

D.N.J. LBR 9019-2. Mediation: Procedures

(a) Referral to mediation.

- (1) Every adversary proceeding will be referred to mediation after the filing of the initial answer to the adversary complaint, except as provided in subdivisions (a)(2) and (3). A contested matter under Bankruptcy Rule 9014 may also be referred to mediation either by joint request of the parties, or by the court at a status conference or hearing.
- (2) An adversary proceeding will not be presumptively referred to mediation if:
 - (A) one or more parties is self-represented;
 - (B) a party seeks a temporary restraining order or preliminary injunction; or
 - (C) the action is initiated by the United States trustee.

An adversary proceeding identified in subdivisions (a)(2)(A), (B), or (C) may be referred to mediation only by the request of a party, on written notice to the other parties and the court, or by the court's own motion at a status conference or hearing.

- (3) A party subject to presumptive mediation may file a motion requesting to be excused from mediation participation, or requesting a determination that the mediation should not proceed. If a party intends to raise an objection to mediation at the pretrial conference, then not later than 7 days before the pretrial conference the objector must notify the court and all parties to the adversary proceeding that an objection to mediation will be raised at the hearing.

(b) Selection of mediator.

- (1) The parties must confer regarding the selection of a mediator. The parties may select, or the court may designate, an individual who is not on the court's register of mediators.
- (2) When the parties agree to mediation they must submit to the chamber's e-mail Local Form *Mediation Order*. If the parties also agree on the selection of a mediator, the name of the chosen mediator must be included in the *Mediation Order*.
- (3) If the court overrules a party's objection to mediation, the parties must submit a *Mediation Order* not later than 14 days after the pretrial conference.
- (4) The plaintiff must immediately serve the mediator with the *Mediation Order*.

(c) Acceptance of appointment.

- (1) Promptly after receiving the notification of appointment, the mediator must determine whether there is a basis for disqualification, or whether the mediator is unable to serve for any other reason. The determination should include a search for conflicts of interest in the manner prescribed by the applicable Rules of Professional Conduct for attorneys, and by the applicable rules pertaining to the profession of the mediator.
- (2) A party who believes that the mediator has a conflict of interest or other basis for disqualification must promptly advise the mediator, as applicable, and other parties. If the mediator does not withdraw, and the party is dissatisfied with the mediator's decision, the party can seek a determination of the issue from the court.

(d) Organizational conference. Upon entry of the Mediation Order, the parties must promptly contact the mediator to schedule an organizational telephone conference.

(e) Commencement of mediation. Mediation must commence not later than 60 days after the entry of the *Mediation Order*. Parties may seek an extension of time to conduct the mediation by consent order or by motion.

(f) Pretrial conference. The parties do not need to appear at the pretrial conference if, not later than 3 days before the first scheduled pretrial conference, they submit to the chamber's e-mail:

(1) Local Form *Mediation Order*; and

(2) Local Form *Joint Order Scheduling Pretrial Proceedings and Trial*.

(g) Effect of mediation on discovery. Unless otherwise ordered by the court, the assignment to mediation stays discovery, but does not stay the initial disclosures required under Federal Rule 26(a)(1). A party may file a motion requesting that discovery proceed during mediation or that Rule 26 disclosures be stayed.

(h) Mediation statement. The mediator will fix a date for the parties to submit to the mediator and serve on other parties a brief statement of facts, applicable law, and proposals for settlement. Mediation statements should not be filed with the court. The mediation statement should not exceed 15 pages. The mediation statement must contain:

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

(2) the history of any prior settlement discussions, including disclosure of any previous or outstanding offers and demands; and

(3) an estimate of the cost and time to be expended for further discovery, pretrial motions, and trial. At the discretion of the parties, each party's mediation statement may be prepared and submitted to the mediator for review without service of the statement on other parties.

(i) Attendance. Unless excused by the mediator or the court on a showing of good cause or hardship, or if the mediator or the court determines that it is consistent with the goals of the mediation to excuse a particular person from attending, the following persons must attend the mediation session personally:

(1) each party that is a natural person;

(2) if a party, including a governmental entity, is not a natural person then a representative who is not the party's attorney of record and who either has full authority to negotiate and settle the matter on behalf of the party, or has authority to recommend a settlement and has prompt access to any board or governmental body whose approval is required to settle the matter;

(3) the attorney who has primary responsibility for a party's case; and

(4) other interested parties, such as insurers or indemnitors, whose presence is necessary or beneficial to reaching a full resolution of the matter.

(j) Failure to Attend. Willful failure to attend a mediation session may be reported to the court by the mediator or any other party, and may result in the court imposing sanctions.

(k) Confidentiality.

(1) Except as provided in subdivision (k)(2), unless the mediator and the participants agree otherwise in writing, or unless disclosure is permitted by this Rule or applicable law, a mediator, party, or other participant in the mediation may not disclose to an entity or person who was not a participant in the mediation any oral or written communication concerning the mediation, including any document, report or other writing presented or used solely in connection with the mediation.

(2) A mediator must disclose to a proper authority information obtained at a mediation session if required by law, or if the mediator or a party has a reasonable belief that the disclosure will prevent a participant from committing a criminal or illegal act likely to result in death or serious bodily harm.

(3) A mediator shall not testify in any judicial proceeding as to any statements, matters, occurrences or observations arising out of the mediation except by express written agreement of all parties to the mediation. This clause is not applicable to any litigation to enforce the terms of any written agreement reached by the parties in the

course of the mediation wherein the meaning or content of such agreement is put in issue.

(4) No written record or transcript of any discussion had in the course of mediation is to be kept, absent express written agreement by the parties.

(l) Attorney conduct. A lawyer representing a client at a mediation session is subject to the Rules of Professional Conduct.

(m) Evidentiary privilege. A mediation communication, whether written or verbal, is not subject to discovery or admissible in evidence in any subsequent proceeding. A party may by independent evidence establish the substance of the mediation communication in the subsequent proceeding.

(n) 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 communication.

(o) Termination of mediation. The mediator has the right to terminate the mediation at any time, for any reason, by providing written notice to counsel for all parties.

(p) Procedure following mediation. The mediator must, not later than 7 days after the mediator determines that the mediation has concluded, submit to the court Local Form *Mediation Report*. If mediation occurred in an Adversary Proceeding, the mediator must indicate in the report if all outstanding issues have been resolved, and whether the case can be closed. A continuing failure to file a Mediation Report may result in removal from the Register of Mediators. If an agreement between the parties has been reached, the agreement must be set forth in a written document signed by all of the parties or their legal representatives. If the matter is not fully resolved, the parties should be guided by the dates in the *Joint Order Scheduling Pretrial Proceedings and Trial*. If a scheduling order was not entered, the parties should contact chambers.

2015 Comment

This Rule has been amended to reflect the court's adoption of a presumptive mediation program. The Rule supersedes the court's General Order Adopting Mediation Procedures dated November 20, 2013.

2016 Comment

This Rule has been amended to eliminate the requirement that the mediator file a statement accepting or declining appointment and to stress the importance of filing a Mediation Report.