court were numerous. Examples included the Bankruptcy Courts for the Eastern District of California; Delaware; the Middle District of Florida; the Southern District of Florida; the Northern district of Illinois; the Eastern District of Michigan; New Jersey; the Southern District of New York; the Eastern District of Pennsylvania; and the Eastern District of Virginia.

[67] Examples of variation within a single bankruptcy court were numerous. Examples included the Bankruptcy Courts for the Northern District of Alabama; the Central District of California; the Northern District of California; Delaware; the Middle District of Florida; the Central District of Illinois; the Northern

Table 2: How Is Mediation Initiated?

Condition	Number	Pct.
Only at the request of the parties	32	20.6
Both at the request of the parties and on the court's suggestion	26	16.8
Both at the request of the parties and at the discretion of the court	41	26.4
Only at the discretion of the court	27	17.4
The court routinely orders chapter 11 matters to mediation	6	3.9
Mediation is not u0sed	11	7.1
Other	4	2.6
No Response	8	5.2
Total	155	100.0

There was little agreement as to when in a proceeding mediation should be ordered or suggested. The consensus view, judging from written comments and the options checked on the survey form, was that mediation should be suggested at any time when it seems appropriate – in other words, a case-specific view.

Adversary proceedings were identified as the type of proceeding most often referred to mediation (n=89), followed by contested matters (n=57) and plan negotiation/confirmation (n=51). It should come as no surprise that the most frequent response (mentioned by more than half of the judges) for the use of mediation was in adversary proceedings. Adversary proceedings are lawsuits. What is being sought (or denied) should be evident from the complaint. The use of mediation to resolve lawsuits is hardly a novel idea for litigators.

The relatively frequent mention of plan negotiation suggests a use for mediation beyond the conventional model of court-annexed mediation, in which a filed civil case is assigned to a mediator for settlement, if possible. Plan negotiation may certainly involve conflict, but the emphasis is not on simply resolving a dispute. The emphasis will be on creating a plan that can be confirmed. A type of negotiation different from conventional settlement negotiation may be needed, one that accommodates multiple parties and that takes into account factors other than the legal rights of the parties. Mediation of plan negotiation and confirmation may end up resembling child custody mediation, more than tort or contract-based mediation. The parties involved may not be fond of one another, but they share a responsibility. In custody mediation, that responsibility is the welfare of the child; in chapter 11 plan mediation, the responsibility is the future of the reorganized business. The observation of Mabey et al. fifteen years ago still seems true. These

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District of Illinois; Kansas; the Southern District of Mississippi; New Jersey; the Western District of North Carolina; the Eastern District of Pennsylvania; the Middle District of Pennsylvania; the Western District of Tennessee; the Southern District of Texas; and the Western District of Washington.

are "parties who must yet live together under the aegis of a plan of reorganization."[68]

There is an additional reason for using mediation in the preparation and negotiation of a chapter 11 plan. The parties involved not only "must yet live together;" they have the opportunity (perhaps slight, perhaps substantial) to craft the rules that will govern their relationships after confirmation. In contrast to an adversary proceeding, in which the question will likely be, was a legal rule violated, the question for plan preparation and negotiation is, under what set of rules should the business operate in the future? This is the sort of multi-faceted problem that mediation, skillfully done, can address. It is not a new idea. As Professor Lon Fuller observed almost forty years ago, contrasting mediation to adjudication, "mediation is commonly directed, not toward achieving conformity to norms, but toward the creation of the relevant norms themselves."[69]

Factors the judges said they considered in referring a chapter 11 matter to mediation included the need for a prompt resolution before a plan can be confirmed (n=90), followed by the cost of a trial (n=86) and the likely length of the trial (n=76). Many judges indicated all three factors were important. Some judges also mentioned the willingness of the parties to mediate as a consideration.

3. Use of Other Bankruptcy Judges as Mediators

A consistent theme in the responses was the use of other bankruptcy judges as mediators. Seventy-eight percent of the judges (n=124; 82% of those responding to the question) indicated that they had used other bankruptcy judges as mediators in their courts.[70] Most of the written comments on this practice were favorable. The practice of using other sitting judges as mediators represents a departure from most court-connected mediation programs. Given its wide use and generally high marks from the survey respondents, it merits further study. Bankruptcy law is a specialty practice for most lawyers, and having a sitting bankruptcy judge serve as a mediator certainly saves whatever time might be required to educate the mediator about the underlying law. Outside of bankruptcy practice, retired trial judges have often been popular choices as mediators in court-annexed mediation programs. Nonetheless, the involvement of a sitting bankruptcy judge in a mediation seems to up the stakes

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[68] Mabey et al., *supra* note 11, at 1313; *see* Anthony E. Cook, *Mandatory Mediation and Summary Jury Trial: Guidelines for Ensuring Fair and Effective Processes*, 103 HARV. L. REV. 1086, 1086 (1990) (arguing Congress should enact statutes permitting courts to mandate mediation especially where "protection of the parties' future relationship is essential"); *see also* Craig A. McEwen & Richard J. Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 ME. L. REV. 237, 256–57 (1981) (finding higher levels of satisfaction among people using mediation than litigation).

[69] Lon L. Fuller, *Mediation – Its Forms and Functions*, 44 S. CAL. L. REV. 305, 308 (1971) (discussing potential for mediation).

[70] The high level of use of other bankruptcy judges may be due, at least in part, to the practice of appointing a "settlement judge." Several survey respondents referred to this practice explicitly, and the survey was not designed to distinguish between the two processes.

for the parties. There may be new risks for being reluctant to settle. There may be a perceived need to be very careful with what is disclosed to the mediator.

4. How Often Is Mediation Used in Chapter 11?

In spite of the generally positive attitude towards mediation found in the survey responses, the fact remains that mediation is not often used in chapter 11 cases, as Table 3 indicates. Judges with heavier chapter 11 caseloads tended to report more frequent use of mediation, but the difference was slight.[71]

Table 3

Frequency of Mediation Use in Chapter 11	Count	Percent (of those responding)
Routinely (more than 75%)	5	3.8
Frequently (more than 50%)	6	4.5
Sometimes (more than 25%)	21	15.9
Infrequently (less than 25%)	82	62.1
Never	18	13.6
No response	26	

CONCLUSION

From the surveys, mediation emerges as a dispute resolution process that most bankruptcy judges (81%) report having used or permitted in a chapter 11 proceeding; that most bankruptcy judges seem to be favorably inclined to (69%);[72] and that is infrequently used (62.1%) in chapter 11 cases.[73] In short, mediation in chapter 11 proceedings poses a dilemma. If so many judges have experience with it, and so many judges seem to like it, why then is it not used more often?

It may be that mediation is used more often than we can tell from a review of the local rules, and a survey of the judges. If the parties are willing to pay for it, a mediation can take place without a court order. Nothing prevents it. Nor is there any requirement that the parties file any sort of statement with the court, advising the judge that a mediation has taken place. Put another way, mediations are simply not matters of public record.

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[71] Converting the frequency categories to numerals, with "never" assigned a value of "1," "infrequently" a value of 2, "sometimes" a value of 3, "frequently" a value of 4, and "routinely" a value of 5, the average score for judges reporting a chapter 11 caseload at or below the median value of 36 was 2.18; the average score for judges reporting a chapter 11 caseload above the median value of 36 was 2.26.

[72] There was no evidence of correlation between the number of active chapter 11 cases a respondent had, and the respondent's attitude toward mediation.

[73] *See supra* Table 3, How often is Mediation Used in Chapter 11?, p. 420. The percentage rises to 75% if the "never use mediation" responses are included. *See also supra* Parts II B. 1–4.

It may also be that mediation in chapter 11 proceedings is not an easy sell. There are situations where it might be helpful, but there is never any guarantee of that. Perhaps mediation is used infrequently because judges (and perhaps counsel) believe it cannot be used routinely in chapter 11. Instead, the view from the surveys seems to be that mediation should be used sparingly, and strategically. But who makes that decision? Should judges simply wait until counsel for one of the parties suggests mediation, or should judges encourage it? In the early days of court-connected mediation in the state courts, it was widely believed that the parties – and their lawyers – needed a not-so-subtle nudge to attempt mediation.[74] That "nudge" became the ability of trial judges in many states to order any case, in their discretion, to mediation.[75] Similar authority exists for many bankruptcy judges, depending on the contents of the local rule.[76] Should bankruptcy judges be doing more nudging?

Perhaps they should. It is widely believed in ADR circles that once a court is involved, mediation will not happen often without a nudge from the bench. Certainly the local culture of the bankruptcy bar is important, as well. For example, is the local bankruptcy bar familiar with mediation? This analysis assumes, however, that mediation is desirable in chapter 11. Based on the survey results, the answer to that question seems to be "yes." But even if it is desirable, how should it be used? Again, the preferences of individual bankruptcy judges, and the local culture of the bankruptcy bar will be relevant considerations. The next step should be a review of the local rules, and interviews with bankruptcy judges and practitioners, in an attempt to identify "best practices." When it comes to mediation, we still do not know what works, and does not work. It is worth finding out.

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[74] *See* Baruch Bush, *supra* note 7, at 733 (analyzing development of court-connected mediation in state courts); Welsh, *supra* note 47, at 23–24 (discussing how early days of court-connected voluntary mediation turned into present day court-connected mandatory mediation); *cf.* Lomax, *supra* note 14, at 70–75 (recognizing mediation in bankruptcy first began in Southern District of California).

[75] Barbara A. Phillips, *Alternative Dispute Resolution Symposium Issue*, 33 WILLAMETTE L. REV. 649, 671–72 (1997) (declaring "a nudge from the judge is a time-honored tradition and is more productive than rigid case management orders."); *see* Miller, *supra* note 42, at 436–38 (suggesting increased use of mediation initiated by those with "expanded powers" offers most efficient resolution method); *see also* Mabey et al., *supra* note 11, at 1265 (acknowledging "statutory, case, and inherent authority" support mandatory ADR in bankruptcy courts).

[76] *See* discussion at p. 409; *supra* Table 1, Rules Authorizing Mediation in Bankruptcy Courts, pp 411–16.

APPENDIX

SURVEY FORM

THE USES OF MEDIATION IN CHAPTER 11 PROCEEDINGS
SURVEY

Thank you for taking the time to complete this survey. I am attempting to identify the various ways in which mediation is used in chapter 11 cases around the country. I have prepared this short survey for distribution to bankruptcy judges to learn more about the use, and potential use of mediation in improving case administration.

The survey results will be analyzed and reported in the fall of this year. In the meantime, I will be happy to share the results with you, at your request. The results of the survey will be reported in aggregate terms only. The names of respondents will not be reported.

I gratefully acknowledge the National Conference of Bankruptcy Judges for its assistance in distributing this survey, and I thank Judge Catharine Carruthers, Bankruptcy Judge for the Middle District of North Carolina, for her assistance in drafting this survey.

Ralph Peeples

Professor of Law, Wake Forest University

TOTAL RESPONSES: 158

Results are shown in brackets; responses volunteered by respondents are shown in bold.

Approximately how many chapter 11 cases are assigned to you, as of summer 2009?

AVERAGE: 54 MEDIAN: 36

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1. Have you ever used (or permitted) mediation in a chapter 11 proceeding?

___Yes___No YES: 129

Comments:

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2. If your answer to #2 was yes, how is mediation initiated in your court? [RESULTS COMPILED AT TABLE 2]

___Only at the request of the parties ___At the discretion of the court

___The court routinely orders chapter 11 matters to mediation

___Mediation is not used by the court ____Other _____

3. (a) If your answer to #2 was yes, in what types of proceedings (e.g. adversary proceedings, contested matters, plan preparation/negotiation) have you used or permitted mediation in chapter 11?

ADVERSARY PROCEEDINGS:	89
CONTESTED MATTERS:	57
PLAN NEGOTIATION:	51
ANY AND ALL MATTERS:	29
OTHER:	8

_____
_____
_____

(b) Are there particular instances or issues in a chapter 11 case in which you have, or would, use mediation? If so, please describe:

_____
_____

____I do not use mediation in chapter 11 cases

Comments:_____
_____

4. At what stage in a chapter 11 proceeding do you order or suggest mediation?
Check all that apply:

____Promptly after commencement of the case	[14]
____Before all discovery is completed	[43]
____After all discovery is completed	[49]

____After all expert witness and other reports have been submitted [26]

____Before summary judgment [36]

____After summary judgment [29]

____Before the final pre-trial order has been entered [29]

____After the final pre-trial order has been entered [18]

____Other (please specify)_____ [17]

____I do not use mediation in chapter 11 cases [15]

AT ANY TIME WHEN MEDIATION SEEMS APPROPRIATE [50]
(volunteered response, not supplied on survey)

How frequently do you use (or permit) mediation in some aspect of chapter 11 cases?

____Routinely (more than 75%) [5] ____Frequently (more than 50%) [6]

____Sometimes (more than 25%) [21] ___Infrequently(less than 25%) [82]

___Never [18]

Comments: _____
_____
_____

5. What factors do you consider when you decide to order or suggest a mediation?
Check all that apply:

____length of the trial [76] ____cost of the trial [86]

____need for a prompt resolution before a plan can be confirmed or a disclosure statement approved [90]

WILLINGNESS OF THE PARTIES TO MEDIATE [15]
(Volunteered response, not supplied on survey)
____Other _____[41]

____I do not use mediation in chapter 11 cases [13]

6. Would you characterize mediation in your court as:

_____voluntary [130] ____involuntary [7]

____mediation is not used [8]

BOTH VOLUNTARY AND INVOLUNTARY [4]
(Volunteered response, not supplied on survey)

7. Are other bankruptcy judges ever used as mediators in your court?

____yes [124] ____no [20] ____mediation is not used [6]

8. Do you typically approve the selection of a mediator?

____yes [72] ____no [62] ____mediation is not used [9]

9. Is there a local rule or standing order in your district that either requires or permits the use of mediation in chapter 11 cases?

____Yes ___No

If yes, please identify: _____

10. In your estimation, in what percentage of your cases has mediation been either successful or helpful?

_____% ____mediation is not used

NOT REPORTED, DUE TO THE AMBIGUITY NOTED BY RESPONDENTS IN THE QUESTION

11. Please comment on the use of mediation in chapter 11 proceedings. Does it have a place in chapter 11? If so, under what circumstances should it be used or permitted?

_____

_____

_____

Please indicate your bankruptcy court:_____

Your name (optional)_____