

LBR 9019-2. Alternative Dispute Resolution

(a) Purpose and Scope. To facilitate the voluntary resolution of adversary proceedings and contested matters, the court may establish a Bankruptcy Alternative Dispute Resolution ("BDR") program. This rule does not preclude parties from participating in any other alternative dispute resolution ("ADR") program.

(b) Duty to Consider BDR. Parties to adversary proceedings and contested matters have a duty to consider BDR and other ADR processes to resolve their dispute.

(c) Program Administration.

(1) Bankruptcy Mediation Committee. The court may establish a Bankruptcy Mediation Committee ("Committee") to make recommendations for administration of a BDR program and procedures for the selection, training and evaluation of individuals to serve on a Mediator Panel.

(2) BDR Administrator. The court may appoint a BDR Administrator to administer the BDR program. The responsibilities of the BDR Administrator include:

(A) acting as primary liaison between the court and the Committee on matters of policy, program design and evaluation, education, training and administration;

(B) educating litigants, lawyers, judges and court staff about the BDR program and procedures;

(C) ensuring that appropriate systems are maintained for recruiting, screening and training mediators; and

(D) maintaining records for evaluating the BDR program.

(3) Bankruptcy Mediator Panel. The court shall publish and maintain a list of qualified individuals approved by the court to serve as members of a Bankruptcy Mediator Panel ("Panel").

(A) Application to Serve on Panel. An individual wishing to serve on the Panel shall be may apply by submitting to the court an application substantially conforming to the local form (**Application for Appointment to Bankruptcy Mediator Panel**). The court may request a recommendation by the Committee.

(B) Qualifications. To qualify for service on the Panel, an applicant must be willing to serve as a mediator for one 4-hour BDR conference per calendar quarter, subject only to unavailability due to conflicts, personal or professional commitments, or other matters which would make such service burdensome. An applicant who is an attorney must certify that the applicant is and has been a member in good standing of the bar of any state or the District of

Columbia for at least 5 years and is a member in good standing of the bar of the United States District Court for the District of Hawaii. A non-attorney applicant must submit a statement of professional qualifications, experience, training and other information demonstrating why, in the applicant's opinion, the applicant is qualified to serve as a mediator.

(C) Training. A Panel member may be required to complete court-approved training prior to serving in any mediation under this program.

(D) Compensation. No fees may be charged for telephonic conferences and preparation time prior to the first BDR conference, and for the first 4 hours of BDR conference time. If the matter is not resolved after the first 4 hours of conference time, the mediator is authorized to request compensation at the mediator's regular hourly rate. If there is no agreement as to compensation of the mediator and if compensation is not waived by the mediator, the BDR process will be deemed concluded. If a debtor in possession or trustee, on behalf of the bankruptcy estate, and not individually, is a party, compensation of the mediator is subject to §§ 327 and 330.

(E) Immunity of Mediators. All persons serving as mediators under this rule shall be deemed to be performing quasi-judicial functions and shall be entitled to all of the privileges, immunities and protections that the applicable law accords to persons serving in such capacity.

(d) Assignment to BDR and Appointment of Mediator.

(1) Request for BDR. Parties may request the assignment of a dispute to the BDR program by filing with the court a request substantially conforming to the local form (**Request for Assignment to BDR Program**). The request must be signed by all parties to the disputed matter. The request should include the names, addresses, telephone and fax numbers and email addresses of all counsel representing parties and any pro se party. The parties may indicate a preference for appointment of a particular mediator.

(2) Conflict Check. Upon the filing of a request for assignment to BDR, the court may contact Panel members to conduct a check for possible conflicts and scheduling availability. A Panel member contacted by the court for service as a mediator must promptly make an inquiry that is reasonable under the circumstances to determine whether there are any known facts that a reasonable person would consider likely to affect the impartiality of the mediator, including a financial or personal interest in the outcome of the mediation and any existing or past relationship with a party or foreseeable participant in the mediation.

(3) Order of Assignment. Upon selection of a mediator, the court will enter an order assigning the dispute to the BDR program and appointing the mediator. The order may provide for a stay of discovery or the extension of certain deadlines, but any trial or hearing on a dispositive motion will remain on calendar. A party who objects to an individual's appointment as mediator based on a possible conflict of interest or appearance of impropriety should

promptly bring the matter to the attention of the mediator and the BDR Administrator.

(4) Authority of Mediator. Upon assignment to the BDR program, all procedures within the mediation including, but not limited to, deadlines and the form and content of any submissions, will be determined by the mediator. However, nothing in these guidelines reduces the bankruptcy judge's power and responsibility to maintain overall management control of the case or proceeding before, during, and after the assignment of a matter to the BDR program.

(e) BDR Conference.

(1) Initial Telephone Conference. As soon as practicable after notification of appointment, the mediator will conduct an initial telephone conference with the parties to obtain preliminary information as to the nature of the disputed matter, the expectations of the parties, a mutually agreeable time and place for a formal BDR conference, and any further information which will facilitate BDR.

(2) BDR Conference. As soon as is practicable after the initial telephone conference, the mediator will give notice to the parties of the time and place of the BDR conference. During regular court hours, the court's facilities may be used if available.

(3) BDR Statement. Unless modified by the mediator, not later than 14 days after the date of the order assigning the matter to the BDR program, each party must submit directly to the mediator and serve on all other parties, a written BDR statement. A BDR statement may not be filed with the court and the court shall not have access to them. Such statement may not exceed 15 pages, not including any exhibits and attachments. The BDR statement may include any pertinent information, but must:

- (A)** identify the person, in addition to counsel, who will attend the conference as representative of the party, and who must have decision making authority;
- (B)** describe briefly the substance of the dispute;
- (C)** address whether there are legal or factual issues whose early resolution might appreciably reduce the scope of the dispute or contribute significantly to settlement;
- (D)** identify and describe the status of any related litigation, past or present, in any state or federal court;
- (E)** identify the discovery that could contribute most to equipping the parties for meaningful discussions;
- (F)** set forth the history of past settlement discussions, including disclosure of prior and any presently outstanding offers and demands;
- (G)** make an estimate of the cost and time to be expended for further discovery, pretrial motions, expert witnesses and trial;
- (H)** indicate presently scheduled dates for further status conferences, pretrial conferences, trial or otherwise; and

(l) attach any documents out of which the dispute has arisen, or those which would materially advance the purposes of BDR.

(4) Ex Parte Statement to Mediator Only. By agreement of the parties and with consent of the mediator, each party may submit directly to the mediator, for the mediator's eyes only, a separate written statement describing any additional interests, considerations or matters that the party would like the mediator to understand before the BDR conference begins. Such ex parte statements to the mediator may not be filed with the court and the court shall not have access to them.

(5) Attendance at BDR Conference. Lead counsel and clients, or client's representatives with full settlement authority, shall attend, in person, all BDR conferences scheduled by the mediator, unless excused by the mediator. A governmental entity satisfies the attendance requirement if its lead counsel is in attendance and has been delegated full settlement authority or has reasonable access to the person who has full settlement authority. In the event that the mediator determines it appropriate, the mediator shall have reasonable access to the person who has full settlement authority with appropriate accommodation given to the person's competing public duties. Unexcused failure to attend the BDR conference shall be reported to the court and may result in sanctions.

(6) Conduct of BDR Conference. The BDR conference shall proceed informally. Rules of evidence shall not apply. There shall be no formal examination or cross-examination of witnesses. As appropriate, the mediator may:

- (A) permit each party, through counsel or otherwise, to make an oral presentation of the party's position;
- (B) help the parties to identify areas of agreement and, where feasible, formulate stipulations;
- (C) assess the relative strengths and weaknesses of the parties' contentions and evidence, and explain as carefully as possible the reasoning of the mediator that supports these assessments;
- (D) assist the parties in settling the dispute, including meeting with the parties separately and privately;
- (E) estimate, where feasible, the likelihood of liability and the dollar range of damages;
- (F) help the parties devise a plan for sharing important information or conducting key discovery that will equip them as expeditiously as possible to participate in meaningful settlement discussions or to posture the case for disposition by other means; and
- (G) determine whether some follow-up to the BDR conference would contribute to the settlement or other disposition.

(f) Conclusion of Mediation.

(1) Mediator's Report Upon Completion. Within 7 days after the completion of the BDR conference, the mediator shall file and serve a Mediator Report substantially conforming to the local form (**Mediator Report**). The report should state that BDR has been concluded and describe whether

(A) the parties reached a resolution of their differences and a copy of an agreement is attached or a stipulated order or judgment will be submitted to the court, and/or the complaint will be dismissed, or the underlying motion withdrawn, or

(B) the parties did not fully resolve their differences and the matter is being returned to the court for further disposition.

(2) Mediator's Statement of Hours. For record-keeping and evaluation purposes, the mediator shall submit to the BDR Administrator, but not file with the court, a statement of hours expended by the mediator in the particular matter, with time separated between preparation and time actually spent in the BDR conference or conferences. If more than 4 hours were expended in BDR conference time, the mediator shall report any compensation charged.

(g) Confidentiality.

(1) Except as otherwise provided by this rule or applicable law, any and all communications made in connection with any mediation under this rule are subject to Fed. R. Evid. 408.

(2) Mediators and parties may not communicate with the court about the substance of any position, offer or other matter in the mediation without the consent of all parties, unless such disclosure is required to enforce a settlement agreement or to provide evidence in an attorney disciplinary proceeding, but only to the extent required to accomplish that purpose.