

REBUTTAL: Establishing Standards And Norms In Mediation

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In his recent Law360 article titled "[Beware the 'Standard' Mediation Confidentiality Agreement](#)," mediator Jeff Kichaven observes that some mediation confidentiality agreements seek to prospectively release the mediator from liability to a mediation participant for any act or omission that may occur in connection with the mediation. He provides a thoughtful discussion of the potential risks inherent in executing what he characterizes as the "standard" mediation confidentiality agreement. Kichaven asks whether, by signing such an agreement, a lawyer surrenders the power to protect his client against mediator fraud, malpractice or inappropriate mediation conduct.



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The short response to Kichaven's concern is that parties to a mediation should refuse to execute a confidentiality agreement that removes all future recourse against the mediator no matter how egregious the mediator's actions. A mediation confidentiality agreement encourages the parties and their counsel to speak freely and candidly during a mediation without fear that the statements made, or positions taken, will be used against them in a future proceeding.

A confidentiality agreement also affords assurance to the mediator that he will not be required to turn over his notes or testify at a deposition or trial concerning what took place or what was discussed during the mediation. In short, strict confidentiality has always been and continues to this day to be the cornerstone of successful mediation. Nearly every federal district court that has considered the issue is in agreement that mediation requires confidentiality to promote the candor that is critical to its success.

This is not to say that mediation confidentiality should be absolute. Arguably, a confidentiality statement should not be used to shield a mediator from liability for acts of fraud, coercion or conflict of interest. Although some mediators have no doubt engaged in blatant conflict of interest, coercive behavior or outright fraud, these incidents are thankfully infrequent. In a mediation proceeding in which a client is represented by counsel, counsel can simply terminate an improper or abusive mediation by walking out with the client.

The mediation confidentiality agreement adopted by the U.S. District Court for the Southern District of New York explicitly exempts from confidentiality a party's complaint against a mediator arising from the mediation. In pertinent part, the SDNY agreement states, "The parties may not disclose discussions with the mediator unless all parties agree, because it

is required by law, or because otherwise confidential communications are relevant to a complaint against a mediator or the mediation program arising out of the mediation.”

Thus, the “standard” mediation confidentiality agreement that Kichaven discusses would have no place in one court-annexed mediation program in New York. Moreover, in those instances where disputes arise that are not addressed in the mediation confidentiality agreement, New York federal courts recognize a rigorous “special needs” test to evaluate a party’s request for, or to disclose, confidential mediation information. A good discussion of the factors a court will consider in evaluating “special needs” is found in *In re: Teligent Inc*, 417 BR 197 (SDNY Bankruptcy Court 2009).

Over the past 25 years, the use of mediation by federal, state and local courts, and by private litigants seeking to mediate their disputes, has mushroomed. One might well ask whether efforts at establishing mediation norms and standards have been able to keep up with this growth spurt in mediation’s broad acceptance and popularity. There are multiple forums for conducting alternative dispute resolution. Some “mediations” involve little more than the parties, either with or without their clients present, sitting down before an adjuster” in a no frills attempt to bridge the parties’ “bid” and “ask”. Other mediators will talk to the parties, either together or separately, for a couple of hours and then, in the absence of a quick agreement, call it quits.

There are no widely accepted guidelines concerning the qualifications to be a mediator. A retired professional wrestling referee with no formal mediation training could probably hang out a “mediation” shingle at a store front. At least, in that instance, parties could be assured that this mediator would not tolerate hitting below the belt. But unless counsel has prior experience with a well-established mediation program, such as Conflict Prevention & Resolution or JAMS, it may be difficult to prepare a client who is unfamiliar with mediation and apprehensive about what will be involved, with the specifics as to what will take place and what, if anything, will be demanded of them. Underlying Kichaven’s concern about mediation misconduct may be that what constitutes good and accepted mediation practice continues to evolve.

A Boston University Law Review article by Professor Michael Moffitt, titled “Suing Mediators” [Vol. 83:147, 154 (2003)] observes that “a clear standard of practice for mediators is difficult to identify. Mediation is a fragmented occupation, with practitioners varying to tremendous degree in their training and methodology. While some have argued that mediation should be treated as a profession, the lack of coherence in admission and practice standards makes the analogy imperfect at best. Instead, mediators operate under a patchwork of standards, promulgated by a range of practice associations, program administrators and court systems.”

The ADR program for the SDNY has taken steps to standardize mediation practice in its court-annexed mediation program. A joint pilot project was created by the [New York City Bar Association](#) Committee on Alternative Dispute Resolution and the ADR program for the SDNY to create a mechanism for continued evaluation of mediators once they are added to

the SDNY mediation roster. As a result of the project, a protocol was developed for ongoing evaluation of the SDNY's panel mediators.[1]

In the past, mediators have been assigned by court staff on the basis of their having been previously approved by the court to perform court-annexed mediation. The evaluation protocol, which requires live observation and evaluation of the mediator during a mediation, went into effect in January 2016. Even mediators who have been conducting court-annexed mediations for many years will be subject to evaluation. The SDNY may be the only federal district court that presently conducts ongoing observation and evaluation of court-annexed mediators.

As more and more cases are referred to court-annexed mediation, courts have come to recognize their responsibility to ensure the quality of the mediation services provided. However, very few of the mediation programs that operate on the state or federal level have implemented any kind of systematic, performance-based competency assessment of their mediators. In the absence of competency assessment, court-annexed mediation programs have tended to rely on past training and experience, and participant feedback (when it is available), to determine whether the mediators on their rosters are doing a good job.

An intrinsic challenge to developing an evaluation protocol is determining what skill sets make for a good mediator in the first instance. For example, is there a place in the mediation room for the mediator to use pushing and prodding? Is there a point when pushing and prodding may be viewed by the participants (or by the evaluator) as coercion? As the planning for the SDNY protocol progressed, project participants identified different components of the mediation process to evaluate.

In identifying these components, however, the ADR program for the SDNY was more or less communicating to its corps of 300 volunteer mediators that a certain mediation "process" was expected to be adhered to. For example, the components of the process that would be evaluated include: (1) the premediation conference call with counsel; (2) the mediator's opening statement; (3) the joint session; and (4) exploring facts/interests and developing opinions.

The formalization of this checklist made several implicit assumptions about how a mediation should be conducted. First, that a premediation conference call was a good idea and that it was helpful to discuss the mediator's expectations during that call; second, that the mediator would give an opening statement at the mediation; and third, that the mediator would conduct a joint session with all participants present at the mediation rather than move directly into private caucuses.

Within the protocol's rubric, there is certainly flexibility to permit the mediators to "do their own thing" at the mediation without the risk of receiving a failing grade from the mediator evaluator. For example, some mediators request that counsel for the parties each make an opening statement in the joint session before private caucuses take place. Some do not use this practice. Some mediators will caucus first with the plaintiff; others prefer to meet first

with the defendant. But minor variations aside, a lawyer for a party required to attend a mediation in the SDNY should be able to accurately counsel the client concerning what to expect.

Far from the Boston University Law Review's dour assessment of the state of the mediation art in 2003, considerable progress has been made in standardizing mediation practice. By building a strong ADR program in the SDNY, with ongoing mediator training and evaluation and participant feedback, it is hoped that some of Kichaven's worst fears will be allayed.

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[1] The author was not involved in the joint pilot project.