

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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In re :
ADOPTION OF PROCEDURE FOR :
MEDIATION OF ADVERSARY :
PROCEEDINGS AND CONTESTED :
MATTERS : Misc. No. 94-1001-14
_____ :

AND NOW, this 19th day of APRIL, 1994, upon our review of the volume of cases in the United States Bankruptcy Court for the Eastern District of Pennsylvania, and particularly because of the large number of contested matters and adversary proceedings being set for trial, this Court, upon consideration of the comments and recommendations of the Joint Alternative Dispute Resolution Committee of the Eastern District of Pennsylvania Bankruptcy Conference and of the Philadelphia Bar Association Business Bankruptcy Committee (the "ADR Committee"), in an effort to reduce the cost to litigants and expedite resolution of disputed issues, has decided to implement within this District a pilot program of Court-sponsored mediation in which litigants and counsel meet with an independent mediator.

Accordingly, it is hereby ORDERED that a program of Court-sponsored mediation be and is hereby established and shall be governed by the following rules and procedures:

1.0 REGISTER OF QUALIFIED MEDIATORS

1.1 Each person interested in serving as a mediator shall submit an application to the Chief Bankruptcy Judge for approval and set forth such person's qualifications in the same format as the attached Exhibit "A." The decision of the Chief

Judge to approve or disapprove an appointment as a mediator shall be final, nonappealable, and nonreviewable. The Clerk's Office shall establish and maintain a register of qualified attorneys who have volunteered to serve as mediators and who have been approved by the Chief Judge.

1.2 To qualify for service as a mediator under this order, an attorney shall certify to the Court that he or she meets the following minimum qualifications. The attorney shall be:

(a) Duly licensed to practice before the courts of the Commonwealth of Pennsylvania and the Federal Courts for the Eastern District of Pennsylvania;

(b) An experienced attorney who has served and substantially participated in a sufficient number of bankruptcy matters as the attorney of record for the debtor, debtor-in-possession, trustee, or creditors' committee from commencement through conclusion (i.e., confirmation of a plan or discharge) or as attorney of record for a party in interest in an adversary proceeding or contested matter from commencement through completion (i.e., judgment, order or stipulated settlement).

1.3 Alternative, appropriate qualifications may be offered by non-bankruptcy attorneys, law professors, or other individuals who desire to serve as mediators.

1.4 Persons selected by the Court to serve as mediators shall be appropriately trained.

2.0 LIST OF QUALIFIED MEDIATORS

2.1 A list of qualified mediators shall be prepared by the Clerk's Office no later than 15 days prior to the beginning of each six month period, i.e., a list shall be submitted by December 15 for the period January 1 through June 30; and by June 15 for the period July 1 through December 30. The first list shall be submitted by June 15, 1994, and remain in effect through December 31, 1994.

2.2 The list of qualified mediators shall be reviewed and approved by the Chief Bankruptcy Judge, and, thereafter shall be posted in the Clerk's Offices in Reading and Philadelphia and made available to litigants upon request.

3.0 ASSIGNMENT OF A MATTER TO MEDIATION

3.1 A case that is not subject to compulsory arbitration according to Local Rule may be assigned to mediation by a Judge of this Court sua sponte or upon the request of one or more of the parties. A party to the matter shall constitute one of the actual parties in the subject litigation, unless the Court or duly appointed mediator believes that additional parties would be either helpful or necessary to successful mediation, whereupon the additional parties could be requested to take part in the mediation. Any party opposing mediation may so advise the Court and the Judge will determine whether such opposition should be sustained.

3.2 Upon the assignment of a matter to mediation, the Judge shall designate, upon consultation with the parties, a mediator from the list of qualified mediators.

3.3 The Court's order assigning a matter to mediation shall be in the form attached hereto as Exhibit "B." The original order shall be retained in the Court's file, one copy shall be mailed to the mediator, and one copy shall be mailed to each party.

3.4 Within five (5) days of receiving a copy of the referral order, the mediator shall determine whether he or she is disqualified from acting as a mediator in the matter for any reason, including but not limited to, an actual or potential conflict of interest. If the mediator determines he or she is disqualified, the mediator shall promptly furnish a notice of disqualification to the Judge and the parties, whereupon an alternate mediator shall be designated by the Judge as in Paragraphs 3.2 and 3.3, above, and in this Paragraph 3.4. If the mediator is not disqualified and accepts the mediation assignment, the mediator shall so notify the Clerk's Office.

3.5 The Clerk's Office shall monitor the designations of mediators to ensure that no mediators are overutilized.

3.6 No person who has a present conflict of interest in a dispute may be designated as a mediator. Subsequent to a mediation under this Order, a mediator's firm shall not be disqualified from appointment as a professional in the proceeding or from representation of another party in interest, solely

because of the service as a mediator of one of its attorneys, provided, however, that if the person who served as mediator has received material information that could advance a third party to the detriment of either party to the mediation, such person shall not communicate with any member or employee of his or her firm about any aspect of the mediation or the information obtained in the mediation conference, i.e., an appropriate screening mechanism must be established and maintained surrounding and isolating the mediator.

4.0 MEDIATION PROCEDURE

4.1 Mediation shall not delay any pending trial or hearing unless the Court and all parties in interest consent. Mediation conferences shall be held as promptly as possible so that resolution of any dispute is not delayed.

4.2 The mediator shall fix a time and place for the mediation conference, and all adjourned sessions, which shall be reasonably convenient for the mediator and the parties, and shall give the parties at least 15 days' written notice of the initial conference. The conference shall begin as early as practicable, and in any event not more than 30 days after the mediator has been notified of his or her selection, unless truly exceptional circumstances prevent beginning the conference within such time or fairness to the parties requires a continuance, in which event the mediator may, with the consent of all the parties, continue the conference. The mediator shall immediately advise the Court by letter of the delay and the date of the initial conference.

In no event shall the date from notification of the mediator's appointment to the initial conference extend more than 60 days. The mediator may, with the consent of all parties, schedule additional mediation conferences at a time, date, and place reasonably convenient to all parties and the mediator.

4.3 Each party shall provide the mediator with a case information submission (the "Submission") consisting of (a) a motion, or reply) setting forth such party's cause of action or defenses; (b) a list of all witnesses that such party would call at trial, and a summary of their expected testimony; (c) a copy of the principal exhibits upon which such party would rely at trial; and (d) a written statement, not to exceed three (3) pages, of the principal rules of law upon which such party relies. If an exhibit is voluminous, a summary may be provided instead. The submission of a summary of expected testimony shall constitute a certification by the attorney that he or she, or other counsel of record for the party, has personally spoken with the witness or has reviewed a written statement of the witness, deposition transcript, or interrogatory answers signed by the witness, and believes in good faith that the witness will testify substantially in accordance with the summary. The Submission shall be provided to the mediator and served on all other parties not less than seven (7) calendar days prior to the date noticed for the mediation conference. The Submission shall not be filed with the Court, shall not be construed as a pleading, shall not satisfy any discovery obligation, and shall not limit the

evidence the parties can use at trial if mediation does not result in a settlement. No rebuttal or supplemental submissions shall be permitted.

4.4 The attorney who is primarily responsible for each party's case shall personally attend the mediation conference and any adjourned sessions of that conference. Local counsel need not appear if lead counsel is present. The attorney for each party shall be prepared to discuss the following matters in detail and in good faith:

- (a) All liability issues;
- (b) All damage issues; and
- (c) The position of his/her client relative to settlement.

4.5 All individual parties who reside within the counties comprising the jurisdiction of the Eastern District of Pennsylvania shall personally attend the mediation conference unless excused by the mediator for cause. Parties, other than individuals, whose principal place of business is located in such area shall have a representative attend with authority to negotiate settlement. Individuals and other parties who neither reside in nor have their principal place of business located in the Eastern District of Pennsylvania shall be available by telephone during the mediation conference. The mediator shall decide when the parties shall be present in the conference room.

4.6 Willful failure to attend the mediation conference shall be reported to the Court by the mediator and may result in the imposition of sanctions by the Court.

4.7 All proceedings or writings of the mediation conference, including the Submission, mediator's settlement recommendation, and any statement made by any party, attorney, or other participant shall in all respects be privileged and confidential and shall not be reported, recorded, placed in evidence, made known to the trial court or jury, or construed for any purpose as an admission against interest. No party shall be bound by any statement or act said or done at the conference unless a settlement is reached, in which event the agreement upon a settlement shall be reduced to writing and shall be binding upon all parties to that agreement. Federal Rule of Evidence 408 applies herein. No recordation of the mediation conference is permitted.

4.8 (a) If the mediator makes any oral or written suggestions to counsel about 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 his or her client.

(b) The mediator shall have no obligation to make any written comments or recommendations but, in his or her discretion, may provide the attorneys for the parties with a written settlement recommendation memorandum. No copy of any such memorandum shall be filed with the Clerk or made available

in whole or in part, directly or indirectly, either to the Court or the jury.

(c) The attorneys for the parties shall forward copies of any such memorandum to their clients and shall advise them of the fact that the mediator is a qualified attorney selected by the Court, who is acting as an impartial mediator in an attempt to help the parties reach an agreement and avoid the time, expense, and uncertainty of trial.

4.9 The mediator shall have the duty and authority to establish the time schedule for mediation activities, including a schedule for the parties to act upon the mediator's recommendation, having in mind that the purpose of this order is prompt dispute resolution.

5.0 PROCEDURE UPON COMPLETION OF MEDIATION SESSION

5.1 Upon the conclusion of the mediation conference, the following procedure shall be followed:

(a) If the parties have reached an agreement regarding disposition of the proceeding, the parties shall determine who shall (1) prepare the stipulation to dismiss or enter judgment on stipulated terms, and (2) submit the fully-executed stipulation to the Bankruptcy Court for approval within thirty (30) days; and

(b) The mediator shall file with the Clerk within 10 days after the mediation is concluded, a certificate in the form attached as Exhibit "C" showing compliance with the

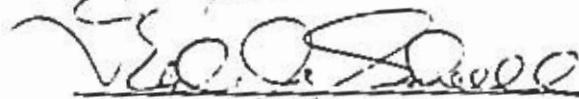
mediation requirements of this order, and whether a settlement has been reached.

5.2 All those who participate in the mediation process shall reasonably cooperate with any individual or group working with this Court in attempting to evaluate this pilot mediation program.

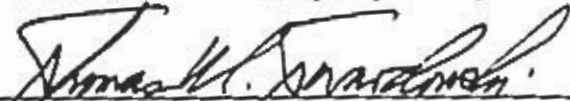
6.0 EFFECTIVE DATE

The foregoing Procedure for Mediation of Adversary Proceedings and Contested Matters shall become effective on May 2, 1994, and shall apply to all adversary proceedings and contested matters then pending or filed on or after such date.

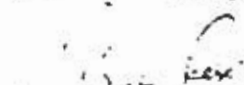
BY THE COURT:



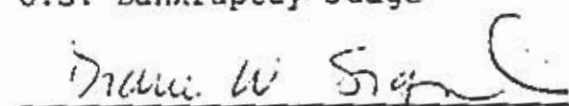
DAVID A. SCHOLL
Chief U.S. Bankruptcy Judge



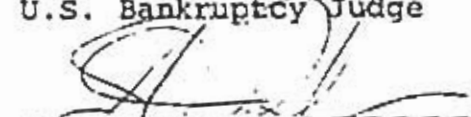
THOMAS M. TWARDOWSKI
U.S. Bankruptcy Judge



BRUCE FOX
U.S. Bankruptcy Judge



DIANE WEISS SIGMUND
U.S. Bankruptcy Judge



STEVEN RASLAVICH
U.S. Bankruptcy Judge