

A USER'S GUIDE TO BANKRUPTCY MEDIATION AND SETTLEMENT CONFERENCES

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I. INTRODUCTION

Pushed by a drastic increase in the amount of bankruptcy filings,¹ the need to streamline bloated dockets,² and hopes of reducing the increasingly high cost of litigation³ has caused both bankruptcy judges and bankruptcy attorneys to seek out and

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

² See ADMINISTRATIVE OFFICE OF U.S. CTS., USE OF ALTERNATIVE DISPUTE RESOLUTION PROCEDURES INCREASE, COURT ADMIN BILL 2 (Feb 1992) (noting that effective litigation management should incorporate varying ADR programs).

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

employ various methods of alternative dispute resolution (ADR). ADR can reduce the strain on both the over-burdened court system and litigants' monetary bottom-line by providing fast and inexpensive ways to avoid traditional bankruptcy litigation.⁴

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

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

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

Courts have the inherent authority to “manage their own affairs so as to achieve the orderly and expeditious disposition of their cases.”⁵ This authority extends to

⁴ Ralph R. Mabey, Charles J. Tabb & Ira S. Dizengoff, *Expanding the Reach of Alternative Dispute Resolution in bankruptcy: The Legal and Practical Bases for the Use of Mediation and the Other Forms of ADR*, 46 S.C. L. REV 1259, 1262–63 (1995); see also Anne M. Burr, *Building Reform from the Bottom Up: Formulating Local Rules for Bankruptcy Court Annexed Mediation*, 12 OHIO ST. J. ON DISP. RESOL. 311, 312 (1997) (noting that because the primary objectives of the Bankruptcy Code, debtor rehabilitation and maximum distribution to creditors, are frustrated when cases remain unresolved, bankruptcy courts are progressively turning to ADR).

bankruptcy courts as well.⁶ A court is free to take advantage of its case management abilities as long as it does not come into conflict with constitutional safeguards, engage in the practice of coercing parties into settlements, or does not impose an undue burden or excessive delays on any of the parties.⁷ Indeed, Congress and courts have encouraged the promotion of ADR within the judicial system.⁸

Bankruptcy courts derive power to use mediation and settlement conferences from both statutory and rule based authority. For instance, Congress passed the Authorization of Alternative Dispute Resolution.⁹ The statute allows for “the use of alternative dispute resolution processes in all civil actions, including adversary proceedings in bankruptcy.”¹⁰ The statute explicitly authorizes the use of neutral evaluations, such as the use of settlement conferences and mediation as authorized forms of ADR.¹¹ In addition to the statutory authority derived from 28 U.S.C. § 651, bankruptcy judges may

⁵ See *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630–31 (1962).

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

⁷ See *id.* at 1285.

⁸ See *In re NLO, Inc.*, 5 F. 3d 134, 158 (6th Cir. 1993) (“Requiring participation in a pre-trial [settlement] conference is [justifiably] permitted . . . for it may facilitate settlement at very little expense to the parties and the court.”). Congress has also encouraged federal courts to engage in various methods of ADR through legislation.

⁹ 28 U.S.C. §§ 651–658 (2000).

¹⁰ *Id.* at § 651(b).

¹¹ *Id.* at § 651(a).

have been able to utilize their § 105 powers in order allow for mediation. Section 105 allows bankruptcy judge to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions” of the Bankruptcy Code.¹² Before § 651 was enacted, bankruptcy judges would rely on § 105 to appoint mediators in order to bring a case to an efficient resolution.¹³

B. *Settlement Conferences in the Bankruptcy Court*

The authority for the bankruptcy court to use the mandatory settlement conference is clear. The Federal Rules of Bankruptcy Procedure allow for the court to order a pre-trial conference in order to facilitate a settlement.¹⁴ Indeed, the rule bears a strong resemblance to Rule 16 of the Federal Rules of Civil Procedure.¹⁵ One of the drafters of Rule 16, Arthur Miller, indicated that it was intended to encourage judicial involvement within settlement discussions during the pretrial stages.¹⁶ In the bankruptcy system, settlement conferences are now routinely used to facilitate the settlement of bankruptcy issues.¹⁷

¹² 11 U.S.C. 105(a) (2000).

¹³ *See, e.g., In re El Paso Elect. Co.*, No. 92-10148, slip op. (Bankr. W.D. Tex. Jan. 15, 1993) (retaining a mediator to determine “whether negotiations towards a consensual plan of reorganization among the parties in interest in this case are at an impasse”).

¹⁴ FED. R. BANKR. P. 7016(a)(5)

¹⁵ *See* FED. R. BANKR. P. 7016; FED. R. CIV. P. 16.

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

¹⁷ *See, e.g.,* Email from the Honorable John K. Olson, United States Bankruptcy Judge for the Southern District of Florida, to Jarrod Martin (Nov. 14, 2008, 15:15 EST) (on file

III. A PRACTICAL APPROACH TO MEDIATIONS AND SETTLEMENT CONFERENCES

In bankruptcy, it is often difficult to mediate before a case has been assigned to a judge because a creditor may be unaware that bankruptcy is imminent until the case is filed.¹⁸ As a result, the likelihood of mediation and settlement conferences will vary by jurisdiction and judge. However, an informal poll at the annual meeting of the National Conference of Bankruptcy Judges in 1996, where both judges and bankruptcy lawyers participated in the poll, points toward an increase in the amount of settlement conferences that will be used in the future. Out of approximately 200 respondents, sixteen percent believed that the use of mandatory settlement conferences should occur more, and forty-one percent believed that mandatory settlement conferences should be used somewhat more than now.¹⁹ Only fifteen percent of respondents believed that the conferences should be used less than now.²⁰ With the exponential increase in bankruptcy filings in

with author) (noting that he [Judge Olson] handles two settlement conferences per month on average).

¹⁸ Email from Patricia Redmond, Senior Partner, Stearns, Weaver, Miller, Weissler, Alhadeff & Sitterson, P.A., to Jarrod Martin (Nov. 24, 2008, 18:06 EDT) (on file with author). However, creditors can check reports from The Dun and Bradstreet Corporation—international providers of business credit information and credit reports—to check a debtor’s solvency. *Id.*

¹⁹ *Results of an Informal NCBJ Poll*, BCD NEWS AND COMMENT, January 2, 1996, at 1.

²⁰ *Id.* However, just because respondents believe that settlement conferences should be used more often does not necessarily mean that they are being used more often. The Honorable Jeff Bohm, a Bankruptcy Judge for the Southern District of Texas in Houston, states that he has seen no increase in either mediations or settlement conferences within the Southern District. Telephone Interview with the Hon. Jeff Bohm, United States Bankruptcy Judge for the Southern District of Texas, in Houston, TX. (Nov. 8, 2008).

recent months, it is unlikely that these numbers have changed significantly between then and now.²¹

A. Arguments For Mediation and Settlement Conferences (Or What to Tell the Judge When Requesting Mediation)

While all of the following examples are good reasons to mediate, all three bankruptcy judges that I interviewed refused to order either a mandatory settlement conference or engage in court-annexed mediation unless both parties agreed upon the order. For example, Judge Robert Mark, a Bankruptcy Judge in the Southern District of Florida in Miami, would generally only grant mediation or a settlement conference if both parties had already agreed upon it or had shown some interest in it.²² Simply because both parties agree upon mediation however does not mean that judges would necessarily grant the order. The following sub-parts are provided to practitioners as potential talking points when asking a bankruptcy judge for mediation.

1. Solving Complex Cases

Within recent years, mediation and settlement conferences have been especially effective in the context of “mega-bankruptcy” cases.²³ One “mega-bankruptcy” case in

²¹ See *supra* notes 1–4 and accompanying text.

²² Email from John Dodd, former clerk to the Hon. Robert A. Mark, associate at Greenberg Traurig LLP, to Jarrod Martin (Nov. 20, 2008, 8:05 EST) (on file with author).

²³ See Hon. Cecelia G. Morris & Cheryl J. Lee, *From Behind the Bench: Toward an Efficient Mediation Model—Evaluative Mediation in Bankruptcy*, NORTON BANKR. L. ADVISOR (Norton Institute on Bankruptcy Law, Nashville, Tn.), Apr. 2007, at 6. Even if a matter does not settle, there is still some benefit from the mediation process. Parties are

which a settlement conference proved essential was that of *In re Cajun Electric*. In that case, there were two bidders competing for Cajun Electric’s non-nuclear assets, plus the right to sell power to eleven different energy cooperatives located throughout Southwest.²⁴ The case was so negative and acrimonious that “the first confirmation hearing lasted several years with various issues being appealed all the way to the 5th Circuit.”²⁵ Judge Buffone, a district court judge, with the assistance of two bankruptcy judges, called a mandatory settlement conference, which subsequently broke the deadlock. So what was it about the settlement conference that was able to break the deadlock? The judge was able to finally get every party to the table. “Four of the five Louisiana Public Service Commissioners were there. Every co-op general manager and board president was there with their lawyers. The Rural Utilities Service was there. Members of the fuel chain were there.”²⁶ How did the settlement conference accomplish the settlement? First, it got all of the players in the same room together, where dialogue

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

²⁴ *See How Settlement was Reached in Cajun Electric*, BCD NEWS AND COMMENT, Sept. 15, 1999, at 1.

²⁵ *Id.*

²⁶ *Id.*

was not only open, but also encouraged. Once every side's positions were then articulated, it forced everyone to reevaluate their position. It became apparent to everyone involved what would work and what would not. "At the end of the day, [the deal] was still 20 million [dollars] lower than Louisiana Generating. And LaGen's plan had fewer problems and fewer objections than SWEPCO's plan. While both appeared confirmable, it was equally apparent, there was a substantial likelihood that LaGen would be confirmed."²⁷ The conference acted as a very effective evaluative tool in which the party holding up the proceeding was able to see its tenuous position, which ultimately resulted in billions of dollars worth of energy contracts and settlement dollars changing hands.²⁸

Cajun Electric is not the only large case that has seen disputes referred to a settlement conference. Both the Enron Corporation bankruptcy and the Adelphia Communications Corporation bankruptcy found their way to judicial mediators.²⁹ In both the Enron bankruptcy and the Adelphia bankruptcy, multiple disputes within the bankruptcies were referred to mediation.³⁰ The types of disputes referred to mediation in the Enron and Adelphia bankruptcies included: claims objections, collection of accounts receivable, and declaratory judgment actions to a judicial mediator. The Honorable John K. Olson, a bankruptcy judge in the Southern District of Florida, reinforces this idea. He

²⁷ *Id.* at 2.

²⁸ *See Id.*

²⁹ *See Morris & Lee, supra* note 23, at 7.

³⁰ *Id.*

specifically notes that both settlement conferences and mediations are generally very useful, even when the parties prove to be sophisticated.³¹

Mediation can be a useful tool in a bankruptcy judge's toolbox in order to resolve large bankruptcy claims, especially in cases of mass-tort litigation.³² Because bankruptcy courts are unable to hear personal injury claims,³³ each tort claim or class action may have to be independently tried all over the country.³⁴ Mediation has proved quite effective in resolving mass tort problems in the bankruptcy context. Where once the costly, length, and fragmented nature of mass tort litigation would threaten to completely destroy the possibility of Chapter 11 reorganization, the time and cost saving methods of mediation saved reorganizations where they would once die.³⁵

³¹ Olson, *supra* note 17.

³² See Morris & Lee, *supra* note 23, at 6.

³³ See 28 U.S.C. § 157(b)(2)(O) (2000); *id.* 157(b)(5).

³⁴ See Morris & Lee, *supra* note 23, at 6–7.

³⁵ *Id.* at 7. Reducing costs are particularly important within the bankruptcy context. In bankruptcy, litigation costs for the debtor come out of property of the estate. Every dollar that comes out of property of the estate is a dollar out of the pockets of the creditors. As a result, creditors have an even greater sense of urgency to solve problems as cheaply as possible, for they are paying for both sides of the litigation. See 11 U.S.C. § 503 (2000) (amended in 2005). Settlement conferences tend to be very cost-effective. Rules prevent active judges from taking any fees. Therefore, if a judge recommends a case for a judicial settlement conference, the costs of the parties are reduced dramatically. See Interview with the Hon. Laurel M. Isicoff, United States Bankruptcy Judge for the Southern District of Florida, in Miami, Fla. (Nov. 14, 2008) (on file with author); Mabey, Tabb & Dizengoff, *supra* note 4, at 1271 (“Because the mediators in both phases of mediation were acting judges, there was no payment of the mediators’ costs.”).

2. Calling the Expert

An aspect of mediation that judges find invaluable is that of the expert mediator.³⁶ For example, the Honorable Jeff Bohm, a Houston bankruptcy judge in the Southern District of Texas, is normally very reluctant to use mediation unless absolutely necessary, and does not use mandatory settlement conferences. However, if the mediator requested is an expert within the field, such as another bankruptcy judge or a partner at a large bankruptcy firm, he is much more confident in the success of a mediation.³⁷ For example, one case involved nineteen parties in a complex chapter 11. If the case were to

³⁶ While being a bankruptcy expert is often very important to parties when selecting a mediator, that expert must still qualify to be a mediator. In the Bankruptcy Court for the Southern District of Florida, Local Rule 9019 lays out the following qualifications to be a mediator. A mediator must:

- (a) be an active member of The Florida Bar and qualified to practice in this court or be a retired federal or state judge;
- (b) have been admitted to practice in a state or federal court for at least the past 5 years or be a retired federal or state judge;
- (c) have completed a minimum of 40 hours in a circuit court mediation training program certified by the Florida Supreme Court or be certified by the Florida Supreme Court as a circuit court mediator; and
- (d) agree to accept at least 2 mediation assignments per year in cases where at least one party lacks the ability to compensate the mediator, in which case the mediator's fees shall be reduced accordingly or the mediator shall serve pro bono if no litigant is able to contribute compensation.

Banker. S.D. Fla. R. 9019-2.

³⁷ See Bohm, *supra* note 20.

continue its litigation, it would cost the parties millions in legal fees.³⁸ A mediator was brought in who specialized in “mega bankruptcy” mediation, a bankruptcy partner at a large New York law firm.³⁹ While the mediation did not solve everything, enough was completed where the parties were able to work through the problems amongst themselves and avoid prolonged legal battles before the Judge.⁴⁰

If an effective mediator is not selected, all parties are likely to suffer, as bankruptcy tends to make everyone a loser to an extent.⁴¹ This may be why mediators in complex bankruptcy cases tend to be former or current bankruptcy judges.⁴² According to Judge Bohm, the least effective bankruptcy mediators tend to be those who are full-time mediators with little practical bankruptcy experience.⁴³ Therefore, if an attorney believes that mediation may be likely in his or her bankruptcy case, thorough research should be done on potential mediators. Having an inferior bankruptcy mediator could prove catastrophic for the successful reorganization of a “mega bankruptcy.”

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* Bankruptcy mediation appears to be tailor made for confirmation of a plan, as it “typically involves a dispute between the unsecured creditors’ committee, the secured creditor and the debtor-in-possession.” This can often lead to extremely difficult factual, legal and multiple financial issues. An expert mediator would be tailor-made for this kind of multiple party dispute. See Irvin W. Sandman, *Should Bankruptcy Lawyers Resist Mediation?*, AM. BANKR. INST. J., June 1995, at 3.

⁴¹ See Morris & Lee, *supra* note 21, at 7.

⁴² *Id.* An added benefit to requesting a judge to mediate your bankruptcy dispute is that it does not cost any of the parties any money, as judges are prohibited from taking compensation if they sit as a mediator. See Bohm, *supra* note 20.

⁴³ See Bohm, *supra* note 20.

3. The Gravitas of a Judge

Both practitioners and judges note that one of the more intangible items a judge managing a settlement conference brings to the table is the gravitas that comes from being a judge. The Honorable Laurel Isicoff, a Bankruptcy Judge for the Southern District of Florida, explains that the gravitas a judge has can often be used to break up stubborn parties.⁴⁴ Parties are much less likely to dig in their heels and be unreasonable when dealing with a judge instead of an agreed upon mediator.⁴⁵ The benefits of judicial gravitas extend to the parties as well. Allison Day, a shareholder at Genovese, Joblove & Battista, states, “I love having a [bankruptcy] judge mediate. Sometimes your own client needs to hear that their case is not as good as they think it is Although there are some fine mediators that aren’t [bankruptcy] judges, sometimes that is just the ticket.”⁴⁶ Indeed, Allison Day notes that bankruptcy judges are exceedingly helpful in providing a reality check for clients who think their case is better than it actually is.⁴⁷ As an added benefit, Judge Isicoff notes that a judge’s gravitas goes a long way toward making parties behave much more civilly toward one another.⁴⁸ Both clients and attorneys are much less

⁴⁴ See Isicoff, *supra* note 35.

⁴⁵ *Id.*

⁴⁶ Email from Allison Day, Shareholder, Genovese, Joblove & Battista, to Jarrod Martin (Oct. 24, 2008, 13:39 EDT) (on file with author).

⁴⁷ See *id.*

⁴⁸ See Isicoff, *supra* note 35. It should also be noted that the small amount of bankruptcy judges could also contribute to this civility. With only three bankruptcy judges in Miami, the odds are high that if an attorney appears in front of any of the three judges in a settlement conference, the odds are high that they could appear in front of one of them

likely to misbehave in front of a sitting judge for fear of having to come in front of that judge in the near future.⁴⁹

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

1. Are Lazy Lawyers Giving Clients What They Want?

Not everyone is excited about the prospect of mediation within the bankruptcy courts. Judge Bohm argues that parties are beginning to use mediation as a crutch.⁵⁰ Judge Bohm feels that attorneys are refusing to discuss settlements until they have had a chance to mediate.⁵¹ Mediation shouldn't be a necessity for attorneys to be cordial with one another and talk about potential settlements.⁵² Judge Bohm feels that a large problem with mediation is that it does not force attorneys to assess the risk of a case because of the low cost of mediation and the knowledge that through mediation, they will still be able to get something.⁵³ Judge Bohm notes that this laziness could prevent attorneys from

the next day in court. *See* United States Bankruptcy Court for the Southern District of Florida, <http://www.flsb.uscourts.gov/> (last visited Nov. 19, 2008).

⁴⁹ *See id.*

⁵⁰ *See* Bohm, *supra* note 20.

⁵¹ *Id.*

⁵² *See id.* *But see* Markowitz, *supra* note 23. (noting that the South Florida bankruptcy bar was amazingly cordial with one another, which made working with Florida bankruptcy attorneys surprisingly easy during mediations).

⁵³ *See* Bohm, *supra* note 20.

recognizing when clients don't want to settle, and simply want to get their day in court. Clients can feel that they have not won unless they have actually had their day in court.⁵⁴

Under the rules of ethics however, unless the lawyer has explicit or inherent authority to settle, the lawyer must ask his or her client whether she wants to settle.⁵⁵ Accordingly, an attorney who does not abide by this rule could be subject to discipline by the state bar.⁵⁶ Unfortunately, the Rules of Professional Conduct are not always effective deterrents to unethical behavior. For example, in December of 2008, “[t]he Florida Supreme Court in recent court orders disciplined 23 attorneys, disbarring six, suspending 13 and placing six on probation. Some attorneys received more than one form of discipline. Four attorneys were reprimanded.”⁵⁷ Ethical rules alone are not sufficient to prevent attorneys from discouraging clients from settling before mediation.

One could also argue that most large, institutional bankruptcy clients are sophisticated enough to not allow their lawyers to dictate when settlement will or will not occur. This argument is not a winning one. A large institutional client is likely to have an attorney on staff acting as general counsel. Generally, attorneys unfamiliar with

⁵⁴ *See id.*

⁵⁵ MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2002) (“A lawyer shall abide by a client’s decision whether to settle a matter.”)

⁵⁶ *Id.* at PREAMBLE(16).

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<http://www.floridabar.org/divcom/jn/jnnews01.nsf/8c9f13012b96736985256aa900624829/252c6f1b3e818ca3852575190067e5e7?OpenDocument>

bankruptcy law tend to fear bankruptcy issues.⁵⁸ As a result, it is very possible that even a sophisticated general counsel for a large company could be overwhelmed by the expertise of a large firm bankruptcy attorney.

2. Dangers of the Settlement Conference

Most of the Judges and practitioners I surveyed expressed general appreciation for the role of the judicial settlement conference within the bankruptcy context. However, one situation appeared to cause unease amongst a few of the people I talked to. In some bankruptcy courts, judges manage settlement conferences where they are also the finder of fact.⁵⁹ Judge Isicoff notes a number of problems that can occur when this happens. In the settlement conference process, parties may be more likely to hold back critical information if they know the mediator will be hearing their case later.⁶⁰ Additionally, if the case proceeds forward, it may be difficult for the judge to forget information that came forward during that settlement conference.⁶¹

Jerry Markowitz notes one judge, Judge David Houston—a Bankruptcy Judge for the Northern District of Mississippi—managed settlement conferences in which he was also the finder of fact.⁶² Judge Houston gives an interesting perspective that I am sure

⁵⁸ Harvey C. Fisher & Robert G. Seidenstein, “Bankruptcies; Lucrative Practice Seeing Bottom Falling Out,” *New Jersey Lawyer* October 9, 2006 Volume 15, No. 40 page 1.

⁵⁹ *See Isicoff, supra* note 35.

⁶⁰ *See id.*

⁶¹ *Id.*

⁶² *See Markowitz, supra* note 23. Mr. Markowitz also notes that Judge Houston is very active on the lecture circuit. *Id.*

many practitioners would disagree with. Jerry Markowitz explains that Judge Houston did not see a problem with managing his own settlement conferences because he was “able to turn the light on and off.”⁶³ By that, he means that when he is acting as the mediator, he is the mediator, and when he is the judge, he is able to “turn off” the information that he learned as a mediator.⁶⁴ Mr. Markowitz explained that as a practitioner, this was not a situation he wanted to find himself in. By participating in a settlement conference in front of the same judge the case is before, he felt the process would be tainted as both parties would be holding back information.⁶⁵

IV. TIPS FROM THE EXPERTS

To be successful in bankruptcy mediation, practitioners and judges were unanimous in stating that preparation was the key to a successful mediation. There are many ways to prepare for mediation, but Judge Isicoff notes that reading the local rules is one of the most important things a party can do before engaging in bankruptcy mediation.⁶⁶ For example, if one hasn’t looked through the local rules, he or she would be unaware that parties need at least ten calendar days advance written notice of a mediation conference.⁶⁷ Attorneys appearing in front of Judge Isicoff must read them.

⁶³ *See id.*

⁶⁴ *Id.*

⁶⁵ *See id.*

⁶⁶ *See Isicoff, supra* note 35. In the Southern District of Florida, the local rule that governs mediation is 9019-2.

⁶⁷ Bankr. S.D. Fla. R. 9019-2(C)(1).

Failing to do so could lead Judge Isicoff to call the offending attorney into chambers to read all of the local rules under her supervision.⁶⁸

Aside from knowing the local rules, general preparation is necessary before engaging in bankruptcy mediation.⁶⁹ Know both the facts and know the law, especially if you are participating in a settlement conference.⁷⁰ “A good mediator makes you feel insecure and uncertain about the outcome. If you haven’t prepared and feel that you aren’t completely in the right, you could end up giving more than you wanted to. You need to be prepared so you can argue and advocate.”⁷¹

After preparing yourself for mediation, the next step is to prepare your client for mediation. This process does not vary much from mediation preparation in other areas of the law. Sit your client down and make it clear to them that they do not have to agree on anything that they are not comfortable with.⁷² “It should be made clear that the mediator will not decide the merits of the client’s case . . . and the rules of evidence don’t apply.”⁷³

⁶⁸ See Isicoff, *supra* note 35.

⁶⁹ See Olson, *supra* note 17. It is important to note that tips to succeed in bankruptcy mediation can cross over into many other types of mediation.

⁷⁰ See Markowitz, *supra* note 23. Importantly, Jerry Markowitz urges new practitioners to see as many mediations as they can before participating in one on their own. “You don’t go and play baseball before you’ve taken a few swings to practice or have some experience.” *Id.*

⁷¹ *Id.* For another practical checklist on what a bankruptcy attorney should do before going to mediation, see Morris & Lee, *supra* note 23, at 10.

⁷² See Bohm, *supra* note 20.

⁷³ Morris & Lee, *supra* note 23, at 10.

Expectation management is also vital to preparing a client. A client needs to understand that “a successful mediation is usually one in which everybody feels that they gave up something.”⁷⁴ Judge Olson iterates that a client must understand that, while litigation results are usually not nuanced, settlement agreements stemming from mediation can contain various tradeoffs, both obvious and hidden. Mediation is very rarely a yes or no answer.⁷⁵

V. CONCLUSION

If a practitioner wishes to use bankruptcy mediation, there are a number of things he or she could point out to the judge to help ensure mediation is recommended. First, if you are dealing with a “mega bankruptcy,” note how successful mediation can be in bringing many parties together to resolve an issue that would otherwise be deadlocked. Second, point out how experts within the field acting as mediators, be it another bankruptcy judge or a partner at a large bankruptcy firm, can help work through very complicated cases during the mediation process. Third, if asking for a settlement conference or using a retired judge as an expert mediator, note how the gravitas of a judge can help break otherwise deadlocked parties. Additionally, avoid the appearance of using mediation as a crutch. A judge still wants you to actively evaluate your case before requesting mediation. Also, one should avoid asking a judge to manage a settlement conference in a case he or she is assigned to. It can cause problems for both the court and the parties involved. Finally, success in bankruptcy mediation, like in all kinds of

⁷⁴ Olson, *supra* note 17.

⁷⁵ *See id.*

mediation, requires preparation. Without it, you are failing both your client and the bankruptcy mediation system.

It will be interesting to see how bankruptcy mediation evolves as the number of bankruptcies increase in the coming years. As of now, none of those I interviewed recommend substantive changes to the way bankruptcy mediations and settlement conferences are used.⁷⁶ However, I could see courts implementing a number of measures to increase the number of mediations, such as recommending more mandatory settlement conferences and mediations or providing parties with incentives for using mediation, such as fast-track hearings for cases that have gone through ADR. With the bankruptcy court system looking to be increasingly taxed in the upcoming months, bankruptcy ADR will continue to command an even greater focus. Practitioners seeking to side-step bloated bankruptcy dockets may be able to use the talking points in this paper in order to convince a judge to recommend mediation or a settlement conference, thus accomplishing two goals. For the court, a crowded docket is relieved. For the parties, disputes are resolved fast and at a fraction of the cost of litigation.

⁷⁶ See Bohm, *supra* note 20; Day, *supra* note 46; Dodd, *supra* note 22; Isicoff, *supra* note 35; Markowitz, *supra* note 23; Olson, *supra* note 17.