Alternative Dispute Resolution in a Bankruptcy Court: The Mediation Program in the Southern District of California

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Table of Contents

List of Tables

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EXECUTIVE SUMMARY

In the summer of 1986, the Bankruptcy Court of the Southern District of California established a mediation program for adversary proceedings and contested matters. During the course of litigation, at the court's invitation, parties to such disputes may jointly choose a mediator from a list of mediators submitted by the bankruptcy section of the local bar association and approved by the court. The mediators have volunteered to work without remuneration for their services. Upon this selection, the court issues an order appointing the mediator to the proceeding; from this point forward, the conduct and reporting of the outcome of mediation are generally governed by General Order No. 145 of the bankruptcy court. Details of the mediation are not communicated to the court, but if the parties resolve the dispute during mediation, the mediator will so indicate on a certificate submitted to the court. The purpose of the mediation program is to facilitate the efficient settlement of the dispute to the benefit of the parties and the very crowded calendar of the court. But in no case is a mediator's recommendation binding on the parties. They are free to insist on returning their dispute to the trial court's calendar.

This report describes and analyzes the program as it developed through the assignment of its first eighty adversary proceedings to mediation. The information reported covers the period from August 18, 1986, until January 7, 1988. The research proceeded by means of interviews and archival analysis. Twenty-six participants in the program, including judges and senior court staff, mediators, and advocates, contributed their knowledge and opinions through individual semistructured interviews. In addition, the case files of each proceeding assigned to mediation during the study period were thoroughly reviewed and summarized; some proceedings not assigned to mediation were also reviewed to form a basis of comparison. This study is in no sense an "experiment," however, because the assignment of proceedings to mediation was not con-

trolled by the researchers in any way. The research does no more than describe, and make whatever inferences seem plausible from, the interviews and case files as these developed during the study period.

Highlights of the Interviews

Judges and mediators gave a variety of responses to a question about the characteristics of a proceeding that make it particularly susceptible to settlement through mediation. Virtually all the respondents believed that because most bankruptcy adversary proceedings can be resolved by the transfer of money, they should be susceptible to a negotiated settlement. Another factor promoting settlement in many bankruptcy disputes is the relative inability of the debtor to afford a protracted legal struggle. One class of adversary proceeding that often possesses both these characteristics is the dischargeability proceeding, in which the plaintiff (for example, a finance company) brings suit under one or more subsections of 11 U.S.C. § 523(a) to prevent a Chapter 7 debtor from discharging his or her debt to the company as part of the bankruptcy estate. Respondents agreed generally that such suits were good candidates for settlement through mediation.

Beyond this general agreement about dischargeability, the judges made no claim to detailed or objective standards that guide their decision about when and to whom to offer the services of the mediation program. Advocates and mediators agreed generally that relatively small claims would be more susceptible to mediated settlement than disputes over larger amounts; they varied, however, in describing the borderline between "small" and "large," placing it as low as $4,000 and as high as $100,000. Several respondents noted that the important variable was the cost of a mediated settlement compared with the anticipated cost of going to trial. There was consensus that the costs of trial tend to preclude trying claims of less than $4,000.

Mediators reported two distinctive approaches to their task. Most of them cast the mediation session in the mold of a settlement conference, in which their task was to work actively to bring the parties together and facilitate a settlement by various means of

diplomacy. A minority of the mediators saw their role as that of an arbitrator, whose task was to examine the papers, hear the parties, and then offer an opinion about the appropriate conclusion to the dispute and work actively to bring the parties to that conclusion.

The interview respondents tended to agree about the qualities of a good mediator without regard to the distinction between settlement and arbitration. Attorneys stressed the importance of having confidence in the mediator's legal competence and fairness, based on reputation in the community. The good mediator was described as one who listened and then responded with apparent knowledge of the law and a balanced view of the strengths and weaknesses of each party's case.

The voluntary nature of the mediation program prevented any taint of unfairness attaching to it, in the opinion of the respondents. Moreover, attorneys reiterated that the mediation of a dispute about money is less problematic than the mediation of a dispute over fundamental rights or other nonpecuniary values. Further, mediation does not prevent or even seriously slow the litigants' progress to trial, provided the timetables established in General Order No. 145 are followed.

An important advantage of mediation may be the benefit it gives attorneys in convincing clients not to pursue proceedings through to trial. Given relatively small stakes, fixed expenses, and an uncertain outcome, trial is not a desirable means of terminating a dispute. Clients who experience mediation and are told by the mediator about their chances of prevailing at trial are more likely than other clients to take their lawyer's advice to settle. The same process can sometimes affect an attorney directly, particularly one who has become perhaps too locked in a litigious posture for a particular proceeding.

The major cited disadvantage to mediation was that attorneys might use the session as a discovery device, taking what they learned from the session into subsequent pretrial and trial litigation. There was also a slight sentiment that at least some attorneys readily agree to mediation simply to maintain favor in the eyes of the bankruptcy bench, rather than from a sincere desire to bring the proceeding to a rapid termination through mediated settlement.

When asked about their reasons for accepting assignments as mediators, panel members most often referred to the personal satisfaction they received from participation. They also referred to the pride of being selected, learning from the exposure to the lawyers who were bringing disputes before them in mediation, and the value of playing the role of judge in a settlement conference.

There was consensus among the respondents that the program aided the court by freeing the judges' calendars somewhat.

There was also general agreement that voluntary mediation was preferable to mandatory mediation. Given that the mediators participate without remuneration for their efforts, it was especially important that they not be faced with parties or attorneys who were hostile to the goals or methods of the program. Nevertheless, there was a minority view that the powers of the mediators should be increased and their recommendations should be binding.

Analysis of the Case Files

During the period of the study, twenty-nine individuals served as mediators. The range of participation was from one to nine proceedings. There was an overlap of roles worth noting: Approximately one-third of the mediators also appeared as advocates in litigation going to mediation. A smaller number of mediators are also members of the panel of Chapter 7 trustees. There was no expressed or apparent concern about conflicting roles in the program. We note, however, for other districts that might contemplate instituting a similar program, that there may be a minimum size of the bankruptcy bar that would appear to be required to support such a program without creating the reality or appearance of conflict of interest.

Between August 14, 1986, and November 2, 1987, eighty adversary proceedings and two contested matters had been assigned to mediation. The analysis included only the adversary proceedings. Sixty-four of these proceedings (80 percent) had been brought under the dischargeability statute, 11 U.S.C. § 523(a), for demand amounts ranging from less than $1,000 to more than $6,500,000. The remaining eighteen proceedings involved preferences, transfer, obligation avoidance by the trustee, breach of con-

tract, objection to discharge of the entire estate, partnership dissolution, and legal malpractice. Of the total of eighty proceedings, sixty-seven arose from Chapter 7 liquidation cases and the remaining thirteen arose from Chapter 11 reorganization efforts. Chapter 13 debt adjustment plans led to no adversary activity assigned to mediation, in line with general expectation that these cases produce little adversary activity.

The three judges used the program with different frequencies: 27.5 percent, 55 percent, and 17.5 percent for Departments 1, 2, and 3, respectively. All three judges used the program primarily for the mediation of dischargeability disputes. Judges differed somewhat in the ages of the proceedings they sent to mediation, particularly in the earliest stages of the program, with one judge tending more to use the program for older, perhaps particularly recalcitrant proceedings. On average, a proceeding had been through two or three pretrial status conferences before the judge first offered mediation as a possible aid to dispute resolution.

At the conclusion of the study period, twenty-two proceedings had terminated as an apparent direct result of mediation, thirteen were awaiting mediation, seventeen had terminated by means other than mediation (although a mediator had been assigned and in many instances the mediation session had been conducted), twenty in which mediation had not been effective in resolving the dispute were pending, and eight were pending in different conditions that we have labeled collectively "uncertain," including apparently successful but as yet unconfirmed mediated settlements.

There was a clear relationship, which cannot be accounted for by the age of the proceeding, between the size of the demand and the status of the proceeding at the end of the study period. Proceedings involving relatively small amounts of money (less than $10,000) were settled more frequently through mediation than were larger proceedings; proceedings involving large amounts of money or making nonpecuniary demands were apparently less likely to achieve resolution through mediated settlement.

Full utilization of the benefits of the mediation program depends on a close tracking of events subsequent to the mediation session. Particularly for proceedings in which the stakes are small, the incentives for parties to bring the dispute formally to a conclu-

sion may also be small. Once the judge's staff has marked a proceeding as "off-calendar," there is not now a routine way to ensure that in fact the proceeding is terminated. The costs of establishing such a procedure might be worth the benefits that would accrue from its use.

Generality of conclusions drawn from the program in San Diego may be limited by one unusual feature, which is the very high frequency of appearance of one attorney representing a small number of creditor finance companies. Thirty-two of the eighty proceedings (40 percent) were dischargeability actions brought by this attorney on behalf of five plaintiffs. The proceedings exhibited a very high likelihood of settling, either in mediation or outside it. This may have been because of the relatively small stakes (typically less than $3,000) in comparison with the costs of proceeding to trial. The economic incentives for quick settlement were great for both sides to the disputes.

We conclude that the mediation program as instituted does seem to move proceedings off the judges' pretrial status conference calendars, presumably to make room for other proceedings waiting their turns. Moreover, the judges are optimistic that they can save time by referring certain issues to mediators, instead of referring them to each other as "settlement judges." It is still unclear, however, that the volume of the program could rise to the level that would seriously reduce the average intervals of time between status conferences for most adversary proceedings. The amount of work waiting to be done by the court, at least in this district, appears to be considerably greater than the amount of work that can be favorably disposed of by the alternative track of mediation. From the court's perspective, then, neither the length of the work-day nor the average length of the queue of cases and proceedings needing judicial attention will be markedly reduced by the continuation of the mediation program. But from the individual litigant's viewpoint, particularly the litigant who is bound to go to trial and is awaiting assignment of precious trial time, the accumulated consequences of successfully mediated adversary proceedings might well shorten the waiting period required for a full judicial hearing.

I. INTRODUCTION

This report describes the background, structure, and current operations of a mediation program for adversary proceedings and contested matters in the bankruptcy court in the Southern District of California. Some features of bankruptcy court activity and terminology are different enough from those in the district court to deserve a brief review in this opening chapter.

Bankruptcy law distinguishes between cases and proceedings. A bankruptcy case commences with the filing of a petition under one of the several chapters of title 11 of the United States Code. In addition to beginning the case, the filing also acts as the order granting temporary relief from the action of creditors.[1] The termination of a bankruptcy case can take several forms, depending on the chapter in which the case is filed and the success of the debtor in meeting the statutory provisions established under that chapter.

The original and exclusive jurisdiction of bankruptcy cases resides with the district court.[2] The district court may then refer "any or all cases under title 11 . . . to the bankruptcy judges for the district."[3] The reference is in fact routine, so that the district court judges and clerks have no contact with most bankruptcy cases. Furthermore, the great bulk of cases, those filed under Chapter 7, Liquidation, and having no assets to distribute to creditors, pass through the bankruptcy court with little direct judicial involvement.[4]

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1. "A voluntary case under a chapter of this title is commenced by the filing with the bankruptcy court of a petition under such chapter by an entity that may be a debtor under such chapter. The commencement of a voluntary case under a chapter of this title constitutes an order for relief under such chapter." 11 U.S.C. § 301. Section 362 of title 11 governs the operation of the automatic stay.

2. 28 U.S.C. § 1134(a).

3. 28 U.S.C. § 157(a).

4. The best estimate of time spent by a bankruptcy judge on a Chapter 7 case, suggests that, on the average, less than forty minutes of judge time is

Numerous circumstances, however, that arise more or less within the context of a bankruptcy case may bring counsel in front of the bankruptcy judge with matters requiring judicial resolution. The general label given to this activity in the bankruptcy court is a *proceeding*. The scope of the bankruptcy court's jurisdiction over proceedings has been the subject of considerable litigation and legislation during the past decade, beginning with the Bankruptcy Reform Act of 1978, and including the prominent *Marathon* decision and subsequent legislative efforts in 1984 and 1986 to conform the bankruptcy provisions of titles 11 and 28 with the apparent mandates of that decision.[5] The key operative statutes now in force include 28 U.S.C. §§ 157 and 1334. Section 157 distinguishes between core and noncore proceedings, and also between proceedings under title 11, proceedings arising in a case under title 11, and proceedings related to a case under title 11. Sections 1334(c)(1) and (c)(2) provide for either mandatory or discretionary federal court abstention for certain proceedings.

Within the category of core proceedings there is a further distinction, unique to bankruptcy nomenclature, between *adversary proceedings* and *contested matters*.[6] Adversary proceedings are

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expended from filing to termination. J. E. Shapard, The 1981 Bankruptcy Court Time Study (Federal Judicial Center 1982), table 2 at p. 28.

5. The Bankruptcy Reform Act of 1978 (Pub. L. No. 95-598); The Bankruptcy Amendments and Federal Judgeship Act of 1984 (Pub. L. No. 98-353); The Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986 (Pub. L. No. 99-554); Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 102 S. Ct. 2858, 73 L. Ed. 2d 598 (1982).

6. The pertinent portion is 28 U.S.C. § 157(b)(2), which reads as follows:

"Core proceedings include, but are not limited to —

"(A) matters concerning the administration of the estate; (B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under Chapter 11, 12, or 13 of title 11 but not the liquidation of estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11; (C) counterclaims by the estate against persons filing claims against the estate; (D) orders in respect to obtaining credit; (E) orders to turn over property of the estate; (F) proceedings to determine, avoid, or recover preferences; (G) motions to terminate, annul, or modify the automatic stay; (H) proceedings to determine, avoid, or recover fraudulent conveyances; (I) determinations as to the

initiated by complaint and are governed by the rules established in Part VII of the Bankruptcy Rules, whereas contested matters are initiated by motion and are governed by Bankruptcy Rule 9014 (which itself incorporates some of the rules of Part VII). The rules of adversary proceedings closely follow the Federal Rules of Civil Procedure.

Although the leading edges of bankruptcy law involve questions of jurisdiction over different classes of proceedings, the proceedings at the focus of the mediation program in California Southern appear to raise no such issues, but lie within the categories established as core proceedings.

Quantities of Cases and Proceedings, Nationally and in California Southern

National filings of bankruptcy petitions have increased dramatically during the past two years. Between 1980 and 1985, filings remained relatively constant, at approximately one thousand per day for every day in the year and varying between 344,261 in 1984 to 374,726 in 1983.[7] But the number of filings jumped to 477,856 in 1986, and then jumped again in 1987 to 561,278.

The amount of adversary activity reported by the bankruptcy courts declined while case filings increased. During 1985, 70,002 adversary proceedings were commenced, whereas in 1986 and 1987 the numbers were 64,473 and 60,164.[8] The significance of this decrease remains to be determined, because the change may reflect only the final stages of accommodating to changes in Ad-

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dischargeability of particular debts; (J) objections to discharges; (K) determinations of the validity, extent, or priority of liens; (L) confirmations of plans; (M) orders approving the use or lease of property, including the use of cash collateral; (N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate; and (O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims."

7. These numbers are for the courts' statistical year, which runs from July 1 to June 30. Numbers taken from the Annual Report of the Director of the Administrative Office of the U.S. Courts for each year listed.

8. Table F-8, Annual Report of the Director.

ministrative Office categories for counting adversary proceedings and contested matters.

The Southern District of California has roughly paralleled the national trends, with an increase in case filings from 5,825 in 1985 to 8,991 in 1987, and a decrease in adversary filings from 1,073 in 1985 to 922 in 1986 and 971 in 1987.

The Prevalence of Dischargeability Complaints, Nationally and in California Southern

Nationally, the single most frequent cause of action in an adversary proceeding is a complaint about the dischargeability of debt in the bankruptcy estate. The complaint is brought pursuant to the provisions of 11 U.S.C. § 523, alleging facts that, if accepted by the bankruptcy judge at trial, would prevent the particular debt at issue from being discharged with the rest of the debtor's bankruptcy estate. During 1986, for example, 43 percent of all adversary proceedings were of this type; dischargeability was the most frequent or second most frequent cause of action in every district in the country. In California Southern approximately 60 percent of the adversaries filed during 1986 were dischargeability actions.[9]

9. Data provided by Administrative Office of the U.S. Courts. We thank David Gentry and other members of the Statistical Analysis and Reports Division for their cooperation.

II. BACKGROUND AND GOALS OF THE MEDIATION PROGRAM

The idea for the mediation program in California Southern originated among a small number of bankruptcy attorneys encouraged particularly by a member of the Bankruptcy Court, Judge Louise Malugen. Together, judge and lawyers sought means to improve the services of the Bankruptcy Court to attorneys and litigants in the district. They were concerned that trial costs effectively limited access to court of parties with relatively small claims. They wanted to provide a speedier, less expensive resolution for cases being tried. They were mindful that the small size of the bench, numbering only three judges, severely limited opportunities for court-supervised settlement. They observed that the present bench was not likely to add new judges in the near future and that although the bench was already highly efficient, it was already fully occupied in handling its present caseload. They envisioned, therefore, that assistance would have to come from the bar. They surmised that an alternative that could handle even a modest number of small cases would free some of the court's time to handle extended, difficult cases.

In 1985, Radmila Fulton became the chairperson of the Bankruptcy Section of the San Diego County Bar Association. At the suggestion of Judge Malugen, Ms. Fulton initiated informal discussions among her colleagues regarding the possibility of a dispute settlement forum serving the bankruptcy court but operated by the bar. She was encouraged by the favorable responses from bar members and therefore arranged for Judge Malugen formally to propose a mediation program to the Bankruptcy Section in October 1985.[10] The forty members attending the presentation organized

10. Early in their deliberations, the group decided against pursuing the development of a dispute resolution forum based on arbitration, in part because they were unsure whether the findings of such a forum could be binding upon

themselves into a working committee of eight attorneys, representing both creditors and debtors, to work out the details of a mediation program.

In December 1985, the working committee met and agreed to divide themselves into four subcommittees to select mediation panel members and decide the circumstances of mediation (times, places, notice requirements, documents to be prepared, etc.), method of reporting the mediation to the court, and appeal procedures.[11] In January 1986, the work of the subcommittees was assembled into one document, copies of which were sent to the forty original participants for their comments. Based on these comments, a revised document was sent to the Bankruptcy Court in April. And on June 4, 1986, the Bankruptcy Court filed General Order No. 145, effective July 1, 1986, creating the bankruptcy mediation program. Thus, in less than a year, the bankruptcy bar had converted a suggestion from the bench into a mediation program that the court could sanction.

During the fall of 1986, experienced bankruptcy attorneys were actively solicited by the bar association to volunteer for pro bono service on the new mediation panel. Notices were placed in local bar publications and the program was vigorously promoted among the members of the bar. By August 14, 1986, the first mediation had been calendared, and by September 9 the court received word on the completion of the first mediation.

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the parties under the bankruptcy rules. The group believed that the principles of mediation would serve the court and the parties more effectively.

11. During the first fifteen months of the program no appeal procedure had been required. We will not deal further in the report with the question of appeal.

III. METHODS USED IN THE STUDY

The goal of our study has been to provide a balanced and objective representation of the California Southern mediation program. To accomplish this goal, we pursued three related but relatively independent sources of information. First, we studied the relevant legal and administrative materials; the document of prime importance is the court's General Order No. 145. The full text of the order is presented here in appendix 1. Second, we interviewed most of the people who played important roles in the program during its first fifteen months of operation; we included the judges, the clerk of court, the mediators (a number of whom have also been advocates at mediation on behalf of other clients), and advocates. A list of the persons interviewed is contained in Appendix 2. Third, and finally, we surveyed and summarized the salient features of the case files of all the proceedings sent to mediation between the beginning of the program in August 1986 and November 2, 1987. During that time, eighty adversary proceedings and two contested motions were assigned to mediators.

Before the mediator interviews were initiated, the prospective interviewees were advised of the nature of the intended study by letter from Judge Malugen. Additionally, the interviewer telephoned the office of each mediator interviewee about one week before the intended interview to set an appointment and further advise the interviewee of the nature of the study. Each mediator interview was conducted at the interviewer's office and lasted about one hour. Although all the interviews were structured by a common protocol, the interviewees were encouraged to provide any information they thought relevant. Attorneys who had not served as mediators but had served as advocates in mediations were interviewed by telephone using a shortened protocol.

One of us attended two mediation sessions to get a firsthand sense of the process being followed. In each mediation, the mediator invited the attendance of the interviewer with the consent of the

participants. We also attended pretrial status conferences to observe how the question of mediation is raised and a mediator is assigned.

In compiling and presenting this information, we have tried to remain mindful that no single perspective on a complex operation provides a full view of the operation. Moreover, generalizations made from different perspectives can contradict each other. It is particularly important to avoid naive acceptance of causal inferences, gathered during opinion surveys or interviews, contained in the respondents' comments about the overall structure or functioning of a complex operation. This point about descriptive social research has been vigorously announced by Professors Ebbesen and Konecni, specifically in the context of research into the operations of courts.[12] Sensitive to the risk they have warned us about, we present this part of our information as the evaluations of experts who are closer to the program than anyone else, not as final validations of the operation of the program. The results of our interviews are thus one of the three perspectives on the program that we have tried to bring to report, the other two being the perspective gained from the document that defines how the program should work (General Order No. 145) and the perspective gained from a close analysis of the official records maintained by the clerk of the court.

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12. Konecni & Ebbesen, *External Validity of Research in Legal Psychology*, 3 L. & Hum. Behav. 39 (1979); Konecni & Ebbesen, *The Mythology of Legal Decision Making*, 7 Int'l J.L. & Psychiatry 5 (1984).

IV. PROCEDURES UNDER GENERAL ORDER NO. 145

The complete text of General Order No. 145, including facsimiles of the associated forms, is presented in appendix 1. In this chapter we highlight certain features of the order and comment briefly on the actual operation of the program in respect to the letter of the order.

Section 1 is a preliminary statement that formally establishes the purposes of the program envisioned by the court. The primary purpose is to enhance the opportunity for parties to settle their disputes quicker and cheaper than by full adjudication, but without a loss of party satisfaction with the process. Secondarily, the court establishes the program with a hope that it will afford the court some relief from its rapidly growing workload.

If the current study and report were a formal evaluation of the program, these purposes would be the standards against which the performance of the program would be strictly measured.[13]

Sections 2 and 3 describe the register of attorneys from which mediators will be chosen, the qualifications required of such attorneys, and the times at which the list of attorneys submitted to the court shall be refreshed. The purpose of the statement of qualifications is to limit eligibility to attorneys who are, and who are known to be, experienced bankruptcy practitioners. The purpose of refreshing the list is to spread both the opportunity and responsibility of serving in this pro bono capacity among as many members of the bar as are willing to serve. It is clear that in a bar of modest size, these requirements may finally come into conflict.

Section 4 addresses the method by which a mediator will be chosen for a particular assignment. The assignment is suggested by

13. As mentioned, the present report is primarily descriptive rather than normative. A formal evaluation, if done according to the highest standards for such work, would have required greater intervention into the program, through the random assignment of proceedings to mediation or comparison groups, than seemed warranted at this time.

the judge, and agreed to by the attorneys, during status conferences or other hearings. As will be shown, the number of conferences held in a given proceeding before mediation is suggested and accepted has varied from one to eight. When the judge suggests that the attorneys may wish to consider meeting with a mediator, and the attorneys agree, the courtroom deputy hands the attorneys the list of mediators, and the judge asks them to confer outside the courtroom to select a mutually acceptable first choice and alternate from the list. When the attorneys return to the courtroom, the judge hears their choices at the first opportunity and indicates that the order appointing the mediator will be mailed by the court. Typically, at the same time the judge also schedules the next status conference for that proceeding; the date chosen is always after the latest date by which the mediation must be held under the terms of the order.

Between August 1986 and May 1987, attorneys were free to choose from the entire list of available mediators irrespective of the number of mediations each mediator might already have been assigned. Several mediators were being chosen much more frequently than others. Concerned that this trend, if continued, would discourage both those who served too often and those who did not serve often enough, the court instituted a procedure whereby a panel member would serve no more than once each quarter: Whenever a mediator was assigned, his or her name was removed from the list of available mediators until the quarter was over.[14]

Section 5 spells out the conditions under which mediation is to occur. The order specifies that mediation should take place no later than forty-five days after the date the mediator is appointed, except that the mediator may grant one continuance of the first scheduled date provided the parties file a written stipulation agreeing to the continuance with the court. In fact, such stipulations for continuance appeared to be necessary in only a small number of cases.[15]

14. Memorandum, "Results of Meeting Regarding Mediation Panel on May 12, 1987." Files of the Clerk of Court.

15. The exact timing of mediation in respect to the date of the order appointing the mediator was not always discernible from the official record because mediators did not in all cases submit the required certificate of compliance, although other information in the files suggested that mediation had been held and had catalyzed the arrival at settlement.

Information in chapter 6 provides more detail on the important time intervals observed in mediated proceedings.

Exhibit C of the order is the standard questionnaire that each party is to submit to the mediator. Emphasized on the cover page of the questionnaire is the court's desire to keep all information pertaining to the details of the mediation out of the court's files; only in this way can the parties be sure that the positions they take during mediated negotiations cannot affect the court's response to whatever subsequent arguments the parties may wish to make. Section 5 also contains a lengthy subsection on the privileged nature of the mediation session. On the other hand, the questionnaire contains a stern warning that failure to fill it out completely "shall be reported by the mediator to the Court and may be grounds for the imposition of sanctions."

Section 5 requires further that the attorneys for both parties, and the parties themselves in most instances, must be present at the mediation. And in fact, as we learned through interviews, attorneys generally believed that party attendance was important and necessary for purposes of mediation.

Section 6 specifies the form and procedures by which the mediator is to report the mediation to the court. The court imposes a strict time limit between the date of mediation and the time by which the mediator is to file the certificate of compliance. Judging from the materials in the official case files, this requirement has not always been honored.

The language and forms of General Order No. 145 are the only written sources of instruction for the conduct of the mediation program. They form a skeleton around which the court, the parties, and their attorneys build the program's reality.

V. THE OPINIONS OF THE PARTICIPANTS

The goal of our interviews with program participants was to gather and report their opinions about the program as they had experienced it and their recommendations for how it might be improved. The interview format was semistructured, in that the interviewer had a list of questions but was also prepared to let the participant dwell on particular matters that the participant believed to be most important. In editing material from the interview notes, we have attempted to include material that we believe will be interesting to the general reader as well as useful to the reader who may be contemplating the establishment of a similar program. Appendix 2 is a list of all the persons interviewed for the report.

Proceedings Chosen for Mediation

One of the topics pursued in all interviews was the suitability of particular proceedings for mediation. This general topic was addressed in different ways. We were particularly interested to learn how the judges determined the time at which they would raise the question of mediation with the parties, and for which types of proceedings. We asked the judges and mediators what factors in a proceeding make it particularly susceptible to settlement through mediation. We received a variety of answers that touched on several dimensions of the life of the proceedings in the court.

Before turning to specific responses, we note that the respondents were nearly unanimous that the issues typically raised in a bankruptcy proceeding dealing with amounts of money allegedly owed by one party to another should be susceptible to settlement before trial. One highly experienced and respected member of the mediation panel opined that any bankruptcy trial is a result of a mistake by one or more attorneys in assessing the case or educating the client. There is an obvious feature of most bankruptcy proceedings that drives them to termination at the earliest feasible point: One party to the action, the bankrupt debtor, has little if any

money with which to finance the litigation. Some participants also noted that because the level of preparation required by federal rules was greater than that required to pursue a similar debt-collection action in state court, attorneys were more likely to settle the bankruptcy proceeding before trial. The added degree of preparation made realistic assessment of trial outcome more likely.[16]

Opinions of the Judges

None of the three judges had a formal or explicit rule for deciding which causes of action were to be assigned to mediation or when in the life of a proceeding the assignment to mediation would be made.[17] Two judges specifically mentioned dischargeability proceedings as good candidates for mediation because the issue is usually limited to the fact of the defendant-debtor's conduct in relation to the language of 11 U.S.C. § 523(a).[18] One of these judges expanded this category to include all "weak" proceedings, viz., proceedings in which "one side has just enough factual contention to avoid having his case dismissed by a motion for summary judgment." The third judge, while not denying the usefulness of mediation for relatively simple, factually weak cases, stated that complex, multiparty proceedings (with several creditors against a single debtor) would respond to mediation, because the process would facilitate the creditors' working out a mutually satisfactory distribution of whatever assets arose from the settlement. This opinion was not shared by the other judges, one of whom believed that complex cases would put too great a burden on the pro bono mediators.

One judge was optimistic that virtually any case coming through the bankruptcy adversary process could benefit from the

16. These opinions are, of course, empirical conjectures that could be tested by reference to the appropriate data in state and federal courts.

17. As shown in the next chapter, the judges use the program at different rates, and one judge in particular began frequent use only after the program passed its first birthday.

18. Section 523(a)(1)(10) of title 11 lists circumstances that will except a particular debt from discharge. As is discussed more fully in chapter 6, the typical action is brought under section 523(a)(2)(A) or (B), alleging facts about debtor's conduct or intent and/or creditor's reliance thereon.

process. Another, however, stated that mediation would be unsuited for a proceeding in which "a fundamental dispute exists in the facts or about the rights of the parties." One judge noted that mediation would be inappropriate for litigation on relief from the automatic stay, because of the tight timetable that must be observed.[19] Two judges were enthusiastic about eliminating their earlier practice of asking each other to serve as a "settlement judge." By relying on mediators instead, they have improved their time management.

Opinions of Mediators and Advocates

A number of attorneys with extensive experience in the court and the mediation program expressed opinions concerning the differences between the judges in the assignment of cases to mediation. They noted that two judges appeared reluctant to suggest mediation irrespective of the potential benefits of the procedure for settlement. Only one judge was seen as consistently raising the possibility of mediation, and no judge was perceived as forcing or insisting on use of the program. With only one dissenter, these attorneys suggested that even this judge could inquire about mediation more often. They supported this opinion by stating that it is awkward for an advocate to raise the possibility of mediation without an explicit invitation from the court because the suggestion may sound like an admission of weakness.

Comments made by a few advocates and mediators suggested that another factor that may influence the move to mediation is a developed relationship of accommodation between bench and bar. According to these lawyers, counsel who regularly practice in the bankruptcy court are reluctant to reject the invitation to mediate because they believe that agreeing to mediation helps maintain their good working relationship with the bench. In contrast, counsel who rarely appear in the bankruptcy court are seen as less moti-

19. The provisions covering the imposition of the stay and relief from it are set out in 11 U.S.C. § 362. Section 362(e) calls for automatic relief from the stay of any act against property in the bankruptcy estate thirty days after the request therefor, unless the court after notice and hearing orders a continuance of the stay.

vated and therefore less likely to accept the invitation. In fact, a few attorneys opined that advocates might choose mediation inappropriately to gain an advantage of some sort from the bankruptcy bench which, they believe, strongly supports the program and wishes to have it used. We have no way to confirm this conjecture.

Abstracting from numerous comments by mediators and advocates about the qualities of a proceeding that can benefit from mediation, we arrive at this sketch: Enough discovery has been completed (or little discovery is necessary) so that the factual positions of the parties are mutually understood; the bankruptcy rules do not place extraordinary calendaring demands on the disposition of the case; the disposition of the case turns on the facts rather than on an interpretation of the law; the dispute is over an amount of money owed; the attorneys perceive that mediation will save their clients money and that their clients are more likely to consider a settlement if they hear their position evaluated by an apparently competent and objective third party; and one or both parties are, for whatever reason, reluctant to go to trial.

The attorneys were generally agreed that proceedings brought over relatively small amounts of money were more likely to reach settlement as a direct result of mediation than were claims involving large amounts of money. When pressed to quantify the distinction between "large" and "small" claims, attorneys placed the dividing line as low as $4,000 and as high as $100,000. Several attorneys emphasized that the question was not whether a large claim could be mediated, but whether the costs of trial made any given claim attractive for mediation. There was a consensus that the costs of trial tend to preclude claims of less than about $4,000.[20]

In part because dischargeability claims tend to be small and in part because the issue in such proceedings is typically limited to the conduct of the defendant-debtor, the attorneys believed that such claims are well suited for assignment to mediation. In this view they agreed with the opinion of the judges.

Some attorneys explained that timing was the most important criterion for establishing a proceeding as particularly suitable for mediation. Cases should be sent out to mediation before too much

20. See chapter 6 for information on the size of claims sent to mediation.

discovery is undertaken because the costs of discovery tend to push parties on to trial. Once the parties have incurred the expense of discovery, much of the potential cost-saving of mediation is lost as an incentive. Similarly, the mediation should be considered before the court issues a trial order. The preparation of documents pursuant to a trial order, like discovery, is a time-consuming and therefore expensive task. Again, once the parties have completed the trial orders, they have less economic incentive to mediate.

When the costs of discovery and complying with the trial order have been incurred, mediation may still remain attractive in certain instances when both parties are uncertain how a court would decide their case. In these instances, mediation may be attractive because "as unpredictability approaches a coin flip, the parties seek a settlement to avoid running a further loss."

A number of mediators and advocates discussed features of parties and their attorneys that influence the course of mediation and its likelihood of producing settlement directly. Mediation was often seen as an attractive option when one or both attorneys confront client control problems. Such problems typically result from clients' unfamiliarity with the peculiar rules of bankruptcy. Some clients, particularly noninstitutional creditors, do not understand the policy of the debtor's "fresh start" and the "clear and convincing" standard that applies in trials under 11 U.S.C. § 523(a). From a creditor's perspective, these policies may appear unfairly to favor debtors in the discharge of their debts. The creditor's attorney cannot easily advise the creditor of the weakness of the case without running the risk of appearing disloyal. But when mediation is scheduled, the attorney can tell the client that he or she knows and respects the attorney who is doing the mediation and will therefore respect that attorney's opinion on how best to proceed with the litigation. One attorney related that a particular institutional lender had promoted lending procedures that failed to review borrowers' assets with sufficient rigor to support subsequent allegations that the debtor had intentionally misstated debts and assets when applying for the loan.[21] In our respondent's opinion, the me-

21. Section 523(a)(2)(B) of title 11 excepts from discharge any debt "for money, . . . to the extent obtained by (A) false pretenses, a false representation,

diator was in a better position to explain this deficiency to the lender than was the lender's own attorney.

Other client control problems arise when a party feels victimized and "insists on its day in court." The party may have a very weak case yet feel a strong need to express anger or frustration to someone with the status of a judge. Several attorneys opined that if the victimized party will agree to it, mediation is more likely to lend satisfaction than a trial. The less formal structure of mediation "permits the victimized party to express outrage" more fully than he or she could at trial.

Several mediators noted that mediation could work to advantage when one of the attorneys was unfamiliar with bankruptcy law. Sometimes, it was explained, attorneys stray into an occasional bankruptcy case on behalf of a client they have assisted in some other matter. These inexperienced attorneys cannot accept their opponent's evaluation that they have misunderstood bankruptcy law, but they can accept the word of a respected and unbiased mediator.

The most extreme case of unfamiliarity arises when one or both parties are unrepresented by counsel; this is infrequent but persistent in bankruptcy court activities. Mediation can provide several advantages in such cases. First, the mediator can take the time to explain to the parties such legal concepts as "fresh start," something a judge ordinarily does not have time to do. Second, because of its informality, mediation is less intimidating to the unrepresented parties than is a formal court trial.

Two Implicit Models of the Program

One of the most interesting generalizations to emerge from the interviews with mediators was that they were generally divisible into two categories, depending on how they conceptualized and organized their role vis-a-vis the parties and attorneys. In part, we suppose, because General Order No. 145 permits the mediator

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or actual fraud . . . ; (B) use of a statement in writing (i) that is materially false; (ii) respecting the debtor's . . . financial condition; (iii) on which the creditor to whom the debtor is liable for such money . . . reasonably relied; and (iv) that the debtor caused to be made or published with intent to deceive . . . ."

substantial latitude in running the mediation, two models have implicitly emerged. We have labeled them the "trial settlement conference" and "arbitration."

The introductory portion of the mediation proceeds in approximately the same manner whether the mediator follows a "settlement" or an "arbitration" format. Following introductions, the mediator explains the ground rules of the mediation. The parties are sworn in by the mediator, and then either the attorneys or the parties on each side alternate in presenting their cases, typically without interruption.

In the settlement conference model, the mediator typically begins by having all the participants introduce themselves. One mediator comments that the personal introductions are very important: "It is important that the parties all meet each other—that the banker see that the debtor is a single woman with a baby." The mediator then may explain how he or she intends to proceed. One such mediator stated, "I say that my role is to see if settlement is possible and that it is not my role to make a decision who is right and who is wrong." At least one mediator then invites the parties to tell their stories without interruption. More often, however, the mediators have each attorney present the case because, as one said, "You go with the attorneys because they know the case best." The mediators ensure that the presentation takes place in the presence of both clients because the role of the client, as one mediator put it, "is as a student to be educated about the case." Another added that he found it useful to have the attorneys talk in front of their clients because he felt it "was the first time they were actually talking to each other."

After both sides have been heard and any preliminary issues settled, most "settlement" mediators then ask the clients to leave the conference room to "raise the level of frankness." Typically, mediators then meet individually with each attorney.

The "settlement" mediators often explained that they had learned this procedure while participating as advocates in settlement conferences. They intentionally model themselves after judges whose settlement techniques they admire. From their experience, they had learned the importance of letting the parties talk without interruption, so they would be assured that they had been heard

and that their thoughts and feelings were considered seriously by the mediator. The mediators believed that meeting individually with each attorney was also important because attorneys tend to speak more openly when their opposition is absent. The mediators were willing to consider the procedural suggestions of the parties; for example, some said they were prepared to see the clients individually if that were suggested.

In summary, the "settlement" mediators believed that their primary responsibility was to provide thoughtful, impartial assessments of cases. One mediator summarized her method as "Show me your case and I'll give you my recommendation." These mediators believed they were expected not to settle cases, but rather to facilitate settlement through their assessments and recommendations.

Although no mediator reported following a "pure model" of mediation, one mediator offered that he would have been content merely to facilitate dialogue between the parties if he had been asked to do so.

A smaller percentage of the panel members described the role in language reminiscent of arbitration. Mediators following this model were less likely to spend time listening to the client and more likely to take persuasive measures to reach settlement.

Several of these mediators stated they had operated as arbitrators at the request of the parties. In one case, the attorneys agreed that the case turned solely on a single legal question and that they were willing to accept the mediator's decision on that question.

At the present time, as will become clear when the archival data are presented in chapter 6, we cannot test the question whether mediators espousing one model were more likely than those in the other group to foster a settlement directly from the mediation session.

Several attorneys noted that a "successful" mediation does not always imply a quick settlement thereafter; the mediation may serve as an "ice-breaker" that attorneys can use to advantage with clients. Indeed, one attorney stated that mediation had been useful in convincing him that his case was stronger than he had thought; as a result of mediation, he decided to try the case.

This last point is important, in part, because of its relationship to the major disadvantage to mediation cited by numerous advocates and mediators, which is that the process might be used intentionally as a discovery device with no intention of settlement.

Qualities of a Good Mediator

A major factor in settling a case is the trusted and knowledgeable evaluation of the case by an unbiased third party. For that reason, attorneys prefer mediators whom they know personally: "A good mediator is someone I know and respect, someone who knows the peculiarities of bankruptcy law." If the attorney trusts the mediator, that trust can be conveyed to the client: "I can say, 'I know [this] mediator; he is capable and fair.'" The mediator conveys trust by listening to the parties and their attorneys. One mediator said in this regard, "They [the parties] just want to tell their story, to be heard—it is a catharsis. . . . Don't cut them off, whether it is relevant or not."

Trust and knowledge were mentioned repeatedly as interconnected themes. "[It is] the mediator's experience that permits the advocate to tell the client that he can be trusted." A good mediator "is experienced from both sides [creditor and debtor]; it helps to tell the clients, 'I've been on both sides.'" A knowledgeable mediator is one who has "a balanced practice" and "has lots of experience and knows the law." Without trust and experience, mediators cannot fulfill one of their most important roles, that of giving a candid evaluation of the value of the party's case. Sometimes the mediator must frankly advise a client to listen to an attorney who has advised in favor of settlement: "This is what your attorney is telling you—and she is right."

The good mediator was sometimes described as a teacher: "He learns the case quickly and does not commit himself too soon. . . . He is a teacher, he helps the parties understand why they should settle for less than they had planned." The good mediator communicates as a teacher: "The key is clear communication, really, as opposed to persuasion."

Although the mediator's thorough knowledge of bankruptcy law was stressed throughout, "a practical and pragmatic under-

standing" was seen as "more important than merely a technical knowledge of the rules." A good mediator "can make realistic predictions" about cases.

The mediator's preparation

The mediators reported spending approximately an hour reading the case questionnaires. They also read any cases cited and any important documents, such as depositions, if that material could be read fairly quickly. It appears to be both the practice of the mediators and the expectation of the advocates that the mediator spend no more than an hour or so in preparation.

Communicating with parties

Mediators reported using several communication styles. Some mediators avoided speaking directly with a party. One mediator said that "I read the briefs, the law, and give my impression of the case. I do not hear from the clients because I've read their declarations." Nonetheless, he and most others we talked to insisted on the importance of the clients' presence. Some thought that hearing the clients directly was "only important when client credibility is an issue." Others stressed the importance of having the attorneys discuss the case in front of the clients, to educate the clients. One mediator stated that "hearing the client out, uninterrupted, is the most valuable feature of mediation"; in his view, this is the feature that distinguishes mediation from a court trial.

No mediator reported talking to a party absent his or her attorney. We observed a mediation in which the two attorneys, out of the presence of their clients, asked the mediator to talk with their clients without the attorneys present. The attorneys had agreed between themselves to a settlement but could not get their clients to agree. The mediator, after some reflection, declined.

Perceived Advantages and Disadvantages of the Mediation Program as an Alternative to Trial

Mediation inevitably raises questions of fundamental fairness, in part because mediation lacks some of the procedural safeguards found at trial. We asked mediators to address any concerns they

might have about this issue. Several commented that the voluntary nature of the program assured fairness. One attorney added that mediation does not infringe on the right to trial. Another observed that most cases settle before trial anyway. "If the case settles through mediation, the parties have a much greater sense that the settlement is fair."

In response to the fairness question, one attorney reflected that mediation typically functions as a means to settle a dispute over an amount of money owed. For that function, mediation is a fair process; it might not be a fair process for adjudicating a fundamental right or a demand for specific performance.

The absence of trial court evidentiary safeguards was simply not perceived as a problem. One attorney commented that such safeguards as rules against irrelevancy and hearsay are themselves not relevant because the mediator is not making a binding decision, or even any decision at all. However, the absence of these rules might render mediation less fair, according to several attorneys, because their absence tends to make the more able lawyer even more dominant than at trial. The restrictive effect of evidentiary trial rules tends to dampen the differences in skill between the attorneys and to shift power to a third party, the judge, who can use the evidentiary rulings to compensate further for skill differences between lawyers. In mediation the better attorney is further advantaged because the attorneys carry more of the burden of presenting the facts than at trial. At a mediation, the attorney may present all the facts rather than have the client testify.

A forum for settlement

Mediation, according to several mediators, enables some litigation-minded attorneys to settle cases they could not otherwise settle. Some attorneys find settlement difficult because they have been taught only how to seek a resolution through litigation. As one mediator stated, "Settlement talk sounds like a weakness in the attorney." These attorneys need what one mediator called "a blessed forum" that legitimizes settlement, "a mechanism that safely permits them to think settlement."

Our informants pointed to a variety of other advantages to mediation. One mediator, a former bankruptcy judge, observed that in some ways mediators are more sensitive than judges to the problems of client control and that mediators are more able to factor that problem into their mediation strategy. One observed that mediation provides the parties with "a free second opinion" about the value of their cases. She said that this second opinion was especially valuable for solo practitioners who do not have the advantage of partners to provide such additional thought.

Economic considerations

One attorney stated emphatically that "what drives mediation is economics—one cannot afford to try small cases." Cost saving was mentioned a number of times. Estimates of savings varied: One attorney, who had mediated a number of cases, estimated trial costs for the simplest case at $1,500. His charges for mediating these cases averaged $150. Another attorney reported the cost saving of mediating a major case, in which trial costs were running over $1,000 a day, at 80 percent.

Reported time savings are connected to the cost savings. Many attorneys observed that not only is the mediation itself more speedy than trial, but also the time in preparing for a mediation is substantially less. Attorneys cannot run the risk of losing a trial because of its finality, so they must engage in extensive discovery although much of the discovery is of only marginal use. For mediation, they engage in only moderate discovery, thereby saving a great deal of time (and money).

Client satisfaction

Clients perceive mediation as less stressful than trial, according to one attorney who has handled a number of discharge petitions. He commented that his clients are "terrified" of going to court "because they think they are going to get yelled at by the judge and by the other attorney." They prefer "the informality and reduced stress of mediation." His clients choose mediation over trial even when he advises them that they would most likely win at trial but

will probably end up settling for a third of the disputed debt if mediated.

Clients appreciate the opportunity mediation affords to speak without interruption and to talk directly to the opposition. This telling of the story without interruption also enhances the mediator's greater credibility in the eyes of the clients because the mediator "has heard the intensity [of the clients], and the specificity of the charges."

Flexibility

The flexibility of mediation was cited as providing a variety of advantages. Mediators can suggest flexible solutions to resolve the dispute. For example, one mediator suggested that a debtor agree voluntarily to reinstate a disputed debt and that the creditor agree that fraud not show on the credit report. Both parties avoided an unacceptable risk they could not have avoided at trial: the debtor of an even poorer credit record, the creditor of getting nothing.

The flexibility associated with mediation shows up in other ways as well. Many attorneys voiced their appreciation that the parties in mediation can meet where and when they choose, avoiding the rigid hours and busy location of the bankruptcy court. Mediations were reported as having been held in the late afternoon to accommodate working clients better. Parties with offices in outlying areas hold mediations there, rather than driving downtown to the courthouse. Time can be used more flexibly. At one complex mediation involving numerous parties, we observed the following events during a noon break (in addition to some quick lunches): One of the participants devoted the noon hour to working out the details of proposed settlement with a subsidiary party by telephone in an adjoining office; three other participants returned to their offices to catch up on other work; and two key participants remained with the mediator to work on other aspects of the case.

Disadvantages of mediation

As mentioned, the major cited disadvantage of mediation was the fear that the process would be misused as a discovery device. However, no one reported attending a mediation where that fear

had been realized. One attorney thought that mediation might be disadvantageous to a party who "wanted to hide his strategy." And a few thought that advocates might choose mediation inappropriately, to curry favor with the bankruptcy bench.

Perceived Benefits of Mediation to the Mediators

Many mediators felt that the major benefit they received from the mediation program was personal satisfaction. Some spoke of the pride they felt in doing a service to the bar and to the public. Others spoke of mediation as a useful learning experience. One mediator reflected on how it was "to walk in another person's shoes, to sit at the end of the table rather on one side, trying to say that which a judge would say. It was instructive in helping me know how a judge thinks in a settlement conference." Still others talked about learning how to be better advocates by observing how other advocates presented their cases.

Some mediators who originally volunteered out of a sense of public duty found that mediating was simply an interesting and enjoyable activity. One commented, "I like doing it; it's interesting. I like to meet people. I get ego gratification when I am assisting people resolve their problems. " Later in the interview he added, "It's a nice break from routine. I have no obligations to either party. I feel no pressure. It is almost like a mini-vacation, among the stresses of everyday practice."

Several mediators volunteered for the program because they wanted to prepare themselves for a possible judgeship. One said that mediation "helps me understand how a judge makes decisions." Although no one said that he or she volunteered to impress the bankruptcy bench, some commented that they thought others had volunteered to gain approval from the bench.

Perceived Benefits of Mediation to the Court

All of the participants—judges, mediators, and advocates—agreed that the program helps the bankruptcy bench. One commented that mediation "helps unclog the system . . . . Mediation works as well as arbitration without the costs and formality." Another added that handling even 10 percent of the cases has the ef-

fect of adding another judge because so many mediated cases would otherwise end up litigated. Although one mediator preferred the trial system on ideological grounds, he supported mediation because "it helps keep the system up. Court delay is unfair to the parties."

Specific Evaluations and Recommendations Made by Participants

Most of the provisions of General Order No. 145 met the approval of almost all the attorneys interviewed. They appreciated the wide discretion the order gives the mediator and that "it calls for so little paperwork." Attorneys did express concern that the qualification requirements exclude former judges who lack bankruptcy experience and that the qualification standards may exclude highly competent bankruptcy attorneys who have worked on very few but quite complex Chapter 11 business reorganization plans. A number of attorneys criticized the questionnaire as too general and not designed for bankruptcy, a reflection of its origin in personal injury practice.[22] Several mediators commented that the attachments to the questionnaire provide more practical and useful data than the questionnaire itself.

Mandatory mediation

The attorneys, speaking either as advocates or as mediators, stated their fundamental satisfaction with the mediation program in its present form. Few wanted the powers of the mediator expanded. They did not want to see the process binding because "that would dissuade many from choosing the process." Although, as one said, "there is power in the robe," most were emphatic that mediator power should "only be the power to educate and render knowledgeable opinions." One attorney commented that a mandatory process would "bring in cases that attorneys don't intend to settle and that would take up the energy and time of the mediator with poor results." He added that "at present the mediator knows

22. The authors of the order used a state superior court personal injury questionnaire as a prototype in creating the bankruptcy mediation questionnaire.

that the attorneys want to settle if possible and so they come prepared to settle." He also noted that in any event they "can now choose to make it binding if they want to." Another attorney, noting the extraordinary importance of the right of trial, observed that if mediation were to be made mandatory and binding, then the right to trial would be diminished or lost.

On the other hand, several attorneys opined that the mediator should be given the power to make binding decisions. One felt that binding mediation would restrict advocates from misusing mediation as "discovery fishing expeditions."

Several attorneys suggested that mediators be given other kinds of powers. For example, one mediator spoke of the need for a way "to put teeth" into calendaring mediation. Several others thought that if cases that did not settle through mediation were immediately set for trial, all parties would be encouraged to take mediation more seriously. Most respondents, however, felt that even these changes might be dysfunctional and that it was better to leave the present model of mediation alone.

Panel qualifications

Formal mediator qualification standards were not perceived as an important issue. The attorneys frequently commented that the community of bankruptcy practitioners in San Diego is small enough that almost all the active practitioners know each other by reputation, if not personally. Because of this familiarity, formal qualifications for mediation panel membership are of less importance than they might be in larger districts or in districts that have no identifiable bankruptcy bar. One attorney commented that it did not matter that several mediators on the panel lack certain necessary qualifications because they had not been selected to serve.

Mediator training

The mediators did not support formal mediation training. Most felt that they had learned how to mediate adequately from observing outstanding judges conduct settlement conferences. Training was unnecessary because the practice of selecting mediators on the basis of reputation weeded out panel members who did not

mediate well. Several attorneys commented that one strength of the program, including the way in which the panel is constructed, is its present lack of red tape. One noted that she was reluctant to "fix that which is not broken."

The mediators did not report feeling overworked. One mediator thought that "one or two hours a month" was reasonable; a second thought six to nine all-day mediations a year was acceptable. Typically, mediators were willing to accept one case a month as long as the case could be mediated in an afternoon. Although General Order No. 145 originally did not limit the number of cases that might be assigned to any given mediator, a recent modification limits a mediator to one case every three months.[23]

Mediator compensation

Most mediators rejected the notion of paying mediators. One commented that "paying mediators would put more people on the panel but not necessarily better people." Some were concerned that mediator payment might skew the mediation. Paid mediators might be encouraged to prolong a mediation. Other mediators, however, believed they should be remunerated, for example, at the rate given state court-appointed arbitrators.[24]

It is significant that the mediators emphasized the importance of recognition for their effort. One suggested an annual occasion at which certifications of participation could be awarded.[25]

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23. See note 14 and related text.

24. California Code of Civil Procedure § 1141.18 sets the compensation for arbitrators participating in the state judicial arbitration program at $150 per day or per case, whichever is greater.

25. In fact, the court organized such an occasion, including the awarding of certificates for participation as mediators, in the fall of 1987.

VI. ARCHIVAL ANALYSIS

In this chapter we supplement information gained from interviews with a review of the case files of the adversary proceedings sent to mediation during the first fifteen months of the program's operations (August, 14, 1986, through November 2, 1987). Most generally, our purpose is to raise and answer questions that cannot be addressed objectively through gathering opinions from the program's participants. Some of these questions probe the structure of the program. For example, how many mediators have served in the program, and how often has each served? Do lawyers who act as mediators also bring cases up before other mediators?

A second set of questions elicits the basic descriptive information required to understand the scope and pace of the program. For example, how many proceedings have been sent to mediation? How old were they when the mediator was assigned? What were the issues in dispute, and how much money was involved? How many mediations were followed by a settlement that appears to be directly due to the mediation? Is there a reliable way to discern the causal impact of mediation? Here, as in any analysis of the effect of an innovation, one question must always be "Effective compared to what?" We have therefore attempted to place the mediation program and its outcomes in the larger context of general adversary litigation in the San Diego court. Whenever a case settles following mediation, we would like to know whether it would have settled anyway and, if so, when. We have already learned from the interviews that the participants in the program share and express the opinion that the program brings the benefit of saving the court's time. Can our archival analysis prove or disprove this consensual belief? This is a difficult question to answer under any circumstances, and because our study did not encompass the use of rigorous experimental methods, we will not have a final satisfying response to it here. But we point to some of the information available in the files that gives us the best answer we can expect under the circumstances.

Answers to the basic questions have raised a third set of questions that goes to a very salient characteristic of the San Diego program, which is the high proportion of mediations that have involved one attorney representing a small number of creditor organizations. This high rate of utilization of the program by a single practitioner directed our attention to additional questions that might not have arisen otherwise. Specifically, we were able to inquire whether mediation is related to the size of average settlements and whether the availability and outcome of mediation can be understood by reference to the economic aspects of bankruptcy and its related legal practice. Although the answers we provide to these questions are both fragmentary and tentative, they are, we believe, sufficiently interesting to warrant publication at this time.

Composition of the Panel of Mediators

During the period of the study, twenty-nine individuals served as mediators. Nine served once, eight served twice, three served three times, six served four times, and the remaining three served five, eight, and nine times each. As mentioned in the chapter on method, the court altered the method of mediator selection when it discovered that a relatively small number of mediators were being oversubscribed.

Another feature of the panel, perhaps not surprising given the method of its selection, is that some of its members also appeared as advocates in proceedings that went to mediation. The degree of overlap appeared to be approximately one-third; that is, during the study approximately one-third of the lawyers who had served as mediators had also been advocates in a proceeding that went to mediation. A smaller number of mediators are also members of the panel of Chapter 7 trustees.

We mention these overlapping roles to emphasize that there would appear to be a minimum size of the active or "elite" bankruptcy bar that is required to support a program such as this one. Beneath that minimum size, the degree of overlap of roles might create a problem of conflict or the appearance of conflict.

The Proceedings Sent to Mediation

The first orders appointing mediators were signed August 14, 1986. Between then and November 2, 1987, eighty adversary proceedings and two contested matters were assigned to mediation. We are concerned here only with the adversary proceedings; the number of contested matters sent to mediation at this point is not large enough to study for whatever possibly unique characteristics they may possess.

Distribution of mediated proceedings by cause of action

Sixty-four of the eighty adversaries (80 percent) were brought under 11 U.S.C. § 523(a), *Dischargeability*, including (a)(2), (a)(4), (a)(5), and (a)(6), which list circumstances and conditions that prevent an individual debtor from receiving a bankruptcy discharge of a particular debt. The typical case involves a debtor who, prior to filing a Chapter 7 petition, has borrowed money from a finance company and now seeks to have the debt discharged as part of the estate in bankruptcy. The finance company brings suit under section 523 (a)(2), complaining that the debtor made materially false statements that the company relied on in approving the loan, and in particular that the debtor did not disclose all other existing debts at the time of the application. In response, the debtor typically issues a simple denial, but sometimes adds one or more affirmative defenses against the charge of reasonable reliance by the company on the information supplied on the debtor's application form. These are the issues that must be resolved to determine whether the debt will be discharged or not, given the requirements of section 523(a)(2)(A) and (B).

The remaining sixteen proceedings assigned to mediation, representing 20 percent of the proceedings, covered a fairly broad range of adversary activity, including preferences, transfer, obligation avoidance, breach of contract, objection to discharge (of the entire estate, as opposed to discharge of a single debt), partnership dissolution, and two proceedings involving what were essentially legal malpractice complaints.

The predominance of dischargeability complaints in the set of proceedings sent to mediation is higher than among adversary proceedings generally, both in the Southern District of California and in the nation. We reviewed the national data for the twelve months ending June 30, 1986, and found that dischargeability was either the first or second most frequent single cause of complaint in every bankruptcy court in the country. During that period, 61,993 adversaries were filed nationally. Forty-three percent were dischargeability complaints. For that period in San Diego, there were 906 adversaries, of which 62 percent were dischargeability complaints.[26]

Although adversary complaints were always first or second most frequent, their absolute rate varied considerably from district to district: Iowa Southern registered 75 percent dischargeability, while Alaska counted 15 percent and Puerto Rico 19 percent. [27] California Southern's 62 percent for that period was a tie for the twelfth rank in the country.

Thus, the 80 percent rate of dischargeability complaints sent to mediation is higher than the overall rate of dischargeability complaints for the district and the nation. Analysis presented later suggests a reason for this disproportionality.

Distribution of mediated proceedings by bankruptcy chapter

The predominance of complaints against individual debtors for consumer loan repayments suggests that most of the proceedings assigned to mediation arose out of Chapter 7 bankruptcies, and this is true. Thirteen of the eighty adversaries arose from Chapter 11 reorganization efforts, and the remaining sixty-seven arose from

26. The reader will note a discrepancy between the number of adversaries reported for California Southern in 1986 here and in the introduction. This discrepancy (of sixteen cases) reflects two numbers provided from two different official sources presumably counting the same data base; the difference is inconsequential for current purposes.

27. The Administrative Office categories of adversary proceedings includes a miscellaneous class, "Other," which usually accounts for only a small percentage of adversaries. In Alaska and Puerto Rico, however, this category accounted for the highest percentages of complaints, with dischargeability complaints coming in a distant second.

Chapter 7 liquidations. Chapter 13 debt adjustment bankruptcies generated no adversary activity leading to mediation. We have no efficient way of learning whether these relations among the chapters coming to mediation mirror the overall contributions of each chapter to adversary activity or whether there is a skew in any direction. We can observe, however, that these proportions would not be expected purely on the basis of the raw number of bankruptcy filings, by chapter, for the district. Thus, for the twelve months ending June 30, 1986, the total of 7,859 bankruptcy filings were distributed as follows: Chapter 7, 59 percent; Chapter 11, 6 percent; Chapter 13, 35 percent. It seems a plausible speculation that Chapter 11 cases, which frequently involve the management of considerable assets, will generate adversary activity out of proportion to their percentage of total filings and hence will be overrepresented in mediation proceedings as well. The debt adjustment plans of Chapter 13 appear to generate little adversary activity in general, and none that the judges found suitable for sending to mediation.[28]

Distribution of mediated proceedings by assigning judge

Tables 1 and 2 describe how the three judges have used the mediation program. Table 1 shows the number of assignments to mediation made by each judge for each quarter of the study period, and table 2 shows the distribution of assignments by cause of action. We conclude from the tables that the three judges used the program with differing frequency, but that all of them used the program primarily for dischargeability complaints. Judge Malugen, the most frequent user of the program, had the lowest concentration of dischargeability assignments, 55 percent; the concentrations of Judges Meyers and Hargrove were 86 percent and 79 percent, respectively.

28. Material gathered nationally on adversary proceedings does not include reference to the chapter of the case out of which the proceeding arose. Hence we have no convenient way to gauge this distribution of activity in California Southern against a national or other baseline.

Table 1
ASSIGNMENTS TO MEDIATION, BY JUDGE AND QUARTER OF THE STUDY PERIOD

Judge	Quarter of Study Period					Total Cases in Study Period
	Aug.-Oct.	Nov.-Jan.	Feb.-Apr.	May-Jul.	Aug.-Nov.*	
Meyers	6**	2	2	2	10	22
Malugen	6	3	16	6	13	44
Hargrove	0	3	3	3	5	14
Total	12	8	21	11	28	80

* The last order appointing a mediator during the study period was filed on November 2.

** One of these six includes four very closely related complaints, C85-0012 through -0015, which were combined for virtually all judicial purposes, including assignment to mediation.

Table 2
ASSIGNMENTS TO MEDIATION, BY JUDGE AND CAUSE OF ACTION

Judge	Type of Cause of Action	
	Dischargeability	Other
Meyers	19	2-Transfer/avoidance 1-Objection to disch.
Malugen	34	4-Transfer/avoidance 3-Contract dispute 1-Objection to disch. 1-Dissolve prtnrshp. 1-Legal malpractice
Hargrove	11	1-Transfer/avoidance 1-Objection to disch. 1-Contract dispute
Total	64	16

Age of proceedings at the time of assignment to mediation

When the eighty proceedings are considered as a single group, the median age of a proceeding at the time the mediator was ap-

pointed is just under one year (see table 3). It is reasonable to expect, however, that during the early portion of the program, the judges would reach back into their inventories of older pending proceedings and determine whether the parties would be prepared to go to mediation. As the program matures, we would expect the judges to raise the possibility of mediation earlier in the life of the case.

Table 3
DAYS FROM FILING TO APPOINTMENT OF MEDIATOR, BY JUDGE*

	Meyers	Malugen	Hargrove**	All Judges
Count	22	44	14	80
Mean	429.7	335.0	810.2	444.2
Median	365	276	591	360
Sigma	229.9	206.6	454.7	322.9
Minimum	112	81	360	81
Maximum	1051	870	1777	1777

* Based on the date of the final appointment, if more than one appointment was made.

**When Judge Hargrove was appointed to the bench in September 1985, he inherited a large number of cases that had lain dormant because of prior judicial vacancies.

We examined this possibility by dividing the eighty proceedings into four groups of twenty proceedings each, organized in order of the dates on which the mediators were assigned. The first group of twenty were assigned between August 14, 1986, and February 6, 1987; the median age of proceedings in this group was 401 days (median filing date was October 4, 1985). The second group of twenty were assigned between February 10, 1987, and April 30, 1987; the median age of proceedings in this group was 427 days (median filing date was December 17, 1985). The third group of twenty were assigned between May 10, 1987, and September 10, 1987; the median age of proceedings in this group was 345 days (median filing date was August 14, 1986). And the fourth group of twenty were assigned between September 10,

1987, and November 2, 1987; the median age of filing in this group was 321 days (median filing date was December 11, 1986). Thus, from the first group to the last, the median age of the cases assigned to mediation decreased by approximately 20 percent. Relatively younger cases are now being assigned to mediation.

The judges differed among themselves in the average ages of cases they assigned to mediation, as shown in table 3. In the last set of twenty cases assigned, which were all assigned during the last seven weeks of the study period, the differences among the judges had decreased, however.

Status of proceedings at the time of mediation

Our interviews with the judges and mediators did not provide much information about how decisions are made as to when a proceeding is particularly ripe or ready for mediation, although presumably the agreement of counsel to engage in mediation, when the offer is made, gives some indication of ripeness.[29] We have therefore turned to measurable features of the proceedings in an effort to describe when in the course of the litigation mediation occurred. The data on case age provide one such index. Another index is the amount of court time already expended when mediation occurs, as measured by the number of courtroom appearances the parties have already made when they assent to the judge's offer of mediation.

For the full set of eighty proceedings, six had included trials and motions hearings prior to assignment to mediation, as well as the briefer, more frequent pretrial status conferences that are held from time to time after issue is joined. Interestingly, these procedurally complicated proceedings were not all among the older members of the set, nor were they assigned to mediation relatively early in the life of the program. However, they do not represent typical proceedings that the San Diego court has been sending to mediation. They are discussed further in the next section, on the outcomes of mediation.

29. Unfortunately, we have no information on how frequently mediation was suggested by the judges and rejected by counsel.

Table 4
NUMBER OF PRETRIAL STATUS CONFERENCES (PSCs) OR OTHER COURTROOM ACTIVITIES PRIOR TO ASSIGNMENT OF MEDIATION, BY GROUPS OF TWENTY CASES

Groups of Twenty Cases	One PSC	Two PSCs	Three PSCs	Four PSCs	Five PSCs	Six PSCs	Seven PSCs	Eight PSCs	Mean*	Median	Trials or Hearings
First Group	6	3	5	2	1	1	1	0	2.7	2.8	1
Second Group	4	7	1	4	1	0	0	0	2.4	2.5	3
Third Group	4	8	3	1	0	1	0	1	2.2	2.6	2
Fourth Group	6	5	5	3	1	0	0	0	2.3	2.4	0

* Excludes the proceedings with trials or formal hearings prior to mediation. Any calculation of this additional burden on courtroom time, in units equivalent to the relatively brief pretrial status conferences, would markedly increase these means for the groups in which the proceedings are placed.

Table 4 summarizes the information about the amount of courtroom activity a proceeding had generated by the time a mediator was assigned. As the program has matured, the amount of courtroom activity prior to assignment has decreased somewhat.

In summary, proceedings in the last portion of the study period were assigned to mediation at a younger age, with less prior courtroom activity, than proceedings in the early portion of the study period.

Results of Mediation

The final proceeding in the set of eighty was assigned for mediation on November 2, 1987, and the final full review of the proceedings files occurred on January 7, 1988, with some additional information provided by the court current to approximately January 20. As of that date, the dispositions of the proceedings were distributed as follows:

- Twenty-two proceedings had terminated as a result of mediation;
- Thirteen proceedings were pending, apparently awaiting mediation;
- Seventeen proceedings in which mediation had been apparently unnecessary or insufficient to end the dispute had terminated;
- Twenty proceedings in which mediation had not been effective in ending the dispute were pending;
- Eight proceedings were pending, in various conditions that we have lumped together as "uncertain," including apparently successful but as yet unconfirmed mediations.

We discuss each of these groups of proceedings in turn.

Proceedings in which mediation produced settlement

We must begin by acknowledging that the attribution of causal efficacy to a single event, such as a session of mediation, in a process as complex as litigation is always problematic. The question of the alternative, "Would the proceeding have settled just as quickly without mediation?" is very difficult to answer. The only

sure way to increase the confidence in causal attributions is to perform a true experiment, which in the current context would have meant the random assignment of proceedings to mediation and nonmediation conditions.[30] Perhaps such a study can be done in the future. In the meantime, we must use information in the proceedings files to make inferences relating the mediation process with the disposition of the proceeding. We can supplement this information by examining proceedings that did not go to mediation but were apparently similar to those that did in all pertinent regards. But there is always a risk, in comparing the two sets of proceedings, that they differ systematically in one or more ways that we have not discerned, and that they are therefore not useful in discovering the causal efficacy of mediation. Aware of these problems of inference, we have endeavored to sustain a very conservative position in respect to our conclusions about the effects of mediation on the dispositions of proceedings.

As of January 7, twenty-two proceedings had terminated in a fashion that pointed directly to mediation as a sufficient condition of the termination.[31] In these proceedings, the judgment of causal effectiveness was based on the presence in the file of a certificate of compliance from the mediator stating that the mediation had produced settlement, and, within a reasonable time thereafter, of the stipulated settlement and final judgment and order of the court. These proceedings are identified in appendix 3.

Eighteen of the proceedings brought a complaint of nondischargeability, 11 U.S.C. § 523, and the remaining four brought

30. For a review of the technical, ethical, and policy-related issues involved in performing true experiments in the courts, see Experimentation in the Law: Report of the Federal Judicial Center Advisory Committee on Experimentation in the Law (Federal Judicial Center 1981). For an example of a true experiment in a setting similar to this one, see A. Partridge & A. Lind, A Reevaluation of the Civil Appeals Management Plan (Federal Judicial Center 1983).

31. "Termination" refers in every proceeding but one to the official closing of the proceeding by a final judgment and order. In the single exception, C85-0681M11, Tollenar v. Johnson, the issue between the named parties was resolved by mediation, but the proceeding remained open for the resolution of issues arising under a cross-claim. In such a proceeding, mediation served to simplify the litigation without removing it from the stream that occupies the court's time and attention.

objection to discharge, avoidance, or partnership issues. All proceedings but two contained specific demands for money. The demands ranged from a high of $96,000 to a low of $1,300. Most demands were for relatively small amounts. This distribution reflected a predominance of very similar nondischargeability proceedings brought by a single plaintiff's attorney representing a small number of consumer finance companies. We will return to the significance of this later.

Table 5
DISTRIBUTION OF SIZE OF DEMAND AMONG TWENTY SUCCESSFULLY MEDIATED PROCEEDINGS*

Size of Demand	No. of Proceedings
< $2,000	2
$2,000 to $5,000	10
$5,000 to $10,000	3
$10,000 to $20,000	1
$20,000 to $50,000	2
$50,000 to $100,000	2

NOTE: Mean = $12,750. Median = $3,100.
* Two proceedings with unliquidated demand are not included.

How did these proceedings move through the adversary process? Table 6 displays the major time intervals for these twenty-two proceedings. Numbers in the first column represent the time in days from filing the complaint to appointing the mediator. These numbers may be compared with the first column in table 3, which describes the same time interval for all eighty proceedings. It appears that the successfully mediated proceedings were sent to mediation relatively early in their tenures; this point will be further clarified in the discussion of the other classes of proceedings.

Table 6
MAJOR TIME INTERVALS FOR THE TWENTY-TWO PROCEEDINGS SETTLED AS A RESULT OF MEDIATION

	Days from Filing to Appoint.	Days from Appoint. to Term.	Days from Filing to Term.
Mean	354	141	495
Median	245	149	397
Maximum	1207	271	1414
Minimum	94	42	142

The number of days from the appointment of the mediator to the final judgment, approximately 140 on the average, is at first glance somewhat surprising, given the requirement under General Order No. 145 that mediation be held within forty-five days of the date of the order appointing the mediator and given the success of the mediation. Two factors contributed to the delay. First, mediation was not uniformly held within the time period specified by the order. Second, there were frequent delays, if that is the correct word, between the date of the mediation and the submission of the certificate or the stipulated settlement.

A delay at this point in the process should perhaps be expected. Because the settlement usually means a compromise on the amount sued for, it counts as a "victory" for plaintiff, and plaintiff's lawyer volunteers, or is requested by the mediator, to draft the stipulated settlement document to forward to the court. Particularly when the dollar amount is small, as is often true in these proceedings, plaintiff's lawyer has no compelling financial incentive to expedite this task through his or her office. There is absolutely no incentive for the defendant to complain of a delay. And the delay is well beneath the threshold that would move the court to administrative action sua sponte. It appears that following a successful mediation on a relatively small claim, no one has a compelling interest to move the proceeding quickly to an official conclusion.[32]

32. The median time from filing to disposition of proceedings completed by a successful mediation was approximately thirteen months; the mean (arithmetic average) duration was more than sixteen months. The difference be-

Descriptions of the progress of two mediated proceedings

Here we briefly describe the course of two proceedings that were successfully mediated. The first was a relatively fast, simple nondischargeability proceeding brought by a finance company against a Chapter 7 debtor who allegedly had, before filing for bankruptcy, intentionally falsified her financial condition on the loan application, on which the creditor claimed to have reasonably relied in granting the loan, thereby excepting the debt from discharge under 11 U.S.C. § 523(a)(2). In answer, the debtor denied falsification and also challenged the reliance because the finance company was allegedly known to conduct independent credit checks. The loan was for approximately $2,900 with an annual interest rate of approximately 21 percent. Six weeks after issue was joined, the court issued a notice for the first pretrial status conference, to be held almost three months later. The debtor-defendant and attorneys for both sides attended that conference, at which the judge described the mediation program and inquired whether the attorneys would like to have their proceeding mediated. They agreed and selected a mediator on the spot. The judge noted that the mediator would be appointed and then scheduled the next status conference three months hence. The order appointing the mediator was issued a month after the first pretrial status conference. By the time of the second conference, the issue still remained open and the judge continued the conference for approximately six weeks, but within about two weeks, the mediator submitted a certificate of compliance indicating that mediation had produced a settlement. The attorneys made a brief appearance at the time of the scheduled conference and announced the success of the mediated settlement, at which point the cause was marked "off-calendar" in the courtroom minute entry. The next day plaintiff's attorney filed a stipu-

tween these two measures reflects the presence of several relatively old proceedings, i.e., proceedings filed between 1983 and 1985. As the mediation program matures, fewer such old proceedings will be sent to mediation; the average time from filing to disposition should therefore decrease and the distribution of these times should become more regular.

lated settlement and draft order or entry of judgment, which the court soon executed. The settlement called for a total payment of $500 to be made in equal payments over ten months, without interest. The debt was acknowledged as nondischargeable in bankruptcy. Should the debtor fail to make the payments, the amount owed would revert to the original demand, less payments already made.

From filing to termination, the proceeding occupied ten months of calendar time and perhaps thirty to forty-five minutes of courtroom time.[33] No chambers work beyond routine preparation for the conference was required.

The second example is of a much more complicated proceeding, a dischargeability issue, for a sum of approximately $100,000, arising out of the conduct of a Chapter 11 debtor-in-possession. The complaint had been filed approximately one year before the opening of the mediation program, and the proceeding had been scheduled for trial after three pretrial status conferences had revealed no material progress toward settlement. The parties had submitted statements of facts and law pursuant to the pretrial order. Just before trial the parties requested a continuance and assignment to mediation. Within several weeks the mediator scheduled and held mediation, and shortly thereafter submitted a certificate of compliance announcing success. Plaintiff's attorney subsequently filed a stipulated settlement and draft order for judgment, calling for a relatively complicated payment scheme from the debtor-in-possession, in amounts to depend on his taxable income as reported to the Internal Revenue Service. The plaintiff agreed not to object to any subsequent reorganization plans that the debtor might submit.

In this instance, then, mediation seemed clearly to avoid the requirement of a multiday trial.

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33. This is an estimate based on observations made by the authors of courtroom activity on the days when the judges schedule their pretrial status conferences.

Proceedings awaiting mediation

Appendix 4 lists thirteen proceedings awaiting mediation on January 7, 1988, with nothing in the case file to indicate that significant activity had occurred since the date of the mediator's appointment. For the purpose of establishing an overall "success rate" of settlements through mediation, these proceedings must remain of ambiguous value, but one fact about them is worth reporting. They were bunched rather tightly in terms of filing dates and dates on which mediators were assigned. In September, October, and November of 1987, the court had a burst of activity in the program, including the assignments of these proceedings.[34] None of the proceedings had reported a mediation as of January 7. Some of the proceedings appear from the case file to have slipped well beyond the mediation date required under General Order No. 145 without motions for extension being filed. It is of further interest to note that the court has not established a routine procedure for tracking this interval. Whether the cost of establishing the procedure would be greater than the benefit to be derived from collecting the information is a question the court might wish to consider.

Terminated proceedings for which mediation was either unnecessary or insufficient for settlement

Appendix 5 lists seventeen proceedings that were assigned to mediation but apparently terminated for reasons other than the mediation process. In seven of these, each marked with an asterisk in the appendix, the progress of the proceeding from complaint to the filing of a settlement order was strikingly similar to the progress of proceedings in which mediation had led to settlement. Yet the mediator filed no certificate of compliance, and thus there was no way to tell if mediation had in fact been held and, if so, what the outcome was. The most plausible inference based on the case record is that the mediation was not held, and we must conclude therefore that mediation was not directly effective in producing the settlement.

Of the remaining ten proceedings, only one proceeded to trial before terminating. The others were dismissed or settled. Two set-

34. *See* table 1 *supra.*

tled before mediation was held, and the others were dismissed or settled after a mediation that the mediator reported had been unsuccessful in producing settlement.

Table 7 presents the money demands made in the fourteen of these proceedings where the demand was specific.

Comparing this distribution of demands with the distribution shown in table 5, it appears that the cases that terminated other than through mediation were more widely distributed in demand than the successfully mediated cases but were not remarkably different from them. Both sets of proceedings differ from the still pending proceedings in which mediation was ineffective, as will be shown in table 9.

Table 7
DISTRIBUTION OF SIZE OF DEMAND AMONG FOURTEEN TERMINATED PROCEEDINGS WHERE MEDIATION WAS REJECTED OR UNSUCCESSFUL*

Size of Demand	No. of Proceedings
< $2,000	4
$2,000 to $5,000	4
$5,000 to $10,000	0
$10,000 to $20,000	1
$20,000 to $50,000	3
$50,000 to $100,000	1
$100,000 to $150,000	1

NOTE: Mean = $24,200. Median = $2,600.
* Three proceedings with unliquidated demand are not included.

It might be possible to argue, but it would be rather more difficult to prove, that "bargaining in the shadow of mediation" enhances the likelihood of settlement or speeds the pace with which the proceeding moves to termination. Without additional experimental control over the assignment of cases, we have no way here

to establish what interesting differences there may have been between these seventeen proceedings and the twenty-two that were successfully mediated. Table 8 shows the averages and ranges of the major time intervals of the seventeen proceedings. These figures may be compared with those shown in table 6. Because each set of proceedings includes several very long proceedings, the arithmetic averages are considerably greater than the medians; a comparison between the two groups should be based on the medians. The statistical test appropriate to compare the medians of the intervals for these two sets of proceedings revealed that they are not significantly different from each other.

Table 8
MAJOR TIME INTERVALS FOR THE SEVENTEEN PROCEEDINGS TERMINATED OTHER THAN BY MEDIATION

	Days from Filing to Appoint.	Days from Appoint. to Term.	Days from Filing to Term.
Mean	461	136	597
Median	330	106	418
Maximum	1357	269	1577
Minimum	81	18	99

Pending proceedings in which mediation had been unsuccessful in producing a settlement

Appendix 6 lists twenty proceedings still pending on January 7, 1988, in which mediation had been assigned but either had not been held, or if held had not led to a resolution of the issue. In each case there was sufficient information in the file to determine that events had moved on beyond the time when mediation was or should have been held.

Mediation had apparently not been conducted in seven of these proceedings, although the mediator had been appointed between four and twelve months prior to January 7, 1988. Three of the seven were either in trial or close to beginning trial, two had rejoined the cycle of pretrial status conferences, one was awaiting a

ruling on a motion under advisement, and one had been marked as settled in the courtroom minutes but had not yet received a final judgment.

Mediators had submitted certificates of compliance in the remaining thirteen proceedings of this group. Eleven reported that no settlement had been reached, and two reported successful outcomes that did not in fact reach final judgment. The fates of the eleven varied across the same spectrum of activity described in the previous paragraph: Some were either in or very close to trial, others were again entrained in pretrial status conferences, one had been labeled as settled but was still awaiting receipt of a settlement document from the attorneys, and one was in the midst of a dispute that had arisen when a party had filed a motion to compel discovery just before mediation.

The status of these proceedings as pending is not an artifact of their filing dates. That is, proceedings still pending, after mediation or considerably after the assignment of the mediator, on January 7, 1988, were not in general younger proceedings than those already terminated because of mediation or another reason. Indeed the contrary is true. Of these twenty proceedings still pending, fourteen (70 percent) had been filed in or before 1985. Of the thirty-nine terminated cases, fifteen (38 percent) had been filed in or before 1985. Further, as shown in table 9, the proceedings contained in this group were substantially larger, in terms of their demands, than the proceedings that had terminated by the last day of the study. A comparison of tables 5, 7, and 9 makes this point clearly. For the pending proceedings, eleven of fourteen (85 percent) contained demands exceeding $20,000. For the proceedings terminated other than through mediation, five out of fourteen (36 percent) contained demands exceeding $20,000. And for the proceedings terminated through mediation, five out of twenty (25 percent) contained demands exceeding $20,000.

These facts suggest that proceedings involving relatively small amounts of money will be more susceptible to successful mediation of the sort practiced in this program than larger, perhaps more complicated proceedings.

Table 9
DISTRIBUTION OF SIZE OF DEMAND AMONG FOURTEEN PENDING PROCEEDINGS IN WHICH MEDIATION WAS REJECTED OR UNSUCCESSFUL*

Size of Demand	No. of Proceedings
< $2,000	0
$2,000 to $5,000	1
$5,000 to $10,000	1
$10,000 to $20,000	1
$20,000 to $50,000	5
$50,000 to $100,000	1
$100,000 to $500,000	3
$500,000 to $1,000,000	1
$1,000,000 to $7,000,000	1

NOTE: Mean = $674,000. Median = $45,000.
* Six proceedings with unliquidated demand are not included.

Proceedings with uncertain status as of January 7, 1988

Appendix 7 lists eight proceedings that we have segregated from the previous pending list because of their ambiguous status at the end of the study period. Six proceedings had filed certificates of compliance announcing successful mediation, with an attorney assigned to write the settlement document, but the document had not yet been filed, nor had any others that would allow a definitive conclusion that mediation had or had not succeeded. In the seventh proceeding, the minutes showed that a settlement had been read into the record during a pretrial status conference held approximately three months after the mediation cut-off date. There is no further documentation. And in the eighth proceeding, the debtor had disappeared following mediation.

In the normal course of events, we would expect that the group of six would count as successful mediations and that the seventh and eighth would count as having terminated for reasons other than mediation. But for purposes of this report, we leave their outcomes as uncertain.

VII. FURTHER ANALYSIS AND CAVEATS

One inadequacy of the current research is our inability to distinguish, on any purely objective basis, proceedings the judges sent to mediation from those they did not. This is caused in part by the lack of specific criteria for assignment within the program itself and in part by a lack of clear appreciation on our part of what are the key variables that should be examined to determine what factors have been, or should be, used in making the decision about using the mediation program to facilitate settlement. The primary conclusion to emerge from the analysis so far is that a dischargeability petition involving a relatively modest sum of money is the best candidate for a successful mediation. But this conclusion must be tempered by two caveats. First, it appears that a significant proportion of all the adversary proceedings filed in California Southern are complaints about dischargeability, so that the base rate for determining the success of mediation for other kinds of disputes is relatively limited. And second, a considerable proportion of the dischargeability complaints moving through the mediation program so far has involved a single plaintiff's lawyer representing a small number of finance companies; it would be hazardous to generalize very far from this relatively confined sample of attorney response to mediation. In this section of the report, we clarify the nature and extent of these circumstances that should condition the conclusions drawn about the outcomes of mediation.

First, we look more closely at the fate of dischargeability proceedings in the district. In the Introduction we noted that dischargeability complaints in California Southern amount to about 60 percent of the total adversary complaints filed. But it appears that a substantial minority of proceedings terminate before issue is joined and that no more than 5 percent ever reach trial, even without the benefit of mediation. We note further that dischargeability proceedings accounted for 80 percent of the proceedings sent to medi-

ation during the study period. Given the high attrition rate before issue is joined, there would appear to be an overrepresentation of dischargeability proceedings in the population going to mediation. Two possible explanations for this high proportion come to mind.

The judges may have sent to mediation dischargeability petitions that they considered unreasonably recalcitrant to ordinary judicial management, in the hope that the mediation would facilitate a timely termination of the dispute. Alternatively, the judges may have sent to mediation dischargeability petitions that were sufficiently ripe for termination that mediation would accomplish the final moves to agreement between the parties just as quickly or more quickly than negotiations prompted by pretrial status conferences scheduled at least ninety days apart.

These alternatives are not mutually exclusive; rather, they approach mediation with different purposes. In the first case, mediation is used as an extraordinary procedure when other attempts at judicial case management have not proved fruitful or possible. Although the probability of a successful settlement arising from mediation may be low, the payoff for the court and litigants in time saved would make the relatively small time investment by parties and mediator worthwhile. In the second case, mediation is used more simply as an expediting process for a proceeding that would probably settle almost as quickly in any event; the probability of settlement through mediation is relatively high, but so is the probability of settlement without mediation. By taking the proceeding off the calendar and placing it in the hands of a mediator, the judge frees time on the calendar for review of the very long queue of other proceedings that require periodic judicial attention. In such cases, perhaps no more time will be saved by mediation than what is required for a single pretrial status conference, but given the quantity of such conferences, motions hearings, trials, and other judicial activities on the bench and in chambers, even this is a useful economy.

Examination of the case files strengthens our sense that both these alternatives reflect the actual practices of the court. The size and complexity of dischargeability proceedings sent to mediation ranged from very great to very small. By and large the small proceedings went timely to termination, either clearly as a result of

mediation or not, whereas the larger proceedings, which tended also to be already older by the time they were assigned, were more recalcitrant to mediation just as they had been to whatever other efforts at settlement had been undertaken.

It may be that this general analysis holds for other types of proceedings as well, but at this stage the small numbers of proceedings of each type in the population prevent forming a conclusion.

We turn finally to what may be a unique feature of the program in California Southern—the predominance of one attorney as a participant. Thirty-two of the eighty proceedings in our sample (40 percent) were dischargeability petitions brought by one attorney on behalf of a total of five separately named finance companies.[35] The demands in these proceedings were all for less than $5,000 and were often for less than $3,000; thus they composed a very large proportion of the relatively small proceedings in the study. Further, not one of these proceedings fell into the group of twenty still pending cases in which mediation had clearly not worked. The proceedings had terminated as a result of mediation or otherwise (twenty proceedings), were apparently awaiting mediation (five proceedings), or fell into our "uncertain" category because the attorney had yet to submit the stipulated settlement and proposed order for judgment to the court (seven proceedings).

We have no way to judge whether other districts considering the development of a mediation program would find a mix of proceeding types and sizes similar to the one in California Southern. Certainly the very frequent participation of a single attorney as an advocate in the system has some implications for understanding the system in San Diego as well as elsewhere. At the very least, one should expect a degree of routinization and regularization of the process as the participants become thoroughly familiar and practiced with the requirements and intentions of General Order No.145.

This high degree of participation had an unintended benefit for research, in that we have been able to develop a small, uniform set

35. Twenty-five of these were on behalf of one plaintiff. The authors are grateful to Mr. Jerry Suppa, Esq., for his cooperation.

of data that allows us to compare the outcomes of dischargeability complaints under three conditions: when mediation was attempted and succeeded, when mediation was scheduled but either was not held or was held but cannot be credited with success, and when mediation was not scheduled. In all cases the plaintiff's lawyer was the same, and the sizes of the demand varied but slightly. Proceedings for the first two groups are included in the lists given in appendixes 3 and 5, and proceedings for the third group come from a sample of proceedings filed by this lawyer between November 1985 and June 1986 and terminated no later than December 12, 1986, and before trial. These filing dates fall within the range of filing dates of proceedings in the study population.

Table 10
DEMANDS AND FINAL OUTCOMES FOR THREE SETS OF DISCHARGEABILITY PROCEEDINGS BROUGHT BY THE SAME LAWYER*

	Not Assigned to Mediation (13)	Mediation Not Causal to Termination (8)	Mediation Causal to Termination (12)
Demand	$2,466	$2,135	$2,635
Result	$1,393	$838	$519
Percentage of Demand Awarded	59	39	20

* In each set of proceedings, one terminated by dismissal without a money judgment in favor of the plaintiff and was counted as zero for determining the average settlement received by plaintiff.

As shown in table 10, the form through which a proceeding terminated appears to be related to the size of the final judgment: Proceedings terminating as a result of mediation averaged an approximate 20 percent return on the demand for the plaintiff; proceedings terminating after assignment to mediation but not as a result thereof averaged a 38 percent return; and proceedings terminating without assignment to mediation brought an average return of approximately 59 percent to the plaintiff. These differences were not related to differences in size of demand, which was constant

across the three groups of proceedings. Nor were they related to the number of terminations by dismissal, of which there was one in each group.

We caution against premature interpretation of this observation. It would not be correct to conclude that the assignment to mediation, or the mediation process itself, drives down the amount the plaintiff collects in such dischargeability proceedings, because we cannot rule out the existence of unknown factors that differentiate between the proceedings in the three groups. We know only that these proceedings were brought by the same attorney for the same plaintiffs for approximately the same amounts of money against debtors who were apparently in the same approximate financial circumstance. But because the plaintiff's attorney had control over his options according to his own analysis of the best outcome for the client, and his analysis may have depended on factors about the debtor, the debtor's lawyer, and other variables about which we know nothing, we cannot conclude that there is a direct causal relationship between the presence or absence of mediation and the outcome of the proceeding. An experimental analysis in which there was random assignment of proceedings to conditions, across a larger number of plaintiffs' lawyers, would be required to come to such a conclusion with confidence. We offer this finding here, nevertheless, to suggest that this is a potentially interesting and important research question.

Mediation as a Ceremony and a Validation of Outcome

Our final observation is a more general one relating to the function of mediation for the relatively small dischargeability proceedings that feature so prominently in this program. To begin with, the bankrupt defendant is faced with a poor choice in such a lawsuit, simply because of the economics of the situation in which he or she has been placed. The apparent choices are to settle the suit early for some proportion of the demand or to fight the complaint all the way to trial. Given the language of the statute and standard of proof for the allegation of fraud,[36] plaintiff may not

36. *In re* Graziano, 35 Bankr. 589 (Bankr. E.D.N.Y. 1983).

have an easy task at trial, and if the defendant insists on trial, he or she may very well prevail. But the costs of going to trial, made up largely of the nonrecoverable attorney's fee, are greater than the costs of the settlement that the debtor is likely to be able to work out with the finance company. It is thus in no one's financial interest to go to trial: not the debtor, debtor's attorney, or plaintiff's attorney.[37] This can be a rather bitter pill for a debtor who earnestly believes that the debt should be dischargeable as part of the bankruptcy estate and that the finance company should not be pursuing the matter. In this setting, the mediation program may play a role quite different from any initially intended for it under General Order No. 145. In particular, it may give the debtor an experience of "due process," of a full hearing by a person who has status and the apparent respect of the court and both attorneys, who listens carefully and then works toward an outcome that both sides can accept. As table 10 suggests, a debtor who goes through this process may, as a result, end up paying less of the debt than he or she would otherwise have had to pay. But even if that is not the case, the debtor may go away from the process with a more satisfied sense that the issues were fully heard and resolved. We cannot offer this as a conclusion proven by the interviews or archival analysis we have so far conducted. But it is consistent with our observations and analysis.

Mediation as a Means of Saving Time

We conclude that the mediation program as instituted does seem to move proceedings off the judges' pretrial status conference calendars, presumably to make room for other proceedings waiting their turns. Further, by transferring settlement work from judges to the bar, considerable judge time may be saved. It is still unclear, however, that the volume of the program could rise to the level that would seriously reduce the average intervals of time between these conferences for most adversary proceedings. The amount of work waiting to be done by the court, at least in this district, would ap-

37. We thank the several attorneys who shared with us their charges for moving a debtor through the various stages of a bankruptcy and related proceedings.

favorably disposed of by the alternative track of mediation. From the court's perspective, then, neither the length of the case-related work day nor the average length of the queue of cases and proceedings needing judicial attention will be markedly reduced by the continuation of the mediation program. But from the individual litigant's viewpoint, particularly the litigant who is sure to go to trial and is awaiting assignment of precious trial time, the accumulated consequences of successfully mediated adversary proceedings might well speed the time when that full judicial hearing can be held.

Appendix 1
GENERAL ORDER NO. 145

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re:	) GENERAL ORDER NO. 145
	)
ADOPTION OF PROCEDURES GOVERNING	)
MEDIATION OF CONTESTED MATTERS	)
AND ADVERSARY PROCEEDINGS IN	)
BANKRUPTCY CASES	)
	)

1.0 PRELIMINARY

The Court finds that the volume of cases and adversary proceedings filed in this district has placed substantial burdens upon counsel, litigants and the Court, resulting in significant delays in the resolution of disputed matters. A program for Court annexed mediation, in which litigants and counsel come together with an independent mediator, offers an opportunity to settle legal disputes with less cost or time, and to the satisfaction of all the parties. In addition, it offers to the Court the prospect of some relief from the heavy and constantly increasing case load. This General Order is accordingly adopted for these purposes.

2.0 REGISTER OF VOLUNTARY ATTORNEYS

2.1 The judges of the Bankruptcy Court shall establish and maintain a register of qualified attorneys who have volunteered to serve, without compensation, as mediators in contested matters and adversary proceedings in cases pending in the Bankruptcy Court. The attorneys so registered shall be selected by the bankruptcy judges from this District from lists of attorneys who meet the qualifications hereinafter described.

The attorneys so registered shall be members of the Bar of this Court. The application will be submitted to the San Diego County Bar Association, which in turn shall submit to the Clerk the application of each proposed mediator. The application shall set forth the qualifications described herein and conform in format to the attached Exhibit "A".

2.2 In order to qualify for service as a mediator under this rule, an attorney shall certify to the Court that he or she meets the following minimum qualifications:

a. Be an active member of the State Bar of California, duly licensed to practice before the courts of the State of California and the Federal Courts for the Southern District of California;

b. Have been admitted to practice in a state court for at least four (4) years;

c. Have served as the attorney of record for at least three (3) bankruptcy cases from commencement through conclusion (i.e., confirmation of a plan or discharge); or alternatively,

d. Have served as the attorney of record for a party in interest for at least three (3) or more adversary proceedings or contested matters from commencement through completion (i.e., judgment, order or stipulated settlement).

3.0 LIST OF ELIGIBLE MEDIATORS

3.1 A list of eligible mediators shall be submitted to the Clerk of the Bankruptcy Court once per calendar quarter by the San Diego County Bar Association. The list to be submitted no later than March 15 shall be effective April 1 through June 30. The list to be submitted no later than June 15 shall be effective July 1 through September 15. The list to be submitted no later than September 15 shall be effective October 1 through December 31. The list to be submitted no later than December 15 shall be effective January 1 through March 31 of the following year.

4.0 ASSIGNMENT TO MEDIATION

4.1 A case may be assigned to mediation by order of the Court at a status conference or other hearing. If a case is to be assigned to mediation, the parties attending the status conference shall be presented with a form order assigning the matter to mediation, and the current list of eligible mediators. The matter shall trail on the Court's calendar if necessary, so that all parties attending the status conference may confer and designate a mutually acceptable mediator and an alternate. If the parties cannot agree, the Court shall appoint a mediator and alternate from the list.

4.2 Form of Order

The Court's order assigning a matter to mediation shall be in the form attached hereto as Exhibit "B". This form may be prepared as an original with carbon paper duplicates, or copies may be prepared after completion of the form. The original and one copy shall be retained in the Court's file. One copy shall be mailed to the mediator and one copy to each party.

5.0 MEDIATION PROCEDURE

5.1 Time and Place

The mediator shall fix a time and place for the mediation conference, and all adjourned sessions, that is reasonably convenient for the parties, and shall give them at least 15 days' written notice of the initial conference. The conference shall be set to begin as soon as practicable, but in no event more than 45 days after the mediator has been notified of his selection. The mediator may, upon written stipulation of the parties (filed with the Court), grant one continuance of the conference, which continuance shall not extend the time from notification of the mediator's appointment to the conference to a period longer than 75 days.

5.2 Submission of Completed Case Questionnaires

Each party shall provide the mediator with a completed case questionnaire in the format attached hereto as Exhibit "C". Said case questionnaire shall be served on the mediator and all other parties not less than seven (7) calendar days prior to the date noticed for the mediation conference as set forth in paragraph 5.1 above.

5.3 Attendance and Preparation Required

The attorney who is primarily responsible for each party's case shall personally attend the mediation conference and any adjourned sessions of that conference. The attorney for each party shall come prepared to discuss the following matters in detail and in good faith:

a. All liability issues;

b. All damage issues; and,

c. The position of his/her client relative to settlement.

5.4 Parties To Be Available

All individual parties who reside within the County of San Diego shall personally attend the

mediation conference unless excused by the mediator for cause. Parties, other than individuals, whose principal place of business is located in San Diego County, shall have a representative appear with authority to negotiate. Individuals and other parties who neither reside in San Diego County, nor have their personal place of business located therein, shall be available for conference with their counsel to the mediator by telephone. The mediator shall decide when the parties are to be present in the conference room.

5.5 Failure To Attend

Willful failure to attend the mediation conference shall be reported to the Court by the mediator and may result in the imposition of sanctions by the Court.

5.6 Proceedings Privileged

All proceedings or writings of the mediation conference, including the case questionnaire, mediator's settlement recommendation, plus any statement made by any party, attorney or other participant, shall in all respects be privileged and not reported, recorded, placed in evidence, made known to the trial court or jury or construed for any purpose as an admission against interest. No party shall be bound by anything said or done at the conference unless a settlement is reached, in which event the agreement upon a settlement shall be reduced to writing and shall be binding upon all parties to that agreement. Federal Rule of Evidence 408 applies herein.

5.07 If the mediator makes any oral or written suggestions as to the advisability of a change in any party's position with respect to settlement, the attorney for that party shall promptly transmit that suggestion to his client.

The mediator shall have no obligation to make any written comments or recommendations, but may, in

his discretion, provide the attorneys for the parties with a written settlement recommendation memorandum. No copy of any such memorandum shall be filed with the Clerk or made available in whole or in part, directly or indirectly, either to the Court or to the jury.

The attorneys for the parties shall forward copies of any such memorandum to their clients and shall advise them of the fact that the mediator is a qualified attorney who has volunteered to act as an impartial mediator, without compensation, in an attempt to help the parties reach an agreement and avoid the time, expense and uncertainty of trial.

The mediator shall have the duty and authority to establish the time schedule for mediation activities, including a schedule for the parties to act upon the mediator's recommendation, having in mind that the purpose of this Order is prompt dispute resolution.

6.0 PROCEDURE UPON COMPLETION OF MEDIATION SESSION

6.1 Upon the conclusion of the first mediation session conducted by the mediator where all parties are in attendance, the following procedure shall be followed:

a. If the mediation session has been concluded and is successful in that the parties have reached an agreement regarding the disposition of the proceeding, the parties shall determine who shall prepare the stipulation to (1) dismiss, enter judgment on whatever terms or continue the mediation session to a date convenient to all parties and the mediator, and (2) submit the fully executed stipulation to the Bankruptcy Court for approval; and,

b. After the mediation, the mediator shall file with the Clerk within 10 days, a certificate in the form attached as Exhibit "D" showing that there has been compliance with the settlement and me-

diation requirements of this rule, and whether a settlement has been reached.

7.0 IMPLEMENTATION

The foregoing Procedures Governing Mediation Of Contested Matters And Adversary Proceedings in Bankruptcy Cases shall become effective on July 1, 1986, and shall apply to all bankruptcy cases and related adversary proceedings filed or pending on or after that date.

DATED: June 4, 1986

JAMES W. MEYERS, Chief Judge
United States
Bankruptcy Court

LOUISE DeCARL MALUGEN, Judge
United States
Bankruptcy Court

JOHN J. HARGROVE, Judge
United States
Bankruptcy Court

Appendix 1

APPLICATION

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA
MEDIATION PANEL

Name: _____

Address: _____
Street City State Zip

_____

California State Bar Number: _____

Date of Admission: _____
(Must be four (4) years or more)

Are you a member of the United States District Court for the Southern District of California? _____

Date of Admission: _____

List three bankruptcy matters in which you have either:

a. Served as attorney of record from commencement to confirmation or discharge; or,

b. Served as attorney of record for a party-in-interest in three or more adversary proceedings or contested matters from commencement through completion (i.e., judgment, order or stipulation).

Case Title	Case Number	Dates
1.		
2.		
3.		

I hereby certify that the undersigned meets the qualifications for membership to the Mediation Panel and that the foregoing is true and correct.

DATED: _____ _____

Exhibit "A"

UNITED STATES BANKRUPTCY COURT) Bankruptcy No._____
SOUTHERN DISTRICT OF CALIFORNIA)
940 Front Street, Room 5-N-26) Adversary No._____
San Diego, California 92189)

In re:

_____ Debtor.

(Short Title And Number Of Adversary Proceeding If Applicable)

_____ Plaintiff(s),

vs.

_____ Defendant(s).

ORDER APPOINTING MEDIATOR AND ASSIGNMENT TO MEDIATION

The above-captioned matter is hereby assigned to the following mediator or, if such mediator is unable to serve, to the alternate:

Mediator:	Alternate:
_____	_____
Name	Name
_____	_____
Address	Address
_____	_____
City, State, Zip	City, State, Zip
_____	_____
Telephone	Telephone

EXHIBIT "B"

The matter concerns: ( )Dischargeability
( )Objection to Claim ( )Lien Avoidance
( )Other:_____
_____

The Attorneys for the parties are:

_____	_____
Name	Name
_____	_____
Address	Address
_____	_____
City, State, Zip	City, State, Zip
_____	_____
Telephone	Telephone

The parties are ordered to comply with the provisions of General Order No. _____, including submission of the case questionnaire to the mediator by _____.

DATE: _____ _____
Bankruptcy Judge

EXHIBIT "B" (cont'd)

-DO NOT FILE WITH THE COURT-
-THIS IS NOT AN ANSWER OR RESPONSE TO THE COMPLAINT-

Name of Court: UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re:
Debtor:
Plaintiff: Case No.
Defendants: Adversary Proceeding No. C8-

CASE QUESTIONNAIRE
IN CONNECTION WITH MEDIATION PROCEDURE

-INSTRUCTIONS-

1. The purpose of this case questionnaire is to help the parties settle their differences and reduce expense, making mediation a meaningful and effective procedure.

2. Upon the parties receiving notification of the appointment of a mediator and receiving notice of the date, time and place of the mediation conference, each party shall simultaneously prepare and serve upon all other parties and the mediator, a completed questionnaire in accordance with this form. YOU WILL NOT FILE THE CASE QUESTIONNAIRE OR COPIES THEREOF WITH THE COURT. THIS IS NOT AN ANSWER OR RESPONSE TO THE COMPLAINT, NOR IS IT INTENDED TO MODIFY OR AMPLIFY THE EXISTING PLEADINGS. THE PARTIES' GOOD FAITH COMPLIANCE WITH THE LETTER AND SPIRIT OF THE RULE REGARDING MEDIATION REQUIRES A CONSCIENTIOUS AND COMPLETE DISCLOSURE OF INFORMATION AND POSITIONS. PLEASE COMPLETE THE QUESTIONNAIRE WITH THESE PRINCIPLES IN MIND.

EXHIBIT "C"

3. a. ALL QUESTIONS REFER TO THE INCIDENT OR AGREEMENT IN THIS ADVERSARY PROCEEDING ONLY.

   b. Answer each question. If a question is not applicable, answer "N/A".

   c. Your answers are not limited to your personal knowledge, but you are required to furnish all information available to you or anyone acting on your behalf, whether you are a plaintiff, defendant, cross-complainant or cross-defendant.

   d. Type or legibly print your answer below each question. If you cannot completely answer a question in the space provided on the case questionnaire, check the "attachment" box and put the number of the question and the complete answer on an attached sheet of paper. You should not put part of an answer on the case questionnaire and part on the attachment. You may put more than one answer on each attached page.

   e. When you have completed the case questionnaire, sign the verification and serve the original upon the mediator with copies to all other parties.

   f. Failure to complete the case questionnaire fully and in compliance with the stated purpose (see paragraph 2 above) shall be reported by the mediator to the Court and may be grounds for the imposition of sanctions.

   g. DO NOT FILE THIS CASE QUESTIONNAIRE WITH THE COURT.

EXHIBIT "C" (cont'd)

-DO NOT FILE WITH THE COURT-

Plaintiff: Case No.

Defendant:

-QUESTIONS-

1. FOR ALL CASES

a. State your name and street address.

b. State your current business name and street address, type of business entity and your title.

c. Describe in detail your claim or defenses and the facts on which they are based, giving relevant dates.

See attachment for answer to number 1.c.

d. State the name, street address and telephone number of each person who has knowledge of facts relating to this lawsuit and specify his/her area of knowledge.

See attachment for answer to number 1.d.

e. Describe each document or photograph that relates to the issues and facts. You are encouraged to attach a copy of each. For each that you have described but not attached, state the name, street address and telephone number of each person who has it.

See attachment for answer to number 1.e.

f. Describe each item of physical evidence that relates to the issues and facts, give its location and state the name, street address and telephone number of each person who has it.

See attachment for answer to number 1.f.

EXHIBIT "C" (cont'd)

g. State the name and street address of each insurance company, guarantor, bonding agency or co-obligor who is claimed by you to be responsible in whole or in part for the damages claimed against you.

See attachment for answer to number 1.g.

h. Describe the conduct of plaintiff that will bar or diminish any recovery.

See attachment for answer to number 1.h.

i. Describe the factual basis of any legal defenses that will bar or diminish any recovery by plaintiff.

See attachment for answer to number 1.i.

2. FOR CLAIMS ARISING FROM TORT (INJURY TO PERSON OR PROPERTY). 11 U.S.C. § 523(a)(6).

a. Describe in detail all damages to the person for which you claim compensation including, but not limited to, injury or illness, medical and related expenses and loss of income.

See attachment for answer to number 2.a.

b. Itemize your property damage with attention to the market value of the item damaged and the cost of replacement or repair. State the amount as to each item and where practicable submit a copy of an itemized bill or estimate.

See attachment for answer to number 2.b.

3. FOR CASES BASED ON AGREEMENTS.

a. In addition to your answer to 1.e., state all the terms and give the date of any part of the agreement that is not in writing.

See attachment for answer to number 3.a.

EXHIBIT "C" (cont'd)

b. Describe each item of damage or cost you claim, state the amount and show how it is computed.

See attachment for answer to number 3.b.

4. FOR CASES ARISING UNDER THE PROVISIONS OF TITLE 11.

a. Please list the Bankruptcy Code section(s) which you rely upon for recovery or defense.

See attachment for answer to number 4.a.

b. State briefly the relation between the Code section(s) and the facts which you assert.

See attachment for answer to number 4.b.

I declare under penalty of perjury that the foregoing answers are true and correct under the laws of the State of California.

Executed this _____ day of _____, 19__, at _____, _____.

_____

EXHIBIT "C" (cont'd)

UNITED STATES BANKRUPTCY COURT) Bankruptcy No._____
SOUTHERN DISTRICT OF CALIFORNIA)
940 Front Street, Room 5-N-26) Adversary No._____
San Diego, California 92189)

In re:

_____ Debtor.

(Short Title And Number Of Adversary Proceeding If Applicable)

_____ Plaintiff(s),

vs.

_____ Defendant(s).

MEDIATOR'S CERTIFICATE OF COMPLIANCE

I, _____, court appointed mediator declare:

1. Date of Mediation: _____

   Continued Date:
   (If applicable) _____

2. The Rules governing mediation have ___ have not ___ been complied with.

3. A settlement of this matter has ____ has not ____ been reached.

4. If settlement has been reached, _____ (plaintiff/defendant) shall prepare the stipulation for settlement.

DATED: _____ _____
Mediator

EXHIBIT "D"

Appendix 2
LIST OF INTERVIEWEES

Members of the Court

Hon. James W. Meyers, Chief Judge
Hon. Louise D. Malugen
Hon. John J. Hargrove
William R. Parker, Clerk

Mediators and Advocates

Steven A. Berkowitz
Mikel Bistrow
David Buchbinder
Michael Busch
Russell DePhillips
Radmila Fulton
Stephen Haynes
Don Hiney
Ronald Hutcherson
Jeffrey Isaac
L. Scott Keehn
Dean Kirby
David Loadman
Frederick Meiser, Jr.
Robert Middendorf
Fred Phillips
Ross Pyle
William Smelko
Jerry Suppa
Raymond T. Theep
Victor Vilaplana
Ardelle Williams

Appendix 3
PROCEEDINGS TERMINATED AS OF JANUARY 7, 1988: MEDIATION PRODUCED SETTLEMENT

1.	C83-2474P7(H)	Sutherland v. Continental Bank & Trust
2.	C84-06819 (M)	Mesa Shopping Center v. Hurlburt
3.	C84-0842P7(LM)	Unger v. Shirk
4.	C85-0673M7	Mission Thrift & Loan v. Baker
5.	C85-0681LM11	Tollenaar v. Johnson
6.	C85-0752LM11	Coronado Ocean Venture v. McPartlin
7.	C85-1007LM7	ITT v. Standley
8.	C85-1072H7	Security Pacific Finance v. Gearhart
9.	C86-0314LM7	ITT v. Thompson & Thompson
10.	C86-0353LM7	ITT v. McAvoy
11.	C86-0503LM7	ITT v. Enos
12.	C86-0592M7	ITT v. Huseas
13.	C86-0602LM7	ITT v. Bolstad
14.	C86-0617LM7	ITT v. Kelly
15.	C86-0680LM7	ITT v. Siemers
16.	C86-0968LM7	ITT v. Amosa
17.	C86-0993M7	ITT v. Doyle
18.	C87-0021LM11	H & A Constr. Co. v. Kemp et al.
19.	C87-0044LM7	ITT v. Hartelt
20.	C87-0058LM7	Bank of San Diego v. Free
21.	C87-0144LM7	ITT v. Hudson & Hudson
22.	C87-0185M7	Mitchell v. Rowley & Rowley

Appendix 4
PROCEEDINGS AWAITING MEDIATION
AS OF JANUARY 7, 1988

1.	C85-0974LM7	Bank of San Diego v. Gartland
2.	C86-0250H7	ITT v. Hunts
3.	C86-0448H7	McMahans Furniture v. Raymond
4.	C86-0507LM7	ITT v. Barton
5.	C86-0533H7	Sears, Roebuck v. LeFebvre
6.	C86-0774H7	Dawson v. Landers
7.	C86-0973M7	Associated Financial Service v. Fornelli
8.	C86-0974M7	ITT v. Fornelli
9.	C86-1015LM7	Short v. Collins
10.	C87-0033LM11	Peterson v. Andel Gp. & Miden
11.	C87-0115LM7	Buchbinder v. Short
12.	C87-0239LM7	ITT v. Weaver
13.	C87-0415LM7	Edmons v. Metcalf

Appendix 5
PROCEEDINGS TERMINATED AS OF JANUARY 7, 1988: TERMINATION NOT ATTRIBUTABLE TO MEDIATION

1.	C83-1913P7(H)	Sparks v. Gundlach
2.	C83-2341P7(H)	Clothier v. Clothier
3.	C83-2478(M)	Boldt v. Barney
4.	C85-0718LM7	Giacalone v. Handrus
5.	C85-0887LM7	Travelers Express v. Quainton
6.	C85-0940LM7	Dalaimo v. Dalaimo
7.	C85-1059LM7	Commonwealth Bank v. Cortez*
8.	C86-0094LM7	ITT v. Pointer*
9.	C86-0191LM7	Nelson v. Wright & Sons
10.	C86-0465M7	Price v. Cooke*
11.	C86-0526M7	ITT v. Hall*
12.	C86-0635LM7	ITT v. Callahan*
13.	C86-0721LM7	Beneficial of Calif. Inc. v. Kuszajewski*
14.	C86-0828M7	ITT v. Kukman*
15.	C86-0939LM7	Beneficial of Calif. Inc. v. Boulware
16.	C86-0970LM7	ITT v. Aiello
17.	C87-0550LM7	Aetna Finance Co. v. Bean

*"Look like" mediated cases, but without certificate of compliance.

Appendix 6
PROCEEDINGS PENDING ON JANUARY 7, 1988: MEDIATION REJECTED OR UNSUCCESSFUL

1.	C82-02382K11	Flannery v. Rogers
2.	C83-02534P(H)	Lee v. McNamara
3.	C84-0184P7	Boldt v. Oberman
4.	C84-0797P11	Chalet & Associates v. Mahoney
5.	C85-0012-15M7	Wolf v. Boekamp(s)
6.	C85-0560P7	Taxel v. Admin. Mgmt. Serv. & I.G.I.
7.	C85-0775M7	Bullock & Lee v. French
8.	C85-0820M7	Casebolt et al. v. Howarter
9.	C85-0821M7	Campbell et al. v. Howarter
10.	C85-0829M7	Cooke v. Howarter
11.	C85-0877LM7	Taxel v. Equity General Insurance
12.	C85-0975M11	Murray v. Jennings et al.
13.	C85-0983H7	Cate v. Gartland
14.	C85-0988M7	Shaima v. Martineau
15.	C86-0021H7	Bank of San Diego v. Gearhart
16.	C86-0077LM7	Sioson et al. v. Oira
17.	C86-0196M11	Imaizumi v. Bliss & Bliss
18.	C86-0413LM11	Mahoney et al. v. Vel Pak Inc. et al.
19.	C86-0547LM11	Vista Medical Investors v. Schlehuber
20.	C87-0051M7	Heldoorn v. Kolchik

Appendix 7
PROCEEDINGS WITH UNCERTAIN STATUS AS OF JANUARY 7, 1988

1.	C86-0453LM11	Vista Medical Investors v. Brown
2.	C86-0633H7	Finance One/California v. Mathews
3.	C86-0846LM7	ITT v. Lobas
4.	C86-0923LM7	Purdue National Bank v. Lanz
5.	C86-0948M7	Associates Financial Serv. v. Armstrong
6.	C86-0952M7	ITT v. Armstrong
7.	C86-0969M7	ITT v. Malone
8.	C87-0369KM7	ITT v. Los Santos

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THE FEDERAL JUDICIAL CENTER

The Federal Judicial Center is the research, development, and training arm of the federal judicial system. It was established by Congress in 1967 (28 U.S.C. §§ 620-629), on the recommendation of the Judicial Conference of the United States.

By statute, the Chief Justice of the United States is chairman of the Center's Board, which also includes the Director of the Administrative Office of the United States Courts and six judges elected by the Judicial Conference.

The Center's **Continuing Education and Training Division** provides educational programs and services for all third branch personnel. These include orientation seminars, regional workshops, on-site training for support personnel, and tuition support.

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