

Guidelines, Policies and Procedures of USBA Mediation Division

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1.0 INTRODUCTION

Litigation in bankruptcy cases may frequently impose significant economic as well as other burdens on parties and often delays resolution of disputes. Alternative dispute resolution procedures (“ADR”) have the potential to reduce delay, cost, stress, and other concerns associated with litigation. Mediation, in particular, allows parties more active involvement in determining the resolution of their disputes.

2.0 ESTABLISHMENT OF MEDIATION DIVISION

The U.S. Bankruptcy Attorney for the Southern District of Alabama will begin offering limited mediation services in Mobile beginning November 1, 2015 through a BA Mediation Division. Pursuant to a mediation program commenced in the Northern District of Alabama, a Mediation Division has been established as a formal practice section within the U.S. Bankruptcy Administrator (“USBA”) organization. The BA Mediation Division is not a replacement for any “panel of neutrals” or other entity established by the Bankruptcy Court or District Court to provide ADR services.

3.0 GUIDELINES POLICIES AND PROCEDURES

This section prescribes guidelines, policies and procedures which form a basis for operating the BA Mediation Division. These guidelines, policies and procedures are promulgated in

conformance, except as otherwise modified herein, with the Order Adopting Alternative Dispute Resolution Plan adopted by the U.S. District Court for the Southern District of Alabama on February 8, 1995, and as may be set forth in any Local Rule adopted by the U.S. Bankruptcy Court for the Southern District of Alabama from time to time (the “Local Rules”). Should the guidelines, policies, and procedures set out herein conflict with the Local Rules, the provisions of these Guidelines and Procedures shall control.

4.1 CASES ELIGIBLE FOR MEDIATION BY THE BA MEDIATION DIVISION

Most controversies arising in an adversary proceeding, contested matter, or other dispute in a bankruptcy case may be mediated by the BA Mediation Division. Matters which are **not eligible** are those which involve or concern:

- a. employment and compensation of professionals;
- b. compensation of trustees and examiners;
- c. objections to discharge under 11 USC Section 727;
- d. matters involving criminal issues, contempt, or other types of sanctions;
- e. adequacy of disclosure statements;
- f. confirmation of a plan;
- g. any matter which the presiding judge may decide to exclude from mediation by the BA Mediation Division;
- h. any issue upon which the USBA has taken a position;
- i. any matter in which the participation by the USBA or his designee as mediator, would constitute an actual conflict of interest; and,
- j. the USBA or his designee reserves the authority to decline to participate mediator for any reason, within the discretion of the USBA. See Section 12.

5.0 EVALUATION OF CASES FOR POTENTIAL REFERRAL TO THE BA MEDIATION DIVISION

The Court may conduct an ADR evaluation conference during the early stages of a case, proceeding, or matter to determine whether it may be appropriate for ADR. After consultation with the parties, the Court may recommend or elect to order the parties to submit to ADR in accordance with the procedures outlined herein. In addition, the parties themselves may request a referral to the BA Mediation Division.

At various stages of a bankruptcy case, proceeding, or matter, BA Mediators may inquire of the parties/litigants whether mediation would be a useful tool in resolving the case, proceeding, or matter. If the parties/litigants respond affirmatively, the BA Mediator shall provide the parties/litigants with copies of Local Rules and the BA Mediation Guidelines.

6.1 REFERRAL OF MATTERS TO THE BA MEDIATION DIVISION

The Court may refer to the BA Mediation Division any case, proceeding, or matter deemed relevant and appropriate for mediation. The Court may make such referral with or without a hearing as the Court may deem appropriate. Such referral may be made by the Court:

- a. on its own motion;
- b. upon written stipulation of the parties to the matter;
- c. upon oral motion of the parties or any party in interest at any hearing or status conference; or,
- d. on motion of a single party to the matter.

Upon request by a party or the BA Mediator, 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.

Referral of a case for mediation by the BA Mediation Division shall be made by Court order. A copy of said order shall be transmitted to or served on the Bankruptcy Administrator.

7.0 EFFECT OF MEDIATION BY THE BA MEDIATION DIVISION ON PENDING MATTERS

Upon the entry of an order referring a case, proceeding, or matter to mediation, proceedings in the dispute in mediation will be stayed as to the parties in mediation for such time period as may be set by the Court.

8.0 OBJECTION TO MEDIATION

A party may object to the referral of a case, proceeding, or matter for mediation by the BA Mediator, by filing a written request for reconsideration, for good cause shown, within 10 days of the date of the Court's order. Mediation processes will be stayed pending decision on the request for reconsideration, unless otherwise directed by the Court.

9.0 ROLE OF THE BANKRUPTCY ADMINISTRATOR

The Bankruptcy Administrator shall serve as the primary mediator of the BA Mediation Division. The Bankruptcy Administrator is also charged with organizing, coordinating, developing and implementing the policies, procedures and practices of the Mediation Division. Although the Bankruptcy Administrator serves as primary mediator, the Bankruptcy Administrator may assign the function of mediator to his designee, in accordance with the guidelines and qualifications set out herein.

10.1 BA MEDIATOR QUALIFICATION REQUIREMENTS

A person serving as mediator in the BA Mediation Division must:

- a. be an attorney employed by the USBA for the Southern District of Alabama;

- b. have five (5) years of predominantly bankruptcy practice experience;
- c. have received registration as a trained mediator by the Alabama Center for Dispute Resolution.
- d. maintain membership on the Alabama Center for Dispute Resolution State Court Mediator Roster.
- e. abide by the Alabama Code of Ethics for Mediators; and,
- f. be admitted to practice law in the federal courts in the Southern District of Alabama.

11.0 ANNUAL REPORTING OF QUALIFICATIONS

Any person serving as a mediator in the BA Mediation Division shall reaffirm his or her qualifications under this section in writing to the Bankruptcy Administrator.

12.1 NEUTRALITY OF MEDIATORS IN THE BA MEDIATION DIVISION

Absent a Court order to the contrary, within fifteen (15) days of receiving an order referring a case, proceeding, or matter to the BA Mediation Division for mediation, the BA Mediator shall undertake to ascertain to the best of his or her ability knowing only the facts at the time of the referral to mediation:

- a. whether mediation of the referred case creates or constitutes an actual conflict of interest for the USBA; and,
- b. whether the mediator is impartial and free of conflicts in accordance with Standard 5 of the Alabama Code of Ethics for Mediators.

If a conflict is discovered, the BA Mediator shall forthwith report in writing to the Court that the mediator is ineligible to serve, and nothing more. In such event, the parties/litigants may proceed with mediation with a non-BA Mediator in accordance with Local Rules.

If at any time during the process of mediation, the BA Mediator becomes aware of, or a party raises an issue concerning the mediator's neutrality based on either an interest in the case, proceeding, or matter or a relationship or affiliation with one of the parties, or any other matter, the mediation shall cease and terminate and the BA Mediator shall forthwith report in writing to the referring Court his or her withdrawal and nothing more. In such event, the parties/litigants

may proceed with mediation with a non-BA Mediator in accordance with Local Rules.

The BA Mediator may withdraw at any time if he or she has a concern or believes that the parties/litigants have a concern regarding his or her neutrality. In such instance, the BA Mediator shall cease the mediation and forthwith report in writing his or her withdrawal, and nothing more, to the referring Court. Upon withdrawal of the BA Mediator, the parties/litigants may proceed with mediation with a non-BA Mediator in accordance with Local Rules.

To assure the neutrality of the USBA and the BA Mediator, and to avoid, at the earliest possible time, any conflict or concern regarding the mediator's neutrality or the appropriateness of the matter for mediation, the BA Mediator shall inquire at the initiation of the mediation conference whether:

- a. any party/litigant or attorney representing a party/litigant anticipates disclosure or is concerned about inadvertent disclosure of information which the party/litigant or attorney does not want the BA Mediator to know, in light of the BA Mediator's status as a USBA employee.
- b. any party/litigant or attorney representing a party/litigant believes the matter is not appropriate for mediation by a BA Mediator.

If such concern is raised, the mediation shall cease and the BA Mediator shall withdraw from the mediation and report in writing his or her withdrawal to the Court, and nothing more. Upon

withdrawal of the BA Mediator, the parties/litigants may proceed with mediation with a non-BA Mediator in accordance with Local Rules.

BECAUSE THE USBA HAS CERTAIN ASSIGNED DUTIES WITH RESPECT TO THE ADMINISTRATION OF BANKRUPTCY CASES, ALL LITIGANTS/PARTIES TO A PROPOSED MEDIATION ARE REQUIRED TO EXECUTE A WAIVER OF CONFIDENTIALITY, IN FAVOR ONLY OF THE USBA. THE WAIVER SHALL NOT INURE TO THE BENEFIT OF ANY OTHER LITIGANT/PARTY TO THE MEDIATION, AND SHALL OPERATE ONLY TO THE EXTENT NECESSARY TO PERMIT THE USBA TO PERFORM ITS ASSIGNED DUTIES AND FUNCTIONS.

13.0 WITHDRAWAL OF BA MEDIATOR

Should a BA Mediator withdraw for any reason, he or she shall not discuss with any replacement or substitute mediator the issue that was the subject of the mediation, the basis for his or her withdrawal, or any matters discussed at mediation.

14.0 COMPENSATION

BA Mediators are prohibited from accepting compensation for serving as a mediator, other than the compensation provided to them as USBA employees. Parties to the mediation may be requested to bear miscellaneous expenses of the mediation, such as copying, meals, or other items, if requested by the BA mediator.

15.0 BA MEDIATOR'S LIABILITY

There shall be no liability on the part of, and no cause of action shall exist or be recognized against the USBA or any person who is appointed and serves as a BA Mediator.

16.0 TIME WITHIN WHICH TO CONDUCT MEDIATION

The Court order referring the case, proceeding, or matter to mediation may contain a date by which the mediation must be concluded. Absent the order containing a date certain, it is anticipated that the mediation will occur within forty-five (45) days of the date of the order.

The BA Mediator or any party to the mediation may request the Court to extend the deadline within which to mediate.

It shall be the responsibility of each of the parties/litigants to promptly contact the Bankruptcy Administrator (or such designee as he may direct) to schedule a time for the mediation conference. Written notice shall be given to all counsel and *pro se* parties by the BA Mediator or his designee of the time and place of the mediation. The BA Mediator or his designee will, in writing, briefly explain the BA Mediation Division and request that the parties/litigants provide a mediation position statement in accordance with paragraph 18.0 herein.

17.0 PLACE OF MEDIATION CONFERENCE

The BA Mediator or his designee shall determine the place for the mediation conference, taking into account the location of the majority of the litigants, any physical limitations of the parties, economy of the location of the mediation, or any other relevant factors.

Mediation will usually be conducted at the United States District Courthouse, 155 St. Joseph St., Ste. 205, Mobile, Alabama, 36602-3914.

18.1 SUBMISSION OF MEDIATION MATERIALS

At least five (5) days before the mediation conference, or less if agreed to by the BA Mediator, the parties shall submit only to the BA Mediator:

- a. copies of relevant pleadings and motions;
- b. a short memorandum stating the legal or factual positions of each party respecting the issues in dispute; and,
- c. a response to any written questions the BA mediator may have sent the parties/litigants;
- d. identity of the person(s), in addition to counsel, who will attend the mediation as representative of the party with decision making authority;
- e. a statement addressing whether there are legal or factual issues whose early resolution might appreciably reduce the scope of the dispute or contribute significantly to settlement;
- f. a statement setting forth the history of past settlement discussions, including disclosure of prior and any presently outstanding offers and demands;
- g. an estimate of the cost and time to be expended for further discovery, pretrial motions, expert witnesses, and trial; and,
- h. identification of presently scheduled dates for further status conferences, pretrial conferences, trial or otherwise.

**WRITTEN MEDIATION STATEMENTS SHALL NOT BE FILED WITH THE COURT
NOR PROVIDED TO THE JUDGE REFERRING THE CASE, PROCEEDING, OR
MATTER AND THE COURT SHALL NOT HAVE ACCESS TO THEM. WRITTEN
MEDIATION STATEMENTS SHALL NOT BE SERVED ON OTHER PARTIES OR
LITIGANTS.**

19.0 ATTENDANCE AT MEDIATION CONFERENCE

The attorney primarily responsible for each party's case, proceeding, or matter must personally attend the mediation conference and must be prepared and authorized to discuss all relevant issues including settlement. The parties, including *pro se* parties, must also be present, except when a party is other than an individual or when a party's interest is being represented by an insurance company, an authorized representative of such party of insurance company, with full authority to settle, must attend.

Willful failure of a party to attend the mediation conference may be reported by the BA Mediator to the Court which may then impose appropriate sanctions. Mediation sessions will be private. Persons other than the parties and their representatives may attend only with the permission of all parties and with the consent of the BA Mediator.

20.0 METHOD/MANNER OF MEDIATION

The BA Mediator shall determine how the mediation will be conducted.

21.0 PROTECTION OF INFORMATION DISCLOSED AT MEDIATION

No record will be made of the mediation proceedings. Additionally, the BA 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 the BA Mediator while serving in such capacity.

The BA Mediator shall not testify or be compelled to testify in regard to the mediation in connection with any arbitral, judicial, or other proceeding. The BA Mediator shall not be a necessary party in any proceedings relating to the mediation. The BA Mediator is not required to prepare written comments or recommendations to the parties.

Except as provided by the Waiver of Confidentiality referenced in Section 12, *infra*, the BA Mediator is 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 or the BA Mediator 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 BA 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.

22.1 CONCLUSION OF THE MEDIATION PROCESS

The BA Mediator will conclude the mediation process when:

- a. a settlement is reached;
- b. the mediator concludes, and informs the parties, that further mediation efforts would not be useful; or,
- c. one of the parties informs the mediator that settlement is not possible.

23.0 REPORT TO THE REFERRING COURT

As soon as is practicable after the mediation conference, the BA Mediator shall file with the Court and serve on the parties a report indicating whether a settlement has been reached.

Regardless of the outcome of the mediation conference, the BA Mediator shall not provide the Court with any details of the substance of the mediation conference.

24.0 PREPARATION OF ORDERS

If a settlement is reached at mediation, a party designated by the BA Mediator or agreed to by the parties/litigants shall submit a fully executed stipulation and/or Motion to Approve Settlement in accordance with Bankruptcy Rules of Procedure 2002 and 4001. If the designated or agreed upon party fails to file the executed stipulation and/or Motion to Approve Settlement, the referring Court may impose appropriate sanctions.

25.0 TERMINATION OF MEDIATION

Upon the filing of the BA Mediator's report in accordance with Section 23.0 herein or the entry of an order withdrawing the matter from mediation pursuant to Section 26.0 herein, the mediation will be deemed terminated, and the BA Mediator will be excused and relieved from further responsibilities in the matter without further Court order. If the mediation does not result in a resolution of all of the disputes in the referred case, proceeding, or matter, the case, proceeding, or matter shall proceed to trial or hearing pursuant to the referring Court's scheduling orders.

26.0 WITHDRAWAL OF MATTER FROM MEDIATION

Any case, proceeding, or matter referred to mediation pursuant to the provisions herein may be withdrawn from mediation by the referring Court at any time and for any reason, within the sound discretion of the Court.

27.0 DESTRUCTION OF MEDIATION MATERIALS

The BA Mediator is authorized to destroy all mediation materials received, generated, or related to the referred mediation.

28.0 MODIFICATION OF GUIDELINES, POLICIES, AND PROCEDURES

The guidelines, policies and procedures contained herein may be modified from time to time.

