

**Rule 9019-5      Mediation.**

- (a) Types of Matters Subject to Mediation. The Court may assign to mediation any dispute arising in an adversary proceeding, contested matter or otherwise in a bankruptcy case. Except as may be otherwise ordered by the Court, all adversary proceedings filed in a chapter 11 case and, in all other cases, all adversaries that include a claim for relief to avoid a preferential transfer (11 U.S.C. § 547 and, if applicable, § 550) shall be referred to mandatory mediation. Unless otherwise ordered by the Court, in any adversary proceeding that includes a claim for relief to avoid a preferential transfer (11 U.S.C. § 547 and, if applicable, § 550), the bankruptcy estate (or if there is no bankruptcy estate the plaintiff in the adversary proceeding) shall pay the fees and costs of the mediator. Parties to an adversary proceeding or contested matter may also stipulate to mediation, subject to Court approval.
- (b) Effects of Mediation on Pending Matters. The assignment of a matter to mediation does not relieve the parties to that matter from complying with any other Court orders or applicable provisions of the Code, the Fed. R. Bankr. P. or these Local Rules. Unless otherwise ordered by the Court, the assignment to mediation does not delay or stay discovery, pretrial hearing dates or trial schedules.
- (c) The Mediation Process.
- (i) Time and Place of Mediation Conference. After consulting with all counsel and pro se parties, the mediator shall schedule a time and place for the mediation conference that is acceptable to the parties and the mediator. Failing agreement of the parties on the date and location for the mediation conference, the mediator shall establish the time and place of the mediation conference on no less than twenty one (21) days' written notice to all counsel and pro se parties.
- (ii) Submission Materials. Unless otherwise instructed by the mediator, not less than seven (7) calendar days before the mediation conference, each party shall submit directly to the mediator and serve on all counsel and pro se parties such materials (the "Submission") as the mediator directs. The mediator shall so direct not less than fourteen (14) days before the mediation conference. Prior to the

mediation conference, the mediator may talk with the participants to determine what materials would be helpful. The Submission shall not be filed with the Court and the Court shall not have access to the Submission.

(iii) Attendance at Mediation Conference.

(A) Persons Required to Attend. Except as provided by subsection (j)(xiii)(B) herein, or unless excused by the Mediator upon a showing of hardship, the following persons must attend the mediation conference personally:

- (1) Each party that is a natural person;
- (2) If the party is not a natural person, including a governmental entity, a representative who is not the party's attorney of record and who has full authority to negotiate and settle the matter on behalf of the party;
- (3) If the party is a governmental entity that requires settlement approval by an elected official or legislative body, a representative who has authority to recommend a settlement to the elected official or legislative body;
- (4) The attorney who has primary responsibility for each party's case; and
- (5) Other interested parties, such as insurers or indemnitors or one or more of their representatives, whose presence is necessary for a full resolution of the matter assigned to mediation.

(B) Failure to Attend. Willful failure to attend any mediation conference, and any other material violation of this Local Rule, shall be reported to the Court by the mediator and may result in the imposition of sanctions by the Court. Any such report of the mediator shall comply with the confidentiality requirement of Local Rule 9019-5(d).

- (iv) Mediation Conference Procedures. The mediator may establish procedures for the mediation conference.
  - (v) Settlement Prior to Mediation Conference. In the event the parties reach a settlement in principle after the matter has been assigned to mediation but prior to the mediation conference, the plaintiff shall advise the mediator in writing within one (1) business day of the settlement in principle.
- (d) Confidentiality of Mediation Proceedings.
- (i) Protection of Information Disclosed at Mediation. The mediator and the participants in mediation are prohibited from divulging, outside of the mediation, any oral or written information disclosed by the parties or by witnesses in the course of the mediation. No person may rely on or introduce as evidence in any arbitral, judicial or other proceeding, evidence pertaining to any aspect of the mediation effort, including but not limited to: (A) views expressed or suggestions made by a party with respect to a possible settlement of the dispute; (B) the fact that another party had or had not indicated willingness to accept a proposal for settlement made by the mediator; (C) proposals made or views expressed by the mediator; (D) statements or admissions made by a party in the course of the mediation; and (E) documents prepared for the purpose of, in the course of, or pursuant to the mediation. In addition, without limiting the foregoing, Rule 408 of the Federal Rules of Evidence, any applicable federal or state statute, rule, common law or judicial precedent relating to the privileged nature of settlement discussions, mediations or other alternative dispute resolution procedures shall apply. Information otherwise discoverable or admissible in evidence does not become exempt from discovery, or inadmissible in evidence, merely by being used by a party in the mediation.
  - (ii) Discovery from Mediator. The mediator shall not be compelled to disclose to the Court or to any person outside the mediation conference any of the records, reports, summaries, notes, communications or other documents received or made by the mediator while serving in such capacity. The mediator shall not

testify or be compelled to testify in regard to the mediation in connection with any arbitral, judicial or other proceeding. The mediator shall not be a necessary party in any proceedings relating to the mediation. Nothing contained in this paragraph shall prevent the mediator from reporting the status, but not the substance, of the mediation effort to the Court in writing, from filing a final report as required herein, or from otherwise complying with the obligations set forth in this Local Rule.

- (iii) Protection of Proprietary Information. The parties, the mediator and all mediation participants shall protect proprietary information.
- (iv) Preservation of Privileges. The disclosure by a party of privileged information to the mediator does not waive or otherwise adversely affect the privileged nature of the information.
- (e) Recommendations by Mediator. The mediator is not required to prepare written comments or recommendations to the parties. Mediators may present a written settlement recommendation memorandum to attorneys or pro se litigants, but not to the Court.
- (f) Post-Mediation Procedures.
  - (i) Filings by the Parties. If a settlement is reached at a mediation, the plaintiff shall file a Notice of Settlement or, where required, a motion and proposed order seeking Court approval of the settlement within thirty (30) days after such settlement is reached. Within sixty (60) days after the filing of the Notice of Settlement or the entry of an order approving the settlement, the parties shall file a Stipulation of Dismissal dismissing the action on such terms as the parties may agree. If the plaintiff fails to timely file the Stipulation of Dismissal, the Clerk's office will close the case.
  - (ii) Mediator's Certificate of Completion. No later than fourteen (14) days after the conclusion of the mediation conference or receipt of notice from the parties that the matter has settled prior to the mediation conference, unless the Court orders otherwise, the mediator shall file with the Court a certificate in the form provided by the Court

("Certificate of Completion") showing compliance or noncompliance with the mediation conference requirements of this Local Rule and whether or not a settlement has been reached. Regardless of the outcome of the mediation conference, the mediator shall not provide the Court with any details of the substance of the conference.

- (g) Withdrawal from Mediation. Any matter assigned to mediation under this Local Rule may be withdrawn from mediation by the Court at any time.
- (h) Termination of Mediation. Upon the filing of a mediator's Certificate of Completion under Local Rule 9019-5(f)(ii) or the entry of an order withdrawing a matter from mediation under Local Rule 9019-5(g), the mediation will be deemed terminated and the mediator excused and relieved from further responsibilities in the matter without further order of the Court. If the mediation conference does not result in a resolution of all of the disputes in the assigned matter, the matter shall proceed to trial or hearing under the Court's scheduling orders.
- (i) [Reserved]
- (j) Alternative Procedures for Certain Preference Proceedings.
  - (i) Applicability. This subsection (j) shall apply to any adversary proceeding that includes a claim to avoid and/or recover an alleged preferential transfer(s) from one or more defendants where the amount in controversy from any one defendant is equal to or less than \$75,000. Hereinafter in this subsection (j), a defendant from whom a plaintiff seeks to avoid and/or recover an alleged preferential transfer in an amount equal to or less than \$75,000 shall be referred to as "Defendant."
  - (ii) Service of this Rule with Summons. The plaintiff in any adversary proceeding that includes a claim to avoid and/or recover an alleged preferential transfer(s) from one or more defendants where the amount in controversy from any one defendant is equal to or less than \$75,000 shall serve with the Summons a copy of this Del. Bankr. L.R. 9019-5(j) and the Certificate (as defined hereunder).

- (iii) Defendant's Election. On or within thirty (30) days after the date that the Defendant's response is due under the Summons, the Defendant may opt-in to the procedures provided under this subsection (j) by filing with the Court on the docket of the adversary proceeding and serving on the Plaintiff, a certificate in the form of Local Form 118 ("Certificate"). The time period provided hereunder to file the Certificate is not extended by the parties' agreement to extend the Defendant's response deadline under the Summons.
- (iv) Mediation of All Claims. Unless otherwise specifically agreed by the parties, the Defendant's election to proceed to mediation under subsection (j)(iii) operates as a referral with regard to that Defendant of each claim in which such Defendant is identified as a defendant in the underlying adversary proceeding.
- (v) Appointment of Mediator. On or within ten (10) days after the date that the Certificate is filed, Plaintiff shall file either: (i) a stipulation (and proposed order) regarding the appointment of a mediator from the Register of Mediators approved by the Court; or (ii) a request for the Court to appoint a mediator from the Register of Mediators approved by the Court. If a stipulation or request to appoint is not filed as required hereunder, then the Clerk of Court may appoint in such proceeding a mediator from the Register of Mediators approved by the Court.
- (vi) Election by Agreement of the Parties. In any adversary proceeding that includes a claim to avoid and/or recover an alleged preferential transfer(s) from one or more defendants where the amount in controversy from any one defendant is greater than \$75,000, the plaintiff and defendant may agree to opt-in to the procedures provided under this subsection (j) by filing a certificate in the form of Local Form 119 ("Jt. Certificate") on the docket of the adversary proceeding within the time provided under subsection (j)(iii) hereof that includes the parties' agreement to the appointment of a mediator from the Register of Mediators; provided, however, that in a proceeding that includes more than one defendant, only the defendant who agrees to opt-in

to the procedures provided under this subsection is subject to the provisions thereof and the referral to mediation thereunder. The use of the term "Defendant" in subsections (j)(xi)(B), (j)(xii)(A) and (j)(xii)(B) hereinafter shall include any defendant who agrees with plaintiff to mediation under this subsection (j)(vi).

- (vii) Participation. Each of the parties to mediation conducted under this subsection (j) shall participate in mediation in an effort to consensually resolve their disputes prior to further litigation.
- (viii) Confidentiality of Mediation Proceedings. The provisions of Del. Bankr. L.R. 9019-5(d) shall apply to any mediation conducted pursuant to this subsection (j).
- (ix) Mediator Costs. The plaintiff shall bear the costs of the mediator in any mediation conducted pursuant to this subsection (j).
- (x) Effects of Mediation on Pending Matters. Except as expressly set forth in subsection (j)(xi) hereof, the provisions of Del. Bankr. L.R. 9019-5(b) shall apply to any mediation conducted pursuant to this subsection (j).
- (xi) Scheduling Order.
  - (A) Effect of Scheduling Order. Any scheduling order entered by the Court at the initial status conference or otherwise shall apply to the parties and claims which are subject to mediation under this subsection; provided, however, that: (1) the referral to mediation under this subsection (j) shall operate as a stay as against the parties to the mediation of any requirement under Fed. R. Bankr. Proc. 7026 to serve initial disclosures; (2) the referral to mediation under this subsection (j) shall operate as a stay as against the parties to the mediation of such parties' right and/or obligation (if any) to propound, object or respond to written discovery requests or other discovery demands to or from the parties to the mediation; and (3) as further provided in

subsection (j) (xi) (B) hereof and subject to subsection (j) (xi) (C) hereof, after the conclusion of mediation the timeframes set forth in the scheduling order entered by the Court shall be adjusted so that such timeframes are calculated from the date of completion of mediation (as evidenced by the date of entry on the adversary docket of the Certificate of Completion) rather than any other point of time employed by the Court in calculating such relevant timeframe. The stay provided for under this subsection shall automatically terminate upon the filing of the Certificate of Completion.

- (B) Agreement to and Filing of Scheduling Order after Conclusion of Mediation. If the mediation does not result in the resolution of the litigation between the parties to the mediation, then within two (2) business days after the entry of the Certificate of Completion on the adversary docket: (1) the parties to the mediation shall confer regarding the adjustment of the timeframes set forth in the scheduling order entered by the Court so that such timeframes are calculated from the date of completion of mediation, and agree to a related form of scheduling order or stipulation and proposed order; and (2) the plaintiff or the Defendant shall file such proposed scheduling order or stipulation and proposed order on the docket of the adversary proceeding under certification of counsel and serve a copy of such filing on the mediator. If the parties do not agree to the form of scheduling order or stipulation as required hereunder and the timely filing thereof, then the mediator shall file a notice that identifies the deadlines set forth in the scheduling order entered by the Court as adjusted to be calculated from the date the mediation concluded. With the consent of the parties, the mediator may incorporate the notice of such deadlines into the Certificate of Completion and, if so incorporated, the parties are relieved of their obligation to otherwise prepare and file a separate form of scheduling order. Absent



further Order of the Court, the deadlines identified by the mediator and filed with the Court shall apply to and govern further proceedings in the underlying adversary proceeding as between the parties to the mediation.

- (C) Plaintiff's Election. Notwithstanding any other provision of this subsection (xi), the Plaintiff may elect to have the deadlines in proceedings in which mediation under this subsection are completed within a given fourteen (14) day period each calculated from the date of completion of mediation (or expected date of completion of mediation) of the last mediation within such 14 day period.
- (D) Absence of Scheduling Order. The terms of this subsection (xi) apply only if the Court enters a form of scheduling order in the underlying adversary proceeding prior to the conclusion of mediation.

(xii) Mediation Submission Materials.

- (A) Timing. Within twenty-one (21) days after the date that the Certificate is filed, the Defendant shall serve its position statement on the plaintiff and the mediator. The plaintiff shall serve its position statement on the Defendant and the mediator within twenty-one (21) days after the date that the Defendant's position statement is served. Absent leave of the mediator, no further statements shall be served by either party. The parties' respective position statements shall not be filed in the underlying adversary proceeding.
- (B) Contents. The parties' position statements shall address the merits of plaintiff's claim to avoid and/or recover the alleged preferential transfer(s) and Defendant's defenses thereto, and may address any other procedural or substantive issues the parties believe to be relevant to the mediation. Each position statement should identify and/or discuss evidence then known to such party that supports that party's assertions, and mere

argument alone is not sufficient for a party to meet its burden under this subsection (j) (xii) (B). For purposes of example only, if the Defendant argues that the transfers at issue are protected from avoidance or recovery under 11 U.S.C. § 547(c) (4), then the Defendant should identify in its position statement the nature and calculation of the alleged new value at issue and evidence, if any, to support its assertion that such value qualifies as new value. In return, plaintiff should identify and discuss the factual and/or legal basis (if any) on which it relies to oppose Defendant's stated defense(s). Notwithstanding the provisions of subsections (xii) (A) or (B), the mediator may require a separate settlement-related statement that is not served on any party to the mediation. As noted further below, the provisions of Del. Bankr. L.R. 9019-5(c) (iii) (B) apply to any mediation conducted pursuant to this subsection.

- (C) Length. Absent consent of the mediator, the length of any position statement shall not exceed ten (10) pages, exclusive of exhibits and/or supporting evidence.

(xiii) The Mediation Conference.

- (A) Timing. Mediation shall be initiated so as to be concluded within forty-five (45) days after service of plaintiff's mediation statement.
- (B) Persons Required to Attend. A representative of each party who has full authority to negotiate and settle the matter on behalf of the party must attend the mediation in person. Such representative may be the party's attorney of record in the adversary proceeding. Other representatives of the party or the party (if the party is not the representative appearing in person at the mediation) may appear by telephone, videoconference or other similar means. If the party is not appearing at the mediation in person, the party shall appear at the mediation by telephone, videoconference or other similar means as directed by the mediator.

- (C) Mediation Conference Procedures. The mediator may establish other procedures for the mediation conference.
- (xiv) Other Mediation. Unless otherwise ordered by the Court or agreed by the parties, the parties' participation in, and the conclusion of, mediation pursuant to this subsection (j) excuses such parties from any requirement to mediate otherwise included in the scheduling order entered by the Court in the underlying adversary proceeding prior to the conclusion of mediation. To the extent that the Court requires, or the parties agree to, additional mediation, the plaintiff shall not bear the presumption of cost for the mediator with regard to any such additional mediation.
- (xv) Other Terms. The provisions of Del. Bankr. L.R. 9019-5(c)(iii)(B), 9019-5(e), 9019-5(f), 9019-5(g) and 9019-5(h) shall apply to any mediation conducted under this subsection (j).