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The NYSCDM Report from the NYS Council on Divorce Mediation



**NY State Council on  
Divorce Mediation**

## The NYSCDM Report

From the New York State  
Council on Divorce Mediation

**The former "Monthly Mailer" is now being sent via email. To obtain a hard copy of this publication, simply print the email you received or click "View it in your browser" above and print it from the internet.**

*The information, opinions, references or other materials herein should not be considered legal advice on specific subjects, but rather should alert readers to issues which are raised during mediation. Actual application of any of the matters discussed depends on the facts in each case. Readers and their clients should obtain specific advice from the most appropriate professional.*

*The views expressed by the authors or submitters in this NYSCDM Report are (but not necessarily) their own and do not necessarily reflect those of the NYS Council on Divorce Mediation. We encourage healthy debate and welcome readers to submit articles expressing their constructive views of topics covered in this publication.*



Fall 2011 • Volume 7, Issue 8

### Publishing Notes

Thanks to Carol A. Butler, Ph.D., Charles M. Newman, Clare Piro and Laura Zeliger for helping get this edition of the Monthly Mailer out in November. We can call it the Fall Edition. Clare urged that a Publications Committee be formed to work on the Monthly Mailer, which, first, needed to be re-named, for several obvious reasons. Among the suggestions were "The Bulletin", "The Review", and "Update." However, by an informal polling I made by telephone to several readers, "The NYSCDM Report" seemed to be the most favored suggestion.

Carol A. Butler, Ph. D., is an active mediator and mental health professional. Her insights, suggestions, and many interesting cases, have given this publication more depth.

Chuck Newman is an attorney, mediator, and arbitrator, and he joined the committee during

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Laura E. Zeliger, Executive Director, The NYS Council on Divorce Mediation

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first contribution to the Publications Committee was suggesting new names for the “Monthly Mailer.” His reviews and comments on the contents of this edition were tremendously helpful.

Laura is the Council’s Executive Director, and her first involvement and contributions to the design and creation of this edition were immeasurable.

I urge members to read and contribute to the new periodic publication, which we expect, subject to the Board’s approval, will be issued quarterly.

My own contributions to this edition include a discussion of the new “Marriage Equality Act,” and the federal “Defense of Marriage Act,” which interact in unforeseen ways. The interaction could be a deterrent to same-gender couples getting married. The discussion is below.

—Eli Uncyk, Esq., Publisher.

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## Peer Groups

### 1. Manhattan Peer Group

This peer group meets at the offices of Elaine Nissen and Chuck Newman, 500 Fifth Avenue, 16th Floor (42nd Street and Fifth Avenue). The last meeting, November 21, 2011, featured Lauren Prince and Georgia Davis Graham presenting on the importance of being aware of taxes in connection with mediations. All divorce mediators and interested professionals are welcome. There is no charge, and there is no requirement that attendees be members of New York State Council, or any other organization. Space is limited, so please RSVP to [hcw@ehnissen.com](mailto:hcw@ehnissen.com) if you plan to attend.

The Manhattan Peer Group meets monthly, mostly on Mondays.

**Contact Mike Stokamer by phone at (212) 925-7881 or by e-mail at [emes52@aol.com](mailto:emes52@aol.com) for dates and subjects.**

### 2. Katonah

This peer group meets the second Monday of every month, 12:30 p.m. – 2:00 p.m. at Loretta Sheridan's office: 35 High Street, Katonah, NY 10536. Five minutes from the train. Call 914-232-6689 to join. RSVPs essential. New members welcome. *"The main purpose of our peer group is to share any issues or problems we may have in our own practices and seek input from the other members. The group is very helpful. The usual members are a few expert senior psychotherapists and two or three attorneys, plus a general membership of about ten. We also discuss networking, potential revenue enhancement and advertising ideas through the Council and otherwise. Of course, coffee and bagels enhance our thought processes."* –Loretta Sheridan, Esq.

**Contact Rett Sheridan for more information:**

Loretta A. Sheridan, Esq.  
Attorney – Divorce Mediator  
35 High Street  
Katonah, NY 10536  
(914) 232-6689

### 3. Central NY Mediation Group

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#### 4. White Plains Divorce Mediation Peer Group

The White Plains Divorce Mediation Peer Group serves the lower-/mid-Westchester area.

Contact Clare Piro at (914) 946-0848 for more information.

#### 5. Rochester NY Peer Group

**Rochester Association of Family Mediators** - Meets monthly September to June the second Tuesday of each month from 9-10 AM. Guests are welcome. For more information, contact The Gail Ferraioli, President of RAFM at [gail@claritymediations.com](mailto:gail@claritymediations.com). Or, visit the RAFM website at [www.rafm.net](http://www.rafm.net) for information about monthly programs and how to join.



#### Deep Thanks

**Posted by:** Gail Ferraioli

**Date:** Sun Sep 11, 2011 4:49 pm (PDT)

Dear Council Members,

Please let me thank all of you who came and supported the Upstate mini-Conference in September. It was a great opportunity to see each other, learn from one another and from Jamie and JoAnne - each of whom illuminated diverse subjects and informed us with their expertise, respectively, in taxes and resilience in children. I am grateful for your presence and especially appreciative of those of you who came from many hours away.

May I also take a moment to publicly thank several people who provided great help to make this conference a reality and added to the ease of the day? First, Bobbie Dillon,

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days of planning. From afar, Kathy Jaffe did as well - particularly regarding continuing education hours. Bob Badalato diligently kept us apprised of registrations. Laura Zeliger, was most responsive to myriad emails about everything from evaluation forms to Council banners and was present at every turn from early morning through the close of the conference. During the day of the conference, Julie Mersereau and Renee La Pointe kept registration and book sales moving. Finally, Bobbie Dillon deftly, and with her usual aplomb, facilitated a discussion about credentialing and licensure of mediation - eliciting thoughtful input to this topic - directly from both our members as well as from other professionals with whom we interface in our work. You each have my deep gratitude.

Seeing the joy arise from people being, working, learning and sharing together enhanced my own feeling of connection to our Council. Thank you again for the honor of being among you.

To peace and happiness,

Gail

Gail Ferraioli

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*Internationally recognized child expert JoAnne Pedro-Carroll, Ph.D., presents on increasing resiliency in children of divorce.*

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## Useful Web Site Information

1. The Child Support Standards Chart, released April 1, 2011, is now available on the web at [https://www.childsupport.ny.gov/dcse/child\\_support\\_standards.html](https://www.childsupport.ny.gov/dcse/child_support_standards.html). Please save the link for future reference. **Submitted by Bill Hoefer, Esq.**
2. New York State Unified Court System—Divorce Resources and compilation of State programs to help students and children in families having parental conflict.:

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## Events and Programs

### Fall 2011 Downstate Mini-Conference



Saturday, December 3rd, 2011

John Jay College of Criminal Justice

899 Tenth Avenue New York, NY 10019

(Between 58th and 59th Streets)

Go to <http://www.nyscdm.org> for more information.

The Fall 2011 Mini-Conference, co-sponsored by the Family and Divorce Mediation Council of Greater New York, will be a full day of informative and entertaining presentations for mediators of all levels of experience.

### Topics

#### **Tax Traps in Real Estate Transfers - Federal, State, and Especially City**

The couple you're working with has finally decided who's buying out who? Great! You've helped them work out the transfer of hundreds of thousands of dollars of equity? Fantastic! But have you carefully and accurately explained all tax issues to them -- including capital gains taxes and real estate transfer taxes?

The tax issues involved in real estate transfers are often ignored or downplayed, yet doing things correctly can save our clients tens of thousands of dollars...and doing things wrong (or ignoring the issues) can lead to malpractice actions seeking to recover these lost funds from us. Our presenters will discuss when to worry about Federal Capital Gains tax, including the \$250,000 and \$500,000 exemptions; the divorce rules; avoiding NY State taxes; and how to properly minimize clients' exposure to the New York City Real Property Transfer Tax.

#### **Same-Sex Marriage: Equality? Not Entirely**

New York State's enactment of Marriage Equality was a giant leap forward for the LGBTQ community. But in the midst of the celebration, there is need for caution. Hear how federal and many state laws limit or deny marriage recognition to LGBTQ families. We will discuss some of the issues mediators may encounter when serving LGBTQ clients, as well as ways to safeguard the stability of these relationships. Topics will include issues relating to

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**Real World Child Support: How Magistrates Decide Difficult Child Support Issues**

Our cases often involve child support issues that fall between the cracks. How should non-traditional parenting plans affect child support? How can we ethically and legally help couples maximize tax savings by calling child support “alimony”? Where should the “income cap” be in high-income cases? If a payor chooses a new, less lucrative career, is he/she entitled to pay less child support? What do we do when a parent reports suspiciously low income? Should we require discussion of how to pay for college in all cases? Do the answers to these questions depend on where the couples live? Support Magistrate Levy (retired) will go into real-world detail on how the bench resolves some (TBD) of these issues, giving us guidance on how to handle these cases when they enter our practices.

**Interactive role play: Mediating With Clients Who Present Unusual Challenges**

We sometimes work with parties whose characteristics and interpersonal dynamics stump us as to how to mediate effectively. This workshop will present a case whose dynamics challenge the mediator and the process. The “mediators” will be audience members who will mediate for the couple, and/or will offer creative suggestions on how to work these sensitive and demanding cases.

**PARKING:** Discount parking (currently \$10 for the whole day) is available at MGS Concerto, 205 W. 59th St., which is between 10th Avenue and West End Avenue

**Association of Divorce Financial Planners - Greater New York Chapter**



The Association of Divorce Financial Planners - Greater New York Chapter meets the second Wednesday morning (8:30 a.m. – 9:30 a.m.) of every other month at their new meeting place.

**Remaining 2011 Meeting Date: December 14th**

Location: Benjamin Steak House  
 52 East 41st Street (One block south of Grand Central Station)  
 Cost: \$20 for full breakfast buffet  
 Hosts: Cindy Thompson and Stacy Francis  
 Questions/RSVP: by phone (914-906-2919)

Non-members are invited to join the lively discussion and study group. Everyone is encouraged to bring questions, scenarios, and situations to discuss. For more information, please contact the Association of Divorce Financial Planners c/o Pam Humbert, 514 Fourth Street, East Northport, New York 11731 or

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## Association of Family and Conciliation Courts (AFCC) 49th Annual Conference



Location: Hyatt Regency Chicago., 6525 Grand Teton Plaza, Madison, WI 53719-1085.

Date: June 6-9, 2012

Theme: **Attachment, Brain Science and Children of Divorce: The ABCD's of Child Development for Family Law**

AFCC is accepting proposals for 90-minute workshop sessions to be presented at the AFCC 49th Annual Conference. Proposals must be received by Wednesday, October 5, 2011 to be considered. For more information, email [afcc@afccnet.org](mailto:afcc@afccnet.org), go to [www.afccnet.org](http://www.afccnet.org), or call (608) 664-3750 / fax (608) 664-3751.

Instructions for the proposal process are at: [AFCC Proposals](#)

Submissions should be made on-line, at: <http://www.surveymonkey.com/s/8W8XSQ5>.

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## Articles of Interest

### 1. Custody Evaluation Orders: The Written Report

The Timothy Tippins column in *The New York Law Journal* of September 1, 2011, titled "Custody Evaluation Orders: The Written Report" is useful in mediations as well as in litigation. Mediators may wish to recommend that the parties who are working on custody issues without any result in sight, find an evaluator to do the kind of custody evaluation a court would have requested. Of course, parenting coordinators can achieve excellent results, but in the frozen reaches of intransigence, a neutral evaluation can help the parties reach a resolution. You can find the entire article at [www.nylj.com](http://www.nylj.com), and look for the September 1st edition of the NYLJ. Or try the following uncomfortably long URL:

<http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1202512946287&src=EMC-Email&et=editorial&bu=New%20York%20Law%20Journal%20&pt=New%20York%20Law%20Journal%20Featured-Columnist%20Alert&cn=columnists%2009%2F02%2F11&kw=Custody%20Evaluation%20Orders%3A%20The%20Written%20Report&slreturn=1&hblogin=1>

Among the most persuasive reasons Mr. Tippins gives for having an evaluation done is: "Because most cases settle without going to trial, the written report often represents the



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*explain, or justify the conclusions expressed in the report. **The report can carry near decisive weight with some courts and is sometimes used to bludgeon the parties into a settlement.** These dynamics make the written report a critical document, one with the potential to alter lives”* (emphasis supplied). From a mediation perspective, the parties and mediator may want to consider the evaluator’s power as explained by Mr. Tippins, including when deciding on whom to hire as the evaluator.

## **2. Creative Parenting Agreements Still Needed With Same-Sex Marriage**

*The New York Law Journal* column on Mediation by Abby Tolchinsky and Ellie Wertheim, entitled “**Creative Parenting Agreements Still Needed With Same-Sex Marriage,**” published on August 29, 2011, can also be found at <http://www.nylj.com>. The column begins with the issue, “If a child is born of a valid legal marriage, with an unknown donor, will courts ultimately rule that, as with heterosexual marriages, there is a presumption of legitimacy and therefore no need for a second-parent adoption?”

However, it also addresses the inherent problems of the new State law conflicting with the federal Defense of Marriage Act (DOMA).

United States Attorney General Eric Holder has already announced that the U.S. Department of Justice will not continue to defend the constitutionality of Section 3 of the Defense of Marriage Act (“DOMA”) in two pending cases challenging that section of the Act. DOMA’s Section 3 defines marriage as a “legal union between one man and one woman” for all purposes under any federal law, notwithstanding any state law which recognizes same-gender marriages.

One egregious result is the financial hardship imposed on residents of states, like New York, which permits a married couple to file joint state income tax returns, only if the couple files a joint federal tax return. Under DOMA, the Internal Revenue Service would not be permitted to accept a joint federal tax return filed by a same-gender couple. The couple would be considered “single” under the federal tax law.

However, couples considered married under New York law, are unable to file joint New York tax returns. Their only option currently is to file New York tax returns “married filing separately,” or possibly “head of household.” Members of a couple who do not qualify for “head of household” filing status suffer the generally higher tax rates which apply to married taxpayers filing separate tax returns.

In addition, taxpayers who work for companies which provide benefits to the same-gender

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on their federal tax returns. A New York Times article (“Bank Levels Playing Field,” NYT, Oct. 15, 2011, p.B4, col. 6) reported that Bank of America will reimburse employees with same-gender partners for the extra taxes the bank’s employees will have to pay for the health insurance. Federal tax law recognizes only heterosexual marriages as an economic unit, so that the employee who covers his/her spouse does not incur income under federal tax law for employer-paid benefits.

Some legislation is needed to rectify the impact of the New York Tax Law on same-gender couples who are affected by DOMA.

Write to your state representatives in Albany and express your opinion. I urge that the NYSCDM join with other organizations in finding a way out of this quandary, and not wait for the judicial system to find DOMA unconstitutional (if it does so find).

Eli Uncyk, Esq.

### **3. The Post-Separation, Single Parent... Couple**

**By Ada L. Hasloeher**

**Divorce and Family Mediation Center, LLC**

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Melville, NY 11747

Ada is a member of the board of the NYSCDM.

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Connect with Ada on LinkedIn: <http://www.linkedin.com/in/adalhasloeher>

You’re probably wondering what this title could possibly mean. It is unusual, but accurately describes what actually goes on for most couples parenting their children in a post-separation world. And because of that, I thought it worthy of closer examination.

I find in my mediations that many couples choose joint custody (joint decision-making) with one parent being the residential custodial parent (where the children reside most of the time). Before we explore this concept, you may want to refer to my article “Child Custody Arrangements” where I give a detailed explanation of the various custody arrangements in New York State.

When we work on a joint custody co-parenting plan, the bulk of the time spent with the

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wake up in the morning, it's that parent who gets them ready for school or camp. When the children come home, there are usually extra-curricular activities to run to such as soccer practice, tutoring or some other after school pursuit. The children have homework to do, school projects to work on, dinner to eat, showers to take and then wind-down before bedtime. I'm exhausted just writing about it!

The residential custodial parent is usually the taskmaster, homework-nagger, referee-of-sibling-disputes, cook, clean-laundry-producer, computer-fixer, cabbie and all-around authority figure. When spouses live together, they normally share in these responsibilities.

However, now that they are living separately, a new plan must be constructed to include the full participation of both parents, not only to ease the burden on the custodial parent, but for the welfare of the children as well.

I point this out because I have seen times when, during the heated debate about the separation, the custodial parent may threaten the non-custodial parent about access to the children. Aside from the fact that children should never be used as pawns in the negotiation (for all the obvious reasons), I don't think it occurs to the custodial parent what life will be like being a "single" parent morning, noon and night, day in and day out. It doesn't matter how much you love your children, parenting is tough. While this may not feel burdensome at first, being the "on site" parent creates enormous pressure, and eventually, the need for a break will be essential.

Despite mapping out a weekly and monthly schedule that provides as much balance in the co-parenting as possible, the lion's share of the time with the children still seems to fall to the custodial parent. The task at hand is thinking through a parenting plan that allows for as much shared day-to-day responsibility as possible within the constraints of the living arrangements. This is where mediation really is instrumental.

And so the title of this article: **The post-separation, single parent... couple.** Parents will always be parents and as such, the post-separated single parent will still be part of a couple as they co-parent their children.

BUT there is still that sticky issue of the custodial parent feeling as though he or she is left holding the bag on everything, as if he or she were... a single parent.

When crafting a parenting plan, the most important consideration is that the children have as much access to both parents as possible. Research strongly suggests that children who are co-parented by loving, involved and cooperative parents are significantly impacted in a more positive way in both the short and long term. They become happier, more confident, and well adjusted adults. This just makes sense.

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parent being the custodial parent (CP) and the other being the non-residential custodial parent (NRCP), the challenge is how to create a balance of time with the children.

This is not only crucial for the children, but also for the parents. And it is especially true if the NRCP has been extremely involved in the day to day lives of the children before the separation. The very thought of not being there every day to tuck the kids in at night or have breakfast with them before school can be particularly disconcerting.

Working in substantial time for the children to be with the NRCP is key for a number of reasons. For the CP, he or she may soon find that being a 24-hour parent is both physically and mentally exhausting. Soon enough, the idea that the NRCP will be picking the kids up on Friday at 6:00 and bringing them home on Sunday at 7:00 starts to sound like a brilliant concept! If the NRCP's work schedule is such that access to the children during the weekdays is limited, any block of time he or she will have with the children will be that much more significant.

Two of the central factors that parents need to reflect on when working on their parenting plan are the ages of the children and the parents' schedules (work and otherwise). For the most part, this will guide the calendar more than anything else. Additional factors may include: the maturity of the children, consideration of their individual needs and desires (if appropriate) and most importantly, honoring the relationship they have with both parents prior to the separation.

Before the separation, both parents, dwelling in the marital home together, tend to make all the day-to-day decisions about the children without realizing they're doing it:

- What afterschool activity does Jack have today and who is going to be home to pick him up?
- What birthday gift has to be purchased for Jennifer's friend's party this Saturday and who is going to shop for it?
- How are we going to get Jack to his soccer game and Jennifer to her party and what does the pickup schedule look like?
- Who is going to work on the science project with Jennifer and who will make sure that the math tutor is secured for Jack?

These, and so many more decisions are made every day while cleaning up the kitchen together, working side-by-side raking the leaves, or by text message/phone call when parents are working during the day. Now, while living apart, they will have to figure out how to continue to make those "joint" decisions.

For every couple, there are infinite varieties of plans they can work out together and I've seen couples come up with an amazing array of possibilities. For example:

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after school until the other parent comes home from work.

- The NRCP works a regular schedule and can only be available several nights during the week for dinner with the children, with the possibility that one or more of those evenings can be an overnight.

There is no “one size fits all,” so by working together, we can tease out all kinds of options until the parents create a workable arrangement that provides the access that each parent needs and desires. Mediation offers the forum to craft flexible and creative schedules that reflect and satisfy the needs of the entire family.

Bear in mind that letting the children see a united front will be very important here. Once the plan is in place, it may take a little time for everyone to get used to it, and often, the plan will be tweaked with experience. We know that children can be wily, and if they sense discord between their parents, they can easily manipulate and exploit a situation to their advantage. Therefore, a common parent narrative (what you agree to tell your children about the parenting plan), includes explaining that the plan is open to adjustments if necessary and appropriate. Most important is for both parents to make clear that the intention is to create a practical and effective plan that works for both the parents and the children. This is not only an attainable goal but imperative to the success of your post-separation family arrangement.

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## Cases of Interest

This case was spotted by several members, who posted summaries on blogs and listservs. The following summary of the case is from Alla Roytberg, Esq. You can read the rest of Alla’s blog at: <http://divorceandseparationwithdignity.blogspot.com/2011/08/mediator-successfully-quashes-subpoena.html>

### **Mediator successfully quashes a subpoena in Suffolk County - Rosenthal v. Rosenthal, NY Supreme Court, Suffolk County, Justice Garguilo (August 5, 2011)**

When the parties started their mediation, they signed an agreement with the mediator with the following clause:

*“To preserve the integrity of the mediation process it is agreed that neither Mediator, nor*

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*acting on either Participant's behalf in the event that this matter proceeds to litigation. Each Participant makes this covenant with the other as a condition of your agreement with each other to attempt mediation. Each of you also makes this covenant to Mediator to induce Mediator to serve as the facilitator of your negotiations. Participants agree to be responsible for any costs (including attorney fees) which Mediator might incur in order to prevent noncompliance with this paragraph."*

In this case, both parties during a subsequent litigation joined in their desire to call the mediator as a witness to testify, but the mediator was against it. The court cited the New York State Manual for Administrative Law Judges and Hearing Officers and Judge Judith S. Kaye's ADR Task Force report, which stated that "The mediator shall not be called as a witness at trial." Justice Garguilo agreed with the mediator that as a matter of public policy confidentiality was important. However, he noted that in this case both parties wanted the mediator called. The court's decision to quash the subpoena finally rested on the fact that the parties contracted with the mediator by signing an agreement with the clause noted above. The Court chose not to disturb their contract.

**THE TAKEAWAY**

**For Mediators** : include this language in your retainer agreements.

**For Parties:** make sure you understand the consequences of contracting with the mediator to keep him/her out of court..

This New York Law Journal reported the case initially, and its citation is as follows: **Rosenthal v. Rosenthal, 26245-2010, NYLJ 1202511357622, (Sup.Ct, Suff, Co. Decided August 5, 2011).**

The entire text of the decision is reprinted here:

The underlying matrimonial action provides the backdrop for an Order to Show Cause submitted by a mediator, Lisa S. Fine. Ms. Fine, an attorney, seeks an Order:

1. Quashing the subpoena served on her, the mediator, who assisted the plaintiff and defendant in obtaining their currently contested settlement agreement and divorce; and directing that the subpoenaing party (plaintiff herein) be directed to compensate the mediator for her reasonable fees, including attorney's fees, for making this application; and
2. Alternatively, in the event that the mediator is compelled to testify upon consent of both parties or otherwise, order that the party or parties insisting on the mediator's testimony, pay the mediator for said testimony at her current hourly fee of \$350.00.

Both parties oppose the application and, in essence, join in a request to compel the testimony of the mediator.

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The parties each executed a "Mediation Agreement" with the petitioner, Lisa S. Fine. Paragraph 4 of the Mediation Agreement reads as follows:

"To preserve the integrity of the mediation process it is agreed that neither Mediator, nor Mediator's records or notes shall be subject to subpoena by either Participant or anyone acting on either Participant's behalf in the event that this matter proceeds to litigation. Each Participant makes this covenant with the other as a condition of your agreement with each other to attempt mediation. Each of you also makes this covenant to Mediator to induce Mediator to serve as the facilitator of your negotiations. Participants agree to be responsible for any costs (including attorney fees) which Mediator might incur in order to prevent noncompliance with this paragraph. the Mediation Agreement also sets forth an hourly rate of \$280.00 due the Mediator for services rendered."

The Court has reviewed all submissions. The petitioner-mediator adroitly sets forth both public policy arguments and Administrative Law rationale substantiating her position. For instance, the New York State Manual for Administrative Law Judges and Hearing Officers declares that legal protection of confidentiality in mediation is important in order to facilitate discussion. The manual cites Judge Judith S. Kay's ADR Task Force report which asserts:

"g) Confidentiality in mediation. (1) Except as otherwise expressly provided by law or court rule, all materials of the mediator are confidential and not subject to disclosure in any judicial or administrative proceeding. Any communication relating to the subject matter of the mediation made during the mediation session by any participant, mediator, or any other person present at the mediation session shall be a confidential communication.

The quoted report goes on to state that: "The mediator shall not be called as a witness at trial. In order to promote mediation as a resolution tool, the parties must be assured of the absolute confidentiality of the process. Such confidentiality will promote candor and a free exchange of ideas."

Nevertheless, the matter at bar presents an interesting scenario. The parties for whom the confidentiality protections are in place join in opposing the petition to quash the subpoena. However, as noted herein above, the parties did also contract with the mediator to preclude her testimony and/or records in the event of litigation. The Court will not disturb that contract.

The petition is GRANTED only to the extent that the subpoena is quashed. All other relief sought is DENIED.

The foregoing constitutes the ORDER of this Court.

/s/Justice Jerry Garguilo      August 5, 2011

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[Editor's Note. Judge Garguilo relied on the contractual agreement not to subpoena the mediator, so his discussion of the sanctity of the mediation room (if we can call it that) was interesting and helpful, but not dispositive. In one sentence at the end, he raises (but doesn't resolve) another very interesting issue. Isn't confidentiality, as such, for the benefit of the parties, rather than the mediator? If, in effect, both people who benefit from the confidentiality join in waiving it, why should the holder of the confidence have any right to object to disclosing it? We suspect the answer may be related to the idea that confidentiality supports the whole process of mediation, not just the individual privacy rights of the parties. But that discussion will have to await another day. Also, if the judge was enforcing the part of the contract that allowed the mediator to avoid testifying, why didn't he enforce the part of the contract that says the parties should pay the fees involved in the mediator vindicating the contract? Just wondering.]

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