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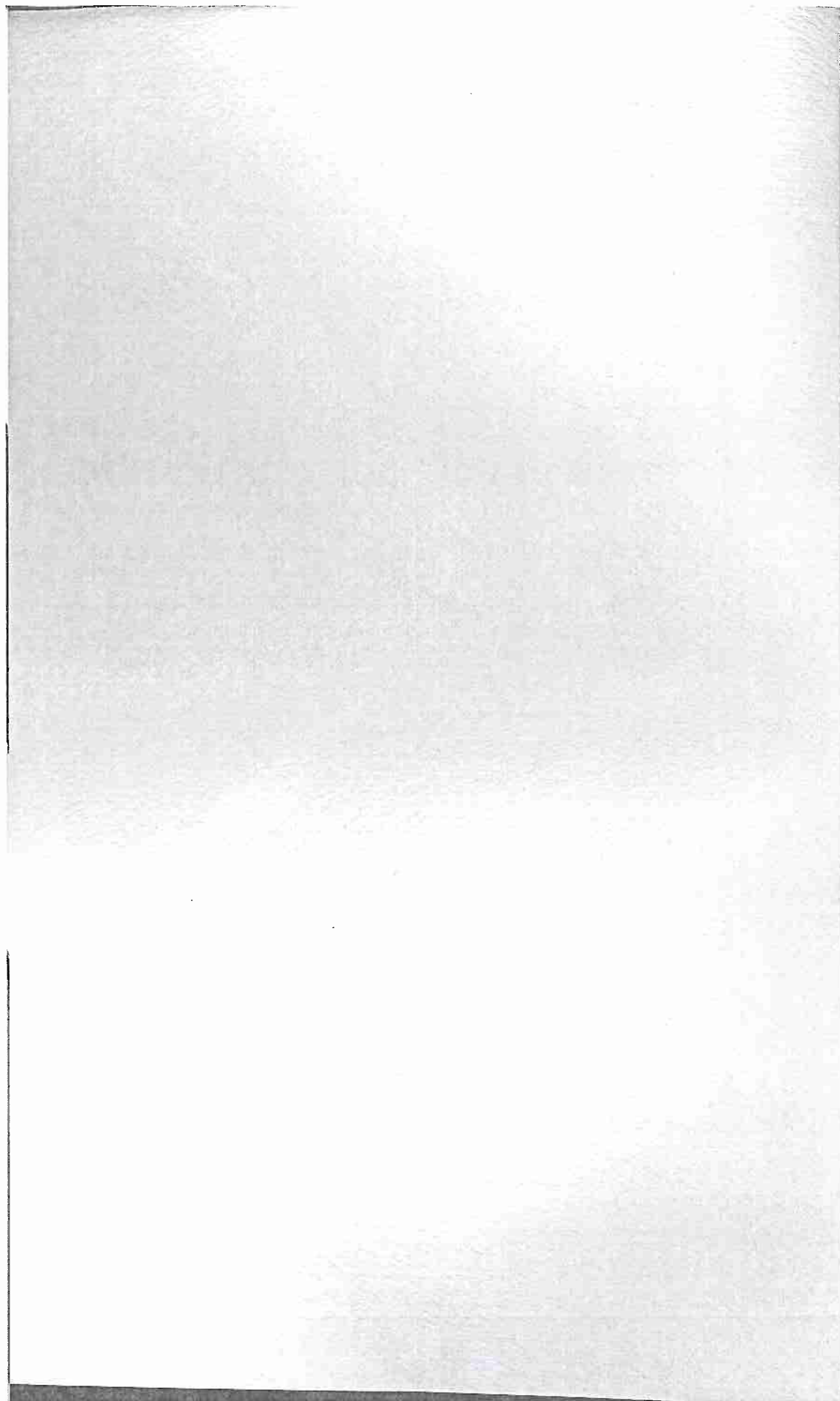
EXPANDING THE REACH OF ALTERNATIVE
DISPUTE RESOLUTION IN BANKRUPTCY:
THE LEGAL AND PRACTICAL BASES
FOR THE USE OF MEDIATION AND
OTHER FORMS OF ADR

*Ralph R. Mabey
Charles J. Tabb
Ira S. Dizengoff*

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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

Ralph R. Mabey, Charles J. Tabb,** and Ira S. Dizengoff****

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* Partner, LeBoeuf, Lamb, Greene & MacRae, L.L.P., Salt Lake City, Utah. Adjunct Professor of Law, J. Reuben Clark Law School, Brigham Young University. B.A. 1968, University of Utah; J.D. 1972, Columbia University School of Law; United States Bankruptcy Judge for the District of Utah, 1979-83; Bankruptcy Rules Advisory Committee of the U.S. Judicial Conference 1987-1993. Mr. Mabey served as the examiner in the A.H. Robins Co. case (helping to forge a consensual plan of reorganization). He has successfully served as a mediator in pivotal litigation in the Hunt bankruptcy proceedings in Texas and dispositive exit financing disputes in the Thrifty Oil Chapter 11 reorganization in California. Mr. Mabey is a member of three panels of the American Arbitration Association: the Large, Complex Case Panel of Arbitrators, the National Advisory Committee for Bankruptcy Alternative Dispute Resolution, and the Utah Judicial Panel.

** Professor of Law, University of Illinois College of Law. B.A. 1977, summa cum laude, Vanderbilt University; J.D. 1980, University of Virginia School of Law. Bankruptcy Rules Advisory Committee of the U.S. Judicial Conference 1993-present; Chair of ADR Subcommittee of the Bankruptcy Rules Advisory Committee.

*** Associate, LeBoeuf, Lamb, Greene & MacRae, L.L.P., New York, New York. B.A. 1989, magna cum laude with high honors, Brandeis University; J.D. 1992, Benjamin N. Cardozo School of Law.

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Many bankruptcy judges responded generously to our inquiries and their contributions are reflected throughout the article. The authors wish to thank those judges for their time in responding to our inquiries and for showing a genuine concern in this endeavor. In compiling ADR usage, the authors also reviewed, and drew from, materials provided in Harvey R. Miller et al., *Is Alternative Dispute Resolution a Universal Alternative for All Issues that Arise in Bankruptcy and Reorganization Cases?* (Feb. 1994) (unpublished manuscript, on file with the authors) and ROBERT J. NIEMIC & JEFFREY REICH, *FEDERAL JUDICIAL CENTER, ADR IN BANKRUPTCY COURTS: SUMMARY OF LOCAL BANKRUPTCY RULES AND GENERAL ORDERS ON ADR* (Nov. 18, 1994) (unpublished manuscript, on file with authors). We also acknowledge and appreciate their assistance.

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INTRODUCTION

Driven by the explosion of bankruptcy filings,¹ increasing pressure to streamline dockets,² and acute sensitivity to the costs and inefficiencies of litigation,³ an increasing number of bankruptcy courts now employ or

1. The number of bankruptcy petitions filed nationwide steadily increased in the late 1980s through early 1990s: 642,933 from July 1988 to June 1989; 725,484 from July 1989 to June 1990; and 880,399 from July 1990 to June 1991. *One Million Filings Expected in '91*, 21 BANKR. CT. DEC., Sept. 19, 1991, at A7 (citing figures from the Administrative Office of the U.S. Courts). In fiscal year 1992, bankruptcy filings peaked at 972,490. Since then, bankruptcy filings have declined somewhat. In fiscal year 1993, for example, there were 918,734 bankruptcy filings. Administrative Office of U.S. Courts, 1993 Report of the Director: Activities of the Administrative Office (1993). According to the latest figures from the Administrative Office of the U.S. Courts, bankruptcy filings for the fiscal year ending September 30, 1994 totalled 837,797. See also Claudia MacLachlan, *Economy Up, Bankruptcies Head Down*, NAT'L L.J., Dec. 26, 1994, at B1. Bankruptcy filings in 1995, however, are expected to begin a new upswing.

2. See *infra* notes 77-90 and accompanying text.

3. See generally Robert G. Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure From the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 3 (1989) ("Jurists today complain about the excessive costs and the unreasonable delay of litigation,

encourage alternative dispute resolution (ADR) methods.⁴ ADR can alleviate

the result, they argue, of an overburdened court system and overzealous advocacy." For example, in the Bankruptcy Courts for the Southern District of New York for the four-year period 1989-1992, professionals earned almost \$770 million in fees. Edward A. Adams, *Bankruptcy Fees Here Are Highest in Nation*, N.Y.L.J., June 24, 1993, at 1. In 1992, the U.S. Senate held hearings on bankruptcy fees with the stated intention to curb the perceived excesses of bankruptcy fee awards.

4. Alternative dispute resolution has been defined as:

a set of practices and techniques that aim (1) to permit legal disputes to be resolved outside the courts for the benefit of all disputants; (2) to reduce the cost of conventional litigation and the delays to which it is ordinarily subject; and (3) to prevent legal disputes that would otherwise likely be brought to the courts.

James F. Henry & Jethro K. Lieberman, *Lessons from the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424, 425-26 (1986).

The types of ADR include (i) arbitration, (ii) mediation, (iii) early neutral evaluation, (iv) neutral fact-finding, (v) mini-trials and (vi) summary jury trials. In arbitration, a neutral third party (or panel) listens to arguments and reviews evidence at a hearing and renders a decision. For a description of existing court-annexed arbitration programs, see BARBARA S. MEIERHOEFFER, *COURT-ANNEXED ARBITRATION IN TEN DISTRICT COURTS* (1990). The leading reference on commercial arbitration is G. WILNER, *DOMKE ON COMMERCIAL ARBITRATION* (rev. ed. 1987). The arbitrator's decision can be either binding or nonbinding. Arbitration arises in one of two ways: as a private, voluntary process, separate and apart from court processes; or as a mandatory or compulsory process referred to as court-annexed arbitration.

Mediation differs fundamentally from arbitration. In mediation the third party neutral, the mediator, informally guides and assists the parties in agreeing to a mutually acceptable settlement by consensus. See generally JAY FOLBERG & ALISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLUTION, CONFLICTS WITHOUT LITIGATION* 130 (1984); Lon L. Fuller, *Mediation-Its Forms and Functions*, 44 S. CAL. L. REV. 305, 308 (1971). The role of the mediator is to facilitate negotiations between the parties, not to act as a decision maker. For a comprehensive view of a mediator's role, see C. MOORE, *THE MEDIATION PROCESS* (1986). Mediation is not the determination of the strengths and weaknesses of a parties' position but rather a mechanism to reach consensus consistent with the goals of the parties.

Virtually all bankruptcy court ADR programs are court-annexed mediation (arbitration in the Bankruptcy Court for the Eastern District of Pennsylvania is required for all adversary proceedings seeking money damages less than \$100,000). See Appendix A (describing existing ADR programs in bankruptcy courts).

In early neutral evaluation each side presents its case to the evaluator in a more formal manner than in mediation, with arguments and evidence. After hearing the presentations, the evaluator expresses an opinion as to the probable value of the case. The theory is that settlement will be facilitated if the parties understand realistically the strength of their case. See generally Wayne D. Brazil et al., *Early Neutral Evaluation: An Experimental Effort to Expedite Dispute Resolution*, 69 JUDICATURE 279, 280 (1986).

In neutral fact finding, the third party neutral makes findings of fact and reports to the court. The neutral may rely on information submitted by the parties as well as independent research and investigation. Often the neutral is an expert in the particular field involving the disputed facts. Fact finding is oriented more toward assisting the court in resolving litigation than toward promoting settlement between the parties. Resolution of a critical factual issue, however, may enhance the willingness of the parties to settle by providing the parties with a more realistic assessment of their chances of prevailing in litigation.

the strain on the court system and the parties' pocketbooks by offering litigants options for resolving disputes which bypass or reduce the delays and costs of court proceedings.⁵

Despite the advantages offered, not many organized ADR programs exist in the bankruptcy courts. Few reported decisions grapple with the role of or authority for ADR in bankruptcy cases and proceedings, and the handful of appointments of examiners or mediators⁶ to assist in a plan or other complex negotiations rest largely on an *ad hoc* and ill-defined foundation. One reason for these lacunae may be a residual unfamiliarity with or suspicion of ADR.⁷

In a mini-trial, the attorneys for each side make a summary presentation of their case with the idea that, after hearing these presentations, the parties may be more amenable to settlement. Mini-trials are a hybrid form of negotiation, mediation, and arbitration. See generally, Green, *The Mini-Trial Handbook*, in CORPORATE DISPUTE MANAGEMENT (E. Green ed., 1982); Douglas M. Parker & Phillip L. Radoff, *The Mini-Hearing: An Alternative to Protracted Litigation of Factually Complex Disputes*, 38 BUS. LAW. 35 (1982). A third party neutral may attend the presentation to serve as a moderator and to offer nonbinding opinions as to the probable resolution of certain issues.

Summary jury trials have been described as "the jury equivalent of a mini-trial." Judge Thomas D. Lambros of the U.S. District Court for the Northern District of Ohio, who invented the summary jury trial, has described many aspects of the procedure in Thomas D. Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution*, 103 FED. RULES DIG. 461 (1984) [hereinafter Lambros, *Dispute Resolution*]; Thomas D. Lambros, *The Summary Jury Trial—An Alternative Method of Resolving Disputes*, 69 JUDICATURE 286, 286 (1986). A short-form presentation of the case is made to an advisory jury, which then renders a nonbinding verdict. Counsel may be permitted to question the jurors about their decision.

5. Barbara Franklin, *ADR Meets Bankruptcy; Experts Explore Ways to Abbreviate the Process*, N.Y.L.J., April 22, 1993, at 5.

ADR may, in a lot of cases, offer a more efficient resolution of controversies and disputes than litigation in the bankruptcy court . . . It's a long time from the filing of a petition to plan confirmation. Given the cost to creditors and everybody else, virtually anything you can do to expedite these proceedings is worthwhile.

Id. (quoting Professor F. Stephen Knippenberg); see Peter Blackman, *AAA's New Director, Slate Brings Business Twist to Non Profit Group*, N.Y.L.J., April 14, 1994, at 5 ("[A]reas ripe for greater use of mediation include . . . bankruptcies."); *Bankruptcy Mediation Successful in Middle District of Florida*, 22 BANKR. CT. DEC., April 16, 1992, at A1, A4 (ADR will "put a dent in the [overcrowded] docket of [bankruptcy judges], while offering litigants greater satisfaction than what might otherwise be gained at the hands of a judge").

6. 11 U.S.C. § 105(b) (1994) prohibits the appointment of receivers. FED. R. BANKR. P. 9031 precludes the appointment of masters in cases and proceedings under title 11 of the United States Code [hereinafter the Bankruptcy Code or the Code].

7. Presumably, many parties do not engage in ADR because of lack of familiarity with the process. Volpe & Bahn, *Resistance to Mediation: Understanding and Handling It*, 1987 NEGOTIATION J. 297, 298. In addition, some judges do not encourage ADR because they believe the role of the court is limited to adjudication of cases not the management of settlements. See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 445 (1982) (arguing that judges should sit in a neutral, disinterested and deliberate fashion and suggesting that active judicial management might tarnish this image).

Another reason is the absence of a clear roadmap in the law, rules, or precedents.⁸ This article addresses these concerns and seeks to provide a foundation for expanding the use of ADR in bankruptcy.

We review (i) the reported decisions and selected unreported orders in bankruptcy cases where ADR has been employed,⁹ (ii) the general characteristics of ADR programs currently in existence in bankruptcy courts, and (iii) the statutory authority for the use of mandatory ADR¹⁰ in bankruptcy cases.¹¹

Although many commentators are advocates of the use of ADR, some assert that the use of mandatory ADR is not the solution to overcrowded dockets. Judge Jack Weinstein argues if cases are growing in the federal courts, so be it! That is what judges and courts are there to do: to hear cases. We are public servants pledged to do justice, not exalted elites who bless the masses with such bites of judicial time as we deign to dole out. If some judges are truly overburdened, then the first resort should be to add judges or to add support staff, not to shut the courthouse door.

Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901, 1909-10 (1989); see also Letter from Richard L. Bohanon, Bankruptcy Judge, Western District of Oklahoma, to Ralph R. Mabey (Nov. 15, 1994) (on file with authors) ("Concerning ADR mechanisms in bankruptcies, however, it is my view that they are inappropriate in the American judicial system. . . . Many judges order mediation or arbitration in an effort to force the parties to settle their disputes. That is not the reason why we have courts.").

8. For example, the newly amended Bankruptcy Code authorizes the bankruptcy court to impose on parties in interest "such limitations and conditions as the court deems appropriate to insure that the case is handled expeditiously and economically . . .," 11 U.S.C. § 105(d) (1994), but provides no other ADR guideline. Bankruptcy Rule 9019 requires the parties' consent before arbitration can be final and binding, but says nothing about mediation. See *infra* notes 91-98, 148-63, and accompanying text.

9. The most notable impact of ADR in bankruptcy programs is in the resolution of many smaller adversary proceedings through the use of unpaid or nominally paid mediators. See generally STEVEN HARTWELL & GORDON BERMANT, FEDERAL JUDICIAL CENTER, ALTERNATIVE DISPUTE RESOLUTION IN A BANKRUPTCY COURT: THE MEDIATION PROGRAM IN THE SOUTHERN DISTRICT OF CALIFORNIA (1988). This article, however, gathers only the references to ad hoc usage of ADR and to court-annexed ADR in the larger cases. One commentator suggested that the reason so many bankruptcy cases sent to mediation ultimately settle is because the mediator is able to diffuse the egos of attorneys that have prevented prior consensus. "A mediator of powerful stature signals, 'You must respect me because you must care what I think about you. I cannot issue a binding decision, but if you behave in such a way that you dishonor me, because of my standing, you dishonor yourself.'" Hugh Ray, *Mediators, Egos and Common Courtesy*, TEX. LAW., March 14, 1994, at 22 (citing the success of the mediation in the Olympia & York bankruptcy).

10. By "mandatory ADR" we mean court-imposed ADR such as mediation; we do not mean final and binding arbitration.

11. The use or enforceability of contractual arbitration agreements is beyond the scope of this article. For examples of the treatment of contractual arbitration agreements in bankruptcy compare *In re Bicoastal Corp.*, 111 B.R. 999, 1003 (Bankr. M.D. Fla. 1990) (allowing creditor to enforce arbitration clause because creditor's claim needed to be liquidated before distribution could be effected and arbitration was judicially and financially economical) with *In re Chas. P. Young Co.*, 111 B.R. 410, 417-18 (Bankr. S.D.N.Y. 1990) (leaving the enforcement of

This review reveals that some bankruptcy courts have well-founded ADR programs which usually include volunteer mediators or settlement judges.¹² The use of mediation¹³ or other ADR in complex or lengthy negotiations, such as plan of reorganization deadlocks, is generally confined to the occasional appointment of examiners, mediators, or settlement judges.¹⁴ A lack of clarity as to the authority under which to order mediation and as to the practicalities of such an order (such as who pays the bill) underlies its infrequent usage in complex situations, in which the greatest economies might otherwise be obtained.

Adequate statutory, case, and inherent authority exist to support the imposition by the bankruptcy courts of mandatory ADR, notably mandatory mediation, and the imposition, in proper circumstances, of costs against the parties or the estate.¹⁵ The Bankruptcy Rules¹⁶ should be amended to regularize the procedures for using ADR and to further its salutary use.¹⁷

I. SUMMARY OF ADR USES IN BANKRUPTCY COURTS

Bankruptcy courts employ ADR techniques in bankruptcy cases apart from a court-annexed ADR program to facilitate plan negotiations¹⁸ and to

contractual arbitration agreements to the sound discretion of the bankruptcy court, and noting that a drawn-out arbitration proceeding will adversely affect the debtor's ability to formulate a plan of reorganization). *See generally* *Zimmerman v. Continental Airlines, Inc.*, 712 F.2d 55, 56 (3d Cir. 1983), *cert. denied*, 464 U.S. 1038 (1984) (holding that the bankruptcy judge has discretion to decide whether to compel a debtor to proceed with contractual arbitration proceedings); *Double TRL, Inc. v. F.S. Leasing, Inc. (In re Double TRL, Inc.)*, 65 B.R. 993, 998 (Bankr. E.D.N.Y. 1986); Fred Neufeld, *Enforcement of Contractual Arbitration Agreements under the Bankruptcy Code*, 65 AM. BANKR. L.J. 525 (1991).

12. *See infra* Appendix A.

13. Mediation has been the most commonly used form of ADR in bankruptcy cases. In the liquidation of claims, mediation is particularly useful because it allows the parties to avoid the procedural requirements of litigation and permits immediate focus on the substance of the dispute.

14. *See infra* notes 26-40 and accompanying text. The use of mediation to forge a consensus in a plan of reorganization, however, is not simple. In the plan negotiation process there are a multitude of competing interests. Also, in plan negotiations, the importance of the going concern value of a debtor, which is a subjective analysis, is not easily mediated. *See* Harvey R. Miller et al., *Is Alternative Dispute Resolution a Universal Alternative for All Issues that Arise in Bankruptcy and Reorganization Cases?* (Feb. 1994) [hereinafter Miller] (unpublished manuscript, on file with the authors). Some parties may have an incentive to delay resolution of the underlying matter that could cause the mediation to break down.

15. *See infra* notes 69-186 and accompanying text.

16. Reference to the Bankruptcy Rules is to the Federal Rules of Bankruptcy Procedure.

17. We do not recommend any change which would impose final and binding arbitration on nonconsenting parties.

18. *See infra* notes 27-29 and accompanying text.

liquidate claims.¹⁹ Approximately twelve bankruptcy courts have court-annexed ADR programs.²⁰ The rest of ADR usage is case-specific and on an *ad hoc* basis. The following is a sampling of reported decisions and unreported orders organized by the timing and nature of the ADR.²¹ Part A reviews ADR separate from court-annexed programs; Part B reviews court-annexed ADR.²²

A. *Case Specific Uses of ADR Where No Court-Annexed ADR Program Is in Place*

Bankruptcy courts have upheld the use of mandatory ADR procedures (i) pursuant to a plan of reorganization that provides for ADR as a method of liquidating claims for distribution²³ or (ii) prior to the formulation of a plan in which claims need to be liquidated in order to allow the debtor to propose a viable plan.²⁴ The courts have approved such plans, however, only when the ADR procedures did not impose binding arbitration on the parties absent their consent.²⁵ Bankruptcy courts have also used mediators preconfirmation

19. See *infra* notes 41-54 and accompanying text.

20. See *infra* Appendix A.

21. Cases discussed in the text, as opposed to the footnotes, are for illustrative purposes and provided solely as examples of ADR usage in large cases.

22. See Miller, *supra* note 14.

23. See *infra* notes 50-53 and accompanying text.

24. See *infra* notes 41-46 and accompanying text.

25. One court, however, apparently permitted claimants to be bound by a mediation ruling to the extent the claimant sought recovery against the debtor. In *Dore & Assocs. Contracting, Inc. v. American Druggists' Insurance Co. (In re Dore & Assocs. Contracting, Inc.)*, 43 B.R. 717 (Bankr. E.D. Mich. 1984), the confirmed plan of reorganization provided that all claims be submitted to a mediation panel set up through the Bay County, Michigan Circuit Court mediation rule. The state court mediation procedure provided a means to facilitate settlement of disputed claims against the debtor. No evidence was received and no testimony was heard at the mediation. Instead, the "claimants" merely submitted "mediation summaries" outlining, in offer of proof style, what they expected the evidence to establish and how they believed the law applied. The mediators separately interviewed the attorneys as to their "bottom line" positions regarding settlement. The mediators then determined what sum would most likely result in settlement of the dispute. This procedure ultimately determined the extent of each claimant's claim against the estate (making the procedure appear to be binding as to the debtor's liability). The reorganization plan also barred the claimants from proceeding to trial if dissatisfied with the monetary award granted by the mediator. *Id.* at 718-19.

Several claimants objected to this process because it precluded them from having their "day in court," and thus sought to enjoin preliminarily the mediation procedure. The court acknowledged that "there simply is no statutory or other foundation for mediation substituting for judicial allowance of claims." *Id.* at 719 n.2. The court reasoned as follows. Section 502(b) requires that "the court, after notice and a hearing, shall determine the amount of . . . and allow or disallow disputed claims." *Id.* The mandatory nature of the language indicates that claim allowance must be a judicial function. The only exception to this requirement is provided in

to assist multiple constituencies in achieving a consensual plan of reorganization.

1. *ADR Preconfirmation*

Bankruptcy courts have used ADR prior to plan confirmation to appoint a mediator or other neutral to (i) negotiate terms of a consensual plan of reorganization, (ii) resolve single creditor disputes, and (iii) resolve multiple creditor claims of the same nature.

a. *Mediating Reorganization Plans*

Bankruptcy courts have appointed three types of neutrals²⁶ to negotiate plan disputes: (i) paid mediators,²⁷ (ii) settlement judges,²⁸ and (iii) examiners.²⁹

Bankruptcy Rule 9019(c) which permits the court to submit a matter to binding arbitration, if the parties have so stipulated. The court also agreed that the plan effectively denied the claimants their day in court because the mediation procedure was the only method for liquidating claims. The court concluded, however, that the objectors had the right to litigate their claims against the debtor's surety, and the court held that, although the claimants had noteworthy arguments against the enforceability of such a mediation procedure, the time to object to the procedure was when the plan was proposed for confirmation. *Id.* at 719.

The court noted that the claimants were free to pursue claims against the debtor's surety because the mediation result could not bind the claimants outside the bankruptcy case. Although recognizing that successful claims against the debtor's surety would permit the surety to seek reimbursement from the debtor, the court expressed no opinion on this issue because it deemed the issue to be premature. Once the plan of reorganization was confirmed, with the mediation procedure in place, the plan became binding on all claimants under *res judicata* principles. Accordingly, the objectors' claims had to be submitted and settled through the mediation procedure.

26. In addition, some courts have retained expert witnesses under *Federal Rule of Evidence (FRE)* 706 to help resolve bankruptcy disputes. See *In re Seri, Inc.*, No. 93-71037, Adv. Pro. No. 93-71042 (Bankr. N.D. Ala. June 13, 1994) (Wright, J.) (appointing expert to resolve adversary proceeding); *In re Amdura Corp.*, Nos. 90-B-03811-E to 03816-E (Bankr. D. Colo.) (Matheson, J.); *In re Logan County Farm Enters., Inc.*, No. 88-7150-TS (Bankr. W.D. Okla.) (TeSelle, J.) (appointing liquidating agent as mediator); *In re Amarex*, No. BK-82-2335-A (Bankr. W.D. Okla.) (Bohanon, J.); *In re Royal Composing Room, Inc.*, 62 B.R. 403, 405 (Bankr. S.D.N.Y. 1986) ("Although the bankruptcy court could appoint an expert under Rule 706(a) . . . , an expert's function would appear to be limited to rendering opinions to assist the court as the trier of fact to understand the evidence or to determine a fact in issue.").

27. See, e.g., *In re John Breuner Co.*, No. 93-47076-J (Bankr. N.D. Cal.) (mediator appointed to resolve dispute between debtor and creditors' committee; mediation successful); *In re Eagle-Picher Indus. Inc.*, No. 1-91-00100 (Bankr. S.D. Ohio June 5, 1992) (appointing a mediator pursuant to § 105 to assist the constituencies in working toward a consensual plan); *In re El Paso Elect. Co.*, No. 92-10148 (Bankr. W.D. Tex. Jan. 15, 1993) (court retained a mediator to "investigate and determine whether negotiations towards a consensual plan of reorganization among the parties in interest in this case are at an impasse"); *In re Enden, Inc.*, No. 90-22343-GM (Bankr. C.D. Cal.) (appointing mediator to reconcile disputed payout to

unsecured creditors in affiliated cases; consensual plan reached).

Recent examples of the use of paid mediators in bankruptcy cases to resolve plan of reorganization disputes include the following:

In *In re Eagle-Picher Indus.*, No. 1-91-00100 (Bankr. S.D. Ohio June 5, 1992) (Perlman, J.), the bankruptcy court, relying on § 105 of the Bankruptcy Code as authority, appointed a mediator during the debtor's exclusivity period to "assist the several constituencies in their efforts to negotiate a consensual chapter 11 plan of reorganization." The court directed the mediator to report to the court within 40 days on the progress of the mediation and, in the event no agreement was reached, to identify the reasons for the impasse without disclosing the specific positions of the parties which produced the impasse. The order appointing the mediator provided that if the mediator declared an impasse in the negotiations for a consensual plan, exclusivity would terminate 60 days after the declaration. See *Official Unsecured Creditors' Committee v. Eagle-Picher Indus., Inc. (In re Eagle-Picher Indus., Inc.)*, 1994 Bankr. LEXIS 1998, *1-16 (Bankr. S.D. Ohio July 27, 1994) (denying motion of creditors' committee and equity committee to declare an impasse in negotiations so that they could file competing plans after exclusivity had terminated).

In *In re CF Holding Corp. and Colt's Manufacturing Co.*, Nos. 92-21038, 92-21039 (Bankr. D. Conn.), the debtors sought and obtained appointment of a mediator with the consent of the key parties in interest. The bankruptcy case was commenced on March 18, 1992, and a plan of reorganization was filed in September 1992. The parties could not agree on the proposed treatment of claims and thus the mediator's task was to assist the eight major constituencies in agreeing on the treatment of claims and negotiating a consensual plan. No consensus was reached, however, and cost of the mediator was paid by the debtors' estates. Subsequently, a consensual plan was confirmed and the disclosure statement acknowledged that many of the mediator's ideas and recommendations were contained in the plan. Letter from Robert L. Krechevsky, Bankruptcy Judge, District of Connecticut, to Ralph R. Mabey (Nov. 15, 1994) (on file with authors); see Thomas Scheffey, *Colt's Mediation May Portend More ADR in Bankruptcy*, CONN. LAW. TRIBUNE, April 26, 1993, at 4.

In *In re Zale Corp.*, No. 392-30001-SAF-1 (Bankr. N.D. Tex.), a group of bondholders sought the appointment of a mediator to assist the creditors in negotiating a consensual plan of reorganization. Proponents of an existing plan of reorganization objected, asserting that rather than proceed with mediation, they should be allowed to proceed toward confirmation of their own plan. Nonetheless, the court appointed a mediator. No agreement was reached among the parties during the two month period that the mediator served. An agreement was subsequently reached among the parties and the mediation costs were paid by the estate. See *Miller supra* note 14, at 13.

In *In re Carabetta Enterprises, Inc.*, Nos. 92-51917 to 92-52126 (Bankr. D. Conn. Dec. 27, 1994), the court *sua sponte* appointed a mediator to help "develop and present to the court an agreement on the principal terms and conditions of one or more plans of reorganizations." The debtor and the creditors' committee each filed plans of reorganization after termination of the debtor's exclusivity periods. Prior to the mediation order, the court indicated that it would determine if each plan was confirmable and if so, then permit the creditors to choose. The court, however, determined that mediation would better serve the interests of the estate. The mediator's costs are borne by the estate. See *Modified Order Referring Matter to Mediation* (Bankr. D. Conn. Dec. 27, 1994).

28. See, e.g., *In re Thorton Wholesale Florist, Inc.*, No. 93-11000-H11 (Bankr. S.D. Cal. Aug. 1, 1994) (Bankruptcy Judge MacDonald served as a settlement judge resulting in a confirmed Chapter 11 plan); *In re MEI Diversified*, No. BKY 4-93-3170 (Bankr. D. Minn. 1993) (Kressel, J.) (appointing Bankruptcy Judge Margaret A. Mahoney to mediate among the proponents of three competing plans; mediation proved successful and estimated cost savings

"somewhere between \$500,000 and \$1 million") (see Letter from Robert J. Kressel, Bankruptcy Judge, District of Minnesota, to Ralph R. Mabey (Nov. 14, 1994) (on file with authors)); *In re Valley Forge Plaza Assocs.* No. 89-111365 (Bankr. E.D. Pa.) (consensual plan mediated by Hon. Judith H. Wizmur from New Jersey in case before Hon. David Scholl, see Letter from Judith H. Wizmur, Bankruptcy Judge, to Ralph R. Mabey (Nov. 1994) (on file with authors)); *In re MCorp Financial*, Nos. 89-02312-H3-11, 89-02324-H5-11, 89-02848-H2-11 (Bankr. S.D. Tex. 1989) (Bankruptcy Judge Felsenthal appointed to mediate plan); *In re Family Health Services*, No. SA 89-01549 JW (Bankr. C.D. Cal.) (use of settlement judge).

29. See e.g., *In re Public Serv. Co. of New Hampshire*, 99 B.R. 177 (Bankr. D.N.H. 1989); *In re A.H. Robins Co.*, No. 85-01307-R, 88 B.R. 742 (Bankr. E.D. Va. August 13, 1986). The order appointing the examiner in *Robins* provided him with the authority to investigate and evaluate matters relevant to the debtor's business operations, to monitor the progress of the formulation of a plan of reorganization, to evaluate and suggest proposed elements of a plan, and "to take all other necessary and appropriate action in furtherance of assisting to bring this case to a just, prompt and economic disposition." In *In re Ionosphere Clubs, Inc. and Eastern Airlines, Inc.*, Nos. 89 B 10448 & 104449 (Bankr. S.D.N.Y. March 30, 1989) (Lifland, J.), the order appointing an examiner authorized the examiner to

(a) canvas, determine and identify the issues and impediments that must be resolved to facilitate a reorganization; (b) determine whether the negotiations as to any such issues and impediments to the proposal of a plan of reorganization . . . are at an impasse; (c) inquire of the principal parties in interest in the chapter 11 case . . . concerning their respective positions as to the resolution of any issues and impediments to the formulation of a plan of reorganization, and test the resolve of the assumptions underlying each party's position; (d) hold meetings with the principal parties . . .; (e) mediate any differences in respect of the position of the various parties in interest . . . and to attempt to achieve a consensus among the parties so that a consensual plan of reorganization may be proposed, confirmed and consummated consistent with the Bankruptcy Code; and (f) act as a facilitator in respect of all of the foregoing matters.

See also *In re Sirius Sys., Inc.*, 112 B.R. 50 (Bankr. D.N.H. 1990) (appointing an examiner to resolve disputes between equityholders).

For example, in *In re Rocky Mountain Helicopters, Inc.*, Nos. 93C-25447 through 93C-25450 (Bankr. D. Utah April 25, 1994) (Clark, C.J.), the court appointed an examiner "to facilitate the just, prompt and economic disposition of these cases, by among other things, mediating disputes, if any, between the Debtors creditor constituencies and/or the . . . Creditors' Committee in the development and negotiation of the principal terms and conditions of a plan of reorganization" The order specifically authorized the examiner to hold mediation conferences; he was precluded from employing counsel. In addition, the powers and duties of the examiner were limited to the scope of the order appointing him, notwithstanding the provisions outlining an examiner's duties in sections 1104 and 1106 of the Bankruptcy Code.

In *In re Apex Oil Co.*, 111 B.R. 235, 237 (Bankr. E.D. Mo. 1990), *rev'd on other grounds*, 132 B.R. 613 (E.D. Mo. 1991), *aff'd in part, rev'd in part*, 960 F.2d 728 (8th Cir. 1992), the bankruptcy court *sua sponte* appointed an examiner with authority to take "any necessary and appropriate actions in furtherance of assisting the Court and parties in bringing these proceedings to a just, prompt and economic disposition." *Id.* at 236. The functions of the examiner encompassed (i) the stabilization of the estate, (ii) asset disposition and (iii) investigation of claims and causes of action available to the estate. *Id.* at 237. In addition to mediating and settling various claims against the estate at favorable terms to the debtor, the examiner "played a key and pivotal role in every significant phase of this bankruptcy . . . [and] this case could not

(1) *Paid Mediators*

The first type of neutral used to negotiate a plan of reorganization is a paid mediator. In *In re El Paso Electric Co.*,³⁰ for example, the court, faced with a motion for extension of exclusivity,³¹ *sua sponte* appointed a mediator to

- (1) investigate whether negotiations for a consensual plan were at an impasse, and conduct mediation between the parties to develop a consensual plan, (2) meet with parties interested in acquiring some or all of the debtor's assets in order to determine the viability of such alternative, (3) recommend to the court those parties which the mediator found to be

have arrived at its current posture without the Examiner's . . . role in both enhancing the value of these estates and saving the Debtors millions in legal fees by successfully mediating otherwise destructive disputes. . . ." *Id.* at 244. (In addition, the opinion of the Eighth Circuit extols the substantial achievements of the Examiner in this case.). Further, the examiner was precluded from appearing before the court on any disputed matter so as not to prejudice the court.

In *In re UNR Industries, Inc.*, 72 B.R. 789 (Bankr. N.D. Ill. 1987), the debtor, an asbestos manufacturer, sought to extend the time in which it would have the exclusive right to file a plan of reorganization over the objections of several creditors. The debtor argued that several unknown factors compelled the extension of exclusivity, including the extent to which future claimants are creditors with claims, and the debtor's pending suits against its insurance carrier in district court. The bankruptcy court recognized that the pending litigations could last upwards of five years and that a consensual plan of reorganization was the best route toward an effective reorganization. The court noted, that "[t]he parties, [however], have staked out their positions and have refused to move." *Id.* at 792.

Although the court acknowledged that the Bankruptcy Code sought to remove the administration of bankruptcy cases from bankruptcy judges, the court stated that "this does not mean . . . that the bankruptcy judge should bury his head in the sand when confronted with a case which does not appear to be making any significant movement." *Id.* at 794. The court concluded that the bankruptcy judge still retains responsibility to manage cases and to move them toward a point of resolution in a manner that promotes fairness to all parties. *Id.* Accordingly, "in order to get the UNR plan negotiations moving," the court appointed an examiner whose primary task was to monitor the status of negotiations conducted among the parties.

The court specifically authorized the examiner to inquire of various parties "as to their positions in negotiations and to mediate any differences that exist. This mediative role is a necessary concomitant of the Examiner's determination regarding impasse." *Id.* at 795-96. The court added that the examiner must have power to test the strength of each party's resolve and the assumptions underlying each party's position. The court, however, limited the examiner's role and precluded him from seeking "to achieve any substantive result in negotiations." *Id.* at 796. The examiner was to determine whether an impasse existed and, where appropriate, "to facilitate the resolution of substantive differences." *Id.* The Court ordered the examiner to issue a report informing the court as to the status of negotiations on the plan of reorganization.

30. *In re El Paso Elec. Co.*, No. 92-10148 (Bankr. W.D. Tex. Jan. 15, 1993) (empowering the mediator to monitor the negotiations and assist the parties in reaching nonlitigated resolutions so that the ultimate goal of a consensual plan in the case could be timely realized).

31. 11 U.S.C. § 1121(d) (1988 & Supp. 1994) authorizes the court to extend the debtor's exclusive period for filing a plan of reorganization for cause shown.

qualified purchasers of the debtor, (4) participate in meetings with utility regulatory agencies, (5) monitor certain parties' compliance with agreements to deliver rate proposals, and (6) oversee the rehabilitation process and make reports to the court.³²

A plan of reorganization was subsequently confirmed on December 8, 1993, involving the sale of the debtor to a third party. The cost of the mediator was paid by the debtor's estate.³³ Although the mediation was a success, parties expressed discontent with the process.³⁴

(2) Settlement Judges

A second type of neutral used in plan negotiations is a settlement judge. For example, in *MC Corp Financial*,³⁵ mediation through a settlement judge was used to develop a consensual plan of reorganization. Two competing plans of reorganization had been submitted. Certain creditors asked the bankruptcy judge to serve as an unpaid mediator in an attempt to build a consensus around a single plan, and thus avoid the need to conduct simultaneous disclosure statement hearings for the competing plans. Complete consensus was not reached, however, and one plan eventually was confirmed over the objection of certain creditors and equity interest holders.

A group of dissident creditors sought a stay of the confirmation order and appealed. The United States Court of Appeals for the Fifth Circuit *sua sponte* appointed an acting bankruptcy judge³⁶ (not the presiding judge) to attempt to resolve the differences among the parties and arrive at a consensual plan. After mediation, a consensual amended plan was confirmed by the bankruptcy court. Because the mediators in both phases of mediation were acting judges, there was no payment of the mediators' costs.

32. See Order Modifying Order Regarding Rule 2004 Examination, Appointing Mediator, Setting Further Hearings and Providing Shortened Notice (Bankr. W.D. Tex. Jan. 15, 1993) (Monroe, J.).

33. Janet Elliot, *\$6M Mediator Settles for \$77,125*, TEX. LAW., June 27, 1994, at 4.

34. An attorney representing the equity committee in *El Paso Electric* commented that "when a judge appoints a mediator, 'he is injecting him or herself into the actual interchange between the parties.'" Karen Donovan, *Macy's Mediation Signals New Push on Reorganizations*, NAT'L L.J., March 7, 1994, at 21. In addition, another attorney in the case commented that the mediation added nothing to the resolution of the case except \$1 million in costs. *Id.*

35. Nos. 89-02312-H3-11, 89-02324-H5-11, 89-02848-H2-11 (Bankr. S.D. Tex. 1989) (Clark, J.); see *In re MCorp Fin., Inc.*, 160 B.R. 941, 947 (S.D. Tex. 1993) (discussing aspects surrounding the mediation). See Miller, *supra* note 14.

36. Judge Steven Felsenthal.

(3) *Examiners*

Bankruptcy courts have also authorized examiners in complex cases to mediate deadlocks in the negotiation of a plan of reorganization.³⁷ In *In re Public Service Co.*,³⁸ for instance, the court appointed an examiner to mediate a deadlock in plan negotiations. The court analyzed the statutory basis for the appointment of an examiner and concluded that an examiner "shall investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan."³⁹ The court held that the debtor's strict interpretation of an "examiner" as merely an investigator of fraud and other irregularities was unwarranted.

The court concluded that the facts justified the appointment of an examiner. "A clear impasse on rate level negotiations has occurred, multiple plans of reorganization are imminent, and there is a need as indicated above for an examiner to mediate during the 60-day period [in which a consensual

37. Some bankruptcy courts have utilized examiners, in essence, to mediate differences in the insolvency laws of two nations.

In *In re Olympia & York Realty Corp.*, No. 92-B-42698 (Bankr. S.D.N.Y.) (Garrity, J.), the debtor was subject to dual insolvency proceedings in the United States and Canada. The court *sua sponte* appointed an examiner to implement a protocol that would "harmonize" the Canadian and United States proceedings, and achieve a consensus among the various parties regarding the corporate governance of the debtor. The court appointed an examiner who was authorized to retain counsel. Over the course of several months, a consensus was reached regarding a corporate governance protocol. The cost was paid by the debtor's estate. See Miller, *supra* note 14, at 17.

In *In re Maxwell Communications Corp.*, No. 91-B-15741 (Bankr. S.D.N.Y.), the debtor was subject to dual insolvency proceedings in the United States and Great Britain. Creditors sought the appointment of an examiner to "reconcile the potential for conflict that existed as a result of the dual proceedings and to facilitate and expedite the reorganization of [the debtor]." Richard A. Gitlin & Ronald J. Silverman, *The Role of the Examiner in the Maxwell Communications Corporation plc International Insolvency*, in *Dealing with Foreign Workouts and Insolvencies 1993: Practical Strategies for Lenders and Investors* 235-61 (PLI No. 671 1993). The examiner was directed to "(1) investigate the debtor's financial condition, (2) harmonize the dual proceedings, (3) identify the issues that were impediments to a successful reorganization, and (4) attempt to facilitate the development of a consensual plan of reorganization." Final Supplemental Order Appointing Examiner and Approving Agreement Between Examiner and Joint Administrators (Bankr. S.D.N.Y. Jan. 15, 1992) (Brozman, J.). A plan of reorganization was subsequently confirmed. For a general description of the background to the *Maxwell* case, see Jeffrey S. Sabin et al., Case Study: Maxwell, The Epitaph, paper presented at the Acquisition, Trading and Legal Strategies for Distressed Debt Conference, in New York, N.Y. (November 15-16, 1994).

38. 99 B.R. 177 (Bankr. D.N.H. 1989)

39. *Id.* at 182 (citing 11 U.S.C. § 1106(a)(3)) (emphasis added).

plan may be proposed]."⁴⁰ In addition, the appointment of an examiner would aid the court in "interpreting" the utility rate aspects of the plan of reorganization. As is the case whenever an examiner is appointed, the costs were borne by the estate.

b. *Resolution of Multiple Claims
of the Same Nature*

The use of mediation has not been limited to negotiating reorganization plans. ADR has been used in complex cases prior to the confirmation of a reorganization plan to aid in the resolution of claim disputes with a common nexus of law or fact.⁴¹ A prominent example is *In re P.A. Bergner & Co.*

40. *Id.* at 183.

41. Numerous courts have implemented claims resolution procedures using ADR techniques in unreported cases to liquidate claims of a similar nature so as to permit the proposal of a plan of reorganization by the debtor, including *In re Child World, Inc.*, No. 92-B-20887 (Bankr. S.D.N.Y. 1992) (the debtor sought and the court authorized a standing ADR procedure for resolving certain tort and insurance claims, including the use of a mediator); *In re Caretta Trucking Inc.*, No. 92-29015 (Bankr. D.N.J.); *In re St. Johnsbury Trucking Co.*, No. 93-B-43136 (Bankr. S.D.N.Y. 1994); *In re Woodward & Lothrop Holdings, Inc.*, No. 94-B-40222 (Bankr. S.D.N.Y.). See also, e.g., *Herman's Sporting Goods, Inc. v. American Motorists Ins. (In re Herman's Sporting Goods, Inc.)*, No. 93-31529 (Bankr. D.N.J. Nov. 15, 1993) (approving an alternative dispute resolution procedure for resolution of personal injury and product liability claims against the debtor); *In re Walter Indus., Inc. f/k/a In re Hillsborough Holdings Corp.*, Nos. 89-9715-8P1 to 89-9746-8P1 (Bankr. M.D. Fla. May 6, 1993) (authorizing the debtor to employ a mediator pursuant to the claims resolution procedure); *In re P.A. Bergner & Co. Holding Co.*, Nos. 91-05501 to 05516 (Bankr. E.D. Wis.) (Letter from Russell A. Eisenberg, Bankruptcy Judge, to Ralph R. Mabey (Nov. 15, 1994) (on file with authors) describing use of claims resolution procedure in Bergner's Department Stores case; following the announcement of a mandatory mediation program, many disputed claims were resolved by the parties or in the plan of reorganization, leaving 1,215 claims totaling \$1,183,700,000.00 which were included in an ADR process which emphasized business person involvement in an offer and exchange negotiation; all but 111 of these remaining claims were resolved short of mediation; mediators have helped resolve almost all of these 111 remaining claims which total \$694,300,000.00); *In re Rubus Realty Co.*, No. 11-93-10329-RA (Bankr. D.N.M. Sept. 20, 1993) (Hon. Stewart Rose reports use of mediation to resolve 2,000 personal injury claims; judge refused to grant relief from stay until parties had submitted to mediation.); *In re Chicago Food Group*, No. 92B-13512 (Bankr. N.D. Ill) (chapter 7 case in which Judge Russell A. Eisenberg was asked to visit the Northern District of Illinois to act as mediator to help resolve more than 100 claims under the Perishable Agricultural Commodities Act).

In *In re U.S.H. Corp.*, No. 91-B-11625 (Bankr. S.D.N.Y. 1991), the court appointed a mediator to help resolve approximately twenty multimillion dollar construction related claims. The debtor was a developer of townhouses and private homes throughout the United States. The court established a two-step claims resolution process. First, the parties were required to submit to nonbinding mediation. If mediation was unsuccessful, the court would estimate the value of the claim for voting purposes. The mediation proved successful as the claims settled in a short time. See Second Order (A) Authorizing, Approving and Establishing Procedures for Liquidating

Holding Co.,⁴² in which a mediator was retained on the debtor's motion for the purpose of expediting the resolution of hundreds of personal injury claims and several thousand disputed trade claims.⁴³

The ADR order in *P.A. Bergner* required the debtor to submit a postconfirmation report analyzing the claims mediation process.⁴⁴ This report indicated that 1,215 claims were resolved in ADR in the approximate amount of \$1.2 billion. The debtor also reported its observations regarding the utility

For Purposes of Allowance, Through Either Alternative Dispute Resolution or Mandatory Claims Estimation, Certain Disputed, Contingent or Unliquidated Claims Under Section 502(c) of the Bankruptcy Code and (B) Authorizing and Approving the Continued Retention, Employment and Compensation of [Neutral] as Dispute Resolution Specialists, No. 91-B-11625 (Bankr. S.D.N.Y. December 1992) (court determined that the "expedited liquidation of the Disputed Litigation Claims is imperative to the formulation and confirmation of a plan or plans of reorganization"). The resolution of these claims was prior to the adoption of General Order No. 117, which formally established the mediation program in the Bankruptcy Courts for the Southern District of New York. See *infra* Appendix A.

Also, in *In re Ionosphere Clubs, Inc.*, Nos. 89 B 10448-49, 91 B 10287 (Bankr. S.D.N.Y.), the trustee moved to establish procedures for binding arbitration to resolve claims of and against travel agents. The underlying contracts provided for binding arbitration to resolve disputes. In the event a party objected to binding arbitration, it would be referred to mediation.

In *In re Columbia Gas Transmission Corp.*, No. 91-804 (Bankr. D. Del. Aug. 27, 1992), the court appointed a claims mediator to help resolve the calculation of rejection damage claims resulting from the debtor's rejection of gas purchase and sale contracts. The total value of filed claims in the case exceeded \$14 billion. Without objection, the court outlined procedures for the estimation of these claims. The procedures required the mediator to address issues common to many of the claims and make a recommendation to the court on those issues. While the court was considering the mediator's recommendations regarding the generic issues, the claimants would recalculate their claims in accordance with the mediator's recommendations or submit arguments why their claim was distinguishable so that the mediator's generic methodology should not apply. If the debtor refiled an objection to the recalculated claim, the parties and the mediator would determine what further proceedings were necessary. At any time, the debtor could reach settlement with the claimants, and the mediator would review those settlements to assess their fairness. Finally, the mediator would file a report with the court, which would include his recommendations and any assessment of the fairness of settled claims. The court would then hold a hearing. The costs of the mediator are paid by the debtor's estate. See Robert E. Nies, *ADR Fosters Kinder, Gentler Bankruptcies*, N.J. L.J., Jan. 16, 1995, at 6 (discussing *Columbia Gas* mediation/estimation process). The description of the claims estimation procedure is taken from the order of the Bankruptcy Court dated August 27, 1992. Although termed a mediation (sometimes termed an estimation), the attendant procedures outlined by the court obviously depart from classic mediation.

42. Nos. 91-05501 to 05516 (Bankr. E.D. Wis.).

43. See Order Approving Implementation of An Alternative Dispute Resolution Procedure Including Mandatory Mediation (Bankr. E.D. Wisc. Feb. 11, 1993) (Eisenberg, J.) (permitting "any party . . . to return to this Court either to seek modifications to or relief from the ADR Procedure in the event that any of the procedures themselves proves to be unworkable"). *Id.* at 2.

44. Postconfirmation Report on Claims Processing and Alternative Dispute Resolution Procedure (December 13, 1994).

of ADR in resolving this bankruptcy case. The debtor opined that "one of the benefits of mediation was that the parties were required to appear before a neutral person. This forced the parties to prepare their cases and focus on the issues."⁴⁵ In addition, the success of the ADR program was the result of its (i) flexibility, (ii) nonadversarial nature and (iii) the ability to settle claims without attorney representation.⁴⁶

c. *Resolution of Single Creditor Claims*

Yet another use of mediation prior to confirmation is to resolve single creditor claims.⁴⁷ For example, in *In re MCorp Financial, Inc.*,⁴⁸ the debtor used mediation to resolve two disputes with single creditors. The first mediation involved a \$53 million claim arising out of the rejection of a real property lease. The parties consented to the appointment of a mediator after trial had commenced. The mediation did not result in settlement and was terminated. The cost of mediation was divided equally between the debtor's estate and the creditor.

The second mediation involved another \$50 million claim. The debtor moved for estimation of the claim, but subsequently sought appointment of a mediator. This time the mediation proved effective, and the claim was settled. The debtor's estate and the creditor equally shared the cost of mediation.

2. *ADR PostConfirmation*

Bankruptcy courts have also used ADR after the confirmation of a plan to (i) liquidate claims of a similar nature under a claims resolution facility, and (ii) resolve single creditor disputes.⁴⁹

45. *Id.* at 6.

46. *Id.* at 7. ("Many of the trade and expense creditors in the industry reconcile claims on a daily basis.").

47. See *Carabetta Enters. v. City of Ashbury Park* (*In re Carabetta Enters., Inc.*), No. 92-51917, Adv. Pro. No. 93-5267 (Bankr. D. Conn. Mar. 19, 1995) (contract dispute regarding rights to develop property referred to mediation); *In re Kovalchick*, 175 B.R. 863, 870 (Bankr. E.D. Pa. 1994) (indicating that dispute between debtor and secured creditor sent to mediation); *In re Salant Corp.*, No. 90-B-12037 (Bankr. S.D.N.Y.), (authorizing retention of mediator to mediate a single \$1.7 million union claim).

48. Nos. 89-02312-H3-11, 89-02324-H5-11, 89-02848-H2-11 (Bankr. S.D. Tex. 1989); see Miller, *supra* note 14, at 9.

49. Several reported decisions and selected unreported orders discuss the claims resolution facilities established in confirmed plans of reorganization. The following is a description of these cases:

In *Kubicik v. Apex Oil Co.* (*In re Apex Oil Co.*), 884 F.2d 343, 345 (8th Cir. 1989), the Eighth Circuit upheld a claims resolution procedure for the liquidation of personal injury and wrongful death claims. The appellants had asserted prepetition claims against the debtor in state

court seeking damages based on wrongful death and personal injury pursuant to the Jones Act and general maritime law. When the appellants moved to vacate the automatic stay to allow their state law claims to proceed, the bankruptcy court referred their motions to an examiner for investigation. The examiner concluded that, based on the large number of Jones Act claims and the defense cost of each, the potential cost to the debtor would prejudice the estate. The examiner then recommended that the motions for relief from the stay be denied and the claims be subject to a "Claims Resolution Procedure" whereby the claimants could initiate a multiple-step process, culminating in either negotiation, mediation, arbitration, or a trial on the merits in the district court. In response to this recommendation, the bankruptcy court modified the automatic stay to permit each of the Jones Act claimants to follow this claims resolution procedure. The bankruptcy court noted that "if Apex were required to defend separately the large number of pending claims . . . Apex's reorganization would be seriously prejudiced." *Id.* at 345. The court thus concluded that a balancing of the parties' interests mandated a modification of the stay only to permit claimants to follow the claims resolution procedure--requiring either proof of claim negotiation or mediation before allowing either binding arbitration or trial in the appropriate district court.

On appeal to the district court, subsequently transferred to the Court of Appeals for the Eighth Circuit pursuant to 28 U.S.C. § 1631, the claimants asserted that the plain language of 28 U.S.C. § 1445(a) precluded the claims procedure fashioned by the bankruptcy court. *Id.* at 348.

The claimants alleged that the Jones Act, which incorporates 28 U.S.C. § 1445(a), precludes the removal of claims from state to federal court. *See generally* Lirette v. N.L. Sperry Sun, Inc., 820 F.2d 116, 117-18 (5th Cir. 1987); Kinder v. Wisconsin Barge Line, Inc., 69 B.R. 11, 12 (E.D. Mo. 1986) (28 U.S.C. § 157(b)(5) does not override the provision incorporated by the Jones Act precluding removal to federal court). The Eighth Circuit did not address the appellant's argument that the claims resolution procedure was jurisdictionally defective because the argument was raised for the first time on appeal and had not been presented nor addressed by the court below. After affirming the bankruptcy court's decision and temporarily enforcing the stay, the Eighth Circuit remanded the case for further findings of fact and conclusions of law regarding the claims resolution procedure.

The Eighth Circuit, however, allowed any claimant to petition the court for relief from the automatic stay to pursue its claim in state court. Thus, until the bankruptcy court examined the legal basis for the permanency of the stay, claimants could opt out of the claims resolution procedure and seek relief from the stay to proceed with their claims in state court. *Apex*, 884 F.2d at 349; *see also* Claudia MacLachler, *Apex Examiner's Role is Bigger than Usual*, NAT'L L.J., October 8, 1990, at 44.

In *In re Eagle Bus Manufacturing, Inc.*, 134 B.R. 584 (Bankr. S.D. Tex. 1991), *aff'd sub nom.*, NLRB v. Greyhound Lines (*In re Eagle Bus Manufacturing, Inc.*), 158 B.R. 421 (S.D. Tex. 1993), the confirmed plan of reorganization sought to liquidate claims of various personal injury and workers' compensation claimants through the use of an ADR procedure. The plan proponents believed that because the claims were not liquidated, many of the claims were contested, and the bankruptcy court might not have jurisdiction to liquidate these claims, *see* 28 U.S.C. § 157(b)(2)(O) (liquidation of personal injury tort claims are not core proceedings), the use of ADR was necessary to liquidate the claims and confirm a plan. Under the terms of the plan, the ADR procedure provided that each damages claim "w[ould] be subjected to a three-step process designed to produce a settlement with respect to the Claim. If unsuccessful, the holder of the Damages Claim [could] then obtain relief from the Bankruptcy Court to pursue the Claim in an appropriate nonbankruptcy forum." *Eagle Bus Manufacturing*, 134 B.R. at 591. If, however, the ADR produced a liquidated allowed claim, the claim would be either satisfied from third-party sources or treated as an allowed unsecured claim against the debtor. *See generally*

a. *Claims Resolution Facilities in a Confirmed Plan of Reorganization*

One of the most notable examples of the use of ADR in a claims resolution facility pursuant to a confirmed reorganization plan is *In re A.H. Robins Co.*⁵⁰ In *A.H. Robins*, the confirmed plan of reorganization established a settlement fund to compensate parties who claimed injuries resulting from the use of the Dalkon Shield intrauterine device. The plan provided for a claimants' trust and a claims resolution facility.⁵¹ The claims resolution facility provided claimants with various options in which to seek compensation for their injuries beginning with "instant settlement offers," in which a claimant would receive \$725 in exchange for a release against the debtor. If a claimant rejected all settlement offers, the claimant could proceed with the case against the debtor by litigation or binding arbitration.⁵² In addition, the plan provided accelerated binding arbitration to those claimants willing to limit their maximum recovery. The district and bankruptcy courts retained jurisdiction over controversies surrounding the claims resolution facility.⁵³

Carolyn M. Penna, *The Greyhound ADR Program*, N.Y. L.J., December 13, 1990, at 3. See also, e.g., *In re Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d 721, 725 (2d Cir. 1992); *In re DI Distributors, Inc.*, No. 89-295-JFK (Bankr. D. Del. Nov. 1, 1994) (Fitzgerald, J.) (approving claims resolution facility for asbestos related disease claims); *In re Rose's Stores, Inc.*, No. 93-01365-5-ATS (Bankr. E.D.N.C. April 11, 1994) (Bankruptcy Judge A. Thomas Small reported use of mandatory ADR under a reorganization plan to resolve personal injury claims); *In re Buchanan*, No. 90-04050JC (Bankr. S.D. Miss. Nov. 25, 1992) (Ellington, J.) (Order Confirming Trustee's First Amended Plan of Liquidation) (appointing "special master" to liquidate contingent claims, accepted by contingent claimant class); *In re Amatex Corp.*, 107 B.R. 856 (E.D. Pa. 1989) (Giles, J. and Scholl, B.J.) (claims resolution facility); *In re A.H. Robins*, 88 B.R. 742 (E.D. Va. 1988), *aff'd*, 880 F.2d 694 (4th Cir. 1989), *cert. denied*, 493 U.S. 959 (1989); *In re Continental Airlines Corp.*, No. 83-04019-H2-5 (Bankr. S.D. Tex. August 27, 1986) (holding that class 15 creditors may consent to resolve disputed claims through binding arbitration instead of through the bankruptcy court); *In re Laser Mfg.*, No. LA 82-01935-GM (Bankr. C.D. Cal.) (using ADR under plan to resolve personal injury claims).

50. 88 B.R. 742 (E.D. Va. 1988), *aff'd*, 880 F.2d 694 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989).

51. See Georgene M. Vairo, *The Dalkon Shield Claimants Trust: Paradigm Lost (or Found)?*, 61 FORDHAM L. REV. 617, 618 n.4 (1992).

52. *Id.* at 645. Those claimants who rejected the various options were subject to an in-depth review process and settlement conference which necessarily delayed resolution of their claims. *Id.* at 643-44.

53. *Id.* at 649 ("[T]he district court retains various powers regarding litigation and arbitration . . . [including the power] to stay any arbitration or litigation . . .").

b. *Resolution of Single Creditor Claims*

In certain instances after the confirmation of a plan of reorganization, bankruptcy courts have used mediators to resolve single creditor claims or disputes. In *In re Hunt*, for example, the court appointed a mediator to help resolve a pending lawsuit which alleged that the debtor had transferred substantial assets on the eve of bankruptcy to the prejudice of creditors.⁵⁴ The mediation resulted in settlement. The costs of the mediator were paid by the estate.

B. *Bankruptcy Court-Annexed ADR Programs*

A growing, but still small, number of bankruptcy courts have adopted court-annexed ADR programs as described in Appendix A of this article.⁵⁵ These programs focus primarily on the use of mediators to assist in the resolution of litigated matters.⁵⁶ Bankruptcy courts establish these programs by a local rule or general order.

1. *General Characteristics*

a. *Qualifications of Neutral*

Most programs require that the bankruptcy court maintain a register of qualified neutrals. Typically, the parties may agree to choose their own neutral. If the parties cannot agree within a specified short time period, the court or the clerk will designate a neutral from the register. Each program establishes qualifications for its neutrals.

54. See *Pate v. Hunt (In re Hunt)*, Adv. No. 391-3331, Case No. 388-35726 (Bankr. N.D. Tex. April 20, 1994) (the parties and the court agreed to the appointment of a mediator to facilitate settlement of the adversary proceeding); see also *In re Cooper Mfg. Corp.*, No. 84-01061-W (Bankr. W.D. Okla. Oct. 18, 1994) (court appointed mediator to resolve adversary proceeding); Letter from Nancy C. Dreher, Bankruptcy Judge, District of Minnesota, to Ralph R. Mabey (Nov. 15, 1994) (on file with authors) (court used settlement judge to resolve approximately 80 pending adversary proceedings postconfirmation in *In re Centran* (Bankr. D. Minn.)).

55. See *infra* Appendix A. As described in Appendix A, many bankruptcy courts are considering the implementation of some form of ADR.

56. Litigation within the context of a bankruptcy case is divided into two subcategories: adversary proceedings and contested matters. FED. R. BANKR. P. 7001, 9014; see also FED. R. BANKR. P. 9014, Advisory Committee Note, ("Whenever there is an actual dispute, other than an adversary proceeding, before the bankruptcy court, the litigation to resolve that dispute is a contested matter."). We sometimes refer to all adversary proceedings and contested matters as proceedings.

Most programs require that the neutral be an attorney who is an active member in good standing (usually four or five years) of the bar of the state and the federal district court. In addition, the attorney must have a specified minimum experience in bankruptcy matters.

A few programs permit nonattorneys to serve as neutrals. These programs may require only that the neutral be a professional, such as an accountant or financial advisor, who is licensed by a state professional organization. In addition, some programs require nonattorneys to apply to the court for approval as a neutral.

The programs differ on whether the judges of the bankruptcy court retain any approval power over the registration of the neutrals who meet the specified minimum qualifications. Some programs grant one or more of the judges such power, which usually is nonreviewable. Under this model, the approved register of neutrals is typically fixed (and posted at the bankruptcy clerk's office) for a defined period of time. The register is then updated. The other paradigm is to have registration on the approved list be automatic upon the filing of a verification by the applicant. Under this approach, the list may be updated on a continuous basis.

In addition to professional experience or status, some programs require that the individual complete an approved mediation training course. The type and extent of required training varies considerably between programs.

b. *Disqualification and Conflicts of Interest*

Some of the ADR programs address the issue of conflicts of interest of the neutral and the possibility of disqualification for bias. Most require the designated mediator to accept or decline the appointment within a very short time period (such as five days) thus allowing the designee to decline if a disqualifying conflict of interest appears. Some recently adopted programs apply to neutrals those provisions from the Judicial Code that deal with the oath of office for judges and the disqualification of judges for bias or prejudice.⁵⁷

c. *Compensation*

ADR programs also differ on whether the neutral is compensated. If the neutral does receive payment for services, the parties typically share the costs equally, although the program may provide that the costs of mediation be charged to the bankruptcy estate subject to court approval. The amount of compensation may be a set amount per mediation, or defined according to a schedule. The parties and mediator are usually free to agree on alternative

57. See 28 U.S.C. § 455(b)(1).

compensation. In pro bono programs, the neutral must agree to accept a specified number of mediations per year.

d. *Assignment to ADR*

A matter may be assigned to ADR (typically to mediation) either by mutual agreement of the parties, or by the court upon its own motion or a motion of a party in interest including the United States Trustee. The programs, thus generally, contemplate the mandatory referral of a matter to ADR. The ADR proceeding, however, is nonbinding, thereby allowing the parties to reject any decision or recommendation of the neutral.

e. *Disputes Suitable for ADR*

Most programs do not limit the types of matters that may be submitted to ADR. Usually all adversary proceedings and contested matters are potential subjects of referral. The court uses its discretion in deciding whether a particular proceeding is suitable for ADR. The court retains ultimate authority over the matter and may withdraw it from mediation at any time. No ADR program specifically provides for the appointment of a mediator to facilitate plan negotiations. In the Bankruptcy Court for the Eastern District of Pennsylvania, all proceedings involving less than \$100,000 are to be submitted to nonbinding arbitration.⁵⁸

f. *Attendance*

If a mediation order is to be effective, the parties and their attorneys must participate in the process in good faith. Thus, the programs require that the attorney must attend all the proceedings, be prepared to discuss all issues including the client's position, and have authority to settle.⁵⁹ In addition, the programs require that individual parties or the fully authorized representatives of nonindividual parties must also attend. If the parties are not resident in the district, they may be permitted to participate by telephone. Willful failure to attend may result in court-imposed sanctions.⁶⁰ Some programs also expose

58. The JIAJA, *see infra* note 77, designated the Eastern District of Pennsylvania as a pilot district, thus dictating that all matters involving less than \$100,000 be submitted to nonbinding arbitration. *See infra* Appendix A.

59. These requirements are generally consistent with the mandate of *Federal Rules of Civil Procedure* 16(f) which requires good faith participation in pretrial conferences. If the attorney is not authorized to settle, the local rules or general orders provide that the party with settlement authority be present at the ADR session.

60. *See Gilling v. Eastern Airlines, Inc.*, 680 F. Supp. 169, 170-71 (D.N.J. 1988) (district court upheld sanctions against a party for merely going "through the motions" in court-annexed

parties or counsel to the possibility of sanctions if they do not participate in good faith.

g. *Mediation Process and Confidentiality*

The mediation process is intended to take place expeditiously. The assigned neutral is given control over scheduling, including the power to set the first conference (after consulting with the parties) and the authority to set deadlines. The admonition is usually made to schedule the conference as early as practicable and as far in advance of the scheduled court hearing or trial as possible. Some rules specify the number of days within which the mediation conference must be held. Advance written notice of the time and date of the conference must be given to the parties. Some of the rules or orders require the parties to complete written information submissions describing their side of the case, and then to serve that submission on the mediator and the opposing parties before the conference. The mediator is permitted, but not required, to make a written settlement recommendation to the parties.

With the exception of the mediator's final report indicating whether settlement has been reached and certifying participation by the parties in good faith, all writings, statements, and actions relative to the mediation proceedings are confidential. If the mediator does make a written settlement recommendation, it is not to be filed with the court. *Federal Rule of Evidence* 408 typically applies.⁶¹

h. *Effect on Pending Proceedings*

The assignment of a matter to mediation may, but usually does not, operate as a stay of discovery, hearing, or trial. Often the court will put the matter on the calendar for final hearing at the same time the assignment to mediation is made.

i. *Final Report and Settlement Stipulation*

The neutral's final report, which is filed with the court, is limited to stating whether the parties complied with the mediation order and whether the

arbitration); *New England Merchants Nat'l Bank v. Hughes*, 556 F. Supp. 712, 715, 716 (E.D. Pa. 1983) (denying *de novo* trial request of a defendant who presented no excuse for failing to appear at an arbitration hearing). *But see* Dwight Golann, *Making Alternative Dispute Resolution Mandatory: The Constitutional Issues*, 68 OR. L. REV. 487 (1989) (other courts refused to deny the *de novo* trial request of parties who fail to participate meaningfully in ADR, because the constitutionality of court-annexed ADR rests on the ability of the parties to go to trial if they fail to agree).

61. See *infra* notes 178-86 and accompanying text.

parties reached a settlement. If the parties do reach settlement, the parties must submit the executed stipulation agreement to the court for approval, usually within a short period of time.⁶²

2. *The Application of Court-Annexed ADR Programs in Large Chapter 11 Cases*

Pursuant to general order or local rule authorizing court-annexed mediation, bankruptcy courts have ordered mediation in an effort to effect a consensual plan of reorganization or otherwise expedite the debtor's emergence from Chapter 11.⁶³

One of the highest profile appointments of a mediator pursuant to a general order occurred in *In re R.H. Macy & Co., Inc.*⁶⁴ In an effort to move the case "out of the court's clutches by the end of the year," the court *sua sponte* appointed Cyrus Vance as a mediator⁶⁵ "to develop and present to the court an agreement on the principal terms and conditions of a plan of reorganization in these cases."⁶⁶ The term of the mediator's appointment initially was four months, but was subsequently extended twice. Following appointment of the mediator, the parties agreed to a merger with a competitor

62. The settlements must be approved in accordance with Bankruptcy Rule 9019.

63. Examples of the use of mediation pursuant to a general order or local rule include:

In *In re 680 Fifth Avenue Assocs.*, No. 92-B-44734 (Bankr. S.D.N.Y.), the court *sua sponte* appointed a mediator to assist in negotiating a consensual plan; no plan agreement was reached and the costs of the mediator were divided among the parties in what was essentially a two-party dispute. See Order Appointing Mediator (Bankr. S.D.N.Y. Nov. 18, 1993) (authorizing retention of mediator and stating the "purpose of the mediation is to assist the several constituencies herein in their efforts to negotiate a consensual chapter 11 plan of reorganization"). The order further permitted the mediator to communicate with the court about the status of the mediation process but not about the substance of the discussions.

In *In re Cellular Information Systems, Inc.*, No. 92-45024 (Bankr. S.D.N.Y.), the court *sua sponte* appointed a mediator to develop a consensual plan of reorganization. Although no consensus was reached, the mediator helped develop mirror image plans with creditors making the choice. The cost of the mediator was paid by the debtor's estate. See *In re Cellular Information Sys., Inc.*, 171 B.R. 926, 946 n.42 (Bankr. S.D.N.Y. 1994); see also *In re Celotex Corp.*, No. 90-10016-881 (Bankr. M.D. Fla. July 28, 1994) (upon joint motion of the Debtor and various creditor groups the court appointed a mediator, pursuant to § 105 of the Bankruptcy Code and the local court-annexed mediation rules, to facilitate resolution of disputes that may arise during the negotiation of a reorganization plan).

64. No. 92-B-40477 (Bankr. S.D.N.Y. Feb. 22, 1994) (the appointment of the mediator was recognized as one of the first uses of a mediator under the court's recently enacted general order formally establishing a mediation program; the bankruptcy courts in the Southern District of New York, however, had previously appointed mediators in other cases on an *ad hoc* basis).

65. See *infra* Appendix A for a description of the court's program.

66. Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code for the Second Amended Plan of Reorganization for R.H. Macy & Co. and Certain of Its Subsidiaries, Oct. 27, 1994, available in LEXIS, Bankruptcy library, Macy file.

and a joint plan of reorganization was approved.⁶⁷ The debtor's estate paid the cost of the mediator.

Mediation, pursuant to local rule or general order, has also been used to expedite the debtor's emergence from Chapter 11. In *Thrifty Oil Co.*,⁶⁸ the debtor and its lenders agreed upon a plan of reorganization subject to the resolution of numerous issues respecting the terms and documentation of exit financing. After months of negotiations, a mediator was appointed who facilitated agreement and the resulting plan confirmation.

II. AUTHORITY FOR THE USE OF ADR IN BANKRUPTCY

Despite the increased use of mandatory ADR in bankruptcy cases, the courts have not consistently articulated the sources of their authority to compel participation in ADR. This section reviews these sources, which include (1) the court's inherent power to manage and control its docket, (2) the statutes enabling the district courts to use ADR through local district court rules, (3) section 105 of the Bankruptcy Code, (4) sections 1104 and 1106 of the Bankruptcy Code authorizing the use of examiners, (5) section 1123 of the Bankruptcy Code, (6) local bankruptcy court rules, and (7) Bankruptcy Rule 7016. After exploring these bases for authority, this section synthesizes from

67. In his final report, pursuant to the standing mediation order, the mediator conveyed some observations about the use of mediation in bankruptcy. First, the mediator highlighted, from his viewpoint, of course, the accomplishments of the mediation which resulted in: (i) a consensual plan of reorganization supported by the debtor, its creditors' committee, its bondholders' committee and its financial institutional lenders, (ii) a plan that valued the debtor at approximately \$4.1 billion, which represented an increase of almost \$1 billion from the date of initial appointment of the mediator, (iii) a plan that provided for 98% of the debtor's employees to maintain their jobs, and (iv) the savings of approximately \$30 million in legal fees.

The report concluded that:

Bankruptcy reorganizations are important for our nation's economy -- in terms of continuing viable and valuable business enterprises and in preserving jobs. How courts deal with bankruptcy is also important to the public's perception of our judicial system. I am convinced that mediation can and will facilitate the agreements that form the basis of the financial restructuring that must be at the core of any consensual reorganization. I believe that the mediation process can do so in a way that reduces the costs and delays that are sometimes negatively associated with bankruptcy.

Your Honor's appointment of a mediator was indeed a bold move and one that has turned out to be very successful.

See Notice of Conventional Filing of Final Report of Cyrus R. Vance, As Mediator, Pursuant to the Standing Mediation Order and the Mediation Order Entered in the Macy's Reorganization Cases, Dec. 13, 1994, available in LEXIS, Bankruptcy library, Macy file [hereinafter Macy's Mediator Final Report].

68. *In re Thrifty Oil Co.*, No. FE92-09132-A11 (Bankr. S.D. Cal. Jan. 2, 1995).

them a standard for the referral to mandatory mediation, the compensation of mediators, and the maintenance of mediation confidentiality.

A. *Inherent Authority of Courts*

The inherent authority⁶⁹ of federal courts, including bankruptcy courts,⁷⁰ permits them to "manage their own affairs so as to achieve the orderly and expeditious disposition of cases."⁷¹ The courts may exercise this

69. The doctrine of "inherent authority" was introduced into American jurisprudence in *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812). The Supreme Court acknowledged its continued validity in *Link v. Wabash Railroad Co.*, 370 U.S. 626, 630-31 (1962). See *Ex parte Peterson*, 253 U.S. 300, 312 (1920) (Federal courts enjoy the "inherent power to provide themselves with appropriate instruments required for the performance of their duties."). Judge Robert Peckham argues that *Link* "initially set the tone for the extremely deferential attitude of the appellate courts toward the district courts' authority to use pretrial procedures." Robert F. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CAL. L. REV. 770, 790 (1981).

In *Eash v. Riggins Trucking Inc.*, 757 F.2d 557 (3d Cir. 1985), the Court of Appeals for the Third Circuit identified three types of inherent powers. *Id.* at 562-64. The first, irreducible inherent authority, was said to stem "from the fact that once Congress has created lower federal courts and demarcated their jurisdiction, the courts are vested with judicial powers pursuant to Article III." *Id.* at 562. The second use of the term deals with powers that federal courts invoke, by strict functional necessity, in order to exercise their other powers. *Id.* at 562-63. The Supreme Court has termed this type of inherent power "essential to the administration of justice" and "absolutely essential for the functioning of the judiciary." *Id.* at 563 (quoting *Michaelson v. United States*, 266 U.S. 42, 65 (1924); *Levine v. United States*, 362 U.S. 610, 616 (1960)). The third type of inherent power discussed by the *Eash* court is sometimes said to be "rooted in the notion that a federal court, sitting in equity, possesses all of the common law equity tools of a Chancery Court (subject, of course, to congressional limitation) to process litigation to a just and equitable conclusion." 757 F.2d at 563 (citing *ITT Community Dev. Corp. v. Barton*, 569 F.2d 1351, 1359 (5th Cir. 1978)).

70. As units of the federal district courts, bankruptcy courts enjoy substantial adjudicatory powers, 28 U.S.C. §§ 151, 157, and thus the inherent authority pertaining to those adjudicatory powers. See, e.g., *In re Maurice*, 167 B.R. 114, 130 (Bankr. N.D. Ill. 1994) (bankruptcy court as unit of district court has inherent authority to enter sanctions); *State Unauthorized Practice of Law Comm. v. Paul Mason & Assocs.*, 159 B.R. 773, 776 (N.D. Tex. 1993), *aff'd*, 46 F.3d 469 (5th Cir. 1995). 28 U.S.C. § 151 provides that

[i]n each judicial district, the bankruptcy judges . . . shall constitute a unit of the district court to be known as the bankruptcy court for that district. Each bankruptcy judge, as a judicial officer of the district court, may exercise the authority conferred under this chapter with respect to any action, suit, or proceeding and may preside alone and hold a regular or special session of the court, except as otherwise provided by law or by rule or order of the district court.

28 U.S.C. § 151 (1988). But see *Plastiras v. Idell (In re Sequoia Auto Brokers, Ltd.)*, 827 F.2d 1281, 1291 (9th Cir. 1987) (holding that bankruptcy judges do not have inherent power to punish for contempt).

71. *Link*, 370 U.S. at 630-31; *Moser v. Universal Eng'g Corp.*, 11 F.3d 720, 723 (7th Cir. 1993); *HMG Property Investors, Inc. v. Parque Indus. Rio Canas*, 847 F.2d 908, 915 (1st Cir.

case management authority to encourage or require nonbinding ADR, but only when it does not interfere with constitutional safeguards,⁷² does not coerce settlement,⁷³ and does not impose undue burdens or delays on the parties.⁷⁴

1988) (District courts have "inherent powers, rooted in the chancellor's equity powers, 'to process litigation to a just and equitable conclusion.'"); *see also Ex parte Peterson*, 253 U.S. at 312 (appointment of auditors authorized by courts' "inherent power to provide themselves with appropriate instruments required for the performance of their duties."); *But see Identiseal Corp. v. Positive Identification Sys., Inc.*, 560 F.2d 298, 302 (7th Cir. 1977) (court cannot force a party to engage in discovery); *J.F. Edwards Constr. Co. v. Anderson Safeway Guard Rail Corp.*, 542 F.2d 1318, 1322 (7th Cir. 1976) (court cannot compel parties to stipulate to facts).

Courts have relied on their inherent authority to suspend or disbar attorneys, *see, e.g., In re Snyder*, 472 U.S. 634, 643 (1985); to initiate contempt proceedings, *see Mistretta v. United States*, 488 U.S. 361, 390 (1989) (federal courts possess inherent authority to initiate contempt proceedings and to appoint a private attorney to prosecute the contempt); to dismiss a case, *Hyler v. Reynolds Metal Co.*, 434 F.2d 1064, 1065 (5th Cir. 1970), *cert. denied*, 403 U.S. 912 (1971) (inherent power to dismiss case for failure to prosecute); and to levy sanctions against parties, *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765, 767 n.14 (1980) (the efficient judicial docket management necessitates the need for courts to be able to sanction parties). *See also Moulton v. Commissioner*, 733 F.2d 734, 735 (10th Cir.), *modified*, 744 F.2d 1448 (10th Cir. 1984) (affirming order imposing double costs and attorney's fees on litigant who had taken a frivolous appeal from a tax deficiency judgment); *Penthouse Int'l Ltd. v. Playboy Enters., Inc.*, 663 F.2d 371, 386 (2d Cir. 1981).

72. Courts considering the issue of mandatory ADR have not questioned the constitutionality of the procedure. As one commentator has suggested, the absence of constitutional challenges may be explained by the nonbinding nature of the ADR. Lambros, *Dispute Resolution, supra* note 4, at 469; *see Golann, supra* note 60, at 487 (concluding that although the Supreme Court has never ruled on the constitutionality of mandatory ADR, lower courts have generally held that nonbinding ADR is constitutional); *Strandell v. Jackson County*, 838 F.2d 884, 886-88 (7th Cir. 1987) (refusing to uphold sanction against attorney for refusal to participate in summary jury trial, in part, because mandatory summary jury trial would require disclosure of information that should be protected by the work-product privilege); *Vietnamese Fishermen's Ass'n v. Knights of Ku Klux Klan*, 543 F. Supp. 198, 208 (S.D. Tex. 1982) (stating that district court power to fashion remedy is broad, but it cannot interfere with constitutional rights).

73. *Kothe v. Smith*, 771 F.2d 667, 669 (2d Cir. 1985) (rejecting the district court's use of sanctions to coerce parties to settle); *In re LaMarre*, 494 F.2d 753, 756 (6th Cir. 1974) (indicating in dicta that due process considerations would bar a judge from compelling settlement); *see also In re Ashcroft*, 888 F.2d 546, 547 (8th Cir. 1989) (stating that the law does not countenance court coerced settlement); *National Ass'n of Gov't Employees v. National Fed'n of Fed. Employees*, 844 F.2d 216, 222-23 (5th Cir. 1988) (holding that failure to compromise a case does not constitute grounds for imposing sanctions); *Abney v. Patten*, 696 F. Supp. 567, 568 (W.D. Okla. 1987) ("Obviously [FRCP 16] does not permit compelled settlements, nor even the imposition of settlement negotiations on unwilling litigants.").

Many commentators have criticized what is termed by Professor Judith Resnik as "managerial judges." Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 376 (1982); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 536 (1986) ("ADR . . . offers not only an alternative to, but often a replacement for, adjudication."); *see also G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648, 661 (7th Cir. 1989) (Coffey, J. dissenting) ("Our trial judges must never fall prey to becoming part of a process that even subliminally suggests a pressure to forego the essential right of trial.").

74. *In re NLO, Inc.*, 5 F.3d 154, 158 (6th Cir. 1993).

Within these limitations, Congress has encouraged the use of ADR.⁷⁵ According to one commentator, "active promotion of settlements is now unmistakably the established position of the federal judiciary."⁷⁶ Ample inherent authority exists for bankruptcy courts to compel parties to participate in ADR reasonably adapted to the legitimate needs of case management, the litigants, and judicial economy.

Requiring participation in a pre-trial conference, even if settlement is explored, is permitted . . . and justifiably so, for it may facilitate settlement *at very little expense to the parties and the court*. A jury trial, even one of a summary nature, however, requires at minimum the *time-consuming process* of assembling a panel and (one would hope) thorough preparation for argument by counsel, no matter how brief the actual proceeding. Compelling an unwilling litigant to undergo this [burdensome] process improperly interposes the tribunal into the normal adversarial course of litigation.

Id. (emphasis added).

One commentator suggests that "[b]urdensome settlement procedures inevitably obstruct, or even eliminate, the litigant's ability to proceed to trial . . . [e]ven if de jure access is unmolested (e.g., when the ADR purports to be nonbinding), de facto access may be limited if the litigant's substantive and procedural rights become illusory." David A. Rammelt, Note, "Inherent Power" and Rule 16: How Far Can a Federal Court Push the Litigant Toward Settlement?, 65 IND. L.J. 965, 989 (1990). Compare *G. Heileman*, 871 F.2d at 652 (FRCP 16 and the common law "inherent authority" doctrine permit a federal district court to order represented litigants to appear at a pretrial settlement conference); *Home Owners Funding Corp. v. Century Bank*, 695 F. Supp. 1343, 1347 (D. Mass. 1988) (district court may compel participation); *Arabian Am. Oil Co. v. Scarfone*, 119 F.R.D. 448, 449 (M.D. Fla. 1988); *Cincinnati Gas & Elec. Co. v. General Elec. Co.*, 117 F.R.D. 597 (S.D. Ohio 1987), *aff'd*, 854 F.2d 900 (6th Cir. 1988) (recognizing the trial court's authority to require participation in summary jury trials); *Lockhart v. Patel*, 115 F.R.D. 44, 46 (E.D. Ky. 1987) (recognizing the authority of the trial court to compel attendance of represented parties at pretrial conferences) with *NLO*, 5 F.3d at 157; *Strandell*, 838 F.2d at 884. But see *Roadway Express*, 447 U.S. at 765 (The court's inherent authority must be exercised with restraint and discretion and be reasonably necessary "to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the District Courts."). See generally Charles F. Webber, *Mandatory Summary Jury Trial: Playing by the Rules?*, 56 U. CHI. L. REV. 1495, 1510-11 (1989) (arguing that the power to compel the attendance of a represented party is not within the inherent authority of a district court); Note, *Mandatory Mediation and Summary Jury Trial: Guidelines for Ensuring Fair and Effective Processes*, 103 HARV. L. REV. 1086 (1990) [hereinafter *Mandatory Mediation*] (arguing in favor of mandatory summary jury trial).

75. See *infra* notes 77-90 and accompanying text.

76. Marc Galanter, *The Emergence of the Judge as a Mediator in Civil Cases*, 69 JUDICATURE 257, 261 (1986); Peckham, *supra* note 69, at 773 ("While few judges wish to force unwilling parties to settle, many judges believe that the promotion of informed and fair settlements is one of the most important aims of pretrial management.").

B. *Statutory Authority in Federal District Courts and Their Bankruptcy Units*

In 1988, Congress strongly encouraged the use of ADR in civil litigation by enacting the Judicial Improvements and Access to Justice Act⁷⁷ (JIAJA). The JIAJA designated twenty district courts that "may authorize by local rule the use of arbitration in any civil action, including an adversary proceeding in bankruptcy."⁷⁸ In these pilot districts, nonbinding⁷⁹ arbitration is permissive if the parties so stipulate, and may be mandatorily imposed by the court if the action seeks money damages of less than \$100,000.⁸⁰ The utility of the pilot programs as authority for bankruptcy court ADR is limited, however, because (i) the pilot programs have expired,⁸¹ (ii) the statute does not confer any authority to adopt ADR programs in districts other than those designated as pilot districts, and (iii) the statute does not authorize the use of forms of ADR other than nonbinding arbitration.⁸²

Congress has since reiterated its commitment to ADR by enacting the Civil Justice Reform Act of 1990 (CJRA).⁸³ The CJRA instructed all district courts to implement a formal civil justice expense and delay reduction plan. In the findings supporting the CJRA, Congress determined that "evidence suggests that an effective litigation management and cost and delay reduction program should incorporate several interrelated principles, including . . . utilization of alternative dispute resolution programs in appropriate cases."⁸⁴

77. Pub. L. No. 100-702, 102 Stat. 4659. Title IX of the Act, on "Arbitration," is codified at 28 U.S.C. §§ 651-658 (1994).

78. 28 U.S.C. § 651 (1994). See generally 6 NORTON BANKR. L. & P. § 146:3, at 146-10 (2d ed. 1994) [hereinafter NORTON].

79. The arbitration provided by the JIAJA is nonbinding and a losing party may request a trial de novo. 28 U.S.C. § 655.

80. 28 U.S.C. § 652 (1994). The Bankruptcy Court for the Eastern District of Pennsylvania, one of the twenty pilot districts, accordingly adopted a local rule providing for the compulsory arbitration of proceedings for less than \$100,000. See *infra* Appendix A. The parties were free, however, to reject the arbitrator's award and seek a trial de novo by the bankruptcy court. The legislative history to the JIAJA underscores that parties may be required to participate in nonbinding ADR.

81. The effective term of the JIAJA pilot programs was Nov. 19, 1988 through Nov. 19, 1993 except that the provisions of the statute continued to apply through final disposition of all actions in which the referral to arbitration was made before the date of repeal. See Pub. L. No. 100-702, tit. IX, § 906, 102 Stat. 4659 (1988).

82. NORTON, *supra* note 78, at 146-11. In the bankruptcy context the pilot programs mention use of arbitration in adversary proceedings but omit reference to contested matters.

83. Pub. L. No. 101-650, 104 Stat. 5089 (1994), codified at 28 U.S.C. § 473. For a discussion of the CJRA, see Joseph R. Biden, Jr., *Equal, Accessible, Affordable Justice Under Law: The Civil Justice Reform Act of 1990*, 1 CORNELL J.L. & PUB. POL'Y 1, 6-7 (1992).

84. See ADMINISTRATIVE OFFICE OF U.S. CTS., *USE OF ALTERNATIVE DISPUTE RESOLUTION PROCEDURES INCREASE, COURT ADMIN. BILL 2* (Feb. 1992).

The CJRA requires each district in establishing its plan to consider the use of mandatory, nonbinding ADR methods, such as mediation, minitrials, summary jury trials, and neutral evaluation programs, in appropriate cases.⁸⁵ Of those four forms,⁸⁶ mediation is expected to provide the leading method of ADR. Summary jury trials are to be available at the judge's discretion, but are expected to be used less frequently because of their complexity and expense.⁸⁷ The CJRA also requires early neutral evaluation and mandatory settlement conferences to be tested on a pilot project basis and then compared to the mediation program. Accordingly, the CJRA provides ample statutory authority for district courts to implement ADR programs and to compel participation in nonbinding ADR.⁸⁸

The federal district courts' expense and delay reduction plans may be extended to bankruptcy cases presided over by bankruptcy courts which constitute units of the district courts.⁸⁹ This extension may be effected either through the express action of the district court or through the routine adoption of corresponding local bankruptcy rules under the authority of the district court.⁹⁰

C. Section 105 of the Bankruptcy Code

Section 105 of the Bankruptcy Code provides important statutory authority for the use of nonbinding ADR procedures in bankruptcy cases in two of its provisions. First, it empowers the bankruptcy court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions" of the Bankruptcy Code.⁹¹ A bankruptcy court can exercise its

85. 28 U.S.C. § 473(b)(4); *see* 28 U.S.C. § 473(a)(6)(B) (The CJRA permits district courts "to refer appropriate cases to alternative dispute resolution programs that . . . the court may make available . . .").

86. These forms of ADR are discussed *supra* note 4.

87. *See supra* note 4 for a brief explanation of summary jury trials.

88. The unwilling party, of course, would still be free to refuse to settle and seek a determination of its claims in court.

89. *See* *Carp v. Inbar (In re Inbar)*, 1991 U.S. Dist. LEXIS 7558, at *2 (D. Mass. May 24, 1991). Because the bankruptcy court is a unit of the district court, the district court's local rules apply to it unless the local rules of the bankruptcy court speak with particularity to a question. *Id.*

90. The CJRA legislation, however, only requires the district courts to consider certain guidelines in enacting an expense and delay reduction plan, it provides no mandate as to what should be included in those plans. Accordingly, the CJRA provides no reference to bankruptcy cases. For example, the Civil Justice Expense and Delay Reduction Plan (S.D.N.Y. December 12, 1991), recognizes that "[ADR] mechanisms have been underutilized by the Court," but omits any reference to bankruptcy cases and proceedings. *Id.* at 5.

91. 11 U.S.C. § 105(a) (1994); *see* *Erti v. Paine Webber Jackson & Curtis, Inc. (In re Baldwin-United Corp. Litig.)*, 765 F.2d 343, 348 (2d Cir. 1985) ("[T]he Bankruptcy Court . . . may use its equitable powers to assure the orderly conduct of the reorganization proceedings.").

equitable discretion only in a manner consistent with the Bankruptcy Code.⁹² Section 105 does not authorize courts to create substantive rights that are otherwise unavailable under the Bankruptcy Code.⁹³ A court may, however, rely on § 105 to implement ADR as a "necessary or appropriate" *procedural* means to carry out the provisions of the Bankruptcy Code.⁹⁴ Thus, courts have relied on § 105 to appoint mediators in the interest of bringing a case to an efficient resolution.⁹⁵

Second, § 105(d) of the Bankruptcy Code, added by the Bankruptcy Reform Act of 1994,⁹⁶ provides statutory support for the use of mandatory nonbinding ADR procedures in bankruptcy cases:

The court, on its own motion or on the request of a party in interest, may --

(1) hold a status conference regarding any case or proceeding under this title after notice to the parties in interest; and

(2) unless inconsistent with another provision of this title or with applicable Federal Rules of Bankruptcy Procedure, *issue an order at any such conference prescribing such limitations and conditions as the court deems appropriate to ensure that the case is handled expeditiously and economically . . .*⁹⁷

The statute also provides a nonexclusive list of orders that may be entered by the court to expedite the case, such as setting a date by which a debtor shall file a plan of reorganization and disclosure statement. The legislative history indicates that this amendment "authorizes bankruptcy court judges to . . .

92. *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988); *In re Plaza de Diego Shopping Ctr., Inc.*, 911 F.2d 820, 830-31 (1st Cir. 1990) ("[T]he bankruptcy court's equitable discretion is limited and cannot be used in a manner inconsistent with the commands of the Bankruptcy Code.").

93. *United States v. Pepperman*, 976 F.2d 123, 131 (3d Cir. 1992); *In re Morristown & Erie R.R. Co.*, 885 F.2d 98, 100 (3d Cir. 1989) (bankruptcy court order only legitimate to the extent that some other provision of the Code or other applicable law entitles the parties to the relief requested).

94. 11 U.S.C. § 105; *see Garrity v. Leffler (In re Neuman)*, 71 B.R. 567, 573 (S.D.N.Y. 1987); *see also In re Royal Composing Room, Inc.*, 62 B.R. 403, 405 n.2 (Bankr. S.D.N.Y. 1986), *aff'd*, 78 B.R. 671 (S.D.N.Y. 1987), *aff'd*, 848 F.2d 345 (2d Cir. 1988), *cert. denied*, 489 U.S. 1078 (1989) (suggesting that in cases involving rejection of collective bargaining agreements there might be a need for a labor mediator, but until Congress provides for the appointment of such a mediator the court should not attempt to "intrude on the parties' labor negotiations").

95. *See supra* notes 27, 63.

96. Pub. L. No. 103-394, § 104, 108 Stat. 4106 (1994) (codified at 11 U.S.C. § 105(d)). President Clinton signed the Bankruptcy Reform Act into law on October 22, 1994.

97. 11 U.S.C. § 105(d) (emphasis added).

manage their dockets in a more efficient and expeditious manner."⁹⁸ The statute gives bankruptcy judges considerable latitude to compel parties to submit their dispute to ADR prior to trial as a means of expeditiously and economically handling the case.

D. Sections 1104 and 1106 of the Bankruptcy Code and the Use of Examiners for ADR

Another source of authority bankruptcy courts rely on to implement ADR is their authority to order the appointment of examiners. In large Chapter 11 cases, several bankruptcy courts have appointed examiners with the authority to facilitate plan negotiations.⁹⁹

These courts have grounded their actions in §§ 1104 and 1106 of the Bankruptcy Code. Section 1104(c) empowers an examiner¹⁰⁰ to "conduct such an investigation of the debtor as is appropriate, including an investigation of any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor of or by current or former management of the debtor"¹⁰¹

Section 1106(b) of the Bankruptcy Code details the duties of an examiner upon appointment, and provides that "[a]n examiner appointed under section 1104(c) of this title shall perform the duties specified in paragraphs (3) and (4) of subsection (a) of this section, and . . . any other duties of the trustee that the court orders the debtor in possession not to perform."¹⁰² The duties specified in paragraph (3) are to "investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan"¹⁰³

Thus, the statutory function of an examiner is not limited to investigating fraud or irregularities. The statutory language provides that the examiner shall investigate "any other matter relevant to the case or to the formulation of a

98. H.R. 5116, 103d Cong., 2d Sess., 140 CONG. REC. 10752, 10764 (1994). The legislative history also states that notwithstanding Bankruptcy Rule 7016, which apparently authorizes bankruptcy judges to hold status conferences in adversary proceedings, some judges were reluctant to do so without clear and explicit statutory authorization. The amendment clarifies that bankruptcy judges now have clear statutory authority to hold status conferences in adversary proceedings and contested matters.

99. See *supra* notes 29, 37-40.

100. A court may appoint an examiner *sua sponte* under 11 U.S.C. § 105. *In re UNR Indus., Inc.*, 72 B.R. 789, 794 (Bankr. N.D. Ill. 1987); *In re Landscaping Servs., Inc.*, 39 B.R. 588, 590 (Bankr. E.D.N.C. 1984).

101. 11 U.S.C. § 1104(c).

102. 11 U.S.C. § 1106(b).

103. *Id.* § 1106(a)(3).

plan"¹⁰⁴ Presumably, the conduct of such an investigation may naturally include the investigation and mediation of settlement discussions.

While at least one commentator disapproves of the use of examiners as plan facilitators, arguing that this necessarily expands the examiner's powers without proper authority,¹⁰⁵ the case law concludes that an examiner does not need expanded powers to mediate plan negotiations.¹⁰⁶ Although an examiner may mediate disputes within the ambit of the investigation authorized by statute, issues of confidentiality and coercion may arise.¹⁰⁷

E. Sections 1123 and 502 of the Bankruptcy Code

Subsections 1123(a)(3) and (4) require a plan of reorganization to specify and provide for the treatment of each classified claim.¹⁰⁸ Subsection 1123(b)(6) allows the plan to "include any other appropriate provision not inconsistent with the applicable provisions of this title."¹⁰⁹

Under this authority, at least where the affected class has accepted the plan, courts have confirmed plans of reorganization which provide for the liquidation of claims through ADR-driven claims resolution facilities. These

104. *Id.* See also H.R. REP. NO. 595, 95th Cong., 1st Sess. 404, 494, 864 (1977). The standards for determining whether to order the appointment of an examiner are the same as those for the appointment of a trustee: protection is needed and the cost of an examiner is not disproportionately high. *Id.*

105. 5 COLLIER ON BANKRUPTCY ¶ 1106.02, at 1106-55 to 1106-57 (15th ed. 1993) [hereinafter COLLIER]. According to *Collier*,

[it] is an abuse of discretion for a bankruptcy court to assign to an examiner the rights and powers of the debtor. . . . The language of section 1106(b) is not broad enough, nor did Congress intend for it to be construed, to make an examiner a pseudo-trustee. Courts which have attempted to vest examiners with the rights and powers of a debtor in possession pursuant to either section 1106(b) or section 105(a) do violence to the scheme devised by Congress after considerable deliberation.

Id. Thus, *Collier* asserts that the function of examiners is limited and examiners cannot be used to negotiate plan deadlocks or "speed" the bankruptcy process.

106. See, e.g., *In re Public Serv. Co.*, 99 B.R. 177, 182 (Bankr. D.N.H. 1989); *In re UNR Indus., Inc.*, 72 B.R. 789, 795 (Bankr. N.D. Ill. 1987).

107. See *infra* notes 182-86 and accompanying text. An examiner usually plays more than a passive role in a case and, in any event, must report results of the examination, although apparently not the settlement discussions themselves. See *Vietnam Veterans Found. v. Erdman*, No. 84-0940, 1987 WL 9033, at *2-3 (D.D.C. Mar. 19, 1987) (explaining that a bankruptcy examiner is clothed by the statute with judicial powers and is a court officer, and that such examiner's report, if relevant, may well be admissible); *In re Revco D.S., Inc.*, 118 B.R. 468, 470 (Bankr. N.D. Ohio 1990) (accepting examiner's report into evidence); *In re Baldwin-United Corp.*, 46 B.R. 314, 317 (Bankr. S.D. Ohio 1985) (stating that an examiner is an officer of the court). These confidentiality and coercion issues are discussed *infra* notes 164-204 and accompanying text.

108. 11 U.S.C. § 1123(a)(3), (4).

109. 11 U.S.C. § 1123(b)(6).

facilities may require submission to nonbinding ADR¹¹⁰ or binding ADR.¹¹¹

The use of binding ADR to determine a claim amount under a confirmed plan of reorganization may offend § 502(b) of the Bankruptcy Code which requires "the court, [and not some ADR tribunal], . . . [to] determine the amount" of a disputed claim.¹¹² The arguable interference between §§ 1123 and 502 in this area of binding ADR has not been resolved by the courts.¹¹³

110. See, e.g., *In re A.H. Robins*, 88 B.R. 742 (E.D. Va.), *aff'd*, 880 F.2d 694 (4th Cir. 1988), *cert. denied*, 493 U.S. 959 (1989); see also *supra* notes 49-53.

111. See, e.g., *Dore & Assocs. Contracting, Inc. v. American Druggists' Insurance Co.* (*In re Dore & Assocs. Contracting, Inc.*), 43 B.R. 717 (Bankr. E.D. Mich. 1984); see also *supra* note 25.

112. 11 U.S.C. § 502(b) (emphasis added).

113. In any event, case law supports the proposition that, in certain circumstances, the provisions of a confirmed plan of reorganization are binding upon creditors under principles of *res judicata*, even where the provisions are beyond the jurisdiction of the bankruptcy court. See, e.g., *Stoll v. Gottlieb*, 305 U.S. 165, 171-72 (1938) (barring creditor from suing on guaranty because bankruptcy court's contested jurisdiction was irrelevant to the application of *res judicata* doctrine; creditor neither raised the issue of the bankruptcy court's jurisdiction nor objected to the offending plan provision at the confirmation hearing); *Republic Supply Co. v. Shoaf*, 815 F.2d 1046, 1053 (5th Cir. 1987) (applying the doctrine of *res judicata*, the Fifth Circuit found that an improper release of a nondebtor third party was binding on a creditor notwithstanding the fact that the bankruptcy court lacked subject matter jurisdiction to release a nondebtor via plan confirmation); *Federal Deposit Ins. Corp. v. O'Donnell*, 136 B.R. 585, 587 (D.D.C. 1991) (barring FDIC from subsequently attacking jurisdiction in the district court because of FDIC's failure to raise jurisdictional objection during confirmation hearing; thus, FDIC was precluded from enforcing its guaranty because the discharge of a nondebtor's guaranty under the confirmed plan was given *res judicata* effect regardless of whether the discharge exceeded statutory authority); see also *In re Szostek*, 886 F.2d 1405, 1413 (3d Cir. 1989) (recognizing the propriety of *Shoaf* and applying *res judicata* principles to a chapter 13 plan). But see, e.g., *Sun Fin. Co. v. Howard* (*In re Howard*), 972 F.2d 639, 641 (5th Cir. 1992) (limiting the *res judicata* effect of *Shoaf* by stating, in dictum, that *Shoaf* "stands for the proposition that a confirmed . . . plan is *res judicata* as to all parties who participate in the confirmation process") (emphasis in original); *Union Carbide Corp. v. Newboles*, 686 F.2d 593, 595 (7th Cir. 1982) (not barring a creditor from suing a nondebtor on an obligation purportedly released under a debtor's confirmed reorganization plan); *Bill Roderick Distrib., Inc. v. A.J. MacKay Co.* (*In re A.J. MacKay Co.*), 50 B.R. 756, 758 (D. Utah 1985) (refusing to enforce a nondebtor guarantor discharge provision included within a confirmed chapter 11 plan).

Further, one commentator has suggested that the use of ADR to resolve claim disputes is unnecessary and may be in violation of the Bankruptcy Code because § 502(c) of the Bankruptcy Code currently provides a mechanism for the estimation of claims. Miller, *supra* note 14, at 18. Section 502(c) requires a bankruptcy court to estimate contingent or unliquidated claims which, if not fixed or liquidated, would unduly delay the administration of the estate. The obligation of the court to liquidate contingent claims under § 502(c) is mandatory. Courts are to use "whatever method is best suited to the particular contingencies at issue," *Bittner v. Borne Chem. Co.*, 691 F.2d 134, 135 (3d Cir. 1982), and "need only arrive at a reasonable estimate of the probable value of the claim." *In re Baldwin-United Corp.*, 55 B.R. 885, 898 (Bankr. S.D. Ohio 1985). Estimation fixes the amount of a contingent or unliquidated claim for purposes of allowance,

At least one court has determined, however, that a plan of reorganization which sought to resolve claim disputes by binding arbitration¹¹⁴ was unconfirmable. In *In re Filex, Inc.*,¹¹⁵ the court held that

the proposed liquidation plan . . . is patently unconfirmable under Chapter 11 of the Bankruptcy [Code] because it provides that all objections or disputes as to claims will be resolved by an arbitrator in accordance with the rules of the American Arbitration Association rather than by this court in accordance with 11 U.S.C. § 502.¹¹⁶

A class of claims may, however, submit itself and its dissenters to mandatory nonbinding ADR under a confirmed plan since the voluntary settlement of a claim eliminates any dispute which would invoke § 502(b).¹¹⁷

F. Bankruptcy Rules

The rule-making power of the federal judiciary buttresses the authority of the bankruptcy courts to use court-annexed ADR.¹¹⁸ Although the Bankruptcy Rules mention ADR only once,¹¹⁹ they are intended to secure the "just,

voting on a plan, and distribution under the plan. Moreover, some courts have held that estimation of a claim serves as a cap on the debtor's liability. 55 B.R. at 898. Other courts, however, have held that estimation does not serve as a final cap on liability. *In re MCorp Fin.*, 137 B.R. 219, 226 (Bankr. S.D. Tex. 1992). Thus, the utility of using ADR to supplant estimation can be viewed as inconsistent with § 502.

Although § 502(c) provides a fail safe mechanism for liquidating claims through estimation if conventional means would be unduly burdensome or delaying, it certainly is not intended to discourage parties from settling their claims--nor, in the authors' view, to discourage courts from facilitating that settlement through the use of appropriate ADR.

114. Bankruptcy Rule 9019(c) limits the use of binding arbitration in bankruptcy cases to instances where the parties consent. FED. R. BANKR. P. 9019(c) (on stipulation of the parties to any controversy affecting the estate, the court may authorize the matter to be submitted to final and binding arbitration); *Jorgensen v. Federal Land Bank (In re Jorgensen)*, 66 B.R. 104, 108 (Bankr. 9th Cir. 1986) (because the creditor's liquidating plan of reorganization did not provide for the appointment of an arbitrator, the court's appointment of an arbitrator is not a legitimate exercise of its power; the court may appoint an arbitrator only with the stipulation of the parties).

115. *In re Filex, Inc.*, 116 B.R. 37 (Bankr. S.D.N.Y. 1990).

116. *Id.* at 40.

117. 11 U.S.C. 1123(b)(6); *In re A.H. Robins Co.*, 880 F.2d 694, 698 (4th Cir. 1989), *cert. denied*, 493 U.S. 959 (1989) (94% of tort claimants voted to accept the plan and its nonbinding ADR procedures for the resolution of claims); *In re Drexel Burnham & Lambert Group, Inc.*, 130 B.R. 910, 920 (S.D.N.Y. 1991) (settlement establishes the legal, equitable, and contractual rights of all class members regarding the debtors' liability; provided the plan gives the class precisely the consideration the settlement establishes to be the collective rights of the class, the class is unimpaired).

118. NORTON, *supra* note 77, § 146:3, at 146-11.

119. Bankruptcy Rule 9019(c) provides that "[o]n stipulation of the parties to any controversy

speedy and inexpensive determination of every case and proceeding."¹²⁰ Local bankruptcy rules and Bankruptcy Rule 7016 are the principal bases upon which courts refer matters to ADR in bankruptcy cases.

1. *Authority to Promulgate Bankruptcy Rules*

The bankruptcy court's authority to promulgate local rules is a derivative power that stems from 28 U.S.C. § 2075,¹²¹ which vests authority in the Supreme Court to prescribe rules governing procedure and practice in bankruptcy cases and proceedings. Section 2075 provides that these rules "shall not abridge, enlarge, or modify any substantive right."¹²² In addition, such rules must be consistent with Acts of Congress.¹²³ The legislative history to this enabling statute indicates that Congress envisioned "broad rulemaking power" and accordingly courts have upheld rules aimed at promoting efficiency in the courts.¹²⁴

2. *Local Rules*

Bankruptcy Rule 9029 delegates to the federal district courts the authority to make and amend local rules governing practice and procedure in bankruptcy cases and proceedings, but only to the extent those rules are not inconsistent with the Bankruptcy Rules promulgated by the Supreme Court pursuant to 28 U.S.C. § 2075.¹²⁵ In virtually every judicial district, the district court has delegated the local bankruptcy rule-making power to bankruptcy judges.¹²⁶ *Federal Rule of Civil Procedure (FRCP)* 83 governs the procedure for making local rules under Bankruptcy Rule 9029.¹²⁷ Several bankruptcy courts' local

affecting the estate the court may authorize the matter to be submitted to final and binding arbitration." FED. R. BANKR. P. 9019.

120. FED. R. BANKR. P. 1001.

121. 28 U.S.C. § 2075 (1994); *In re Walat*, 87 B.R. 408, 410 (Bankr. E.D. Va.), *aff'd*, 89 B.R. 11 (E.D. Va. 1988).

122. 28 U.S.C. § 2075 (1994); see Gerald L. Maatman, Jr., *The Future of Summary Jury Trials in Federal Courts*: Strandell v. Jackson County, 21 J. MARSHALL L. REV. 455, 474 (1988).

123. 28 U.S.C. § 2071 (1994); *In re Wildman*, 30 B.R. 133, 144 (Bankr. N.D. Ill. 1983).

124. *Bonner v. Adams*, 734 F.2d 1094, 1099 (5th Cir. 1984).

125. FED. R. BANKR. P. 9029; 9 COLLIER, *supra* note 105, ¶ 9029.02, at 9029-5; see *McCargo v. Hedrick*, 545 F.2d 393, 402 (4th Cir. 1976) (invalidating a local rule requiring the parties to submit a pretrial written statement of the controlling matters and issues or be subject to sanction, including default: "local rules are not a source of power but are instead a manifestation of it").

126. Bankruptcy Rule 9029 expressly permits this delegation. It also permits the district court to apply its local rules of practice and procedure to bankruptcy cases.

127. FED. R. CIV. P. 83. *FRCP* 83 requires that local rules may not be inconsistent with the

rules, promulgated pursuant to Bankruptcy Rule 9029 and FRCP 83, provide for court-annexed ADR programs.¹²⁸

In accordance with the statutory rule-making authority, a local rule governing bankruptcy cases will only be upheld if: (1) it does not abridge, enlarge, or modify any substantive right established by the Constitution or the Bankruptcy Code, and (2) it is a matter of procedure not inconsistent with the Bankruptcy Rules.¹²⁹ If the local rule fails either test it is invalid.¹³⁰

Under the first test, local rules may not abridge, enlarge, or modify any substantive right.¹³¹ A local rule is not a substantive rule merely because it may in some way affect a substantive right.¹³² Rather, if it relates to "the administration of legal proceedings and prescribes the manner in which the court shall function to carry out the implementation of substantive rights," it is procedural in nature and does not affect substantive rights.¹³³

Federal Rules of Civil Procedure. But because Bankruptcy Rule 9029 imports only the local rule-making procedure of FRCP 83, this substantive provision may not control.

128. See *infra* Appendix A.

129. *In re Salisbury Flower Mkts., Inc.*, Bankr. No. 4-89-3142, 1991 Bankr. LEXIS 225 (Bankr. D. Minn. Feb. 22, 1991); *Industrial Fin. Corp. v. Falk (In re Falk)*, 96 B.R. 901, 904 (Bankr. D. Minn. 1989).

130. *Falk*, 96 B.R. at 904.

131. For example, local rules which increase, reduce, or modify the jurisdiction of bankruptcy courts or of any other court are not valid under the rule-making power of Bankruptcy Rule 9029. *In re Wildman*, 30 B.R. 133, 147 (Bankr. N.D. Ill. 1983) (interim rule creating jurisdiction for bankruptcy court and prohibiting jury trials by bankruptcy courts invalid because not limited to practice and procedure and inconsistent with Bankruptcy and Federal Civil Procedure Rules). Such rules granting jurisdiction are invalid because they are not related to the "mechanical aspects of a trial" and because they alter substantive rights and "trespass[] upon terrain reserved to the Constitution or to the Congress." *Id.* at 147, 148; *Burger King Corp. v. Wilkinson (In re Wilkinson)*, 923 F.2d 154, 155 (10th Cir. 1991) (local rule eliminating motions for rehearing in bankruptcy proceedings except at district court's discretion invalid because it frustrated appellate court's jurisdiction, substantively altered the right to a rehearing, and was inconsistent with bankruptcy rules).

132. *Falk*, 96 B.R. at 904; *In re Walat*, 89 B.R. 11, 12 (E.D. Va. 1988) (rejecting contention that local rule requiring debtor to file form plan negatively impacted the debtor's exclusivity rights); see *Kimbrough v. Holiday Inn*, 478 F. Supp. 566, 571 (E.D. Pa. 1979) (concluding that compulsory, nonbinding arbitration did not violate a litigant's substantive right to a jury trial).

133. *Falk*, 96 B.R. at 904. The distinction between substance and procedure is often unclear. Rules that may be classified as procedural may also bear directly on the substantive rights of litigants. The difficulty in distinguishing substantive from procedural rights arises because the two become blurred when a "procedural" rule affects substance. What are thought to be fundamental rights--access to federal courts, uniform treatment, and the even, unbiased application of the laws of the United States--are, in a sense, both procedural and substantive because procedural restrictions may limit these rights. "Ultimately, procedure and substance cannot be divorced: no procedural decision can be completely 'neutral' in the sense that it does not affect substance." E. Donald Elliot, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 325 (1986).

Furthermore, courts have held that rules promulgated under 28 U.S.C. § 2075 are entitled to a presumption that they were promulgated with the proper authority and do not negatively impact substantive rights.¹³⁴ Presumably, the bankruptcy court's rule-making authority which stems from § 2075, via the district court, enjoys the same the presumption. The court's power to make rules governing practice and procedure includes the power "to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either."¹³⁵ Therefore, if a rule governs subject matter that is "rationally capable of classification as either [substance or procedure]," it may be regulated under the rule-making authority.¹³⁶

Local rules which promote the efficiency of the court's operations are generally considered procedural.¹³⁷ Courts also favor local rules or orders that encourage ADR procedures which promote the efficiency of the court by relieving the litigants and the courts of excessive costs and delays.¹³⁸ Thus,

134. *In re Walat*, 87 B.R. 408, 411 (Bankr. E.D. Va. 1988); *In re Management Data Servs., Inc.*, 43 B.R. 962, 966 (Bankr. W.D. Wash. 1984).

135. *Bonner v. Adams*, 734 F.2d 1094, 1101-02 (5th Cir. 1984) (quoting *Hanna v. Plumer*, 380 U.S. 460, 472 (1965)).

136. *Walat*, 87 B.R. at 412 n.1. Generally, rules related to the mechanical or business operations of the courtroom and the necessary functions preceding and following trial, such as rules relating to process, practice, procedure, pleadings, or motions, are deemed procedural and do not affect substantive rights. *In re Wildman*, 30 B.R. 133, 147 (Bankr. N.D. Ill. 1983); see *In re Leach*, 102 B.R. 805, 807 (Bankr. D. Kan. 1989) (local rule requiring timely opposition to a motion valid because it governs practice and procedure). In addition, the power to promulgate rules and to regulate the conduct of attorneys practicing before the court is "incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *American Bank & Trust Co. v. Moyer (In re Moyer)*, 51 B.R. 302, 307 (Bankr. D. Utah 1985) (upholding local rule, promulgated under Bankruptcy Rule 9029, detailing the procedure for pretrial conferences and the binding effect of pretrial orders).

137. *Lance, Inc. v. Dewco Serv., Inc. (In re Lance)*, 422 F.2d 778, 784 (9th Cir. 1970) ("Local Rules are promulgated by District Courts primarily to promote the efficiency of the Court."); *In re Walat*, 89 B.R. 11, 12 (E.D. Va. 1988) (holding that local rules are valid if they are designed "to make the process of litigation a fair and efficient mechanism for the resolution of disputes"); see, e.g., *Adams*, 734 F.2d at 1102 (upholding local rule allowing attorneys to file with clerk a "label matrix" containing the names and addresses of all creditors because it promotes efficiency of the court and facilitates the process of notifying creditors of the bankruptcy process); *Walat*, 89 B.R. at 13 (finding local rule requiring chapter 13 plans in bankruptcy cases to conform to an approved form was a valid exercise of the rule-making power regulating procedure because it facilitated the processing of a large number of chapter 13 cases and advanced the efficient use of court time); *Moyer*, 51 B.R. at 306 (finding local rule regarding pretrial conference procedure valid because "its spirit, intent and purpose is clearly designed to be broadly remedial, allowing courts to actively manage the preparation of cases for trial").

138. *Cincinnati Gas & Elec. Co. v. General Elec. Co.*, 854 F.2d 900, 903 n.4 (6th Cir. 1988), cert. denied, 489 U.S. 1033 (1989) (summary jury trial undertaken with the cooperation of the parties allowed under Federal Rules of Civil Procedure and under court's inherent power

it has been held that the mandatory referral of a case to mediation interposes a procedural step without prejudicing substantive rights.¹³⁹

The second rule-making test is that local rules must govern matters of procedure not inconsistent with the Bankruptcy Rules.¹⁴⁰ Where Bankruptcy Rules provide courts with latitude to vary procedures, courts have rule-making authority to do so.¹⁴¹ Bankruptcy courts are also permitted to adopt local rules which impose reasonable additional procedural requirements on the parties that go beyond those provided for in the Bankruptcy Rules.¹⁴² Accordingly, if the Bankruptcy Rules are silent, a local rule will be upheld as valid if it "carries forward the purposes of the Bankruptcy [Code] and keeps faith with the policies embodied therein."¹⁴³ The adoption of local ADR

to manage its own cases); *New England Merchants Nat'l Bank v. Hughes*, 556 F. Supp. 712, 715 (E.D. Pa. 1983) (finding local rule referring certain cases to compulsory arbitration valid because its purpose was to save litigants time and money and it relieved court's constantly increasing caseload). Courts generally find that local rules regarding settlement techniques do not conflict with the substantive right to a trial by jury as long as the settlement technique is voluntary or the litigants are entitled to demand a trial de novo. *Rhea v. Massey-Ferguson, Inc.*, 767 F.2d 266, 269 (6th Cir. 1985); *New England Merchants*, 556 F. Supp. at 714.

139. In *Rhea*, the court found that the local rule, which provided that diversity cases involving only monetary damages may be referred to mediation before trial, was not inconsistent with a federal rule regarding the right to jury trials. Referring cases to the mediation panel "merely . . . interposes an additional step between the jury demand and trial." 767 F.2d at 269. In addition, the settlement evaluations issued by the mediation panel had no force unless accepted by the parties. *Id.*; see also *New England Merchants*, 556 F. Supp. at 714 (compulsory arbitration system does not violate right to trial by jury since litigant is entitled to demand a trial de novo following arbitration). See generally Golann, *supra* note 60, at 487 (explaining that courts have long recognized that compelling parties to undertake pretrial ADR usually only delays, rather than abridges, the exercise of constitutional rights).

140. *Industrial Fin. Corp. v. Falk (In re Falk)*, 96 B.R. 901, 905 (Bankr. D. Minn. 1989) (striking down local rule extending the time for filing dischargeability complaints because it went beyond the time permitted by Bankruptcy Rule 4007(c)). See, e.g., *Bersher Invs. v. Imperial Sav. Ass'n (In re Bersher Invs.)*, 95 B.R. 126, 129 (Bankr. 9th Cir. 1988) (upholding local rule permitting appropriate discipline of a party who opposes a motion and then fails to notify opposing counsel or the court of a later intent not to oppose motion because rule was consistent with Bankruptcy Rules providing for appropriate discipline for frivolous pleadings or undue delay).

141. *Adams*, 734 F.2d at 1100; see *In re Salisbury Flower Mkts., Inc.*, Bankr. No. 4-89-3142, 1991 Bankr. LEXIS 225, at *4 (Bankr. D. Minn. Feb. 22, 1991) (upholding local rule allowing the sale of estate property on four days notice to only those creditors who request notice because the rule does not conflict with Bankruptcy Rules providing for 20 days notice to all creditors but allowing courts to shorten the time for notice or direct another method).

142. *In re Walat*, 89 B.R. 11, 13 (E.D. Va. 1988) ("Rule 9029 does not say that bankruptcy courts are prohibited from imposing additional requirements on the parties.").

143. *Adams*, 734 F.2d at 1100-01; *Walat*, 89 B.R. at 13 ("Because the central purpose of [the local rule at issue] is obviously efficiency, a purpose which is consistent with the letter and spirit of the bankruptcy laws, there is no conflict with the interests of any party."). See, e.g., *In re C.S. Crawford & Co.*, 423 F.2d 1322, 1324-25 (9th Cir. 1970) (upholding local rule

bankruptcy rules is further buttressed by Bankruptcy Rule 7016, which incorporates *FRCP* 16, which in subsection (c)(9) authorizes the court to act respecting "settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule."¹⁴⁴

Local rules may, however, compel parties to first submit disputes to ADR¹⁴⁵ only if the requirement does not impose impermissible burdens.¹⁴⁶ Courts which reject the authority to compel participation in ADR rely upon (i) the burdensome nature of the chosen ADR, or (ii) the probability that some constitutional right will be abridged, such as the disclosure of privileged work product.¹⁴⁷ Thus, in order for a local rule compelling ADR to be valid, the

requiring plaintiffs seeking review of referee's order to furnish referee with transcript of evidence because, although there are no other rules on point, local rule is the same in principle as federal rule requiring an appellant to designate a record on appeal); *Chillicothe State Bank v. Duncan* (*In re Duncan*), 95 B.R. 672, 676 (Bankr. W.D. Mo. 1988) (upholding local rule requiring that copies filed with court contain the court's filing stamp because the rule was designed to provide assurances that copies of the record submitted were true copies, was rooted in common sense, and was "thoroughly consistent with the related bankruptcy rules.").

144. FED. R. BANKR. P. 7016; FED. R. CIV. P. 16(c)(9).

145. *But see* Rammelt, *supra* note 74, at 998 (suggesting that "[b]ecause the express power to compel the [ADR] procedure cannot be found in the [*FRCP*], its use violates fundamental procedural principles--namely lack of notice and uniformity."). The author suggests that the ad hoc use of summary jury trials precludes litigants from a degree of predictability in the presentation of her case and advocates a clear articulation of the limits to ad hoc ADR to eliminate discretionary restrictions on court access, procedural irregularities and disparate treatment of litigants.

146. NORTON, *supra* note 78, § 146:3, at 146-11 (stating that a district court judge was not specifically authorized by Federal Rules of Civil Procedure 16 to require a litigant to participate in a summary jury trial (citing *Strandell v. Jackson County*, 838 F.2d 884, 887 (7th Cir. 1987)); *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 107 F.R.D. 275, 281 (W.D. Wis. 1985), *aff'd*, 871 F.2d 648 (7th Cir. 1989) (determining that Federal Rules of Civil Procedure Rule 16 authorized a trial court to require a corporate representative with settlement authority to appear at a pre-trial conference and to sanction the party if the representative did not appear)). *But see* *Mills v. Killebrew*, 765 F.2d 69, 72 (6th Cir. 1985) (holding that local rules which provide that the Michigan Supreme Court shall "by general rules establish, modify, amend and simplify the practice and procedure in all courts" of Michigan and may "promulgate and amend general rules governing practices and procedure," provide constitutional and statutory support for mandatory court-annexed mediation; "[g]iven [these local rules] we do not believe there was any clear statutory or constitutional proscription against mediation."). The mediation program in *Killebrew* only compelled the parties to submit their case to mediation, but the parties could reject the mediator's award and proceed to trial in the normal fashion. If the case proceeded to trial, however, and the verdict did not exceed the mediator's award by 10%, the party rejecting the award would be assessed actual costs.

147. *In re NLO, Inc.*, 5 F.3d 154, 158 (6th Cir. 1993) (contrasting mandatory participation at a pre-trial conference with attendance at a summary jury trial, the court concluded that "[r]equiring participation in a pre-trial conference . . . is permitted under [*FRCP*] 16(a), and justifiably so, for it may facilitate settlement at very little expense to the parties and the court. A jury trial, even one of a summary nature, however, requires at minimum the time-consuming

ADR procedure must not impose unreasonable requirements on the parties and must not modify constitutional rights. Bankruptcy court-annexed mediation, as opposed to a time-consuming and costly mini-trial or summary jury trial, ordinarily does not offend these goals.

G. *Bankruptcy Rule 7016*

As noted above, Bankruptcy Rule 7016 through its incorporation of *FRCP* 16 provides further strong support for the use of ADR in adversary proceedings.¹⁴⁸ It provides subjects for consideration at pretrial conferences and directs the bankruptcy court to give consideration and take appropriate steps with respect to "settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule."¹⁴⁹ Moreover, this endorsement of ADR is imported into the settlement of contested matters as well as adversary proceedings through Bankruptcy Rule 9014. Rule 9014 allows the court to order Bankruptcy Rule 7016 effective in any contested matter.¹⁵⁰

Prior to its amendment in 1993, *FRCP* 16(c) gave the following guidance concerning "subjects to be discussed" at pretrial conferences: "[t]he participants at any conference under this rule may consider and take action

process of assembling a panel and (one would hope) thorough preparation for argument by counsel, no matter how brief the actual proceeding. Compelling an unwilling litigant to undergo this process improperly interposes the tribunal into the normal adversarial course of litigation."); *Strandell*, 838 F.2d at 888 (court not empowered to compel participation in summary jury trial because summary trial would require disclosure of privileged work product).

148. NORTON, *supra* note 78, § 146:3, at 146-11 (referring to *FRCP* 16 as the legal predicate upon which authority for court-annexed mediation has been historically found).

149. FED. R. BANKR. P. 7016; FED. R. CIV. P. 16(c)(9). *Collier* analyzes Bankruptcy Rule 7016(c) and concludes that it "contemplates the use of procedures other than litigation to resolve disputes, including extrajudicial measures. Subparagraph (c)(9) emphasizes that certain statutes and local rules may authorize the court to order alternative dispute resolution procedures such as mediation and nonbinding arbitration, *even when not agreed to by the parties.*" 9 COLLIER, *supra* note 105, ¶ 7016.04, at 7016-17 (emphasis added).

150. FED. R. BANKR. P. 9014; *see* NORTON, *supra* note 78, § 146:3, at 146-11; *see also* A. Leo Levin & Deirdre Golash, *Alternative Dispute Resolution In Federal District Courts*, 37 U. FLA. L. REV. 29 (1985) (discussing the increased use of ADR programs in federal district courts). *See generally In re Transamerican Natural Gas Corp.*, 978 F.2d 1409, 1416 (5th Cir. 1992); Lisa A. Lomax, *Alternative Dispute Resolution in Bankruptcy: Rule 9019 and Bankruptcy Mediation Programs*, 68 AM. BANKR. L.J. 55, 83 (1994).

Whether a local rule could provide for compulsory ADR in contested matters is subject to debate. Such a rule might be attacked on the basis that the local rule was inconsistent with the federal rules, because it would remove the court's case-by-case discretion provided for in Bankruptcy Rule 9014. On the other hand many, if not most, local rules establish a set procedure in an area where the court might otherwise exercise its discretion on a case-by-case basis. *See, e.g., supra* notes 141, 143.

with respect to . . . (7) the possibility of settlement or the use of extrajudicial procedures to resolve the dispute. . . ."¹⁵¹ Courts relied on this broad procedural authority to impose ADR on the parties.¹⁵² The Advisory Committee Note to former *FRCP* 16(c)(7) indicated, however, that a district court may lack the authority to compel participation at "extrajudicial procedures": "[I]t is not the purpose of Rule 16(c)(7) to impose settlement negotiations on unwilling litigants. . . . The rule does not make settlement conferences mandatory. . . . In addition to settlement, Rule 16(c)(7) refers to exploring the use of procedures other than litigation to resolve the dispute."¹⁵³

In 1993, the Court of Appeals for the Sixth Circuit held that district courts cannot compel participation by unwilling parties in summary jury trials relying, in part, on former *FRCP* 16(c)(7) as a basis for the lack of authority.¹⁵⁴ In *In re NLO, Inc.*, employees of a uranium processing facility alleged that the facility's operators negligently exposed them to dangerous levels of radioactive and hazardous materials. The district court ordered that a summary jury trial be held as a settlement tool and stated that the summary jury trial would be open to the public.¹⁵⁵ NLO refused participation in the summary jury trial, in part because of the public access to the trial, and filed a petition for mandamus seeking emergency review of the district court's order.

The Sixth Circuit held that the district court's order compelling participation in a "public" summary jury trial under threat of sanctions was clearly

151. FED. R. CIV. P. 16(c) (1983) (amended 1993).

152. *Federal Reserve Bank v. Carey-Canada, Inc.*, 123 F.R.D. 603, 607 (D. Minn. 1988) ("It is hard to imagine that the drafters of [*FRCP* 16(c)(7)] actually intended to strengthen courts' ability to manage their caseloads while at the same time intended to deny the court the power to compel participation by the parties to the litigation."); cf. *In re Royal Composing Room, Inc.*, 62 B.R. 403 (Bankr. S.D.N.Y. 1986):

Under [*FRCP*] 16, made applicable by Bankruptcy Rule 7016, a judge may direct the parties to appear for a conference before trial for, among other purposes, facilitating the settlement of the case. The court's role as trier of fact makes it preferable that a third party [mediator] be involved if . . . settlement negotiations are likely to be extensive or require discussion of matters that are unlikely to become matters of record at any trial. This court concludes that, until Congress explicitly provides for the court to intrude on the parties' . . . negotiations in this way, the court should not attempt to innovate.

Id. at 405.

153. FED. R. CIV. P. 16, NOTES OF ADVISORY COMM. ON 1983 AMENDMENTS TO RULES, SUBDIVISION (C): SUBJECTS TO BE DISCUSSED AT PRETRIAL CONFERENCES, 28 U.S.C. (West Supp. 1994). In ascertaining the meaning of the Federal Rules of Civil Procedure, the construction given to them by the Advisory Committee is of weight. See *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 444 (1946).

154. *In re NLO, Inc.*, 5 F.3d 154, 157 (6th Cir. 1993).

155. *Id.* at 155.

erroneous as a matter of law.¹⁵⁶ The court explained that "a summary jury trial is a nonbinding mini-trial designed to give attorneys and their clients an indication of what they may expect at a full-blown trial on the merits."¹⁵⁷ The court added that while district courts have substantial inherent power to manage their dockets, that power must be exercised in a manner that is in harmony with the Federal Rules of Civil Procedure. The Sixth Circuit concluded that the provisions of former *FRCP* 16, as amplified by the Advisory Committee commentary (prior to the 1993 amendments), did not permit compulsory participation in settlement proceedings.¹⁵⁸ Thus, prior to the 1993 amendments to *FRCP* 16, the authority for compulsory ADR (at least in the Sixth Circuit)¹⁵⁹ was not clear, and unwilling litigants could object to court-ordered ADR.¹⁶⁰

The amendment to *FRCP* 16(c), effective December 1, 1993, clarified somewhat the authority for the use of mandatory ADR. Former *FRCP* 16(c)(7), referred to above, has been renumbered as *FRCP* 16(c)(9), and now provides that subjects for consideration at pretrial conferences include "settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule."¹⁶¹ Although amended *FRCP* 16(c)(9) encourages broadened ADR usage, it omits reference to the court's authority to compel ADR. This limitation is highlighted in the legislative history to the Advisory Committee Note to amended *FRCP* 16(c)(9), which provides that the rule "does not attempt to address the extent to which a court by exercise of its inherent powers can compel parties to . . . participate in alternative dispute resolution procedures and does not limit the powers of the

156. *Id.* at 156; *but see* *Arabian Am. Oil Co. v. Scarfone*, 119 F.R.D. 448, 449 (M.D. Fla. 1988) (forcing the parties to submit to a summary jury trial).

157. *NLO*, 5 F.3d at 156. At a summary jury trial parties exchange evidence before the actual trial commences. A jury is selected from the regular jury pool. The parties then present opening statements, summarize the evidence which would be presented at a full trial (no live testimony is permitted), and present closing statements. The jury is then charged with the law and asked to respond to a series of interrogatories concerning liability and damages. *See generally* S. Arthur Spiegel, *Summary Jury Trials*, 54 U. CIN. L. REV. 829 (1986).

158. *NLO, Inc.*, 5 F.3d at 157. *But see* *McKay v. Ashland Oil*, 120 F.R.D. 93 (E.D. Ky. 1988) (ordering a nonconsensual summary jury trial); *Scarfone*, 119 F.R.D. 448 (M.D. Fla. 1988) (holding that court possesses the authority to require participation in a summary jury trial). *See generally* *Mandatory Mediation*, *supra* note 74, at 1086.

159. *See supra* note 147.

160. Jennifer O'Hearne, Comment, *Compelled Participation in Innovative Pretrial Proceedings*, 84 NW. U. L. REV. 290, 320 (1990) (stating that federal courts should reject the lure of forcing unwilling litigants to participate in pretrial settlement proceedings, because such compelled participation is unauthorized by the Federal Rules of Civil Procedure and is an unwise extension of judicial power). *But see* Lomax, *supra* note 150, at 82-85 (arguing that the authority for bankruptcy courts to utilize mediation is clear).

161. FED. R. CIV. P. 16(c)(9).

court to compel participation when authorized to do so by statute."¹⁶² Rather the amendment is a recognition that some statutes and local rules authorize use of ADR even when not agreed to by the parties, and that these statutes and local rules do not offend *FRCP* 16(c)(9). The Advisory Committee acknowledged "strong feelings that this authority [to mandatorily impose nonbinding ADR] is needed and, indeed, already within the court's inherent powers."¹⁶³

H. *A Synthesized Standard for the Referral to Mediation, the Assessment of Costs and the Preservation of Confidentiality*

From the foregoing, one may derive the following standards.

1. *The Appointment of a Mediator*

Absent the parties' agreement, a bankruptcy court should only refer a proceeding to mediation when the court has determined that "the mediation will not abridge substantive rights of the parties" and is reasonably likely to advance "the just, speedy and inexpensive resolution of the matter." Thus, a bankruptcy court's discretion to refer matters to ADR should be tempered by notions of cost, speed, and the protection of substantive rights.¹⁶⁴ Because

162. H.R. REP. NO. 74, 103d Cong., 1st Sess. 123 (1993). Perhaps in the belief that the authority to compel ADR was within the court's inherent authority, the amendment omitted an earlier provision, found in the draft published for comment prior to the 1993 changes, which authorized courts to compel ADR over the objection of unwilling litigants. See Joseph T. McLaughlin & Karen M. Crupi, *Developments in ADR: Summary Jury Trials*, 201 N.Y. L.J. 1 (1994); see also FED. R. CIV. P. 16, Advisory Committee Note, H.R. REP. NO. 74, 103d Cong., 1st Sess. 201 (1993):

Paragraph (9) is revised to describe more accurately the various procedures that, in addition to traditional settlement conferences, may be helpful in settling litigation. Even if a case cannot immediately be settled, the judge and attorneys can explore possible use of alternative procedures such as mini-trials, summary jury trials, mediation, neutral evaluation, and nonbinding arbitration that can lead to consensual resolution of the dispute without a full trial on the merits. The rule acknowledges the presence of statutes and local rules or plans that may authorize use of some of these procedures even when not agreed to by the parties [i.e., the CJRA]. The rule does not attempt to resolve questions as to the extent a court would be authorized to require such proceedings as an exercise of its inherent power.

Id. (emphasis added).

163. H.R. REP. NO. 74, 103d Cong., 1st Sess. 123 (1993).

164. An ADR order cannot be "so onerous, so clearly unproductive, or so expensive in relation to the size, value, and complexity of the case . . ." *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648, 654 (7th Cir. 1989). In addition, an ADR order cannot infringe on protected rights and privileges. See *Strandell v. Jackson County*, 838 F.2d 884, 888 (7th Cir. 1987) (granting parties' request to relieve the party from a mandatory summary jury trial on the grounds that the names and statements of witnesses, which would be protected under

mediation is usually an inexpensive form of ADR, which is not unduly intrusive or burdensome,¹⁶⁵ but is often effective, it is the prevalent form in bankruptcy proceedings.

A bankruptcy court's discretion to impose a mediator on the parties must also be informed by the consequences of mandatory mediation on the unwilling litigant. In ascertaining whether mandatory mediation will impair substantive rights of the parties, the bankruptcy court must be mindful that the threat of "informal sanctions"¹⁶⁶ on parties resisting ADR may jeopardize a party's right to have the matter decided by the court. The risk of informal sanctions by the court may coerce a party to settle. This risk is heightened where a court orders a party to attend mediation because the party may settle under the belief that the court would be unsympathetic should the party decline to settle. A substantially increased danger of a party settling in the shadow of informal sanctions exists if the mediator and presiding judge have ex parte communications.¹⁶⁷

The risk of informal sanctions may also be heightened if the mediator is a settlement judge.¹⁶⁸ The use of settlement judges who sit in the same

the work product doctrine, would be disclosed at summary jury trial).

165. See *supra* notes 4, 9.

166. The term "informal sanctions" refers to the unspoken implication that a court may be inclined to rule against a party on other issues in the case because of that party's unwillingness to engage in ADR. But see Robert J. Keenan, *Rule 16 and Pretrial Conferences: Have We Forgotten the Most Important Ingredient?*, 63 S. CAL. L. REV. 1449, 1497 (1990) (arguing that attorneys will provide an adequate procedural safeguard against indirect coercion by the court).

Retribution by a judge might be in the form of partiality to the party opposing settlement when deciding questions of law or matters within judicial discretion. Scott A. Miller, Note, *Expanding the Federal Courts' Power to Encourage Settlement Under Rule 16*: G. Heileman Brewing v. Joseph Oat, 1990 WISC. L. REV. 1399, 1423. In addition, a party may feel pressured to settle a matter if the settlement judge or the presiding judge "hints at her belief as to the value of the case, or suggests settlement within a given dollar range." *Id.* at 1424. Further, the party's attorney may enhance the pressure of his client to settle because the attorney's own purposes may be at odds with those of his client. For example, the attorney might persuade his client to settle because he knows that he will be appearing before the settlement judge or presiding judge in other matters and cannot risk the "wrath" of the judge or the potential that the judge may view him as unreasonable. But see William E. Craco, Note, *Compelling Alternatives: The Authority of Federal Judges to Order Summary Jury Trial Participation*, 57 FORDHAM L. REV. 483, 499 (1988) (represented parties, though involved in the procedure against their will, would be unwilling to finance their attorney's less than zealous participation and would likely pressure counsel to make the time spent as meaningful as possible under the circumstances); see *Kimbrough v. Holiday Inn*, 478 F. Supp. 566, 571 (E.D. Pa. 1979) (The benefits of mandatory ADR include the litigant's ability to demand a trial de novo, the substantial savings of discovery resources, the ability of the ADR to achieve a fair result, the limited nature of the procedure, and the fact that the "[l]itigants [had] the opportunity to test the validity of their claims very shortly after [commencement of the case].").

167. See *infra* notes 194-96 and accompanying text.

168. Bankruptcy Judge Thomas Baynes of the Middle District of Florida, a leading advocate

district as the trial judge may prompt the parties to the mediation to consider its impact upon their appearances before the settlement judge in other cases.¹⁶⁹ Accordingly, prior to the imposition of mandatory mediation the court should determine that these risks are mitigated, or otherwise outweighed by the benefits of mediation.¹⁷⁰

2. *Compensation of a Mediator*

Once the standard for appointment of a mediator is met, the court has authority to assess the reasonable costs of mediation against the parties or the estate as is appropriate in the case. Although the Bankruptcy Code may not expressly authorize payment to third parties other than examiners for mediation,¹⁷¹ and the CJRA does not address the assessment of costs,¹⁷²

of ADR, argues that judges "force settlement through the exercise of their power," meaning that attorneys will feel considerable pressure to settle to "keep the judge happy." Thus, if another judge is used to mediate or supervise a settlement conference, Judge Baynes would argue that the judge should be brought in from outside the district. (Telephone interview with Hon. Thomas Baynes, Bankruptcy Judge, Middle District of Florida (November 1994).

The authors have been informed, however, that settlement judges from within the same district have often been used successfully in bankruptcy proceedings (e.g., in the Middle District of Tennessee and the Northern District of Chicago).

169. Some courts find that the risk of coercion is mitigated by the benefits of settlement and accordingly, have offered to act as a mediator in their own cases and thereby settled substantive issues in the case. See *In re Ames Dep't Stores, Inc.*, Nos. 90 B 11233 to 90 B 11285, 1991 WL 259036 (Bankr. S.D.N.Y. 1991). "One potential danger of this ad hoc activism is that a judge may effectively coerce, rather than induce, settlement by forcing a litigant to forego his right to trial. Worse yet, a judge may become so involved in the settlement process that, should the matter proceed to trial, an unbiased factual and legal determination becomes impossible." Rammelt, *supra* note 74, at 972.

170. A party may remain unaware of the strengths and weaknesses of its case and only through participation in mediation will the party be enlightened. This can prompt the party to abandon a position in favor of common ground. In addition, the use of mediation in bankruptcy cases would allow parties to engage in integrative bargaining which permits the parties to be creative with solutions, thereby allowing all parties to believe they received a favorable settlement. *Mandatory Mediation*, *supra* note 74, at 1091. Also, the Bankruptcy Code indirectly encourages the use of integrative bargaining. Section 1103(c)(3) expressly authorizes a creditors' committee to meet with the debtor and assist in the formulation of a plan of reorganization. 11 U.S.C. § 1103(c)(3).

171. A mediator may not be a professional person within the meaning of § 330 of the Bankruptcy Code, which authorizes "reasonable compensation for actual, necessary services rendered by such . . . professional person . . ." 11 U.S.C. § 330(a)(1). But see 11 U.S.C. § 506(c) (permitting the surcharge of a secured creditor's collateral for the "reasonable, necessary costs and expenses of preserving, or disposing of . . . a secured creditor's collateral"); Franklin, *supra* note 5, at 5 (quoting Harvey Miller; the Bankruptcy Code "allows a court to have conferences in adversary proceedings. It doesn't authorize the appointment of persons who are paid from the estate.").

172. Bankruptcy Rule 7016 similarly does not address the assessment of costs.

the ability of a bankruptcy court to assess costs of ADR is likely encompassed within the court's inherent power¹⁷³ and subsections 105(a) and (d) of the Bankruptcy Code. The bankruptcy court, however, retains the discretion to limit the amounts assessed by capping the mediator's compensation or otherwise tailoring it to the end of efficient case management.¹⁷⁴

Moreover, *FRE* 706¹⁷⁵ provides analogous support for the imposition of mediation costs on the parties. *FRE* 706, relying presumably on the courts' inherent powers, authorizes the court to assess the costs of expert witnesses against the parties in such proportion as the court directs. The same power should be available to bankruptcy courts in the assessment of mediation costs.¹⁷⁶ Allowing bankruptcy courts to provide for compensation of

173. See *supra* notes 69-76 and accompanying text; see also *White v. Raymark Indus., Inc.*, 783 F.2d 1175, 1177 (4th Cir. 1986); *Tiedel v. Beech Aircraft Corp.*, 118 F.R.D. 54, 58 (W.D. Mich. 1987), *rev'd sub nom.* *Tiedel v. Northwestern Mich. College*, 865 F.2d 88 (6th Cir. 1988) (upholding the imposition of costs against plaintiff who rejected mediation award and failed to obtain verdict 10% in excess of the mediation award). The court held that the cost-shifting feature of the local rule was a valid exercise of the court's inherent power to conduct its business in an economical and efficient manner. Numerous policy considerations suggest that this cost assessment mechanism is within the ambit of inherent power. The power to assess costs (i) is designed to encourage the speedy and efficient resolution of disputes and to avoid, if possible, the unnecessary expense and time involved in litigation, and (ii) is a necessary and effective means of encouraging parties to participate in the mediation.

174. Similar arguments were advanced by the court in *Beech Aircraft*, 118 F.R.D. at 54, in upholding the assessment of costs against a plaintiff rejecting a mediation award. See generally *Jennings v. D.H.L. Airlines*, 101 F.R.D. 549 (N.D. Ill. 1984); Bartell, *Taxation of Costs and Awards of Expenses in Federal Court*, 101 FED. RULES DIG. 553 (1984). For an example of a bankruptcy court order capping the mediator's compensation see *In re Zale Corp.*, No. 392-30001-SAF-1 (Bankr. N.D. Tex.).

175. *FRE* 706 provides that

Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. . . . In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

FED. R. EVID. 706(b). Courts have consistently held that *FRE* 706 allows the court to assess the cost of the expert's compensation as it deems appropriate. *McKinney v. Anderson*, 924 F.2d 1500, 1511 (9th Cir. 1991) ("We believe that the phrase 'such proportion as the court directs,' in an appropriate case, permits the district court to apportion all the cost to one side."); *Students of Cal. Sch. for the Blind v. Honig*, 736 F.2d 538, 549 (9th Cir. 1984), *vacated on other grounds*, 471 U.S. 148 (1985). One court, however, has distinguished the role of a court-appointed expert and a mediator and held that "although [a] mediator may be an 'expert in the law,' he or she is not a Rule 706 expert witness whose costs are taxable" *Kansas v. Deffenbaugh Indus.*, 154 F.R.D. 269, 270 (D. Kan. 1994). Limiting the ability of a court to assess the costs of a mediator because it does not fulfill the technical definition of an expert under *FRE* 706 appears to be unduly restrictive and without reason.

176. See *supra* notes 69-76 and accompanying text. See *Mediation: Boon or Bane?*, 23 BANKR. CT. DEC., Feb. 11, 1993, at A1, A5 ("If the case is resolved, why not pay the mediator

mediators may speed the process and decrease the overall expense of bankruptcy.¹⁷⁷

3. Preserving Confidentiality

The referral of a bankruptcy matter to mediation raises concerns about the extent to which disclosures at mediation are protected. Absent confidentiality, substantive rights of the parties may be jeopardized.¹⁷⁸ As discussed above, the ADR order of a bankruptcy court or its local rules typically provide that *FRE* 408 applies to mediation or other forms of ADR.¹⁷⁹ One commentator noted that for ADR (particularly bankruptcy mediation) to be effective "the parties must feel comfortable enough to confide in the mediator and to admit weaknesses in their positions, so as to evaluate the reasonableness of a settlement proposal."¹⁸⁰ Although *FRE* 408 protects the confidentiality of offers regarding the "validity or amount" of a "disputed claim," it expressly

who brought it about?").

177. *Id.* at A5 ("If you mediate [early] you will have saved time and money"); cf. FED. R. BANKR. P. 1001 (these rules shall be construed to secure the just, speedy, and inexpensive determination of every case and proceeding); Heartland Fed. Sav. & Loan Ass'n v. Briscoe Enters., Ltd., II (*In re Briscoe Enters. Ltd., II*), 994 F.2d 1160, 1163 n.8 (5th Cir.), *cert. denied*, 114 S. Ct. 550 (1993) (the court retained Professor Elizabeth Warren to educate the court on the current status of the law regarding cramdown and "fair and equitable," *id.* at 1164, standards under the Bankruptcy Code).

One limitation of many current mediation programs, such as the programs for the Bankruptcy Courts in the Southern District of California and the Middle District of Florida, is that these programs typically do not compensate mediators. Thus, no mediators, other than paid mediators, could afford to mediate an impasse in the formulation of a plan of reorganization, for instance, which would likely involve arduous and time consuming negotiations, and where the greatest economies of administration could be accomplished.

178. See Macy's Mediator Final Report, *supra* note 67, at 2 ("One of the strengths of the mediation process is that the parties can trust in its absolute confidentiality--and that confidentiality, of course, needs to be maintained.").

179. *FRE* 408, which is applicable in bankruptcy cases and proceedings, provides:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

FED. R. EVID. 408.

180. NORTON, *supra* note 78, § 146:4, at 146-14.

permits evidence disclosed in negotiation sessions to be admitted to prove bias or prejudice. Accordingly, avenues exist through which disclosures at ADR, which were thought to have been disclosed in confidence during the ADR, can be used against a party.¹⁸¹ Moreover, because of the lack of uniform rules governing the role of mediators, the possibility exists that a mediator could informally impact a party's case by communicating with the presiding judge.

The use of examiners as mediators highlights the concerns of confidentiality in bankruptcy ADR. Although an examiner is precluded from ex parte contact with the court,¹⁸² an examiner as mediator is not classic mediation. Rather, the examiner is clothed with judicial authority and is required to "file a statement of any investigation conducted . . . including any fact ascertained pertaining to fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor, or to a cause of action available to the estate."¹⁸³ Although the examiner's mandate may facilitate settlement,¹⁸⁴ it also presents the possibility that confidential communications between parties in ADR can be presented to the court.¹⁸⁵

181. The Bankruptcy Rules, for example, encourage broad discovery pursuant to Bankruptcy Rules 7026 and 2004. Bankruptcy Rule 7026 specifically provides that "parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action" FED. R. BANKR. P. 7026. In addition, *Norton* advocates making all communications at mediation privileged so as to protect the parties and in the event the mediation fails, the mediator. NORTON, *supra* note 78, § 146:4, at 146-16. *Norton* asserts that in the absence of a privilege, a mediator can be subpoenaed to deposition or trial and would have no basis to object or seek a protective order. *Id.* § 146:4, at 146-17. Although *Norton* raises an important concern, the parties to the mediation typically agree contractually not to subpoena or otherwise require the mediator to testify or produce settlement notes or other information in any future proceeding.

182. FED. R. BANKR. P. 9003(a).

183. 11 U.S.C. § 1106(a)(4)(A). In addition, examiners have been empowered to report progress in plan negotiations to the court and may be required to apprise the court of the parties' positions. *See, e.g., In re El Paso Elect. Co.*, No. 92-10148 (Bankr. W.D. Tex. Jan. 15, 1993); *In re Public Serv. Co.*, 99 B.R. 177 (Bankr. D.N.H. 1989). When examiners attempt to force parties to settle according to their recommendations, they undermine the consensual nature of mediation; such pressure causes parties to attempt to persuade the third party about the legal merits of their dispute instead of focusing on the various interests underlying the claims. *Mandatory Mediation*, *supra* note 74, at 1098.

184. *See supra* notes 29, 36-39 and accompanying text.

185. Although some courts have recognized that the "prospect of an Examiner being required to indiscriminately produce investigative materials [to third parties] obtained through promises of confidentiality and reliance upon [court] orders raises grave concerns touching both the integrity of the Bankruptcy Court's processes, as well as the integrity of the statutory position of the Examiner," *In re Apex Oil Co.*, 101 B.R. 92, 98-99 (Bankr. E.D. Mo. 1989); *In re Baldwin United Corp.*, 46 B.R. 314, 316 (Bankr. S.D. Ohio 1985), an examiner answers solely to the court and is "a court fiduciary and is amenable to no other purpose or interested party." *Baldwin*, 46 B.R. at 316 (quoting *In re Hamiel & Sons, Inc.*, 20 B.R. 830, 832 (Bankr. S.D. Ohio 1982)). Accordingly, although the examiner's investigative files may be protected from

Accordingly, in ascertaining whether the salutary goals of ADR will be furthered in a particular case, the court must be mindful that confidences are preserved. Thus, in every mediation the court should by rule or order require the parties and the mediator to preserve the confidences disclosed in mediation to the fullest legal extent.¹⁸⁶

III. RECOMMENDATIONS FOR IMPROVING ADR IN BANKRUPTCY CASES

This article demonstrates that ADR already has substantial and varied application to bankruptcy cases, and a substantial body of authority supporting its usage. Lacking is a consistent standard for the use of mediation and a unifying procedural framework.

We have synthesized, in Part II H, a standard for the use of mediation, drawn from our reading of the authorities. It is unsurprising: Absent the parties' agreement, the court may refer a matter to mediation, and assess appropriate costs, if it finds that mediation will not abridge the substantive rights of the parties and is reasonably likely to advance the just, speedy, and inexpensive resolution of the matter.

We recommend the following procedural framework: (i) the amendment of Bankruptcy Rule 9019(c) to provide for mandatory mediation and the assessment of costs where appropriate; (ii) complementary amendments to the Bankruptcy Rules to streamline the consequences of mandatory mediation and ensure confidentiality and impartiality, and (iii) the continued use of examiners as mediators provided the court finds the ADR standard to be met and preserves the confidentiality of the mediation.

third parties, apparently the court would be free to inquire further into the examiner's files thereby potentially jeopardizing confidences. Another criticism levelled at mediation which indirectly relates to confidentiality issues is that mediation privatizes an otherwise public dispute. NORTON, *supra* note 78, § 146:4, at 146-18 to 146-19 ("When matters of significant public importance are referred to mediation, creditors, the public and/or the media may claim some right to oversee and to participate in the proceedings.").

186. See NORTON, *supra* note 78, § 146:4, at 146-18; Arthur A. Chaykin, *Mediator Liability: A New Rule for Fiduciary Duties*, 53 U. CIN. L. REV. 731, 732 (1984) (suggesting that improper coercion tactics may expose mediators to malpractice liability as fiduciaries). Compare Arthur A. Chaykin, *The Liabilities and Immunities of Mediators: A Hostile Environment for Model Legislation*, 2 OHIO ST. J. ON DISP. RESOL. 47, 50-53 (1986) (arguing against mediator immunity) with Joseph B. Stulberg, *Mediator Immunity*, 2 OHIO ST. J. ON DISP. RESOL. 85, 87, 89 (1986) (arguing for mediator immunity except when a mediator participates in an illegal agreement or deliberately helps one party at the expense of the other). See Wagshal v. Foster, Civ. A. No. 92-2072, 1993 U.S. Dist. LEXIS 4073, at *7 n.4 (D.D.C. Feb. 5, 1993) (suggesting that mediators have immunity, to the extent judges have immunity, while acting in their capacity as mediators).

A. *Amend Bankruptcy Rule 9019(c)*

Although the authority of bankruptcy courts to use ADR seems clear,¹⁸⁷ there is no unifying procedural encouragement. Accordingly, we believe that, in addition to continued usage, a unified procedure would enhance the instances of ADR. Thus, bankruptcy ADR would benefit from an amendment to the Bankruptcy Rules.

Amended Bankruptcy Rule 9019(c) could provide (changes in italics):

C. *ALTERNATIVE DISPUTE RESOLUTION.*

(1) On stipulation of the parties to any controversy affecting the estate the court may authorize the matter to be submitted to final and binding arbitration *or to any other form of alternative dispute resolution.*

(2) *The court, on its own motion or the motion of a party in interest or the United States Trustee, may order the parties to submit any controversy affecting the estate to mediation. Unless the court orders otherwise, the costs of the process, including the compensation of the appointed neutral, shall be borne equally by the parties. Unless the court orders otherwise for cause shown, the referral to mediation shall not stay other proceedings respecting the controversy.*¹⁸⁸

187. See *supra* notes 69-163 and accompanying text. A preliminary draft amendment suggested by the American Bar Association Section of Business Law, the Joint Task Force on Bankruptcy Court Structure and Insolvency Processes, would amend 28 U.S.C. § 157(e). The amendment would provide that

a bankruptcy judge, on motion of a party or sua sponte, may appoint masters, mediators or similar third-party officers of the court pursuant to orders of the bankruptcy judge or local rules of the bankruptcy judges for the district, as the bankruptcy judge finds desirable to assist in resolving disputes, to facilitate settlements, or to reduce delays.

Draft dated Sept. 20, 1994 presented to the Joint Task Force on Bankruptcy Court Structure and Insolvency Processes at the National Conference of Bankruptcy Judges, in Toronto, Ontario (Oct. 7, 1994). The accompanying legislative note would provide:

It has long been recognized as [an] 'inherent power' of the Federal courts the power of a judge to appoint ancillary officers of the court to assist in achieving a just result and to require parties to participate in out-of-court dispute resolution procedures conducted by those officials . . . The proposed statutory addition makes it clear that bankruptcy judges have this inherent power. Adoption of the amendment will help promote the use of [alternative] dispute resolution procedures in the bankruptcy court and will help ameliorate delays and expenses associated with bankruptcy.

Id. (citations omitted).

188. As described further in Appendix A, many local rules or general orders provide the bankruptcy court with the flexibility to stay other proceedings related to the bankruptcy case. This flexibility permits the court to address the propriety of a universal stay on all matters on a case-by-case basis.

There does not appear to be any reason to limit the reach of Bankruptcy Rule 9019(c) to binding arbitration in light of the expanded uses of ADR. The specific reference to binding arbitration alone, as in the present rule, could lead to a negative inference opposing the use of other forms of ADR which would likely be more effective in bankruptcy cases than arbitration.

The language of Bankruptcy Rule 9019 indicates that it extends to contested matters as well as adversary proceedings. Accordingly, amended Bankruptcy Rule 9019(c) would provide a bankruptcy court with unambiguous procedural guidelines to order mediation without compromising any other provisions of the Bankruptcy Rules.¹⁸⁹

Although courts may decide to use local rules or general orders to carry out the purposes of ADR, litigants will benefit from a national uniform rule.¹⁹⁰ The unpredictability of ADR will be lessened and a body of case law interpreting the ADR rule will be encouraged, thereby increasing litigants' knowledge and familiarity with the extent and limitations of ADR.

B. Make Complementary Amendments to the Bankruptcy Rules to Preserve the Integrity and Confidentiality of the ADR

In addition to the amendment to Bankruptcy Rule 9019(c), other Bankruptcy Rules would benefit from complementary amendments to streamline ADR usage, preserve the integrity and confidentiality of the ADR process, and foster the actual and perceived fairness of ADR in bankruptcy cases.¹⁹¹ For example, the Bankruptcy Rules could provide that (i) any document, paper, or matter made or disclosed in an ADR process is confidential;¹⁹² (ii) neutrals appointed in an ADR process are precluded from

189. See *Mills v. Killebrew*, 765 F.2d 69, 72 (6th Cir. 1985) (a local rule that authorizes a court to send cases to mediation provides constitutional and statutory support for the mediator's jurisdiction); Stephen W. Sather & Adrian M. Overstreet, *The Single-Asset Real Estate Debtor: A Selective Overview*, 2 J. BANKR. L. & P. 343, 391 (July 1993) ("By requiring alternate [sic] dispute resolution at an early stage of the case, bankruptcy courts can promote negotiation and reduce expense. . . . The scope of Section 105 is broad and would include the authority to order parties to mediation, nonbinding arbitration, or other forms of alternate [sic] dispute resolution."). But see *In re NLO, Inc.*, 5 F.3d 154, 157 (6th Cir. 1993) (requiring participation in a summary jury trial, where such compulsion is not permitted by the Federal Rules, is an unwarranted extension of the judicial power).

190. Ad hoc ADR usage does not provide sufficient guidance to litigants to permit a proper balance between protecting litigants from judicial coercion and allowing courts legitimate docket management authority. Miller, *supra* note 166, at 1427. In addition, a national rule promotes more formality, enforceability, and greater national uniformity. *Id.* at 1428; see Robert E. Keeton, *The Function of Local Rules and the Tension with Uniformity*, 50 U. PITT. L. REV. 853 (1989); A. Leo Levin, *Local Rules as Experiments: A Study in the Division of Power*, 139 U. PA. L. REV. 1567, 1579 (1991) (referring to experimentation with local rules as a means of dealing with the slow pace of national reform of the *FRCP*).

191. H.R. REP. NO. 595, 95th Cong., 1st Sess. 95 (1977).

192. Bankruptcy Rule 9019 could be amended to add a new subpart (d) to provide:

ex parte communications with the court concerning matters affecting a case;¹⁹³ (iii) certain persons and relatives connected with the bankruptcy judge could not serve as neutrals;¹⁹⁴ and (iv) a neutral should be disqualified from serving if his impartiality might reasonably be questioned within the meaning of 28 U.S.C. § 455.¹⁹⁵

CONFIDENTIALITY. Conduct or statements made in the course of alternative dispute resolution are confidential and are considered to be made in the course of 'compromise negotiations' within the meaning of Federal Rule of Evidence 408.

In addition, the bankruptcy court might suggest that the litigants contractually agree not to subpoena the mediator in any proceeding related to the bankruptcy, so as to preserve the confidentiality of the ADR process. Furthermore, some of the court-annexed mediation programs provide that communications made in the mediation process are not only confidential, but are also "privileged."

Further, in order to preserve confidences and secrets within the meaning of Bankruptcy Rule 9018, an amendment could provide (changes in italics):

On motion or on its own initiative, with or without notice, the court may make any order which justice requires . . . (4) *to protect the estate or any entity with respect to any conduct or statements made or any paper disclosed in confidence in connection with alternative dispute resolution.*

193. Amended Bankruptcy Rule 9003 could provide (changes in italics):

(a) GENERAL PROHIBITION. Except as otherwise permitted by applicable law, any examiner, any party in interest, any attorney, accountant, or employee of a party in interest, *and any neutral appointed to conduct alternative dispute resolution* shall refrain from ex parte meetings and communications with the court concerning matters affecting a particular case or proceeding.

194. Amended Bankruptcy Rule 5002 could read in pertinent part (changes in italics):

(a) APPROVAL OF APPOINTMENT OF RELATIVES PROHIBITED. The appointment of an individual as a trustee or examiner pursuant to § 1104 of the Code *or as a neutral to conduct alternative dispute resolution* shall not be approved by the court if the individual is a relative of the bankruptcy judge approving the appointment or the United States Trustee in the region in which the case is pending.

(b) JUDICIAL DETERMINATION THAT APPROVAL OF APPOINTMENT OR EMPLOYMENT IS IMPROPER. A bankruptcy judge may not approve the appointment of a person as a trustee or examiner pursuant to § 1104 of the Code, *approve the appointment of a neutral to conduct alternative dispute resolution*, or approve the employment of a person as an attorney, accountant, appraiser, auctioneer, or other professional person pursuant to §§ 327, 1103, or 1114 of the Code if that person is or has been so connected with such judge or the United States Trustee as to render the appointment or employment improper.

195. Several bankruptcy court local rules or general orders extend 28 U.S.C. § 455 to neutrals appointed pursuant to an ADR process on the premise that the same need for confidence in the integrity of the system exists in the ADR process. Amended Bankruptcy Rule 5004(a) could provide (changes in italics):

(a) DISQUALIFICATION OF JUDGE OR NEUTRAL. A bankruptcy judge *and a neutral appointed to conduct alternative dispute resolution* shall be governed by 28 U.S.C. § 455. A bankruptcy judge shall be disqualified from presiding over the proceeding or contested matter in which the disqualifying circumstance arises, or, if appropriate, shall be disqualified from presiding over the case. *A neutral shall be disqualified from serving as a neutral in the proceeding or contested matter in which the*

C. *Continue to Permit Court-Appointed Examiners to Mediate*

As explained by the bankruptcy court in *Public Service Co.*, the role of examiners is not limited to investigating fraud or irregularities.¹⁹⁶ The function of an examiner, according to § 1106(a)(3) of the Bankruptcy Code, includes "investigat[ing] . . . any other matter relevant to the case or to the formulation of a plan."¹⁹⁷ The *Public Service* court determined that this function permitted the examiner to "mediate during the 60-day period [in which a consensual plan may be proposed]."¹⁹⁸ Accordingly, an examiner, without expanded powers authorized by the bankruptcy court, can serve to mediate negotiations toward achieving a consensual plan of reorganization. Mediation by an examiner may naturally flow from the power to investigate "any other matter relevant to the case or the formulation of a plan." As a practical matter, an examiner's role often includes mediation.

The use of an examiner as mediator should, however, be recognized for its limitations, including the accompanying threat of informal sanctions.¹⁹⁹ Subject to an examiner's statutory duty to report, the examiner should be made subject to the confidentiality requirements of all mediators.²⁰⁰

CONCLUSION

Immersed in the adversary system as we are, it is easy to forget that although

the adversarial system ensures legal resolution of disputes, its confrontational nature may not allow parties to resolve their underlying differences and often leaves their relationships permanently scarred. Such an outcome may be inevitable for many deep-seated conflicts, but parties often can resolve their disputes on a more amicable basis. Thus, parties who must or wish to interact on a regular basis in the future benefit greatly from consensual conflict resolution.²⁰¹

disqualifying circumstance arises.

196. See *supra* notes 38-40 and accompanying text.

197. 11 U.S.C. § 1106(a)(3).

198. *In re Public Serv. Co.*, 99 B.R. 177, 183 (Bankr. D.N.H. 1989).

199. See *supra* notes 166-70 and accompanying text.

200. See *supra* note 192.

201. *Mandatory Mediation*, *supra* note 74, at 1092; see WAYNE BRAZIL, *EFFECTIVE APPROACHES TO SETTLEMENT: A HANDBOOK FOR LAWYERS AND JUDGES* 11 (1988); NANCY H. ROGERS & CRAIG A. McEWEN, *MEDIATION* 17 (1989) (suggesting that the nonadversarial nature of mediation can help preserve an ongoing relationship).

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. As increasing societal litigiousness has eroded these negotiated settlements and increased judicial burdens, the courts have turned to alternate means--Alternative Dispute Resolution--to redress the imbalance between litigation and negotiation.

There is now ample precedent and authority and good reason for this expanded use of ADR in bankruptcy. We suggest in Part II H of this article that its use now be measured against an articulated legal standard and, in Part III, conformed to a unifying procedure contained in the Bankruptcy Rules.

APPENDIX A
BANKRUPTCY COURT-ANNEXED ADR PROGRAMS

This appendix highlights the characteristics of existing ADR programs in bankruptcy courts pursuant to a local bankruptcy rule or general order.²⁰²

202. In January 1994 and November 1994 the authors contacted every bankruptcy court in the country, inquiring whether that district had a formal ADR plan or whether ADR was used in some informal manner on an ad hoc basis. A significant number of responses were received. In addition, the authors have reviewed a draft report by the Federal Judicial Center (FJC), cataloging the results of a similar inquiry. ROBERT J. NIEMIC & JEFFREY REICH, FEDERAL JUDICIAL CENTER, ADR IN BANKRUPTCY COURTS: SUMMARY OF LOCAL BANKRUPTCY RULES AND GENERAL ORDERS ON ADR (Nov. 18, 1994) (unpublished manuscript, on file with the authors). A few courts responded to the FJC survey but not to the inquiry by the authors; those courts were included in this article on the basis of the information reported by the FJC. The FJC study is still in preliminary form and is not to be cited as definitive.

As of November 1994, several districts were studying the possibility of implementing a formal plan in the near future, and expected that some type of plan would be forthcoming. Often these efforts were coordinated with a local bar group. See Telephone interview with Barry Russell, Bankruptcy Judge, Central District of California (Nov. 15, 1994); letter from Lewis M. Killian, Jr., Bankruptcy Judge, Northern District of Florida, to Diana M. Sangalli (Dec. 9, 1994) (on file with authors); Letter from Donald L. Rickertsen, Esq., by request of A. David Kahn, Chief Bankruptcy Judge, Northern District of Georgia, to Diana M. Sangalli (Dec. 2, 1994) (on file with authors); Letter from Monice K. Crawford, judicial assistant to James A. Pusateri, Chief Bankruptcy Judge, District of Kansas, to Diana M. Sangalli (Nov. 21, 1994) (on file with authors); Letter from John K. Pearson, Bankruptcy Judge, District of Kansas, to Ralph R. Mabey (Nov. 18, 1994) (on file with authors); Letter from Jerry A. Brown, Bankruptcy Judge, Eastern District of Louisiana, to Ralph R. Mabey (Nov. 17, 1994) (on file with authors) (indicating likely adoption of local rules that provide for ADR); Letter from Edward Ellington, Bankruptcy Judge, Southern District of Mississippi, to Diana M. Sangalli (Nov. 30, 1994) (on file with authors); Letter from William H. Gindin, Chief Bankruptcy Judge, District of New Jersey, to Diana M. Sangalli (Nov. 22, 1994) (on file with authors). The FJC study also indicates that ADR programs are being considered by the bankruptcy courts in the Central District of California (which has since adopted a program, see *infra* Appendix A part iii.); the Eastern District of California; the District of Colorado; the Northern District of Illinois; the Western District of Missouri; and the District of Utah.

Some courts indicated that while no formal program was in place, some type of informal arrangements were being used in occasional cases. See Letter from Charles G. Case II, Bankruptcy Judge, District of Arizona, to Diana M. Sangalli (Nov. 22, 1994) (on file with authors) (settlement conferences); Letter from Helen S. Balick, Chief Bankruptcy Judge, District of Delaware, to Diana M. Sangalli (Dec. 13, 1994) (on file with authors) (informal arrangement to refer appropriate adversary proceedings or contested matters to United States Magistrate for mediation); Letter from Robert F. Hershner, Jr., Chief Bankruptcy Judge, Middle District of Georgia, to Diana M. Sangalli (Nov. 18, 1994) (on file with authors) (settlement judges, reports "about a seventy-five percent success rate"); Letter from Jack B. Schmetterer, Bankruptcy Judge, Northern District of Illinois, to Ralph R. Mabey (Nov. 15, 1994) (on file with authors) (indicating use of settlement judges); Letter from John H. Squires, Bankruptcy Judge, Northern District of Illinois, to Ralph R. Mabey (Nov. 17, 1994) (on file with authors) (indicating use of settlement judges in Midway Airlines, Nos. 91-B-6449 to 91-B-6451, William J. Stroecker, No. 88-B-02873 and The Grabill Corp. Nos. 89-B-1639 to 89-B-01643 cases); Letter from William L. Edmonds, Chief Bankruptcy Judge, Northern District of Iowa, to Diana M. Sangalli (Nov.

The bankruptcy courts in twelve districts have adopted court-annexed ADR programs: (i) the Northern District of Alabama; (ii) the Northern District of California; (iii) the Central District of California; (iv) the Southern District of California; (v) the Middle District of Florida; (vi) the Southern District of Florida; (vii) the Northern District of Indiana; (viii) the Southern District of New York; (ix) the Western District of Oklahoma; (x) the District of Oregon; (xi) the Eastern District of Pennsylvania; and (xii) the Eastern District of Virginia. Many other districts are in the process of adopting formal programs, or now employ informal programs.²⁰³

i. *Northern District of Alabama*

Effective March 1, 1994, the Bankruptcy Court for the Northern District of Alabama promulgated Local Rule 102, which adopted the ADR plan authorized by District Court Local Rule 16.1(c). The district court plan, based on the principles of "early intervention . . . , flexibility, and a preference for nonbinding over binding processes,"²⁰⁴ provides that the bankruptcy judge may direct the parties to participate in the ADR plan adopted by the court. The program has three components: an Open ADR track, a mediation track,

21, 1994) (on file with authors) (settlement judge used on very limited basis); Letter from James D. Gregg, Bankruptcy Judge, Western District of Michigan, to Diana M. Sangalli (Nov. 21, 1994) (on file with authors) (settlement judge); Letter from Dennis D. O'Brien, Chief Bankruptcy Judge, District of Minnesota, to Diana M. Sangalli (Nov. 28, 1994) (on file with authors) (bankruptcy judges used as mediators); Letter from Terrence M. Healow, law clerk to John L. Peterson, Bankruptcy Judge, District of Montana, to Diana M. Sangalli (Nov. 21, 1994) (on file with authors) (settlement conferences presided over by United States Magistrate); sample order in *In re Mendoza*, Case No. 7-93-11291 MR, Adv. No. 93-1233 M (Bankr. D.N.M.) (settlement conference with attorney on "settlement panel").

The FJC study lists the following bankruptcy courts as those with significant use of "ad hoc" ADR: the District of New Jersey (which as noted above is considering adopting a formal program); the Southern District of New York (before it adopted General Order 117); the Southern District of Ohio; the Eastern District of Wisconsin; the Northern District of Texas; the Southern District of Texas; and the Western District of Texas.

Other courts responded that no ADR programs were in place and none were anticipated in the immediate future. See Letter from James D. Walker, Jr., Bankruptcy Judge, Middle District of Georgia, to Ralph R. Mabey (Nov. 18, 1994) (on file with authors); Letter from William V. Altenberger, Chief Bankruptcy Judge, Central District of Illinois, to Diana M. Sangalli (Nov. 16, 1994) (on file with authors); Letter from Russell J. Hill, Chief Bankruptcy Judge, Southern District of Iowa, to Diana M. Sangalli (Nov. 22, 1994) (on file with authors); Letter from J. Wendell Roberts, Chief Bankruptcy Judge, Western District of Kentucky, to Diana M. Sangalli (Nov. 17, 1994) (on file with authors); Letter from Paul Mannes, Chief Bankruptcy Judge, District of Maryland, to Diana M. Sangalli (Nov. 23, 1994) (on file with authors); Letter from James D. Gregg, Bankruptcy Judge, Western District of Michigan, to Ralph R. Mabey (Nov. 21, 1994).

203. NIEMIC & REICH, *supra* note 202.

204. Introduction to Alternative Dispute Resolution Plan, United States District Court, Northern District of Alabama.

and a combined Mediation/Arbitration (Med/Arb) track. In addition, litigants are encouraged to use other ADR procedures available through private means.

Each judge is empowered to exclude certain classes of proceedings from consideration for referral to ADR. All proceedings not excluded, however, are subject to an ADR evaluation conference held soon after the commencement of the case. The ADR evaluation conference, which requires attorney attendance, may either be held separately or in conjunction with a *FRCP* 16 pretrial conference. The judge, after consulting with the parties, decides as a result of the conference whether any form of ADR should be used and, if so, orders the parties to use either the Mediation or Med/Arb track. Alternatively, the parties may agree to elect one of these procedures or any other ADR procedure available under the open ADR track.

The court may refer a case to mediation upon its own motion or the motion of one of the parties, or by stipulation of all parties. A party may, however, object to referral by the court and request reconsideration. Generally, the court delays referring the proceeding to mediation until some degree of discovery has established the parties' positions. Upon agreement by the parties, however, the court may approve an earlier referral. Proceedings are stayed during the mediation for a time period set by the court.

The local rule permits the parties an opportunity to choose a neutral. If the parties fail to agree, the court selects the neutral from a compiled list of candidates qualified by training and experience. The neutral's compensation, which is fixed by party agreement or the court, is shared equally by the parties unless otherwise agreed or directed by the court.

The neutral's role in mediation is to assist the parties in negotiating a settlement. The parties must submit written materials to the mediator in advance of the mediation conference. The conference is informal, but the rule permits witnesses and experts to be used. The neutral does not make findings of fact, recommendations to the court, or a decision on the merits. If the parties fail to develop a settlement, the neutral may submit a settlement proposal to the parties, but not to the court, for consideration. The neutral also may comment on questions of law.

The attorney primarily responsible for each party's case must personally attend the mediation conference and be prepared to discuss all relative issues, including settlement. Attendance of individual parties (and, if applicable, an authorized representative of a nonindividual party having full authority to negotiate and settle) also is mandatory. Willful failure to attend may result in sanctions.

The mediation process concludes when either the parties reach a settlement or the neutral determines that an impasse exists. The neutral files a report with the court signed by the parties indicating whether settlement was reached. The mediation process is confidential and is considered a compromise negotiation for purposes of the *FRE* 408. No record is kept of the mediation.

The combined Med/Arb track features elements of both mediation and arbitration. Unlike mediation, however, the court may only refer a case to Med/Arb upon consent of all parties. Med/Arb initially proceeds the same as a case submitted to mediation with the third-party neutral holding a conference and meeting with the parties. If an agreement is not reached during the mediation, however, the neutral may consider additional testimony, review the evidence, and permit the parties to make further presentation summarizing the facts and applicable law. The neutral then renders a nonbinding decision that is filed with the court. The parties, however, may agree in writing that the decision is either binding or conditionally binding.

The Open ADR track permits the parties to use any form of ADR upon which they mutually agree. Such alternate forms may include private arbitration, mini-trials, and summary jury trials. If the parties elect Open ADR, the court requires the parties to submit an executed agreement detailing the format of the selected ADR process, including the submission of a written report stating whether an agreement was reached, and providing for the payment by the parties of all expenses associated with the process.

ii. *Bankruptcy Court for the Northern District of California*

The Bankruptcy Court for the Northern District of California adopted General Order No. 12 for mediation, early neutral evaluation, and other ADR.²⁰⁵ The chief bankruptcy judge appoints one of the bankruptcy judges to serve as the "Bankruptcy Dispute Resolution Program Administrator."

Most types of adversary proceedings and contested matters may be referred to mediation. The matter may be referred on the court's own motion, on motion of a party, or by stipulation. The parties may select a neutral, although the judge will do so if the parties are unable to agree on a neutral the judge deems appropriate. The referral to ADR does not stay trial dates or discovery schedules, unless the court orders otherwise.

The neutral must be taken from a court-approved roster. Neutrals serve one-year terms. Attorneys and nonattorneys may be selected by the court for the roster. Attorneys must have been a member in good standing of the bar of any state for at least five years, be a member in good standing of the federal court bar for the district, and have served as principal attorney of record in at least three bankruptcy matters. Nonattorneys must submit a statement of professional qualifications, experience, training, and the like, demonstrating why the court should appoint the applicant to the roster.

205. The information regarding ADR in the Bankruptcy Court for the Northern District of California is drawn from NIEMIC & REICH, *supra* note 202. As of November 1994, according to Hon. Dennis Montali, the bankruptcy judges in the Northern District of California have not had occasion to use ADR in large chapter 11 cases. Letter from Dennis Montali, Bankruptcy Judge, Northern District of California, to Ralph R. Mabey (Nov. 21, 1994) (on file with authors).

Neutrals are prohibited from serving in violation of the bias provisions of the Judicial Code. Upon selection, the neutral must promptly determine all potential or actual conflicts of interest under the rules governing their profession. If the neutral cannot serve for any reason, the alternate neutral will be called on to serve. Neutrals are not compensated.

The neutral must, within a week of appointment, set the time for the conference. A thirty-day time limit is imposed, subject to a stipulated continuance of up to thirty additional days. Within fifteen days of the referral order, the parties are required to make detailed submissions to the neutral and serve them on the opposing party. The principal attorney for each party must attend the mediation, as must individual parties or representatives with settlement authority. Willful failure to attend is sanctionable. The neutral is not obliged, but is permitted, to make written recommendations for settlement to the parties which may not be filed with the court. *FRE* 408 applies and the negotiations are confidential.

At the conclusion of the ADR process the neutral must submit a report indicating compliance with the General Order, and whether a settlement has been reached. The report also must contain an estimate of the number of hours spent on the matter. If a settlement is reached, a written stipulation must be prepared and submitted to the court for approval.

iii. *Bankruptcy Court for the Central District of California*

On February 21, 1995, Judge Ashland of the Central District of California signed General Order 95-01, which establishes a mediation program effective July 1, 1995.²⁰⁶ The program is available at no cost to the parties involved in the bankruptcy case. The parties may employ any form of ADR—including mediation, negotiation, early neutral evaluation, and settlement facilitation—that the parties consider appropriate for the particular matter. Matters are referred to the mediation program by either written request of the parties or the judge, acting *sua sponte* or on the request of a party.

Almost all controversies arising in contested matters, adversary proceedings, or other disputes in a bankruptcy case are eligible for referral to the mediation program. However, the order specifically excludes disputes concerning (a) employment and compensation of professionals; (b) compensation of trustees and examiners; (c) objections to discharge under 11 U.S.C. § 727, except where such objections are joined with disputes over dischargeability of debts under 11 U.S.C. § 523; and (d) matters involving contempt or other types of sanctions.²⁰⁷

The mediation program is administered by a judge appointed by the chief judge of the bankruptcy court. Once a matter is referred to mediation, the

206. *In re Adoption of Mediation Program for Bankruptcy Cases and Adversary Proceedings*, General Order 95-01 (Bankr. C.D. Cal. Feb. 21, 1995).

207. *Id.* at 3.

program administrator provides the parties with a roster of mediators. If the parties cannot agree upon a mediator and an alternate, then the administrator will make the selection. Alternatively, the administrator, at his or her discretion, may grant the parties' request to appoint a mediator who is not listed on the roster.

Both attorneys and nonattorneys may apply for appointment to the roster to serve as mediators for a one-year term. To qualify for appointment, attorneys must be a member in good standing of any state bar for at least five years; be a member in good standing in the federal courts for the Central District of California; have served as attorney of record in at least three bankruptcy cases, adversary proceedings, or contested matters; and be willing to serve as mediator for one year and undertake one matter each quarter. Nonattorney applicants must be a member in good standing of the applicant's profession for at least five years. The judicial disqualification standards set forth in 28 U.S.C. § 455 apply to a mediators serving in any matter. In addition, attorney mediators must determine and disclose all conflicts as prescribed by the California Rules of Professional Conduct. Nonattorney mediators must determine all conflicts as prescribed by the rules applicable to the nonattorney's profession.

Mediators serve on a pro bono basis. However, if the parties do not resolve the matter after one full day of mediation, the mediator may either agree to continue to serve on a pro bono basis, or the mediator and the parties may agree on compensation. Compensation is subject to prior approval by the court if the costs will be charged to the estate.

All individual parties and representative of nonindividual parties must personally attend the mediation conference. Willful failure to attend may result in imposition of sanctions. The mediation conference is an informal proceeding: rules of evidence do not apply, and witnesses are not formally examined or cross-examined. Upon completion of the conference, the mediator must file with the court a certificate stating whether the parties have complied with the mediation order and whether the parties reached an agreement. All communications made and documents presented during the mediation conference cannot be disclosed to anyone not involved in the mediation and are protected by Federal Rule of Bankruptcy Procedure 7068.

iv. *Bankruptcy Court for the Southern District of California*

General Order No. 145 of the Bankruptcy Court for the Southern District of California, effective July 1, 1986, established the procedures governing mediation of contested matters and adversary proceedings in bankruptcy cases. General Order No. 145 has been adopted as Local Bankruptcy Rule 7016-3. This mediation program, generally considered to be the first bankruptcy ADR program, is well-known because of the study of the program conducted by the

Federal Judicial Center (FJC).²⁰⁸ The study concluded that the program was a success because it might shorten the time and cost to a litigant to resolve an adversary proceeding. For the period studied, however, the program did not bring about an appreciable reduction in the court's backlog.²⁰⁹

Cases are assigned to mediation by order of the court at a status conference or other hearing. The rule does not specify the types of matters referred to mediation; rather, it applies globally to "adversary proceedings and contested matters." Steven Hartwell and Gordon Bermant, the authors of the FJC study, believe that "because most bankruptcy adversary proceedings can be resolved by the transfer of money, they should be susceptible to negotiated settlement."²¹⁰ These authors, after extensive interviews with participants and judges using the mediation program, noted that dischargeability proceedings were good candidates for settlement through mediation--eighty percent of the adversary proceedings and contested matters assigned to mediation between August 14, 1986 and November 2, 1987 were brought under § 523(a) of the Bankruptcy Code.²¹¹ "Beyond this general agreement about dischargeability, the judges made no claim to detailed or objective standards that guide their decision about when and to whom to offer the services of the mediation program."²¹²

The bankruptcy court maintains a register of attorneys who qualify as mediators. To qualify, the attorney must be an active member of the state bar, have been admitted to practice for a minimum of four years, and have served as the attorney of record for a minimum of three bankruptcy cases, adversary proceedings or contested matters. The parties are free, however, to choose a mutually acceptable mediator. If the parties cannot agree, the court will appoint a mediator from the register. The mediators volunteer to serve without compensation.²¹³

The mediator reviews all case information, including a case questionnaire that must be completed by the parties. Attendance by the attorneys is required, and nonattendance may be sanctioned. The mediator may make oral or written settlement recommendations to the parties, but those recommendations may not be filed with the court. The parties are free to accept or reject the mediator's recommendation, and will not be bound by anything said or written during the

208. STEVEN HARTWELL & GORDON BERMANT, FEDERAL JUDICIAL CENTER, ALTERNATIVE DISPUTE RESOLUTION IN A BANKRUPTCY COURT: THE MEDIATION PROGRAM IN THE SOUTHERN DISTRICT OF CALIFORNIA (1988). The complete text of General Order No. 145 may be found at Appendix 1 of *id.*

209. *Id.* at 6.

210. *Id.* at 2.

211. *Id.* at 39.

212. *Id.* at 2, 57-63. General Order No. 145 does not specify whether parties are compelled to proceed with mediation if a judge refers their case. Rather, the order only indicates that parties "shall not be bound by anything said or done at the [mediation] conference unless a settlement is reached, in which event the agreement . . . shall be reduced to writing." *Id.*

213. *Id.* at 35.

process unless the parties execute a written settlement agreement that is submitted to and approved by the court. All proceedings or writings connected with the mediation process are considered "privileged," not merely confidential, under *FRE* 408. Upon conclusion of the process, the neutral must submit a report to the court stating only that the parties complied with the requirements of the process and whether they reached a settlement.

In larger or complex proceedings in which extensive mediation is appropriate, the program retains the flexibility to allow the selection of mediators from outside the district and the payment of mediation costs by the parties.

v. *Bankruptcy Court for the Middle District of Florida*

Effective June 1, 1992, the Bankruptcy Court for the Middle District of Florida adopted Local Rule 2.23, which established "Procedures for Court-Annexed Mediation."²¹⁴ Adoption of the local rule came after the successful completion of a pilot mediation program.

Local Rule 2.23(b)(1) provides that "the Court may order the assignment of a matter or proceeding to mediation at a pretrial conference or other hearing, upon the request of any party in interest . . . or upon the Court's own motion." Mediators are appointed by the court. Although the rule does not provide for mediators to receive compensation for their services, a temporary grant of funds to pay mediators \$200 per session was approved by the Administrative Office of U.S. Courts.

To prevent delay, the court still sets the matter for trial, final hearing, or pretrial conference just as if no assignment to mediation had been made. Local Rule 2.23(b)(2), however, does not stay further discovery and preparation for final hearing until the mediation has been held. Thus, in the event mediation fails to achieve a settlement, the matter will be tried as originally scheduled.²¹⁵ The court retains the power to withdraw the matter from mediation at any time.

Matters referred to mediation in the Bankruptcy Courts for the Middle District of Florida generally deal with objections to claims, valuations, dischargeability of support obligations under § 523(a)(5) of the Bankruptcy Code, and tax issues. Nondischargeability issues concerning fraud under § 523(a)(2), (4), and (6) of the Bankruptcy Code have not been referred to mediation. The rule itself, however, does not limit the type of matters that may be referred.

214. See Hon. Thomas E. Baynes, *Mediation Program in the Middle District of Florida*, A.B.I. J., at 14 (Oct. 1993); *Bankruptcy Mediation Successful in Middle District of Florida*, BANKR. CT. DEC., Apr. 16, 1992, at A1; *Mediation: Boon or Bane?*, BANKR. CT. DEC., Feb. 11, 1993, at A1.

215. Local Rule for the Bankruptcy Court for the Middle District of Florida 2.23(f).

The court maintains a register of qualified attorneys who have applied to serve as mediators. To qualify as a mediator, the attorney must be an active member of the state bar; have been admitted to practice for at least four years; have served as the attorney of record in at least ten bankruptcy cases, adversary proceedings or contested matters; and have completed a mediation training course. The provisions of the Judicial Code regarding disqualification of judges apply to mediators.

The mediation conference is held as promptly as possible. Failure of the attorneys or a party representative to attend or to participate in good faith in the mediation is sanctionable by the court. At the conclusion of the process, the mediator must file a report with the court showing compliance of the parties with the mediation order and stating whether or not settlement has been reached. If the parties settle, they must submit a written agreement to the court for approval as provided for in Bankruptcy Rule 9019. All statements and writings related to the mediation (other than the mediator's final report) are privileged. No party is bound by any statement or writing unless an agreement is reached, consistent with *FRE* 408.

vi. *Bankruptcy Court for the Southern District of Florida*

The Bankruptcy Court for the Southern District of Florida adopted a mediation rule, Local Rule 919, effective April 1, 1994. Any adversary proceeding or contested matter may be referred to mediation upon the request of any party, the United States Trustee, or the court's own motion. The standard referral order must designate the date of the trial or hearing, direct that the mediation be conducted at least ten days before the hearing date, and require the parties to agree on a mediator from the register of approved mediators within a week of the order. If they fail to agree, the clerk shall select a mediator at random from the register. A party may object to the designated mediator; each party is given one such peremptory "strike." The rule expressly provides that the referral to mediation does not stay discovery or preparation for trial, and the matter is set for hearing as if no referral was ordered. The presiding judge retains the power to withdraw the matter from mediation at all times.

To qualify as a mediator a person must be an attorney who is an active member of the Florida bar, a member of the bar of the district court, admitted to practice for the past five years, have completed forty hours of certified mediation training, and agree to accept at least two assignments per year on a reduced compensation or pro bono basis. Other than pro bono cases, mediators are compensated according to a published schedule or at the rate agreed to by the parties and the mediator. The parties share costs equally. A mediator must take the oath prescribed in section 453 of the Judicial Code and may be disqualified for bias or prejudice.

Upon referral to mediation, the mediator, after consulting with the parties, schedules the conference, with at least 10 days advance notice. The

conference is to be held as soon as practicable and as far in advance of the trial as possible. The mediator has the duty and authority to set times and deadlines in order to facilitate speedy resolution. Attendance of the attorney and a representative of the party with settlement authority is mandatory, although a two-hour maximum for participation is provided. Failure to attend or to participate in good faith is sanctionable. The mediator may, but is not obligated, to make written recommendations, and is not to file any such recommendation with the court. All negotiations are considered confidential in accordance with *FRE* 408.

After the mediation is concluded the mediator must file a report within five days showing whether the parties complied and whether a settlement was reached, or whether the parties are at impasse. If an agreement was reached, the parties must file a stipulation within ten days.

vii. *Bankruptcy Court for the Northern District of Indiana*

The Bankruptcy Court for the Northern District of Indiana provides only a "generic" rule. In its entirety, Local Bankruptcy Rule B-919.2 provides:

The court may, upon its own initiative, or upon the motion of a party, set any appropriate adversary proceeding or contested matter for a non-binding method of alternate dispute resolution. The parties may, however, agree to be bound by the results of any such alternate method of dispute resolution.

viii. *Bankruptcy Court for the Western District of Oklahoma*

The Bankruptcy Court for the Western District of Oklahoma has adopted Local Rule 30, as amended effective July 1, 1994. As Chief Judge Lindsey observes, "The Rule is rather generic."²¹⁶ The rule is premised on the recognition that ADR procedures "may facilitate compromise or narrowing of issues." It applies to all contested matters and adversary proceedings.

The process is usually triggered by a request for ADR by a party. Although the rule is not limited to mediation, only nonbinding forms of ADR may be used. The opposing party may object to the ADR request within ten days, and the court then decides whether to assign the matter to ADR. If the judge does decide to assign the matter to ADR, it may, in its discretion, stay the proceeding in whole or in part to allow time for the ADR procedure to be completed. As an alternative, the judge may order the parties to participate in a settlement conference before another judge.

216. Letter from Paul B. Lindsey, Chief Bankruptcy Judge, Western District of Oklahoma, to Diana M. Sangalli (Nov. 18, 1994) (on file with authors).

The costs of the ADR procedure "shall be borne by the requesting party" unless the parties agree to share the costs. This provision, however, may serve to chill the willingness of parties to request ADR.

Local Rule 30 omits criteria for the qualifications of neutrals, the means by which the neutral is selected, confidentiality or privilege, means of compelling attendance, or the method by which the ADR process is to be conducted.

ix. *Bankruptcy Courts for the District of Oregon and the Southern District of New York*

On September 28, 1993, the Bankruptcy Court for the District of Oregon filed General Order No. 93-1. The General Order established "Procedures Governing Mediation of Matters in Bankruptcy Cases and Adversary Proceedings." In November 1993, the Bankruptcy Court for the Southern District of New York entered General Order No. 117, adopting rules identical to those in Oregon. A detailed set of forms have been approved as well.

As with the programs previously discussed, the court maintains a register of qualified mediators. Eligibility in these programs, however, is somewhat broader: to qualify, the person must have been licensed for at least four years in the State as an attorney, accountant, real estate broker, engineer, or other professional; be an active member in good standing in the applicable professional organization; and have completed a mediation training course. The parties have the initial option to select a mediator. If the parties cannot agree, the court appoints a mediator and alternate mediator from lists provided by the parties. The Judicial Code provisions for disqualification of judges apply to mediators. The mediator's compensation is agreed upon by the mediator and the parties. If the estate is to be charged with the expense of the mediator, the compensation is subject to court approval.

Cases are assigned to mediation upon a motion of any party in interest, the United States Trustee, the court upon its own motion, or by stipulation of the parties. Notwithstanding the assignment of a matter to mediation, the matter is also set for the next appropriate hearing on the court docket in the normal course of any matter. The General Orders specify that, unless ordered by the bankruptcy judge, any adversary proceeding, contested matter, or other dispute may be referred to mediation. The mediator establishes the guidelines for the mediation conferences upon consultation with the parties. The mediator has the authority to establish deadlines. A representative of each party with authority to settle the controversy must attend the mediation conference, and a failure to attend or participate in good faith is sanctionable. The mediator reviews all case information and may make oral or written settlement recommendations. The parties are free to accept or reject the mediator's recommendation. If the mediation results in settlement, an order reflecting the settlement shall be presented to the bankruptcy court for approval. If,

however, the mediation ends in an impasse, the matter will be heard or tried as scheduled.

The mediator is required to file a final report showing compliance or noncompliance with the mediation order and stating the final results. All statements and writings (other than the mediator's final report) in connection with the mediation are confidential in accordance with *FRE* 408.

x. *Bankruptcy Court for the Eastern District of Pennsylvania*

(1) *Compulsory arbitration*

Local Bankruptcy Rule 9019.2 for the Bankruptcy Court for the Eastern District of Pennsylvania, effective July 31, 1992, provides that "[a]ny adversary proceedings classified . . . as complaints to recover money damages not in excess of \$100,000 shall be subject to *compulsory* arbitration before a panel of arbitrators."²¹⁷ The genesis of this compulsory arbitration rule is the JIAJA, which designated the Eastern District of Pennsylvania as a pilot district that "may authorize by local rule the use of arbitration in any civil action, including an adversary proceeding in bankruptcy."²¹⁸

Local Rule 9019.2 adopts the procedures for arbitration provided in Rule 8 of the local rules of the district court. Rule 8, however, empowers the judge, *sua sponte* or upon a motion filed by a party prior to the appointment of the arbitrators to order the case exempted from arbitration upon a finding that the objectives of an arbitration (i.e., providing litigants with a speedier and less expensive alternative to traditional courtroom trial) would not be realized either because the case involves complex legal issues, legal issues predominate over factual issues, or for other good cause.

If the matter is sent to arbitration, any party may demand, within thirty days after the arbitration award is entered, a trial de novo in the bankruptcy court. Upon demand for a trial de novo the action is placed on the trial calendar and treated as if it had not been referred to arbitration.²¹⁹ If a trial de novo is not demanded within the thirty day period, the arbitrator's award becomes a final judgment with the same force and effect as a judgment of the court itself, "except that it shall not be the subject of appeal."²²⁰ The arbitrators are paid \$100 for each case but may petition the court for additional fees in the event the arbitration hearing is protracted.²²¹

217. E.D. PA. LOCAL BANKR. R. 9019.2 (emphasis added).

218. 28 U.S.C. § 651(a) (1988) (repealed effective Dec. 31, 1994 by Pub. L. No. 100-702, tit. IX, § 906, 102 Stat. 4664 (1988)); see *supra* notes 77-82 and accompanying text.

219. *Id.* (referencing E.D. PA. R. 8(7)(A) & (B)).

220. *Id.*

221. E.D. PA. R. 8(2).

(2) *Mediation*

The Bankruptcy Court for the Eastern District of Pennsylvania issued General Order No. 94-1001-14 on April 15, 1994, adopting as a pilot program a "Procedure for Mediation of Adversary Proceedings and Contested Matters." The General Order became effective on May 2, 1994, and applied to pending matters as well as those later filed.

Any case not subject to compulsory arbitration under Local Rule 9019.2 may be assigned to mediation upon the request of a party or by the bankruptcy court *sua sponte*. A party may, however, object to the assignment to mediation, at which time the court will determine if the matter is suitable for mediation.

Upon assignment to mediation the court designates the mediator from the list of qualified mediators after consulting with the parties. The clerk's office monitors the designations of mediators to ensure that no one is "overutilized." Each person interested in serving as a mediator must apply to the chief bankruptcy judge, who makes a final, nonreviewable decision whether to add the applicant to the register of mediators. The list is updated every six months, and is posted at the clerk's offices in Reading and Philadelphia.

To qualify as a mediator, an attorney must certify that he or she is licensed to practice in the state and in the federal court for the district, and is an "experienced attorney who has served and substantially participated in a sufficient number of bankruptcy matters as the attorney of record." Further, the General Order allows differing eligibility requirements for "non-bankruptcy attorneys, law professors, or other individuals," without specifics. Accordingly, the chief bankruptcy judge has wide discretion to determine eligibility. Finally, the General Order requires persons selected to serve as mediators to be appropriately trained.

The mediation process is designed to proceed quickly after referral. The designated mediator must disqualify himself within five days if he determines that he has a conflict of interest. The General Order specifies that the mediation shall not delay any pending trial or hearing unless the court and all parties in interest consent. The mediation conference is scheduled by the mediator, and shall be held as early as practicable, and in any event no more than thirty days after the mediator is notified of the selection. The only exception is if truly exceptional circumstances or fairness to the parties dictates otherwise and all parties consent. An absolute sixty-day deadline to hold the initial conference is imposed.

The parties are required to provide an "information submission" to the mediator which summarizes the important aspects of the party's position at least a week before the conference. The submission is not filed with the court, is not construed as a pleading, does not satisfy any discovery obligation, and does not limit the evidence that may later be used at a trial. Furthermore, the General Order states that all proceedings and writings pertaining to the

mediation and all statements are privileged and confidential in accordance with *FRE* 408.

The attorney with primary responsibility for the case is required to attend the mediation conference, as are parties who reside in the district. Nonresidents must be available by telephone. Willful failure to attend is sanctionable. The mediator is not obliged to but may provide a written settlement recommendation which is not filed with the court. At the conclusion of the mediation the mediator must file a certificate of compliance and indicate whether a settlement has been reached. If an agreement has been reached, an executed stipulation must be filed with the court for approval within thirty days.

xi. *Bankruptcy Court for the Eastern District of Virginia*

In an effort to reduce the cost to litigants and expedite resolution of disputed issues, the Bankruptcy Court for the Eastern District of Virginia, pursuant to Chief Judge Bostetter's General Order 92-1-2,²²² effective October 1, 1992, implemented a court-sponsored mediation program. In this program "litigants and counsel meet with an independent mediator after the completion of discovery but before a trial date is set."

Cases are referred to mediation either by joint request of the parties or by the court at a status conference or other hearing. The General Order does not limit the types of cases referable to mediation; rather, the order applies globally to adversary proceedings and contested matters. The mediator reviews all helpful information and may make oral or written settlement recommendations. The parties are free to accept or reject the mediator's recommendation.

The court maintains a register of qualified attorneys who have volunteered to serve, without compensation, as mediators. The list is updated every six months and is posted at the clerk's office. At a minimum, to qualify as a mediator the attorney must be an active member of the state bar, be admitted to practice for at least five years, have served as the attorney of record and substantially participated in at least twenty bankruptcy cases or in at least ten adversary proceedings or contested matters, and have completed a mediation training program. If the parties cannot agree upon a mediator the court appoints one from the register.

The mediator must determine within five days after appointment if a disqualifying conflict exists. The initial conference is to be held at a time set by the mediator at as early a date as possible, and in no event more than forty-five days after the referral, subject to truly extraordinary circumstances or fairness to parties. The parties must complete and serve on the mediator and

222. General Order No. 92-1-2 provides that the court-sponsored mediation program will initially apply only to cases in the Alexandria Division assigned to Chief Judge Martin V.B. Bostetter, but may be expanded in the future.

the other parties a case information submission. The submission is not to be filed with the court, is not a pleading, and may not be used in court in any way. The mediation proceedings are privileged and confidential.

The attorney with primary responsibility must attend the mediation, as well as resident parties. Nonresident parties must appear by telephone. Willful nonappearance is sanctionable.

The mediators are unpaid volunteers who help the parties reach an agreement and avoid the time, expense, and uncertainty of trial. The mediator has the option of submitting a written settlement recommendation to the parties. After the process is completed, the mediator must file a report. According to a law clerk in the chambers of Chief Judge Bostetter, a litigant's incentive to using mediation rather than proceeding to trial is that Judge Bostetter has specific motion days with heavy calendars; if a party agrees to mediation, Chief Judge Bostetter will hear the proposed settlement prior to hearing any other matters.²²³

xii. *Miscellaneous Informal Bankruptcy Court ADR Programs*

Several courts have informal programs or use the district court rules in ADR for adversary proceedings and contested matters. The techniques used on an *ad hoc* basis are almost always either mediation or a form of settlement conference. Many bankruptcy courts indicated use of a person other than the presiding bankruptcy judge to conduct a settlement conference. For example, some courts use another bankruptcy judge, either in the same district or another district, and others call on the services of a United States Magistrate to serve as the mediator. This system of dispute resolution appeals to its proponents because judges that serve as mediators are judicial officers and are not compensated for their time by the parties; thus costs are kept to a minimum.

223. See *id.* ¶ 5.1(a)(2) (providing that if the mediation is successful, the parties must submit the fully-executed stipulation to the Bankruptcy Court for approval).

