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Is Mediation As Practiced By An Attorney Necessarily The Practice Of Law?

Older New York authority treats mediation as the practice of law, perhaps because non-attorneys had not begun to offer mediation services. For example, in Bauerle v. Bauerle, 616 N.Y.S.2d 275 (App. Div. 4th Dept. 1994), a wife moved to disqualify the attorney for the husband in a divorce action. To do so, she needed to prove the existence of a prior attorney-client relationship and that the attorney's current representation was "adverse" and "substantially related" to the prior representation. The wife had never retained the attorney as a mediator, but had met with him for an initial orientation session concerning that possibility. In disqualifying the attorney, the court observed: "That preliminary orientation session is materially indistinguishable from the initial consultation with an attorney wherein information is disclosed in confidence by a prospective client who later decides not to retain the attorney."

Opinion 678 issued by the New York State Bar Association Committee on Professional Ethics in 1996 explicitly applied provisions of the CPR to the conduct of an attorney as a mediator. The specific question, which is closely related to the subject matter of this memorandum, was: "May a lawyer receive referrals from an agency that advertises the availability of divorce mediators?" The question was answered in the negative, based on the provisions of DR2-103(C)(1) (subsequently DR2-103(F)) which limited the kind of referral services that an attorney can use in promoting the "lawyer's services". While the opinion acknowledged that non-lawyers provided mediation services, it commented that "a lawyer may engage in mediation as an aspect of providing legal services. Whether or not one conceives of the lawyer as 'representing the participants in divorce mediation, the lawyer's role as a neutral mediator may include rendering advice about legal questions or preparing a settlement agreement—services that would ordinarily seem to entail the practice of law when performed by lawyers." The opinion acknowledged that other jurisdictions have characterized mediation by lawyers as not constituting the practice of law, but stated that characterization "overlooks the participants' expectations. Participants in divorce mediation cannot be kept unaware of a mediator's professional qualification as a lawyer. ***They are entitled to know the mediator's professional***

qualifications, and it would be deceptive for a mediator who is a lawyer to withhold that fact."

Similarly, Opinion 736 issued by the NYSBA Committee on Professional Ethics in 2001 applied various provisions of the CPR to provide guidance on whether and when "an attorney engaged in matrimonial mediation [may] draft and file a separation agreement and divorce papers that incorporate terms agreed upon by the marital parties in the course of the mediation."

The concept that mediation services differ when provided by an attorney as opposed to a non-lawyer is also embodied in the Guidelines for ADR Neutrals issued by the OCA. The Guidelines distinguish between "mediation", defined as a facilitative process, and "neutral evaluation" defined as "a confidential, non-binding process in which a neutral third party (the neutral evaluator) with expertise in the subject matter relating to the dispute provides an assessment of likely court outcomes of a case or an issue in an effort to help parties reach a settlement". While non-attorneys with the requisite training in mediation techniques can serve as "mediators" as that term is narrowly defined, only attorneys and judges can become "neutral evaluators" or, with the requisite mediation skills training, act as neutrals in "mixed processes" in which both evaluative and facilitative mediation techniques will be used. Similarly, "alternative dispute resolution procedures" are among the areas of "professional practice" qualifying for CLE credit under applicable OCA guidelines. Also relevant is the fact that under the CNA New York Lawyers Professional Liability Policy offered through NYSBA, **"Legal services"** mean: those services, including pro bono services, performed by an **Insured** for others as a lawyer, arbitrator, mediator . . . or other neutral fact finder , , , .

That attorney-mediators are held to higher standards than non-attorney mediators is also reflected in the Rules of Professional Conduct adopted in 2009. Those Rules contain specific provisions defining some of the specific professional obligations of attorney-mediators, notably Rule 1.12 entitled "Special Conflicts of Interest for Former Judges, Arbitrators, Mediators or Other Third-Party Neutrals" and Rule 2.4 entitled "Lawyer Serving as Third-Party Neutral". These rules are consistent with the CPR's approach to regulating the provision of non-legal services by attorneys set forth in DR 1-106 entitled "Responsibilities Regarding Nonlegal Services" and DR 1-107 regarding "Contractual Relationships between Lawyers and Nonlegal Professionals". Under those provisions, when an attorney provides non-legal services, the CPR standards were presumed to apply unless the attorney could prove that the client was informed and understood that the services were not the practice of law. Given the inherently legal components of mediation, it is unlikely that a client would have that understanding.

New York's approach varies from that of the ABA. The ABA, recognizing the split of opinion among the various states, adopted a resolution in 2002 which would clarify that "mediation is not the practice of law," regardless whether the mediator discusses legal issues with the parties. Even the ABA Resolution, however, concedes that to the extent the Settlement Agreement goes beyond the terms of agreement specified by the parties or uses different language, it may constitute the practice of law. Similarly, the ABA,

together with the American Arbitration Association and the Association for Conflict Resolution, adopted Model Standards of Conduct for Mediators, which does not appear to distinguish between mediation when provided by an attorney and by a non-attorney. However, the Standards do distinguish between mediation and "neutral evaluation" even though the latter process is often part of the mediation process, especially when conducted by an attorney.

CONCLUSION

While there is a plausible argument for the proposition that mediation is not the practice of law because no "attorney-client relationship" is formed, the overwhelming weight of authority in New York suggests that it is. Even were it not technically considered the practice of law, attorneys are permitted to provide a wider range of services in the context of mediation than can non-attorney mediators. At the same time, they are held to the same or analogous standards as would apply in the context of a law practice.