

## Rule 9019-2

### ALTERNATIVE DISPUTE RESOLUTION (ADR); MEDIATION

(a) **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. At the conclusion of the mediation, the mediator shall report to the Court (1) the identity of the parties in attendance at the mediation, and (2) that parties either reached an agreement in whole or in part or that the mediation was terminated without the parties' coming to an agreement.

(b) **Purpose.** Mediation is intended as an alternative method to resolve civil cases, saving time and cost without sacrificing the quality of justice to be rendered or the right of the litigants to a full trial in the event that mediation does not resolve the dispute.

(c) **Qualifications; Conflicts.**

(1) **Qualifications of Mediators.** The parties may select any person to serve as mediator. Parties are encouraged to choose a mediator who has sufficient knowledge and experience in mediations and in bankruptcy law. Notwithstanding the foregoing, the Court, by administrative order, may establish qualifications and maintain a list of those persons eligible to serve as mediator in a residential mortgage modification mediation.

(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.

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

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

(f) ***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 shall be compensated for fees and expenses as established and agreed to by the parties to the mediation. Absent agreement of the parties or order of the Court to the contrary, the cost of the mediator's services shall be paid equally by the parties to the mediation.

In cases in which one or more parties to the mediation is a Chapter 11 trustee or debtor-in-possession, payment of the mediator's charges attributable to that party shall be authorized without the necessity of filing an application with the Court.

(g) ***Confidentiality.***

(1) ***Definitions.*** As used in this section (g), "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 (g), all Mediation Communications are confidential, and the mediator and the Mediation Participants shall 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 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 shall not be compelled to disclose to the Court or to any person outside the mediation conference any Mediation Communications, nor shall 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 waives that privilege, but only to the extent necessary for another Mediation Participant to respond to the disclosure.

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

(i) ***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.

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

(k) ***Participation of Parties at Mediation.*** All parties to the mediation are required to attend the mediation in person, unless authorized by the Court or the mediator to attend by telephone. Parties are encouraged to participate in the mediation in a good faith attempt to resolve the issues between them. Parties who are not individuals shall participate in mediations through the presence of a representative with full authority to settle the matter that is the subject of the mediation.

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***Notes of Advisory Committee***

***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 is effective July 1, 2013.