

**ADR PROGRAM
UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT
OF TENNESSEE
(1/27/04)**

I. AUTHORITY

Pursuant to 28 U.S.C. §§ 471, 473(a)(6) and 651(a), FED. R. BANKR. P. 7016(c)(9) and LBR 9019-2, this Court is authorized to implement court-supervised methods of alternative dispute resolution. The Alternative Dispute Resolution (“ADR”) Program for the Bankruptcy Court for the Middle District of Tennessee provides for Judicially Conducted Settlement Conference, Mediation, and Non-binding Arbitration.

II. DEFINITIONS

- A. “Alternative Dispute Resolution Proceeding” is any Judicially Conducted Settlement Conference, Mediation or Non-binding Arbitration ordered pursuant to this ADR Program and LBR 9019-2.
- B. “ADR Neutral” includes arbitrators and mediators selected by the Court to conduct an ADR Proceeding. ADR Neutrals are guided by the ethical rules and considerations applicable to judges under 28 U.S.C. § 455. An ADR Neutral in a court-ordered ADR Proceeding shall have immunity to the same extent as a Judge of the Bankruptcy Court in the conduct of an ADR Proceeding.
- C. “Judicially Conducted Settlement Conference” is a form of mediation in which a Bankruptcy Judge presides.
- D. “Mediation” is an informal process in which an ADR Neutral conducts discussions among the disputing parties to enable them to reach a mutually acceptable resolution.
- E. “Non-binding Arbitration” is a process in which an ADR Neutral considers the facts and arguments presented by the parties and renders a written decision that is non-binding.

III. GENERAL PROVISIONS

- A. Application of ADR. All bankruptcy cases, contested matters and adversary proceedings in this district are subject to this ADR Program except that any case, contested matter or adversary proceeding withdrawn to the District Court shall become subject to the District Court rules with respect to ADR.

- B. Court Supervision. The Bankruptcy Court retains authority to supervise every action that is subject to this ADR Program.
- C. Sanctions. To ensure compliance, if a party or a party's attorney, without good cause, fails to comply with an order under this ADR Program or fails to follow the instructions of an ADR Neutral within an ADR Proceeding, the Court may impose sanctions upon the party or the party's counsel, including but not limited to the payment of reasonable attorney fees, ADR Neutral's fees and costs and contempt.
- D. Confidentiality.
1. No discussion, statement or information provided during an ADR Proceeding shall be used by any party, repeated or otherwise provided to any other person for use in the litigation or in any other litigation for any purpose whatsoever or for any other purpose not in connection with the litigation. This protection includes, but is not limited to, the protection provided by Rule 408 of the Federal Rules of Evidence. No statement during an ADR Proceeding may be reported, recorded, placed into evidence, made known to the Court, or construed for any purpose as an admission. However, otherwise discoverable evidence is not rendered confidential by use during an ADR Proceeding.
 2. Neither the parties to an ADR Proceeding nor any other person in any forum shall attempt to subpoena an ADR Neutral or any confidential materials produced or created in connection with an ADR Proceeding without first obtaining leave of this Court.
 3. ADR Neutrals shall not divulge information imparted in the course of an ADR Proceeding without the consent of all parties, except as otherwise required by law. In the absence of a statute to the contrary, an ADR Neutral must treat information revealed in an ADR Proceeding as confidential, except for the following:
 - a. Information that is statutorily mandated to be reported;
 - b. Information that all parties agree may be disclosed; or
 - c. Information that, in the judgment of the ADR Neutral, reveals a danger of serious physical harm to a party or to a third person.
 4. ADR Neutrals shall maintain confidentiality in the storage and disposal of records and shall render anonymous all identifying information when ADR materials are used for research, training or statistical compilations.

IV. PROCEDURES AND ADMINISTRATION

- A. Referral for ADR Proceeding. Upon motion of any party or at the initiative of the Court, a bankruptcy case, contested matter or adversary proceeding may be referred for a Judicially Conducted Settlement Conference, Mediation or Non-binding Arbitration, with or without the consent of all parties. The Order of Reference may include a date by which the ADR Proceeding must be concluded.
- B. Physical Presence of Parties. Unless the Court or ADR Neutral specifies otherwise, every party or a representative of every party with authority to settle shall be physically present for the ADR Proceeding. A governmental entity need not have present the person(s) who would be required to approve a settlement but must send a representative who is knowledgeable about the facts and the governmental entity's position.
- C. Use of District Court ADR Panel Members. This Court will not qualify its own ADR Panel, but will use the panel approved by the United States District Court for the Middle District of Tennessee. The Clerk of the Bankruptcy Court will obtain the list of ADR Panel Members from the District Court Clerk or ADR Coordinator when required by this ADR Program. As provided below, the parties may select an ADR Neutral who is not a District Court ADR Panel Member.
- D. Selection of ADR Neutral.
1. Except for Judicially Conducted Settlement Conferences, within ten (10) days after an order directing an ADR Proceeding, the parties must either agree on an ADR Neutral and file an agreed order appointing that neutral, or file a Notice that no agreement has been reached. In the event the parties timely file Notice that they are unable to agree on a neutral, the Clerk of the Bankruptcy Court will select at random three neutrals from the ADR Panel maintained by the District Court (with one additional neutral designated for each party over two) and each party shall strike one name. The Court will enter an Order appointing the remaining neutral.
 2. If the parties fail to timely file an agreed order appointing a neutral or a Notice that they are unable to agree, the Clerk will randomly select a neutral from the District Court's ADR Panel and an order appointing that neutral will be entered.
 3. Objection to the order of appointment must be made by motion within ten (10) days. If an objection is sustained, the selection process is repeated.

4. A neutral selected under this process who is unable or unwilling to serve for any reason, shall be replaced by repeating the selection process.
- E. Compensation of ADR Neutrals. All ADR Neutrals shall be compensated at rates to be agreed upon by the parties or set by the Court. Compensation for ADR services shall be borne equally by the parties to the ADR Proceeding unless otherwise agreed or ordered by the Court.

V. JUDICIALLY CONDUCTED SETTLEMENT CONFERENCE

- A. Settlement Judge. Settlement conferences may be conducted by any Bankruptcy Judge other than the Judge to whom the case, matter or proceeding is assigned for trial.
- B. Settlement Statements.
 1. At least five (5) business days before the Judicially Conducted Settlement Conference, each party shall deliver under seal, directly to the courtroom deputy for the Settlement Judge, an *ex parte* Settlement Statement. The Settlement Statement shall be furnished only to the Settlement Judge and not to any other party. The Settlement Statement shall not be filed with the Clerk of Court.
 2. The Settlement Statement shall include a summary of the party's view of the facts and law as to each theory of liability or defense, factors compelling or blocking settlement and the status of discovery. Each party shall state whether any settlement offer has been made, the terms thereof and the status of any settlement discussions. Each Statement shall contain a candid assessment of the strengths and weaknesses of both sides of the case, and an estimate of the economic cost of proceeding to trial. The Settlement Statement shall contain a statement of the settlement authority extended by the client.

VI. MEDIATION

- A. Notice of Time and Place for Mediation. After a case, matter or proceeding has been referred for mediation, the mediator in consultation with the parties and counsels, shall set the time and place for the mediation and send appropriate notices.
- B. Mediation Statements. Each party shall submit a Mediation Statement as directed by the Mediator. Absent other instructions, the Mediation Statement shall include a summary of the party's view of the facts and law as to each theory of liability or defense, factors compelling or blocking settlement and the status of discovery. Each Statement shall contain a candid assessment of the strengths and weaknesses of both

sides of the case, and an estimate of the economic cost of proceeding to trial. Each party shall state whether any settlement offer has been made, the terms thereof and the status of settlement discussions. All documents deemed critical by a party shall be submitted to the mediator. The Mediation Statement, documents and information contained therein may be disclosed to other parties to the mediation only with the consent of the producing party.

- C. Mediator's Report. Within ten (10) days after the mediation, the Mediator shall file a report. The report should indicate: (a) whether the dispute settled; (b) whether the mediation was continued; or (c) whether the mediation terminated without settlement. No other information shall appear in the Mediator's report nor, without the consent of all parties, shall any additional information regarding the mediation be provided by the Mediator to the Judge.
- D. Preparation of Judgment. If the mediation results in a settlement, counsel for the plaintiff (or for the moving party) shall prepare and file a judgment, approved for entry by opposing counsel.

VII. NON-BINDING ARBITRATION

- A. In General. Non-binding arbitration provides the parties with a brief written decision by an experienced ADR Neutral that declares the prevailing party and states the amount of damages or other relief that should be awarded. The arbitrator's decision is non-binding.
- B. Conference Statement. Unless otherwise directed by the arbitrator, at least five (5) days prior to the arbitration conference, each party shall deliver to the arbitrator a written analysis of their claims or defenses, together with copies of critical documents or other evidence in support of their respective positions. Each party shall contemporaneously serve these papers upon all opposing parties.
- C. Incorporation of Statutes. Arbitration conferences shall be conducted to the extent practicable consistent with the provisions of 28 U.S.C. §§ 654 through 658.
- D. Preparation of Judgment. If the arbitration results in a settlement, counsel for the plaintiff (or for the moving party) shall prepare and file a judgment approved for entry by opposing counsel.