

MEDIATION IN BANKRUPTCY COURTS

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¹ This paper was prepared by Barry Russell Chief United States Bankruptcy Judge for the Central District of California. The General Order for his court's mediation program may be found on the Court Website www.cacb.uscourts.gov

I. INTRODUCTION

1. Over the past 15-20 years, the use of alternative dispute resolution (ADR) has been growing in significance and popularity, having served parties in disputes both large and small, from international conflicts to neighborhood arguments. Because ADR is used with increasing frequency in such everyday settings as schools, churches, and workplaces, many people are now becoming acquainted with these approaches to problem solving.

1. Liquidation courts handle a high volume of matters, affecting the lives of hundreds of thousands of individuals and businesses every year. It has always been characteristic of this type of litigation that most of the matters filed in court are resolved through settlement. Why, then, should liquidation courts consider establishing ADR programs? In short, because ADR suits these cases well and helps resolve them earlier. More philosophically, because courts should, as public institutions, provide a range of dispute resolution services.

2. In this paper, we explore the various questions and considerations courts should address when designing an ADR program. In recent years, mediation has been the primary type of ADR used in the courts. Mediation is generally defined as a facilitated negotiation, in which a neutral third party mediator assists the parties in reaching a mutually acceptable settlement.

3. Unlike litigation and arbitration, where there is a decision maker, in mediation only the parties are empowered to reach an acceptable agreement.

4. I urge any court that is considering adoption of an ADR program to carefully work through the issues discussed below and to answer them thoughtfully, so both the court and the litigants will be well-served by the ADR program.

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II. PLANNING FOR AN ADR PROGRAM

5. An effective ADR program begins with careful planning. Experience indicates that a court serves itself and its litigants well by taking time to address several issues at the outset. A court that already has an ADR program, but is seeking to revitalize it, can also benefit from exploring these planning issues.

6. When we speak of a court ADR program, we mean a systematic approach to providing ADR services to litigants. Such a program might be used by all the judges or by some and might be managed by the court itself or by an outside entity. This paper discusses the many decisions a court should make when designing and implementing an ADR program.

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Determine the Goals of Your ADR Program

7. You should begin by developing a clear statement of your ADR program goals. This statement serves at least three purposes. First, it states the court's policy regarding

ADR—i.e., there must be a reason for being. Second, it gives the court a roadmap to follow as it decides the many questions involved in designing an ADR program. And third, it provides the court a standard against which to measure the performance and outcomes of the ADR program.

Some of the goals of court ADR programs are:

- a. *To save time and money.*

Obviously if a dispute is resolved sooner rather than later, there are savings to both the parties and to the court. However, although reducing valuable court time is important, there are other, possibly more important, reasons for adopting an ADR program.

- b. *To enhance party satisfaction with the legal system by enabling them to decide their own fate.*

Insolvency courts are in the business of providing a safe environment for disputes to be resolved. It is important that the parties feel that they have been fairly treated. Clearly, parties are more satisfied if they have a greater role in deciding their dispute. Especially in the insolvency court, many parties have the potential for ongoing business relationships. While the ability of a judge in deciding a matter is limited to the pleadings, the parties in devising a solution may go far beyond the limited issues before the court.

- c. *To reach a durable agreement that will result in less future litigation.*

One of the many benefits of a stipulated agreement is that it is far more likely to be lived up to by the parties. The result benefits the court by greatly reducing the likelihood of future disputes concerning any order the court might issue.

8. Clarification of goals will help you determine what type of ADR to provide, who should provide it, and many other important matters—including whether ADR is needed in your court at all. Whatever your goals, they should be appropriate to your circumstances and legal culture.

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Include All-Important Constituents in Planning Your ADR Program

9. This is one of the most important steps a court should take in developing an ADR program. Failure to include all interested parties in the planning process may result in a program that is never implemented, or if implemented, is doomed to fail.

10. There are a number of groups that might be included or consulted in designing and implementing your program: the judges, the clerk's office, the insolvency bar, and the growing number of individuals or institutions that provide expert advice on ADR.

Judges

11. Experience has shown that the most important group initially to get involved is the judges. Without the support of the judges, the program will never get off the ground. It is therefore advisable that a judge should be the initial leader in establishing a program.

Court Staff

12. It is very important to get the clerk's office involved from the beginning. The ADR program should be integrated into the court's case management system in order to have readily available data to determine the effectiveness of the program.

13. Ultimately, procedures must be developed for the training of deputy clerks, secretaries, and possibly law clerks who will eventually be responsible for implementing the program.

The Insolvency Bar

14. It is very important to get input from the insolvency bar. As counsel for most of the parties, their support is important. Depending on the local culture, the insolvency bar may be familiar and comfortable with ADR. If not, they will have to be educated. Failure to seek their input may create resistance to the program, thereby making implementation more difficult.

ADR Experts

15. It is highly recommend that you seek the input from ADR experts, usually educational institutions, Judges and staff from insolvency courts with established ADR programs are another excellent source.

16. The need for expert advice should not be underestimated. While you know a great deal about insolvency litigation, they know a great deal more about ADR. Establishing an ADR advisory group comprised of ADR experts may provide valuable assistance, especially in the initial planning and implementation of the program.

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Determine the Type of ADR Best Suited to Your Court's Goals

17. The predominant type of ADR used in insolvency courts is mediation. This should come as no surprise because the very nature of insolvency practice involves a culture of attempting to reach a reasonable settlement.

18. Arbitration, another form of ADR, is designed to achieve authoritative resolution, much like adjudication. Arbitration, in lieu of mediation, may be used when the parties cannot reach a settlement through mediation but still wish to avoid the expense or delay of litigation while having a third party make a decision. In such a situation, arbitration may be more beneficial to parties who want a trial-like process but who also want to establish procedural rules as they see fit.

19. In this paper, we discuss mediation almost exclusively, with only occasional comparisons to other types of ADR, and therefore we will use the term "mediation" rather than the broader term "ADR" in the following sections.

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Determine Whether the Court Will Manage the Program Itself or Rely on an Outside Entity

20. The general model for a insolvency court mediation program is that it is court administered. This is probably due to the fact that most insolvency courts feel they should not leave administration of a court function to another organization, such as a non-profit

mediation provider or bar association. Having another organization administer the program could create serious quality control and delegation of authority problems.

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Determine the Rules and Forms That Your Mediation Program Will Need

21. It is critical for a successful mediation program to have an adequate structure. Without it the program is unlikely to succeed. The rules and forms that provide that structure will be discussed in detail at the appropriate points later in this paper. It is also critical that the mediation program be formally approved or adopted. Formality is important because there should be no misunderstanding that the program is backed by the court's authority and bears the court's stamp of approval.

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Undertake an Education and Outreach Program

22. ***For the Bar*** . It is extremely important to educate the bar as to the benefits of using mediation and to start doing so even while you are in the first stages of designing the mediation program. Depending on the local culture, the bar may require a lot of education or very little. At minimum, the court should sponsor or co-sponsor programs introducing the bar to mediation in general, to the particular features and requirements of your mediation program, and to the differences between representing a client in mediation as compared to litigation.

23. ***For Judges*** . It is very important to educate the judges on the concept of mediation, its benefits, and the reasons for supporting the program and encouraging the public and members of the bar to participate in it. It is very beneficial for judges to be trained in mediation skills. Most of us will not play the role of mediator, but first-hand experience with the process, even if only through training, helps significantly in understanding how to use mediation effectively for cases on our dockets.

24. ***For Clerks and Judicial Staff*** . It is very important to train the court personnel who are necessary for the program's operation. At least one member of each judge's staff must be trained to handle the referral of a particular matter to the mediation program.

25. In order to initiate the mediation assignment process, there must be an order of the court referring the matter to the mediation program. Someone, either a deputy clerk, law clerk, the judge, or secretary, must be trained in the procedures to follow after the judge signs the order. The deputy clerk who later receives the signed order must also be trained.

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III. SELECTING CASES FOR THE MEDIATION PROGRAM

26. During the planning process, your court, with the assistance of its major constituents, will have to make some very important decisions about just how the mediation process is going to apply to the cases filed in your court. The final rules or orders you adopt should explain to litigants what types of matters are eligible for mediation, how specific matters will be selected and referred, and when in the life of the litigation the mediation process is likely to occur.

Determine How Matters Will Be Referred To Mediation

27. It is extremely important to establish a method for referring matters to mediation. Unless your court mandatorily and automatically refers all or specified types of matters, the judges are going to be the critical element in your mediation program. If they do not refer cases, the program will have little business, your neutrals will gain little experience, and the program will have little visibility or effect.

28. Referral of a matter to the mediation program can generally occur in one of three ways: (1) by the mutual, voluntary request of the parties outside the course of a status conference or other court hearing; (2) during a status conference or other court hearing; or (3) by the judge outside the course of a status conference or other hearing, either *sua sponte* or on the request of a party.

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Resolve the Question of Whether Judges Can Order Parties to Mediation or Whether Referrals Should Be with Party Consent Only

29. Whether to authorize the judges to refer cases over the parties' objection is a very important policy matter. For obvious reasons, it is preferable that the parties voluntarily decide to go to mediation and to choose the mediator. Indeed, by voluntarily agreeing, the mediation has already begun, and I so inform the parties in court. Nevertheless, we recommend that the general order provide for broad discretion of the judge not only to order the parties to mediation, but also to select the mediator. There are clearly cases that warrant such action, such as those in which the parties are so intransigent that they cannot move from their position by themselves but probably can with the assistance of a mediator. Courts that are just starting to use mediation and where the bar is unfamiliar with the process may also want the court to order participation, at least initially, to acquaint attorneys with the process.

30. You should keep certain things in mind, however. From a judge's view, I feel that it is important to keep pressure on each side to complete discovery as soon as possible. Therefore, I will ask each side at a status conference exactly what discovery is needed, whether they want to mediate the matter, and, if so, how much discovery is necessary to mediate the matter and when they want to mediate it. If discovery might be delayed as a result of pursuing mediation, I would give a request for such delay careful consideration. On the other hand, each judge must carefully assess whether a request by counsel for mediation is a dilatory tactic or a sincere effort to reach a settlement.

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IV. THE NEUTRALS

Determine Who Should Provide the Mediation Service

31. Determining who will serve as mediators for your court is one of the most important decisions you will make. The quality of the mediations you provide, and thus the reputation and credibility of your program, will rest in the end on your mediators. If your court authorizes its judges to order referrals without party consent, the court takes on a special responsibility for the quality of the mediators. The court has several options.

Judges

32. Whether the judges should serve as mediators is a very important question for the court to ask. In general, it is not a good idea to have judges act as mediators in their own district because, among other things, mediation is an effective method for saving the judge's time.

33. If the judges are going to serve as mediators, either routinely or occasionally, it is important that they receive mediation skills training. It is just as important that judges provide as high a quality process as non-judge mediators do.

Court Panel

34. The general model for court-annexed mediation programs is to provide litigants a panel of mediators approved by the court. Such panels are usually offered as a service to litigants, but many courts also permit litigants to select a mediator from some source other than the panel.

35. To ensure a quality panel, whether the mediators are compensated or not, it is important that the court screen applicants and select those to be appointed. If the court needs to keep its administrative responsibilities to a minimum, it could delegate the authority to screen and/or finally approve the members of the panel, but the court must then determine that the entity to which it delegates this responsibility—for example, a bar association or university-based mediation program—can meet the court's standards. Though delegation would ease the court's administrative burden, ensuring the qualifications of its mediators seems well worth some effort on the court's part. That effort should include establishing criteria for panel membership, screening applicants, requiring training, and monitoring performance.

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Determine the Qualifications and Training the Mediation Providers Should Have

36. Your court should establish standards by which to evaluate applicants for its mediator panel. These standards generally include membership in a profession and training in mediation.

Professional Qualifications

37. It is very important for the court to determine the professional qualifications of its mediation panel, which can consist of attorneys and non-attorneys.

Training

38. It is extremely important that the court's mediators have mediation training. High standing in the insolvency bar or another profession does not necessarily qualify someone to be a mediator. And, although some people are natural mediators, most are not. Mediation involves special skills, which can be learned only through training and experience. Failure to require a certain level of training for the panel members will likely result in a program that does not live up to its potential.

39. Who provides the training and how much training to require are important decisions. Although a court itself could present the training, it is far more common and

effective for the court to approve an educational institution or other entity to provide the training.

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Determine the Procedures for Recruiting, Selecting, and Removing Panel Members

40. In recruiting the mediators, the court should widely publicize the program through local bar associations and other professional organizations and local legal newspapers. The court should consider placing notices in the clerk's office as well as inside and outside the courtrooms. The court should also develop a standard application form for those who wish to be considered for the court's panel.

41. A quality mediator panel begins with the appointment process but does not end there. We recommend, first, setting a term on the appointment (e.g., three years), so you can relatively easily remove members who do not perform well. To determine performance, we recommend that you systematically ask the mediation participants, by questionnaire, for their assessment of the mediation process and the mediator. While you may be tempted to rely on word of mouth, it does not provide a reliable assessment of your program or the mediators.

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Determine Whether the Mediators Will Receive a Fee for Their Services

42. Whether to pay mediators is an extremely important issue to be decided when designing your mediation program. Failure to address this issue may result in problems with the program.

43. Many insolvency mediation programs are essentially free of charge or require the parties to pay a very small fee to the mediator.

44. There are a number of advantages in not paying the mediator. There may, for example, be less controversy in the selection of the panel of mediators by the court. In addition, the parties may more willingly agree to mediation if they do not have to pay the mediator. On the other hand, the court may find it easier to recruit panel members if they are reimbursed, even modestly, for their efforts.

V. THE MEDIATION SESSION

45. There are a considerable number of important issues to be decided about the mediation session itself. Addressing these matters in your order or rules will provide guidance to the judges, litigants, and mediators and will strengthen your program's quality.

Determine Who Should Participate in the Mediation Sessions

46. In most insolvency matters, lawyers usually participate fully in the mediation sessions. The main question for your court to decide is who, in addition to the attorney, should be required to attend the mediation session. It is imperative to require a representative for each side to attend who has full settling authority.

Trustees and Parties

47. There is one usual participant in many liquidation mediation sessions, namely an appointed trustee in the case. Whether the trustee will also be represented at the session by counsel will depend on a number of factors, such as local customs and the need for the trustee to be represented by counsel.

48. Discretion should be left to the mediator whether to waive any person's presence at the session. We grant the mediator this discretion because the mediator knows better than the judge what a successful mediation requires. For fairness and the appearance of fairness of the program, the mediator should generally grant all parties the same rights and obligations.

Governmental Agencies

49. Governmental agencies present special challenges in requiring a person with settlement authority to attend the mediation session. In dealing with governmental agencies, a court should consider meeting with the agencies to explore the possibility of giving local counsel more settlement authority. In addition, these agencies may agree to have a person with higher or ultimate settlement authority available by telephone during a mediation session. If such agreements can be made as a matter of policy and specific arrangements can be made in advance of the mediation sessions, mediators in cases involving the government will be in a much better position to help the parties settle the matter.

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Consider How Mediators Will Be Selected for Referred Cases

50. As mentioned before, most courts allow the parties to select the neutral. The obvious benefit is that, in so doing, the mediation process has already begun and the parties will feel more comfortable attending the session itself. However, most courts will want to retain the ability to designate a neutral if the parties cannot agree.

51. In liquidation mediations, the common practice is to have only one mediator. Nevertheless, there may be situations in which more than one mediator should attend. For example, if the matter involves some very technical questions, it might be beneficial to have one mediator who is proficient in the mediation process and another mediator who is better versed in the technical aspects of the matter.

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Determine the Scope of the Mediator's Authority

51. Mediators in liquidation matters, as in non-liquidation mediations, should be given clear authority to set up the time and place of the sessions as well as authority to preside over the sessions. One of the most important elements of the mediation session is to require the person with settlement authority to be present, unless excused by the mediator. This requirement should be an essential part of the rules of the program. (See discussion above at Determine Who Should Participate in the Mediation Session.).

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Decide What Procedural and Administrative Requirements to Adopt

Scheduling the Mediation Sessions

52. It is very important to provide in your mediation plan clear guidelines for the commencement of the session, as well as for any continuation of the session. One of the most common problems in mediation programs is securing the initial location, time, and date of the session with proper notification to all sides. Procedures must also be established for continuing the sessions or setting the initial session beyond the requirements as provided for in either the mediation plan and or the court's order referring the matter to mediation. The mediator who schedules the session, generally in consultation with counsel for the parties. This is the better practice because it ensures that the mediation will be held at the convenience of the participants and it lifts a burden off court staff.

Submission of Pre-Mediation Statements

53. It is very important to require all parties to submit pre-session statements so the mediator and all parties to the mediation session are aware of the various positions and agreements at that time.

54. You will have to decide whether the statements should be available to the opposing parties. To guide the parties, your mediation rule or plan should state the court's expectations on this matter or indicate that discretion will lie with the mediator. Mediators often request both exchange of a set of pre-session statements between the parties and submission of a set of confidential statements only to the mediator.

The Location of the Mediation Sessions

55. In insolvency mediation, the sessions are almost always held in the office of the mediator. For obvious reasons, it would be extremely unlikely for a session to be held at the office of an attorney for one of the parties or at the office of one of the parties. In the case of court-annexed insolvency programs, it may be possible to hold a session in a conference room at the courthouse, but if this is done the court will have to provide a court contact with whom the mediator can make arrangements. If court space is used, the court and mediator should be mindful of the potential necessity of securing two separate rooms so that separate conferences between the mediator and the parties and their counsel, if any, can take place. In addition, the availability of the courthouse during certain hours and certain days will be limited. Finally, it will be necessary to make arrangements for a computer and printer for preparing settlements.

Preparation of Settlement Agreements

56. In insolvency mediations, agreements should generally be put in writing at the conclusion of the session. Depending on the complexity of the agreement, it could be totally completed or, at minimum, consist of a listing of the main points agreed to by the parties. It should be signed by both the parties and their attorneys before they leave the mediation.

57. Either the mediator or one of the attorneys for the parties may prepare the agreement. Experienced mediators in liquidation matters may have prepared forms for certain types of matters.

Filing a Final Report on the Mediation Process

58. It is very important that a final report be filed with the court indicating that the mediation has concluded and whether the matter resulted in a settlement. The filing of such a report is important for at least two reasons. First, it is important that the trial judge know the outcome as soon as possible for scheduling purposes. Second, it is important for statistical purposes so the court can track the outcome of the meditations. This information should be integrated with all the other statistical data relating to the mediation program.

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VI. ENSURING THE QUALITY OF A MEDIATION PROGRAM

59. Careful consideration of the many issues discussed above will take you a long way toward a quality mediation program. But several important matters remain.

Determine the Ethics Rules that Will Apply in Your Mediation Program

Confidentiality

60. One of the essential elements of the mediation process is confidentiality. Therefore, it is important that all participants understand that, as far as possible, the court will require that communications made during the session remain confidential. Certainly the judge can guarantee that nothing disclosed during the mediation will be admissible at trial.

61. The mediator, the parties, and their attorneys should be required to sign a confidentiality agreement prior to commencing the mediation conference.

Conflicts of Interest

62. The court must consider what conflict of interest provisions to place in its mediation plan or rule. The judge and attorneys in the matter will already be subject to the normal conflict of interest rules prior to the mediation conference. Therefore, the only provisions for conflicts of interest must be made for the mediators. The court must determine the proper standards dealing with conflicts.

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Monitor and Evaluate Your Mediation Program

63. It is very important for a court in the initial planning stages of a mediation program to carefully consider how the effectiveness of the program is to be monitored. Failure to make such plans may result in inability to recognize and correct problems with the program and may also result in lost opportunities to collect data about cases referred to mediation. Therefore, it is important to have constant input from all participants in the mediation process — *i.e.*, the judges, the mediators, attorneys for the parties, and the parties themselves—and to set up a procedure for routinely collecting information about referred cases.

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Address the Problem of Underuse as Soon as It Is Recognized

64. Routine collection of information about your mediation program will provide an early alert to any problems, including the problem of underuse. You should address this problem before it taints the program as flawed in some way.

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Establish a Procedure for Reporting Problems

65. It is very important for the court to set up procedures to deal with non-compliance, by counsel and/or their clients, with the requirements of the court's mediation rule or general order.

66. Initially, you must determine who will handle such non-compliance issues—the judge handling the matter or another judge assigned to handle such problems. Some courts have designated a particular judge to handle all such problems. However, in most insolvency courts, non-compliance is handled by the judge to whom the case is assigned.

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VII. MANAGING A COURT MEDIATION PROGRAM

67. We must consider one last element for a successful court mediation program and that is the consistent and thoughtful management of that program.

68. The court's mediation program should be managed pursuant to specific guidelines spelled out in a document such as a general order or local rules. Most, if not all, of the liquidation courts manage their program using court staff, with a judge involved to some degree in the running of the program.

69. The successful bankruptcy court mediation programs have been started through the inspiration, guidance, and hard work of a single judge and his or her judicial staff (i.e., secretary and law clerk). It is also essential to get the clerk's office involved in coordinating the integration of the mediation program with the court's case management systems.

70. If the program is administered by court staff, the only cost is the cost of the personnel involved, including the time judges to order cases to mediation, the time clerk's office staff use in processing the assignment orders through the case management systems and monitoring case progress, and the time court staff use in training and generally maintaining the program.

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VIII. CONCLUSION

71. To make a court program work, the judges must support it. With the court's encouragement, the bar will in a short time accept the idea of mediating cases through the court's program.

72. Further, in establishing the program, it will be necessary to consider the various issues involved and choose the various elements that will ensure a successful mediation program in your court. For example, the court must recruit a qualified and trained group of mediators and decide what, if any, compensation is to be paid to the mediators. It is very important to lay out in detail what the responsibilities are of all involved (i.e., the mediator, the parties, and their attorneys).

73. Once the matter is ordered to mediation by the judge, the most important step is to ensure that the mediator and the attorneys for the parties actually set up and attend the mediation session. One of the most common problems in court mediation programs is failure to make sure the mediator is notified and the mediation session is set up.

74. Most mediation programs work very well; like a garden, however, they need proper care. The benefits of a successful mediation program go far beyond saving court time and expenses to the parties. Mediation also gives the parties a much greater role in their own destiny and greatly enhances their faith in the judicial system.

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