

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE:

GENERAL ORDER NO. # 97-4

**ADOPTION OF PROCEDURES
GOVERNING MEDIATION OF
MATTERS IN BANKRUPTCY
CASES,**

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. To provide a court-annexed alternate dispute resolution procedure, the court hereby adopts this General Order creating the Mediation Program for the Western District of Pennsylvania (the “**Mediation Program**”).

2.0 ASSIGNMENT OF MATTERS TO MEDIATION.

The court may assign any matter deemed relevant to the Mediation Program *sua sponte*, upon written stipulation of the parties to the matter, or on motion of a party to the matter or the U.S. Trustee. Upon the motion of the mediator, a party to the mediation, or the U.S. Trustee, the court may order additional parties to participate in the mediation if the presence of the additional parties would be necessary or helpful to a successful mediation.

3.0 TYPES OF MATTERS SUBJECT TO MEDIATION.

The court may assign to mediation any dispute arising in an adversary proceeding, contested matter or otherwise in a bankruptcy case. FRBP 7016 hereby is made applicable to all matters in which mediation is requested in accordance with the Mediation Program.

4.0 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.

5.0 THE MEDIATOR.

5.1 Register of Mediators/Mediation Program Administrator.

The Clerk of the Court shall establish and maintain a register of persons (the “**Register**”) qualified under this section 5.0 and designated by the court to serve as mediators in the Mediation Program. The Chief Bankruptcy Judge shall appoint a judge of this court to serve as the “**Mediation Program Administrator.**” Aided by a staff member of the court, the Mediation Program Administrator shall receive applications for designation to the Register, maintain the Register, track and compile reports on the Mediation Program, and otherwise administer the program.

5.2 Application and Certification of Mediators.

5.2.1 Application and Qualification Requirements.

Each applicant shall submit to the Mediation Program 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 Register. 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. Each applicant shall certify that the applicant has completed appropriate mediation training

or has sufficient experience in the mediation process. Each applicant ~~hereunder~~ shall agree to accept at least one *pro bono* appointment per year. If after serving in a pro bono capacity insufficient Mediation Matters exist to allow for compensation, credit for pro bono service shall be carried into subsequent years in order to qualify the mediator to receive compensation for providing service as a mediator.

5.2.2 Court Certification.

The court in its sole and absolute determination on any basis shall grant or deny an application submitted pursuant to subsection 5.2.1 of this General Order. If the court grants the application, the applicant's name shall be added to the Register, subject to removal pursuant to subsection 5.4. of this General Order.

5.2.3 Reaffirmation of Qualifications.

Each applicant accepted for designation to the Register shall reaffirm annually the continued existence and accuracy of the qualifications, statements and representations made in the application.

5.3 Mediator's Oath.

Before serving as a mediator, each person designated as a mediator shall take the following oath or affirmation:

"I, _____, do solemnly swear (or affirm) that I will faithfully and impartially discharge and preform all the duties incumbent upon me as a Mediator in the Mediation Program of the U.S. Bankruptcy Court for the Western District of Pennsylvania without respect to persons and will do so equally with respect to the poor and to the rich."

5.4 Removal from Register.

A person shall be removed from the Register either at the person's request or by court order

entered on the sole and absolute determination of the court.. If removed by court order, the person shall be eligible to file an application for reinstatement after one year.

6.0 APPOINTMENT OF A MEDIATOR.

6.1 Appointment by Court.

Upon assignment of a matter to mediation and unless special circumstances exist as determined by the court, the parties shall select a mediator and an alternate mediator from a listing of three (3) mediators from the register selected by the court. If the parties fail to make such selection within the time frame as set by the court, then the court shall appoint a Mediator and alternate Mediator.

6.2 Inability of Mediator to Serve.

If the mediator is unable or elects not to serve, the mediator shall file and serve on all parties to the mediation and on the alternate mediator, within seven calendar days after receipt of 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 or election not to accept the appointment within seven 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.

6.3. Disqualification of Mediator.

6.3.1 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.

6.3.2 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 6.3.1. of the General Order. The inquiry shall include, but shall not be limited to, a search for conflicts of interests 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 6.3.1 and that the mediator has no actual potential conflict of interest or (b) a notice of withdrawal.

6.3.3 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 the other parties to the mediation. If the mediator does not withdraw, and the movant is dissatisfied with this decision, 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.

6.4 Mediator's Liability.

Aside from proof of actual fraud or unethical conduct, 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 General Order on account of any act or omission in the course and scope of such person's duties as a mediator.

7.0 COMPENSATION.

7.1 Compensation of Mediator.

Unless the court orders otherwise, before a party will be eligible to be a paid

mediator, that person must have fulfilled the pro bono requirement. Once eligible to serve as a mediator for compensation, which shall be at reasonable rates and subject to judicial review, the mediator may require compensation or reimbursement of expenses as agreed by the parties to the mediation. Prior court approval shall also be required if the estate is to be charged. If the mediator consents to serve without compensation, and, at the conclusion of the first full day of the mediation conference it is determined by the mediator and the parties to the mediation that additional time will be both necessary and productive in order to complete the mediation, then:

- (1) If the mediator consents to continue to serve without compensation, the parties to the mediation may agree to continue the mediation conference; and
- (2) If the mediator does not consent to continue to serve without compensation, 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 court approval.

Where the parties have agreed to pay Mediation Fees and expenses, they shall share equally all such fees and expenses unless the parties to the mediation agree to some other allocation. The court may, in the interest of justice, determine a different allocation.

7.2 Party Unable to Afford Mediator.

If the court determines that a party to a matter assigned to mediation cannot afford to pay the fees and costs of the mediator, the court may appoint a mediator to serve *pro bono* as to that party.

8.0 THE MEDIATION.

8.1 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.

8.2 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 or 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.

8.3 Attendance at Mediation Conference.

8.3.1 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, including a governmental entity, 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.

8.3.2 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.

8.3.3 Failure to Attend.

Willful failure to attend any mediation conference, and any other material violation of this General Order, 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 requirement of section 9.1 of this General Order.

8.4 Mediation Conference Procedures.

The mediator may establish procedures for the mediation conference.

9.0 CONFIDENTIALITY OF MEDIATION PROCEEDINGS.

9.1 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.

9.2 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 subsection shall prevent the mediator from reporting the status, but not the substance, of the mediation effort to the court in writing, from filing a final report as required by subsection 10.1, or from complying with the obligations set forth in section 11.0.

9.3 Protection of Proprietary Information.

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

9.4 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.

10.0 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.

11.0 POST MEDIATION PROCEDURES.

11.1 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.

11.2 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 Program Administrator, a certificate in the form provided by the court showing compliance or noncompliance with the mediation conference requirements of this General Order 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.

11.3 Mediator's Report.

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

12.0 WITHDRAWAL FROM MEDIATION.

Any matter assigned to mediation pursuant to this General Order may be withdrawn from mediation by the court at any time.

13.0 TERMINATION OF MEDIATION.

Upon the filing of a mediator's certificate pursuant to subsection 11.2 or the entry of an order withdrawing a matter from mediation pursuant to section 12.0, 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 orders.

14.0 OTHER ALTERNATIVE DISPUTE RESOLUTION PROCEDURES.

Nothing contained in this General Order is intended to prevent or discourage the parties from employing any other method of alternative dispute resolution.

AND NOW, this 13th day of August, 1997, it is hereby ordered that the attached Procedures Governing Mediation of Matters in Bankruptcy Cases are hereby adopted.

/S/ Bernard Markovitz
Bernard Markovitz
Chief Bankruptcy Judge

/S/ Warren W. Bentz
Warren W. Bentz
Bankruptcy Judge

/S/ Judith K. Fitzgerald
Judith K. Fitzgerald
Bankruptcy Judge

/S/ M. Bruce McCullough
M. Bruce McCullough
Bankruptcy Judge

/S/ Joseph L. Cosetti
Joseph L. Cosetti
Bankruptcy Judge

FORMS

FORM A

APPLICATION FORM

FORM B

MEDIATOR'S CERTIFICATE OF COMPLETION OF MEDIATION CONFERENCE

FORM C-1

REPORT OF MEDIATION PROGRAM CONFERENCE

FORM C-2

MEDIATOR'S SURVEY

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF PENNSYLVANIA

APPLICATION FOR ADMISSION TO
BANKRUPTCY MEDIATION PROGRAM REGISTER

General Instructions

(1) Each applicant must read General Order #97-4 of this court. Copies of the General Order are available in each of the divisional offices of the court.

(2) If additional space is needed to respond fully to any item on this application, please set forth the response(s) on a separate page with an identification of the question number to which it responds, sign each such additional page, and attach hereto.

(3) Please send with this application a diskette that contains a true copy of this application in a version of software acceptable to the court.

(4) Attorney applicants are to complete Parts I, II and IV of this Application.

(5) Non-attorney applicants are to complete Parts I, III and IV of this Application.

Part I. ALL APPLICANTS.

Name: _____

Firm: _____

Office Address: _____

Street

City

State

Zip Code

Office Phone: _____

Office Fax: _____

E-Mail: _____

Pa.I.D. or other Professional Association I.D. _____

7. Have you been removed from any professional organization, or have you resigned from any professional organization while an investigation into allegations of professional misconduct was pending? Yes _____ No _____
If so, please explain the circumstances of such removal or resignation.

8. Check the count(y)(ies) in which you are willing to conduct mediation conferences:

I hereby certify that I have read General Order #97-4 of the Bankruptcy Court for the Western District of Pennsylvania, that I meet the qualification set forth therein for admission to this court's Register of mediators, and that I will fully comply with the relevant provisions of this court's General Orders, Local Rules, and Local Forms, and any modifications thereto, relating to mediation. I will immediately contact the Mediation Coordinator, and any parties for whom I have accepted appointment as a mediator, upon learning I am no longer qualified to serve pursuant to the provisions of General Order # 97-4 of this court.

If I am applying for appointment as an attorney mediator, I certify that I am a member in good standing of the state and federal bar(s) listed above. If I am applying for appointment as a non-attorney mediator, I certify that I am a member in good standing of my profession.

I consent to disclosure of the information contained in this Application to court personnel and to the parties and their representatives whose matters have been referred to the Bankruptcy Mediation Program of this court.

I declare under penalty of perjury that the information contained in this Application is true and correct.

Executed on _____, ____ at _____.

Return completed application and diskette to:

The Honorable Judith K. Fitzgerald, Chief Judge
Mediation Program Administrator
Suite 5490 U.S. Steel Tower
600 Grant Street
Pittsburgh, PA 15219

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF PENNSYLVANIA

In re: _____) Bankruptcy No. _____
)
)
Debtor _____)
)
)
Motion No. _____)
)
)
Plaintiff _____) Adversary No. _____)
)
)
vs. _____)
)
)
)
)
Defendant _____)
)
)

MEDIATOR'S CERTIFICATE OF COMPLETION OF MEDIATION CONFERENCE

1. I hereby certify that pursuant to an order of assignment of this Court to the Bankruptcy Mediation Program dated _____, a Mediation Program Conference was held on _____/was not held.
(list all date(s) on which conference was held)

2. A settlement/resolution of this matter was _____/was not____ reached.

Dated: _____ Mediator: _____

Signature

Type or print:

Name: _____

Address: _____

Telephone: _____

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF PENNSYLVANIA

In re: _____) Bankruptcy No. _____
)
Debtor _____)
)
Motion No. _____)
)
Plaintiff _____) Adversary No. _____
)
vs. _____)
)
)
)
Defendant _____)
)
)

REPORT OF MEDIATION PROGRAM CONFERENCE

I, _____, mediator for the Bankruptcy Mediation Program, state:

1. A Mediation Program conference was held on _____, _____ and (if applicable) on the following continued date(s): _____ (attach attendance form(s)).

2. The rules governing the conference were _____/were not _____ complied with. If not, explain below:

3. A settlement/resolution of this matter was ___/was not ___ reached.

4. If a settlement/resolution was reached, (plaintiff/defendant/other party) _____ prepared the written stipulation for settlement.

5. Prior to the preparation of a final written agreement, the parties choose to put the agreement on the court record. Yes ___ No ___.

FORM "C-1"

Page 1

MEDIATOR'S SURVEY

Bankruptcy mediation is a new program in this District. We need your help to evaluate the effectiveness of the program. Please complete this form and return it to:

**The Honorable Judith K. Fitzgerald, Chief Judge, Mediation Program Administrator,
5490 U.S. Steel Tower, 600 Grant St., Pittsburgh, PA 15219**

within _____ days. This information will be used solely for the purpose of evaluating the mediation program.

1. Case Name: _____
Case No.: _____

2. Chapter: _____7 _____11 _____12 _____13

3. Adv. Name: _____
Adv. No. _____
Motion No. _____

4. When were you appointed as mediator? _____

5. When did the mediation take place? _____

6. Where did you meet?
_____ Mediator's Office
_____ Courthouse
_____ Office of a Party
_____ Office of a Party's Attorney
_____ Other (specify) _____

7. How long was the mediation?
_____ less than 1 hour
_____ 1-2 hours
_____ 3-4 hours
_____ one day
_____ more than one day (specify number of days) _____

8. The dispute that you mediated was:
_____ totally resolved (subject to court approval)
_____ partially resolved (certain issues were settled)
_____ partially resolved (certain issues were narrowed for litigation)
_____ not resolved

9. In your opinion, did each party have a representative with full settlement authority at the mediation conference? _____yes _____no

10. Did the parties who attended the mediation conference participate in good faith? _____ yes _____ no

11. What was the type of proceeding?
_____ non-dischargeability (specify basis) § 523(a)(_____)
_____ objection to claim
_____ preference
_____ fraudulent transfer
_____ turnover
_____ administrative expense
_____ valuation
_____ other (specify) _____

12. How much money was claimed in the dispute?
_____ under \$1,000
_____ \$1,000 to \$5,000
_____ \$5,000 to \$10,000
_____ \$10,000 to \$50,000
_____ \$50,000 to \$100,000
_____ \$100,000 to \$500,000
_____ over \$500,000
_____ nonmonetary issue (specify) _____

13. The plaintiff or movant was a[n]:
_____ trustee
_____ individual
_____ corporation
_____ partnership
_____ Internal Revenue Service
_____ other (specify) _____

14. The defendant or respondent was a[n]
_____ trustee
_____ individual
_____ corporation
_____ partnership
_____ Internal Revenue Service
_____ other (specify) _____

15. What did you dislike about the mediation conference? _____

16. What did you like about the mediation conference? _____

