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# Evaluating Bankruptcy Mediation

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## Evaluating Bankruptcy Mediation

*William J. Woodward, Jr.\**

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\* I. Herman Stern Professor, Temple University School of Law. The author thanks Jean Braucher for her helpful comments and Jessica Natali and Kieth Verrier for their research assistance.

Portions of this Article are based on James O'Neill, III & William J. Woodward, Jr., *Interim Report on Court Sponsored Mediation* (Jan. 3, 1996) and William J. Woodward, Jr., *Report on Court Sponsored Mediation, U.S. Bankruptcy Court, Eastern District of Pennsylvania* (Jan. 6, 1998), both on file with the author.

## I. INTRODUCTION

Mediation seems to be taking the world of conflict resolution by storm. This phenomenon could stem from the very nature of this "kinder and gentler" process. Unlike hard-edged litigation, which produces winners and losers, mediation allows everyone to emerge from the process with something and be happy (or unhappy) about it. At an ideological level, mediation substitutes a "freely negotiated agreement" for the "government intervention" that otherwise would be imposed by a judicial decision. Moreover, because mediation is simply facilitated negotiation,<sup>1</sup> nobody is stuck with an outcome with which they do not agree. Touted by some as a good answer to crowded dockets and their corresponding high costs, mediation is a process whose arrival could scarcely be more fitting for our times.

It is, of course, very easy to get caught up in this "trendy" approach to dispute resolution. We would expect, for example, the parties to mediation to come away reasonably satisfied, given that their frame of reference is the Armageddon of litigation. Similarly, one would scarcely expect trained mediators to be critical of mediation -- they have a stake in the success of this form of dispute resolution and, through it, they have substituted (even if only partially) a healing model for the destructive, litigation model of legal services. Judges might also be enamored by this process, as it enlists persons outside the judicial system to assist in processing disputes within it. We may, in short, have a built-in bias in the direction of more mediation.<sup>2</sup>

Mediation has come relatively late to bankruptcy.<sup>3</sup> First begun in the areas of family and community law,<sup>4</sup> some bankruptcy practitioners and judges probably viewed this "soft" form of dispute resolution as being out of place in the world of business, contracts, and economics. But mediation is now playing a key role even in the number-crunching halls of the bankruptcy court. One after another, districts are creating bankruptcy court-annexed mediation programs. Perhaps courts have recognized that in the business context mediation may have untapped heretofore unrealized potential. The participants in bankruptcy are, after all, deal-makers; and mediation is simply a process for facilitating deal-making. There is no reason to expect that the bankruptcy system's enthusiastic embrace of mediation will subside.

That's the rub. Although seemingly innocuous, the increased use of mediation could have serious policy implications, particularly when this process is embraced

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1. See Nancy Kauffman & Barbara Davis, *What Type of Medication Do You Need?*, 53 DISP. RESOL. J. 8, 10 (1998) (citing THE MEDIATION CENTER, ASHEVILLE, ANNUAL REPORT 5 (1995)).

2. It may be that the only constituency (other than academics) one might expect to be skeptical of mediation are the lawyers who would litigate their case but for the mediation process. For them, mediation could be perceived as simply another obstacle in vindicating their client's interests or a way of reducing their own services in the dispute resolution process.

3. Mediation reportedly appeared for the first time in bankruptcy in 1986. See 6 NORTON BANKR. L. & PRAC. 2D § 146:2 (West 1998) (explaining the historical application of mediation in Bankruptcy Courts); Lisa A. Lomax, *Alternative Dispute Resolution in Bankruptcy: Rule 9019 and Bankruptcy Mediation Program*, 68 AM. BANKR. L.J. 55, 56 (1994) (explaining that although arbitration is not new to bankruptcy, mediation is).

4. See Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1550 n.15 (1991) (explaining that mediation programs began in the early to mid 1970's in the area of divorce).

as part of a formal dispute resolution system, whether in bankruptcy or elsewhere. In the context of large-scale embrace of ADR by the legal system, there is thus a danger of rushing headlong into bankruptcy mediation without getting answers to very basic questions about its potential for success in this particular context.

Bankruptcy mediation is a fertile ground for legal scholars who can help answer basic questions about the process while both developing closer ties to bankruptcy practitioners, and beginning to do empirical research. Bankruptcy is, after all, an excellent area for empirical research. Although the law is can be exceedingly complex, bankruptcy deals with a very basic problem: insufficient funds to pay creditors. The cases all involve issues that spring from that common problem, and from our policy of permitting individuals and businesses to walk away from their debts under specified circumstances. It scarcely needs saying that bankruptcy is a high-volume business in almost every district. The common theme and high volume of bankruptcy cases combine to produce data which can be systematically collected and analyzed. It should come as no surprise, therefore, that some of the most significant empirical research into the legal system during the past 20 years has been in the area of bankruptcy.

The relatively-recent appearance of mediation in bankruptcy and the newly-recognized need for and value of empirical research<sup>5</sup> coincides to offer near-unique opportunities for academics to do modest empirical work that can directly affect policy at the local level and, at the same time, improve researchers' experience and confidence in conducting empirical research in law.

This Article aims to do several things. First, it will briefly describe a court-sponsored mediation program developed several years ago by the court and bankruptcy bar in the Eastern District of Pennsylvania. The program depended on trained mediators who did their work on court-selected bankruptcy matters on a *pro bono* basis. Partly because of its "cost-free" nature, the program created a need for periodic evaluation to ensure the court and bar that it was delivering positive results without inflicting undesirable hidden costs on the participants or the local bankruptcy system as a whole.<sup>6</sup>

A description of the program is a prelude to the main point, which is to urge the empirical study of mediation in bankruptcy at the local level. This kind of alternative dispute resolution seems extremely promising, theoretically provocative at many levels, and at odds with a more traditional vision of the legal process as, essentially, one built on adversaries doing battle. In the current legal environment, these features may contribute to an overly strong embrace of mediation as a cure for many dispute-related ills without considering the negative consequences. Because of the hidden costs and hype surrounding mediation, court-annexed mediation programs in bankruptcy require study for valid assessment.

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5. See, e.g., Homer Kripke, *Law and Economics: Measuring the Economic Efficiency of Commercial Law in a Vacuum of Fact*, 133 U. PA. L. REV. 929 (1985); Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775 (1987); William J. Woodward, Jr., *Does "Efficient" Mean "Better:" New Judgment Liens on Personal Property*, 27 HARV. J. ON LEGIS. 1 (1990).

6. The Recommendations contained in the Final Report from that Study are attached as Appendix 1. The Local Rule, which contains some innovative provisions influenced by the Study, is attached as Appendix 2.

The Article will suggest that court-sponsored mediation in bankruptcy offers even the novice an opportunity to conduct modest, manageable empirical research that will be of substantial use to those making decisions about these programs. Indeed, I will argue that small, "local" studies may well be far more valid and useful for decision making purposes than will the large, well-funded national studies in the bankruptcy area with which we are familiar. Having developed those points, the Article will focus on a study conducted of the bankruptcy mediation program in the Eastern District of Pennsylvania and, in that context, discuss the process of conducting such a local study, and the issues confronted in designing it. While the Eastern District study is not the main focus of this Article, it will include some of the study's results to illustrate what is involved in doing such a study.

## II. BANKRUPTCY MEDIATION IN THE EASTERN DISTRICT OF PENNSYLVANIA

In 1994, a committee of the Eastern District of Pennsylvania Bankruptcy Conference,<sup>7</sup> working with the local bankruptcy judges, created a court-sponsored mediation program for the District. The Conference invited bankruptcy practitioners and professors to participate in a mediation training program that it arranged. Once trained, one could be listed as a mediator qualified for selection by the court to mediate a case.<sup>8</sup>

From the start, the Program depended on individual judges selecting cases for mediators and on the parties agreeing to participate. Much research into the mediation process suggests that mediation is ineffective unless the parties are open-minded and willing to participate in it.<sup>9</sup> Perhaps more important, *requiring* parties to participate in mediation triggers a central cost issue in the bankruptcy context. In a business case, for example, the estate's costs of participating in the mediation process (as distinguished from compensating the mediator) will come from the estate and reduce distributions. Similarly, in an individual case, mandatory mediation could ultimately add to the fees debtors' lawyers charge for representing debtors. These higher fees could exclude some debtors from bankruptcy entirely. Imposing additional dispute processing costs on an already burdened bankruptcy system is ill-advised when the benefits are uncertain. Permitting the parties to decide for themselves avoids (or at least reduces) such problems.

From the outset, the Eastern District depended on the services of *pro bono* mediators. Using the services of *pro bono* mediators essentially enlists lawyers in

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7. The Conference is a voluntary association of the bankruptcy lawyers who work in the bankruptcy courts in the Eastern District of Pennsylvania. there is no cite for this The Conference created and sponsors the Consumer Bankruptcy Assistance Project, a program offering *pro bono* bankruptcy services to low income clients, and an annual Forum, a weekend continuing legal education retreat during which bankruptcy law professors lead bankruptcy practitioners and judges in the study and discussion of hypothetical legal problems created for the Forum.

8. Mediation training from other sources could qualify one as a mediator. Because skill as a mediator was quite different from skill as a bankruptcy lawyer, the Rule ultimately developed did not require a mediator to be a lawyer. See *infra* Appendix 2, Local Rule 9019-3(c)(2).

9. The research on this point goes in both directions. See *infra* text accompanying notes 20-30.

the service of helping their colleagues resolve their disputes. Their assistance enabled the Eastern District to smooth the introduction of this "new" dispute resolution process to an initially-skeptical bar<sup>10</sup> and helped to avoid host of cost issues.<sup>11</sup> Fortunately, the Conference has a strong record of voluntary community service<sup>12</sup> without which this approach would have been very difficult to put into place. Most of the volunteer mediators are practicing bankruptcy lawyers, but the list of qualified mediators includes professors and non-lawyers as well.

While the parties to a dispute might request that the court appoint a mediator to assist them in settlement,<sup>13</sup> the initiative usually comes from the judges. The District's bankruptcy judges make varying use of the process. One judge reserves mediation for cases that are very difficult to try, while others send many "routine" cases into the process. Altogether, they assign approximately 110 cases to mediation each year.<sup>14</sup> The predominant kind of issue sent to mediation is dischargeability,<sup>15</sup> but preference matters are common as well.<sup>16</sup> The range is, however: business torts, artisans' liens, and assumptions of leases have all been sent to the mediation process. The data in our studies suggested that dischargeability matters might be particularly well-suited to the mediation process in bankruptcy.

The data we collected also strongly suggest that the judges, party lawyers, and mediators are all satisfied with the Program. Many of the cases sent to mediators settle or move closer to settlement. In the cost-conscious legal setting of bankruptcy, the data suggest that mediation saves the participants dispute resolution costs. With the enactment of a Local Rule at the District Court level, the mediation program has become a relatively-permanent part of the dispute resolution apparatus in bankruptcy.

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10. The skeptic might have less resistance to a process in which a well-known lawyer or friend is the mediator than one involving an unknown professional mediator. In addition, serving as a mediator in one case makes one a more willing participant when one's own client's dispute is involved.

11. If the mediator is to be paid for her services, what should be the source? The estate, since it will be the general beneficiary of the dispute resolution savings from mediation? The parties? Should the costs be shared in some way? Should the mediator's fees have a limit other than that they be "reasonable"? Ultimately, the Eastern District decided that mediators ought to be compensated in unusually large cases; its resolution to these cost issues can be found in Rule 9019-3(f).

12. See *supra* note 7.

13. See *infra* Appendix 2, Rule 9019-3(e).

14. About 65% of the lawyers and parties accept the assignment and agree to using the services of the Mediator. Data was compiled by the Clerk of the Court, Joseph Simmons, and reported to the author by telephone on March 11, 1999.

15. Most personal bankruptcy results in a discharge of debts, but the Bankruptcy Code "excepts from discharge" certain kinds of debts, such as those incurred by fraud or some forms of intentional wrongdoing. 11 U.S.C. § 523 (1993). Dischargeability disputes arise when the debtor and the creditor disagree about whether a given debt fits the category specified by the Bankruptcy Code.

16. The Bankruptcy Code permits the trustee to recover "preferences," that is, specified payments made to creditors within 90 days or one year prior to the filing of bankruptcy. The Code's definition of "preference" is very complex and technical, see 11 U.S.C. § 547(b) (1993); whether a given payment fits the definition or its many exceptions is often hotly contested.

### III. MEDIATION AND ITS COSTS

Like lunch, mediation is not "free." Apart from the obvious costs of the mediator's and parties' time, and use of a place to conduct a mediation session, there are other costs both to the parties and to the public that require attention. Monitoring of and research into these programs will help uncover such costs and ensure that they are not ignored amid the hoopla surrounding mediation. A thorough analysis of the nature of mediation and its critiques will expose the dangers of too enthusiastic an embrace of this technique.

#### *A. Mediation as "Voluntary" Settlement*

In simplest terms, mediation is the use of a third party to assist parties to a dispute in reaching compromise.<sup>17</sup> In its purest form, the mediator simply aids the parties in clarifying the issues and the parties' respective positions. For example, she might suggest limits or weaknesses in their respective positions, help the parties to think creatively about solutions, or aid them in articulating the terms of a settlement.<sup>18</sup> It is fundamental to this form of alternative dispute resolution that neither party can be bound by the outcome unless they agree with it.

It is this most fundamental feature of mediation that produces a crucial area of debate in the context of court-sponsored mediation programs: what features of such a program are needed to maintain the voluntary nature of the process?

A branch of this debate concerns so-called "mandatory" mediation programs. Such a program would require all litigants, or some portion of them,<sup>19</sup> to submit their dispute to mediation. With the recent avalanche of such court-annexed "mandatory" mediation programs, a debate has begun about whether "mandatory mediation" is a contradiction in terms.

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17. See Jean F. Powers, *The Lawyer's Duties and Responsibilities in Dispute Resolution, Ethical Implications of Attorneys Requiring Clients To Submit Malpractice Claims to ADR*, 38 S. TEX. L. REV. 625, 627 (1997); Robert B. Fitzpatrick, *Employment Discrimination and Civil Rights Actions in Federal and State Courts, Shouldn't We Make Full Disclosure to Our Clients of ADR Options?*, SC59 A.L.I.-A.B.A. 755, 763-65 (1998).

18. Donald T. Weckstein, *In Praise of Party Empowerment--and of Mediator Activism*, 33 WILLAMETTE L. REV. 501, 508-09 (1997). See generally Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991); Lisa A. Lomax, *Alternative Dispute Resolution in Bankruptcy: Rule 9019 and Bankruptcy Mediation Program*, 68 AM. BANKR. L.J. 55 (1994); Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485 (1985).

19. The court-annexed mediation program in the District Court for the Eastern District of Pennsylvania randomly assigns cases filed to mediation. See ELIZABETH PLAPINGER & MARGARET SHAW, COURT ADR: ELEMENTS OF PROGRAM DESIGN 12 (1997). The reason for this structure is so that researchers could compare the cases which went to mediation with those which did not and see if there were differences. Mediation in that Federal District Court is governed by Local Civil Rule 53.2.1. See FED. LOCAL CT. RULES, ED PA RULE 53.21.

In their very provocative study<sup>20</sup> Craig McEwen and Thomas Milburn stated that "The paradox of mediation . . . is that it offers disputing parties precisely what they do not want when they most need it"<sup>21</sup> They argued that the structure of many disputes makes unlikely the voluntary entry into mediation, but that, once there, many formerly "unwilling" parties derive its benefits.<sup>22</sup> Specifically, revenge and retribution often build in a dispute and interfere with its resolution; but these negative thoughts can be overcome with the assistance of a skilled mediator.<sup>23</sup> Supporters of "mandatory" mediation reconcile the apparent contradiction in terms by urging that the only "mandatory" part is that the parties show up; what happens after that is completely voluntary.

Thus, supporters of mandatory mediation contend that it is not essential to the idea of mediation that the parties voluntarily participate in the process; only that any resolution of the dispute have the assent of both parties. But even with final assent to the outcome, the mediation process itself might be coercive in mandatory programs and, particularly, situations where there is a structural imbalance of power between the disputing parties.<sup>24</sup> Those who concern themselves either with coercion within the process or with the fairness of mediated settlements have a deeper critique.

The late Professor Trina Grillo, in a path breaking article, discussed the coercion inherent in "mandatory" mediation, particularly where the mediator files with the court a report about what transpired at the mediation.<sup>25</sup> Her influential observation was that power imbalances that exist outside of mediation are reproduced within mediated settlements;<sup>26</sup> and, therefore, persons who possess less power might well be better off with judicial decisions (which can compensate for a power imbalance) than with their own "voluntary" agreements.<sup>27</sup> While Professor Grillo's observations came from the family law area, power imbalances are of course present in bankruptcy cases, particularly in cases involving consumers. Indeed, the provisions of the Code requiring judicial oversight of consumer reaffirmation agreements<sup>28</sup> attest to Congressional recognition that creditor-consumer agreements require special oversight.

It should be obvious as well that, in the bankruptcy process, mandatory programs could generally apply mild, uneven coercion in the consumer context. To begin with, mediation takes lawyer time and, if a mediation session were a required feature of a consumer bankruptcy case, the lawyers' fees for processing such cases would increase. This, of course, would further restrict consumers' access to bankruptcy. Additionally, the consumer's lawyer, once at a mediation session, has

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20. Craig McEwen & Thomas Milburn, *Explaining the Paradox of Mediation*, 9 NEGOTIATION J. 22 (1993); see also Julie Macfarlane, *Court-based Mediation of Civil Cases: an Evaluation of the Ontario Court (General Division) ADR Centre* (visited May 26, 1999)<<http://www.acjnet.org/docs/minagont.txt>>.

21. McEwen & Milburn, *supra* note 20, at 31.

22. *Id.* at 28-31.

23. *Id.*

24. See generally Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

25. See Grillo, *supra* note 4, at 1598; see also Fiss, *supra* note 24, at 1076.

26. See Fiss, *supra* note 24, at 1583-86.

27. *Id.*

28. 11 U.S.C. § 524(c) (1993).



a financial interest to settle that part of the dispute through mediation rather than expend additional time in court to litigate the matter. One cannot discount entirely the influence that such a dynamic might exert over a large number of cases.<sup>29</sup>

The limited resources available to certain types of parties in the bankruptcy process would seem to counsel against mandatory mediation programs. At minimum, the dynamics suggest close judicial scrutiny of any settlements that result from such a process.<sup>30</sup>

### B. Mediation as "Private" Settlement

Just as a property owner's use of her "private property" has the capacity to affect third parties,<sup>31</sup> nearly any "private" contract has the capacity to affect outsiders to the contract in some way. My simple purchase of a lawn mower affects (through the family budget) my daughter's ability to buy something she wants with family funds. A subcontractor's agreement with the contractor to install the new toilet affects the owner's eventual satisfaction with the new bathroom. The lawyer's job within the realm of contract law is to discriminate among those contracts in which third parties acquire *legal* interests (third-party beneficiary contracts), and those in which they do not.

Third parties are affected in a more indirect way when private agreements reached through a mediation process replace adjudicated decisions within our legal system. Judicial decisions are publicly reported and are thus open to critical appraisals. Anyone can visit a library and find out how similar disputes have been decided in the past. Moreover, our system of precedent means that decision makers will try to decide similar disputes the same way. Recorded, publicly available precedent gives some measure of predictability to decision making. Replacing judicial decisions with private agreements deprives the general public of information about how disputes are being resolved and thereby prevents analysis the private system for consistency or fairness. It has been long established that in negotiation settings, a disparity in information translates into a disparity in power and that

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29. One recent empirical study of mediation in small claims and common pleas courts concluded that "there is little support for concerns about pressures to accept unfair settlements in mandatory mediation." Roselle Wissler, *The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts*, 33 WILLAMETTE L. REV. 565, 566 (1997). In bankruptcy settings involving the debtor, at least, the dynamics of pressure in mediation might well be quite different than outside of bankruptcy. In bankruptcy, the debtor has very limited legal resources relative to most creditors. This itself raises concerns that the debtor might be "steered" into settlements in a mandatory system that she would not agree to (or would not be in her best interests) in a non-mandatory one. See Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures* 67 AM. BANKR. L.J. 501 (1993) (where the evidence gathered by the author suggests subtle "cultural" pressures on debtors to select Chapter 13 over Chapter 7 or vice versa). We find data supporting similar conclusions in TERESA SULLIVAN ET AL., AS WE FORGIVE OUR DEBTORS 246-52 (1989).

30. Judicial approval of settlements is required in any event under Bankruptcy Rule 9019(a). The point here is that settlements reached through a mandatory mediation program in bankruptcy seem more likely to be the product of differential coercion and may require closer monitoring than settlements achieved in a process that the parties *enter* voluntarily.

31. At some point the effect of a person's use of private property becomes a "nuisance," actionable for injunction or damages. See generally W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 619-22, 637 (5th ed. 1984).

eventually works its way into the outcome.<sup>32</sup> To the extent that entities involved in disputes either are repeat players or share information with one another, the effects of asymmetrical information on the quality of justice -- already a problem when repeat players and one-shotters have disputes<sup>33</sup> -- is amplified.<sup>34</sup>

Both the general and specific effects of private agreements on third parties are present in the bankruptcy context, but the protections of the bankruptcy process may reduce their impact. Because creditors share common funds, for example, any private agreement (whether facilitated by mediation or not) involving some of those funds can affect all the other claimants in a direct, pecuniary way. The bankruptcy demand that similar creditors be treated similarly requires that such agreements have judicial approval.<sup>35</sup> If bankruptcy courts and reviewing courts are sensitive to potential disparities of information and power in the mediation process, they will be in a position to counteract them.

### C. Direct Costs

The direct costs of a mediation program are the services and related costs of mediators. In the bankruptcy context the hard question is who should bear these costs. Bankruptcy complicates the problem because adding dispute resolution costs to the bankruptcy process can affect the debtor's prospects for a reorganization or fresh start -- the more the debtor spends on dispute resolution, the less she will have to work with in resuscitating her business in bankruptcy or in beginning her post-bankruptcy life on a sound financial footing. This concern is obviously intensified in programs where parties can be required to enter mediation.<sup>36</sup> The options for dealing with the costs of mediation in bankruptcy are limited.

A program can duck part of this problem by using uncompensated "volunteer" mediators.<sup>37</sup> In these programs the central issue is maintaining an adequate supply of well-trained, skilled mediators. If mediators within a program are compensated, a bankruptcy program must face other difficult questions: how much might mediators charge, who will pay the mediator, and, if the fees are to be shared by the parties, how will the shares be determined. Different programs have resolved these questions differently.<sup>38</sup>

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32. See Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95, 100-04 (1974).

33. *Id.* at 98-104 (explaining nine advantages that repeat players have over one-shotters in the context of dispute resolution).

34. See Marc Galanter & Mia Cahill, "Most Cases Settle": *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1385-86 (contending that when needed information is not open to the public, the information disparities become magnified).

35. Bankruptcy Rule 9019(a).

36. See *supra* text accompanying notes 25-30.

37. The Programs in both the District and Bankruptcy Courts of the Eastern District of Pennsylvania have been volunteer programs. However, under a new District Court Rule for the Bankruptcy Court, the parties may pay mediators a fixed fee in bankruptcy following a first, voluntary, day of mediation. See *infra* Appendix 2, Rule 9019-3(f).

38. For example, in Florida, in large Chapter 11 cases, the bankruptcy courts compensate their mediators. See Lomax, *supra* note 3, at 73 n.119 (citing *Mediation Boon or Bane?*, 23 WEEKLY NEWS & COMMENT (BCD) No. 30, Feb. 11, 1993, at A-8 ("We usually provide for an hourly rate for the mediator, decide the maximum amount of compensation and split the costs between the two parties."))

## IV. THE NEED FOR LOCAL STUDY

Given the direct and hidden costs implicated by mediation programs, and the potential impact these costs have on the quality of justice in the bankruptcy system it is obvious that court-annexed mediation programs require study and monitoring to ensure they are delivering positive results. Unfortunately, certain characteristics of the bankruptcy mediation system make it difficult to study mediation at the national level. Researchers are far more likely to perform productive and informative research at the local level.

Mediation programs in bankruptcy are not the same in each district, and even if they were structured similarly, differences in local bankruptcy cultures<sup>39</sup> would cause similar programs to operate in different ways. For example, different attitudes and perceptions of bankruptcy judges about mediation might account for substantial differences in multi-district statistical data. Similarly, basic attitudes about core policies in bankruptcy that differ from district-to-district<sup>40</sup> could work their way into the mediation process and these attitudes could affect the substance of resulting settlements. In one well-known study, Professor Braucher showed that different districts' substantially differing proportion of Chapter 13 filings were best explained by the different "legal cultures" and the different attitudes they reflected about the bankruptcy process.<sup>41</sup> These attitudes could be present in views about settling various kinds of cases and, therefore, impact upon settlement statistics.

More generally, lawyers' perception of the operative law in a given place will serve as a backdrop and context for whatever resolutions occur through mediation. Generally, because this *operative* law can vary dramatically from district to district at least in consumer cases,<sup>42</sup> the substance of settlements and, perhaps, the likelihood of settlement of various kinds of disputes may vary from district to district as well. Judges in a given district, for example, might be perceived by professional participants in the mediation process as "strict" on debtors who incur substantial

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(quoting Judge Baynes, Tampa Division, Middle District of Florida)). In the Eastern District of Pennsylvania, compensation for *arbitrators* is governed by Local Civil Rule 53.2. See FED. LOCAL CT. RULES, - E.D. PA RULE - 53.2. The arbitrators are paid \$100 each for their services performed in each case assigned for arbitration and not for their actual expenses incurred. See *id.* If an arbitration is protracted, the arbitrator can petition the court for additional compensation. See *id.* "The fees shall be paid by or pursuant to the order of the Director of the Administrative Office of the United States Courts." *Id.*

39. A four-city study by Professor Jean Braucher showed that lawyers' perspectives about the appropriateness of Chapter 7 or Chapter 13 differed from place to place in a way that could not be explained by differences in the applicable law. See Braucher, *supra* note 29, at 514-16. Those differing cultures will surely affect the approach a District takes to mediation (*e.g.*, whether to make it a routine or extraordinary process), practitioners' perceptions of the appropriateness of mediation in various contexts, and the like.

40. Braucher, *supra* note 29, at 556-80.

41. *Id.*

42. Most of the research establishing district-to-district variations has been in the consumer area. In the business arena, the evidence is strong that corporations "shop" for the most favorable district in which to reorganize. See Theodore Eisenberg & Lynn M. LoPucki, *Shopping for Judges: An Empirical Analysis of Venue Choice in Large Chapter 11 Reorganizations*, 84 CORNELL L. REV. (forthcoming July 1999). These data suggest that different *operative* law may exist in different districts in business cases as well.

credit card debt prior to bankruptcy.<sup>43</sup> If such were the case, we would expect such perceptions to affect the mediation process (either through the mediator or through debtor and creditor counsel) and, ultimately, the substance of the mediated settlements of challenges to a debtor's discharge.

Thus, if one generalizes from these examples, it suggests that the information that is most meaningful for operative decisions about mediation programs will come from close study of individual programs within their legal culture. A corollary might well be that no court-annexed mediation program in bankruptcy will be ideal for all districts; what will be best will depend on the culture into which it is introduced. The limited amount of available data in a local program makes it possible even for novices to perform an empirical study. The limited amounts of available data also serve to dictate many of the design parameters for such a study.

## V. THE SMALL EMPIRICAL STUDY OF MEDIATION

### A. Preliminary Observations--Quantitative versus Qualitative Measurement

For many, "empirical study" means gathering thousands of items of quantifiable data, performing complex statistical operations on those data, and drawing inferences from the results.<sup>44</sup> Such quantitative studies are beyond the expertise of many legal academics and, because of the massive data collection requirements, usually require outside funding.<sup>45</sup> Moreover, as suggested earlier,<sup>46</sup> such a massive study of mediation may well be ill-advised because of local variations in bankruptcy programs and district-to-district variation in "bankruptcy culture." In addition, many scientific studies make comparisons between the group being studied and a "control group" which does not share the variable in question.<sup>47</sup> In the mediation context, this kind of study would envision a comparison of a group of cases which was sent to mediation with another group that was not sent to mediation. By definition, the

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43. There is a broad range of judicial attitudes reflected in the decisions on this issue. Compare *In re Wolniewicz*, 224 B.R. 302, 305-07 (Bankr. W.D.N.Y. 1998) (holding that debtors could not discharge their substantial credit card debt under Chapter 7 reasoning that their actions of having obligations of more than six times their family income evidence a scheme to incur debt that they never intended to repay), with *Bank of New York v. Le*, 222 B.R. 366, 370 (Bankr. W.D. Okla. 1998) (finding that a creditor's nondischargeability claim based on a debtor's implied representation as to his ability to pay is insufficient to bar discharge reasoning that the "purpose of the cards is to extend credit until the time the debtor has the ability to pay").

44. One such study of the mediation process is Kim Dayton, *The Myth of Alternative Dispute Resolution in the Federal Courts*, 76 IOWA L. REV. 889 (1991).

45. The work of Professors Sullivan, Warren, and Westbrook was supported by substantial external funding. SULLIVAN, *supra* note 29, at ix-x. Professor Sullivan is trained in Sociology. *Id.* at back cover.

46. See *supra* Part IV.

47. In Professor Dayton's study, comparisons were made between districts which had substantial involvement with alternative dispute resolution with districts which did not. The study aimed at "the effect of ADR on nine variables measuring cost or delay that might be affected by, or respond to, court management techniques." Dayton, *supra* note 44, at 917. Professor Dayton generally concluded that there were no statistically significant differences in the ADR and non-ADR districts on the variables she measured. *Id.*

groups of cases would not be identical<sup>48</sup> and, if studied at the local level, would be too few to support a statistical comparison.<sup>49</sup>

Fortunately, structured study of mediation programs is neither impossible nor beyond the capabilities of researchers with limited experience using empirical methods. There is a substantial literature on qualitative empirical measurement, that is, the empirical study of processes by other than quantitative methods.<sup>50</sup> This approach to empirical study is intuitive, natural, and satisfying. It involves the now-common social science techniques of creating and distributing questionnaires, interviewing participants, and studying court documents. Information developed through these methods can enlighten decisions about the future of mediation programs.

### B. Working with Questionnaires

Perhaps the simplest method for gathering information about a local mediation program is also the most obvious: development and distribution of a questionnaire to various participants in the process.<sup>51</sup> There is little more to this method than

48. As observed by Galanter & Cahill, real life permits no comparison between a settlement and the adjudication of the same case. Galanter & Cahill, *supra* note 34, at 1346-47.

This is not a new problem in evaluating social programs. As two researchers said in 1982:

Although it is generally asserted that the strongest evaluation studies make comparisons between at least two groups (one of which has received the innovative program or services while the other has not), one of the perennial problems faced by evaluators is the inaccessibility of control groups. Experience has shown that finding a control group (say, a second health education program with aims that are similar to the one being evaluated) is extremely difficult. Also, the best comparison groups for evaluation studies are those that are constituted randomly. But the problems of randomization (e.g., how to keep the students in education program A at school X from talking to students in education program B at the same school, thereby confounding the effects of each) are sometimes nearly impossible to overcome.

JACQUELINE KOSECOFF & ARLENE FINK, EVALUATION BASICS 22 (1982).

49. In the Eastern District of Pennsylvania studies, 60 persons responded to the first survey and 46 responded to the second.

There have been far larger studies of mediation and related processes. See, e.g., Barbara A. Phillips, *Mediation: Did we get it Wrong?*, 33 WILLAMETTE L. REV. 649 (1997) (discussing survey results of mediation in the construction industry where information was received from 2,300 contractors, design professionals and attorneys (459 attorneys responded)); Bethany Verhoef Brands et al., Project, *The Iowa Mediation Service: An Empirical Study of Iowa Attorneys' Views of Mandatory Farm Mediation*, 79 IOWA L. REV. 653, 693-94 (1994) (discussing a survey of 325 Iowa attorneys, with a 75% response rate, looking at mediation between farmers and creditors); Dayton, *supra* note 44; Wissler, *supra* note 29, at 590-91 (discussing mediation questionnaire from Settlement Week in Ohio where the questionnaire was completed by 570 mediators, 1124 attorneys, and 646 parties); Macfarlane, *supra* note 20.

50. See, e.g., JACQUELINE KOSECOFF & ARLENE FINK, EVALUATION BASICS (1982); DAVID NACHMIAS & CHAVA NACHMIAS, RESEARCH METHODS IN THE SOCIAL SCIENCES 287-303 (1976); MICHAEL QUINN PATTON, HOW TO USE QUALITATIVE METHODS IN EVALUATION (1987) [hereinafter QUALITATIVE METHODS]; MICHAEL QUINN PATTON, QUALITATIVE EVALUATION METHODS (1980).

51. Written documents, like open-ended written items on questionnaires, serve as one type of data collection under a qualitative method of study. See QUALITATIVE METHODS, *supra* note 50, at 7. "Document analysis yields excerpts, quotations, or entire passages from records, correspondence, official reports, and open-ended surveys." *Id.* By using open-ended narrative type questions and not pre-determined response choices on a questionnaire, a qualitative method produces a large amount of detailed data about a small number of people. *Id.* at 9-10.

determining the information to be sought and developing a clear instrument through which to capture the information.

### 1. *Who Should Be Surveyed?*

A threshold issue in designing a survey is determining who should be the respondents.<sup>52</sup> In the mediation process potential participants for a survey include the mediators, the parties, the parties' lawyers, the judges, and the personnel in the clerk's office. Each will bring a different perspective to their views of the program.

In the Eastern District of Pennsylvania study, we decided to survey only the mediators and the parties' lawyers. There were several reasons for this decision. First, we didn't need to send surveys to the judges and court personal -- there were so few of them that we could interview them in person.<sup>53</sup> While very labor-intensive, it seemed clear that a structured, interactive session would provide more information than would a survey.<sup>54</sup> Ultimately we settled on group interviews with the judges. The relatively large number of mediators involved precluded an in-person interview with each of them.

As between sending questionnaires to the actual parties or to their lawyers, the choice was primarily driven by practical considerations. Surveying the actual parties would have provided very valuable insights into the perceived workings of the Mediation Program by those most directly affected by it. Most importantly, we might have been able to determine whether the Program improved party satisfaction with the legal process, a strong justification for having a mediation program in the first place.

Nevertheless, surveying the parties had strong practical drawbacks. For one thing, the parties had a broad range of education and experience—they ranged from consumer debtors in disputes about dischargeability to business people involved in preference actions. This range of experience made design of a survey instrument that all respondents would understand in the same way difficult, if not impossible. Surveying the parties' lawyers avoided this problem because the lawyers' common experience and education made them much easier to communicate with as a group.<sup>55</sup> At an even more practical level, the mediators' and lawyers' names and addresses

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52. Decisions on sampling size and units for analysis are part of the technical design for data collection and analysis. *Id.* at 45, 50.

53. The advantage of interviewing people is that respondents get to respond in their own personal terms and express their own views. *Id.* at 114-15. When the response format is open-ended, the interviewer never tells the respondents how to respond, or what categories, words or phrases that must be used in their answers. *Id.* at 115. "This is what distinguishes qualitative interviewing from the closed interview, questionnaire, or test typically used in quantitative research." *Id.*

54. The simple availability of follow-up and clarifying questions makes an in-person interview far superior to a written survey.

55. See ROBERT ROSENTHAL & RALPH L. ROSNOW, *ESSENTIALS OF BEHAVIORAL RESEARCH: METHODS AND DATA ANALYSIS* 128 (1984) (self-reporting works well with professionals because they have the language and experience to describe their own behavior).

were readily available from the clerk's office. Identifying the actual parties who would have participated in mediation sessions was far more difficult.<sup>56</sup>

## 2. *What Information to Solicit?*

In its most general form, a researcher wants to know if a mediation program is working. If it is not, she wants to know if it can be fixed and, if so, how to do so.<sup>57</sup> But measuring success in a mediation program raises a classical measurement problem: defining success and deciding what should count as showing it. Many would, for example, regard an improvement in the rate of "voluntary" settlements<sup>58</sup> to be success. While that criterion is itself problematic,<sup>59</sup> even if there were agreement on its use in measuring "success," there would be difficulty determining a mediation program's contribution to a settlement. If, for example, a case were assigned to mediation, the mediator attempted to schedule a conference, and the parties settled prior to the scheduling, would we attribute that success to the mediation program? What if the parties settled the case the day before the scheduled mediation conference? Would we attribute success to the mediation process if the parties settled the case two weeks after the mediation conference?

One solution to this problem is to measure "success" in a less "objective" way, which was how our group approached it. Rather than attempting to define "success" using a method that would include some cases and exclude others, we sought subjective evaluation by those involved in the process and invited comments from which we could draw some tentative conclusions about whether the Program was working.

In addition to the general question whether a program is working, one generally wants to know something about the kinds of cases or issues sent to mediation, the extent to which the rules were followed (*e.g.*, were required documents filed, were the parties prepared, etc.), the demands the Program makes on the time of the parties and the mediators, and the critiques and suggestions for improvement. A comprehensive questionnaire might explore those areas as well recognizing, however, that as the questionnaire gets longer, the number of likely responses will decrease.

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56. In mediation sessions involving businesses, for example, the business might have sent its CEO, its Controller, or simply its lawyer to the mediation session. Public records would not contain that information.

57. Patton suggests that the initial decisions require answers to these questions:

- (1) *Who* is the information for and who will use the findings of the evaluation?
- (2) *What* kinds of information are needed?
- (3) *How* is the information to be used? For what purposes is evaluation being done?
- (4) *When* is the information needed?
- (5) *What* resources are available to conduct the evaluation?

QUALITATIVE METHODS, *supra* note 50, at 8.

58. See *supra* text accompanying notes 17-30.

59. See generally Fiss, *supra* note 24; Galanter & Cahill, *supra* note 34; Grillo, *supra* note 4.

### 3. *What Should Be the Form of the Questions?*

The questionnaires in our studies contained both open-ended or “qualitative” questions calling for a respondent’s own words and closed-ended or “quantitative” questions asking the respondent to select one of several alternatives. The former kinds of questions are able to provide a wider (and, in larger studies, potentially unmanageable) range of information; the latter kinds of question provide information that can be quantified and graphed.<sup>60</sup>

Qualitative questions are more likely to uncover information that the respondents believe is important in evaluating a program. We read the respondent’s own words and can capture nuance from the answer that is unavailable in a quantitative response. Moreover, if a respondent misreads the question, her different reading may well be reflected in her answer. This means that there is less likelihood that a respondent’s misreading of the question will go undetected by the researcher. On the other hand, the verbal responses to qualitative questions require either interpretation or synthesis by the researcher and this can introduce the researcher’s interpretive bias into the study. In small studies, respondents’ answers can simply be gathered and read together for the information they convey and the researcher will incorporate those answers generally into a narrative; in larger studies, some categorizing of qualitative responses will be necessary in order to manage the information.

Quantitative questions can suffer from researcher bias in a different way. These questions confine the universe of responses in a way that qualitative questions do not. This means that if the researcher is asking the wrong questions or has a preexisting bias toward some result, she may inadvertently construct the quantitative questions in a way that will confirm the bias. In addition, ambiguity in the questions is a far bigger problem with quantitative questions because a box checked by the respondent cannot indicate whether she misread the question.

In the Eastern District of Pennsylvania study, we surveyed both mediators and lawyer participants in the process in the Summer of 1995 and Fall of 1996. The survey instruments were substantially the same, although they differed slightly for mediators and litigators.<sup>61</sup>

The questionnaires in both surveys had both qualitative and quantitative questions. This mixed question approach allowed us both to quantify some

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60. Once again, the literature on program evaluation is illuminating:

Quantitative measures are succinct, parsimonious, and easily aggregated for analysis; quantitative data are systematic, standardized, and easily presented in a short space. By contrast, the qualitative measures are longer, more detailed, and variable in content; analysis is difficult because responses are neither systematic nor standardized. Yet the open-ended responses permit one to understand the world as seen by the respondents. The purpose of gathering responses to open-ended questions is to enable the researcher to understand and capture the points of view of other people without predetermining those points of view through prior selection of questionnaire categories.

MICHAEL QUINN PATTON, *QUALITATIVE EVALUATION METHODS* 28 (1980).

61. One major difference in the two instruments was the addition to the second questionnaire of questions about compensating mediators within the process. There had been inconclusive discussions about this question following the first survey and it seemed important to see whether those who got the services of a free mediator would have been willing to pay.



information and to better understand the kind of information considered important by the respondents. Fortunately, there were considerably fewer than 100 respondents in each of our surveys, so the information from the qualitative questions was manageable.

### C. Interviewing Participants

Unless the numbers are too large, one can learn a great deal for purposes of evaluation by simply interviewing the judges, lawyers, clients, and mediators involved in the mediation process. A structured, interactive interview is perhaps the most natural and intuitive approach to gathering information about a local Program.

We interviewed four of the District's bankruptcy judges two at a time contemporaneously with the second survey of mediators and party lawyers. A primary purpose of these interviews was to gather and share information about the workings of the Program and identify places where, from the judges' perspective, it might be altered. Apart from being a more efficient use of our time, the joint interviews uncovered more information and enabled the judges to discuss the Program and their own use of mediation with one another. Since our Program allowed judges to suggest or assign cases to mediators, a natural focus in these interviews related to how each judge decided which cases should go to mediators.

The interviews revealed that our judges differed in how they used mediation and in how they offered it to the parties. At one end of the spectrum was a judge that used mediation very sparingly, reserving it for the unusual cases that are "unadjudicable" because of their non-legal underpinnings. Such cases are certainly good candidates for the mediation process, which can uncover the emotional attitudes and relationship history that may be animating the parties' legal arguments.<sup>62</sup>

This approach tends to limit the use of mediation and implicitly reflects the view that adjudication is the "better" route to the resolution of disputes in the larger bulk of cases. This view is reflected in the literature that is critical of mediation as a substitute for adjudication because the mediated outcomes tend to reflect the preexisting power structure.<sup>63</sup> In the consumer bankruptcy setting, at least, there is good reason to be concerned with "consensual" resolutions of disputes between consumer debtors and creditors who tend to be "repeat players" and have considerably more resources at their disposal.<sup>64</sup>

Moreover, when cases present a clear legal issue (*e.g.*, "is this debt dischargeable"), adjudication may be a faster and more economical means of arriving at a resolution and in bankruptcy, in particular, speed and cost are very important. The threat of adjudication itself and the prospect of the loser subsequently appealing the case supplies powerful motivation for the parties to settle their case, thereby ending the dispute in a consensual fashion. An adjudicatory

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62. Mediation's early and extensive use in the family law area attests to its capacity to assist in solving problems that are not as easily addressed through the adversary system.

63. See Fiss, *supra* note 24; Galanter, *supra* note 32; Galanter & Cahill, *supra* note 34; Grillo, *supra* note 4.

64. See *supra* text accompanying notes 28-30.

approach ends the dispute one way or the other without the assistance of a mediator; mediation, if unsuccessful, would be an unnecessary detour to the same result.

The view that mediation has a relatively limited role in bankruptcy implies that the parties or their attorneys are fully capable of settling any dispute if given sufficient motivation to settle.<sup>65</sup> If that is so, then mediation becomes an unnecessary expense in an already-burdened bankruptcy system. These views are reflected in informal comments about the Program from members of the bankruptcy bar.

From our interviews we found at the other extreme a judge who assigned cases to mediation essentially by asking the parties if they wanted a mediator and, if they said "no," required that they give a reason. This procedure sends significantly more cases to mediation and, no doubt, sends some parties to mediation who otherwise would not have considered the process. It reflects the view that a mediator can assist the parties in settling even a "simple" case and can assist even parties who lack knowledge or confidence that a third party can assist in their negotiation.<sup>66</sup> This procedure also reflects, perhaps, a view that a mediated settlement is a more positive outcome than an adjudicated result or a settlement reached under imminent threat of adjudication.

#### D. Comparing Interviews with Questionnaires

The interviews revealed a central issue of great practical importance within our mediation program: should mediation be used sparingly (as did one judge) or more-or-less across the board (as did another)? The answer to this question depended partly on whether the advantages of mediation outweighed the costs in the context of bankruptcy. Confirming one or the other of those approaches through other data offered the promise of fact-based Program improvement.

While it was tempting to try to test the validity of these views statistically, there were simply too few cases in our system that had actually used mediation. Since, however, many of the questions in our instruments were designed with this central question in mind, the data in the responses could be looked to for guidance on this central question. We fashioned many of these questions quantitatively so they would elicit a response that we could quantify and graph.

While not statistically significant in any respect (again, the number of responses was too small and there was no control group), the responses to the questionnaires in both studies *tended* to suggest that the benefits outweighed the costs in most cases. If "settlement assisted by mediation" was a desirable end,<sup>67</sup> responses to the questionnaires suggested that mediation was playing a positive role within our local bankruptcy system across the bulk of the cases in which it was employed. Answers to the quantitative questions tended to support this contention.

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65. One author critical of alternative dispute resolution quotes one judge as writing:

Alternative dispute resolution is illusory, if not an outright myth. Effective movement of a trial docket occurs when a presiding judge does two things: (1) sets an early trial date, and (2) adheres to the trial date if a settlement or dismissal does not occur in the interim.

Dayton, *supra* note 44, at 889 n.1.

66. See the views described in McEwen & Milburn, *supra* note 20.

67. See *supra* text accompanying notes 17-35.

While responses from both surveys were positive about the program, the data from the second set of responses were far more positive than that of the first set. The Final Report contained several simple graphs to make the information more usable and quantified the information with percentages that showed the strength of the data. Both with the graphs and with the text, we compared the responses of mediators and litigators so the reader could determine if bias was present. Samples of the graphs accompany the text; it is a simple matter to create them with any good spreadsheet program.

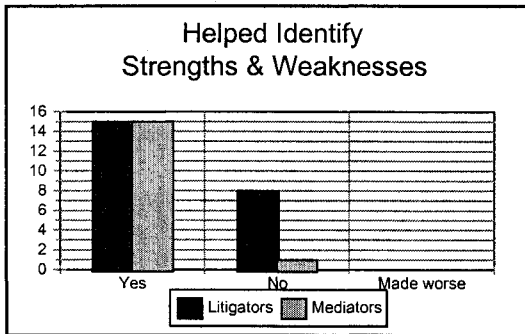


Figure 1: Sample Graph of Questionnaire Data

The surveys, for example, asked both litigators and mediators if settlement was reached during the mediation session, whether the mediation process moved the case toward settlement, and whether the case would have settled absent mediation. The responses were decidedly positive<sup>68</sup> and strongly suggested that the participants felt that the process moved cases toward settlement.

That data did not show whether mediation was “worth it,” either in any particular case or across the cases generally. We could not tell what the parties and their lawyers would have accomplished in the absence of mediation. The surveys did elicit data which strongly suggested that the participants were generally pleased with the mediation process.<sup>69</sup>

It is possible, of course, that the positive data were generated by the litigators’ positive feelings toward the *pro bono* mediation services of a fellow bankruptcy lawyer, or that the mediators’ views were corrupted by their own need to believe in the positive contribution they made as a mediator. Once again, we cannot know the extent to which these factors played a role in their responses.

On the basis of the data, the Report concluded that mediation was a viable tool for the District to use. Because the implications of following such a recommendation would further burden our *pro bono* mediators, however, the Report also recommended that we find a way to compensate mediators who served beyond

68. For example,

Seventy-eight percent of the responding mediators and 84% of the responding litigators thought that mediation moved their cases toward settlement. Only 8% of the mediators thought their cases would have settled without mediation whereas 16% of the litigators thought their cases would have settled without mediation.

Final Report at 7.

69. The questionnaires asked whether mediation helped the parties identify the issues and strengths and weaknesses of their cases, whether it encouraged exchange of information, whether it advanced the case toward resolution, and whether it reduced the costs of resolution. The data were quantified in the text and displayed graphically.

a reasonable period of time for a volunteer. This recommendation ultimately found its way into the local rule promulgated for the bankruptcy court.<sup>70</sup>

### E. Docket Study

A common method for conducting empirical research in bankruptcy is to study the bankruptcy court dockets.<sup>71</sup> Dockets present information about cases in a systematic way. This enables researchers to quantify it. For purposes of studying mediation, for example, a docket will note when a matter has been assigned to mediation, when a mediator has scheduled a mediation session, and if and when a matter is settled.

We were fortunate during Summer 1997 to be able to study the dockets of a recently-appointed bankruptcy judge. The judge and Bankruptcy Court Clerk permitted us to examine the dockets and files of the 74 cases the judge had sent to mediation since beginning work as a bankruptcy judge.

At the outset, we were not entirely sure what, if anything, such a study would yield. It might, we thought, reveal something that we hadn't seen in the interviews or responses to the questionnaires or provide us with a cross-check on the other data. In addition, about midway through the period of study, the judge made a change to the pretrial process. By examining the way the cases progressed through the pretrial process before and after that change, we could potentially determine how the change in procedure affected the speed of disposition. Fortunately, the study of the dockets of 74 cases was manageable without outside funding.

A docket study has certain advantages over other methods of research into the bankruptcy process. Most importantly, such a study does not depend on busy lawyers answering questionnaires. This means one can get a more complete view of a selected group of cases. Further, the information is standardized, allowing for quantitative analysis. Our study simply measured time between various docketed events so we could see whether mediation seemed to have an influence on the speed of case disposition. Thus, for example, we counted the number of days from a case's filing date to the date when a mediator was appointed, the number of days from the filing date to the date on which the mediator scheduled a hearing, and the number of days from those dates to the actual disposition of the matter. Entering this data into a spreadsheet program allowed us to see if there were patterns.

As we looked at the data, there emerged what seemed to be a surprisingly large number of cases where a mediator had been appointed but little actual work by the mediator was apparent from the file. Perhaps the most important hypothesis that could be tested against this observation was whether the *active* presence of a mediator was related to the speed at which a case progressed. Since the cases we studied all had mediators appointed, we could test the hypothesis by separating the cases in which a mediator actually did something from the cases where nothing

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70. See *infra* Appendix 2, Rule 9019-3(f). The Local Rule became effective February 1, 1999.

71. A bankruptcy docket study forms the basis for a very provocative article on bankruptcy and divorce, Peter C. Alexander, *Divorce and the Dischargeability of Debts: Focusing on Women as Creditors in Bankruptcy*, 43 CATH. U. L. REV. 351, 368-69 (1994); a large version of a docket study also forms part of the basis for SULLIVAN, *supra* note 29.

further happened. When we sorted the cases this way, a strong -- and somewhat surprising -- pattern emerged.

We found that the average time to the case's disposition differed depending on whether the mediator did or did not schedule a hearing. In cases where the mediator did not report scheduling a hearing, a case took on average 70.14 days<sup>72</sup> from the appointment of the mediator to the case's disposition. When the mediator reported scheduling a hearing, the average was 63.75 days.

We were also able to separate the cases that were disposed of by settlement and those which were not. Having isolated the cases that settled, we sorted those cases on whether the mediator reported scheduling a hearing or not and the same pattern emerged. When the mediator did not report scheduling a hearing, the average time between the appointment of a mediator and settlement was 69.16 days;<sup>73</sup> when the mediator did report scheduling a hearing, the average time between mediator appointment and settlement was 58.44 days.

The main conclusions we drew from the docket study were, first, that the mediator's mere scheduling of a hearing seemed to push a case towards disposition. This fact may, of course, have no relationship with mediation *per se*; the looming hearing date itself may well prompt the parties to serious negotiation.<sup>74</sup> Nevertheless, the data

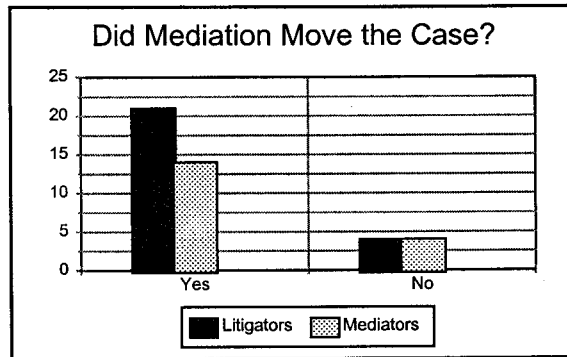


Figure 2: Data from Questionnaires

from the docket study were consistent with responses to the questionnaires (summarized in an accompanying graph) that showed the participants perceived that mediation sped the disposition of the case.

The docket study revealed a fact that was not evident from the questionnaire responses or from interviewing the judges: that some volunteer mediators were not as attentive to their obligations as they should have been. This resulted in a cautionary recommendation that the Program be more closely monitored, and that the court give administrative help to the volunteer mediators.<sup>75</sup> This observation in turn also added fuel to a discussion about compensating mediators. Ultimately, the Report recommended that the court consider compensating mediators in larger

72. In compiling this average, we removed one distorting case where it took 272 days to dispose of the case. With the 272 day case included in the calculations, the average was 75.75 days.

73. In compiling this average, again, we removed the distorting 272 day case. With that case included in the calculations, the average was 77.65 days.

74. See *supra* note 54.

75. Recommendation 4, *infra* Appendix 1.

undertakings. That recommendation ultimately resulted in a partial-compensation provision in the proposed Local Rule.<sup>76</sup>

From a methodological standpoint, the docket study served as an important cross-check on the self-reporting approach taken with the questionnaires and added information to the overall study. It tended to confirm the conclusion we drew from the questionnaires that the presence of mediation was a positive force in moving a case towards resolution. It also gave us information about cases whose participants did not return their questionnaires.

The docket study tended to suggest that some mediators had been less than vigilant in discharging their volunteer obligations and it now seems obvious that such persons might be reluctant to reveal this information by responding to a questionnaire. While we did not set out to test the extent to which our volunteers were following through with their good intentions, it now seems clear that volunteer performance should be investigated in a program which relies on volunteer mediators. A docket study, unlike a questionnaire, can help gather information for such an evaluation.

### F. Combining the Study Methods

The questionnaires, interviews, and docket study supplied those responsible for the mediation program with data from different sources. In retrospect, one might conclude that the overall study was stronger than the sum of these component parts. The different parts tended to corroborate one another and offset the small sample size and subjectivity that is inevitable in evaluative research. Together, the different parts of the study supplied what appeared to be a reasonably accurate sketch of the mediation program. More, of course, could have been done -- for example, we could have interviewed mediators or lawyers or some group of them. It is always a matter of judgment whether one's supply of information is an adequate basis on which to take action. The relatively strong corroboration that the different parts of the study supplied suggested that the information collected to that point was reasonably accurate and that it could reliably serve as a basis on which to move forward.

## VI. CONCLUSION

Legal reform too often proceeds without an adequate understanding of how the preexisting rules are actually working. Since at least the 1960's<sup>77</sup> legal academics conducting modest empirical work have brought forth insights that influenced policy in bankruptcy and elsewhere. Because the legal system often operates in an unexpected fashion, even a simple, small empirical study can yield new insights.<sup>78</sup>

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76. See *infra* Attachment 2, Local Rule 9019-3(f).

77. See, e.g., Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963); Stewart Macaulay, *The Use and Non-Use of Contracts in the Manufacturing Industry*, 9 PRAC. LAW. 13 (1963).

78. Simple interviews of the parties, lawyers, jurors and others connected with the famous law school case *Sullivan v. O'Connor*, 296 N.E.2d 183 (Mass. 1973), has given generations of contracts students insights into the legal system that was unavailable without the study. See RICHARD DANZIG, THE

Most members of law school faculty, however are not trained in the social science methods necessary to conduct large-scale empirical studies commonly conducted at institutions of higher education. Thus, while legal academics ought to be doing more of this important research, it is very difficult to know where to begin. A study of a local bankruptcy mediation program offers a starting point to those academics with little experience in empirical research.

Performing the studies described here did not require expertise in systems analysis, empirical research, or social science methods. On the contrary, the experimental methods used here, while well-recognized in social science research, are natural and intuitive. At its most basic, The data gathering process consists of deciding what needs to be learned and then devising ways to find out about it. The very process of assembling, analyzing and drawing conclusions from raw data teaches both about the subject being studied and about the methods for studying it.

Moreover, studying a local mediation program can have an immediate, tangible impact on policy making. The research results from the studies here informed the process of evaluating our mediation program and may have contributed to the quality of the resulting operational decisions about the direction of the program. Law professors all too seldom see such immediate impact from their work outside the classroom.

Finally, an empirical study of the kind described here can help to forge or maintain links between judiciary, practicing bar, and academy. In an era where complaints about a widening distance between the law schools and law practice abound, this incidental benefit from this kind of research may be the most important of all.

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CAPABILITY PROBLEM IN CONTRACT LAW 5-41 (1978). Without Professor Peter Alexander's empirical work in the clerks' offices of two courts, we would know far less of bankruptcy's disparate treatment of women. See Alexander, *supra* note 71. Looking only at the Bankruptcy Code and cases decided under it would not lead a student to discover substantial unexplained differences in the rates of Chapter 7 and 13 filings in different districts. See SULLIVAN, *supra* note 29. Curiosity about that unexplained filing data led to further the hypothesis that local bankruptcy "cultures" are producing a very non-uniform law-in-action from our uniform federal statute. See Braucher, *supra* note 29.

The non-uniformity of our *delivered* bankruptcy law is a far more subtle and difficult problem and would require something other than statutory tinkering to fix it. However one might feel about the need or possibility of addressing the harder problem, detecting the problem is the first step. That step cannot be taken within the confines of the law library.

## APPENDIX 1

## Summary of Recommendations of the Report on Court Sponsored Mediation, U.S. Bankruptcy Court, Eastern District of Pennsylvania, January 6, 1998:

1. The Program should remain voluntary. While there is broad movement in many jurisdictions toward “mandatory” assignment of cases to mediation, both the bankruptcy context and the pro bono nature of our program would not seem to permit such assignments at this point. The data do suggest, however, that our judges could make more use of the Program and the mediation literature suggests that nudging reluctant parties into mediation often produces successful outcomes.
2. The parties’ decision to enter mediation should occur (as now) after the parties are somewhat familiar with the essential facts underlying their claims and defenses. Mediation at an earlier time has less prospect of success.
3. Mediators should continue to give their services on a pro bono basis--there is no evidence in the data that an occasional request to conduct a routine mediation session is presenting a burden to our volunteer mediators. We should probably define a limitation on their voluntary commitment (perhaps one day) beyond which we do not expect them to continue the mediation session without the parties making arrangements with the mediator for payment to cover expenses and/or services. Historically, mediation sessions going beyond one day are very rare.
4. Some of the data suggest that some mediators do not follow through on their obligations once appointed. Given the pro bono nature of the Program, it is essential that the Program be monitored on an ongoing basis for quality control purposes.
5. The Bankruptcy Court should continue to maintain a list of qualified mediators and ensure that adequate numbers of mediators are available to conduct bankruptcy mediation on a pro bono basis. To qualify as mediator, a person should show evidence that he or she has substantial experience in mediation or has been trained to mediate cases by a recognized entity qualified to train mediators. We should not formally require that a volunteer mediator be either a practicing lawyer or a bankruptcy expert — successful mediation sessions have been conducted in our Program by people who are neither.
6. Individual bankruptcy judges have varied widely in their methods for offering mediation to the parties and obtaining their agreement to enter mediation. The approach to assignment of cases goes to the “voluntary” nature of the parties’ entry to mediation. There is insufficient data in our study to conclude which method is “best.”
7. To relieve the burdens on our volunteer mediators, the Court should lend an administrative hand in scheduling the mediation session.
8. The Court should make available conference room space in which to conduct mediation sessions.
9. The Court should continue to require a short, timely submission by the parties that summarizes the facts and issue involved in order to assist the mediator.



10. After some specified period of time following the appointment of the mediator, the mediator should formally "close" the mediation process by filing a Report (on a form supplied by the Clerk's Office) indicating 1) whether or not the scheduled mediation conference was actually held, 2) whether the parties actually settled their case, and 3) if not, whether the parties made progress toward settlement. The Report should become part of the record and the mediation process should be considered "open" until the report formally closes it. There should be follow-up on "open" cases.
11. Consistent with maintaining the confidentiality of the mediation process, the Court should monitor settlement results achieved through the mediation process for their impact on third parties (primarily other creditors) and for their fairness in some instances. This probably happens as a matter of course in bankruptcy.
12. All aspects of the actual mediation conference should remain strictly confidential. A recent Pennsylvania statute, 42 Pa. C. S. A. 5949 deals with confidentiality in mediation and addresses many of the issues.
13. The Eastern District of Pennsylvania Bankruptcy Conference and the Court should consider further mediation training sessions and educational programs to acquaint the Bar with mediation and to revitalize the panel of mediators.
14. The Bankruptcy Court may wish to define an appropriate entity to decide and carry out changes to the Program thought to be necessary, to plan training and education in mediation, and to monitor the Program regularly.

## APPENDIX 2

*Local Rule 9019 - 3, Eastern District of Pennsylvania*

## Local Rule 9019-3

## Mediation

(a) *Certification of Mediators.* The Chief Judge shall certify as many mediators as the Chief Judge determines are necessary.

(b) *Application.* An application for certification as a mediator may be obtained from the clerk. A properly completed application may be submitted to the clerk.

(c) *Selection Criteria.*

(1) *Attorney Applicants.* An attorney admitted to the bar of this court under L.B.R. 2090-1 may be certified as a mediator if the attorney (i) has served as a mediator on a regular basis or participated in or is willing to participate in formal mediation training and (ii) has been involved actively for at least three (3) years

(A) as counsel of record in bankruptcy cases either for the debtor, debtor in possession, trustee, or creditors' committee, or for a party to adversary proceedings or contested matters; or

(B) as an academic or practicing attorney in matters that involve legal or factual issues or business transactions that are the subject of litigation before this court.

(2) *Non-Attorney Applicants.* A person who is not an attorney may be certified as a mediator if the person (i) has served as a mediator on a regular basis or participated in or is willing to participate in formal mediation training and (ii) has been involved actively for at least three (3) years

(A) as a professional in bankruptcy cases; or

(B) as a participant or a professional in matters that involve legal or factual issues or business transactions that are the subject of litigation before this court.

(d) *Register of Certified Mediators: Retention of Appointment Orders.* The clerk shall maintain a Register of Certified Mediators and provide a copy of the Register on request. Orders appointing mediators shall be retained by the clerk and the clerk shall maintain a record of each mediator's appointments.

(e) *Orders Appointing a Mediator.* Any matter arising in a case, other than an adversary proceeding subject to compulsory arbitration under L.B.R. 9019-2, may be assigned for mediation. The court, on its own motion, or on the request of a party may assign a matter for mediation. If the court determines a matter will be assigned for mediation, the court, after consultation with the parties, shall appoint a mediator from the Register of Certified Mediators. The clerk shall mail promptly a copy of the order to the mediator.

(f) *Compensation.* A mediator who accepts an appointment volunteers the time expended to prepare for the mediation and to conduct a mediation conference or conferences lasting up to four (4) hours. After completion of four (4) hours in a mediation conference or conferences, the mediator may either (i) continue to volunteer the mediator's time or (ii) give the parties the option to agree to pay the mediator \$150 per hour for additional time spent on the mediation. The parties shall

each pay a pro rata share of the mediator's compensation, unless they agree to some other allocation of the obligation to pay the fee. A motion to enforce a party's obligation under this subdivision to compensation a mediator is governed by L.B.R. 9014-3

(g) *Disqualification to Serve as Mediator.* Mediators shall be disqualified for bias or prejudice as provided in 28 U.S.C. § 144 and shall disqualify themselves from proceeding with any appointment when they would be required to disqualify themselves under 28 U.S.C. § 455 if they were a justice, judge, or magistrate judge. Within five (5) days of receiving an order of appointment the mediator shall notify the clerk that the appointment is accepted and there is no ground for disqualification or that mediator is disqualified.

(h) *Confidentiality: Service of Mediator's Law Firm.* A mediator shall treat all information obtained during the mediation process as confidential. A mediator's law firm is not automatically disqualified from employment as a professional in a case or from representing a party in the case solely because of the mediator's prior service in a case. If the mediator's law firm is employed as a professional in a case or undertakes representation of a party in the case and disclosure of information obtained by the mediator in the mediation would be harmful, an appropriate screening mechanism shall be established by the mediator's law firm to insure the mediator has no connection with the law firm's discharge of its responsibilities in the case.

(i) *Parties to the Mediation.* On the request of the mediator or on the court's own motion, the court may direct that additional parties participate in the mediation or be invited to participate in the mediation.

(j) *Scheduling Mediation Conference.*

(1) *Authority of Mediator.* The mediator shall select the date, time, and, subject to subdivision (j)(2), the location of the initial mediation conference and all other mediation activities.

(2) *Location.* Promptly after the entry of an order appointing a mediator, the clerk shall advise the mediator of the dates and times mediation facilities are available at the courthouse. The initial mediation conference and any additional conferences shall be held in the courthouse unless the mediator determines that it is in the interest of the mediator and the parties to hold the conference at another location designated by the mediator.

(3) *Date.* The date of the initial mediation conference shall be no later than thirty (30) days after the mediator is notified of the appointment.

(4) *Notice.* The clerk shall give notice to the parties of the name of the mediator and the date, time, and location of the initial mediation conference at least 15 days before the date of the initial mediation conference.

(5) *Continuance.* The mediator may continue the initial conference to a date that is no later than sixty (60) days after the mediator is notified of the appointment if the parties consent and the mediator finds that exceptional circumstances prevent holding the initial conference on the original date or fairness to the parties justifies a continuance. If the initial conference is continued to a later date, the mediator shall notify the judge who entered the appointment order.

(6) *Additional Conferences.* The mediator, with the consent of the parties, may schedule additional mediation conferences.

(k) *Mediation Procedure*

(1) **No Automatic Continuance of Matters Assigned to Mediation.** A trial or hearing will not be continued to accommodate a mediation unless the parties consent to the continuance and the court so directs.

(2) **Mediation Memorandum.** Not later than three (3) days before the initial mediation conference, each party shall deliver or telecopy to the mediator and to each other party a mediation conference memorandum no longer than two (2) pages, summarizing the nature of the matter and the party's positions on (1) the major factual and legal issues affecting liability, (2) the relief sought by each party and (3) settlement. Mediation memoranda are solely for use in the mediation process and shall not be filed.

(3) **Attendance of Counsel at Mediation Conference.** An attorney who is responsible for the representation of a party shall attend the initial mediation conference and any additional mediation conferences. Local counsel for an attorney attending a conference does not have to appear. Each attorney shall be prepared to discuss in good faith the following:

- (i) all liability issues;
- (ii) all damage issues; and
- (iii) the client's position on settlement.

(4) **Attendance of Parties at Mediation Conference.** If an individual or any other entity that is a party to a mediation resides within or has its principal place of business located within the Eastern District of Pennsylvania, the individual shall attend the mediation conference in person and any other entity shall have a person with decision making authority for it attend the mediation conference. All other individuals or entities that are parties to the mediation must be available by telephone and the person available by telephone must have decision making authority. The mediator for cause may excuse attendance completely or authorize participation by telephone.

(5) **Sanctions.** Willful failure of an attorney or a party to comply with subdivisions (k)(3) or (k)(4) shall be reported to the judge who entered the appointment order and may result in imposition of appropriate sanctions.

(6) **No Recording of Mediation Conference.** A mediation conference shall not be recorded by any means.

(7) **Conclusion of Mediation.** The mediator shall file a Mediation Report on the form provided by the clerk within ten (10) days of the conclusion of the mediation. If the mediation results in an agreement for the resolution of the matter, the parties shall determine which of them will prepare the stipulation of settlement, have the stipulation of settlement executed, and file the requisite motion for court approval. A motion for court approval shall be filed no later than thirty (30) days after the conclusion of the mediation.

(8) **Confidentiality of Mediation: No Use at Trial or Otherwise.** A Mediation Submission, a mediator's written settlement recommendation memorandum or any oral suggestions relating to settlement, and any statement of a party, an attorney, the mediator, or other participant is confidential and privileged and shall not be disclosed to third parties. F.R.E. 408 applies to mediation under this rule and no statement made during the mediation process or writing used during the mediation process shall be offered or admissible as evidence in any trial or hearing, made

known to the court or jury, or construed for any purpose as an admission. Papers relating to the mediation, except the Mediation Report, shall not be filed or delivered to a judge of the court. This subdivision does not apply to the reporting of or processing of complaints about unlawful or unethical conduct during the mediation process.

#### SOURCE

This rule is derived from the Standing Order of the Bankruptcy Court dated May 2, 1994 (S.O.) and Local Rule of Civil Procedure 53.2.1..

Subdivision (a) is derived from S.O. ¶ 1.1.

Subdivision (b) is derived from L.R.Civ.P. 53.2.1(1)(c).

Subdivision (c)(1) is a revision of S.O. ¶¶ 1.2(b), 1.3, and 1.4. Subdivision (c)(2), which authorizes the certification of individuals who are not attorneys as mediators, is new.

Subdivision (d) is a revision of S.O. ¶¶ 1.1, 2.2, and 3.5.

Subdivision (e) is derived from S.O. ¶¶ 3.1 and 3.2.

Subdivision (f) is new.

Subdivision (g) is derived from L.R.Civ.P. 53.2.1(4)(e).

Subdivision (h) is derived from S.O. ¶ 3.6.

Subdivision (i) is derived from S.O. ¶ 3.1.

Subdivision (j) is derived from S.O. ¶¶ 4.2 and 4.9. Subdivision(j)(2) is new. Mediation conferences are to be held in the courthouse unless the mediator determines that there is a significant reason why everyone would be better served by holding the conference at a different location.

Subdivision (k). The sources of the respective parts of this subdivision are as follows:

<u>Part</u>	<u>S.O</u>
(1) No Automatic Continuance	¶ 3.1
(2) Mediation Memorandum	L.R.Civ.P. 53.2.1(5)(a)
(3) Attendance of Counsel	¶ 4.4
(4) Attendance of Parties	¶ 4.5
(5) Sanctions	¶ 4.6
(6) No Recording	¶ 4.7
(7) Conclusion of Mediation	¶ 5.1
(8) Confidentiality	¶¶ 4.3, 4.7, and 4.8