PROPOSED ADMINISTRATIVE ORDER – BANKRUPTCY ADR PROGRAM

Final draft of administrative order implementing local
ADR rules proposed by Committee as of 8/11/2015

LBR 9019-1 - Bankruptcy Alternative Dispute Resolution Program

The following Local Rules govern the Bankruptcy Alternative Dispute Resolution Program (the "Program") in the United States Bankruptcy Court for the Western District of Michigan.

LBR 9019-2 - ADR Favored

(a) Purpose. The Court recognizes that formal litigation of disputes in bankruptcy cases, contested matters and adversary proceedings frequently imposes significant economic burdens on parties and often delays resolution of those disputes. The procedures established by these Local Rules 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.

A court-authorized dispute resolution program, in which litigants and counsel meet with one or more neutral third parties, offers an opportunity for parties to resolve disputes promptly and less expensively, to their mutual satisfaction. By these Local Rules, the Program is adopted for the United States Bankruptcy Court for the Western District of Michigan. It is the Court's intention for the Program to allow participants to take advantage of and utilize mediation, negotiation and case evaluation to resolve disputes. The specific method or methods employed will be those which the Court or the parties determine appropriate and applicable, and may vary from matter to matter.

(b) Scope - These Local Rules apply to all matters referred to the Program. All other Local Rules apply, except to the extent inconsistent with these Local Rules.

LBR 9019-3 - Administration of the Program

The Court will designate personnel to maintain and collect applications, maintain a Panel of Qualified Neutrals, track and compile results of the Program, and handle such other administrative duties as necessary (collectively, the "ADR Administrator").

LBR 9019-4 - Eligible Matters

Unless otherwise ordered by the Judge handling the particular matter, all controversies arising in an adversary proceeding, contested matter, or other dispute in a bankruptcy case, will be eligible for referral to the Program except matters involving contempt or other types of sanctions, other than alleged stay and discharge violations.

LBR 9019-5 – *Pro Bono* Mediations

(a) *Pro bono* mediations include those matters in which the mediator determines one or both parties are unable to pay their share of the mediator's posted fee.

(b) Any party who is unable to pay their share of the mediator's posted fee must complete a form requesting *pro bono* services available from the Clerk of the Court or the ADR Administrator.

(c) If one or more parties are unable to pay their share of the mediator's fee, the other party or parties may still pay their share of the mediator's fee, but will not be required to pay any portion of the non-paying party's share of the fee.

(d) The mediator may agree to a reduced fee for one or more parties so long as it does not render him or her unable to serve due to lack of neutrality.

LBR 9019-6 - Panel of Qualified Neutrals

(a) The Bankruptcy Court shall establish and maintain a Panel of Qualified Neutrals (the "Panel") who have offered to serve as mediators or case evaluators for the possible resolution of matters referred to the Program.

(b) Neutrals may serve as members of the Panel for five-year terms without the need to re-apply.

(c) Applications to serve as a member of the Panel shall be submitted to the ADR Administrator by the deadlines established by the Court, shall set forth the qualifications described below, and should conform to forms promulgated by the Court.

(d) Applicants must agree to mediate at least one *pro bono* matter per year.

LBR 9019-7 - Qualifications and Criteria for Panel of Qualified Neutrals

a. In order to qualify for service on the Court's Panel of Qualified Neutrals, each applicant shall certify to the Court that the applicant:

(1) Is willing to serve as a Neutral and to undertake to evaluate or mediate settlement of matters subject only to unavailability due to conflicts, personal or professional commitments, or other matters which would make such service inappropriate;

(2) Is, and has been, a member in good standing of the bar of the United States District Court for the Western District of Michigan, and has regularly practiced in Bankruptcy Court for at least 10 years;

(3) Has served as the principal attorney of record in active matters in at least 10 bankruptcy cases (without regard to the party represented) from case commencement to the earlier of the date of the application or conclusion of the case, or has served as the principal attorney of record for a party in interest in at least 10 adversary proceedings or contested matters from commencement through conclusion;

(4) Shall have completed requisite alternative dispute resolution training provided or approved by the Court before serving on any assigned matters; and

(5) Shall be governed by any standards of professional conduct and ethical rules adopted by the Michigan Supreme Court for state-court mediators, as those standards and rules may be amended.

b. The Court will appoint members to the Panel of Qualified Neutrals from the applications submitted, giving due regard to alternative dispute resolution training and experience and such matters as professional experience and location so as to make the Panel appropriately representative of the public being served by the Program. Appointments will 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.

c. The Neutrals on the Panel will indicate to the ADR Administrator the city or cities within the District in which they are willing to act or serve.

LBR 9019-8 - Service of Neutrals

(a) No Neutral may serve in any matter in violation of the standards set forth in 28 U.S.C. §455.

(b) Although parties shall not be considered their clients, a Neutral shall promptly determine all conflicts or potential conflicts in the same manner as an attorney would under the Michigan Rules of Professional Conduct as if any party to the dispute were their client. If the Neutral is a member of a firm and the firm has represented one or more of the parties, the Neutral shall promptly disclose that circumstance to all parties in writing.

(c) A party who believes that the assigned Neutral has a conflict of interest shall promptly bring the matter to the attention of the Neutral. If the Neutral does not withdraw from the assignment, the matter shall be brought to the attention of the Court by the Neutral or any of the parties.

(d) Promptly after appointment, any Neutral unavailable to serve in the matter shall notify the parties and the ADR Administrator so the parties may select an alternate Neutral in accordance with these Rules.

LBR 9019-9 - Assignment of Disputes to the Program

(a) A contested matter in a bankruptcy case, adversary proceeding, or other dispute may be referred to the Program by order of the Judge at any time. While participation in the Program is intended to be voluntary, any Judge, on the request of a party or *sua sponte*, may refer specific matters to the Program.

(b) If a party objects to referral to the Program, the party may file an objection within 14 days of the order of referral.

(c) If a matter is to be assigned to the Program, the parties will be presented with the order assigning the matter to the Program and with a current roster of the Panel or directed to the electronic location of the current roster.

(d) Within 14 days after the issuance of a case management order or other order referring a matter to the Program, the parties shall mutually agree upon the selection of one Mediator (or, in the cases referred to Blue Ribbon Case Evaluation only, three Blue Ribbon case evaluators).

(e) The neutral(s) may be selected from the Court's list of approved Neutrals or, by mutual agreement, any person or entity, including a Michigan community dispute resolution program. The plaintiff in an adversary proceeding or movant in a contested matter shall file a *Notice of Selection of Neutral(s)* with the Court and provide a copy to the selected neutral(s).

(f) Whenever the parties cannot agree or fail to file a *Notice of Selection of Neutral(s)*, the ADR Administrator's staff assistant shall randomly select a mediator or three case evaluators from the Court's Panel of Qualified Neutrals and notify the parties and neutral(s) of their selection.

(g) An order assigning a matter to the Program shall be docketed and served on the assigned Neutral and by first class mail to any interested parties to the dispute who do not have ECF capabilities.

(h) Subject to availability and by prior arrangement with the Clerk of the Court, mediators and case evaluators may use court facilities to conduct mediations and case evaluations.

LBR 9019-10 - Effect on Discovery

Unless otherwise ordered by the Court, the assignment to mediation or case evaluation shall act to stay discovery, but will not stay the mandatory disclosures required under Fed.R.Civ.P. 26(a). Any party may file a motion seeking to proceed with discovery or to stay Rule 26(a) disclosures.

LBR 9019-11 - Certification of ADR Conference

(a) Unless otherwise ordered, no later than 14 days before the initial scheduling conference set in an Adversary Proceeding and whenever ordered by the Court in other contested matters, counsel (or unrepresented parties) shall confer and file a certification that they have discussed ADR options. The certification may be included in the parties' report required by Fed. R. Civ. P. 26(f) for adversary proceedings or in a separate form developed by the Court for other contested matters. The certification shall verify that the filing party has:

(1) Received and reviewed the information sheet entitled *Bankruptcy Dispute Resolution Program Instructions for Parties*;

(2) Discussed the available dispute resolution options provided by the Court and private entities with other counsel or unrepresented parties;

(3) Considered whether their dispute could benefit from any of the available dispute resolution options; and

(4) Whether they have chosen to participate in the Program and, if so, whether they have selected Mediation or Case Evaluation.

MEDIATION RULES

The following "Mediation Rules" apply only to mediation.

LBR 9019-12 – Confidentiality & Privilege

(a) Definitions. As used in this rule on confidentiality and privilege, "Mediation Communication" means an oral or written statement, or nonverbal conduct intended to make an assertion, by or to a Mediation Participant made during the course of the mediation, whether during a Mediation Conference or prior to a mediation if made in furtherance of a mediation; "Mediation Participant" means a Party or any person who attends a mediation whether in person or by telephone, videoconference, or other electronic means; "Party" means a person participating in a mediation directly or through a designated representative, who is a named party, a real party in interest, or who would be a named party or real party in interest if an action or third-party complaint relating to the subject matter of the mediation were filed in a court of law; and "Other Proceeding" means any adjudicative process, including related discovery proceedings.

(b) Confidential Mediation Communications. Except as provided in this section, all Mediation Communications are confidential and the mediator and the Mediation Participants shall not disclose any Mediation Communication outside of the mediation, and no person may introduce in any Other Proceeding evidence pertaining to any aspect of the mediation process. However, information contained in a Mediation Communication which is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery merely because of its disclosure or use in mediation.

(c) Evidence Rules and Laws. Without limiting subsection (b) and subject to any exceptions in subsection (d), Rule 408 of the Federal Rules of Evidence and any applicable federal or Michigan statute, rule, common law, or judicial precedent relating to the privileged nature of settlement discussions or Mediation Communications apply.

(d) Exceptions to Confidentiality. Notwithstanding subsections (b) and (c), upon order of the Court, Mediation Communications may be revealed in the following situations:

1. Settlement agreements. Terms of a signed, written agreement reached during or as a result of a mediation, unless the Parties agree that those terms are to be kept confidential, including Mediation Communications which are relevant and material to a determination of insurance coverage for amounts at issue in the mediated settlement agreement;
2. Waiver. Mediation Communications for which the confidentiality or privilege against disclosure has been waived by all Parties in writing or on the record in Other Proceedings or by an individual Mediation Participant who discloses a Mediation Communication, but only to the extent necessary for another Mediation Participant to respond to the disclosure;
3. Malpractice claims. Mediation Communications relevant and material to a Party's claim of legal malpractice or other tort committed during the mediation concerning the actions of a Party's attorney or other agent involved in the mediation.

(e) Required disclosures. A mediator may disclose information from a Mediation Communication to a law enforcement agency or similar authority if required by law or if the mediator has a reasonable belief such disclosure will prevent a Mediation Participant from committing a criminal or illegal act likely to result in death or serious bodily harm.

(f) Attorneys, agents, etc. This rule shall not prevent a Party from revealing Mediation Communications to that Party's attorney, agent, employee or partner for an artificial entity, such as a corporation, partnership or limited liability company.

(g) Preservation of Privileges. The disclosure by a Mediation Participant of privileged information (e.g., attorney/client, doctor/patient, etc.) in a Mediation Communication to the

mediator, or another Mediation Participant does not waive or otherwise adversely affect the privileged nature of the information.

(h) Mediation Participants shall not:

(1) call or subpoena the mediator as a witness or expert in any proceeding relating to the mediation, to testify as to the subject matter of the mediation or any thoughts or impressions which the mediator may have about the parties or merits of the dispute; or

(2) subpoena or otherwise seek discovery of any notes, documents or other material prepared by the mediator in the course of or in connection with the mediation; or

(3) offer into evidence (or reveal in any argument) any statements, views, or opinions of the mediator.

(i) Communications with Court Personnel. Nothing in this rule shall be construed to prevent Parties, counsel or mediators from responding in absolute confidentiality to inquiries or surveys by persons authorized by this Court to evaluate the Program.

LBR 9019-13 - Mediation Procedure

(a) Initial Telephone Conference. As soon as practicable after notification of appointment, the mediator shall conduct a telephone conference with counsel for the parties and any unrepresented parties to discuss the nature of the matter, the expectations of the parties concerning the scheduling and nature of the mediation process, and anything else which will facilitate the mediation process.

(b) Mediation Conference Scheduling. Within 14 days of the telephonic conference, the mediator shall give notice to the parties of the time and place for the mediation, which shall be held at a time and location convenient to the parties.

(c) Mediation Statements. Unless modified by the mediator, no later than seven days before the date of the Mediation Conference, each party shall submit a written Mediation Statement directly to the mediator and serve copies on all other parties. Mediation Statements shall not exceed 15 pages (excluding any exhibits and attachments). While Mediation Statements may include any useful information, they must:

(1) Identify the person(s), in addition to counsel, who will attend the session as representative of the party with decision-making authority;

(2) Describe briefly the substance of the dispute;

(3) Identify any legal or factual issues whose early resolution might appreciably reduce the scope of the dispute or contribute significantly to settlement;

(4) Identify any outstanding discovery which could contribute most to equipping the parties for meaningful settlement discussions;

(5) Set forth the history of past settlement discussions, including disclosure of 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 (this information may be included in a separate, confidential communication between the party and the mediator only); and

(7) Indicate presently scheduled dates for further status conferences, pretrial conferences, trial or otherwise.

(d) Statements Not To Be Filed with Court. The written Mediation Statements shall not be filed with or disclosed to the Court and the Court shall not have access to them.

(e) Identification of Mediation Participants. Parties may identify in their Mediation Statements persons connected to a party opponent (including a representative of a party opponent's insurance

carrier) whose presence at the Mediation Conference could make it more productive; the fact a person has been so identified, shall not, by itself, result in an order compelling that person to attend the Mediation Conference.

(f) Documents. Parties shall attach to their written Mediation Statements copies of any documents which would materially advance the purposes of the Mediation Conference.

LBR 9019-14- Attendance at Mediation Conference

(a) Counsel. Counsel for each party primarily responsible for resolving the matter (and unrepresented parties) shall personally attend the Mediation Conference and any adjourned sessions. All counsel and parties shall come prepared to discuss all liability issues, all damage issues, and the position of the party relative to settlement.

(b) 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 unless excused by the mediator for cause. A bankruptcy trustee need not be physically present so long as the trustee is represented by counsel, their counsel personally attends the mediation and the trustee can be reached throughout the entirety of the Mediation Conference.

(c) Telephonic Attendance. A party or lawyer who is excused by the Court or the mediator from appearing in person at the Mediation Conference may be required to participate by telephone.

LBR 9019-15- Conduct of the Mediation Conference

The Mediation Conference shall proceed informally and rules of evidence shall not apply. There shall be no formal examination or cross-examination of witnesses. Where necessary, the mediator may conduct continued Mediation Conferences after the initial session. 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, formulate stipulations;

(c) Help the parties assess the relative strengths and weaknesses of the parties' contentions and evidence;

(d) Help the parties estimate the likelihood of liability and the dollar range of damages;

(e) Help the parties devise a plan for sharing the important information and/or conducting the key discovery which will equip them to participate as expeditiously as possible in meaningful settlement discussions or to posture the dispute for disposition by other means; and

(f) Determine whether some form of follow-up to the Mediation Conference would contribute to the process of case development or settlement.

LBR 9019-16 - Suggestions and Recommendations of Mediator

The mediator shall have no obligation to make any written comments or recommendations, but may, at the request of all parties and in the mediator's discretion, provide the parties with a written settlement recommendation to resolve an impasse. No copy of any such recommendation may be filed with the Clerk or revealed, in whole or in part, directly or indirectly, to the Court or Court staff, or be provided to anyone other than the parties.

LBR 9019-17 - Conclusion of the Mediation Conference

Upon the conclusion of the Mediation Conference, the following procedure shall be followed:

(a) If the parties have reached an agreement regarding the disposition of the matter, the parties shall determine who shall prepare the writing to dispose of the matter, and they may continue the Mediation Conference to a date convenient to all parties and the mediator if necessary.

(b) Within 14 days following the conclusion of any Mediation Conference, the mediator shall file a report with the Court and serve a copy on the parties. The report shall only indicate:

(1) The date of the Mediation Conference; the names and roles of all attendees; and whether the dispute was resolved.

(2) If the matter was not completely resolved, the mediator will indicate whether further mediation or other ADR procedures are contemplated by the parties.

(3) If the matter was completely resolved, the mediator will report when appropriate pleadings will be filed with the Court and the party or parties responsible for such filing.

(c) Regardless of the outcome of the Mediation Conference, the mediator will not provide the Court with any details of the substance of the conference.

LBR 9019-18 - Failure to Attend Mediation Conference

Failure to attend the Mediation Conference may result in the imposition of sanctions by the Court.

LBR 9019-19 - Compensation of Mediators

(a) The mediator shall be paid their customary hourly rate by counsel for represented parties (or directly by *pro se* parties).

(b) Unless otherwise agreed in writing, the mediator's fees and expenses shall be assessed in as many equal parts as there are separately represented or participating parties.

(c) The mediator is responsible for billing counsel and pro se parties who shall pay said bills in full within 30 days of billing or as otherwise agreed by the mediator.

(d) In their discretion, a mediator may waive or agree to a reduced fee for any party without affecting the obligations of any other party.

LBR 9019-20 - Evaluation of Mediation Program

In order to assist the ADR Administrator in compiling useful data to evaluate the Program and to aid the Court in assessing the efforts of the members of the Panel, the mediator shall report to the ADR Administrator such statistical and evaluative information as may be required without violating confidentiality on a form provided by the Court.

CASE EVALUATION

The following rules apply only to Case Evaluation.

LBR 9019-21 - Definition of Case Evaluation

Case evaluation affords litigants an ADR process patterned after one extensively used in Michigan state courts. (*See* Mich. Comp. Laws §§ 600.4951-.4969; Mich. Ct. R. 2.403.) Case Evaluation involves establishment of a settlement value for a dispute by a three-member panel of attorneys. There are two types of Case Evaluation available in this Court: Standard Case Evaluation and Blue Ribbon Case Evaluation.

The Court may order any dispute to Standard Case Evaluation unless the parties unanimously agree to submit the case to Blue Ribbon Case Evaluation.

LBR 9019-22 - Standard Case Evaluation

a. *Adoption of Michigan State-Court Procedures.* The procedures governing Standard Case Evaluation are generally set forth in Rule 2.403 of the Michigan Rules of Court. Unless modified by these rules, the Program Description, or court order in a particular case, the provisions of Mich. Ct.

R. 2.403, as amended from time to time, will govern in cases referred to Standard Case Evaluation, except as follows:

1. *Panel selection.* The ADR Administrator will select all three case evaluators from the Court's Panel of Qualified Neutrals.

2. *Fees.* Each party must pay each case evaluator $100.00 apiece, for a total case evaluation fee of $300 per party, within 14 days of the notice of acceptance of their appointment by the case evaluators. ADR Administrator's notice of selection of the case evaluators and acceptance of their appointment by the case evaluators. Allocation of Fees - The rules set forth in Mich. Ct. R. 2.403 for allocation of fees among multiple parties or claims apply. Once paid, the fee is not subject to refund.

b. *Submission of Documents*. The rules for submission of documents set forth in Mich. Ct. R. 2.403 apply, except that case evaluation summaries are limited to 20 pages. Documents must be submitted directly to the evaluators, with a proof of service filed with the ADR Administrator. Failure to file or serve such documents in a timely manner subjects the offending party to a $150.00 penalty, with $50 payable to each case evaluator, which may not be charged to the client.

c. *Hearing Time Limit.* Each side's presentation at the case evaluation hearing is limited to 30 minutes.

d. *Time for Rendering Award.* The case evaluators shall render a written evaluation at the close of the hearing and serve copies personally on the parties or their counsel at that time and provide the original to the ADR Administrator's office.

e. *Rejecting Party's Liability for Costs*

1. In cases submitted to Standard Case Evaluation, the provisions of Mich. Ct. R. 2.403 governing liability for costs apply, except that attorneys' fees will not be taxed for rejection of a case evaluation award absent the agreement of all parties.

2. In cases submitted to Standard Case Evaluation, the parties may stipulate in writing to the assessment of attorneys' fees in accordance with Mich. Ct. R. 2.403.

LBR 9019-23 - Blue Ribbon Case Evaluation

Blue Ribbon Case Evaluation allows parties to choose their own evaluators and to request that the evaluators devote substantial time to the evaluation process. A case may be referred to Blue Ribbon Case Evaluation only with the unanimous consent of the parties. All procedures applicable to Standard Case Evaluation apply, except:

a. *Selection of Evaluators*. The parties jointly select the Blue Ribbon case evaluators, who need not be members of the Court's Panel of Qualified Neutrals.

b. *Fees*. Case evaluators are compensated at their customary hourly rate, to be assessed in as many equal parts as there are separately represented parties, or as otherwise agreed by the parties at the time Blue Ribbon Case Evaluation is ordered.

c. *Case Evaluation Briefs and Hearings*. No limits apply to the length of Blue Ribbon Case Evaluation hearings or to the length of case evaluation briefs, unless agreed to in writing by the parties. No late fees are imposed for untimely submissions of case evaluation briefs.

d. *Time for Rendering Award*. In an extraordinary case, where the award cannot reasonably be rendered at the conclusion of the hearing, the evaluators may render their written evaluation no later than seven days after the hearing concludes.