NEW YORK LAW JOURNAL, 2/22/13, "OUTSIDE COUNSEL", P. 4

Lawyer-Mediator's Dilemma to Report Misconduct but Maintain Confidentiality

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Mediators operate under various standards and rules that govern the many different mediation programs that now exist, such as the Model Standards for Mediators and the Southern District of New York's Local Civil Rule 83.12 governing Southern District of New York mediation. When a mediator is a lawyer admitted to practice in the state of New York, the mediator is also subject to the New York Rules of Professional Conduct (NYRPC). Difficulty arises when there is a conflict between the prescriptions set forth in the mediation standards and rules and the NYRPC.

This article addresses a fact pattern raised at a training program for the pro bono panel of mediators serving in the Southern District of New York's Alternative Dispute Resolution Program. The group considered the situation where a mediator obtains knowledge that one of the parties has knowingly presented false evidence at a mediation and intends to use the same false evidence at trial if the mediation is not successful.[1] The Southern District of New York mediation trainer suggested that the mediator's duties of confidentiality prevent the mediator from disclosing the use of false evidence to the court. This result is counterintuitive to lawyers who are subject to a duty of candor under the Rules of Professional Conduct. We concluded, at least in the context of court-annexed mediation, that the mediator's duty of confidentiality should not trump the lawyer's duties as an officer of the court.

Confidentiality Rules

The dilemma presented by these facts arises because the rules and ethical standards that govern mediation are premised on the core mediation principle of confidentiality. For example, the 2005 Model Standards for Mediators, which have been adopted by the American Arbitration Association, the American Bar Association, and the Association for Conflict Resolution, elevate confidentiality to one of nine standards that govern all mediators. The Model Standards require that a mediator "maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law."[2]

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Confidentiality requirements also appear in the law establishing New York's Community Dispute Resolution Centers (CDRCs)[3] and in the rules governing court-annexed mediation in the Southern District of New York,[4] the Eastern District of New York[5] and the New York County Commercial Division.[6] Likewise, the rules governing the U.S. Court of Appeals for the Second Circuit's Civil Appeals Management Plan (CAMP) conferences establish that information shared during a CAMP mediation proceeding is confidential, and CAMP participants are prohibited from disclosing what is said in a CAMP proceeding to anyone other than clients, principals or co-counsel.[7]

Of these five sets of confidentiality rules, only the Commercial Division's creates an exception specifically allowing mediators to report attorney ethical violations.

It is unclear whether these confidentiality rules rise to the level of a legal privilege for mediation communications. The New York Court of Appeals has explicitly declined to address what, if any, mediation privilege exists under New York law,[8] and the Uniform Mediation Act (UMA), which explicitly creates a mediation privilege, has not been adopted by New York State or federally.

The UMA has, however, influenced the interpretation of mediation confidentiality rules in the Second Circuit. The Second Circuit explicitly relied on the UMA in *In re Teligent*. The court upheld a bankruptcy court's refusal to allow a party to subpoena confidential mediation communications and set forth a standard for evaluating claims to lift mediation confidentiality. "A party seeking disclosure of confidential mediation communications must demonstrate (1) a special need for the confidential material, (2) resulting unfairness from a lack of discovery, and (3) that the need for the evidence outweighs the interest in maintaining confidentiality."[9] This broad, sweeping language seems to apply to any "confidential" mediation, whether confidential by operation of a court rule or order or otherwise. In a recent opinion, Judge Leonard Sand applied the three-pronged *Teligent* test in the context of a private mediation conducted before the Financial Industry Resolution Centre Ltd. in Singapore.[10]

Notwithstanding the uncertainty surrounding the federal mediation privilege, federal courts take seriously the mediation confidentiality rules, and attorneys who violate them face penalties. A lawyer was castigated by the Second Circuit for quoting from a court-sponsored mediation: "If participants cannot rely on the confidential treatment of everything that transpires during these sessions then counsel of necessity will feel constrained to conduct themselves in a cautious, tight-lipped, non-committal manner more suitable to poker players in a high-stakes game than to adversaries attempting to arrive at a just resolution of a civil dispute."[11] In another case, then-Dis-

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trict Judge Denny Chin sanctioned a lawyer for informing the court of settlement proposals and other mediation communications.[12]

Rules of Professional Conduct

Under the NYRPC, a lawyer has a duty of candor to the court. For example, when a lawyer, client or witness called by the lawyer has offered material evidence and the lawyer comes to know that the evidence is false, NYRPC 3.3(a) requires that the lawyer disclose the false evidence to the court if other remedial measures fail, even where making such disclosure violates a client confidence. The commentary to NYRPC 2.4 makes explicit that "[l]awyers who represent clients in alternative dispute resolution processes are governed by the Rules of Professional Conduct." In the case of mediation, a lawyer's duty of candor toward both the mediator and the other party is governed by NYRPC 4.1, which prohibits a lawyer in the course of representing a client from making a false statement of fact or law to a third person, and NYRPC 3.4(a)(4), which forbids the use of false evidence.

Pursuant to NYRPC 8.3, when a lawyer-mediator knows that another lawyer has committed a violation of the Rules of Professional Conduct that "raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer," the lawyer-mediator must report the violation to a tribunal or other authority empowered to investigate or act upon it. The New York State Bar Association, interpreting the prior version of this rule as it appeared in the Code of Professional Responsibility, opined that a violation involving false statements to a tribunal raises a substantial question as to honesty, trustworthiness or fitness to practice law.[13] The use of false evidence in the context of mediation should also raise substantial questions about a lawyer's honesty, trustworthiness and fitness to practice law.

NYRPC 8.3(c) contains exceptions specifying that the rule does not require disclosure of information otherwise protected by NYRPC 1.6 (governing confidential client information) or information gained by a lawyer or judge while participating in a bona fide lawyer assistance program. However, there is no exception in the rule for information gained by a lawyer in the course of a mediation or while serving as a mediator.

The Tension

While the mediation rules generally require the protection of all matters learned during a mediation—with no exception for intentional misrepresentations or other unethical behavior—the New York rules of professional conduct emphasize a lawyer's duty of candor to the court. And it is hard to imagine that any court, much less the Eastern or Southern districts of New York, would tolerate silence by a lawyer who knows that a fraud has been, and continues to be, perpetrated on it. Yet, there is woefully little support for lawyer-mediators who seek guidance when confronted with fraudulent or unethical behavior.

New York's Mediator Ethics Advisory Committee (MEAC) responds to ethics questions raised by mediators working in New York CDRCs. A 2006 MEAC opinion discussed a situation in which a mediator determined that a party had received insurance payouts totaling $19,000 for damage to a piano that the party had purchased for only $1,000. The mediator concluded that the party had committed insurance fraud and sought advice on whether he could report the criminal activity to the authorities. MEAC opined that the mediator should not disclose the fraudulent activity:

> Members of the Committee sympathize with the inquirer's concern that justice will be subverted if the mediator fails to report evidence that one party has engaged in insurance fraud. However, mediators often come across evidence of criminal conduct while mediating at a community dispute resolution center, and they are expected to refrain from disclosing that information so that parties can candidly discuss and resolve their disputes without worrying that their statements will be introduced as evidence against them.[14]

There is no indication in this opinion that the result would vary if the claimant were represented by counsel or if the mediator were a lawyer.

A more recent MEAC opinion suggested that there may be room for the lawyer-mediator to argue that the Standards of Conduct for New York State CDRC mediators allow for the reporting of substantial violations of the Rules of Professional Conduct. The opinion addresses the question of whether a lawyer-mediator may disclose the names of parties involved in mediation for the purpose of conducting a conflict check within the lawyer-mediator's law firm.

Noting that the ethical guidelines establish that the mediator should not disclose the parties' names to anyone for any purpose including conflict checks, MEAC explained that the commentary to the confidentiality provisions uses "should" language, and the mediator may depart from the command with very strong reason. "A requirement under another professional ethics code, such as the Rules of Professional Conduct, may amount to a strong reason for the mediator to depart from the Committee's directive."[15] Applying this same principle, the lawyer-mediator might take the position that the Rules of Professional Conduct provide a "very strong reason" justifying the disclosure of attorney misconduct that would otherwise fall within mediation confidentiality rules.

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Lawyer-mediators should have surer footing. As it stands, the lawyer-mediator faces potentially serious consequences under mediation confidentiality rules for disclosing information obtained in the context of a mediation and potentially serious consequences under NYRPC 8.3 for failure to report substantial violations of the Rules of Professional Conduct. While the 2010 MEAC opinion provides some support for lawyer-mediators who participate in New York's CDRC program, there is little guidance for New York mediators operating in most other contexts aside from the Commercial Division's alternative dispute resolution program. The potential clash between attorney and mediator ethics has been recognized among academics,[16] but it has yet to be adequately addressed by lawmakers, courts or disciplinary committees.

Fraud Exception

It is surprising that courts have not made clear that a fraud on the court should deprive the offender of mediation confidentiality just as the crime-fraud exception vitiates the attorney-client privilege. As the Second Circuit has explained, communications between a lawyer and client lose their privileged status if they are in furtherance of ongoing criminal or fraudulent conduct because "advice in furtherance of such goals is socially perverse, and the client's communications seeking such advice are not worthy of protection."[17] Likewise, false evidence or intentional misstatements in the context of mediation undermine the very goals of self-determination and collaborative problem solving which mediation seeks to promote. It logically follows that fraud on the court should disrupt mediation confidentiality as well.

The policy concerns we describe are most compelling when applied to court-annexed mediation programs conducted in the context of ongoing litigation. When mediation occurs outside the auspices of the court—or when the parties are not represented by counsel—the considerations may weigh differently. But where the court is involved in oversight, it becomes untenable to condone professional misconduct in the context of mediation.

At the very least, courts should find that a fraud exception applies to the mediation confidentiality rules in court-annexed mediations, as we have suggested. A cleaner resolution would be for courts hosting mediation programs to promulgate rules like those of the Commercial Division, explicitly allowing mediators to disclose unethical conduct on the part of counsel as required by NYRPC 8.3.

1. For purposes of this article, we assume that the "knowledge" is actual knowledge and that the source of the knowledge is from one of the parties at the mediation. We recognize, however, that it may be difficult to parse when a lawyer "knows" that another has presented false evidence. See Erin K. Jaskot & Christopher J. Mulligan, "Witness Testimony and the Knowledge Requirement: An Atypical Approach to Defining Knowledge and Its Effect on the Lawyer as an Officer of the Court," 17 GEO. J. LEGAL ETHICS 845, 846 (2004) ("The lack of a coherent definition for what evidence constitutes 'knowledge' has resulted in a swirl of uncertainty surrounding Model Rule 3.3").
2. Model Standards of Conduct for Mediators Standard V (September, 2005).
3. N.Y. Judic. L. §849-b(6).
4. Southern District of New York Local Civil Rule 83.9.
5. Eastern District of New York Local Civil Rule 83.8.
6. New York County Commercial Division Alternative Dispute Resolution Rule 6.
7. U.S. Court of Appeals for the Second Circuit Local Rule 33.1(e).
8. *Hauzinger v. Hauzinger*, 10 N.Y.3d 923 (2008).
9. *In re Teligent*, 640 F.3d 53, 58 (2d Cir. 2011).
10. *Dandong v. Pinnacle Performance*, 10 Civ. 8086 (LBS), 2012 WL 4793870 (S.D.N.Y. Oct. 9, 2012).
11. *Lake Utopia Paper v. Connelly Containers*, 608 F.2d 928, 930 (2d Cir. 1979).
12. *Bernard v. Galen Group.*, 901 F.Supp. 778 (S.D.N.Y. 1995).
13. New York State Bar Association Opinion #635 (Sept. 23, 1992).
14. MEAC Opinion 2006-03, http://www.nycourts.gov/ip/adr/Publications/MEAC_Opinions/FormalPublishedOpinion2006-03.pdf.
15. MEAC Opinion 2010-02, http://www.nycourts.gov/ip/adr/Publications/MEAC_Opinions/FormalPublishedOpinion2010-02.pdf
16. Rosemary J. Matthews, Comment, "Do I Have to Say More? When Mediation Confidentiality Clashes with the Duty to Report," 34 CAMPBELL L. REV. 205 (2011); Rebecca H. Hiers, "Navigating Mediation's Uncharted Waters," 57 RUTGERS L. REV. 531 (2005); Pamela A. Kentra, "Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict for Attorney-Mediators Between the Duty to Maintain Mediation Confidentiality and the Duty to Report Fellow Attorney Misconduct," 1997 B.Y.U. L. REV. 715; Mori Irvine, "Serving Two Masters: The Obligation Under the Rules of Professional Conduct to Report Attorney Misconduct in a Confidential Mediation," 26 RUTGERS L.J. 155 (1994).
17. *In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983*, 731 F.2d 1032, 1038 (2d Cir. 1984).