Formal Adversary Mediation Procedures for the Eastern District of Wisconsin Bankruptcy Court

Notes of Brainstorming Sessions

I. History

On July 22, 2013, the judges of the Eastern District bankruptcy court invited members of the bankruptcy community to a brainstorming session, to discuss creation of a formal process for referring adversary litigation to mediation.

A number of people attended the brainstorming session on August 8, 2013 at 3:00 p.m. in the clerk's office, and began initial discussions. Another brainstorming session took place August 20, 2013, one on September 18, 2013, and another on October 18, 2013.

During that time period, two individuals contacted the court and offered their services as private mediators, should the court adopt procedures that would use private mediators. Attorney Michael F. Dubis and Attorney (and former judge) William A. Jennaro offered their services.

Attorney Debra H. Tuttle, of Wisconsin Foreclosure Mediation Network & Metro Milwaukee Mediation Services, Inc., attended a couple of the sessions, and provided for reference a copy of the National Standards for Court-Connected Mediation Programs created by the Center for dispute Settlement and the Institute of Judicial Administration. Judge Susan V. Kelley had written an article for the NCBJ (National Conference of Bankruptcy Judges) newsletter, surveying bankruptcy courts across the country regarding the procedures different bankruptcy courts employ for referring cases to mediation. At Judge Kelley's suggestion, law clerk Emily Stedman created a chart listing each district, describing whether they had formal mediation procedures, and enumerating certain factors—did the district have a local rule governing mediation, was it mandatory or voluntary, did the court keep a list of mediators, who could serve as mediators (judges only, lawyers, private mediators), whether there was a fee for participating. The group also obtained a copy of the mediation procedures (implemented by general order) for the District of Nebraska bankruptcy court; a copy of the local rules for the Eastern District of Wisconsin (the district court), including the rules governing mediation procedures, and the orders that the district court uses to implement its procedures; and copies of 28 U.S.C. section 651, et seq. and Fed. R. Civ. P. 16.

II. Summary of Discussions

Voluntary vs. Involuntary

The participants discussed in detail whether a formal mediation procedure ought to be mandatory or voluntary. A number of participants argued against a mandatory procedure. An attorney who represents mortgage lenders pointed out that many mortgage lenders were bound by regulations which required them to follow specific settlement procedures. While the lenders might still elect to participate in other processes, requiring them to participate in a mandatory procedure might conflict with the settlement regulations or disrupt settlements otherwise achievable under those regulations. Some counsel who regularly represent defendants expressed concern at their clients being forced to incur more litigation expense to participate in mandatory mediation when they didn't want to be in bankruptcy court to begin with. They also noted that if the mediation process took place after they had been forced to file an answer to the complaint, the mediation process wouldn't save their clients that cost, and there would be less incentive for their clients to approach settlement. Some argued that an adversary proceeding is a litigation proceeding, and that mediation might serve as an "easy out" for attorneys who are too lazy, or unprepared, or scared to litigate. Others argued that if the court required mediation before the parties had an opportunity to complete discovery, it was unlikely that the parties could reach any meaningful resolution. Counsel for the United States Trustee questioned whether it would be appropriate to require the UST to mediate denial-of-discharge complaints alleging fraud.

Other participants—particularly some consumer debtors' counsel—argued that the only way to get their clients to participate would be to make the process mandatory. One attorney suggested a procedure whereby the court would order mediation ASAP, even before the defendant had filed an answer, creating a presumption that mediation will take place. The burden then would shift to one of the parties to show why the case wasn't suitable for mediation.

By the end of the final session on October 18, 2013, the group seemed to have reached consensus that whatever procedures the court adopted, it should not make participation in mediation mandatory.

Timing—Before the Defendant Answers? Before Completion of Discovery?

The group discussed over several sessions the timing of when the mediation should take place. Again, many who represented defendants argued that sending parties to mediation after the defendant had gone to the time and expense of preparing the answer would make defendants less interested in participating. Others argued that sending parties to litigation before completion of discovery would be a waste of time, as the parties wouldn't have a sense of the parameters of the case.

One participant suggested that the court could create a notice to go out with the summons. It would explain the mediation process. There would be a form the lawyers could sign and return, certifying that they'd made their clients aware of the existence of the mediation procedures. Another followed up by suggesting that the judge also could use the pretrial conference to explain the parameters of the program. This procedure would require the defendant to file an answer before the judge could explain. Some wondered whether the pretrial conference would be the best point in time at which to require parties to elect whether or not to go to mediation. One participant suggested that mediating a discovery plan could be part of the issues evaluated at mediation. The group talked about whether the court should suspend all litigation deadlines (including discovery) once parties had indicated that they wanted to explore mediation. Several, including Judge Kelley, discussed the idea of early neutral evaluation; the parties could participate in that process very early on, perhaps before the defendant answered, and then later decide whether to participate in full-blown litigation.

By the end of the October 18 session, the participants were circling around the following procedure:

A notice would go out to the parties upon the filing of the complaint, explaining the mediation process, and asking the defendant whether the defendant wished to explore mediation. If the defendant wished to explore mediation, the defendant could ask the court to give the defendant additional time to file an answer. Once the defendant had indicated a desire to participate, the plaintiff would have seven (7) days in which to either agree to participate in mediation or to decline. If the plaintiff agreed to participate, the stipulation between the parties would extend the deadline for the defendant to file an answer, and would set a date for the mediation session. If the plaintiff did not agree to participate, the Court would provide the defendant with a new answer deadline.

Cost

It became clear over the course of the meetings that the question of whether to charge the parties to participate in mediation involved consideration of the identity of the parties. The participants identified three groups of parties for whom the question of whether to charge fees, and how much, might be answered differently.

First, the group discussed *pro se* parties. The group acknowledged that while mediation might be most helpful for *pro se* litigants, many lacked the resources to pay mediation costs. One party suggested that perhaps only judges be used to mediate cases involving *pro se* debtors, which would ensure

that mediation would be free of charge for those litigants. Others disagreed, arguing that requiring some fee—even a small one—would encourage *pro se* parties to fully participate, and to "buy in" to any resolution.

The second group was parties represented by counsel, but of somewhat limited means. The third group was parties who had funds to retain a private mediator if they so chose. With regard to these two groups, there were several suggestions. One suggestion was that the court's procedure would specify that the first two hours of the mediation were free of charge. After that, if the parties hadn't reached a resolution and wanted to continue mediating, they would pay a fee. Another participant suggested a sliding scale—everyone pays something, but the amount would be determined by the parties' financial circumstances. Another participant suggested a two-track system--if the parties wanted a judge to mediate, there would be no charge, but if they wanted a private mediator, there would be a small fee due from each party. Another participant suggested a sliding fee scale. Another participant suggested that parties in the second and third categories would pay for mediation, but all private mediators would, as a condition of being on the panel, agree to do one mediation free of charge every year, or six months—some set time period. Judge Halfenger wondered who the court thought the target audience for the program might be. He noted that parties who are sufficiently funded to hire a private mediator—a JAMS member, perhaps—would do so, and didn't need a court referral system. If the issue was indigent or law-income parties who needed free mediation, the court might consider turning to a local bar association—the Milwaukee Bar Association or the Eastern District Bar.

Judge Kelley suggested a system in which a private mediator would agree to review the case, schedule a mediation session, and provide up to four hours of mediation for a fee of $500. If the parties wanted to continue mediation after the expiration of that four-hour period, they could negotiate the mediation fees with the mediator. She opined that this might avoid foot-dragging—people would have an incentive to resolve their cases within the four hours, to avoid having to pay more.

By the end of the October 18 session, the participants hadn't yet firmly settled on an answer to the cost question, although all agreed that *pro se* litigants probably needed a different option than represented litigants.

Selection of Mediators

The participants discussed whether to use "private" mediators instead of, or as well as, judges, and if so, whether those private mediators would have to be lawyers. One trustee noted that if the issue involved, for example, a

landlord suing a debtor for non-dischargeability of rent, or former spouses suing each other, a non-judge mediator would likely be fine, because one wouldn't need to know bankruptcy law to facilitate discussion of the issues. One participant asked whether anyone was likely to volunteer as a mediator if the program didn't provide for some fee. One participant suggested that parties could be required to make special application if they wanted a bankruptcy judge, as opposed to a private mediator, to facilitate the discussions. Deb Tuttle suggested that private mediators have insurance. When a participant asked why that would be necessary if the litigants, as a condition of participation, waived all claims against the mediator, Deb responded that some claims can't be waived—fraud or malfeasance on behalf of the mediator, for example. Everyone agreed that if the program used private mediators, there should be some selection process, and the mediators should receive training.

There was discussion of who would supervise a panel of private mediators. This, in part, gave rise to Judge Halfenger's suggestion that a local bar association might better administer a mediation panel than the court.

By the end of the October 18, session, the participants hadn't yet settled the question of how to select and supervise a private mediation panel.

Miscellaneous

Judge Kelley suggested that once the court comes up with a mediation program, the court name that program after Bankruptcy Judge Dale E. Ihlenfeldt. Everyone heartily supported that suggestion.