

LOCAL RULES CORNER

Delaware Bankruptcy Court

By Marcos A. Ramos

We inaugurate the Local Rules Corner series with a look at the Delaware Bankruptcy Court's local rules. For our committee, we identify the following potentially relevant issues and/or rules:

Amendment. Our discussion relies on the local rules effective as of February 1, 2012, but it is important to know that the Delaware Bankruptcy Court considers amendments to the local rules on an annual basis and also adopts its local rules on an annual basis. *See* Del. Bankr. L.R. 1001-1.

General orders and chambers procedures. The local rules do not displace general orders adopted by the Delaware Bankruptcy Court or chambers procedures adopted by individual judges. *See* Del. Bankr. L.R. 1001-1(e). The Bankruptcy Court also may modify the application of its rules in the interests of justice. *See* Del. Bankr. L.R. 1001-1(c).

Admission to the court. The practice of law is limited to those members of the bar of the Delaware District Court and those otherwise admitted under the rules. *See* Del. Bankr. L.R. 9010-1(a). Non-Delaware counsel commonly are admitted *pro hac vice* to practice before the Delaware Bankruptcy Court. As in other jurisdictions, such admission requires the attorney to be moved for admission by a member of the Delaware Bankruptcy Court and for the attorney to submit to the jurisdiction of the Delaware Bankruptcy Court for disciplinary purposes in connection with the attorney's appearance before the Bankruptcy Court. *See* Del. Bankr. L.R. 9010-1(b). Generally, counsel must associate with Delaware counsel within 30 days after (i) the filing of the first paper filed on such party's behalf or (ii) the filing of a case transferred or removed to the Delaware Bankruptcy Court. *See* Del. Bankr. L.R. 9010-1(d). However, creditors (either *pro se* or through out-of-state counsel) may file or prosecute a proof of claim or a response to an objection to their claim without associating with Delaware counsel. *See* Del. Bankr. L.R. 9010-1(e)(iii).

Mediation. The Bankruptcy Court has the authority to assign to mediation any dispute arising in a bankruptcy case (including contested matters) or an adversary proceeding. *See* Del. Bankr. L.R. 9018-3, 9018-5. In limited circumstances, certain of the Delaware Bankruptcy Court judges agree to serve as an appointed judicial mediator. More often, a private mediator is selected by the parties or appointed by the court. The mediator has broad latitude to determine the structure of the mediation session(s) as well as the form and content of any written submissions. *See* Del. Bankr. L.R. 9019-5(c). Generally, the party representative with settlement authority is required to attend the mediation conference in person, along with its counsel. *See* Del. Bankr. L.R. 9019-5(c)(iii). A party's disclosure of information during mediation is deemed to be confidential and

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does not waive any otherwise applicable privilege or immunity. *See* Del. Bankr. L.R. 9019-5(d). Generally, the mediator is protected from being compelled to testify concerning the mediation. *See* Del. Bankr. L.R. 9019-5(d)(ii). If a matter is assigned to mediation, that assignment does not delay or stay discovery, pretrial hearing dates, or trial schedules, unless otherwise ordered by the Bankruptcy Court. *See* Del. Bankr. L.R. 9019-5(b).

Appeals. There is no bankruptcy appellate panel in the District of Delaware and therefore appeals generally are taken directly to the Delaware District Court. If a party intends to seek a stay of the underlying decision, the stay first must be sought from the Delaware Bankruptcy Court. *See* Fed. R. Bankr. P. 8005. The Bankruptcy Court may require a bond and the local rules do not incorporate additional or different requirements to prevailing law with regard to the issuance and/or posting of a bond. If the Bankruptcy Court denies the request to stay, the movant may move the district court for a stay. Any appeal from the Bankruptcy Court is subject to consideration for mandatory mediation in the district court. *See* Order Regarding Procedures to Govern Mediation of Appeals from the United States Bankruptcy Court for this District (Mediation Order) (Sep. 11, 2012). If the appeal is deemed appropriate for mediation, principal briefing and motion practice related to the appeal are deferred until the mediation is concluded or the district court determines otherwise. *See* Mediation Order, ¶ 2(b)(i). The mediation may be conducted by a district court magistrate judge or a private mediator. *See* Mediation Order, ¶ 2(b). The mediator may determine the form of written submissions and the confidentiality of statements made during the mediation process is protected by the order. *See* Mediation Order, ¶¶ 2, 4.

E-Discovery. The procedures for e-discovery are included in Local Rule 7026-3. Under that rule, the parties may agree on procedures for e-discovery and the local rule applies in the absence of such agreement. *See* Del. Bankr. L.R. 7026-3(a). By its terms, Local Rule 7026-3 “applies to all matters covered by Fed. R. Cir. P. 26.” *See id.* It requires the sharing between the parties of information regarding potential custodians and electronic systems that may contain responsive information. *See* Del. Bankr. L.R. 7026-3(b)(i)-(ii). Parties must identify their electronic document-retention policies, the individual responsible for such policies, and a person to serve as the party’s “e-discovery liaison” for purposes of the party’s production of electronic information under the rule. *See* Del. Bankr. L.R. 7026-3(b)(iii)-(iv). The e-discovery liaison is responsible for the party’s e-discovery production, must be familiar with the party’s electronic systems and capabilities, knowledgeable about the technical aspects of e-discovery, and prepared to participate in e-discovery disputes. *See* Del. Bankr. L.R. 7026-3(c)(i)-(iii). The parties are encouraged to reach agreement regarding the format of the electronic production, although absent agreement, parties may produce image files without metadata, provided that metadata is appropriately preserved. *See* Del. Bankr. L.R. 7026-3(f). Absent a showing of good cause, each party is required to bear its own costs. *See* Del. Bankr. L.R. 7026-3(i).

Discovery disputes. Discovery disputes are governed by Local Rule 7026-1. *See* Del. Bankr. L.R. 9006-1(b). Under that rule, a motion must be filed with the Bankruptcy Court at least seven days prior to the hearing date on such motion and responses are due at least one business day before the hearing date. *See* Del. Bankr. L.R. 7026-1(a). However, the Bankruptcy Court might advise parties to contested matters or in adversary proceedings that the parties should alert the

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court to discovery disputes prior to motion practice and in an effort to resolve disputes without motion practice. In any event, the Bankruptcy Court expects the parties to make a reasonable effort to reach agreement prior to filing discovery motions and the moving party is required to certify that a reasonable effort to reach agreement with the opposing party has been made or to identify the circumstances that might excuse such an effort. *See* Del. Bankr. L.R. 7026-1(c).

Filing documents under seal. The procedures to obtain authority from the Bankruptcy Court to file documents under seal are included in Local Rule 9018-1. Under that rule, a person seeking to file a document under seal must file a motion with the Bankruptcy Court. Upon the filing of such motion, the movant must place the documents proposed to be filed under seal in an envelope to be delivered directly to the judge's chambers. *See* Del. Bankr. L.R. 9018-1(b). The documents are segregated and remain under seal until the motion is decided. *See id.* If the motion is granted, the clerk will docket a cover sheet and keep the documents under seal until the case or adversary proceeding is closed. *See id.* If the court previously has authorized the filing of documents under seal, no additional motion is required to file documents under seal. *See* Del. Bankr. L.R. 9018-1(c). Parties commonly electronically file redacted forms of the subject motion or document.

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[Marcos A. Ramos](#) is a director with Richards, Layton & Finger, P.A., in Wilmington, Delaware.

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