Presented:
30th Annual Jay L. Westbrook Bankruptcy Conference

November 17-18, 2011
Four Seasons Hotel, Austin, TX

Mediation in Bankruptcy Cases: How Has it Been Used? When Does It Work? How Hard Can The Mediator Push Parties Towards Settlement?

Michael A. McConnell

Tom Collins

Tom. Collins
1301 West 25th Street
Suite 530
Austin, Texas 78705

TomCollinsADR@austin.rr.com
512-474-2744

Michael A. McConnell
KELLY HART & HALLMAN LLP
201 Main Street, Suite 2500
Fort Worth, Texas 76102-3129

michael.mcconnell@kellyhart.com
817-332-2500

I. INTRODUCTION

By 1970, the rising costs of civil litigation and its associated discovery procedures had become an issue of national importance. Organizations such as the Pound Civil Justice Institute held conferences on the causes of popular dissatisfaction with the administration of justice and focused on the need to avoid the cost and delay of civil litigation by creating alternative mechanisms for the resolution of disputes.[1] As noted by Chief Justice Warren Burger in his keynote address to the 1976 Pound Conference:

> "Where the parking meters now stand were hitching posts for horses. The horses and buggies are gone, even the trolley cars are gone and men like Henry Ford, Louis Chevrolet and the Wright Brothers have altered our lives dramatically. Yet we see that, fundamentally, the methods for settling disputes remain essentially what they were in that day. Perhaps what we need now are some imaginative Wright Brothers of the law to invent, and Henry Fords of the law to perfect, new machinery for resolving disputes."

Building on the success of non-binding mediation using third-party neutrals in labor disputes, lawyers and laymen began to turn to non-binding mediation using neutral third-parties as an avenue of dispute resolution. While consensual forms of mediation had been in use for some time, state legislatures and Congress enacted statutes in the 1980's and 1990's which allowed judges to order non-consenting parties to participate in mediation. Statutes such as the Texas Alternative Dispute Resolution Act of 1987 and the federal Civil Justice Reform Act of 1990 spurred development of more formal mediation programs and court-annexed mediation programs.[2] The first federal court-annexed mediation program was established in 1986 when the Southern District of California established its pilot program. The growing use of third-party mediators and other forms of alternative dispute resolution soon spawned an entire cottage industry of mediator training courses and organizations such as the Judicial Arbitration and Mediation Service ("JAMS"). Alternative Dispute Resolution even had its own language with new terms such as "evaluative mediation", "transformative mediation", "confidential listener" and "co-med-arb". See "*The ABC's of ADR: A Dispute Resolution Glossary*", Cornell Institute for Dispute Resolution (2000).

The use of non-binding mediation also spread to the bankruptcy courts. For example, in 1993, the Southern District of New York began its own court-annexed mediation program for bankruptcy cases. In 1994, a committee of the Eastern District of Pennsylvania Bankruptcy Conference working with the bankruptcy judges created a court-sponsored mediation program for the district. A formal mediator training program was established and mediators served on a *pro bono basis.* The success of this program was chronicled in detail by William Woodward in a

---

[1] Addresses at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, 70 F.R.D. 79 (April, 1976).

[2] Former Chief Justice of the Texas Supreme Court Joe Greenhill advocated alternative methods of dispute resolution in his 1979 state of the judiciary message. Ritter, *Mediation in Texas: Defining the Issues,* Texas Bar Journal 846 (September 1987).

study published in the Journal of Dispute Resolution. Woodward, *Evaluating Bankruptcy Mediation,* J. Dispute Resolution 1(1999*).*

By 1995, twelve bankruptcy courts had formal mediation referral programs. In 2010, this number had grown to over 50 courts. In a recent article in the American Bankruptcy Institute Law Review, Ralph Peeples surveyed the current usage of mediation as a form of ADR in bankruptcy cases and found that most bankruptcy judges (81%) report having used or permitted mediation in Chapter 11 cases and most bankruptcy judges (69%) were favorably inclined to use mediation. Ralph Peeples, *The Uses of Mediation in Chapter 11 Cases,* 17 Am. Bankr. L. Rev. 401 (Winter 2009).

II. AUTHORITY TO ORDER NON-CONSENTING PATIES TO MEDIATION

In 1990, Congress broadened the use of ADR significantly with the passage of the Civil Justice Reform Act of 1990 which directed all district courts to implement a formal civil justice expense and delay reduction plan which would include the utilization of alternative dispute resolution programs in appropriate cases.[3] Section 651 was later added in 1998, 28 U.S.C Section 651 (1998), which gave the federal courts specific authority to order non-consenting parties to mediate.

While the Federal Rules of Bankruptcy Procedure neither authorize nor prohibit mediation of disputes in bankruptcy, mediation is explicitly authorized by local rule or general order in 51 bankruptcy courts.[4] For example, the Southern District of New York has adopted General Order (M-390) governing the mediation of matters in bankruptcy cases and adversary proceedings. The U.S. Bankruptcy Court for the District of Delaware adopted Local Rule 9019-5 which provides extensive guidelines for the assignment of bankruptcy contested matters and adversary proceedings to mediation.

The four Texas federal districts and the local rules of two of the Texas bankruptcy courts now provide directives on mediation.[5]

III. UTILIZATION OF MEDIATION BY THE BANKRUPTCY COURTS

On the mega-case level, mediation utilizing sitting bankruptcy judges as "settlement judges" has produced some phenomenal successes. In an early pioneering use of mediation, the United States Court of Appeals for the Fifth Circuit *sua sponte* appointed Judge Steven Felsenthal of the Northern District to attempt to resolve the differences among the parties and arrive at a consensual plan in the *MCorp Financial* chapter 11 case filed in the Houston Division

---

[3] Ralph Mabey, "Expanding the Reach of Alternative Dispute Resolution in Bankruptcy: The Legal and Practical Bases for the Use of Mediation and the Other Forms of ADR", 46 S.C. L. Rev. 1259 (Summer 1995)

[4] Peeples, *supra* at 407 (Table 1).

[5] LR 16.4, Southern District of Texas; Appendix H, Eastern District of Texas; Rule CV-88, Western District of Texas; Appendix 5, Section III, Northern District of Texas. Local Bankruptcy Rule 9019-2 Northern District of Texas; Appendix L-1001-I, Bankruptcy Court for the Western District of Texas.

Title search: Mediation in Bankruptcy Cases: How Has It Been Used? When Does It Work? How Hard Can the Mediator Push Parties Towards Settlement?

First appeared as part of the conference materials for the
30th Annual Bankruptcy Conference session
"Mediation: When Does It Work?"