

Mediation in Bankruptcy

The Federal Judicial Center Survey of Mediation
Participants

*Report to the Advisory Committee on Bankruptcy Rules
of the Judicial Conference of the United States*

Robert J. Niemic

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Executive Summary

At its March 1997 meeting, the Advisory Committee on Bankruptcy Rules asked the Federal Judicial Center to collect empirical information to help the committee determine whether to consider rules changes that would govern mediation of bankruptcy matters. The committee has not taken a position on the use of mediation in bankruptcy.

The Questionnaire

The Center developed a questionnaire to determine the extent and severity of any problems regarding mediation conducted after judicial referral. (See Appendix 1.)

For the survey mailing, we obtained names and addresses of counsel and mediators who had participated in the mediation of one or more bankruptcy matters after judicial referral pursuant to local bankruptcy rules or procedures during the three-year period before May 1997. These matters were in eighteen of the twenty bankruptcy courts that during the relevant time period had local rules or procedures on mediation *and* had referred at least one matter to mediation.¹ In July 1997 we mailed the questionnaire to almost all these counsel and mediators (1,992 recipients).²

Findings

As of November 15, 1997, the response rate to the questionnaire was 64%. This report is based on those responses. The number of mediated matters³ participated in by 1,043 counsel-respondents was between 1,054 and 2,108⁴ and the number of matters participated in by 440 mediator-respondents was 1,480.

Problems Reported

In designing the questionnaire, the committee's ADR subcommittee and Center staff identified several areas where mediation participants might have observed or perceived problems in the mediations in which they participated. For each problem area asked about in the questionnaire, respondents reported that the problem

1. The bankruptcy clerks in the District of Colorado and the Northern District of Texas informed us that those courts do not maintain any information on matters referred to mediation.

2. Because of the large number of matters referred to mediation in the Central District of California, we surveyed only 50% of the practitioners who had participated in mediation in that district during the study period.

3. Weighted data. See Appendix 2: Methods.

4. An unknown number of matters identified by certain counsel-respondents are duplicates of matters identified by other counsel-respondents. To account for these duplicates, we present a lower bound (which is 50% of the number of matters reported by counsel-respondents) and an upper bound (which is the total number of matters reported by counsel-respondents). The confidentiality of the mediation process prevented us from including information on the questionnaires that would identify particular matters.

occurred in 2.5% or less of the matters referred to mediation. The breakdown of occurrence rates by problem area is shown under “Problems Reported” in Table 1.

Table 1
Rates at Which Certain “Problems” or Events Were Reported

(N = 1,289 Respondents) (weighted data)

	Rate of Occurrence in Counsel-Respondent Matters* (N = 1,054–2,108 Matters)	Rate of Occurrence in Mediator-Respondent Matters (N = 1,480 Matters)
Problems Reported		
Mediator disclosure of confidential information	0.9%–1.8%	0.4%
Party disclosure of confidential information	1.2%–2.4%	0.6%
Confidentiality affecting judicial approval of settlement	0.8%–1.7%	2.3%
Ex parte contacts between mediator & judge	0.4%–0.8%	0.3%
Mediator failure to disclose conflict of interest	0.5%–1.0%	0.1%
Mediator bias or prejudice	0.4%–0.7%	0.1%
Mediator not a “disinterested person”	1.2%–2.5%	2.3%
Rule 5002(b) connections between mediator & judge	0.9%–1.7%	0.1%
Rule 5002(b) connections between mediator & U.S. trustee	0.5%–1.1%	0.3%
Other Issues		
Sua sponte referrals to mediation	11.6%–23.3%	not asked
Referrals over objection of a party	3.3%–6.6%	not asked
Mediator fee paid by bankruptcy estate	10.2%–20.3%	19.0%
Mediator role in formulating reorganization plan	not asked	9.4%

Note: Rate of occurrence is derived by dividing (1) the number matters in which counsel/mediator respondents observed or perceived the particular problem/issue by (2) the total number of matters for all respondents of that type. Adjustments have been made for non-respondents.

* To account for unknown duplicates, we present a lower and upper bound. *See supra* note 4.

Although none of the problems occurred with great frequency, some types of problems appear to occur relatively more frequently than others. Among counsel responses to the questionnaire, the highest occurrence rates were in the areas of

- breaches of confidentiality,
- mediators who were not “disinterested” (as that term is defined in the Bankruptcy Code),
- confidentiality of the mediation process affecting judicial approval of settlement, and
- perceived connections between mediators and judges.

Among the mediator responses, the highest occurrence rates were in the areas of

- confidentiality affecting judicial approval of settlement, and
- mediators who were not “disinterested.”

Other Issues

Respondents also indicated the frequency with which certain events occurred. These are identified as “Other Issues” in Table 1. Respondents reported that, among the matters that were referred to mediation

- bankruptcy judges referred less than 24% of the matters sua sponte,
- less than 7% of the matters were referred over the objection of one or more parties,
- the bankruptcy estate paid the mediator’s fee in less than 21% of the mediated matters, and
- the mediator played a role in formulating a reorganization plan in approximately 9% of the mediator-identified matters.

Summary of Respondent Comments

The report also includes as Appendix 3 a summary of respondent comments as a supplement to the quantitative data.

Questions for Committee Consideration

Questions raised by these data include the following:

- Are observed or perceived problems in mediation of little significance because they occur infrequently?
- Are some observed or perceived problems so serious in nature that any occurrence of the problem, even though infrequent, warrants attention?
- Are these matters best addressed by national rules or should they be left to local rules?

Publication of this report, in addition to serving the committee, will also serve to inform bankruptcy judges, practitioners, and those interested in ADR.

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Report on the Survey

Purpose of the Survey

The Advisory Committee on Bankruptcy Rules asked the Federal Judicial Center to undertake this survey to inform the committee's preliminary look at whether there is a need for national bankruptcy rules to govern mediation. The purpose of the survey is to determine the extent and severity of problems that the committee, lawyers, and mediators believe may affect mediation conducted after judicial referral.

Background

Mediation Programs in Bankruptcy Courts

At least twenty-eight bankruptcy courts (approximately 30% of all bankruptcy courts) currently have local rules, general orders, or guidelines that govern judicial referral of bankruptcy matters to mediation. These courts are

Northern District of Alabama	District of Massachusetts
District of Alaska	Eastern District of Michigan (Southern Division)
Central District of California	District of Nebraska
Eastern District of California	District of New Jersey
Northern District of California	Southern District of New York
Southern District of California	Eastern District of North Carolina ⁵
District of Colorado	Northern District of Oklahoma
Middle District of Florida	District of Oregon
Southern District of Florida	Eastern District of Pennsylvania
District of Idaho	Middle District of Pennsylvania (Northern Tier)
Northern District of Illinois	Western District of Pennsylvania
Northern District of Indiana	Northern District of Texas
District of Kansas	District of Utah
Eastern District of Louisiana	Eastern District of Virginia (Alexandria Division)

The Central District of California has referred the highest number of bankruptcy matters to mediation. The court reports that 1,049 matters, as of February 25, 1998, have been referred since program inception in mid-1995.

The procedures of about twenty mediation programs specifically authorize judges to refer a matter to mediation *sua sponte*. The procedures of a few programs specifically require that the parties consent before a matter can be referred to mediation. None of the twenty-eight courts automatically refers all matters, or even blocks of certain matter types, to mediation.

In addition to the twenty-eight bankruptcy courts listed above, at least three bankruptcy courts, the Southern and Western Districts of Texas and the Northern

5. The Bankruptcy Administrator's Pilot Mediation Program was in existence during the survey period. Subsequently, effective Oct. 1, 1997, the court adopted a local rule on mediated settlement conferences.

District of Ohio, use district court ADR procedures but without specific mention in their local bankruptcy rules.

Other bankruptcy courts are considering the adoption of mediation programs. Currently in some courts that do not have established court procedures for referral to mediation, certain judges make use of “ad hoc” referrals.

Activity by the Federal Judicial Center

In the late 1980s, the Federal Judicial Center reported on its study of the mediation program in the Bankruptcy Court for the Southern District of California.⁶ More recently, the Center has assisted other bankruptcy courts, including the Central District of California, Northern District of California, Southern District of New York, and the District of Utah, in developing questionnaires to send to persons who participated in mediation. Some of the courts have released certain statistics gathered from questionnaire responses.⁷

The Center also has attempted to keep abreast of developments in the bankruptcy ADR area and has compiled a draft “sourcebook” of currently operational ADR programs. The Center plans to publish this sourcebook in a format similar to *ADR and Settlement in the Federal District Courts* and *Mediation & Conference Programs in the Federal Courts of Appeals*.⁸

Activity by Other Organizations

Other groups have studied ADR in bankruptcy courts. The ABA’s Joint Ad Hoc Committee on Bankruptcy Court Structure and Insolvency Processes has debated the need for national or local rules on ADR in bankruptcy. As part of its effort, in the spring of 1997, the joint committee sent a set of local rule provisions on mediation to all federal chief district judges, bankruptcy judges, and bankruptcy clerks.⁹ The document was drafted by a working group made up of several members of the Chapter 11 subcommittee of the ABA’s Business Bankruptcy Committee. The provisions, drafted to assist bankruptcy courts that might decide to adopt *court-based* mediation programs, include suggested text with commentary.¹⁰ Many of the provisions are patterned after several existing local rules and cover such

6. Steven Hartwell & Gordon Bermant, *Alternative Dispute Resolution in a Bankruptcy Court: The Mediation Program in the Southern District of California* (Federal Judicial Center 1988).

7. Professor Woodward of Temple University has prepared a report on the bankruptcy mediation program in the Eastern District of Pennsylvania. William J. Woodward, Jr., *Report on Court Sponsored Mediation*, U.S. Bankruptcy Court, Eastern District of Pennsylvania, January 6, 1998 (unpublished manuscript, on file with the Research Division, Federal Judicial Center).

8. Elizabeth Plapinger & Donna Stienstra, *ADR and Settlement in the Federal District Courts: A Sourcebook for Judges and Lawyers* (Federal Judicial Center 1996); Robert J. Niemic, *Mediation & Conference Programs in the Federal Courts of Appeals: A Sourcebook for Judges and Lawyers* (Federal Judicial Center 1997).

9. Letter from Nathan B. Feinstein, chair of the Joint Ad Hoc Committee on Bankruptcy Court Structure and Insolvency Processes, to all federal chief district judges, bankruptcy judges, and bankruptcy clerks (May 27, 1997) (on file with the Research Division, Federal Judicial Center).

10. The term “court-based” generally refers to an ADR program or practice authorized and used by a court. The term “court-annexed” has the same meaning.

topics as establishing a roster of mediators, selecting a mediator for a matter, handling conflicts of interest, and maintaining confidentiality.

The American Bankruptcy Institute also has become involved in the local rule discussion. The ABI's ADR subcommittee recognized that mediation is used increasingly, even in bankruptcy courts that have not established comprehensive court-based mediation programs. The ABI issued its Model Local Rule,¹¹ which is a set of suggested provisions to govern judicial referral to mediation in these bankruptcy courts. In addition, the ABI has released its *Mediation Manual: A Guide for Implementing Dispute Resolution Procedures in Bankruptcy Matters*.¹² The manual was developed principally for use by attorneys and judges in bankruptcy courts that do not have court-based programs.

The National Bankruptcy Review Commission also considered the need for statutory changes and rules on mediation. Panelists discussed these and related issues at the commission's regional meeting in New York in May 1997 and the full commission discussed mediation at its June 1997 meeting. At its August 1997 meeting, the commission unanimously voted to recommend that Congress authorize bankruptcy courts to "enact local rules establishing mediation programs in which the court may order non-binding, confidential mediation upon its own motion or upon the motion of any party in interest." Such a statute, the commission recommended, should include explicit authority to approve the payment of mediators pursuant to local rules. However, the recommendation states that bankruptcy courts should not "order mediation of a dispute arising in connection with the retention or payment of professionals or in connection with a motion for contempt, sanctions, or other judicial disciplinary matter." The commission's recommendations are contained in its final report to Congress dated October 20, 1997.¹³

In adopting the recommendation, the commission noted that some may question whether specific statutory authority is necessary given that many districts already have established mediation programs. In recent years, commentators have written extensively about inherent power and other authority that allow bankruptcy courts to establish mediation programs.¹⁴

Committee's Request for a Survey

The Alternative Dispute Resolution Subcommittee of the Advisory Committee on Bankruptcy Rules has been monitoring ADR-related activity in the bankruptcy courts for several years. The subcommittee presented a report regarding ADR at the September 1995 meeting of the full committee. The report recommended that the

11. Model Local Rule, ADR Subcommittee of the American Bankruptcy Institute (May 17, 1997) (on file with the Research Division, Federal Judicial Center).

12. Jacob Aaron Esher, *Mediation Manual: A Guide for Implementing Dispute Resolution Procedures in Bankruptcy Matters* (1996) (on file with the Research Division, Federal Judicial Center).

13. *Bankruptcy: The Next Twenty Years*, National Bankruptcy Review Commission Final Report, October 20, 1997, at 489-92.

14. *Id.* at 492.

committee not propose any ADR-related rule changes at that time but that the subcommittee continue to monitor activity relating to ADR in the bankruptcy courts. Before reaching this recommendation, the subcommittee considered specific suggestions for rules changes related to ADR. A preliminary draft of these changes, for discussion purposes only, had been distributed to the full committee at its March 1995 meeting.

At its February 1997 meeting, the subcommittee discussed whether it should (1) move forward on drafting a national rule on mediation, (2) propose a supplemental national rule addressing “problem” areas such as ex parte contacts and confidentiality, or (3) disband. The subcommittee decided not to disband but to ask the Federal Judicial Center to collect empirical information to guide the subcommittee’s actions. It recommended a survey of practitioners in bankruptcy courts that regularly refer matters to mediation to determine the nature and severity of problems that might exist.

The subcommittee identified the following areas where mediation participants might have observed or perceived problems in the mediation process: ex parte contacts, confidentiality, disinterestedness, disclosure of potential and actual conflicts of interest, and payments to neutrals. One member also identified potential problems with mediation in plan formulation vis-à-vis the role of an examiner. He expressed concern about the lack of constraints over mediators/neutrals in the bankruptcy code and rules, whereas there are constraints governing examiners. Some subcommittee members also questioned whether court-ordered mediation works if the parties do not consent to mediation and whether bankruptcy judges should be allowed or encouraged to order parties to mediation if one or more of the parties do not consent (mandatory referral to mediation).

Another issue raised was judicial review of settlement terms after mediation. Although generally not required in settlement of ordinary civil actions, such review usually is required in bankruptcy because settlement of a particular matter might drain assets from the estate or diminish prospects for reorganization, thus affecting all creditors in the bankruptcy case. Given this, there could be facts or issues disclosed in the mediation of a matter that the bankruptcy judge might need to know in deciding whether to approve settlement. The subcommittee recommended that the survey questionnaire ask practitioners if the mediation process’s confidentiality requirements prevented the bankruptcy judge from learning such facts or issues.

On the recommendation of the ADR subcommittee, the full committee at its March 1997 meeting asked the Federal Judicial Center to collect empirical information on mediation practices. The committee did not take a position on the use of mediation in bankruptcy cases. The Center delivered a preliminary report on the survey at the full committee’s meeting in September 1997 and a final report on the survey at the full committee’s meeting in March 1998. The subcommittee plans to review the results contained in this report and then decide whether to make recommendations to the full committee.

Survey Design

The Questionnaire

Federal Judicial Center staff developed a questionnaire to determine the extent and severity of problems regarding mediation conducted after judicial referral. Appendix 1 shows the questionnaire. It consists predominately of questions relating to issues identified by the committee to assist the committee in determining whether to consider rule changes regarding conflicts of interest, ex parte contacts, confidentiality, and payments to neutrals by the bankruptcy estate.

On July 10, 1997, we mailed the questionnaire to a sample of counsel and mediators who participated in the mediation of one or more bankruptcy matters after judicial referral pursuant to programs or procedures of a bankruptcy court during the three-year period before May 1997. See Appendix 2 for a description of the sample and methods. For this first mailing, the due date for questionnaire responses was July 31, 1997. Because of mailing list problems, there were subsequent mailings of about 150 additional questionnaires and they had due dates in the late summer of 1997.

As of November 15, 1997, the Center received 1,272 responses to the 1,992 questionnaires sent, a 63.9% response rate. Table 2 shows the number of people who were sent the questionnaire and the number who responded. The response rate by district is shown in Table 3.

Table 2
Recipients of and Respondents to the Questionnaire
 (unweighted data)

	Number of Recipients	Number of Responses*	Response Rate
Counsel representing parties in mediation	1,539	918	59.6%
Mediators	361	282	78.1%
Both counsel and mediators (mediators who also, as counsel, represented parties in mediation(s) of other matters)	92	72	78.3%
Total	1,992	1,272	63.9%

We asked about each respondent's participation in mediation as counsel representing a party (Questions 1–16), about participation in mediation as a mediator (Questions 17–31), and about the respondent's practice areas (Questions 32 and 33). See Appendix 1. For most questions, we asked for a no, yes, or "can't say" response and for further explanation of any yes response. A summary of these explanations and general comments is included in Appendix 3.

Table 3
Recipients of and Respondents to the Questionnaire—By District
(unweighted data)

Bankruptcy Court	Number of Recipients	Number of Responses*	Response Rate
Alabama Northern	8**	6	75.0%
California Central	468***	280	59.8%
California Eastern	105	72	68.6%
California Northern	207	144	69.6%
California Southern	193	109	56.5%
Florida Middle	55	33	60.0%
Florida Southern	31	21	67.7%
Indiana Northern	9	6	66.7%
Kansas	4	2	50.0%
Nebraska	4	3	75.0%
New Jersey	26	21	80.8%
New York Southern	290	183	63.1%
Oregon	98	63	64.3%
Pennsylvania Eastern	369	232	62.9%
Texas Southern	20	17	85.0%
Texas Western	14	13	92.9%
Utah	11	9	81.8%
Virginia Eastern (Alexandria Division)	80	58	72.5%
Total	1,992	1,272	63.9%

* These unweighted counts include 231 respondents who indicated that they were neither counsel nor mediator in a mediated bankruptcy matter.

** The list provided by the court includes only counsel who represented parties in matters referred to mediation. The court could not provide a list of mediators who participated in matters referred to mediation.

*** Fifty percent random sample. See Appendix 2, Methods.

Possible Second Phase of the Survey

The need for a second phase of the survey may be considered by the committee. In the second phase, which would be based on the results of the first phase, the Center could survey all bankruptcy judges, all bankruptcy clerks, major bankruptcy-related organizations, and a nationwide sample of bankruptcy practitioners to address any notable areas of concern identified in this study report. The Center could also conduct follow-up interviews with certain respondents to the first questionnaire who identified major problems in the mediation process and who gave the Center permission for such follow-up. See Appendix 4, Possible Second Phase of Survey.

Survey Results: Respondents to the Questionnaire

Respondents' Roles in Mediation of Bankruptcy Matters

During the thirty-six months before responding to the questionnaire, 1,043¹⁵ of the respondents to this survey had participated as counsel for a party in the mediation of one or more matters referred to mediation by a bankruptcy judge.

15. Weighted data will be used hereinafter in the body of this report unless otherwise stated. See Appendix 2, Methods for a description of sampling and weighting.

During the same period, 440 respondents had participated as a mediator in one or more matters referred to mediation by a bankruptcy judge. Both of these figures include 194 respondents who participated both as counsel representing a party *and* as a mediator in a separate matter or matters. Table 4 shows the number of respondents (1,289 in total) who were counsel only, mediator only, and both counsel and mediator.¹⁶

Table 4
Respondents by Type: Counsel Only, Mediator Only, or Both
 (weighted data)

	Number of Respondents	Percentage of Respondents
Counsel only	849	65.9%
Mediator only	246	19.1%
Both counsel and mediator (mediators who also represented, as counsel, parties in mediation(s) of other matters)	194	15.0%
Total	1,289*	100.0%

* In addition to the counts shown above, 260 respondents indicated that they were neither counsel nor mediator in a mediated bankruptcy matter, and nine stated that they appeared as a pro se party. Also, nine recipients returned their questionnaires blank and the U.S. Postal Service returned another 58 questionnaires as undeliverable. See Appendix 2, Methods.

The referrals to mediation were *sua sponte*, at the request of a party, or by joint motion. Thirty-four percent of counsel-respondents indicated that a bankruptcy judge referred at least one of their matters to mediation without a request from a party.

Ninety-nine percent of the respondents who said they participated either as counsel, mediator, or both indicated the number of matters in which they had participated. Of those who indicated the number of matters, most (591 respondents or 46.1% of such respondents) participated in the mediation of only one matter. About 30% (386 respondents) participated in two or three. Another 19.6% (252 respondents) had mediation experience in four to eight matters. And 4.2% (54 respondents) participated in nine or more mediations. Of these, sixteen (1.2%) participated in fifteen or more mediations. The range was one to seventy-seven matters.¹⁷

Separating out counsel and mediator responses, the median was one mediation participation for counsel-respondents and three participations for mediator-respondents. The range was one to seventy-one matters for counsel-respondents and one to thirty-nine for mediator-respondents.

16. Throughout this report, we will refer to respondents who represented parties in these mediations as “counsel” and respondents who were mediators in one or more of these matters as “mediators.”

17. One respondent identified a large number of mediated matters where the respondent appeared as counsel and a large number of matters in which the respondent participated as the mediator, for a total of seventy-seven matters. This respondent, who did not give us permission to contact the respondent, reported problems in many of these matters and at a rate proportionately higher than other respondents. The effect of this respondent’s responses; however, does not have a significant effect on the survey results.

Counsel-respondents reported participating in the mediation of 2,108 matters. More than one counsel may be reporting on the same matter, so this count may overstate the number of matters mediated by the attorneys in our sample. We could not design the survey to avoid this duplication, given that we did not want to have cases or matters identified such that respondents would be reluctant to respond candidly or such that respondents might breach confidentiality. We assume that the worst case scenario for duplication is that 50% of the counsel-identified matters are duplicates. Thus, the number of matters participated in by counsel-respondents is somewhere between 1,054 (50% of 2,108) and 2,108 matters. This is an average of 1.0 to 2.0 matters per counsel.¹⁸

Mediator-respondents reported mediating 1,480 matters. This is an average of 3.4 matters per mediator (1,480 matters/429 mediators who indicated the number of matters).¹⁹ Most likely, many of these mediator-identified matters were matters also identified by counsel-respondents.²⁰

Respondents' Practice Areas

Table 5 shows the practice area concentrations of respondents. About 64% of the 1,289 respondents who were counsel, mediator, or both were practitioners who said they spent 20% or more of their time representing creditors or debtors in *business* bankruptcy cases. About 38% (490 of the 1,289 respondents) represented creditors or debtors in *consumer* bankruptcy cases at least 20% of the time. Approximately 20% of the 1,289 respondents had a 20% or more concentration as counsel for a Chapter 7 or Chapter 11 trustee. Only 3.8% spent 20% or more of their time as a bankruptcy trustee, but a slightly larger percent (5.3%) devoted at least that much of their practice to serving as a mediator.

18. These averages were calculated by dividing the lower bound estimate of 1,054 matters by the 1,038 counsel who identified the number of matters and by dividing the upper bound estimate of 2,108 matters by 1,038 counsel. Five of the 1,043 counsel-respondents did not give the number of matters in which they participated.

19. Eleven mediator-respondents did not give the number of matters in which they participated.

20. There should be little double counting of mediator matters within the mediator matter count itself, assuming that a substitute mediator infrequently mediated after substantial participation by the originally appointed mediator and that instances of co-mediation were rare.

Table 5
Practice Areas Constituting 20% or More of Respondents' Practice
 (Respondents Who Were Counsel, Mediator, or Both) ($N = 1,289$) (weighted data)

Practice Area	Number of Respondents	Percentage of Respondents*
Business Cases	821	63.7%
Representing creditors in business bankruptcy cases	631	49.0%
Representing debtors in business bankruptcy cases	574	44.5%
Consumer Cases	490	38.0%
Representing creditors in consumer bankruptcy cases	216	16.8%
Representing debtors in consumer bankruptcy cases	364	28.2%
Serving as Counsel for Bankruptcy Trustees	251	19.5%
Chapter 7	165	12.8%
Chapter 9	0	0.0%
Chapter 11	124	9.6%
Chapter 12	0	0.0%
Chapter 13	0	0.0%
Serving as a Bankruptcy Trustee	49	3.8%
Chapter 7	30	2.3%
Chapter 9	0	0.0%
Chapter 11	23	1.8%
Chapter 12	0	0.0%
Chapter 13	1	0.1%
Serving as a Mediator	68	5.3%
Other	300**	23.3%
Litigation (general)	136	10.6%
Business/transactional (general)	49	3.8%
Bankruptcy/workouts (general)	25	1.9%
Creditor representation (general)	19	1.5%
Family law	8	0.6%
U.S. trustee	5	0.4%
Arbitrator	5	0.4%
Professional liability representation	5	0.4%
Debtor representation (general)	4	0.3%
Examiner/consultant	4	0.3%
Accountant/financial expert	3	0.2%
Law professor	2	0.2%

*Percentages add to more than 100% because many respondents identified more than one practice area.

**Not all respondents identified what their "other" practice areas were.

Years in Practice

About 64% of the 1,289 respondents²¹ had practiced bankruptcy law for five to twenty years. See Table 6. The range of bankruptcy experience was from zero to

21. Twenty of the 1,289 respondents did not include a number of years in response to Question 33. That question asked how long each respondent had practiced in bankruptcy practice areas.

fifty-seven years, with a median of twelve years for counsel-respondents and sixteen years for mediator-respondents.

Table 6
Number of Years Working in Bankruptcy Practice Areas
 (Respondents Who Were Counsel, Mediator, or Both) (*N* = 1,289) (weighted data)

Number of Years	Number of Respondents	Percentage of Respondents
None	53	4.1%
1 to 5	187	14.5%
Between 5 and 10	292	22.7%
10 to 20	539	41.8%
More than 20	198	15.4%
No response	20	1.6%
Total	1,289	100%*

* Total may not add to 100% due to rounding.

Survey Results: “Problems” Identified by Respondents

This section discusses the incidence of problems with the mediation process as observed or perceived by mediation participants who responded to the questionnaire.²² The discussion and tables below describe the extent of those problems as identified by counsel and mediators separately. For each problem area asked about in the questionnaire, respondents reported that the problem occurred in 2.5% or less of the matters referred to mediation.

As discussed above, more than one counsel may be reporting on the same matter or problem. In the data presented below, we assume that the worst case scenario for duplication is that 50% of the counsel-identified matters are duplicates.²³ Thus, we will present a lower bound (which is 50% of the number of matters reported by counsel-respondents) and an upper bound (which is the total number of matters reported by counsel-respondents).

For each problem identified by a respondent, the questionnaire asked the respondent to explain the circumstances and how the situation was handled (see Appendix 3). These qualitative comments are rich with information that may enable the committee to further interpret the severity of the problems identified.

22. Thirteen respondents stated in their written comments that at least one of the matters they identified on the questionnaire did not include a mediation session. This occurred, for example, because the case settled before the mediation session was held, the referral to mediation was recent and the mediation session was not yet scheduled, or the opposing party did not want a mediation session held. It is not known whether other respondents had similar situations in some of the matters they identified. The effect of the circumstances involving the thirteen, and any additional, respondents is that the rates of occurrence of problems may be slightly understated in the results reported in this report.

23. See *supra* note 4.

Mediator Disclosure of Confidential Information

Question 3 (for counsel-respondents): During or after the mediation, did the mediator disclose without permission any statements made or materials used in the mediation?

As described above, 1,043 respondents identified themselves as counsel representing parties. Question 3 asked these respondents to identify the number of matters in which the mediator disclosed without permission any statement made or materials used in mediation. Local rules in all but one of the eighteen courts in the survey specifically impose a confidentiality requirement that generally provides that all written or oral communications that occur during or in connection with the mediation process are confidential. Confidentiality requirements or agreements of this nature are fairly standard in mediation. Twenty-five counsel-respondents (2.4%) identified²⁴ between nineteen and thirty-eight matters where unauthorized disclosure occurred (accounting for duplicates). (Tables 7A and 7B.) These matters represent 0.9%–1.8% of all mediated matters handled by counsel who fully responded to Questions 2 and 3; that is a reported occurrence rate of 0.9%–1.8%.²⁵ Looking at the breakdown of the thirty-eight matters at the upper bound, twenty-two counsel-respondents identified one matter, two identified three, and one identified ten matters.

Question 19 (for mediator-respondents): Did any of the parties to the mediation assert that during or after the mediation you disclosed without permission any statements made or materials used in the mediation?

In similar fashion to Question 3, Question 19 asked the 440 mediator-respondents to identify matters where they were the mediator and where a party to the mediation asserted that the mediator disclosed without permission statements made or materials used in the mediation. Only two mediator-respondents (0.5%) identified any such matters and those respondents said it occurred in a total of six matters. This represents 0.4% of all matters mediated by mediators who fully responded to Questions 18 and 19.²⁶ (Tables 7A and 7B.)

24. “Identified” as used in this context does not mean that the respondents identified the matter name, case number, parties, or any case-identifiable information. Respondents simply wrote down the number of such matters in which they were involved.

25. Throughout this report, rate of occurrence for counsel-respondents is calculated by dividing (1) the number of matters in which counsel-respondents observed or perceived the particular problem/issue by (2) the number of matters in which all counsel-respondents participated, adjusting for respondents who did not fully answer relevant questions.

26. Throughout this report, rate of occurrence for mediator-respondents is calculated by dividing (1) the number of matters in which mediator-respondents observed or perceived the particular problem/issue by (2) the number of matters in which all mediator-respondents participated, adjusting for respondents who did not fully answer relevant questions.

Table 7A
Mediator Disclosure of Confidential Information
 (weighted data)

	Counsel-Respondents		Mediator-Respondents	
	Number of Counsel-Respondents	Percentage of Counsel-Respondents	Number of Mediator-Respondents	Percentage of Mediator-Respondents
Yes	25	2.4%	2	0.5%
No	869	83.7%	423	97.7%
Can't say	144	13.9%	8	1.8%
Total	1,038*	100.0%	433**	100.0%***

Note: Data in Table 7A derived from responses to survey Questions 3 and 19.

Question 3 (for counsel-respondents): During or after the mediation, did the mediator disclose without permission any statements made or materials used in the mediation?

Question 19 (for mediator-respondents): Did any of the parties to the mediation assert that during or after the mediation you disclosed without permission any statements made or materials used in the mediation?

*Five counsel-respondents did not answer Question 3.

**Seven mediator-respondents did not answer Question 19.

***Total may not add to 100% due to rounding.

Table 7B
Number and Rate of Matters with Mediator Disclosure Problem
 (weighted data)

Counsel-Respondents		Mediator-Respondents	
Number of Matters with Mediator Disclosure	Rate of Occurrence in Counsel-Respondent Matters*	Number of Matters with Assertion of Mediator Disclosure	Rate of Occurrence in Mediator-Respondent Matters**
19-38	0.9%–1.8%	6	0.4%

Note: Data in Table 7B derived from responses to survey Questions 3 and 19.

Question 3 (for counsel-respondents): During or after the mediation, did the mediator disclose without permission any statements made or materials used in the mediation?

Question 19 (for mediator-respondents): Did any of the parties to the mediation assert that during or after the mediation you disclosed without permission any statements made or materials used in the mediation?

* The denominator in this calculation is the total number of mediated matters handled by counsel who fully answered Questions 2 and 3.

** The denominator in this calculation is the total number of matters mediated by mediators who fully answered Questions 18 and 19.

Party Disclosure of Confidential Information

Question 4 (for counsel-respondents) and Question 20 (for mediator-respondents): During or after the mediation, did any of the parties to the mediation or their counsel disclose without permission any statements made or materials used in the mediation?

Forty-two of the counsel-respondents (4.0%) identified between twenty-six and fifty-two matters where during or after the mediation one or more of the parties to the mediation or their counsel disclosed without permission statements made or materials used in the mediation. (Tables 8A and 8B.) These matters represent 1.2%–2.4% of all matters handled by counsel who fully responded to Questions 2 and 4. Looking at the fifty-two matters (the upper bound), thirty-seven counsel-respondents identified one such matter, two respondents identified two, one respondent identified three, and two respondents identified four.

Nearly 28% of the mediator-respondents answered “can’t say” when asked the same question; however seven mediator-respondents (1.6%) identified nine mat-

ters where disclosure occurred. (Tables 8A and 8B.) Six respondents identified one matter and one respondent identified three matters. The nine matters represent 0.6% of all matters mediated by mediators who fully answered Questions 18 and 20.

Table 8A
Party Disclosure of Confidential Information

(weighted data)

	Counsel-Respondents		Mediator-Respondents	
	Number of Counsel-Respondents	Percentage of Counsel-Respondents	Number of Mediator-Respondents	Percentage of Mediator-Respondents
Yes	42	4.0%	7	1.6%
No	827	79.7%	305	70.6%
Can't say	169	16.3%	120	27.8%
Total	1,038*	100.0%	432**	100.0%

Note: Data in Table 8A derived from responses to survey Questions 4 and 20.

Question 4 (for counsel-respondents): During or after the mediation, did any of the parties to the mediation or their counsel disclose without permission any statements made or materials used in the mediation?

Question 20 (for mediator-respondents): During or after the mediation, did any of the parties to the mediation or their counsel disclose without permission any statements made or materials used in the mediation?

*Five counsel-respondents did not answer Question 4.

**Eight mediator-respondents did not answer Question 20.

Table 8B
Number and Rate of Matters with Party Disclosure Problem

(weighted data)

Counsel-Respondents		Mediator-Respondents	
Number of Matters with Party Disclosure	Rate of Occurrence in Counsel-Respondent Matters*	Number of Matters with Party Disclosure	Rate of Occurrence in Mediator-Respondent Matters**
26-52	1.2%-2.4%	9	0.6%

Note: Data in Table 8B derived from responses to survey Questions 4 and 20.

Question 4 (for counsel-respondents): During or after the mediation, did any of the parties to the mediation or their counsel disclose without permission any statements made or materials used in the mediation?

Question 20 (for mediator-respondents): During or after the mediation, did any of the parties to the mediation or their counsel disclose without permission any statements made or materials used in the mediation?

* The denominator in this calculation is the total number of mediated matters handled by counsel who fully answered Questions 2 and 4.

** The denominator in this calculation is the total number of matters mediated by mediators who fully answered Questions 18 and 20.

Confidentiality Requirements and Judicial Approval of Settlement

Question 5 (for counsel-respondents) and Question 21 (for mediator-respondents): Did the confidentiality requirements of the mediation process prevent the bankruptcy judge from learning facts or issues that the judge would have needed to know in deciding whether to approve a settlement of the matter that was mediated?

Another issue covered in the questionnaire concerns judicial review of the terms of a settlement reached after mediation. Although such review is generally not required in mediated settlement of ordinary civil actions, it usually is required in bankruptcy because settlement in a particular matter might drain assets from the estate or diminish prospects for reorganization, thus affecting all creditors in

the bankruptcy case. Given this, there could be facts or issues disclosed in a mediation that the bankruptcy judge might need to know in deciding whether to approve a settlement.

Thirty-one counsel-respondents (3.0%) indicated that confidentiality requirements prevented the bankruptcy judge from learning facts or issues that the judge would have needed to know in deciding whether to approve a settlement of the matter. Twenty-six of the thirty-one counsel-respondents indicated how often the problem occurred. Accounting for duplicates, the number of matters with this problem was reported to be between eighteen and thirty-six. (Tables 9A and 9B.) These matters represent 0.8%–1.7% of all matters handled by counsel who fully answered Questions 2 and 5.²⁷ Looking at the breakdown of the thirty-six matters at the upper bound, twenty-one counsel-respondents indicated that there was one such matter, four said it happened in two matters, and one respondent saw it in seven matters.

Twenty mediator-respondents (4.6%) indicated that confidentiality affected settlement approval. Twenty-six percent answered “can’t say.” Sixteen of the twenty indicated how often the problem occurred. (Tables 9A and 9B.) Eleven respondents identified one such matter, and one respondent each identified two, three, five, six, and seven such matters, for a total of thirty-four matters. These thirty-four matters represent 2.3% of all matters mediated by mediators who fully responded to Questions 18 and 21.²⁸

Table 9A
Confidentiality Affecting Judicial Approval of Settlement
(weighted data)

	Counsel-Respondents		Mediator-Respondents	
	Number of Counsel-Respondents	Percentage of Counsel-Respondents	Number of Mediator-Respondents	Percentage of Mediator-Respondents
Yes	31	3.0%	20	4.6%
No	793	76.8%	299	69.1%
Can't say	209	20.2%	114	26.3%
Total	1,033*	100.0%	433**	100.0%

Note: Data in Table 9A derived from responses to survey Questions 5 and 21.

Question 5 (for counsel-respondents): Did the confidentiality requirements of the mediation process prevent the bankruptcy judge from learning facts or issues that the judge would have needed to know in deciding whether to approve a settlement of the matter that was mediated?

Question 21 (for mediator-respondents): Did the confidentiality requirements of the mediation process prevent the bankruptcy judge from learning facts or issues that the judge would have needed to know in deciding whether to approve a settlement of the matter that was mediated?

* Ten counsel-respondents did not answer Question 5.

**Seven mediator-respondents did not answer Question 21.

27. The actual occurrence rate may be slightly greater or less because five of the thirty-one counsel-respondents did not fill in the number of matters in which the problem occurred. These five were counsel in a total of fifteen matters.

28. The actual occurrence rate may be slightly greater or less than 2.3% because four of the twenty mediator-respondents did not fill in the number of matters in which the problem occurred. These four mediated a total of twelve matters.

Table 9B
Number and Rate of Matters with Confidentiality Affecting Judicial Approval of Settlement

(weighted data)

Counsel-Respondents		Mediator-Respondents	
Number of Matters with Confidentiality Affecting Judicial Approval	Reported Rate of Occurrence in Counsel-Respondent Matters*	Number of Matters with Confidentiality Affecting Judicial Approval	Reported Rate of Occurrence in Mediator-Respondent Matters**
18–36+	0.8%–1.7%	34+	2.3%

Note: Data in Table 9B derived from responses to survey Questions 5 and 21.

Question 5 (for counsel-respondents): Did the confidentiality requirements of the mediation process prevent the bankruptcy judge from learning facts or issues that the judge would have needed to know in deciding whether to approve a settlement of the matter that was mediated?

Question 21 (for mediator-respondents): Did the confidentiality requirements of the mediation process prevent the bankruptcy judge from learning facts or issues that the judge would have needed to know in deciding whether to approve a settlement of the matter that was mediated?

* The denominator in this calculation is the total number of mediated matters handled by counsel who fully answered Questions 2 and 5.

** The denominator in this calculation is the total number of matters mediated by mediators who fully answered Questions 18 and 21.

+ Five of the 31 counsel-respondents identified in Table 9A answered yes to Question 5 but did not identify the number of matters in which the problem occurred. Four of the 20 mediator-respondents identified in Table 9A answered yes to Question 21 but did not identify the number of matters in which the problem occurred.

Ex Parte Contacts Between Mediator and Judge

Question 6 (for counsel-respondents): Were there ex parte contacts between the mediator and the judge that were not authorized by the parties?

Fifteen counsel-respondents (1.4%) identified between eight and seventeen matters where there were unauthorized ex parte contacts between the mediator and the judge. This is an occurrence rate of 0.4%–0.8%. (Tables 10A and 10B.) Looking at the seventeen matters at the upper bound, fourteen counsel-respondents identified one matter and one identified three. Nearly 31% of counsel-respondents answered “can’t say.”

Question 22 (for mediator-respondents): Were there ex parte contacts between you and the judge that were not authorized by the parties?

Three mediator-respondents (0.7%) identified five matters (an occurrence rate of 0.3%) in which there were unauthorized ex parte contacts between the mediator and judge. One respondent said it occurred in one matter and two reported occurrence in two matters. (Tables 10A and 10B.)

Table 10A
Ex Parte Contacts Between Mediator and Judge
 (weighted data)

	Counsel-Respondents		Mediator-Respondents	
	Number of Counsel-Respondents	Percentage of Counsel-Respondents	Number of Mediator-Respondents	Percentage of Mediator-Respondents
Yes	15	1.4%	3	0.7%
No	701	67.7%	430	99.3%
Can't say	319	30.8%	0	0.0%
Total	1,035*	100.0%***	433**	100.0%

Note: Data in Table 10A derived from responses to survey Questions 6 and 22.

Question 6 (for counsel-respondents): Were there ex parte contacts between the mediator and the judge that were not authorized by the parties?

Question 22 (for mediator-respondents): Were there ex parte contacts between you and the judge that were not authorized by the parties?

*Eight counsel-respondents did not answer Question 6.

**Seven mediator-respondents did not answer Question 22.

*** Totals may not add to 100% due to rounding.

Table 10B
Number and Rate of Matters with Ex Parte Contacts Between Mediator and Judge
 (weighted data)

Counsel-Respondents		Mediator-Respondents	
Number of Matters with Ex Parte Contacts Between Mediator and Judge	Rate of Occurrence in Counsel-Respondent Matters*	Number of Matters with Ex Parte Contacts Between Mediator and Judge	Rate of Occurrence in Mediator-Respondent Matters**
8–17	0.4%–0.8%	5	0.3%

Note: Data in Table 10B derived from responses to survey Questions 6 and 22.

Question 6 (for counsel-respondents): Were there ex parte contacts between the mediator and the judge that were not authorized by the parties?

Question 22 (for mediator-respondents): Were there ex parte contacts between you and the judge that were not authorized by the parties?

* The denominator in this calculation is the total number of mediated matters handled by counsel who fully answered Questions 2 and 6.

** The denominator in this calculation is the total number of matters mediated by mediators who fully answered Questions 18 and 22.

Mediators' Failure to Timely Disclose Conflict of Interest

Question 7 (for counsel-respondents): Did the mediator fail to timely disclose a conflict of interest that the mediator had?

Fourteen counsel-respondents (1.4%) reported that the mediator failed to timely disclose a conflict of interest. Twelve of the fourteen indicated the frequency of the problem. Accounting for duplicates, the number of matters with this problem was reported to be between ten and twenty, an occurrence rate of 0.5%–1.0%. (Tables 11A and 11B.) Looking at the twenty matters at the upper

bound, seven counsel-respondents identified one matter, four identified two, and one identified five.²⁹

Question 23 (for mediator-respondents): Did any of the parties to the mediation assert that you failed to timely disclose a conflict of interest that you allegedly had?

One mediator-respondent (0.2%) identified two matters (an occurrence rate of 0.14%) in which a party to the mediation asserted that the mediator failed to timely disclose a conflict of interest. (Tables 11A and 11B.)

Table 11A
Mediators' Failure to Timely Disclose Conflict of Interest

(weighted data)

	Counsel-Respondents		Mediator-Respondents	
	Number of Counsel-Respondents	Percentage of Counsel-Respondents	Number of Mediator-Respondents	Percentage of Mediator-Respondents
Yes	14	1.4%	1	0.2%
No	901	87.1%	430	99.3%
Can't say	119	11.5%	2	0.5%
Total	1,034*	100.0%	433**	100.0%

Note: Data in Table 11A derived from responses to survey Questions 7 and 23.

Question 7 (for counsel-respondents): Did the mediator fail to timely disclose a conflict of interest that the mediator had?

Question 23 (for mediator-respondents): Did any of the parties to the mediation assert that you failed to timely disclose a conflict of interest that you allegedly had?

*Nine counsel-respondents did not answer Question 7.

**Seven mediator-respondents did not answer Question 23.

Table 11B
Number and Rate of Matters with Mediators' Failure to Timely Disclose Conflict of Interest

(weighted data)

Counsel-Respondents		Mediator-Respondents	
Number of Matters with Mediators' Failure to Disclose Conflict of Interest	Rate of Occurrence in Counsel-Respondent Matters*	Number of Matters with Assertion of Mediators' Failure to Disclose Conflict of Interest	Rate of Occurrence in Mediator-Respondent Matters**
10-20+	0.5%-1.0%	2	0.1%

Note: Data in Table 11B derived from responses to survey Questions 7 and 23.

Question 7 (for counsel-respondents): Did the mediator fail to timely disclose a conflict of interest that the mediator had?

Question 23 (for mediator-respondents): Did any of the parties to the mediation assert that you failed to timely disclose a conflict of interest that you allegedly had?

* The denominator in this calculation is the total number of matters handled by counsel who fully answered Questions 2 and 7.

** The denominator in this calculation is the total number of matters mediated by mediators who fully answered Questions 18 and 23.

+ Two of the 14 counsel-respondents in Table 11A answered yes to Question 7 but did not identify the number of matters in which the problem occurred.

29. The actual occurrence rate may be slightly greater or less because two of the fourteen counsel-respondents did not identify the number of matters in which the problem occurred. These two were counsel in a total of four matters.

Mediator Bias or Prejudice

Question 8 (for counsel-respondents): Should the mediator have been disqualified for bias or prejudice?

Thirteen counsel-respondents (1.3%) identified between eight and fifteen matters in which the mediator should have been disqualified for bias or prejudice, an occurrence rate of 0.4%–0.7%. (Tables 12A and 12B.) Looking at the fifteen matters at the upper bound, eleven counsel-respondents identified one matter and two identified two.

Question 24 (for mediator-respondents): Did any of the parties to the mediation assert that you should have been disqualified for bias or prejudice?

Question 24 asked mediator-respondents if any of the parties to the mediation asserted that the mediator should have been disqualified for bias or prejudice. Two mediator-respondents (0.5%) identified one such matter each (an occurrence rate of 0.14%). (Tables 12A and 12B.)

Table 12A
Mediator Bias or Prejudice Problem
(weighted data)

	Counsel-Respondents		Mediator-Respondents	
	Number of Counsel-Respondents	Percentage of Counsel-Respondents	Number of Mediator-Respondents	Percentage of Mediator-Respondents
Yes	13	1.3%	2	0.5%
No	975	94.1%	428	98.8%
Can't say	48	4.6%	3	0.7%
Total	1,036*	100.0%	433**	100.0%

Note: Data in Table 12A derived from responses to survey Questions 8 and 24.

Question 8 (for counsel-respondents): Should the mediator have been disqualified for bias or prejudice?

Question 24 (for mediator-respondents): Did any of the parties to the mediation assert that you should have been disqualified for bias or prejudice?

* Seven counsel-respondents did not answer Question 8.

**Seven mediator-respondents did not answer Question 24.

Table 12B
Number and Rate of Matters with Mediator Bias or Prejudice Problem
(weighted data)

Counsel-Respondents		Mediator-Respondents	
Number of Matters with Mediator Bias or Prejudice Problem	Rate of Occurrence in Counsel-Respondent Matters*	Number of Matters with Assertion of Mediator Bias or Prejudice	Rate of Occurrence in Mediator-Respondent Matters**
8–15	0.4%–0.7%	2	0.1%

Note: Data in Table 12B derived from responses to survey Questions 8 and 24.

Question 8 (for counsel-respondents): Should the mediator have been disqualified for bias or prejudice?

Question 24 (for mediator-respondents): Did any of the parties to the mediation assert that you should have been disqualified for bias or prejudice?

* The denominator in this calculation is the total number of matters handled by counsel who fully answered Questions 2 and 8.

** The denominator in this calculation is the total number of matters mediated by mediators who fully answered Questions 18 and 24.

Mediator Not a “Disinterested Person”

Question 9 (for counsel-respondents):

- a. Are you familiar with the term *disinterested person* as defined in 11 U.S.C. § 101(14)?
- b. Would the mediator have failed to qualify as a *disinterested person* if that standard had applied to the appointment of the mediator?

Forty-one counsel-respondents (4.5%) were familiar with the term “disinterested person”³⁰ and indicated that the mediator would have failed to qualify as a disinterested person if that standard had applied to the appointment of the mediator. Thirty-eight of the forty-one counsel-respondents identified between twenty-four and forty-eight matters in which the mediator would have failed to qualify, an occurrence rate of 1.2%–2.5%. (Tables 13A and 13B.) Looking at the forty-eight matters at the upper bound, thirty-two counsel-respondents identified one matter, two identified two, and four identified three.³¹

One-hundred-eighteen counsel-respondents (11.4% of those responding to Question 9a) indicated that they were unfamiliar with the term “disinterested person.”

30. Disinterested person is a term used in connection with the employment by bankruptcy estates of professionals and trustees in bankruptcy cases. The term is defined in the Bankruptcy Code as follows:

“[D]isinterested person” means person that—

- (A) is not a creditor, an equity security holder, or an insider;
- (B) is not and was not an investment banker for any outstanding security of the debtor;
- (C) has not been, within three years before the date of the filing of the petition, an investment banker for a security of the debtor, or an attorney for such an investment banker in connection with the offer, sale, or issuance of a security of the debtor;
- (D) is not and was not, within two years before the date of the filing of the petition, a director, officer, or employee of the debtor or of an investment banker specified in subparagraph (B) or (C) of this paragraph; and
- (E) does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor or an investment banker specified in subparagraph (B) or (C) of this paragraph, or for any other reason.

11 U.S.C. § 101(14).

Section 327 of the Bankruptcy Code provides that generally “the trustee, with the court’s approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee’s duties under [the Bankruptcy Code].” 11 U.S.C. § 327(a). Generally, local bankruptcy rules on mediation do not require that the mediator be a “disinterested person” pursuant to 11 U.S.C. § 101(14) when a mediator is appointed in a bankruptcy case; however, a few existing rules do provide that a person selected as a mediator may be disqualified if not disinterested under 11 U.S.C. § 101. Instead of the disinterestedness test, most local bankruptcy rules on mediation include provisions covering mediator conflicts of interest and disqualification of mediators for bias.

31. The actual occurrence rate may be slightly greater or less because three of the forty-one counsel-respondents did not identify the number of matters in which the problem occurred. These three were counsel in a total of seven matters.

Question 25 (for mediator-respondents):

- a. Are you familiar with the term *disinterested person* as defined in 11 U.S.C. § 101(14)?
- b. Would you have failed to qualify as a *disinterested person* if that standard had applied to your appointment as mediator?

Nineteen mediator-respondents (4.7%) were familiar with the term “disinterested person” and indicated that they would have failed to qualify as a disinterested person if that standard had applied to their appointment. Fifteen mediator-respondents identified how often such appointments occurred. (Tables 13A and 13B.) Eight identified one such matter, three identified two, two identified three, one identified four, and one identified eight, for a total of thirty-two matters (an occurrence rate of 2.3%).³²

Twenty-two mediator-respondents (5.1% of those responding to Question 25a) indicated that they were unfamiliar with the term “disinterested person.”

Table 13A
Non-Disinterested Mediators
 (weighted data)

	Counsel-Respondents		Mediator-Respondents	
	Number of Counsel-Respondents	Percentage of Counsel-Respondents	Number of Mediator-Respondents	Percentage of Mediator-Respondents
Yes	41	4.5%	19	4.7%
No	809	89.0%	374	93.0%
Can't say	59	6.5%	9	2.2%
Total	909*	100.0%	402**	100.0%***

Note: Data in Table 13A derived from responses to survey Questions 9 and 25.

Question 9 (for counsel-respondents):

- a. Are you familiar with the term *disinterested person* as defined in 11 U.S.C. § 101(14)?
- b. Would the mediator have failed to qualify as a *disinterested person* if that standard had applied to the appointment of the mediator?

Question 25 (for mediator-respondents):

- a. Are you familiar with the term *disinterested person* as defined in 11 U.S.C. § 101(14)?
- b. Would you have failed to qualify as a *disinterested person* if that standard had applied to your appointment as mediator?

* One hundred thirty-four counsel-respondents did not answer Question 9b; 118 of them did not answer because they indicated they were not familiar with the term “disinterested person.”

** Thirty-eight mediator-respondents did not answer Question 25b; 22 of them did not answer because they indicated they were not familiar with the term “disinterested person.”

*** Total may not add to 100% due to rounding.

32. The actual occurrence rate may be slightly greater or less because four of the nineteen mediator-respondents did not identify the number of matters in which the problem occurred. These four mediated a total of eighteen matters.

Table 13B
Number and Rate of Matters with Non-Disinterested Mediators
 (weighted data)

Counsel-Respondents		Mediator-Respondents	
Number of Matters with Non-Disinterested Mediator	Reported Rate of Occurrence in Counsel-Respondent Matters*	Number of Matters with Non-Disinterested Mediator	Reported Rate of Occurrence in Mediator-Respondent Matters**
24-48+	1.2%-2.5%	32+	2.3%

Note: Data in Table 13B derived from responses to survey Questions 9 and 25.

Question 9 (for counsel-respondents):

- Are you familiar with the term disinterested person as defined in 11 U.S.C. § 101(14)?
- Would the mediator have failed to qualify as a disinterested person if that standard had applied to the appointment of the mediator?

Question 25 (for mediator-respondents):

- Are you familiar with the term disinterested person as defined in 11 U.S.C. § 101(14)?
- Would you have failed to qualify as a disinterested person if that standard had applied to your appointment as mediator?

* The denominator in this calculation is the total number of matters handled by counsel who fully answered Questions 2 and 9b.

** The denominator in this calculation is the total number of matters mediated by mediators who fully answered Questions 18 and 25b.

+ Three of the 41 counsel-respondents identified in Table 13A answered yes to Question 9b but did not identify the number of matters in which the problem occurred. Four of the 19 mediator-respondents identified in Table 13A answered yes to Question 25b but did not identify the number of matters in which the problem occurred.

Connections Between Mediator and Judge

Question 10 (for counsel-respondents): If Fed. R. Bankr. P. 5002(b)³³ had applied to the appointment of the mediator, would the appointment have been improper because of connections between the mediator and the presiding judge?

Question 10 asked counsel-respondents if the appointment of the mediator would have been improper if Fed. R. Bankr. P. 5002(b) had applied to the appointment. Approximately 20% of counsel-respondents answered “can’t say.” Nineteen counsel-respondents (1.8%) identified between eighteen and thirty-six matters where the appointment would not have been allowed because of connections between the mediator and presiding judge, an occurrence rate of 0.9%–1.7%. (Tables 14A and 14B.) Looking at the thirty-six matters at the upper bound, twelve counsel-respondents identified one matter, three identified two, two identified three, and one identified twelve matters.

Question 26 (for mediator-respondents): If Fed. R. Bankr. P. 5002(b) had applied to your appointment as mediator, would the appointment have been improper because of connections between you and the presiding judge? (footnote omitted)

One mediator-respondent (0.2%) identified one such matter (an occurrence rate of 0.1%). (Tables 14A and 14B.)

33. Fed. R. Bankr. P. 5002(b) currently provides: “A bankruptcy judge may not approve the appointment of a person as a trustee or examiner pursuant to § 1104 of the Code or approve the employment of a person as an attorney, accountant, appraiser, auctioneer, or other professional person pursuant to §§ 327, 1103, or 1114 of the Code if that person is or has been so connected with such judge or the United States trustee as to render the appointment or employment improper.”

Table 14A
Perceived Rule 5002(b) Connections Between Mediator and Judge
 (weighted data)

	Counsel-Respondents		Mediator-Respondents	
	Number of Counsel-Respondents	Percentage of Counsel-Respondents	Number of Mediator-Respondents	Percentage of Mediator-Respondents
Yes	19	1.8%	1	0.2%
No	808	78.0%	428	98.8%
Can't say	209	20.2%	4	0.9%
Total	1,036*	100.0%	433**	100.0%***

Note: Data in Table 14A derived from responses to survey Questions 10 and 26.

Question 10 (for counsel-respondents): If Fed. R. Bankr. P. 5002(b) had applied to the appointment of the mediator, would the appointment have been improper because of connections between the mediator and the presiding judge?

Question 26 (for mediator-respondents): If Fed. R. Bankr. P. 5002(b) had applied to your appointment as mediator, would the appointment have been improper because of connections between you and the presiding judge?

* Seven counsel-respondents did not answer Question 10.

**Seven mediator-respondents did not answer Question 26.

*** Total may not add to 100% due to rounding.

Table 14B
Number and Rate of Matters with Perceived Connections Between Mediator and Judge
 (weighted data)

Counsel-Respondents		Mediator-Respondents	
Number of Matters with Perceived Connections	Rate of Occurrence in Counsel-Respondent Matters*	Number of Matters with Perceived Connections	Rate of Occurrence in Mediator-Respondent Matters**
18–36	0.9%–1.7%	1	0.1%

Note: Data in Table 14B derived from responses to survey Questions 10 and 26.

Question 10 (for counsel-respondents): If Fed. R. Bankr. P. 5002(b) had applied to the appointment of the mediator, would the appointment have been improper because of connections between the mediator and the presiding judge?

Question 26 (for mediator-respondents): If Fed. R. Bankr. P. 5002(b) had applied to your appointment as mediator, would the appointment have been improper because of connections between you and the presiding judge?

* The denominator in this calculation is the total number of matters handled by counsel who fully answered Questions 2 and 10.

** The denominator in this calculation is the total number of matters mediated by mediators who fully answered Questions 18 and 26.

Connections Between Mediator and U.S. Trustee

Question 11 (for counsel-respondents): If Fed. R. Bankr. P. 5002(b)³⁴ had applied to the appointment of the mediator, would the appointment have been improper because of connections between the mediator and the U.S. trustee?

Nineteen counsel-respondents (1.8%) indicated that the appointment of the mediator would have been improper because of connections between the mediator and the U.S. trustee if Fed. R. Bankr. P. 5002(b) had applied to the appointment. Approximately one-fourth of counsel-respondents answered “can’t say.” Eighteen of the nineteen identified between eleven and twenty-two matters where the appointment would not have been allowed, an occurrence rate of 0.5%–1.1%.

34. See *supra* note 33 for text of Rule 5002(b).

(Tables 15A and 15B.) Looking at the twenty-two matters at the upper bound, fourteen counsel-respondents identified one matter and four identified two.³⁵

Question 27 (for mediator-respondents): If Fed. R. Bankr. P. 5002(b) had applied to your appointment as mediator, would the appointment have been improper because of connections between you and the U.S. trustee? (footnote omitted)

Three mediator-respondents (0.7%) identified a total of five matters (an occurrence rate of 0.3%) where their appointment would have been improper under the standard of Fed. R. Bankr. P 5002(b). (Tables 15A and 15B.) One respondent identified one matter and two identified two matters.

Table 15A
Perceived Connections Between Mediator and U.S. Trustee
(weighted data)

	Counsel-Respondents		Mediator-Respondents	
	Number of Counsel-Respondents	Percentage of Counsel-Respondents	Number of Mediator-Respondents	Percentage of Mediator-Respondents
Yes	19	1.8%	3	0.7%
No	761	73.5%	424	97.9%
Can't say	255	24.6%	6	1.4%
Total	1,035*	100.0%***	433**	100.0%

Note: Data in Table 15A derived from responses to survey Questions 11 and 27.

Question 11 (for counsel-respondents): If Fed. R. Bankr. P. 5002(b) had applied to the appointment of the mediator, would the appointment have been improper because of connections between the mediator and the U.S. trustee?

Question 27 (for mediator-respondents): If Fed. R. Bankr. P. 5002(b) had applied to your appointment as mediator, would the appointment have been improper because of connections between you and the U.S. trustee?

* Eight counsel-respondents did not answer Question 11.

**Seven mediator-respondents did not answer Question 27.

*** Total may not add to 100% due to rounding.

Table 15B
Number and Rate of Matters with Perceived Connections between Mediator and U.S. Trustee
(weighted data)

Counsel-Respondents		Mediator-Respondents	
Number of Matters with Perceived Connections	Rate of Occurrence in Counsel-Respondent Matters*	Number of Matters with Perceived Connections	Rate of Occurrence in Mediator-Respondent Matters**
11-22+	0.5%-1.1%	5	0.3%

Note: Data in Table 15B derived from responses to survey Questions 11 and 27.

Question 11 (for counsel-respondents): If Fed. R. Bankr. P. 5002(b) had applied to the appointment of the mediator, would the appointment have been improper because of connections between the mediator and the U.S. trustee?

Question 27 (for mediator-respondents): If Fed. R. Bankr. P. 5002(b) had applied to your appointment as mediator, would the appointment have been improper because of connections between you and the U.S. trustee?

* The denominator in this calculation is the total number of matters handled by counsel who fully answered Questions 2 and 11.

** The denominator in this calculation is the total number of matters mediated by mediators who fully answered Questions 18 and 27.

+ One of the 19 counsel-respondents identified in Table 15A answered yes to Question 11 but did not identify the number of matters in which the problem occurred.

35. The actual occurrence rate may be slightly greater or less because one of the nineteen counsel-respondents did not fill in the number of matters in which the problem occurred. This one respondent was counsel in a total of ten matters.

Survey Results: Other Issues Identified

The survey also inquired about several other issues of interest to the committee. The discussion and tables below describe the responses given by counsel and mediators.

As discussed above, more than one counsel-respondent may be reporting on the same matter or issue. As before, we will present a lower bound (which is 50% of the number of matters reported by counsel-respondents) and an upper bound (which is the total number of matters reported by counsel-respondents).

For each yes answer given by a respondent, the questionnaire also asked the respondent to explain the circumstances and how the situation was handled. A summary of these explanations and general comments are provided in Appendix 3.

Sua Sponte Referrals to Mediation

Question 12 (for counsel-respondents): Did a bankruptcy judge refer any matter to mediation without a request from a party?

As described above, 1,043 respondents identified themselves as counsel representing parties in mediation. Three hundred fifty-three of these counsel-respondents (34.0%) indicated that a bankruptcy judge referred at least one matter to mediation without a request from a party. Three hundred thirty-nine of the 353 identified between 236 and 472 matters with sua sponte referral (accounting for duplicates). (Tables 16A and 16B.) These matters represent 11.6%–23.3% of all mediated matters handled by counsel who fully responded to Questions 2 and 12. Looking at the breakdown of the 472 matters at the upper bound, 259 counsel-respondents identified one matter, fifty-seven identified two, fifteen identified three, six identified from four to eight matters, and two identified ten.³⁶

Table 16C shows a listing of the eighteen courts in the study and the rate of occurrence of sua sponte referral in each district. The table also identifies which courts specifically authorize sua sponte referral in their local ADR rules, general orders, or guidelines. Seventy-two percent of the eighteen courts in the survey included such authorization as of mid-1997. From the data in Table 16C, there is no evident relationship between rates of sua sponte referral and local rule provisions specifically authorizing sua sponte referral.

36. The actual occurrence rate may be greater or less because fourteen of the 353 counsel-respondents did not fill in the number of matters in which sua sponte referral occurred. These fourteen respondents were counsel in a total of seventy-four matters.

Table 16A
Sua Sponte Referrals to Mediation
 (weighted data)

	Counsel-Respondents	
	Number of Counsel-Respondents	Percentage of Counsel-Respondents
Yes	353	34.0%
No	656	63.2%
Can't say	29	2.8%
Total	1,038*	100.0%

Note: Data in Table 16A derived from responses to survey Question 12.

Question 12 (for counsel-respondents): Did a bankruptcy judge refer any matter to mediation without a request from a party?

*Five counsel-respondents did not answer Question 12.

Table 16B
Number and Rate of Matters with Sua Sponte Referral
 (weighted data)

Number of Matters with Sua Sponte Referral	Counsel-Respondents	
	Rate of Occurrence in Counsel-Respondent Matters*	
236-472+	11.6%-23.3%	

Note: Data in Table 16B derived from responses to survey Question 12.

Question 12 (for counsel-respondents): Did a bankruptcy judge refer any matter to mediation without a request from a party?

* The denominator in this calculation is the total number of mediated matters handled by counsel who fully answered Questions 2 and 12.

+ Fourteen of the 353 counsel-respondents identified in Table 16A answered yes to Question 12 but did not identify the number of matters in which the a sua sponte referral occurred.

Table 16C
Rate of Sua Sponte Referral Compared to Local Rule Authorization for Sua Sponte Referral

(N = 1,043) (weighted data)

Bankruptcy Courts in the Survey	Specific Provision in Local Rule for Sua Sponte Referral	Rate of Occurrence of Sua Sponte Referral
1.*	yes	30.0%–60.0%
2.*	no	27.8%–55.6%
3.	yes	20.2%–40.4%
4.	yes	20.0%–40.0%
5.	yes	17.1%–34.2%
6.	yes	13.1%–26.2%
7.	yes	8.6%–17.1%
8.*	yes	8.4%–16.7%
9.*	no	8.4%–16.7%
10.	yes	7.8%–15.6%
11.	no	7.4%–14.9%
12.	yes	5.6%–11.2%
13.	yes	4.8%–9.5%
14.	yes	3.4%–6.8%
15.	yes	2.2%–4.3%
16.*	yes	N/A
17.*	no	N/A
18.*	no	N/A
All Districts in Survey		11.6%–23.3%

* Counsel-respondents identified 30 or fewer matters referred to mediation.

N/A—Counsel-respondents identified no sua sponte referrals.

Referrals over Objection of a Party

Question 13 (for counsel-respondents): Did a bankruptcy judge refer any matter to mediation over the objection of a party?

Eighty-eight counsel-respondents (8.5%) indicated that a bankruptcy judge referred at least one matter to mediation over the objection of a party. Eighty-four of the eighty-eight identified between 68 and 137 matters with such referral. (Tables 17A and 17B.) These matters represent 3.3%–6.6% of all mediated matters handled by counsel who fully responded to Questions 2 and 13. Looking at the breakdown of the 137 matters at the upper bound, seventy-one counsel-respondents identified one matter, four identified two, six identified from three to six, and three identified ten.³⁷

37. The actual occurrence rate may be slightly greater or less because four of the eighty-eight counsel-respondents did not fill in the number of matters in which referral occurred over party objection. These four respondents were counsel in a total of ten matters.

Table 17A
Referrals over Objection of a Party
 (weighted data)

	Counsel-Respondents	
	Number of Counsel-Respondents	Percentage of Counsel-Respondents
Yes	88	8.5%
No	929	89.7%
Can't say	19	1.8%
Total	1,036*	100.0%

Note: Data in Table 17A derived from responses to survey Question 13.

Question 13 (for counsel-respondents): Did a bankruptcy judge refer any matter to mediation over the objection of a party?

*Seven counsel-respondents did not answer Question 13.

Table 17B
Number and Rate of Matters Referred over Party Objection
 (weighted data)

Number of Matters Referred over Party Objection	Counsel-Respondents	
	Rate of Occurrence in Counsel-Respondent Matters*	
68–137+	3.3%–6.6%	

Note: Data in Table 17B derived from responses to survey Question 13.

Question 13 (for counsel-respondents): Did a bankruptcy judge refer any matter to mediation over the objection of a party?

* The denominator in this calculation is the total number of mediated matters handled by counsel who fully answered Questions 2 and 13.

+ Four of the 88 counsel-respondents identified in Table 17A answered yes to Question 13 but did not identify the number of matters in which the referral occurred over a party's objection.

Mediator's Fee Paid by Bankruptcy Estate

Question 14a (for counsel-respondents): Did the bankruptcy estate pay any portion of the mediator's fee?

Two hundred thirty-seven counsel-respondents (22.8%) indicated that the bankruptcy estate paid a portion of the mediator's fee. Two hundred twenty-five of the 237 identified between 210 and 420 such matters. (Tables 18A and 18B.) These matters represent 10.2%–20.3% of all mediated matters handled by counsel who fully responded to Questions 2 and 14a. Looking at the breakdown of the 420 matters at the upper bound, 141 counsel-respondents identified one matter, forty-five identified two, twenty-one identified three, fourteen identified from four to six, and four identified from ten to twenty-five.³⁸

38. The actual occurrence rate may be greater or less because twelve of the 237 counsel-respondents did not fill in the number of matters in which the bankruptcy estate paid the mediator's fee. These twelve respondents were counsel in a total of thirty-nine matters.

Question 29a (for mediator-respondents): Did the bankruptcy estate pay any portion of your fee?

Of the 433 mediator-respondents who answered Question 29a, eighty-nine (20.5%) indicated that the bankruptcy estate paid a portion of their fee. Eighty-five of the eighty-nine identified 276 such matters. (Tables 18A and 18B.) These matters represent 19.0% of all mediated matters handled by mediators who fully responded to Questions 18 and 29a. Looking at the breakdown of the 276 matters, forty-four mediator-respondents identified one matter, fourteen identified two, eight identified three, thirteen identified four to nine matters, and six identified ten to thirty-five.³⁹

Table 18A
Mediator’s Fee Paid by Bankruptcy Estate
(weighted data)

	Counsel-Respondents		Mediator-Respondents	
	Number of Counsel-Respondents	Percentage of Counsel-Respondents	Number of Mediator-Respondents	Percentage of Mediator-Respondents
Yes	237	22.8%	89	20.5%
No	618	59.6%	338	78.1%
Can’t say	182	17.6%	6	1.4%
Total	1,037*	100.0%	433**	100.0%

Note: Data in Table 18A derived from responses to survey Questions 14a and 29a.
Question 14a (for counsel-respondents): Did the bankruptcy estate pay any portion of the mediator’s fee?
Question 29a (for mediator-respondents): Did the bankruptcy estate pay any portion of your fee?
* Six counsel-respondents did not answer Question 14a.
** Seven mediator-respondents did not answer Question 29a.

Table 18B
Number and Rate of Matters with Mediator Paid by Bankruptcy Estate
(weighted data)

Counsel-Respondents		Mediator-Respondents	
Number of Matters with Mediator Paid by Estate	Rate of Occurrence in Counsel-Respondent Matters*	Number of Matters with Mediator Paid by Estate	Rate of Occurrence in Mediator-Respondent Matters**
210–420+	10.2%–20.3%	276+	19.0%

Note: Data in Table 18B derived from responses to survey Questions 14a and 29a.
Question 14a (for counsel-respondents): Did the bankruptcy estate pay any portion of the mediator’s fee?
Question 29a (for mediator-respondents): Did the bankruptcy estate pay any portion of your fee?
* The denominator in this calculation is the total number of mediated matters handled by counsel who fully answered Questions 2 and 14a.
** The denominator in this calculation is the total number of mediated matters handled by mediators who fully answered Questions 18 and 29a.
+ Twelve of the 237 counsel-respondents identified in Table 18A answered yes to Question 14a but did not identify the number of matters in which the mediator was paid by the estate. Four of the 89 mediator-respondents identified in Table 18A answered yes to Question 29a but did not identify the number of matters in which the mediator was paid by the estate.

39. The actual occurrence rate may be slightly greater or less because four of the eighty-nine mediator-respondents did not fill in the number of matters in which the bankruptcy estate paid the mediator’s fee. These four respondents were counsel in a total of twenty-six matters.

Mediator Role in Formulating Reorganization

Question 28 (for mediator-respondents): In your role as mediator, did you formulate a plan of reorganization or facilitate negotiations regarding a plan of reorganization?

Eighty-two mediator-respondents (18.9%) indicated that they formulated a plan of reorganization or facilitated negotiations regarding a plan of reorganization. Seventy-seven of the eighty-two identified 138 such matters. (Tables 19A and 19B.) These matters represent 9.4% of all mediated matters handled by mediators who fully responded to Questions 2 and 28. Looking at the breakdown of the 138 matters, fifty-three mediator-respondents identified one matter, sixteen identified two, five identified from three to nine, one identified ten, and one identified fifteen.⁴⁰

Table 19A
Mediator Role in Formulating Plan of Reorganization
 (weighted data)

	Mediator-Respondents	
	Number of Mediator-Respondents	Percentage of Mediator-Respondents
Yes	82	18.9%
No	349	80.6%
Can't say	2	0.5%
Total	433*	100.0%

Note: Data in Table 19A derived from responses to survey Question 28.
 Question 28 (for mediator-respondents): In your role as mediator, did you formulate a plan of reorganization or facilitate negotiations regarding a plan of reorganization?
 *Seven mediator-respondents did not answer Question 28.

Table 19B
Number and Rate of Matters with Mediator Role in Formulating Plan
 (weighted data)

Number of Matters with Mediator Role in Plan Formulation	Mediator Respondents
	Rate of Occurrence in Mediator-Respondent Matters*
138+	9.4%

Note: Data in Table 19B derived from responses to survey Question 28.
 Question 28 (for mediator-respondents): In your role as mediator, did you formulate a plan of reorganization or facilitate negotiations regarding a plan of reorganization?
 * The denominator in this calculation is the total number of mediated matters handled by mediators who fully answered Questions 18 and 28.
 + Five of the 82 mediator-respondents identified in Table 19A answered yes to Question 28 but did not identify the number of matters in which the mediator played a role in plan formulation.

40. The actual occurrence rate may be slightly greater or less because five of the eighty-two mediator-respondents did not identify the number of matters in which the mediator played a role in formulating a plan of reorganization. These five mediated a total of twenty-two matters.

Potential Issues for Committee Consideration

As one looks at these data, several questions come to mind. First, are observed or perceived problems in mediation of little significance because they occur infrequently? Second, are some observed or perceived problems so serious in nature that any occurrence of the problem, even though infrequent, warrants attention? Third, are these matters best addressed by national rules, or should they be left to local rules?

Appendix 1
Questionnaire

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THE FEDERAL JUDICIAL CENTER
THURGOOD MARSHALL FEDERAL JUDICIARY BUILDING
ONE COLUMBUS CIRCLE, N.E.
WASHINGTON, DC 20002-8003

RYA W. ZOBEL
DIRECTOR

TEL.: 202-273-4160
FAX: 202-273-4019

July 10, 1997

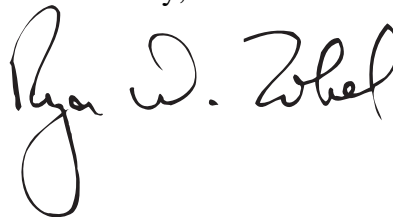
Dear _____:

The Judicial Conference's Advisory Committee on Bankruptcy Rules has received a suggestion that it consider the need to amend the Federal Rules of Bankruptcy Procedure with respect to mediation in bankruptcy courts. At the request of the committee, we are seeking input from practitioners who might have participated in the mediation of one or more bankruptcy matters.

I am writing to ask you to help in this effort. Please complete the enclosed questionnaire even if you did not participate in such a mediation. Given that only a small sample of practitioners will receive this questionnaire, your response is very important.

Please return the questionnaire by July 31, 1997, in the envelope provided. If you have any questions, call Bob Niemic, Project Director, at (202) 273-4070.

Sincerely,



Rya W. Zobel
U.S. District Judge
District of Massachusetts

Enclosures

NATIONAL SURVEY ON MEDIATION IN BANKRUPTCY: QUESTIONNAIRE FOR MEDIATION PARTICIPANTS

For the Advisory Committee on Bankruptcy Rules
of the Judicial Conference of the United States

Designed and administered by the Federal Judicial Center



Instructions

Purpose of This Questionnaire

This questionnaire seeks your views on mediation in bankruptcy cases. The Federal Judicial Center, an independent research and education agency within the federal judiciary, developed the questionnaire at the request of the Judicial Conference's Advisory Committee on Bankruptcy Rules. The Judicial Conference is the policymaking body for the federal courts. The committee has not taken a position on the use of mediation in bankruptcy cases. The survey is part of the committee's preliminary look at whether there is a need for national rules to govern mediation.

Definitions

As used in this questionnaire:

Mediation refers to a nonbinding dispute resolution process in which a mediator (an impartial third party other than a bankruptcy judge) facilitates negotiations between parties to a dispute to help them reach settlement.

Matter refers to any motion, contested matter, adversary proceeding, plan formulation, plan negotiation, or other matter in a bankruptcy case.

Confidentiality

Information collected in this survey will be reported in aggregate form only, and no individual respondent will be identified. The code number on the questionnaire will be used only to follow up with those who do not respond.

Answering the Questionnaire

If you need more space to answer any question, please use the "General Comments" section at the end or attach additional sheets of paper. Please give the number of the question you are answering. If you have questions concerning the survey, please call Bob Niemic, Project Director, at (202) 273-4070.

Returning the Questionnaire

Please return the questionnaire in the enclosed envelope.

Questionnaire

1. During the past 36 months, did you participate **as an attorney for a party** in the mediation of any matter referred to mediation by a bankruptcy judge sua sponte or at the request of a party or parties?

Please check *one*: ₁ No-----> **Go to Question 17, page 5.**

₂ Yes

Questions 2-16 are to be answered by those who participated as an attorney for a party.

2. In how many of the matters described in Question 1 did you participate as an attorney for a party?

_____ matters

For Questions 3–14:

“**No**” = did not occur in any matter included in Question 2.

“**Yes**” = occurred in *one or more* of the matters included in Question 2.

“**Can’t say**” = don’t know or can’t answer.

3. During or after the mediation, did the mediator disclose without permission any statements made or materials used in the mediation?

Please check *one*: ₁ No

₂ Yes----->In how many matters? _____

₃ Can’t say

4. During or after the mediation, did any of the parties to the mediation or their counsel disclose without permission any statements made or materials used in the mediation?

Please check *one*: ₁ No

₂ Yes----->In how many matters? _____

₃ Can’t say

5. Did the confidentiality requirements of the mediation process prevent the bankruptcy judge from learning facts or issues that the judge would have needed to know in deciding whether to approve a settlement of the matter that was mediated?

Please check *one*: ₁ No
₂ Yes----->In how many matters? _____
₃ Can't say

6. Were there ex parte contacts between the mediator and the judge that were not authorized by the parties?

Please check *one*: ₁ No
₂ Yes----->In how many matters? _____
₃ Can't say

7. Did the mediator fail to timely disclose a conflict of interest that the mediator had?

Please check *one*: ₁ No
₂ Yes----->In how many matters? _____
₃ Can't say

8. Should the mediator have been disqualified for bias or prejudice?

Please check *one*: ₁ No
₂ Yes----->In how many matters? _____
₃ Can't say

9. a. Are you familiar with the term *disinterested person* as defined in 11 U.S.C. § 101(14)?

Please check *one*: ₁ No----->**Go to Question 10**
₂ Yes

- b. Would the mediator have failed to qualify as a *disinterested person* if that standard had applied to the appointment of the mediator?

Please check *one*: ₁ No
₂ Yes----->In how many matters? _____
₃ Can't say

10. If Fed. R. Bankr. P. 5002(b)* had applied to the appointment of the mediator, would the appointment have been improper because of connections between the mediator and the *presiding judge*?

- Please check *one*: ₁ No
₂ Yes----->In how many matters? _____
₃ Can't say

11. If Fed. R. Bankr. P. 5002(b) had applied to the appointment of the mediator, would the appointment have been improper because of connections between the mediator and the *U.S. trustee*?

- Please check *one*: ₁ No
₂ Yes----->In how many matters? _____
₃ Can't say

12. Did a bankruptcy judge refer any matter to mediation without a request from a party?

- Please check *one*: ₁ No
₂ Yes----->In how many matters? _____
₃ Can't say

13. Did a bankruptcy judge refer any matter to mediation over the objection of a party?

- Please check *one*: ₁ No
₂ Yes----->In how many matters? _____
₃ Can't say

14. a. Did the bankruptcy estate pay any portion of the mediator's fee?

- Please check *one*: ₁ No-----> **Go to Question 15**
₂ Yes----->In how many matters? _____
₃ Can't say

b. In how many of the matters identified in Question 14.a was the debtor one of the parties at the mediation?

_____ matters

* Fed. R. Bankr. P. 5002(b) currently provides:

A bankruptcy judge may not approve the appointment of a person as a trustee or examiner pursuant to § 1104 of the Code or approve the employment of a person as an attorney, accountant, appraiser, auctioneer, or other professional person pursuant to §§ 327, 1103, or 1114 of the Code if that person is or has been so connected with such judge or the United States trustee as to render the appointment or employment improper.

15. For each “yes” answer you gave in Questions 3–14, please explain the circumstances and how the situation was handled, if applicable. Please give the question number with each explanation. **Otherwise, go to Question 16.**

16. a. In any of the bankruptcy matters in which you participated, do you know of any problems not identified above that occurred with respect to mediation?

Please check *one*: ₁ No-----> **Go to Question 17**

₂ Yes

b. Please identify the problem(s) and in how many matters they occurred:

17. During the past 36 months, did you participate **as a mediator** in any matter referred to mediation by a bankruptcy judge sua sponte or at the request of a party or parties?

Please check *one*: ₁ No-----> **Go to Question 32, page 9.**

₂ Yes

Questions 18-31 are to be answered by those who participated as a mediator.

18. In how many of the matters described in Question 17 did you participate as a mediator?

_____ matters

For Questions 19–29:

“**No**” = did not occur in any matter included in Question 18.

“**Yes**” = occurred in *one or more* of the matters included in Question 18.

“**Can’t say**” = don’t know or can’t answer.

19. Did any of the parties to the mediation assert that, during or after the mediation, you disclosed without permission any statements made or materials used in the mediation?

Please check *one*: ₁ No

₂ Yes----->In how many matters? _____

₃ Can’t say

20. During or after the mediation, did any of the parties to the mediation or their counsel disclose without permission any statements made or materials used in the mediation?

Please check *one*: ₁ No

₂ Yes----->In how many matters? _____

₃ Can’t say

21. Did the confidentiality requirements of the mediation process prevent the bankruptcy judge from learning facts or issues that the judge would have needed to know in deciding whether to approve a settlement of the matter that was mediated?

Please check *one*: ₁ No

₂ Yes----->In how many matters? _____

₃ Can’t say

22. Were there ex parte contacts between you and the judge that were not authorized by the parties?

- Please check *one*: ₁ No
₂ Yes----->In how many matters? _____
₃ Can't say

23. Did any of the parties to the mediation assert that you failed to timely disclose a conflict of interest that you allegedly had?

- Please check *one*: ₁ No
₂ Yes----->In how many matters? _____
₃ Can't say

24. Did any of the parties to the mediation assert that you should have been disqualified for bias or prejudice?

- Please check *one*: ₁ No
₂ Yes----->In how many matters? _____
₃ Can't say

25. a. Are you familiar with the term *disinterested person* as defined in 11 U.S.C. § 101(14)?

- Please check *one*: ₁ No----->**Go to Question 26**
₂ Yes

b. Would you have failed to qualify as a *disinterested person* if that standard had applied to your appointment as mediator?

- Please check *one*: ₁ No
₂ Yes----->In how many matters? _____
₃ Can't say

26. If Fed. R. Bankr. P. 5002(b)* had applied to your appointment as mediator, would the appointment have been improper because of connections between you and the *presiding judge*?

- Please check *one*: ₁ No
₂ Yes----->In how many matters? _____
₃ Can't say

27. If Fed. R. Bankr. P. 5002(b) had applied to your appointment as mediator, would the appointment have been improper because of connections between you and the *U.S. trustee*?

- Please check *one*: ₁ No
₂ Yes----->In how many matters? _____
₃ Can't say

28. In your role as mediator, did you formulate a plan of reorganization or facilitate negotiations regarding a plan of reorganization?

- Please check *one*: ₁ No
₂ Yes----->In how many matters? _____
₃ Can't say

29. a. Did the bankruptcy estate pay any portion of your fee?

- Please check *one*: ₁ No-----> **Go to Question 30**
₂ Yes----->In how many matters? _____
₃ Can't say

b. In how many of the matters identified in Question 29.a was the debtor one of the parties at the mediation?

_____ matters

* Fed. R. Bankr. P. 5002(b) currently provides:

A bankruptcy judge may not approve the appointment of a person as a trustee or examiner pursuant to § 1104 of the Code or approve the employment of a person as an attorney, accountant, appraiser, auctioneer, or other professional person pursuant to §§ 327, 1103, or 1114 of the Code if that person is or has been so connected with such judge or the United States trustee as to render the appointment or employment improper.

30. For each “yes” answer you gave in Questions 19–29, please explain the circumstances and how the situation was handled, if applicable. Please give the question number with each explanation. **Otherwise, go to Question 31.**

31. a. In any of the bankruptcy matters in which you participated, do you know of any problems not identified above that occurred with respect to mediation?

Please check *one*: ₁ No-----> **Go to Question 32**

₂ Yes

b. Please identify the problem(s) and in how many matters they occurred:

32. Please identify each area that has accounted for 20% or more of your entire practice over the past three years.

Please check *all that apply*:

- ₁ Representing creditors in consumer bankruptcy cases
- ₂ Representing debtors in consumer bankruptcy cases
- ₃ Representing creditors in business bankruptcy cases
- ₄ Representing debtors in business bankruptcy cases
- ₅ Serving as an attorney for bankruptcy trustees (specify chapter(s): _____)
- ₆ Serving as a bankruptcy trustee (specify chapter(s): _____)
- ₇ Serving as a mediator
- ₈ Other----->Please specify: _____

33. For how many years have you been working, full or part time, in bankruptcy practice areas?

_____ years

34. May we contact you to discuss your written responses in more detail?

Please check *one*:

₁ No

₂ Yes----->Please provide your name and telephone number:

Name: _____

Phone: (____) _____ - _____

General Comments

Please use the space below to add any comments you think would assist the Advisory Committee on Bankruptcy Rules in its consideration of the need for rules on mediation. (Use the reverse side or additional pages if necessary.)

THANK YOU!

Please return the questionnaire in the enclosed envelope addressed to: Federal Judicial Center (RES), One Columbus Circle, N.E., Washington, DC 20077-0002.

Appendix 2 Methods

As of May 1997, the Center knew of twenty-four bankruptcy courts that had local rules, general orders, or guidelines that governed judicial referral of bankruptcy matters to mediation. These courts are listed below:

Northern District of Alabama	District of Kansas
District of Alaska	Eastern District of Louisiana
Central District of California	Eastern District of Michigan (Southern Division)
Eastern District of California	District of Nebraska
Northern District of California	District of New Jersey
Southern District of California	Southern District of New York
District of Colorado	Eastern District of North Carolina ⁴¹
Middle District of Florida	District of Oregon
Southern District of Florida	Eastern District of Pennsylvania
District of Idaho	Northern District of Texas
Northern District of Illinois	District of Utah
Northern District of Indiana	Eastern District of Virginia (Alexandria Division)

In addition, the Center had learned that the bankruptcy courts for Southern and Western Districts of Texas use district court mediation procedures, but without specific mention in their local bankruptcy rules.

We believe these twenty-six courts² represent all of the bankruptcy courts that had rules, orders, or guidelines on mediation in effect or that have used, with some regularity, district court rules for referral to mediation as of July 10, 1997—that is, the date the questionnaire was mailed.

On May 13, 1997, we asked the clerk in each of these twenty-six bankruptcy courts to provide us with two lists as follows:

- The names and addresses of mediators who mediated one or more mediation sessions in one or more matters over the past three years. (The courts were asked to include mediated matters where all parties were represented by counsel as well as those where one or more parties appeared pro se/pro per.)

41. The Bankruptcy Administrator's Pilot Mediation Program was in existence during the survey period. Subsequently, effective Oct. 1, 1997, the court adopted a local rule on mediated settlement conferences.

42. Five courts that currently have mediation programs were not included in the survey because the programs were not fully or formally operational as of May 1997. Effective Aug. 1, 1997, the Bankruptcy Court for the District of Massachusetts adopted a local rule on mediation. Effective Aug. 13, 1997, the Bankruptcy Court for the Western District of Pennsylvania adopted a general order on mediation. Effective Dec. 1, 1996, the Bankruptcy Court for the Northern Tier of the Middle District of Pennsylvania adopted a Bankruptcy Practice Order on mediation; however, no roster of mediators was established as of May 1997. In addition, the Bankruptcy Courts for the Northern District of Ohio and the Northern District of Oklahoma recently began referring cases to mediation using a procedure similar to that used in their district courts, although a local bankruptcy rule on mediation has not yet been issued.

- The names and addresses of counsel who represented a party or parties in one or more mediation sessions in one or more bankruptcy matters over the past three years. (The courts were asked to exclude, if possible, any pro se/pro per parties, other than those who are themselves attorneys.)

As of May 30, 1997, six of the twenty-six courts reported that no mediations had occurred pursuant to their local rules and therefore these courts did not provide lists. These courts are Alaska, Idaho,⁴³ Illinois Northern, Louisiana Eastern, Michigan Eastern (Southern Division), and North Carolina Eastern. All but one of these programs (North Carolina Eastern's Bankruptcy Administrator Pilot Mediation Program) were adopted within the past one or two years.

The clerks of the bankruptcy courts for the District of Colorado and the Northern District of Texas informed us that those courts do not maintain any information on matters referred to mediation.

Eighteen of the twenty-six courts provided us with lists. The list provided by the Northern District of Alabama, however, includes only counsel who represented parties in matters referred to mediation. The court could not provide a list of mediators.

In two of the eighteen districts, the clerk of court was not able to provide us with the names of all counsel who represented parties in mediated matters during the relevant three year period. First, the Eastern District of Pennsylvania could not readily identify the names of counsel who represented parties in matters referred to mediation. Instead, the court gave us a list of the 311 matters (with main case and adversary proceeding numbers) referred to mediation by the court over the relevant three year period. Center staff extracted counsel names for these cases and proceedings from the court-maintained database called Public Access to Court Electronic Records (PACER). This method most likely included some counsel who were involved in these cases but who did not represent a party in a matter referred to mediation. For contested matters, this method would not provide the names of counsel who represented a party unless that attorney was counsel in the case-in-chief, because PACER does not maintain counsel of record information for contested matters. After these searches for counsel names, case-identifiable information was not associated with the mailing or receipt of questionnaires nor was it, or will it be, used for the review of responses or survey data.

Second, the Southern District of New York was able to provide a list of all mediators who participated in mediations and, for most matters, the names of counsel that appeared on service lists attached to the orders appointing the mediators. However, there were no service lists available for twelve cases. In a process similar to that used for the Eastern District of Pennsylvania, Center staff extracted counsel names for these twelve cases and proceedings from PACER. As for the Eastern District of Pennsylvania, case-identifiable information was not linked during the questionnaire and data analysis processes and, as with all questionnaires in the survey, the confidentiality of all respondents and responses has been and will be preserved.

43. One adversary proceeding, referred to mediation, settled before the scheduled mediation.

The questionnaire was sent to a 100% sample of the names on the counsel and mediator lists for all but one of the eighteen bankruptcy courts listed above. See Table 3 for the number of questionnaires sent by district. Because of the large number of matters referred to mediation in the Central District of California, we selected a random sample of 50% of the practitioners in that district. Data contained in this report for that district has been weighted up by a factor of two, in order to account for the 50% sample.

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Appendix 3

Summary of Respondent Comments

Summary of General Comments

(Counsel and Mediator Respondents' Comments Given at the End of the Questionnaire)

1. Mediation has disadvantages ($N = 32$)
2. Mediation has benefits—generally ($N = 84$)
3. Mediation in my district works well ($N = 19$)
4. More mediation should be encouraged ($N = 15$)
5. Mediation saves clients' money and the court's time ($N = 14$)
6. Mediation is appropriate for bankruptcy matters ($N = 8$)
7. Leave national rules alone—generally ($N = 17$)
8. Make rule changes—generally ($N = 28$)
9. Do not make mediation mandatory ($N = 14$)
10. Make mediation mandatory ($N = 10$)
11. Make improvements to the mediation process—generally ($N = 30$)
12. Mediators should be paid ($N = 14$)
13. Mediators should serve voluntarily ($N = 3$)
14. Improve the appointment of mediators ($N = 8$)
15. Provide more mediator training ($N = 8$)
16. Mediator professionalism should be maintained at a high level ($N = 7$)

Summary of Responses to Question 16b

(Counsel-Respondents' Identification of Problems Not Identified in Questions 3–15)

1. Mediation has disadvantages ($N = 24$)
2. Mediation has benefits—generally ($N = 5$)
3. Mediation saves clients' money and the court's time ($N = 1$)
4. Make rule changes—generally ($N = 4$)
5. Do not make mediation mandatory ($N = 1$)
6. Make improvements to the mediation process—generally ($N = 1$)
7. Mediators should be paid ($N = 5$)
8. Mediators should serve voluntarily ($N = 1$)
9. Improve the appointment of mediators ($N = 3$)
10. Provide more mediator training ($N = 9$)
11. Mediator professionalism should be maintained at a high level ($N = 8$)

Summary of Responses to Question 31b

(Mediator-Respondents' Identification of Problems Not Identified in Questions 19–30)

1. Mediation has disadvantages ($N = 7$)
2. Mediation has benefits—generally ($N = 2$)
3. Make rule changes—generally ($N = 6$)
4. Make improvements to the mediation process—generally ($N = 33$)
5. Mediators should be paid ($N = 3$)

Counsel-Respondents' Explanations of Yes Responses to Questions 3–14
(Excerpts from Representative Responses to Question 15)

Question 3—Mediator Disclosure Problems

My sense is that the mediator consistently has passed information to other parties. My client has no faith in the mediator or the mediation which has now failed.

At one of my mediations, the mediator revealed my confidential assessments to the other side. We eventually settled.

The mediator's report included statements made and material disclosed during mediation.

Question 4—Party Disclosure Problems

In two of three mediations, the items discussed at mediation were routinely discussed before the bankruptcy judge.

Opposing counsel purported to quote, in an oral argument, something that my client had said in mediation.

A pro se (pro per) party had a mental disorder and did not fully understand the confidentiality agreement.

Party attempted to introduce settlement discussion in trial brief.

Disclosed what we had to and nobody objected.

Opposing counsel filed a motion for sanctions against my client in which he made impermissible disclosures.

Question 5—Confidentiality Prevented Judge from Gaining Information for Approval of Settlement

It was explained to the judge that important tradeoffs had been negotiated, at considerable length. The judge specifically asked the debtor to indicate whether he was voluntarily, and with understanding of its consequences, accepting the mediated settlement.

The parties reached a conditional agreement that required the debtor to obtain a new loan. When the debtor could not obtain the loan, the debtor proposed a plan with substantial litigation over the appropriate interest rates. The court held the privilege [mediation confidentiality] extended to all discussions between the debtor and lender concerning interest rates after the mediation since those discussions related to the agreement reached in mediation.

Question 6—Ex Parte Contacts Between Mediator and Judge

The mediator has told me of contacts with the judge. We did not consider it beneficial to take action in response.

Judge disclosed that he had talked to the mediator and that he knew we had been successful. Nothing inappropriate was discussed.

Question 7—Mediator’s Failure to Disclose Conflict of Interest

Party in mediation revealed to counsel that party had consulted with this mediator previously. Mediator denied any recollection.

The first appointed mediator did not disclose that he had a conflict of interest for several weeks (probably five or six weeks). As a result, establishing the scheduled date for mediation was delayed by many weeks because we had to go through the appointment process all over again.

In two cases I agreed and, in fact, requested a specific mediator (local bankruptcy lawyer) whom I knew to be conflicted. I waived the conflict because this is a great mediator. The bankruptcy courts and its practitioners are representatives of a closed society. The best people sometimes have technical conflicts. So what? No one has to settle if they don't want to.

Question 8—Mediator Bias or Prejudice Problems

In both matters, the mediator chose to ignore one of the parties to the mediation and presented that party with a fait accompli. In at least one matter, the fait accompli severely and unfairly impaired the rights of unsecured creditors.

In one case the court appointed an examiner who became the mediator of many disputed issues in the case. This was highly improper. The examiner/mediator said that if a party did not go along with a suggested resolution [the examiner] would make an unfavorable recommendation to the judge.

Mediator was promised appointment as a trustee of emerging . . . [entity] if plan confirmed. Other party . . . determined not to make an issue of that.

The mediator aligned . . . with the trustee because of . . . close ties to the trustee in a former practice.

Question 9(b)—Non-Disinterested Mediator Issue

Mediator had mediated a prior dispute involving some of the parties. Disclosed to parties. Mediation proceeded with consent.

[The] [m]ediator had been in practice with [the] creditor’s attorney. Conflict was disclosed up-front and end result was fair.

[The] [m]ediator had previously participated in case as attorney, as known by all parties.

Attorney for defendants and mediator had very close mutual relationship and knew each other’s approach to matters. Because mediation was not binding, plaintiff went ahead with mediation and adversary action was settled.

[T]he mediator also served as our examiner. No one chose to object to . . . appointment at this time.

Question 10—Perceived Rule 5002(b) Connections Between Mediator and Judge

The mediator is known to be a close friend of the judge. The parties either didn’t care or thought this was a benefit because the mediator could give recalcitrant parties his “read” of what the judge might rule based on his knowledge of the judge.

A case was referred by a bankruptcy judge to his former partner and one of his closest friends. However, I thought the mediator did an excellent job and have no reason to believe there was any improper contact.

[The] mediator used to practice at same firm with [the] judge but now is a solo practitioner.

Connections between mediator and presiding judge were known and disclosed by presiding judge and by mediator. Parties waived or had no problem with relationship.

Question 11—Perceived Rule 5002(b) Connections Between Mediator and U.S. Trustee

The mediator was a former U.S. trustee.

Trustee served as mediator after stipulation by counsel and parties that trustee could act as mediator.

The mediator was on the trustee panel.

Question 12—Sua Sponte Referral

[Judge] strongly suggested mediation and the parties reluctantly concurred. It was a wise suggestion by an able judge.

The bankruptcy judge initiated the mediation sua sponte, without any request from either party. However, both sides agreed to the mediation and it was successful in resolving the matter.

The judge suggested mediation before the parties were about to start a series of depositions. Both parties agreed with court's suggestion.

Bankruptcy judge urged parties to mediate and allowed parties to suggest mediator.

Upon hearing that the parties had been engaging in settlement talks, the bankruptcy judge sent the matter to mediation rather than fix a trial date. However, this was not opposed by either party.

Judge appointed mediator sua sponte from bench in adversary proceeding including claims by debtor-tenant against landlord Had either party not consented to this . . . arrangement, judge would in all likelihood [have] been biased against such party for duration of adversary proceeding.

Case involved [matter type]—Judge felt that mediation would be cheaper and in interest of preserving [the asset] as opposed to litigation.

The bankruptcy judge referred the mediation because he felt the case was “just a matter about money” ripe for mediation. The parties, who tried unsuccessfully for years to settle, reluctantly agreed.

Bankruptcy judges frequently “force” mediation—either by ordering it or putting the parties in an untenable position [so] that they are better off trying mediation.

First notice from the court came with a strong advisory for mediation.

I believe, maybe wrongly, that mediation is mandatory with [judge's name] of the [district]: While helpful in many instances this mediation can often be misleading or coercive particularly if automatic.

The judge sends out a pretrial order directing the parties to file a joint statement of whether they consent to mediation.

Court assigned [case] to mediation without prior request to consent with respect to preference actions. [P]arties, rather than alienating court, merely proceeded with same.

Mandatory mediation of adversary complaint per [court's orders]. If [we] objected, [we] had to give reason why [we did] not want mediation. Case settled prior to mediation hearing.

[Judge] ordered sua sponte that the parties mediate all disputed issues prior to any contested confirmation hearing.

Having the judge insist on mediation before setting it for trial motivated the parties to pursue alternatives to trial.

Opposing counsel advised the judge that mediation would not be productive; the judge twisted the attorney's arm; the resulting mediations settled the cases.

Technically speaking, one makes no "objection" to such a pronouncement from the bench because practitioners, such as myself, appear repeatedly before the same bankruptcy judges representing the same creditors against numerous different debtors on similar causes of action. I have found it to be "politically" unwise to refuse to go to mediation.

Bankruptcy judges in [district] are always referring matters to mediation, whether the parties want it or not.

Our district is aggressive re mediation.

The judge explained the mediation process and [that] they were having very good results.

Cases involving small dollar amount in controversy are routinely referred to mediation by judges so as to free up court resources for more complex cases and those involving greater than \$10,000. This is also beneficial to the parties who save money in attorney fees.

As stated, the judge did not "order"—he "strongly" suggested mediation.

Sua sponte appointment of an "examiner" to serve as a mediator and plan facilitator in connection with [a] dispute.

Bankruptcy judge appointed mediator to facilitate plan discussions. Despite the judge's view to the contrary, we (and other principal parties) felt there was no contribution.

Question 13—Referral Over Party Objection

My client objected to mediation as a delay tactic being used by the opposing counsel. Our objection was overruled and we went through a lengthy, costly, and unsuccessful mediation, which appeared to be a delay tactic after all.

Referred over objection [of] one party. I also had [a] case where [the] judge denied [a] motion to mediate; sustaining objection of trustees.

Three out of four parties supported mediation. The fourth eventually caved in.

Judge directed mediation over objection of parties. Parties selected mediator. One party refused to obtain authority to settle. Case was tried.

We represented a creditor; debtor disputed basis/amount of claim. We felt that mediation would not be useful unless the court decided some legal issues first. The court declined, and the mediation was unsuccessful.

This case could not be resolved in mediation. The court knew that fact from the beginning. We were charged [approximately \$2000] for the mediator to talk for four hours. I told him (mediator) [during] the first hour that it could not be resolved.

Party initially objected; then relented. Mediation not successful.

Mediation ordered even though both sides said they knew it would be unsuccessful.

My recollection is that the debtor filed an objection to the mediation because of the expense and I agreed he could participate at the mediation pro se. The court agreed to this arrangement.

Under [district] rules judge can assign case to mediation without consent of parties. The process proved a waste of time and money since parties had no interest in settlement.

One of the creditors objected to mediation but ultimately caved, and the matter was actually resolved through mediation.

Debtor and plaintiff in adversary proceeding did not want to engage in further settlement discussions. Creditor and defendant did want to engage in such settlement talks and urged the court to order the matter to mediation.

Judge insisted on mediation in a fraud lawsuit brought by chapter 7 trustee against an individual who had entered into a preference settlement with the trustee under false pretenses.

Our district is aggressive regarding mediation.

One party objected but the judge persisted and the process worked well and at minimal cost.

The matter did not resolve and the mediation was aborted due to the bad faith of one party and its counsel.

Question 14—Bankruptcy Estate Paid Mediator's Fee

The debtor paid half of the cost. The debtor was a party.

Each side split costs 50-50.

It has been my experience that the debtor always pays its percentage share of the mediation fees.

The mediator applied for fees.

It seems to me that the estate should always pay for any mediation when it is the primary litigant. No different than court reporters, U.S. trustee, etc.

[In the] first matter, I represented a defendant. The settlement allocated the costs to the estate along with defendant's payment. [In the] second matter, [the] estate agreed to pay its own costs as a party.

Local rules require the parties to split the cost.

Whole fee was paid (full attorney hourly rate) by estate as [an] administrative expense.

[Fee paid] as part of the negotiated mediation agreement.

Debtor in chapter 11 case merely paid funds as an ordinary cost.

In the order referring the parties to mediation, the bankruptcy judge directed that the estate pay the mediator's hourly rate.

We sought court approval to pay the trustee's share of the mediator's fees from the estate.

In one chapter 11, mediator was hired as a professional and paid by the estate.

Payment was approved by the court as part of the mediat[ion] order.

If bankruptcy estate is involved it should pay its share, with approval of court. The judge sometimes limits how much the estate can pay.

Fees were paid from the estate pursuant to a plan that contemplated mediation of multiple similar cases before litigation.

In each case an application to appoint mediator and pay from the estate was filed, noticed to all parties in interest and approved by order of the court.

Mediator-Respondents' Explanations of "Yes" Responses to Questions 19–29
(Excerpts from Representative Responses to Question 30)

Question 19—Parties Asserted Mediator Disclosed Mediation Information

[O]ur local rules build in requirements of 28 U.S.C. 455 for mediators.

Debtor's counsel thought it was inappropriate for me as mediator to invite creditors' committee counsel into the mediation of a dispute between the debtor and a significant creditor. Debtor's counsel stated that my doing so violated the confidentiality of the mediation. Despite these protests, I invited committee counsel into the mediation and, as a result, the dispute settled.

Question 20—Party Disclosure Problems

Counsel utilized disclosures on subsequent motions in the case. Despite my admonishing him not to do so, counsel continued to utilize the disclosed information in subsequent pleadings.

I called [an] instance [of disclosure] to the attention of the court. The subject attorney denied being bound on confidentiality since he represented the creditors' committee which [existed] prior to the mediation. He also forgot having signed a confidentiality order.

Question 21—Confidentiality Prevented Judge from Gaining Information for Approval of Settlement

The parties were willing to admit to holes in their theories and evidence problems that they would not have been required to disclose to the court.

Facts about claimant which would not have come out in trial were discussed and considered.

The debtor in this mediation was only the conduit between the parties in the adversary proceeding. The detail learned in mediation will never fully be exposed in the judicial process.

Question 22—Ex Parte Contacts Alleged Between Mediator and Judge

The bankruptcy judge called me aside one day after learning I was the mediator in the case and let me know he really wanted to see the case settle. The dispute had been going on for several years with one appeal

Question 23—Parties Asserted that Mediator Failed to Disclose Conflict of Interest

One of the parties was a former [contractor] of my firm which the firm had sued When I disclosed this to the parties, the former [contractor] objected to my appointment and an alternate mediator was used.

My office represented a bankruptcy trustee in pending matters in a mediation in which the trustee was a party (in his capacity as trustee). In each case I obtained written waivers as required by local rules and [state] rules of professional conduct.

Question 24—Bias or Prejudice Problem with Mediator

No comments.

Question 25(b)—Non-Disinterested Mediator Issue

In one matter, I had been involved in the bankruptcy case at an earlier point in time as counsel for a major party. My client had subsequently been paid in full and was no longer involved. I disclosed all this to the parties (who had selected [me]) and they felt I was not a problem.

The parties knew the facts and consented.

The court approved me as mediator despite the disinterestedness concern because I had the most knowledge regarding the dispute (disputes related to claims).

In two mediations . . . I was representing a purchaser of [a certain number of] stores. Subsequently (but during the time I was still representing the buyer), I was asked by the parties and the court to conduct the mediations. I obtained waiver from each party.

I disqualified myself with consent of the parties.

Question 26—Perceived Rule 5002(b) Connections Between Mediator and Judge

No comments.

Question 27—Perceived Rule 5002(b) Connections Between Mediator and U.S. Trustee

I am an assistant United States trustee. Both mediations involved dischargeability.

Question 28—Mediator Helped Formulate Reorganization Plan

In mediating a relief from stay on commercial property in a chapter 11, I pointed out some common sense approaches to a plan which had not been obvious to the parties and which resolved many of the contested issues.

I do not believe the issue of referral was ever stated to be the formulation of a plan, but in the process of the mediation, that was determined by the parties to be the ultimate issue.

After efforts to formulate consensual plan with debtor and creditors failed, [I] helped structure creditor proposed plan.

Complex resolution of intellectual property dispute result[ed] in [plan of reorganization] providing debtor license . . . and restructured payment terms.

Case resulted in prenegotiated plan involving mortgage restructuring.

I suggested outline of plan that would minimize conflict of parties and permit debtor to reorganize.

Plan negotiations broke down almost immediately, and the parties walked out.

The issue being mediated involved plan feasibility.

Both situations involved simple plans where there was only one adverse party to debtor. Mediation was used to resolve disputes which allowed a consensual plan to be proposed and confirmed.

In one matter, the dispute was the linchpin to resolving the case. As such, plan issues were involved in the solution.

Question 29—Bankruptcy Estate Paid Mediator Fee

I submitted a fee application, which was approved on shortened notice.

In all my mediations, the parties agree to be jointly liable for the mediator's fees and disbursements and their agreement is embodied in a court order.

Estate paid half of my fee and creditor paid the other half. Court authorized the debtor's payment.

The estate and opposing parties shared my fee in equal shares.

[Fee] paid as expense of administration.

We stipulated, and the court ordered, that the estate would bear one-half of the fee.

The mediation fee was divided equally between the parties and application has been made to the court for payment from the estate's general funds.

There was a standing order permitting the debtor to pay all mediator fees without prior court approval, so long as fees/mediation occurred within certain parameters as part of liquidation.

The chapter 7 trustee was a party to mediation and the estate paid its share of my fee.

[The] court appoints mediator and sets an hourly rate. Mediator applies for compensation, which court must approve. Parties split the mediator's fee.

In each case an application to appoint mediator and pay from the estate was filed, noticed to all parties in interest and approved by order of the court.

Mediation is free in our jurisdiction.

Appendix 4

Possible Second Phase of Survey

After the committee reviews the results contained in this report, it might consider whether it wants the Center to initiate a second phase of the survey. In the second phase, newly designed questionnaires could be sent to all bankruptcy judges, all bankruptcy clerks, selected bankruptcy-related organizations, and a sample of bankruptcy practitioners.⁴⁴ The questionnaires would address any notable specific areas of concern that were identified in the responses to the questionnaires in the first phase. Responses to the second phase questionnaires could also provide specific guidance and views on:

- Whether there is an expressed need for national rules on mediation and,
- If there is,
 - Whether mediation-related provisions should be centralized in one new national rule;
 - Whether mediation-related provisions should be treated as amendments to various existing national rules, with placement of each provision dependent on the subject matter of the provision; or
 - Whether mediation-related provisions should be centralized in one new national rule *and* cross-referenced in the appropriate existing rules.

The Center also could conduct follow-up interviews with certain respondents to the first phase questionnaire who identified major problems in the mediation process and who stated in their answers to Question 34 that they would allow the Center to contact them to discuss their responses in more detail.

44. Those who would receive questionnaires in phase two could be selected in a manner similar to that used for the Center's 1995 survey on bankruptcy rules. See Elizabeth C. Wiggins et al., *Survey on the Federal Rules of Bankruptcy Procedure 3–4* (Federal Judicial Center 1996).