

SAMPLE COURT ADR RULE

FEDERAL

U.S. Bankruptcy Court

District of Hawaii

[Rule 9019.2](#) and [Guidelines for Alternative Dispute Resolution](#)

Statewide or local: Local rule

Process: Mediation

Eligible cases: Any adversary proceeding pending before the court.

Summary:

Rule 9019.2 establishes the administration of the program, provides for confidentiality, provides for the immunity of the mediators, and establishes the authority for the Guidelines. Under the Guidelines, the parties may request assignment to mediation by order of the court. The parties may indicate a preference for a specific mediator; however, the court appoints the mediator. Mediators are approved to be on the roster and are compensated by the parties for any time in session beyond the first four hours.

What is good about this rule:

- *Well-written:* Written in plain, easily understood English.
- *Thoroughness:* It covers everything from administration to mediator qualifications to what should happen in the mediation.
- *Mediator qualifications allow for mediators to be either attorneys or other professionals:* This indicates that the court recognizes individuals other than lawyers are qualified to mediate bankruptcy issues because of their knowledge, skills and abilities, and similarly recognizes that parties may want to select such individuals to mediate their cases.
- *Strong administration section:* It explains the role of the administrator and the Mediation Committee. (A three-person panel nominated by the Bankruptcy Law Section of the Hawaii State Bar Association and approved by the court, this committee has extensive program oversight responsibilities.) Clearly laying out these roles is good for court management.
- *Good section on mediator's role and actions in mediation:* These are clearly defined and explicit, which both creates a standard level of quality in service and molds the expectations of the participants regarding the mediation.
- *Provides for immunity of mediators:* By providing mediators with the same protection as any other person acting in a quasi-judicial capacity, the mediators can perform their duties without fear of liability for doing their job. Quasi-judicial immunity makes

Additional points to note:

- *Parties have a duty to consider mediation:* Many jurisdictions create such a duty in an effort to enhance the use of ADR. However, with no enforcement mechanism, compliance can be problematic.

- *Makes explicit what must be in the confidential statement to the mediator:* This ensures the mediator gets the proper information. Further, some information that must be provided, such as the estimated cost and time that would be expended in further litigation, gets counsel to begin considering questions that will arise in the mediation.
- *Mediators may be evaluated on their performance:* The rule mentions the possibility of evaluating the mediators. This is a great first step to monitoring the quality of the mediators, which most rules do not address. If using this provision as a model, it is important that it be followed up by establishing procedures for evaluating the mediators.
- *Mediators are not compensated for the first four hours of mediation.* After that, the parties can agree to compensate the mediator or the mediation is terminated. Such a rule may lead more parties to mediate and for those parties to mediate more time-effectively. Arguments against such a provision include that it is unfair to the mediator to be the only unpaid professional in the room, the possibility that this could lead the parties to feel pressured to reach agreement within the four hour pro bono period, and the possible skewing of parties' expectations of mediation as a process that should only take a few hours to effectively resolve any case.

Further Reading:

Qualifications

[National Standards for Court-Connected Mediation Programs](#), Center for Dispute Settlement

Ethics

[National Standards for Court-Connected Mediation Programs](#), Center for Dispute Settlement

[Model Standards of Conduct for Mediators](#), American Arbitration Association, American Bar Association, Association for Conflict Resolution

Training

[Guidelines for Implementation of Qualifications Standards for Neutrals](#), Massachusetts Supreme Judicial Court Standing Committee on Dispute Resolution

Monitoring and Evaluation

[Monitoring and Evaluating Court-Based Dispute Resolution Programs: A Guide for Judges and Court Managers](#), National Center for State Courts, 1997.

**U.S. Bankruptcy Court
District of Hawaii**

LBR 9019-2. ALTERNATIVE DISPUTE RESOLUTION

(a) Purpose and Scope. To facilitate the voluntary resolution of adversary proceedings and contested matters, the Bankruptcy Court is authorized to establish guidelines for court-sponsored Bankruptcy Alternative Dispute Resolution (“BDR”) procedures. This rule does not preclude parties from participating in the alternative dispute resolution (“ADR”) procedures implemented under LR 16.11 or in any other ADR process.

(b) Program Administration.

(1) Bankruptcy Mediation Committee. The court may establish a Bankruptcy Mediation Committee to formulate guidelines for BDR procedures and the selection, training and evaluation of individuals to serve on a Mediator Panel.

(2) BDR Administrator. The court may appoint a BDR Administrator to administer the BDR program and to serve as liaison between the court and the Bankruptcy Mediation Committee.

(3) Bankruptcy Mediator Panel. The BDR Administrator shall publish and maintain a list of qualified individuals approved by the court to serve as members of a Bankruptcy Mediator Panel. Individuals selected to serve on the panel may be required to provide a minimum amount of service without compensation.

(c) Confidentiality.

(1) Except as otherwise provided by this rule or applicable law, any and all communications made in connection with any mediation under this rule shall be subject to Rule 408 of the Federal Rules of Evidence.

(2) Mediators and parties shall not communicate with the court about the substance of any position, offer or other matter in the mediation without the consent of all parties, unless such disclosure is required to enforce a settlement agreement or to provide evidence in an attorney disciplinary proceeding, but only to the extent required to accomplish that purpose.

(d) Immunity of Mediators. All persons serving as mediators under this rule shall be deemed to be performing quasi-judicial functions and shall be entitled to all of the privileges, immunities and protections that the applicable law accords to persons serving in such capacity.

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF HAWAII**

GUIDELINES FOR BANKRUPTCY ALTERNATIVE DISPUTE RESOLUTION

1. **Purpose and Scope.** Pursuant to the General Order on Bankruptcy Alternative Dispute Resolution, use of bankruptcy alternative dispute resolution (“BDR”) is authorized in adversary proceedings and contested matters in cases pending before the United States Bankruptcy Court for the District of Hawaii. These guidelines, established in consultation with the Bankruptcy Law Section of the Hawaii State Bar Association, implement a voluntary, court-sponsored mediation process as a complement to the alternative dispute resolution (“ADR”) program to be administered by the District Court. These guidelines do not preclude parties in a bankruptcy proceeding or case from participating in any other court-sponsored or private ADR program. By agreement of the parties, in addition to mediation, the BDR process may include facilitation, early neutral evaluation or other form of alternative dispute resolution.
2. **Duty to Consider BDR.** Parties to adversary proceedings and contested matters shall consider mediation under these guidelines and other ADR processes.

PROGRAM ADMINISTRATION

3. **BDR Administrator.** A staff member of the Bankruptcy Court will be appointed to serve as BDR Administrator. The responsibilities of the BDR Administrator include: (i) acting as primary liaison between the court and Bankruptcy Mediation Committee on matters of policy, program design and evaluation, education, training and administration; (ii) educating litigants, lawyers, judges and court staff about the BDR program and procedures; (iii) ensuring that appropriate systems are maintained for recruiting, screening and training mediators; and (iv) maintaining records for evaluating the BDR program.
4. **Bankruptcy Mediation Committee.** The court will establish a Bankruptcy Mediation Committee responsible for making recommendations to the BDR Administrator for implementing, administering, and overseeing the BDR program, as well as evaluating mediator performance and the effectiveness of the procedures covered by these guidelines. The Mediation Committee shall be comprised of 3 members nominated by the Bankruptcy Law Section of the Hawaii State Bar Association and approved by the court. Upon implementation of the BDR program, one member will serve a 1-year term, one member will serve a 2-year term, and one member will serve a 3-year term, subject to resignation or removal. Each member thereafter will be selected to serve a 3-year term. Committee members are eligible for reappointment.

BANKRUPTCY MEDIATOR PANEL

5. **Bankruptcy Mediator Panel.** The BDR Administrator will publish and maintain a list of qualified professionals who have been recommended by the Mediation Committee and approved by the court for service on the Bankruptcy Mediator Panel. The list will be available at the Clerk’s office and the court’s website: www.hib.uscourts.gov.

6. **Application to Serve on Panel.** An application to serve on the Mediator Panel shall be submitted to the BDR Administrator using a court-approved form. The BDR Administrator will submit the application to the Mediation Committee for review and recommendation.

7. **Qualifications.** To qualify for service on the Mediator Panel, an applicant must be willing to serve as a mediator for one 4-hour BDR conference per calendar quarter, subject only to unavailability due to conflicts, personal or professional commitments, or other matters which would make such service inappropriate. An applicant who is an attorney must certify that the applicant is and has been a member in good standing of the bar of any state or the District of Columbia for at least 5 years and is a member in good standing of the bar of the United States District Court for the District of Hawaii. A non-attorney applicant shall submit a statement of professional qualifications, experience, training and other information demonstrating why, in the applicant's opinion, the applicant is qualified to serve as a mediator.

8. **Training.** Prior to serving in any mediation under this program, each Mediator Panel member may be required to complete training approved by the court.

9. **Evaluation.** Mediators may be evaluated on their performance using standards formulated by the Mediation Committee and approved by the court.

10. **Immunity of Mediators.** All persons serving as mediators under these guidelines shall be deemed to be performing quasi-judicial functions and shall be entitled to all privileges, immunities and protections that applicable law accords to persons serving in such capacity.

11. **Compensation.** No fees may be charged for telephonic conferences and preparation time prior to the first BDR conference, and for the first 4 hours of BDR conference time. If the matter is not resolved after the first 4 hours of conference time, the mediator is authorized to request compensation at the mediator's regular hourly rate. If there is no agreement as to compensation of the mediator and if compensation is not waived by the mediator, the BDR process will be deemed concluded. If a debtor-in-possession or trustee, on behalf of the bankruptcy estate, and not individually, is a party, compensation of the mediator is subject to 11 U.S.C. §§ 327 & 330.

ASSIGNMENT TO BDR AND APPOINTMENT OF MEDIATOR

12. **Request for BDR.** Parties may request the assignment of a dispute to the BDR program by submitting to the BDR Administrator, and filing with the court, a written request using the court-approved form, executed by all parties to the disputed matter. The request should include the names, addresses, telephone and fax numbers of all counsel representing parties and any pro se party. The parties may indicate a preference for a mediator in their request.

13. **Assignment to BDR Program.** Upon the written request by the parties, a disputed matter may be assigned to the BDR program by order of the court. The order also will appoint a mediator. In the court's discretion, discovery may be stayed or discovery deadlines continued, but any trial date will remain on calendar.

14. **Availability of Mediator.** Promptly after appointment, a mediator who is not available to serve in the matter for reasons of conflict or otherwise shall notify the BDR Administrator and the parties of that unavailability. In the event that the appointed mediator is unavailable, the court shall appoint a substitute mediator to serve in the matter. A mediator may be unavailable because the individual has exceeded the quarterly service requirement.

15. **Disclosure by Mediator.** Before commencing mediation, an individual appointed to serve as mediator shall promptly make an inquiry that is reasonable under the circumstances to determine whether there are any known facts that a reasonable person would consider likely to affect the impartiality of the mediator, including a financial or personal interest in the outcome of the mediation and any existing or past relationship with a party or foreseeable participant in the mediation. The mediator shall disclose any such fact known or learned by the mediator to the parties as soon as is practicable. A party who believes that the assigned mediator has a conflict of interest shall promptly bring the matter to the attention of the mediator.

16. **Objection to Mediator.** Not later than 7 days after learning the identity of the mediator appointed by the court, or 7 days after disclosure by the mediator of facts likely to affect the impartiality of a mediator, whichever is later, a party who objects to service by that mediator must submit an objection to the BDR Administrator, specifying the reason for the objection. After review, the court may appoint a substitute mediator, refer the matter to the District Court ADR program, or withdraw the assignment to the BDR program.

17. **Authority of Mediator.** Upon assignment to the BDR program, all procedures within the mediation including, but not limited to, deadlines and the form and content of any submissions, will be determined by the mediator. However, nothing in these guidelines reduces the bankruptcy judge's power and responsibility to maintain overall management control of the case or proceeding before, during and after the assignment of a matter to the BDR program.

BDR CONFERENCE

18. **Initial Telephone Conference.** As soon as practicable after notification of appointment, the mediator will conduct an initial telephone conference with the parties to obtain preliminary information as to the nature of the disputed matter, the expectations of the parties, a mutually agreeable time and place for a formal BDR conference, and any further information which will facilitate BDR.

19. **BDR Conference.** As soon as is practicable after the telephone conference, the mediator will give notice to the parties of the time and place of the BDR conference. During regular court hours, the court's facilities may be used if available.

20. **BDR Statement.** Unless modified by the mediator, not later than 15 days after the date of the order assigning the matter to the BDR program, each party shall submit directly to the mediator and serve on all other parties, a written BDR statement. Such statement may not exceed 15 pages, not including any exhibits and attachments. The BDR statement may include any pertinent information, but must:

- (a) Identify the person, in addition to counsel, who will attend the conference as representative of the party, and who must have decision making authority;
- (b) Describe briefly the substance of the dispute;
- (c) Address whether there are legal or factual issues whose early resolution might appreciably reduce the scope of the dispute or contribute significantly to settlement;
- (d) Identify and describe the status of any related litigation, past or present, in any state or federal court;
- (e) Identify the discovery that could contribute most to equipping the parties for meaningful discussions;
- (f) Set forth the history of past settlement discussions, including disclosure of prior and any presently outstanding offers and demands;
- (g) Make an estimate of the cost and time to be expended for further discovery, pretrial motions, expert witnesses and trial; and
- (h) Indicate presently scheduled dates for further status conferences, pretrial conferences, trial or otherwise.

Parties shall attach to the statement any documents out of which the dispute has arisen, or those which would materially advance the purposes of BDR. The BDR statements shall not be filed with the court and the court shall not have access to them.

21. **Ex Parte Statement to Mediator Only.** By agreement of the parties and with consent of the mediator, each party may submit directly to the mediator, for the mediator's eyes only, a separate written statement describing any additional interests, considerations or matters that the party would like the mediator to understand before the BDR conference begins. Such ex parte statements to the mediator shall not be filed with the court and the court shall not have access to them.

22. **Attendance at BDR Conference.** Lead counsel and clients, or client's representatives with full settlement authority, shall attend, in person, all BDR conferences scheduled by the mediator, unless excused by the mediator. A governmental entity satisfies the attendance requirement if its lead counsel is in attendance and has been delegated full settlement authority, or has reasonable access to the person who has full settlement authority. In the event that the mediator determines it appropriate, the mediator shall have reasonable access to the person who has full settlement authority with appropriate accommodation given to the person's competing public duties. Unexcused failure to attend the BDR conference shall be reported to the court and may result in sanctions.

23. **Conduct of BDR Conference.** The BDR conference shall proceed informally. Rules of evidence shall not apply. There shall be no formal examination or cross-examination of witnesses. As appropriate, the mediator may:

- (a) Permit each party, through counsel or otherwise, to make an oral presentation of the party's position;
- (b) Help the parties to identify areas of agreement and, where feasible, formulate 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 in settling the dispute, including meeting with the parties separately and privately;
 - (e) Estimate, where feasible, the likelihood of liability and the dollar range of damages;
 - (f) Help the parties devise a plan for sharing important information or conducting key discovery that will equip 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 follow-up to the BDR conference would contribute to the to settlement or other disposition.

24. **Confidentiality.** Except as otherwise provided by these guidelines or applicable law, all communications in connection with any mediation under these guidelines shall be subject to Rule 408 of the Federal Rules of Evidence. Mediators and parties shall not communicate with the court about the substance of any position, offer or other matter related to the mediation without the consent of all parties, unless such disclosure is required to enforce a written settlement agreement, to adjudicate a dispute over mediator compensation, or to provide evidence in an attorney disciplinary proceeding. Nothing in these guidelines shall be construed to prevent parties, counsel or the mediator from responding in absolute confidentiality to inquiries or surveys by the BDR Administrator for the purpose of evaluating the BDR program and procedures.

CONCLUSION OF MEDIATION

25. **Mediator's Report Upon Completion.** Within 5 days after the completion of the BDR conference, the mediator shall file and serve a Mediator's Report stating that BDR has been concluded and indicating whether (i) the parties reached a resolution of their differences and a copy of an agreement is attached or a stipulated order or judgment will be submitted to the court, and/or the complaint will be dismissed or the underlying motion withdrawn, or (ii) the parties did not fully resolve their differences and the matter is being returned to the court for further disposition.

26. **Mediator's Statement of Hours.** For record-keeping and evaluation purposes, the mediator shall submit to the BDR Administrator, but not file with the court, a statement of hours expended by the mediator in the particular matter, with time separated between preparation and time actually spent in the BDR conference or conferences. If more than 4 hours were expended in BDR conference time, the mediator shall report any compensation charged.