NEW YORK STATE COUNCIL ON DIVORCE MEDIATION

THE REPORT

SUMMER 2012, VOLUME 8, ISSUE 3

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This is the updated version of the former "Monthly Mailer". It is now being sent via email and is available on the web at www.nyscdm.org. The NYSCDM permits printing and distribution of this edition of THE REPORT.

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 THE REPORT are their own and do not necessarily reflect those of the NYS Council on Divorce Mediation or of the editors.

The editors of THE REPORT would like the journal to be a two-way conversation. We encourage healthy debate. In addition to classic "Letters to the Editor," we welcome your comments, feed-back, criticisms, compliments and other thoughts about any-thing that appears in these pages. We also seek your suggestions for improvement and areas of coverage. If you would like to publish an article or any other kind of paper in THE REPORT, please send us a one-paragraph proposal. The best way to reach us is by email to nyscdmpubs@yahoogroups.com. We look forward to hearing from you.

THE REPORT is published quarterly by the New York State Council on Divorce Mediation.

ELI UNCYK, ESQ. AND CHARLES (CHUCK) M. NEWMAN, ESQ., EDITORS

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Table of Contents

NY State Council on Divorce Mediation

Editor's Page

Without and Within

Welcome to the Summer 2012 issue of The Report, the New York State Council on Divorce Mediation's quarterly journal. We're happy to bring you reports both about the Council and about things that are not specific to divorce and family mediation. We have authors who are members and authors who aren't.

President **Bobbie Dillon** writes about mediator **accreditation**, a topic receiving lots of attention within the Council and all of the ADR community. **The Board** reports on the highlights of its September meeting. We learn about the Council's new Administrative Coordinator, **Melissa Burns. Sydell Sloan**, co-chair with Kathy Jaffe of the **Mentoring** Committee, explains that program. Many of you may want to sign up to be a mentee after reading that article. In the finest tradition of our professions, some may decide to volunteer as a mentor to share-what-you-know.

We have some case and practice notes. One is about a Georgia **ethics** opinion that has lots for us to think about, written by **Rita Callahan**. Rita is not doing divorce mediation, but many members may know her, or about her, from her extensive experience in other kinds of mediation, facilitation and training. Another is about a case that studies the contractual nature of Collaborative law. The article is our first by Buffalo-area mediator and Collaborative lawyer **Michelle Bullock**, a new member of the NYSCDM's Publications Committee. Any members who are interested in serving on the Publications Committee should let us know, or you can contact Melissa at mburns@nyscdm.org. We visit a Massachusetts case that considers many general concepts about **what it is we do** (oh, is that all?) to decide whether a lawyer who left the bar in disgrace may mediate.

Richard Lutringer has written a very interesting, un-cold, book review on revenge. Richard is also known to many of us because of his broad and wide experience in the field, even though he doesn't do divorce and family mediation. **Eli Uncyk**, our co-editor, offers some developments that may have not yet **percolated into our bubble**, but should.

We've got you bookended in this issue. Michelle's article is about when ADR begins, and Rita's is about how our responsibilities to our clients never ends. We hope you find those, and the stuff we look at in between, to be useful.

There's a note on the cover about how to **be in touch** with us. We genuinely welcome it and would love your feedback.

—Chuck Newman

Back To Contents

LETTERS TO THE EDITOR

From: Morna Barsky (mbarskymediation@msn.com)
To: Carol Butler (cabutler@seetheotherside.com)
Subject: congratulations!

Hi Carol...

Just read your excellent article on "...representing family mediators in the future"...congrats!!...it was so well conceived, organized, and beautifully written...of course I was especially delighted with the careful and on target way that you incorporated the issues that we discussed in our phone talk...thank you...and bravo...

I thoroughly enjoyed the entire issue of "The Report"...reflecting an apparent huge input from our very talented, responsible, and generous editors...the photos were a pleasure, as well as meeting you in a clarifying way with your own lovely image on your editorial page...

With much appreciation,
Morna

(Morna Barsky is one of the founding members of the Council, the FDMCGNY and the Academy of Family Mediators, which, after mergers, became a part of the Association for Conflict Resolution. Her insights and reflections on Carol's article represent a wealth of experience. Many mediators look to her for guidance and advice.)

From Margaret L. Herzog, Ph.D.
To the Editors:
I received The Report by email recently, and wanted to repeat my comment of last year. I vastly preferred receiving a hard copy of the monthly mailer.
I confess to be old-fashioned and prefer not to read lengthy attachments in emails. Furthermore, I enjoy a beefy newsletter at the end of a long day.
In my opinion, The Report has valuable content that warrants a real read...on a hard copy.
All the best,
Peggy

Letters To The Editor

Margaret L. Herzog, Ph.D.

Dr. Herzog is a clinical psychologist in Larchmont, New York, specializing in child, adolescence and family issues. She is a Founding Board Member of the New York Institute of Family and Divorce Mediation.

[Editors' Note: We appreciate Dr. Herzog's feedback and welcome all readers to let us know how we're doing. The switch from paper to electronic delivery was based primarily on two considerations. One, of course, was cost. The other is that some members prefer the electronic version, probably so that they *can* read it wherever they are, without remembering to carry paper; and for ease of storage and retrieval. For Dr. Herzog and others who feel more comfortable with paper, you should of course feel free to print out your copy. Your thoughts on paper vs. "e"? Please contact us at NYSCDMpubs@yahoogroups.com. Or if you *really* love paper, snail-mail us at Charles M. Newman, 500 Fifth Avenue, Suite 1610, New York, NY 10110.]

From: Ada L Hasloecher <Ada@dfmcli.com>
To: nyscouncil@optonline.net<nyscouncil@optonline.net>

I want to acknowledge Eli for an outstanding job on "The Report." It's wonderful! I printed it out and read it cover to cover on the train going into the city last week. The new look (fonts, etc.) and feel of it are excellent, the content top notch. Thank you Eli for doing a yeoman's job on it and your continued commitment and contribution to the Council. We are lucky to have you.

Yours,

Ada

Ada L. Hasloecher

(*Ada is a member of the Council's Board of Directors and one of the most active and generous members of the Council, giving her time to various committees and to mentoring and sharing ideas with other mediators.)*

Back To Contents

President's Page

Why all qualified mediators should become Accredited

The New York State Council on Divorce Mediation has Accredited mediators since 1986. The standard for Accreditation requires that mediators have received a basic level of family and divorce mediation training or a combination of education and training; have mediated for two or more years; have mediated at least 25 complete divorce cases; have completed at least 250 hours of face-to-face mediation; have taken the time to consult with peers who have met the Accreditation standard; have demonstrated their ability to write a coherent and comprehensive agreement (Memorandum of Understanding or Separation Agreement); and have committed to continuing education. Of our 229 members, 47 are Accredited.

No standard is perfect. However, this standard demonstrates the member's commitment to excellence as a mediator. It is specific to divorce mediation, not related to the discipline of origin of the mediator (therapy, law, business, conflict resolution, etc.), so it provides a baseline for this particular area of knowledge and skill. It also provides the public with a standard when selecting a divorce mediator.

So why aren't all of our members seeking or striving toward Accreditation? I'd like to share some of the reasons I've heard or been told, along with my take on why you should strive for Accreditation if you aren't already doing so. I would also welcome your feedback. Feel free to email me at bdillon@mediationctr.com or post your comments to the Council listserv, nysmediate@yahoogroups.com.

I'm an attorney/therapist/experienced mediator/fill in the blank, so I don't need case consultation:

Maybe I'm missing something, but I *still* need case consultation and I'm Accredited, have a Master's degree in Conflict Analysis and Resolution, and have been mediating for a decade. There are cases that come along which are difficult and I rely upon my peers to assist me in thinking through strategies for handling such cases. I don't see this as a weakness. On the contrary, I believe it speaks to my desire to provide the best possible service to my clients. Why not reach out to other experienced (Accredited) mediators to continue to improve your skills? And while you are at it, you can count those hours toward the case consultation requirement for Accreditation. This doesn't have to take place in person, it can take place over the phone with an Accredited Mediator from anywhere in the state.

Just because you are Accredited it doesn't mean you are competent/ethical/expert:

That is true. It simply means you passed the requirements of the standard to become Accredited. I would argue that just because you are licensed in a profession it doesn't also mean you are good at what you do or that you will not breach the ethical standards of your field. All standards are imperfect. They are an attempt to set a baseline. However, in my experience, *the majority* of people who strive to attain standards are the type of people for whom competence is extremely important.

PRESIDENT'S PAGE

Why bother becoming Accredited if there is going to be a Certification anyway?

Why wait for a standard which is not here yet, when there is a standard you could strive for today? One does not negate the other. They will simply complement one another and show that you are the kind of professional for whom standards of quality in your craft are important.

You can't police a mediator even if they are Accredited:

That is true. There is a Model Standards of Practice which all of our members agree to abide by when they join the Council. We also have a joint New York State Council on Divorce Mediation (NYSCDM) and Family and Divorce Mediation Council of New York (FDMCNY) Ethics Committee that accepts complaints from the public about divorce mediators and who follow a formal Ethics Protocol in such instances. We are a self-policing group at this point and there are limits to our ability to reign in those we feel are not practicing in the best interest of the mediation community. Yet, I don't understand why this would discourage anyone from striving to attain the highest standard available in their field.

The Accreditation and the Mentoring Committees have worked to make it easier to apply for Accreditation. Simply visit the New York State Council on Divorce Mediation website at www.nyscdm.org. Under the Accreditation section you will find a variety of resources including a document that outlines the "Accreditation Process" and a "Checklist for Memorandum." There is also in the Member's Area of our website a list of Accredited Mediators who have agreed to act as mentors and offer case consultation to members. Why wait? Set a goal to complete your Accreditation application before the end of the year. I will look forward to celebrating with you at our next annual conference!

Bobbie L. Dillon, M.S.
President
New York State Council on Divorce Mediation

Congratulations to the following members who have become Accredited over the past year:

Robin J. Bauer
Maren Cardillo
Gail Ferraioli
David M. Louis
Robin Abrahamson Masson
Clare A. Piro
JoAnn Shartrand
Michael P. Stokamer

Back To Contents

Board Highlights

The Board of Directors of the New York State Council on Divorce Mediation meets four times per year. In order to keep the membership informed of Board activities, we present you with some of the highlights of the September 2012 meeting.

Kathy Jaffe announced that The New York State Council on Divorce Mediation has been approved by the New York State Continuing Legal Education Board as an Accredited Provider of Continuing Legal Education Credits. The Board thanked Kathy for her dedicated service to make this prestigious distinction a reality.

The Board voted to approve funding to contract with Murray Public Relations to raise public awareness and understanding of mediation; enhance the consumer experience on the Council website; increase traffic to the Council website, YouTube page, followers on Twitter, fans on Facebook, members in LinkedIn Group, and followers on Google+; and increase referrals and promotional opportunities for Council members.

The Board approved the Institute Steering Committee's proposal to move forward with plans to secure funds to hire a psychometrician to begin the process of interviewing divorce mediators throughout New York State in order to develop a definition of the skills needed to be considered a competent divorce mediator and, ultimately, the development of a Certified Divorce Mediator (CDM) exam. The Board requested that the Institute Steering Committee reconsider the prerequisites to sit for the exam in order to address some of the concerns expressed by Council members.

The Institute Steering Committee reported they were asked to present at the New York State Dispute Resolution Association (NYSDRA) annual conference about the plans for the Certified Divorce Mediator (CDM). A number of NYSDRA members attended the Council annual conference this past May and said they were impressed with the work we are doing and wanted to inform their members and see how they might assist our efforts.

The Downstate Mini Conference Committee reported that the one day conference will be held at John Jay College again this year on Saturday, December 1.

The Annual Conference Committee reported that a profit was netted at this year's conference. The Committee has also instituted a more advanced record keeping procedure to track the effectiveness of various efforts at the conference (*e.g.:* raffle, book sales).

I would like to remind everyone that Board meeting minutes, once approved, are posted in the Member's Area of the website for any member who is interested in more detail (www.nyscdm.org).

Back To Contents

NYSCDM ADMINISTRATIVE COORDINATOR

The New York State Council on Divorce Mediation is growing and evolving, but our commitment and mission remain the same:

- To promote the highest professional standards for divorce mediation.
- To assist and encourage mediator excellence and success.
- To increase public awareness of the financial and emotional benefits of a mediated agreement.
- To promote mediation as the first choice when couples separate, divorce or face family conflicts.

An administrative position was created to assist in carrying out this mission, and applicants were interviewed in June. The Council hired Melissa Burns to perform administrative duties including fielding calls from members, prospective members and the general public, assisting the Board of Directors at meetings, managing the Yahoo! Groups listserv and NYSCDM website, and working with the various committees within our organization on events and projects. Melissa has also joined the Publications Committee as Production Manager of THE REPORT.

Melissa has a background in business administration and technology management as well as experience working in a mediation practice as an office assistant for her father and our Immediate Past President, Dan Burns. She was hired temporarily by the Council in January primarily to assist with the organization of the Annual Conference, where she was thrilled to meet many of you. You can reach out to Melissa at mburns@nyscdm.org.

Back To Contents

Practice Issues, Cases of Interest and New Developments

What Ethical Obligation Do I Have as a Mediator, *After* a Mediation?

By Rita Callahan

The Committee on Ethics of the Georgia Commission on Dispute Resolution published a thought-provoking Ethics Opinion (Ethics Opinion 4) recently that reminds mediators of their ethical responsibilities *after* a mediation. The opinion is available at http://www.godr.org/files/Ethics%20Opinion%204.pdf and is reprinted in this issue starting on page 25. After the Committee on Ethics was asked to consider a complaint filed by an attorney against a mediator, and after the Committee determined that the mediator had committed some ethical violations, the mediator filed a Petition for Voluntary Discipline and agreed to a 30-day suspension as a registered mediator. To be sure, Georgia's court-annexed mediation system works differently from New York's in many respects, and the Committee was construing a set of Georgia rules, but the concepts are instructive for mediators everywhere. (A little bit of the Georgia details will be described below.)

One of the issues involved the mediator's discussion, *after the mediation*, in a teleconference with the parties, of what constituted a "full and final settlement." The Committee found the mediator violated the principle of *self-determination* of the parties when she sought to impose her interpretation of a mediation agreement. In the Opinion, the Committee determined that "it is not appropriate for a mediator, whether at the mediation itself or later in an attempt by the parties to interpret their own agreement, to enhance the scope of the agreement beyond that which was reached. It is up to the parties and not the mediator to establish the scope of the settlement."

In addition, the Committee separately found that the mediator's actions constituted a violation of the rule of *impartiality*. Georgia's rule states, "A mediator must demonstrate impartiality in word and deed. A mediator must scrupulously avoid any appearance of partiality. Impartiality means freedom from favoritism, bias or prejudice." In a letter to the parties written after the mediation, the mediator wrote that one of the attorneys was wrong and acted in bad faith. The Committee found that the mediator was no longer impartial in word or deed.

Because the mediator had also copied the letter to the local ADR program director, the Committee found that the mediator violated the principle of *confidentiality*. Although this case was court-connected, it was not court-ordered or court-referred, and the local program director had not been involved. The Committee said the program director had no need or right to know the details or opinions concerning the mediation as set forth by the mediator in her letter to the parties, and the mediator "included facts and opinions which should not have been shared."

PRACTICE ISSUES, CASES OF INTEREST AND NEW DEVELOPMENTS

According to this Ethics Opinion, the "case emphasizes that a mediator's ethical obligations to a case and to its participants do not end with the conclusion of the mediation session but continue indefinitely. There is no point in time after the mediation when the parties' right of self-determination should be subjugated to the mediator's intervention. There is no point in time after the mediation when the mediator should not be conscious of the appearance of impartiality or bias. There is no point in time after the mediation when it is ethical to break the mediator's promise of confidentiality."

What is the relevance to New York mediators? Could this happen in New York when a mediator is not mediating for a CDRC? How does a mediation party complain about a mediator? Do New York mediators share the same ethical standards? What can the public expect? Does it matter? The lesson for all of us might be to think carefully about how we behave even after mediation, and to make sure we have internalized the meaning and consequences of the principles of self-determination, impartiality and confidentiality.

Unlike New York's unified court system structure, Georgia's courts are organized by county. There are 159 counties in Georgia; each county has its own magistrate, probate and juvenile courts. The ADR court-connected system was started in 1993 and there are 46 court-connected ADR programs. To mediate in a court-connected ADR program, a mediator must be registered with the Georgia Office of Dispute Resolution (www.godr.org). There are currently 1917 registered neutrals in Georgia. See http://www.godr.org/files/APPENDIX%20C,%20CHAP%201,%206-1-2012.pdf for the Georgia Commission on Dispute Resolution's Ethical Standards for Neutrals, which is the basis for the Committee's findings.

Editors' Note: Ethical complaints about members of the New York State Council on Divorce Mediation are reviewed by a joint Ethics Committee. The Ethics Protocol used by the Committee is a part of the Bylaws of the Council and can be found at our website www.NYSCDM.org.

Rita Callahan first registered as a neutral in Georgia in 1995. While in Georgia, she mediated state, magistrate, juvenile, dependency, and probate cases, and she trained hundreds of people in basic mediation, workplace mediation and advanced mediation. She developed expertise in workplace mediation and conflict resolution, and provides mediation, facilitation, training, conflict assessment and conflict coaching services as a Collaboration and Conflict Resolution Consultant around the country. Rita now works in the Conflict Resolution Section of ConEdison in New York. Contact Rita at rcallahan@mindspring.com.

Back To Contents

Practice Issues, Cases of Interest and New Developments

When Does Collaborative Law Begin?

By Michelle Bullock

What is Collaborative divorce and when does it begin? The Collaborative divorce process is settlement–driven, in which the parties are represented by specially trained Collaborative divorce attorneys in a series of well-planned four-way meetings among the attorneys and their clients. Collaborative divorce can also involve specially trained financial planners, accountants, mediators, facilitators and mental health providers. At the beginning of the process, the parties and their attorneys execute a Participation Agreement, which is a contract that outlines the process and sets the rules which the parties are bound to follow. Critically, the Agreement will include a clause which states that the attorney representing a party in the Collaborative divorce may not represent the party in any future contested matrimonial litigation, should the matter not settle in the Collaborative setting. The theory is that the parties are reluctant to have to re-start with newly engaged counsel; and the attorneys are motivated to resolve the issues through Collaborative process, as their future litigation fees have been eliminated.

The issue of when the Collaborative process begins was addressed by the Westchester County Supreme Court in a June 28th opinion in *Mandell v. Mandell*, 949 N.Y.S.2d 580 (Sup. Ct. West. Cty. 2012). The text of the opinion is set out below starting on page 29. The Mandells wanted (mostly) to cooperate about their divorce, and each hired counsel with the idea that they would enter into the Collaborative process. However, the wife had some concerns about her immediate financial needs. She thus specified that she would only enter into the Collaborative process if the parties, with counsel, could come to an interim support arrangement, so that she did not have to start an action in which she could seek *pendente lite* judicial relief.

The spouses and their lawyers started meeting. A Participation Agreement was drafted with the usual provision that the lawyers could not represent their clients in litigation. In each meeting, the four participants put off the finalization and execution of the Participation Agreement. It was never signed. After a few meetings, the wife apparently concluded she would not get voluntary interim support that would be satisfactory to her. The wife's side declared the end of the attempt to proceed Collaboratively and she started a divorce action and sought *pendente lite* support. She was represented by the same lawyer who representing her in what was hoped would be a Collaborative process.

The husband moved to disqualify the wife's lawyer from representing her in the divorce, because although no Participation Agreement had been signed, the parties and lawyers did meet in what they thought were early Collaborative conferences. Justice Scheinkman wrote a useful history and explanation of the Collaborative process and its place within the range of divorce negotiation and resolution modalities. He dealt with the legal issues around the fact that there was a drafted but unsigned Participation Agreement, and how the parties and counsel behaved.

PRACTICE ISSUES, CASES OF INTEREST AND NEW DEVELOPMENTS

The husband's arguments included that the wife's counsel had been exposed to confidential information during the Collaborative divorce process. Ultimately the Court held that the attorney's alleged exposure to confidential information during the Collaborative process did not warrant her disqualification as the Wife's counsel. In addition, the Court held that because the Participation Agreement was not signed and acknowledged by the parties, it is unenforceable in the matrimonial action. The Court noted that the collaborative process is a settlement technique and attorneys often exchange information during settlement negotiations. "It would be a distinct chill to settlement negotiations if attorneys had to avoid obtaining information from opposing parties and counsel in order to avoid being disqualified."

Justice Scheinkman considered the public policy issues relating to autonomy in deciding on not only the results of negotiation and settlement, but also on the processes to be used to reach them. At its core, though, Justice Scheinkman saw the question as a straightforward contracts issue: did the parties agree in a binding way that their lawyers could not represent them in divorce litigation? The court ruled that on the facts before it, there was no binding contract forbidding the wife's lawyer from representing the wife in litigation.

Michelle Bullock is an attorney, mediator and Collaborative divorce practitioner in Amherst, NY. She is a member of many ADR and Bar organizations, including the NYSCDM and its Publications Committee. Reach her at michelle@michellebullock.com, www.michellebullock.com.

Back To Contents

Practice Issues, Cases of Interest and New Developments

May Former Lawyers Who Have Been Disciplined Act as Mediators? (And So Many Other Questions.)
By Charles M. Newman

We know that many mediators are lawyers. We know there can be differences between what lawyer/mediators and non-lawyer/mediators may do. We don't need to revisit all those issues here to take them as a starting point to look at some very interesting questions raised by a recent decision of the Massachusetts Supreme Judicial Court, the Commonwealth's highest court. The decision in *Matter of Anthony Raoul Bott*, 462 Mass. 430 (2012), decided on June 5, 2012, is reprinted below starting on page 35.

Mr. Bott, then a Massachusetts lawyer, allegedly did some pretty unsavory things. In 2005, he was allowed to resign as a lawyer at a time that he was under investigation for failing to tell his personal injury client that he had settled the case. The investigation was also determining whether he later lied to his client about the amount of the settlement so that he could keep more than his share of the payment. The court system accepted his resignation and treated it as his discipline for improper behavior. Perhaps not coincidentally, Mr. Bott pleaded guilty to larceny and forgery and spent some time in jail for it.

In 2009, Mr. Bott took mediation training and in 2010, he petitioned the Masschusetts courts to be allowed the act as a mediator, despite his having left the practice of law under, shall we say, a cloud. Effectively, he wanted a ruling that his forced removal from the practice of law would not forbid him from the practice of mediation.

Before you read on, take a minute to think about what considerations should be relevant to that decision. Think how you would go about deciding the question, and how you would answer it. There may be some differences in the specifics of Massachusetts and New York law and practice, but here's how the court answered (or almost answered) the question.

The court started by figuring out what constitutes the "practice of law," because only admitted lawyers are allowed to practice law. The first question was whether acting as a mediator constitutes the "practice of law." Stressing that only courts may determine what constitutes the practice of law, it said that the phrase isn't easy to define. It decided that — hold on to your hats — whether an activity constitutes the practice of law depends on the facts.

The court noted that many activities generally associated with the practice of law are also undertaken by people in other professions or occupations. To be an activity that *only* a lawyer my perform, it must generally fall "wholly within" the practice of law. In Massachusetts, mediation is not a regulated or licensed profession, but there are court-mandated rules and ethical guidances for mediators. Training *in law* is not a requirement to be a mediator in Massachusetts. Indeed, one rule says that a mediator is not permitted to

PRACTICE ISSUES, CASES OF INTEREST AND NEW DEVELOPMENTS

"provide legal advice, counseling or other professional services" in connection with the dispute resolution process. The court concluded "that, as a general proposition, a person does not engage in the practice of law when acting as a mediator…" Aha! An answer!

Not so fast. The court went on to consider the meaning of "legal work," as it appears in Massachusetts court rules. Lawyers who have resigned in the face of disciplinary action may not provide "legal work." So if Mr. Bott were going to act as a mediator, that would bring up the question whether mediating is "legal work" in Massachusetts. The court held that — still got a grip on your hat? —while some work may be outside the definition of "legal work" when done by a non-lawyer, the same activity may (*may*) be considered "legal work" when done by a lawyer, and a disbarred or resigned attorney may not perform it because of the disbarment or resignation. Moreover, whether any particular activity by a disbarred or resigned attorney is prohibited depends in part on the public perception whether the activity constitutes the "practice of law." More specifically, the court

> …conclude[d] that an attorney who has resigned while the subject of disciplinary investigation, or who has been disbarred or suspended from the practice of law, **may be prohibited, in some circumstances, from acting as a mediator. The following considerations are relevant** to determining whether mediation or other activities that do not constitute the practice of law when performed by nonlawyers may, in the context of bar discipline cases, nevertheless constitute legal work when performed by a lawyer: (1) whether the type of work is customarily performed by lawyers as part of their legal practice; (2) whether the work was performed by the lawyer prior to suspension, disbarment, or resignation for misconduct; (3) whether, following suspension, disbarment, or resignation for misconduct, the lawyer has performed or seeks leave to perform the work in the same office or community, or for other lawyers; and (4) whether the work as performed by the lawyer invokes the lawyer's professional judgment in applying legal principles to address the individual needs of clients. [Emphasis added.]

The court thought that in Mr. Bott's case, it was important whether he would bring to mediation his professional judgment in applying legal principles to address the individual needs of mediation clients.

Easy, right? We digress to ask a few questions of readers who have experience as divorce lawyers and who are now family or divorce mediators. Do you ever use your divorce law experience when you are mediating? In fact, do you ever *not* use it? Do your mediation clients think — if not expect or silently demand — that you bring your legal experience to your work in the mediation?

Practice Issues, Cases of Interest and New Developments

The court ruled that on the record before it, it did not have enough information to determine whether it would ever be proper for Mr. Bott to act as a mediator, so the appeals court sent the case back down to the trial court to develop more facts. But in doing so, the court made this very interesting distinction that many readers may recognize from different contexts. It appeared to the court that most Massachusetts mediations tend toward the facilitative side, rather than evaluative. The court suggested that evaluative mediation required more legal judgment, so that evaluative mediation may be foreclosed to a resigned or disbarred lawyer, but facilitative mediation might be open to a disgraced lawyer!

A few concluding questions, if we may. How easy is it for a mediator to leave at the door his or her prior professional experience and expertise, law or otherwise? No matter where she is on the facilitative-evaluative spectrum, if a lawyer/mediator realizes that one or both parties is unwittingly giving up important rights or protections, or perhaps even agreeing to something that is unenforceable or illegal, does she have the right or duty to advise the clients? And on another front, is it a good idea that someone who lied to his law client and stole the client's money should be allowed to mediate, at least without disclosing the forced loss of his law license and the jail time he served for harming a client?

Chuck Newman is a divorce and commercial mediator and litigator in Manhattan. He is a member of the Board of ACR-GNY; a member of NYSCDM and a co-editor of The Report*; and a member of several other ADR and bar organizations. He can be reached at cnewman@newmanlawmediation.com, www.newmanlawmediation.com.*

Back To Contents

BOOK REVIEW

Michael McCullough,

***Beyond Revenge : The Evolution of the Forgiveness Instinct* (Jossey Bass, 2008)**

Reviewed by Richard Lutringer

Mediators are sometimes faced with a claimant's unwaivering insistence on resolving their dispute only on patently unrealistic terms . Often, the injured party's desire for revenge seems to put a vice -grip on his ability to respond to a reasonable proposal and blocks him from even wanting to understand the offender's interests and needs. Although perhaps more common in the case of a hurt marital partner in a divorce proceeding, the desire for revenge can appear in disputes involving racial or gender discrimination, medical malpractice, claims involving partners in closely-held businesses, probate disputes among siblings and in myriad other dispute resolution contexts.

Why is the need for revenge so powerful in human beings? How does it relate to forgiveness? Professor Michael McCullough, Director of the Laboratory for Social and Clinical Psychology at the University of Miami, in his book, *Beyond Revenge: The Evolution of the Forgiveness Instinct* (Jossey Bass, 2008), sheds light on how revenge and forgiveness function together in human and animal societies as evolutionary adaptations.

In tracing the roots of revenge and forgiveness, Professor McCullough guides the reader through classical and contemporary research in the fields of anthropology, biology, psychology, neuroscience and game theory. If the desire for revenge is an adaptation in the evolutionary sense, by definition it succeeded over other adaptations. If so, what problems did it solve? McCullough provides three hypotheses: first, deterring individuals who used aggression from harming the same party or group again; second, acting as a deterrence to others from committing acts of aggression; or, third, punishing and reforming members of the group when they fail to " pitch in" as members of the group.

A few examples of the large number of sources cited by McCullough to test his hypotheses: For deterrence of repeated acts of aggression, he cites an experiment using college students who were able to send what they thought were unusually loud sounds (not actually transmitted to the recipient), to graders of essays who had written insulting comments about the student's work. The level of intensity of the sounds administered by the students depended on whether the particular student had been told that the graders would later have the opportunity to reverse roles with them on the apparatus. In other words, the belief that your adversary may be able to harm you in the future, reduces the amount of harm one will do. The thought of harm-in-return acted as a deterrence to aggressive behavior.

Book Review

As to the second hypothesis, acting as deterrence to others from committing aggression, social psychologists have observed that the presence of a third person observing people having an argument, increases the likelihood of an escalation from a word exchange to a physical exchange. He also cites a study of inner-city black youths retaliating for any slight as a part of the code of the streets, *i.e.*, never letting a public act of disrespect go unpunished. With respect to the third hypothesis, forcing free riders to cooperate, McCullough cites research showing that "regularly punishing free riders can indeed establish and maintain large scale group cooperation." Using several studies of psychologist-devised games in which free rider players were "punished" demonstrated that the most successful long-term strategies included punishing free riders who did not contribute their share.

McCullough cites numerous animal behavioral studies to support his thesis that revenge/ forgiveness are adaptations. Here are a few examples:

1. Scouting parties used by skittlefish to locate sources of food. The scouting parties, made up of a few fish, are always on the lookout for predators as they search for food sources. Scouting party members take turns playing the dangerous role of lead fish to check on seemingly docile nearby predators to see if they are in a hungry mood, a clear signal to avoid the area. If one scouting party member doesn't take a turn as lead fish, the others move behind him, literally forcing him to the forefront. In this way, the community discourages free riders by enforcing a quick form of revenge on those who shirk their responsibility to the group. A comparison with the behavior of a similar species from a predator-free environment showed a lack of this adaptation, since it had no evolutionary value for them.

2. Chimpanzees form tightly knit units which punish outsiders, while nurturing the individuals in the group, a social behavior called "conditional bonding" (also used by social scientists in describing human group behavior). Although intra-group hostility for dominance or food is not unusual among chimpanzees in the same unit, once the altercation is over, the combatants display signs of caring and nurturing to each other until the relationship has been regularized. Reconciliation is a common tendency in animals, according to McCullough, "Goats, sheep, dolphins and hyenas all tend to reconcile after conflicts (rubbing horns, flipper's, and fur are common elements of the species' reconciliation gestures."

3. In one remarkable study of Japanese macaque monkeys, when a subordinate individual in the colony was harmed by a more dominant one, the subordinate did not retaliate directly but often would attack one of the dominant individual's younger and less powerful relatives in full view of the dominant macaque, in effect, sending a message that some type of revenge will take place for victimization.

McCullough takes issue with the categorization of the Standard Social Science Model of desire for revenge as a form of mental illness, as in this description by Karen Horney in a 1948 essay: a "governing passion … to which everything else is subordinated, including self-interest." In McCullough's view, although emotional problems may make a person less able to resist "natural vindictive

Book Review

impulses," the desire for revenge is inherent as a human instinct. The ability to forgive is not a treatment for vindictiveness, but — as with the desire for revenge — is also a universal human instinct. According to McCullough, "The desire for revenge isn't a disease to which certain unfortunate people fall prey. Instead, it's a universal trait of human nature, crafted by natural selection, that exists today because it was adaptive in the ancestral environment in which the human species evolved."

McCullough cites a number of computer models of evolutionary development to prove forgiveness is a successful adaptive strategy. In a series of game theory experiments based on the well-known prisoner's dilemma (http://en.wikipedia.org/wiki/Prisoner's_dilemma), scientists modified the original dilemma to create a game with many rounds, instead of the traditional one round. Although the first successful strategy was the simple "tit-for-tat", (the first player would cooperate (*i.e.* would not squeal on his cohort in the prisoner's dilemma game) until the other player no longer cooperated (*i.e.* defected) and then the first player would also defect in the next round). The reality is that people aren't perfect, so that if both parties are playing this strategy and one of the parties mistakenly sends a signal of defection, leading the other party to defect in the next round, a potential doomsday result could inadvertently occur by successive repetitive defections, caused by an initial accidental misreading of the other's signaling behavior as defection. In recent computer modeling simulations, the most successful strategy turns out to be "tit-for-tat" with a twist: it grants forgiveness unconditionally about one third of the time. In other words, if the other party defects, there is a 1-in-3 chance to turn the other cheek and continue cooperating. Whether game theory proves anything in the complex realm of human behavior in any individual case, McCullough makes a strong case that on a large scale there is no doubt that a society without a built-in forgiveness strategy will not be successful in the long run. The adaptive function of forgiveness from an evolutionary standpoint, according to McCullough, is that it helps individuals preserve their valuable relationships.

Based on findings from different areas of scientific research, McCullough focuses on the following three preconditions required to invoke the evolutionary adaptation of forgiveness in an injured party: careworthiness, expected value, and perceived safety. How might these be engendered in a party otherwise disposed to revenge? With respect to careworthiness, it may be through family or other close relationship or compassion, *e.g.*, by stimulating empathy with the other. Expected value could be found through an honest commitment to a future relationship and other reductions in the level of post-conflict anxiety.; Compensation in various forms can be an opening to forgiveness. Perceived safety is the belief that the transgressor will not harm them again — unintentional behavior, even if careless, can be forgiven more easily than malicious acts; admissions of fault and admissions of guilt and remorse may be key. McCullough uses as an example the forgiveness process among the Acholi in Uganda, involving amnesty for child soldiers from Joseph Kony's army as demonstrating the use of the forgiveness instinct in what some may see as an "unforgivable" situation.

Book Review

McCullough discussed the famous "Robber's Cave" experiment (http://en.wikipedia.org/wiki/Realistic_conflict_theory#Robbers_Cave_Study) involving two arbitrary groups of young campers manipulated into fiercely competing and then cooperating with each other. He then reports the success of teaching a young generation of Middle-Eastern children, Arabs and Jews, to live, play and cooperate with one another. McCullough holds out hope for the evolution of human institutions to become more forgiving than revengeful.

Beyond Revenge is a thought-provoking book for mediators to help understand and deal with the desire for revenge when it arises in a mediation. The challenge is to use the learning to develop skills to help aggrieved parties free themselves from an evolutionary adaptation that may no longer be appropriate. "Naming" the feeling and recognizing it as a normal human response, may open the door to a discussion about how it may have worked for earlier generations and how it is working for them. Framing the other side's proposals through the lens of the three preconditions may also till the soil to help the seed of forgiveness take root.

Richard Lutringer is a mediator in New York City. Areas of particular interest are the mediation of family and small business disputes and employment discrimination. He is certified by CEDR and IMI and is on mediation rosters of NY State and Federal Courts, NJ Superior Court, AAA and CPR.

Back To Contents

Around The Council

Committee Report, by Co-Chair Sydell Sloan;

THE MENTORING/CONSULTATION PROGRAM

In light of the current concern among members of NYSCDM members concerning the credentialing of mediators, it seems appropriate to advocate for a time honored method of learning, improving, and evaluating mediator performance. Whether a university, institute, or group teaches the ABCs of mediation and whether or not a written test is an accurate assessment of a mediator's knowledge, skill, and expertise, one should not overlook the value of the old apprenticeship method of learning and practicing a profession. Today, we no longer call it apprenticing but recognize the value of consultation and mentoring.

Kathy Jaffe and I formulated a mentoring program and have co-chaired it for several years. Very few of our members have availed themselves of this opportunity to be supervised, mentored, and to benefit from the opportunity to consult with experienced accredited mediators.

We are now reprinting the letter that was sent to every member two years ago, and which was also included in each packet given to those who attended the May 2012 conference in Saratoga Springs . The letter also appears on NYSCDM's web-site.

We hope that mentoring will be among the methods by which one becomes a better mediator.

LETTER TO THE GENERAL MEMBERSHIP OF NYSCDM

We are pleased to announce the continuation of a mentoring/consultation program under the directorship of Sydell Sloan and Kathy Jaffe. The purpose of the program is to provide support to all newly trained members and those new to the profession of mediation. In addition, the program will allow those members seeking accreditation to accrue the necessary consultation hours to meet the accreditation requirements.

We have recruited accredited members in all parts of the state, who have volunteered to provide you with some or all of the following:

One hour discussion sessions in their office

Observation of your mediation in your office with follow-up debriefing

Observation of their mediation in their office with follow-up debriefing

Telephone conferences and/or E-mail communications

Review of your notes, supporting documents, and initial MOU drafts

Around The Council

The mentor/consultant will not be teaching the basics of mediation. Each mentee is expected to have completed a 40-hour course,

We are recommending that the fee be no more than ½ of the mentor's usual and customary mediation fee. As such, fees will vary throughout the state. We are also recommending that the first hour being offered be free of charge.

A certificate will be issued by the mentor attesting to the hours provided, for the purpose of meeting the accreditation requirements.

CONTACT ANY OF THE FOLLOWING ACCREDITED MEMBERS IN YOUR AREA TO SET UP AN APPOINTMENT

1. Morna Barsky Great Neck mbarskymediation@msn.com
2. Susan Brown Ithaca sbmediator@gmail.com
3. Daniel Burns Albany daniel@burns-mediator.com
4. Beth Danehy Rochester beth@mutualchoices.com
5. Jill Sanders DeMott Rochester jill.sanders.DeMott@gmail.com
6. Bobble Dillon Rochester bdillon@mediationctr.com
7. Glenn Dornfeld Manhattan dornfeld@earthlink.net
8. Doris Friedman Westchester DTF16@aol.com
9. Dolly Hinkley Rochester swimdolly@rochester.rr.com
10. Kathy Jaffe Rockland kathyljaffe@gmail.com
11. BJ Mann Rochester bimann1@frontiernet.net
12. Robin A. Masson Ithaca ram@massonlaw.com
13. Clare Piro Westchester clare@mplawandmediation.com
14. Sydell Sloan Queens, Manhattan dellsy@aol.com
15. Michael Stokamer Manhattan, N.J. emes52@aol.com
16. William Wiesner Suffolk wwiesner@longislanddivorcemediation.com

Back To Contents

DIGESTS OF NOTICES OF INTEREST

From time to time, THE REPORT *will include digests of notices, comments and other information that the editors happen to catch floating through ether. Normally they will be things that we guess might not have come to the general attention of the ADR community. If you come across (or write!) such things that you think would be of interest to members of the NYSCDM, please let us know at* NYSCDMpubs@yahoogroups.com
This issue's contributions come from Eli Uncyk.

New Medicare Tax on Unearned Income.

When mediators help clients calculate their income and expenses, they should be mindful of the Medicare Contribution Tax described below, and discussed in the article from which the quote was taken. See Marcum LLP's *Beyond the Numbers*, July/August 2012: http://www.marcumllp.com/publications-1/the-new-medicare-contribution-tax.

"The Medicare Contribution Tax will be in effect as of January 2013. The tax applies to individuals, estates and trusts and imposes an additional 3.8% tax on net investment income for taxpayers with modified adjusted gross income (MAGI) above threshold amounts."

Mediation clients need to determine actual spendable income when planning for their separate lives and their support obligations. It is often assumed — or in fact heavily relied upon — that equitably distributed securities and other investments which pay dividends, interest, distributions or other income (investment income) to supplement, or be a major part of, the income of either spouse. It is important to note that the Medicare Contribution Tax may have less of a negative impact on the party with lower income. It may be useful to have the parties have an accountant or other financial professional (or the clients themselves) figure out how much is saved if the party with the lower income receives securities which produce investment income.

Referral Source Idea.

Mediators who work to find one client at a time, and even those who work to find good referral sources, have often overlooked employer human resources departments or employee assistance programs (EAPs) within companies. All employers are interested in productivity and in reducing absences. Marital and family stress, including divorce, lead to absences and loss of focus at work, as well as innumerable other negative consequences for the parties involved and their employers. See *BenefitsPro Daily*, August 21, 2012, "Employee pressure puts EAPs in the spotlight." It is available at http://www.benefitspro.com/2012/08/21/employee-pressure-puts-eaps-in-the-spotlight?utm_source=BenefitsProDaily&utm_medium=eNL&utm_campaign=BenefitsPro_eNLs

DIGESTS OF NOTICES OF INTEREST

As described more fully in the article, "Many of today's workers probably think of the EAP as the place where people go to complain about their boss or co-workers, or as a place to talk with someone about their depression and stress. The truth is, EAPs — and their missions and their services — have changed dramatically over the past 20 years…

***

"Here are a few more services from EAPs have grown to include over the years:…

***

"• Legal services. Some EAPs are providing simple legal benefits to employees. Though not as robust as slate of offerings as a group legal plan, EAPs often help with simple legal procedures such as wills or traffic tickets.

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"• Work-life services. Some EAPs provide concierge service, which means doing simple tasks for workers such as picking up dry cleaning. Other services in this category can include pet bereavement and travel services. Many EAPs are presently helping employees not only with childcare, but providing guidance with eldercare issues as the parents of employees are living longer or outliving their retirement plans and are taking up residence with their children."

If mediators have a complete presentation, including materials and handouts, they should make every effort to approach human resources administrators in large companies, to encourage them to make their employees aware of the availability of family and divorce mediation as a resource. Some human resource administrators can be encouraged to give mediators the opportunity to make a presentation to groups of employees about mediation of family conflict, including specifically divorce mediation.

NY State Council on Divorce Mediation

Back To Contents

COURT AND OTHER OPINIONS DISCUSSED IN THIS ISSUE

This opinion is discussed in "**What Ethical Obligation Do I Have as a Mediator, *After* a Mediation?"** starting at p.10, above.

The Committee on Ethics of the Georgia Commission on Dispute Resolution Ethics Opinion 4

Introduction

The Committee on Ethics was asked to consider a complaint against a registered mediator arising from a mediation she conducted in 2009. The Committee issued a final decision and accepted the mediator's petition for voluntary discipline.[1] The Committee believes that a published formal Opinion based on a complaint may be useful to help mediators avoid serious potential ethical issues in their practices. This Opinion is based on the following summary of its finding of facts:

On August 31, 2009, Respondent, a mediator registered with the Georgia Office of Dispute Resolution, mediated a contested probate court case where the parties were represented by counsel. Complainant, one of the attorneys in the case, attended with one client; opposing counsel attended with two clients. The parties and attorneys signed an agreement to mediate. A representative of the estate at issue was not present.

A proposed settlement went through four drafts. Respondent prepared the first draft, then Respondent left before the parties finalized the terms with the following three drafts. Respondent left the parties to finalize their proposed settlement agreement after receiving their assurances that they agreed on all issues of the case. The final settlement agreement was signed by all parties to the mediation and both attorneys, but not the mediator. The Respondent reported the outcome of the mediation to the local ADR office as a full settlement.

Several days later, on September 15, 2009, at a probate court hearing, Complainant asked the court to enter judgment for one of his clients, based on the signed settlement agreement. Opposing counsel was surprised by the motion, as she believed that all claims among all parties had been settled in the mediation, and she protested that the final settlement agreement proffered did not accurately convey that understanding. The judge granted permission for the attorneys to call Respondent from court to ask her help in resolving their disagreement.

With both attorneys listening on a speaker phone, Respondent confirmed that she understood and reported that the signed August 31 agreement was a "full and final settlement" as to all claims. Back in court, both attorneys continued to disagree over the terms of the August 31 settlement agreement, and the judge agreed to read the proffered agreement and make a decision later as to its meaning.Two days after the phone call, in a letter dated September 17, 2009, Respondent accused one of the attorneys of using her name and position as mediator "in support of [his] posturing in front of a probate judge." The attorney's conduct was "distasteful and appalling," she wrote. Respondent went on to declare her opinion that the mediation agreement was to be a "full and final settlement" as to all claims among all parties. To opine otherwise," she wrote, "seems to be disingenuous and reflecting a mean spirited bad faith." If the mediation agreement was not clear as to the full and final settlement, then the drafter of the agreement – in this case the Complainant – was to blame, Respondent asserted. The probate court should also consider the mediation agreement to be a full and final settlement, she contended. And finally, while citing her duty to maintain confidentiality of the mediation, Respondent copied the letter to a third party – the director of the local ADR Program.

One of the attorneys filed a written complaint with the Georgia Office of Dispute Resolution alleging Respondent had violated the Ethical Standards for Mediators.

Jurisdiction of the Ethics Committee[2]

The Georgia Commission on Dispute Resolution is charged with the responsibility to ensure the quality and integrity of all court-connected mediation. To fulfill its mandate, the Commission has implemented standards of conduct to be observed by all mediators working within the context of court-annexed or court-referred programs. In order for the Commission to fulfill its mandate to ensure the integrity of the mediation process and the high ethical standards of mediators working in conjunction with court programs, the Committee took a broad view of its jurisdiction to review the actions of mediators in all but exclusively private mediations. The public has a reasonable expectation that the mediation process will be conducted in a way that protects the rights of the parties and the integrity of the mediation process when it entrusts its disputes to that process in the court system as an alternative to trial.

The Ethics Committee holds jurisdiction over registered mediators, as well as pending court cases that are mediated. Since this mediation involved a registered mediator and a pending court action in a circuit with an approved alternative dispute resolution program, the Ethics Committee found that this mediation and subsequent acts fall within the jurisdiction of the Committee.

COURT AND OTHER OPINIONS DISCUSSED IN THIS ISSUE

Additional facts that supported the finding of jurisdiction include the fact that the court action was scheduled for a hearing at the time of the mediation and that the mediator reported the outcome of the mediation to the local ADR office.

Complainant's Allegations

Complainant asserted that the Respondent violated the Ethical Standards for Mediators in the following areas:

Self-Determination

Allegation: The mediator failed to maintain the parties' right to self-determination by giving legal advice and coercing the parties, which is prohibited by Appendix C, Chapter 1(A) (I)(E);

Discussion and Findings: Self-determination is the very bedrock of mediation. The parties are in control of settling all, some or none of the issues raised in the dispute that led to mediation. The Committee noted that Respondent did not violate the principle of self-determination during the mediation proper nor was there any evidence that she gave legal advice to the parties during the mediation proper. However, the principle of self-determination is, in its essence, the ability of individuals to bargain for themselves. It is not appropriate for a mediator, whether at the mediation itself or later in an attempt by the parties to interpret their own agreement, to enhance the scope of the agreement beyond that which was reached. It is up to the parties and not the mediator to establish the scope of the settlement.

The Committee found as a matter of fact that Respondent attempted to convince the parties of the meaning of terms in the agreement by strongly suggesting what the phrase "full and final settlement" included. Respondent facilitated the first draft of the agreement but did not remain at the mediation and did not participate in drafts two, three or four. Although she did not participate in the final draft, Respondent, in her letter of September 17, told the parties what the intent of the agreement was, what legal effect it had and how it should be interpreted by a trial judge.

The Committee found as a matter of fact that Respondent violated the principle of self-determination of the parties by publishing her letter of September 17, 2009, in which she sought to impose her interpretation of the agreement. Appendix C, Chapter 1(A)(I).

The Complainant also alleged that Respondent gave legal advice prohibited by the ADR Rules. The Committee noted that there was no evidence that Respondent gave legal advice during the mediation proper. Later, however, when the parties were attempting to establish the scope of the agreement reached, she gave legal opinions as to the meaning of "full and final" and gave her legal opinion as to the construction of contracts. Again this was outside the proper role of a neutral mediator, and the Committee found that Respondent violated Appendix C, Chapter 1 (A)(I)(E).

Impartiality

Allegation: The mediator failed to maintain impartiality as required in Appendix C, Chapter 1 (A)(III) (A).

Discussion and Findings: The Complainant alleged that the Respondent showed partiality toward the parties represented by opposing counsel, by misrepresenting the scope of the agreement. Again the Committee found that the gravamen of the Respondent's offense occurred after the mediation session proper and during the parties' attempt to establish the scope and meaning of the agreement in a subsequent proceeding. In her letter of September 17, 2009, to the parties, the Respondent showed that she was biased against Complainant and the clients whom he represented:

> "I do not understand why there is any further argument unless the parties acting in their individual or corporate capacities simply cannot understand the term 'full and final settlement' as you have surely explained it. I believe that to now infer that this case was not a full and final settlement and/or that there was not a complete release *seems to be disingenuous and reflecting a mean spirited bad faith.* (Emphasis supplied.) While I do not know the probate judge in this matter, I hope that he/she shares the wisdom consistently demonstrated by several of our superior court judges in the [local jurisdiction]. If so, I am certain he/she will explain the term 'full and final settlement' in a manner your clients, individually and in their corporate capacities, can fully appreciate. As I recall any discrepancies in drafting a contract are charged against the drafter, who in this case was [Complainant]. By the full and final settlement, the intent of the agreement was clearly to release the Estate from all claims of any of these parties."

The Respondent may not have had any personal knowledge of what the intent of the parties was after the first draft because she had left and had no further participation in the mediation session. The Respondent's letter of September 17, 2009, took a clear position in

Court and Other Opinions Discussed in This Issue

opposition to Complainant and in favor of the clients of opposing counsel. By advocating for her contention that Complainant was wrong and that he had engaged in bad faith and disingenuous legal positions, Respondent was no longer impartial in word or deed.

The Committee found that the Respondent's actions constituted a violation of the rule of impartiality. Appendix C, Chapter 1 (A)(III)(A): "A mediator must demonstrate impartiality in word and deed. A mediator must scrupulously avoid any appearance of partiality. Impartiality means freedom from favoritism, bias or prejudice."

Confidentiality

Allegation: The mediator failed to maintain confidentiality as required in Appendix C, Chapter 1(A)(II).

Discussion and Findings: The hallmark of confidentiality is set out in Chapter C (A)(II) and "is the attribute of the mediation process which promotes candor and full disclosure. Without the protection of confidentiality, parties would be unwilling to communicate freely, and the discussion necessary to resolve disputes would be seriously curtailed."

There is no evidence that the Respondent breached confidentiality by responding to both attorneys after the mediation. However, by mailing a copy to the local ADR program director, Respondent's actions broke through the confines of confidentiality. There was no valid reason to file this letter with a third party who was at best only administratively related to the mediation. The program director had no need or right to know the details or opinions concerning the mediation as set forth by Respondent in her letter to the parties.

The Committee did not reach the issue of how or under what circumstances a mediator might seek advice on how best to handle a dispute arising out of a mediation. In this case the Respondent included in her letter of September 17, 2009, facts and opinions which should not have been shared.

The Committee found that Respondent violated the principle of confidentiality by providing a copy of her September 17, 2009, letter to the program director.

Conclusion

This case demonstrates that mediators must be careful when communicating with mediation participants and court staff about mediations. In this case, the mediator's single ill-conceived letter to the parties – unsolicited, unnecessary, voluntary and shared with a person who had no need to know its contents – violated party self determination, impartiality and confidentiality. When given a choice, it is always prudent for the mediator to say less about a mediation, not more. The working relationship between mediators and their court ADR program directors is unique and critical to the efficient functioning of the court-connected ADR system. While program directors do not and should not have unlimited access to confidential mediation information, some circumstances nonetheless call for mediators and program directors to discuss sensitive information about a mediation with some candor.[3] For example, a program director may advise a mediator on how to best to handle an ethical dilemma that arose during a session. Or a mediator may alert a program director to potential safety issues arising out of a session. If the mediator feels the need to talk with the program director during a session, the mediator should seek the consent of the parties first if doing so will not endanger the participants or significantly enflame the discussion. The mediator should reveal confidential information to the program director only to the extent necessary.[4]

Mediators should be wary of the zealous pursuit of settlement, which might lead a mediator astray from the strict adherence to ethical process. External pressures such as a desire for a strong settlement rate should be tempered to avoid taking shortcuts or applying pressure on the parties rather than allowing the parties to arrive at agreeable solutions themselves. Honoring party self-determination requires time and patience. A mediator's credibility is built on a foundation of skill, fairness, integrity, and ethical conduct. Mediators should take utmost care to protect their professional reputations; after all, they have the most at stake in their reputations. Lastly, this case emphasizes that a mediator's ethical obligations to a case and to its participants do not end with the conclusion of the mediation session but continue indefinitely. There is no point in time after the mediation when the parties' right of self-determination should be subjugated to the mediator's intervention. There is no point in time after the mediation when the mediator should not be conscious of the appearance of impartiality or bias. There is no point in time after the mediation when it is ethical to break the mediator's promise of confidentiality.

July 26, 2012

Footnotes

[1]Before final adjudication, the mediator filed a Petition for Voluntary Discipline accepting "responsibility for the clear violations (i.e., sending the letter and demonstrating bias)" and "acknowledge[d] fault in the more complicated, but clearly troubling issues (breach of self determination and confidentiality)." This Petition was accepted by the Ethics Committee. The mediator agreed to a 30-day suspension as a registered mediator.

[2]During the pendency of the Complaint, Petitioner appealed an adverse decision by the Ethics Committee to the Com-

COURT AND OTHER OPINIONS DISCUSSED IN THIS ISSUE

mission on Dispute Resolution, raising jurisdiction among other issues. Respondent had argued that even if the Commission claimed jurisdiction over the mediation session itself, her complained-of unethical conduct occurred after the actual mediation session and therefore fell outside the Commission's jurisdiction. The Commission did not agree: "Whereas the ending of the mediation session ceases any interplay between the parties, the attorneys and the mediator, it is axiomatic that a mediator's ethical responsibilities to a mediated case, to the parties, to the attorneys, and to any settlement do not end with the mediation session itself but continue indefinitely; and, therefore, we disagree." The Commission affirmed the Committee's finding of jurisdiction over the mediation session.

[3]Of course, those circumstances involve a mediator talking with the program director *responsible for the administration of the case in question*, not any program director. The Uniform Rules for Dispute Resolution Programs, Appendix A to the ADR Rules, Section 7, clearly expect that neutrals will need to communicate with their program directors. Neutrals are reminded to review the confidentiality rules and the exceptions to confidentiality in the ADR Rules, VII.A. and B.

[4]While this case was court-connected, bringing it within the jurisdiction of the commission, the case was neither court-ordered nor court-referred; it was not administered through the local ADR Program, and the local program was not responsible for servicing it or monitoring it. It was not a local program case; therefore, the local program director had no need or right to know the details that were disclosed in the letter.

NY State Council on Divorce Mediation

Back To Contents

Court and Other Opinions Discussed in This Issue

This opinion is discussed in "When Does Collaborative Law Begin?", starting at p. 12, above.

Decided on June 28, 2012

Supreme Court, Westchester County

Monica Mandell, Plaintiff,
against
Mitchell Mandell, Defendant.

16941/2011

16941/2011

Alan D. Scheinkman, J.

In this matrimonial action, Defendant seeks to disqualify Ellen Jancko-Baken, Esq.[FN1] as counsel for Plaintiff based on his contention that she represented Plaintiff in a "Collaborative Law" process prior to the commencement of this action.

The parties were married on August 28, 1998. They have three minor children. Defendant moved out of the marital residence on October 1, 2011. At the time Defendant moved out of the residence, he was working as an attorney at a law firm earning base salary of approximately $260,000.00 and Plaintiff was volunteering as a social worker and earning no income.

In late October of 2011, Plaintiff contacted Defendant to notify him she had retained counsel to commence a divorce and was interested in pursuing a "Collaborative Law" process. This is a form of dispute resolution in which the parties retain counsel specially trained in collaborative law and enter into a contract to negotiate a settlement without involving the Court or a third party arbitrator. As part of the process the parties may agree to engage neutral experts to assist them, such as accountants or appraisers.

One of the principal features of the process is that, if the matter is not resolved, the attorneys who represented the parties in the unsuccessful effort to collaborate upon a settlement may not represent the parties in the ensuing litigation. The theory is that pre-litigation posturing is eliminated and clients have a greater degree of influence in candid negotiations in which the clients participate directly (see Cochran, Legal Ethics and Collaborative Practice Ethics, 38 Hofstra L Rev 537, 542 [2009]). Another way of looking at it is that the prospective expense of having to hire new lawyers if the matter has to go to court will motivate the parties to continue working toward a mutually agreeable resolution (see Office of Court Administration, Collaborative Family Law Center, http://www.nycourts.gov/ip/collablaw/index.shtml). Having counsel agree to absent themselves from any future litigation makes it clear that counsel are committing themselves to the process of dispute resolution by limiting their engagement to that endeavor and counsel have an economic incentive to stick with the process (Lavi, Can the Leopard Change His Spots?! Reflections on the Collaborative Law' Revolution and Collaborative Advocacy, 13 Cardozo J. Conflict Resol. 61, 68-69 [2011]). Further, counsel have no incentive to abandon the process since their role, and their fees, would end. Conversely, counsel have no personal monetary incentive to encourage litigation.

On November 1, 2011, Ms. Jancko-Baken wrote to Defendant to advise him that the firm of Fredman Baken and Kosan had been retained by Plaintiff. Ms. Jancko-Baken's letter expressed her client's desire to resolve issues relating to the divorce using the Collaborative Law process. However, the letter also stated Plaintiff's insistence that her immediate interim financial concerns be addressed before moving forward with the process, to wit, "While this need not be, and in fact, should not be, adversarial, if the temporary issues are not addressed and resolved immediately, I see no other option" (Affirmation of Daniel Molinoff, Esq., dated March 5, 2012 ["Molinoff Aff."], Ex. A). The retainer agreement between Plaintiff and her attorneys expressly contemplated representation in settlement negotiations and representation in contested litigation. As to the latter, the retainer agreement covered such matters as the payment of a trial retainer, disbursements for deposition and court transcripts, and applications to the court for an award of legal fees.

Defendant then retained counsel trained in collaborative law and signed a Collaborative Law retainer with the firm of Kramer Kozek. The retainer agreement between defendant and his counsel was entitled limited scope retainer for collaborative law. While it covered some litigation-related activities, such as the expenses of court reporters and stenographers, it specifically stated that the law firm "will not be permitted to represent you in any court-related matter against your spouse" and that the firm had no obligation to represent the defendant in any

COURT AND OTHER OPINIONS DISCUSSED IN THIS ISSUE

litigation or appeal.

The parties and their counsel met on November 17, 2011. Plaintiff's counsel prepared and circulated an agenda for the meeting. One of the first issues on the agenda for the meeting was a review of the "Participation Agreement". In Collaborative Law, the participation agreement is the contract which binds the parties to abide by the rules of the process. The agenda recited that the parties and counsel were to discuss the ground rules of collaborative law meetings, describe the alternatives to Collaborative Law, describe the roles of the parties and counsel in the process, and ask each person why he or she has chosen to participate in the collaborative law process and record the answers. After this process was complete, the agenda called for: "Ask if there are any final questions and then all sign the Participation Agreement in four duplicate originals". According to the agenda, after the Collaborative Law process was confirmed and established, the parties were to proceed to resolve the immediate issues, establish timetables for financial disclosure, discuss a valuation date, determine the agenda for the next meeting, and develop their "homework" assignments.

It is undisputed that the Participation Agreement was not signed on November 17, 2011. In his affirmation in support of the motion, Defendant's present counsel, who was not present at the meeting, states (without providing any factual basis for his assertion) "apparently it was understood that this would be done at the next meeting, which was scheduled for two weeks later" (Molinoff Aff. ¶24). According to Defendant, the parties read aloud the ground rules and repeated their statements to each other so that each understood what the other had said. Defendant states that after two hours of discussion a substantial amount had been accomplished but the "Participation Agreement was not signed by the parties and was left, instead to the next session, which was scheduled for November 30, 2011" (Affirmation of Mitchell G. Mandell, dated March 5, 2012, ¶8 ["Mandell Aff."]).[FN2] Defendant does not assert what was discussed in relation to the Participation Agreement nor provide an explanation as to why the execution of the document was deferred.

Plaintiff's attorney alleges that the Participation Agreement was not signed because Defendant refused to enter into an interim support agreement acceptable to Plaintiff (Affirmation of Ellen Jancko-Baken, dated March 22, 2012, ¶14 ["Jancko-Baken Aff."). Plaintiff herself states that her attorney told her that an honest commitment to the collaborative law process could not be made if one party perceived that the other party was unwilling to make an interim support arrangement so that the parties could focus discussions on the ultimate resolution of the issues (Affidavit of Monica Mandell, sworn to March 23, 2012, ¶6). She asserts further that she agreed with her attorney that they would not sign the Participation Agreement until they were both satisfied that Defendant made an honest commitment to the process by agreeing to a resolution of the interim support dispute (*id.*, ¶7).

While the minutes of the meeting of November 17, 2011 prepared by the plaintiff's counsel (Molinoff Aff., Ex. F) confirm that interim support was discussed without a firm resolution, and that review of the Participation Agreement was placed on the agenda for the next meeting, the minutes do not indicate that there was any discussion of the Participation Agreement at all, much less any discussion as to why the parties had not signed it. Defendant denies Plaintiff's attorney ever stated that the start of collaborative discussion was being delayed due to the dispute over interim support; Defendant also denies that the plaintiff's counsel ever disclaimed that the collaborative law process had not, in fact, started (Mandell Aff., ¶9). This being said, Defendant does not deny knowing that the November 17, 2011 meeting ended without the Participation Agreement being signed. He also does not deny that he proceeded with the discussions of interim issues and other matters on November 17, 2001 knowing that the Participation Agreement had not been signed.

Defendant concedes that he was advised prior to the start of the next meeting that Plaintiff's counsel would not sign the Participation Agreement because she wanted to reserve the option of moving for interim support if the collaborative process fell apart (*id.*, ¶10). Despite having knowledge of the position of Plaintiff's counsel, Defendant elected to proceed with the second meeting, on the theory that "we were clearly working within the collaborative process even without a signed Participation Agreement" (*id.*, ¶11). The second meeting proceeded but the issue of temporary support was not resolved and the Participation Agreement was not signed. A third meeting was held with the same result. Plaintiff commenced this action for divorce on December 15, 2011.

In support of his motion to disqualify Plaintiff's counsel, Defendant argues that by attending meetings with lawyers trained in Collaborative Law and discussing matters that were to be part of the collaborative process, the parties engaged in the Collaborative Law process, notwithstanding the lack of a signed Participation Agreement. Defendant contends that the attorney for the plaintiff should be disqualified because entering into the Collaborative Law process necessitates that the lawyers retained for that purpose may not litigate the matter should he collaborative process break down. Defendant asserts that by participating in the collaborative process, Plaintiff's counsel learned confidential information and must be disqualified. He states that to allow Plaintiff's counsel to evade

Court and Other Opinions Discussed in This Issue

disqualification because she did not sign the Participation Agreement, though she did participate in three negotiation sessions, "would render the disqualification provision illusory" (Mandell Aff., ¶¶29-30).

In opposition to the motion, Plaintiff's counsel contends that the cornerstone of the collaborative law process — the bright line indicia of whether the parties have entered into such a process — is the Participation Agreement (Jancko-Baken Aff, ¶19). She claims that the parties never got to the point of signing a Participation Agreement because of the dispute over temporary support (*id.*). Counsel argues that collaborative law is a creature of contract and since the parties never entered into a Participation Agreement, there is no basis to disqualify her.[FN3] Plaintiff submits an affirmation from Lawrence Jay Braunstein, Esq., who is a trained collaborative attorney and member of the Board of Managers of the Rockland-Westchester Collaborative Lawyers Association, a group of attorneys in those two counties who have all had collaborative law training. He asserts that parties cannot be said to have engaged in a collaborative law process without a signed Participation Agreement being in place. Without such an agreement, he says, "the parties never entered into the Collaborative Law process, no matter how long or how intensely the parties may have discussed the notion of collaborating'" (Affirmation of Lawrence Jay Braunstein, dated March 22, 2012, ¶2).

The Collaborative Law process is a relatively new concept and there are few New York decisions touching on it (*see H.K. v. A.K.,* 35 Misc 3d 1210(A) [Sup Ct Monroe County 2012] [holding that a breach of the disclosure provisions of a collaborative law agreement does not provide a new or additional basis for voiding separation agreement beyond the legal standards which generally govern the validity of marital agreements]). However, it cannot be denied that Collaborative Law is, at least for now in New York, a voluntary process.

The Collaborative Law process is a relatively new concept and there are few New York decisions touching on it (*see H.K. v. A.K.,* 35 Misc 3d 1210(A) [Sup Ct Monroe County 2012] [holding that a breach of the disclosure provisions of a collaborative law agreement does not provide a new or additional basis for voiding separation agreement beyond the legal standards which generally govern the validity of marital agreements]). However, it cannot be denied that Collaborative Law is, at least for now in New York, a voluntary process. There is no room to argue that, whatever the advantages of collaborative law might be, a court could compel parties to engage in such a process without their consent. Even in the states which have statutes providing for a collaborative matrimonial law process, entry into the process is dependent upon the execution of an agreement by the parties (see No. Car. Gen. Stat. Ann. § 50-72; Vernon's Texas Statutes and Codes Annotated, §15.102). For example, Texas law clearly states a collaborative family law process begins when the parties sign a collaborative family law participation agreement and that the court may not order a party to participate in a collaborative law process over that party's objection (*id.*).

While the parties devote considerable energy to debating whether they did or did not enter upon a collaborative law process, this Court views that discussion, while interesting, as a diversion from the real issue at hand — whether there is an agreement between the parties, enforceable by Defendant, that Plaintiff's counsel may not represent her in a contested matrimonial action between the parties.

It seems manifest that parties to any dispute or litigation — matrimonial matters included — are free, if they wish, to engage in settlement discussions, whether before, during or after the commencement of litigation. Often times, settlement discussions proceed without any written agreement as to the ground rules for the discussion. In the absence of a written agreement, evidence of the parties' settlement offers or even evidence of conduct or statements made during compromise negotiations are inadmissible (CPLR 4547). It is also evident that the parties have wide latitude in establishing the methods, ground rules, and conditions of any settlement or compromise negotiations. In matrimonial matters, parties could opt for direct negotiations (either with or without counsel), mediation (whether conducted by a judge, non-judicial staff, a court-annexed mediator, a professional mediator, or even a third-party such as a family member or friend), or even, subject to public policy limitations, arbitration. There is nothing particularly unusual about some of the major components of collaborative law. For one, it is not uncommon for the parties to agree to keep their settlement discussions between themselves; as noted, the law so provides anyway. For another, it is not uncommon for the parties to agree upon financial experts, such as accountants and experts, to assist both of them; parties in active litigation regularly agree to jointly retain a common appraiser. It is also common for mediators and arbitrators to have special training, just as collaborative lawyers do.

Perhaps the most distinguishing feature of collaborative law, however, is the commitment of counsel not to represent their clients in future litigation. Disqualification of a party's chosen counsel is a severe remedy which is ordered by courts only in narrow circumstances where counsel's conduct would taint the trial *(see Matter of Dream Weaver Realty, Inc.*, 70 AD3d 941 [2d Dept 2010]). In general, disqualification is ordered only where a prior attorney-client relationship existed and the former

COURT AND OTHER OPINIONS DISCUSSED IN THIS ISSUE

and current representation is both adverse and substantially related (*id.*) or where the concerns of the advocate-witness rule are implicated (*see S & S Hotel Ventures Ltd. Partnership v 777 S.H.* Corp., 69 NY2d 437 [19787]). The courts are most reluctant to interfere with a party's selection of counsel: "A party's entitlement to be represented in an ongoing litigation by counsel of his or own choosing is a valued right which should not be abridged absent a clear showing on which the party seeking disqualification carries that burden that counsel's removal is warranted" (*Goldstein v. Held*, 52 AD3d 471, 472 [2d Dept 2008]). The right to choose one's own lawyer has particular relevance in matrimonial and family law matters which are personal and intimate in nature and a relationship marked by trust and confidence between attorney and client is vital.

Here, Defendant suggests that disqualification is warranted because Plaintiff's counsel, by her participation in the collaborative law process, became privy to confidential information. Putting aside that Defendant does not identify what confidential information was disclosed and does not explain how plaintiff's counsel's access to such information would cause him prejudice, Defendant's contention is, in the absence of a binding confidentiality agreement, rather extraordinary. Collaborative law is, at bottom, a settlement technique. It is a quite common, if not everyday, practice for attorneys and clients to share information and engage in settlement dialogues which take a myriad of forms, such as direct communication, mediation, neutral evaluation and others. It would be quite astounding if an attorney, having obtained information during settlement negotiations, would then be disqualified from participation in litigation. As previously noted, statute protects the confidentiality of the content of the negotiations and does so in order that settlement negotiations be fostered. It would be a distinct chill to settlement negotiations if attorneys had to avoid obtaining information from opposing parties and counsel in order to avoid being disqualified. Clients would be ill-served in that they might well decline to participate in candid negotiations lest they be deprived of the services of their trusted counsel and put to the expense, often considerable, of having to compensate another lawyer to become familiar with the matter, as well as suffer delay in the process. Defendant has cited no authority for the proposition that an attorney's exposure to confidential information during settlement negotiations compels the disqualification of counsel. This Court declines to create one.

This said, it is also manifest that, absent some public policy constraint, parties are free to develop and implement their own ground rules for settlement negotiations. The collaborative law Participation Agreement that was drafted for these parties is but an illustration of an agreement to govern settlement discussions. But settlement discussions may — and often do — proceed without a written, or even oral, agreement on ground rules.

In essence, defendant argues that plaintiff and her counsel agreed to the terms of the Participation Agreement by their actions in participating in meetings with Defendant and his counsel. Plaintiff and her counsel argue that they did not so agree and that any such agreement, to be enforceable, must be in writing.

While agreements to arbitrate need not be signed, it is generally considered necessary for there be a written arbitration provision to which the parties have manifested their consent (see CPLR 7501; *see Ernest J. Michel & Co., Inc. v. Anabasis* Trade, Inc., 50 NY2d 951 [1980]). No case has been cited, or found by the Court, in this State in which a court held that agreements to mediate, must be in writing or signed to be enforceable. There is, however, a nuance to this case. Since this is a matrimonial action, no agreement made before or during the marriage is enforceable within the action unless the agreement has been duly signed and acknowledged by the parties (DRL §236, Part B, subd. 3; *Matisoff v. Dobi*, 90 NY2d 127, 659 N.Y.S.2d 209, 681 N.E.2d 376 (1997). While there are cases in which courts have directed the parties to matrimonial litigation to engage in mediation, in such cases the mediation provision was embedded in a valid and enforceable matrimonial agreement (*see Edwards v Poulementis*, 307 AD2d 1051 [2d Dept 2003[). The courts cannot enforce provisions for alternative dispute resolution which are contained in writings executed without compliance with the formalities required by statute (*see Arabian v. Arabian,* 79 AD3d 517 [1st Dept 2010] [provision for arbitration in rabbinical court unenforceable where not set forth in signed, acknowledged writing]). Nor may the courts enforce resolutions reached in mediation conducted during marriage where the resolutions are not embodied in duly signed and acknowledged writings (*see Wetherby v Wetherby*, 50 AD3d 1226 [3d Dept 2008]).

Though it is true that defendant does not here seek to compel plaintiff to engage in collaborative law, he is seeking to enforce the provision in the unsigned Participation Agreement requiring plaintiff's counsel to step aside from representing plaintiff in a future contested matrimonial action, specifically this matrimonial action. This he may not do.

The Participation Agreement prepared for these parties (Molinoff Aff., Ex. E) contains an Article VIII which states:

Unless otherwise agreed, prior to reaching final agreement on all issues, no Complaint will be filed or served, nor will any other motion or document be prepared or filed which would initiate Court intervention.

Court and Other Opinions Discussed in This Issue

The parties understand that their Collaborative Law attorneys' representation is limited to the Collaborative Law process....[T]he parties mutually agree that they will not authorize their collaborative attorneys to represent them or appear as counsel for them with respect to this matter in any Court or on any Court filings other than a mutually agreed upon submission of the documents necessary to finalize the parties' divorce.

The Court notes that Article IX of the Participation Agreement provides that either party can opt out of the collaborative process at any time, though, absent an emergency, a 30 day waiting period is imposed before "any Court hearing" so that the other party can retain counsel. Additionally, Article VII states that a temporary or interim agreement, if made, should be reduced to a "duly signed writing" which, should a party withdraw from the process, may be presented to the Court as the basis for an order.

The Participation Agreement prepared for the parties contains signature blocks for signatures of the parties and their counsel as well as form acknowledgments to be filled in by the notaries public before whom the signatures of the parties were to be acknowledged.

It is undisputed that neither Plaintiff nor Defendant ever signed the Participation Agreement and neither did their counsel. While Defendant may have attended the initial November 17, 2011 meeting with the reasonable expectation that both parties intended to sign the Participation Agreement at that meeting, he certainly was not entitled to perceive that the execution of the Agreement was guaranteed. Until the Agreement was duly executed, either party could change his or her mind. The agenda for that meeting provided that the execution of the Agreement would be taken up before the item entitled "**Resolve immediate issues**"(Molinoff Aff., Ex. D). But it is undisputed, and confirmed by the meeting minutes (*id*., Ex. E), that immediate issues involving interim support, automobiles, and jewelry were discussed, although the Participation Agreement was left unsigned.[FN4] If the due execution of the Participation Agreement was that important to Defendant, he could have preserved his position by insisting that substance not be discussed until the Agreement was signed. He acknowledges that he was told prior to the second meeting that Plaintiff's counsel was refusing to sign the Agreement and despite his being "dismayed" with that, he proceeded with two more meetings.

The Court concludes that, because the Participation Agreement was not signed and acknowledged by the parties, it is unenforceable in this matrimonial action.

In view of this determination, the Court need not consider whether any of the provisions of the Participation Agreement violate any ethical restrictions or public policy considerations. Rule 5.6(a)(2) of the Rules of Professional Conduct, as adopted in New York, prohibits an attorney from participating in offering or making an agreement in which a restriction on a lawyer's right to practice is part of the settlement of a client controversy. In *Jarvis v Jarvis*, 758 P2d 244 (Kan Ct App 1988), as part of a separation agreement, the wife agreed to a "condition precedent" that she would never again retain a particular attorney to advise her with respect to either the pending divorce case or a future litigation. After the divorce, the wife retained the named attorney in order to seek an increase in support and to invalidate the restriction on the attorney's retention. The court invalidated the restriction, holding that it indirectly restricted the attorney's right to practice law as a condition to the divorce settlement and it limited the wife' freedom in choosing an attorney. However, *Jarvis* was distinguished by the First Department in *Feldman v Minars*, 230 AD2d 356 (1st Dept 1997), where the court agreed with academic criticism of the prohibition against restrictive covenants, including the observation that willing participants should be able to agree as they wish. The Appellate Division upheld a settlement which was induced by an agreement by plaintiff's attorneys not to represent other clients in similar litigation with the settling defendants. Similarly, in *Blue Cross and Blue Shield of New Jersey v Philip Morris, Inc*., 53 F.Supp.2d 338 (EDNY 1999), the court upheld an agreement in which plaintiffs promised not to seek to disqualify the law firm for defendant based on firm's ongoing representation of plaintiffs in unrelated matters, in exchange for the law firm's promise not to appear in one of three coordinated actions brought by plaintiffs.

It has been suggested that a collaborative law participating agreement in which counsel agree not to participate in contested litigation representation does not implicate the provisions of Rule 5.6(a)(2) since the participating agreement is not itself the settlement of a client controversy (see Cochran, *Legal Ethics and Collaborative Practice Ethics*, 38 Hofstra L Rev 537, 566 [2009]). While this is so, the distinction may be unsatisfying as it is an agreement as to the process for settlement. More convincing may be the point that the Rule was intended to prohibit a lawyer from agreeing not to represent third parties (*id*). It seems clear that a lawyer could reasonably agree with a matrimonial client to limit the scope of the representation to the negotiation of a settlement and exclude an obligation to provide litigation representation (see Rule of Professional Conduct 1.2[c]). Whether such an agreement can be enforced by the client's adversary is a matter for another day.

Based upon the following papers, numbered 1-27, read on this motion by Defendant Mitchell Mandell to disqualify Ellen Jancko-Baken, Esq. as counsel for the plaintiff:

COURT AND OTHER OPINIONS DISCUSSED IN THIS ISSUE

Order to Show Cause, Affirmation and Exhibits-1-12

Affirmation in Opposition and Cross Motion and Exhibits-13-16

Reply Affirmation and Exhibits-17-18

It is hereby

ORDERED that defendant's motion is denied in its entirety; and it is further

ORDERED that all other requests for relief not specifically addressed herein are denied.

Footnotes

Footnote 1: Ms. Jancko-Baken is a member of the law firm of Fredman, Baken & Kosan LLP. This Justice was a member of a predecessor firm, a relationship which ended in December, 1996, with Ms. Jancko-Baken being an associate attorney at the time. While disclosure of this long-ago relationship is made, disqualification is not required (see Advisory Committee on Judicial Ethics Op. 00-67) and the Court is confident in its ability to decide all matters in this action fairly and impartially.

Footnote 2: The Court notes that defendant submitted an affirmation, rather than an affidavit. Since defendant is a party to the action, the use of an affirmation is inappropriate (see CPLR 2106; *LaRusso v. Katz*, 30 AD3d 240, 243 [1st Dept 2006]). But since the plaintiff has not objected to the defendant's use of an affirmation, and the court would need to permit the defendant to renew the motion to cure the defect *(see Brightly v Liu*, 77 AD3d 874 [2d Dept 2010]), thus delaying the resolution of this issue further, the Court has elected to disregard the defect this time.

Footnote 3: In the opposition papers, Plaintiff inserts requests for the imposition of sanctions and an award to her of counsel fees. These requests are not addressed as Plaintiff did not give proper notice of an application for affirmative relief and, in any event, the Court does not view Defendant's motion as frivolous and Plaintiff failed to submit documentation detailing the services provided at an alleged cost of $6,957.40 nor a basis for the request of $25,000 in legal fees.

Footnote 4: While CPLR 4547 would seemingly bar consideration of these settlement negotiations, neither party has objected to the Court's consideration of the allegations made by each party as to the discussions during their settlement efforts.

This opinion is discussed in **Case Note on *Bott* (Mass resigned attorney wants to be a mediator),** starting at p. 14, above.

Back To Contents

Court and Other Opinions Discussed in This Issue

This opinion is discussed in "**May Former Lawyers Who Have Been Disciplined Act as Mediators? (And So Many Other Questions)",** starting at p. 14, above.

In the Matter of Anthony Raoul Bott

Docket SJC-10935

Dates: January 4, 2012 - June 5, 2012

Present: *Ireland, C.J., Spina, Cordy, Botsford, Gants, Duffly, & Lenk, JJ.*

County: *Suffolk*

Keywords: Unauthorized Practice of Law. Supreme Judicial Court, Practice of law. Attorney at Law, Disciplinary proceeding.

Information filed in the Supreme Judicial Court for the county of Suffolk on March 24, 2005.

A petition, filed on September 10, 2010, was reported by Botsford, J.

DUFFLY, J. We address whether an attorney (petitioner) whose resignation from the practice of law was accepted as a disciplinary sanction may now work, either for pay or on a volunteer basis, as a mediator.(1) We conclude that, although mediation does not in all circumstances constitute the practice of law, an attorney who has resigned from the practice of law while the subject of disciplinary investigation under S.J.C. Rule 4:01, § 15, as appearing in 425 Mass. 1319 (1997), or who has been disbarred or suspended from the practice of law under S.J.C. Rule 4:01, § 8, as appearing in 453 Mass. 1310 (2009), may be prohibited from serving as a mediator when to do so would be perceived by the public as an extension of the attorney's practice of law, or when the conduct of the mediation is so closely related to the practice of law as to constitute legal work within the meaning of S.J.C. Rule 4:01, § 17 (7), as amended, 453 Mass. 1307 (2009). We remand to the county court for a determination whether it is appropriate, in light of our opinion, that the petitioner engage in mediation, and, if so, to impose any conditions necessary to protect his mediation clients and to ensure the integrity of the legal profession.

Background. On May 24, 2005, the petitioner submitted an affidavit of resignation pursuant to S.J.C. Rule 4:01, § 15; his resignation was thereafter accepted as a disciplinary sanction. Matter of Bott, 21 Mass. Att'y Discipline Rep. 64 (2005).(2)

During the spring of 2009, the petitioner successfully completed a mediation training program. In September, 2010, he filed a petition for relief in the county court pursuant to G. L. c. 211, § 3, requesting permission to serve as a mediator. The single justice ordered the petitioner to submit an affidavit describing the type of mediation work he proposed to undertake and the anticipated conditions of engagement, and reserved and reported the case to the full court.(3). Discussion. 1. Practice of law. We have said that "what constitutes the practice of law" is a subject that lies "within the exclusive power of the courts to determine." Real Estate Bar Ass'n for Mass. v. National Real Estate Info. Servs., 459 Mass. 512, 517 (2011) (REBA), citing Lowell Bar Ass'n v. Loeb, 315 Mass. 176, 180 (1943). We have noted, too, that the practice of law is not easily defined. "Whether a particular activity constitutes the practice of law 'must be decided upon its own particular facts . . . .'" REBA, supra, quoting Matter of the Shoe Mfrs. Protective Ass'n, 295 Mass. 369, 372 (1936).

Many activities generally associated with the practice of law "are also undertaken by persons in other professions and occupations." REBA, supra at 518. We have rejected the proposition that "whenever, for compensation, one person gives to another advice that involves some element of law, or performs for another some service that requires some knowledge of law, or drafts for another some document that has legal effect, he is practising law." Id., quoting Lowell Bar Ass'n v. Loeb, supra at 181. "[F]or an activity to be considered the 'practice of law' such that a nonlawyer cannot perform it without committing the unauthorized practice of law, the activity itself must generally fall 'wholly within' the practice of law." REBA, supra, and cases cited.

Although mediation is not generally subject to regulation or licensure in Massachusetts, the Uniform Rules on Dispute Resolution, S.J.C. Rule 1:18, as amended, 442 Mass. 1301 (2005) (Uniform Rules), offer ethical principles and guidance for mediation practice when performed as a court

Court and Other Opinions Discussed in This Issue

-connected dispute resolution service.(4) Rule 2 of the Uniform Rules, 427 Mass. 1303 (1998), defines "[m]ediation" as "a voluntary, confidential process in which a neutral is invited or accepted by disputing parties to assist them in identifying and discussing issues of mutual concern, exploring various solutions, and developing a settlement mutually acceptable to the disputing parties."(5) The Uniform Rules also set forth the required training, professional qualifications, and experience necessary for court-connected mediators.

Any individual who seeks to serve as a mediator in court-connected dispute resolution, including an attorney, must undertake the prescribed mediation training.(6) The rules do not provide that training in the law is a substitute for training as a mediator, nor do they suggest that a legal education enhances or contributes to skill as a mediator. Indeed, the rules proscribe the use of "[a]cademic degrees and professional licensure" as "preclusive criteria . . . in qualifying mediators." Rule (8) (b) (iii) of the Uniform Rules, 441 Mass. 1302 (2005).(7) A mediator is not permitted to "provide legal advice, counseling, or other professional services in connection with the dispute resolution process," even if that individual is an attorney. Rule (9) (c) (iv) of the Uniform Rules, 427 Mass. 1316 (1999).

We conclude that, as a general proposition, a person does not engage in the practice of law when acting as a mediator in a manner consistent with the Uniform Rules.

2. Legal work under S.J.C. Rule 4:01, § 17 (7). We next consider whether mediation, when performed by an attorney who has resigned from the practice of law while the subject of disciplinary investigation, or has been disbarred or suspended from thepractice of law, constitutes legal work in the context of bar discipline matters under S.J.C. Rule 4:01.

Citing S.J.C. Rule 4:01, § 17 (7), which precludes a disbarred or suspended lawyer, or one who has resigned while the subject of disciplinary investigation, from "engag[ing] in legal or paralegal work," bar counsel argues that the category of "legal . . . work" contemplated therein is broader than the practice of law, and contends that, when performed by a lawyer in one of those categories, mediation may be prohibited legal work. We do not agree with bar counsel's reading of the rule, and conclude that "legal . . . work" means the practice of law.

The term "legal . . . work" appears only in § 17 (7) and (8) of S.J.C. Rule 4:01. Section 17 (7) provides that, with the exception of employment as a paralegal subject to conditions and limitations set forth in S.J.C. Rule 4:01, § 18 (3), as appearing in 453 Mass. 1315 (2009):

[N]o lawyer who is disbarred or suspended, or who has resigned or been placed on disability inactive status under provisions of this rule shall engage in legal or paralegal work, and no lawyer or law firm shall knowingly employ or otherwise engage, directly or indirectly, in any capacity, a person who is suspended or disbarred by any court or has resigned due to allegations of misconduct or who has been placed on disability inactive status."

Section 17 (8) of S.J.C. Rule 4:01, as appearing in 453 Mass. 1314 (2009), provides that any such lawyer found to have engaged "in legal or unauthorized paralegal work . . . may not be reinstated until after the expiration of a specified term determined by the court."

Prior to the 2009 amendment, § 17 (7) did not include the term "legal . . . work," and § 17 (8) did not include the phrase "unauthorized paralegal work." The notice inviting comment concerning the proposed amendment to the rule stated: "The proposal amends S.J.C. Rule 4:01 § 17 (7) and (8) to provide that lawyers found to have engaged in the practice of law or unauthorized paralegal work while suspended, disbarred, or subject to a disciplinary resignation, may not be reinstated until after the expiration of a 'specified term determined by the court.'"(8)

That "legal . . . work" refers to the practice of law is apparent from other provisions in § 17, such as those describing the actions a lawyer must take following suspension, disbarment, or disciplinary resignation. Those requirements include that the lawyer notify clients "that he or she is disqualified from acting as a lawyer after the effective date thereof," S.J.C. Rule 4:01, § 17 (1) (c), as appearing in 425 Mass. 1321 (1997), and notify all parties in pending matters that "the lawyer . . . is disqualified from "acting as a lawyer," S.J.C. Rule 4:01, § 17 (1) (d), as appearing in 425 Mass. 1321 (1997). Additionally, S.J.C. Rule 4:01, § 17 (3), as appearing in 425 Mass. 1321 (1997), provides that, after entry of orders imposing disbarment or suspension or accepting resignation, "the lawyer shall not accept any new retainer or engage as lawyer for another in any new case or matter of any nature," and a copy of the order must promptly be transmitted to "each court in the Commonwealth" where the lawyer practiced. S.J.C. Rule 4:01, § 17 (4), as appearing in 425 Mass. 1321 (1997). These provisions mandate that the disciplined lawyer cease the practice of law. Section 17 (7) and (8) enforce that mandate by providing for sanctions against the disciplined lawyer for noncompliance, and by prohibiting lawyers and law firms from aiding in the un authorized practice of law by engaging the disciplined lawyer.

Bar counsel argues that bar discipline decisions have defined "legal . . . work" to include activities commonly performed by lawyers in conjunction with their practice of law, even if those activities are also performed by nonlawyers. See, e.g., Matter of Shanahan, 26 Mass. Att'y Discipline Rep. 582, 587 (2010) ("An activity that may not constitute practicing law when performed by another

Court and Other Opinions Discussed in This Issue

category of professional may well become the practice of law when a lawyer, disbarred or not, performs it"); Matter of Eastwood, 10 Mass. Att'y Discipline Rep. 70, 77 (1994) (abstracting records from registry of deeds constitutes practice of law when conducted by suspended lawyer); Matter of Oates, 5 Mass. Att'y Discipline Rep. 274, 278 (1986) (disbarred attorney prohibited from searching land titles because "title searching is commonly perceived by the general public to be a pursuit, if not exclusively within the realm of the legal profession, closely associated with it"). We do not agree that these decisions stand for the proposition that any activity becomes the practice of law solely because it is performed by a lawyer, but do agree that there may be circumstances where work that does not constitute the practice of law when engaged in by nonlawyers may qualify as legal work that a disbarred or suspended lawyer is precluded from performing.

In the context of bar discipline proceedings, it is relevant whether a disbarred or suspended lawyer draws on his or her legal education and experience and exercises judgment in applying legal principles to address the individual needs of clients. Thus, for example, in Matter of Shanahan, supra at 586, an attorney violated a judgment of disbarment by "applying his knowledge of statutory and town bylaw requirements related to permitting, conservation, property subdivision and conveyancing to address the specific needs of his various clients," and by appearing before planning and zoning boards as the clients' representative, "in connection with their legal rights and obligations concerning their property." Id. Cf. REBA, supra at 523-524 (in context of unauthorized practice of law, extent to which drafting and preparation of documents for others may constitute practice of law "depends to some degree on the type of document, whether legal rights and obligations are being established, whether the document involves providing legal advice or a legal opinion, and whether the document is tailored to address a client's individual legal needs").

These decisions have focused also on the extent to which the lawyer engaged in the same work as part of the lawyer's previous legal practice, and whether the work is customarily engaged in by lawyers. "When a discharged lawyer is engaged in the same area and type of work" as he or she was prior to being disbarred, "the issue of public perception becomes particularly problematic." Matter of Shanahan, supra at 587, citing Matter of Rome, 10 Mass. Att'y Discipline Rep. 229, 231-232 (1994). Abstracting records from the registry of deeds has been held to constitute the practice of law when conducted by a suspended lawyer whose practice was almost exclusively in real estate law. Matter of Eastwood, supra at 77 ("because the lawyer's misconduct occurred in real estate matters, it would be inappropriate to set forth an exception to his suspension to allow him to participate in real estate matters in a registry of deeds during the period of his suspension"). See Matter of Oates, supra (disbarred attorney denied leave to maintain his employment searching land titles and issuing title opinions to attorneys because, subsequent to his disbarment, § 17 [7] "in effect, eliminates his client base by prohibiting attorneys from hiring the respondent for any purpose").

We conclude that an attorney who has resigned while the subject of disciplinary investigation, or who has been disbarred or suspended from the practice of law, may be prohibited, in some circumstances, from acting as a mediator. The following considerations are relevant to determining whether mediation or other activities that do not constitute the practice of law when performed by nonlawyers may, in the context of bar discipline cases, nevertheless constitute legal work when performed by a lawyer: (1) whether the type of work is customarily performed by lawyers as part of their legal practice; (2) whether the work was performed by the lawyer prior to suspension, disbarment, or resignation for misconduct; (3) whether, following suspension, disbarment, or resignation for misconduct, the lawyer has performed or seeks leave to perform the work in the same office or community, or for other lawyers; and (4) whether the work as performed by the lawyer invokes the lawyer's professional judgment in applying legal principles to address the individual needs of clients.

3. Application. It may be inferred from the record that, prior to his resignation, the petitioner had not engaged in mediation, and that he does not propose to provide mediation services to attorneys with whom he previously was engaged in the practice of law or to conduct mediation in the same offices from which he previously conducted his law practice. We therefore focus our discussion on whether mediation as performed by the petitioner will invoke his professional judgment in applying legal principles to address the individual needs of mediation clients. The record does not permit a definitive conclusion regarding the extent to which mediation is performed by lawyers in the Commonwealth. Based on a review of literature discussing lawyer mediation, and from the prevalence of rules and standards directed to the practice of mediation by lawyers, however, it appears that many lawyers do offer mediation services. As also appears from these sources, the extent to which a lawyer mediator draws on his or her legal training and experience may depend on the approach or technique employed. Thus, although court- connected mediation in the Commonwealth seems to fall within the scope of "facilitative" mediation (which does not call on the mediator's exercise of professional judgment as a lawyer), a lawyer may also engage in "evaluative" mediation,

COURT AND OTHER OPINIONS DISCUSSED IN THIS ISSUE

in which a neutral evaluates the merits of the case and may offer an opinion about its worth. See generally Riskin, Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed, 1 Harv. Negotiation L. Rev. 7, 26-34 (1996).(9)

In the context of bar discipline cases, therefore, mediation may constitute legal work such that, following disciplinary resignation, suspension, or disbarment, an individual may engage in it only in certain circumstances and under specified conditions. Although we do not preclude the possibility that the petitioner's proposed service may be appropriate, we are unable, on the record before us, to determine whether the petitioner should be permitted to serve as a mediator prior to any future reinstatement as a member of the bar of the Commonwealth.(10)

Conclusion. The case is remanded to the county court for the single justice to determine, on consideration of the concerns articulated in this opinion, whether and under what conditions the petitioner will be permitted to serve as a mediator.

So ordered.

Footnotes

(1) We acknowledge the amicus brief of Community Dispute Settlement Center, Inc.; Family Services of Central Massachusetts; MetroWest Mediation Services, Inc.; North Shore Community Mediation, Inc.; Massachusetts Office of Public
Collaboration; the Mediation Group; Boston Law Collaborative, LLC; and Mediation Works Inc.

(2) The petitioner resigned from the practice of law following an investigation by the Board of Bar Overseers (board) that revealed that he had settled a personal injury claim without informing his client, understated the settlement amount, and converted a portion of the proceeds for his personal use. Matter of Bott, 21 Mass. Att'y Discipline Rep. 64, 64-66 (2005). He ultimately made full restitution to the client. Id. at 66.

The petitioner later pleaded guilty to charges of larceny and forgery. He was sentenced to a period of incarceration followed by ten years' probation, with conditions including that he refrain from legal practice in any jurisdiction during the probationary period.

(3) The petitioner proposes to serve "as a completely neutral mediator" in disputes involving, among other areas, "auto repair/sales, employment, domestic relations, landlord/tenant, real estate matters, contracts . . . , personal injury, and/or [insurance] benefit issues." He intends to work as "an individual mediator" and not in association with any attorney or law firm; he might work with nonattorney mediators, or as an "ombudsman" for a corporate entity. He also anticipates possibly serving as a volunteer mediator under the auspices of an organization primarily composed of nonattorney volunteers to assist claimants at no cost. He would not hold himself out as an attorney, and would make expressly clear that he does not represent any party involved in a mediation and cannot give legal advice.

(4) Rule 2 of the Uniform Rules on Dispute Resolution, S.J.C. Rule 1:18, 427 Mass. 1303 (1998) (Uniform Rules), provides:

"'Court-connected dispute resolution services' means dispute resolution services provided as the result of a referral by a court. 'To refer' . . . means to provide a
party to a case with the name of one or more dispute resolution services providers or to direct a party to a particular dispute resolution service provider."

(5) See also G. L. c. 233, § 23C, which provides for confidentiality of communications and nondisclosure of a mediator's work product, and defines a mediator as:

"[A] person not a party to a dispute who enters into a written agreement with the parties to assist them in resolving their disputes and has completed at least thirty hours of training in mediation and who either has four years of professional experience as a mediator or is accountable to a dispute resolution organization which has been in existence for at least three years or one who has been appointed to mediate by a judicial or governmental body."

6) "A mediator shall successfully complete a basic mediation training course of at least thirty hours and a court orientation . . . . A mediator shall also complete any additional, specialized training required by a Trial Court Department." Rule (8) (c) (i) of the Uniform Rules, 441 Mass. 1302 (2005). Limited exemptions from training are set forth in Rule (8) (k) of the Uniform Rules, 441 Mass. 1302 (2005); training as a lawyer is not among them. See id.

(7) As noted by the amici, a 2011 survey of seventeen organizations providing mediation services in Massachusetts found that nonlawyers accounted for nearly sixty per cent of mediators. They included "social workers, psychologists, law enforcement personnel, paralegals, educators, government employees, business and organizational consultants, human resources professionals, accountants and financial planners, realtors, and civic and community leaders, among others." See Erickson, Two Alternatives to Litigation: An Introduction to Arbitration and Mediation, 60 Disp. Resol. J. 42, 48 (2005-2006) ("Mediators do not have to have a law degree or practice law [although many do]. Mediators often have degrees in construction, economics, business administration, dispute resolution, political science, labor management, psychology, communication or other subjects. Mediators are usually experts in negotiation and conflict resolution and they may have expertise in the subject matter of the dispute").

COURT AND OTHER OPINIONS DISCUSSED IN THIS ISSUE

(8) The genesis of the amendments to S.J.C. Rule 4:01, including those to § 17 (7) and (8), was a request from this court that certain recommendations in the October, 2005, American Bar Association Report on the Lawyer Regulation System of Massachusetts (ABA Report) be implemented. The ABA Report recommended that S.J.C. Rule 4:01, § 18 (3), be amended to prohibit a disbarred or suspended lawyer from working as a paralegal. The report's authors assumed that "improper 'legal work,'" as used in § 17 (8), meant "engaging in the unauthorized practice of law"; they noted that § 18 (3) "does not set forth requirements for the monitoring of . . . paralegal work to ensure that the disbarred or suspended lawyer does not engage in the unauthorized practice of law. Nor does it provide a means by which to ensure that the licensed lawyer or law firm that employs such an individual is not aiding in the unauthorized practice of law." ABA Report, Commentary to Recommendation 12.

(9) Stated generally, the evaluative mediator provides assessments, prediction, or direction, thereby removing some of the decision-making from the parties. The facilitative mediator's conduct is intended to allow the parties to communicate with and understand one another in order to help them make a decision. Riskin, Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed, 1 Harv. Negotiation L. Rev. 7, 26-34 (1996).

(10) Because similar situations may arise in the future, we think it appropriate to enact a rule governing the circumstances and conditions pursuant to which suspended lawyers may, with leave from the board, be authorized to serve as mediators prior to reinstatement, and we refer the matter to the rules committee of this court. Pending the promulgation of any new rule, an attorney who has resigned from the practice of law while the subject of disciplinary investigation under S.J.C. Rule 4:01, § 15, as appearing in 425 Mass. 1319 (1997), or who has been disbarred or suspended from the practice of law under S.J.C. Rule 4:01, § 8, as appearing in 453 Mass. 1310 (2009), or who has been placed on disability inactive status pursuant to S.J.C. Rule 4:01, § 13, as amended, 453 Mass. 1307 (2009), and who seeks to engage in employment as a mediator, may, in accordance with the time frames of such requests set forth in S.J.C. Rule 4:01, § 18 (3), as appearing in 453 Mass. 1315 (2009), seek leave from the court to engage in such employment.

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Back To Contents