MODEL LOCAL BANKRUPTCY RULES FOR MEDIATION

COMMENTARY

AMERICAN BANKRUPTCY INSTITUTE
MEDIATION COMMITTEE
2015

COMMENTARY ON THE MODEL BANKRUPTCY RULES FOR MEDIATION

INTRODUCTION

The American Bankruptcy Institute, Mediation Committee appointed a subcommittee to draft Model Local Bankruptcy Rules for Mediation as a resource for bankruptcy courts in adopting or revising local bankruptcy rules regarding mediation. The American Bankruptcy Institute's Executive Committee approved the Model Local Bankruptcy Rules for Mediation on February 5, 2015.

Mediation has been used effectively in bankruptcy cases in a number of contexts, for example, adversary proceedings, contested matters, and plan negotiations. Use of mediation is likely to expand in the future. Some districts have adopted detailed local rules for mediation. Other districts have not yet adopted local rules for mediation. In order to assist the bankruptcy courts, the Mediation Committee of the American Bankruptcy Institute promulgated Model Local Bankruptcy Rules for Mediation. These Model Rules can be used as a template for districts contemplating adopting local bankruptcy rules for mediation or for districts considering amending their existing local bankruptcy rules for mediation. The Model Rules may be adopted in whole or in part and may be modified as preferred by a particular district.

BACKGROUND

There are many reasons why the Mediation Committee undertook the Model Rules project. The differences in local rules from jurisdiction to jurisdiction are significant. More than a few jurisdictions do not have local rules governing mediation in bankruptcy cases, and many that do will see their rules evolve as the use of mediation increases. It was the Mediation Committee's belief that uniformity is a good idea, although the committee understands and respects the local customs and culture that may support different approaches to various mediation topics. While a goal was to provide a template that could be used by various jurisdictions, the Model Rules are intended to be subject to customization depending on the preferences of the judges and participants in the various communities.

There are clearly local views that may differ by district. We have taken the view in drafting the Model Rules that mediation is a facilitative process, and we have avoided provisions that might make the dividing line between litigation and mediation more blurred. The Model Rules view a mediator as a facilitator rather than a court officer, an approach that was designed to foster the feeling among participants that they are in control of the process and are not giving up their autonomy in order to participate. Self-determination is the backbone of effective mediation, and the Model Rules attempt to support that concept. The Model Rules and the time frames therein are flexible and, in many respects, depend on the views and goals of the parties to a particular mediation. In this way, mediation will provide an opportunity for the parties to come to their own resolution rather than one imposed by a court or a court officer.

The Mediation Committee spent more than two years developing the Model Rules. Committee members contacted several current and former bankruptcy judges to solicit their views on such rules and the most helpful way to present them. Every subcommittee member

participated in numerous meetings and provided important contributions to the Model Rules. Subcommittee members[1] considered the local rules in effect in various jurisdictions and the work done by other organizations (one of the members had recently completed work on the Delaware Local Rules on Mediation and suggested that we commence with those rules, and many ideas from other local rules were considered and incorporated). When the draft Model Rules were submitted to the Mediation Committee and were
ultimately forwarded to ABI's Executive Committee, those bodies also considered the Model Rules extensively before approving them.

It is the purpose of the Model Rules to support and even enhance the continuing trend toward the extensive use of mediation in resolving disputes in bankruptcy cases, or even the underlying cases themselves. For example, many commentators believe that the chapter 11 process has become too expensive and time-consuming to be effective, except as a sale process or as the tail end of a pre-pack negotiated pre-petition The use of
Mediation, particularly if governed by clear and effective Rules, can be an effective aid in making the chapter 11 process speedier, less expensive and more user-friendly. It could also increase the success rates of chapter 13 cases and make chapter 7 cases more effective by providing a streamlined method of resolution that could often expedite the parties' realization of their rights and avoid the additional delay and expense of litigation.

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COMMENTARY

Two Model Rules have been drafted. The first deals with the procedures governing the mediation itself. Rule 2 governs the process of appointing the mediator. An explanation of some of the key elements of the Model Rules is as follows:

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[1] The members of the subcommittee of the Mediation Committee of the American Bankruptcy Institute are:

ROBERT M. FISHMAN, Shaw Fishman Glantz & Towbin, LLC, Chicago, IL, *Co-Chair Mediation committee*
RICHARD E. MIKELS, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., Boston, MA, *Co-Chair Mediation Committee and Chair of the Mediation Rules Sub-Committee*

JACK ESCHER, MWI, Boston, MA
BONNIE GLANTZ FATELL, Blank Rome, LLP, Wilmington, DE
REGINALD W. JACKSON, Vorys, Ster, Seymour and Pease, LLP, Columbus, OH
RAYMOND T. LYONS, Fox Rothschild, Princeton, NJ
FRANK A. MONACO, JR., Womble Carlyle Sandridge & Rice, LLP, Wilmington, DE
JUDY W. WEIKER, Manewitz Weiker Associates, LLC, Mountain Lakes, NJ

Many suggestions were provided by HON. JUDITH H. WIZMUR (Ret. U.S. Bankruptcy Court (D.N.J.), ELAYNE E. GREENBERG, director of Hugh L. Carey Center at St. John's University, C. EDWARD DOBBS, Parker Hudson Rainer & Dobbs, LLP, Atlanta, GA,, JERRY M. MARKOWITZ, Markowitz, Ringel, Trusty & Hartog, PA, Miami, FL and, SCOTT Y. STUART, Garden City Group, Chicago, IL

Model Rule 1: Mediation

- *Rule 1(a) provides that any dispute may be assigned by the bankruptcy judge to mediation*. This would include adversary proceedings, contested matters and disputes that are not yet before the court, such as plan negotiations.

- *Pursuant to Rule 1(b), the assignment of a dispute to mediation does not automatically produce a delay or stay with respect to discovery, pretrial hearing dates or trial schedules*. However, any party may seek such relief from the bankruptcy court.

- *Rule 1(c) provides for flexibility and party involvement in the conduct of the mediation process*. The Committee tried to balance the need for efficiency with the need for parties to be in control of their own process. The need for efficiency is clear. The need for party control is an important element in making the parties feel more invested in the process thereby making a favorable outcome much more likely.

    - Rule 1(c)(i) recognizes the benefit of the mediator discussing the matter with the parties prior to the actual mediation session and allows that to occur.

    - Rule1(c)(ii) requires discussion between the mediator and the parties with respect to setting the date for the mediation conference, but absent agreement the date will be set by the mediator. Therefore, in the first instance party control is respected and it is only when no agreement can be reached on this basic point that the mediator acts unilaterally.

    - Under Rule 1(c)(iii) the scope of the mediation submissions by the parties is also determined during this consultation with the participants. Further, it is left for discussion between the mediator and the participants, as to what submissions or portions of submissions are to be delivered to opposing parties. In fact, no submission, or portion thereof, may be delivered to opposing parties without the consent of the participant providing the materials. This Rule also provides a suggestion as to what should be included in the submission materials, but allows the mediator and the parties to determine what will actually be required. The suggested contents include an overview of the facts and law, a narrative of the strengths and weaknesses of the party's case, the anticipated cost of litigation, the status of any settlement discussions and the perceived barriers to a negotiated settlement*Rule 1(c)(iv) requires that the parties attend the mediation conference*. While much is left to the parties, the Rules provide no party with discretion as to whether to attend court ordered mediation. Here the need for efficiency is paramount and if the court orders mediation the Rules require attendance. This Rule also allows interested third parties, such as creditors committees, to become participants in some or all aspects of the mediation, but only with the consent of the mediator and the mediation participants. Finally, this Rule, in subsection (C), reflects the strongly held view of the Committee that the mediator should not be a whistle blower. That would create adversity with a party and any further

mediation would be less likely to succeed. Therefore a party is given the right to notify the court of a material violation of the Rules, but the mediator is not authorized to do soThis does not abrogate the other requirements for a mediator to file other reports to the Court which are required by these Rules

- *Rule 1(d) provides extensive protection for information disclosed at the mediation*. Mediation is unlikely to be effective if the views expressed during the mediation can be used against the party expressing such views. Information disclosed in the mediation which is exempt from discovery remains exempt from discovery and inadmissible. Further, the Rules require strict confidentiality and bar discovery from the mediator. Items discussed between the mediator and a particular party may not be disclosed by the mediator to the other participants without the express permission of such party. . The mediator shall not be a witness for any party in litigation on the merits following the mediation process.

- *Pursuant to Rule 1(h), the mediation may be terminated in one of two ways*. An order of the court may terminate the mediation. Likewise the filing of a mediator's certificate of completion will terminate the mediation. This is important because otherwise it is not clear when the mediation ends. Sometimes the parties will leave the mediation room thinking that the mediation is over only to discover that there are points that still need to be mediated. Therefore the mediator is provided some flexibility in determining when the mediation has ended, but the point of termination will be clear and unequivocal. If the mediation has not led to a resolution, then the matter proceeds to litigation before the court. However, the court is provided discretion to reinstate the mediation process if the court determines that such action is appropriate under the circumstances The Rules make clear that a reinstated mediation is treated in all respects as if it were a new mediation and all the rules apply as if such were the case. This avoids uncertainty as to what rules or procedures are applicable to a reopened mediation.

- *While the Model Rules seek to balance party control with efficiency, Rule 1(i) gives the bankruptcy court broad discretion to alter the Rules for a particular case*. For example, the Court may set time requirements notwithstanding the flexibility otherwise provided by the Rules. However, the court may not alter the confidentiality provisions or the immunity provisions of the Rules.

- *Rule 1(j) provides broad immunity for a mediator* . A mediator who does not engage in actual fraud or willful misconduct is protected. This is consistent with the philosophy underlying the Rules that mediation is more likely to be successful when all of the participants, including the mediator, are as protected as possible from adverse results that could flow from participating in the mediation process.

Model Rule 2: Mediator Qualifications and Compensation

- *Rule 2 provides for the establishment of a Register of Mediators (the "Register") in each district*. It provides for the efficient administration of the Register and provides rules setting forth the standards required for inclusion in the Register.

- *Rule 2(e) governs the appointment of mediators*. The default rule is that the parties select the Mediator, unless the court determines that special circumstances exist that support the court making the appointment. If the parties fail to select a mediator then the court makes the appointment. The mediator chosen must be listed in the Register unless the parties all agree to a mediator that is not listed on the Register. While under Rule 1(a) the court must approve the assignment of a dispute to mediation, there is no formal requirement in the Rules that there be a motion filed with the court to appoint a particular mediator who may be chosen by the parties.. Nothing would preclude such a filing, though. Whether or not an application is filed, the mediator is required by Rule 2(e)(iii)(B) to file the statement of conflicts discussed immediately below. It should be noted that the United States Bankruptcy Court for the Southern District of Texas decided in In re: Smith, 524 B.R. 689 (2015) that a mediator is a professional that cannot be engaged without approval of the court. Any district that is adopting mediation rules should consider this issue.

    - *Rule 2(e)(iii)[B] and [C] deal with a mediator's conflicts*. The mediator is required to file with the court and provide to the parties a statement of all of the mediator's connections with the parties and their professionals, and either a statement of why the mediator has no actual or potential conflicts of interest or a notice of withdrawal. In the event a party believes that the mediator has a conflict of interest, the party must timely notify the proposed mediator. The mediator is required to discuss the issue with the complaining party and the other parties, but if the matter is not resolved consensually the mediator must withdraw. The Committee concluded that if a party is uncomfortable with the mediator's independence that this would be detrimental to the mediation. Therefore the mediator is obligated to resign without the need for a court order.

- *Rule 2(f) deals with a mediators compensation*. This rule requires court approval of fees and expenses of a mediator if the estate will be obligated to pay in excess of $25,000. In the first instance the methodology of setting the fees and expense reimbursement are subject to agreement among the parties. This encourages the best practice of having these issues resolved among the parties upon the appointment of the mediator. The rule provides additional protection for the estate if it has liability for fees and expenses over $25,000. For fees and expenses below that threshold, the committee felt that the added time and expense of requiring fee applications was not necessary since a) the agreement of the parties is a necessary prerequisite to payment without formal court approval and b) the estate representative retains the right to object and bring the matter to the court's attention.