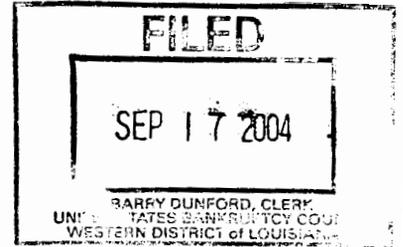


UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF LOUISIANA



IN RE:
**VOLUNTARY MEDIATION PROGRAM
AND PROCEDURAL REQUIREMENTS**

**NOTICE AND REQUEST FOR COMMENT REGARDING
PROPOSED ORDER ADOPTING VOLUNTARY MEDIATION PROGRAM
AND PROCEDURAL REQUIREMENTS**

The Western District of Louisiana was selected by the Federal Judicial Center for a consultation to discuss the design and implementation of a district-wide Alternative Dispute Resolution program. A consultation was conducted on March 12, 2004, in the United States Bankruptcy Court for the Western District of Louisiana. In attendance, in addition to the consultants, were all of the bankruptcy judges for the Western District of Louisiana, the Clerk of the Bankruptcy Court and his office, representatives of the debtor and creditor bar, the United States Trustee and the Standing Chapter 13 Trustee for the Shreveport Division. An ADR Consultation Report was issued by the Federal Judicial Center dated May 18, 2004.

Copies of the Proposed Order Adopting Voluntary Mediation Program and of the Federal Judicial Center Report shall be provided without charge to each member of the Bar of this Court upon request and will be available for public inspection at the offices of the Clerk of the Bankruptcy Court in Shreveport, Alexandria and Lafayette/Opelousas. The information can also be accessed on the internet at www.lawb.uscourts.gov. Due to budgetary restraints copies cannot be mailed, although a copy of this notice shall be circulated to all attendees at the consultation by e-mail.

Comments should be forwarded to:

William P. Gates, Deputy in Charge
Mediation Program Administrator
United States Bankruptcy Court
300 Jackson Street, Suite 116
Alexandria, LA 71301

Comments are requested by October 29, 2004. All comments will be available for public inspection. After the comment period, the Court may adopt the Proposed Order Adopting Voluntary Mediation Program, after considering the comments, without a hearing.

OPELOUSAS, LOUISIANA, this 17th day of Sept., 2004.


GERALD H. SCHIFF, CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF LOUISIANA**

IN RE:

**VOLUNTARY MEDIATION PROGRAM
AND PROCEDURAL REQUIREMENTS**

ORDER

The Western District of Louisiana having been selected by the Federal Judicial Center for a consultation to discuss the design and implementation of a district-wide Alternative Dispute Resolution program for the bankruptcy court, a consultation was conducted on March 12, 2004, in the United States Bankruptcy Court for the Western District of Louisiana. In attendance, in addition to the consultants, were all of the bankruptcy judges for the Western District of Louisiana, the Clerk of the Bankruptcy Court and his office, representatives of the debtor and creditor bar, the United States Trustee and the Standing Chapter 13 Trustee for the Shreveport Division. An ADR Consultation Report was issued by the Federal Judicial Center dated May 18, 2004.

Considering the discussion at the district-wide meeting, the ADR Consultation Report, and the Court being mindful that mediation offers an opportunity for parties to resolve legal disputes with less cost and time and to the satisfaction of the parties, and the Court finding that it is appropriate to establish a voluntary mediation program to be available to litigants and counsel as an alternative method of resolving disputes; the Court further finding that such a mediation program should be voluntary, court-annexed, with mediators appointed and cases assigned by the Court and the process court directed; the following Voluntary Mediation Program is hereby adopted effective as of the date of _____, 2004

1. Assignment to Mediation Program

Any Adversary Proceeding or contested matter may be assigned by the Court to the Mediation Program. In any Mediation in which a bankruptcy estate is a party, compliance with 11 U.S.C. §327 is required.

Assignment of a matter to the Mediation program is voluntary and must be requested by all parties to the matter. The Order of Referral to Mediation shall state whether the parties agree to continue with discovery or suspend discovery during the mediation process. The presiding judge shall determine, after consultation with the parties, whether discovery or other pre-trial proceedings should be stayed.

2. Mediation Register and Appointment of Administrator and Assistant Administrator

The Clerk of the United States Bankruptcy Court for the Western District of Louisiana shall establish and maintain a Register of persons qualifying as Mediators ("Register"). The list shall be available on the website. The following person is designated as Administrator of the Mediation Program ("Administrator"):

William P. Gates, Deputy in Charge
Mediation Program Administrator
United States Bankruptcy Court
300 Jackson Street, Suite 116
Alexandria, LA 71301

The Administrator shall: (1) design and implement case tracking systems to monitor matters assigned to the mediation process; (2) periodically request feedback from participants in the program; (3) prepare such statistical reports as may be required by the Court; (4) send such notices of hearings and conferences to counsel and litigants as the Court may require, although the Court may delegate such noticing requirements to the mediator or counsel for any party; and (5) review and respond to all correspondence and inquiries concerning the mediation program, the Register of Persons qualifying as Mediators, and any matters assigned to the program.

3. Application and Qualification Procedures for Mediation Register:

To qualify for listing on the Register, a person must (A) apply to the Administrator and (B) meet the following minimum qualifications:

(i) The applicant must have been licensed under the laws of Louisiana for at least four years as a recognized professional, such as attorney at law, accountant, real estate broker, appraiser, or engineer.

(ii) The applicant must be an active member in good standing, or if retired, have been a member in good standing at time of retirement, of any applicable professional organization.

(iii) The applicant shall not be or have been:

(a) suspended, disbarred or had the person's professional license revoked, nor have pending any proceeding to suspend or revoke such license;

(b) resigned from any bar or other applicable professional organization while an investigation into allegations of misconduct which would warrant suspension, disbarment or professional license revocation was pending; or

(c) convicted of a felony.

(iv) The applicant shall furnish with the application a certificate of either:

(a) Completion of mediation training course qualifying for at least 12 hours of Louisiana State Bar continuing legal education credit; or

(b) Qualification as a mediator under another state or federal court-annexed mediation program.

(C) An applicant shall be approved, upon recommendation by the Administrator, by Order of the Court.

4. Disqualification or Removal of a Mediator

Any person selected as a mediator may be disqualified for bias or prejudice as provided in 28 U.S.C. §144 or if not disinterested under 11 U.S.C. §101. Any party selected as a mediator shall be disqualified in any matter where 28 U.S.C. §455 would require disqualification if that person were a justice, judge or magistrate.

A person shall be removed from the Register either at the person's request or by court order. If removed from the Register by court order, the person shall not be returned to the Register absent a court order obtained upon motion to the Chief Judge and affidavit sufficiently explaining the circumstances of such removal and reasons justifying the return of the person to the Register.

5. Appointment of the Mediator

A. The parties will choose a mediator and an alternate from the Mediation Register. If the parties cannot agree upon a mediator, then the court shall appoint a mediator and alternate mediator.

B. If a mediator appointed under the preceding provision is unable to serve, the mediator shall file, within seven (7) days after receipt of the notice of appointment, a notice of inability to accept appointment and immediately serve a copy upon the appointed alternate mediator. The alternate mediator shall become the mediator for the matter if such person fails to serve a notice of inability to accept appointment within seven (7) days after filing of the original mediator's notice of inability. If neither can serve, the Court will appoint another mediator and alternate mediator.

6. Compensation of Mediators

(A) If at least one party demonstrates financial need, mediation is available on a *pro bono* basis. Generally, the standard for establishing financial need is the same as is required for obtaining authorization under 28 U.S.C. §1915 for proceeding *in forma pauperis*. If one party is permitted to proceed on a pro bono basis, the mediation will be on a pro bono basis. This does not preclude the other party or parties to the mediation agreeing to compensate the mediator.

(B) If no party is able to demonstrate such a need, then the parties and the mediator need to agree on appropriate compensation for the mediator. If the bankruptcy estate is a party, the party representing the estate is responsible to obtain the necessary authority required by 11 U.S.C. §327, F.R.B.P. 2014 and LBR 2016-1D.

(C) The parties shall share the charges of the mediator equally, unless otherwise agreed by

the parties.

7. The Mediation Process

(A) In order to initiate the mediation process, the parties shall jointly file a Motion for referral to mediation in accordance with the Sample Form (B) attached hereto and shall submit a Consent Order of Referral for Mediation in accordance with the Sample Form (C).

(B) The scheduling and location of mediation shall be established by the mediator, but the initial conference shall be set no later than 45 days following entry of the referral. The mediator may conduct a preliminary conference telephonically. It is imperative that the individual parties attend and participate fully in the mediation sessions. If at the expiration of ninety (90) days from the date the Order of Referral for Mediation was entered, there has been either no Mediation Report or Request for Extension of Time for Filing Mediation Report filed, the Court may *sua sponte* order a status conference be scheduled in accordance with L.B.R. 9029-1(F).

(C) All communications, written or oral, made in connection with the mediation are confidential and shall not be disclosed to anyone without the specific authority of the parties involved. All documents submitted for the mediation conference will either be returned to the submitting party or destroyed by the mediator upon conclusion of the mediation. Neither the confidential mediation conference statements nor communications of any kind may be used by any party with regard to any aspect of subsequent litigation or trial concerning the issues involved in the mediation.

(D) Following completion or termination of the mediation process, the mediator shall file a report in accordance with the Sample Form (D) attached hereto, which report shall state the outcome of the mediation. The parties shall submit and file the appropriate motions in accordance with the mediator's report. Any settlement requiring court authorization is to be noticed in accordance with F.R.B.P. 9019. If an objection to the discharge is the subject of a mediation, notice shall be given in accordance with F.R.B.P. 7041.

8. Sample forms provided

(A) Application for Appointment to Bankruptcy Mediation Panel of the United States Bankruptcy Court for the Western District of Louisiana

(B) Request for Assignment to Mediation Program and Assignment of Mediator and Alternate Mediator

(C) Order of Referral for Mediation

(D) Mediation Report

DONE AND SIGNED at Lafayette, Louisiana, this ____ day of _____, 2004

CHIEF JUDGE GERALD H. SCHIFF

DONE AND SIGNED at Shreveport, Louisiana, this ____ day of _____, 2004

JUDGE STEPHEN V. CALLAWAY

DONE AND SIGNED at Alexandria, Louisiana, this ____ day of _____, 2004

JUDGE HENLEY A. HUNTER

SAMPLES FORMS

(A) Application for Appointment to Bankruptcy Mediation Panel of the United States Bankruptcy Court for the Western District of Louisiana

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF LOUISIANA**

**Application for Appointment to Bankruptcy Mediation Panel
of the United States Bankruptcy Court for the Western District of Louisiana**

Before the Court comes, _____, seeking appointment to the Bankruptcy Mediation Panel of the United States Bankruptcy Court for the Western District of Louisiana, and certifying that the undersigned is:

- (i) a [state specific recognized profession], licensed under the laws of Louisiana for the past _____ years;
- (ii) an active member in good standing [or if retired, have been a member in good standing at time of retirement] of any [applicable professional organization;] and
- (iii) that the undersigned has never been:
 - (a) suspended, disbarred or had the aforementioned license revoked, nor have pending any proceeding to suspend or revoke such license;
 - (b) resigned from any bar or other applicable professional organization while an investigation into allegations of misconduct which would warrant suspension, disbarment or professional license revocation was pending; or
 - (c) convicted of a felony.

Attached to this application is a certificate exhibiting the undersigned's completion of a mediation training course in accordance with Section 3(B)(iv) of the Standing Order regarding Voluntary Mediation in the Western District of Louisiana.

Applicant signature
[Bar roll or other license number]

(B) Request for Assignment to Mediation Program and Assignment of Mediator and Alternate Mediator

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF LOUISIANA
_____ DIVISION**

[CAPTION]

Motion for Order of Referral to Mediation

Now before the Court come the following parties, [parties], who have agreed and so move the Court to Refer the above-captioned adversary proceeding, [or specific disputed matter within the above-captioned case] for Mediation in accordance with the Standing Order regarding Voluntary Mediation effective _____ in the Western District of Louisiana, and so submit an Order of Referral to Mediation in conformance with the selections made for mediator and alternate mediator, and further reflecting the parties' decision to suspend [or continue] discovery during the mediation process.

The parties have agreed upon the following Mediator and Alternate: _____
[or, The parties are unable to agree upon a Mediator or Alternate, and requests the Court make the appointment of same.]

[Signed by counsel for all parties]

(C) Order of Referral for Mediation

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF LOUISIANA
_____ DIVISION**

[CAPTION]

ORDER OF REFERRAL FOR MEDIATION

After conferring with counsel for the parties, who represent that all parties are amenable to mediation, in accordance with the Standing Order regarding Voluntary Mediation effective _____ in the Western District of Louisiana, and that the parties have agreed upon the selection of a Mediator and Alternate in accordance with the provisions of the Standing Order Regarding Voluntary Mediation,

Accordingly:

IT IS ORDERED, pursuant to the provisions of 11 U.S.C. §105(a), the Court appoints _____, as Mediator, and _____, as Alternate Mediator.

IT IS FURTHER ORDERED:

(1) The mediation will take place at such time and place as fixed by the mediator after consultation with the parties.

(2) Unless otherwise directed by the Mediator, not less than seven calendar days before the scheduled mediation conference, each party shall submit directly to the Mediator and serve upon opposing counsel, a Mediation Statement, not to exceed three pages, outlining the key facts and legal issues in the matter being mediated. The Mediation Statement shall not be filed with the Court and the Court shall not have access to them in the case file.

(3) It is suggested the mediation Statement include information the party considers useful, including, but not limited to:

- (A) Names of persons, in addition to counsel, who will attend the Mediation;
- (B) Describe briefly the substance of the dispute;
- (C) Set forth the history of the case, including past settlement discussions, and disclosure of prior and any presently outstanding offers or demands;
- (D) Estimate the cost and time to be expended for further discovery, pre-trial motions, expert witnesses and trial.

(4) The following persons must attend the Mediation Conference in person:

- (A) Each party that is a natural person;
- (B) The attorney who has primary responsibility for each party's case.

(5) A person required to attend the Mediation may be excused from appearing if all parties and the Mediator agree that the person need not attend. The Court for cause may excuse a person's attendance.

(6) The Mediator is requested to report to the Court any willful failure to attend any

Mediation Conference or any other material violation of this Order. Any such report of the Mediator shall comply with the confidentiality requirements hereinafter set forth.

(7) The Mediator and the participants in mediation are prohibited from divulging, outside of the Mediation, any oral or written information disclosed by the parties or witnesses during the course of the mediation. No person may rely on or introduce as evidence in any arbitral, judicial, or other proceeding, evidence pertaining to any aspect of the mediation effort, including but not limited to:

- (A) views expressed or suggestions made by a party with respect to possible settlement of the dispute;
- (B) the fact that another party had or had not indicated a willingness to accept an offer of settlement made by the Mediator;
- (C) proposals made or views expressed by the Mediator;
- (D) statements or admissions made by a party in the course of the mediation;
- (E) documents prepared for the purpose of, in the course of, or pursuant to the Mediation.

Additionally, without limiting the foregoing, Rule 408 of the Federal Rules of Evidence, and any other applicable federal or state statutes, or judicial precedent, relating to the privileged nature of settlement discussions, mediation, or other alternative dispute resolution procedure shall apply. Information otherwise discoverable or admissible in evidence, however, does not become exempt from discovery, or inadmissible in evidence, merely by its use by a party in mediation.

(8) The Mediator may not be compelled to disclose to the Court or to any person outside the Mediation Conference, any of the records, reports, summaries, notes, communications, or other documents received or made by the Mediator while serving in such capacity. The mediator may not testify nor be compelled to testify in regard to the mediation in connection with any arbitral, judicial, or other proceeding. The Mediator shall not be a necessary party in any proceeding related to the mediation. Nothing contained herein, however, shall prevent the Mediator from reporting the status, but not the substance, of the mediation effort to the Court in writing, from filing a final report, or from complying with any other requirements contained herein.

(9) The disclosure by any party of privileged information to the Mediator does not waive or otherwise adversely affect the privileged nature of the information.

(10) The Mediator is not required to prepare written comments or recommendations to the parties. The Mediator may present a written settlement recommendation memorandum to attorneys, but not to the Court.

(11) If a settlement is reached at a mediation, a party designated by the Mediator shall submit a fully executed stipulation and proposed order to the Court within ten calendar days after the mediation, or such time as may be directed by the Mediator. If the party fails to prepare the stipulation and order, the Court may impose appropriate sanctions.

(12) Promptly after the Mediation Conference, the Mediator is requested to file a brief report with the Court, showing compliance or noncompliance with the Mediation Conference requirements of this Order, and whether or not a settlement has been reached. Regardless of the outcome of the Mediation Conference, the Mediator shall not provide the Court with any details of the substance of the conference.

(13) Upon the filing of a Mediator's report pursuant to paragraph 12, the mediation will be deemed terminated.

THUS DONE AND SIGNED in Chambers, at _____, Louisiana, this ____ day of _____, 200__.

Bankruptcy Judge

(D) Mediation Report

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF LOUISIANA
_____ DIVISION**

[CAPTION]

MEDIATOR'S REPORT

The undersigned mediator (or alternate) hereby reports that pursuant to an Order of Appointment by this Court to serve as mediator in the above entitled matter pursuant to the Standing Order Regarding Voluntary Mediation Program, that a mediation did occur and that the outcome of the mediation was as follows:

The parties reached a resolution of their differences and a term sheet was prepared by the mediator and signed by all parties.

The Motion raising the issue will be withdrawn; or

The Adversary Proceeding will be dismissed;

A stipulated order will be presented to the Court; or an appropriate motion for authority to settle shall be filed in accordance with the term sheet.

The parties were unable to reach a voluntary resolution and the matter is returned to the court for action as it deems appropriate.

Dated: _____

Mediator

ADR CONSULTATION REPORT

U.S. Bankruptcy Court for the Western District of Louisiana

Consultants: Judge J. Rich Leonard and Mr. Berry Mitchell

Report prepared by Laural L. Hooper

(Federal Judicial Center)

May 2004

This report summarizes the ADR consultation for the U.S. Bankruptcy Court for the Western District of Louisiana held on March 12, 2004.

Background

The Western District of Louisiana is comprised of three widely dispersed geographic divisions. Each division has its own unique culture. The district is primarily rural with a small Chapter 11 and commercial business caseload. Chapters 7 and 13 matters are most common. The judges generally meet in person once or twice a year.

Currently, the court has no comprehensive, district-wide ADR program. ADR is used on an ad hoc basis, with mediation being the primary type of process used, generally in adversary proceedings.

ADR is more developed in the state courts, especially the use of arbitration and mediation in family law matters.

In August 2003, Chief Judge Gerald H. Schiff requested an ADR consultation and sought assistance on designing, implementing, and sustaining a district-wide ADR program for the bankruptcy court.

The Federal Judicial Center selected Judge J. Rich Leonard, Chief Bankruptcy Judge for the U.S. Bankruptcy Court for the Eastern District of North Carolina, and Berry Mitchell, ADR Administrator for the U.S. District Court for the District of Rhode Island, to serve as consultants.

The Consultation

On March 12, 2004, Judge Leonard and Mr. Mitchell participated in an all-day consultation with the bench and bar in Alexandria, Louisiana. Three separate meetings occurred that day. Below is

a summary of the discussions (grouped by topic) that occurred at those meetings.

Meeting with the Judges

The consultants met first with Chief Judge Gerald Schiff (Opelousas), Judge Henley A. Hunter (Alexandria) and Judge Stephen V. Callaway (Shreveport) to review the court's needs and to further define the consultants' roles and the purpose of the consultation.

Purpose of the Consultation

Judge Schiff reiterated that his primary objective for the consultation was to establish a uniform ADR program for the entire district. He also wanted the program to be flexible enough to allow the other judges to tailor it to their individual case management needs.

The judges also noted that another important objective was to obtain input from members of the bar about the court's proposal to develop a more standardized ADR program, and to learn whether any of the attorneys would be interested in serving on the court's roster of neutrals.

Current Use of ADR

The judges described how they currently incorporate ADR into their case management practices. Approaches ranged from one judge routinely referring matters to mediation via a form order directing mediation and appointing a mediator to another judge using it only sparingly, or in the alternative, referring matters to another judge for mediation.

The consultants asked about the district's legal culture and whether the bar would be receptive to the court's desire to use ADR more systematically. All the judges believed that the bar would be receptive, but also thought that the attorneys would want to be involved in the early stages of designing any new court program.

ADR program implementation

There was some discussion regarding how the court should go about implementing a more standardized ADR program, i.e., by local rule or standing order. The general consensus was that drafting a local rule would take longer and would require submitting the draft rule to the district court for approval. Also, the judges were concerned about drafting any rule that could potentially

conflict with the district court's local rules, and thought that the better approach was to issue a standing order to launch the program.

Funding

One judge queried the consultants as to why the bankruptcy courts were not eligible to receive funds (like the district courts) to establish court ADR programs. In response, the consultants discussed the origins of how some district courts were designated, under various statutes, as pilot or demonstration districts. Because of their designation, those courts were eligible to receive funding to assist in the development of their programs. The consultants made clear that bankruptcy courts have never been eligible to receive such funding, and, that as a result, they must find creative ways to absorb the cost of administering any type of ADR program.

Voluntary vs. mandatory

Another topic explored was whether party participation in the court's program should be mandatory. One judge felt uncomfortable requiring parties to mediate if they have absolutely no desire to do so. This judge thought such a practice defeats the purpose of mediation and could potentially impact negatively on any settlement. Another judge thought a mandatory program would be frowned upon by the district court, and therefore thought it best that any program be voluntary. One consultant commented that he used to think the same way, but his court's experience has revealed that once you get "everyone in the room talking," the settlement rates of voluntary versus mandatory programs are indistinguishable. Thus, the consultant thought having a mandatory-type program should not be ruled out completely.

The court does not envision automatically referring categories of cases to ADR. Case referral to ADR would be done on a case-by-case basis.

Types of cases for referral and volume of cases

The judges were in agreement that the types of cases most suitable for ADR were complex cases with extensive fact issues. Some matters were ruled out, e.g., § 523 and § 727 matters and student loan cases. The judges indicated that those types of matters would cost more to mediate because they routinely settle with little or no discovery. Mediation would prolong the litigation. Similarly, one judge questioned the efficacy of mediating adversary proceedings since the majority of those matters generally settle right before trial. One judge noted, however, that mediation might still prove useful if settlement occurred earlier in the process.

Another area explored was using mediation in pro se cases. The judges did not appear to be

overly enthusiastic about referring such cases, and raised the familiar argument of unequal bargaining power between the parties. Judge Leonard shared his success with using mediation for pro se cases and encouraged the court not to rule out referring appropriate pro se cases.

Currently, the court does not have a backlog of cases, and thus ADR is not being implemented to reduce or streamline the judges' caseloads. Rather, the judges indicated that they see ADR as another tool they have available in their case management arsenal.

In addressing the number of cases neutrals might handle, the judges thought perhaps one to two a month would be optimum, at a rate of \$150.00 an hour, with the first hour being served pro bono.

The judges see whatever ADR program they adopt starting slowly. It will provide an attorney or neutral with an opportunity to use the skills he or she possesses to assist the court in resolving disputes. In discussing and encouraging ADR, the judges reemphasized their commitment to a litigant's right to trial and made clear that ADR was not taking the place of the court conducting trials.

Timing of ADR

The judges and consultants also discussed the timing of the ADR referral. The consultants described the practices in their respective courts. Both consultants noted that referral is generally done very early in the litigation, generally right after the first responsive pleading. In discussing the issue, one LA-W judge noted that it is hard to have a blanket rule regarding the timing of ADR referrals, he prefers making any type of ADR decision on a case-by-case basis. Another judge noted the difficulty in recommending ADR to the parties very early in the litigation process because the parties want to first conduct discovery. The judge noted that the attorneys are very reluctant to engage in any negotiations if there has been no discovery.

Another judge indicated that he routinely raises mediation after the answer has been filed. If there has been no movement, by the next status conference he considers giving the parties an additional 60 days to mediate before setting the case for trial.

One of the judge's asked whether the mediation process generally suspends the discovery track? Both consultants responded that ADR should not be separated from case management and the ADR track should run parallel to the discovery track. Judge Leonard stated that he includes a mediation window in his scheduling order and that the use of ADR does not stop the case from moving forward. His orders always contain a trial date. Similarly, Mr. Mitchell commented that ADR should not delay the litigation process, and the court needs to ensure that the parties and attorneys are aware of all discovery cut-off dates as well as any trial date.

Mediator Fees

Compensation of neutrals is always an important program design element and routinely generates a lot of discussion among courts contemplating any type of ADR program. In discussing the issue, the consultants noted that courts differ in their attitudes regarding compensation of neutrals. In some instances, one consultant commented, if you don't pay the neutral, you run the risk of the parties thinking less of the mediator and the court's ADR processes. The consultant noted that most court neutrals are compensated. All three judges of the court agreed that any neutral serving on the court's roster should be paid for his or her services.

The judge and consultants also discussed whether the court should require pro bono services as part of the court's program. All the judges liked the idea of having such a component and thought it should be a requirement for membership on the panel. One suggested approach was to have the neutrals serve the first hour of any mediation session without compensation.

One judge raised the issue of whether it was a good idea to place a cap on mediators' fees, especially if the mediators want to charge market rates. The consultants agreed that such a cap was probably wise so as to control the costs of mediation.

Another judge wanted to know whether a mediator needs to disclose his or her fees to the court? In general, the consultants commented that neutrals do make their fees known to the court. Judge Leonard noted that he uses a form that allows him to set the compensation along a range running from market rate to pro bono, or some other appropriate combination.

Training and Certification

There was considerable discussion regarding what the type of training, if any, those serving as court neutrals should receive. One judge noted the importance of having neutrals who are trained, but wanted to know further whether those selected for the court's roster should all be required to take the training recommended by the court. Mr. Mitchell thought that having the neutrals go through the same training had a number of benefits. First, there is uniformity in the training curriculum, i.e., everyone is receiving the same type of training, and second, the court can maintain better control over the quality of the training.

There was general consensus among the judges that some type of training will be required to serve as a court neutral. Unanswered questions include: (1) who will actually conduct the training, and (2) the number of hours that will be required.

Court's roster and qualifications of neutrals

One judge queried the practicality and feasibility of the court maintaining three separate panels. This suggestion was raised because of the significant geographic distances between the three divisions. However, after some discussion, it was decided that having three separate panels would not be practicable, especially since the court desires to initially limit the size of its panel to 8-10 individuals. It was decided the better practice would be to select individuals from different geographic areas as necessary.

There was little consensus regarding what qualifications the neutrals should possess. One judge questioned whether it was preferable to require all neutrals to be attorneys or attorneys with bankruptcy experience. One judge thought the roster should have experienced individuals in the oil and gas field. Another judge talked about the need to have individuals with real estate appraisal experience serve on the panel.

Judge Leonard noted that, in his court, mediators come from a list of individuals who have been certified by the Supreme Court of North Carolina. His court does not maintain its own roster of neutrals. Also, he indicated that if necessary, the court could approve any other party selected who has unique or specialized experience mediator relevant to the case. Mr. Mitchell indicated that not only is he the ADR administrator for his district, but he serves as a neutral on the court's ADR panel. He noted that he mediates a significant number of cases that are referred to the panel.

The consultants also noted the practice, albeit rare, of appointing more than one mediator to a case.

Meeting with the Judges and court staff

Attendees at this meeting included staff from the clerk's office and IT office of the court's three divisions.

The purpose of this meeting was to discuss the court's plan to adopt an ADR program and to solicit input from the staff who would be responsible for administering and monitoring the program. To illustrate the challenges involved in administering an ADR program, the clerk noted that for FY 2005, the court would experience a 15% cut in staffing.

Some of the specific questions asked included the following:

What types of tasks will an ADR administrator have to perform? Mr. Mitchell said the typical tasks or responsibilities include: scheduling and tracking mediations, collecting data and writing reports, and in general, monitoring the program to ensure its high quality.

Is there a lot of paperwork required in running an ADR program? Mr. Mitchell commented that the amount of paper work would be determined by the extent to which the process is automated and self-executing. Administering the program should not require a lot of judge involvement or monitoring. For example, scheduling notices and mediation report due dates should all be automated.

To learn more about what it takes to administer an ADR program, one judge asked Mr. Mitchell, "if the court were to hire him on Monday, what would be the first thing he would do as an ADR administrator?" Mr. Mitchell responded that he would first review the court's goals and values to make sure the program accurately reflected those goals. Second, he would review the court's program design to determine if the court had gotten input from all those who have an interest in the program, either as an administrator, user, or provider. Further, to ensure initial success of the program, he would seek out motivated court staff who were interested in seeing the program succeed. Finally, he would address all the concerns of the less enthusiastic endorsers of the program to determine if and how such concerns should be addressed.

One judge wanted to know the type of PACER access granted, if any, to pro hac vice mediators? For example, are they given full access to the system? A consultant commented that he gives the mediator a PACER exemption so that he or she can retrieve the necessary documents from the system. Another option is for the mediator to contact the attorneys directly and request the necessary documents.

Training

One judge inquired whether it was possible to have one of the FJC consultants train the court's neutrals, and whether such training could be construed as a supplemental consultation. The FJC staffer promised to follow-up on the court's request.

One consultant noted that the FJC offers mediation skills training to district and magistrate judges and wanted to know whether bankruptcy judges could take advantage of that training as well. The FJC staffer indicated that she would investigate and report back to the court.

To help defray training costs of the neutrals, the clerk questioned the feasibility of the clerk's office tapping into the library resource fund. Judge Callaway indicated that was not an option and the court should not pursue that route. Other suggestions for funding training included getting the federal, state and local bar associations to sponsor training and/or certification programs, and exploring joint training with other federal agencies.

Potential problems arising in a court ADR program

The court was interested in learning about the different types of issues or potential problems that

might arise in a program and how such problems should be resolved. Some questions posed by the judges included: Is it ever proper for the neutral to have any contact with the assigned judge? How does the court handle a neutral who uses mediation to recruit business? Similarly, what about the mediator who has breached confidentiality, or the judge/neutral who engages in ex parte contact?

The consultants stressed that it is very important to convey to the parties early on in the litigation process how much the judges respect the mediation process and the important role it plays in settling cases. In addition, the consultants noted the court needs to make clear that it takes very seriously the confidential nature of the mediation process and that it would be highly improper for a neutral to have any contact with the judge assigned to the case. However, one consultant did comment that there might be some instances where contact is unavoidable. In those instances, there should never be any discussions about any mediation session.

The consultants suggested a number of options the courts should consider to ensure the confidentiality of the ADR process, including appointing a compliance judge to rule on perceived or actual infractions committed by the neutral or the parties. The compliance judge would be a judge other than the one assigned to the case. Another suggestion offered was having alleged violations reported to a court ADR committee for investigation and disposition.

To minimize the number of problems occurring in his program, one consultant commented that his court's mediators must certify that they do not have any conflicts of interest with any of the parties.

Both consultants stressed the importance of having a process for the removal of neutrals who are no longer performing satisfactorily. In addition, imposing sanctions for non-compliance was suggested as another option for maintaining the quality and integrity of the program. Examples where sanctions might be ordered include a litigant's failure to participate in good faith or an attorney's deliberate violation of a court's order.

Meeting with the Bar

Approximately twenty attorneys and representatives from the Louisiana state bar association gathered at the courthouse for an afternoon meeting to discuss the court's proposal to adopt an ADR program. The court's three judges were also in attendance. The meeting lasted approximately one hour.

After the consultants had been introduced, Judge Leonard described the benefits of using ADR in bankruptcy matters and Mr. Mitchell summarized the discussions that had been held earlier that day, highlighting points of consensus among the judges. The judges had agreed to:

- design and implement an ADR program with mediation being the primary process offered,
- design and implement a program that will be uniform (with individual judge practice components),
- establish and maintain a small panel of court neutrals (8-10 individuals),
- require all neutrals serving on the court's roster to be trained and certified, and
- encourage ADR use earlier in the litigation process, generally before any type of discovery, to maximize cost savings.

Following the consultants' comments the floor was opened up for questions. Below are a list of some of the questions posed by the consultants and the audience.

Questions to audience:

- If you were choosing to implement an ADR program, what type of program would that be?

Judge Callaway made clear to those in attendance that any type of ADR program implemented by the court would be non-mandatory, but would have a component authorizing a judge to order it, if necessary, in specific cases.

One attorney noted that it is important that litigants have some role in selecting the mediator and that such selection should not be left solely to the discretion of the judge.

Another attorney commented that mediation is currently used in large adversary proceedings and fraudulent conveyance actions, and thought that the court should think about using it in Chapter 11 debtor cases.

- How many of you would be interested in serving on the court's roster and taking the necessary training to become certified?

Approximately half of those in attendance expressed an interest in serving on the panel and would be willing to take the necessary training to serve on the panel.

Attorneys' questions for consultants or to the court:

- Are there certain types of cases that are better candidates for mediation?

One consultant noted that all types of cases are good candidates and should be considered.

- How much training would the court require to serve on the panel?

The consultants indicated that it is really up to the court; however, 40 hours is the standard practice and CLE credit is usually offered as well.

One judge from the court commented that he would research the different types of mediation training available. The judge was concerned about the cost of some training programs.

- How would you get neutrals to provide some of their services pro bono?

One consultant commented that recruiting good neutrals is not hard to do. Further, he noted that most attorneys consider service on the court's panel an honor and an opportunity to build or enhance their reputation.

- How many cases should the neutrals expect to mediate weekly or monthly?

One judge thought one to two a month in the early stages of the program.

At the conclusion of the meeting, Chief Judge Schiff thanked those in attendance, reiterated the court's desire to have them be part of the process, and summarized the next steps in the process:

- 1) the court will draft a standing order/rule/document, looking at other court models for ideas;
- 2) the court will circulate the draft document to the bar for their comments;
- 3) to participate in the design process, an attorney should contact the judge in his or her

respective division and provide his or her suggested revisions and comments within 15 days; and

- 4) the court will convene another meeting with the bar to discuss the revised document so the court can launch the program as soon as practicable.

The consultation concluded with the consultants making themselves available for any type of follow-up assistance the judges might need as they work towards their goal of designing and implementing a sound ADR program that accomplishes the objectives of the court.

Submitted: May 18, 2004