

## WE CAN WORK IT OUT: ENTERTAINING A DISPUTE RESOLUTION SYSTEM DESIGN FOR BANKRUPTCY COURT

ELAYNE E. GREENBERG\*

On October 2, 2009, dispute resolution scholars and bankruptcy court jurists courageously began the difficult conversation<sup>1</sup> about the feasibility of an expanded dispute resolution system design for bankruptcy court.<sup>2</sup> This commentary will distill that conversation through a dispute resolution system design lens. Dispute resolution system design offers a framework for organizations to more effectively manage and resolve recurring conflicts.<sup>3</sup> The design of a dispute resolution system requires clarifying ideas, elucidating values, prioritizing goals, considering options and incorporating that information into a more workable process to respond to conflict.<sup>4</sup> All the while, the stakeholders and dispute resolution designers work together to clarify, prioritize and mediate which values will shape the design of the dispute resolution process. For those inevitable times when doubts emerge and commitment waivers, participants might be inspired by the supportive mantra, "We Can Work It Out."<sup>5</sup>

The convening of the dispute resolution scholars and bankruptcy court jurists signaled a critical first step in any dispute resolution system design: the stakeholder assessment.<sup>6</sup> Stakeholders and designers collaborate to gain a more comprehensive understanding of the problem to be addressed.<sup>7</sup> In this beginning phase, stakeholders are identified, interests are understood, the interrelationships among the stakeholders are delineated and the current organizational approach to handling the conflicts in question are understood.<sup>8</sup>

*Try to see it my way  
Do I have to kept on talking till I can't go on?  
While you see it your way*

---

\* Elayne E. Greenberg is Director of the Hugh L. Carey Center for Dispute Resolution. Professor Greenberg has served as a dispute resolution system design consultant to not-for-profits and court systems. A special thanks to Elizabeth Filardi, Class of 2010, and Elizabeth Anderson for assistance in the formatting of this article.

<sup>1</sup> See generally DOUGLAS STONE, BRUCE PATTON, & SHEILA HEEN, *DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST* (Penguin Books) (1999).

<sup>2</sup> ADR Meets Bankruptcy: Cross-Purpose or Cross-Pollination, sponsored by American Bankruptcy Institute Law Review, the Hugh L. Carey Center for Dispute Resolution and St. John's Institute for Bankruptcy Policy (October 2, 2009).

<sup>3</sup> See Amy J. Cohen, *Dispute Systems Design, Neoliberalism, and the Problem of Scale*, 14 HARV. NEGOT. L. REV. 51, 51 (2009).

<sup>4</sup> See Stephanie Smith & Janet Martinez, *An Analytic Framework for Dispute Systems Design*, 14 HARV. NEGOT. L. REV. 123, 129–30 (2009).

<sup>5</sup> THE BEATLES, *We Can Work It Out*, on WE CAN WORK IT OUT / DAY TRIPPER (Capitol Records 1965).

<sup>6</sup> See Smith & Martinez, *supra* note 4, at 129–30.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

*Run the risk of knowing that our love may soon be gone  
We can work it out  
We can work it out.*<sup>9</sup>

Dispute resolution system design, like any innovation,<sup>10</sup> is not for the faint-hearted. Premature evaluations and generic prescriptions are contraindicated. Rather, open-mindedness, patience, perseverance, tentativeness, humbleness and an agility to negotiate the labyrinth of omnipresent obstacles are requisites for successful dispute resolution design innovation. Undaunted by the reality that many good ideas remain just good ideas that are never fully realized, the system design innovator optimistically proceeds, ignoring the odds against success. So, too, dispute resolution and bankruptcy representatives tentatively began the difficult conversation about the feasibility of working together. *We can work it out.*<sup>11</sup>

A predicate to having a meaningful conversation with the dispute resolution and bankruptcy communities is acknowledging why this conversation is so difficult for all those involved.<sup>12</sup> As with any difficult conversation, this discussion was really three intertwined discussions folded into one: the story, the feelings and the identities of all involved.<sup>13</sup> First, if the bankruptcy and dispute resolution communities are even going to consider such a project, how should they go forward? Second, as participants in this exploration, what do the bankruptcy and dispute resolution communities feel about this venture? Critically, what does this having this conversation say about the representative participants as individuals and the members of each profession?

From the bankruptcy jurists' perspective, they questioned the value of even having the discussion. Why fix something that isn't broken especially when the bankruptcy courts work so well. After all, two skilled bankruptcy attorneys know how to settle a case. Why add another unnecessary layer of dispute resolution professionals and muck everything up? Bankruptcy court is about efficiency, and that's what we do well.

Not surprisingly, the dispute resolution professionals approached the discussion from a very different vantage point. Justice for all should include access to dispute resolution. The dispute resolution profession is a higher calling, and of course, we will enhance the functioning of bankruptcy court. Efficiency may be important, but it is a distant third after party choice and self-determination.

*Think of what you're saying*

---

<sup>9</sup> See THE BEATLES, *supra* note 5.

<sup>10</sup> See, e.g., *The Model T Ford: A Short History of Ford's Innovation*, available at <http://www.modelt.ca/background.html> (last visited Nov. 24, 2009); see also John Battelle, *The Birth of Google*, WIRED MAGAZINE, Aug. 2005, [http://www.wired.com/wired/archive/13.08/battelle.html?tw=wn\\_tophead\\_4](http://www.wired.com/wired/archive/13.08/battelle.html?tw=wn_tophead_4).

<sup>11</sup> THE BEATLES, *supra* note 5.

<sup>12</sup> See generally STONE, PATTON, & HEEN, *supra* note 1.

<sup>13</sup> *Id.*

*You can get it wrong and still you think it's alright  
Think of what I'm saying  
We can work it out and get it straight, or say good night.  
We can work it out  
We can work it out.*<sup>14</sup>

And so, the conversation began. Ideas were shared. Participants listened, listened and then listened some more, questioning and learning from each other. Tentatively, they explored how each might interface. Perspectives shifted and a new openness about the possibility of collaboration became evident.

Bankruptcy is a court of dispute resolution where qualified debtors reapportion their debt allocation. Efficiency is the priority.<sup>15</sup> Chapters seven, eleven and thirteen provide specific procedures for defined categories of debtors to follow.<sup>16</sup> Within this statutory framework, judges, trustees, and credit counselors serve dispute resolution roles identifying the creditors that are to be involved, facilitating the development of the plan and deciding on how the debt allocation will proceed. Like any "med/arb" model, the neutrals of bankruptcy court do not interpret their role in a uniform way. Instead, some judges and trustees opt to focus more on their mediative roles, spending time listening to all those involved, culling out interests and encouraging contesting parties to devise their own resolutions.<sup>17</sup> Other judges and neutrals emphasize their decision-making role, believing that their decision-making role will ensure the efficient disposition of cases.<sup>18</sup>

Unbeknownst to many, bankruptcy courts have been using mediation as part of the case management of bankruptcy cases since 1986 when the Southern District of California established the first mediation program.<sup>19</sup> The Civil Justice Reform Act of 1990 stimulated further piloting of mediation programs.<sup>20</sup> Although the Federal Rules of Bankruptcy Procedure are silent about the mediation of bankruptcy cases, fifty-one bankruptcy courts have opted to create court rules that authorize the use of mediation; other courts have used mediation on an ad hoc basis. There is a paucity of information about this patchwork quilt of mediation initiatives. In one of the few surveys conducted on mediation of bankruptcy issues, the Federal Judicial Center in 1998 surveyed mediators and attorneys, but omitted judges.<sup>21</sup>

Better quality information about these mediation programs is essential to formulating a viable dispute resolution design. For example, what is meant by the

---

<sup>14</sup> THE BEATLES, *supra* note 5.

<sup>15</sup> Hon. Elizabeth S. Stong, *Some Reflections From the Bench on Alternative Dispute Resolution in Business Bankruptcy Cases*, 17 AM. BANKR. INST. L. REV. 387, 390 (2009).

<sup>16</sup> Ralph Peeples, *The Use of Mediation in Chapter 11 Cases*, 17 AM. BANKR. INST. L. REV. 401, 402 (2009).

<sup>17</sup> Stong, *supra* note 15, at 392.

<sup>18</sup> *Id.*

<sup>19</sup> See Cassandra G. Mott, Note, *Macy's Miracle on 34<sup>th</sup> Street: Employing Mediation to Develop the Reorganization Plan in a Mega-Chapter 11 Case*, 14 OHIO ST. J. ON DISP. RESOL. 193, 198–99 (1998).

<sup>20</sup> See *id.* at 196.

<sup>21</sup> Peeples, *supra* note 16, at 405–06.

term mediation? How was the program first initiated? In the development of the program, what preliminary education was offered to judges, referees, attorneys and parties? Who are the neutrals and what are their training and qualifications? Which cases are directed to mediation? Who initiates the referral to mediation: the parties, attorneys, judge or trustee? What percentages of cases are referred to mediation? What are the parameters of confidentiality? Are these mediation programs sustainable? Why?

As the conversation continued and the dispute resolution scholars developed a better understanding of bankruptcy court, they then questioned whether the arbitration agreements made by creditor and debtors prior to the commencement of bankruptcy proceedings would be enforced once bankruptcy proceeding began. One dispute resolution scholar noted the irony in spending time litigating this issue, when litigation actually slows down the efficient resolution that both arbitration and bankruptcy proceedings promise.<sup>22</sup> Another dispute resolution scholar posited that an agreement to arbitrate should be characterized as a contract term, not a competing dispute resolution forum. As a contract term, agreements to arbitrate should be honored and allowed to go forward. Approaching the issue from a different perspective, a third dispute resolution scholar addressed the waiver of the right to a jury in bankruptcy and questioned whether arbitration rights should be considered waivable in bankruptcy.<sup>23</sup>

*Life is very short, and there's not time  
For fussing and fighting, my friend  
I have always thought that it's a crime  
So I will ask you once again.*<sup>24</sup>

The discussion then shifted to examining which dispute resolution processes and models might be integrated into bankruptcy proceedings to further the efficient disposition of cases.<sup>25</sup> As the dispute resolution scholars began to appreciate the extent that efficiency is an overarching priority in bankruptcy courts, sometimes at the exclusion of existing rights, they recalibrated their thinking. Any dispute resolution process that might be integrated into bankruptcy proceedings has to be compatible with and advance that priority. Thus, mediation standing alone as a forum that promotes party self-determination would not be a preferred option unless it also had a decision-making component. Possibly, a med/arb intervention would be a more realistic fit. Clarity about which, if any, arbitration agreements made

---

<sup>22</sup> See Marianne B. Culhane, *Limiting Litigation Over Arbitration in Bankruptcy*, 17 AM. BANKR. INST. L. REV. 493, 494–95 (2009).

<sup>23</sup> See Stephen J. Ware, *Bankruptcy Law's Treatment of Creditors' Jury-Trial and Arbitration Rights*, 17 AM. BANKR. INST. L. REV. 479, 483–84 (2009).

<sup>24</sup> See THE BEATLES, *supra*, note 5.

<sup>25</sup> See James R. Coben & Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 HARV. NEGOT. L. REV. 43, 45–49 (2006) (describing likely reasons for relative recency of mediation jurisprudence).

prior to the commencement of bankruptcy proceedings would be enforced, is essential to promoting the efficiency of bankruptcy proceedings.

As the dispute resolution participants began to gain a better understanding about the challenges of helping design a better fit between the bankruptcy forum and the bankruptcy fuss, they cautioned about the importance of using accurate labels to describe dispute resolution interventions. Mischaracterizing a dispute resolution intervention as "mediation" when, in fact, you are describing a dispute resolution intervention with a decision-making component is problematic. Not only does such a misnomer create ambiguity about the purpose and practice of the intervention, but it also dilutes the integrity of the design of a dispute resolution system.

Finally, the conference participants examined the dispute resolution model that was used by Piper Aircraft Company.<sup>26</sup> When the company filed for Chapter 11 as a way to manage some of the pending and anticipated product liability claims against them, Piper Trust was formed to help resolve the outstanding litigation.<sup>27</sup> Piper Trust then designed its own mandatory mediation process for all pending liability action. Notably, there was a one hundred percent settlement rate.

Although the terms of settlement remain confidential, we may speculate about the lessons gleaned from this successful mandatory mediation program. Departing from common practice in which parties split the cost of mediation, Piper Trust paid all the costs of mediation including the travel expenses of the claimant.<sup>28</sup> Another distinguishing feature is that the Trustee of the Trust personally appeared at each and every mediation, listening to the personal devastation experienced by claimants and personally apologizing for any wrong Piper committed.<sup>29</sup> Thus, the Piper trustee took affirmative steps to ensure the successful resolution of the pending claims, when Piper personalized the justice that claimants received and removed the additional costs involved in participating in mediation.<sup>30</sup>

Stepping back and gaining a meta perspective about enhancing the quality of case disposition in bankruptcy courts, the dispute resolution scholars and bankruptcy jurists have their interest piqued, energized about the prospect of collaborating. This first meeting helped clarify how much more information is needed about the current functioning and challenges in bankruptcy courts. What do other bankruptcy judges, trustees and attorneys advise to improve the case management and disposition of bankruptcy cases? What additional skills would judges and trustees find helpful to carry out their roles? What wisdom can be learned there from the existing and failed mediation initiatives in bankruptcy court?

---

<sup>26</sup> See *In re Piper Aircraft Corp.*, 162 B.R. 619, 621 (Bankr. S.D. Fl. 1994).

<sup>27</sup> See Jeffery Davis, *Cramming Down Future Claims in Bankruptcy: Fairness, Bankruptcy Policy, Due Process, and the Lessons of the Piper Reorganization*, 70 AM. BANKR. L. J. 329, 349 (1996).

<sup>28</sup> See ADR Meets Bankruptcy, Pt. 2: Designing Dispute Systems, available at <http://www.indisputably.org/?p=549> (last visited on Nov. 23, 2009).

<sup>29</sup> *Id.*

<sup>30</sup> William J. Woodward, Jr., *The Third Way: Mediation of Products Claims in the Piper Aircraft Trust*, 17 AM. BANKR. INST. L. REV. 463, 472-73 (2009).

Dispute resolution system designers also welcome the opportunity to re-group, process what they have learned, and assess how they might collaborate more effectively with bankruptcy court. Respecting that efficiency is a priority, and self-determination a benefit, what value-added might dispute resolution professionals bring to the current bankruptcy disposition process so that the forum fits the fuss? What menu of dispute resolution processes might be offered? What hybrid processes might be developed? Are there other dispute resolution models that might be instructive?

Yes, dispute resolution system design is not for the faint-hearted. We will continue to proceed tentatively, with an open-mind, remaining patient, humble, and maintaining an agility to negotiate the labyrinth of obstacles to successful dispute resolution design innovation. We remain motivated that together we can create a more effect dispute resolution design for bankruptcy court. And we remain optimistic, mindful that we have just begun to take the very first step in dispute resolution design. *We Can Work It Out.*<sup>31</sup>

---

<sup>31</sup> See THE BEATLES, *supra* note 5.