

# A USER'S GUIDE TO BANKRUPTCY MEDIATION AND SETTLEMENT CONFERENCES

JARROD B. MARTIN†

## I. INTRODUCTION

Bankruptcy judges and bankruptcy attorneys have sought and employed various methods of alternative dispute resolution (ADR) to address problems caused by increased bankruptcy filings,<sup>1</sup> bloated dockets,<sup>2</sup> and high litigation costs.<sup>3</sup> ADR can reduce the strain on both the overburdened court system and litigants' monetary bottom line by providing fast and inexpensive ways to avoid traditional bankruptcy litigation.<sup>4</sup>

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† Law Clerk to the Hon. Jeff Bohm, United States Bankruptcy Court, Southern District of Texas; J.D. University of Miami School of Law; B.A. University of California, Los Angeles. For their contributions, ideas, and advice on this article, I would like to sincerely thank the Hon. Laurel Isicoff, the Hon. Jeff Bohm, and the Hon. John Olson. I would also like to thank Patricia Redmond, Allison Day, Jerry Markowitz, John Dodd, and Dean Marni Lennon. Without their time and assistance, this article would not have been possible. Finally, I would like to thank Freddy Funes for his encouragement and positive feedback while writing this article.

<sup>1</sup> *U.S. Bankruptcy Filing Rate Jumps*, L.A. TIMES, Sept. 4, 2008, at C4 (“Slumping labor and real estate sectors, high gasoline prices and a cost-of-living increase helped U.S. bankruptcy filings reach the highest daily rate in August [2008] since a 2005 law made it harder for Americans to shed debts. The 94,000 total . . . put the country on a pace to record 1.06 million petitions.”). Bankruptcy filings in Florida have likewise increased greatly within the last year, especially consumer filings. Comparing October 2008 to October 2007, both the Northern and Middle Districts of Florida have had consumer filings increase by over 40 percent, while consumer filings in the Southern District of Florida have seen an increase of 80 percent over the same time period. Paul Singerman, Opening Remarks at Bankruptcy Law & Practice: View from the Bench (Nov. 7, 2008) (transcript available by request from the Florida Bar Continuing Legal Education Committee and the Business Law Section of the Florida Bar).

<sup>2</sup> See Note, *The Paths of Civil Litigation*, 113 HARV. L. REV. 1851, 1859 (2000).

<sup>3</sup> See Hon. Alexander L. Paskay & Frances Pilaro Wolstenholme, *Chapter 11: A Growing Cash Cow: Some Thoughts on How to Rein in the System*, 1 AM. BANKR. INST. L. REV. 331, 337 (1993) (noting that a number of areas within bankruptcy litigation can lead to excessive costs).

<sup>4</sup> Ralph R. Mabey, Charles J. Tabb & Ira S. Dizengoff, *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, 1262-63 (1995); 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 (1997) (noting that because the primary objectives of the Bankruptcy Code—debtor rehabilitation and maximum distribution to creditors—are frustrated when cases remain unresolved, bankruptcy courts are progressively turning to ADR).

The first part of this article explores two bankruptcy ADR options: mediation and the settlement conference. Part II of this article examines the history of bankruptcy mediation and settlement conferences, including their statutory basis. Part III seeks to give practitioners and law students reasons for using ADR in bankruptcy and explores some issues in bankruptcy ADR that may prove problematic. This information may provide students and practitioners with talking points while attempting to convince a bankruptcy judge to utilize either mediation or a settlement conference. Part IV provides advice from both practitioners and bankruptcy judges on how to successfully engage in bankruptcy mediation and settlement conferences. Part V summarizes the article and provides a glimpse into where bankruptcy mediation may progress in the near future.

## II. A SHORT HISTORY OF MEDIATION AND SETTLEMENT CONFERENCES IN THE BANKRUPTCY COURTS

### *A. Authority for Use of Mediation in Bankruptcy*

Courts have the inherent authority to “manage their own affairs so as to achieve the orderly and expeditious disposition of [their] cases.”<sup>5</sup> This authority extends to bankruptcy courts.<sup>6</sup> A court is free to take advantage of its case-management abilities as long as it does not interfere with constitutional safeguards, coerce parties into settlements, or impose undue burdens or excessive delays on the parties.<sup>7</sup> Indeed, Congress and the courts have encouraged the promotion of ADR within the judicial system.<sup>8</sup>

Bankruptcy courts derive the power to use mediation and settlement conferences from both statutory and rule-based authority. For instance, Congress has passed the Authorization of Alternative Dispute Resolution,<sup>9</sup> which allows “the use of alternative dispute resolution processes in all civil actions, including adversary proceedings in bankruptcy.”<sup>10</sup> The statute explicitly authorizes the use of neutral

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<sup>5</sup> See *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630-31 (1962).

<sup>6</sup> See Mabey, Tabb & Dizengoff, *supra* note 4, at 1284 n.70 (noting that the inherent authority extends to the bankruptcy courts because, as units of the federal district court, they have substantial adjudicatory powers and the accompanying inherent authority pertaining to those powers).

<sup>7</sup> See *id.* at 1285.

<sup>8</sup> See *In re NLO, Inc.*, 5 F.3d 154, 158 (6th Cir. 1993) (“Requiring participation in a pre-trial [settlement] conference . . . is [justifiably] permitted . . . for it may facilitate settlement at very little expense to the parties and the court.”).

<sup>9</sup> 28 U.S.C. §§ 651-58 (2009).

<sup>10</sup> *Id.* at § 651(b).

evaluations such as settlement conferences and mediation.<sup>11</sup> Before Congress authorized the use of ADR, bankruptcy judges appointed mediators through their § 105 powers.<sup>12</sup> 11 U.S.C. § 105(a) permits bankruptcy judges to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions” of the Bankruptcy Code.<sup>13</sup>

### *B. Settlement Conferences in the Bankruptcy Court*

A bankruptcy court's power to use the mandatory settlement conference is clear. The Federal Rules of Bankruptcy Procedure allow the court to order a pre-trial conference to facilitate a settlement.<sup>14</sup> Indeed, the rule bears a strong resemblance to Rule 16 of the Federal Rules of Civil Procedure.<sup>15</sup> One of the drafters of Rule 16, Arthur Miller, indicated that it was “intended to encourage . . . judicial involvement in settlement discussions at the two pretrial stages.”<sup>16</sup> In the bankruptcy system, settlement conferences are now routinely used to facilitate the settlement of bankruptcy issues.<sup>17</sup>

## **III. A PRACTICAL APPROACH TO MEDIATIONS AND SETTLEMENT CONFERENCES**

In bankruptcy, it may be difficult to mediate before a case has been assigned to a judge because a creditor may be unaware that bankruptcy is imminent until the case is filed.<sup>18</sup> Moreover, the likelihood and success of mediation and settlement conferences will vary by jurisdiction and judge. An informal poll of judges and bankruptcy lawyers at the annual meeting of the National Conference of Bankruptcy

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<sup>11</sup> *Id.* at § 651(a).

<sup>12</sup> *See, e.g., In re Royal Composing Room, Inc.*, 62 B.R. 403, 405 n.2 (Bankr. S.D.N.Y. 1986) (noting that 11 U.S.C. § 105 may be used to appoint a mediator).

<sup>13</sup> 11 U.S.C. § 105(a) (2009).

<sup>14</sup> FED. R. BANKR. P. 7016(a)(5).

<sup>15</sup> *See* FED. R. BANKR. P. 7016; FED. R. CIV. P. 16.

<sup>16</sup> *See* Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 492 (1985).

<sup>17</sup> *See, e.g.*, E-mail from the Hon. John K. Olson, United States Bankruptcy Judge for the Southern District of Florida, to Jarrod Martin (Nov. 14, 2008, 15:15 EST) (on file with author) (noting that [Judge Olson] handles on average two settlement conferences per month).

<sup>18</sup> E-mail from Patricia Redmond, Senior Partner, Stearns, Weaver, Miller, Weissler, Alhadeff & Sitterson, P.A., to Jarrod Martin (Nov. 24, 2008, 18:06 EST) (on file with author). However, creditors can check a debtor's solvency in reports from The Dunn and Bradstreet Corporation, an international provider of business credit information and credit reports. *Id.*

Judges in 1996 pointed to an increase in the amount of settlement conferences that would be used in the future.<sup>19</sup> Out of approximately 200 respondents, 16 percent believed the use of mandatory settlement conferences should occur more, and 41 percent believed that mandatory settlement conferences should be used somewhat more than they were used at that time.<sup>20</sup> Only 15 percent of respondents believed that the conferences should be used less than they were.<sup>21</sup> With the large increase in bankruptcy filings in recent months, it is unlikely that these numbers have changed significantly since the poll was taken.<sup>22</sup>

*A. Arguments for Mediation and Settlement Conference  
(Or What to Tell the Judge When Requesting Mediation)*

While all of the following examples are good reasons to mediate, all three bankruptcy judges interviewed refused to order either a mandatory settlement conference or engage in court-annexed mediation unless both parties agreed to the order. For example, Judge Robert Mark, a Bankruptcy Judge in the Southern District of Florida, generally only grants mediation or a settlement conference if both parties agree or show some interest in doing so.<sup>23</sup> Both parties agreeing upon mediation, however, guarantees nothing. The following sub-sections are provided to practitioners as potential talking points when asking a bankruptcy judge for mediation.

1. Solving Complex Cases

Within recent years mediation and settlement conferences have been especially effective in the context of “mega-bankruptcy” cases.<sup>24</sup> One such case in

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<sup>19</sup> *Results of an Informal NCBJ Poll*, 28 BANKR. CT. DEC. 8 (Jan. 2, 1996).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* However, just because respondents believe that settlement conferences should be used more often does not necessarily mean that they are actually being used more often. The Hon. Jeff Bohm, a Bankruptcy Judge for the Southern District of Texas, said that he has seen no increase in either mediations or settlement conferences within the Southern District. Telephone Interview with the Hon. Jeff Bohm, United States Bankruptcy Judge for the Southern District of Texas, in Houston, Tex. (Nov. 8, 2008).

<sup>22</sup> See *supra* notes 1-4 and accompanying text.

<sup>23</sup> E-mail from John Dodd, former clerk to the Hon. Robert A. Mark and associate at Greenberg Traurig LLP, to Jarrod Martin (Nov. 20, 2008, 8:05 EST) (on file with author).

<sup>24</sup> See Hon. Cecelia G. Morris & Cheryl J. Lee, *From Behind the Bench: Toward an Efficient Mediation Model – Evaluative Mediation in Bankruptcy*, NORTON BANKR. L. ADVISER (Norton Inst. on Bankr. Law, Nashville, Tenn.), Apr. 2007, at 6. Even if a matter does not settle, there is still some benefit from the mediation process. Parties are often able to agree upon discovery deadlines or motion practice. This

which a settlement conference proved essential was *In re Cajun Electric*.<sup>25</sup> In that case, two bidders competed for Cajun Electric's non-nuclear assets, as well as the right to sell power to 11 different energy cooperatives located throughout the Southwest.<sup>26</sup> The case was so negative and "acrimonious that the first confirmation hearing lasted several years with various issues being appealed all the way to the 5th Circuit."<sup>27</sup> Judge Buffone, a district court judge, along with the assistance of two bankruptcy judges, called a mandatory settlement conference that subsequently broke the deadlock.<sup>28</sup> How did the conference break the deadlock? First, it got all of the players in the same room together, where dialogue was not only open, but also encouraged. For example, "[f]our of the five Louisiana Public Service Commissioners were there. Every co-op general manager and board president was there with their lawyers. The Rural Utilities Service was there. Members of the fuel chain were there."<sup>29</sup> Once every side articulated its interests, every party reevaluated its own position. Everyone involved realized what would work and what would not. As a result:

At the end of the day, [the deal] was still . . . 20 million [dollars] lower than Louisiana Generating, and LaGen's plan had fewer problems and fewer objections than SWEPCO's plan. While both appeared confirmable . . . there was a substantial likelihood that LaGen would be confirmed.<sup>30</sup>

The conference was an effective evaluative tool that allowed the party delaying the proceeding to become aware of its tenuous position. Ultimately, the conference

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in turn streamlines the case and saves a significant amount of money. *See id.* Jerry Markowitz, a bankruptcy attorney and mediator, notes that "[u]nlike general commercial litigation, there [are] usually more than two parties in a bankruptcy mediation. It's helpful to bring everyone together in one environment." *See* Telephone Interview with Jerry Markowitz, Senior Partner, Markowitz, Davis, Rangel & Trusty, in Miami, Fla. (Nov. 18, 2008). However, Markowitz was also quick to point out that bankruptcy mediation is not exclusively used in complex areas of bankruptcy. Areas that lend themselves to mediation include: officer and director liability, malpractice litigation, valuation of assets, confirmation issues, and general dischargeability issues. Almost any issue litigated in bankruptcy may be mediated. *See id.*

<sup>25</sup> *In re Cajun Electric Power Coop., Inc.*, 791 F.2d 353 (5th Cir. 1986).

<sup>26</sup> *How Settlement was Reached in Cajun Electric*, BANKR. CT. DEC. WEEKLY NEWS & CMT. (LRP), Sept. 14, 1999, at A1.

<sup>27</sup> *Id.* at A8.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

resulted in billions of dollars worth of energy contracts and settlement dollars changing hands.<sup>31</sup>

*Cajun Electric* is not the only large case that has taken advantage of alternative dispute resolution. In both the Enron and Adelphia Communication bankruptcies, the judges referred multiple disputes to mediation, including claims objections, collection of accounts receivable, and declaratory judgment actions.<sup>32</sup> The Honorable John K. Olson, a bankruptcy judge in the Southern District of Florida, specifically notes that both settlement conferences and mediations are generally very useful, even when the parties are sophisticated.<sup>33</sup>

Mediation is a useful tool for a judge to resolve large bankruptcy claims, especially in cases of mass tort litigation.<sup>34</sup> Because bankruptcy courts are unable to hear personal injury claims,<sup>35</sup> each tort claim or class action may have to be independently tried all across the country.<sup>36</sup> Mediation has proven to be effective in resolving mass tort problems within the bankruptcy context. The time- and cost-saving methods of mediation have thus made Chapter 11 reorganization possible in cumbersome mass tort cases.<sup>37</sup>

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<sup>31</sup> *See id.*

<sup>32</sup> *See Morris & Lee, supra* note 24, at 7.

<sup>33</sup> Olson E-mail, *supra* note 17.

<sup>34</sup> *See Morris & Lee, supra* note 24, at 6.

<sup>35</sup> 28 U.S.C. §§ 157(b)(2)(O), 157(b)(5) (2009).

<sup>36</sup> *See Morris & Lee, supra* note 24, at 6-7.

<sup>37</sup> *Id.* at 7. Reducing costs are particularly important within the bankruptcy context. In bankruptcy, litigation costs for the debtor come out of the estate's property. Every dollar that comes out of the estate is a dollar out of the pockets of the creditors. As a result, creditors have an even greater sense of urgency to solve problems as cheaply as possible because they are paying for both sides of the litigation. *See* 11 U.S.C. § 503 (2009). Settlement conferences tend to be very cost-effective. Rules prevent active judges from taking any fees. Therefore, if a judge recommends a case for a judicial settlement conference, the costs of the parties are reduced dramatically. *See* Mabey, Tabb, & Dizengoff, *supra* note 4, at 1271 ("Because the mediators in both phases of mediation were acting judges, there was no payment of the mediators' costs."); Interview with the Hon. Laurel M. Isicoff, United States Bankruptcy Judge for the Southern District of Florida, in Miami, Fla. (Nov. 14, 2008) (on file with author).

## 2. Calling the Expert

The role of the expert mediator is invaluable to a bankruptcy judge.<sup>38</sup> The Honorable Jeff Bohm, a Houston bankruptcy judge in the Southern District of Texas, is normally reluctant to use mediation unless absolutely necessary and he does not use mandatory settlement conferences.<sup>39</sup> Judge Bohm is much more confident in the mediation's potential success, however, when the requested mediator is an expert within the field, such as another bankruptcy judge or a partner at a large law firm.<sup>40</sup> For example, Judge Bohm cited a case involving multiple parties in a complex Chapter 11 bankruptcy.<sup>41</sup> Continued litigation would have resulted in substantial legal fees, so the parties went to mediation, and a bankruptcy partner who specialized in mega-bankruptcy mediation was retained as the mediator.<sup>42</sup> Mediation did not solve all the parties' issues, but the parties worked through their problems and avoided prolonged legal battles before the court.<sup>43</sup>

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<sup>38</sup> While being a bankruptcy expert is important to parties when selecting a mediator, that expert must still qualify to be a mediator. In the Bankruptcy Court for the Southern District of Florida, Local Rule 9019 lays out the following qualifications to be a mediator. A mediator must:

(a) be an active member of The Florida Bar and [be] qualified to practice in this court or be a retired federal or state judge;

(b) have been admitted to practice in a state or federal court for at least the past [five] years or be a retired federal or state judge;

(c) have completed a minimum of 40 hours in a circuit court mediation training program certified by the Florida Supreme Court or be certified by the Florida Supreme Court as a circuit court mediator; and

(d) agree to accept at least [two] mediation assignments per year in cases where at least one party lacks the ability to compensate the mediator, in which case the mediator's fees shall be reduced accordingly or the mediator shall serve pro bono if no litigant is able to contribute compensation.

Bankr. S.D. Fla. R. 9019-2 (2009).

<sup>39</sup> See Bohm Interview, *supra* note 21.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* Bankruptcy mediation appears to be tailor-made for plan confirmation, as it "typically involves a . . . dispute between the unsecured creditors' committee, the secured creditor and the debtor-in-possession." Irvin W. Sandman, *Should Bankruptcy Lawyers Resist Mediation?*, AM. BANKR. INST. J. (ABI), June 1995, at 27. This often leads to extremely difficult "factual, legal and [multiple] financial issues." *Id.*

If the parties do not select an effective and knowledgeable mediator, all parties are likely to suffer because bankruptcy tends to make everyone a loser.<sup>44</sup> This may be why mediators in complex bankruptcy cases tend to be former or current bankruptcy judges.<sup>45</sup> According to Judge Bohm, the least effective bankruptcy mediators tend to be those who are full-time mediators with little practical bankruptcy experience.<sup>46</sup> Therefore, if an attorney believes that mediation may be likely in his or her bankruptcy case, thorough research should be done regarding potential mediators. Having an inferior bankruptcy mediator could prove catastrophic for the successful reorganization of a mega-bankruptcy.

### 3. The Gravitas of a Judge

Both practitioners and judges note that one of the more intangible items a judge managing a settlement conference brings to the table is the gravitas that comes simply from being a judge.<sup>47</sup> The Honorable Laurel Isicoff, a Bankruptcy Judge for the Southern District of Florida, explains that a judge can use his or her gravitas to break up stubborn parties.<sup>48</sup> Parties are much less likely to dig in their heels and be unreasonable when dealing with a judge instead of an agreed-upon mediator.<sup>49</sup> The benefits of judicial gravitas extend to the parties, as well. Allison Day, a shareholder at Genovese, Joblove & Battista, states “I love having a [bankruptcy] judge mediate. Sometimes your own client needs to hear that their case is not as good as they think it is. . . . Although there are some fine mediators that aren’t [bankruptcy] judges, sometimes that is just the ticket.”<sup>50</sup> Day also notes that bankruptcy judges are exceedingly helpful in providing a reality check for clients who think their case is better than it actually is.<sup>51</sup> As an added benefit, Judge Isicoff notes that a judge’s gravitas goes a long way toward making parties behave more civilly toward one

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<sup>44</sup> See Morris & Lee, *supra* note 24, at 7.

<sup>45</sup> *Id.* Cost-saving is an added benefit to requesting a judge to mediate a bankruptcy dispute since judges are prohibited from taking compensation if they sit as a mediator. See Bohm Interview, *supra* note 21.

<sup>46</sup> See Bohm Interview, *supra* note 21.

<sup>47</sup> See Olson E-mail, *supra* note 17.

<sup>48</sup> See Isicoff Interview, *supra* note 37.

<sup>49</sup> *Id.*

<sup>50</sup> E-mail from Allison Day, Shareholder, Genovese, Joblove & Battista, to Jarrod Martin (Oct. 24, 2008, 13:39 EST) (on file with author).

<sup>51</sup> *Id.*



another.<sup>52</sup> Both clients and attorneys are much less likely to misbehave in front of a sitting judge for fear of appearing before that judge in the future.<sup>53</sup>

*B. Arguments Against Mediation and Settlement Conferences  
(Or What Not to Mention When Asking for Mediation)*

1. Are Lazy Lawyers Giving Clients what They Want?

Not everyone is excited about the prospect of mediation within the bankruptcy courts. Judge Bohm argues that parties are beginning to use mediation as a crutch; he believes that attorneys are refusing to discuss settlements until they have had a chance to mediate.<sup>54</sup> Mediation, however, should not be necessary for attorneys to be cordial with one another and talk about potential settlements.<sup>55</sup> Judge Bohm believes that mediation does not force attorneys to assess the case's risk because of the comparatively low cost of mediation and the belief that they may achieve a positive result.<sup>56</sup> This laziness could prevent attorneys from recognizing when clients do not want to settle and simply want their day in court.<sup>57</sup>

Under the rules of ethics, unless the lawyer has explicit or inherent authority to settle, the client should determine whether or not to settle.<sup>58</sup> An attorney who does not abide by this rule could be subject to discipline by the state bar.<sup>59</sup> Unfortunately, the Rules of Professional Conduct are not always effective deterrents to unethical behavior. For example, in December 2008, “[t]he Florida Supreme Court . . . disciplined 23 attorneys, disbarring six, suspending 13 and placing six on

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<sup>52</sup> Isicoff Interview, *supra* note 37. The small number of bankruptcy judges may also contribute to this civility. For example, with only three bankruptcy judges in Miami, the odds are high that if an attorney appears in front of any of the three judges in a settlement conference, they could appear in front of one of them the next day in court. See United States Bankruptcy Court for the Southern District of Florida, <http://www.flsb.uscourts.gov> (follow “Judges Information” hyperlink) (last visited Nov. 19, 2008).

<sup>53</sup> See United States Bankruptcy Court for the Southern District of Florida, <http://www.flsb.uscourts.gov/> (follow “Judges Information” hyperlink) (last visited Nov. 19, 2008).

<sup>54</sup> See Bohm Interview, *supra* note 21.

<sup>55</sup> See *id.* But see Markowitz Interview, *supra* note 24 (noting that the South Florida bankruptcy bar was amazingly cordial with one another, which made working with Florida bankruptcy attorneys surprisingly easy during mediations).

<sup>56</sup> See Bohm Interview, *supra* note 21.

<sup>57</sup> See *id.*

<sup>58</sup> MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2002) (“A lawyer shall abide by a client’s decision whether to settle a matter.”).

<sup>59</sup> *Id.* at Preamble and Scope ¶ 16.

probation. Some attorneys received more than one form of discipline. Four attorneys were reprimanded.”<sup>60</sup> Clearly, ethical rules alone are not sufficient to prevent attorneys from discouraging clients from settling before mediation.

Arguably, many large, institutional bankruptcy clients are sophisticated enough not to allow their lawyers to dictate when settlement will or will not occur. This argument may not be a winning one. A large institutional client is likely to have an attorney on staff acting as general counsel. Generally, attorneys unfamiliar with bankruptcy law tend to fear bankruptcy issues.<sup>61</sup> Thus, it is possible that even a sophisticated general counsel for a large company could be overwhelmed by the expertise of a large firm bankruptcy attorney.

## 2. Dangers of the Settlement Conference

Most of the judges and practitioners surveyed expressed general appreciation for the role of the judicial settlement conference within the bankruptcy context. A few interviewees were uneasy about situations, however, where the judge manages settlement conferences and also serves as the finder of fact.<sup>62</sup> Judge Isicoff notes a number of problems that can occur in that situation.<sup>63</sup> For example, within the settlement conference process, parties may be more likely to hold back critical information if they know that the mediator will be presiding over their case later.<sup>64</sup> Moreover, if the case continues after the conference, it may be difficult for the judge to forget information that came forward during the conference.<sup>65</sup>

Jerry Markowitz notes that one judge, the Honorable David Houston, a Bankruptcy Judge for the Northern District of Mississippi, has managed settlement conferences in which he was also the finder of fact.<sup>66</sup> Markowitz explains that Judge Houston does not see a problem with managing his own settlement conferences because he is “able to turn the light on and off.”<sup>67</sup> When Judge Houston acts as the mediator, he is the mediator, and when he is the judge, he is able to “turn off” the

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<sup>60</sup> *The Florida Bar's Public Info. and Bar Serv. Dept.*, THE FLA. BAR NEWS, Dec. 15, 2008.

<sup>61</sup> Harvey C. Fisher & Robert G. Seidenstein, *Bankruptcies: Lucrative Practice Seeing Bottom Falling Out*, N.J. LAW.: THE WKLY. NEWSPAPER, Oct. 9, 2006, at 1.

<sup>62</sup> See Isicoff Interview, *supra* note 37.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> See Markowitz Interview, *supra* note 24. Markowitz also notes that Judge Houston is very active on the lecture circuit. *Id.*

<sup>67</sup> *Id.*

information that he learned as a mediator.<sup>68</sup> Markowitz notes that as a practitioner, he did not want to face this situation because he felt the process would be tainted, as both parties would withhold information at the conference.<sup>69</sup>

#### IV. TIPS FROM THE EXPERTS

To be successful in bankruptcy mediation, practitioners and judges were unanimous in stating that preparation is the key to a successful mediation.<sup>70</sup> Judge Isicoff notes that reading the local rules is one of the most important things a party can do before engaging in bankruptcy mediation.<sup>71</sup> For example, if a party has not looked through the local rules, he or she will be unaware that parties need at least 10 calendar days advance written notice of a mediation conference.<sup>72</sup> If an attorney fails to follow the rules, Judge Isicoff may call the offending attorney into chambers to read the local rules under her supervision.<sup>73</sup>

In addition to learning the court's local rules, general preparation is a necessity before engaging in bankruptcy mediation.<sup>74</sup> Know both the facts and the law, especially if you are participating in a settlement conference, because:

A good mediator makes you feel insecure and uncertain about the outcome. If you haven't prepared and feel that you aren't completely in the right, you could end up giving more than you wanted to. You need to be prepared so you can argue and advocate.<sup>75</sup>

An attorney must prepare the client for mediation. This process does not vary much from mediation preparation in other areas of the law. The client should understand that he or she does not have to agree on anything he or she is

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<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> See Isicoff Interview, *supra* note 37. In the Southern District of Florida, the local rule that governs mediation is Bankr. S.D. Fla. R. 9019-2.

<sup>72</sup> Bankr. S.D. Fla. R. 9019-2(C)(1).

<sup>73</sup> See Isicoff Interview, *supra* note 37.

<sup>74</sup> See Olson E-mail, *supra* note 17. It is important to note that tips to succeed in bankruptcy mediation can cross over into many other types of mediation.

<sup>75</sup> See Markowitz Interview, *supra* note 24. Importantly, Markowitz urges new practitioners to observe a number of mediations before participating, because "[y]ou don't go and play baseball before you've taken a few swings to practice or have some experience." *Id.* For another practical checklist on what a bankruptcy attorney should do before going to mediation, see Morris & Lee, *supra* note 24, at 10.

uncomfortable with.<sup>76</sup> More specifically, “[i]t should be made clear that the mediator will not decide the merits of the client’s case . . . and the rules of evidence don’t apply.”<sup>77</sup> Expectation management is also vital to preparing a client.<sup>78</sup> A client should know that “a successful mediation is usually one in which everybody feels that they gave up something.”<sup>79</sup> Judge Olson explains that a client must understand that, while litigation results are usually not nuanced, settlement agreements stemming from mediation can contain various tradeoffs, both obvious and hidden.<sup>80</sup> Mediation is very rarely a simple yes or no answer.<sup>81</sup>

## V. CONCLUSION

If a practitioner wishes to use bankruptcy mediation, there are a number of things he or she could articulate to the judge to persuade him or her to order mediation. First, if dealing with a mega-bankruptcy, the attorney should note how mediation can resolve an issue that would otherwise be deadlocked.<sup>82</sup> Second, the attorney should request an effective, experienced mediator and emphasize how that mediator’s qualifications will aid the parties to resolve complicated issues.<sup>83</sup> Third, if asking for a settlement conference or using a retired judge as an expert mediator, the attorney should note how the gravitas of a judge can help break otherwise deadlocked parties.<sup>84</sup> Moreover, the practitioner should avoid the appearance of using mediation as a crutch.<sup>85</sup> A judge still wants counsel to actively evaluate the case before requesting mediation.<sup>86</sup> Further, an attorney should avoid asking a judge to manage a settlement conference if the judge is already assigned to the case to avoid problems for both the court and the parties involved. Finally, success in bankruptcy mediation requires the attorney to sufficiently prepare him or herself and the client.<sup>87</sup>

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<sup>76</sup> See Bohm Interview, *supra* note 21.

<sup>77</sup> Morris & Lee, *supra* note 24, at 10.

<sup>78</sup> *Id.*

<sup>79</sup> Olson E-mail, *supra* note 17.

<sup>80</sup> *Id.*

<sup>81</sup> See *id.*

<sup>82</sup> Morris & Lee, *supra* note 24, at 6-7.

<sup>83</sup> See Bohm Interview, *supra* note 21.

<sup>84</sup> See Isicoff Interview, *supra* note 37.

<sup>85</sup> See Bohm Interview, *supra* note 21.

<sup>86</sup> See Isicoff Interview, *supra* note 37.

<sup>87</sup> See Markowitz Interview, *supra* note 24.

Bankruptcy mediation will certainly evolve as the number of bankruptcies increase in the coming years. As of now, none of the interviewees recommend substantive changes to the way bankruptcy mediations and settlement conferences are used. However, it is quite easy to envision courts implementing various measures to increase the number of mediations such as recommending more mandatory settlement conferences and mediations or providing parties with incentives for using mediation (*i.e.*, fast-tracking hearings for cases that have gone through ADR). Bankruptcy courts are facing increased dockets in the upcoming months, so bankruptcy ADR will continue to command an even greater focus. Practitioners seeking to sidestep bloated bankruptcy dockets may use the points in this article to convince a judge to recommend mediation or a settlement conference, potentially saving both time and money for the client.