March 04, 2014 Roosevelt Inn Program Materials

The Art of Mediation:
A Cost Effective Alternative to Judicial Determinations

- Fact Pattern
- Local Civil Rule 83.8 Court Annexed Mediation (Eastern District Only)
- Summary Overview Local Civil Rule 83.8
- Mediation Instructions to Counsel in EDNY Mediation
- New York Courts Commercial Division Nassau County Rules/ADR
- Professional Ethics in Mediation and Arbitration
- Sample Nassau County Order of Reference
- Daniel Weitz, The Brains Behind Mediation: Reflections on Neuroscience, Conflict Resolution and Decision-Making.
- Nassau County Bar Association Tribunal Rules and Applications

FACT PATTERN

Jean, Greg and Neil were poker buddies who knew each other for years. They decided to go into business together. Jean is an accountant with interests in numerous businesses. Greg owns gas stations, convenience stores and commercial real estate. Neil and his family own and operated car washes and associated oil change facilities.

Neil's father, Otto, who was also one of the "poker gang" told Jean and Greg that he had entered into an agreement to purchase a gas station/convenience store/car wash business ("Agreement to Purchase") at a price of $1,240,000.00. Although he claimed that the purchase price of the business was $1,240,000.00, the final written contract of sale only reflected a purchase price of $340,000.

Otto and Neil told Jean and Greg that the seller specifically requested that the contract be drafted that way in order for the seller to avoid paying the 25% penalty to Gouge the Customer Gas Company, its gas franchisor, which penalty would be triggered as a result of the fact that the seller was selling the gas station less than one year from the date of purchase. Jean and Greg agreed to buy the gas station/convenience store/car wash business with Neil. Otto had the right to assign the Agreement to Purchase, and it was decided that it would be assigned to J & G Enterprises, Inc. a corporation previously formed by Jean and Greg for other purposes but which had never actually been used. Jean, Greg and Neil were each to own 1/3 of the company. Otto was not going to be actually named as a shareholder but it was agreed he would be involved in the negotiations and that he was to be involved in the operation of the business.

Each of the three named shareholders was to be responsible for coming up with an investment of $450,000.00 at the time of closing (included closing costs). No actual written

shareholder agreement was ever signed. Greg, Jean and Neil were represented by one attorney with regard to the business acquisition and lease transaction. According to Jean and Greg the difference in price between the contract and "real" price of the business was paid by checks which the buyers were directed to pay to third party companies on behalf of the seller, as well as by money paid to a "silent partner" of the seller corporation. The monies paid at the actual closing by Greg and Jean, either in checks made payable to the seller directly or to the designated third parties, did total their required contributions towards the purchase price. Neil and his father however, rather than bringing a check made payable to the silent partner to the closing as they were supposed to do, advised Greg and Jean when they arrived at the closing that Neil's mother had traveled from her home on Long Island to Brooklyn in order to make their payment in cash to the silent partner, Sam Snead, who would not be attending the closing. Therefore the only actual additional money brought to the closing table by Neil was $46,666. When Greg and Jean asked Neil and Otto for a copy of a receipt for the cash allegedly paid to "Sam Snead" Neil said he didn't have one but promised to provide it. Based upon that representation, and although Jean and Greg believed that they might be the victims of some type of scheme designed to allow Neil to gain one third ownership of the company for virtually no investment, the closing went forward. In the days following the closing Jean and Greg continued to request copies of the receipt. Unlike the typical closing statement which provides copies of all checks and sets forth the purchase price paid etc. no such statement was every provided by counsel.

J & G is a subchapter S corporation. Jean is the corporation’s accountant. The K-1's issued at the end of each year reflected that Jean, Greg and Neil each owned 33% of the issued shares of the company. The books of the company also reflected the fact that Neil had an

outstanding debt owed to J & G based on the fact that he failed to produce a copy of the receipt for the money he allegedly invested in cash. But for that debt, based on the actual monies brought to the closing by Neil his ownership interest would only be 6%.

As a result of many disputes over the years including Neil's failure to ever produce a copy of his receipt, as well as the fact that Jean and Greg suspected that Neil was siphoning cash from the business, the decision was made to purchase the property the business had previously been leasing from Gouge The Customer Gas Company, for $2,200,000.00, and to sell the operating business with a lease back to the new purchaser. The property purchase was subject to a $1.54 million dollar mortgage which required personal guarantees. Neil refused to be a guarantor, notwithstanding the fact that as 1/3 owner of J & G he would own 1/3 of its assets, which included the real estate.

Once the operating business was sold Jean and Greg handled the business of J & G which consisted of nothing more than renting the real estate to the buyer, collecting the rent, paying the mortgage, taxes, insurance, and other expenses of the company. Based on the fact that the day to day operation had been sold, Neil who had been involved in overseeing the operation of the car wash and convenience store, etc. was no longer involved in the business.

Prior to distributing the excess proceeds from the sale of the operating business to Neil, Jean and Greg insisted that Neil repay his indebtedness to the company. Barring any such repayment, Jean and Greg had advised Neil that they intend to apply his share of the purchase money received from the buyer, as well as his share of all future payments from the buyer to pay down Neil's outstanding loan on the books to the company. Once that loan is repaid, Neil has been advised he will receive his one-third share of all future payments from the buyer.

Neil commences an action for dissolution of the Corporation pursuant to NY Bus Corp Law §1104(a) by Order to Show Cause, seeking a Temporary Restraining Order and Preliminary Injunction. Neil alleges that he was frozen out of the company by Jean and Greg whom he claims seized all of J & G's assets.

Mediation Participants : Neil and his attorney

Jean and Greg and the attorney for J & G

Local Rules of the United States District Courts for the Southern and Eastern Districts of New York

Effective September 3rd, 2013

with amendments to the SDNY Rules for the Division of Business Among District Judges Rule 13 effective 1/1/2014, Rules 18 and 21 effective 1/13/2014

Adopted by the Board of Judges of the Eastern District of New York and the Southern District of New York
Approved by the Judicial Council of the Second Circuit

Local Civil Rule 83.8. Court-Annexed Mediation (Eastern District Only) [formerly Local Civil Rule 83.11]

(a) **Description.** Mediation is a process in which parties and counsel agree to meet with a neutral mediator trained to assist them in settling disputes. The mediator improves communication across party lines, helps parties articulate their interests and understand those of the other party, probes the strengths and weaknesses of each party's legal positions, and identifies areas of agreement and helps generate options for a mutually agreeable resolution to the dispute. In all cases, mediation provides an opportunity to explore a wide range of potential solutions and to address interests that may be outside the scope of the stated controversy or which could not be addressed by judicial action. A hallmark of mediation is its capacity to expand traditional settlement discussions and broaden resolution options, often by exploring litigant needs and interests that may be formally independent of the legal issues in controversy.

(b) **Mediation Procedures.**

(1) Eligible cases. Judges and Magistrate Judges may designate civil cases for inclusion in the mediation program, and when doing so shall prepare an order to that effect. Alternatively, and subject to the availability of qualified mediators, the parties may consent to participation in the mediation program by preparing and executing a stipulation signed by all parties to the action and so-ordered by the Court.

(A) Mediation deadline. Any court order designating a case for inclusion in the mediation program, however arrived at, may contain a deadline not to exceed six months from the date of entry on the docket of that order. This deadline may be extended upon motion to the Court for good cause shown.

(2) Mediators. Parties whose case has been designated for inclusion in the mediation program shall be offered the options of (a) using a mediator from the Court's panel, a listing of which is available in the Clerk's Office; (b) selecting a mediator on their own; or (c) seeking the assistance of a reputable neutral ADR organization in the selection of a mediator.

(A) Court's panel of mediators. When the parties opt to use a mediator from the Court's panel, the Clerk's Office will appoint a mediator to handle the case who (i) has been for at least five years a member of the bar of a state or the District of Columbia; (ii) is admitted to practice before this Court; and (iii) has completed the Court's requirements for mediator training and mediator expertise. If any party so requests, the appointed mediator also shall have expertise in the area of law in the case. The Clerk's Office will provide notice of their appointment to all counsel.

(B) Disqualification. Any party may submit a written request to the Clerk's Office within fourteen days from the date of the notification of the mediator for the disqualification of the mediator for bias or prejudice as provided in 28 U.S.C. § 144. A denial of such a request by the Clerk's Office is subject to review by the assigned Judge upon motion filed within fourteen (14) days of the date of the Clerk's Office denial.

(3) Scheduling the mediation. The mediator, however chosen, will contact all attorneys to fix the date and place of the first mediation session, which shall be held within thirty days of the date the mediator was appointed or at such other time as the Court may establish.

(A) The Clerk's Office will provide counsel with copies of the Judge's order referring the case to the mediation program, the Clerk's Office notice of appointment of mediator (if applicable), and a copy of the program procedures.

(4) Written mediation statements. No less than fourteen (14) days prior to the first mediation session, each party shall submit directly to the mediator a mediation statement not to exceed ten pages double-spaced, not including exhibits, outlining the key facts and legal issues in the case. The statement will also include a description of motions filed and their status, and any other information that will advance settlement prospects or make the mediation more productive. Mediation statements are not briefs and are not filed with the Court, nor shall the assigned Judge or Magistrate Judge have access to them.

(5) Mediation session(s). The mediator meets initially with all parties to the dispute and their counsel in a joint session. The mediator may hold mediation sessions in his/her office, or at the Court, or at such other place as the parties and the mediator shall agree. At this meeting, the mediator explains the mediation process and gives each party an opportunity to explain his or her views about the matters in dispute. There is then likely to be discussion and questioning among the parties as well as between the mediator and the parties.

(A) Separate caucuses. At the conclusion of the joint session, the mediator will typically caucus individually with each party. Caucuses permit the mediator and the parties to explore more fully the needs and interests underlying the stated positions. In caucuses the mediator strives to facilitate settlement on matters in dispute and the possibilities for settlement. In some cases the mediator may offer specific suggestions for settlement; in other cases the mediator may help the parties generate creative settlement proposals.

(B) Additional sessions. The mediator may conduct additional joint sessions to promote further direct discussion between the parties, or she/he may continue to work with the parties in private caucuses.

(C) Conclusion. The mediation concludes when the parties reach a mutually acceptable resolution, when the parties fail to reach an agreement, on the date the Judge or Magistrate Judge specified as the mediation deadline in their designation order, or in the event no such date has been specified by the Court, at such other time as the parties and/or the mediator may determine. The mediator has no power to impose settlement and the mediation process is confidential, whether or not a settlement is reached.

(6) Settlement. If settlement is reached, in whole or in part, the agreement, which shall be binding upon all parties, will be put into writing and counsel will file a stipulation of dismissal or such other document as may be appropriate. If the case does not settle, the mediator will immediately notify the Clerk's Office, and the case or the portion of the case that has not settled will continue in the litigation process.

(c) **Attendance at Mediation Sessions.**

(1) In all civil cases designated by the Court for inclusion in the mediation program, attendance at one mediation session shall be mandatory; thereafter, attendance shall be voluntary. The Court requires of each party that the attorney who has primary responsibility for handling the trial of the matter attend the mediation sessions.

(2) In addition, the Court may require, and if it does not, the mediator may require the attendance at the mediation session of a party or its representative in the case of a business or governmental entity or a minor, with authority to settle the matter and to bind the party. This requirement reflects the Court's view that the principal values of mediation include affording litigants with an opportunity to articulate their positions and interests directly to the other parties and to a mediator and to hear, first hand, the other party's version of the matters in

dispute. Mediation also enables parties to search directly with the other party for mutually agreeable solutions.

(d) **Confidentiality.**

(1) The parties will be asked to sign an agreement of confidentiality at the beginning of the first mediation session to the following effect:

(A) Unless the parties otherwise agree, all written and oral communications made by the parties and the mediator in connection with or during any mediation session are confidential and may not be disclosed or used for any purpose unrelated to the mediation.

(B) The mediator shall not be called by any party as a witness in any court proceeding related to the subject matter of the mediation unless related to the alleged misconduct of the mediator.

(2) Mediators will maintain the confidentiality of all information provided to, or discussed with, them. The Clerk of Court and the ADR Administrator are responsible for program administration, evaluation, and liaison between the mediators and the Court and will maintain strict confidentiality.

(3) No papers generated by the mediation process will be included in Court files, nor shall the Judge or Magistrate Judge assigned to the case have access to them. Information about what transpires during mediation sessions will not at any time be made known to the Court, except to the extent required to resolve issues of noncompliance with the mediation procedures. However, communications made in connection with or during a mediation may be disclosed if all parties and, if appropriate as determined by the mediator, the mediator so agree. Nothing in this section shall be construed to prohibit parties from entering into written agreements resolving some or all of the case or entering and filing with the Court procedural or factual stipulations based on suggestions or agreements made in connection with a

mediation.

(e) **Oath and Disqualification of Mediator.**

(1) Each individual certified as a mediator shall take the oath or affirmation prescribed by 28 U.S.C. § 453 before serving as a mediator.

(2) No mediator may serve in any matter in violation of the standards set forth in 28 U.S.C. § 455. If a mediator is concerned that a circumstance covered by subparagraph (a) of that section might exist, e.g., if the mediator's law firm has represented one or more of the parties, or if one of the lawyers who would appear before the mediator at the mediation session is involved in a case on which an attorney in the mediator's firm is working, the mediator shall promptly disclose that circumstance to all counsel in writing. A party who believes that the assigned mediator has a conflict of interest shall bring this concern to the attention of the Clerk's Office in writing, within fourteen (14) days of learning the source of the potential conflict or the objection to such a potential conflict shall be deemed to have been waived. Any objections that cannot be resolved by the parties in consultation with the Clerk's Office shall be referred to the Judge or Magistrate Judge who has designated the case for inclusion in the mediation program.

(3) A party who believes that the assigned mediator has engaged in misconduct in such capacity shall bring this concern to the attention of the Clerk's Office in writing, within fourteen (14) days of learning of the alleged misconduct or the objection to such alleged misconduct shall be deemed to have been waived. Any objections that cannot be resolved by the parties in consultation with the Clerk's Office shall be referred to the Judge who has designated the case for inclusion in the mediation program.

(f) **Services of the Mediators.**

(1) Participation by mediators in the program is on a voluntary basis. Each mediator shall receive a fee of $600 for the first four hours or less of the actual mediation. Time spent preparing for the mediation will not be compensated. Thereafter, the mediator shall be compensated at the rate of $250 per hour. The mediator's fee shall be paid by the parties to the mediation. Any party that is unable or unwilling to pay the fee may apply to the referring judge for a waiver of the fee, with a right of appeal to the district judge in the event the referral was made by a magistrate judge. Each member of the panel will be required to mediate a maximum of two cases pro bono each year, if requested by the Court. Attorneys serving on the Court's panel will be given credit for pro bono work.

(2) Appointment to the Court's panel is for a three year term, subject to renewal. A panelist will not be expected to serve on more than two cases during any twelve month period and will not be required to accept each assignment offered. Repeated rejection of assignments will result in the attorney being dropped from the panel.

(g) **Immunity of the Mediators.** Mediators shall be immune from liability or suit with respect to their conduct as such to the maximum extent permitted by applicable law.

COMMITTEE NOTE

Because this Local Civil Rule has been recently reviewed and updated by the Court, the Committee has not undertaken to review it in detail.

Overview of Local Civil Rule 83.8 – Eastern District Court-Annexed Mediation and Mediation Instructions to Counsel in EDNY Mediation

- Jaymie Sabilia-Heffert,
2L at Touro Law School

Local Civil Rule 83.8 – Eastern District Court-Annexed Mediation

A case becomes eligible for mediation when the Judge or Magistrate Judge prepares an order designating the civil case to the mediation program or when the parties consent to participation in the program. The parties must prepare and execute a stipulation, signed by all parties to the action and so-ordered by the Court. The deadline for a case to be included in the mediation program is within six (6) months of the date of entry on the docket of that order. Extensions to the deadline may be allowed upon a showing of good cause.

A mediator may be chosen by one (1) of three (3) ways: (1) from the Court's panel found on the Court's website at https://www.nyed.uscourts.gov/adr/Mediation/displayAll.cfm, (2) the parties may select a mediator on their own, or (3) by the assistance of a neutral ADR organization. The Court's panel of mediators are required to have been a member of the bar of a state or the District of Columbia for a minimum of five (5) years, be admitted to practice before this Court, and to have completed the Court's training requirements for mediation. It is important for a party to note that unless specifically requested, the mediator may not have expertise in the area of law in the case.

Pursuant to 28 U.S.C. § 144, any party may submit a written request to the Clerk's office within fourteen (14) days from the date of notification of the mediator for the disqualification of the mediator for bias or prejudice. If the disqualification is denied, it is subject to review by the assigned Judge upon motion filed within fourteen (14) days of the denial.

The first mediation session is to be held within thirty (30) days of the date the mediator was appointed (unless otherwise specified by the Court) which is to be set up by the mediator. Within fourteen (14) days prior to the first session, each party shall submit to the mediator a mediation statement no longer than ten (10) pages which is to outline the key facts and legal issues as well as any filed motions and their status.

The first session is a joint session wherein the mediator will meet with all parties to the dispute and their counsel together. In this meeting, the mediator will explain the mediation process and give each party an opportunity to explain their respective views about the issues in dispute. Following this explanation, the parties will likely engage in a discussion and questioning with one another. At the conclusion of the joint session, the mediator will likely then hold separate caucuses with each party. During these separate caucuses, the mediator and the parties are given the opportunity to explore more fully the needs and interests underlying their respective stated positions. The mediator may offer specific suggestions for settlements or help the parties generate creative settlement proposals, but does not have the authority to force an unwanted settlement upon the parties. Additional joint and separate caucuses are available if needed.

Upon a mutually acceptable resolution among the parties the mediation is concluded. The settlement that is reached, in whole or in part, shall be binding upon the parties and will be put into writing and counsel will file a stipulation of dismissal or another appropriate document. If the parties fail to meet such a resolution by the date set by the Judge or Magistrate Judge assigned to the case or at such other time determined by the parties and the mediator, the mediator will notify the Clerk's Office. Upon this notification, the case, or unsettled portion of the case, will continue in the litigation process.

Attendance is mandatory at one (1) mediation session and then it becomes voluntary. It is required that each party's respective attorney be present at every mediation session. The Court, as well as the mediator, may require attendance at the mediation session of a party or its representative in the case of a business or governmental entity or a minor, with authority to settle the matter and bind the party. This requirement ensures the principle values of mediation of affording litigants with an opportunity to articulate their positions and interests directly to the other parties and for the mediator to hear them.

At the beginning of the first mediation session, the parties will sign a confidentiality agreement. The agreement, unless otherwise agreed, provides that all written and oral communication made by the parties and the mediator in connection with or during any session remains confidential, and that the mediator may not be called by any party as a witness in any subsequently related court matter, unless related to the alleged misconduct of the mediator.

Each mediator shall take the oath or affirmation prescribed by 20 U.S.C. §453 and shall not serve in any matter in violation of the standards set forth in 28 U.S.C. §455. Mediators will maintain the confidentiality of all information provided to, or discussed, with them. No papers generated by the mediation process will be included in Court files nor shall the assigned Judge or Magistrate Judge have access to them.

Mediators participate in the program on a voluntary basis. A mediator shall receive a fee of $600 for the first four (4) hours of the actual mediation and will not be compensated for the time spent preparing for the mediation. The parties to the mediation are the ones who pay the mediator's fees and any party that is unable or unwilling to pay the fees may apply to the Judge for a waiver of the fee. Appointment to the Court's panel is for a three (3) year term, subject to renewal. A mediator will not be expected to serve on more than two (2) cases during a twelve (12) month period. Mediators shall remain immune from liability or suit with respect to their conduct to the maximum extent permitted by the law.

Mediation Instructions to Counsel in EDNY Mediation

The application of the Local Civil Rule 83.8 in EDNY follows the formal rules procedures. Unless otherwise provided, the first mediation session shall take place about four (4) to six (6) weeks after the date of the Mediation Order. Counsel are to select the mediator and schedule the first mediation session. Counsel shall electronically file and confirm in writing to the ADR Administrator, Gerald P. Lepp, the name of the mediator as well as the date, time and place of the first mediation session. Counsel are to confer with one another and speak with the

mediator in scheduling the first session, which should be scheduled for an entire day. Trial counsel, a representative of their client with full settlement authority, and the insurance adjustor shall attend the mediation sessions in person.

Compensation of mediators not on the EDNY Panel is determined by agreement among counsel and the mediator. Many EDNY panel mediators provide private mediations as well.

If the Mediation Department is requested to select the mediator, the department will provide the parties with a list of available EDNY Panel mediators with experience in the subject of the case. Counsel is given seven (7) days to numerically rank their preferred mediator and the ADR Administrator will select the mediator who gets the lowest number on the combined list of preferences.

MEDIATION INSTRUCTIONS
TO COUNSEL IN EDNY MEDIATION
(last updated 08/21/2012)

I. Date for mediation session and selecting Mediator

Unless otherwise provided in the Mediation Referral Order, the first mediation session will take place approximately four to six weeks after the date of the Mediation Order. Counsel are to select the Mediator, schedule the first mediation session, and (1) electronically file and (2) confirm in writing to the ADR Administrator, Gerald P. Lepp (Fax 718-613-2368) , the name of the Mediator, and the date, time, and place of the first mediation session. Counsel are to confer with each other and to speak directly with the potential Mediator, in scheduling the first mediation session. A mediation session should be scheduled for an entire day. Trial Counsel, a representative of their client with full settlement authority, and the Insurance Adjustor shall attend the mediation sessions in person.

Counsel may select the Mediator from the EDNY Panel of Mediators which is listed on the ADR website www.nyed.uscourts.gov/adr and also schedule the session. The names of the mediators, their areas of concentration together with addresses and telephone numbers are listed on the website. **Each mediator shall receive a fee of $600 for the first four hours or less of the actual mediation. Time spent preparing the mediation will not be compensated. Thereafter, the mediator shall be compensated at the rate of $250 per hour. The mediator's fee shall be paid by the parties to the mediation.**.

Any party that is unable or unwilling to pay the Mediator's fee may apply to the referring judge for a waiver of the fee, with a right of appeal to the District Judge in the event the referral was made by a Magistrate Judge.

Counsel may also agree to a particular mediator whether or not he/she is on the EDNY panel or to use the services of an independent Alternative Dispute Resolution organization. Compensation of mediators not on the EDNY Panel is determined by agreement among Counsel and the mediator.

If Counsel select the mediator, then the name of the Mediator, date, time and place of the mediation session, shall be confirmed in a letter to all Counsel with a copy to the Mediation Office (fax: 718-613-2368). The Confirmation Letter shall be filed electronically (ECF) with the Court.

Please be aware that many of the EDNY panel mediators provide private mediations as well. **It is very important that you identify yourself to the mediator as a party in a case which was court-ordered to mediation.**

Alternatively, the Mediation Department may be requested to select the Mediator. In such case, the Mediation Department will provide the parties with a list of available EDNY Panel Mediators with experience in the subject of the case. Within seven (7) days, Counsel shall rank their choices for the Mediator. Counsel shall each have one vote in which to rank their preferences. Counsel are to numerically rank their preferences for the Mediator; for example, the

first choice “1", the second choice “2", the third choice “3", and so on. The ADR Administrator will select the Mediator who gets the lowest number on the combined lists of preferences and notify counsel on ECF. In accordance with Administrative order 2004-08 (as of August 2, 2004) electronic filing became mandatory in the Eastern District of New York for all cases (pro se cases are excluded).

II. Submissions

The mediation statement is intended to inform the mediator about the case from the party’s view. Before drafting the mediation statement, counsel should discuss with the mediator any particular requirements that the mediator may have.

The Local Civil Rule 83.11(b) (4) provides that “no less than seven days prior to the first mediation session, each party shall submit directly to the mediator a mediation statement not to exceed ten pages double-spaced, not including exhibits, outlining the key facts and legal issues in the case. The statement will also include a description of motions filed and their status, and any other information that will advance settlement prospects or make the mediation more productive. Mediation statements are not briefs and are not filed with the Court, nor shall the assigned Judge or Magistrate Judge have access to them.”

Unless otherwise agreed by the parties and the mediator, the submissions shall not be exchanged among counsel.

III. Attendance in Person required of Trial Counsel, Insurance Adjustor, and Party Representative with full settlement authority at each Session and Session Location.

Attendance in person at each mediation session is required of the trial counsel, insurance adjustor (if any) and the party or its representative with full settlement authority to settle the matter in the case of a business or governmental entity or a minor. The names and general job titles of the employee(s) or agents of the corporation or insurance company who will attend the mediation session should be included in the mediation statement. **Availability by telephone is unacceptable.**

Mediation sessions may be conducted at the offices of the mediator, the Courthouses of the Eastern District at Central Islip and Brooklyn, and with the consent of all Counsel, a Counsel’s conference room. Telephone the Mediation Office for reservations at the Courthouses. (Telephone 718-613-2577 or FAX 718-613-2368)

IV Finalizing agreement

Oral agreements should be committed to writing and signed at the mediation session. In addition, a stipulation of discontinuance should be prepared and filed. A form of stipulation of discontinuance is attached hereto.

V. Questionnaire for Attorneys in Mediated Cases

After the mediation has taken place, please evaluate the performance of your Mediator and return your evaluation to:

Gerald P. Lepp, ADR Administrator
US District Court
225 Cadman Plaza East
Brooklyn, NY 11201

VI. Other Resources

EDNY Local Civil Rule 83.11 Court-Annexed Mediation
(Eastern District Only)

EDNY ADR website www.nyed.uscourts.gov/adr

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IT IS HEREBY STIPULATED AND AGREED by and between the undersigned parties:

1. No party shall be bound by anything said or done during the Mediation, unless either a written and signed stipulation is entered into or the parties enter into a written and signed agreement.

2. The Mediator may meet in private conference with less than all of the parties.

3. Information obtained by the Mediator, either in written or oral form, shall be confidential and shall not be revealed by the Mediator unless and until the party who provided that information agrees to its disclosure.

4. The Mediator shall not, without the prior written consent of both parties, disclose to the Court any matters which are disclosed to him or her by either of the parties or any matters which otherwise relate to the Mediation.

5. The mediation process shall be considered a settlement negotiation for the purpose of all federal and state rules protecting disclosures made during such conferences from later discovery or use in evidence. The entire procedure shall be confidential, and no stenographic or other record shall be made except to memorialize a settlement record. All communications, oral or written, made during the Mediation by any party or a party's agent, employee, or attorney are confidential and, where appropriate, are to be considered work product and privileged. Such communications, statements, promises, offers, views and opinions shall not be subject to any discovery or admissible for any purpose, including impeachment, in any litigation or other proceeding involving the parties. Provided, however, that evidence otherwise subject to discovery or admissible is not excluded from discovery or admission in evidence simply as a result of it having been used in connection with this mediation process.

6. The Mediator and his or her agents shall have the same immunity as judges and

court employees have under Federal law and the common law from liability for any act or omission in connection with the Mediation, and from compulsory process to testify or produce documents in connection with the Mediation.

7. The parties (i) shall not call or subpoena the Mediator as a witness or expert in any proceeding relating to: the Mediation, the subject matter of the Mediation, or any thoughts or impressions which the Mediator may have about the parties in the Mediation, and (ii) shall not subpoena any notes, documents or other material prepared by the Mediator in the course of or in connection with the Mediation, and (iii) shall not offer into evidence any statements, views or opinions of the Mediator.

8. The Mediator's services have been made available to the parties through the dispute resolution procedures sponsored by the Court. In accordance with those procedures, the Mediator represents that he has taken the oath prescribed by 28 U.S.C. 453.

9. Any party to this Stipulation is required to attend at least one session and as many sessions thereafter as may be helpful in resolving this dispute.

10. An individual with final authority to settle the matter and to bind the party shall attend the Mediation on behalf of each party.

Dated: _____

_____ _____
Plaintiff Defendant

_____ _____
Attorneys for Plaintiff Attorneys for Defendant

Consented to: _____
Mediator

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

STIPULATION
OF SETTLEMENT
CV

----------x

It is hereby stipulated by and between Counsel that this action is settled.

Therefore, it is ordered by the Court that this action is discontinued without costs and without prejudice to the right to reopen the action if settlement is not consummated.

DATED:

_____
Counsel for Plaintiff

_____
Counsel for Defendant

_____
SO ORDERED:
U.S. DISTRICT JUDGE

NYCOURTS.GOV

ALTERNATIVE DISPUTE RESOLUTION

Overview

Mission Statement

The NYS Unified Court System is committed to promoting the appropriate use of mediation and other forms of alternative dispute resolution (ADR) as a means of resolving disputes and conflicts peacefully.

Mediation and other ADR processes are available state-wide. Click on one of the links below to learn more.

Involved in a CONFLICT?

Information for ADR PRACTITIONERS

About Us

The Office of Alternative Dispute Resolution is part of the Division of Professional and Court Services in the New York State Unified Court System Office of Court Administration. We invite you to learn more About Us.

Web page updated: August 14, 2013

10th Judicial District

Nassau County Family Court
The Nassau County Family Court offers free, on-site mediation for parties with parenting (custody/ visitation) and support disputes. Judges or Referees may refer parties to mediation or parties may request mediation. For more information, call 516-493-4000.

Nassau County Supreme Court offers several ADR Programs:

1. Nassau County's **Matrimonial Center** maintains a roster of Parenting Coordinators and mediators.
2. **Neutral Evaluation**: After a preliminary conference or when deemed appropriate by the Judge, a case can be referred to a volunteer attorney who serves as a neutral evaluator. For more information, contact Mary Campbell at 516-493-3321.
3. **Voluntary**, binding arbitration and neutral evaluation are available for tort cases.
4. The **Commercial Division** offers a mediation program. The Judge may refer cases to mediation.

Suffolk County Supreme Court offers several ADR programs:

1. **Divorce Mediation and Early Neutral Evaluation:** PROJECT CALM ("Civil Alternatives to Litigating in Matrimonials"): Call 631-853-4333 to ask for a referral.
2. **Mediation and Neutral Evaluation in Guardianship Cases:** Call the **Model Guardianship Part** for more information.
3. The **Commercial Division** offers a mediation program.
   The Judge may refer cases to mediation.

Nassau County

Rules of the Alternative Dispute Resolution Program

INTRODUCTION

Alternative dispute resolution ("ADR") refers to a variety of processes other than litigation that parties use to resolve disputes. ADR offers the possibility of a settlement that is achieved sooner, at less expense, and with less inconvenience and acrimony than would be the case in the normal course of litigation. The principal forms of ADR include arbitration, neutral evaluation and mediation.

The Court will offer mediation as the default ADR option. Mediation is a confidential, informal procedure in which a neutral third party helps disputants negotiate. With the assistance of a mediator, parties identify issues, clarify perceptions and explore options for a mutually acceptable outcome. Although parties are not obligated to settle during mediation, the process frequently concludes with a written agreement.

Mediation is particularly appropriate for the resolution of complex commercial cases. Mediation offers the parties a confidential, structured forum in which to explore practical business concerns and develop tailor-made solutions beyond those that a Judge can often provide. Moreover, a mediator will not impose a solution on the parties or attempt to tell them what to do; if the parties cannot reach agreement, the case will be returned to the referring Justice.

The following Rules shall govern cases sent to mediation by Justices of the Commercial Division and other authorized Justices in Nassau County, as well as cases referred upon consent of the parties. Parties whose cases are the subject of an order of reference are free at the outset to use the services of a private ADR provider of their choosing in lieu of taking part in this court's program. After a case has been submitted to the court's program, parties can terminate the process and proceed to ADR elsewhere.

Rule 1. The Program:

The Commercial Division of the Supreme Court of the State of New York, Nassau County, operates the Alternative Dispute Resolution Program ("the Program"). The Program shall be applicable to cases referred by Justices of the Commercial Division, the District Administrative Judge of the Supreme Court, Nassau County ("the Administrative Judge"), and the other Justices of the Supreme Court, Nassau County upon authorization of the Administrative Judge; and commercial cases referred by consent of the parties.

Rule 2. The Roster:

(a) The Administrative Judge shall establish and maintain a roster of mediators ("the Roster") who shall

possess such qualifications and training as required by Part 146 of the Rules of the Chief Administrative Judge (see http://www.nycourts.gov/rules/chiefadmin/146.shtml).

(b) Every member of the Roster, and any other person who serves as a mediator pursuant to these Rules, shall comply with the Code of Ethical Standards for Mediators of the Commercial Division upon its issuance. Continuing presence on the Roster is subject to review by the Administrative Judge. Mediators may be removed from the Roster at the discretion of the Administrative Judge in consultation with the Unified Court System Office of ADR Programs.

(c) The Roster will be available through the Nassau County Supreme Court or on the Commercial Division website (at http://www.nycourts.gov/courts/comdiv/nassau.shtml).

↑

Rule 3. Procedure:

(a) Cases shall be referred to mediation as early as is practicable. If the Justice or the Administrative Judge decides to refer a case to the Program or if the parties consent to a referral at a conference or in a written stipulation, the Justice shall issue an Order of Reference requiring that the case proceed to mediation in accordance with these Rules. A case not deemed appropriate for referral at its outset may be referred to the Program later in the discretion of the Justice.

(b) Within five (5) business days from receipt of the Order of Reference, the parties shall confer and select an agreed-upon mediator from the court=s roster. During this time, the parties shall also complete and return to the court and selected mediator the Mediation Initiation Form. Copies of the Mediation Initiation Form can be obtained from the Nassau County Supreme Court or on the Commercial Division website (at http://www.nycourts.gov/courts/comdiv/nassau.shtml).

(c) If the parties are unable to agree on a mediator, the parties shall within the same five (5) business days from receipt of the Order of Reference, submit to the Court the Mediation Initiation Form with four (4) names from the roster (two names from each party if necessary without indicating who picked which mediator). The Court will select a mediator from among the four (4) names submitted by the parties. Once a mediator is agreed upon or selected by the Court, the parties shall contact the mediator to schedule an initial session. Any mediator selected pursuant to this rule must comply with the conflict check procedures in Rule 8 below.

(d) The parties may agree on a mediator other than one listed on the Court=s roster, if they so desire. For a substitution to be made, the parties must contact the other mediator directly, make arrangements for that person to conduct the mediation, and submit a Mediation Initiation Form to both the Court and the selected mediator. Mediators selected from outside the Roster must comply with the deadlines set forth in these Rules and the confidentiality and immunity rules set forth herein as well.

(e) The initial mediation session must be conducted within 45 days from the date of the Order of Reference. This deadline is important and must be met. In the event of any extraordinary difficulties, the mediator shall contact the Court and, if necessary, intervention will occur to expedite the process. The mediator may initially request a conference call with both parties regarding any preliminary matters.

(f) At least one week before the initial session, each party shall deliver to the mediator a memorandum of not more than three pages, (12 point font, doubled spaced) setting forth that party's views as to the nature of the dispute, and suggestions as to how the matter might be resolved. This memorandum shall not be served on the adversary or filed in court, shall be read only by the mediator, and shall be destroyed by the mediator immediately upon completion of the proceeding.

(g) Unless exempted by the mediator for good cause, every party, including counsel must attend the initial

mediation session either in person or, in the case of a corporation, partnership or other business entity, by an official (or more than one if necessary) who is both fully familiar with all pertinent facts and authorized to settle the matter. Any attorney who participates in the mediation process shall be fully familiar with the action and authorized to settle.

(h) Parties and their counsel may be referred to mediation for a free four (4) hour initial session. Subject to the mediator=s discretion and full disclosure to the parties at the beginning of the initial session, the mediator may apply up to one (1) hour of preparation time toward the initial session, in which case the initial session shall last for no more than three (3) hours. At the conclusion of the initial session, the parties and mediator may (but are not required to) agree to continue the mediation. Mediator compensation for any additional mediation time beyond the initial session is governed by Rule 6, below.

(i) Within seven (7) days after the mediation process has concluded-whether by agreement, or the refusal of one or more parties to continue, the mediator shall complete the Mediation Disposition Form indicating settlement or lack thereof and transmit the Form, along with any written agreement, to the Court. If the mediation process results in a settlement, the parties shall submit an appropriate stipulation to the Part of the Justice assigned.

(k) At the end of an initial session mandated by subdivision (h) of this Rule, any party or the mediator may terminate the mediation process. If the mediation process has been terminated by one party only, the identity of that party shall not be reported.

(l) Notwithstanding the foregoing, if a party or counsel fails to schedule an appearance for a mediation session in a timely manner, appear at any scheduled session or otherwise fail to comply with these Rules, the mediator may advise the Court and the Court may impose sanctions.

↑

Rule 4. Confidentiality:

(a) The mediation process shall be confidential. All documents prepared by parties or their counsel and any notes or other writings prepared by the mediator in connection with the proceeding-as well as any communications made by the mediator, parties or their counsel, for, during, or in connection with the mediation process-shall be kept in confidence by the mediator and the parties and shall not be summarized, described, reported or submitted to the court by the mediator or the parties. No party to the mediation process shall, during the action referred to mediation or in any other legal proceeding, seek to compel production of documents, notes or other writings prepared for or generated in connection with the mediation process, or seek to compel the testimony of any other party concerning the substance of the mediation process. Any settlement, in whole or in part, reached during the mediation process shall be effective only upon execution of a written stipulation signed by all parties affected or their duly authorized agents. Such an agreement shall be kept confidential unless the parties agree otherwise, except that any party thereto may thereafter commence an action for breach of this agreement. Documents and information otherwise discoverable under the Civil Practice Law and Rules shall not be shielded from disclosure merely because the documents and information are submitted or referred to in the mediation process (including, without limitation, any documents or information which are directed to be produced pursuant to Rule 7b herein).

(b) No party to an action referred to the Program shall subpoena or otherwise seek to compel the mediator to testify in any legal proceeding concerning the content of the mediation process. In the event that a party to an action that had or has been referred to the Program attempts to compel such testimony, that party shall hold the mediator harmless against any resulting expenses, including reasonable legal fees incurred by the mediator or reasonable sums lost by the mediator in representing himself or herself in connection

therewith. However, notwithstanding the foregoing and the provisions of Rule 4 (a), a party or the Court may report to an appropriate disciplinary body any unprofessional conduct engaged in by the mediator and the mediator may do the same with respect to any such conduct engaged in by counsel to a party.

(c) Notwithstanding the foregoing, to the extent necessary, (i) the parties may include confidential information in a written settlement agreement; (ii) the mediator and the parties may communicate with the Court about administrative details of the proceeding; and (iii) the mediator may make general reference to the fact of the services rendered by him or her in any action required to collect an unpaid, authorized fee for services performed under these Rules.

Rule 5. Immunity of the Neutral:

Any person designated to serve as a mediator pursuant to these Rules shall be immune from suit based upon any actions engaged in or omissions made while serving in that capacity to the extent permitted by law.

Rule 6. Compensation:

Parties shall not be required to compensate the mediator for services rendered during the initial session, or for time spent in preparation for the initial session. Should the parties choose to continue beyond the initial session, mediators shall be compensated at a maximum rate of $300/hour for time spent in mediation, and up to $150/hour for any additional preparation time needed beyond the initial session. All mediator fees and expenses shall be borne equally by the parties unless the court determines otherwise.

Rule 7. Stay of Proceedings:

(a) Unless otherwise directed by the Justice assigned, referral to mediation will not stay the court proceedings in any respect.

(b) Parties committed to the mediation process who conclude that additional time is required to fully explore the issues pertaining to their case may request a stay of proceedings. Regardless of whether a stay is granted by the Assigned Justice, if informal exchange of information concerning the case will promote the effectiveness of the mediation process and the parties so agree, the mediator shall make reasonable directives for such exchange consistent with any pre-existing disclosure order of the court and in compliance with the deadlines set forth herein.

(c) If the matter has not been entirely resolved within the 45-day period as provided in these rules (See Rule 3 (e)) but the parties and the mediator believe that it would be beneficial if the mediation process were to continue, the process may go forward. However, the mediation process should be completed within 75 days from the date of the Order of Reference unless the assigned Justice specifically authorizes the process to continue beyond the 75 days.

Rule 8. Conflicts of Interest:

In order to avoid conflicts of interest, any person tentatively designated to serve as a mediator shall, as a condition to confirmation in that role, conduct a review of his or her prior activities and those of any firm of which she is a member or employee. The mediator shall disqualify him or herself if the mediator would not be able to participate fairly, objectively, impartially, and in accordance with the highest professional standards. The mediator shall also avoid an appearance of a conflict of interest. In the event that any potentially disqualifying facts should be discovered, the mediator shall fully inform the parties and the Court of all relevant details. Unless all parties after full disclosure consent to the service of that mediator, the mediator shall decline the appointment and another mediator shall promptly be selected by the parties or the Court in a manner consistent with Rule 3 (b). Any such conflicts review shall include a check with regard to all parents, subsidiaries, or affiliates of corporate parties.

↑

Rule 9. Communication with Assigned Justice:

The mediator may communicate with the assigned Justice or the assigned Justice=s staff about administrative details of the processing of any case referred to the Program by that Justice, but shall not discuss any substantive aspect of the case. Upon termination of the proceeding by a party pursuant these rules, the mediator shall not reveal to the Court which party brought the proceeding to an end. The mediator shall report to the Court at the conclusion of the proceeding whether the proceeding produced a resolution of the case in whole or in part.

↑

Rule 10. Further ADR:

(a) While early attempts at mediation may not necessarily result in settlement, follow up attempts at a later date are consistent with the goals of this Program. Accordingly, upon request of a party or upon its own initiative, the Court may in its discretion issue an order directing subsequent referrals to the Program.

(b) Any case subsequently referred shall proceed in accordance with these Rules. For example, the parties shall not compensate the mediator for services rendered during an initial session or for time spent in preparation for an initial session conducted pursuant to a subsequent Order to the Program.

(c) Nothing in this Rule shall prohibit the parties from proceeding to mediation or other ADR, without Order of the court, and at their own expense.

↑

Rule 11. Administration of Program:

The Program shall be supervised by the Hon. Thomas A. Adams, Administrative Judge, Tenth Judicial District – Nassau County.

↑

Web page updated: May 28, 2013

Campbell Law Review

Fall, 2011

Campbell Law Review

34 Campbell L. Rev. 205

LENGTH: 9608 words

COMMENT: Do I Have to Say More? When Mediation Confidentiality Clashes with the Duty to Report*

* This Comment would not have been written without the insights provided by Professor Mark Morris of the North Carolina Central University School of Law. The Author is indebted to him and to Mr. Frank Laney, Chief Mediator for the 4th Circuit Court of Appeals, for their help and generosity. Any and all errors are the Author's alone.

NAME: Rosemary J. Matthews

LEXISNEXIS SUMMARY:
... Notwithstanding the damage external to the mediation, the confidence of parties to the mediation in the fairness of the settlement would be undermined if one party learned of misconduct serious enough to have been subject to reporting requirements that was not reported. ... While this exit strategy sounds great in theory, it works only when all parties to the mediation behave according to the highest ethical standards. ... The mediator encouraged Waller to tell the trial court about this, and when he did not, the mediator himself did so. ... Because the courts have been unhelpful in this area, attorneys and dispute resolution professionals have turned to the rules that govern attorneys and mediators in order to bring some order and guidance to the situation. ... Reporting Permitted by Mediation Rules Florida, South Carolina, and Tennessee all make provision in their mediation ethics rules for reporting of professional malpractice as required by the respective state Codes. ... Georgia's mediation rules are substantially the same as those in the states with clashing rules - mediators are required to report child abuse and may break confidentiality to defend against claims of mediator misconduct. ... In North Carolina, attorney-mediators are mediators first and attorneys second.

TEXT:
[*205]

I. Beginnings

Joe Smith is an experienced mediator and well-respected attorney in his county. n1 He usually mediates divorce settlements, priding himself on a nearly eighty percent settlement rate. n2 Smith was recently hired to mediate a settlement between a couple that was heading for an ugly court

battle. The attorney for the husband, a younger attorney who clearly looked up to Smith, confided in Smith that he had advised the husband to conceal from the wife the existence of a mutual fund account that was performing extremely well. The attorney joked with Smith about how he was "putting one over on" the wife, and that the mutual fund had been transferred into the name of a paralegal in order to avoid detection by the wife or her attorney.

Smith was concerned about whether the husband was mediating in good faith and counseled the husband and his attorney on the importance of open dialogue and of behaving with integrity toward the wife. Eventually, however, Smith, unable to persuade the husband or his attorney to be open about the mutual fund, withdrew from the mediation, citing to the wife an unspecified conflict of interest. n3 With a second mediator, a settlement was eventually reached without the existence of the mutual fund ever coming to light. Some months later, the wife's attorney, by chance, overheard the husband's attorney talking about the settlement [*206] and did some investigative work, uncovering the mutual fund and the plot to keep it secret. The wife filed an action with the court to have the settlement set aside, a complaint against the husband's attorney for fraud, and a separate complaint against Smith under Rule 8.3 of the state's Code of Professional Responsibility (the Code). n4 This Comment will explore the mediation rules and Codes of the various states.

Without mediation - and other forms of alternative dispute resolution - the civil justice system in this country would surely collapse under its own weight. n5 Legal scholars from Chief Justice Warren Burger down have noted that the adversarial process should not be the only way to resolve disputes, and indeed, it is not suitable for many people. n6 Recognizing this, many states have made attempts at alternate dispute resolution (ADR) necessary to continuation of lawsuits. n7

The demand, therefore, for trained ADR professionals is high. The American Arbitration Association lists approximately 8,000 arbitrators [*207] and mediators in its network; n8 there are over 1,200 certified Superior Court mediators in North Carolina. n9 Most states allow both attorney and nonattorney mediators, requiring only that certified mediators have professional qualifications and complete mediation training. n10

Problems arise when the attorneys for the parties in the mediation behave in ways that would, in a litigation setting, lead to professional sanctions. How the states should handle this situation is the subject of quite heated debate.

One side of the debate holds that attorney-mediators are attorneys first. They are still bound by the same Code that they abide by as attorneys, and these responsibilities cannot be put on hold. Those who adhere to this side believe that the Code protects the integrity of the profession, because violations harm the profession as a whole. As another part of their argument, the attorney-mediator would note that reporting attorney misbehavior under Rule 8.3 is (generally) mandatory; n11 if a mediator, such as Smith, does not report infractions that he has knowledge of, he opens himself up to sanctions. n12

The other side of the debate holds that attorney-mediators are, at that moment, mediators, not attorneys. The mediator is not at the mediation as a referee, but as a facilitator who is working to get the best resolution for the parties. Forcing mediators to wear two hats is unfair, they argue, to both the mediator and the participants. Forcing attorney-mediators to be on the alert for every infraction the parties may have committed in order to protect themselves from liability is not conducive to a good process or result. It also means that attorney-mediators have additional responsibilities that nonattorney-mediators do not, leading to discrepancies in how these two groups of identically trained mediators operate.

This Comment surveys the conflict at the state level and proposes a [*208] solution. n13 In the first section, there will be a short discussion of mediation and the clash between the mediation rules and the Code. In the second section, the Comment will discuss the choices that are available to the states in designing mediation and professional conduct rules. This section will explore the interplay between the two sets of rules in more detail, paying close attention to what the rules allow and what they forbid. Finally, a concluding section will discuss the competing, important interests and a proposed path forward.

II. Some Background

A. An Introduction to Mediation

Mediation is defined by Black's Law Dictionary as "[a] method of nonbinding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution." n14 Mediation can be defined broadly - as allowing for neutral evaluation of claims and reasonableness of settlement offers - or narrowly - as only allowing the neutral n15 to facilitate the parties' negotiations. n16 However mediation is defined, each state determines the qualifications, standards, and sanctions applicable to mediators. n17

[*209] Parties to mediation and their attorneys will have certain expectations of both the mediator and the mediation process. They expect that the mediation will be conducted according to the conventions of the state, that the mediator will make some evaluation of the chances of success of the claims, and that the mediator will keep their discussions confidential. n18 Confidentiality is perhaps the most important factor in the [*210] success of mediation as a form of dispute resolution. Parties expect that what they say will go no further and so are more willing to admit fault or regret than they would be if their statements could be repeated in court. n19

B. Attorney Ethics Rules

While confidentiality is important, parties to mediation also expect that the mediator will behave according to the standards of his profession. If mediators are presumed to adhere to mediation ethical standards, then in most states, they would be expected to keep everything said and done in mediation confidential. n20 However, if the mediator is an attorney, then the question becomes: is he or she expected to adhere to the attorney ethics standards also? n21 The American Bar Association [*211] has attempted to solve this issue by providing, in the words of one author, "an "exit door' from the lawyers' ethical rules. The "key' to this "door' is advising the ADR disputants that the lawyer/neutral is not acting as an attorney for any or all of the disputants with the attendant attorney-client ethical rules, but is instead acting as a neutral." n22 To be sure, this so-called exit door may not be perfect because the lawyer qua neutral may still be subject to some other provisions of the Model Rules.

While this exit strategy sounds great in theory, it works only when all parties to the mediation behave according to the highest ethical standards. In cases such as the hypothetical described supra, where a party actively tries to defraud the other party, the attorney-mediator's "exit" begins to look like complicity. Attorney-mediators are, if not formally then at least perceptually, bound by both the mediator ethics rules and the Code.

As one might expect, there is very little case law in this area. The American Bar Association did not adopt a modern version of Rule 8.3 until 1969, and the first major case involving the Rule was not until 1988. n23 That first major case was In re Himmel. n24 Himmel, a solo practitioner, n25

was suspended from practicing law for a year by the Illinois Supreme Court because he failed to report the misconduct of another attorney. n26 Himmel came as a "dramatic surprise to the bar." n27 To that [*212] point, Professor Rotunda notes:

while there [were] lawyers who [took] seriously their ethical obligations to report the violations of other lawyers, it [was] unusual to find the bar authorities enforcing this rule... . [Until Himmel, it was] virtually unheard of to find a case where a lawyer [was] disciplined merely for refusing to report another lawyer. n28

The dearth of case law noted by Professor Rotunda has not changed. One case that is frequently cited in discussions of mediation confidentiality is In re Waller. n29 Waller represented the plaintiff in a medical malpractice case that was sent to mediation. n30 As there was no mediation confidentiality statute in D.C. at the time, the trial court made an order regarding the mediation. n31 The order indicated that "no statements of any party or counsel shall be disclosed to the court or admissible as evidence for any purpose at the trial of this case." n32 The mediator realized that the surgeon who operated on the plaintiff was not named as a defendant, and asked Waller why not. n33 Waller told the mediator that he had not named the surgeon because he "was the surgeon's attorney." n34 The mediator encouraged Waller to tell the trial court about this, and when he did not, the mediator himself did so. n35 Waller made some excuses, n36 but was eventually disciplined by the D.C. Board of Professional Responsibility, an action confirmed by the D.C. Court of Appeals. n37

The mediator, whose actions were technically in contempt of the court order, was not disciplined. Professor Irvine cautions that in the Waller case, "the attorney-mediator made a judgment call that was supported [*213] by the court. Not every attorney-mediator should expect to be so fortunate." n38 That mediators are rarely the subject of such disciplinary actions has several causes. Firstly, if we use the Smith hypothetical above as our example, the actual infraction was not committed by Smith - his liability is secondary and mainly to the profession, rather than to the wife. Secondly, there is usually a hold harmless clause in any mediation contract, so that the wronged party is contractually bound to overlook any primary liability of the mediator. A more persuasive reason is that the goal of mediation is a confidential settlement - parties are therefore reluctant to air their dirty laundry in the courts where everything is public record. Infractions of the Code or the mediation ethics rules by an attorney-mediator are not often adjudicated by the courts, but rather by ethics committees that publish decisions only when they would be helpful to future attorneys or mediators. A final reason is that some courts believe that the clash between the two sets of rules is a question for the legislature. n39

Because the courts have been unhelpful in this area, attorneys and dispute resolution professionals have turned to the rules that govern attorneys and mediators in order to bring some order and guidance to the situation.

III. Three Approaches to the Problem

The current Model Rules do not recognize the role of neutral for lawyers, and the prevailing paradigm of lawyering under the Model Rules is the lawyer functioning as a representative of a

client. Arguably, the legal and ADR professional regimes are distinct, and lawyers acting as neutrals should be governed by ADR professional standards like any non-lawyer acting as a neutral. An analogous distinction is between lawyers and lawyers acting as judges, wherein the former are subject to the Model Rules and the latter are subject to the Judicial Code of Conduct. n40

While some commentators may claim that the two standards are not in tension, n41 they are, and in fact cause problems in certain, easily repeatable [*214] situations.

In order to get an idea as to how the states have approached the conflict between mediation confidentiality and reporting requirements, this Comment looked at the Code and the mediation rules for each state and the District of Colombia. n42 The states fall into three basic categories: (1) those with direct tension between the mediation confidentiality requirements and the Code's reporting requirements under Rule 8.3, n43 (2) those with an "out" for the mediator if the misconduct has already been reported, and (3) those that have made an attempt to harmonize the two. A breakdown of the states by category is represented below.

Figure 1

States in black are those with harmonious rules. States in gray have rules that allow mediators to talk about misconduct, but not to report it. States in white have clashing rules.

[*215]

A. Wishin' and Hopin'

Thirty-six states and the District of Colombia have mediation rules that clash with their Code of Professional Responsibility. n44 This means that in over seventy percent of jurisdictions, the highest court has adopted two sets of rules that are in direct conflict. An example of the clashing rules is provided by the District of Colombia. Pursuant to the D.C. Rules of Professional Conduct, "[a] lawyer who 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 in other respects, shall inform the appropriate professional authority." n45 The operative words in this rule, of course, are "knows" and "shall." If the hypothetical involving Mediator Smith was in D.C. and he knew that the husband's lawyer was perpetrating a fraud, he would be required to report said behavior to the State Bar. However, pursuant to *section 16-4207 of the D.C. Code*, "unless subject to [open meetings requirements], mediation communications are confidential to the extent agreed by the parties or provided by other law or rule of the District of Columbia." n46 Mediators are trained to report child or elder abuse, threats of violence, or actual violence, n47 but they are extremely hesitant to make a call where the issue is professional malpractice. Many interpret the conflicting rules as requiring them only to confirm whether a mediation session did or did not take place and whether a settlement was reached.

There are a couple of explanations as to why so many states have clashing rules. Firstly, mediation is relatively new, and the rules are [*216] generally on their first or second iteration - all the kinks have not been noticed or ironed out. Secondly, attorneys generally abide by their Codes - it is rare that a mediator would have cause to report an attorney because of something that attorney did in a mediation session. n48 Also, as noted above, the liability of the mediator is usually secondary to that of the attorney involved. Any aggrieved party would need to take a lot of time and

energy to bring charges under the Code against the mediator - time and energy that probably would be better spent pursuing the other party or his attorney.

B. The Ability to Testify Only

Five states (Maryland, New Mexico, Pennsylvania, Virginia, and Wisconsin) have mediation rules that allow the mediators some kind of "out" when allegations of misconduct are made. n49 These states do not allow the mediator to report misconduct, but will allow him or her to either testify or to disclose information that may be relevant after an accusation of misconduct is made or proven. n50

In New Mexico, the mediator can be compelled to testify in cases [*217] where his or her testimony is needed to "disprove a claim or complaint of professional misconduct or malpractice based on conduct during a mediation and filed against a mediation party or nonparty participant." n51 There is no provision for reporting misconduct by the mediator. n52 Virginia's rule is substantially the same. n53

The rules in Maryland, Pennsylvania and Wisconsin are vaguer. Pursuant to section 904.085 of Wisconsin's General Statutes,

in an action or proceeding distinct from the dispute whose settlement is attempted through mediation, the court may admit evidence otherwise barred by this section if, after an in camera hearing, it determines that admission is necessary to prevent a manifest injustice of sufficient magnitude to outweigh the importance of protecting the principle of confidentiality in mediation proceedings generally. n54

Wisconsin attorney-mediators, therefore, cannot report misconduct that they become privy to via mediation. However, if there is an accusation in a hearing distinct from the dispute that led to the mediation - e.g., a grievance hearing or a hearing to set aside the settlement - and the court decides that the mediator's testimony would be in the interests of justice, then the mediator may be ordered to testify. The rules in Maryland and Pennsylvania are, though not as detailed, substantially the same. n55

While the five states discussed here have rules that acknowledge that things occasionally go wrong in mediation and that parties do not always bargain in good faith, no state recognizes the requirement of reporting in its own version of Rule 8.3. n56 If there is a hearing and the mediator is called to testify, it may become obvious that the mediator has not reported misconduct that he had knowledge of, opening the mediator [*218] to professional sanctions.

It is worth noting that the Uniform Mediation Act states that where there has been "a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participant, or representative of a party based on conduct occurring during a mediation[,]" the strict confidentiality requirements are relaxed. n57 However, they are only relaxed for the parties involved and their attorneys, for the Act goes on to state that "[a] mediator may not be compelled to provide evidence of a mediation communication" in order to substantiate such a claim. n58

C. A Clear Harmonization

Six states (Georgia, Florida, North Carolina, South Carolina, Tennessee, and Washington) have harmonious mediation and ethics rules. n59 These states are concentrated geographically in the southeast, which is an unexpected but explainable result. If states are a laboratory for experimentation, n60 then it stands to reason that nearby states will copy a state that has sensible and logical rules. The six states fall into two categories: those that use the mediation rules as the (to borrow a metaphor) exit door n61 and those that use the Code as the exit. n62 The same number of [*219] states fall into the former category (Florida, South Carolina, and Tennessee) as the latter, but North Carolina, as discussed below, is the latest state to harmonize its rules, and it chose to amend the Code. n63 It remains to be seen whether more states will follow the lead of these six states and which approach they will choose.

1. Reporting Permitted by Mediation Rules

Florida, South Carolina, and Tennessee all make provision in their mediation ethics rules for reporting of professional malpractice as required by the respective state Codes. n64 The malpractice must be professional to be reportable - simple bad behavior or bad faith is not enough. n65 Pursuant to the Florida mediation rules, "there is no confidentiality or privilege attached to ... any mediation communication ... offered to report, prove, or disprove professional malpractice ... [or] professional misconduct occurring during the mediation, solely for the internal use of the body conducting the investigation of the conduct." n66 Pursuant to the South Carolina rules, one of the limited exceptions to confidentiality is "any disclosure[] required by law or a professional code of ethics." n67 Pursuant to the Tennessee mediation rules, "[a] Neutral shall preserve and maintain the confidentiality of all dispute resolution proceedings except where required by law to disclose information." n68 However, "nothing herein shall replace, eliminate, or render inapplicable relevant ethical standards not in conflict with these rules which may be imposed by the Code of Responsibility with respect to lawyers, or similar sets of standards imposed upon any Neutral by virtue of the Neutral's professional calling." n69

Each of the three states, then, permits the disclosures required by the mediator's professional Code. n70 The flaw in the design is clear. Some mediators will be bound by professional codes, and some will not. This will have two distinct impacts on mediations. Firstly, the mediator who is bound by the code will be forced to keep an eye out for infractions [*220] that he is bound to report - Smith, in the hypothetical above, would have had to report (under the attorney Code of ethics) what the husband's lawyer was doing. Secondly, parties to the mediation will (or should) be aware that their actions will be subject to an extra layer of scrutiny by the mediator.

If the mediator is required to abide by the reporting requirements of his professional Code, then he cannot give his full attention to the mediation; he must necessarily give some of his attention to possible reportable infractions. A nonattorney-mediator, when confronted with a situation like the one described above, would work to encourage disclosure, urge the husband to recognize the problem with failing to disclose the asset, and the discuss issues with negotiating in bad faith. In other words, the nonattorney-mediator would be focused on the mediation and on getting both parties to a successful and fair resolution. An attorney-mediator, on the other hand, would be focused on the mediation, but a small voice in the back of his or her head would be calculating the risks and rewards of reporting the conduct of the husband's lawyer. If the attorney-mediator reports the lawyer and the complaint is without foundation, the mediator has broken confidentiality as a mediator and will be subject to sanctions by the board that oversees mediators. n71

Reporting - even if the report is substantiated - will give the mediator a reputation in the community as a reporter. This reputation should not scare attorneys who negotiate in good faith and ethically, but may well cause a drop in the reporter's mediation business because attorneys may worry that the mediator will report first and think later. n72 Even if parties continue to use the mediator, there is a chance that they will be less forthcoming than they would be with a nonattorney-mediator or with an attorney-mediator who has no history of reporting, out of concern that their legitimate actions could be misconstrued and lead to an investigation by the state bar.

The solution to Smith's dilemma used by Florida, South Carolina, and Tennessee is, therefore, not without complication. While the method used by these states is infinitely preferable to simply ignoring the problem, it has flaws that may negatively impact the mediation process.

2. Harmonization Through the Ethics Code

Three states with harmonious rules (Georgia, North Carolina, and [*221] Washington) use their Codes to provide the harmony. The differences between the three are interesting and instructive. Georgia's mediation rules are substantially the same as those in the states with clashing rules - mediators are required to report child abuse and may break confidentiality to defend against claims of mediator misconduct. However, Georgia has no provision for testimony where misconduct has already been reported (as in the states like Maryland with some kind of exit for testimony) and no harmonization as in Florida, South Carolina, or Tennessee. n73 In Georgia, the exit is in the Code: "[a] lawyer having knowledge that another lawyer has committed a violation of the Georgia Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, should inform the appropriate professional authority." n74 The rule continues: "there is no disciplinary penalty for a violation of this Rule." n75 In every other state with an equivalent to Rule 8.3, the lawyer who knows of the misconduct is required to inform the appropriate authority. n76 The Georgia Code was amended in 2001 to its current form. Before 2001, the pertinent rule read:

(A) A lawyer possessing unprivileged knowledge of [misconduct] shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

(B) A lawyer possessing unprivileged knowledge or evidence concerning another lawyer or a judge shall reveal fully such knowledge or evidence upon proper request of a tribunal or other authority empowered to investigate or act upon the conduct of lawyers or judges. n77

[*222] The mediation rules were enacted in 1993 and require complete confidentiality except in four situations: (1) confirming appearance (or not) at a scheduled mediation, (2) reporting child abuse or threats, (3) documents or communications needed to prove or disprove misconduct on the part of the mediator, and (4) statutory duties. n78 The rules have been amended but not substantially altered since their enactment. n79 Perhaps concluding that the rules were intentionally harmonized with the Code is a charitable interpretation, but it does explain why Georgia's Code is different from that in almost every other state.

Washington State adopted new ethics rules in 2006. n80 The state bar debated modifying Washington's permissive reporting requirement to make Rule 8.3 reporting mandatory. n81 The committee charged with determining whether to amend the rule (the WSBA Ethics 2003 Committee) debated for over two months whether to require mandatory reporting under Rule 8.3, and eventually decided against such a move. n82 The debate over whether to move to mandatory reporting is fascinating, but nowhere in the minutes of the meetings is mediation mentioned. n83

North Carolina has recently amended its Code in order to exempt attorney-mediators from the reporting requirements imposed by Rule 8.3. n84 Pursuant to North Carolina's new Rule 8.3,

[a] lawyer who is serving as a mediator and who is subject to the North Carolina Supreme Court Standards of Professional Conduct for Mediators [*223] (the Standards) is not required to disclose information learned during a mediation if the Standards do not allow disclosure. If disclosure is allowed by the Standards, the lawyer is required to report professional misconduct consistent with the duty to report n85

In North Carolina, attorney-mediators are mediators first and attorneys second. North Carolina is the only state in the union to have rules that are written in this manner. n86 The amendment to Rule 8.3 was recommended by the Standards, Discipline and Advisory Opinions Committee of the Dispute Resolution Commission. n87 The Commission had been asked by the State Bar to examine the conflict between the Code and the mediation rules, and, after "wrestling with the Rule 8.3 scenario as well as with the larger issue of what happens when a mediator's ethical obligations conflict with the standards of conduct of another profession to which he or she belongs," the Commission decided to recommend amending the Rule to make the mediation rules dominant. n88

The difficulty with using the Code to ease the tension between the mediation ethics and the Code is that the Code only applies to attorneys. Attorneys, therefore, will know that they should keep misconduct of other attorneys, revealed in mediation, confidential. Nonattorney-mediators may, however, be bound by a Code applicable to their own profession - for example, the mediator may be a Doctor of Medicine (MD). Nonattorney-mediators may see misconduct like that described above, know that it is ethically bad, but not know to whom they should report the misconduct. The body that oversees mediation ethics would advise nondisclosure. n89 If the misconduct is especially egregious, it is easy to imagine that a mediator frustrated by this answer would look around for someone to whom he or she could to report the attorney's conduct.

IV. Where Do We Go From Here?

There are four issues that are important to consider when examining the tensions that have been identified here. These are (1) whose interests would (and would not) be served by reporting attorney misconduct; (2) whether confidentiality can ever be absolutely guaranteed; (3) [*224] whether keeping misconduct confidential is within the reasonable expectations of the parties to the mediation; [and] (4) whether it is possible to provide clear guidance for all parties involved. n90

A. Whose Interest Are Best Served by the Confidentiality Rules?

Public confidence in lawyers and the legal profession is undermined when stories of misconduct come to light. This is doubly so if the misconduct was ignored by other lawyers. In ruling on

Himmel, the Illinois Supreme Court held that the "underlying purposes" of the disciplinary rules were to "maintain the integrity of the legal profession, to protect the administration of justice from reproach, and to safeguard the public." n91 Each of the three purposes identified in Himmel is impaired when attorneys fail to abide by the requirements of Rule 8.3. Notwithstanding the damage external to the mediation, the confidence of parties to the mediation in the fairness of the settlement would be undermined if one party learned of misconduct serious enough to have been subject to reporting requirements that was not reported.

If stories of misconduct come to light, they also erode the confidence of the parties to mediation. No matter if one's mediation was conducted according to the highest ethical standards and the resultant settlement was fair to all parties, if one of the parties hears about some misconduct that occurred in his mediation, he is going to reexamine his settlement. If the misconduct becomes known before the mediation is scheduled, both parties may be on the defensive from the start, expecting that the other party may be acting unethically and that the mediator is acting as an accomplice.

B. Are Guarantees of Confidentiality Disingenuous?

Very few states have mediation rules that demand absolute confidentiality. n92 In most of the other states, there are four common exceptions [*225] that either require or allow mediators to disclose information they learned in the mediation: (1) child or elder abuse; n93 (2) threats to people or property; n94 (3) to defend against allegations of mediator misconduct, n95 and (4) to train or consult with other mediators. n96 In three states (Mississippi, Louisiana, and Arkansas) a court may examine the mediator's testimony in camera in order to make a determination as to whether "the facts, circumstances and context of the communications or materials sought to be disclosed warrant a protective order of the court or whether the communications or materials are subject to disclosure." n97

Are absolute guarantees of confidentiality, especially in court-ordered mediation, a good idea? Would they simply mean that parties have an incentive to hide assets or material facts? With lowered guarantees of confidentiality, the parties and their attorneys know where the line is and what behavior will put them over that line, making the chances of a fair and honest negotiation that much higher.

C. What Are the Reasonable Expectations of Parties to a Mediation?

It is unlikely that a person can become an attorney without having some working knowledge of the Code in his or her state. n98 As a member [*226] of North Carolina's Dispute Resolution Commission Standards and Discipline Committee put it, "the unethical attorney should have no reasonable expectation that an attorney-mediator will keep his professional misconduct in confidence." n99 Attorneys know that professional misconduct will be reported by other attorneys with knowledge. n100 Attorneys who know about misconduct value their law license too highly not to report such behavior.

It is harder to argue that parties to mediation will reasonably expect that misconduct will be kept confidential. If a lawyer tells his client that there is a way to hide assets and that he or she will not tell the mediator about those assets, the client would reasonably assume that the lawyer has a legal, ethical way to hide the assets.

D. Can We Provide Clear Guidance?

The need for a firm, simple, clear rule is obvious. As things stand in the overwhelming majority of states, attorney-mediators must make very tough choices when confronted with clear misconduct. They know that state Bar Associations are willing and able to sanction attorneys who do not report misconduct, that mediation ethics bodies zealously guard the integrity of the process, and that those bodies are willing to suspend the attorney-mediator if he or she breaches their rules. They also know that nonattorney-mediators do not face the same high-stakes choices that they do. While there is pressure on attorney mediators to decide which side their bread is buttered on, n101 there is also increasing demand for attorney-mediators. n102 After all, an attorney-mediator knows the lay of the land, so to speak, and can give the parties informed guidance on chances of litigation success or failure.

Clear guidance will help all of the parties prepare for the mediation. The parties will know what they should disclose and that the other side will be held to the same standard; the attorneys will know the consequences of unethical behavior, and the mediator will have no discretion about reporting misconduct.

[*227]

E. The Way Forward

So where does this leave us? We need a way to harmonize the Code and the mediation rules that takes into account the interests of both the parties and the wider community, that recognizes that confidentiality is not always absolute, that conforms to the reasonable expectations of all involved, and that is clear and simple to apply. This Comment argues that the best rule is that used by Tennessee. Pursuant to the Tennessee mediation rules: "[a] Neutral shall preserve and maintain the confidentiality of all dispute resolution proceedings except where required by law to disclose information." n103 However, the general standards of the mediation rules provide that: "nothing herein shall replace, eliminate, or render inapplicable relevant ethical standards not in conflict with these rules which may be imposed by the Code of Responsibility with respect to lawyers, or similar sets of standards imposed upon any Neutral by virtue of the Neutral's professional calling." n104

These rules allow the attorney-mediator to be bound by both sets of rules at the same time. n105 As noted supra, there is the problem that nonattorney-mediators will not be beholden to the Code, but they are not bound by it in any other situation, so it is unfair to complain that they are not bound in this situation. This rule allows the attorney-mediator to create a mediation that is fair to all involved and to report misconduct when necessary. The rule also formalizes the expectations of all parties that a mediator who is also an attorney will not completely shed that persona when he acts as a neutral. It is also clear; the rule itself says that confidentiality is not absolute where it conflicts with the professional code of the mediator.

This rule does, however, require the mediator to wear two hats - that is, to focus both on the mediation at hand and on any potential ethical violations that may be revealed. However, as noted supra, ethical violations are rare. The author could not find any published mediation ethics opinions that dealt with the subject, and the first court case that dealt with Rule 8.3 was not until 1988 (almost twenty years after the modern Code was written).

[*228] If we return to the hypothetical, Smith would be required to report the misconduct of the attorney for the husband if he cannot persuade him to reveal the asset. In this way, Smith can protect the wife and his own law license and the interests of the wider community.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionMandatory ADRCivil ProcedureAlternative Dispute ResolutionMediationsTortsProcedureAlternative Dispute Resolution

FOOTNOTES:

n1. This is an entirely hypothetical fact situation, although some general details were taken from N.C. Dispute Resol. Comm'n, Advisory Op. 10-16 (2010), available at http://www.nccourts.org/Courts/CRS/Councils/DRC/Documents/compliedaor_10-16.pdf; Or. State Bar Bd. of Governors, Formal Op. No. 2005-167 (2005); and Fla. Mediator Qualifications Advisory Panel, Advisory Op. 95-005 (1995).

n2. The settlement rate for mediated divorce and custody actions ranges between sixty and eighty percent. Stephen G. Bullock & Linda Rose Gallagher, Surveying the State of the Mediative Art: A Guide to Institutionalizing Mediation in Louisiana, *57 La. L. Rev. 885, 919 (1997).*

n3. Withdrawal is what the ethics opinions cited supra note 1 would tell Smith to do.

n4. See Model Rules of Prof'l Conduct R. 8.3 (2010) ("A lawyer who 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 in other respects shall inform the appropriate professional authority."). This rule is referred to in several amusing ways by practicing attorneys, one of the best being the "duty to squeal." 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 BYU L. Rev. 715, 741 (1997).*

n5. For the period July 1, 2009-June 30, 2010, a total of 5,319 of the 8,691 cases filed in North Carolina Superior Court were sent to mediation - of which, 2,772 (43%) settled. 2009-2010 N.C. Dispute Resol. Comm'n Rep. 10 (2010). Since 2007, the U.S. Department of Justice has saved 2,869 months (or over 239 years) of litigation time by using some form of alternate dispute resolution. Alternative Dispute. Resolution at the Department of Justice, U.S. Dep't of Justice, http://www.justice.gov/odr/doj-statistics.htm (last updated Dec. 2010). In 2010 alone the Department saved more than $ 11 million in litigation and discovery expenses. Id.

n6. Burger noted that:

We must move away from total reliance on the adversary contest for resolving all disputes. For some disputes, trials will be the only means, but for many, trials by the adversary contest must in time go the way of the ancient trial by battle and blood. Our system is too costly, too painful, too destructive, too inefficient for a truly civilized people. To rely on the adversary process as the principal means of resolving conflicting claims is a mistake that must be corrected.

Warren E. Burger, The State of Justice, *70 A.B.A. J. 62, 66 (1984).*

n7. For example, all civil actions filed in North Carolina Superior Court must be mediated before a court date will be calendared. *N.C. Gen Stat. § 7A-38.1(a)* (2009).

n8. Statement of Ethical Principles for the American Arbitration Association, an ADR Provider Organization, Am. Arbitration Ass'n, http://www.adr.org/sp.asp?id=22036 (last visited Oct. 31, 2011).

n9. 2009-2010 N.C. Dispute Resol. Comm'n Rep. 4 (2010).

n10. See generally State Requirements for Mediators, Mediation Training Inst. Int'l, http://www.mediationworks.com/medcert3/staterequirements.htm (last visited Oct. 31, 2011). But see *Poly Software Int'l v. Su, 880 F. Supp. 1487, 1493 (D. Utah 1995)* (defining "mediator" as "an attorney who agrees to assist parties in settling a legal dispute").

n11. In some states, reporting is not mandatory. See infra Part III.C.2.

n12. See Model Rules of Prof'l Conduct R. 8.4 cmt. 1 (2010) ("Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct ... .").

n13. My focus here is primarily on mediation in civil litigation (civil mediation). Mediation occurs in many other settings (criminal law, family law, worker's compensation, employment disputes, to name but a few), and the issues discussed here are no less relevant in those areas than they are here. However, in the interests of brevity and clarity, I have chosen to discuss only the civil arena.

n14. Black's Law Dictionary 453 (3d pocket ed. 2006).

n15. "Neutral," for the purposes of this Comment, is used interchangeably with "mediator."

n16. See Douglas H. Yarn, Lawyer Ethics in ADR and the Recommendations of Ethics 2000 to Revise the Model Rules of Professional Conduct: Considerations for Adoption and State Application, *54 Ark. L. Rev. 207, 216 (2001).* Note that nonattorney-mediators will

almost necessarily be confined to a more narrow version of mediation, while attorney-mediators, because of their legal knowledge, may choose either style.

n17. See Ala. Code of Ethics for Mediators II (Alabama); Alaska R. Civ. P. 100 (Alaska); *Ariz. Rev. Stat. § 12-2238* (LexisNexis, Westlaw through 2011 3d Legis. Sess.) (Arizona); *Ark. Code Ann. § 16-7-206* (Westlaw through 2011 Legis. Sess.) (Arkansas); *Cal. Civ. Proc. Code § 1775.12* (Deering, Westlaw through 2011-2012 1st Extra. Sess.) (California); *Colo. Rev. Stat. § 13-22-307* (Westlaw through 2011 1st Reg. Sess.) (Colorado); Conn. Gen. Stat. § 52-235d (Westlaw through 2011 Jan. Reg. Sess.) (Connecticut); Del. Ch. Ct. R. 95 (Delaware) (mediation for "business and technology disputes"); *D.C. Code § 16-4207* (Westlaw through Sep. 2011) (District of Colombia); *Fla. Stat. § 44.405* (Westlaw through 2011 1st Reg. Sess.) (Florida); Ga. Alt. Disp. Resol. R. VII (Georgia); Guidelines For Haw. Mediators V, available at http://www.courts.state.hi.us/services/alternative_dispute/selecting/guidelines/confidentiality_&_information_exchange.html (Hawaii); *Idaho Code Ann. § 9-808* (Westlaw through 2011 Chs. 1-335) (Idaho); *710 Ill. Comp. Stat. 35/8* (Westlaw through P.A. 97-342 of 2011 Reg. Sess., with exception of P.A. 97-333 to -334) (Illinois); Ind. R. of Alt. Disp. Resol. 2.5, available at http://www.in.gov/judiciary/rules/adr/#_Toc244667873 (Indiana); *Iowa Code § 679C.108* (Westlaw through 2011 Reg. Sess.) (Iowa); *Kan. Stat. Ann. §§5-511* to -512 (Westlaw through 2011 Reg. Sess.) (Kansas); Ky. Model Ct. Mediation 12 (Kentucky); *La. Rev. Stat. Ann. § 9:4112* (Westlaw through 2011 1st Extra. Sess.) (Louisiana); Me. R. Civ. P. 16B (2009) (Maine); Md. Ct. R. 17-109 (2009) (Maryland); Mass. R. Sup. Jud. Ct. 1:18 at R. 8, available at http://www.lawlib.state.ma.us/source/mass/rules/sjc/sjc118.html (Massachusetts); *Mich. Comp. Laws § 205.747* (Westlaw through 2011 Reg. Sess.) (Michigan); Minn. Gen. R. Prac. 114.10 (Minnesota); Miss. Mediation R. for Civ. Litig. VII, available at http://courts.ms.gov/rules/msrulesofcourt/court_annexed_mediation.pdf (Mississippi); Mo. Sup. Ct. R. 17.06 (Missouri); *Mont. Code Ann. § 26-1-813* (Westlaw through 2011 legislation) (Montana); *Neb. Rev. Stat. § 25-2937* (Westlaw through 2011 1st Reg. Sess.) (Nebraska); Nev. Mediation R. 11 (Nevada); N.H. Super. Ct. R. 170 (New Hampshire); *N.J. Stat. Ann § 2A:23C-8* (West, Westlaw through L. 2011 c. 136) (New Jersey); *N.M. Stat. Ann. § 44-7B-5* (Westlaw through 2011 1st Reg. Sess.) (New Mexico); N.Y. C.P.R.L. § 7504 (McKinney 2011) (New York); N.C. Standards of Prof'l Conduct for Mediators III (North Carolina); N.D. R. Ct. IV (North Dakota); *Ohio Rev. Code Ann. § 2710.07* (West, Westlaw through portion of 2011-2012 Sess.) (Ohio); *Okla. Stat. tit. 12, § 1805* (Westlaw through 2011 1st Reg. Sess.) (Oklahoma); *Or. Rev. Stat. § 36.220* (Westlaw through 2011 Reg. Sess.) (Oregon); 42 Pa. Cons. Stat. § 5949 (Westlaw through 2011 Act 81) (Pennsylvania); *R.I. Gen. Laws § 9-19-44* (Westlaw through 2011 Jan. Sess.) (Rhode Island); S.C. Alt. Disp. Resol. R. 8 (2009) (South Carolina); *S.D. Codified Laws § 19-13A-8* (Westlaw through 2011 Reg. Sess.) (South Dakota); Tenn. Sup. Ct. R. 31 (2009) (Tennessee); *Tex. Civ. Prac. & Rem. Code Ann. § 154.053* (West, Westlaw through 1st Called Sess. 2011) (Texas); *Utah Code Ann. § 78B-6-208* (West, Westlaw through 2011 2nd Special Sess.) (Utah); *Vt. Stat. Ann. tit. 12, § 5720* (Westlaw through 2011 1st Sess.) (Vermont); *Va. Code Ann. § 8.01-581.22* (Westlaw through 2011 Reg. Sess.) (Virginia); *Wash. Rev. Code § 7.07.070* (Westlaw through 2011 legislation) (Washington); W. Va. Trial Ct. R. 25.12 (West Virginia); *Wis. Stat. § 904.085* (Westlaw through 2011 Act 44, except for Acts 32 and 37), amended by Executive Budget Act, 2011 Wis. Act 32 (updating statutory cross-reference) (Wisconsin); *Wyo. Stat. Ann. § 1-43-102* (Westlaw through 2011 Gen. Sess.) (Wyoming).

n18. Pursuant to the Federal Rules of Evidence, "conduct or statements made in compromise negotiations" are inadmissible as evidence to prove "liability for, invalidity of, or amount of a claim ... or to impeach through a prior inconsistent statement or contradiction[.]" *Fed R. Evid. 408(a).*

n19. One place where apologies have been found to be extremely useful tools in reducing litigation is in medical-malpractice suits. A study by Johns Hopkins found that apologies reduced malpractice settlement amounts by thirty percent. Rachel Zimmerman, Doctors' New Tool to Fight Lawsuits: Saying I'm Sorry, Wall St. J., May 18, 2004, at A1; see also Jeffrey M. Senger, Frequently Asked Questions About ADR, 48 U.S. Atty's Bulletin 9, 11 (2000).

n20. "Everything" is slightly misleading. However, it is much simpler than "everything except child and elder abuse, threats or actual violence, and in some states, statements covered by open meetings legislation."

n21. Each state also retains its own Code. See Ala. Rules of Prof'l Conduct R. 8.3 (Alabama); Alaska Rules of Prof'l Conduct R. 8.3 (Alaska); Ariz. Rules of Prof'l Conduct R. 8.3 (Arizona); Ark. Rules of Prof'l Conduct R. 8.3 (Arkansas); Cal. Rules of Prof'l Conduct R. 1-100 (California); Colo. Rules of Prof'l Conduct R. 8.3 (Colorado); Conn. Rules of Prof'l Conduct R. 8.3 (Connecticut); Del. Rules of Prof'l. Conduct R. 8.3 (Delaware); D.C. Rules of Prof'l Conduct R. 8.3 (District of Colombia); Fla. Bar Reg. R. 4-8.3 (Florida); Ga. Rules of Prof'l Conduct R. 8.3 (Georgia); Haw. Rules of Prof'l Conduct R. 8.3 (Hawaii); Idaho Rules of Prof'l Conduct R. 8.3 (Idaho); Ill. Sup. Ct. Rules of Prof'l Conduct R. 8.3 (Illinois); Ind. Rules of Prof'l Conduct R. 8.3 (Indiana); Iowa Rules of Prof'l Conduct R. 32:8.3 (Iowa); Kan. Rules of Prof'l Conduct R. 8.3 (Kansas); Ky. Sup. Ct. R. 8.3 (Kentucky); La. State Bar Ass'n. Art. XVI § 8.3 (Louisiana); Me. Rules of Prof'l Conduct R. 8.3 (Maine); Md. Lawyer's Rules of. Prof'l Conduct R. 8.3 (Maryland); Mass. R. Sup. Jud. Ct. 3.07 at R. 8.3, available at http://www.lawlib.state.ma.us/source/mass/rules/sjc/sjc307/rule8-3.html (Massachusetts); Mich. Rules of Prof'l Conduct R. 8.3 (Michigan); Minn. Rules of Prof'l Conduct R. 8.3 (Minnesota); Miss. Rules of Prof'l Conduct R. 8.3 (Mississippi); Mo. Sup. Ct. R. 4-8.3 (Missouri); Mont Rules of Prof'l Conduct R. 8.3 (Montana); Neb. Ct. Rules of Prof'l Conduct § 3-508.3 (Nebraska); Nev. Rules of Prof'l Conduct R. 8.3 (Nevada); N.H. Rules of Prof'l Conduct R. 8.3 (New Hampshire); N.J. Rules of Prof'l Conduct R. 8.3 (New Jersey); N.M. Rules of Prof'l Conduct R. 16-803 (New Mexico); N.Y. Rules of Prof'l Conduct R. 8.3 (New York); N.C. Rules of Prof'l Conduct R. 8.3 (North Carolina); N.D. Rules of Prof'l Conduct R. 8.3 (North Dakota); Ohio Rules of Prof'l Conduct R. 8.3 (Ohio); 5 Okla. State Ch. 1, app. 3-A R. 8.3 (Oklahoma); Or. Rules of Prof'l Conduct R. 8.3 (Oregon); Pa. Rules of Prof'l Conduct R. 8.3 (Pennsylvania); R.I. Sup. Ct V at R. 8.3 (Rhode Island); S.C. Rules of Prof'l Conduct R. 8.3 (South Carolina); *S.D. Codified Laws § 16-18-appx-8.3* (Westlaw through 2011 Reg. Sess.) (South Dakota); Tenn. Sup. Ct. R. 8 at R. 8.3 (Tennessee); Tex. Rules Prof'l Conduct R. 8.03 (Texas); Utah Rules of Prof'l Conduct R. 8.3 (Utah); Vt. Rules of Prof'l Conduct R. 8.3 (Vermont); Va. Sup. Ct. R. pt. 6, § II, para. 8.3 (Virginia); Wash. Rules of Prof'l Conduct R. 8.3 (Washington); W. Va. Rules of Prof'l Conduct R. 8.3 (West Virginia); Wis. Sup. Ct. R 20:8.3 (Wisconsin); Wyo. Rules of Prof'l Conduct R. 8.3 (Wyoming).

n22. Duane W. Krohnke, ADR Ethics Rules to Be Added to Rules of Professional Conduct, 18 Alternatives to High Cost Litig. 108, 115 (2000).

n23. Ronald D. Rotunda, The Lawyer's Duty to Report Another Lawyer's Unethical Violations in the Wake of Himmel, *1988 U. Ill. L. Rev. 977, 979-80 (1988).* Rotunda notes that the Rules contained a "vague" provision for whistleblowing in their original form, written in 1908. Id. The Rules were significantly amended in the 1980s; however, Rule 8.3 was in place in the 1969 revisions. *Id. at 980.*

n24. *In re Himmel, 533 N.E.2d 790 (Ill. 1988).* The actual details of Himmel, while fascinating, are not as relevant here as the fact that the case happened at all.

n25. Rotunda, supra note 23, at 982.

n26. *Himmel, 533 N.E.2d at 796.* The attorney whose misconduct led to the charges against Himmel was disbarred. *Id. at 790.*

n27. Rotunda, supra note 23, at 991. The case was described to the author by a member of the North Carolina Dispute Resolution Commission as the seed that grew into the recent changes in the North Carolina Code.

n28. Id. at 982.

n29. *In re Waller, 573 A.2d 780 (D.C. 1990).*

n30. *Id. at 781.*

n31. 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, 179 (1994).*

n32. *Waller, 573 A.2d at 781 n.4.*

n33. Id.

n34. Id.

n35. Id.

n36. *Id. at 782* ("What really happened is that I said I represented Dr. Jackson [the surgeon] but I really meant that I didn't represent Dr. Jackson. Dr. Jackson wasn't a party so I didn't think it was important.").

n37. *Id. at 780* ("suspended from the practice of law in the District of Columbia for a period of sixty days").

n38. Irvine, supra note 31, at 180.

n39. See, e.g., *Foxgate Homeowners' Ass'n v. Bramalea Cal., Inc., 25 P.3d 1117, 1128 (Cal. 2001)* ("Whether a mediator in addition to participants should be allowed to report conduct during mediation that the mediator believes is taken in bad faith and therefore might be sanctionable under [the] Code of Civil Procedure [or the Code] ... is a policy question to be resolved by the Legislature.").

n40. Yarn, supra note 16, at 220.

n41. See id. at 216 (stating that the two standards "neither overlap nor conflict significantly"). Also note that the ADR rules generally provide for reporting of any matter "required by law or rule." Several mediators have commented to the Author that they are not willing to risk their professional reputations and mediation certifications on such vague language, especially since the Codes have not been enacted by the legislature.

n42. In the analysis that follows, three states are not included: California, Michigan, and New York. The California Ethics Rules have no provision analogous to Rule 8.3. See Cal. Rules of Prof'l Conduct R. 1-100 to 5-320. If there were an equivalent provision, California would fall into the second category of states, those where mediators are allowed to testify. See *Cal. Evid. Code § 703.5* (2011) ("No arbitrator or mediator, shall be competent to testify ... except as to a statement or conduct that could ... be the subject of investigation by the State Bar or Commission on Judicial Performance ... ."). What Michigan calls "mediation" is actually more like arbitration, with a panel of "mediators" and formal presentations of evidence by the parties. See Mich. Comp. Laws § 600.4691 (2009). New York has no centrally-codified mediator ethics rules.

n43. Or the equivalent.

n44. This Comment considers only state rules, not all the rules for mediation in federal courts. In a few cases, the federal rules fall into a different category from the state rules. Compare Guidelines for Hawai'i Mediators § V.1. (2002) ("The mediator ... should hold all information acquired in mediation in confidence. Mediators are obliged to resist disclosure of information about the contents and outcomes of the mediation process."), available at http://www.courts.state.hi.us/services/alternative_dispute/selecting/guidelines/introduction.ht

ml, with D. Haw. Local R. 88.1(k) (2009) (allowing mediators to break confidentiality "to provide evidence in an attorney disciplinary proceeding").

n45. D.C. Rules of Prof'l Conduct R. 8.3(a) (emphasis added).

n46. *D.C. Code § 16-4207* (Westlaw through Sep. 2011).

n47. These reporting requirements are explicitly required in some states and implicitly required in others. Compare, Me. R. Civ. P. 16B(k)(ii) ("A neutral does not breach confidentiality by making such a disclosure if the disclosure is ... information concerning the abuse or neglect of any protected person."), with Mass. R. Sup. Jud. Ct. 1:18 at R. 9(h)(i) ("Information disclosed in dispute resolution proceedings ... shall be kept confidential by the neutral ... unless disclosure is required by law or court rule.").

n48. A cynic might note that this is because attorneys are smart enough to keep their misdeeds hidden and their clients quiet enough that a mediator would never notice the misconduct.

n49. Each has a Rule 8.3 that requires attorneys with knowledge of misconduct to report it. Md. Lawyer's Rules of Prof'l Conduct R. 8.3(a) ("A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate authority."); N.M. Rules of Prof'l Conduct R. 16-803(a) ("A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate authority."); Pa. Rules of Prof'l Conduct R. 8.3(a) ("A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate authority."); Va. Sup. Ct. R. pt. 6, § . II, para. 8.3 ("A lawyer having reliable information 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 to practice law shall inform the appropriate authority."); Wis. Sup. Ct. R. 20:8.3 ("A lawyer who 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 in other respects, shall inform the appropriate professional authority.").

n50. See, e.g., 42 Pa. Cons. Stat. § 5949(b)(3) (Westlaw through 2011 Act 81) ("[Duty of confidentiality] does not apply to a fraudulent communication during mediation that is relevant evidence in an action to enforce or set aside a mediated agreement reached as a result of that fraudulent communication.").

n51. *N.M. Stat. Ann. § 44-7B-5(A)(8)* (Westlaw through 2011 1st Reg. Sess.).

n52. See id.

n53. *Va. Code Ann. § 8.01-581.22* (Westlaw through 2011 Reg. Sess.) (detailing that confidentiality may be waived "where communications are sought or offered to prove or disprove a claim or complaint of misconduct or malpractice filed against a party's legal representative based on conduct occurring during a mediation").

n54. *Wis. Stat. § 904.085(4)(e)* (Westlaw through 2011 Act 44, except for Acts 32 and 37) (emphasis added), amended by Executive Budget Act, 2011 Wis. Act 32 (updating statutory cross-reference).

n55. Md. R. of Alt. Disp. Resol. 17-109(d)(3) (indicating confidentiality may be waived to "assert or defend against a claim or defense that because of fraud, duress, or misrepresentation a contract arising out of a mediation should be rescinded."); 42 Pa. Cons. Stat. § 5949(b)(3) (Westlaw through 2011 Act 81) ("The privilege and limitation [to confidentiality] does not apply to a fraudulent communication during mediation that is relevant evidence in an action to enforce or set aside a mediated agreement reached as a result of that fraudulent communication.").

n56. See supra, notes 17, 21 and accompanying text.

n57. Unif. Mediation Act § 6(a)(6) (2001).

n58. Id. § 6(c).

n59. Compare Fla. Bar Reg. R. 4-8.3, and Ga. Rules of Prof'l Conduct R. 8.3, and N.C. Rules of Prof'l Conduct R. 8.3, and S.C. Rules of Prof'l Conduct R. 8.3, and Tenn. Sup. Ct. R. 8 at R. 8.3, and Wash. Rules of Prof'l Conduct R. 8.3, with *Fla. Stat. § 44.405* (Westlaw through 2011 1st Reg. Sess.), and Ga. Alt. Disp. Resol. R. VII, and N.C. Standards of Prof'l Conduct for Mediators R. III, and S.C. Alt. Disp. Resol. R. 8, and Wash. Rev. Code. § 7.07.070 (Westlaw through 2011 legislation).

n60. *Gonzales v. Raich, 545 U.S. 1, 42 (2005)* (quoting *New State Ice Co. v. Liebman, 285 U.S. 262, 311 (1932)* (Brandeis, J., dissenting)).

n61. See *Fla. Stat. § 44.405* ("There is no confidentiality or privilege attached to ... any mediation communication ... offered to report, prove, or disprove professional malpractice occurring during the mediation, solely for the purpose of the professional malpractice proceeding."); S.C. App. Ct. R. 407 ("This rule [guaranteeing mediation confidentiality] does not prohibit ... any disclosures required by law or a professional code of ethics."); Tenn. Sup. Ct. R. 31 ("Nothing herein shall replace, eliminate, or render inapplicable relevant ethical standards.").

n62. See Ga. Rules of Prof'l Conduct R 8.3 ("There is no disciplinary penalty for a violation of this Rule."); N.C. Rules of Prof'l Conduct R. 8.3(e) ("A lawyer who is serving as a mediator and who is subject to the North Carolina Supreme Court Standards of Professional Conduct for Mediators ... is not required to disclose information learned during a mediation if the Standards do not allow disclosure. If disclosure is allowed by the Standards, the lawyer is required to report professional misconduct consistent with the duty to report."); Wash. Rules of Prof'l Conduct R. 8.3(a) ("(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct ... should inform the appropriate professional authority." (emphasis added)).

n63. N.C. Rules of Prof'l Conduct R. 8.3(e).

n64. See supra note 61.

n65. See supra note 61.

n66. *Fla. Stat. § 44.405(4)(a)(4)*, (4)(a)(6).

n67. S.C. Alt. Disp. Resol. R. 8(b)(5).

n68. Tenn. Sup. Ct. R. 31, at app. A § 7(a).

n69. Id. § 2(b).

n70. See supra note 61 and accompanying text.

n71. See Irvine, supra note 31, at 180.

n72. Mediation is, after all, a place where lying is accepted - the dance of negotiation requires that both sides conceal their bottom line, at least in the beginning.

n73. See discussion supra Part III.C.1.

n74. Ga. Rules of Prof'l Conduct R. 8.3 (emphasis added).

n75. Id.

n76. See, e.g., Ala. Rules of Prof'l Conduct R. 8.3 ("A lawyer possessing unprivileged knowledge of a violation of Rule 8.4 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation." (emphasis added)); Ind.

Rules of Prof'l Conduct R. 8.3 ("A lawyer who 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 in other respects, shall inform the appropriate professional authority." (emphasis added)).

Interestingly, the official comment to the Georgia Rule reads: "Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigations when they know of a violation of the Georgia Rules of Professional Conduct[,]" even though the language of the rule makes it clear that reporting is not required. Ga. Rules of Prof'l Conduct R. 8.3 cmt. 1 (emphasis added).

n77. Ga. Rules of Prof'l Conduct DR 1-103 (repealed 2001), available at http://www.gabar.org/handbook/part_iii_before_january_1_2001_-_canons_of_ethics/_rule_3-101/.

n78. Ga. Alt. Disp. Resol. VII. In many states, "statutory duties" refer to open meeting requirements. See *710 Ill. Comp. Stat. 35/8* (Westlaw through P.A. 97-342 of 2011 Reg. Sess., with exception of P.A. 97-333 to -334) ("Unless subject to the Open Meetings Act or the Freedom of Information Act, mediation communications are confidential to the extent agreed by the parties or provided by other law or rule of this State.").

n79. There have been multiple amendments: removing protections of confidentiality where there have been threats or reports of child abuse (February 1995); making intake sessions confidential (November 1996); making notes and records of a court ADR program immune from discovery to the extent that such notes or records pertain to cases and parties ordered or referred by a court to the program (November 1996); removing confidentiality where there has been a complaint against the mediator (November 1996); and limiting discovery to written and executed agreements only (May 1999). See Ga. Alt. Disp. Resol. VII, available at http://www.godr.org/files/CURRENT%20ADR%20-RULES%20COMPLETE%201-19-2010.pdf.

n80. Ethics 2003 Committee, Washington State Bar Association, http://www.wsba.org/Resources-and-Services/Ethics/Ethics-2003 (last visited Oct. 23, 2011).

n81. Id.

n82. Id.

n83. Id.

n84. N.C. Rules of Prof'l Conduct R. 8.3(c).

n85. Id.

n86. See supra, notes 17, 21 and accompanying text.

n87. 2009-2010 N.C. Dispute Resol. Comm'n Rep. 5 (2010).

n88. Id.

n89. See N.C. Dispute Resol. Comm'n, Advisory Op. 10-16 (2010), available at http://www.nccourts.org/Courts/CRS/Councils/DRC/Documents/compliedaor_10-16.pdf.

n90. The four have their genesis in the minority report from a committee of the N.C. Dispute Resolution Commission. See N.C. Disp. Resol. Comm'n. Standards and Discipline Comm., Minority Report to the North Carolina Dispute Resolution Commission 2-4 (November 3, 2006) (on file with the Campbell Law Review) [hereinafter Minority Report].

n91. *In re Himmel, 533 N.E.2d 790, 795 (Ill. 1988)* (quoting *In re LaPinska, 381 N.E.2d 700, 705 (Ill. 1978)).*

n92. See Del. Ch. Ct. R. 95(b) (Delaware); Ind. R. of Alt. Disp. Resol. 2.11 (Indiana); N.H. Super. Ct. R. 170(E)(1) (New Hampshire); *R.I. Gen. Laws § 9-19-44* (Westlaw through 2011 Jan. Sess.) (Rhode Island); *Tex. Civ. Prac. & Rem. Code § 154.053(c)* (Westlaw through 2011 1st Called Sess.) (Texas).

n93. See, e.g., Me. R. Civ. P. 16B(k) ("Information concerning the abuse or neglect of any protected person" is not confidential).

n94. See, e.g., *Or. Rev. Stat. § 36.220(6)* ("A mediation communication is not confidential if the mediator or a party to the mediation reasonably believes that disclosing the communication is necessary to prevent a party from committing a crime that is likely to result in death or substantial bodily injury to a specific person.").

n95. See, e.g., Okla. Stat. tit. 12. § 1805(f) ("If a party who has participated in mediation brings an action for damages against a mediator arising out of mediation ... [confidentiality] shall be deemed to be waived as to the party bringing the action.").

n96. See, e.g., *Utah Code Ann. § 78B-6-208(5)* (Westlaw through 2011 2nd Special Sess.) ("An ADR provider or an ADR organization may communicate information about an ADR proceeding with the director for the purposes of training, program management, or program evaluation and when consulting with a peer. In making those communications, the ADR provider or ADR organization shall render anonymous all identifying information.").

n97. Miss. Mediation R. Civ. Lit. § VII(D); see also *La. Rev. Stat. Ann. 9:4112* (Westlaw through 1st Extra. Sess.); *Ark. Code Ann. § 16-7-206* (Westlaw through 2011 Reg. Sess.).

These states are not included in the "partly harmonious" category because there is nothing in those rules about misconduct - the in camera review is limited to issues concerning the underlying case.

n98. Law schools typically require law students to take a course in Ethics and Professional Responsibility and all but four states require would-be attorneys to pass the Multistate Professional Responsibility Examination (MPRE). National Conference of Bar Examiners, http://www.ncbex.org/multistate-tests/mpre/ (last visited Oct. 21, 2011).

n99. See Minority Report, supra note 90 and accompanying text.

n100. See Model Rules of Prof'l Conduct R. 8.3.

n101. That is, whether they would rather lose their law license or their mediation certification.

n102. See Urska Velikonja, Making Peace and Making Money; Economic Analysis of the Market for Mediators in Private Practice, *72 Alb. L. Rev. 257, 263 (2009)* (arguing that there is "attorney domination of the mediator selection process" because "most of the private mediators' caseload is disputes already in litigation or about to be litigated.").

n103. Tenn. Sup. Ct. R. 31 at app. A § 7(a).

n104. Id. § 2(b).

n105. The problem with this whole system, of course, is that nonattorney-mediators are not bound by the Code as attorney mediators are, raising the inference that there are two separate standards. In the regular case, however, where attorneys for the parties behave ethically, there will be no difference between the two mediators. The issues discussed here will only have an effect where one attorney behaves unethically. Deciding how to resolve this distinction is, thankfully, beyond the scope of this Comment.

Not Reported in F.Supp.2d, 2011 WL 4552997 (S.D.N.Y.)
(Cite as: 2011 WL 4552997 (S.D.N.Y.))

H

Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.
NORTHWESTERN NATIONAL INSURANCE COMPANY, Plaintiff,
v.
INSCO, LTD., Defendant.

No. 11 Civ. 1124(SAS).
Oct. 3, 2011.

Matthew Christian Ferlazzo, Esq., Evan L. Smoak, Esq., Barger and Wolen LLP, New York, NY, Daniel L. FitzMaurice, Esq., Matthew John Shiroma, Esq., Day Pitney, L.L.P., Hartford, CT, for Plaintiff.

James J. Boland, Esq., Robin C. Dusek, Esq., Joseph T. McCullough, IV, Esq., Catherine A. Miller, Esq., Kerry Elizabeth Slade, Esq., Freeborn & Peters LLP, Chicago, IL, for Defendant.

OPINION AND ORDER

SHIRA A. SCHEINDLIN, District Judge.

I. INTRODUCTION

***1** Northwestern National Insurance Company ("NNIC") and Insco, Ltd. ("Insco") are parties to a pending arbitration concerning disputes arising from a reinsurance agreement in effect between March 1, 1978, and April 1, 1979 (the "Agreement"). Before the Court is NNIC's motion to reopen this case and disqualify the law firm of Freeborn & Peters, LLP ("Freeborn") from representing Insco in the arbitration.

NNIC asserts (1) that issues of attorney disqualification are properly decided by the Court; and (2) that because of arbitration panel deliberations acquired by Freeborn, they must be disqualified from further representing Insco in the arbitration. Because Freeborn's behavior in the circumstances described below constituted a serious breach of its ethical duties and has tainted the arbitration proceedings, NNIC's motion is granted.

II. BACKGROUND

A. The Arbitration

In 1978, Insco and NNIC executed the Agreement whereby Insco agreed to reinsure a certain percentage of NNIC's liabilities in exchange for premium payments.[FN1] The Agreement provided that any disputes arising between the parties should, upon written request of the parties, be submitted to arbitration.[FN2] In June 2009, NNIC commenced arbitration against Insco for amounts owed under the Agreement as well as interest and attorneys' fees.[FN3] Pursuant to the Agreement, NNIC selected Diane Nergaard as its party appointee, Insco selected Dale Diamond as its party appointee, and an impartial umpire, Martin Haber, was selected by lottery.[FN4] Throughout these proceedings NNIC has been represented in both the arbitration and the related court matters by Barger & Wolen LLP ("Barger"), and Insco has been represented by Freeborn.

FN1. A brief background of the Agreement as well as certain important terms and conditions are set out in this Court's earlier opinion and order denying NNIC's February 18, 2011 Petition to Appoint an Arbitrator, and closing this case. *see Northwestern Nat'l Ins. Co. v. Insco, Ltd.*, No. 11 Civ. 1124, 2011 WL 1833303, at *1–2 (S.D.N.Y. May 12, 2011).

FN2. *See id.*

FN3. *See* 7/21/11 Declaration of Matthew C. Ferlazzo, counsel for NNIC, ("Ferlazzo Decl.") ¶ 2.

FN4. *See id.*

On February 2, 2010, the arbitration panel held

an organizational meeting to discuss the case.[FN5] At that meeting, the parties dealt with confidentiality issues, scheduling matters and other procedural issues.[FN6] The parties agreed that they could communicate with their "party appointeds," however they could not discuss any issues relating to pending motions after those motions had been fully briefed and were pending before the panel.[FN7] The panel also made disclosures to the parties about potential conflicts of interest, and they promised to continue to update their disclosures throughout the arbitration.[FN8] By February 2011, there had been extensive motion practice before the panel,[FN9] as well as numerous interim orders issued by the panel.[FN10]

FN5. *See* 2/2/10 Organizational Meeting Transcript ("Org. Tr. I"), Ex. 1 to Ferlazzo Decl.

FN6. *See id.* at 13:1–20:25, 110:1–111:25.

FN7. *See id.* at 19:8–20:17.

FN8. *See* 8/22/11 Declaration of Robin C. Dusek, counsel for Insco, ("Dusek Decl.") ¶ 7.

FN9. *See* Ferlazzo Decl. ¶ 5.

FN10. *See, e.g.*, 1/11/11 Interim Order 8 and 1/28/11 Interim Order 9, Ex. D to 8/22/11 Declaration of Catherine A. Miller, counsel for Insco ("Miller Decl.").

B. Freeborn Obtains Arbitration Pan el Communications

In the Fall of 2010, Freeborn was informed by Insco's party appointee, Diamond, that he was concerned about Nergaard's close relationship with Barger and that "she was too dependent on Barger & Wolen as a source of business."[FN11] Diamond continued to express such concerns to Freeborn through February 2011.[FN12] In December 2010, Insco became aware of rumors that Nergaard had failed to disclose additional appointments by Barger to arbitration panels and other potential conflicts of interest.[FN13] Upon Insco's request for updated disclosures, Nergaard disclosed multiple arbitration appointments, including two arbitration appointments by Barger that she had failed to disclose.[FN14] At that point, Haber informed the parties of additional disclosures and asserted that full disclosures had been made by the panel.[FN15]

FN11. 8/22/11 Declaration of Joseph T. McCullough IV, counsel for Insco, ("McCullough Decl.") ¶ 5. As with almost every other point in this case, the parties vigorously dispute the nature and frequency of the communications that Nergaard had with Evan Smoak, an attorney at Barger, who represents NNIC in the arbitration. *Contrast* McCullough Decl. ¶ 6 (Nergaard received "abusive calls" from Smoak) and Dusek Decl. ¶ 15 (Nergaard was "threatened" by Smoak) *with* 9/6/11 Declaration of Evan L. Smoak ¶¶ 5–6 (denying all allegations).

FN12. *See* McCullough Decl. ¶ 9.

FN13. *See id.* ¶ 7; Dusek Decl. ¶¶ 13–14.

FN14. *See* 12/10/10 5:04 p.m. E-mail *"RE: Panel Disclosures,"* Ex. G to McCullough Decl.

FN15. *See* 12/11/10 1:10 p.m. E-mail "Updated Disclosures–NNIC v Insco," Ex. I to McCullough Decl.

***2** On February 11, 2011, Diamond shared certain private e-mail communications among panel members with Freeborn because they had "bothered him for some time."[FN16] Specifically, the e-mails concerned Nergaard's frustration with Insco and its attorneys "attacking" and "slandering" her about her additional arbitration appointments by Barger.[FN17] The communications show that Nergaard was upset about Insco's challenge as to whether she could decide the "case fairly on the merits."[FN18]

FN16. McCullough Decl. ¶¶ 9–10.

FN17. *See* 12/10/10 10:51 p.m. E-mail *"RE: Panel Disclosures,"* Ex. H to McCullough Decl.

FN18. 12/10/10 11:53 p.m. E-mail *"Re: Panel Disclosures,"* Ex. H to McCullough Decl.

On February 15, 2011, Insco sent a letter to the panel and NNIC demanding that all of the arbitrators resign immediately because of "evident partiality." FN19 Diamond immediately resigned informing the panel that (1) he did not want NNIC to have a basis to appeal the panel's final ruling because of any alleged conflict of interest that Diamond had with Insco, and (2) he believed the hearing had been unfair and that "NNIC has successfully twisted the entire arbitration process." FN20 Insco then asked the panel to (1) preserve all communications "regarding this arbitration," and (2) turn over any communications that Nergaard had with Barger, NNIC or any third party. FN21 Subsequently, Joseph McCullough, an attorney at Freeborn, spoke to Diamond who "volunteered to provide documents he said would demonstrate that Ms. Nergaard was under the control of NNIC and its counsel." FN22 McCullough agreed, and Diamond turned over to Freeborn 182 pages of panel e-mails, including approximately 130 e-mails (duplicates excluded) in total, approximately thirty of which were from Haber. FN23 Freeborn's attorneys personally reviewed all the information contained in the e-mails and shared them with Insco. FN24 NNIC's attorneys expressed suspicion in February 2011 that Diamond had disclosed panel communications after receiving letters from Insco that referenced these panel discussions. FN25 Insco did not directly address NNIC's concern at the time, but engaged in a flurry of communications accusing Nergaard of partiality and demanding further disclosures as well as her resignation based on numerous undisclosed conflicts of interest pursuant to accepted American Arbitration Association ("AAA") and AIDA Reinsurance and Insurance Arbitration Society ("ARIAS") rules, guidelines and procedures. FN26

FN19. 2/15/11 Resignation Demand, Ex. 2 to Ferlazzo Decl.

FN20. 2/15/11 Diamond Resignation Letter, Ex. J to McCullough Decl.

FN21. *See* 2/16/11 2:54 p.m. E-mail *"RE: NNIC v. Insco,"* Ex. 3 to Ferlazzo Decl.

FN22. McCullough Decl. ¶ 11.

FN23. *See* Ferlazzo Decl. ¶¶ 24–25.

FN24. *See* McCullough Decl. ¶ 12.

FN25. *See* 2/17/11 2:55 p.m. E-mail *"RE: Nergaard Disclosures,"* Ex. 4 to Ferlazzo Decl.; 2/22/11 3:54 p.m. E-mail *"RE: NNIC v. Insco,"* Ex. 4 to Ferlazzo Decl.

FN26. *See, e.g.*, 2/17/11 8:26 a.m. E-mail "Disclosures," Ex. 4 to Ferlazzo Decl.; 2/17/11 10:02 p.m. E-mail *"RE: NNIC v. Insco,"* Ex. 4 to Ferlazzo Decl.

C. The Dispute Concerning the Pan el Discussions

NNIC first learned conclusively that Insco was in possession of private panel e-mails when Insco attached them as an exhibit to a declaration submitted to this Court on March 4, 2011, in reference to NNIC's previously mentioned February 18, 2011 Petition to Appoint an Arbitrator. FN27 NNIC immediately contacted Insco, and its counsel Freeborn, informing them that NNIC was seriously concerned upon discovering that Insco had such e-mails, and questioning Insco regarding how and when Insco got the e-mails, how many they had in their possession and other details about the e-mails. FN28 Insco treated these questions as "akin to discovery requests" and did not provide any useful information about the e-mails. FN29 Insco further asserted that they were entitled to possess these e-mails because they were evidence of "unethical behavior" by a panel member. FN30

FN27. *See* Ferlazzo Decl. ¶ 15; 3/9/11 4:54 p.m. E-mail *"RE: NNIC/Insco–Insco's Improper Possession and Use of Panel Communications,"* Ex. 5 to Ferlazzo Decl.

FN28. *See* 3/9/11 4:54 p.m. E-mail *"RE: NNIC/Insco–Insco's Improper Possession and Use of Panel Communications."*

FN29. *See* Dusek Decl. ¶ 23; 3/11/11 2:55 p.m. E-mail *"RE: NNIC/Insco–Insco's Improper Possession and Use of Panel Communications,"* Ex. 5 to Ferlazzo Decl., also included as Ex. N to Dusek Decl.

FN30. *See* 3/11/112:55 p.m. E-mail *"RE: NNIC/Insco–Insco's Improper Possession and Use of Panel Communications."*

***3** At this Court's pre-motion conference before the filing of NNIC's Petition to Appoint an Arbitrator, Insco asserted that it intended to file a cross-motion to challenge Haber and Nergaard as impartial arbitrators after they failed to resign.[FN31] Ultimately, Insco did not file this cross-motion after being told by the Court that it could not entertain an attack upon the qualifications of the arbitrators until after the conclusion of the arbitration.[FN32] After this Court denied NNIC's petition to have the Court appoint a replacement for Diamond, Insco appointed Jonathon Rosen as its new party appointee in place of Diamond.[FN33]

FN31. *See* 3/15/11 Conference Transcript at 2:21–3:21.

FN32. *See id.* at 4:12–20.

FN33. *See* Dusek Decl. ¶ 19.

At the next organizational meeting before the arbitration panel in June, Insco continued to complain about Nergaard's failure to make certain disclosures[FN34] and NNIC demanded that Insco produce the communications it received from Diamond.[FN35] Haber agreed with NNIC that Diamond's production of documents to Insco constituted a "massive violation," and Insco agreed to produce the documents.[FN36] Insco, through its entire team of attorneys, asserts that none of the e-mails in question contain any information that is relevant to the merits of the arbitration proceeding.[FN37]

FN34. *See* 6/15/11 Organizational Meeting Transcript ("Org. Tr. II"), Ex. 1 to Ferlazzo Decl. at 17:13–20:24.

FN35. *See id.* at 154:17–156:25.

FN36. *See id.* at 156:20–25.

FN37. *See* Miller Decl. ¶¶ 9–10; Dusek Decl. ¶ 18; McCullough Decl. ¶ 12; 8/22/11 Declaration of Kerry E. Slade, counsel for Insco, ¶¶ 3–5.

On June 28, Insco provided NNIC with the full 182–page document that it received from Diamond.[FN38] Because the document contained many e-mails exchanged solely among panel members, NNIC hired outside counsel, Daniel FitzMaurice of the law firm Day Pitney, who had never worked on the present arbitration, to review the e-mails.[FN39] NNIC's attorneys did not personally review the e-mails.[FN40] FitzMaurice reviewed all of the e-mail communications and compiled a chart of every e-mail in the document, noting its time, sender, recipient and a brief summary of the content.[FN41] NNIC strenuously asserts that the content summaries on the Chart suggest that many of the e-mails relate to issues that were or are still pending in the arbitration.[FN42] NNIC further claims that when Insco used some of the panel e-mails as an exhibit to a declaration submitted concerning the February 18, 2011 Petition to Appoint an Arbitrator, it did not disclose additional e-mails from Nergaard in the same e-mail chain, and that Insco changed the appearance of certain e-mails.[FN43] Insco fervently denies this allegation, claiming that the e-mails it presented were authentic and complete.[FN44]

FN38. *See* Ferlazzo Decl. ¶ 20.

FN39. *See id.* ¶ 24.

FN40. *See* 9/6/11 Reply Declaration of Matthew C. Ferlazzo ("Ferlazzo Reply Decl.") ¶¶ 9–16. Insco maintains, however, that it "appeared" that NNIC had reviewed "at least a portion of the e-mails," *see* McCullough Decl. ¶ 14.

FN41. *See* 7/21/11 Panel E-mail Chart, Exs. 1 and 2 to 7/21/11 Declaration of Daniel L. FitzMaurice, outside counsel from Day Pitney (collectively, the "Chart").

FN42. *See* Ferlazzo Decl. ¶¶ 25–33.

FN43. *See id.* at ¶¶ 40–43; *see also* Ferlazzo Reply Decl. ¶¶ 2–8.

FN44. *See* Dusek Decl. ¶¶ 21–22.

D. The Pan el's Response and the Present Action

On June 30, 2011, in response to NNIC's complaints about the e-mail disclosures, the panel issued Interim Order 12.[FN45] In its Order, the panel noted that the "release by Mr. Diamond of intra-panel communications was highly inappropriate," but that "[n]evertheless, this Panel will continue to decide the case on the facts and evidence presented."[FN46] The panel further noted that "this action by Mr. Diamond [ ] struck at the heart of the arbitral process in that the deliberations among the Panel are solely for the Panel's use and no one else."[FN47] While the panel determined that it would continue with the hearing anyway, it ordered that (1) all documents, electronic or printed, that came from Diamond's disclosure "be destroyed within 10 calender days and that no copies be retained by either party," and (2) "no document released by Mr. Diamond be used in any brief, motion or other writing or argument ... presented to this Panel."[FN48]

FN45. *See* 6/30/11 Interim Order 12, Ex. 7 to Ferlazzo Decl., also attached as Ex. L to McCullough Decl.

FN46. *Id.*

FN47. *Id.*

FN48. *Id.*

***4** The Order further provided, somewhat ambiguously, that ten days would provide enough time for the parties to destroy the documents "or make appropriate motions before a court."[FN49] NNIC suggests that this phrase contemplates a wide variety of motions, such as the present one to disqualify counsel.[FN50] Insco, however, believes that this clause was limited to "an opportunity to ask a court for relief from Interim Order 12's requirement that they destroy the documents."[FN51] Insco complied with the Order by destroying all of its copies of the confidential communications.[FN52] Subsequent to Interim Order 12, however, NNIC informed all parties that it was considering taking action in court, and continued to question Insco about the content of specific e-mails.[FN53] Insco asserted that it could no longer answer NNIC's questions because it had destroyed the e-mails pursuant to Interim Order 12.[FN54] NNIC countered that this constituted illicit obstruction of a legal proceeding because the panel had specifically allowed the parties time to make motions in court.[FN55]

FN49. *Id.*

FN50. *See* Petitioner's Memorandum of Law in Support of Its Motion to Disqualify Insco's Counsel ("Pl.Mem.") at 23.

FN51. Dusek Decl. ¶ 29.

FN52. *See* McCullough Decl. ¶ 17; 7/18/11 10:50 a.m. E-mail *"NNIC v. Insco–Interim Order # 12,"* Ex. O to Dusek Decl.

FN53. *See* 7/7/11 3:38 p.m. E-mail "NNIC/Insco–Interim Order 12," Ex. 8 to

Ferlazzo Decl.; 7/15/11 6:49 p.m. E-mail "NNIC/Insco–Insco's Improper Possession of Panel Deliberations," Ex. 9 to Ferlazzo Decl.

FN54. *See* 7/18/11 11:29 a.m. E-mail *"RE: NNIC/Insco–Insco's* Improper Possession of Panel Deliberations and Refusal to Answer Questions About Their Misconduct," Ex. 9 to Ferlazzo Decl.

FN55. *See* Pl. Mem. at 23.

On June 30, 2011, the parties argued their summary judgment motion before the panel.[FN56] NNIC's motion was denied by a written order dated July 19, 2011,[FN57] On July 21, 2011, NNIC moved this Court to reopen this case and disqualify Freeborn from further representing Insco in the arbitration because of their actions in obtaining the panel discussion e-mails from Diamond, and their failure, for months, to fully disclose the documentation they had acquired. As part of its opposition papers to this motion, Freeborn submitted a copy of the Chart prepared by FitzMaurice containing an additional "Response" column where Freeborn explains why no e-mail in the document bears upon the merits or pending proceedings of the arbitration.[FN58] In addition, both Insco and NNIC have submitted portions of the 182–page panel communications disclosure for this Court's review.[FN59]

FN56. *See* McCullough Decl. ¶ 17.

FN57. *See* 7/19/11 Interim Order 17 NNIC's Motion for Summary Judgment, Ex. M to McCullough Decl.

FN58. *See* 8/22/11 Revised Panel E-mail Chart, Exs. A and B to Miller Decl.

FN59. *See* Selected Freeborn E-mails, Exs. C, E and F to Miller Decl.; Selected Freeborn E-mails, Exs. 1 and 2 to 9/6/11 Reply Declaration of Daniel L. FitzMaurice (filed under seal).

III. APPLICABLE LAW

A. Arbitrability

"The Supreme Court has 'distinguished between 'questions of arbitrability,' which are to be resolved by the courts unless the parties have clearly agreed otherwise, and other 'gateway matters,' which are presumptively reserved for the arbitrator's resolution." [FN60] "[M]atters of attorney discipline are beyond the jurisdiction of arbitrators.... Issues of attorney disqualification ... cannot be left to the determination of arbitrators selected by the parties themselves for their expertise in the particular industries engaged in." [FN61] "[I]ssues of a lawyer's professional responsibilities [are] not within the customary expertise of [ ] industry arbitrators" and are "appropriately decided by the Court." [FN62] It is now settled that " 'possible attorney disqualification [ ] is not capable of settlement by arbitration.' " [FN63]

FN60. *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 393 (2d Cir.2011) (quoting *Mulvaney Mech., Inc. v. Sheet Metal Workers Int'l Ass'n, Local 38*, 351 F.3d 43, 45 (2d Cir.2003) (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83–85, 123 S.Ct. 588, 154 L.Ed.2d 491(2002))).

FN61. *Bidermann Indus. Licensing, Inc. v. Avmar N.V.*, 173 A.D.2d 401, 570 N.Y.S.2d 33, 34 (1st Dep't 1991) (citations omitted).

FN62. *Employers Ins. Co. of Wausau v. Munich Reins. Am., Inc.*, No. 10 Civ. 3558, 2011 WL 1873123, at *2 (S.D.N.Y. May 16, 2011).

FN63. *Munich Reins. Am., Inc. v. ACE Prop. & Cas. Ins. Co.*, 500 F.Supp.2d 272, 275 (S.D.N.Y.2007) (quoting *In Matter of Arbitration Between R3 Aerospace Inc.*

and Marshall of Cambridge Aerospace Ltd., 927 F.Supp. 121, 123 (S.D.N.Y.1996)). *Accord Gordon v. Skylink Aviation, Inc.*, 28 Misc.3d 1235(A) (Sup.Ct.N.Y.Co.2010).

B. Attorney Disqualification

"Whether to disqualify counsel is a matter subject to the trial court's sound discretion .... However, there is a general aversion to motions to disqualify in the Second Circuit." FN64 "While it is within the discretion of the Court to disqualify an attorney ... a party seeking to disqualify an opponent party's counsel generally faces a high burden of proof in doing so." FN65

FN64. *Feinberg v. Katz*, No. 01 Civ. 2739, 2003 WL 260571, at *3 (S.D.N.Y. Feb.5, 2003) (quotation marks and citations omitted).

FN65. *Miness v. Ahuja*, 713 F.Supp.2d 161, 166 (E.D.N.Y.2010) (citing *Purgess v. Sharrock*, 33 F.3d 134, 144 (2d Cir.1994) and *Glueck v. Jonathan Logan, Inc.*, 653 F.2d 746, 748 (2d Cir.1981)).

*5 This reluctance to disqualify results from two factors. First, disqualification separates the client from his counsel of choice. Second, motions to disqualify are often tactically motivated; they cause delay and add expense; they disrupt attorney-client relationships sometimes of long standing; in short, they tend to derail the efficient progress of litigation. Thus parties moving for disqualification of counsel carry a heavy burden and must satisfy a high standard of proof to succeed on the motion. However, the Second Circuit counsels that any doubts that exist should be resolved in favor of disqualification. FN66

FN66. *Feinberg*, 2003 WL 260571, at *3 (quotation marks and citations omitted).

"The disqualification of an attorney in order to forestall violation of ethical principles is a matter committed to the sound discretion of the district court." FN67 "The authority of federal courts to disqualify attorneys derives from their inherent power to 'preserve the integrity of the adversary process.' " FN68 "[T]he courts have not only the supervisory power but also the duty and responsibility to disqualify counsel for unethical conduct prejudicial to his adversaries." FN69 "A trial judge is required to take measures against unethical conduct occurring in connection with any proceeding before [her]." FN70 "A party seeking disqualification of an attorney based on the disclosure of confidential information previously made to the attorney, usually in [the] course of previous representation, has the burden of identifying the specific confidential information imparted to the attorney." FN71 "[D]isqualification is warranted," however, "if 'an attorney's conduct tends to taint the underlying trial.' " FN72

FN67. *Cresswell v. Sullivan & Cromwell*, 922 F.2d 60, 72 (2d Cir.1990).

FN68. *Hempstead Video, Inc. v. Incorporated Vill. of Valley Stream*, 409 F.3d 127, 132 (2d Cir.2005) (quoting *Board of Educ. of N.Y. v. Nyquist*, 590 F.2d 1241, 1246 (2d Cir.1979). *Accord Hull v. Celanese Corp.*, 513 F.2d 568, 571 (2d Cir.1975) ("The district court bears the responsibility for the supervision of the members of its bar.").

FN69. *Ceramco, Inc. v. Lee Pharm.*, 510 F.2d 268, 271 (2d Cir.1975).

FN70. *Gentner v. Shulman*, 55 F.3d 87, 89 (2d Cir.1995). *Accord Lelsz v. Kavanagh*, 137 F.R.D. 646, 655–56 (N.D.Tex.1991) ("There is no question that the Court possesses the authority to remove an attorney from a case pursuant to its inherent power to regulate the conduct of attorneys practicing before it.") (collecting cases).

FN71. *Muriel Siebert & Co., Inc. v. Intuit Inc.*, 32 A.D.3d 284, 820 N.Y.S.2d 54, 55 (1st Dep't 2006) (quotation marks and citations omitted).

FN72. *Canal+ Image UK Ltd. v. Lutvak*, No. 10 Civ. 1536, 2011 WL 2396961, at *9 (S.D.N.Y. June 8, 2011) (quoting *GSI Commerce Solutions, Inc. v. BabyCenter, LLC*, 618 F.3d 204, 209 (2d Cir.2010)).

IV. DISCUSSION

A. This Court Must Decide the Motion for Disqualification

Insco argues, as an initial matter, that this Court should refuse to entertain the present motion and instead, let "the arbitration panel decide, in the first instance, whether the information contained in the e-mails at issue is in any way problematic for that proceeding to continue with the parties represented by current counsel." FN73 While it is indeed true that the Federal Arbitration Act FN74 ("FAA") represents a "liberal federal policy favoring arbitration," FN75 the Court continues to play a central role in issues involving attorney disqualification. FN76 In addition to the fact that Insco fails to cite any relevant precedent for leaving this matter to the arbitration panel, there are two compelling reasons here for the Court to entertain this motion: (1) Courts, rather than insurance industry experts, decide issues of attorney discipline, and (2) the panel in this case has already indicated that it is not interested in considering this matter. FN77

FN73. Insco's Opposition to Petitioner's Motion to Disqualify ("Def.Mem.") at 10–11.

FN74. 9 U.S.C. § 1, *et seq.*

FN75. *AT & T Mobility LLC v. Conception*, —— U.S. ——, 131 S.Ct. 1740, 1745, 179 L.Ed.2d 742 (2011) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983)).

FN76. *See Munich Reins.*, 500 F.Supp.2d at 275.

FN77. *See* Org. Tr. II at 155:16–156:25.

1. Attorney Disqualification Is a Matter for the Court

Attorney disqualification is "a substantive matter for the courts and not arbitrators" for the simple reason that "it requires an application of substantive state law regarding the legal profession." FN78 In other words, arbitrators are selected by parties to a dispute primarily for their "expertise in the particular industries engaged in" and cannot be expected to be familiar with the standards of conduct applicable to the legal profession. FN79 I also note that in this action, the attorneys played a significant role in selecting their parties' respective party appointed arbitrators—a fact that further casts doubt on the ability of the arbitration panel to consider a motion to disqualify counsel. Moreover, the alleged wrongful conduct arose out of accusations of bias against one of the arbitrators. It is therefore appropriate for the Court to follow established New York precedent and consider this motion to disqualify Freeborn from representing Insco in the arbitration.

FN78. *Munich Reins.*, 500 F.Supp.2d at 275.

FN79. *Bidermann*, 570 N.Y.S.2d at 34.

2 The Pan el Has Refused to Consider This Matter

***6** Even if the panel were competent to resolve this matter, it has explicitly refused to do so in the present case. In the second arbitration organizational meeting on June 15, where the issue of the released documents was brought to the panel's attention, the panel refused to address it. Other than ordering disclosure, the panel simply stated "it's not really a panel issue," and "[i]t's not

this Panel's issue because I would have to become embroiled in any of that and I avoid that whole circumstance because I go forward in life. I don't go backwards." FN80 Later, at the arbitration hearing for summary judgment on June 30, the panel further stated regarding the e-mails, "Counsel, this is the Panel's order [Interim Order 12] and if you believe you have legal rights that you need to have enforced, you know where to get them enforced. We don't want this to go any further before us." FN81 Moreover, in the panel's formal written response to Freeborn's actions in obtaining the e-mails, Interim Order 12, the panel noted that it had not investigated the entire situation, and "[t]he Panel notes that the communications at issue were only part of the deliberative process" and "we do not know whether every writing among the Panel was delivered." FN82 The panel also included a reference to the parties' abilities to "make appropriate motions before a court." FN83 It is thus clear that the panel was either unable or uninterested in fully dealing with the e-mail disclosure and its consequences. The panel here did not fully address the factual record related to the improperly disclosed e-mails nor did it consider the legal question of whether disqualification was warranted. It would, therefore, be manifestly unfair for this Court to refuse to at least consider NNIC's motion to disqualify Freeborn.

FN80. Org. Tr. II at 155:16–156:25.

FN81. 6/30/11 Opening Arguments Transcript, Ex. 1 to Ferlazzo Decl., at 13:6–10.

FN82. Interim Order 12.

FN83. *Id.*

B. Freeborn's Actions Constituted a Serious Breach of Its Ethical Duties

Freeborn's actions in obtaining and hiding panel deliberations in an ongoing arbitration constituted a serious violation of arbitral guidelines, as well as ethical rules. While not considered binding law upon the parties, Comment Three to the ARIAS Code of Conduct, Canon VI, states that "[i]t is not proper at any time for arbitrators to ... inform anyone concerning the contents of the deliberations of the arbitrators." FN84 The ARIAS Ethics Guidelines further state that "[a]n arbitrator should not reveal the deliberations of the Panel. To the extent an arbitrator predicts or speculates as to how an issue might be viewed by the Panel, the arbitrator should at no time repeat statements made by any member of the Panel in deliberations, even his or her own." FN85 Likewise, the American Bar Association's Code of Ethics for Arbitrators in Commercial Disputes, prepared in conjunction with the AAA, states that "[i]n a proceeding in which there is more than one arbitrator, it is not proper at any time for an arbitrator to inform anyone about the substance of the deliberations of the arbitrators." FN86

FN84. ARIAS Code of Conduct, Ex. 10 to Ferlazzo Decl., *available at* http://www.arias-us.org/index.cfm?a=32.

FN85. ARIAS Additional Ethics Guidelines, Ex. 10 to Ferlazzo Decl., *available at* http://www.arias-us.org/index.cfm?a=384.

FN86. American Bar Association's Code of Ethics for Arbitrators in Commercial Disputes, Canon VI(c), Ex. 10 to Ferlazzo Decl., *available at* http://www.americanbar.org/content/dam/aba/migrated/dispute/commercial_disputes.authcheckdam.pdf.

*7 Despite Insco's intimation that the present arbitration was not governed by ARIAS or AAA rules and guidelines, FN87 Insco's attempts to rely on ARIAS and AAA guidelines so frequently throughout the arbitration proceedings render this argument incredible. FN88 Moreover, the New York State Rules of Professional Conduct state that a "lawyer or law firm shall not ... engage in conduct involving dishonesty, fraud, deceit or

misrepresentation; ... engage in conduct that is prejudicial to the administration of justice." FN89 I fully agree with the panel's findings in Interim Order 12 that Insco's conduct was inappropriate and that it was a violation of the New York State Rules of Professional Conduct, as well as multiple non-binding arbitration guidelines referred to previously. There is also no question that this Court is authorized to impose sanctions on attorneys "found to have engaged in conduct violative of the New York State Rules of Professional Conduct as adopted from time to time by the Appellate Divisions of the State of New York." FN90

FN87. *See* McCullough Decl. ¶ 4.

FN88. *See, e.g.*, Resignation Demand; 2/17/11 8:26 a.m. E-mail "Disclosures," Ex. 4 to Ferlazzo Decl.; 2/17/11 10:02 p.m. E-mail *"RE: NNIC v. Insco,"* Ex. 4 to Ferlazzo Decl.

FN89. 22 NY.C.R.R. § 1200.00 R. 8.4(c)-(d).

FN90. Loc. Civ. R. 1.5(b)(5).

1. Insco's Allegations of Bias Do Not Justify Its Actions

Insco attempts to defend its actions by arguing that (1) there is nothing problematic about *ex parte* communications with a party appointee to an arbitration panel, and (2) the e-mails that Insco obtained were legitimately discoverable for the purpose of proving Nergaard's lack of impartiality. FN91 While the parties in the present action certainly contemplated that they could and would communicate with their party-appointed arbitrators, FN92 in light of the ethical arbitration guidelines noted above and the conclusion of Interim Order 12, this authority cannot be construed to extend to the sharing of actual panel deliberations and communications. I understand and appreciate that "ex parte feedback from party-appointed arbitrators regarding the arbitration panel's view of the facts and issues can help the parties narrow the issues in dispute, focus on the evidence and arguments the arbitrators are most interested in, and reach a negotiated settlement." FN93 However, leaking private communications among the arbitrators that may contain sensitive deliberations on disputed matters goes beyond the salutory purpose of expediting the arbitration and has a strong tendency to taint arbitral proceedings.

FN91. *See* Def. Mem. at 12–15.

FN92. *See* Org. Tr. 1 at 19:8–20:18.

FN93. McCullough Decl. ¶ 3.

Furthermore, Insco's actions cannot be justified by its allegations of Nergaard's lack of impartiality. Although the FAA allows a court to vacate an arbitration award—after it has been rendered—"where there was evident partiality or corruption in the arbitrators," FN94 the Second Circuit has set a very high standard for vacature, and it will only be granted where "a reasonable person, considering all of the circumstances, 'would *have* to conclude' that an arbitrator was partial to one side." FN95 More importantly, though, a party is never allowed to probe the decision-making process of an arbitration panel to prove bias, except in the most egregious of cases. FN96 In fact, "[p]ost-verdict examinations of a judicial or quasi-judicial officer, be he judge, juror, or arbitrator, for the purpose of impeaching his decision, are inherently suspect, indeed, roundly condemned, in our system of jurisprudence." FN97 In this case, Insco's suspicions concerning Nergaard related to failures to disclose appointments in other arbitrations and other personal conflicts of interest. Such allegations are distinguishable from serious allegations of negligence or malfeasance in the pending arbitration.

FN94. 9 U.S.C. § 10.

FN95. *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132, 137 (2d Cir.2007) (quoting

Morelite Constr. Corp. v. New York City Dist. Council Carpenters Benefit Funds, 748 F.2d 79, 84 (2d Cir.1984)) (emphasis in original). *Accord Sofia Shipping Co., Ltd. v. Amoco Transp. Co.*, 628 F.Supp. 116, 119 (S.D.N.Y.1986) ("Courts are reluctant to set aside an award based on a claim of evident partiality, and will do so only if the bias of the arbitrator is direct and definite; mere speculation is not enough.").

FN96. *See Petition of Fertilizantes Fosfatados Mexicanos,* S.A., 751 F.Supp. 467, 468 n. 1 (S.D.N.Y.1990) ("This case should not be viewed as a precedent in any way for inquiry into the deliberations of an arbitration panel. Such matters should remain confidential and inviolate. The only reason it was permitted here was because of the seriousness of the charges made by the dissenter against the other two arbitrators."); *see also Matter of Arbitration Between Advest, Inc. and Asseoff,* No. 92 Civ. 2269, 1993 WL 119690, at *3 (S.D.N.Y. Apr.14, 1993).

FN97. *Reichman v. Creative Real Estate Consultants, Inc.*, 476 F.Supp. 1276, 1286 (S.D.N.Y.1979). *Accord Rubens v. Mason,* 387 F.3d 183, 191 (2d Cir.2004).

***8** Insco's argument that the prohibition on probing panel deliberations is limited to *"admitting evidence ... in subsequent legal proceedings"*[FN98] also fails to justify its conduct in this case. "While arbitrators may be deposed regarding claims of bias or prejudice, cases are legion in which courts have refused to permit parties to depose arbitrators—or other judicial or quasi-judicial decision-makers—regarding the thought processes underlying their decisions." [FN99] The information that Insco obtained here went well beyond inquiries into the potential bias of an arbitrator, and included the receipt of a large number of private panel communications. The communications relate to a number of issues, and at least some relate to the arbitrators' thought processes in the proceeding. Even the cases relied upon by Insco make clear that vacature of an award is warranted where parties obtained information relating to the merits of the dispute.[FN100] It was, therefore, inappropriate for Insco to obtain panel deliberations before the close of the arbitration, and in violation of arbitration guidelines. Especially in light of the fact that Insco had already asked the panel to preserve all internal communications,[FN101] there was no need for Insco to obtain and review internal communications while the matter was still pending. Finally, and in any event, even if Insco felt it could later mount legitimate attacks on Nergaard's impartiality, it was "not proper at any time for arbitrators to ... assist a party in post-arbitral proceedings, except as is required by law." [FN102]

FN98. Def. Mem. at 14 (emphasis in original).

FN99. *Hoeft v. MVL Group, Inc.*, 343 F.3d 57, 67 (2d Cir.2003), *overruled on other grounds as stated in ATSI Commc'ns, Inc. v. Shaar Fund, Ltd,* 547 F.3d 109, 115 (2d Cir.2008).

FN100. *See, e.g., Prozina Shipping Co. Ltd. v. Elizabeth–Newark Shipping, Inc.*, No. 98 Civ. 5834, 1999 WL 705545, at *5 (S.D.N.Y. Sept.10, 1999).

FN101. *See* 2/16/11 2:54 p.m. E-mail *"RE: NNIC v. Insco."*

FN102. ARIAS Code of Conduct, Canon VI, comment 3.

The Court also finds no merit or appeal in Insco's counter-arguments that (1) NNIC improperly and strategically delayed making this motion until after the panel's denial of summary judgment even though they learned of the e-mails in February or March, and (2) that NNIC's attorneys could have simply read the e-mails themselves in

order to level the playing field.[FN103] *First,* Insco cannot complain about the timing of the present motion, when it failed to disclose exactly what information was in its possession until after the June 15 organizational meeting. *Second,* NNIC cannot be faulted for refraining from reading 182 pages of e-mails exchanged among the panel members. NNIC was under no obligation to take the same inappropriate actions as Insco did and review documents identified as panel communications.

FN103. *See* Def. Mem. at 7, 17.

C. The E-mails Obtained by Insco Contain Substantive Discussions About the Underlying Proceedings

NNIC argues that the ethical lapses outlined above require that Freeborn be disqualified from further representing Insco in this matter. While attorney disqualification is a "drastic measure,"[FN104] when faced with questions of disqualification, "any doubt is to be resolved in favor of disqualification."[FN105] The Court's mandate to protect the integrity of the adversary process is not limited to cases involving the compromise of an attorney's loyalty to a current or former client.[FN106] Disqualification is warranted when the violations alleged " 'pose[ ] a significant risk of trial taint.' "[FN107]

FN104. *Capponi v. Murphy,* 772 F.Supp.2d 457, 471 (S.D.N.Y.2009). *Accord Scantek Med., Inc. v. Sabella,* 693 F.Supp.2d 235, 238–39 (S.D.N.Y.2008) (collecting cases).

FN105. *Sea Trade Maritime Corp. v. Coutsodontis,* No. 09 Civ. 488, 2011 WL 3251500, at *6 (S.D.N.Y. July 25, 2011) (citing *Hull,* 513 F.2d at 571).

FN106. *Matter of Beiny,* 129 A.D.2d 126, 517 N.Y.S.2d 474, 484 (1st Dep't 1987).

FN107. *Decker v. Nagel Rice LLC,* 716 F.Supp.2d 228, 231 (S.D.N.Y.2010) (quoting *Glueck,* 653 F.2d at 748). *Accord Medical Diagnostic Imaging, PLLC v. CareCore Nat'l, LLC,* 542 F.Supp.2d 296, 306 (S.D.N.Y.2008).

*9 NNIC points to numerous instances of specific communications between Freeborn and Diamond that raise a serious risk of tainting the underlying proceedings including: (1) e-mail 9[FN108] pertains to a draft of what became Interim Order 9; (2) e-mails 64–67 involved communications between Freeborn and Diamond in which Freeborn provided Diamond with a one-sided view of certain discovery issues which Diamond then forwarded to the full panel; (3) e-mails 52, 111, 238, and 253 pertain to drafts of what were to become Interim Orders 8, 9 and 11. Freeborn had these e-mails in February 2011 at the latest, and Order 11 was not issued until July 7, 2011; (4) e-mail 52 also pertains to discovery issues pending before the panel while discovery disputes were still ongoing in the arbitration; (5) e-mail 145 pertains to the location of certain depositions still at issue in the arbitration. The parties had ongoing disputes about the location of depositions; (6) e-mail 170 pertains to choice of law issues which were later the subjects of complaints; (7) e-mail 212 contains Haber's views about the timing of depositions, summary judgement and the audit report. This e-mail was in Freeborn's possession by February 2011, and arguments on summary judgement did not occur until June; and (8) e-mail 238 contains Haber's views about depositions, some of which were still pending.[FN109] Because many of these e-mails relate to actual and ongoing disputes in the arbitration, disqualification of Freeborn is warranted.

FN108. Specific e-mails from Diamond's disclosure are referred to based on their numerical position in the Chart prepared by FitzMaurice. While McCullough does not mention any e-mails sent to him by Diamond before February 11, *see* McCullough Decl. ¶ 9, the Chart contains

e-mail chains that were forwarded to McCullough in January as well. Moreover, as noted in the footnotes to the Reply Declaration of FitzMaurice, it is unclear exactly how early some of the e-mail chains were forwarded to McCullough.

FN109. *See* Pl. Mem. at 9–10; Ferlazzo Decl. ¶¶ 26–33.

While Insco argues that none of the panel communications at issue are important to or tend to taint the arbitration, there is little support for this argument. Although, for example, Insco denies that e-mail 9 contains a draft order, it appears to admit that the e-mail "concerned" an unissued scheduling order and that it received the e-mail before the order was issued.[FN110] Insco quotes a portion of e-mail 52—a paragraph concerning accountability and attorneys' fees—to show that it does not constitute deliberations.[FN111] However, that e-mail, as well as the long chain of e-mails of which it is a part, contain extended discussions by the panel concerning discovery issues, as well as the proposed text of a discovery order.[FN112] Moreover, these e-mails were mostly sent on February 10 and 11, and were forwarded to Freeborn a few days later on February 17. Both parties agree that discovery has been a hotly contentious topic in the arbitration proceedings, and that disputes were ongoing in February 2011. Likewise, while e-mail 145 may be limited to a draft order regarding the location of depositions that was finalized before the e-mail was disclosed to Freeborn, the subsequent e-mails in the chain also contain substantive discussions, including panel members' opinions.[FN113] Also, despite the fact that the e-mail shows that Nergaard contemplated certain panel e-mails being shared with the parties, she specifically asked that this not take place until the pending issue was resolved.[FN114]

FN110. *See* Def. Mem. at 17.

FN111. *See id.* at 18.

FN112. *See* E-mails 40–62, Ex. E to Miller Decl.

FN113. *See* E-mails 140–145, Ex. C to Miller Decl.

FN114. *See* E-mail 142, Ex. C to Miller Decl. In e-mail 142, Nergaard explicitly expressed concern that certain e-mails were shared prior to the panel's resolution.

***10** Furthermore, although Insco disputes that e-mail 170 contains substantive discussions about choice of law, the e-mail does contain discussions about issues that could arise regarding choice of law.[FN115] E-mail 170 is also part of a chain of multiple internal panel communications that include Haber soliciting other panel members' views on issues about the location of depositions.[FN116] Similarly, Insco cites a portion of e-mail 212 to show that it contains no substantive views on summary judgment.[FN117] However, the debate about the production of audit reports contained in the e-mail chain, including e-mail 212, was an important issue to the parties, spanned several internal panel communications and affected the scheduling of summary judgment.[FN118] Finally, although Insco quotes only a sentence from e-mail 238, that e-mail is part of a chain of over a dozen internal panel e-mails that discuss discovery issues, as well as a draft order.[FN119] Thus, Insco acted inappropriately by obtaining e-mails that contained deliberations on live and contested issues which were not meant to be shared with the parties.

FN115. *See* E-mail 170, Ex. F to Miller Decl.

FN116. *See* E-mails 168–179.

FN117. *See* Def. Mem. at 18.

FN118. *See* E-mails 209–216, Ex. F to Miller Decl.

FN119. *See* E-mail 238, Ex. F to Miller Decl.

In sum, disclosure of the foregoing discussions tended to taint the proceedings, and to the extent there is any doubt, it should be resolved in favor of disqualification. In an age in which electronic communications play a central role in arbitrator deliberations, it is imperative that such communications remain as protected as all other forms of private panel interactions. Deliberate action to obtain such records is a disservice to the integrity of the adversarial process, and is strictly and unambiguously prohibited. Allowing parties to obtain confidential panel deliberations would provide an unfair advantage in the legal proceedings and have a chilling effect on the ability of arbitrators to communicate freely.

V. CONCLUSION

For the foregoing reasons, plaintiff's motion to disqualify counsel Freeborn from representing defendant Insco is granted. The Clerk is directed to close this motion [Docket No. 22] and this case is to remain closed.

SO ORDERED.

S.D.N.Y.,2011.
Northwestern Nat. Ins. Co. v. Insco, Ltd.
Not Reported in F.Supp.2d, 2011 WL 4552997 (S.D.N.Y.)

END OF DOCUMENT

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 93-370 **Februrary 5, 1993**
Judicial Participatatin in
Pretrial Settlement Negotiations

A lawyer should not, absent informed client consent, reveal to a judge the limits of the lawyer's settlement authority or the lawyer's advice to the client regarding settlement. A judge participating in pretrial settlement discussions may inquire as to a lawyer's settlement authority or advice to the client concerning settlement terms, but should not require a lawyer to make such disclosures where the information is subject to Rule 1.6 and the lawyer does not have authority to disclose them.

With the increasing and salutary initiatives in the areas of alternative dispute resolution and pretrial settlement, a process sponsored and supported by the courts and the Bar, certain issues concerning the responsibilities of both attorneys and those conducting such proceedings have become apparent and should be addressed.

In this instance the Committee has been asked whether the Model Rules of Professional Conduct (1983, amended 1993), prohibit a lawyer from disclosing to a judge conducting pretrial settlement discussions the limits of settlement authority given by the client. Further, the Committee is asked whether a lawyer may properly be required to disclose to a judge in a settlement conference the lawyer's advice to the client regarding settlement.

The specific facts presented to the Committee are as follows: During pretrial settlement negotiations the judge meets separately with each counsel in chambers, all counsel having notice of the meeting. The judge, without prior notice, asks the lawyer to reveal the limits of settlement authority conferred on the lawyer by the client.[1] The judge also asks the lawyer to disclose the settlement terms the lawyer will recommend to the client.

As a preliminary matter, we note that in many states, and in the federal system, a judge has the discretion to mandate participation of counsel in a pretrial settlement conference. In addition, Model Rule 3.2 imposes on a lawyer the duty to seek expeditious resolution of a matter consistent with the interests of the client. Reasonable settlement is often better for the client than the fortuities of a trial. A lawyer should therefore cooperate to the fullest extent

1. The phrase "limits of settlement authority" is understood to mean the minimum amount the plaintiff will accept or the maximum amount the defendant will offer.

possible in a pretrial settlement conference.

A Lawyer's Authority and Advice Regarding Settlement are Confidential Matters

Protected by Model Rule 1.6

Model Rule 1.6,[2] prohibits the disclosure of information relating to the representation without the client's informed consent. Both the limits of settlement authority and the lawyer's advice to the client regarding settlement are clearly "information relating to the representation" within the meaning of Rule 1.6. Therefore, disclosure of this confidential information is prohibited in the absence of consent by the client after consultation,[3] unless the disclosure (1) falls within one of the exceptions specified by Rule 1.6(b), or (2) is "impliedly authorized to carry out the representation."

Neither of the Rule 1.6(b) exceptions applies to the information sought by the judge in the instances here under consideration. The requested disclosures also cannot ordinarily be considered as "impliedly authorized in order to carry out the representation." The Comment to Rule 1.6 discusses the nature of the "impliedly authorized" exception, defining it as a "disclosure that facilitates a satisfactory conclusion."[4] The ethical propriety of the requested disclosures turns on whether these disclosures would facilitate a conclusion satisfactory to the client.

While a lawyer normally has implied authority to enter into routine stip-

---

2. Rule 1.6 provides:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1)to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2)to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

3. The meaning of "consultation" is given in the Terminology Section of the Model Rules:

"Consult" or "consultation" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

4. The Comment to Rule 1.6 states in relevant part:

A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

ulations and to admit matters not in dispute, the settlement parameters sought by the judge are neither routine nor uncontested. The potential for adversely affecting the client's position, or leading to a disposition of the case that is not satisfactory to the client, will ordinarily be significantly increased by disclosure of the client's ultimate settlement position. Such information is confidential and its disclosure cannot be said to be impliedly authorized simply by reason of the lawyer's representation of the client. Although there will be occasions when a lawyer's authority to reveal a client's settlement position may be implied from the circumstances, no such implication arises simply because the inquiry is made by a judge. Such information should not be disclosed even to a judicial mediator without informed client consent. [5]

While a Judge, During Settlement Discussions, May Inquire as to a Lawyer's Settlement Authority or Advice to the Client Concerning Settlement Terms, a Judge Should Not Require a Lawyer to Make Such Disclosures Where the Information is Subject to Rule 1.6 and the Lawyer Does Not Have Authority to Disclose Them

We turn to the question of whether a judge is precluded from asking such questions of counsel, or from requiring counsel to answer them, by the Model Code of Judicial Conduct (1990) ("MCJC") or the predecessor Code of Judicial Conduct (1972) ("CJC"). While MCJC Canon 3B(7)(d) permits judges to participate in settlement conferences, [FN6] it does not override, nor permit an exception, either explicit or implicit, to the obligation of confidentiality imposed on a lawyer by Rule 1.6.

The predecessor Code of Judicial Conduct (1972) did not contain a counterpart to MCJC 3B(7)(d). Neither did it contain an express prohibition against a judge's participation in voluntary pretrial settlement conferences with the parties and their counsel. If, however, the judge participated in settlement discussions to such an extent that the judge became a witness to crucial fact issues, disqualification would be enforced under Canon 3C(1)(a). See, e.g., Collins v. Dixie Transportation, Inc., 543 So.2d 160 (Miss.1989).

In the pretrial settlement process, the judge's role is to "encourage and seek to facilitate settlement, but parties should not feel coerced into surrendering the right to have their controversy resolved by the courts." MCJC, from the Commentary to Canon 3B(8). It is not appropriate for the judge to compel

---

5. The disclosure of settlement limits or recommendations by an attorney where settlement authority is contractually retained by an insurance carrier or other third party is not addressed in this opinion.

6. "A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge." MCJC Canon 3B(7)(d).

lawyers to make confidential admissions which may be against their clients' interests.[7]

In Kothe v. Smith, 771 F.2d 667 (2d Cir.1985), the court criticized a judge's "excessive zeal" in imposing sanctions on a party who did not settle a case prior to trial within the range recommended by the court, stating "Offers to settle a claim are not made in a vacuum.... [T]he process of settlement is a two-way street, and a defendant should not be expected to bid against himself." Kothe, at 669-670; see also Brooks v. Great Atlantic & Pacific Tea Co., 92 F.2d 794, 796 (9th Cir.1937) ("The judge must not compel agreement by arbitrary use of his power and the attorney must not meekly submit to a judge's suggestion, though it be strongly urged.").

Thus we conclude a judge may not require a lawyer to disclose settlement limits authorized by the lawyer's client, nor the lawyer's advice to the client regarding settlement terms. This is not to suggest, however, that a judge may not, in seeking to facilitate a settlement, and in an appropriate manner, make inquiry of a lawyer as to those matters. For example, while attempting to settle a case a judge may well feel it appropriate and helpful to inquire of counsel the limits of his settlement authority or whether counsel will recommend to the client the terms of settlement the judge recommends. Such an inquiry, if exercised within limits, is proper. Those limitations are formed by the ethical constraints imposed upon lawyers by Rule 1.6 not to disclose information relating to the representation without prior client consent or other expressly-permitted excuse.

The judge should be sensitive to these ethical constraints on counsel and sensitive as well to the superior position of authority the judge enjoys with respect to the lawyer and the effect an inquiry from one in the judge's position may have upon lawyers who must appear before him, particularly those who appear before the judge frequently. Accordingly, a judge making such an inquiry should acknowledge the lawyer's ethical duties and assure the lawyer that the inquiry is not intended to pressure the lawyer to violate them. Properly phrased and sincerely expressed, such prefatory remarks will help strike the balance between the perceived need of the judge to inquire and the ethical duty of the lawyer to comply with relevant confidentiality rules.

If the lawyer, in response to the inquiry, expresses a reticence to disclose

---

7. The Advisory Committee's Notes to the 1983 amendment to Fed.R.Civ.P. 16(c) state in relevant part:

> The reference to "authority" is not intended to insist upon the ability to settle the litigation. Nor should the rules be read to encourage the judge conducting the conference to compel attorneys to enter into stipulations or to make admissions that they consider to be unreasonable, that touch on matters that could not normally have been anticipated to arise at the conference, or on subjects of a dimension that normally require prior consultation with and approval from the client.

such information on ethical grounds, the judge should not pursue the inquiry further.

The question may also arise whether a lawyer is justified in lying or misrepresenting in response to questions about the limits of settlement authority on the basis that the judge is behaving improperly and has no right to the information or a truthful answer. Model Rule 4.1 states: "In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person." The Comment to Rule 4.1 states in relevant part:

> Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are in this category....

While as explained in the Comment, supra, a certain amount of posturing or puffery in settlement negotiations may be an acceptable convention between opposing counsel, a party's actual bottom line or the settlement authority given to a lawyer is a material fact. A deliberate misrepresentation or lie to a judge in pretrial negotiations would be improper under Rule 4.1. Model Rule 8.4(c) also prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, and Rule 3.3 provides that a lawyer shall not knowingly make a false statement of material fact or law to a tribunal. The proper response by a lawyer to improper questions from a judge is to decline to answer, not to lie or misrepresent.

Conclusion

Despite the benefits of pretrial settlement of litigated matters, the Committee is of the opinion that, absent informed client consent, a lawyer should not reveal to a judge, and a judge conducting pretrial settlement discussions should not require a lawyer to disclose, the limits of the lawyer's settlement authority or the lawyer's advice to the client regarding settlement.

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 06-439 **April 12, 2006**

Lawyer's Obligation of Truthfulness When Representing a Client in Negotiation: Application to Caucused Mediation

Under Model Rule 4.1, in the context of a negotiation, including a caucused mediation, a lawyer representing a client may not make a false statement of material fact to a third person. However, statements regarding a party's negotiating goals or its willingness to compromise, as well as statements that can fairly be characterized as negotiation "puffing," ordinarily are not considered "false statements of material fact" within the meaning of the Model Rules[1].

In this opinion, we discuss the obligation of a lawyer to be truthful when making statements on behalf of clients in negotiations, including the specialized form of negotiation known as caucused mediation.

It is not unusual in a negotiation for a party, directly or through counsel, to make a statement in the course of communicating its position that is less than entirely forthcoming. For example, parties to a settlement negotiation often understate their willingness to make concessions to resolve the dispute. A plaintiff might insist that it will not agree to resolve a dispute for less than $200, when, in reality, it is willing to accept as little as $150 to put an end to the matter. Similarly, a defendant manufacturer in patent infringement litigation might repeatedly reject the plaintiff's demand that a license be part of any settlement agreement, when in reality, the manufacturer has no genuine interest in the patented product and, once a new patent is issued, intends to introduce a new product that will render the old one obsolete. In the criminal law context, a prosecutor might not reveal an ultimate willingness to grant immunity as part of a cooperation agreement in order to retain influence over the witness.

A party in a negotiation also might exaggerate or emphasize the strengths, and minimize or deemphasize the weaknesses, of its factual or legal position. A buyer of products or services, for example, might overstate its confidence in the availability of alternate sources of supply to reduce the appearance of

1. This opinion is based on the Model Rules of Professional Conduct as amended by the ABA House of Delegates in August 2003 and, to the extent indicated, the predecessor Model Code of Professional Responsibility of the American Bar Association. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in the individual jurisdictions are controlling.

dependence upon the supplier with which it is negotiating. Such remarks, often characterized as "posturing" or "puffing," are statements upon which parties to a negotiation ordinarily would not be expected justifiably to rely, and must be distinguished from false statements of material fact. An example of a false statement of material fact would be a lawyer representing an employer in labor negotiations stating to union lawyers that adding a particular employee benefit will cost the company an additional $100 per employee, when the lawyer knows that it actually will cost only $20 per employee. Similarly, it cannot be considered "posturing" for a lawyer representing a defendant to declare that documentary evidence will be submitted at trial in support of a defense when the lawyer knows that such documents do not exist or will be inadmissible. In the same vein, neither a prosecutor nor a criminal defense lawyer can tell the other party during a plea negotiation that they are aware of an eyewitness to the alleged crime when that is not the case.

Applicable Provision of the Model Rules

The issues addressed herein are governed by Rule 4.1(a).[2] That rule prohibits a lawyer, "[i]n the course of representing a client," from knowingly making "a false statement of material fact or law to a third person." As to what constitutes a "statement of fact," Comment [2] to Rule 4.1 provides additional explanation:

2. Although Model Rule 3.3 also prohibits lawyers from knowingly making untrue statements of fact, it is not applicable in the context of a mediation or a negotiation among parties. Rule 3.3 applies only to statements made to a "tribunal." It does not apply in mediation because a mediator is not a "tribunal" as defined in Model Rule 1.0(m). Comment [5] to Model Rule 2.4 confirms the inapplicability of Rule 3.3 to mediation:

> Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration (see Rule 1.0(m)), the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.

Rule 3.3 does apply, however, to statements made to a tribunal when the tribunal itself is participating in settlement negotiations, including court-sponsored mediation in which a judge participates. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-370 (1993) (Judicial Participation in Pretrial Settlement Negotiations), in FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998 at 157, 161 (ABA 2000).

Rule 8.4(c), which on its face broadly proscribes "conduct involving dishonesty, fraud, deceit or misrepresentation," does not require a greater degree of truthfulness on the part of lawyers representing parties to a negotiation than does Rule 4.1. Comment [1] to Rule 4.1, for example, describes Rule 8.4 as prohibiting "misrepresentations by a lawyer other than in the course of representing a client . . . ." In addition, Comment [5] to Rule 2.4 explains that the duty of candor of "lawyers who represent clients in alternative dispute resolution processes" is governed by Rule 3.3 when the process takes place before a tribunal, and otherwise by Rule 4.1. Tellingly, no reference is made in that Comment to Rule 8.4. Indeed, if Rule 8.4 were interpreted literally as applying to any misrepresentation, regardless of the lawyer's state of mind or the triviality of the false statement in question, it would render Rule 4.1 superfluous, including by punishing unknowing or immaterial deceptions that would not even run afoul of Rule 4.1. *See* GEOFFREY C. HAZARD, JR. & W. WILLIAM

> This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.[3]

Truthfulness in Negotiation

It has been suggested by some commentators that lawyers must act honestly and in good faith and should not accept results that are unconscionably unfair, even when they would be to the advantage of the lawyer's own client.[4] Others have embraced the position that deception is inherent in the negotiation process and that a zealous advocate should take advantage of every opportunity to advance the cause of the client through such tactics within the bounds of the law.[5] Still others have suggested that lawyers should strive to balance the

---

HODES, THE LAW OF LAWYERING § 65.5 at 65-11 (3d ed. 2001). It is not necessary, however, for this Committee to delineate the precise outer boundaries of Rule 8.4(c) in the context of this opinion. Suffice it to say that, whatever the reach of Rule 8.4(c) may be, the Rule does not prohibit conduct that is permitted by Rule 4.1(a).

3. The RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 98, cmt. c (2000) (hereinafter "RESTATEMENT") (citations omitted) echoes the principles underlying Comment [2] to Rule 4.1:

> Certain statements, such as some statements relating to price or value, are considered nonactionable hyperbole or a reflection of the state of mind of the speaker and not misstatements of fact or law. Whether a statement should be so characterized depends on whether the person to whom the statement is addressed would reasonably regard the statement as one of fact or based on the speaker's knowledge of facts reasonably implied by the statement, or instead regard it as merely an expression of the speaker's state of mind.

4. *See, e.g.*, Reed Elizabeth Loder, "Moral Truthseeking and the Virtuous Negotiator," 8 *Geo. J. Legal Ethics* 45, 93-102 (1994) (principles of morality should drive legal profession toward rejection of concept that negotiation is inherently and appropriately deceptive); Alvin B. Rubin, "A Causerie on Lawyers' Ethics in Negotiation," 35 *La. L. Rev.* 577, 589, 591 (1975) (lawyer must act honestly and in good faith and may not accept a result that is unconscionably unfair to other party); Michael H. Rubin, "The Ethics of Negotiation: Are There Any?," 56 *La. L. Rev.* 447, 448 (1995) (embracing approach that ethical basis of negotiations should be truth and fair dealing, with goal being to avoid results that are unconscionably unfair to other party).

5. *See, e.g.*, Barry R. Temkin, "Misrepresentation by Omission in Settlement Negotiations: Should There Be a Silent Safe Harbor?," 18 *Geo. J. Legal Ethics* 179, 181 (2004) (clients are entitled to expect their lawyers to be zealous advocates; current literature bemoaning lack of honesty and truthfulness in negotiation has gone too far); James J. White, "Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation," 1980 *Am. B. Found. Res. J.* 921, 928 (1980) (misleading other side is essence of negotiation and is all part of the game).

apparent need to be less than wholly forthcoming in negotiation against the desirability of adhering to personal ethical and moral standards.[6] Rule 4.1(a) applies only to statements of material fact that the lawyer knows to be false, and thus does not cover false statements that are made unknowingly, that concern immaterial matters, or that relate to neither fact nor law. Various proposals also have been advanced to change the applicable ethics rules, either by amending Rule 4.1 and its Comments, or by extending Rule 3.3 to negotiation, or by creating a parallel set of ethics rules for negotiating lawyers.[7]

Although this Committee has not addressed the precise question posed herein, we previously have opined on issues relating to lawyer candor in negotiations. For example, we stated in Formal Opinion 93-370[8] that, although a lawyer may in some circumstances ethically decline to answer a judge's questions concerning the limits of the lawyer's settlement authority in a civil matter,[9] the lawyer is not justified in lying or engaging in misrepresentations in response to such an inquiry. We observed that:

> [w]hile . . . a certain amount of posturing or puffery in settlement negotiations may be an acceptable convention between opposing counsel, a party's actual bottom line or the settlement authority given to a lawyer is a material fact. A deliberate misrepresentation or lie to a judge in pretrial negotiations would be improper under Rule 4.1. Model Rule 8.4(c) also prohibits a lawyer from engaging in conduct involving dishonesty,

---

6. *See, e.g.*, Charles B. Craver, "Negotiation Ethics: How to Be Deceptive Without Being Dishonest/How to Be Assertive Without Being Offensive," 38 *S. Tex. L. Rev.* 713, 733-34 (1997) (lawyers should balance their clients' interests with their personal integrity); Van M. Pounds, "Promoting Truthfulness in Negotiation: A Mindful Approach," 40 *Willamette L. Rev.* 181, 183 (2004) (suggesting that solution to finding more truthful course in negotiation may lie in ancient Buddhist practice of "mindfulness," of "waking up and living in harmony with oneself and with the world").

7. *See, e.g.*, James J. Alfini, "Settlement Ethics and Lawyering in ADR Proceedings: A Proposal to Revise Rule 4.1," 19 *N. Ill. U. L. Rev.* 255, 269-72 (1999) (author would amend Rule 4.1 to prohibit lawyers from knowingly assisting the client in "reaching a settlement agreement that is based on reliance upon a false statement of fact made by the lawyer's client" and would expressly apply Rule 3.3 to mediation); Kimberlee K. Kovach, "New Wine Requires New Wineskins: Transforming Lawyer Ethics for Effective Representation in a Non-Adversarial Approach to Problem Solving: Mediation," 28 *Fordham Urb. L. J.* 935, 953-59 (2001) (urging adoption of separate code of ethics for lawyers engaged in mediation and other non-adversarial forms of ADR); Carrie Menkel-Meadow, "The Lawyer as Consensus Builder: Ethics for a New Practice," 70 *Tenn. L. Rev.* 63, 67-87, (2002) (encouraging Ethics 2000 Commission to develop rules for lawyers in alternative dispute resolution context).

8. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-370, in FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998 at 160-61.

9. The opinion also concluded that it would be improper for a judge to insist that a lawyer "disclose settlement limits authorized by the lawyer's client, or the lawyer's advice to the client regarding settlement terms."

fraud, deceit, or misrepresentation, and Rule 3.3 provides that a lawyer shall not knowingly make a false statement of material fact or law to a tribunal. The proper response by a lawyer to improper questions from a judge is to decline to answer, not to lie or misrepresent.

Similarly, in Formal Opinion 94-387,[10] we expressed the view that a lawyer representing a claimant in a negotiation has no obligation to inform the other party that the statute of limitations has run on the client's claim, but cannot make any affirmative misrepresentations about the facts. In contrast, we stated in Formal Opinion 95-397[11] that a lawyer engaged in settlement negotiations of a pending personal injury lawsuit in which the client was the plaintiff cannot conceal the client's death, and must promptly notify opposing counsel and the court of that fact. Underlying this conclusion was the concept that the death of the client was a material fact, and that any continued communication with opposing counsel or the court would constitute an implicit misrepresentation that the client still was alive. Such a misrepresentation would be prohibited under Rule 4.1 and, with respect to the court, Rule 3.3. Opinions of the few state and local ethics committees that have addressed these issues are to the same effect.[12]

False statements of material fact by lawyers in negotiation, as well as implicit misrepresentations created by a lawyer's failure to make truthful statements, have in some cases also led to professional discipline. For example, in reliance on Formal Opinion 95-397, a Kentucky lawyer was disciplined under Rule 4.1 for settling a personal injury case without disclosing that her client had died.[13] Similarly, in a situation raising issues like those presented in Formal Opinion 93-370, a New York lawyer was disciplined for

10. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-387 (1994) (Disclosure to Opposing Party and Court that Statute of Limitations Has Run), in FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998 at 253.

11. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-397 (1995) (Duty to Disclose Death of Client), in FORMAL AND INFORMAL ETHICS OPINIONS 1983-1988 at 362.

12. *See* New York County Lawyers' Ass'n Committee on Prof'l Ethics Op. 731 (Sept. 1, 2003) (lawyer not obligated to reveal existence of insurance coverage during a negotiation unless disclosure is required by law; correlatively, not required to correct misapprehensions of other party attributable to outside sources regarding the client's financial resources); Pennsylvania Bar Ass'n Comm. on Legal Ethics & Prof'l Responsibility Informal Op. 97-44 (Apr. 23, 1997) (lawyer negotiating on behalf of a client who is an undisclosed principal is not obligated to disclose the client's identity to the other party, or to disclose the fact that that other party is negotiating with a straw man); Rhode Island Supreme Court Ethics Advisory Panel Op. 94-40 (July 27, 1994) (lawyer may continue negotiations even though recent developments in Rhode Island case law may bar client's claim).

13. Kentucky Bar Ass'n v. Geisler, 938 S.W.2d 578, 579-80 (Ky. 1997); *see also* In re Warner, 851 So. 2d 1029, 1037 (La.), reh'g denied (Sept. 5, 2003) (lawyer disciplined for failure to disclose death of client prior to settlement of personal injury action); Toledo Bar Ass'n v. Fell, 364 N.E.2d 872, 874 (1977) (same).

stating to opposing counsel that, to the best of his knowledge, his client's insurance coverage was limited to $200,000, when documents in his files showed that the client had $1,000,000 in coverage.[14] Affirmative misrepresentations by lawyers in negotiation also have been the basis for the imposition of litigation sanctions,[15] and the setting aside of settlement agreements,[16] as well as civil lawsuits against the lawyers themselves.[17]

In contrast, statements regarding negotiating goals or willingness to compromise, whether in the civil or criminal context, ordinarily are not considered statements of material fact within the meaning of the Rules. Thus, a lawyer may downplay a client's willingness to compromise, or present a client's bargaining position without disclosing the client's "bottom line" position, in an effort to reach a more favorable resolution. Of the same nature are overstatements or understatements of the strengths or weaknesses of a client's position in litigation or otherwise, or expressions of opinion as to the value or worth of the subject matter of the negotiation. Such statements generally are not considered material facts subject to Rule 4.1.[18]

Application of the Governing Principles to Caucused Mediation

Having delineated the requisite standard of truthfulness for a lawyer engaged in the negotiation process, we proceed to consider whether a different standard should apply to a lawyer representing a client in a caucused mediation.[19]

---

14. In re McGrath, 468 N.Y.S.2d 349, 351 (N.Y. App. Div. 1983).

15. *See* Sheppard v. River Valley Fitness One, L.P., 428 F.3d 1, 11 (1st Cir. 2005); Ausherman v. Bank of America Corp., 212 F. Supp. 2d 435, 443-45 (D. Md. 2002).

16. *See, e.g.*, Virzi v. Grand Trunk Warehouse & Cold Storage Co., 571 F. Supp. 507, 512 (E.D. Mich. 1983) (settlement agreement set aside because of lawyer's failure to disclose death of client prior to settlement); Spaulding v. Zimmerman, 116 N.W.2d 704, 709-11 (Minn. 1962) (defense counsel's failure to disclose material adverse facts relating to plaintiff's medical condition led to vacatur of settlement agreement).

17. *See, e.g.*, Hansen v. Anderson, Wilmarth & Van Der Maaten, 630 N.W.2d 818, 825-27 (Iowa 2001) (law firm, defendant in malpractice action, allowed to assert third-party claim for equitable indemnity directly against opposing counsel who had engaged in misrepresentations during negotiations); Jeska v. Mulhall, 693 P.2d 1335, 1338-39 (1985) (sustaining fraudulent misrepresentation claim by buyer of real estate against seller's lawyer for misrepresentations made during negotiations).

18. Conceivably, such statements could be viewed as violative of other provisions of the Model Rules if made in bad faith and without any intention to seek a compromise. Model Rule 4.4(a), for example, prohibits lawyers from using "means that have no substantial purpose other than to embarrass, delay, or burden a third person . . . ." Similarly, Model Rule 3.2 requires lawyers to "make reasonable efforts to expedite litigation consistent with the interests of the client."

19. This opinion is limited to lawyers representing clients involved in caucused mediation, and does not attempt to explore issues that may be presented when a lawyer serves as a mediator and, in carrying out that role, makes a false or misleading statement of fact. A lawyer serving as a mediator is not representing a client, and is thus not subject to Rule 4.1, but may well be subject to Rule 8.4(c) (*see* note 2 above). *Cf.* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 04-433 (2004)

Mediation is a consensual process in which a neutral third party, without any power to impose a resolution, works with the disputants to help them reach agreement as to some or all of the issues in controversy. Mediators assist the parties by attempting to fashion creative and integrative solutions to their problems. In the most basic form of mediation, a neutral individual meets with all of the parties simultaneously and attempts to moderate and direct their discussions and negotiations. Whatever is communicated to the mediator by a party or its counsel is heard by all other participants in the mediation. In contrast, the mediator in a caucused mediation meets privately with the parties, either individually or in aligned groups. These caucuses are confidential, and the flow of information among the parties and their counsel is controlled by the mediator subject to the agreement of the respective parties.

It has been argued that lawyers involved in caucused mediation should be held to a more exacting standard of truthfulness because a neutral is involved. The theory underlying this position is that, as in a game of "telephone," the accuracy of communication deteriorates on successive transmissions between individuals, and those distortions tend to become magnified on continued retransmission. Mediators, in turn, may from time to time reframe information as part of their efforts to achieve a resolution of the dispute. To address this phenomenon, which has been called "deception synergy," proponents of this view suggest that greater accuracy is required in statements made by the parties and their counsel in a caucused mediation than is required in face-to-face negotiations.[20]

It has also been asserted that, to the contrary, less attention need be paid to the accuracy of information being communicated in a mediation – particularly in a caucused mediation – precisely because consensual deception is intrinsic to the process. Information is imparted in confidence to the mediator, who controls the flow of information between the parties in terms of the content of the communications as well as how and when in the process it is conveyed. Supporters of this view argue that this dynamic creates a constant and agreed-upon environment of imperfect information that ultimately helps the mediator assist the parties in resolving their disputes.[21]

(Obligation of a Lawyer to Report Professional Misconduct by a Lawyer Not Engaged in the Practice of Law). In our view, Rule 8.4(c) should not impose a more demanding standard of truthfulness for a lawyer when acting as a mediator than when representing a client. We note, in this regard, that many mediators are nonlawyers who are not subject to lawyer ethics rules. We need not address whether a lawyer should be held to a different standard of behavior than other persons serving as mediator.

20. *See generally* John W. Cooley, "Mediation Magic: Its Use and Abuse," 29 *Loy. U. Chi. L.J.* 1, 101 (1997); *see also* Jeffrey Krivis, "The Truth About Using Deception in Mediation," 20 *Alternatives to High Cost Litig.* 121 (2002).

21. Mediators are "the conductors – the orchestrators – of an information system specially designed for each dispute, a system with ambiguously defined or, in some situations undefined, disclosure rules in which mediators are the chief information officers with near-absolute control. Mediators' control extends to what nonconfidential informa-

Whatever the validity may be of these competing viewpoints, the ethical principles governing lawyer truthfulness do not permit a distinction to be drawn between the caucused mediation context and other negotiation settings. The Model Rules do not require a higher standard of truthfulness in any particular negotiation contexts. Except for Rule 3.3, which is applicable only to statements before a "tribunal," the ethical prohibitions against lawyer misrepresentations apply equally in all environments. Nor is a lower standard of truthfulness warranted because of the consensual nature of mediation. Parties otherwise protected against lawyer misrepresentation by Rule 4.1 are not permitted to waive that protection, whether explicitly through informed consent, or implicitly by agreeing to engage in a process in which it is somehow "understood" that false statements will be made. Thus, the same standards that apply to lawyers engaged in negotiations must apply to them in the context of caucused mediation.[22]

We emphasize that, whether in a direct negotiation or in a caucused mediation, care must be taken by the lawyer to ensure that communications regarding the client's position, which otherwise would not be considered statements "of fact," are not conveyed in language that converts them, even inadvertently, into false factual representations. For example, even though a client's Board of Directors has authorized a higher settlement figure, a lawyer may state in a negotiation that the client does not wish to settle for more than $50. However, it would not be permissible for the lawyer to state that the Board of Directors had formally disapproved any settlement in excess of $50, when authority had in fact been granted to settle for a higher sum.

Conclusion

Under Model Rule 4.1, in the context of a negotiation, including a caucused mediation, a lawyer representing a party may not make a false statement of material fact to a third person. However, statements regarding a party's negotiating goals or its willingness to compromise, as well as statements that can fairly be characterized as negotiation "puffing," are ordinarily not considered "false statements of material fact" within the meaning of the Model Rules.

---

tion, critical or otherwise, is developed, to what is withheld, to what is disclosed, and to when disclosure occurs." Cooley, *supra* note 20, at 6 (citing Christopher W. Moore, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT 35-43 (1986)).

22. There may nevertheless be circumstances in which a greater degree of truthfulness may be required in the context of a caucused mediation in order to effectuate the goals of the client. For example, complete candor may be necessary to gain the mediator's trust or to provide the mediator with critical information regarding the client's goals or intentions so that the mediator can effectively assist the parties in forging an agreement. As one scholar has suggested, mediation, "perhaps even more than litigation, relies on candid statements of the parties regarding their needs, interests, and objectives." Menkel-Meadow, *supra* note 7, at 95. Thus, in extreme cases, a failure to be forthcoming, even though not in contravention of Rule 4.1(a), could constitute a violation of the lawyer's duty to provide competent representation under Model Rule 1.1.

SUPREME COURT OF THE STATE OF NEW YORK
COMMERCIAL DIVISION- COUNTY OF NASSAU

PRESENT: Hon. _____

Justice

----------X Index No. _____

Plaintiff,

ORDER OF REFERENCE TO MEDIATION

against -

Defendant.

----------X

(1) On CONSENT OF THE PARTIES or by ORDER OF THE COURT **(CIRCLE ONE)** this case is referred to mediation through the ADR Program of the Commercial Division;

(2) The parties shall select a mediator and jointly execute a Mediation Initiation Form, located at http://www.nycourts.gov/courts/comdiv/nassau.shtml within five business days of receipt of this Order.

(3) The parties shall schedule an initial mediation session within 45 days of the date of this Order pursuant to the ADR Program's Rules (available at http://www.nycourts.gov/courts/comdiv/nassau.shtml.)

(4) All proceedings in this action (including motion practice, shall continue during the mediation process except for (depositions), (e-discovery), _____ /shall be stayed during the mediation process (strike non relevant portions).

(5) The parties shall appear for a status conference with the court on _____ __ at _____AM/PM.

Dated: _____

_____
J.S.C.

THE BRAINS BEHIND MEDIATION: REFLECTIONS ON NEUROSCIENCE, CONFLICT RESOLUTION AND DECISION-MAKING

*Daniel Weitz**

INTRODUCTION

On September 13, 1848, an explosives charge sent a three-foot tamping iron about an inch in diameter through the head of Phineas Gage.[1] Although Gage survived, the tamping iron, which entered just under the left eye and exited through the frontal portion of his head, destroyed his prefrontal cortex.[2] Prior to the accident, Gage was a popular foreman of a railroad construction crew.[3] After the accident, he was a tactless, profane, and impulsive man with a dramatically altered personality.[4]

It is through extreme examples of severe deficits in the brain that scientists were able to develop our earliest descriptions of how the brain affects behavior. Today, advances in neuroscience have given us unprecedented insights into the workings of the human brain.[5] A great deal has been discovered in disciplines ranging from cognitive-behavioral psychology and neuropsychology to molecular biology. To what extent these discoveries impact other fields, including the dispute resolution profession, is now a hotly-pursued topic. While a quick survey of recent studies of the brain produces a flood of connections to the practice of mediation, even

* Dan Weitz is the Statewide ADR Coordinator for the NYS Unified Court System and an Adjunct Clinical Professor at the Benjamin N. Cardozo School of Law. The views expressed in this article are his alone and do not reflect those of the Unified Court System or Cardozo School of Law.

1 *See The Phineas Gage Information Page Maintained By Malcolm Macmillan*, http://www.deakin.edu.au/hbs/GAGEPAGE (last visited Feb. 14, 2010).

2 *Id.*

3 *Id.*

4 *Id.*

5 For a great explanation of functional magnetic resonance imaging (fMRI), see MARCO IACOBONI, MIRRORING PEOPLE, THE SCIENCE OF EMPATHY AND HOW WE CONNECT WITH OTHERS 59 (2009). For a description of transcranial magnetic stimulation (TMS). *Id.* at 90. Other brain imaging techniques include electroencephalography (EEG) and magnetoencephalography (MEG). *Id.* at 162, 163.

neuroscientists caution against the certainty of their findings.[6] There is still more research to be done and many of these studies provide evidence of correlation but not necessarily causation. Perhaps we should resist the temptation to champion a long sought-after scientific basis for all that we do as mediators. However, there is no denying the fascination with what we are learning about the human brain, how it guides our behaviors, and how it impacts the way we make decisions. At a minimum, it is cause for great reflection.

I. OUR NEGATIVE VIEW OF CONFLICT

Mediation training programs often begin with a conflict word association exercise to explore the nature of conflict. Trainees typically produce a list of similarly negative words including argue, fight and disagreement. This list propels a lively discussion of why we tend to view conflict as something that is always negative. We point to television, our past experiences and even our parents. After encouraging reflection, sometimes through small group exercises, mediation trainers ask whether anything positive ever comes from conflict. Trainees list a number of positives including clarity, recognition, understanding, and improved relationships. The trainer then hopes the group will come to appreciate that conflict is not inherently good or bad but that the nature of conflict often depends on how it is handled.

Recent discoveries in the field of neuroscience shed even greater light on our predominantly negative view of conflict. In *Nurture Shock*, Po Bronson and Ashley Merryman discuss the work of Dr. E. Mark Cummings at the University of Notre Dame.[7] Cummings studied the impact that everyday parental conflict may have on children. Cummings found that the typical married couple had about eight disputes each day and that spouses were roughly three times more likely to express anger to each other as they were

---

[6] *See* Edward Gandolf, *Cautions About Applying Neuroscience to Batter Intervention* 3 (citing NEUROSCIENCE AND THE LAW: BRAIN, MIND, AND THE SCALES OF JUSTICE (Brent Garland & Mark Frankel, eds. 2004)), *available at* http://www.nationalcenterdvtraumamh.org/lib/File/Neuroscience%20and%20batterer%20programs-FINAL.pdf (last visited Mar. 6, 2011); *see also* Nigel Eastman & Colin Campbell, *Neuroscience and Legal Determination of Criminal Responsibility*, 7 NATURE REV. NEUROSCIENCE 311 (Apr. 2006), *available at* http://www.nature.com/nrn/journal/v7/n4/full/nrn1887.html.

[7] PO BRONSON & ASHLEY MERRYMAN, NURTURE SHOCK 184 (2009).

to show affection.[8] Children are witnesses to these conflicts forty-five percent of the time.[9] Cummings staged experiments to see what impact this type of conflict had on children. Ultimately, what he found was that witnessing the conflict itself did not result in any negative change in the child's behavior, provided the child was allowed to see the resolution of the argument.[10] It was only when the argument was stopped in the middle before resolution that it had a negative effect on the child's behavior.[11] Cummings has even shown that being exposed to marital conflict can be good for children provided it is constructive and resolved with affection.[12]

Think for a moment about our own childhood experiences with conflict. Did our parents fight? If so, was it constructive conflict? And as to a more subtle point, as Bronson and Merryman highlight, did our parents ironically make matters worse by taking the fight upstairs or into the other room, thus sparing us the exposure? If so, did they remember to tell us that they worked it all out?

Bronson and Merryman also point to a body of research on the nature of conflict among siblings.[13] Dr. Hildy Ross of the University of Waterloo found only about one in every eight conflicts between siblings ends in compromise or reconciliation.[14] In the other seven conflicts, the siblings withdraw usually after the older child bullied or intimidated the younger child.[15] Scottish researcher Dr. Samantha Punch concluded, "Sibship is a relationship in which the boundaries of social interaction can be pushed to the limit. Rage and irritation need not be suppressed, whilst politeness and toleration can be neglected."[16] Children made seven times as many more negative and controlling statements to their siblings as they did to their friends, according to Dr. Ganie DeHart of SUNY Geneseo in New York.[17]

Bronson and Merryman wonder what siblings learn from the thousands and thousands of interactions that they have with each other when, no matter how the conflict is handled, they will still be

---

8 *Id.*
9 *Id.*
10 *Id.*
11 *Id.*
12 *Id.*
13 BRONSON & MERRYMAN, *supra* note 7, at 120.
14 *Id.*
15 *Id.*
16 *Id.* at 121.
17 *Id.* at 120–21.

together the next day. They suggest perhaps that children learn poor social skills from those interactions, just as often as they learn good ones. They learn of conflict, but not necessarily constructive conflict.[18]

Bronson and Merryman also provide support for those who claim that we get our negative view of conflict, and perhaps our poor conflict resolution skills, from children's television. Citing studies involving comparisons of educational television with more violent children's shows, we now know that while children may be less violently aggressive after watching educational television, they are far more relationally aggressive.[19] Bronson and Merryman explain that while physical aggression can include pushing or hitting, and verbal aggression often involves name calling, relational aggression involves ignoring or telling lies about another child. The more children watched educational television, the more controlling, manipulative and bossier they became. Bronson and Merryman point out that one possible explanation for this phenomenon may be that educational television spends most of its time establishing conflict between characters and very little time resolving it. Preschoolers, for example, are said to be less able to connect the information from the end of the show to what happened earlier. They tend to learn from the individual behaviors shown rather than the overall lesson.[20]

Bronson and Merryman not only provide us with insights into our views on conflict, but they also provide us with food for thought on why we behave the way we do in conflict.[21] For example, significant research has been done on the importance of sleep, which supports the position that we consolidate learning and store memory during sleep.[22] Bronson and Merryman report that according to these studies, negative memories are stored in the amygdala (an area of the brain associated with strong emotions such as fear) while neutral and positive memories are stored in the hippocampus (an area of the brain associated with storage of memory and conversion of short term to long term memory).[23] Furthermore, lack of sleep is harder on the hippocampus than it is on the amygdala, so we may remember negative feelings and events more

---

[18] *Id.* at 119.

[19] BRONSON & MERRYMAN, *supra* note 7, at 180.

[20] *Id.*

[21] *Id.* at 35.

[22] *Id.* at 33–35.

[23] *Id.* at 35.

so than neutral or positive ones. Could this explain why we so often seem to judge people in conflict by their most negative potential? Other studies have shown that stress can cause a similar effect on the hippocampus.[24] During situations of stress, hormones called glucocorticoids are released in the brain.[25] Glucocorticoids are known to cause damage to the hippocampus. In fact, under extreme conditions, glucocorticoids can kill brain cells in the hippocampus.[26] This suggests that stress, and the brain chemistry connected with it, is not only related to our negative view of conflict but perhaps our negative view of those with whom we have conflict and how we interact with them.

What can we learn from the field of neuroscience and these studies of the brain, conflict and even educational television? The above research suggests that our predominantly negative view of conflict is shaped by our experience dating back to early childhood. This further suggests that our negative view of conflict is perhaps a conditioned response. Did any of us have positive role models for dealing constructively with conflict when we were children? And even if we did, were those lessons as frequent or as powerful as the negative ones?[27] Did our parents let us watch educational television thinking we were learning something good about conflict resolution? The jury may still be out on exactly what it was we were learning, but it appears evident in the way in which so many of us behave in conflict situations that we developed more destructive than constructive skills. Furthermore, our negative view of conflict undoubtedly impacts how we approach it and increases the likelihood that we will adopt a competitive style when a collaborative style would be optimal. The perception that conflict is inherently negative quite possibly precludes many disputing parties from even trying mediation when it would otherwise be helpful to them. However, if our negative view of conflict is indeed largely a conditioned response, perhaps we can change it. If our destructive behavior in conflict is further influenced by the unconscious effects of stress or lack of sleep, perhaps we can mitigate these effects by simply becoming aware that they exist. Therefore, the integration of mediation and neuroscience not only provides help with resolving the conflict at hand, it provides an opportunity to develop con-

---

24 JOHN MEDINA, BRAIN RULES 178 (2009).

25 *Id.* at 179.

26 *Id. See also* NORMAN DOIDGE, THE BRAIN THAT CHANGES ITSELF 248 (2007).

27 For an interesting discussion of the psychological phenomenon of "negativity bias," which means that the human mind is wired to magnify the negative, see JONAH LEHRER, HOW WE DECIDE 81 (2009).

structive conflict resolution approaches and skills that can be used well into the future.

II. NEUROPLASTICITY AND REASON FOR HOPE

During much of the twentieth century, the prevailing theory was that our brains, at least for the most part, were almost completely formed and unchanging after childhood.[28] However, recent discoveries have provided evidence of neuroplasticity, which challenges the assumption that our brains are done developing once we reach adulthood.[29] For example, studies have shown that exercise can improve cognitive function and even brain physiology.[30] Exercise also appears to stimulate a protein known as Brain Derived Neurotrophic Factor ("BDNF"), which aids in the development of healthy tissue.[31] In *Brain Rules,* molecular biologist John Medina refers to BDNF as having a powerful fertilizer-like growth effect on certain neurons in the brain.[32] According to Medina, BDNF not only keeps neurons young and healthy, rendering them much more willing to connect with one another, but it also encourages the formation of new cells in the brain.[33]

Another revolutionary scientific discovery is the neural insulator known as myelin. In *The Talent Code*, Daniel Coyle describes how myelin wraps itself around the nerve fibers in our brain that serve as the basis of skill, making them stronger and faster.[34] The thicker it gets, the better it insulates and the faster and more accurate our movements and thoughts become. Coyle tells us that we continue to grow myelin well into our fifties and beyond, after which we still make myelin even though we start to lose more than we make.[35]

These are amazing discoveries. No matter how prior experience may have shaped our perception of conflict, if we can always acquire new skills and improve our brain function, it is not a far stretch to believe we can improve the way in which we perceive

---

28 DOIDGE, *supra* note 26, at i.

29 *Id.* at xix.

30 *See* MEDINA, *supra* note 24, at 7–27. *See also* DOIDGE, *supra* note 26.

31 *See* MEDINA, *supra* note 24, at 22.

32 *Id.*

33 *Id.*

34 *See generally* DANIEL COYLE, THE TALENT CODE (2009).

35 *Id.* at 6.

and deal with conflict. As Coyle puts it, maybe you *can* teach an old dog new tricks; it just takes "deep practice."[36]

III. MEDIATOR SKILLS AND DECISION-MAKING

In my journey through numerous books and studies dealing with neuroscience, a number of associations with conflict resolution and mediation emerged. Studies of the brain have produced major insights into how we make decisions. When viewing these insights from the perspective of a conflict resolution professional, it does not take much to connect aspects of mediation and mediator skills to neuroscience and what we have been learning about the brain.

Fundamental mediator skills include the delivery of an opening statement, framing negotiable issues, and generating movement between parties who are stuck in their positions.[37] The utility of these skills can be connected to a number of findings including the psychological phenomenon of "priming," "the framing effect," the role of mirror neurons, and the functions of the left and right hemispheres of the brain as they impact cooperation, empathy, and problem solving.[38] Additional studies in behavioral economics and cognitive-behavioral psychology provide explanations for how our adult views of conflict are shaped, discussed *supra*, and reasons why mediator skills and reflective practice are so helpful to people in conflict.

Malcolm Gladwell wrote in *Outliers* that, "[p]lane crashes are much more likely to be the result of an accumulation of minor difficulties and seemingly trivial malfunctions."[39] The same is true for any discussion of the impact of specific mediator skills. Focus on the use of any one skill or nuance of process will not by itself typically change the nature of the dialogue between the parties in me-

---

[36] *Id.* at 47–53. "Deep practice" as used by Coyle is comparable to the term "deliberate practice" used by psychologist Anders Ericsson, who described deliberate practice as "working on technique, seeking constant critical feedback, and focusing ruthlessly on shoring up weaknesses." *Id.* at 51. Ericsson is known in part for his groundbreaking work, which included the central tenet that "every expert in every field is the result of around ten thousand hours of committed practice." *Id. See also* MALCOLM GLADWELL, OUTLIERS 40 (2008).

[37] *See Mediation Training Curriculum Guidelines*, New York State Unified Court System, http://www.nycourts.gov/ip/adr/Part146_Curriculum.pdf (last visited Mar. 6, 2011) [hereinafter Mediation Training Guidelines].

[38] *See infra* Part IV.

[39] GLADWELL, OUTLIERS, *supra* note 36, at 183.

diation. The true difference between whether or not the parties' conflict lands safely or crashes to the ground is the accumulation of skills and nuances of process that may seem trivial when viewed in isolation.

IV. THE PSYCHOLOGICAL PHENOMENON OF PRIMING AND MEDIATOR OPENING STATEMENTS

Most mediators begin the initial meeting with an opening statement. This is particularly true of mediators who deal with interpersonal conflict including divorce, community, or workplace mediation.[40] The goals of an opening statement include educating the parties about the process, developing rapport and trust, and setting the tone for a collaborative negotiation. Despite the apparent benefits of providing an opening statement, some mediators question its utility.[41] Critics of a mediator opening statement say it takes too long and much of it is a waste of time as the parties are too distracted to absorb the content. However, the research of John Bargh on the "priming effect" may provide new insights.

John Bargh, a psychology professor at Yale University, has published many books and papers on the "priming effect," in which prior presentation of a word or concept can influence behavior.[42] One of the most well known priming studies involves two groups of undergraduate students at New York University who were asked to read a long list of words.[43] Everyone was given a list of five-word sets and asked to make a grammatically correct four-word sentence out of each set. These are called scrambled sentence tests. For example, students are presented with the following: "feels weather the hot patience." This five-word set could be unscrambled to read "the weather feels hot." However, students in this experiment were actually given one of two different lists containing words meant to "prime" them to behave in a specific way. Mixed into one list were words associated with being polite; mixed into the other list were words associated with being rude. When the students were soon placed in an experimental situation to measure the

---

40 *See* Mediation Training Guidelines, *supra* note 37.

41 This is based on my own experience working with mediators.

42 *See* MALCOLM GLADWELL, BLINK 53 (2007).

43 *See id.* at 55 (describing a study conducted by John Bargh, Mark Chen and Lara Burrows at New York University).

degree to which they would act polite or rude, their behavior correlated with the words with which they were primed.

After completing twenty variations of the scrambled sentences, the students were instructed to take the completed lists down the hall to the professor's office where they were to be collected and scored. When the students arrived at the professor's office, there was another student standing in the doorway asking the professor a series of questions. The real test was to see how quickly the students would interrupt or how long the students would wait before interrupting to hand in the completed test. The students who were primed with polite words waited longer on average than the students who were primed to be rude. In fact, the overwhelming majority of the students primed to be polite never interrupted at all.[44] Simply priming them with words associated with being polite made them wait longer than those students who were primed with words associated with being rude.

There is an enormous body of research demonstrating the ability to prime subjects with subtle words to act in an almost limitless variety of ways.[45] Research has even shown that priming can make us slow or fast, or even good or bad at math. But before we explore math, I will conclude the discussion of opening statements.

Think about the words mediators emphasize in their opening statements. Most give meaningful emphasis to words such as "listen," "understand," "comfortable," "confidential," "freely," and "informal." Mediation trainers and teachers often discuss the benefits of a good opening statement in order to set the tone for mediation because we want to establish an atmosphere of cooperation and open dialogue and in doing so, distinguish mediation from its adversarial alternatives. While most mediators have always appreciated the power of a good opening statement, we now have reason to believe there is a scientific explanation for its effectiveness as well. According to the "priming effect," "the way we think and act . . . are a lot more susceptible to outside influences than we realize."[46]

When we deliver opening statements, we have the potential to prime the parties to act in a manner consistent with the words we use. Furthermore, given our tendency to associate conflict with that which is negative, parties are likely primed to behave poorly in conflict. At a minimum, they are primed to adopt a competitive

---

[44] *Id.*

[45] *See* IAIN MCGILCHRIST, THE MASTER AND HIS EMISSARY 167 (2009).

[46] GLADWELL, BLINK, *supra* note 42, at 58.

and adversarial approach to conflict. Therefore, a mediator's opening statement is not only an important aspect of establishing a collaborative atmosphere, but perhaps also plays a role in neutralizing the way in which parties are negatively primed as they enter the process.[47]

V. THE FRAMING EFFECT AND THE UTILITY OF FRAMING NEGOTIABLE ISSUES

The research showing that we can be made to perform better or worse on mathematical problems ties the "priming effect" with another psychological phenomenon known as the "framing effect."[48] In a study conducted by Sian L. Beilock from the University of Chicago, a group of female undergraduates were given a series of relatively simple math problems known as "modular arithmetic."[49] Students were given horizontal math problems, represented by a left to right linear equation as well as vertical math problems represented by numbers above and below one another forming the equation. Then, half of the female students were reminded of a negative stereotype, for example that women do not do as well as men on math.[50] This form of priming is called the "stereotype threat" condition in which simply reminding people of a stereotype can create anxiety, which in turn decreases performance.[51] This allowed Beilock and her colleagues to explore how a high-stress situation creates worries that compete for the working memory normally available for performance. After all, if we are stressed out and anxious, there is going to be less working memory available to deal with solving the math problems.

Jonah Lehrer, a frequent writer in the field of neuroscience, described the results of Beilock's study in his blog, *The Frontal Cortex*.[52] As it turned out, the activation of the stereotype led to decreased performance, but only on the horizontal problems.[53]

---

47 For a related discussion on the power of "anchoring," a commonly used negotiation technique, see LEHRER, *supra* note 27, at 156–58.

48 *See id.* at 106.

49 *See* Sian Beilock, *Math Performance in Stressful Situations*, 17 CURRENT DIRECTIONS IN PSYCHOL. SCI. 3395 (2008).

50 *Id.* at 339.

51 *Id.*

52 Jonah Lehrer, *The Frontal Cortex* (Apr. 13, 2010), http://scienceblogs.com/cortex/2010/04/dont_choke.php.

53 *Id.*

The reason for these results has to do with the local processing differences of the brain.[54] The horizontal problems depended more on the same area of the brain (the left prefrontal cortex) associated with anxiety, which would likely be preoccupied worrying about our math performance. In contrast, performance on vertical problems was unaffected.[55] The vertical math problems are perceived primarily as visual spatial problems, which are associated with a different area of the brain (the right prefrontal cortex), which is not distracted by our anxieties or threatened by stereotypes.[56] In other words, according to Lehrer, "merely changing the presentation of the problem can dramatically alter how the brain processes the information."[57]

Beilock's study should also remind mediators of a classic skill we call "framing negotiable issues."[58] Mediators are trained to frame issues in neutral language to invite interest-based discussion rather than adversarial positional bargaining. This is done in order to avoid adopting the position of either party and to create an inviting agenda that encourages meaningful dialogue. We frame issues neutrally to take the sting out of the topic. Thanks to Sian Beilock, we now know that neutral framing also changes the way in which the brain actually processes the information and may even mitigate the anxiety produced by conflict.

VI. PRISONERS OF OUR PRECONCEPTIONS[59]

"Tell me what you know . . . Then tell me what you don't know, and only then can you tell me what you think. Always keep those three separated."

Colin Powell[60]

Robert Burton's fascinating work, *On Being Certain, Believing You Are Right Even When You're Not*, discusses an impressive line

---

54 *Id.*

55 *Id.*

56 *Id.*

57 *Id.*

58 *See* Lela P. Love, *Deconstructing Dialogue and Constructing Understanding, Agendas, and Agreements*, 38 FAM. & CONCILIATION CTS. REV. 27, 30 (2000).

59 This phrase is borrowed from University of California at Berkley psychologist Philip Tetlock referring to political pundits who, according to Tetlock, are particularly prone to dismissing dissonant or contradictory possibilities. Or as Jonah Lehrer puts it, they "[p]erform elaborate mental gymnastics to avoid admitting error." *See* LEHRER, *supra* note 27, at 209.

60 *Id.* at 248.

of studies, which show that emotional habits and patterns and expectations of rewards are difficult to break.[61] Burton also makes a compelling case for how this same argument applies to thoughts: "Once firmly established, a neural network that links a thought to a feeling of correctness is not easily undone. An idea known to be wrong continues to feel correct."[62]

In *How We Decide*, Jonah Lehrer points to studies that show people with strong affiliations, for example, partisan voters, when confronted with inconsistent information, recruit the prefrontal cortex to filter the information to fit what it already believes and to ignore inconsistencies.[63] Once this is done, they get a positive emotional response (through the release of dopamine) and are rewarded—to Lehrer, this is the definition of rationalizing.[64]

Marco Iacoboni and colleagues conducted research that revealed how political sophisticates, in answering political questions, rely on memory and a "default state network" or the region that is most active when we are resting.[65] In order to better understand the default state network, Iacoboni refers to the state you are in when you are daydreaming.[66] You were certainly conscious but not necessarily engaged in any form of conscious deliberation. Sophisticates think about politics all the time so they do not need to employ conscious deliberation to the political statements—they just rely on memory. Political novices show activity in the regions of the prefrontal cortex associated with cognitive attention and in doing so shut down the default state network.[67]

Think about parties in conflict who have invested a lot of time, energy and thought to their positions. How much of their behavior in conflict is driven by their default state network and retrieval of memory? The research on political sophisticates suggests that perhaps a great deal of conflict is driven by processes other than conscious deliberation.[68] Colin Powell's approach to thinking, for

---

61 *See generally* ROBERT A. BURTON, ON BEING CERTAIN, BELIEVING YOU ARE RIGHT EVEN WHEN YOU'RE NOT (2008).

62 *Id.* at 97–98.

63 LEHRER, *supra* note 27, at 205. For another example of cognitive dissonance, see BURTON, *supra* note 61, at 13.

64 LEHRER, *supra* note 27, at 205.

65 *See* IACOBONI, *supra* note 5, at 252–53.

66 *Id.* at 253.

67 *Id.* at 252.

68 For a related discussion on the phenomenon of "confabulation," in which the mind "makes up" information to resolve ambiguities, see MCGILCHRIST, *supra* note 45, at 81.

instance, is a possible way to avoid becoming prisoners of our preconceptions.

VII. Mirror Neurons

Conflict escalation is a universal experience. We have all been involved in conflicts and we have all experienced firsthand how conflict has a tendency to escalate. One person speaks and the receiver raises an eyebrow. The speaker continues and suddenly an insult is hurled. Mediators allow venting as a means to let off steam. Mediators also frequently and repeatedly summarize the concerns raised by the parties as a way to de-escalate conflict and encourage discussion of interests instead of positions.[69] But what really is at the core of the escalation? Is it just poor word choice or tone? What did that raised eyebrow really mean and were there other expressions communicated that we perhaps failed to consciously appreciate?

According to Marco Iacoboni, Italian scientists were among the first to discover mirror neurons while researching the macaque monkey in a laboratory in Parma, Italy.[70] Macaque monkeys were given grasping tasks, for example, picking up a raisin or a peanut.[71] Meanwhile, the researchers tracked the firing of neurons in the motor areas of the monkey's brain through implanted electrodes.[72] One day, researcher Leo Fogassi casually picked up a peanut and discovered that the monkey's brain reacted as if the monkey had grasped the peanut himself.[73] The area of the brain that reacted was the same area that reacts when the monkey performs the grasping action.[74] Only this time it happened based solely on observing Fogassi as he performed the task.[75] Soon enough, researchers discovered these same mirror neurons in human beings.[76]

---

69 Love, *supra* note 58, at 28.

70 *See* Iacoboni, *supra* note 5, at 10 (According to Iacoboni, there are several recorded observations of mirror neurons claiming to be the first but none are confirmed as such. However, through many subsequent controlled experiments over a period of twenty years, the existence of mirror neurons was indeed confirmed).

71 *Id.*

72 *Id.*

73 *Id.*

74 *Id.*

75 *Id.*

76 Iacoboni, *supra* note 5, at 10.

Anyone who has ever spent time with a baby knows how easily they can imitate and how this simple action can easily bring a smile to your face. But what researchers are beginning to conclude is that babies do not only learn to imitate, they imitate to learn.[77] In one study, a baby imitated facial expressions as early as forty-one minutes after birth.[78]

According to Iacoboni, this ability to imitate is the result of special neurons known as mirror neurons. These mirror neurons are not just about copying, but are also a means of understanding another's intentions.[79] In fact, the mirroring of other people's speech is necessary for us to perceive it.[80] Mirror neurons send signals to the limbic system, which allows us to feel the emotions associated with the observed facial expressions. Only after we feel these emotions internally are we able to explicitly recognize them.[81] Mirror neurons also learn to predict the actions of other people and to code them for intention, which suggests that mirror neurons are shaped by our experience.[82] Mirror neurons help us reenact in our brains the intentions of other people, giving us a profound understanding of their mental states.[83]

The discovery of mirror neurons has had widespread implications for many disciplines. For example, Iacoboni and others have begun to connect deficits in mirror neuron function to conditions such as autism.[84] Is there a connection between our unconscious imitation or mirroring of others and the way in which conflicts escalate? How much of our anger or frustration, or dismissive tone is derived from the other as opposed to our own free will or autonomy?

Iacoboni also discusses the interdependence of self and other when he says, "the more we learn about mirror neurons, the more we realize that we are not rational, free acting agents. . . . Mirror neurons in our brains produce automatic imitative influences of which we are often unaware and that limit our autonomy by means of powerful social influences."[85] He even points out that "imita-

---

77 *Id.* at 48.

78 *Id.*

79 *Id.* at 58.

80 *Id.* at 105.

81 *Id.* at 112.

82 IACOBONI, *supra* note 5, at 162.

83 *Id.*

84 *Id.* at 172.

85 *Id.* at 209.

tion and 'liking' tend to go together as well."[86] Is that why we hate it when people make faces at us or roll their eyes when we speak? Are we unconsciously looking for mirroring and instead receiving explicit rejection? How much of our response to conflict begins as an unconscious mirroring of the other? And if mirroring plays a role in the escalation of conflict, can it play a similar role in the de-escalation of conflict? According to Iacoboni, "mirroring is a pervasive form of communication and social interaction among humans."[87]

We now know that parties in conflict have to deal with brains that may be wired to amplify the negative in conflict and are subject to the unyielding power of our preconceptions and the escalating potential of mirror neurons. At the same time, mediators can use opening statements and summarizing skills to encourage the parties toward a more collaborative conflict approach, de-escalate conflict, and perhaps discuss their interests instead of just their positions. The reflections on the neuroscience surrounding conflict and decision-making are endless. But for now, I have only one more observation.

VIII. MEDIATING ON THE RIGHT SIDE OF THE BRAIN

In 1979, Betty Edwards published the bestselling book *Drawing on the Right Side of the Brain*, in which she illustrated how suppressing the left side of the brain and enabling the right side of the brain can bring out the true artist in anyone.[88] She believed that the left hemisphere is too narrowly focused on details to see the big picture. However, by using techniques to suppress the left hemisphere, she allows the right hemisphere to see the whole picture and put the pieces together.[89]

A common theme in the neuroscience literature surveyed for this article involves the differences between the left and right hemispheres of the brain. While the left hemisphere of the brain is critical to decision-making, particularly for its ability to engage in sequential logic, it is the right hemisphere upon which we rely for

---

[86] *Id.* at 114.

[87] *Id.* at 245.

[88] *See generally* BETTY EDWARDS, DRAWING ON THE RIGHT SIDE OF THE BRAIN (1979).

[89] *Id.* For an interesting interpretation of the applicability of Edwards' book, see DANIEL H. PINK, A WHOLE NEW MIND: WHY RIGHT-BRAINERS WILL RULE THE FUTURE 15 (2006).

matters of cooperation, empathy, and the types of problem solving associated with a shift toward collaboration.[90]

If we are to accept some of the differences between the left and right hemispheres as accurate, then mediators should find ways to activate the right hemispheres of the parties in mediation. By doing so, we maximize the parties' ability to engage in collaborative dialogue. According to the research reported by Iain McGilchrist and others, there are quite a few commonly accepted differences between the left and right hemispheres of the brain. For example: "the left hemisphere delivers what we know, rather than what we actually experience"[91]; or the right hemisphere is concerned with the whole context while the left hemisphere is concerned with the parts and naming.[92] According to McGilchrist, "we must learn to use a different kind of seeing, to be vigilant not to allow the right hemisphere's options to be too quickly foreclosed by the narrower focusing of the left hemisphere."[93]

Most mediators likely recall the Prisoner's Dilemma model in game theory, which has served as a basis for training mediators in the benefits of collaboration over competition.[94] According to McGilchrist, scientists have studied the brains of humans as they played this Prisoner's Dilemma game.[95] In Prisoner's Dilemma, subjects that achieve mutual cooperation with another human being show activity in the pleasure centers of the brain, including the

---

90 *See generally* MCGILCHRIST, *supra* note 45. Additional differences between the left and right hemispheres cited by McGilchrist include: "When we put ourselves in others' shoes, we are using the right inferior parietal lobe and the right lateral prefrontal cortex, which is involved in inhibiting the automatic tendency to espouse one's own point of view." *Id.* at 57; "In circumstances of right hemisphere activation, subjects are more favourably disposed towards others and more readily convinced by arguments in favour of positions that they have not previously supported." *Id.*; "The right hemisphere plays an important role in 'theory of the mind,' a capacity to put oneself in another's position and see what is going on in that person's mind." *Id.*; "Ultimately, there is clear evidence that when it comes to recognising emotion. . .whether it is expressed in language or through facial expression, it is the right hemisphere on which we principally rely." *Id.* at 59; "The one exception to the right hemisphere's superiority for the expression of emotion is anger." *Id.* at 61; the right hemisphere is partial to emotions that deal with bonding and empathy while the left hemisphere is partial to competition, rivalry and self belief. *See id.* at 62–63; an extensive body of research now indicates that insight, whether mathematical or verbal, is associated with activation in the right hemisphere." *See id.* at 65; "Denial is a left hemisphere specialty." *See id.* at 85; "Our sense of justice is underwritten by the right hemisphere, particularly by the right dorsolateral prefrontal cortex." *Id.* at 86.

91 *Id.* at 164.

92 *See id.* at 70.

93 *Id.* at 164.

94 For a detailed description of Prisoner's Dilemma, see MCGILCHRIST, *supra* note 45, at 147.

95 *Id.*

dopamine system, striatum, and orbitofrontal cortex.[96] They do not, however, show activity when cooperation is with a computer.[97] When playing with a human being, the majority of regions showing cooperation are right-sided whereas when playing with the computer the regions are mainly left-sided.[98] McGilchrist goes on to say that "[i]t is mutuality, not reciprocity, fellow-feeling, not calculation, which is both the motive and reward for successful cooperation."[99]

The research on the Prisoner's Dilemma scenario provides support for the theory that relationship building and direct communication between the parties is a critical component of establishing a cooperative negotiation environment. This research also has implications for the use of caucus in mediation. Mediators are frequently taught to caucus less if the parties have an ongoing relationship; the parties need to learn to work things out themselves.[100] The research on Prisoner's Dilemma supports the theory that the parties, particularly those with the potential for an ongoing relationship, may do better together in joint session than apart in caucus. At a minimum, caucus should be used sparingly in order to give the parties the greatest opportunity to develop the mutuality and fellow feeling necessary for cooperation.

---

96 *Id.*

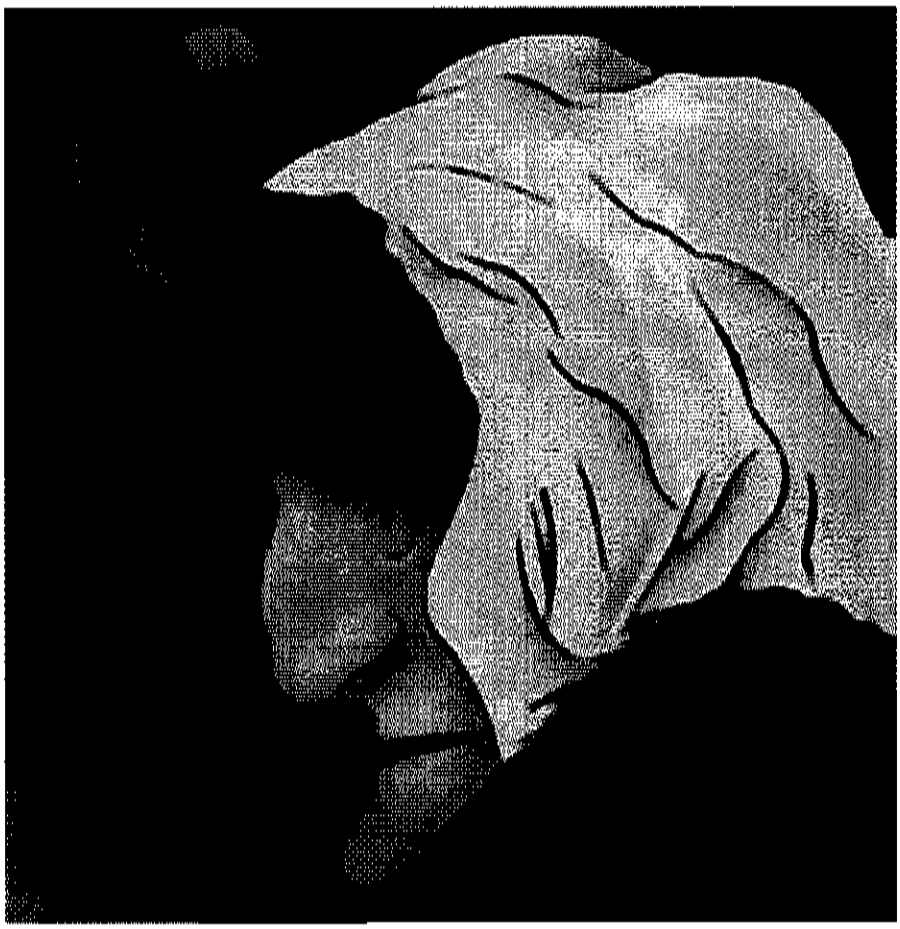
97 *Id.*

98 *Id.*

99 *Id.*

100 CARRIE MENKEL-MEADOW ET AL., DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL 355 (2d ed. 2005).

IX. OLD LADY YOUNG LADY[101]



The above image has been used extensively by mediation trainers. Through elicitive dialogue trainers might ask the trainees to look at the image and describe what they see. Some trainees would say they see an old lady. Others would say they see a young lady. And some would say they see both. The trainer might then ask those who see the young lady to help those who do not and vice versa. Trainees draw attention to the mouth of the old lady and encourage the viewer to see the mouth as a choker on the neck of the young lady. They point out that the young lady is looking off to her right revealing a profile of her left jawbone. The jawbone is

[101] This picture known as "My Wife and My Mother-in-Law" was originally published in 1915 by the cartoonist W.E. Hill.

also the nose of the old lady. Eventually, everybody will see both images. The lessons learned may include the fact that two people can look at the same thing and see it in dramatically different ways. One might say the image reflects the importance of being open to looking at a situation from another point of view. However, if anyone doubted that the other was telling the truth about what they see, they might only be willing to look at the image from their own point of view. What neuroscience now tells us about this exercise takes these lessons one step further.

McGilchrist argues that the right hemisphere will not prematurely resolve ambiguities such as the "old lady young lady image" because studies of the brain involving images like this one reveal that such ambiguities can be seen in one way or another, but not simultaneously.[102] This means you cannot hold onto your own point of view and simultaneously see the other. You have to suspend your point of view or toggle points of view for a brief moment in order to see the other perspective. This is easier said than done. With images such as the old lady young lady, "[w]e remind ourselves that this is pure biology on display, and move on to other thoughts. But with unstable mental images that are personally meaningful, this is far more difficult."[103] The key to this challenge may reside in the abilities of the right hemisphere. "So the left hemisphere needs certainty and needs to be right. The right hemisphere makes it possible to hold several ambiguous possibilities in suspension together without premature closure on one outcome."[104]

CONCLUSION

"It is the rule of thumb among cognitive scientists that unconscious thought is 95 percent of all thought—and that may be a serious underestimate. Moreover, the 95 percent below the surface of conscious awareness shapes and structures all conscious thought."[105]

Phineas Gage and his horrible accident provided us with some of our earliest insights into the connection between our brain and the way in which we behave. Advances in technology now enable

---

102 *See* MCGILCHRIST, *supra* note 45, at 82.

103 BURTON, *supra* note 61, at 199.

104 MCGILCHRIST, *supra* note 45, at 82.

105 GEORGE LACKOFF & MARK JOHNSON, PHILOSOPHY IN THE FLESH 13 (1999).

us to observe the brain in unprecedented ways. This has led to a wide array of discoveries in neuroscience with potentially broad application to the dispute resolution profession. Researchers who have studied the role of conflict in the lives of children have taught us that we learn as many if not more ineffective conflict management skills growing up as effective skills. From glucocorticoids to cognitive dissonance and the discovery of mirror neurons, we have reason to believe our perceptions of conflict and those with whom we have conflict may be influenced as much, if not more, by our unconscious thoughts than our own free will. We have explored how the "priming effect" and the "framing effect" can be correlated with the utility of certain mediator skills, including the delivery of opening statements and the framing of negotiable issues. We have learned there are many differences between the tendencies of the left and right hemispheres of the brain. These differences may provide new clues in how to best use mediation to foster collaborative dialogue. Yet we have only seen the tip of the iceberg when it comes to the application of neuroscience to the world of dispute resolution and mediation. More discoveries are surely on the horizon.