

APPENDIX III

ADOPTION OF MEDIATION PROGRAM FOR BANKRUPTCY CASES AND ADVERSARY PROCEEDINGS **(Third Amended General Order No. 95-01)**

1.0 PURPOSE AND SCOPE

The United States Bankruptcy Court for the Central District of California (the “Court”) recognizes that formal litigation of disputes in bankruptcy cases and adversary proceedings frequently imposes significant economic burdens on parties and often delays resolution of those disputes. The procedures established herein are intended primarily to provide litigants with the means to resolve their disputes more quickly, at less cost, and often without the stress and pressure of litigation.

The Court also notes that the volume of cases, contested matters and adversary proceedings filed in this district has placed substantial burdens upon counsel, litigants and the Court, all of which contribute to the delay in the resolution of disputed matters. A Court-authorized mediation program, in which litigants and counsel meet with a mediator, offers an opportunity for parties to settle legal disputes promptly, less expensively, and to their mutual satisfaction. The judges of the Court hereby adopt the Mediation Program for Bankruptcy Cases and Adversary Proceedings (the “Mediation Program”) for these purposes.

It is the Court’s intention that the Mediation Program shall operate in such a way as to allow the participants to take advantage of and utilize a wide variety of alternative dispute resolution 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 mediators and the parties, and will vary from matter to matter.

Nothing contained herein is intended to preclude other forms of dispute resolution with the consent of the parties.

2.0 CASES ELIGIBLE FOR ASSIGNMENT TO THE MEDIATION PROGRAM

Unless otherwise ordered by the judge handling the particular matter (the “Judge”), all controversies arising in an adversary proceeding, contested matter, or other dispute in a bankruptcy case are eligible for referral to the Mediation Program.

3.0 PANEL OF MEDIATORS

3.1 Selection

- a. The Court shall establish and maintain a panel (“Panel”) of qualified professionals who have volunteered and been chosen to serve as a mediator (“Mediator”) for the possible resolution of matters referred to the Mediation Program. The Panel shall be comprised of both attorneys and non-attorneys.
- b. Applicants shall submit an Application (in the form attached) (the “Application”) to the judge appointed as the administrator of the Mediation Program (the “Mediation Program Administrator”), setting forth their qualifications as described in Paragraph 3.3 below.
- c. The judges of the Court will select the Panel from the applications submitted to the Mediation Program Administrator. The judges will consider each applicant’s training and experience in mediation or other alternative dispute resolution, if any, as well as the applicant’s professional experience and location. Appointments may be limited to keep the Panel at an appropriate size and to ensure that the Panel is comprised of individuals who have broad based experience, superior skills, and qualifications from a variety of legal specialties and other professions.

3.2 Term. Mediators shall serve as members of the Panel for a term of three years unless the Mediator is advised otherwise by the Court or submits a written request to withdraw from the Panel to the Mediation Program Administrator. Reappointment will occur at the judges’ discretion, and an application for reappointment is not required.

3.3 Qualifications

- a. **Attorney Applicants.** An attorney applicant shall certify to the Court in the application that the applicant:
 1. Is, and has been, a member in good standing of the bar of any state or of the District of Columbia for at least 5 years;
 2. Is a member in good standing of the federal courts for the Central District of California;
 3. Has served as a principal attorney of record in at least 3 bankruptcy cases (without regard to the party represented) from case commencement to conclusion or, if the case is still pending, to the date of the Application, or has served as the principal attorney of record for a party in interest in at least 3 adversary proceedings or contested matters from commencement to conclusion or, if the case is still pending, to the date of the Application; and

4. Is willing to undertake to evaluate or mediate at least one matter 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. **Non-Attorney Applicants.** A non-attorney applicant shall certify to the Court in the Application that the applicant has been a member in good standing of the applicant's particular profession for at least 5 years, and shall submit a statement of professional qualifications, experience, training and other information demonstrating, in the applicant's opinion, why the applicant should be appointed to the Panel. Non-attorney applicants shall make the same certification required of attorney applicants contained in Paragraph 3.3.a.4.

3.4 Geographic Areas of Service. Applicants shall indicate on the Application all counties within the Central District in which they are willing to serve. Applicants must be willing to travel to all such counties to conduct Mediation Conferences.

4.0 ADMINISTRATION OF THE MEDIATION PROGRAM

The Chief Judge will appoint a judge of the Court to serve as the Mediation Program Administrator. The Mediation Program Administrator will be aided by assigned staff members of the Court, who will maintain and collect applications, maintain the roster of the Panel, track and compile results of the Mediation Program, and handle such other administrative duties as are necessary.

5.0 ASSIGNMENT OF MATTERS TO THE MEDIATION PROGRAM

5.1 Assignment by Request of Parties. A contested matter in a case, adversary proceeding, or other dispute (hereinafter collectively referred to as "Matter" or "Matters") may be assigned to the Mediation Program if requested in writing by the parties in the form attached as Official Forms 701 and 702.

5.2 Assignment by Judge. Matters may also be assigned by order of the Judge at a status conference or other hearing. While participation by the parties in the Mediation Program is generally intended to be voluntary, the Judge, acting *sua sponte* or on the request of a party, may designate specific Matters for inclusion in the Mediation Program. The Judge may do so over the objections of the parties. If a Matter is assigned to the Mediation Program by the Judge at a status conference or other hearing, the parties will be presented with an order assigning the Matter to the Mediation Program, and with a current roster of the Panel. The parties shall normally be given the opportunity to confer and to select a mutually acceptable Mediator and an Alternate Mediator from the Panel. If the parties cannot agree, or if the Judge deems selection by the Judge to be appropriate and necessary, the Judge shall select a Mediator and an Alternate Mediator from the Panel.

5.3 Assignment of Non-Panel Mediators. The Judge may, in his or her sole discretion, appoint individuals who are not members of the Panel as the Mediator and Alternate Mediator at the request of the parties and for good cause shown.

- 5.4 Use of Official Court Order Assigning Matter to Mediation Program.** The order appointing the Mediator and Alternate Mediator and assigning a Matter to the Mediation Program shall be in the form attached as Official Form 702 (“Mediation Order”). The original Mediation Order shall be docketed and retained in the case or adversary proceeding file and copies shall be mailed, by the party so designated by the Judge, to the Mediator, the Alternate Mediator, the Mediation Program Administrator, and to all other parties to the dispute.
- 5.5 Existing Case Deadlines Not Affected by Assignment to Mediation.** Assignment to the Mediation Program shall not alter or affect any time limits, deadlines, scheduling matters or orders in the case, any adversary proceeding, contested matter or other proceeding, unless specifically ordered by the Judge.
- 5.6 Disclosure of Conflicts of Interest.** No Mediator may serve in any Matter in violation of the standards regarding judicial disqualification set forth in 28 U.S.C. § 455.
- a. Disclosure by Attorney Mediators.** An attorney Mediator shall promptly determine all conflicts or potential conflicts in the manner prescribed by the California Rules of Professional Conduct and disclose same to all parties in writing. If the attorney Mediator’s firm has represented one or more of the parties, the Mediator shall promptly disclose that circumstance to all parties in writing.
 - b. Disclosure by Non-Attorney Mediators.** A non-attorney Mediator shall promptly determine all conflicts or potential conflicts in the same manner as a non-attorney would under the applicable rules pertaining to the non-attorney Mediator’s profession and disclose same to all parties in writing. If the Mediator’s firm has represented one or more of the parties, the Mediator shall promptly disclose that circumstance to all parties in writing.
 - c. Report of Conflict Issue by Parties.** A party who believes that the assigned Mediator and/or the Alternate Mediator has a conflict of interest shall promptly bring the issue to the attention of the Mediator and/or the Alternate Mediator, as applicable, and shall disclose same to all parties in writing.
 - d. Resolution of Conflict Issue by Judge.** If the Mediator and/or the Alternate Mediator does not withdraw from the assignment, the issue shall be brought to the attention of the Judge in writing by the Mediator, the Alternate Mediator, or any of the parties in the form attached as Official Form 704. The notice shall be filed with the Court, and copies of the notice shall be mailed to the Judge, all of the parties to the dispute, their counsel, if any, the Mediator, the Alternate Mediator, and the Mediation Program Administrator. The Judge will then take whatever action(s) he or she deems necessary and appropriate under the circumstances to resolve the conflict of interest issue.

6.0 CONFIDENTIALITY

- 6.1 In General.** No written or oral communication made, or any document presented, by any party, attorney, Mediator, Alternate Mediator or other participant in connection with or during any Mediation Conference, including the written Mediation Conference statements referred to in Paragraph 7.8 below, may be disclosed to anyone not involved in the Mediation, nor may any such communication be used in any pending or future proceeding in this Court or any other court. All such communications and documents shall be subject to all of the protections afforded by FRBP 7068. Such communication(s) may be disclosed, however, if all participants in the Mediation, including the Mediator, agree in writing to such disclosure. In addition, nothing contained herein shall be construed to prohibit parties from entering into written agreements resolving some or all of the Matter(s), or entering into or filing procedural or factual stipulations based on suggestions or agreements made in connection with a Mediation Program conference (“Mediation Conference”).
- 6.2 Non-Confidentiality of Otherwise Discoverable Evidence.** Notwithstanding the foregoing, nothing herein shall require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of a Mediation Conference.
- 6.3 Written Confidentiality Agreement Required.** The parties and the Mediator shall enter into a written confidentiality agreement in the form attached as Official Form 708.
- 6.4 Effect of Recorded Settlement Agreement on Confidentiality.** An oral agreement reached in the course of a Mediation Conference is not made inadmissible or protected from disclosure if all of the following conditions are satisfied:
- a. The oral agreement is recorded by a court reporter, tape recorder, or other reliable means of sound recording;
 - b. The terms of the oral agreement are recited on the record in the presence of the parties and the Mediator, and the parties express on the record that they agree to the terms recited;
 - c. The parties to the oral agreement expressly state on the record that the agreement is enforceable or binding or words to that effect; and
 - d. The recording is reduced to writing and the writing is signed by the parties and their counsel, if any, within 3 days after it is recorded.
- 6.5 Effect of Written Settlement Agreement on Confidentiality.** A written settlement agreement prepared in the course of a Mediation Conference is not made inadmissible or protected from disclosure if the agreement is signed by the settling parties and their counsel, if any, and either of the following conditions are satisfied:

- a. The agreement provides that it is admissible or subject to disclosure, or words to that effect; or
- b. The agreement provides that it is enforceable or binding or words to that effect.

6.6 Court Evaluation of Mediation Program Not Precluded by Confidentiality Provisions. Nothing contained herein shall be construed to prevent Mediators, parties, and their counsel, if any, from responding in absolute confidentiality to inquiries or surveys by persons authorized by the Court to evaluate the Mediation Program.

6.7 Confidentiality of Suggestions and Recommendations of Mediator. The Mediator shall have no obligation to make any written suggestions or recommendations but may, as a matter of discretion, provide counsel for the parties (or the parties, where proceeding in *pro per*), with a written settlement recommendation memorandum. No copy of any such memorandum shall be filed with the Court or made available, in whole or in part, directly or indirectly, to the Judge.

7.0 MEDIATION PROCEDURES

7.1 Selection of Mediator. Counsel for the parties (or the parties, where proceeding in *pro per*), are encouraged to contact the proposed Mediator and Alternate Mediator as soon as practicable (preferably before submitting the Mediation Order to the judge for approval, if possible) to determine the availability of the Mediator and Alternate Mediator to serve in the Matter.

7.2 Availability of Mediator. If the Mediator is **not** available to serve in the Matter, the Mediator shall notify the parties, the Alternate Mediator, and the Mediation Program Administrator of that unavailability by mail in the form attached as Official Form 703 as soon as possible, but no later than 7 days from the date of receipt of notification of appointment. **Upon notification of the Mediator's unavailability to serve, the Alternate Mediator shall automatically serve as the Mediator without the necessity for further court order.**

7.3 Availability of Alternate Mediator. If the Alternate Mediator is **not** available to serve in the Matter, the Alternate Mediator shall notify the parties and the Mediation Program Administrator of that unavailability by mail in the form attached as Official Form 703 as soon as possible, but no later than 7 days from the receipt of notification by the Mediator, pursuant to Paragraph 7.1 above, of the Mediator's unavailability to serve.

7.4 Selection of Successor Mediator.

- a. **By Parties.** Within 7 days of receipt of the Alternate Mediator's notification

of unavailability, the parties shall choose a mutually acceptable Successor Mediator and Successor Alternate Mediator by mail in the form attached as Official Form 702. (This is the same Official Form which is used to appoint the original Mediator and Alternate Mediator, as described in Paragraph 5.4 above. However, the word “Successor” **must** be inserted in the caption of the Mediation Order in front of the words “Mediator” and “Alternate Mediator”). The parties shall file such form with the Court and provide a courtesy copy to the Judge and the Mediation Program Administrator.

- b. **By Judge.** If the parties are unable to agree on a choice of Successor Mediator and Successor Alternate Mediator, they shall notify the Judge and the Mediation Program Administrator of their inability to do so by mail in the form attached as Official Form 704. In that event, the Judge shall appoint the Successor Mediator and Successor Alternate Mediator.
- c. **Use of Official Court Order Assigning Successor Mediator.** When the Successor Mediator and Successor Alternate Mediator have been chosen by the parties and/or appointed by the Judge, the Judge shall execute an order appointing the Successor Mediator and Successor Alternate Mediator in the form attached as Official Form 702. (This is the same Official Form which is used to appoint the original Mediator and Alternate Mediator, as described in Paragraph 5.4 above. However, the word “Successor” **must** be inserted in the caption of the Mediation Order in front of the words “Mediator” and “Alternate Mediator”).

7.5 Initial Telephonic Conference. Promptly, but no later than 14 days of receipt of notification of appointment, the Mediator shall conduct a telephonic conference with counsel for the parties (or the parties, where appearing in *pro per*) to discuss ((a) fixing a convenient date and place for the Mediation Conference, (b) the procedures that will be followed during the Mediation Conference, (c) who shall attend the Mediation Conference on behalf of each party, (d) what material or exhibits should be provided to the Mediator before the Mediation Conference, and (e) any issues or matters that it would be especially helpful to have the parties address in their written Mediation Conference Statements.

7.6 Mediation Conference Scheduling. Also within 14 days of receipt of notification of appointment, the Mediator shall give notice to the parties of the date, time and place for the Mediation Conference. The Mediation Conference shall commence no later than 30 days following the receipt of notification by the Mediator, and shall be held in a suitable neutral setting such as the office of the Mediator, or at a location convenient and agreeable to the parties and the Mediator.

- a. **Continuance of Mediation Conference.** The date for the Mediation Conference may be continued for a period not to exceed 30 days upon written stipulation between the Mediator and the parties. The stipulation need not be filed with the Court but the parties must mail a copy of it to the Judge and the Mediation Program Administrator.

- b. **Additional Continuance.** At the written request of the parties and for good cause shown, the Judge may, in his or her sole discretion, approve an additional continuance of the Mediation Conference beyond the period specified in Paragraph 7.6.a.

7.7 Mandatory Service of Mediation Order Prior to Mediation Conference. Prior to the Mediation Conference, the parties' counsel shall serve a copy of the Mediation Order on the Mediator, Alternate Mediator, Mediation Program Administrator, and all parties to the dispute.

7.8 Mediation Conference Statements. Each party shall submit a written Mediation Conference statement ("Mediation Statement") directly to the Mediator and to the parties to the Mediation Conference no less than 7 days prior to the date of the initial Mediation Conference, unless modified by the Mediator.

- a. **Format.** Mediation Statements shall not exceed 10 pages, excluding exhibits and attachments. Mediation Statements shall comply with all of the requirements of Court Manual Section 2-5, unless such compliance is excused by the Mediator.

- b. **Confidentiality.** Mediation Statements shall be subject to all of the protections afforded by the confidentiality provisions contained herein and by FRBP 7068.

- c. **Statements Not Filed with Court.** The Mediation Statements shall **not** be filed with the Court, and the Judge shall not have access to them. In addition, the phrase "**CONFIDENTIAL -- NOT TO BE FILED WITH THE COURT**" shall be typed on the first page of the Mediation Statements.

- d. **Mandatory Contents.** Mediation Statements must:

1. Identify the person(s), in addition to counsel, who will attend the Mediation Conference as representative(s) of the party, who have authority to make decisions;
2. Describe briefly the substance of the dispute;
3. Address any legal or factual issue(s) that might appreciably reduce the scope of the dispute or contribute significantly to settlement;
4. Identify the discovery that could contribute most to preparing the parties for meaningful discussions;
5. Set forth the history of past settlement discussions, including disclosure of any prior and any presently outstanding offers 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 dates for further status conferences, pretrial conferences, trial, or otherwise; and
 8. Attach copies of the document(s) from which the dispute has arisen (*e.g.*, contracts), or the document(s) whose availability would materially advance the purposes of the Mediation Conference.
- e. **Recommended Additional Contents.** Parties may identify in the Mediation Statements the person(s) connected to a party opponent (including a representative of a party opponent's insurance carrier) whose presence at the Mediation Conference would substantially improve the prospects for making the session productive. The fact that a person has been so identified shall not, by itself, result in an order compelling that person to attend the Mediation Conference.
- f. **Additional Mediation Statements for Mediator Only.** Each party may submit directly to the Mediator, for his or her eyes only, a separate confidential Mediation Statement describing any additional interests, considerations, or matters that the party would like the Mediator to understand before the Mediation Conference begins. Such Mediation Statements shall not exceed 10 pages, excluding exhibits and attachments, and shall comply with all of the requirements of Court Manual Section 2-5 unless such compliance is excused by the Mediator.

7.9 Mandatory Attendance at Mediation Conference.

- a. **By Counsel.** Counsel for each party who is primarily responsible for the Matter (or the party, where proceeding in *pro per*) shall personally attend the Mediation Conference and any adjourned session(s) of that conference, unless excused by the Mediator for cause. Counsel for each party shall come prepared to discuss all liability issues, all damage issues, and the position of the party relative to settlement, in detail and in good faith.
- b. **By Parties.** All individual parties, and representatives with authority to negotiate and to settle the Matter on behalf of parties other than individuals, shall personally attend the Mediation Conference and any adjourned session(s) of that conference, unless excused by the Mediator for cause. Each party shall come prepared to discuss all liability issues, all damage issues, and the position of the party relative to settlement, in detail and in good faith.
- c. **By Governmental Agencies.** A unit or an agency of government satisfies

this attendance requirement if represented by a person who has, to the greatest extent feasible, authority to settle, and who is knowledgeable about the facts of the case, the governmental unit's position, and the procedures and policies under which the governmental unit decides whether to accept proposed settlements.

- d. Telephonic Appearance.** Any party or lawyer who is excused by the Mediator from appearing in person at the Mediation Conference may be required by the Mediator to participate by telephone. This decision is within the Mediator's sole discretion.

7.10 Consequences of Failure to Attend Mediation Conference and Other Violations of Mediation Program Procedures. Willful failure to attend the Mediation Conference and/or other violations of the Mediation Program procedures shall be reported to the Judge by the Mediator by written notice in the form attached as Official Form 705, and may result in the imposition of sanctions by the Judge. The Mediator's notice shall be filed with the Court and copies of the notice shall be mailed to the Judge, all of the parties to the dispute, their counsel, if any, and the Mediation Program Administrator. The Judge will then take whatever action(s) he or she deems necessary and appropriate under the circumstances to resolve the issue of such willful failure to attend the Mediation Conference and/or other violations of the Mediation Program procedures.

7.11 Conduct at the Mediation Conference. The Mediation Conference shall proceed informally. Rules of evidence shall not apply. There shall be no formal examination or cross-examination of witnesses. The Mediator may conduct continued Mediation Conferences after the initial session where necessary. As appropriate, the Mediator may:

- a.** Permit each party (through counsel or otherwise) to make an oral presentation of its position;
- b.** Help the parties identify areas of agreement and, where feasible, enter into 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, through separate consultation or otherwise, in settling the dispute;
- e.** Estimate, where feasible, the likelihood of liability and the dollar range of damages;
- f.** Help the parties devise a plan for sharing the important information and/or conducting the key discovery that will assist 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 form of follow up to the Mediation Conference would contribute to the case development process or to settlement.

7.12 Suggestions and Recommendations of Mediator. If the Mediator makes any oral or written suggestions as to the advisability of a change in any party's position with respect to settlement, the attorney for that party shall promptly transmit that suggestion to the client. The Mediator shall have no obligation to make an written comments or recommendations, but may, as a matter of discretion, provide the parties with a written settlement recommendation memorandum. No copy of any such memorandum shall be filed with the Court or made available in whole or in part directly or indirectly, to the Judge.

8.0 PROCEDURE UPON COMPLETION OF MEDIATION CONFERENCE

8.1 Upon the conclusion of the Mediation Conference the following procedures shall be followed:

- a. **If Matter Settled.** If the parties have reached an agreement regarding the disposition of the Matter, the parties, with the advice of the Mediator, shall determine who shall prepare the writing to dispose of the Matter. If necessary, the parties may, with the Mediator's consent, continue the Mediation Conference to a date convenient for all parties and the Mediator. Where required, they shall promptly submit a fully executed settlement stipulation to the Judge for approval, and shall mail a copy to the Mediation Program Administrator. The Judge will accommodate parties who desire to place any resolution of a Matter on the record during or following the Mediation Conference.
- b. **Mediator's Certificate of Completion of Conference.** Within 14 days of 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 attached as Official Form 706, which shows whether there has been compliance with the Mediation Conference requirements and whether or not a settlement has been reached. Regardless of the outcome of the Mediation Conference, the Mediator will **not** provide the Judge with any details of the substance of the Mediation Conference.
- c. **Confidential Evaluation.** In order to assist the Mediation Program Administrator in compiling useful data to evaluate the Mediation Program and aid the Court in assessing the efforts of the members of the Panel, the Mediator shall provide a Mediation Conference Report to the Mediation Program Administrator in the form attached as Official Form 709. The Mediation Conference Report shall **not** be filed with the Court and the Judge shall not have access to it. In addition, the phrase "**CONFIDENTIAL -- NOT TO BE FILED WITH THE COURT**" shall be typed on the first page of the Mediation Conference Report.

9.0 PRO BONO AND COMPENSATED SERVICE OF MEDIATORS

9.1 Mandatory Pro Bono Service. The Mediator shall serve on a *pro bono* basis and shall not require compensation or reimbursement of expenses for the first full day of at least one Mediation Conference per quarter per year. If, at the conclusion of the first full day of the Mediation Conference, it is determined by the parties that

additional time will be both necessary and productive in order to complete the Mediation Conference, then:

- a. If the Mediator consents to continue to serve on a *pro bono* basis, the parties may agree to continue the Mediation Conference; or
- b. If the Mediator does not consent to continue to serve on a *pro bono* basis, the Mediator's compensation shall be on such terms as are satisfactory to the Mediator and the parties, and shall be subject to the prior approval of the Judge if the estate is to be charged with such expense.

9.2 Compensated Service Upon Completion of Mandatory Pro Bono Service. After a Mediator has concluded at least one *pro bono* mediation for the particular quarter, nothing herein shall prohibit the Mediator and the parties from agreeing that the Mediator may be compensated for services rendered by the Mediator. The amount of such compensation and the terms governing the amount and payment shall be as agreed upon among the parties. If applicable, any party or parties to the mediation may apply to the Judge for authorization to compensate the Mediator from property of the estate. Nothing in this provision, however, shall require any party to compensate a Mediator other than as may be mutually agreed upon among the parties and the Mediator.

10.0 IMPLEMENTATION

10.1 The Mediation Program became effective on July 1, 1995.

10.2 Judge Barry Russell is appointed the Mediation Program Administrator.