

PROCEDURES GOVERNING ALTERNATIVE DISPUTE RESOLUTION MATTERS IN BANKRUPTCY CASES

RULE 9072-1. PURPOSE AND SCOPE

(a) **ADR Program.** Litigation in bankruptcy cases frequently imposes significant economic and other burdens on parties and often delays resolution of disputes. Alternative Dispute Resolution ("ADR") procedures have the potential to reduce delay, cost, stress and other burdens often associated with bankruptcy and bankruptcy related litigation. Mediation, in particular, allows parties more active involvement in determining the resolution of their disputes. To provide a court-annexed ADR procedure, the court adopts Local Rules 9072-1 through 9072-9 creating an ADR Program for the District of Arizona (the "ADR Program").

(b) **ADR Methods.** It is the court's intention that the ADR Program shall operate in such a way as to allow the participants to take advantage of and utilize a wide variety of ADR methods. These methods may include, but are not limited to, mediation, negotiation, early neutral evaluation, and settlement facilitation. The specific method or methods employed will be those that are appropriate and applicable as determined by the mediator and the parties, or as directed by the court and will vary from matter to matter. Nothing contained herein is intended to preclude other forms of ADR with the consent of the parties.

RULE 9072-2. ASSIGNMENT OF MATTERS TO ADR

The court may assign a matter for inclusion in the ADR Program sua sponte, upon written stipulation of the parties to the matter, or on motion of a party to the matter or the United States Trustee. While participation by the parties in the ADR Program is generally intended to be voluntary, the court may designate specific matters for inclusion in the ADR Program, or the United States Trustee, the court may order additional parties to participate in the ADR Program if the participation of the additional parties would be necessary or helpful.

RULE 9072-3. TYPES OF MATTERS SUBJECT TO ADR

Unless otherwise ordered by the court, all controversies arising in an adversary proceeding, contested matter, or other dispute in a case are eligible for referral to the ADR Program.

RULE 9072-4. EFFECT OF ADR ON PENDING MATTERS

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

RULE 9072-5. PANEL OF MEDIATORS/ADR PROGRAM ADMINISTRATOR

The clerk shall establish and maintain two lists of attorneys and panel trustees (the "Panel") qualified under Local Rule 9072-6 and approved by the court to serve as mediators in the ADR Program. The Chief Bankruptcy Judge shall appoint a judge of this court, who is willing, to serve as the ADR Program Administrator (the "ADR Program Administrator"). Aided by staff members of the court, the ADR Program Administrator shall receive applications for approval to the Panel, track and compile reports on the ADR Program, and otherwise administer the ADR Program and handle such other administrative duties as are necessary.

RULE 9072-6. APPLICATION AND CERTIFICATION OF MEDIATORS

(a) Application and Qualification Requirements. Each attorney or panel trustee applying for approval to the Panel must submit to the ADR Program Administrator the Application Form which can be obtained from the court's website. Except as otherwise determined by the court, to be approved as a mediator in the ADR Program, each applicant must meet the following criteria:

(1) if the applicant is an attorney, be a member in good standing of the bar of any state or the District of Columbia, with at least five years of practice; or

(2) if the applicant is an attorney, be a member in good standing of the bar of the Federal District Court of Arizona, with at least five years of practice; or

(3) if the applicant is a panel trustee, be an active panel trustee in good standing with the office of the United States Trustee with at least five years of service as a panel trustee, or if retired, have been a panel trustee in good standing with the; office of the United States Trustee with at least five years of service as a panel trustee;

(4) not have been suspended, or have had a professional license or bond revoked, or have pending any proceeding to suspend or revoke such license or bond;

(5) not have resigned from a professional organization or panel while an investigation was pending into allegations of misconduct which would warrant suspension, disbarment or professional license or bond revocation;

(6) not have been convicted of a felony;

(7) have completed appropriate mediation training, or have sufficient experience, in the mediation process;

(8) be determined by the court to be competent to perform the duties of a mediator; and

(9) be willing to serve as mediator in at least one matter during each quarter of each year, subject only to unavailability due to conflicts, personal or professional commitments, or other matters which would make such service inappropriate.

(b) Term. Mediators shall serve as members of the Panel for a term of three (3) years unless the mediator is advised otherwise by the court or submits a written request to withdraw from the Panel to the ADR Program Administrator. Reappointment will occur at the court's discretion, and an application for reappointment shall not be required. A mediator assigned to act as a mediator in a matter before expiration of his or her term shall continue said service until the mediation is concluded regardless of term expiration.

(c) Court Certification. The court, in its sole discretion, shall grant or deny an application submitted pursuant to Local Rule 9072-6. If the court grants the application, the applicant's name shall be added to the Panel, subject to removal pursuant to Local Rule 9072-6(f).

(d) Reaffirmation of Qualifications. Each applicant approved 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 Local Rule 9072-6(f).

(e) Mediator's Oath. Before serving as a mediator, each person designated to the Panel as a mediator shall take the following oath or affirmation:

"I, _____, do solemnly swear (or affirm) that I will faithfully and impartially discharge and perform all the duties incumbent upon me as a Mediator in the ADR Program of the United States Bankruptcy Court for the District of Arizona with equal respect to all persons regardless of race, religion, gender, ethnicity, or economic status . So help me God."

(f) Removal from Panel. A person shall be removed from the Panel either at the person's request or by court order. If removed by court order, the person shall not be returned to the Panel absent a court order obtained on motion to the ADR Program Administrator, supported by an affidavit sufficiently explaining the circumstances of such removal and the reasons justifying the return of the person to the panel.

RULE 9072-7. APPOINTMENT OF MEDIATOR

(a) Selection and Appointment of Mediator.

(1) Selection by Parties. Unless otherwise ordered by the court, within seven days following the receipt of notice of assignment of a matter to the ADR Program, the parties to the matter 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 proposed mediator is not on the Panel but is otherwise qualified under Local Rule 9072-6 to mediate the matter. If the court, in its sole discretion approves the parties' selection, immediately after entry of the order of

appointment, the court shall notify the parties, the mediator, and the alternative mediator of the appointment.

(2) **Selection/Appointment by Court.** If the parties cannot agree upon a mediator within 14 days following the receipt of notice of assignment of a matter to the ADR Program, the parties shall notify the court; thereupon, the court shall appoint a mediator and an alternative mediator from the Panel, and shall notify in writing the parties, the mediator, and the alternative mediator of such appointment.

(b) **Inability of Mediator to Serve.** If the mediator is unable to serve, the mediator shall, within seven days after receipt of notice of the appointment, file and serve on all parties to the matter, and on the alternate mediator a notice of inability to accept the appointment. If the alternate mediator does not file and serve on all parties to the mediation a notice of inability to accept the appointment within seven days after receipt of the original mediator's notice of inability to accept the appointment, the alternate mediator shall then become the mediator. If neither the mediator nor the alternate mediator can serve, the court shall appoint another mediator and alternative mediator.

(c) **Disqualification of Mediator.**

(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. § 455. 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.

(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 Local Rule 9072-7(c)(1). The inquiry shall include, but 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 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 Local Rule 9072-7(c)(1) and that the mediator has no actual or potential conflict of interest or (b) a notice of withdrawal.

(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 voluntarily withdraw, the issue shall be brought to the court's attention by the mediator or any of the parties to the mediation. Any pleading shall be filed with the court, and copies of the pleading shall be mailed to all of the parties to the mediation, their counsel of record, if any, the mediator, the alternative mediator, and the ADR Program Administrator. The court shall take such action as the court deems necessary or appropriate to resolve the alleged conflict of interest and to avoid the appearance of impropriety.

(d) **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 on account of any act or omission in the course and scope of such person's duties as a mediator.

(e) **Compensation.**

(1) **Compensated Mediation.** Mediators who meet the requirements of Local Rule 9072-6 shall be paid fees and expenses on such terms as the mediator and the parties to the mediation may agree or as the court otherwise may direct. The parties to the mediation shall share equally all ADR fees and expenses unless the parties to the mediation agree otherwise. The court may, in the interest of justice, determine a different allocation or a different fee structure. ADR fees and expenses are subject to prior court approval if the bankruptcy estate is to be charged with any portion. Notwithstanding the foregoing, the mediator's fee, whether agreed to by the parties or fixed by the court, may not be contingent or otherwise based on the result or outcome of the ADR process. The court shall maintain a list of all mediators who are qualified to be compensated mediators.

(2) **Uncompensated Mediation.** The court shall maintain a list of mediators who have agreed to serve as mediators without compensation in those cases where one or more of the parties can not afford to pay for mediation. Any attorney or panel trustee willing to serve as an uncompensated mediator shall file then Application Form pursuant to Local Rule 9072-6 above and state that they are willing to serve as an uncompensated mediator. To be approved as a uncompensated mediator it is not required that the applicant have completed mediation training

Committee Notes 2009: Time deadlines have been amended to be consistent with amendments to the Federal Rules of Bankruptcy Procedure, effective December 1, 2009.

RULE 9072-8. THE MEDIATION

(a) **Initial Telephonic Conference.** Promptly, but no later than 14 days of receipt of notification of appointment, the mediator shall conduct a telephone conference with counsel of record for the parties (or the parties, where appearing pro se) to discuss (1) fixing a convenient date and place for the ADR Conference; (2) the procedures that will be followed during the ADR Conference; (3) who shall attend the ADR Conference on behalf of each party; (4) what material or exhibits should be provided to the mediator before the ADR Conference; and (5) any issues or matters that it would be especially helpful to have the parties address in the Submission materials.

(b) **Time and Place of ADR Conference.** After consulting with all counsel and pro se parties, the mediator shall schedule a convenient time and neutral place for the ADR Conference, and promptly give all counsel and pro se parties at least 14 days advance written notice of the time and place of the ADR Conference. The mediator shall schedule the ADR Conference to begin as soon as practicable after entry of the order of appointment.

(c) Submission Materials. Not less than seven days before the ADR Conference, each party shall submit directly to the mediator, and shall serve on all counsel and pro se parties, an ADR statement (the "Submission"). The Submission shall not be filed with the court and the court shall not have access to the submission of any portion thereof. The Submission may include any information that the parties would consider useful, but must:

(1) Identify the person(s), in addition to counsel of record, who will attend the ADR Conference as representative of the party with decision making authority;

(2) Describe briefly the nature and scope of the substance of the dispute;

(3) Address whether there are legal or factual issues whose early resolution might reduce appreciably the nature and scope of the dispute or significantly contribute to settlement;

(4) Identify the discovery that could contribute most to equipping the parties for meaningful settlement discussions;

(5) Set forth the history of past settlement discussions, including disclosure of prior and any presently outstanding offers, counteroffers, and demands;

(6) Make an estimate of the cost and time to be expended for further discovery, pretrial motions, expert witnesses, and trial;

(7) Indicate presently scheduled court dates for further status conferences, pretrial conferences, trial, or otherwise; and

(8) Attach copies of the document(s) from which the dispute has arisen or other relevant documents or information whose availability would materially advance the purposes of the Mediation Conference.

(d) Attendance at ADR Conference.

(1) **Persons Required to Attend.** The following persons must attend the ADR Conference:

(A) Each party who is a natural person;

(B) If a 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;

(C) If the party is a governmental or quasi 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;

(D) The attorney who has primary responsibility for each party's case. The attorney shall come prepared to discuss all liability issues, all damage issues, and the position of the party relating to settlement, in detail and good faith; and

(E) 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 the ADR program.

(2) **Excuse.** A person required to attend the ADR Conference is excused from appearing if all parties and the mediator agree that the person need not attend the ADR Conference. The court for cause may excuse a person's attendance at the ADR Conference. Any party or attorney who is excused by the mediator from appearing in person at the ADR Conference may be required by the mediator to participate telephonically. Telephonic participation at the ADR Conference should be the exception rather than the rule and shall only be permitted upon good cause shown. This decision is within the mediator's sole discretion.

(3) **Failure to Attend.** Willful failure to attend any ADR Conference, and any other material violation of these Local Rules, shall be reported to the court by the mediator and may result in the imposition of sanctions by the court or other appropriate relief. Any such report of the mediator shall comply with the confidentiality requirements of the Local Rules. The court will take whatever action(s) it deems necessary and appropriate under the circumstances to resolve the issue of such willful failure to attend the ADR Conference and/or other violations of the Local Rules.

(e) **ADR Conference Procedures.** The mediator may establish appropriate procedures for the ADR Conference. The ADR Conference shall proceed informally. The Rules of Evidence shall not apply. There shall be no formal examination of witnesses.

(f) **Confidentiality of ADR Proceedings.**

(1) **Protection of Information Disclosed at ADR.** Unless otherwise agreed by the parties, the mediator and the participants in the ADR process are prohibited from divulging, outside of the ADR proceeding, any oral or written information disclosed by the parties or by witnesses in the course of the ADR Conference including the Submission of materials or any portion thereof. No person may rely on or introduce as evidence in any arbitral, judicial, or other proceedings, evidence pertaining to any aspect of the ADR proceeding, 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 ADR Proceeding; and (e) documents prepared for the purpose of, in the course of, or pursuant to the ADR proceeding or Local Rules. In addition, without limiting the foregoing, and notwithstanding Local Rule 9072-8(e), Rule 408, Fed.R.Evid. and any applicable federal or state statute, rule, common law, or judicial precedent relating to the privileged nature of settlement discussions, mediation, or other ADR 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 ADR Conference.

(2) **Discovery from Mediator.** The mediator shall not be compelled to disclose to the court or to any person outside the ADR Conference any of the records, reports, summaries, notes, communications, testimony, 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 ADR proceeding in connection with any arbitral, judicial, or other proceeding. The mediator shall not be a necessary party in any proceeding relating to the ADR proceeding. Nothing contained in this subsection shall prevent the mediator from reporting the status, but not the substance, of the ADR proceeding to the court in writing, from filing a final report as required by Local Rule 9072-8(g), or from complying with any of the other obligations set forth in Local Rule 9072-9.

(3) **Protection of Proprietary Information.** The parties, the mediator, and all ADR participants shall protect proprietary information obtained during the ADR Conference.

(4) **Preservation of Privileges.** The disclosure by a party of privileged information to the mediator or at the ADR Conference does not waive or otherwise adversely affect the privileged nature of the information.

(g) **Recommendation 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 the attorneys or pro se litigants, but not to the court.

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RULE 9072-9. POST ADR PROCEDURES

(a) **Preparation of Orders.** If a settlement is reached at an ADR Conference, the party designated by the mediator shall submit a fully executed stipulation and proposed order to the court within 21 days after the conclusion of the ADR Conference. If the party designated by the mediator fails to prepare the stipulation and order proposed, the court may impose appropriate sanctions or other appropriate relief.

(b) **Mediator's Certificate of Completion.** Promptly after the conclusion of the ADR Conference, the mediator shall file with the court, and serve on the parties and the ADR Program Administrator, a certificate in the form provided by the court showing compliance or noncompliance with the Mediation Conference requirements of Local Rules 9072-1 through 9072-9 and whether or not a settlement has been reached. Regardless of the outcome of the ADR Conference, the mediator shall not provide the court with any details of the substance of the ADR Conference.

(c) **Mediator's Report.** In order to assist the ADR Program Administrator in compiling useful data to evaluate the ADR Program, and to aid the court in assessing the efforts of the members of the Panel, the mediator shall provide the ADR Program Administrator with an estimate of the number of hours spent in the ADR Conference and other statistical and evaluative information on a form provided by the court. The mediator shall provide this report whether or not the ADR Conference results in settlement.

(d) **Withdrawal from ADR.** Upon the filing of a mediator's certificate pursuant to Local Rule 9072-9(b) or the entry of an order withdrawing a matter from ADR pursuant to Local Rule 9072-9(d), the ADR will be deemed terminated, and the mediator excused and relieved from further responsibilities in the matter without further court order. If the ADR Conference does not result in a resolution of all of the disputes in the assigned matter, the matter shall proceed to trial or hearing on all remaining issues pursuant to the court's scheduling orders.

(e) **Termination of ADR.** Upon the filing of the mediator's certificate pursuant to Local Rule 9072-9(b) or the entry of an order withdrawing a matter from ADR pursuant to Local Rule 9072-9(d), the ADR will be deemed terminated and the mediator excused and relieved from further responsibilities in the matter without further court order.

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