

**MEDIATION PROGRAM FOR THE
U.S. BANKRUPTCY COURT, NORTHERN DISTRICT OF NEW YORK**

1.0 PRELIMINARY STATEMENT

Litigation in bankruptcy cases frequently imposes significant economic and other burdens on parties and often delays resolution of disputes. Alternate dispute resolution procedures have the potential to reduce delay, cost, stress and other burdens often associated with litigation. Mediation, in particular, allows parties more active involvement in determining the resolution of their disputes without sacrificing the quality of justice to be rendered or the right of the litigants to a full trial on all issues not resolved through mediation.

Mediation is a process in which an impartial person, the mediator, facilitates communication between disputing parties and counsel to promote understanding, reconciliation and settlement. Mediation enables litigants to take control of their dispute and encourages amicable resolutions.

The mediator may, among other things, suggest alternatives, analyze issues, question perceptions, use logic, conduct private caucuses and stimulate negotiations between opposing sides. The mediator is an advocate for settlement and uses the mediation process to ensure that the parties fully explore all areas of agreement. The mediator does not serve as a judge or arbitrator and has no authority to render decisions on questions of fact or law or to force settlements.

2.0 ASSIGNMENT OF MATTERS TO MEDIATION

A matter may be assigned to mediation only by order of the Court ("Order of Assignment"). Upon motion of a party to the matter or the United States trustee, written stipulation, or by *sua sponte* order the court may assign to mediation any dispute arising in an adversary proceeding, contested matter or otherwise in a bankruptcy case. Federal Rules of Bankruptcy Procedure 7016 hereby is made applicable to all matters in which mediation is requested.

3.0 EFFECT OF MEDIATION ON PENDING MATTERS

The assignment of a matter to mediation does not relieve the parties to that matter from complying with any other court orders or applicable provisions of the United States Code, the Federal Rules of Bankruptcy Procedure, or the local rules of this court. Unless otherwise ordered by the court, the assignment to mediation does not delay or stay discovery, pretrial, hearing dates, or trial schedules.

4.0 THE MEDIATOR

4.1 Registration of Mediators/Mediation Administrator

The clerk of the court shall establish and maintain a register of persons (the "Panel") qualified under this section and designated by the court to serve as mediators in the Mediation Program.

4.2 Application and Certification of Mediators

4.2.1 Application and Qualification Requirements

Each applicant shall submit to the Mediation Administrator a statement of professional qualifications, experience, training, and other information demonstrating, in the applicant's opinion, why the applicant should be designated to the Panel. The applicant shall have completed eight hours of formal mediation training. The applicant shall submit the statement in the form attached hereto as Form A. The statement also shall set forth whether the applicant has been removed from any professional organization, or has resigned from any professional organization while an investigation into allegations of professional misconduct was pending, and the circumstances of such removal or resignation. This statement shall constitute an application for designation to the Mediation Program.

4.2.2 Court Certification

The court in its sole discretion shall grant or deny an application submitted pursuant to subsection 4.2.1 of this rule. If the court grants the application, the applicant's name shall be added to the Panel, subject to removal pursuant to section 4.4 of this rule.

4.2.3 Reaffirmation of Qualifications

Each applicant accepted for designation to the Panel shall reaffirm annually the continued existence and accuracy of the qualifications, statements and representations made in the application. Failure to comply with this section shall be grounds for removal under section 4.4.

4.3 Mediator's Oath or Affirmation

Upon appointment to the Panel or selection as a mediator, every mediator must sign a written oath or affirmation (see 28 U.S.C. §453), as if the person were a judge, and file the oath or affirmation with the Mediation Administrator.

4.4 Ethical Standards for Mediators

All mediators shall adhere to the Standards of Conduct for Mediators as promulgated by the American Arbitration Association ("AAA standards"). A failure to adhere to the AAA standards may constitute sufficient cause for the removal from the Panel. Such failure will not void any consensual agreement between the parties unless both parties consent to the rescission of the agreement or, on motion of any party to the mediation or, *sua sponte*, the court finds that the mediator's conflict of interest or failure to abide by the AAA standards caused actual prejudice to a party.

4.5 Removal from Panel

A person shall be removed from the Panel either at the person's written request to the Mediation Administrator or by court order for cause. If removed by court order, the person shall not be returned to the Panel absent a court order obtained on motion to the Mediation Administrator supported by an affidavit sufficiently explaining the circumstances of such removal and the reasons justifying the return of the person to the Panel.

5.0 APPOINTMENT OF MEDIATOR

5.1.1 Selection by Parties

Within 15 calendar days of the date of service of the Order of Assignment of a matter to mediation, the parties to the matter to be mediated shall select a mediator, and

an alternate mediator, and shall present the court with a proposed order of appointment. If such selection is not from the Panel, the parties shall submit with the proposed order of appointment a stipulation by the parties that the person is not on the Panel but is qualified to mediate the matter. If the court approves the parties' selection, immediately after entry of the order of appointment, the court shall notify the parties, the mediator and the alternate mediator of the appointment.

5.1.2 Selection/Appointment by Court

If the parties cannot agree upon a mediator within 15 calendar days of the date of service of the Order of Assignment, the court shall appoint a mediator and an alternate mediator from the Panel and shall notify the parties, the mediator, and the alternate mediator of such appointment.

5.2.1 Inability of Mediator to Serve

If the mediator is unable to serve due to a conflict or other reason precluding acceptance of the appointment, the mediator shall file and serve on all parties to the mediation and on the alternate mediator, within five calendar days after receipt of the notice of appointment, a notice of inability to accept the appointment. The alternate mediator then shall become the mediator if the alternate does not file and serve on all parties to the mediation a notice of inability to accept the appointment within five calendar days after receipt of the original mediator's notice of inability to accept the appointment. If neither the mediator nor the alternate mediator can serve, the court shall appoint another mediator and alternate mediator.

5.2.2 Mediator's Prior Service

A mediator has the option of declining to accept the mediation based on having served as a mediator on four previous occasions within a period of one year.

5.3 Disqualification of Mediator

5.3.1 Disqualifying Events

Any person selected as a mediator may be disqualified for bias or prejudice in the same manner that a judge may be disqualified under 28 U.S.C. §144. Any person selected as a mediator shall be disqualified in any matter where 28 U.S.C. §455 would require disqualification if that person were a judge. Any member of the bar who is

certified and designated as a mediator pursuant to this rule shall not solely for that reason be disqualified from appearing or acting as counsel in any other matter or case pending before this court.

5.3.2 Inquiry by Mediator; Disclosure

Promptly after receiving notice of appointment, the mediator shall make inquiry sufficient to determine whether there is a basis for disqualification under subsection 5.3.1 of this rule. The inquiry shall include, but shall not be limited to, a search for conflicts of interest in the manner prescribed by the applicable rules of professional conduct for attorney mediators, and by the applicable rules pertaining to the mediator's profession for non-attorney mediators. Within seven calendar days after receiving notice of appointment, the mediator shall file with the court and serve on the parties to the mediation either (a) a statement that there is no basis for disqualification under subsection 5.3.1 and that the mediator has no actual or potential conflict of interest or (b) a notice of withdrawal.

5.3.3 Objection Based on Conflict of Interest

A party to the mediation who believes that the assigned mediator and/or the alternate mediator has a conflict of interest promptly shall bring the issue to the attention of the mediator and/or the alternate mediator, as applicable, and to other parties to the mediation. If the mediator does not withdraw, the issue shall be brought to the court's attention by the mediator or any of the parties to the mediation. The court shall take such action as the court deems necessary or appropriate to resolve the alleged conflict of interest.

5.4 Mediator's Liability

There shall be no liability on the part of, and no cause of action shall arise against, any person who is appointed as a mediator pursuant to this rule on account of any act or omission in the course and scope of such person's duties as a mediator. *See e.g. Wagshal v. Foster*, 28 F.3d 1249 (D.C. Cir. 1994).

6.0 COMPENSATION

6.1 Compensation of Mediator

The mediator shall serve on a *pro bono* basis and shall not require compensation

or reimbursement of expenses. It is anticipated that the mediation shall not exceed six hours in length. If, at the conclusion of the six hours of mediation, it is determined by the mediator and the parties to the mediation that additional time will be necessary and productive in order to complete the mediation, then:

- (1) If the mediator consents to continue to serve on a *pro bono* basis, the parties to the mediation may agree to continue the mediation conference; or
- (2) If the mediator does not consent to continue to serve on a *pro bono* basis, the mediator's fees and expenses shall be on such terms as are satisfactory to the mediator and the parties to the mediation, subject to prior court approval if the estate is to be charged. The parties to the mediation shall share equally all mediation fees and expenses unless the parties to the mediation agree otherwise. The court may, in the interest of justice, determine a different allocation. In no case will compensation exceed an hourly rate of \$150 per hour.

7.0 THE MEDIATION

7.1 Time and Place of Mediation Conference

After consulting with all counsel and *pro se* parties, the mediator shall schedule a convenient time and place for the mediation conference, and promptly give all counsel and *pro se* parties at least 14 calendar days' written notice of the time and place of the mediation conference. The mediator shall schedule the mediation to begin as soon as practicable.

7.2 Submission Materials

Not less than seven calendar days before the mediation conference, each party shall submit directly to the mediator, and serve on all counsel and *pro se* parties, any materials (the "Submission") the mediator directs to be prepared and assembled. The mediator shall so direct not less than 14 calendar days before the mediation conference. Prior to the mediation conference, the mediator may talk with the participants to determine what materials would be helpful. The Submissions shall not be filed with the court and the court shall not have access to them.

7.3 Attendance at Mediation Conference

7.3.1 Persons Required to Attend

The following persons personally must attend the mediation conference:

- (1) Each party that is a natural person;
- (2) If the party is not a natural person, a representative who is not the party's attorney of record and who has full authority to negotiate and settle the matter on behalf of the party;
- (3) If the party is a governmental entity that requires settlement approval by an elected official or legislative body, a representative who has authority to recommend a settlement to the elected official or legislative body;
- (4) The attorney who has primary responsibility for each party's case; and
- (5) Other interested parties such as insurers or indemnitors, or one or more of their representatives, whose presence is necessary for a full resolution of the matter assigned to mediation.

7.3.2 Excuse

A person required to attend the mediation is excused from appearing if all parties and the mediator agree that the person need not attend. The court for cause may excuse a person's attendance.

7.3.3 Failure to Attend

Willful failure to attend any mediation conference, and any other material violation of this rule, shall be reported to the court by the mediator and may result in the imposition of sanctions by the court. Any such report of the mediator shall comply with the confidentiality requirements of section 8.1 of this rule.

7.4 Mediation Conference Procedures

The mediator may establish procedures for the mediation conference.

8.0 CONFIDENTIALITY OF MEDIATION PROCEEDINGS

8.1 Protection of Information Disclosed at Mediation

The mediator and the participants in mediation are prohibited from divulging, outside of the mediation, any oral or written information disclosed by the parties or by witnesses in the course of the mediation. No person may rely on or introduce as evidence in any arbitral, judicial, or other proceedings, evidence pertaining to any aspect of the mediation effort, including but not limited to: (a) views expressed or suggestions made by a party with respect to a possible settlement of the dispute; (b) the fact that another party had or had not indicated willingness to accept a proposal for settlement made by the mediator; (c) proposals made or views expressed by the mediator; (d) statements or admissions made by a party in the course of the mediation; and (e) documents prepared for the purpose of, in the course of, or pursuant to the mediation. In addition, without limiting the foregoing, Rule 408 of the Federal Rules of Evidence and any applicable federal or state statute, rule, common law or judicial precedent relating to the privileged nature of settlement discussions, mediation or other alternative dispute resolution procedure shall apply. Information otherwise discoverable or admissible in evidence, however, does not become exempt from discovery, or inadmissible in evidence, merely by being used by a party in a mediation.

8.2 Discovery from Mediator

The mediator shall not be compelled to disclose to the court or to any person outside the mediation conference any of the records, reports, summaries, notes, communications, or other documents received or made by a mediator while serving in such capacity. The mediator shall not testify or be compelled to testify in regard to the mediation in connection with any arbitral, judicial or other proceeding. The mediator shall not be a necessary party in any proceedings relating to the mediation. Nothing contained in this section shall prevent the mediator from reporting the status, but not the substance, of the mediation effort to the court in writing, from filing a report as required by section 9.1, or from complying with the obligations set forth in section 10.

8.3 Protection of Proprietary Information

The parties, the mediator, and all mediation participants shall protect proprietary information during and after the mediation conference.

8.4 Preservation of Privileges

The disclosure by a party of privileged information to the mediator does not waive or otherwise adversely affect the privileged nature of the information.

9.0 RECOMMENDATIONS BY MEDIATOR

The mediator is not required to prepare written comments or recommendations to the parties. Mediators may present a written settlement recommendation memorandum to attorneys or *pro se* litigants, but not to the court.

10.0 POST MEDIATION PROCEDURES

10.1 Preparation of Orders

If a settlement is reached at a mediation, a party designated by the mediator shall submit a fully executed stipulation and proposed order to the court within twenty calendar days after the end of the mediation. If the party fails to prepare the stipulation and order, the court may impose appropriate sanctions.

10.2 Mediator's Certificate of Completion

Promptly after the mediation conference, the mediator shall file with the court, and serve on the parties and the Mediation Administrator, a certificate in the form provided by the court showing compliance or noncompliance with the mediation conference requirements of this rule and whether or not a settlement has been reached. Regardless of the outcome of the mediation conference, the mediator shall not provide the court with any details of the substance of the conference.

10.3 Mediator's Report

In order to assist the Mediation Administrator in compiling useful data to evaluate the Mediation Program, and to aid the court in assessing the efforts of the members of the Panel, the mediator shall provide the Mediation Administrator with an

estimate of the number of hours spent in the mediation conference and other statistical and evaluative information on a form provided by the court. The mediator shall provide this report whether or not the mediation conference results in settlement.

11.0 WITHDRAWAL FROM MEDIATION

Any matter assigned to mediation pursuant to this rule may be withdrawn from mediation by the court at any time upon determination that the matter is not suitable for mediation. In addition, where mediation is brought about either by *sua sponte* order or motion, a party may withdraw from the mediation at any time after attending the first scheduled mediation conference only upon notice and motion. In order to withdraw, the withdrawing party shall, no later than five business days prior to any subsequently scheduled mediation activity, file with the court a motion seeking to withdraw from the mediation, briefly stating the reasons for the request and serve on the Mediator Administrator, mediator and other parties (or their counsel). The method of service of the motion for withdrawal shall provide for actual receipt by the parties and the mediator no later than three business days prior to the next scheduled mediation activity. The court shall rule upon the motion without argument. All mediation activity shall be stayed pending an order from the court.

12.0 TERMINATION OF MEDIATION

Upon the filing of a mediator's certificate pursuant to section 10.2 or the entry of an order withdrawing a matter from mediation pursuant to section 11.0, the mediation will be deemed terminated, and the mediator excused and relieved from further responsibilities in the matter without further court order. If the mediation conference does not result in a resolution of all of the disputes in the assigned matter, the matter shall proceed to trial or hearing pursuant to the court's scheduling order.

13.0 REEVALUATION/REVISION PROCEDURE

The purpose and administration of this rule shall be reviewed and reevaluated at such time and in such manner as the court deems appropriate.