

Rule 9019-2

MEDIATION

(a) **Application.** Unless otherwise ordered by the Court, this rule applies in all mediations of an issue before the Court. In the event of a conflict between a Court order and this rule, the order will control.

(b) **Definition.** Mediation is an opportunity for the parties to negotiate their own settlement consistent with the mediation policy of self-determination. Mediation is a confidential process that includes a supervised settlement conference presided over by an impartial, neutral mediator to promote conciliation, compromise, and the ultimate settlement of a civil action. The mediator's role in the settlement is to suggest alternatives, analyze issues, question perceptions, conduct private caucuses, stimulate negotiations between opposing sides, and keep order. The mediation process does not allow for testimony of witnesses. The mediator should not opine or rule upon questions of fact or law or render any final decision in the case.

(c) **Purpose.** Mediation is intended as an alternative method to resolve civil cases, saving time and money for litigants without sacrificing the quality of justice to be rendered or the right of the litigants to a full trial in the event of an impasse following mediation. Mediation enables litigants to resolve their disputes incorporating terms of their choosing.

(d) **Qualifications; Conflicts.**

(1) **Selection of Mediator.** The parties may select any person to serve as mediator. If the parties cannot agree on a mediator, then one will be selected by the Court. Parties are encouraged to choose a mediator who has sufficient knowledge and experience in mediation and in bankruptcy law.

(2) **Conflicts of Interest.** The mediator must disclose all actual or potential conflicts of interest involving the parties participating in the mediation process. The parties may waive a mediator's actual or potential conflict of interest, provided that the mediator concludes in good faith that the mediator's impartiality will not be compromised. The unique nature of bankruptcy cases favors the parties' ability to waive conflicts and supersedes the concept of non-waivable conflicts.

(e) **Standards of Professional Conduct for Mediators.** All mediators in cases pending in this District, whether or not certified under the rules adopted by the Supreme Court of Florida, will be governed by standards of professional conduct and ethical rules adopted by the Supreme Court of Florida for circuit court mediators.

(f) **Disqualification of a Mediator.** After reasonable notice and hearing, and for good cause, the presiding judge has discretion and authority to disqualify any mediator from serving as mediator in a particular case. Good cause may include any violation of the standards of professional conduct for mediators.

(g) **Mediation Process.**

(1) **Duties of the Mediator.** At the conclusion of the mediation, the mediator will report to the Court (A) the identity of the parties who participated in the mediation process; and (B) whether the mediation resulted in an agreement in whole or in part, was adjourned for further mediation, or whether the mediator declared an impasse.

(2) **Duties of Counsel.** Counsel must be familiar with the duties imposed on them as well as their respective clients consistent with this rule. Counsel who fails to attend the mediation and actively participate in the mediation process may be subject to appropriate sanctions.

(3) **Participation of Parties at Mediation.** Unless excused in writing by the Court, all parties to the mediation must participate in the mediation with authority to negotiate the amount and the issues in dispute. If a party proxy will participate in lieu of a party, notice must be provided in advance to all other counsel and the mediator. If anyone objects to the proxy, then such matter should be brought to the Court's attention in advance of the mediation.

(4) **Failure to Attend.** The mediator will report non-attendance by any party.

(5) **Settlement.** A settlement agreement reached in whole or in part with any of the parties must be reduced to writing and signed by the parties and their attorneys in the presence of the mediator.

(h) **Compensation of Mediators.** Unless otherwise indicated in an order appointing a mediator, an order directing parties to mediate, or other similar Court order, the mediator will be compensated for fees and expenses as established and agreed to by the parties to the mediation. Absent agreement of the parties or Court order to the contrary, the cost of the mediator's services will be paid equally by the parties to mediation within 30 days of invoicing, and payment thereafter will be enforceable by the Court. If one or more parties to the mediation is a case trustee or debtor-in-possession, payment of the mediator's charges attributable to that party will be an expense of the bankruptcy estate and are authorized without the necessity of further Court order.

(i) **No Stay.** Absent an order to the contrary or agreement of the parties, discovery and preparation for a trial or contested matter is **not** abated merely by the pendency of a mediation.

(j) **Confidentiality.**

(1) **Definitions.** "Mediation Communication" means an oral or written statement, or nonverbal conduct intended to make an assertion, by or to a participant in a mediation made during the course of the mediation, or prior to a mediation if made in furtherance of a mediation; "Mediation Participant" means a mediation party or a person who attends a mediation in person or by telephone, videoconference, or other electronic means; "Mediation Party" means a person participating in a mediation directly or through a designated

representative, and 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 relating to the subject matter of the mediation were brought in a court of law; and “Subsequent Proceeding” means an adjudicative process that follows a mediation, including related discovery.

(2) ***Confidential Mediation Communications.*** Except as provided in this section (j), all Mediation Communications are confidential, and the mediator and the Mediation Participants must not disclose outside of the mediation any Mediation Communication, and no person may introduce in any Subsequent Proceeding evidence pertaining to any aspect of the mediation effort. However, information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery merely because of its disclosure or use in mediation.

(3) ***Evidence Rules and Laws.*** Without limiting subsection (2), 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 or mediations apply.

(4) ***Settlement Agreements.*** Notwithstanding subsections (2) and (3), no confidentiality attaches to a signed, written agreement reached during or as a result of a mediation, unless the Mediation Parties agree otherwise, or to any communication for which the confidentiality or privilege against disclosure has been waived by all Mediation Parties.

(5) ***Preservation of Privileges.*** The disclosure by a Mediation Participant or Mediation Party of privileged information to the mediator or to another Mediation Participant or Mediation Party does not waive or otherwise adversely affect the privileged nature of the information.

(6) ***Disclosures by Mediator.*** The mediator cannot be compelled to disclose to the Court or to any person or other tribunal outside the mediation conference any Mediation Communications, nor can the mediator be required to testify in regard to the mediation in connection with any Subsequent Proceeding or be a party to any Subsequent Proceeding.

(7) ***Disclosure of Communications.*** A Mediation Participant who makes a representation about a Mediation Communication in any Subsequent Proceedings waives that privilege, but only to the extent necessary for another Mediation Participant to respond to that particular disclosure.

(k) ***Mediators as Counsel in Other Cases.*** Any member of the bar who is selected as a mediator under this rule will not, for that reason alone, be disqualified from appearing and acting as counsel in another unrelated case pending in this District.

(l) ***Referral to Mediation.*** Any pending case, proceeding, or contested matter may be referred to mediation by the Court at such time as the Court may determine to be in the interests of justice. The parties may request the Court to submit any pending case, proceeding, or contested matter to mediation at any time.

(m) ***Mortgage Modification Mediations and Other Specialty Mediations.*** When deemed necessary, the Court may establish procedures, policies, and necessary orders to deal with the mediation of emerging bankruptcy trends, such as residential mortgage modifications.

Notes of Advisory Committee

2023 Amendment

This amendment updates the rule to specify the duties of the mediator, counsel and parties to mediation. The amendment also establishes a deadline and terms for payment of the mediator and clarifies that litigation is not stayed while mediation is pending. This amendment to the rule is effective August 1, 2023.

2013 Amendment

The amendments to this rule significantly modify the rule as originally promulgated in 1989 and amended in 1995 and 1997. The amendments reflect the development of the mediation process in the Middle District of Florida.

Section (c)(2): The parties' ability to waive a mediator's actual or potential conflict of interest in bankruptcy cases differs from the Rules for Certified and Court Appointed Mediators adopted by the Florida Supreme Court, Rules 10.100 et seq., and the opinions of the Mediator Ethics Advisory Committee.

Section (g): The confidentiality provisions of section (g) are adapted in significant part from Florida's Mediation Confidentiality and Privilege Act, Sections 44.401-44.405, Florida Statutes. Although the civil remedies provisions contained in Section 44.406 are not incorporated in this rule, parties are reminded that violations of this rule may be sanctionable under Local Rule 9011-3. By way of example, permissible disclosures in a subsequent proceeding would include statements made at a mediation to the extent necessary to support or oppose a reformation or declaratory relief action concerning an ambiguity in a settlement agreement. Additionally, a confidential settlement agreement is subject to disclosure if required by a subpoena or order of a court of competent jurisdiction.

This amendment to the rule is effective July 1, 2013.

1997 Amendment

This amendment conforms the existing Local Rules to the uniform numbering system prescribed by the Judicial Conference of the United States and to the model system suggested and approved by the Advisory Committee on Bankruptcy Rules of the Judicial Conference's Committee on Rules of Practice and Procedure. In renumbering the Local Rules to conform to the uniform numbering system, no change in substance is intended. This amendment to the rule was effective on April 15, 1997.

This rule was formerly Local Rule 2.23. The Advisory Committee Notes to the superseded rules may be helpful in interpreting and applying the current rules.

1995 Amendment

The amendment to Local Rule 2.23(b) makes clear that if the parties stipulate to a particular person on the register of mediators, the Court may appoint that person as mediator.

The amendment to Local Rule 2.23(d)(1) makes clear that the parties may agree to a shorter notice period for the mediation conference.

Paragraph (k) is new. It clarifies that the Court and the parties retain the flexibility to order or conduct mediation in ways other than that described in this rule. If the Court orders mediation other than pursuant to the methods and procedures contained in this rule, the confidentiality and compliance provisions of the rule will nevertheless apply to that mediation.

These amendments to the rule were effective on February 15, 1995.