



INTERNATIONAL INSOLVENCY INSTITUTE

Twelfth Annual International Insolvency Conference

Supreme Court of France

Paris, France

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*Some Reflections From The Bench On Alternative Dispute Resolution In
Business Bankruptcy Cases*

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U.S. Bankruptcy Court
New York

June 21-22, 2012

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American Bankruptcy Institute Law Review
Winter 2009

ADR Meets Bankruptcy: Cross-Purposes or Cross-Pollination?

*387 SOME REFLECTIONS FROM THE BENCH ON ALTERNATIVE DISPUTE RESOLUTION IN BUSINESS BANKRUPTCY CASES

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The notion that most people want black-robed judges, well-dressed lawyers and fine paneled courtrooms as the setting to resolve their disputes is not correct. People with problems, like people with pains, want relief, and they want it as quickly and inexpensively as possible.

Chief Justice Warren E. Burger,

Our Vicious Legal Spiral, 16 JUDGES J. 23, 49 (Fall 1977).

More than ten years ago, I wrote a short article for the ALI-ABA publication *The Practical Litigator* entitled "A User's Guide to Alternative Dispute Resolution in Business Cases." At the time, I was a commercial litigator at a large New York-based law firm, and my practice was concentrated in complex business cases, generally representing defendants. My interest in alternative dispute resolution flowed from my growing conviction that the best litigator should know how to take a problem-solving approach to a case. I also began to see that often, even an imperfect settlement can be a better outcome for the client than a good trial. I became trained as a mediator, joined the mediator panel of the federal district court, and helped to establish a court-annexed **mediation** program for New York State Supreme Court's Commercial Division, in Manhattan. I also served from time to time as an arbitrator. But overwhelmingly, my practice and perspective remained that of a big-firm litigator.

Fast forward about ten years, to late 2009. It has been my privilege to serve as a bankruptcy judge for more than six years, since September 2003. I go to work in a federal courthouse, I wear a robe rather than a suit in the courtroom, and I conduct conferences, motions, and trials nearly every day. I have presided over thousands of bankruptcy cases, and issued more orders determining more issues than I can count. Our docket, like many courts' dockets, is largely made up of individual consumer cases, and my work is divided about equally between consumer and business cases.

It would be reasonable to assume that having traversed the divide between bar and bench, and having become part of the adjudicatory process--the very dispute resolution process to which **mediation** and other ADR techniques posit themselves as "alternative"--I would no longer look to ADR tools as effective means of dispute resolution. But it would also be wrong.

The fact is, as a bankruptcy judge, I see more, not fewer, reasons for counsel, clients, and parties to consider ADR tools and techniques, including facilitated negotiations and **mediation**, to resolve and even to avoid disputes. The purpose of this article is to revisit some of the topics from ten years ago with the additional *388 per-

spective of the bench, and to consider how these topics apply in the simultaneously broad and specialized context of dispute resolution in business bankruptcy cases.

I. ADR: THE BIG PICTURE

Ask most lawyers to define alternative dispute resolution and you'll usually get a list of the formal and informal processes for resolving disputes between parties that do not entail bringing the dispute to closure in a court proceeding. Ask most judges and you'll hear answers ranging from deep knowledge and engagement in the issues to a gentle mistrust that such processes belong in, or even near, a courthouse.

Ten years ago, I wrote that ADR is more than the processes it encompasses, and that in the business dispute setting especially, the best way to think about ADR is in terms of its goals. The goals of ADR in business disputes always include resolving the parties' dispute, but they often go farther. An important goal in one situation may be preserving the parties' relationship. In another it may be managing and minimizing the costs and burdens of the dispute. And in yet another it may be addressing the underlying issues that gave rise to the dispute so that future disputes can be avoided. Or in the most common case there may be a combination of goals, some more apparent than others.

As a bankruptcy judge, this seems even truer. The bankruptcy process is well served by counsel and parties who know their case and the applicable law, understand the business, and can navigate effectively the bankruptcy process as set forth in the Bankruptcy Code and Rules. But it is also essential that counsel appreciate their role as problem solvers. In a federal civil action, the parties may litigate for months or even years without encountering the judge. In a business bankruptcy case, the parties may appear in court on "first-day" motions within the first hours or days after the petition commencing the case is filed. Those hearings address matters that are the life-blood of the company's potential reorganization, including whether the company may use its cash collateral, pay its workers, and borrow funds to keep the door open and the lights on. These "first-day" motions may begin as contested matters and end up in a consensual resolution, often with significant input from the bankruptcy judge.

So how do these goals of ADR measure up against the problem-solving goals of the bankruptcy process? One commonly articulated goal is preserving the parties' relationships. In the reorganization of a business, the company's financial distress may have damaged key relationships with any or all of lenders, suppliers, landlords, and customers. The failure to repair any one of these relationships can spell disaster for the company's prospects to reorganize successfully. Another often-cited goal is keeping costs down. Of course, this is essential in a bankruptcy case. And a third goal can be to address the underlying issues that caused the difficulties in the first place-- this is a fundamental challenge in a business restructuring. If the company ***389** does not address the underlying causes of its financial distress, it is likely not to succeed in its reorganization efforts.

Courts have been supportive of ADR initiatives by parties to disputes before them. As one court observed:

We recognize that [ADR] is an evolving concept and that new mechanisms, often borrowing on more traditional ones, are being created. Although we would not likely be inclined to enforce an agreement to resolve a dispute through trial by combat or ordeal, we do not wish to put a straightjacket on the creative development of new forms of [ADR] that individual parties, or industries, find useful and preferable to litigation.

Annapolis Prof'l Firefighters Local 1926 v. City of Annapolis, 642 A.2d 889, 895 n. 6 (Md. Ct. Spec. App.

1994).

So ten years ago, as a litigator, I wondered why so many lawyers seem to mistrust ADR for the resolution of business disputes. And I questioned why so many ADR practitioners, including “neutrals” who conduct ADR processes such as **mediation**, arbitration, and early neutral evaluation, mistrust business lawyers who seek to have a role in ADR? Now I would ask two additional questions: why do some courts seem to avoid ADR as a case management tool, and why are some ADR professionals, including arbitrators and mediators, concerned about courts embracing these techniques?

Then and now, my answer is the same--not for any good reason. Courts can only improve their case management by understanding and incorporating ADR tools where appropriate. These are simply additional tools, and potentially very effective tools, to achieve a creative, efficient, and productive resolution to a business problem.

Similarly, skilled ADR professionals have nothing to fear from the involvement of courts in the dispute resolution process. A judge who understands the **mediation** process can help the parties address both their positions and their interests. It is often easier for a judge than for counsel to identify both strengths and weaknesses of the parties' positions, and to suggest the possibility of settlement. The court can also remind the parties that the alternative to a negotiated resolution is a prompt hearing or trial date and a decision that will leave at least one party, and perhaps many parties, worse off than a negotiated resolution.

As a lawyer, I found that well-prepared lawyers can be among the most highly skilled and creative negotiators and can provide needed information and guidance to clients attempting to solve their business disputes. They are also most aware of their clients' “BATNA”--the best alternative to a negotiated agreement.

As a bankruptcy judge, it's apparent that it would be impossible to function effectively as a business bankruptcy lawyer without a problem-solving approach to disputes and the skills necessary to accomplish that result, including through the *390 thoughtful use of ADR. And courts should be able to promote, not inhibit, consensual resolutions through case management. Bankruptcy litigation moves at an accelerated pace, but it still imposes significant burdens in attorneys' fees, client time, and negative publicity. It can damage a company's business relationships at a time when they may already be fragile. And there is likely to be the distraction of uncertainty about the ultimate outcome. Equally important, courtroom contests can shift the parties' focus toward past disagreements rather than future opportunities, and can damage or even destroy the parties' prospects for a reorganization that would be a mutually beneficial outcome.

II. THE HISTORICAL BACKGROUND OF ADR

In many respects, the goals and processes of ADR are not new. Since 1937, the Federal Rules of Civil Procedure have authorized courts to conduct judicial settlement conferences, with the aim of achieving early and cost-effective settlements. In its present form, Rule 16(a)(1) authorizes the court to direct the attorneys for the parties and any unrepresented parties to attend a conference “for such purposes as ... expediting the disposition of the action.” Rule 16(c)(2)(I) also directs that, at the pre-trial conference, the court may take “appropriate action” as to “settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule.” The Rule further provides that the court may require “a party or its representative [to] be present or reasonably available by other means to consider possible settlement.” *FED. R. CIV. P. 16(c)*. See generally *Wagshal v. Foster*, 28 F.3d 1249, 1252-53 (D.C. Cir. 1994), cert. denied, 514 U.S. 1004 (1995) (comparing process of **mediation** to obligations under Rule 16); *Nick v. Morgan's Foods, Inc.*, 270 F.3d 590,

595 (8th Cir. 2001); *Negron v. Woodhull Hosp.*, 173 F. App'x 77, 79 (2d Cir. 2006); *Bulkmatic Transp. Co. v. Pappas*, No. 99Civ. 12070(RMB)(JCF, 2002 WL 975625, at *2 (S.D.N.Y. May 9, 2002). Even in its original 1937 incarnation, Rule 16 authorized courts to “direct the attorneys for the parties to appear before it for a conference to consider ... [t]he simplification of the issues [and] [s]uch other matters as may aid in the disposition of the action.” FED. R. CIV. P. 16, as adopted, 308 U.S. 645; Cong. Rec., vol. 83, pt. 1, p. 13, Exec. Comm. 905; H. Doc. 460 and H. Doc. 588, 75th Cong. (1938).

Rule 16's provisions authorizing courts to promote settlement and “resolv[e] the dispute” through case administration are made applicable to bankruptcy litigation by Federal Rule of Bankruptcy Procedure 7016 and its predecessor, Bankruptcy Rule 716, which provide that Rule 16 applies in bankruptcy adversary proceedings. As the 1973 Advisory Committee's Note to Rule 716 explains, “[t]he economies of time and money and greater efficiency in the judicial process attainable by the use of pre-trial procedures should be available in adversary proceedings in bankruptcy cases.” See Leon R. Yankwich, *The Impact of the Federal Rules of Civil Procedure in Bankruptcy*, 42 CAL. L. REV. 738, 756 (1954); Bankr. R. 716 advisory *391 committee's note (1973, superseded 1983). Compare Bankr. R. 716 (1973) with FED. R. BANKR. P. 7016 (no substantive change).

Congress dramatically expanded the role of ADR in the federal courts in 1990, with the adoption of the Civil Justice Reform Act (“CJRA”), 28 U.S.C. §§ 471-82. Recognizing that the expansion of ADR was one of the “cornerstone principles” of the CJRA, the Senate Judiciary Committee stated:

[T]he last 15 years have witnessed the burgeoning use of dispute resolution techniques other than formal adjudication by courts While the data is not yet complete, studies of various ADR programs have shown generally favorable results As the Federal Courts Study Committee concluded: ‘Experience to date provides solid justification for allowing individual federal courts to institute ADR techniques in ways that best suit the preferences of bench, bar and interested publics’ The [Judiciary] committee strongly agrees with this assessment.

S. REP. NO. 101-416, at 28 (1990), reprinted in 1990 U.S.C.C.A.N. 6802, 6831.

In the CJRA, Congress required every federal district court to adopt a Civil Justice Expense and Delay Reduction Plan, and directed each district court, in developing its Plan, to consider whether “to refer appropriate cases to [ADR] programs.” 28 U.S.C. § 473(a)(6) (2006). Some courts have reached well beyond the requirements of the plans adopted under the CJRA, and have specifically required lawyers to review the relative costs and merits of ADR and litigation with their clients. See, e.g., *Schwarzkopf Tech. Corp. v. Ingersoll Cutting Tool Co.*, 142 F.R.D. 420, 423-24 (D. Del. 1992) (in response to the CJRA, court directed attorneys to certify that they had discussed with their clients both the probable expense of the litigation and any available ADR measures that might resolve the dispute more efficiently).

In 1998, Congress expanded on these steps and passed the Alternative Dispute Resolution Act of 1998, codified at 28 U.S.C. §§ 651-58. The Act amends the United States Code to require that each district court authorize the use of ADR processes in all civil actions. 28 U.S.C. § 651(b) (2006). The Act further encourages the use of ADR by mandating that district courts require litigants in all civil actions to consider the use of ADR at “an appropriate stage in the litigation.” 28 U.S.C. § 652(a) (2006).

Bankruptcy courts have similarly embraced the notion of court-annexed ADR. Many courts have adopted court-annexed **mediation** programs to assist in managing the heavy caseload that we face and to promote the productive resolution of disputes. Some courts have adopted specialized ADR procedures for certain kinds of

disputes, such as preference actions. In 2004, for example, the bankruptcy court in the District of Delaware, where many large business bankruptcy cases are filed, adopted a General Order providing for the mandatory **mediation** of claims to avoid [*392](#) a preferential transfer. General Order of the U.S. Bankruptcy Court for the District of Delaware dated April 7, 2004 (Walrath, C.J.). That same year, the district court in the District of Delaware, where appeals from bankruptcy court decisions are generally heard, adopted an order providing for the mandatory **mediation** of bankruptcy appeals. General Order of the U.S. District Court for the District of Delaware dated July 23, 2004 (Robinson, C.J.).

III. FACILITATIVE AND EVALUATIVE ADR

As a lawyer, I wrote that ADR can take many forms, and there may be as many styles of ADR as there are business problems. Now, as then, commentators agree that two general and complementary approaches exist: facilitative ADR and evaluative ADR. From a lawyer's perspective, facilitative ADR is often shorthand for **mediation**, and evaluative ADR is understood to refer to processes that lead to an assessment or decision, including early neutral evaluation and arbitration.

Taking the view from the bench, it's clear that facilitative and evaluative techniques complement each other in alternative dispute resolution--and also exist in case management, especially in a business reorganization case, where the case may require an immediate conference on an unexpected impasse in the parties' negotiations at one moment, a prompt evidentiary hearing and decision at another, and a full day for hearings and caucuses among the parties at the next. That is, the spectrum of approaches from facilitative to evaluative dispute resolution is analogous to the range of roles that may be assumed by a bankruptcy judge in a business bankruptcy case.

What is facilitative ADR? In a facilitative ADR effort, the neutral encourages the parties to communicate with each other and to assess their own interests and the realistic prospects for a settlement. In a purely facilitative **mediation**, the neutral does not opine as to how the dispute should be resolved, or what a likely outcome would be in court. Rather, the neutral emphasizes that the parties control the process, and encourages the parties to develop their own resolution to the dispute.

How does facilitative ADR compare with an evaluative process? As a lawyer, I wrote that in an evaluative ADR session, the neutral may assume a role that is much more akin to the role conventionally undertaken by a judge, and provide the parties with an assessment of the merits of some or all aspects of the case. The mediator's assessment may come in the form of a mediator's proposal of a possible framework and terms for settlement. Some forms of ADR are explicitly evaluative, such as arbitration and early neutral evaluation, and the objective of the ADR proceeding is for the neutral, as arbitrator or evaluator, to assess and even decide the dispute. I also noted that there are risks associated with evaluation because the parties may feel that the neutral is taking sides. *See generally* Kimberlee K. Kovach & Lela P. Love, "[Evaluative Mediation is an Oxymoron](#)," 14 *ALTERNATIVES* 31, 31 (1996); E. Patrick McDermott & Ruth Obar, "[*393What's Going On](#)" in *Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit*, 9 *HARV. NEGOT. L. REV.* 75, 97 (2004). One or both parties may feel that the neutral has underestimated the merits of their positions. At a minimum, one or both parties may feel that the neutral has prejudged, or misjudged, the dispute to its disadvantage, and may conclude that the **mediation** has failed.

Now, after six years on the bench, I appreciate that in the business bankruptcy context, the role of the judge is both facilitative and evaluative, so the comparison may not be so stark. And in a complex business bankruptcy dispute, a mediator may combine aspects of facilitation and evaluation to get the best results. In this setting, the

neutral's evaluation of the merits of the dispute, including the parties' likelihood of success in court and the associated timetable and uncertainty, may well prove a potent catalyst for the ultimate resolution of the dispute. This may be especially true when the mediator is a judge, and therefore viewed by the parties as having special insight into these issues. The mediator's assessment may be based on the record of the case, written submissions provided by the parties, oral statements made at the **mediation** session by the parties or their attorneys, and the mediator's own background and experience in the field. And it may be offered in a conference among all of the participants or in a caucus with one of the parties.

When I mediate as a judge, I am reluctant to offer an assessment or proposal too early in the process. But once a framework has been established for productive discussions, a judicial “mediator's proposal” to bridge the gap has often helped parties to overcome an impasse. While this can take place in a conference among all of the participants or in a caucus with one of the parties, the fact that we are proceeding in a courtroom generally leads me to take this up with parties individually--both so that they can tell me what I may be overlooking, and to avoid the impression that I am “ruling” in the matter. The neutral's evaluation of aspects of the parties' positions often becomes the starting point, and even the destination, for settlement.

IV. ADR TOOLS: MEDIATION, ARBITRATION, EARLY NEUTRAL EVALUATION, AND MORE

Ten years ago, it seemed useful to review the basic ADR tools from a lawyer's perspective--**mediation**, arbitration, and early neutral evaluation. In bankruptcy court, **mediation** is overwhelmingly the preferred process in court-annexed ADR programs, but a review of the basic attributes of these three processes remains helpful.

A. *Mediation*

Mediation is a private, confidential, structured process where parties are joined by a neutral mediator in a structured session aimed at assisting the parties to reach a negotiated resolution to their dispute. One court has described **mediation** as “a process in which a mediator facilitates communication and negotiation between *394 parties to assist them in reaching a voluntary agreement regarding their dispute.” *Cook Children's Med. Ctr. v. New England PPO Plan of Gen. Consol Mgmt.*, 491 F.3d 266, 276 (5th Cir. 2007) (quoting UNIF. MEDIATION ACT § 2 (2001)).

Courts may direct parties to participate in **mediation**, but only the parties can reach an agreement in **mediation**. Settlements reached through **mediation** are often broader in scope than purely economic settlements of lawsuits, and creative mediators, lawyers, and parties can achieve results that could not be directed by a court. As another court found, “**mediation** stands in stark contrast to formal adjudication, and even arbitration, in which the avowed goal is to uncover and present evidence of claims and defenses in an adversarial setting.” *State v. Williams*, 866 A.2d 1258, 1266 (N.J. 2005); see *In re Yellowstone Mountain Club, LLC*, 410 B.R. 659, 663 (Bankr. D. Mt. 2009) (“Perhaps with [the mediator's expertise], the parties may reach some realistic and consensual middle ground in this case ...”). Courts have also noted that “**mediation** is the one option which is most likely to preserve an ongoing business relationship that might otherwise break down during a more acrimonious adversarial proceeding.” *Poly Software Int'l, Inc. v. Su*, 880 F. Supp. 1487, 1494 n.10 (D. Utah 1995).

Although there is plenty of room for creativity in structuring the **mediation** process, it generally has several defined phases. Before the parties meet with the mediator, they may submit written statements of their positions on the relevant factual and legal issues. An effective submission also provides the context necessary to under-

stand the interests that underlie the dispute. These submissions are generally confidential, and provided only to the mediator. The mediator may conduct telephone conferences with counsel and the parties to become familiar with the issues and the status of the parties' own negotiations.

When I mediate as a judge, I am always interested in any written submissions that the parties may choose to make, but I also pay close attention to the docket in the case and in any related proceedings. Often, I speak with the parties both together and separately before convening an in-person joint session, in order to hear their perspectives on the law and the facts, and also to understand their interests and the opportunities and potential obstacles to a settlement.

At the **mediation**, the mediator generally opens the proceedings with a description of his or her role and the confidentiality of the proceedings. Next, each side may make an opening statement. Skilled lawyers recognize that the audience for this statement includes the mediator, the opposing lawyer, and the client. Witnesses are not called, rules of evidence do not apply, and cross-examination does not occur.

The mediator may ask for a caucus with one of the parties and that party's attorney, with only the attorneys, or perhaps even only the parties. Caucuses provide additional or more complete information about the facts, a party's needs and positions. They also provide an opportunity to test possible methods for resolution. Communications during a caucus are not shared with other participants in the **mediation** unless the participants specifically authorize the mediator to do so.

***395** How does this change when the mediator is a judge, and the setting is a courtroom? Mediating as a judge creates special opportunities, and perhaps also some special challenges. Judges usually function as decision-makers, and assess the law and the facts on a daily basis. In a bankruptcy court, it's not unusual for a judge to determine dozens of matters in a single motion calendar. This role may give the judge greater credibility than another mediator, and parties may be less willing to take, or more easily persuaded to move away from, unreasonable positions in that setting.

In addition, counsel and clients alike appreciate that a federal courthouse is a special setting, and they take the process seriously. At the same time, a judicial **mediation** in a courtroom is still **mediation**, not adjudication—I often note at the outset that nothing can happen to a party unless that party agrees. I open the session on the record, taking the appearances of all who are present, and then ask whether anyone would like to state anything on the record, noting that it is absolutely not required to do so. We then go off the record for the hard work of the **mediation** session, beginning jointly, and breaking into caucus as appropriate.

Mediation sessions can last hours or days, and if the matter is complex, they may be scheduled over a period of weeks or even months. Telephone sessions, sessions with a single party and its counsel, and sessions with counsel only, may be conducted between joint sessions. **Mediation** may open a dialog among the parties that leads to settlement on its own. Most **mediations** end in a settlement of some or all of the issues. As one commentator notes, “[i]t is generally agreed that 75 percent to 90 percent of cases that reach the **mediation** table will settle there.” Michael G. Ornstil, *Nailing Down Mediation Agreements*, 32 TRIAL 18 (June 1996); see MASSACHUSETTS SUPERIOR COURT CIVIL PRACTICE MANUAL § 10.1 (2d ed. 2008) (“The importance of discussing ADR alternatives is underscored by many studies, which have indicated that the success rate for **mediation** is approximately 75 to 85 percent.”); Wayne D. Brazil, *Thoughts About Spiritual Fatigue: Sustaining Our Energy by Staying Centered*, 2008 J. DISP. RESOL. 411, 420 (2008) (“The data [that the Northern District of California] collects about the **mediations** it sponsors ... indicate that, while about 60% of the cases settle

through our **mediations**, some 80% of the parties and lawyers believe that overall, ... the benefits of being involved in the **mediation** process outweigh the costs.”) (quotation omitted); Nicole L. Waters & Michael Sweikar, *Efficient and Successful ADR in Appellate Courts: What Matters Most?* 62 DISP. RESOL. J. 42, 44 (Aug.-Oct. 2007) (“[I]n one study of three California early **mediation** programs ... and two voluntary programs in the Superior Courts [approximately] 7,900 cases attended and participated in **mediation**. Sixty percent of those cases settled as a direct result of **mediation**.”); Sylvia Shaz Shweder, *Judicial Limitations in ADR: The Role and Ethics of Judges Encouraging Settlements*, 20 GEO. J. LEGAL ETHICS 51, 57 n.42 (2007) (reporting that approximately sixty percent of cases in the Eastern District of New York settle after **mediation**).

*396 B. Arbitration

Federal policy strongly favors arbitration, as reflected in the Federal Arbitration Act, 9 U.S.C. §§ 1-16. *See, e.g., Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 268 (1995) (the FAA applies to all disputes, up to the the maximum limit of Congress' power under the commerce clause); *Kowalewski v. Samandarov*, 590 F. Supp. 2d 477, 489 (S.D.N.Y. 2008) (“The Second Circuit has ... recognized that because of the strong federal policy favoring arbitration ... doubts as to whether a claim falls within the scope of [the] agreement should be resolved in favor of arbitrability ... [A]rbitration must not be denied unless a court is positive that the clause it is examining does not cover the asserted dispute.”) (citations omitted).

Business contracts often include a provision requiring that disputes arising under the contract must be resolved in arbitration, and courts routinely enforce such provisions when they are challenged. At least one court has found that “‘arbitration’ in the FAA is a broad term that encompasses many forms of dispute resolution,” such as arbitration and early neutral evaluation. *Fisher v. GE Med. Sys.*, 276 F. Supp. 2d 891, 893 (M.D. Tenn. 2003) (quotations omitted). Many state and federal courts incorporate some form of arbitration into their court-annexed ADR programs.

Arbitration is similar in many respects to a trial. Discovery may be available to the parties before the hearing. The arbitrator may hold a pre-hearing conference. Evidence and arguments are presented to the arbitrator, and witnesses may be called to testify and to be cross-examined. Depending on the forum procedures and the arbitrator's practice, the rules of evidence may not be strictly applied. Ex parte contacts with the arbitrator are not allowed, and while the arbitrator may encourage the parties to consider settlement, the arbitrator cannot become involved in settlement discussions. After the hearing is completed, the arbitrator issues a decision that is binding on the parties and enforceable in a court.

C. Early Neutral Evaluation

Early neutral evaluation (“ENE”) has been incorporated as an option into several court-annexed ADR programs. ENE aims to provide the parties with a neutral, expert assessment of the strengths and weaknesses of their respective positions.

In a typical ENE proceeding, the parties, through their lawyers, make written submissions setting forth their positions and the supporting evidence. Additional presentations may be made at a face-to-face meeting with the neutral. Following the submission of evidence and argument, the ENE neutral provides a non-binding assessment of the merits of the parties' respective positions, either orally or in writing. As in arbitration, the neutral provides an assessment of the merits of the dispute, but unlike arbitration, the neutral's assessment is not bind-

ing. And like **mediation**, the process is informal and not bound by established processes, but *397 unlike **mediation**, the role of the neutral is explicitly evaluative. After the parties hear the neutral's evaluation, they may well proceed to settlement, using the neutral's evaluation as a starting point for meaningful compromise.

D. "Med-Arb"

"Med-arb" is a hybrid procedure that combines **mediation** and arbitration. In the usual med-arb proceeding, **mediation** is attempted, but if it is unsuccessful, then the parties move to arbitration, often before the same neutral who served as mediator. The arbitration may be binding or non-binding. In a binding arbitration, the arbitrator's decision ends the matter. In non-binding arbitration, if the arbitrator's decision is not satisfactory to either side, the parties may return to litigation and trial.

E. Summary Jury Trials and Mini-Trials

Summary jury trials and mini-trials are two additional forms of ADR. Here, the parties conduct mock trials before a jury or a judge, and receive an evaluation of the case based upon their presentations. Like arbitration, these proceedings have much in common with a trial, and they can be costly. Like ENE, these proceedings can assist the parties in gaining a realistic assessment of the strengths and weaknesses of their legal and factual claims.

V. THE ROLE OF THE ADR NEUTRAL

If the parties have the ability to choose the ADR neutral, either from a court panel or from a private service, what attributes should they seek out? One commentator, Judge Harold Baer, Jr. of the Southern District of New York, identified several important qualities in a mediator, including patience, the ability to listen, and the ability to make the parties feel at home. Hon. Harold Baer, Jr., *Mediation--Now is the Time*, 21 LITIGATION 5, 6 (Summer 1995). (It may be that not only a mediator, but also a judge, would be well served by these qualities.) The specialized and accelerated nature of the bankruptcy process, and the complex issues presented in many business reorganizations, suggest that some knowledge of financial matters and perhaps even the particular business environment, as well as the ability to move quickly without sacrificing the patience necessary for a productive process, are also important attributes.

Some view the characteristics of a successful mediator as quite different from those of a successful arbitrator. One commentator describes the difference as follows:

In arbitration, the neutral employs mostly "left brain" or "rational" mental processes--analytical, mathematical, logical, technical *398 administrative; in **mediation**, the neutral employs mostly "right brain" or "creative" mental processes--conceptual, intuitive, artistic, holistic, symbolic, emotional Because the role of the mediator involves instinctive reactions, intuition, keen interpersonal skills, the ability to perceive subtle psychological and behavioral indicators, in addition to logic and rational thinking, it is much more difficult than the arbitrator's role to perform effectively. It is fair to say that while most mediators can effectively perform the arbitrator's function, the converse is not necessarily true.

John W. Cooley, *Arbitration vs. Mediation--Explaining the Differences*, 69 JUDICATURE 263, 263-64 (1986).

These considerations raise an interesting question for court-annexed **mediation** programs in which judges of the court may be appointed to serve as mediators in cases before other judges of the court. Our court and others have made this option available, and long before the CJRA, judges referred matters for settlement conference purposes to other judges of their court. Can a judge serve as an effective mediator or “settlement judge”? The answer seems to be yes, but only if the judge remains keenly mindful of the different role that he or she has taken on. The judge's role in deciding a dispute is challenging indeed, but the judge-mediator's role in facilitating a productive negotiation among the parties can be vastly more difficult--after all, when the judge is presiding and rendering a decision, no-one but the judge needs to agree on the outcome. Consensus is desirable, but a decision is inevitable. By contrast, in **mediation**, the judge may bring knowledge, perspective, and process skills to the role of mediator, but he or she lacks the ability to render a decision.

The neutral's training and experience with the ADR procedures that the parties intend to use are also important factors to consider. Many courts have mandatory **mediation** programs, but not all courts require that the court-appointed mediators have training and experience in **mediation** skills. The court-annexed ADR programs in the U.S. District and Bankruptcy Courts for the Southern and Eastern Districts of New York require such training. *See* Richard C. Reuben, *The Lawyer Turns Peacemaker*, 82 A.B.A. J. 54, 60-61 (Aug. 1996) (discussing the risks attendant to the provision of ADR services by untrained neutrals). And the trend favors training in these process skills--ten years ago, the court-annexed ADR program operated by the Commercial Division of New York Supreme Court had no training requirement at all, but now that court and all New York State courts require mediators in court-annexed **mediation** programs to have completed a minimum of forty hours of approved training and recent experience mediating cases in the relevant subject area. *See* Administrative Order of the Chief Administrative Judge of the Courts, Part 146.4(b) (June 18, 2008). The skills necessary to be an effective mediator are, in many respects, quite different from the skills acquired by a seasoned litigator, so years or even decades of experience as a courtroom litigator *399 may not be a sign that a potential mediator can be effective. And as noted above, they can also be quite different from the skill set generally employed by a judge.

Experience in the particular subject matter can also assist an ADR neutral in performing effectively. For example, in the case of early neutral evaluation, a neutral that is recognized in the field may be able to give a far more credible assessment of the parties' positions than a neutral that is unfamiliar with the area. For similar reasons, a judge who is serving as a mediator may be able to provide an assessment of the strengths and weaknesses of the parties' positions with some authority. A neutral that is closely identified with a particular side of an issue--for example, a lawyer who represents exclusively landlords or tenants in a landlord-tenant dispute, or a lawyer who represents exclusively employees or management in employment litigation--might be perceived by the other side as biased.

As a lawyer, I found that lawyers had an important role to play in selecting the neutral. Much of a lawyer's skill and training is aimed at identifying the issues and arguments on behalf of the client, and at tailoring the presentation of the matter to the audience, whether adversary, judge, or jury. Where the parties have a role in selecting the neutral, the lawyer can contribute to the success of the proceedings by applying these skills, and even instincts, to this task.

As a judge referring my own cases to **mediation**, I have been asked to assist the parties in selecting a mediator from our court's roster. Input from the parties is critical--are there conflicts issues to be aware of? Is there a history between the parties that is likely to make one mediator more effective than another? What is the reason for the impasse, and why have the parties not been able to overcome these issues and reach a settlement on their

own? Sometimes the most valuable information can be discussed candidly among the attorneys, but cannot be taken up with the judge.

CONCLUSION

Ten years ago, I concluded that ADR has much to offer in the resolution of business disputes. Now I would add that ADR has much to offer in the effective management of business bankruptcy cases. Business reorganizations are more likely to succeed when all of the parties pursue not only their legal positions, but also their interests. The prospect of a successful reorganization may be lost if the parties spend their time in contentious and costly litigation about past events, rather than productive engagement about future prospects that may be mutually beneficial.

In each of the principal forms of ADR that are used in court-annexed ADR programs--**mediation**, arbitration, and ENE--skilled lawyers who are familiar with the effective use of ADR techniques can dramatically enhance the likelihood of success of the ADR process. Equally important, bankruptcy courts that are effective in the targeted use of court-annexed ADR programs, including **mediation**, can enhance the likelihood of success of business reorganizations, and reduce the costs of the process. And ADR professionals should embrace those efforts.

17 Am. Bankr. Inst. L. Rev. 387

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