

# Mediator Ethics In New York State

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Sometimes, ethics issues arise from real-life scenarios that can happen to anyone. Imagine, on a dark and stormy winter night, waiting at a bus stop where you and one other person seek cover from the wet snow. In the thirty minutes you have been waiting, no buses (but plenty of snowflakes) have come and gone, and the weather is only getting worse. Finally, a lone taxicab comes by and you flag it down. Your fellow would-be passenger looks at you pleadingly. Would you offer to share the cab with him on these facts? You might well under normal circumstances. But suppose you had met that same person hours earlier as one party in a mediation you yourself conducted. In fact, you now have intimate details of his dispute with his landlord. You fear that doing a “good deed” here might create the appearance of a conflict of interest or at least a lack of neutrality, even though the mediation has ended. Surely, you think, it can’t be wrong to show some compassion and offer a ride under these conditions. Or can it?

Ethics training for mediators sometimes includes this kind of hypothetical to help trainees think about the problem of ensuring neutrality. By talking to mediators and law professors, however, it becomes clear that this scenario, or others like it, is not a mere hypothetical: similar incidents frequently occur in real life, too.

Indeed, mediators can face far more sophisticated and nettlesome dilemmas than this one. Suppose a mediator learns during the course of a commercial mediation that a party received \$19,000 in insurance money for a piano that cost the party only \$1,000. Is the mediator – who, by his own commitment, was personally compelled to “see justice done” – prohibited from reporting the crime of insurance fraud under his obligation to keep all mediation communications confidential? *See*, Judiciary Law § 849-b(6); Standards of Conduct for New York State Community dispute resolution Centers (hereafter “CDRC Standards”) mediators Standard V: Confidentiality. (*Editors Note: All of the CDRC Standards cited herein are available at <http://www.nycourts.gov/ip/adr/MEAC.shtml>. They are abbreviated as CDRC Standards without the website citation to avoid repetition.*)

What if the mediator is aware of a relevant fact or law that the parties do not cite? Or, suppose a mediator – who happens to be an attorney – mediates an attorney-client fee dispute. He believes the attorney has failed to provide notice to the client about the right to arbitrate the fee dispute pursuant to Part 137 of the rules of the Chief Administrative Judge (22 NYCRR 137.2[a]). Can the attorney-mediator reveal information about Part 137 to the parties (perhaps significantly changing the balance of power in their dispute) and still maintain the delicate balance between Self-determination and Quality of the Process? *See*, CDRC Standard I (Self-determination) and Standard VI (Quality of the Process). How do the duties the attorney-mediator has as a mediator mesh with his professional obligation as an attorney to report another attorney’s failure to comply with Part 137?

Mediators are not “alone” when confronting ethics issues like the ones described above. This article will provide back-ground on the emergence and growth of ethics resources for mediators, such as the mediator ethics advisory Committee (“MEAC”) in New York. The article will also briefly address ethics

guidelines and principles recently adopted in the New York rules of Professional Conduct (22 NYCRR 1200 ff) and the rules of the Chief administrative Judge (22 NYCRR 146).

### **What is the MEAC?**

To help give mediators guidance about their own ethical conduct, the New York State Unified Court System, Office of alternative dispute resolution and Court improvement Programs (ADR/CIP) established the MEAC in 2005. The MEAC responds to ethics questions posed by mediators who provide dispute resolution services to the Community dispute resolution Centers (CDRCs) throughout New York State by interpreting the CDRC Standards and, when necessary, other relevant standards of conduct applicable to a mediator. In addition to responding to inquiries, the MEAC was created to “promote professional development and consistency of practice among dispute resolution practitioners” and to recommend changes to the CDRC Standards. *See*, “Learn more about MEAC”, available at <http://www.nycourts.gov/ip/adr/meaC.shtml#About>.

The MEAC’s composition is intended to reflect the spectrum of mediation clients using the CDRCs. The thirteen members encompass ADR professionals “drawn from geographically diverse communities in New York State.” *Id.* The Chair, in consultation with the Deputy Chair and Counsel, appoints four members each from the following groups: CDRC volunteer mediators, CDRC employees (or employees of other dispute resolution providers), and individuals who meet at least one of the following criteria, (i) an ADR professor at university or graduate level, (ii) a current or former member of an ethics advisory panel for a professional association, (iii) a member in good standing of the New York State Dispute Resolution Association, and (iv) a member in good standing of an ADR Committee of a New York State or local bar association. *Id.*

The MEAC has several subcommittees with staggered membership, including the four-member Quarterly Subcommittee whose members handle incoming ethics inquiries. (Others include a Standards Revision Subcommittee which drafts proposed amendments to the Standards, and a Membership Subcommittee charged with recommending potential candidates to fill vacancies).

The MEAC receives ethics inquiries through email or regular mail, at which point the Deputy Chair calls a meeting of the members of the current Quarterly Subcommittee to discuss the inquiry and begin deliberations. In these deliberations, subcommittee members can consider and apply the CDRC Standards and any other relevant standards and authority. For example, in the scenario described above in which the mediator became aware of possible insurance fraud on the part of a party who had recouped \$19,000 in insurance for a \$1,000 piano, the Quarterly Subcommittee consulted the CDRC Standards and also considered the relevant enabling legislation (Laws of 1981, Chapter 847, Section 1), a prior MEAC opinion (MEAC Op. 2006-01), and CDRC Standards II (Impartiality), V (Confidentiality), and VI (Quality of the Process). The MEAC concluded that the mediator should not report the possible fraud and instead should consider withdrawing if he believed his impartiality would be compromised, and consult with CDRC staff to determine what steps to take. *See*, MEAC Op. 2006-03, available at <http://www.nycourts.gov/ip/adr/FormalPublishedOpinion2006-03.pdf>.

The MEAC was also particularly concerned about the need for confidentiality. Accordingly, it opined that the mediator “should refrain from contacting the police and from otherwise disclosing information conveyed during mediation to anyone other than staff of the center where he mediates.” *Id.* Disclosure to

police would only be appropriate if someone's "physical safety is imminently at stake" and only after consultation with center staff. *Id.*

## Development and Application of CDRC Standards

The drafters of the CDRC Standards, many of whom are now current members of the MEAC, had amply-developed precedent to use as a framework: the Model Standards of Conduct for Mediators (Model Standards). The Model Standards, most recently revised in 2005, were prepared in 1994 by a joint committee, comprised of members from the American Arbitration Association, the American Bar Association's Section of Dispute Resolution, and the Association for Conflict Resolution.

The CDRC Standards follow the Model Standards' use of several key principles that are essential to framing ethical conduct in mediations (i) Self-Determination, (ii) Impartiality, (iii) Conflicts of Interest, (iv) Competence, (v) Confidentiality, (vi) Quality of the Process, (vii) Advertising and Solicitation, and (viii) Responsibilities to the Mediation Profession. The CDRC Standards are not identical to the Model Standards, however. One difference is that the Model Standards contain a provision on fees that is absent from the CDRC Standards because CDRC Mediators volunteer their services. *See*, Sheila Murphy and Jeremy Zeliger, *Model Standards of Conduct & Ethics Advisory Committee, The New York Mediator*, Fall/ Winter 2005 available at [http://www.nycourts.gov/ip/adr/Publications/New\\_York\\_Mediator/FallWinter2005.pdf](http://www.nycourts.gov/ip/adr/Publications/New_York_Mediator/FallWinter2005.pdf).

Another significant difference is that the CDRC Standards specifically exclude allegations of child abuse from what is considered confidential. Article 21-A of the Judiciary Law generally governs the operation and funding of the CDRCs. Under that statutory scheme, all mediation communications occurring in a CDRC are deemed confidential (without exception) and may not be used in any subsequent judicial or administrative proceeding. Nonetheless, in 1983, the Office of Court Administration ("OCA") sought, and the Attorney General issued, an opinion that allowed OCA to establish a policy for the CDRCs that deemed child abuse an inappropriate subject for mediation and as such, a topic that need not be treated as confidential under Article 21-A. *See*, 1983 NYOP Atty. Gen 47.

One standard that is frequently cited and addressed in many MEAC opinions is Standard VI: Quality of the Process, which speaks directly to, and aims to promote, mediator professionalism. The comments to this standard instruct the mediator that his or her "primary purpose... is to help the parties communicate, negotiate, and/or make decisions." CDRC Standard VI: Comment 5. The comment emphasizes that mediators should resist mixing their roles with those of another profession offering advice. CDRC Standard VI: Comment 5. Another comment advises the mediator to explore ways to accommodate a party who appears to be having difficulty comprehending issues. CDRC Standard VI: Comment 8.

This standard weighed heavily in the MEAC's response to the scenario described above in which a mediator asked whether he had a duty to reveal his knowledge of the Part 137 Attorney-Client Fee Dispute Procedures to the attorney and client who were parties before him. The MEAC balanced Quality of the Process with Standard I: Self-Determination, and concluded that the attorney-mediator "should not intervene in the decisions of parties who have both voluntarily agreed to mediate a dispute." NYS MEAC Op. 2008-02, available at <http://www.nycourts.gov/ip/adr/FormalPublishedOpinion2008-02.pdf>. The opinion did note, however, that the mediator may discuss with the parties their option to seek outside legal advice about "any special requirements with respect to attorney-client fee disputes." *Id.*

## Qualification Standards for Mediators

Although ethics standards like those described above serve an important role, they are not the only way to ensure that neutrals are professionally responsible. There are different layers of minimum qualification standards for mediators, depending on where they work. These baselines help ensure the high level of competence that one would expect of an ethical mediator.

Mediators who volunteer their services in the CDRCs are held to strict qualification standards that the ADRCIP promulgates, reviews, and audits. Since January 1, 2003, mediators certified by CDRCs must have no less than 30 hours of initial mediation training, which is to include information on Article 21-A and relevant ethics standards. CDRC volunteer mediators must also complete an apprenticeship for the CDRC. Mediators assigned to special types of cases, including child custody and visitation or child support matters, must also complete an additional 12 hours of specialized training focused on these areas. There is also a six-hour continuing education requirement. *See*, NYS CDRC Program Manual Chap VII (Training).

Part 146 of the Rules of the Chief Administrative Judge, promulgated on June 18, 2008, sets forth the minimum qualifications and training for mediators and neutral evaluators who serve on court annexed rosters. Part 146 was established to ensure that parties receive quality dispute resolution services from the Unified Court System. These standards separately define mediation and neutral evaluation, clearly establishing a difference between the two processes, and further ensuring that an appropriately trained individual provides the ADR to the parties. *See*, 22 NYCRR146, available at <http://www.nycourts.gov/rules/chiefadmin/146.shtml>.

Part 146 sets different levels of minimum training for neutral evaluators and mediators. Under 146.4(a), neutral evaluators must complete six hours of approved training in procedure and ethics matters. 22 NYCRR146.4(a). Under 146.4(b), mediators are required to complete 24 hours of basic mediation training and 16 hours of specialized training in mediation technique specific to the types of cases they mediate. They must also “have recent experience mediating actual cases in the subject area of the types of cases referred to them.” 22 NYCRR146.4 (b). Part 146 itself does not include an ethics requirement for mediators. The training curriculum guidelines for CDRC mediators, however, does include an ethics component. *See*, NYS CDRC Program Manual Chap VII (Training).

Mediation programs are particularly popular in the Commercial Division of the Supreme Court. *See*, <http://www.nycourts.gov/comdiv>. Many neutrals on Commercial Division rosters have already met, if not greatly exceeded, Part 146’s qualification requirements. Nonetheless, they may also be subject to an additional set of conduct standards, depending on the county or counties in which they serve. For example, the New York County Commercial Division Alternative Dispute Resolution Program promulgated its own Standards of Conduct for Mediators (CD Mediator Standards), which were revised in June 2008, and a separate set of standards for arbitrators and neutral evaluators. *See* Ethical Standards for Mediators and Ethical Standards for Arbitrators and Neutral Evaluators, available at [http://www.nycourts.gov/courts/comdiv/ADR\\_overview.shtml](http://www.nycourts.gov/courts/comdiv/ADR_overview.shtml). Based on the Model Standards of the ABA Joint Committee, the CD Mediator Standards rely heavily on and incorporate for use the New York County Commercial Division Rules of the Alternative Dispute Resolution Program (NY County Rules) within the Standards themselves. *See*, <http://www.nycourts.gov/courts/comdiv/PDFs/NYCounty/Attachment1.pdf>.

For example, the NY County Rules, after completion of four hours of volunteer mediation, permit the parties to stop or continue while splitting a capped hourly fee for the mediator. NY County Rule 5. The CD Mediator Standard addressing compensation (Standard VII) in turn requires that the mediator explain the rules that govern how and when the mediator gets paid as they are set out in the NY County Rules. The Standard further instructs mediators not to seek compensation in other circumstances. *Id.*

## Other Sources of Guidance for Mediators

New York is not alone in providing guidance on ethics issues to its mediators. The American Bar Association (ABA) has created a national database compiled of mediator ethics opinions from 43 states as well as from the Dispute Resolution Section of the ABA. The National Clearinghouse for Mediator Ethics Opinions (Clearinghouse) is available on the ABA's website at <http://new.abanet.org/ethics/dispute/Pages/default.aspx>, and allows researchers to search by keyword, opinion category, state, year, opinion type, or any combination thereof. For easy researching, the opinion category field is broken down by the nine standards set forth in the Model Standards.

A search of all opinions in the category "Conflicts of Interest," for example, yielded 65 results, including guidance on whether a mediator may serve as co-counsel in a matter she mediated to impasse a year earlier (*see*, FL-1994-002, available at [http://flcourts.org/gen\\_public/adr/bin/MEAC%20opinions/1994%20opinion%20002.pdf](http://flcourts.org/gen_public/adr/bin/MEAC%20opinions/1994%20opinion%20002.pdf)) (held, no), and whether and to what extent a law firm providing mediation services to a court for a nominal fee must run a conflicts check (*see*, DC-1997-001, available at [http://www.dcbart.org/for\\_lawyers/ethics/legal\\_ethics/opinions/opinion276.cfm](http://www.dcbart.org/for_lawyers/ethics/legal_ethics/opinions/opinion276.cfm)) (held yes, but the firm need not perform an extended check of officers, directors, and affiliated entities).

By comparison, the CDRC Standard entitled "Conflicts of Interest" requires that the mediator "avoid the appearance of a conflict of interest before, during and after a mediation either by disclosing the conflict or withdrawing from the process." CDRC Standard III. After making a reasonable inquiry to determine whether any conflicts exist, the mediator is required to disclose any actual or potential conflicts to the parties. If after disclosure, all parties consent to retaining the mediator despite the conflict, the mediator may continue to mediate the case. The Standard also prohibits a mediator from soliciting future employment from the parties after the mediation has concluded. *Id.*

Applying this particular standard to the hypothetical involving the shared taxi ride from the beginning of this article does not lead to a definitive answer. The standard prohibits the mediator from establishing a relationship with either party after the mediation that would raise questions about the integrity of the mediation process. Comment 3 to this Standard elaborates by instructing the mediator to consider "the time elapsed following the mediation and the nature of the relationship established and services offered." Should personal safety, common courtesy, or other factors play a role in analyzing this? Perhaps, in a future MEAC opinion, mediators will be provided with direct guidance. To the authors of this article, however, personal safety should in limited circumstances, trump the conflict of interest rule, provided that the mediator later makes an appropriate disclosure to all affected parties about what happened.

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Despite the high volume of writings in this publication, and elsewhere, about the new Rules of Professional Conduct (22 NYCRR1200, effective 4/1/09) it seems appropriate to close with a few brief thoughts about how those rules impact mediators.

First, and perhaps foremost, a review of the Terminology section of the Rules (Rule 1.0) reveals that the definition of a “Tribunal” has greatly expanded. *See*, Rule 1.0(w). The definition now includes not only a court, but an arbitration panel, or even a legislative body or administrative agency acting in an adjudicative capacity. Significant by its absence, however, is any mention of a mediator or mediation in that definition. *Id.* Thus, to the extent that a lawyer has new duties to a “tribunal” they do not include a mediator or a mediation, unless the Rule in question indicates the contrary.

Rule 2.4 creates an express new duty for any lawyer serving as a third party neutral, including mediators and arbitrators. It requires that lawyer-neutrals inform any unrepresented parties appearing before them that the lawyer-neutrals are not representing them. When a lawyer-neutral knows or reasonably should know that the unrepresented party does not understand the lawyer-neutral’s role in the matter, the lawyer “shall explain the difference between the lawyer’s role as a third-party neutral and a lawyer’s role as one who represents a client.” Rule 2.4(b). A parallel to this rule for lawyers approached by unrepresented individuals can be found in Rule 4.3(b). *See also* NYC Bar Opn. 2009-2 (discussing duties under former Code DR7-104[A][2]).

Finally, Rule 1.12 addresses conflicts of interest arising from prior service as a mediator or other third-party neutral. In general, Rule 1.12(b) prohibits a lawyer who served as a mediator in a matter from representing anyone connected with that matter, absent informed consent of all parties to the proceeding, confirmed in writing. Any such conflict is imputed to others at the mediator’s firm, subject to the possibility of appropriate screening measures as described in Rule 1.12(d)(1) if there is not otherwise an appearance of impropriety.

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