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17-BK-D

Richard E. Mikels

September 6, 2017

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[rmikels@pszjlaw.com](mailto:rmikels@pszjlaw.com)

**Via Federal Express**

Committee on Rules of Practice  
and Procedure  
Administrative Office of the  
United States Courts  
One Columbus Circle, NE  
Washington, DC 20544

**Re: Proposal for Bankruptcy Rules Amendments**

Dear Committee Members:

Jerry Markowitz and I, are the co-chairs of the Mediation Committee of the American Bankruptcy Institute. One goal of our Mediation Committee is to expand the use of mediation in bankruptcy courts and enhance the benefits of mediation for participants in bankruptcy cases.

In 2015 our Committee completed the ABI Model Rules for Bankruptcy Mediation. A copy of the Model Rules with the advisory comments is attached. It is not our intention that these rules be adopted in their entirety in every district. Rather, we hope that they will serve as a template for new or revised local rules which incorporate indigenous practice and norms. We understand that our Model Rules have served this purpose in some districts.

We are now investigating the extent to which bankruptcy courts have adopted local mediation rules. It appears, preliminarily, that over 20% of bankruptcy courts do not have any mediation rules. Moreover, existing local rules vary widely. Some courts have extensive provisions; some adopt to the mediation rules of the district court; and some merely acknowledge the availability of mediation.

We think as a matter of policy that every bankruptcy court should have local mediation rules. This policy imperative is

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Committee on Rules of Practice and Procedure

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reflected in the Alternative Dispute Resolution Act of 1998 (28 U.S.C. § 651 *et seq.*) [the “Act”] which requires local ADR rules in every district court and arguably in all bankruptcy courts.

Mediation and other alternative dispute resolution vehicles are becoming a standard part of our legal system. Mediation can expedite outcomes, save litigation expense when an accord is reached and lead to resolutions tailored to the underlying needs of the parties even if such needs are not directly part of the litigation. For example, mediation can fashion resolutions which consider the personal history between the parties or the possibility of a future business relationship. Moreover, some rules regarding the conduct of mediation, like rules on confidentiality are essential to the process. Further, the absence of a local rule on mediation may lead a court or parties to question whether a court has the authority to order or permit mediation. This question was considered in the Chapter 11 proceeding of Caesars Entertainment Operating Company, Inc. [Case No. 15-01145] in the Northern District of Illinois.

To foster the use of mediation and eliminate ambiguity, the leadership of our committee suggests the following amendment to Federal Rules of Bankruptcy Procedure:

**Proposed Rule Amendment**

The title of Rule 9019 should be amended to read:

“Rule 9019. Compromise, Arbitration and Mediation.”

The following language should be added as a sub-part (d) to Fed.R.Bankr.P. 9019:

“Mediation.” The court may assign to mediation any dispute arising in a bankruptcy case, whether or not an adversary proceeding or contested matter is presently pending with respect to such dispute. Parties to an adversary proceeding, contested matter, or a dispute not yet pending before the court may also stipulate to mediation, subject to court approval. The mediation shall be subject to the limitations on admissibility contained in Fed. R. Evid. 408 and such additional confidentiality provisions as may be

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applicable under applicable law and governing local rules. Without limiting the foregoing, the mediator and the mediation participants in any mediation shall be prohibited from divulging, and may not be compelled to testify concerning, any oral or written information disclosed by the mediation participants or by witnesses in the course of the mediation process, nor shall such information be admissible as evidence for any purpose in any arbitral, judicial or other proceeding. 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. Each district shall adopt a local bankruptcy rule consistent with this provision implementing appropriate procedures for the use of mediation in all pending cases.

In addition to clarifying the authority of bankruptcy judges to order mediation and providing basic confidentiality language to protect the participants, the Committee on Rules of Practice and Procedure (the “Rules Committee”) might consider including an even more comprehensive confidentiality provision in a national rule. For your easy reference the attached ABI Model Rules for Bankruptcy Mediation provide for confidentiality as follows:

“(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

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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 obligation set forth in this Local Rule 1.

(iii) Protection of Proprietary Information. The parties, the mediator and all mediation participants shall protect proprietary information.

(iv) Preservation of Rights. The disclosure by a party of privileged information to the mediator does not waive or otherwise adversely affect the privileged nature of the information...

The Rules Committee might also choose to consider many other examples of confidentiality provisions for mediation, including state laws and forms from other organizations. Of course, the Rules Committee might also decide to include the shorter

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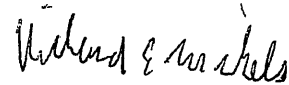
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version of the proposed mediation rule which encompasses a more basic confidentiality provision and leaves the details to the local mediation rules required to be promulgated by each of the courts.

We hope the Rules Committee will consider changes to the Federal Rules of Bankruptcy as suggested in this letter. We believe that these changes will enhance the use and value of mediations in disputes that occur regularly in the bankruptcy courts and provide appropriate uniform safeguards to all parties, their advisers and the mediators involved in bankruptcy mediation.

Thank you for your consideration of these issues. Let us know if you have any questions about this letter that we may be able to address.

Sincerely,



Richard E. Mikels

REM  
cc: Jerry Markowitz  
Hon. Melvin S. Hoffman

**MODEL LOCAL BANKRUPTCY RULES FOR  
MEDIATION**

# Model Rule 1

## Mediation

- (a) Types of Matters Subject to Mediation. The court may assign to mediation any dispute arising in a bankruptcy case, whether or not any adversary proceedings or contested matters is presently pending with respect to such dispute. Parties to an adversary proceeding, contested matter and a dispute not yet pending before the court, 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 U.S. Code, the Bankruptcy Rules 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. Any party may seek such delay or stay, and the court, after notice and hearing, may enter appropriate orders.
- (c) The Mediation Conference.
- (i) Informal Mediation Discussions. The mediator shall be entitled to confer with any or all a) counsel, b) pro se parties, c) parties represented by counsel, with the permission of counsel to such party and d) other representatives and professionals of the parties, with the permission of a pro se party or counsel to a party, prior to, during or after the commencement of the mediation conference (the "Mediation Process"). The mediator shall notify all Mediation Participants of the occurrence of all such communications, but no advance notice or permission from the other Mediation Participants shall be required. The topic of such discussions may include all matters which the mediator believes will be beneficial at the mediation conference or the conduct of the Mediation Process, including, without limitation, those matters which will ordinarily be included in a Submission under Local Rule 1(c)(iii). . All such discussions held shall be subject to the confidentiality requirements of subsection (d) of this Local Rule 1.
- (ii) Time and Place of Mediation Conference. After consulting with the parties and their counsel, as appropriate, 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. The mediation conference may be concluded after any number of sessions, all of which shall be considered part of the mediation conference for purposes of this Local Rule.
- (iii) Submission Materials. Each Mediation Participant (as defined below) shall submit directly to the mediator such materials (the "Submission") as are directed by the mediator after consultation with the Mediation Participants. The mediator may confer with the Mediation Participants, or such of them as the mediator determines appropriate, to discuss what materials would be beneficial to include in the Submission, the timing of the Submissions and what portion of such materials, if any, should be provided to the mediator but not to the other parties. No Mediation Participant shall be required to provide its Submission, or any part thereof, to another party without the consent of the submitting Mediation Participant. The Submission shall not be filed with the

# Model Rule 1

## Mediation

court and the court shall not have access to the Submission. A Submission shall ordinarily include an overview of the facts and law, a narrative of the strengths and weaknesses of a party's case, the anticipated cost of litigation, the status of any settlement discussions and the perceived barriers to a negotiated settlement.

(iv) Attendance at Mediation Conference.

- (A) Persons Required to Attend. Unless excused by the mediator upon a showing of hardship, or if the mediator determines that it is consistent with the goals of the mediation to excuse such party, the following persons (the " Mediation Participants") 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 authority to negotiate and settle the matter on behalf of the party, and prompt access to any board, officer, government body or official necessary to approve any settlement that is not within the authority previously provided to such representative;
  - 3) The attorney who has primary responsibility for each party's case;
  - 4) Other interested parties, such as insurers or indemnitors, whose presence is necessary, or beneficial to, reaching a full resolution of the matter assigned to mediation, and such attendance shall be governed in all respects by the provisions of this subparagraph (c)(iv) of this Local Rule 1.
- (B) Persons Allowed to Attend. Other interested parties in the bankruptcy case who are not direct parties to the dispute, i.e., representatives of a creditors committees, may be allowed to attend the mediation conference, but only with the prior consent of the mediator and the Mediation Participants, who will establish the terms, scope and conditions of such participation. Any such interested party that does participate in the mediation conference will be subject to the confidentiality provisions of Local Rule 1(d) and shall be a Mediation Participant.
- (C) Failure to Attend. Willful failure of a Mediation Participant to attend any mediation conference, and any other material violation of this Local Rule, may be reported to the court by any party, and may result in the imposition of sanctions by the court. Any such report shall comply with the confidentiality requirement of Local Rule 1(d).



# Model Rule 1

## Mediation

- (v) Mediation Conference Procedures. After consultation with the Mediation Participants or their counsel, as appropriate, the mediator may establish procedures for the mediation conference.
  - (vi) Settlement Prior to Mediation Conference. In the event the parties reach an agreement in principle after the matter has been assigned to mediation, but prior to the mediation conference, the parties shall promptly advise the mediator in writing. If the parties agree that a settlement in principle has been reached, the mediation conference shall be continued (to a date certain or generally as the mediator determines) to provide the parties sufficient time to take all steps necessary to finalize the settlement. As soon as practicable, but in no event later than thirty (30) days after the parties report of an agreement in principle, the parties shall confirm to the mediator that the settlement has been finalized. If the agreement in principle has not been finalized, the mediation conference shall go forward, unless further extended by the mediator, or by the court.
- (d) Confidentiality of Mediation Proceedings.
- (i) Protection of Information Disclosed at Mediation. The mediator and the Mediation Participants are prohibited from divulging, outside of the mediation, any oral or written information disclosed by the Mediation Participants or by witnesses in the course of the mediation (the “Mediation Communications”). No person, including without limitation, the Mediation Participants and any person who is not a party to the dispute being mediated or to the Mediation Process (a “Person”) , may rely on or introduce as evidence in any arbitral, judicial or other proceeding, evidence pertaining to any aspect of the Mediation Communications, 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. However, except as set forth in the previous sentence, no Person shall seek discovery from any of the Mediation Participants with respect to the Mediation Communications.
  - (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, Mediation 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 or the Mediation Communications in connection with any arbitral,

# Model Rule 1

## Mediation

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 1.

- (iii) Protection of Proprietary Information. The Mediation Participants and the mediator shall protect proprietary information. Proprietary information should be designated as such by the Mediation Participant seeking such protection, in writing, to all Mediation Participants, prior to any disclosure of such proprietary information. Such designation shall not require the disclosure of the proprietary information, but shall include a description of the type of information for which protection is sought. Any disputes as to the protection of proprietary information may be decided by the court.
- (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 parties, or any of them, but not to the court.
- (f) Post-Mediation Procedures.
  - (i) Filings by the Parties. If an agreement in principle for settlement is reached (even if the agreement in principle is subject to the execution of a definitive settlement agreement or court approval, and is not binding before that date) during the mediation conference, one or more of the Mediation Participant shall file a notice of settlement or, where required, a motion and proposed order seeking court approval of the settlement.
  - (ii) Mediator's Certificate of Completion. After the conclusion of the mediation conference (as determined by the mediator), the mediator shall file with the court a certificate in the form provided by the court ("Certificate of Completion") notifying the court about whether or not a settlement has been reached. Regardless of the outcome of the Mediation Process, the mediator shall not provide the court with any details of the substance of the conference or the settlement, if any.
  - (iii) If the Agreement in Principle is not completed. If the parties are not able or willing to consummate the agreement in principle that was reached during the mediation conference, and the agreement in principal never becomes a binding contract, the substance of the proposed settlement shall remain confidential and shall not be disclosed to the court by the mediator or any of the Mediation Participants.
- (g) Withdrawal from Mediation. Any matter assigned to mediation under this Local Rule may be withdrawn from mediation by the court at any time. Any Mediation Participant may file a motion with the court seeking authority to withdraw from the mediation or

## Model Rule 1

### Mediation

seeking to withdraw any matter assigned to mediation by court order from such mediation.

- (h) Termination of Mediation. Upon the filing of a mediator's Certificate of Completion under Local Rule 1(f) (ii) or the entry of an order withdrawing a matter from mediation under Local Rule 1(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 Process 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. However, the court shall always have the discretion to reinstitute the Mediation Process if the court determines that such action is the most appropriate course under the circumstances. In such event, Local Rule 1 and Local Rule 2 shall apply in the same manner as if the mediation were first beginning pursuant to Local Rule 1(a).
- (i) Applicability of Rules to a Particular Mediation. The court may, upon request of one or more parties to the mediation, or on the court's own motion, declare that one or more of provisions of this Local Rule may be suspended or rendered inapplicable with respect to a particular mediation except Local Rule 1(d) and Local Rule 1(j). Otherwise these Local Rules shall control any mediation related to a case under the Bankruptcy Code.
- (j) Immunity. Aside from proof of actual fraud or other willful misconduct, mediators shall be immune from claims arising out of acts or omissions incident or related to their service as mediators appointed by the bankruptcy court. See, *Wagshal v. Foster*, 28 F.3d. 1249 (D.C. Cir. 1994). Appointed mediators are judicial officers clothed with the same immunities as judges and to the same extent set forth in Title 28 of the United States Code.

## Model Rule 2

### Mediator Qualifications and Compensation

- (a) Register of Mediators. The Clerk shall establish and maintain a register of persons (the "Register of Mediators") qualified under this Local Rule and designated by the Court to serve as mediators in the Mediation Program. The Chief Bankruptcy Judge shall appoint a Judge of this Court, the Clerk or a person qualified under this Local Rule who is a member in good standing of the Bar of the State of \_\_\_\_\_ to serve as the Mediation Program Administrator. Aided by a staff member of the Court, the Mediation Administrator shall receive applications for designation to the Register, maintain the Register, track and compile reports on the Mediation Program and otherwise administer the program.
- (b) Application and Qualifications. Each applicant shall submit to the Mediation Program Administrator a statement of professional qualifications, experience, training and other information demonstrating, in the applicant's opinion, why the applicant should be designated to the Register. The applicant shall submit the statement substantially in compliance with Local Form \_\_\_\_\_. The statement also shall set forth whether the applicant has been removed from any professional organization, or has resigned from any professional organization while an investigation into allegations of professional misconduct was pending and the circumstances of such removal or resignation. This statement shall constitute an application for designation to the Mediation Program. Each applicant shall certify that the applicant has completed appropriate mediation training or has sufficient experience in the mediation process. To have satisfied the requirement of "appropriate mediation training" the applicant should have successfully completed at least 40 hours of mediation training sponsored by a nationally recognized bankruptcy organization. To have satisfied the requirement of "sufficient experience in the mediation process" the applicant must have at least ten (10) years of professional experience in the insolvency field.
- (c) Court Certification. The Court in its sole and absolute discretion, on any feasible basis shall grant or deny any application submitted under this Local Rule. If the Court grants the application, the applicant's name shall be added to the Register, subject to removal under these Local Rules.
- (i) Reaffirmation of Qualifications. The Mediation Program Administrator may request from each applicant accepted for designation to the Register to reaffirm annually the continued existence and accuracy of the qualifications, statements and representations made in the application. If such a request is made and not complied with within one month of such request, the applicant shall be removed from the Register until compliance is complete (the "Suspension of Eligibility"). After the passage of six months from the Suspension of Eligibility, if compliance is not complete, the applicant shall be permanently removed from the Register and may only be placed on the Registry by reapplying in the manner set forth pursuant to the provisions of subsection (b) of this Local Rule 2.
- (d) Removal from Register. A person shall be removed from the Register either at the person's request or by Court order entered on the sole and absolute determination of the Court. If removed by Court order, the person shall be eligible to file an application for reinstatement after one year.

## Model Rule 2

### Mediator Qualifications and Compensation

- (e) Appointment.
- (i) Selection. Upon assignment of a matter to mediation in accordance with these Local Rules and unless special circumstances exist, as determined by the Court, the parties shall select a mediator. If the parties fail to make such selection within the time frame as set by the Court, then the Court shall appoint a mediator. A mediator shall be selected from the Register of Mediators, unless the parties stipulate and agree to a mediator not on the Register of Mediators.
  - (ii) Inability to Serve. If the mediator is unable to or elects not to serve, he or she shall file and serve on all parties, and on the Mediation Program Administrator, within seven (7) days after receipt of notice of appointment, a notice of inability to accept the appointment. In such event an alternative mediator shall be selected in accordance with the procedures pursuant to Subsection (e)(i) of this Local Rule 2.
  - (iii) Disqualification.
    - (A) Disqualifying Events. Any person selected as a mediator may be disqualified for bias or prejudice in the same manner that a Judge may be disqualified under 28 U.S.C. § 44. Any person selected as a mediator shall be disqualified in any matter where 28 U.S.C. § 455 would require disqualification if that person were a Judge.
    - (B) Disclosure. Promptly after receiving notice of appointment, the mediator shall make an inquiry sufficient to determine whether there is a basis for disqualification under this Local Rule. The inquiry shall include, but shall not be limited to, 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. Within ten (10) days after receiving notice of appointment, the mediator shall file with the Court and serve on the parties either (1) a statement disclosing to the best of the applicant's knowledge all of the applicant's connections with the parties and their professionals, together with a statement that the mediator believes that there is no basis for disqualification and that the mediator has no actual or potential conflict of interest or (2) a notice of withdrawal.
    - (C) Objection Based on Conflict of Interest. A party to the mediation who believes that the assigned mediator has a conflict of interest promptly shall bring the issue to the attention of the mediator and to the other parties. If after discussion among the mediator, the party raising the issue and the other parties the issue is not resolved and any of the parties requests the withdrawal of the mediator, the mediator shall file a notice of withdrawal.
- (f) Compensation. A mediator shall be entitled to serve as a paid mediator and shall be compensated at reasonable rates, and, subject to any judicial review of the reasonableness of fees and expenses required by this subsection of Local Rule 2, the

## Model Rule 2

### Mediator Qualifications and Compensation

mediator may require compensation and reimbursement of expenses (“Compensation”) as agreed by the parties. Court approval of the reasonableness of such fees and reimbursement of expenses shall be required if the estate is to be charged for all or part of the mediator’s Compensation and the Compensation to be paid by the estate for such mediation exceeds \$25,000. If the Compensation to be paid by the estate for the particular mediation does not exceed \$25,000, then court approval shall only be necessary if the estate representative objects to the fees sought from the estate. If the mediator consents to serve without compensation and at the conclusion of the first full day of the mediation conference it is determined by the mediator and the parties that additional time will be both necessary and productive in order to complete the mediation or arbitration, then:

- (i) If the mediator consents to continue to serve without compensation, the parties may agree to continue the mediation conference.
  - (ii) If the mediator does not consent to continue to serve without compensation, the fees and expenses shall be on such terms as are satisfactory to the mediator and the parties, subject to Court approval, if required by subsection (f) of this Local Rule 2. Where the parties have agreed to pay such fees and expenses, the parties shall share equally all such fees and expenses unless the parties agree to some other allocation. The Court may determine a different allocation.
  - (iii) Subject to Court approval, if the estate is to be charged with such expense, the mediator may be reimbursed for expenses necessarily incurred in the performance of duties.
- (g) Party Unable to Afford. If the Court determines that a party to a matter assigned to mediation cannot afford to pay the fees and costs of the mediator, the Court may appoint a mediator to serve pro bono as to that party.

**MODEL LOCAL BANKRUPTCY RULES FOR  
MEDIATION  
*COMMENTARY***

**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<sup>1</sup> 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.

## 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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<sup>1</sup> 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*

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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.
  - Rule 1(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 so. This 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.

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