

1) Read the Statute, 2) Read the Statute, 3) Read the...Local Rules!*

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Much has been written in recent months regarding the novel but increasingly utilized practice of a bankruptcy judge mediating a case over which he is presiding (“**judicial self-mediation**”). To date, however, commentators have failed to discuss one crucial factor: while a combination of federal procedural rules and statutes (including section 105 of the Bankruptcy Code) afford bankruptcy judges the general authority to hold settlement conferences and engage in alternative dispute resolution, mediations are governed by separate, specific local rules and procedures.

When read in the context of judicial self-mediation, do the local rules and procedures governing mediation in the bankruptcy courts in the Southern District of New York and the District of New Jersey permit such a role? Or does judicial self-mediation contravene the very rules judges put in place to guide behavior? We found that the rules and procedures in these jurisdictions both permit and prohibit the practice, to varying degrees. Judicial self-mediation raises issues in connection with confidentiality, conflicts, and compensation. As discussed below, these issues could be addressed by revising the local rules expressly to permit judicial self-mediation or to make clear that it is not permissible.

Confidentiality

The local rules governing confidentiality in a mediation are not uniform. For example, Section 5.0 of the *Procedures Governing Mediation of Matters and the Use of Early Neutral Evaluation and Mediation/Voluntary Arbitration in Bankruptcy Cases and Adversary Proceedings* (the “**S.D.N.Y. Procedures**”), as referenced in S.D.N.Y. LBR 9019-1, contemplates complete confidentiality between the mediator and the parties, on the one hand, and the court, on the other. It provides that “[a]ny statements made by the mediator, by the parties or by others during the mediation process *shall not be divulged* by any of the participants in the mediation (or their agents) or by the mediator *to the Court* or to any third party. All records, reports, or other documents received or made by a mediator while serving in such capacity shall be confidential and *shall not be provided to the Court*, unless they would be otherwise admissible” (emphasis added). Implicit in this rule is that the mediator and the court will not be the same person, given the impossibility of preventing divulgence to the court when the judge also serves as mediator. Assuming the S.D.N.Y. were to explicitly authorize judicial self-mediation, a revised rule would provide a clear standard for confidentiality when one person is both presiding judge and mediator.

In contrast to the S.D.N.Y. Procedures, D.N.J. LBR 9019-2(k) is more broadly worded, providing instead that “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” (emphasis added). Typically, where the presiding judge is not the mediator, this rule would prohibit the judge from receiving information or communications exchanged as part of the mediation. As written, the rule would allow a presiding judge serving as mediator to access all mediation information and communications. To the extent the rule is driven by a policy of ensuring that parties to a mediation are able to exchange communications and information freely without prejudicing their positions before the court in the event mediation is unsuccessful, the rule may warrant re-examination if the D.N.J. were to explicitly authorize judicial self-mediation.

Conflicts

D.N.J. LBR 9019-2(c)(2) provides that if any party believes the mediator has a conflict of interest, it must promptly advise the mediator, and if the mediator does not withdraw, the party can seek a determination of the issue from the court. This grants authority to the mediator who has not withdrawn, wearing his or her hat as the judge, to review his or her decision not to withdraw. A revised rule in connection with judicial self-mediation may instead provide that as a next step, the matter is referred to another judge on the bench rather than the mediator/judge presiding over the matter at hand.

This revised rule could also provide for referral in situations where the parties determined there was a conflict regarding the judge/mediator that required resolution after the parties already had consented to judicial self-mediation. These changes would address the inherent conflict of a judge ruling on situations involving his or her own role or decisions (and for what it is worth, similarly sensitive matters of recusal and stay pending appeal might also benefit from a rule requiring referral).

Section 2.3 of the S.D.N.Y. Procedures presents even more complexity, providing for disqualification of a mediator for bias or prejudice, if not disinterested, or if “28 U.S.C. § 455 would require disqualification if that person were a justice, judge or magistrate.” 28 U.S.C. § 455(b)(3) includes as grounds for disqualification situations where a judge “has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding *or expressed an opinion concerning the merits of the particular case in controversy*” (emphasis added). That second prong presents a double conundrum for a judge-mediator. On one hand, it is likely that any judge, simply by carrying out his or her judicial duties, will have issued multiple rulings or made comments during the pendency of the case, involving matters such as dismissal, DIP financing, cash collateral, or other controversies, that concern the merits of the controversy to be mediated. Under the current rule, such opinions arguably could preclude a judge from serving as mediator. Conversely, the court, in its capacity as mediator, may well express opinions to the parties, individually or collectively, regarding the merits of their claims—standard components of a mediator’s role—in a manner that could then disqualify the judge-mediator from serving as judge. If judicial self-mediation is to be permitted, a revised rule would be helpful to clarify that the expression of opinions in either capacity will not result in disqualification from serving in either capacity.

Compensation

A mediator who is also a sitting judge is prohibited from accepting compensation for mediation (see, e.g., 28 U.S.C. § 455(b)(4)). Both the S.D.N.Y. Procedures and the D.N.J. local bankruptcy rules address compensation of a mediator. Section 4.0 of the S.D.N.Y. Procedures provides that a mediator’s compensation “shall be on terms as are satisfactory to the mediator and the parties.” This flexible standard would allow a judge-mediator to forego compensation and permit judicial self-mediation. On the other hand, D.N.J. LBR 9019-1(f) provides that “[a] mediator must be compensated at a reasonable hourly rate, as agreed in writing by the parties prior to commencement of the mediation, and may be reimbursed for expenses, as agreed by the parties” (emphasis added). The use of “must” for compensation versus “may” for expenses underscores the requirement that mediators be reasonably compensated for their time, an impossibility in the judicial mediation context (self or otherwise). As a sitting judge cannot be compensated by any of the parties for his or her work as a mediator, this language would need to be revised to make clear that no compensation is required for any mediation by a judicial officer.

Conclusion

To the extent the use of judicial self-mediation continues (at least in the bankruptcy courts of the S.D.N.Y. and D.N.J.), the parties should carefully consider the local rules, which would benefit from amendment or clarification either to (i) accommodate the practice and provide appropriate safe harbors to ensure that judicial self-mediation conforms with all local rules, or (ii) explicitly prohibit judicial self-mediation. Regardless of whether judges may modify the application of local rules in cases before them, all parties would benefit from clear procedural guidance when a judge takes on an official mediation role in his or her own case.

* Our title is a twist on Justice Frankfurter’s three rules of statutory interpretation: “(1) Read the statute; (2) read the statute; (3) read the statute!”