U.S. DISTRICT COURT
N.D. OF N.Y.
FILED
September 13, 2013

LAWRENCE K. BAERMAN, CLERK

UNITED STATES DISTRICT COURT
for the
NORTHERN DISTRICT OF NEW YORK

GENERAL ORDER #47

Pilot Mandatory Mediation Program

So Ordered: September 13, 2013

Gary L. Sharpe
Chief Judge
U.S. District Court

PILOT MANDATORY MEDIATION PLAN
NORTHERN DISTRICT OF NEW YORK

SECTION 1 - INTRODUCTION AND AUTHORITY

1.1 TITLE

This Plan will serve as the authorization for a Two-Year Pilot Mandatory Mediation Program.

1.2 PURPOSE AND SCOPE

A. **Purpose**. The United States District Court for the Northern District of New York has adopted this Pilot Mandatory Mediation Plan. The "Effective Date" of the Plan will be **January 1, 2014.** The Pilot Paid Mediation Program is designed to provide quicker, less expensive and potentially more satisfying alternatives to continuing litigation, without impairing the quality of justice or the right to trial.

B. **Scope**. This Pilot Mandatory Mediation Plan applies to civil actions pending or commenced on and after the Effective Date, except as otherwise indicated herein. During the pendency of this Pilot, the current voluntary Arbitration, Mediation, and Early Neutral Evaluation Programs will be suspended. The Local Rules for voluntary mediation will apply only to *Pro Se* Cases that proceed through the Assisted Mediation Program.

C. **Magistrate Judge Consent Cases**. Consistent with Local Rule of Civil Procedure 72.1, in cases where the parties have consented to jurisdiction by a Magistrate Judge under 28 U.S.C. § 636, the Magistrate Judge shall have the same powers as the District Court Judge originally assigned to the case.

D. **Plan Administration**.

1. **Staffing**. The Clerk of Court will appoint an ADR administrator to assist with the management and oversight of the Court's ADR programs.

2. **ADR Information and Guidelines**. Information about the Court's Alternative Dispute Resolution Programs are available at *http://www.nynd.uscourts.gov* and also at the Court Clerk's office.

3. All inquiries about the Pilot Mandatory Mediation Program and the Court's other ADR Programs should be directed to:

Suzanne Gunter, ADR Program Administrator
U.S. District Court
James T. Foley U.S. Courthouse
Albany, New York 12207

Telephone: (518) 257-1807
e-mail: Suzanne Gunter@nynd.uscourts.gov

SECTION 2 - OVERVIEW

2.1 REFERRAL INTO THE PILOT MANDATORY MEDIATION PROGRAM.

A. **New Cases**. All civil cases filed on and after the Effective Date of the Pilot Mandatory Mediation Program shall be referred automatically in the Pilot Mandatory Mediation Program. Notice of the Pilot Mandatory Mediation requirements will be provided to all parties immediately upon the filing of a complaint and answer or a notice of removal. ADR intervention will be scheduled at the conference held pursuant to Local Rule of Civil Procedure 16.1. The following categories of actions are exempted from automatic referral:

1. *Habeas Corpus* and extraordinary writs;
2. Applications to vacate a sentence;
3. Social Security appeals;
4. Bankruptcy appeals;
5. Cases implicating issues of public policy, exclusively or predominantly;
6. IRS summons enforcement actions;
7. Government foreclosure actions;
8. Civil asset forfeiture actions;
9. Prisoner civil rights actions;
10. Civilian Pro Se actions (these actions may be referred to the Court's Assisted Mediation Program); and
11. Any action to enforce a government summons, subpoena or civil investigative demand.

B. **Pending Cases**. The assigned Judge or Magistrate Judge on any pending civil case may, *sua sponte* or with status conference, issue an order referring the case into the Pilot Mandatory Mediation Program. The order shall specify a date on which the ADR intervention is to be completed.

C. **Stipulation**. A case may be referred into the Pilot Mandatory Mediation Program by stipulation of all parties. Stipulations shall be filed and shall designate the time frame within which the ADR process will be completed. Stipulations are presumed acceptable unless the assigned Judge or Magistrate Judge determines that the interests of justice are not served.

2.2 RELIEF FROM ADR REFERRAL

A. **Opting Out Motions**. Any party may file, with the assigned Magistrate Judge for that case, a motion to opt out of, or for relief, from the Pilot Mandatory Mediation Program.

B. **Motion**. Opting Out Motions must be made within fourteen (14) days from (I) the date of the first conference under Local Rule 16.1 in new cases, or (ii) the date of a *sua sponte* Pilot Mandatory Mediation Referral Order in pending cases.

C. **Criteria**. Opting Out Motions shall be granted only for "good cause" shown. Inconvenience, travel costs, attorney fees or other costs shall not constitute "good cause." A party seeking relief from the Pilot Mandatory Mediation Program must set forth the reasons why Mandatory Mediation has no reasonable chance of being productive.

D. **Judicial Initiative**. The assigned Magistrate Judge may, *sua sponte,* exempt any case from the Court's Pilot Mandatory Mediation Program.

2.3 VIOLATIONS OF THE PILOT MANDATORY MEDIATION PROGRAM.

A. **Report of Violation**. A Neutral or party may report to the assigned Magistrate Judge any failure to attend a mediation conference, to substantially comply with the mediation Referral Order, or to otherwise participate in the Pilot Mandatory Mediation Program process in good faith.

B. **Proceedings and Sanctions in Response to Report of Violation**. Upon receipt of such a report, the Court may take whatever actions it deems appropriate, including issuing an order to show cause why sanctions should not be imposed. Show cause hearings shall be conducted on the record, but under seal. If sanctions are imposed, objections thereto and any other comment thereon shall be filed with the Court within fourteen (14) days from the date of the notice of sanctions and contemporaneously served on all other counsel, unrepresented parties and the Neutral.

2.4 EVALUATION OF THE MANDATORY PILOT MEDIATION PLAN

Congress has mandated that the Courts' ADR programs be evaluated. Neutrals, counsel and parties shall promptly respond to any request from the Court for an evaluation of the Mandatory Pilot Mediation Program. Responses will be used for research and monitoring purposes only. The sources of specific information will not be disclosed to the assigned Judge or in any report. The prepared report on this Pilot Mandatory Mediation Program will also be used by the Board of Judges and the Court's ADR Committee to determine if this program should be continued beyond the Pilot program period.

SECTION 3 - NEUTRALS

3.1 NEUTRALS

A. **Neutral Panel for the Pilot Mandatory Mediation Program**. The Court shall select a panel of Neutrals to serve on the Pilot Mandatory Mediation Program. The number of Neutrals will be decided by the Court after receiving a recommendation from the ADR Committee on the number of anticipated Neutrals that will be necessary to address the caseload during the two-year Pilot program. Membership on any of the Court's ADR panels is a privilege, not a right. The Court shall have the authority to establish qualifications for Neutrals, monitor their performance and withdraw any Neutral from a panel. The Neutrals selected by the Court will be posted on the external website for selection by the parties in cases from Albany, Binghamton, Utica, Syracuse and Plattsburgh.

B. **Private Neutrals**. The parties may select a Neutral who is not a member of the Court's Pilot Mandatory Mediation Program Panel. Such selections are presumed acceptable unless the assigned Judge determines that the interests of justice are not served.

C. **Training**. The requirements for training will be established by the Court in consultation with the Northern District ADR Committee. Participation in required training programs will be mandatory.

D. **Oath**. All persons serving as Neutrals shall take the oath or affirmation prescribed in 28 U.S.C. § 453.

E. Disqualification and Unavailability of Neutrals.

1. **Disqualification**. A Neutral serving on the Panel for the Pilot Mandatory Mediation Program may be disqualified for bias or prejudice, pursuant to 28 U.S.C. § 144. A Neutral shall disqualify himself or herself in any case in which a justice, judge or magistrate judge would be disqualified pursuant to 28 U.S.C. § 455, subject to the waiver provision of 42 U.S.C. § 455(e).

2. **Notice of Recusal**. A Neutral serving on the Panel for the Pilot Mandatory Mediation Program who discovers a circumstance requiring disqualification shall immediately notify all counsel, unrepresented parties and the Court. A new Neutral serving on the Panel for the Pilot Mandatory Mediation Program shall be selected by agreement of the parties or, in the event the parties are unable to agree, by the Court.

3. **Objections to Selected Neutral**. Prior to the issuance of an Order designating a Neutral serving on the Panel for the Pilot Mandatory Mediation Program, the Court will contact the selected Neutral who will review the case for possible conflicts. Following issuance of the Court's Order, a party who believes a disqualifying conflict exists should first confer with the Neutral. If the matter is not resolved by, for example, waiver or recusal, a motion and supporting affidavit shall be filed with the Court with the assigned magistrate judge within fourteen (14) days from the Court's Order, stating the facts and the reasons for the belief that a disqualifying conflict, bias or prejudice exists. In the event a conflict or other objection does not become apparent until after the Mandatory Mediation process has commenced, a motion for disqualification must be made at the earliest opportunity or the objection is waived.

4. **Unavailability.** A selected Neutral serving on the Panel for the Pilot Mandatory Mediation Program who later becomes unable to serve within the time period set forth in the Court's Scheduling or Referral Order shall notify all counsel, unrepresented parties and the Court. A new Neutral serving on the Panel for the Pilot Mandatory Mediation Program shall be selected by agreement of the parties or, in the event the parties are unable to agree, by the Court.

3.2 IMMUNITIES

All persons serving as Neutrals in the Court's Pilot Mandatory Mediation Program are performing quasi-judicial functions and are entitled to all the immunities and protections that the law accords to the performance of tasks integrally related to the judicial process, including settlement and alternative dispute resolution. *See, e.g.,* ***Wagshal v. Foster***, 28 F.3d 1249 (D.C. Cir. 1994).

SECTION 4 - APPROVED ADR PLAN INTERVENTIONS

4.1 ADR INTERVENTIONS

A. **Timing**. Timing will be decided by the assigned Magistrate Judge. It is the intent of the program to have cases proceed into the Pilot Mandatory Mediation Program as early as possible in the case.

B. **Scheduling.** The referral of a case to the Pilot Mandatory Mediation Program does not delay or defer other dates established in the Scheduling Order and has no effect on the scheduled progress of the case toward trial.

4.2 SELECTING CASES.

A. **New Cases.** Prior to the Local Rule 16.1 scheduling conference, counsel and any unrepresented parties shall confer about the Pilot Mandatory Mediation Program as part of their discussion of "the possibilities for a prompt settlement or resolution of the case" pursuant to Fed. R. Civ. P. 26(f). The parties shall attempt to agree upon a Neutral and, at the scheduling conference, shall be prepared to report on the outcome of their discussion pursuant to Local Rule 16.1(d). The initial Scheduling Order shall include a deadline for the completion of the Mandatory Mediation session.

B. **Pending Cases.** In pending cases, all *sua sponte* referrals will be into the Pilot Mandatory Mediation Program.

4.3 MULTIPLE PILOT MANDATORY MEDIATION INTERVENTIONS

A. **Initial Intervention.** Generally, a first Pilot Mandatory Mediation Program session will be scheduled within twelve (12) weeks after the Local Rule 16.1 conference. The minimum duration for the first session is two (2) hours, but the parties are encouraged to spend additional time unless the Mediator agrees that additional time would not be productive.

B. **Additional Interventions**. If the initial mediation session is not successful in resolving the case, but the parties agree that an additional session(s) would be helpful, the process will be scheduled as set forth below:

1. **By the Mediator.** The Mediator will, in consultation with the parties, schedule subsequent sessions as needed to explore and evaluate the possibility of reaching a mutually acceptable resolution. Additional sessions must be

conducted within the date for completion of Mandatory Mediation set forth in the Court's Scheduling or Referral Order.

4.4 CONFIDENTIALITY

Each of the interventions under this Plan shall be confidential as set forth in the corresponding sections below.

SECTION 5 - PILOT MANDATORY MEDIATION

5.1 DESCRIPTION OF MEDIATION AND ITS PROCESS

The Pilot Mandatory Mediation Program Mediation, as defined in this General Order and Plan is intended to offer a flexible, non-binding, confidential process in which a qualified Neutral, the Mediator, facilitates resolution of the issues between the parties and assists with settlement discussions. Through various methods and techniques, the Mediator seeks to improve communication between the participants (parties, counsel, experts or whoever is included in the mediation); helps participants articulate their interests; helps participants understand the interests of the other participants, including their "opponent"; probes the strengths and weaknesses of each party's legal positions; and helps generate and define options for a mutually agreeable resolution. The Mediator may engage in "reality checking", but will not give an overall evaluation of the case unless requested by all the parties. The Mediator has no fact-finding or decision-making authority. The central tenet of mediation is that the parties find their own solutions, with the assistance of the Mediator. A hallmark of mediation is its capacity to go beyond traditional settlement discussions and explore creative outcomes responsive to the participants' needs and interests.

5.2 QUALIFICATIONS OF MEDIATORS

A. Who May Qualify

Mediators serving as Neutrals in the Pilot Mandatory Mediation Program may be attorneys or non-attorneys, with relevant experience. All Mediators must successfully complete initial and periodic training as required by the Court.

To effectively assist ADR participants and the Court, Mediators must:

- Be knowledgeable about civil litigation in federal court;
- Have strong mediation process skills and the temperament to listen effectively and facilitate communication between all participants and across "party" lines;
- Exhibit strong problem-solving skills and the ability to generate meaningful options to assist parties and other participants with settlement negotiations.

5.3 COMPENSATION OF MEDIATORS

A. Mediators shall receive $150/hour for the first two hours of the initial mediation session. This cost includes any necessary preparation time spent by the Mediator in preparing for the initial session. Thereafter, Mediators shall receive no more than their Court-approved hourly rates[1] for time spent in mediation and preparation.

B. Mediators may require that counsel and/or parties sign an agreement confirming the terms of retention and compensation.

C. Mediator fees shall be divided equally among all separately represented parties, unless otherwise agreed or ordered by the Court.

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[1]Hourly rates during the pendency of the Pilot Program may not exceed $300.00 per hour.

D. A party who has been granted *in forma pauperis*[2] status and is represented by counsel is automatically relieved of his or her *pro rata* share of the Mediator's fee. All other parties shall continue to bear their *pro rata* portions of the fee.

E. A party who has not sought *in forma pauperis* status and is represented, but is financially unable to pay all or part of the *pro rata* share of the Mediator's fee, may move for a waiver of the fee requirement on a form provided by the Court.

F. All Mediation Panel members must provide *pro bono* services. The minimum service requirement is one *pro bono* case or two reduced compensation cases for every four (4) fully-compensated cases for which the Mediator is selected. (For example, for every four fully compensated cases the Mediator must perform one pro bono Assisted Mediation either as Assisted Mediation Counsel or as the Mediator in an Assisted Mediation case.)

5.4 SELECTION OF MEDIATOR

A. **Pilot Mandatory Mediation Panel List**. The Court shall maintain a list of Court approved and trained Mediators for this Pilot Program. Each Mediator shall provide to the Court information on his or her area(s) of expertise and compensation rates.

B. **Private Mediators**. The parties may select a Mediator other than from the Court's Pilot Mandatory Mediation list. Such selections are presumed acceptable unless the assigned Magistrate Judge determines that the interests of justice are not served.

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[2]Cases involving Pro Se Litigants are excluded from the Pilot Mandatory Mediation Program and may be referred by the Court into the Assisted Mediation Program.

C. **Selection**.

1. Once the parties have stipulated or been referred to mediation, they shall have twenty-eight (28) days from the date of the Local Rule 16.1 conference or ADR Referral Order in which to select a Mediator, confirm the Mediator's availability including a conflict check and file a stipulation regarding their selection. The Clerk shall send a copy of the ADR Scheduling and/or Referral Order to the Mediator.

2. If the parties fail to agree upon a Mediator within the twenty-eight (28) day period, the Court shall select a Mediator for the case from the Court's Mediator list and shall issue an Order notifying the parties of the Mediator's identity.

5.5 SCHEDULING AND LOCATION OF THE MANDATORY MEDIATION

A. **Scheduling**. Promptly upon being selected, the Mediator shall conduct a telephone conference, jointly or separately, with counsel and any unrepresented parties, to fix the date and place of the mediation.

B. **Timing**. Unless otherwise ordered, a first mediation session shall be conducted within twelve (12) weeks after the Local Rule 16.1 conference. In pending cases, mediation shall be conducted in accordance with the Pilot Mandatory Mediation Referral Order.

C. **Location**. The mediation session shall be held in the Mediator's office, unless otherwise agreed. Space may be available at the U.S. Courthouse upon request through the Clerk's Office ADR Administrator.

5.6 MEDIATION MEMORANDUM

A. **Time for Submission**. No later than seven (7) days before the scheduled mediation session, each party shall submit to the Mediator a written "Mediation Memorandum."

B. **Prohibition Against Filing**. Mediation Memoranda shall not be filed and the assigned Judge shall not have access to them. They shall be subject to the confidentiality of the mediation process and treated as a document prepared "for settlement purposes only."

C. **Content of Mediation Memoranda**. Mediation Memoranda must not exceed ten (10) double-spaced pages and shall:

1. Identify by name and title or status:

    a. All person(s) with factual knowledge and/or settlement authority, who, in addition to counsel, will attend the mediation as a representative(s) of the party; and

    b. Any other person(s) (including an insurer representative) whose presence might substantially improve the effectiveness of the mediation or the prospects of settlement;

2. Concisely describe the parties' claims and defenses, addressing the parties' views of the key liability issues and damages, and discussing the key evidence;

3. State the relief sought in the case and the basis for monetary calculations;

4. Describe the current status of the case, including the status of any motions made;

5. Describe the history and current status of settlement negotiations, including offers and counteroffers; and

6. Provide any other information that might be pertinent to resolution of the case, including possible settlement options and alternatives.

Parties should include, along with the Mediation Memorandum, copies of documents that are likely to make the mediation more productive or materially advance settlement prospects.

5.7 COMMUNICATIONS WITH THE MEDIATOR

After receiving Mediation Memoranda and submissions pursuant to Section 5.6, the Mediator may request additional information from any party or participant. The Mediator, at his or her discretion, may also discuss the case in confidence and *ex parte* with counsel, parties and/or representatives. The Mediator shall not disclose any confidential communication, including the Mediation Memoranda and submissions, without permission.

5.8 ATTENDANCE AND PARTICIPATION

A. **Parties**. All named parties and their counsel are required to attend the mediation session(s) in person unless excused under 5.8(E) below.

1. **Corporation or other entity**. A party other than a natural person (*e.g.* a corporation or some other entity or association) satisfies this attendance requirement if represented by one or more persons, other than outside counsel, who have authority to settle and who are knowledgeable about the facts and circumstances of the case and the claims being made.

2. **Government entity**. A unit or agency of government satisfies this attendance requirement if represented by one or more persons who have, to the greatest extent feasible, authority to settle, and who are knowledgeable about the facts of the case, the agency's or unit's position, and the procedures and policies under which the agency or unit decides whether to enter into proposed settlements. If the action is brought by the government on behalf of one or more individuals, at least one such individual shall also attend.

B. **Counsel**. Each party shall be accompanied at the mediation session by the attorney who will be primarily responsible for handling the trial of the matter and/or is most familiar with the matter at that stage of the proceeding.

C. **Insurers**. Insurer representatives are required to attend in person if their agreement is necessary to achieve a settlement, unless excused under 5.8(E) below.

D. **Other Attendees**. The Mediator may require the attendance of any other individual who appears reasonably necessary for the advancement of communication and resolution between the parties.

E. **Request to be Excused**. Any person who is required to attend a mediation session may be excused from attending in person only after showing that personal attendance would impose an extraordinary or otherwise unjustifiable hardship. Not less than fourteen (14) days before the date set for the mediation, a person seeking to be excused must submit a letter to the Mediator with copies sent to all other counsel and unrepresented parties, which states (the letter should not be filed with the Court):

1. All considerations that support the request; and

2. Whether the other party or parties join in or object to the request.

Any party opposing the request shall submit a written statement to the Mediator of opposition no less than seven (7) days prior to the mediation (the opposition document should not be filed with the Court).

The Mediator shall promptly make a determination as to the necessity of the person's attendance and may require personal participation, permit participation by telephone, or excuse the person's presence altogether. The Mediator's decision shall be final.

F. **Participation by Telephone**. A person excused from appearing in person at a mediation session shall be available by telephone or otherwise be available as the Mediator may direct.

G. **Good Faith Participation in the Process**. All parties and counsel shall participate in mediation in good faith. Failure to do so shall be sanctionable by the Court.

5.9 THE MEDIATION SESSION

A. The first mediation session shall be a minimum of two (2) hours. The parties may, and are encouraged to, extend the length of the session.

B. The mediation session shall be conducted in accordance with the process described in detail by the Mediator during the opening of the mediation. The process may include, as appropriate and necessary, the following:

- Mediator "opening statement" and introduction to the process and session
- An opportunity to present each party's positions, claims and concerns
- Joint sessions with all parties participating
- Various "caucus" sessions in which the Mediator meets with one or more parties and/or their counsel, as the Mediator deems appropriate

C. The Mediator shall have discretion to structure the mediation so as to maximize the benefits of the process.

D. Any communications to the Mediator during a "caucus" shall not be disclosed by the Mediator to any other party without permission.

E. The mediation session shall be informal, and conducted with civility.

5.10 CONFIDENTIALITY IN MEDIATION

A. **Confidential Treatment**. Mediation is confidential and private. No participant in the mediation process or any portion thereof may communicate confidential information acquired during mediation without the consent of the disclosing party. There shall be no stenographic or electronic recording, *e.g.*, audio or visual, of the mediation process.

1. All written and oral communications made in connection with or during the mediation session, any positions taken and any views of the merits of the case formed by any participant, including parties, counsel and the Mediator, are privileged and confidential.

2. There shall be no communication between the assigned Judge or designated Magistrate Judge and the Mediator regarding a case referred for mediation.

3. No communication made in connection with or during any mediation session may be disclosed or used for any purpose including impeachment in any pending or future proceeding in the Court.

4. The confidentiality of information disclosed during mediation does not prohibit or limit:

   a. the Court from collecting information relative to evaluation of the Pilot Mandatory Mediation program;

   b. the Mediator from reporting a failure to participate in the Pilot Mandatory Mediation process in good faith, except that the Mediator shall not disclose the content of confidential communications;

   c. the Mediator from filing "Mediation Certification" forms pursuant to 5.11;

   d. a party from seeking to enforce a settlement agreement;

   e. a party from disclosing the final resolution and settlement reached unless, in the interest of justice, the parties have agreed to the confidentiality of same; or

   f. a participant from making such disclosures as are required by law.

5.11 CONTINUED MEDIATION AND REPORTS

A. At the close of the initial mediation session, the Mediator and the parties shall jointly determine whether it would be appropriate and helpful to then schedule additional mediation. Follow-up could include, without limitation, written reports, telephonic discussions, negotiations between the parties with the Mediator available for assistance, or further mediation sessions.

B. Within seven (7) days after the close of each mediation session, and on the form "Mediation Certification" provided by the Court, the Mediator shall report to the Court the date the session was held, whether the case settled in whole or in part and whether any follow up is scheduled. The Mediation Certification shall be filed.

C. The Clerk of Court will provide the attorneys, parties, and mediator with survey questions regarding the Pilot Mandatory Mediation Program. The information gathered during the survey period at the conclusion of each mediation will be used by the Board of Judges and ADR Committee to study the effectiveness of this program.